

24 August 2026

REF: OIA88720

s9(2)(a)

By email: [REDACTED]

Tēnā koe [REDACTED],

Official information request for records relating to Wai 1896 from 1 January 2008

I refer to your correspondence of 28 June 2026 requesting the following under the Official Information Act 1982 (OIA), in summary:

"all official information held by Te Tari Whakatau relating to the decision-making, assessment, administration and treatment of WAI 1896 from 1 January 2008 to the present", and specifically:

1. **Decision-making regarding Large Natural Groupings** – all documents relating to whether WAI 1896 was assessed as falling within, or outside of, the Crown's preferred Large Natural Grouping settlement approach; was ever considered as an exception to that preferred approach; any criteria applied when considering whether WAI 1896 should proceed separately or within a Large Natural Grouping; the identity of every person involved in making or recommending those decisions; any formal or informal decision that WAI 1896 should proceed only through Large Natural Groupings.
2. **Assessment of WAI 1896 interests** – all documents assessing, analysing or discussing the historical, geographical or whakapapa interests asserted through WAI 1896, including but not limited to Tāmaki/Kaipara/Hauraki areas.
3. **Settlement overlap assessments** – all documents relating to overlapping interests with settlements: Ngāti Whātua Ōrākei, Ngāti Whātua o Kaipara, Ngāti Pāoa, Te Roroa, Ngāti Manuhiri, Te Kawerau ā Maki, Ngāi Tai ki Tāmaki, Te Ākitai Waiohua, Ngāti Tamaoho, Tāmaki Makaurau Collective, Marutūāhu Collective, Pare Hauraki Collective.
4. **Patuone assessment** – all documents created before 11 March 2026 identifying or analysing Patuone's whakapapa, tribal affiliations; marriages; political relationships; residence at Takapuna; residence at Whakatiwai; residence at Pūtiki; Mahurangi interests; Te Roroa connections; Ngāti Pāoa connections, and if no such documents exist prior to 11 March 2026, to confirm that fact.

5. **Internal consideration of WAI 1896** – all documents that discuss WAI 1896 descendants of Patuone; descendants of Hapi Waka; descendants of Hohaia Patuone; Ngāti Hao; settlement pathway for WAI 1896; whether WAI 1896 presents difficulties within the Large Natural Grouping model.
6. **Procedural framework** – all documents explaining how existing whānau claims lodged before development of the Large Natural Grouping policy were intended to transition into that policy; whether any exceptions to the Crown’s preferred Large Natural Grouping approach have been considered since 2008; the policy governing exceptions to the Crown’s preference for settlement through Large Natural Groupings; the decision-making framework applied where a claim spans multiple rohe or multiple settlement areas; and if no such policy, framework or guidance exists, to confirm that no such documents are held.

On 23 July, we advised that we were able to respond to parts one and six of your request and that for parts two – five, we are able to provide documents as follows:

- a) Overlapping interests reports, briefings and correspondence relating to Ngāpuhi, Patuone and Wai 1896 overlapping interests with other groups in the Tāmaki/Hauraki/Kaipara/Mahurangi areas since 1 January 2008; and
- b) Internal customary interests reports on Ngāpuhi or Patuone interests in the Tāmaki/Hauraki/Kaipara/Mahurangi areas since 1 January 2008.

We advised we would provide our response on 24 August. We need more time to prepare our response for parts two – five. Due to the time required to compile the information and the need to undertake consultation, we can provide our response to parts two – five by **7 September**.

Response to parts one and six of your request.

Please find attached at **Appendix One** a table of documents and information released in response to your request.

Some of this information has been withheld under the following section of the Act:

- a) 18(d) – information is already publicly available.

Other information has been redacted as it is out of scope of the request.

Further information is provided below.

Wai claims are not assessed as to whether they come within the Crown’s LNG policy

You have asked whether Wai 1896 has been assessed as falling within the Crown’s LNG policy or as an exception, who has made these decisions, and any criteria applied in assessing this.

We do not have relevant documents for this part of your request as Wai 1896 has not been assessed as “falling within the Crown’s LNG policy”. This is because natural groups (whānau / hapū

/ iwi) are the relevant groups that the Crown assesses in relation to the LNG policy when the Crown considers whether a given group is a 'large' natural group.

A Wai claim is a registered claim with the Waitangi Tribunal, and a comprehensive settlement will settle all the historical claims, including Wai claims, of the LNG to the extent those Wai claims apply to the LNG.

The Crown's LNG policy in relation to Wai claims registered prior to the LNG policy

You have asked for "all documents explaining how existing whānau claims ... were expected to transition into" the Crown's LNG policy.

We do not have documents relating to this aspect of your request. We have instead provided information about how the LNG policy was developed.

The Crown's LNG policy was developed in the 1990s. Attached document **1** in **Appendix One**, in particular paragraphs 26, 32, 104, 105 and attachments, sets out the development of the policy.¹

The LNG policy was first published in *Healing the past, building a future. A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (Office of Treaty Settlements, 1999), which is publicly available. The August 2025 edition of *Healing the past* sets out the Crown's current LNG policy and is available online at [The Red Book](#) p.39.

Exceptions to the LNG policy application since 2008 and policy governing exceptions

The Crown applies the LNG policy flexibly depending on circumstances and there are no policy documents governing the application of the LNG policy beyond the frameworks and principles set out in the Red Book.

There are instances where the Crown has applied the LNG policy flexibly since 2008, for example:

- b) the Ngāpuhi negotiations where the approach has shifted from one LNG to up to multiple hapū groupings;
- c) the Whanganui iwi negotiations where four LNGs were recognised;
- d) the Ngāti Kahungunu negotiations where seven LNGs were recognised; and
- e) the Maraeroa A and B blocks negotiations, an LNG of descendants of the Maraeroa A and B blocks.

¹ This document was provided as Crown evidence in the *Ngāti Whatua Ōrakei v. Attorney General* case in the High Court concerning the application of the Crown's overlapping interest policy.

The approach to Ngāpuhi Treaty negotiations has changed from one LNG to up to 10 hapū groupings

Between 2014 and 2019, the Tūhoronuku Mandated Iwi Authority (TIMA) was the mandated entity representing Ngāpuhi as one LNG to negotiate a Treaty settlement.

In December 2019, the Crown discontinued its recognition of the TIMA mandate and invited groupings of Ngāpuhi hapū to submit proposals to seek mandates and negotiate Treaty settlements.

This shift reflected messages the Crown was receiving from ngā hapū o Ngāpuhi as well as various recommendations of the Waitangi Tribunal (**Tribunal**) in its report on the *Ngāpuhi Mandate Inquiry* (2015) to “practically and flexibly apply its policies in accordance with the rangatiratanga and tikanga of affected groups”.

Hapū groupings are equivalent to LNGs in the Ngāpuhi Treaty negotiations context. Each hapū grouping will negotiate a Treaty settlement, with an individual cultural and local redress package and engage in a collective negotiation for a financial and commercial redress package and other Ngāpuhi wide matters. We note that the LNG policy allows for hapū to have acknowledgement of their unique claims. This can be done through specific redress within an agreed redress package.

The Crown has established criteria for confirming Ngāpuhi hapū groupings

Crown criteria for confirming a Ngāpuhi hapū grouping are size, coherence, what remains, grouping capability, and levels of hapū support. Attached document **2** in **Appendix One** sets out the criteria.

The Minister for Treaty of Waitangi Negotiations decides whether to confirm a hapū grouping and has stated that up to 10 hapū groupings will be confirmed. It is important to note that a confirmed hapū grouping then undertakes a full mandate process to seek a mandate from the claimant community to negotiate a Treaty settlement.

An example of an assessment of a hapū grouping proposal assessment against the criteria for Whangaroa Papa Hapū grouping which is published on Te Tari Whakatau website at [Whangaroa-Papa-Hapu-hapu-grouping-development](#).

LNG policy application where a claim spans multiple rohe or settlement areas

You have asked about the framework applied where “a claims spans multiple rohe”.

It is common for LNGs to have claims with diverse geographical interests and rohe that overlap with other LNGs. The key policy is that claims are settled to the extent that they relate to the claimant definition of an LNG.

Two examples, one where claims are included in more than one LNG and one where there are distinct settlements are:

- f) Ngāti Hikairo, Ngāti Apakura, and Ngāti Paretekawa are included in both the Waikato-Tainui Raupatu (1995) and Maniapoto (2021) deeds of settlement as they identify with both iwi confederations through differing lines of whakapapa. The Maniapoto deed of settlement lists some Wai claims that will be settled 'in so far as they relate to Maniapoto or a representative entity' and excludes any claims associated with groups included in the settlement that arise as a result of descent from a tūpuna who is not referred to in the claimant definition.
- g) Ngāti Mutunga iwi have two distinct settlements due to geographical divergence of the iwi in the nineteenth century. Ngāti Mutunga (Taranaki) and Ngāti Mutunga o Wharekauri (Chatham Islands), have the same ancestry and hapū but different areas of interest for each settlement. Each deed of settlement states that it only applies to the relevant area of interest.

Treaty settlements are published online at [Te Tari Whakatau - Find a Treaty settlement](#).

Your request was considered for proactive release in line with The Te Tari Whakatau Official Information Act 1982 proactive release policy. Our assessment determined your request falls within the scope for proactive release as its contents are of interest to the wider public.

Our response to your request will be published in the next 20 days at [Te Tari Whakatau - Official Information Act responses](#) with your personal information removed.

Our response to your request will be published in the next 20 days at Te Tari Whakatau - Official Information Act responses with your personal information removed. If you have any further queries about this letter, please contact Sonya Wynne at sonya.wynne@whakatau.govt.nz

You have the right to seek an investigation and review by the Ombudsman of our response to your request. Information about this process is available at www.ombudsman.parliament.nz or phone 0800 802 602.

Nāku noa, nā



Leah Campbell
Director

Appendix One: Further information

Table of Documents for OIA 88720

Document number	Date	Document description	Extent of information released	Reason for withholding information	Page number (s)
<i>Part Six documents – procedural framework</i>					
1.	1999	<i>Healing the past, building a future. A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown</i> (Office of Treaty Settlements, 1999),	Withheld in full	s18(d)	-
2.	2025	<i>Healing the past, building a future. A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown</i> (Office of Treaty Settlements)	Withheld in full	s18(d)	-
3.	13 10 2020	Affidavit of Lilian Marie Anderson affirmed on 13 October	All		1 - 340
4.	11 12 2020	159 - Ngā hapū o Ngāpuhi - Criteria for hapū groupings and request for confirmation of Te Whakaaetanga Alliance as a hapū grouping	Parts not released - out of scope		341-349
		Whangaroa-Papa-Hapu-hapu-grouping-development	Withheld in full	S18(d)	-

Reasons for withholding under section 9 of the Official Information Act 1982ⁱ

s 9(2)(a) – protect the privacy of natural persons, including the deceased.

s 9(2)(b) – protect information that would:

- (i) – disclose a trade secret;
- (ii) – unreasonably prejudice commercial position of subject.

s 9(2)(ba) – protect information where making it available would:

- (i) – prejudice the supply of similar information; or
- (ii) – likely otherwise damage the public interest.

s 9(2)(c) – prejudice to measures protecting health or safety of the public.

s 9(2)(d) – prejudice to substantial economic interests of New Zealand.

s 9(2)(e) – prejudice to measures that prevent or mitigate material loss to members of the public.

s 9(2)(f) – maintain the constitutional conventions which protect:

- (i) – communications by or with the Sovereign or their representative; or
- (ii) – collective and individual ministerial responsibility; or
- (iii) – the political neutrality of officials; or
- (iv) – the confidentiality of advice tendered by Ministers and Crown officials.

s 9(2)(g) – maintain the effective conduct of public affairs through:

- (i) – the free and frank expression of opinions;
- (ii) – the protection from improper pressure or harassment.

s 9(2)(h) – maintain legal professional privilege.

s 9(2)(i) – enable the Crown holding the information to carry out commercial activities.

s 9(2)(j) – negotiations sensitive.

s 9(2)(k) – prevent the disclosure of information for improper gain or advantage.

Reasons for refusing information under section 18 of the Official Information Act 1982ⁱ

s 18(a) – good reasons by virtue of s 6, 7 or 9 of the Act:

s 18(b) – the department or Minister or organisation neither confirms nor denies the existence or non-existence of the information:

s 18(c) – making the information available would –

- (i) – be contrary to a specified enactment; or
- (ii) – constitute contempt of court or the House of Representatives:

s 18(d) – the information is, or will soon be, publicly available:

s 18(da) – the request is made by a defendant or person acting on behalf of a defendant and is –

- (iii) – information that could be sought under the Criminal Disclosures Act 2008; or
- (iv) – information that could be sought under that Act and that has been disclosed or withheld under that Act:

s 18(e) – the information requested does not exist, or cannot be found:

s 18(f) – the information cannot be made available without substantial collation or research:

s 18(g) – the information is not held by the department or Minister of the Crown or organisation, and the person dealing with the request has no grounds for believing that it is:

- (i) – held by another department, Minister of the Crown or organisation, or by a local authority; or
- (ii) – connected more closely with the functions of another department or Minister of the Crown or organisation or local authority:

s 18(h) – the request is frivolous or vexatious or the information requested is trivial.

ⁱ Please see the Official Information Act 1982 for full version of sections 9 and 18 of the Act.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE

CIV-2015-404-2033

UNDER THE

Judicature Amendment Act 1972 and Part 30
of the High Court Rules

BETWEEN

NGĀTI WHĀTUA ŌRĀKEI TRUST

Plaintiff

AND

ATTORNEY-GENERAL

First Defendant

AND

MARUTŪĀHU RŌPŪ LIMITED
PARTNERSHIP

Second Defendant

AND

TE ARA RANGATŪ O TE IWI O NGĀTI
TE ATA WAIŌHUA INC

Third Defendant

AFFIDAVIT OF LILIAN MARIE ANDERSON

13 October 2020

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Gregor Allan
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I, Lilian Marie Anderson, of Wellington, public servant, solemnly and sincerely affirm:

Introduction

1. I am the Chief Executive of the Office for Māori Crown Relations – Te Arawhiti. I have held this role since December 2019. I am authorised to provide this affidavit on behalf of Te Arawhiti and have already sworn an affidavit in this proceeding (dated 9 September 2016).

Matters covered in this affidavit

2. As I explain next, I am familiar with the Crown's Treaty settlement negotiation processes. I provide this affidavit to describe the Crown's general policy on Treaty settlement negotiations, especially in relation to overlapping interests.
3. The negotiation history in Tāmaki Makaurau is unique. The main factor influencing how negotiations have progressed has been the nature and degree of overlap between groups with interests in Tāmaki, which has made consideration of appropriate redress and overlapping interests challenging.
4. In its 2007 *Tāmaki Makaurau Settlement Process Report*, the Waitangi Tribunal raised significant concerns with the Crown's initial approach to settlement. In very broad terms, the Tribunal disapproved of the Crown reaching an agreement in principle with Ngāti Whātua Ōrākei without sufficiently understanding the interests of other groups. The Tribunal also took issue with the Crown's approach to assessing groups' interests and, in particular, its assessment that Ngāti Whātua Ōrākei had predominant interests in the central Tāmaki isthmus. In making its recommendations, the Tribunal said that "[t]he first step, unfortunately, is that this draft settlement [with Ngāti Whātua Ōrākei] really must be stopped in its tracks", so that draft settlements can be negotiated with other groups and "they can all be looked at together".¹
5. The Crown responded to that report and, through agreement with all affected groups, reached a unique solution to concerns about overlapping interests in Tāmaki in the form of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed. Through that agreement, the Crown provided shared cultural and commercial redress in the wider Auckland region to a collective of Tāmaki iwi and hapū. Agreement to this approach, in turn, allowed negotiations to

¹ Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at p 107.

2/14

resume on Ngāti Whātua Ōrākei's deed of settlement and also enabled iwi-specific negotiations to commence with a number of other Tāmaki claimant groups, a process that is now nearing completion.

6. Other witnesses will explain the detail of those agreements and how they were reached. In this affidavit, I draw on the process guide *Ka tika ā muri, ka tika ā mua - Healing the past, building a future* (the Red Book) (a copy of which is **attached** and marked "LMA-1")² to explain matters of general principle and policy that affect all Treaty settlements and that therefore informed the Crown's position in progressing negotiations in Tāmaki Makaurau. I do this by:

- 6.1 describing the evolution of the Crown's approach to the settlement of historical Treaty of Waitangi claims;
- 6.2 outlining several important elements of Treaty settlement deeds; and
- 6.3 explaining, in general terms, how the Crown considers overlapping interests within the Treaty settlement process.

7. The remainder of my affidavit describes changes to the Crown's settlement practices in the period covered by this litigation and identifies certain work currently under way to update how Crown policy is documented.

My experience

- 8. Before being appointed Chief Executive of Te Arawhiti, I was the acting Chief Executive of Te Arawhiti. I assumed that position on 1 January 2019, at which time Te Arawhiti was established and assumed the functions of the Office of Treaty Settlements (OTS). For approximately two and a half years prior to that (from 15 August 2016), I was the Director of OTS, which at that time was part of the Ministry of Justice.
- 9. Prior to this, I worked at Te Puni Kōkiri and held the positions of Acting Deputy Chief Executive Policy and Chief Advisor.
- 10. This followed an extensive earlier period working at OTS for over 12 years holding various positions including Deputy Director and Chief Advisor.

² Published in June 2018.

11. Before joining OTS I was employed at the Crown Forestry Rental Trust for some 12 years working with iwi groups to provide funding to progress their Treaty of Waitangi claims.
12. Having held these roles, I am familiar with Treaty settlement negotiation processes. In particular, I understand the challenges arising in a negotiation context involving overlapping interests. Since 2004, I have led, overseen or otherwise been involved with a number of such negotiations across the country.

Matters of general policy and principle

Evolution of the Crown's approach and the Red Book

13. In May 1991, Sir Douglas Graham was appointed the first Minister in Charge of Treaty of Waitangi Negotiations. At that time, Treaty settlement negotiations were supported by the Treaty of Waitangi Policy Unit within the Ministry of Justice. That unit was later constituted as OTS and made accountable to the Minister in Charge of Treaty of Waitangi Negotiations in 1995.
14. Between 1992 and 1994, certain principles for the settlement of Treaty claims were developed. These were approved by Cabinet in 1994 and then modified by Cabinet in 1996 following submissions from Māori and other groups.
15. These Cabinet decisions provided a framework for settlement negotiations and redress packages and, along with experience gained from early negotiations, supported the development of Crown negotiating principles and guidelines for the resolution of historical claims. These led to the 1999 publication *Ka tika ā muri, ka tika ā mua – Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*. At the time, this publication was known as “the Green Book”. Later editions came to be called “the Red Book”.
16. The purpose of the Red Book was (and remains) to provide guidance to claimant groups and the general public about the Treaty settlement process. The current edition of the Red Book was published in 2018.³

³ The Red Book has been periodically reissued with minor amendments. All references in this affidavit are to the most recent version dated June 2018 [Exhibit LMA-1].

Handwritten signature/initials

17. In 2000, following a review of settlement process and policy, six key principles were added to the text of the Red Book. These principles were added with a view to ensuring that settlements would be fair, durable and final and would occur in a timely manner. I refer to these below.
18. The Red Book identifies the essential elements of the Treaty settlement process. Certain milestones are common to all negotiation processes, namely achieving a deed of mandate, the ratification and signing of deeds of settlement and, then, enactment of legislation. These milestones are commonly achieved through agreeing certain instruments, such as agreements in principle, or particular text that then contributes to the final agreement, such as agreed historical accounts, formal Crown acknowledgements of Treaty breach and the Crown's apology. Negotiations are focused on the redress to be included in a settlement, which tend to be organised in three workstreams: Crown apology redress, cultural redress, and financial and commercial redress. The Red Book explains these milestones, instruments and types of redress and explains other standard features of the Treaty settlement process, such as the use and roles of mandated claimant representatives and Crown negotiators.
19. As the Red Book also notes, most Treaty settlements are achieved through the passage of bespoke settlement legislation through Parliament. Only at that point does a deed of settlement become unconditional.⁴ Likewise, the transfer of redress to a settling group usually only happens if and when Parliament passes legislation to effect that transfer. This is the case for most forms of cultural redress, including the vesting of land, statutory instruments and protocols between iwi and Crown agencies. In some exceptional circumstances, the Crown may provide for the early release of certain forms of commercial and financial redress to a settling group "on account" prior to the passage of settlement legislation, the value of which is then deducted from the redress to be transferred on or after settlement date.
20. Although certain milestones and instruments are common to all negotiation processes, each negotiation is different. For example, although the Crown's preference is to negotiate a single comprehensive settlement with a large

⁴ Exhibit LMA-1 at p 60. For some small claims, settlement legislation is not required and the deed of settlement is binding.

natural group, that is not always possible. An important factor is the need to take account of relationships, not only between the Crown and groups but also internally within large natural groupings and externally between overlapping groups. In many situations collective or regional approaches may be needed. Groups may end up settling through more than one agreement and through membership of more than one settling group (as, for instance, with Ngāti Whātua Ōrākei, the Marutūāhu Collective and Te Ākitai Waiotapu). The Crown must respond flexibly to the particular circumstances of each negotiation.

21. Terms of negotiation set out expectations between the Crown and the settling group about the parties' objectives and the "ground rules" or processes to be used during negotiations.⁵ Negotiation processes are then informed by discussions and decisions made over the course of negotiations.
22. Because of the need to tailor negotiations to the circumstances and to maintain a flexible approach to Treaty settlements, the Red Book is a "guide" only. This is indicated by its full title ("A Guide to Treaty of Waitangi Claims and Negotiations with the Crown") and is explicitly noted on its inside cover:⁶

The guide provides general information only and readers should not act or rely on information in this guide without first discussing the detail with OTS.

Guidelines for the resolution of historical Treaty claims

23. As noted, in the mid-1990s certain general principles for the settlement of Treaty claims were approved by Cabinet after submissions from Māori and other groups. Since 1999 the Red Book has set out the Crown's Treaty settlement policy framework and guidelines for the resolution of historical claims.⁷
24. Several of these guidelines are especially relevant in the context of overlapping interests.⁸

⁵ Exhibit LMA-1 at p 54.

⁶ Exhibit LMA-1 (inside cover).

⁷ These are found in Exhibit LMA-1 at pp 24–25.

⁸ The other guidelines are to the effect that (i) the Crown will explicitly acknowledge historical injustices, (ii) the Crown has a duty to act in the best interests of all New Zealanders and (iii) settlements affect neither

- 24.1 Treaty settlements should not create further injustices – either to the claimant group seeking redress, other claimant groups and other New Zealanders generally;
- 24.2 durable settlements must be fair, achievable, and remove the sense of grievance.
- 24.3 the Crown must deal fairly and equitably with all claimant groups; and
- 24.4 settlements will take into account fiscal and economic constraints and the ability of the Crown to pay compensation.

Crown negotiating principles

25. The Red Book also sets out six “negotiating principles”,⁹ these being the principles that were approved by Cabinet and added in 2002. These principles and the Red Book commentary in relation to each are:

Good faith – The negotiating process is to be conducted in good faith, based on mutual trust and cooperation towards a common goal.

Restoration of relationship – The strengthening of the relationship between the Crown and Māori is an integral part of the settlement process and will be reflected in any settlement. The settlement of historical grievances also needs to be understood within the context of wider government policies that are aimed at restoring and developing the Treaty relationship.

Just redress – The overall redress should relate fundamentally to the nature and extent of breaches suffered, with existing settlements used as benchmarks for future settlements where appropriate.

Fairness between claims – There needs to be consistency in the treatment of claimant groups. In particular, ‘like should be treated as like’ so that similar claims receive a similar level of financial and commercial redress. This fairness is essential to ensure settlements are durable.

Māori entitlements as New Zealand citizens nor do they affect ongoing rights arising out of the Treaty or under the law.

⁹ Exhibit LMA-1 at pp 25–26.

Transparency – It is important that claimant groups have sufficient information to enable them to understand the basis on which claims are settled.

Government-negotiated – The Treaty settlement process is necessarily one of negotiation between claimant groups and the government. They are the only two parties who can, by agreement, achieve durable, fair and final settlements. The government's negotiation with claimant groups ensures delivery of the agreed settlement and minimises costs to all parties.

Key settlement policies

26. The Red Book summarises “key settlement policies” of the Crown that set basic parameters, essentially as follows:¹⁰

- 26.1 the Crown prefers to negotiate with large natural groupings rather than individual whānau and hūpā;
- 26.2 claimant negotiators require secure mandates;
- 26.3 there must be a suitable post-settlement governance entity to receive settlement assets;
- 26.4 settlements must be comprehensive and final;
- 26.5 settlements are intended to be neutral in their effect on the continued existence of any Treaty of Waitangi or remaining aboriginal title or customary rights; and
- 26.6 settlements must be fair, affordable and practicable.

27. Additionally, one of the policies addresses overlapping interests:¹¹

Overlapping claims or interests of other claimant groups must be addressed to the satisfaction of the Crown before the Crown will conclude a settlement involving any of the sites or assets concerned.

28. It is important to note that while there have been changes in Crown settlement practice since the Red Book was first published in 1999, including to practice

¹⁰ Exhibit LMA-1 at p 27.

¹¹ Exhibit LMA-1 at p 27.

relating to overlapping claims and interests, the need for overlapping interests to be addressed to the Crown's satisfaction has not changed. This fundamental policy position has been applied in all settlement negotiations to date.

Important elements of Treaty settlements

29. This section of my evidence outlines several important aspects of Treaty settlements. These inform the Crown's broad approach to negotiations involving overlapping interests, which I will then address.

Mandating and deeds of mandate

30. As I have noted, one of the Crown's key settlement policies is that a secure mandate on the part of the claimant negotiators is required before negotiations can start. This assures both the Crown and the settling group that their mandated representatives have been properly authorised.
31. Before any entity seeks a mandate from its claimant community, it needs to agree with the Crown the strategy of how it will seek this mandate (a "mandate strategy"). The entity will then develop a "deed of mandate", which is a formal statement prepared by a claimant group stating who is appointed to represent them in negotiations with the Crown, and how the mandate was approved by the claimant group.¹² After a process of consultation culminating in a vote of eligible members of the claimant community, Ministers will make a decision whether or not to recognise the deed of mandate and enter negotiations with the mandated representatives.

Group definition and associated "areas of interest"

32. Another key settlement policy is that the Crown prefers to settle with large natural claimant groupings, which may include a number of iwi or hapū. An indicative "claim area" or "area of interest" is normally developed by settling groups themselves during mandating. As the Red Book notes, this area is normally included in a deed of mandate to "set out an area to which the claims mainly relate" and "to help define the claimant group and to let neighbouring claimant groups know about any areas where they may claim overlapping

¹² Exhibit LMA-1 at p 42.

interests".¹³ Preferably, it is developed by a settling group following a consultative process with neighbouring or overlapping groups.

33. The Red Book further notes that identifying an area of interest "also allows the claimant group to endorse an overall negotiating approach, including where redress will be sought", and that "[c]laimant groups may wish to acknowledge any areas where they share interests with other claimant groups, and any areas that are regarded as mainly relating to their group only".¹⁴ This may inform aspirations for redress in specific areas and views as to whether redress should be exclusive or non-exclusive (I discuss these concepts later in this affidavit).
34. An area of interest is also included in a deed of settlement as part of the claimant definition. This may differ from that included in a deed of mandate due to information that emerges during negotiations with a settling group and engagement with overlapping groups.
35. Areas of interest are helpful tools in the overall negotiation and settlement process. They assist the Crown, in a very practical way, to identify potential redress items by identifying the area in which offers of property-related redress or relationship redress (such as protocols) might meet a settling group's aspirations. However, as specifically noted in the Red Book, they certainly do not constitute a Crown definition or acknowledgement of tribal boundaries.¹⁵

Note: The Crown does not attempt to define precise boundaries through the settlement process. Rather, general 'areas of interest' are recognised within which redress may be made available to a claimant group, subject to overlapping claims being addressed to the satisfaction of the Crown.

Historical account

36. Historical accounts summarise key facts about the relationship between the claimant group and the Crown and set out the historical background to the Crown acknowledgements and apology.
37. The purpose of the historical account is to inform and contextualise the Crown's acknowledgements of Treaty breaches and the Crown's apology to the

¹³ Exhibit LMA-1 at p 43.

¹⁴ Exhibit LMA-1 at p 43.

¹⁵ Exhibit LMA-1 at p 43.

claimant group. These three elements collectively constitute the “Crown Apology” and are sometimes referred to together as “Crown apology redress”. However, the Crown does not consider the historical account itself to be redress – the Crown’s acknowledgements and apology are the redress.

38. A historical account is not intended to constitute a full historical record, as the Red Book explains:¹⁶

The historical account does not need to be complex or long. It should be an accurate summary of the historical background. This gives the text authority and helps the general public to understand the basis for the settlement, because it puts the redress included in the settlement into proper context. In settlement legislation, the historical account or a summary may form the Preamble to the Act.

39. The process of agreeing a historical account (and indeed the other elements of the Crown Apology) is a matter of negotiation. Historical accounts are often carefully worded and structured. Commonly, where a settling group wishes a historical account to record a matter that the Crown does not agree with, the historical account will record that matter expressly as the view of the settling group.
40. Settling groups may choose to preface the deed of settlement with a “background” section recording the claimant group’s tribal history prior to 1840, as understood by the group. This is so that the significance of the history and the settlement can be understood from the group’s perspective. These sections commonly include reference to whakapapa, waiata and other traditional sources that are important to groups.

Acknowledgements and apology

41. Through the Crown’s acknowledgements, the Crown acknowledges historical breaches of the Treaty and its principles and accepts responsibility for those breaches. Acknowledgements also express the Crown’s understanding of the impact of those breaches on the claimant group.

¹⁶ Exhibit LMA-1 at p 79.

42. Through the Crown apology the Crown expresses its regret and apologises to the claimant group for its breaches. It is naturally important in rebuilding relationships.

Cultural redress

43. As noted in the Red Book, cultural redress is used as a general term for redress that is neither financial nor commercial redress, nor an element of the Crown Apology (i.e. neither the historical account, the Crown apology nor the Crown acknowledgement).¹⁷
44. Cultural redress is intended to recognise the cultural interests (as opposed to economic interests or needs) of the negotiating group and often recognises associations with the natural environment and specific sites of significance. It might reflect grievances such as loss of guardianship over sites of spiritual significance and loss of access to or control over traditional resources.
45. The Red Book identifies a range of different instruments and mechanisms potentially available as forms of cultural redress and exemplifies their use through relevant case examples. It provides detailed information concerning the distinct interests likely to be implicated by different kinds of sites or resources and identifies the redress options therefore likely suited to sites or resources of those kinds.¹⁸
46. Cultural redress might, for example, secure protection over particular sites or entail the vesting of land ("vesting" being the creation or transfer of a fee simple estate in land). It might also provide for recognition of the group's cultural associations through instruments such as overlay classifications, statutory acknowledgements and deeds of recognition, which recognise, in various ways, groups' associations with significant sites and areas that are owned or managed by the Crown.¹⁹
47. Cultural redress might also confer rights of participation in decision-making, for example through the creation of a conservation management plan or a joint committee for the management of natural resources. Certain cultural redress

¹⁷ Exhibit LMA-1 at p 90.

¹⁸ Exhibit LMA-1 at pp 94-114.

¹⁹ Exhibit LMA-1 at pp 122-123.

mechanisms, often called “protocols” or “relationship agreements”, have a focus on strengthening relationships between the group and Crown agencies or local and regional authorities, so might stipulate how those bodies will interact with the claimant group and provide for their input in decision-making processes.²⁰

48. For cultural redress to be considered for a site, area or resource, the Crown requires there to be an association with that specific site, area or resource.
49. Such associations might be of various kinds. The Crown does not require these to be established as a matter of tikanga or even based in tikanga. An item of redress might carry importance by virtue of a cultural practice or because of a particular historical event that impacted the group or possibly due to a broken promise of the Crown. What matters to the Crown is establishing the importance of the association to the settling group.
50. As a result, it is important for settling groups to identify at an early stage those sites (or resources, flora or fauna) within their areas of interest that are culturally significant to them and to collate information on their associations with them. This begins during the process of compiling a mandate strategy and/or deed of mandate and continues to be refined up until a deed of settlement is entered into. The Red Book also notes the importance of consultation with other groups, so as to identify and, if possible, resolve any overlapping interests.²¹
51. Examples of associations put forward by settling groups include tūpuna maunga (mountains), awa (rivers), pā (fortifications), marae and kainga (permanent settlement/village), nohoanga (temporary settlements or camping grounds, which are often seasonal), mahinga kai (cultivated area or food gathering place), urupā (burial grounds) or other wāhi tapu (spiritual sites, such as battle grounds where bodies still lie).
52. As noted, other associations might exist because a site is significant in the history of the group. For example, it might be the site of a significant event

²⁰ Exhibit LMA-1 at pp 123-124.

²¹ Exhibit LMA-1 at p 91.

that had ongoing effects for the group. A site might also relate directly to a historical Crown act or omission for which a grievance is held.

53. I note that the Waitangi Tribunal in its *Tāmaki Makaurau Settlement Process Report* recommended that the Crown “engage with and understand concepts of layers of interests rather than ‘predominance’ and ranking”.²² The Tribunal also commented, specifically in relation to cultural redress sites, that “[w]here there are layers of interests in a site, all the layers are valid. They derive from centuries of complex interaction with the whenua, and give all the groups with connections mana in the site”.²³
54. The Crown seeks to understand all associations of all groups. As I explain below, the Crown does not consider that it can or should adjudicate upon matters of tikanga or mana whenua. Rather, the Crown considers the nature of associations to be relevant to determining redress that is fair and appropriate. Fairness requires the Crown to consider consistency across settlements. This requires more than simply considering kinds of associations and related redress items across settlements. As I set out further below, a range of factors affect what is appropriate redress in any context.
55. The Crown does not accept mere assertions of associations. The Crown will consider evidence provided by the settling group of their asserted associations with particular sites or areas so as to understand the basis of those assertions and the importance of the associations to the group. As I explain below, the Crown will also seek information concerning associations of other groups with those sites or areas so as to understand, as far as possible, the full range of groups’ associations with those places. I have read the affidavit that the Hon Christopher Finlayson has prepared for this hearing and agree with his explanation that the purpose of the Crown’s historical inquiry is to ensure there is a “principled historical basis” for redress.²⁴
56. As I have noted, the strengthening of relationships between the Crown and Māori is an important principle underlying all Treaty settlements. It applies to all Māori, not just the group in negotiations, hence the settlement guideline

²² Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at p 109.

²³ Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at p 97.

²⁴ Affidavit of Christopher Finlayson sworn on 8 October 2020 at [9].

that Treaty settlements should not create further injustices to the group seeking redress or others. In seeking to understand all the different associations with a site, the Crown considers its obligations to the settling group and other groups. A failure to consider all associations may cause harm to relationships with and between groups and thereby undermine the Crown's objective of securing durable settlements.

57. Offers of cultural redress are also affected by purely practical considerations. Most obvious is the question of whether the Crown owns or manages the relevant site or resource. Further, the Crown must consider consistency with statutory requirements (for example the Resource Management Act 1991, the Conservation Act 1987 and the Public Works Act 1981) and the protection of third-party rights.²⁵ The Crown must also consider the fiscal implications for the Crown accounts of the vesting of land as gifted redress.
58. Also, in accordance with the key settlement policies discussed above, cultural redress will not be provided unless overlapping interests are addressed to the Crown's satisfaction.²⁶

Financial and commercial redress

59. Financial and commercial redress means the part of the settlement that is primarily economic or commercial in nature. It is comprised of a financial and commercial redress amount (described in the Red Book as the "redress quantum" or "redress amount") and may also include commercial opportunities over Crown land.²⁷
60. Financial and commercial redress is provided in recognition and settlement of historical Treaty claims against the Crown. It also helps a claimant group establish an economic platform for future development. It recognises that, where claims for loss of land or resources are established, the Crown's breaches of the Treaty will usually have held back the group's potential economic development.²⁸

²⁵ Exhibit LMA-1 at p 92: "important principles guiding the Crown's approach to cultural redress".

²⁶ Also listed as an important principle in Exhibit LMA-1 at p 92.

²⁷ Exhibit LMA-1 at pp 81-82.

²⁸ Exhibit LMA-1 at p 81.

61. Such redress is not, however, intended to constitute full compensation for the losses of a claimant group. As explained in the Red Book, for several reasons (including potential overlaps between claimant groups), assessing those losses with any certainty would be impossible. That aside, "a full compensation or 'damages' approach to redress would place too great a burden on the present and future generations of taxpayers".²⁹
62. The Crown abandoned the notion of a cap on total settlements (the "fiscal envelope") in 1996 and has since sought to ensure that the value of individual settlements is fiscally prudent while reflecting the underlying breaches in a way that is consistent across settlements.
63. This entails the Crown considering the relative seriousness of the breaches and the amount of land lost to the claimant group. As the Red Book sets out, a guiding principle for the Crown is that the financial and commercial redress amount should relate fundamentally to the nature and extent of the Crown's breaches of the Treaty and its principles.³⁰ The Crown considers the most serious breaches are raupatu with loss of life. In assessing consistency across settlements, the Crown considers settlements for similar grievances and the relative sizes of settling groups. In terms of process, the Crown shares with settling groups the information it has gathered as to the types and amounts of land loss experienced by the group, and the group's population size. Groups can then raise any perceived errors and present information from other sources. From there, the Crown makes an offer for the total financial and commercial redress amount. Negotiations usually ensue.
64. Once the Crown and the claimant group have agreed the total financial and commercial redress amount, the parties then negotiate commercial property redress. The agreed transfer value of the commercial property redress is deducted from the total redress amount (in what is effectively a "purchase" of the property from the Crown) with the balance provided to the settling group as cash.
65. Commercial redress may take a number of forms, with settlement date property transfers being the most common. The value of these properties is

²⁹ Exhibit LMA-1 at p 83.

³⁰ Exhibit LMA-1 at p 81.

negotiated based on current market valuations. Examples of these commercial redress properties are "landbank" properties³¹ (surplus Crown-owned land specifically earmarked and set aside for possible use in Treaty settlements), Crown forest licensed land³² and operational sites such as school sites. Operational sites are generally offered on the basis they will be leased back to the Crown.

66. Commercial redress may also include rights and opportunities to purchase properties for a specified time after settlement. Examples are deferred selection properties and rights of first refusal.
67. "Deferred selection properties" are Crown-owned properties that may be purchased by the settling group (using funds from settlement or otherwise) after settlement for a specified period, such as two years. A group may ultimately decide not to take up a deferred selection property. These properties are not ascribed a value in the settlement. A valuation process to determine the sale and purchase price is only undertaken if the deferred selection option is taken up.
68. "Rights of first refusal" are rights to purchase Crown land that is not available at the time of settlement but which, should it become available for sale within a specified period (often more than 100 years), will be offered to the claimant group ahead of any other purchaser.³³ Such rights are not ascribed a value in the settlement.
69. There is a key difference between the Crown's approach to identifying potential commercial redress items and that taken with respect to cultural redress items. Commercial redress requires an association in the general area in which the redress item is located but does not require an association with the redress item itself. As with cultural redress, the Crown will inform itself as to the settling group's associations in the relevant area. The kinds of associations the Crown will consider for this purpose are the same as those considered in relation to cultural redress.

³¹ Exhibit LMA-1 at pp 134-138.

³² Exhibit LMA-1 at pp 86-87.

³³ Exhibit LMA-1 at pp 85-86.

70. A negotiating group will be invited to select which (if any) commercial redress properties it would like to "purchase" from its financial and commercial redress amount and which it might like the opportunity to purchase after settlement. A group might make selections based on commercial considerations or because the land has customary or historical significance or a combination of these factors.
71. In a highly overlapped area, such as Tāmaki Makaurau, Crown decisions to offer commercial redress include consideration of distributing assets across overlapping groups in a way that both contributes to the economic and social development of each group and is fair to each group. Fairness requires consideration of matters such as the value of properties, their location, how many groups there are and how many properties are available.
72. The Crown generally considers commercial properties to be substitutable in that the negotiating group can take the financial and commercial redress amount as cash, rather than as commercial property.³⁴ If a commercial property is not available or considered inappropriate for some reason (including for example, in light of the concerns of overlapping groups), a property of a similar value and nature may be negotiated into the commercial redress package in substitution.

Exclusive and non-exclusive redress

73. The Crown may offer "exclusive" redress or "non-exclusive" redress.³⁵ Exclusive redress is redress that is available only once for a particular site, property or resource. It generally means no further redress (exclusive or non-exclusive) will be available for other groups for that site, property or resource. By contrast, non-exclusive redress can be made available more than once. Although exclusive redress usually involves just one group, it can be offered on a shared or joint basis to two or more groups to recognise multiple interests (as with the vesting of title to Tāmaki maunga in the Ngā Mana Whenua o Tāmaki Makaurau Collective).
74. The vesting of land is the most obvious example of exclusive cultural redress. Once land has been vested it cannot be re-vested. Examples of non-exclusive

³⁴ Exhibit LMA-1 at p 84.

³⁵ Exhibit LMA-1 at pp 54-55.

redress include statutory acknowledgements, deeds of recognition and protocols between iwi and Crown agencies. If the Crown provides these to a group as part of a settlement of their Treaty claims, that does not prevent the same redress being provided to another group over the same site or area.

75. Commercial redress is generally exclusive, though it too can be offered on a shared or joint basis (such as the Ngā Mana Whenua o Tāmaki Makaurau right of first refusal arrangements). It is also possible for a property to be subject to a series of rights of refusal or deferred selection, whereby one group can exercise the relevant right if not exercised by another.
76. In considering exclusive property redress (whether it is cultural or commercial, and whether it is provided “on account” prior to settlement, on settlement date, or later) the Crown will consider a number of matters, including the aspirations of the settling group, the nature of association of the settling group and, similarly, the nature of any overlapping interests. Of course, a property may not be available for transfer if the Crown still requires its use, if there is significant public interest in the site, or if there are statutory obligations to former owners.

Crown consideration of overlapping interests

77. The Crown’s objective in the Treaty settlement process is to provide redress in acknowledgement of the Crown’s past wrongs and, in the process, restore and enhance relationships as best it can. It is within this context that the Crown gives consideration to groups’ assertions of associations.

78. The Red Book contains a section headed “overlapping claims or shared interests”.³⁶ This refers to situations in which there are overlapping associations of the kinds I have described. The Red Book states that “such situations are also known as ‘cross claims’”.³⁷ These words “overlapping claims” and “cross-claims” suggest a context limited to overlaps between two or more negotiating groups. However, overlapping interests and associations can exist between groups regardless of their settlement status. They may involve groups that have settled, groups that are in negotiations and groups still to enter into negotiations.

³⁶ Exhibit LMA-1 at p 53.

³⁷ Exhibit LMA-1 at p 53.

79. The Crown recognises that multiple groups may have associations with the same area. As I noted earlier, groups articulate and assert different kinds of associations and different supporting narratives. To inform itself about what redress may be appropriate to offer, the Crown directs its efforts at understanding those narratives and why they are important. Where assertions of interests arise from assertions of tikanga or mana whenua, the Crown does not consider that it can or should adjudicate upon matters of tikanga or mana whenua. For example, groups sometimes have different views about when, as a matter of tikanga, customary interests may have been extinguished or subsumed into the interests of other groups. The Crown will not determine the tikanga that should apply, the content of that tikanga or how that tikanga should then be applied. The Crown's role is to support groups to address these issues themselves. The Crown's approach to redress will be informed by the dialogue between groups on these issues.

The overlapping interests process

80. As I have already said, one of the Crown's key settlement policies is that "overlapping claims or interests of other claimant groups must be addressed to the satisfaction of the Crown before the Crown will conclude a settlement involving any of the sites or assets concerned".³⁸ For this reason, all modern Treaty settlements have featured a process to address overlapping interests. The Red Book outlines this process at a high level:³⁹

In areas where there are overlapping claims, the Crown encourages claimant groups to discuss their interests with neighbouring groups at an early stage in the negotiation process and establish a process by which they can reach agreement on how such interests can be managed. Addressing overlapping claims at an early stage will avoid delays – and the possibility of a challenge to the settlement package – at a later stage in the settlement process. The Crown will assist this process by providing information on proposed redress items to all groups with a shared interest in a site or property.

Disagreements relating to overlapping claims may arise from the Crown proposing a particular form of redress, such as the transfer of a site or

³⁸ Exhibit LMA-1 at p 53.

³⁹ Exhibit LMA-1 at p 27.

property to one claimant group to the exclusion of another. Where there are overlapping claims, such exclusive redress may not always be appropriate. Often both groups have an interest, such as historical or cultural associations, in a site or property and these interests can be accommodated by a form of redress which is non-exclusive. This allows the interests of different groups to be recognised and accommodated.

81. In an affidavit filed earlier in these proceedings, the former Minister for Treaty of Waitangi Negotiations Mr Christopher Finlayson observed that the Crown can seldom “resolve” long-standing issues between iwi.⁴⁰ The Red Book notes that this is not the Crown’s purpose either:⁴¹

Nor is it intended that the Crown will resolve the question of which claimant group has the predominant interest in a general area. That is a matter that can only be resolved by these groups themselves.

82. Rather than resolving such questions, the Crown must be satisfied that overlapping issues have been addressed to the point that redress can be considered appropriate. I address below the sorts of issues bearing on the question of whether redress is appropriate.
83. As I have explained, despite the potential for disputes as to overlapping interests, the Crown’s practice is not to simply withdraw property-related redress in the face of dispute between groups. The Crown is aware of the value that groups attach to the provision of redress related to land (or other geographical features) and especially to the transfer of land. As the Red Book states, “Treaty settlements involve more than money, and most claimant groups want to see spiritual, cultural and environmental concerns met as much as economic ones”.⁴² Further, although the Crown must be vigilant in maintaining relationships with and between groups, questions of equity would arise if redress items became unavailable to unsettled groups merely because an overlapping group is dissatisfied. Such an approach would effectively concede a veto to that overlapping group. Had the Crown adopted such a policy to date it would have achieved far fewer settlements.

⁴⁰ Affidavit of Christopher Finlayson sworn on 8 July 2016 at [14].

⁴¹ Exhibit LMA-1 at p 53.

⁴² Exhibit LMA-1 at p 83.

Engagement and information gathering

84. The Crown typically begins seeking information from neighbouring groups about the nature and extent of any overlapping interests as part of the process of identifying a claimant group and its associated “areas of interest”. For most groups this begins as early as the mandate strategy or deed of mandate stage. As associations and negotiating parameters are established and refined, there are ongoing efforts to engage with overlapping groups. The Crown seeks to engage directly with overlapping groups at key intervals during the negotiation process in order to provide information on proposed redress items and to invite and assess information about associations in areas where interests may overlap. This occurs through correspondence and by meeting *kanohi-ki-kanohi*. The Crown will usually also undertake or commission research of its own.
85. The Crown also encourages groups to discuss overlapping claims together at an early stage and to establish a process by which they might reach agreement. The Waitangi Tribunal’s *Hauraki Settlements Overlapping Claims Inquiry Report* has recently re-emphasised the utility of tikanga processes in allowing affected groups to themselves resolve overlapping interests.⁴³ As noted, the Crown prefers that any issues relating to overlapping interests are settled by mutual agreement between affected groups. Crown policy ensures that tikanga concepts and processes can be utilised by groups at any stage of negotiations. The Crown can likewise support engagement between groups at any stage of the process by providing information or funding research, mediation or facilitation.
86. The Crown does not, however, require that tikanga processes be used, or purport to adjudicate on the appropriate tikanga by which overlapping interests are addressed. Groups do not always agree on the concepts and processes to be used. What is considered *tika* by one group may not be considered *tika* by another. The Crown seeks to be satisfied that there has been proper opportunity for engagement between groups. The Crown considers the nature of that engagement to be appropriately a matter for the affected groups.
87. To provide impetus for engagement, at times the Crown has specified timeframes for engagement to occur or feedback to be provided. There can be

⁴³ Waitangi Tribunal *The Hauraki Settlements Overlapping Claims Inquiry Report* (Wai 2840, 2020) at pp 86-92.

an inherent tension between the Crown's objective of settling longstanding Treaty grievances without unfair delay and not adversely affecting relationships with and between Māori. Managing this tension can be challenging.

88. The Crown generally requires overlapping interests to be addressed before an agreement in principle is signed. However, this is not always possible. In order to balance the interests of the negotiating group and overlapping groups, the Crown may allow more time for further engagement to take place after the signing of an agreement in principle, depending on the particular issues arising and the prospect of prejudice to either group. In such circumstances it is standard for the text of the agreement in principle to state that redress contemplated in the agreement will be included in the deed of settlement "only if overlapping claim issues in relation to that redress have been addressed to the satisfaction of the Crown",⁴⁴

Minister's preliminary and final decisions

89. The Crown's position is that the Crown, not settling groups, must make final decisions as to redress. That said, subject to its settlement policies, the Crown will give effect to agreement reached between groups.
90. Of course, agreement is not always achieved and the Minister for Treaty of Waitangi Negotiations may need to make a decision as to what redress is appropriate in the context. This is really a last resort. Agreement between groups – as opposed to a potentially divisive decision by the Crown – is always to be preferred. However, where agreement is not possible, the Crown must take decisions. As the Red Book states, the Crown has "accepted a moral obligation to resolve historical grievances in accordance with the principles of the Treaty of Waitangi".⁴⁵
91. Generally, the Minister will make a preliminary decision on the basis of information provided by officials, which includes discussion of the information provided by the groups. The relevant groups are then given an opportunity to bring further information to the Minister's attention prior to a final decision. After this "final" decision, officials sometimes refer to an overlapping claims process as being "closed". This language indicates a particular step in the

⁴⁴ See for example cl 3.10.1 of the Crown's 2016 agreement in principle with Te Ākitai Waiohū.

⁴⁵ Exhibit LMA-1 at p 54.

process but if an overlapping group subsequently raises an issue the Crown remains open to further consideration.

92. As set out in the Red Book,⁴⁶ decisions in an overlapping interests context are guided by the following general principles:

- the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations, and
- the Crown's wish to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.

93. Some OTS policy documentation and correspondence (for example, in a document entitled "The Crown's Overlapping Claims Policy", **attached** and marked "LMA-2", and which is referred to in an internal OTS "toolbox", also **attached** and marked "LMA-3") includes a third principle:

The Crown's duty to ensure the redress offered to the claimant group in negotiations doesn't cause prejudice to a settled group and has no unintended inferences about the mana of other groups.

94. This is an extension of the second principle that has emerged as more groups have reached settlement. It reflects that the Crown's approach is the same regardless of the settlement status of the groups and indicates the importance the Crown places upon protecting relationships with all groups (see, for example, the **attached** briefing from OTS officials to the Minister, marked "LMA-4").⁴⁷ It is, however, subject to the Crown's ability to offer redress despite the opposition of an overlapping group (including opposition of settled groups based upon unintended inferences). As the affidavit filed earlier by Mr Finlayson stated, "the Crown's wish [is] to ensure the redress offered to the claimant group in negotiations strikes a balance between the Crown's obligations to that group and its ongoing obligations and relationships with overlapping settled groups".⁴⁸ Although the Crown does not consider it can or should make determinations about disputes over mana, the Crown must be

⁴⁶ Exhibit LMA-1 at p 54.

⁴⁷ See also Exhibit LMA-3.

⁴⁸ Affidavit of Christopher Finlayson sworn on 8 July 2016 at [35.3].

sensitive to opposition based upon claims of mana and to the possibility that groups might regard redress as inferring a Crown view about mana.

Determining appropriate redress

95. Overlapping interests are just one factor considered by the Crown in determining appropriate redress.
96. As I have said, each negotiation is different. Each settling group has a different mix of aspirations for their people. Each therefore has a different view of the amount, type and location of redress that will enable them to enter a deed of settlement in the knowledge that the overall package will be endorsed by their membership when they vote to ratify the settlement and the post-settlement governance entity.
97. Similarly, what the Crown is prepared to offer, and what it considers will have the best prospect of achieving durable settlement, depends entirely on the context of the negotiation. The starting point for Crown consideration of appropriate redress is always the nature and extent of a group's grievances under the Treaty. This reflects the negotiating principle of "just redress" referred to earlier, which states that redress should fundamentally relate to the nature of the Treaty breaches suffered.
98. I have already commented on some of the many inter-related factors that can affect the Crown's decision to offer a certain site or asset as settlement redress. These include, but are not limited to:
 - 98.1 whether the group has an association with the redress item (cultural redress) or the general area in which the redress item is located (commercial redress);
 - 98.2 whether the redress is cultural or commercial;
 - 98.3 whether the redress is exclusive or non-exclusive;
 - 98.4 the nature of a group's associations within the area in which redress is sought;
 - 98.5 the aspirations of the settling group;

- 98.6 whether the Crown owns or manages the relevant site or asset, and any applicable statutory requirements or third-party rights;
- 98.7 whether the offer of redress can be accommodated within the value parameters for the settlement;
- 98.8 the distribution of redress between settling groups in a way that contributes to their economic and social development and is fair to each group;
- 98.9 the extent of Crown-owned property available for use as redress in the group's identified "area of interest"; and
- 98.10 the availability and nature of comparable alternative redress.
99. In an overlapping context, agreement between groups as to redress is always to be preferred, as I have said. The Crown is fully aware that a Minister's decision in the face of disagreement raises the prospect of disappointment and adverse impacts on relationships. In deciding what is appropriate to offer, the Crown must also take that prospect into account. Although the Crown's position is that settlement does not require the consent or satisfaction of overlapping groups, the Crown considers the nature and extent of opposition to particular redress and the risk of adverse impacts upon relationships with and between Māori groups.
100. I note that, in his affidavit for this hearing, Mr Finlayson states that he regarded associations as "commensurate" if there was a principled historical basis for the redress and the redress was reasonable and fair in all the circumstances.⁴⁹ Descriptions of redress as "commensurate" or "sufficient" often reflect a context in which redress proposals are challenged by overlapping groups on the basis that the settling group does not actually have the asserted associations or that they are "insufficient" to warrant the proposed redress. However, the decision for the Crown is, as Mr Finlayson says, whether redress is appropriate in all the circumstances – not whether associations in isolation warrant redress.

⁴⁹ Affidavit of Christopher Finlayson sworn on 8 October 2020 at [34].

Changes to Crown settlement practice

101. This section of my evidence addresses changes to the Crown's settlement practices in the period over which the events subject to this litigation took place, including those arising from Tribunal reports and feedback from claimants.

Waitangi Tribunal concerns

102. In June 2007, the Waitangi Tribunal released two reports following urgent inquiries into the Crown's settlement policies and practice. *The Tāmaki Makaurau Settlement Process Report*⁵⁰ and *The Report on the Impact of the Crown's Treaty Settlement Policy on Te Arawa Waka*.⁵¹ Both reports raised broad concerns about the Crown's processes for consultation, the techniques used by OTS to assess groups' interests and the nature and effect of cultural redress instruments. These comments followed the 2003 *Ngāti Tūwharetoa ki Kāwharua Settlement Cross-Claim Report*, which also raised concerns about Crown practice in relation to overlapping interests.⁵²
103. As I have noted, the *Tāmaki Makaurau Settlement Process Report* also found significant flaws in the Crown's initial approach to addressing overlapping interests in Tāmaki Makaurau. The Tribunal described the Crown's decision to negotiate with Ngāti Whātua Ōrākei ahead of other groups as "picking winners".⁵³ This approach, it said, precluded genuine engagement with other groups and denied the human reality that, after "three or more years" of effort, the Crown was "already emotionally and intellectually committed" to the agreement in principle.⁵⁴ The Tribunal noted that the Crown's original decision to offer exclusive cultural redress in three iconic maunga on the central Tāmaki isthmus was "on the basis of an assessment that Ngāti Whātua o Ōrākei's interests in those sites were predominant".⁵⁵ As already noted, the

⁵⁰ Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007).

⁵¹ Waitangi Tribunal *The Report on the Impact of the Crown's Treaty Settlement Policy on Te Arawa Waka* (Wai 1353, 2007).

⁵² Waitangi Tribunal *Ngāti Tūwharetoa ki Kāwharua Settlement Cross-Claim Report* (Wai 996, 2003).

⁵³ Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at pp 12-13.

⁵⁴ Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at p 95.

⁵⁵ Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at p 48.

Tribunal strongly disapproved of the assessment of “predominance”, recommending instead an understanding of “layers of interests”.⁵⁶

The Crown's response

104. Following the 2007 Tribunal reports and after seeking feedback from claimant groups and other stakeholders, the Crown adopted a series of practice changes to Treaty settlement negotiations. These changes affected a range of processes and activities, including large natural groupings, recognising mandates, comprehensive settlements and overlapping interests, as well as a new regional approach. (Relevant documentation setting out these practice changes is attached and marked “LMA-5”,⁵⁷ “LMA-6”,⁵⁸ “LMA-7”,⁵⁹ and “LMA-8”.⁶⁰) These practice changes allowed for greater flexibility in the implementation of policy. However, they did not alter the principles and policies that set the framework for Treaty settlements, including those I have described earlier in this affidavit.
105. To avoid the consequences identified by the Tribunal of “picking winners” and to allow for a fuller understanding of inter-relationships between claimants, the Crown moved to a regional approach whereby the Crown seeks to engage simultaneously with multiple claimant groups in a common geographic area. By engaging in this way, the Crown seeks to consider overlapping interests earlier in negotiations. Pre-mandate claimant funding is available for groups to engage in overlapping interests discussions with neighbouring groups before their negotiations have commenced. The approach of simultaneous negotiations and co-ordinated redress offers also aims to support overlapping interests engagement by giving groups a sense of what they will receive in comparison to their neighbours. The Crown has also increased the use of facilitators to work with groups towards resolution.

⁵⁶ Waitangi Tribunal *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007) at p 97.

⁵⁷ Office of Treaty Settlements *Improving practice under Crown policy on overlapping claims and mandate* (14 February 2008).

⁵⁸ Office of Treaty Settlements *Recent Work and New Approaches: Improving Overlapping Claims and Mandate Policy and Practice* (20 March 2008).

⁵⁹ Office of Treaty Settlements *Improving Overlapping Claims and Mandate Processes – Progress Report* (2 May 2008).

⁶⁰ Office of Treaty Settlements *Implications of Current Negotiation Practice: Claimant collectives, mandate and non-comprehensive settlements* (11 July 2008).

Updates to policy documentation

106. Te Arawhiti is currently reviewing and refining the Crown's overlapping interests policy documentation, guidance and practices. This process began at Waitangi in February 2017, where the then Minister for Treaty of Waitangi Negotiations the Hon Christopher Finlayson, gave his support to a proposal by the Iwi Chairs Forum for the Crown and the Iwi Chairs Forum to work together to review and refine the Crown's approach to overlapping claims issues.
107. Engagement with the Iwi Chairs Forum occurred in 2018 and early 2019, focussing on certain proposals put forward by the Iwi Chairs Forum in its paper "A new approach to overlapping claims" (a copy of which is **attached** and marked "LMA-9").⁶¹ The paper suggested fundamental changes centred on the importance of early engagement on overlapping interests and on the importance of agreement between iwi in addressing those. The paper also suggested that the Crown be bound by agreements reached between iwi and that negotiations be paused if no agreement is reached.
108. The current Minister, the Hon Andrew Little, responded to the Iwi Chairs Forum in a letter of 13 March 2019 (a copy of that letter is **attached** and marked "LMA-10"). The Minister confirmed that current policy guidance provides for overlapping interests to be addressed as early as possible in the negotiation process. The Minister also advised the Crown could not accept the proposal to remove the Crown as a final decision-maker as to what redress the Crown will offer. However, the Minister did provide an assurance that the Crown will seek to give effect to any agreement between iwi, subject to policy implications.
109. Te Arawhiti is now reviewing its policy documentation, guidance and practices following engagement with the Iwi Chairs Forum, and taking into account the Tribunal's *Hauraki Overlapping Claims* report, released in December 2019, which

⁶¹ The paper proposed, among other things: a tikanga-based process led by iwi without Crown engagement; the process of engagement to be agreed between iwi parties before negotiations commence; the nature of iwi interests and corresponding rights to be debated up-front prior to negotiations starting; the use of an independently facilitated dispute resolution process to assist the parties where an impasse is reached; agreements between iwi to be binding on the Crown; and negotiations to be paused if no agreement is reached.

recommended, among other things, that the Red Book be brought up to date as a statement of Crown policy and practice.⁶²

110. As a result, the Red Book is being updated. In the first instance, Te Arawhiti is updating sections of the Red Book relating to policy and processes for mandate, overlapping interests and cultural redress. Te Arawhiti has also drafted a policy document that contains a more detailed statement of the Crown's overlapping interests policy and processes. The draft policy document has been noted by the Minister and will now be provided to the Iwi Chairs Forum for feedback.
111. The purpose of these updates is to provide a fuller explanation of the Crown's overlapping interests policy, however, the fundamental elements of the policy will not change from those I have set out above. As I have noted, the Crown takes a purposefully flexible approach to overlapping interests, as it does to Treaty settlements in general, and the Red Book and other Crown policy statements are only intended to provide guidance for claimant groups and Crown agencies in the negotiation process.

AFFIRMED

at Wellington, this 13th day of October)

2020)

before me:)

Hannah Alice Doogan
Solicitor
Wellington

)
Lilian Marie Anderson

Deputy Registrar/ Solicitor of the High Court of New Zealand

Exhibits to the Affidavit of Lilian Marie Anderson
13 October 2020

Exhibit	Document	Date	Delium Reference
LMA-1	Office of Treaty Settlements <i>Ka tika ā muri, ka tika ā mua - Healing the past, building a future</i> (the Red Book)	01/06/2018	OTS.050.0001
LMA-2	Office of Treaty Settlements <i>The Crown's Overlapping Claims Policy</i>	25/09/2013	OTS.011.0251
LMA-3	Office of Treaty Settlements "Toolbox" <i>An Introduction to Overlapping Claims</i>	29/05/2017	OTS.011.0340
LMA-4	Office of Treaty Settlements <i>Application of Crown's overlapping claims policy to settled groups</i>	30/04/2012	OTS.011.0192
LMA-5	Office of Treaty Settlements <i>Improving practice under Crown policy on overlapping claims and mandate</i>	14/02/2008	OTS.011.0055
LMA-6	Office of Treaty Settlements <i>Recent Work and New Approaches: Improving Overlapping Claims and Mandate Policy and Practice</i>	20/03/2008	OTS.011.0070
LMA-7	Office of Treaty Settlements <i>Improving Overlapping Claims and Mandate Processes – Progress Report</i>	02/05/2008	OTS.011.0107
LMA-8	Office of Treaty Settlements <i>Implications of Current Negotiation Practice: Claimant collectives, mandate and non-comprehensive settlements</i>	11/07/2008	OTS.011.0120
LMA-9	Iwi Chairs Forum <i>New Approach to Overlapping Claims</i>	01/05/2018	OTS.012.1126
LMA-10	Letter from Minister Little to the Iwi Chairs Forum	13/03/2019	OTS.067.0020

"LMA-1"



Ka tika ā muri, ka tika ā mua

He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana
ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna

Healing the past, building a future

A Guide to Treaty of Waitangi Claims and Negotiations with the Crown

This is the exhibit marked "LMA-1" referred to in
the attached Affidavit of **Lilian Marie Anderson**
sworn and affirmed at Wellington this ^{13th} day of October
2020 before me

Hannah Alice Doogan
Solicitor
Wellington

Deputy Registrar/Solicitor of the High Court of
New Zealand

Office of Treaty
Settlements

Te Tari Whakatau Take e pā ana
ki te Tiriti o Waitangi

OTS.052.0001

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The Office of Treaty Settlements

- negotiates settlements of historical claims directly with claimant groups, under the guidance and direction of Cabinet
- provides policy advice to the government on generic Treaty settlement issues and on individual claims
- oversees the implementation of settlements, and
- administers the protection mechanism of Crown-owned land for Treaty settlement purposes.

