ENVIRONMENTAL INFORMATION AND THE ADEQUACY OF TREATY SETTLEMENT PROCEDURES

Office of the
PARLIAMENTARY COMMISSIONER FOR THE ENVIRONMENT
Te Kaitiaki Taiao a Te Whare Pāremata

PO Box 10-241, Wellington

September 1994

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Acknowledgements

The Parliamentary Commissioner for the Environment and her investigation team would like to thank the many individuals who generously assisted with this investigation, particularly claimants and negotiators involved in the case studies, departmental and agency staff, local authority staff, those members of environmental groups who provided comment and all those who assisted in the review of drafts.

ISBN 0-908804-52-0

Preface

The continuing debate about the use of public lands in the settlement of Treaty claims, particularly lands with conservation values, has aroused a great deal of anxiety and in some cases anger. The general public of New Zealand has not understood what has been happening.

Since 1985 when the Waitangi Tribunal was given jurisdiction to consider claims of breaches of the Treaty of Waitangi reaching back to 1840, the Government has been faced with many such claims. One critical element in the process of resolving many of the claims is the way environmental aspects are handled. It is that matter which is the subject of this report.

So far as the Parliamentary Commissioner for the Environment's authority to investigate and report on these matters is concerned, any Treaty settlement process that relates to public lands and environmental matters is either an aspect of, or at least closely related to, "the processes established by the Government to manage the allocation, use and preservation of natural and physical resources" to quote s. 16(1)(a) of the Environment Act 1986.

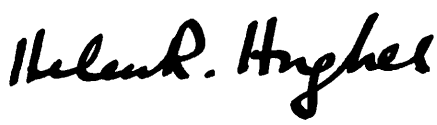
My concern is the means by which environmental planning and environmental management are dealt with within that process. In my view it is the issue of how environmental values will be protected that is relevant, not whether tangata whenua or the Crown can best ensure that the quality of the environment will be maintained.

Discussions on the nature of the investigation and on the final report have taken place between the Law Commission and the Office of the Parliamentary Commissioner for the Environment. I am extremely grateful for the assistance given which has not only improved the substance of the report but has assisted the office in understanding the present difficulties that have arisen in the course of Treaty settlements.

Government has recently identified criteria for managing the allocation of conservation lands under claim and announced that a booklet will be released on settlement policies. These have and will contribute to an understanding of the process. However it is still unclear how some claims will proceed and whether current procedures will be improved.

I believe the most constructive approach to the environmental aspects of Treaty settlements is the development of a planning regime which ensures that in each case the information necessary for sound environmental decisions is obtained and considered by decision makers, including Maori negotiators.

It is hoped that this report will help to clarify the process for Treaty settlements so that the public is better informed on how environmental concerns may be handled.



Helen R Hughes
Parliamentary Commissioner for the Environment

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1. Introduction

Procedures for settling Treaty claims are evolving. However, despite recent Government statements which have identified criteria for making decisions on the use of some public lands of conservation value, it is not yet clear how the environmental implications of settlement options will be identified and addressed in specific situations. This report, in its concern that the quality of the environment is maintained and enhanced, assesses the adequacy of procedures for environmental planning and management which have been carried out to date within the claim settlement process.

1.1 Background

The Office of the Parliamentary Commissioner for the Environment was established under the Environment Act 1986. Its purpose is to ensure that in the management of natural and physical resources, full and balanced account is taken of the intrinsic values of ecosystems, all values placed by individuals and groups on the quality of the environment, the principles of the Treaty of Waitangi, the sustainability of natural and physical resources and the needs of future generations.

In 1992 concerns were expressed to the Parliamentary Commissioner about what was perceived to be a failure of the Government to address the environmental implications of settling Treaty claims. Reports in the media at the same time reflected a range of similar concerns from some environmental groups.

Most of the concern that has been expressed has focused upon the potential use of areas of "Crown" land, or resources which are "publicly" owned, in the settlement of claims. The public interest matters raised have included the issues of public access and the protection of conservation values (e.g. indigenous forest and wildlife habitat, and specific species such as tuatara). The transfer to Maori of title to public resources has been hailed by some as having implications of "privatisation". Concern has been expressed that with Maori

ownership or control there will be no accountability to the public for management of those resources, although it is generally recognised that the provisions of the Resource Management Act 1991 will apply.

These concerns have been heightened with the enactment of the Treaty of Waitangi Amendment Act 1993 which removed from the Waitangi Tribunal the power to make recommendations over private land. Strong views have since been expressed that the public could be adversely affected in the interests of settling a claim and that the environment ultimately will suffer.

Alternatively, it is also argued that where the tangata whenua are "kaitiaki" (guardians) over particular natural resources, the sustainability of which is a responsibility they must bear, the resources are not theirs to destroy. That view suggests that increased Maori involvement in management on this basis could complement protection of the environment and that public interests such as access and conservation values can be accommodated in arrangements that also accommodate Maori interests (for example, through easements, conservation covenants or shared management arrangements).

In respect of claims for land, many lands under consideration for return have been taken from Maori in breach of the promises and guarantees made in the Treaty. Furthermore, aside from or in conjunction with questions of resource ownership, an important aspect of many claims is the adequacy of the Crown's management of resources which are taonga, and whether or not environmental degradation has occurred. Reports prepared by the Waitangi Tribunal outline numerous cases in which failure by the Crown and its agents to take account of Maori concerns has contributed to environmental degradation[1].

Many of these issues were canvassed in a series of workshops held by government officials in 1993 at which representatives of Maori, environmental interest groups and government presented a range of

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1 for example Waitangi Tribunal 1983, 1984, 1986, 1988a, 1991

views. If anything, the arguments appeared to become more entrenched. The Commissioner therefore determined that an independent opinion on Treaty settlements and their implications for the environment would be of benefit. The Crown has accepted that valid Treaty grievances must be addressed and that it is in the public interest that they are. Expressing this matter in the terms used in Treaty jurisprudence, the Crown as a party to the Treaty has a duty to conduct its business, giving due consideration to the principles of the Treaty.

From preliminary enquiries, however, it is not clear whether a Treaty grievance settlement process yet exists to ensure that those involved in negotiations and final decisions have full information as to the environmental implications of settlement options.[2]

The Commissioner is aware that while this report has been in preparation, the Government has been developing policies relating to natural resources and the settlement of claims. At the time of writing, further policy in the Treaty area has still to be released. During the last phase of this investigation, ministerial press releases and a speech by the Minister of Justice indicated the shape of Government thinking. This included criteria to be applied when consideration is being given to using the conservation estate in settlement of Treaty claims, with the process for consultation being determined on a case-by-case basis.[3] Further policy decisions have yet to be released.

1.2 Terms of Reference

The Commissioner conducted her investigation under section 16(1)(a) and 16(1)(f) of the Environment Act 1986 according to the following terms of reference:

(i) *With the purpose of maintaining and improving the quality of the environment, to enquire into and report on the adequacy of processes used by the Crown and*

2 "Process" is a generic term which covers various procedures including validation, acceptance, negotiation, mediation, statutory procedures and Cabinet and Parliamentary procedures.

3 Ministers of Conservation and Justice, June 1994.

government agencies to manage the allocation, use and preservation of natural and physical resources in the context of Treaty negotiations.

(ii) *To provide advice on remedial action as appropriate.*

The purpose of this report is to clarify how far procedures for settling Treaty claims ensure that the information necessary for sound environmental decision making is obtained by those responsible for critical decisions and agreements.[4] Inevitably it has addressed the effectiveness of environmental planning and environmental management carried out by the relevant public authorities in this context (s.16(1)(b). Environmental planning involves setting objectives and obtaining the information necessary to make decisions. Management ensures that natural and physical resources are protected through a range of methods.

While this report focuses primarily on the provision of environmental information relating to claims brought before the Waitangi Tribunal, it is recognised that the Crown is also concerned with situations in which there are valid Maori interests in natural and physical resources outside the context of a claim relating to breaches of the Treaty[5]. In situations

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4 The broad definition of "environment" as set out in section 2 of the Environment Act 1986, underlies this report:

> *"Environment" includes -*
> *(a) Ecosystems and their constituent parts including people and communities; and*
> *(b) All natural and physical resources; and*
> *(c) Those physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes; and*
> *(d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.*

5 For example, in findings made by the Planning Tribunal, the relationship of Maori and their ancestral lands has been recognised separately from questions of Treaty breach. Numerous cases include *Royal Forest and Bird Protection Society v. W A Habgood Ltd* (1987) 12 NZTPA 76, in which the Tribunal found that such a relationship can be shown to continue regardless of whether the land concerned remains in Maori ownership, and *Haddon v. Auckland Regional Council* A 77/93, in which the Tribunal commented upon mechanisms to restore customary authority where a traditional relationship exists between Maori and natural resources. The Tribunal noted that "authority is meaningless without some power (ihi)which can be provided for or recognised."

where an ongoing ancestral relationship exists, the Crown may decide to return land as a matter of "good Government" rather than as a matter relating to redress. In so doing, some parallels with the claims process may exist.

While recognising that there is a wide range of bodies responsible for Crown resources which might be involved in Treaty claims, the Commissioner chose to investigate the settlement process in the context of lands owned by the Crown and managed under the Conservation Act 1987, the Reserves Act 1977, the Wildlife Act 1953 and the Land Act 1948 (with particular reference to pastoral lands).

Two assumptions underlie this investigation:

1. Valid Treaty grievances must be settled fairly.

2. Government is committed to environmental protection through established statutes and procedures.

1.3 Principles underlying an adequate process

Any process for Treaty negotiations must ensure that the Maori Treaty partner and the general public have confidence that all the implications, including environmental implications, of settlement proposals have been thought through and addressed. It may not be possible to propose set criteria for all procedures. However, what is proposed is a principled approach which is sufficiently flexible to reflect the nature of the issues, rights and interests involved in each case.

To this end:

- Any process for resolving Treaty claims which relate to natural and physical resources must have regard to maintaining and improving the quality of the environment.

- Any process should be clear and well understood and, in particular, must aim to ensure that decision makers have the relevant environmental information before key decisions are made.

The adequate identifying and addressing of environmental implications through those processes should help make the resolution durable and also acceptable to Maori and the general public alike.

In the context of these principles, public consultation is seen to be an efficient and important method of information gathering. It may also serve as a forum for the disclosure of information necessary for the public to understand the background to particular settlements and provide a basis for public education on Maori values and culture.

1.4 Methodology

Government agencies were contacted and documentation analysed to ascertain both the process for settlement of Treaty claims and the details of selected case studies. Meetings were also held with representatives of claimants identified in the case studies, public interest groups, agency staff and persons otherwise involved in the settlement process.

In order to clarify some issues of relevance to this investigation, the Commissioner commissioned a legal opinion on the identity of the Crown and the nature of its obligations to consult with both the public and Maori in the context of Treaty claims. This report is attached as an Appendix. A further report on overseas jurisdictions and claims settlement procedures has also been completed as part of the investigation. While the report will shortly be published by the Commissioner as a background paper, reference is made in the present report to overseas settlement models that have been used in the background paper by way of comparison with procedures implemented in New Zealand.

2. Constitutional and procedural framework for the settlement of Treaty claims

2.1 Introduction

The Treaty of Waitangi was entered into in 1840 between the Queen of England and various Maori chiefs. Under Article I of the Treaty, the Queen obtained the right to establish a system of government in New Zealand, but subject to obligations under Article II to protect Maori rights to those resources (taonga) which they wished to retain and under Article III to protect Maori legal, social and political rights and interests.

The obligations of the Queen of England under the Treaty are now those of the Crown in right of New Zealand.[6]

Throughout its life the Treaty has continued to be asserted by Maori. For example in the 1880s Maori sent numerous petitions to the Government and deputations to England.[7] They have also continued to seek redress in the courts, including the Privy Council. In the past the Government has moved to compensate Maori for grievances. However, it was not until 1975 when it enacted the Treaty of Waitangi Act 1975,[8] that a formal means of identifying Treaty grievances was provided through the establishment of the Waitangi Tribunal. The Crown has also established a range of procedures and policies to recognise its relationship with Maori under the Treaty of Waitangi. These include the

6 *New Zealand Maori Council v. Attorney-General* [1994] 1 NZLR 513, 517.

7 Orange, C., (1987), p.4.

8 The objective of the Act is to: "provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty".

incorporation of references to the Treaty in some legislation, and implementation of procedures to resolve grievances.

References to the Treaty in legislation are not dealt with in any depth in this report. Further, as pointed out in section 1, it is recognised that the Crown may be involved in Treaty matters which do not depend upon claims to the Waitangi Tribunal. These depend upon the existence of a relationship between tangata whenua and particular natural and physical resources, a relationship which the Crown has the power to acknowledge and confirm. While this report deals primarily with environmental information relevant to the settlement of grievances, its approach could be said to be relevant where the Crown moves to acknowledge the customary relationship between the tangata whenua and a particular area or natural or physical resource.

The process for settling Treaty claims can be grouped into three key stages: the grievance/claim stage, the negotiation or mediation stage, and final agreement stage. They are summarised in Table 2.1. and outlined in section 2.3. The identity of the Crown and its responsibilities in relation to the settlement process are explained in the following sections.

2.2 The Crown's roles

In the course of this investigation, questions have been raised about the identity of the Crown.

2.2.1 What is the Crown?

At the formal level, the Crown is the Queen in right of New Zealand or her representative, the Governor General, in both cases almost always acting on the advice of responsible Ministers. At a more practical level, the Crown is the Ministers of the Crown which form the Cabinet or, as appropriate, individual ministers or officials with delegated responsibility who are the Crown.[9]

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[9] Sir Kenneth Keith, letter to the New Zealand Fish and Game Council (quoted in Appendix I, para 15), 11 March 1994. A distinction should be noted here in relation to the Commissioner of Crown Lands who is an independent officer appointed under statute by Parliament and who reports directly to the Minister of Lands on the exercise and performance of the Commissioner's statutory

As Sir Kenneth Keith, President of the Law Commission, points out:

> *The basic political and constitutional fact is that the Ministers for the time being have the relevant powers of advice, of decision or of direction - in all cases within the law - since they have the support of the House of Representatives the members of which are elected by the people.* [10]

2.2.2 *The Crown's responsibilities*

The Crown has dual responsibilities: to Maori as party to the Treaty and to the people of New Zealand as the government of the day. The Tribunal has recognised that while the Crown's sovereignty is limited by the authority of the tribes to exercise a control in respect to their resources, it does have the power:

> *to legislate for all matters relating to "peace and good order", and that includes the right to make laws for conservation control.* [11]

The Treaty of Waitangi Act 1975 made provision for the observation of the "principles" of the Treaty, held by the Privy Council to be "the underlying mutual obligations and responsibilities which the Treaty places on the parties". On those "principles", the Privy Council further noted:

> *Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Maori property...as part of taonga, in return for being*

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powers and functions: s.12A Survey Act 1986 authorises appointment under the State Sector Act 1988.

10 Maoridom consider that their Treaty partner is the Queen of England, as stated in the Treaty. It is accepted that she may wish to delegate her powers to the Governor-General or to Ministers. However, beyond that, officials are considered to be servants of the Crown (Mutu, M., pers.comm.).

11 Waitangi Tribunal, Muriwhenua Fishing claim, p.232.

> *recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown.*[12]

The Privy Council went on to observe that the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.[13]

> *[If]...a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action.*[14]

The establishment by the Crown of processes to provide redress for breaches of the Treaty is consistent with its Treaty obligations under Article II. At the same time, and consistent with its Article I responsibilities, the Crown has the power, subject to statutory restrictions on the exercise of that power, to implement a resource management framework which protects the environment, including procedures to ensure that decision makers obtain full information about the implications of their decisions for the environment.

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12 *NZ Maori Council v. Attorney General* [1994] 1 NZLR 513, 517.

