Ka tika ā muri, ka tika ā mua

He Tohutohu Whakamārama i ngā Whakataunga Kerēme e pā ana ki te Tiriti o Waitangi me ngā Whakaritenga ki te Karauna

Healing the past, building a future

A Guide to Treaty of Waitangi Claims and Negotiations with the Crown

Office of Treaty Settlements
Te Tari Whakatau Take e pā ana ki te Tiriti o Waitangi

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- negotiates settlements of historical claims directly with claimant groups, under the guidance and direction of Cabinet
- provides policy advice to the government on generic Treaty settlement issues and on individual claims
- oversees the implementation of settlements, and
- administers the protection mechanism of Crown-owned land for Treaty settlement purposes.

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You can view this booklet and other information about the Office of Treaty Settlements and individual Treaty settlements online at **www.govt.nz**.

We welcome your questions and any feedback.

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He Inoinga

E te Atua Matua, ko koe te kaihanga o te rangi me te whenua, te mātāpuna o te ora, o te tapu. Ko to mātou inoi tēnei kia hōutia tō rongo ki runga i te whenua, ki waenganui i te tangata. Tirohia atawhaitia te kaupapa tātari i ngā take e pā ana ki te Tiriti o Waitangi. Arahina tonutia ngā tikanga kawe i te kaupapa kia puta mārama ai te rangatiratanga o te tangata, o te whenua. Werohia mātou ki te tao o te pono kia tutuki rawatia ēnei take. E te Atua, kia aroha nui nei ki a mātou. Ko koe hoki te timatanga me te whakatutukitanga o ngā mea katoa.

Āmene

O Parent God, you are the creator of the heavens and the earth, and you are the source of life and wholeness. This is our prayer that you cast upon the land, and amongst the people your spirit of reconciliation. Look with loving concern upon the principle of careful consideration for the issues that relate to the Treaty of Waitangi. Constantly guide the processes that carry forward the principle so that there is clear manifestation of the chiefly dignity of people, and of the land. Challenge us with the dart of truth so that the issues may, with integrity, reach fulfilment. Lord, may we have aroha for people and for the land just as you have great aroha for us. For you are the beginning and the fulfilment of all things.

Amen

Karakia by Pā Henare Tate on behalf of
Te Rōpu Māori o te Manatū Ture
(Māori focus group of the Ministry of Justice)

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OTS also wishes to thank those who gave permission to use photographs in this guide, Pā Henare Tate for the opening prayer and Professor Sir Hugh Kawharu for allowing his translation of the Treaty to be reproduced.

Overview of this guide

This edition of *Healing the past, building a future* has been updated for 2018. Changes have been made to reflect the new arrangements for management of the Treaty settlements lanbank, and information on recent settlements has been added to the table on page 20. *Healing the past, building a future* is a practical guide to the negotiation and settlement of historical grievances under the Treaty of Waitangi. It also sets out an overview of the historical background to Treaty grievances and settlements, and explains how settlement policy has developed.

Healing the past, building a future is also available in electronic form online at **www.govt.nz**.

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Text of the Treaty of Waitangi – Te Tiriti o Waitangi

Three versions of the Treaty follow. These are the Māori and English texts recognised in the Treaty of Waitangi Act 1975, followed by Professor Sir Hugh Kawharu's English translation of the Māori text. The principles arising from the Treaty are discussed on pages 15 and 16.

The text in Māori

TE TIRITI O WAITANGI

Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira – hei kai wakarite ki nga Tangata Maori o Nu Tirani – kia wakaaetia e nga Rangatira Maori te Kawanatanga o te Kuini ki nga wahikatoa o te wenua nei me nga motu – na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a, e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona, he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

KO TE TUATAHI

Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ke te Kuini o Ingarani ake tonu atu – te Kawanatanga katoa o o ratou wenua.

KO TE TUARUA

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu — ki nga tangata katoa o Nu Tirani te tino Rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kaihoko e meatia nei e te Kuini hei kai hoko mona.