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You can view this booklet and other information about the Office of Treaty Settlements and individual Treaty settlements online at www.govt.nz.

We welcome your questions and any feedback.

He Inoinga

E te Atua Matua, ko koe te kaihangā o te rangi me te whenua, te mātāpuna o te ora, o te tapu. Ko to mātou inoi tēnei kia hōutia tō rongō ki runga i te whenua, ki waenganui i te tangata. Tirohia atawhaitia te kaupapa tātari i ngā take e pā ana ki te Tiriti o Waitangi. Arahina tonutia ngā tikanga kawē i te kaupapa kia puta mārama ai te rangatiratanga o te tangata, o te whenua. Werohia mātou ki te tao o te pono kia tutuki rawatia ēnei take. E te Atua, kia aroha nui nei ki a mātou. Ko koe hoki te timatanga me te whakatutukitanga o ngā mea katoa.

Āmene

O Parent God, you are the creator of the heavens and the earth, and you are the source of life and wholeness. This is our prayer that you cast upon the land, and amongst the people your spirit of reconciliation. Look with loving concern upon the principle of careful consideration for the issues that relate to the Treaty of Waitangi. Constantly guide the processes that carry forward the principle so that there is clear manifestation of the chiefly dignity of people, and of the land. Challenge us with the darts of truth so that the issues may, with integrity, reach fulfilment. Lord, may we have aroha for people and for the land just as you have great aroha for us. For you are the beginning and the fulfilment of all things.

Amen

*Karakia by Pā Henare Tate on behalf of
Te Rōpu Māori o te Mānau Ture
(Māori focus group of the Ministry of Justice)*

Acknowledgements

The Office of Treaty Settlements (OTS) is grateful for the assistance it has received from individuals, organisations and government departments in the preparation of the first edition of this guide. In particular we would like to thank the following claimant groups and organisations: Nga Hapu o Te Ahuriri, Taneuiarangi Manawatu Incorporated, Te Rūnanga o Ngāi Tahu, the Māori Focus Group – Ministry of Justice, the Waitangi Tribunal, Te Ohu Kai Moana, and the Crown Forestry Rental Trust.

OTS also wishes to thank those who gave permission to use photographs in this guide, Pā Henare Tate for the opening prayer and Professor Sir Hugh Kawharu for allowing his translation of the Treaty to be reproduced.

Overview of this guide

This edition of *Healing the past, building a future* has been updated for 2018. Changes have been made to reflect the new arrangements for management of the Treaty settlements loanbank, and information on recent settlements has been added to the table on page 20. *Healing the past, building a future* is a practical guide to the negotiation and settlement of historical grievances under the Treaty of Waitangi. It also sets out an overview of the historical background to Treaty grievances and settlements, and explains how settlement policy has developed.

Healing the past, building a future is also available in electronic form online at www.govt.nz.

Contents

1	Text of the Treaty of Waitangi – Te Tiriti o Waitangi
---	---

SETTLEMENT FRAMEWORK

6	The status of the Treaty of Waitangi today
7	Historical background to Māori claims against the Crown – what are Treaty claims all about?
14	Milestones in the development of Treaty settlements policy
17	Who or what is the Crown?
18	About the Office of Treaty Settlements
20	Progress with Treaty settlements so far
23	The Crown's general approach to Treaty settlements

THE NEGOTIATIONS PROCESS

29	Overview of the negotiations process
32	Negotiations and the Waitangi Tribunal process
35	Step 1: Preparing claims for negotiations
49	Step 2: Pre-negotiations
56	Step 3: Negotiations
64	Step 4: Ratification and implementation

SETTLEMENT REDRESS

77	Settlement redress
79	Historical account, Crown acknowledgements of breach and apology
81	Financial and commercial redress
90	Cultural redress

SUPPORTING INFORMATION

134	Protection of potential settlement assets
142	Glossary of technical terms
146	Glossary of Māori terms
148	Frequently asked questions about Treaty settlements
150	Contact details for other organisations
152	List of figures
154	List of tables
155	Index

Text of the Treaty of Waitangi – Te Tiriti o Waitangi

Three versions of the Treaty follow. These are the Māori and English texts recognised in the Treaty of Waitangi Act 1975, followed by Professor Sir Hugh Kawharu's English translation of the Māori text. The principles arising from the Treaty are discussed on pages 15 and 16.

The text in Māori

TE TIRITI O WAITANGI

Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira – hei kai wakarite ki nga Tangata Maori o Nu Tirani – kia wakaaetia e nga Rangatira Maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu – na te mea hoki he tokomaha ke nga tangata o tona lwi Kua noho ki tenei wenua, a, e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kau ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona, he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aia nei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

KO TE TUATAHI

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ke te Kuini o Ingarani ake tonu atu – te Kawanatanga katoa o o ratou wenua.

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu — ki nga tangata katoa o Nu Tirani te tino Rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata mona te wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kaihoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata Maori katoa o Nu Tirani. ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) W. Hobson,
Consul and Lieutenant-Governor.

Na ko matou, ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

The text in English

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands — Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. HOBSON, Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.
[Here follow signatures, dates, etc.]

English translation of the Māori text by Professor Sir Hugh Kawharu

Victoria, the Queen of England, in her concern to protect the chiefs and subtribes of New Zealand and in her desire to preserve their chieftainship¹ and their lands to them and to maintain peace² and good order considers it just to appoint an administrator³ one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands⁴ and also because there are many of her subjects already living on this land and others yet to come.

So the Queen desires to establish a government so that no evil will come to Māori and European living in a state of lawlessness.

So the Queen has appointed me, William Hobson a Captain in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents⁵ to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

THE FIRST

The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government⁶ over their land

THE SECOND

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise⁷ of their chieftainship over their lands, villages and all their treasures⁸. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell⁹ land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

THE THIRD

For this agreed arrangement, therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties¹⁰ of citizenship as the people of England¹¹.

(Signed) W. Hobson
Consul and Lieutenant-Governor

So we, the Chiefs of the Confederation and of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.

Was done at Waitangi on the sixth of February
in the year of our Lord 1840.

(Footnotes on next page)

FOOTNOTES

The following footnotes are Professor Sir Hugh Kawharu's comments on his translation reproduced with his permission from *Waitangi: Māori and Pākehā perspectives to the Treaty of Waitangi* (Auckland, Oxford University Press, 1989, pages 319–20).

The views expressed are those of the author and are not necessarily accepted by the Crown in every detail.

1. Chieftainship: this concept has to be understood in the context of Māori social and political organisation as at 1840. The accepted approximation today is 'trusteeship'; see NZMC Kaupapa 1983.
2. Rongo: 'Peace', seemingly a missionary usage (rongo – to hear i.e. hear the 'Word' – the 'message' of peace and goodwill, etc.).
3. Chief: ('Rangatira') here is of course ambiguous. Clearly a European could not be a Māori, but the work could well have implied a trustee-like role rather than that of a mere 'functionary'. Māori speeches at Waitangi in 1840 refer to Hobson being or becoming a 'father' for the Māori people. Certainly this attitude has been held towards the person of the Crown down to the present day – hence the continued expectations and commitments entailed in the Treaty.
4. Islands: ie neighbouring, not of the Pacific.
5. Making: ie 'offering' or 'saying' – but not 'inviting to concur' (c.f. English version).
6. Government: 'Kāwanatanga'. There could be no possibility of the Māori signatories having any understanding of government in the sense of 'sovereignty', i.e. any understanding on the basis of experience or cultural precedent.
7. Unqualified exercise: of the chieftainship – would emphasise to a chief the Queen's intention to give them complete control according to their customs. 'Tino' has the connotation of 'unquestionable'.
8. Treasures: 'taonga'. As submissions to the Waitangi Tribunal concerning the Māori language have made clear, 'taonga' refers to all dimensions of a tribal group's estate, material and non-material – heirlooms and wāhi tapu, ancestral lore and whakapapa, etc.
9. Sale and purchase: 'hokonga'. Hoko means to buy or sell.
10. Rights and duties: 'tikanga'. While 'tika' means right, correct, (eg 'e tika hoki' means that is right), 'tikanga' most commonly refers to custom(s), for example of the marae; and custom(s) clearly includes the notion of duty and obligation.
11. There is, however, a more profound problem about 'tikanga'. There is a real sense here of the Queen 'protecting' (i.e. allowing the preservation of) the Māori people's tikanga (i.e. customs) since no Māori could have had any understanding whatever of British tikanga (i.e. rights and duties of British subjects). This, then, reinforces the guarantees in Article Two.

Settlement framework

In this part we look at:

- the status of the Treaty of Waitangi today
- the background to the Crown's Treaty settlement policy
 - what historical claims are about and progress in reaching settlements to date
- Settlement policy and the framework for negotiations

Released under the Official Information Act 1982

The status of the Treaty of Waitangi today

The Treaty of Waitangi, signed in 1840, is an agreement between the British Crown and Māori. It has always retained its importance as a founding document of New Zealand. Although the Treaty is not directly enforceable in New Zealand courts, specific legislation does provide for the principles of the Treaty to be given some effect (for example, the State-Owned Enterprises Act 1986). In other cases, legislative provisions might persuade the court that they should be interpreted in accordance with the principles of the Treaty. The Treaty is therefore very significant in New Zealand's legal framework.

In summary, today there are three main ways in which the principles of the Treaty, rather than the words of the Treaty itself, are given effect:

- The Waitangi Tribunal can inquire into claims by any Māori that the Crown has acted in breach of Treaty principles, and make recommendations on redress. In limited circumstances some of these recommendations can become binding.
- The courts can apply Treaty principles when legislation allows them to do so, and many agencies and departments are required by legislation to consider Treaty principles when carrying out their functions.
- The Crown has accepted a moral obligation to resolve historical grievances in accordance with the principles of the Treaty of Waitangi.

These developments and the principles of the Treaty as developed by the Waitangi Tribunal and the Courts are discussed later in this section. But first the historical background to Treaty claims is discussed.

Historical background to Māori claims against the Crown – what are Treaty claims all about?

Introduction

This guide presents only a very brief summary of the history behind the main types of Māori grievances under the Treaty. For those wishing to explore the subject further, there are many books and reports available on the events outlined below. The following information and comments are of a general nature, and are not intended to pre-judge the outcome of current and future Waitangi Tribunal hearings or negotiations. Both hearings and negotiations on individual claims provide an opportunity to consider in more detail the historical dealings between a claimant group and the Crown.

The signing of the Treaty of Waitangi

The Treaty of Waitangi was signed in good faith by representatives of the British Crown and by Māori rangatira on behalf of their people, between February and September 1840. The Treaty was drawn up in an attempt to protect the interests of the British and Māori at a time of increasing land speculation and uncontrolled settlement by British subjects. It was a forward-looking agreement that sought to establish a peaceful and mutually beneficial relationship between the tangata whenua and British settlers under the protection of the British Crown.



Illustration: signing of the Treaty of Waitangi (Alexander Turnbull Library)

The key features of the Treaty are as follows:

- Article One: sovereignty (English text) or kāwanatanga (Māori text) was conveyed to the Crown.
- Article Two: Māori retained rangatiratanga or 'chieftainship' over their resources and tūnga for as long as they desired, but yielded to the Crown the right of pre-emption, which gave the Crown the sole right to purchase land from Māori.
- Article Three: Māori were guaranteed all the rights and privileges of British citizens.

The Crown intended Māori to be treated fairly and honourably, particularly in the course of land transactions. It envisaged that land would be acquired in situations where Māori were willing sellers and where the loss of a particular area would not harm the relevant iwi or hapū. These good intentions suffered under the practical difficulties of administering a new colony and building a nation. For instance, the colonial administration was financially under-resourced, suffered from a lack of experienced officials, and was under pressure from settler groups.

Investigations over the last century have revealed that in many instances the Crown's actions in purchasing Māori land were flawed to a greater or lesser degree. Since 1985, the Waitangi Tribunal has conducted hearings into many matters relating to Māori land and the economic and social impacts of land dealings from 1840 onwards. The Tribunal has also heard Māori claims on other issues that had not been previously investigated.

The relationship and transactions between Māori and the Crown occurred in the context of a complex interaction of two cultures. There is no single or simple explanation for events following the signing of the Treaty, given the rapidly changing economic and social environment and the variety of motivations among Māori, the Crown, and settlers. However, the statistics of the decline in Māori land-holdings are striking, as the maps on page 11 & 12 show. The following summary is based on Tribunal and other investigations which enable preliminary conclusions to be drawn on broad issues relating to the history of Māori lands. While these relate primarily to significant land losses, their importance is not simply economic, but also concerns wider effects on Māori society and culture.

Pre-1840 land purchases: 'old land claims' and 'surplus lands'

Before the Treaty, there had been an extensive trade in land. Various Europeans claimed to have bought large parts of the country. Following the signing of the Treaty of Waitangi in 1840, the Crown announced that it would examine all such transactions in order to find out whether the land had been fairly acquired from the proper Māori owners. The aims of this policy were to guard against European purchasers accumulating too much land and to facilitate control over the colonisation of the country, as the preamble of the Treaty envisaged. As a result of investigations by specially appointed commissioners, many of these alleged purchases were held to be invalid, and the land remained with its Māori owners. In cases where the commissioners concluded that a valid sale had taken place, the Crown awarded land to the purchaser. The Crown's policy was that no claimant (that is, settler purchaser) could be awarded more than 2,560 acres, and the Crown retained any surplus land. The Crown believed that, because Māori had agreed to sell the land, their claims to it were extinguished and the Crown's retention of the surplus was a matter between itself and the European purchaser.

Some hapū and iwi have questioned the validity of the Land Claims Commissioners' findings on the grounds that the Māori involved had no concept of permanent alienation, and that the transactions were merely conditional arrangements involving no transfer of ownership. Under some present day claims the findings of the commissioners on individual claims are challenged, as is the Crown's approach to disposing of the 'surplus' lands.

The New Zealand Company purchases

The New Zealand Company claimed to have purchased very large areas of land in central New Zealand before the signing of the Treaty. As a result of an agreement with the Crown, however, the Company restricted its claims to specific blocks of land at New Plymouth, Wanganui, Wellington, Manawatu, Porirua and Nelson. These transactions were investigated by Commissioner William Spain in the early 1840s. Meanwhile, the New Zealand Company established several settlements and introduced settlers.

Māori at that time disputed many of the Company's claims. It is likely that they had not intended to give up their pā, wāhi tapu and cultivations and that there was a lack of mutual understanding of the Company's reserves policy (generally known as the 'Tenths' policy because it provided for one tenth of the land sold to be set aside as reserves for the Māori concerned). Spain found that, with the exception of Porirua, the Company had generally made legitimate purchases of at least some of the areas they claimed. In some cases he recommended that further payment should be made to the Māori vendors. In the case of New Plymouth, Governor Fitzroy rejected the recommendation and the Crown re-negotiated part of the original purchase. Agreements were later reached with Māori at Wellington, Nelson and Wanganui, and Crown titles were issued to the Company and its settlers.

Significant aspects of these arrangements have since been challenged. There are questions about the negotiation of the new terms, and the management of the several categories of reserves.

Pre-emption waiver purchases, and 'surplus lands'

Article Two of the Treaty reserved to the Crown the sole right to buy Māori land. Known as Crown pre-emption, this policy was applied for most of the period from 1840 to 1865. This policy had three key objectives: to control and regulate European settlement, to avoid confrontation between Māori and settlers, and to provide the Crown with income from the resale of land to pay for the costs of government, national development, and social services. It is clear that many Māori and settlers, particularly around Auckland, objected to Crown pre-emption. Governor Fitzroy reported in 1844 that the government's authority would be challenged if it did not abandon pre-emption. The Governor then waived the Crown's right of pre-emption to allow Europeans to make direct purchases of Māori land under certain terms and conditions. The waiver operated for a year, during which time settlers acquired large areas of land in and around Auckland.

Purchases under the waiver are likely to involve a number of issues, including whether Māori interests were adequately protected and the owners correctly identified. As with 'old land claims', restrictions were placed on the amounts of land that could be awarded to purchasers. Governor Grey later approved limited awards to purchasers, with the Crown retaining the surplus for general European settlement purposes. It is not clear even today how much of this surplus land the Crown retained, but estimates vary from 16,427 acres to 72,127 acres.

Pre-1865 Crown purchases

During the quarter-century following the signing of the Treaty, the Crown purchased large areas of land from Māori in many parts of the country, including almost the whole of the South Island. As noted earlier, throughout most of this period the Crown had a monopoly on purchasing Māori land. It is difficult to make generalisations about these purchases. Each reflects the particular circumstances of specific iwi and hapū, the geographical location and features of specific blocks of land, and the value they were considered to have for European settlement at the time. One example of inappropriate Crown action is the failure to ensure that approval for the sales was properly obtained. The fairness of the terms, the adequacy and protection of reserves for Māori, and inaccurate surveys have also been identified as problems with particular purchases.

Aggressive Crown purchase activity in Taranaki has been linked to armed conflict between competing Māori groups.

Recent research has thrown much new light upon these purchases and the circumstances that lay behind them. The Waitangi Tribunal has identified various breaches of the Treaty of Waitangi and its principles during its inquiries into pre-1865 purchases, as in the case of the Ngāi Tahu claims, and more may be identified during further Tribunal inquiries or in negotiations.

War and land confiscation (raupatu)

During the 1850s, Māori in some parts of the North Island became concerned about the consequences of sales and settlement. This led to inter-tribal agreements to oppose the sale of further land to the Crown. Although Māori views differed, there was significant support for the political objectives that found expression in the establishment of the King Movement (the 'Kīngitanga'), centred on the Waikato. The development of these policies frustrated settlers, and the Crown interpreted the King Movement as a general challenge to its authority.

The flashpoint of war was the Crown's improper attempts to buy land offered for sale at Waitara in Taranaki. The local issue was that the Crown had failed to get general agreement with the rangatira and hapū claiming rights over Waitara before it concluded detailed negotiations. The Crown continued to pursue its own purchase policy rather than addressing the basis of Māori concerns about such purchase practices and, in doing so, started the land dispute which consequently sparked off a war in Taranaki in 1860. The Waitara purchase created grave suspicion among Māori generally about the Crown's true intentions towards their lands. This remained when the Taranaki war drew to a close in 1861. Fighting broke out again in Taranaki in 1863, followed by the Crown's invasion of the Waikato a few months later. There were other armed conflicts in different parts of the central North Island until 1869.

The Crown considered its Māori opponents in these conflicts to be rebelling against the Queen's authority, and decided to confiscate land to punish 'rebels' and to provide land for European occupation. The Crown accepts that confiscating Māori land after the warfare of the 1860s in Waikato, Taranaki, and the Bay of Plenty was an injustice, and was in breach of the Treaty of Waitangi and its principles. Similar acknowledgements are likely to be appropriate in other districts where there have been confiscations (raupatu). In considering acknowledgements regarding confiscations, the seriousness of any Crown breaches of the Treaty and its principles will also depend on the nature of its accompanying actions. Matters such as the use of excessive force by the Crown and the loss of life clearly need to be taken into account.

The introduction and operation of the Native Land Court

The Native Land Court was established under Acts of Parliament in 1862 and 1865 to bring land held under customary title under a statutory system of individual title. This involved investigating claims to customary ownership of Māori land.

There have been many criticisms of the effects of the Native land laws. These include: the interpretation of customary rights to land, the early limitation of the number of owners who could appear on a title (together with their ability to act as absolute owners rather than trustees for tribal land), the costs of the process, and its tendency to promote excessive sales and the fragmentation of remaining Māori holdings. The court system has been criticised by claimants and some historians for undermining the social structure of Māori society.

These and other criticisms may prove valid when considering the operations of the Native Land Court system in particular districts. The long-term results of the system are clear. By the end of the 19th century, many hapū were left with insufficient lands for their subsistence and future development.

Between 1865 and 1899, 11 million acres of Māori land in the North Island had been purchased by the Crown and European settlers (see the maps on pages 11 & 12).

The Crown acknowledges that the operation and impact of the Native land laws had a widespread and enduring impact upon Māori society. In cases where claimants can demonstrate a prejudicial impact in their rohe, the Crown will acknowledge, in the context of an agreed settlement, that it breached its responsibilities under the Treaty of Waitangi.

20th century

Large scale alienations of Māori land continued well into the 20th century by such means as the new Māori Land Boards, the Board of Māori Development and other government agencies, as well as through the Native/Māori Land Court. These alienations included approximately 3.5 million acres sold between 1910 and 1930. A great deal more was leased during the same period. By 1930, Māori retained only 6% of the land in New Zealand. Many grievances relate to these alienations, and also to Crown actions concerning Māori land development schemes and consolidation schemes. Grievances have also arisen in connection with the gifting of land by Māori to the Crown for specific purposes, such as schools. Often the Crown has not returned such gifted land to the rightful owners once the purpose has been fulfilled, but used it for other purposes or disposed of it. The Crown also accepts that the application of the Public Works Acts, particularly in the 20th century, sometimes disadvantaged Māori interests. For instance, there may have been inadequate consultation or compensation, or a wāhi tapu or site of cultural significance may have been lost.

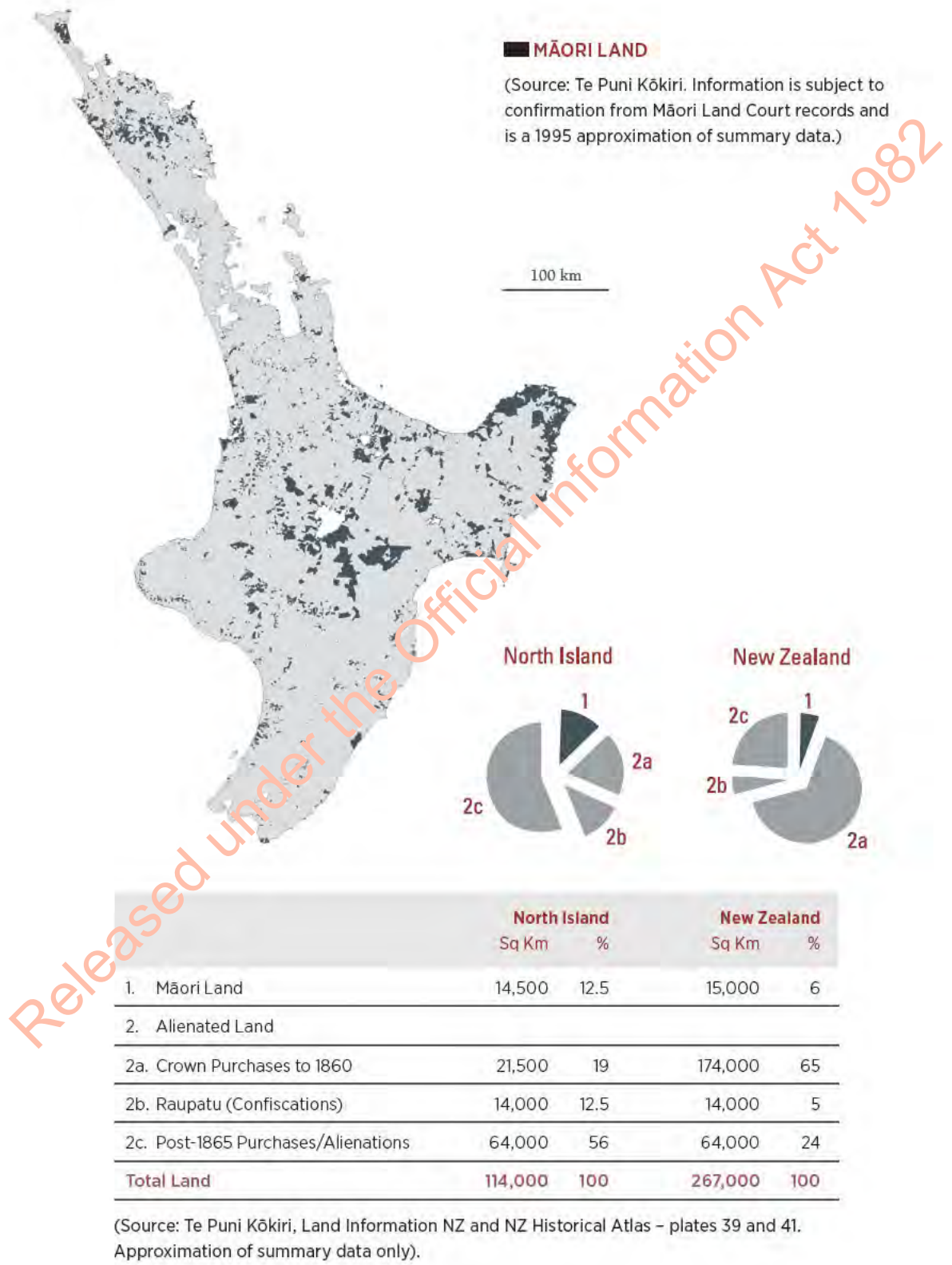
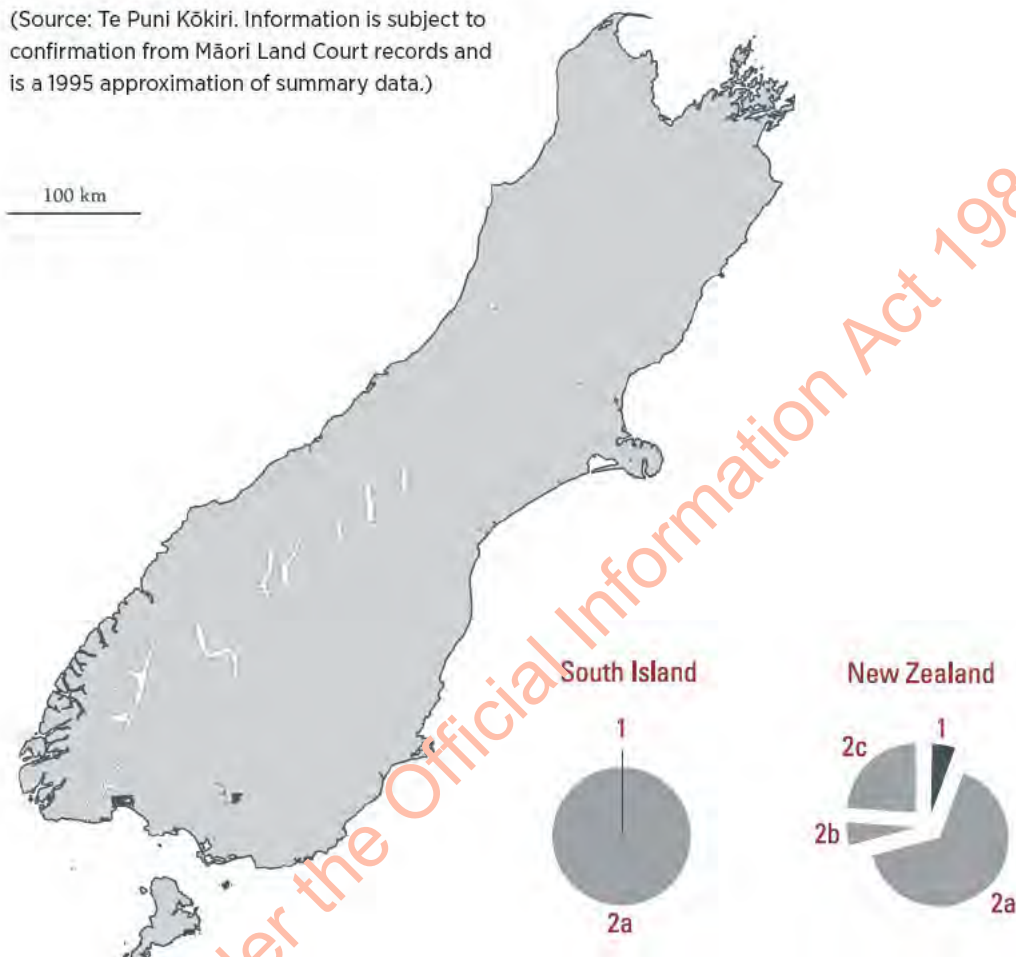


Figure 1.1: Māori land today and types of Māori land alienation 1840–1995, North Island

■ MĀORI LAND

(Source: Te Puni Kōkiri. Information is subject to confirmation from Māori Land Court records and is a 1995 approximation of summary data.)



	South Island		New Zealand	
	Sq Km	%	Sq Km	%
1. Māori Land	500	0.5	15,000	6
2. Alienated Land				
2a. Crown Purchases to 1860	152,600	99.5	174,000	65
2b. Raupatu (Confiscations)			14,000	5
2c. Post-1865 Purchases/Alienations			64,000	24
Total Land	153,000	100	267,000	100

(Source: Te Puni Kōkiri, Land Information NZ and NZ Historical Atlas – plates 39 and 41. Approximation of summary data only).

Figure 1.2: Māori land today and types of Māori land alienation 1840–1995, South Island

Other dimensions of Māori claims – wāhi tapu and taonga, language, flora and fauna

The Māori concept of tūrangawaewae, 'a place to stand', indicates the close connections between land, tribal and personal identity and mana. Widespread loss and alienation of land undermined these connections. In the longer term, the loss and alienation of tribal lands contributed to the breakdown and dispersal of traditional communities, and the loss of Māori language and traditional knowledge.

Customary sources of food and other resources were also reduced, not only because Māori had less land, but because general changes in land use also had a harmful effect on many species and resources. For instance, the draining of wetlands and lagoons affects complex ecosystems of plants, birds and fish. Where such broader effects of land loss and alienation, combined with the general effects of European settlement, arise in hearings or negotiations, it is difficult to separate the results of any Crown actions or omissions from other factors at work.

Claims involving land loss and alienation have many consequences beyond loss of income and a resource base for future development. Wāhi tapu (sacred places) including urupā (burial grounds) were often destroyed, or access to them lost. Sometimes taonga, such as carvings, burial chests and buildings, have been destroyed or acquired from Māori in dubious circumstances.

Māori have also brought claims to the Tribunal relating to more general cultural concerns. These include claims that the Crown has breached its obligations to protect the Māori language as a taonga covered by Article Two of the Treaty. As with the loss of land, these cultural and spiritual concerns go beyond economic issues to questions of identity and self-determination.

Conclusion

As a result of these and other types of permanent alienation, Māori today possess only a small portion of the land that they held in 1840. The Crown accepts that excessive land loss has had a harmful effect on Māori social and economic development in general. This loss of land has been accompanied by the loss of access to forests, waterways, food resources, wāhi tapu and other taonga. In addition, the Crown has not always recognised Māori interests or customary values in relation to natural resources, nor has it protected these in laws and policies. As a result, Māori have lost most of their land as an economic resource and tūrangawaewae, and have also been deprived of traditionally used natural resources and places of spiritual and cultural value.

These historical events form the basis of the grievances of Māori that are being heard and addressed today through the Waitangi Tribunal and negotiations processes.

Milestones in the development of Treaty settlements policy

Māori have sought resolution of their grievances about Crown actions for over 150 years. Before the establishment of the Waitangi Tribunal, Māori communities and leaders brought many petitions to the Crown asking for recognition of their Treaty rights or for particular injustices to be put right. Sometimes the Crown responded with special commissions of inquiry (such as the Sim Commission during the 1920s on confiscations) and provided some redress. But the terms of reference for such inquiries were often very limited and there was no consistent policy underlying any resulting 'settlements', which were often neither negotiated nor ratified by the claimant groups. As a result, those settlements often failed to resolve the grievance and in many cases are now seen to be unfair.

Establishment of the Waitangi Tribunal

Dissatisfaction with such previous settlements and lack of action by the Crown on outstanding grievances led to increasing calls during the 1960s and early 1970s for a forum where Māori claims against the Crown could be heard. Action in the ordinary courts was not possible in most cases. A treaty such as the Treaty of Waitangi can only be enforced through the courts if it has been made part of New Zealand law through an Act of Parliament. This did not happen. However, as noted earlier, today some statutes do incorporate references to Treaty principles.

In 1975 the government of the day established the Waitangi Tribunal under the Treaty of Waitangi Act 1975. The main functions of the Tribunal at that time were to:

- hear claims by Māori against the Crown concerning breaches of the Treaty of Waitangi and its principles
- determine the validity of such claims, and
- make non-binding recommendations to the Crown on redress for valid claims.

In exercising these functions the Tribunal was given exclusive authority to determine the meaning and effect of the Treaty as embodied in the Māori and English texts, and to decide issues raised by the differences between them.

At that stage the Tribunal could only hear claims about grievances arising from Crown actions or omissions from 1975 onwards. Even so, establishing the Tribunal was an important step in recognising the importance of the Treaty and its principles.

During the 1980s, political and social interest in the Treaty and related issues continued to grow. This had an effect both on the law, as the courts interpreted it, and on the actions of the government.



Waitangi Tribunal in hearing

In 1985 the law was changed to allow the Waitangi Tribunal to hear claims going back to 6 February 1840. This paved the way for the Tribunal to be given additional functions and powers in the next few years in relation to State-Owned Enterprise land and licensed Crown forest land (see pages 15–16). The Tribunal's membership was also increased to enable it to progress more claims at a time.

1986 – Cabinet requirement to consult Māori

In 1986 Cabinet agreed that, in the area of policy development and legislation, appropriate Māori groups should be consulted on all significant matters affecting how the Treaty is applied. This reflected a major change in the broader public and political view of the Treaty and of Māori interests.

Treaty principles in the courts and legislation

THE 'LANDS' CASE (1987)

During the 1980s, in response to references to Treaty principles in legislation, judges increasingly showed that they would apply the 'principles' in a way that broadly protected Māori interests. The 1987 'Lands' case, *New Zealand Māori Council v. Attorney-General* [1987] NZLR 641, may be described as the fundamental recent case on the Treaty. This case involved Māori concerns about the proposed transfer of Crown land to the new State-Owned Enterprises. Section 9 of the State-Owned Enterprises Act 1986 stated: 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi', enabling the courts to define and apply Treaty principles to the Crown's actions under this specific legislation. When the 'Lands' case went to the Court of Appeal, the Court characterised the Treaty relationship as a special relationship 'akin to a partnership'. The nature of the relationship is reflected in the following four principles:

- Fiduciary duty: the relationship between the Treaty partners creates responsibilities similar to those of a trustee. The Crown has a duty to actively protect Māori interests.
- Full spirit of co-operation: the Treaty requires that each party act reasonably and in good faith towards the other. This would require the Crown to make informed decisions about matters of significance to Māori. In many cases where there are Treaty implications the responsibility to make informed decisions will require consultation.
- The honour of the Crown: the Treaty is a positive force in the life of the nation, and thus in the government of the country.
- Fair and reasonable redress: the Crown should not impede its capacity to give fair and reasonable redress.

As a result of the 'Lands' case, Parliament looked to improve statutory protection of Māori interests. For example, the State-Owned Enterprises Act 1986 was amended by the Treaty of Waitangi (State Enterprises) Act 1988. This amendment ensured that land transferred from the Crown to the new State-Owned Enterprises would still be available for settling Māori claims, through a process known as 'resumption'.

THE CROWN FOREST ASSETS ACT 1989 AND THE CROWN FORESTRY RENTAL TRUST

In 1989, the Court of Appeal twice confirmed its approach in the 'Lands' case in cases about Crown forest assets and coal assets. Further legislation followed in the Crown Forest Assets Act 1989. This protected Māori interests in former State forest land – land under mainly exotic forests (forests planted with non-native trees) – that the Crown had developed. The purpose of this legislation, apart from regulating the management of Crown forest assets, is:

- to permit the transfer of assets (cutting rights in the specified forests) to other parties – and to grant a Crown forestry licence that provides access to the land – while at the same time protecting the claims of Māori to the land, and
- in cases where claims by Māori under the Treaty of Waitangi Act are successful, to enable the Waitangi Tribunal to make binding orders to transfer licensed Crown forest land under the trees to Māori ownership, and for the Crown to pay Māori compensation for the fact that such land is being returned subject to the encumbrance of a Crown forestry licence (that another party retains the cutting rights).

Also, as part of the response to the Court of Appeal's decision on licensed Crown forest land, the Crown, the New Zealand Māori Council and the Federation of Māori Authorities agreed to establish the Crown Forestry Rental Trust (CFRT). The functions of CFRT are:

- to receive rentals from licensed Crown forest land and hold them in trust until Treaty claims relating to the lands concerned are resolved to use the interest from the accumulated rentals to fund research into Māori claims relating to Crown forest land, and to help claimants prepare for negotiations with the Crown
- when the resolution of a Treaty claim relating to licensed Crown forest land results in land being transferred to a claimant group, to transfer the accumulated rentals for that land to the claimant group, and
- when a Treaty claim relating to licensed Crown forest land is resolved without requiring the return of land to the claimant group, to transfer the accumulated rentals to the Crown.

More detail on the protection and possible resumption of licensed Crown forest land is provided on pages 140–141. More detail on claimant funding for negotiations is on pages 49–51.

Development of settlement policy and structures

The developments noted above meant that the government needed to co-ordinate its response to Māori claims under the Treaty and to develop clear and consistent policies for settlements. In 1989 the Treaty of Waitangi Policy Unit (TOWPU) was established in the Department of Justice to deal with these issues.

In 1993 Cabinet created the portfolio of Minister in Charge of Treaty of Waitangi Negotiations to give clear leadership to the negotiations process.

The government developed a set of policy proposals for settling claims, which were approved by Cabinet in late 1994 and published as the *Crown Proposals for the Settlement of Treaty of Waitangi Claims*. The Crown proposals were modified following submissions from Māori and others and, subsequently, provided the framework for later settlement negotiations and redress packages. Following a review of the settlement process and policy in 2000, six key principles were established to guide the Crown in future settlements of historical claims under the Treaty of Waitangi.

The principles are intended to ensure settlements are fair, durable, final and occur in a timely manner (see pages 25–26 for a full outline of the principles).

Figure 1.3: development of Treaty settlement policy

Development of Treaty settlement policy (1985 to present)	
1985	<ul style="list-style-type: none"> Waitangi Tribunal jurisdiction extended to 6 February 1840
1989	<ul style="list-style-type: none"> Establishment of the Treaty of Waitangi Policy Unit (TOWPU) within the Department of Justice
1992	<ul style="list-style-type: none"> Cabinet approves Crown principles for settlement of historical claims
1994	<ul style="list-style-type: none"> Based on experience in early claims and consultation, the 'Crown Proposals' for the settlement of historical claims, including the fiscal envelope, are developed and released
1995	<ul style="list-style-type: none"> Public/iwi consultation on Crown Proposals Report on submissions to Crown Proposals OTS established
1996	<ul style="list-style-type: none"> Cabinet review of policies in Crown Proposals, some changes made Coalition government ends the 'fiscal envelope' but existing settlements are benchmarks for future settlements
1997	<ul style="list-style-type: none"> Additional non-commercial redress options are developed for natural resources
2000	<ul style="list-style-type: none"> Review of policy and establishment of new principles
Present	<ul style="list-style-type: none"> Ongoing and future negotiations may raise new issues for Crown and claimants to work through, possibly resulting in new applications of redress options

Who or what is the Crown?

The expression 'the Crown' is used a lot in this guide. It refers to the executive branch of government (which is the branch that carries out the administration of government) and stands for the historical authority of the sovereign (the Queen or King) as head of state. Today the executive government is made up of the Governor-General (the Queen's representative), Ministers who are Members of Parliament (the legislative or law-making arm of government), and their departments. The Queen herself has no real or personal authority.

While 'the Crown' is a convenient way of referring to one party involved in settlement negotiations, it can seem to be something rather abstract or impersonal. Because of our democratic system it can also be said that ultimate authority or sovereignty in fact rests with voters. In this sense the Crown also symbolises the people of New Zealand.

The diagram below shows the components of the Crown or Executive and some of the ministerial positions relevant to the negotiation of historical Treaty settlements.

How the Crown operates in negotiations

All major decisions in the negotiations process are made by Cabinet or by relevant Ministers acting under authority delegated by Cabinet. For instance:

- Cabinet approves Deeds of Settlement before they are signed on behalf of the Crown, and
- the Minister for Treaty of Waitangi Negotiations and the Minister of Māori Development jointly decide whether the Crown should recognise a Deed of Mandate from a claimant group.

The main government agency providing advice and assistance to Ministers and the Cabinet during the negotiations process is the Office of Treaty Settlements (OTS). OTS is also the main point of contact between the Crown and claimant groups.

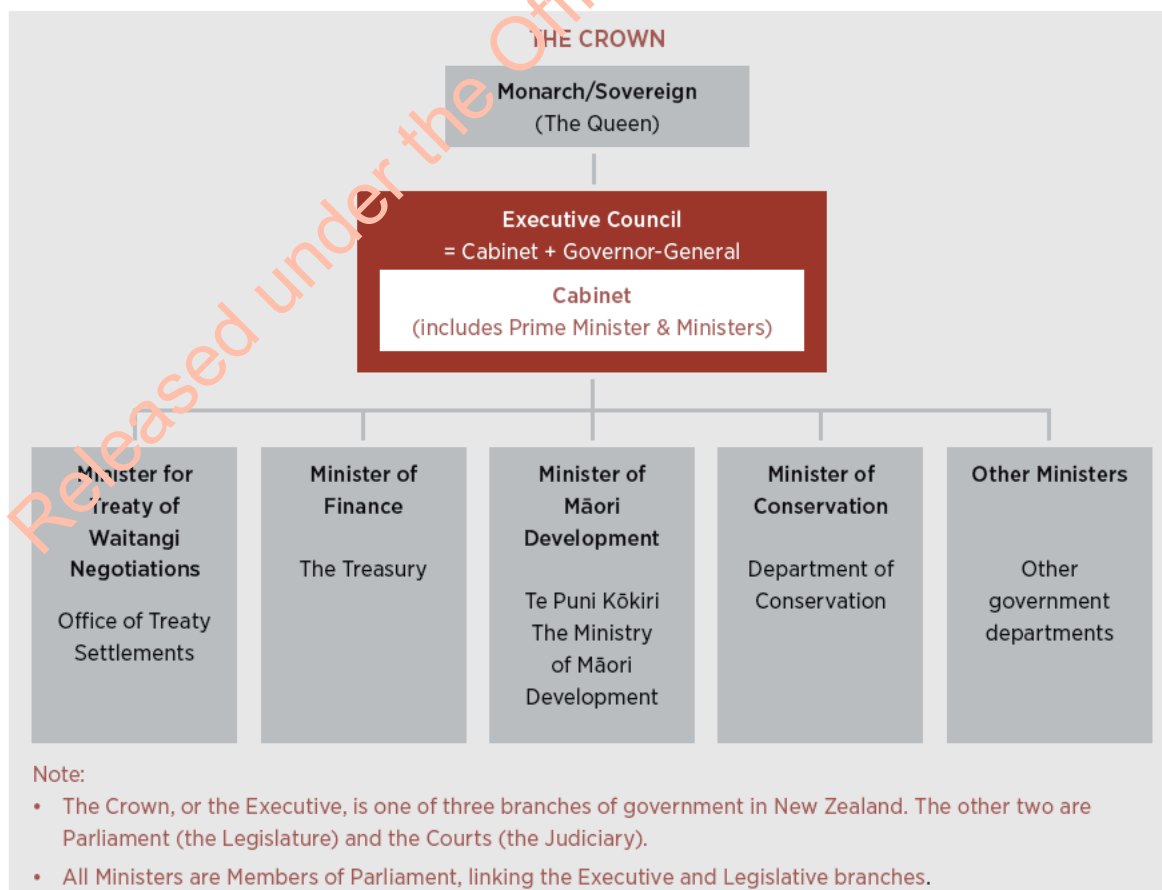


Figure 1.4: the Crown

About the Office of Treaty Settlements

The Office of Treaty Settlements (OTS) was created in January 1995. It is a separate unit within the Ministry of Justice and reports directly to the Minister for Treaty of Waitangi Negotiations on historical Treaty settlement issues.

What does OTS do?

The main jobs of OTS are to:

- negotiate settlements of historical claims directly with claimant groups, under the guidance and direction of Cabinet
- provide policy advice to the Minister for Treaty of Waitangi Negotiations and Cabinet on generic Treaty settlements issues and on individual claims
- co-ordinate the government departments that are involved in the negotiation and settlement process
- review and provide advice to the Minister for Treaty of Waitangi Negotiations about the mandates of claimant groups and their proposed post-settlement governance entities
- oversee the implementation of settlements, and
- administers the protection mechanism of Crown-owned land for Treaty settlement purposes

This means that OTS is the main point of contact for claimant groups seeking resolution of their historical grievances through negotiations with the Crown. OTS works closely with claimant groups through all stages of the negotiations process to make sure that:

- claimant groups are fully informed about the negotiations process
- all agreed milestones along the route to a negotiated settlement are met, within agreed time limits
- the Crown understands the claimant group's grievances and what they want to achieve through settlement
- there is co-ordinated advice and information from all government departments involved in the negotiations
- the Crown and the claimant group work together, as far as possible, to achieve a negotiated settlement, and
- obligations in Deeds of Settlement, once signed, are carried out as intended and within the agreed time limits.

Structure and people

OTS is led by a Director who has overall responsibility for OTS and leads the policy and negotiations work. Below the Director are Deputy Directors and Negotiation and Settlement Managers.

Negotiation and Settlement Managers are each responsible for a set of specific claims within a region. Each team usually contains several policy analysts from OTS, an OTS historian and representatives from key government departments such as the Department of Conservation and the Treasury. For many claims, a specially appointed Chief Crown Negotiator may lead negotiations.

Teams each have responsibility for a number of claims and conduct active negotiations with claimant groups according to a work programme. This ensures that OTS's resources are used as effectively as possible and that proper care and attention is devoted to each claim.

Although OTS takes the lead role in negotiations, other departments are involved as follows:

- *Treasury* – advice on overall fiscal management of settlement process, and assessment of fiscal risks to the Crown for settlement redress options.
- *Te Puni Kōkiri* – advice on mandating and governance issues, and also monitors Crown action in response to Waitangi Tribunal recommendations.
- *Department of Conservation* – advice on issues affecting conservation land, plant, animal and freshwater fish species.
- *Crown Law Office* – advice to OTS on legal issues and the drafting of Deeds of Settlement and settlement legislation.
- *Ministry for Primary Industries* – advice on non-commercial sea fisheries issues.
- *Ministry for the Environment* – advice on resource management issues.
- *Land Information New Zealand* – advice on Crown landholding issues, including Public Works Act 1981 issues.
- *Parliamentary Counsel Office* – drafting of settlement legislation.

It should be noted at this point that the resources available to the Crown for the negotiation of settlements are, like those of all other Crown agencies, limited. This means that from time to time the Crown must work out which areas of its existing and potential workload have the highest priority. This may mean, for example, that claimant groups that have completed all the necessary research, and resolved all overlapping claims and mandate issues, are given a higher priority in the negotiations process by OTS.

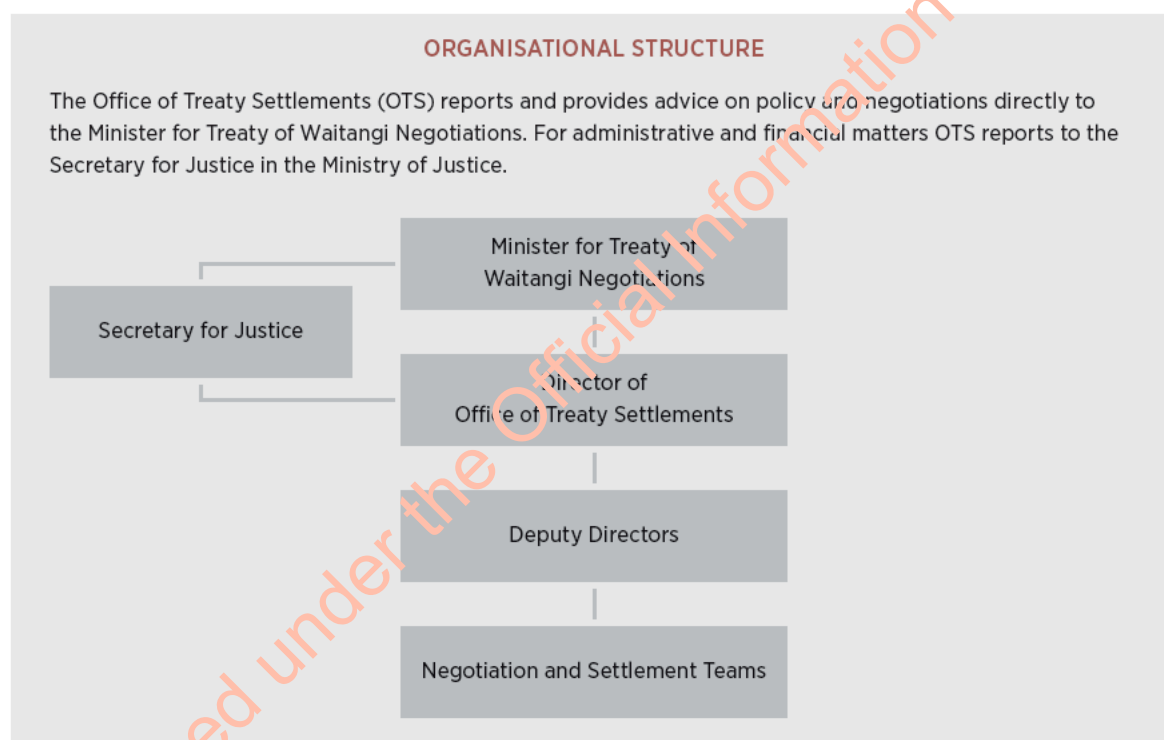


Figure 1.5: the Office of Treaty Settlements organisational structure

Progress with Treaty settlements so far

At a glance: summary of Treaty settlements to date

The current Treaty settlement process has resulted in a number of settlements. These range from the large Waikato-Tainui, Ngāi Tahu and Central North Island Collective settlements, to smaller settlements such as Hauai, Te Uri o Hau and Ngāti Tūrangitukua.

The nature and amount of redress provided in each settlement package largely depends on the severity of the breaches of the Treaty and their extent, as reflected in the amount of land alienated and how this was achieved (for instance, through confiscation or by purchase).

The settlements to date reflect a combination of a variety of redress options. Some early settlements consist solely of financial and commercial redress. Since 1997, most settlement packages have been made up of a Crown Apology, cultural redress and financial and commercial redress. Part 3 explains redress options in more detail.

The following table (Figure 1.6) sets out the settlements achieved to date. The dollar amount does not include claimant funding or the value of any land that the Crown may have gifted to a claimant group.

Information on individual settlements is also available online at www.govt.nz.

Figure 1.6: Summary of Treaty settlements to date

Settlement	Date signed	Value of Settlement
Waitomo ¹	14/6/1990	n/a
Ngāti Whakaue ¹	23/9/1993	\$5,210,000
Ngāti Rangiteaorere ¹	21/10/1993	\$760,000
Hauai ¹	30/10/1993	\$715,682
Waikato-Tainui Raupatu ²	22/5/1995	\$170,000,000
Waimakuku	20/12/1995	\$375,000
Te Maunga	2/10/1996	\$129,032
Rotomā	6/10/1996	\$43,931
Ngāi Tahu ²	21/11/1997	\$170,000,000
Ngāti Tūrangitukua	26/9/1998	\$5,000,000
Pouakani	19/11/1999	\$2,000,000
Te Uri o Hau	13/12/2000	\$15,600,000
Ngāti Tainui	12/5/2001	\$41,000,000
Ngāti Tama	20/12/2001	\$14,500,000
Ngāti Awa	27/3/2003	\$43,390,000
Ngāti Tūwharetoa (Bay of Plenty)	6/6/2003	\$10,500,000
Ngaa Rauru Kaitahi	27/11/2003	\$31,000,000
Te Arawa Lakes ³	18/12/2004	\$2,700,000
Ngāti Mutunga (Taranaki)	31/7/2005	\$14,900,000
Te Roroa ⁴	17/12/2005	\$9,500,000
Affiliate Te Arawa Iwi and Hapū	11/6/2008	\$38,600,000
CNI Forests on-account settlements ⁵	25/6/2008	\$14,669,640
Taranaki Whānui ki te Upoko o te Ika	19/8/2008	\$25,025,000
Ngāti Apa (North Island)	8/10/2008	\$16,000,000
Ngāti Whare	8/12/2009	\$9,568,260
Ngāti Manawa	12/12/2009	\$12,207,780
Waikato River ⁶	17/12/2009	n/a
Raukawa/Te Pūmautanga o Te Arawa Upper Waikato River Co-Management ⁷	9/3/2010	n/a
Ngāti Kuia	23/10/2010	\$24,330,388
Ngāti Apa ki te Rā Tō	29/10/2010	\$27,830,388
Rangitāne o Wairau	4/12/2010	\$24,830,388
Ngāti Pāhauwera	17/12/2010	\$20,000,000
Ngāti Porou	22/12/2010	\$90,000,000
Ngāi Tamanuhiri	5/3/2011	\$11,070,000
Maraeroa	12/3/2011	\$1,800,000

Settlement	Date signed	Value of Settlement
Ngāti Māhino	2/4/2011	\$9,600,000
Ngāti Manuhiri	21/5/2011	\$9,000,000
Ngāti Whātua o Kaipara	9/9/2011	\$22,100,000
Waitaha	20/9/2011	\$7,500,000
Rongowhakaata	30/9/2011	\$22,240,000
Ngāti Whātua Ōrakei	5/11/2011	\$18,000,000
Te Aupōuri	28/1/2012	\$21,040,000
Ngāti Raukawa	2/6/2012	\$50,000,000
Ngāti Ranginui	21/6/2012	\$38,027,555
Tāmaki Makaurau Collective ⁸	8/9/2012	n/a
Ngāi Takoto	27/10/2012	\$21,040,000
Te Rarawa	28/10/2012	\$33,840,000
Ngāti Toa Rangātira	7/12/2012	\$70,610,000
Ngāti Rangiwewehi	16/12/2012	\$6,000,000
Tapuika	16/12/2012	\$6,000,000
Ngāti Koroki Kahukura	20/12/2012	\$3,000,000
Ngāti Koata	21/12/2012	\$11,760,000
Te Ātiawa o Te Waka-a-Māui	21/12/2012	\$11,760,000
Ngāti Pūkenga	7/4/2013	\$7,000,000
Ngāti Rarua	13/4/2013	\$11,760,000
Ngāti Tama ki Te Tau Ihu	20/4/2013	\$12,060,000
Maungaharuru Tangitū Hapū	25/5/2013	\$23,000,000
Ngāi Tūhoe	4/6/2013	\$168,923,000
Ngāti Rangiteaorere	14/6/2013	\$750,000
Ngāti Hauā	18/7/2013	\$13,000,000
Ngāi te Rangi	14/12/2013	\$29,500,000
Ngāti Kaitiaki	7/2/2014	\$21,040,000
Te Kawerau ā Maki	22/2/2014	\$6,500,000
Ngāruahine	5/8/2014	\$67,500,000
Whanganui River	9/8/2014	\$81,000,000
Te Ātiawa (Taranaki)	9/8/2014	\$87,000,000
Tauranga Moana iwi Collective ⁸	21/1/15	\$250,000
Ngāti Hineuru	2/4/2015	\$25,000,000
Taranaki Iwi	5/9/2015	\$70,000,000
Heretaunga Tamatea	26/9/2015	\$105,000,000
Ngāi Tai ki Tāmaki	7/11/2015	\$12,700,000
Rangitāne o Manawatū	14/11/2015	\$13,500,000
Ngatikahu ki Whangaroa	18/12/2015	\$6,200,000

Settlement	Date signed	Value of Settlement
Rāngitane o Wairarapa-Tamaki Nui-ā-Rua	6/8/2016	\$32,500,000
Ahuriri Hapū	2/11/2016	\$19,500,000
Te Wairoa	26/11/2016	\$100,000,000
Ngāti Tamaoho	30/4/2017	\$10,300,000
Ngāti Tūwharetoa	8/7/2017	\$77,612,740
Ngāti Hei	17/8/2017	\$8,500,000
Ngāti Rangi	10/3/2018	\$17,000,000

Notes to figure 1.6

1. These settlements were reached in relation to individual WAI Claims.
2. Settlement value excludes subsequent payments made under the Relativity Clauses agreed to in the deeds of settlement with these iwi.
3. Settlement value excludes \$7.3 million paid to capitalise the annuity Te Arawa received from the Crown and address any remaining annuity issues.
4. Settlement value excludes ex gratia payments and redress provided through other appropriations.
5. This Central North Island settlement provided on-account redress for a collective of groups, including the Affiliate Te Arawa Iwi and Hapū. As each of these groups concludes comprehensive settlements, their share of the CNI settlement will be listed separately, and the total value listed against the CNI settlement will be reduced accordingly. Ngāti Rangitahi joined the CNI Collective on 4 November 2008.
6. The Waikato River settlement provides funding for co-management, clean up of the Waikato River, and other initiatives. These payments are not redress in settlement of Waikato-Tainui's historical claims.
7. Provides for co-management of Upper Waikato River. This is not redress in settlement of historical claims.
8. Financial redress is to be provided in the comprehensive settlements for the individual iwi.

Settlement of Māori interests in fisheries

On 23 September 1992 the Crown and representatives of Māori signed a Deed of Settlement settling Māori interests in commercial fisheries and making provision for statutory recognition of Māori customary sea fisheries. The Deed was given effect by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

The Deed and legislation arose as a result of a dispute between the Crown and Māori about the Quota Management System (QMS). The Māori Fisheries Act 1989 was an earlier attempt to resolve the issues. It provided for the transfer from the Crown to Māori of 10% of the total allowable catch for all species then subject to the QMS.

However, there remained disputes between the Crown and Māori on the nature and extent of Māori fishing rights and their status. To finally resolve these, the Deed dated 23 September 1992 was entered into between the Crown and Māori representatives.

This Deed provided that:

- Māori would enter into a joint venture with Brerley Investments Limited to acquire Sealord Products Limited, a major fishing company
- the Crown would pay to Māori a sum of \$150 million to be used for the development and involvement of Māori in the New Zealand fishing industry, including participation in the acquisition of Sealord Products Limited, and the Crown would introduce legislation to:
 - transfer to Māori 20% of any further quota allocation for additional species as they came under the QMS
 - recognise Māori customary fishing practices through regulations, and
 - reconstitute the Māori Fisheries Commission as the Treaty of Waitangi Fisheries Commission.

On 14 December 1992 the Treaty of Waitangi (Fisheries Claims Settlement) Act was passed to put the Deed into effect. The purpose of the legislation was threefold:

- to give effect to the settlement of claims relating to Māori commercial fishing rights
- to make better provision for Māori non-commercial, traditional and customary fishing rights and interests, and
- to make better provision for Māori participation in the management and conservation of New Zealand's fisheries.

The legislation constituted a full and final settlement of all Māori claims to commercial fishing rights. It also provided that non-commercial customary Māori fishing, relating to fish controlled by the Fisheries Act, could take place only within regulations made under that Act. Non-commercial customary rights and interests still give rise to ongoing Treaty obligations on the Crown, including when the Crown develops customary fishing regulations. Although issues relating to allocating the settlement assets (quota, shares in fishing companies and cash) remain outstanding, the settlement means that a significant asset is now controlled by and on behalf of Māori.



Ngāti Ruanui toa at Deed of Settlement signing

The Crown's general approach to Treaty settlements

Definitions of historical and contemporary claims

The Crown has made a distinction between two types of claim – 'historical claims' and 'contemporary claims'. Historical claims are those arising out of Crown acts (things the Crown did) or omissions (things the Crown failed to do) before 21 September 1992. The acts or omissions include those done by or on behalf of the Crown or by or under legislation. Contemporary claims arise out of Crown actions or omissions after that date. This guide deals with negotiations for historical claims only.

The date of 21 September 1992 was chosen because that is when Cabinet agreed on the general principles for settling Treaty of Waitangi claims. A 'cut-off' date was needed so as to be able to make consistent comparisons between the redress provided to different claimant groups.

How are contemporary claims resolved?

The settlement of historical claims does not remove the Crown's ongoing obligations under the Treaty or the law. However, greater awareness today of Treaty obligations is likely to reduce the risk of contemporary breaches. If they do occur, contemporary claims may be resolved in a number of ways, depending upon the kind of Crown action or omission that led to the grievance.

As with historical grievances, any Māori may bring a claim about a contemporary matter to the Waitangi Tribunal. In some cases, where specific Treaty obligations have been recognised in legislation, such as the Resource Management Act 1991, Māori may be able to bring a case in the courts or specialist tribunals.

The Office of Treaty Settlements is not responsible for the negotiation of contemporary claims. Any response by the Crown to such claims involves the government department or agency that has responsibility for the relevant policy area. For instance, the Ministry of Economic Development led the Crown response on contemporary claims about television and radio broadcasting rights and, once resolved, the responsibility for Crown policy in this area was passed to Te Puni Kōkiri. Similarly, the Crown's response to contemporary claims on Crown minerals is managed by the Ministry of Business, Innovation and Employment.



Figure 1.7: Historical and contemporary Treaty claims

Crown guidelines for the resolution of historical claims

The Crown wants to negotiate settlements of historical Treaty claims that are lasting and acceptable to most New Zealanders. It also wants to be consistent in its approach to the many claimant groups involved in negotiations, while acknowledging that each claimant group is different. To meet these objectives the following guidelines have been developed. These are:

- the Crown will explicitly acknowledge historical injustices – that is, grievances arising from Crown actions or omissions before 21 September 1992
- Treaty settlements should not create further injustices
- the Crown has a duty to act in the best interests of all New Zealanders
- as settlements are to be durable, they must be fair, achievable and remove the sense of grievance
- the Crown must deal fairly and equitably with all claimant groups
- settlements do not affect Māori entitlements as New Zealand citizens, nor do they affect their ongoing rights arising out of the Treaty or under the law, and
- settlements will take into account fiscal and economic constraints and the ability of the Crown to pay compensation.

The guidelines are explained under the following headings:

THE CROWN WILL EXPLICITLY ACKNOWLEDGE HISTORICAL INJUSTICES

The Crown's acknowledgement of and apology for well-founded breaches of the Treaty and its principles is vital to rebuilding the relationship between the Crown and claimant groups. It is also important for the claimant groups to record their agreement that their historical grievances have been finally settled, so that both parties can move on to a more positive future. Clear statements on these matters are included in Deeds of Settlement.

TREATY SETTLEMENTS SHOULD NOT CREATE FURTHER INJUSTICES – EITHER TO CLAIMANT GROUPS OR ANYONE ELSE

This includes the claimant group seeking redress, other claimant groups and other New Zealanders generally. In negotiating the settlement of historical claims, the Crown does not want to create new injustices. In practice this means:

- the settlement itself should be fair for the claimant group concerned
- in providing settlement redress to one claimant group the Crown should not harm the interests of other claimant groups, and
- existing private property rights should be respected.

