

The new approach revisited:
a discussion paper
on the Waitangi Tribunal's
current and developing practices

Waitangi Tribunal

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The Waitangi Tribunal and the settlement of historical Treaty claims

This publication updates the Tribunal's new approach to the conduct of inquiries into historical claims. It appears in the aftermath of an election in which much attention was focused on the Treaty sector, and especially on accelerating the negotiation of Treaty settlements.

A critical role in New Zealand society

There is new confidence and dynamism in Māori communities that have concluded Treaty settlements. But for many, these opportunities remain a long way in the future. Some Māori still live with a sense of grievance and loss about the way our society treated them in the past. For groups affected by colonial wars, confiscation and large-scale land loss, this sense of grievance can be profound. When it is combined with social deprivation and exclusion, the maintenance of social cohesion becomes a concern.

New Zealanders accept that these issues must be addressed. In the interests not only of Māori, but of us all, it is necessary to

- **resolve** the grievances;
- **restore** the wellbeing of Māori communities; and
- **reconcile** Māori communities with the state and other parts of society.

This process is well underway, and the Waitangi Tribunal plays a critical role in it.

In the Tribunal, Pākehā and Māori leaders and elders sit together with judges to

- **investigate** to find the truth of the past;
- **listen** to claimant communities, and to the Crown;
- **affirm** claims where they are proven; and
- **explain** where they fall short.

Hearings are in public. Evidence is tested, and authoritative reports produced. The Tribunal engages actively with communities over a period of many months, and as a result of this interaction, communities change and move forward.

The changes brought about by groups' engagement with the Tribunal are a necessary platform for a robust and durable claim settlement process. Without a Waitangi Tribunal inquiry, most claimant groups are not ready to settle. In the process of preparing for and participating in Tribunal hearings, groups test and confirm their leaders, and are encouraged to pull together as communities. They emerge ready to make hard decisions that will stick. This groundwork is vital for the challenge ahead: negotiating a full and final settlement with the Crown.

A balanced, streamlined inquiry process

The Tribunal is committed to innovation. It recognises that in the past, inquiries took too long. It has updated and streamlined its processes so that nowadays, the hearing phase of district inquiries takes place over a matter of months,¹ rather than being spaced over several years.² Now, Tribunal panels work to a carefully monitored plan to deliver their reports within two years of hearings ending.³ These timelines have halved the length of major historical inquiries,⁴ and compare favourably with the time it takes to negotiate major Treaty settlements.⁵

The Tribunal uses its New Approach in all new inquiries into historical claims.⁶ There are two main forms, which are fully explained in the accompanying paper. In summary, the New Approach comprises:

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

Using the modular form, a partial inquiry into key issues may finish in as little as three years all up.

The Tribunal aims for a balanced approach that is practical, efficient and economical. Research, multiple claimants, and a fair hearing will always take time – and time is a necessary characteristic of a process that is transformative. But it cannot be allowed to take too long. The challenge is always to balance the need for a process that is comprehensive and healing with a recognition that early settlement must be encouraged and facilitated. The Tribunal is now well on track to achieving that balance.

Accelerating progress towards Treaty settlements

The Tribunal now has sufficient experience of running standard and modular form new approach inquiries to be able to predict timelines.⁷

If all claimants opted to put their claims through a modular form inquiry, large numbers of claims and claimants would be addressed simultaneously in multi-district, regional inquiries that could enable the hearing of all historical claims by 2012. This would require a high level of integration between the work of the Crown in negotiating direct settlements and the work of the Tribunal in conducting inquiries. It would also require a much higher level of Crown/claimant cooperation than is currently the case, including constructive engagement by the Crown in Tribunal inquiries on issues it is likely to concede in subsequent negotiations for settlement.

However, if all chose the more adversarial standard form inquiry, the finish date would be closer to 2020.

Probably, there will be a mixture of modular and standard form inquiries, and some districts may proceed straight to direct negotiations without a Tribunal hearing. Such a mix would enable completion at or before 2015.⁸

Most importantly, the choices are for the Crown and claimants to make.

The short point is that the Tribunal is ready, willing and able to facilitate settlement negotiation in line with Government and claimant aspirations for all Treaty claims to be settled as soon as possible.

Chief Judge Joe Williams
Chairperson
Waitangi Tribunal

NOTES

¹ Eg. Gisborne 8 months, Wairarapa ki Tararua 13 months, Urewera 20 months

² Eg. 3 years for Mohaka ki Ahuriri, and 4 years each for Kaipara, Northern South Island and Hauraki

³ Eg. the report for Gisborne took just over two years to complete. Wairarapa and Urewera are currently in report writing, aiming to report within two years of the final hearing. Examples of inquiries commenced under the 'old' approach are Mohaka ki Ahuriri, which completed its main report in just over 4 years, and Kaipara and Hauraki, which have so far spent 4 and 3 years respectively in report writing

⁴ The overall period from start of planning and research to issue of report has reduced from 8-12 to 4-6 years

⁵ While these figures are approximate, we estimate that the period from commencement of serious negotiations to implementing statute lasted about 5 years for Tainui and 7 years for Ngai Tahu, the two largest land claim settlements concluded to date. Most other major tribal settlements in the last 10 years have taken between 4 and 8 years to bring from preparation for mandate recognition to statutory completion, one of the quickest being Te Uri o Hau (3-4 years)

⁶ Contemporary claims are covered in a companion paper

⁷ Maps are appended showing the current status of Tribunal district inquiries and Treaty settlements

⁸ This date is dependent upon adequate human and financial resourcing. The current constraint is on the ability to commission district-wide research programmes, undertake claimant facilitation, and provide report-writing support to panels. Additional resourcing of negotiations may also be required to sustain the momentum towards settlement

The new approach revisited

a discussion paper

on the Waitangi Tribunal's current and developing practices

1. In 2001, the Tribunal produced a paper that described its new approach to inquiry into historical claims. In it, we outlined the objectives and features of the new approach, which now has been, or is being, broadly followed in eight district inquiries: Gisborne, Urewera, Wairarapa ki Tararua, Whanganui, Central North Island ('CNI', comprising the Taupo, Rotorua and Kaingaroa districts), and National Park.
2. The purpose of this paper is twofold:
 - (a) to refine and update the description of the new approach, in an effort to capture how it is operating now;
 - (b) to describe how we now regard the new approach as severable into component parts, such that some but not all of its phases may be employed in a district inquiry.
3. These ends are achieved by the two annexures that follow. They are:

(a) Annexure 1: Update of the standard new approach inquiry

In the first annexure, we update the original new approach paper. It was last updated on 5 October 2002. We were initially planning to print in bold the changes in this version, but there were so many that the document ended up looking peculiar. It should simply be noted that our thinking has moved on in a number of areas, responding both to our experience and changing factors in the claimant and Crown landscape.

