workingpaper

The Treaty Settlement Process

An overview of the Waitangi Tribunal and the Office of Treaty Settlements

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1. Purpose

The aim of this working paper is to outline the purpose and operation of the Waitangi Tribunal and the Office of Treaty Settlements today as these are the two key institutions established by government to manage the Treaty of Waitangi settlement process.

In undertaking research for Report 7, *Exploring the Shared Goals of Māori: Working towards a National Sustainable Development Strategy* (SFI, in press), it became necessary to develop a more in depth understanding of the roles of these institutions. This working paper has therefore been prepared to provide a more detailed exploration of these institutions. The findings of this research will feed back into Report 7.

Report 7 has five objectives, as shown below, of which this working paper works towards achieving Objective 3.

> **Objective 1:** To investigate shared Māori goals that are identified in published literature.
>
> **Objective 2:** To investigate challenges in measuring these shared Māori goals.
>
> **Objective 3:** To investigate existing institutions and mechanisms capable of progressing Māori goals.
>
> **Objective 4:** To understand future challenges and opportunities the New Zealand Māori population may face.
>
> **Objective 5:** To synthesise the findings of the above objectives in order to understand the areas of synergy and tension that exist between Māori goals, institutions and mechanisms, and the development of a National Sustainable Development Strategy. (SFI, in press)

1.1 Project 2058

This research is part of a larger project called *Project 2058*. The strategic aim of *Project 2058* is to promote integrated long-term thinking, leadership and capacity-building so that New Zealand can effectively seek and create opportunities, and explore and manage risks, over the next 50 years. In order to achieve this aim, the *Project 2058* team will work to:

1. Develop a detailed understanding of the current national planning landscape, and in particular the government's ability to deliver long-term strategic thinking;
2. Develop a good working relationship with all parties that are working for and thinking about the 'long-term view';
3. Recognise the goals of iwi and hapū, and acknowledge te Tiriti o Waitangi;
4. Assess key aspects of New Zealand's society, asset base and economy in order to understand how they may shape the country's long-term future, such as government-funded science, natural and human-generated resources, the state sector and infrastructure;
5. Develop a set of four scenarios to explore and map possible futures;
6. Identify and analyse both New Zealand's future strengths and weaknesses, and potential international opportunities and threats;
7. Develop and describe a desirable sustainable future in detail, and
8. Prepare a *Project 2058* National Sustainable Development Strategy. (SFI, 2009a: 3)

Report 7, *Exploring the Shared Goals of Māori: Working towards a National Sustainable Development Strategy*, and its supporting working papers (SFI, 2009b; 2009c; 2009d; 2010) have been designed to progress the third point above: Recognise the goals of iwi and hapū, and acknowledge te Tiriti o Waitangi.

2. Methodology

This working paper has been produced to supplement Report 7, *Exploring the Shared Goals of Māori: Working towards a National Sustainable Development Strategy* (SFI, in press). It aims to provide an overview of the Waitangi Tribunal and the Office of Treaty Settlements as the two key institutions established by government to manage the Treaty settlement process. To this end, the purpose and operation of these institutions, and how they are evolving over time is outlined below.

2.1 Terminology

For an explanation of key terms see the Glossary of this working paper (page 16).

2.2 Data collection

Information was gathered from publications produced by the Waitangi Tribunal and the Office of Treaty Settlements, as well as from relevant academic, government and iwi publications, published media and conference papers. Conversations have also taken place with experts within these institutions.

2.3 Limitations and Boundaries

The authors acknowledge that a wealth of unpublished material exists in this area, with countless conversations and discussions taking place both publicly and privately that do not reach publication. Since the Institute is not a key participant in these conversations, this paper is informed only by material published in the public arena.

In this working paper we look into government processes and institutions involved in the settlement of Treaty claims. We do not explore the role of iwi and hapū and what happens after a settlement is made. In addition, although it is relevant to the settlement process, the Foreshore and Seabed issue is not discussed in this working paper. Instead it is addressed in Report 7.

3. History of the Treatment of Injustices

For over 150 years Māori have been seeking the resolution of grievances relating to actions of the Crown (OTS, 2010a: 19). Prior to the Waitangi Tribunal there was no streamlined process for addressing Māori claims, with no consistent policy underlying settlements (ibid.). The number of Māori grievances brought before the Crown between 1840 and 1988 led to it being estimated in 1988 that 2500 potential claims would be made to the Waitangi Tribunal (Belgrave, 2005: 17). In fact, for almost every case examined before the Waitangi Tribunal since 1985, there have been previous attempts to gain appropriate settlement (Belgrave, 2005: 3).

The Native Land Court was established in 1865 under the Native Land Acts 1862 and 1865, to transfer collectively owned Māori land into individual titles. By the 1930s the proceedings of the court and the systems put in place regarding Māori land at this time meant that Māori retained ownership of only 6% of land in New Zealand (OTS, 2010a: 15). This resulted in significant losses in income, resources, wāhi tapu and taonga, which would have an enduring impact on Māori society (OTS, 2010a: 18–19). A part of the Native Land Court's duty was also to investigate claims to customary ownership of Māori land (ibid.: 15).

