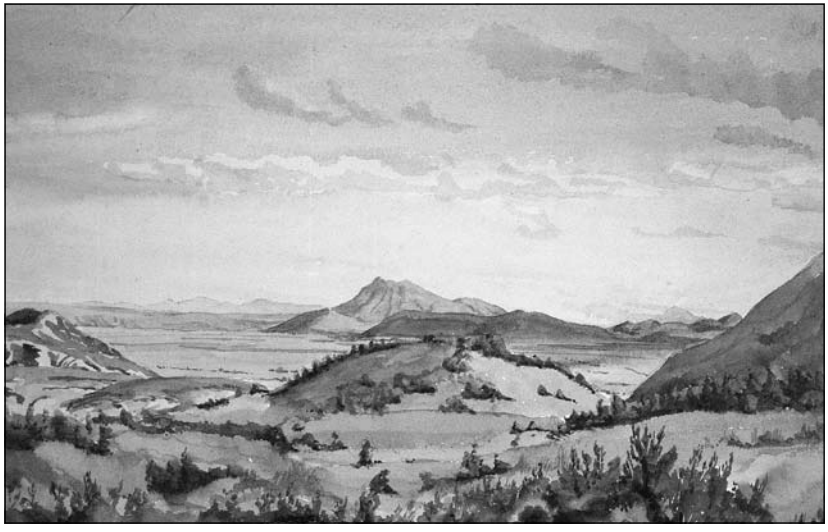

THE FINAL REPORT ON THE IMPACTS OF THE CROWN'S TREATY SETTLEMENT POLICIES ON TE ARAWA WAKA AND OTHER TRIBES

Previous page: The Kaingaroa Plains, from near Waiotapu, May 1890, Lister family, Alexander Turnbull Library, Wellington (E-394-f-028-1).

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The Honourable Parekura Horomia
Minister of Maori Affairs

The Right Honourable Helen Clark
Prime Minister

The Honourable Mark Burton
Minister in Charge of Treaty of
Waitangi Negotiations
Parliament Buildings
WELLINGTON

The Waitangi Tribunal
141 The Terrace
WELLINGTON

30 July 2007

E te Pirimia, tēnā koe e te Ariki Kahurangi. E te Minita Māori, te Kāhu Kōrako, tēnā koe e tū nei ki te kei o te Waka Māori. E te Minita nōna te mana whakarite take e pā ana ki te Tiriti ō Waitangi, tēnā koe e whakamoe nei i te wairua ohooho o te iwi Māori.

Tēnei rā te mihi manahau, te mihi matakuikui ki a koutou katoa.

Tēnā hoki koutou i ō tātou tini mate kua rauhingia ki te nohopukutanga o te tangata ki te whareahuru o ngā marae o Tuawhakarere.

This is the fourth report that the Tribunal has issued on claims brought in respect of the Crown's settlement with Nga Kaihautu o Te Arawa.

We have found in this report that aspects of the Crown's processes for dealing with overlapping groups, and aspects of the deed of settlement itself, are inconsistent with the principles of the Treaty of Waitangi.

We have thought carefully about what recommendations to make. Treaty settlements are critical to the future of our country, and we consider that any recommendation to delay or stop a proposed settlement should be made only as a last resort.

Nevertheless, we cannot endorse the settlement in its current form. We have grave concerns for the impact of this settlement on overlapping iwi and on the durability of future central North Island settlements. Future settlements cannot proceed like this. The Crown cannot continue to 'pick favourites' and make decisions on tribal interests in isolation, based on inadequate information. However, we believe that the affiliate iwi and hapu of Te Arawa deserve a settlement.

We therefore recommend that their proposed settlement be delayed, pending the outcome of a forum of central North Island iwi and other affected groups, convened by Te Puni Kokiri. All the claimants to our inquiry, plus the Nga Kaihautu and the Crown Forestry Rental Trust, should participate in this hui.

The aim of the forum would be to negotiate between participants, according to tikanga, high-level guidelines for the allocation of Crown forest lands. Neither the Crown nor the Waitangi Tribunal need be directly involved. The New Zealand Maori Council and the Federation of Maori Authorities should be present to represent the general interests of Maori nationally.

The aim of the forum would be to reach agreement upon:

- principles to guide decision-making over the allocation of central North Island Crown forest lands in Treaty settlements;
- the overall proportionality to apply to the allocation of assets between different iwi; and
- the priority given to particular iwi in respect of Crown forest lands in each geographical area.

Issues of manawhenua may have greatest bearing on the priority given to groups in a specific area. The forum may take a different form, but the critical thing is that these decisions are made by the central North Island iwi themselves, on their own terms, answerable to each other.

We note that this approach would benefit the Crown, insofar as it would no longer be in the unenviable position of determining the allocation of settlement assets between these groups, based on its understanding of their customary interests and of the potential size and shape of future settlements.

Equally, it would give Maori an assurance that the allocation of Crown forest assets had been undertaken fairly, transparently, and according to tikanga. Iwi may, post settlement, consider managing their forest assets collectively, to maximise combined commercial returns and to create opportunities for flexible arrangements in respect of cultural practices and access.

Most importantly, we consider that truly durable Treaty settlements would grow out of such a process. We are not confident that this will be the case if the current Te Arawa deed of settlement is enacted.

Heoi ano

CHAPTER 1

INTRODUCTION

Procedural Background

The process by which the Crown and Nga Kaihautu o Te Arawa Executive Council (KEC) have negotiated the settlement of Te Arawa's historical Treaty claims dates back to 2003. The negotiations have not proceeded smoothly for Te Arawa. In 2004 and 2005, the Waitangi Tribunal issued reports on the process by which the Crown recognised the KEC's mandate to negotiate Te Arawa's claims. During the mandating process, the proportion of Te Arawa represented by the KEC dropped to approximately half, as various groups withdrew their support. Nevertheless, negotiations proceeded. The KEC and Crown signed their agreement in principle in September 2005, and the deed of settlement in September 2006. The Crown will introduce legislation enabling the settlement at some time after 1 August 2007.

In late 2006, however, following the signing of the deed of settlement, new claims were brought to the Tribunal in respect of the proposed settlement. The claimants were, for the most part, the half of Te Arawa who choose to stand outside the KEC mandate and who considered that the settlement would prejudice their interests by transferring to the KEC certain cultural and commercial assets, including Crown forestry licensed (CFL) lands, in which they have interests. In January 2007, before the Tribunal sat to hear these claims, the New Zealand Maori Council and the Federation of Maori Authorities filed proceedings against the Crown in the High Court, alleging that the proposed KEC settlement would breach commitments made by the Crown in 1989 and 1990 in respect of the transfer of CFL lands. After seeking feedback on the matter from parties, the Tribunal decided in early February to adjourn consideration of all matters relating to the Crown forestry assets involved, pending the High Court's ruling on the New Zealand Maori Council and Federation of Maori Authorities litigation.[1] The Tribunal heard claims on cultural redress aspects of the settlement at a hearing held in Rotorua between Monday 26 February and Friday 1 March 2007. Our report on these claims, *Report on the Impact of the Crown's Settlement Policy on Te Arawa Waka* was released on Monday 18 June. (That report is reproduced in this volume.)

Following the 4 May 2007 release of the High Court decision of Judge Gendall, the Tribunal sought submissions from parties on whether to reconvene to hear the forestry issues. Memoranda filed in reply universally supported the reconvening of the Tribunal. The Tribunal sat at Tamatekapua in Rotorua to hear commercial redress claims from Monday 25 to Wednesday 27 June 2007. As a result, this report deals only with issues regarding the

transfer of CFL lands to Te Pumautanga o Te Arawa, the post-settlement governance entity, under the terms of the KEC deed of settlement. It should properly be read in conjunction with our first settlement process report. Because the present report is in many ways an addendum to that report, and because of the pressure of time under which the Tribunal is operating in this inquiry, wherever possible we have sought to refer to that report in order to avoid unnecessarily repeating material. A fuller account of the background to the hearing of central North Island Treaty claims and the KEC mandating issues is set out in our previous Te Arawa mandate reports,[2] and in our first settlement process report.

The pressure of time we referred to above is the result of a clause in the KEC deed of settlement which commits the Crown to introducing enabling legislation to effect the settlement within nine months of the ratification of the post-settlement governance entity.[3] The trust deed of Te Pumautanga o Te Arawa was signed on 1 December 2006. By a memorandum of 19 June 2007, the Crown notified the parties that the Government did not intend to introduce the settlement legislation before 31 July 2007.[4] Thus, because the Tribunal has no jurisdiction in respect of any Bill that has been introduced into the House of Representatives, we were obliged to issue this report on or before 31 July 2007.[5]

The present report comprises five chapters. Chapter 1 introduces the claim and the claimant groups. Chapter 2 provides essential background information to the issues. Chapters 3 and 4 contain our substantive analysis and comment, and chapter 5 sets out our overall findings and recommendations.

Participants in the June 2007 Hearing

Groups with claims on commercial redress issues included most Te Arawa groups that appeared at our February 2007 hearing, along with iwi from outside the Te Arawa confederation and those outside the Te Arawa Waka, who have interests in central North Island CFL lands. We use the broad term 'Te Arawa Waka' in the title of this report to reflect the fact that the groups bringing claims in relation to the proposed KEC settlement were not only the core hapu and iwi of the Te Arawa confederation descended from Tamatekapua, but also their Te Arawa whanaunga, Waitaha and Ngati Makino. The Te Arawa Waka also includes Ngati Tuwharetoa. This description from the Tribunal's 1984 *Report on the Kaituna River Claim* describes the relationships of the tribes of the Te Arawa Waka:

> Te Arawa is a confederation of Maori tribes which are descended from the crew of the Arawa canoe that landed at Maketu many hundreds of years ago. From Maketu the voyagers and their succeeding generations moved inland occupying the central part of the North Island in terms of the tribal saying '. . . Mai Maketu Ki Tongariro . . .' from Maketu in the Bay of Plenty on the sea-coast, to Mt Tongariro near Lake Taupo in the hinterland. Te Arawa comprises the tribes descended from Tuwharetoa living near Lake Taupo, and the tribes claiming descent from Tamatekapua living on the shores of the Rotorua lakes and surrounding districts down to Maketu itself.[6]

In addition to the iwi of the Te Arawa Waka, we heard from Ngati Manawa, Tuhoe, Ngati Haka–Patuheuheu, Ngati Raukawa, and the New Zealand Maori Council.

Generic opening submissions were presented by both Kathy Ertel and Karen Feint on behalf of all claimant groups.[7]

In this report, we frequently use terms such as 'non-KEC Te Arawa groups' and 'non-Te Arawa central North Island iwi'. We do this purely for reasons of economy, in order to avoid excessively long and clumsily constructed sentences. We sincerely regret any offence we may cause by referring to iwi and hapu 'in the negative' in this way.

Te Arawa groups that stand outside the KEC mandate

Ngati Rangitihi (Wai 1370, Wai 1375)

The chairperson of Te Rangatiratanga o Ngati Rangitihi,

Andre Paterson, filed evidence on behalf of Ngati Rangitihi.[8] Richard Boast, Josey Lang, Baden Vertongen, and Laura Carter appeared as counsel.

Ngati Rangiunuora (Wai 1310)
Kathy Ertel and Vicki Milcairns appeared as counsel for Ngati Rangiunuora. No additional evidence was filed in support of the claim for the June 2007 hearing.

Ngati Tamakari (Wai 1349)
David Whata-Wickliffe filed written evidence for Ngati Tamakari.[9] Michael Sharp appeared as counsel.

Te Kotahitanga o Ngati Whakaue (Wai 1204)
Anaru Te Amo presented evidence for Te Kotahitanga o Ngati Whakaue.[10] Hamuera Mitchell and David Stephens filed written evidence.[11] Matanuku Mahuika, John Kahukiwa, Miharo Armstrong, and Rawiri Rangitauira appeared as counsel.

Ngati Karenga (Wai 1398)
William (Boy) Hall filed a written affidavit on behalf of Ngati Karenga.[12] Donna Hall, Martin Taylor, and Leroy Dickson appeared as counsel.

Ngati Rangiteaorere (no specific claim)
Donna Hall and Leroy Dixon appeared as counsel for Ngati Rangiteaorere. No additional evidence was filed in support of the claim for the June 2007 hearing.

Te Arawa groups that dispute KEC representation

Walter Rika of Ngati Whaoa (Wai 1297)
Claimant Walter Rika filed written evidence.[13] Martin Taylor and Richard Charters appeared as counsel.

Peter Staite of Ngati Whaoa (Wai 1311)
Claimant Peter Staite filed written evidence.[14] Michael Sharp appeared as counsel.

Other central North Island iwi

Ngai Moewhare (Wai 1399)
Maanu Paul presented evidence for Ngai Moewhare, a hapu of Ngati Manawa which has withdrawn from Te Runanga o Ngati Manawa.[15] Donna Hall, Martin Taylor, and Leroy Dickson appeared as counsel.

Te Kotahi a Tuhoe Trust (Wai 1225)
Tamati Kruger presented evidence on behalf of Te Kotahi a Tuhoe Trust.[16] Te Kani Williams appeared as counsel.

Ngati Haka–Patuheuheu (Wai 1371)
Te Kani Williams appeared as counsel. No additional evidence was filed in support of the claim for the June 2007 hearing.

Ngati Makino (Wai 1372)
Annette Sykes and Jason Pou appeared as counsel for Ngati Makino. No additional evidence was filed in support of the claim for the June 2007 hearing.

Ngati Tuwharetoa (Wai 1373)
Two affidavits from Ngati Tuwharetoa witnesses in the April 2007 New Zealand Maori Council High Court litigation were filed as evidence in this inquiry: that of Lake Taupo Forest Trust chief executive George Asher; and that of the deputy chairperson of the Tuwharetoa Maori Trust Board, Paranapa Otimi.[17] Lake Taupo Forest Trust forest operations manager Geoffrey Thorp spoke to George Asher's evidence at the hearing.[18] Karen Feint and Kelly Fox appeared as counsel.

Tauhara hapu (Wai 1397)
Peter Clarke filed evidence on behalf of Tauhara hapu of Ngati Tuwharetoa.[19] Donna Hall, Martin Taylor, and Leroy Dickson appeared as counsel.

Te Runanga o Ngati Manawa (no specific claim)
Ngati Manawa pakeke Rano (Bert) Messent filed a written

affidavit on behalf of Te Runanga o Ngati Manawa.[20] Richard Boast and Deborah Edmunds appeared as counsel.

Ngati Raukawa (no specific claim)

Ngati Raukawa Trust Board Treaty claims manager Chris McKenzie presented evidence for Ngati Raukawa.[21] Richard Boast, Josey Lang, and Laura Carter appeared as counsel.

Ngati Tutemohuta (no specific claim)

Ngati Tutemohuta claims manager Lennie Johns filed a written affidavit.[22] Aiden Warren appeared as counsel.

The New Zealand Maori Council (Wai 1395)

Sir Graham Latimer filed a written affidavit, and Maanu Paul presented oral evidence, on behalf of the New Zealand Maori Council.[23] Donna Hall, Martin Taylor, and Leroy Dickson appeared as counsel.

The Crown

Peter Andrew, Damen Ward, and Yvette Cehtel appeared as counsel for the Crown. Sam Davis appeared as Crown kaumatua. OTS director Paul James and Land Information New Zealand Crown property manager Paul Jackson gave evidence for the Crown.[24] The Crown also filed as evidence the affidavit of Crown Forestry Rental Trust chief executive Ben Dalton from the April 2007 New Zealand Maori Council and Federation of Maori Authorities High Court litigation.[25]

Other parties

Ngati Whare are currently in settlement negotiations with the Crown, and did not wish to file a claim against the Crown. However, their counsel, Jamie Ferguson, filed a memorandum noting their opposition to the provision in the deed of settlement by which the Crown will be deemed a confirmed beneficiary of accumulated rentals held by CFRT.[26]

Counsel for Ngati Tahu, Maryanne Crapp, appeared in a watching brief capacity.

Finally, counsel for Te Pumautanga, Willie Te Aho, also attended the hearing and made a brief oral statement at the conclusion.

Venue and Hearing

The Tribunal sat at hearing at Papa-i-ouru (Tamatekapua) Marae in Rotorua from Monday 25 to Wednesday 27 June 2007.

Notes

1. The New Zealand Maori Council and the Federation of Maori Authorities subsequently appealed the High Court decision. The Court of Appeal heard their appeal on 19 June 2007 and delivered its judgment on 2 July 2007. The appeal was dismissed: *New Zealand Maori Council v Attorney-General* unreported, 2 July 2007, Court of Appeal, CA241/07.
2. Waitangi Tribunal, *The Te Arawa Mandate Report* (Wellington: Legislation Direct, 2004); Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005)
3. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006) (doc B26), sec 4.1
4. Crown counsel, memorandum concerning introduction of settlement legislation, 19 June 2007 (paper 3.1.161)
5. Treaty of Waitangi Act 1975, s 6(6)
6. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wellington: Waitangi Tribunal, 1984), p 7
7. Counsel for Ngati Rangiunuora, generic submissions, 22 June 2007 (paper 3.1.166); counsel for Ngati Tuwharetoa, opening submission on behalf of all claimants, 25 May 2007 (paper 3.3.36)
8. Andre Paterson, brief of evidence, 13 June 2007 (doc B12)
9. David Whata-Wickcliffe, brief of evidence, 21 June 2007 (doc B27)
10. Andrew Te Amo, brief of evidence, 18 June 2007 (doc B19)
11. Hamuera Mitchell, brief of evidence, 13 June 2007 (doc B10); David Stephens, brief of evidence, 18 June 2007 (doc B18)
12. William Hall, brief of evidence, 13 June 2007 (doc B15)
13. Walter Rika, brief of evidence, 13 June 2007 (doc B6)
14. Peter Staite, brief of evidence, 21 June 2007 (doc B28)
15. Maanu Paul, brief of evidence, 13 June 2007 (doc B9)
16. Tamati Kruger, brief of evidence, 8 June 2007 (doc B11)

17. George Asher, brief of evidence, 13 June 2007 (doc B7); Paranapa Otimi, brief of evidence, 13 June 2007 (doc B8)
18. Geoffery Thorp, brief of evidence, 2 July 2007 (doc B36)
19. Peter Clarke, brief of evidence, 13 June 2007 (doc B13)
20. Rano Messent, brief of evidence, 22 June 2007 (doc B29)
21. Chris McKenzie, brief of evidence, 13 June 2007 (doc B16)
22. Lennie Johns, brief of evidence, 13 June 2007 (doc B5)
23. Graham Latimer, brief of evidence, 13 June 2007 (doc B14)
24. Paul James, brief of evidence, 22 March 2007 (doc B21); Paul James, brief of evidence, undated (doc B24); Paul Jackson, brief of evidence, 19 June 2007 (doc B22); Paul Jackson, amended brief of evidence, 27 June 2007 (doc B22(a))
25. Ben Dalton, brief of evidence, 19 April 2007 (doc B23)
26. Counsel for Ngati Whare, memorandum concerning urgency, 22 June 2007 (paper 3.1.168)

CHAPTER 2

BACKGROUND

Before describing the key issues in our inquiry, we must first summarise the relevant factual background to the claims. Given the time constraints, we have sought to do this as briefly as possible. We discuss three key matters by way of context to the rest of the report:

- litigation undertaken by the New Zealand Maori Council and the Federation of Maori Authorities in the late 1980s over the Government's proposed sale of State-owned forestry lands in the central North Island, the settlement of that litigation by way of the Crown forestry agreement 1989, and the statutory measures taken to give effect to that agreement;
- the efforts made by the Crown, before, during, and after the KEC negotiations, to engage with other central North Island claimant groups whose interests coincided or overlapped with those of the KEC ('overlapping claimants'); and
- the commercial redress terms of the KEC deed of settlement, in particular provisions relating to the transfer of CFL lands to the value of the quantum set, and the offer of additional CFL lands under the 'deferred selection' mechanism.

We now describe each of these in turn. These sections are necessarily brief, and meant only to provide a framework for the discussions in the chapters that follow. More detail is provided where necessary in those chapters. Also, a fuller account of the second of these points (albeit with a focus on cultural redress issues) can be found in chapter 3 of our first settlement process report (see pp 54–55). In particular, that report includes a useful table showing the key events in the Crown's negotiations with the KEC, and in its communications with overlapping claimants. We conclude this chapter with a brief summary of the overall findings and recommendations of that report.

Forestry Litigation and the Crown Forestry Agreement 1989

High Court litigation and the July 1989 Crown forestry agreement

In February 1989, the New Zealand Maori Council and the Federation of Maori Authorities filed proceedings in the High Court to prevent the Crown (in the form of the State-owned enterprise Forestcorp) from selling off State-owned forestry assets, arguing that the sales would be inconsistent with Treaty principles and with the Court of Appeal's

Lands case decision of two years earlier. Indeed, the High Court found that matter went:

> to the very heart of the issue raised by the 1987 case . . . whether assets including forest lands could be disposed of through the new State enterprises to interests outside the State enterprises without breach of the principles of the Treaty of Waitangi.[1]

However, no substantive hearing and judgment was necessary, since the Government undertook not to sell the forest assets until its proposals had been further developed, following consultation with the Maori people. The court simply expressed hope that the dispute would 'be resolved in the spirit of partnership and in accordance with the principles of the Treaty'.[2] The New Zealand Maori Council was left to negotiate with the Government, and in July 1989 the matter was settled out of court. The product of that settlement was an agreement between the Crown and the council signed in July 1989, commonly known as the Crown forestry agreement. As we will discuss in later chapters, the commitments made by the Crown in that agreement are central to the claims before us in respect of the proposed KEC settlement.

The four-page agreement proposed a creative solution to the problem. The Crown would be free to sell to private buyers the existing tree crop, and licences to grow and mill trees on the lands, but not the land itself. The Crown would retain for itself the initial proceeds from these sales, but the annual licence rentals would be paid into a trust. The interest from the funds accumulating in the rental trust would then be used to fund Maori claimant groups to prepare, present, and negotiate Treaty claims involving, or possibly involving, Crown forest lands.

Because the freehold title to the lands remained with the Crown, it would be able to use the lands in Treaty settlements as redress for historical breaches. Under the terms of the forestry licences, the Crown retained the right to 'resume' the land. Crown forest lands could be returned to claimant groups following investigation and recommendation by the Waitangi Tribunal. Where the Tribunal so recommended, Crown forest land, along with the Crown's rights and obligations in respect of existing forestry licences, would be transferred to the successful claimants. The claimants would also receive two sums of money. First, compensation for the fact that the land was being returned subject to encumbrances, as calculated using one of several formulae set out in the agreement. Secondly, the claimants would receive from the rental trust all the accumulated rentals associated with lands to be returned to them. Both Maori and the Crown agreed to 'jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest possible period'.[3] Where the Tribunal determined that a certain area of Crown forest would not be required for resumption, that land, plus the accumulated rentals associated with it, would return to the Crown. The payment of accumulated rentals was meant to have the effect of backdating the settlement to circa 1990. Following the settlement of all Treaty claims relating to Crown forest lands, any remaining lands and accumulated rentals would pass to the Crown.

