Treaty of Waitangi Settlements Process

Executive Summary

- Prior to 1985 governments made ad hoc attempts to settle Māori grievances. In 1985 the Waitangi Tribunal was allowed to inquire into Māori claims against the government dating back to 1840.
- Any Māori may make a claim to the Waitangi Tribunal against the Crown. The Māori Purposes Bill 2006 introduces a cut off date of 1 September 2008 for submitting historical claims to the Waitangi Tribunal.
- Claimants whose claims relate to forestry land may receive financial support from the Crown Forestry Rental Trust (CFRT). CFRT is funded out of the interest earned from rentals of Crown forests.
- The Crown agency responsible for negotiating the settlement of historical grievances is the Office of Treaty Settlements (OTS), a unit within the Ministry of Justice.
- The Tribunal may only inquire into whether a practice or policy adopted by the Crown, or an action or omission by the Crown, is inconsistent with the principles of the Treaty of Waitangi and has prejudicially affected the claimants. Settlement legislation prevents the Tribunal from inquiring into claims that have already been settled.
- Historical claims are combined by the Tribunal into district inquiries. There are 37 district inquiries, of which eleven have been completed. Another six inquiries have completed hearings and are in the process of having reports written. A "new approach" adopted by the Waitangi Tribunal promises to speed up the Tribunal inquiry process.
- The Tribunal may only make recommendations to the Crown. In some limited circumstances – notably, Crown forest and SOE lands – the Tribunal may make a binding recommendation for the Crown to return land to Māori.
- The settlement of claims is done by direct negotiation between claimants and OTS on behalf of the Crown. It is possible to enter into direct negotiations without a Waitangi Tribunal report.
- OTS negotiates with "large natural groupings" of Māori claimants.
- As at August 2006, there have been 20 settlements completed, with a value of approximately $750 million.
- Currently about three settlements are reached every year. It is estimated that there are approximately 50 settlements yet to be reached.
Introduction

The process of settling Māori Treaty of Waitangi related grievances is undertaken through two separate but intertwined paths. The first is Waitangi Tribunal inquiries. The second is direct negotiations between claimants and the Crown. While most claims by Māori for the resolution of historical grievances are taken before the Waitangi Tribunal to be investigated and reported on, some Māori groups opt to negotiate directly with the Crown before the Tribunal has completed its investigation. Claimants that have received a report from the Waitangi Tribunal must still go through the direct negotiations process with the Office of Treaty Settlements before reaching a final settlement. A Tribunal report will generally form the platform for the subsequent settlement negotiations, but the Tribunal is not involved in those negotiations nor in the implementation of a settlement.

Table 1: The Waitangi Tribunal Process and the Negotiations Process

|--------------------------|-------------------------|---------------------------------------|----------------------------------------------------------|-------------------|


The Waitangi Tribunal

The Waitangi Tribunal was established under the Treaty of Waitangi Act 1975. It is a permanent commission of inquiry set up to investigate Māori claims regarding the Treaty of Waitangi. Initially the Tribunal could only hear grievances occurring after the passing of the 1975 Act. Only fourteen claims had been lodged by 1984. In 1985 the Treaty of Waitangi Act was amended to allow the Tribunal to hear claims dating back to 6 February 1840 (when the Treaty was first signed). Since that time the Tribunal has registered more than 1,300 claims, and the Tribunal has released 95 reports.

The Tribunal consists of a Chairperson and up to sixteen other members. The Chairperson must also be a Judge of the High Court or the Chief Judge of the Māori Land Court (the current chairperson is the Chief Judge of the Māori Land Court). Inquiries are heard by between three and six members. At least one member of every inquiry must be a Māori, and generally around half the members of an inquiry are Māori. Most of the members sit on a part-time basis only. There has been comment that there is a potential for a "conflict of interest" with the Chief Judge of the Māori Land Court also assuming the role of the Chairman of the Tribunal, and the 2005 Confidence and Supply Agreement between New Zealand First and the Labour Party agrees to review the appropriateness of the Chair of the Waitangi Tribunal also holding an appointment as a Māori Land Court judge.

Notes:
1. The Role of the Tribunal, Waitangi Tribunal, [http://www.waitangitribunal.govt.nz/about/about.asp](http://www.waitangitribunal.govt.nz/about/about.asp)
3. Ministry of Justice, Presentation on the Waitangi Tribunal, Wellington, 2005, p. 7; Personal communication from Waitangi Tribunal.
The Tribunal is supported by approximately 50 staff, who are employees of the Ministry of Justice. These staff carry out administrative functions for the Tribunal, as well as conducting research, liaising with claimants, and providing report writing assistance to the members of the Tribunal.\(^6\) The Waitangi Tribunal in 2004/05 had an expenditure of $7.2 million.\(^7\)

**Figure 1: Waitangi Tribunal Expenditure, 1998-2006**

![Bar chart showing expenditure from 1998/1999 to 2005/2006](chart.png)

Source: Ministry of Justice Annual Reports.