13 Ibid., 517.

14 Ibid., 517.

Table 2.1: SUMMARY OF STAGES OF THE TREATY SETTLEMENT PROCESS

stage of process	range of approaches
grievance/claim stage	Full investigation by the Waitangi Tribunal in public forum, with discretion to allow opportunity for interested parties (other than the claimant and the Crown) to be heard. Disclosure of findings to the public in a report.
	Preliminary investigation by the Tribunal - referral to the Crown for negotiation or mediation. No public disclosure of details.
	Claim lodged with the Tribunal. Request by claimants to negotiate or mediate. Assessment undertaken by the Crown and agreement reached with claimant on general nature of claim. No public disclosure of details.
	Case is heard by the Courts. Public process but no public input. Public disclosure.
negotiation or mediation to agree on options for redress	Mediation with the help of a Waitangi Tribunal mediator.
	Direct negotiations through the Minister of Justice.
	Negotiation with a Minister who has authority to act.
	Special procedures established to respond to specific cases, eg fisheries negotiations.
final agreement[15]	Negotiation of a final agreement, endorsement by Cabinet and passage through Parliament or existing statutory procedures.

15 In some circumstances, there may be no negotiation where a settlement option is implemented by the Crown immediately following validation or acceptance.

In some instances, Maori involved in the process might prefer not to be in full agreement with an outcome which in the end involves a unilateral power of decision making.

2.3 The settlement framework developed by the Crown

The Waitangi Tribunal was established as a forum for exploring Maori grievances under the Treaty of Waitangi. Until 1985 the Tribunal's power extended only to investigating contemporary claims; in 1985, its powers of review were extended to cover any acts, policy, or practice of the Crown since 6 February 1840.

2.3.1 The identification and validation of Treaty claims

When the Tribunal receives a claim which meets the legislative criteria it is placed on the claims register.[16] The Tribunal normally publishes additions to the register in its publication *Te Manutukutuku*. Thus, the fact of a claim being lodged is in the public arena.

Substantial background research is completed and made available to all parties before the matter goes to a hearing before the Tribunal.[17] Such research may include an assessment of the state of natural resources or taonga. Following submissions from the claimants, other interested parties, members of the public who have requested that they be heard, and the Crown (whose position is co-ordinated by the Treaty of Waitangi Policy Unit in the Department of Justice), the Tribunal considers whether the claim is well founded and may issue an interim report on its findings. Where such a report is issued, the Tribunal may recommend negotiation between the claimant and the Crown and assist by holding further hearings on remedies.[18] The Tribunal issues its final report (including recommendations) to the Minister of Maori Affairs and other Ministers of the Crown who in the opinion of the Tribunal have an interest. The Tribunal's involvement ceases at that point.[19] Tribunal reports are freely available to the public. For the cost of copying evidence is also available.

Herein lies a distinction between the Tribunal's independent validation of claims through a hearing process, and the Crown's willingness to accept a claim for negotiation or mediation where there has been no

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16 Waitangi Tribunal: A Guide to the Waitangi Tribunal, 1993 edition, p. 10 .

17 Ibid. The research is carried out by the claimants, a claimant-commissioned researcher or a Tribunal-commissioned researcher.

18 Ibid., p.12.

19 Ibid.

hearing. In the second case the public may have no knowledge of the substance of the claim or the reasons for Crown acceptance.

Claimants who wish to settle a grievance by negotiation with the Crown can signal their desire to do so when they lodge their claim. Where in the opinion of the Tribunal the negotiation of a settlement seems likely to succeed, the Tribunal may undertake a preliminary assessment of the claim and refer it to the Crown. [20]

A negotiations register has been established by the Crown which places claims in order of priority for direct negotiation. The register can be obtained on request.

The decision to proceed with negotiation is made by the Cabinet Committee on Treaty of Waitangi Issues (formerly the Crown Task Force on Treaty of Waitangi issues). The Committee looks at the research already carried out to decide whether or not it thinks a solution can be reached by negotiation. It also checks whether the Crown has previously agreed to negotiate; whether the claimants wish to negotiate all or part of the claim; whether the person acting on behalf of the claimants properly represents the areas, iwi, hapu and whanau concerned in the claim; whether both the Crown and claimants have a measure of agreement about the underlying facts of the claim (which does not have to include agreement on how these facts might be interpreted); whether both the claimants and the Crown are prepared to abide by any final agreement; and whether the claim presents new policy issues for the Crown which it has not had the chance to fully consider. [21]

Where the Crown and claimants agree to negotiate, they can seek deferral of a Tribunal hearing. A disadvantage of that course is that the public may then not be informed or understand the full nature of the claim nor the factors which establish its validity. Where negotiations

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20 The Government's direct negotiation process is designed to deal speedily with a large number of claims. As the Department of Justice's briefing papers point out, the direct negotiation of claims is a political approach, "whether or not preceded by a Tribunal or court hearing. Direct negotiation can establish a valid or prima facie case more cheaply and faster than through the Tribunal and court processes ..." (Briefing papers to the Minister of Justice, 1993, Vol. 1, p. 68).

21 Ibid., p. 79.

fail to result in settlement, the claimants have the option of going back to the Tribunal to seek a hearing.[22]

The Courts of general jurisdiction have also been involved in adjudicating Treaty rights, as in cases taken by Maori against the Crown on the basis of legislation containing references to the Treaty or Maori customary rights.[23] Section 9 of the State-Owned Enterprises Act 1986 has provided the basis for a number of such challenges.[24]

2.3.2 Settlement of claims by mediation or negotiation

As shown in Table 2.1, in order to reach agreement with Maori over resolution of their grievances, the Crown has set in place a range of approaches, including mediation and negotiation.

Mediation

To facilitate the resolution of claims, the Waitangi Tribunal is able to appoint a mediator, whether or not the claim has been through a full tribunal hearing. If claimants consider that their claim can, in whole or part, be settled through mediation and the Crown is willing to negotiate, then they can request that a mediator be appointed. A Tribunal member, the director of the Tribunal or some other person may be appointed in

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22 According to the Tribunal's 1993 End of Year Statement, there are 396 claims on its register. The Tribunal has completed 42 reports, on which recommendations were made in 23 cases and it is likely to report on 12 claims in 1994. The Tribunal points out that many of the claims can be grouped for concurrent inquiry and that some are duplicated. It estimates that remaining claims could involve about 30 inquiries.

23 See for example *Te Weehi v. Regional Fisheries Officer* [1986] 1 NZLR 680, and compare Justice Chilwell in *Huakina Development Trust v. Waikato Valley Authority* [1987] 2 NZLR 188, 223, that the Treaty may be used as an extrinsic aid in the interpretation of legislation. On the other hand, the Planning Tribunal has on a number of occasions declined to deal with Treaty claims in the course of Resource Management or other hearings within its jurisdiction, on the basis that ownership per se is not an issue to be dealt with under the Resource Management Act: see *Haddon v. Auckland Regional Council* [1994] NZRMA 49, 56-57, per Planning Judge Kenderdine.

24 *NZMC v. A-G* [1987], NZLR 641 (CA). The Treaty of Waitangi (State Enterprises) Act 1988 was enacted to give effect to the agreement between Crown and the New Zealand Maori Council in settlement of the application for judicial review which was the basis of that case.

that role.[25] The mediation process is normally carried out on a confidential basis and it is unclear what information is provided before mediation commences. The mediator reports the results of the mediation to the Waitangi Tribunal. If the process has not been successful, the case can be heard before the Tribunal.

Direct negotiation through the Minister of Justice as Minister in Charge of Treaty of Waitangi Negotiations

In 1988 the Minister of Justice was appointed as the Minister in charge of Treaty of Waitangi negotiations, with the principal responsibility for advancing claims resolutions while, in the Department of Justice, the Treaty of Waitangi Policy Unit (TOWPU) was established.

TOWPU assumes the lead role in coordinating the Crown's position before the Waitangi Tribunal and conducting direct negotiations with Maori on behalf of the Crown.

The direct negotiation process handled by the Minister of Justice has been broken down into three distinct phases, as outlined in the booklet "The Direct Negotiation of Maori Claims"[26]:

> **The Framework Agreement:** in which an agreement is reached between the parties on an agenda for detailed negotiations, that is, the items and issues that should be negotiated, including the structure and procedures of negotiations and ratification procedures.
>
> **Agreement in Principle**: in which detailed negotiations based upon the agreed agenda are entered into. The objective is to arrive at agreement on all of the issues and to reach acceptable solutions.

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25 Department of Justice, 1993: p. 15. See also Treaty of Waitangi Act 1975, clause 9A of the Second Schedule

26 Department of Justice, 1990.

Detailed agreement: in which implementation of the agreement will be worked through and methods to measure its success.[27]

Although the fact of a claim being lodged is public knowledge, negotiations to settle a claim are treated confidentially on a 'without prejudice' basis, and the release of any information is subject to agreement between the parties. The confidentiality of the negotiation phase applies whether the claim has proceeded through the Waitangi Tribunal or has been accepted by the Crown for settlement without a full hearing.

Treating the process as confidential protects the negotiations at a sensitive phase, enabling negotiators to carry on discussions without prejudice or disruption at a time when there is no public interest in disclosure of the information and when premature disclosure could compromise the process and prejudice the outcome. Information which may justify a confidential approach includes matters of political or commercial sensitivity. The application of the principle of confidentiality in the Treaty settlement process accords with the approach available to decision-makers under the Official Information Act. It enables a distinction to be drawn between information of commercial, political or other similar sensitivity of a type which there is good reason to withhold and environmental information which should normally be available to enable informed decision making.

Each stage of the negotiation process is ratified by Cabinet on the Crown side (through the Cabinet Committee on Treaty of Waitangi Negotiations) and by claimants in conjunction with their hapu/iwi on the other. Theoretically Cabinet procedures enable environmental implications to be reviewed through the Minister for the Environment, who is a member of the Committee, provided environmental information has been obtained by this stage. There may be, however, a problem that the Minister's scrutiny comes late in the process which cannot guarantee that all appropriate information is available unless environmental information is made a formal requirement at a sufficiently early stage.

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27 Department of Justice, 1990, pp. 9-10.

While the focus of this report is upon the Crown's responsibilities to ensure that adequate information is obtained, it should not be forgotten that the Maori party is also a decision maker in the settlement process. Maori negotiators would generally agree in principle to a course of action before it is ratified. It stands to reason therefore that they too must be fully informed on environmental as on other factors likely to affect the outcome. In many cases, negotiators are bound by accountability and decision-making procedures common to their hapu or iwi. The process of information gathering and consultation with members of the relevant hapu or iwi will be governed by those procedures. [28]

Negotiation or mediation with other Ministers

In some instances, negotiations with Maori have been carried out by individual Ministers and their departments within their own statutory and administrative procedures. In the case of the claim to Takapourewa (Stephen's Island), for example, the Minister of Conservation entered into mediation through his Department to resolve management issues relevant to his jurisdiction. Negotiation or mediation of this kind is able to be handled within existing statutory frameworks, without the need for any formal structures for conducting negotiations. At the point when a settlement is to be implemented, however, statutory procedures involving public consultation may arise, as under the Conservation Act or Reserves Act.

It can be observed that where Ministers with particular advocacy functions, such as the Minister of Conservation, also act as negotiators, there is potential for conflict of interest between their role as Crown negotiator on the one hand, and conservation advocate on the other. There are however checks on a Minister's actions through the mechanism of the Cabinet Committee on Treaty of Waitangi Issues.

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28 The Waitangi Tribunal has pointed out that tribal representation is a major impediment to the resolution of claims (refer Te Manutukutuku: 1993: Waitangi Tribunal End of Year Statement, p.3). While there are mechanisms which can be used to help resolve these issues (s 6A of the Treaty of Waitangi Act 1975, or s. 30 of Te Ture Whenua Maori Act 1993), the Tribunal has recognised that representation issues can affect negotiations as much as Tribunal enquiries.

Other processes

A variety of other processes have been implemented since 1988. These include the Ngai Tahu "Early Warning System", which aimed to identify potential Ngai Tahu interests in surplus Crown land and the Crown/Congress Joint Working Party which was established by agreement between the Crown and Maori Congress as a result of the desire of Railcorp to sell surplus lands in which there is a potential Maori interest under the Treaty of Waitangi. In 1993, those processes were replaced with a more general process to notify surplus Crown lands through the Department of Survey and Land Information.[29] This latter process is intended to provide a means of ensuring that the Crown does not dispose of surplus lands without first checking for potential Maori interests under the Treaty.

Other procedures have been developed to address specific issues, such as the Crown's obligation to settle matters associated with the fisheries claim as a result of decisions of the High Court.

2.3.3 Final Agreement

Final agreements entered into between the Crown and claimants normally require endorsement by Cabinet. Implementation takes place either through procedures contained in existing legislation or by the passage of special legislation. [30]

According to current procedures for the consideration of proposals by Cabinet, Cabinet papers are to be checked for a range of implications, including those of environmental significance. Departments responsible for preparing advice are required to consult with the relevant Government departments and submissions will be rejected if the

29 It should be noted that management of surplus public works lands such as that of Railcorp does not come within the scope of the Commissioner of Crown Lands, although the Minister may invite the Commissioner to alienate surplus Crown-owned land.

30 As noted earlier Maori involved in the process might prefer not to be in full agreement with an outcome which in the end involves a unilateral power of decision making .

necessary consultation has not taken place.[31] The degree to which the intention of this practice is fulfilled is unknown.

In some cases involving single agency action Ministerial but not Cabinet approval is required. In these cases the information requirements of the relevant authorising legislation will apply.

31 Cabinet Office Manual, Chapter 4, Appendix 2 (December 1991).

3. Information for decision makers

"Information is the heart of the matter, it can unlock the door to the vault called success. It affects our appraisal of reality and the decisions that we make. Why then do we fail to get adequate information? Because we tend to regard our negotiation encounters with people as a limited happening or an event. We seldom anticipate that we will need information until the occurrence of a crisis or a "focal event", which creates a cascade of dysfunctional consequences". [32]

3.1 Government commitment to environmental assessment

The New Zealand Government has a history of enacting legislation to protect aspects of the environment. Since the 1970s, it has had in place a policy of environmental assessment designed, through careful planning, to avoid environmental degradation. The Environmental Protection and Enhancement Procedures were promulgated in 1973. Their most recent revision was in 1987. Those procedures state that "it is the responsibility of government departments to ensure that environmental protection and enhancement are incorporated in their policies and operations and that a system of environmental assessment is implemented."[33]

The purpose of the Environment Act 1986, under which the Ministry for the Environment and the Parliamentary Commissioner for the Environment were established, is set out in the long title to the Act thus:

32 Cohen, H., 1990.

33 Ministry for the Environment, 1987, p.1.

An Act to -

(c) Ensure that, in the management of natural and physical resources, full and balanced account is taken of -

(i) The intrinsic values of ecosystems; and

(ii) All values which are placed by individuals and groups on the quality of the environment; and

(iii) The principles of the Treaty of Waitangi; and

(iv) The sustainability of natural and physical resources; and

(v) The needs of future generations

As already noted, "environment" is given a broad definition under both the Environment Act and the Resource Management Act to include ecosystems and their constituent parts, all natural and physical resources and the social, economic, aesthetic and cultural conditions which affect the environment or which are affected by changes to the environment.

The passage of the Resource Management Act 1991 strengthened the ability of relevant agencies such as local authorities to promote the sustainable management of natural and physical resources. In order to achieve that purpose, the Act focuses on identifying the adverse effects of activities through a process of environmental assessment. Indeed, local authorities are required to state the environmental results anticipated from the implementation of their policies and methods.

3.2 Information for the protection of the environment in the settlement process

The quality of the environment is affected by decisions which affect the environment. Decisions which maintain and improve the quality of the environment are more likely where there is a timely provision of environmental information to decision makers.

The Ministers of Justice and Conservation have announced the Government's criteria for determining how the conservation estate may be used in the settlement of Treaty claims. They have stated that the public interest will be protected by maintaining stewardship and public access and that changes in management can only occur where that would

not result in the loss of protection of natural and historic resources. Although it is understood that the Government is preparing policy on other aspects of the claims process, it is not yet clear how environmental assessment will be incorporated into that process.