Before legislation was passed to enact the agreement, there was one further development. The Crown agreed by deed poll of 17 October 1989 not to register title to Crown forest land until the Waitangi Tribunal had confirmed that the land was no longer liable to be returned to Maori ownership. The deed poll also iterated the parties' expectation that the Tribunal would have heard most of the claims relating to Crown forest land by the middle of 1992.[4]

The Crown Forest Assets Act 1989 and CFRT

The Crown Forestry agreement was given statutory effect by the Crown Forest Assets Act 1989. The Act established a rental trust, called the Crown Forestry Rental Trust (CFRT), allowed the Crown to sell forestry licences to private buyers, and empowered the Waitangi Tribunal to make binding recommendations in respect of the return of CFL land to Maori claimants.[5] The forest licences issued by

the Crown would automatically roll over year by year, until such time as the Waitangi Tribunal made a recommendation in respect of the return of that CFL land. At that point, the land would transfer to the claimants (along with associated compensation), and the licence would terminate over a 35-year period.[6] The Crown was restricted under the Act from selling or otherwise disposing of any CFL land unless the Waitangi Tribunal had made a recommendation (including where the Tribunal recommended that CFL land was no longer liable for resumption and could be transferred to the Crown).[7]

The CFRT was established by a deed of April 1990. The CFRT would comprise six trustees, three appointed by the New Zealand Maori Council and the Federation of Maori Authorities, and three by the Crown. The trust would receive from the Crown and invest all rental moneys from CFL land, and distribute the interest earned 'to assist any claimant in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve or could involve Licensed Land'.[8] Clause 11 of the deed provided for the payment of accumulated rentals to claimants following a Waitangi Tribunal recommendation that CFL land be returned to them. First, the successful claimants would become 'confirmed beneficiaries' of the trust. Then, the confirmed beneficiaries would receive the accumulated rentals held by the trust in respect of the CFL land to be returned. As was noted by various parties in our inquiry, this provision creates a financial incentive to claimant groups to maximise the quantity of CFL land (and therefore the value of the accompanying accumulated rentals) that forms part of their settlement.

Seventeen years after the establishment of CFRT, the value of the accumulated rentals on many CFL blocks is now greater than the value of the land. While this situation may not have been envisaged in 1990, it is important to remember that accumulated rentals are not the 'icing on the cake', but are an integral part of the 1989 regime. The payment of accumulated rentals is intended to restore a situation equivalent to that which would have existed if the claim had been settled in 1989, and the groups had been receiving rentals on their CFL land assets from licensees ever since. Dr Brian Easton made this comment on the payment of accumulated rentals to successful claimant groups:

> It may at first seem unfair that the effective value of the settlement may far exceed the quantum because of the remitting of the accumulated rents on the purchased land. An alternative approach is to think that while the settlement is formally in 2008, say, it has a retrospective element in that the revenue stream from rents on the land is backdated to 1990, when the CFRT began to receive the rents.[9]

Lastly, following the return of the land to Maori ownership, the confirmed beneficiaries were entitled to receive all future rental payments for the duration of the licence. The deed provided that the Crown could become a confirmed beneficiary of the trust, where the Tribunal recommended that an area of CFL land be not liable for return to Maori ownership. In such circumstances, the Crown would receive all accumulated rentals associated with that CFL land, and would be released from its obligation to pay future rentals on that land to the trust.[10]

We should note here that this mechanism has never been used and, in fact, the Waitangi Tribunal has never issued binding recommendations in respect of CFL lands. Instead, the Crown has sought to settle with Maori claimant groups by direct negotiation. In five cases, such settlements have included the transfer of CFL lands to the claimants: the Ngai Tahu, Waikato Raupatu, Te Uri o Hau, Ngati Awa, and Ngati Tuwharetoa (Bay of Plenty) settlements. In these cases, the settlement legislation has included a 'deeming provision' to legislate for the transfer of CFL land to the claimants in the absence of a Waitangi Tribunal recommendation. The Ngati Awa Settlement Act 2005, for example, provides that:

> The Crown must give notice under . . . the Crown Forest Assets Act 1989 in respect of the redress licensed land as if that section applies to the redress licensed land, even though the Waitangi Tribunal has not made a recommendation. . . .
>
> Notice given by the Crown . . . has effect as if the Waitangi Tribunal had made a recommendation . . . for the return of the redress licensed land and that recommendation had become final on the settlement date.[11]

Similar provisions were included in the other Treaty settlements involving the transfer of CFL land.[12] As we will discuss, aspects of the transfer of CFL land in the proposed KEC settlement have no exact precedent.

The Development of the Crown Offer to the KEC and the Terms of the Deed of Settlement

Development of Crown offer to KEC

In this section, we outline the development of the Crown's offer of commercial redress to the KEC during negotiations in 2005 and 2006, in order to provide a framework for our later discussion of Crown engagement with other groups. Appendix I shows the development of the offer to the KEC during the different stages of the negotiation process, as a reference for the discussion which follows.

Formal negotiations between the KEC and the Crown began with the signing of the terms of negotiation on 26 November 2004. The first formal offer of commercial redress was made to the KEC by the Crown on 25 July 2005. The offer listed nine CFL forest blocks, totalling approximately 62,000 hectares, from which the KEC would select parcels for inclusion in the deed of settlement, to the value of the quantum set ($36 million). At this point, officials did not expect that the KEC would take up the entire area of land on offer. Instead, it was in the nature of a 'pool' from which land would be selected. The total value of the CFL lands contained in that pool was approximately five times that of the quantum on offer to the KEC.[13] The KEC had, however, made it clear to officials by this time that their key objectives in negotiations included to maximise their ability to purchase land subject to CFLs from their quantum and therefore receive the associated accumulated rentals, and to enable a geographic spread of assets.[14] The Crown's offer stated that the 'exact configuration of [CFL] land to be transferred will need to be agreed by the parties before a Deed of Settlement is finalised'.[15] In this first offer, the KEC was offered a right of deferred selection (that is, the option to use the accumulated rentals on CFL land acquired under quantum to purchase additional Crown properties *after* the settlement date) on a number of commercial properties, to be exercised within six months of the settlement date. No right of deferred selection was offered over CFL lands, however. Nor was Horohoro State Forest, administered by the Ministry of Agriculture and Forestry (and not subject to a CFL), included on the list of commercial assets in the Crown's first offer.

In their internal advice to the Minister in Charge of Treaty of Waitangi Negotiations on 22 July 2005, immediately prior to the first offer, officials from the Office of Treaty Settlements (OTS) anticipated that the proposed quantum would be below the KEC's expectations. They suggested that the right of deferred selection could be extended to cover CFL lands within the pool later in the negotiating process, if necessary, to achieve 'further negotiation flexibility'. This would allow the KEC to spend the accumulated rentals it received to purchase additional CFL lands within the six-month deferred selection period. Officials identified various benefits for the Crown in extending the right of deferred selection to cover CFL lands: it allowed the Crown to increase the value of the settlement to the KEC without increasing its own costs, and at lower operational costs than would apply if the more frequent right of first refusal mechanism was used.[16]

The KEC responded to the Crown's first offer on 8 August 2005 with its counter-offer. This included a number of

requests. It wanted the right of deferred selection to apply to all CFL lands included in the offer, and to receive the accumulated rentals associated with all CFL lands included in the settlement: both those acquired within the quantum and those acquired through the deferred selection process.[17] In their advice to the Treaty Negotiations Minister, officials recommended that the KEC should be granted a right of deferred selection over CFL lands. However, they advised that the total pool of CFL land on offer should be reduced, to ensure that sufficient land was available for future settlements with central North Island iwi. They also considered that accumulated rentals on CFL lands transferred under the deferred selection mechanism should not be paid to the KEC, because to do so would:

> provide a significant windfall to the Kaihautu Executive Council and raise significant issues of fairness between other groups . . . particularly those who do not have CFL land in their claim area . . .[18]

Following an initial assessment of the interests of non-KEC central North Island iwi (described below), the Crown made its second offer to the KEC on 17 August 2005. At this point, the pool of CFL land on offer more or less took its final form. In line with the advice of officials, the Crown's second offer extended the right of deferred selection to cover CFL lands, but reduced the total pool of land available for selection by approximately 11,000 hectares. As appendix I shows, the quantity of land on offer in the Pukuriri and Reporoa CFL blocks was reduced, and the Headquarters CFL block was completely removed from the offer.[19] At this stage, the negotiating parties had not reached agreement on the land values of the various CFL blocks. We assume that decisions on the reduction in the pool of CFL land were based on estimated land values from Land Information New Zealand.

The agreement in principle was signed on 5 September 2005, and made public on OTS's website shortly afterwards. The pool of CFL land on offer in the agreement in principle was the same as the pool in the Crown's second offer, with one change: the area of the West CFL block in Rotoehu forest included in the agreement in principle was greater than that included in the second offer. We note that the agreement in principle also included in the commercial redress package the Ministry of Agriculture and Forestry-administered 1458-hectare Horohoro State Forest, which was not subject to a CFL. As the value of the quantum was $36 million, the KEC would be able to select as much of the approximately 51,000-hectare pool of CFL land as its $36 million would buy, and then spend the accumulated rentals associated with those CFL lands to purchase additional CFL lands. The agreement in principle made it clear that a six-month right of deferred selection would apply in respect of CFL land within the pool, and that the KEC would not receive the accumulated rentals on the deferred selection lands.[20] It did not mention, however, that the settlement legislation would include provision to deem the Crown a confirmed beneficiary of CFRT funds, in order for it to receive the accumulated rentals on the CFL lands offered under deferred selection.

Following the agreement in principle, the KEC was to select the CFL blocks it would acquire from within the pool. The total amount of land the KEC could acquire would be the maximum area available to it by using the quantum amount, plus the accumulated rentals on those lands acquired with the quantum, plus any other funds available to it from other sources. The first step in the selection process would be to negotiate an agreed valuation for the 51,000 hectares of CFL lands within the pool.

The valuation process began in January 2006, when Land Information New Zealand provided 'material information' relating to the CFL lands to OTS, for disclosure to the KEC. Officials at Land Information New Zealand had earlier divided the CFL blocks described in the agreement in principle into 14 'selection units'. The selection units were required to be 'of sufficient size to enable a meaningful valuation to be obtained' and the boundaries to be 'on practical lines that would not compromise ongoing management for forestry purposes'.[21] Valuers were appointed

by Land Information New Zealand (for the Crown) and the KEC. By late May, valuations for each party had been completed.

However, during late April there was a very important development which dramatically affected the valuation of the CFL land, and in turn the total area available to the KEC. The KEC proposed that a restrictive covenant be placed over the CFL lands, requiring that the land remain in commercial forestry.[22] Such a covenant (known as a Kyoto covenant) would assist the Crown to meet its international climate change commitments (known as Kyoto liabilities) by ensuring that the CFL lands were not deforested and converted to other uses (mainly pastoral farming, and in particular dairying). The Crown accepted the KEC's proposal, which appeared to be broadly consistent with the direction of its climate change policy, and on 2 June 2006 the parties agreed to a variation in the valuation process outlined in the agreement in principle, whereby the CFL lands would be revalued 'as if commercial forestry was the highest and best use for the land'.[23] One effect of such a restriction would be to reduce the value of any land to which it applied.

By June 2006, therefore, it had become apparent to the parties that the KEC would potentially be able to acquire the full pool of approximately 51,000 hectares of CFL land on offer in the agreement in principle: either directly under quantum, or through deferred selection.[24]

By late June, the new valuations were completed. There was a wide divergence in the valuations commissioned by the Crown and by the KEC. Table 1 shows those valuations, the first based on a 'highest and best use' market value, the second assuming that the land use would be restricted to commercial forestry.

The differences in valuation were the result of different interpretations of various factors, including: whether certain units would more profitably be converted to dairy farming; the impact of climate change policies; road access to blocks; potential future income streams from units; and inflation of land values.[25] We note that in June 2006, when these valuations were done, no decisions about climate change policy had yet been made by Cabinet.

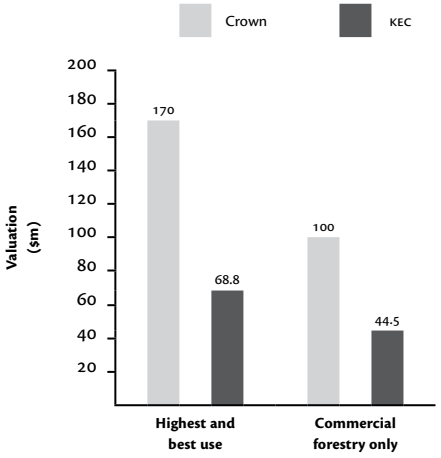


Table 1: Crown and KEC valuations for total pool of CFL land on offer (51,000 ha)

Source: Paul Jackson, brief of evidence, 27 June 2007 (doc B2(b)), pp 8–9

Beginning on 1 June 2006, the OTS and KEC negotiating teams met in Rotorua and Wellington at various times to seek an agreed valuation. This process was completed on 27 June, when the Treaty Negotiations Minister met with the KEC chairman Rawiri Te Whare and they together agreed to a valuation of $85 million for the total 51,000 hectare pool of CFL land, subject to a covenant restricting land use to forestry.[26] At the same meeting, it was agreed that the KEC would acquire the total pool of 14 CFL selection units on offer. The KEC adopted the Crown's proposal for which selection units would be acquired with the quantum amount, and which would be purchased by deferred selection (using the accumulated rentals on the quantum units plus additional funds).[27] A 29 June 2006 letter from Land Information New Zealand Crown property manager Paul Jackson to Te Whare set out which units were to be purchased within the quantum and which were to be

Crown forest licence	Gross area (ha)	Transfer value ($m)	Accumulated CFRT rentals as at April 2008 ($m)
Waimaroke (F1A)	1860	3.491	3.221
Waimaroke (F1C)	4401	5.281	7.418
Waimaroke (F1E)	5523	6.610	9.309
Waimangu (F2)	649	1.234	1.237
Pukuriri (F8)	9600	8.533	10.482
Wairapukao (F5)	2200	5.162	3.879
Horohoro (F7)	1164	1.512	1.218
Rotoehu (F8)	1689	4.177	4.223
Total	27,086	36.000	40.985

Table 2: Settlement licensed land offered to KEC in deed of settlement **Source: document B1(8)**

Crown forest licence	Gross area (ha)	Transfer value ($m)	Accumulated CFRT rentals as at April 2008 ($m)
Waimaroke (F1B)	7615	13.567	12.834
Waimaroke (F1D)	3307	4.188	5.574
Reporoa (F4A)	7071	16.476	12.064
Reporoa (F4B)	2269	5.629	3.870
Reporoa (F4C)	3089	7.675	5.271
Highlands (F6)	530	1.464	0.985
Total	23,881	49.000	40.599

Table 3: Deferred licensed land offered to KEC in deed of settlement **Source: document B1(8)**

purchased under deferred selection, and the value of accumulated rentals associated with each unit.

We reproduce the information from that letter in tables 7 and 8. We note that the alphanumeric descriptors refer to the CFL units, and do not correspond with the legal lot descriptions used in the agreement in principle, deed of settlement, and in our appendix I.

These tables show that eight CFL units with a combined value of $36 million will be transferred to Te Pumautanga (the post-settlement governance entity representing the KEC hapu and iwi, and the body which will receive the settlement assets) under the quantum. These units are called 'settlement licensed land'. The value of the accumulated rentals associated with the 27,086 hectares of settlement licensed land amounts to almost $41 million. This figure approximately represents the cost to the claimants of the delay in settlement since 1990, and therefore the accumulated rentals are paid to Te Pumautanga outside the quantum. The right of deferred selection granted to the KEC allows it to purchase further CFL land from within the pool at market value, using the accumulated rentals and any other funds available to it. At the 27 June 2006 meeting referred to above, the KEC opted to purchase the entire pool of CFL land on offer. The 23,881 hectares of CFL land remaining in the pool to be acquired under the deferred selection mechanism is called 'deferred licensed land'. The value of this land is $49 million, greater by $8 million than the value of accumulated rentals to be received by Te Pumautanga on settlement licensed lands. Thus, Te Pumautanga must cover the difference using other funds. The approximately $40.6 million of accumulated rentals associated with the deferred licensed lands is to be paid not to Te Pumautanga, but to the Crown. Appendix II shows the locations of all CFL lands included in the settlement.

Commercial redress terms of the deed of settlement

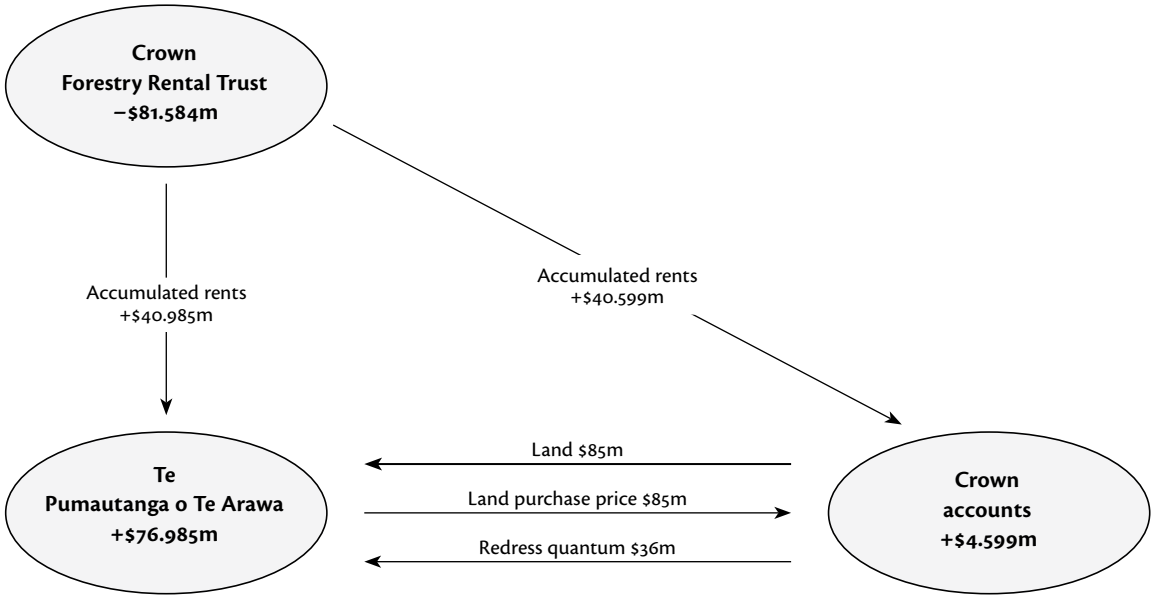
The deed of settlement between the KEC and the Crown was signed on 20 September 2006. The deed includes an historical account and apology, cultural redress terms, and commercial redress terms. Here we are concerned only with the last of these.

The deed notes that the KEC had been offered a six-month right of deferred selection over additional CFL lands outside quantum, and that it had exercised that right by agreeing to purchase all deferred licensed land on offer. The schedules to the deed contain a full description of the 51,000 hectares of CFL lands (including both quantum land and deferred licensed land) selected by the KEC, but do not indicate which units are to be transferred within the quantum and which under deferred selection. The deed stipulates that the settlement legislation will provide that 'in relation to the Deferred Licensed Land . . . with effect from the Actual Deferred Settlement Date, the Crown will be a "Confirmed Beneficiary" under clause 11.2 of the trust deed of the Crown Forestry Rental Trust', allowing it to receive the accumulated rentals associated with the deferred selection lands.[28] The terms of the covenant restricting the land use to commercial forestry are set out at clauses 12.47 to 12.49 of the deed.

The deed also offers a right of deferred selection over other commercial assets:

- a Ministry of Social Development residential dwelling, to be leased by Te Pumautanga back to the Ministry of Social Development;
- five schools (Rotokawa School, Lynmore Primary School, Mokoia Intermediate School/Owhata School, Ngongotaha School, and Horohoro School), to be leased by Te Pumautanga back to the Ministry of Education;
- the 1458-hectare Horohoro State Forest, currently administered by the Ministry of Agriculture and Forestry;
- a 68-hectare former Te Puni Kokiri farm property, currently landbanked by OTS; and
- four geothermal wells in the Ngatamariki field.

We note that two schools (Western Heights High School and Otonga Road School) offered under a buy



Net cash flows to parties to KEC settlement

Source: Dr Brian Easton, 'Commentary on the Agreement between the Crown and Nga Kaihautu o Te Arawa', report commissioned by the Waitangi Tribunal, 2007 (doc B20), p 12

and leaseback scheme in the agreement in principle were removed from the deed of settlement. These non-CFL commercial settlement assets were not the subject of substantive submissions in our June 2007 hearing. We do note, however, that both Ngati Whakaue and Ngati Raukawa claimed customary interests in the Horohoro State Forest, and Ngati Whakaue disputed that any of the groups represented by the KEC had had customary interests there recognised by the Native Land Court.[29]

One other provision in the deed warrants mention. Clauses 11.19 and 11.20 provide for the creation of two public access easements across a Whakarewarewa forest block which is not a part of the KEC settlement package, and which therefore creates no cost or benefit for the KEC. The Crown acknowledged that the easements were included in the deed of settlement as a 'trade off' with the Rotorua District Council, in return for the council's cooperation in facilitating other elements of the settlement.[30] Ngati Whakaue objected to the easements, on the ground that they would reduce the value of the land in that block – land which, they expected, would form a part of their Treaty settlement in the future. (The Parekarangi 4 or Moerangi blocks on which the easements will be located were awarded to Ngati Whakaue in the Native Land Court in 1888.[31]) Both Ngati Whakaue and the Crown filed evidence and submissions on the easements. However, because of the limited time we have had to prepare this report, we have not been able to consider the matter fully. We would simply comment

that, to the extent that the consultation process with Ngati Whakaue over the easements was the same as the general consultation process on overlapping interests, our findings in respect of the latter issue apply equally to the consultation over easements.

The commercial redress terms of the KEC settlement are complex to grasp. Dr Brian Easton helpfully elucidated the situation by preparing a diagram showing the net cash flows resulting from the various transactions associated with the settlement. We reproduce his diagram here as figure 1.