THE CROWN HAS A DUTY TO ACT IN THE BEST INTERESTS OF ALL NEW ZEALANDERS

The Crown must govern in the interests of all New Zealanders. In considering redress options it must balance the grievances and aspirations of Māori claimant groups with matters such as continued protection of and public access to conservation areas, and the overall management in the national interest of resources such as water, petroleum and geothermal energy.

AS SETTLEMENTS ARE TO BE DURABLE, THEY MUST BE FAIR, ACHIEVABLE AND REMOVE THE SENSE OF GRIEVANCE

Settlements will not last if they are seen to be unfair and do not remove the sense of grievance. The process of negotiation is intended to ensure that the Crown and a claimant group sign a Deed of Settlement only when both parties are satisfied that it is fair, and the claimant groups agree that their grievances will be finally settled. Settlements must also be achievable in a practical sense. For instance, the loss of traditional seasonal migration routes and access to plant and animal resources are an important part of some claims. While this way of life can not be restored, the Crown and claimant groups have developed several redress instruments to recognise claimant groups' interests in such resources today.

THE CROWN MUST DEAL FAIRLY AND EQUITABLY WITH ALL CLAIMANT GROUPS

This means that the Crown must have consistent policies and processes and that the redress for each group should be fair in relation to the redress received by other groups. However, the Crown also acknowledges that each claimant group has different interests and particular claims against the Crown.

SETTLEMENTS DO NOT AFFECT MĀORI ENTITLEMENTS AS NEW ZEALAND CITIZENS OR ON-GOING TREATY OR LEGAL RIGHTS

Article Three of the Treaty guarantees to Māori that they will enjoy the rights and privileges of British citizens. These rights and privileges are in addition to the rights guaranteed under Article Two. Māori receive settlement funds and other assets as redress for historical Treaty breaches. The settlement of historical claims relating to Crown actions or omissions that occurred prior to 21 September 1992 does not limit current rights and benefits that Māori might be entitled to receive as New Zealanders, nor any existing rights under the Treaty of Waitangi or aboriginal title and customary law.

SETTLEMENTS WILL TAKE INTO ACCOUNT FISCAL AND ECONOMIC CONSTRAINTS AND THE ABILITY OF THE CROWN TO PROVIDE REDRESS

Because of the nature and size of the losses that Māori have borne, it is unlikely in most instances that redress made many decades later will fully compensate claimants financially. There are also difficulties in working out historical and contemporary values, and assessing the value of improvements made by the Crown or settlers. However, generations of Māori have suffered financial and other losses as a result of Crown Treaty breaches. Most of their original land has long since passed into non-Māori, private ownership. It is clear that the Crown is not in the position to meet the cost of putting right all wrongs. It is also clear that in many cases no economic compensation is possible for cultural losses.

The Crown aims to strike a balance to negotiate fair, just, and practical settlements that include a range of remedies to meet cultural aspects of claims as well as providing financial and commercial redress. Redress necessarily reflects present-day social and economic realities.

Crown negotiating principles

To complement the Crown guidelines, and following a review of the historical Treaty settlement policy framework at the beginning of 2000, the government developed a set of six principles. The principles are intended to ensure that settlements are fair, durable, final and occur in a timely manner.

The principles are as follows.

GOOD FAITH

The negotiating process is to be conducted in good faith, based on mutual trust and co-operation towards a common goal.

RESTORATION OF RELATIONSHIP

The strengthening of the relationship between the Crown and Māori is an integral part of the settlement process and will be reflected in any settlement. The settlement of historical grievances also needs to be understood within the context of wider government policies that are aimed at restoring and developing the Treaty relationship.

JUST REDRESS

Redress should relate fundamentally to the nature and extent of breaches suffered, with existing settlements being used as benchmarks for future settlements where appropriate. The relativity clauses in the Waikato-Tainui and Ngāi Tahu settlements will continue to be honoured, but such clauses will not be included in future settlements. The reason for this is that each claim is treated on its merits and does not have to be fitted under a predetermined fiscal cap.

FAIRNESS BETWEEN CLAIMS

There needs to be consistency in the treatment of claimant groups. In particular, 'like should be treated as like' so that similar claims receive a similar level of financial and commercial redress. This fairness is essential to ensure settlements are durable.

TRANSPARENCY

First, it is important that claimant groups have sufficient information to enable them to understand the basis on which claims are settled. Secondly, there is a need to promote greater public understanding of the Treaty and the settlement process.

GOVERNMENT-NEGOTIATED

The Treaty settlement process is necessarily one of negotiation between claimant groups and the government. They are the only two parties who can, by agreement, achieve durable, fair and final settlements. The government's negotiation with claimant groups ensures delivery of the agreed settlement and minimises costs to all parties.

The protection of potential settlement assets

As part of the development of an overall policy framework for the settlement of historical claims, the Crown has developed a number of ways in which Crown assets are protected if there is the possibility they may later be needed for use in Treaty settlements. Surplus Crown-owned land, for example, may be included in landbanks specifically set up to provide a ready source of Crown property for use in Treaty settlements.

There are 15 regional landbanks which together cover the whole of New Zealand. Where land is declared surplus, it is advertised and any Māori who has a claim registered with the Tribunal may apply to have it included in the regional landbank. If the Crown agrees, the property is included in the appropriate landbank.

The protection of potential settlement assets and the role of the Waitangi Tribunal

There are two ways in which the Waitangi Tribunal can become involved in the protection of potential settlement assets:

- Statutory memorials, and
- Statutory protection of Crown forest assets.

Statutory memorials were established under the Treaty of Waitangi (State Enterprises) Act 1988. This added a new section to the State-Owned Enterprises Act 1986 and required that memorials (a formal notation or record) be placed on all titles to Crown land transferred to State-Owned Enterprises under that Act. As a result and under certain circumstances the Waitangi Tribunal has the power to order the Crown to take back or 'resume' such land for use in a Treaty settlement, even if that land has been transferred to a third party.

The Tribunal has similar powers in relation to Crown-owned land that is subject to a Crown forestry licence. These powers are provided in the Crown Forest Assets Act 1989.

Generally speaking, the Crown hopes it can negotiate settlements with claimant groups without requiring resumptions.

For full details on how these protection mechanisms were established and how they work see 'protection of potential settlement assets' on page 134.

Key settlement policies

The development of the principles of the Treaty of Waitangi by the Waitangi Tribunal and the Courts, the Crown guidelines for the resolution of historical claims, the Crown negotiating principles and the completion of a substantial body of research into the historical background to grievances, have allowed a set of policies to be established which put into practice the Crown's intention to resolve historical claims under the Treaty of Waitangi. These policies are covered in more detail in both the preceding and subsequent chapters and references to these sections are noted in the following summary. In brief:

- Treaty settlement policy applies only to historical claims – claims arising from actions or omissions by or on behalf of the Crown or by or under legislation, on or before 21 September 1992 (see page 23).
- The Crown is ready to negotiate most claims involving raupatu, pre-1865 Crown purchases, subsequent Crown purchases and/or breaches arising from the operations and impact of the Native land laws. Provided that clear evidence of harm to the claimant group is available, exhaustive research is not required before starting negotiations (see page 36).
- The Crown seeks a comprehensive settlement of all the claims of a claimant group. This is to ensure all historical grievances have been addressed and enable the Crown and the claimant group to begin a new relationship (see page 38).
- The Crown strongly prefers to negotiate claims with large natural groupings rather than individual whānau and hapū.
- A secure mandate on the part of the claimant negotiators is required before negotiations can start. This assures both the Crown and the claimant group that their mandated representatives have been properly authorised (see pages 41–48). The claimant group must also ratify any resulting Deed of Settlement before it is binding (see pages 65–66).
- Overlapping claims or interests of other claimant groups must be addressed to the satisfaction of the Crown before the Crown will conclude a settlement involving any of the sites or assets concerned (see pages 53–54).
- A suitable governance entity is required before settlement assets can be transferred. The Crown does not dictate how settlement assets are to be used, but requires assurance that claimant groups have established an entity that is acceptable to the whole claimant group, and is representative, transparent and accountable (see pages 67–72).
- The Crown has to set limits on what and how much redress is available to settle historical claims. Redress must be fair, affordable and practicable in today's circumstances, bearing in mind settlements already reached, other matters for which the government must provide, and existing legal frameworks – for example, the Resource Management Act 1991.
- Settlements are final. In exchange for the settlement redress, the settlement legislation will prevent the courts, Waitangi Tribunal or any other judicial body or tribunal from re-opening the historical claims.
- Settlements are intended to be neutral in their effect on the continued existence of any Treaty of Waitangi or remaining aboriginal title or customary rights claimant groups may have. This means that Māori are still able to pursue claims based on the continued existence of aboriginal title or customary rights. The Crown also retains the right to dispute the existence of such title or rights in future. It also means that while settlements settle all claims arising from acts or omissions by the Crown prior to 21 September 1992, claimant groups retain the right to pursue claims for acts or omissions by the Crown after that date that may have resulted in breaches of the Treaty of Waitangi and its principles.

The negotiations process

This part:

- provides an overview of the four steps in the negotiations process including the key decision points for claimant groups and the Crown
- outlines the process followed by the Waitangi Tribunal and its relationship to negotiations with the Crown
- explains each of the four steps in more detail.

Released under the Official Information Act 1982

Overview of the negotiations process

The four steps of the negotiations process

Each negotiation with a claimant group is different because that group has different claims and interests. However, the negotiation of historical Treaty claims usually involves four steps. They are:

STEP 1 – PREPARING CLAIMS FOR NEGOTIATIONS

- agreement by the Crown and the claimant group to negotiate. This involves the Crown accepting that there is a well-founded grievance, and the claimant group meeting the Crown's preference for negotiating with large natural groupings (see page 39)
- the mandate of the claimant group representatives (including agreement on the claims to be negotiated) is conferred by the claimant group and then recognised by the Crown. The mandated representatives may conduct the negotiations themselves, or appoint negotiators to do so. We use 'mandated representatives' in the rest of this summary to cover both situations, and
- processes are put in place for mandated representatives to consult with claimant group members on settlement issues and develop a register of members (continues up to ratification).

STEP 2 – PRE-NEGOTIATIONS

- Terms of Negotiation are developed and signed, setting out the basis upon which negotiations will take place
- relevant Ministers approve the funding available to mandated representatives on behalf of the claimant group as a contribution to the cost of negotiations, and
- the claimant group identify the areas or sites and Crown assets in which they are interested in seeking redress and the types of redress they think are appropriate in relation to those sites or areas.



Figure 2.1: Four main steps of negotiations between a claimant group and the Crown

STEP 3 – NEGOTIATIONS

- formal negotiations begin. This involves the mandated representatives continuing to consult with members of the claimant group on settlement issues and, where relevant, seek their views on a governance structure for managing settlement assets
- after sufficient progress in negotiations, the Minister for Treaty of Waitangi Negotiations sends a letter to the mandated representatives outlining parameters of the Crown offer, including quantum (the total monetary value of the financial and commercial redress to be provided by the Crown, see page 82)
- alternatively, the Crown and mandated representatives can seek a more formal agreement. This is known as an Agreement in Principle. An Agreement in Principle outlines the nature and scope of all settlement redress agreed as the basis for the final Deed of Settlement. An Agreement in Principle is non-binding on the Crown and the claimant group, and
- usually (and certainly when requested to do so), the Minister presents an outline of the Agreement in Principle to claimant group members, including kuia and kaumātua, several weeks before it is signed.

Once the Agreement in Principle has been signed by the Crown and mandated representatives, then:

- work begins on the detail of a draft Deed of Settlement. The remaining issues are usually matters of detail and implementation. The Deed of Settlement is the final Crown offer to the claimant group for the settlement of their historical grievances and will reflect the agreements made in the Agreement in Principle
- where relevant, the mandated representatives continue to seek the claimant group's views on a governance structure for managing settlement assets
- the claimant group's mandated representatives continue to update the register of claimant group members
- mandated representatives approve and initial a complete Deed of Settlement (initialling indicates to the wider claimant group that their mandated representatives believe the Crown's final offer should be accepted), and
- the Crown reviews the proposed governance entity to ensure it is representative, accountable and transparent.

STEP 4 – RATIFICATION AND IMPLEMENTATION

- the mandated representatives engage in an extensive communication process on the initialled Deed of Settlement and (if not done later) the proposed governance entity by, for example, publishing summary information and holding communication hui
- the mandated representatives hold a postal ballot of claimant group members on the initialled Deed of Settlement
- the mandated representatives will also hold a postal ballot of claimant group members on the proposed governance entity at this point or at a later date
- if a sufficient majority of claimant group members has ratified the settlement, their mandated representatives, as authorised through the ratification process, sign the Deed of Settlement, which is binding and subject only to the establishment of the governance entity and the passage of legislation to give effect to the settlement

- once the governance entity is ratified by the claimant group and established, the Crown introduces enacting legislation for the settlement, and
- following the legislation, both the Crown and claimants implement the agreements in the Deed including the transfer of settlement assets and cultural redress.

Key decision points for claimant groups and the Crown

Figure 2.2 shows the key points where the **whole claimant group** must be involved in decisions about the settlement of their claims. While the mandated representatives will consult and communicate with the wider claimant group throughout the negotiations process, there are some key points in the process where the whole claimant group should be involved. These are:

- mandating representatives for negotiations
- being consulted in the development of the settlement package, including the Agreement in Principle and draft Deed of Settlement
- approving the Deed of Settlement, and
- approving the claimant group's proposed governance entity for the transfer of settlement assets.

Figure 2.3 shows the key decision points and decision makers for the Crown during the various steps of negotiations.

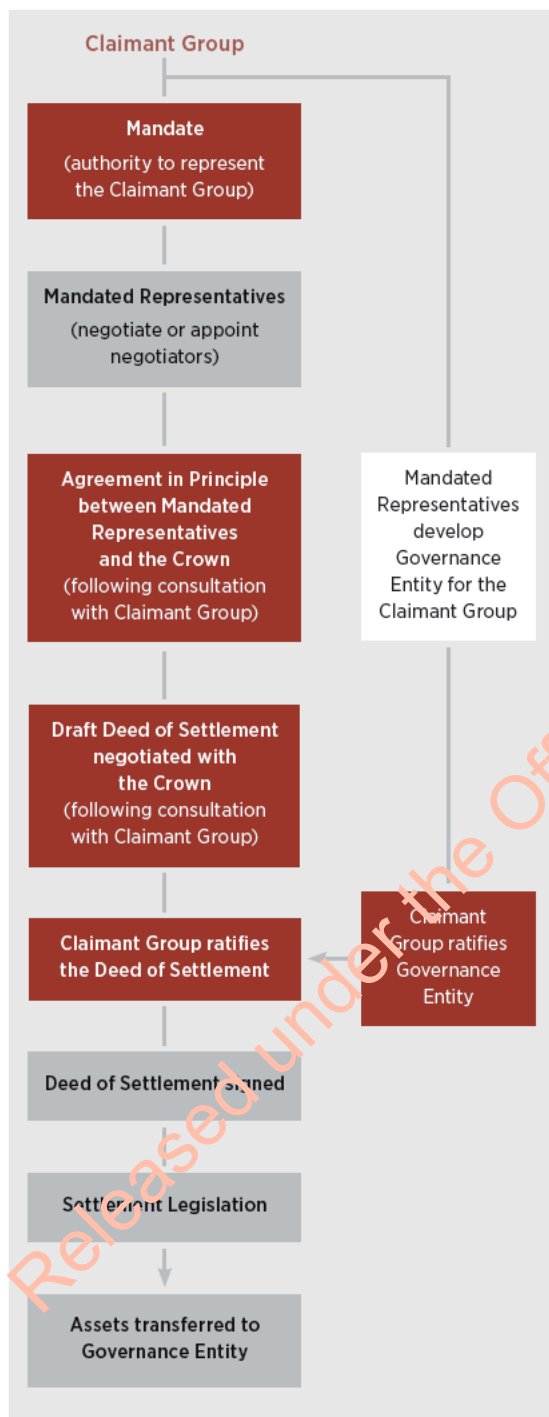


Figure 2.2: Key decision points for claimant groups

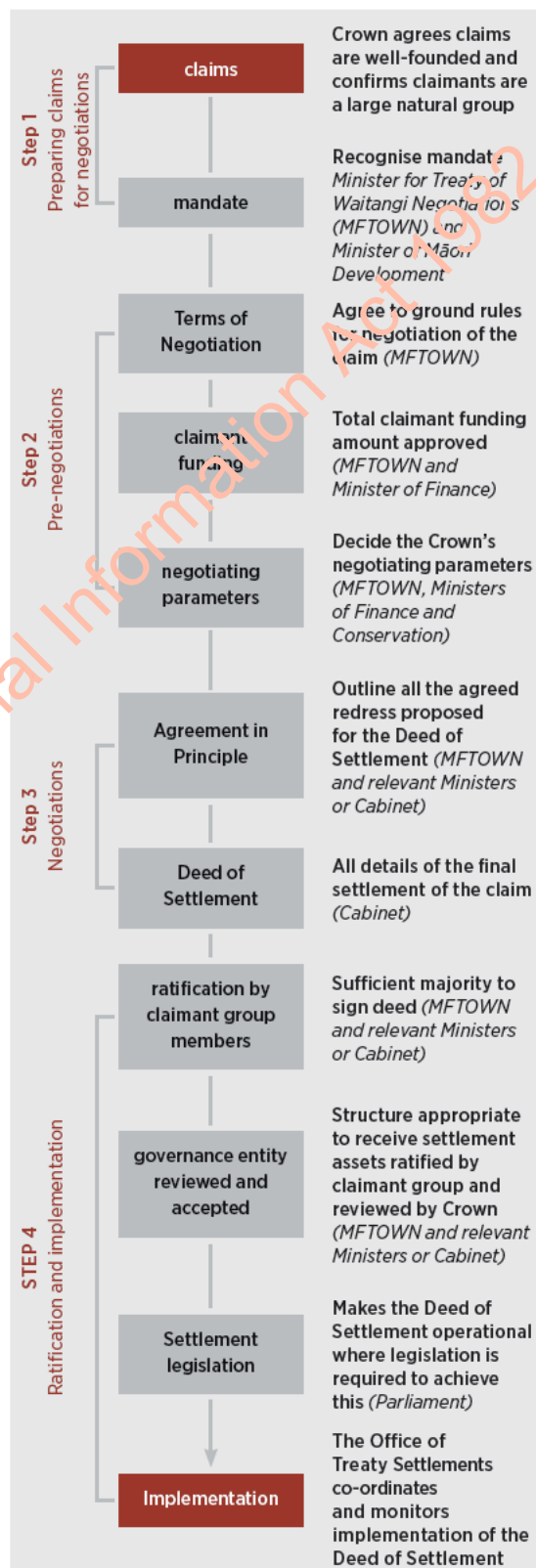


Figure 2.3: Key decision points for the Crown

Negotiations and the Waitangi Tribunal process

Claimant groups first need to register their claims with the Waitangi Tribunal

Prior to a full explanation of the negotiations process between the Crown and claimant groups, some comments need to be made about the relationship between such negotiations and the Waitangi Tribunal's claims process.

Under the Treaty of Waitangi Act 1975, any Māori may make a claim to the Waitangi Tribunal. It is not necessary to have a mandate for making a claim. Claims need to be registered with the Waitangi Tribunal before the Tribunal can begin an inquiry or the Crown can begin negotiating with a claimant group. Once a claim is registered, claimant groups can seek negotiations with the Crown straight away, or may choose instead to have their claims heard by the Tribunal before entering negotiations. If a claimant group wants to enter into negotiations they must cease actively pursuing their claim or claims before the Tribunal. The Crown also requires claimant groups to forgo other avenues of redress such as a remedies hearing by the Tribunal or action in the High Court. This is to ensure that negotiations are conducted in good faith and both parties have a strong incentive to reach an agreement.

While any Māori may make a claim to the Waitangi Tribunal and it is not necessary to have a mandate to make a claim, in seeking a comprehensive, fair and durable settlement for all the historical grievances of a claimant group, the Crown seeks negotiations with mandated representatives and strongly prefers to negotiate with large natural groupings. In recent years, overlapping claimant groups and dissenters within claimant groups have tried to halt the work of mandated representatives by appeals to the Waitangi Tribunal or the High Court. Both the Tribunal and the Courts have been reluctant to allow these appeals where the mandated representatives and the Crown can demonstrate that robust processes have been used to address mandate or overlapping claims issues. Any decision to complete the Tribunal process prior to seeking negotiations on a settlement with the Crown is a matter for the claimant group alone. It should be noted, however, that a completed Tribunal report may be helpful to the successful completion of a settlement with the Crown if a claimant group must also address significant overlapping claims from other groups.

Taking a claim through the Waitangi Tribunal

If claimants choose to pursue their claim through the Waitangi Tribunal, or to go back to the Waitangi Tribunal, the process would move through the following steps:

- research may be funded by the Tribunal or Crown Forestry Rental Trust according to priorities set by the Tribunal. Claims are usually grouped into District Inquiries and a 'casebook' of evidence is put together from all the research for the registered claims in a District as a basis for the hearing
- the Tribunal then holds interlocutory conferences prior to hearings to identify issues of difference between the Crown and claimant groups and to facilitate resolution of mandate and overlapping claim issues
- a Tribunal hearing—this usually takes the form of a series of six to ten weeks of hearings spaced out over a period of up to 12 months for a single or multiple claimant groups, usually on their marae. Once claimants' and Tribunal evidence is completed, Crown evidence is then heard before all parties present closing submissions, and
- a Tribunal report is then drafted and completed (within six months to one year) and sets out whether or not the claims are well-founded. If the claims are well-founded, it may recommend that the claimants and Crown negotiate a settlement on the basis of the findings. It may go further and make general or specific recommendations, including how relief might be provided.

The process, from the start of research to the completion of a report, should take between three and four years.

Sometimes, as a result of problems in negotiations or for other reasons, claimant groups may choose to go back to the Tribunal for a remedies hearing. This is usually where claimant groups have a choice to utilise the Tribunal's power to make binding orders with respect to State-Owned Enterprise land that has a resumptive memorial on its title, or to licensed Crown forest land. In this process, the Tribunal can make recommendations in the form of interim orders over the land, which, if no alternative is negotiated, become orders that bind the Crown after a period of 90 days. In the case of licensed Crown forest land, the order can include monetary compensation.

Apart from orders for the resumption of land, the Tribunal's recommendations are not binding on the Crown. However, the government always considers any recommendations carefully.

How do the Waitangi Tribunal process and the negotiations process relate to each other?

Figure 2.4 below shows the two processes side by side:

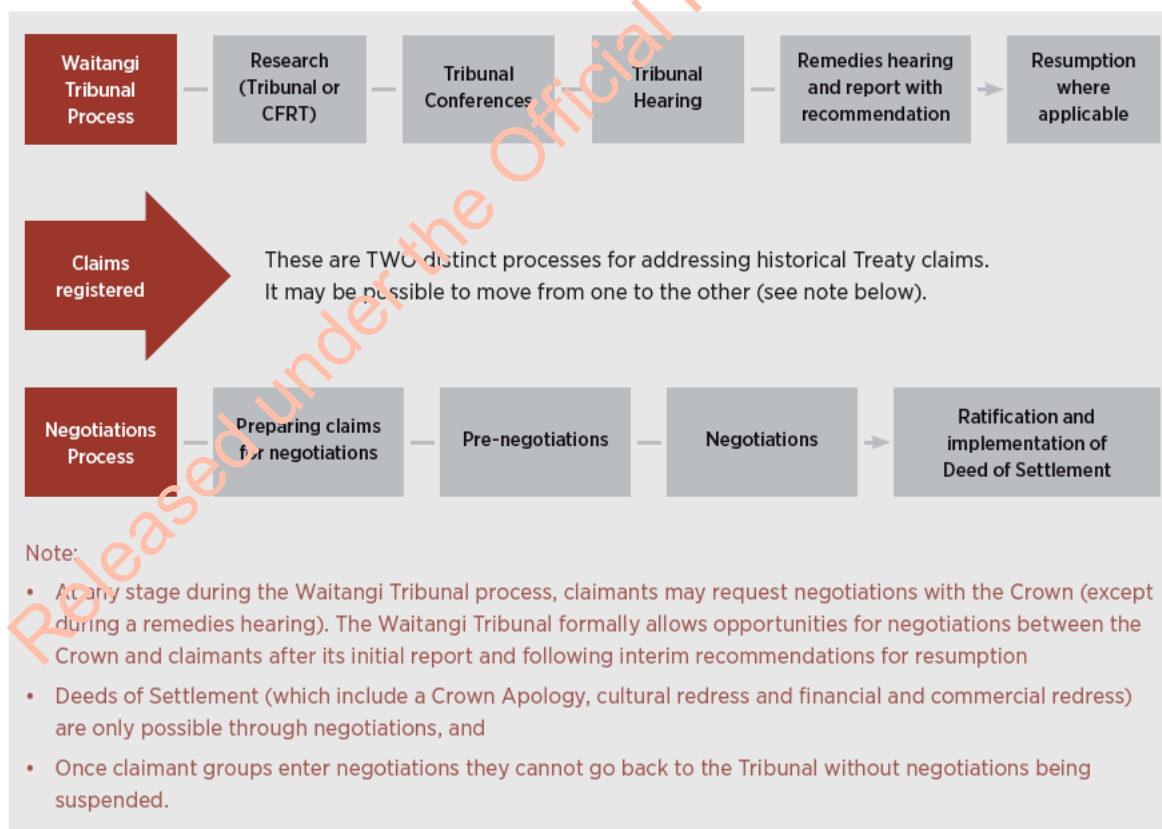


Figure 2.4: Comparison of the negotiations process and the Waitangi Tribunal process (more detail on resumption is given on pages 140–141).

How long does each process, negotiations or the Tribunal, take?

This will depend very much on the circumstances of the claims. The full Tribunal process from lodging a claim to recommendations for resumption can take several years. Until recently, settlement negotiations have generally taken several years rather than months to resolve. However, the completion of a large body of research into land confiscations, Crown purchases prior to 1865 and the operation of the Native Land Court means the Crown now has a good understanding of the types of land-based historical claims and the amount of land lost by Māori in every region of the country. The Crown and claimant groups have also developed a wide range of possible redress options, so less detailed work in this area is now required. An outline of an agreement between the Crown and a claimant group can now be registered in an Agreement in Principle. These developments should see a decrease in the time it takes to negotiate settlements.

Similarly, the Tribunal's use of interlocutory conferences before hearings begin, the casebook method in the hearing process and the use of report writers in casebook inquiries have decreased the time required to hear and report on claims. Further innovations in this area by the Tribunal, such as the regional approach to hearings trialed in Poverty Bay in 2001 and 2002, have also streamlined the claims process. Claimants should talk to both OTS and the Tribunal about likely timelines for their particular claims.

Step 1: Preparing claims for negotiations



Figure 2.5: Step 1 – preparing claims for negotiations

Preparing claims for negotiations involves:

- the claimant group providing the Crown with sufficient research to show that they have been harmed by Crown actions or omissions in breach of the Treaty of Waitangi and its principles
- the Crown accepting that it breached its obligations under the Treaty of Waitangi and its principles
- the Crown assessing whether the claimant group and the claims to be settled meet the criteria for comprehensive negotiations with a large natural group
- representatives of the claimant group obtaining a mandate from the claimant group to negotiate the claims, and
- the Crown assessing the mandate and deciding whether to recognise it.

Starting out

As noted previously, a claimant group wishing to enter negotiations must have a claim registered with the Waitangi Tribunal. Claimants initiate the settlement process for their historical claims by approaching either OTS or the Minister for Treaty of Waitangi Negotiations to begin negotiations.

Types of claim and Crown readiness to negotiate

TYPES OF CLAIM

Most historical Treaty claims involve one or more of the following types of land loss:

- purchases of Māori land by the Crown before 1865, including pre-Treaty purchases later investigated and validated ('Old Land Claims'), Crown purchases, and post-Treaty private purchases made during the Crown's waiver of its pre-emptive right to purchase Māori land
- confiscation of Māori land by the Crown under the New Zealand Settlements Act 1863, and/or
- transactions after 1865 under the various native land laws.

The Waitangi Tribunal, the Crown Forestry Rental Trust, claimants and the Crown have now done a great deal of historical research into these three types of claim. In particular, the Waitangi Tribunal's Ngāi Tahu and Muriwhenua reports dealt with purchases before 1865, the Taranaki and the Ngāti Awa reports considered confiscation, and the Rangahaua Whānui National Overview Report summarised research on dealings in the Native Land Court, along with many other matters affecting the alienation of Māori land.

As a result of this and other research, the Crown now has a good understanding of the types of land-based historical claims in every area of the country and the amount of land that was lost by Māori. The Crown accepts that confiscating land after the warfare of the 1860s in Taranaki, Waikato and the Bay of Plenty was an injustice, and was in breach of the Treaty of Waitangi and its principles. Similar acknowledgements are likely to be appropriate in other districts where there have been confiscations (raupatu). The Crown also acknowledges that Crown purchases prior to 1865 had a widespread and enduring impact on Māori society, as did the operations of the Native land laws after 1865.

CROWN READINESS TO NEGOTIATE

Because the Crown acknowledges that widespread breaches of the Treaty and its principles are likely to have occurred, it is willing, if claimant groups wish, to negotiate settlements of claims that include purchases before 1865, confiscation, and the operation and impact of the Native land laws after 1865. Claimants who want to negotiate to settle such claims do not need to go through Waitangi Tribunal hearings or provide detailed research on each and every Crown action or omission that they consider breached the Treaty and its principles. However, they do need to show the link between the Crown's acts or omissions and the harm to their tūpuna (ancestors).

For most claims involving large natural groups, the Crown expects that the Waitangi Tribunal's Rangahaua Whānui series, and research already completed by the Tribunal, the Crown Forestry Rental Trust, the Crown and/or claimants will provide a sufficient basis to begin negotiations. Because the Rangahaua Whānui reports are of a general and regional nature, further historical research is likely to be required in some areas to identify, at least at a broad level, which group was harmed. Claimants should also note that a Tribunal report may be useful where there are significant issues arising from overlapping claims with other groups.

RELATIONSHIP BETWEEN TYPE OF TREATY BREACH AND REDRESS

While the Crown is prepared to enter negotiations with claimant groups who suffered from breaches of the Treaty and its principles relating to any of the three main types of land alienation, it does not accept that the same amount of redress should be available in each case. Although the impact of land loss on Māori society was often similar regardless of the way land was lost, the culpability (extent to which a party is wrong or to blame) of the Crown does differ from case to case. The Crown believes that the seriousness of each type of breach is different and redress should reflect that, but this is a matter for discussion during the negotiations.

Assessing the research

OTS, with assistance from the Crown Law Office, assesses research on historical claims submitted to the Crown for the purpose of negotiations. This may include reports by the Waitangi Tribunal or research undertaken at the Tribunal's request.

So that a proper assessment can be made, the research should clearly set out the grievances and provide historical evidence to support them. It should be based on a broad and sufficient use of primary and secondary sources, including oral sources if appropriate, and show a good understanding of the historical context of the situation on which the claims are based. The Crown also requires research to be logically set out, written in an objective manner and to include references.

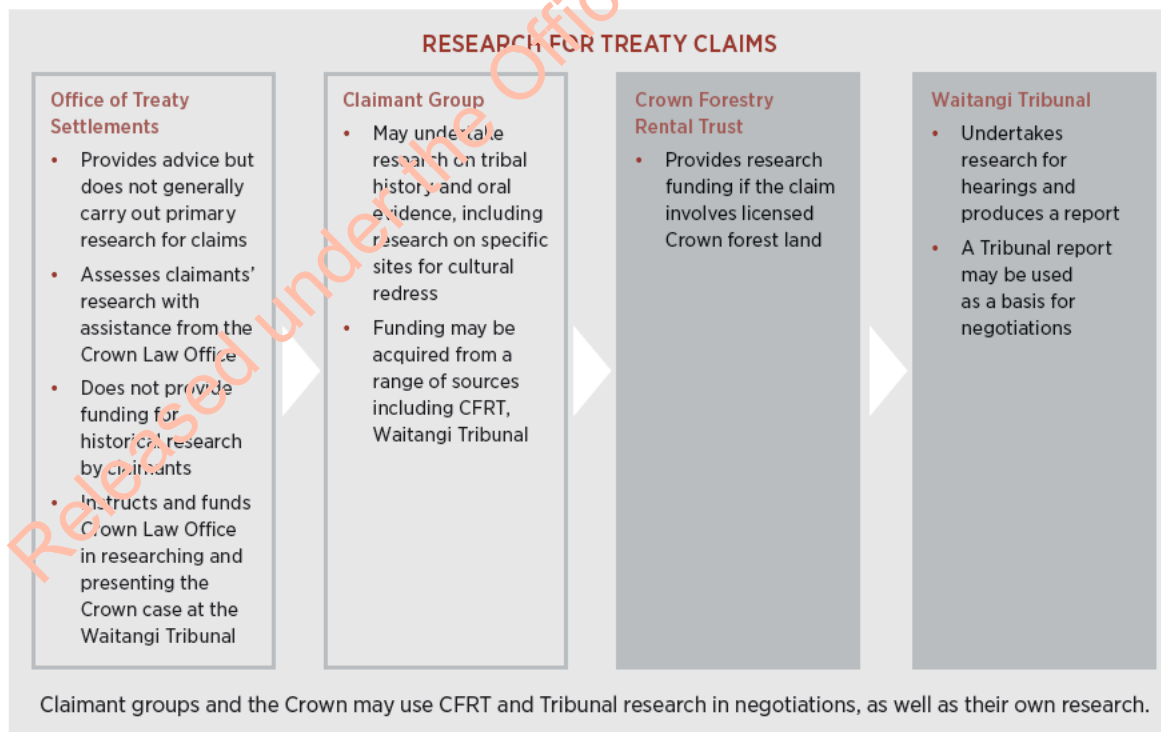


Figure 2.6: Research for Treaty claims

NEED FOR EXTRA RESEARCH

During negotiations, the Crown and claimant negotiators may need to agree whether particular breaches of the Treaty and its principles occurred – for example, if the claimants want the Crown to apologise for a particular action. If the Crown does not initially accept that there has been a breach in that case, it will discuss its reasons with claimants. It may be that more research or analysis needs to be done. Extra research may also be needed on specific issues arising from a claim, for example, to find out whether more than one group is making claims over the same area or a particular site – what are known as overlapping claims or cross-claims. (In Waitangi Tribunal proceedings ‘overlapping’ is used for minor overlaps and ‘opposing’ is used for a high degree of overlap). How overlapping claims can be addressed is discussed on pages 53–54. In any event, negotiations on cultural redress will be assisted by any research or information on a claimant group’s associations with a particular site.

HELP WITH RESEARCH

OTS does not directly help claimant groups with research, but can give advice on where more research is needed. The Waitangi Tribunal can also provide information about how to carry out research.

Any claimant funding provided by OTS is intended for the purpose of negotiations only and not for reimbursing research costs. However, if the claim involves licensed Crown forest land, a claimant group may be eligible for funding assistance from the Crown Forestry Rental Trust.

Comprehensive negotiations

So that it can be sure that it has properly addressed all the historical claims of a claimant group, the Crown strongly prefers to negotiate settlements of all the historical claims (claims relating to acts or omissions by the Crown prior to 21 September 1992) of a claimant group at the same time. That is what is meant by comprehensive negotiations.

A key objective of negotiations for Treaty settlements is to help set right the grievances that claimant groups have about historical Crown actions. It is in the interests of both the Crown and claimant groups for this to be done as effectively and efficiently as possible. It therefore makes sense for settlements to be comprehensive, providing redress for all the wrongs done to a claimant group. Settlements made ‘bit by bit’ over a long time-span would risk leaving the sense of wrong to linger, and might never achieve a sense of final resolution. Comprehensive settlements also reduce the costs and time involved in negotiations and implementation for both the Crown and claimant groups.

Negotiations with large natural groups

The Crown strongly prefers to negotiate settlements with large natural groups of tribal interests, rather than with individual hapū or whānau within a tribe. This makes the process of settlement easier to manage and work through, and helps deal with overlapping interests. The costs of negotiations are also reduced for both the Crown and claimants.

Comprehensive negotiations with large natural groups also allow the Crown and mandated representatives to work out a settlement package that includes a wide range of redress. Redress is the term we use for all the ways the Crown can make amends for the wrongs it has done. For instance, many of the Statutory Instruments available for cultural redress (see Part 3) are only workable and cost-effective for large natural groupings. Having a wide range of redress means that the settlement is more likely to be lasting because it meets a greater number of needs.

Attempts to have the Waitangi Tribunal or the High Court reject the Crown's preference for negotiating settlements with large natural groupings and endorse negotiations with specific hapū and whānau have not been upheld by either body. In its Pakakahi and Tangahoe Settlement Claims Report 2000, the Waitangi Tribunal says of the Crown's preference for dealing with large natural groupings, that 'this is an approach with which we have considerable sympathy. There appear to us to be sound practical and policy reasons for settling at iwi or hapū aggregation level where that is at all possible.'

Hapū or whānau interests

In some circumstances, it may be possible to deal with distinct hapū or whānau interests that are separate from the main tribal claims within a settlement. Distinct recognition for these groups can be part of a wider settlement package. This has been done in the Ngati Ruanui settlement, for example, see page 62.

Mandating for negotiations

WHAT IS MANDATING?

Mandating is the process by which the claimant group chooses representatives and gives them the authority to enter into discussions and agreements with the Crown on their behalf. In some cases, the claimant group may confirm the mandate of an existing representative organisation, for example, their iwi rūnanga. This mandate then gives the existing representatives the authority to appoint negotiators on behalf of the claimant group.

Mandating claimant representatives to negotiate is one of the most important stages in the Treaty settlement process. Many of the grievances of the past relate to agreements made between Māori and the Crown, where the Crown dealt with people who did not have the authority to make agreements on behalf of the affected community. A strong mandate protects all the parties to the settlement process: the Crown, the mandated representatives and the claimant group that is represented.

Mandated representatives need to demonstrate that they represent the claimant group, and the claimant group needs to feel assured that the representatives legitimately gained the right to represent them. This can only be achieved through a process that is fair and open.

The Crown will usually, at the early stage, publish information on the claimant and claim definitions, invite submissions and contact members of the claimant community to inform them that their claims may be settled by the proposed negotiations.

The mandating process will usually involve a series of hui that allow members of the claimant group to express their views about who should represent them in negotiations with the Crown. These hui will need to be advertised widely so as many members of the claimant group as possible have the opportunity to participate. These discussions may be supplemented by pānui or newsletters that clearly explain the mandate being sought and the issues involved. These can be distributed to those on the register of members of the claimant group. Finally, a postal ballot of claimant group members may be carried out to assist in the choice of who should represent the claimant group.

Those finally chosen as mandated representatives will also have a responsibility to keep claimant group members informed of progress throughout negotiations with the Crown.

To ensure that as many members of the claimant group as possible are given a reasonable opportunity to take part in the mandating process, it is important that the process and any associated hui are well publicised. For this reason it may also be necessary to hold mandating hui outside the claimant group's rohe. There should be reasonable public notice before each hui and it is recommended that at least one public notice is published at least three weeks before each hui. The notice should state clearly that a mandate for negotiations is being sought. Such notices should also be placed in newspapers in Auckland and Wellington or in other locations where large numbers of the claimant group may live. The fullest possible participation by members of a claimant group at an early stage in the settlement process can reduce the possibility of delays to the completion of a settlement.

As in every community, there is often opposition from groups or individuals who reject those claiming to represent them. Sometimes opposing groups or individuals may refuse to participate in the subsequent negotiations. Once mandated, the representatives should make clear that those individuals or groups have the opportunity to participate in the settlement process at any stage.

In its Pakakohi and Tangahoe Settlement Claims Report 2000, the Waitangi Tribunal endorsed Ngati Ruanui's approach to mandating and described the process used by the Ngati Ruanui Working Party as a 'bottom-up' approach. The Tribunal stated: 'we consider as a general principle that a conjoint marae and hapū approach to mandating as adopted by the working party for its particular circumstances is fundamentally sound'.

THE CHOICE OF MANDATED REPRESENTATIVES IS A MATTER FOR THE CLAIMANT GROUP

It is for the claimant group to decide who will represent them and to determine an appropriate way to select their representatives. The Crown does not wish to interfere in matters of tikanga (custom), but the Crown does need assurance that the mandate is secure before starting negotiations. That is because mandating is central to the durability of settlements and because public funds are involved in the settlement process. Therefore, some procedures for recording decisions and communicating with members of the claimant group may have to be adapted to provide sufficient evidence that the representatives have gained the necessary authority.

Sometimes the mandated representatives may also be the negotiators but in other cases their role, once authorised, may be to appoint others to negotiate. Such negotiators must act within the instructions given by the mandated representatives and regularly report back to them. To ensure the widest possible representation of a claimant group during negotiations and to achieve durable settlements, claimant groups may also consider members who live outside the rohe as possible mandated representatives and/or negotiators.

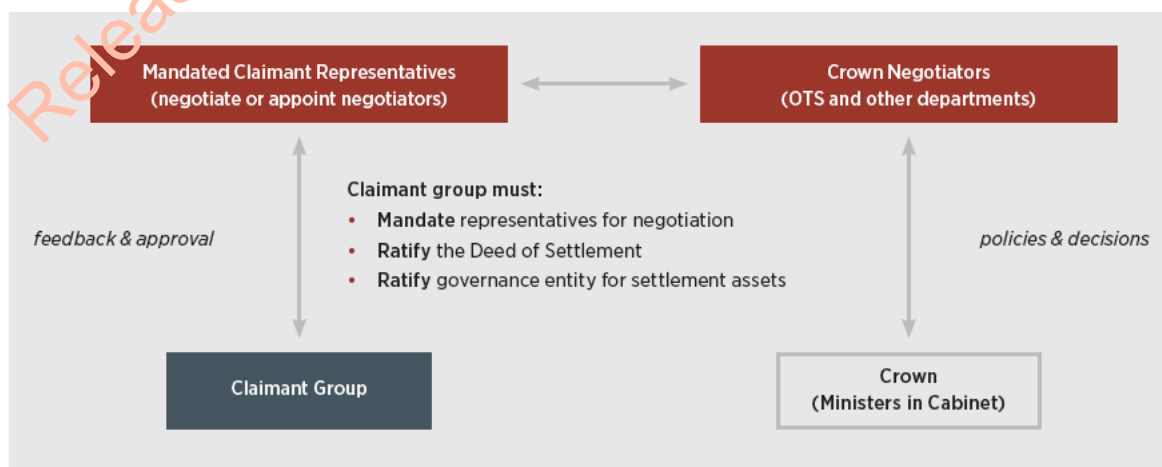


Figure 2.7: Links between negotiators and the groups they represent

MANDATE IS FOR NEGOTIATIONS ONLY

Claimant groups may be concerned that in mandating representatives for negotiations they are also handing over control and management of settlement assets. This is not the case. A mandate to negotiate only gives the mandated representatives the authority to negotiate a draft Deed of Settlement. All members of the claimant group must then have a say on whether the Deed is accepted or not. Similarly, it should not be assumed that mandated representatives will, as of right, play a primary role in the administration of settlement assets. Control over settlement assets is known as post-settlement governance and involves setting up a legal entity for this purpose. As with the final Deed of Settlement, the governance entity is subject to ratification by the claimant group. The key decision points in the settlement process that require claimant group participation are shown in figure 2.2 on page 31, and more detail about governance entities is on pages 67–72.

IMPORTANCE OF SEEKING EARLY ADVICE FROM OTS AND TE PUNI KŌKIRI

Obtaining a strong mandate that the Crown can recognise can be a demanding process. Different groups will need to take different approaches (this is why a ‘real life’ example is not included in this guide), but OTS can give claimant groups examples of processes that have worked so far, and explain in more detail the specific requirements for a Deed of

Mandate. OTS strongly advises any group wanting to obtain a formal mandate for negotiations to consult with the OTS Settlement Development Team **before** starting the mandating process. They should also seek advice from TPK.

Mandate recognition process

The Crown has developed a formal procedure to verify that:

- the Crown is dealing with the right claimant group representatives
- the representatives are properly mandated to negotiate an offer for the settlement of the claimant group’s historical Treaty claims
- the mandated representatives have a process in place to ensure they are accountable, and
- the mandated representatives have developed a process to identify as many claimant group members as possible – this usually involves establishing, if they have not already done so, a register of members.

Once the Crown is satisfied that the people seeking to represent the claimant group have provided sufficient evidence to verify the above information, it can recognise the representatives’ mandate to negotiate on behalf of the claimant group.

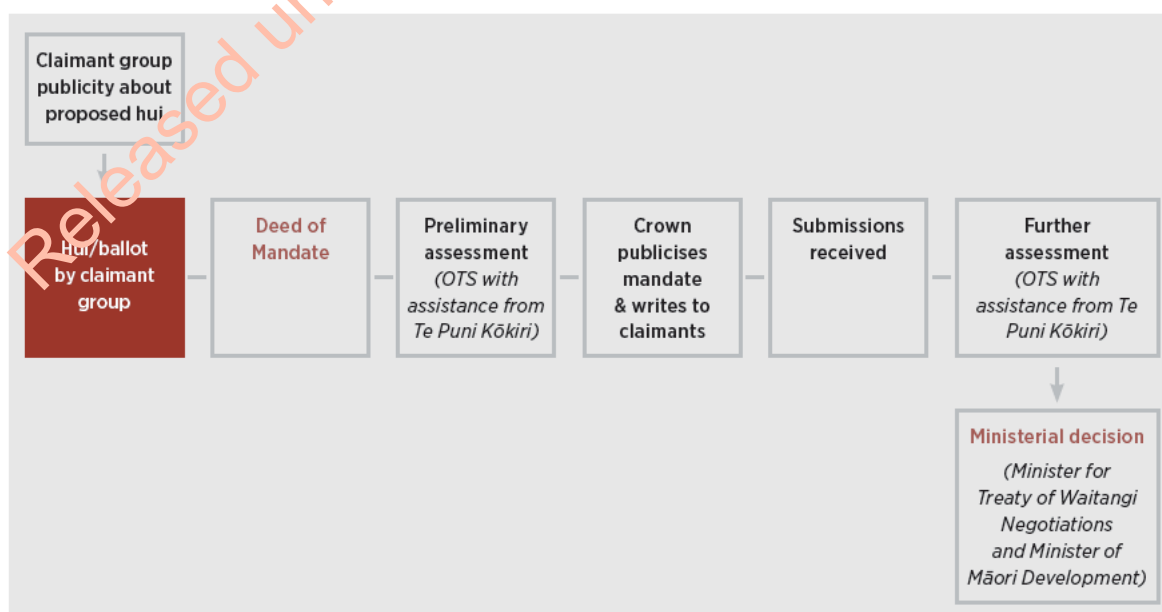


Figure 2.8: Mandate recognition process

CONFIRMING THAT THE MANDATING PROCESS IS FAIR AND OPEN

One way to ensure that the members of the claimant group see the mandating process as fair and open is to appoint neutral observers to witness the process. Te Puni Kōkiri, the Crown's principal adviser on relationships with Māori, performs this role. Contact details for Te Puni Kōkiri are on page 150.

What is a Deed of Mandate?

The key document in the mandate recognition process is the Deed of Mandate. This is a formal statement prepared by the claimant group, which outlines information on what the mandate covers and how the claimant group approved it (a checklist of what must be included in the Deed of Mandate can be found on page 45).

A Deed of Mandate:

- defines the claimant group
- states the claims that are intended to be settled
- identifies the area to which claims relate, and
- states who has authority to represent the claimant group in negotiations with the Crown.

The following pages describe how each of the above matters might be developed in a Deed of Mandate.

Key elements of a Deed of Mandate

CLAIMANT GROUP DEFINITION

The claimant group definition is a description of those people whose claims would be settled by the settlement that results from the proposed negotiations. Such people would be eligible to become beneficiaries of the settlement. The claimant group definition usually has the following parts.

- a named founding ancestor (or ancestors) who is common to many (but not necessarily all) of the iwi and hapū
- a list of iwi and hapū names
- a description of a land area in which the ancestors of the claimant group exercised customary rights. This is often necessary to distinguish the claimant group from other groups, if the same iwi and hapū names, or the same descent lines, occur in other parts of the country.

All those people who can trace descent from the named ancestor, or from recognised ancestors of any of the iwi or hapū, will be part of the claimant group as of right. The definition will need to be tailored for each large natural group. For example, if a hapū affiliates to more than one iwi, that hapū can be included within the definition of the claimant group. In doing so, the hapū will be included only in relation to its descent from a particular ancestor. Any other claims the hapū may have arising from other descent lines (and another claimant group) will not be settled.

CLAIMS TO BE SETTLED

The Crown prefers to negotiate comprehensive settlements covering all the historical claims of a group (that is, all claims arising from Crown acts or omissions before 21 September 1992). The scope of the claims to be settled arises directly from the definition of the claimant group.

Nevertheless, it is important that the Deed of Mandate clarifies what 'all claims' means in practice. This helps individual members of the claimant group to know whether it is proposed that their claims will be part of the negotiations. The Deed of Mandate should therefore list the specific claims registered with the Waitangi Tribunal that may be covered in part or whole by the proposed negotiations. The Waitangi Tribunal can provide claimant groups with a list of claims that have been lodged in their area. Claimant groups may need to obtain copies of these claims to see whether they are covered by or overlap with their claims.

If a claimant group thinks that some claims should be explicitly excluded, they should discuss this first with OTS. There may be a few cases where the Crown has already accepted that a particular claim will be addressed in a separate negotiation, or where a final settlement has already been reached for part of the claim. Any claims of an individual arising from descent from another tribal group (not included in the claimant group definition) will automatically be excluded from the negotiations.

CLAIM AREA

It is important for the Deed of Mandate to set out an area to which the claims mainly relate. This is used to help define the claimant group and to let neighbouring claimant groups know about any areas where they may claim overlapping interests. It also allows the claimant group to endorse an overall negotiating approach, including where redress will be sought. Claimant groups may wish to acknowledge any areas where they share interests with other claimant groups, and any areas that are regarded as mainly relating to their group only. Claimant groups may be able to reach agreement with neighbouring claimant groups on overlapping areas. This can simplify later negotiations with the Crown on appropriate redress in relation to these areas.

Note: The Crown does not attempt to define precise boundaries through the settlement process. Rather, general 'areas of interest' are recognised within which redress may be made available to a claimant group, subject to overlapping claims being addressed to the satisfaction of the Crown.

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MANDATED REPRESENTATIVES

The claimant group needs to mandate a body or a group of individuals who have the authority to negotiate and initial a draft Deed of Settlement. The mandated representatives may negotiate the settlement themselves, or authorise a set of negotiators to negotiate on their behalf.

In selecting representatives it is important that they are seen to be fairly representative of all the interests that must be taken into account, as well as having the necessary skills to negotiate. This is especially important for a large natural group, which may comprise many individuals, marae, and tribal groups.

The Deed of Mandate will also need to endorse a structure by which the mandated representatives are accountable to the wider claimant group. It will need to specify how decisions will be made, and provide for the claimant community to replace mandated representatives if necessary. It should also provide for the mandated representatives to report back to the claimant group on progress and specify consultation procedures on particular issues. For example, it might require negotiators to consult with certain sections of a claimant group on matters concerning them particularly. In all cases, the Deed of Mandate should state that the mandated representatives must present a draft Deed of Settlement to the members of the claimant group for ratification before it is signed by the mandated representatives.

The Deed of Mandate should set out the proposed entity to hold the mandate to receive funding, and the proposed accountability arrangements for managing these funds. Only a legal entity can receive claimant funding from the Crown. Although it is the Crown's preference that a legal entity be established to receive claimant funding, this is not essential as long as the accountability of the mandated representatives for the use of claimant funding to both OTS and the wider claimant group is clear.

Deciding on representation and accountability during negotiations is separate from establishing a legal entity to represent members and manage settlement assets. This legal entity is commonly referred to as the post-settlement governance entity.

Review of Deed of Mandate by OTS

OTS reviews Deeds of Mandate, with advice from Te Puni Kōkiri (TPK). Final responsibility for the decision to recognise a mandate is held by the Minister for Treaty of Waitangi Negotiations and the Minister of Māori Development – see page 46.

OTS and TPK undertake separate reviews of a claimant group's Deed of Mandate. In so doing, they seek to determine whether the Deed of Mandate:

- clearly defines the claimant group and the claims to be settled
- shows that the wider claimant group members have been consulted and that they support the representatives seeking the mandate to pursue negotiations with the Crown
- provides authorisation for the representatives to negotiate a comprehensive settlement of all the claimant group's historical claims
- shows that representatives are accountable to the wider claimant group
- acknowledges any opposition to the mandate and describes the extent of that opposition, and
- identifies overlapping claims.

To assist claimant groups seeking to enter negotiations, OTS has developed a detailed checklist showing what is required in a Deed of Mandate. The Deed of Mandate checklist follows.

It should be noted that OTS does not confer mandates. This can only be done by claimant group members. OTS does need to be certain, however, that the mandate is sound and that it has been conferred in an open process.

Deed of Mandate checklist

These are essential items – a claimant group can include additional material to reflect its own requirements and circumstances.

1. DEFINITION OF THE CLAIMANT GROUP

A statement clearly outlining who the claimant group is:

- its name, any common founding ancestor(s), the names of iwi and hapū
- a list of the marae associated with the claimant group
- the area covered by its claims, and
- groups who have overlapping interests.

It may also be useful to include an indication of the claimant group's core areas, and areas in which there may be shared or overlapping interests with other groups.

2. COMPREHENSIVE SETTLEMENT

- a statement that the claimant group intends to seek a comprehensive settlement of all its historical claims (including all 'Wai' numbers and any unregistered claims), and
- the claimant group should list all of the relevant Wai numbers in the Deed of Mandate.

3. MANDATED REPRESENTATIVES

- the names of the representatives who are seeking Crown recognition of their mandate
- a description of the way those representatives will make decisions, and
- the process by which the representatives will appoint negotiators.

4. HOW WAS THE MANDATE OBTAINED?

A description of how the mandate was obtained, with all supporting evidence, including:

- advertisements in which the mandate agenda is clearly stated
- minutes of hui
- signed lists of attendees
- whether Crown (TPK) or independent observers were present at mandating hui, and
- any other methods used, such as postal ballots or mail-outs to members of the claimant group and the responses received.

5. ACCOUNTABILITIES OF THE MANDATED REPRESENTATIVES

A statement outlining the accountabilities of the mandated representatives, in particular:

- the requirements of the representatives to report back to the claimant group and the ability of the claimant group to have input into key decisions
- the requirement of the mandated representatives to inform claimants when any milestone is reached in negotiation
- the requirement of the mandated representatives to inform claimants
- the right of the members of the claimant group to take away authority from some or all of the mandated representatives or replace them, and
- the duty of the mandated representatives to present the draft Deed of Settlement to the members of the claimant group for their consideration before entering into any binding agreements with the Crown.

6. PROVIDING DEED OF MANDATE TO OTHER PARTIES

- an agreement that the Crown may make the Deed of Mandate known to the public and give the details of the Deed of Mandate to any claimant and outside claimant groups, if asked to.

PUBLICISING THE DEED OF MANDATE

If a Deed of Mandate meets the Crown's requirements, OTS will make known in local and national media that it has received the Deed of Mandate. OTS will also ask for views or comments on the Deed from interested parties. Usually three weeks are provided for people to send in their comments on the Deed of Mandate.

This step does not mean that the Crown doubts the mandate, or that it is bound to accept it. Publicising the Deed in this way means that the Crown is taking reasonable steps to seek the views of all those with an interest in the proposed negotiations. OTS, in consultation with TPK, then reviews any comments on the Deed. TPK is well placed to advise on these matters, as it has a regional network with links into Māori communities.

DECISION BY MINISTERS

After reviewing and considering any comments received on the Deed of Mandate, OTS, in consultation with TPK, reports to the Minister for Treaty of Waitangi Negotiations and the Minister of Māori Development. These Ministers decide, on behalf of the Crown, whether to recognise the mandate. Recognition of the mandate by Ministers is conditional on the representatives retaining their mandate to represent the claimant group throughout negotiations.

Mandates are monitored and mandated representatives are required to provide regular reports to OTS and TPK on the continued support for their mandate and on consultation with the wider claimant group.

The recognition of a Deed of Mandate may also be conditional. As noted earlier in this chapter, for example, where there are parts of a claimant group that oppose the approach taken to the negotiations, the Crown may require mandated representatives to reserve a place so that the hapū or whānau concerned can participate, should they wish to do so.

HOW LONG DOES A MANDATE REVIEW TAKE?

The time taken to complete the mandate assessment and get the Ministers' decision depends on the size and complexity of the claimant group and their claims. For a straightforward mandate, this may take three months, including making the Deed of Mandate known and considering any views or comments received. During this period, OTS stays in contact with the representatives who put forward the Deed of Mandate, and provides them with copies of comments received. The Minister for Treaty of Waitangi Negotiations and Minister of Māori Development advises the mandated representatives of the decision when it is made.

Questions and answers about mandating

WHAT FUNDING IS AVAILABLE FOR MANDATING?

Funding from the Crown is not available in advance for mandating processes. This is because it could be seen as taking sides before the claimant group has made a decision on who is to represent them in negotiations with the Crown. However, once the Crown has recognised the Deed of Mandate, it can consider providing funding for mandated representatives, including reimbursing some of the costs of obtaining the mandate. It is therefore important that groups seeking a mandate keep good records of their costs (see the section on claimant funding on pages 49–51). Funding to assist with mandating may also be available from the Crown Forestry Rental Trust for claims relating to licensed Crown forest land.

WHAT IF THERE IS A SERIOUS DISPUTE ABOUT MANDATE?

The Crown realises that it would be unrealistic to expect any group to reach one hundred percent agreement on a mandate, or any other issue. There is no set level of support that ensures that the Crown will recognise the mandate. It is a matter of assessing all the information available, then Ministers must make a considered judgment on whether the mandate is secure enough for the Crown to start negotiations.

Sometimes there will be rival claims to mandate, with no clear majority emerging. If two or more groups each claim a large level of support within a claimant community, the Crown encourages the groups to work together to resolve their differences, and to approach the Crown again when the mandate is secure.

Another approach is to ask the Māori Land Court to give advice on who represents a particular group. This can be done under section 30 of Te Ture Whenua Māori Act 1993 and may enable a mandate to be put forward to the Crown. However, the usual requirements for a secure mandate must still be met. In some cases, the section 30 mandate may not resolve divisions within the claimant group. If the Crown concludes that the representatives appointed under section 30 do not have the support of the claimant group, it will not start negotiations, as any settlement is unlikely to be durable. Claimants should note that section 30 does not bind the Crown in matters relating to Treaty settlements.

WHAT IS A CONDITIONAL MANDATE?

In other cases, there may be a clear majority of support for the mandated representatives, but a significant minority, perhaps a hapū or individual marae, is opposed. In such cases, the Crown may give conditional recognition to the mandate. In some cases, the conditions must be met before negotiations can begin. In others, the conditions must be met throughout the negotiations. OTS, with support from TPK, monitors conditional mandates to ensure the conditions are being met. The Crown may withdraw recognition of the mandate if conditions are not met.

HOW CAN A MANDATE BE KEPT SECURE?

A mandate may be secure at first but can be lost if the mandated representatives lose the confidence of the wider claimant group. This can happen if the mandated representatives do not keep the wider group informed of progress and issues in the negotiations or if it is perceived that claimant funding is being managed unwisely. The result may be a challenge to the mandate or rejection of the Deed of Settlement when the time comes for ratification. To avoid this, the mandated representatives and the claimant group should agree before negotiations start on matters such as:

- how people will be kept informed (such as pānui, hui), and how often
- issues or stages in negotiations when the mandated representatives need to seek approval from kaumātua or the entire claimant group
- how and when groups, such as whānau or hapū with particular claims, should be kept informed, and
- transparent processes for claimant funding.

The mandated representatives must retain their mandate to represent the claimant group throughout the negotiations. If a serious mandate dispute arises during negotiations the Crown will encourage the members of the claimant group to work together to resolve the issue. This may include, for example, using a facilitator to crystallise the issues underlying the dispute and assisting the claimant group members to achieve a resolution.

HOW DO NEGOTIATING MANDATES RELATE TO THE MANDATES REQUIRED BY TE OHU KAI MOANA FOR DISTRIBUTING COMMERCIAL FISHERIES ASSETS?

Te Ohu Kai Moana (the Treaty of Waitangi Fisheries Commission) is responsible for managing and distributing to iwi assets covered by the 1992 settlement of Māori commercial fishing claims. It also requires iwi to demonstrate a clear mandate and appropriate governance structures before distributing assets. See page 150 for contact details.

A mandate obtained for one purpose is not automatically acceptable for other purposes. But with careful planning, it is possible for claimant groups to create a process to meet both fisheries and claim negotiation mandate requirements at the same time. Claimants interested in taking this approach should talk to both OTS and Te Ohu Kai Moana first.

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Step 2: Pre-negotiations

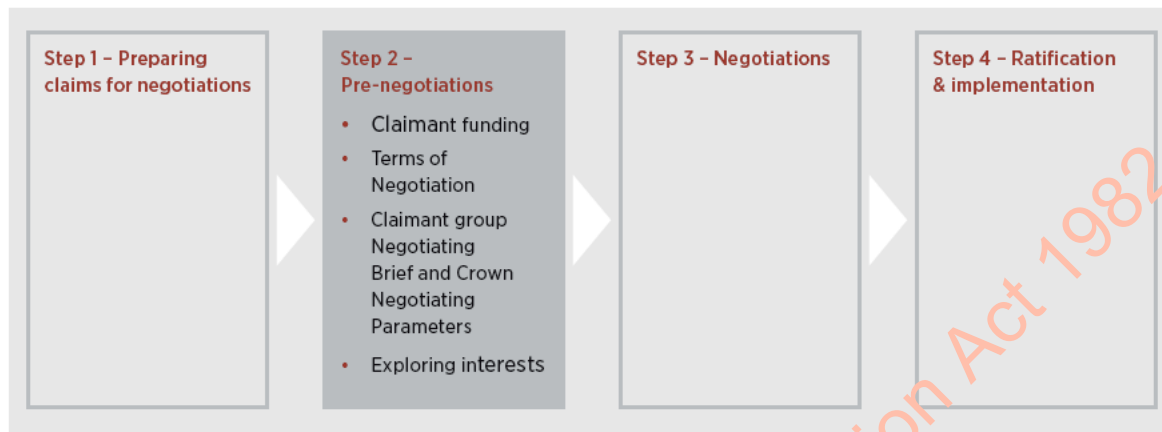


Figure 2.9: Step 2 – pre-negotiations

During pre-negotiations:

- after discussion with the mandated representatives of a claimant group, the Crown decides how much funding it will contribute to help the claimant group with the cost of negotiations
- the Crown and mandated representatives discuss and formally agree on the objectives of the negotiations and the way they will negotiate. This agreement is set out in the Terms of Negotiation, and
- the mandated representatives prepare a Negotiating Brief and the Crown sets out its Negotiating Parameters. These provide information on the interests, issues, assets and resources they will be discussing in negotiations.

As part of the development of their Negotiating Brief, claimant groups are asked to identify the interests they wish to have addressed in the settlement, including identifying key sites or food gathering places and Crown properties claimant groups may wish to include in some way in their settlement redress.

Some of the interests identified may also be shared by other claimant groups or may be subject to claims by other groups and, as a result, processes will need to be established as early as possible in the negotiations process to address overlapping claims or shared interests between claimant groups. Developing these processes may be critical in ensuring a settlement is completed in a timely manner.