**Claimants**

Any Māori may make a claim to the Waitangi Tribunal without requiring a mandate from a wider organisation.\(^8\) Nevertheless, the Tribunal usually prefers that claimants are legally represented and, where it is appropriate, that claimants arrange joint representation with other claimants.\(^9\) Furthermore, assistance to claimants from legal aid and the Crown Forestry Rental Trust tends to favour larger organisations that are representative of iwi or hapu or clusters of claimant groups.\(^10\) The Crown's policy is to negotiate settlements with "large natural groupings". By this the Crown means a Māori group with clear kinship links and a sizeable membership and claim area.\(^11\) In practice this means that it is easier for established Māori organisations to pursue claims than it is for individuals.

As at April 2006 1,315 claims had been registered by the Waitangi Tribunal.\(^12\) Typically a larger Māori organisation will have a number of separate claims registered under its name, or registered by smaller groups or even individuals affiliated to it. Hence there is no strict relationship between the number of claims registered at the Tribunal and the number of groups who may potentially settle with the Crown.

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\(^8\) Treaty of Waitangi Act 1975, s.6.

\(^9\) Treaty of Waitangi Act 1975, s.6.

\(^10\) Treaty of Waitangi Act 1975, s.6.


\(^12\) Personal communication from Waitangi Tribunal.
Since 1987 claimants have been eligible for legal aid to pursue a claim before the Waitangi Tribunal. Before granting legal aid, the Legal Services Agency must be satisfied that:

- the case requires legal representation; and
- the group of Māori would suffer hardship if aid were not granted; and
- the interest of the group is not sufficiently protected by any other claim.\(^{13}\)

Legal aid for Waitangi Tribunal claims has been steadily increasing in recent years, reaching $11 million in 2004/05.\(^ {14}\)

**Figure 2: Legal Aid for Waitangi Tribunal Claims, 1995-2005**

![Graph showing legal aid for Waitangi Tribunal claims from 1995 to 2005.](source: Legal Services Agency Annual Reports)

The Crown Forestry Rental Trust is a trust established in 1990 which funds groups with claims to Crown forest licensed land. It was set up under the Crown Forest Assets Act 1989, after the New Zealand Māori Council and the Federation of Māori Authorities took court action to protect Māori interests in the Crown’s commercial forests. The Act allowed the Crown to sell licences for forestry, but prevented it from selling the land itself until the Waitangi Tribunal recommends who should be awarded ownership of the land - Māori or the Crown.\(^ {15}\)

The Trust receives the rental proceeds from the licensing of Crown forest land. Until the beneficial owners of the lands have been determined, the Trust:

- invests the rental proceeds and holds them in trust;
- applies the interest earned on the rental proceeds to help Māori claimants prepare, present and negotiate claims that involve or could involve Crown forest licensed lands. The Trust cannot settle Treaty claims itself.\(^ {16}\)

The accumulated Annual Rental Fees for all Crown Forest Licensed Lands will eventually be returned to successful claimants, or to the Crown. As at March 2005, the total capital assets held by CFRT totalled $459 million.\(^ {17}\)

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\(^{15}\) Establishment, CFRT, [http://www.CFRT.org.nz/about/establishment.asp](http://www.CFRT.org.nz/about/establishment.asp)

\(^{16}\) About the Trust, CFRT, [http://www.CFRT.org.nz/about/](http://www.CFRT.org.nz/about/)

The Crown Forestry Rental Trust has six Trustees. For the Crown, the Minister of Finance appoints three Trustees. For Māori, the New Zealand Māori Council and the Federation of Māori Authorities appoint three Trustees. The Trust receives no appropriation funding. All Trust operating costs, and assistance to claimants, are paid solely from the interest earned on Annual Rental Fees. In 2004/05, CFRT provided $14.4 million in assistance to claimants, and had administration expenses of $3.6 million. Since 1990 it has disbursed $66.3 million in direct assistance to claimants. CFRT funds approximately 80% of the research work for Waitangi Tribunal inquiries. As at 2005, there had been five cases totalling $46 million in which the Trust's assets were distributed to beneficiaries as part of final settlements.

Figure 3: Crown Forestry Rental Trust Annual Expenditure, 1994-2005

Source: Crown Forestry Rental Trust Reports to Appointors

It was originally anticipated that CFRT would be a short-term agency, with forestry claims being settled quickly by 1992. However, the desire of the Waitangi Tribunal to hear wider hapu and iwi claims across an entire district (rather than for specific forest blocks) and the Crown policy of only negotiating comprehensive settlements with large groupings meant that CFRT extended itself into broader support for Māori claimant groups, some of whom might only have an attenuated claim to a forest.

