

Application of Crown's overlapping claims policy to settled groups

Purpose

1. This briefing identifies issues with the understanding and application of the Crown's overlapping claims policy to settled groups and recommends improvements.

Crown overlapping claims policy

2. The Crown's overlapping claims policy is set out in the Office of Treaty Settlements Guide (*Ka tika ā muri, ka tika ā mua – Healing the past, building a future*).
3. The Crown's overlapping claims policy does not distinguish between settled and non-settled groups as the term *claimant group* covers both groups.
4. The main elements of the Crown's overlapping claims policy are:
 - a. Overlapping claims must be addressed to the satisfaction of the Crown before it will conclude a settlement involving any sites or assets;
 - b. The settlement does not establish or recognise claimant group boundaries as such matters can only be decided by the groups themselves;
 - c. The Crown can only settle the claims of the group with whom it is negotiating, not other groups with overlapping claims. Those groups are able to negotiate their own settlements with the Crown;
 - d. The Crown will not address the question of which claimant group has the predominant interest in a general area. That matter can only be resolved by the groups themselves;
 - e. In areas where there are overlapping claims, the Crown will encourage claimant groups to engage with neighbouring groups at an early stage in negotiations and agree on how these interests should be managed;
 - f. Addressing overlapping claims early in negotiations can avoid delays and possible challenges to the settlement package. The Crown will assist this process by providing information on proposed redress items to groups with shared interests in an area;
 - g. The Crown's preference is that groups resolve overlapping claims between them however if this is not possible a Ministerial decision will be made;
 - h. Should a Ministerial decision be necessary, the Crown is guided by two general principles:
 - i. The Crown's wish to reach a fair, appropriate settlement with the negotiating group; and
 - ii. The Crown's wish to retain the ability to provide redress to neighbouring groups and achieve a fair settlement of their claims.

Comment

5. The successful management of overlapping claims and interests is a critical part of the negotiation strategy. Overlapped interests exist across all regions of New Zealand, particularly the North Island. Early understanding and management of overlapping

claims and interests support timely and durable settlements and minimise conflicts between iwi.

6. The Crown's overlapping claims policy does not distinguish between settled and non-settled groups. However our research suggests that inconsistent application of the policy to settled groups is contributing to delays in negotiations progress e.g. Hawkes' Bay iwi and to litigation e.g. Raukawa and Taranaki Whanui.
7. Our assessment is the current policy is largely fit for purpose, but clearer direction about how the policy should be applied to settled groups is required.
8. As the number of settled groups increase we consider officials need to apply the policy by focussing on the *interests* of all groups in an area, rather than on solely what *claims* remain to be settled in an area. This approach supports the principle of finality of settlements, while acknowledging the Crown should be expected to understand and recognise the overlapped interests of settled groups when negotiating the claims of non-settled groups.
9. Updated operational guidelines for OTS negotiations teams will be prepared and a communication strategy developed clarifying what the claimant community can expect from the Crown when it is negotiating the overlapped interests of settled groups.
10. The operational guidelines will refer to the Crown's obligation to:
 - a. Include settled groups in overlapping claims research and engagement strategies early in negotiations so the full range of interests in an area is clear;
 - b. Ensure a comprehensive understanding of overlapping claims and interests underpins redress development, including where:
 - i. the Crown audit identifies properties not previously available to a settled group; and
 - ii. co-governance arrangements are involved;
 - c. Recognise that non-exclusive redress in deeds of settlement e.g. statutory acknowledgments do not remove the requirement to engage with the settled group regarding the settling groups' interests over the same area; and
 - d. Clarify the Crown's expectation about the role of iwi to lead overlapping claims engagement, at what point the Crown may need to make final decisions and provide sufficient detail about how this will be managed.
11. The guidelines will be informed by recent experience. For example, the application of the Crown's overlapping claims policy in the Raukawa negotiation. Further detail about how the Crown's overlapping claims policy has been applied in this negotiation is attached at **Appendix 1**.
12. A letter setting out how the Crown's overlapping claims policy applies to settled groups has been prepared in response to MTI's request for clarity on this issue. The draft letter is attached at **Appendix 2** for your information.

Waitangi Tribunal observations

13. We consider our proposed approach is in keeping with Waitangi Tribunal observations. While the Tribunal has not addressed the application of the Crown's overlapping

claims policy to settled groups at length, some of its statements can be extrapolated to apply to settled groups. Several reports have focussed on the broad application of the overlapping claims policy e.g. Ngāti Awa Settlement Cross-Claims Report 2002 and Tamaki Makaurau Settlement Process Report 2007.

14. The Ngāti Awa Settlement Cross-Claims Report 2002 observed that officials must be constantly vigilant to ensure the cost of settlements in the form of damage to tribal relations is kept to the absolute minimum. The report drew attention to the possibility that damage to tribal relations can affect the long-term reconciliation of Crown and Maori that settlements seek to achieve. The Tuwharetoa ki Kawerau Cross-Claims Report 2003 endorsed this point. The Tamaki Makaurau Settlement Process Report 2007 reflected on the potential for settlement negotiations to damage whanaungatanga.

Consultation

15. The Crown Law Office was consulted in the development of this briefing.

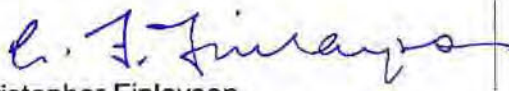
Next steps

16. We will seek your views on an opportunity for you to communicate the policy position to iwi and others. For example, an article in the next Kōkiri Ngātahi pānui.

Recommendations

17. We recommend you:
- a. **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
 - b. **note** the draft letter to the Chair of Maungaharuru-Tangitu Incorporation clarifying how the Crown's overlapping claims policy applies to settled groups attached for your information at **Appendix 2**; and
 - c. **agree** to help promote clear understanding about Crown's overlapping claims policy through an article in the next Kōkiri Ngātahi pānui. YES / NO


Tania Ota
Manager Strategic Policy

NOTED / APPROVED / NOT APPROVED

Hon Christopher Finlayson Minister for Treaty of Waitangi Negotiations
Date: / / 2012

Appendix 1 – Background information on application of Crown's overlapping claims policy

Raukawa

1. Following the initialling of the Raukawa deed of settlement in November 2011 several neighbouring iwi filed urgency applications at the Waitangi Tribunal to prevent the deed being signed. The applications claimed the Raukawa settlement would prejudice to their interests and the Crown had not adequately consulted them.
2. One of these groups who filed with the Tribunal was Te Pumautanga o Te Arawa who had had their claims settled through the Affiliate Te Arawa Iwi and Hapu Settlement in 2008.
3. The Tribunal granted the application for urgency and criticised the Crown's overlapping claims process. The Crown chose to vacate a tentatively scheduled 2 November 2011 signing date and initiate a new phase in its overlapping claims process. The Tribunal agreed to adjourn the urgency hearing, but requested the Crown keep the Tribunal informed of developments.
4. The Raukawa Settlement Trust and the Crown developed a strategy to resolve outstanding overlapping claims issues and allow the Raukawa deed to be signed. The Crown-led strategy was designed to work in parallel with iwi to iwi engagement. The strategy was designed to ensure that if the Crown had to make decisions on whether to include contested redress in the Raukawa settlement, those decisions would stand up to scrutiny from the Tribunal.
5. The Crown-led overlapping claims strategy is as follows:
 - a. Overlapping claimant groups to provide written information to the Crown to support their views relating to outstanding issues.
 - b. If requested, the Crown to meet with overlapping claimant groups to discuss outstanding issues (either together with the Raukawa Settlement Trust, independently, or both).
 - c. The Crown to discuss information provided by overlapping claimant groups with the Raukawa Settlement Trust and to seek further information from the Raukawa Settlement Trust (if necessary).
 - d. If issues remain unresolved, the Crown to provide preliminary views on whether to include redress, reasons for those views, and include any information the Raukawa Settlement Trust may have provided in response.
 - e. Overlapping claimant groups and the Raukawa Settlement Trust to respond the Crown's preliminary views (if necessary).
 - f. If requested, the Crown to meet with overlapping claimant groups to discuss outstanding issues (either together with the Raukawa Settlement Trust, independently, or both).
 - g. The Crown to inform groups of outcomes.
6. At 30 April 2012 the Crown is in the final stages of the above process and most overlapped interests have been resolved. The Crown is now deciding whether to include certain redress items in the Raukawa settlement where matters have not been

resolved. The same policy approach has been taken for settled groups (Te Arawa iwi) and unsettled groups (Ngāti Hinerangi).

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Appendix 2 – Draft letter to Maungaharurup-Tangitu Incorporation

XX May 2012

Irrelevant

Tēnā koe

I am writing in response to your recent meeting with the Minister for Treaty of Waitangi Negotiations where you sought clarity about application of the Crown's overlapping claims policy to settled groups.

I have set out below:

- how the Crown's overlapping claims policy applies to settled and non-settled groups; and
- the implications of your agreements with neighbouring groups about how overlapped areas will be managed.

Crown's overlapping claims policy

The Crown's overlapping claims policy is outlined on pages 58 – 60 of the Red Book (*Ka tika ā muri, ka tika ā mua – Healing the past, building a future*). The policy applies equally to settled groups and non-settled groups. A key principle is that the Crown must understand the interests each group has in a particular area, whether they are settled or unsettled.

Once the interests of all iwi groups are clear, for non-settled groups the Crown must ensure sufficient redress remains available for the negotiation of their future settlement(s). For settled groups the Crown must ensure the provision of redress for the settling groups does not undermine a completed settlement(s) or damage future relationships between iwi.

The Crown prefers that groups reach agreement on how overlapped interests should be managed themselves if possible. However the Crown will provide assistance to the settling group to support this engagement whenever that it is required.

Maungaharuru-Tangitu AIP

The agreement in principle (AIP) signed by Maungaharuru-Tangitu Incorporated (MTI) states that a deed of settlement will only be signed if the overlapping interests of other claimant groups in relation to the proposed settlement redress have been addressed to the satisfaction of the Crown.

Our expectation is that in managing overlapping interests, any existing agreements and previous records of engagement are taken into consideration. However, there may be groups who have overlapping interests but with whom you do not have pre-existing agreements. The interests of these groups also need to be considered. When the Minister is comfortable the redress being offered to MTI does not unreasonably prejudice the interests of other groups, whether settled or unsettled, we anticipate it will be confirmed.

Overlapping claims with Mana Ahuriri Inc and Ngāti Hineuru Iwi Inc

We acknowledge that MTI shares overlapping interests with the Ahuriri hapū (represented by Mana Ahuriri Incorporated (MAI)) and Ngāti Hineuru (represented by Ngāti Hineuru Iwi

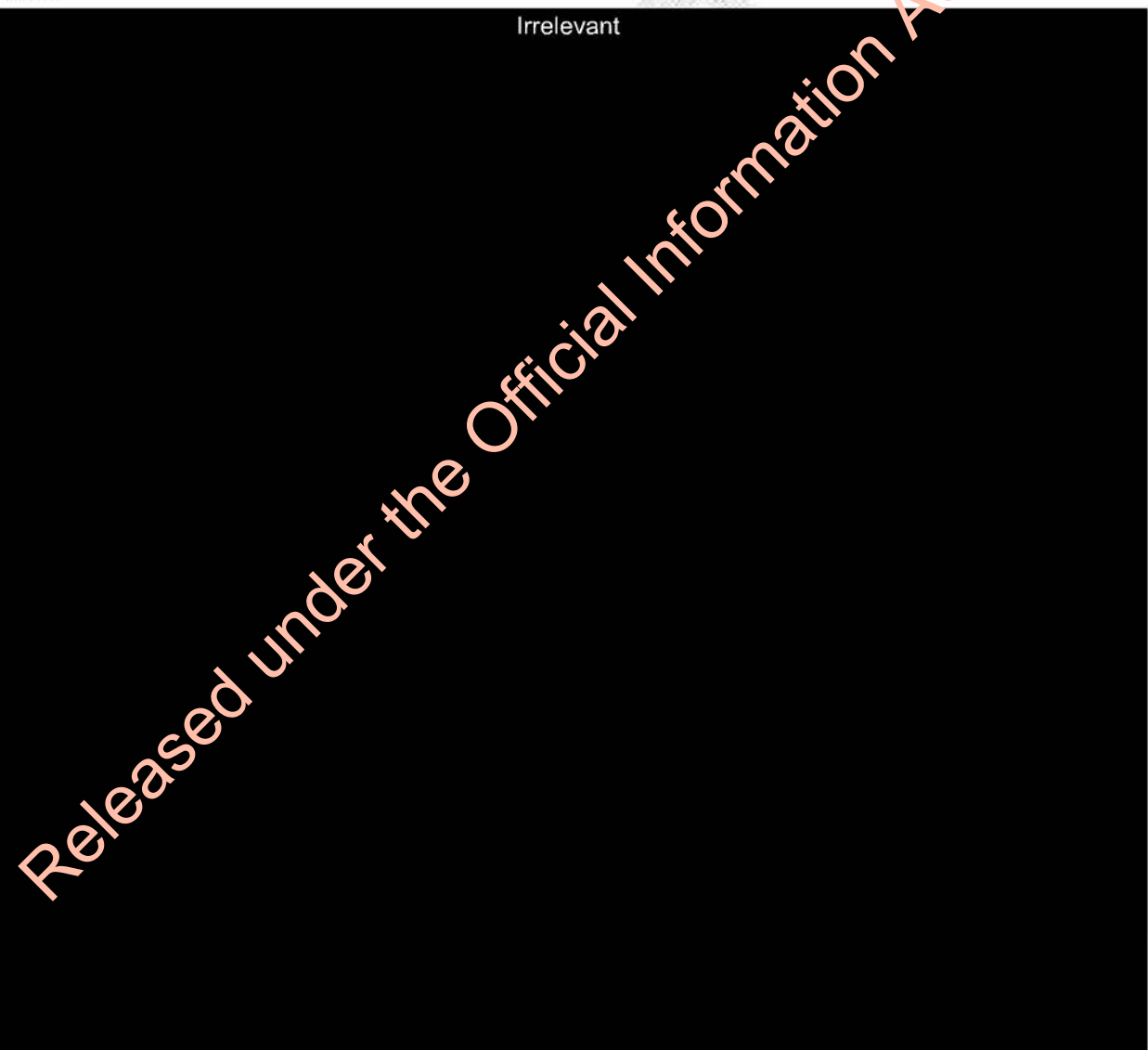
Incorporated (NHII)). You already have a Memorandum of Understanding (MOU) with NHII and MAI regarding these interests.

Overlapping claims with Ngāti Pāhauwera

With respect to Ngāti Pāhauwera and MTI, the Crown's starting point will be the decisions already made during the previous overlapping claims process. We acknowledge both parties have previously engaged with each other and the Crown on overlapping interests and we intend to ensure this information is drawn on for the current process.

We do not expect MTI to re-enter discussions that have been concluded and a Ministerial decision made. However, as part of its ongoing relationship with settled groups the Crown is committed to understanding Ngāti Pāhauwera's interests in any redress proposed for MTI, including non-exclusive redress eg statutory acknowledgements. Our expectation is also that MTI will engage with Ngāti Pāhauwera regarding their interests in any redress proposed for MTI.

Irrelevant



Crown commitment to constructive process

We are mindful of the timeframes in which we are aiming to initial a deed of settlement and proposed a process to support these timeframes being met at our meeting of 13 February 2012. We are committed to assisting MTI to resolve their overlapping claims in a

constructive and robust way. Please contact me on 027 55 99 157 if you have any questions.

Nāku noa, nā

Marian Smith
Settlement and Negotiations Manager

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✓

"LMA-5"



OFFICE OF TREATY SETTLEMENTS

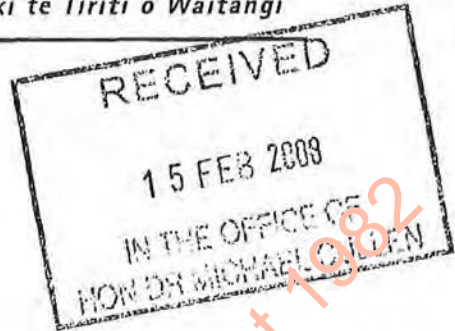
Charles Fergusson Building • Bowen Street • PO Box 919 Wellington
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Waea (04) 494 9800 • Waea Whakaahea (04) 494 9801

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

I need
a meeting
with Pounamu
Mika & Shane to
discuss the

paper.
Recy ok
but how?!



Minister in Charge of Treaty of Waitangi Negotiations
Associate Ministers of Treaty of Waitangi Negotiations

Subject: Improving practice under Crown policy on overlapping claims and mandate

Date:	14 February 2008	Priority:	Medium
Report No:	2007/2008 -	File Ref:	IWP-01-027005 06-02

Action Sought

Minister	Action Sought	Deadline
Treaty Negotiations Minister (Hon Dr Michael Cullen)	agree to discuss your views with officials on the relative priority of practice improvement initiatives and scope for modifying policy settings to improve the way overlapping claims and mandate issues are resolved; agree that the Office of Treaty Settlements (OTS) continue to consult with Treaty Sector agencies on the initiatives, and report back to you on progress by 4 April 2008.	25 February 2008
Associate Treaty Negotiations Minister (Hon Mika Hirini)	Note	none
Associate Treaty Negotiations Minister (Hon Shane Jones)	Note	none

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Paul James	Director	04 494 9826 021 392 921	✓

This is the exhibit marked "LMA-5" referred to in the attached Affidavit of Lilian Marie Anderson sworn/affirmed at Wellington this 15 day of October 2020 before me

[Signature]
Deputy Registrar/Solicitor of the High Court of New Zealand

Hannah Alice Deegan
Solicitor
Wellington

SEEN

OTS-011.0055

Sandra Preston	Manager	04 494 9911	027 268 8624	
Hauraki Greenland	Principal Analyst	04 498 9734		
Collin Minnaar	Analyst	04 494 9811		

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Improving practice under Crown Policy on overlapping claims and mandate

Purpose

1. This paper:
 - informs you of the key issues surrounding overlapping claims and mandate policies and practice;
 - summarises work areas already underway to improve practice;
 - seeks your agreement on which areas to prioritise for improving the way overlapping claims and mandate issues are resolved; and
 - updates you on recent discussions with other agencies on the role they could play to assist with managing mandate and overlapping claims issues.

