



## Ka tika ā muri, ka tika ā mua

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

# Healing the past, building a future

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

**Office of Treaty  
Settlements**

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

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## The Office of Treaty Settlements

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

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You can also view this booklet and other information about the Office of Treaty Settlements and settlements on our website at **[www.ots.govt.nz](http://www.ots.govt.nz)**. By using the word search you can also find all the booklet text on subjects you are interested in. If you have a question for us, you can use the email letter box. We welcome your questions and any feedback.

## He Inoinga

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

Āmene

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

Amen

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

## Acknowledgements

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

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## Overview of this guide

This edition of *Healing the past, building a future* updates and replaces the first edition published in 1999. Changes have been made to reflect the development of policy and practice since that time. *Healing the past, building a future* is a practical guide to the negotiation and settlement of historical grievances under the Treaty of Waitangi. It also sets out an overview of the historical background to Treaty grievances and settlements, and explains how settlement policy has developed. The first edition of *Healing the past, building a future* was widely read, not only by claimants and their advisers, but also by all those with an interest in the resolution of Treaty claims. The Office of Treaty Settlements hopes this edition will be equally useful. *Healing the past, building a future* is also available in electronic form at [www.ots.govt.nz](http://www.ots.govt.nz).

# Contents

1	Text of the Treaty of Waitangi – Te Tiriti o Waitangi
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## SETTLEMENT FRAMEWORK

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

## THE NEGOTIATIONS PROCESS

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

## SETTLEMENT REDRESS

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

## SUPPORTING INFORMATION

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

# Text of the Treaty of Waitangi – Te Tiriti o Waitangi

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

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## The text in Māori

### TE TIRITI O WAITANGI

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

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

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

### KO TE TUATAHI

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

### KO TE TUARUA

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

### KO TE TUATORU

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

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

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

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

Ko nga Rangatira o te wakaminenga.

## The text in English

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

### ARTICLE THE FIRST

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

### ARTICLE THE SECOND

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

### ARTICLE THE THIRD

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

W. HOBSON, Lieutenant Governor.

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

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

## English translation of the Māori text by Professor Sir Hugh Kawharu

Victoria, the Queen of England, in her concern to protect the chiefs and subtribes of New Zealand and in her desire to preserve their chieftainship<sup>1</sup> and their lands to them and to maintain peace<sup>2</sup> and good order considers it just to appoint an administrator<sup>3</sup> one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands<sup>4</sup> and also because there are many of her subjects already living on this land and others yet to come.

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

So the Queen has appointed me, William Hobson a Captain in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents<sup>5</sup> to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

### THE FIRST

The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government<sup>6</sup> over their land.

### THE SECOND

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise<sup>7</sup> of their chieftainship over their lands, villages and all their treasures<sup>8</sup>. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell<sup>9</sup> land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

### THE THIRD

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties<sup>10</sup> of citizenship as the people of England<sup>11</sup>.

(Signed) W. Hobson  
Consul and Lieutenant-Governor

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

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

*(Footnotes on next page)*

## FOOTNOTES

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

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

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



# Settlement framework

In this part we look at:

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

## The status of the Treaty of Waitangi today

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

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

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

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

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

## Introduction

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

## The signing of the Treaty of Waitangi

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



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

The key features of the Treaty are as follows:

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

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

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

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

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

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

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

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## **The New Zealand Company purchases**

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

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

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

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## **Pre-emption waiver purchases, and 'surplus lands'**

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

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

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## Pre-1865 Crown purchases

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

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

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

## War and land confiscation (raupatu)

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

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

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

## The introduction and operation of the Native Land Court

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

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

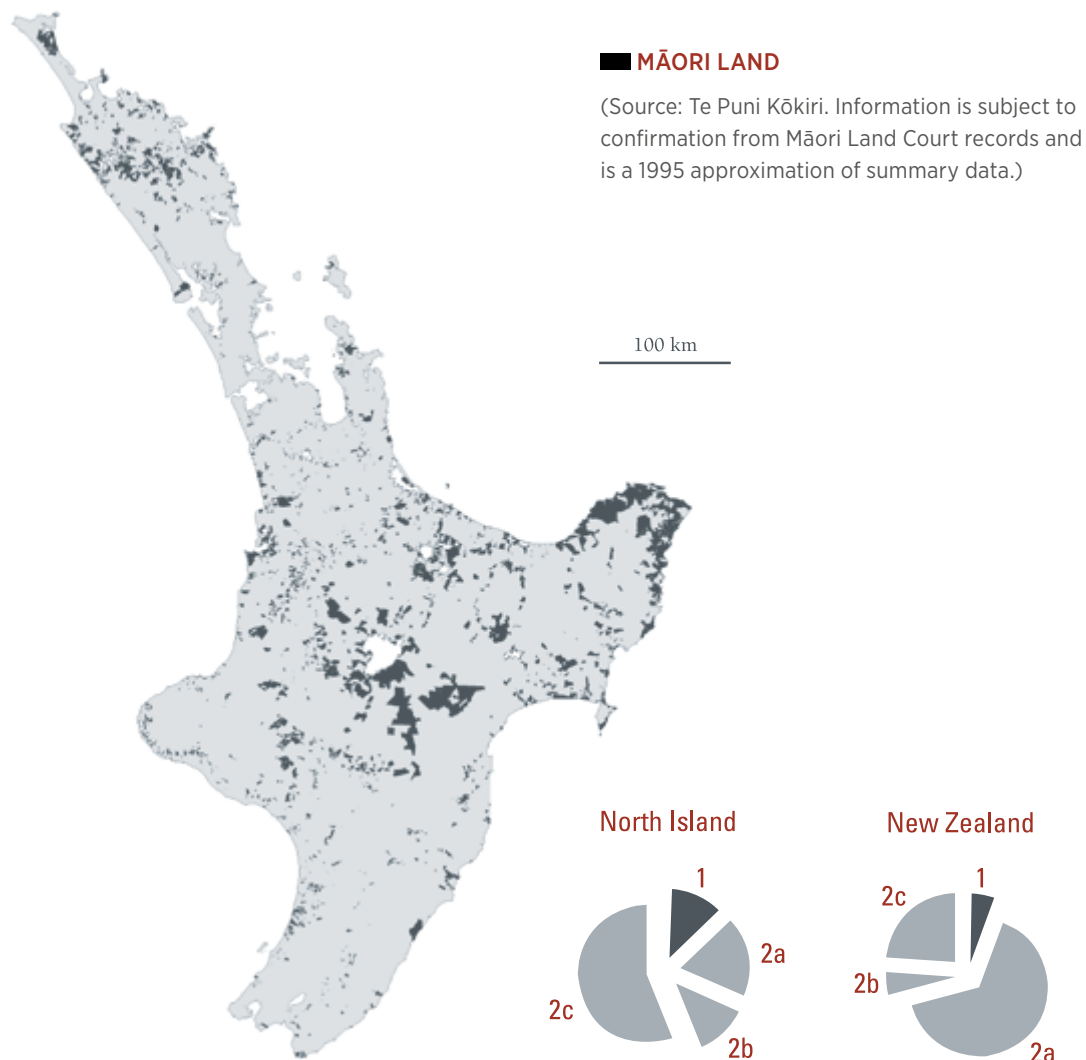
These and other criticisms may prove valid when considering the operations of the Native Land Court system in particular districts. The long-term results of the system are clear. By the end of the 19th century, many hapū were left with insufficient lands for their subsistence and future development.

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

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

## 20th century

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



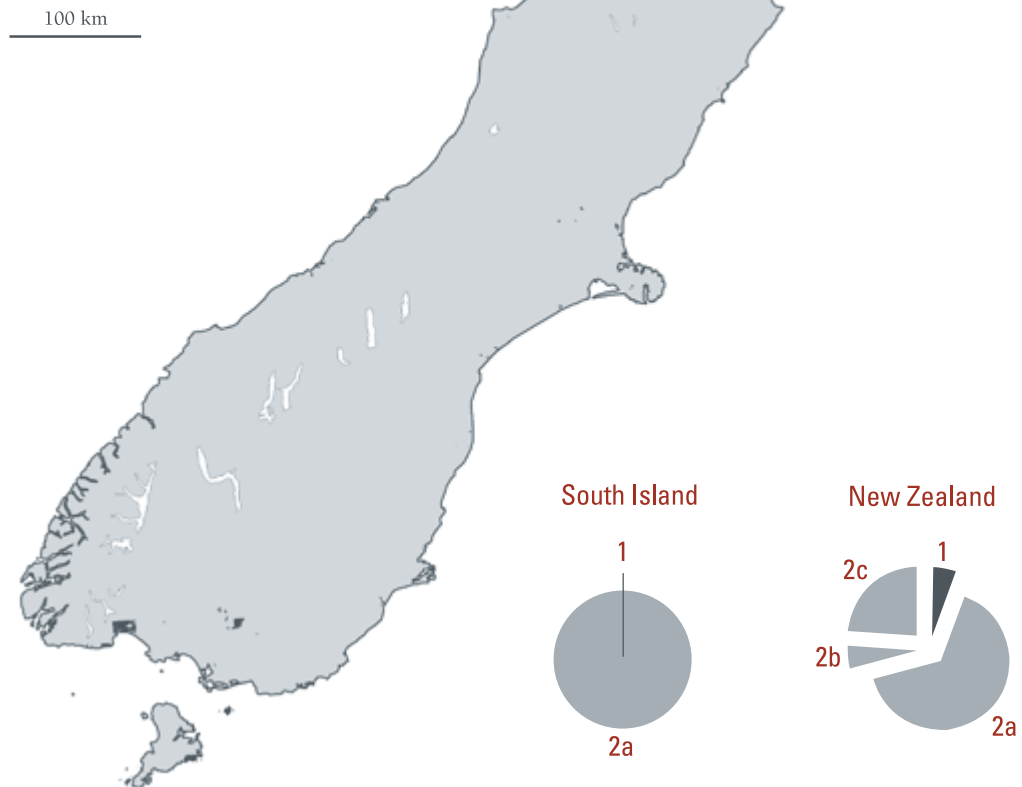
	North Island		New Zealand	
	Sq Km	%	Sq Km	%
1. Māori Land	14,500	12.5	15,000	6
2. Alienated Land				
2a. Crown Purchases to 1860	21,500	19	174,000	65
2b. Raupatu (Confiscations)	14,000	12.5	14,000	5
2c. Post-1865 Purchases/Alienations	64,000	56	64,000	24
<b>Total Land</b>	<b>114,000</b>	<b>100</b>	<b>267,000</b>	<b>100</b>

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

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

## **MĀORI LAND**

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



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

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

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



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

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

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

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

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

## Conclusion

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

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

# Milestones in the development of Treaty settlements policy

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

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## Establishment of the Waitangi Tribunal

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

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

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

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

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

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



*Waitangi Tribunal in hearing*

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

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## 1986 – Cabinet requirement to consult Māori

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

## Treaty principles in the courts and legislation

### THE 'LANDS' CASE (1987)

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

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

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

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

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

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

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

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

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

## Development of settlement policy and structures

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

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

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

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

Figure 1.3: development of Treaty settlement policy

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

# Who or what is the Crown?

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

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

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

## How the Crown operates in negotiations

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

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

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

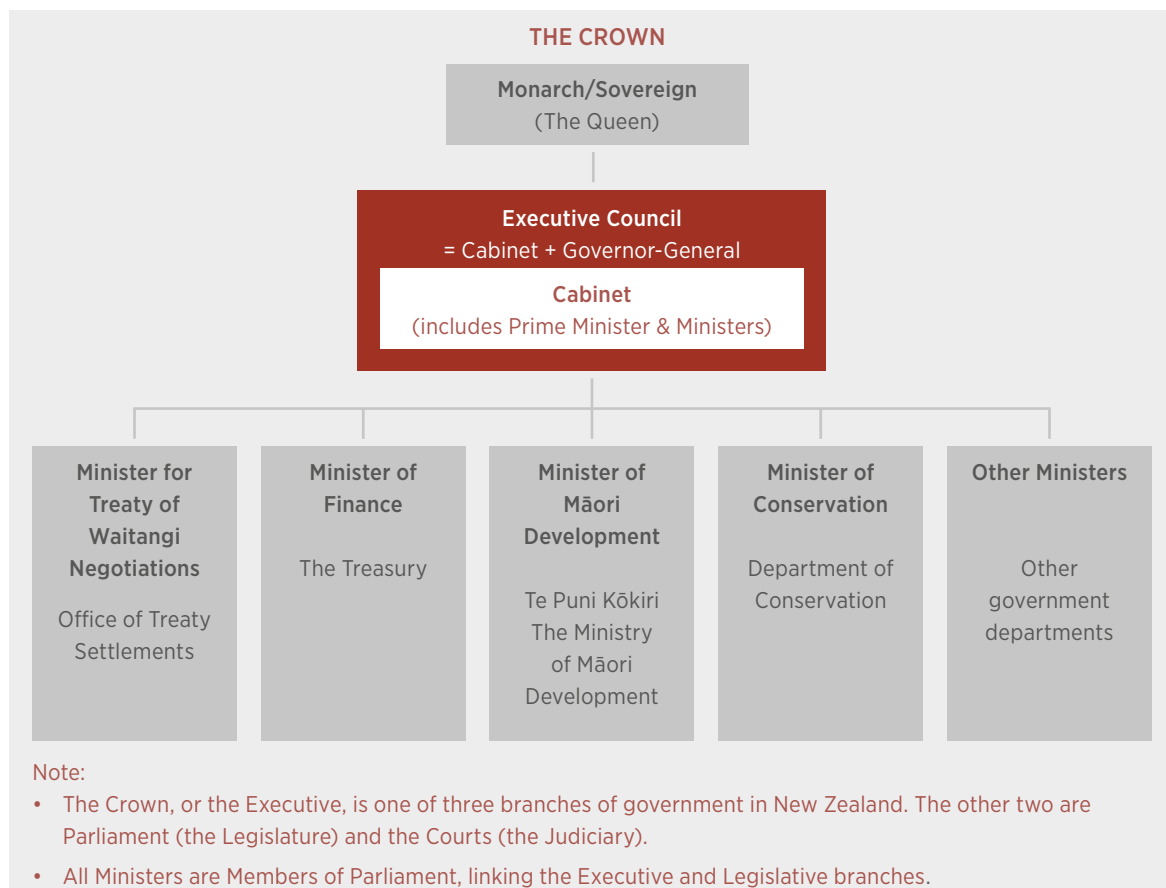


Figure 1.4: the Crown

# About the Office of Treaty Settlements

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

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## What does OTS do?

The main jobs of OTS are to:

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

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

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

## Structure and people

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

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

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

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

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

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

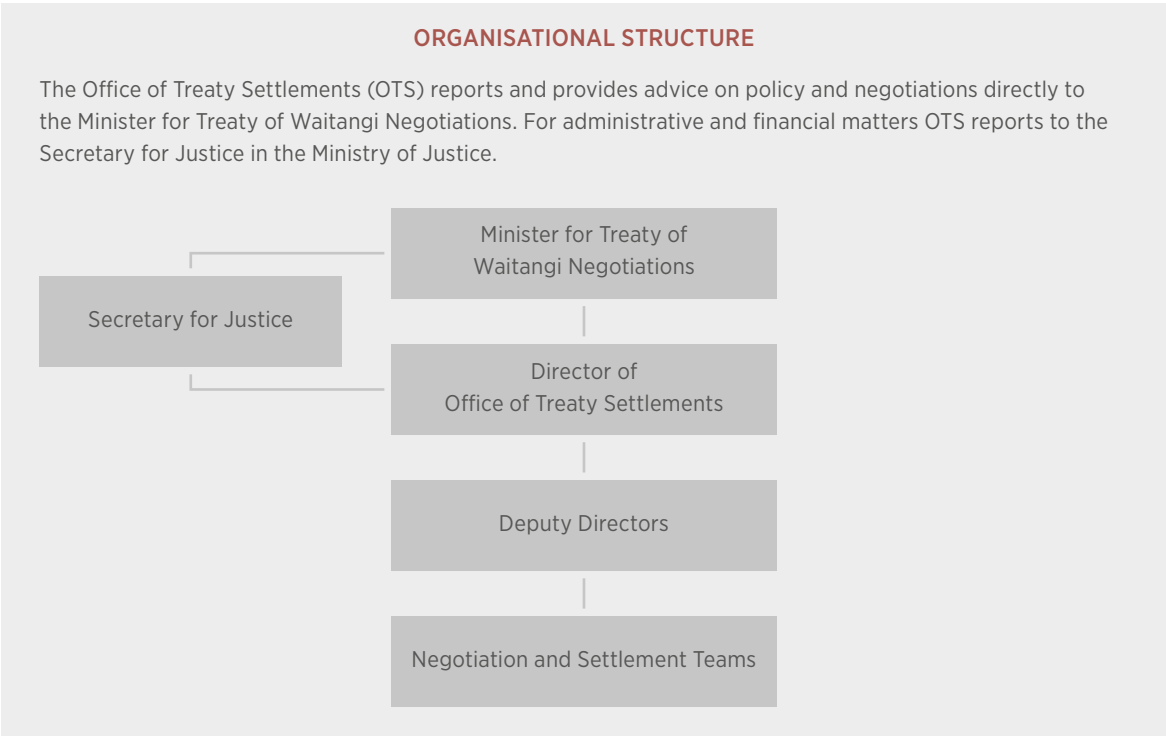


Figure 1.5: the Office of Treaty Settlements organisational structure

# Progress with Treaty settlements so far

## At a glance: summary of Treaty settlements to date

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

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

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

The table on the next page sets out the settlements achieved to date. The dollar amounts do not include claimant funding or the value of any land that the Crown may have gifted to a claimant group. The figure of \$170 million for Commercial Fisheries includes a sum of \$20 million, an estimate of the value of Māori entitlements to 20% of the quota for any new species brought under the Quota Management System.

In addition, there have been several part-settlements. These include the purchase and transfer by the Crown of cultural redress property of particular significance to a claimant group, and the transfer of a number of railway properties to the relevant claimant groups, as part of their future Treaty settlement package.

Please contact OTS directly for further details about individual settlements. Information on individual settlements is also available at the OTS website ([www.ots.govt.nz](http://www.ots.govt.nz)).

### Notes for following figure 1.6

1. Includes \$650,000, which was paid in advance of settlement in 1990.
2. Excludes \$7.3 million paid in to capitalise the annuity Te Arawa received from the Crown and address any remaining annuity issues.
3. The Central North Island settlement provides on-account redress for a collective of groups, including the Affiliate Te Arawa Iwi and Hapū. As each of these groups concludes comprehensive settlements, their share of the CNI settlement will be listed separately, and the total value listed against the CNI settlement will be reduced accordingly. Ngāti Rangitihi joined the CNI Collective on 4 November 2008, increasing the value of the CNI settlement.
4. The Waikato River settlement provides funding for co-management, clean up of the Waikato River and other initiatives. These payments are not redress in settlement of Waikato-Tainui's historical claims.
5. Excludes ex gratia payments and redress provided through other appropriations.
6. Provides for co-management of Upper Waikato River. This is not redress in settlement of historical claims.
7. Financial redress is to be provided in the comprehensive settlements for the individual iwi.
8. Total Settlement Redress is defined as Financial and Commercial Redress and generally doesn't include the value of gifted and cultural redress. Excludes individual on accounts less than \$1 million.



Figure 1.6: Summary of Treaty settlements to date

Settlement	Year of Deed	Value of Settlement
Waikato-Tainui Raupatu	1994/95	\$170,000,000
Waimakuku	1995/96	\$375,000
Rotomā	1996/97	\$43,931
Te Maunga	1996/97	\$129,032
Ngāi Tahu	1997/98	\$170,000,000
Ngāti Tūrangitukua	1998/99	\$5,000,000
Pouakani <sup>1</sup>	1999/00	\$2,000,000
Te Uri o Hau	1999/00	\$15,600,000
Ngāti Ruanui	2000/01	\$41,000,000
Ngāti Tama	2001/02	\$14,500,000
Ngāti Awa (and ancillaries)	2002/03	\$43,390,000
Ngāti Tūwharetoa (Bay of Plenty)	2002/03	\$10,500,000
Ngaa Rauru Kīitahi	2003/04	\$31,000,000
Te Arawa Lakes <sup>2</sup>	2004/05	\$2,700,000
Ngāti Mutunga (Taranaki)	2005/06	\$14,900,000
Te Roroa <sup>5</sup>	2005/06	\$9,500,000
Affiliate Te Arawa Iwi and Hapū	2007/08	\$38,600,000
CNI Forests on-account settlements <sup>3</sup>	2007/08	\$67,282,380
Taranaki Whānui ki te Upoko o te Ika	2007/08	\$25,025,000
Ngāti Apa (North Island)	2008/09	\$16,000,000
Waikato River <sup>4</sup>	2008/09	n/a
Ngāti Manawa	2009/10	\$12,207,780
Ngāti Whare	2009/10	\$9,568,260
Raukawa/Te Pūmautanga o Te Arawa Upper Waikato River Co-Management <sup>6</sup>	2009/10	n/a
Rangitane o Wairau	2010/11	\$24,830,388
Ngāti Kuia	2010/11	\$24,330,388
Ngāti Apa ki te Ra To	2010/11	\$27,830,388
Ngāti Pāhauwera	2010/11	\$20,000,000
Ngāti Porou	2010/11	\$90,000,000
Ngai Tamanuhiri	2010/11	\$11,070,000
Maraeroa	2010/11	\$1,800,000
Ngāti Makino	2010/11	\$9,600,000
Ngāti Manuhiri	2010/11	\$9,000,000
Ngāti Whatua o Kaipara	2010/11	\$22,100,000
Rongowhakaata	2011/12	\$22,240,000
Waitaha	2011/12	\$7,500,000

Settlement	Year of Deed	Value of Settlement
Raukawa	2011/12	\$50,000,000
Ngāti Whatua o Orakei	2011/12	\$18,000,000
Ngāti Koata	2011/12	\$11,760,000
Ngāti Rarua	2011/12	\$12,260,000
Ngāti Tama (Tainui Taranaki ki te Tonga)	2011/12	\$12,560,000
Te Atiawa (Tainui Taranaki ki te Tonga)	2011/12	\$12,260,000
Te Aupouri	2011/12	\$21,040,000
Te Rarawa	2011/12	\$33,840,000
Ngāi Takoto	2011/12	\$21,040,000
Ngāti Ranginui	2011/12	\$38,027,555
Tāmaki Makaurau collective settlement <sup>7</sup>	2011/12	n/a
Ngāti Toa	2012/13	\$70,610,000
Ngāti Rangiteaorere	2012/13	\$750,000
Ngāti Rangiwewehi	2012/13	\$6,000,000
Tapuika	2012/13	\$6,000,000
Tauranga Moana iwi Collective	2012/13	n/a
Ngāti Koroki Kahukura	2012/13	\$3,000,000
Ngāti Pukenga	2012/13	\$5,915,000
Maungaharuru Tangitu Hapu	2012/13	\$23,000,000
Ngāi Tuhoe	2012/13	\$168,923,000
Taranaki iwi on account	2012/13	\$14,000,000
Hauraki Collective on account	2012/13	\$53,500,000
Ngāti Haua	2012/13	\$13,000,000
Ngāti Kuri	2013/14	\$21,040,000
Ngāi te Rangi	2013/14	\$29,500,000
Te Kawerau ā Maki	2013/14	\$6,500,000
Whanganui River	2013/14	\$81,000,000
Rāngitane o Wairarapa-Tamaki Nui-ā-Rua on account	2013/14	\$6,500,000
Ngāruahine	2013/14	\$67,500,000
Te Atiawa	2013/14	\$87,000,000
Ngāti Tamaoho on account	2013/14	\$2,000,000
Ngāti Hineuru	2014/15	\$25,000,000

## Settlement of Māori interests in fisheries

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

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

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

This Deed provided that:

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

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

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

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



*Ngati Ruanui toa at Deed of Settlement signing*

# The Crown's general approach to Treaty settlements

## Definitions of historical and contemporary claims

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

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

## How are contemporary claims resolved?

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

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

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

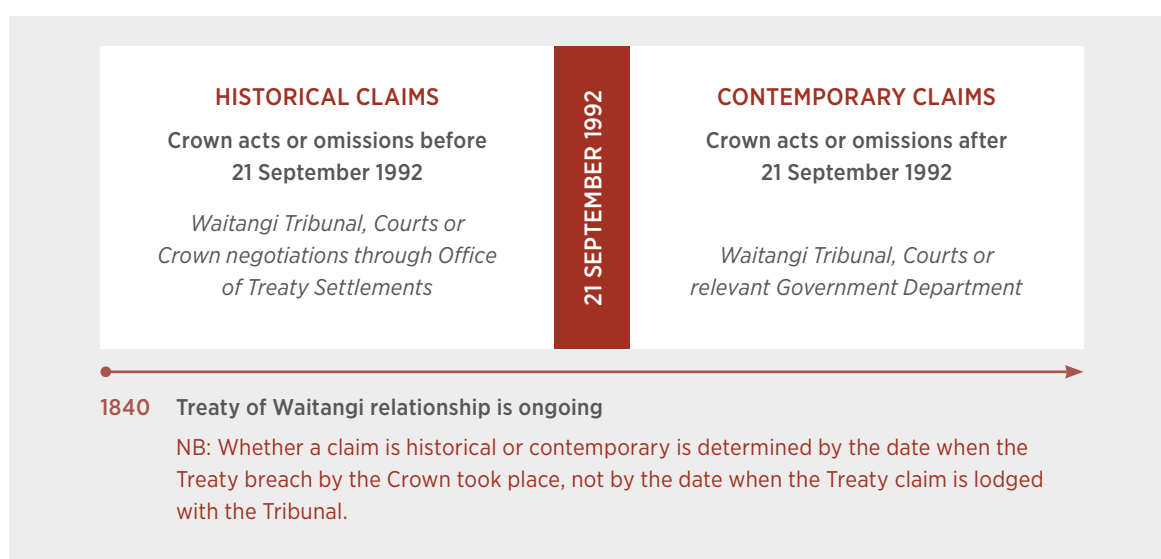


Figure 1.7: Historical and contemporary Treaty claims

## **Crown guidelines for the resolution of historical claims**

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

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

The guidelines are explained under the following headings:

### **THE CROWN WILL EXPLICITLY ACKNOWLEDGE HISTORICAL INJUSTICES**

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

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

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

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

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

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

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

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

## **THE CROWN MUST DEAL FAIRLY AND EQUITABLY WITH ALL CLAIMANT GROUPS**

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

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

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

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

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

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

## **Crown negotiating principles**

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

The principles are as follows.

### **GOOD FAITH**

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

### **RESTORATION OF RELATIONSHIP**

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

### **JUST REDRESS**

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

### **FAIRNESS BETWEEN CLAIMS**

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

### **TRANSPARENCY**

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

## GOVERNMENT-NEGOTIATED

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

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## The protection of potential settlement assets

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

There are two main types of landbank:

- *Crown Settlement Portfolio (CSP)* – all surplus Crown-owned land within the former raupatu or confiscation boundaries specified under the New Zealand Settlements Act of 1863 is automatically landbanked.
- *Regional landbanks* – operate in all areas not covered by the Crown Settlement Portfolio. Where land in these areas is declared surplus, it is advertised and any Māori who has a claim registered with the Tribunal may apply to have it included in the regional landbank. If the Crown agrees, the property is included in the appropriate landbank.

In the recent past the Crown also established a number of Claim Specific Landbanks (CSLB). Although these continue to operate, no further such landbanks are likely to be established now that the entire country is covered by regional landbanks.