24 1997: Onewhero returned to Tainui Maori Trust Board ($245,662); 2000: Westland, Canterbury, Otago and Southland forests to Ngāi Tahu ($25,519,810); 2002: 100% of Pouto and 44.98% of Mangawhai to Te Uri o Hau ($1,642,593); 2005: 100% of Rotoehu East, 14.8% of Rotoehu West, 33.9% of Northern boundary to Ngāti Awa ($16,700,852); 2005: 14.1% of Rotoehu West to Tuwharetoa ki Kawerau ($1,908,773). Source: Personal communication from CFRT.
In 2000 CFRT adopted a new direction of "enhancing capacity within Māori communities" and acting as a "facilitator of regional development" rather than simply allocating funds and resources on application by claimants. In 2001 Parliament's Māori Affairs Committee commenced an inquiry into CFRT. The Committee's report, published in 2003, found that CFRT was "not fulfilling the purpose for which it was established", and that the Trust's performance had been "wholly unsatisfactory". Since then CFRT has refocused on its core activity of facilitating settlements between the Crown and Māori rather than being an active player in the process.

The Crown

Historical Treaty claims are dealt with by the Office of Treaty Settlements (OTS), which is the responsibility of the Minister in charge of Treaty of Waitangi Negotiations. OTS was created in 1995 as a unit within the Ministry of Justice. It is headed by a Director, who leads several teams that conduct active negotiations with one or more claimant groups at a time. OTS negotiations and the provision of policy advice cost $8.3 million in 2004/05. In May 2006 the government announced funding of $5.2 million over the next four years to provide OTS with additional staff and resources to further the progress of Treaty negotiations.

OTS also manages the property portfolio of Crown land set aside for possible Treaty settlements. Properties held by the "landbank" range from houses in cities to large farm blocks. Administration of the OTS property portfolio cost $5.9 million in 2004/05.

The Crown Law Office, as the Government's principal legal adviser, represents the Crown at Tribunal hearings and provides legal advice in the course of settlement negotiations. The Crown Law Office has a Treaty Issues unit of about thirteen lawyers and several contract researchers. The Crown Law Office's involvement in the Treaty process is funded out of the OTS Tribunal representation budget, which in 2004/05 cost $3.7 million.

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In the Treaty settlements process Te Puni Kōkiri (Ministry of Māori Development) advises the Government on the mandating procedure for the settlement of Treaty claims. Other government departments involved include Treasury (which provides advice on the fiscal management of claims), the Department of Conservation (which provides advice on issues concerning conservation land and plant, animal and fish species), and the Ministry for the Environment (which provides advice on resource management issues). The Parliamentary Counsel Office drafts settlement legislation.\(^5\)

The government has announced its policy that all historical claims must be lodged before 1 September 2008, with the object of settling all historical claims by 2020.\(^3\) That policy will be implemented by amending the Treaty of Waitangi Act 1975. As at September 2005, there were 952 claims before the Waitangi Tribunal, of which 64 percent were under action at various stages of the Tribunal process.\(^7\)

### Table 2: Waitangi Tribunal Claims Settled, Subject to Inquiry and Awaiting Inquiry (as at June 2005)

<table>
<thead>
<tr>
<th>Total Registered Claims since 1975</th>
<th>1236</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claims settled with Crown (and removed from further inquiry), withdrawn or further inquiry declined</td>
<td>134</td>
</tr>
<tr>
<td>Claims fully reported on by Tribunal</td>
<td>154</td>
</tr>
<tr>
<td>Claims under inquiry or in preparation for inquiry</td>
<td>608</td>
</tr>
<tr>
<td>Claims awaiting inquiry</td>
<td>340</td>
</tr>
</tbody>
</table>

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Registration of a claim by the Tribunal does not mean that the Tribunal believes the claim to be well founded or that the people making the claim are the appropriate representatives of the people on whose behalf the claim is being made. The Tribunal may decide not to inquire into a claim if it is trivial or not made in good faith, or if there is a reasonable alternative open to the claimants. 38

The Tribunal may only inquire into particular matters. Firstly, a claim must relate to:
- an Act of Parliament, regulation or other statutory instrument;
- a practice or policy adopted by the Crown or on behalf of the Crown;
- an action or omission by the Crown or on behalf of the Crown.

Secondly, the claimants must establish that the claim is:
- inconsistent with the principles of the Treaty of Waitangi, 39 and
- has prejudicially affected the claimants. 40

The Deeds of Settlement and settlement legislation to date have all stipulated that no Court or the Waitangi Tribunal may inquire into claims that have already been settled between Māori and the Crown. Currently the practice is to remove from the jurisdiction of the Tribunal and Courts:
- commercial fishing and commercial fisheries;
- the Waikato raupatu (confiscation);
- Ngāi Tahu claims to the South Island;
- other claims that have been settled, such as Ngāti Tūrangitukua, Pouakani, Te Uri o Hau, Ngāti Ruanui, and Ngāti Tama. 41

Claims may relate to privately owned land, and the Tribunal may inquire into and report on such claims. However, the Tribunal may not recommend that the land be returned to Māori ownership, or that the Crown acquire it. In such circumstances, the claimants may seek compensation from the Crown. 42

The exception to the limit placed on the Tribunal in relation to private land is memorialised lands – these are lands owned or formerly owned by a state-owned enterprise, or a tertiary institution, or former New Zealand Railways land, that have a memorial on the title advising that the Waitangi Tribunal may recommend that the land be returned to Māori ownership. 43

