



Settlement Redress

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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



Introduction

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.

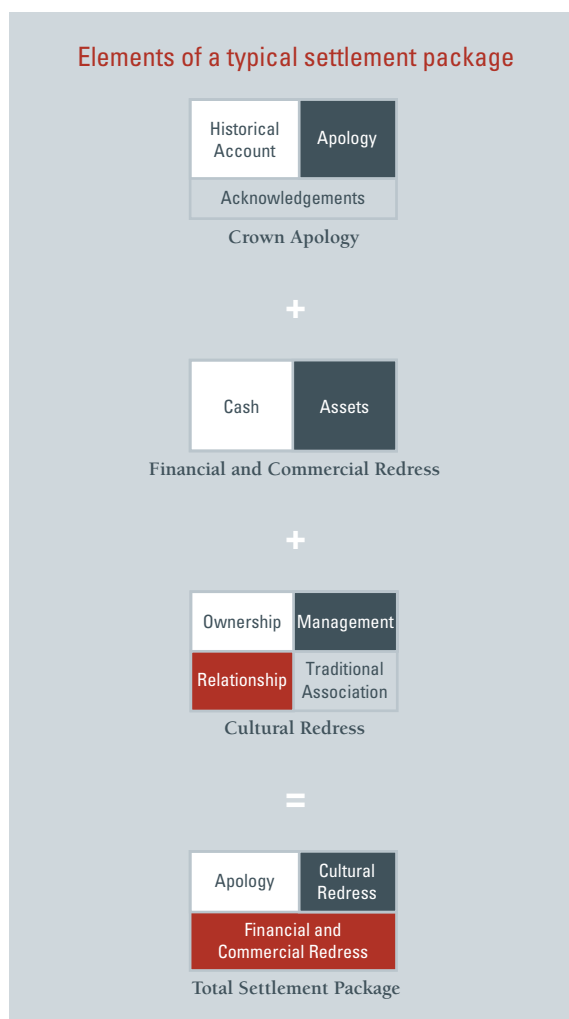


Figure 3.1: elements of a typical settlement package

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?

Apology

Historical Account, Crown Acknowledgements of Breach and Apology

Significance

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

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

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

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

Contents of the historical account

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

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

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

Content of the Crown acknowledgements

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

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

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

Contents of the apology

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

- recognising the impact of the Treaty breaches on the claimant group
- restoring the honour of the Crown, and
- re-building 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.

Redress

Financial and Commercial Redress

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

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

Aims of financial and commercial redress

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

Financial and commercial redress also recognises that where claims for the loss of land and/or resources are established, the Crown's breaches of the principles of the Treaty will usually have held back the potential economic development of the claimant group concerned. The Crown does not provide full compensation based on a calculation of total losses to the claimant group, for the reasons explained on page 89, 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 page 66).

It does not include:

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

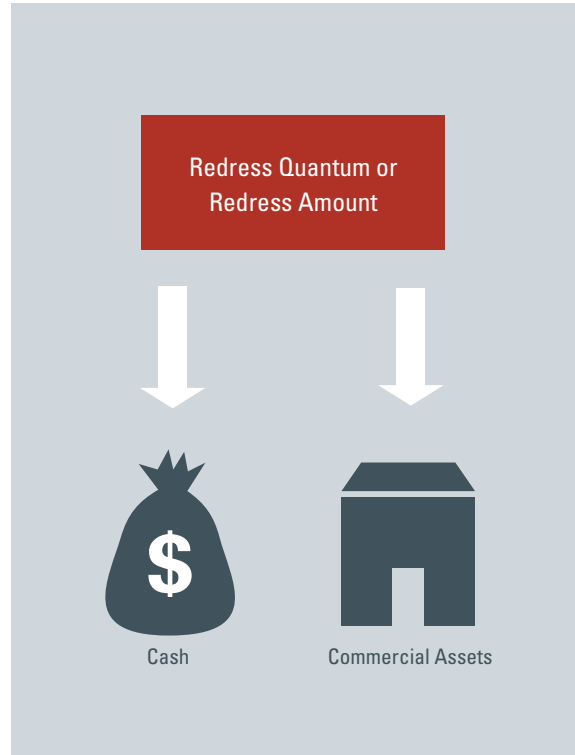


Figure 3.2: elements of financial and commercial redress

Negotiating the redress quantum

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

Full compensation for all the economic losses of a claimant group is not available

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

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

Factors the Crown takes into account in developing its quantum offer

In deciding how much to offer, the Crown mainly takes into account the amount of land lost to the claimant group through the Crown's breaches of the Treaty and its principles, the relative seriousness of the breaches involved (raupatu with loss of life is

regarded as the most serious), and the benchmarks (measures) set by existing settlements for similar grievances. Secondary factors are the size of the claimant group today, whether there are any overlapping claims and any other special factors affecting the claim.

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

What scope is there for claimant groups to negotiate on the quantum offer?

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

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

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

Cash

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

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

Purchase of Crown properties – 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 March 2002 was \$134.9 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 (see page 126).

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.

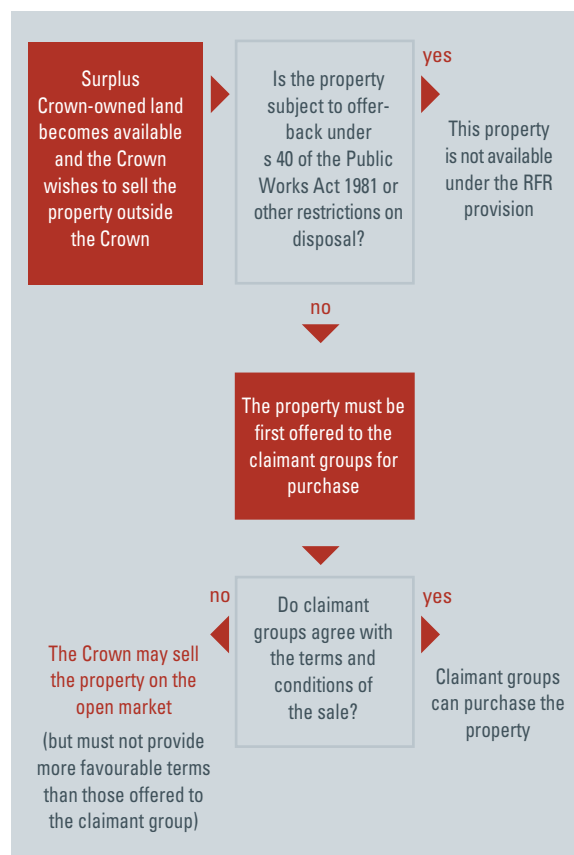


Figure 3.3: the Right of First Refusal

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.