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

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

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

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

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

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

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

## Key settlement policies

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

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

# The negotiations process

This part:

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



# Overview of the negotiations process

## The four steps of the negotiations process

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

### STEP 1 – PREPARING CLAIMS FOR NEGOTIATIONS

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

### STEP 2 – PRE-NEGOTIATIONS

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

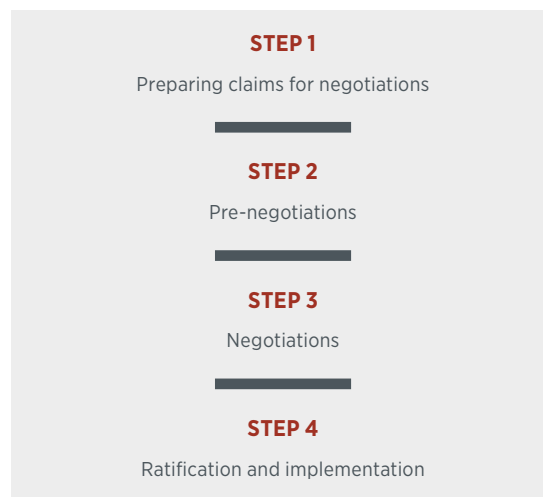


Figure 2.1: Four main steps of negotiations between a claimant group and the Crown

### STEP 3 – NEGOTIATIONS

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

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

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

#### STEP 4 – RATIFICATION AND IMPLEMENTATION

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

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

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### Key decision points for claimant groups and the Crown

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

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

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

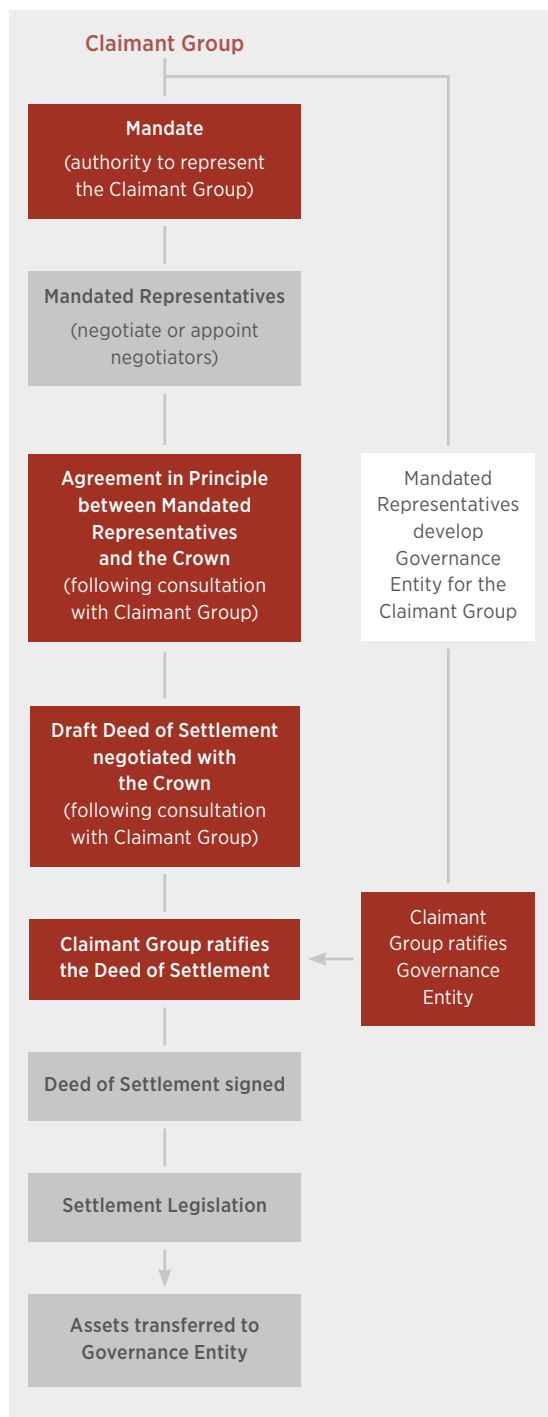


Figure 2.2: Key decision points for claimant groups

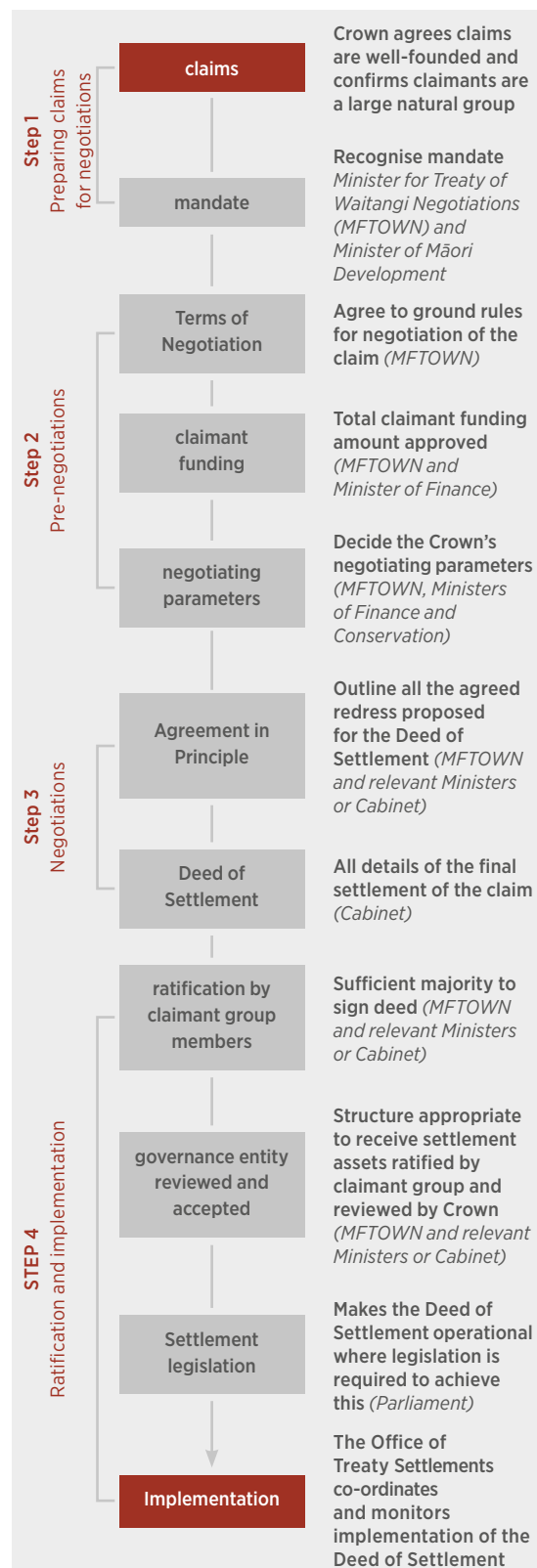


Figure 2.3: Key decision points for the Crown

# Negotiations and the Waitangi Tribunal process

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

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

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

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

## Taking a claim through the Waitangi Tribunal

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

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

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

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

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

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

Figure 2.4 below shows the two processes side by side:

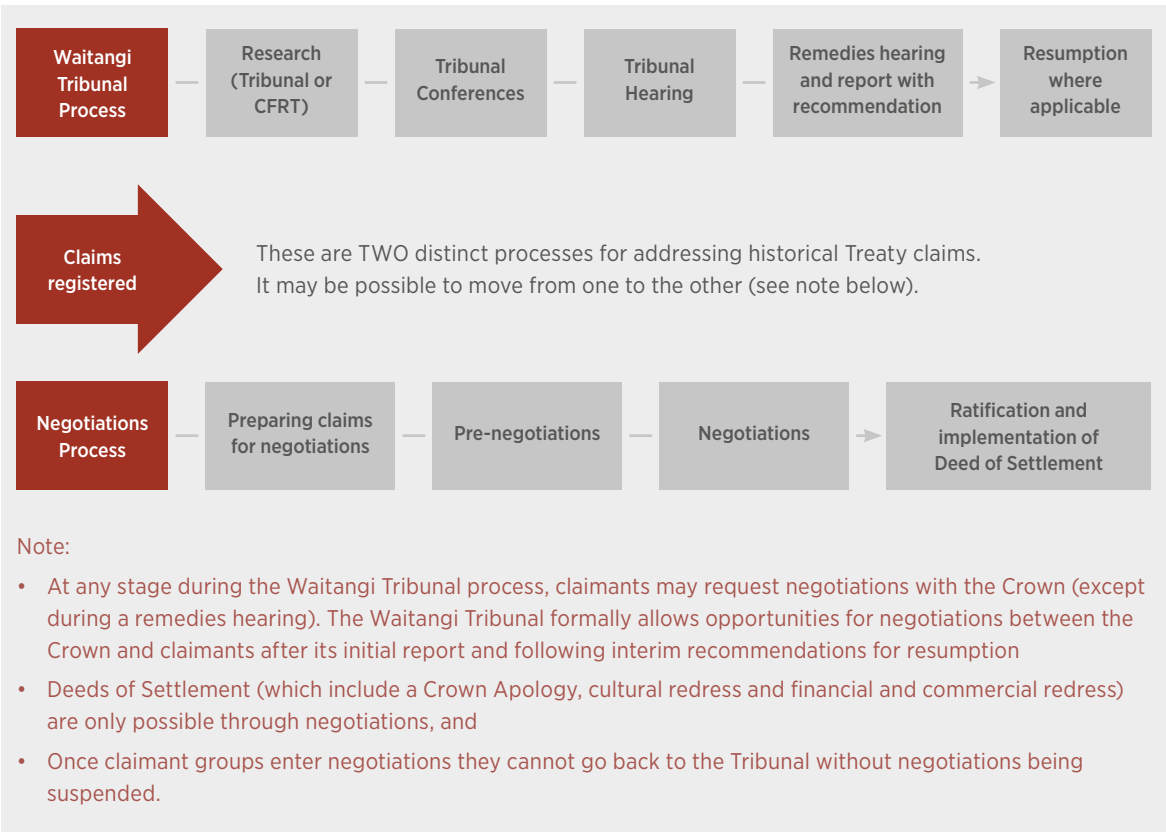


Figure 2.4: Comparison of the negotiations process and the Waitangi Tribunal process (more detail on resumption is given on pages 140–141).

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

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

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

## Step 1: Preparing claims for negotiations



Figure 2.5: Step 1 – preparing claims for negotiations

Preparing claims for negotiations involves:

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

### Starting out

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

## Types of claim and Crown readiness to negotiate

### TYPES OF CLAIM

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

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

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

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

### CROWN READINESS TO NEGOTIATE

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

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



## RELATIONSHIP BETWEEN TYPE OF TREATY BREACH AND REDRESS

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

## Assessing the research

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

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

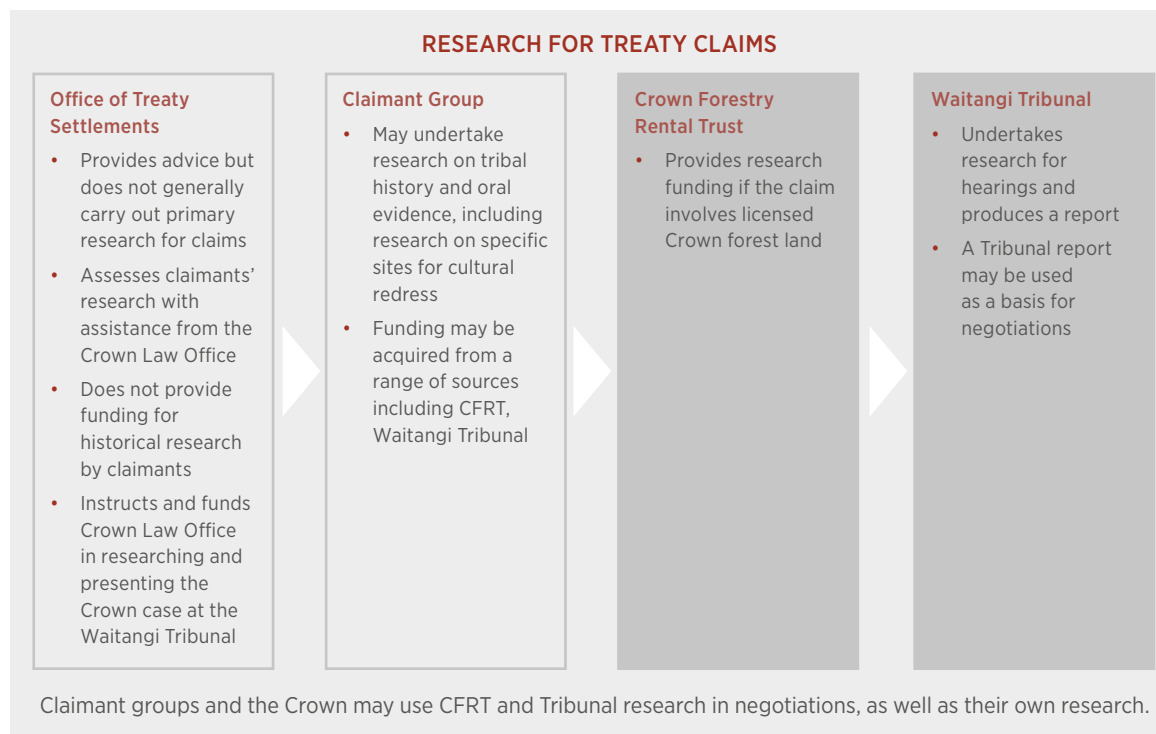


Figure 2.6: Research for Treaty claims

## NEED FOR EXTRA RESEARCH

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

## HELP WITH RESEARCH

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

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

## Comprehensive negotiations

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

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

## Negotiations with large natural groups

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

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

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

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## Hapū or whānau interests

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

## Mandating for negotiations

### WHAT IS MANDATING?

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

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

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

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

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

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

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

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

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

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

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

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

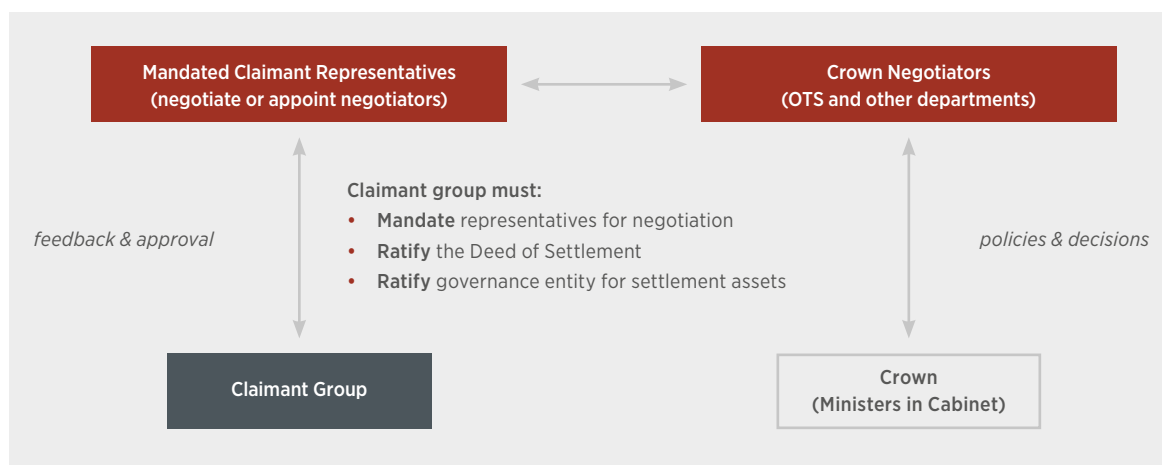


Figure 2.7: Links between negotiators and the groups they represent

## MANDATE IS FOR NEGOTIATIONS ONLY

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

## IMPORTANCE OF SEEKING EARLY ADVICE FROM OTS AND TE PUNI KŌKIRI

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

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

## Mandate recognition process

The Crown has developed a formal procedure to verify that:

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

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

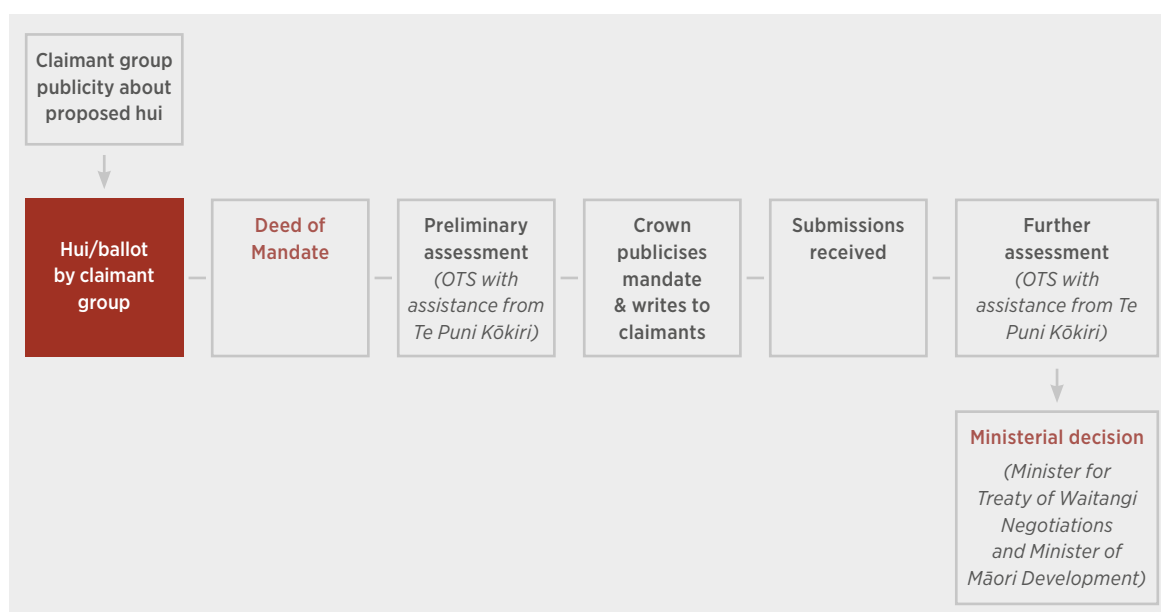


Figure 2.8: Mandate recognition process

## CONFIRMING THAT THE MANDATING PROCESS IS FAIR AND OPEN

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

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## What is a Deed of Mandate?

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

A Deed of Mandate:

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

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

## Key elements of a Deed of Mandate

### CLAIMANT GROUP DEFINITION

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

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

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

## CLAIMS TO BE SETTLED

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

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

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

## CLAIM AREA

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

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

## MANDATED REPRESENTATIVES

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

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

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

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

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

## Review of Deed of Mandate by OTS

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

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

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

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

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



## Deed of Mandate checklist

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

### 1. DEFINITION OF THE CLAIMANT GROUP

A statement clearly outlining who the claimant group is:

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

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

### 2. COMPREHENSIVE SETTLEMENT

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

### 3. MANDATED REPRESENTATIVES

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

### 4. HOW WAS THE MANDATE OBTAINED?

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

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

### 5. ACCOUNTABILITIES OF THE MANDATED REPRESENTATIVES

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

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

### 6. PROVIDING DEED OF MANDATE TO OTHER PARTIES

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

## **PUBLICISING THE DEED OF MANDATE**

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

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

## **DECISION BY MINISTERS**

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

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

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

## **HOW LONG DOES A MANDATE REVIEW TAKE?**

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

## Questions and answers about mandating

### WHAT FUNDING IS AVAILABLE FOR MANDATING?

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

### WHAT IF THERE IS A SERIOUS DISPUTE ABOUT MANDATE?

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

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

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

### WHAT IS A CONDITIONAL MANDATE?

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

### HOW CAN A MANDATE BE KEPT SECURE?

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

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

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

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

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

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

## Step 2: Pre-negotiations



Figure 2.9: Step 2 – pre-negotiations

During pre-negotiations:

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

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

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

### Claimant funding to help with the cost of negotiations

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

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

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

## THE APPROVAL PROCESS

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

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

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

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

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

## ACCOUNTABILITY FOR FUNDS

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

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

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

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

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

It is also preferable that:

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

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

## **TAX**

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

## **SAVINGS**

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

## **SHORTFALLS OR UNEXPECTED COSTS**

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

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

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

## **KEY REQUIREMENTS OF TERMS OF NEGOTIATION**

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

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

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

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

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

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

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

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

The Terms also highlight that negotiations can only continue if:

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

Other matters covered by the Terms are:

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

The Terms can also include:

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

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

### CLAIMANT GROUP NEGOTIATING BRIEF

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

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

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

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



## CROWN NEGOTIATING PARAMETERS

The Crown needs to:

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

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

Specific approval by Cabinet or Ministers is required for:

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

## CONFIDENTIALITY

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

## Overlapping claims or shared interests

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

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

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

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

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

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

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

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

## Exclusive redress

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

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

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

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

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

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

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

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## Non-exclusive redress

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

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

## Choosing and establishing a governance entity to manage settlement assets

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

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

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

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

## Step 3: Negotiations



Figure 2.10: Step 3 – negotiations

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

In this section we look more closely at:

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

### Negotiating structures and processes

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

#### THE CROWN

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

## CROWN NEGOTIATING TEAM

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

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

## CLAIMANT GROUP NEGOTIATING TEAM

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

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

## JOINT WORKING GROUPS

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

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

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



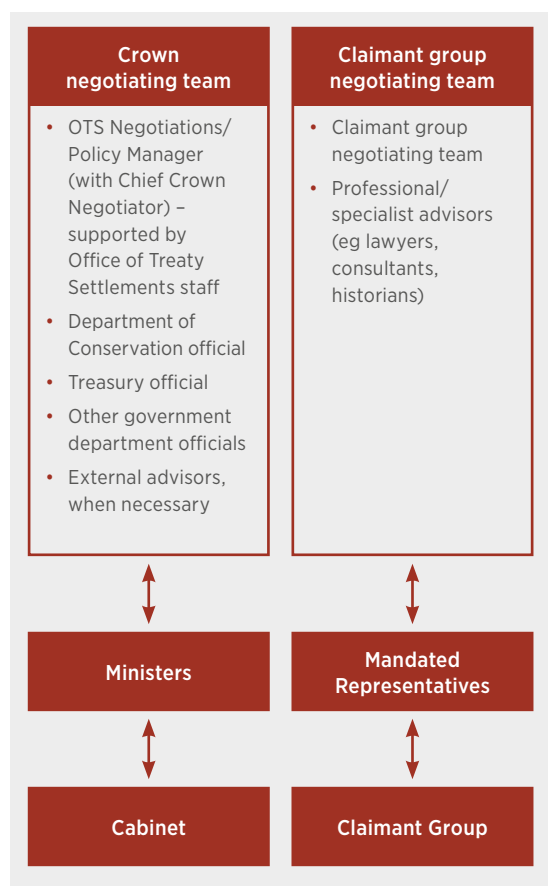
*Crown and Te Uri o Hau working group*

## Agreement in Principle

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

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

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



*Figure 2.11: Crown and claimant negotiating teams – accountability*

## **HISTORICAL ACCOUNT, ACKNOWLEDGEMENTS AND APOLOGY**

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

## **CROWN PROPERTIES AS REDRESS – TRANSFER OR VESTING OF SETTLEMENT PROPERTIES**

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

## **STATEMENTS OF IWI VALUES – OVERLAY CLASSIFICATIONS**

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

## **NAME CHANGES**

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

## **FINANCIAL AND COMMERCIAL REDRESS AMOUNTS**

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

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

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

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



*Signing of Ngati Ruanui Heads of Agreement*



## Deed of Settlement

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

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

The Deed can also include:

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

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



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

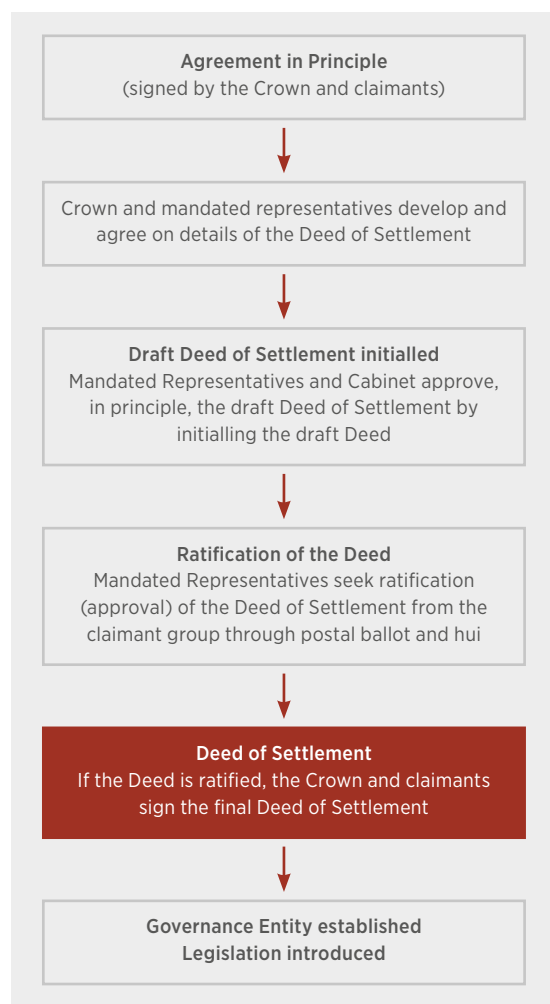


Figure 2.12: the process from Agreement in Principle to Deed of Settlement

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

## Hapū or whānau interests

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

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

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

## EXAMPLE – HAPŪ INTERESTS IN THE NGATI RUANUI DEED OF SETTLEMENT

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

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

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

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

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## Role of third parties in settlement negotiations

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

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

## LOCAL AUTHORITIES

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

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

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

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

## **PRIVATE INDIVIDUALS OR ORGANISATIONS**

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

## **THE GENERAL PUBLIC AND PUBLIC INTEREST GROUPS**

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

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

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

## Step 4: Ratification and implementation



Figure 2.13: Step 4 – ratification and implementation

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

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

## Ratification

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

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

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

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

## MAKING SURE THE RATIFICATION PROCESS IS ADEQUATE

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

## FUNDING FOR RATIFICATION

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

## HAPŪ CONSULTATION, HUI AND POSTAL BALLOTS

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

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

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

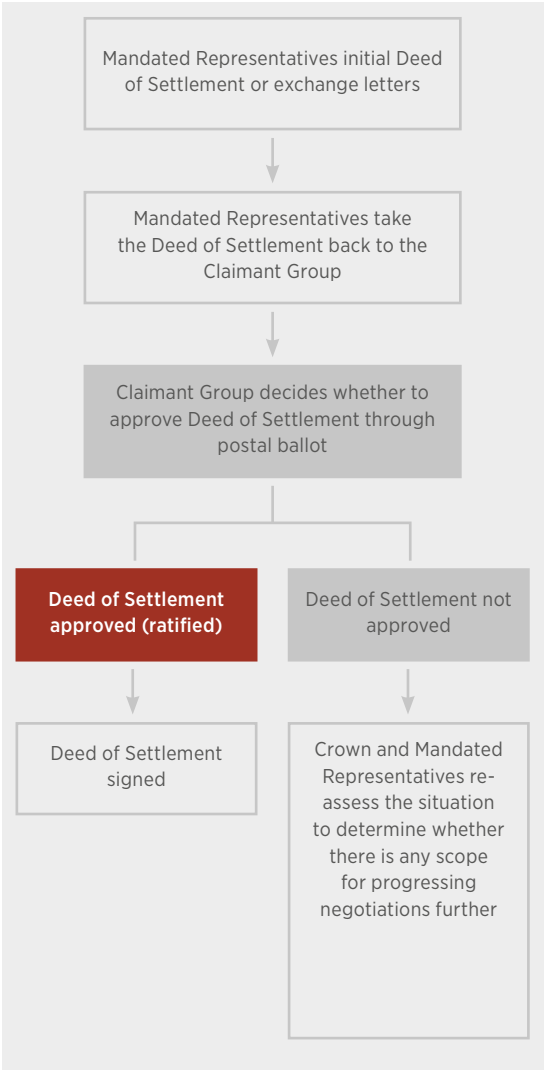


Figure 2.14: ratification of Deed of Settlement by the claimant group

### GETTING INFORMATION TO ALL MEMBERS OF THE CLAIMANT GROUP

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

### CLAIMANT GROUP'S DECISION

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

### SIGNING THE DEED OF SETTLEMENT

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



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

## Governance entities – Crown principles

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

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

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

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

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

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

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## Choosing a governance entity

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

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

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

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

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

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

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

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

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

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

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

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

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

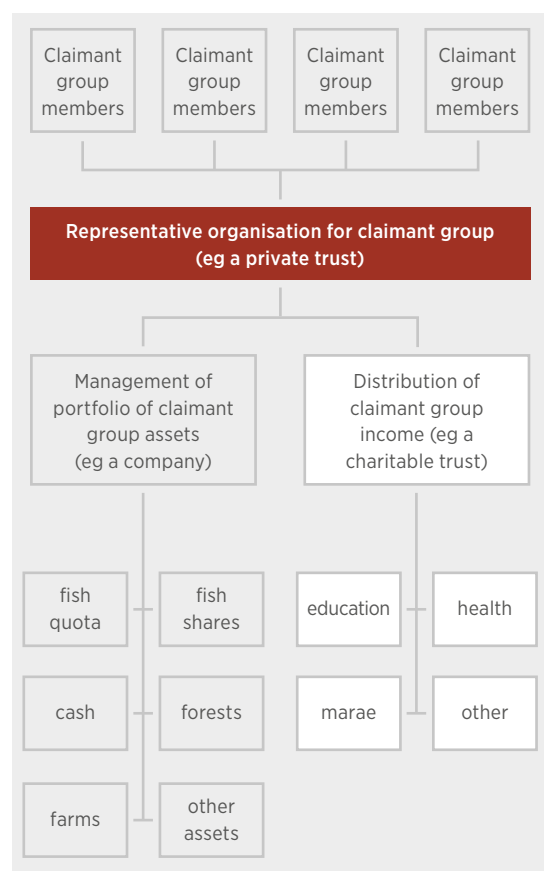


Figure 2.15: example of a governance entity for distribution of settlement assets (based on a model developed by Te Ohu Kai Moana)



## Reviewing and ratifying a governance entity

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

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

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

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

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

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

## Twenty questions on governance

### INFORMATION REQUIRED IN DISCLOSURE MATERIAL FOR GOVERNANCE ENTITIES

In the twenty questions:

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

### GENERAL

1. **WHAT IS THE PROPOSED GOVERNANCE ENTITY AND ITS STRUCTURE?**
  - Briefly describe the governance entity, any bodies accountable to it (such as asset management and benefit distribution bodies), and the relationship between the governance entity and those bodies.
2. **HOW WAS THE PROPOSED GOVERNANCE ENTITY DEVELOPED?**
  - What opportunities were there for beneficiaries of the settlement to provide input in the development of the proposals?, and
  - To what extent were matters of tikanga and kawa considered in the development of the governance entity?

