Chapter 9

Cultural Redress

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KEY POINTS

- What cultural redress outcomes do you want from negotiations?
- Create a list of sites of significance and obtain all relevant information, including ownership (Crown or local authority)
- Clarify your interests in each site
- Make sure you have a good understanding of all the types of cultural redress relating to land
- Be prepared to push for variations of cultural redress (for land) not yet used in a Deed of Settlement – but be realistic
- Carry out site suitability visits and due diligence before accepting any cultural redress land (regardless of which management regime it will fall under)
- Bring up place name changes early in the negotiation
- Insist that agreements on how to handle overlapping claims are addressed to the satisfaction of the Crown and negotiators; try to resolve them before signing the AiP
- Do not sign an AiP until you are sure all major aspects of cultural redress are covered in sufficient detail

Remember...

- Carefully estimate the level of management and costs associated with each type of cultural redress land
- There is no point in extensive cultural redress if your post-settlement governance entity will not have the administrative or financial ability to manage all sites, protocols and other relationships with the Crown and local government
- If a particular redress will not add value (in financial or cultural terms), do not accept it just because it is on offer. Do not let the Crown make the settlement look bigger with fluff

INTRODUCTION

Cultural redress is a significant part of most settlements. As the title implies, cultural redress is a non-commercial type of redress focussed on, but not exclusive to, sites or areas of cultural, spiritual, historical or traditional significance to the claimant group. The Red Book states (page 96) that cultural redress is intended to '*…meet the cultural rather than economic interests…*' of the claimant group.

The Red Book covers cultural redress on pages 96–144. It sets out the Crown view on all aspects of cultural redress, including what is not negotiable or feasible from the Crown's point of view because of existing legislation or other reasons. Members of the mandated body should become fully familiar with the text before they develop a negotiating strategy.

This Guide should not be read as an endorsement of Crown policy, it is a record of what has been negotiated to this point. Negotiators who wish to challenge aspects of the Crown's position should do so, but first weigh up the costs and benefits.

While there are limits on the redress the Crown will provide, it is up to negotiators to investigate other unique redress options if they consider they suit their claimant group better. There are no guarantees, but negotiators will not achieve desired cultural redress outcomes if they do not attempt to negotiate them with the Crown.

As preliminary comment, the Guide suggests that:

- the mandated body focus on considering what cultural redress will have most relevance for the claimant group, and
- claimants do not seek a standard redress option if it is not relevant to the claimant group or will impose excessive maintenance costs.

AGREEMENT IN PRINCIPLE AND CULTURAL REDRESS

As emphasised several times in this Guide, negotiators should ensure that all key elements of the desired settlement package are clearly identified in the AiP. It is unwise to leave important or substantive matters to be dealt with after the AiP is signed.

An AiP may state that:

> '*The cultural redress package is based on factors such as the nature and extent of claims, the redress sought […] and the instruments available to the Crown.*'

The AiP usually identifies specific sites and the conditions of their transfer or association with the governance entity

Overlapping claims

Negotiators should try to resolve overlapping claim issues before signing the AiP rather than risk having the settlement stall or even be overturned at the later Deed of Settlement stage.

The commentary on the Terms of Negotiations noted the importance of overlapping claims and discussed how to deal with them. An AiP usually states that all items of cultural redress are subject to overlapping claim issues being resolved and/or addressed to the satisfaction of the Crown.

The key is the phrase '*to the satisfaction of the Crown…*' and this appears to override the view of the negotiators (and overlapping claimants). Recently the phrase '*…to the satisfaction of the Crown and claimants…*' has been used. Negotiators are advised to insist on this text.

The easier position for the Crown may be to remove redress where cross-claim or overlapping claimants protest to the Crown. However, where a vesting process to accommodate overlapping claims is agreed it will be set out in the AiP.

As the AiP will not contain full detail it will include a clause that provides that the cultural redress is also subject to '*any other conditions set out […] relating to specific items of cultural redress*'.

Nature and scope of AiP

While the mandated body and the Crown may debate the overall purpose and effect of the AiP, the AiP must contain:

- the full nature and scope of settlement redress, and
- that the negotiations to a Deed of Settlement will concern detail of **that** redress, not the agreement of new redress.

AiP to contain nature and scope of redress sought by negotiators

For recent AiPs the cultural redress clause typically states that the AIP provides '*…an outline of the proposed cultural redress package*'. It could be argued that this wording gives the parties more scope to discuss and negotiate further redress in the Deed of Settlement, but it is better that the AiP sets out, as fully as possible, the nature and scope of the redress sought by negotiators.

Natural resources of general public interest
The Red Book notes (page 98) that the cultural redress aims of the claimant group often involve natural resources of general public importance that the Crown '... owns and manages *[...] in the best interest of New Zealand as a whole and in accordance with Treaty principles.*' The significance of this and the policy behind it permeates and affects all aspects of settlement redress. This is discussed elsewhere in the Guide.

AGREEMENT IN PRINCIPLE AND CULTURAL REDRESS PROPERTIES

Crown offer of replacement sites
The vesting of cultural redress sites is subject to a number of conditions. It is possible that not all sites will be vested due to one or more conditions not being satisfied. In that case the Crown should, *in good faith*, agree to work with the mandated body to identify and vest suitable replacement sites. Such a clause is not evident in all AiPs. The mandated body should insist that this clause is included.

Replacement site suitability
Another matter for the mandated body is the physical location and suitability of these sites. Sometimes site visits or inspections have occurred after the AiP is signed and it has been discovered that the site is not suitable for the claimant group. Issues such as site access need to be identified early. An inaccessible site is of little value.

The mandated body should undertake a site visit or inspection before the AiP to ensure that the site is suitable to it. Mutual acknowledgements in the Deed of Settlement can then confirm that the negotiators have visited sites, for example:

'Ngāti Tūwharetoa and the Crown acknowledge and record that prior to the date of this Deed, Ngāti Tūwharetoa had the opportunity to inspect the cultural redress Properties and satisfy itself as to the state and the condition of the cultural redress Properties' [Ngāti Tūwharetoa Deed if Settlement, page 55].

Disclosure information and due diligence
The Crown will provide disclosure information for those sites available for vesting. Although it would be ideal to get all disclosure information before signing an AiP, this is labour-intensive work and would add months to the AiP process.

The mandated body may need to engage specialists to undertake a comprehensive assessment of the proposed site to enable them to fully assess the merits or otherwise in becoming the owner of the particular site.

This process is very important and will need to be completed before the Deed of Settlement is signed. An example of this detail is recorded as '*4.15 Disclosure Information*' in the Ngati Awa Deed of Settlement.

Cultural or commercial redress?
In some instances aspects of cultural redress could be viewed as commercial. For example, vesting part of the Whakarewarewa Thermal Springs Reserve in the Te Arawa Affiliate Iwi/Hapū AiP brings with it the right to an ongoing rental stream from the current 'tenant', the New Zealand Māori Arts and Crafts Institute.

From the perspective of a mandated body, such examples are useful in illustrating the manner in which the overall 'value package' of a settlement can be increased without being counted as part of the financial and commercial redress amount. This takes on importance for both parties when the impact of the relativity clause is looked at (see Relativity section in the Financial and Commercial Redress chapter).

Multiple site owners
A mechanism in some AiPs reflects the fact that more than one claimant group may have an interest in a particular site. Two examples are:
- the Ngā Raurū Kiitahi AiP which provides a mechanism for joint ownership of the Rehu Village site with Ngāti Ruanui, and
- the Te Arawa Affiliate Iwi/Hapū AiP mechanism which enables a number of sites including the Te Ariki site to be shared with other Iwi/Hapū.

Other land/reserves
When the parties sign the AiP it is possible there are other sites which could be transferred to the claimant group but for which specific agreement has not yet been obtained.

Such sites might include Crown and/or local authority owned and/or managed areas. In such a case, the AiP should contain a clause setting out a process for engagement with the relevant parties before a Deed of Settlement is signed.

CONDITIONS OF CULTURAL REDRESS PROPERTIES
An AiP usually states that vesting cultural redress properties is (where relevant) subject to:
a. further identification and survey of sites where appropriate
b. confirmation that no prior offer back or other third party right such as those under the Public Works Act 1981 exists in relation to the site and that any other statutory provisions that must be complied

with before the site can be transferred are able to be complied with

c. *any specific conditions or encumbrances to each title and included in the tables*
d. *any rights or encumbrances (such as a tenancy, lease, licence, easement, covenant or other right or interest whether registered or unregistered) in respect of the site to be transferred, either existing at the date the Deed of Settlement is signed, or which are advised in the disclosure information as requiring to be created*
e. *creation of marginal strips where Part IVA of the Conservation Act 1987 so requires*
f. *Sections 10 and 11 of the Crown Minerals Act 1991*
g. *The rights of obligations at the Settlement Date of third parties in relation to fixtures, structures or improvements*
h. *any other specific provisions relating to cultural redress properties that are included in a Deed of Settlement*
i. *the Crown confirming the nature and extent of overlapping claims to the sites, and being satisfied that these interests have been appropriately safeguarded.*

After signing the AiP, the Crown will prepare disclosure information for each site and provide that information to the mandated body. If any properties are unavailable for transfer (because of *a – i* above), the Crown has no obligation to substitute other properties, but in good faith, will consider alternative redress options.

Unless otherwise specified, the governance entity will be responsible for the maintenance of the cultural redress properties, including future pest control, fencing, interpretation material, required biosecurity responses and refuse removal as required. The governance entity will also become liable for payment of any rates after transfer of the properties.

OTHER INTERESTS

In some AiPs, clauses cover the scenario where there are likely to be multi-claimant group interests (other than for fee simple redress, discussed above), but where only one claimant group currently has a mandated body.

For example, the Ngā Raurū Kiitahi AiP provides such a mechanism in relation to Mount Taranaki and the Whanganui River.

'EQUIVALENT' CLAUSE

Sometimes, in order to save time, it is possible to have an 'equivalent' clause so that post-AiP negotiators are able to negotiate detail that is *no less favourable* than that provided by previous benchmark settlements.

Inherent in that, is that the mandated body is fully conversant and familiar with the detail in that other settlement.

For example, the Ngā Raurū Kiitahi AiP provides a clause which confirms that '*...Ukaipō entitlements will, in substance, be on similar terms to those provided in recent Taranaki settlements'.*

Note: This also provides a level of security to the Crown because it limits the boundaries of the negotiation. In each case, weigh up the advantages of using this clause.

WAIKATO-TAINUI: THE WAIKATO RIVER DRAFT AIP

In May 2007 Waikato-Tainui negotiators signed a draft AiP with the Crown for settlement of the historical claims of Waikato-Tainui in relation to the Waikato River. The Crown Acknowledgements include the statements:

> *The Crown acknowledges the importance to Waikato-Tainui of the principle of te mana o te awa arising from their relationship with the Waikato River... The Crown seeks a Settlement that will recognise and sustain the special relationship Waikato-Tainui have with the Waikato River.*

The AiP deals primarily with management issues and provides a number of redress mechanisms to protect Waikato-Tainui interests, other iwi river interests and the interests of the Crown and third parties. The most interesting and unique aspect of this AiP is the proposed co-management arrangements. These are highlighted below.

GUARDIANS ESTABLISHMENT COMMITTEE
To be formalised as soon as practicable after the AiP is signed, the Committee comprises:
a) five members to represent Waikato-Tainui
b) four members appointed by Ministers of the Crown to represent the interests of all New Zealanders, and
c) one member nominated by Environment Waikato (regional council) to represent the regional community interest.

The purposes of the Committee are to develop an initial vision for the Waikato River, based on the Waikato-Tainui objectives and any additional objectives to represent the interests of all New Zealanders; and to develop an initial Strategy that is to implement and promote the vision. This agreed vision will be included in the Deed of Settlement and settlement legislation. The AiP further states that:

The Guardians Establishment Committee will act in a manner that is consistent with and achieves co-management.