Own and lease

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.



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

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 pages 20-21). Claimant groups may use the settlement quantum to purchase forest lands.

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.

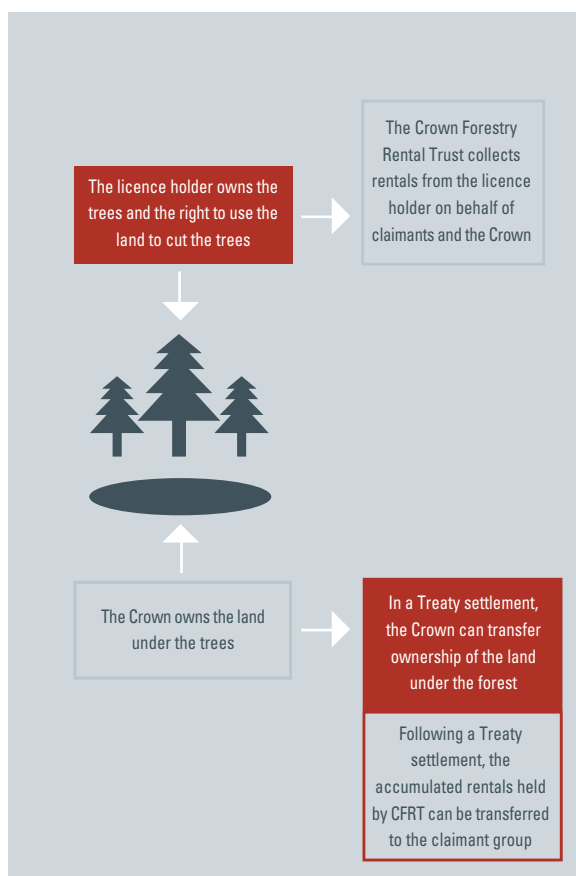


Figure 3.4: licensed Crown exotic forest land in settlement

State-Owned Enterprise 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 31. 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. Sometimes SOE property is also available for settlement purposes when a specific property is surplus to the requirements of the SOE and it is a willing seller.

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 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 *Cultural Redress: Resources and Interests*, starting on page 107.

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. This provision may not be needed in future if the Inland Revenue Department continues to make rulings that accept redress is not subject to either income tax or GST.

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 affairs 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.

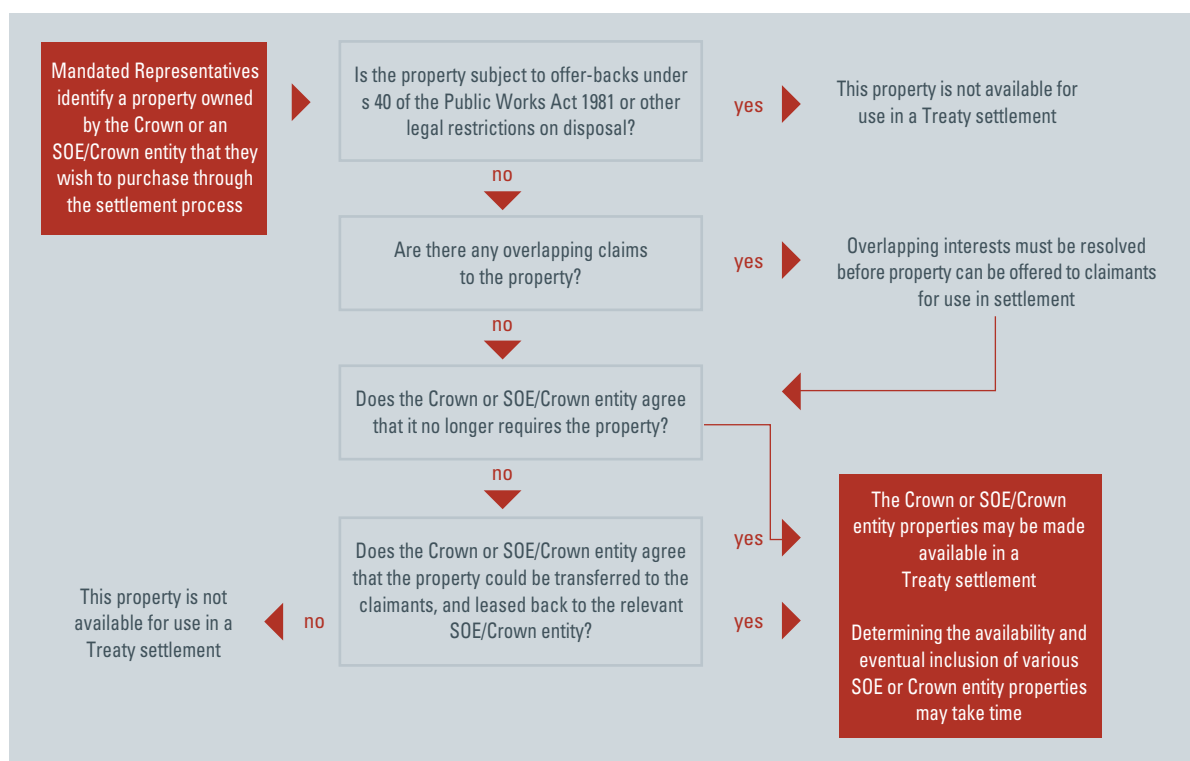


Figure 3.5: selection process for commercial properties

Redress

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 *Cultural Redress: Resources and Interests*, starting on page 107), 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 *Cultural Redress: Statutory Instruments*, starting on page 126).

Significance of cultural issues in negotiations

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

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

Aims of cultural redress

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

- protection of wāhi tapu (sites of spiritual significance) and wāhi whakahirahira (other sites of significance) possibly through tribal ownership or guardianship (kaitiakitanga – see page 107)
- 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 54), 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.

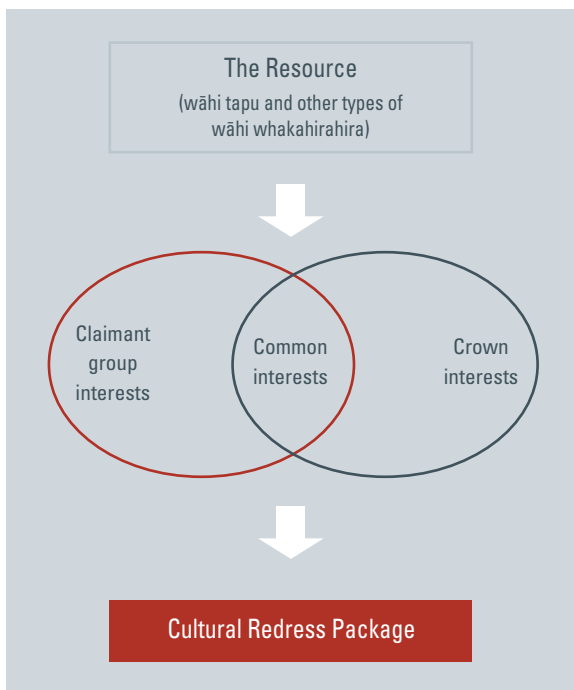


Figure 3.6: negotiating a cultural redress package

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.