First, Te Pumautanga receives a quantum of $36 million from the Crown as commercial redress for historical Treaty breaches. It nominates to spend all of that quantum on CFL forests. Next, Te Pumautanga receives $40.985 million from CFRT in accumulated rentals on the CFL forests purchased. With the $40.985 million of accumulated rentals, plus approximately $8 million of other funds, Te Pumautanga purchases $49 million worth of additional CFL lands, exercising its right of deferred selection. The accumulated rentals associated with the deferred licensed land, totalling approximately $40.599 million, are paid to the Crown by CFRT. Thus:

- The net financial benefit to Te Pumautanga from the settlement is $76.985 million, which is equal to the value of the quantum ($36 m) plus the value of the associated accumulated rentals ($40.985 m). After spending this sum on CFL lands, plus approximately $8 million from other sources, Te Pumautanga owns $85 million in forest assets following the settlement.
- The net position of CFRT is reduced by $81.584 million following the settlement: that being the sum of the accumulated rentals paid out to Te Pumautanga ($40.985 m) and to the Crown ($40.599 m).
- The net position of the Crown is increased by $4.599 million, that being the difference between the value of the quantum awarded to Te Pumautanga ($36 m), and the value of the accumulated rentals on deferred licensed land paid to the Crown by CFRT ($40.599 m). (The offer of deferred selection CFL lands to Te Pumautanga is fiscally neutral for the Crown because it simply gives Te Pumautanga the option to buy additional lands at market value.) In addition, a $85 million appropriation is required to cover the cost of the forestry covenants: that is, the difference between the Crown's assessment of the market value of the CFL lands, and the agreed price at which the land is transferred to the KEC.

Crown Engagement with Non-KEC Central North Island Groups with Overlapping Interests

Having described the progress of negotiations between the KEC and the Crown, and the terms of the deed of settlement which has eventuated from those negotiations, we now turn to review the process by which the Crown sought to protect the interests of non-KEC groups whose interests overlap those of the KEC. This process was undertaken by the Crown in parallel to the KEC negotiations. We dealt in some detail with the equivalent overlapping claims process in respect of cultural redress issues in our first settlement process report. During our June hearing on commercial redress issues, counsel for the Crown Mr Andrew stressed to us that its consultation processes in respect of commercial redress and cultural redress were one and the same. Therefore, he agreed in principle to the Tribunal applying to the Crown's commercial redress consultation process its findings in respect of the consultation on cultural redress.[32] Nevertheless, because different groups were affected by the commercial redress issues, and for the sake of thoroughness, we review here the key communications and hui between OTS and both non-KEC Te Arawa groups and non-Te Arawa central North Island groups.

The director of OTS, Paul James, described to us the measures taken by the Crown to address overlapping claims issues during the KEC negotiations. In early 2005,

OTS and KEC together identified two categories of groups with interests overlapping those of the KEC. The Crown's two categories were:

- non-KEC Te Arawa groups with overlapping interests: Tapuika, Waitaha, Ngati Rangiwewehi, Ngati Makino, and non-KEC Ngati Whakaue; and
- non-Te Arawa central North Island groups with overlapping interests: Ngati Raukawa, Ngati Tuwharetoa, Ngati Whare, Ngati Manawa, Ngati Haka–Patuheuheu, Ngati Awa, and Ngati Tuwharetoa (Bay of Plenty).

Slightly different processes were followed by the Crown in dealing with groups in each of these categories, but the essence of the approach was the same. Three rounds of form letters were sent out to each overlapping claimant group: the first following the first offer to the KEC but prior to the signing of the agreement in principle ('initial contact'); the second following the signing of the agreement in principle ('substantive consultation'); and the third inviting comment on the provisional decision of the Treaty Negotiations Minister on overlapping claims matters. The key difference in the approach taken to non-KEC Te Arawa groups, versus non-Te Arawa groups, came before the agreement in principle was reached, when overlapping Te Arawa groups were sent two letters instead of one. We discuss this more fully below.

Some of the letters sent out to the two categories of groups described above were filed by the Crown as evidence in our inquiry. However, it is not clear to us whether the Crown filed a comprehensive set of letters. As a result, we are uncertain about the significance of the fact that we did not see letters to all of these groups for each stage. We commented on the Crown's filing of evidence in our earlier report on cultural redress matters.

Phase 1: Communication and assessment of overlapping interests before the agreement in principle

On 29 June 2005, OTS wrote to non-Te Arawa central North Island groups. The letter invited recipients to identify any interests they might have in areas which were the subject of the KEC negotiations, saying:

> Any information you are able to provide will enable the Crown to take these interests into account when considering what redress it can offer to the Te Arawa iwi and hapu represented by the Kaihautu Executive Council.

Recipients of the letter were given a month to reply with some or all of the following information:

- the boundaries of the general area in which the group exercised customary interests;
- the ancestor, iwi, or hapu through which the group identified those interests;
- any specific land block interests within the KEC area of interest and the basis for those interests;
- details of Native Land Court awards of customary land within the group's area of interests;
- any pa or kainga, or other sites of major significance (eg, wahi tapu or mahinga kai);
- any information about the group's use of rivers and other waterways; and
- any other information that might assist the Crown in assessing overlapping interests, including ancestral associations.

Attached to the letter was a 1:500,000 scale map of the KEC area of interest, and a brief summary of the Crown's historical Treaty claims process and overlapping claims policy. The attached maps filed in evidence in our inquiry were poor quality black and white photocopies. The outline of overlapping claims policy indicated that the Crown's information-gathering process on overlapping claims would involve two stages: 'initial contact' made before the signing of the agreement in principle with the KEC; and 'substantive consultation' made after the signing of the agreement in principle. Finally, the letter suggested that groups get in touch with the KEC directly to discuss overlapping interests.[33] We note that the due date for responses, 29 July 2005, was four days after the Crown's initial offer to the KEC.

Also on 29 June, a similar letter was sent to non-KEC Te Arawa groups. This letter informed recipients about the KEC's identified area of interests, and notified them that a second letter would follow shortly inviting them to identify any of their own interests which overlapped with those of groups within the KEC. Attached to the letter was a map showing the KEC area of interest.[34] The follow-up letter was sent out on 28 July 2005, immediately after the Crown's first offer to the KEC. The attached general policy summaries were the same as those included in the 29 June 2005 letter to non-Te Arawa groups, as was the list of the kinds of information sought by the Crown to establish the groups' interests (ie, the list above).

The letter also described the additional steps the Treaty Negotiations Minister had directed officials to take in order to safeguard the interests of non-KEC Te Arawa groups. These additional steps were: the provision directly to the group of a summary of preliminary Crown research on that group's overlapping interests; and the seeking of information from those groups on their future intentions in negotiations. Attached to the letter was a table setting out the Crown's preliminary assessment of each group's interests in the KEC area of interest. The table set out the Crown's understanding of the general area encompassed by the groups' Treaty claims (ie, claims registered with the Waitangi Tribunal), the specific blocks which lay within those areas, and specific sites of significance to the group. These assessments were based on statements of claims for the Tribunal's central North Island inquiry, and on Native Land Court minute book references from 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', a report by Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley filed for the central North Island inquiry.[35] The letter also suggested that groups get in touch with the KEC directly to discuss overlapping interests. Recipients were asked to provide this information by 17 August, leaving them around six weeks to respond.[36]

The responses of Ngati Whakaue and Ngati Rangitihi to these letters were filed as evidence in our inquiry. Counsel for Ngati Whakaue, John Kahukiwa, replied to OTS on 17 August, directing the office to evidence filed by Ngati Whakaue in support of their claims in the Tribunal's central North Island inquiry for evidence on their customary interests. He noted that the Crown had limited its information gathering to statements of claims and 'Nga Mana o te Whenua o Te Arawa', but that other sources were available to it in the central North Island inquiry, including pleadings, document banks, and testimonial evidence.[37] Counsel for Ngati Rangitihi, Deborah Edmunds, replied to OTS on 12 August, saying:

> To provide you with the information you request would take a considerable amount of time and resources. In fact, it is like preparing a customary usage/mana whenua report for the purposes of Waitangi Tribunal hearings.

Ms Edmunds then noted that her Ngati Rangitihi clients were currently busy preparing submissions for the Tribunal's central North Island inquiry, but would seek to provide the information requested a week after the due date. Finally, she conveyed the 'strong view' of Ngati Rangitihi that:

> any consultation should occur *before* an Agreement in Principle. We note that previous Agreement In Principles contain significant allocations of specific sites to the negotiating group. We fail to see how this can be done without creating significant potential prejudice unless there has been extensive prior consultation on potential redress sites as well as broader issues. [Emphasis in original.][38]

In a 26 August 2005 letter, Ngati Rangitihi described the boundaries of its core rohe and the blocks in which it had interests, and referred officials to its submissions, mana-whenua report, and other evidence in the Tribunal's central North Island and Te Urewera inquiries.[39]

Using the information available to it at the time, the Crown made its preliminary assessment of overlapping interests, and reported this to the Treaty Negotiations

Minister on 15 August 2005, just before the Crown's second offer to the KEC.[40] It was this preliminary assessment which informed the Crown's decision to reduce the size of the pool of CFL land in its second offer to the KEC, from approximately 62,000 hectares to approximately 51,000 hectares. The OTS briefing paper of 15 August set out the rationale behind this. Officials recognised that the extension of the right of deferred selection to include CFL lands would be sought by other central North Island groups in future settlements, and, if granted, would increase the amount of CFL land required for each of these future settlements. Officials advised that the key issue to be addressed in respect of overlapping interests of non-KEC iwi was the sufficiency of CFL land remaining in the Kaingaroa Forest for future settlements with Ngati Manawa, Ngati Rangitihi, and Ngati Tuwharetoa. They considered that relatively large amounts of Kaingaroa CFL land would remain available for settlements with Ngati Manawa and Ngati Rangitihi (though they noted that Ngati Rangitihi's interests were in areas overlapped by Ngati Manawa, and possibly by Ngati Tuwharetoa and Ngati Whare). Officials' key concern was that Ngati Tuwharetoa 'may have threshold interests in the southern part of the Kaingaroa 2 block being offered to the Kaihautu Executive Council and may possibly have less CFL land available to them (relative to the Kaihautu Executive Council collective, Ngati Rangitihi and Ngati Manawa)'. Thus, they recommended the reduction in the pool of CFL land in the Crown's second offer:

> Officials consider it prudent to further safeguard the interests of overlapping claimants groups (in particular, those groups discussed above) and therefore propose that, on the basis of the proposal that the Kaihautu Executive Council have the opportunity to purchase all the CFL land on offer, the following areas be removed from the initial Crown offer of CFL land:
>
> a. a southern part of the Kaingaroa 2 block (approximately half of the area subject to the Pukuriri CFL) to ensure that sufficient CFL land is available for a future settlement with Ngati Tuwharetoa . . . and
> b. parts of the Kaingaroa 1 block (parts of the Headquarters and Reporoa CFL included in the initial offer) due to uncertainties surrounding the threshold interests of iwi/hapu affiliated to the Kaihautu Executive Council in these areas.[41]

Officials then noted that 'further detailed analysis' would be required to ensure that there was no 'major imbalance in the availability of forest land relative to the nature and extent of Treaty breaches, between the Kaihautu Executive Council and other groups with claims', and that this would be undertaken following the signing of the agreement in principle. Lastly, officials advised that, following this further analysis, additional land in the Rotoehu West CFL may be included in the pool on offer, in order to address the KEC's repeated requests that the land available there be increased to better meet the interests of Ngati Pikiao.[42]

As is shown in appendix I, the second offer to the KEC extended the right of deferred selection to cover CFL lands, but reduced the total pool of CFL land available. The pool offered in the agreement in principle was slightly larger than that in the second offer, as additional Rotoehu West CFL land was included, as anticipated.

Phase 2: Communication and assessment of overlapping interests after the agreement in principle

Following the signing of the agreement in principle on 5 September 2005, the Crown embarked on its next round of information gathering in respect of overlapping interests. OTS director Paul James described the two dimensions of this process to us. First, the Crown undertook 'further comprehensive research' on the interests of overlapping groups, drawing in particular on forms of historical and customary evidence other than Native Land Court records.

This research was coupled with 'extensive consultation with the claimants who had overlapping interests'. In the cases of Ngati Manawa and Ngati Whare, the Crown drew upon information provided during direct negotiations.[43]

This 'extensive consultation' with iwi took the form of a further round of letters, sent to non-Te Arawa overlapping groups on 9 September, and to non-KEC Te Arawa groups on 14 September.[44] More than 100 letters were sent out by OTS following the signing of the agreement in principle.[45] The letter directed recipients to the copy of the KEC agreement in principle on OTS's website, and included a summary of the commercial redress provisions, including a map showing the location of the CFL forests included in the pool on offer.

The letters to non-KEC Te Arawa groups also drew the recipients' attention to the inclusion in the offer of particular CFL forests, where the Crown was aware that the recipient group had interests in those forests.

Recipients were invited to comment on the terms of redress offered to the KEC by 4 November 2005, approximately six weeks after the letters were sent out.

A number of responses were included in the Crown evidence filed in our inquiry. Ngati Rangitihi sent a comprehensive submission on the agreement in principle on 28 November 2005.[46] The submission expressed a number of concerns about the process by which the agreement in principle had been developed, many of which were broadly similar to the concerns raised by claimants at our February and June 2007 hearings. In particular, Ngati Rangitihi were concerned that the inclusion of Rotoehu CFL land in the offer to the KEC would leave insufficient land available for their own future settlement. Ngati Whakaue sent in their substantive response to the agreement in principle on 25 November 2005.[47] Their response also raised concerns with the process as whole, and expressed the view that the Crown intended to transfer to Te Pumautanga lands in which Ngati Whakaue had interests. In particular, Ngati Whakaue objected to the inclusion of Whakarewarewa CFL lands in the agreement in principle. Counsel for Ngati Rangiwewehi, Tauhara hapu, Ngati Rangiteaorere, and Ngati Wahiao responded on 9 December 2005.[48] The Ngati Tuwharetoa claims committee's chairperson, Paranapa Otimi, responded on 12 December 2005, noting Ngati Tuwharetoa's interests in a number of CFL blocks on offer to the KEC: Pukuriri, Waimaroke, and Wairapukao.[49]

As a result of this round of research and consultation, a second assessment of overlapping interests was produced. A comparison of OTS's analysis of overlapping interests before and after the agreement in principle shows that a number of adjustments were made as a result of the reassessment after the agreement in principle:

- Ngati Rangitihi: a threshold interest was recognised in Rotomahana Parekarangi, and a threshold interest in Matahina A6 was no longer recognised;
- Ngai Tuhoe and Ngati Haka–Patuheuheu: a threshold interest was recognised in Waiohau B9 and Kaingaroa 1;
- Ngati Tuwharetoa: a threshold interest was recognised in Erua and Waimihia Forests;
- Ngati Whare: a threshold interest was recognised in Heruiwi;
- Ngati Hineuru: a threshold interest was recognised in Kaweka, and a threshold interest in Heruiwi (other than Heruiwi 4) was no longer recognised; and
- Ngati Kahungunu: a threshold interest was recognised in Heruiwi 4 and Gwavas.[50]

Appendix III shows the Crown's final assessment of the interests of overlapping groups in the central North Island CFL blocks which will remain after the KEC settlement. This is the land from which commercial redress in future central North Island Treaty settlements will be provided. We have rearranged the Crown's data so that each forest area is listed only once, with the names of the various overlapping groups with interests in that block alongside. The Crown's original table was arranged according to overlapping groups, and repeated the names of some forest

areas a number of times, next to each group with interests there. We believe our presentation of the same data gives a more accurate representation of the situation as it is on the ground: the interests of many groups overlapping a finite amount of land.

As a result of this reassessment, the Crown concluded that adequate central North Island CFL land would remain following the KEC settlement to accommodate future central North Island settlements. This 'included assessing a number of possible configurations of claimant groups coming together for direct negotiations'.[51] As a result, the Crown concluded that no change to the CFL redress offered to the KEC was necessary, and all units included in the pool of CFL land described in the agreement in principle remained on offer to the KEC.

But by the Crown's own assessment, each of the 51,000 hectares of CFL land on offer to the KEC is overlapped by the interests of one or more non-KEC group.[52] This gives some impression of the complexity of customary interests over these lands. Similarly, the vast majority of the remaining central North Island CFL lands outside the KEC offer are also claimed by more than one group.[53] We note that the threshold interests of some claimant groups in our inquiry did not figure in the Crown's assessment of overlapping interests: Ngati Raukawa, Tapuika, Ngati Rangiteaorere, Ngati Tamakari, Ngati Rangiunuora, and Ngati Whaoa.

Phase 3: Provisional decision of the Minister on overlapping interests

On 14 July 2006, OTS sent out a third round of form letters, advising overlapping groups of the Treaty Negotiations Minister's provisional decision on overlapping claims matters.[54] The letters advised groups that the Crown had been 'careful to ensure that it will retain sufficient CFL lands and other commercial assets within the central North Island region for use in future Treaty settlements with other iwi groups'. It also described the areas of remaining central North Island CFL with which the Crown believed the recipient group could probably demonstrate the strongest customary association, and other CFL lands where the recipient group could demonstrate a threshold interest. Recipients were asked to reply with their comments by 3 August 2006, less than three weeks after the letters were sent out. On 7 August, overlapping groups were informed by letter of the Treaty Negotiations Minister's final decision on overlapping claims matters.

The 14 July letter to Ngati Rangitihi noted that OTS officials were available to meet in the following two weeks to discuss overlapping claims matters. This hui was held in Rotorua on 28 July 2006. Senior KEC representatives attended.[55] A similar offer was extended to Ngati Whakaue. Ngati Whakaue made a substantive response to the Treaty Negotiations Minister's provisional decision on 3 August 2006, but refused to meet with officials if members of the KEC were in attendance. A hui was subsequently arranged and held on 26 September 2006.[56] The deed of settlement was signed on 30 September 2006.

Tribunal's June 2007 Report on Cultural Redress Matters

The Waitangi Tribunal issued its *Report on the Impact of the Crown's Treaty Settlement Policy on Te Arawa Waka* in prepublication format on 15 June 2007. In addition to recommendations concerning sites for specific cultural redress, that report made general findings and recommendations:

- that the Crown had breached the Treaty by failing to act as an honest broker during the KEC negotiation process, and by failing to protect the customary interests of overlapping groups in the cultural redress sites offered to the KEC;
- that the Crown must improve its policies and practices in order to achieve fair and sustainable settlements which restore the Treaty relationship;
- that the Crown must reprioritise the work programme for OTS to commence negotiations with all Te Arawa

hapu and iwi who stand outside the KEC, and with Ngati Makino; and
- that hui should be held to determine whether or not those groups with outstanding mandate issues support the KEC.

Summary

The key points in this chapter were as follows:

- In 1989, the Crown reached an agreement with the New Zealand Maori Council and the Federation of Maori Authorities whereby it would not sell off State-owned forest lands but would keep them for future use in Treaty settlements. The rentals paid to the Crown by the licensees using the CFL blocks are held in a trust. When CFL land is transferred to a successful claimants group in a Treaty settlement, the accumulated rentals associated with that land are paid out of the trust to the claimant group.
- The key milestones in the negotiations between the Crown and the KEC were: the signing of the terms of negotiation in November 2004; the signing of the agreement in principle in September 2005; and the signing of the deed of settlement in September 2006. The proposed settlement will transfer a total of 51,000 hectares to of central North Island CFL land, in 14 CFL blocks, to the KEC. The agreed value of that land, subject to a covenant ensuring that it will stay in forest for 28 years, is $85 million.
- In acquiring this land in its settlement, the KEC will 'spend' its $36 million settlement quantum on eight CFL blocks, then spend the accumulated rentals on those blocks (plus some additional funds) to purchase an additional six CFL blocks. The use of this so-called 'deferred selection' mechanism in Treaty settlements is unusual.
- During the KEC negotiations, the Crown undertook to inform and to protect the interests of central North Island groups with interests that overlap those of the KEC. These groups included core Te Arawa hapu and iwi who stand outside the KEC, and other central North Island iwi, such as Ngai Tuhoe and Ngati Tuwharetoa.

Notes

1. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 152
2. Ibid, p 153
3. Crown forestry agreement 1989, 20 July 1989, cl 6
4. Deed poll, 17 October 1989
5. Crown Forest Assets Act 1989, ss 11, 34, 40; Treaty of Waitangi Act 1975, s 8HB
6. Crown Forest Assets Act 1989, pt 4
7. Ibid, s 35
8. 'Trust Deed for Crown Forestry Rental Trust', April 1990, cl 9
9. Dr Brian Easton, 'Commentary on the Agreement between the Crown and Nga Kaihautu o Te Arawa', report commissioned by the Waitangi Tribunal, 2007 (doc B20), p 6
10. 'Trust Deed for Crown Forestry Rental Trust', April 1990, cl 11
11. Ngati Awa Settlement Act 2005, s 141
12. Ngai Tahu Claims Settlement Act 1998, s 34; Waikato Raupatu Claims Settlement Act 1995, s 26; Te Uri o Hau Claims Settlement Act 2002, s 121; Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 123
13. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 15 August 2005 (doc B3(8)), p 5
14. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 22 July 2005 (doc B3(6)), p 3
15. OTS, 'Crown Settlement Offer for the Settlement of the Historical Claims of the Affiliate Te Arawa Hapu', undated (doc B3(15))
16. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 22 July 2005 (doc B3(6)), pp 3–5
17. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 15 August 2005 (doc B3(8)), p 3
18. Ibid, p 6
19. Ibid
20. 'Agreement in Principle for the Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu', 5 September 2005, cl 63
21. Paul Jackson, brief of evidence, 27 June 2007 (doc B22(b)), p 11
22. Ibid, p 7; OTS to Minister in Charge of Treaty of Waitangi Negotiations, 26 June 2006 (doc B3(11)), p 4
23. Paul Jackson, brief of evidence, 27 June 2007 (doc B22(b)), p 7
24. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 26 June 2006 (doc B3(11)), p 4
25. Paul Jackson, brief of evidence, 27 June 2007 (doc B22(b)), p 10

26. An appropriation of $85 million was included in the 2007 Budget to cover the cost of the forestry covenant to the Crown; that is, the difference between $170 million (the Crown's own assessment of the market value of the land at highest and best use) and $85 million (the agreed 'forestry only' value at which the land was actually transferred by the settlement): *Budget 2007: The Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2008*, bk 5, vol 2, 17 May 2007 (doc B35), p 788.
27. Paul Jackson to KEC, 28 June 2006 (doc B1(7))
28. *Deed of Settlement of the Historical Claims of the Affiliate Te Arawa Iwi/Hapu* (Wellington: OTS, 2006) (doc B26), cl 12.25
29. Counsel for Ngati Whakaue, closing submissions, 4 July 2007 (paper 3.3.54), pp 2, 9; counsel for Ngati Raukawa, closing submissions, 4 July 2007 (paper 3.3.57), p 2
30. Crown counsel, closing submissions, 6 July 2007 (paper 3.3.59), p 21
31. Counsel for Ngati Whakaue, closing submissions, 9 July 2007 (paper 3.3.62), p 6
32. Crown counsel, oral submissions, 27 June 2007 (recording 4.3.3)
33. OTS to Ngati Manawa, 29 June 2005 (doc B21(a)(11))
34. OTS to Ngati Wahiao, 29 June 2005 (doc B21(a)(12))
35. Merata Kawharu, Ralph Johnson, Verity Smith, Robert Wiri, David Armstrong, and Vincent O'Malley, 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report', 2 vols, report commissioned by CFRT, 2005 (docs A107, A108)
36. OTS to Ngati Rangitihi, 28 July 2005 (doc B21(a)(13))
37. Counsel for Ngati Whakaue to OTS, 17 August 2005 (doc A32(a)(35))
38. Counsel for Ngati Rangitihi to OTS, 12 August 2005 (doc A32(a)(9))
39. Counsel for Ngati Rangitihi to OTS, 26 August 2005 (doc A32(a)(10))
40. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 15 August 2005 (doc B3(8))
41. Ibid, p 7
42. Ibid, pp 7–8
43. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), p 27
44. See, for example, docs A32(a)(12), (37), (84), (94)
45. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), p 13
46. Counsel for Ngati Rangitihi to OTS, 28 November 2005 (doc A32(a)(19))
47. Counsel for Ngati Whakaue to OTS, 25 November 2005 (doc A32(a)(43))
48. Counsel for Ngati Rangiwewehi, Tauhara hapu, Ngati Rangiteaorere, and Ngati Wahiao to OTS, 9 December 2005 (doc A32(a)(99))
49. Paranapa Otimi to OTS, 12 December 2005 (doc A32(a)(100))
50. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), pp 23–25, 28–29
51. Ibid, pp 29–30
52. Ibid, p 23
53. Ibid, p 29
54. See, for example, OTS to Ngati Rangitihi, 14 July 2006 (doc A32(a)(23)); OTS to Ngati Whakaue, 14 July 2006 (doc A32(a)(55)); OTS to Ngati Makino, 14 July 2006 (doc A32(a)(73)); OTS to Ngati Haka–Patuheuheu, 17 July 2006 (doc A32(a)(88)); OTS to Ngati Tuwharetoa, 17 July 2006 (doc A32(a)(104))
55. OTS to Ngati Rangitihi, 14 July 2006 (doc A32(a)(23)); OTS, notes of meeting with Ngati Rangitihi, 31 July 2006 (doc A32(a)(25))
56. Ngati Whakaue to OTS, 3 August 2006 (doc A32(a)(59)); OTS, background notes to meeting with Ngati Whakaue, 26 September 2006 (doc A32(a)(62))

CHAPTER 3

TERMS OF THE DEED OF SETTLEMENT

Introduction

Broadly, the first set of issues raised by claimants in this inquiry can be expressed in this way: Where the commercial redress provisions in the deed of settlement are inconsistent with the Crown forestry agreement made between Maori and the Crown in 1989, are they nevertheless consistent with Treaty principles?