The interests of the wider community in the management of natural and physical resources have been recognised in the Resource Management Act. The provisions for public consultation assume that relevant information on the environmental effects of a proposal may be obtained from the wider community. The same principle applies in the context of Treaty claims settlement. Some members of the public, including environmental groups and individuals, may have information required by decision makers to ascertain the effects of proposed settlement options and a process is therefore required to obtain it.

The value of an approach enabling environmental information to be provided is that it allows for assessment of the environmental implications of a proposal irrespective of issues of ownership. In the context of the settlement of Treaty claims, there are several identifiable and discrete stages of the process where environmental assessment information could be beneficial.

Validation of Treaty claims

Relevant information may include environmental effects of the Treaty breach, such as loss or degradation of natural resources considered taonga and effects on claimants.

Where relevant to a claim, this information is typically presented by claimants. For example, in a number of cases considered by the Waitangi Tribunal, environmental information was a central part of the evidence and final report. Examples include the Motunui, Kaituna, Manukau, Muriwhenua Fisheries, Mangonui Sewerage and Ngai Tahu reports.[34] Much information was provided on the degradation of taonga

[34] Waitangi Tribunal 1983, 1984, 1985, 1988a, 1988b, and 1991. See also Parliamentary Commissioner for the Environment 1988.

such as the Manukau, Kaituna and Motunui waters and the need for restoration and environmental protection.

Negotiation of validated claims

Where a range of settlement options is still at the proposal stage, negotiators and other decision makers need to understand the environmental implications of those options, including the likely social effects of proposed changes affecting natural and physical resources.

In cases where groups other than tangata whenua place a high value on resources being considered as a possible settlement option for claims, significant social implications may exist both for claimants and other stakeholder groups. Information sought early may also identify hapu groups other than claimants who consider themselves valid stakeholders, a matter which is relevant to issues such as representation and *mana whenua*, beyond the scope of this report.

Other information that may be necessary could relate to potential liabilities associated with a resource such as areas requiring rehabilitation (for example in cases of land degradation or where hazards are identified) or potential resource conflicts.

Identification of likely environmental implications of settlement options will also help to determine whether subsequent statutory processes will apply and be adequate to address all key issues once the preferred settlement option is chosen.

The extent and scope of any assessment or consultation will vary with each range of options and will normally be in the detail that corresponds with the scale and significance of the anticipated effects of the proposal on the environment.

Such information can serve to assist both the Crown and claimants to evaluate the options for settlement before making final decisions. There do not however appear to be any formal steps within the settlement

process to ensure that such information is available at the appropriate time.

Implementation of negotiated settlement package

Once the Crown and claimants have negotiated and agreed on a settlement package, implementation may be subject to a range of statutory and administrative procedures. In some cases a statutory environmental assessment process could apply, so that before implementation of a settlement an assessment of relevant environmental values may be required, or a public process, or special legislation may be enacted to implement the settlement arrangements.

Where the settlement package includes or results in a change in use of natural and physical resources, resource consents may be required under the Resource Management Act, which has provisions for environmental effects assessments and public participation. Certain changes, in ownership, use, and management of Crown lands will be covered by the Conservation, Reserves or Land Acts, which vary in the information they require and in the involvement of interested parties. These statutory provisions are further explored in the following section.

Decision makers will require adequate information to set terms and conditions to promote sustainable management of natural and physical resources and protection of unique natural values.

In cases where existing statutory procedures are not followed, a settlement may be by way of special legislation. In that case, a Select Committee will provide a final channel for the provision of any further information.

Prior to making decisions or entering into agreements, it is the responsibility of the Crown as Treaty partner and negotiator to ascertain as Government of the day the effects of settlement proposals on all parties it represents.

3.3 Consultat
and information

In a strict legal sense the public at large (and, more specifically, environmental groups) have no general entitlement to be consulted in the context of Treaty settlements except where that entitlement is provided for in statutes that govern the management of the relevant resources (see Appendix 1). However, this does not preclude the Crown from conducting whatever consultation is required to fully inform itself of the resources being considered in the negotiation process, including the relevant values held by stakeholders and the wider public.

Consultation with members of the public or environmental groups by the Crown is one thing. Directly including the public or environmental groups as parties in the negotiation between Crown and Maori as Treaty partners is another. In such negotiations members of the public are not negotiating parties in their own right.

Where the Crown may decide to implement a consultation procedure, three major limitations, on the scope of consultation should be noted:

(a) consultation cannot bring executive decision-making to a standstill;
(b) it cannot undermine the statutory regime and time frames laid down in legislation; and
(c) the power of final decision must remain with the executive decision maker, or the Crown\Maori claimant(s) in a negotiation.[35]

Members of the public, including some environmental groups, claim a general right to be heard during the settlement process. If this were to happen they would have to establish a legitimate expectation. This would be on the basis of an expressed or implied undertaking by the Crown, or because of their existing status as users of those lands and resources, or by showing a long tradition of the Crown consulting them on issues concerning the land or resource concerned.[36]

35 See Appendix I, para. 28.

36 See also Appendix I, paras. 19, 20.

Analysis of the relevant legislation as outlined in section 3.4 below shows that the Crown has a broad discretion to deal with lands and other resources which it administers. It also shows that in most situations there is only limited provision for public consultation when the Crown makes decisions about lands and resources held under those Acts.

3.4 Legal and administrative framework for obtaining information

The purpose of this section is to set out the statutory framework within which some of the natural and physical resources relevant to Treaty settlement arrangements may be used, allocated or preserved at the implementation stage of the process. It analyses how information is provided to ensure that sound environmental management results from the process.

The statutory framework governs the future management of natural resources after a settlement has been implemented, and may include conditions to govern the use of resources.

Table 3.1 compares in schematic form the information and consultation requirements of the Resource Management Act, the Conservation Act and the Land Act 1948. The Table makes the comparison in terms of the information and relevant consultation that may be required when particular functions are exercised.

Detailed provisions for public consultation and information-gathering are not necessarily required in statutes focusing wholly on Crown-owned resources as they are in statutes which also govern non-Crown and/or privately owned resources. This is because for the most part decisions do not impinge on individual rights.[37] Moreover in the case of resources controlled by the Department of Conservation, the Department itself is in a position to undertake the necessary information gathering. While some of the statutes administered by the relevant departments operate in conjunction with the Resource Management Act, their

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37 For discussion on the matters relevant to exercising decision making powers see *Legislative Change: Guidelines on Process and Content*, Report No 6, Legislative Advisory Committee, revised edition, Dec 1991.

objectives may be more specific and they may define more closely the interests provided for in the management of the resource.

Table 3.1: COMPARISON OF OBJECTIVES, INTERESTS AND INFORMATION REQUIREMENTS IN STATUTES

RESOURCE MANAGEMENT ACT	CONSERVATION ACT (administered by DOC)	LAND ACT (administered by DOSLI)
OBJECTIVE: promote sustainable management of natural and physical resources	**OBJECTIVE:** promote conservation (includes intrinsic values and public appreciation and enjoyment)	**OBJECTIVE:** to administer Crown land. With respect to pastoral leases: implied provision for production but not at the expense of soil and water values.
Decision makers require information on: the effects of polices and activities on: the sustainable management of natural and physical resources (s. 5). matters of national importance and other matters (ss. 6-7) requirement to take into account the principles of the Treaty (s. 8).	**Decision makers require information on:** all values associated with lands and species covered by the legislation, including values held by Maori and the public. impacts of actions on conservation resources requirement to give effect to the principles of the Treaty	**Information requirements/ threshold test** for decision-making not explicit in legislation. CCL has discretion. However while in practice, a wide range of information is obtained, e.g in tenure review process, criteria for determining issues of public interest not clear.
Provisions for obtaining information: detailed consultation procedures in the development of polices and plans (Schedule 1) including specific requirements to consult with tangata whenua; in consideration of consents - local authorities must be satisfied that applicant has provided sufficient information to assess environmental effects (Schedule 4). Assessment can be guided by polices and plans. Can commission further research if necessary.	**Provisions for obtaining information:** detailed consultation procedures in the development of CMS and CMP. CMS and CMP guide decision-making where relevant; otherwise the purpose of the legislation is main guide. Conservation Boards have been used to gather public views on proposals relating to tangata whenua. **Note: Resource Management Act applies except in cases where the Crown is undertaking an activity with no significant effects outside the boundaries of the area concerned (s.4).**	**Provisions for obtaining information:** not set out in Act. However, internal procedures exist: e.g. procedures for reclassification of pastoral land. **Note: Resource Management Act applies.**

Abbreviations: CMS = Conservation Management Strategy, CMP = Conservation Management Plan, CCL - Commissioner of Crown Lands

The Resource Management Act 1991

The Resource Management Act provides the principal statutory framework regulating the use, development or protection of many of the natural and physical resources which are the subject of Treaty claims, including land, water, the coastal marine area, and the beds of rivers and lakes. It does not apply to the allocation of mineral and fishery resources, but does regulate the environmental effects associated with mining and forestry. It may therefore cover any land-use issues associated with those resources. When resources owned by the Crown are made over to claimants - as to any other sector of the community - by way of transfer of title or other interest in land, the resource then becomes subject to the normal planning process of the Resource Management Act.

The Resource Management Act sets out procedures to require decision makers to undertake appropriate consultation with those affected or likely to be affected by decisions, and to enable decision makers to obtain full information on the range of potential effects of proposed activities on the environment. The most comprehensive consultative process arises at the planning level, when policies and plans are being formulated. Whilst the analysis required under section 32 is a protection against unnecessary regulation when plans are formulated or changed, the exercise is also intended to protect against unjustifiable impacts of planning on private property rights. Procedures for information gathering through consultation are set out in the First Schedule to the Act (in relation to the development of policies and plans) and in the Fourth Schedule (in relation to applications for resource consents).

The focus of the Act is on managing the effects of activities on the environment. However because decisions made under this Act can have a significant impact on private property rights, both the consultative process and the information-gathering objective operate as checks and balances in the system.

The Department of Conservation

The Department of Conservation is responsible for administering a range of legislation including the Conservation Act 1987, the Reserves Act 1977, the Wildlife Act 1953, the National Parks Act 1980, and the Marine Reserves Act 1971. In the following sections, the main procedures are outlined for decision making under these statutes. The National Parks Act 1980 is not dealt with in this report only because none of the case studies involves the Act.

The Conservation Act 1987

The purpose of the Conservation Act is to promote the conservation of New Zealand's natural and historic resources and for that purpose to establish a Department of Conservation. "Conservation" is defined as:

> *the preservation and protection of natural and historic resources for the purpose of maintaining their intrinsic values, providing for their appreciation and recreation enjoyment by the public, and safeguarding the options of future generations* (s.2).

Section 4 of the Conservation Act states that the Act is to be so interpreted as to give effect to the principles of the Treaty of Waitangi. The courts have not yet clarified the precise application of this section, nor whether it applies to the other Acts administered by the Department of Conservation.[38]

The functions of the Department, as set out in section 6, also assist in understanding the framework and scope of management of resources held under the Conservation and other Acts administered by the Department:

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38 See *Ngai Tahu Maori Trust Board v Director-General of Conservation* (Unreported: HC, CP 841-92, March 17 1993)

(a) To manage for conservation purposes, all land, and all other natural and historic resources, for the time being held under this Act, and all other land and natural and historic resources whose owner agrees with the Minister that they should be managed by the Department:

(b) To advocate the conservation of natural and historic resources generally:

(c) To promote the benefits to present and future generations of -

(i) The conservation of natural and historic resources generally and the natural and historic resources of New Zealand in particular;

(e) To the extent that the use of any natural or historic resource for recreation or tourism is not inconsistent with its conservation, to foster the use of natural and historic resources for recreation, and to allow their use for tourism:

Under the Conservation Act, procedures for consultation and information gathering fall into two broad categories: those relating to the process of management planning, for the development of statements of general policy, conservation management strategies (CMS) and conservation management plans (CMP); and those that apply to more specific functions relating to the conservation estate. It should be noted that strategies and plans, once developed and approved, also apply to lands administered under the Reserves Act and the Wildlife Act.[39]

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[39] Under s. 4 of the Resource Management Act the Crown is exempt from the restrictions of the Act in the case of land use otherwise regulated by s.9(1). Thus the Crown does not require resource consents for any work or activity it carries out within the boundaries of land held under the Conservation Act 1987 or the Acts listed in the First Schedule to the Act where those activities contravene the provisions of a district plan or proposed plan. That exemption is

Analysis of the Conservation Act highlights five levels of "consultation" which are provided for under the Act. These are set out schematically in Table 3.2, together with the "threshold tests" which apply, that is, the information which is implicitly required before the relevant discretionary function can be exercised. Because the Tables provide an outline only, reference should be made to the Acts for full details.

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subject to the proviso that it does not apply to work or activities of the Crown in the relevant areas that -

> *(a) Is consistent with a conservation management strategy, conservation management plan, or management plan established under the Conservation Act 1987 or any other Act specified in the First Schedule to that Act; and*
>
> *(b) Does not have a significant adverse effect beyond the boundary of the area of land.*

This provision is an exception to the provisions of sections 17D and 17E of the Conservation Act, that conservation management strategies and plans do not override the provisions of any Act or policies approved under any Act.

The exemption does not apply to land held under the Land Act, since that Act is not listed in the First Schedule to the Conservation Act. Moreover, where no conservation management strategy or plan exists, or where a Treaty settlement proposal is inconsistent with the relevant instrument, or there would be an adverse cross-boundary effect, the provisions of the Resource Management Act will apply, and if a proposed use or activity will contravene the district plan, resource consents must be obtained.

Where the Crown does enjoy an exemption from the Resource Management Act, that immunity would be lost upon change of ownership, or where land is vested without transfer of fee simple title or where any arrangement such as management of an area is negotiated without involving change of title to the land, since immunity attaches only to the Crown and only in respect of the Crown's own work or activity.

Table 3.2: CONSERVATION ACT 1987

CONSERVATION ACT 1987				
NATURE OF FUNCTION		THRESHOLD TEST/Type of Information Required	LEVEL of Consultation/Public Involvement	
s 7 s 8	* Minister may declare conservation area. * Minister may declare conservation area to be reserve under Reserves Act 1977.	• Implied requirement for information as to values and purposes for which land is held.	1	• Notice by Minister in *Gazette except for closure of conservation area or marginal strips.*
ss 13, 24H	* Temporary closure of conservation area to public. * Closure of marginal strip.	• Implied requirement for information to establish that grounds for closure exist: public safety, fire hazard or conservation purpose.		• Closure requested by manager (s 24H) or provided for in CMS/CMP(s13); • DG informs public as to closure and gives reasons.
ss 24A,B,E	* Approval to reduce width of marginal strip; * Declaration of exemption to marginal strip requirements for land abutting bed of river; * Where threshold not satisfied Minister may grant exemption to marginal strip requirements for renewal of lease or licence under Land Act 1948; * Minister may declare exemption for land that is part of core assets of Electricity Corporation of NZ (so long as they remain assets of ECNZ), or required in connection with electricity works. * Minister may authorise exchange of marginal strip for another strip of land.	• Needs information as to values of marginal strip, public access and recreational use (s 24C), and in relation to renewal of lease or licence under Land Act over marginal strip, factors of "public interest" and equity are relevant. • In case of exchange, Minister must be satisfied that it will better achieve purposes of s 24C as to access etc.		
s16A	* Exchange of stewardship areas for other land.	• Needs information on which Minister may be "satisfied" that grounds for exchange exist.	2	• Prerequisite is consultation between Minister and CB and Minister's satisfaction as to purpose of exchange; • *Gazette* notice of Minister's authorisation. • *Gazette* notice of declaration of exemption.