KO TE TUATORU

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata Maori katoa o Nu Tirani. ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) W. Hobson,
Consul and Lieutenant-Governor.

Na ko matou, ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

The text in English

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands — Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

ARTICLE THE FIRST

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W. HOBSON, Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.
[Here follow signatures, dates, etc.]

English translation of the Māori text by Professor Sir Hugh Kawharu

Victoria, the Queen of England, in her concern to protect the chiefs and subtribes of New Zealand and in her desire to preserve their chieftainship[1] and their lands to them and to maintain peace[2] and good order considers it just to appoint an administrator[3] one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands[4] and also because there are many of her subjects already living on this land and others yet to come.

So the Queen desires to establish a government so that no evil will come to Māori and European living in a state of lawlessness.

So the Queen has appointed me, William Hobson a Captain in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents[5] to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

THE FIRST

The Chiefs of the Confederation and all the chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government[6] over their land.

THE SECOND

The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise[7] of their chieftainship over their lands, villages and all their treasures[8]. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell[9] land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

THE THIRD

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties[10] of citizenship as the people of England[11].

(Signed) W. Hobson
Consul and Lieutenant-Governor

So we, the Chiefs of the Confederation and of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.

Was done at Waitangi on the sixth of February in the year of our Lord 1840.

(Footnotes on next page)

FOOTNOTES

The following footnotes are Professor Sir Hugh Kawharu's comments on his translation reproduced with his permission from *Waitangi: Māori and Pākehā perspectives to the Treaty of Waitangi* (Auckland, Oxford University Press, 1989, pages 319–20).

The views expressed are those of the author and are not necessarily accepted by the Crown in every detail.

1. Chieftainship: this concept has to be understood in the context of Māori social and political organisation as at 1840. The accepted approximation today is 'trusteeship'; see NZMC Kaupapa 1983.
2. Rongo: 'Peace', seemingly a missionary usage (rongo – to hear i.e. hear the 'Word' – the 'message' of peace and goodwill, etc.).
3. Chief: ('Rangatira') here is of course ambiguous. Clearly a European could not be a Māori, but the work could well have implied a trustee-like role rather than that of a mere 'functionary'. Māori speeches at Waitangi in 1840 refer to Hobson being or becoming a 'father' for the Māori people. Certainly this attitude has been held towards the person of the Crown down to the present day – hence the continued expectations and commitments entailed in the Treaty.
4. Islands: ie neighbouring, not of the Pacific.
5. Making: ie 'offering' or 'saying' – but not 'inviting to concur' (c.f. English version).
6. Government: 'Kāwanatanga'. There could be no possibility of the Māori signatories having any understanding of government in the sense of 'sovereignty', i.e. any understanding on the basis of experience or cultural precedent.
7. Unqualified exercise: of the chieftainship – would emphasise to a chief the Queen's intention to give them complete control according to their customs. 'Tino' has the connotation of 'quintessential'.
8. Treasures: 'taonga'. As submissions to the Waitangi Tribunal concerning the Māori language have made clear, 'taonga' refers to all dimensions of a tribal group's estate, material and non-material – heirlooms and wāhi tapu, ancestral lore and whakapapa, etc.
9. Sale and purchase: 'hokonga'. Hoko means to buy or sell.
10. Rights and duties: 'tikanga'. While 'tika' means right, correct, (eg 'e tika hoki' means that is right), 'tikanga' most commonly refers to custom(s), for example of the marae; and custom(s) clearly includes the notion of duty and obligation.
11. There is, however, a more profound problem about 'tikanga'. There is a real sense here of the Queen 'protecting' (i.e. allowing the preservation of) the Māori people's tikanga (i.e. customs) since no Māori could have had any understanding whatever of British tikanga (i.e. rights and duties of British subjects). This, then, reinforces the guarantees in Article Two.