Executive Summary

2. The first settling iwi groups were large, cohesive, motivated and used to making significant decisions as entities. They had clear goals for their participation in the settlement process. While mandate and overlapping claims arose they were manageable because of the large scale of the groups and because the process was new and other groups had yet to fully utilise the tools available to place settlements under scrutiny.
3. As settlements are reached they are necessarily impacting on cultural and whakapapa affiliations. The settlement process itself is generating new affiliations and reinvigorating latent ones, and new leaders are challenging established conventions. There is also greater contesting of historical accounts and more unresolved views on identity and the nature of customary rights. The Crown is negotiating with groups who are not necessarily cohesive, used to making decisions as entities, or share common clear goals. This context strongly influences the durability and stability of mandates and exacerbates overlapping claims/interests.
4. Within this context, significant issues exist around the areas of overlapping claims and mandate. The key issues are the quality, timing and inclusiveness of engagement; large natural group and mandate processes exacerbating relationship tensions; and insufficient support for discussions between overlapping claimants. These issues are impacting on the durability and pace of Treaty settlements.
5. The Crown responsibility for the resolution of mandating and overlapping claims issues differs significantly. Mandating issues (and developing goals for the settlement process) are primarily the responsibility of the settling group and its members. The Crown can assist with the provision of facilitators and other tools to resolve issues. While it must ultimately make the decision on whether to accept a mandate, it has limited power to resolve mandating issues within groups. There are limits on how much influence and control the Crown can exert without the Crown creating another grievance or exacerbating relationship tensions. The Crown has, and is able to play, a much larger role and responsibility in managing and resolving overlapping claims.

6. A range of initiatives to improve current practice in managing overlapping claim and mandate issues are being implemented. These initiatives will significantly contribute to addressing the key issues. Making fundamental changes to the policy settings may create a risk that claimants perceive their interests are being prejudiced in some way or that does not affect the durability of previous settlements.
7. However, there may be scope in taking a significant step away from existing policy settings by:
 - involving a third party to identify large natural groups and/or define mandate for large natural groups; or
 - the Crown publishing the Māori Fisheries Act iwi list to show the level the Crown would prefer to settle claims (i.e. to determine large natural groups).
8. Further work needs to be undertaken on the feasibility and implications of these options and amending policy settings. Consultation also needs to occur with Te Puni Kōkiri, Crown Law Office, the Crown Forestry Rental Trust and the Waitangi Tribunal. None of these options nor are the practice improvement initiatives are mutually exclusive. We therefore seek your views on the relative priority of the practice and policy initiatives discussed in this paper.
9. An expanded and enhanced communication role for both the Office of Treaty Settlements and Ministers also has the potential address mandate issues at an early stage and help claimant groups develop their goals for the settlement process.

Recommendations

10. It is recommended that you:

- **note** that the Office of Treaty Settlements (OTS) is implementing a number of initiatives to improve practice under Crown policy in resolving overlapping claim and mandate issues; YES / ~~NO~~
- **agree** to discuss your views on the relative priority of the practice improvement initiatives and scope for modifying policy settings (including modifying the roles and responsibilities of agencies and enhancing communication processes) with officials;
- **agree** that OTS continue discussions with Te Puni Kōkiri, Crown Forestry Rental Trust, Crown Law Office and the Waitangi Tribunal on the implementation of options,
- **agree** that OTS report back to you on progress and the further development of priority areas by 4 April 2008
- **forward** a copy of this report to the Associate Ministers of Treaty of Waitangi Negotiations and Minister of Māori Affairs YES / ~~NO~~

pp. 
Paul James
Director, Office of Treaty Settlements

NOTED / <u>APPROVED</u> / NOT APPROVED

Hon Dr Michael Cullen Minister in Charge of Treaty Negotiations
Date: 14 / 2 / 2008

NOTED / APPROVED / NOT APPROVED
Hon Mita Ririnui Associate Minister in Charge of Treaty Negotiations
Date: / / 2008

NOTED / APPROVED / NOT APPROVED
Hon Shane Jones Associate Minister in Charge of Treaty Negotiations
Date: / / 2008

Background

11. On 22 November 2007 we reported to you on the Crown's priorities to December 2007. As a result of that paper, you confirmed that one of those priorities was a scoping paper on a range of potential changes to the Crown's process and policies for resolving or making decisions on mandate and overlapping interests.
12. We also reported to you on 7 December 2007 on the role that other agencies could play to assist with mandate and overlapping claims issues, and you agreed that OTS continue to discuss these ideas with those agencies.
13. This paper:
 - informs you of the key issues and problems surrounding overlapping claims and mandate policies and practice;
 - summarises work areas already underway to improve practice in managing overlapping claims and mandate issues;
 - seeks your agreement on which areas to prioritise for improving the way overlapping claims and mandate issues are resolved; and
 - updates you on recent discussions with other agencies on the role they could play to assist with managing mandate and overlapping claims issues.

Mandate and Overlapping Claims: Policy and Context

Recent Context

14. Comprehensive settlements of historical claims have been occurring for more than a decade. The first settling iwi groups were large, cohesive, motivated and used to making significant decisions as entities. They had clear goals for their participation in the settlement process. While mandate and overlapping claims arose they were manageable because of the large scale of the groups and because the process was new and other groups had yet to fully utilise the tools available to place settlements under scrutiny.
15. Subsequent attempts made to apply the same large-scale approach to other regions such as Taranaki and the Far North (Muriwhenua) floundered because the groups that made up these regions could not agree to act together for this purpose. Instead, the groups that had the cohesion and motivation to mandate negotiators and move through the settlement process were smaller units within the larger region.
16. In Taranaki four of eight iwi moved through the process relatively rapidly. Although each took different approaches and had different goals they had sufficient internal cohesion to manage the stress of taking significant, transparent and accountable decisions that were later ratified by the wider membership. Their progress was often contested by dissident members or neighbouring iwi using the Courts or the Waitangi Tribunal. None of the other four iwi in the region has made significant progress since that time, primarily because of internal rather than external factors. They have not

been able to resolve mandate and other internal issues, such as their goals for settlements issues, in order to make progress on settlement claims.

17. Later attempts to apply a regional approach such as Te Arawa and early attempts at a wider Central North Island approach, encountered similar issues and significant progress was only made with smaller units or groups (Te Pumautanga o Te Arawa, Ngati Manawa). Achieving a mandate requires a claimant group to agree on a range of issues prior to moving into the settlement process itself. Groups reach this agreement at different speeds.
18. The Treaty Settlements environment has become more complex and dynamic since early settlements were attempted and the government's policies were set in place over a decade ago. As settlements are reached, they necessarily impact on cultural and whakapapa affiliations. The settlement process itself is generating new affiliations and reinvigorating latent ones, and new leaders are challenging established conventions. There is also greater contesting of historical accounts and more unresolved views on identity and the nature of customary rights. This context strongly influences the durability and stability of mandates and exacerbates overlapping claims/interests (e.g. the Ngati Whatua and Te Arawa negotiations). This context requires a much more sophisticated practice around managing relationships, and ascertaining who has Treaty interests.
19. The Crown's stated policy preference is to negotiate claims with large natural groupings rather than individual whanau and hapu. The critical purpose of this policy is to keep the number of settlements to a realistic level. This policy preference also helps manage overlapping interests and reduces the costs of negotiations 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 wider range of redress. Having a wider range of redress means that the settlement is more likely to be lasting because it meets a greater range of needs.
20. Overlapping claims and mandate and representation issues are linked to the policy preference of large natural groups. In forming large natural groups, mandate and representation become significant considerations and areas of overlapping claims/interests start to be identified.

Mandate Policy

21. A robust mandate is required before negotiations can commence. Effective mandates are important to both the Crown and claimant groups. They are important to the Crown because they provide certainty that the negotiators have the authority to represent the settling group and they have received that mandate in an open, transparent manner in which all have had the opportunity to participate. Many of the grievances and breaches of the Treaty of Waitangi that the Crown is attempting to settle arose from disputed or inadequate mandates. Mandates are important to the claimant group because they allow all members of the claimant group to take part in deciding who will represent their interests in negotiating with the Crown to settle their historical grievances. Good mandates also provide certainty for both sides that an agreement will be durable.
22. 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 but does need assurance that the mandate is secure before starting negotiations.

23. 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, before 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.
24. The Crown, in consultation with Maori and in response to Waitangi Tribunal findings, has developed processes to ascertain mandate that have generally passed the tests of reasonableness, transparency and judicial review.

Overlapping Claims Policy

25. 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. Overlapping claims occur in all settlements. As the Waitangi Tribunal noted in its report on the Ngati Awa claim, boundaries between Maori groups are not lines on a map. Group interests intersect and overlap as do Crown opportunities to provide redress. Because claimant groups enter into and move through the settlement process at different times and at different speeds processes have been developed to ensure that providing redress for one group will not limit, exclude or disadvantage those which negotiate settlements at a later date.
26. The Crown's policy is that overlapping claims or interests of other claimant groups must be addressed to the satisfaction of the Crown before a settlement involving any of the sites or assets concerned can be concluded. This places the Crown at the centre of resolving disputes.
27. In areas where there are overlapping claims, the Crown's practice is to encourage 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. Even so, the Crown conducts its own research in identifying the interests of all claimant groups in the area being settled. In doing so, it informs overlapping groups that it is settling a specific area and invites those overlapping claimants' to provide information on their specific interests in that area.
28. Current policy preference is that overlapping claims over specific items of redress are resolved by mutual agreement between claimant groups. In the absence of any agreement, the Crown may have to make a decision. These decisions have been guided by two general principles:
- A need to reach a fair and appropriate settlement with the claimant group in negotiations; and
 - A need to maintain 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.
29. Substantive consultation between the Crown and overlapping claimant groups occurs after the Crown and the negotiating group have reached an Agreement in Principle. The Crown invites comment on any concerns overlapping groups may have in relation to specific items of redress, meets with these groups, takes into account their specific interests, may commission further historical research and may amend redress in an

Agreement in Principle (in consultation with the negotiating group) if found to be warranted. However, once a Deed of Settlement has been initialled, alterations to the redress package are unlikely because this could require the group in negotiations to re-ratify the settlement package.

Key Issues and Challenges

30. The greater complexity of the claim environment means managing more strident claimant voices, engaging with a broader range of opinion, and accommodating more interests in the process of determining mandate and representation. A strong mandate can generally be established and maintained in situations where groups have high internal cohesion, motivation, and experience working together as a group (e.g. Ngāi Tahu). But when this is not the case, experience has shown that mandates can quickly become unstable and fracture.
31. The Crown responsibility for the resolution of mandating and overlapping claims issues differs significantly. Mandating issues (and developing goals for the settlement process) are primarily the responsibility of the settling group and its members. The Crown can assist with the provision of facilitators and other tools to resolve issues. While it must ultimately make the decision on whether to accept a mandate, it has limited power to resolve mandating issues within groups. There are limits on how much influence and control the Crown can exert without the Crown creating another grievance or exacerbating relationship tensions. The Crown has, and is able to play, a much larger role and responsibility in managing and resolving overlapping claims.
32. The Waitangi Tribunal's concerns about the Crown's approach to managing mandate and overlapping claims are:
 - a. **The quality, timing and inclusiveness of engagement.** The Crown has not engaged with *all* claimants affected by a mandating and negotiations process early enough to avoid divisive issues or negative perceptions arising. Engagement has been ad hoc, not comprehensive or broad enough, and at times, carried out in a manner inconsistent with tikanga. Inadequate engagement practices have fractured relationships and created perceptions of the Crown favouring some claimants and alienating those who are not in direct negotiations.
 - b. **Large natural group and mandate processes exacerbating relationship tensions.** Decisions around large natural groups and mandate require the buy-in of potential overlapping claimants if overlapping claims are to be prevented. When the Crown recognises mandate and commences negotiations with a particular group, this has not necessarily led to cordial working relationships between potential cross claimants being established. Instead, at times, the process has created relationship tensions and exacerbated issues around overlapping claims and interests. Similarly, the Crown has also been criticised for not proactively dealing with mandate challenges when in negotiations with claimant groups.
 - c. **Insufficient support for discussions between overlapping claimant groups.** The Crown has been criticised for leaving the responsibility for resolving differences between claimants to the claimant party in formal negotiation. The Crown could take greater accountability for ensuring that dialogue between overlapping claimants does not wither, actively assist to develop solutions, and specify this dialogue as a central element of the negotiation processes.

Current work to improve practice

33. Much of the recent Waitangi Tribunal criticism relates to shortcomings around how the current policy settings are implemented, rather than inadequacies of the policy settings themselves. In response, different measures and approaches to improve current practice are being implemented. These initiatives are summarised below and some benefits and limitations are identified. The initiatives are not mutually exclusive and a mix of different initiatives could be the most effective. We intend to do further work to identify how effectively each initiative can improve the way overlapping claims and mandate issues are resolved. However, in the interim, we seek your views on which areas we might prioritise.

Initiatives Underway

34. **Ensuring best practice in resolving overlapping claims.** We will be working with TPK and CLO to develop best practice guidelines, drawing on Waitangi Tribunal findings and OTS' experience, to better apply current Crown policy on addressing overlapping claims. The emphasis will be on earlier and more comprehensive engagement with overlapping groups and other significant stakeholders, better use of facilitation, and empowering claimant interests themselves to champion ways to resolve overlapping claims. A significant current exemplar is the process established in the Ngati Apa negotiations after the Crown met with overlapping claimants. Ngati Apa leaders are now negotiating with overlapping claimants to define and accommodate their respective interests, including implications for redress. The discussions do not involve legal counsel and the absence of the Crown facilitates the process.
35. Better practice may significantly aid the Crown's position in Tribunal inquiries. However, earlier and better engagement with overlapping groups involves both changing our business practice and behaviour, particularly increasing our activity and improving our capability. These are both time and resource intensive changes. We intend to seek assistance from TPK and CFRT to increase our capability in these areas. There may also be limits on the ease to which we can use successful models of engagement across different contexts. We will monitor closely, through for example, seeking specific feedback from all claimants, to ensure we deepen and broaden our capability here.
36. **Developing a regional approach and strategies.** We recently discussed with you our priorities based on adopting a strategic regional approach to negotiation activity. This approach is likely to assist in improving consultation between overlapping groups and managing representation and mandate issues. To support the regional approach, strategy papers to address specific overlapping claims for negotiations are currently being developed (e.g. in the Taranaki Whanui (Wellington) claimant region, the Far North and Chatham Islands). Developing regional strategies will enable OTS to better understand the context of overlapping claims in a particular region and tools for engaging with claimants. They will enable ministers to make decisions around the best approach to be taken, such as the extent to which they may wish to lead engagement opportunities. However, in a contested claims environment the ground can shift very quickly and regional strategies will require regular updating.
37. **Addressing shared interests over the same redress:** Some current innovations to the design of redress, which are being implemented include :
- a. vesting land in multiple parties (CNI and Te Rarawa);

- b. creating multiparty advisory or management committees; and
- c. collective settlements over large assets with multiple interests such as forests (CNI).
38. These mechanisms allow better tailored responses where overlapping interests are difficult to separate or distinguish from each other. They also enable better economies of scale as they avoid fragmenting assets and diminishing their value. They work best where claimants acknowledge the legitimacy and extent of each others' redress interests. However, they can be difficult to design where the nature of interest varies between claimants, and are not effective where there is no mutual recognition between claimants (e.g. Ngati Kuri and Te Aupouri). These mechanisms are in the early stages of implementation. They are complex, highly technical and involve considerable assistance from other agencies (e.g. Department of Conservation) and for these reasons, we are implementing them at a measured pace. As these mechanisms become more embedded into practice, we may be able to establish better precedents.
39. **Using independent facilitation.** Independent facilitation enables greater distance to be put between claimants and the Crown's negotiating agency OTS, thus enhancing the neutrality of facilitators, and hopefully the prospect of consensus. It also means that different capability, such as expertise in tikanga, and the reputations of facilitators, can be made available to resolve issues. However facilitation of any kind may be insufficient to resolve a stalemate, and the pool of resources is limited. The Crown may still be faced with developing redress offers that seek to accommodate overlapping claimants without their consent, or making decisions on who represents claimants, which will be seen as interfering in the realm of iwi.
40. Currently the Crown is funding independent facilitation in the CNI negotiations and in the top of the South Island. These are claimant based and led initiatives. Facilitators such as Wira Gardiner, Ngatata Love, Judge Mick Brown and Hon David Caygill have served or are serving in this capacity. Two main facilitation work streams are underway:
- An element of the Crown's strategy to settle all claims by 2020 [POL Min (07) 10/6 refers], is for the use of experienced and respected kaumatua to facilitate better engagement between claimants and the Crown, and between claimant groups themselves. They would work singly or collectively with claimants to facilitate their preparation for negotiations and across claimant lines to ensure broader buy in to negotiation processes. This is a similar role to that of kaumātua currently employed by OTS (attached draft terms of reference).
 - We are working with Te Puni Kokiri to engage regional staff who have standing in their local communities who could act as facilitators when we engage with claimant groups.
41. **Claimant Led Initiatives.** We are supporting and encouraging the use of claimant led initiatives (e.g Te Tau Ihu and Waikato Tainui) and empowering claimant interests themselves to champion ways to resolve overlapping claims, and manage mandate tensions.

Is there a need to review policy settings?

42. Improvements to current practice will significantly contribute to addressing issues around the quality, timing and inclusiveness of engagement, and decision making processes around mandate and overlapping claims. Making fundamental changes to

may create a risk that claimants perceive their interests are being prejudiced in some way or that does not affect the durability of previous settlements. Overlapping interests will still arise and need resolution to prevent developing into claims; and settling with large natural groups is still a logical (and reasonable, according to the Waitangi Tribunal) approach. It is *how* these issues are resolved which is key.

43. More analysis needs to be done on these initiatives, but there may also be scope in taking a significant step away from existing policy settings by:

- involving a third party to identify large natural groups and/or define mandate for large natural groups; or
- the Crown publishing the Māori Fisheries Act iwi list to show the level the Crown would prefer to settle claims (i.e. to determine large natural groups). Cabinet agreed in May 2007 [POL Min (07) 10/6 refers] to use the list of iwi contained in the Māori Fisheries Act iwi list as a guide to the level the Crown will prefer to settle claims, but this has never been made public.

44. The main options for involving a third party to identify large natural groups and/or define mandate for large natural groups are:

- *Could the Waitangi Tribunal recommend who the Crown should negotiate with?* Our initial analysis suggests some benefits may accrue from the Tribunal playing a greater role here. This would assist the Crown's negotiating agency from becoming closely implicated in claimant disputes. The Tribunal would be able to use its expertise and reputation capital to influence claimant group formation (as it has in the Mohaka ki Ahuriri inquiry in 2004). However, there are jurisdictional issues to consider and the Tribunal may not be willing to adopt this role. It is not clear that such a role will lead to an increased pace of negotiations as the Tribunal will need to revisit previous inquiries for claims where mandate is still contested (e.g. Muriwhenua), and will likely prefer a consultative and submissions based mandate process anyway. Furthermore, the Crown will still exercise a decision on whether or not to accept the Tribunal's recommendation.
- *What role can Section 30 determinations play under the Te Ture Whenua Maori Act 1993?* This question is at the centre of the Crown's approach to the current Ngati Pahauwera remedies application before the Waitangi Tribunal, and the Tribunal's consideration and our exchanges with Ngati Pahauwera legal counsel will inform our analysis of the feasibility of using s30. However, the process requirements for such determinations are also likely to be more cumbersome and drawn out as are current mandating processes given the legal environment in which they would take place. On the other hand Maori Land Court registrars are able to carry out inquiries under s30 without requiring judicial direction. Claimants do not favour the use of section 30 determinations and currently there are only five applications.
- *Could responsibility for facilitating claimant group representation be transferred to Te Puni Kokiri?* This would require some capability development by TPK, although their regional structure facilitates engagement with Maori communities and leaders, and their focus on developing Maori potential creates more opportunities to build broader relationships.
- *Could hapū-level organisations seek legitimate representation status under the Waka Umanga Bill?* The Bill proposes allowing legal entities for small groups (below iwi level) to seek legal recognition (or legitimate representative status) for Treaty settlement purposes. While this could assist in overcoming mandate

challenges, this proposal would risk the fragmentation of groups for negotiations and may compromise the ability to settle claims by 2020.