As before, this version should be regarded as a work in progress. In particular, the interlocutory phase remains under scrutiny. Participants in our process convened to discuss them at hui held for the purpose in Wellington in October and December 2003. As described below, variations are now being deployed in the Whanganui district inquiry.

(b) Annexure 2: Modular variation of the standard new approach inquiry

In the second annexure, we describe how the new approach can also be modular in form. This variation of the standard approach allows claimants to opt for some Tribunal involvement, but not necessarily a full inquiry. This choice would usually be made when the claimants concerned are primarily focused on settlement negotiations, but the Tribunal assists with planning and commissioning research, and addressing generic issues.

The standard new approach

1. Introduction

1.1 Objectives of the new approach are:

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

1.2 The new approach involves seeing the claims process as comprising five phases:

The five phases of inquiry	Likely duration
Casebook preparation	24 months
Interlocutory conferencing	6-12 months
Hearings	8-12 months
Reporting	12-24 months
Negotiation and settlement	?? ¹

2. Phase 1: casebook preparation

2.1 The primary purpose of this phase is to confirm the scope of the inquiry and produce a casebook of research.

2.2 This phase commences when there are sufficient human and financial resources available for the Tribunal to accord the district a priority status. In determining the order by which inquiry districts are to be brought on the hearing programme, the Tribunal has regard to:²

- the priority that the Tribunal has accorded districts with a raupatu element;

¹ Negotiation and settlement are not within our purview, and it is not possible for us to estimate an average time for the negotiations process

² The *Guide to the Practice and Procedure of the Waitangi Tribunal*, pages 3-4

- the readiness of claimants to proceed, including any research in progress under the auspices of either the Tribunal or the Crown Forestry Rental Trust;
- overlaps with districts already under research or in hearing;
- the findings of the Rangahaua Whānui National Overview report regarding the comparative degree of land and resource loss, and when those losses occurred;
- the preference of the claimants to go through the Tribunal process rather than directly into negotiation (where that is known);
- requests by claimants for the Tribunal to provide a forum in which evidence can be presented and a report prepared to assist in imminent negotiation towards settlement; and
- any other relevant factors.

2.3 In determining the order in which generic claims are to be brought on to the hearing programme, the Tribunal has regard to:

- the readiness of claimants to proceed;
- the time that a claim has been outstanding on the register;
- the availability of hearing time allowed by gaps in the hearing of district inquiries; and
- any other relevant factors.

Planning the casebook

2.4 From the point where a district is brought into the active programme of the Tribunal, it is essential that momentum is maintained through the 4-6 year period until settlement negotiations can commence. To commence the casebook preparation phase, the following is required:

- A general understanding of the main causes of resource alienation in the district;
- A general understanding of who the main iwi/hapū are and how they relate to each other, both historically and now;
- A general understanding of the main groups' relationship with the Crown since 1840, and of the claims currently registered with the Tribunal including their geographical extent;
- A preliminary understanding of the research required to complete a casebook for the district;
- Confidence that sufficient funding (usually from CFRT) is available to proceed;

- An understanding by the claimants in the district of what the new approach entails, and a broad consensus that they want to embark on the process now.
- 2.5 The documents that will normally contain much of the information listed in 2.4 are a district overview report (Rangahaua Whānui and other research to date); claims summaries; and a review of available research by the Chief Historian. Once these are available, and arrangements have been made for resources to be targeted at the district by the Tribunal and CFRT, the Tribunal should call its first Phase 1 conference.

Casebook-phase judicial conferences

- 2.6 It usually takes several conferences, held over a period of months, for a judge/legal member and a kaumātua to ascertain:

(a) *Who are the main claimants?*

It is necessary to identify the iwi and hapū and communities with separate interests in claims against the Crown. The objective is to understand more fully what lies behind the list of registered claimants. Overlapping interests of claimants should also be ascertained.

(b) *Who are their spokespeople?*

Are they the registered claimants? If not, why not? This is where the mandate and representation issues should surface.

(c) *Do the main groups have legal representation?*

The Tribunal believes that prejudice will likely follow if claimants do not have legal advice from the point where the main groupings of claimants have emerged. We will provide input on the process for obtaining legal aid.

(d) *What are the core geographical areas covered by the main groups' claims?*

And also, what is a sensible district boundary for the Tribunal to work within? In determining the extent of a particular inquiry district, the Tribunal balances a number of factors, including:³

- commonalities between claims (such as the Crown's actions or the resources to which claims relate);
- the geographical size of the district;
- the number of claims to be heard within the district;
- the associations that tribes have with an area; and

³ The *Guide to the Practice and Procedure of the Waitangi Tribunal*, page 2

- the effect on other neighbouring districts of the boundary set for this inquiry.

(e) *What sort of Tribunal process will meet the claimants' objectives?*

The Tribunal could conduct the process so as to assist claimants to move into negotiations sooner rather than later, with reduced levels of historical research, hearing time, and reporting. Alternatively, claimants might prefer a comprehensive research, hearing, and reporting process. The parties' objectives will now be the subject of discussion, with a view to tailoring the process (within limits dictated by the Tribunal's status as a commission of inquiry) to the particular needs of the claimants and the Crown in the hearing district in question. What the Tribunal will not tolerate, however, is unnecessary delay.

A shortened inquiry and hearing process might involve the Tribunal in amending, or omitting, certain of the phases described here. These possibilities are being explored in the context of what we are calling the 'modular approach' to inquiries, which is really a development of the new approach.

(f) *What research is necessary to complete the casebook?*

A programme of research projects should be prepared and circulated before the conference. Usually, this draft programme will be prepared by the Tribunal's Chief Historian, following consultation with parties on the preliminary review of available research.

Projects should have a district-wide perspective, but take account of particular iwi/hapū engagement with the Crown, and where possible, use existing specific claims as case studies. Contemporary issues that require expert evidence should also be included at this point. The pros and cons of more research should be debated. Limited funds available may also be a factor in determining the comprehensiveness of research coverage.

With some experience of preparing casebooks for new approach inquiries now to hand, we realise that pitching the casebook at the right level is a critical aspect of the success in the new approach.

It is necessary for generic issues all to be covered, together with a sampling of more detailed case studies that illustrate the breaches and their effects at hapū and whānau level.

If there is too great an emphasis on researching all specific claims in detail, or an expectation that there will be separate claimant reports on identical/shared issues, the research process will run the risk of running over time and creating unnecessary duplication. A further consequence could be an overemphasis on detail and

separate pleadings at the interlocutory phase, and a consequential descent to minutiae in the statement of issues.

The planning of the casebook is therefore crucial, with involvement by experienced people who already have a sense of the scope of the issues in the district. In particular, experience is required to develop a sense of how much coverage is enough, and where the 'too much' line might be crossed.