Settlement framework

In this part we look at:

- the status of the Treaty of Waitangi today
- the background to the Crown's Treaty settlement policy – what historical claims are about and progress in reaching settlements to date
- Settlement policy and the framework for negotiations

The status of the Treaty of Waitangi today

The Treaty of Waitangi, signed in 1840, is an agreement between the British Crown and Māori. It has always retained its importance as a founding document of New Zealand. Although the Treaty is not directly enforceable in New Zealand courts, specific legislation does provide for the principles of the Treaty to be given some effect (for example, the State-Owned Enterprises Act 1986). In other cases, legislative provisions might persuade the court that they should be interpreted in accordance with the principles of the Treaty. The Treaty is therefore very significant in New Zealand's legal framework.

In summary, today there are three main ways in which the principles of the Treaty, rather than the words of the Treaty itself, are given effect:

- The Waitangi Tribunal can inquire into claims by any Māori that the Crown has acted in breach of Treaty principles, and make recommendations on redress. In limited circumstances some of these recommendations can become binding.
- The courts can apply Treaty principles when legislation allows them to do so, and many agencies and departments are required by legislation to consider Treaty principles when carrying out their functions.
- The Crown has accepted a moral obligation to resolve historical grievances in accordance with the principles of the Treaty of Waitangi.

These developments and the principles of the Treaty as developed by the Waitangi Tribunal and the Courts are discussed later in this section. But first the historical background to Treaty claims is discussed.

Historical background to Māori claims against the Crown – what are Treaty claims all about?

Introduction

This guide presents only a very brief summary of the history behind the main types of Māori grievances under the Treaty. For those wishing to explore the subject further, there are many books and reports available on the events outlined below. The following information and comments are of a general nature, and are not intended to pre-judge the outcome of current and future Waitangi Tribunal hearings or negotiations. Both hearings and negotiations on individual claims provide an opportunity to consider in more detail the historical dealings between a claimant group and the Crown.

The signing of the Treaty of Waitangi

The Treaty of Waitangi was signed in good faith by representatives of the British Crown and by Māori rangatira on behalf of their people, between February and September 1840. The Treaty was drawn up in an attempt to protect the interests of the British and Māori at a time of increasing land speculation and uncontrolled settlement by British subjects. It was a forward-looking agreement that sought to establish a peaceful and mutually beneficial relationship between the tangata whenua and British settlers under the protection of the British Crown.

Illustration: signing of the Treaty of Waitangi (Alexander Turnbull Library)

The key features of the Treaty are as follows:

- Article One: sovereignty (English text) or kāwanatanga (Māori text) was conveyed to the Crown.
- Article Two: Māori retained rangatiratanga or 'chieftainship' over their resources and taonga for as long as they desired, but yielded to the Crown the right of pre-emption, which gave the Crown the sole right to purchase land from Māori.
- Article Three: Māori were guaranteed all the rights and privileges of British citizens.

The Crown intended Māori to be treated fairly and honourably, particularly in the course of land transactions. It envisaged that land would be acquired in situations where Māori were willing sellers and where the loss of a particular area would not harm the relevant iwi or hapū. These good intentions suffered under the practical difficulties of administering a new colony and building a nation. For instance, the colonial administration was financially under-resourced, suffered from a lack of experienced officials, and was under pressure from settler groups.

Investigations over the last century have revealed that in many instances the Crown's actions in purchasing Māori land were flawed to a greater or lesser degree. Since 1985, the Waitangi Tribunal has conducted hearings into many matters relating to Māori land and the economic and social impacts of land dealings from 1840 onwards. The Tribunal has also heard Māori claims on other issues that had not been previously investigated.

The relationship and transactions between Māori and the Crown occurred in the context of a complex interaction of two cultures. There is no single or simple explanation for events following the signing of the Treaty, given the rapidly changing economic and social environment and the variety of motivations among Māori, the Crown, and settlers. However, the statistics of the decline in Māori land-holdings are striking, as the maps on page 11 & 12 show. The following summary is based on Tribunal and other investigations which enable preliminary conclusions to be drawn on broad issues relating to the history of Māori lands. While these relate primarily to significant land losses, their importance is not simply economic, but also concerns wider effects on Māori society and culture.