For the sake of brevity, in this chapter we refer to the July 1989 Crown forestry agreement, and the statutory instruments which gave it effect (the Crown Forest Assets Act 1989 and the April 1990 CFRT deed), collectively as 'the 1989 agreement' or 'the 1989 regime'. The terms of the KEC deed of settlement depart from the 1989 regime in two significant ways. First, CFL lands will be transferred to Te Pumautanga, following the passage of settlement legislation, without a determination and a binding recommendation of resumption by the Waitangi Tribunal. Two categories of CFL lands will be transferred in this way: settlement licensed land (to the value of the quantum) and deferred licensed land (to be purchased at market value by right of deferred selection). Secondly, the deed provides for legislation to be passed which will deem the Crown a confirmed beneficiary of the accumulated rentals associated with the CFL lands transferred under right of deferred selection. That these provisions are inconsistent with the 1989 regime was not at issue: the Crown admitted as much (with the caveat, discussed below, that the 1989 agreement contemplated that the Crown would receive CFRT rentals under certain circumstances) before the Court of Appeal in June 2007.[1] Rather, the key matters raised by claimants for our consideration are:

- whether any departure from the 1989 agreement is per se in breach of the Treaty; and, if not,
- whether the terms of the KEC deed of settlement relating to the deferred selection mechanism and the deeming of the Crown as a confirmed beneficiary of CFRT funds are consistent with the Treaty.

The 1989 Agreement

We do not propose to deal with the first of these issues at any length. At our June 2007 hearing, we heard different views on the nature and status of the 1989 agreement. The claimants argued that the Crown Forestry agreement was a solemn compact. Mr Paul spoke at some length about the New Zealand Maori Council view of the agreement. Ms Ertel and Ms Feint emphasised that the 1989 agreement

was reached in settlement of litigation, and was binding on the parties. Ms Feint submitted:

> In departing from the 1989 Agreement, the Crown has breached its Treaty obligations, which must include a duty to adhere to agreements reached with its Treaty partner and a duty actively to protect the rights of all claimants to Crown forest lands.[2]

Other claimant counsel made submissions along similar lines.

The Crown argued at length that the 1989 agreement was never intended to preclude the direct settlement of Treaty claims, outside the processes it established:

> The 1989 agreements do not create a Treaty obligation on the Crown to only pursue matters before the Tribunal. The Crown must remain open to other means of settling Treaty grievances.[3]

Counsel for the Crown noted that Maori, including some groups in the present inquiry, had consented to the use of these other options, and had themselves sought to pursue them. He argued that the Crown was free to choose between Treaty-compliant options in settling Treaty claims:

> The Crown must not settle with groups in a way that substantially prejudices its ability to provide sufficient redress to other groups. Fair processes must be used. Subject to those caveats, direct negotiation is Treaty-compliant.[4]

The High Court has considered the legal implications of the inclusion in the KEC deed of settlement of provisions which are inconsistent with the 1989 agreement. Justice Gendall, in his High Court decision, declined to make the declaration sought by the New Zealand Maori Council and the Federation of Maori Authorities to strike the commercial redress provisions out of the deed of settlement, on the ground that 'as a matter of Parliamentary Sovereignty, the Courts cannot presume to tell Parliament what it can and cannot do'.[5] Judge Gendall's view that the content of settlement legislation was a matter for Parliament, not the courts, to decide was upheld by the Court of Appeal. In its decision, the Court of Appeal emphasised that the 1989 agreement was a political compact:

> The Settlement Deed in the present case is equally a political compact, with the only material unconditional obligation undertaken by the Crown being the introduction of a Bill for consideration by Parliament. The wisdom of proceeding with the settlement with TPT [Te Pumautanga o Te Arawa] in the face of strong opposition from the appellants, Ngati Makino and others, and in the face of the criticisms expressed by the Tribunal, is like the decision to proceed with the *Sealords* settlement: a political decision to be made in Parliament.[6]

The jurisdiction of the Waitangi Tribunal is far broader than that of the courts. Our statutory task is to determine whether or not the KEC settlement, or any of the elements or processes it contains, is consistent with the principles of the Treaty.

We now turn to examine the specific provisions of the deed of settlement which, the claimants allege, are in breach of the Treaty: the extension of the right of deferred selection to cover CFL lands, and the provision to deem the Crown a confirmed beneficiary of CFRT rentals.

Deferred Selection over CFL Lands

While rights of deferred selection or first refusal to purchase have been used in past settlements, there is no exact precedent for extending a right of deferred selection over CFL lands as has been given to the KEC. The deferred selection provision was included in the deed of settlement after the KEC asked that it be included in its 8 August 2005 counter-offer. However, this request would not have come

as a surprise to the Crown. In a briefing paper to the Treaty Negotiations Minister immediately prior to the Crown's first offer to the KEC, OTS officials explained the benefits (for the KEC and for the Crown) of extending deferred selection to cover CFL lands:

> If the entire quantum is used for licensed Crown forest land, the Kaihautu Executive Council would not normally be able to purchase other commercial assets at the time of settlement using funds in addition to their quantum. The inability to do so could detract from the overall settlement package . . .
>
> To ensure that the Kaihautu Executive Council can still purchase the full range of assets without using quantum would require a 'deferred selection process' (DSP). DSP has not been a common redress instrument in recent settlements, the most comparable past example to what is proposed in this instance being that offered to Ngai Tahu.
>
> The key benefit of a DSP for the Kaihautu Executive Council would be the ability to purchase land subject to a CFL to the full value of the quantum, receive the rentals and then be able to purchase (and leaseback) non-surplus Crown land, and purchase geothermal assets very shortly after Settlement Date.
>
> From a Crown perspective, the DSP has the benefit of enhancing the value of the package with limited cost to the Crown. In addition, a time-limited DSP has lower operational costs and decreases risks associated with overlapping claimants than a Right of First Refusal (RFR). Those operational costs do increase the longer a DSP is in place.[7]

While officials anticipated that the right of deferred selection might need to be extended to cover CFL lands in order to 'enhance the acceptability of the total financial and commercial redress package' to the KEC, it was not put on the table in the Crown's first offer. Instead, following the KEC's request in its counter-offer, the Crown included it in its second offer.

On 15 August 2005, officials estimated that the value of the total pool in the initial offer was five times the value of the quantum.[8] The extension of the right of deferred selection to cover CFL land would enable the KEC to use the entire sum of accumulated rentals on quantum land to purchase additional CFL lands. In practice, it would more than double the total value of land which the KEC could select from the pool on offer.

The claimants in our inquiry objected to the offer of deferred selection over CFL lands for a number of reasons:

- It would create a financial benefit for the Crown, which would receive both the sale price (at market value) on the deferred selection lands, and the accumulated rentals associated with those lands.
- By increasing the quantity of land which the KEC could afford to purchase from the pool on offer, it would increase the risks that insufficient CFL lands would remain for use in future settlements, and that land of significant cultural value to overlapping groups would pass to the KEC.
- Similarly, by increasing the quantity of land available to the KEC, it would exacerbate the KEC's existing 'unfair advantage' of having first choice in the purchase of CFL settlement lands. (This was often expressed by claimants in terms of the Crown seeking to deal with claimant groups that were 'first up, best dressed'.)

We have little to say about the offer of deferred selection over CFL lands in and of itself. The claimants objected primarily to the *effects* of the offer: that is, the increase in the amount of land available to the KEC, and the corresponding reduction in CFL land remaining for future settlements with other iwi. We deal with these matters in chapter 4. We make our findings in respect of the first bullet point in the next section, dealing with the provision deeming the Crown to be a confirmed beneficiary. The substance of the other objections concerns the robustness of the Crown's processes for assessing the customary interests of overlapping groups, and for assessing the sufficiency of remaining

CFL lands for future settlements in the central North Island. We discuss each of those processes in the next chapter.

We have no objection in principle to any mechanism which allows the Crown to offer a more generous settlement to claimants, provided always that the interests of groups outside the negotiations are protected. We would add that at the point that deferred selection over CFL lands was included in the offer to the KEC, the Crown must have known that the area of land which the KEC would be able to acquire would more than double, given the value of the accumulated rentals. Thus, the duty of the Crown to actively protect the interests of all groups with overlapping interests was increased, particularly as every hectare of CFL land in the pool was subject to overlapping claims. The highest standard of consultation with overlapping groups would be required, to communicate the complexity of the deal on offer, and to allow the groups to ensure that their interests were not prejudiced in the process.

Deeming of the Crown as Confirmed Beneficiary

One of the most contentious issues for the claimants in this inquiry was the provision in the deed of settlement for the Crown to become a confirmed beneficiary of the accumulated rentals associated with deferred licensed lands. On the face of it, this appears to run counter to the fundamental purpose of the 1989 agreement, which provided for the transfer of the lands to claimant groups as redress for Crown Treaty breaches. However, as the Crown noted, the 1989 agreement does in fact contemplate the Crown receiving CFRT rentals and CFL lands in certain circumstances. According to the Crown Forestry agreement:

> If the Waitangi Tribunal recommends that land is no longer subject to resumption, the Crown's ownership and related rights are confirmed. . . .
>
> Whenever the Tribunal recommends that land is no longer subject to resumption, the accumulated capital in the Rental Trust relevant to that piece of land will be paid to the Crown. . . .
>
> Any monies remaining over from this account [CFRT funds] after all claims over forest lands have been settled will be refunded to the Crown.[9]

It is self-evident that none of these circumstances applies in the current situation. The essence of the Crown case seems to be this: by its own calculations, sufficient CFL lands will remain in the central North Island following the KEC settlement to accommodate future settlements with all other central North Island iwi. Thus, the accumulated rentals on deferred selection lands it will receive under the KEC settlement are in effect an 'advance payment' on rental moneys the Crown will (by its calculations) be entitled to at some point in the future, following the completion of all central North Island Treaty settlements. The Crown referred to itself as the 'residual beneficiary' of accumulated rentals and surplus CFL lands.

Development and communication of confirmed beneficiary proposal

On 9 September 2004, the Deputy Prime Minister and Minister of Finance, the Honourable Dr Michael Cullen, and the then Treaty Negotiations Minister, the Honourable Margaret Wilson, discussed a proposal, upon the completion of all central North Island Treaty settlements, to hold all remaining central North Island CFL lands and associated accumulated rentals in a trust established for the purpose of Maori economic development. They proposed that central North Island iwi would be given a right of first refusal over remaining central North Island CFL lands, to be purchased at market value. Central North Island iwi would not, however, receive the accumulated rentals associated with any land they purchased in this way. Instead, those

accumulated rentals, plus some or all of the remaining CFL land not purchased in this way by iwi, would be placed in the proposed Maori economic development trust.

While, as we discuss in the next section, the idea of the Maori economic development trust may have dropped off the radar, the other part of Dr Cullen's proposal persisted: during KEC negotiations the Crown proceeded on the basis that the accumulated rentals on deferred selection land would not go to the KEC. In our reading of the available evidence of internal Crown documents, it kept to itself the idea that it would become the beneficiary of those rents, right up until the time that that aspect of the settlement machinery became public. Officials' advice to the Treaty Negotiations Minister at the time of the first offer to the KEC was quite straightforward on the point. OTS's briefing paper of 22 July 2005 noted that further negotiation flexibility could be achieved through:

> extending the properties covered by the deferred selection to include specified parcels of land subject to CFLs (*where any accumulated rentals associated with the land would be returned to the Crown*). [Emphasis added.][10]

In its public communications – for example, letters to overlapping claimant groups, and in the agreement in principle itself – this detail was omitted from explanations of the proposed settlement. From the time of the second offer to the KEC, it was made clear to all parties that the KEC (or, more correctly, Te Pumautanga) would not receive the accumulated rentals on deferred selection lands. What was never mentioned, so far as we can see, was that the Crown would receive those rentals instead.

Of particular concern is that OTS did not mention this aspect of the settlement in its 20 December 2005 letter to CFRT. This was despite the fact that the letter was prepared in response to a specific request from CFRT for 'written clarification of the deferred selection process with regard to licensed Crown forest land . . . and the associated accumulated rentals' to be included in the KEC settlement.[11] We note that evidence of CFRT chief executive Ben Dalton confirms that the CFRT trustees and management became aware only:

> some time after the publication of the draft deed of settlement that the terms of settlement include the Crown being treated as a 'Confirmed Beneficiary' in relation to any Crown forestry rental proceeds associated with any Crown forest license land to be acquired . . . under the deferred selection process . . .[12]

Meanwhile, internal ministerial advice continued to indicate a clear expectation that the accumulated rentals would pass to the Crown. A 26 July 2006 Treasury briefing paper to the Minister for State Owned Enterprises made reference to the 'additional CFRT rentals that the Crown will forgo' as a result of the effect of the proposed forestry covenant on land values.[13] So far as we can, tell the proposal for the Crown to receive the accumulated rentals first became public in September 2006 when the deed of settlement was signed. The New Zealand Maori Council and the Federation of Maori Authorities initiated court proceedings in January 2007.

Tribunal finding

The rentals on CFL land have accumulated in CFRT funds since 1990 for the specific purpose of providing redress for the Crown's historical breaches of the principles of the Treaty. The Crown was a party to the agreement which established the trust for that purpose. In our view, for the Crown to include this provision in the deed of settlement is inconsistent with the Treaty. To make matters worse, the Crown failed to communicate this proposal to the other parties to that agreement (the New Zealand Maori Council and the Federation of Maori Authorities), to CFRT itself, to the claimant groups that might otherwise have received benefits from those rentals, and indeed to the general public.

Maori economic development trust proposal

At our June 2007 hearing, the Crown insisted that it had not planned to receive the rentals for itself. Rather, it argued that the accumulated rentals were always to have been paid into a Maori economic development trust, along the lines proposed by Dr Cullen and Margaret Wilson in September 2004. We now turn to discuss that proposal.

Dr Cullen's 9 September 2004 letter described above proposed that the accumulated rentals on CFL lands offered under deferred selection would not pass to the claimant group, but would instead be placed into a specially created Maori economic development trust. The purpose of the trust would be to fund Maori development on a national basis, rather than solely for the benefit of central North Island iwi. On 20 September 2004, Dr Cullen wrote to Ms Wilson to outline the proposal in a letter.[14] Her response was brief and non-committal.[15] Critically, in our view, there is no evidence of any further policy development of the idea, or consultation over it, either by Cabinet or by officials. This is despite the fact that Dr Cullen's letter specifically remarks that the proposal would require separate consultation with Maori in general, and central North Island Maori in particular. The absence of evidence suggests to us that the Maori development trust proposal may have become a dead letter.

This was a very important proposal, one which, if it were to be pursued, would have required major policy development and intensive consultation with stakeholders, including the New Zealand Maori Council, the Federation of Maori Authorities, Te Puni Kokiri, CFRT, Treasury, and all Maori. We have seen no evidence that this occurred. Nor have we seen evidence that this 2004 proposal was in the minds of officials or Cabinet during the KEC negotiations. Dr Cullen's initial, high-level sketch remains the fullest expression of the Maori economic development trust proposal.

In closing submissions, counsel for the Crown referred to the proposal in this way:

> to avoid any misapprehension by Maori, and as an indication of the Crown's good faith, the Government wishes to discuss with Maori placing the accumulated rentals and the purchase price of the deferred licensed land in a trust for the social and economic development of Maori.[16]

We are not convinced by the Crown's arguments that it always intended to place the accumulated rentals in trust, as proposed by Dr Cullen some years ago. There is simply no evidence before us to show that the Crown thought through this proposal before initialling the KEC deed of settlement. In our view, references to the proposal by the Crown at our hearing are in the nature of an *ex post facto* justification of its plan to receive the accumulated rentals for itself.

Tribunal finding

The Crown's inclusion in the deed of settlement of provisions deeming itself to be a confirmed beneficiary of the accumulated rentals on deferred selection land, without consultation and in disregard of its 1989 commitments, constitutes a breach of the principles and duties imposed by the Treaty of Waitangi and discussed in our first settlement process report (see pp 20–38).

Future directions

The 1989 agreement was reached in the expectation that all Treaty claims affecting CFL lands would be settled within four years. For a number of reasons, this has not happened. In our view, it is time for the parties to the 1989 agreement, along with iwi and hapu, to review the situation. We return to this view at the conclusion of our report.

Summary

The key points in this chapter were:

- The provisions of the KEC deed of settlement which offer a right of deferred selection over CFL lands, and which deem the Crown a confirmed beneficiary of the accumulated rentals on deferred selection land, are inconsistent with the 1989 agreement. This was not in dispute.
- In terms of the Treaty, however, our view is that the deferred selection mechanism, by increasing the amount of central North Island CFL land available to the KEC in the settlement – land that was subject to overlapping claims – and thereby reducing the CFL land available to all other iwi in future Treaty settlements, the Crown's duty of active protection of the interests of all Maori was increased. Under the circumstances, the highest standards of communication and meaningful consultation were required.
- For the Crown to have introduced into a Treaty settlement a provision whereby it would receive accumulated rentals for CFRT for itself is in breach of the principles and duties imposed by the Treaty. Furthermore, we are concerned at the Crown's apparent failure to communicate the proposal to affected parties, in particular CFRT, the New Zealand Maori Council, and the Federation of Maori Authorities, until the deed of settlement went public.

Notes

1. *New Zealand Maori Council v Attorney-General* unreported, 2 July 2007, Court of Appeal, CA241/07, para 43
2. Counsel for Ngati Tuwharetoa, opening submission on behalf of all claimants, 25 May 2007 (paper 3.3.36), p 2
3. Crown counsel, closing submissions, 6 July 2007 (paper 3.3.59), p 5
4. Ibid
5. *New Zealand Maori Council v Attorney-General* unreported, 4 May 2007, Gendall J, High Court, Wellington, CIV-2007-485-000095, para 89
6. *New Zealand Maori Council v Attorney-General* unreported, 2 July 2007, Court of Appeal, CA241/07, para 47
7. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 22 July 2005 (doc B3(6)), paras 15–18
8. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 15 August 2005 (doc B3(8)), p 5
9. Crown forestry agreement 1989, cls 7, 11(iv), (v)
10. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 22 July 2005 (doc B3(6)), p 3
11. OTS to CFRT, 20 December 2005 (doc B38(17))
12. Ben Dalton, brief of evidence, 19 April 2007 (doc B23), p 3
13. Treasury, report on benefit to Crown from forestry covenant with KEC, 27 July 2006 (doc B2(2))
14. Minister of Finance to Minister in Charge of Treaty of Waitangi Negotiations, 20 September 2004 (doc B3(4))
15. Minister in Charge of Treaty of Waitangi Negotiations to Minister of Finance, 17 December 2004 (doc B3(5))
16. Crown counsel, closing submissions, 6 July 2007 (paper 3.3.59), p 7

CHAPTER 4

PROTECTION OF INTERESTS OF OVERLAPPING CLAIMANTS

Introduction

This chapter sets out to answer the following question: Has the Crown ensured that the commercial and cultural interests of central North Island groups outside the KEC will not be prejudiced as a result of the KEC settlement?

In order to address this question, we review the Crown's Treaty settlement policy in respect of overlapping claims to commercial redress assets. We then discuss the application of that policy during the KEC negotiations. This discussion focuses on: the Crown's approach to consultation with overlapping claimant groups during negotiations; its assessment of the threshold interests of those groups in the various central North Island CFL lands; and its assessment of the appropriateness and sufficiency of the central North Island CFL land remaining after the KEC settlement to provide for future Treaty settlements with other central North Island iwi.

Crown Settlement Policy

We begin by briefly reviewing current Crown Treaty settlement policy, to provide a background to the discussion of the various Crown processes undertaken during the KEC negotiations, which comprise the bulk of the chapter.

Commercial versus cultural redress

Crown settlement policy makes a fundamental distinction between commercial and cultural redress. OTS's settlement and negotiation guide *Ka Tika a Muri, Ka Tika a Mua* (usually referred to simply as the *Red Book*) explains the nature and purpose of 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.
>
> . . . . .
>
> 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.[1]

In many cases, claimant groups will choose to take some or all of the commercial redress quantum, in the form of Crown-owned proprieties, in place of cash. CFL lands are such a Crown-owned commercial property. In general, the Crown regards commercial properties as 'substitutable' when used in this way.[2] In other words, the Crown's policy is to treat commercial properties as a substitute for cash and therefore as being free of cultural or ancestral associations.