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

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

### REPRESENTATION

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

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

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

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

6. **HOW OFTEN AND HOW WILL THE REPRESENTATIVES CHANGE?**

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

### ACCOUNTABILITY

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

- What are the duties and obligations of the representatives?

- Do the governance entity and any bodies accountable to it have to act exclusively for the benefit of beneficiaries?, and
- Who exercises control over any bodies accountable to the governance entity?

**8. WHICH DECISIONS WILL MEMBERS HAVE A SAY IN AND HOW?**

- As well as having a say in who the representatives on the governance entity will be, will members have a say in any decisions made by the governance entity?
- What notice, quorum and other relevant provisions will there be relating to meetings of members?
- What voting rights do members have at hui called by the governance entity (such as the AGM)?, and
- What majority will be required to pass a resolution at a meeting of members?

**9. HOW ARE DECISIONS MADE BY THE GOVERNANCE ENTITY?**

- How often do the representatives meet?
- What quorum and other relevant provisions will there be relating to meetings of the governance entity?
- How are these meetings publicised?, and
- Can members attend those meetings and what rights do they have at those meetings?

**10. WHO WILL MANAGE THE REDRESS RECEIVED IN THE SETTLEMENT?**

- Will different bodies manage different aspects of the redress?
- Are the relationships between the representational, commercial and social functions of the governance entity clearly defined?, and
- Are there any limitations on management decisions on holding or using assets, for example, do any transactions require the consent of members?

**11. WHO WILL DETERMINE WHAT BENEFITS ARE MADE AVAILABLE TO BENEFICIARIES?**

- Can the function of determining benefits be delegated by the governance entity?

**12. WHAT ARE THE CRITERIA FOR DETERMINING HOW BENEFITS ARE ALLOCATED AND DISTRIBUTED?**

- Are these criteria set in the constitution of the governance entity or are the decisions left to the representatives?

**13. HOW WILL THE PEOPLE MANAGING ASSETS AND DETERMINING BENEFITS BE ACCOUNTABLE TO BENEFICIARIES?**

- Will there be regular hui or other reporting processes for the representatives to report to beneficiaries?
- What reports will beneficiaries receive?
- How will roles and responsibilities be separated to clearly define the limits of power that each office holder has?
- Are there any limitations on liability of the representatives?
- Can the representatives be directors or employees of any bodies accountable to the governance entity?, and
- What would happen if a representative had a conflict of interest in a decision or transaction of the governance entity?

**14. WHAT ARE THE RULES UNDER WHICH THE GOVERNANCE ENTITY AND ANY BODIES ACCOUNTABLE TO IT OPERATE?**

- How do members get access to the rules (trust deeds or constitutions) of the governance entity and any asset management and benefit distribution bodies?, and
- What legislation is particularly relevant to the rules (such as Companies Act 1993, Trustee Act 1956, Perpetuities Act 1964, Te Ture Whenua Māori Act 1993)?

**15. ARE THERE ANY INTERIM GOVERNANCE ARRANGEMENTS IN THE PERIOD BETWEEN THE ESTABLISHMENT OF THE GOVERNANCE ENTITY AND THE DATE THAT THE SETTLEMENT ASSETS ARE TRANSFERRED? IF SO, WHAT ARE THEY?**

- Who will represent beneficiaries of the settlement during the interim period?
- What can they do?, and
- Will there be interim elections?

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

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

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

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

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

**TRANSPARENCY**

**19. HOW OFTEN WILL ACCOUNTS BE PREPARED AND AUDITED?**

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

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

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

**Settlement legislation**

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

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

**DRAFTING SETTLEMENT LEGISLATION**

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

**PARLIAMENTARY PROCESS**

Figure 2.16 shows the various stages in passing a bill.



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

## SELECT COMMITTEE CONSIDERATION

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

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

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

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

## ROLE OF OTS IN THE LEGISLATIVE PROCESS

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

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

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

## SECOND READING, COMMITTEE OF THE WHOLE HOUSE AND THIRD READING

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

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

## OTHER STEPS TO FINALISE THE SETTLEMENT

Three other steps must be taken to finalise the settlement:

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



*Ngāi Tahu Third Reading*

## Implementation – making the settlement happen

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

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

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

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

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

Among the Crown's key responsibilities are:

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

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



*Tainui's Te Kauhanganui building at Hopuhopu*

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## Building a future

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

# Settlement redress

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

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



# Settlement redress

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

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

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

## Main aims of settlements

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

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

How do settlements give effect to these aims?

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

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

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

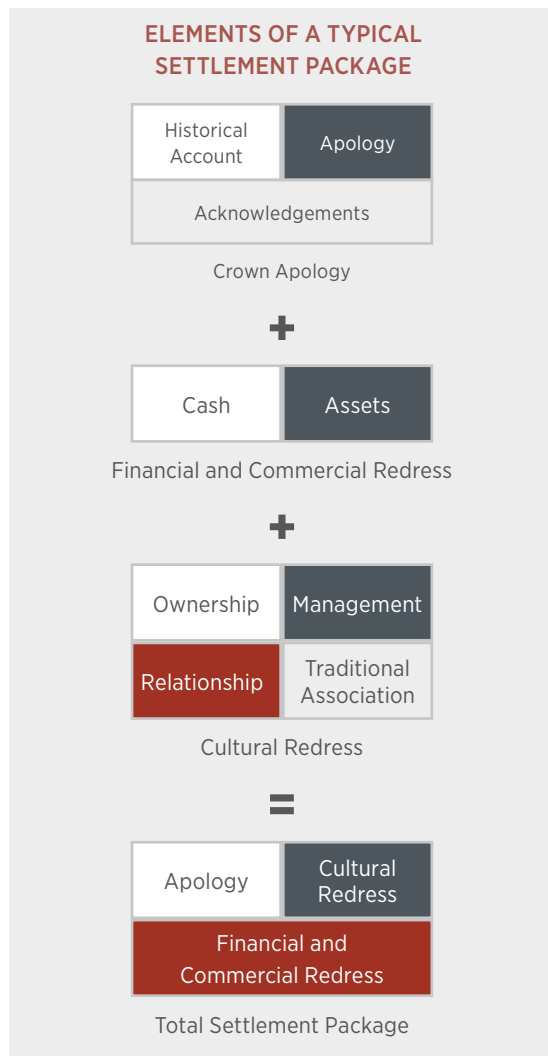


Figure 3.1: elements of a typical settlement package

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

# Historical account, Crown acknowledgements of breach and apology

## Significance

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

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

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

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

## Contents of the historical account

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

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

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

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## Content of the Crown acknowledgements

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

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

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

## Contents of the apology

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

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

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

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

## Development of the historical account, Crown acknowledgements and apology

### PROCESS

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

### CONCESSIONS ARE MADE ON A 'WITHOUT PREJUDICE' BASIS

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

# Financial and commercial redress

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

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

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## Aims of financial and commercial redress

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

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

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

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

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

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

## DISCONTINUANCE OF THE SETTLEMENT ENVELOPE

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

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

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

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

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

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

## What redress is included in the quantum?

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

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

It does not include:

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

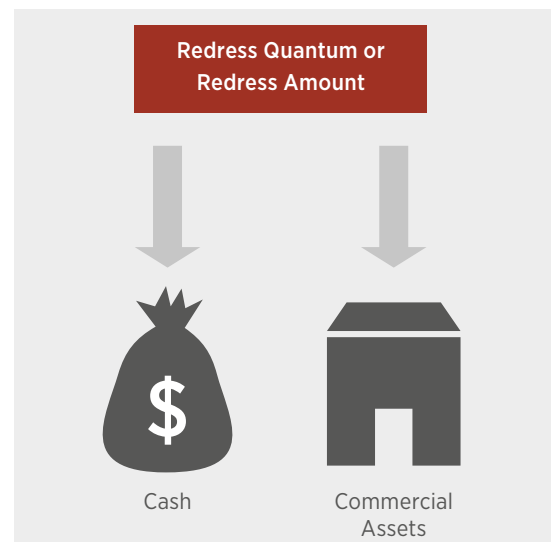


Figure 3.2: elements of financial and commercial redress

## Negotiating the redress quantum

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

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

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

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

### FACTORS THE CROWN TAKES INTO ACCOUNT IN DEVELOPING ITS QUANTUM OFFER

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

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

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

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

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

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

## CASH

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

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

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## Purchase of Crown properties – OTS landbanks and surplus departmental property

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

OTS has a system of landbanks covering the whole country that hold a wide range of Crown properties available for use in settlements. The total value of these properties as at December 2014 was \$372.2 million. These properties have usually been placed in the regional landbanks at the request of claimant groups after they have been declared surplus to requirements by government departments. They are, therefore, expected to be the first choice of many claimant groups when they are considering their commercial redress. Because they have been set aside specifically for this purpose, choosing these properties allows claimant groups to receive properties that would otherwise have been sold.

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

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

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

## VALUATION

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

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



## Right of First Refusal

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

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

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

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

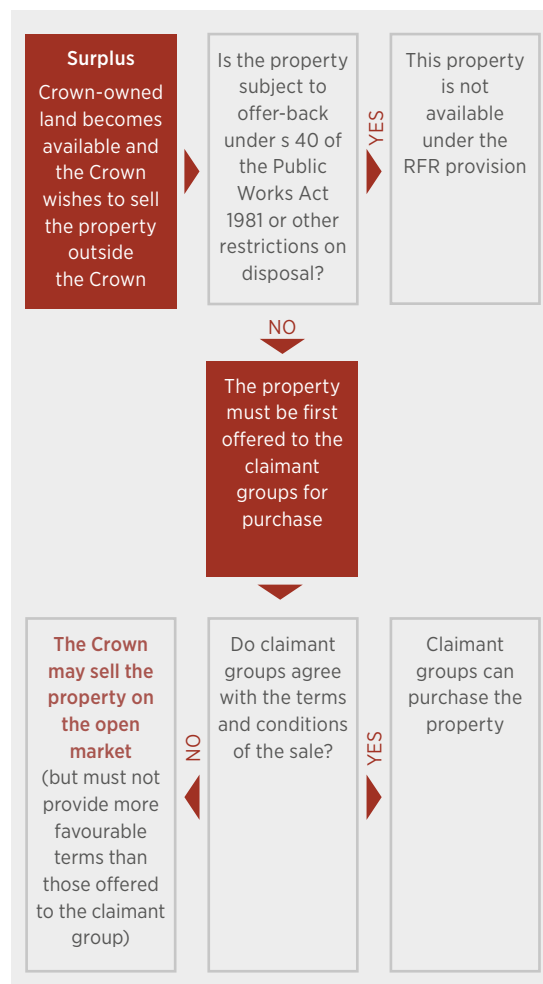


Figure 3.3: the Right of First Refusal

### HOW A RIGHT OF FIRST REFUSAL WORKS

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

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

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

## Sale and lease back

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

## Use of licensed Crown forest land

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



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

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

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

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

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

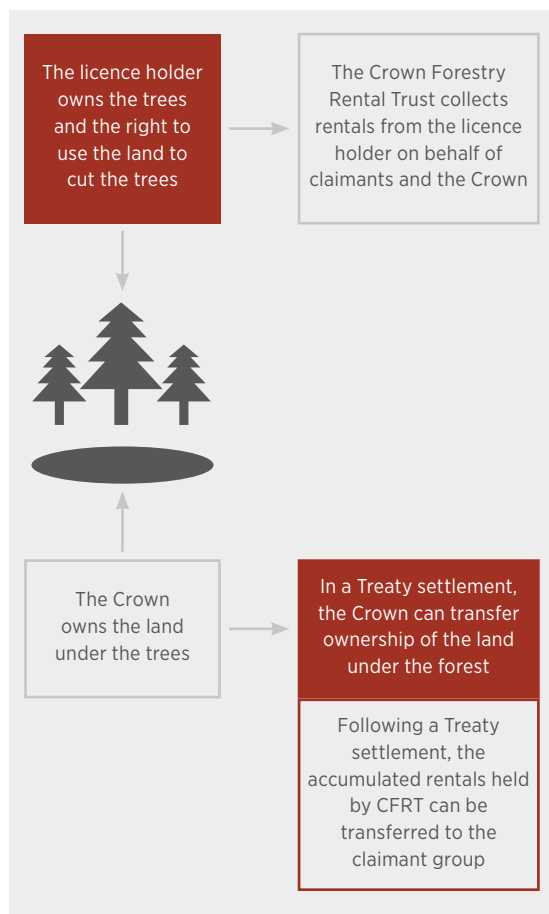


Figure 3.4: licensed Crown exotic forest land in settlement

## State-owned enterprises and Crown entity land

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

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

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

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

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

- the property must be cleared of any offer-back rights under section 40 of the Public Works Act 1981, or of other overriding third party property rights, and
- any overlapping claims must have been addressed to the satisfaction of the Crown.

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

## SPECIALIST ADVISERS

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

## Natural resources including geothermal and mineral resources

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

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

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

### SURPLUS NATURAL RESOURCE-BASED ASSETS

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

## Taxation and interest on settlement redress

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

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

### INCOME GENERATED FROM SETTLEMENT REDRESS IS SUBJECT TO APPLICABLE TAX

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

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

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

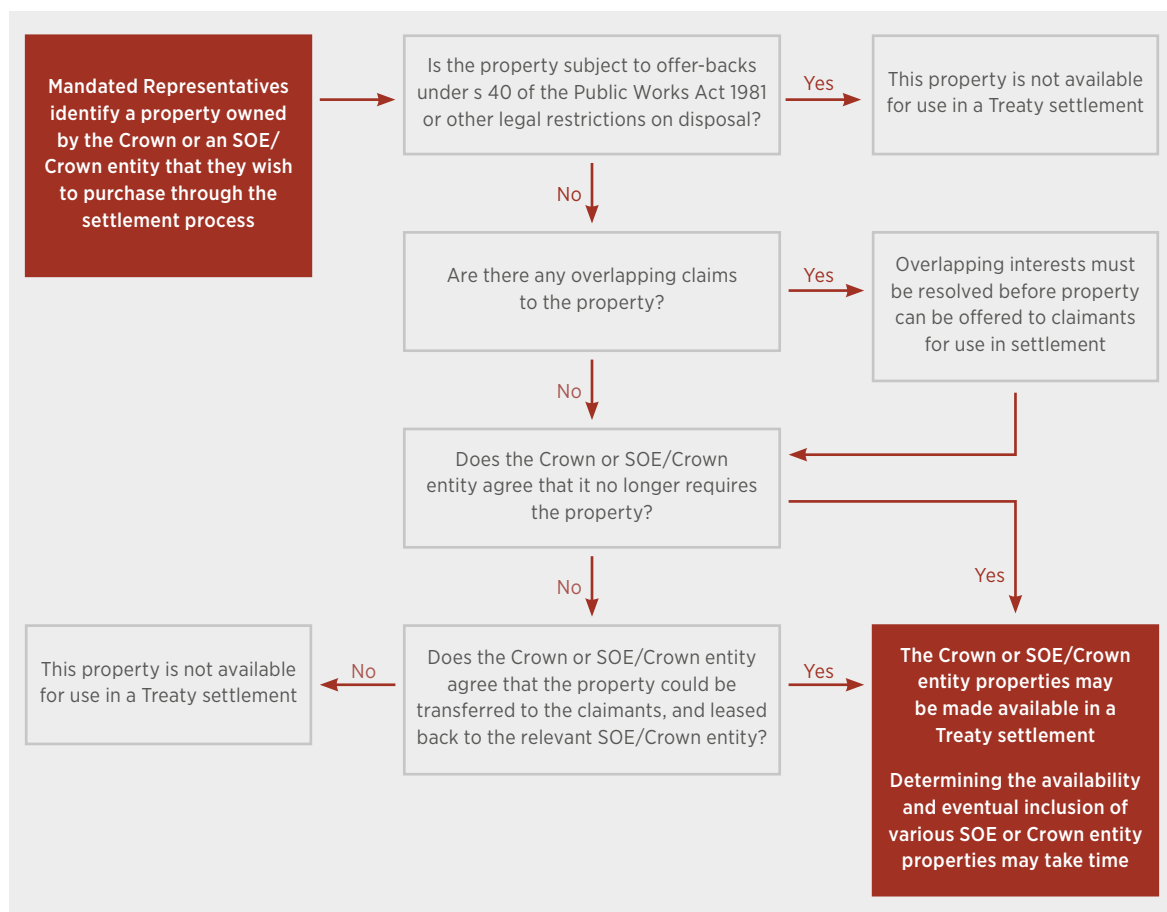


Figure 3.5: Selection process for commercial properties

# Cultural redress

## Introduction

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

This section:

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

## Significance of cultural issues in negotiations

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

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

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## Aims of cultural redress

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

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

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

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

## Negotiations process for cultural redress

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

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

### IDENTIFYING INTERESTS

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

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

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

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

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

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

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

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

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

Although the opening positions are opposite, if the parties' interests are communicated effectively, it is much easier for them to focus on areas of commonality and agree on redress that meets most or all of those interests. This is also shown in the next diagram.

## The Crown's general approach to cultural redress

The Crown recognises the importance of cultural redress in contributing to a balanced settlement package that meets cultural as well economic interests of the claimant group. However, cultural redress aims often involve natural resources of general public importance. If the Crown owns and manages these resources, it must act both in the best interests of New Zealand as a whole and in accordance with Treaty principles. So deciding what redress to offer involves considering and balancing a wide range of interests.

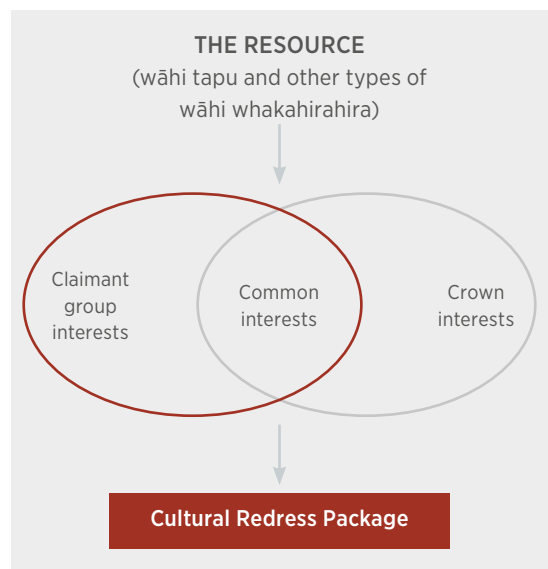


Figure 3.6: negotiating a cultural redress package

This means, for example, that providing ownership of a resource may not be possible, even though claimant groups may ask for that at the beginning of negotiations. However, there are many ways of meeting underlying interests, and both the Crown and claimant group must be willing to explore them. The options that have been developed in settlement negotiations to date are designed to satisfy the aspirations of claimant groups in many different ways, while still providing for the interests of New Zealanders as a whole.

Important principles guiding the Crown's approach to cultural redress are:

- redress must be a meaningful expression of the relationship of the claimant group with the site, animal, plant or resource
- the Crown cannot provide redress over resources it does not own and (in almost all cases) manage
- overlapping claims must be addressed to the satisfaction of the Crown
- redress must be consistent with existing legal frameworks such as the Resource Management Act 1991 and the Conservation Act 1987
- settlement redress should not generally be used for issues more appropriately dealt with at a national level
- before land can be made available for transfer to a claimant group, it must have been cleared under section 40 of the Public Works Act 1981, and any other relevant restrictions on disposal, and
- other existing third party rights over Crown land (such as easements, leases and licences) will be protected if the land concerned is used in settlement.



## The scope of cultural redress

Negotiations on cultural redress can be very wide-ranging, and include matters as diverse as place names, customary fisheries management and protection of wāhi tapu. The following list covers the main types of resources dealt with in negotiations to date:

- wāhi tapu and other sites of significance (wāhi whakahirahira) including mountains
- rivers and lakes (waterways)
- wetlands, lagoons, indigenous forests and tussock lands
- coastal areas including the foreshore and islands
- customary freshwater and marine fisheries
- geothermal and mineral resources
- moveable taonga (artefacts), and
- traditional place-names.

Claimant group interests that have been addressed in a variety of ways include:

- recognition of cultural, spiritual, historical and traditional associations with areas or natural resources
- protection of wāhi tapu
- recognition of the role of Māori as kaitiaki (guardians or caretakers) of the natural environment, and
- access to resources of cultural significance.

## Further information on cultural redress

To assist mandated representatives and others with an interest in the negotiations process, more details are included later on in this Part. In the section headed *Resources and Interests* starting on page 100, each type of resource is discussed, including:

- the significance the type of site or resource may have for claimant groups
- the interests claimant groups may wish to protect or promote
- the Crown's interests and approach to redress, and
- possible redress options.

Some redress options apply to more than one type of resource. For these options (an example is the *Statutory Acknowledgement*) the redress option is noted briefly under the resource heading, and a more detailed explanation is set out in the section *Statutory Instruments*, starting on page 115.

The rest of this section includes:

- a summary table of statutory instruments
- a short discussion about the concept of co-management in relation to land managed for conservation purposes, and
- three case studies of cultural redress in practice to show how the process works, and how the available redress options can be used flexibly to meet both claimant group and Crown interests.

## SUMMARY OF STATUTORY INSTRUMENTS FOR CULTURAL REDRESS

Instrument name	Key features	Page
Statutory vesting of fee simple estate	Provides ownership (title). Rights to use and manage may vary according to type of site.	116
Statutory vesting and gifting back of sites of outstanding significance	Ownership of site of outstanding significance (eg Aoraki/Mount Cook) is vested in the claimant group who then (after a specified interval) return it unconditionally to the Crown for all New Zealanders.	118
Statutory vesting of riverbed or lakebed	May be available for beds of rivers or lakes of great significance to the claimant group – where it is also legally possible. Vests the riverbed or lakebed only, not water, and involves protection of existing property, use and access rights.	119
Statutory vesting as reserve	Site is vested in the claimant group as a reserve under s26 of the Reserves Act 1977, and the claimant group holds and administers the site subject to the Reserves Act.	120
Overlay classifications (Tōpuni, Taki Poipoia or Kirihipi)	Applies to highly significant sites on land administered by the Department of Conservation (DOC): recognises a statement of the claimant group's associations, describes their values and principles, and identifies actions to avoid harm to these.	121
Statutory Acknowledgements	Applies to sites of significance (including rivers, lakes, mountains, wetlands and coastal areas) where land is owned by the Crown: acknowledges a statement of the claimant group's associations, and enhances the claimant group's ability to participate in specified Resource Management Act 1991 processes.	122
Deeds of Recognition	May follow from Statutory Acknowledgement (SA). The Minister responsible for managing the land subject to SA acknowledges a statement of the claimant group's associations, and agrees to consult and have regard to the claimant group's views on specified matters.	123
Protocols	Issued by a Minister (eg Minister of Conservation). Sets out how the relevant department will exercise its functions, powers and duties in relation to specified matters in the claimant group's area of interest, interact with the claimant group and provide for its input into decision-making.	123
Place-name changes	Usually to a dual Māori/English name. Provides visible recognition for the claimant group.	114
Joint Advisory or Management Committee	Can be established under s9 of the Reserves Act 1977 or s56 of the Conservation Act 1987 to advise on or manage a site or area of importance to both the claimant group and the Crown. Such committees will usually be made up of representatives of both a claimant group (or groups – if the site or area is important to more than one claimant group) and DOC.	95

## **Is co-management of conservation land an option for cultural redress?**

### **WHAT DOES CO-MANAGEMENT MEAN?**

Co-management is a term widely used overseas. It describes activities where governments and communities are involved to greater or lesser degrees in providing information, consultation, co-operation with the community, communication about initiatives, advisory boards, management boards and the like. Sometimes the term joint management is used in the same way. In New Zealand the terms are increasingly used, but what they actually mean is often unclear.

### **HOW DOES IT APPLY IN NEW ZEALAND?**

In New Zealand the Conservation Act 1987 places responsibility for conservation management on the Department of Conservation. It requires a great deal of communication and consultation by the department with iwi and other groups. The Department of Conservation uses the term co-operative conservation management to describe arrangements and relationships that provide for greater input than these requirements. Some of these arrangements and relationships result from redress provided in Treaty settlements, such as the statutory instruments summarised in the table on the previous page. We describe these in more detail in the section Statutory Instruments, starting on page 115. Others have been developed simply as part of the department's ongoing obligation to give effect to Treaty principles under the Conservation Act 1987.

### **IS CO-MANAGEMENT A POSSIBLE OUTCOME IN TREATY SETTLEMENTS?**

Claimant groups may express their aims for redress involving conservation land as a desire for co-management or joint management. As discussed above, it is useful to explore this aim further in negotiations to discover the underlying interests that claimant groups wish to protect or promote. However, co-management in the sense of one of a range of co-operative conservation management arrangements forms an important part of recent settlements and current negotiations. Where there are both significant conservation and cultural interests in a reserve site but it does not seem feasible to transfer title to the claimant group, the Crown may consider establishing a Joint Management Committee over the site under section 9 of the Reserves Act 1977. Where these conditions apply, but the land involved is a conservation area, a Joint Advisory Committee under section 56 of the Conservation Act 1987 may be the right way to meet the interests of all parties.

In summary, whether an arrangement or relationship is described as co-management or co-operative conservation management is not important. What is important is that all parties to the arrangement understand its purpose, their role and responsibilities, and that lines of accountability (that is, who is responsible to whom and for what) are clear. Funding and other resources also need to be agreed and understood.

## Case studies



*The Clutha River/Mata-Au*

### CASE STUDY 1

#### **Ngāi Tahu – Statutory Acknowledgement for the Clutha River/Mata-Au**

##### **SIGNIFICANCE TO NGĀI TAHU**

This example, abridged from the Statutory Acknowledgement for the Clutha River/Mata-Au, shows the many ways in which waterways have cultural, spiritual, historic and traditional associations for Ngāi Tahu.

The Mata-Au river takes its name from a Ngāi Tahu whakapapa that traces the genealogy of water. On that basis, the Mata-Au is seen as the descendant of the creation traditions. On another level, the river was an integral part of a network of trails which were used to ensure the safest journey and incorporated locations along the way for activities such as overnight camping and gathering kai. The river was also very important in the transportation of pounamu from inland areas down to settlements on the coast. The traditional mobile lifestyle of the people led to their dependence on the resources of the river.

The Mata-Au is also where the boundary line between Ngāi Tahu and Ngāti Mamoe was drawn, later to be overcome by unions between the families of the tribes. Strategic marriages between hapū further strengthened the kupenga (net) of whakapapa, and thus rights to travel on and use the resources of the river. Because of these patterns of activity the river continues to be important to rūnanga located in Otago and beyond. These rūnanga carry the responsibilities of kaitiaki in relation to the area.

Urupā and battlegrounds are also located all along the Mata-Au. These are places holding the memories, traditions, victories and defeats of Ngāi Tahu tūpuna, and are frequently protected by secret locations.

##### **NGĀI TAHU'S INTERESTS**

Ngāi Tahu was concerned that in its area of interest the Resource Management Act 1991 (RMA) did not deliver what it was supposed to in terms of iwi involvement in resource management, particularly for resources of great cultural significance such as rivers, lakes and wetlands. They proposed a number of ways in which iwi involvement in resource management could be improved, including Crown directives to local or regional government, or legislative amendments to the RMA. Further discussions established that the main problems were:

- failure to notify Ngāi Tahu of resource consent applications affecting culturally significant areas
- lack of awareness among consent authorities of Ngāi Tahu's traditional associations, and
- Ngāi Tahu's experience that it constantly had to 'prove' the cultural significance of sites as individual resource consent applications were considered.