Impact of cultural redress on quantum

Many aspects of cultural redress do not have a direct monetary value, and so do not count against the redress quantum (monetary value of the settlement). If cultural redress does involve the transfer of land to a claimant group this is usually done by way of gift by the Crown to the claimant group. This means that the value of such land is not charged to the claimant group as part of their redress quantum. This approach recognises the cultural rather than commercial nature of the sites involved.

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
- plant and animal species
- 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 *Cultural Redress: Resources and Interests* starting on page 107, 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 *Cultural Redress: Statutory Instruments*, starting on page 126.

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

<i>Instrument name</i>	<i>Key features</i>	<i>Page</i>
Statutory vesting of fee simple estate	Provides ownership (title). Rights to use and manage may vary according to type of site.	126
Statutory vesting and gifting back of sites of outstanding significance	Ownership of site of outstanding significance (e.g. 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.	128
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.	129
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.	130
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.	131
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.	132
Advisory Committee appointments	Provides for the claimant group to advise a Minister directly on specified matters – for instance, advice to the Minister of Fisheries in relation to a taonga fish species.	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.	133
Protocols	Issued by a Minister (e.g. 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.	133
Camping entitlements (Nohoanga or Ukaipo)	Entitlement to camp temporarily on specified Crown-owned land, for the purpose of lawful gathering of traditional foods and other natural resources.	134
Place-name changes	Usually to a dual Māori/English name. Provides visible recognition for the claimant group.	125
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.	101

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 *Cultural Redress: Statutory Instruments*, starting on page 126. 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.

Studies

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 132, 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), see page 133. 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 of Fisheries 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), paua 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 of Fisheries.

The Crown's interests

The Crown, through the Ministry of Fisheries, has an active duty to protect commercial and recreational as well as customary interests in fisheries. The Ministry of Fisheries 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 of Fisheries 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 of Fisheries. The protocol will set out how the Ministry of Fisheries 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 133.

Comment

Many of Ngati Ruanui's interests in fisheries exceeded what could be provided for in a protocol with the Ministry of Fisheries. 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 of Fisheries, 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.

Camping entitlements (Nohoanga)

A nohoanga is an entitlement to exclusive camping rights, for a fixed period of time each year, on an area of up to one hectare of Crown owned land near a river, lake, or some other source of mahinga kai. Its purpose is to provide easier access for Te Uri o Hau to the mahinga kai source for lawful, non-commercial fishing and gathering of natural resources.

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 133). 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

Cultural Redress: 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 mātaītai*)
- protests against environmental degradation (e.g., 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.



Moutohorā Island and Kāpūterangi, wāhi tapu of Ngāti Awa

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 *Cultural Redress: Statutory Instruments* starting on page 126.

<i>Redress options using statutory instruments for wāhi tapu and wāhi whakahirahira</i>	<i>Further detail (page)</i>
Statutory vesting of fee simple estate (transfer of legal ownership of land)	126
Statutory vesting and gifting back of sites of outstanding significance	128
Statutory vesting as a Reserve	130
Overlay classifications (Tōpuni, Taki Poipoia or Kirihipi)	131
Statutory Acknowledgements	132
Deeds of Recognition	133
Protocols	133
Camping entitlements (Nohoanga or Ukaipo)	134
Place-name changes	125
Joint Advisory or Management Committee	101

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 page 117)
- 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 87).

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.

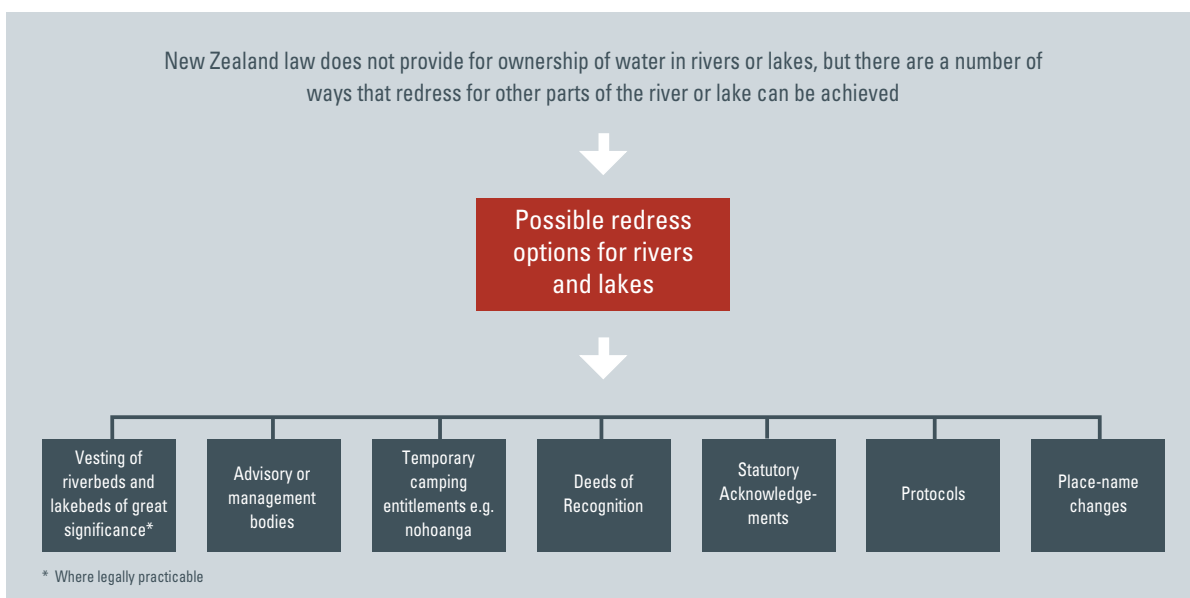


Figure 3.7: some redress options for rivers and lakes

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 diagram on the previous page gives an overview, with more detail in the table above.

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.

<i>Redress options using statutory instruments for rivers and lakes</i>	<i>Further detail (page)</i>
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	126
Statutory Acknowledgements	132
Deeds of Recognition	133
Protocols	133
Camping entitlements (Nohoanga or Ukaipo)	134
Place-name changes	125

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 *Cultural Redress: Statutory Instruments* starting on page 126.

