APPENDIX D

DEPARTMENT OF JUSTICE (TREATY OF WAITANGI POLICY UNIT)
ANALYSIS OF CLAIMS RELATED POLICY ISSUES

1.1 The Treaty of Waitangi Policy Unit is responsible for the provision of policy advice on specific claims related policy issues [CAB M(91) 19/17 refers]. The twelve following issues have been identified as arising from the Te Roroa report.

i. The Remedies Hearing

1.2 The Tribunal made six specific recommendations on this claim. The remaining recommendations are tagged as interim proposals to assist the parties in formulating further submissions on remedies. The Tribunal has proposed that these submissions be heard at a 'remedies hearing' set down for 12 October 1992. On hearing these submissions the Tribunal proposes to make further specific recommendations on the claim.

1.3 The use of a remedies hearing is a departure from previous reports. It is usual for the Crown and claimants to negotiate the settlement of the claim once the report has been released. In the past only one claim has had a reporting back requirement.

1.4 This appears to be an unnecessary step in the negotiations process, when it is more important for the Crown to be negotiating with claimants to resolve this matter. Particularly, when the interim recommendations provide a clear guideline for negotiating the settlement of the claim.

1.5 Officials consider that the Crown should make every effort to ensure that there is no need for the remedies hearing by progressing sufficiently with the negotiations.

1.6 Counsel for the Crown and for the claimants could request a deferral of the hearing by joint memorandum in this case. Claimants and the Crown will retain the right to return to the Tribunal at some future date.

ii. Crown Policy on Reserves

1.7 The Report identifies five areas surveyed out for 'Native Reserves' which were not created. Certain other areas which were reserved were not maintained as reserves. The Tribunal also identifies one area which should

have been retained as tribal estate.

1.8 These areas contain either wahi tapu, traditional food resources, or were required for the general needs of tangata whenua. The Tribunal found that the Crown's failure to create reserves in respect of these areas arose as a result of sharp practices, negligence and oversight.

1.9 The certainty with which these reserves can be identified is an important departure from claims which have previously been heard. Usually a percentage of the overall area purchased by teh Crown was reserved, not specific areas marked on survey plans. This makes settlement of the reserves aspect of the claim a compact option.

iii. Impact of the Report on Crown Land Holdings

1.10 Some of the land affected by the Report is Crown owned. Much falls within the Department of Conservation estate, while a small area may also be held by other Crown agencies.

1.11 Where the land is held by the Department of Conservation the extent to which the Crown may be willing to transfer such assets into private ownership must be considered.

1.12 Precedent does exist. Mount Hikurangi, for example, was returned to Ngati Porou, Taupiri Mountain to Tainui, and Mount Taranaki to the Taranaki tribes (although it was immediately returned to the Crown). It would be very difficult to rationally justify an exception to the precedent in this case, in light of the Tribunal's findings. There is an undeniable obligation on the part of the Crown to consider this course of action, as in most cases the Tribunal found that the land had been obtained by the Crown sharp practices, negligence and oversight.

1.13 It is important to note that following the Hikurangi settlement, the Minister of Conservation (after specific requests from environmental groups) gave an undertaking that a public revocation process of reserve status would precede any change of status of conservation lands. This would allow for submissions and the consideration of public comment. In the case of the negotiations with Ngai Tahu, both the Crown and the claimants are aware of this requirement.

1.14 There are a number of ways in which the impact of returning conservation estate could be minimised to the benefit of both parties. This could include arrangements as to joint management, securing existing public rights of access, applying for reserve status, creating caveats and securing Heritage Protection Orders over land of conservation value.

iv. Impact of the Report on Private Land Holdings

1.15 The public appears to entertain misunderstandings about the Crown's policy on privately owned lands and about the status of Waitangi Tribunal recommendations. This has probably arisen as a result of media reports. Indeed, it seems that some private land owners are concerned that the Crown intends to compulsorily purchase their land to settle this claim.

1.16 However, the Crown's policy on private land holdings is clear. The Minister of Justice and the Prime Minister have both made a series of public statements which reiterate that the Government's policy is that:

> "private land is not used to settle Maori land grievances unless the purchase is negotiated on a willing buyer/willing seller basis".

1.17 In the past the Crown has successfully negotiated the purchase of private land on a willing buyer/willing seller basis to settle claims (see the Manukau claim Wai 8). Officials are aware of a number of land owners affected by the Te Roroa recommendations who do wish to sell either all of their land or the areas which contain wahi tapu. Clearly this is a state of affairs which can operate to the advantage of all parties in the settlement of this claim. Indeed officials consider that in order to settle this claim it may, in some specific instances, be necessary to offer to purchase private land from those who wish to sell. There may be some problems associated with agreeing on price.

v. The Impact of the Report on State Owned Enterprise Land Holdings

1.18 The Waipoua Exotic Forest is administered by Timberlands, a State Owned Enterprise. Following representations from Te Roroa in 1989, the Minister of State Owned Enterprises withdrew the forest from the current asset sale programme. The decision as to be reviewed when the Tribunal issued its report or during 1991, which ever occurred first.

1.19 It appears that the forest has not yet been sold. It is still to be determined whether this asset reverted to Crown ownership or transferred outright to the SOE.