Claimant funding to help with the cost of negotiations

The Crown does not necessarily provide funding for all the costs that a claimant group has to meet when negotiating its historical claims. But the Crown will **contribute** towards certain expenses for mandated groups:

- *the costs of pre-negotiations* – obtaining a mandate (payable once the Crown recognises the mandate), agreeing Terms of Negotiation, and starting formal negotiations
- *the costs of negotiations* – reaching a draft Deed of Settlement. This funding may also be used to develop a post-settlement governance entity, and
- *the costs of ratification* – carrying out a process for the claimant group to confirm a Deed of Settlement.

This funding will be *over and above* any money or other assets eventually given to the claimant group as redress for its historical Treaty claims, including any accumulated Crown forestry rentals.

THE APPROVAL PROCESS

Soon after a claimant group's mandate has been recognised, OTS makes an assessment of the amount the Crown will contribute to the claimant group's costs for negotiations. The following factors are considered:

- the complexity of the claim – for instance, does it raise new issues that will be difficult to resolve?
- are there possible overlapping claim interests that need to be taken into account?
- is the claimant group in strong agreement about the proposed negotiations, or are there specific issues within the group that will need particular attention during the negotiations process – for example, between the iwi body and hapū, or the ahi kā groups (those still in the traditional rohe) and other members of the group?
- how big is the claimant group, and how scattered are its members throughout the country?, and
- is consultation likely to require hui (or other ways of communicating with the claimant group) to be arranged outside the rohe – for example, in the main city centres?

While the Crown does not intend to interfere in the claimant group's decision on how to organise themselves for negotiations, the Crown is interested in discussing how they propose to manage the negotiations, as this will have an impact on both the funding allocated and the Crown's planning for the negotiations.

OTS must then consult the Treasury before making a final recommendation to the Minister for Treaty of Waitangi Negotiations and the Minister of Finance, on the amount of claimant funding the Crown will provide.

During this process, OTS will keep the mandated representatives informed of how their funding approval is progressing. This process may take up to six weeks to complete, after which the mandated representatives will be advised of the Ministers' decision by letter.

ACCOUNTABILITY FOR FUNDS

Mandated representatives are told the total amount of funding approved and what the terms of payment will be. A reasonable contribution to mandate costs that the claimant group has already met (for which accounts may be requested) will be paid in a lump sum. Apart from that, payments are made in advance (for example, funding to assist in developing Terms of Negotiation is paid before the document has been developed), with the Crown paying in amounts of no more than \$50,000 at a time. Each payment will be linked to progress in negotiations and reaching the most important milestones. This will provide a good indicator of progress throughout the settlement process and assist the mandated representatives with budgeting. The allocation of claimant funding to milestones will need to be discussed by the Crown and the mandated representatives in pre-negotiations meetings.

The funding will be paid directly to the mandated representatives on behalf of the claimant group. The Crown will only make payment if the mandated representatives:

- complete and provide payment requisition forms and a breakdown of expenses
- provide OTS every 12 months with independently audited financial statements for the funds they have received, and
- provide, if OTS asks for them, copies of invoices for expenses incurred in the negotiation process.

The Crown needs this information to make sure that the funding has been spent on activities that will help reach a settlement, and to comply with obligations under the Public Finance Act 1989. These requirements do not replace any existing reporting or accountability obligations the claimant group may have (for example, as a trust, company or incorporated society). OTS will also provide audit guidelines to ensure claimant groups are fully aware of how they can comply with these requirements.

Mandated representatives will also need to be able to account for the use of the funding to their wider claimant group, in order to assure the group that they are managing the claim properly.

It is also preferable that:

- claimant groups are advised by their mandated representatives of the amount provided and how it is intended to be used
- there is a legal entity in place to receive the funding, such as a trust
- internal processes and policies are in place for the management of the claimant funding, and
- all internal payments are authorised through appropriate processes so that, for example, individual mandated representatives should not approve their own payments.

OTS will be able to provide information on the costs a claimant group is likely to incur, including the costs of specialist advice needed to assist mandated representatives complete their task of negotiating a settlement.

TAX

Claimant groups need to take into account that all funding provided by OTS to assist in the negotiations process is inclusive of GST, if any. Claimant groups are urged to seek independent advice as early as possible on their liability for tax on this funding.

SAVINGS

Once settlement is reached, any approved claimant funds that have not been spent will be paid to the claimant group's post-settlement governance entity, as well as the redress package they negotiate.

SHORTFALLS OF UNEXPECTED COSTS

If claimant groups have costs over and above the amount of approved funding, the Crown may, in exceptional circumstances, consider providing extra funds to cover them. But if the extra amount is approved, it is likely to be payment of a 'cash advance' on the final settlement. In other words, it will be deducted from the claimant group's eventual redress package, once settlement is reached. Such payments will be provided only if there is good progress in negotiations and settlement is close. Alternatively, the claimant group may wish to seek additional funding from other sources.

Terms of Negotiation – setting the ground rules and objectives for negotiations

Following recognition of the Deed of Mandate, the Crown and mandated representatives need to discuss how they will run the negotiations. This involves agreeing on 'ground rules' and objectives for the formal talks between the Crown and mandated representatives. These are called the Terms of Negotiation (or Terms) and are written into a non-binding agreement between the parties. The agreement is not binding because the parties at this stage have only agreed to negotiate. They should be free to 'walk away' from negotiations at any time if they choose. However, it is expected that the parties will keep to the Terms while in negotiations. Signing Terms of Negotiation is therefore a significant milestone towards settlement and is often the first agreement claimant groups have signed with the Crown since the Treaty of Waitangi.

KEY REQUIREMENTS OF TERMS OF NEGOTIATION

Each claimant group negotiates the wording of their Terms. However, parts of the Terms also set out the Crown's objectives and basic approach to Treaty settlements. Negotiations can only proceed if the claimant group accepts that the Crown also has objectives both generally, in relation to the Treaty settlement process, and in relation to specific settlements.

From the Crown's point of view, the Terms need to clearly define the claimant group who will benefit from the settlement. The definition of a claimant group is important because a key Crown objective of a successful settlement is that it be comprehensive. This means that a settlement accepted by the claimant group settles all the historical claims of a claimant group. Historical claims are defined as all the claims of a claimant group that result from the actions or omissions of the Crown prior to 21 September 1992. This covers all relevant claims registered with the Waitangi Tribunal and any other claims that the claimant group might have regarding the actions or omissions of the Crown prior to 21 September 1992. It includes claims relating to the Treaty, legislation or common law (including customary law and aboriginal title).

Other Crown objectives set out in the Terms are that the settlement to be negotiated:

- is intended to remove the sense of grievance of the claimant group
- will be fair and durable, and
- provides the foundation for an improved relationship between the Crown and the claimant group based on the Treaty of Waitangi and its principles.

The Terms provide that, after reaching settlement of all historical claims of a claimant group:

- neither the courts nor the Waitangi Tribunal, nor any other body, will be able to consider the issues covered by the settlement (including the validity or adequacy of the settlement), and
- memorials on the titles of properties within the claim area not subject to claims by other groups will be lifted.

These provisions are essential if the settlement is to be final.

However, a comprehensive settlement will still allow a claimant group or a member of a claimant group to pursue claims against the Crown for acts or omission after 21 September 1992, including claims based on the continued existence of aboriginal title or customary rights. The Crown also retains the right to dispute such claims or the existence of such title or rights. For more detail on the claims to be covered by a settlement see page 43.

The Terms also highlight that negotiations can only continue if:

- the mandated representatives fulfil any special conditions required by the Crown's recognition of their mandate and provide regular reports on that mandate.

Other matters covered by the Terms are:

- negotiations will be conducted in good faith
- negotiations are conducted in private and remain confidential, and media statements will only be made when the parties agree
- negotiations are 'without prejudice' (that is, there is no admission of liability. Neither party is bound until the Deed of Settlement is signed and they can go back to legal proceedings if negotiations break down), and
- any Deed of Settlement remains conditional until the claimant group ratifies it and Parliament passes any necessary settlement legislation.

The Terms can also include:

- reference to breaches of the Treaty that the Crown has already conceded, and/or
- the aspirations the claimant group may have for the settlement.

Negotiating brief for the claimant group and the Crown's negotiating parameters

CLAIMANT GROUP NEGOTIATING BRIEF

The mandated representatives need to identify the interests that they want to promote through the negotiations for the settlement of their historical claims. This is usually referred to as a Negotiating Brief. A detailed explanation of 'interests' in the context of negotiations is set out on page 91.

To prepare their Negotiating Brief, the mandated representatives need to:

- clarify what breaches and prejudice they consider should be included in discussions on the Crown's acknowledgements and apology
- identify the area of land affected by the claims
- identify culturally important sites and interests relating to them
- identify commercial Crown assets in their area of interest that they want the Crown to consider for potential use in settlement
- keep the wider claimant group informed of progress and consult with it as necessary, and
- resolve any issues that arise because other claimant groups also have an interest in a site or area. The Crown can only provide redress if it is satisfied that any overlapping claims have been addressed.

Mandated representatives will draw up a Negotiating Brief in discussion with members of the claimant group. OTS suggests that mandated representatives consider the types of redress developed in settlements so far in developing their Negotiating Briefs. These are explained in Part 3.

CROWN NEGOTIATING PARAMETERS

The Crown needs to:

- discuss with the claimant group the general issues that the Crown needs to take into account, such as fairness between settlements, fiscal constraints and the wider public interest
- identify Crown properties in the claimant group's area of interest and assess their potential availability (land in the conservation estate is not generally available apart from individual sites of special cultural significance), and
- once it has precise information about the importance of specific sites and other interests of the claimant group, discuss with the mandated representatives and departments or agencies concerned redress options that may meet the claimant group's interests.

The Crown generally approaches the negotiations from within established policy parameters. A wide range of redress options has been developed to address claimant group and Crown interests and, where possible, the Crown prefers to use existing types of redress. Further detail on these redress options is provided in the settlement redress section starting on page 77.

Specific approval by Cabinet or Ministers is required for:

- any new types of redress
- any exceptions to Crown policy
- the financial and commercial redress, and
- the redress in the draft Deed of Settlement before it is ratified by the claimant group.

CONFIDENTIALITY

Material prepared for the negotiations, such as the claimant group's Negotiating Brief and papers written for Ministerial or Cabinet approval, may contain some comments or information that the parties do not necessarily wish to share with each other during negotiations. For this reason, such material is usually kept confidential.

Overlapping claims or shared interests

An overlapping claim exists where two or more claimant groups make claims over the same area of land that is the subject of historical Treaty claims. Such situations are also known as 'cross claims'. Addressing overlapping claims is a key issue for settlements, particularly in the North Island where there are many valid overlapping claims.

The settlement process is not intended to establish or recognise claimant group boundaries. Such matters can only be decided between claimant groups themselves. For example, any maps used during the settlement process or in subsequent communications are used only for specific purposes, such as determining the area where protocols with government departments might apply.

The Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. These groups are able to negotiate their own settlements with the Crown. Nor is it intended that the Crown will resolve the question of which claimant group has the predominant interest in a general area. That is a matter that can only be resolved by those groups themselves.

The Waitangi Tribunal has discussed the nature of Māori boundaries in its Ngāti Awa Raupatu Report 1999. In that report, the Tribunal stated, 'the essence of Māori existence was founded not upon political boundaries, which serve to divide, but upon whakapapa or genealogical ties, which served to unite or bind. The principle was not that of exclusivity but that of associations. Indeed, the formulation of dividing lines was usually a last resort.' The Tribunal applied this approach when considering overlapping claims between Ngāti Maniapoto and Ngāti Tama. It upheld a revised Crown settlement offer to Ngāti Tama that provided for non-exclusive redress and the transfer of particular sites to Ngāti Tama in an area claimed by both groups, where Ngāti Tama's interests justified this (see the Tribunal's Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report 2001).

In areas where there are overlapping claims, the Crown encourages claimant groups to discuss their interests with neighbouring groups at an early stage in the negotiation process and establish a process by which they can reach agreement on how such interests can be managed. Addressing overlapping claims at an early stage will avoid delays – and the possibility of a challenge to the settlement package – at a later stage in the settlement process. The Crown will assist this process by providing information on proposed redress items to all groups with a shared interest in a site or property.

Disagreements relating to overlapping claims may arise from the Crown proposing a particular form of redress, such as the transfer of a site or property to one claimant group to the exclusion of another. Where there are overlapping claims, such exclusive redress may not always be appropriate. Often both groups have an interest, such as historical or cultural associations, in a site or property and these interests can be accommodated by a form of redress which is non-exclusive. This allows the interests of different groups to be recognised and accommodated.

Clearly, the Crown would prefer that disagreements over redress were settled by mutual agreement between claimant groups. However, in the absence of agreement amongst them, the Crown may have to make a decision. In reaching any such decision on overlapping claims, the Crown will be guided by two general principles:

- the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations, and
- the Crown's wish to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.

Exclusive redress

Managing overlapping claims is an important issue for both the Crown and claimant groups. Some forms of redress that the Crown can offer claimant groups is only available in exclusive form. In other words, if the Crown provides this redress to one claimant group it is not available as redress for other claimant groups.

Examples of exclusive redress might be a commercial office building owned by the Crown or licensed Crown forest land. If it is provided to one claimant group in a settlement, it is clearly not available as redress for another claimant group. Similarly, if the Crown agrees to an overlay classification (tōpuni or taki poipoia) for one group, that site will not usually be available to another claimant group (see Part 3 for a full discussion of redress options).

Where there are valid overlapping claims to a site or area, the Crown will only offer exclusive redress in specific circumstances. For example, when several groups claim an area of licensed Crown forest land, the Crown considers the following questions:

- has a threshold level of customary interest been demonstrated by each claimant group?
- if a threshold interest has been demonstrated:
 - what is the potential availability of other forest land for each group?
 - what is the relative size of likely redress for the Treaty claims, given the nature and extent of likely Treaty breaches?
 - what is the relative strength of the customary interests in the land?, and
- what are the range of uncertainties involved? The Crown is likely to take a cautious approach where uncertainties exist, particularly where overlapping claimants may be able to show breaches of the Treaty relating to the land, and would lose the opportunity to seek resumptive orders from the Tribunal.

The relative weightings given to each of these considerations will depend on the precise circumstances of each case. Broadly, a claimant group would not have to show the dominant interest in the forest land to be eligible to receive that land in redress, only a threshold level of interest. The strength of relative customary interests in the land is only likely to be the primary factor when there is limited forest land available.

The Waitangi Tribunal has found that this approach to addressing overlapping claims to licensed Crown forest land is consistent with the Treaty of Waitangi and its principles (see the Tribunal's Ngāti Awa Settlement Cross-Claims Report 2002, chapter 4). Although this approach was developed in the context of licensed Crown forest land, similar principles would be expected to apply to other commercial redress.

Exclusive redress may also be considered where a claimant group has a strong enough association with a site to justify this approach (taking into account any information or submissions about the association of overlapping claimants with that site). This exception would apply to sites, such as wāhi tapu, where no other site could be used as alternative redress.

Non-exclusive redress

Where overlapping claims exist and there is no agreement among groups about how these should be dealt with in a settlement, the Crown may offer non-exclusive redress. This may include legal instruments such as Statutory Acknowledgements, Deeds of Recognition and Protocols with government departments and agencies. These forms of redress, which allow more than one claimant group to gain redress in relation to a site or property, are explained fully in Part 3.

The Crown does not require the agreement of other claimant groups when it is offering non-exclusive redress in areas with overlapping claims, but such agreement is preferable.

Choosing and establishing a governance entity to manage settlement assets

It is very important to think about the post-settlement governance entity and begin work on developing that entity at an early stage in the settlement process. The governance entity represents the claimant group and holds and manages the settlement redress on their behalf. Determining the type and structure of that entity is, therefore, a very important decision for claimant group members. The process for developing the governance entity should involve the whole claimant group and they will need time to consider and contribute to its development.

The Crown cannot transfer the settlement redress to the claimant group until this entity has been developed and ratified by the members of the claimant group. For this reason, the Crown requires that the governance entity be ratified by a claimant group and established as a legal entity by the time the settlement legislation enacting the settlement package is introduced in Parliament. The introduction of settlement legislation normally occurs within six to twelve months of a Deed of Settlement being signed. Delays in establishing and ratifying a governance entity will result in delays in a claimant group receiving its settlement package.

Claimant groups should seek professional advice on their choice of a governance entity to ensure that it will meet their needs and purposes following a settlement. At first glance there is a wide variety of possible legal entities for claimant groups to choose from, but the experience of claimant groups who have passed through the settlement process is that, in practice, the choice is limited (for more information on governance entities see pages 67–72). It will also assist claimant groups and avoid possible delays if their mandated representatives discuss with OTS how they intend to establish a governance entity and the types of governance entity they are considering, at an early stage in the settlement process.

Whichever entity is chosen that entity must provide for accountable and transparent processes of governance. This means that the work of elected representatives is visible and that they are accountable to their wider claimant group membership.

Step 3: Negotiations

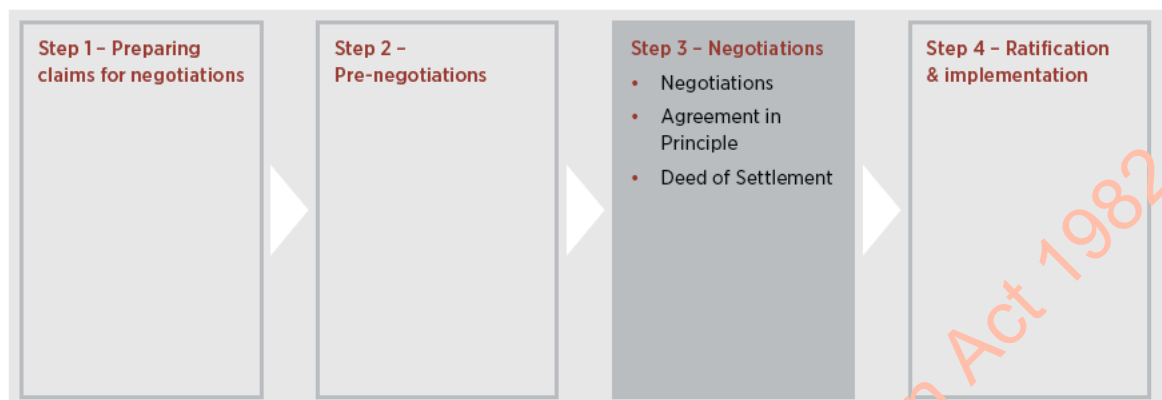


Figure 2.10: Step 3 – negotiations

During the negotiations step, the Crown and the mandated representatives put forward their proposals for settling the claim and try to reach an agreement. If there is broad agreement, the discussions then concentrate on the details of those proposals. Usually the Crown and the mandated representatives exchange letters outlining an Agreement in Principle to signal their agreement on the monetary value of the settlement (what is known as the 'settlement quantum'), and the scope and nature of other redress to be provided. When all the details of the redress have been agreed, these are set out in a draft Deed of Settlement for approval by Cabinet and for ratification by the claimant group (see Step 4, page 64).

In this section we look more closely at:

- negotiating structures and processes
- who takes part in negotiations and how they actually work
- how claims of Iwi and whānau can be addressed in comprehensive negotiations, and
- the role that third parties, such as local authorities, can have in negotiations.

Negotiating structures and processes

Who are the people involved on each side of the negotiating table and how do they work together? On each side, the actual negotiators report to and are accountable to the people or institutions who give them authority to negotiate.

THE CROWN

For most negotiations, Cabinet will entrust this responsibility to the Minister for Treaty of Waitangi Negotiations and other relevant Ministers. The Crown negotiating team, which is made up of officials, then negotiates on the Minister's behalf. As outlined earlier, any redress outside established policy parameters requires the specific approval of Cabinet or Ministers. Cabinet must also approve the redress in the draft Deed of Settlement before it can be initialled by the Crown and the mandated representatives and put to claimant group members for ratification.

CROWN NEGOTIATING TEAM

OTS is responsible for co-ordinating the Crown negotiating team. The team will usually have three or more members and be supported by specialist advisers. Typically, the members of the team are:

- *Negotiations/Policy Manager* – an OTS manager who leads the negotiations on behalf of the Crown. She or he reports to the Director of OTS, who is accountable to the Minister for making sure the negotiations are within the limits of the established policy parameters. In some negotiations, the Crown team will be led by a Chief Crown Negotiator working on contract. She or he will work in tandem with the OTS Negotiations/Policy Manager.
- *Other Crown negotiators* – usually a senior official from the Department of Conservation and another from Treasury. The Department of Conservation is involved because many aspects of cultural redress relate to land held by the Department. Treasury participate because of the financial importance of the settlement to the Crown. Other government departments – for example, the Ministry for Primary Industries or Land Information New Zealand – are involved in negotiations as issues relating to their area of responsibility are raised. OTS co-ordinates their involvement, also.
- *Specialist advisers* – depending on the size and type of the claim, the Crown negotiating team could be supported by a lawyer from the Crown Law Office, a commercial lawyer or other professional adviser (for example, on forestry valuations).

CLAIMANT GROUP NEGOTIATING TEAM

Mandated representatives represent the claimant group in negotiations. They may appoint a group of negotiators or be the negotiators themselves. Negotiating teams are accountable to mandated representatives and these representatives are accountable back to the claimant group.

- *Negotiating team* – the size and make-up of this team is a matter for the claimant group – although experience has shown that a core team of about three to five is a practical size. Whether to have a 'Chief Negotiator' is a matter for the claimant group.
- *Specialist advisers* – how to include specialist advisers on the negotiating team is a matter for the claimant group. Sometimes they are part of the core team. In other cases they are not on the team but provide advice on particular issues when required. OTS can provide information on the types of specialist assistance that might be required at different stages of the negotiations process.

JOINT WORKING GROUPS

Usually there are many issues to be covered in negotiations, and for larger claims, the core negotiating teams may not be able to deal with each issue in detail themselves and move quickly towards settlement. One option is to set up joint working groups on key issues to enable a number of issues to be worked on at the same time. This frees up the core negotiating teams to look at the settlement as a whole. Working groups also provide an efficient way for experts in various fields to contribute to the settlement. Whether or not working groups are used, the negotiators will usually need to work through the following issues:

- *Crown Apology* – the historical basis of the claims, those matters the Crown acknowledges as breaches of the Treaty and its principles, and the wording of the Crown's apology.
- *Financial and commercial redress* – working out the detailed terms on which agreed commercial settlement assets might be transferred – for instance, valuation matters, terms of leasebacks, disclosure of information about the assets. For more complex settlements, smaller sub-groups might be set up to look at types of assets such as forestry.
- *Cultural redress* – considering the application of specific redress options to meet claimants' interests in wāhi tapu, resource management and access to traditional food and resources, and ongoing relationships with the Crown.

When the parties have agreed in principle on the settlement redress, the claimant group will receive a letter from the Minister for Treaty of Waitangi Negotiations outlining an Agreement in Principle, to which the claimant group will then formally respond.



Crown and Te Uri o Hau working group

Agreement in Principle

The Agreement in Principle phase of Treaty settlement negotiations is where the majority of substantive negotiations about redress happen. All key redress must be negotiated in this phase and no substantive new redress will be considered during the following Deed of Settlement phase. The Agreement in Principle will set out the agreed settlement terms and all settlement redress. An Agreement in Principle is a non-binding document however, the Crown considers that once an Agreement in Principle is signed the settlement will be finalised on the basis of this document and this document alone. It should therefore be as comprehensive as possible and not include exploratory statements especially in relation to key redress.

All potential settlement redress must be raised for negotiation and if agreed recorded in the Agreement in Principle. No new redress will be included in the deed. Key issues requiring particular attention to achieve a robust Agreement in Principle within the timeframes agreed are:

- historical account
- acknowledgements and apology
- Crown properties as redress – transfer or vesting of settlement properties
- statements of iwi values-overlay classifications, name changes and financial and commercial redress amounts.



Figure 2.11: Crown and claimant negotiating teams – accountability

HISTORICAL ACCOUNT, ACKNOWLEDGEMENTS AND APOLOGY

It is policy to present Crown acknowledgements to claimants during the Agreement in Principle phase, before historical account negotiations commence. The acknowledgements will be refined over the course of historical account negotiations. Ideally most of the Crown acknowledgements and at least section headings for the historical account will be completed in time for inclusion in the Agreement in Principle. If a fully drafted historical account cannot be included in the Agreement in Principle, refinement of the acknowledgements may continue after the Agreement in Principle.

CROWN PROPERTIES AS REDRESS – TRANSFER OR VESTING OF SETTLEMENT PROPERTIES

During negotiations properties may be identified as commercial or cultural properties. Once Crown property redress is agreed, the properties are recorded in the Agreement in Principle and only those properties (cultural or commercial) can become settlement properties. No new Crown properties can be added into the Deed of Settlement after Agreement in Principle.

STATEMENTS OF IWI VALUES – OVERLAY CLASSIFICATIONS

During Agreement in Principle negotiations the mandated body should consider what the relevant settling group's statements of values are and where the sites are that the overlay classifications may apply to. The sites must be listed in the Agreement in Principle to be part of the settlement.

NAME CHANGES

Mandated bodies can seek to add new official geographic names. These need to be recorded in the Agreement in Principle and are subject to overlapping claims resolution.

FINANCIAL AND COMMERCIAL REDRESS AMOUNTS

The mandated body and the Crown will need to negotiate and agree the financial and commercial redress amount (financial redress) and record that in the Agreement in Principle. This is also called quantum.

Because the Agreement in Principle records all settlement redress it is necessary that any overlapping claims are substantially resolved before the Agreement in Principle is finalised and signed. Overlapping claims are where two or more claimant groups make the same claim over the same area of land (that is the subject of historical Treaty claims). The provision of settlement redress in the Agreement in Principle will remain subject to the satisfactory resolution of overlapping claims prior to the Deed of Settlement being signed. It's not in the interests of the mandated body or the Crown to finalise an Agreement in Principle until overlapping claim issues are satisfactorily resolved. Dealing with these issues at an early stage in the process avoids the potential for later lengthy and costly delays to a settlement. OTS will discuss and agree an overlapping claims strategy with mandated bodies in the Agreement in Principle negotiations phase.

The mandated body may request, and the Crown may agree, to advance up to 20% of the financial redress amount when the Agreement in Principle is signed or shortly after. This will be recorded in the Agreement in Principle.

Once an Agreement in Principle is signed by the Crown and mandated iwi body negotiations work shifts from negotiating redress to a more technical deed-drafting process.



Signing of Ngati Ruanui Heads of Agreement

Deed of Settlement

A Deed of Settlement is the comprehensive and final agreement reached between the Crown and a claimant group. A Deed of Settlement sets out in detail the redress that the Crown will give to the claimant group in order to settle their claims. The redress may include the Crown's acknowledgements and apology, payment of cash, the transfer of lands within the claim area, and mechanisms for recognising other important interests that the claimants might have. It is essential that the Deed include:

- mutual acknowledgements about what is being settled – all historical claims (claims regarding actions or omissions of the Crown prior to 21 September 1992) of the claimant group
- a statement by the claimant group that the settlement is accepted as fair, final and comprehensive, and
- an acknowledgement that once the claims are settled, the jurisdiction of the courts and the Waitangi Tribunal over the claims is removed, any memorials on former SOE properties are removed and any landbank arrangements in relation to the claimant group are wound up.

The Deed can also include:

- the background to the negotiations, including a history of the claims, any previous investigations, hearings before the Waitangi Tribunal (if there have been any), and any relevant court decisions
- an outline of the negotiations and agreements leading to the current settlement, including an Agreement in Principle or any other undertakings entered into between the Crown and the claimant group
- the parties' intentions regarding the ongoing Treaty relationship between the Crown and the claimant group, and
- a statement that the settlement of all historical claims of that claimant group does not affect that claimant group's right to pursue claims against the Crown for acts or omissions after 21 September 1992, including any claims based on aboriginal or customary rights, and that the Crown also retains the right to dispute such claims.

Cabinet must approve the content of a Deed of Settlement before it can be initialled by mandated representatives prior to ratification by the wider claimant group. Usually, legislation is then required for the Deed to become unconditional. Prior to the introduction of legislation the claimant group will have ratified and established a governance entity to hold and manage the settlement assets. For some small claims, settlement legislation is not required and the Deed will state that it is a binding agreement on signing by the Crown and claimant group representatives.

In summary, the process from Agreement in Principle to final Deed of Settlement usually works like this:

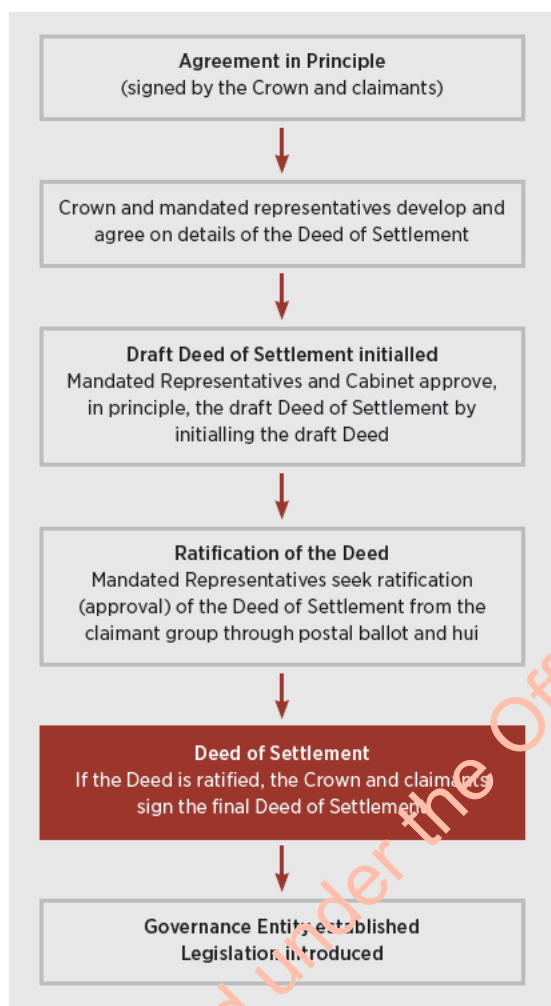


Figure 2.12: the process from Agreement in Principle to Deed of Settlement

Under step 4, the guide explains how the ratification process works and goes on to look at implementing the Deed of Settlement. Before doing so, the way in which the parts of a claimant group can receive specific redress in a comprehensive settlement is set out. This is followed by a discussion of the role of third parties in negotiations.

Hapū or whānau interests

As noted earlier, the Crown believes there are major benefits to both claimant groups and the Crown in having comprehensive negotiations with large natural groupings. This means that the various items of redress are not individually linked back to specific claims or grievances, but that the redress in total settles all the historical claims of the claimant group. It is then up to the claimant group, within its governance entity, to decide how to manage and distribute the benefits, taking into account the interests of hapū or whānau. This is usually a practical and realistic approach, given that the Crown does not provide full compensation for grievances, and changes in land ownership and use usually make it impossible to match grievance and redress on a site-by-site basis. The result is that smaller claims will usually be merged with a claim by a large natural grouping (see page 39 for more detail).

However, the Crown recognises that in some cases this comprehensive approach needs to take into account smaller, individual claims which can be addressed within the comprehensive settlement. This will only be considered where the grievances are very specific.

The Crown and mandated representatives need to discuss and agree on whether and how many claims of the claimant group should be given separate recognition and redress within the settlement. Generally, specific redress options for individual hapū or whānau should form only a small proportion of any overall redress package. This ensures that most of the benefits of settlement are available to all members of the claimant group.

EXAMPLE – HAPŪ INTERESTS IN THE NGATI RUANUI DEED OF SETTLEMENT

The following examples show how particular hapū interests were met in the Ngati Ruanui settlement.

During the negotiations between the Crown and Ngati Ruanui, the Ngati Ruanui mandated representatives sought redress involving the Turuturu Mokai pā site. This site was particularly significant to one Ngati Ruanui hapū, Ngati Tupaia, as it was the site of an important battle they had fought during the Taranaki Wars. The mandated representatives sought the return of the site for Ngati Tupaia.

The Crown (and the South Taranaki District Council, who owned or administered parts of the site) agreed to transfer the site to the Ngati Ruanui governance entity, subject to on-going public access over part of the site. Following its transfer to the Ngati Ruanui governance entity, it is intended that the site will be transferred to Ngati Tupaia, once an appropriate entity to receive the site on behalf of Ngati Tupaia has been established.

Other settlements where separate provision for hapū or whānau interests have been agreed include the Ngāti Tūrangitukua settlement (1998) and Ngāi Tahu settlement (1997).

Role of third parties in settlement negotiations

OTS is often asked about the role of parties other than the Crown and claimants in settlement negotiations.

Negotiations are between the Crown and the claimant group concerned. Other parties such as local authorities, private individuals or special interest groups may have a strong interest in the outcomes of the negotiations, but this does not give them a 'seat at the table'. However, communicating with other parties appropriately during the negotiations can both improve the redress available, and improve acceptance and understanding of the eventual settlement. Examples of how this can occur are considered next.

LOCAL AUTHORITIES

Local authorities are often responsible for managing many of the reserves in their area. These reserves may cover both land owned by the council and land owned by the Crown that has been set aside as a reserve. Land owned by or vested in a local authority is not available for use in Treaty settlements, unless the local authority offers it for use. The Crown also prefers that the consent of a local authority administering a Crown-owned reserve is obtained, if it is to be used in a settlement.

If a claimant group is interested in a Crown-owned reserve administered by a local authority, the Crown, claimant group and local authority can work together to meet the interests of all parties concerned. Options include transferring title to the claimant group but with the local authority retaining control and management, perhaps with input from the claimant group. Retaining rights of public access to reserves will usually be a condition of use if the reserves become part of a settlement.

Local authorities can also be involved in discussions on natural and physical resource management issues, airports or street names, as well as reserves that they own outright. Because local authorities are not part of the Crown, they cannot be bound to commitments on their part in a settlement unless settlement legislation affects their rights and duties. However, they may well agree to undertake certain actions (such as working on water quality or changing a street name) and this is often recorded in the Deed of Settlement as having happened. The main example of redress with a general impact on local authorities in a claim area is the Statutory Acknowledgement (see pages 122–123).

The Crown recognises that the long-term success of settlements will depend very much on effective working relationships at the local level. Good consultation during the negotiations lays the foundation for this. To promote such relationships, the Crown is willing to facilitate discussions between claimant groups and local authorities. The Crown, through a letter from the Minister for Treaty of Waitangi Negotiations, can encourage local authorities to enter into Memoranda of Understanding with claimant groups.

PRIVATE INDIVIDUALS OR ORGANISATIONS

As previously noted, private land is not available for use in settlements. Many areas of Crown land are also subject to private property rights for the benefit of third parties. These rights include easements, licences and leases. The Crown ensures that third parties are notified and their interests are suitably protected in settlement arrangements.

THE GENERAL PUBLIC AND PUBLIC INTEREST GROUPS

In negotiating with Māori to settle historical Treaty claims, the government is aware that there is widespread public interest in the Treaty claims settlement process, particularly if it involves conservation land or a change in the way it is managed. It is generally not practical or appropriate to discuss settlement options publicly until there is a broad measure of agreement between the Crown and mandated representatives. Both parties need confidentiality to explore ideas and express themselves freely.

However, as a negotiated settlement develops, there are situations where a certain level of public communication is not only helpful, but vital for wider acceptance of the settlement. This may happen through contact with a number of national conservation organisations that represent the public interest in conservation matters. For example, the New Zealand Fish and Game Council has authority by law to advise the Minister of Conservation on matters affecting sports fish and game and the New Zealand Conservation Authority has been established by law to advise the Minister of Conservation on matters affecting conservation legislation. There are also a number of established public interest groups, such as the Federated Mountain Clubs of New Zealand and Federated Farmers, with whom it may be appropriate to consult from time to time.

The Crown acknowledges the value of communicating with the public, and with local authorities and special interest groups, about settlements that concern public conservation land, or Crown lands administered by local authorities. However, communication does not give third parties the right to veto any aspect of the settlement or to alter agreements reached between the Crown and a claimant group. Nevertheless, such communication does enable both the Crown and claimant group to make decisions about the settlement redress from a good understanding of the potential impact on the wider community. It also helps make settlements better understood and more acceptable to the public at large, and therefore more durable.

Step 4: Ratification and implementation



Figure 2.13: Step 4 – ratification and implementation

The last step of the negotiations process involves getting final approval for the settlement, and transferring the agreed redress to the claimant group.

In particular this involves:

- ratification of the Deed of Settlement
- ratifying and establishing a governance entity for holding and managing settlement assets
- settlement legislation, and
- implementation.

Ratification

The Deed of Settlement initialled between the Crown and the mandated representatives must be clearly approved by the wider claimant group before it becomes binding. This approval process is called ratification.

The key part of the ratification process is a postal ballot in which all members of the claimant group over the age of 18 are eligible to vote. Because many members of the claimant group will live outside their rohe, a postal ballot is an essential and not an optional part of the ratification process.

For this reason, it is essential that a claimant group has developed a register of its members by this stage in the settlement process. The register is a critical tool for providing members with the opportunity to take part in the ratification process through hui, receiving material explaining the settlement offer, and the postal ballot.

To gain approval, the claimant representatives must communicate with their hapū or iwi members about the details of the proposed settlement. This communication will build on earlier consultation between mandated representatives and the wider claimant group. Communication must also be open enough to make sure that all members of the claimant group, including those who live outside their rohe, can take a full part in the discussion that is part of this final decision-making stage. The mandated representatives usually publish a written summary of the Deed of Settlement, which is distributed as widely as possible. This publication complements the communication meetings organised by the mandated representatives. Because of the importance of the ratification process, it is essential to allow claimant group members enough time to consider the proposed Deed of Settlement. Experience has shown that communication with claimant group members during the ratification process is considerably enhanced if they have had regular opportunities throughout the negotiations process to discuss progress with mandated representatives.

MAKING SURE THE RATIFICATION PROCESS IS ADEQUATE

Like mandating, the ratification process is for the claimant group to work through, but the Crown will not sign a settlement if the process used was inadequate, or if the claimant group does not clearly support the proposed settlement. OTS therefore keeps in close contact with the mandated representatives to help them ensure that the ratification process will be acceptable to the Crown. The basic principle is that all adult members of the claimant group must have the opportunity to have a say. The most effective way of doing this is through a postal ballot.

FUNDING FOR RATIFICATION

The Crown makes funding available to the mandated representatives to cover ratification processes. Ratification involves significant costs to a claimant group. Therefore, claimant groups need to plan for this when assessing their funding needs at the start of negotiations.

HAPŪ CONSULTATION, HUI AND POSTAL BALLOTS

To help make this final decision on ratification, claimant groups may use a combination of postal voting, communicating directly through hui held inside and outside their rohe, and written material sent directly to members of the claimant group. In designing a ratification process, claimant groups will obviously need to consider the views of hapū and the tikanga of those affected. They also need to make sure that as many members of the claimant group as possible may take part in the decision. Postal ballots in particular are very important for gathering views if claimant group members are scattered throughout the country – as many claimant groups are today. For this reason, it is important that the claimant group register is as up to date as possible and everyone on the register has been verified as a member of the claimant group. Whakapapa is the basis for verification.

Postal ballots should be conducted by an independent returning officer. Voting forms should ask eligible voters whether they vote to approve or disapprove of the Crown settlement offer, and, if they approve, authorise that the Deed of Settlement be signed by a named individual or individuals on behalf of the claimant group. Often, but not always, those authorised to sign are the mandated representatives.

The Crown will also send officials from Te Puni Kōkiri as independent observers to hui where the Crown offer is discussed to ensure a fair and open process is followed.



Figure 2.14: ratification of Deed of Settlement by the claimant group

GETTING INFORMATION TO ALL MEMBERS OF THE CLAIMANT GROUP

To make sure that all claimant group members understand what it means to ratify the settlement, claimant groups usually produce a detailed summary of the Deed of Settlement that can, for example, be sent out with postal ballot forms. Planning for writing and publishing the document should be built into the mandated representatives' work programme and included in budgets.

CLAIMANT GROUP'S DECISION

The mandated representatives then let the Minister for Treaty of Waitangi Negotiations know the results of the ratification process. If the Deed of Settlement has been ratified and the Crown considers that there is enough support for the Deed, the Crown and the person or persons authorised by the claimant community through the ratification process sign it. As noted on page 60, settlement legislation is then usually required for the Deed to become unconditional. A governance entity approved by the members of the claimant group must be established before the legislative process can begin. We explain the legislative process on pages 72-74.

SIGNING THE DEED OF SETTLEMENT

This is a very important ceremony for both the claimant group and the Crown, since it is both the end of negotiations and the start of the new relationship set out in the Deed. Most claimant groups prefer to host the ceremony at one of their marae so that as many people as possible can take part. The Crown is usually represented by the Minister for Treaty of Waitangi Negotiations, as well as other Ministers and officials involved in the negotiations. The claimant group may also wish to invite MPs, members of other iwi and local dignitaries.



Signing of the Deed of Settlement for Mātaatua Wharenui, Wairaka marae, 1996

Governance entities – Crown principles

By this time, mandated representatives should have developed their ideas about the type of governance entity that will best serve the needs of their claimant group after the settlement is completed. The term governance entity simply refers to the legal entity the claimant group will use to represent them and to hold and manage the settlement redress to be transferred by the Crown under the Deed of Settlement. This includes not just the commercial and financial assets to be transferred, but also the cultural redress. The latter includes Statutory Acknowledgements, Deeds of Recognition, camping entitlements, Protocols with government departments and agencies and other cultural redress.

It is a matter for the claimant group to choose a governance entity that will serve their needs and reflect their tikanga. However, to fulfil its responsibilities to taxpayers and all members of a claimant group, the Crown has developed a set of principles against which proposed governance entities are assessed. If the proposed governance entity is consistent with these principles – which are normally included in the Deed of Settlement – the Crown is able to transfer settlement assets to the claimant group, once any settlement legislation is enacted.

The Crown's principles for post-settlement governance entities are that the entity has a structure that:

- adequately represents all members of the claimant group
- has transparent decision-making and dispute resolution procedures
- is fully accountable to the whole claimant group
- ensures the beneficiaries of the settlement and the beneficiaries of the governance entity are identical when the settlement assets are transferred from the Crown to the claimant group, and
- has been ratified by the claimant community.

Ensuring that the governance entity is consistent with these principles means that the Crown is meeting its responsibility to all New Zealanders to ensure that settlement assets are managed by and for those who will rightfully benefit from the settlement. These concerns are, of course, equally important to members of the claimant group who will want to see good management of their settlement assets.

The Crown cannot transfer the settlement redress to a claimant group until they have a governance entity that has been considered and ratified by the members of a claimant group. For this reason, the Crown requires claimant groups to have ratified and established their governance entity by the time the legislation implementing a settlement is introduced to Parliament.

Choosing a governance entity

A governance entity is the body or entity that a claimant group chooses to represent members following a settlement. The governance entity also holds settlement assets and makes decisions on how these assets will be managed and how any benefits derived from these assets are used for the benefit of claimant group members.

Based on the experience of claimant groups, it is unlikely that an existing tribal governance entity will meet the needs and purposes of claimant groups following a settlement. Existing entities may not be legal entities, and may also lack transparency or not be representative of the entire claimant group.

Although on the surface the range of options for claimant groups seeking to develop a new governance entity is quite large, in practice the number of options that meet the needs and purposes of such groups following the conclusion of a settlement is relatively small. OTS urges claimant groups to seek appropriate professional advice when considering their options for a governance entity.

Increasing numbers of claimant groups have found that private trusts, with subsidiary trusts or companies to manage the settlement assets, meet their post-settlement objectives. The Crown is also comfortable about transferring settlement redress to such entities.

Two existing types of governance entity—a Māori Trust Board established under the Māori Trust Boards Act of 1955 and a governance entity established through private legislation – require some further comment at this point.

Māori Trust Boards are, by law, ultimately accountable to the Minister of Māori Development and not to the members of a claimant community. The Crown does not consider accountability to the Minister rather than to the members of a claimant group appropriate for the administration of a settlement. Beneficiaries of a Māori Trust Board also do not have a beneficial interest or rights to the use or benefit from property in such Trust Boards. Because of these factors, claimant groups may find Trust Boards too restrictive and lacking in accountability. Although a review of the Act governing these boards is under way, it is unlikely the results of this review will be implemented in time to accommodate claimant groups who are already in negotiations with the Crown or are considering entering the negotiations process.

Governance entities established through private legislation also tend to have more drawbacks than advantages. Firstly, an individual Member of Parliament must agree to sponsor the proposed law. Secondly, Parliament must be convinced that there is no other way of achieving the aims of the legislation within existing law. And, as with all legislation, it will be subject to public notification and consultation.

Such a Bill may also face extensive and public examination by a Select Committee during its passage through Parliament and that Select Committee may recommend changes to the legislation to which the claimant group is opposed. And if subsequent amendments to the legislation establishing the governance entity are needed because of changes of circumstances, the claimant group will have to convince Parliament to make those amendments.

Private Bills also proceed on a timetable that is not within the control of either a claimant group or the government. As a result, the governance entity may not be established by the time a settlement has been concluded. Settlement legislation is not introduced to Parliament until the governance entity is established so it is possible that seeking to establish a governance entity through private legislation could lead to a delay in the transfer of the settlement assets to the claimant group.

A Private Bill can also be costly. Claimant groups must pay for any legislation to be drafted, devote a considerable amount of their own time to managing the process and meet the cost of any professional advisers used during the passage of a Private Act.

Any governance entity established under a Private Act must still comply with the principles set out at the beginning of this section. The Crown, as with any other post-settlement governance entity, does not provide tax advantages to governance entities established in this way.

Finally, claimant groups may find that matters they think are better discussed only among their members become subject to public debate through the legislative process. Internal hapū or iwi issues can thus enter the wider public arena.

Once again, choosing from the available options for a post-settlement governance entity is a matter for claimant groups and their members. OTS urges claimant groups to discuss this matter and seek professional advice as early as possible in the settlement process. The Crown cannot transfer settlement assets to a claimant group until their governance entity has been ratified and established.

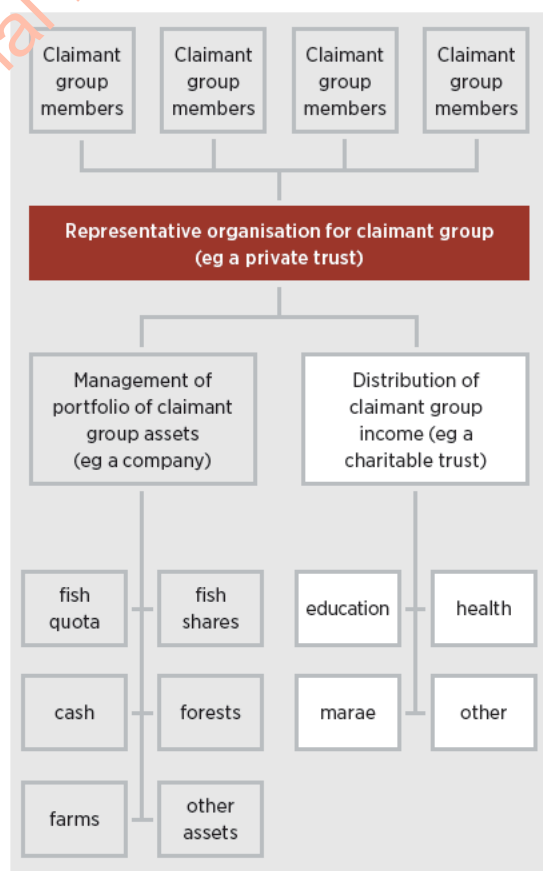


Figure 2.15: example of a governance entity for distribution of settlement assets (based on a model developed by Te Ohu Kai Moana)

Reviewing and ratifying a governance entity

While a claimant group's mandated representatives will have the leading role in exploring and developing options for a governance entity, they must also give all members of the claimant group the chance to review and ratify their proposed entity.

The ratification process for a post-settlement governance entity may be carried out at the same time as the members of a claimant group consider whether or not to ratify a Deed of Settlement, or it can occur as a separate process. Whichever is the case, the proposed post-settlement governance entity must be ratified by the members of the claimant group and established as a legal entity before the Crown can introduce settlement legislation and transfer the redress provided in the settlement to the claimant group. The Crown must also have had the opportunity to assess the proposed governance entity against its principles before the wider claimant group membership is asked to ratify that entity. The Crown's review of the entity against the principles will take in any subsidiaries of that entity as well.

The ratification process for a governance entity will be similar to that used to ratify a Deed of Settlement and the Crown's review of the ratification process will also take a similar form.

The Crown has developed a set of questions that members of claimant groups can use during the ratification process to assess whether they will support the proposed post-settlement governance entity. These questions must be answered in any communication material used by mandated representatives of a claimant group during the review and ratification process for a post-settlement governance entity. The Crown also uses the answers to these questions to assess whether the proposed entity meets the principles of representation, accountability and transparency.

DOES THE CROWN REQUIRE SETTLEMENT ASSETS TO BE USED FOR PARTICULAR PURPOSES?

No. Settlement assets belong to the claimant group and it is for members, through the governance entity, to decide how best to use their redress, provided that this is for the benefit of the claimant group. Of course, the Crown hopes that the use and distribution of settlements should help improve the social and economic status of Māori, but the way to achieve this is for each claimant group to decide.

Twenty questions on governance

INFORMATION REQUIRED IN DISCLOSURE MATERIAL FOR GOVERNANCE ENTITIES

In the twenty questions:

- a **beneficiary** is a person who is entitled to benefits from a Deed of Settlement of historical claims between Maori claimants and the Crown
- **benefits** can take a range of forms, and it is up to the governance entity to make the decisions on how those benefits will be distributed. For example, scholarships, kaumatua flats, marae maintenance and health initiatives for members are various types of benefit. There could also be 'intangible' benefits such as the increased vigour and strength of a claimant group because of an increase in the number of members who speak te reo and are integrated into their own tikanga
- the **governance entity** is the representative, accountable and transparent body that receives and manages the settlement on behalf of the claimant group. It will:
 - represent the claimants in regard to the settlement
 - make decisions on how to manage any redress received in the settlement package (cash, properties and other redress), and
 - make decisions on how benefits (if any) are passed to the beneficiaries of the settlement
- a **member** is a beneficiary who is registered with the governance entity in relation to the Deed of Settlement, and
- a **representative** is a person who is elected to the governance entity.

GENERAL

1. WHAT IS THE PROPOSED GOVERNANCE ENTITY AND ITS STRUCTURE?

- Briefly describe the governance entity, any bodies accountable to it (such as asset management and benefit distribution bodies), and the relationship between the governance entity and those bodies.

2. HOW WAS THE PROPOSED GOVERNANCE ENTITY DEVELOPED?

- What opportunities were there for beneficiaries of the settlement to provide input in the development of the proposals?, and
- To what extent were matters of tikanga and kawa considered in the development of the governance entity?

3. WHAT IS THE RELATIONSHIP BETWEEN THE PROPOSED NEW GOVERNANCE ENTITY AND EXISTING ENTITIES (IF ANY) THAT CURRENTLY REPRESENT THE CLAIMANT COMMUNITY?

- What happens to the existing entities once the new entity is established?

REPRESENTATION

4. HOW CAN BENEFICIARIES OF THE SETTLEMENT PARTICIPATE IN THE DEVELOPMENT OF THE GOVERNANCE ENTITY?

- Who are the beneficiaries of the settlement?
- Are all beneficiaries entitled to register as members?
- What are the benefits of registration?
- Are there any registration requirements?
- How will eligibility for registration be verified?
- Who makes decisions on registration and how are those decisions made?, and
- Can those decisions be appealed, and if so, how?

5. HOW DO MEMBERS HAVE A SAY IN WHO THE REPRESENTATIVES ON THE GOVERNANCE ENTITY WILL BE?

- How many representatives will there be on the governance entity?
- Who can be a representative?
- Are they chosen on iwi, marae, hapū, whānau or other group basis?
- How will they be chosen?
- How do members know when an election is due?, and
- How do members exercise their vote?

6. HOW OFTEN AND HOW WILL THE REPRESENTATIVES CHANGE?

- What is the term of office for a representative?, and
- Under what circumstances (if any) can a representative be removed?

ACCOUNTABILITY

7. WHAT ARE THE PURPOSES, PRINCIPLES, ACTIVITIES, POWERS AND DUTIES OF THE GOVERNANCE ENTITY AND ANY BODIES ACCOUNTABLE TO IT?

- What are the duties and obligations of the representatives?

- Do the governance entity and any bodies accountable to it have to act exclusively for the benefit of beneficiaries?, and
 - Who exercises control over any bodies accountable to the governance entity?
- 8. WHICH DECISIONS WILL MEMBERS HAVE A SAY IN AND HOW?**
- As well as having a say in who the representatives on the governance entity will be, will members have a say in any decisions made by the governance entity?
 - What notice, quorum and other relevant provisions will there be relating to meetings of members?
 - What voting rights do members have at hui called by the governance entity (such as the AGM)?, and
 - What majority will be required to pass a resolution at a meeting of members?
- 9. HOW ARE DECISIONS MADE BY THE GOVERNANCE ENTITY?**
- How often do the representatives meet?
 - What quorum and other relevant provisions will there be relating to meetings of the governance entity?
 - How are these meetings publicised?, and
 - Can members attend those meetings and what rights do they have at those meetings?
- 10. WHO WILL MANAGE THE REDRESS RECEIVED IN THE SETTLEMENT?**
- Will different bodies manage different aspects of the redress?
 - Are the relationships between the representational, commercial and social functions of the governance entity clearly defined?, and
 - Are there any limitations on management decisions on holding or using assets, for example, do any transactions require the consent of members?
- 11. WHO WILL DETERMINE WHAT BENEFITS ARE MADE AVAILABLE TO BENEFICIARIES?**
- Can the function of determining benefits be delegated by the governance entity?
- 12. WHAT ARE THE CRITERIA FOR DETERMINING HOW BENEFITS ARE ALLOCATED AND DISTRIBUTED?**
- Are these criteria set in the constitution of the governance entity or are the decisions left to the representatives?
- 13. HOW WILL THE PEOPLE MANAGING ASSETS AND DETERMINING BENEFITS BE ACCOUNTABLE TO BENEFICIARIES?**
- Will there be regular hui or other reporting processes for the representatives to report to beneficiaries?
 - What reports will beneficiaries receive?
 - How will roles and responsibilities be separated to clearly define the limits of power that each office holder has?
 - Are there any limitations on liability of the representatives?
 - Can the representatives be directors or employees of any bodies accountable to the governance entity?, and
 - What would happen if a representative had a conflict of interest in a decision or transaction of the governance entity?
- 14. WHAT ARE THE RULES UNDER WHICH THE GOVERNANCE ENTITY AND ANY BODIES ACCOUNTABLE TO IT OPERATE?**
- How do members get access to the rules (trust deeds or constitutions) of the governance entity and any asset management and benefit distribution bodies?, and
 - What legislation is particularly relevant to the rules (such as Companies Act 1993, Trustee Act 1956, Perpetuities Act 1964, Te Ture Whenua Māori Act 1993)?
- 15. ARE THERE ANY INTERIM GOVERNANCE ARRANGEMENTS IN THE PERIOD BETWEEN THE ESTABLISHMENT OF THE GOVERNANCE ENTITY AND THE DATE THAT THE SETTLEMENT ASSETS ARE TRANSFERRED? IF SO, WHAT ARE THEY?**
- Who will represent beneficiaries of the settlement during the interim period?
 - What can they do?, and
 - Will there be interim elections?

16. HOW WILL THE STRUCTURE AND THE RULES OF THE GOVERNANCE ENTITY AND ANY BODIES ACCOUNTABLE TO IT BE CHANGED?

- How can the structure and the rules of the governance entity be changed?
- Are there any rules that cannot be changed?, and
- How can the relationships with any bodies accountable to the governance entity be changed?

17. WHAT ARE THE PLANNING/MONITORING/REVIEW PROCESSES FOR DECISIONS OF THE GOVERNANCE ENTITY?

18. WHAT IF MEMBERS DO NOT AGREE WITH A DECISION MADE BY THE GOVERNANCE ENTITY?

- Can members call a special meeting of the governance entity?, and
- Are there dispute resolution procedures for particular issues?

TRANSPARENCY

19. HOW OFTEN WILL ACCOUNTS BE PREPARED AND AUDITED?

- Who prepares the accounts?
- How is the auditor chosen?
- Can a representative be the auditor?, and
- Will members have access to copies of accounts?

20. WILL BENEFICIARIES RECEIVE INFORMATION ABOUT DECISIONS THAT AFFECT THEM? HOW? HOW OFTEN?

- Can they get a copy of the rules of the governance entity (see question 14)?
- Will they get Annual Reports and other regular reports?
- Can they get minutes and resolutions of meetings of the representatives?, and
- Where do they get further information?

Settlement legislation

Nearly all Deeds of Settlement require settlement legislation to be passed. This means that the settlement does not take effect until Parliament has passed an Act for this purpose. Settlement legislation is needed:

- to ensure the finality of the settlement by removing the ability of the courts and Waitangi Tribunal to re-open the historical claims of the Deed of Settlement
- to provide for statutory instruments such as Statutory Acknowledgements or Overlay Classifications to be applied
- to remove statutory memorials from land titles in the claim area, and
- to vest land in the governance entity on behalf of the claimant group if normal administrative land transfer processes would not be appropriate.

DRAFTING SETTLEMENT LEGISLATION

The Parliamentary Counsel Office drafts bills for introduction to Parliament. The mandated representatives receive copies of the draft bill, so they can be sure that it gives full effect to the Deed of Settlement. Deeds include a provision that the claimant group agrees to support the legislation once it is introduced.

PARLIAMENTARY PROCESS

Figure 2.16 shows the various stages in passing a bill.

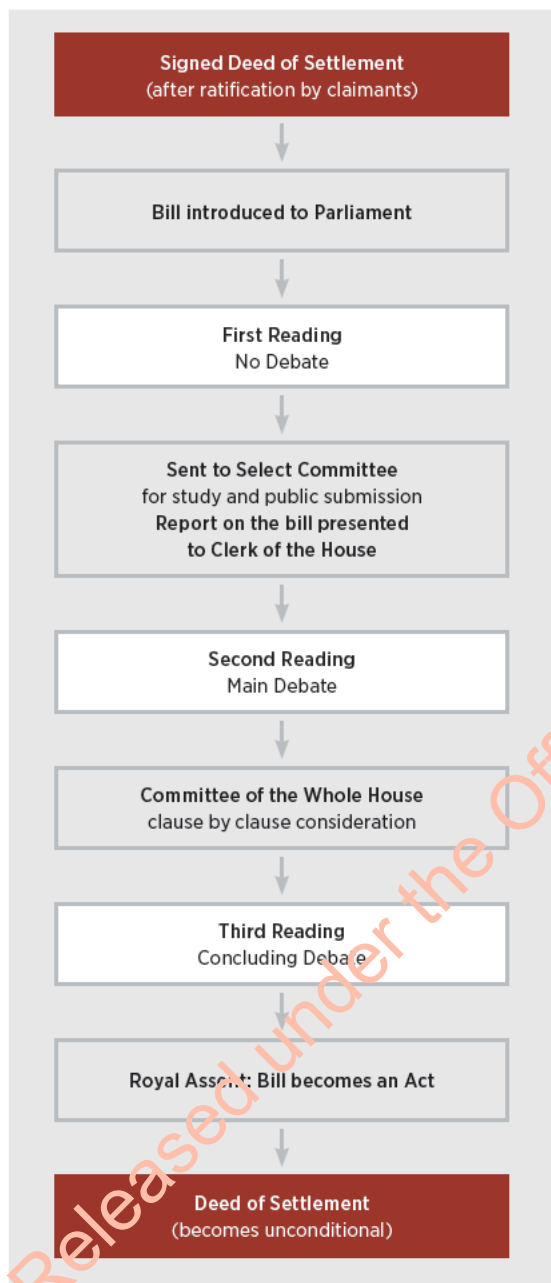


Figure 2.16: Finalising the settlement – the parliamentary process for passing legislation

SELECT COMMITTEE CONSIDERATION

Generally, legislation is referred to a select committee after its formal introduction and first reading. Parliament has several select committees, made up of Members of Parliament from different political parties. The number of MPs each party has on a select committee generally depends on that party's share of seats in Parliament as a whole, but the final make-up is decided by Parliament. Once a select committee has had a bill referred to it by Parliament, it invites the public to comment or make submissions on the bill so that the committee can take into account, and report back to Parliament, what the public and various organisations think about the bill. To do this, select committees usually advertise for submissions in the public notices column of newspapers and will often travel around the country to hear what people who made submissions have to say. Submissions are usually in writing, but a person or group may also appear before the committee to have their say and to answer any questions the committee may have of them.

The mandated representatives, and any individual member of the claimant group who may wish to, may make submissions to the select committee, using their rights as New Zealanders to participate in the democratic process.

The mandated representatives and OTS may also work together, with the committee's permission, to prepare material for reports to the committee. Claimant groups should be aware that if the settlement negotiation process has been a matter for strong debate within their group, dissenters may use the opportunity of a Select Committee hearing to seek further debate on the content of the settlement package and the process by which it was achieved.

Legislation giving effect to Treaty settlements is different from most other legislation in that it flows from an agreement already reached between the Crown and the claimant group. While Parliament may accept or reject the bill, the Select Committee can ensure that this is an informed decision through a thorough review of the bill. The purpose of such review is to ensure that the bill properly and effectively reflects the settlement, and to report to Parliament on the effect of the bill. It is not to re-negotiate the terms of the settlement by making amendments that would alter the substance of the Deed of Settlement. This reflects long-established Parliamentary practice that Parliament should not use its sovereignty (absolute power) to change legal agreements between the Crown and a third party, unless this is necessary in the national interest.

ROLE OF OTS IN THE LEGISLATIVE PROCESS

OTS is responsible for monitoring the passage of the bill through the select committee stage. This involves:

- preparing a briefing to the committee, which provides a summary and an examination of each part of the bill. The briefing is intended to assist the committee members in considering the bill
- providing further written reports to the committee if required to do so
- appearing before the committee to answer any questions the committee may wish to ask, and
- analysing the public submissions and providing a report on these to the committee.

Once this process is complete, the committee reports the bill back to Parliament. Parliament's Standing Orders require bills to be reported back within six months of referral to a Select Committee.

SECOND READING, COMMITTEE OF THE WHOLE HOUSE AND THIRD READING

After receiving the Select Committee's report, Parliament conducts a debate on the bill known as the Second Reading Debate. This debate is a general one on the aims and purposes of the bill. It then considers the bill in detail through a stage called the Committee of the Whole House. The Committee of the Whole House – which is made up of all Members of Parliament – may vote on the bill clause by clause or part by part. Amendments may also be put forward by any MP. If the Committee of the Whole House adopts the bill, it is given its third reading. The third reading is when Parliament formally votes to pass the bill. It then goes to the Governor-General for the 'Royal Assent', the signature that turns the bill into an Act of Parliament and makes it part of New Zealand law. The third reading of a settlement bill in Parliament is a historic occasion for the Crown and the claimant groups.

Special arrangements can be made through the Speaker's office to reserve seats in the public gallery for members of the claimant group, and for the singing of waiata at the end of the third reading.