This will be achieved, among other means, by dialogue with local authorities, management agencies and regulatory authorities.

GUARDIANS OF THE WAIKATO RIVER
The Guardians – a statutory body – will be provided for in the Deed of Settlement and settlement legislation. It will be composed of a number of members to represent Waikato-Tainui and other iwi with interests along the Waikato River, and an equal number from the Crown and Environment Waikato.

Its primary function will be to: '*finalise and approve the initial Strategy to implement the Vision*', and '*... as necessary, develop arrangements to achieve Co-management with persons ... exercising powers to carrying out functions under any Act that affects the Waikato River*'.

WAIKATO RIVER STATUTORY BOARD
This will be a statutory body consisting of four Waikato-Tainui representatives and four current Environment Waikato councillors. Its purpose will be to:

... assist the implementation of the Vision and those parts of the Strategy that relate to Environment Waikato's responsibilities through enabling Waikato-Tainui's effective participation in decision-making under the RMA and the Local Government Acts that affect the Waikato River.

PROTOCOLS WITH MINISTERS OF THE CROWN
These protocols with relevant Ministers, '*will reflect the intention of the settlement to achieve Co-management, and will be drafted and agreed between Waikato-Tainui and the Crown before any Deed of Settlement is signed*'.

WAIKATO RIVER TRUST

Waikato-Tainui will establish the Waikato River Trust as the post-settlement governance entity and the Trustee of that Trust will be Te Kauhanganui o Waikato Inc through its executive committee. The Trustee will receive, hold and manage any financial redress and exercise the powers and functions conferred on Waikato-Tainui under the Deed of Settlement and settlement legislation.

WHAT'S NEW IN THIS AIP

The process breaks with the usual pattern in that the Draft AiP is in the public arena and must be approved by both the Waikato-Tainui representative organisation (Te Kauhanganui) and Cabinet before it can be signed. All other AiPs have been signed by the parties before they were released to the public.

Another significant point is that a number of key matters are identified for detailed negotiation after the AiP is signed. As discussed elsewhere in this Guide, negotiators have a stronger position if all substantive matters are noted in the AiP. The potential for deadlock is increased in proportion to the number of important matters that remain to be settled before the Deed of Settlement is initialled, including the ever-difficult financial redress, as well as land adjacent to the river.

Perhaps the strongest indication of change from the Crown is its receptiveness to an overarching co-management regime for the Waikato River. However, Te Arawa Lakes Settlement sets a precedent for this concept with its co-management regime for the Rotorua lakes. In theory co-management will give much greater effect to Waikato-Tainui rangatiratanga over the Waikato River. The Deed of Settlement will ultimately determine how this co-management regime will operate in practice.

DEED OF SETTLEMENT AND CULTURAL REDRESS

This Guide emphasises the need for all substantive elements of the settlement redress to be identified in the AiP and not left for the Deed of Settlement process. The Deed of Settlement is about settlement detail, not broad-brush key redress issues.

This section discusses a negotiating process for cultural redress sites touches on sites of significance, and examines cultural redress in four general categories:

- exclusive redress – fee simple sites (level 1)
- Crown retains ownership of land (level 2)
- redress that establishes relationships with other parties (level 3), and
- other forms of cultural redress.

It concludes with a discussion on negotiation issues the mandated body needs to consider before and during cultural redress negotiations.

NEGOTIATING FOR CULTURAL REDRESS SITES

'Experience in settlement negotiations so far indicates that faster and more effective progress can be made if the parties clearly communicate the interests they wish to protect and promote, rather than stating redress positions right at the outset'
(the Red Book, page 97).

Negotiators are recommended to become familiar with the Crown position in the Red Book from the outset so they can make positive progress towards cultural redress. This does not mean negotiators need to slavishly follow the Crown's lead but simply that the Red Book indicates how the Crown is likely to approach the table.

A common view is that it is significantly more advantageous for negotiators to seek to shape the cultural redress offer before it is made by the Crown. One possible route could be to:

1. Create a list of all sites of significance to the claimant group with associated korero as to why they are important – in other words identify the claimant group interests
2. With the Office of Treaty Settlements, obtain as much information about the sites as possible, such as legal description and ownership, and identify any sites administered by local authorities rather than the Crown
3. Clarify the claimant group's redress aspirations for various sites. Rank their relative importance to the claimant group and determine where the desired redress for each site sits on the 'cultural redress hierarchy'
4. Do the groundwork for each site; review site suitability and access, complete due diligence and any other relevant matters
5. Negotiate a redress offer with the Office of Treaty Settlements.

Negotiators and the mandated body might want to 'think outside the square' if no existing redress mechanism meets the claimant group's interests. In that case negotiators should be prepared to shape realistic alternatives to put to the Crown.

SITES OF SIGNIFICANCE

Sites of significance are places within the rohe that are particularly important to the claimant group. They may include pa sites, awa, maunga, wahi tapu, or other places or particular cultural or spiritual significance.

The Crown recognises the importance of cultural redress in contributing to what it describes as a '*balanced settlement package*' that will meet the claimant group's cultural and economic needs. But there is an important proviso; if the Crown owns and manages resources of cultural or spiritual significance to the claimants '*it must act both in the best interests of New Zealand as a whole and in accord with Treaty principles*' (the Red Book, page 98).

The Crown must therefore balance a '*wide range of interests*'. That means that returning ownership of a site or resource may not be possible. This may be the case, for example, for Department of Conservation land, where some form of involvement in management of the site is a more likely outcome.

Undisclosed sites of significance

While some sites of significance may have been identified and described as part of the evidence prepared for Tribunal purposes – to establish identity or connections with the land – a significant number not requiring identification for particular Tribunal purposes might remain undisclosed.

Identify all sites of significance

However, sites of significance need to be identified as part of the cultural redress sought by claimants in their negotiations. Negotiators need to ensure that *all* such sites are identified, and that the redress sought for each is discussed and agreed among themselves in advance of negotiations.

Map showing sites of significance

The process is helped if claimants accurately identify

their sites, locate them on maps, and provide full information about their significance, together with up to date information about the current legal status of the land. This will indicate whether the land is in private or Crown ownership, whether it is part of the Department of Conservation estate or has been vested in a local authority.

Legal status and sites of significance
Knowledge about the legal status of the land is important when claimants are deciding on the redress they seek (see above). If the land is in private ownership or controlled by Department of Conservation, this will have implications for redress. Geographic information systems (GIS) technicians can locate accurate land title information using a number of sources.

Locating sites of significance
Locating sites of significance requires technical input from GIS experts. The Trust can facilitate this. Claimants should work closely with GIS technicians when identifying sites of significance to ensure accuracy, as knowledge of these places is often confined to the claimant group.

Archaeology record, Land Court minutes
Information about sites of significance can often be found in the archaeological record or written or archival sources including Native Land Court minute books. Written accounts of early European visitors to the area are often useful.

Historians can assist in locating and compiling such information, but the main source will always be the claimants themselves. They can best speak of the significance and meaning of these places.

There may be a few dozen such sites, or several hundred. Sometimes sites will not be a mere single point on the landscape, but will include interrelated areas covering a wider area. Kāinga, pā sites, urupā, mahinga kai, trails, cultivations and natural resource areas may form a complex of occupation and use covering many hectares.

Categories for sites of significance are summarised in the tables below.

The first table shows the two levels, the second table names the seven models in the Level 1 exclusive fee simple sites and the third table describes the six models in the Level 2 Crown retains ownership of land sites.

Level	Sites of significance by level	Models
1	Exclusive fee simple sites	7
2	– Crown retains ownership of land – Statutory acknowledgements	5

Table 1

Model	Level 1: Exclusive fee simple sites
1	Statutory vesting of fee simple estate ('freehold')
2	Statutory vesting of fee simple: protected private land (s76)
3	Statutory vesting of fee simple with conservation covenant (s77)
4	Statutory vesting of fee simple: Recreation, Historic or Scenic Reserve
5	Statutory vesting of fee simple: Reserve with joint management with local authority
6	Statutory vesting of fee simple: management and control of land that is not a reserve (s38)
7	Statutory vesting of fee simple: vested recreation reserve (s26)

Table 2

Model	Level 2: Crown retains ownership of land
8	Statutory vesting of fee simple estate and gifting back to the Crown of sites of great significance
9	Conservation estate with overlay classification
10	Crown land: reserve with statutory acknowledgement
10A	Other Crown-owned resource with a Statutory Acknowledgement
11	Deeds of Recognition
12	Camping entitlements (Ukaipō or Nohoanga)

Table 3

LEVEL 1: EXCLUSIVE FEE SIMPLE SITES

Fee simple vesting directly to the governance entity is the most comprehensive redress. The sites are often transferred subject to a range of conditions depending on the nature of the site to be transferred. In other words, vesting of the sites may result in ownership – but with 'strings attached'. It is vital, therefore, that the mandated body has a clear understanding of what the conditions mean and exactly what they are getting.

There are different scenarios where cultural redress land is returned (vested) to the claimant group.

Core conditions that attach to each type of vesting are discussed in more detail and real examples from settlements illustrate each redress model, which are arranged in hierarchical order. The examples differ; they may start with one type of land ownership and tenure and end with something different. The reason for this variety and level of detail is to give negotiators as many precedents as possible so they can put these types of redress into their strategy bag.

Particular care has been taken to identify the status of Crown ownership before vesting and the new status (if any) after return to the claimant group. In each case it provides a 'can do' precedent for negotiators to note. If redress of a certain nature has been provided before, it should be able to be provided again.

Seven 'Level 1' models are presented in a hierarchical sequence beginning with statutory vesting of fee simple or full freehold ownership, through to statutory vesting of fee simple as a vested recreation reserve.

For each of the 12 models, a bar graph shows the degree of management and costs that ultimately lie with the governance entity. Note that these graphs are indicative only and may vary depending on the details of each particular redress. Their primary aim is to show the relative weighting between each type of redress. For example, is full ownership but with very high maintenance and management costs a good result over a particular site?

0%.....100%

Management	
Costs	

In some instances negotiators may say 'yes' but for others the costs maybe too high and they may want to look at another redress model for the site.

Keep in mind that just keeping the grass mowed can run into thousands of dollars each year. Is the post-settlement governance entity going to be structured and staffed in a way that can adequately manage and maintain all cultural redress properties?

Status of redress

It is critical to understand the specific status of each component of redress.

The mandated body should seek specific specialist advice on any conditions and encumbrances. Such conditions and encumbrances may include existing leases or licences or a particular statutory or legislative status that applies to the land. Their range and nature can vary significantly and be settlement and site specific. It is beyond the scope of this Guide to comment on such conditions and encumbrances.

It is very important for the mandated body to assess such issues on a case-by-case basis, using specialist advice where necessary.