45. Using the Māori Fisheries Act iwi list to determine large natural groups does bring a number of risks. There have already been significant departures from this list to date (e.g. Ngāti Whātua) and there was intense debate around the formation of this list. However, using an existing determination of groupings would help ensure that the Crown is consistent with its future decisions on groups for negotiations, and limit departures from the policy of negotiating comprehensive settlements with large natural groups. Using the list would give the Crown independence from determining who it should negotiate, may expedite Treaty settlements progress, and could address criticisms regarding certainty and transparency in the mandate process.
46. The two options could be progressed either instead of, or alongside, improvements to practice. We seek your views on the priority we should give to these options, particularly the use of the Māori Fisheries Act iwi list.

Enhancing Communication Processes

47. Effective communication can and does make contributions to settlement progress. Internal communication within groups attempting to gain a mandate for negotiations is critical to ensure the group is clear on the goals it wishes to achieve in the settlement process and what is expected of its negotiators.
48. The Crown assists at this stage by communicating its own expectations and what it can do to assist settlement groups through the process. This communication is primarily carried out at face to face level in small groups. The Crown could increase understanding of the settlement process and increase the pace of settlements by acting in association with negotiators and claimant group representatives to communicate to a claimant group's wider membership. Such communication would provide information about what both sides to the negotiations will be doing and provide regular updates on their progress.
49. The latter can largely be carried out by OTS but there are also roles for the Minister and his Associates in communicating with specific claimant groups, particularly prior to negotiations commencing to ensure they have realistic expectations about Crown policy and what might be achieved. Ministers also may have an expanded role in communicating more widely with Maori generally to ensure Maori communities are fully aware of what can be achieved through settlements and the benefits that have already been achieved by settling groups. This expanded role has the potential address mandate issues at an early stage and help claimant groups develop their goals for the settlement process.

Consultation with other Treaty Sector agencies

50. We have had preliminary discussions with Te Puni Kōkiri, the Crown Forestry Rental Trust, the Waitangi Tribunal and Crown Law Office about the practice and process improvements we are developing and implementing and also initial thinking around enhancing agency roles. The result of these discussions are summarised below:

Te Puni Kōkiri (TPK)

51. On 19 December 2007 we reported to you on discussions with TPK about the role of specialist advisors. TPK is consulting with the Minister of Maori Affairs on the

pool of experienced advisors that could be available to improve engagement and relationship management practice and strengthen mandate facilitation.

52. The roles of the specialist advisors are yet to be clarified, but may include:

- a. providing insight into the complex relationships between groups within a region;
- b. meeting with key leaders to ascertain difficulties that may arise during the mandate phase or when overlapping interests are being worked through, and how to resolve them; and
- c. facilitating discussion between overlapping claimant groups.

The Crown Forestry Rental Trust (CFRT) and Waitangi Tribunal

53. In response to the Te Arawa and Ngāti Whātua Tribunal inquiries, a 'Governance Forum' of agencies with statutory roles in the Treaty sector has met three times at chief executive and senior management level to discuss sector collaboration, strategic planning and other issues. The CFRT is preparing a draft paper for the next cross-agency meeting in March about the role that mediation could play in resolving overlapping claims and whether it would be useful to fund mediators at various stages of negotiations.

54. We have indicated to Chief Judge Joe Williams that we would like to discuss proposals for enhancing roles of various agencies in the Treaty settlement process. Informally the Chief Judge indicated that the change in ministerial leadership has already sent signals to the claimant community that the government is serious about making progress. He has raised the idea of the three organisations meeting with Ministers to discuss the mandate and overlapping claim issues as soon as possible, but we have recommended that we meet first to work through the issues.

Privilege

Next Steps

56. The next steps are:

- continue initiatives to improve best practice (e.g. developing and implementing regional strategies; develop best practice guidelines; implementing the Taumata Kaumātua proposal)
- undertake more detailed analysis on the areas for further work around improving consultation, roles of other agencies in the process, incentives and redress;
- discuss with you the relative priorities of the practice improvement initiatives and scope for modifying policy settings (including modifying the roles and responsibilities of agencies and enhancing communication processes);

- discuss the options for improving collaboration over how mandate and overlapping claims issues are resolved at the OTS/CFRT/Waitangi Tribunal forum in early March;
- develop concrete proposals with CLO and TPK about the possible roles of their agencies in the process; and
- report back to you by 4 April March on the consultation with agencies and how options could be implemented and their implications.



Paul James
Director

Released under the Official Information Act 1982



Recent Work and New Approaches: Improving Overlapping Claims and Mandate Policy and Practice

Presentation to CFRT, Waitangi Tribunal,
OTS Governance Forum
20 March 2008

Deputy Registrar/Solicitor of the High Court of
New Zealand

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or
Doogan
This is the exhibit marked "LMA-6" referred to in
the attached Affidavit of Lilian Marie Anderson
affirmed at Wellington this 13th day of October
2020 before me

Handwritten signature



Purpose

- To update you on the scope and direction of TPK, Crown Law and OTS work on overlapping claims and mandate issues, including recent engagement with the Minister
- To start seeking your feedback on proposed options to improve practice and policy
- To discuss how the Waitangi Tribunal and CFRT could be involved



Problem Definition

- Treaty sector context increasingly complex; all negotiations have multiple layers of overlapping interest; earlier settlements have exacerbated divisions.
- Policy and practice have been process oriented and weighted towards reducing litigation risk.
- Crown's understanding of local circumstances and cultural dynamics not comprehensive.
- Negotiating with groups who are not cohesive, unfamiliar with making decisions as entities and do not share common goals.
- Practice issues around the quality, timing and inclusiveness of engagement as raised in Te Arawa and Tamaki Makaurau Tribunal reports.
- Policy settings increasingly interpreted in different ways - not always negotiating with currently defined large natural groups; negotiating non-comprehensive claims (e.g. Waikato River); negotiating before recognising mandate (e.g. CNI).



Objectives of Policy Work

Mandate and overlapping claims policy that balances achieving settlements with building relationships by:

- building upon a thorough understanding of local circumstances and the cultural dynamics that drive local circumstances
- reducing likelihood of litigation challenges
- focusing on early, broad, inclusive and timely engagement
- increasing flexibility in applying large natural groups, mandating and comprehensiveness policies to resolve issues



Possible Options

- A range of options and approaches required - one solution won't fit all negotiation circumstances.
- A mix of improvements to practice and refinements to policy.

Practice options

- Implement a regional approach to priority claims
- Address shared interest over the same redress (eg CNI forests)
- Use independent facilitation and mediation
- Develop and support claimant led initiatives
- Stronger agency co-ordination
- Develop best practice guidelines

Policy options

- Involve third parties to identify large natural groups or determine mandates eg. TPK, Maori Land Court, Waitangi Tribunal, or under Waka Umanga Bill
- Use and publish the Maori Fisheries Act iwi list as a starting point for large natural groupings
- Recognise flexibility in application of policy specific to circumstances eg. large natural groups, comprehensiveness and mandate

Increased Momentum to Settle Claims by 2020



Improved Resolution of Overlapping Claim and Mandate Issues

- Better understanding of local circumstances and cultural dynamics
 - Reduced litigation challenges
- Increased flexibility in applying policies and practice
- Broad, early, inclusive and timely engagement

Implement Regional Strategies →

Use Independent Facilitation →

Encourage Claimant led initiatives →

Address shared interests on same redress →

Improve and change practice

Change policy settings

← Use Maori Fisheries Act List to determine large natural groups

← Use Third Party to Identify Large Natural Groups:

← Waka Umanga Bill
Section 30 determinations
Role for Waitangi Tribunal
Role for TPK



Assessment of possible options

CHANGING PRACTICE

Option	Benefits	Limitations	Assessment	Next Steps
A. Independent Facilitation (includes combining Taumata Kaumata proposal and with using TPK regional staff as facilitators) <i>environmental team</i>	Will facilitate use of local knowledge, standing and networks to resolve disputes; good example of 'joined up' roles and sector collaboration.	Effectiveness situation specific; quality of facilitator crucial; limited 'pool' of possible facilitators to draw on; resource intensive	Will lead to broader, earlier and more timely and inclusive engagement; enables flexible approach; enables engagement to build on understanding of local circumstances	DEVELOP PROPOSAL Develop concrete facilitation proposal with other agencies and identify resource implications
B. Claimant led facilitation	Empowers claimants to resolve issues themselves; working well in several claims (Ngāti Apa, Te Tau Ihu)	Will not work where claimants do not recognise each other's interests. May not lead to outcomes that Crown can accept. Resource intensive for Crown and Iwi.	May slow down negotiation momentum in short term but speed up regional negotiations in long term. Will lead to broader, earlier more timely and inclusive engagement;; enables engagement to build on understanding of local circumstances	CONTINUE CURRENT APPLICATION Continue to apply model where claimant capability and shared interests high e.g. Te Tau Ihu, Ngāti Apa, Waikato River. Identify resource implications for Crown and Iwi, before applying in other claims.

communicating examples.



<p>C. Regimes to address shared interests over redress (e.g. CNI, Te Tau Ihu)</p> <p><i>Strategic initiative to management of shared interests</i></p>	<p>Allows for better tailored responses where overlapping interests are difficult to distinguish. Avoid fragmenting assets and diminishing their value.</p>	<p>Can be difficult to design where the nature of interest varies between claimants. May not succeed where there is no mutual recognition between claimants. Complex and technical and require considerable assistance from other agencies. Resource intensive for both Crown and iwi.</p>	<p>Enables broader, earlier and more timely and inclusive engagement. Enables flexible application of LNG, mandate and comprehensiveness policies; enables engagement to build on understanding of local circumstances</p>	<p>CONTINUE CURRENT APPLICATION</p> <p>Possibly too resource intensive to do this approach elsewhere this year? Conduct a review/evaluation of what's worked well in order to extend that practice to other negotiations and identify resource and organisational implications.</p>
<p>D. Adopt best practice in all engagement processes, through developing best practice guidelines</p>	<p>Avoids perception that Crown favouring particular claimants - will show an ongoing relationship between the Crown and its (other) Treaty partners. Illustrate direct response to Tribunal recommendations about proactivity, relationship building, and</p>	<p>Might be perceived as bureaucratic 'process' response to issues.</p>	<p>Will complement other options, but not sufficient by itself. Enables OTS practice to be specified and transparent to other parties.</p>	<p>DEVELOP BEST PRACTICE GUIDELINES</p> <p>Develop and publish best practice guide and communicate change in practice</p>



CHANGING POLICY SETTINGS

Options	Benefits	Limitations	Assessment	Next Steps
A. Waitangi Tribunal role in ascertaining mandate	Uses reputation capital of Tribunal; would diminish role of Crown in provoking mandating issues	Tribunal would need to revisit old inquiries; some claimants may feel interests prejudiced. Would diminish Crown opportunities to build relationships with claimants. Jurisdictional issues.	Change in legislation would be required and possibility of claimant litigation	HAS POTENTIAL? Continue discussions with sector agencies to determine feasibility
B. S30 determination by Māori Land Court (MLC)	Would avoid Crown becoming embroiled in mandating processes and challenges	Court likely to require further resources. Not favoured by iwi (i.e. only 5 applications)	Unlikely to streamline mandate process	HAS POTENTIAL? Currently seeking a review of an existing Section 30 order through the Māori land Court.
C. Waka Umanga Bill	Would help overcome mandate challenges	Might risk fragmentation of groups for negotiations and impact on ability to meet 2020.	Potentially useful as a legislative vehicle to change mandate policy; Bill due for second reading mid-year.	HAS POTENTIAL? Continue discussions with sector agencies to determine feasibility



<p>D. Use Māori Fisheries Act iwi list as starting point for LNGs</p>	<p>Could facilitate formation of large natural groups; reduce disputes and length of time to get mandates. Gives Crown independence from determining who it should negotiate with</p>	<p>May provoke claimant litigation; likely to be controversial given government position that the list should only be used for fisheries purposes.</p>	<p>Cabinet agreed to use this list in May 2007, but never made public. Would overcome mandating issues and speed up settlement process.</p>	<p>HIGH RISK AND CONTROVERSIAL – NOT FEASIBLE?</p>
<p>F. Regional approach to settlements</p>	<p>Will improve Crown and claimant engagement between overlapping groups. Will enable OTS to understand the context of overlapping claims and tools for engagement.</p>	<p>Not all claimants will have clear mandate and so may not be able to 'commit' the interests they claim to represent. Not by itself a deal maker.</p>	<p>Will assist in earlier and timely engagement with broad range of groups; increases flexibility in applying LNG/ comprehensiveness/ mandate policies.</p>	<p>CONTINUE CURRENT APPLICATION Continue to integrate regional approach into current strategy and practice, and make public announcements about this new approach.</p>



Timetable

March – develop proposals

April – take proposals to Cabinet

May – make announcements



Minister's Feedback

- At this stage, all options still on the table
- Keen on a mix and match approach - i.e. being able to tailor a suite of different approaches to specific negotiation circumstances
- Keen to proactively invite Maori Land Court and Waitangi Tribunal to assist
- Settling with natural groups is our focus, and negotiations with collectives our preference
- Not that keen on using the Maori Fisheries Act iwi list as starting point for large natural groups



Some questions...

- Are these proposals heading in the right direction?
- Any gaps? Other ideas/proposals?
- What different roles might CFRT and Waitangi Tribunal play to improve practice and policy?
- How can CFRT and Waitangi Tribunal be involved in further developing proposals?

"LMA-7"



OFFICE OF TREATY SETTLEMENTS

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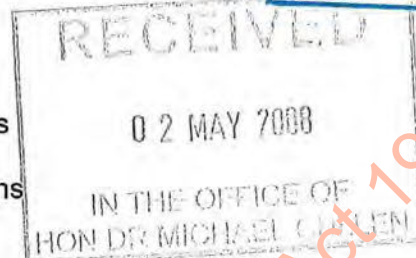
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Te Tari Whakatau Take e pa ana ki te Tiriti o Waitangi

DESPATCHED

5 MAY 2008

Minister's Office



Minister in Charge of Treaty of Waitangi Negotiations
Minister of Māori Affairs
Associate Ministers of Treaty of Waitangi Negotiations

Subject: Improving overlapping claims and mandate processes
– progress report

Date:	2 May 2008	Priority:	Medium
Report No:	2007/08 - 410	File Ref:	TWP 01-06-02

Action Sought

Minister	Action Sought	Deadline
Treaty Negotiations Minister (Hon Dr Michael Cullen)	Note the feedback received from Treaty Sector agencies on proposals to support a regional approach to engagement and negotiations and improve the way overlapping interests and mandate issues are managed. Note that a draft Cabinet paper will be forwarded to your Office by 9 May 2008.	6 May
Associate Treaty Negotiations Minister (Hon Mita Ririnui)	Note	none
Associate Treaty Negotiations Minister (Hon Shane Jones)	Note	none

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1 st Contact
Paul James	Director	04 494 9826 021 392 921	✓
Sandra Preston	Manager	04 494 9911 027 268 8624	
Wayne Bettjeman	Senior Analyst	04 494 9729	

This is the exhibit marked "LMA -7" 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

Hannah Alice Doogan
Solicitor
Wellington

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Improving overlapping claims and mandate processes – progress report and feedback from Treaty Sector agencies

Purpose

1. This paper:
 - a. updates you on our discussions with Treaty sector agencies on the proposals for managing overlapping claims and mandate issues; and
 - b. advises you on the direction of the key proposals being incorporated in the draft Cabinet paper to be submitted to you next week.

Executive Summary

2. On 6 March 2008, we discussed with you the scope and direction of multi-agency work on overlapping claim and mandate issues, and a suite of proposed options and approaches. You agreed that the Office of Treaty Settlements should further develop those options with Te Puni Kokiri and Crown Law Office into proposals for a Cabinet paper, and discuss the options with the Waitangi Tribunal and the Crown Forestry Rental Trust.
3. We have met with Treaty Sector agencies (Te Puni Kokiri, Crown Forestry Rental Trust, Waitangi Tribunal as well as the Crown Law Office) on a number of occasions to further develop the options and approaches. Our most recent meeting with the Waitangi Tribunal and Crown Forestry Rental Trust was on 24 April. The presentation we spoke to at that meeting is attached and is a summary of current thinking and progress. The presentation is also indicative of the content of the draft Cabinet Paper, which is based around the flexible use of the suite of options to support a regional approach to settlement.
4. The Treaty Sector agencies are supportive of the suite of proposed options and approaches. We have had robust discussions regarding the role of different agencies in supporting a regional approach to settlement and implementing the options. These discussions and feedback have helped refine proposals and been incorporated into the draft Cabinet paper.
5. The draft Cabinet paper seeks agreement for incorporating these approaches into policy and interagency working relationships, and making announcements about how they will be implemented. In broad terms the proposals involve:
 - Regional strategies prepared collaboratively with input by all sector agencies.
 - Facilitation services and the negotiation contexts that facilitation might be used.
 - Structures to manage ownership of shared interests.
 - Best practice guidance.
 - Roles that other agencies might have in recognising mandate, particularly the Waitangi Tribunal.
6. We aim to forward the draft Cabinet paper to your office by 9 May.

7. It is recommended that you

- **Note** the feedback we have received from Treaty Sector agencies on proposals to support a regional approach to engagement and negotiations and improve the way overlapping interests and mandate issues are managed.
- **Note** that a draft Cabinet paper will be forwarded to your Office for your consideration by 9 May 2008.

Paul James
Director, Office of Treaty Settlements

We need to scope in on OSS, TRIC, and Cal's P-100

NOTED / APPROVED / NOT APPROVED



Hon Dr Michael Cullen
Minister in Charge of Treaty Negotiations

Date: 3 / 5 / 2008

NOTED / APPROVED / NOT APPROVED
<p>Hon Mita Rinui Associate Minister in Charge of Treaty Negotiations</p>
<p>Date: / / 2008</p>

NOTED / APPROVED / NOT APPROVED
<p>Hon Shane Jones Associate Minister in Charge of Treaty Negotiations</p>
Date: / / 2008

Improving overlapping claims and mandate processes – progress report and feedback from Treaty Sector agencies

Purpose

8. This paper:
 - a. updates you on our discussions with Treaty sector agencies on the proposals for managing overlapping claims and mandate issues; and
 - b. advises you on the direction of the key proposals being incorporated in the draft Cabinet paper to be submitted to you next week.