39 In assessing whether a claim is inconsistent with the principles of the Treaty of Waitangi, the Tribunal has taken the view that the Treaty is a "living document" to be interpreted in a contemporary setting. In considering the interpretation of the principles of the Treaty, the Tribunal noted in the Motunui-Waitara Report (1983), that:
"A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place."
Similarly, in relation to the interpretation of the Treaty from a "European" legal approach, the Tribunal considered that it should interpret the Treaty in the spirit in which it was drawn up and take into account the surrounding circumstances according to the principles of treaty interpretation, rather than interpreting the Treaty of Waitangi according to the narrower traditional tenets of statutory interpretation. http://www.waitangi-tribunal.govt.nz/scripts/reports/reports/6/2BC95342-6426-48EF-A9CE-38F3C9027330.pdf
41 Melvin, p. 13; Treaty of Waitangi Act 1975, s.6.
43 Treaty of Waitangi Act 1975, s.8A; State-Owned Enterprises Act 1986, s.27B.
Historical claims usually fall into the following areas:

<table>
<thead>
<tr>
<th>Pre-1840 land purchases and New Zealand Company purchases</th>
<th>The New Zealand Company and British settlers and speculators claimed to have purchased huge areas of New Zealand before the signing of the Treaty. Subsequently Crown commissioners found that only a small proportion of this claimed land (571,000 acres) had been legitimately purchased and had title issued for it. Significant aspects of the New Zealand Company purchases and the arrangements of the commissioners have been challenged by claimants. Māori claimants have questioned whether pre-1840 land purchases approved by the Crown were actual sales or merely conditional arrangements with no transfer of ownership. Māori claimants have also challenged the failure to set aside land for Māori purposes (“tenths”).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-emption waiver purchases</td>
<td>Article two of the Treaty of Waitangi reserved for the Crown the sole right to buy Māori land, known as Crown pre-emption. In 1844 the Crown abandoned pre-emption for a year to allow direct purchase of Māori land by settlers, mainly in the Auckland area. It is estimated that about 97,427 acres were sold by Māori to settlers under general waivers.</td>
</tr>
<tr>
<td>Pre-1865 Crown purchases</td>
<td>Between 1840 and 1865 the Crown purchased large areas of Māori land, including virtually all of the South Island and roughly 7 million acres of the North Island. There have been claims made that many of these purchases were intended by Māori to be more in the nature of an ongoing relationship with guarantees of social and economic advancement rather than outright sale, and that the amount paid by the Crown for the land was insufficient.</td>
</tr>
<tr>
<td>War and land confiscation (raupatu)</td>
<td>During the 1860s war broke out between many Māori and the Crown, and some 2.5 million acres of Māori land were confiscated to punish “rebels” and kept in Crown ownership. Another 2.1 million acres were confiscated, then returned to Māori ownership, but often in an individualised title. The Crown has conceded that its confiscation of Māori lands (under the 1863 New Zealand Settlements Act) as part of the wars of the 1860s was in breach of the Treaty. The Crown considers that “raupatu” was worse than its actions leading to other claims, as the confiscated lands were taken “at the point of a gun” as part of wars in which many Māori were killed.</td>
</tr>
<tr>
<td>The Native Land Court</td>
<td>The Native Land Court was the mechanism established by the Crown to permit Māori to convert their land from customary tenure into legal, transferable title. Between 1864 and 1899, roughly 11 million acres of Māori land in the North Island passed through the Native Land Court and was subsequently sold either to the Crown or European settlers. It is alleged that the form of title created by the Court facilitated the fragmentation of Māori land ownership and society and permitted the alienation of Māori land.</td>
</tr>
<tr>
<td>20th Century</td>
<td>Many grievances relate to alienation of Māori land in the 20th century, including the application of the Public Works Acts, Crown purchases, and Crown actions regarding land development and consolidation schemes.</td>
</tr>
</tbody>
</table>


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The Tribunal groups claims into geographical inquiry districts, and generally it hears all claims – historical and contemporary – that relate to that district in a single inquiry. The boundaries of an inquiry district are somewhat subjective, but the Tribunal attempts to ensure that there is a degree of commonality in the type of claim being made, tribal associations with the area and geography. The number of claims dealt with in an inquiry district varies – for example, the Gisborne/Turanga inquiry dealt with claims from five principal tribal groups, as well as claims from a number of individuals and families, while the Central North Island (CNI) inquiry for the volcanic inland plateau has around 170 claims. Thus the number of claims filed with the Tribunal does not bear relation to the actual number of inquiries conducted by the Tribunal.

The Tribunal has 37 districts in its inquiry programme. As at January 2006, eleven districts had been completed, while hearings for another six district inquiries have been completed and final reports are being written.