LEVEL 1: EXCLUSIVE REDRESS: VESTING OF FEE SIMPLE ESTATE IN GOVERNANCE ENTITY

	Status	Administering body	Crown influence	Advantages	Disadvantages
1	'Freehold'	Ownership not influenced by Reserves Act 1977	None; rights equal to any other freehold land	Full mana whenua and management rights	All costs lie with governance entity; any encumbrances may hinder development
2	Protected private land (s76 Reserves Act)	Governance entity manages site	Minister may revoke status	More flexible than s17–s23 reserves; weight of Crown could enhance protected status; land may be sold	All costs lie with governance entity
3	'Freehold' with conservation covenant (s77)	Governance entity manages site	Covenant is reached by agreement with Minister	More flexible that s17–s23 reserves; Crown could enhance protected status	Costs lie with governance entity but the Department of Conservation may pick up some
4	Recreation (s17) or Historic (s18) reserve; Scenic (s19) is rare	Governance entity manages site	Consent of Minister of Conservation needed for some matters	Governance entity can be administering body; costs may be negotiable with Department of Conservation	Ministerial consent dilutes mana whenua; may have encumbrances
5		Governance entity has joint management with local authority	Minister's powers from Reserves Act	Costs fall on local authority; governance entity chair has casting vote on the joint management body	Funding decisions remain with local authority
6	Managed as if it is a reserve (s38)	Local authority (may be joint with governance entity)	Minister appoints administering body	Governance entity may have no costs (joint management or local authority is body)	Not full expression of mana whenua; limited iwi role
7	Vested recreation reserve (s26)	Local authority	Minister's powers from Reserves Act	No costs fall on governance entity	Iwi only has titular mana whenua; no managing rights

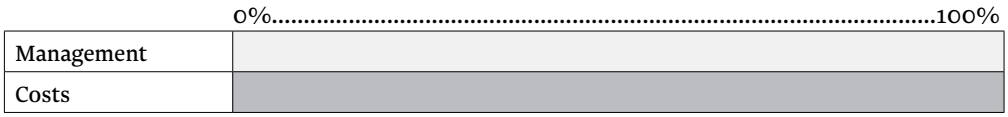
Table 9.1 Hierarchy of Whenua cultural redress

LEVEL 2: CROWN RETAINS OWERSHIP OF LAND

	Status	Administering body	Crown influence	Advantages	Disadvantages
8	Site vested in claimant group and gifted back to Crown	Crown	High – sites tend to be National Park status	All costs with Crown; iwi associated with iconic site	No management role
9	Overlay classification	Crown	High – on conservation estate	Iwi values acknowledged; can agree on protection principles for site; generally exclusive redress to iwi	No ownership
10	Statutory Acknowledgement (SA)	Crown	Consent authority must 'have regard to' the SA	No management costs fall on governance entity; enhances RMA 'affected party' status of iwi	Status limited to 'advisory' management role; non-exclusive redress; consent authority not compelled to 'have regard' to their views
11	Deed of Recognition (always with SA)	Crown	Minister's powers from Reserves Act	Minister 'must have regard to' governance entity's view	Non-exclusive; Minister not compelled to 'have regard'
12	Camping entitlement	Crown	Minister's powers from Reserves Act	Exclusive to iwi	Only 210 days per year; all other laws/by-laws apply to use; Crown can withdraw right

Table 9.1 Hierarchy of Whenua cultural redress (continued)

MODEL 1: STATUTORY VESTING OF FEE SIMPLE ESTATE ('FREEHOLD') (7 examples)



This is the most comprehensive return of cultural redress land. The settlement legislation transfers ownership of the land to the claimant group, usually its governance entity. The claimant group hold the freehold title that gives them the right to:

- ownership of everything on the land
- control and management of the site
- naming rights and the ability to exclude others.

The claimant group also carry the costs of management (maintenance, pest and weed control, and fencing), rates, and any legal liabilities. Under this regime the claimant group has full management rights and all of the costs.

Fee simple title has been obtained from recreational, historic, local purpose and landing reserves, conservation areas, stewardship areas, marginal strips, and river/lake beds in Crown ownership. Note, however, that some titles still carry encumbrances such as existing leases, right of way easements and lawful public access for recreation (lake bed).

This vesting model can, on rare occasions, include the statutory vesting of a riverbed or lakebed. Three examples are given below. The Red Book (page 129) states,

> *... where legally practicable, the lakebed or riverbed may in some cases be available for vesting in the claimant group [...] Redress [...] involves a number of legal and practical issues, which means that the settlement arrangements will probably be complex and require co-operation with a range of third parties. For those reasons, only rivers or lakes of great significance to the claimant group are likely to be available for this type of redress.*

It needs to be emphasised that the Crown is very reluctant to vest riverbeds in claimant groups, and even if vesting occurs the water column and aquatic life remain in Crown ownership.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Whakamata-kiuru	Landing reserve (Ellesmere Landing)	Fee simple	Freehold	Te Rūnanga o Ngāi Tahu / existing leases for up to ten years
Te Waihora (Lake Ellesmere)	Conservation estate	Fee simple (bed)	Freehold	Joint management plan between Te Rūnanga o Ngāi Tahu and the Department of Conservation
Rarotoka (Island)	Crown land	Māori freehold land (s130 TTWM)	Freehold	Te Rūnanga o Ngāi Tahu; lease lighthouse site to Marine Safety Authority; 500m Fisheries Area created around island

Ngai Tahu (1996)

Whakamatakiuru: revocation of reserve status

- vesting of fee simple estate in Te Rūnanga
- Rūnanga agrees to offer leases up to ten years to present occupiers.

Te Waihora: sixteen pages of Deed of Settlement set out the conditions associated with the lake and its bed, including mahinga kai and agreement with North Canterbury Fish and Game Council for their use of maimai on the bed of Te Waihora. It includes the preparation of a joint management plan by the Rūnanga and the Director-General with costs falling to both parties.

Rarotoka: islands used as a resting place by Ngāi Tahu on the journey to the Titi Islands, and as a navigational marker: deemed to be Māori freehold land as if it had acquired that status in accordance with section 130 of Te Ture Whenua Māori Act 1993

- vested in Te Rūnanga as Māori freehold land subject to leaseback of a small portion of the island to the Marine Safety Authority who will continue to occupy the lighthouse. In addition a 500 metre Fisheries Area has been created around the island. Te Runanga may make a formal request to the Crown to give Te Runanga o Ngai Tahu rights to manage the fisheries within that area.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Oteono	Stewardship area (Conservation Act)	Fee simple	Freehold	Te Uri o Hau governance entity
Whakapirau	Marginal strip (s24 Conservation Act)	Fee simple	Freehold	Te Uri o Hau governance entity

Te Uri o Hau (2000)

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Whakaahu-rangi Marae	Local purpose reserve (s23)	Fee simple	Freehold	Ngāti Ruanui governance entity
Turuturu Mokai	Historic reserve	Fee simple	Freehold subject to easement	Ngāti Ruanui governance entity (to vest fee simple in Ngāti Tupaia hapū]

Ngāti Ruanui (2001)

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Nukumaru site	Recreation reserve	Fee simple	Freehold	Te Kaahui o Rauru; grazing leases and right of way easement
Puau site	Conservation area	Fee simple	Freehold	Te Kaahui o Rauru; informal grazing right
Rehu village site	Conservation area	Fee simple	Freehold	Approved transferee (Ngāti Ruanui and Ngā Raurū);

Ngā Raurū Kiitahi (2003)

Nukumaru: the recreation reservation under section 17 of the Reserves Act is revoked.

- Nukumaru vests in the Crown as Crown land
- fee simple estate vests in the governance entity (Te Kaahui o Rauru).

Puau: site ceases to be a conservation area under the Conservation Act

- fee simple estate vests in the governance entity.

Rehu Village: an example where two iwi have interests in the same cultural redress and are required to form a legal entity to receive and manage the site.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Te Arawa Lake beds	Crown ownership	Fee simple	Only own lake beds	Te Arawa governance entity

Te Arawa Lakes (2004)

Lake beds are vested in the governance entity but the iwi do not own or have rights to the water column or aquatic life.

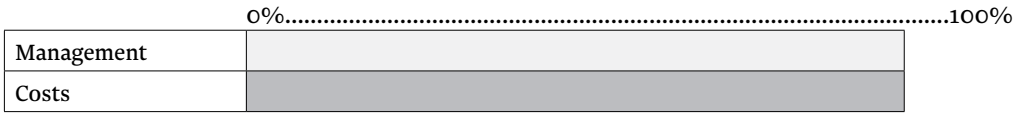
Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Te Rau o Te Huia Pā site	Historic reserve	Fee simple	Freehold	Te Rūnanga o Ngāti Mutunga – grants informal grazing rights

Ngāti Mutunga (2005)

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Okataina Lodge site	Reserves Act	Fee simple	Freehold (conditional)	Te Arawa governance entity to grant lease to the Crown
Te Ariki site	Reserves Act	Half share in fee simple	Management Deed	Governance entity enters Management Deed with trustees of Te Ariki Trust

Affiliate Te Arawa Iwi/Hapū (2006)

MODEL 2: STATUTORY VESTING OF FEE SIMPLE: PROTECTED PRIVATE LAND (s76) (2 examples)



Scenic, historic and harbour purpose reserves have been vested into protected private land. This allows the Department of Conservation access to the land, if necessary, to protect conservation values. This status is more flexible than other reserves and provides more scope to the iwi to negotiate the Treaty settlement. In cases where the Crown insists on conservation guarantees this may be the best option for the claimant group.

'Declaration of protected private land (section 76 Reserves Act) – the owner of any private land or the lessee of any Crown land may apply to the Minister of Conservation for his land or any part thereof to be protected private land, under and subject to the terms of any agreement entered into between the owner or lessee and the Minister.'

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
South Bay / Kaikoura Peninsula	Harbour Purpose reserve	Fee simple	Protected private land	Te Rūnanga o Ngāi Tahu
Huriawa	Historic reserve	Fee simple	Protected private land	Te Rūnanga o Ngāi Tahu

Ngāi Tahu (1996)

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Otitapu Pā	Part of scenic reserve	Fee simple	Protected private land	Te Rūnanga o Ngāti Awa agreement with the Minister of Conservation

Ngāti Awa (2003)

Otitapu Pā: revocation of section 19 scenic reserve status
- site vests in Crown as Crown Land subject to section 82 of Reserves Act
- fee simple estate vested in governance entity subject to protected private land agreement (section 76).

Ngāti Tuwharetoa Bay of Plenty has an almost identical redress at Otitapu.

MODEL 3: STATUTORY VESTING OF FEE SIMPLE WITH CONSERVATION COVENANT (s77) (5 examples)

0%.....100%

Management	
Costs	Costs may be negotiable with DoC

Because of their special significance to the claimant group the parties have agreed to place conservation covenants over private land that previously was historic reserve, conservation area or Crown Forest Land. The Red Book (page 127) notes that these covenants allow for the protection of indigenous plants and animals, cultural or spiritual values, or preserving public access.

> *'Conservation covenants (section 77, Reserves Act) – if the Minister is satisfied that any private land or any Crown land held under Crown lease should be managed so as to preserve the natural environment, or landscape amenity, or wildlife or freshwater-life or marine-life habitat or historic value [...] and can be achieved without Crown ownership; the Minister may treat and agree with the claimant group for a covenant to provide for the management of that land in a manner which will achieve the purposes of conservation.'*
> *Ngā Whenua Rāhui kawenata (section 27A Conservation Act 1987 and section 77A Reserves Act) – if satisfied that any Māori land... should be managed so as to preserve and protect:*
> - *the natural environment, landscape amenity, wildlife or freshwater-life or marine-life habitat or historic value of the land, or*
> - *the spiritual and cultural values which Māori associate with the land*
> - *the Minister may [...] treat and agree with the owner or the lessee for a Nga Whenua Rāhui kawenata to provide for the management of the land in a manner which will achieve those purposes.*
>
> Covenants (section 27 Conservation Act 1987) –
> *(a) There may be granted or reserved over any land any covenant for conservation purposes in favour of the Minister; and*
> *(b) Every such covenant shall run with and bind the land that is subject to the burden of the covenant'*

Note that this covenant provides for public access to the land.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Sinclair Wetlands	Conservation estate	Fee simple	Ngā Whenua Rahui covenant	Te Rūnanga o Ngāi Tahu

Ngāi Tahu (1996)

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Pukeareinga	Scenic reserve	Fee simple	Conservation covenant	Te Uri o Hau governance entity

Te Uri o Hau (2000)

Pukeareinga was only vested in Te Uri o Hau after the Office of Treaty Settlements was convinced that it was not a 'mountaintop' that had to be retained by the Crown in the public interest.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Te Atua Reretahi	Conservation area	Fee simple	Conservation covenant	Governance entity grants conservation covenant to the Minister of Conservation

Ngāti Tūwharetoa (Bay of Plenty) (2003)

Te Atua Reretahi: site ceases to be a conservation area under the Conservation Act 1987

- fee simple estate vested in governance entity subject to the conservation covenant.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Okoki Pā site (Te Rangihīroa burial site)	Historic reserve	Fee simple	Okoki Pā conservation covenant	Te Rūnanga o Ngāti Mutunga grants conservation covenant to the Minister of Conservation

Ngati Mutunga (2005)

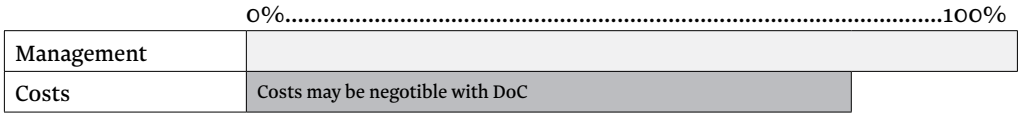
Te Rangihīroa was also known as Sir Peter Buck.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Moerangi site	Crown Forest Land	Fee simple	Conservation covenant	Governance entity grants the Crown a conservation covenant
Lake Rotokawa site	Crown ownership	Fee simple	Conservation covenant	Governance entity grants the Crown a conservation covenant

Affiliate Te Arawa Iwi/Hapū (2006)

Moerangi site vests in governance entity subject to a forestry right able to be registered under the Forestry Rights Registration Act.