OTHER STEPS TO FINALISE THE SETTLEMENT

Three other steps must be taken to finalise the settlement:

- the Waitangi Tribunal must be told that the claim or claims have been settled. This means filing a document called a 'memorandum', signed by the lawyers for both parties, with the Waitangi Tribunal. The memorandum advises the Tribunal of the terms on which the settlement has been reached and asks for the Tribunal's register to be amended to reflect this
- secondly, if court proceedings were suspended before entering into negotiations, the claimant group's counsel must provide the Crown with a document called a 'notice of discontinuance', ending the legal proceedings, and
- finally, any landbank arrangement within the area covered by the settlement comes to an end, except to the extent necessary to give effect to the Deed of Settlement.



Ngāi Tahu Third Reading

Implementation – making the settlement happen

By the time the implementation phase of a settlement begins, the claimant group will have established a governance entity to hold and manage the settlement assets. The governance entity will also have responsibility for managing the implementation of the settlement.

OTS oversees the implementation of settlements on behalf of the Crown. OTS liaises with other government agencies involved in the settlement to ensure that all agreed deadlines for handing over settlement assets to the governance entity are met. OTS also monitors whether the Crown meets all other requirements of the settlement.

Other Crown departments and agencies have significant responsibilities during the implementation phase. Where redress involves an ongoing relationship between a department or agency and the governance entity, managing that redress is the responsibility of the department or agency concerned. In the case of a Conservation Area, for example, that is the Department of Conservation.

Among a governance entity's specific responsibilities during implementation are:

- applying for resource consents if needed, and/or
- deciding who will represent the governance entity if representation is part of the redress – for example, as a statutory adviser or member of a statutory board.

Among the Crown's key responsibilities are:

- raising title for property to be transferred
- execution of encumbrances (covenants, leases, licences) affecting settlement properties, and
- notifying other parties directly affected by settlements.

Both the Crown and mandated representatives need to develop detailed work plans for implementation, to ensure it is carried out as efficiently as possible.



Tainui's Te Kauhanganui building at Ngapuna

Building a future

As the title to this guide suggests, settlements of historical claims are intended both to heal the past and build a future. While the cash or assets provided as settlement redress may not meet all the needs and aspirations of a claimant group, the Crown does contribute through settlements to a platform for future development. Once the initial phase of implementation outlined above is over, the future is largely in the hands of the claimant group. Their governance entity picks up the responsibility for managing and developing settlement assets. In doing so, it remains accountable to the wider claimant group through the decision-making and reporting processes approved by the claimant group.

Settlement redress

This part looks at the possible components of redress available in a negotiated settlement:

- the acknowledgements and apology made by the crown for the wrongs caused to the claimant group
- the ways in which Crown assets can be transferred to the claimant group to help meet economic or cultural interests.
- other ways in which the claimant group can be recognised
 - for instance, by involving it in decision-making about resources of cultural significance, and the legal mechanisms, known as Statutory Instruments, used to recognise cultural interests.

Released under the Official Information Act 1982

Settlement redress

So far this guide has looked at the Crown's policy framework and the negotiations process. It has also briefly mentioned some of the different types of redress available. This section looks in more detail at the options for settlement redress. This includes:

- the acknowledgements and apology made by the Crown for the wrongs caused to the claimant group
- ways in which Crown assets can be transferred to the claimant group to help meet their economic interests
- ways in which Crown assets can be transferred to the claimant group to help meet their cultural interests, and
- other ways in which claimant groups' interests can be recognised – for instance, by involvement in decision-making about resources of cultural significance.

Not all the redress options discussed will be relevant to every settlement – some settlements may involve only two or three different items of redress. New redress options, or new applications for existing options, could also be developed in future negotiations to meet different interests or circumstances. However, the existing options do offer a very wide range of redress to meet interests and values that claimant groups have so far identified as being important to them. They also have the advantage of existing Cabinet approval, and have become familiar to government departments, local authorities and others involved in settlement implementation.

Main aims of settlements

The overall aims of negotiations are to reach a settlement that:

- is intended to remove the sense of grievance
- is a fair, comprehensive, final and durable settlement of all the historical claims of the claimant group, and
- provides a foundation for a new and continuing relationship between the Crown and the claimant group, based on the principles of the Treaty of Waitangi.

How do settlements give effect to these aims?

In practice, for a settlement to achieve these aims means that:

- the Crown recognises the wrongs done – it does this through the historical account, Crown acknowledgements and apology
- the Crown provides financial and commercial redress, in recognition of breaches by the Crown of the Treaty of Waitangi and its principles, which can be used to build an economic base for the claimant group, and
- the Crown provides redress recognising the claimant group's spiritual, cultural, historical or traditional associations with the natural environment, sites and areas within their area of interest – often called cultural redress.

Together these three areas of redress make up a balanced settlement package that the claimant group may accept in final settlement of their historical grievances.

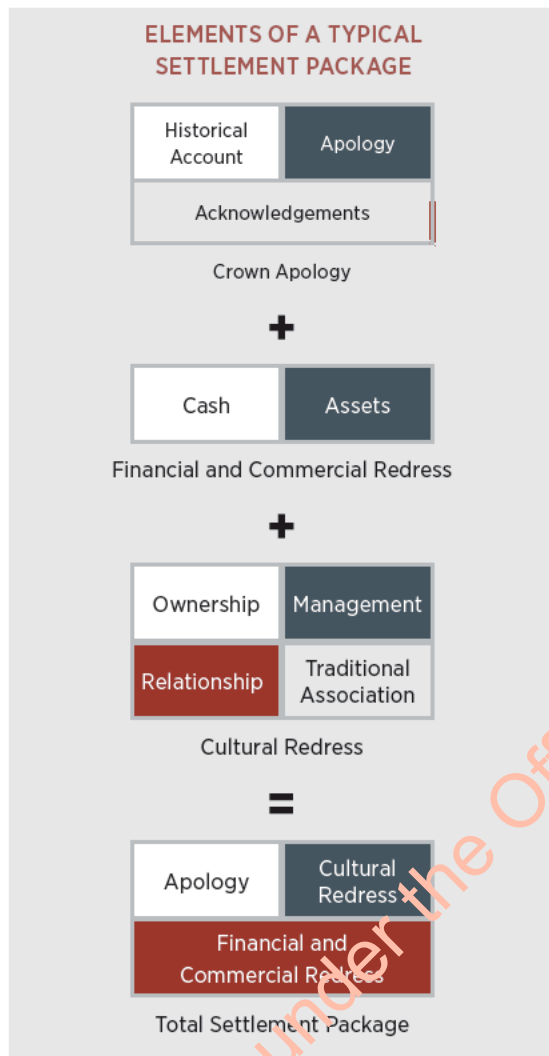


Figure 3.1: elements of a typical settlement package

It is now possible to look more closely at each of these three areas of redress – what do the various redress options involve, and what are the issues for claimant groups and the Crown to consider in negotiations?

Historical account, Crown acknowledgements of breach and apology

Significance

Among the first and most important items in a Deed of Settlement are the historical account, Crown acknowledgements and apology, collectively known as the Crown Apology. They may be seen as the first step in reconciling and healing the relationship between the Crown and the claimant group.

The historical account provides a basis for the Crown acknowledgements and apology. It summarises the key facts about the relationship between the claimant group and the Crown that gave rise to a breach or breaches of the Treaty of Waitangi and its principles, as agreed between the Crown and the claimant group. The Crown acknowledgements and apology go on to recognise these breaches and the losses, resentment and grief suffered by the claimant group. In turn, the Crown, by expressing its regret and unreserved apology, lays a foundation for settling the historical claims of the claimant group.

The Deed of Settlement may set out the historical account, Crown acknowledgements and apology in Māori and in English. Claimant groups may also wish to include opening karakia and waiata.

It is now possible to look more closely at each of the elements of the historical account, Crown acknowledgements and apology.

Contents of the historical account

The historical account is an agreed statement between the Crown and the claimant group that:

- narrates the events that form the factual background and foundation for the historical claims, and
- refers to the Treaty-based relationship between the Crown and the claimant group, and the events that led to the breakdown of that relationship.

The historical account does not need to be complex or long. It should be an accurate summary of the historical background. This gives the text authority and helps the general public to understand the basis for the settlement, because it puts the redress included in the settlement into proper context. In settlement legislation, the historical account or a summary may form the Preamble to the Act.

Content of the Crown acknowledgements

In the acknowledgements, the Crown accepts its responsibility for breaches of the Treaty of Waitangi and its principles and may go on to recognise:

- the pain and suffering caused by the grievances arising as a result of the Crown's breaches of the Treaty and its principles
- contributions the claimant group has made to the public benefit, and
- the consequences of the breach, including landlessness and social impacts.

Depending on their length and form, the Crown's acknowledgements may be included in the settlement legislation.

Contents of the apology

In the apology, the Crown formally expresses its regret for past injustices suffered by the claimant group and breaches of the Treaty of Waitangi and its principles. It is a clear response by the Crown to the matters set out in the historical account and Crown acknowledgements. The apology makes very significant steps towards:

- recognising the impact of the Treaty breaches on the claimant group
- restoring the honour of the Crown, and
- rebuilding the relationship between the Crown and the claimant group.

The scope and language of the apology should reflect the seriousness of the grievances for which the Crown apologises, and the nature of the settlement. It should highlight the key breaches and other wrongs for which the Crown accepts responsibility.

The settlement legislation will also include the text of the apology in Māori and English. This means that Parliament approves the apology as a statement of the Crown's views on its past Treaty breaches, and records the settlement of the grievances caused by those breaches.

Development of the historical account, Crown acknowledgements and apology

PROCESS

It is often useful to set up a working party to develop these documents, usually involving historians working for the Crown and claimant group negotiating teams. Usually the claimant group provides information about their view of the Treaty breaches and the events that gave rise to them. The Crown members of the working party may then prepare a draft text of the historical account to be discussed with the mandated representatives. When the working party has reached agreement on the text, they will refer it to the core negotiating teams for approval. A similar process would be followed for the Crown acknowledgements. Then, the Crown will draft its apology and discuss it with the claimant group. The apology will express the Crown's regret for the breaches of the Treaty and its principles described in the historical account and Crown acknowledgements.

CONCESSIONS ARE MADE ON A 'WITHOUT PREJUDICE' BASIS

As with all other aspects of negotiations, the Crown and the claimant groups are not bound by, and do not accept liability for, concessions they make in drafting the historical account, Crown acknowledgements and apology. They are not bound until they have signed the Deed of Settlement. Should negotiations break down, the matters discussed in negotiations cannot be used as evidence in Waitangi Tribunal hearings.

Financial and commercial redress

Financial and commercial redress means the part of the settlement that is primarily economic or commercial in nature, and which is given a monetary value. This value is the redress quantum. Financial redress refers to the portion of the total settlement the claimant group receives in cash and commercial redress refers to any Crown assets, such as property, that contribute to the total redress quantum. In this section we discuss:

- the aims of financial and commercial redress
- limitations on financial and commercial redress and how a redress quantum is negotiated, and
- forms of financial and commercial redress – these include cash and the ways in which Crown and, in some limited circumstances, memorialised State-Owned Enterprise or Crown entity land, can be used in settlements.

Aims of financial and commercial redress

The key aim of providing a redress quantum to claimant groups is in recognition and settlement of historical claims against the Crown under the Treaty of Waitangi. A guiding principle is that the quantum of redress should relate fundamentally to the nature and extent of the Crown's breaches of the Treaty and its principles.

Financial and commercial redress also recognises that where claims for the loss of land and/or resources are established, the Crown's breaches of the principles of the Treaty will usually have held back the potential economic development of the claimant group concerned. The Crown does not provide full compensation based on a calculation of total losses to the claimant group, for the reasons explained on page 83, but it does contribute to re-establishing an economic base as a platform for future development.

The Crown does not spell out how claimant groups must use their financial and commercial redress. This is a matter for the claimant group to determine according to the rules of their governance entity. Claimant groups that have settled so far have invested their redress to produce income to fund their long-term development.

The development of the Crown's approach to financial and commercial redress

The task for the Crown in developing the current settlement policy was to devise an approach to financial and commercial redress that, within a negotiated settlement as a whole:

- enables the claimant group's sense of grievance to be resolved
- contributes to the economic and social development of the claimant group
- is fair between claimant groups, and
- takes account of New Zealand's ability to pay, considering all the other demands on public spending such as health, education, social welfare, transport and defence.

DISCONTINUANCE OF THE SETTLEMENT ENVELOPE

The concept developed by the Crown in the period 1992–94 to meet the concerns set out above was called the Settlement Envelope, also called the 'fiscal envelope'. The government of the time set the total dollar amount it assessed that New Zealand as a whole could afford to devote to Treaty settlements. The amount set aside in the Settlement Envelope was \$1,000 million in 1994 dollars, to be spent over about 10 years.

The idea of a Settlement Envelope and the amount set aside for it by the government were not well received by Māori. Many Māori thought that it was too soon to set an overall limit or fiscal cap on redress for historical claims. Many were also worried that claims settled later would be at a disadvantage, despite the government's intentions. The total amount of \$1,000 million was also seen by many as arbitrary and insufficient.

In 1996, after a number of settlements had been successfully negotiated, the fiscal cap was abandoned.

Crown policy was further modified by a new government in 2000. This policy states that:

- redress should relate fundamentally to the nature of the breaches suffered
- different claimant groups should be treated consistently, so that similar claims receive similar redress, and
- while maintaining a fiscally prudent approach, each claim is treated on its merits and does not have to be fitted under a predetermined fiscal cap.

We now look in more detail at what the redress quantum includes and the factors the Crown takes into account when considering particular claims.

What redress is included in the quantum?

The term *redress quantum* means the dollar value of cash and assets transferred to the claimant group in settlement of their historical claims. It is also called the *redress amount* and includes:

- cash, and/or
- the market value of commercial assets transferred to the claimant group by the Crown, and/or
- any cash or commercial assets provided to hapū or whānau as redress in recognition of particular hapū or whānau interests (see pages 61–62).

It does not include:

- redress gifted by the Crown, such as the return of wāhi tapu
- redress based on rights and processes rather than on cash or property (for example, a Statutory Acknowledgement or a Right of First Refusal), or claimant funding.

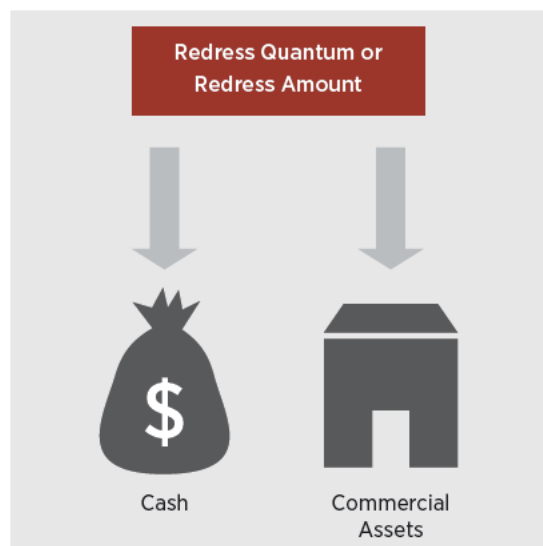


Figure 3.2: elements of financial and commercial redress

Negotiating the redress quantum

Treaty settlements involve more than money, and most claimant groups want to see spiritual, cultural and environmental concerns met as much as economic ones. Nevertheless, the quantum issue will usually be of critical importance in negotiations. The Crown's general approach can be considered under the following headings.

FULL COMPENSATION FOR ALL THE ECONOMIC LOSSES OF A CLAIMANT GROUP IS NOT AVAILABLE

It is impossible to put a precise value on the economic losses resulting from most historical Treaty breaches. This is because so much time has passed, and because identifying the effects of various causes on the economic status of the claimant group today is such a complex matter. Also, given the overlaps between many claimant groups, determining the loss to each claimant group would be impossible. European settlement has also brought benefits to Māori that cannot be easily expressed in money terms. However, many commentators estimate that the losses to Māori amount to tens of billions of dollars.

Even if an acceptable method of calculating the losses resulting from the Crown's Treaty breaches could be developed, and if the result was to establish that losses did amount to such huge sums, it is clear that a full compensation or 'damages' approach to redress would place too great a burden on the present and future generations of taxpayers. For that reason, it would not be practicable or generally acceptable to the New Zealand public. Negotiations are instead aimed at a fair level of redress, taking all the circumstances into account.

FACTORS THE CROWN TAKES INTO ACCOUNT IN DEVELOPING ITS QUANTUM OFFER

In deciding how much to offer, the Crown mainly takes into account the amount of land lost to the claimant group through the Crown's breaches of the Treaty and its principles, the relative seriousness of the breaches involved (raupatu with loss of life is regarded as the most serious), and the benchmarks (measures) set by existing settlements for similar grievances. Secondary factors are the size of the claimant group today, whether there are any overlapping claims and any other special factors affecting the claim.

By considering all these factors for each claim, the Crown aims to ensure fairness and consistency in the quantum offers made to claimant groups. Before determining its quantum offer, the Crown gives mandated representatives the information it has available on the types and amounts of land loss, and on population size. This allows the mandated representatives an opportunity to correct any errors of fact, or present information from other sources.

WHAT SCOPE IS THERE FOR CLAIMANT GROUPS TO NEGOTIATE ON THE QUANTUM OFFER?

After the Crown has presented its quantum offer, there will usually be a period of negotiation on the amount to be offered. The mandated representatives may wish to draw various factors affecting their claims to the closer attention of Ministers. A revised offer may be made if Ministers think this is appropriate. The quantum offered should be considered in the context of the settlement as a whole, taking into account the Crown's acknowledgements and apology and any cultural redress being offered.

The Crown will not, however, keep increasing the quantum offered simply to reach a settlement. The final offer must still be affordable and fair in relation to settlements already reached. If the final amount the Crown is prepared to offer is not acceptable to the claimant group, they may prefer to withdraw from negotiations.

Once the Crown and mandated representatives have agreed on the overall quantum or redress amount, there will usually be detailed discussions on the mixture of cash and assets that will make up the agreed amount.

CASH

Claimant groups may prefer to take all or part of their redress quantum in cash. A settlement wholly in cash might be suitable, for instance, if no Crown land in the claim area is available for transfer and the claimant groups would like to establish their own fund to purchase properties on the open market or to make other investments. The balance of cash and assets needs to be determined by the mandated representatives in consultation with the wider claimant group before the Deed of Settlement is signed. One benefit of a cash settlement is that it reduces the costs of implementing the settlement for both the Crown and claimant groups. Claimant groups may also see greater flexibility and opportunity in negotiating directly with third party vendors and with banks.

After settlement, investment decisions are a matter for the governance entity to make according to its rules.

Purchase of Crown properties – Treaty settlement landbanks and surplus departmental property

Often, key aims for claimant groups are to rebuild their land holdings and to invest for future development. This reflects the importance of land to cultural identity. One way to achieve this is by taking all or part of the redress quantum in the form of available Crown properties located in the claim area. In this process assets are transferred from the Crown to the claimant group at market valuation, in effect 'spending' the redress quantum.

The Crown operates a system of landbanks covering the whole country that hold a wide range of Crown properties available for use in settlements. The total value of these properties as at December 2017 was approximately \$400 million. These properties have usually been placed in the regional landbanks at the request of claimant groups after they have been declared surplus to requirements by government departments. They are, therefore, expected to be the first choice of many claimant groups when they are considering their commercial redress. Because they have been set aside specifically for this purpose, choosing these properties allows claimant groups to receive properties that would otherwise have been sold.

Sometimes a property may relate directly to Crown breaches of the Treaty of Waitangi and its principles (for example, the property may be in an area that was confiscated under the New Zealand Settlements Act 1863). Generally, however, the Crown regards commercial properties as substitutable.

Claimant groups can only receive commercial assets if they are in their area of interest, but sometimes other claimant groups have claims that cover the same area. In such cases of overlap, the Crown will only transfer properties where these overlaps have been addressed by the claimant groups or where it is able to offer similar property to the overlapping group or groups.

Land managed by the Department of Conservation is not generally available as commercial redress, but individual sites of special cultural significance may be considered for transfer to claimant groups as part of cultural redress.

VALUATION

Because claimant groups may be taking all or part of their redress quantum in the form of commercial assets, their negotiators will want to make the best use of the money available, and assure the wider claimant group that fair transfer values have been agreed. Similarly, the Crown has a responsibility to taxpayers to ensure it receives fair value for assets transferred through the settlement process. Both these concerns can be met by providing that properties will be transferred at current market value using an agreed method of reaching a value. The transfer values will be included in the Deed of Settlement.

Where specific land and property held by government departments and agencies is not surplus but is sought by claimant groups it may be possible to consider two other options. These are a Right of First Refusal over specific Crown-owned property or the opportunity to own and lease back Crown property.

Right of First Refusal

Sometimes Crown land that would be very useful to the claimant group concerned is not available for immediate use in settlement. This may be because of the operational needs of the department concerned. In these cases, a Right of First Refusal (RFR) may be negotiated to provide the claimant group with an opportunity to purchase specific Crown properties if they become available in the future.

An RFR means that the claimant group has the right to purchase at market value, ahead of any other potential purchaser, specific surplus Crown land, if the relevant government department decides to sell it within a specified period in the future. An RFR is subject to existing third party rights and statutory requirements such as, for example, the offer-back provisions of the Public Works Act 1981.

Rights of First Refusal therefore recognise the importance to claimant groups of rebuilding their land holdings, and their relationship to the land as tangata whenua. An RFR is not valued in monetary terms or counted against the settlement quantum.

An RFR is not usually available on designated properties where that property is in an area subject to unresolved overlapping interests between claimant groups.



Figure 3.3: the Right of First Refusal

HOW A RIGHT OF FIRST REFUSAL WORKS

The Crown may offer the claimant group an RFR over specific Crown-owned property. This will:

- last for a limited period of time (for example, run for 50 years from the Deed), and
- allow the vendor department to test value in the market before offering the property to the claimant group.

For each of the specified properties the vendor agency must not sell the land without first offering it to the claimant group. The RFR is subject, as noted earlier, to any existing legal rights to purchase or lease the property. Certain sales to a local authority, SOE or Crown entity are exempt from the RFR but any later sale by such organisations to a third party will be subject to the RFR. Under the RFR an offer will be made to the claimant group who will then have a defined period in which to consider it. If the claimant group does not accept the offer, the vendor department may sell the land on the open market but must not do so on terms more favourable than those offered to the claimant group.

Sale and lease back

If a property is neither surplus nor subject to a Right of First Refusal claimant groups may, in certain cases, be able to purchase the property from the government department or agency concerned if it undertakes to then lease back the property to that department or agency. Both the purchase and lease back are to occur at market value and need to be agreed between both the government agency concerned and the claimant group.

Use of licensed Crown forest land

Another form of Crown-owned property available for use in settlements is Crown exotic forest land. Crown exotic forest land forms a special category of commercial redress, reflecting the arrangements between the Crown and Māori in the Crown Forest Assets Act 1989 (see page 15). Claimant groups may use the settlement quantum to purchase forest lands.



Tūrangi Police Station, transferred to Ngāti Tūranganitukua and leased back to the NZ Police

If the Crown and claimant groups agree that licensed Crown forest land will form part of the settlement redress, the following points apply:

- the Crown own the land not the trees, so only the land is available for use in settlement
- the licence-holder owns the trees and the right to occupy the land to cut them
- land is transferred subject to existing Crown forestry licences, and the claimant group becomes the licensor instead of the Crown
- on settlement, the Crown issues termination notices to the licence holder(s)
- the termination period will be a maximum of 35 years
- as the last crop of trees is harvested on each area, the licence on that block terminates – this enables the claimant group owners to use the land as it becomes available
- the claimant group can receive the accumulated rentals held by the Crown Forestry Rental Trust. This is in addition to the redress quantum
- after transfer, the claimant group receives the future rentals from the licensee until the licence is extinguished when the last crop is harvested, and
- the settlement legislation will:
 - provide for the transfer of the land as if the Waitangi Tribunal has made a binding recommendation on the Crown forest land being used in settlement, and
 - provide that the claimant group can receive no further remedies under the Crown Forest Assets Act 1989 in relation to claims to licensed Crown forest land.

As with other commercial redress, there also needs to be a valuation process by which the market value of the land is determined so that it can be included in the Deed of Settlement as part of the total quantum of financial and commercial redress received by the claimant group. Other matters to be considered are whether any easements (such as rights of way) are required.

Where licensed Crown forest land is transferred and may contain sites of importance to other claimant groups, settlement legislation can provide for access to sites that are registered as wāhi tapu with the NZ Historic Places Trust.

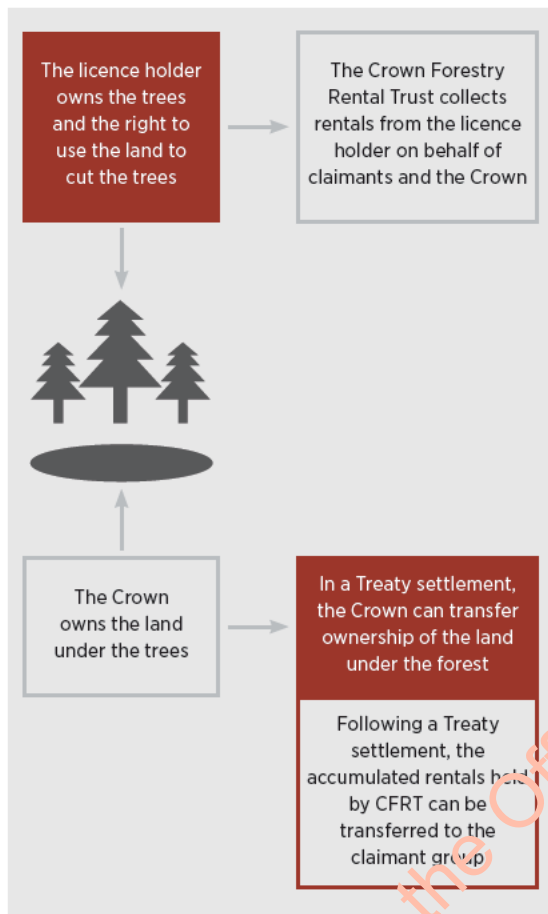


Figure 3.4: licensed Crown exotic forest land in settlement

State-owned enterprises and Crown entity land

State-owned enterprises (SOEs) are public companies owned by the Crown established under the State-Owned Enterprises Act 1986. Examples are New Zealand Post Limited and Land Corporation Limited (Landcorp). Crown land transferred to SOEs on their establishment is subject to the statutory memorial system noted on page 26. This memorial system also applies to land that was transferred to rail companies and tertiary education institutes. This enables the Waitangi Tribunal in specified circumstances to order the Crown to resume memorialised properties to resolve a well-founded Treaty claim. SOE land is generally not available for use in Treaty settlements.

Crown entities are listed in the Fourth Schedule of the Public Finance Act 1989 and include:

- District Health Boards (formerly Crown Health Enterprises)
- Crown Research Institutes
- Boards of Trustees for state schools, and
- tertiary education institutions.

In some cases, Crown entities such as hospitals may own the land they occupy. Crown entity property is not available for use in settlements unless it is surplus, or there are exceptional circumstances and the entity is a willing seller. Ministers cannot generally direct Crown entities about how they should deal with their land.

Also, for both SOE and Crown entity-owned land:

- the property must be cleared of any offer-back rights under section 40 of the Public Works Act 1931, or of other overriding third party property rights, and
- any overlapping claims must have been addressed to the satisfaction of the Crown.

Working through the processes to transfer SOE and Crown entity land is difficult and time-consuming, adding to transaction costs for both the claimant group and the Crown. The claimant group should consider whether cash to buy properties of their choice on the open market would be a better option.

SPECIALIST ADVISERS

Depending on the number and type of commercial properties involved in the settlement, both the Crown and mandated representatives will probably need to employ specialist advisers such as commercial lawyers, valuers and property consultants. This should be taken into account in planning and budgeting.

Natural resources including geothermal and mineral resources

Natural resources are not available for general use in settlements in the way that cash or surplus lands are. There are three main reasons for this:

- there are existing arrangements for allocating and managing natural resources on a national basis (for instance, geothermal energy is managed under the Resource Management Act 1991). It would not normally be appropriate to create different arrangements through Treaty settlements
- transferring rights to natural resources would lead to significant risk for both a claimant group and the Crown. For the claimant group, there is no guarantee of income from such rights and any income derived from such rights may vary considerably over time. This income, therefore, may not meet the expectations of the claimant group. Because of the uncertainty of income, it is also often very difficult to value such resources, and
- the Crown owns and manages nationalised minerals (including petroleum, uranium, gold and silver) under the Crown Minerals Act 1991, in the national interest. It considers that it should continue to do so. These resources are therefore not available for use in Treaty settlements.

However, Māori (like any other individuals or companies) can use cash received in a settlement to invest in natural resource developments, through the usual market and resource management processes.

SURPLUS NATURAL RESOURCE-BASED ASSETS

If the Crown or a Crown entity has surplus natural resource-based assets in a claim area – for example, a small hydro-electric or geothermal power station, these assets may be considered for use in a settlement if the quantum allows. As with other commercial assets, transfer to the claimant group would be at market valuation. Redress involving claimant groups' cultural interests in natural resources is discussed in the section *Resources and Interests*, starting on page 100.

Taxation and interest on settlement redress

SETTLEMENT REDRESS IS NOT INCOME OR THE SUPPLY OF GOODS OR SERVICES

Redress is transferred to claimant groups to settle their historical claims against the Crown. It is the Crown's understanding that payments of this nature are not income (for the purposes of income tax), or the supply of goods and services (for the purposes of goods and services tax (GST)). In accordance with these understandings, the Crown may provide indemnities in Deeds of Settlement. This means that if a claimant group is found liable to pay either income tax or GST on the redress provided by the Crown, the Crown will pay the amount of the liability to the claimant group.

INCOME GENERATED FROM SETTLEMENT REDRESS IS SUBJECT TO APPLICABLE TAX

However, the indemnities provided by the Crown do not go beyond the initial transfer of the settlement redress. Any subsequent dealings with the settlement redress, and any income generated are subject to the same tax laws applying to everyone else. Claimant groups are, of course, able to seek independent advice on how to manage their Development for tax purposes. The Crown will not use settlement legislation to provide specific tax advantages to groups that have received settlement redress.

ANY PAYMENT OF INTEREST ON THE QUANTUM IS SEPARATE FROM REDRESS AND SUBJECT TO INCOME TAX

If settlement legislation is required to make a settlement complete, there may be a significant delay between signing the Deed of Settlement and the payment of cash or transfer of other assets. Depending on the expected length of the delay, the Crown and claimant groups may need to negotiate whether the Deed should provide for interest on the redress quantum from the date of the Deed to when it is actually paid. This will maintain the value of the settlement to the claimant groups. Interest is paid in a lump sum with the settlement quantum, but does not form part of the redress quantum. This is because it is a transaction cost rather than redress. If the Crown agrees to pay interest, the rate of interest will depend on market conditions and, as with any interest receipt, tax may be payable.

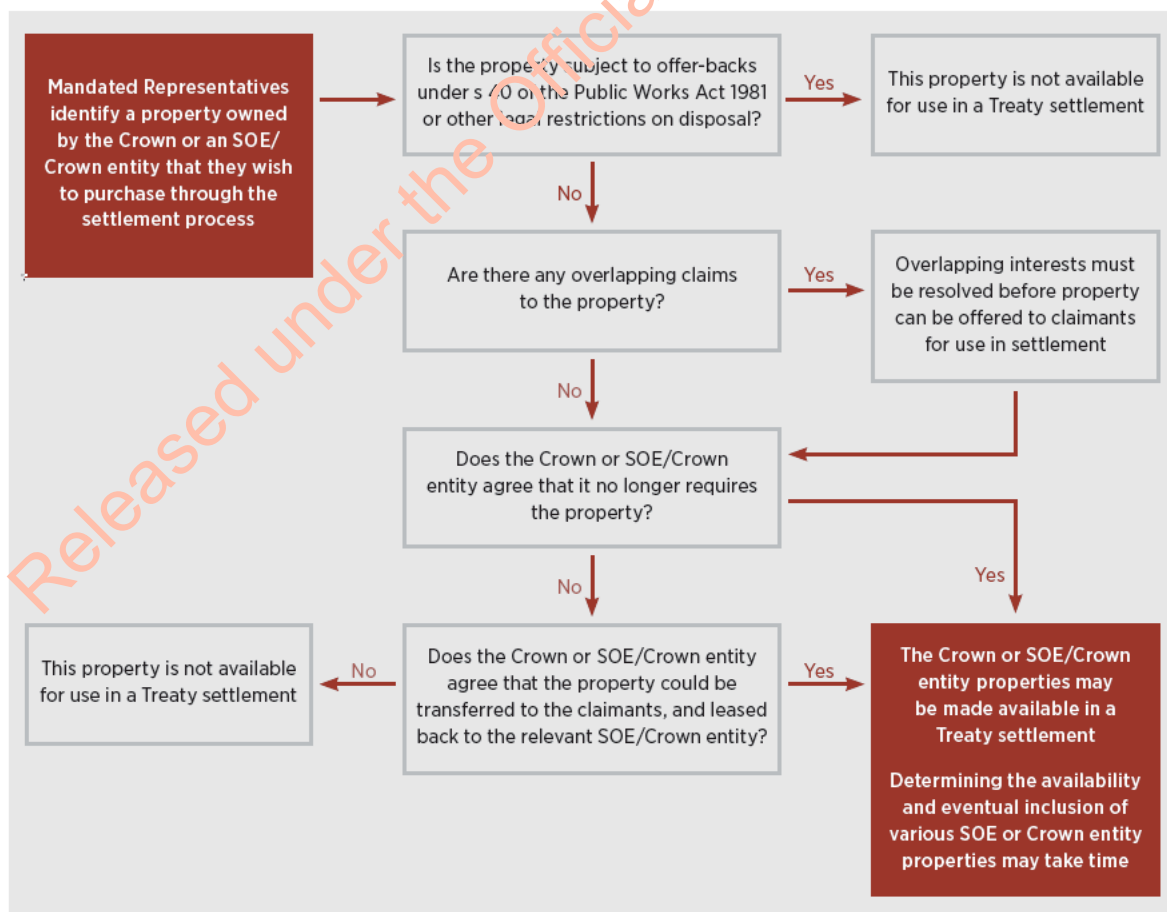


Figure 3.5: Selection process for commercial properties

Cultural redress

Introduction

Redress involving 'cultural recognition' is intended to meet the cultural rather than economic interests of the claimant group. Sometimes redress involving these concerns is called 'mahinga kai' redress, or simply 'non-commercial' redress. For consistency, 'cultural redress' will be used as a general term to cover the range of redress options other than the Crown Apology and financial and commercial redress. The term 'interests' has a special importance in negotiations (see the box on the next page).

This section:

- explains the significance and aims of cultural redress
- outlines the negotiations process for cultural redress, noting the emphasis on underlying interests rather than negotiating positions
- outlines the Crown's general approach to cultural redress
- provides an overview of the nature and scope of cultural redress options
- gives some examples of cultural redress provided in settlements to date
- provides more details on different types of resources (for example, rivers and plants and animal species) and the issues they raise for negotiations (see *Resources and Interests*, starting on page 100), and
- looks at the options available for cultural redress in greater detail – such as statutory instruments, the legal mechanisms that can be used to meet a wide range of claimant group interests and aspirations (see *Statutory Instruments*, starting on page 115).

Significance of cultural issues in negotiations

In negotiations and Waitangi Tribunal hearings to date, claimant groups have often raised the following concerns as part of their historical grievances against the Crown:

- loss of ownership or guardianship of sites of spiritual and cultural significance
- loss of access to traditional foods or resources (this may be the result of loss of ownership of land or environmental changes), and
- exclusion from decision-making on the environment or resources with cultural significance.

Aims of cultural redress

In negotiations claimant groups will therefore often want redress to meet the following linked interests:

- protection of wāhi tapu (sites of spiritual significance) and wāhi whakahirahira (other sites of significance) possibly through tribal ownership or guardianship (kaitiakitanga – see page 100)
- recognition of their special and traditional relationships with the natural environment, especially rivers, lakes, mountains, forests and wetlands
- giving claimant groups greater ability to participate in management and making decision-makers more responsible for being aware of such relationships, and
- visible recognition of the claimant group within their area of interest.

In negotiations so far, claimant groups and the Crown have worked together to develop a range of redress options to meet these interests. These now provide a very useful basis for discussion with other claimant groups.

But before looking further at the scope and nature of cultural redress, the negotiating process for such redress is discussed, focussing on the importance of interests.

Negotiations process for cultural redress

As explained in the pre-negotiation section (page 49), it is important for claimant groups:

- to gather information on the culturally significant sites and resources in their rohe, and their associations to the sites and resources
- to identify their interests in these sites and resources as a basis for discussion in negotiations, and
- to consult other iwi or claimant groups to identify and resolve (if necessary) any overlapping interests.

IDENTIFYING INTERESTS

Experience in settlement negotiations so far indicates that faster and more effective progress can be made if the parties clearly communicate the interests they wish to protect and promote, rather than stating redress positions right at the outset.

Often, identifying interests means looking for the reasons that lie behind an initial statement of a negotiating position. In contrast to a statement of interests, a statement of position will focus on a specific goal – for instance, a desire to have a specific property returned to the claimant group. Stressing **interests** rather than positions is particularly important for cultural redress. Interests in cultural redress are often more complex than in economic redress, and the range of redress options is also greater. It also makes it easier to provide redress alternatives to meet the interest, if the redress initially sought cannot be provided.

For instance, in their first approach to a particular site with strong cultural associations, claimant groups may be seeking ownership while the Crown is reluctant to transfer ownership. After discussions about their respective interests in the site, it might become clear that the claimant group's main concern is to protect tūāhu (place(s) of worship) on part of the site, while the Crown wants to maintain public access for recreation on the rest of the site. Once the interests have been identified in this way, it becomes much easier to identify possible redress options. These might not involve any change of ownership, but they still enable each party's interests to be met. This approach also helps to make negotiations more conciliatory and constructive.

To sum up, in order to identify interests, both parties need to be willing to ask questions to explore the reasoning behind the positions initially put forward, and to listen to each other's point of view and concerns.

IN NEGOTIATIONS, 'INTERESTS' IS A SHORTHAND WAY OF REFERRING TO THE DESIRES, CONCERNS AND VALUES THAT ARE IMPORTANT TO EACH NEGOTIATING PARTY.

For example, in relation to a wāhi tapu site a claimant group may have interests such as:

- preventing inappropriate access to the site
- preserving historical features of the site, or
- ensuring the site is managed according to tikanga (custom).

A negotiating position, on the other hand, might simply be the aim of having ownership of the wāhi tapu returned.

The Crown's position may be that a change of ownership will not be offered for some reason such as Public Works Act 1981 requirements. However the Crown may have similar interests in the site as the claimant group, such as preservation of ecological values.

Although the opening positions are opposite, if the parties' interests are communicated effectively, it is much easier for them to focus on areas of commonality and agree on redress that meets most or all of those interests. This is also shown in the next diagram.

The Crown's general approach to cultural redress

The Crown recognises the importance of cultural redress in contributing to a balanced settlement package that meets cultural as well economic interests of the claimant group. However, cultural redress aims often involve natural resources of general public importance. If the Crown owns and manages these resources, it must act both in the best interests of New Zealand as a whole and in accordance with Treaty principles. So deciding what redress to offer involves considering and balancing a wide range of interests.

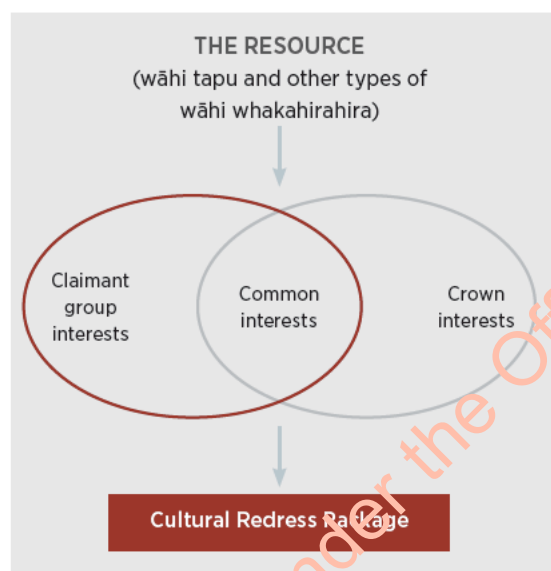


Figure 3.6: negotiating a cultural redress package

This means, for example, that providing ownership of a resource may not be possible, even though claimant groups may ask for that at the beginning of negotiations. However, there are many ways of meeting underlying interests, and both the Crown and claimant group must be willing to explore them. The options that have been developed in settlement negotiations to date are designed to satisfy the aspirations of claimant groups in many different ways, while still providing for the interests of New Zealanders as a whole.

Important principles guiding the Crown's approach to cultural redress are:

- redress must be a meaningful expression of the relationship of the claimant group with the site, animal, plant or resource
- the Crown cannot provide redress over resources it does not own and (in almost all cases) manage
- overlapping claims must be addressed to the satisfaction of the Crown
- redress must be consistent with existing legal frameworks such as the Resource Management Act 1991 and the Conservation Act 1987
- settlement redress should not generally be used for issues more appropriately dealt with at a national level
- before land can be made available for transfer to a claimant group, it must have been cleared under section 40 of the Public Works Act 1981, and any other relevant restrictions on disposal, and
- other existing third party rights over Crown land (such as easements, leases and licences) will be protected if the land concerned is used in settlement.

The scope of cultural redress

Negotiations on cultural redress can be very wide-ranging, and include matters as diverse as place names, customary fisheries management and protection of wāhi tapu. The following list covers the main types of resources dealt with in negotiations to date:

- wāhi tapu and other sites of significance (wāhi whakahirahira) including mountains
- rivers and lakes (waterways)
- wetlands, lagoons, indigenous forests and tussock lands
- coastal areas including the foreshore and islands
- customary freshwater and marine fisheries
- geothermal and mineral resources
- moveable taonga (artefacts), and
- traditional place-names.

Claimant group interests that have been addressed in a variety of ways include:

- recognition of cultural, spiritual, historical and traditional associations with areas or natural resources
- protection of wāhi tapu
- recognition of the role of Māori as kaitiaki (guardians or caretakers) of the natural environment, and
- access to resources of cultural significance.

Further information on cultural redress

To assist mandated representatives and others with an interest in the negotiations process, more details are included later on in this Part. In the section headed *Resources and Interests* starting on page 100, each type of resource is discussed, including:

- the significance the type of site or resource may have for claimant groups
- the interests claimant groups may wish to protect or promote
- the Crown's interests and approach to redress, and
- possible redress options.

Some redress options apply to more than one type of resource. For these options (an example is the *Statutory Acknowledgement*) the redress option is noted briefly under the resource heading, and a more detailed explanation is set out in the section *Statutory Instruments*, starting on page 115.

The rest of this section includes:

- a summary table of statutory instruments
- a short discussion about the concept of co-management in relation to land managed for conservation purposes, and
- three case studies of cultural redress in practice to show how the process works, and how the available redress options can be used flexibly to meet both claimant group and Crown interests.

SUMMARY OF STATUTORY INSTRUMENTS FOR CULTURAL REDRESS

Instrument name	Key features	Page
Statutory vesting of fee simple estate	Provides ownership (title). Rights to use and manage may vary according to type of site.	116
Statutory vesting and gifting back of sites of outstanding significance	Ownership of site of outstanding significance (eg Aoraki/Mount Cook) is vested in the claimant group who then (after a specified interval) return it unconditionally to the Crown for all New Zealanders.	118
Statutory vesting of riverbed or lakebed	May be available for beds of rivers or lakes of great significance to the claimant group – where it is also legally possible. Vests the riverbed or lakebed only, not water, and involves protection of existing property, use and access rights.	119
Statutory vesting as reserve	Site is vested in the claimant group as a reserve under s26 of the Reserves Act 1977, and the claimant group holds and administers the site subject to the Reserves Act.	120
Overlay classifications (Tōpuni, Taki Poipoia or Kirihipi)	Applies to highly significant sites on land administered by the Department of Conservation (DOC): recognises a statement of the claimant group's associations, describes their values and principles, and identifies actions to avoid harm to these.	121
Statutory Acknowledgements	Applies to sites of significance (including rivers, lakes, mountains, wetlands and coastal areas) where land is owned by the Crown: acknowledges a statement of the claimant group's associations, and enhances the claimant group's ability to participate in specified Resource Management Act 1991 processes.	122
Deeds of Recognition	May follow from Statutory Acknowledgement (SA). The Minister responsible for managing the land subject to SA acknowledges a statement of the claimant group's associations, and agrees to consult and have regard to the claimant group's views on specified matters.	123
Protocols	Issued by a Minister (eg Minister of Conservation). Sets out how the relevant department will exercise its functions, powers and duties in relation to specified matters in the claimant group's area of interest, interact with the claimant group and provide for its input into decision-making.	123
Place-name changes	Usually to a dual Māori/English name. Provides visible recognition for the claimant group.	114
Joint Advisory or Management Committee	Can be established under s9 of the Reserves Act 1977 or s56 of the Conservation Act 1987 to advise on or manage a site or area of importance to both the claimant group and the Crown. Such committees will usually be made up of representatives of both a claimant group (or groups – if the site or area is important to more than one claimant group) and DOC.	95

Is co-management of conservation land an option for cultural redress?

WHAT DOES CO-MANAGEMENT MEAN?

Co-management is a term widely used overseas. It describes activities where governments and communities are involved to greater or lesser degrees in providing information, consultation, co-operation with the community, communication about initiatives, advisory boards, management boards and the like. Sometimes the term joint management is used in the same way. In New Zealand the terms are increasingly used, but what they actually mean is often unclear.

HOW DOES IT APPLY IN NEW ZEALAND?

In New Zealand the Conservation Act 1987 places responsibility for conservation management on the Department of Conservation. It requires a great deal of communication and consultation by the department with iwi and other groups. The Department of Conservation uses the term co-operative conservation management to describe arrangements and relationships that provide for greater input than these requirements. Some of these arrangements and relationships result from redress provided in Treaty settlements, such as the statutory instruments summarised in the table on the previous page. We describe these in more detail in the section Statutory Instruments, starting on page 115. Others have been developed simply as part of the department's ongoing obligation to give effect to Treaty principles under the Conservation Act 1987.

IS CO-MANAGEMENT A POSSIBLE OUTCOME IN TREATY SETTLEMENTS?

Claimant groups may express their aims for redress involving conservation land as a desire for co-management or joint management. As discussed above, it is useful to explore this aim further in negotiations to discover the underlying interests that claimant groups wish to protect or promote. However, co-management in the sense of one of a range of co-operative conservation management arrangements forms an important part of recent settlements and current negotiations. Where there are both significant conservation and cultural interests in a reserve site but it does not seem feasible to transfer title to the claimant group, the Crown may consider establishing a Joint Management Committee over the site under section 9 of the Reserves Act 1977. Where these conditions apply, but the land involved is a conservation area, a Joint Advisory Committee under section 56 of the Conservation Act 1987 may be the right way to meet the interests of all parties.

In summary, whether an arrangement or relationship is described as co-management or co-operative conservation management is not important. What is important is that all parties to the arrangement understand its purpose, their role and responsibilities, and that lines of accountability (that is, who is responsible to whom and for what) are clear. Funding and other resources also need to be agreed and understood.

Case studies



The Clutha River/Mata-Au

CASE STUDY 1

Ngāi Tahu – Statutory Acknowledgement for the Clutha River/Mata-Au

SIGNIFICANCE TO NGĀI TAHU

This example, abridged from the Statutory Acknowledgement for the Clutha River/Mata-Au, shows the many ways in which waterways have cultural, spiritual, historic and traditional associations for Ngāi Tahu.

The Mata-Au river takes its name from a Ngāi Tahu whakapapa that traces the genealogy of water. On that basis, the Mata-Au is seen as the descendant of the creation traditions. On another level, the river was an integral part of a network of trails which were used to ensure the safest journey and incorporated locations along the way for activities such as overnight camping and gathering kai. The river was also very important in the transportation of pounamu from inland areas down to settlements on the coast. The traditional mobile lifestyle of the people led to their dependence on the resources of the river.

The Mata-Au is also where the boundary line between Ngāi Tahu and Ngāti Mamoe was drawn, later to be overcome by unions between the families of the tribes. Strategic marriages between hapū further strengthened the kupenga (net) of whakapapa, and thus rights to travel on and use the resources of the river. Because of these patterns of activity the river continues to be important to rūnanga located in Otago and beyond. These rūnanga carry the responsibilities of kaitiaki in relation to the area.

Urupā and battlegrounds are also located all along the Mata-Au. These are places holding the memories, traditions, victories and defeats of Ngāi Tahu tūpuna, and are frequently protected by secret locations.

NGĀI TAHU'S INTERESTS

Ngāi Tahu was concerned that in its area of interest the Resource Management Act 1991 (RMA) did not deliver what it was supposed to in terms of iwi involvement in resource management, particularly for resources of great cultural significance such as rivers, lakes and wetlands. They proposed a number of ways in which iwi involvement in resource management could be improved, including Crown directives to local or regional government, or legislative amendments to the RMA. Further discussions established that the main problems were:

- failure to notify Ngāi Tahu of resource consent applications affecting culturally significant areas
- lack of awareness among consent authorities of Ngāi Tahu's traditional associations, and
- Ngāi Tahu's experience that it constantly had to 'prove' the cultural significance of sites as individual resource consent applications were considered.

THE CROWN'S INTERESTS

The Crown's initial view was that the RMA provided adequate ways for iwi to be involved in and consulted on resource management. The legislative framework provided for the balancing of a wide range of interests, and this could be undermined if consent authorities were required to give greater weighting to iwi interests. The Crown was also concerned about time and cost implications of any changes for consent authorities and private individuals or organisations. However, after further discussions the Crown agreed to look at ways to address Ngāi Tahu's specific concerns noted above.

NEGOTIATED OUTCOME – STATUTORY ACKNOWLEDGEMENT

The legal mechanism developed to meet the interests jointly identified by the Crown and Ngāi Tahu was the Statutory Acknowledgement. This is explained in more detail on page 122, but in summary a Statutory Acknowledgement:

- records in the settlement legislation the Crown's acknowledgement of Ngāi Tahu's statement of its association with the river, lake, or other site in Crown ownership
- strengthens the notification provisions of the RMA through specific obligations on decision-makers
- can be used as evidence in proceedings before consent authorities or the Environment Court, and
- enables the Minister of the Crown responsible for the site to enter into a Deed of Recognition with the claimant group, providing for claimant group input into specified matters relating to management of the Crown land involved (but not water). There is a Deed of Recognition between Ngāi Tahu and the Minister of Conservation for the Clutha River/Mata-Au.

The Environment Court and the Historic Places Trust must also have regard to the Statutory Acknowledgement in deciding whether to hear representatives of Māori at proceedings affecting the site.

OTHER CULTURAL REDRESS FOR THE CLUTHA RIVER/MATA-AU

Other cultural redress agreed to recognise Ngāi Tahu's interests in the Clutha River/Mata-Au was:

- place-name change to the Clutha River/Mata-Au, and
- provision of four nohoanga entitlements.

COMMENT

The Statutory Acknowledgement instrument is extremely significant in the cultural redress options now available. The negotiations involved were complex and required both the Crown and Ngāi Tahu to be creative in looking for a solution that would meet the claimant group's concerns about the RMA without undermining its basic framework. The Statutory Acknowledgement was used in the Ngāi Tahu settlement not only for rivers and lakes but for mountains, wetlands, lagoons, coastal areas and specific sites of cultural significance. It has since also been applied in settlements with other claimant groups.

CASE STUDY 2

Ngati Ruanui – Ministry for Primary Industries protocol

SIGNIFICANCE TO NGATI RUANUI

Freshwater and marine fisheries in the Ngati Ruanui area of interest have great cultural and traditional significance for the people of Ngati Ruanui. The coast and rivers within the rohe of Ngati Ruanui have traditionally been an important source of mahinga kai for the people of Ngati Ruanui.

NGATI RUANUI'S INTERESTS

In negotiations, Ngati Ruanui sought recognition of their role as kaitiaki for fisheries within their area of interest. It was important for Ngati Ruanui to have an acknowledgement of their traditional relationship with species of fish and other aquatic life. In particular, Ngati Ruanui sought protection and enhancement of their customary interests in tuna (eel), pua and other taonga fish species. Ngati Ruanui also emphasised their desire to have greater participation in fisheries management. This included making provision for Ngati Ruanui's input into the development of fisheries plans, regulations and other services of the Ministry for Primary Industries.

THE CROWN'S INTERESTS

The Crown, through the Ministry for Primary Industries, has an active duty to protect commercial and recreational as well as customary interests in fisheries. The Ministry for Primary Industries acknowledged that its ability to achieve the sustainable management of fisheries in the Ngati Ruanui area of interest would be greatly enhanced by improving its relationship with the iwi. In this respect, the Ministry for Primary Industries was willing to explore Ngati Ruanui's customary interest in fisheries and identify the particular areas where Ngati Ruanui could provide input into fisheries management.

NEGOTIATED OUTCOME

In the Deed of Settlement signed on 12 May 2001, Ngati Ruanui and the Crown agreed that the Deed of Settlement will provide for, and the settlement legislation will enable, the Minister of Fisheries to issue a protocol to Ngati Ruanui. The overriding purpose of the protocol is to foster a good working relationship between Ngati Ruanui and the Ministry for Primary Industries. The protocol will set out how the Ministry for

Primary Industries will interact with Ngati Ruanui in a way that will enable Ngati Ruanui to provide input into a range of Ministry processes.

PROTOCOLS

Protocols are statements issued by a Minister of the Crown, or other statutory authorities, setting out how that particular agency intends to:

- exercise its functions, powers and duties in relation to specified matters within its control in the claimant group's area of interest, and
- interact with a claimant group on a continuing basis and enable that group to have input into its decision-making process.

Essentially, protocols are a relationship building tool which seek to enhance relationships between government agencies and claimant groups. This form of redress is explained in more detail on page 126.

COMMENT

Many of Ngati Ruanui's interests in fisheries exceeded what could be provided for in a protocol with the Ministry for Primary Industries. In many cases, these interests were beyond the scope of the Ministry's powers and functions. For example, some of the responsibility for management of native freshwater fisheries lies with the Department of Conservation. To ensure the Crown could meet Ngati Ruanui's interests in fisheries, other types of fisheries redress were agreed: a protocol with the Department of Conservation (which includes recognition of indigenous fish species for which the Department has statutory responsibility), further provisions for Ngati Ruanui's involvement in the management of tuna (eel), and Ngati Ruanui to be appointed as an Advisory Committee (in relation to indigenous fish, aquatic life and seaweed) to the Minister of Conservation and the Minister of Fisheries. The legislation implementing Ngati Ruanui's settlement will also acknowledge the cultural, spiritual, historic and/or traditional association of Ngati Ruanui with all indigenous species (Nga Taonga a Tane raua ko Tangaroa) found in their area of interest.

CASE STUDY 3

Te Uri o Hau – Pouto Conservation Stewardship Area

SIGNIFICANCE TO TE URI O HAU

The land within the Pouto Conservation Stewardship Area is recognised as a major traditional food gathering area for Te Uri o Hau. Traditionally, the area contained many temporary settlements and Te Uri o Hau whānau from the Pouto Peninsula and other marae in the Kaipara harbour would camp here to catch tuna (eels), kanae (mullet) and gather manu (birds), harakeke (flax) and berries.

The area is also an important wāhi tapu for Te Uri o Hau because it contains urupā and taonga buried beneath the land as a result of the many battles fought there.

TE URI O HAU'S INTERESTS

Te Uri o Hau sought exclusive access to mahinga kai resources in the area, particularly in relation to the lakes. Te Uri o Hau also sought involvement in the management of the area – alongside the Department of Conservation – and protection for wāhi tapu sites. Protection was particularly important, as Te Uri o Hau had long been concerned about past interference with urupā.

THE CROWN'S INTERESTS

The Pouto Conservation Stewardship Area is an extensive and unique area of mobile, consolidated and old sand dunes with associated wetlands and numerous small dune lakes. The stewardship area also contains one of the best examples of duneland forest in New Zealand and is home to many bird species, including some, such as the dotterel, that are at risk. It is land on which the Crown places a high conservation value.

NEGOTIATED OUTCOME

In the Deed of Settlement signed on 13 December 2000, Te Uri o Hau and the Crown agreed that the settlement legislation (enacted October 2002) would provide for the following in relation to the Pouto Conservation Stewardship Area:

- an overlay classification or Kirihipi over the whole dune and lake complex

- two Statutory Acknowledgements and a Deed of Recognition
- two camping entitlements (Nohoanga)
- Protocols with the Department of Conservation, the Ministry for Primary Industries, the Ministry of Culture and Heritage and the Ministry of Economic Development
- a commitment to consider a proposal from Te Uri o Hau to include the Pouto Lakes eel
- fisheries within the application of the Fisheries (Kaimoana Customary Fishing) Regulations 1998, and
- a commitment to consider restrictions on certain eel fishing methods in the Pouto Lakes.

OVERLAY CLASSIFICATION – KIRIHIPI

An overlay classification (known as Kirihipi in the Te Uri o Hau settlement) recognises Te Uri o Hau's spiritual, cultural, historical and traditional values relating to the area. These values are recorded in the Deed of Settlement. The Department of Conservation, which administers the Pouto Conservation Stewardship Area, must consult in agreed ways and avoid harm to Te Uri o Hau's values.

The word Kirihipi was used by Te Uri o Hau because it is the word used to describe a document of sheepskin parchment known as Kirihipi Te Tiriti o Ngāti Whatua that records their relationship with the Crown.

To Te Uri o Hau, the Kirihipi confers Te Uri o Hau values upon a piece of Crown-owned land without overriding the powers of the Crown to manage that land for the purposes for which it is held.

STATUTORY ACKNOWLEDGEMENTS AND DEED OF RECOGNITION

A Statutory Acknowledgement and Deed of Recognition are ways in which the Crown recognises Te Uri o Hau's association with the Pouto Conservation Stewardship Area. The Statutory Acknowledgement strengthens the notification processes of the Resource Management Act 1991 and requires consent authorities when determining whether to notify an activity to have regard to the Statutory Acknowledgement when deciding whether Te Uri o Hau is an 'affected party'. The Deed of Recognition requires that Te Uri o Hau is consulted on specified matters and that the Minister of Conservation must have regard to their views.

The second Statutory Acknowledgement is for the Kaipara Harbour which borders the eastern boundary of the stewardship area.

PROTOCOL WITH THE MINISTRY FOR CULTURE AND HERITAGE

A protocol is a statement issued by a Minister of the Crown or other statutory authority. These set out how a particular government agency intends to interact with a claimant group in relation to specific matters in a claimant group's area of interest and enable that group to have an input in the agency's decision-making (see page 123). Because of the wāhi tapu in the stewardship area, the protocol governing Te Uri o Hau's relationship with the Ministry for Culture and Heritage is particularly important.

COMMENT

Both Te Uri o Hau and the Crown have strong legitimate interests in the Pouto Conservation Stewardship Area. The redress provided to Te Uri o Hau in relation to the area recognises their traditional and cultural associations, their interests in food-gathering and their strong interest in conservation for future generations. The Crown was able to provide this redress while safe-guarding the interests that all New Zealanders have in the preservation of the unique natural features and wildlife in the area.

Resources and interests

Introduction

Earlier in this Part, an overview of cultural redress and some practical examples from recent negotiations were provided. This section looks in more detail at the main types of resources and issues claimant groups may be concerned about in negotiations on cultural redress. These are:

- wāhi tapu and other sites of significance (wāhi taonga or wāhi whakahirahira) including mountains
- rivers and lakes (waterways)
- wetlands and lagoons, indigenous forests and tussock lands
- coastal areas including the foreshore and islands
- customary freshwater and marine fisheries
- geothermal and mineral resources
- plant, animal and fish species
- moveable taonga (artefacts), and
- traditional place-names.

For each resource listed, this section outlines:

- the significance the type of site or resource may have for claimant groups
- the interests claimant group may wish to protect or promote
- the Crown's interests and approach to redress, and
- possible redress options (for customary fisheries we also look at the options for meeting claimant group interests under existing legislation).

THE IMPORTANCE OF THE TOTAL ENVIRONMENT

In preparing information for this guide OTS found that looking at major types of natural resources separately helped in presenting the issues and options most clearly. However, the Crown recognises that Māori traditionally have a holistic view towards environmental or resource management, and that the elements of the environment cannot be viewed in isolation. The redress options available through negotiations can be used to build a total settlement package that provides for this approach.

KAITIAKITANGA

In the rest of this section we often refer to kaitiakitanga as an interest that claimant groups may wish to see recognised or enhanced through the settlement process. While the concept is often translated as 'guardianship', this does not give the full depth of its meaning to Māori. The following explanation is provided in the Te Puni Kōkiri publication *Mauriora ki te Ao: An Introduction to Environmental and Resource Management Planning* (1993, page 10):

'Kaitiakitanga is a broad notion that is applied in many situations. The root word in kaitiakitanga is tiaki, which includes aspects of guardianship, care and wise management. The prefix kai denotes the agent by which tiaki is performed. Kaitiaki therefore stands for a person and/or other agent who performs the tasks of guardianship.'

Kaitiakitanga as a system takes place in the natural world, within the domain of Atua. Kaitiakitanga is practised through:

- the maintenance of wāhi tapu, wāhi tūpuna and other sites of importance
- the management of fishing grounds (mahinga mātaihai)
- protests against environmental degradation (eg Moa Point protests)
- observing the maramataka (lunar calendar)
- observing the tikanga of sowing and harvest
- good resource management, and
- designing settlements in keeping with the design and nature of the environment.

Kaitiaki are the interface between the secular and spiritual worlds, as the mana for kaitiaki is derived from mana whenua. To Māori, kaitiaki is not a passive custodianship. Neither is it simply the exercise of traditional property rights, but entails an active exercise of power in a manner beneficial to the resource. Kaitiaki who practise kaitiakitanga do so because they hold an authority, that is they have the mana to be kaitiaki. Hence, kaitiakitanga is inextricably linked to tino rangatiratanga.'

The redress options developed so far provide many ways to enhance the ability of a claimant group to exercise kaitiakitanga. This may be through the transfer of culturally significant sites or improved participation in resource management processes.

Wāhi tapu and wāhi whakahirahira, including maunga

SIGNIFICANCE TO MĀORI

Claimant groups will often seek redress for sites of special significance because of their spiritual, cultural, historical or traditional associations. They may be the sites of former pā or marae, urupā, battlegrounds or traditional camping or gathering sites. Maunga (mountains) especially the peaks, often have special significance for tribal identity and as the embodiment of tūpuna. The value of such sites to claimant groups is in their associations rather than their present economic worth. Wāhi tapu usually refers to a site of special spiritual significance, while the terms *wāhi whakahirahira*, *wāhi taonga* or *sites of significance* may be used to indicate more general cultural significance. The term wāhi whakahirahira is used in the rest of this guide.

The provision of redress involving wāhi tapu and wāhi whakahirahira, along with the Crown's acknowledgements and apology, is an important step in rebuilding the relationship between the Crown and claimant group.