Cultural redress stands in direct contrast to commercial redress under Crown policy. *Ka Tika a Muri, Ka Tika a Mua* describes the relationship between the two:

> 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.[3]

There is an important qualification to the Crown's 'substitutability' policy in relation to commercial redress, however: claimant groups can receive assets only within their 'area of interest'. In other words, a group must be able to demonstrate a minimum level of customary interest in a property to receive it in a Treaty settlement, despite the fact that the property is treated as a purely commercial asset. This minimum level of customary interest is called a 'threshold interest'.

Threshold interests

The identification of the various iwi threshold interests in a block is particularly critical in cases of Crown commercial redress properties in which more than one iwi have interests. OTS director Paul James described to us the working definition of threshold interests used by the office:

> The concept of a threshold interest means that a claimant group can demonstrate that they have customary associations with a piece of Crown land, but not necessarily the only interest in that land.[4]

Because the test for determining threshold interests is deliberately kept low, and because the transfer of a commercial asset such as CFL land is necessarily exclusive, the Crown will often need to determine which of two or more groups with interests in a block will receive the land in a settlement. Thus, some transparent, straightforward way of assessing the relative interests of overlapping groups is required. *Ka Tika a Muri, Ka Tika a Mua* sets out Crown policy for allocating CFL lands subject to overlapping threshold interests:

> Where there are valid overlapping claims to a site or area, the Crown will only offer exclusive redress in specific circumstances. For example, when several groups claim an area of licensed Crown forest land, the Crown considers the following questions:
>
> - has a threshold level of customary interest been demonstrated by each claimant group?
> - if a threshold interest has been demonstrated:
>   - what is the potential availability of other forest land for each group?
>   - what is the relative size of likely redress for the Treaty claims, given the nature and extent of likely Treaty breaches?
>   - what is the relative strength of the customary interests in the land?, and
> - what are the range of uncertainties involved?
>
> The Crown is likely to take a cautious approach where uncertainties exist, particularly where overlapping claimants may be able to show breaches of the Treaty relating to the land, and would lose the opportunity to seek resumptive orders from the Tribunal.[5]

It further states that the relative weighting given to each of these factors must be considered case by case, depending

on the precise circumstances which apply, but that, broadly speaking, it is not necessary for a group to demonstrate a *dominant* customary interest in a block to become eligible to receive land in that block in a settlement.[6] We now discuss the Crown's methodology for determining the threshold interests of iwi in central North Island CFL blocks during the KEC negotiations.

Application of Policy during KEC Negotiations

During its negotiations with the KEC, the Crown needed to maintain contact with other central North Island groups with interests in the lands it proposed to transfer to the KEC in the settlement. It needed to do so both to keep all groups abreast of developments in the negotiations generally, and to build up an accurate picture of the interests of those overlapping groups, to ensure their interests were protected. We now turn to consider the Crown's consultation with overlapping claimant groups, and the various assessments it undertook during the negotiations to protect their interests.

Consultation with overlapping groups

Since 2002, the Crown has stressed the importance of early engagement with overlapping claimants. At our June 2007 hearing, Paul James stated that the Crown had heeded Waitangi Tribunal recommendations in its cross-claims reports issued in 2002 and 2003.[7] He commented that 'the Crown sought to engage early' with overlapping claimants after signing the terms of negotiation with the KEC in 2004.[8]

What this meant in practice, however, was that OTS sent three rounds of form letters to overlapping claimants during 2005 and 2006, explaining the progress of KEC negotiations, asking for information about their interests, and inviting them to discuss their interests directly with the KEC.[9] Much of this correspondence was described in a table filed by the Crown, showing a chronology of consultation with overlapping claimants. The chronology illustrates the dearth of direct engagement with these groups: in its description of 110 communications with overlapping claimants in 2005 and 2006, only two refer to face-to-face meetings with the claimants.[10]

While the Crown failed to engage directly with the five groups listed in its consultation chronology, it failed to engage *at all* with several other groups. The five groups listed in the consultation chronology were Ngati Rangitihi, Ngati Whakaue, Ngati Makino, Ngati Haka–Patuheuheu, and Ngati Tuwharetoa. At our June hearing, there were several other groups that claim not to have been consulted at any stage: some of Ngati Whaoa and Ngati Tahu, Ngati Te Rangiunuora, Ngai Tuhoe, the New Zealand Maori Council, Ngati Rangiteaorere, Ngati Karenga, and Ngai Moewhare. We acknowledge that some of these groups are involved in mandate disputes with the KEC, but surely they, too, deserve to be consulted. After all, the Crown consulted Ngati Tutemohuta and the Tauhara hapu by writing letters to their counsel, even though these groups are part of wider Ngati Tuwharetoa.[11] The omission of the wider Ngai Tuhoe iwi (as distinct from Ngati Haka–Patuheuheu) from the consultation process appears to be particularly serious. According to the 2001 census, Ngai Tuhoe number approximately 30,000. Ngai Tuhoe presented extensive tangata whenua evidence at the Tribunal's recent central North Island inquiry.[12] Volume 1 of the Tribunal's central North Island report refers frequently to their customary interests within the inquiry area.[13]

Similarly disadvantaged were those Te Arawa groups that continue to contest their inclusion in the KEC mandate, including Ngati Whaoa, Ngati Tamakari, and Ngati Te Rangiunuora. In our first settlement process report, we found that these groups objected to direct participation in the KEC settlement, and we recommended 'hui or mediation' as a path towards the resolution of their disputes (see pp 188–189). Crown engagement with these groups is the only way that they can obtain access to commercial, as well

as to cultural, redress so that subsequent settlements meet the requisite standards of fairness for all claimants.

We have already discussed our views on the Crown's approach to consultation in full in our first settlement process report. We note that the Tamaki Makaurau Tribunal has also recently reminded OTS that letters are not enough.[14] At our June 2007 hearing, the Crown accepted in principle that our findings in respect of its process of consultation on cultural redress matters could also be applied to its consultation over commercial redress. In our earlier report, we identified many flaws in the Crown's process for engaging with overlapping claimants:

- a reliance on written correspondence and a failure to engage face-to-face with overlapping claimant groups;
- a failure to respond meaningfully to the information provided by claimants and their concerns over the proposed redress;
- a failure by officials to fully inform the Treaty Negotiations Minister of important developments on overlapping claims issues, and of the expectation among overlapping claimants that negotiations would begin soon;
- delays in communicating with some groups;
- a failure to allow sufficient time for overlapping claimant groups to research and prepare a full response describing their interests, or to take into account the fact that many of these groups had little or no resourcing to undertake such research;
- a failure to provide full and clear information to overlapping claimant groups about the Crown's expectations and processes in assessing their interests; and
- a tendency to prefer the KEC's advice on matters of custom over that of any other group (see pp 69–75).

Tribunal finding

We consider that the Crown's failures in respect of consultation over commercial redress constitute a breach by the Crown of its Treaty duties to act honourably and with the utmost good faith, and to actively protect the interests of all Maori.

Assessment of threshold interests of overlapping groups

The Crown's assessment of the interests of overlapping groups was based on consultation with the groups themselves, and its own in-house research. We deal with each of these in turn.

Consultation on overlapping interests

Paul James identified the consultation round that followed the signing of the agreement in principle as being the fullest and the most important in the Crown's assessment of overlapping interests. At this stage, he said:

> the Crown wished to identify groups that may be able to demonstrate a threshold interest through other forms of historical and customary evidence, if not through a claim to the Native Land Court. This information was coupled with extensive consultation with claimants who had overlapping interests.[15]

However, none of the claimants at our June 2007 hearing accepted that the Crown had properly consulted with them over their threshold interests. Paranapa Otimi of Ngati Tuwharetoa referred to the map illustrating the Crown's representation of his iwi's threshold interests as 'rubbish'. When asked by his counsel whether this map accurately reflected Tuwharetoa's interests, Mr Otimi replied that the Crown never consulted Tuwharetoa about this. He implied that, without kanohi ki te kanohi consultation, accuracy (and mutual respect) was impossible.[16] Chris McKenzie, the Ngati Raukawa witness, repeatedly referred to the unsatisfactory information provided in the Crown's coloured maps filed in February 2007. As far as Raukawa were concerned, these maps came 'out of the blue', and the Crown made no attempt to explain the omission of any reference to Ngati Raukawa in them.[17]

Our finding in respect of the Crown's general approach

to consultation applies here also. We would further note that the negative consequences of this approach went beyond failing to keep overlapping groups properly informed of the development of negotiations. The lack of full and robust engagement with overlapping claimant groups about their interests in central North Island CFL lands resulted in a Crown process of determination of interests which was virtually unilateral. Further, any assessment made by the Crown about overlapping interests on the basis of a flawed consultation process would necessarily be built on a flimsy foundation, putting the interests of overlapping claimant groups at greater risk. We acknowledge, however, that the Crown did also carry out in-house research. We now turn to review that in-house research process.

In-house research

Prior to the June 2007 hearing, the Tribunal asked the Crown to file material showing how it had assessed the interests of hapu and iwi in central North Island CFL lands.[18] In response, the Crown filed three large folders of Native Land Court records and related evidence.[19] The Crown noted that the evidence was filed 'by way of example only', to show the kind of historical material drawn on in its analysis, but not necessarily the full extent of that material. Accepting that point, we have nevertheless found it instructive to review the historical evidence on which the Crown's in-house research was based.

Most of the material consisted of copies of original nineteenth-century Native Land Court minutes, with little associated analysis. Only six original Native Land Court blocks, out of more than 20 affected by the KEC settlement, were included in the material filed. Apart from the production of nearly complete Native Land Court title determination minutes for these six blocks, there is little consistency in the information supplied. For example, at tab 5 on Rerewhakaitu, there is an unattributed one-page summary of who appeared at an 1881 Native Land Court hearing, but there is no hectareage or survey plan information. A useful section from Kawharu et al's 'Nga Mana o te Whenua o Te Arawa: Customary Tenure Report' is also attached, but this is the only block for which this sort of information is supplied.[20] Kaingaroa 1 is better described, with a fuller title determination summary and both hectareage and Maori land plan references. Further, what can only be described as a scathing indictment of the Crown's 1880 acquisition of this block, taken from historical evidence filed in the central North Island inquiry, is attached.[21] The even larger Kaingaroa 2 block lacks a similar sort of historical commentary to assist readers with interpretation of the barely legible raw Native Land Court minutes.[22]

We acknowledge that we have not seen all the evidence gathered and analysis done by the Crown in its determination of threshold interests. However, on the basis of what we have seen, we are far from convinced that the Crown has developed a consistent and robust methodology for determining the threshold interests of central North Island iwi in CFL lands. Certainly, few, if any, claimants had confidence in the Crown's ability to judge the strength of their customary land interests. At our June hearing, both counsel for Ngati Raukawa Richard Boast and counsel for Ngati Makino Annette Sykes questioned Mr James on the Maori cultural and language skills of his staff. Mr James was prepared to accept the implied criticism, while maintaining that OTS had the ability to contract in such expertise.[23]

Tribunal comment

As a result of the inadequacies of the processes underpinning the Crown's assessment of overlapping interests, it appears that several errors have been made. In closing submissions, claimant counsel detailed instances of failures by the Crown to protect their clients' customary interest in particular lands which will pass to the KEC. These included, for example:

- Ngati Whakaue, who claim interests in the Horohoro CFL block and Horohoro State Forest;[24]
- Ngati Haka–Patuheuheu, who claim interests in Kaingaroa 1 and 1A;[25]

- Ngai Tuhoe, who claim interests in Kaingaroa 1, 1A, and 2;
- Ngati Tuwharetoa, who claim interests in the Pukuriri, Waimaroke, Wairapukao, and Reporoa CFL blocks;[26] and
- Ngati Raukawa, who claim interests in Horohoro State Forest.[27]

Other claimant groups disputed the Crown's assessment of their interests in the CFL lands which will remain available for future Treaty settlements after the KEC settlement (shown in appendix III). These included:

- Ngai Tuhoe, whose claimed interests in Kaingaroa 1 are not recognised in the Crown's assessment;
- Ngati Rangitihi, whose claimed interests in Rotoehu are not recognised in the Crown's assessment; and
- Ngati Haka–Patuheuheu, whose claimed interests in Kaingaroa 1A are not recognised in the Crown's assessment.

A more robust process, including a fuller explanation of the Crown's policies and process in this area, would have avoided this situation.

Finally, we note that the Crown's assessment was very poorly communicated to the parties affected by it. So far as we are aware, at no point prior to the present inquiry did the Crown disclose to overlapping claimant groups the coloured threshold interest maps, and the accompanying table summarising its assessment of their threshold interests, which it filed in evidence in our inquiry. These maps show the Crown's assessment of the threshold interests of 13 overlapping groups in approximately 30 CFL land areas.

There are significant problems with these maps, in our view. They cover a region much larger than either the KEC 'area of interest' (shown with a dotted line on the maps), or the Waitangi Tribunal's central North Island inquiry area, meaning that any detail on the location of the CFL blocks proposed to pass to the KEC is lost. Adding to the visual confusion, the threshold interest areas of each group are superimposed on black outlines of the original Maori land blocks. The composite map showing the interests of all groups is almost unintelligible, because it shows so many overlaps, particularly in the Kaingaroa area.[28] Despite the flaws in the Crown maps, the failure to distribute these to overlapping groups constituted a lost opportunity for effective and informed consultation.

For the sake of clarity, we have prepared simplified maps for eight overlapping groups, together with a map showing the location of all CFL blocks. These maps vividly illustrate the complexity of customary interests in the central North Island CFL lands. They are attached to this report at appendix IV. We have simplified the maps, for example, by removing the outlines of the original Maori land blocks.

Assessment of appropriateness of remaining central North Island CFL land

During our June 2007 hearing, there was much talk of the sufficiency of remaining central North Island CFL lands to provide for future settlements with central North Island iwi. In our view, the concept of sufficiency, and the attendant focus on the area of CFL land available, is restrictive. It suggests an analysis based almost entirely on commercial grounds. We understand the Crown's distinction between cultural redress and commercial redress, and its reasons for making such a distinction. We note also that the Crown does in fact recognise the cultural value of commercial redress lands, to a very limited extent, through its threshold interests policy. However, as we discuss further below, we consider that the unique central North Island situation demanded a full consideration of cultural, as well as commercial, value in providing for the future allocation of CFL land. We now turn to consider the Crown's assessment of both the appropriateness (in cultural terms) and the sufficiency of remaining CFL lands.

It hardly needs stating that Maori do not divide their rights and interests in land along cultural and commercial lines. In her opening submissions, counsel for Ngati Tuwharetoa, Karen Feint, stated that claimant cultural considerations dictated that ancestral land was not

'inter-changeable' and that it was 'culturally offensive' for OTS to suggest otherwise.[29] Claimant rejection of the concept of substitutability arises from their belief in the inherent cultural value of land, especially the ancestral associations that make such land unique.

Paul James indicated that the Crown was cognisant of the relationship between commercial and cultural redress. He stated that:

> the Crown understands that many claimant groups place a premium upon obtaining land (as opposed to cash) as commercial redress . . . [This] informs the Crown's efforts to provide licensed land so as to balance historical customary attachments with the commercial aspects of the redress.[30]

Mr James noted that 'the Crown continued refining its knowledge of the interests of overlapping claimants' during the KEC negotiations, based on, among other things, evidence filed in the Tribunal's central North Island and Te Urewera inquiries.[31] As a result of this refinement, the Crown withdrew some of the CFL land initially offered to KEC: a substantial portion of the Kaingaroa Pukuriri CFL block, and smaller portions of the Headquarters and Reporoa CFL blocks. In their 15 August 2005 briefing to the Treaty Negotiations Minister, officials advised that this withdrawal was 'prudent to further safeguard the interests of overlapping claimant groups'. OTS identified the groups most affected as Ngati Manawa, Ngati Rangitihi, and Ngati Tuwharetoa.[32] We note that the Crown did make some attempt to accommodate overlapping claimants in this culturally significant area.

Other groups have not had their interests recognised in the remaining CFL lands – for example, Tuhoe in Kaingaroa 1, or Ngati Haka–Patuheuheu in Kaingaroa 1A. This may reflect the Crown's reliance on Native Land Court records in its assessment of threshold interests: the central North Island Tribunal also found that 'the interests of Tuhoe, Ngati Haka Patuheuheu, and Ngati Hineuru were not properly recognised in the titles that resulted from the Native Land Court in the Kaingaroa district'.[33]

Further, the Crown table of the interests of overlapping groups in central North Island CFL lands remaining after the KEC settlement (see app III) unaccountably omits non-KEC Te Arawa groups (apart from Ngati Rangitihi) from its allocation of threshold interests at Kaingaroa.

Tribunal comment

These kinds of issues were at the core of many of the claims before us. Claimant groups objected to seeing parts or all of certain CFL blocks, located on land of enormous cultural significance for them, passing to the KEC by way of commercial redress. In particular, Te Arawa groups that chose to remain within the Tribunal's central North Island inquiry may feel that they have been excluded from a rightful share of CFL land in which they have strong customary interests. We are not satisfied that any Treaty analysis was undertaken by officials. Being 'fair' to overlapping claimants, in the context of these claims, means more than simply having enough land. It requires a stringent analysis of the historical data, a clear understanding of the nature of the overlapping claimant groups, their claims, and their interests, and a set of transparent criteria to apply in making any assessment of these interests. In our view, the Crown has not done enough during the KEC negotiations to recognise the underlying cultural significance of the CFL lands to all central North Island iwi, both Te Arawa and non-Te Arawa.

Assessment of sufficiency of remaining central North Island CFL land

Central to the Crown's case in this inquiry was the frequently stated position that, following the KEC settlement, sufficient CFL land would remain to provide for future Treaty settlements with all other central North Island iwi. It repeatedly assured overlapping claimants during the KEC negotiations, and during our inquiry, that sufficient CFL land will remain available for them.[34] Mr James said that:

At all times in formulating appropriate redress for KEC, Crown officials were aware of and accommodated the need to ensure that sufficient land remained available to satisfy settlements with overlapping claimants.

He maintained that approximately 63 per cent of the Kaingaroa, Whakarewarewa, Rotoehu, and Horohoro CFL land remained available for future settlements.[35] The basis of the 63 per cent figure appears to be the assessment shown in the table included in Paul Jackson's evidence, entitled 'Balance of central North Island Crown forestry licence land available for Treaty of Waitangi Settlements'.[36] However, when we attempted to compare Mr Jackson's table with the equivalent table prepared by OTS (reproduced in this report as appendix III), we encountered problems. The data in OTS's table uses both CFL units and ex-Maori land descriptions. Thus, the table lists CFL units in the Whakarewarewa Forest (Highlands CFL, Tokorangi CFL, and Whaka CFL), but for the Kaingaroa Forest, ex-Maori land areas replace the CFL units (Kaingaroa 1, 1A, and 2). This creates confusion about which CFL units have been allocated to which groups. The Kaingaroa allocations are further confused because the multiple overlaps there have not been factored into the hectare columns. The Crown has identified interests for five separate groups in the more than 41,000 hectares of Kaingaroa 1 area (which contains over five CFL units): Ngati Rangitihi, Ngati Haka–Patuheuheu, Ngati Tuwharetoa, Ngati Manawa, and Ngati Whare. But the hectare columns show an area of more than 41,000 hectares against *each* of these five groups. The effect of the Crown's presentation of the data is to inflate the apparent total area available to each of the five groups. The table appears to show that, for four of the groups, a greater area of land will be available to them than was allocated to the KEC.

Apart from this lack of clarity over which CFL areas might be available to which groups for use in Treaty settlements, we have two more substantive concerns with the Crown's assessment of sufficiency. First, it is not clear that all groups have been provided for in the assessment. The Crown has apparently overlooked Ngati Raukawa's interests in Horohoro and Patetere, interests described by Ngati Raukawa before the central North Island Tribunal.[37] Similarly, the Crown has failed to recognise Ngai Tuhoe interests in Kaingaroa. Furthermore, the Crown apparently overlooked smaller groups such as Tapuika, Ngati Rangiteaorere, Ngati Tamakari, Ngati Te Rangiunuora, and Ngati Whaoa from consideration in such commercial redress.

Secondly, it is not clear that the Crown undertook a full reassessment of the area of land required for future central North Island Treaty settlements, following the introduction of the deferred selection mechanism and the Kyoto forestry covenant features into the KEC settlement. As we described in chapter 2 of this report, the amount of land which the KEC was able to acquire under the quantum, and by using the accumulated rentals from the quantum land, was massively increased during the course of negotiations. The last material changes in the Crown's assessment of the sufficiency of remaining CFL lands were based on the information-gathering process which followed the signing of the agreement in principle in September 2005. It was not until late June 2006, however, that the effect of the forestry covenants on the quantity of land available to the KEC became clear. In effect, by halving the value of the CFL land in the pool, the introduction of the covenants doubled the quantity of land available to the KEC.

Tribunal comment

Although we cannot say for sure, we consider it likely that the right of deferred selection over CFL lands, and forestry covenants, will be used in future central North Island settlements. We are not convinced, however, that the Crown undertook a full reassessment of the sufficiency and appropriateness of remaining CFL lands in the light of both these major developments. It follows that, if other central North Island iwi will receive Treaty settlements in the future on

a similar basis to that received by the KEC, any development which increased the area of CFL land passing to the KEC might also be offered to other central North Island iwi. We would expect therefore that such developments might trigger a major re-evaluation by the Crown of the land required to accommodate future central North Island settlements. We acknowledge that the pool on offer was reduced after the right of deferred selection was extended to cover CFL lands in the Crown's second offer. However, we were not made aware of any equivalent alteration following the agreement over the covenants, which had an equal, or perhaps more significant, impact on the area of land passing to the KEC.

Additionally, we consider that overlapping groups should have been provided with expert advice on commercial redress when considering the impact of matters as technically demanding as the effect on their interests of the deferred selection mechanism and the forestry covenants. The Crown should ensure that professional advice is made available to overlapping claimants, at reasonable cost, in situations such as this. A recent recommendation by the Tamaki Makaurau Tribunal is pertinent: that the Crown fund the other, overlapping, groups to 'enable them to analyse the redress on offer' and 'form a view on what other available commercial redress is comparable.'[38]

The inclusion of the deferred selection mechanism and Kyoto forestry covenant features in the KEC settlement may have significantly disadvantaged overlapping claimants. These claimants were not privy to the confidential negotiations on such matters. They did not know the precise location of the deferred settlement land until it was disclosed in evidence filed by the Crown in advance of our June 2007 hearing. This ruled out meaningful consultation over how it affected their interests. Nor did overlapping claimants have any knowledge of the magnitude of the price reduction resulting from the forestry covenants. Indeed, it was not made apparent until the last day of our June 2007 hearing, when Mr Jackson confirmed that the size of the Crown appropriation required to cover the difference in the Crown's market valuation of the lands passing to the KEC and the actual sale price agreed by the parties was $85 million.[39] This information had initially been excised from Mr Jackson's brief of evidence, and was included only after Tribunal member the Honourable Doug Kidd noted at our hearing that the size of the appropriation had been a matter of public record since the publication of the Budget in May 2007. We make general comment on the Crown's filing of evidence in our earlier report of cultural redress.