MODEL 4: STATUTORY VESTING OF FEE SIMPLE: RECREATION, HISTORIC OR SCENIC RESERVE
(3 examples)



This redress is used where the Crown does not consider it possible to offer full ownership of the site to the claimant group who, however, are prepared to manage and control the site as a reserve and are prepared to take the associated costs.

The site is vested in the claimant group as a reserve under section 26 of the Reserves Act 1977. The claimant group holds and administers the site subject to the Reserves Act. In other words the claimant group has limitations on what it can do with the site. Negotiators are strongly advised to familiarise themselves with the relevant parts of the Reserves Act and the implications of using the various types of reserves available.

Reserve status has been kept in these models although the type of reserve has been revoked in some cases.

Notes:
- the change from wildlife refuge to scenic reserve with the governance entity as administering body, and
- that the Administering Body status of Whakatāne District Council over a historic reserve is revoked.

Functions of an administering body (section 40, Reserves Act) – the body administers, manages and controls the reserve in accordance with appropriate provisions of the Act to ensure the use, enjoyment, development, maintenance, protection, and preservation [...] of the reserve.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Moeraki Lake	Wildlife Refuge	s26 vesting	Historic reserve	Te Rūnanga o Ngāi Tahu
Wairewa	Conservation estate	s26 vesting	Historic reserve	Te Rūnanga o Ngāi Tahu
Kopuwai	Pastoral lease	s26 vesting	Historic reserve	Te Rūnanga o Ngāi Tahu/ rights of lessee not affected
Arahura Valley	Crown land	Māori freehold land (s130 TTWM)	Waitaki historic reserve	Mawhera Inc; Department of Conservation owns huts and bridges and maintains tracks; no new permits / licences issued by the Minister after Settlement
Crown Tītī Islands	Crown land	Fee simple	Freehold title to Rūnanga o Ngāi Tahu	Managed by ten Rakiura Māori as if it were a Nature reserve

Ngāi Tahu (1996)

Arahura Valley: traditionally a major source of pounamu. The Crown vested title to the bed of the Arahura River to Mawhera Corporation (a Māori landowners' Trust) in 1976. The purpose of the redress is so Mawhera Corp. is able to exercise effective control and management over its lands within the Arahura catchment.

Waitaki Historic Reserve created in upper catchment and vested (s26) at no cost to Mawhera Corporation as Administering Body; public access protected; legal but unformed roads in middle section closed. Title vested to Mawhera Corporation as Māori freehold land subject to easements.

Crown Tītī Islands: the return of the islands will ensure that the rights of Rakiura (Stewart Island) Māori to harvest titi on a sustainable basis will be protected in perpetuity. Rakiura Māori, as the administering body have the statutory responsibility for control and management of the islands. The administering body and Department of Conservation may both put forward annual work programmes to be carried out on the islands. Costs will fall to the appropriate party or be shared as the case may be.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Kapūterangi	Historic reserve	Fee simple	Historic reserve	Te Rūnanga o Ngāti Awa
Te Ihukatia	Part of recreation reserve	Fee simple	Recreation reserve	Te Rūnanga o Ngāti Awa
Whaka-paukōrero	Part of scenic reserve	Fee simple	Historic reserve	Te Rūnanga o Ngāti Awa (advised by Joint Advisory Committee)

Ngāti Awa (2003)

Kapūterangi: revoke appointment of Whakatāne District Council to control and manage Kapūterangi
- revoke reservation of site as a historic reserve
- vest in the Crown as Crown land
- fee simple estate vested in governance entity
- reservation of Kapūterangi as a historic reserve subject to s18 of the Reserves Act for which the Ngāti Awa governance entity will be the administering body. Ngāti Awa undertakes to acknowledge in any published and interpretational material that Kapūterangi is a site that is significant to other iwi (page 75 Deed of Settlement).

Te Ihukatia: revoke the reservation of Te Ihukatia as a recreation reserve
- vest site in the Crown as Crown land
- fee simple estate vested in governance entity
- reservation of Te Ihukatia as a recreation reserve subject to s17 of the Reserves Act for which the Ngāti Awa governance entity will be the administering body.

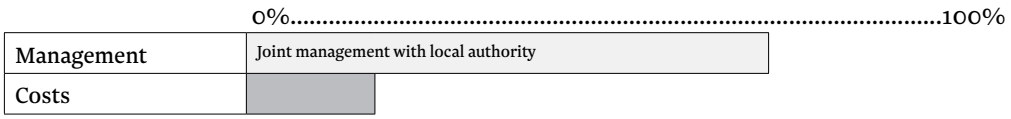
A similar process is used for Whakapaukōrero except its status changes from a scenic to a historic reserve.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Te Kaukahiwi o Tirotirowhetu	Scenic reserve	Fee simple	Scenic reserve	Governance entity
Whaka-paukōrero	Part of scenic reserve	Fee simple	Historic reserve	Governance entity

Ngāti Tūwharetoa (Bay of Plenty) (2003)

Note: Whakapaukōrero has been used as cultural redress for Ngāti Tūwharetoa and Ngāti Awa.

MODEL 5: STATUTORY VESTING OF FEE SIMPLE: RESERVE WITH JOINT MANAGEMENT WITH LOCAL AUTHORITY (2 examples)



These sites are of particular iconic value to New Zealand, for example Maungakiekie (One Tree Hill). Fee simple vests in the governance entity but reserve status is maintained and a joint management regime applies.

The Reserves Act is irrevocable over the sites and the Minister of Conservation retains all functions under the Act. Although the claimant groups own the sites, use of the sites is constrained by the Reserves Act 1977.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Pou Tū o Te Rangi	Historic reserve	Fee simple	Historic reserve	Joint management: Te Uri o Hau and Kaipara District Council

Te Uri o Hau (2000)

Pou Tū o Te Rangi: revocation of appointment of Kaipara District Council to control and manage

- revocation of site as historic reserve
- vest in Crown as Crown land
- fee simple estate vested in Te Uri o Hau governance entity
- reservation of site as a historic reserve
- Minister appoints a joint management committee (three from each, with Te Uri o Hau chair to have casting vote).

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Maungakiekie (One Tree Hill Domain)	Recreation reserve	Fee simple	Reserves Act	Joint management: Ngāti Whatua o Orākei and Auckland City Council; existing encumbrances continue
Puketapapa (Mt Roskill)	Conservation area	Fee simple	Reserves Act	Joint management: Ngāti Whatua o Orākei and Auckland City Council; existing encumbrances continue

Ngāti Whātua o Ōrākei (AiP 2006)

Note: This cultural redress model was signalled in the AiP but has yet to be realised in a Deed of Settlement.
Joint management is based on the Bastion Point Reserves Board model. Ngati Whatua o Orakei forms fifty percent of the administering body and appoints the chair who has a casting vote. The goodwill of the local authority is vital during the negotiations. Auckland City Council will continue to fund management of sites and retain ultimate control over funding decisions.

MODEL 6: STATUTORY VESTING OF FEE SIMPLE: MANAGEMENT AND CONTROL OF LAND THAT IS NOT A RESERVE (s38) (1 example)

0%.....100%

Management	Joint or entirely with local authority
Costs	

Although reserve status is revoked and the claimant group holds fee simple, the sites are treated *as if they were* recreation reserves, that is, the Crown has a significant role. In one case the claimant group does not even form part of the administering body. This redress is limited to sites with high public recreational value.

'Control and management of land that is not a reserve (section 38, Reserves Act) – the Minister, or an administering body of a reserve with the consent of the Minister, may also control and manage any land that is not a reserve (including any Māori reservation) for any of the purposes specified in s17–23 of the Reserves Act [...] The Minister may appoint such persons, trustees (including trustees appointed under s438 of the Māori Affairs Act 1953), trust, voluntary organisation, Māori Trust Board, or Māori Incorporation as he thinks fit to be an administering body to control and manage any land that is not a reserve.'

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Taramea	Reserve	Fee simple	Public access continues	Te Rūnanga o Ngāi Tahu and Riverton Community Council as if it were a Recreation Reserve (s38)
Okains Bay	Recreation reserve	Fee simple	Public access continues	Banks Peninsula District Council (BPDC) as if it were a Recreation Reserve (s38); buildings vested in BPDC

Ngai Tahu (1996)

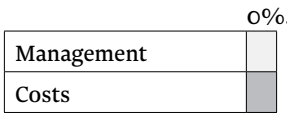
Taramea: Te Rūnanga o Ngāi Tahu has joint management rights and responsibilities (three members from each body).

Okains Bay: cancellation of appointment of Banks Peninsula District Council (BPDC) to control and manage as a recreation reserve

- revocation of reserve status
- vesting of fee simple estate in the land and building known as 'Tini Ara Pata' to Te Rūnanga
- Te Rūnanga agrees to site being managed and controlled by the BPDC as if it were a recreation reserve (section 38 Reserves Act) in perpetuity.

Note: structures and improvements on the site are vested in BPDC.

MODEL 7: STATUTORY VESTING OF FEE SIMPLE: VESTED RECREATION RESERVE (s26) (1 example)



In this model, although the fee simple is vested in the governance entity, ownership of the site is symbolic rather than substantive, as it has no role as an Administering Body.

'Vesting of reserves (section 26, Reserves Act) – for the better carrying out of the purposes of any reserve vested in the Crown the Minister may vest the reserve in any local authority or in any trustees empowered to hold and administer the land and expend money thereon for the purposes;'

Note: the claimant group has no rights at all over these sites.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Onaero Domain	Recreation reserve	Fee simple (to high water)	Vested recreation reserve	New Plymouth District Council (s26,26A)
Urenui Domain	Recreation reserve	Fee simple (to high water)	Vested recreation reserve	New Plymouth District Council (s26,26A)

Ngāti Mutunga

Although the mana of the iwi is reflected in fee simple ownership it is not absolute because the administering body is the local authority. The governance entity has no management rights and does not pick up any substantial costs. These sites have high public recreational value that ultimately overrides any potential for 'freehold' status.

Level 2: Crown retains ownership of the land
There are many examples of redress where the Crown has not been prepared to relinquish ownership of a site, for example on the grounds of a wider public interest. In all these models the Crown retains ownership but a range of mechanisms recognise the relationship of the claimant group with that site.