In addition to applying to the Native Land Court, Māori made continuous attempts to have their claims recognised in the form of letters to governors, petitions to ministers and direct appeals to the Crown. This resulted in commissions of inquiry, royal commissions and cases going to the superior courts (Belgrave, 2005: 17, 32).[1] In the early 1920s, limited progress was made, with the Government beginning to make modest settlements (Belgrave, 2005: 33). These took the form of either a lump sum, or annual payments over a fixed term, rather than the return of land or access to resources. Māori Trust Boards were set up to administer these settlements.

In the 1960s and 70s there was an increasing demand for a forum where Māori claims against the Crown could be heard (OTS, 2010a: 19). This was in response to growing dissatisfaction with the quality of previous settlements and the lack of action by the Crown in addressing outstanding grievances (ibid.). There was a need for a forum to hear these grievances as in most cases a Treaty claim couldn't be brought before the ordinary courts as the Treaty is not officially a part of New Zealand law (ibid.). This led to the establishment of the Waitangi Tribunal in 1975.

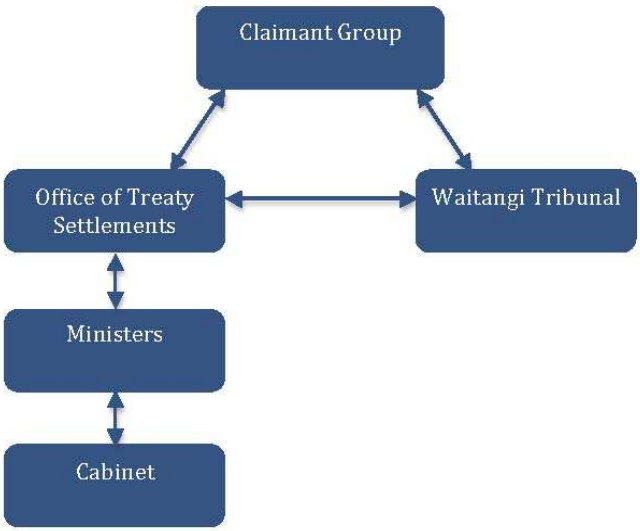
In 1973 then Prime Minister Norman Kirk announced that from the following year the sixth of February would become a national holiday called 'New Zealand Day' (MCH, 2009a). Previously celebrated as Waitangi Day, Kirk's decision to change the name reflected his 'acceptance that New Zealand was ready to move towards a broader concept of nationhood' (ibid.), as signaled by his statement in 1974: 'We are not one people; we are one nation' (*Otago Daily Times*, 2010). Following Kirk's death in 1974 and the subsequent change of government in 1975, the holiday was renamed Waitangi Day (MCH, 2009a).

[1] There were 10 royal commissions relating to Maori issues between 1945–55 (Belgrave, 2005: 17).

4. Managing the Treaty Settlement Process

The Waitangi Tribunal and the Office of Treaty Settlements (OTS) are the key institutions established by government to manage the Treaty settlements process. They are closely related and yet have very different functions in the settlement process. The function of the Waitangi Tribunal is to inquire into and make recommendations on claims by Maori relating to the Treaty of Waitangi and its principles (Waitangi Tribunal, 2009a, 2010). The OTS then represents the Crown in settlement negotiations, provides advice to government and co-ordinates all parties involved in the process (OTS, 2010a: 23). It is not necessary for a claim to undergo the Waitangi Tribunal process in order to negotiate with the Crown; however a claim must be registered with the Tribunal. Once a claim is registered, claimant groups can choose whether to immediately seek negotiations with the Crown, or instead to have their claims heard by the Tribunal before entering negotiations (OTS, 2010a: 38).[2] The majority of claimants have so far chosen to have their claims heard by the Tribunal (Hamer, 2004: 12). The settlement process and how the relevant groups interrelate is set out in Figure 1. A more detailed explanation of the role of the Waitangi Tribunal and the OTS follows in Sections 4.1 and 4.2.

Figure 1 The Treaty Settlement Process
Source: OTS, 2010a: 38–39, 63.



This process has emerged as a significant mechanism to support iwi and hapū to enhance the well-being of their communities and for New Zealand as a nation to heal injustices of the past. In Figure 2 below, an overview of the estimated Vote Treaty Negotiations appropriations in the 2010/11 financial year is provided.

[2] 'At any stage during the Waitangi Tribunal process, claimants may request negotiations with the Crown (except during a remedies hearing). The Waitangi Tribunal formally allows opportunities for negotiations between the Crown and claimants after its initial report and following interim recommendations for resumption' (OTS, 2010a: 39).

Figure 2 Overview of the Vote Treaty Negotiations appropriations, 2010/11

Source: Treasury, 2010: 1

The Minister for Treaty of Waitangi Negotiations is responsible for appropriations in Vote Treaty Negotiations for the 2010/11 financial year covering the following:

Vote Treaty Negotiations contains a multi-year appropriation of $1,400 million for the five-year period 2010 to 2014. This appropriation is for the settlement of historical Treaty of Waitangi claims and provides for the payment of redress through the transfer of assets (cash and property) from the Crown to claimant groups, and for the payment of interest on settlement redress.

In addition, annual appropriations sought for Vote Treaty Negotiations in 2010/11 total $62.796 million.