1.20 It is also to be determined whether the Crown Forest Assets Act 1989 impacts on this exotic forest in any way.

vi. Fiscal Implications of the Report

1.21 While Te Roroa is a high profile claim the claim boundary is relatively small. Matters for settlement are readily identifiable and involve the return of specific blocks of land, the return and protection of wahi tapu, and the

provisions of financial assistance for basic public utilities and social services to the area.

1.22 The specific fiscal implications of settling this claim cannot be determined at this stage.

vii. Control and Protection of Wahi Tapu (Sites of special significance to Maori)

1.23 The Report contains recommendations n the control and protection of land based wahi tapu as well as moveable cultural property. The Crown has a general policy on wahi tapu which is consistent with these recommendations. That policy consists of a scheme of legislation and Cabinet directives relating to both types of wahi tapu.

a. Wahi Tapu Located on Land

1.23.1 The Resource Management Act 1991 identifies the protection of wahi tapu as a matter of national importance. It establishes heritage protection orders as a way of achieving protection, and confers responsibilities on regional and territorial authorities to fulfil the Crown's obligations in this regard. A number of Acts confer similar protection including, for example, sections 439 and 439A of the Maori Affairs Act 1953.

1.23.2 In addition, the Crown has a general policy on the protection of wahi tapu sites before the disposal of Crown land. In December 1988 officials were directed to draft a circular to notify all Crown agencies responsible for the management and disposal of Crown lands of the requitement to consult and negotiate with iwi on the protection of known wahi tapu before decisions are taken on the management and disposal of these lands [CM 88/47/27 refers]. A circular was subsequently prepared by it related only to the disposal of property, not to management requirements [CO(89) 13 refers]. There is also a policy of pre-sale identification of wahi tapu sites on State Owned Enterprise land and Crown owned production forests [TOW(90)27 refers]. Both of these directives have particular relevance for this claim.

b. Moveable Cultural Property

1.23.3 The Moveable Cultural Heritage Bill is currently in draft stage. One of the primary concerns of the bill is the protection of moveable cultural property, such a the burial chests referred to in this claim.

1.23.4 Clearly, existing Crown policy is actively committed to the protection of such wahi tapu. The recommendations made by the Tribunal's report are in keeping with this policy.

vii. The Provision of Essential Public Utilities and Social Services

1.24 The Tribunal found that the Crown failed to provide essential public utilities, including legal access to the Waipoua settlement, electricity, telephones, mail services and social services such as schools and health facilities.

1.25 Cost, viability and principle are the primary policy issues raised in this context. The implications of providing such services to remote communities will be reported back in conjunction with officials from responsible departments and the claimants.

1.26 Officials believe this matter has potentially serious precedent effects. In giving effect to the Tribunal's recommendations, these matters should be considered in the context of the wider package of redress negotiated for the whole grievance.

ix. The Rateability of Maori Land

1.27 The Report raises the issue of the rateability of Maori land. Successive Governments have attempted to address this matter, but no clear policy statements have been made. Exemption from rating is now a matter which local authorities are empowered to deal with on an individual basis. The Te Roroa Report presents an opportunity to discuss this issue with the authorities involved.

x. Joint Management of Public Reserves

1.28 The Tribunal also recommends shared management responsibilities in respect of public reserves owned both by the Kaipara and Far North District Councils and by the Department of Conservation.

1.29 Both the Resource Management Act 1991 and the Conservation Act 1986 contain Treaty clauses which require agencies affected by these Acts to ensure that the running of their portfolios is consistent with the principles of the Treaty of Waitangi. Joint management in the operation of such facilities is consistent with those principles.

1.30 The broader policy implications of such recommendations will be reported back in conjunction with officials from responsible departments. Similar issues are being addressed by the Ngai Tahu negotiators.

xi. Resource Management

1.31 The implications of advising all persons with interests in multiply owned Maori lands, of matters which affect their lands may be a difficult task given the state of records which exist. The Tribunal's recommendations

affecting resource management require further consideration.

1.32 As to the referral of the Historic Places Trust Bill to the Tribunal for its consideration as recommended by the Report, the Treaty of Waitangi Act 1975 makes specific provision for the House of Representatives or individual Ministers to refer a Bill to the Tribunal for consideration. The Bill is currently at Select Committee stage.

xii. Precedents which the Settlement of the Claim Could Create

1.33 The settlement of the Te Roroa claim could set precedents for future claims which involve the provision of services to remote communities. However, there is a qualifying factor in this case. The Tribunal found that the Crown owed Te Roroa a duty over and above its Treaty obligations - the duty of being 'a good neighbour'. In addition, Te Roroa provides an ideal 'test case' to canvass options in respect of rectifiable but persisting social problems in a way consistent with government policy. Solutions relating to the provision of some services and public utilities can probably be achieved in the short term.

1.34 The specific recommendations made by the Tribunal in the Report may have some precedent value. However, most claim-specific issues contained in the Report bear little resemblance to those in other claims currently being negotiated. Precedents set by claims such as Ngai Tahu and Tainui will be of limited relevance in settling Te Roroa, except possibly with respect to the joint management of conservation areas with the Crown.