##### **THE CROWN'S INTERESTS**

The Crown's initial view was that the RMA provided adequate ways for iwi to be involved in and consulted on resource management. The legislative framework provided for the balancing of a wide range of interests, and this could be undermined if consent authorities were required to give greater weighting to iwi interests. The Crown was also concerned about time and cost implications of any changes for consent authorities and private individuals or organisations. However, after further discussions the Crown agreed to look at ways to address Ngāi Tahu's specific concerns noted above.

##### **NEGOTIATED OUTCOME – STATUTORY ACKNOWLEDGEMENT**

The legal mechanism developed to meet the interests jointly identified by the Crown and Ngāi Tahu was the Statutory Acknowledgement. This is explained in more detail on page 122, but in summary a Statutory Acknowledgement:

- records in the settlement legislation the Crown's acknowledgement of Ngāi Tahu's statement of its association with the river, lake, or other site in Crown ownership
- strengthens the notification provisions of the RMA through specific obligations on decision-makers
- can be used as evidence in proceedings before consent authorities or the Environment Court, and
- enables the Minister of the Crown responsible for the site to enter into a Deed of Recognition with the claimant group, providing for claimant group input into specified matters relating to management of the Crown land involved (but not water). There is a Deed of Recognition between Ngāi Tahu and the Minister of Conservation for the Clutha River/Mata-Au.

The Environment Court and the Historic Places Trust must also have regard to the Statutory Acknowledgement in deciding whether to hear representatives of Māori at proceedings affecting the site.

#### **OTHER CULTURAL REDRESS FOR THE CLUTHA RIVER/MATA-AU**

Other cultural redress agreed to recognise Ngāi Tahu's interests in the Clutha River/Mata-Au was:

- place-name change to the Clutha River/Mata-Au, and
- provision of four nohoanga entitlements.

#### **COMMENT**

The Statutory Acknowledgement instrument is extremely significant in the cultural redress options now available. The negotiations involved were complex and required both the Crown and Ngāi Tahu to be creative in looking for a solution that would meet the claimant group's concerns about the RMA without undermining its basic framework. The Statutory Acknowledgement was used in the Ngāi Tahu settlement not only for rivers and lakes but for mountains, wetlands, lagoons, coastal areas and specific sites of cultural significance. It has since also been applied in settlements with other claimant groups.

## **CASE STUDY 2**

### **Ngati Ruanui – Ministry for Primary Industries protocol**

#### **SIGNIFICANCE TO NGATI RUANUI**

Freshwater and marine fisheries in the Ngati Ruanui area of interest have great cultural and traditional significance for the people of Ngati Ruanui. The coast and rivers within the rohe of Ngati Ruanui have traditionally been an important source of mahinga kai for the people of Ngati Ruanui.

#### **NGATI RUANUI'S INTERESTS**

In negotiations, Ngati Ruanui sought recognition of their role as kaitiaki for fisheries within their area of interest. It was important for Ngati Ruanui to have an acknowledgement of their traditional relationship with species of fish and other aquatic life. In particular, Ngati Ruanui sought protection and enhancement of their customary interests in tuna (eel), pua and other taonga fish species. Ngati Ruanui also emphasised their desire to have greater participation in fisheries management. This included making provision for Ngati Ruanui's input into the development of fisheries plans, regulations and other services of the Ministry for Primary Industries.

#### **THE CROWN'S INTERESTS**

The Crown, through the Ministry for Primary Industries, has an active duty to protect commercial and recreational as well as customary interests in fisheries. The Ministry for Primary Industries acknowledged that its ability to achieve the sustainable management of fisheries in the Ngati Ruanui area of interest would be greatly enhanced by improving its relationship with the iwi. In this respect, the Ministry for Primary Industries was willing to explore Ngati Ruanui's customary interest in fisheries and identify the particular areas where Ngati Ruanui could provide input into fisheries management.

#### **NEGOTIATED OUTCOME**

In the Deed of Settlement signed on 12 May 2001, Ngati Ruanui and the Crown agreed that the Deed of Settlement will provide for, and the settlement legislation will enable, the Minister of Fisheries to issue a protocol to Ngati Ruanui. The overriding purpose of the protocol is to foster a good working relationship between Ngati Ruanui and the Ministry for Primary Industries. The protocol will set out how the Ministry for

Primary Industries will interact with Ngati Ruanui in a way that will enable Ngati Ruanui to provide input into a range of Ministry processes.

## PROTOCOLS

Protocols are statements issued by a Minister of the Crown, or other statutory authorities, setting out how that particular agency intends to:

- exercise its functions, powers and duties in relation to specified matters within its control in the claimant group's area of interest, and
- interact with a claimant group on a continuing basis and enable that group to have input into its decision-making process.

Essentially, protocols are a relationship building tool which seek to enhance relationships between government agencies and claimant groups. This form of redress is explained in more detail on page 126.

## COMMENT

Many of Ngati Ruanui's interests in fisheries exceeded what could be provided for in a protocol with the Ministry for Primary Industries. In many cases, these interests were beyond the scope of the Ministry's powers and functions. For example, some of the responsibility for management of native freshwater fisheries lies with the Department of Conservation. To ensure the Crown could meet Ngati Ruanui's interests in fisheries, other types of fisheries redress were agreed: a protocol with the Department of Conservation (which includes recognition of indigenous fish species for which the Department has statutory responsibility), further provisions for Ngati Ruanui's involvement in the management of tuna (eel), and Ngati Ruanui to be appointed as an Advisory Committee (in relation to indigenous fish, aquatic life and seaweed) to the Minister of Conservation and the Minister of Fisheries. The legislation implementing Ngati Ruanui's settlement will also acknowledge the cultural, spiritual, historic and/or traditional association of Ngati Ruanui with all indigenous species (Nga Taonga a Tane raua ko Tangaroa) found in their area of interest.

## CASE STUDY 3

### Te Uri o Hau – Pouto Conservation Stewardship Area

#### SIGNIFICANCE TO TE URI O HAU

The land within the Pouto Conservation Stewardship Area is recognised as a major traditional food gathering area for Te Uri o Hau. Traditionally, the area contained many temporary settlements and Te Uri o Hau whānau from the Pouto Peninsula and other marae in the Kaipara harbour would camp here to catch tuna (eels), kanae (mullet) and gather manu (birds), harakeke (flax) and berries.

The area is also an important wāhi tapu for Te Uri o Hau because it contains urupā and taonga buried beneath the land as a result of the many battles fought there.

#### TE URI O HAU'S INTERESTS

Te Uri o Hau sought exclusive access to mahinga kai resources in the area, particularly in relation to the lakes. Te Uri o Hau also sought involvement in the management of the area – alongside the Department of Conservation – and protection for wāhi tapu sites. Protection was particularly important, as Te Uri o Hau had long been concerned about past interference with urupā.

#### THE CROWN'S INTERESTS

The Pouto Conservation Stewardship Area is an extensive and unique area of mobile, consolidated and old sand dunes with associated wetlands and numerous small dune lakes. The stewardship area also contains one of the best examples of duneland forest in New Zealand and is home to many bird species, including some, such as the dotterel, that are at risk. It is land on which the Crown places a high conservation value.

#### NEGOTIATED OUTCOME

In the Deed of Settlement signed on 13 December 2000, Te Uri o Hau and the Crown agreed that the settlement legislation (enacted October 2002) would provide for the following in relation to the Pouto Conservation Stewardship Area:

- an overlay classification or Kirihipi over the whole dune and lake complex

- two Statutory Acknowledgements and a Deed of Recognition
- two camping entitlements (Nohoanga)
- Protocols with the Department of Conservation, the Ministry for Primary Industries, the Ministry of Culture and Heritage and the Ministry of Economic Development
- a commitment to consider a proposal from Te Uri o Hau to include the Pouto Lakes eel
- fisheries within the application of the Fisheries (Kaimoana Customary Fishing) Regulations 1998, and
- a commitment to consider restrictions on certain eel fishing methods in the Pouto Lakes.

#### **OVERLAY CLASSIFICATION – KIRIHIPI**

An overlay classification (known as Kirihipi in the Te Uri o Hau settlement) recognises Te Uri o Hau's spiritual, cultural, historical and traditional values relating to the area. These values are recorded in the Deed of Settlement. The Department of Conservation, which administers the Pouto Conservation Stewardship Area, must consult in agreed ways and avoid harm to Te Uri o Hau's values.

The word Kirihipi was used by Te Uri o Hau because it is the word used to describe a document of sheepskin parchment known as Kirihipi Te Tiriti o Ngāti Whatua that records their relationship with the Crown.

To Te Uri o Hau, the Kirihipi confers Te Uri o Hau values upon a piece of Crown-owned land without overriding the powers of the Crown to manage that land for the purposes for which it is held.

#### **STATUTORY ACKNOWLEDGEMENTS AND DEED OF RECOGNITION**

A Statutory Acknowledgement and Deed of Recognition are ways in which the Crown recognises Te Uri o Hau's association with the Pouto Conservation Stewardship Area. The Statutory Acknowledgement strengthens the notification processes of the Resource Management Act 1991 and requires consent authorities when determining whether to notify an activity to have regard to the Statutory Acknowledgement when deciding whether Te Uri o Hau is an 'affected party'. The Deed of Recognition requires that Te Uri o Hau is consulted on specified matters and that the Minister of Conservation must have regard to their views.

The second Statutory Acknowledgement is for the Kaipara Harbour which borders the eastern boundary of the stewardship area.

#### **PROTOCOL WITH THE MINISTRY FOR CULTURE AND HERITAGE**

A protocol is a statement issued by a Minister of the Crown or other statutory authority. These set out how a particular government agency intends to interact with a claimant group in relation to specific matters in a claimant group's area of interest and enable that group to have an input in the agency's decision-making (see page 123). Because of the wāhi tapu in the stewardship area, the protocol governing Te Uri o Hau's relationship with the Ministry for Culture and Heritage is particularly important.

#### **COMMENT**

Both Te Uri o Hau and the Crown have strong legitimate interests in the Pouto Conservation Stewardship Area. The redress provided to Te Uri o Hau in relation to the area recognises their traditional and cultural associations, their interests in food-gathering and their strong interest in conservation for future generations. The Crown was able to provide this redress while safe-guarding the interests that all New Zealanders have in the preservation of the unique natural features and wildlife in the area.



# Resources and interests

## Introduction

Earlier in this Part, an overview of cultural redress and some practical examples from recent negotiations were provided. This section looks in more detail at the main types of resources and issues claimant groups may be concerned about in negotiations on cultural redress. These are:

- wāhi tapu and other sites of significance (wāhi taonga or wāhi whakahirahira) including mountains
- rivers and lakes (waterways)
- wetlands and lagoons, indigenous forests and tussock lands
- coastal areas including the foreshore and islands
- customary freshwater and marine fisheries
- geothermal and mineral resources
- plant, animal and fish species
- moveable taonga (artefacts), and
- traditional place-names.

For each resource listed, this section outlines:

- the significance the type of site or resource may have for claimant groups
- the interests claimant group may wish to protect or promote
- the Crown's interests and approach to redress, and
- possible redress options (for customary fisheries we also look at the options for meeting claimant group interests under existing legislation).

## THE IMPORTANCE OF THE TOTAL ENVIRONMENT

In preparing information for this guide OTS found that looking at major types of natural resources separately helped in presenting the issues and options most clearly. However, the Crown recognises that Māori traditionally have a holistic view towards environmental or resource management, and that the elements of the environment cannot be viewed in isolation. The redress options available through negotiations can be used to build a total settlement package that provides for this approach.

## KAITIAKITANGA

In the rest of this section we often refer to kaitiakitanga as an interest that claimant groups may wish to see recognised or enhanced through the settlement process. While the concept is often translated as 'guardianship', this does not give the full depth of its meaning to Māori. The following explanation is provided in the Te Puni Kōkiri publication *Mauriora ki te Ao: An Introduction to Environmental and Resource Management Planning* (1993, page 10):

*'Kaitiakitanga is a broad notion that is applied in many situations. The root word in kaitiakitanga is tiaki, which includes aspects of guardianship, care and wise management. The prefix kai denotes the agent by which tiaki is performed. Kaitiaki therefore stands for a person and/or other agent who performs the tasks of guardianship.'*

*Kaitiakitanga as a system takes place in the natural world, within the domain of Atua. Kaitiakitanga is practised through:*

- the maintenance of wāhi tapu, wāhi tūpuna and other sites of importance
- the management of fishing grounds (mahinga mātaihai)
- protests against environmental degradation (eg Moa Point protests)
- observing the maramataka (lunar calendar)
- observing the tikanga of sowing and harvest
- good resource management, and
- designing settlements in keeping with the design and nature of the environment.

*Kaitiaki are the interface between the secular and spiritual worlds, as the mana for kaitiaki is derived from mana whenua. To Māori, kaitiaki is not a passive custodianship. Neither is it simply the exercise of traditional property rights, but entails an active exercise of power in a manner beneficial to the resource. Kaitiaki who practise kaitiakitanga do so because they hold an authority, that is they have the mana to be kaitiaki. Hence, kaitiakitanga is inextricably linked to tino rangatiratanga.'*

The redress options developed so far provide many ways to enhance the ability of a claimant group to exercise kaitiakitanga. This may be through the transfer of culturally significant sites or improved participation in resource management processes.



## Wāhi tapu and wāhi whakahirahira, including maunga

### SIGNIFICANCE TO MĀORI

Claimant groups will often seek redress for sites of special significance because of their spiritual, cultural, historical or traditional associations. They may be the sites of former pā or marae, urupā, battlegrounds or traditional camping or gathering sites. Maunga (mountains) especially the peaks, often have special significance for tribal identity and as the embodiment of tūpuna. The value of such sites to claimant groups is in their associations rather than their present economic worth. Wāhi tapu usually refers to a site of special spiritual significance, while the terms *wāhi whakahirahira*, *wāhi taonga* or *sites of significance* may be used to indicate more general cultural significance. The term wāhi whakahirahira is used in the rest of this guide.

The provision of redress involving wāhi tapu and wāhi whakahirahira, along with the Crown's acknowledgements and apology, is an important step in rebuilding the relationship between the Crown and claimant group.

### CLAIMANT GROUP INTERESTS

In preparing for negotiations, the claimant group will usually identify wāhi tapu or wāhi whakahirahira in their rohe where there are concerns or interests to discuss with the Crown. In general terms claimant groups may seek recognition and improved ability to exercise kaitiakitanga (stewardship or guardianship) through ownership of sites or improved participation in their management. More specifically, this might involve:

- being able to control access by the public to prevent damage or inappropriate behaviour on wāhi tapu areas
- being able to protect wāhi tapu without revealing exact locations
- preserving historical features such as pā terraces and rock art
- preserving or re-establishing indigenous plants and animals
- being able to pass on traditional knowledge and skills
- using the traditional name for the site, and
- using or obtaining access rights to cultural resources such as medicinal plants or ochre for dyeing.

### THE CROWN'S INTERESTS AND APPROACH

In considering redress for wāhi tapu and wāhi whakahirahira, the Crown will be concerned:

- to ensure the redress is meaningful to the claimant group
- to preserve any existing public access unless there are strong reasons for restricting it
- to preserve historical features of a site
- to preserve indigenous plants and help to re-establish them if appropriate
- to ensure the site is appropriately managed, in a way that is consistent with existing legislation
- to ensure any overlapping claim issues have been addressed to the satisfaction of the Crown, and
- to ensure any existing legal rights of third parties (such as rights of way, drainage easements) are protected.

And, as already noted, the Crown can only use land in redress if it is the owner.

The lists of Crown and claimant group interests show that in many cases these will overlap – for instance, both may want to restore indigenous trees and plants on a particular site. Building from their common interests, the parties can then look at ways to meet other more divergent interests.

### REDRESS OPTIONS FOR WĀHI TAPU AND WĀHI WHAKAHIRAHIRA

The table below notes the main redress options that may be suitable for wāhi tapu and wāhi whakahirahira. The options provide many ways to meet the following broad interests:

- recognition of the claimant group
- claimant group involvement as kaitiaki in the management of a wāhi tapu or wāhi whakahirahira
- claimant group input into decision-making about a wāhi tapu or wāhi whakahirahira, and
- improved access to places where traditional foods or other resources can be gathered.

The range of options provides a great deal of flexibility in developing solutions to deal with each situation on an individual basis. More detail on the statutory instruments is included in the section *Statutory Instruments* starting on page 115.

Redress options using statutory instruments for <b>wāhi tapu and wāhi whakahirahira</b>	Further detail (page)
Statutory vesting of fee simple estate (transfer of legal ownership of land)	116
Statutory vesting and gifting back of sites of outstanding significance	118
Statutory vesting as a Reserve	120
Overlay classifications (Tōpuni, Taki Poipoia or Kirihipi)	121
Statutory Acknowledgements	122
Deeds of Recognition	123
Protocols	123
Place-name changes	114
Joint Advisory or Management Committee	95

## Rivers and lakes (waterways)

### SIGNIFICANCE TO MĀORI

The Crown acknowledges that rivers and lakes have great significance for Māori. The Crown also acknowledges that, while the common law originating in England has different rules on ownership for the bed, banks and water, Māori have traditionally viewed a river or lake as a single entity. From Waitangi Tribunal reports, other publications and negotiations to date, the Crown understands that to a claimant group rivers and lakes can be or represent any or all of the following:

- the embodiment of or creation of ancestors
- a key aspect of tribal and personal identity
- the location of wāhi tapu
- sources of water, food and other resources such as hāngi stones and pounamu
- part of traditional travel routes and trading networks
- boundary markers and part of traditional tribal defences, and
- possessors of mauri, the life force or essence that binds the physical and spiritual elements of all things together.

These complex and significant associations underpin Māori claims to ownership and other redress over rivers and lakes.

## CLAIMANT GROUP INTERESTS

In negotiations on cultural redress for rivers and lakes, claimant groups may wish to protect or promote their interests in the following ways:

- obtaining ownership of the riverbed
- improving their ability to exercise kaitiakitanga through improved participation in resource management processes
- promotion of the health of the waterway, particularly as a source of food, through the control of pollution
- promotion of sustainable fishing and other harvesting (see customary fisheries issues on pages 109–110)
- control of access to all or part of the waterway, for example, to prevent damage or inappropriate access to wāhi tapu in or near the waterway
- being able to pass on or enhance traditional skills and knowledge
- preserving or re-establishing the numbers of indigenous plants and animals
- the use of the traditional name for the waterway or sites in and along the waterway, and
- access rights to cultural resources such as hāngi stones.

## THE CROWN'S INTERESTS AND APPROACH

Like claimant groups, the Crown is also concerned about the health of rivers and lakes and maintaining or improving this where possible. The Crown also wants to manage waterways in the best interests of all New Zealanders and to protect existing rights of public access to waterways. Within this overall framework, it is prepared to offer redress to meet many of the aims of claimant groups for waterways, and in this way recognise the cultural significance of these resources.

Under common and statute law, claiming ownership implies exclusive possession with the right to prevent others from using the resource. This is a concept that raises many practical and legal difficulties with waterways.

## NEW ZEALAND LAW DOES NOT PROVIDE FOR OWNERSHIP OF WATER IN RIVERS AND LAKES

As noted earlier, the Crown acknowledges that Māori have traditionally viewed a river or lake as a single entity, and have not separated it into bed, banks and water. As a result, Māori consider that the river or lake as a whole can be owned by iwi or hapū, in the sense of having tribal authority over it. However, while under New Zealand law the banks and bed of a river can be legally owned, the water cannot. This reflects the common law position that water, until contained (for example, put in a tank or bottled), cannot be owned by anybody. For this reason, it is not possible for the Crown to offer claimant groups legal ownership of an entire river or lake – including the water – in a settlement.

The Crown also considers that the benefits of hydro-electricity generation belong to all New Zealanders and it does not provide compensation for any past interference with rivers for these purposes.

However, negotiations can explore redress options for specific grievances relating to rivers or lakes such as the flooding or destruction of wāhi tapu or effects on traditional fisheries that arise from Crown actions.

## ECONOMIC INTERESTS

If claimant groups have economic rather than cultural aims involving waterways, these are considered as part of Financial and Commercial Redress (see page 81). Large hydro dams of national importance are not available for use in settlement, but smaller dams may be available for transfer at market value, depending on the redress quantum (the total monetary value of the redress provided by the Crown).

The idea of charging for public access to waterways for recreational use is also not acceptable to the Crown. Free and generally unrestricted public access to waterways is part of the New Zealand way of life, and the Crown does not wish to alter this through the settlements process.

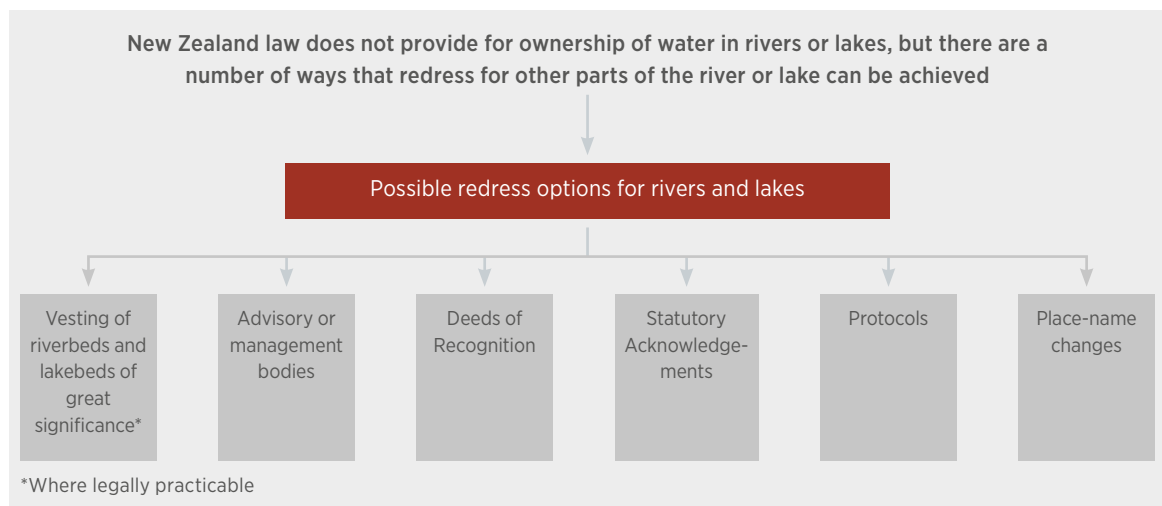


Figure 3.7: some redress options for rivers and lakes

## REDRESS OPTIONS FOR WATERWAYS

Within the limitations noted above, there are still many constructive and effective ways in which to meet claimant groups' cultural interests in lakes and rivers in settlements. The table above gives an overview.

The options are designed to meet the interests and objectives of the claimant group through:

- claimant group involvement in the management or decision-making in relation to a waterway, and/or
- improved access to places where traditional foods, aquatic species or other resources can be gathered.

Redress options using statutory instruments for <b>rivers and lakes</b>	Further detail (page)
Statutory vesting of fee simple estate (transfer of legal ownership of land under the water, where legally practicable), available only for rivers or lakes of great significance, and subject to a number of conditions	116
Statutory Acknowledgements	122
Deeds of Recognition	123
Protocols	123
Place-name changes	114

The range of options provides a great deal of flexibility in developing solutions to deal with each situation on a case by case basis. More detail on statutory instruments is in the section *Statutory Instruments* starting on page 115.

## Wetlands and lagoons, indigenous forests and tussock lands

### SIGNIFICANCE TO MĀORI

These types of areas or ecosystems are grouped together as they often raise similar issues in negotiations. The available redress options are also similar across the range of such sites.

### WETLANDS AND LAGOONS

There were once many more wetlands and lagoons in New Zealand, and they were valuable sources of traditional food and plants for Māori. Drainage and the development of agriculture, industry and housing have greatly reduced such areas, and they often face threats from pollution and introduced plants and animals.

### INDIGENOUS FORESTS

Indigenous forests may be important for their links with tūpuna and tribal history, as locations of wāhi tapu and as sources of food and other natural resources such as logs for carving or medicinal plants.

### TUSSOCK LANDS

Such areas can seem barren compared to forests, but they still have great significance for their cultural associations or as sources of food and other natural resources. For instance, in the Ngāi Tahu settlement the transfer of the High Country Stations to Ngāi Tahu recognised the wide range of associations that these areas had for the iwi.



*Mararoa Valley, Ngāi Tahu*

### CLAIMANT GROUP INTERESTS

From negotiations to date the Crown is aware of the following specific interests relating to the broader interests of recognition and kaitiakitanga that claimant

groups may raise in negotiations about wetlands and lagoons, indigenous forests and tussock lands:

- the vesting of title or other protection for wāhi tapu or wāhi whakahirahira
- improved participation in resource management processes
- being able to pass on or enhance traditional skills and knowledge
- preserving historical or archaeological features
- preserving or re-establishing indigenous plants and animals
- the use of the traditional name for the site
- acquiring access rights to cultural resources such as medicinal plants or fallen trees for carving, and
- improving the health of the habitat and management of fisheries in wetlands and lagoons.

### THE CROWN'S INTERESTS AND APPROACH

The Crown's interests in and approach to redress involving wetlands and lagoons, indigenous forests and tussock lands match its approach to wāhi tapu and wāhi whakahirahira, and its approach to rivers and lakes, as already explained. This means that the Crown will be concerned:

- to ensure the redress is meaningful to the claimant group
- to keep conservation land in public ownership unless there is strong justification for vesting title in the claimant group
- to preserve public access unless there are strong reasons for restricting it
- to preserve historical features of a site
- to preserve indigenous plants and animals and help re-establish them if appropriate
- to ensure there is an appropriate way of managing the site, which meets the requirements of existing legislation
- to ensure any overlapping claim issues have been addressed to the satisfaction of the Crown, and
- to ensure any existing legal rights of third parties (such as rights of way, drainage easements) are protected.

And, as already noted, the Crown can only use land in redress if it is the owner.

Claimant groups and the Crown will often have many interests in common in relation to these areas, and can work from these to explore ways of meeting any remaining differing interests.

## REDRESS OPTIONS FOR WETLANDS AND LAGOONS, INDIGENOUS FORESTS AND TUSSOCK LANDS

Within the limitations noted above, there are still many constructive and effective ways in which to meet claimant groups' cultural interests in wetlands and lagoons, indigenous forests and tussock land. These options are noted in the table to the right.

The options are designed to meet the following broad interests:

- recognition of the claimant group
- claimant group involvement in the management of a specified area
- claimant group input into decision-making about a specified area, and
- improved access to places where traditional foods or other resources can be gathered.

The range of options provides a great deal of flexibility in developing solutions to deal with each situation on an individual basis. More detail on statutory instruments is available in the section *Statutory Instruments* starting on page 115.

Redress options using statutory instruments for <b>wetlands, lagoons, indigenous forests and tussock lands</b>	Further detail (page)
Statutory vesting of fee simple estate (transfer of legal ownership of land) for wāhi tapu or wāhi whakahirahira within such areas	116
Statutory vesting as a reserve	120
Overlay classifications (Tōpuni, Taki Poipoia or Kirihipi)	121
Statutory Acknowledgements	122
Deeds of Recognition	123
Protocols	123
Place-name changes	114

## Coastal areas including the foreshore and islands

### DEFINITIONS

Foreshore means the area of land covered and uncovered by the flow and ebb of the tide at mean spring tides. Legal boundaries to land are usually surveyed to a line called mean high water springs, with the area from this to low tide making up the foreshore.

The Coastal Marine Area is defined in the Resource Management Act 1991 and means the foreshore, seabed, and coastal water, and the air space above the water out to the 12-mile limit of the territorial sea. The boundary on the landward side is generally the line of mean high water springs. However, where that line crosses a river, the landward boundary at that point is the lesser of:

- one kilometre upstream from the mouth of the river, or
- the point upstream that is calculated by multiplying the width of the river mouth by five.

### SIGNIFICANCE TO MĀORI

The foreshore and coastal areas were, and still are, of great significance to Māori as sources of food and other resources such as whalebones. Before roads were developed, most travel was by coastal walkways or boat journeys along the coast. Tribal authority over coastal areas was therefore vital for food, trade and defence and was often keenly disputed. Coastal areas also have great significance for their cultural and spiritual associations – examples are the sites of the waka landings from Hawaiiki, the stories associated with the naming of geographical features, and the locations of urupā and other wāhi tapu.