In addition, existing legislation recognises **Māori customary freshwater fishing rights**, and new regulations are being developed for the South Island, pursuant to the Ngāi Tahu settlement, to improve the ability of iwi to manage these rights on a local basis. These provisions and developments are noted on pages 117-118.

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 *Cultural Redress: Statutory Instruments* starting on page 126.

<i>Redress options using statutory instruments for wetlands, lagoons, indigenous forests and tussock lands</i>	<i>Further detail (page)</i>
Statutory vesting of fee simple estate (transfer of legal ownership of land) for wāhi tapu or wāhi whakahirahira within such areas	126
Statutory vesting as a reserve	130
Overlay classifications (Tōpuni, Taki Poipoia or Kirihipi)	131
Statutory Acknowledgements	132
Deeds of Recognition	133
Protocols	133
Camping entitlements (Nohoanga or Ukaipo)	134
Place-name changes	125

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 springs 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.

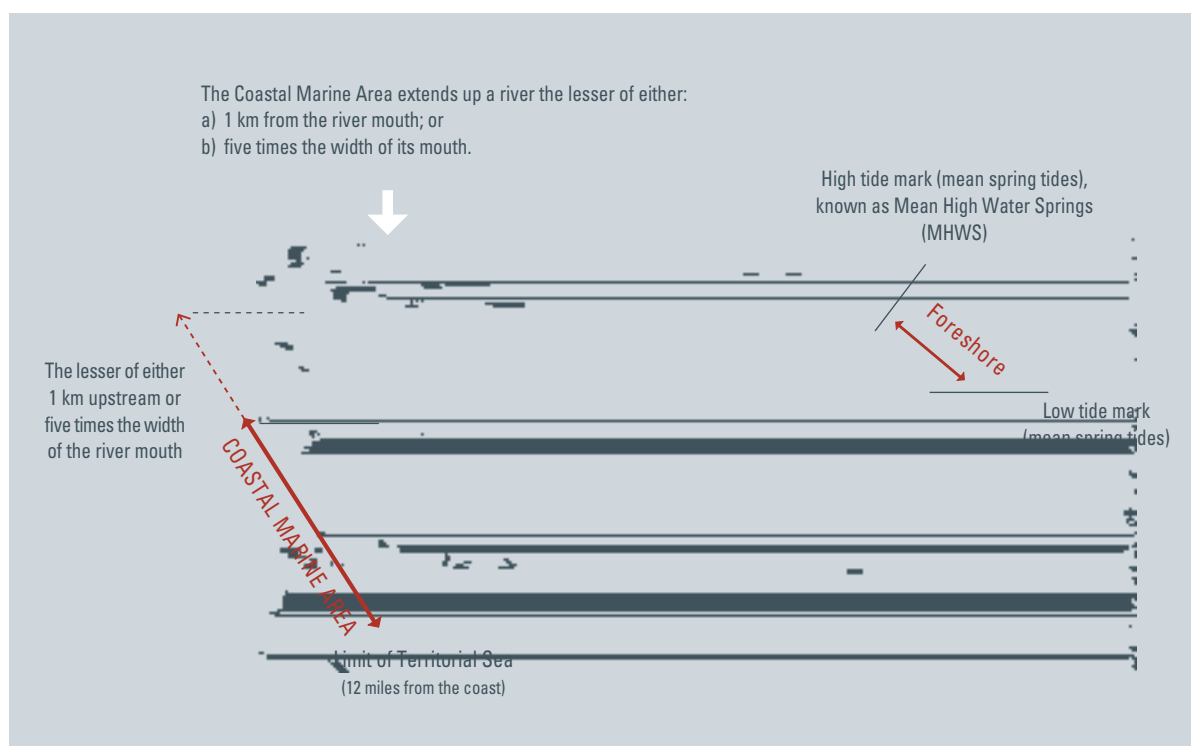


Figure 3.8: the Coastal Marine Area (CMA)

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 mātaimai (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.

<i>Redress options using statutory instruments for coastal areas</i>	<i>Further detail (page)</i>
Statutory Acknowledgements	132
Protocols	133
Place-name changes	125

Islands – significance, interests and redress options

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

Māori customary fisheries – use of existing legislation

Introduction

Both freshwater and marine customary fisheries issues have been raised in negotiations to date. Fisheries issues are, of course, closely related to the surrounding resource (river, lake or sea), and redress relating to these resources may help in resolving some fisheries issues. For instance, camping entitlements (Nohoanga or Ukaipo) near a traditional fishing spot may improve access to the fishery, see page 134. Other statutory instruments can improve input into decision-making about the waterway that supports a traditional fishery. There are more details on claimant interests in rivers and lakes on page 110, and coastal areas on pages 115-116.

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.

Protection and regulation of customary freshwater fishing rights

Section 26ZH of the Conservation Act 1987 currently protects Māori customary freshwater fishing rights. Under the Ngāi Tahu Claims Settlement Act 1998 it is intended that this provision will be replaced in the South Island by specific customary freshwater fishing regulations presently under development between the Department of Conservation and all South Island iwi for their areas of interest. The regulations will detail processes for identifying and appointing tangata tiaki/kaitiaki for customary freshwater fisheries. Tangata tiaki/kaitiaki will then be able to manage customary food gathering of freshwater fish for their area. There will be the capacity under the mātaihai provisions in the Fisheries (South Island Customary Fishing) Regulations 1999 to establish freshwater customary fishing reserves.

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 of Fisheries (contact details on page 170).