CLAIMANT GROUP INTERESTS

In preparing for negotiations, the claimant group will usually identify wāhi tapu or wāhi whakahirahira in their rohe where there are concerns or interests to discuss with the Crown. In general terms claimant groups may seek recognition and improved ability to exercise kaitiakitanga (stewardship or guardianship) through ownership of sites or improved participation in their management. More specifically, this might involve:

- being able to control access by the public to prevent damage or inappropriate behaviour on wāhi tapu areas
- being able to protect wāhi tapu without revealing exact locations
- preserving historical features such as pā terraces and rock art
- preserving or re-establishing indigenous plants and animals
- being able to pass on traditional knowledge and skills
- using the traditional name for the site, and
- using or obtaining access rights to cultural resources such as medicinal plants or ochre for dyeing.

THE CROWN'S INTERESTS AND APPROACH

In considering redress for wāhi tapu and wāhi whakahirahira, the Crown will be concerned:

- to ensure the redress is meaningful to the claimant group
- to preserve any existing public access unless there are strong reasons for restricting it
- to preserve historical features of a site
- to preserve indigenous plants and help to re-establish them if appropriate
- to ensure the site is appropriately managed, in a way that is consistent with existing legislation
- to ensure any overlapping claim issues have been addressed to the satisfaction of the Crown, and
- to ensure any existing legal rights of third parties (such as rights of way, drainage easements) are protected.

And, as already noted, the Crown can only use land in redress if it is the owner.

The lists of Crown and claimant group interests show that in many cases these will overlap – for instance, both may want to restore indigenous trees and plants on a particular site. Building from their common interests, the parties can then look at ways to meet other more divergent interests.

REDRESS OPTIONS FOR WĀHI TAPU AND WĀHI WHAKAHIRAHIRA

The table below notes the main redress options that may be suitable for wāhi tapu and wāhi whakahirahira. The options provide many ways to meet the following broad interests:

- recognition of the claimant group
- claimant group involvement as kaitiaki in the management of a wāhi tapu or wāhi whakahirahira
- claimant group input into decision-making about a wāhi tapu or wāhi whakahirahira, and
- improved access to places where traditional foods or other resources can be gathered.

The range of options provides a great deal of flexibility in developing solutions to deal with each situation on an individual basis. More detail on the statutory instruments is included in the section *Statutory Instruments* starting on page 115.

Redress options using statutory instruments for wāhi tapu and wāhi whakahirahira	Further detail (page)
Statutory vesting of fee simple estate (transfer of legal ownership of land)	116
Statutory vesting and gifting back of sites of outstanding significance	118
Statutory vesting as a Reserve	120
Overlay classifications (Tōpuni, Taki Poipoia or Kirihipi)	121
Statutory Acknowledgements	122
Deeds of Recognition	123
Protocols	123
Place-name changes	114
Joint Advisory or Management Committee	95

Rivers and lakes (waterways)

SIGNIFICANCE TO MĀORI

The Crown acknowledges that rivers and lakes have great significance for Māori. The Crown also acknowledges that, while the common law originating in England has different rules on ownership for the bed, banks and water, Māori have traditionally viewed a river or lake as a single entity. From Waitangi Tribunal reports, other publications and negotiations to date, the Crown understands that to a claimant group rivers and lakes can be or represent any or all of the following:

- the embodiment of or creation of ancestors
- a key aspect of tribal and personal identity
- the location of wāhi tapu
- sources of water, food and other resources such as hāngi stones and pounamu
- part of traditional travel routes and trading networks
- boundary markers and part of traditional tribal defences, and
- possessors of mauri, the life force or essence that binds the physical and spiritual elements of all things together.

These complex and significant associations underpin Māori claims to ownership and other redress over rivers and lakes.

CLAIMANT GROUP INTERESTS

In negotiations on cultural redress for rivers and lakes, claimant groups may wish to protect or promote their interests in the following ways:

- obtaining ownership of the riverbed
- improving their ability to exercise kaitiakitanga through improved participation in resource management processes
- promotion of the health of the waterway, particularly as a source of food, through the control of pollution
- promotion of sustainable fishing and other harvesting (see customary fisheries issues on pages 109–110)
- control of access to all or part of the waterway, for example, to prevent damage or inappropriate access to wāhi tapu in or near the waterway
- being able to pass on or enhance traditional skills and knowledge
- preserving or re-establishing the numbers of indigenous plants and animals
- the use of the traditional name for the waterway or sites in and along the waterway, and
- access rights to cultural resources such as hāngi stones.

THE CROWN'S INTERESTS AND APPROACH

Like claimant groups, the Crown is also concerned about the health of rivers and lakes and maintaining or improving this where possible. The Crown also wants to manage waterways in the best interests of all New Zealanders and to protect existing rights of public access to waterways. Within this overall framework, it is prepared to offer redress to meet many of the aims of claimant groups for waterways, and in this way recognise the cultural significance of these resources.

Under common and statute law, claiming ownership implies exclusive possession with the right to prevent others from using the resource. This is a concept that raises many practical and legal difficulties with waterways.

NEW ZEALAND LAW DOES NOT PROVIDE FOR OWNERSHIP OF WATER IN RIVERS AND LAKES

As noted earlier, the Crown acknowledges that Māori have traditionally viewed a river or lake as a single entity, and have not separated it into bed, banks and water. As a result, Māori consider that the river or lake as a whole can be owned by iwi or hapū, in the sense of having tribal authority over it. However, while under New Zealand law the banks and bed of a river can be legally owned, the water cannot. This reflects the common law position that water, until contained (for example, put in a tank or bottled), cannot be owned by anybody. For this reason, it is not possible for the Crown to offer claimant groups legal ownership of an entire river or lake – including the water – in a settlement.

The Crown also considers that the benefits of hydro-electricity generation belong to all New Zealanders and it does not provide compensation for any past interference with rivers for these purposes.

However, negotiations can explore redress options for specific grievances relating to rivers or lakes such as the flooding or destruction of wāhi tapu or effects on traditional fisheries that arise from Crown actions.

ECONOMIC INTERESTS

If claimant groups have economic rather than cultural aims involving waterways, these are considered as part of Financial and Commercial Redress (see page 81). Large hydro dams of national importance are not available for use in settlement, but smaller dams may be available for transfer at market value, depending on the redress quantum (the total monetary value of the redress provided by the Crown).

The idea of charging for public access to waterways for recreational use is also not acceptable to the Crown. Free and generally unrestricted public access to waterways is part of the New Zealand way of life, and the Crown does not wish to alter this through the settlements process.

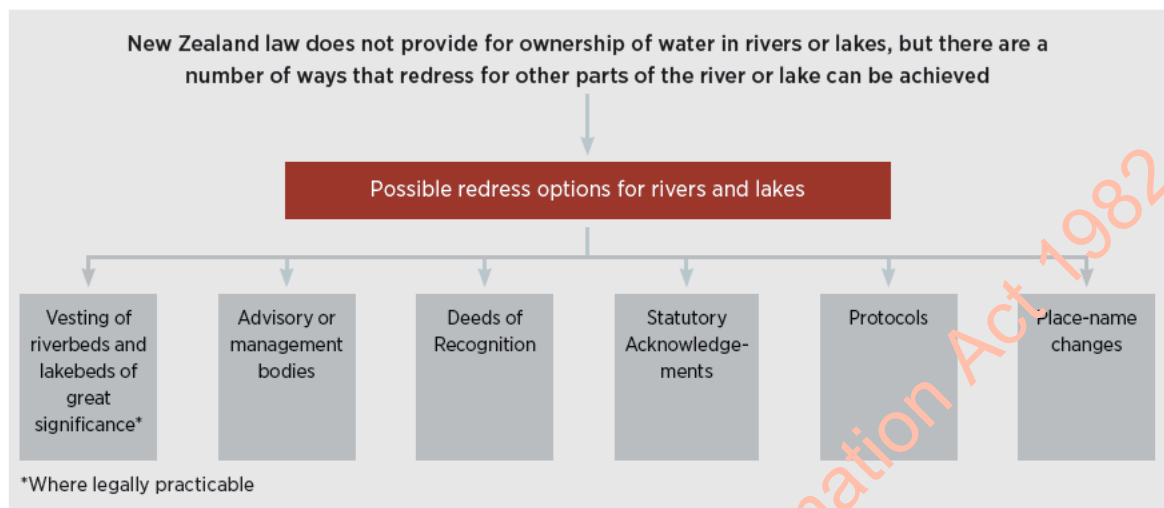


Figure 3.7: some redress options for rivers and lakes

REDRESS OPTIONS FOR WATERWAYS

Within the limitations noted above, there are still many constructive and effective ways in which to meet claimant groups' cultural interests in lakes and rivers in settlements. The table above gives an overview.

The options are designed to meet the interests and objectives of the claimant group through:

- claimant group involvement in the management or decision-making in relation to a waterway, and/or
- improved access to places where traditional foods, aquatic species or other resources can be gathered.

Redress options using statutory instruments for rivers and lakes	Further detail (page)
Statutory vesting of fee simple estate (transfer of legal ownership of land under the water, where legally practicable), available only for rivers or lakes of great significance, and subject to a number of conditions	116
Statutory Acknowledgements	122
Deeds of Recognition	123
Protocols	123
Place-name changes	114

The range of options provides a great deal of flexibility in developing solutions to deal with each situation on a case by case basis. More detail on statutory instruments is in the section *Statutory Instruments* starting on page 115.

Wetlands and lagoons, indigenous forests and tussock lands

SIGNIFICANCE TO MĀORI

These types of areas or ecosystems are grouped together as they often raise similar issues in negotiations. The available redress options are also similar across the range of such sites.

WETLANDS AND LAGOONS

There were once many more wetlands and lagoons in New Zealand, and they were valuable sources of traditional food and plants for Māori. Drainage and the development of agriculture, industry and housing have greatly reduced such areas, and they often face threats from pollution and introduced plants and animals.

INDIGENOUS FORESTS

Indigenous forests may be important for their links with tūpuna and tribal history, as locations of wāhi tapu and as sources of food and other natural resources such as logs for carving or medicinal plants.

TUSSOCK LANDS

Such areas can seem barren compared to forests, but they still have great significance for their cultural associations or as sources of food and other natural resources. For instance, in the Ngāi Tahu settlement the transfer of the High Country Stations to Ngāi Tahu recognised the wide range of associations that these areas had for the iwi.



Mararoa Valley, Ngāi Tahu

CLAIMANT GROUP INTERESTS

From negotiations to date the Crown is aware of the following specific interests relating to the broader interests of recognition and kaitiakitanga that claimant

groups may raise in negotiations about wetlands and lagoons, indigenous forests and tussock lands:

- the vesting of title or other protection for wāhi tapu or wāhi whakahirahira
- improved participation in resource management processes
- being able to pass on or enhance traditional skills and knowledge
- preserving historical or archaeological features
- preserving or re-establishing indigenous plants and animals
- the use of the traditional name for the site
- acquiring access rights to cultural resources such as medicinal plants or fallen trees for carving, and
- improving the health of the habitat and management of fisheries in wetlands and lagoons.

THE CROWN'S INTERESTS AND APPROACH

The Crown's interests in and approach to redress involving wetlands and lagoons, indigenous forests and tussock lands match its approach to wāhi tapu and wāhi whakahirahira, and its approach to rivers and lakes, as already explained. This means that the Crown will be concerned:

- to ensure the redress is meaningful to the claimant group
- to keep conservation land in public ownership unless there is strong justification for vesting title in the claimant group
- to preserve public access unless there are strong reasons for restricting it
- to preserve historical features of a site
- to preserve indigenous plants and animals and help re-establish them if appropriate
- to ensure there is an appropriate way of managing the site, which meets the requirements of existing legislation
- to ensure any overlapping claim issues have been addressed to the satisfaction of the Crown, and
- to ensure any existing legal rights of third parties (such as rights of way, drainage easements) are protected.

And, as already noted, the Crown can only use land in redress if it is the owner.

Claimant groups and the Crown will often have many interests in common in relation to these areas, and can work from these to explore ways of meeting any remaining differing interests.

REDRESS OPTIONS FOR WETLANDS AND LAGOONS, INDIGENOUS FORESTS AND TUSSOCK LANDS

Within the limitations noted above, there are still many constructive and effective ways in which to meet claimant groups' cultural interests in wetlands and lagoons, indigenous forests and tussock land. These options are noted in the table to the right.

The options are designed to meet the following broad interests:

- recognition of the claimant group
- claimant group involvement in the management of a specified area
- claimant group input into decision-making about a specified area, and
- improved access to places where traditional foods or other resources can be gathered.

The range of options provides a great deal of flexibility in developing solutions to deal with each situation on an individual basis. More detail on statutory instruments is available in the section *Statutory Instruments* starting on page 115.

Redress options using statutory instruments for wetlands, lagoons, indigenous forests and tussock lands	Further detail (page)
Statutory vesting of fee simple estate (transfer of legal ownership of land) for wāhi tapu or wāhi whakahirahira within such areas	116
Statutory vesting as a reserve	120
Overlay classifications (Tōpuni, Taki Poipoia or Kirihipi)	121
Statutory Acknowledgements	122
Deeds of Recognition	123
Protocols	123
Place-name changes	114

Coastal areas including the foreshore and islands

DEFINITIONS

Foreshore means the area of land covered and uncovered by the flow and ebb of the tide at mean spring tides. Legal boundaries to land are usually surveyed to a line called mean high water springs, with the area from this to low tide making up the foreshore.

The Coastal Marine Area is defined in the Resource Management Act 1991 and means the foreshore, seabed, and coastal water, and the air space above the water out to the 12-mile limit of the territorial sea. The boundary on the landward side is generally the line of mean high water springs. However, where that line crosses a river, the landward boundary at that point is the lesser of:

- one kilometre upstream from the mouth of the river, or
- the point upstream that is calculated by multiplying the width of the river mouth by five.

SIGNIFICANCE TO MĀORI

The foreshore and coastal areas were, and still are, of great significance to Māori as sources of food and other resources such as whalebones. Before roads were developed, most travel was by coastal walkways or boat journeys along the coast. Tribal authority over coastal areas was therefore vital for food, trade and defence and was often keenly disputed. Coastal areas also have great significance for their cultural and spiritual associations – examples are the sites of the waka landings from Hawaiiki, the stories associated with the naming of geographical features, and the locations of urupā and other wāhi tapu.

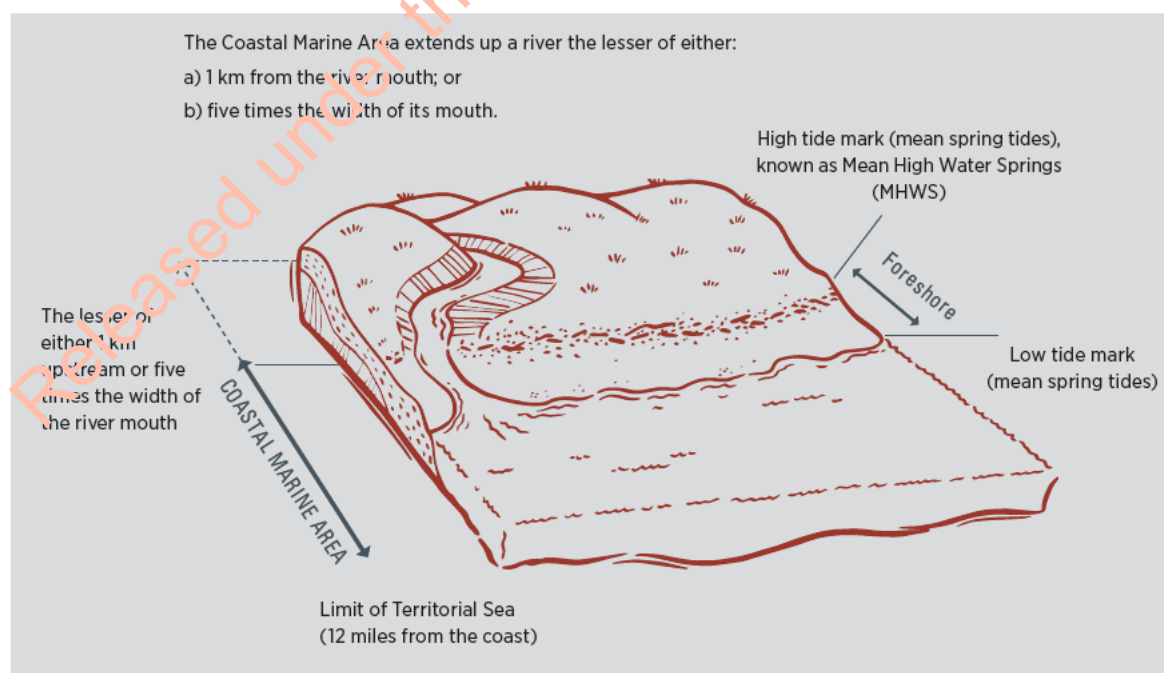


Figure 3.8: The Coastal Marine Area (CMA)

CLAIMANT GROUP INTERESTS

From negotiations to date, the Crown is aware of the following specific interests relating to the broader interests that claimant groups may raise in negotiations about coastal areas (including the foreshore) and islands:

- obtaining ownership of culturally significant areas
- improving participation in resource management
- the health of the foreshore and coastal environment, particularly as it affects kaimoana
- sustainable non-commercial fishing and other harvesting
- being able to prevent damage or inappropriate access to wāhi tapu
- preserving or re-establishing indigenous plants and animals
- being able to pass down or enhance traditional skills and knowledge
- the use of traditional place names, and
- acquiring better access for customary gathering of food and other resources.

THE CROWN'S INTERESTS AND APPROACH

The Crown's approach to redress involving foreshore and coastal areas is based on:

- maintaining existing public access to the foreshore and seabed and islands, and
- environmental management of the Coastal Marine Area by regional councils under the Resource Management Act 1991.

Groups that have concluded comprehensive settlements of their historical claims with the Crown can still bring claims based on aboriginal title or customary rights relating to Crown omissions or actions after 21 September 1992.

The Marine and Coastal Area Act (Takutai Moana) 2011 enables Māori to apply for recognition of certain customary interests in New Zealand's coastal area. Go to www.justice.govt.nz/macaa for more information.

As with inland waterways, the Crown and Māori have many interests in common in relation to the health of the coastal environment and the sustainable use of resources. There are clearly very different views on the ownership of the foreshore. The redress options developed so far show that many interests of claimant groups can be met without transferring ownership.

REDRESS OPTIONS FOR COASTAL AREAS

These include:

- action to protect wāhi tapu on the foreshore, and
- recognition through a statutory instrument (see below).

In addition, existing legislation provides for ways of managing customary fishing, including the establishment of mātaihai (coastal fishing reserves), and these are briefly explained on the next page.

ACTION TO PROTECT WĀHI TAPU ON THE FORESHORE

The Crown and claimant groups may agree to measures such as fencing off separate areas or re-routing walkways to protect wāhi tapu on the foreshore.

RECOGNITION THROUGH A STATUTORY INSTRUMENT

Statutory instruments that may be suitable for recognising claimant group interests in coastal areas are noted in the following table.

Redress options using statutory instruments for coastal areas	Further detail (page)
Statutory Acknowledgements	122
Protocols	123
Place name changes	114

ISLANDS – SIGNIFICANCE, INTERESTS AND REDRESS OPTIONS

In general, islands raise many of the same concerns for claimant groups as wāhi tapu and wāhi whakahirahira, or wetlands, forests and tussock lands, but they also raise some of the same issues for the Crown relating to coastal areas. Islands are often also highly significant for conservation purposes – as sanctuaries for endangered and recovering plant and animal species. Depending on the size of the island, the purpose for which it is used and its current ownership, most of the redress options already discussed could be applied to islands.

Māori customary fisheries – use of existing legislation

INTRODUCTION

Both freshwater and marine customary fisheries issues have been raised in negotiations to date. Fisheries issues are, of course, closely related to the surrounding resource (river, lake or sea), and redress relating to these resources may help in resolving some fisheries issues. Other statutory instruments can improve input into decision-making about the waterway that supports a traditional fishery.

In this section the focus is on customary fisheries themselves and the measures available under existing legislation and outside a negotiated settlement to recognise and provide for them.

Customary marine fisheries – taiapure and Customary Fishing Regulations

TAIAPURE

A taiapure regime is a management tool for non-commercial fisheries areas that are of special significance to the local tangata whenua. It gives a certain amount of management control to a specially appointed committee. Establishing such a committee may allow Māori to consult extensively with the local community and other stakeholders such as recreational fishers. A small number of taiapure have now been established.

The relevant legislation is the Fisheries Act 1996, in particular Part IX, sections 174 to 186B. Part IX deals with all customary, non-commercial fishing provisions of the Act. Claimant groups interested in this option should contact the Ministry for Primary Industries (contact details on page 151).

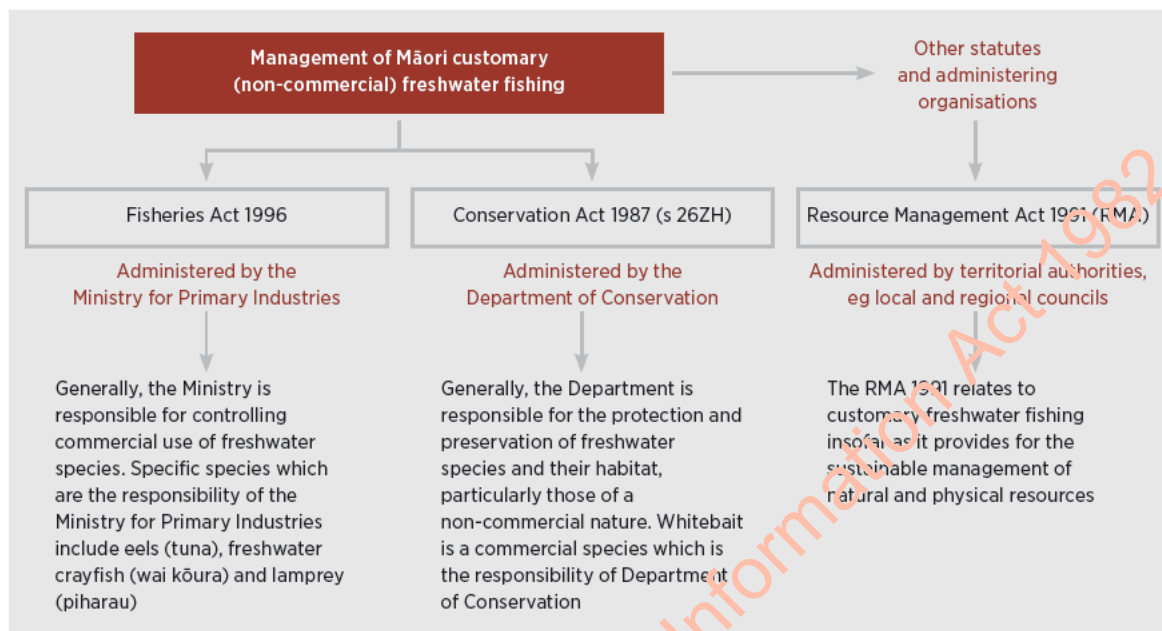


Figure 3.9: freshwater fish – who has responsibility for species and habitat management?

CUSTOMARY FISHING REGULATIONS

The Fisheries (South Island Customary Fishing) Regulations 1999 and the Fisheries (Kaimoana Customary Fishing) Regulations 1998, which apply to the rest of New Zealand, apply to sea fisheries and provide similar systems for:

- identifying and appointing tangata tiaki/kaitiaki to manage customary non-commercial food gathering of fish and other sea life within defined areas
- record-keeping as part of management
- enabling tangata tiaki/kaitiaki to participate in sustainable fisheries management through the Ministry for Primary Industries
- establishing mātaihai reserves (see below), and
- creating penalties for breaching the regulations and by-laws made under them.

Mātaihai reserves enable tangata tiaki/kaitiaki to manage the area of the reserve (an identified traditional fishing ground). Generally, no commercial fishing is permitted and the tangata tiaki/kaitiaki may control all non-commercial fishing by Māori or non-Māori through by-laws approved by the Minister of Primary Industries.

Claimant groups may wish to consider how the regulations can be used, outside of a settlement, to meet concerns about customary non-commercial sea fishing. The 'Fisheries' section on the Ministry for Primary Industries website has more detail and guidance on Māori customary fishing. See page 151 for contact details.

Before a mātaihai reserve is established, the proposal must be advertised so that the local community can make submissions, and the Minister of Fisheries must be satisfied that a number of conditions have been met. For instance, the proposed reserve must not unreasonably interfere with local non-commercial fishing, or prevent commercial quotas being filled.

Geothermal and mineral resources

SIGNIFICANCE TO MĀORI

Geothermal resources have long been prized by Māori. As well as providing hot water for many day-to-day uses, particular sources may have medicinal qualities and be wāhi tapu. Mineral resources of traditional value include pounamu (greenstone), hāngi stones and red ochre/kōkōwai.

CLAIMANT GROUP INTERESTS

From negotiations to date, the Crown is aware of the following specific interests relating to recognition and kaitiakitanga that claimant groups may raise in negotiations about geothermal and mineral resources:

- obtaining ownership of culturally significant areas
- improving participation in resource management
- obtaining use or access rights
- protection of the environment from the harmful effects of the commercial use of geothermal and mineral resources
- the ability to use resources to pass on traditional knowledge, and
- the right to exploit resources commercially, to provide jobs or to share in income/profits from exploitation.

THE CROWN'S INTERESTS AND APPROACH

The use of geothermal energy is managed under the Resource Management Act 1991. As with rivers and lakes, there is no legal provision for ownership of the water (in the form of geothermal steam) in geothermal sites. Most significant mineral resources have been nationalised and are now managed under the Crown Minerals Act 1991 for the benefit of all New Zealanders.

COMMERCIAL INTERESTS

Commercial interests in geothermal and mineral resources are discussed in the section Financial and Commercial Redress (page 81).

FACTORS AFFECTING CULTURAL REDRESS

In considering cultural redress for these resources, the Crown takes into account:

- the special significance of the resource to the claimant group
- its significance to the wider public – the Crown should not be prevented from protecting, preserving and/or managing the resource in the national interest
- whether the claimant group would benefit from managing the resource
- whether the claimant group would have an advantage in managing the resource, perhaps because of traditional knowledge and skills
- existing and potential third party rights, and
- whether any proposed redress fits into existing legal frameworks.

To give a practical example, a small geothermal site may be of great cultural significance to a claimant group. If the Crown owns the site, it may be prepared to transfer ownership of the land to the claimant group, but because water is not owned by anyone, it cannot vest the geothermal water in the claimant group. Following vesting of the land, the claimant group's use of the site would be governed by the same rules that apply to other landowners. For example, the Resource Management Act 1991 governs the allocation of geothermal energy.

REDRESS OPTIONS FOR GEOTHERMAL AND MINERAL RESOURCES

These include:

- vesting ownership of culturally significant minerals
- providing for use or access rights, and
- other recognition through statutory instruments.

VESTING OWNERSHIP OF CULTURALLY SIGNIFICANT MINERALS

For mineral resources with cultural significance, the Crown may consider transferring ownership of minerals that it owns within the claim area. This was done with the vesting of pounamu in the Ngāi Tahu settlement, for instance. Nationalised minerals (petroleum, uranium, gold and silver) are not available as redress. Under the Crown Minerals Act 1991, the Crown owns and manages these in the national interest.

PROVISION FOR USE OF AND/OR ACCESS RIGHTS FOR MINERALS

The Crown may grant specific use rights to mineral resources it owns or manages, apart from nationalised minerals. An example is the recognition of use rights for hāngi stones at specific Crown-owned sites. Such use rights may be combined with access rights to or over Crown land to enable claimant groups to use or gather resources.

In other cases the Crown may acknowledge associations with specific minerals. For example, the Ngati Ruanui Deed of Settlement includes:

- an acknowledgement of Ngati Ruanui's cultural, spiritual, historic and/or traditional association with purangi (a variety of argillite), and
- a protocol between Ngati Ruanui and the Ministry of Economic Development to create a consultative relationship on petroleum resources in accordance with the Crown Minerals Act 1991.

RECOGNITION THROUGH STATUTORY INSTRUMENTS

Statutory instruments that may be useful where geothermal or mineral resources are involved are shown in the table opposite.

NOTE ON VESTING OWNERSHIP OF LAND FOR GEOTHERMAL SITES

For geothermal sites, redress through statutory vesting of title will be limited to transferring ownership of land only, because the water (in the form of geothermal steam) cannot be owned. In deciding whether a site is available, the same general factors apply as for other sites of significance. There are several ways of transferring title, which are explained on page 116. When land is transferred it does not include nationalised minerals.

Redress options using statutory instruments for Geothermal and mineral resources	Further detail (page)
Statutory vesting of fee simple estate (transfer of legal ownership of land – see note above) available only for individuals sites of high cultural significance	116
Statutory Acknowledgements	122
Protocols	123
Place-name changes	114

Moveable taonga

SIGNIFICANCE TO MĀORI

By moveable taonga we mean artefacts (that is, objects) of great significance to the claimant group. Sometimes the Crown and third parties may have acquired taonga in ways that we would now consider to be in breach of the Treaty or its principles.

CLAIMANT GROUP INTERESTS

In negotiation, claimant groups may seek:

- return of taonga to tribal ownership, or
- involvement in the care and custody (kaitiakitanga) of taonga held in institutions such as museums.

THE CROWN'S INTERESTS AND APPROACH

How the Crown will approach redress will largely depend on the particular circumstances of the claim to the taonga – for instance, the current legal status of the taonga and any relevant legislation, such as the Antiquities Act 1975. The Crown will also consider whether the general public interest justifies the taonga being held in a museum or similar institution. It should also be noted that the legislation in this area is currently under review.

REDRESS OPTIONS FOR MOVEABLE TAONGA

RETURN OF OWNERSHIP

If the Crown is the legal owner, returning ownership to the claimant group may be an option. But if third parties have legal ownership, the Crown will be reluctant to disturb this.



Mātaatua Wharehau, Ngāti Awa

INVOLVEMENT IN CARE OF TAONGA – PROTOCOLS

If returning the taonga is not appropriate, the Crown could:

- agree to involve the claimant group in the care and custody (kaitiakitanga) of the taonga, if the Crown holds the taonga, or
- try to arrange negotiations between the claimant group and a third party with the aim of giving the claimant group greater involvement in the care of the taonga.

Both these options could include the development of a protocol, a formal statement issued by the relevant department or agency, setting out how the claimant group will have input into decision-making or other specified processes. For more detail see page 123.

Visible recognition of a claimant group

SIGNIFICANCE TO MĀORI

This redress category involves official place-names and pouwhenua or other physical markers that might be used to indicate a claimant group's association with an area. When New Zealand was colonised and settled by Europeans, English or European place-names replaced many traditional Māori names to describe some places – mountain ranges, lakes, rivers and other geographical features. However, the Māori place-names retain their significance to Māori communities as indicators of tribal identity and history.

CLAIMANT GROUP INTERESTS

In negotiations, claimant groups may seek:

- equal status for Māori and English place-names;
- replacement of an English name with the Māori name, particularly if the English name is offensive to the claimant group, and/or
- replacement of a Māori name that the claimant group does not consider appropriate.

THE CROWN'S INTERESTS AND APPROACH

Redress options must balance the interests of the whole community, bearing in mind the significance that both Māori and European names have for their respective communities.

REDRESS OPTIONS FOR PLACE-NAMES

CHANGE OF OFFICIAL PLACE-NAME

Settlement legislation can be used to change official place-names within the claim area to joint Māori/English names, and in some limited circumstances to Māori only names. The Crown and the claimant group must agree on the list of names to be changed, and the number of changes must be reasonable for the size of the claim area (for example, 88 name changes were included in the Ngāi Tahu settlement, but only four – a change of spelling and three sites without names were named – in the Ngāti Ruanui settlement).

The new names have the same status as names assigned by the New Zealand Geographic Board Ngā Pou Taunaha o Aotearoa (NZGB). If place-names are changed or assigned as part of a settlement, the Crown will also undertake to use the new name on new departmental signs and in future official publications. The Crown will also advise local authorities and Transit New Zealand of the changes and encourage them to use the new official names on road signs as these are replaced.

USE OF EXISTING LEGISLATION

The New Zealand Geographic Board Ngā Pou Taunaha o Aotearoa (NZGB) also has the function of encouraging the use of original Māori place-names on official maps. Māori can submit requests for place-name changes to the Board separately from the Treaty settlement process.

PLACE-NAMES CONTROLLED BY LOCAL AUTHORITIES

Place-name changes as part of a settlement are limited to those controlled by the Crown. Local authorities, not the Crown, control naming of streets and some reserves. The Crown is willing to arrange discussions with local authorities about street names or other place-names that are of concern to claimant groups.

CHANGES OF NAMES FOR RESERVES AND NATIONAL PARKS

Name changes to reflect a claimant group's traditional association with an area now subject to reserve or National Park status can be included in settlement legislation.

POUWHENUA

The Crown may agree to having pouwhenua (carved posts) placed on Crown land at a site of particular significance to a claimant group. This allows the claimant group to be recognised in a visible way in their area of interest. Claimant groups provide the pouwhenua and have responsibility for their care and upkeep.

Statutory instruments

Introduction

In this section we explain in more detail the statutory instruments noted in the earlier discussion of redress options. A statutory instrument is a legal mechanism included in settlement legislation to give effect to agreed redress. The statutory instruments included in this section are:

- statutory vesting of fee simple estate (title to land)
- statutory vesting and gifting back of sites of great significance
- statutory vesting of riverbeds or lakebeds of great significance
- statutory vesting as a reserve
- overlay classifications (Tōpuni, Taki Poipoia or Kirihipi)
- Statutory Acknowledgements
- Deeds of Recognition, and
- protocols.

Flexibility of statutory instruments

Statutory instruments are very useful in negotiations because they have been developed to meet a wide range of claimant group and Crown interests and to apply to a wide range of resources.

This gives the negotiating teams a lot of flexibility in developing redress that is suitable for the circumstances of each claimant group. For instance, the Statutory Acknowledgement instrument:

- provides both recognition for the claimant group and the opportunity for a claimant group's traditional associations to be given regard to in specified Resource Management Act 1991 processes, and
- can be used for many different resources including mountains, rivers, lakes, wetlands, indigenous forests and coastal areas.

It is also possible for more than one instrument to be used for a particular site or resource. For instance, Mount Earnslaw/Pikirakatahi in the Ngāi Tahu settlement is the subject of an overlay classification, Statutory Acknowledgement, Deed of Recognition and place-name change.

Released under the Official Information Act 1982

Statutory vesting of fee simple estate

VESTING (TRANSFER) OF OWNERSHIP

Vesting (or statutory vesting) is the technical term used when the settlement legislation transfers ownership of land to claimant groups. By ownership we mean the legal title to land, sometimes also called the fee simple or freehold title. Usually, ownership carries with it the fullest range of rights over land, although all landowners are, of course, governed by general legislation such as the Resource Management Act 1991. However, it can be useful in negotiations to separate out the 'bundle of rights' that make up ownership, so as to determine which are most relevant. These include:

- the right to exclude others
- ownership of things growing on the land or improvements (such as buildings)
- control and management of the site – how it is used and developed, and
- naming rights.

Some claimant groups also value the prestige or recognition that comes with owning the legal title.

It is also useful to consider the costs and liabilities that go with ownership, these include:

- management costs (fencing, pest and weed control, property maintenance, etc.)
- rates and other local body charges, and
- legal liabilities – for example under the Resource Management Act 1991 or the Health and Safety in Employment Act 1992.

By identifying which interests are most important to the claimant group, and how these relate to any interests the Crown might have, the negotiating teams can work towards agreement on the redress option that best meets the interests of both. This may not always mean transferring ownership to the claimant group.

WHEN IS CROWN LAND AVAILABLE FOR TRANSFER IN SETTLEMENT?

If Crown land is being transferred as cultural rather than commercial redress, sites must usually be of significance to the claimant group, either as wāhi tapu or wāhi whakahirahira. As noted earlier, conservation land is not generally available for use in settlements apart from individual sites with wāhi tapu or wāhi whakahirahira significance.

If the land is subject to section 40 of the Public Works Act 1981 or other restrictions on disposal by the Crown, it must also be cleared of any other back or other third party rights before it can be used in settlement.

OPTIONS FOR TRANSFERRING OWNERSHIP

If transferring ownership to land is a key issue, and land is available, the following options can be considered. These options provide flexibility in how sites are actually controlled and managed after the return of ownership. They include:

- vesting the fee simple (freehold) title with no restrictions on use and management, but possibly with some encumbrances (for example, existing easements or leases)
- vesting title subject to conservation covenants or other appropriate covenants under the Reserves Act 1977 or the Conservation Act 1987 – these allow for matters such as protecting indigenous plants and animals, cultural or spiritual values, or preserving public access
- vesting title subject to a protected private land agreement under the Reserves Act 1977 – this allows the Department of Conservation access to the land, if necessary, to protect conservation values
- vesting title on condition that the land is managed by an administering body as if it were a reserve – this is particularly useful if land is currently a reserve managed by a local authority and has high public recreational value (this option is made possible under section 38 of the Reserves Act 1977), and
- vesting the fee simple (freehold title) in the claimant group with ongoing reserve status.

The most suitable method of vesting is determined on a case-by-case basis. Using these options in a flexible way enables a wide range of interests to be met and at the same time achieves the main aim of transferring ownership to the claimant group.

VESTING TAKES PLACE THROUGH SETTLEMENT LEGISLATION

Transferring ownership of wāhi tapu is usually done through the settlement legislation and is called 'vesting'. This vesting can simplify the processes associated with transferring Crown land.

OVERLAPPING CLAIMS

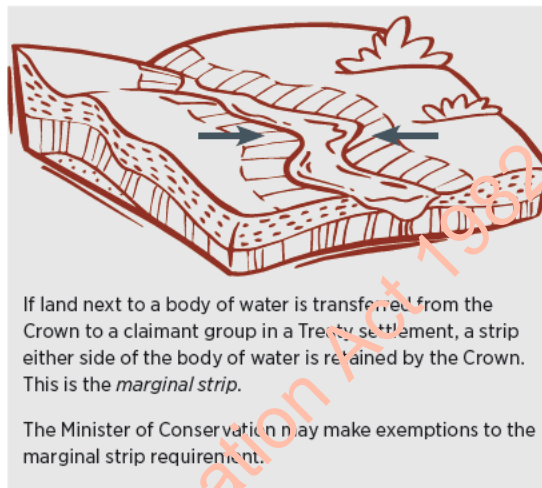
Before transferring title to a claimant group, the Crown needs to be satisfied that any issues relating to overlapping claims have been addressed.

RIGHTS OF THIRD PARTIES

Existing legal rights of third parties in relation to the site will be preserved on transfer. These may include leases, grazing licences, easements and statutory powers.

MARGINAL STRIPS

The Conservation Act 1987 provides that if land next to a body of water is transferred from the Crown, a strip on either side of the body of water (a 'marginal strip') is held back from the sale and managed by the Department of Conservation on behalf of the Crown. This preserves public access to bodies of water, such as lakes, rivers and the sea. The marginal strip is usually 20 metres wide. All land vested through Treaty settlements must have a marginal strip unless the Minister of Conservation approves an exemption. Exemptions may be approved where, for example, a marginal strip would not be effective, such as on a cliff face. If the Minister approves an exemption, the legislation vesting the site will provide that the marginal strip requirement does not apply.



If land next to a body of water is transferred from the Crown to a claimant group in a Treaty settlement, a strip either side of the body of water is retained by the Crown. This is the *marginal strip*.

The Minister of Conservation may make exemptions to the marginal strip requirement.

Figure 3.10: marginal strips

ONGOING COSTS AND INCOME

If ownership of land is transferred to claimant groups, the costs of ownership as well as the benefits are also transferred. These include rates, pest and weed control and other management costs – depending on the type of site. On the other hand, the claimant group will receive any income from the site, such as rental for grazing licences.

Statutory vesting of fee simple estate and gifting back of sites of great significance

So far we have looked at the permanent transfer of ownership of wāhi tapu or wāhi whakahirahira to the claimant group. These are usually small and well-defined areas of high importance. Certain other geographic features of New Zealand represent taonga of huge significance to Māori, and indeed to all New Zealanders. Aoraki/Mount Cook is a good example, representing both a Ngāi Tahu ancestor and New Zealand's natural beauty.

With sites of such importance, the Crown may consider it appropriate to recognise the level of Māori interest in the area by restoring to Māori the sense of original 'custodianship' of the site.

It is a difficult task to achieve this aim, while at the same time preserving for all New Zealanders the right of unlimited access to and use of the area, as well as its status as conservation land.

The redress option that has been developed to achieve this objective requires:

- the Crown to recognise the importance of the site to the claimant group, and, in the spirit of good faith, vest the ownership of the site in the claimant group, and
- in the same spirit, the claimant group to agree that they will freely and without condition gift the site back to the Crown, on behalf of all New Zealanders, so that the site may keep its current status (in the case of Aoraki/Mount Cook, for example, as part of a National Park).

Vesting of title is done by Order in Council (a regulation made by the Executive Council – see 'the Crown' diagram on page 17), authorised by the settlement legislation, on a date agreed by the parties. The gifting back then takes place when the claimant group deliver a Deed of Gift, signed by them, to the Crown, again on an agreed date (likely to be after a short period of time, such as a week after vesting).

The conservation and management status of the site will not change, nor will the vesting and gifting back affect any third party rights. However, a site of this status is also likely to be covered by other types of redress, such as an overlay classification, a Statutory Acknowledgement and/or a place-name change.

So far, the option of vesting and gifting back has been applied only to very significant mountain peaks (Aoraki/Mount Cook in the Ngāi Tahu settlement, and Mount Taranaki/Egmont in a separate agreement in 1978). Its use for other types of site could be explored in future negotiations.

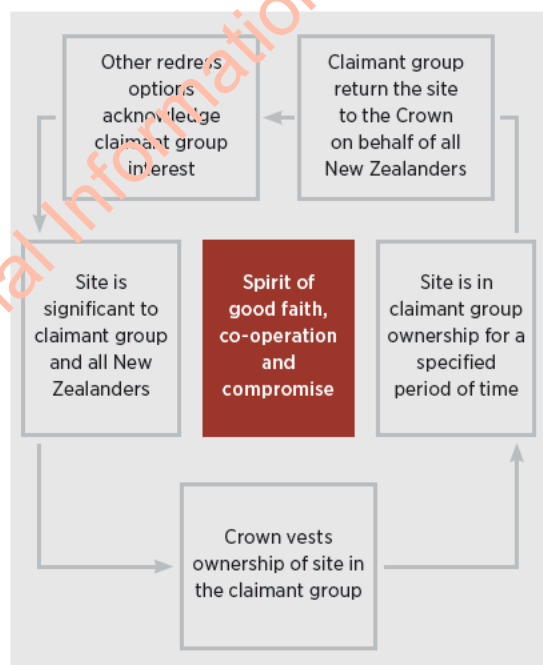


Figure 3.11: vesting and gifting back of significant sites

Statutory vesting of fee simple estate of riverbeds and lakebeds of great significance

As noted in the earlier section on natural resources and interests, the Crown cannot provide ownership of lakes and rivers as a whole in settlement. However, where legally practicable, the lakebed or riverbed may in some cases be available for vesting in the claimant group. First of all, it is necessary to be sure that the Crown actually owns the bed concerned. This may arise under legislation, for instance, the Coal Mines Amendment Act 1903 vested the beds of navigable rivers in the Crown. Or the common law *ad medium filum* rule (the owner of the land at the bank owns the riverbed to the mid-point) may mean that the Crown is the owner.

Redress that includes vesting lakebeds and riverbeds involves a number of legal and practical issues, which means that the settlement arrangements will probably be complex and require co-operation with a range of third parties. For these reasons, only rivers or lakes of great significance to the claimant group are likely to be available for this type of redress. The Crown will also need to consider the significance of the river or lake to all New Zealanders in deciding its approach to redress.

If vesting ownership of a lakebed or riverbed in a claimant group is agreed as part of a settlement package, then the following general principles will apply:

- ownership of the water and of animals and plants living in the lake, as well as existing structures on the lakebed owned by third parties (such as dams, jetties and poles), will not be included in the vesting
- local authorities will be consulted on any interests they consider need to be protected by legislation or contract, through means such as access easements (that is, rights of way)
- for rivers, the role of regional councils under the Resource Management Act 1991 will be preserved, but additional means may be developed to allow the claimant group to play a greater role in managing the riverbed – for instance, the establishment of a special advisory body, and
- existing lawful public access and commercial uses will be preserved.

Other special conditions might need to be negotiated on a case-by-case basis. For instance, the Ngāi Tahu settlement provides for vesting the bed of Te Waihora (Lake Ellesmere) in Te Rūnanga o Ngāi Tahu. The lakebed is managed under a Joint Management Plan developed between Te Rūnanga o Ngāi Tahu and the Director-General of Conservation. Te Rūnanga and the North Canterbury Fish and Game Council have also made a separate agreement for managing maimai on Te Waihora.



Te Waihora (Lake Ellesmere)

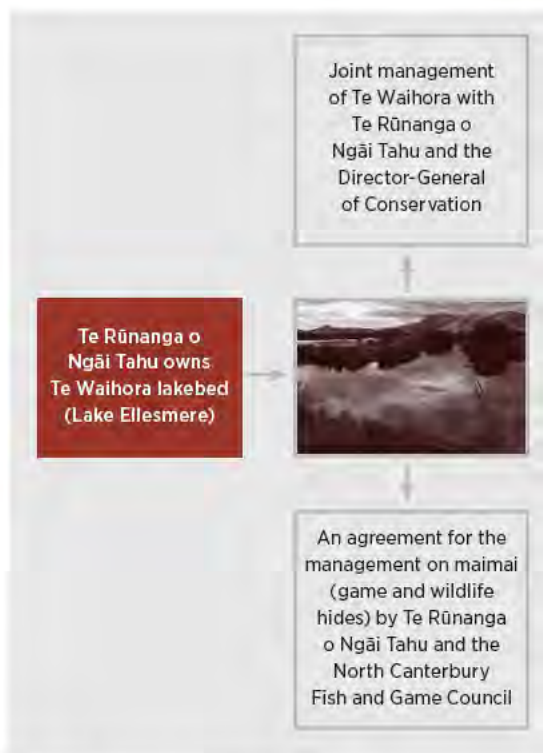


Figure 3.12: Te Waihora (Lake Ellesmere) – ownership of the lakebed

Statutory vesting as a reserve

SECTION 26 OF THE RESERVES ACT 1977

Section 26 of the Reserves Act 1977 provides that the Minister of Conservation may vest reserves subject to the Reserves Act (such as historic or recreation reserves) in *administering bodies*.

This is achieved in settlement legislation by:

- making the governance entity of the claimant group an administering body for the purposes of the Reserves Act
- vesting the reserve in the administering body, under section 26 of the Reserves Act, for the administering body to hold and administer as a trustee, and
- exempting the vesting from the normal administrative processes – such as public notification of the proposed vesting.

WHAT IS THE EFFECT OF VESTING?

The claimant group becomes the administering body of the reserve, and responsible for its management. That means it must manage the reserve in accordance with its classification (as an historic reserve, for example) and in a way that meets the provisions of the Reserves Act and any other law applying to the site. In general, this preserves public rights of access and use consistent with the classification of the reserve. The new administering body must prepare a management plan for the reserve within five years of being appointed. This requires a public consultation process.

The claimant group is responsible for all of the costs of control and management, but the provisions of the Reserves Act that usually govern how revenue earned from the reserve must be spent will not apply.

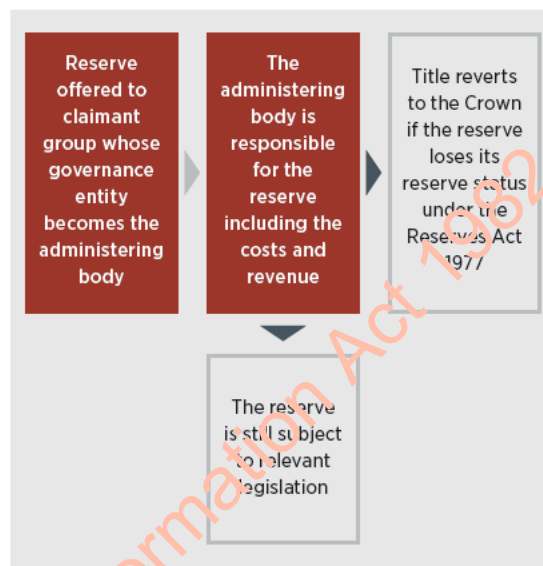


Figure 3.13: Vesting of reserves

WHEN MIGHT VESTING OF A RESERVE BE OFFERED?

The Crown may offer appointment as the administering body of a reserve as redress in a settlement if:

- it is not considered possible to offer full ownership of the site to the claimant group, but
- the claimant group wish to manage and control the site as a reserve and are prepared to take on the responsibility and cost of doing so.

WHAT TYPE OF RESERVE MIGHT BE USED?

Usually historic and recreation reserves will be considered. Nature reserves, scientific reserves and other ecologically sensitive areas are very unlikely to be offered. The availability of scenic reserves will depend on an assessment of the ecological sensitivity of the site and the claimant group's experience and interest in managing ecological values.

ENCUMBRANCES

The vesting of a reserve will be subject to any existing third party rights, such as leases and easements.

Overlay classifications

An overlay classification is a statutory instrument and was developed from the custom of providing chiefly protection though spreading a dogskin cloak (tōpuni) over the person or thing to be protected. An overlay classification applies to an area of land administered by the Department of Conservation. The status of the land (for example, as part of a National Park) is not affected, although the way it is managed may be. The concept has been given a variety of names by claimant groups. In the Ngāti Ruanui Deed of Settlement it is known as Nga Taki Poipoia o Ngāti Ruanui. In the Ngāi Tahu Deed – where the concept was first developed – it is known as a Tōpuni. Te Uri o Hau have, in their Deed of Settlement, used the name Kirihipi.

AN OVERLAY CLASSIFICATION

- acknowledges the claimant group's spiritual, cultural, historical and traditional values in respect of a site
- maintains existing status (for example, National Park status), and
- Department of Conservation must consult and in agreed ways, avoid harm to these values

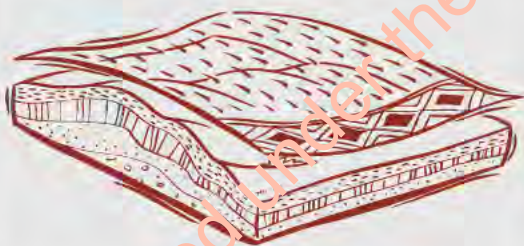


Figure 3.14: Overlay classification

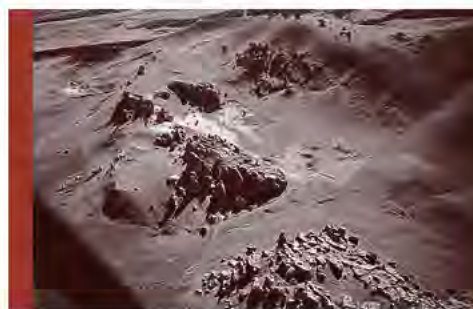
CROWN ACKNOWLEDGEMENT OF CLAIMANT GROUP VALUES

When the Crown agrees to declare an area to be subject to an overlay classification, the Crown acknowledges in legislation a statement by the claimant group of the particular traditional values that the group has in relation to that area. This statement is taken into account in the way the Crown manages the site.

WHAT IS THE EFFECT OF AN OVERLAY CLASSIFICATION?

In recognition of the acknowledged values, those managing the overlay classification are given certain procedural obligations. Those obligations provide for the claimant group to have input into the management of the overlay classification, through:

- notification in the NZ Gazette of principles agreed between the claimant group and the Minister of Conservation – any agreed principles will have the aim of ensuring that the Minister avoids harming the claimant group's acknowledged values
- requiring the New Zealand Conservation Authority and the regional Conservation Board to consult the claimant group and to have particular regard to both their acknowledged values and any agreed principles as well as the views of the claimant group, in carrying out certain management planning and policy functions under the Conservation Act 1987 and associated legislation
- notification of the overlay classification on conservation and national park management plans affecting those areas, as well as in the NZ Gazette, so that the public is informed, and
- requiring the Director-General of Conservation to take action on any agreed principles – the Director-General has discretion as to how and to what extent any such action is taken. It may range from simply issuing a statement to recommending regulations.



Kura Tāwhiti/Castle Hill – Tōpuni area in Ngāi Tahu settlement

WHEN IS AN OVERLAY CLASSIFICATION AVAILABLE?

An overlay classification gives a very high degree of recognition. Its use is therefore limited to a small number of sites. The Crown also considers that it is most appropriately used as an exclusive instrument, which means that the Crown would not give this redress over the same site to more than one claimant group.

Statutory acknowledgements

CULTURAL, HISTORICAL, SPIRITUAL AND TRADITIONAL ASSOCIATION WITH AN AREA

Within an area of interest, certain sites or features may be of particular traditional significance to a claimant group, for different reasons. That significance may not always be obvious to third parties, such as local authorities. As a result, a claimant group may feel that its traditional association with the particular site has not always been fully considered. For instance, wahi tapu could have been unintentionally destroyed because a local authority had never been aware of a site, and the claimant group had never been told that a resource consent had been applied for or granted over the area in question.

CROWN ACKNOWLEDGEMENT OF ASSOCIATION

The Crown may agree in a settlement to acknowledge in legislation a statement by the claimant group of their special association with an area or feature.

WHEN MAY A STATUTORY ACKNOWLEDGEMENT BE GIVEN?

The Crown will consider giving a Statutory Acknowledgement over defined sites or features on Crown-owned land that are of high significance to the claimant group. They may include rivers, lakes, wetlands, mountains, forests, islands, coastal areas and other such areas traditionally of high significance to Māori, either for their resources or for their links to tribal history and tūpuna.

Statutory Acknowledgements are not exclusive instruments: this means that the Crown could give an acknowledgement over the same site to more than one claimant group. They can be a useful way of recognising valid overlapping interests.

EFFECTS OF STATUTORY ACKNOWLEDGEMENTS

Because of the Crown's recognition of the association of the claimant group with the site or feature, the Statutory Acknowledgement also strengthens the notification provisions of the Resource Management Act 1991. It does this by obliging decision-makers acting under those provisions to proceed in certain ways.

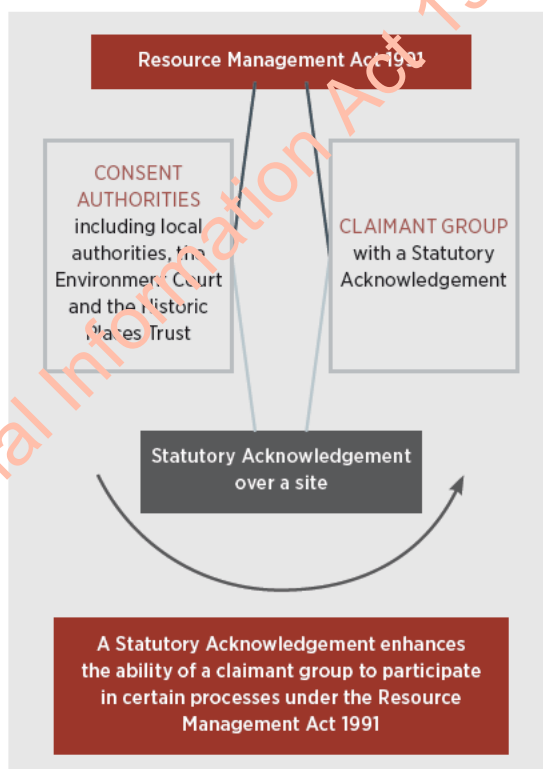


Figure 3.15: Statutory Acknowledgements

These legal obligations are that:

- consent authorities must have regard to the Statutory Acknowledgement in deciding whether the claimant group is an 'affected party' when notifying resource consent applications for those sites
- consent authorities must send summaries of all relevant applications to the claimant group before making a decision on notification
- local authorities must attach information on the acknowledgements to any relevant plans, and
- the Environment Court and the Historic Places Trust must have regard to the Statutory Acknowledgement when deciding whether to hear representatives of Māori at proceedings affecting the sites.

MORE DETAILS ON STATUTORY ACKNOWLEDGEMENTS

Case Study 1: Ngāi Tahu – Statutory Acknowledgement for the Clutha River/Mata-Au on page 96 looks at Ngāi Tahu's associations with the Clutha River/Mata-Au, and the interests that Ngāi Tahu and the Crown were seeking to meet in developing this redress option. The text of the Statutory Acknowledgement for Aoraki/Mount Cook is set out in full on pages 125–126.

Deeds of Recognition

If a Statutory Acknowledgement has been made, the Minister of the Crown responsible for managing the area may also enter into a Deed of Recognition over the land area under management. A Deed of Recognition will provide that the claimant group must be consulted on specified matters, and that the relevant Minister must have regard to their views.

WHEN WILL A DEED OF RECOGNITION BE ENTERED INTO?

The Crown is likely to agree to enter into a Deed of Recognition over any area covered by a Statutory Acknowledgement that the Crown is responsible for managing. But this means it will not enter into a Deed of Recognition over Crown-owned land managed by a local authority, or over water. For this reason, a Deed of Recognition is not available for a coastal area.

WHAT IS THE IMPACT ON MANAGING THE LAND?

The Deed provides for the claimant group to contribute from time to time to managing the land. Many such sites – for example, lakebeds – are given very little active management by the Crown. The Deed of Recognition does not require the Crown to increase its management activities. As an example the Deed of Recognition for Aoraki/Mount Cook is set out on pages 127–132.

Protocols

WHAT IS A PROTOCOL?

A protocol is a statement issued by a Minister of the Crown, or other statutory authority, setting out how a particular government agency intends to:

- interact with a claimant group on a continuing basis and enable that group to have input into its decision-making process, and
- exercise its functions, powers and duties in relation to specified matters within its control in the claimant group's area of interest.

HOW DO PROTOCOLS WORK?

Protocols set out processes (that is, ways of making decisions), not results. For example, a protocol issued by the Minister of Conservation might state that requests from the claimant group for the customary use of cultural materials will be considered, but it will not guarantee that the requests will be granted. This is because protocols are issued subject to the Minister's and the agency's legal and policy obligations, they do not restrict those obligations.

Since protocols set out administrative processes, they will be enforceable by way of judicial review (that is, the courts can consider how a protocol should have affected the way in which a decision was made). But damages are not available as compensation for the fact that decisions were not made in accordance with protocols. Protocols are statements made by the Crown, and not contracts, so they are not enforceable as contracts.

PROTOCOLS MAY BE AMENDED OR CANCELLED

It may become necessary or desirable, because of changes in law or policy, or for some other reason, to amend or cancel a particular protocol. But if the relevant Minister wants to make such changes, they must first consult the claimant group and have regard to its views.

WHEN MIGHT A PROTOCOL BE OFFERED IN A SETTLEMENT?

A protocol is a useful way of helping to define the relationship between the claimant group and government departments, particularly those whose activities are of special interest to Māori. For example, the Minister of Conservation has issued protocols on cultural materials and historic resources, amongst other things. A protocol from the Minister of Fisheries may be a useful way to deal with some customary kaimoana fisheries issues.

A protocol may also serve to meet claimant group concerns when other redress is not available or appropriate. For example, it may not be possible to transfer ownership of a number of wāhi tapu sites on Crown-owned land to the claimant group. However, a suitable protocol may help meet their concerns about protection of and access to those sites.

Protocols are not exclusive redress instruments, which means that the Minister could issue protocols to more than one claimant group for the same or an overlapping area.

Sometimes memoranda of understanding with non-Crown agencies (for example, local authorities) may be a suitable way of dealing with claimant group interests in decision-making processes. The Crown may agree to try to arrange discussions with such third parties, but any resulting protocols are not part of the settlement with the Crown.

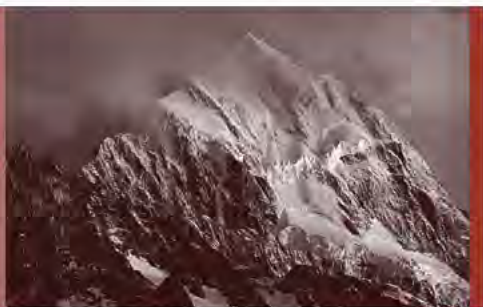
EXAMPLE OF A PROTOCOL

Case Study 2: Ngati Ruanui – Ministry for Primary Industries Protocol, on page 97 shows how this instrument is used.

Claimant specific redress

On some occasions it is more appropriate to negotiate a new form of redress for a particular claimant group interest, rather than rely on the existing redress instruments. An example of a negotiated redress instrument is the Statement of Joint Aspirations in the Pouakani Deed of Settlement. Titiraupenga (a mountain) is a very important wāhi tapu to the Pouakani people. To acknowledge this they were offered three forms of redress, a Statutory Acknowledgement over the site, a Memorandum of Understanding and a Statement of Joint Aspirations. A Statement of Joint Aspirations recognises that Titiraupenga is a taonga and records the joint aspirations of the Pouakani people and the Crown for Titiraupenga.

Example of a statutory acknowledgement – Aoraki/Mount Cook



Aoraki/Mount Cook

'He kapua kei runga i Aoraki whakarewa whakarewa'
(*'The cloud that floats aloft Aoraki, forever fly, stay aloft'*)

The following is an extract from Schedule 14 Ngāi Tahu Claims Settlement Act 1998, Sections 205 and 206.

Statutory acknowledgement – Aoraki/Mount Cook

STATUTORY AREA

The statutory area to which this statutory acknowledgement applies is the area known as Aoraki/Mount Cook located in Kā Tiritiri o te Moana (the Southern Alps), as shown on Allocation Plan MS 1 (SO 19831).

PREAMBLE

Under section 206, the Crown acknowledges Te Rūnanga o Ngāi Tahu's statement of Ngāi Tahu's cultural, spiritual, historic, and traditional association to Aoraki as set out below.

NGĀI TAHU ASSOCIATION WITH AORAKI

In the beginning there was no Te Wai Pounamu or Aotearoa. The waters of Kiwa rolled over the place now occupied by the South Island, the North Island and Stewart Island. No sign of land existed.

Before Raki (the Sky Father) wedded Papatūānuku (the Earth Mother), each of them already had children by other unions. After the marriage, some of the Sky Children came down to greet their father's new wife and some even married Earth Daughters.

Among the celestial visitors were four sons of Raki who were named Aoraki (Cloud in the Sky), Rakíroa (Long Raki), Rakírua (Raki the Second), and Rārakíroa (Long Unbroken Line). They came down in a canoe which was known as Te Waka o Aoraki. They cruised around Papatūānuku who lay as one body in a huge continent known as Hawaiiki.

Then, keen to explore, the voyagers set out to sea, but no matter how far they travelled, they could not find land. They decided to return to their celestial home but the karakia (incantation) which should have lifted the waka (canoe) back to the heavens failed and their craft ran aground on a hidden reef, turning to stone and earth in the process.

The waka listed and settled with the west side much higher out of the water than the east. Thus the whole waka formed the South Island, hence the name: Te Waka o Aoraki. Aoraki and his brothers clambered on to the high side and were turned to stone. They are still there today.

Aoraki is the mountain known to Pākehā as Mount Cook, and his brothers are the next highest peaks near him. The form of the island as it now is owes much to the subsequent deeds of Tū Te Rakiwhānoa, who took on the job of shaping the land to make it fit for human habitation.

For Ngāi Tahu, traditions such as this represent the links between the cosmological world of the gods and present generations, these histories reinforce tribal identity and solidarity, and continuity between generations, and document the events which shaped the environment of Te Wai Pounamu and Ngāi Tahu as an iwi.