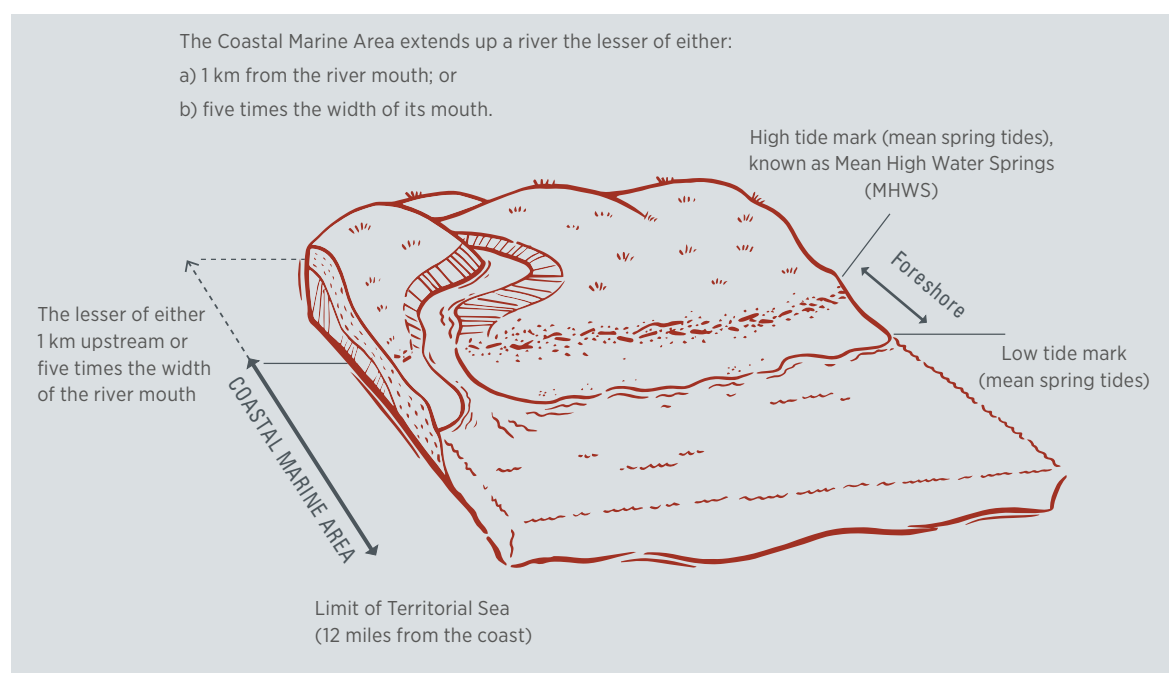


Figure 3.8: The Coastal Marine Area (CMA)

## CLAIMANT GROUP INTERESTS

From negotiations to date, the Crown is aware of the following specific interests relating to the broader interests that claimant groups may raise in negotiations about coastal areas (including the foreshore) and islands:

- obtaining ownership of culturally significant areas
- improving participation in resource management
- the health of the foreshore and coastal environment, particularly as it affects kaimoana
- sustainable non-commercial fishing and other harvesting
- being able to prevent damage or inappropriate access to wāhi tapu
- preserving or re-establishing indigenous plants and animals
- being able to pass down or enhance traditional skills and knowledge
- the use of traditional place-names, and
- acquiring better access for customary gathering of food and other resources.

## THE CROWN'S INTERESTS AND APPROACH

The Crown's approach to redress involving foreshore and coastal areas is based on:

- maintaining existing public ownership of and access to the foreshore and seabed and islands, and
- environmental management of the Coastal Marine Area by regional councils under the Resource Management Act 1991.

We also note that the Crown and certain Māori are involved in litigation in the Courts concerning customary title to the foreshore and seabed. The main proceeding (Marlborough Foreshore and Seabed case) was heard in the High Court in June 2001. The final outcome from this litigation may have an impact on the approaches of claimant groups and the Crown to ownership issues in the future. However, this will not affect existing settlements because these were negotiated in good faith as comprehensive settlements of all historic claims. As noted already, groups that have concluded comprehensive settlements of their historical claims with the Crown can still bring claims based on aboriginal title or customary rights relating to Crown omissions or actions after 21 September 1992.

As with inland waterways, the Crown and Māori have many interests in common in relation to the health of the coastal environment and the sustainable use of resources. There are clearly very different views on the ownership of the foreshore. The redress options developed so far show that many interests of claimant groups can be met without transferring ownership.

## REDRESS OPTIONS FOR COASTAL AREAS

These include:

- action to protect wāhi tapu on the foreshore, and
- recognition through a statutory instrument (see below).

In addition, existing legislation provides for ways of managing customary fishing, including the establishment of mātaihai (coastal fishing reserves), and these are briefly explained on the next page.

## ACTION TO PROTECT WĀHI TAPU ON THE FORESHORE

The Crown and claimant groups may agree to measures such as fencing off separate areas or re-routing walkways to protect wāhi tapu on the foreshore.

## RECOGNITION THROUGH A STATUTORY INSTRUMENT

Statutory instruments that may be suitable for recognising claimant group interests in coastal areas are noted in the following table.

Redress options using statutory instruments for <b>coastal areas</b>	Further detail (page)
Statutory Acknowledgements	122
Protocols	123
Place-name changes	114

The Marine and Coastal Area Act (Takutai Moana) 2011 enables Māori to apply for recognition of their cultural rights in New Zealand's coastal area. Go to [www.justice.govt.nz/macaa](http://www.justice.govt.nz/macaa) for more information.



## ISLANDS – SIGNIFICANCE, INTERESTS AND REDRESS OPTIONS

In general, islands raise many of the same concerns for claimant groups as wāhi tapu and wāhi whakahirahira, or wetlands, forests and tussock lands, but they also raise some of the same issues for the Crown relating to coastal areas. Islands are often also highly significant for conservation purposes – as sanctuaries for endangered and recovering plant and animal species. Depending on the size of the island, the purpose for which it is used and its current ownership, most of the redress options already discussed could be applied to islands.

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## Māori customary fisheries – use of existing legislation

### INTRODUCTION

Both freshwater and marine customary fisheries issues have been raised in negotiations to date. Fisheries issues are, of course, closely related to the surrounding resource (river, lake or sea), and redress relating to these resources may help in resolving some fisheries issues. Other statutory instruments can improve input into decision-making about the waterway that supports a traditional fishery.

In this section the focus is on customary fisheries themselves and the measures available under existing legislation and outside a negotiated settlement to recognise and provide for them.

## Customary marine fisheries – taiapure and Customary Fishing Regulations

### TAIAPURE

A taiapure regime is a management tool for non-commercial fisheries areas that are of special significance to the local tangata whenua. It gives a certain amount of management control to a specially appointed committee. Establishing such a committee may allow Māori to consult extensively with the local community and other stakeholders such as recreational fishers. A small number of taiapure have now been established.

The relevant legislation is the Fisheries Act 1996, in particular Part IX, sections 174 to 186B. Part IX deals with all customary, non-commercial fishing provisions of the Act. Claimant groups interested in this option should contact the Ministry for Primary Industries (contact details on page 151).

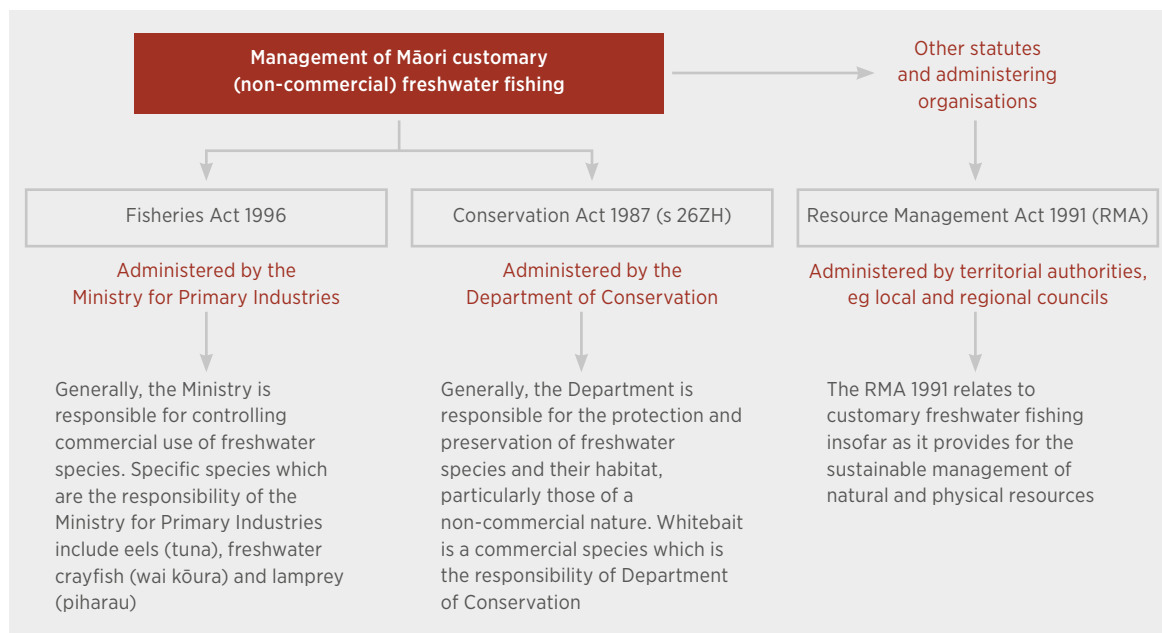


Figure 3.9: freshwater fish – who has responsibility for species and habitat management?

## CUSTOMARY FISHING REGULATIONS

The Fisheries (South Island Customary Fishing) Regulations 1999 and the Fisheries (Kaimoana Customary Fishing) Regulations 1998, which apply to the rest of New Zealand, apply to sea fisheries and provide similar systems for:

- identifying and appointing tangata tiaki/kaitiaki to manage customary non-commercial food gathering of fish and other sea life within defined areas
- record-keeping as part of management
- enabling tangata tiaki/kaitiaki to participate in sustainable fisheries management through the Ministry for Primary Industries
- establishing mātaihai reserves (see below), and
- creating penalties for breaching the regulations and by-laws made under them.

Mātaihai reserves enable tangata tiaki/kaitiaki to manage the area of the reserve (an identified traditional fishing ground). Generally, no commercial fishing is permitted and the tangata tiaki/kaitiaki may control all non-commercial fishing by Māori or non-Māori through by-laws approved by the Minister of Primary Industries.

Claimant groups may wish to consider how the regulations can be used, outside of a settlement, to meet concerns about customary non-commercial sea fishing. The 'Fisheries' section on the Ministry for Primary Industries website has more detail and guidance on Māori customary fishing. See page 151 for contact details.

Before a mātaihai reserve is established, the proposal must be advertised so that the local community can make submissions, and the Minister of Fisheries must be satisfied that a number of conditions have been met. For instance, the proposed reserve must not unreasonably interfere with local non-commercial fishing, or prevent commercial quotas being filled.

## Geothermal and mineral resources

### SIGNIFICANCE TO MĀORI

Geothermal resources have long been prized by Māori. As well as providing hot water for many day-to-day uses, particular sources may have medicinal qualities and be wāhi tapu. Mineral resources of traditional value include pounamu (greenstone), hāngi stones and red ochre/kōkōwai.

### CLAIMANT GROUP INTERESTS

From negotiations to date, the Crown is aware of the following specific interests relating to recognition and kaitiakitanga that claimant groups may raise in negotiations about geothermal and mineral resources:

- obtaining ownership of culturally significant areas
- improving participation in resource management
- obtaining use or access rights
- protection of the environment from the harmful effects of the commercial use of geothermal and mineral resources
- the ability to use resources to pass on traditional knowledge, and
- the right to exploit resources commercially, to provide jobs or to share in income/profits from exploitation.

### THE CROWN'S INTERESTS AND APPROACH

The use of geothermal energy is managed under the Resource Management Act 1991. As with rivers and lakes, there is no legal provision for ownership of the water (in the form of geothermal steam) in geothermal sites. Most significant mineral resources have been nationalised and are now managed under the Crown Minerals Act 1991 for the benefit of all New Zealanders.

### COMMERCIAL INTERESTS

Commercial interests in geothermal and mineral resources are discussed in the section Financial and Commercial Redress (page 81).

### FACTORS AFFECTING CULTURAL REDRESS

In considering cultural redress for these resources, the Crown takes into account:

- the special significance of the resource to the claimant group
- its significance to the wider public – the Crown should not be prevented from protecting, preserving and/or managing the resource in the national interest
- whether the claimant group would benefit from managing the resource
- whether the claimant group would have an advantage in managing the resource, perhaps because of traditional knowledge and skills
- existing and potential third party rights, and
- whether any proposed redress fits into existing legal frameworks.

To give a practical example, a small geothermal site may be of great cultural significance to a claimant group. If the Crown owns the site, it may be prepared to transfer ownership of the land to the claimant group, but because water is not owned by anyone, it cannot vest the geothermal water in the claimant group. Following vesting of the land, the claimant group's use of the site would be governed by the same rules that apply to other landowners. For example, the Resource Management Act 1991 governs the allocation of geothermal energy.

### REDRESS OPTIONS FOR GEOTHERMAL AND MINERAL RESOURCES

These include:

- vesting ownership of culturally significant minerals
- providing for use or access rights, and
- other recognition through statutory instruments.

### VESTING OWNERSHIP OF CULTURALLY SIGNIFICANT MINERALS

For mineral resources with cultural significance, the Crown may consider transferring ownership of minerals that it owns within the claim area. This was done with the vesting of pounamu in the Ngāi Tahu settlement, for instance. Nationalised minerals (petroleum, uranium, gold and silver) are not available as redress. Under the Crown Minerals Act 1991, the Crown owns and manages these in the national interest.

## PROVISION FOR USE OF AND/OR ACCESS RIGHTS FOR MINERALS

The Crown may grant specific use rights to mineral resources it owns or manages, apart from nationalised minerals. An example is the recognition of use rights for hāngi stones at specific Crown-owned sites. Such use rights may be combined with access rights to or over Crown land to enable claimant groups to use or gather resources.

In other cases the Crown may acknowledge associations with specific minerals. For example, the Ngati Ruanui Deed of Settlement includes:

- an acknowledgement of Ngati Ruanui's cultural, spiritual, historic and/or traditional association with purangi (a variety of argillite), and
- a protocol between Ngati Ruanui and the Ministry of Economic Development to create a consultative relationship on petroleum resources in accordance with the Crown Minerals Act 1991.

## RECOGNITION THROUGH STATUTORY INSTRUMENTS

Statutory instruments that may be useful where geothermal or mineral resources are involved are shown in the table opposite.

## NOTE ON VESTING OWNERSHIP OF LAND FOR GEOTHERMAL SITES

For geothermal sites, redress through statutory vesting of title will be limited to transferring ownership of land only, because the water (in the form of geothermal steam) cannot be owned. In deciding whether a site is available, the same general factors apply as for other sites of significance. There are several ways of transferring title, which are explained on page 116. When land is transferred it does not include nationalised minerals.

Redress options using statutory instruments for <b>Geothermal and mineral resources</b>	Further detail (page)
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Statutory vesting of fee simple estate (transfer of legal ownership of land – see note above) available only for individuals sites of high cultural significance	116
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Statutory Acknowledgements	122
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Protocols	123
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Place-name changes	114
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## Moveable taonga

### SIGNIFICANCE TO MĀORI

By moveable taonga we mean artefacts (that is, objects) of great significance to the claimant group. Sometimes the Crown and third parties may have acquired taonga in ways that we would now consider to be in breach of the Treaty or its principles.

### CLAIMANT GROUP INTERESTS

In negotiation, claimant groups may seek:

- return of taonga to tribal ownership, or
- involvement in the care and custody (kaitiakitanga) of taonga held in institutions such as museums.

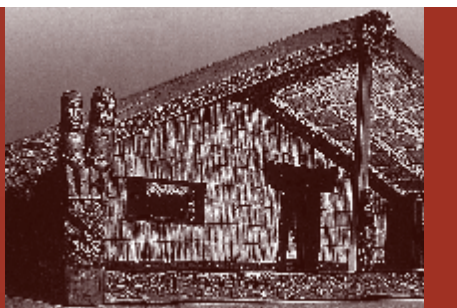
### THE CROWN'S INTERESTS AND APPROACH

How the Crown will approach redress will largely depend on the particular circumstances of the claim to the taonga – for instance, the current legal status of the taonga and any relevant legislation, such as the Antiquities Act 1975. The Crown will also consider whether the general public interest justifies the taonga being held in a museum or similar institution. It should also be noted that the legislation in this area is currently under review.

### REDRESS OPTIONS FOR MOVEABLE TAONGA

#### RETURN OF OWNERSHIP

If the Crown is the legal owner, returning ownership to the claimant group may be an option. But if third parties have legal ownership, the Crown will be reluctant to disturb this.



*Mātaatua Wharehau, Ngāti Awa*

### INVOLVEMENT IN CARE OF TAONGA – PROTOCOLS

If returning the taonga is not appropriate, the Crown could:

- agree to involve the claimant group in the care and custody (kaitiakitanga) of the taonga, if the Crown holds the taonga, or
- try to arrange negotiations between the claimant group and a third party with the aim of giving the claimant group greater involvement in the care of the taonga.

Both these options could include the development of a protocol, a formal statement issued by the relevant department or agency, setting out how the claimant group will have input into decision-making or other specified processes. For more detail see page 123.

## Visible recognition of a claimant group

### SIGNIFICANCE TO MĀORI

This redress category involves official place-names and pouwhenua or other physical markers that might be used to indicate a claimant group's association with an area. When New Zealand was colonised and settled by Europeans, English or European place-names replaced many traditional Māori names to describe some places – mountain ranges, lakes, rivers and other geographical features. However, the Māori place-names retain their significance to Māori communities as indicators of tribal identity and history.

### CLAIMANT GROUP INTERESTS

In negotiations, claimant groups may seek:

- equal status for Māori and English place-names;
- replacement of an English name with the Māori name, particularly if the English name is offensive to the claimant group, and/or
- replacement of a Māori name that the claimant group does not consider appropriate.

## THE CROWN'S INTERESTS AND APPROACH

Redress options must balance the interests of the whole community, bearing in mind the significance that both Māori and European names have for their respective communities.

## REDRESS OPTIONS FOR PLACE-NAMES

### CHANGE OF OFFICIAL PLACE-NAME

Settlement legislation can be used to change official place-names within the claim area to joint Māori/English names, and in some limited circumstances to Māori only names. The Crown and the claimant group must agree on the list of names to be changed, and the number of changes must be reasonable for the size of the claim area (for example, 88 name changes were included in the Ngāi Tahu settlement, but only four – a change of spelling and three sites without names were named – in the Ngāti Ruanui settlement).

The new names have the same status as names assigned by the New Zealand Geographic Board Ngā Pou Taunaha o Aotearoa (NZGB). If place-names are changed or assigned as part of a settlement, the Crown will also undertake to use the new name on new departmental signs and in future official publications. The Crown will also advise local authorities and Transit New Zealand of the changes and encourage them to use the new official names on road signs as these are replaced.

### USE OF EXISTING LEGISLATION

The New Zealand Geographic Board Ngā Pou Taunaha o Aotearoa (NZGB) also has the function of encouraging the use of original Māori place-names on official maps. Māori can submit requests for place-name changes to the Board separately from the Treaty settlement process.

## PLACE-NAMES CONTROLLED BY LOCAL AUTHORITIES

Place-name changes as part of a settlement are limited to those controlled by the Crown. Local authorities, not the Crown, control naming of streets and some reserves. The Crown is willing to arrange discussions with local authorities about street names or other place-names that are of concern to claimant groups.

## CHANGES OF NAMES FOR RESERVES AND NATIONAL PARKS

Name changes to reflect a claimant group's traditional association with an area now subject to reserve or National Park status can be included in settlement legislation.

## POUWHENUA

The Crown may agree to having pouwhenua (carved posts) placed on Crown land at a site of particular significance to a claimant group. This allows the claimant group to be recognised in a visible way in their area of interest. Claimant groups provide the pouwhenua and have responsibility for their care and upkeep.

# Statutory instruments

## Introduction

In this section we explain in more detail the statutory instruments noted in the earlier discussion of redress options. A statutory instrument is a legal mechanism included in settlement legislation to give effect to agreed redress. The statutory instruments included in this section are:

- statutory vesting of fee simple estate (title to land)
- statutory vesting and gifting back of sites of great significance
- statutory vesting of riverbeds or lakebeds of great significance
- statutory vesting as a reserve
- overlay classifications (Tōpuni, Taki Poipoia or Kirihipi)
- Statutory Acknowledgements
- Deeds of Recognition, and
- protocols.

## Flexibility of statutory instruments

Statutory instruments are very useful in negotiations because they have been developed to meet a wide range of claimant group and Crown interests and to apply to a wide range of resources.

This gives the negotiating teams a lot of flexibility in developing redress that is suitable for the circumstances of each claimant group. For instance, the Statutory Acknowledgement instrument:

- provides both recognition for the claimant group and the opportunity for a claimant group's traditional associations to be given regard to in specified Resource Management Act 1991 processes, and
- can be used for many different resources including mountains, rivers, lakes, wetlands, indigenous forests and coastal areas.

It is also possible for more than one instrument to be used for a particular site or resource. For instance, Mount Earnslaw/Pikirakatahi in the Ngāi Tahu settlement is the subject of an overlay classification, Statutory Acknowledgement, Deed of Recognition and place-name change.

## Statutory vesting of fee simple estate

### VESTING (TRANSFER) OF OWNERSHIP

Vesting (or statutory vesting) is the technical term used when the settlement legislation transfers ownership of land to claimant groups. By ownership we mean the legal title to land, sometimes also called the fee simple or freehold title. Usually, ownership carries with it the fullest range of rights over land, although all landowners are, of course, governed by general legislation such as the Resource Management Act 1991. However, it can be useful in negotiations to separate out the ‘bundle of rights’ that make up ownership, so as to determine which are most relevant. These include:

- the right to exclude others
- ownership of things growing on the land or improvements (such as buildings)
- control and management of the site – how it is used and developed, and
- naming rights.

Some claimant groups also value the prestige or recognition that comes with owning the legal title.

It is also useful to consider the costs and liabilities that go with ownership, these include:

- management costs (fencing, pest and weed control, property maintenance, etc.)
- rates and other local body charges, and
- legal liabilities – for example under the Resource Management Act 1991 or the Health and Safety in Employment Act 1992.

By identifying which interests are most important to the claimant group, and how these relate to any interests the Crown might have, the negotiating teams can work towards agreement on the redress option that best meets the interests of both. This may not always mean transferring ownership to the claimant group.

### WHEN IS CROWN LAND AVAILABLE FOR TRANSFER IN SETTLEMENT?

If Crown land is being transferred as cultural rather than commercial redress, sites must usually be of significance to the claimant group, either as wāhi tapu or wāhi whakahirahira. As noted earlier, conservation land is not generally available for use in settlements apart from individual sites with wāhi tapu or wāhi whakahirahira significance.

If the land is subject to section 40 of the Public Works Act 1981 or other restrictions on disposal by the Crown, it must also be cleared of any offer back or other third party rights before it can be used in settlement.

### OPTIONS FOR TRANSFERRING OWNERSHIP

If transferring ownership to land is a key issue, and land is available, the following options can be considered. These options provide flexibility in how sites are actually controlled and managed after the return of ownership. They include:

- vesting the fee simple (freehold) title with no restrictions on use and management, but possibly with some encumbrances (for example, existing easements or leases)
- vesting title subject to conservation covenants or other appropriate covenants under the Reserves Act 1977 or the Conservation Act 1987 – these allow for matters such as protecting indigenous plants and animals, cultural or spiritual values, or preserving public access
- vesting title subject to a protected private land agreement under the Reserves Act 1977 – this allows the Department of Conservation access to the land, if necessary, to protect conservation values
- vesting title on condition that the land is managed by an administering body as if it were a reserve – this is particularly useful if land is currently a reserve managed by a local authority and has high public recreational value (this option is made possible under section 38 of the Reserves Act 1977), and
- vesting the fee simple (freehold title) in the claimant group with ongoing reserve status.

The most suitable method of vesting is determined on a case-by-case basis. Using these options in a flexible way enables a wide range of interests to be met and at the same time achieves the main aim of transferring ownership to the claimant group.



## VESTING TAKES PLACE THROUGH SETTLEMENT LEGISLATION

Transferring ownership of wāhi tapu is usually done through the settlement legislation and is called 'vesting'. This vesting can simplify the processes associated with transferring Crown land.

## OVERLAPPING CLAIMS

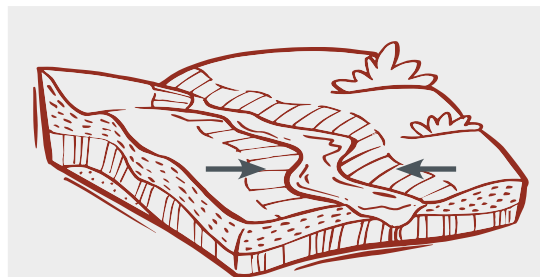
Before transferring title to a claimant group, the Crown needs to be satisfied that any issues relating to overlapping claims have been addressed.

## RIGHTS OF THIRD PARTIES

Existing legal rights of third parties in relation to the site will be preserved on transfer. These may include leases, grazing licences, easements and statutory powers.

## MARGINAL STRIPS

The Conservation Act 1987 provides that if land next to a body of water is transferred from the Crown, a strip on either side of the body of water (a 'marginal strip') is held back from the sale and managed by the Department of Conservation on behalf of the Crown. This preserves public access to bodies of water, such as lakes, rivers and the sea. The marginal strip is usually 20 metres wide. All land vested through Treaty settlements must have a marginal strip unless the Minister of Conservation approves an exemption. Exemptions may be approved where, for example, a marginal strip would not be effective, such as on a cliff face. If the Minister approves an exemption, the legislation vesting the site will provide that the marginal strip requirement does not apply.



If land next to a body of water is transferred from the Crown to a claimant group in a Treaty settlement, a strip either side of the body of water is retained by the Crown. This is the *marginal strip*.

The Minister of Conservation may make exemptions to the marginal strip requirement.

Figure 3.10: marginal strips

## ONGOING COSTS AND INCOME

If ownership of land is transferred to claimant groups, the costs of ownership as well as the benefits are also transferred. These include rates, pest and weed control and other management costs – depending on the type of site. On the other hand, the claimant group will receive any income from the site, such as rental for grazing licences.

## Statutory vesting of fee simple estate and gifting back of sites of great significance

So far we have looked at the permanent transfer of ownership of wāhi tapu or wāhi whakahirahira to the claimant group. These are usually small and well-defined areas of high importance. Certain other geographic features of New Zealand represent taonga of huge significance to Māori, and indeed to all New Zealanders. Aoraki/Mount Cook is a good example, representing both a Ngāi Tahu ancestor and New Zealand's natural beauty.

With sites of such importance, the Crown may consider it appropriate to recognise the level of Māori interest in the area by restoring to Māori the sense of original 'custodianship' of the site.

It is a difficult task to achieve this aim, while at the same time preserving for all New Zealanders the right of unlimited access to and use of the area, as well as its status as conservation land.

The redress option that has been developed to achieve this objective requires:

- the Crown to recognise the importance of the site to the claimant group, and, in the spirit of good faith, vest the ownership of the site in the claimant group, and
- in the same spirit, the claimant group to agree that they will freely and without condition gift the site back to the Crown, on behalf of all New Zealanders, so that the site may keep its current status (in the case of Aoraki/Mount Cook, for example, as part of a National Park).

Vesting of title is done by Order in Council (a regulation made by the Executive Council – see 'the Crown' diagram on page 17), authorised by the settlement legislation, on a date agreed by the parties. The gifting back then takes place when the claimant group deliver a Deed of Gift, signed by them, to the Crown, again on an agreed date (likely to be after a short period of time, such as a week after vesting).

The conservation and management status of the site will not change, nor will the vesting and gifting back affect any third party rights. However, a site of this status is also likely to be covered by other types of redress, such as an overlay classification, a Statutory Acknowledgement and/or a place-name change.

So far, the option of vesting and gifting back has been applied only to very significant mountain peaks (Aoraki/Mount Cook in the Ngāi Tahu settlement, and Mount Taranaki/Egmont in a separate agreement in 1978). Its use for other types of site could be explored in future negotiations.