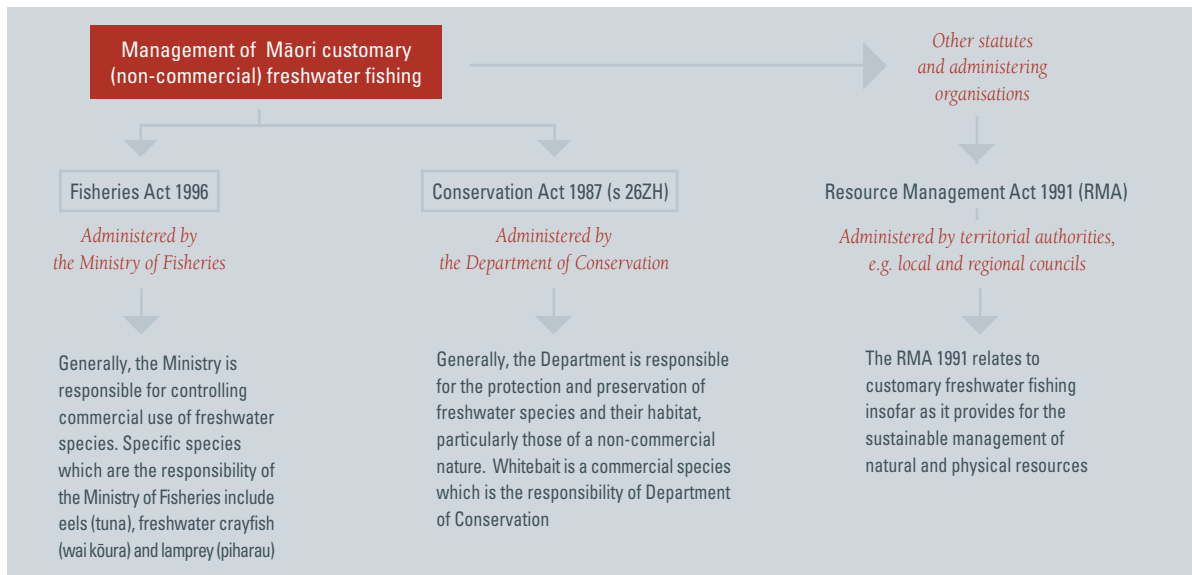


Figure 3.9: freshwater fish - who has responsibility for species and habitat management?

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 of Fisheries
- establishing mātaimai reserves (see below), and
- creating penalties for breaching the regulations and by-laws made under them.

Mātaimai 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 Fisheries.

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 Ministry of Fisheries has published a booklet that provides advice on this: *A Guide to the Kaimoana Customary Fishing Regulations 1998* (see page 170 for contact details).

Before a mātaimai 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.

Fish species of great cultural significance

If an indigenous fish species is of great cultural significance to a claimant group, some of the existing plant and animal species redress options used in settlement packages may be suitable. These are explained on pages 121-123.

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 94).

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 (see page 94) .

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 below.

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 (see pages 126-131). There are several ways of transferring title, which are explained on page 127. When land is transferred it does not include nationalised minerals.

<i>Redress options using statutory instruments for Geothermal and mineral resources</i>	<i>Further detail (page)</i>
Statutory vesting of fee simple estate (transfer of legal ownership of land - see note above) available only for individuals sites of high cultural significance	126
Statutory Acknowledgements	132
Protocols	133
Camping entitlements (Nohoanga or Ukaipo)	134
Place-name changes	125

Plant, animal and fish species

Significance to Māori

Certain plants, animals (including birds) and fish may be taonga of very great significance to the claimant group. Their significance may come from the importance of the species as a resource (for food, medicine, clothing, building, weaving or carving) or from links to tribal history and tūpuna.

Claimant group interests

From negotiations to date, the Crown is aware of the following specific interests that claimant groups may raise in negotiations about plants, animals and fish:

- recognition of the significance of certain plant, animal or fish species to them
- greater ability to participate in managing certain species, including balancing conservation aims with cultural practices
- protection or restoration of the habitats of such species
- rights to harvest certain species, and
- improved access to areas where such species have traditionally been gathered.

The Crown's interests and approach

Claimant groups and the Crown share common interests in wanting to protect and re-establish threatened and endangered indigenous species. The Crown acknowledges that claimant groups can and do make a valuable contribution to species management because of their detailed knowledge of many species. The Crown also manages a wide range of activities that affect various species and their habitats, and must balance a complex range of public and private interests in doing so. Financial and other limits on resources must also be kept in mind. Because of these factors, some redress options may be available only for larger claimant groups, or on a multi-iwi (regional) basis.

Redress options therefore seek appropriate ways of getting the claimant group and the Crown to work together on common goals for agreed species and on resolving any areas of difference.

Redress options for plant, animal and fish species

These include:

- recognising species of special significance to the claimant group through an acknowledgement in legislation
- appointing the claimant group as an Advisory Committee to the Minister responsible for management of certain species
- agreeing to add certain non-commercial fish species to the list of totally prohibited species in the relevant commercial fishing areas, and
- other recognition through statutory instruments.

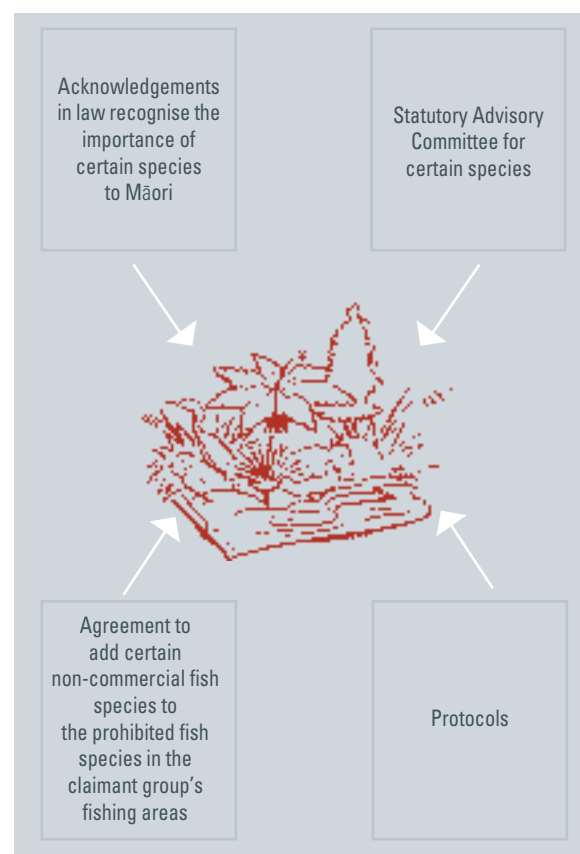


Figure 3.10: redress options for taonga species

Acknowledgement for taonga animal and plant species

The Crown can acknowledge in the settlement legislation a claimant group's cultural, spiritual, historic and traditional association with species in their area of interest. The species must be indigenous.

Acknowledgements for taonga species do not affect any other powers, duties or functions, or the rights of anybody who is not a party to the settlement. This option is likely to be available only for larger claimant groups, or on a multi-iwi (regional) basis.

Acknowledgements and appointment as an Advisory Committee for taonga fish species

As with an acknowledgement for animals and plants, an acknowledgement for fish species provides an acknowledgement by the Crown of the cultural, spiritual, historical and traditional association of the claimant group with the taonga fish species agreed and listed. However, an acknowledgement for fish species is put into effect in a different way from that just described for animal and plant species.

Acknowledgements for taonga fish species are put into effect through appointing the representative body of the claimant group as an Advisory Committee to the Minister responsible for the management of the species concerned.