The meltwaters that flow from Aoraki are sacred. On special occasions of cultural moment, the blessings of Aoraki are sought through taking of small amounts of its 'special' waters, back to other parts of the island for use in ceremonial occasions.

The mauri of Aoraki represents the essence that binds the physical and spiritual elements of all things together, generating and upholding all life. All elements of the natural environment possess a life force, and all forms of life are related. Mauri is a critical element of the spiritual relationship of Ngāi Tahu Whānui with the mountain.

The saying 'He kapua kei runga i Aoraki, whakarewa whakarewa' ('The cloud that floats aloft Aoraki, for ever fly, stay aloft') refers to the cloud that often surrounds Aoraki. Aoraki does not always 'come out' for visitors to see, just as that a great chief is not always giving audience, or on 'show'. It is for Aoraki to choose when to emerge from his cloak of mist, a power and influence that is beyond mortals, symbolising the mana of Aoraki.

To Ngāi Tahu, Aoraki represents the most sacred of ancestors, from whom Ngāi Tahu descend and who provides the iwi with its sense of communal identity, solidarity, and purpose. It follows that the ancestor embodied in the mountain remains the physical manifestation of Aoraki, the link between the supernatural and the natural world. The tapu associated with Aoraki is a significant dimension of the tribal value, and is the source of the power over life and death which the mountain possesses.

PURPOSES OF STATUTORY ACKNOWLEDGEMENT

Pursuant to section 215, and without limiting the rest of this schedule, the only purposes of this statutory acknowledgement are—

- a) To require that consent authorities forward summaries of resource consent applications to Te Rūnanga o Ngāi Tahu as required by regulations made pursuant to section 207 (clause 12.2.3 of the deed of settlement); and
- b) To require that consent authorities, the Historic Places Trust, or the Environment Court, as the case may be, have regard to this statutory acknowledgement in relation to Aoraki, as provided in sections 208 to 210 (clause 12.2.4 of the deed of settlement), and

- c) To empower the Minister responsible for management of Aoraki or the Commissioner of Crown Lands, as the case may be, to enter into a Deed of Recognition as provided in section 212 (clause 12.2.6 of the deed of settlement), and

- d) To enable Te Rūnanga o Ngāi Tahu and any member of Ngāi Tahu Whānui to cite this statutory acknowledgement as evidence of the association of Ngāi Tahu to Aoraki as provided in section 211 (clause 12.2.5 of the deed of settlement).

LIMITATIONS ON EFFECT OF STATUTORY ACKNOWLEDGEMENT

Except as expressly provided in sections 208 to 211, 213, and 215,—

- a) This statutory acknowledgement does not affect, and is not to be taken into account in, the exercise of any power, duty, or function by any person or entity under any statute, regulation, or bylaw, and
- b) Without limiting paragraph (a), no person or entity, in considering any matter or making any decision or recommendation under statute, regulation, or bylaw, may give any greater or lesser weight to Ngāi Tahu's association to Aoraki (as described in this statutory acknowledgement) than that person or entity would give under the relevant statute, regulation, or bylaw, if this statutory acknowledgement did not exist in respect of Aoraki.

Except as expressly provided in this Act, this statutory acknowledgement does not affect the lawful rights or interests of any person who is not a party to the deed of settlement.

Except as expressly provided in this Act, this statutory acknowledgement does not, of itself, have the effect of granting, creating, or providing evidence of any estate or interest in, or any rights of any kind whatsoever relating to, Aoraki.

Example of a deed of recognition – Aoraki/Mount Cook

The following Deed was made pursuant to section 215 of the Ngāi Tahu Claims Settlement Act 1998

DEED OF RECOGNITION FOR AORAKI

THIS DEED IS MADE ON 22 OCTOBER 1998

BETWEEN:

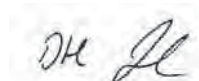
- (1) TE RŪNANGA O NGĀI TAHU ("Te Rūnanga")
- (2) HER MAJESTY THE QUEEN in right of New Zealand acting by and through the Minister of Conservation (the "Crown")

BACKGROUND

- A. On 21 November 1997 Te Rūnanga and the Crown entered into a Deed of Settlement (the "Deed of Settlement") recording the matters required to give effect to a settlement of all of the historical claims of Ngāi Tahu Whānui.
- B. Pursuant to clause 12.3 of the Deed of Settlement, Te Rūnanga and the Crown agreed to enter into Deeds of Recognition acknowledging, on the terms identified below, Te Rūnanga's statement of the cultural, spiritual, historic and/or traditional association on which the mana and tangata whenua status of Ngāi Tahu in relation to specific areas is based.

ACCORDINGLY, the parties acknowledge and agree as follows:

1. **Specific Area of Aoraki**
The area which is the subject of this Deed is the area known as Aoraki / Mount Cook (the "Area") as shown on Allocation Plan MS 1 (S.O. 19831) appended to the Deed of Settlement. The Area is administered by the Department of Conservation.
2. **Ngāi Tahu Association with Aoraki**
 - 2.1 Pursuant to section 206 of the Ngāi Tahu Claims Settlement Act 1998 (clause 12.2.2 of the Deed of Settlement), the Crown acknowledges Te Rūnanga's statement of Ngāi Tahu's cultural, spiritual, historic and/or traditional association to Aoraki as set out below.
 - 2.2 In the beginning there was no Te Wai Pounamu or Aotearoa. The waters of Kiwa rolled over the place now occupied by the South Island, the North Island and Stewart Island. No sign of land existed.



DEED OF RECOGNITION FOR AORAKI

- 2.3 Before Raki (the Sky Father) wedded Papatūānuku (the Earth Mother), each of them already had children by other unions. After the marriage, some of the Sky Children came down to greet their father's new wife and some even married Earth Daughters.
- 2.4 Among the celestial visitors were four sons of Raki who were named Aoraki (Cloud in the Sky), Rakiroa (Long Raki), Rakirua (Raki the Second), and Rarakiroa (Long Unbroken Line). They came down in a canoe which was known as Te Waka o Aoraki. They cruised around Papatūānuku who lay as one body in a huge continent known as Hawaiiki.
- 2.5 Then, keen to explore, the voyagers set out to sea, but no matter how far they travelled, they could not find land. They decided to return to their celestial home but the karakia (incantation) which should have lifted the waka (canoe) back to the heavens failed and their craft ran aground on a hidden reef, turning to stone and earth in the process.
- 2.6 The waka listed and settled with the west side much higher out of the water than the east. Thus the whole waka formed the South Island, hence the name: Te Waka o Aoraki. Aoraki and his brothers clambered on to the high side and were turned to stone. They are still there today. Aoraki is the mountain known to Pākehā as Mount Cook, and his brothers are the next highest peaks near him. The form of the island as it now is owes much to the subsequent deeds of Tū Te Rakiwhānoa, who took on the job of shaping the land to make it fit for human habitation.
- 2.7 For Ngāi Tahu, traditions such as this represent the links between the cosmological world of the gods and present generations, these histories reinforce tribal identity and solidarity, and continuity between generations, and document the events which shaped the environment of Te Wai Pounamu and Ngāi Tahu as an iwi.
- 2.8 The meltwaters that flow from Aoraki are sacred. On special occasions of cultural moment, the blessings of Aoraki are sought through taking of small amounts of its 'special' waters back to other parts of the island for use in ceremonial occasions.
- 2.9 The mauri of Aoraki represents the essence that binds the physical and spiritual elements of all things together, generating and upholding all life. All elements of the natural environment possess a life force, and all forms of life are related. Mauri is a critical element of the spiritual relationship of Ngāi Tahu Whānui with the mountain.

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DEED OF RECOGNITION FOR AORAKI

- 2.10 The saying 'He kapua kei runga i Aoraki, whakarewa whakarewa' ('The cloud that floats aloft Aoraki, for ever fly, stay aloft') refers to the cloud that often surrounds Aoraki. Aoraki does not always 'come out' for visitors to see, just as that a great chief is not always giving audience, or on 'show'. It is for Aoraki to choose when to emerge from his cloak of mist, a power and influence that is beyond mortals, symbolising the mana of Aoraki.
- 2.11 To Ngāi Tahu, Aoraki represents the most sacred of ancestors, from whom Ngāi Tahu descend and who provides the iwi with its sense of communal identity, solidarity, and purpose. It follows that the ancestor embodied in the mountain remains the physical manifestation of Aoraki, the link between the supernatural and the natural world. The tapu associated with Aoraki is a significant dimension of the tribal value, and is the source of the power over life and death which the mountain possesses.
- 3. Role of Te Rūnanga**
- 3.1 By reason of the Crown's acknowledgement of the association described in clause 2, Te Rūnanga must be consulted and particular regard had to its views relating to the association described in clause 2 concerning the following management and administration activities which may be undertaken from time to time by the Crown in relation to the land within the Area:
- (a) the preparation, consistent with Part IIIA of the Conservation Act and section 47 of the National Parks Act, of all Conservation Management Strategies and/or National Park Management Plans which relate to the Area;
 - (b) the preparation of all non-statutory plans, strategies or programmes for the protection and management of the Area in relation to the following:
 - (i) any programme to identify and protect indigenous plants;
 - (ii) any survey to assess current and future visitor activities;
 - (iii) any departmental guidelines for search and rescue programmes;
 - (iv) any programme to identify and protect wildlife;
 - (v) any programme to eradicate pests or other introduced species; or
 - (vi) any survey to identify the number and type of concessions which may be appropriate; and

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DEED OF RECOGNITION FOR AORAKI

- (c) the location, construction and relocation of any structures, huts, signs and tracks.
- 3.2 In order to enable Te Rūnanga to fulfill its role under clause 3.1 the Crown will provide Te Rūnanga with relevant information to enable Te Rūnanga to consider and advise its views to the Crown on any matter on which it is consulted.
- 3.3 The Crown will inform Te Rūnanga of all concession applications to the Area (but retains the discretion to withhold commercially sensitive material).
- 4. Other Provisions**
- Pursuant to sections 217, 218 and 219 of the Ngāi Tahu Claims Settlement Act 1998 (clauses 12.2.11, 12.2.12 and 12.2.13 of the Deed of Settlement);
- 4.1 except as expressly provided in this Deed of Recognition:
- (a) this Deed of Recognition does not affect, and is not to be taken into account in, the exercise of any power, duty, or function by any person or entity under any statute, regulation, or bylaw; and
- (b) without limiting paragraph (a), no person or entity, in considering any matter or making any decision or recommendation under any statute, regulation, or bylaw, may give any greater or lesser weight to Ngāi Tahu's association to the Area than that person or entity would give under the relevant statute, regulation or bylaw, if this Deed of Recognition did not exist in respect of the Area.
- 4.2 except as expressly provided in this Deed of Recognition, this Deed does not affect the lawful rights or interests of any person who is not a party to the Deed of Settlement; and
- 4.3 except as expressly provided in this Deed of Recognition, this Deed does not, of itself, have the effect of granting, creating, or providing evidence of any estate or interest in, or any rights of any kind whatsoever relating to, the Area.
- 4.4 Nothing in this Deed requires the Crown to undertake any management function referred to in clause 3 above.
- 5. Alienation of Land**
- Pursuant to section 214 of the Ngāi Tahu Claims Settlement Act 1998 (clause 12.2.8 of the Deed of Settlement), in the event that the Area is alienated by the

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DEED OF RECOGNITION FOR AORAKI

Crown, this Deed of Recognition is automatically terminated (and the right of first refusal set out in Part 9 of the Ngāi Tahu Claims Settlement Act 1998 (Section 9 of the Deed of Settlement) applies).

6. **Change in Management**

Pursuant to clause 12.2.9 of the Deed of Settlement, if there is a change in the Crown entity managing the Area, or the applicable statutory management regime over the Area, the Crown will take reasonable steps to ensure that Te Rūnanga continues to have input into the management of the Area through the negotiation, by the Minister responsible for the new management or management regime, of a new or amended Deed of Recognition to replace this Deed of Recognition.

7. **Interpretation**

- 7.1 Terms defined in the Deed of Settlement will have the same meaning in this Deed. In addition:

concession has the meaning given to it in the Conservation Act 1987.

- 7.2 To the extent that any inconsistencies exist between this Deed of Recognition and the Deed of Settlement the provisions of the Deed of Settlement will prevail.

EXECUTED as a Deed on 22 October 1998

SIGNED for and on behalf of
HER MAJESTY THE QUEEN in
right of New Zealand by
HON. DR NICK SMITH, Minister
of Conservation in the presence of:

)
)
)
)
)
)
Hon. Dr Nick Smith

Graine Campbell
Witness

Graine Campbell
Signature

Conservation Advisor
Occupation

Wellington
Address

DEED OF RECOGNITION FOR AORAKI

THE SEAL of
TE RŪNANGA O NGĀI TAHU was
affixed to this document in the presence
of:



M. J. [Signature]

Rūnanga Representative

[Signature]

Secretary

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DM JL

Supporting information

Released under the Official Information Act 1982

Protection of potential settlement assets

This section explains how the Crown protects the following assets for potential use in settling historical Treaty of Waitangi claims:

- surplus Crown-owned land
- Public Works Act land held by the Crown and sought by local authorities
- Crown-owned land transferred to State-Owned Enterprises and tertiary education institutions, and
- licensed Crown forest land.

Claimant groups are often concerned that the Crown will sell land that could be used to settle claims before a settlement is negotiated. The Crown is committed to ensuring that it retains sufficient assets to settle all historical claims. However, in doing so, the Crown must also be able to conduct its day-to-day business efficiently. In order to ensure that both of these objectives can be met, the Crown has provided both statutory and administrative processes to enable assets to be used in settlement.

These are:

- 'landbanking' processes managed by OTS
- consultation process for Public Works Act land held by the Crown and sought by local authorities
- statutory protection of Crown forest assets and
- statutory memorials (such as under Section 27B of the State-Owned Enterprises Act 1986).

The term Protection Mechanism is used to describe all of these ways of protecting Crown assets for possible use in future Treaty of Waitangi settlements. The term can also be used in a narrow sense to describe the landbanking process by which the Crown protects surplus Crown land for future settlements and holds that land in Treaty settlement landbanks until the settlements in which the land might be used are completed.

This section explains each of these processes, and also outlines the process managed by Te Puni Kōkiri for protecting or transferring sites of significance (wāhi tapu) outside the settlement process.

The Protection Mechanism – surplus Crown-owned land and Treaty settlement landbanks

The Protection Mechanism is run by OTS and ensures that surplus Crown-owned land is considered for possible use in Treaty settlements before it can be sold on the open market. This preserves the capacity of the Crown to provide redress for well-founded claims. Properties that meet the criteria for protection (see page 135) are bought and landbanked (that is, held by the Crown until the claims in the area concerned have been settled). Separate funding is used to pay for properties for landbanking, so claimants do not have to pay for the properties being landbanked. Nor does the Protection Mechanism affect the money available to settle claims.

This Protection Mechanism applies to all Crown (departmental) land, Crown Research Institute land, and District Health Board land that has become surplus and on which all statutory obligations – such as any obligations under the Public Works Act to offer land back to the original owners – have been cleared, and the department or agency wishes to sell. Land owned by SOEs and some other Crown entities is protected by the statutory memorial system described on page 153.

When a property is landbanked it is then available for use in settlement. As claims are settled, claimant groups can include landbanked properties in the settlement. In such cases the properties will be part of the overall settlement quantum and will be transferred to claimants at market value. If properties available for a particular settlement are not included in that settlement, they are sold on the open market on behalf of the Crown, unless the properties are also subject to overlapping claims from other claimant groups. Following settlement of all claims – including any overlapping claims – in a landbank area, the landbank for the area concerned ceases to operate.



Figure 4.1: Landbank overview

Treaty settlement landbanks

There are 15 regional landbank areas that together cover the whole country. When Crown-owned land in these areas is declared surplus, it is publicly advertised and any Māori who has registered a claim with the Waitangi Tribunal for the relevant area may apply to have the land protected and placed in the regional landbank.

If the Crown agrees to protect the property that has become surplus, Land Information New Zealand (LINZ) will buy it and hold it in a Treaty settlement landbank. Properties not landbanked are released and sold on the open market. Each regional landbank is subject to a financial cap that limits the total value of property that can be protected for each region, although this does not apply in Raupatu Areas (see below).

Property protected in regional landbanks is not held for any particular claimant group, even though it may have been protected on the basis of one group's application.

RAUPATU AREAS

In recognition of the significance of the breaches of the Treaty associated with raupatu, or confiscation, surplus Crown-owned properties in Raupatu Areas are treated slightly differently.

The Raupatu Areas are: East Wairoa, Waiuku, Tauranga, Bay of Plenty, Taranaki and Mohaka-Waikare.

Surplus Crown-owned properties within these areas are automatically considered for landbanking whether

or not an application is received. However, the information provided in an application may increase the likelihood a property will be landbanked. Also, there is no financial limit to the total value of properties landbanked in the Raupatu Areas.

Criteria for landbanking

Under the Protection Mechanism process properties may be landbanked in a regional landbank based on the following criteria, applied on a case-by-case basis:

- the applicants have given sufficient reasons to show the significance of the site to them
- there is a strong enough justification for meeting the costs of holding the property
- there is room within the financial limit, and
- if the limit has been reached, the property is of such significance that an exception should be made and the property should be protected anyway.

Once property is approved for landbanking, the vendor agency and LINZ begin to negotiate and finalise the transfer at market value from the department or agency selling the property.

It is important to note that before property is considered for landbanking, it must have been cleared from the requirement to offer it back to former owners under section 40 of the Public Works Act 1981 or section 23 of the New Zealand Railways Corporation Restructuring Act 1990. Any other legal obligations affecting the Crown's ability to dispose of the land must also be resolved.



Landbank property – Anson House, Taoranga

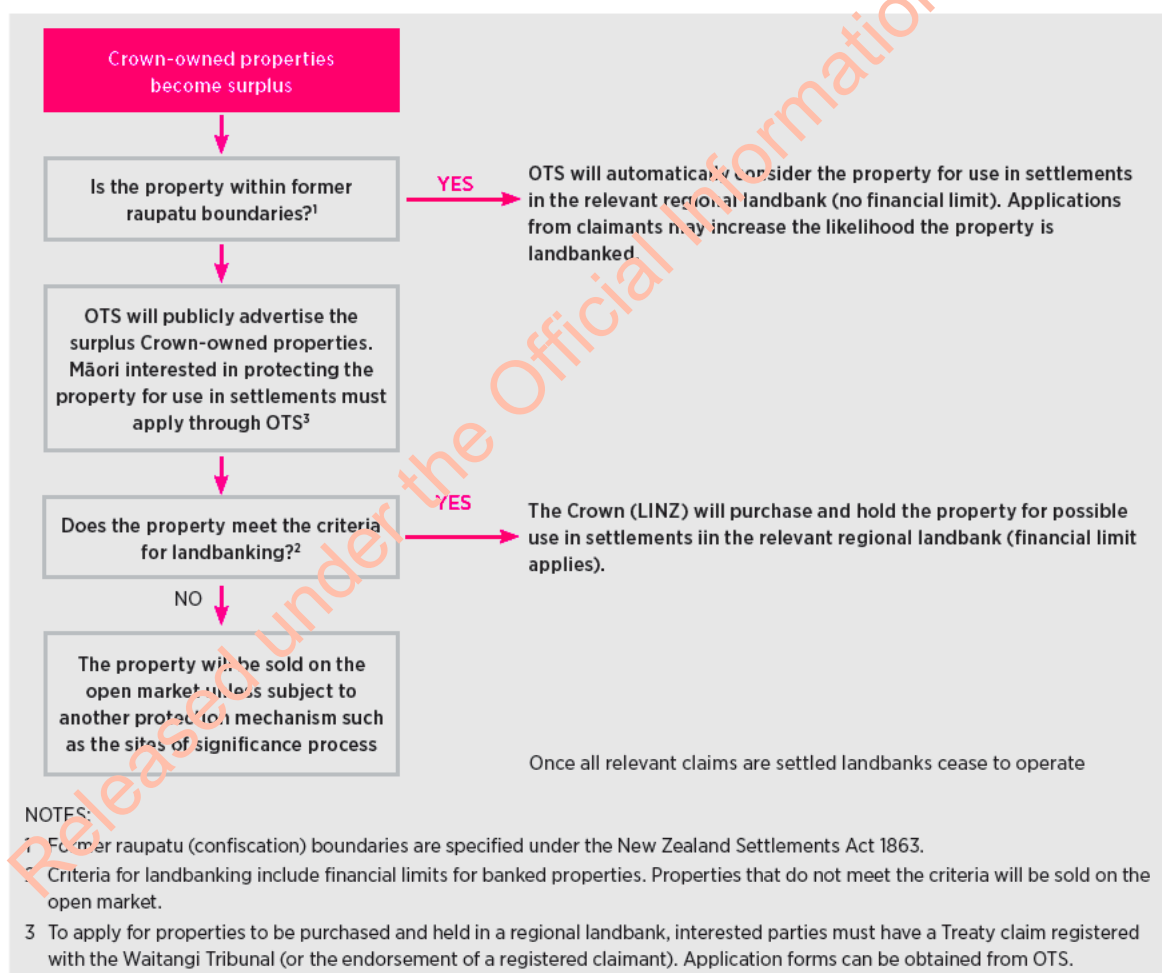


Figure 4.2: OTS Protection Mechanism process



Figure 4.3: map showing coverage of the various landbanks

VENDOR PREFERENCE EXEMPTION

Cabinet has agreed that in exceptional circumstances Ministers may, on a case-by-case basis, consider exempting a property from landbanking to allow it to be sold to a specific third party. This policy may be applied, for example, when surplus land is required to

provide continuing community services. Cabinet will consider such exemptions only after applications from Māori have been received and considered under the Protection Mechanism.

If such an exemption is agreed, provision may be made through a Right of First Refusal for the Crown to

reacquire the property if the community service stops operating from the property. If the Crown does reacquire the property, and it is declared surplus, it can be reconsidered for landbanking.

Further information on landbanking is available from the Settlement Advisor - Protection Mechanism, Office of Treaty Settlements (see OTS contact details on inside front cover).

MANAGEMENT OF LANDBANKED PROPERTIES

Land Information New Zealand (LINZ) has overall responsibility for managing landbanked properties and is required to act as a good landlord and to maintain the properties to at least the standard they were in when acquired. LINZ must also manage the landbank so that it recovers the costs of holding properties and obtains a commercial rate of return.

Transfer of Public Works Act land held by the Crown to a local authority for a public work

A consultation process introduced in 2001 deals with the situation when a local authority wants to obtain land acquired by the Crown under the Public Works Act for a local work, such as a road or sewerage system. As part of this process the interests of Māori are considered and, if confirmed, protected. This process aims to make sure that, if possible, the relevant land is not lost to the Treaty settlement process, and that matters relating to sites of significance are addressed. It weighs up the competing interests of local authority requirements for land for a local work and the interests of Māori.

As part of this process, OTS and Te Puni Kōkiri use the Protection Mechanism processes to identify any Māori interests, and then advise on how these interests may be appropriately taken into account. The Minister for Land Information (the Minister) considers this advice in deciding to either approve or decline the transfer to the local authority under section 50 of the Public Works Act.

The relevant considerations that the Minister takes into account in making a decision include:

- the nature of the work and its importance to the community
- the availability of other sites for the public work, and
- the significance of the property to Māori and the issue of any encumbrances that could be placed on the land to protect Māori interests

The Minister balances Māori interests against the wider community interest in the proposed public work when she or he assesses what, if any, measures should be adopted to protect those Māori interests.

WHAT DO CLAIMANTS HAVE TO DO AND WHY?

OTS will seek comments from the relevant claimant group or groups from the perspective of protecting land for use in Treaty settlements. Claimant groups will provide site-specific information, where possible, on the significance of the property. The following types of information would be useful, but are not limited to:

- a the historical or cultural significance of the particular property
- b any specific features of the property that mean it could not be substituted by another property
- c whether the property is the specific subject of a Waitangi Tribunal claim, and
- d the intended future use by the claimant group of this property if it were transferred in a Treaty settlement.

OTS will also invite claimant groups to make any comments in support of the local work proposal.

It is possible that these properties will not be surplus to the requirements of the Crown agency. In such cases if the property is not transferred to the local authority then the Crown agency will continue to hold the land for the existing public work. If the property becomes surplus at some time in the future the standard processes for the disposal of surplus Crown land will be applied.

Statutory protection: memorials noted on land titles

Following the challenge by the New Zealand Māori Council, in the Lands case referred to earlier (page 15), to the Crown's intention to transfer land to the then newly created State-Owned Enterprises, Parliament passed the Treaty of Waitangi (State Enterprises) Act 1988. This provided a new section 27A in the State-Owned Enterprises Act 1986, requiring that memorials (a formal notation or record) be placed on all titles to Crown land transferred to State-Owned Enterprises under that Act.

The effect of such a memorial is that under section 27B of the State-Owned Enterprises Act 1986 the Waitangi Tribunal, in specified circumstances, can order the Crown to take back or 'resume' a property to be used in settling a Treaty claim, unless the Crown and claimant groups first agree on a settlement. These memorials have become commonly known as section 27B memorials.

There is provision for similar memorials to be noted on the titles of former Crown railway land, and land transferred by the Crown to tertiary educational institutions. However, the provisions for railway land have never come into play to date, as such land has been leased rather than sold to operators.

These memorials remain on the titles even if they are sold to third parties, and are not removed until claims over the area concerned have been settled or affected Māori groups agree to their removal. The memorial warns third parties that the property may be used for settling Treaty claims through resumption by the Crown. If this happens compensation is paid as if the property was being acquired under the Public Works Act 1981.



Figure 4.4: 27B and other memorials on land titles

Statutory protection of Crown forest assets

As well as the protections just noted, there are provisions in the Crown Forest Assets Act 1989 that prevent the Crown from disposing of land over which there is a Crown forestry licence.

As with section 27B and similar memorials, these provisions arose from Māori concerns that the Crown's plans to sell assets – in this case the land under exotic forests – would greatly reduce assets available for settlement. The Waitangi Tribunal has similar powers to make binding recommendations over Crown forest land as it has over memorialised land. There are further requirements affecting the return of Crown forest land, which are explained in more detail on page 86.

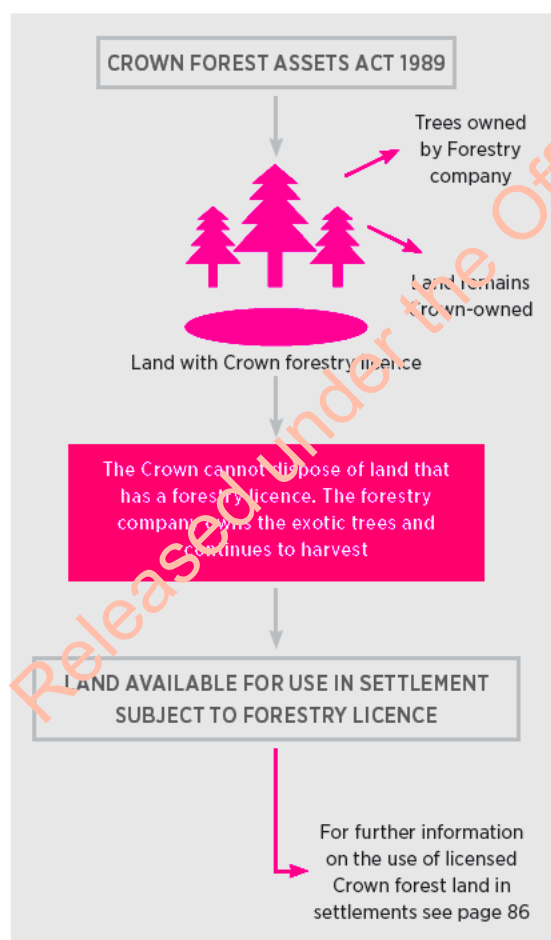


Figure 4.5: protection of Crown forest assets

When can the Waitangi Tribunal order 'resumption'?

The Waitangi Tribunal can make recommendations for resuming memorialised lands when:

- a claim is registered with the Waitangi Tribunal relating to the memorialised land, and
- the Waitangi Tribunal finds that the claim is well-founded, and
- returning all or part of the memorialised land to Māori ownership is required to compensate for or remove the prejudice caused by the Crown action or omission in breach of the Treaty and its principles.

Recommendations for resumption are first made as interim orders, that is, they are not binding immediately. The legislation allows the claimant group and the Crown 90 days to negotiate a settlement. This may or may not include the properties covered by the interim orders. If a negotiated settlement is not reached in 90 days, the recommendations become final and binding and the Crown must resume the properties for transfer to the claimant group.

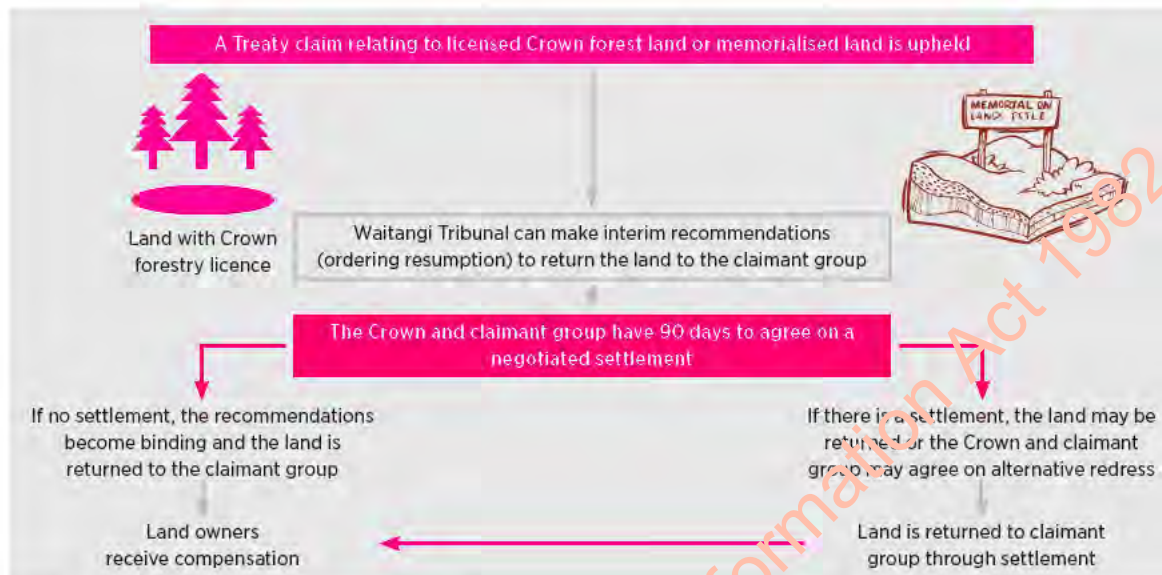


Figure 4.6: Waitangi Tribunal resumption order

Has the Waitangi Tribunal ever used its resumptive powers?

In 1998 the Tribunal made interim recommendations for resumption of SOE land in the Ngāti Tūrangitukua claim area. The scope of the recommendations took account of the Crown's position on existing claim relativities, and did not include all 'resumable' properties in the claim area. The Crown and Ngāti Tūrangitukua reached a settlement in September 1998, before the recommendations became binding. The settlement included one of the properties recommended for resumption.

Use of memorialised properties in negotiated settlements

Alternatively, memorialised properties may be considered for use in a negotiated settlement. Whether or not a specific property is used will depend on the particular circumstances affecting that property.

WHAT COMPENSATION DOES THE OWNER OF A MEMORIALISED PROPERTY RECEIVE?

When a property is acquired through resumption, the owner of the property gets compensation from the Crown as if the property had been compulsorily acquired under the Public Works Act 1981. This is

because it is the Crown, rather than the owner, who bears the cost of settling Treaty claims. The Public Works Act sets out a process for determining the market value of the property and specifies other costs that owners can recover. If the use is by agreement, the Deed of Settlement will provide for market valuation and how this is worked out.

Additional protection for wāhi tapu – the 'Sites of Significance' process

Apart from the landbank processes and separate from the Treaty settlements process, there is another source of land protection for Māori. As a matter of good government, the Crown accepts a responsibility to protect wāhi tapu and other sites of historical, spiritual, and cultural significance to Māori.

This responsibility is administered by Te Puni Kōkiri through a 'Sites of Significance' process that is separate from, but works in tandem with, the Protection Mechanism and is concerned primarily with protecting sites of significance on surplus Crown land. The process is open to any Māori who can establish an association with the site, whether or not they have a Treaty of Waitangi claim. The criteria that these sites should meet, and the details on how to apply for protection, are set out in the Te Puni Kōkiri publication Sites of Significance Process (see page 150 for contact details).

Glossary of technical terms

Words in italics are defined elsewhere in this Glossary or in the Glossary of Māori Terms. Page references are to relevant text.

Term	Definition	Page
Aboriginal title	an indigenous property right recognised at common law sometimes used interchangeably with customary title or <i>customary rights</i> . Title generally refers to interests in land, while rights refers to use rights such as fishing or gathering plants	27
Agreement in Principle	an agreement between the Crown and a claimant group, marked by the signing of a formal document or, in some cases, the exchange of letters between the claimant group and the Minister for Treaty of Waitangi Negotiations. The Agreement in Principle outlines the nature and scope of all settlement redress and is the basis for the final Deed of Settlement. An Agreement in Principle is non-binding on the Crown and claimant group.	58
Alienation	general term for loss of ownership of land, whether through sale, confiscation or other means such as acquisition under the Public Works Act 1981 or similar legislation	6–11
Apology	the Crown's formal expression of regret for breaches of the Treaty and its principles in relation to the claimant group	79
Claimant group definition	a description of those people whose claims will be settled and who will be the beneficiaries of the settlement and the <i>governance entity</i>	42
Claimant funding	Crown funding provided to a claimant group as a contribution towards the costs they incur in negotiating their settlement	49
Coastal Marine Area	expression used in the Resource Management Act 1991 for the inshore, sea and seabed out to the 12-mile limit	107
Common law	system of judge made law applied in New Zealand from 1840, and derived from the English legal system	51
Comprehensive negotiations	negotiation of all <i>historical claims</i> of a claimant group at the same time	38
Contemporary claims	those claims arising from Crown acts or omissions after 21 September 1992 (see also <i>historical claims</i>)	23
Crown	executive branch of government	17
Crown acknowledgements	those matters that the Crown acknowledges as breaches of the Treaty and its principles. These form the basis of the apology in a <i>Deed of Settlement</i>	79
Crown Negotiating Parameters	particular parameters of redress agreed by Ministers as available for discussion between the Crown and the claimant group's mandated representatives	52
Customary rights	<i>Common law</i> recognition of traditional rights of indigenous people – for instance, rights to fish or to gather plants, – sometimes used interchangeably with <i>aboriginal title</i> , but 'title' more correctly refers to interests in land	22

Term	Definition	Page
Deed of Mandate	a formal statement prepared by a claimant group stating who is appointed to represent them in negotiations with the Crown, and how the mandate was approved by the claimant group	42
Deed of Recognition	Deed issued by Minister of the Crown responsible for an area of Crown land covered by a <i>Statutory Acknowledgement</i> , recognising a statement of the claimant group's associations with the area and allowing for consultation with the claimant group on specified matters	123
Deed of Settlement	the complete, detailed and formal settlement agreement signed on behalf of the Crown and the claimant group	60
Easement	rights that a third party or the public may have over land – for instance, a right of way, the right to drain water over or under the land, or a right of access for specified purposes	63
Fee simple estate	full legal ownership of or title to land, also known as freehold title	116
Fiscal envelope	see Settlement Envelope	81
Governance entity	the representative, accountable and transparent body which eventually receives and manages settlement assets on behalf of the claimant group	67
Hapū or whānau interests	interests of specific hapū or whānau within the larger claimant group and distinct from the collective claims of the larger claimant group, which may be given specific recognition in a settlement	61
Historical account	narrative of historical basis for the claims being settled by a Deed of Settlement, the context for the Crown's acknowledgements and apology	79
Historical claims	those claims that may arise out of or relate to Crown acts or omissions before 21 September 1992	23
Landbanking	a process to protect surplus Crown-owned lands for future use in the settlement of Treaty claims (see also Protection Mechanism, Treaty settlements landbank)	134
Lease	a contract providing for exclusive possession of land for a defined period, creating the relationship of landlord and tenant (or lessor and lessee)	63
Licence	in the Treaty settlement context, this refers to permission from a landowner to go onto or use land for specified purposes – for instance, a grazing licence	63
Licensed Crown forest land	land under Crown exotic forests, subject to the Crown Forest Assets Act 1989. Cutting rights to trees may be licensed, and the Waitangi Tribunal can order the Crown to transfer land and other compensation to a claimant group in specified circumstances	86

Term	Definition	Page
Mandating for negotiations	process by which the claimant group chooses representatives and gives them the authority to negotiate with the Crown on behalf of the group (see also Deed of Mandate)	39
Memorials	statutory notations on certificates of title of the power of the Waitangi Tribunal to order resumption of the land by the Crown for return to Māori	139
Overlapping claim or shared interest	where two or more claimant groups make claims over the same area of land which is the subject of historical Treaty claims. Also known as a 'cross claim'	53
Overlay classification	statutory instrument that applies to specified land managed by the Department of Conservation, allowing for recognition of claimant group values in the management of the site without altering the underlying classification of the land, for example, as part of a National Park. Known as Tōpuni in the Ngāi Tahu settlement, Taki Poipoia o Ngati Ruanui in the Ngati Ruanui settlement, and Kirihihi in the Te Uri o Hau settlement	121
Protection Mechanism	a generic term for the processes by which the Crown ensures that Crown land can be retained for use in settlements. It is also used to refer specifically to the process – administered by OTS – through which surplus Crown-owned lands can be retained in landbanks until claims for which the land may be used in settlement, have been completed (see also land banking)	134
Protocol	statutory instrument comprising a statement issued by a Minister of the Crown, or other statutory authority, setting out processes for how a particular government agency intends to interact with a claimant group and enable that group to have input into its decision-making process	123
Quantum	total monetary value of the redress in terms of cash and assets provided to a claimant group in settlement of their historical claims. It also refers to the total amount of financial and commercial redress in a settlement package	81
Resumption	where the Waitangi Tribunal makes a binding recommendation ordering the Crown to resume (take back ownership of) land subject to a memorial as redress in settling well-founded Treaty claims	140
Right of First Refusal	the right of a claimant group to have the opportunity, ahead of any other potential purchaser, to purchase specified surplus Crown land when such land is available for disposal by the vendor agency	85
Section 40 offer-back	the right, under section 40 of the Public Works Act 1981, of a former owner of land acquired by the Crown for a public work to have that land offered back, should the land no longer be required for the public work	136
Settlement Envelope	concept, developed by the Crown in 1992-1994, used to describe the total sum set aside for the settlement of historical Treaty claims (also called the 'fiscal envelope'). It was discontinued at the end of 1996	81

Term	Definition	Page
Statutory Acknowledgement	statutory instrument in which the Crown recognises (in settlement legislation) the claimant group's statement of its cultural and traditional links with a specified area or feature, such as rivers, lakes, mountains, coastal areas, wetlands, etc.	122
Statutory instruments	generic term for redress options recognising a range of cultural interests in settlements, through the use of arrangements set out in settlement legislation, for example, a Statutory Acknowledgement	115
Terms of Negotiation	a written agreement between the Crown and a claimant group setting out the agreed objectives and ground rules for negotiations	51
Treaty settlements landbank	overall term for the regional landbanks of properties for potential use in Treaty settlements, managed by Land Information New Zealand.	135
Vendor agency	government department involved in the transfer of properties in settlements or under a Right of First Refusal, or through the protection mechanism operated by OTS (see also Protection Mechanism)	85
Vesting	statutory transfer of fee simple estate (title or ownership) in land. A type of statutory instrument available in settlements	116

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Glossary of Māori terms

Term	Definition	Page
Ahi kā	tribal fire, symbolising rights of possession based or continuous ongoing occupation	50
Hapū	subtribe, grouping of related whānau	7, 39
Hui	meeting, assembly	39, 65
Iwi	used in this text to mean whakapapa-based tribe	7, 39
Kaitiakitanga	the practice of guardianship, care and wise management of, for example, natural resources. Kaitiaki (guardian) refers to the person(s) exercising kaitiakitanga	100
Karakia	prayer	79
Kaumātua	elders	29
Kāwanatanga	government or governorship	1, 7
Kirihipi	sheepskin, used in the Te Uri o Hau (Ngāti Whatua hapū) settlement to describe an overlay classification. It refers to a re-affirmation of the Treaty of Waitangi by Ngāti Whatua written on a sheepskin and known as Kirihipi te Tiriti o Ngāti Whatua	121
Kuia	female elder	29
Mahinga kai	food resource or place where such a resource is found	90
Marae	the reserved area on which meeting and dining houses are located. The space in front of the wharenui (meeting house) is the marae ātea	32, 101
Maunga	mountain	101
Pā	fortified place, stockaded village	8, 101
Pouwhenua	carved and decorated post of hard wood, used in settlements to signify the presence of a particular claimant group	113
Rangahaua Whānui	broad research by theme or district (used by Waitangi Tribunal)	36
Rangatira	chief, person of high rank	1
Rangatiratanga	chieftainship, the exercise of customary authority, see also tino rangatiratanga	1, 7
Roua	confiscation of land	9, 36
Rohe	district, area, region	40
Rūnanga	assembly, iwi council	39
Taki Poipoia	refers to wāhi tapu or places of spiritual significance and is used in the Ngāti Ruanui settlement to describe an overlay classification	121
Taonga	treasure	1, 113
Tikanga	customs, rituals, lore	1, 40

Term	Definition	Page
Tino rangatiratanga	highest chieftainship, authority. In this context the Crown interprets this to mean Māori self-management or autonomous authority of Māori groups over their Development and resources	1
Tōpuni	dogskin cloak, used to signify chiefly protection, and used in the Ngāi Tahu settlement to describe an overlay classification	21
Tūpuna	ancestors	36
Urupā	burial ground	101
Wāhi taonga	treasured or special place. This guide generally uses wāhi whakahirahira to indicate places of significance other than wāhi tapu, this includes wāhi taonga	101
Wāhi tapu	sacred place	101
Wāhi whakahirahira	treasured or significant place	101
Waiata	song, chant	79
Whānau	extended family group	39, 61

Frequently asked questions about Treaty settlements

Q What if the Crown knows that a claimant group has made a mistake in negotiations to the claimant group's disadvantage?

A The Crown has an obligation to negotiate in good faith. If claimant groups have not recognised something in their claim to which they are entitled, or which would benefit them in negotiations, then the Crown, if it knows of the mistake, will ensure that such matters are brought to the claimant group's attention. Otherwise the settlements are unlikely to be durable. Terms of Negotiation record the Crown's and the claimant group's agreement to negotiate in good faith, so this is a mutual obligation on both parties.

Q Is there still a 'settlement envelope'?

A The 'settlement envelope' or 'fiscal envelope' no longer exists. Existing settlements will only be used as benchmarks where appropriate, such as similar claims requiring similar levels of redress. Appropriations are set aside every year for the settlement of historical Treaty claims, but these reflect the expected number of settlements in any given year and not a pre-determined fiscal cap.

Q Are Māori customary rights extinguished when a claim is settled?

A Settlements do two things. First, they provide redress for breaches of rights, including Treaty and any customary rights, up to 21 September 1992. Secondly, the settlement may recognise those rights in modern-day structures, for example, commercial fishing quotas. Customary rights may also have been previously extinguished by statute or other legal act. Settlements do not try to define every customary right that may still exist. Claimant groups can seek to advance claims to customary rights in the future. Of course, the Crown reserves the right to challenge the validity of any such claim.

Q Haven't there been full and final settlements before?

A There have been a number of attempts in the past to resolve certain Māori grievances. However, these 'settlements' were negotiated in a different context and often did not fully address all aspects of the grievances of the groups concerned. Nor were

members of wider claimant groups consulted about the content of such settlements. Settlements under the current policy take all historical grievances into account and fulfil the principles of the Treaty or Waitangi, and Crown responsibilities under it. In addition, it is only in recent years that the courts have begun to articulate the principles of the Treaty, now being reflected in settlement policy.

Q Are settlements under the negotiations process final?

A Yes. Claimant groups and their members cannot re-litigate their claims before the Waitangi Tribunal or courts after a settlement is reached. However, settlements still allow groups that have received them to pursue claims against the Crown for acts or omissions after 21 September 1992, including claims based on the continued existence of aboriginal title or customary rights. The Crown also retains the right to dispute such claims or the existence of such title rights.

Q Does anyone challenge the evidence of the claimants at the Waitangi Tribunal?

A Yes. Crown lawyers take a major role and ensure alternative evidence is put forward where necessary.

Q Is private land available for use in Treaty settlements?

A No, private land is not available for use in Treaty settlements, with two exceptions. The first exception is where, before the property passed into private hands, it was subject to a resumptive memorial provided for by law. This means that, at the time the private owner acquired it, they knew the government could compulsorily reacquire such land (at market value) if the Waitangi Tribunal upheld a Treaty claim and made an order that the land be returned to Māori ownership. It is the Crown's preference to seek negotiated settlements with claimants, without having to resume properties now owned by third parties. The second exception is where there is a willing seller/willing buyer. Such purchases are very rare and are likely to be small wāhi tapu.

Q Why isn't there a cut-off date for claims and settlements?

A One of the key objectives of Treaty settlements is to remove the sense of wrong that Māori feel about the Crown's actions by acknowledging the grievances that they have suffered. A specific 'cut-off' date would too rigidly confine the process, possibly resulting in well-founded claims not being dealt with. The Crown, while wishing to address all claims as soon as possible, cannot force any claimant group to begin negotiations. Also, claimant groups often wish to work through Waitangi Tribunal hearings and/or need to address mandating issues prior to entering negotiations, and these processes can take time. Moreover, there is a practical limit to the number of claims that the Crown can deal with at any time, and Māori should not be disadvantaged by this.

Q How does recognition of the rights of Māori under the Treaty fit in with the principle of equality under the law?

A English common law, which New Zealand inherited, recognises the customary rights and aboriginal title of indigenous people. The Treaty of Waitangi also recognised such rights. Recognition of such rights is therefore consistent with a legal system which itself recognises such property rights and does not conflict with the general principle of equality under the law.

Q What is the legal definition of a Māori?

A The term 'Māori' is defined in the Treaty of Waitangi Act 1975 and means 'a person of the Māori race of New Zealand; and includes any descendant of any such person'. This definition means that, as long as a person can trace descent from a Māori ancestor, such a person may identify as Māori. Using this definition results in all members of a claimant group sharing the benefits from settling their claim. Under the law it is therefore not possible to exclude people on the basis of specified 'percentages' of Māori ancestry.

Q Does redress for historical grievances mean that the government no longer has to pay social welfare benefits to Māori?

A No. Claimant groups receive settlement monies and other redress, such as cultural recognition, in settlement of their historical Treaty claims. A settlement does not extinguish the rights and privileges guaranteed to them as New Zealanders under Article 3 of the Treaty. Settlement redress would be meaningless if it involved a corresponding drop in other entitlements.

Q Can conservation land be used in settlements?

A Generally, conservation land (Crown land managed by the Department of Conservation) is not available for use in Treaty settlements. However, individual sites of special cultural significance may be transferred to claimant groups. If appropriate, the transfer may be subject to conditions to protect public access and environmental values. Claimant group interests in conservation land can be met through a number of other statutory instruments. These are explained in Part 3.

Q Are the public's rights affected by settlements?

A Generally no, but camping entitlements, which are entitlements to temporarily occupy a piece of Crown-owned land up to one hectare in size near traditional food-gathering areas, are for the exclusive use of members of a group that has received a settlement. They provide rights similar to those contained in other leases or licenses granted by the Department of Conservation. Camping entitlements are allocated so as not to affect public access to waterways.

Contact details for other organisations

Contact details for other organisations mentioned in this guide:

WAITANGI TRIBUNAL (TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI)

Established under the Treaty of Waitangi Act 1975 to hear claims by Māori against the Crown for breaches of the Treaty of Waitangi and its principles. The Tribunal funds historical research into claims other than those relating to licensed Crown forest land.

SX11237
Wellington
New Zealand

Phone 04 914 3000
Fax 04 914 3001
Website www.waitangitribunal.govt.nz

TE PUNI KŌKIRI (MINISTRY OF MĀORI DEVELOPMENT)

Te Puni Kōkiri is the lead department for advice to the government on Māori issues. Te Puni Kōkiri can assist claimant groups with information on mandate and governance issues, and also administers the Sites of Significance Process for the protection of wāhi tapu outside the direct negotiations or Protection Mechanism processes.

Head Office
PO Box 3943
Wellington
New Zealand

Phone 04 819 6000
Fax 04 819 6246
Web www.tpk.govt.nz

CROWN FORESTRY RENTAL TRUST (NGĀ KAITIAKI RETI NGAHERE KARAUNA)

If a claim concerns licensed Crown forest land, CFRT can assist with research, Waitangi Tribunal hearings and preparing for negotiations to the point where the Crown recognises a Deed of Mandate.

PO Box 2219
Wellington
New Zealand

Phone 0800 2378 2378 / 04 915 1500
Fax 04 916 7806
Web www.cfrrt.org.nz

MĀORI LAND COURT (TE KŌOTI WHENUA MĀORI)

The Māori Land Court holds records of Māori land ownership since the establishment of the Native Land Court in 1862. Its Minute Books record the proceedings that brought blocks of Māori customary land under statutory Māori freehold title. Today the Court administers Te Ture Whenua Māori 1993 governing transfer of and succession to Māori freehold land and associated administrative matters.

Head Office
SX11203
Wellington
New Zealand

Phone 04 914 3102
Fax 04 914 3100
Web www.maorilandcourt.govt.nz

TE OHU KAIMOANA (TREATY OF WAITANGI FISHERIES COMMISSION)

Te Ohu Kaimoana is responsible for the management of commercial fisheries settlement assets and developing an allocation method for distribution to iwi, to be approved by the Minister of Fisheries. Iwi seeking a share of settlement assets must have a mandate and governance structure meeting TOKM's requirements, and can obtain advice and information on these matters from TOKM.

PO Box 3277
Wellington
New Zealand

Phone 04 931 9500
Fax 04 931 9518
Web www.teohu.maori.nz

**DEPARTMENT OF CONSERVATION
(TE PAPA ATAWHAI)**

The Department of Conservation is responsible for the management of New Zealand's conservation lands, including National Parks and reserves. Publications are available on a range of issues, including cultural redress involving DOC in the Ngāi Tahu settlement. The Department's Treaty Settlement Unit participates as part of the Crown Negotiating Team in settlement negotiations.

Head Office
PO Box 10-420
Wellington
New Zealand

Phone 04 471 0726
Fax 04 381 3057
Web **www.doc.govt.nz**

**MINISTRY FOR PRIMARY INDUSTRIES
(MANATŪ AHU MATUA)**

The Ministry for Primary Industries is responsible for the sustainable management of commercial fisheries through the Quota Management System, and of Māori customary sea fishing under regulations.

Head Office
PO Box 2526
Wellington 6140
New Zealand

Phone 0800 00 83 33
Fax 04 894 0720
Web **www.mpi.govt.nz**
www.fish.govt.nz

**MINISTRY FOR THE ENVIRONMENT
(MANATŪ MŌ TE TAIAO)**

The Ministry for the Environment reports on the state of the New Zealand environment and the way that environmental laws and policies work in practice as part of advice to the government on action necessary to improve environmental management. Most of the responsibility for day-to-day environmental management rests with local government, particularly the regional councils. The Maruwhenua unit within MFE provides advice and support on Māori issues and perspectives.

Head Office
PO Box 10-362
Wellington
New Zealand

Phone 04 439 7400
Fax 04 439 7700
Web **www.mfe.govt.nz**

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List of figures

Page	Description
11	1.1 Māori land today and types of Māori land alienation 1840-1995, North Island
12	1.2 Māori land today and types of Māori land alienation 1840-1995, South Island
16	1.3 Development of Treaty settlement policy
17	1.4 The Crown
19	1.5 The Office of Treaty Settlements organisational structure
21	1.6 Summary of Treaty settlements to date
23	1.7 Historical and contemporary Treaty claims
29	2.1 Four main steps of negotiations between a claimant group and the Crown
31	2.2 Key decisions points for claimant groups
31	2.3 Key decision points for the Crown
33	2.4 Comparison of the negotiations process and the Waitangi Tribunal process
35	2.5 Step 1 – Preparing claims for negotiations
37	2.6 Research for Treaty claims
40	2.7 Links between negotiators and the groups they represent
41	2.8 Mandate recognition process
49	2.9 Step 2 – Pre-negotiations
56	2.10 Step 3 – Negotiations
58	2.11 Crown and claimant negotiating teams – accountability
61	2.12 The process from Agreement in Principle to Deed of Settlement
64	2.13 Step 4 – Ratification and implementation
66	2.14 Ratification of Deed of Settlement by the claimant group
68	2.15 Example of a governance entity for distribution of settlement assets
73	2.16 Finalising the settlement – the parliamentary process for passing legislation
78	3.1 Elements of a typical settlement package
82	3.2 Elements of financial and commercial redress
85	3.3 The Right of First Refusal
87	3.4 Licensed Crown exotic forest land in settlement
89	3.5 Selection process for commercial properties
92	3.6 Negotiating a cultural redress package
104	3.7 Some redress options for rivers and lakes
107	3.8 The Coastal Marine Area (CMA)
110	3.9 Freshwater fish – who has responsibility for species and habitat management?
117	3.10 Marginal strips
118	3.11 Vesting and gifting back of significant sites

Page	Description
119	3.12 Te Waihora (Lake Ellesmere) – ownership of the lakebed
120	3.13 Vesting of reserves
121	3.14 Overlay classification
122	3.15 Statutory Acknowledgements
135	4.1 Types of landbanks
136	4.2 The OTS Protection Mechanism process
137	4.3 Map showing coverage of Treaty settlements landbanks
139	4.4 27B and other memorials on land titles
140	4.5 Protection of Crown forest assets
141	4.6 Waitangi Tribunal resumption order

Released under the Official Information Act 1982

List of tables

Page	Description
94	Summary of statutory instruments for cultural redress
102	Redress options using statutory instruments for wāhi tapu and wāhi whakahirahira
104	Redress options using statutory instruments for rivers and lakes
106	Redress options using statutory instruments for wetlands, lagoons, indigenous forests and tussock lands
108	Redress options using statutory instruments for coastal areas
112	Redress options using statutory instruments for geothermal and mineral resources

Released under the Official Information Act 1982

Index

Page	Description
58	Agreement in Principle
49–51	Claimant funding
22	Commercial fisheries, settlement of Māori interests in
38	Comprehensive negotiations
79	Crown acknowledgements
79–80	Crown Apology: apology, 80; Crown acknowledgements, 79; historical account, 79
17	Crown, definition of
15	Crown Forestry Rental Trust
90	Cultural redress
109–110	Customary fisheries
123, 127–132	Deed of Recognition
60	Deed of Settlement
81	Financial and commercial redress
88, 111–112	Geothermal resources
67–72	Governance entities
7–13	Historical background to Māori claims
75	Implementation
26, 134–138	Landbanks
8–12	Land purchases: 20th century, 10; maps of, 11–12; New Zealand Company, 8; pre-1840, 8; pre-1865 Crown purchases, 9; pre-emption waiver, 8–9
86–87	Licensed Crown forest land
39–48	Mandating: Deed of Mandate, 42–46; mandate recognition process, 41–42; questions and answers about, 47–48; review by OTS, 44
146–147	Māori terms, glossary of
141	Memorialised properties
88, 111–112	Minerals
10	Native Land Court
29–75	Negotiations process: negotiations, 56–63; overview, 29–30; pre-negotiations, 49–55; preparing to enter, 35–48; ratification and implementation, 64–75; relationship with Waitangi Tribunal process, 32–34
18–19	Office of Treaty Settlements
150–151	Organisations, other, contact details
53–54	Overlapping claims
114	Place-name changes
26	Protection Mechanism: see also landbanks, 134–138
123	Protocols
81–82	Quantum

Page	Description
64-66	Ratification
9	Raupatu
77-132	Redress: Crown Apology, 79-80; cultural redress, 90-132; financial and commercial redress, 81-89
100	Resources and interests, redress options for
85-86	Right of First Refusal
72-75	Settlement legislation
27	Settlement policies (key)
122-123	Statutory Acknowledgement
115	Statutory instruments
116	Statutory vesting
1, 113	Taonga
142-145	Technical terms, glossary of
62-63	Third parties, role in negotiations
14-16	Treaty settlement policy: milestones in development of, 14-16; summary of key policies, 27
1-4	Treaty of Waitangi: English text, 2; English translation of Māori text, 3; Māori text, 1; principles (Court of Appeal), 15; signing, 7; status today, 6
14	Waitangi Tribunal: compulsory powers of resumption (section 27 memorials), 26, 139; establishment of, 14; power to determine meaning of Treaty of Waitangi, 14; relationship between Tribunal process and negotiations process, 32-34
101-102	Wāhi tapu

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"LMA-2"



PART OF THE MINISTRY OF JUSTICE

WITHOUT PREJUDICE

This is the exhibit marked "LMA -2" referred to in the attached Affidavit of Lilian Marie Anderson sworn/affirmed at Wellington this 13th day of October 2020 before me

Hannah Alice Doogan
Deputy Registrar/Solicitor of the High Court of New Zealand

Hannah Alice Doogan
Solicitor
Wellington

The Crown's Overlapping Claims Policy

1. The Crown considers that an overlapping claim exists where two or more claimant groups make the same claim over the same area of land that is the subject of historical Treaty claims.
2. In areas where there are overlapping claims, the Crown encourages the claimant group that is in negotiations to discuss their interests with neighbouring groups at an early stage in the negotiations process, and establish a process by which they can reach agreement on how such interests can be managed.
3. The Crown prefers that overlapping claims in relation to specific items of redress are resolved by mutual agreement between claimant groups. However, in the absence of any agreement, the Crown may have to make a decision. In reaching such a decision the Crown is guided by three general principles:
 - The Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations;
 - The Crown's wish to maintain its capability to provide appropriate redress to other claimant groups who have yet to enter into negotiations with the Crown, and to achieve a fair settlement of their historical claims; and
 - The Crown's duty to ensure the redress offered to the claimant group in negotiations doesn't cause prejudice to a settled group and has no unintended inferences about the mana of other groups.
4. The Crown can only settle the claims of the group with which it is negotiating. It cannot settle the claims of other groups with overlapping interests and who are not in negotiation with the Crown. In settling the claims of one group, the Crown does not seek to determine which group has a predominant interest in a general area. Rather, the Crown recognises that a number of groups may have interests in the same general area. The settlement is also not intended to establish or to recognise boundaries between claimant groups.
5. When negotiating a redress package with a claimant group in negotiations, the Crown considers a number of factors, including:
 - whether any overlapping groups have customary interests in the area, and the nature of those interests;
 - whether alternative redress options are available for use in a further settlement with overlapping groups; and
 - whether it is appropriate to provide non-exclusive redress so as not to preclude similar redress for overlapping groups over the same area.
6. Where there are valid overlapping claims to a site or and area, it is only in specific circumstances that the Crown will offer exclusive redress (i.e. redress that, if provided to one claimant group in a settlement, will not be available as redress for another claimant group). For example, in the case of licensed Crown forest land, if several groups claim an area of that

land, the Crown will first consider whether each group has demonstrated a threshold level of customary interest in that land. If this threshold is demonstrated, the Crown then considers the potential availability of other forest land for each group. The Crown also considers the relative size of likely redress for the Treaty claims, given the nature and extent of likely breaches. Additionally, the Crown considers the range of uncertainties involved. Where uncertainties exist, such as conflicting historical accounts of association with the land, the Crown is likely to take a cautious approach to offering redress, particularly where other claimant groups are able to show breaches of the Treaty relating to the land and would lose the opportunity to seek resumptive orders from the Waitangi Tribunal.

7. The Crown seeks information from, and consults with, potential overlapping claimants directly. The process is set out below.
 - Initial contact with overlapping claimant groups: during the initial stages of negotiations, the Crown seeks information from overlapping groups as to the extent and nature of their interests within the area of interest identified by the group in negotiations. Information provided by overlapping groups will assist the Crown to develop redress that takes into account those interests; and
 - Substantive consultation with overlapping claimant groups: this occurs after the Crown and the negotiation group have reached an Agreement in Principle outlining the specific items of redress being offered. The Crown advises all overlapping claimants of the redress being offered to the negotiating group, and invites their comment on any concerns the groups may have in relation to specific items of redress.
8. Up until the time that the Crown and the group in negotiations sign a Deed of Settlement, the proposed redress package can be amended to take into account relevant overlapping claim considerations. For example, the Crown and the group in negotiations may decide, based on submissions from overlapping claimants, that it is not appropriate to offer a particular item of redress. However, once a Deed has been initialled, alterations to the redress package are unlikely because this could require the group in negotiations to re-ratify the settlement package.

Version	Date	Reviewed by	Change description	Updated by
0.1	18 th Sept 2013		Draft. Taken from Te Rarawa - Overlapping Claims Strategy 28Jun07.doc supplied by Maureen Hickey	Pip Watson
0.2	25 th Sept 2013		Reviewed by SME and approved for use. No updates	Pip Watson

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☐ or [Principles & Policy](#) [Frequently Asked Questions](#) [Process](#) [Procedures](#) [Templates & Best Practice](#)

Search on site

An introduction to overlapping claims

An overlapping claim exists where two or more claimant groups may have interests in the same area of land that is the subject of settlement discussions or negotiations.

Key actions

As a redress package is developed, OTS should ensure that groups with overlapping interests have the opportunity to comment on redress proposed for a claimant group. When finalising the redress package the Crown will consider the interests of overlapping claimants to ensure a fair, appropriate and timely settlement for the claimant group, while maintaining the Crown's ability to provide fair and appropriate redress to other claimant groups. A settlement package should not cause prejudice to claimant groups that have settled its claims.

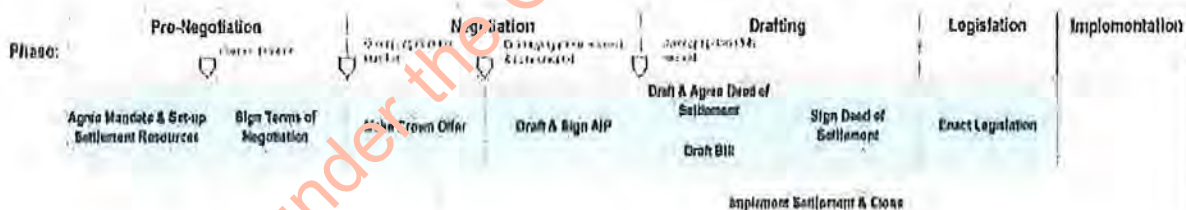
OTS responsibilities

Resolving overlapping claims is a priority work stream for those responsible for leading negotiations including the Chief Crown Negotiator, lead analysts and managers.

OTS prefers that overlapping claims are robustly addressed before an AIP is signed to reduce rework during the deed drafting phase, to reduce litigation, and to flush out unavoidable litigation in a timely manner.

However, the process outlined in this section of Toolbox and the resources provided can be adapted for use during the deed phase if OTS leadership and the Minister prefer.

To ensure a robust process we need to achieve the following milestones to resolve overlapping claims:



Overlapping claim milestone

- ☐ Claimants identified
- ☐ Claims assessed and communicated
- ☐ Terms substantially resolved

Achieved by...

