

**TE RUNANGA o NGATI WHATUA**

**and**

**THE CROWN**

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**TERMS OF NEGOTIATION**

**BETWEEN TE RUNANGA o NGATI WHATUA AND THE CROWN**

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**14 October 2008**

## **Parties to these Terms of Negotiation**

1. The Parties to this document, known as the Terms of Negotiation, are the Crown, as defined in paragraph 8, and Te Runanga o Ngati Whatua (the Runanga), on behalf of Ngati Whatua, as defined in paragraph 4.

## **Purpose of these Terms of Negotiation**

2. These Terms of Negotiation:
  - 2.1 set out the scope, objectives, and general procedures for the formal discussions the parties will conduct in order to settle the historical claims of Ngati Whatua (as defined in paragraph 7);
  - 2.2 record the intentions of the parties regarding the negotiation process, including the intention to negotiate in good faith, confidentially and without prejudice; and
  - 2.3 are not legally binding and do not create a legal relationship. However, the parties acknowledge that each expects the other to use best endeavours to comply with the terms set out in this document during negotiations.

## **Objectives of the Negotiations**

3. The parties agree that the objectives of the negotiations will be to negotiate in good faith a settlement of all the historical claims of Ngati Whatua (as defined in paragraph 7) that:
  - 3.1 is comprehensive, final, durable and fair in the circumstances;
  - 3.2 will not in any way:
    - 3.2.1 diminish or affect any rights that Ngati Whatua have arising from Te Tiriti o Waitangi/the Treaty of Waitangi and its principles, except to the extent that claims arising from these rights are settled; or
    - 3.2.2 extinguish or limit any aboriginal or customary rights Ngati Whatua may have;
  - 3.3 recognises the nature and extent of the breaches of the Crown's obligations to Ngati Whatua under Te Tiriti o Waitangi/the Treaty of Waitangi and its principles, and where appropriate, acknowledges the effect these breaches have had on the political, economic, social, and cultural well-being of Ngati Whatua;
  - 3.4 provides a platform to assist Ngati Whatua to redevelop their economic base. In addition, the Crown acknowledges that Ngati Whatua view the settlement as a means of enhancing their political, economic, social, and cultural, well-being;
  - 3.5 will enhance the ongoing relationship between the parties (both in terms of Te Tiriti o Waitangi/the Treaty of Waitangi and otherwise);

- 3.6 will restore the faith and trust of Ngati Whatua in the Crown, and restore the honour of the Crown; and
- 3.7 demonstrates and records that both parties have acted honourably and reasonably in negotiating the settlement.

#### **Definition of Claimant Group**

4. Ngati Whatua means:
  - 4.1 those who descend from Haumoewarangi and other recognised tupuna;
  - 4.2 every individual referred to in paragraph 4.1; and
  - 4.3 any whanau, hapu or group of individuals to the extent that the whanau, hapu or group of individuals is composed of individuals referred to in paragraph 4.1.
5. For the purposes of paragraph 4.1, a person is descended from another person if the first person is descended from the other by:
  - 5.1 birth;
  - 5.2 legal adoption; or
  - 5.3 Māori customary adoption in accordance with Ngati Whatua tikanga.
6. The detail of the definition of Ngati Whatua will be developed further over the course of the negotiations for inclusion in any Agreement in Principle and Deed of Settlement that may be agreed between the parties.

#### **Ngati Whatua Historical Claims**

7. Ngati Whatua Historical Claims:
  - 7.1 means all claims made at any time (whether or not the claims have been researched, registered or notified) by any Ngati Whatua claimant or any person or group representing Ngati Whatua that:
    - 7.1.1 are founded on a right arising from Te Tiriti o Waitangi/the Treaty of Waitangi, or its principles, whether based on legislation, common law (including customary law and aboriginal title), fiduciary duty, or otherwise; and
    - 7.1.2 arise from or relate to any acts or omissions before 21 September 1992 by or on behalf of the Crown, or by or under legislation; and
  - 7.2 includes every claim to the Waitangi Tribunal to which paragraph 7.1 applies, including the following claims registered with the Waitangi Tribunal insofar as they relate to Ngati Whatua:
    - 7.2.1 Wai 303;
    - 7.2.2 Wai 121;
    - 7.2.3 Wai 313;
    - 7.2.4 Wai 719;

- 7.2.5 Wai 887;
- 7.2.6 Wai 1045;
- 7.2.7 Wai 1046;
- 7.2.8 Wai 188;
- 7.2.9 Wai 504;
- 7.2.10 Wai 619;
- 7.2.11 Wai 683;
- 7.2.12 Wai 688;
- 7.2.13 Wai 745;
- 7.2.14 Wai 763;
- 7.2.15 Wai 857;
- 7.2.16 Wai 861;
- 7.2.17 Wai 985;
- 7.2.18 Wai 1114;
- 7.2.19 Wai 1343; and
- 7.2.20 such other Wai claims made by Ngati Whatua claimants as identified by the Runanga in the course of negotiations;