NATURE OF FUNCTION		THREASHOLD TEST/Type of Information required	LEVEL of Consultation/Public Involvement	
s 18	* Minister may declare conservation area to be held for special protection, or status may be revoked.	● Implied requirement for information as to suitability of area for purpose.	3	● Declaration by Minister if "satisfied" as to threshold test applicable to any case; ● + **public process of s 49.** Where Act requires Minister to give public notice, notice published in daily newspapers (national and/or local) and public process follows, including submissions from any person, reasonable opportunity for appearing before DG, summary of submissions and comments to Minister, recommendation by DG; Minister shall consider recommendations and summary before deciding whether to proceed with proposal.
s 26	* Minister may dispose of stewardship area.	● Implied requirement for information as to values of area and adjacent specially protectedsame principle areas held by Minister, to justify disposal.		
s 28	* Minister may acquire/dispose of natural or historic resources other than land.	● Implied requirement for information before disposal that resource not required for conservation purposes; or that disposal is desirable to enable acquisition of other natural resource for conservation purposes.		
s 14	* Minister may grant lease or license (up to 60 years) over conservation area where there is a CMS/CMP; or if no CMS/CMP, after prior consultation with CB (up to 5 years), or if in accordance with Act.	● Information needed to establish conformity with CMS/CMP; if no CMS/CMP, information to "satisfy" Minister that no significant conservation values likely to be affected.	4	● Minister gives public notice of intention to make grant; ● may require consultation with CB; ● + **public process of s 49.**
s 15	* grant of easement over conservation area.	● Grant of easement depends on same threshold as to compliance with CMS/CMP.		
s 17	* Director-General may authorise use of conservation area for recreation, tourism, sport, trade etc.	● Purpose of Act guides discretion; where CMS/CMP exists, use shall not be contrary; ● needs information for DG to ascertain conformity with CMS/CMP and establish appropriate conditions.		● No requirement for DG to use a public consultative process.

NATURE OF FUNCTION		THREASHOLD TEST/Type of Information required	LEVEL of Consultation/Public Involvement	
ss 17A, B, C	**PART IIIA: Management Planning** * DG may prepare and recommend for approval by Minister draft statements of general policy.	• Management planning requires full information on the nature of the resource and implications of possible uses of the conservation estate. • The provisions of Part IIIA recognise that the consultative process provides one means of acquiring relevant information and enables appropriate public disclosure of environmental information.	5	• Requires consultation with Conservation Authority, notices in newspapers, and to regional councils and iwi authorities; interested persons may lodge written submissions with DG, reasonable opportunity must be available for submitters to be heard, DG prepares summary of submissions for CA and sends to Minister, CA may consult CB and send its comments to Minister, Minister approves policy.
ss 17 D,F,N	* DG may prepare CMSs for approval by CA.			• Preparation of CMS and CMP requires consultation with CBs affected and other groups or persons as DG considers practicable and appropriate; • notification and public process in accordance with s 49, with notices to appropriate local authorities and iwi authorities; • provision for submissions, consultation with CBs, for public opinion to be received, and opportunity for appearance in support; • summary prepared by DG for CBs to consider and CBs may request redraft before sending to CA for approval. • In case of CMP, CBs approve CMP or may request revision, consult with CA which may further consult as appropriate, and amend as it considers appropriate; • before CB gives approval, CA or Minister may require CA to approve draft, with further consultation as considered appropriate, with recommendations and preliminary approval by CA before final approval by CB.
ss 17 E,F,N	* DG shall prepare CMP as required by CMS for approval by CB.			

Abbreviations: DG = Director-General, CA = Conservation Authority, CB = Conservation Board(s), CMS = Conservation Management Strategy, CMP = Conservation Management Plan

are set out for functions which impact more permanently either on the management of the reserve or on its use by the public. The Act sets out when the notification and submission procedures of sections 119, 120 are required.

As already observed in relation to the Conservation Act, under the Reserves Act consultation undertaken and information adduced in relation to the functions under the Act arise only at the implementation stage, too late to impinge on the decision as to which Treaty settlement option is preferred.

Table 3.3 sets out the levels of consultation that may be required under the Act, the point at which information on environmental factors may be required and the kind of information which is expressly or implicitly required.

Table 3.3: RESERVES ACT 1977

RESERVES ACT 1977				
FUNCTION		THRESHOLD TEST/ Type of Information Required	LEVEL of public involvement/ consultation	
s.4	* Minister may require inquiries, surveys, reports to be prepared on land which may possess scenic, historic, cultural, archaeological, biological, geological or other scientific features or interest.	• Threshold test as to purpose of Act and of reserve being satisfied; • Information required as to purpose, and whether reserve status will ensure improvement, protection or access.	1	• Notice in *Gazette* in most cases. • Generally if discretion is to be exercised by admin.body, consent of Minister is required.
s.12	* Minister may acquire land for reserve purposes.			
s.15	* Minister may authorise exchange of reserve land for other land.			
ss.26, 27	* Minister may vest Crown reserve in local authority or trustees (but this does not transfer fee simple title), and may revoke vesting.	• Vesting must enable fulfilment of purposes of reserve; revocation if no longer required for reserve purposes, or if there has been breach of trust.		
ss.28, 29, 30, 35, 36	* Minister may appoint local authorities, voluntary organisations, Reserves or other special Board or Trust, or other Minister to control and manage reserve.	• Threshold test is that the appointment be for the better carrying out of the purposes of the reserve.		
s.42	* Minister may consent to cutting or destruction of trees/bush on historic, scenic or nature reserves; * Admin.body of recreation, Government or local purpose reserve may consent to cutting or destroying trees/bush.	• Minister must be satisfied that use or destruction is necessary for management or maintenance of reserve. • Needs information on whether activity will promote purpose of reserve and is necessary for that purpose.		
ss.44, 45, 46, 49,50 72	* Minister may authorise various uses of reserves or of resources on reserves, including Maori cultural harvesting (subject to Wildlife Act in appropriate cases).	• Authorisation depends on purpose of classification of reserve, compliance with Act and with conditions imposed.		
ss.53, 55,58, 60,61	* Admin.body may undertake or authorise certain activities on reserves.	• Exercise of power depends upon purpose of reserve being furthered.		• Where authorisations involve activities restricted under RMA and for which there is no Crown immunity under that Act, resource consents will be required.
s.59A	* Power of Commissioner to authorise trade, business or occupation in reserve.	• Information needed to determine compliance of proposal with CMS/CMP/MP.	2	• Prior public consultation in process of establishing CMS/CMP, the terms of which must be complied with for exercise of functions.

FUNCTION		THRESHOLD TEST/ Type of Information Required	LEVEL of public involvement/ consultation	
s.48A	* Minister may authorise construction of communication stations on reserves.	● Information as to need for construction, whether able to be located outside reserve; whether effects material and permanent (for exercise of discretion to waive consultation).	3	● Unless Minister gives authorisation, admin.body must in most cases obtain consent of Minister. ● Prerequisite is that activity must conform with and be contemplated in CMS/CMP (unless effects are minor), or unless resource consent granted under RMA - both require prior public consultation. ● Where activity does not conform with approved CMS/CMP, Minister or admin.body shall give public notice as specified in s 119 and provisions of s 120 apply as to procedures for public process.
ss.54, 56, 57, 58A, 59	* Minister or admin.bodies may allow planting, development of facilities, farming, grazing, or the grant of leases or licences for carrying on trade, business or occupation in reserves.	● Information on whether activity will achieve appropriate use, enjoyment, development, maintenance, protection or preservation of reserve, as purpose of reserve and jurisdiction admin.body may require.		
s.13	* Declaration of National reserve by Order in Council on recommendation of Minister; * Revocation of National reserve status only by Act of Parliament.	● Information needed on national and international values of reserve.	4	● *Gazette* or public notice of intention to exercise discretion and invite submissions on proposal; ● **Public process under s 120;** ● Minister considers all public submissions or objections; ● Notice to other Ministers with interest or management responsibilities and consent obtained; ● Notice in *Gazette*. Sections 119, 120 provide that where public notice is required under Act relating to national reserve, Gazette and newspaper notices must be published; any persons or organisations may make written submissions to Minister or admin.body, there shall be reasonable opportunity for hearing by Commissioner or admin.body as appropriate, in accordance with procedure set by person hearing, and full consideration shall be given by Minister or admin.body to submissions before deciding to proceed with proposal.
s.16 s.24 s.25	* Classification of reserves. * Change or revocation of classification. * Revocation has effect of making land available for disposal under Land Act.	● Information required on suitability of area for purpose of classification, to ensure control, management, development, use, maintenance and preservation of reserves for appropriate purposes; and information to enable Minister to determine advisability of change in light of purpose of classification.		
s.24A	* Change of purpose of local purpose reserve.	● No threshold test specified.		
s.47	* Part or whole of reserve may be set aside as wilderness area.	● Information as needed for management of reserve area as wilderness area.		
s.48	* Grant of easement.	● Information needed to ascertain conformity with purpose of reserve and whether consultation can be waived.		
ss.73, 74	* Grant of leases or licences for farming, grazing or afforesting.	Information required to ascertain whether reserve available for activities because not required for reserve purposes and whether in public interest to grant interest in land.		
s.75	* Afforestation.	● Information as to whether there are adequate resources and managerial safeguards available to prevent destruction of reserve values.		

FUNCTION		THRESHOLD TEST/ Type of Information Required	LEVEL of public involvement/ consultation	
ss.40A, B	* CMSs shall implement statements of general policy and establish objectives for reserves managed by DOC under Act. * Purpose of CMPs is to implement policy and CMSs and establish objectives for management of Crown reserves according to purposes for which reserve classified under Act.	● Implied need for information to establish that planning instruments promote purpose of Act, and purpose and objectives for which particular reserves are classified.	5	● CMS/CMPs are prepared, notified and approved in accordance with consultative requirements under relevant provisions of Part IIIA of Conservation Act 1987[40]; ● CMS may be revoked by DG in accordance with public process required set out in ss.199,120.
s.41	* Preparation of management plan (MP) by admin.body. * MPs in force or in draft in 1990 deemed to be approved as CMP or draft.			● Admin.body publicly notifies intention to prepare management plan, receives and fully considers written suggestions; ● public notice of draft MP (s 119), objections or suggestions received(s 120), with hearing by admin.body; ● Consultation with Minister before approval.

Abbreviations: Admin. body = Administering body/bodies, CMS = Conservation Management Strategy, CMP = Conservation Management Plan, MP = Management Plan

40 For procedures, see Table 3.1.

It should be noted that where reserves are vested in the tangata whenua at tribal level through trustees, the Maori Land Court has powers of adjudication under Te Ture Whenua Maori/Maori Land Act 1993.

The Wildlife Act 1953

This Act provides that all wildlife, unless specifically excluded, shall be absolutely protected throughout New Zealand.

As is the case with the Reserves Act, the fact that conservation management strategies and plans, as prepared under the Conservation Act, are applicable means that a consultative process pertinent to wildlife management has already taken place, and that the exercise of some statutory discretions may be restricted as a result of that process. Similarly, general policies for wildlife management under the Wildlife Act are established through the consultative process. No work can be done on any wildlife sanctuary, refuge or management reserve before a conservation management strategy or plan is approved for the relevant area (sections 14B-14E). For some specific functions of management, the Act provides the Minister and Director-General with a wide discretion. In some cases threshold criteria are stipulated, but for others, the discretion is unfettered other than by the purpose of the Act.

Table 3.4: THE WILDLIFE ACT 1953

WILDLIFE ACT 1953				
NATURE OF FUNCTION		THRESHOLD TEST/Type of Information Required	LEVEL of Consultation/public Involvement	
s.41	* Minister may acquire, dispose of, use and manage land for purposes of Act; * Minister may authorise research, collect and disseminate information.	● Principal requirement is fulfilment of the purpose of the Act. ● Implied requirement for wildlife information to justify exercise of discretionary powers.	1	● No requirements for notification or consultation.
ss.9-14A	* G-G may declare by proclamation areas for purpose of wildlife sanctuary, refuge or management reserve.	● Implied requirement for wildlife information to justify exercise of discretionary powers. ● Implied requirement that appropriate circumstances exist.	2	● Proclamation by G-G on recommendation of Minister (and jointly if other affected Ministers). ● Minister must consult with and obtain consent of other affected Ministers.
ss.53, 54, 59	* DG may authorise taking or killing of protected wildlife etc, or customary use and cultural harvesting if within purpose of Act and protection of particular wildlife lifted wholly or partially;[41] * DG may authorise hunting or killing of any animals on any land where there is threat to persons or property; * Minister may authorise DOC officers to enter onto any land to conduct studies, take, hunt or remove protected wildlife where there is threat to persons or property.	● Discretion must be exercised on basis of overriding purpose of Act and on basis of threshold criteria as to protection of wildlife, threat to property or persons, soil and water conservation factors and cultural factors.	3	● Test that Minister must be "satisfied" as to threshold criteria; ● Notice to owner where relevant.
ss.14B-14E	* Establishment of objectives for wildlife management in statements of general policy approved by Minister, or in CMS and CMP approved under Conservation Act.	● Information as required to fulfil the statutory purpose of the CMS/CMP.	4	● Activities must be sanctioned by approved CMS/CMP prepared pursuant to the prescribed consultative process under the Conservation Act.[42]

Abbreviation: G-G = Governor-General, D-G = Director-General of Conservation, CMS = Conservation Management Strategy, CMP = Conservation Management Plan

41 See New Zealand Conservation Authority, May 1994. It is arguable that given the absolute protection to wildlife under the Act, the Wildlife Act may override the Treaty of Waitangi.

42 The requirement for consistency with or approval under a CMS/CMP presupposes that there has been prior public consultation under the conservation Act (see s.17N).

Although the Act empowers the Minister, in appropriate circumstances, to exercise functions without recourse to public consultation, it provides the powers for research to be commissioned and information otherwise obtained, subject to the purposes of the Act (s.41). Arguably that information will be available to assist in decisions relating to the acquisition, disposal, use or management of wildlife areas in the context of Treaty settlements, but as the procedures now exist, there is no guarantee that appropriate information will be available or be used in the Treaty settlement process, or indeed in any other similar situation. The provisions of the Act will apply only at the implementation stage, and unless special consultative provisions are stipulated before that stage, the information required for sound environmental decision making will not be available until after the preferred settlement option has been selected.

Treaty settlements and lands managed by the Department of Conservation: Departmental guidelines for decision making

The Treaty settlement process affects lands under the administration of the Department of Conservation. As a result of concerns expressed by the Minister of Conservation that there be a greater sense of cultural understanding on the part of Pakeha and Maori in accommodating mutual concerns, both inside and outside the claims process, the Department developed approaches to the settlement of claims based upon the objectives of legislation governing the management of any relevant natural resource.[43] The approach to claims is based upon the premise that there will be no change in use of the lands (ie they can continue to be managed for conservation purposes, with the public as beneficiaries), but that the administering body or form of tenure may change. The concept of "trusteeship", in which land in the conservation estate is administered for the Crown by trustees underlies this approach. At the same time, the Crown must seek agreement with the "trustee" before altering or removing its functions.

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43 Policy and Procedures Manual, 2.10.27.

Under this approach, land in the conservation estate would not become surplus until either:

- its values were lost; or
- there would be net conservation benefit from its disposal; or
- the quality of conservation management could be maintained or improved without ongoing Crown ownership.

That approach suggests that land could be disposed of to Maori (or other parties) provided the objectives and quality of management are maintained or improved. The former guidelines also suggest that land in the conservation estate which was under claim but which was not surplus could be put under a trusteeship. This would express the shared understandings and common objectives of the claimants and the public as joint beneficiaries of the trust.

With the announcement of new policy and criteria to be applied in the settlement of Treaty claims by the Ministers of Justice and Conservation, the guidelines relating to Treaty claims have been withdrawn by the Department of Conservation.[44] The Department's approach to procedures will have to be reappraised in the light of these Ministerial announcements.