Background

9. On 6 March 2008, we discussed with you the scope and direction of multi-agency work on overlapping claim and mandate issues, and a suite of proposed options and approaches. You agreed that the Office of Treaty Settlements should further develop those options with Te Puni Kokiri and Crown Law Office into a Cabinet paper, and discuss the options with the Waitangi Tribunal and the Crown Forestry Rental Trust.
10. Since then, we have met a number of times with Te Puni Kokiri, Crown Forestry Rental Trust, Waitangi Tribunal, and Crown Law Office to further develop the options and approaches. Discussions have focussed on the role these agencies could have in supporting claimants and the Crown through the negotiations process, and in implementing the options. Discussions have helped in refining proposals and have been incorporated into the draft Cabinet paper.

Key proposals – Cabinet Paper

11. Our most recent meeting with the Waitangi Tribunal and Crown Forestry Rental Trust was on 24 April. The presentation we spoke to is attached and is a good summary of current progress and thinking on how options and new approaches. The presentation is also indicative of the content of the draft Cabinet paper, which is based around the flexible use of the suite of options and approaches which support a regional approach to settlement. The draft Cabinet paper seeks agreement for incorporating these approaches into policy and interagency working relationships, and making announcements about these approaches and how they will be implemented.
12. The draft Cabinet paper contains the same suite of options and proposals discussed with you on 6 March 2008, and in broad terms involve:
 - **Regional strategies being prepared collaboratively with input by all sector agencies.** Proposes that these strategies set out practical steps for managing risks to settlement negotiations and how they may be mitigated; how engagement with claimants and stakeholders will be carried out; timelines; communications plan and who will be involved over the course of the settlement negotiations. This will also identify the skills and resources required by the negotiating parties.
 - **Facilitation services and the occasions that these services will be used.** Proposes that facilitation be carried out on a number of levels and need will be triggered at any time during the settlement negotiation process. A number of agencies could have a role in providing or delivering facilitation services. The

type of facilitation (or mediation) required, and the role of different agencies, is likely to be determined by the specific context and circumstances of each negotiation.

- **Structures to manage ownership of shared interests.** This includes mechanisms for managing overlapping customary interests and also large land based assets where collective iwi ownership may resolve issues of overlapping interests.
- **Best practice guidance.** While the Treaty sector has a number of comprehensive guides on Treaty settlement process, there may be a need for a negotiations training programme to assist claimants at the negotiation table.
- **Recognising mandate.** Proposes that other Treaty sector agencies could have a role in recognising mandate, including the Waitangi Tribunal which could take on an enhanced role in assisting with mandate conflicts and facilitating the engagement of people in the mandating process.

Feedback on Options and Approaches from Treaty Sector Agencies

13. We have continued to work closely with Te Puni Kokiri and Crown Law Office in further developing options and the Cabinet Paper. Both agencies are supportive of progress and the direction of the work.
14. The presentation (attached) to the Treaty Sector Forum (Chief Judge Joe Williams Judge Carrie Wainwright, Dame Margaret Bazley and Richard Moorsom from the Waitangi Tribunal; Gregory Fortuin, and Jason Ake from Crown Forestry Rental Trust) focussed on how the regional approach to negotiate to settle claims might work. Discussions centred on regional strategies and the role of agencies in supporting and facilitating claimants in their engagement with others with overlapping interests in a claim and negotiations with the Crown. Discussions then considered the role of the Waitangi Tribunal and the Maori Land Court in ascertaining mandate where that was in dispute or not easily attained.
15. The Waitangi Tribunal and Crown Forestry Rental Trust are supportive of the suite of options and approaches being progressed. Their feedback from last week's Treaty Sector Forum meeting is summarised below, and has been used to strengthen parts of the Cabinet paper.

Overview of options

16. Different skill sets required for facilitation and mediation services, and the distinction between facilitation and mediation in the negotiation process needs to be made. There is a shortage of mediators that could work effectively in this environment and it would take some time to increase the numbers.
17. Consideration should be given on supporting a negotiations workshop to assist and 'upskill' claimants in their negotiations with the Crown. The Canadians have developed a negotiations training programme for their First Nations People which has proved very effective in lifting negotiators skills and reaching settlements earlier.

Regional Strategies

18. The Forum noted that Waitangi Tribunal and Crown Forestry Rental Trust prepare regional strategies for their own purposes. They strongly suggested that regional strategies be sector-wide and prepared collaboratively with input by all sector agencies.
19. They suggested that Office of Treaty Settlements (OTS) lead the development of strategies as it will be OTS who ultimately negotiated with claimants, and this relationship ought to be fostered very early in the engagement process.

Regional facilitation

20. The Forum was adamant that there cannot be one model or approach to independent or local facilitation in a region. Each region is unique - skill sets and dynamics are different.
21. They suggest there be a menu of options which can be applied flexibly and quickly in response to the changing circumstances during all phases of the settlement process (not just during the early engagement phase).
22. Not many people can fill the role of regional facilitators, as it requires special attributes and skills to work with, and gain the confidence of, iwi leaders.
23. Waitangi Tribunal noted it has a good reputation in regions in which it has worked. It has goodwill of claimants and provides an independent forum and entry point for claimants to engage in the settlement process. Waitangi Tribunal is in the unique position of "allowing claimants to have the ear of someone who is outside the set piece settlement process".
24. Waitangi Tribunal will consider how it could take a more prominent role in independent facilitation either by way of a roving mediator or the use of judges (retired or otherwise).

Role of courts in ascertaining mandate

25. The current function of Waitangi Tribunal is to conduct urgent inquiry on mandate process. A new role could be to facilitate claimants in reaching a decision on who is mandated to represent their interests in settling a claim.
26. Where it will undertake this role will depend on scale of the issue. Waitangi Tribunal could assist in situations where the issue of mandate has not escalated by providing a process and environment that provides access for those who feel excluded from the conventional process for achieving mandate.
27. Waitangi Tribunal see this to be a non adversarial process where lawyers should not not be involved. Waitangi Tribunal could then consider and decide whether the mandate objections are valid or not.
28. The Chief Judge considered that if all the interested parties are been given the opportunity to be engaged with and heard in terms of mandate issues then the Māori Land Court will not likely be needed to adjudicate over mandate, but if it is, very infrequently.

Next Steps

29. The draft Cabinet paper is well developed. We are currently incorporating comments from Te Puni Kokiri and Crown Law Office and are following up with the Waitangi Tribunal suggestions for ways it can assist in facilitating engagement by claimants in settlement negotiations. We intend to forward the draft Cabinet paper to your office for your consideration by 9 May. Following that, the paper will be distributed to all departments with an interest in this issue. A final paper will be submitted to your Office for Cabinet's consideration in early June.

Released under the Official Information Act 1982



Progress Report: Improving Overlapping Claims and Mandate Policy and Practice

Presentation to CFRT, Waitangi Tribunal,
OTS Governance Forum

Thursday, 24 April 2008

Office of Treaty Settlements



Purpose

- To update you on progress since last meeting, including more thinking on how some of the options could work
- To seek further feedback from you on the options and role of agencies

 **Possible Options**

Practice options

- Implement a regional approach to priority claims
- Address shared interest over the same redress (eg CNI forests)
- Use independent facilitation and mediation
- Develop and support claimant led initiatives
- Develop best practice guidelines

Policy options

- Involve third parties to identify large natural groups or recognised mandates eg. Maori Land Court, Waitangi Tribunal, or under Waka Umanga Bill
- Use the Maori Fisheries Act iwi list as a starting point for large natural groupings
- Recognise flexibility in application of policy specific to circumstances eg. LNGs, comprehensiveness and mandate

3 Office of Treaty Settlements

In-Confidence

 **How might the Regional Approach work?**

- Crown seeking to negotiate settlement with multiple claimants in a common geographic region
- Allows for engagement with claimant interests in a region during mandating stage or pre-mandate
- How will we select and define regions?
- What are the characteristics of desirable regional negotiations?
- Key tools to support Regional Approach are regional strategies and engagement plans. Other tools?

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Regional Strategies

- OTS and TPK (and other agencies) jointly develop and implement regional strategies to guide the Crown's approach and engagement with claimants
- Regional strategies could identify:
 - All claimant interests in the claim region and their leadership
 - The claims under negotiation
 - Whether sub-sets of claims can be negotiated separately
 - Extent of overlapping or shared claimant interests
 - Traditional claimant allegiances and inter-relationships
 - Prospects for forming large natural groups, including the need for facilitation exercises
 - Appropriate governance mechanisms
 - Potential redress strategies (e.g. resources/assets subject to joint or multiple claim)
 - Key stakeholders in the settlements process
 - Other government agencies who will be involved



Regional Strategies

- Can be developed early in the process for new claims – pre-mandate?
- Can be developed at any stage to assist in negotiations that have stalled?
- Will include developing an engagement plan for the Crown to engage with claimant interests and other stakeholders
- The engagement plan will set out practical steps to carrying out engagement, involvement of Ministers, timeliness and communication process
- Could TPK play lead role in developing engagement plans?
- **What role could CFRT and the Waitangi Tribunal play in development of regional strategies and engagement plans?**



Implications of Regional Approach for Policy

- A regional approach is an alternative way to recognising mandate and applying the LNG policy – i.e. a different way of achieving the same policy outcomes
- The LNG policy to be used to mandate, negotiate and settle with a single group
- OR**
- Use regionally based approach to recognise the mandate of a number of smaller natural groups in a region and negotiate with those groups collectively but settling with each group individually
- Does not require groups to overcome hurdles to form LNGs and lessens the risks of exacerbating, or creating, relationship tensions
- Enables overlapping interests to start being managed at the mandating stage, or before



TPK Local Facilitation

- Minister of Maori Affairs implementing proposal to establish a team of specialist staff and contractors to:
 - provide a point of contact between claimants and Crown agencies and a sounding board for both;
 - assist in the explanation of the Crown's Treaty settlement processes to claimants, particularly in the pre-mandate phase; and in the explanation of claimant tikanga requirements to the Crown;
 - provide cultural support to Crown engagement with claimants during mandate and negotiation processes;
 - provide early warning of mandate issues that may lead to overlapping claims, and where appropriate help to resolve them.
- Early days of development and implementation - TPK and OTS figuring out how it will work. **What role could CFRT and the Waitangi Tribunal play?**



Independent Regional Facilitation

- Experience suggests that independent facilitation is effective where claimant groups have asked for this service or where the issues are complex or intra-claimant conflicts are escalating
- What criteria or judgement calls should we apply for using independent facilitation?
- **In what way could CFRT or Waitangi Tribunal support this?**
- Possible role of independent facilitators:
 - Point of contact between claimants and between claimants and the Crown
 - Present the Crown's perspective with integrity and conviction
 - Rebuild and foster unity amongst claimant groups and encourage appropriate governance arrangements
 - Assist claimants to resolve overlapping claims through developing their own models of resolution
 - Facilitate the development and management of appropriate mandating processes



Mandate – role for Waitangi Tribunal?

- Possible approach is the use of "investigating officers" commissioned by the Tribunal to make their own inquiries into the mandate situation among claimant communities and report 'on the record' to the Tribunal on the same.
- Opportunity for engagement by all parties during the hearings phase of the inquiry to resolve mandate between competing representatives
- Already used in the Central North Island
- A departure from the traditional justice model?
- **How and when in hearings process would Waitangi Tribunal assist in ascertaining mandate?**



Mandate – role for the Maori Land Court?

- MLC has statutory jurisdiction in respect of mandates under s.30 of Te Ture Whenua Maori Act 1993
- Should MLC have the power to bind parties, including Crown, in s.30 decisions?
- Small communities whose mandate is not recognised can test the exclusion decision in the MLC
- Two key risks:
 - the decision making role shifts from the claimant group to the MLC;
 - would mean MLC determines for the Crown whom it should be negotiating with, and the number of settlements that will be negotiated
- **Way forward – continue with the status quo or give MLC this role?**



Next Steps

- We are still working on these options with TPK and Crown Law
- Got any more ideas or feedback? We'll need it from you by the middle of next week.
- We expect to report to the Minister with a draft Cabinet paper next week.
- End of May – paper considered by Cabinet

"LMA-8"



OFFICE OF TREATY SETTLEMENTS

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

RECEIVED

11 JUL 2008

IN THE OFFICE OF

HONORABLE MICHAEL CULLEN

15 JUL 2008

Minister's Office

Minister in Charge of Treaty of Waitangi Negotiations
Minister of Māori Affairs
Associate Ministers of Treaty of Waitangi Negotiations

Subject: Implications of current negotiation practices: Claimant collectives, mandate and non comprehensive settlements

Date:	11 July 2008	Priority:	High
Report No:	2007/2008 550	File Ref:	TWP 01 06 02

Action Sought

Minister	Action Sought	Deadline
Treaty Negotiations Minister (Hon Dr Michael Cullen)	<p>Agree that current negotiation practice reflects greater flexibility in the implementation of Government policy, and that Treaty sector agencies should continue to refine this approach.</p> <p>Agree to the development of a communications strategy for the sector on the Government's decision to increase flexibility in the implementation of key policy settings.</p> <p>Agree that a copy of this paper should be provided to the Crown Forestry Rental Trust.</p> <p>Consider discussing the approach outlined in this paper more widely with your colleagues.</p>	18 July 2008
Minister of Māori Affairs (Hon Parekura Horomia)	Note	None
Associate Treaty Negotiations Minister (Hon Mita Ririnui)	Note	None
Associate Treaty Negotiations Minister (Hon Shane Jones)	Note	None

This is the exhibit marked "LMA -8" 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

1

Deputy Registrar/Solicitor of the High Court of New Zealand

OTS 2011.0120

Contact for Telephone Discussion (if required)

Name	Position	Telephone		1st Contact
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Heather Staley	Contractor	04 494 9758		

Released under the Official Information Act 1982

Implications of current negotiation practice: claimant collectives, mandate and non comprehensive settlements

Purpose

1. This paper outlines the implications of practice changes in the areas of large natural groups, overlapping claims, recognising mandate and comprehensive settlements, as well as the new regional approach. ~~The paper responds to your request for advice on the broader implications of current negotiation practice, including whether current practice is fully consistent with Treaty settlement policy settings.~~

Executive Summary

2. Negotiation practice has evolved over the last year, under your leadership and in response to feedback from the Treaty sector that agencies could be more flexible in their implementation of Government policy. This increased flexibility relates specifically to: large natural groups, overlapping claims, recognising mandate and comprehensive settlements. Experimentation with a regional approach to negotiation has been an important change in practice.
3. Officials believe that the recent changes to negotiation practice constitute a more flexible interpretation of Government policy, compared to past practice. Officials do not believe that Ministers need to seek changes to the principles and policies that set the framework for Treaty settlements, in order to accommodate these changes to negotiation practice. Current negotiation practices are consistent with these principles and policies.
4. Taking a regional approach to negotiations and a more flexible interpretation of policy settings presents a range of opportunities and also carries some risks. Officials recommend continuing to implement and refine the recent practice changes, including where appropriate through the collaborative development of regional strategies. Officials identify many likely benefits to the settlement process from the preparation of regional strategies in the future. Some further evolution of Treaty sector agencies' roles would be required to support regional strategies, with resource implications for agencies.
5. A communications strategy will help to ensure that the Treaty sector and wider stakeholders understand the changes to previous practice and are able to capitalise on the opportunities they provide. Communications activities will also allow the Government to emphasise that it has responded to feedback from the Treaty sector. Well-informed claimants who can see that their feedback to the Crown is being heard and acted on will make the working environment easier for the Crown, with positive impacts on traction towards 2020.

Recommendations

6. It is recommended that you:

1. **note** that negotiation practice has evolved over the last year under your leadership and in response to feedback from the Treaty sector, specifically in relation to: large natural groups, overlapping claims, recognising mandate and comprehensive settlements
2. **note** that officials believe that the recent changes to negotiation practice constitute a more flexible interpretation of Government policy, compared to past practice
3. **agree** that no changes to Treaty settlement principles and policies are required to accommodate these changes to negotiation practice YES / ~~NO~~
4. **note** that the new approach to negotiations presents a range of opportunities and also carries some risks, and that on balance officials recommend continuing to implement and refine the recent practice changes, including where appropriate through the collaborative development of regional strategies
5. **note** that some further evolution of Treaty sector agencies' roles would be required to support regional strategies, including enhancing Te Puni Kōkiri's role, and that this would have resource implications for agencies
6. **direct** the Office of Treaty Settlements to prepare a communications strategy to help the Treaty sector and wider stakeholders to understand and capitalise on the recent practice changes, by 15 August YES / ~~NO~~
7. **agree** that a copy of this paper should be provided to the Crown Forestry Rental Trust, and YES / ~~NO~~
8. **consider** whether you wish to discuss the approach outlined in this paper more widely with your colleagues. YES / ~~NO~~ *HC*

Paul James
Paul James
Director, Office of Treaty Settlements

NOTED / <u>APPROVED</u> / NOT APPROVED
<i>[Signature]</i>
Hon Dr Michael Cullen Minister in Charge of Treaty Negotiations
Date: 14 / 7 / 2008

Introduction

7. On 6 March 2008, you discussed with officials the scope and options for managing overlapping claims and mandate issues. The Office of Treaty Settlements worked with Te Puni Kōkiri and Crown Law, and consulted with the Waitangi Tribunal and Crown Forestry Rental Trust on a draft Cabinet paper, which was submitted mid May. We subsequently agreed with your office that the advice would be better presented as a briefing paper on the broader implications of current practices in settlement negotiations, including the regional approach.
8. This paper is structured in four sections, with a number of appendices. Section 1 provides you with background information on the policy settings; on the historical interpretation of policy in practice and problem indicators; and on current adapted practice. Section 2 contains comment on the broader implications of these recent changes to negotiation practice. This section explores opportunities and risks, and offers officials' advice. Sections 3 and 4 cover consultation on the paper and suggested next steps.
9. A set of appendices provides more detailed information and analysis on aspects of the paper. Appendix A contains case studies of the regional approach in practice. Appendices B – F respectively cover the implications of the regional approach for the large natural group policy, and the implications of recent practice changes for recognising mandate, resolving overlapping claims, and non comprehensive settlements. Appendix F examines the implications of the regional approach for agencies. Appendix G outlines some preliminary ideas about communicating the recent practice changes.