As the Guide has emphasised, it is up to the mandated body to consider whether a particular form of redress is desirable. For example will a certain type of redress simply put an unwelcome administrative load on the post-settlement governance entity with no real return in value to the claimant group. In this instance 'value' does not refer just to financial issues, but to cultural, historical and other values held by the claimant group.

The negotiators need to be especially aware that certain of these redress instruments will almost certainly need to be managed and monitored by staff of the governance entity. In some instances the settlement may be of such a size that carrying sufficient staff in the governance entity for such purposes would be difficult if not impossible. Negotiators who have no staff should not envisage that trustees would be able to carry out the administrative functions. This seldom works in the long run.

MODEL 8: STATUTORY VESTING OF FEE SIMPLE ESTATE AND GIFTING BACK TO THE CROWN OF SITES OF GREAT SIGNIFICANCE

0%.....100%

Management
Costs

The Red Book observes that the cultural redress aims of the claimant group often involve natural resources of general public importance that the Crown '*...owns and manages [...] in the best interest of New Zealand as a whole...*'.

The significance of this statement and the policy behind it permeates and effects many aspects of settlement redress. In the Ngai Tahu examples above, the Crown has acted on its policy discussed in the Red Book (page 128):

'With sites of such importance, the Crown may consider it appropriate to recognise the level of Māori interest in the area by restoring to Māori the sense of original 'custodianship' of the site.'

But the claimant group then unconditionally gifts the sites back to the nation.

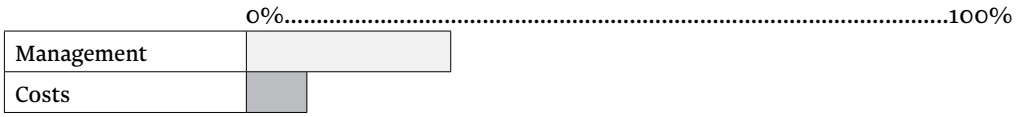
Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Aoraki/Mount Cook	Crown Land – part of Mount Cook National Park	Fee simple estate vested in Rūnanga	Te Rūnanga vests Aoraki in Crown by Deed of Gift	Aoraki/Mount Cook remains part of the National Park
High Country Stations (Elfin Bay, Routeburn, Greenstone)	Purchased by the Crown for Landbank at Ngāi Tahu request	Fee simple estate (at market value) vested in Rūnanga	Mountain tops gifted to nation; balance leased in perpetuity to DoC at peppercorn rentals	The Department of Conservation (DoC) manages conservation estate (Leaseback Conservation Areas); concessions and commercial activities permitted only with consent of Rūnanga; Ngāi Tahu has right to farm the freehold titles with Crown grazing licences

Ngāi Tahu (1996)

Aoraki/Mount Cook: 'As further recognition of the significance of Aoraki/Mount Cook to Ngāi Tahu Whānui (the Deed of Settlement) also provides for a Statutory Acknowledgement, Deed of Recognition, Tōpuni and Statutory Advisor role for Te Rūnanga in relation to Aoraki/Mount Cook and for the name of Mount Cook to be changed to Aoraki/Mount Cook.

High country stations: the fee simple estate was vested in Ngāi Tahu who then gifted back the mountaintops to the nation. The conservation and management status of the gifted sites does not change.

MODEL 9: CONSERVATION ESTATE WITH OVERLAY CLASSIFICATION (4 examples)



An overlay classification is the highest form of cultural recognition provided in a Treaty settlement. This mechanism was developed from the custom of providing chiefly protection though spreading a dog skin cloak (tōpuni) over the person or thing to be protected.

The concept has been given a variety of names by claimant groups: *Ngā Taki Poipoia o Ngāti Ruanui* (Ngāti Ruanui); *Tōpuni* (Ngāi Tahu); *Kirihipi* (Te Uri o Hau); and *Whenua Rāhui* (Te Arawa Affiliate) *Owhakatihi* (Ngāti Tūwharetoa Bay of Plenty).

Although it may appear to be a relatively minor point these various names in te reo Māori illustrate a case where the Crown allows flexibility to claimants. In the case of Te Uri o Hau this allowed the oral history of Te Tiriti Kirihipi to be included in the redress package although the Crown never accepted the historicity of the oral history about a sheepskin document, now lost.

An overlay classification applies to highly significant sites administered by the Department of Conservation. It is the most overt acknowledgement of a claimant group's mana and rangatiratanga in a specific area. The rangatiratanga is underlined in that the Red Book states that it is an *exclusive redress instrument*, and will not be offered to more than one group in respect of the same area.

The Crown-owned status of the land is not affected, although the way it is managed may be. When the Crown agrees to declare an area to be subject to an overlay classification, the Crown acknowledges a statement by the claimant group of the particular traditional values that the group has in relation to that area. Crown policy documents assert that this statement of traditional values is taken into account in the way the Crown manages the site. The overlay classification provides for:

- the governance entity and the Crown to agree on protection principles to avoid harm to the claimant group's values or any diminution of them, and for the Director-General of Conservation to take action in relation to the protection principles.

The procedural obligations of an overlay classification typically include:

- notification in the *New Zealand Gazette* of the principles agreed between the claimant group and the Minister of Conservation – any agreed principles will have the aim of ensuring that the Minister avoids harming the claimant group's acknowledged values
- requiring the New Zealand Conservation Authority and the regional Conservation Board to consult the claimant group and to have particular regard to both their acknowledged values and any agreed principles, as well as the views of the claimant group, in carrying out certain management planning and policy functions under the Conservation Act and associated legislation. As with other instruments the level of consideration these agencies are required to have is to, '*have particular regard to*'.
- notification of the overlay classification on conservation and national park management plans affecting those areas, as well as in the *New Zealand Gazette* so that the public is informed
- requiring the Director-General of Conservation to take action on any agreed principles; the Director-General has discretion as to how and to what extent any such action is taken. It may range from simply issuing a statement to recommending regulations; for example, the Affiliate Te Arawa Deed of Settlement states that the Director-General has: '*a complete discretion to determine the method and extent of the action to be taken*'. (clause 11.8.12(a)).

It is important to note that the actions are usually negotiated and agreed between the claimant group and the Crown and included in the Deed of Settlement.

The degree that claimant groups take advantage of this redress will in large part be driven by the capability of the post-settlement governance entity, particularly whether it can employ sufficient staff to carry out matters associated with this and other cultural redress.

Land	Status	Ownership	Redress mechanism	Administering body / special conditions / encumbrances
Aoraki	National Park	Crown	Tōpuni	Department of Conservation
Ripapa Island	Historic reserve	Crown	Tōpuni	Department of Conservation
Kura Tawhiti	Castle Hill Conservation Area	Crown	Tōpuni	Department of Conservation

Ngāi Tahu (1996)

Aoraki / Mount Cook is perhaps the most famous overlay classification. On its website Te Rūnanga o Ngāi Tahu says of its tōpuni:

> *'Tōpuni provide very public symbols of Ngāi Tahu mana and rangatiratanga over some of the most prominent landscape features and conservation areas in Te Waipounamu... a tōpuni confirms and places an 'overlay' of Ngāi Tahu values on specific pieces of land managed by the Department of Conservation (DoC). A tōpuni does not override or alter the existing status of the land but ensures that Ngāi Tahu values are also recognised acknowledged and provided for. Each tōpuni involves three levels of information:*
>
> - *a statement of the Ngāi Tahu values in relation to the area*
> - *a set of principles aimed at ensuring that DoC avoids harming or diminishing those values...*
> - *specific actions which DoC has agreed to undertake to give effect to those principles.*
>
> *The specific actions may change over time as circumstances change, but Conservation Boards will always be required to have particular regard to Ngāi Tahu values in relation to each site, and to consult and listen to Ngāi Tahu when they prepare plans and strategies in relation to those areas.'*

Land	Status	Ownership	Redress mechanism	Administering body / special conditions / encumbrances
Pouto	Stewardship Area	Crown	Kirihipi overlay area	Department of Conservation

Te Uri o Hau (2000)

Land	Status	Ownership	Redress mechanism	Administering body / special conditions / encumbrances
Wai-ariki	Part of Waitotara Conservation Area	Crown	Taki Poipoia	Department of Conservation [section 62, Conservation Act]

Ngāti Ruanui (2001)

Land	Status	Ownership	Redress mechanism	Administering body / special conditions / encumbrances
Parimahana	Scenic reserve	Crown	Owhakatihi	Department of Conservation (section 62 Conservation Act)

Ngāti Tūwharetoa (Bay of Plenty) (2003)

The Ngāti Tūwharetoa (Bay of Plenty) Deed of Settlement (clause 5.7.3) states that:

'The Settlement Legislation will provide that [...] the declaration of an area as an Owhakatihi [...] and the acknowledgement of Ngāti Tūwharetoa Values in respect of the area ... will be for the following purposes only:

- *An agreement on Protection Principles*
- *That the New Zealand Conservation Authority and the relevant conservation boards will be required to have particular regard to Ngāti Tūwharetoa Values and those Protection Principles [...], and*
- *The taking of action in respect of such Protection Principles...'*

Note, however, that the Crown acknowledges the statement by the claimant group but does not endorse, recognise or necessarily accept that statement.

The Affiliate Te Arawa Iwi/Hapū has a whenua rāhui:

Purposes of Whenua Rāhui
That the only purposes of the declaration of the site as a Whenua Rāhui, and of acknowledging the Affiliate Te Arawa Iwi/Hapū Values in relation to the site, are to:

(a) require that the New Zealand Conservation Authority, and relevant Conservation Boards, have particular regard to the Affiliate Te Arawa Iwi/Hapū Values and the Protection Principles...;
(b) require the New Zealand Conservation Authority to give the governance entity an opportunity to make submissions as provided in [named] clause; and
(c) enable the taking of action under [named] clauses' (clause 11.8.3, Affiliate Te Arawa Deed of Settlement).

In considering whether the overlay classification instrument provides any greater rights or interests to the governance entity the provisions may state:

General provisions
That the declaration of the site as a Whenua Rahui and the Crown's acknowledgement of the Affiliate Te Arawa Iwi/Hapū Values do not...

(a) affect, and may not be taken into account by, any person exercising a power or performing a function or duty under legislation or a bylaw;
(b) affect the lawful rights or interests of any person; or
(c) grant, create or provide evidence of an estate or interest in, or rights relating to, the Whenua Rāhui; and that except as expressly provided in [named] clauses, a person, in considering a matter or making a decision or recommendation under legislation or a bylaw, must not give greater or lesser weight to the Affiliate Te Arawa Iwi/Hapū Values than the person would give if they were not referred to by the Settlement Legislation.' (clauses 11.8.28/29, Te Arawa Affiliate Deed of Settlement).

Exclusive redress?
The Red Book statement about overlay classification being exclusive redress (page 132) is contradicted in the Affiliate Te Arawa AiP where the Crown provides itself room to provide the same status to another claimant group. This may be a provision to accommodate other Te Arawa iwi/hapū who have yet to settle, but negotiators are advised not to deviate from the exclusive redress status of overlay classifications.

> *'In recognition of overlapping claims the granting of this overlay classification will not prevent the Crown from granting an overlay classification to persons other than the Affiliate Te Arawa Iwi/Hapū or the Governance Entity with respect to the same area. To this end, the Crown retains the ability to, in consultation with the Governance Entity, amend the protection principles if necessary to take account of a future Treaty settlement with an overlapping claimant group' (paragraph 39, Affiliate Te Arawa Iwi/Hapū AiP).*

From the Crown's point of view this clause is an example of development of a redress mechanism to meet new conditions, rather than a policy inconsistency.

An AiP usually states that the overlay classification will be, in substance, on the same terms as those provided in previous Treaty settlements.