The Tribunal inquiry process involves five stages:

<table>
<thead>
<tr>
<th>Stage</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Casebook preparation</td>
<td>The scope of the inquiry is confirmed and a casebook of research is produced.</td>
</tr>
<tr>
<td>Interlocutory conferencing</td>
<td>Claims are particularised and refined.</td>
</tr>
<tr>
<td>Hearings</td>
<td>The Tribunal hears and tests the evidence and submissions of claimants and the Crown.</td>
</tr>
<tr>
<td>Report writing</td>
<td>The Tribunal writes a report on the inquiry district.</td>
</tr>
<tr>
<td>Negotiations and settlement</td>
<td>The Tribunal anticipates that its role will be limited to occasional conferences, and very limited hearings.</td>
</tr>
</tbody>
</table>


Since 1995 the Tribunal has followed a casebook method for its inquiries. Research is, if possible, completed before the hearing commences, and bound into volumes (the casebook). Research for the casebook can take about two to four years to complete. The casebook is the basis of the evidence to be presented by the claimants at the inquiry, and helps the Crown formulate its response.

Since 2001, the Waitangi Tribunal has adopted a "new approach" to speed up the process. Before the hearings commence, the Tribunal holds a series of interlocutory conferences between claimants and the Crown, with claimants presenting comprehensive and particularised statements of claim and the Crown making a statement of response. This is to define the core issues of the inquiry, encourage the Crown and claimants to reach early agreement on issues, and allow claimants and the Crown to proceed to negotiations sooner.

58 Ministry of Justice, Presentation on the Waitangi Tribunal, p. 6.
59 Ministry of Justice, Presentation on the Waitangi Tribunal, p. 6.
The actual hearings last about six to ten weeks, spread out over approximately a year.\textsuperscript{60} Hearings are typically held on marae or in facilities in the claimant's area. Although it is a commission of inquiry rather than a court of law, Waitangi Tribunal hearings are a formal environment and proceed in accordance with procedure outlined by the Tribunal. Witnesses, including tangata whenua, give evidence to the Tribunal. Expert witnesses may be cross-examined by lawyers representing claimants and the Crown. Hearings are not only an opportunity to hear and test evidence and submissions from the claimants and the Crown; they can also provide an important catharsis for claimants, and this is a critical part of the Treaty claims resolution process.\textsuperscript{61}

In the case of the Gisborne/Turanga inquiry (the first to be conducted according to the "new approach"), hearings commenced in November 2001 and the final report was produced in November 2004. By comparison the first group of district inquiries had taken around eight years to complete from preparation of the research casebook to release of the report.\textsuperscript{62}

In the Central North Island (CNI) inquiry (a very large inquiry covering three districts with more than 170 individual claims) the new approach was modified to speed up the time taken by the crown and claimants to reach a settlement.\textsuperscript{63} With the new "modular" approach used in the CNI inquiry, claimants and the Crown are expected to work together at every stage of the Tribunal process, and the five steps of the Tribunal process are greatly truncated with a greater emphasis on speed.\textsuperscript{64}

If the Tribunal finds that a claim is well founded it can make a recommendation to the Government on how the claim should be settled. In most cases, the Tribunal's findings form a platform for the claimants and Crown to commence settlement negotiations.

The Tribunal may not make any recommendations that privately owned land be returned to Māori ownership or that the Crown acquire the land.\textsuperscript{65} The Government considers the Tribunal's findings and recommendations, but it is not generally bound to accept them. Whether the Government follows the Tribunal's recommendations is a political decision.\textsuperscript{66}

The Tribunal may make "binding recommendations" for the return of certain lands previously owned by the Crown, notably land and assets that came under the State-Owned Enterprises Act 1986 and the Crown Forest Assets Act 1989, and lands vested under the New Zealand Railways Corporation Restructuring Act 1990. Where the Tribunal makes a binding recommendation, there is a 90-day period in which the Crown and claimants may reach a negotiated settlement. If no settlement is reached, the binding recommendation takes effect. This power has only been used once, in the case of the Turangi Township Report. In this case the Crown and claimants were able to reach a negotiated settlement within 90 days.\textsuperscript{67}

\textsuperscript{61} The new approach revisited, p. 21.
\textsuperscript{62} Ministry of Justice, Presentation on the Waitangi Tribunal, p. 5.
\textsuperscript{63} Central North Island Introduction, Waitangi Tribunal, \url{http://www.waitangi-tribunal.govt.nz/inquiries/cntni_ing/}
\textsuperscript{64} The new approach revisited, pp. 23-26.
\textsuperscript{65} Treaty of Waitangi Act 1975, s.6(4A); provisions governing the exceptions are set out in sections 8A to 8I.
\textsuperscript{66} Melvin, p. 7, \url{http://www.waitangitribunal.govt.nz/doclibrary/public/TheClaimsProcessoftheWT.pdf}
\textsuperscript{67} Melvin, pp. 7-8.
Since 1975 the Waitangi Tribunal has registered more than 1300 claims. The historical claims are being dealt with in 37 district inquiries. Eleven of those inquiries have been completed, and another six have completed hearings and are awaiting reports. Nine inquiries are yet to start the Waitangi Tribunal process, though some of these inquiry districts are in direct negotiation with the Crown. Some of the largest and most complex claims, including the Ngāi Tahu claim covering much of the South Island, and the Taranaki and Waikato Raupatu claims, have been completed. By November 2005, claims relating to about 62% of New Zealand's land area had been completed by the Waitangi Tribunal. Claims relating to about 26% of New Zealand's land area were in the process of inquiry. Claims relating to 12% of New Zealand's land area were awaiting a Waitangi Tribunal inquiry or settlement.