Outcomes from start-up judicial conference(s)

2.7 The main results of this conference (usually more than one conference) should be:

- (a) Identification of the main claimant group(s), so that both Legal Services (who provide funding for legal costs) and CFRT (who provide funding for research, claimant organisation and hearing costs) can ascertain likely cost, and begin to fund;
- (b) Identification of mandate/representation issues, on which the Tribunal can direct specific work while research is being prepared. The Tribunal may convene hui or mediations where necessary to resolve intra-group or inter-group issues. It is envisaged that greater use will be made of alternative dispute resolution mechanisms, mainly negotiation and mediation, to resolve any intractable difficulties that arise within or between groups;
- (c) Confirmation of the district boundary. (Note: once the district inquiry boundary is confirmed, the registered claims within the district inquiry will be consolidated by the Tribunal's registrarial staff);
- (d) Confirmation of the claimants' objectives, and the type of process the Tribunal should plan to provide;
- (e) Confirmation of a casebook research programme and deadline, to enable the Tribunal and CFRT to divide the work and set budgets for this phase.
- (f) Decision on whether or not to establish a research coordinating and monitoring body to oversee the research programme – these have been deployed in the Wairarapa ki Tararua and CNI inquiries, for example.

2.8 Once these matters are known and understood, with any areas of difficulty addressed and resolved, the main activity over the next several months will be historical research.

Judicial conferences for monitoring progress

- 2.9 The number of judicial conferences required during the period when the casebook is being compiled will vary from district to district. The Tribunal for each district inquiry will need to assess how many conferences are required to monitor the progress of the historical research programme, and to ensure that momentum is maintained within the claimant communities.
- 2.10 Clustering of groups with common grievances and whakapapa will be ongoing through this period, and Tribunal engagement and encouragement will usually be required. Tribunal involvement in the teasing out of representation or mandate issues might also be called for.
- 2.11 In some district inquiries, it has been found valuable to conduct a survey of the claimant population to ascertain their views of allegiances and issues. This has increased the ability of the Tribunal to work positively with claimant groups for the purposes of clustering, and resolving issues between groups, and between groups and other agencies.
- 2.12 Throughout, the Tribunal needs to be assuring itself that completion of the casebook can be achieved by the specified date. If doubts arise, strategies will need to be put in place to meet the planned date – or, if absolutely necessary, change it.

Casebook review

- 2.13 The Tribunal's Chief Historian will carry out a review of the casebook evidence just prior to or immediately following the casebook deadline. Additional research may be commissioned at this point to cover any gaps or weaknesses identified.
- 2.14 The Chief Historian's assessment is a report to the Tribunal. It will sometimes be made available to the parties. Sometimes it will not. Each Tribunal will make that decision depending on the circumstances in that district inquiry.
- 2.15 In the past, a casebook has been considered ready to close when 80% of the research necessary for the inquiry has been filed. This percentage is probably too low to work in the new approach. This is because the casebook closure triggers the finalisation of statements of claim. If significant research is outstanding at that point, claimants cannot be expected to make their final amendments to their statements of claim. To require this of them in the absence of all the evidence would be in breach of rules of procedural fairness. But to allow further amendments to statements of claim and then of course also to the statement of response would be to prolong and complicate the interlocutory phase of the process considerably. This is most undesirable. Accordingly, the casebook will usually need to be about 95% complete, with all major reports filed, before the next phase in the process can ensue.

3. Phase 2: interlocutory conferencing

- 3.1 The primary purpose of this phase is to particularise and refine the claim issues. It commences once the casebook is completed and distributed.
- 3.2 The steps set out in the table below are essentially those that were taken in the Gisborne, Wairarapa and Urewera district inquiries.
- 3.3 Because of a sense that these steps can usefully be refined to achieve an even better outcome, some variations have begun to emerge in the planning of other district inquiries as they come on stream.
- 3.4 With respect to statements of claim, in both Urewera and Wairarapa there was considerable replication of the main pleadings of the claimants in those districts. This led to a great deal of work (on the part of claimant counsel, Tribunal staff, and Crown counsel) that was probably not needed to produce the statement of issues that is the goal of the pleading process.
- 3.5 Where there are many separate claims and claimants, and it is considered desirable to avoid the main or 'generic' pleadings of the claimants being submitted to the Tribunal in many different forms in separate statements of claim, an alternative approach is available. It is currently being deployed in the Whanganui district inquiry, and may be applicable to other districts too.
- 3.6 Claimant counsel in the Whanganui district inquiry are working together to produce one statement of claim that sets out the claimants' pleading of the main allegations against the Crown that the Māori groups in the district largely have in common.
- 3.7 This will have the considerable advantage of there being an agreed pleading of what are likely to be the main issues in the district inquiry, and of requiring the Crown to respond to these only once.
- 3.8 Where this approach is followed, the claimants would file, in addition to a generic statement of claim, a separate statement of the claims against the Crown that are particular to them. For each claimant group, therefore, there would be (1) participation in a generic statement of claim filed on behalf of all claimants in the district; and also (2) a separate statement of claim, filed after the generic statement of claim, setting out the claims against the Crown particular to that claimant group.
- 3.9 Where this two-step approach is used for the filing of statements of claim, the indicative timetable set out below would need to be varied.

Timing	Interlocutory Milestone
	Casebook completed and distributed ("CCD")
2-3 months after CCD	<p>Particularised statements of claim (SOCs) filed in draft</p> <p>First Phase 2 Conference (on draft SOCs)</p> <p>The Tribunal and parties</p> <ul style="list-style-type: none"> • Analyse and comment upon the draft statements of claim • Identify any pleadings that are unclear, or appear to lack a basis in the evidence • Suggest changes to form and substance
3-4 months after CCD	<p>Final particularised statements of claim filed</p> <p>Cut-off date for claims to be included for inquiry takes effect: the inclusion of further claims after this point only by leave</p> <p>Tribunal registers the final amended statements of claim and may issue a memorandum outlining its understanding of the scale and content of the various claims in the inquiry</p>
4-5 months after CCD	Crown files draft statement of response (SOR)
5-6 months after CCD	<p>Second Phase 2 Conference (on draft SOR)</p> <p>The Tribunal and parties</p> <ul style="list-style-type: none"> • Analyse and comment upon the draft statement of response • Identify any pleadings that are unclear, or appear to lack a basis in the evidence • Suggest changes to form and substance
6-7 months after CCD	Crown files final statement of response
7-8 months after CCD	<p>Tribunal analyses statements of claim and response, and prepares draft statement of issues (SOI). The SOI indicates the matters that appear to be the subject of agreement between the parties, those which remain contested, and how they differ</p> <p>The draft statement of issues is distributed to the parties</p>