Pre-1840 land purchases: 'old land claims' and 'surplus lands'

Before the Treaty, there had been an extensive trade in land. Various Europeans claimed to have bought large parts of the country. Following the signing of the Treaty of Waitangi in 1840, the Crown announced that it would examine all such transactions in order to find out whether the land had been fairly acquired from the proper Māori owners. The aims of this policy were to guard against European purchasers accumulating too much land and to facilitate control over the colonisation of the country, as the preamble of the Treaty envisaged. As a result of investigations by specially appointed commissioners, many of these alleged purchases were held to be invalid, and the land remained with its Māori owners. In cases where the commissioners concluded that a valid sale had taken place, the Crown awarded land to the purchaser. The Crown's policy was that no claimant (that is, settler purchaser) could be awarded more than 2,560 acres, and the Crown retained any surplus land. The Crown believed that, because Māori had agreed to sell the land, their claims to it were extinguished and the Crown's retention of the surplus was a matter between itself and the European purchaser.

Some hapū and iwi have questioned the validity of the Land Claims Commissioners' findings on the grounds that the Māori involved had no concept of permanent alienation, and that the transactions were merely conditional arrangements involving no transfer of ownership. Under some present day claims the findings of the commissioners on individual claims are challenged, as is the Crown's approach to disposing of the 'surplus' lands.

The New Zealand Company purchases

The New Zealand Company claimed to have purchased very large areas of land in central New Zealand before the signing of the Treaty. As a result of an agreement with the Crown, however, the Company restricted its claims to specific blocks of land at New Plymouth, Wanganui, Wellington, Manawatu, Porirua and Nelson. These transactions were investigated by Commissioner William Spain in the early 1840s. Meanwhile, the New Zealand Company established several settlements and introduced settlers.

Māori at that time disputed many of the Company's claims. It is likely that they had not intended to give up their pā, wāhi tapu and cultivations and that there was a lack of mutual understanding of the Company's reserves policy (generally known as the 'Tenths' policy because it provided for one tenth of the land sold to be set aside as reserves for the Māori concerned). Spain found that, with the exception of Porirua, the Company had generally made legitimate purchases of at least some of the areas they claimed. In some cases he recommended that further payment should be made to the Māori vendors. In the case of New Plymouth, Governor Fitzroy rejected the recommendation and the Crown re-negotiated part of the original purchase. Agreements were later reached with Māori at Wellington, Nelson and Wanganui, and Crown titles were issued to the Company and its settlers.

Significant aspects of these arrangements have since been challenged. There are questions about the negotiation of the new terms, and the management of the several categories of reserves.

Pre-emption waiver purchases, and 'surplus lands'

Article Two of the Treaty reserved to the Crown the sole right to buy Māori land. Known as Crown pre-emption, this policy was applied for most of the period from 1840 to 1865. This policy had three key objectives: to control and regulate European settlement, to avoid confrontation between Māori and settlers, and to provide the Crown with income from the resale of land to pay for the costs of government, national development, and social services. It is clear that many Māori and settlers, particularly around Auckland, objected to Crown pre-emption. Governor Fitzroy reported in 1844 that the government's authority would be challenged if it did not abandon pre-emption. The Governor then waived the Crown's right of pre-emption to allow Europeans to make direct purchases of Māori land under certain terms and conditions. The waiver operated for a year, during which time settlers acquired large areas of land in and around Auckland.

Purchases under the waiver are likely to involve a number of issues, including whether Māori interests were adequately protected and the owners correctly identified. As with 'old land claims', restrictions were placed on the amounts of land that could be awarded to purchasers. Governor Grey later approved limited awards to purchasers, with the Crown retaining the surplus for general European settlement purposes. It is not clear even today how much of this surplus land the Crown retained, but estimates vary from 16,427 acres to 72,127 acres.