The new criteria require the maintenance of stewardship and public access and protection of the existing and potential rights of existing concessionaires.[45] Even when those criteria are met, alienation will still be subject to the test that it must not give rise to "adverse effects on the overall management of the conservation estate, or place important conservation values at risk."[46]

It would appear therefore that under the guidelines promulgated by the Department of Conservation, the final test of an agreement in the context

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44 Pers.comm. Wayne Devine, Department of Conservation 7 July 1994 in relation to section 2.10.27 of the Policy and Procedures Manual.

45 Ministers of Justice and Conservation, June 1994.

46 Minister of Justice, 24 June 1994.

of a claim rests on the Minister's satisfaction that there will be no detrimental effect on conservation objectives or public benefit. This is as was formerly the case. The process entered into to ensure that the Minister is satisfied may vary in each case. In some instances public consultation may be required either under the relevant statutes, or by the Minister in exercising his or her statutory discretion.

The Land Act 1948: Pastoral Land

The Land Act provides a sharp contrast to the preceding Acts, both in terms of the objectives guiding the use of land in the public estate other than conservation land, and in its silence as to any consultative requirements. Moreover, the provisions of the Act depend on a premise that land held under this Act is available for productive agricultural or pastoral-type uses. Further, that it will be held under arrangements which give a private interest in land, subject to the administrative functions exercised by the Commissioner of Crown Lands.

The purpose of the Land Act is to make provision for the administration of Crown Lands by the Commissioner of Crown Lands. Under section 2 of the Act, Crown Land is land vested in Her Majesty which is not for the time being set aside for any public purpose or held in fee simple. It does not include any Maori land, nor land held in trust by the Crown under any other Act unless that Act is declared to be subject to the Land Act. It may be indicative of the administrative emphasis of the Land Act that the principal decision making powers are vested in the Commissioner of Crown Lands.

In most cases, the Act does not provide for any particular purpose other than administration, and contains no general objective for management of the land it covers. It does, however, provide for specific interests and management constraints in relation to certain classes of land such as pastoral land. Moreover, underlying the concept of a pastoral lease is an assumption that due to the fragile nature of "pastoral" land, the Crown should retain ownership to safeguard its soil and water values. The creation of this separate class of Crown land, the pastoral lease (s 51),

with no right of freeholding, and the retention of Crown control over its use, was considered to be justified on soil conservation grounds at the time the Land Act was enacted.[47] However, the ability of the Crown to safeguard public interest in conservation, access, recreation, and other values in respect of pastoral leases is constrained by the rights held by lessees, while public access over land held under pastoral lease is subject to leaseholder consent.

Administration of pastoral leases, formerly undertaken by the Land Settlement Board, is now the responsibility of the Commissioner of Crown Lands. In undertaking his duties, the Commissioner is guided by the policies of the former Land Settlement Board which had responded to a growing range of interests in high country lands, many of which are not provided for under the Land Act. Thus, although the Land Act does not provide for the Crown to impose formal protection of conservation values in pastoral lease tenure, policies have been developed for issues which go beyond water and soil values.[48]

Table 3.5 sets out a synopsis of the major functions relevant to Crown land issues. It indicates the breadth of powers which the Commissioner of Crown Lands may exercise without any formal procedural requirements as to consultation. But for proposals affecting Crown land, the Commissioner of Crown Lands operates under a policy which includes consultation.[49] Where the particular provision supplies a basic threshold test, some degree of consultation may be inferred. Examples include tests as to the suitability of land for a given purpose, or whether the 'water and soil conservation objectives' for the land can be met, although the Act gives little direct guidance as to the overall objectives

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47 Commissioner of Crown Lands. 1994.

48 A Departmental discussion document notes that there are opinions from CLO to suggest that some of the policies going beyond water and soil issues are *ultra vires*, ibid. p.14.

49 That policy was established under section 13 of the Land Act which related to duties of the Land Settlement Board. Although section 13 was repealed by section 32(1) of the State-Owned Enterprises Act 1986, the policy has not been withdrawn.

for land management under it other than those specified or implied for pastoral lease tenure.

Table 3.5: LAND ACT 1948

LAND ACT 1948				
NATURE OF FUNCTION		THRESHOLD TEST/ Type of Information Required	LEVEL of Public Involvement/ Consultation	
s.51	* Classification or reclassification of Crown land available for disposal.	● No prescribed threshold test other than object and purpose of Act (unless provision includes status criteria for applicants). ● Implied need for information as to suitability of land for purpose of classification. ● In case of pastoral lease/licence, implied tests as to 'water and soil conservation objectives'(s 66A) and 'good husbandry'(s.99) apply.	1	● No requirement to consult specified but as a matter of policy CCL does consult where there are no contractual obligations relating to the land.
ss.52 - 54 s.60 s.62 - 66	* CCL may alienate Crown land. * CCL may grant or reserve easement or right of way. * Acquisition of land on renewable lease or purchased for cash; pastoral land acquired on pastoral lease/pastoral occupation licence.	● No threshold test specified or implied other than purpose of Act.		
s.81	* CCL may issue leases/licences over Crown land subject to covenants/ conditions.	● Information implicitly needed to ensure that covenants or conditions "not inconsistent with Act" complied with.		
ss.106 -108	* CCL may permit burning of tussock, cultivation, cropping, afforestation on pastoral lands.	● Needs information as to conditions relevant to nature of land and whether proposed activity appropriate and land able to be restored.		
ss.117 -118	* Land held under lease may by G-G by Proclamation be resumed for public works-type purposes.	● Needs information for decision maker to form "opinion" that land required for purpose.		
s.122	* Lessee may purchase fee simple of renewable lease.	● No consultation or information requirement, as matter of contract between Crown and lessee.		
s.125	* Lessee may renew existing lease, but in case of pastoral lease, CCL may alter tenure or determine that land no longer available for disposal.	● Implied requirement for information on state of land/land use issues.		
ss.126 , 126A	* Exchange of existing lease for different tenure.	● For pastoral lease, prerequisite for reclassification implies test as to purpose; conversion of pastoral lease does not confer right to acquire title.		
s.169	* G-G may by Warrant bring reserve land under Land Act.	● No statutory limitation on discretion.		

NATURE OF FUNCTION		THRESHOLD TEST/ Type of Information Required	LEVEL of Public Involvement/ Consultation	
ss 40, 40A	* CCL may purchase private land or lease of interest in Crown/Maori land.	Value of land and its suitability for purposes of Act.	2	● No prescribed consultative process unless CCL required to obtain Ministerial approval, or consultation with other affected Ministers is required.
ss 44 - 46	* CCL may undertake development work to prepare for settlement of Crown land.	● Information on which CCL can form opinion that work is necessary and calculated to improve land/for proper farming of land.		
ss 67-68	* Disposal of land unable to be classified, subject to CCL opinion that land should not be permanently alienated.	● Implied requirement for CCL to be informed as to whether land should be permanently alienated.		
ss 89-94	* CCL may consent to transfer, sublease or other disposition of lease or licence, depending on "public interest".	● Threshold for refusal of consent is "public interest", implying need for information on public interest.		
s 167	* Minister may by notice in *Gazette* set aside Crown land as reserve for any purpose which in opinion of Minister is "desirable in the public interest".	● Information required to ascertain "public interest".		
s 66A	* CCL may grant recreation permits over pastoral lease land.	● Prerequisite is that permit would not be "incompatible with water and soil conservation objectives" for the land; may require condition as to surrender of land to facilitate erosion-prevention measures.	3	Public applications; Lease/licence-holder's consent; Inquiry by CCL and consultation with lessee or licensee.
s 146	* Lessee/licensee may forfeit lease/licence where CCL "satisfied" prescribed grounds exist.	● Grounds for forfeiture include non-payment of rent, non-exclusive occupancy, non-residence, non-compliance with conditions such as management of land or improvements required.		

Abbreviation: CCL = Commissioner of Crown Lands, C-G = Governor-General

The Commissioner of Crown Lands has minimal obligations under the Act to undertake consultation when making decisions under the Land Act. Land may therefore be acquired as Crown land, or may be alienated, classified or the classification changed, or work undertaken on Crown land, at the discretion of the Commissioner of Crown Lands. For the most part criteria are also minimal, and the Act does not provide clear guidelines or tests for decision making. For example, in acquiring land, the Commissioner must ascertain by whatever means he thinks fit the suitability of the land for the purposes of the Act, or in classifying land, its suitability for the purpose of the classification; in granting recreation permits over pastoral lease land, the Commissioner must be of the opinion that the activity may be "properly undertaken" on the land and not "incompatible with any water or soil conservation objectives relating to the land"; and may impose a condition as to surrender of any part of the land to facilitate erosion-prevention measures (section 66A).

Departmental policy and guidelines for decision making

The Department of Survey and Land Information has adopted a policy for consultative procedures where the Land Act does not provide guidance. Thus, in the administration of pastoral leases, the Commissioner of Crown Lands has been guided by a number of reviews. One, the 1982 Committee of Inquiry into Crown Pastoral Leases, known as the Clayton Report, concluded that classifying land as pastoral land and the concept of pastoral lease tenure are outmoded, and that subject to the exclusion of reserves and multiple use land, lessees should have the right to freehold their properties.

In 1989 officials developed a proposal that land classification should be replaced by a land categorisation process to establish three categories of land: farm land, conservation land and restricted land use. Farm land held under pastoral lease could be freeholded, while land not suitable for production and containing high conservation values would be transferred to the Department of Conservation, and land with a mix of values be contained in a special lease category and retained in Crown ownership.

Under the Land Act, pastoral leases do not attract the right to freehold (s.66), although ss 63, 65, of the Act provide for the Commissioner to freehold the other categories of land provided for in section 51, farm land, urban land and commercial land. The Act also provides for land held under a pastoral lease to be reclassified under one of the other categories set out in s.51, thereby enabling the Commissioner subsequently to freehold the land (s.126A). In order to respond to approaches from lessees to reclassify their leasehold lands, the Commissioner has developed procedures for negotiating with lessees, while also consulting with the Department of Conservation and other interested parties to review the tenure of the leases through a reclassification exercise.[50]

Recent announcements by the Minister of Justice[51] suggest that the Minister of Lands hopes to include a statutory reclassification procedure in a new Land Act.

3.5 Potential Treaty settlement outcomes

When potential Treaty settlement outcomes are categorised as to effect on natural and physical resources, a limited number of outcomes are likely. The major options available for the settlement of Treaty claims to natural resources are:

- change in who manages, but no change in management objectives or who benefits from management;
- change of ownership;
- change of management objective/use;
- compensation through substitution or finance

Examples of these potential outcomes where the allocation, protection or use of natural or physical resources is involved are set out in Table 3.6 together with the statutory provisions relating to environmental planning and management. A perceived deficiency at the present time is whether

50 DOC collected information on vegetation, landform, recreational, historical and cultural values associated with land under its Protected Natural Areas Programme (PNA). PNA has been carried out primarily on pastoral land in the South Island.

51 Minister of Justice, June 1994.

any attempt is made to provide and assess environmental information **before** decisions are made on whether there will be a change in ownership, management or use.

In general, where there is no change in ownership, the resource will continue to be managed under the relevant statute (e.g., Conservation, Reserves, Fisheries Acts). Even if there is a change in the adminstration or management of the resource, either by the management being taken over by iwi or by joint management regimes being established, statutory compliance provisions still apply. Important matters to consider may include: who has responsibility for what (for example daily management, management planning, monitoring), how will the changes proposed impact on the quality of management and decision making and what resources may be necessary for future management. In such cases, an assessment of the state of the resource and the quality of existing management may be of benefit.

Where a change to the status of a resource is proposed (as by removing the reserve status from an area and returning the land to the claimants in fee simple title), the provisions of the Resource Management Act will generally apply to any future activities the claimants may wish to carry out. Thus any positive or adverse environmental effects will be identified in the course of an environmental assessment, either when provisions are made in the district or regional plan or when applications for resource consents are made. The relevant local authority then has the ability to put conditions on a consent or refuse it in order to protect the environment.

Because the Resource Management Act however is not invoked for a function such as a change of status to an area held by the Department of Conservation (e.g. from Reserve status to fee simple title), any assessment of the environmental implications of the change could be provided for under the EP&EP and any relevant statutory requirements or departmental policies that apply to such cases. It is however not clear at what stage these procedures are implemented in the Treaty settlement process, or if they are implemented at all.

As far as the Resource Management Act is concerned, there is no requirement that protective measures, such as covenants, are provided for except through the mechanisms of making rules in plans or by setting conditions in resource consents. Difficulty appears to arise when public use of Crown land may be denied or restricted following a change of ownership. Under these circumstances, prior to settlement an assessment of the implications of potential options would be desirable. Further, without a specific assessment prior to the transfer of title to an area, constraints to future development (for example in regard to soil erosion potential) will not be identified prior to transfer to the claimant.

Practical examples of procedures used to consider some of these outcome options are discussed in the next chapter.

Table 3.6: EXAMPLES OF POTENTIAL OUTCOME OPTIONS FOR TREATY CLAIMS TO CROWN RESOURCES AND PROCEDURES FOR ENVIRONMENTAL PLANNING AND MANAGEMENT

EXAMPLES OF POTENTIAL OPTIONS [These examples are only proposals or scenarios: none have been implemented except for Mount Taranaki.]	NATURAL AND PHYSICAL RESOURCES PRESENTLY IN CROWN OWNERSHIP			STATUTORY PROVISIONS FOR ENVIRONMENTAL PLANNING AND MANAGEMENT:
	OWNERSHIP	USE	WHO MANAGES	
Stephen's Island	no change	no change	change: * joint management	change: could gain additional status under Reserves Act; existing statutes apply (e.g. Wildlife Act); RMA also applies
geothermal	no change	change possible	change: * iwi management; or * joint management	no change: RMA applies if change in use requires resource consents
Mount Taranaki	change of ownership but leased or gifted back to the Crown	no change	no change	no change (National Parks Act applies)
Land under Crown pastoral lease	no change of ownership but allocation of right to a lease; or change of ownership (of all or part of former lease)	restricted change; or change possible (over all or part of former lease)	iwi management (as lessee); iwi management over all or part of former lease (as owner)	no change (Land Act and RMA apply); or change to all or part of former lease: (removal from Land Act, RMA applies) part of property of high conservation value could be transferred to DOC, or covenanted as private land)
Tutae Patu Lagoon	change in ownership	change possible	change: * iwi management; or * joint management	removal from Conservation Act or Reserves Act; RMA applies if change in use requires resource consents

Abbreviations: RMA = Resource Management Act - where resource consents required, and notified, CA/RA = Conservation Act and/or Reserves Act - where public involvement provisions apply.

4. Case studies: the assessment of environmental information in the context of settlements

The following case studies illustrate the assessment procedures used in three Treaty settlement situations, and identifies some of the problems and issues associated with the settlement process.

4.1 Takapourewa (Stephen's Island)

The case of Takapourewa involved a claim to the Waitangi Tribunal. Following preliminary research by Tribunal researchers, the Tribunal proposed that mediation between the claimants, Ngati Koata and the Crown take place. The claim was accepted for mediation by the Minister of Conservation within specified limits. The Cabinet Committee on Treaty of Waitangi Issues endorsed that approach. Although the island's acquisition under the Public Works Act has not been formally accepted by the Crown as a valid claim, the Department of Conservation considered that some of the issues could, in part, be dealt with by developing a joint management proposal. The proposal would recognise the claimants' interests as former owners of the island and the interests of the Crown and the public in general in conservation. The Department considered that outstanding validation issues would be dealt with in the course of mediation.

A history of the Crown's involvement in Stephen's Island is set out in Table 4.1.