Timing	Interlocutory Milestone
9 months after CCD	<p>Third Phase 2 Conference (on draft SOI)</p> <p>The Tribunal and parties</p> <ul style="list-style-type: none"> • Analyse and comment upon the draft statement of issues • Identify any matters not covered • Identify areas where the parties differ from the Tribunal's interpretation of the matters upon which there is agreement, and the matters in contention • Parties' submissions on drafting can be filed by way of memoranda after the conference
9-10 months after CCD	<p>The Tribunal revises draft SOI, and distributes final version</p> <p>This document serves as the focus for the rest of the inquiry</p>
10-11 months after CCD	<p>Fourth Phase 2 Conference (planning hearings)</p> <p>This conference follows hui involving Tribunal staff, claimants and counsel at which arrangements are canvassed and tentatively agreed. At the conference, the parties and the Tribunal</p> <ul style="list-style-type: none"> • Finalise the number of hearing weeks for the inquiry • Finalise the agenda for each of the hearing weeks in the inquiry, including the list of witnesses to appear for claimants and Crown, and the venues for the hearings. The Tribunal will seek the assurance of counsel that witnesses' evidence will not be repetitive • Discuss and set protocols for timing of the filing of evidence, and the mode of filing • Discuss and set timetable for the filing of the Crown's evidence • Discuss and set protocols for cross-examination

Determining the number of days of hearing

- 3.10 The Tribunal expects each district inquiry to work within a range of 30-50 days' hearing (6-10 hearing weeks) per inquiry. The hearings will take place usually at the rate of about five days per month, over a period of about 8-12 months.
- 3.11 The number of hearing days allocated for each inquiry will be set at the last interlocutory conference. The determination is based on the Tribunal's perception of the parties' actual needs (rather than their desires). The aim is for the interlocutory process to have been sufficiently exhaustive for members to come to an understanding of the nature of the various claims and claimant groupings to be heard.
- 3.12 The number of days allocated will depend upon several criteria, including
- the number of groups whose claims have been amalgamated for that hearing;
 - the number and complexity of the claim issues;
 - the degree to which these issues are unique to this district inquiry (as opposed to having been canvassed extensively by previous tribunals);
 - the nature of the Crown's response to the evidence and claim issues; and
 - the amount of cross-examination anticipated to be required.
- 3.13 Once the number of hearing days has been determined, additional days will be provided in exceptional circumstances only. Generally, counsel would have to indicate that an exigency has arisen that was not foreseen at the time when the number of hearings days was decided upon. Even then, changes may not be possible. This is because the Tribunal's forward plan is the basis for budgetary allocations. The allocation of more hearing days to one district inquiry can often be made only at the expense of another district inquiry.
- 3.14 The Tribunal uses the following techniques for ensuring that hearing time is kept within sensible bounds:
- Ensuring that subject areas/issues that have been agreed upon are not unnecessarily traversed;
 - Some authors of reports may not need to be called, and/or may answer questions in writing;
 - Counsel may be encouraged to present submissions succinctly, with time limits imposed where appropriate;
 - Summaries of reports may be taken as read;

- Cross-examination by counsel will be by leave only and be limited in time. Tribunals should work to encourage claimant counsel to focus their cross-examination on improving the case against the Crown rather than on undermining the case of other claimants;
- District-wide site visits, rather than on a claim-by-claim basis, should be encouraged. Site visits should be restricted in time, and time restrictions adhered to. If additional site-related material is considered necessary to show the associations of a particular group with a particular site, this may be achieved through submission of video evidence;
- Time allocated to the presentation of counsels' closing submissions may be limited. Summaries may be called for;
- The Tribunal may sit for longer periods each day to get through the hearing agenda, but only in exceptional circumstances.

3.15 It should be noted that the techniques outlined in the previous paragraph for limiting the duration of hearings are primarily directed at avoiding the presentation to the Tribunal of material that it has already heard, or (in the case of site visits) seen. Also to be avoided is the elaboration of unnecessary detail, or matters of concern to claimants that are outside the Tribunal's jurisdiction. For instance, counsel should be required to make a factual and legal connection between the activities of local and regional authorities and the Tribunal's jurisdiction, which is in respect of the Crown.

3.16 The desirability of requiring claimants and their counsel, and also the Crown, to be efficient in their use of the Tribunal's time should not derogate from the right of parties to be heard. In particular, claimants must be afforded the opportunity to hear oral presentation of the substance of their own claim. For many claimant communities, the hearing is effectively their only, and certainly their best, opportunity to understand what their claims are about.

Allocating hearing time as between claimant groupings

3.17 Once the Tribunal has determined the number of hearing days that will be made available to the district inquiry, the Tribunal prefers that claimant counsel co-ordinate and agree between them allocation of the time to the various groupings of claimants within the district inquiry. During the period of interlocutory conferencing, it becomes apparent to all participants who are the leading counsel in the inquiry. These will usually be experienced practitioners who are representing the main claimant groupings. The Tribunal looks to these counsel to co-ordinate the process of planning the hearing programme. Tribunal staff will usually help arrange hui to this end, and assist with the liaison between claimant parties and the Crown. Once the parties have reached agreement in principle on the allocation of time as between the claimant

groupings, and as between claimants and the Crown, and also the preferred venue for hearings, a draft plan is submitted to the Tribunal for its consideration. The Tribunal will usually go along with the parties' preferences.

3.18 In the event of agreement between the parties proving impossible (this has not happened yet), the Tribunal would itself have to allocate hearing time to the parties.

4. Phase 3: hearings

4.1 The primary purpose of this phase is to hear and test the evidence and submissions of claimants and the Crown, and to set out the Tribunal's findings and recommendations, and the reasoning for its decisions.

4.2 This phase commences once the Tribunal is satisfied that:

- the claimant groups understand their claim and have identified all the issues the Tribunal should inquire into;
- the Crown has set out which issues it will call evidence on and why;
- the evidential material is sufficient to allow the Tribunal to inquire fully into those issues;
- a hearing schedule has been agreed upon; and
- funding is available to cover claimants' costs through the hearing process.

4.3 It is at this point that the balance of the Tribunal members will usually be appointed.

Cross-examination

4.4 It is an integral part of the new approach that cross-examination is well managed in the hearing process. The Tribunal must do this in order to manage the content of the hearing days, and maintain the timetable.

4.5 In determining issues relating to cross-examination, the Tribunal maintains its focus on its inquiry jurisdiction, which is to make findings on claims against the Crown.

4.6 In order that all parties have notice of the extent of cross-examination sought, and the focus of the cross-examination, cross-examination is permitted only by leave. All parties must seek leave to cross-examine prior to the hearing at which the witness appears. Each Tribunal will set its own deadline for the filing of such applications.