This is intended to be spent as follows:

- $21.520 million (34% of the Vote) for the purchase of policy advice, negotiation, settlement and implementation of historical Treaty claims from the Office of Treaty Settlements.
- $7.335 million (12% of the Vote) for the purchase of property management services from the Office of Treaty Settlements.
- $2.961 million (5% of the Vote) for the purchase of Crown representation at Waitangi Tribunal hearings of historical claims.
- $10 million (16% of the Vote) for claimant funding to support the settlement of historical Treaty claims.
- $1 million (less than 2% of the Vote) to support the implementation of the Central North Island Forests land settlement.
- $120,000 (less than 1% of the Vote) for debt write-off of rentals owing from Landbank properties.
- $3.600 million (6% of the Vote) for depreciation on assets held in the Office of Treaty Settlements landbank.
- $16.260 million (26% of the Vote) for the purchasing of property by the Office of Treaty Settlements for historical Treaty of Waitangi settlement purposes.

The Ministry of Justice expects to collect $5.877 million of revenue on behalf of the Crown from Landbank property operations.

These appropriations for the 2010/11 financial year relate primarily to the two government institutions leading the Treaty settlement process – the Waitangi Tribunal and the Office of Treaty Settlements. Clearly, there is considerable national investment in the settlement process and work towards the aspirational 2014 deadline. The remainder of this Working Paper provides an overview of the operation of these two institutions and their work towards this goal.

4.1 Te Rōpū Whakamana i te Tiriti o Waitangi – The Waitangi Tribunal

The Waitangi Tribunal was created under the Treaty of Waitangi Act 1975. The initial bill that led to the establishment of the Waitangi Tribunal was sponsored by the then Minister of Maori Affairs, Hon Matiu Rata who described it as a 'milestone of social and political achievement' (Hamer, 2004: 3). Rata was known for his work towards reforming Maori land law and towards the settlement of Treaty of Waitangi claims (MCH, 2009b).

The Waitangi Tribunal is a permanent Commission of Inquiry, whose job is to investigate and make recommendations to government (the Office of Treaty Settlements) on claims made to it by Māori.[3] It does not therefore settle the grievances of Māori, rather it provides assistance towards political settlement of claims through 'independent examination and advice' (Melvin, 2004: 16). Claims relate to actions or omissions of the Crown that are inconsistent with the principles of the Treaty, as outlined by the Treaty of Waitangi Act 1975, s6 (1) (d). The Waitangi Tribunal:

> for the purposes of the Treaty of Waitangi Act 1975 … has exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them. (Waitangi Tribunal, 2009a: 1)

These interpretations are subject to change both within the Waitangi Tribunal and as interpreted by the courts (TPK, 2001: 77). Claims may be historical or contemporary, and they may relate to either specific pieces of land or a generic government policy (MCH, 2009c).[4]

A chairperson, who is either a High Court judge or a retired judge, or chief judge in the Māori Land Court, heads the Waitangi Tribunal (Waitangi Tribunal, 2010a). Judge Ken Gillanders-Scott was Chairperson of the Waitangi Tribunal until his retirement in 1980; at this time, Judge Edward Taihakurei Durie took over this key role (Hamer, 2004: 4). Judge Joseph Williams was confirmed as the next Tribunal Chairperson in 2004, after roles as deputy and acting chairperson in the preceding years (Government Directory Online, 2004). In 2009, Judge Wilson Whare Isaac was appointed to the role for the next five years (NZPA, 2009).

Before the Tribunal can begin an inquiry, or the Crown can begin negotiating with a claimant group, the relevant claims must be registered with the Waitangi Tribunal (OTS, 2010a: 38). On receiving a claim, the Tribunal will conduct research into that claim and compile a casebook.

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[3] As at September 8, 2009, 2125 claims had been registered with the Waitangi Tribunal. There are 1341 claims still pending, however many of these will likely not meet the statutory requirements for registration (Waitangi Tribunal, 2009b). Multiple claims are often grouped under one comprehensive claimant group (usually large iwi/hapū groups) for analysis and settlement. This means that the overall number of claims will not equate to the number of final settlements (Waitangi Tribunal, 2009c). Since 1992, 28 settlements have been made through the OTS at a total value of over NZ$1 billion (OTS, 2010b: 11).

[4] An historical claim is defined under Section 2 of the Treaty of Waitangi Act 1975 as 'a claim made under section 6(1) that arises from or relates to an enactment referred to in section 6(1)(a) or (b) enacted, or to a policy or practice adopted or an act done or omitted by or on behalf of the Crown, before 21 September 1992'. 'Claims based on Crown actions or omissions after this date are known as contemporary claims, and are dealt with through separate processes' (OTS, 2009a).

The claim then undergoes a series of hearings which can take up to three years. Oliver argued in 1991 that 'a glance at the record of proceedings in any major report will show that the Tribunal has opted for thorough investigation rather than the expeditious dispatch of claims' (Oliver, 1991: 17).[5] The Tribunal produces a report which is generally used by claimants as the basis of their settlement negotiations with the Crown (Waitangi Tribunal, 2009c). Importantly, the Waitangi Tribunal is not a court of law which means that it has more scope to require witnesses and resources to come before it, or to actively conduct its own research (ibid.). The reports produced not only inform the settling of claims, but they compile and present important New Zealand histories.

> one of the most notable features of the Tribunal 's work was the art and sophistication with which it listened to and relayed a Maori version of history to a wider audience (Sharp, cited in Hayward & Ween, 2004: xvii).