The Tribunal expects that in future there will probably be a mix of "modular" inquiries and "standard form" inquiries. According to the Tribunal, "such a mix would enable completion at or before 2015." If all claimants opted to put their claims through the "modular" approach, with the Crown and claimants working closely together to reach agreements before the report is written and the Tribunal truncating the steps of the Tribunal inquiry, then all historical claims could be heard by 2012. However, if all chose the more adversarial form of inquiry, the finishing date would be closer to 2020.

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69 The new approach revisited, p. 2.
Negotiation

Claimants do not have to go through the complete Tribunal process, and may instead elect to enter immediately into direct negotiations with the Crown. For negotiations to begin, a claimant group must first have registered its claim with the Waitangi Tribunal, but if a claimant group wishes to enter into negotiations it must normally cease actively pursuing its claim or claims before the Tribunal. Because a great deal of research has already been undertaken in previous claims, it is possible to enter into negotiations without a Waitangi Tribunal report, although research identifying the link between Crown acts or omissions and the harm to the claimants is necessary. In many cases, however, claimants prefer to wait for a full Waitangi Tribunal report to present to OTS as part of their evidence.

The Crown strongly prefers to negotiate claims with "large natural groupings" of claimants for all historical claims, rather than individual whanau and hapu. Each settlement will usually cover multiple Tribunal claims, as well as any claims that have not been specifically registered. Therefore, the number of settlements required depends more on the degree to which claimants can come together as well-mandated large natural groups for negotiations, rather than how many claims have been registered.

There has been criticism of the Crown's insistence on negotiating with only "large natural groupings". It has been argued that this potentially alienates some groups, creating a risk that some "full and final" settlements will require re-opening and re-negotiation. One commentator has suggested that there is the possibility that the process itself may be adversely affecting the redevelopment of traditional Māori social structures, and may therefore be creating new Treaty grievances. Some claimants have criticised the negotiations process, claiming that the Crown has greater resources than the claimants and that the process is a highly demanding and sometimes disillusioning experience. 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 High Court 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.

73 Claims Progress, http://www.nz01.2day.terabyte.co.nz/ots/LiveArticle.asp?ArtID=1243035403
The government has developed six principles for negotiating:

<table>
<thead>
<tr>
<th>Principle</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Good faith</td>
<td>The negotiating process is to be conducted in good faith based on mutual trust and cooperation towards a common goal.</td>
</tr>
<tr>
<td>Restoration of relationship</td>
<td>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.</td>
</tr>
<tr>
<td>Just redress</td>
<td>Redress should relate fundamentally to the nature and extent of breaches suffered. Existing settlements will be used as benchmarks for future settlements where appropriate.</td>
</tr>
<tr>
<td>Fairness between claims</td>
<td>There needs to be consistency in the treatment of claimant groups.</td>
</tr>
<tr>
<td>Transparency</td>
<td>Firstly, 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.</td>
</tr>
<tr>
<td>Government-negotiated</td>
<td>The Treaty settlement process is necessarily one of negotiation between claimants and the government as the only two parties who can, by agreement, achieve durable, fair and final settlements.</td>
</tr>
</tbody>
</table>

Source: Healing the Past, Building a Future, p. 30.

Negotiation with a claimant group usually involves four steps:

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preparing claims for negotiations</td>
<td>There is an 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 &quot;large natural groupings&quot;. The mandate of the claimant group representatives is conferred by the claimant group and recognised by the Crown. (The fact that negotiations are with mandated representatives of tribal groups is a key difference from the Waitangi Tribunal inquiries, where any Māori may make a claim).</td>
</tr>
<tr>
<td>Pre-negotiations</td>
<td>Terms of negotiation are developed and signed. The relevant Ministers approve the funding available to mandated representatives to meet part of the cost of the negotiations. The claimant group identifies the areas or sites for which they are interested in seeking redress.</td>
</tr>
</tbody>
</table>

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### Negotiations

Formal negotiations begin between the Crown negotiating team and the claimant group negotiating team. After sufficient progress, the Minister in Charge of Treaty of Waitangi Negotiations sends a letter to the mandated representatives outlining the parameters of the Crown offer and seeking an Agreement in Principle from the claimant group to the Crown's offer. Alternatively, the Crown and mandated representatives can seek a more formal Heads of Agreement that outlines the Crown settlement offer in more detail.

Once an Agreement in Principle or Heads of Agreement has been signed, work begins on a draft Deed of Settlement.

Cabinet must approve the contents of a Deed of Settlement before it can be approved and initialled by the mandated representatives of the claimant group.