Cross-examination of the claimants' technical witnesses

- 4.7 The premise upon which leave is granted is that the Crown, which is effectively the defendant in Treaty claims, has a prima facie right to cross-examine claimants' evidence.
- 4.8 The practice is developing for some questions to be put to technical witnesses, and answered by them, in writing. The Tribunal may allow this practice where evidence has been filed late, or where time for cross-examination at the hearing is short.
- 4.9 Counsel for claimants (effectively co-plaintiffs) do not have a prima facie right to question the witnesses of other claimant counsel. Leave to do this is granted only where it can be demonstrated by counsel that their clients' cases against the Crown will be adversely affected by the evidence of other claimants. Pro forma applications for claimant counsel to cross-examine other claimants' witnesses will therefore not suffice. They need to make out the case for likely prejudice.
- 4.10 Where the Tribunal has commissioned research from a historian, the evidence of that historian may support the case for the claimants, but the historian is not formally a claimant witness. In such cases, the witness will often be led by a member of the Tribunal's staff rather than by claimant counsel. In recognition of the fact that the witness has not been briefed by claimant counsel, the Tribunal would usually take a more lenient approach to cross-examination by claimant counsel. This reflects the need for claimant counsel to have the opportunity to bring out, by asking questions, particular emphases or themes in the evidence.

Cross-examination of the claimants' non-technical witnesses

- 4.11 These witnesses are called upon to tell the claimants' story, and lay down their take, from the point of view of the group itself. Cross-examination of such witnesses raises issues specific to the Tribunal and its jurisdiction.
- 4.12 The Tribunal recognises that there is an inherent bias in this kind of claimant evidence. Its purpose is to lay down a tribal whāriki to establish the group's identity. The group's importance, and the nature and extent of its sphere of influence, is nearly always inflated by those who operate from within it. This is an inevitable part of the establishment and expression of mana. In particular, historical rivalries with neighbouring tribal groups are unlikely to be viewed objectively by any of the parties involved.
- 4.13 The Tribunal's primary focus in inquiries is on whether claimants have been prejudicially affected by any acts, omissions, policies or practices of the Crown that are inconsistent with the principles of the Treaty of Waitangi, and are within the Tribunal's jurisdiction. Claimants' statements of identity and personal experience operate within the truth and reconciliation function of the Tribunal, and are critical to its function

as a body offering catharsis and recognition to people whose grievances have been long overlooked.

- 4.14 It is rarely the case that cross-examination of these witnesses will assist the Tribunal in its primary function. Inevitably, claimants sometimes wish to expose and play out tribal rivalries before the Tribunal. Counsel play an important role in ensuring that competing claims for mana as between claimants do not overshadow the Tribunal's task. Counsel need to trust the Tribunal members' experience and wisdom, that enables them to judge claims to mana in the light of the evidence as a whole, and also their own knowledge of the relevant politics.
- 4.15 Obviously, any wild overstatements that witnesses offer as fact may need to be pegged back by careful questioning. But challenges can also serve to inflate differences, making it more rather than less difficult for the Tribunal to perceive where the truth of the matter lies. Often it will be just as effective for counsel simply to point out that the party he or she represents will be presenting evidence that supports a different view. While this approach departs from the formal rules of evidence, it is within the Tribunal's jurisdiction to encourage this approach where appropriate. It will often conform better with the Tribunal's kawa of ensuring that all witnesses, and especially kaumātua, are accorded the utmost respect.
- 4.16 An alternative approach is for counsel to submit questions in writing to non-technical claimant witnesses. This has the advantage of allowing the witness to reflect on the issues, and provide a considered answer. Often this will allow a more measured response, that conforms better with the usual desire of claimant groups to maintain good relations with their neighbours, but also to assert their own mana.
- 4.17 These guidelines should not be taken as indicating that cross-examination of non-technical claimant witnesses will never be appropriate. It will, however, not usually be appropriate, should always be approached with caution, and should always be conducted with a courtesy that reflects respect for the mana of the witness and his or her tribal group, and also for the mana of the forum.

5. Phase 4: report writing

- 5.1 The Tribunal will draft a report in keeping with its statutory requirement to make findings on whether the Crown has breached the principles of the Treaty of Waitangi, whether prejudice has resulted for claimants, and to make recommendations on how to remove the prejudice, as appropriate. Within that statutory requirement, however, there is scope for different types of report.
- 5.2 The form that the report will take may be the subject of discussion with the parties during the interlocutory process, and again at the conclusion

of hearings. Depending on what is required for the inquiry, the report could be:

- a comprehensive narrative of historical events and analysis of the Treaty issues arising and advanced, supplemented with detailed reasoning of the Tribunal's findings and recommendations;
- a report that provides detailed analysis on targeted issues and summarises others as agreed during the interlocutory process;
- a summary only of the Tribunal's findings and main reasons for them (under 100 pages);
- a collection of the Tribunal's 'statements of issues' minutes issued throughout the interlocutory process, supplemented with the Tribunal's findings and recommendations;
- any combination of the above that is appropriate for the Tribunal's inquiry.

5.3 All reports should be subject to the Tribunal's established editorial standards, to maintain consistency of quality and presentation. Preparation of the report will be faster or slower depending on which of the options under 5.2 above is chosen as appropriate. The Tribunal expects each inquiry to result in a published report 12-24 months from the completion of hearings.

5.4 After the hearings have concluded, and the discussion as to form of report sought has been conducted, each Tribunal will need to take some time to plan the path forward. It may be beneficial for its decisions about this to be communicated to the claimants either by memorandum or in a hui. Then if, during the course of its report writing, the Tribunal's intentions change (eg as to the timing or the length of the report, or the issues to be canvassed in depth) it may be appropriate to update the parties. Again, this may be by memorandum of the Tribunal or hui involving Tribunal members and claimants, depending on the circumstances.

6. Phase 5: negotiations and settlement

6.1 The primary purpose of this phase is to provide the claimants and Crown with the opportunity to reach settlement of all Treaty grievances, both historical and contemporary. The Tribunal's role within this phase is reactive only. It can become involved when either party wants the Tribunal's opinion on

- interpretation of Treaty jurisprudence;
- the fairness and justice of the negotiations and settlement process; or
- appropriate remedies.

- 6.2 The Tribunal anticipates that its role will be limited to occasional conferences and very limited hearings.

7. Note on parallel processes

- 7.1 The Office of Treaty Settlements has published its process and guiding principles. It is a four-stage process:
- 1 Preparing a claim for negotiation (key milestones are Deed of Mandate and Tribunal Report)
 - 2 Pre-negotiations (key milestones are Terms of Negotiation and Negotiating Briefs, and “overlapping claims/shared interests”)
 - 3 Negotiations (key milestones are Heads of Agreement and Deeds of Settlement)
 - 4 Ratification and Implementation (key milestones are Governance Structures and Legislation)
- 7.2 It is well recognised that the inquiry into claims would benefit in terms of time and cost savings if the Tribunal’s and the Crown’s processes proceeded in tandem.
- 7.3 The possible ways in which the two processes might proceed simultaneously is the subject of ongoing discussion between the Waitangi Tribunal and the Office of Treaty Settlements and Crown Law Office.
- 7.4 The 'modular' variation of the new approach is a move in the direction of synthesising the inquiry and settlement processes (see annexure 2).