Section 1: Background

1.1 The policy settings

10. Treaty settlement principles and policies have been established by Cabinet and refined over time on the basis of experience gained through negotiations. Hon Margaret Wilson reviewed the policy settings early in her tenure as Minister in Charge of Treaty of Waitangi Negotiations: the current settings were agreed by Cabinet in 2000 [CAB (00) M 11/4]. The six principles approved by Cabinet to guide negotiations were:
 - a. good faith;
 - b. restoration of the relationship;
 - c. just redress;
 - d. fairness between claims;
 - e. transparency; and
 - f. government negotiated.
11. The Government's settlement policies and principles were subsequently published in *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (the "Red Book"), which has since guided claimants and officials in negotiations. The six principles that guide negotiations are elaborated on page 30 of the Red Book.

1.2 Historical interpretation of policy in practice and problem indicators

12. The Treaty sector is innately complex. Mandate to negotiate can be challenging to establish. Negotiations of historical claims by claimant groups are complicated by multiple layers of overlapping, shared and competing interests. The Crown has not always given due weight to local circumstances and the cultural dynamics and history of inter-relationships between groups. Even when the Crown has accepted in theory that it needs to engage with groups earlier and more meaningfully, it has not always done so in practice.
13. In its interpretation of Treaty settlement policies, the Crown's practice has been process-oriented and weighted towards reducing the risk of litigation. The Office of Treaty Settlements has adhered fairly strictly to the Red Book's requirements with regard to key process steps, particularly in the areas of mandate and handling overlapping claims. There has also been a strong emphasis placed by the Crown on precedents. Some stakeholders have viewed this historical practice positively, but others have not.
14. The Waitangi Tribunal was critical of the Crown's conduct in its reports on the Affiliate Te Arawa settlement and Ngāti Whātua o Orakei agreement in principle. The Tribunal's criticism focused on three effects of the Crown's approach to negotiations:
 - a. the quality, timing and inclusiveness of engagement with all claimants affected by a proposed settlement was not wide or early enough, or sufficiently consistent with tikanga to ensure that divisions or negative perceptions did not arise. Instead, groups that were not in negotiations felt alienated or disadvantaged. In particular, the Tribunal identified that Crown offers were disadvantaging non-participating groups, by prematurely closing-off redress options;
 - b. Government choices as to which groups it will negotiate with have on occasion exacerbated relationship tensions. This in turn has had a negative impact on the implementation of the large natural group policy: the Crown has at times negotiated – in the Tribunal's view – with large groups that have been diminished from their natural size by the withdrawal of particular hapū from negotiations; and
 - c. insufficient support for discussions between overlapping claimant groups. The Crown largely left responsibility for managing overlapping interests to the claimant group in negotiations, and did not ensure that these discussions were able to progress over time.

1.3 Current adapted practice

The regional approach

15. In response to this feedback and to your request for greater flexibility, Treaty sector agencies are now taking a different approach to negotiations. Agencies have been experimenting with a regional approach that allows for greater responsiveness, and helps to accommodate or respond to inter-relationships of claimants and their neighbouring groups.
16. A regional approach involves the Crown seeking to negotiate settlement of historical Treaty claims of multiple claimant groups in a common geographic area. This approach entails the Crown engaging with all claimant interests in a region early, before a formal mandate or negotiations process starts. Where claimant interests overlap, the Crown seeks to engage with those groups to facilitate resolution. Where a number of claimant groups in the same region wish to enter negotiations but do not

consider themselves to be a large natural group, the Crown seeks to facilitate a collective process.

17. These recent operational changes appear to be assisting in engaging overlapping interests earlier and more meaningfully than previously. Three case studies provided in Appendix A (of Gisborne (Tūranga), Te Tau Ihu and the Central North Island Iwi Collective) illustrate different pathways taken under this regional approach and some of the effects that the approach has had.
18. Initial experiments with the regional approach indicate that there will be value in developing and implementing formal regional strategies in the future, to guide regional negotiations.
19. The regional approach to negotiations adopted over the past year has particular application to overlapping claims and mandate processes. This approach has included forming regional collectives for negotiations and dispute resolution, particularly those that involve overlapping claims and recognition of mandate.
20. **Appendices B – E provide detailed analysis and discussion of the impacts of the recent changes in the areas of large natural groups, overlapping claims, recognising mandate and comprehensive settlements. The key points are summarised below.**

Large Natural Groups

21. The regional approach does not replace the large natural group policy. Indeed, the regional approach enhances the large natural group policy: by getting a broader and deeper understanding of regional dynamics before entering into negotiations, the Crown will be better able to support the identification and maintenance of large natural groups.
22. However, establishing a regional approach to claimant group recognition, engagement and settlement creates an opportunity to achieve many of the benefits intended by the large natural group policy in alternative ways if necessary. The regional approach will work in circumstances where diversity in claimant interest would otherwise hamper the formation of a large natural group.
23. The regional approach provides a setting for the Crown to recognise appropriate claimant groups and for groups and the Crown to embark on negotiations. The large natural group concept is complemented under the regional approach by a range of other types of group or groups with which the Crown might negotiate:
 - a. one large natural group, in one large geographic region and with one settlement (for example, Waikato Tainui Raupatu and Ngāi Tahu);
 - b. one negotiation with several small groupings of claimants, potentially with multiple settlements (for example, Gisborne);
 - c. several large natural groups, each with their own separate negotiations and settlements arrived at about the same time (for example, northern South Island);
 - d. many mandated groups; many settlements, all at different times (for example, Taranaki tribes); or
 - e. redress-driven negotiations where different groups have similar interests in the same natural resource assets within the same geographic regions (for example, Central North Island Forestry settlement).

Recognising mandate

24. The Crown still requires that those with whom it will negotiate must be able to demonstrate that they have the authority/support to negotiate on behalf of the claimant community (towards a settlement or – in the Central North Island case – towards a particular deal). However, recent operational practice has assumed that not all claimant groups need to go through the process specified in the Red Book to demonstrate that they have the mandate of their people. Instead, the Crown may consider initiating negotiations with groups where:
- a. the group is represented through a Mandated Iwi Authority under Schedule 3 of the Māori Fisheries Act 2004;
 - b. the claimant leadership demonstrates sufficient mana about iwi members;
 - c. a group has been determined under section 30 of the Te Ture Whenua Māori Act 1993 as being representative of the group; and
 - d. a combination of any or all of the above, combined with elements of the mandate process described in the Red Book to address any areas of doubt, particularly if there is known division or conflict within the group.
25. The Waitangi Tribunal may be able to help by facilitating the formation of groups for mandating purposes. The Waitangi Tribunal has considered whether the role of "investigating officers" could be expanded to inquire into mandates among claimant communities and report on them. This intervention departs from the traditional judicial model but could be very useful in encouraging parties to engage in the process both "on and off the record". This engagement could be done during the hearings phase of a district inquiry. The Waitangi Tribunal is keen to explore this option further and will continue to work with officials to identify areas where it could apply.

Overlapping interests / claims

26. Adopting a regional approach in negotiations has had a number of benefits in ensuring overlapping interests are actively considered earlier in negotiations. The main method for achieving this is by involving all relevant neighbouring groups in negotiations / discussions. The involvement of all relevant groups in negotiations has then allowed the Crown to provide incentives to groups to make concessions. Depending on the preparedness of groups within a region to begin negotiations, the preferred approach recently has been to simultaneously negotiate:
- a. with as many groups in the region as possible;
 - b. within as few negotiations as possible; and
 - c. with each of the key negotiations milestones reached at the same time.
27. The Crown has also used facilitators for both managing negotiations and forming the collectives in negotiations. These facilitators have been experienced, senior leaders with an understanding of the Treaty settlement framework, claimant group dynamics, tikanga Māori (particularly dispute resolution) and managing complex negotiations. Increased use of facilitators, particularly Crown funded facilitators, may result in a different mix of skills and experience in the wider Crown team used to negotiate settlements. The resource implications of this will be considered as part of the review of the Office of Treaty Settlements.

Non comprehensive settlements

28. The shift in approach to larger, regionally determined settlements may make it more likely that the Crown will want to use non comprehensive or on account settlements in the future.
29. Non comprehensive or on account settlements are given implicit Cabinet approval at the time the settlement is approved to deviate from the Crown's stated preference for comprehensive settlements.
30. In summary, the recent changes in practice have resulted in a number of innovations in the way that we engage and negotiate with claimants. The following table maps the recent practice changes against the Government's policy settings (as articulated in the Red Book). The implications of this analysis are discussed in Section 2 below.

Table One: Comparison of policy settings and recent practices

Current settlement policies	Recent practice
Treaty settlement policy applies to historical claims (prior to 1992).	No change
The Crown is ready to negotiate most historical claims. Exhaustive research is not required before commencing negotiations.	No change
Redress must be fair, affordable and benchmarked against previous settlements.	No change (although you have asked for further advice on financial flexibility)
Settlements are final and legislation removes the power of Waitangi Tribunal or courts from reopening the historical claims.	No change
Claimants retain the right to pursue claims against the Crown for Treaty breaches after 1992.	No change
A suitable post settlement governance entity must be established and ratified before assets will be transferred.	No change
The Crown generally prefers to negotiate claims with large natural groups rather than whanau and hapū.	The Crown wants to negotiate with large groups, but where that is not possible, it will negotiate with collectives of groups that have established sufficient common interest to work together.
A secure mandate on the part of the claimant negotiators is a prerequisite to negotiations commencing. The resulting deed of settlement must be ratified before it is binding.	Representatives of the claimant group must demonstrate they have the mandate to negotiate and settle claims on behalf of their members. This can be done in a number of ways. The deed of settlement must be ratified by the members of the claimant group before it is signed.
Overlapping interests must be addressed to the satisfaction of the Crown before a settlement is concluded.	The Crown will assist in resolving overlapping interests in a region through actions such as the use of facilitation / mediation / regional co-ordination of claimants and conducting negotiations between neighbouring groups at the same time.
The Crown seeks a comprehensive settlement of all claims of claimant group. This will enable the Crown and claimant group to begin a new relationship.	The Crown seeks a comprehensive settlement of all claims of a claimant group, but will negotiate non comprehensive and on account settlements in some circumstances.

Section 2: Comment on implications

2.1 Opportunities and risks

31. Officials have been learning by doing during this period of fairly intense activity. This section outlines some of the opportunities and risks for both the Crown and claimants that we see or could expect to arise from the recent practice changes. Relevant parts of this assessment will be fed into the internal review of the Office of Treaty Settlements, and into planning for settling all historical Treaty claims by 2020.

Opportunities

32. Experience to date indicates that the improved flexibility of the recent practice changes affords a range of policy, operational and communications opportunities.
33. In policy terms, the Government's aspiration is settlement of all historical claims by 2020. Improved flexibility may mean that the Crown and claimants are able to achieve quicker results and more durable agreements. Claimant groups are likely to see incentives to enter negotiations and settle quickly, where they perceive the possibility of having their claims fast-tracked and settled generously.
34. The new flexibility of the recent practice changes should also improve the inclusiveness of the settlement process on the journey to 2020. As collectives are more likely to be able to negotiate good overall settlements than small groups acting alone, those parts of the package that relate to smaller participants will potentially be better and more durable than small groups could otherwise secure. Regional negotiations may also encourage smaller groups to participate.
35. The main operational opportunity afforded to the Crown by the regional approach is that it allows the Crown to deal with overlapping claims and mandate issues better. Some overlapping claims can be resolved through internalisation to large natural groups, but not all. The new approach allows for experimentation with alternative routes to resolution, without abandoning the previous approach which has worked well for some groups.
36. A further operational advantage to the regional approach is that taking a strategic approach by region will allow better front-end planning to take place across Treaty sector agencies. This should result in more efficient and effective processes and in fewer surprises for Ministers, agencies and stakeholders. The regional approach also offers opportunities to connect with other Māori development work currently underway. Discussions between Treaty sector agencies have identified enhanced roles that could be played in the formation of future regional strategies, particularly for Te Puni Kōkiri and the Waitangi Tribunal. Further detail on what these enhanced roles are likely to involve is provided in Appendix F.
37. Well-informed claimants who can see that their feedback to the Crown is being heard and acted on make the working environment easier for the Crown, with positive impacts on traction towards 2020. In terms of communications, agreeing to the continued implementation and refinement of the recent practice changes will allow the Government to answer explicitly some of the criticisms of its approach in recent years, by emphasising that it has responded to sector feedback. In particular, the Government will be well placed to respond to the Waitangi Tribunal's criticism that the Crown has been focused on achieving settlement milestones, to the detriment of engagement with groups not in negotiation. There is an opportunity to make clear the Crown's expectations and intentions with regard to future process. Better front-end planning across Treaty sector agencies will also allow for clearer and more consistent messaging to Treaty stakeholders.
38. Looking at opportunities afforded specifically by the areas of large natural groups, overlapping claims, recognising mandate and comprehensive settlements, we identify:
 - a. *Large natural groups*: operationally, the recent practice changes may mean fewer and more efficient negotiations and that the Crown should be better able to accommodate claimant community characteristics;
 - b. *Overlapping interests / claims*: operationally, the recent practice changes should create an incentive for overlapping interests and claims to be agreed, if all groups are advancing broadly in step with each other. If implemented well, the recent

changes to the way we are seeking to resolve overlapping interests / claims should substantially reduce the risk of litigation. More use of facilitation tools in early stages should also help to achieve a level of consensus, so that non-participating groups do not feel the need to go to the Waitangi Tribunal or Courts. From a communications perspective, the practice changes afford the Crown an opportunity to stress both that its broad role is not that of referee, and that it has responded to the Tribunal's concern for earlier Crown engagement with groups that have overlapping interests / claims;

- c. *Recognising mandate*: operationally, the recent practice changes should speed up negotiation by allowing more steps to be taken in parallel, increasing the chances of settlement success through momentum. From a communications perspective, the practice changes allow the Crown an opportunity to show its respect and recognition of other mandate and leadership models; and
- d. *Comprehensive settlements*: redress-driven negotiations (where there are similar interests in resources) will enable wealth generation comparatively quickly. The Central North Island forest land is an example of this. With economic pressure relieved, negotiations on other components to achieve comprehensive settlements may be easier to achieve. The recent practice changes also provide an opportunity to resolve quickly comparatively minor but still important matters, without the full settlement process having to be completed.

Risks

- 39. Officials see some potential risks with the recent practice changes as well.
- 40. At a policy level, the Government's aspiration is completion by 2020. Although there are many advantages to the regional approach, it will not provide a complete solution to the challenges of meeting this goal date. Negotiating on a regional basis requires a significant investment, in scale and over time. The Crown's capacity is limited, meaning that groups that are not in priority regions will necessarily be on a slower track to settlement. Not all regions can be managed in the same way as the Central North Island Iwi Collective. Because they do not have the same characteristics that allowed for quick traction. Auckland is one such example.
- 41. In addition, the speed of progress may be slowed by unintended effects of operational changes, such as agreement to negotiate with smaller (and in some cases very small) groups, resulting in a proliferation of claims, or any reduced commitment to leadership in the future.
- 42. Also at an operational level, you have recently approved negotiation priorities for the short-medium term. As groups with overlapping claims come together, they afford the Crown opportunities to resolve difficult issues. The Crown may be tempted to capitalise on these groups' agreement immediately, in case delay jeopardises consensus. This temptation raises the risk that low priority - but expedient - negotiations will displace approved high priority negotiations. A further consequence may be that some groups currently in negotiations will be abandoned by the Crown in favour of negotiations that are expected to make progress more quickly.
- 43. Officials see two types of possible fiscal risks to the Crown associated with the recent negotiation practice changes:
 - a. recent settlements have addressed both claimants' reluctance to settle and very difficult problems with overlapping claims through generous Crown offers. This approach is creating a fiscal risk to the Crown, as groups that received modest

settlements in the past may wish to raise the relativities with the current Government

- b. if you agree to the continued implementation and refinement of the recent practice changes, there will be resource considerations for Treaty sector agencies that have not been allowed for in Budget 2008 and that may be difficult to meet from existing baselines. (See further Appendix F.)
44. Officials also see communications risks associated with the recent practice changes:
- a. there is a risk that the recent practice changes will be viewed by Treaty stakeholders as the Crown behaving inconsistently with past practice (and by implication, possibly unfairly to either past or present claimants)
 - b. there is a risk that the Government's efforts to communicate its new flexibility will:
 - i. be perceived by Treaty stakeholders as the Government stepping away from its settlement principles and/or from the Red Book, or
 - ii. will simply result in confusion as to what is now permitted.
45. Looking at risks posed by the recent practice changes specifically in the areas of large natural groups, overlapping claims, recognising mandate and comprehensive settlements, we identify:
- a. *Large natural groups*: operationally, the recent practice changes raise the risk that Crown resources will be insufficient to meet the challenge of achieving both depth of regional engagement and breadth of regional coverage. Regional structures may take longer to establish, if they are complex in make up. Having invested heavily in the formation of large regional structures, the Crown may then be at a negotiating disadvantage, for fear of this investment going to waste. There is an additional risk that without adequate communication of the Crown's expectations, Māori will be unclear as to what sort of groups the Crown will negotiate with;
 - b. *Overlapping interests / claims*: operationally, the recent practice changes do not mitigate the risk of one group preventing others from moving forward, if so motivated. Incentives can encourage concessions to be made where overlapping interests are acknowledged by affected groups. Where groups do not acknowledge one another's claims, however, incentives may not prove effective. A communications risk to the Crown also arises from the increased onus on groups to sort out their own differences: some claimants have expressed their view that it is the Crown's duty to rule on which group has the stronger claim. The Crown needs to be clear that it may ultimately still have to make a call as to whether it considers overlapping claims have been satisfactorily addressed;
 - c. *Recognising mandate*: the Crown is now prepared to be more flexible as to the evidence it will consider in determining appropriate authority/support to negotiate. Operationally and from a communications perspective, these recent practice changes mean that more political judgement may be required of agencies in their advice. The changes may also create more pressure on officials to allow genuinely inappropriate shortcuts in process. Mandate proliferation resulting in substantially more negotiations will have implications for Treaty sector agencies' resources. There is a substantial risk of confusion among claimants as to what the Crown's position on mandate is, without clear communication of the practice changes. An additional communications risk is that there may be a perception

that groups not required to go through the Red Book process are receiving special treatment; and

- d. *Comprehensive settlements*: operationally, the part settlements allowed by the recent practice changes may take as much resource as comprehensive settlements, yet – from a communications perspective – provide less assurance to stakeholders of meaningful progress towards 2020. There is a risk that the use of 'on account' settlements and other non comprehensive settlements will result in public backlash or confusion from the New Zealand public, if iterative or multiple settlements are noted.
46. There is an additional risk that is not strictly related to the settlement process per se, but may be considered an associated policy risk. The Government's intention is that the settlement process should contribute to the economic advancement of Māori (among other outcomes). Crown agencies will continue to scrutinise post-settlement governance proposals of claimants for acceptable levels of transparency and other considerations. However, at a practical level, quick settlements mean that Crown Forestry Rental Trust and Te Puni Kōkiri have less time to support groups to establish robust post-settlement governance and management arrangements. The risk of poor post-settlement outcomes may therefore be increased. Settling with collectives has the potential to exacerbate this risk, as separate settlements with several small groups within a collective may have implications for the scale and durability of their post-settlement governance entities.