4.1.1 The evolution of the Waitangi Tribunal

The Tribunal was originally only able to investigate contemporary claims, with no power to accept claims relating to Crown actions prior to 1975 (Hamer, 2004: 3). During the first five years of its life the Tribunal was relatively ineffective, with many Māori viewing it as 'little more than a "token gesture"' (ibid.: 4). This changed with the appointment of Edward Taihakurei Durie as Chief Judge of the Māori Land Court and Chair of the Tribunal in 1980, after which, many of the Tribunal's procedures began to be governed by Māori protocol (ibid.). Following this, in 1985, the Waitangi Tribunal was given the power to investigate historical claims dating back to 1840 and to 'commission research and appoint legal counsel for claimants' (MCH, 2009d). In addition, while the Tribunal originally had three members, by 1988 it had 17 (Hamer, 2004: 6).

In 1985, the Waitangi Tribunal issued the 'Manukau Report' which contributed to the development of the current Waitangi Tribunal settlement process. It was issued in response to a claim by a confederation of hapū affiliated to Waikato-Tainui (known as the Wai-8 claim). The claim expressed concern about the desecration of traditional Māori resources, and the lack of Māori input into how these resources were being used. The resulting Manukau Report clearly highlighted the need for Maori values to be provided for in legislation and to be 'given proper consideration when Maori interests are particularly affected' (Waitangi Tribunal, 1989: 144). Similar principles were also present in the 1995 document *Crown Proposals for the Settlement of Treaty of Waitangi Claims* (OTS, 1995), which attempted to create an appropriate structure for the settlement of Treaty of Waitangi claims, and invited public submissions (OTS, 1995: 30). Many of the proposals were modified as a result of the post-publication consultation hui held between February and April 1995, however the initial structure for progressing claims remains the basis of current settlement policy (CFRT, 2003: 67). Interestingly, one proposal was a 'Fiscal Envelope' – a cap of $1 billion for all historical settlements – however, this was abandoned in 1996 due to the level of public outcry (OTS, 2010a: 87–88).

[5] For a detailed account of the claim process, see Oliver (1991: 7–17).

In 1996, the 'casebook' system was introduced to reduce the costs and complexity of investigating and processing claims (Boast, 2004: 58). This involved grouping claims regionally for research and hearings and producing a 'casebook', which is a collection of reports compiling the main issues relating to a specific region. This would then form the basis for researching all claims relating to that area (ibid.). This system paved the way for further development under what was called the 'new approach'.

In 2005, the Crown introduced an innovation to the structure of the inquiry process, which was driven by the then Chair of the Tribunal, Justice Joe Williams. The 'new approach', as it has been dubbed, aimed to achieve a more balanced, practical, efficient, economical and streamlined inquiry process, which would shorten report timeframes and assist both the Crown and Māori to achieve their goals (Waitangi Tribunal, 2005a).

The Waitangi Tribunal's role is to contribute to the following process:

- resolve the grievances;
- restore the well-being of Māori communities; and
- reconcile Māori communities with the state and other parts of society (Waitangi Tribunal, 2005b: 1).

In the past, the Waitangi Tribunal's initial hearing phase moved at a significantly slower rate than at present, whereby it took three years for the Mohaka ki Ahuriri hearings, and four years for the Kaipara, Northern South Island and Hauraki hearings (Waitangi Tribunal, 2005b: 3).[6] The 'new approach' aims to produce practical, efficient and economical outcomes, and has significantly sped up the process – the Gisborne hearings took place over a period of eight months, the Wairarapa ki Tararua hearings over 13 months, and the Urewera hearings 20 months (ibid.).[7]

The Tribunal's aim is to adhere to a 'carefully monitored plan' to deliver reports within two years of the hearings ending. The objectives of the new approach include:

- To establish the fastest possible process, mindful of natural justice requirements;
- To streamline processes, so that 'down-time' between phases is minimised and all parties know what is required of them at all times;
- To focus inquiries towards the significant outputs and outcomes, such as a purpose-built Tribunal report, and just and timely settlement of grievances;
- To identify and, where possible, resolve sooner rather than later any issues of mandate and representation among claimant groups;

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6 The Mohaka ki Ahuriri hearing took place from November 1996–February 2000 (Waitangi Tribunal, 2004a); Kaipara: August 1997–June 1998, March 1999–September 2001 (Waitangi Tribunal, 2006a: 1–3); northern South Island: 2000–2004 (Waitangi Tribunal, 2008) and Hauraki: September 1998–November 2002 (Waitangi Tribunal, 2006b).

7 Gisborne: hearings took eight and a half weeks during the period November 2001–June 2002 (Waitangi Tribunal, 2004b: 2,4); Wairarapa ki Tararua: nine weeks of hearings between March 2004–March 2005 (Waitangi Tribunal, n.d.[a]) and Urewera: November 2003–February 2005 (Waitangi Tribunal, n.d.[b]).

- To provide discipline, management, and efficient use of resources by thorough planning and budget setting (Waitangi Tribunal, 2005b: 6).

The 'new approach' used by the Waitangi Tribunal means that two options are available for a claimant group to use when looking at historic claims.

1. The standard form, which emphasises a streamlined pre-hearing process, and the early articulation of the parties' cases so that agreements can be reached and concessions made in advance, thereby reducing the issues argued in hearings; and
2. The modular form, which is available to claimants who favour a quick entry into settlement negotiations with the Crown, but who seek the Tribunal's assistance in developing and testing their evidence, defining the main issues, and providing a general report on the extent of Treaty breach (Waitangi Tribunal, 2005b: 2).