The Crown manages fish species through both the Minister of Conservation (freshwater species) and the Minister of Fisheries (saltwater species). Some species may be managed by either the Ministry of Fisheries or the Department of Conservation, according to the season. Depending upon which fish species are identified and agreed upon as taonga species, obligations (set out in the box to the right) may arise for both Ministries. However, the use of these options is likely to be restricted to larger claimant groups or to multi-iwi settlements, because of the significant duties they place on the Crown.

Appointment as an Advisory Committee to the Minister of Fisheries and the Minister's obligations

Because of the acknowledgement of the traditional association of the claimant group with the taonga fish species, the Crown through the Minister of Fisheries may agree to appoint the governance entity of the claimant group as an Advisory Committee to the Minister for those species. This is done under existing legislation that provides for the appointment of such committees.

The settlement legislation then requires the Minister - when making policy decisions affecting species within the group's area of interest – to consult the committee and to recognise and provide for the claimant group's association with those species.

Appointment as an Advisory Committee to the Minister of Conservation and the Minister's obligations

Because of the acknowledgement of the traditional association of the claimant group with the taonga fish species, the Crown through the Minister of Conservation may agree to appoint the governance entity of the claimant group as an Advisory Committee to the Minister for indigenous fish or other aquatic life managed by the Department of Conservation in the area of interest. This is done under existing legislation that provides for the appointment of such committees.

The settlement legislation then requires the Minister to consult the committee and have regard to its advice on the taonga fish species – particularly the Department of Conservation's management and conservation of those species within the area of interest.

Agreement to add taonga fish species to the list of totally prohibited species

The Crown and claimant groups may agree to add certain non-commercial taonga fish species to the list of totally prohibited species in the relevant commercial fishing area(s), and to consult the claimant group if any of the species are determined to be commercially viable. As with Advisory Committee appointments, this option is likely to be available only for larger claimant groups, or multi-iwi settlements.

Other recognition through statutory instruments

If an acknowledgement for a species or appointment as an Advisory Committee is not available, or is not the most appropriate redress for the concerns expressed, the other statutory instruments noted in the following table may be useful. They apply to sites or processes rather than directly to species, but the significance of a species could form part of a claimant group's interest in a particular site, or be an issue on which the claimant group provides input.

<i>Other redress options using statutory instruments that could contribute to recognising a claimant group's interests in animal, fish or plant species</i>	<i>Further detail (page)</i>
Overlay classifications (Tōpuni, Taki Poipoia or Kirihipi) – one of the agreed values for the area could be the importance of a species found there	131
Statutory Acknowledgements – importance to claimant groups of species in the statutory area could be recorded in the claimant group's statement of its associations	132
Deeds of Recognition – claimant group advice to relevant Minister on land management could include species or habitat issues. The Crown is not responsible for water management so usefulness for fish species is limited	133
Protocols – can provide for claimant group input into species or habitat management issues	133
Camping entitlements (Nohoanga or Ukaipo) – can improve claimant group access to species that can be lawfully gathered	134

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 Wharenui, 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 133.

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 Ngati Ruanui settlement).

The new names have the same status as names assigned by the New Zealand Geographic Board. 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 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.

Instruments

Cultural Redress: 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
- protocols, and
- camping entitlements (Nohoanga or Ukaipo).

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.

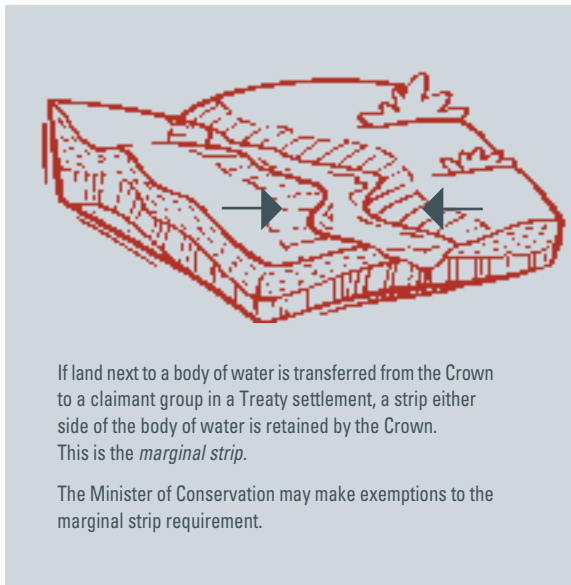


Figure 3.11: marginal strips

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 22), 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.

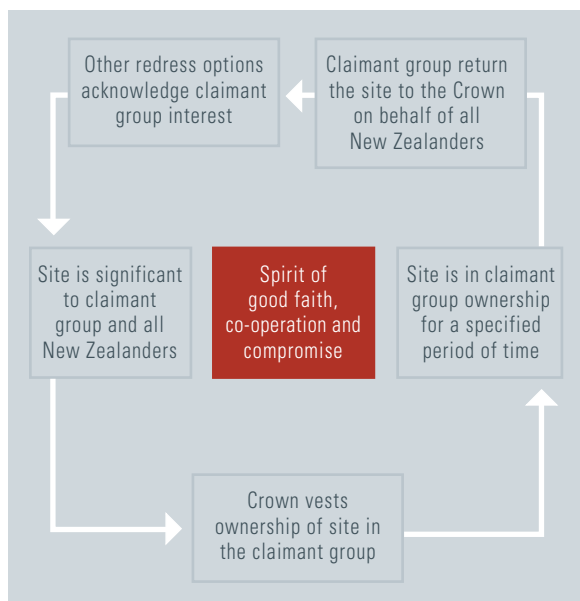


Figure 3.12: vesting and gifting back of significant sites

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)

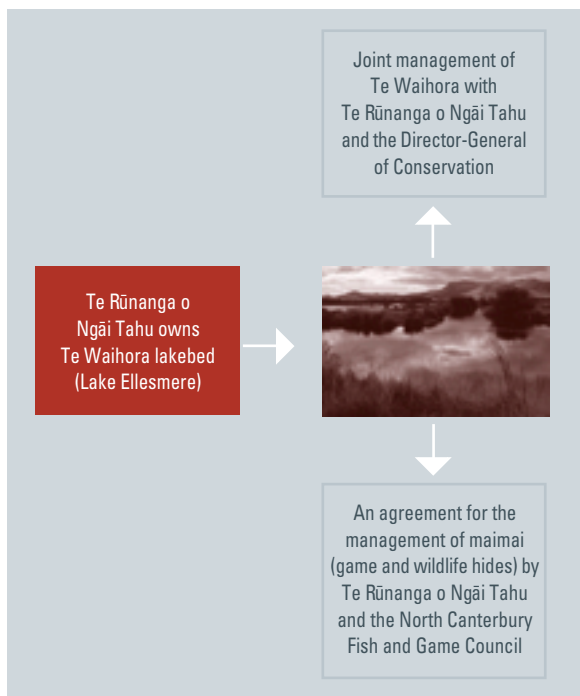


Figure 3.13: Te Waihora (Lake Ellesmere) - ownership of the lakebed

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.