2.2 Office of Treaty Settlements advice

47. To date, the changes made to negotiations practice over the past year appear to be speeding up the settlement progress and to be well-received by stakeholders. The Office of Treaty Settlements considers that the opportunities to be gained from continuing with a more flexible approach significantly outweigh the potential risks. We have identified these risks in collaboration with other agencies, but we are not currently observing them materialising in practice and we believe that they could be managed if necessary. On this basis, we recommend that you approve the continued implementation and refinement of the recent practice changes.
48. We are conscious that the risks identified in Section 2.1 are inherent in the new approach. Subject to your agreement, we will work with the other Treaty sector agencies to minimise these risks, by making the necessary adjustments to the way we do our business over time. In particular, we will monitor carefully both the speed of progress towards 2020 and any effects on claimants. The preparation of regional strategies should allow us to make robust decisions on key issues such as mandate, by allowing front-end analysis of what makes a sensible and appropriate group to negotiate with. The regional approach will also allow agencies to assess the governance and management capacity and capability of groups earlier, and to do more pre-settlement planning with them for the post-settlement period.
49. We do assess the risk of these recent practice changes causing confusion in the sector to be quite significant. Accordingly, we recommend increasing communications to the sector, to maximise the potential of this approach and minimise any confusion arising from the recent changes. Initial advice on communications is provided in Appendix G, but subject to your approval, we will provide you with more substantive advice by 15 August.
50. As illustrated in Table One above, changes in operational practice relate to four out of the ten major current settlement policies. Officials do not believe that Ministers need to seek changes to the principles and policies that set the framework for Treaty settlements, in order to accommodate these changes to negotiation practice. Current

negotiation practices are consistent with these principles and policies: they are simply a more flexible implementation of principles and policies that were intended to be flexibly applied.

51. However, if you do not agree with this assessment, we will prepare a Cabinet paper, to secure agreement to any changes that you consider to be a matter of policy rather than implementation.

Section 3: Consultation

52. This paper and its proposals were developed in close collaboration with Te Puni Kōkiri and the Crown Law Office. The Treasury has been provided with a copy of this paper for its information and has provided us with some comments.

Section 4: Next steps

53. Officials are available to discuss this paper with you if you wish.
54. Subject to your approval, officials will:
 - a. discuss the recent practice changes to negotiations with members of the Treaty Sector Forum and other relevant government agencies and will confirm the details as to how the sector will work together in the future, and
 - b. prepare a communication strategy for your consideration.

Appendix A: Case studies of the regional approach in practice

Case study 1: Gisborne (Tūranga)

55. In May 2007 the separately mandated groups of Ngāi Tamanuhiri, Te Pou a Haokai and Rongowhakaata agreed to a single terms of negotiation, which has them negotiating together. These negotiations have culminated in a single offer by the Crown and may result in three redress packages within a single deed of settlement, which will be ratified separately by the three groups.
56. This approach to negotiations and settlement will help the resolution of all overlapping interests that may arise between the three claimant groups. The three groups have taken advantage of their movement into negotiations at the same time, which has created opportunities for them to canvass issues of mutual interest.

Case study 2: Te Tau Ihu

57. There are some similarities between Te Tau Ihu and the Gisborne groups. The eight tribes with interests in the top of the South Island (Te Tau Ihu) have formed three groups for negotiations: Kurahaupō ki te Waipounamu (3 iwi), Tainui Taranaki ki Te Tonga (4 iwi) and Ngāti Toa Rangatira]. Kurahaupō signed terms of negotiation in June 2006 and Tainui Taranaki in November 2007. It was clear to both the Crown and Kurahaupō that negotiations would not be able to proceed smoothly to agreement in principle, due to the difficulty in resolving overlapping interests in cultural sites and Crown forest licensed land.
58. Kurahaupō took the opportunity to be a driver of change and instigated discussions with other groups on the forestry issues. The Crown made an initial offer to Kurahaupō in February 2008, but did not sign an agreement in principle with Kurahaupō before substantial offers were made to the other groups. The Crown waited until Ngāti Toa Rangatira and Tainui Taranaki negotiations were advanced enough to enable it to make quantum offers to those groups. Keeping the three negotiations on the same timeline means all overlapping interests will be considered and can be resolved prior to completing settlements in the region.

Case study 3: Central North Island Iwi Collective

59. Many attempts over twenty years aimed to settle claims over the Crown Forest Licensed land in the central North Island. The Affiliate Te Arawa settlement and subsequent Waitangi Tribunal findings and recommendations shaped the recent successful endeavour to settle these claims. The paramount chief of Ngāti Tūwharetoa, Dr Tumu Te Heuheu, approached Ministers, asking whether the Collective could develop a proposal to settle the claims over the Central North Island forest lands. This initiative has culminated in the establishment of the Central North Island Iwi Forest Group ("the Collective") in October 2007 and the settlement of the forest claims of a number of iwi achieved in June 2008.
60. This settlement would not have been possible without strong leadership and willingness to compromise by both parties. The skill of the Crown-appointed facilitator was also a significant factor in the agreement by so many of the central North Island iwi to this settlement. Committed leadership and skilled facilitation are essential for achieving settlements for large negotiations, particularly those which involve many groups with overlapping and complex interests. In this case, rangatira-to-rangatira negotiations proved valuable, as did the commitment of the collective to achieving a collective solution and to collective future management of the asset. A tight timeframe to conclude the deal is also viewed as a factor contributing to its success, because it encouraged risk-taking.

Appendix B: Implications of the regional approach for the large natural group policy

61. The Crown prefers claimants to form large groups for the purposes of Treaty settlement negotiations as:
 - a. this reduces the prevalence and number of overlapping claim disputes;
 - b. it enables more substantial redress offers to be made;
 - c. claimants are able to pool their resources therefore reducing the costs of negotiation;
 - d. claimants can form larger, financially viable and sustainable post settlement governance entities to receive the settlement assets; and
 - e. it will help the Crown to complete settlements faster and increase the likelihood of settling all claims by 2020.
62. This preference led to the policy of seeking to negotiate with "large natural groups": groups with clear kinship links and a sizeable membership and claim area. This policy has been controversial, with some commenting that it can lead to people entering negotiations together who are not large, natural or a cohesive group.
63. Establishing a regional approach to claimant group recognition, engagement and settlement creates an opportunity to achieve many of the benefits described above. However, the regional approach will work in circumstances where diversity in claimant interest would otherwise hamper the formation of a large natural group. This is an alternative way to achieve the large natural group policy intentions.
64. The regional approach provides a way in which the appropriate claimant group or groups for the Crown to negotiate with may be recognised. The regional approach then provides a setting for groups and the Crown to embark on negotiations. The large natural group concept is thus complemented by a range of other types of group or groups with which the Crown might negotiate:
 - a. one large natural group, in one large geographic region and with one settlement (for example, Waikato Tainui Rauapatu and Ngāi Tahu);
 - b. one negotiation with several small groupings of claimants, potentially with multiple settlements (for example, Gisborne);
 - c. several large natural groups, each with their own separate negotiations and settlements arrived at about the same time (for example, northern South Island);
 - d. many mandated groups; many settlements, all at different times (for example, Taranaki tribes); or
 - e. redress-driven negotiations where different groups have similar interests in the same natural resource assets within the same geographic regions (for example, Central North Island Forestry settlement).
65. The regional approach also enhances the large natural group policy: by getting a broader and deeper understanding of regional dynamics before entering into

negotiations, the Crown will be better able to support the identification and maintenance of large natural groups.

Choosing the structure of regional negotiations

66. Each of the potential regional structures will suit different circumstances. In pulling together negotiations with a region, the Crown seeks to pull together groups for negotiations which are as large as possible (in terms of population, land area covered), while minimising the resulting complexity of the negotiations. These judgements are likely to be made based on those things that could bring the claimants together (common whakapapa, historical experience, and leadership that is capable of working together with others) versus those elements that may divide the groups or make the negotiations more complex (different whakapapa, history of divisions / disagreements with neighbouring groups and leadership that has a greater focus on division than unity).
67. Any consideration of the structure of regional negotiations also needs to address how "border groups" involved in negotiations. These groups are often capable of aligning with at least two different larger groups. While they may never fully be part of other, larger groups, it is important to ensure that they do not "fall into the gap" between their larger neighbours, and have the opportunity to determine who they are most prepared to work with, while understanding that they will need to go with one group because the Crown will not prioritise negotiations with them on their own for some time. Terms of negotiation and the structure of the negotiation teams need to cover how the interests of these groups are addressed in the larger negotiations.
68. The decision on how to structure regional negotiations requires a number of judgements. These are best considered on a case by case basis, ideally as part of developing the regional strategies described below. Experience indicates that the sooner the Crown is clear on how it might want to structure negotiations, the sooner it can create these expectations with claimants. The Waitangi Tribunal district reports have also provided useful guidance on these matters.

Pulling together the advice on recommended structure

69. How the Crown structures regional negotiations and works with claimant groups within the region will be a key part of the regional approach. It is proposed that the Office of Treaty Settlements and Te Puni Kōkiri lead the development and implementation of regional strategies to determine this. Regional strategies should be developed early and before formal negotiations and mandating processes take place.
70. Each regional strategy will start to identify each iwi's area of interest, commercial assets available for settlement (such as Crown forest licensed land, Land Corp land and Office of Treaty Settlements land bank), conservation lands, and the internal structure to their composite groups and the inter-relationships. This information will provide the basis for engagement with claimants and stakeholder interests; the formation of a large natural group for settlement purposes; the involvement of ministers, timelines and communication processes; and progress to key settlement milestones such as mandate. The regional strategy will also provide an insight to options for managing ownership of cultural and commercial assets.
71. These strategies will be able to assist the Crown in determining whether a single large natural group can be formed in a region for the purposes of negotiation, or whether other configurations of groups and different timing of settlement negotiations would better address the overlapping interests of groups in the region. The strategies will identify the need for facilitation to assist groups through mandate issues or with resolving overlapping claims. These strategies will also assist the Crown in assessing the resources it requires for negotiations in the region.

72. Over the next two to three years formal regional strategies may be required for:
- a. six large regions (Northland, King Country, Whanganui/National Park, Central North Island, and Hauraki);
 - b. five smaller regions (remainder of Taranaki, Manawatu Rangitikei, Tauranga and East Bay of Plenty and North Auckland); and
 - c. those groups that have engaged in the settlement process but where progress has stalled (for example, Auckland and the Chatham Islands).
73. At its meeting on 3 February 2004 the Cabinet Business Committee [CBC Min (04) 3/9] agreed that the Crown may give priority to claimant groups that agree to join together for negotiations over those groups that do not. The Committee also agreed to negotiate settlements with large natural groups that also covered the claims of some dissenting tribal interests.
74. The regional approach practiced today provides for a wider interpretation and application of the large natural group policy approved in 2004. We consider that current practice is consistent with the policy intent.

Appendix C: Recognising mandate

75. The Crown requires a secure mandate from the claimant group negotiators before it enters negotiations. Achieving and maintaining mandate can be one of the most difficult, and yet critical, aspect of the settlement process. The Red Book sets out a process that demonstrates to the Crown that representatives have the mandate to negotiate on behalf of their members. While this mandate process is appropriate for groups that have internal challenges to representation or who are not well known to the Crown, recent operational practice has assumed that not all claimant groups need to go through the specified process to demonstrate they have the mandate of their people.
76. As part of the Central North Island Forestry negotiations, the Crown accepted a wider range of evidence in weighing the claims of claimant representatives that they had a mandate to negotiate. As a consequence, in future not all claimant groups will necessarily be required to complete the mandate process described in the Red Book before they can enter negotiations. Instead, the Crown may consider initiating negotiations with groups where:
- a. the group is represented through a Mandated Iwi Authority under Schedule 3 of the Māori Fisheries Act 2004;
 - b. the claimant leadership has longstanding mana and respect of their iwi members;
 - c. a group has been determined under section 30 of the Te Ture Whenua Māori Act 1993 as being representative of the group; and
 - d. a combination of any or all of the above and elements of the mandate process described in the Red Book to address any areas of doubt, particularly if there is known division or conflict within the group.
77. The Waitangi Tribunal may be able to help by facilitating the formation of groups for mandating purposes. The Waitangi Tribunal has considered whether its role could be expanded to inquire into mandates among claimant communities and report on them. This intervention departs from the traditional judicial model but could be very useful in encouraging parties to engage in the process both "on and off the record". This engagement could be done during the hearings phase of a district inquiry. The Waitangi Tribunal is keen to explore this option further and will continue to work with officials to identify areas where it could apply.
78. Irrespective of how mandate is demonstrated, settlement redress packages must be ratified by the claimant community before a settlement is considered agreed.
79. These proposed changes are more of interpretation of current policy rather than establishing new policy and therefore we consider they do not require Cabinet approval.

Appendix D: Overlapping interests / claims

80. As you have publicly commented, the Crown does not wish to play the role of historical video referee, deciding on which group has the greater claim to any particular place. These are matters that only the groups in question can resolve between themselves, and even then agreement is often difficult to achieve. The Crown must ensure that all parties who have an interest in the same place / redress have an opportunity for their interest to be accommodated within the settlement process. In settling the grievances of one group the Crown does not want to create new grievances with neighbouring groups. Occasionally, it must be expected that this approach will not work to resolve overlapping interests and claims. In such cases, as a last resort, the Crown may ultimately still have to make a call as to whether it considers overlapping claims have been satisfactorily addressed, if it wishes to achieve its 2020 goal.

Relationship of the regional approach with overlapping claims policy

81. Adopting a regional approach in negotiations has had a number of benefits in ensuring overlapping interests are actively considered earlier in negotiations. The main method for achieving this is by involving all relevant neighbouring groups in negotiations / discussions. Depending on the preparedness of groups within a region to begin negotiations, the preferred approach to date has been to simultaneously negotiate:
- a. with as many groups in the region as possible;
 - b. within as few negotiations as possible; and
 - c. with each of the key negotiations milestones reached at the same time.
82. This approach has provided a strong incentive for the groups to reach agreement on resolution and management of their overlapping cultural and commercial interests.
83. Where it has not been possible to achieve simultaneous negotiation milestones, the next preference is to encourage groups with overlapping interests, who are yet to enter negotiations, to enter them sooner. At a minimum the Crown has relied on representatives whose mandate is not proven in term of process but rather derives from their mana as the representatives for the purposes of resolving overlapping interests. In some cases the process has also involved a level of consultation with all Waitangi Tribunal claimants. It has also ensured that overlapping groups are informed of what redress the Crown is proposing to offer during the later stages of negotiations.

Use of facilitators

84. The Crown has also used facilitators for both managing negotiations and forming the collectives in negotiations. These facilitators have been experienced, senior leaders with an understanding of the Treaty settlement framework, claimant group dynamics, tikanga Māori (particularly dispute resolution) and managing complex negotiations. Each person has been selected on a case by case basis using considerations such as:
- a. whether the history of the relationship between the overlapping groups would benefit from external assistance;
 - b. the nature of the issues under discussion / disagreement;

- c. whether their mana, for example as senior members of the Waitangi Tribunal¹, would facilitate resolution;
 - d. any existing relationships between the leadership of the groups and potential facilitators; and
 - e. whether particular skills sets or experience would be more useful in reaching agreement between the overlapping interests. This will depend in part on the nature of the issues, and in part on the "personalities" of the overlapping groups and their leadership.
85. Leaders of the Central North Island groups understood the desirability of resolving overlapping claims themselves and agreed to the appointment of a Crown facilitator – Wira Gardiner. The success of the Central North Island Iwi Forest Collective may well encourage other groups in similar circumstances to take a similar approach in the future.
86. Increased use of facilitators, particularly Crown funded facilitators, may result in a different mix of skills and experience in the wider Crown team used to negotiate settlements. The resource implications of this will be considered as part of the review of the Office of Treaty Settlements.

Redress options in heavily overlapped areas

87. A common method for resolving overlapping interests has been to offer non-exclusive redress. This option is generally more applicable for cultural redress, where ownership is not usually necessary to satisfy claimant's interest. The Central North Island Forestry settlement provides a model for collective ownership of commercial redress. As other regional negotiations progress, options for joint ownership / management of cultural or commercial redress could aid the negotiation process.
88. These new approaches to resolving overlapping interests are consistent with the policy on overlapping interests where the Crown's two general principles were to:
- a. reach a fair and appropriate settlement with the group in negotiations; and
 - b. maintain, as far as possible, the capability to provide appropriate redress to other groups in the settlement of their claims.²
89. These changes are more of interpretation than policy and therefore we consider they do not require Cabinet approval.

¹ Senior members of the Waitangi Tribunal have made this suggestion and indicated they would be keen to assist in facilitating the resolution of overlapping interests as part of the settlement process.

² Paraphrased from page 59 of the Red Book.

Appendix E: Non comprehensive settlements

90. The Crown has a stated preference to negotiate comprehensive settlements of all historical claims of a claimant group (CBC Min (04) 3/9). The Central North Island Forestry and Waikato River settlements are not comprehensive ones. There have been examples of non comprehensive or on account settlements. We consider that non comprehensive / on account settlements should be considered when the nature of the redress / grievance under negotiation:
- a. is large / complex;
 - b. creates a significant precedent for future negotiations; or
 - c. requires immediate response / redress from the Crown to maintain confidence in the settlement process; and
 - d. means that a partial / on account settlement will accelerate the overall pace of negotiations or maintain public confidence in the social justice of the settlement process.
91. A shift in approach to larger regional settlements may make these circumstances more likely in the future.
92. Non comprehensive / on account settlements have implicit Cabinet approval to deviate from the preference at the time the settlement is approved. Given that the policy is stated as a preference, and that Cabinet implicitly approves this deviation on a case by case basis, we do not consider it necessary to seek Cabinet approval for a policy change.

Appendix F: Implications of the regional approach for agencies

Implications for Treaty sector agencies

93. It is proposed that the Office of Treaty Settlements leads preparation of regional strategies with strong support from Te Puni Kōkiri. Developing these strategies would be a sector wide activity, involving input from Crown Forestry Rental Trust, Waitangi Tribunal and other government agencies. While a regional strategy has not been prepared to date, and agencies are not familiar with the resources required within the full lifecycle of regional settlements, they are likely to require significantly more resource than is currently available.
94. Te Puni Kōkiri has established a team of specialist staff and contractors to facilitate discussions between overlapping claimants and improve the Crown's quality, timing and inclusiveness of engagement with iwi groups in the mandate and negotiations process. This team would also contribute to the development of regional strategies, and provide cultural support to Office of Treaty Settlements and other departments.
95. Te Puni Kōkiri-led facilitation is being used in local situations to help groups form and deal with local overlapping claims and mandate issues. Over the last few months, Te Puni Kōkiri has been leading the mandate process for Whakatōhea, and has worked with Ngāti Kuri and Ngāi Takoto on mandate issues. Ngāti Kuri and Ngāi Takoto are also working through the Te Hiku o te Ika regional forum to resolve their overlapping issues with other Muriwhenua/Te Hiku iwi. These approaches have worked well and Te Puni Kōkiri and Office of Treaty Settlement officials are keen to continue with these practices, depending on the availability of their respective resources.
96. As discussed in Appendix C, the Waitangi Tribunal is keen to help where it can to resolve mandate issues. We will work with the Tribunal to identify opportunities where its members can play a larger role in helping claimants form groups for mandate and negotiations.