In 2005 Justice Williams commented that if the modular form of inquiry was used, large numbers of claims and claimants could be addressed simultaneously in multi-district regional inquiries that could wrap up all historic claims by 2012. If the more adversarial standard form of inquiry were used, then it would be more likely that a possible finish date would be closer to 2020. It is important to note that a combination of the two approaches will most probably be used by the various claimants, which would more likely result in a completion date of 2015 or earlier.

In 2006 an additional amendment was made to the Treaty of Waitangi Act 1975 whereby s6(AA) was inserted to place a deadline on applications for claims. Under Section 6, claims made prior to midnight on the 1st of September 2008 are still able to be processed (and previously registered historical claims may still be amended at any stage) and new contemporary claims may still be lodged.

Of current inquiries awaiting reports of the Tribunal, the WAI262 inquiry has particularly significant and far-reaching implications. The case makes four statements of claim, which encompass four broad categories: intellectual property aspects of taonga works; biological and genetic resources of indigenous and/or taonga species; tikanga Māori, mātauranga Māori and te reo Māori; relationship of kaitiaki with the environment (Waitangi Tribunal, 2006c). Following the hearing of closing submissions in June 2007, the Tribunal entered the report-writing stage of the process (Waitangi Tribunal, 2010b).

4.2 Te Tari Whakatau Take e pa ana ki te Tiriti o Waitangi – Office of Treaty Settlements

In 1989, the New Zealand government set up a policy unit to examine Treaty of Waitangi settlement issues; in 1995, this unit became the Office of Treaty Settlements (OTS).[8] Over the

[8] OTS expenses for the 2008/09 financial year included 'Policy advice for Treaty Negotiations': $11,097,000; 'Representation: Waitangi Tribunal': $1,619,000, and 'Property Portfolio Management': $4,908,000 (OTS, 2010b: 14).

15 years the OTS has been in existence, 'the framework for resolving Māori grievances has developed an "interest based" negotiation brief' (Cody, 2003). This means 'both parties at the negotiation table commit to explore their respective interests in good faith …with the aim of reaching solutions together. Positional bargaining is avoided as much as possible' (ibid.).

The OTS produces four-monthly status reports, the most recent of which advises that currently there are over 20 claimant groups from around the country involved in pre-negotiation discussions, or negotiations with the Crown (OTS, 2010b: 3).[9] Claimant groups are usually iwi or large hapū that have a longstanding historical and cultural association with a particular area, as 'the Crown strongly prefers to negotiate claims with large natural groupings rather than individual whānau and hapū' (OTS, 2006: 14). Once an agreement has been reached, the OTS works to implement settlements and advise on the acquisition, management, transfer and disposal of Crown-owned property for Treaty claim purposes (OTS, 2010: 2). To date more than $1 billion[10] has been committed to final and comprehensive settlements and several part-settlements (OTS, 2009b). A settlement must be accepted as fair and final, and settle all of the historical claims of the claimant group. Redress focuses on;

> 'recognition of the claimant group's historical grievances, on restoring the relationship between the claimant group and the Crown, and on contributing to a claimant group's economic development' (OTS, 2009a).

In 2000, the Crown reviewed settlement policies and processes and announced the following guiding principles for negotiating Treaty settlements (OTS, 2010a: 30). In summary, the principles include:

- Good faith in conducting negotiations;
- Restoration of relationship between Māori and the Crown;
- Just redress;
- Fairness and consistency between claims;
- Transparency of information; and
- Government-negotiated nature of process.

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9 In order to manage settlement assets and exercise the forms of cultural redress provided in a settlement package, an appropriate 'governance entity' must be established by the claimants. A 'governance entity' is a legal entity, the constitution of which is a matter for the claimant group to decide according to its needs and tikanga. Before transferring assets, the Crown must ensure that they will be effectively managed by and for those who should rightfully benefit from the settlement of the claim (OTS, 2010a: 71–72).

10 This includes $27.256 million paid as claimant funding separate from the negotiated settlement redress (OTS, 2010b: 4). 'The total value of settlements has exceeded $1 billion in nominal dollars. The relativity mechanism in the Waikato-Tainui and Ngāi Tahu Deeds of Settlement has not yet been triggered as the relativity mechanism totals all values in 1994 terms, taking account of interest and inflation since 1994. For the purposes of the relativity mechanism, a settlement of $50 million in the 2008/09 financial year is equivalent to a settlement of $24 million in 1994' (OTS, 2010b: 4). 'The mechanism provides that, where the total redress amount for all historical treaty settlements exceeds $1 billion in 1994 present-value terms, the Crown is liable to make payments to maintain the real value of Ngāi Tahu's and Waikato-Tainui's settlements as a proportion of all Treaty settlements' (Parliamentary Library, 2006: 16).