Statutory Acknowledgements

MODEL 10: CROWN LAND: STATUTORY ACKNOWLEDGEMENT

0%.....100%

Management	
Costs	

Statutory Acknowledgements (the Red Book, pages 132–133) may be given in respect of areas or features on Crown-owned land that are of high significance to the claimant group. These sites may include rivers, lakes, wetlands, mountains, forests, islands, coastal areas and other such areas traditionally of high significance to Māori, either for their resources or for their links to tribal history and tupuna.

Statutory Acknowledgements are second level redress, below overlay classifications. The post-settlement governance entity has a more passive role and again the need for quality staff to handle these matters is emphasised. Unlike the overlay classifications, statutory acknowledgements are ***not exclusive redress*** instruments and the Crown may give an acknowledgement over the same site to more than one claimant group.

In the settlement legislation the Crown acknowledges a statement by the claimant group of their cultural, spiritual, historic and traditional association with an area or geographical feature, and enhances the claimant group's ability to participate in specified Resource Management Act issues by creating obligations on decision-makers acting under those provisions, to proceed in certain ways. These obligations are that:

- *consent authorities **must have regard** to the Statutory Acknowledgement in deciding whether the claimant group is an 'affected party' when notifying resource consent applications for those sites*
- *consent authorities must send summaries of all relevant applications to the claimant group before making a decision on notification*
- *local authorities must attach information on the acknowledgements to any relevant plans*
- *the Environment Court and the Historic Places Trust must have regard to the Statutory Acknowledgement when deciding whether to hear representatives of Māori at proceedings affecting the site*
- *the governance entity and any member of the claimant group is able to cite Statutory Acknowledgements as evidence of their association to the Statutory Areas.*

A major advantage of this mechanism is that it provides advance warning of activities that might threaten wahi tapu and other sites within the area of the statutory acknowledgement area. Without this protection the potential – as many claimant groups know to their cost – is that wahi tapu can be damaged before they are even aware of the activity.

It is essential to note that although consent authorities 'must have regard to' the statutory acknowledgement in deciding whether the claimant group is an 'affected party', there is no guarantee that they will be deemed as such by the authority.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Whenua Hou (Island)	Codfish Island Nature Reserve	Crown	Nature Reserve with Statutory Acknowledgement and Deed of Recognition	Joint Committee: Four from Murihiku Runanga and four from the Southland Conservation Board

Ngāi Tahu (1996)

Whenua Hou: name changed from Codfish Island Nature Reserve to Whenua Hou; continues to be administered by the Minister of Conservation as a Nature Reserve. Statutory Acknowledgement and Deed of Recognition recognise the Ngāi Tahu association with Whenua Hou and provide for the ongoing recognition of that association.

The Joint Committee may advise the Southland Conservation Board, the New Zealand Conservation Authority and the Minister of Conservation on all matters to do with the control and management of Whenua Hou. Whenever practicable those bodies must consult and have particular regard for the views of the joint committee, but there is no guarantee that the bodies will heed that advice.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Owairaka (Mt Albert Domain)	Reserves Act	Crown: vested in Auckland City Council	Reserves Act + Statutory Acknowledgement	ACC: Joint management body may give advice (Memorandum of Understanding between Ngāti Whātua o Orākei and Auckland City Council)

Ngāti Whātua o Orākei (AiP 2006)

This is an example of Crown land vested in a local authority (as opposed to the local authority being delegated to manage the site). The Crown will not take it away to vest in a claimant group for a Treaty settlement. Instead the site has a Statutory Acknowledgement, plus the joint management body may give advice.

Note that the advice may not necessarily be heeded. The reserve status does not change.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Thirteen Te Arawa Lakes	Crown ownership of water column	Crown	Reserves Act + Statutory Acknowledgement	Rotorua Lakes Strategy Group (equal numbers from Te Arawa Governance entity, Bay of Plenty Regional Council, Rotorua District Council)

Te Arawa Lakes (2004)

In this unique settlement the lake beds are vested in the Te Arawa governance entity but the Crown retains ownership of the water column and air stratum. Some lakes have reserve status, and a Statutory Acknowledgement is placed by the Crown over all 13 lakes. Members of the Te Arawa governance entity form a minority on the joint committee charged with strategic management of the lakes.

The range of Crown-owned sites that can fall within this category of redress is reflected in the Ngā Raurū Kiitahi Deed of Settlement where the cultural redress Schedule sets out the Statements of Association by the iwi in relation to each of eight Statutory Acknowledgement Areas:

Nukumaru Recreation Reserve, Coastal Marine Area, Tapuarau Conservation Area, Lake Beds Conservation Area, Ototoka Scenic Reserve, and parts of the Pātea, Whenuakura and Waitōtara Rivers.

The general provisions relating to statutory acknowledgements indicate the limited weight this instrument might have in practice:

General provisions
That the Statutory Acknowledgement and the Geothermal Statutory Acknowledgement do not (except as expressly provided in named clauses)

(a) affect, and may not be taken into account by, any person exercising a power or performing a function or duty under legislation or a bylaw;
(b) affect the lawful rights or interests of any person; or
(c) grant, create or provide evidence of an estate or interest in, or rights relating to, a Statutory Area or the Geothermal Resource, as the case may be;

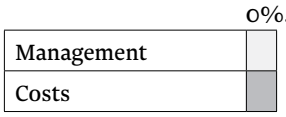
That except as expressly provided (in named clauses), a person, in considering a matter or making a decision or recommendation under legislation or a bylaw, must not give greater or lesser weight to a Statement of Association than the person would give if the Statement of Association was not referred to by the Settlement Legislation;' (clauses 11.1.17/18, Affiliate Te Arawa Deed of Settlement).

Each Statutory Acknowledgement can be a substantial document; for example, in the Ngati Awa Deed of Settlement, the Statutory Acknowledgements for eleven sites run to fifty pages.

The AiP usually notes that Statutory Acknowledgements will, in substance, be provided on the same terms to those provided in previous Treaty settlements, and will not prevent the Crown from providing a statutory acknowledgement to persons other than the claimant group or the governance entity with respect to the same area. This is also standard. It implies that extreme variations on the template are not likely to be accepted by the Crown.

Negotiators should still be prepared to push the boundaries if they consider it to be in the interests of their claimant group.

MODEL 10A: OTHER CROWN-OWNED RESOURCE WITH A STATUTORY ACKNOWLEDGEMENT
(1 example)



Geothermal Statutory Acknowledgement (GSA)

Ngāti Tuwharetoa Bay of Plenty have a Geothermal Statutory Acknowledgement (GSA) (clause 5.5) which enables the governance entity or any member of the iwi to cite the GSA as evidence of their association with the use of geothermal water in the local geothermal system.

Land	Previous status	Ownership	New status	Administering body / special conditions / encumbrances
Kawerau Geothermal System	Crown-owned resource	Crown	Crown	Geothermal Statutory Acknowledgement

Ngāti Tūwharetoa (Bay of Plenty) (2003)

MODEL 11: DEEDS OF RECOGNITION
A Deed of Recognition (the Red Book, page 133) is a cultural redress instrument that relates to any area covered by a Statutory Acknowledgement that the Crown is responsible for managing. A Deed of Recognition will not prevent the Crown from providing a Deed of Recognition to persons other than the claimant group or the governance entity with respect to the same area.

The Crown is unlikely to enter into a Deed of Recognition over Crown-owned land that is managed by a local authority, or over water. A Deed of Recognition will provide for the governance entity to be consulted in relation to specified matters, and that the relevant Minister *must have regard* to their views. In theory it provides for the claimant group to contribute 'from time to time' to managing the land.

The consultation requirements on the Minister, in relation to specified activities within the specified area to which a Deed of Recognition applies, will typically provide that:

'Deed of Recognition requires consultation with governance entity

> *The Deed of Recognition must provide that the Minister of Conservation must, if undertaking the activities specified in that deed in relation to or within the Statutory Area to which the deed applies, consult and have regard to the views of the Governance Entity concerning the association of the Affiliate Te Arawa Iwi/Hapū with that Statutory Area as described in the relevant Statement of Association.'* (clause 11.5, Affiliate Te Arawa Deed of Settlement)

Consistent with the wording in relation to consultation in the other instruments, under the Affiliate Te Arawa Deed of Recognition the Minister is merely to '*have regard to*' the views of the governance entity. This is a much lower threshold than could have been utilised, such as '*give effect to*' which would place a higher level of duty on the Minister. It appears the Minister is able to 'have regard to' but ultimately ignore, the views of a claimant group. There might be cases where the claimant group's views were absurd or patently unachievable but this phrase gives the Minister too much latitude to also discount reasonable points of view.

Deeds of Recognition are significant documents in the Schedules, for example, the four Ngati Awa Deeds of Recognition comprise fifty pages.

An AiP often notes that the Deed of Recognition will, in substance, be provided on similar terms to those provided in previous Treaty settlements. Again, this is the Crown trying to set limits in advance.

MODEL 12: CAMPING ENTITLEMENTS (UKAIPŌ OR NOHOANGA)

Camping entitlements (the Red Book, pages 134–135) are renewable ten-year entitlements that will enable the governance entity to permit members of the claimant group to occupy land temporarily and on a non-commercial basis so as to have access to:

1. *the coast or a waterway for lawful fishing;*
2. *lawful gathering of natural resources in the vicinity of the Ukaipō site.*

These are exclusive camping rights *granted* by the Crown for up to 210 days each year, on an area up to one hectare, of Crown-owned land near a river, lake, or other source of mahinga kai. Their purpose is to provide for easier access for the claimant group to the mahinga kai source.

Camping entitlements include the following rights:

- to occupy the site exclusively while camping (subject to regulatory requirements including district or regional plan requirements)
- to erect temporary shelters (subject to consent requirements of the relevant Crown agency managing the land) and the right to undertake activities (again, subject to all applicable laws and regulations) to better enable the holders to use the land as a campsite, and
- to be kept informed by the Crown agency managing the land about activities that may affect the holder and the right not to be unreasonably disturbed.

The distinct right accruing to the governance entity distinct from the general public under this instrument is the right to occupy a site exclusively. However camping, erection of temporary structures and resource extraction activities are all subject to existing regulation and consent requirements.

A camping entitlement does not enhance or provide any other lawful rights of the governance entity (other than to access the land, etc). In particular it:

1. does not create any new or increased right to fish or gather natural resources – such as any species protected under the Wildlife Act 1953, or
2. does not permit the holder to obstruct or prevent public access to the mahinga kai source.

In the Ngā Raurū Kiitahi Deed of Settlement the significance of the word 'grant' is reflected in the ability of the Crown to terminate an Ukaipō Entitlement if the governance entity has defaulted in performing any of its obligations under the agreement. In other words there are clear responsibilities tied to the right.

The AiP may state that Ukaipō will be, in substance, on the same terms as those provided in recent local Treaty settlements, in other words the Crown is constraining variation on previous settlements.

When site visits or inspections occur after the AiP is signed it is sometimes found that the site is not suitable for the claimant group. In light of the Crown's reluctance to find replacement sites, it is an important for the mandated body to complete a site visit before signing the AiP.

LEVEL THREE: RELATIONSHIPS WITH OTHER PARTIES

Protocols

A protocol (the Red Book, pages 133–134) is a statement issued by a Minister of the Crown or other statutory authority that sets out how the government agency intends to:

- *exercise its functions, powers and duties in relation to specified matters within its control in the Protocol area*
- *interact with the governance entity on a continuing basis and enable that group to have input into its decision-making processes.*

All protocols must comply with the applicable legislation. Normally protocols might be provided by the Department of Conservation, Ministry of Fisheries and Ministry of Culture and Heritage. There may be other Ministers identified to cover specific matters in some settlements. For example, the Ngāti Ruanui Deed of Settlement includes a Ministry of Economic Development Protocol and Te Uri o Hau includes the Minister of Energy.