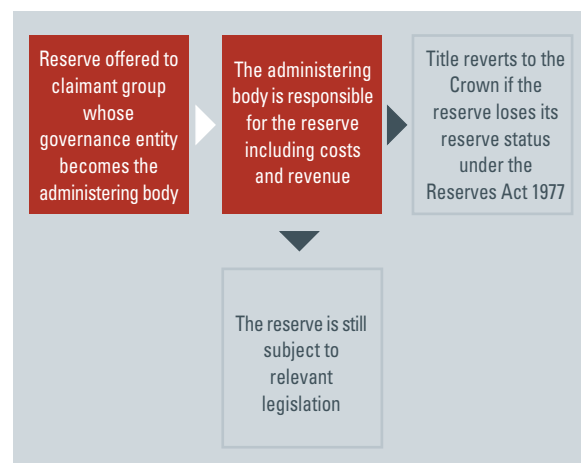


Figure 3.14: vesting of reserves

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 Ngati Ruanui Deed of Settlement it is known as *Nga Taki Poipoia o Ngati 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

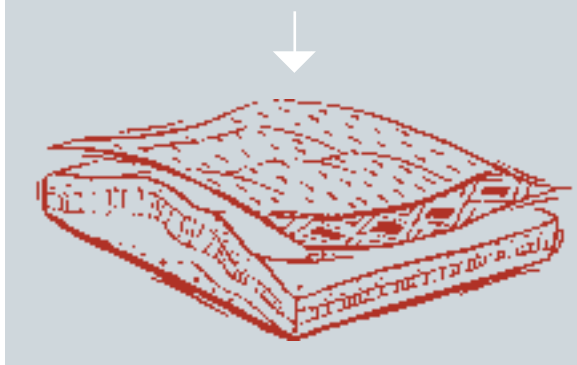


Figure 3.15: overlay classification

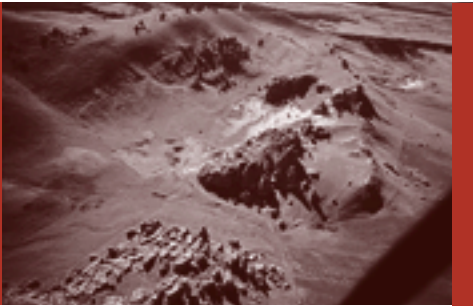
Crown acknowledgement of claimant group values

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.

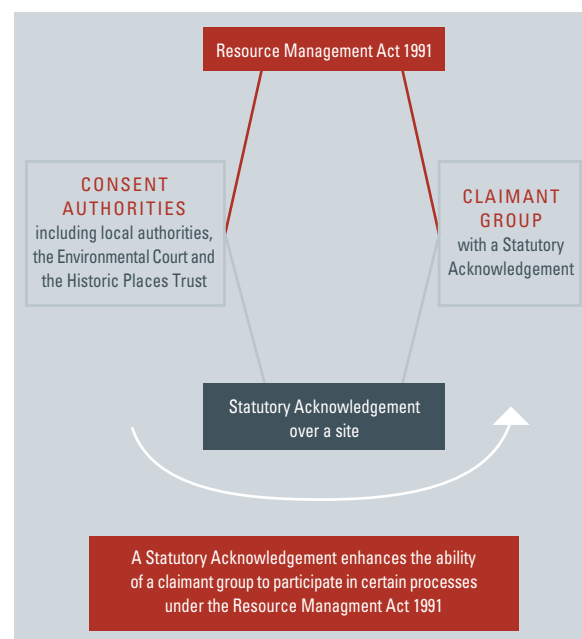


Figure 3.16: Statutory Acknowledgements

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 102 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 136-138.

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 139-143.

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 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 of Fisheries protocol on page 104 shows how this instrument is used.

Camping entitlements***What is a camping entitlement?***

A camping entitlement (called an Ukaipo in the Ngati Ruanui settlement and a Nohoanga in the Ngāi Tahu and Te Uri o Hau settlements) is an entitlement to exclusive camping rights, for up to 210 days each year, on an area of up to one hectare of Crown-owned land near a river, lake, or other source of mahinga kai (customary food or materials). Its purpose is to provide easier access for iwi to the mahinga kai source for lawful, non-commercial fishing and gathering of natural resources.



Nohoanga on the shores of Lake Pūkaki, Ngāi Tahu

What rights does a camping entitlement confer?

The main rights conferred by a camping entitlement are:

- the right to camp on the site during certain periods of the year, so the claimant group can have access for lawful, non-commercial gathering of mahinga kai resources
- the right to occupy that site exclusively while camping (provided that regulatory requirements are met – see below)
- the right to erect temporary shelters and (with the consent of the relevant Crown agency managing the land) the right to undertake activities – such as clearing gorse – that will better enable the holders to use the land as a campsite, and
- the right to be kept informed by the Crown agency managing the land about activities that may affect the holder and the right not to be unreasonably disturbed.

Camping entitlements are subject to all regulatory requirements

Holders of a camping entitlement must obey all laws and regulations that apply to the area. This includes any restrictions on camping. If the district or regional plan does not automatically permit camping, the holder will have to apply to the local authority for a resource consent.

Do camping entitlements enhance any other lawful rights of the claimant group?

No. In particular, a camping entitlement does not:

- create any new or increased right to fish or gather natural resources – such as any species protected under the Wildlife Act 1953. Its purpose is to help provide easier access to exercise existing rights, or
- permit the holder to obstruct or prevent public access to the mahinga kai source.

Claimant specific redress

On some occasions it is more appropriate to negotiate a new form of redress for a particular claimant group interest, rather than rely on the existing redress instruments. An example of a negotiated redress instrument is the Statement of Joint Aspirations in the Pouakani Deed of Settlement. Titiraupenga (a mountain) is a very important wāhi tapu to the Pouakani people. To acknowledge this they were offered three forms of redress, a Statutory Acknowledgement over the site, a Memorandum of Understanding and a Statement of Joint Aspirations. A Statement of Joint Aspirations recognises that Titiraupenga is a taonga and records the joint aspirations of the Pouakani people and the Crown for Titiraupenga.