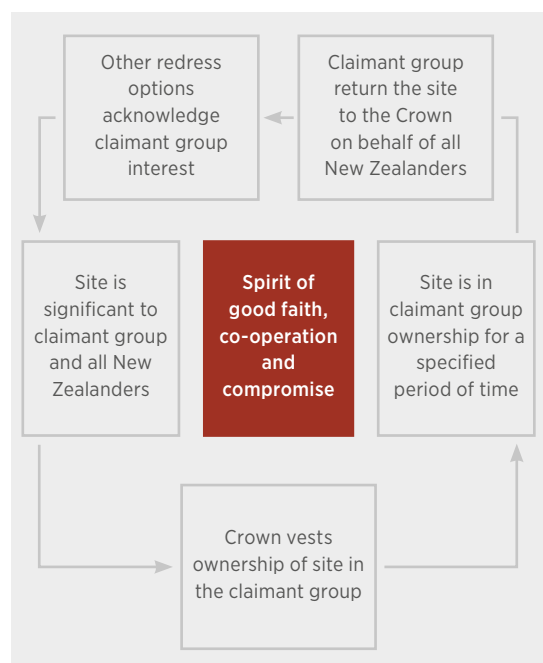


Figure 3.11: vesting and gifting back of significant sites

## Statutory vesting of fee simple estate of riverbeds and lakebeds of great significance

As noted in the earlier section on natural resources and interests, the Crown cannot provide ownership of lakes and rivers as a whole in settlement. However, where legally practicable, the lakebed or riverbed may in some cases be available for vesting in the claimant group. First of all, it is necessary to be sure that the Crown actually owns the bed concerned. This may arise under legislation, for instance, the Coal Mines Amendment Act 1903 vested the beds of navigable rivers in the Crown. Or the common law *ad medium filum* rule (the owner of the land at the bank owns the riverbed to the mid-point) may mean that the Crown is the owner.

Redress that includes vesting lakebeds and riverbeds involves a number of legal and practical issues, which means that the settlement arrangements will probably be complex and require co-operation with a range of third parties. For these reasons, only rivers or lakes of great significance to the claimant group are likely to be available for this type of redress. The Crown will also need to consider the significance of the river or lake to all New Zealanders in deciding its approach to redress.

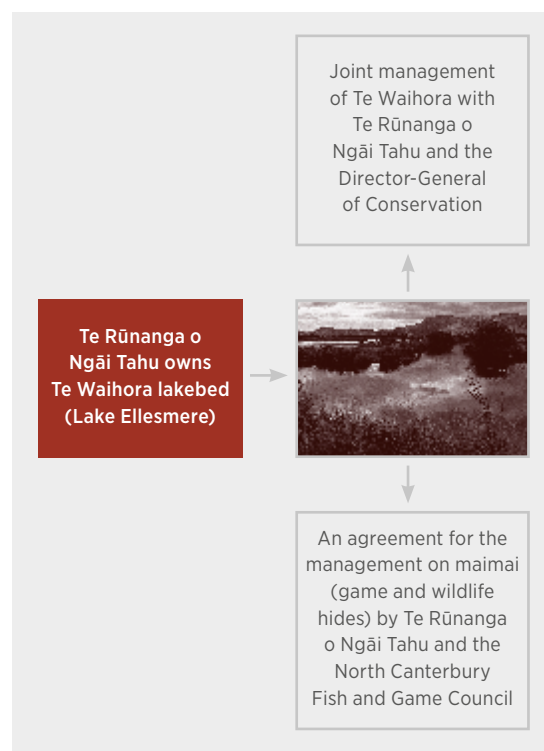
If vesting ownership of a lakebed or riverbed in a claimant group is agreed as part of a settlement package, then the following general principles will apply:

- ownership of the water and of animals and plants living in the lake, as well as existing structures on the lakebed owned by third parties (such as dams, jetties and poles), will not be included in the vesting
- local authorities will be consulted on any interests they consider need to be protected by legislation or contract, through means such as access easements (that is, rights of way)
- for rivers, the role of regional councils under the Resource Management Act 1991 will be preserved, but additional means may be developed to allow the claimant group to play a greater role in managing the riverbed – for instance, the establishment of a special advisory body, and
- existing lawful public access and commercial uses will be preserved.

Other special conditions might need to be negotiated on a case-by-case basis. For instance, the Ngāi Tahu settlement provides for vesting the bed of Te Waihora (Lake Ellesmere) in Te Rūnanga o Ngāi Tahu. The lakebed is managed under a Joint Management Plan developed between Te Rūnanga o Ngāi Tahu and the Director-General of Conservation. Te Rūnanga and the North Canterbury Fish and Game Council have also made a separate agreement for managing maimai on Te Waihora.



*Te Waihora (Lake Ellesmere)*



*Figure 3.12: Te Waihora (Lake Ellesmere) – ownership of the lakebed*

## Statutory vesting as a reserve

### SECTION 26 OF THE RESERVES ACT 1977

Section 26 of the Reserves Act 1977 provides that the Minister of Conservation may vest reserves subject to the Reserves Act (such as historic or recreation reserves) in *administering bodies*.

This is achieved in settlement legislation by:

- making the governance entity of the claimant group an administering body for the purposes of the Reserves Act
- vesting the reserve in the administering body, under section 26 of the Reserves Act, for the administering body to hold and administer as a trustee, and
- exempting the vesting from the normal administrative processes – such as public notification of the proposed vesting.

### WHAT IS THE EFFECT OF VESTING?

The claimant group becomes the administering body of the reserve, and responsible for its management. That means it must manage the reserve in accordance with its classification (as an historic reserve, for example) and in a way that meets the provisions of the Reserves Act and any other law applying to the site. In general, this preserves public rights of access and use consistent with the classification of the reserve. The new administering body must prepare a management plan for the reserve within five years of being appointed. This requires a public consultation process.

The claimant group is responsible for all of the costs of control and management, but the provisions of the Reserves Act that usually govern how revenue earned from the reserve must be spent will not apply.

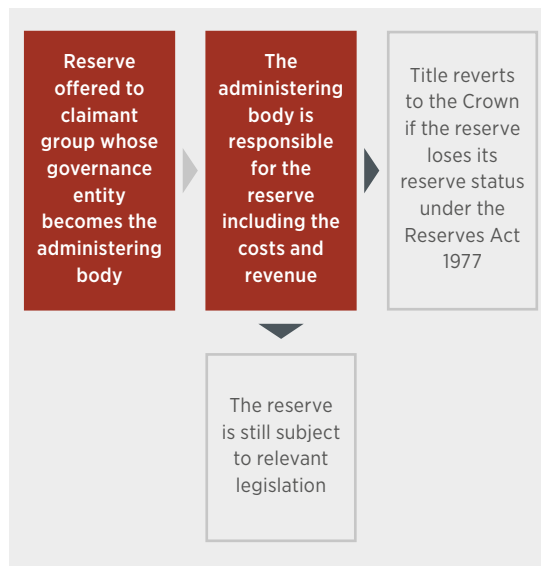


Figure 3.13: Vesting of reserves

### WHEN MIGHT VESTING OF A RESERVE BE OFFERED?

The Crown may offer appointment as the administering body of a reserve as redress in a settlement if:

- it is not considered possible to offer full ownership of the site to the claimant group, but
- the claimant group wish to manage and control the site as a reserve and are prepared to take on the responsibility and cost of doing so.

### WHAT TYPE OF RESERVE MIGHT BE USED?

Usually historic and recreation reserves will be considered. Nature reserves, scientific reserves and other ecologically sensitive areas are very unlikely to be offered. The availability of scenic reserves will depend on an assessment of the ecological sensitivity of the site and the claimant group's experience and interest in managing ecological values.

### ENCUMBRANCES

The vesting of a reserve will be subject to any existing third party rights, such as leases and easements.

## Overlay classifications

An overlay classification is a statutory instrument and was developed from the custom of providing chiefly protection though spreading a dogskin cloak (tōpuni) over the person or thing to be protected. An overlay classification applies to an area of land administered by the Department of Conservation. The status of the land (for example, as part of a National Park) is not affected, although the way it is managed may be. The concept has been given a variety of names by claimant groups. In the Ngāti Ruanui Deed of Settlement it is known as Nga Taki Poipoia o Ngāti Ruanui. In the Ngāi Tahu Deed – where the concept was first developed – it is known as a Tōpuni. Te Uri o Hau have, in their Deed of Settlement, used the name Kirihipi.

### AN OVERLAY CLASSIFICATION

- acknowledges the claimant group's spiritual, cultural, historical and traditional values in respect of a site
- maintains existing status (for example, National Park status), and
- Department of Conservation must consult and in agreed ways, avoid harm to these values

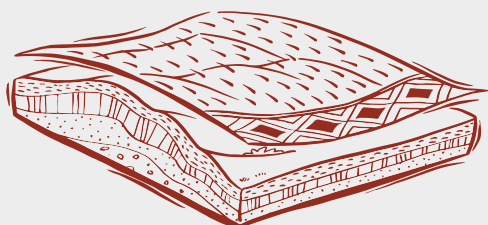


Figure 3.14: Overlay classification

### CROWN ACKNOWLEDGEMENT OF CLAIMANT GROUP VALUES

When the Crown agrees to declare an area to be subject to an overlay classification, the Crown acknowledges in legislation a statement by the claimant group of the particular traditional values that the group has in relation to that area. This statement is taken into account in the way the Crown manages the site.

### WHAT IS THE EFFECT OF AN OVERLAY CLASSIFICATION?

In recognition of the acknowledged values, those managing the overlay classification are given certain procedural obligations. Those obligations provide for the claimant group to have input into the management of the overlay classification, through:

- notification in the NZ Gazette of principles agreed between the claimant group and the Minister of Conservation – any agreed principles will have the aim of ensuring that the Minister avoids harming the claimant group's acknowledged values
- requiring the New Zealand Conservation Authority and the regional Conservation Board to consult the claimant group and to have particular regard to both their acknowledged values and any agreed principles, as well as the views of the claimant group, in carrying out certain management planning and policy functions under the Conservation Act 1987 and associated legislation
- notification of the overlay classification on conservation and national park management plans affecting those areas, as well as in the NZ Gazette, so that the public is informed, and
- requiring the Director-General of Conservation to take action on any agreed principles – the Director-General has discretion as to how and to what extent any such action is taken. It may range from simply issuing a statement to recommending regulations.



Kura Tāwhiti/Castle Hill – Tōpuni area in Ngāi Tahu settlement

## WHEN IS AN OVERLAY CLASSIFICATION AVAILABLE?

An overlay classification gives a very high degree of recognition. Its use is therefore limited to a small number of sites. The Crown also considers that it is most appropriately used as an exclusive instrument, which means that the Crown would not give this redress over the same site to more than one claimant group.

## Statutory acknowledgements

### CULTURAL, HISTORICAL, SPIRITUAL AND TRADITIONAL ASSOCIATION WITH AN AREA

Within an area of interest, certain sites or features may be of particular traditional significance to a claimant group, for different reasons. That significance may not always be obvious to third parties, such as local authorities. As a result, a claimant group may feel that its traditional association with the particular site has not always been fully considered. For instance, wāhi tapu could have been unintentionally destroyed because a local authority had never been aware of a site, and the claimant group had never been told that a resource consent had been applied for or granted over the area in question.

### CROWN ACKNOWLEDGEMENT OF ASSOCIATION

The Crown may agree in a settlement to acknowledge in legislation a statement by the claimant group of their special association with an area or feature.

### WHEN MAY A STATUTORY ACKNOWLEDGEMENT BE GIVEN?

The Crown will consider giving a Statutory Acknowledgement over defined sites or features on Crown-owned land that are of high significance to the claimant group. They may include rivers, lakes, wetlands, mountains, forests, islands, coastal areas and other such areas traditionally of high significance to Māori, either for their resources or for their links to tribal history and tūpuna.

Statutory Acknowledgements are not exclusive instruments: this means that the Crown could give an acknowledgement over the same site to more than one claimant group. They can be a useful way of recognising valid overlapping interests.

## EFFECTS OF STATUTORY ACKNOWLEDGEMENTS

Because of the Crown's recognition of the association of the claimant group with the site or feature, the Statutory Acknowledgement also strengthens the notification provisions of the Resource Management Act 1991. It does this by obliging decision-makers acting under those provisions to proceed in certain ways.

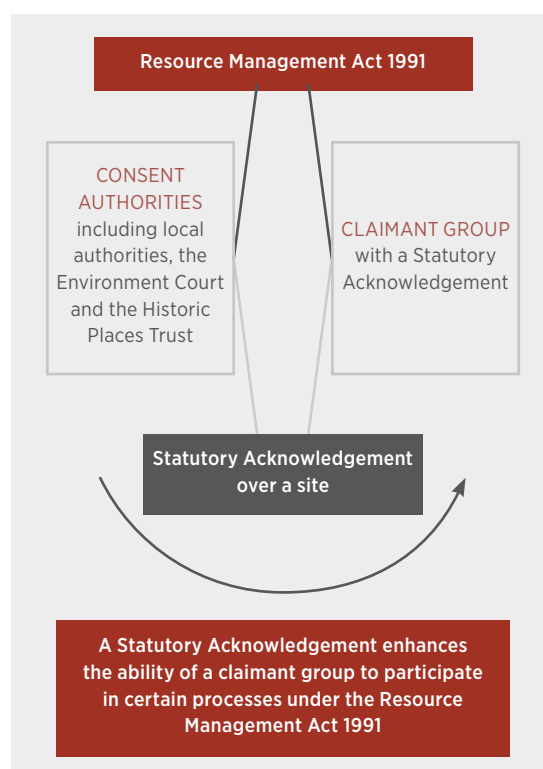


Figure 3.15: Statutory Acknowledgements

These legal obligations are that:

- consent authorities must have regard to the Statutory Acknowledgement in deciding whether the claimant group is an 'affected party' when notifying resource consent applications for those sites
- consent authorities must send summaries of all relevant applications to the claimant group before making a decision on notification
- local authorities must attach information on the acknowledgements to any relevant plans, and
- the Environment Court and the Historic Places Trust must have regard to the Statutory Acknowledgement when deciding whether to hear representatives of Māori at proceedings affecting the sites.

## MORE DETAILS ON STATUTORY ACKNOWLEDGEMENTS

*Case Study 1: Ngāi Tahu – Statutory Acknowledgement for the Clutha River/Mata-Au* on page 96 looks at Ngāi Tahu's associations with the Clutha River/Mata-Au, and the interests that Ngāi Tahu and the Crown were seeking to meet in developing this redress option. The text of the Statutory Acknowledgement for Aoraki/Mount Cook is set out in full on pages 125–126.

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## Deeds of Recognition

If a Statutory Acknowledgement has been made, the Minister of the Crown responsible for managing the area may also enter into a Deed of Recognition over the land area under management. A Deed of Recognition will provide that the claimant group must be consulted on specified matters, and that the relevant Minister must have regard to their views.

### WHEN WILL A DEED OF RECOGNITION BE ENTERED INTO?

The Crown is likely to agree to enter into a Deed of Recognition over any area covered by a Statutory Acknowledgement that the Crown is responsible for managing. But this means it will not enter into a Deed of Recognition over Crown-owned land managed by a local authority, or over water. For this reason, a Deed of Recognition is not available for a coastal area.

### WHAT IS THE IMPACT ON MANAGING THE LAND?

The Deed provides for the claimant group to contribute from time to time to managing the land. Many such sites – for example, lakebeds – are given very little active management by the Crown. The Deed of Recognition does not require the Crown to increase its management activities. As an example the Deed of Recognition for Aoraki/Mount Cook is set out on pages 127–132.

## Protocols

### WHAT IS A PROTOCOL?

A protocol is a statement issued by a Minister of the Crown, or other statutory authority, setting out how a particular government agency intends to:

- interact with a claimant group on a continuing basis and enable that group to have input into its decision-making process, and
- exercise its functions, powers and duties in relation to specified matters within its control in the claimant group's area of interest.

### HOW DO PROTOCOLS WORK?

Protocols set out processes (that is, ways of making decisions), not results. For example, a protocol issued by the Minister of Conservation might state that requests from the claimant group for the customary use of cultural materials will be considered, but it will not guarantee that the requests will be granted. This is because protocols are issued subject to the Minister's and the agency's legal and policy obligations, they do not restrict those obligations.

Since protocols set out administrative processes, they will be enforceable by way of judicial review (that is, the courts can consider how a protocol should have affected the way in which a decision was made). But damages are not available as compensation for the fact that decisions were not made in accordance with protocols. Protocols are statements made by the Crown, and not contracts, so they are not enforceable as contracts.

### PROTOCOLS MAY BE AMENDED OR CANCELLED

It may become necessary or desirable, because of changes in law or policy, or for some other reason, to amend or cancel a particular protocol. But if the relevant Minister wants to make such changes, they must first consult the claimant group and have regard to its views.



## WHEN MIGHT A PROTOCOL BE OFFERED IN A SETTLEMENT?

A protocol is a useful way of helping to define the relationship between the claimant group and government departments, particularly those whose activities are of special interest to Māori. For example, the Minister of Conservation has issued protocols on cultural materials and historic resources, amongst other things. A protocol from the Minister of Fisheries may be a useful way to deal with some customary kaimoana fisheries issues.

A protocol may also serve to meet claimant group concerns when other redress is not available or appropriate. For example, it may not be possible to transfer ownership of a number of wāhi tapu sites on Crown-owned land to the claimant group. However, a suitable protocol may help meet their concerns about protection of and access to those sites.

Protocols are not exclusive redress instruments, which means that the Minister could issue protocols to more than one claimant group for the same or an overlapping area.

Sometimes memoranda of understanding with non-Crown agencies (for example, local authorities) may be a suitable way of dealing with claimant group interests in decision-making processes. The Crown may agree to try to arrange discussions with such third parties, but any resulting protocols are not part of the settlement with the Crown.

## EXAMPLE OF A PROTOCOL

*Case Study 2: Ngati Ruanui – Ministry for Primary Industries Protocol* on page 97 shows how this instrument is used.

## Claimant specific redress

On some occasions it is more appropriate to negotiate a new form of redress for a particular claimant group interest, rather than rely on the existing redress instruments. An example of a negotiated redress instrument is the Statement of Joint Aspirations in the Pouakani Deed of Settlement. Titirapunga (a mountain) is a very important wāhi tapu to the Pouakani people. To acknowledge this they were offered three forms of redress, a Statutory Acknowledgement over the site, a Memorandum of Understanding and a Statement of Joint Aspirations. A Statement of Joint Aspirations recognises that Titirapunga is a taonga and records the joint aspirations of the Pouakani people and the Crown for Titirapunga.



## Example of a statutory acknowledgement – Aoraki/Mount Cook



### **Aoraki/Mount Cook**

*‘He kapua kei runga i Aoraki whakarewa whakarewa’  
(The cloud that floats aloft Aoraki, forever fly, stay aloft)*

The following is an extract from Schedule 14 Ngāi Tahu Claims Settlement Act 1998, Sections 205 and 206.

### **Statutory acknowledgement – Aoraki/Mount Cook**

#### **STATUTORY AREA**

The statutory area to which this statutory acknowledgement applies is the area known as Aoraki/Mount Cook located in Kā Tiritiri o te Moana (the Southern Alps), as shown on Allocation Plan MS 1 (SO 19831).

#### **PREAMBLE**

Under section 206, the Crown acknowledges Te Rūnanga o Ngāi Tahu’s statement of Ngāi Tahu’s cultural, spiritual, historic, and traditional association to Aoraki as set out below.

#### **NGĀI TAHU ASSOCIATION WITH AORAKI**

In the beginning there was no Te Wai Pounamu or Aotearoa. The waters of Kiwa rolled over the place now occupied by the South Island, the North Island and Stewart Island. No sign of land existed.

Before Raki (the Sky Father) wedded Papatūānuku (the Earth Mother), each of them already had children by other unions. After the marriage, some of the Sky Children came down to greet their father’s new wife and some even married Earth Daughters.

Among the celestial visitors were four sons of Raki who were named Aoraki (Cloud in the Sky), Rakiroa (Long Raki), Rakirua (Raki the Second), and Rārakiroa (Long Unbroken Line). They came down in a canoe which was known as Te Waka o Aoraki. They cruised around Papatūānuku who lay as one body in a huge continent known as Hawaiki.

Then, keen to explore, the voyagers set out to sea, but no matter how far they travelled, they could not find land. They decided to return to their celestial home but the karakia (incantation) which should have lifted the waka (canoe) back to the heavens failed and their craft ran aground on a hidden reef, turning to stone and earth in the process.

The waka listed and settled with the west side much higher out of the water than the east. Thus the whole waka formed the South Island, hence the name: Te Waka o Aoraki. Aoraki and his brothers clambered on to the high side and were turned to stone. They are still there today.

Aoraki is the mountain known to Pākehā as Mount Cook, and his brothers are the next highest peaks near him. The form of the island as it now is owes much to the subsequent deeds of Tū Te Rakiwhānoa, who took on the job of shaping the land to make it fit for human habitation.

For Ngāi Tahu, traditions such as this represent the links between the cosmological world of the gods and present generations, these histories reinforce tribal identity and solidarity, and continuity between generations, and document the events which shaped the environment of Te Wai Pounamu and Ngāi Tahu as an iwi.

The meltwaters that flow from Aoraki are sacred. On special occasions of cultural moment, the blessings of Aoraki are sought through taking of small amounts of its ‘special’ waters, back to other parts of the island for use in ceremonial occasions.

The mauri of Aoraki represents the essence that binds the physical and spiritual elements of all things together, generating and upholding all life. All elements of the natural environment possess a life force, and all forms of life are related. Mauri is a critical element of the spiritual relationship of Ngāi Tahu Whānui with the mountain.

The saying ‘He kapua kei runga i Aoraki, whakarewa whakarewa’ (‘The cloud that floats aloft Aoraki, for ever fly, stay aloft’) refers to the cloud that often surrounds Aoraki. Aoraki does not always ‘come out’ for visitors to see, just as that a great chief is not always giving audience, or on ‘show’. It is for Aoraki to choose when to emerge from his cloak of mist, a power and influence that is beyond mortals, symbolising the mana of Aoraki.

To Ngāi Tahu, Aoraki represents the most sacred of ancestors, from whom Ngāi Tahu descend and who provides the iwi with its sense of communal identity, solidarity, and purpose. It follows that the ancestor embodied in the mountain remains the physical manifestation of Aoraki, the link between the supernatural and the natural world. The tapu associated with Aoraki is a significant dimension of the tribal value, and is the source of the power over life and death which the mountain possesses.

#### **PURPOSES OF STATUTORY ACKNOWLEDGEMENT**

Pursuant to section 215, and without limiting the rest of this schedule, the only purposes of this statutory acknowledgement are–

- a) To require that consent authorities forward summaries of resource consent applications to Te Rūnanga o Ngāi Tahu as required by regulations made pursuant to section 207 (clause 12.2.3 of the deed of settlement); and
- b) To require that consent authorities, the Historic Places Trust, or the Environment Court, as the case may be, have regard to this statutory acknowledgement in relation to Aoraki, as provided in sections 208 to 210 (clause 12.2.4 of the deed of settlement), and

- c) To empower the Minister responsible for management of Aoraki or the Commissioner of Crown Lands, as the case may be, to enter into a Deed of Recognition as provided in section 212 (clause 12.2.6 of the deed of settlement), and
- d) To enable Te Rūnanga o Ngāi Tahu and any member of Ngāi Tahu Whānui to cite this statutory acknowledgement as evidence of the association of Ngāi Tahu to Aoraki as provided in section 211 (clause 12.2.5 of the deed of settlement).

#### **LIMITATIONS ON EFFECT OF STATUTORY ACKNOWLEDGEMENT**

Except as expressly provided in sections 208 to 211, 213, and 215,–

- a) This statutory acknowledgement does not affect, and is not to be taken into account in, the exercise of any power, duty, or function by any person or entity under any statute, regulation, or bylaw, and
- b) Without limiting paragraph (a), no person or entity, in considering any matter or making any decision or recommendation under statute, regulation, or bylaw, may give any greater or lesser weight to Ngāi Tahu’s association to Aoraki (as described in this statutory acknowledgement) than that person or entity would give under the relevant statute, regulation, or bylaw, if this statutory acknowledgement did not exist in respect of Aoraki.

Except as expressly provided in this Act, this statutory acknowledgement does not affect the lawful rights or interests of any person who is not a party to the deed of settlement.

Except as expressly provided in this Act, this statutory acknowledgement does not, of itself, have the effect of granting, creating, or providing evidence of any estate or interest in, or any rights of any kind whatsoever relating to, Aoraki.

## Example of a deed of recognition – Aoraki/Mount Cook

The following Deed was made pursuant to section 215 of the Ngāi Tahu Claims Settlement Act 1998

### DEED OF RECOGNITION FOR AORAKI

THIS DEED IS MADE ON 22 OCTOBER 1998

BETWEEN:

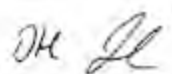
- (1) TE RŪNANGA O NGĀI TAHU (“Te Rūnanga”)
- (2) HER MAJESTY THE QUEEN in right of New Zealand acting by and through the Minister of Conservation (the “Crown”)

#### BACKGROUND

- A. On 21 November 1997 Te Rūnanga and the Crown entered into a Deed of Settlement (the “Deed of Settlement”) recording the matters required to give effect to a settlement of all of the historical claims of Ngāi Tahu Whānui.
- B. Pursuant to clause 12.3 of the Deed of Settlement, Te Rūnanga and the Crown agreed to enter into Deeds of Recognition acknowledging, on the terms identified below, Te Rūnanga’s statement of the cultural, spiritual, historic and/or traditional association on which the mana and tangata whenua status of Ngāi Tahu in relation to specific areas is based.

ACCORDINGLY, the parties acknowledge and agree as follows:

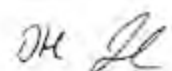
1. **Specific Area of Aoraki**  
The area which is the subject of this Deed is the area known as Aoraki / Mount Cook (the “Area”) as shown on Allocation Plan MS 1 (S.O. 19831) appended to the Deed of Settlement. The Area is administered by the Department of Conservation.
2. **Ngāi Tahu Association with Aoraki**
  - 2.1 Pursuant to section 206 of the Ngāi Tahu Claims Settlement Act 1998 (clause 12.2.2 of the Deed of Settlement), the Crown acknowledges Te Rūnanga’s statement of Ngāi Tahu’s cultural, spiritual, historic and/or traditional association to Aoraki as set out below.
  - 2.2 In the beginning there was no Te Wai Pounamu or Aotearoa. The waters of Kiwa rolled over the place now occupied by the South Island, the North Island and Stewart Island. No sign of land existed.



#### DEED OF RECOGNITION FOR AORAKI

- 2.3 Before Raki (the Sky Father) wedded Papatūānuku (the Earth Mother), each of them already had children by other unions. After the marriage, some of the Sky Children came down to greet their father's new wife and some even married Earth Daughters.
- 2.4 Among the celestial visitors were four sons of Raki who were named Aoraki (Cloud in the Sky), Rakiroa (Long Raki), Rakirua (Raki the Second), and Rarakiroa (Long Unbroken Line). They came down in a canoe which was known as Te Waka o Aoraki. They cruised around Papatūānuku who lay as one body in a huge continent known as Hawaiiki.
- 2.5 Then, keen to explore, the voyagers set out to sea, but no matter how far they travelled, they could not find land. They decided to return to their celestial home but the karakia (incantation) which should have lifted the waka (canoe) back to the heavens failed and their craft ran aground on a hidden reef, turning to stone and earth in the process.
- 2.6 The waka listed and settled with the west side much higher out of the water than the east. Thus the whole waka formed the South Island, hence the name: Te Waka o Aoraki. Aoraki and his brothers clambered on to the high side and were turned to stone. They are still there today. Aoraki is the mountain known to Pākehā as Mount Cook, and his brothers are the next highest peaks near him. The form of the island as it now is owes much to the subsequent deeds of Tū Te Rakiwhānoa, who took on the job of shaping the land to make it fit for human habitation.
- 2.7 For Ngāi Tahu, traditions such as this represent the links between the cosmological world of the gods and present generations, these histories reinforce tribal identity and solidarity, and continuity between generations, and document the events which shaped the environment of Te Wai Pounamu and Ngāi Tahu as an iwi.
- 2.8 The meltwaters that flow from Aoraki are sacred. On special occasions of cultural moment, the blessings of Aoraki are sought through taking of small amounts of its 'special' waters back to other parts of the island for use in ceremonial occasions.
- 2.9 The mauri of Aoraki represents the essence that binds the physical and spiritual elements of all things together, generating and upholding all life. All elements of the natural environment possess a life force, and all forms of life are related. Mauri is a critical element of the spiritual relationship of Ngāi Tahu Whānui with the mountain.