The Crown must now, in the interests of fairness, offer overlapping claimants comparable treatment. We are not confident that it can assure those claimants that it will do so.

Conclusion

In our hearing, the Crown made much of statements in the Tribunal's *Ngati Awa Settlement Cross-Claims Report* which appear to approve, in principle, of the Crown's overlapping claims policy. That Tribunal stated:

> We agree with the Crown that, in a situation such as this [where the Crown is faced with overlapping claims to CFL land proposed for use in a Treaty settlement], judgement and caution is required. It is not an easy situation. It is not a situation to which tikanga really speaks, because the disposition of the Crown's forest licensed landholdings, and the relative claims of Maori groups to them, are a product of the post-colonial era. Perhaps it can be said, though, that there is a natural pragmatism inherent in tikanga which, in our view, finds expression in the essentials of the Crown's policy.
>
> There really is no solution that the Crown could come to here that would be universally applauded . . . Pragmatism and fairness are principles that have led the Crown to the solution they propose, and this Tribunal can see no Treaty basis for differing from the Crown as to the substance of its policy. While the implementation of the policy produces negative effects for some groups, we consider that those negative

> effects are, on balance, less than those that would arise from the alternatives.[40]

Similarly, this comment by the Ngati Maniapoto/Ngati Tama settlement cross-claims Tribunal is often raised in relation to overlapping claims issues:

> If the Tribunal were to take the view that the Crown ought not to deliver redress to any claimant where there are overlapping or cross-claims, the repercussions for the Crown's settlement policy would be very serious. It would thwart the desire on the part of both the Crown and Maori claimants to achieve closure in respect of their historical Treaty grievances. Indefinite delay to the conclusion of Treaty settlements all around the country is an outcome that this Tribunal seeks to avoid.[41]

We, too, recognise the difficulty faced by the Crown in seeking a compromise between the cultural and commercial interests of different groups, and the undesirability in principle of delaying the settlement of Treaty claims.

In our view, however, the situation in our inquiry in respect of the proposed KEC settlement is significantly different from the situation addressed by either of those Tribunals. Simply put, more groups claim interests in the lands proposed to be transferred to the KEC, and the CFL assets at stake are far larger and more valuable. No previous Tribunal, until the Tamaki Makaurau Tribunal earlier this year, has considered a situation involving such a complex mesh of overlapping claims as we face here.

The table of overlapping interests reproduced in appendix III, and maps showing the threshold interests of overlapping groups in appendix IV, well illustrate the number of different groups that have recognised interests in the CFL blocks which will remain after the KEC settlement. It should also be noted, because many claimants argued that their interests in certain of these remaining CFL blocks had not been recognised, that the real situation is more complex than even the Crown's assessment suggests.

The Crown failed to adapt its policy to the unique situation of overlapping cultural and commercial interests created by the KEC settlement. We consider that inflexible application of its existing policy was inappropriate and inadequate in this case. In our view, the Crown should have adapted the application of its policy to take account of the unique circumstances in the central North Island: in particular, the area and value of the CFL lands and the large number of major overlapping claimant groups in the region. We note the Tamaki Makaurau Tribunal's recent comment that both cultural and commercial redress should 'take into account and reflect the multi-layered nature of these multiple interests'.[42] Because the Crown did not fully apprise itself of these interests, and take them into account, we have grave concerns that both the commercial and cultural interests of overlapping claimant groups will be prejudiced by the KEC settlement.

Making matters worse is the fact that, because the Crown's consultation processes have not been transparent and robust, they have left overlapping claimant groups suspicious and fearful. The Crown's attitude has been 'trust us, we know what we're doing', but they have left these groups with no confidence that this is the case.

Summary

The key points in this chapter were:

- The Crown's consultation with overlapping claimants in respect of commercial redress issues was the same as its consultation over cultural redress issues. In our first settlement process report, *The Report on the Impact of the Crown's Settlement Policy on Te Arawa Waka*, we found that this process was flawed and inadequate, and therefore that the Crown had breached its Treaty duties to protect the interests of overlapping claimants.
- The same finding applies to the Crown's consultation over commercial redress. The Crown failed to fully and robustly engage with overlapping claimant groups. Its

consultation consisted almost entirely of correspondence by letter. Overlapping claimant groups were not provided with sufficient information, or resources, or time, to make informed decisions about how the KEC settlement would affect their interests. Some groups were not communicated with at all.

- One result of this failure by the Crown was that its information on the threshold interests of overlapping claimants in central North Island CFL land may be inaccurate. Certainly, the Crown's assessment is disputed by several claimants.
- Another result is that the Crown's ability to provide appropriate CFL land to remaining central North Island groups is uncertain. Further, it is not clear that the Crown fully reassessed its ability to provide sufficient CFL land to all non-KEC groups in the light of two major developments during the KEC negotiations which increase the area of CFL land in that settlement: the extension of the right of deferred selection to CFL lands, and the introduction of forestry covenants over those lands.
- While earlier Tribunals have found that the Crown's overlapping claims and threshold interest policies are consistent with Treaty principles, we consider that their findings were made in regard to situations which were significantly different from the situation we are considering here. In our view, the Crown should have adapted the application of its policy to take account of the unique circumstances in the central North Island: in particular, the area and value of the CFL lands and the large number of major overlapping claimant groups in the region.

Notes

1. OTS, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e Pa Ana ki te Tiriti o Waitangi me nga Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: OTS [2002]), pp 87–88
2. Ibid, p 90
3. Ibid, p 98
4. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), p 18
5. OTS, *Ka Tika a Muri, Ka Tika a Mua: He Tohutohu Whakamarama i nga Whakataunga Kereme e Pa Ana ki te Tiriti o Waitangi me nga Whakaritenga ki te Karauna – Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, 2nd ed (Wellington: OTS [2002]), p 58
6. Ibid, pp 59–60
7. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2002); Waitangi Tribunal, *The Ngati Tuwharetoa ki Kawerau Settlement Cross-Claim Report* (Wellington: Legislation Direct, 2003)
8. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), p 14
9. Ibid, pp 14–15
10. The two meetings are those with Ngati Rangitihi and Ngati Whakaue in September 2006: doc B32.
11. Counsel for Tauhara hapu to OTS, 18 July 2005 (doc A32(a)(91)); counsel for Tauhara hapu to OTS, 12 October 2005 (doc A32(a)(95)); counsel for Ngati Rangiteaorere and Ngato Wahiao to OTS, 14 November 2005 (doc A32(a)(97)); OTS to counsel for Tauhara hapu, 18 November 2005 (A32(a)(98)); counsel for Ngati Rangiwewehi, Tauhara hapu, Ngati Rangiteaorere, and Ngati Wahiao to OTS, 9 December 2005 (doc A32(a)(99)); OTS to counsel for Ngati Rangiteaorere, 21 December 2005 (doc A32(a)(102)); OTS to counsel for Ngati Tutemohuta, 29 June 2005 (doc A32(a)(106)); counsel for Ngati Tutemohuta to OTS, 28 July 2005 (doc A32(a)(107)); OTS to counsel for Ngati Tutemohuta, 2 September 2005 (doc A32(a)(108)), 9 September 2005 (doc A32(a)(109)), 27 October 2005 (doc A32(a)(110))
12. Wai 1200 ROI, docs D9–D12 (for Ngati Raukawa); Wai 1200 ROI, docs C16–C22 (for Ngai Tuhoe)
13. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims (Stage 1)*, 4 vols (Wellington: Waitangi Tribunal, 2007), vol 1
14. Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 109
15. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), p 27
16. Paranapa Otimi, oral evidence, 25 June 2007 (recording 4.4.3)
17. Chris McKenzie, brief of evidence, 13 June 2007 (doc B16), pp 6, 16–18
18. Presiding officer, memorandum concerning reconvening of Tribunal, 24 May 2007 (paper 2.7.3)
19. OTS, evidence concerning Kaingaroa forest blocks, undated (doc B4)
20. Ibid (doc B4(5), Rerewhakaitu)

21. Ibid (doc B4(9), Kaingaroa 1)
22. Ibid (doc B4(10), Kaingaroa 2)
23. Counsel for Ngati Raukawa, oral submissions, 27 June 2007 (recording 4.4.3); counsel for Ngati Makino, oral submissions, 25 June 2007 (recording 4.4.3)
24. Counsel for Ngati Whakaue, closing submissions, 4 July 2007 (paper 3.3.54), p 2
25. Counsel for Ngati Haka–Patuheuheu, closing submissions, 26 June 2007 (paper 3.3.46), p 3
26. Counsel for Ngati Tuwharetoa, closing submissions, 5 July 2007 (paper 3.3.55), p 7
27. Counsel for Ngati Raukawa, closing submissions, 4 July 2007 (paper 3.3.57), p 4
28. OTS, mapbook showing threshold interests in remaining Crown forest licensed land, undated (doc A76), pp 5–18
29. Counsel for Ngati Tuwharetoa, closing submissions, 5 July 2007 (paper 3.3.55), p 5
30. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), p 17
31. Ibid, p 25
32. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 15 August 2005 (doc B3(8)), para 25
33. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims (Stage 1)*, 4 vols (Wellington: Waitangi Tribunal, 2007), vol 1, p 125
34. Robyn Fisher, brief of evidence, 22 December 2006 (doc A32), pp 20–21, 34, 41, 44, 48, 56, 60
35. Paul James, brief of evidence, 18 April 2007 (doc B21(a)), pp 21, 27
36. Paul Jackson, brief of evidence, 27 June 2007 (doc B22(b)), sch 1
37. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims (Stage 1)*, 4 vols (Wellington: Waitangi Tribunal, 2007), vol 1, pp 96–98
38. Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 108
39. Paul Jackson, brief of evidence, 27 June 2007 (doc B22(b)), p 12
40. Waitangi Tribunal, *The Ngati Awa Settlement Cross-Claims Report*, p 76
41. Waitangi Tribunal, *The Ngati Maniapoto/Ngati Tama Settlement Cross-Claims Report* (Wellington: Legislation Direct, 2001), p 20
42. Waitangi Tribunal, *The Tamaki Makaurau Settlement Process Report* (Wellington: Legislation Direct, 2007), p 105

CHAPTER 5

FINDINGS AND RECOMMENDATIONS

Summary of Findings

In chapters 3 and 4, we found that the Crown has breached the Treaty in the following ways:

- A provision was included in the KEC deed of settlement to deem the Crown a confirmed beneficiary of CFRT rental moneys. We have seen no evidence that the Crown sought the consent of Maori generally, or the Maori parties to the 1989 agreement specifically, before including this provision in the deed.
- The Crown failed to engage fully and robustly with all central North Island groups with interests in the lands affected by the KEC deal. The Crown failed to meet directly with these groups, and failed to communicate with them early in the development of the offer to the KEC. Some groups were not communicated with at all, while those groups that were were simply sent pro-forma letters which failed to convey all the information necessary for them to make fully informed decisions.

As a result, the Crown's determination of the threshold customary interests of central North Island groups outside the KEC appeared to be unilateral. We are not satisfied that the Crown had all the information it required to make these determinations in an accurate and fair manner. The Crown's treatment of CFL lands as 'substitutable' according to their commercial value, sharply distinguished from their cultural value, is unsatisfactory, and may have resulted in ownership of sites of great cultural importance to overlapping groups passing to the KEC.

Further, the Crown's limited contact with non-KEC central North Island groups leads us to doubt the robustness of its analysis of the sufficiency of remaining CFL lands for future settlements with other central North Island iwi. We are not confident that the Crown will be able to offer commercial redress to remaining central North Island iwi on a similar basis to that offered to the KEC. We note, for example, that Ngai Tuhoe has not been factored into the sufficiency equation in relation to the Kaingaroa forests, but that the central North Island Tribunal has recently noted that they have customary interests in that area which would be sufficient at least to constitute a threshold interest. It is also unclear to us how the Crown amended its offer in the light of two major developments during negotiations (the extension of the right of deferred selection to cover

CFL lands, and the introduction of a forestry covenant over those lands), the combined effect of which increased the KEC's purchasing power from approximately 20 per cent of the hectare pool of CFL land initially offered, to 100 per cent (albeit of a reduced pool) by June 2006.

It should be remembered that these Treaty breaches come on top of our findings in the *Report on the Impact of the Crown's Settlement Policy on Te Arawa Waka* that the Crown breached the Treaty by:

- failing to act as an honest broker during the KEC negotiation process; and
- failing to protect the customary interests of overlapping groups in the cultural redress sites offered to the KEC.

In particular, the Crown's processes for consulting with overlapping groups during the KEC negotiations were inadequate and failed to protect the interests of overlapping groups in the cultural redress sites offered to the KEC.

We consider that there is a high risk that significant prejudice will accrue to central North Island iwi outside the KEC if the settlement proceeds in its current form. The Crown has failed to fulfil its Treaty duties to actively protect the interests of all Maori, and to treat Maori groups equitably.

Conclusions

The central North Island CFL lands are a unique asset in terms of their size (approximately 190,000 hectares in total), their commercial value, their cultural significance, and the number of large iwi whose interests overlap the land. Among those iwi are the 11 collective groups represented by the KEC: Ngati Ngararanui, Ngati Kearoa/Ngati Tuara, Ngati Tura/Ngati Te Ngakau, Ngati Te Roro o Te Rangi, Ngati Tuteniu, Ngati Uenukukopako, Tuhourangi/Ngati Wahiao, Ngati Tahu/Ngati Whaoa, Ngati Pikiao, Ngati Rongomai, and Ngati Tarawhai. By its own reckoning, the Crown also recognises the interests of the following overlapping groups in these lands: Ngati Makino, Waitaha, Ngati Whakaue, Ngati Rangiwewehi, Ngati Rangitihi, Ngai Tuhoe, Ngati Haka–Patuheuheu, Ngati Tuwharetoa, Ngati Manawa, Ngati Whare, Ngati Hineuru, Ngati Kahungunu, Tamawhiti/Hauiti, and Ngati Rangi. Lastly, there are those other groups that appeared at our June 2007 hearing, whose claim to interests in these lands has not yet been recognised, perhaps most notably Ngati Raukawa. While all of these iwi and hapu have dominant customary interests in particular areas, these interests are rarely if ever exclusive interests.

Te Arawa, along with these other central North Island groups, have waited since 1989 for the transfer of CFL in Treaty settlements. The proposed KEC settlement is not the first settlement to transfer central North Island CFL lands to a claimant group, but the area involved (approximately 51,000 hectares) is far greater than that awarded to Ngati Awa (9428 ha) or Tuwharetoa ki Kawerau (844 ha). The allocation and transfer of the central North Island CFL lands is the largest and most significant process in Treaty settlements since the allocation of fisheries quota under the Sealord deal. For that reason, it is absolutely critical for the durability of all settlements with central North Island iwi that processes which provide for the transfer of these major assets are fair, robust, and consistent with the principles of the Treaty.

The recent history of the Te Arawa settlement has not been without its troubles. In the 1990s, attempts were made to negotiate a collective settlement with all central North Island iwi. There was wide support for this idea, although many central North Island groups were not ready in terms of mandate development and research preparation to enter into negotiations with the Crown at that time. As late as 2002, such an approach was still contemplated. However, for reasons which are beyond the scope of this report to describe, these collective approaches have not succeeded.

Since the collapse of these collective initiatives, there

have been other developments. Groups such as Ngati Tuwharetoa and Ngai Tuhoe have sought to have their claims heard before the Waitangi Tribunal. Others, such as the Te Arawa groups represented by the KEC, Ngati Manawa, and Ngati Whare, have sought to negotiate a Treaty settlement directly with the Crown. The proportion of the Te Arawa population represented by the KEC has fallen from most of Te Arawa in the early stages of the mandating process to approximately half by the time the deed of settlement was signed. Much of the background to this is covered in the Tribunal's two Te Arawa mandate reports. As the size of the KEC mandate was reduced, the number of central North Island groups with overlapping interests outside the KEC increased. The Crown and the KEC have been left negotiating a settlement involving CFL land and cultural sites over which many other groups have interests. By the Crown's own assessment, not a single hectare of the 51,000 hectares to be transferred in the KEC settlement can be claimed exclusively by groups within the KEC. Every hectare is overlapped. At the time of the second Te Arawa mandate report, it was clear to that Tribunal that this situation would eventuate, hence the concern expressed by that Tribunal over the Crown's proposal for the management of overlapping claimants' issues:

> we do not believe that to proceed with negotiations with just over half of Te Arawa, and to leave the other groups waiting (for an unspecified time) for an opportunity to negotiate and settle their claims, would be consistent with Treaty principles. This would not in effect be a comprehensive settlement of Te Arawa's historical claims, no matter how narrowly the terms of negotiation define 'Te Arawa'. Nor would it properly safeguard the overlapping core claims of other Te Arawa groups. We believe that Treaty breaches and prejudice will inevitably arise.[1]

We have heard in great detail about the development of Crown policy for managing overlapping claims, and the processes by which that policy was implemented. We are fully au fait with the intricacies of the commercial redress terms in the KEC deed of settlement. We have found in this report that important aspects of these processes, and of the terms of the deed, are inconsistent with the Treaty. We made similar findings in respect of cultural redress in our first settlement report.

The hearing of the present claims and the preparation of this second report have been done as quickly as possible in order to make recommendations before the introduction of the settlement legislation removes our jurisdiction. The pressure of time has not prevented us, however, from satisfying ourselves that the fundamental flaws in the Crown's processes will leave non-KEC central North Island groups exposed to great risk that their interests will be prejudiced through this settlement.

All the claimants in this inquiry sought, by way of relief, a recommendation that the deferred selection process (including the deeming of the Crown to be a confirmed beneficiary of CFRT funds) be removed from the settlement, or that the entire KEC settlement be put on hold pending the proper resolution of overlapping claims issues, or both.

Counsel for Te Pumautanga made brief but effective submissions at our June hearing. He made it plain that Te Pumautanga wanted the settlement to proceed. He noted that affiliate groups had already invested significant time and energy in preparing to receive settlement assets and developing governance structures. It must be remembered that the KEC negotiated this settlement in good faith, establishing a mandate, pursuing its interests through negotiations, and generally arranging its affairs in accordance with the Crown policies of the time. Simply put, the KEC and Te Pumautanga have done nothing wrong.

In considering what recommendation to make, we have two options before us. On the one hand, we could recommend that the KEC settlement proceed despite its flaws, perhaps with some modification, and hope that, despite the Crown's failure to engage robustly with overlapping groups, their interests will not be prejudiced as a result. On the other, we could recommend to the Treaty Negotiations

Minister that the flaws in the process are too great to allow the settlement to proceed, and that the settlement Bill should not be introduced into the House.

Both options create disadvantage for one group or another. The first option creates the potential for the interests of all central North Island iwi outside the KEC and Te Pumautanga to be prejudiced. Important cultural and commercial assets will pass out of their reach permanently, by a process from which they feel excluded. Their ability to claim these assets in the future will be removed. The second option creates a more certain disadvantage, for a smaller group. The affiliate hapu and iwi of Te Pumautanga will not receive the settlement in its current form, a settlement for which they have negotiated for almost three years. Their receipt of a settlement in any form will be delayed by months.

We see Treaty settlements as critical to the future of our country. For this reason, we consider that any recommendation that a proposed settlement not proceed should be made only as an absolute last resort. However, on balance, we cannot endorse the KEC settlement in this form. We have not made this decision lightly, but we have grave concerns about the impact of this settlement on overlapping iwi, and on the durability of future central North Island settlements. We find the arguments of the claimants in this inquiry – that their interests have not been protected during the KEC negotiations, and that they will be irreversibly prejudiced if the settlement proceeds – persuasive. We note that, according to the Crown's figures, the total combined population of Te Arawa (including groups within and outside the KEC), Ngati Tuwharetoa, Ngai Tuhoe, Ngati Manawa, and Ngati Whare is 100,000.[2] There may be a delay for the approximately 24,000 iwi and hapu members represented by Te Pumautanga, but the competing equities here warrant, at the very least, a reassessment of the terms of the settlement. On balance, we think that to defer the settlement by a few months, while all outstanding issues are addressed, is the appropriate course of action.

Future settlements cannot proceed like this. In particular, the Crown must seek to redress the imbalance in information and resources between the negotiating parties. It cannot continue to 'pick favourites' and make decisions on tribal interests in isolation, based on inadequate information. At present, overlapping claimants seem to be treated as 'risk groups', to be kept at arm's length. To alienate groups with whom it will inevitably have to deal in the future is not a sustainable strategy for the Crown: it cannot conduct substantive consultation with these groups on the basis of a letter or two.

Recommendation

We cannot endorse the KEC settlement in its current form. However, as we continue to stress, we believe that the affiliate iwi and hapu represented by Te Pumautanga deserve a settlement. We recommend that the proposed settlement be varied and delayed pending the outcome of a forum of central North Island iwi convened by Te Puni Kokiri. All the parties to our inquiry (including the New Zealand Maori Council and the Federation of Maori Authorities), plus the KEC and CFRT, should participate in this hui. The purpose of this forum would be to reach agreement on:

- principles to guide decision-making over the allocation of central North Island CFL land;
- the overall proportionality to apply to the allocation of assets between different iwi; and
- the priority given to particular iwi in respect of CFL assets in each geographical area.

We expand on this proposal below.

A Way Forward

Previous attempts to pursue comprehensive multi-iwi settlements over central North Island forest lands have not succeeded. However, all parties seem to agree that this is a good idea in principle. Annette Sykes's questioning

of various claimant groups at our June hearing, regarding their attitude to collective settlement and collective post-settlement activity, showed that all claimants in this inquiry are committed to the idea at some level. It occurs to us that, at this juncture, the time is ripe to attempt such an approach again. The hearing stages of the Waitangi Tribunal's central North Island and Te Urewera inquiries are now complete, and the evidence filed in those inquiries is on the public record. The final volumes of the central North Island report have now been released. The Te Urewera Tribunal intends to issue its report in 2008. Ngati Manawa, Ngati Whare, and half of Te Arawa are in negotiations with the Crown. Ngai Tuhoe and Ngati Tuwharetoa have made progress towards mandating a body to negotiate their claims. Without doubt, a greater number of central North Island iwi are further down the track towards readiness for negotiations than was the case in the mid and late 1990s. Historical evidence on the Treaty claims of most of these groups has been prepared, presented, and examined in the Waitangi Tribunal process.