Following negotiations between the department and Ngati Koata and with the help of a Tribunal mediator, a draft proposal was finalised. As the department's information papers explain, when its requirement for lighthouse use was altered, the Crown had three options for dealing with the island:

- *offering the surplus land back to the successors of the former Maori owners; or*

- *disposing of the surplus land on the open market;*
- *requiring the surplus land for another government work (namely, reserve: s. 52(1)(d), Public Works Act 1981).*

The proposal is to follow the last option. However, in the spirit of mutual co- operation under the principles of the Treaty of Waitangi, and to settle the grievance, the Crown and Ngati Koata have proposed a joint management arrangement.[52]

52 Department of Conservation, 1992.

Table 4.1: CHRONOLOGY OF EVENTS: TAKAPOUREWA

EVENTS		critical decision	level of consultation
1891	Takapourewa taken by the Ministry of Transport under the Public Works Act for use as a lighthouse site.		
1966	The island established as a wildlife sanctuary under the Wildlife Act.		
1987	Minister of Conservation takes responsibility for management of the Wildlife Sanctuary.		
1988	The island beyond the immediate vicinity of the lighthouse becomes surplus to the requirements of the Ministry of Transport.		
1989	Jim Elkington lodges claim to the island on behalf of Ngati Koata. Waitangi Tribunal undertakes research report and provides to Department of Conservation and claimants.		Exploratory discussions involving Tribunal. Other potential tribal interests checked through consultation: no apparent conflict identified.
1990	The Waitangi Tribunal appoints a mediator to assist the Crown (through the Department of Conservation) and Ngati Koata reach agreement over future management of the island.		
1992	Commencement of mediation between Department of Conservation Staff and Jim Elkington.	**The Crown accepts the invitation to enter into mediation through the Minister of Conservation.**	Confidential briefings with locally based NGOs. National level of NGOs refused to be involved unless process more public.
December			Marlborough Conservation Board asked by Director General of Conservation to comment on the draft agreement (December).
		Draft Agreement reached	
			The Board calls for submissions by 7 May (1993). Public meeting held in March (Feb).
			Board passes its resolutions at Waikawa Marae (May 25).
	Ngati Kuia appeals to the Maori Appellate Court. Rangitane places a counter claim to the island. Minister of Conservation puts proposals on hold pending resolution of counter claims.		
1994	**February**: following a meeting with the mediator, Ngati Apa, Ngati Kuia and Rangitane agree to support Ngati Koata's claim		Claimant and tribal representatives.

The draft proposal involved the classification of the island as a nature reserve under the Reserves Act, with the Ngati Koata no Rangitoto ki te Tonga Trust Board acting as the administering body and the Department of Conservation undertaking day-to-day management. Management planning would be the responsibility of the tribal trust board in accordance with normal planning requirements, including public consultation. Final approval was to be given by the Minster of Conservation.

A detailed plan developed by the Department and Ngati Koata for interim management of the island sets out the roles and functions of the Ngati Koata no Rangitoto ki te Tonga Trust and the Department over the first five years. The plan was made available to the public for comment to the Conservation Board.

Consistent with the objectives for management of the wildlife values of the island, the primary management aim of the administering body was stated to be the protection and preservation in perpetuity of the indigenous flora and fauna of Takapourewa[53].

Statutory and administrative procedures

The legislation which covers or is proposed for the management of Takapourewa is capable of dealing with the management issues contained in the draft agreement without reference to a Treaty claim. The Reserves Act already contains provisions for vesting reserves in a variety of entities including Maori Trust Boards.

The proposals agreed to between negotiators and their relationship to statutory requirements are set out below:

53 Draft Deed of Management, p.2.

Table 4.2: TAKAPOUREWA: PROPOSED STATUTORY PROCEDURES

proposal	relevant legislation	level of consultation
set aside surplus land for another government work	s 52 Public Works Act	unspecified
classify as a "Nature Reserve"	ss 16 of the Reserves Act[54]	public can lodge submissions and be heard (s 119 and 120). There are however exceptions to the need to notify in some circumstances. This case is one of those exceptions due to its transfer from the Conservation Act to the Reserves Act
vest in the Ngati Koata no Rangitoto ki te Tonga Trust Board	s 26 (1) of the Reserves Act	Minister to notify the vesting in the Gazette. Threshold test that vesting is for the better management of the reserve.

Information required

The scope and content of the information required for each proposal is not made explicit in the Reserves Act. However, the purpose of classification as set out in s 16 emphasises that the Minister would ultimately have to be satisfied that the natural values of the island can be protected by and are appropriate to the classification given to it. Further, that the management objectives of the island will be able to be met. Those sections of the Act provide for a public submission process, within which information about the implications of the proposal may be gathered and considered. The proposal to vest the island does not require consultation but it can be assumed that the Minister would wish to be satisfied that the vesting would not be to the detriment of the management objectives of the reserve.

The above statutory procedures have not yet been entered into. However, in December 1992, Director-General of Conservation asked the Marlborough Conservation Board, in whose region the island is situated, for its advice on the proposal. Under section 6 M 1 of the Conservation Act, one of the functions of Conservation Boards is to advise the Conservation Authority and the Director-General on proposed

54 Access to the island would be provided for under sections 20 and 57 of the Reserves Act, in which the Minister can issue permits for access after consultation with the administering body.

changes of status to areas of national or international importance. The Board was asked to consider how the settlement proposals affected its interests, not to consider the validity of the claim.

The Board made the decision to ask the public for written submissions and advertised in newspapers in Blenheim, Nelson and Christchurch. It also held three public meetings to discuss the matter.[55]

While the Board stated that it could support the proposal, as a result of public concern it recommended some amendments. For example, the Board moved that it support the vesting proposal, providing the Ngati Koata no Rangitoto ki te Tonga Trust clarify its constitution so that only its conservation objectives apply to the administration of the island.

Further, in her report to the Director-General, and in a subsequent report the chairperson raised a number of issues about the Board's role in the process and the potential for improvement, some of which were reflected in the recommendations made by the Board:[56]

- insufficient time to manage a public process and provide comment;
- difficulty in anticipating public interest in the proposal (while the proposal was advertised locally, submissions were received from all over the country);
- difficulty for the public to obtain and understand the explanatory information prior to the closing of submissions;
- public concern over the merits of the claim and the perception that the claim had not been adequately or publicly tested (the Board concluded that it was not satisfactory to consider the details of a proposed settlement when substantial doubts remained about the validity of the claim);

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55 Susan King, May 1993.

56 The Conservation Board Chairpersons' Conference in February 1994.

- the Board should have been involved in the mediation process earlier.[57]

The chairperson also emphasised that the Board focused on the issue of how best to protect flora and fauna of the island and not whether Ngati Koata should be involved in management of conservation land.[58]

While one of the claimants accepted that some form of public consultation should take place, he pointed out that any responsibility for such a process rested with the Crown.[59] He also expressed concern that prior to the public hearings taking place, the Board should have been better briefed on the background to the claim and the Maori interests involved. Some difficulty was experienced by he and the Board during the submission process by virtue of his membership of the Board, and having to stand back from the process.

The Minister of Conservation acknowledged that the Board's advice contained helpful comments[60] which he then referred back to the Department of Conservation for further analysis. However, he subsequently put the proposals on hold in view of assertions by other tribal groups that they, and not only Ngati Koata, had an interest in the island. It is understood that these matters have now been resolved between the various tribal interests.

However, the issue of the Crown's acceptance that the claim represents a breach of the Treaty is still to be resolved. While the Department of Conservation has sought validation through the Tribunal mediator, along with a public report, the mediator has pointed out that he is bound under the Treaty of Waitangi Act 1975 to declare only the results of the mediation.

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57 Susan King, 12 August 1993.

58 Minutes of the Conservation Board Chairpersons' Conference, Feb. 94, p.11.

59 Pers.comm., Jim Elkington, 28 April 1994.

60 Press Statement, June 1993.

It is understood that the claim is now to be heard before the Waitangi Tribunal.

Somewhat different problems and solutions are illustrated in the case of Tutae Patu Lagoon.

4.2 Tutae Patu Lagoon and surrounding reserves

Tutae Patu Lagoon and its surrounding area are the subject of Ngai Tahu's ancillary claims to the Waitangi Tribunal, which have yet to be reported. A major aspect of the claim over the area is concerned with the quality of the environment, which from Ngai Tahu's perspective involves the "protection, management and enhancement of the mahinga kai resources within the coastal region ..."[61].

On the basis of Ngai Tahu's claim and the Crown's acceptance of it for negotiation through the Minister of Justice in 1992, a draft agreement was developed by the Waimakariri District Council and the Ngai Tahu Negotiating Group, with assistance from the Department of Conservation. More detailed background to the claim and negotiations is set out in Table 4.3.

The proposal developed by the parties covers an area of coast between points south of Waikuku Beach and north of Kairaki Pines which are held under different categories of reserve. The area includes Tutae Patu Lagoon. The parties agreed that the whole area, including Tutae Patu Lagoon, be covered by a joint management plan to be developed under the Reserves Act, while specific areas be held in different forms of ownership. It was proposed that the lagoon itself be vested in Ngai Tahu in fee simple title.

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61 R Tau, pers.comm.

Table 4.3: CHRONOLOGY OF EVENTS: TUTAE PATU LAGOON

EVENTS		Critical decision	Level of Consultation
1848	The lagoon was acquired in Crown ownership through the Kemp purchase.		
1867	Lagoon became part of a rifle range.		
1868	Ngai Tahu asked that Tutae Patu be returned to them as a mahinga kai: request declined		
1900	Lagoon became part of a wildlife refuge.		
1950	Lagoon became part of a domain.		
1976	Lagoon became a wildlife management reserve (Government Purpose Reserve s.22 (2) of the Reserves Act).		
1986	Waimakariri District Council sought to revoke reserve status over the Waikuku beach area in order to purchase land from the Crown and sell to lessees (bach owners). Revocation advertised under the Reserves Act. Ngai Tahu objected on the basis of their claim to the Waitangi Tribunal.		
1988	The issue of Tutae Patu Lagoon presented by Ngai Tahu to the Waitangi Tribunal at Tuahiwi Marae (30 June).	**Minister of Justice agrees to place the issue on the agenda for main Ngai Tahu claim**	
1992	Local bach owners approached Minister of Justice to seek resolution of Ngai Tahu claim.		
1993	Ngai Tahu and the Waimakariri District Council developed a proposal with assistance from DOC. The proposal was developed on the basis that the bach sites be freeholded, with reserves surrounding and within the area to be managed by the Council.	**Draft Agreement reached**	Director-General of Conservation asks North Canterbury Conservation Board to provide comment by 27 August (July 7). Board notifies proposal for public submissions with one month time frame.
	North Canterbury Fish and Game Council submission to the Minister of Conservation (or to the Director General). Both reports sent to Ngai Tahu for comment.		submissions heard by Board (August). Resolutions passed.

Statutory and administrative procedures

The main proposals agreed to and the statutory provisions proposed to apply to their further implementation are set out in Table 4.4. As the legislation governing the area concerned is administered by the Department of Conservation, the changes proposed would have to be considered by the Minister of Conservation under that legislation.

Table 4.4 TUTAE PATU LAGOON: PROPOSED STATUTORY PROCEDURES

proposal	relevant legislation	consultation requirements
34 ha conservation area (held under s.62 of the Conservation Act) to become a recreation reserve	Declaration of conservation area under s.7 of the Conservation Act; Declaration of recreation reserve under s 8 of the Conservation Act.	notice by Minister in Gazette ditto
vest all recreation reserves in a combined Trust (Waimakariri District Council/Ngai Tahu Trust Board)	s.26 (1) of the Reserves Act	Minister gives notice in Gazette
transfer of lagoon to Ngai Tahu in fee simple title exemption from marginal strip requirements	special legislation	potential select committee process
revocation of Wildlife Management status	s.14 of Wildlife Act	

Information requirements

The information required for the transfer of a Conservation Reserve and the vesting of recreation reserves in a joint trust is not made explicit in the statutes. However, the Minister of Conservation would need to be satisfied that the area would continue to be managed in such a way as to continue to meet conservation and wildlife management objectives, regardless of ownership or status.[62]

The proposal to change the status of the lagoon to fee simple title and to exempt marginal strip requirements is planned to be implemented through special legislation. In such a case a select committee would normally provide a means of consulting with the public to obtain information, although in that situation the information requirements are not clear. However, at the time of the Board's hearings, the Department's manuals provided for such a transfer if an area could be deemed "surplus". By definition this included the need to be satisfied that the quality of conservation management can be maintained or improved. An important component of that information would include Ngai Tahu's proposals for future management.

In July 1993 the Director-General of Conservation asked the North Canterbury Conservation Board to comment on aspects of the draft agreement and to consult with the North Canterbury Fish and Game Council. The Board however considered that it had a responsibility to consult with the public and not just with the Fish and Game Council. It actively sought public comment through newspaper advertisements and a public forum.[63]

In its comments on the proposal the Board assessed the implications for conservation, recreation and public access in the area. With regard to the

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62 Under section 8 of the Conservation Act, no tests are specified as to the environmental effects or consequences of the change of status: the statutory procedure does not ensure that information appropriate to environmental decision making is available to the Minister or delegated officer.

63 David Alexander, 1993, p.1.

proposals for joint management of the proposed recreation reserves, the Board supported joint vesting in a Waimakariri District Council/Ngai Tahu Board and pointed out that certain practical matters, such as the public nature of meetings, be clarified.

On the basis of Ngai Tahu's proposals for future management of the lagoon itself, the Board concluded that the "transfer of Tutae Patu to Ngai Tahu would be in the best interests of the site"[64]. With regard to the proposal to exempt the marginal strip requirements, the Board concluded that given Ngai Tahu's willingness to maintain public access along an existing walkway and the likelihood that a marginal strip would frustrate the wise management of the area, the requirement could be dispensed with.[65]

Overall, the Board concluded that the proposal "is an exciting and positive proposal for conservation in North Canterbury". However, as far as the consultation process is concerned, it commented:

- that the Crown should review the process it follows for public consultation in order to give sufficient time and information at the beginning of the consultation phase to allow for meaningful public understanding and comment.

In the Board's report, the chairperson explained that:

- the Board shared the public's concern that the proposal appeared as if from nowhere when it was announced...that there seemed to be so much agreement to it that it was in effect a *fait accompli*, and that there was a rush to gather public comment;

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64 Report to Director-General of Conservation, p.7: as the Chairperson pointed out, one of the important issues that contributed to the Board's conclusion was the fact that "there is little prospect of improved management by the Department of Conservation in the near future, nor is the CMS for Canterbury likely to give Tutaepatu (as a small isolated piece of DOC-administered land) an increased priority for management. By contrast this is an important and valuable piece of land for Ngai Tahu and they can be expected to take to the task of management with a will. It will also form part of a wider management proposal which will markedly increase its value as a wetland.

65 Ibid, p.8.

- that much additional information about the proposal's effects only emerged at a relatively late date, when the Ngai Tahu Maori Trust Board presented its submission at the public forum. People felt that they had insufficient time to digest and comment upon this new information;
- that as a public body appointed to bring forward public views, the Board was implicitly being asked to gather public views, which was "dumping an awful lot on that Board" (given that the Board was the only body to consult with the public on the matter);
- the Board was required to operate under difficult time constraints;
- it did not consider that the process of consultation was smooth, particularly as the North Canterbury Fish and Game Council prepared its own separate response to the Director General of Conservation.[1]

The chairperson concluded that "just how the wider process of public education and consultation should be conducted is beyond the brief of the Board, but lessons must be learnt from this exercise, so that they can be applied to the next settlement proposals."[2]

The proposal is still under consideration as part of the wider Ngai Tahu claim and the statutory and legislative procedures outlined have not yet been entered into.

4.3 Pastoral lands purchased for settlement of the Ngai Tahu claim

In 1992, the Government purchased the Greenstone, Elfin Bay and Routeburn pastoral leases for use in settlement of the Ngai Tahu claim. One of the conditions of the purchase of the Elfin Bay and Greenstone leases was that the purchase did not bind the Crown to transfer the lessee's interest without making adequate provision for ongoing public recreation access.[3] Similarly, in the case of the Routeburn Station,

1 David Alexander, Chairperson, 26 August 1993.

2 Ibid.

3 Department of Conservation (Otago Conservancy), May 1993.

public recreation access.[68] Similarly, in the case of the Routeburn Station, purchased later in 1992, Cabinet noted that the purchase be subject to agreement on the exclusion from the Land Bank or that areas of conservation value be excluded from transfer to Ngai Tahu.