7.3 does not include claims by descendants of Haumoewarangi and other recognised tupuna where such claims:

- 7.3.1 have been settled by the Te Uri o Hau Claims Settlement Act 2002;
- 7.3.2 are included as the historical claims to be settled by the Te Roroa, Ngati Whatua o Orakei or Ngati Whatua o Kaipara negotiations; or
- 7.3.3 are included as the historical claims to be settled by Te Kawerau a Maki

#### **Definition of the Crown**

8. The Crown:

8.1 means the Sovereign in right of New Zealand; and

8.2 includes all Ministers of the Crown and all government departments; but

8.3 does not include:

- 8.3.1 an Office of Parliament; or

8.3.2 a Crown entity; or

8.3.3 a State Enterprise named in the First Schedule to the State-Owned Enterprises Act 1986.

### **Mandate to Negotiate**

9. The Crown has approved the mandate strategy of the Runanga attached as **Appendix 1**.
10. The Runanga agrees to complete the mandating process by December 2008.
11. These Terms of Negotiation, and the commencement of negotiations, are conditional on the Minister in Charge of Treaty of Waitangi Negotiations and the Minister of Māori Affairs recognising the Deed of Mandate for the Runanga confirming that it has a mandate from Ngati Whatua to negotiate the settlement of the Historical Claims.

### **Mandate Maintenance**

12. The Runanga agrees to provide the Office of Treaty Settlements with a report on the state of its mandate every three months, and the Crown agrees to provide copies to the Runanga of any correspondence it receives relating to the mandate of the Runanga.
13. On request of the Runanga, the Crown agrees to promptly provide them with any relevant information, reports, or other documents relating to mandate that would be disclosed if the Runanga were to make a request under the Official Information Act 1982.
14. If representation issues arise during negotiations that cannot be resolved by agreement within Ngati Whatua, the Runanga and the Crown will discuss a process to address those issues. The Crown will provide assistance where both parties agree it is appropriate.

### **Subject Matter for Negotiation**

15. The parties will together agree upon subject matters to be negotiated. Any party may raise for discussion subject matters in addition to those agreed upon.
16. The negotiations will include the following categories of redress:
  - 16.1 the Crown's apology and acknowledgements;
  - 16.2 cultural redress; and
  - 16.3 financial and commercial redress.

### **Process of Negotiations**

17. The parties agree that the general process of negotiations will include, but not necessarily be limited to:

- 17.1 **Agreement in Principle:** The signing of an Agreement in Principle which will outline the scope and nature, in principle, of the settlement redress which will be recorded in the Deed of Settlement;
- 17.2 **Initialled Deed of Settlement:** The initialling of a Deed of Settlement by the parties. The Deed will set out the terms and conditions of the settlement of the Ngati Whatua Historical Claims;
- 17.3 **Ratification:** The presentation by the Runanga of the initialled Deed of Settlement to Ngati Whatua for ratification in a manner to be agreed by the parties. A governance entity structure approved by the Crown, will also be presented to Ngati Whatua for ratification before the settlement legislation can be introduced but this need not necessarily occur contemporaneously with ratification of the Deed of Settlement;
- 17.4 **Deed of Settlement signed if ratified:** The signing of the Deed of Settlement by the Runanga on behalf of Ngati Whatua and a Crown representative on behalf of the Crown if the Deed of Settlement is ratified;
- 17.5 **Settlement Legislation:** The required settlement legislation receiving the Royal Assent.

#### **Negotiations Schedule**

18. The Parties agree to work towards the indicative Negotiations Schedule set out below:
- 18.1 commence substantive negotiations as soon as reasonably practicable; and
- 18.2 endeavour to be ready to sign an Agreement in Principle within 12 months of signing Terms of Negotiation; and
- 18.3 endeavour to agree, within twelve months of the signing of the Agreement in Principle, a draft Deed of Settlement between the Crown and Ngati Whatua; and
- 18.4 meet regularly until a settlement is given effect.
19. The Parties acknowledge the process of negotiations is subject to various matters, some of which are outside the Parties' control.