What we propose is that a forum of all iwi with interests in central North Island CFL lands be constituted. The aim of the forum would be to negotiate between members, according to tikanga, high-level guidelines for the allocation of CFL lands. Neither the Crown nor CFRT nor the Waitangi Tribunal need be involved in it, other than perhaps to assist in resourcing. The New Zealand Maori Council and the Federation of Maori Authorities should be present, to represent the general interests of Maori nationally, and in recognition of their status as the Maori parties to the very agreement which ensured the retention of CFL lands for Treaty settlement purposes. They would undoubtedly have ideas for what to do with any CFL lands left over after central North Island settlements have been completed. The forum may take a different form, but the critical thing is that these decisions are made by the central North Island iwi themselves (with the council and the federation), on their own terms, answerable to one another.

The first job of such a forum would be to agree on the guiding principles by which decisions on allocation would be made: for example, the extent to which customary interests should determine allocation, and the extent to which the CFL lands should be treated as purely commercial assets. Following agreement on these principles, forum members would then decide on a framework for allocation. Such a framework might have two dimensions: first, the overall proportionality of assets which would transfer to each group; and secondly, the priority given to the various groups in any given geographical area, based on the strength of their customary interests. Issues of mana whenua may have greater bearing on the priority given to groups in a specific area.

There is an obvious precedent for such an approach: the Maori Fisheries Commission. The task faced by a forum established on the lines we propose here would in fact be smaller than the one faced by that commission. First, the number of groups involved is smaller. Secondly, we do not propose that a central North Island iwi forum would receive the settlement assets and allocate them to its members. Rather, its role would be limited to setting out a clear and agreed framework within which the represented groups and the Crown would negotiate their settlements.

This approach would also benefit the Crown, insofar as it would no longer be in the unenviable position of determining the allocation of settlement assets between these groups, based on its understanding of their customary interests and of the potential size and shape of future settlements. Equally, Maori would have an assurance that the allocation of CFL assets had been undertaken fairly, transparently, and according to tikanga. Iwi may consider, post-settlement, managing their forest assets collectively, to maximise combined commercial returns and to create opportunities for flexible arrangements in respect of cultural practices and access. Most importantly, we consider that truly durable Treaty settlements would grow out of such a process. We are not confident that this will be the case if the KEC deed of settlement proceeds in its current form.

Notes

1. Waitangi Tribunal, *The Te Arawa Mandate Report: Te Wahanga Tuarua* (Wellington: Legislation Direct, 2005), p 112
2. OTS to Minister in Charge of Treaty of Waitangi Negotiations, 2 September 2004 (doc B3(3)), p 2

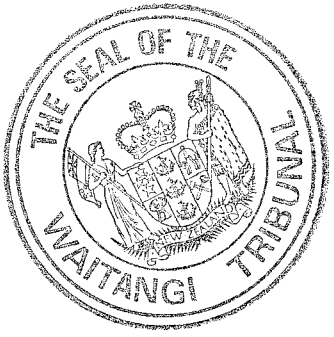
Dated at Wellington this 30th day of July 2007

Judge Caren Leslie Fox, presiding officer

Peter Philip Brown, member

Honourable Douglas Lorimer Kidd DCNZM, member

Tuahine Northover MNZM, member



APPENDIX I

DEVELOPMENT OF CROWN OFFER OF CFL LAND TO THE KEC

The table on the following page shows the development of the Crown offer of CFL land to the KEC.

CFL block name (forest name)	**First Crown offer 25 July 2005 (TPA c62,000 ha)**	**Second Crown offer 17 August 2005 (TPA < 51,000 ha)**	**Agreement in principle 5 September 2005 (TPA c51,000 ha)**	**Deed of settlement 30 September 2006 (Total area c51,000 ha)**
Waimaroke CFL (Kaingaroa Forest)	Lots 1, 2 DPS 47428 Lots 1, 3 DPS 19572	Lots 1, 2 DPS 47428 Lots 1, 3 DPS 19572	Lots 1, 2 DPS 47428 Lots 1, 3 DPS 19572	Lots 1, 2 DPS 47428 Lots 1, 3 DPS 19572
Waimangu CFL (Whakarewarewa Forest)	Lot 1 DPS 57559	Lot 1 DPS 57559	Lot 1 DPS 57559	Lot 1 DPS 57559
Pukuriri CFL (Kaingaroa Forest)	Lots 1, 3, 4, 6 DPS 73202	*Part Lot 1, Part Lot 6 DPS 73202*	*Part Lot 1, Part Lot 6 DPS 73202*	*Part Lot 1, Part Lot 6 DPS 73202*
Reporoa CFL (Kaingaroa Forest)	Lot 1 DPS 45063 Lot 1 DPS 55285 Lot 1 DPS 55286 Lot 1 DPS 64818 Lots 1, 2 DPS 55284 Lot 1 DPS 55287 Lot 1 DPS 27452 Lot 1 DPS 55758	*Lot 1 DPS 45063* *Lot 1 DPS 55285* *Lot 1 DPS 55286* *Lot 1 DPS 64818* *Lots 1, 2 DPS 55284* *Lot 1 DPS 55287* *Lot 1 DPS 27452*	*Lot 1 DPS 45063* *Lot 1 DPS 55285* *Lot 1 DPS 55286* *Lot 1 DPS 64818* *Lots 1, 2 DPS 55284* *Lot 1 DPS 55287* *Lot 1 DPS 27452*	*Lot 1 DPS 45063* *Lot 1 DPS 55285* *Lot 1 DPS 55286* *Lot 1 DPS 64818* *Lots 1, 2 DPS 55284* *Lot 1 DPS 55287* *Lot 1 DPS 27452*
Wairapukao CFL (Kaingaroa Forest)	*Part Lot 1 DPS 47427*	*Part Lot 1 DPS 47427*	*Part Lot 1 DPS 47427*	*Part Lot 1 DPS 47427*
Highlands CFL (Whakarewarewa Forest)	*Part Lot 1, Lot 2 DPS 57556*	*Part Lot 1, Lot 2 DPS 57556*	*Part Lot 1, Lot 2 DPS 57556*	*Part Lot 1, Lot 2 DPS 57556*
Horohoro CFL	*Lots 1–6 DPS 62530*	*Lots 1–6 DPS 62530*	*Lots 1–6 DPS 62530*	*Lots 1–6 DPS 62530*
West CFL (Rotoehu Forest)	*Lot 1 DPS 45081* *Lot 1 DPS 53628* *Part Lot 1 DPS 57554* *Lot 1 DPS 57547*	*Lot 1 DPS 45081* *Lot 1 DPS 53628* *Part Lot 1 DPS 57554* *Lot 1 DPS 57547*	*Lot 1 DPS 45081* *Lot 1 DPS 53628* *Part Lot 1 DPS 57554* *Lot 1 DPS 57547* *Lots 1, 2, Part Lot 3 DPS 53632* *Lot 2 DPS 68401*	*Lot 1 DPS 45081* *Lot 1 DPS 53628* *Part Lot 1 DPS 57554* *Lot 1 DPS 57547* *Lots 1, 2, Part Lot 3 DPS 53632* *Lot 2 DPS 68401*
Headquarters CFL (Kaingaroa Forest)	*Part Lot 2 DPS 45072*			

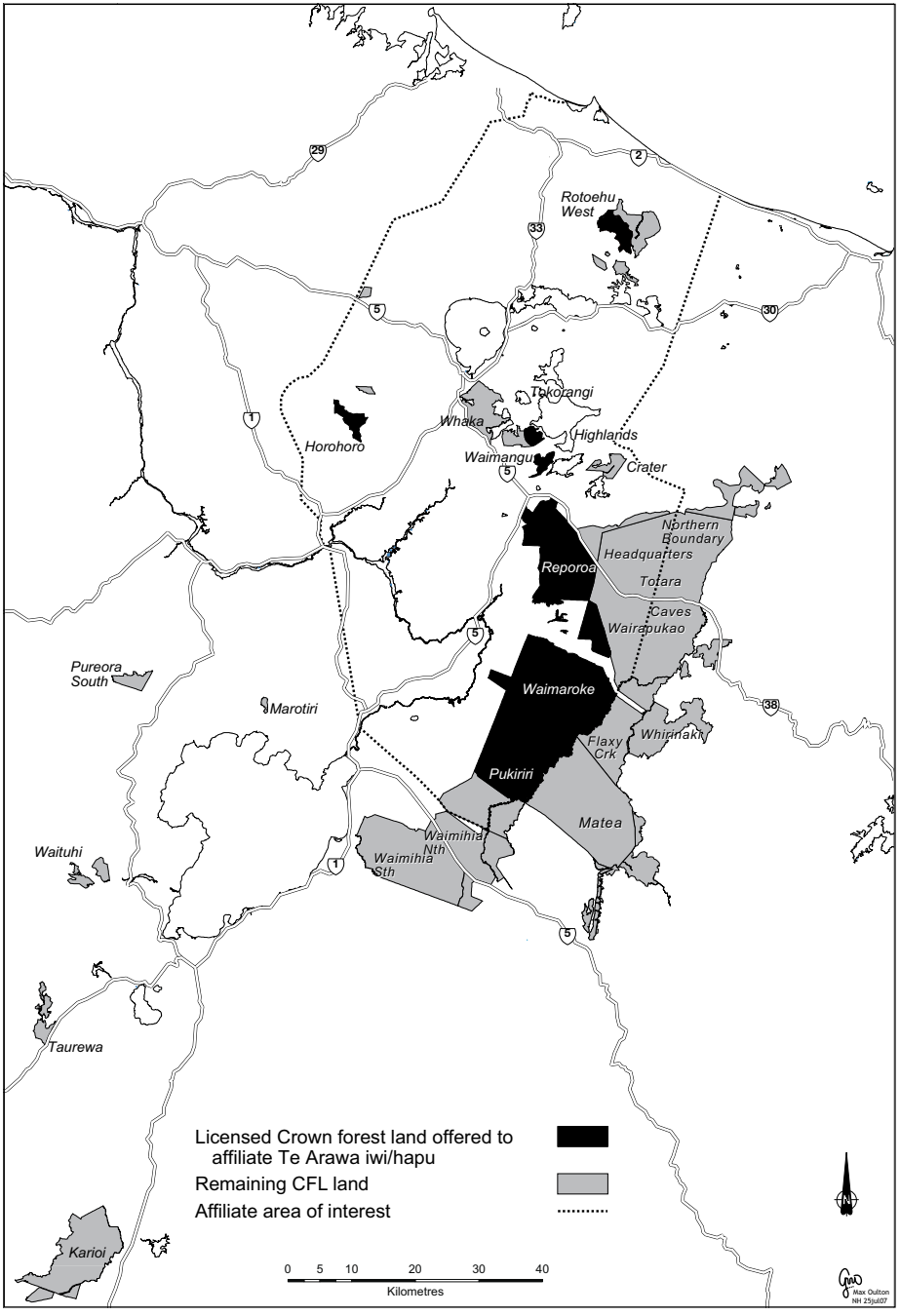
Note: Plain text denotes entire CFL block; italics denotes part CFL block

TPA – total pool area

APPENDIX II

LOCATION OF CFL LANDS IN KEC DEED OF SETTLEMENT

The map on the following page shows the location of CFL lands in the KEC deed of settlement.



Location of CFL lands in the KEC deed of settlement

APPENDIX III

THE CROWN'S ASSESSMENT OF OVERLAPPING INTERESTS

The table on the following pages shows the Crown's assessment of the threshold interests of overlapping CNI claimants in the remaining CFL lands. It is based on material from pages 28 and 29 of Paul James's brief of evidence of 18 April 2007 (doc B21(a)).

CFL forest name	Area (ha)	Groups with non-overlapped interests	Groups with overlapped interests
Crater Forest/Rerewhakaitu	1081	Ngati Rangitihi	
Erua Forest	184	Ngati Tuwharetoa	
Gwavas	8426		Ngati Kahungunu
Heruiwi 4	2368		Ngai Tuhoe Ngati Manawa Ngati Whare Ngati Hineuru Ngati Kahungunu
Heruiwi	8484		Ngati Manawa Ngati Whare
Kaingaroa 1	41,238		Ngati Rangitihi Ngati Haka Pataheuheu Ngati Tuwharetoa Ngati Manawa Ngati Whare
Kaingaroa Forest/Rerewhakaitu	1742	Ngati Rangitihi	
Karioi	11,018		Ngati Tuwharetoa Tamawhiti/Hauiti Ngati Rangi
Marotiri Forest	166	Ngati Tuwharetoa	
Matahina A	2415	Ngati Haka Pataheuheu	
Matahina C	499	Ngati Haka Pataheuheu	
Part Esk	7558		Ngati Hineuru Ngati Kahungunu
Part Kaweka	7522		Ngati Hineuru Ngati Kahungunu
Part Patunamu Forest	3236		Ngai Tuhoe Ngati Kahungunu
Part Remainder Horohoro	205		Ngati Whakaue Ngati Rangiwewehi
Part Remainder Rotoehu	3597		Ngati Makino–Waitaha
Pohokura	2896		Ngati Manawa Ngati Hineuru

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Pukahunui	18,750	Ngati Manawa	
Pureora South Forest	1022	Ngati Tuwharetoa	
Remainder Kaingaroa 1A	50		Ngati Rangitihi Ngati Manawa Ngati Whare
Remainder Kaingaroa 2	7340		Ngati Rangitihi Ngati Tuwharetoa Ngati Manawa
Rotomahana Parekarangi	69	Ngati Rangitihi	
Runanga 1	1308		Ngati Tuwharetoa Ngati Hineuru Ngati Kahungunu
Runanga 2	4125	Ngati Tuwharetoa	
Tauhara Middle 3	398	Ngati Tuwharetoa	
Taurewa Forest	1322	Ngati Tuwharetoa	
Te Whaiti 1	739		Ngai Tuhoe Ngati Manawa Ngati Whare
Te Whaiti 2	739		Ngai Tuhoe Ngati Manawa Ngati Whare
Waimihia North Forest	7161	Ngati Tuwharetoa	
Waimihia South Forest	16,030	Ngati Tuwharetoa	
Waiohau B9	784		Ngai Tuhoe
Waituhi Forest	1179	Ngati Tuwharetoa	
Whakarewarewa/Highlands; Whakarewarewa/Tokorangi; Whakarewarewa/Whakarewarewa block	4577	Ngati Whakaue	
Whirinaki	3643		Ngai Tuhoe Ngati Manawa Ngati Whare
Total CFL area remaining	17,1871		

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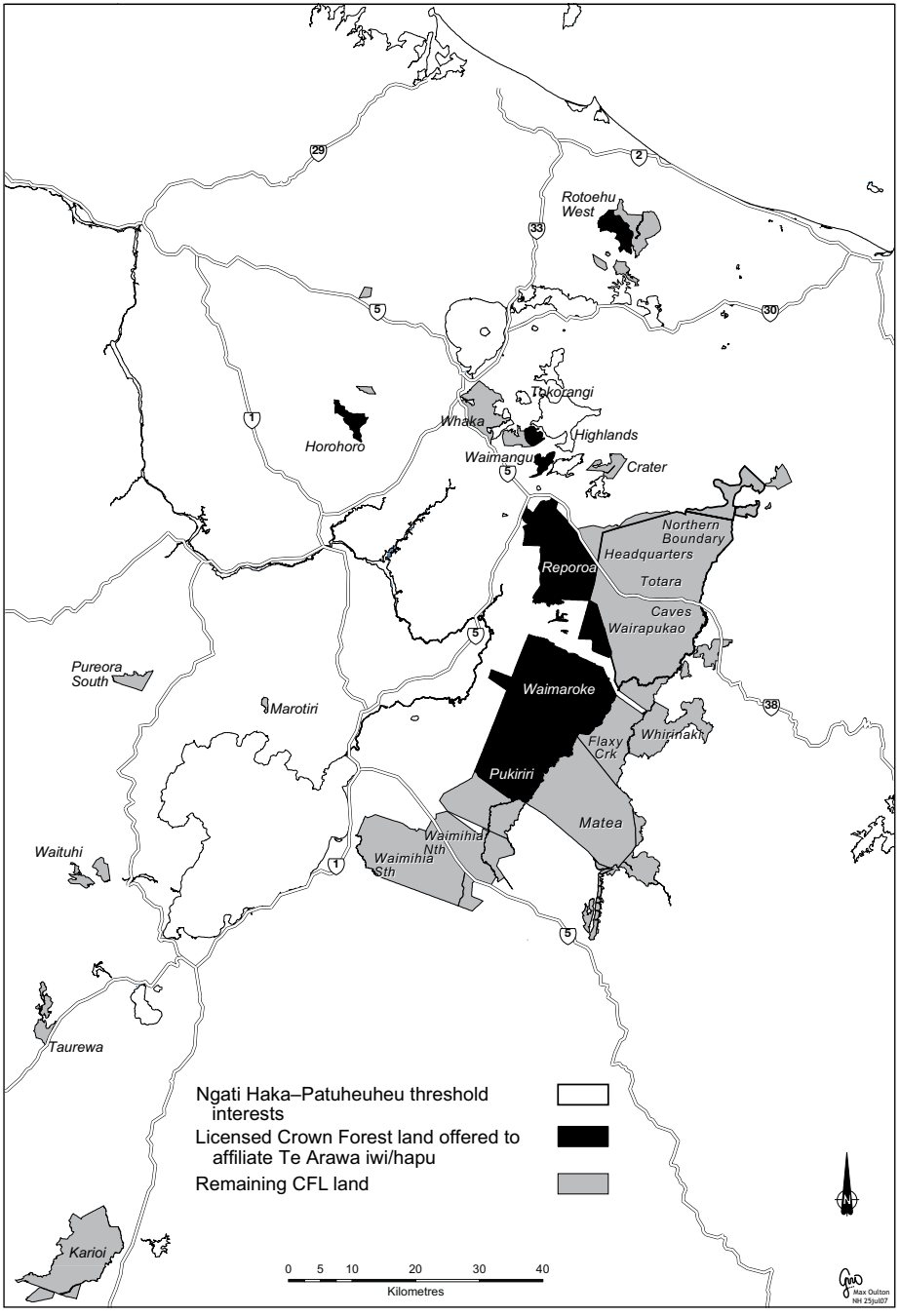
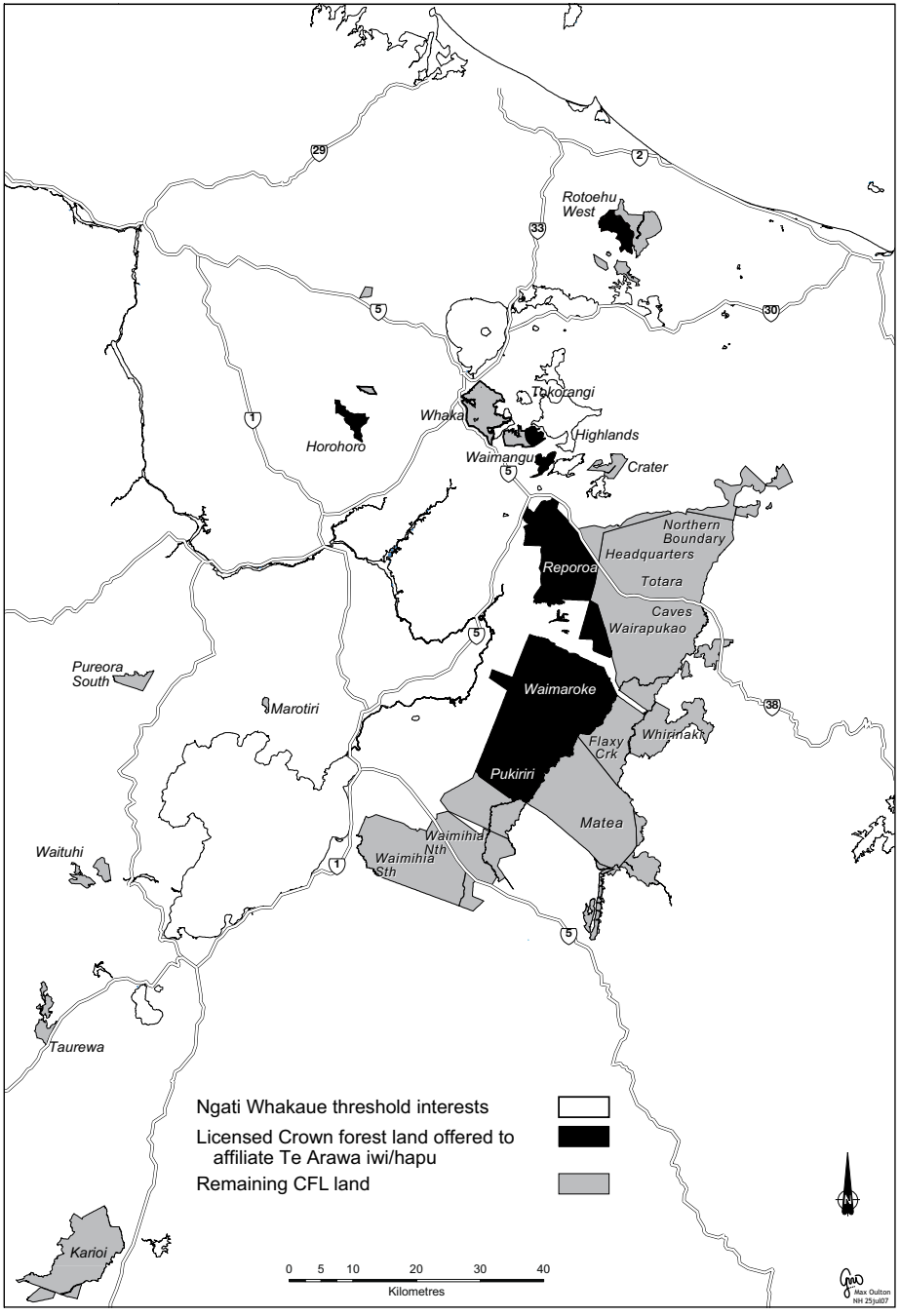
APPENDIX IV

THE CROWN'S ASSESSMENT OF THRESHOLD INTERESTS

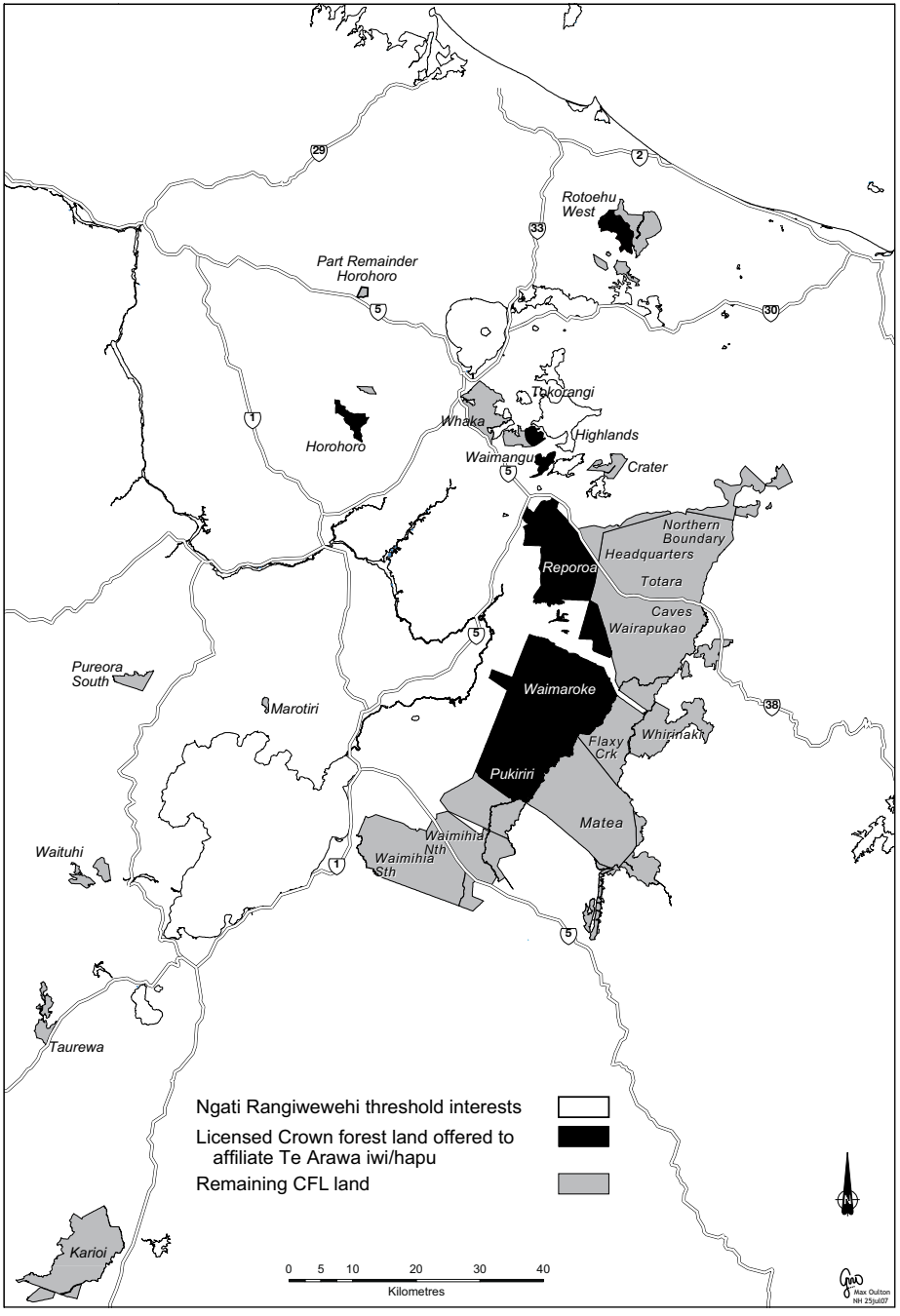
The eight maps that follow show the Crown's assessment of the threshold interests of Ngati Haka–Patuheuheu, Ngati Whakaue, Ngati Rangiwewehi, Ngati Makino–Waitaha, Ngati Manawa, Ngati Tuwharetoa, Ngai Tuhoe, and Ngati Rangitihi in the remaining central North Island Crown forestry licence land.