8. Commentary on the new approach

- 8.1 The Waitangi Tribunal is uniquely bicultural in its composition and *modus operandi*. It is vitally important that this feature should remain intact.
- 8.2 In particular, the Tribunal’s respect for, and commitment to, tikanga Māori must remain. It is difficult to be categorical about how issues of tikanga might arise in hearings, or how they should be dealt with when they do. Suffice to say that the mana of all those appearing before the Tribunal should continue to be respected. Tribunals must continue to be flexible, and adopt processes dictated by tikanga whenever such circumstances arise.
- 8.3 A Tribunal hearing is a forum not only for arguments and stories, but also for emotions. It is well recognised that Tribunal hearings can provide an important catharsis for claimants, and this is a critical part of the Treaty claims resolution process. Time must be taken, where

appropriate, to ensure that this aspect of the Tribunal's role is not undermined.

- 8.4 In short, tikanga must remain to the forefront, and people, and their different perspectives, are to be respected. But this new approach to managing claims is an endeavour to ensure that these imperatives are accompanied by a commitment to discipline, and efficient use of limited resources. Finding the right balance is an ongoing challenge.
- 8.5 It is hoped that the pre-hearing conferencing will afford the Tribunal the opportunity to develop new techniques, incorporating the tradition of *kōrero kanohi ki te kanohi*, to define and refine the issues in the claims, and assist in the management of intra- and inter-tribal tensions and disputes.
- 8.6 The challenge for all of us is to engage in this new approach in a way that enables the ongoing development of the Tribunal's unique kawa, and at the same time makes our processes more responsive and efficient. If we can achieve such a blend, the mana of the Tribunal, and of all those who engage with it, will surely be enhanced.

The modular new approach

1. Introduction

- 1.1 The modular new approach has been developed in the Central North Island inquiry, as a modification of the new approach designed to meet the particular needs and aspirations of the Crown and claimants in that region. It is predicated on a high level of engagement and motivation by the Crown, whose representatives (like the claimants') have a strong focus on entry into settlement negotiations as soon as practicably possible.
- 1.2 Rather than opting for a full Tribunal inquiry, the Crown and claimants have agreed to the division of the inquiry into a series of modules. At the end of any of the modules, the parties may decide that they have made sufficient progress to commence settlement negotiations.
- 1.3 The modular new approach should be considered as an option for parties who seek:
 - A speedy preparation for entry to negotiations;
 - A fair and transparent public process as part of that preparation;
 - Hearings and a Tribunal report on the key big-picture grievances of concern to most or all claimants in a district, before starting negotiations;
 - An impartial public process that identifies all claimants in a district, their representation, their relationships, and their issues, before starting negotiations
 - The ability to organise the inquiry on a larger regional scale, combining more than one district.
- 1.4 **The modular new approach will not suit claimants who need to tell their whole tribal and colonial experience to the Tribunal. There is insufficient time available in this model; the standard new approach is the better choice for claimants in this situation.**
- 1.5 The modular new approach is now being trialled in the Central North Island. The Tribunal may now offer this variation for the speedy preparation of claimants and Crown for negotiations in other districts.

2. Start-up

- 2.1 The process of start-up conferences is the same as described in annexure 1, with the addition of a process to define the generic, big-picture issues that would form the core of the first series of modules.

2.2 In the Central North Island inquiry, the Tribunal's Chief Historian and staff released discussion papers identifying the big-picture issues, the research currently available on them, and proposing additional research. These papers were reviewed by the Tribunal, claimants, the Crown, and a committee of research experts representing the parties. The result was an agreed definition of the big-picture issues and a research programme to cover them. The timetabling of research, and the setting of a casebook deadline, followed detailed planning by the funding agency (Crown Forestry Rental Trust), the research committee, and the parties.

3. The first module: research phase

3.1 A programme of casebook research, mainly consisting of broad-brush overview reports, is carried out to provide research reports on the big-picture issues. It is monitored by the parties and the Tribunal via conferences and the research committee.

3.2 Simultaneously with the written research programme, the claimants prepare their oral evidence. This part of the preparation needs to be completed earlier than in the standard new approach, which gives the claimants until the start of hearings to finish this work. The oral evidence needs to be completed and produced in advance in a form that will allow it to meet the casebook deadline.

3.3 At the same time, the Crown carries out its research on the issues. The planning and progress of the Crown's research is made public and monitored in the same way as the claimants' research. It does not follow and respond to the production of the claimant and Tribunal research, as in the standard new approach.

3.4 Both research programmes (claimant and Crown) must be completed by the casebook deadline set by the Tribunal. The Chief Historian will then review the casebook, as for the standard new approach, and advise as to whether there is a sufficient base of evidence for the inquiry to proceed to hearing.

3.5 The completion of the casebook is the end of the first module. At this point, the claimants and the Crown may decide that they have sufficient knowledge of each other and the issues, and sufficient research material, to proceed directly to negotiations. If not, they may opt to continue with the second module.

4. The second module: interlocutory phase

4.1 In its modular version, the interlocutory phase of the new approach is greatly truncated. Parts of it may be omitted or varied to suit the circumstances of the claimants and the timeframes within which the parties are operating.

- 4.2 For instance, in the Central North Island modular inquiry, claimants had the option of particularising those parts of their statements of claim which deal with the big-picture issues. There was no requirement to do so, and the cut-off for filing new claims at this point applied only to stage 1 of the inquiry. The Crown was required to produce a formal statement of its position on the big-picture issues, in advance of the hearings. This responded more to the casebook of evidence than to particularised statements of claim, but set out the Crown's position on all key matters.
- 4.3 After considering the casebook, the statements of claim, and the Crown's statement of position, the Tribunal will distil matters for its inquiry and draft a statement of issues (SOI). It is envisaged that this will be a short and generic document. There will be no exchange of drafts, but the matters may be addressed at judicial conferences if parties or the Tribunal feel that this would improve understanding of positions and assist the inquiry.
- 4.4 The interlocutory phase would normally be confined to a period of about three months, but timeframes will vary depending on the amount of evidence, the number and complexity of issues, and the degree of agreement between the parties.
- 4.5 At the end of the interlocutory phase, a conference would be held to discuss whether, and how, to conduct the third module of the inquiry. At this point, the Crown and claimants may feel that they are sufficiently prepared and informed to negotiate a fair and durable settlement. Alternatively, they may decide to proceed with the third module (hearings). In that case, a planning conference would timetable the hearings, as with the standard new approach.

5. Third module: hearings

- 5.1 Hearings will proceed as described for the standard new approach (see annexure 1).
- 5.2 Like the interlocutory phase, however, there will be a greater emphasis on speed. The aim will be to conduct the hearings over as short a period as possible, with a view to achieving a quick result. The number and conduct of hearings, based on the smaller, big-picture casebook, will be relatively circumscribed.
- 5.3 These emphases reflect the desire of claimants and Crown, in choosing the modular new approach, to move quickly to a point where settlement negotiations can commence.
- 5.4 It is anticipated that, at the end of the hearings, the claimants and the Crown may decide that they are ready to negotiate a settlement. They may opt to leave the Tribunal process at this point. It is possible for the processes to coincide, depending on the choices of parties, so that the

Tribunal proceeds to write its report during the preliminary phases of negotiation.