- Terms of Negotiation signed
- Crown Offer made
- Agreement in Principle (AIP) signed

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Hannah Alice Doogan
Solicitor
Wellington

This is the exhibit marked "LMA -3" referred to in the attached Affidavit of **Lilian Marie Anderson** sworn/affirmed at Wellington this 31st day of October 2020 before me

Hannah Alice Doogan
Deputy Registrar/Solicitor of the High Court of New Zealand

▪ [Log in](#)

Principles & Policy

Search Site

Search

Principles & Policy

Frequently Asked
Questions

Process

Procedures

Templates & Best
Practice

Principles

The Crown prefers that overlapping claims in relation to specific items of redress are resolved by mutual agreement between claimant groups. However, in the absence of any agreement, the Crown may have to make a decision. In reaching a decision the Crown is guided by three general principles:

Quick Links

[Principles](#)

[Policy](#)

[Rules of Thumb](#)

1. The Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations;
2. The Crown's wish to maintain its capability to provide appropriate redress to other claimant groups who have yet to enter into negotiations with the Crown, and to achieve a fair settlement of their historical claims; and
3. The Crown's duty to ensure the redress offered to the claimant group in negotiations doesn't cause prejudice to a settled group and has no unintended inferences about the mana of other groups.

Policy

- We will not sign a Deed of Settlement unless the overlapping claims process has been completed.
- Use Overlapping Claims Policy Sept 2013 document to assist with communicating our policy externally.

Rules of Thumb

- **Allow time and start early:** It is likely that your strategy to resolve overlapping claims issues will alter a number of times as this work stream progresses. Ensure there is enough time for the process to progress – for officials to gather information, for claimant groups to meet to discuss matters of concern and, if needed, for the Minister to consider options provided to him. Your work plan should allow sufficient time for these steps to occur.
- **Knowledge:** Make sure you understand the interests of all the parties involved and bring this knowledge to the discussion on redress so the interests of overlapping claimants (including those who have settled and those iwi yet to receive a Crown recognised mandate) interests can be considered as redress is developed. To acquire this knowledge, you will need to involve OTS historians and other negotiations teams in the overlapping claims process as early as possible.
- **Involvement and responsiveness:** While the Crown's preference is for claimant groups to lead this process, the Crown needs to remain involved both to provide assistance to all parties, and to make sure that any process is agreed by all parties and to clearly document the discussions./p>
- **Transparency:** Make sure that any agreed process is explained to all the claimant groups concerned, including settled groups and those claimant groups yet to receive a Crown recognised mandate, so that all claimant groups have the same information and that the process is consistently applied. Follow up all verbal agreements in writing.

- **Flexibility:** This is not a one-size fits all process! Keep thinking, asking questions and exploring solutions.
- **Attention to detail:** Keeping records of the overlapping claims process is essential. Record who has been contacted, when and what their responses are. The **Overlapping Claimant Register** is key in helping you achieve this.
- If issues cannot be resolved, we have to ensure the Minister for Treaty of Waitangi Negotiations is fully briefed to make a decision.

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Frequently asked questions

Search Site

Search

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Frequently Asked
Questions

Process

Procedures

Templates & Best
Practice

Who are overlapping claimants?

Overlapping claimants are neighbouring groups (comprised in various ways) who have interests in the same land as the group in negotiations. Overlapping claimant can be groups who are in negotiations, groups who have yet to enter negotiations and groups who have already settled their claims.

Overlapping claimants can also be individuals and WAI Claimants, and overlapping claimants may not necessarily fit tidily into Crown recognised large natural groups. How you engage with overlapping claimants of this type will depend on the status of negotiations for the large natural groups and the nature of the particular concern or interest.

What is an overlapping claim?

The "Healing the past, building a future" (the Red Book) defines overlapping claims:

'An overlapping claim exists where two or more claimant groups make claims over the same area of land that is the subject of historical Treaty claims. (p.58)'

The Crown can reasonably assume that if other groups in an area have settled they won't have any active historical claims in the area and won't get any further redress. However, the group may still have interests in the area and in how the Crown recognises and prepares redress for the claims of other non-settled groups.

What is an interest?

Interests refer to the associations, desires, concerns and values that are important to groups. An interest in a site is not extinguished through a settlement.

What is a neighbouring group?

[See overlapping claimants.](#)

Who are settled groups?

Claimant groups who have settled their historical Treaty claims.

Quick links

[Who are overlapping claimants?](#)

[What is an overlapping claim?](#)

[What is an interest?](#)

[What is a neighbouring group?](#)

[Who are settled groups?](#)

[Why do we have to engage with settled groups on their overlapping claim matters?](#)

Why do we have to engage with settled groups on overlapping claims matters?

While settled groups cannot receive further redress as a result of engagement with another group's overlapping claims process, they still have a right to engage in the overlapping claims process to ensure the Crown and the claimant group in negotiations fully understand the nature of their interests and/or concerns. It is the Crown's duty to ensure the redress offered to the claimant group in negotiations doesn't cause prejudice to a settled group and has no unintended inferences about the mana of other groups.

In order to prevent a Treaty breach, the Crown must find the right balance between recognising the mana of the settling group and not acting inconsistently with, or eroding the existing settlement and mana of any settled groups.

Existing agreements between settled and non-settled groups must be taken into consideration. For example, with the Maungaharuru-Tangitu Incorporated (MTI) negotiation, which involves overlapping claims discussion with Ngāti Pāhauwera (a settled group), the Crown's starting point is the decisions already made during the previous overlapping claims process run with (MTI) when Ngāti Pāhauwera was in negotiations.

As more claimant groups achieve settlement, the post-settlement relationship between settled groups and the Crown will take greater prominence. It is the Crown's on-going responsibility to continue to engage with those settled groups in relation to redress being offered to neighbouring groups.

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Process section

Search Site

Search

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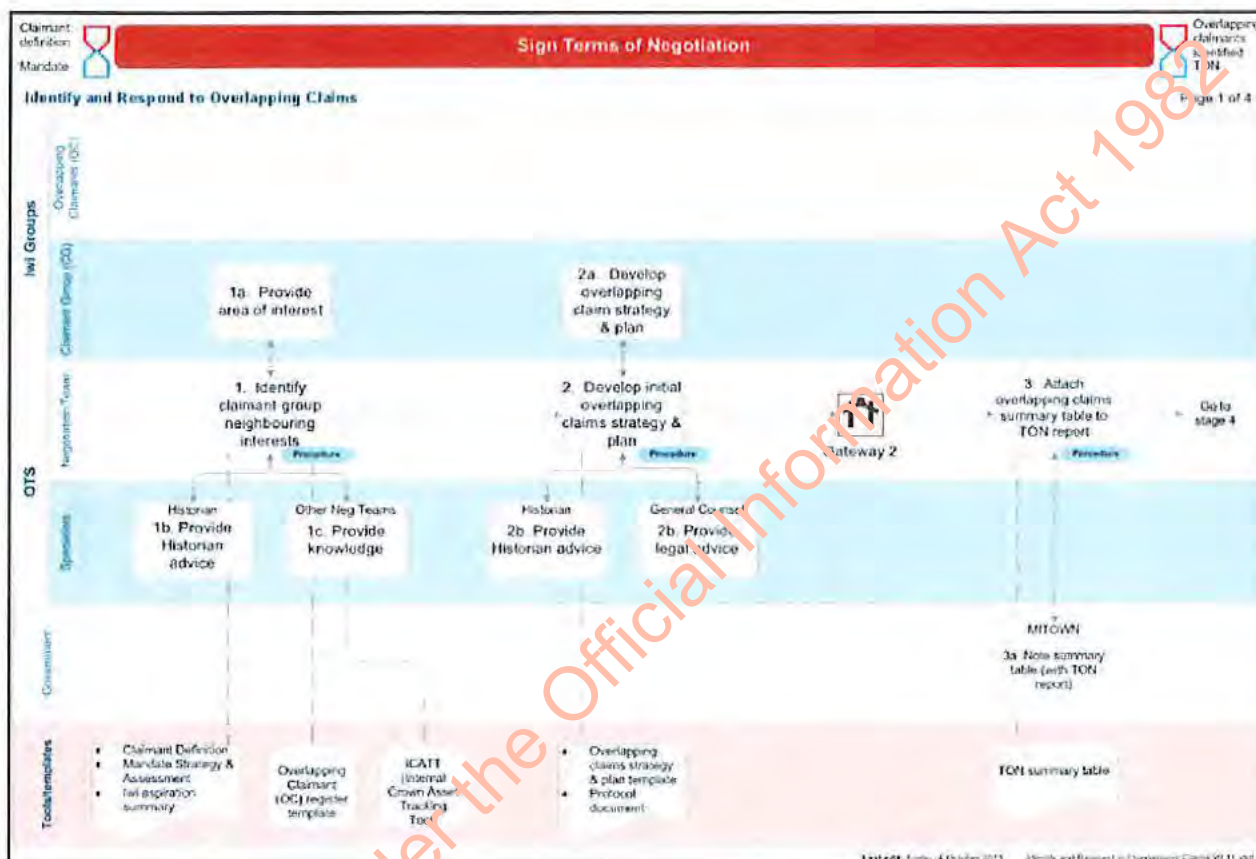
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Process

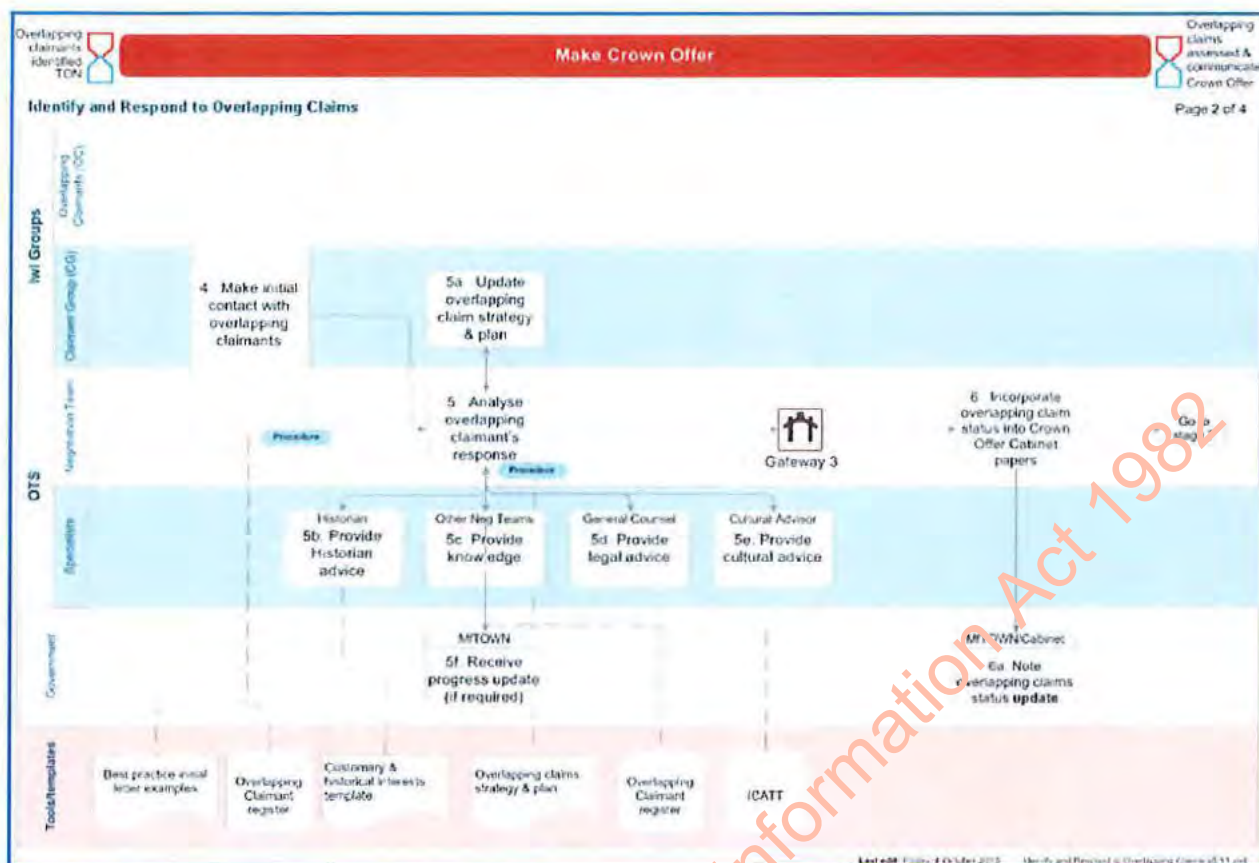
Procedures

Templates & Best Practice

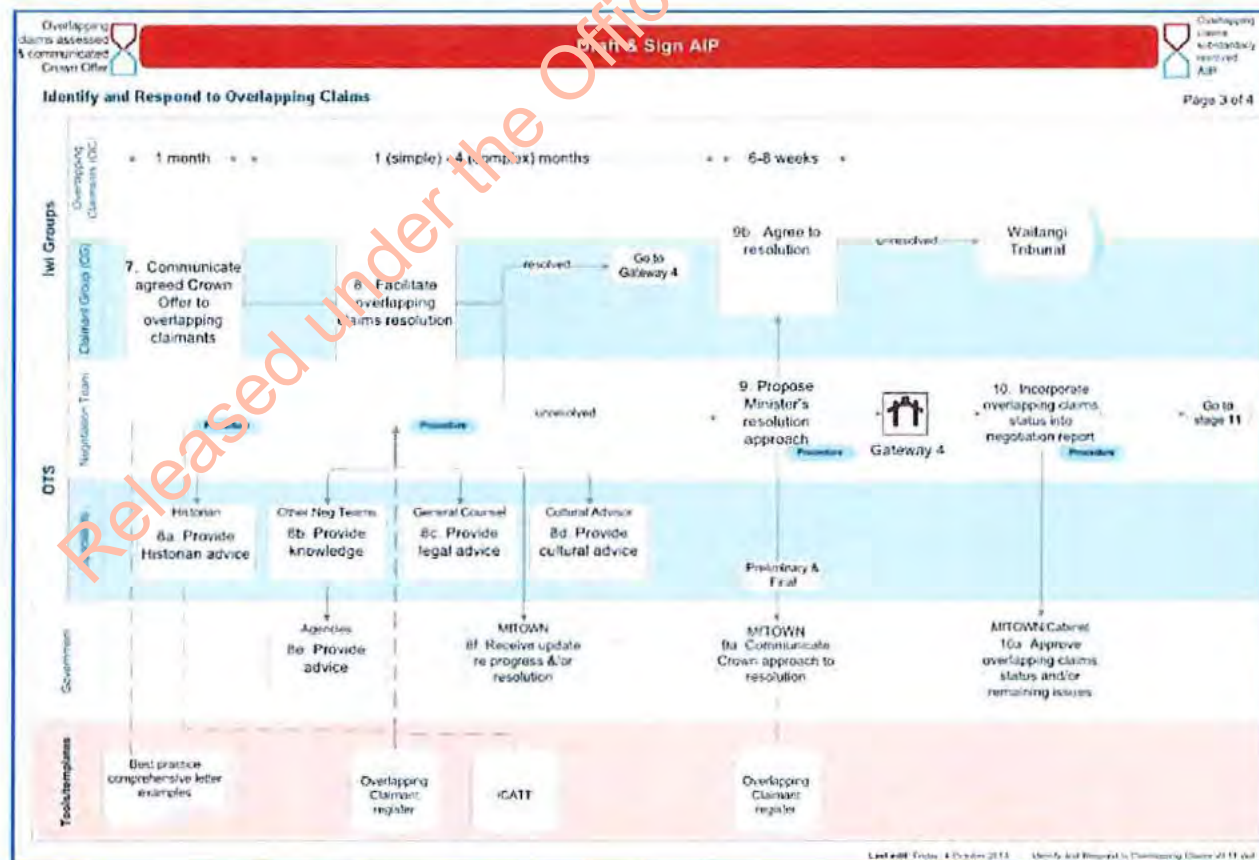
Page 1 of 4 - Sign terms of Negotiation



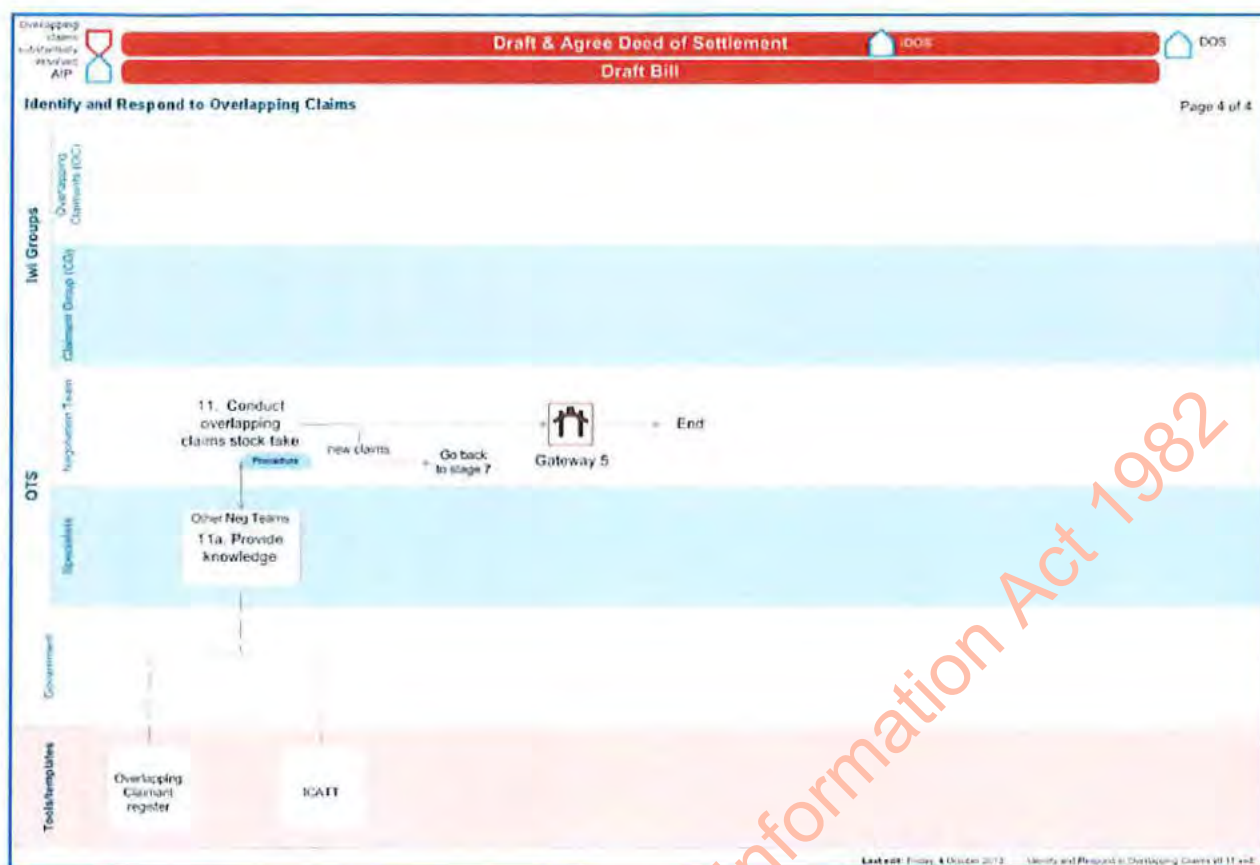
Page 2 of 4 - Make Crown Offer



Page 3 of 4 - Draft and Sign AIP



Page 4 of 4 - Draft and Deed of Settlement



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Procedures

Search Site

Search

Principles & Policy

Frequently Asked Questions

Process

Procedures

Templates & Best Practice



Links to procedures as following:

Sign terms of Negotiation

1. Identify claimant group neighbouring interests
2. Develop initial overlapping claims strategy and plan



Gateway 2

3. Attach overlapping claims summary table to TON report

Make Crown Offer

4. Make initial contact with overlapping claimants (Word, 69KB)
5. Analyse overlapping claimant's response (Word, 63KB)



Gateway 2

Draft and Sign AIP

7. Communicate agreed Crown offer to overlapping claimants
8. Facilitate overlapping claims resolution (Word, 74KB)
9. Propose Minister's resolution approach (Word, 75KB)



Gateway 4

10. Incorporate overlapping claims status into negotiation report

Quick Links

Sign terms of Negotiation
Make Crown Offer
Draft and Sign AIP
Draft Deed of Settlement

Draft Deed of Settlement

11. Conduct overlapping claims stocktake (Word, 58KB)



Gateway 5

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1. Identify claimant group neighbouring interests

When to use: During the 'Sign Terms of Negotiation' process, use this procedure to work with the Claimant Group (CG) to start gathering and identifying which overlapping claimants you will need to consult with including:

- Wai claimants
- Mandated neighbouring groups
- Un-mandated neighbouring groups
- Settled neighbouring groups.

Role: Settlement Development team:

- Negotiation Manager
- Lead Analyst

Consult:

- Historian
- Other Negotiation Teams

Note: The CCN has the overall accountability for overlapping claims resolution.

Tips:

- Ensure you have read:
 - The [Crown's Overlapping Claims policy](#)
 - [Overlapping claims: the views of the Tāmaki Makaurau and Te Arawa Waka Tribes](#) [2010]. As of September 2013, this memo and recommendations are being updated.
- When you meet with other teams in current negotiations, ensure you agree when and how you will keep each other up to date with your respective settlements. This will minimise the risk of inadvertently communicating sensitive settlement information at the wrong time.
- It is important to be clear about the scope of work that is required at this time of the process. Agree with your Negotiation Manager the level of information that is required at this point eg you could just be identifying neighbours and areas of interests versus understanding historic claim details.

Linkages:

- Quantum research (if any to date)

Templates/tools:

[Overlapping claimant register](#)

Best practice:

[Ngati Haua: overlapping claims register](#) [17 March 2013]

Steps

Step	Action
1	<p>Gather neighbouring group interest information from filed information, external sources and discussing with your Claimant Group (CG).</p> <p>You must refer to:</p> <ul style="list-style-type: none">• Mandate and Mandate Strategy (including Claimant Definition) and OTS assessment• Wai claims.

Step	Action
	<p>Other possible sources to investigate:</p> <ul style="list-style-type: none"> • Previous overlapping claim engagement your CG has been party to • Iwi aspiration summary • Wai claims • Historical reports • Any relevant quantum research • Waitangi Tribunal • District inquiry reports • Te Kāhui Māngai website (www.tkm.govt.nz) • List of Crown assets in area of interests from the Internal Crown Asset Tracking Tool (ICATT)
2	<p>Meet with other negotiation teams to discuss and source additional information such as:</p> <ul style="list-style-type: none"> • Previous mandate information • Dynamics of the region e.g. is there more than one entity seeking mandate? • Information from identified 'area' experts • Settled neighbours' redress details and documentation, e.g. Historical Accounts, Deed of Settlements • Current negotiations iwi aspirations, negotiation commitments and timeframes. Investigate current overlapping claim engagements.
3	<p>Analyse current information:</p> <ul style="list-style-type: none"> • Analyse which groups have interests in the area and which Crown assets are likely to be contested. • If possible map, the areas of interest (AOI) of the various groups against the Crown assets. • Identify which groups may assert an interest in an area/specific site.
4	<p>Discuss area of interests with the CG.</p> <p>Note:</p> <p>Some iwi are reluctant to document this information and may only provide verbal feedback. In this instance it can be beneficial to have your claimant group's AOIs roughly mapped, showing overlapping claimant groups area of interests. This should be for internal use only.</p>
5	<p>Populate the Overlapping claimant register with the following information:</p> <ul style="list-style-type: none"> • Iwi / Wai claimants • Contact details • Redress areas • Mechanisms • Engagement to date <p>This register should be filed in Jukebox under OC-FO1. Ensure your team are aware of the Overlapping Claims Register as it is a living document and will need to be continually updated.</p>

Version History

Version	Date	Reviewed by	Change description	Updated by
0.1	6 th Sept 2013		Draft	Pip Watson
0.2	16 th Sept 2013	Claim SME team	Marian Horan & Jo Young's changes	Pip Watson
0.3	25 th Sept 2013	Claim SME team	Marian Horan, Casey Pickett and Maureen Hickey changes. Minor edits	Pip Watson
0.4	1 st October	LT and Sysdoc QA	QA edits	Pip Watson

Released under the Official Information Act 1982

2. Develop initial overlapping claim strategy and plan

When to use:

During the 'Sign Terms of Negotiation' process, use this procedure to communicate and discuss with the CG the Crown's policy with respect to overlapping claim resolution and work together to develop an initial overlapping claims strategy and plan.

By the end of this procedure it should be clear if the overlapping claims strategy is:

- Iwi led
- Joint led; or
- Crown led.

Note: The CCN has the overall accountability for overlapping claims resolution.

Role:

Settlement Development Team:

- Negotiation Manager
- Lead Analyst

Consult:

- Historian
- General Counsel

Tips:

Crown's overlapping claim principles:

- To reach a fair, appropriate, and timely settlement with the claimant group in negotiations
- To maintain its ability to provide fair and appropriate redress to other claimant groups.

Crown's overlapping claim approach to addressing issues:

- The Crown encourages Claimant Groups (CG) to meet and discuss their concerns directly with overlapping claimants. However, OTS will support or lead this process where appropriate.
- The Crown will consult directly with overlapping claimants, providing information on the proposed settlement and opportunity to comment on the redress offered to the CG.

Overlapping claim plan and strategy

- The plan should be discussed upfront with CG and reviewed on a regular basis to make sure that any outstanding issues are identified early on and a process is discussed and agreed with the CG for resolution.

Administration and reporting

- Ensure overlapping claims is an agenda item at every negotiations meeting
- Include an overlapping claims update in all reports to the Minister

Linkages:

- Negotiating strategy and plan

Templates/tools:

[Overlapping claims strategy and plan](#)

[Overlapping claims protocol between Claimant Group and Crown](#) [July 2003]

Best practice:

Steps

Step	Action
1	<p>Meet with the CG:</p> <ul style="list-style-type: none"> • Give them context and information about resolving overlapping claims. Provide them with a written letter outlining the Crown's expectations. • Agree with the CG your strategic approach to resolving overlapping claims and whether this is iwi led or not. The Crown prefers an iwi led approach, but can be flexible.
2	<p>Complete the Initial Overlapping Claims Strategy and Plan template:</p> <ul style="list-style-type: none"> • Document at a high level what needs to happen, by when within the overall settlement timeframes: for Sign Terms of Negotiation, Make Crown Offer, Draft and Sign AIP and Draft and Agree Deed of Settlement / Draft Bill • Consider the following when completing the template <ul style="list-style-type: none"> • When will the claimant group discuss aspirations (either general or site specific) with their neighbours? • Who are the neighbouring groups (including settled groups and those iwi yet to receive a Crown recognised mandate and those who have yet to enter negotiation)? • Where will meetings be held (on a marae or at a neutral venue)? • If iwi led, how do they intend to get agreement from their neighbours to the process and timeframes? • Should letters formally outlining a Crown offer be jointly sent by either the claimant group or the Crown? • How will the Crown be informed of any agreements or hui outcomes (i.e. will officials attend some/all hui, will the iwi provide reports on the hui)? • How will the Crown will be informed of neighbouring iwi support/non-challenge (letters or emails provided to the Crown): <p>Note: Support, non-challenge should be provided to the Crown in written form.</p>
3	<p>Seek advice and feedback from General Counsel on the Initial Overlapping Claims Strategy and Plan</p>
4	<p>Submit the Overlapping claims strategy and plan to Gateway 2 as part of the mandatory process documentation submission.</p> <p>Present key options/risk assessment to the Gateway Review team to sound out the following decisions:</p> <ul style="list-style-type: none"> • Comprehensive vs. non comprehensive AIP documentation required • Signing of AIP with or without all overlapping claims substantially resolved.

Version History

Version	Date	Reviewed by	Change description	Updated by
0.1	6 th Sept 2013		Draft	Pip Watson
0.2	16 th Sept 2013	Claim SME team	Marian Horan & Jo Young's changes Addition of Gateway 2 needs	Pip Watson
0.3	25 th Sept 2013	Claim SME team	Marian Horan, Casey Pickett and Maureen Hickey changes. Minor edits	Pip Watson
0.4	1st October	LT and Sysdoc QA	QA edits	Pip Watson

Released under the Official Information Act 1982

3. Attach overlapping claims summary table to TON report

When to use: During the 'Sign Terms of Negotiation' process, use this procedure to create and attach an overlapping claims summary table to the Terms of Negotiation (TON) report to MfTOWN.

Role: Settlement Development Team

- Lead Analyst

Note: The CCN has the overall accountability for overlapping claims resolution.

Tips:

Linkages:

- TON Ministerial Report

Templates/tools:

- [TON summary table](#)

Best practice:

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Steps

Step	Action
1	Populate the TON summary table template with the following information: <ul style="list-style-type: none">• Neighbouring groups• Degree of overlap – partial vs complete• Mandated vs settled• Engagement status to date• Overlapping areas where there could be potential concerns (e.g. known relationship tensions, disputes over LNG status, etc).
2	Attach summary table to TON report and submit following the usual Ministerial process.
3	Arrange and conduct a handover meeting to next settlement team to ensure overlapping claim status is clarified and understood by the new team. Include the draft strategy and plan and Overlapping claimant register.

Version History

Version	Date	Reviewed by	Change description	Updated by
0.1			Draft. Changed description from assessment to summary based on feedback from Maureen	Pip Watson

Version	Date	Reviewed by	Change description	Updated by
0.2	16 th Sept 2013	Claim SME team	Marian Horan & Jo Young's changes Addition of handover to next team	Pip Watson
0.3	25 th Sept 2013	Claim SME team	Marian Horan, Casey Pickett and Maureen Hickey changes. Minor edits	Pip Watson
0.4	1st October	LT and Sysdoc QA	QA edits	Pip Watson

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4. Make initial contact with overlapping claimants

- When to use:** During the 'Make Crown Offer' process, use this procedure to make initial contact with identified overlapping claimants.
- Role:** Negotiation Team (commonly referred to as 'AIP' teams):
- Negotiation Manager
 - Lead Analyst
- Claimant Group
- Claimant Group mandated representative
- Note: The CCN has the overall accountability for overlapping claims resolution.
- Tips:**
- Ensure your Overlapping Claimant register is as accurate and up to date as possible.
 - Your communication strategy should be as wide as possible to ensure the Crown has made all efforts to ensure all affected parties have been communicated with. It is advisable to over communicate rather than take a cautionary approach.
 - It is essential to write to all Wai claimants to identify Wai claims that will be settled (or partially settled) by the negotiations with [the mandated entity] and that negotiations are underway.
 - Where possible, initiate and open discussions with OCs to improve your understanding of shared interests. However be aware that the CG redress negotiations are still confidential.
 - Advise/agree dates you intend to send key letters to overlapping claimants, this provides CG with a deadline for their own correspondence if they wish to make contact first.
 - Read the memo: [Overlapping claims: the views of the Tāmaki Makaurau and Te Arawa Waka Tribunals](#) [2010]. As of September 2013, this memo and recommendations are being updated.
- Linkages:**
- Formation of Crown Offer package
- Templates/tools:** [Overlapping claimant register](#)
[OTS letter to Wai Claimants to advise of mandate recognition](#)
- Best practice:** [Ngāti Hinerangi initial letter](#)
[Ngāti Tuhoe initial letter](#)

Steps

Step	Action
1	Obtain handover from the Settlement Development: <ul style="list-style-type: none">• Ensure you have an adequate handover to understand the current overlapping claim status.• Obtain the most up to date version of:<ul style="list-style-type: none">• Overlapping claims strategy and plan

Step	Action
	<ul style="list-style-type: none"> • Overlapping claimant register. • Ask whether Settlement Development have written to Wai Claimants to advise of Mandate recognition, if not, prepare and send letter [link template letter here] <p>Note the following recommended Crown approach and key messages to OCs:</p> <ul style="list-style-type: none"> • The Crown is required to engage with all iwi who may have interests in the redress we are proposing to offer the CG – this includes neighbours who have settled already. • OC who have settled cannot receive any additional redress as a result of an overlapping claims process. • OC should, however, have the opportunity to provide comments on redress being offered to the CG and the Crown has to take these comments into account when making a final decision on any outstanding issues. • Engagement should be simultaneous with as many groups in a region as possible with invitations to neighbouring groups to identify any potential overlapping interests. The aim is to promote early, broad, inclusive and timely engagement with claimant groups about their interests in a region.
2	<p>Reconfirm with the CG about who is leading the overlapping claimant communication.</p> <p>Ask the CG if they wish to share copies of any correspondence they have sent to overlapping groups to give you context and provide records.</p>
3	<p>Send initial Crown letter to overlapping claimants</p> <p>This should be sent from the Crown, but as a courtesy the CG should review the content. Use the one of the best practice Initial letter as a start. Contents should include:</p> <ul style="list-style-type: none"> • Re-iteration of any previous messages (if occurred) • Key timeframes • Proposed engagement process going forward • Crown's understanding of the overlapping claimants area of interest • Request for information on OC's interests within the CGs area of interest • Invitation to discuss • CG area of interest attachment and claimant definition. Note: CG needs to agree to this being shared. • CG contact details for overlapping claims • OTS contact details for overlapping claims work stream lead. • Check letter content with other relevant negotiation teams. <p>Note:</p> <p>If a group is not mandated, you may need to send this letter to several entities which represent the Large Natural Group's (LNG's) interests. Discuss the pre-mandate LNG's dynamics with the Settlement Development team or TPK.</p>
4	<p>If requested, meet with CGs (jointly or separately as agreed) and discuss:</p> <ul style="list-style-type: none"> • Settlement timeframes • Overlapping claims process • Boundaries and nature of interests within the boundaries • Formal feedback including rationale.

Step	Action
	<p>Note:</p> <ul style="list-style-type: none"> The Tribunal reports stress the importance of kanohi-ki-te-kanohi, or face-to-face consultation without which the Crown is unable to compile accurate information on claimants interests, or earn their trust and respect. Ideally the CG should meet separately with OC without the Crown to discuss overlapping claim issues. Note that iwi relationships and dynamics may make this challenging at times. If agreement in writing cannot be obtained then the Crown needs to know what key items of redress are opposed and why.
5	Update the Overlapping claimant register as appropriate.
6	File all correspondence methodically to enable easy discovery should there be any future OIA enquiries or litigation.

Version History

Version	Date	Reviewed by	Change description	Updated by
0.1	6 th Sept 2013		Draft	Pip Watson
0.2	16 th Sept 2013	Claim SME team	Marian Horan & Jo Young's changes	Pip Watson
0.3	25 th Sept 2013	Claim SME team	Marian Horan, Casey Pickett and Maureen Hickey changes. Minor edits	Pip Watson
0.4	1 st October	Leadership team & Sysdoc QA	QA edits Addition of more detail re what is included in the initial letter to claimants.	Pip Watson
0.5	7 July 2015	Casey Pickett	Inclusion of Wai claimant obligations and an extra "tip"	Casey Pickett

5. Analyse overlapping claimant's response

When to use: During the 'Make Crown Offer' process, use this procedure to analyse responses from overlapping claimants and update the overlapping claims strategy and plan.

Role: Negotiation Team (commonly referred to as 'AIP' team):

- Negotiation Manager
- Lead Analyst

Consult:

- Historian
- Other Negotiation Teams
- General Counsel
- Cultural Advisor

Note: The CCN has the overall accountability for overlapping claims resolution.

Tips:

- Around this time, details of the redress package will be being discussed. It is therefore very important to keep your historian involved.
- Be aware of all redress (including non-exclusive redress) that is subject to overlapping claims.
- Ensure any advice on the nature and scope of overlapping interests is clearly taken into account during the development of redress
- Ensure that all correspondence is responded to
- Added caution needs to be applied when assessing predominance of interests. The Tāmariri Makaurau Tribunal report stated that 'OTS officials who evaluated these interests were not sufficiently expert, inadequately supervised, and failed to seek external expert help in performing this task'. The Tribunal considered that the Crown did not acknowledge the limitations of the available historical evidence.
- It may also be beneficial to seek advice on iwi interests from a cultural advisor and/or engage a cultural advisor for help with future facilitation.

Linkages:

- Quantum process, in particular the land block assessment table. Note this may be confidential
- Strong linkage to overall negotiation planning process. The overlapping claims status can dictate when a Crown Offer is made and when cabinet papers are submitted.

Templates/tools:

[Overlapping claims strategy and plan](#)
[Overlapping claimant register](#)
[Customary and historical interests template](#)

Best practice:

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Steps

Step	Action
1	Analyse claimant responses:

Step	Action
	<ul style="list-style-type: none"> • Collate all written responses and update claimant register. • Discuss with other negotiation teams as appropriate. • Feed into Crown Offer development. • Send a letter to correspondent acknowledging receipt of the correspondence
2	<p>Update the overlapping strategy and plan.</p> <p>Include:</p> <ul style="list-style-type: none"> • details of the above discussions • specific site details • report from the Internal Crown Asset Tracking Tool (ICATT) to show any other possible overlapping sites • additional engagement tactics • next steps.
3	<p>Seek advice and feedback on the updated Overlapping Claims Strategy and Plan from other specialists as appropriate (e.g. Historian, other negotiation teams, cultural advisor, General Counsel).</p> <p>Where appropriate, work with your Historian to update the Customary and historical interests template.</p>
4	Obtain a peer review of overlapping claims strategy and plan from the QA forum.
5	<p>Submit updated Overlapping Claims Strategy and Plan to Gateway 3. Present key options/risk assessment to the Review team for the following decisions:</p> <ul style="list-style-type: none"> • Comprehensive vs. non comprehensive AIP documentation • Signing of AIP with or without all overlapping claims substantially resolved
6	Update MfTOWN with progress as appropriate prior to incorporating claim status into Crown Offer Cabinet papers.

Version History

Version	Date	Reviewed by	Change description	Updated by
0.1	6 th Sept 2013		Draft	Pip Watson
0.2	16 th Sept 2013	Claim SME team	Marian Horan & Jo Young's changes	Pip Watson
0.3	25 th Sept 2013	Claim SME team	Addition ICATT (Internal Crown Asset Tracking Tool) reference. Marian Horan, Casey Pickett and Maureen Hickey changes. Minor edits	Pip Watson
0.4	1 st October	Leadership team & Sysdoc QA	QA edits. Addition of Customary and	Pip Watson

			historical interests template.	
0.5	7 July2015	Casey Pickett	Additions to ensure we formally respond to all correspondence	Casey Pickett

Released under the Official Information Act 1982

7. Communicate agreed Crown Offer to overlapping claimants

When to use:	<p>During the 'Draft and Sign AIP' process, use this procedure to proactively communicate details of the agreed Crown Offer made to the CG, to overlapping claimants.</p> <p>If new redress or overlapping claims come to light after the AIP is signed, use the same procedure as appropriate to communicate new details.</p>
Role:	<p>Negotiation Team (commonly referred to as 'AIP' team):</p> <ul style="list-style-type: none">• Negotiation Manager• Analyst <p>Claimant Group</p> <ul style="list-style-type: none">• Claimant Group mandated representative <p>Note: The CCN has the overall accountability for overlapping claims resolution.</p>
Tips:	<ul style="list-style-type: none">• Ideally this communication happens after the Crown Offer has been accepted by the CG. However, in some circumstances this communication can happen before acceptance (i.e. where it affects related redress proposed for the overlapping claimant or joint redress proposals).• If communication occurs before acceptance, consider any risks and work to mitigate them. Note that the claimant community may not be aware of or have agreed to the proposed redress.• Do not include a copy of the entire Crown Offer in any OC communication as it will contain quantum details which are confidential to the CG.• Ensure your Claimant register is as accurate and up to date as possible.• A minimum of four weeks should be allowed for the OCs to provide a response to the Crown Offer communication.• Some claimant groups may prefer OTS to make the follow up contact. This is a matter of judgement. OTS should encourage 'CG to OC dialogue'.• You should not assume that a lack of response is an indication that the neighbouring iwi has no concerns about the proposed redress.• The Waitangi Tribunal has stated that although CG to OC engagement is the preferred approach to resolving overlapping claims, the Crown cannot withdraw from its responsibility in this matter. We are required to find possible solutions which may include:<ul style="list-style-type: none">• the Crown providing information to both parties• the Crown facilitating an overlapping claims hui with all iwi who claim interests in the redress concerned, providing an overview of the Crown process and withdrawing while the iwi discuss internal matters.
Linkages:	<ul style="list-style-type: none">• Acceptance of the Crown offer
Templates/tools:	Overlapping claimant register
Best practice:	Ngāti Hako comprehensive letter Waitaha Powerpoint presentation to overlapping claimants

Steps

Step	Action
1	Reconfirm with the CG about how and when the overlapping claimant communication is to be managed.
2	<p>Prepare a comprehensive Crown letter.</p> <p>This should be sent from the Crown, but the CG should be given the opportunity to review and provide feedback. Use the best practice comprehensive letter as a start and ensure the following content is included:</p> <ul style="list-style-type: none"> • Re-iteration of initial contact message • Crown Policy on overlapping claim resolution • Key timeframes • Proposed engagement going forward • Proposed submission process going forward: <ul style="list-style-type: none"> • Timeframes • Submissions must be made in writing (email is acceptable) • Must provide confirmation of support and/or agreements made with the CG or list matters/issues for further discussion and clarification • Subject to OIAs • Summary of site specific Crown Offer redress offered within the OC area of interest • Copy of Crown Offer (full disclosure). Note remove quantum details. • Crown Offer subject to overlapping claims resolution and final Cabinet sign-off. • Note that follow-up will be made within the next two weeks • OTS contact details for overlapping claims work stream lead and where to send submissions.
3	Check letter content with other relevant negotiation teams and send.
4	Make contact with OC within two weeks of sending the comprehensive letter.
5	Offer to meet to discuss any issues. Use the Waitaha Powerpoint presentation to overlapping claimants as support.
6	Update Overlapping claimant register as appropriate.

Version History

Version	Date	Reviewed by	Change description	Updated by
0.1	5 th Sept 2013		Draft	Pip Watson
0.2	17 th Sept 2013	Claim SME team	Marian Horan & Jo Young's changes	Pip Watson
0.3	25 th Sept 2013	Claim SME team	Addition ICATT (Internal Crown Asset Tracking Tool) reference. Marian Horan, Casey Pickett and Maureen Hickey changes. Minor edits	Pip Watson
0.4	1 st October	Leadership team &	QA edits	

Version	Date	Reviewed by	Change description	Updated by
		Sysdoc QA		

Released under the Official Information Act 1982

8. Facilitate overlapping claims resolution

- When to use:** During the 'Draft and Sign AIP' process, use this procedure to facilitate the resolution of all overlapping claims prior to AIP signing.
- Role:** Negotiation Team (commonly referred to as 'AIP' team):
- Negotiation Manager
 - Lead Analyst
- Consult:
- Historian
 - Other negotiation teams
 - General Counsel
 - Cultural Advisor
- Other Negotiation Teams Claimant Group
- Claimant Group mandated representative
- Note: The CCN has the overall accountability for overlapping claims resolution.

- Tips:**
- You should not assume that a lack of response is an indication that the neighbouring iwi has no concerns about the proposed redress.
 - It is important to be meticulous about record keeping. The overlapping claims register should constantly be updated and meetings and discussions with CG and OCs minuted and documented.
 - Discussing your particular overlapping claims situation with many of your OTS colleagues is important in order to:
 - capitalise on previous lessons learnt
 - consider different problem solving approaches and tactics.
 - For complex overlapping issues, a minimum of four months should be allowed to enable enough time to work through this procedure.

- Linkages:**
- AIP drafting

Templates/tools: [Overlapping claimant register](#)

Best practice:

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Steps

Step	Action
1	Assess and update Overlapping claimant register as appropriate.
2	Determine preferred resolution approach and tactics which may include: <ul style="list-style-type: none">• Internal research• External facilitation and mediation eg external independent Historian, Cultural Advisor or Tikanga expert• CCNs.
3	Discuss updated overlapping claims strategy and plan, plus preferred resolution approach with

Step	Action						
	<p>relevant specialists, including:</p> <ul style="list-style-type: none"> • QA forum • Historian • Other negotiation teams • General Counsel • Cultural Advisor 						
4	<p>Meet with OC's as appropriate to:</p> <ul style="list-style-type: none"> • reiterate Crown's approach, plan and timeframes to resolve overlapping claims • discuss issues and seek resolution 						
5	<p>Obtain CG report and feedback on engagement with overlapping iwi and any agreements reached and update the Overlapping Claimant Register</p>						
6	<p>Meet with other agencies as appropriate, e.g.</p> <ul style="list-style-type: none"> • if specific issues are raised by OC's, OTS may have to discuss the issue with the relevant Crown agency <p>Note:</p> <ul style="list-style-type: none"> • NZGB requires support from neighbouring iwi for any proposed place name changes. DOC also runs a similar process to NZGB for any proposed place name changes on DOC lands. 						
7	<p>After an appropriate time, identify and assess remaining OC's submissions to CG's Crown Offer or redress package:</p> <table border="1"> <thead> <tr> <th>If ...</th><th>...then</th></tr> </thead> <tbody> <tr> <td>all claims are resolved</td><td> <ul style="list-style-type: none"> • update overlapping claims status for Gateway 4 material submission. • go to procedure 10: Incorporate overlapping claims status into negotiation report </td></tr> <tr> <td> <p>some unresolved claims remain e.g. any of the following scenarios are true:</p> <ul style="list-style-type: none"> • Groups are unable to reach agreement on certain items of redress despite many rounds of informal and formal discussion and Crown facilitation. • The CG wishes to conclude negotiations and sign their AIP, and there remain outstanding issues that cannot be resolved iwi to iwi • Issues remain unresolved. </td><td> <ul style="list-style-type: none"> • a Ministerial decision is required • claimants need to indicate that they have exhausted all possibilities and that the Crown should make the decision for them. • Go to step 8. </td></tr> </tbody> </table>	If ...	...then	all claims are resolved	<ul style="list-style-type: none"> • update overlapping claims status for Gateway 4 material submission. • go to procedure 10: Incorporate overlapping claims status into negotiation report 	<p>some unresolved claims remain e.g. any of the following scenarios are true:</p> <ul style="list-style-type: none"> • Groups are unable to reach agreement on certain items of redress despite many rounds of informal and formal discussion and Crown facilitation. • The CG wishes to conclude negotiations and sign their AIP, and there remain outstanding issues that cannot be resolved iwi to iwi • Issues remain unresolved. 	<ul style="list-style-type: none"> • a Ministerial decision is required • claimants need to indicate that they have exhausted all possibilities and that the Crown should make the decision for them. • Go to step 8.
If ...	...then						
all claims are resolved	<ul style="list-style-type: none"> • update overlapping claims status for Gateway 4 material submission. • go to procedure 10: Incorporate overlapping claims status into negotiation report 						
<p>some unresolved claims remain e.g. any of the following scenarios are true:</p> <ul style="list-style-type: none"> • Groups are unable to reach agreement on certain items of redress despite many rounds of informal and formal discussion and Crown facilitation. • The CG wishes to conclude negotiations and sign their AIP, and there remain outstanding issues that cannot be resolved iwi to iwi • Issues remain unresolved. 	<ul style="list-style-type: none"> • a Ministerial decision is required • claimants need to indicate that they have exhausted all possibilities and that the Crown should make the decision for them. • Go to step 8. 						
8	<p>Work with General Counsel to undertake robust litigation analysis. Consider:</p> <ul style="list-style-type: none"> • the balance of redress offered in each settlement package • the outcome of discussions/hui/facilitation between the affected groups • any comments that the groups may have about particular redress offered to each other that might affect their interests • for commercial redress, the availability of other commercial redress and the total financial 						

Step	Action
	<p>value of each settlement in view of the Crown's Treaty breaches</p> <p>Note a decision to withdraw redress already offered, or to change the redress offered, may present risks to the settlement for the Crown and for the group involved.</p>
9	<p>Provide evidence that the Crown has:</p> <ul style="list-style-type: none"> encouraged and assisted the groups to reach agreement to the fullest extent possible. engaged sufficiently and equally with all groups to avoid any perception that the Crown is prioritising some negotiations over others.
10	Update strategy and plan as appropriate.
11	If appropriate, present overlapping claims strategy and litigation analysis at the QA forum to seek peer advice and feedback.
12	Update the Overlapping claimant register as appropriate.
13	File all correspondence methodically to enable easy discovery should there be any future OIA or litigation enquiries.

Version History

Version	Date	Reviewed by	Change description	Updated by
0.1	6 th Sept 2013		Draft	Pip Watson
0.2	17 th Sept 2013	Claim SME team	Marian Horan, Maureen Hickey & other SME team discussion.	Pip Watson
0.3	25 th Sept 2013	Claim SME team	Rewrote/ordered based on Marian Horan, Casey Pickett and Maureen Hickey advice.	Pip Watson
0.4	26 th Sept 2013	Marian Horan	Re-ordered and condensed	Marian Horan, Pip Watson
0.5	1 st October	Leadership team & Sysdoc QA	QA edits	Pip Watson

9. Propose Minister's resolution approach

When to use:	During the 'Draft and Sign AIP' process, use this procedure to recommend a resolution approach when all other best endeavours to seek agreement have been exhausted. This takes the form of two Ministerial reports (preliminary and final) with accompanying consultation.
Role:	<p>Negotiation Team (commonly referred to as 'AIP' team):</p> <ul style="list-style-type: none">• Negotiation Manager• Lead Analyst <p>Note: The CCN has the overall accountability for overlapping claims resolution.</p>
Tips:	<ul style="list-style-type: none">• A ministerial decision to withdraw redress already offered, or to change the redress offered, may present risks to the settlement – both for the Crown and for the group involved.• Ministerial decisions are a last resort as Ministers prefer that overlapping claims are resolved between claimants.• However, ministerial decisions can allow the claimant negotiators and claimant groups to maintain mana – they have not voluntarily acquiesced to something their claimant community finds undesirable.• Following the Tribunal's findings in the Tamaki Makaurau Settlement Process Report, it is important to balance the timing of bringing the Minister into the process with the need for the Crown to demonstrate that OTS has:<ul style="list-style-type: none">• encouraged and assisted groups to reach agreement to the fullest extent possible; and• engaged sufficiently and equally with all groups to avoid perceptions that the Crown is prioritising some negotiations over others.• Where a ministerial decision-making process is underway, it is important to continue to encourage where possible a parallel process of engagement hui in case claimant groups are able to resolve overlapping claims themselves.• Reports to the Minister need to include robust litigation risk analysis.• A minimum of six weeks should be allowed between the preliminary and final MfTOWN report.
Linkages:	<ul style="list-style-type: none">•
Templates/Tools:	Overlapping Claimant register

Best practice:

Depending to the level of overlapping claim complexity refer to the following report examples:

For...	Refer to...
Simple claims	Preliminary report Ngāti Porou preliminary report Final report Ngāti Porou final report
Complex claims	Meeting notes Ngāti Kuri meeting notes Preliminary report Ngāti Kuri interim letter Ngāti Kuri preliminary report Final report Ngāti Kuri final report

Steps

Step	Action
1	Prepare preliminary report for MfTOWN as follows: <ul style="list-style-type: none"> • Review relevant best practice preliminary reports. • Propose process for addressing remaining issues. • Attach litigation analysis. • Seek decision on approach.
2	If appropriate present at the OA forum to seek peer advice and feedback.
3	MfTOWN writes to CG and all OCs with preliminary decision The letter: <ul style="list-style-type: none"> • acknowledges support/non-support/concerns • advises groups of preliminary decision (i.e. may amend or withdraw redress, or redress remains in Crown Offer) • offers officials to meet with groups to discuss as appropriate
4	Coordinate and communicate responses from OCs as appropriate: <ul style="list-style-type: none"> • Meet with OC and collate all responses to MfTOWN preliminary proposal in the Overlapping Claimant register. • Provide regular updates of responses and resolution options to MfTOWN either as stand-alone reports or in the weekly report.
5	Continue to actively encourage groups to resolve issues.
6	Prepare Final report for MfTOWN, as follows: <ul style="list-style-type: none"> • Review relevant best practice final reports. • Propose process for addressing remaining issues. • Attach litigation analysis.

Step	Action
	<ul style="list-style-type: none"> • Seek decision on approach • Attach relevant letters for signing.
7	If appropriate present at the QA forum to seek peer advice and feedback.
8	<p>Send the final report to the MfTOWN.</p> <p>MfTOWN considers the report then writes to all CG and all OCs with the final decision letter:</p> <ul style="list-style-type: none"> • acknowledges support/non-support/concerns • outlines Crown's wish to: <ul style="list-style-type: none"> • reach a fair and appropriate settlement with each group it is in negotiations • maintain, as far as possible, its capability to provide appropriate redress to all non-settled iwi and achieve a fair settlement of their historical claims • not to prejudice settled iwi. • outlines Crown's right to choose not to offer any redress over significantly contested areas • provides the final decision (i.e. may amend or withdraw redress, or redress remains in Crown Offer) • offers officials to meet with groups to discuss as appropriate
9	<p>Coordinate and communicate responses from CG and OC as appropriate</p> <ul style="list-style-type: none"> • Meet with OC and collate all responses to MfTOWN final proposal in the Overlapping Claimant register
10	<p>Work with General Counsel to update litigation analysis. Consider:</p> <ul style="list-style-type: none"> • the outcome of discussions/hui/facilitation between the affected groups • assess likelihood and impact of Tribunal litigation
11	<p>Update evidence that the Crown has:</p> <ul style="list-style-type: none"> • encouraged and assisted the groups to reach agreement to the fullest extent possible. • engaged sufficiently and equally with all groups to avoid any perception that the Crown is prioritising some negotiations over others.
12	<p>Submit updated overlapping claims status to Gateway 4. Present key options/litigation risk assessment to the Review team for the following decisions:</p> <ul style="list-style-type: none"> • signing of AIP with or without all overlapping claims substantially resolved. • if appropriate, signing of AIP with Waitangi Tribunal Claim or high litigation risk.

Version History

Version	Date	Reviewed by	Change description	Updated by
0.1	17 th Sept 2013		Draft – created after reviewing other procedures with SME team	Pip Watson
0.2	25 th Sept 2013	Claim SME team	<p>Rewrote based on Marian Horan, Casey Pickett and Maureen Hickey advice.</p> <p>Marian rewrote Tips section</p>	Pip Watson/ Marian Horan

Version	Date	Reviewed by	Change description	Updated by
0.3	1 st October	Leadership team & Sysdoc QA	Addition of "During the 'Draft and Sign AIP' process" QA edits	Pip Watson

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10. Incorporate overlapping claims status into negotiation report

- When to use:** During the 'Draft and Sign AIP process', use this procedure to update the MfTOWN on the overlapping claims status and background.
This update should give resolved or unresolved details and be added to the final negotiation report submitted to the MfTOWN prior to the signing of the AIP.
- Role:** Negotiation Team (commonly referred to as 'AIP' team):
- Negotiation Manager
 - Lead Analyst
- Note: The CCN has the overall accountability for overlapping claims resolution.
- Tips:**
-
- Linkages:**
- Negotiation ministerial report prior to Agreement in Principle signing
- Templates/tools:**
-
- Best practice:** [Maungaharuru Tangitu Hapū resolved report](#)
[Overlapping Claims with Maungaharuru Tangitu acknowledgement letter](#)

Steps

Step	Action						
1	Prepare status report for MfTOWN.						
	<table><tr><th>If claims are...</th><th>then...</th></tr><tr><td>resolved</td><td>outline summary of resolution.</td></tr><tr><td>unresolved</td><td><ul style="list-style-type: none">• outline summary of unresolved issues• include litigation analysis from procedure: Facilitate overlapping claims resolution.</td></tr></table>	If claims are...	then...	resolved	outline summary of resolution.	unresolved	<ul style="list-style-type: none">• outline summary of unresolved issues• include litigation analysis from procedure: Facilitate overlapping claims resolution.
	If claims are...	then...					
	resolved	outline summary of resolution.					
unresolved	<ul style="list-style-type: none">• outline summary of unresolved issues• include litigation analysis from procedure: Facilitate overlapping claims resolution.						
2	Attach the following to the negotiation report and submit following the usual Ministerial process: <ul style="list-style-type: none">• summarised status• GG and OC's letters of overlapping claim acknowledgement letter for MfTOWN to sign for sending.						
3	Arrange and conduct hand over to next Negotiation team (commonly referred to as the 'DOS' team).						

Version History

Version	Date	Reviewed by	Change description	Updated by
0.1	6 th Sept 2013		Draft	Pip Watson

Version	Date	Reviewed by	Change description	Updated by
0.2	17 th Sept 2013	Claim SME team	No changes identified from SME team. Minor changes/alignment from Pip.	Pip Watson
0.3	25 th Sept 2013	Claim SME team	Marian Horan, Casey Pickett and Maureen Hickey changes. Minor edits.	Pip Watson
0.4	1 st October	LT and Sysdoc QA	QA edits	Pip Watson

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11. Conduct overlapping claims stock take

- When to use:** During the 'Draft and Agree Deed of Settlement' process, use this procedure to check that no further overlapping claims have surfaced (or have the potential to surface) from neighbouring iwi prior to iDOS.
- Role:** Negotiation Team (commonly referred to as 'DOS' team):
- Negotiation Manager
 - Lead Analyst
- Note: The CCN has the overall accountability for overlapping claims resolution.
- Tips:**
- This procedure should start one month after the AIP has been signed and continue until iDOS and assumes that overlapping claims were largely resolved prior to AIP.
 - All steps in the overlapping claims process must be undertaken prior to initialling a Deed. If overlapping claims were not substantially resolved prior to AIP, please refer to procedures 4 - 10
 - Continue to update with overlapping claimant register with details of any correspondence and undertaking
- Linkages:**
-
- Templates/tools:**
- Wai Claim letter [link to: <http://intranet/ots-toolbox/phase-4/P4-NF-9-the-negotiations-framework/P4-NF-9.6-large-natural-groups-&-mandate/P4-NF-9.6.6.4-Letter-to-Wai-claimants-regarding-AIP.doc>]
 - Overlapping Claimant Register [link to <http://intranet/ots-toolbox/overlappingclaims/Bestpracticeandtemplates/3Oclaimantregister.doc>]
- Best practice:**
-

Steps

Step	Action		
1	Write to all WAI Claimants to advise the AIP has been signed		
2	Undertake redress and overlapping claim stock take as follows: <ul style="list-style-type: none"> • Review any undertakings made through the overlapping claims process (e.g. provision of information, reciprocal letters of support etc). • Run report from the Internal Crown Asset Tracking Tool (ICATT) to show any other possible overlapping sites • Check with other Negotiation Teams: <ul style="list-style-type: none"> • AIP team – Review all previous pre-AIP overlapping claims material (i.e. Ministerial reports, Ministerial Letters, iwi correspondence, claimant correspondence, meeting minutes) • Other neighbouring negotiation teams – Other settlement overlapping claim status. • Check for any written feedback from iwi. 		
	<table> <tr> <td>If there are...</td><td>then...</td></tr> </table>	If there are...	then...
If there are...	then...		

Step	Action	
	new claims and/or a change in redress	<ul style="list-style-type: none"> communicate to OCs go back to procedure: Communicate agreed Crown Offer to overlapping claimants (as appropriate).
	No new claims	<ul style="list-style-type: none"> proceed to Gateway 5
2	Repeat this procedure monthly until iDOS	

Version History

Version	Date	Reviewed by	Change description	Updated by
0.1	6 th Sept 2013		Draft	Pip Watson
0.2	17 th Sept 2013	Claim SME team	Minor changes updates from Casey, Marian and Kathryn.	Pip Watson
0.3	25 th Sept 2013	Claim SME team	Addition ICATT (Internal Crown Asset Tracking Tool) reference. Merged two procedures into one.	Pip Watson
0.4	1 st October	LT and Sysdoc QA	QA edits	Pip Watson
0.5	7 July 2015	Casey Pickett	Risk mitigation re Wai Claimants and if 'best practice' isn't followed	

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Name	File Name
Ngāti Hauā: overlapping claims register	Ngāti Hauā overlapping claims register March 2013
Ngāti Hinerangi initial letter	Ngāti Hinerangi initial letter
Ngai Tuhoe initial letter	Ngai Tuhoe initial letter
Ngāti Hauā comprehensive letter	Ngāti Hako comprehensive letter
Waitaha powerpoint presentation to overlapping claimants	Overlapping claims process for the Waitaha Raupatu Trust
Ngāti Porou preliminary report	Report to MfTOWN re Turanga & Ngāti Porou overlap FINAL
Ngāti Porou final report	Final decision on Overlapping Claims report Aug 2010
Ngāti Kuri meeting notes	Ngāti Kuri meeting notes
Ngāti Kuri interim letter	MfTOWN Report Ngāti Kuri overlapping claims interim
Ngāti Kuri preliminary report	MfTOWN Report Ngāti Kuri overlapping claims prelim decision
Ngāti Kuri final report	MfTOWN Report Ngāti Kuri overlapping claims final decision
Ngāti Kuri overlapping claims consultation letter	Ngāti Kuri Consultation Letters 16 April 2013
Maungaharuru Tangitu Hapū resolved report	2013-03-14 Maungaharuru OC and Place Names
Overlapping claims with Maungaharuru Tangitu acknowledgement letter	2013-03-14 Min to MAI re MTI settlement
Overlapping Claims Strategy and Plans Tuwhareroa	Tuwharetoa Overlapping Claims Strategy v2 July 2013
Overlapping Claims Strategy and Plans Rangitāne o Wairarapa	Rangitaane o Wairarapa Overlapping Claims 5 Nov 2013

Templates & Tools

Name	File Name
Overlapping claimant register	Overlapping claimant register
Overlapping claims strategy and plan	Overlapping claims strategy and plan
Overlapping claims protocol between Te Rūnanga o Te Rarawa & Crown	Overlapping claims protocol
TON Summary table	TON Summary table
Customary and Historical interests template (for Historians)	Customary and Historical interests template

Tips

Name	File Name
Crown's Overlapping claims policy	Overlapping Claims Policy Sept 2013 v.02
Overlapping claims: the views of the tamaki Makaurau and Te Arawa Waka tribunals	<u>OLC Tribunal Tamaki report summary memo Nov 2010</u>

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"LMA-4"
OFFICE OF TREATY SETTLEMENTS
Te Tari Whakataua Take e pā ana ki te Tiriti o Waitangi

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Minister for Treaty of Waitangi Negotiations

Subject: Application of Crown's overlapping claims policy to settled groups

Date:	30 April 2012	Priority:	Medium
Report No:	2011/2012 – 649	File Ref:	TWP-01-06-02

Action Sought

Minister	Action Sought	Deadline
Minister for Treaty of Waitangi Negotiations (Hon Christopher Finlayson)	Note the Crown's overlapping claims policy applies to settled groups but a clearer application of the policy and what settled groups can expect from Crown engagement are required; and Agree to help promote clear understanding about Crown's overlapping claims policy through an article in the next Kōkiri Ngātahi pānui.	By 4 May 2012

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1 st Contact
Tania Ott	Manager, Strategic Policy	04 498 2390	027 531 9811 ✓
Carolyn Read	Senior Analyst	04 494 9811	

This is the exhibit marked "LMA -4" referred to in the attached Affidavit of **Lilian Marie Anderson** sworn/affirmed at Wellington this 13th day of October 2020 before me

Hannah Alice Doogan
Solicitor
Wellington

Deputy Registrar/Solicitor of the High Court of New Zealand