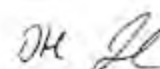
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#### DEED OF RECOGNITION FOR AORAKI

- 2.10 The saying 'He kapua kei runga i Aoraki, whakarewa whakarewa' ('The cloud that floats aloft Aoraki, for ever fly, stay aloft') refers to the cloud that often surrounds Aoraki. Aoraki does not always 'come out' for visitors to see, just as that a great chief is not always giving audience, or on 'show'. It is for Aoraki to choose when to emerge from his cloak of mist, a power and influence that is beyond mortals, symbolising the mana of Aoraki.
- 2.11 To Ngāi Tahu, Aoraki represents the most sacred of ancestors, from whom Ngāi Tahu descend and who provides the iwi with its sense of communal identity, solidarity, and purpose. It follows that the ancestor embodied in the mountain remains the physical manifestation of Aoraki, the link between the supernatural and the natural world. The tapu associated with Aoraki is a significant dimension of the tribal value, and is the source of the power over life and death which the mountain possesses.
- 3. Role of Te Rūnanga**
- 3.1 By reason of the Crown's acknowledgement of the association described in clause 2, Te Rūnanga must be consulted and particular regard had to its views relating to the association described in clause 2 concerning the following management and administration activities which may be undertaken from time to time by the Crown in relation to the land within the Area:
- (a) the preparation, consistent with Part IIIA of the Conservation Act and section 47 of the National Parks Act, of all Conservation Management Strategies and/or National Park Management Plans which relate to the Area;
  - (b) the preparation of all non-statutory plans, strategies or programmes for the protection and management of the Area in relation to the following:
    - (i) any programme to identify and protect indigenous plants;
    - (ii) any survey to assess current and future visitor activities;
    - (iii) any departmental guidelines for search and rescue programmes;
    - (iv) any programme to identify and protect wildlife;
    - (v) any programme to eradicate pests or other introduced species; or
    - (vi) any survey to identify the number and type of concessions which may be appropriate; and

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DEED OF RECOGNITION FOR AORAKI

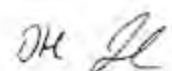
- (c) the location, construction and relocation of any structures, huts, signs and tracks.
- 3.2 In order to enable Te Rūnanga to fulfill its role under clause 3.1 the Crown will provide Te Rūnanga with relevant information to enable Te Rūnanga to consider and advise its views to the Crown on any matter on which it is consulted.
- 3.3 The Crown will inform Te Rūnanga of all concession applications to the Area (but retains the discretion to withhold commercially sensitive material).
- 4. Other Provisions**

Pursuant to sections 217, 218 and 219 of the Ngāi Tahu Claims Settlement Act 1998 (clauses 12.2.11, 12.2.12 and 12.2.13 of the Deed of Settlement):

  - 4.1 except as expressly provided in this Deed of Recognition:
    - (a) this Deed of Recognition does not affect, and is not to be taken into account in, the exercise of any power, duty, or function by any person or entity under any statute, regulation, or bylaw; and
    - (b) without limiting paragraph (a), no person or entity, in considering any matter or making any decision or recommendation under any statute, regulation, or bylaw, may give any greater or lesser weight to Ngāi Tahu's association to the Area than that person or entity would give under the relevant statute, regulation or bylaw, if this Deed of Recognition did not exist in respect of the Area.
  - 4.2 except as expressly provided in this Deed of Recognition, this Deed does not affect the lawful rights or interests of any person who is not a party to the Deed of Settlement; and
  - 4.3 except as expressly provided in this Deed of Recognition, this Deed does not, of itself, have the effect of granting, creating, or providing evidence of any estate or interest in, or any rights of any kind whatsoever relating to, the Area.
  - 4.4 Nothing in this Deed requires the Crown to undertake any management function referred to in clause 3 above.
- 5. Alienation of Land**

Pursuant to section 214 of the Ngāi Tahu Claims Settlement Act 1998 (clause 12.2.8 of the Deed of Settlement), in the event that the Area is alienated by the

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DEED OF RECOGNITION FOR AORAKI

Crown, this Deed of Recognition is automatically terminated (and the right of first refusal set out in Part 9 of the Ngāi Tahu Claims Settlement Act 1998 (Section 9 of the Deed of Settlement) applies).

**6. Change in Management**

Pursuant to clause 12.2.9 of the Deed of Settlement, if there is a change in the Crown entity managing the Area, or the applicable statutory management regime over the Area, the Crown will take reasonable steps to ensure that Te Rūnanga continues to have input into the management of the Area through the negotiation, by the Minister responsible for the new management or management regime, of a new or amended Deed of Recognition to replace this Deed of Recognition.

**7. Interpretation**

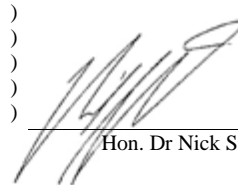
- 7.1 Terms defined in the Deed of Settlement will have the same meaning in this Deed.  
In addition:


*concession* has the meaning given to it in the Conservation Act 1987.

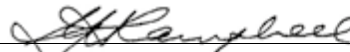
- 7.2 To the extent that any inconsistencies exist between this Deed of Recognition and the Deed of Settlement the provisions of the Deed of Settlement will prevail.

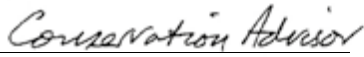
**EXECUTED** as a Deed on 22 October 1998

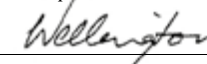
**SIGNED** for and on behalf of  
**HER MAJESTY THE QUEEN** in  
right of New Zealand by  
**HON. DR NICK SMITH**, Minister  
of Conservation in the presence of:

)  
)  
)  
)  
)  
)  
  
\_\_\_\_\_  
Hon. Dr Nick Smith

  
\_\_\_\_\_  
Witness

  
\_\_\_\_\_  
Signature

  
\_\_\_\_\_  
Occupation

  
\_\_\_\_\_  
Address

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DEED OF RECOGNITION FOR AORAKI

THE SEAL of  
TE RŪNANGA O NGĀI TAHU was  
affixed to this document in the presence  
of:



Rūnanga Representative

  
\_\_\_\_\_

Secretary

  
\_\_\_\_\_

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# Supporting information

# Protection of potential settlement assets

This section explains how the Crown protects the following assets for potential use in settling historical Treaty of Waitangi claims:

- surplus Crown-owned land
- Public Works Act land held by the Crown and sought by local authorities
- Crown-owned land transferred to State-Owned Enterprises and tertiary education institutions, and
- licensed Crown forest land.

Claimant groups are often concerned that the Crown will sell land that could be used to settle claims before a settlement is negotiated. The Crown is committed to ensuring that it retains sufficient assets to settle all historical claims. However, in doing so, the Crown must also be able to conduct its day-to-day business efficiently. In order to ensure that both of these objectives can be met, the Crown has provided both statutory and administrative processes to enable assets to be used in settlement.

These are:

- ‘landbanking’ processes managed by OTS
- consultation process for Public Works Act land held by the Crown and sought by local authorities
- statutory protection of Crown forest assets, and
- statutory memorials (such as under section 27B of the State-Owned Enterprises Act 1986).

The term Protection Mechanism is used to describe all of these ways of protecting Crown assets for possible use in future Treaty of Waitangi settlements. The term can also be used in a narrow sense to describe the process by which OTS acquires surplus Crown land for future settlements and holds that land in landbanks until the settlements in which the land might be used are completed.

This section explains each of these processes, and also outlines the process managed by Te Puni Kōkiri for protecting or transferring sites of significance (wāhi tapu) outside the settlement process.

## The Protection Mechanism – surplus Crown-owned land and OTS landbanks

### OVERVIEW

The Protection Mechanism is run by OTS and ensures that surplus Crown-owned land is considered for possible use in Treaty settlements before it can be sold on the open market. This preserves the capacity of the Crown to provide redress for well-founded claims. Properties that meet the criteria for protection (see page 135) are bought by OTS and landbanked (that is, held by OTS until the claims in the area concerned have been settled). OTS receives separate funding to pay for properties for landbanking, so claimants do not have to pay for the properties being landbanked. Nor does the Protection Mechanism affect the money available to settle claims.

This Protection Mechanism applies to all Crown (departmental) land, Crown Research Institute land, and District Health Board land that has become surplus and on which all statutory obligations – such as any obligations under the Public Works Act to offer land back to the original owners – have been cleared, and the department or agency wishes to sell. Land owned by SOEs and some other Crown entities is protected by the statutory memorial system described on page 153.

When a property is landbanked it is then available for use in settlement. As claims are settled, claimant groups can include landbanked properties in the settlement. In such cases the properties will be part of the overall settlement quantum and will be transferred to claimants at market value. If properties available for a particular settlement are not included in that settlement, OTS then sells them on the open market on behalf of the Crown, unless the properties are also subject to overlapping claims from other claimant groups. Following settlement of all claims – including any overlapping claims – in a landbank area, the landbank for the area concerned ceases to operate.



Figure 4.1: Types of landbanks

## Types of landbanks

There are three types of landbank operated by OTS:

### REGIONAL LANDBANKS

There are 15 regional landbank areas and they operate over any land not covered by the Crown Settlement Portfolio or Claim Specific Landbanks (see below). When such Crown-owned land in these areas is declared surplus, it is publicly advertised and any Māori who has registered a claim with the Waitangi Tribunal for the relevant area may apply to have the land protected and placed in the regional landbank. If the Crown agrees to protect the property that has become surplus, OTS will buy it and hold it in a regional landbank. Properties not landbanked are released and sold on the open market.

Regional landbanks are subject to financial caps that limit the total value of property that can be protected for each region. Property protected in regional landbanks is not held for any particular claimant group, even though it may have been protected on the basis of one group's application.

### CROWN SETTLEMENT PORTFOLIO (CSP)

This operates within the former raupatu or confiscation boundaries specified under the New Zealand Settlements Act 1863. All surplus Crown-owned properties within these boundaries are automatically landbanked but the property is not linked with a specific claim at that point. There is no financial cap or limit on the value of land that may be held in the CSP.

The Crown Settlement Portfolio was established in recognition of the severity of confiscation and because there is often little land remaining in Crown ownership in the areas where confiscation occurred.

### CLAIM SPECIFIC LANDBANKS

In the recent past, Claim Specific Landbanks were established to hold land relevant to specific claims. Although these landbanks will continue to operate, no more are being set up as the whole country is now covered by a network of regional landbanks that serve the same purpose. Once the claims to which a Claim Specific Landbank applies have been settled, the landbank will cease to operate and any properties remaining within it will be sold. As with regional landbanks, existing Claim Specific Landbanks operate under financial caps that limit the total value of surplus Crown-owned property in each.

## Criteria for landbanking

Under the Protection Mechanism process properties may be landbanked in a regional landbank or Claim Specific Landbank based on the following criteria, applied on a case-by-case basis:

- the applicants have given sufficient reasons to show the significance of the site to them
- there is a strong enough justification for meeting the costs of holding the property
- there is room within the financial cap, and
- if the cap has been reached, the property is of such significance that an exception should be made and the property should be protected anyway.

Once property is approved for landbanking, the vendor agency and OTS begin to negotiate and finalise the transfer at market value from the department or agency selling the property to OTS.

It is important to note that before property is considered for landbanking, it must have been cleared from the requirement to offer it back to former owners under section 40 of the Public Works Act 1981 or section 23 of the New Zealand Railways Corporation Restructuring Act 1990. Any other legal obligations affecting the Crown's ability to dispose of the land must also be resolved.



Landbank property – Anson House, Tauranga

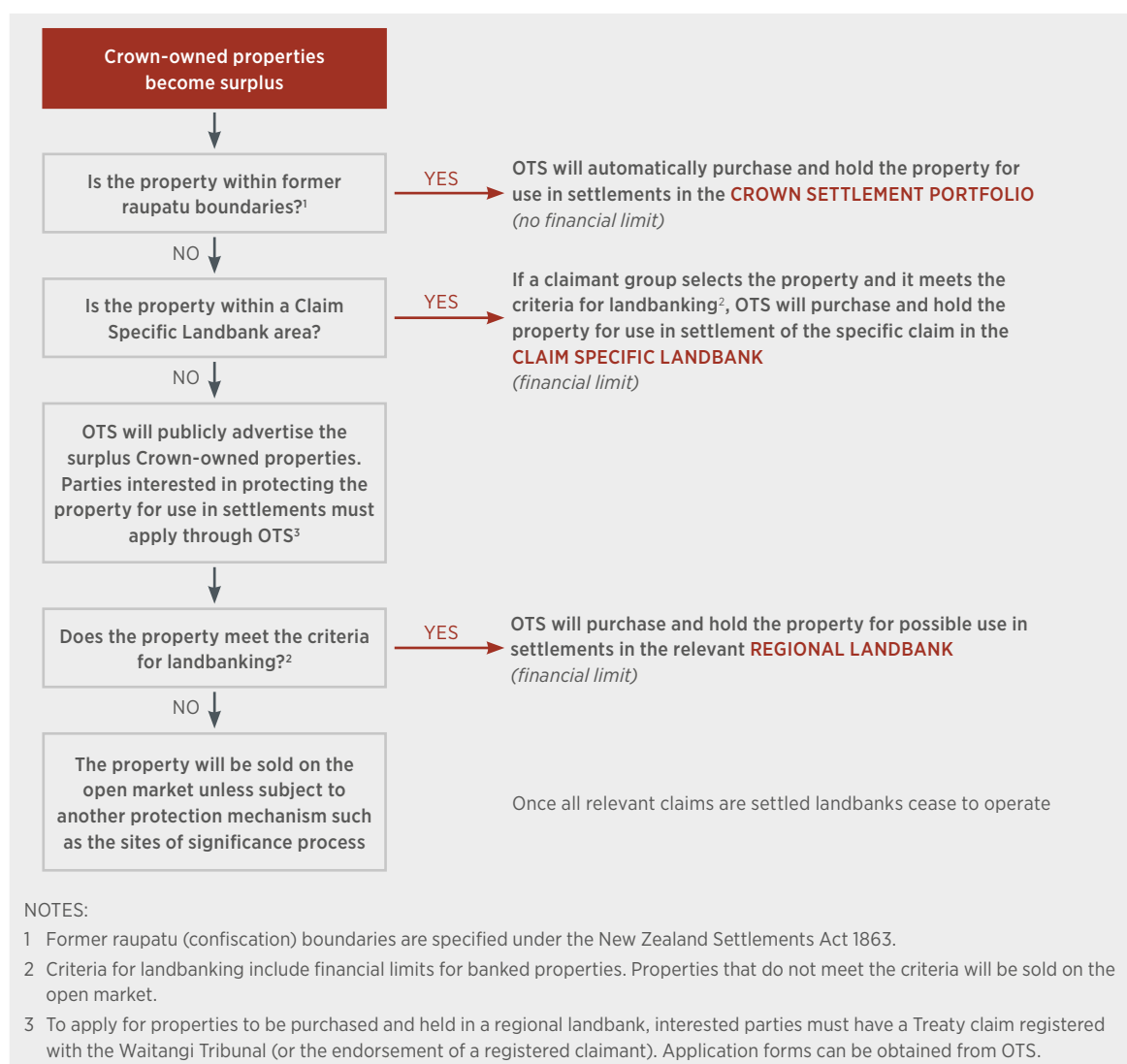


Figure 4.2: OTS Protection Mechanism process

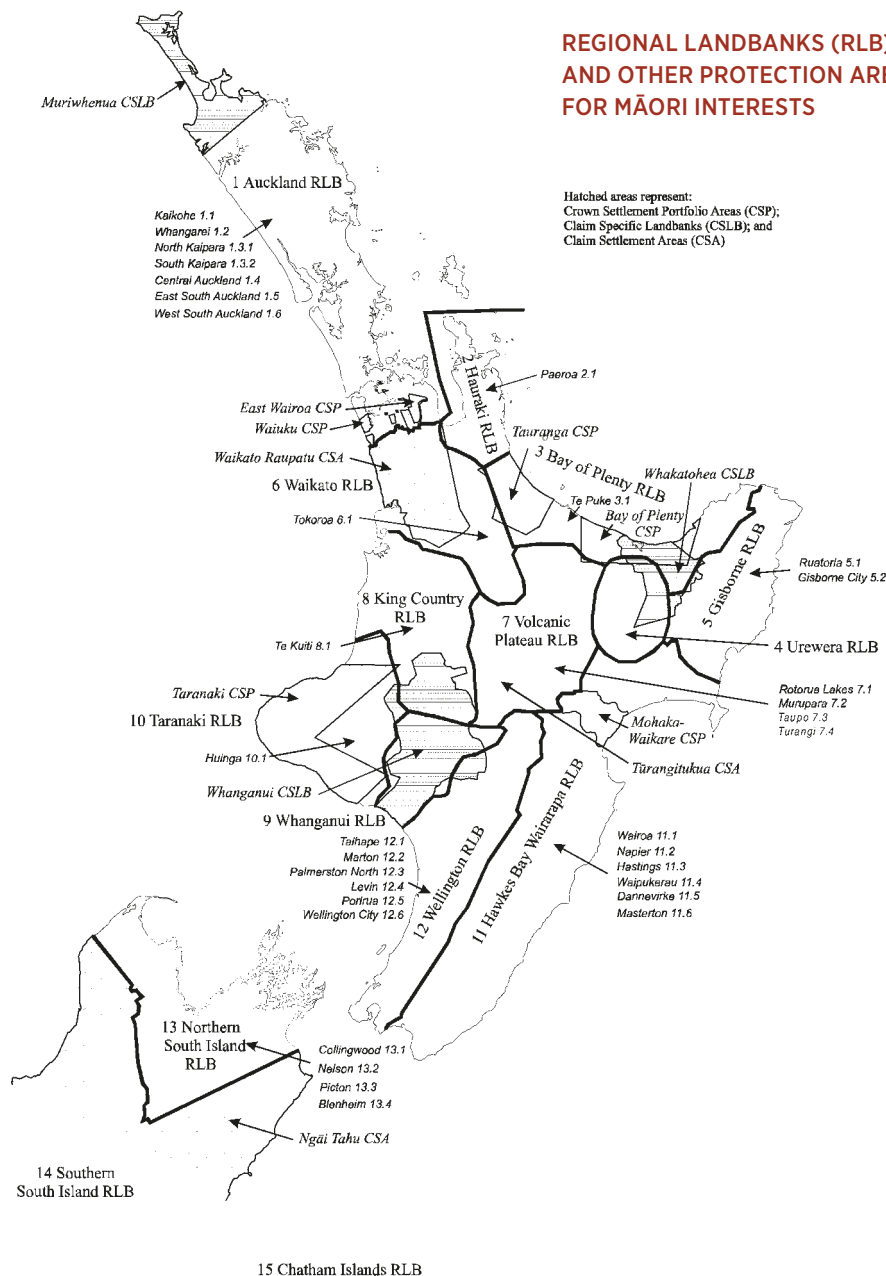


Figure 4.3: map showing coverage of the various landbanks

## VENDOR PREFERENCE EXEMPTION

Cabinet has agreed that in exceptional circumstances Ministers may, on a case-by-case basis, consider exempting a property from landbanking to allow it to be sold to a specific third party. This policy may be applied, for example, when surplus land is required to provide continuing community services. Cabinet will consider such exemptions only after applications from

Māori have been received and considered under the Protection Mechanism.

If such an exemption is agreed, provision may be made through a Right of First Refusal for the Crown to reacquire the property if the community service stops operating from the property. If the Crown does reacquire the property, and it is declared surplus, it can be reconsidered for landbanking.

*Further information on landbanking is available from the Protection Mechanism Coordinator, Office of Treaty Settlements (see OTS contact details on inside front cover).*

## MANAGEMENT OF LANDBANKED PROPERTIES

OTS has overall responsibility for managing landbanked properties and is required to act as a good landlord and to maintain the properties to at least the standard they were in when acquired. OTS must also manage the landbank so that it recovers the costs of holding properties and obtains a commercial rate of return.

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## Transfer of Public Works Act land held by the Crown to a local authority for a public work

A consultation process introduced in 2001 deals with the situation when a local authority wants to obtain land acquired by the Crown under the Public Works Act for a local work, such as a road or sewerage system. As part of this process the interests of Māori are considered and, if confirmed, protected. This process aims to make sure that, if possible, the relevant land is not lost to the Treaty settlement process, and that matters relating to sites of significance are addressed. It weighs up the competing interests of local authority requirements for land for a local work and the interests of Māori.

As part of this process, OTS and Te Puni Kōkiri use the Protection Mechanism processes to identify any Māori interests, and then advise on how these interests may be appropriately taken into account. The Minister for Land Information (the Minister) considers this advice in deciding to either approve or decline the transfer to the local authority under section 50 of the Public Works Act.

The relevant considerations that the Minister takes into account in making a decision include:

- the nature of the work and its importance to the community
- the availability of other sites for the public work, and
- the significance of the property to Māori and the issue of any encumbrances that could be placed on the land to protect Māori interests.

The Minister balances Māori interests against the wider community interest in the proposed public work when she or he assesses what, if any, measures should be adopted to protect those Māori interests.

## WHAT DO CLAIMANTS HAVE TO DO AND WHY?

OTS will seek comments from the relevant claimant group or groups from the perspective of protecting land for use in Treaty settlements. Claimant groups will provide site-specific information, where possible, on the significance of the property. The following types of information would be useful, but are not limited to:

- a the historical or cultural significance of the particular property
- b any specific features of the property that mean it could not be substituted by another property
- c whether the property is the specific subject of a Waitangi Tribunal claim, and
- d the intended future use by the claimant group of this property if it were transferred in a Treaty settlement.

OTS will also invite claimant groups to make any comments in support of the local work proposal.

It is possible that these properties will not be surplus to the requirements of the Crown agency. In such cases if the property is not transferred to the local authority then the Crown agency will continue to hold the land for the existing public work. If the property becomes surplus at some time in the future the standard processes for the disposal of surplus Crown land will be applied.

## Statutory protection: memorials noted on land titles

Following the challenge by the New Zealand Māori Council, in the Lands case referred to earlier (page 15), to the Crown's intention to transfer land to the then newly created State-Owned Enterprises, Parliament passed the Treaty of Waitangi (State Enterprises) Act 1988. This provided a new section 27A in the State-Owned Enterprises Act 1986, requiring that memorials (a formal notation or record) be placed on all titles to Crown land transferred to State-Owned Enterprises under that Act.

The effect of such a memorial is that under section 27B of the State-Owned Enterprises Act 1986 the Waitangi Tribunal, in specified circumstances, can order the Crown to take back or 'resume' a property to be used in settling a Treaty claim, unless the Crown and claimant groups first agree on a settlement. These memorials have become commonly known as section 27B memorials.

There is provision for similar memorials to be noted on the titles of former Crown railway land, and land transferred by the Crown to tertiary educational institutions. However, the provisions for railway land have never come into play to date, as such land has been leased rather than sold to operators.

These memorials remain on the titles even if they are sold to third parties, and are not removed until claims over the area concerned have been settled or affected Māori groups agree to their removal. The memorial warns third parties that the property may be used for settling Treaty claims through resumption by the Crown. If this happens compensation is paid as if the property was being acquired under the Public Works Act 1981.

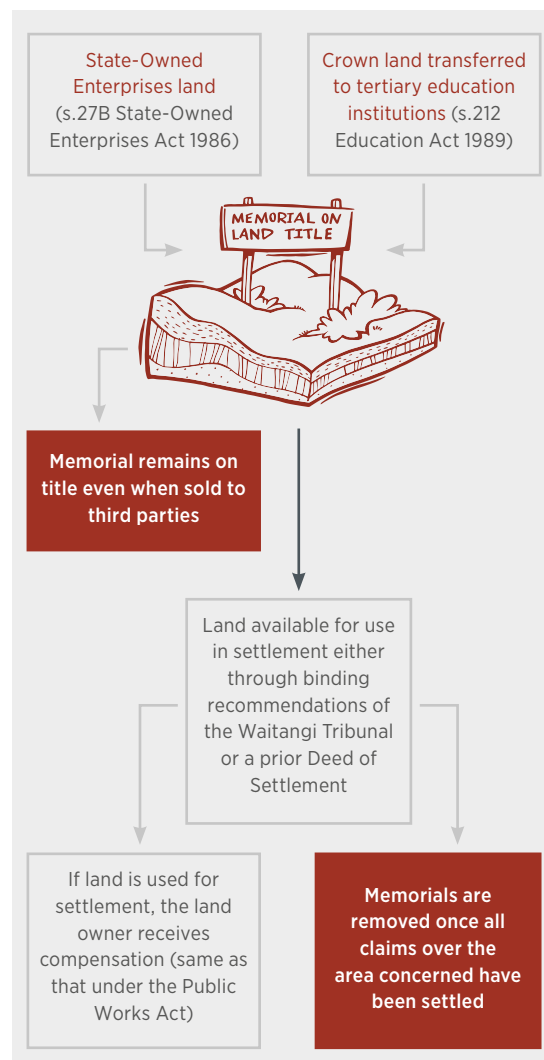


Figure 4.4: 27B and other memorials on land titles

## Statutory protection of Crown forest assets

As well as the protections just noted, there are provisions in the Crown Forest Assets Act 1989 that prevent the Crown from disposing of land over which there is a Crown forestry licence.

As with section 27B and similar memorials, these provisions arose from Māori concerns that the Crown's plans to sell assets – in this case the land under exotic forests – would greatly reduce assets available for settlement. The Waitangi Tribunal has similar powers to make binding recommendations over Crown forest land as it has over memorialised land. There are further requirements affecting the return of Crown forest land, which are explained in more detail on page 86.

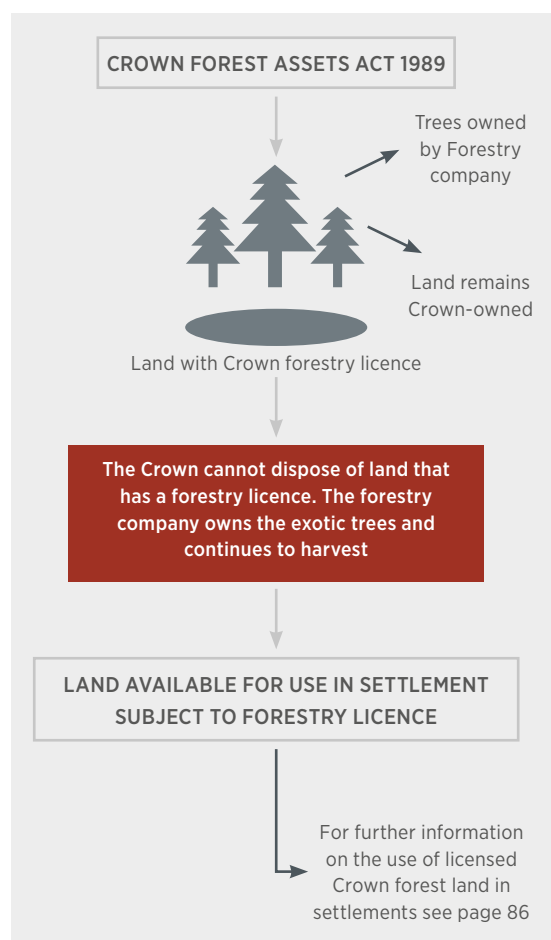


Figure 4.5: protection of Crown forest assets

## When can the Waitangi Tribunal order 'resumption'?

The Waitangi Tribunal can make recommendations for resuming memorialised lands when:

- a claim is registered with the Waitangi Tribunal relating to the memorialised land, and
- the Waitangi Tribunal finds that the claim is well-founded, and
- returning all or part of the memorialised land to Māori ownership is required to compensate for or remove the prejudice caused by the Crown action or omission in breach of the Treaty and its principles.

Recommendations for resumption are first made as interim orders, that is, they are not binding immediately. The legislation allows the claimant group and the Crown 90 days to negotiate a settlement. This may or may not include the properties covered by the interim orders. If a negotiated settlement is not reached in 90 days, the recommendations become final and binding and the Crown must resume the properties for transfer to the claimant group.



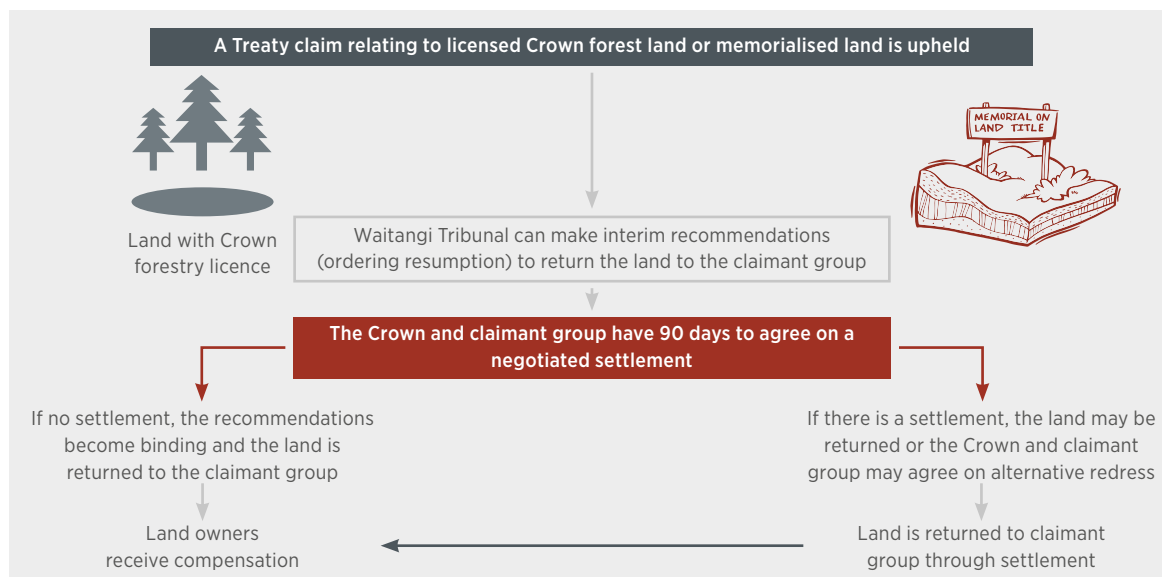


Figure 4.6: Waitangi Tribunal resumption order

## Has the Waitangi Tribunal ever used its resumptive powers?

In 1998 the Tribunal made interim recommendations for resumption of SOE land in the Ngāti Tūrangitukua claim area. The scope of the recommendations took account of the Crown's position on existing claim relativities, and did not include all 'resumable' properties in the claim area. The Crown and Ngāti Tūrangitukua reached a settlement in September 1998, before the recommendations became binding. The settlement included one of the properties recommended for resumption.