#### **What the Settlement of the Ngati Whatua Historical Claims will enable**

20. The parties agree that the settlement of the Ngati Whatua Historical Claims will enable the:
- 20.1 final settlement of all the Ngati Whatua Historical Claims, and the release and discharge of all of the Crown's obligations and liabilities in respect of those claims;
- 20.2 discontinuance of the Office of Treaty Settlements landbank arrangements for the protection of potential settlement properties for the benefit of Ngati Whatua;
- 20.3 removal of any resumptive memorials from the titles of land subject to the State Owned Enterprises Act 1986; the Railways Corporation Restructuring Act 1990, the Crown Forest Assets Act 1989 and the Education Act 1989, and

for statutory protection relating to Ngati Whatua's historical claims against the Crown for the benefit of Ngati Whatua to be removed;

20.4 removal of the jurisdiction of the courts, the Waitangi Tribunal, and any other judicial body or tribunal in respect of the Ngati Whatua Historical Claims, the Deed of Settlement, the redress provided or settlement legislation; (but not for the removal of such jurisdiction in respect of the implementation or interpretation of terms in any Deed of Settlement or any settlement legislation.) To avoid doubt the settlement legislation will not remove the ability of Te Runanga o Ngati Whatua to respond to proceedings initiated by any third party which involve or affect the Ngati Whatua Historical Claims or the Deed of Settlement, or any settlement legislation; and

20.5 discontinuance of proceedings before any Court or Tribunal in relation to the Ngati Whatua Historical Claims.

### **Communication**

21. The parties will each ensure regular and appropriate internal consultation procedures throughout the negotiations, taking into account the need to keep Ngati Whatua informed, but also the need for confidentiality regarding third parties.
22. The Crown will advise the Runanga of all documentation received by the Crown that affects Ngati Whatua and forward on to them documentation (subject only to the need for confidentiality regarding third parties).
23. The Crown will aim to ensure departments are aware of the nature and subject matter of the negotiations with the objective of advising the Runanga of any issues that arise in the course of negotiations that may cause Ngati Whatua concern. The parties will agree on a process to address such issues if these arise.

### **Overlapping Claims**

24. The parties agree that overlapping claim issues will need to be addressed to the satisfaction of the Crown before a Deed of Settlement can be concluded. The parties also agree that certain items of redress provided to Ngati Whatua as part of the Deed of Settlement may need to reflect the importance of an area or feature to other claimant groups.
25. The parties will at an early stage in the negotiation process discuss the nature and extent of the interests of overlapping claimant groups in Ngati Whatua's area of interest. The parties will then consider what further actions on the part of Ngati Whatua are necessary to address overlapping claim issues.
26. The Crown will carry out its own consultation with overlapping claimant groups, and will keep the Runanga informed of any issues that may arise during that consultation which may affect the Runanga or Ngati Whatua.

### **Overlapping Negotiations**

27. Where the Crown is engaged in Treaty settlement negotiations with another claimant group whose area of interest includes part of Ngati Whatua's area of interest, the Crown will regularly update the Runanga on the progress of those negotiations, subject only to the confidentiality of matters specific to the other negotiations.
28. Where the Crown becomes aware that the mandated representative of another claimant group has expressed an interest in settlement assets, or other settlement

redress, in which the Runanga have also expressed an interest then the Crown, prior to offering the particular redress item or asset for inclusion in a settlement, will:

28.1 notify the Runanga of the shared interest; and

28.2 facilitate a discussion between the relevant mandated representatives in order to resolve, at an early stage, any potential conflicts between the claimant groups regarding the settlement assets and/or settlement redress.

### **Governance Structure for Settlement Assets**

29. The parties agree that before settlement legislation can be introduced, an appropriate legal entity to receive the settlement redress will need to be in place that:

29.1 has been ratified by Ngati Whatua (in a manner to be agreed by both parties);

29.2 is in a form which both parties agree adequately represents Ngati Whatua;

29.3 has transparent decision-making and dispute resolution processes; and

29.4 is accountable to, and acts for the benefit of, Ngati Whatua.

### **Not bound until Deed of Settlement**

30. The parties acknowledge that this document does not bind either party to reach a settlement and that any agreement reached in negotiation discussions is confidential, without prejudice, and will not be binding until given effect in a signed Deed of Settlement and settlement legislation.

### **Claimant Funding**

31. The parties agree that the Crown will make a contribution to the negotiation costs of Ngati Whatua. This contribution will be paid in instalments at specified milestones (to be agreed by the parties) in the negotiation process.

32. The parties agree to work together to ensure fairness and transparency in these funding arrangements, and agree to inform each other of issues that arise, and work together to resolve those issues if possible.

33. The Crown acknowledges that the Crown's contribution to negotiation costs will be fair in relation to funding provided to other claimant groups.

34. The Runanga agrees to adhere to the Office of Treaty Settlements' claimant funding policy guidelines. In particular, before each instalment of claimant funding is approved, the Runanga will provide the Crown with invoices that demonstrate that the previous instalment of claimant funding was applied to negotiation expenses.

35. The Runanga will provide the Crown with an annual report from an independent auditor for the claimant funding that it receives from the Crown, certifying that the funding has been spent on the negotiations.

36. The details of the Crown's contribution to negotiation costs will be specified in a separate funding letter that sets out, amongst other things, the levels of funding, details of milestones, and timing of payments.