It is understood that some areas within the properties purchased were in freehold title.

The purchase by the Crown of the former pastoral leases is consistent with the Tribunal's recommendation that the Crown provide compensation for its failure to provide Ngai Tahu with reserves of land. However, in public debate, the appropriateness of using those areas rather than other more commercially oriented alternatives has been questioned. While future options are not yet clear, some public concern has focused upon how Ngai Tahu might manage the areas in future.[69]
A chronology of events is set out in Table 4.5.

Statutory and administrative procedures

Options for use of the former leases have not yet been clarified. However it is clear that had Ngai Tahu purchased the interests of the former lessees directly, or had the Crown transferred the interests of the former lessees directly to Ngai Tahu, then all the existing rights and duties of the Crown and the lessees that exist under the Land Act would apply to management of the land. For example, were Ngai Tahu to wish to develop a tourism operation, then application for a recreation permit would have to be made to the Commissioner of Crown Lands under

68 Department of Conservation (Otago Conservancy), May 1993.

69 For example, a public campaign: "Hands Off the Greenstone" has been launched by Public Access New Zealand (PANZ). Concern is expressed that either by freeholding the lease in Ngai Tahu, or by transferring the existing lease, the "door would be open for exclusive fishing and hunting and tolls over walking tracks." The stand taken by PANZ is that "public ownership and control is the only way to properly safeguard the outstanding public values of the area".

There has also been public concern expressed about Ngai Tahu proposals to build a monorail in the Greenstone valley. A petition against the proposal was presented to Parliament in April 1994 by Federated Mountain Clubs.

s.66A of the Land Act. Depending upon the nature of the activity, consents could also be required under the 'Resource Management Act. Ngai Tahu would hold exclusive rights to pasturage and, subject to the terms of the Crown lease, would enjoy many of the rights of private property, including rights under the Trespass Act. Should Ngai Tahu wish to enter into negotiations to freehold the area, then the Commissioner's negotiation procedures, including consultation with the Department of Conservation and the public would presumably apply as normal administrative practice.

Information requirements

As outlined, the Crown has determined that in the case of the three properties, conservation values and public access should be provided for, although appropriate options have yet to be agreed to.

As a consequence of the Crown's decision to provide for conservation values and access, the Minister of Conservation was asked to prepare a report on the conservation values of the properties. The terms of reference provided for the following matters:

1. An assessment of conservation values, having no regard for past or possible future ownership of the lands involved.

2. An assessment of how much of the land that is identified as having conservation values should be retired from grazing in order to maintain those values.

3. An exercise to prioritise the conservation values identified as essential for protection and desirable for protection.[70]

The report is to be included amongst information considered by the Commissioner of Crown Lands as part of the Crown perspective in negotiations with Ngai Tahu. The report prepared by the Department

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70 Department of Conservation (Otago Conservancy), May 1993

indicates that Ngai Tahu agreed to the investigation pending settlement of the claim. It was released to environmental groups and Ngai Tahu for comment in July 1993.

A meeting was held in Queenstown in February 1994 between officials and environmental groups to discuss the report. Ngai Tahu attended as observers.

The meeting is reported to have become a "forum to air grievances about a lack of consultation by the Government".[71] Criticism came not only from environmental groups, but also from a representative of the Waitaha people, who "disputed the claim that Ngai Tahu are the guardians of the land". Directives from the meeting requested public consultation on the options available for the land, the opportunity to comment on the in-principle agreement between the Crown and Ngai Tahu and that a report be made on the farming value of the land.[72]
On 24 June 1994, a speech prepared by the Minister of Justice was delivered on his behalf to a public meeting organised by Public Access New Zealand.[73] The speech made comments on the Ngai Tahu claim, the Government's recent decisions on the use of the Conservation Estate in the settlement of Treaty claims, and the use of the three former pastoral leases in settlement of the Ngai Tahu claim. With respect to the three leases, the Minister's speech assures the public that in consideration of options for their use, "the same procedure will be followed ... as is followed with any other pastoral lessee seeking a tenure review". The Conservation report was considered to be an integral part of that process and " DOSLI are now preparing the report on the farming or other viability issues and then it is proposed that DOC and DOSLI and Ngai Tahu as the "notional" lessees will sit down to see if some broad agreement can be reached."

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71 *Southland Times*, 25 Feb., 1994.

72 Ibid.

73 Minister of Justice, June 1994.

The Minister's speech also added that "assuming that a broad agreement is reached, however, then it is proposed there be full public input particularly from the interest groups. That again follows the usual procedure and it will be no different here. Ultimately the Minister of Lands will have to consider all the representations and make a decision whether to proceed or not." The speech suggests that at the end of the process, access rights will be far better recognised than they are now, and conservation values far better protected.

Table 4.5: CHRONOLOGY OF EVENTS: GREENSTONE, ELFIN BAY, ROUTEBURN PASTORAL LEASES

EVENTS		critical decision	level of consultation
1990	Waitangi Tribunal publishes its report on the Ngai Tahu claim.		
1991	Commencement of direct negotiations between the Crown and Ngai Tahu.		
	Framework Agreement reached (check date - not made public).	✓	
1992	Crown purchases pastoral leases for potential use in settlement of the Ngai Tahu claim.	✓	
1993	June: DOC completes report on conservation values of the areas concerned.		Copies to NGOs and Ngai Tahu for comment. Closing date for comment: October.
1994			
	DOC reconsidering conservation report.		Meeting held in Queenstown between DOC, NGOs, Federated Farmers and Ngai Tahu to discuss the conservation report (Feb 94).
	24 June: delivery of speech prepared by Minister of Justice which outlines the process that will be used to determine how leases will be evaluated for settlement.		

5. A Canadian model

In the course of preparing this report, consideration has been given to settlement models in the common law jurisdictions of Canada, Australia and the United States of America. A forthcoming report will outline in some detail the legal basis of indigenous rights in Australia, the United States and Canada and some of the polices and procedures that have been put in place to settle indigenous claims (Wickliffe in preparation).

5.1 Settlement outcomes

A range of settlement outcomes has been negotiated overseas. For example, in both Australia and Canada, regimes have been negotiated whereby joint management of natural resources by the Crown and aboriginal people is possible. In Australia in the management of natural parks, legal title to two national parks (Uluru and Kakadu) has reverted to aboriginal interests but through a compelled lease-back arrangement to the Australian National Parks and Wildlife Service. Management plans which are drafted under the National Park and Wildlife Act are prepared by Boards of Management which have a majority of members nominated by the aboriginal owners.

In a similar arrangement under an agreement with the Inuit people, the Government of Canada retains ultimate responsibility for wildlife. However the Nunavut Wildlife Management Board, which has Inuit representatives, is responsible for management and regulation of wildlife, subject to Ministerial confirmation of the Board's decisions.

5.2 Procedural issues

Many of the procedural issues identified in New Zealand, such as how to ensure that decision makers obtain full information and how to involve affected parties, are common to other countries.

The approach to claims settlement which most closely resembles New Zealand's is that taken by Canada in respect to the negotiation of

comprehensive claims. British Columbia has also developed procedures to deal with the interests of non-aboriginal people. For example, in negotiations with the Nisga'a people, the Federal, Provincial and First Nations parties have established a joint Nisga'a Public Education Working Group. This body is responsible for general public education concerns arising from the negotiations. It produces educational material, holds public meetings and is available to answer queries from the public.

The British Columbia Treaty Commission illustrates in more detail a model that may prove useful for New Zealand. In many ways the experience in British Columbia parallels the concerns now being expressed in New Zealand. British Columbia is faced with the fact that there are at least 30 claims to aboriginal title to be settled.

5.2.1 *The British Columbia Treaty Commission*

In 1976, as a result of *Calder*,[74] the Federal Government began to negotiate with the Nisga'a, whose territory is in British Columbia. However, the Provincial Government of British Columbia continued to deny the existence of aboriginal title and did not participate in the negotiations.

It was not until August 1990, with growing demand for provincial and federal governments to recognise aboriginal rights, that the Provincial Government agreed to become involved and participate in the establishment of a tripartite task force to develop a negotiation process for British Columbia. The role of the task force[75] was to make recommendations on the scope of negotiations, the organisation and process of negotiations, interim measures and public education.[76]

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74 *Calder v. Attorney General of British Columbia* [1973] SCR 313. As a result of this case, the courts affirmed the existence of aboriginal title in Canadian law.

75 The task force consisted of two persons appointed by the Government of British Columbia, two persons nominated by the Government of Canada, two persons nominated by First Nations Congress and one person nominated by the Union of British Columbia Indian Chiefs.

76 *British Columbia Claims Task Force*, June 28, 1991.

In its report, the Commission dealt with the issue of non-aboriginal interests by recommending that they "be represented at the negotiating table by the federal and provincial governments." In so saying however, it pointed out that:

> *As the treaties will cover a variety of political, economic and social issues, as well as the ownership of and jurisdiction over land, sea and resources, they will significantly affect British Columbians, and other Canadians.*
>
> *A wide range of groups want to participate in the development of treaties with First Nations. This interest should be encouraged. If treaties are to establish a workable new relationship, it is essential that these groups have the opportunity to contribute to their development. To achieve this, the federal and provincial governments must establish effective ways of consulting with non-aboriginal interest groups.*
>
> *In the past, non-aboriginal interest groups have been critical of the federal and provincial governments for not consulting them or for not keeping them adequately informed during negotiations. This has led to demands for a place at the negotiating table, or for the opportunity to observe negotiations. The task force sees these arrangements as impractical. They may impede progress in negotiations. At the Framework Agreement stage, the parties may wish to consider special procedural arrangements to involve non-aboriginal interests during the negotiations.*[77]

In June 1991, the British Columbia Claims Task Force recommended that a British Columbia Treaty Commission be established by agreement among the First Nations, Canada, and British Columbia to facilitate a negotiation process which would involve the commitment of all parties, would be based in British Columbia, would be fair, impartial, effective

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77 pp. 54-55 .

and understandable (so that each party would understand its duties and responsibilities). [78]

In September 1992, the British Columbia Treaty Commission was established by Orders in Council as recommended, with provision for legislation to be introduced by Canada and British Columbia to establish the Commission as a legal entity to carry out the purposes of the Agreement (clause 2). The Commission's powers and functions are set out in the British Columbia Treaty Commission Agreement (see Appendix 2).

Negotiation procedures

Negotiations under the jurisdiction of the Commission are structured in six stages as set out in Table 5.1

At stage two of the process, the Commission must assess the readiness of all three parties to begin negotiations by ensuring that:

(i) Each party has:

- A appointed a negotiator;
- B confirmed that it has given the negotiator a comprehensive and clear mandate;
- C sufficient resources to carry out the procedure;
- D adopted a ratification procedure;
- E identified the substantive and procedural matters to be negotiated.

(ii) In the case of a First Nation:

- A has identified and begun to address any overlapping territorial issues with neighbouring First Nations;

(iii) In the case of Canada and British Columbia respectively:

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78 Ibid., pp. 34-35.

A has obtained background information on the communities, people and interests likely to be affected by negotiations; and

B has established mechanisms for consultation with non-aboriginal interests.

Table 5.1: STEPS IN THE TREATY NEGOTIATION PROCESS IN BRITISH COLUMBIA

SIX STEPS TO SETTLEMENT

(Source: *Policy and Process: Treaty Negotiations in British Columbia*, Federal Treaty Negotiation Office)

1 Submitting a statement of intent to negotiate

The negotiation process starts when a First Nation sends the Treaty Commission a statement of intent to negotiate a treaty. The statement identifies the First Nation and the geographic area of its traditional territory and specifies a contact for communication. Once the Treaty Commission accepts the statement of intent as complete, it convenes a meeting between the three negotiating parties. The meeting must be held within 45 days.

2 Preparing to negotiate

The three negotiating parties - the federal and provincial governments, and the First Nation which filed the statement of intent - then carry out preparatory work, identify topics to be negotiated, appoint and entrust their negotiators. Before moving to the next stage, the Treaty Commission must determine whether all parties are ready to begin negotiations.

3 Negotiating a Framework Agreement

The three parties begin by negotiating a Framework Agreement which identifies the objectives of the negotiations and the subjects for discussion and establishes a timetable and any special procedures for the negotiations.

4 Negotiating an Agreement in Principle

The parties negotiate the topics identified in the Framework Agreement. Although the topics may differ in each set of negotiations, topics include land and resource rights, environmental management, governance, compensation, taxation, cultural artifacts and heritage. When agreement is reached on each subject, the AIP is ratified.

5 Negotiating a final Treaty

The parties negotiate final details and wording on the agreements reached during stage four. They also agree on how the treaty will be implemented. The treaty is then formally ratified and signed by all parties. Legislation is subsequently passed to give effect to the treaty.

6 Implementing the Treaty

The parties to the negotiations work cooperatively to implement the provisions of the treaty.

The Federal Chief Negotiator is a named individual who is able to talk to the public and the media.

Since the establishment of the Treaty Commission and as a means of consulting with non-aboriginal interests, the Governments of Canada and British Columbia have formed the Treaty Negotiation Advisory Committee (TNAC). The Committee consists of resource industries, business, labour, local government, environmental and recreation groups to advise both governments in the course of negotiations. It also provides First Nations with an opportunity to exchange information with TNAC members. The TNAC reports to the provincial Minister of Aboriginal Affairs and the federal Minister of Indian Affairs and Northern Development. Members of the TNAC swear an oath of secrecy. An observer from the Treaty Commission attends meetings.

The TNAC is also made up of sectoral subcommittees which report back on particular issues.[79] At present, the TNAC is regarded with some suspicion by First Nations who do not fully understand its purpose.[80]

As far as public information is concerned, the Commission maintains a public record of the status of negotiations and at least annually a report prepared by the Commission is to be tabled in Parliament outlining progress in negotiations, the operations of the Commission and any other matter considered appropriate. More specifically, a recent newsletter points out that the Commission has:

> *adopted an Information Policy about the negotiating process which respects personal privacy while making pertinent documents available for public review...Within the scope of this policy, Statements of Intent will be available to the public on request only after the Initial Meeting has been held...All Statements of Intent will become public in due course. The*

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79 These are: the Fisheries Sectoral Advisory Committee, the Energy, Petroleum and Mineral Resources Sectoral Advisory Committee, the Lands and Forests Sectoral Advisory Committee, the Wildlife Sectoral Advisory Committee and the Governance Sectoral Advisory Committee.

80 pers comm., Connaghan, C.

the need to ensure that negotiations are not harmed.[81]

The Commission regards itself as "The Keeper of the Process"[82], ensuring that it remains honest and fair.

Comparison between processes implemented in British Columbia and New Zealand

Clearly there are some differences between the situation in Canada/British Columbia and that which obtains in New Zealand. Negotiations in Canada involve three parties: the Federal and Provincial Governments, and First Nations, whereas those in New Zealand involve only two. Canada has two settlement processes, those relating to treaties and those relating to the clarification of aboriginal title and the establishment of new treaties. New Zealand's processes are based on one Treaty only.

Nevertheless, there are many similarities in terms of process between both countries. The main concern of the Commissioner is that information be provided to appropriate parties at key stages of the settlement process. The establishment of an independent body in British Columbia serves, among other things, to provide a check on what information is needed and by whom. The establishment of a similar mechanism in New Zealand may help to ensure that the roles of various parties remain clear: that is that the negotiating parties are Crown and Maori and that the public is consulted where appropriate. A clearly defined process could increase Maori and public confidence in the process. Table 5.2 provides some comparisons between the negotiation procedures which are followed in British Columbia and New Zealand.