## Use of memorialised properties in negotiated settlements

Alternatively, memorialised properties may be considered for use in a negotiated settlement. Whether or not a specific property is used will depend on the particular circumstances affecting that property.

### WHAT COMPENSATION DOES THE OWNER OF A MEMORIALISED PROPERTY RECEIVE?

When a property is acquired through resumption, the owner of the property gets compensation from the Crown as if the property had been compulsorily acquired under the Public Works Act 1981. This is

because it is the Crown, rather than the owner, who bears the cost of settling Treaty claims. The Public Works Act sets out a process for determining the market value of the property and specifies other costs that owners can recover. If the use is by agreement, the Deed of Settlement will provide for market valuation and how this is worked out.

## Additional protection for wāhi tapu – the 'Sites of Significance' process

Apart from the landbank processes and separate from the Treaty settlements process, there is another source of land protection for Māori. As a matter of good government, the Crown accepts a responsibility to protect wāhi tapu and other sites of historical, spiritual, and cultural significance to Māori.

This responsibility is administered by Te Puni Kōkiri through a 'Sites of Significance' process that is separate from, but works in tandem with, the Protection Mechanism and is concerned primarily with protecting sites of significance on surplus Crown land. The process is open to any Māori who can establish an association with the site, whether or not they have a Treaty of Waitangi claim. The criteria that these sites should meet, and the details on how to apply for protection, are set out in the Te Puni Kōkiri publication Sites of Significance Process (see page 150 for contact details).

# Glossary of technical terms

Words in *italics* are defined elsewhere in this Glossary or in the Glossary of Māori Terms. Page references are to relevant text.

Term	Definition	Page
<b>Aboriginal title</b>	an indigenous property right recognised at common law sometimes used interchangeably with customary title or <i>customary rights</i> . Title generally refers to interests in land, while rights refers to use rights such as fishing or gathering plants	27
<b>Agreement in Principle</b>	an agreement between the Crown and a claimant group, marked by the signing of a formal document or, in some cases, the exchange of letters between the claimant group and the Minister for Treaty of Waitangi Negotiations. The Agreement in Principle outlines the nature and scope of all settlement redress and is the basis for the final Deed of Settlement. An Agreement in Principle is non-binding on the Crown and claimant group.	58
<b>Alienation</b>	general term for loss of ownership of land, whether through sale, confiscation or other means such as acquisition under the Public Works Act 1981 or similar legislation	6–11
<b>Apology</b>	the Crown's formal expression of regret for breaches of the Treaty and its principles in relation to the claimant group	79
<b>Claimant group definition</b>	a description of those people whose claims will be settled and who will be the beneficiaries of the settlement and the <i>governance entity</i>	42
<b>Claimant funding</b>	Crown funding provided to a claimant group as a contribution towards the costs they incur in negotiating their settlement	49
<b>Coastal Marine Area</b>	expression used in the Resource Management Act 1991 for the foreshore, sea and seabed out to the 12-mile limit	107
<b>Common law</b>	system of judge made law applied in New Zealand from 1840, and derived from the English legal system	51
<b>Comprehensive negotiations</b>	negotiation of all <i>historical claims</i> of a claimant group at the same time	38
<b>Contemporary claims</b>	those claims arising from Crown acts or omissions after 21 September 1992 (see also <i>historical claims</i> )	23
<b>Crown</b>	executive branch of government	17
<b>Crown acknowledgements</b>	those matters that the Crown acknowledges as breaches of the Treaty and its principles. These form the basis of the apology in a <i>Deed of Settlement</i>	79
<b>Crown Negotiating Parameters</b>	particular parameters of redress agreed by Ministers as available for discussion between the Crown and the claimant group's mandated representatives	52
<b>Customary rights</b>	<i>Common law</i> recognition of traditional rights of indigenous people – for instance, rights to fish or to gather plants, – sometimes used interchangeably with <i>aboriginal title</i> , but 'title' more correctly refers to interests in land	22

Term	Definition	Page
<b>Deed of Mandate</b>	a formal statement prepared by a claimant group stating who is appointed to represent them in negotiations with the Crown, and how the mandate was approved by the claimant group	42
<b>Deed of Recognition</b>	Deed issued by Minister of the Crown responsible for an area of Crown land covered by a <i>Statutory Acknowledgement</i> , recognising a statement of the claimant group's associations with the area and allowing for consultation with the claimant group on specified matters	123
<b>Deed of Settlement</b>	the complete, detailed and formal settlement agreement signed on behalf of the Crown and the claimant group	60
<b>Easement</b>	rights that a third party or the public may have over land – for instance, a right of way, the right to drain water over or under the land, or a right of access for specified purposes	63
<b>Fee simple estate</b>	full legal ownership of or title to land, also known as freehold title	116
<b>Fiscal envelope</b>	see Settlement Envelope	81
<b>Governance entity</b>	the representative, accountable and transparent body which eventually receives and manages settlement assets on behalf of the claimant group	67
<b>Hapū or whānau interests</b>	interests of specific hapū or whānau within the larger claimant group and distinct from the collective claims of the larger claimant group, which may be given specific recognition in a settlement	61
<b>Historical account</b>	narrative of historical basis for the claims being settled by a Deed of Settlement, the context for the Crown's acknowledgements and apology	79
<b>Historical claims</b>	those claims that may arise out of or relate to Crown acts or omissions before 21 September 1992	23
<b>Landbanking</b>	a process to protect surplus Crown-owned, or formerly Crown-owned, lands for future use in the settlement of Treaty claims (see also Protection Mechanism)	134
<b>Lease</b>	a contract providing for exclusive possession of land for a defined period, creating the relationship of landlord and tenant (or lessor and lessee)	63
<b>Licence</b>	in the Treaty settlement context, this refers to permission from a landowner to go onto or use land for specified purposes – for instance, a grazing licence	63
<b>Licensed Crown forest land</b>	land under Crown exotic forests, subject to the Crown Forest Assets Act 1989. Cutting rights to trees may be licensed, and the Waitangi Tribunal can order the Crown to transfer land and other compensation to a claimant group in specified circumstances	86

Term	Definition	Page
<b>Mandating for negotiations</b>	process by which the claimant group chooses representatives and gives them the authority to negotiate with the Crown on behalf of the group (see also Deed of Mandate)	39
<b>Memorials</b>	statutory notations on certificates of title of the power of the Waitangi Tribunal to order resumption of the land by the Crown for return to Māori	139
<b>Overlapping claim or shared interest</b>	where two or more claimant groups make claims over the same area of land which is the subject of historical Treaty claims. Also known as a 'cross claim'	53
<b>Overlay classification</b>	statutory instrument that applies to specified land managed by the Department of Conservation, allowing for recognition of claimant group values in the management of the site without altering the underlying classification of the land, for example, as part of a National Park. Known as Tōpuni in the Ngāi Tahu settlement, Taki Poipoia o Ngati Ruanui in the Ngati Ruanui settlement, and Kirihipi in the Te Uri o Hau settlement	121
<b>Protection Mechanism</b>	a generic term for the processes by which the Crown ensures that Crown land can be retained for use in settlements. It is also used to refer specifically to the process – administered by OTS – through which surplus Crown-owned lands can be retained in landbanks until claims for which the land may be used in settlement, have been completed (see landbanking)	134
<b>Protocol</b>	statutory instrument comprising a statement issued by a Minister of the Crown, or other statutory authority, setting out processes for how a particular government agency intends to interact with a claimant group and enable that group to have input into its decision-making process	123
<b>Quantum</b>	total monetary value of the redress in terms of cash and assets provided to a claimant group in settlement of their historical claims. It also refers to the total amount of financial and commercial redress in a settlement package	81
<b>Resumption</b>	where the Waitangi Tribunal makes a binding recommendation ordering the Crown to resume (take back ownership of) land subject to a memorial as redress in settling well-founded Treaty claims	140
<b>Right of First Refusal</b>	the right of a claimant group to have the opportunity, ahead of any other potential purchaser, to purchase specified surplus Crown land when such land is available for disposal by the vendor agency	85
<b>Section 40 offer-back</b>	the right, under section 40 of the Public Works Act 1981, of a former owner of land acquired by the Crown for a public work to have that land offered back, should the land no longer be required for the public work	136
<b>Settlement Envelope</b>	concept, developed by the Crown in 1992-1994, used to describe the total sum set aside for the settlement of historical Treaty claims (also called the 'fiscal envelope'). It was discontinued at the end of 1996	81

Term	Definition	Page
<b>Statutory Acknowledgement</b>	statutory instrument in which the Crown recognises (in settlement legislation) the claimant group's statement of its cultural and traditional links with a specified area or feature, such as rivers, lakes, mountains, coastal areas, wetlands, etc.	122
<b>Statutory instruments</b>	generic term for redress options recognising a range of cultural interests in settlements, through the use of arrangements set out in settlement legislation, for example, a Statutory Acknowledgement	115
<b>Terms of Negotiation</b>	a written agreement between the Crown and a claimant group setting out the agreed objectives and ground rules for negotiations	51
<b>Vendor agency</b>	government department involved in the transfer of properties in settlements or under a Right of First Refusal, or through the landbanks operated by OTS (see landbanking)	85
<b>Vesting</b>	statutory transfer of fee simple estate (title or ownership) in land. A type of statutory instrument available in settlements	116

## Glossary of Māori terms

Term	Definition	Page
<b>Ahi kā</b>	tribal fire, symbolising rights of possession based or continuous ongoing occupation	50
<b>Hapū</b>	subtribe, grouping of related whānau	7, 39
<b>Hui</b>	meeting, assembly	39, 65
<b>Iwi</b>	used in this text to mean whakapapa-based tribe	7, 39
<b>Kaitiakitanga</b>	the practice of guardianship, care and wise management of, for example, natural resources. Kaitiaki (guardian) refers to the person(s) exercising kaitiakitanga	100
<b>Karakia</b>	prayer	79
<b>Kaumātua</b>	elders	29
<b>Kāwanatanga</b>	government or governorship	1, 7
<b>Kirihipi</b>	sheepskin, used in the Te Uri o Hau (Ngāti Whatua hapū) settlement to describe an overlay classification. It refers to a re-affirmation of the Treaty of Waitangi by Ngāti Whatua written on a sheepskin and known as Kirihipi te Tiriti o Ngāti Whatua	121
<b>Kuia</b>	female elder	29
<b>Mahinga kai</b>	food resource or place where such a resource is found	90
<b>Marae</b>	the reserved area on which meeting and dining houses are located. The space in front of the wharehau (meeting house) is the marae ātea	32, 101
<b>Maunga</b>	mountain	101
<b>Pā</b>	fortified place, stockaded village	8, 101
<b>Pouwhenua</b>	carved and decorated post of hard wood, used in settlements to signify the presence of a particular claimant group	113
<b>Rangahaua Whānui</b>	broad research by theme or district (used by Waitangi Tribunal)	36
<b>Rangatira</b>	chief, person of high rank	1
<b>Rangatiratanga</b>	chieftainship, the exercise of customary authority, see also tino rangatiratanga	1, 7
<b>Raupatu</b>	confiscation of land	9, 36
<b>Rohe</b>	district, area, region	40
<b>Rūnanga</b>	assembly, iwi council	39
<b>Taki Poipoia</b>	refers to wāhi tapu or places of spiritual significance and is used in the Ngāti Ruanui settlement to describe an overlay classification	121
<b>Taonga</b>	treasure	1, 113
<b>Tikanga</b>	customs, rituals, lore	1, 40

Term	Definition	Page
<b>Tino rangatiratanga</b>	highest chieftainship, authority. In this context the Crown interprets this to mean Māori self-management or autonomous authority of Māori groups over their Development and resources	1
<b>Tōpuni</b>	dogskin cloak, used to signify chiefly protection, and used in the Ngāi Tahu settlement to describe an overlay classification	121
<b>Tūpuna</b>	ancestors	36
<b>Urupā</b>	burial ground	101
<b>Wāhi taonga</b>	treasured or special place. This guide generally uses wāhi whakahirahira to indicate places of significance other than wāhi tapu, this includes wāhi taonga	101
<b>Wāhi tapu</b>	sacred place	101
<b>Wāhi whakahirahira</b>	treasured or significant place	101
<b>Waiata</b>	song, chant	79
<b>Whānau</b>	extended family group	39, 61

## Frequently asked questions about Treaty settlements

*Q What if the Crown knows that a claimant group has made a mistake in negotiations to the claimant group's disadvantage?*

A The Crown has an obligation to negotiate in good faith. If claimant groups have not recognised something in their claim to which they are entitled, or which would benefit them in negotiations, then the Crown, if it knows of the mistake, will ensure that such matters are brought to the claimant group's attention. Otherwise the settlements are unlikely to be durable. Terms of Negotiation record the Crown's and the claimant group's agreement to negotiate in good faith, so this is a mutual obligation on both parties.

*Q Is there still a 'settlement envelope'?*

A The 'settlement envelope' or 'fiscal envelope' no longer exists. Existing settlements will only be used as benchmarks where appropriate, such as similar claims requiring similar levels of redress. Appropriations are set aside every year for the settlement of historical Treaty claims, but these reflect the expected number of settlements in any given year and not a pre-determined fiscal cap.

*Q Are Māori customary rights extinguished when a claim is settled?*

A Settlements do two things. First, they provide redress for breaches of rights, including Treaty and any customary rights, up to 21 September 1992. Secondly, the settlement may recognise those rights in modern-day structures, for example, commercial fishing quotas. Customary rights may also have been previously extinguished by statute or other legal act. Settlements do not try to define every customary right that may still exist. Claimant groups can seek to advance claims to customary rights in the future. Of course, the Crown reserves the right to challenge the validity of any such claim.

*Q Haven't there been full and final settlements before?*

A There have been a number of attempts in the past to resolve certain Māori grievances. However, these 'settlements' were negotiated in a different context and often did not fully address all aspects of the grievances of the groups concerned. Nor were

members of wider claimant groups consulted about the content of such settlements. Settlements under the current policy take all historical grievances into account and fulfil the principles of the Treaty of Waitangi, and Crown responsibilities under it. In addition, it is only in recent years that the courts have begun to articulate the principles of the Treaty, now being reflected in settlement policy.

*Q Are settlements under the negotiations process final?*

A Yes. Claimant groups and their members cannot re-litigate their claims before the Waitangi Tribunal or courts after a settlement is reached. However, settlements still allow groups that have received them to pursue claims against the Crown for acts or omissions after 21 September 1992, including claims based on the continued existence of aboriginal title or customary rights. The Crown also retains the right to dispute such claims or the existence of such title rights.

*Q Does anyone challenge the evidence of the claimants at the Waitangi Tribunal?*

A Yes. Crown lawyers take a major role and ensure alternative evidence is put forward where necessary.

*Q Is private land available for use in Treaty settlements?*

A No, private land is not available for use in Treaty settlements, with two exceptions. The first exception is where, before the property passed into private hands, it was subject to a resumptive memorial provided for by law. This means that, at the time the private owner acquired it, they knew the government could compulsorily reacquire such land (at market value) if the Waitangi Tribunal upheld a Treaty claim and made an order that the land be returned to Māori ownership. It is the Crown's preference to seek negotiated settlements with claimants, without having to resume properties now owned by third parties. The second exception is where there is a willing seller/willing buyer. Such purchases are very rare and are likely to be small wāhi tapu.



*Q Why isn't there a cut-off date for claims and settlements?*

A One of the key objectives of Treaty settlements is to remove the sense of wrong that Māori feel about the Crown's actions by acknowledging the grievances that they have suffered. A specific 'cut-off' date would too rigidly confine the process, possibly resulting in well-founded claims not being dealt with. The Crown, while wishing to address all claims as soon as possible, cannot force any claimant group to begin negotiations. Also, claimant groups often wish to work through Waitangi Tribunal hearings and/or need to address mandating issues prior to entering negotiations, and these processes can take time. Moreover, there is a practical limit to the number of claims that the Crown can deal with at any time, and Māori should not be disadvantaged by this.

*Q How does recognition of the rights of Māori under the Treaty fit in with the principle of equality under the law?*

A English common law, which New Zealand inherited, recognises the customary rights and aboriginal title of indigenous people. The Treaty of Waitangi also recognised such rights. Recognition of such rights is therefore consistent with a legal system which itself recognises such property rights, and does not conflict with the general principle of equality under the law.

*Q What is the legal definition of a Māori?*

A The term 'Māori' is defined in the Treaty of Waitangi Act 1975 and means 'a person of the Māori race of New Zealand; and includes any descendant of any such person'. This definition means that, as long as a person can trace descent from a Māori ancestor, such a person may identify as Māori. Using this definition results in all members of a claimant group sharing the benefits from settling their claim. Under the law it is therefore not possible to exclude people on the basis of specified 'percentages' of Māori ancestry.

*Q Does redress for historical grievances mean that the government no longer has to pay social welfare benefits to Māori?*

A No. Claimant groups receive settlement monies and other redress, such as cultural recognition, in settlement of their historical Treaty claims. A settlement does not extinguish the rights and privileges guaranteed to them as New Zealanders under Article 3 of the Treaty. Settlement redress would be meaningless if it involved a corresponding drop in other entitlements.

*Q Can conservation land be used in settlements?*

A Generally, conservation land (Crown land managed by the Department of Conservation) is not available for use in Treaty settlements. However, individual sites of special cultural significance may be transferred to claimant groups. If appropriate, the transfer may be subject to conditions to protect public access and environmental values. Claimant group interests in conservation land can be met through a number of other statutory instruments. These are explained in Part 3.

*Q Are the public's rights affected by settlements?*

A Generally no, but camping entitlements, which are entitlements to temporarily occupy a piece of Crown-owned land up to one hectare in size near traditional food-gathering areas, are for the exclusive use of members of a group that has received a settlement. They provide rights similar to those contained in other leases or licenses granted by the Department of Conservation. Camping entitlements are allocated so as not to affect public access to waterways.

## Contact details for other organisations

Contact details for other organisations mentioned in this guide:

### **WAITANGI TRIBUNAL (TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI)**

Established under the Treaty of Waitangi Act 1975 to hear claims by Māori against the Crown for breaches of the Treaty of Waitangi and its principles. The Tribunal funds historical research into claims other than those relating to licensed Crown forest land.

SX11237  
Wellington  
New Zealand

Phone 04 914 3000  
Fax 04 914 3001  
Website [www.waitangi-tribunal.govt.nz](http://www.waitangi-tribunal.govt.nz)

### **TE PUNI KŌKIRI (MINISTRY OF MĀORI DEVELOPMENT)**

Te Puni Kōkiri is the lead department for advice to the government on Māori issues. Te Puni Kōkiri can assist claimant groups with information on mandate and governance issues, and also administers the Sites of Significance Process for the protection of wāhi tapu outside the direct negotiations or Protection Mechanism processes.

Head Office  
PO Box 3943  
Wellington  
New Zealand

Phone 04 819 6000  
Fax 04 819 6299  
Web [www.tpk.govt.nz](http://www.tpk.govt.nz)

### **CROWN FORESTRY RENTAL TRUST (NGĀ KAITIAKI RETI NGAHERE KARAUNA)**

If a claim concerns licensed Crown forest land, CFRT can assist with research, Waitangi Tribunal hearings and preparing for negotiations to the point where the Crown recognises a Deed of Mandate.

PO Box 2219  
Wellington  
New Zealand

Phone 0800 2378 2378 / 04 915 1500  
Fax 04 916 7806  
Web [www.cfrrt.org.nz](http://www.cfrrt.org.nz)

### **MĀORI LAND COURT (TE KOOTI WHENUA MĀORI)**

The Māori Land Court holds records of Māori land ownership since the establishment of the Native Land Court in 1862. Its Minute Books record the proceedings that brought blocks of Māori customary land under statutory Māori freehold title. Today the Court administers Te Ture Whenua Māori 1993 governing transfer of and succession to Māori freehold land and associated administrative matters.

Head Office  
SX11203  
Wellington  
New Zealand

Phone 04 914 3102  
Fax 04 914 3100  
Web [www.courts.govt.nz/maorilandcourt](http://www.courts.govt.nz/maorilandcourt)

### **TE OHU KAIMOANA (TREATY OF WAITANGI FISHERIES COMMISSION)**

Te Ohu Kaimoana is responsible for the management of commercial fisheries settlement assets and developing an allocation method for distribution to iwi, to be approved by the Minister of Fisheries. Iwi seeking a share of settlement assets must have a mandate and governance structure meeting TOKM's requirements, and can obtain advice and information on these matters from TOKM.

PO Box 3277  
Wellington  
New Zealand

Phone 04 931 9500  
Fax 04 931 9518  
Web [www.teohu.maori.nz](http://www.teohu.maori.nz)

## DEPARTMENT OF CONSERVATION (TE PAPA ATAWHAI)

The Department of Conservation is responsible for the management of New Zealand's conservation lands, including National Parks and reserves. Publications are available on a range of issues, including cultural redress involving DOC in the Ngāi Tahu settlement. The Department's Treaty Settlement Unit participates as part of the Crown Negotiating Team in settlement negotiations.

Head Office  
PO Box 10-420  
Wellington  
New Zealand

Phone 04 471 0726  
Fax 04 381 3057  
Web **[www.doc.govt.nz](http://www.doc.govt.nz)**

## MINISTRY FOR PRIMARY INDUSTRIES (MANATŪ AHU MATUA)

The Ministry for Primary Industries is responsible for the sustainable management of commercial fisheries through the Quota Management System, and of Māori customary sea fishing under regulations.

Head Office  
PO Box 2526  
Wellington 6140  
New Zealand

Phone 0800 00 83 33  
Fax 04 894 0720  
Web **[www.mpi.govt.nz](http://www.mpi.govt.nz)**  
**[www.fish.govt.nz](http://www.fish.govt.nz)**

## MINISTRY FOR THE ENVIRONMENT (MANATŪ MŌ TE TAIAO)

The Ministry for the Environment reports on the state of the New Zealand environment and the way that environmental laws and policies work in practice as part of advice to the government on action necessary to improve environmental management. Most of the responsibility for day-to-day environmental management rests with local government, particularly the regional councils. The Maruwhenua unit within MFE provides advice and support on Māori issues and perspectives.

Head Office  
PO Box 10-362  
Wellington  
New Zealand

Phone 04 439 7400  
Fax 04 439 7700  
Web **[www.mfe.govt.nz](http://www.mfe.govt.nz)**

## List of figures

Page	Description
11	1.1 Māori land today and types of Māori land alienation 1840-1995, North Island
12	1.2 Māori land today and types of Māori land alienation 1840-1995, South Island
16	1.3 Development of Treaty settlement policy
17	1.4 The Crown
19	1.5 The Office of Treaty Settlements organisational structure
21	1.6 Summary of Treaty settlements to date
23	1.7 Historical and contemporary Treaty claims
29	2.1 Four main steps of negotiations between a claimant group and the Crown
31	2.2 Key decisions points for claimant groups
31	2.3 Key decision points for the Crown
33	2.4 Comparison of the negotiations process and the Waitangi Tribunal process
35	2.5 Step 1 – Preparing claims for negotiations
37	2.6 Research for Treaty claims
40	2.7 Links between negotiators and the groups they represent
41	2.8 Mandate recognition process
49	2.9 Step 2 – Pre-negotiations
56	2.10 Step 3 – Negotiations
58	2.11 Crown and claimant negotiating teams – accountability
61	2.12 The process from Agreement in Principle to Deed of Settlement
64	2.13 Step 4 – Ratification and implementation
66	2.14 Ratification of Deed of Settlement by the claimant group
68	2.15 Example of a governance entity for distribution of settlement assets
73	2.16 Finalising the settlement – the parliamentary process for passing legislation
78	3.1 Elements of a typical settlement package
82	3.2 Elements of financial and commercial redress
85	3.3 The Right of First Refusal
87	3.4 Licensed Crown exotic forest land in settlement
89	3.5 Selection process for commercial properties
92	3.6 Negotiating a cultural redress package
104	3.7 Some redress options for rivers and lakes
107	3.8 The Coastal Marine Area (CMA)
110	3.9 Freshwater fish – who has responsibility for species and habitat management?
117	3.10 Marginal strips
118	3.11 Vesting and gifting back of significant sites

Page	Description
119	3.12 Te Waihora (Lake Ellesmere) – ownership of the lakebed
120	3.13 Vesting of reserves
121	3.14 Overlay classification
122	3.15 Statutory Acknowledgements
135	4.1 Types of landbanks
136	4.2 The OTS Protection Mechanism process
137	4.3 Map showing coverage of the various landbanks
139	4.4 27B and other memorials on land titles
140	4.5 Protection of Crown forest assets
141	4.6 Waitangi Tribunal resumption order

## List of tables

Page	Description
94	Summary of statutory instruments for cultural redress
102	Redress options using statutory instruments for wāhi tapu and wāhi whakahirahira
104	Redress options using statutory instruments for rivers and lakes
106	Redress options using statutory instruments for wetlands, lagoons, indigenous forests and tussock lands
108	Redress options using statutory instruments for coastal areas
112	Redress options using statutory instruments for geothermal and mineral resources

# Index

Page	Description
58	Agreement in Principle
49–51	Claimant funding
22	Commercial fisheries, settlement of Māori interests in
38	Comprehensive negotiations
79	Crown acknowledgements
79–80	Crown Apology: apology, 80; Crown acknowledgements, 79; historical account, 79
17	Crown, definition of
15	Crown Forestry Rental Trust
90	Cultural redress
109–110	Customary fisheries
123, 127–132	Deed of Recognition
60	Deed of Settlement
81	Financial and commercial redress
88, 111–112	Geothermal resources
67–72	Governance entities
7–13	Historical background to Māori claims
75	Implementation
26, 134–138	Landbanks
8–12	Land purchases: 20th century, 10; maps of, 11–12; New Zealand Company, 8; pre-1840, 8; pre-1865 Crown purchases, 9; pre-emption waiver, 8–9
86–87	Licensed Crown forest land
39–48	Mandating: Deed of Mandate, 42–46; mandate recognition process, 41–42; questions and answers about, 47–48; review by OTS, 44
146–147	Māori terms, glossary of
141	Memorialised properties
88, 111–112	Minerals
10	Native Land Court
29–75	Negotiations process: negotiations, 56–63; overview, 29–30; pre-negotiations, 49–55; preparing to enter, 35–48; ratification and implementation, 64–75; relationship with Waitangi Tribunal process, 32–34
18–19	Office of Treaty Settlements
150–151	Organisations, other, contact details
53–54	Overlapping claims
114	Place-name changes
26	Protection Mechanism: see also landbanks, 134–138
123	Protocols
81–82	Quantum

Page	Description
64–66	Ratification
9	Raupatu
77–132	Redress: Crown Apology, 79–80; cultural redress, 90–132; financial and commercial redress, 81–89
100	Resources and interests, redress options for
85–86	Right of First Refusal
72–75	Settlement legislation
27	Settlement policies (key)
122–123	Statutory Acknowledgement
115	Statutory instruments
116	Statutory vesting
1, 113	Taonga
142–145	Technical terms, glossary of
62–63	Third parties, role in negotiations
14–16	Treaty settlement policy: milestones in development of, 14–16; summary of key policies, 27
1–4	Treaty of Waitangi: English text, 2; English translation of Māori text, 3; Māori text, 1; principles (Court of Appeal), 15; signing, 7; status today, 6
14	Waitangi Tribunal: compulsory powers of resumption (section 27 memorials), 26, 139; establishment of, 14; power to determine meaning of Treaty of Waitangi, 14; relationship between Tribunal process and negotiations process, 32–34
101–102	Wāhi tapu