6. Fourth module: a Tribunal report

- 6.1 The nature of the Tribunal Report produced as a result of the big-picture inquiry will depend on the amount and depth of evidence, the number and seriousness of the issues remaining in contention (as opposed to agreed), and the preferences of parties.
- 6.2 The Tribunal may write a brief report. It may or may not include findings. It may or may not include recommendations.
- 6.3 Alternatively, the parties may prefer a fuller report on the issues, with a substantial historical analysis and narrative, culminating in findings and recommendations. The outcome, and the length of time involved, will depend on the choices of parties, the views of the Tribunal hearing the claims, and the evidential base provided.
- 6.4 In any event, the Tribunal would seek to produce the report substantially faster than a full, standard new approach report. It may be possible to publish the report within a six-month timeframe.

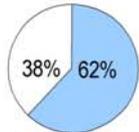
7. Fifth module: start-up conferences for an inquiry into particulars

- 7.1 After receipt of the Tribunal's report, the claimants and Crown may enter into negotiations. Alternatively, they may decide that a settlement will require the full exposition of all issues and all particular claims. The parties may seek a conference on the matter. If, as a result of the choices made at the conference, the Tribunal resumes its inquiry on a more detailed and particular basis, there would be start-up conferences to agree on a second research programme and a second casebook deadline.
- 7.2 The process is then likely to follow the standard new approach, with the exclusion of the matters already heard and reported upon.

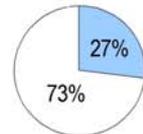
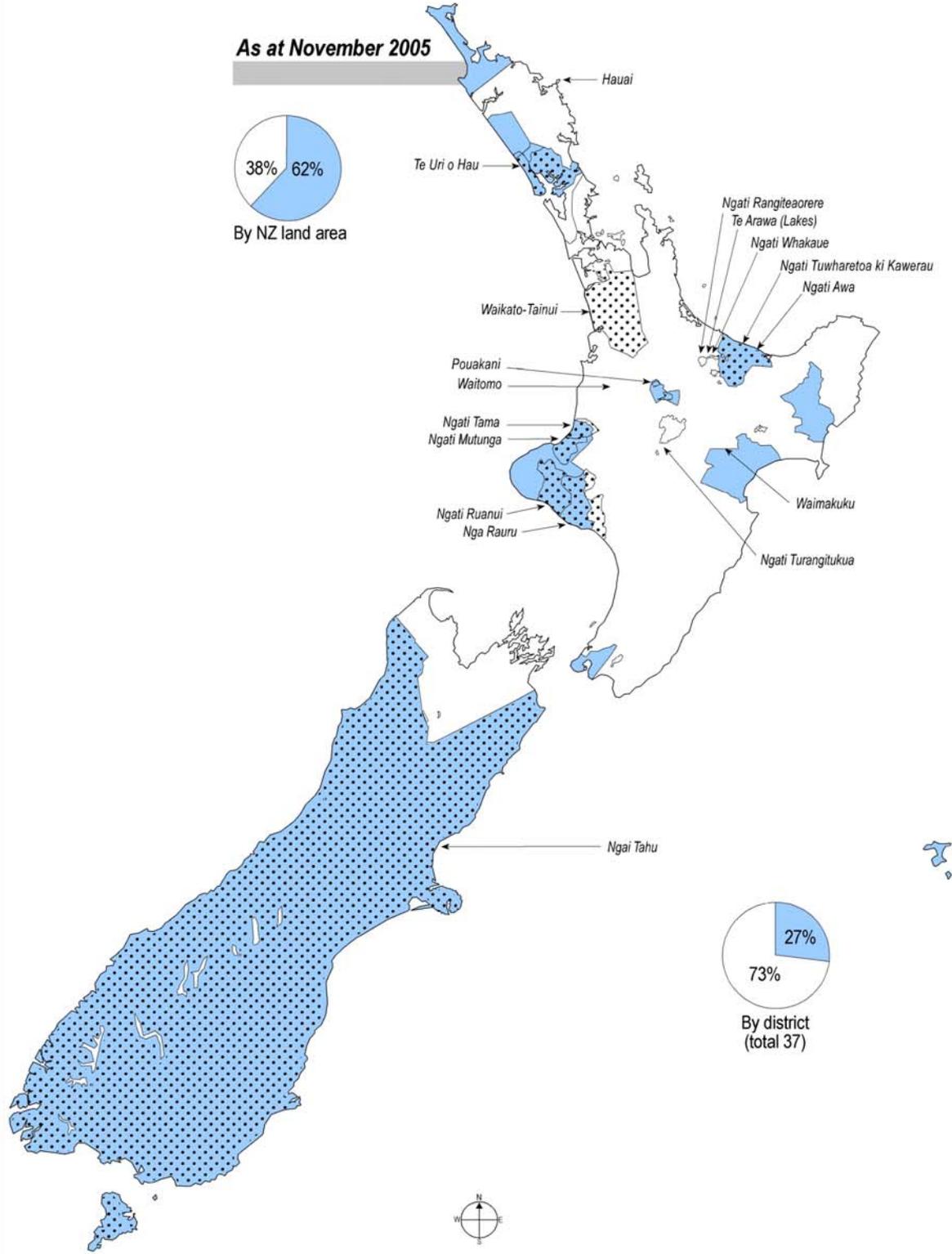
Districts with Completed Waitangi Tribunal Inquiries