Implications for the Office of Treaty Settlements

97. You have been advised by the Chief Executive of the Ministry of Justice that she intends to review elements of the capacity and capability of the Office of Treaty Settlements to deliver its outcomes and outputs. Part of this consideration will include understanding the implications of adopting a stronger regional approach.
98. The Office of Treaty Settlements has identified a number of implications from the adoption of a regional approach to negotiations so far. These implications are outlined below.
99. There may be efficiencies in negotiating with neighbouring groups in parallel. For example, in the top of the South Island the three negotiations are using about 55% of the resources that would have been needed to complete the negotiations to the agreement in principle stage using the previous approach. However, we do not yet know how much resource will be required to get to a Deed.
100. There may be a need for a different mix in the Crown team, particularly if there is greater use of regional facilitators, in addition to Crown Chief Negotiators. This may result in greater use of external advisors / consultants.
101. The Crown is likely to have more negotiations, in a smaller number of geographic regions, at any one time, because of the greater resource requirements for the multiple parties involved. The Office of Treaty Settlements estimates that it can support about four regions in negotiations at any one time. (This will in part depend on how large the regions are, and how many negotiations are underway in each region.)

102. Conducting a number of negotiations on the same timeframes may make the Office of Treaty Settlement work load "chunkier" as negotiations within the region reach major negotiation milestones at the same time. This will require greater management of resource and work flow. For example, historically, negotiation of agreements in principle have required about five times the personnel resources of the pre-negotiation phases; completing a deed of settlement about six times the personnel resources of the pre-negotiation phase; and as soon as the deed is complete the resource required to complete legislation is about the same as the pre-negotiation phase. With fewer large regional negotiations this five fold increase in resource requirement could represent 25% of the total personnel of the Office. The Office will consider how to manage this significant ramp up and down of resources and what options there are for "smoothing" these lumps between negotiations within, and across, the regions as part of the review.
103. It is not possible yet to assess whether the on-account settlement in the Central North Island will reduce the overall resources needed to complete comprehensive settlements in the region. Much of this assessment will turn on whether the claimant groups accept that the on-account forestry redress represents the majority of the commercial redress for a comprehensive settlement. An assessment of the longer term resource requirements could be made following completion of agreements in principles for comprehensive settlements in the Central North Island.
104. Settling multiple groups at the same time within a region results in some resource efficiencies, compared with the previous approach. Notwithstanding this reduction in resource requirements, agencies may still require a net increase in resources to complete all settlements by 2020 (that is, the remaining task is larger than the reduction from the efficiency improvements).
105. You can expect further briefing on the resource implications of the regional approach to negotiations in the context of the Office of Treaty Settlements review.

Appendix G: Communication of the recent practice changes

106. The previous narrower interpretation of settlement policies created the perception of the Office of Treaty Settlements as a "gate keeper" or an obstruction in negotiating settlements. The greater flexibility in interpretation has increased momentum in negotiations and optimism for claimants. This will be best understood by those claimants who are currently in negotiations, but not necessarily by those yet to enter negotiations. The recent practice changes will need to be communicated clearly to stakeholders. Subject to your agreement, we will provide further advice to you on approaches, including the possibility of the Office of Treaty Settlements and Te Puni Kōkiri running information hui in regions where the regional approach is being implemented.
107. The policy principles for settlements include transparency and fairness so that claimants not in negotiations have confidence that they are not disadvantaged by decisions relating to other groups. You announcing, or publicly discussing, the greater flexibility in interpreting policy would demonstrate our continued commitment to transparency and fairness for claimant groups that are not in negotiations. This is an important part of pre-negotiations and continuing creating an environment which will make settling all claims by 2020 achievable.
108. We are aware that there is an increasing level of discussion around the implications of your leadership in the Treaty Negotiations portfolio and the implications of the current practice of greater flexibility in interpreting policy settings. Two initial options would allow you to further foster public discussion of the ideas canvassed in this paper, if you wished:
- a. as previously advised, the Stout Centre would be delighted to host you in a public seminar; or
 - b. we could include some of these ideas in speech notes and draft media statements for future negotiation milestones you will be commenting on over the next few months.

"LMA-9"

New approach to overlapping claims

Overview for discussion with Iwi Chairs Forum

On behalf of Iwi Working Group (Treaty Cross Claims)

May 2018, Whanganui

Hannah Alice Doogan
Solicitor
Wellington

Deputy Registrar/Solicitor of the High Court of
New Zealand

This is the exhibit marked "LMA-9" referred to in
the attached Affidavit of Lilian Marie Anderson
sworn/affirmed at Wellington this 13th day of October
2020 before me



OTS.012.1126

Current issues

Approach to overlapping claims and interests is creating issues

- No formal Crown process – iwi 'encouraged' to consult.
- Process is different for each settlement.
- Little or no regard to interests of settled groups.
- Layers of interests are not weighed or clearly identified.
- Crown putting redress ahead of relationships – with iwi pitted against iwi.
- Iwi concerned objections of overlapping interests are not heard, or they're made aware too late in the process.

Current issues

Approach to overlapping claims and interests is creating issues

- Iwi trying to get the 'best settlement' they can, doing so at the peril of relationships.
- Crown acknowledging mana in settlements is re-writing history.
- Under the overlapping claims policy (Red Book), the Crown makes redress offers to iwi that cannot demonstrate or provide evidence of a historical or tikanga connection with a particular land or property.

Change is needed... from Crown

Approach to overlapping interests will result in more litigation

- Many Iwi say the existing process does not work.
- Requires fundamental changes (not tweaks to current approach).
- New Government appear to be 'rushing' settlements – causing issues along way, taking same path as previous Government.
- The Crown has proven to be inept when it comes to matters of iwi mana – even the Government's own Ministers have said this in Parliament.

Change is needed... from Crown

Approach to overlapping interests will result in more litigation

- Rather than focusing on classes of redress, there needs to focus on implications for iwi mana of any redress.
- Whether it be commercial or cultural. Ownership of property implies mana whenua. This point seems to be lost on OTS and the Government.
- A possible way to fix this, could be to ask the settled iwi (with stronger ties to whenua) to take part in gifting the land to the outside iwi. That way they retain their mana and the relationship with the settling iwi is maintained.

Change is needed... from Crown

Approach to overlapping interests will result in more litigation

- The tikanga-based agreements between Ngāti Whātua Ōrākei and Ngāti Paoa is another proven way forward where iwi settle their differences, not the Crown.
- Ideally, the Crown would identify upfront what redress it intends to make available to iwi and then invite affected iwi (neighbouring settled and unsettled) to identify mana impacts for them.
- The current process, doesn't involve other iwi until the negotiations are progressed, and the redress is not made public until the settlement is initialled. This means affected iwi have little other option than litigation.



Change is needed... from iwi

Change is needed... from iwi

Solving our problem rather than the Crown's problem

- Current approach encouraging some iwi to turn their back on relationships simple to get best deal.
- We need to start by showing confidence in our own tikanga based processes to resolve the real issue at the heart of overlapping interests, iwi mana.
- Showing confidence in our own processes means excluding Crown involvement altogether (unless the disputing parties agree otherwise).

Change is needed... from iwi

Solving our problem rather than the Crown's problem

- This means removing the Crown as the final arbiter in the event of an impasse (again, unless the parties agree to Crown making the decision for them).
- The Crown role in the process of determining iwi mana, should be the provider of resources only.
- We know where we can legitimately claim iwi mana. This should be debated on the marae or in our environment not the courts or Beehive.

View from those not settled

The process will get harder not easier

- There are a handful of areas left in the country where settlements are outstanding
- Most other areas have either fully settled, or there have been some settlements that have been through the overlapping claims process
- Settled iwi, who have been vocal in this space, went through the same process now being complained of and have had the 'benefit' of reaching settlement on that basis
- Those iwi settling second (third or fourth etc) have no option but to negotiate with what is left. The process therefore successively gets harder, not easier.

Considerations for new approach

Some principles for new approach may include:

- At the outset, settling group to identify their interests in an area.
- Identify areas of overlapping or shared interests. Consultation then takes place with other iwi.
- Tikanga-based engagement between iwi (both the settling iwi and those identified as having overlapping/shared interests).
- If Iwi reach agreement it should become binding on the Crown to follow/implement in the settlement negotiations
- Aim: To agree a process for engagement and dispute resolution (iwi to iwi).

Tikanga-based approach

Released under the Official Information Act 1982

Ideas for new approach

Use formal tikanga-based process early

- Where there is a potential for redress within areas of overlapping interests the Crown allows for an iwi to iwi tikanga-based process (decided by them & without Crown involvement), at the beginning of the settlement journey.
- Where there is an impasse (and subject to any bespoke process agreed between the iwi), the Crown supports an independently-facilitated dispute resolution process for the discussion and resolution of overlapping claims issues.

Released under the Official Information Act 1982

Ideas for new approach

Independent investigation & assessment

- Where required, the independent body would undertake an investigation and assessment of the respective customary (and other interests) of the iwi in the area of overlapping or shared interest. They would make a determination based on knowledge of tikanga. This would be provided to the iwi for agreement, and then to the Crown.
- This should be done early in the process – before AIP or any negotiations begin. That way issues of overlapping claims can be resolved before it is too late.
- The process should have an agreed time limit on it, to ensure no one is unfairly affected.

Ideas for tikanga-based approach

Example of tikanga-based process (without Crown involvement)

- Mandated group, or Collective, identifies where it believe it has interests.
- The Mandate is recognised by own iwi and Crown (as current).
- Leaders of 'mandated group' meet with leaders of 'affected iwi' to debate the nature of their interests and any corresponding rights.
- That process to be conducted within the generally accepted parameters of tikanga – allowing for the fact that this will be interpreted differently in different places.

Ideas for tikanga-based approach

Example of tikanga-based process (without Crown involvement)

- The iwi to iwi (leaders to leaders, not legal to legal) process continues until both sides agree on an outcome, or, agree that they could not agree.
- The Crown could observe this process but it would not be a referee or have the final say.
- The tikanga process early in the settlement journey would not be a 'tick box exercise' – it is for iwi to debate and agree mana before the Crown is involved, or negotiations are started.

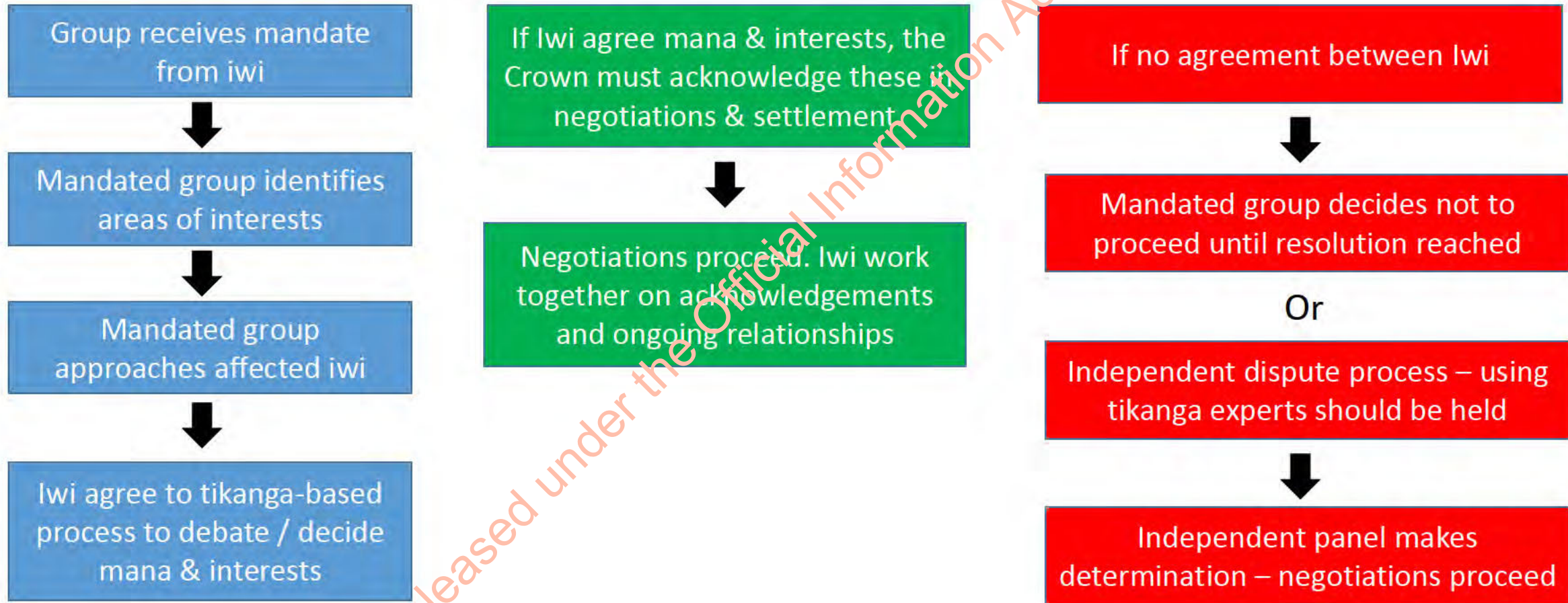
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Ideas for tikanga-based approach

In the event of an impasse, the following could happen (examples only)

- The mandated group decides not to progress settlement until a resolution is achieved, so the groups must keep talking until they do reach consensus.
 - *This is closest to the way our tipuna resolved these matters apart from war.*
- An independent authority helps to make a determination.
 - *NOT the Crown unless both parties agree to this option before entering into the discussion. This could be a panel of tikanga experts similar to the CNI process*
- After a certain time frame (3-6 months) if no resolution is achieved the settlement is put on hold for a period of time and returned to after a break.

Ideas for tikanga-based approach



Ideas for tikanga-based approach

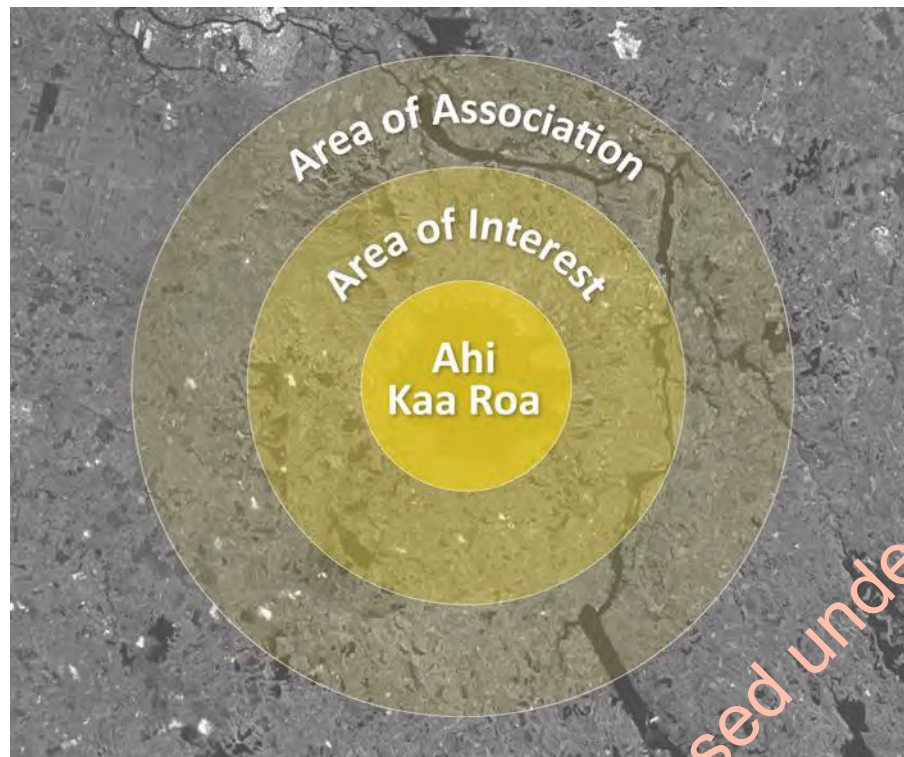
Examples of where this has worked well

- In 2017, After kanohi-ki-te-kanohi negotiations, Ngāti Whātua Ōrākei and Ngāti Paoa resolved their differences with respect to the properties within Ngāti Whātua Ōrākei sacred land.
- The Kawenata involved each party acknowledging where the other had primary (or lead) and secondary (or shared) mana whenua interests within the wider Tāmaki Makaurau region.
- That acknowledgment was a significant factor in Ngāti Whātua Ōrākei's decision to discontinue its litigation against Ngāti Paoa.