4.2.1 The negotiations process

The OTS negotiates settlements of historical Treaty of Waitangi claims on behalf of the Crown (relating to acts and omissions prior to 21 September 1992). To begin negotiations for a claim it must first be registered with the Waitangi Tribunal. Claimants can choose to have their claims heard by the Tribunal before entering negotiations with the Crown (OTS, 2010a: 38). The OTS also reports and provides advice on policy and negotiations directly to the Minister for Treaty of Waitangi Negotiations, and is responsible for surplus Crown land that can be used in settlements.[11] The OTS negotiating team is made up of officials and negotiates with the claimant on behalf of relevant Ministers, who are in turn entrusted to oversee the process and report back to Cabinet. Cabinet must then approve the draft deed of settlement before it is initialed (OTS, 2010a: 61). If redress is outside of policy parameters, the specific approval of ministers or cabinet is required prior to it being initialed by the crown and the claimant group (ibid.). The OTS will also facilitate the passing of relevant legislation through the select committee stage (ibid.: 79).

The negotiations process between the claimant group and the OTS encompasses the following stages, as outlined in Figure 3 and presented in more detail in Table 1.

Figure 3 The Office of Treaty Settlement Process
Source: Adapted from OTS, 2010a: 35–37.

1. **Pre Negotiations**
    a) Mandate established
    b) Mandate recognised by Crown
    c) Terms of negotiation
2. **Negotiations**
    a) In negotiation
    b) Agreement in Principle signed
    c) Deed of Settlement signed
3. **Enactment through legislation**
    a) Final and comprehensive settlement enacted through legislation

4.2.2 The current status of the settlement process

Table 1 sets out our interpretation of the current settlement process. It is important to note that the process is complex, in that one claimant group may include multiple claims. It is therefore not easy to understand the linkages from an initial claim to the claimant group and from the claimant group to the final settlement. The process is likely to be under increasing time constraints in light of the 2014 deadline proposed by the current government for the

[11] As at October 2007, the OTS held a landbank of 777 properties to the approximate book value of $248 million (OTS, 2008: 16).

settling of all historical Treaty claims (NZ Govt, 2009).[12] It remains to be seen whether this aspirational goal will be achieved by the target date.

Table 1 Treaty Settlement Process and Claims Status as at 28 February 2010
Source: OTS, 2010b

Stage (tier one)	Stage (tier two)	Description	Claimant groups at each stage[13]	Redress agreed but not yet settled ($ m)	Redress settled ($ m)
1. Pre - negotiations	(a) Mandate established	Where a claimant group wishes to negotiate with the Crown, it must demonstrate that the breaches harmed their tūpuna. Groups can choose to either go through the Waitangi Tribunal or directly into negotiations.	[14]		
	(b) Mandate recognised by Crown	Deeds of Mandate are assessed and approved by the OTS and TPK. They are publicised to ensure all stakeholders have a chance to comment. The Minister for Treaty of Waitangi Negotiations and the Minister of Māori Affairs make the final decision on behalf of the Crown, and a mandate may be recognised subject to certain conditions.	**6:** Ngāti Tu, Ngāti Hineuru, Ngāti Tūwharetoa, Mana Ahuriri, Ngāti Whakaue, Taranaki iwi		
	(c) Terms of negotiation	The Crown and the mandated representatives need to discuss how they will run negotiations. This involves the "ground rules" and objectives for the formal talks between the Crown and mandated representatives. Once agreed, these Terms are signed.[15]	**1:** Moriori		

12 Previously, the Labour government had set the target date of 2020 (NZ Govt, 2007).

13 One claimant group may incorporate multiple claims (Waitangi Tribunal, 2009c).

14 It is difficult to identify a set number here as this is an organic stage that occurs before a claimant group is part of the official OTS process.

15 See *Healing the past, building a future* (Summary edition) (OTS, 2006: 29).

Stage (tier one)	Stage (tier two)	Description	Claimant groups at each stage[13]	Redress agreed but not yet settled ($ m)	Redress settled ($ m)
2. Negotiations	(a) In negotiation	Claimant groups at this stage are negotiating with the Crown the basic elements of a settlement, such as the nature of the historical account and possible cultural and commercial redress.	**10**: Te Rūnanga o Ngāti Whātua, Ngāti Rehua, Raukawa (Comprehensive), Ngāti Ranginui, Ngāti Pukenga, Ngāi Tūhoe, Ngati Rangiwewehi, Tapuika, Ngati Rangiteaorere, Te Iwi o Whanganui (River claim)		
	(b) Agreement in Principle signed	Once the broad outline of a settlement is agreed between a claimant group and the Crown, the parties mark this milestone by signing an Agreement in Principle noting the outline of the settlement. The goal of an Agreement in Principle is to record the basic outline of a proposed settlement between the Crown and a claimant group, which will settle all of that group's historical claims against the Crown.[16]	**21:** Te Rarawa, Te Aupouri, Ngāti Kāhu, Ngati Kuri, Ngāi Takoto, [17] Ngātikahu ki Whangaroa, Ngāti Whātua o Ōrākei, Ngāti Whatua o Kaipara, Te Kawerau a Maki, Ngāti Manuhiri, Tamaki Collective, Ngāti Mākino, Waitaha, Tūranganui-a-Kiwa[18], Ngāti Porou, Ngāti Pahauwera, Te Atiawa (Taranaki), Rangitaane o Manawatu, Kurahaupō,[19] Ngāti Toa Rangātira, Tainui Taranaki ki te Tonga[20]	$517	

16 See *Healing the past, building a future* (Summary edition) (OTS, 2006: 39)

17 Te Rarawa, Te Aupouri, Ngāti Kahu, Ngāti Kuri and Ngāi Takoto are members of Te Hiku Forum which signed an Agreement in Principle for collective interests on 16 January 2010 (OTS, 2010b: 7).