Pre-1865 Crown purchases

During the quarter-century following the signing of the Treaty, the Crown purchased large areas of land from Māori in many parts of the country, including almost the whole of the South Island. As noted earlier, throughout most of this period the Crown had a monopoly on purchasing Māori land. It is difficult to make generalisations about these purchases. Each reflects the particular circumstances of specific iwi and hapū, the geographical location and features of specific blocks of land, and the value they were considered to have for European settlement at the time. One example of inappropriate Crown action is the failure to ensure that approval for the sales was properly obtained. The fairness of the terms, the adequacy and protection of reserves for Māori, and inaccurate surveys have also been identified as problems with particular purchases.

Aggressive Crown purchase activity in Taranaki has been linked to armed conflict between competing Māori groups.

Recent research has thrown much new light upon these purchases and the circumstances that lay behind them. The Waitangi Tribunal has identified various breaches of the Treaty of Waitangi and its principles during its inquiries into pre-1865 purchases, as in the case of the Ngāi Tahu claims, and more may be identified during further Tribunal inquiries or in negotiations.

War and land confiscation (raupatu)

During the 1850s, Māori in some parts of the North Island became concerned about the consequences of sales and settlement. This led to inter-tribal agreements to oppose the sale of further land to the Crown. Although Māori views differed, there was significant support for the political objectives that found expression in the establishment of the King Movement (the 'Kīngitanga'), centred on the Waikato. The development of these policies frustrated settlers, and the Crown interpreted the King Movement as a general challenge to its authority.

The flashpoint of war was the Crown's improper attempts to buy land offered for sale at Waitara in Taranaki. The local issue was that the Crown had failed to get general agreement with the rangatira and hapū claiming rights over Waitara before it concluded detailed negotiations. The Crown continued to pursue its own purchase policy rather than addressing the basis of Māori concerns about such purchase practices and, in doing so, started the land dispute which consequently sparked off a war in Taranaki in 1860. The Waitara purchase created grave suspicion among Māori generally about the Crown's true intentions towards their lands. This remained when the Taranaki war drew to a close in 1861. Fighting broke out again in Taranaki in 1863, followed by the Crown's invasion of the Waikato a few months later. There were other armed conflicts in different parts of the central North Island until 1869.

The Crown considered its Māori opponents in these conflicts to be rebelling against the Queen's authority, and decided to confiscate land to punish 'rebels' and to provide land for European occupation. The Crown accepts that confiscating Māori land after the warfare of the 1860s in Waikato, Taranaki, and the Bay of Plenty was an injustice, and was in breach of the Treaty of Waitangi and its principles. Similar acknowledgements are likely to be appropriate in other districts where there have been confiscations (raupatu). In considering acknowledgements regarding confiscations, the seriousness of any Crown breaches of the Treaty and its principles will also depend on the nature of its accompanying actions. Matters such as the use of excessive force by the Crown and the loss of life clearly need to be taken into account.

The introduction and operation of the Native Land Court

The Native Land Court was established under Acts of Parliament in 1862 and 1865 to bring land held under customary title under a statutory system of individual title. This involved investigating claims to customary ownership of Māori land.

There have been many criticisms of the effects of the Native land laws. These include: the interpretation of customary rights to land, the early limitation of the number of owners who could appear on a title (together with their ability to act as absolute owners rather than trustees for tribal land), the costs of the process, and its tendency to promote excessive sales and the fragmentation of remaining Māori holdings. The court system has been criticised by claimants and some historians for undermining the social structure of Māori society.