## **Waiver of Other Avenues of Redress**

37. The parties agree that during these negotiations, the Runanga will not pursue or initiate, before any court or tribunal, in relation to any of the claims that are within the scope of the negotiations, any proceedings for redress covering all or part of the same subject matter as these negotiations, except as provided in paragraph 38.

## **Participation in Waitangi Tribunal Northland District Inquiry**

38. The Runanga is a party to the Northland District Inquiry. During these negotiations the Runanga will not pursue claims against the Crown in the Northland District inquiry. The Runanga agree to participate in the inquiry only to the extent of:

38.1 Providing research and evidence of mana whenua, ahi kaa roa, customary interests and customary activities within the traditional Ngati Whatua rohe and extends;

38.2 Responding to research prepared by CFRT, the Tribunal and/or any other party or by responding by way of cross-examination and/or submission to evidence and/or arguments advanced by other parties, including the Crown, which may:

38.2.1 adversely affect the Tribunal's consideration of historical events relevant to Ngati Whatua that are a subject of the Northland Inquiry; or

38.2.2 adversely affect the identification, definition, nature, or extent of Ngati Whatua's existing customary rights and interests.

38.3 The parties agree that, before Ngati Whatua take any of the steps in paragraphs 38.1 and 38.2 above, the Runanga and the Crown will use their best endeavours to reach agreement regarding the nature and extent of any proposed steps or participation in the Northland District Inquiry.

39. Notwithstanding paragraphs 37 and 38 above, if the Runanga decide to initiate, pursue or participate in the Northland District Inquiry beyond what is contemplated in paragraph 38, it will provide the Crown with 10 working days notice.

## **Procedural Matters**

40. The parties agree that:

40.1 negotiations will be on a "without prejudice" basis and will be conducted in good faith and in a spirit of co-operation;

40.2 negotiations will be conducted in private and will remain confidential except:

40.2.1 where both parties agree otherwise (such as when consultation with third parties is necessary); or

40.2.2 when the Crown is required to release information under the Official Information Act 1982; or

40.2.3 where a party is required to release information as required in the course of litigation involving other parties (to avoid doubt, the negotiations will remain without prejudice as between the Parties, including for the purpose of any future litigation between the Parties.)


- 40.3 on request of the Runanga, the Crown will provide the Runanga with any correspondence or documentation it receives about the negotiations if that information is of a kind that would be disclosed to the Runanga if it were to make a request for it under the Official Information Act 1982;
- 40.4 both parties reserve the right to withdraw from negotiations if they become untenable;
- 40.5 both parties recognise the value of maintaining consistency in negotiating personnel;
- 40.6 media statements concerning the negotiations will only be made when mutually agreed by both parties;
- 40.7 the parties will endeavour to ensure that the location of meetings will be suitable and convenient to both parties;
- 40.8 in the event that the Crown has conceded breaches of Te Tiriti o Waitangi/the Treaty of Waitangi that relate directly to Ngati Whatua during the course of Waitangi Tribunal hearings, the Crown accepts these concessions as relevant to these negotiations; and
- 40.9 The parties recognise the importance of using Te Reo Maori in the negotiations, where appropriate. The Runanga will provide the Crown with adequate notice when a translator is required in the negotiations.

**Amendments**

41. The parties acknowledge that it may be necessary to amend these Terms of Negotiation from time to time during the negotiations and agree that no amendment is effective until approved by both parties and recorded in writing:


SIGNED THIS 14<sup>th</sup> DAY OF October 2008

For and on behalf of the Crown:



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Hon Dr Michael Cullen  
Minister in Charge of Treaty of Waitangi Negotiations



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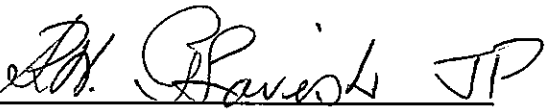
Hon Mita Rinui  
Associate Minister in Charge of Treaty of Waitangi Negotiations



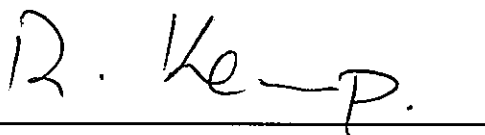
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Hon Parekura Horomia  
Minister of Maori Affairs

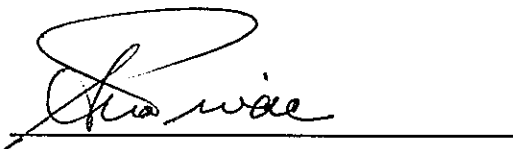
For and on behalf of Te Runanga o Ngati Whatua

Authorised Signatory: 

Printed Name: Rangimarie Naida Glavish J.P.  
Chairperson

Authorised Signatory: 

Printed Name: Russell Rata Kemp  
Trustee

Authorised Signatory: 

Printed Name: Allan Matthew Pivac J.P.  
Secretary