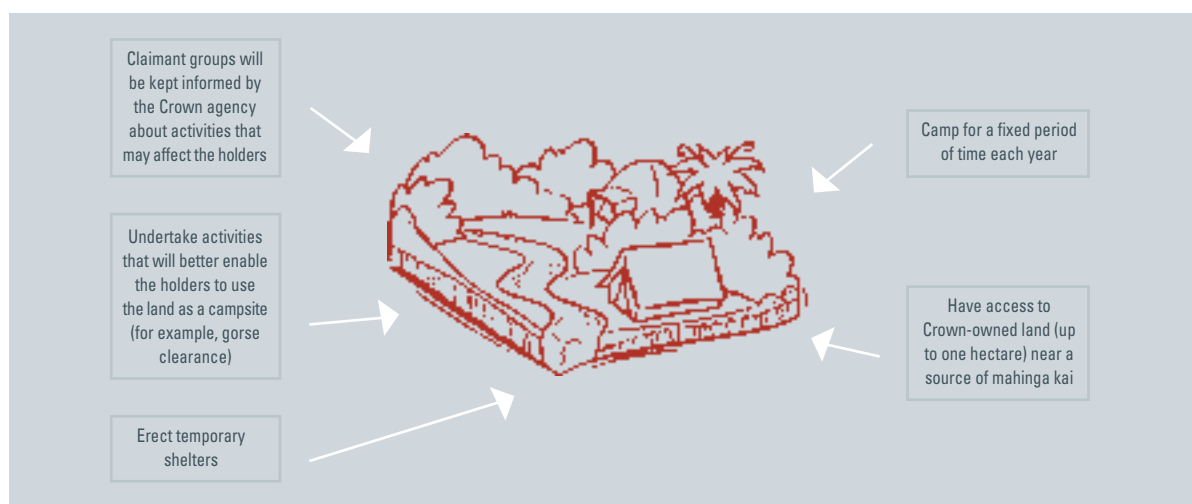


Figure 3.17: camping entitlements

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, for ever fly, stay aloft)’*

Statutory Acknowledgement for Aoraki/Mount Cook

The following is an extract from Schedule 14 Ngāi Tahu Claims Settlement Act 1998, Sections 205 and 206.

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 Hawaiiki.

Then, keen to explore, the voyagers set out to sea, but no matter how far they travelled, they could not find land. They decided to return to their celestial home but the karakia (incantation) which should have lifted the waka (canoe) back to the heavens failed and their craft ran aground on a hidden reef, turning to stone and earth in the process.

The waka listed and settled with the west side much higher out of the water than the east. Thus the whole waka formed the South Island, hence the name: Te Waka o Aoraki. Aoraki and his brothers clambered on to the high side and were turned to stone. They are still there today. Aoraki is the mountain known to Pākehā as

Mount Cook, and his brothers are the next highest peaks near him. The form of the island as it now is owes much to the subsequent deeds of Tū Te Rakiwhānoa, who took on the job of shaping the land to make it fit for human habitation.

For Ngāi Tahu, traditions such as this represent the links between the cosmological world of the gods and present generations, these histories reinforce tribal identity and solidarity, and continuity between generations, and document the events which shaped the environment of Te Wai Pounamu and Ngāi Tahu as an iwi.

The meltwaters that flow from Aoraki are sacred. On special occasions of cultural moment, the blessings of Aoraki are sought through taking of small amounts of its 'special' waters, back to other parts of the island for use in ceremonial occasions.

The mauri of Aoraki represents the essence that binds the physical and spiritual elements of all things together, generating and upholding all life. All elements of the natural environment possess a life force, and all forms of life are related. Mauri is a critical element of the spiritual relationship of Ngāi Tahu Whānui with the mountain.

The saying 'He kapua kei runga i Aoraki, whakarewa whakarewa' ('The cloud that floats aloft Aoraki, for ever fly, stay aloft') refers to the cloud that often surrounds Aoraki. Aoraki does not always 'come out' for visitors to see, just as that a great chief is not always giving audience, or on 'show'. It is for Aoraki to choose when to emerge from his cloak of mist, a power and influence that is beyond mortals, symbolising the mana of Aoraki.

To Ngāi Tahu, Aoraki represents the most sacred of ancestors, from whom Ngāi Tahu descend and who provides the iwi with its sense of communal identity, solidarity, and purpose. It follows that the ancestor embodied in the mountain remains the physical manifestation of Aoraki, the link between the supernatural and the natural world. The tapu associated with Aoraki is a significant dimension of the tribal value, and is the source of the power over life and death which the mountain possesses.

Purposes of Statutory Acknowledgement

Pursuant to section 215, and without limiting the rest of this schedule, the only purposes of this statutory acknowledgement are-

- (a) To require that consent authorities forward summaries of resource consent applications to Te Rūnanga o Ngāi Tahu as required by regulations made pursuant to section 207 (clause 12.2.3 of the deed of settlement); and
- (b) To require that consent authorities, the Historic Places Trust, or the Environment Court, as the case may be, have regard to this statutory acknowledgement in relation to Aoraki, as provided in sections 208 to 210 (clause 12.2.4 of the deed of settlement), and
- (c) To empower the Minister responsible for management of Aoraki or the Commissioner of Crown Lands, as the case may be, to enter into a Deed of Recognition as provided in section 212 (clause 12.2.6 of the deed of settlement), and
- (d) To enable Te Rūnanga o Ngāi Tahu and any member of Ngāi Tahu Whānui to cite this statutory acknowledgement as evidence of the association of Ngāi Tahu to Aoraki as provided in section 211 (clause 12.2.5 of the deed of settlement).

Limitations on Effect of Statutory Acknowledgement

Except as expressly provided in sections 208 to 211, 213, and 215,-

(a) This statutory acknowledgement does not affect, and is not to be taken into account in, the exercise of any power, duty, or function by any person or entity under any statute, regulation, or bylaw, and

(b) Without limiting paragraph (a), no person or entity, in considering any matter or making any decision or recommendation under statute, regulation, or bylaw, may give any greater or lesser weight to Ngāi Tahu's association to Aoraki (as described in this statutory acknowledgement) than that person or entity would give under the relevant statute, regulation, or bylaw, if this statutory acknowledgement did not exist in respect of Aoraki.

Except as expressly provided in this Act, this statutory acknowledgement does not affect the lawful rights or interests of any person who is not a party to the deed of settlement.

Except as expressly provided in this Act, this statutory acknowledgement does not, of itself, have the effect of granting, creating, or providing evidence of any estate or interest in, or any rights of any kind whatsoever relating to, Aoraki.

Deed

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.



[REDACTED]