18 Turanganui-a-kiwa comprises Ngāi Tamanuhiri, Rongowhakaata, Te Whakarau

19 The Kurahaupō Trust comprises Ngāti Apa Ki Te Ra To, Ngāti Kuia and Rangitāne o Wairau.

20 Four Te Tau Ihu iwi – Ngāti Koata, Ngāti Rarua, Te Atiawa and Ngāti Tama – make up Tainui Taranaki ki te Tonga.

Stage (tier one)	Stage (tier two)	Description	Claimant groups at each stage[13]	Redress agreed but not yet settled ($ m)	Redress settled ($ m)
		When all the details of the settlement have been agreed, these are set out in a draft Deed of Settlement for approval by Cabinet. The draft Deed of Settlement is then initialled by both the Crown and the mandated representatives.			
	(c) Deed of Settlement signed	Once the initialled Deed of Settlement and Governance entity have been ratified the Crown and claimants can sign the final Deed of Settlement.	**5**: Ngāti Apa, Waikato-Tainui (River Claim), Ngāti Whare, Ngāti Manawa, Raukawa (River Claim)		$38

Stage (tier one)	Stage (tier two)	Description	Claimant groups at each stage[13]	Redress agreed but not yet settled ($ m)	Redress settled ($ m)
3. Enactment through legislation	(a) Final and comprehensive settlement enacted through legislation	Settlement legislation is usually needed to implement a settlement. The legislation allows the settlement assets to be transferred to the governance entity on behalf of the claimant group and the group can begin to make use of the cultural redress provided in the settlement.	**19:**[21] Taranaki Whānui ki te Upoko o Te Ika, Te Uri o Hau, Te Roroa, Waikato-Tainui (Raupatu), Ngāti Tūwharetoa (BOP), Ngāti Awa, Central North Island Collective, Te Arawa Lakes, Affiliate Te ArawaIwi and Hapu, Pouakani, Ngāti Tūrangitukua, Ngāti Ruanui, Ngāti Tama, Ngaa Rauru Kiitahi, Ngāti Mutunga, Ngāi Tahu, Fisheries, Ngāti Whakaue, Hauai		$919
Settlements 1992–1997 not included above		Between 1992 and 1997 there were four settlements that have not been enacted through legislation because they were small and/or stand-alone claims.	**4:**[22] Ngāti Rangiteaorere, Waimakuku, Rotoma, Te Maunga		$1
Other expenses[23]					$128
Total			**66**[24]	$517[25]	$1,087[26]

[21] Includes the fisheries settlement which was enacted as the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Ngāti Whakaue and Hauai settlements which were enacted within the Reserves and other Land Disposals Act 1995, and the Taranaki Whānui settlement, which was enacted 4 August 2009 as the Port Nicholson Block (Taranaki Whānui ki Te Upoko o Te Ika) Claims Settlement Act 2009. Since September 1992, 28 settlements have been made including 19 which were 'enacted through legislation' (OTS, 2010b: 11; communication with OTS, 14 September 2009).

[22] Not all settlements have been enacted through legislation (OTS, 2010b: 6–7). Those which have not been were small and/or stand-alone claims which did not require legislation (communication with OTS, 14 September 2009). Of the nine settlements not recorded in the above table as 'enacted through legislation', five are recorded in the table in the 'Deed of Settlement' stage. This leaves four small settlements not enacted through legislation (all from 1997 or before) (OTS, 2010b: 6–7, 11).

[23] Other expenses include:
i. the value of gifting for claims that have been settled or part-settled, but for which the value of the gifting has not been included in the settlement value ($72,344,997).
ii. part-settlements including those involving surplus railways properties ($26,789,520).
iii. claimant funding for claims which have not yet been settled, and claimant funding where this is separate from total settlement value ($27,256,034).
iv. costs associated with the administration of the Ngāi Tahu Ancillary Claims Trust ($1,769,183).
(OTS, 2010b: 11)

[24] This does not include claimant groups with only a mandate established.

As at September 8, 2009, 2125 claims have been registered with the Waitangi Tribunal. Because each claimant group may encompass multiple claims it is unclear how many claims are at each stage of the negotiations (Waitangi Tribunal, 2009b).

Table 1 shows that six claimant groups are currently in the pre-negotiations stage with the OTS. In addition, there are also 36 claimant groups in the negotiations stage of the claims and settlements process, of which $516 million in redress has been allocated but not yet enacted through legislation.[27]

To date, 23 claimant groups have had claims settled to the value of $1.087 billion. This equates to $1471 per person of Māori descent in New Zealand.[28] Included in this number are 19 settlements enacted through legislation and four settlements that have not been enacted through legislation because they were small and/or stand-alone claims.

5. Observations

The government's aspirational goal for the completion of full and final Treaty settlements is 2014. Given the significance and enormity of completion, progress to date is considerable. The post-settlement era has the potential to emerge as a sound foundation from which to progress New Zealand's future.