An example is a protocol issued by the Minister of Conservation that might state that requests from the governance entity (for the customary use of cultural materials, for example) will be considered. The protocol will not guarantee that the requests will be granted. Protocols are issued subject to the Minister's and the agency's legal and policy obligations. They do not restrict those obligations. Nor do protocols provide for the governance entity to have exclusive consultation rights in relation to a specified area.

It is recommended that the mandated body focus on considering which Ministers will have most relevance for the claimant group. This might include protocols with other Ministers. Again, negotiators should be mindful that Crown negotiators will always be wary of any new redress models on the grounds that they will create a precedent.

Protocols do not affect the ability of the Crown to interact or consult:

> *'The Protocols do not restrict the ability of the Crown to interact or consult with (or issue a protocol to) any person including any iwi, hapū, marae, whanau, or representative of tangata whenua.' (clause 9.9, Affiliate Te Arawa Deed of Settlement)*

Protocols do not grant, create or provide evidence of an estate or interests or rights relating to the subject matter of the protocol:
'The DOC Protocol does not have the effect of granting, creating or providing evidence of an estate or interest in, or rights relating to, land held, managed or administered, or flora or fauna managed or administered, under the Conservation Legislation.' (clause 9.2.3, Affiliate Te Arawa Deed of Settlement)

In addition the powers of the Crown are not curtailed or limited by anything within a protocol:

Protocols subject to rights and obligations
The Protocols do not restrict:
(a) the ability of the Crown, in accordance with the law and government policy, to perform its functions and duties and exercise its powers, including its power to introduce legislation and change government policy;
(b) the responsibilities of the responsible Minister or relevant Department; or
(c) the legal rights of the Affiliate Te Arawa Iwi/Hapū or a Representative Entity.' (clause 9.7.4, Affiliate Te Arawa Deed of Settlement)

The relevant Minister has the authority to amend or cancel a protocol. Before the Minister makes such changes, they must first consult the claimant group. The level of consideration the Minister is required to have to the governance entity's submissions is limited, as worded in clause 9.7.3 of the Te Arawa Affiliate Deed of Settlement, to have '*particular regard to its views*'.

In essence, therefore, under a protocol, the benefit accruing to the governance entity is a formal process for interaction between the governance entity and particular Ministers or Ministries. At law, protocols are subject to judicial review. However damages are not available as compensation if decisions are made in breach of any protocols. It is important to note therefore that potentially expensive legal action may be required for the governance entity, in the event that the Crown agency declines to adhere to any agreed protocols.

A protocol does not provide a certain outcome for the governance entity, but a process. Failure to comply with a protocol does not amount to a breach of the Deed of Settlement. For example, see clause 9.8 of the Affiliate Te Arawa Deed of Settlement.

The AiP usually states that protocols will be, in substance, on the same terms as those provided in previous Treaty settlements. The Crown uses precedent to set the limits of redress.

The Protocol Area is not necessarily the full Area of Interest asserted by the claimant group.

PROMOTION OF RELATIONSHIPS WITH THIRD PARTIES
The mechanisms that follow are common through almost all Deeds of Settlement so that governance entities have had ample time to 'test drive' each of them. It would be useful for the mandated body to contact the leaders of some of those governance entities to discuss how effectively they work in practice. What 'looks good' on paper may in some cases prove to be a 'Claytons'.

Promotion of relationship between claimant group and local authorities
'The Deed of Settlement will note that the Minister in Charge of Treaty Negotiations will write to the relevant local authorities [local and regional councils] in relation to:

- *encouraging each council to enter into an Memorandum of Understanding (MOU) (or a similar document) with the governance entity in relation to the interaction between the council and the governance entity concerning the performance of the council's functions and obligations, and the exercise of its powers, in the Area of Interest.'*

This process may also include the Minister for the Environment and/or the Minister of Local Government.

The AiP may also include such matters as:

a encouraging discussions between the governance entity and local authority in relation to the name[s] of identified place(s)
b encouraging discussions regarding council processes in naming and renaming of streets and/or other place names
c encouraging the council to make provision for certain rights in named Reserve(s)
d recognising the traditional association of identified iwi/hapū with certain Reserves and explore options for involving them in the administration
e support a change in the District Plan that would

provide for specified hapū/iwi to gather cultural materials for traditional purposes without the need for a resource consent, and

f erect interpretation material agreed with the governance entity explaining the traditional association of specified hapū/iwi with a site.

These sections are usually case specific, referring to unique aspects of redress. Each mandated body should give careful consideration to what particular aspects they might want in this proposed relationship.

Promotion of relationship between governance entity and other organisations

In this case relevant Ministers will write to bodies such as the New Zealand Historic Places Trust, Fish and Game New Zealand and the Regional Conservation Board encouraging them to enter into MOUs/protocols with the governance entity concerning information exchange and matters of common interest within the area over which the relevant protocol (elsewhere in the AiP) relates.

These letters can only 'encourage'. The effect of this clause is not binding on either the Crown or the target third parties. Consequently some claimant groups may question the use or appropriateness of such a clause in an AiP. That view arouses sympathy but experience has been that when Ministers write letters of encouragement, they do hold some weight with third parties.

The intent to establish these relationships is now quite standard. Negotiators are recommended to make contact with established governance entities to discuss how the mechanism works in practice.

Monitoring the provisions of the Resource Management Act

The Ngāti Awa Deed of Settlement (clause 5.14) has a standard reference used in several settlements.

'The Crown agrees that:

a As soon as reasonably practicable after the Settlement Date, the Ngāti Awa Governance Entity will be given an opportunity to express to Ministry for the Environment (MFE) their views on how the Treaty of Waitangi provisions, and other relevant provisions, of the RMA 1991 are being implemented in the area of interest; and

b After the Settlement Date, the Ministry for the Environment will monitor... the performance of local government in implementing the Treaty of Waitangi provisions, and other relevant provisions, of the RMA 1991 in the area of interest.'

A variant in one Deed of Settlement says that the Ministry for the Environment and the governance entity '*... will meet annually or as otherwise agreed to discuss the performance of local government...*' This is a much stronger statement than a provision for the governance entity to 'express their views'.

As suggested, the mandated body needs to carefully consider the overall size of their settlement redress and ensure that they will have the administrative capability to carry out these functions.

Joint advisory or management committees

This mechanism is used to meet claimant group interests on Crown land which is not being vested back to the governance entity. The Red Book notes (page 101):

> *'Where there are both significant conservation and cultural interests in a reserve site but it does not seem feasible to transfer the title to the claimant group, the Crown may consider establishing a Joint Management Committee over the site under section 9 of the Reserves Act 1977. Where these conditions apply, but the land involved is a conservation area, a Joint Advisory Committee under section 56 of the Conservation Act 1987 may be the right way to meet the interests of all parties.'*

The Joint Management Committee may advise on or manage a site or area of importance to both the claimant group and the Crown, and will comprise representatives of the claimant group and the Department of Conservation.

Ngāti Awa has two committees:

5.3: Joint Advisory Committee in respect of Matata Scenic Reserve, Whakapaukorero and Te Awa A Te Atua (Matata Wildlife Refuge Reserve):

- Minister appoints two members nominated by Ngati Awa governance entity and two nominated by the Director-General (DG)
- Minister and DG *will consult with, and have regard* to the views of, the Joint Advisory Committee (JAC) in relation to conservation matters affecting the sites retained in Crown ownership (excludes Whakapaukōrero which is owned by Ngāti Awa), notably preparation of any Conservation Management Plans and annual planning
- JAC will also advise Ngāti Awa governance entity on Conservation matters affecting Whakapaukorero
- Costs lie with both parties.

5.4: Joint Management Committee in respect of Moutohora (Whale) Island Wildlife Management Reserve, Ohope Scenic Reserve, and Tauwhare Pā Scenic Reserve

- Minister appoints three members nominated by Ngāti Awa governance entity, two nominated by Director-General and one by Bay of Plenty Conservation Board
- The Minister, the Director General, the New Zealand Conservation Authority and the Bay of Plenty Conservation Board *must consult with, and have regard to* the advice of, the Joint Management Committee concerning the Conservation of the Jointly Managed Sites, notably development of Conservation policy, conservation management and annual business planning

- Costs lie with the Crown.

Te Arawa: Rotorua Lakes strategy group

The Te Arawa Lakes Deed of Settlement (clause 9.3) provides for this joint committee under the Local Government Act 2002 whose purpose:

> '*... is to contribute to promoting the sustainable management of the Rotorua Lakes and their catchments for the use and enjoyment of present and future generations, while recognising and providing for the traditional relationships of Te Arawa with their ancestral lakes.*'

Although the beds of the lakes are vested in Te Arawa the Crown retains the water column and air stratum. However the Crown has placed a statutory acknowledgement over the lakes, some of which have reserve status, and Te Arawa can participate in strategic management of the lakes by being part of this joint committee.

Members of this permanent joint committee within the meaning of the Local Government Act are drawn equally from the Bay of Plenty Regional Council, Rotorua District Council and the governance entity.

Other forms of cultural redress

It will be important for negotiators and the mandated body to assess the usefulness and applicability of these types of redress most of which may not benefit them. There is little point in accepting redress 'just because it's there' if it has no intrinsic value to the claimant group or will have high maintenance costs out of all proportion to the importance of the site. Three forms are examined:

- Advisory committees
- Gifts, and
- Place-name changes.

Advisory committees

If the claimant group identify indigenous fish species as taonga of 'very great significance' they may be appointed as an Advisory Committee to the Minister responsible for management of those species (the Red Book, pages 121–122). Depending on the species the Minister will either be for Fisheries or Conservation.

When making policy decisions affecting those species the Minister of Fisheries is required to:

> *'consult the committee and **recognise and** provide for the claimant group's association with those species.' The Minister of Conservation is required 'to consult the committee and **have regard to** its advice on the taonga fish species – particularly Department of Conservation management and conservation of those species within the area of interest.'*

Note the different levels of obligation on the Ministers. The former must '*recognise and provide for*' but the latter is confined to '*have regard to*'. For examples, see Ngāti Awa Deed of Settlement clause 5.5, and Ngāti Ruanui clause 9.1.19/20.

Gifts

Although not commonly used, the Crown has used a gifting mechanism for some cultural redress. In the Ngāti Awa settlement the Crown gifted Ngāti Awa $1 million to assist in the development of the Mātaatua complex. Mātaatua meetinghouse was returned to Ngāti Awa in 1996 as partial settlement of historical claims. The Crown will also vest to Ngāti Awa all or part of the land under Whakatāne airport if ever the Minister of Conservation revokes its status as a reserve under section 24 of the Reserves Act.

Place-name changes

The Crown has a preference for dual naming: *'Settlement legislation can be used to change official place-names within the claim area to joint Māori/English names, and in some limited circumstances to Māori only names'* (the Red Book, pages 121, 123).

There are also examples where Māori names have been given to sites with no previous official names; for instance Whitikau, Maraeroa and Te Ramanui in the Ngāti Ruanui Deed of Settlement restore ancient tribal names to those sites.

There do not tend to be a lot of proposed name changes in each AiP. The Crown does not typically raise place-name changes early, as redress options are not always tabled by the mandated body for discussion early in the negotiations. Second, and closely related to the first

issue, the Crown requires widespread consultation with many parties on place-name changes. This process takes a very long time. It is possible that the combined effect of this and the first issue is that not all place-name changes get to the negotiating table.

Local authorities rather than the Crown control naming of streets and some reserves, and as a matter of principle the Crown is very reluctant in the context of Treaty settlements, to influence local government decisions. On this basis it is in the claimant group's interests to build positive relationships with local government so they are sympathetic to name changes.

Given the potential drawn-out nature of this type of redress it is recommended that they be considered by negotiators and tabled very early in the negotiation process. This is compounded by the fact that place-name changes must go through the Geographic Board, which meets infrequently.