-  Principal settlements completed
-  Completed Waitangi Tribunal inquiries

As at November 2005



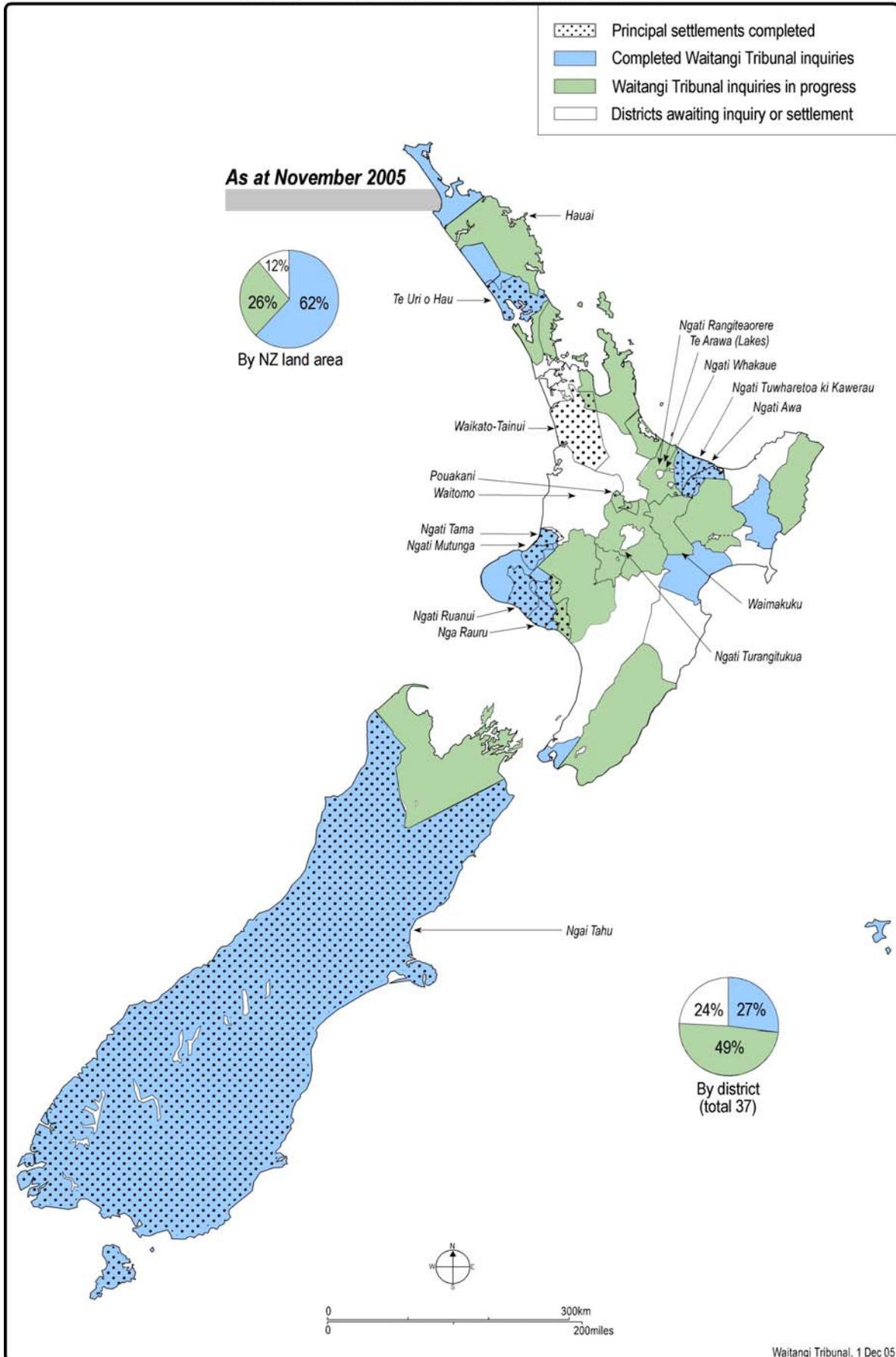
By NZ land area



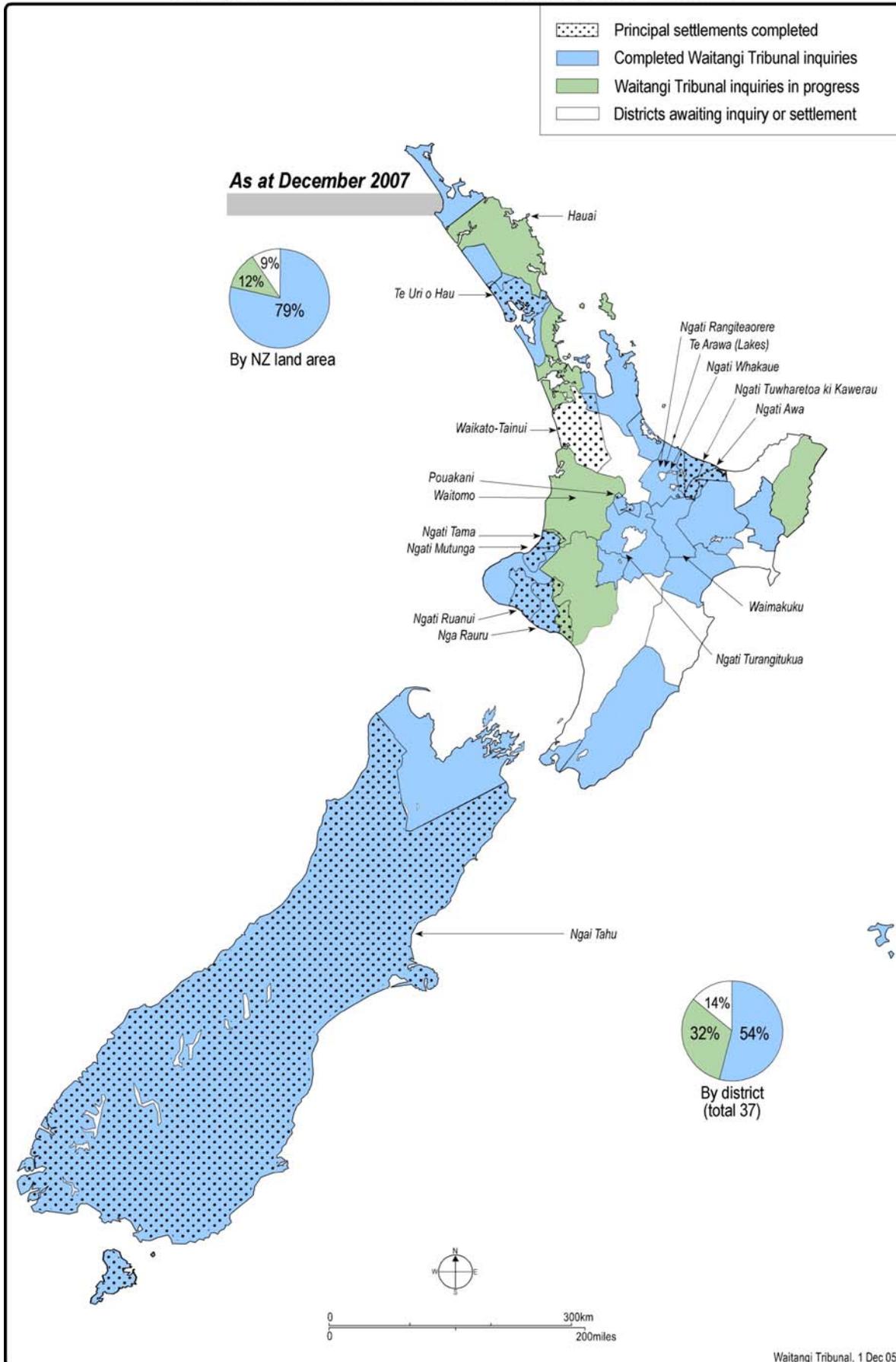
By district (total 37)



Waitangi Tribunal Inquiries in Progress or Completed



Waitangi Tribunal Inquiries Scheduled to be in Progress or Completed



Treaty Settlements Following Waitangi Tribunal Involvement

Treaty Settlements without Waitangi Tribunal Hearings