### Ratification and implementation

The mandated representatives engage in consultation with the claimant group members on the Deed of Settlement and on the proposed governance entity (the legal entity the claimant group will use to manage the settlement redress). The mandated representatives hold a ballot of the claimant group, a majority being required to ratify the settlement. In Treaty settlements so far, the settlement offer has been supported by between 70% and more than 90% of those who voted. The Crown also requires the proposed governance entity to meet certain principles of representation, accountability, and transparency, and to be ratified by the claimant group. The Deed of Settlement is signed by representatives of the Crown and the claimants, and the Crown introduces enacting legislation for the settlement.

Currently there are about three 'large natural group' settlements a year. It is estimated that there are roughly fifty claims of large natural groups nationwide still to be settled.\(^76\) There are currently over 20 claimant groups either in negotiation, or seeking to enter negotiations in the near future. Thought is being given to streamlining the negotiations process to reduce timeframes.\(^79\)

### Settlement Redress

Settlement redress typically consists of a Crown apology, financial and commercial redress, and cultural redress. A Crown apology recognises wrongs done through an agreed historical account, acknowledges Treaty breaches by the Crown, and makes a formal statement of apology.\(^80\)

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Financial and commercial redress is the part of the settlement that is primarily commercial in nature and given a monetary value. The Crown does not provide full compensation based on the total losses to the claimant group, but it does contribute to re-establishing an economic base as a platform for future development. It is for the claimant group, according to the rules of their governance entity, to determine what they do with that financial and commercial redress. In 1994 the government proposed a Settlement Envelope (also called the "fiscal envelope") of $1 billion for Treaty settlements. The proposal was strongly opposed by many Māori. After a series of hui between Māori groups and the government, the Settlement Envelope was abandoned. The current policy is for the quantum (the amount of redress offered in cash and commercial assets such as land) to be determined by the amount of land lost by the claimant group through the Crown's breaches of the Treaty, the relative seriousness of the breach (i.e. raupatū/confiscation with loss of life is regarded as the most serious), and the benchmark set by existing settlements. Other factors include the size of the claimant group, overlapping claims and other special factors.

Many claimants have been critical that the settlements fall short of their expectations, and some believe that the compensation offered is insufficient to settle Māori claims for all time. The Crown's approach is that even if an acceptable method for calculating losses resulting from the Crown's Treaty breaches could be developed, and if the result was to establish that the losses did amount to huge sums, a full compensation or "damages" approach would be an enormous burden upon present and future generations of taxpayers.

Cultural redress is intended to meet the cultural interests of the claimant group. It can include protection of wahi tapu/sacred sites (including the transfer of legal ownership), recognition of special rights to particular places such as rivers, lakes or mountains, changes of name, or co-management rights to land or resources.

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82 In particular, the Deeds of Settlement negotiated with Waikato-Tainui and Ngāi Tahu include a relativity mechanism. The mechanism provides that, where the total redress amount for all historical Treaty settlements exceeds $1 billion in 1994 present-value terms, the Crown is liable to make payments to maintain the real value of Ngāi Tahu’s and Waikato-Tainui’s settlements as a proportion of all Treaty settlements. The agreed relativity proportions are 17% for Waikato-Tainui and approximately 16% for Ngāi Tahu.
85 *Healing the Past, Building a Future*, pp. 96-101.
## Table 3: Settlements 1992-2006