Agreement in Principle and name changes
The AiP will usually identify the place-names that the parties have agreed should be subject to change. Phrases used in AiPs include:

- 'The Deed of Settlement and Settlement Legislation *will provide for* the name …'
- 'The Crown and the Mandated Body *will discuss*, for inclusion in the Deed of Settlement changing the name …'
- 'The Crown *will explore*, for inclusion in the Deed of Settlement, changing the existing place name…'

Note: Only the first example provides certainty for the name change, underlining the importance of locking every key aspect of settlement redress into the AiP rather than anticipating that it will eventuate in the Deed of Settlement.

Wāhi Tapu
Many claimant groups have major concerns about the integrity of their wāhi tapu. In some cases, of course, they do not want the location of those wāhi tapu to become public knowledge. Those wāhi tapu on Crown land can still be protected on any site that has an overlay classification or statutory acknowledgement. There may also be sites that are public knowledge and this is accommodated for in the Ngāti Awa Deed of Settlement in 5.9 *Sites considered by Ngāti Awa to be Wāhi Tapu*.

> *'The Crown and Ngāti Awa acknowledge that the sites described (in the schedule) are considered by Ngāti Awa to be wāhi tapu… Nothing in this clause constitutes or implies any acknowledgement or agreement by the Crown that such sites are waahi tapu… The Crown and Ngāti Awa acknowledge that nothing (in the previous clauses) will affect the lawful rights or interests of any party who is not a party to this Deed.'*

The schedule identifies four sites returned to Ngāti Awa and six Crown-owned properties. Six small wāhi tapu sites in the Pouto Forest were vested in the governance entity in the Te Uri o Hau Deed of Settlement.

Prohibition of taking certain fish species for commercial purposes
Another mechanism to protect species of special significance to the claimant group is for the Crown to agree to add non-commercial fish species to a list of totally prohibited species in the relevant commercial fishing areas (the Red book, pages 121–123).

For example, the Ngā Raurū Kiitahi Deed of Settlement (clause 12.1) lists seven prohibited species, and has a specific reference to the taking of undersized tuna (eel) by the governance entity with the potential to relocate them in waterways in the Fisheries Protocol Area and aquacultural farms.

Shellfish Right of First Refusal (RFR)
The Ngā Raurū Kiitahi Deed of Settlement contains this relatively rare form of redress. In essence it provides for RFR for quota of identified shellfish species for a period of 50 years. It applies to kina (sea urchin) and seven species of purimu (surf clam). The Deed only applies if the Minister declares any of the identified species to be part of the Quota Management System and sets a Total Allowable Commercial Catch (TACC) of that species.

This form of redress, although culturally-based, has a commercial component because the governance entity will be able to sell catching rights annually for any shellfish quota they obtain.

Coastal tendering
In the event that the Minister of Conservation offers Authorisations of any part of the Specified Coastal Marine Area by public tender, the post-settlement governance entity will have a preferential right to purchase a proportion of the Authorisations. In the Ngāti Awa Deed of Settlement that proportion is up to five percent that must be 'not less than fair average quality' relative to the other portions.

Unique redress
Examples of 'one-off' redress specific to one claimant

group found in settlements are briefly summarised here. They are included to show that negotiators should always be prepared to 'think outside the square' and not be limited by precedent in their negotiation goals. This redress includes:

- Hangi stones at Moutohora Island
- Awanuiārangi II title
- Offshore Islands
- Putauaki (Mt Edgecumbe)
- Cultural redress in relation to Taranaki maunga
- Puurangi (Acknowledgement of Association)
- Oyster reserves
- Lake Okaro
- Fishing Licences
- Access to Paru and Indigenous Plants, and
- Special classification of Council-owned Reserves.
- Hangi stones at Moutohora Island (clause 5.8, Ngāti Awa Deed of Settlement)

This redress empowers the Joint Management Committee to grant permits to a member of Ngāti Awa to extract by hand, loose hangi stones from Moutohora (Whale) Island Wildlife Management Reserve. This bypasses the provisions of section 8 of the Crown Minerals Act 1991.

- *Awanuiārangi II title* (section 9, Ngāti Awa Deed of Settlement)

This is symbolic and equivalent to the Tainui Te Wherowhero Title. Clause 9.1.1 *Land to be held by eponymous ancestor*, provides that any land could come under this title, including land subsequently acquired by the governance entity.

The Crown and Ngāti Awa have agreed that Ngāti Awa can choose to declare settlement properties to be 'Protected land' in which case it would have some of the characteristics of 'Māori Land' as defined in Te Ture Whenua Māori Act 1993. The governance entity is able to put protections into its charter that make it more difficult to alienate the land.

- *Offshore Islands* (clause 5.11, Ngāti Awa Deed of Settlement)

The Crown will consult the Ngāti Awa governance entity if the Department of Internal Affairs conducts a review of the local government administration of seven named offshore islands.

- Pūtauaki (Mt Edgecumbe) (clause 5.12, Ngāti Awa Deed of Settlement)

The Minister in Charge of Treaty of Waitangi Negotiation has written to the current owner of Pūtauaki (Tarawera Forest Limited) to initiate a process to see whether the owners are prepared to divest their interests in Pūtauaki. Ngāti Awa acknowledges that this can only occur with the consent of both parties and that the Crown is not in a position to impose any meeting or discussions.

- *Cultural redress in relation to Taranaki maunga* (clause 13, Nga Raurū Kiitahi Deed of Settlement)

The parties agree that Maunga Taranaki is of great cultural, spiritual, historical and traditional importance to Ngā Raurū Kiitahi and other iwi of Taranaki. The clause notes that the governance entity and the Crown will work with the mandated representatives of the other iwi of Taranaki to develop an apology and cultural redress in relation to historical claims relating to the mountain. Other Taranaki iwi Deeds of Settlement have a similar clause. That is necessary until all iwi in Taranaki have mandated bodies in place to negotiate their claims.

- *Puurangi* (Acknowledgement of Association) (clause 9.5, Ngāti Ruanui Deed of Settlement)

The settlement legislation will acknowledge the cultural, spiritual, historical and/or traditional association of Ngāti Ruanui with Puurangi in the Area of Interest. Puurangi is a type of argillite traditionally used for tools and weapons.

- *Oyster reserves* (clause 5.10, Te Uri o Hau Deed of Settlement)

The Crown will consult with the governance entity in respect of the development of regulations relating to the customary non-commercial food gathering of oysters in reserves in Kaipara Harbour.

- *Lake Okaro* (clause 10.12 Te Arawa Lakes Deed of Settlement)

This notes that Lake Okaro is currently vested in and administered by the Rotorua District Council and therefore cannot be transferred by the Crown to Te Arawa. The Minister in Charge of Treaty of Waitangi Negotiation will write to the District Council, '*to encourage it to reach a mutually satisfactory arrangement with Te Arawa as to the status, management and ownership of Lake Okaro*'.

- *Fishing Licences* (clause 11.10, Te Arawa Lakes Deed of Settlement)

'Te Arawa and the Crown agree that the sum of $400,000 capitalises the ongoing annual cost of purchasing 200 fishing licences for the Te Arawa Lakes from Eastern Region Fish and Game New Zealand.'

- *Access to Paru and Indigenous Plants* (clause 11.15, Te Arawa Lakes Deed of Settlement)

Te Arawa acknowledges that relevant Ministers in consultation have written to Bay of Plenty Regional Council and Waikato Regional Council asking them to consider amending any relevant Regional Plan or Proposed Plan that applies to the Te Arawa Lakes so that Te Arawa may take paru and indigenous plants from the lakes without needing a resource consent.

- *Special classification of Council-owned Reserves* (clause 11.10, Affiliate Te Arawa)

Four sites are identified as Specially Classified Reserves with an acknowledgement by the Crown of the Affiliate Te Arawa Iwi/Hapū values in relation to the sites. The only purpose is to give effect to the requirement that the Rotorua District Council must have regard to the Protection Principles in the following clauses.

This is similar in function to certain overlay classifications.

OTHER NEGOTIATION ISSUES

A number of issues are briefly discussed here for a mandated body to consider in developing its negotiation strategy.

Vesting of cultural redress properties

The Deed of Settlement should clearly set out the conditions relating to the vesting of properties and sites in the governance entity. For example:

'Each cultural redress property shall vest in the governance entity

a) As redress and without charge to, or consideration to be provided or paid by, the governance entity or any other person; and

b) Subject to and, where applicable, with the benefit of all Encumbrances that relate to that property, which are specified in the attachment and the terms of this Deed'. (Ngāti Tūwharetoa Deed of Settlement, page 53, Ngāti Awa page 80)

See *Conditions of cultural redress Properties* in the AiP section for more detail.

Warranties and actions before settlement

As with any property transfer it is important that the mandated body seeks some assurance that the governance entity will receive exactly what was agreed in the negotiations. Other than the mandated body completing all necessary due diligence procedures as discussed in the Guide, there are two primary ways to secure this, as provided in most recent Deeds of Settlement. The first is to ensure that the Crown has an obligation to maintain properties prior to Settlement. This is discussed below.

The second way is to ensure that the Deed of Settlement has a built-in process whereby negotiators are able to inspect the properties or sites before Settlement.

CROWN TO MAINTAIN REDRESS PROPERTIES PRIOR TO SETTLEMENT

As observed, the time between a Deed of Settlement being signed and the Settlement Date can be significant. Ideally, the mandated body would seek an assurance from the Crown in the Deed of Settlement that the redress properties would be in the same state and condition on the Settlement Date as they were when the Deed of Settlement was signed.

For example:

'Ngāti Awa and the Crown agree that the cultural redress Properties are to be vested in substantially the same state and condition as at the date of this Deed [...] The Crown agrees that between the date of this Deed and the Settlement Date it will maintain and administer the cultural redress Properties [...] in substantially the same state and condition as at the date of this Deed.' (Ngāti Awa Deed of Settlement page 83)

While the Crown will provide a limited assurance it is important for the mandated body to understand the current position of the Crown in this regard which is essentially limited to 'buyer beware'.

On occasion the negotiators might seek to negotiate that the Crown restores a site before settlement where degradation of the site is directly a fault of the Crown.

Future management of specified cultural redress properties

Some claimant groups have found that maintenance costs, such as mowing grass, are much higher than they anticipated. Consequently negotiators need to carefully evaluate those costs before committing to vesting of any cultural redress land.

The Deed of Settlement and settlement legislation may have conditions on properties that are vested subject to existing reserve status:

a their reserve status may not be revoked
b the governance entity may not dispose of, exchange, transfer, mortgage or charge any of them
c the Minister of Conservation is to retain all functions and powers under the Reserves Act 1977.

This provision is most likely to be placed on sites that have high iconic value to all New Zealanders.

COSTS

Costs associated with transfer of cultural redress properties should fall to the Crown, as in the Ngā Raurū Kiitahi Deed of Settlement (clause 10.17):

> *'The Crown will pay survey and registration costs, and other costs agreed by the Crown and Ngā Raurū Kiitahi, required to vest the cultural redress Properties in a Transferee.'*

Cultural redress for other claimant groups / flexibility

Some Deeds of Settlement reflect the fact that more than one claimant group may have an interest in a particular cultural site. The Crown may require an acknowledgement from the mandated body in the Deed of Settlement that the Crown is able to provide similar redress to other claimant groups in the claim area if there are overlapping claims. This means that where possible the Crown may offer, and then have in place, certain settlement redress instruments that result in multiple governance entities having ownership or administering rights over the same area.

Such mechanisms are likely to be an increasing feature on the settlement landscape given the Crown's preference for large natural grouping negotiations. This also illustrates that when negotiating a Deed of Settlement the mandated body (and the Crown) should remain flexible and look at different ways of achieving positive outcomes.