Based on the previous sections of this Working Paper, we are able to make the following observations:

- The establishment of the Waitangi Tribunal in 1975 was the institutional outcome of a longstanding informal process of Maori bringing grievances to the Crown. The Treaty of Waitangi Act 1975 provides a basis for a consistent, equitable and transparent process to address the grievances of Māori.
- Establishing the Treaty of Waitangi settlements process was an enormous step of leadership, in particular by then Prime Minister, Norman Kirk, and Minister of Māori Affairs, Matiu Rata. The vision for the Tribunal was progressive, and its ambitious task of reconciling injustice has remained central throughout the Tribunal's ongoing evolution.
- The processes of the Waitangi Tribunal and the Office of Treaty Settlements interact, and are complex and non-linear. The 'new approach' and the introduction of the modular process have enabled more efficient processing of claims however

25 The figure of $516.75 million has been provisionally allocated to claims that are not yet settled (OTS, 2010b: 12).

26 The total amount settled as at February 2010 is $1,087 million (OTS, 2010b: 11).

27 See Table 1.

28 The figure of $1471 per person of Māori descent has been calculated by dividing $1,087,000,000 by 739,039. The $1,087,000,000 figure is compensation awarded to date (see Table 1), while the 739,039 figure is a 'Māori descent resident estimate' for 2008. The latter figure was supplied by the Parliamentary Library and is an approximate and unpublished figure. It was supplied to Sustainable Future through personal communications and has been used in the absence of published figures.

progress remains difficult to gauge. Reporting on progress towards the settlement of historical claims is in regard to claimant groups, not claims. However, presumably data on the progress on specific claims is available, especially as the deadline for lodging historical claims has passed. Without the OTS making reporting on progress towards settlement of claims publicly available, it is difficult to gain a full picture on progress to date.

- $1.087 billion of claims have been settled, and $517 million agreed but not settled, between the Crown and different claimant groups. There is not yet an indication of the total expected value of all settlements. Clearly, claimants and the people of New Zealand have made a significant investment to date, both in terms of funds used and time taken in working towards settlement of claims. There remains the need for a last push in order to meet the aspirational goal of 2014, so that 'full and final settlement' is achieved.
- In delving into the history of the settlements process, and in particular the work produced by the Waitangi Tribunal, the Tribunal's invaluable contribution to the documentation of Aotearoa New Zealand's national history has become apparent. How this wealth of historical knowledge is stored and shared is an important consideration for the Tribunal, government, iwi and hapū, and the wider New Zealand public. Much can be learnt from developing a shared understanding of the Tribunal's findings.
- Moving into the future, there exists significant potential for the development of innovative legal instruments to further support cultural and intellectual property rights. It will be interesting to see how the release of the Report on the WAI262 flora and fauna and cultural intellectual property claim feeds into this process.

A number of outstanding questions demand further examination:

1. How do we manage our approach to the completion of full and final settlements?
2. How can reporting be improved to gain a more accurate and comprehensive understanding of this trajectory?
3. What happens post-settlement? How can the experience be used to positively leverage the relationships between government, and iwi and hapū into the future?
4. How can the historical knowledge that has been gained be made accessible to the public?
5. How can the wisdoms learnt from this process inform how we address injustices that exist outside of the boundaries of the Tribunal in the future?

These questions will feed into a wider discussion in Report 7, *Exploring the Shared Goals of Māori: Working towards a National Sustainable Development Strategy*, which investigates how a National Strategy for Sustainable Development can support the achievement of the goals of Māori.

Glossary

Note: We have primarily used the online version of the *Te Aka Māori-English, English-Māori Dictionary and Index* to source these definitions (Moorfield, 2009). Where this was not possible we have used alternative sources, which are referenced within the glossary.

Glossary	
Agreement in Principle	an agreement between the Crown and a claimant group marked by an exchange of letters between the claimant group and the Minister for Treaty of Waitangi Negotiations. The letters describe the broad outline of a settlement package (OTS, 2010a: 157)
claimant group	those people whose claims will be settled and who will be the beneficiaries of the settlement and the governance entity (OTS, 2010a: 157)
contemporary claims	those claims arising from Crown acts or omissions after 21 September 1992 (OTS, 2010a: 158)
Deed of Mandate	a formal statement prepared by a claimant group stating who is appointed to represent them in negotiations with the Crown, and how the mandate was approved by the claimant group (OTS, 2010a: 158)
Deed of Settlement	the complete, detailed and formal settlement agreement signed on behalf of the Crown and the claimant group (OTS, 2010a: 158)
hapū	a sub-tribe; most iwi are comprised of two or more hapū, although a number of smaller iwi have marae but no hapū (TPK, n.d.)
historical claims	those claims that may arise out of or relate to Crown acts or omissions before 21 September 1992 (OTS, 2010a: 159)
injustice	natural injustice is the act of doing harm to mankind, by violating natural rights. Civil injustice, is the unlawful violation of civil rights (Mojo Law, 2010)
iwi	a Māori tribe descended from a common named ancestor or ancestors, usually comprised of a number of hapū (TPK, n.d.)
Māori	aboriginal inhabitant of New Zealand
taonga	property, goods, possessions, effects, treasure, something prized
Terms of Negotiation	a written agreement between the Crown and a claimant group setting out the agreed objectives and ground rules for negotiations (OTS, 2010a: 161)
te Tiriti o Waitangi	the Māori version of the Treaty of Waitangi
Treaty settlement	An agreement involving financial and other compensation reached between government and a Māori iwi or group of iwi in respect of a Treaty claim (Deverson & Kennedy, 2008: 1198)
whānau	extended family, family group, a familiar term used to refer to a number of people

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