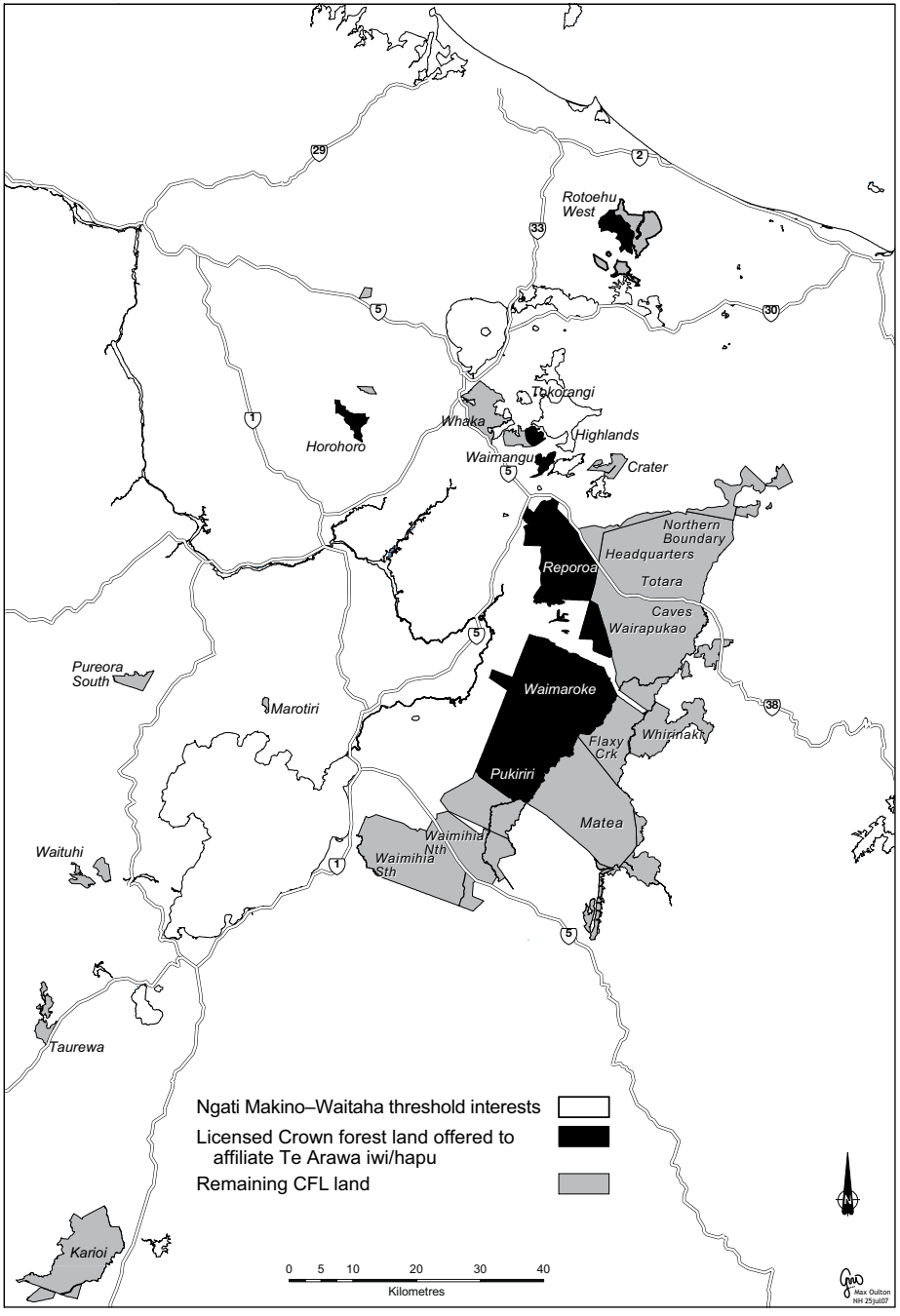
Crown assessment of threshold interests of Ngati Haka–Patuheuheu in remaining central North Island Crown forestry licence land



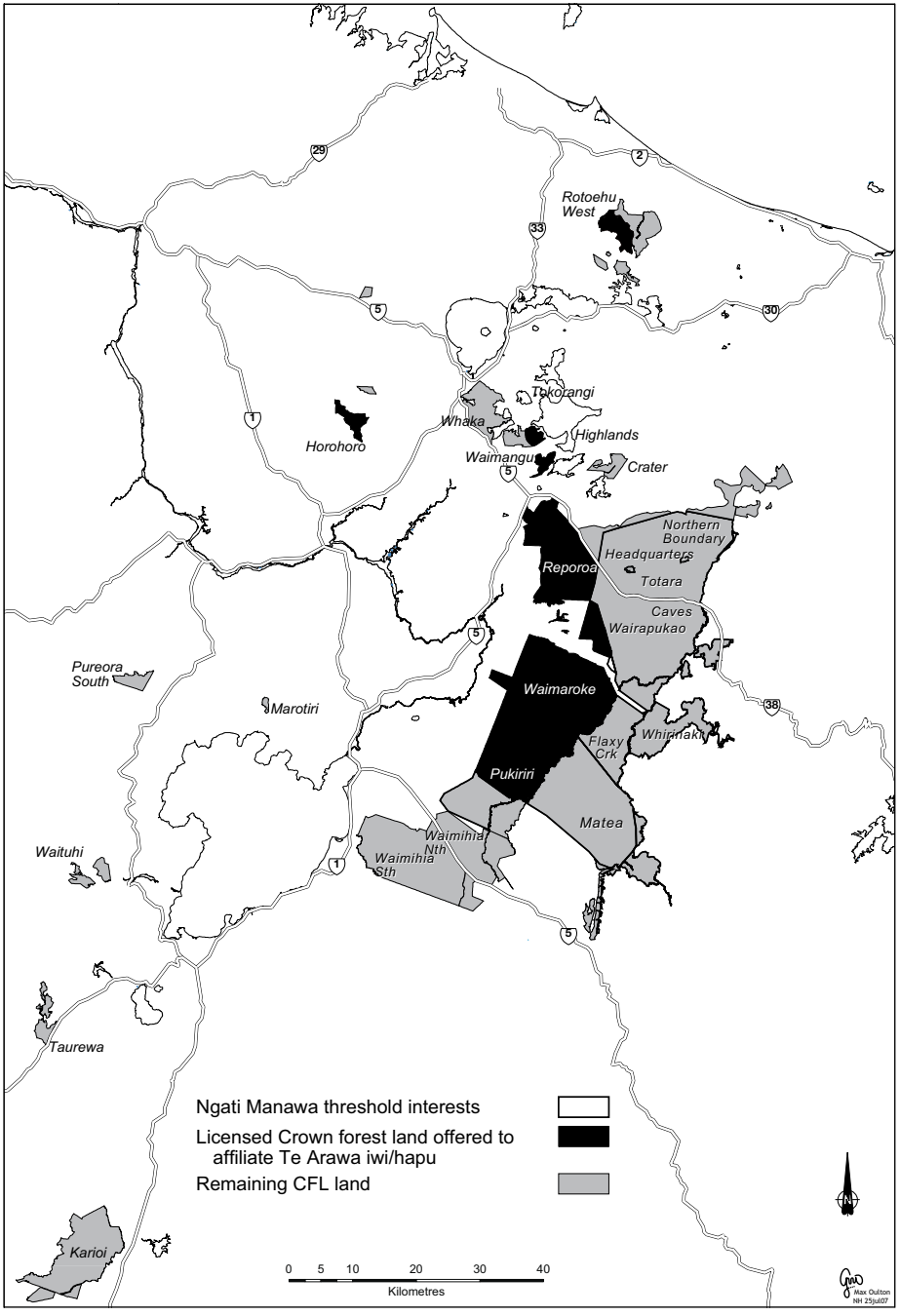
Crown assessment of threshold interests of Ngati Whakaue in remaining central North Island Crown forestry licence land



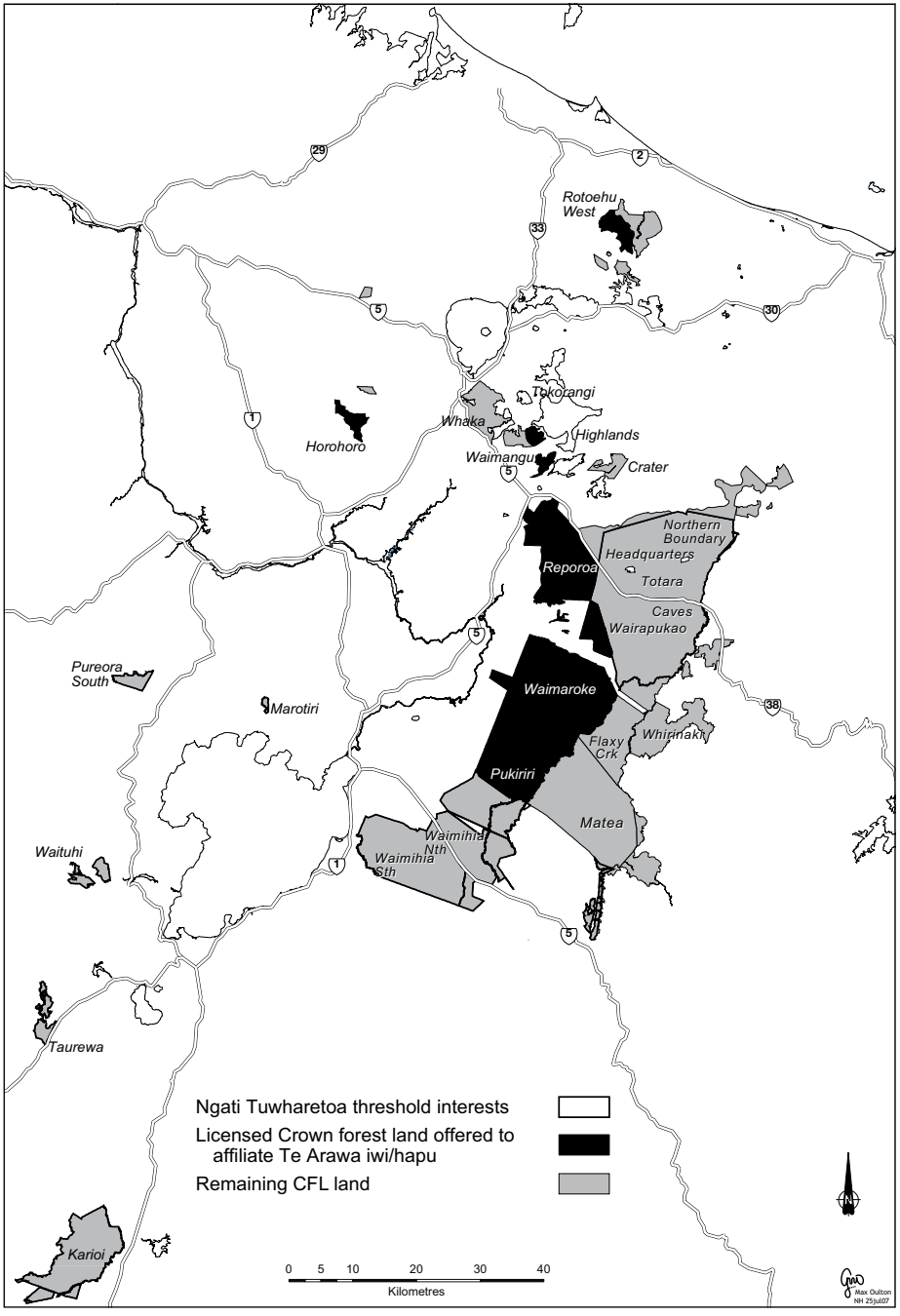
Crown assessment of threshold interests of Ngati Rangiwewehi in remaining central North Island Crown forestry licence land



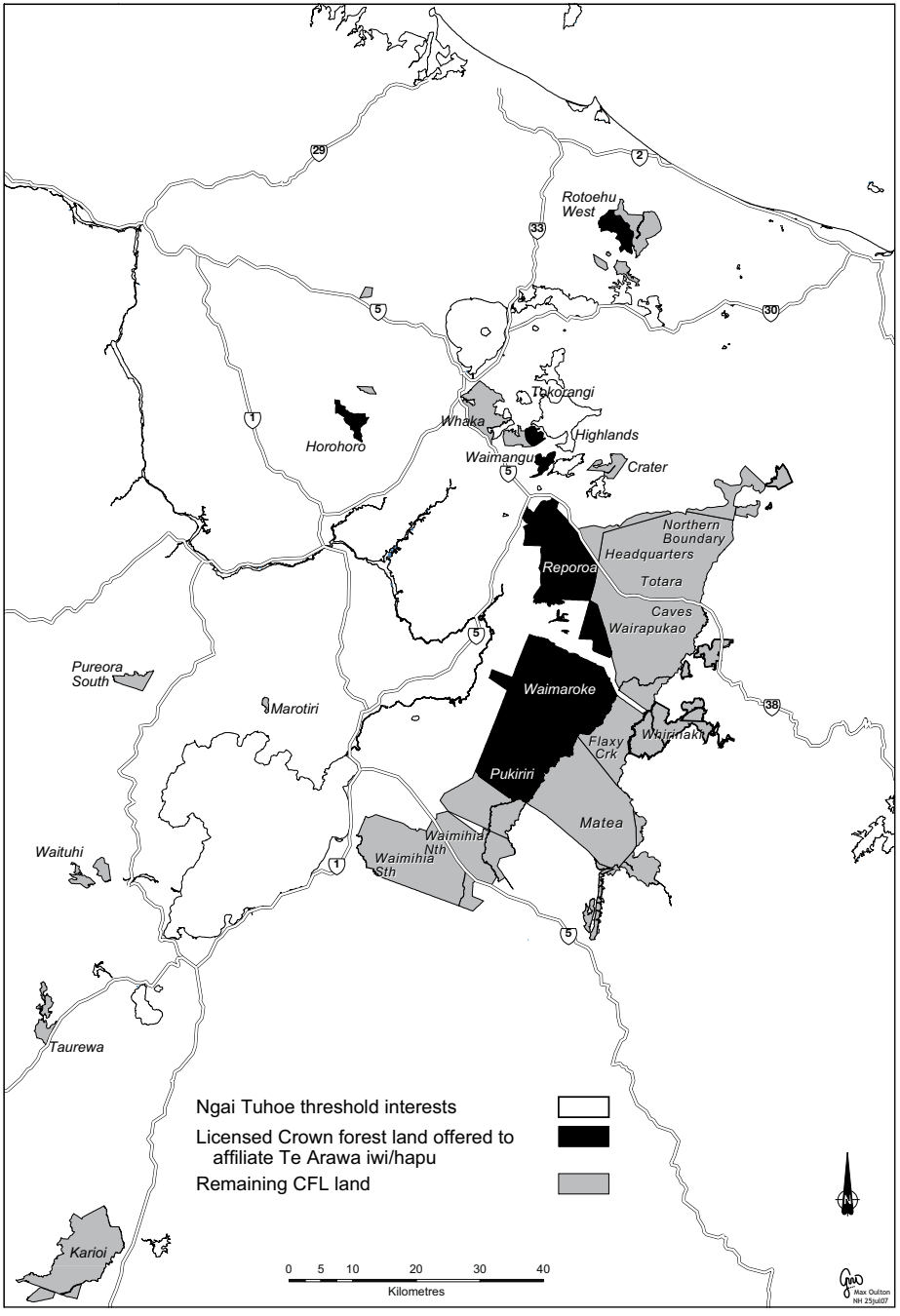
Crown assessment of threshold interests of Ngati Makino–Waitaha in remaining central North Island Crown forestry licence land



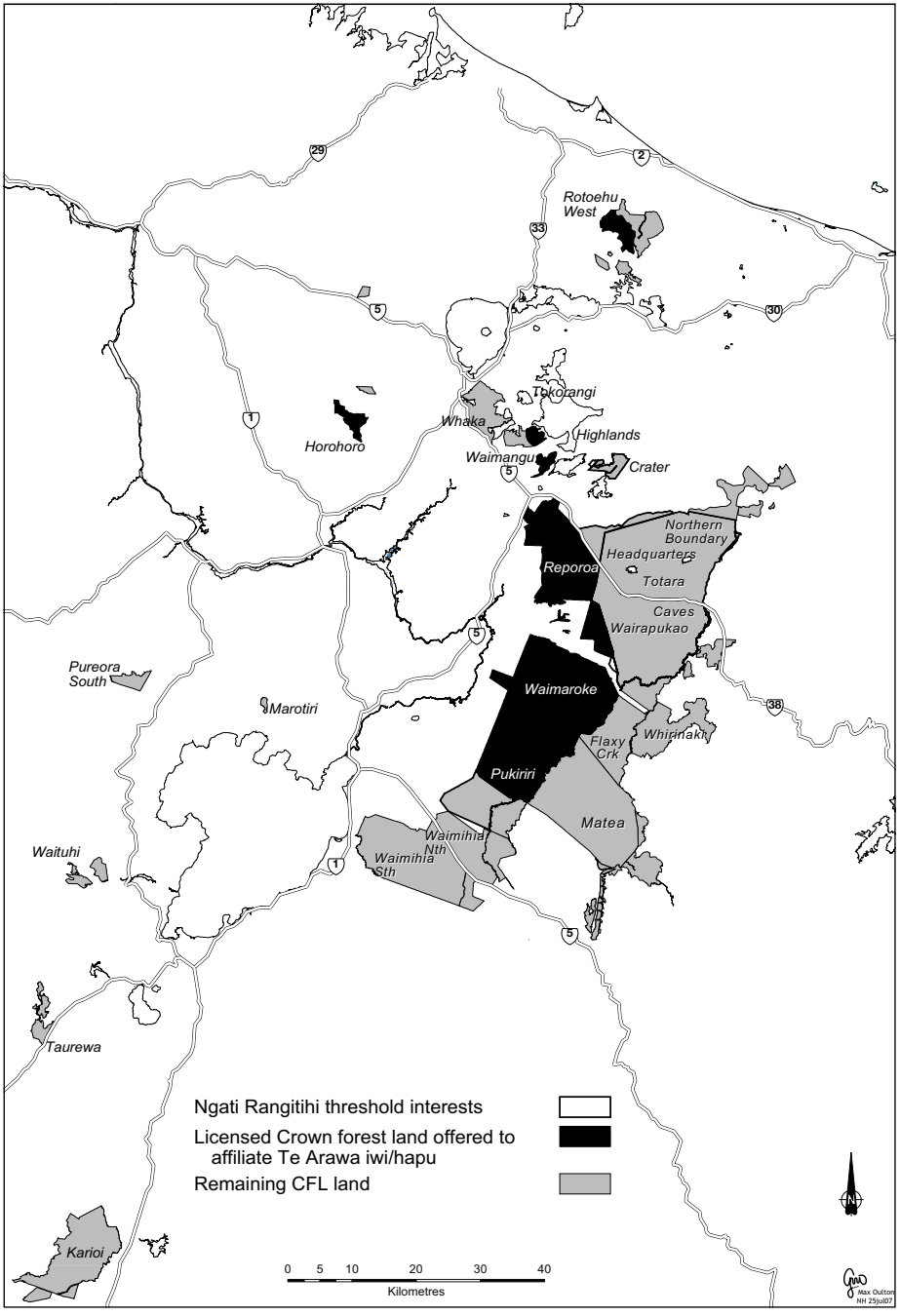
Crown assessment of threshold interests of Ngati Manawa in remaining central North Island Crown forestry licence land



Crown assessment of threshold interests of Ngati Tuwharetoa in remaining central North Island Crown forestry licence land



Crown assessment of threshold interests of Ngai Tuhoe in remaining central North Island Crown forestry licence land



Crown assessment of threshold interests of Ngati Rangitihi in remaining central North Island Crown forestry licence land