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81 British Columbia Treaty Commission, July 1994

82 pers comm., Connaghan, C., BC Claims Commission, March 1994

Table 5.2: COMPARISON OF NEW ZEALAND AND BRITISH COLUMBIA SETTLEMENT PROCEDURES

	NEW ZEALAND	CANADA: (B C Claims Commission)
context	Treaty of Waitangi: negotiations aim to provide redress for grievances against Maori by the Crown under the Treaty	Aboriginal rights: negotiations aim to clarify aboriginal rights where no treaties have been entered into (different process for treaties).
stages	* request by claimants to negotiate/referral by Waitangi Tribunal * acceptance of claim by Cabinet Committee of the TOW and Minister of Justice (against broad criteria) and placement on negotiations register; * negotiation of a Framework Agreement (covers scope of negs, timeframe and structure, ratification procedures, financial assistance). * negotiation of Agreement in Principle (find practical solutions, agreement on ratification); * negotiation of Detailed Agreement (implementation). NB release of information to be agreed between the parties	* claimants submit to the BC Claims Commission statement of intent to negotiate; * parties (Fed. and Prov. Govt and First Nations) prepare to negotiate (carry out preparatory work, appoint negotiators. Parties assessed by Commission for readiness to begin (criteria include whether Fed. and Prov. Govt have sufficient background information on affected parties, and whether they have established mechanisms to consult with non-aboriginal interests). * negotiation of a Framework Agreement; * negotiation of Agreement in Principle; * final Treaty: final details and implementation. * implementation
structures	The Crown manages and controls the process; Crown negotiators consist of officials from various departments with accountability to Ministers. Some confusion where departments have statutory responsibilities to consult. Where negotiators can't agree, claimants have recourse to the Tribunal. However it is not clear how the Tribunal would become involved in process issues rather than matters of substance.[83] No formal mechanism for consultation with the public (not to forget procedures that have evolved eg Conservation Board hearings).	The Commission provides independent facilitation of the process. It checks against set criteria that certain issues have been addressed. It provides dispute resolution services. Negotiators are named and terms of reference and mandate made public; The Treaty Negotiation Advisory Committee (consisting of industry, business, labour, fish, wildlife and environmental interests) provides a formal consultation process.

83 The Tribunal's mediation process has been used in some cases. The process has usually involved a mediator appointed by the Tribunal, however there do not appear to be any clear criteria for assessing impacts, identifying other interests etc.

6. Evaluation of current procedures

As noted in section 1.4, to be adequate:

- Any process for resolving Treaty claims which relate to natural and physical resources must have regard to maintaining and improving of the quality of the environment.

- Any process should be clear and well understood and, in particular, must aim to ensure that decision makers have the relevant environmental information before key decisions are made.

The adequate identifying and addressing of environmental implications through those processes should help make the resolution durable and also acceptable to Maori and the general public alike.

6.1 Responsibilitie of the Crown

Because of the multifaceted nature of the Crown and its responsibilities, there is potential for confusion between:

a) the role of the Minister of Justice, in coordinating all relevant information from a range of Ministers and government agencies in order to formulate options for settlement of a claim; and

b) the role of a Minister with resource management responsibilities as a final decision maker in negotiations or mediation; and

c) the role of Ministers and their departments as providers of information to the negotiations or mediation.

In the first case, when a claim has been either formally validated by the Tribunal, or accepted by the Crown as valid, a wide range of settlement options may be considered, including some that are beyond the power of an individual minister to implement, and which may have to be implemented through special legislation. In that context, the role of

individual Ministers and agencies with resource management responsibilities as providers of information should not be confused with that of negotiation.

In some cases the Crown may not accept a claim as involving a breach of Treaty obligations. But as a matter of good government, as a means of acknowledging the relationship of the tangata whenua with the resource or taonga in issue and of recognising mana, it may nevertheless take action on a "without prejudice" basis to acknowledge that relationship rather than to give redress for an alleged Treaty breach.

In other cases, where the Crown acknowledges wrong done, though without formal validation of a claim, that acceptance may well provide a compelling basis on which to proceed to settlement. In such cases the process lacks the transparency of a public hearing, and may require public disclosure of information on the basis for the arrangements and the reasons why the Crown has entered into negotiations and/or mediation and settlement.

Where a negotiation or mediation is handled specifically by a Minister with a direct interest in the management of the relevant resource, it is not always clear whether that Minister is representing the Crown as a whole in settling a grievance, or whether the Minister is dealing with management issues that are part of his/her normal statutory responsibilities. The case of Takapourewa suggests that the two can be confused.

Where Ministers are advocates for particular management objectives, their direct interest in the management of the resource may come into conflict with their role as a Crown negotiator, particularly where the claimant may wish to negotiate options that are contrary to the interests of that Minister.

It would be in the interests of all parties for the various responsibilities to be clearly defined before any negotiation or mediation commences. This would mean identifying who has the mandate to negotiate or

mediate, who should release information and who has management responsibilities for the resource.

6.2 Understanding the process

At the present time it is fair to say that the public of New Zealand do not understand the steps involved in a Treaty settlement process, although criteria that will govern the use of the conservation estate for settling claims have recently been announced. It is however not yet clear how the process carried out in each case will ensure that those criteria will be met.

There is a clear need to define more precisely the three distinct stages in the settlement process: the grievance/claim stage, the negotiation or mediation stage and the settlement stage. There is also a need to explain the role of the Crown at each stage and finally to identify when and how information, particularly environmental information will be sought as well as released to the public.

6.2.1 The distinction between the grievance/claim stage and the negotiation or mediation stage

In order to understand the context of negotiation and mediation and for the sake of completeness, it is worth noting some of the difficulties experienced by the Conservation Boards in separating issues of validation from those of environmental assessment. Information in this report shows that the distinction between validation and negotiation can become confused, particularly in cases where claims are referred for direct negotiation without having been validated by the Tribunal, or where the Crown accepts the validity of a claim without a full Tribunal hearing. The Crown should consider ensuring that if any of its ministers or agencies enter into negotiations for the settlement of a grievance, the basis for doing so is made clear. If the distinction between the validation of a claim, and the negotiation or mediation of its settlement is not made, then validation issues will become confused with the negotiation or mediation procedures, or even the implementation procedures. This is especially important if or when an environmental assessment process involving the public takes place, as illustrated by the case of Takapourewa.

This problem may also arise if at the stage of implementing the settlement the public becomes involved in a statutory process under the Conservation or other relevant Act; or subsequently under the Resource Management Act without it having been made clear why the settlement is necessary. In such cases, a public authority acting under say the Conservation Act may find itself trying to address issues for which it has no mandate.

6.3 The negotiation or mediation phase and the planning process

The most important element of the negotiation or mediation phase is information. This stage is essentially a planning one. It is an important function of planning to suggest how best use ought to be made of available resources and to enable well-informed choices to be made. But whereas negotiation or mediation are confidential processes, planning is a participatory or consultative process. The challenge is to enable each to take place without prejudice to the other.

6.3.1 The distinction between negotiation or mediation, and consultation

A distinction should be drawn between the Crown's role in negotiating or mediating with Maori, and any consultation that the Crown must carry out with the public in order to clarify the environmental implications of settlement options. Where the settlement process does not provide distinct ways for the Crown to seek information from its constituents and where the purpose of that process is not clear, claimants may find themselves debating the issues with public interest groups in the media. This has occurred in the case of the Ngai Tahu claim and the pastoral leases. There is a danger in the negotiation phase that claimants and their respective hapu or iwi will be insufficiently resourced to respond to well organised interest groups.

In such cases, it is the Crown which must deal with the public. At the same time the public must be aware that they are not negotiating with Maori but are providing information to the negotiations. It is inevitable and desirable that the public do become involved with providing information. However the point at which their input occurs should be clearly defined and understood.

Confidentiality

It is fair and reasonable in negotiations between Treaty partners, Crown and Maori, that detailed information and negotiating positions remain confidential, allowing free and full exchange of views to arrive at agreement. However, the confidentiality of the process can still be protected while improving the provision of information and advising interested parties of matters such as the following:

- what issues will be dealt with in the negotiating process and why
- what the steps of the process will be
- roles of public authorities involved
- what public resources may be involved in options under consideration
- whether information will be sought by the Crown from its constituents and if so how
- the final outcome of negotiations or mediation, and how this meets Crown obligations under the Treaty.

Although unnecessary secrecy may contribute to fear and distrust, misinformation, and reduced harmony between Maori and the wider community, there is no absolute rule that every settlement will involve full public consultation.

6.3.2 Environmental information

Even in situations where a claim is heard before the Waitangi Tribunal, or where Parliament passess new legislation required to implement a settlement, environmental information may be no more than incidental. In other cases there is no guarantee that all necessary environmental information will be identified.

Investigation for this report suggests that there is a major gap in the process. The information provided to decision makers on environmental effects, taking 'environment' in its broad statutory definition to include impacts on people of changes in resource management is not covered. There is no specific provision in the settlement process for environmental assessment early in the negotiation or mediation stage.

While statutory provisions for implementation provide for a certain level of information to be obtained, the nature and timing of those procedures are insufficient to ensure that timely and appropriate information is provided before key decisions are made. For example, procedures set out in the Conservation Act, Reserves Act, Wildlife Act and the Land Act come too late in the process, which is *particularly relevant when choices have been made between options prior to the implementation stage.* Similar problems arise with the implementation of a settlement through special legislation. In light of Government's 20-year commitment to environmental assessment (see section 3.1) this is a serious omission.

The statutes studied in this report provide an indication as to how, over the years, Parliament has considered that procedures should be carried out by public authorities dealing with environmental management responsibilities. Analysis of the statutes shows however that together they are an inadequate basis on which to develop an approach to environmental issues in the settlement of Treaty claims. Moreover, as the legislation now stands, the approach in the various statutes is not wholly consistent given years of accumulated amendments. A more principled approach needs to be developed in respect of environmental assessment, public consultation and decision making.

It is the responsibility of government departments to ensure that environmental protection and enhancement procedures (EP&EP) are incorporated into their policies and operations and that a system of environmental assessment is implemented (see Appendix 3). Environmental impact assessment is defined as a conscious and systematic effort to assess the environmental consequences of choosing between various options which may be open to the decision maker. Environmental assessment must begin at the inception of a proposal when there is a real choice between various courses of action including the alternative of doing nothing. It is essentially a planning tool, and is an integral part of the decision making process.

A government agency such as TOWPU, responsible for exercising a discretion with environmental consequences is thus responsible for

ensuring that the process of environmental assessment is carried out and where appropriate that an environmental impact report is prepared.

The criteria listed in the EP&EP make it clear that where resources are to be allocated, used or preserved, as in the case of many Treaty settlements, an environmental impact report is required. The EP&EP also make it clear that an early report can deal with various alternative solutions to the problem of meeting the intended objectives of the proposed settlement. The scope of an impact report will reflect the scale of the environmental significance of a proposal and questions related to the timing and scope of any necessary consultation will have to be addressed. Guidance is given in the EP&EP and in the Fourth Schedule of the Resource Management Act 1991 on the appropriate advice that should be sought. If this procedure is followed it becomes quite clear when environmental information from concerned or expert groups should be obtained.

This form of environmental assessment, at the point where decision makers are faced with a choice between options, is commonly recognised at the concept stage of engineering proposals. Once an option has been chosen, then environmental protection measures to mitigate any adverse environmental effects are introduced into detailed designs. At the concept stage environmental information assists in choices between options. At the preferred design or option stage, environmental information assists management to control adverse effects. Both stages as applied to engineering planning and design are equally applicable to resource allocation and management decisions.

The examples discussed in section 4 of this report illustrate procedures that have been used to seek information or advice in relation to resources under negotiation or mediation. However, as in the cases of Takapourewa and Tutae Patu, the Conservation Boards involved made their own decision to seek public comment on the option agreed to by the Crown and Maori parties. Whether or not Ministers, negotiators, mediators or officials involved in the process consciously sought such information, including environmental information, prior to decisions between options, or in setting conditions relating to preferred options,

the fact remains that the collection of environmental information is not expressly provided for in the process. While the involvement of the Boards has provided a valuable means of gaining information and passing it on to decision makers, their role in the settlement process has evolved in an unplanned fashion. Further clarification of their role may be necessary, particularly where they are asked only to comment on proposals which involve issues outside their jurisdiction, or which are relevant to other statutory bodies.

In the case of the former pastoral leases, information prepared by the Department of Conservation was not intended to represent a thorough assessment of all values associated with the areas, since the Commissioner of Crown Lands also has responsibilities in this situation. The Minister of Justice has made it clear that the normal reclassification procedures will be followed. However, that fact was not made clear until July 1994 and the announcement was preceded by strong public lobbying in the absence of a clear process.

6.4 Improving the process

This evaluation suggests that the procedures used for settling Treaty claims could be improved. Of fundamental importance is the need to inform the public and in many cases the claimants about the steps in the process. It is hoped this will be clear in a booklet soon to be released by Government. As Table 6.1 indicates, the process itself could be improved if attention is given to both releasing and obtaining information. It is necessary to make provision for participation and ensure appropriate environmental information is obtained prior to decisions being made on possible options. In addition a distinction should be made between environmental information required for planning purposes and environmental information required for management of a resource. The first assists choices between options, the second assists in deciding on conditions for ongoing management.

As suggested earlier, public consultation is an important method of information gathering. More over, in the Commissioner's experience the early provision of environmental information with the assistance of

the public can go a long way to ensure that any controversy is defused and that decisions are made with the support of all parties.

Although this report suggests that a consultative process of environmental assessment would assist the Treaty partners and the public, other procedures could also improve the provision of environmental information. There is merit in considering aspects of the British Columbia model. Having an independent "Keeper of the Process" able to facilitate information flow, able to identify appropriate points at which consultation should take place and to inform the public of progress being made could help to deal with some unsatisfactory elements of the present process.

Table 6.1: THE TREATY SETTLEMENT PROCESS: PROCEDURES FOR MANAGEMENT OF ENVIRONMENTAL INFORMATION

Maori responsibility	STAGES IN PROCESS	Crown responsibility
Information on the substance of the claim [including relevant environmental information] provided to the Waitangi Tribunal or Government.	GRIEVANCE/CLAIM STAGE Validation of claim by Waitangi Tribunal or acceptance of claim by the Crown.	Information provided to Waitangi Tribunal Information provided by claimant evaluated Full public disclosure
Negotiator with mandate announced Iwi/hapu evaluation of assessment	CONFIDENTIAL NEGOTIATION OR MEDIATION STAGE **Framework Agreement** Broad range of options including Tribunal recommendations identified **Agreement in Principle** Preferred option identified	Negotiator with mandate announced Environmental Impact Assessment of options including public consultation if necessary
Iwi/hapu involved as members of the public	SETTLEMENT STAGE **Final Settlement**	Statutory requirements may be initiated. Conditions may be recommended or legislation enacted if necessary.
Keeper of the Process could check that appropriate action takes place		

Glossary

CCL	Commissioner of Crown Lands
CMP	Conservation Management Plan
CMS	Conservation Management Strategy
DOC	Department of Conservation
DOSLI	Department of Survey and Land Information
hapu	band, subtribe
iwi	tribe, people
kaitiaki/kaitiakitanga	steward, guardian/ stewardship, guardianship. As defined in section 2 (1) of the Resource Management Act in relation to a resource, "includes the ethic of stewardship based on the nature of the resource itself".
mana whenua	customary authority: over land and other taonga within the tribal rohe.
MP	management plan
NGO	Non-government organisations
RMA	Resource Management Act 1991
tangata whenua	"people of the land": the Maori iwi or hapu which has mana whenua (customary or traditional authority) and kaitiakitanga over a particular area
taonga	anything of significance to Maori culture and spirituality; includes intangibles as well as objects of a tangible nature
TNAC	Treaty Negotiation Advisory Committee
TOWPU	Treaty of Waitangi Policy Unit (Department of Justice)

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