<table>
<thead>
<tr>
<th>Claimant</th>
<th>Year Settled</th>
<th>Value of Settlement ($)</th>
<th>Settlement Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fisheries</td>
<td>1992/93</td>
<td>170,000,000</td>
<td>Treaty of Waitangi (Fisheries Claims) Settlement Act 1992</td>
</tr>
<tr>
<td>Ngāti Whakaue</td>
<td>1993/94</td>
<td>5,210,000</td>
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</tr>
<tr>
<td>Ngāti Rangitāneorere</td>
<td>1993/94</td>
<td>760,000</td>
<td></td>
</tr>
<tr>
<td>Hauai</td>
<td>1993/94</td>
<td>715,682</td>
<td></td>
</tr>
<tr>
<td>Waikato-Tainui Raupatu</td>
<td>1994/95</td>
<td>170,000,000</td>
<td>Waikato-Raupatu Claims Settlement Act 1995</td>
</tr>
<tr>
<td>Waimakuku</td>
<td>1995/96</td>
<td>375,000</td>
<td></td>
</tr>
<tr>
<td>Rotomā</td>
<td>1996/97</td>
<td>43,931</td>
<td></td>
</tr>
<tr>
<td>Te Maunga</td>
<td>1996/97</td>
<td>129,032</td>
<td></td>
</tr>
<tr>
<td>Ngāi Tahu</td>
<td>1996/97</td>
<td>170,000,000</td>
<td>Ngāi Tahu Claims Settlement Act 1998</td>
</tr>
<tr>
<td>Ngāti Turangitukua</td>
<td>1998/99</td>
<td>5,000,000</td>
<td>Ngāti Turangitukua Claims Settlement Act 1999</td>
</tr>
<tr>
<td>Pouakani</td>
<td>1999/00</td>
<td>2,000,000</td>
<td>Pouakani Claims Settlement Act 2000</td>
</tr>
<tr>
<td>Te Uri o Hau</td>
<td>1999/00</td>
<td>15,600,000</td>
<td>Te Uri o Hau Claims Settlement Act 2002</td>
</tr>
<tr>
<td>Ngāti Ruanui</td>
<td>2000/01</td>
<td>41,000,000</td>
<td>Ngāti Ruanui Claims Settlement Act 2003</td>
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<tr>
<td>Ngāti Tama</td>
<td>2001/02</td>
<td>14,500,000</td>
<td>Ngāti Tama Claims Settlement Act 2003</td>
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<tr>
<td>Ngāti Awa (and ancillaries)</td>
<td>2002/03</td>
<td>43,390,000</td>
<td>Ngāti Awa Claims Settlement Act 2005</td>
</tr>
<tr>
<td>Ngāti Tuwharetoa (Bay of Plenty)</td>
<td>2002/03</td>
<td>10,500,000</td>
<td>Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005</td>
</tr>
<tr>
<td>Ngā Rauru Kiitihi</td>
<td>2003/04</td>
<td>31,000,000</td>
<td>Ngaa Rauru Kiitihi Claims Settlement Act 2005</td>
</tr>
<tr>
<td>Te Arawa Lakes</td>
<td>2004/05</td>
<td>2,700,000</td>
<td>Te Arawa Lakes Settlement Bill introduced in April 2006</td>
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<td>Ngāti Mutunga</td>
<td>2005/06</td>
<td>14,900,000</td>
<td>Ngāti Mutunga Claims Settlement Bill introduced in July 2006</td>
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<tr>
<td>Te Roroa</td>
<td>2005/06</td>
<td>9,500,000</td>
<td>Settlement legislation being drafted</td>
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<tr>
<td>Total Settlement Redress</td>
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<td>707,323,645</td>
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<tr>
<td>Other expenses against MYA</td>
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<td>40,915,152</td>
<td></td>
</tr>
<tr>
<td>Other expenses</td>
<td></td>
<td>508,361</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
<td>748,747,159</td>
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</tr>
</tbody>
</table>

Source: Based on Office of Treaty Settlements, Quarterly Report to 31 March 2006, p. 11. (Note: Te Arawa Lakes settlement excludes $7.3 million paid in to capitalise the annuity Te Arawa received from the Crown and address any remaining annuity issues.)

## Settlement

A Deed of Settlement is the comprehensive and final agreement reached between the Crown and a claimant group. The Deed of Settlement is made after the mandated representatives of the claimants and the Cabinet agree, in principle, to the draft Deed of Settlement, and the Deed of Settlement is ratified by the claimant group through postal ballot and hui. The Crown will not sign a settlement unless the ratification process used by the claimant group is sufficiently robust and the group clearly supports the proposed settlement.⁸⁶

The Deed of Settlement is then signed by the Crown and representatives of the claimants. This is an important ceremony for both the claimant group and the Crown.

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

- to ensure finality of the settlement by removing the ability of the courts and the Waitangi Tribunal to re-open the claims or the Deed of Settlement;
- to provide for statutory instruments such as Statutory Acknowledgements or Overlay Classifications to be applied;
- to override the statutory limitations to land held by the Crown under statutes such as the Conservation Act 1987 and the Reserves Act 1977;
- to remove statutory memorials from land titles, and
- to vest land in the governance entity on behalf of the claimant group if normal administrative land transfer processes would not be appropriate.

Following their first reading in Parliament, settlement bills are sent to the Māori Affairs Committee. Dissenters within the claimant group may use the opportunity to make submissions on the settlement package and on the mandate issue. The Committee will also receive a briefing from OTS. 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. It is not the Committee’s role to renegotiate 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 power to change legal agreements between the Crown and a third party, unless this is necessary in the national interest.67

There has been criticism by some claimants that the legislative process is a significant final hurdle, adds time to an already protracted process, and creates potential divisions and uncertainty in what should be an agreement between the Crown and the claimant group.68

As at August 2006 there are two settlement bills before the Māori Affairs Committee - the Ngāti Mutunga Claims Settlement Bill and the Te Arawa Lakes Settlement Bill.

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Conclusion  The settlement of Treaty of Waitangi claims comprises two separate processes—inqueries into grievances against the Crown by the Waitangi Tribunal, and settlement of claims through the process of direct negotiation between claimant groups and the Crown.

Of the Waitangi Tribunal's 37 inquiry districts, eleven have been reported on or settled, while almost all inquiries are in the process of being inquired into. A 'new approach' taken by the Tribunal promises to speed up the time taken to conduct inquiries, and historical claims are expected to be reported on by 2015.

Nineteen settlements have been reached between Māori claimants and the Crown, with a total value of approximately $750 million. Currently about three settlements are reached every year. It is estimated that approximately 50 large natural groups of claimants nationwide have yet to be settled, of which more than 20 are either in negotiation with OTS or seeking to enter negotiations. The government's aim is to conclude all historical settlements by 2020.

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