Other potential options to explore



Example of 'Sphere of influence' model

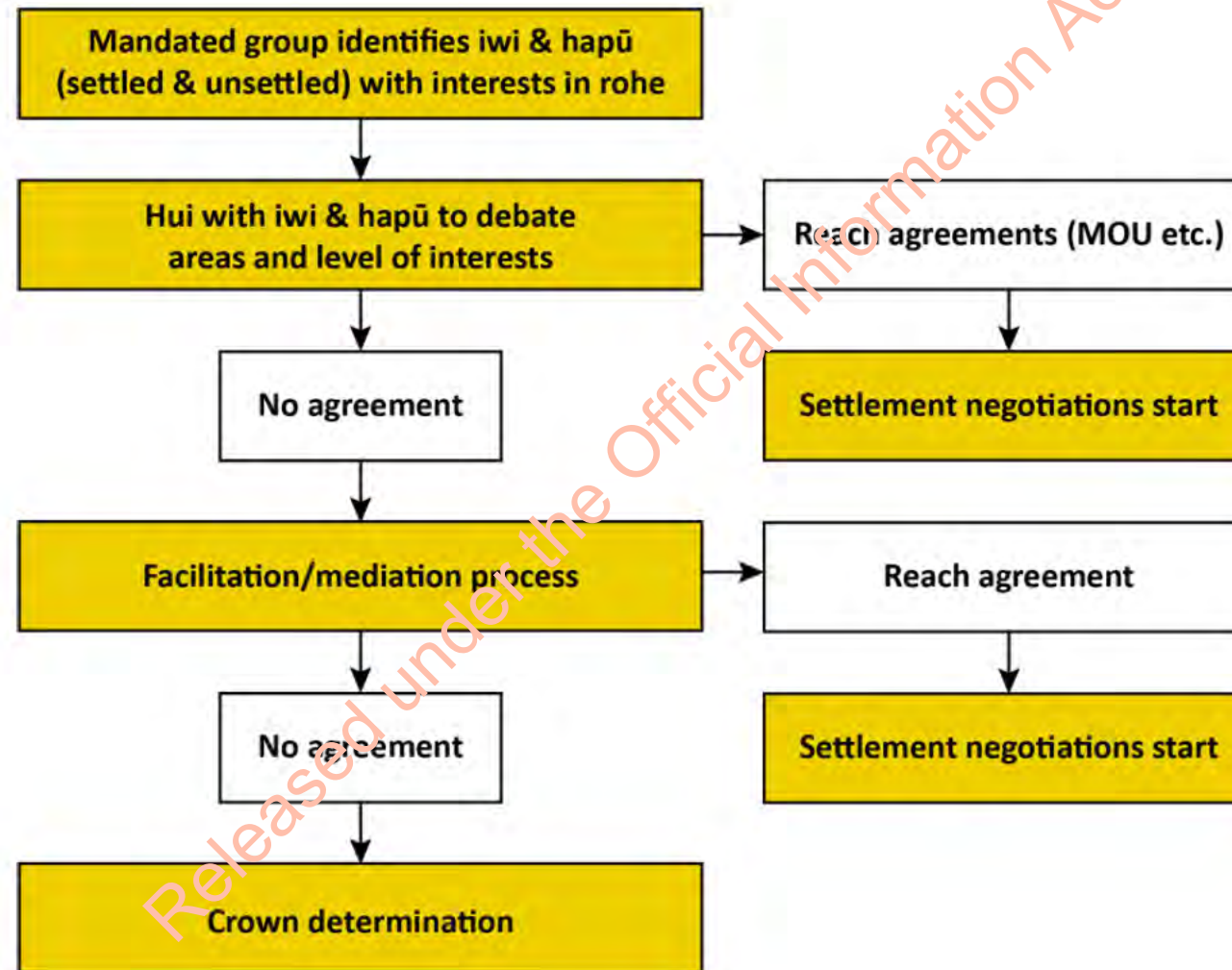


An example model for identifying and agreeing interests

- **Ahi Kaa Roa** (settling iwi group – leads process and observed by Crown)
- **Area of Interest** (settled/unsettled iwi & hapū or settlements in the rohe – potentially agree formal arrangement e.g. MOU)
- **Area of Association** (neighbouring iwi & hapū who might be affected – consideration to be given)

* Based on Tūhoe approach

Example of potential formal process



Other considerations

Recognising mana in settlements

- Collective settlements should not allow an iwi to 'coat tail' or gain new mana in an area
 - Collective settlements should clearly state which iwi/hapū within Collective has interest for certain land. They should not give every iwi in the Collective the same degree of mana.
- During negotiations, Crown must make clear, any redress land that is offered and not taken, may be offered to other unsettled iwi at a later date
 - Where land is not taken by an iwi, and it is offered to another, this should be done with the agreement of ahi kaa. This agreement does not require a re-negotiation of a settlement or transfer of funds, but rather true consultation and iwi to iwi agreement.

Other considerations

Fair and fit redress

- Any redress ultimately provided by the Crown within an area of identified overlapping/shared interest:
 - being commensurate with the relative customary interests of the iwi involved;
 - being consistent with, and not prejudicial to, the rights and interests of the iwi; and
 - not undermining the value and integrity of any existing settlements.

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Key questions

- The 'Red book' already allows for iwi to have non-Crown discussions and reach agreements. There are examples of where that has occurred and agreements have been honoured.
- Whose tikanga is the right tikanga?
- How long should a 'mandated group' have to wait before they can advance settlement with Crown?

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Key questions

- Tikanga includes acknowledging any agreements reached between the iwi and not challenging them after the fact.
 - Who would make a determination of an agreement before it goes to Court?
 - Is there a benchmark for 'agreements reached'? E.g. between hapū, iwi, marae
- What if there is not agreement on who has ahi kaa, mana whenua? How would this be determined.

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Notes for Minister

- The existing process does not work for us.
- There needs to be some fundamental changes (not tweaks to the existing policy/process)
- The Iwi Chairs Forum has agreed to progress its work as requested by the Minister of Treaty Claims Settlements to develop a new cross-claims policy that avoids conflict caused and any current and future litigation
- The ICF agreed that a tikanga-based approach is used to form the basis of a new cross claims policy.
- The National Iwi Chairs Forum Working Group will continue to engage directly with the Minister on the development of a new cross-claims policy.
- ICF would like to discuss this work being (jointly) funded by Crown.



13 MAR 2019

Iwi Chairs Forum

Iwi Working Group on Treaty Cross Claims

c/o Scott Campbell

Director, Campbell Squared

Irrelevant

This is the exhibit marked "LMA-10" referred to in the attached Affidavit of **Lilian Marie Anderson** sworn/affirmed at Wellington this 13th day of October 2020

Hannah Alice Doogan before me

Solicitor
Wellington

Deputy Registrar/Solicitor of the High Court of
New Zealand

Tēnā koutou katoa

I want to thank the Iwi Chairs Forum for its positive contribution to this challenging area. In reviewing your paper, I am encouraged that the principles that underpin your proposed model and the Crown's objectives have much in common.

Your paper presents a model for resolving overlapping interests that has many workable elements.

I have also heard your views on the shortcomings of the existing overlapping claims policy.

Working through overlapping interests is one of the most challenging aspects of the settlement process. The government is determined to address the historical breaches of the Treaty through meaningful redress and wants to do this efficiently so unsettled groups can benefit from their redress. However, the process must fairly take into account the interests of other iwi. A good process is crucial for addressing these challenges.

Since receiving your paper my officials have considered how the current Crown policy and practice can be improved in light of the issues and processes the ICF has put forward and have engaged with your advisors. While in my view the current policy principles that emphasise early engagement and iwi led discussions, are basically sound, I think the policy needs to more clearly address a number of the points you have made.

While, as I discuss below, there are elements of your proposed model that would be problematic in practice, I share your view that overlapping interests are most appropriately addressed through iwi led discussions. I have directed my officials to continue looking at how the Crown can better support this in the context of specific negotiations.

Clarifying when overlapping claims engagement takes place

Your paper states overlapping claims engagement takes place too late, leaving iwi with little option but to litigate. The current policy is for overlapping claims to be addressed as early as possible in the negotiations process and for substantive engagement with overlapping iwi to have taken place before an agreement in principle (AIP) is signed.

I have directed my officials to ensure all overlapping claims practice clearly reflects this policy. I think it is also necessary to more clearly address the situation where genuine efforts have not resolved all issues and postponing the AIP would unduly delay the settlement. In these instances, the policy will provide that a condition of moving beyond AIP is that a process is put in place for resolving any outstanding issues before initialling a deed of settlement. This process should be developed in consultation with the overlapping iwi and provide assurance their interests will be addressed.

Recognising iwi interests

Your paper states the Crown is making redress offers without sufficient evidence of customary interests.

I can assure you the Crown considers evidence of interests, including the rights and interests of settled groups, before making redress offers. In considering our external articulation of Crown policy we have, however, identified that the policy fails to properly reflect this.

I want to give assurance to all iwi the Crown will consider the interests of settled groups. We intend to revise the articulation of Crown policy, in particular, how it relates to settled groups. This will involve drafting a clear statement about the Crown's responsibilities to all iwi when making decisions, in line with the Treaty principles, including active protection and consultation. I have also asked for future official references to be to "overlapping interests" rather than "overlapping claims" to reflect the fact the Crown must consider all interests, not just those of potential cross claimants, in making these decisions.

Resolving overlapping interests through iwi led tikanga-based engagement and the removal of the Crown as decision maker

The current policy encourages overlapping interests to be resolved through iwi led engagement. This policy provides for iwi to engage according to their tikanga. In addition, the Crown will provide support for additional research, mediation and facilitation to assist the parties if agreement is not reached. However, in our experience, agreement is not always reached even with this support. As noted I have directed my officials to consider other ways the Crown can support tikanga-based engagement.

While I cannot accept the proposal to remove the Crown as a final decision maker on the redress the Crown is prepared to offer to settle a group's historical Treaty claims, I can provide an assurance the Crown will seek to give effect to any agreement between iwi subject to consideration of Treaty settlement policy implications.

The Crown and settling iwi are putting redress ahead of relationships

Your paper states the Crown prioritises reaching settlement over relationships. I can assure it does not. This issue sits at the heart of the tension between the Crown's objective to settle with groups as efficiently as possible so as not to deprive them of the benefits of their settlement while not adversely affecting other iwi interests. Ultimately time does need to be built into negotiations from the start to allow for proper resolution of issues through iwi led engagement. This is, however, a fine balance as delays will prejudice unsettled groups by denying them the advantages settled groups already have.

Next steps

The Crown may continue to refine these processes over time to ensure settlements are durable, fair and transparent. We are happy to continue talking as we do this.

Thank you again for your assistance with this important mahi.

Nāku noa, nā



Hon Andrew Little
Minister for Treaty of Waitangi Negotiations

Minister for Treaty of Waitangi Negotiations

out of scope

Ngā hapū o Ngāpuhi: Criteria for hapū groupings and

Date 11 December 2020
Report No. (TA) 2020/2021 – 159

Priority: High
File ref: CLA-N052-UF 15

Action sought

**Minister for Treaty of
Waitangi Negotiations**
(Hon Andrew Little)

**Agree to the proposed criteria for confirming hapū
groupings.**

By 18 December 2020

out of scope

**Forward this report to the Minister for Māori
Development for his information.**

Contact for phone discussion (if required)

Name	Position	Phone		1 st Contact
Leah Campbell	Regional Director – Te Raki (Acting)	04 913 9202	027 836 0532	✓
Trina Dyll	Negotiation and Settlement Manager	04 494 9871	027 498 8856	
Ashley Tvrdeic	Analyst	04 439 4105	-	

Ngāpuhi: Criteria for hapū groupings

Purpose

2. This briefing seeks your agreement to:
 - a. the following criteria for confirming hapū groupings for the purpose of the current ngā hapū o Ngāpuhi mandating process:
 - i. size,
 - ii. coherence,
 - iii. what remains,
 - iv. group capability, and
 - v. levels of hapū support; and
 - b. [REDACTED]

out of scope

Executive Summary

3. This paper seeks your agreement to a set of criteria to use in confirming groups of ngā hapū o Ngāpuhi as suitable to begin formal mandating processes (hapū groupings). These proposed criteria are a mix of the type of factors considered up until 2012 in recognising claimant groups as large natural groups (size and coherence) and some factors that reflect the particular circumstances of Ngāpuhi mandate issues (what remains, group capability and capacity, and levels of hapū support).
4. Since you and the Minister for Māori Development called for mandate proposals from hapū in December 2019, groups have formed to prepare mandate proposals in Whangāroa, Hokianga (three), Mangakāhia, Kaikohe, Waimate-Taiāmai, Ngāti Hine and Te Pēwhairangi (two). Groups in Mangakāhia, Kaikohe and Waimate-Taiāmai are in the very beginning stages of forming and preparing proposals. In Hokianga not all hapū are covered by the groups preparing proposals. Whangarei hapū are not actively working on a mandate proposal.

out of scope

5. [REDACTED]

6. [REDACTED]

7.

8.

9.

10.

11.

12.

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13.

14.



out of scope

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Recommendations

15. It is recommended you:

- a. agree the following criteria for use in confirming hapū groupings for the purpose of the current ngā hapū o Ngāpuhi mandating process:

YES / NO

- i. size;
- ii. coherence;
- iii. what remains;
- iv. group capability;
- v. levels of hapū support;

out of scope

- e. forward a copy of this briefing to the Minister for Māori Development for his information.

YES / NO

Leah Campbell

Regional Director – Te Raki (Acting)

NOTED / APPROVED / NOT APPROVED

Hon Andrew Little

Minister for Treaty of Waitangi Negotiations

Date: 15/12/20

Background

Current approach to ngā hapū o Ngāpuhi mandating has additional steps

16. In December 2019, the Minister for Treaty of Waitangi Negotiations and the Minister for Māori Development (the Ministers) discontinued the Crown's recognition of the Tūhoronuku Independent Mandate Authority (TIMA) mandate [TA 2019/2020 – 183 refers], and invited mandate proposals from hapū groupings while noting their strong preference for collective commercial negotiations between all Ngāpuhi hapū groupings and the Crown.
17. The shift from one large natural grouping to seeking hapū grouping proposals reflected the messages the Crown was receiving from ngā hapū o Ngāpuhi throughout the evolved mandate process. Hapū felt their hapū rangatiratanga was being eroded by being placed into one large natural grouping and wanted the opportunity to look after their own interests at the negotiation table.
18. This call for mandate proposals from hapū groupings is an additional step on top of the usual Treaty settlement mandating process. The step of seeking hapū grouping proposals prior to mandate strategy development has been introduced to allow hapū time and space to come together as they choose. We envisage the mandate process for Ngāpuhi hapū groupings will usually have the following steps outlined in **Table One** below.

Table One: Mandate process for Ngāpuhi hapū groupings

Step 1	Hapū grouping proposal received
Step 2	Crown confirms hapū grouping
Step 3	Hapū grouping submits draft mandate strategy, Public consultation on mandate strategy
Step 4	Mandate strategy finalised
Step 5	Mandate strategy implemented including voting from hapū members on mandate
Step 6	Deed of mandate compiled, Public consultation on deed of mandate
Step 7	Deed of mandate submitted to Crown
Step 8	Crown decision to recognise mandate

We recommend hapū groupings are confirmed for the same reasons large natural groups have been in other areas

19. We consider Crown confirmation of a hapū grouping is similar to the Crown's confirmation of large natural groupings – a step that takes place prior to mandating processes starting. As with confirmation of large natural groups, we propose you confirm hapū groupings against a set of criteria that will ensure hapū groupings are sufficiently large and broad in scope to:
 - a. make negotiations of standard redress instruments possible;
 - b. minimise the impact of shared/overlapping interests; and
 - c. ensure negotiations can be completed in a timely and cost-effective manner for all parties.

Hapū grouping assessments will be similar to past large natural group assessments but require fit for purpose criteria

Five criteria are proposed for assessment of hapū grouping confirmation

20. In order to ensure hapū groupings are large and broad enough in scope to conduct negotiations with the Crown, we propose the following set of criteria in **Table Two** below, be used to assess mandate proposals before confirming hapū groupings.

Table Two: Criteria for assessing hapū groupings

SIZE	Is the number of hapū, number of marae and estimated hapū population covered by the mandate large enough to make the process of settlement easier to manage and work through, and to help deal with overlapping interests?
COHERENCE	Is the hapū grouping joined together by whakapapa, rohe, historic alliances and contemporary political coherence to differentiate it sufficiently from other hapū and allow the possibility of settlement?
WHAT REMAINS	What will be left over in the region if a mandate proposal is recognised, both in terms of hapū and marae interests as well as the area of interests concerned?
GROUPING CAPABILITY	Will the potential grouping that is putting forward the mandate proposal have the capability and capacity to implement a mandate strategy?
LEVELS OF HAPŪ SUPPORT	Is there evidence that hapū covered by a mandate proposal support being included in this hapū grouping?

distinct?

21. In 2012, the Minister for Treaty of Waitangi Negotiations confirmed large natural groups [OTS report 2012/2013 refers]. At that time, consideration was particularly given to size and coherence (whether the group had Wai claims, formal claimant definition of the group, population of the group, and number of hapū and marae in a group). For the purposes of Ngāpuhi hapū grouping confirmation, we consider these two criteria should be assessed using information more relevant to the Ngāpuhi context, including size of population and contemporary political/social cohesion, rather than whether a group has a legalistic claimant definition or specific Wai claims.
22. In addition to the criteria of size and coherence, we propose three additional criteria not used when large natural grouping assessments were last made in 2012. "What remains" is intended to ensure that all hapū, hapū members, marae, claims of Ngāpuhi and rohe will eventually be covered by a mandate of a hapū grouping. Grouping capability and levels of support are intended to ensure that if a hapū grouping is confirmed, a rūpū is in place that can develop a mandate strategy that will have support of hapū membership. We consider these last two factors are necessary in the Ngāpuhi mandating context to ensure resource and time are not wasted on non-viable rūpū.

Treaty breach assessment should be conducted at the same time as hapū grouping assessment

23. Although not part of large natural group assessment, the Crown typically also assesses whether historical Treaty breaches exist that require a negotiated settlement with a particular group. In the case of Ngāpuhi, we are satisfied on the basis of breach concessions in the Waitangi Tribunal's (the Tribunal) Te Paparahi o te Raki (Northland) District Inquiry that all hapū and regions of Ngāpuhi have been subjected to Treaty breaches. We propose that high-level breach assessments be made alongside hapū grouping confirmation assessment to give Ministers more information on whether the hapū grouping is likely to be suitable to negotiate the settlement of their claims.

The Waitangi Tribunal's minimum standards also need to be accounted for

24. The Crown has been criticised in the Ngāpuhi mandating context by the Tribunal for not applying the "large natural grouping policy" flexibly and according to the tikanga of affected groups. The Tribunal has recommended that as a "minimum standard" the Crown should inform itself of the history and tikanga of the hapū it is dealing with. The proposed approach to hapū grouping confirmation in this paper accounts for these Tribunal findings, primarily because it responds to proposals from the hapū themselves. In making assessments of hapū groupings, we will need to take particular account of what the hapū say about themselves, especially customary evidence presented in the Tribunal's Te Paparahi o Te Raki Inquiry.

The development of mandate proposals across ngā hapū o Ngāpuhi

We are working with Ngāpuhi groups to develop proposals

25. We are currently working with groups from across Ngāpuhi to support their work to develop mandate proposals. These regions are: Hokianga, Whangāroa, Kaikohe, Waimate-Taiāmai, Mangakāhia, Whangarei and Te Pēwhairangi. We are also working with the Ngāti Hine confederation

out of scope

26. Groups in Mangakāhia, Kaikohe and Waimate-Taiāmai are in their very beginning of stages of forming and preparing proposals. In Hokianga not all hapū are covered by the groups preparing proposals. Whangarei hapū are not actively working on a mandate proposal. Updates on progress across the regions for comparative purposes are provided for your information at Appendix One.

Hapū divisions have resulted from the recognition of the Tūhoronuku Independent Mandated Authority mandate

out of scope

30. Many of the divisions between hapū across all regions of ngā hapū o Ngāpuhi have come about through the recognition of the TIMA mandate and the evolved mandate processes over the last decade. This has resulted in a high level of distrust of the Crown by ngā hapū o Ngāpuhi and caused deep divisions between groups who supported these processes and those who did not.

out of scope

This new approach to mandating is already going some way to resolving those trust issues, with groups also meeting together to work through those internal divisions.

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