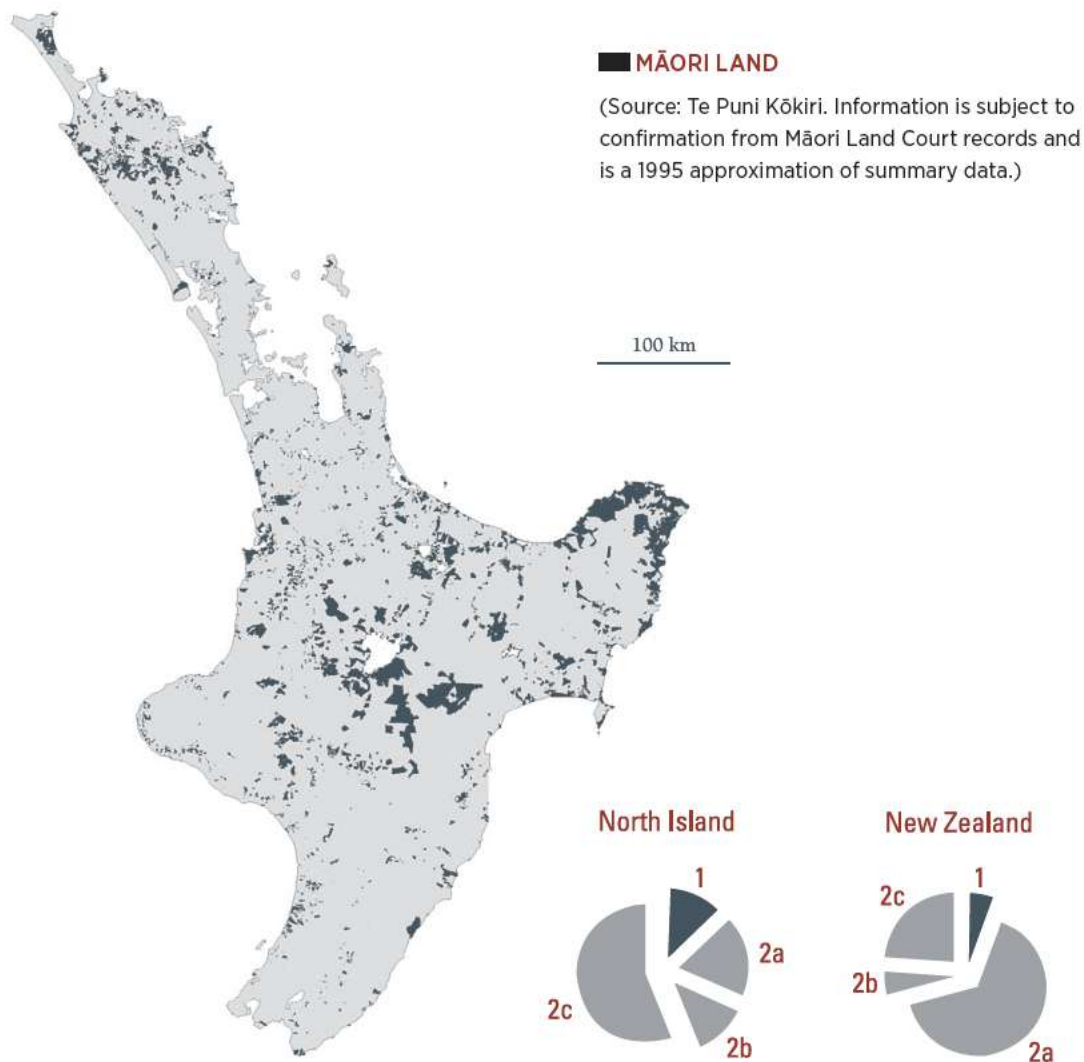
These and other criticisms may prove valid when considering the operations of the Native Land Court system in particular districts. The long-term results of the system are clear. By the end of the 19th century, many hapū were left with insufficient lands for their subsistence and future development.

Between 1865 and 1899, 11 million acres of Māori land in the North Island had been purchased by the Crown and European settlers (see the maps on pages 11 & 12).

The Crown acknowledges that the operation and impact of the Native land laws had a widespread and enduring impact upon Māori society. In cases where claimants can demonstrate a prejudicial impact in their rohe, the Crown will acknowledge, in the context of an agreed settlement, that it breached its responsibilities under the Treaty of Waitangi.

20th century

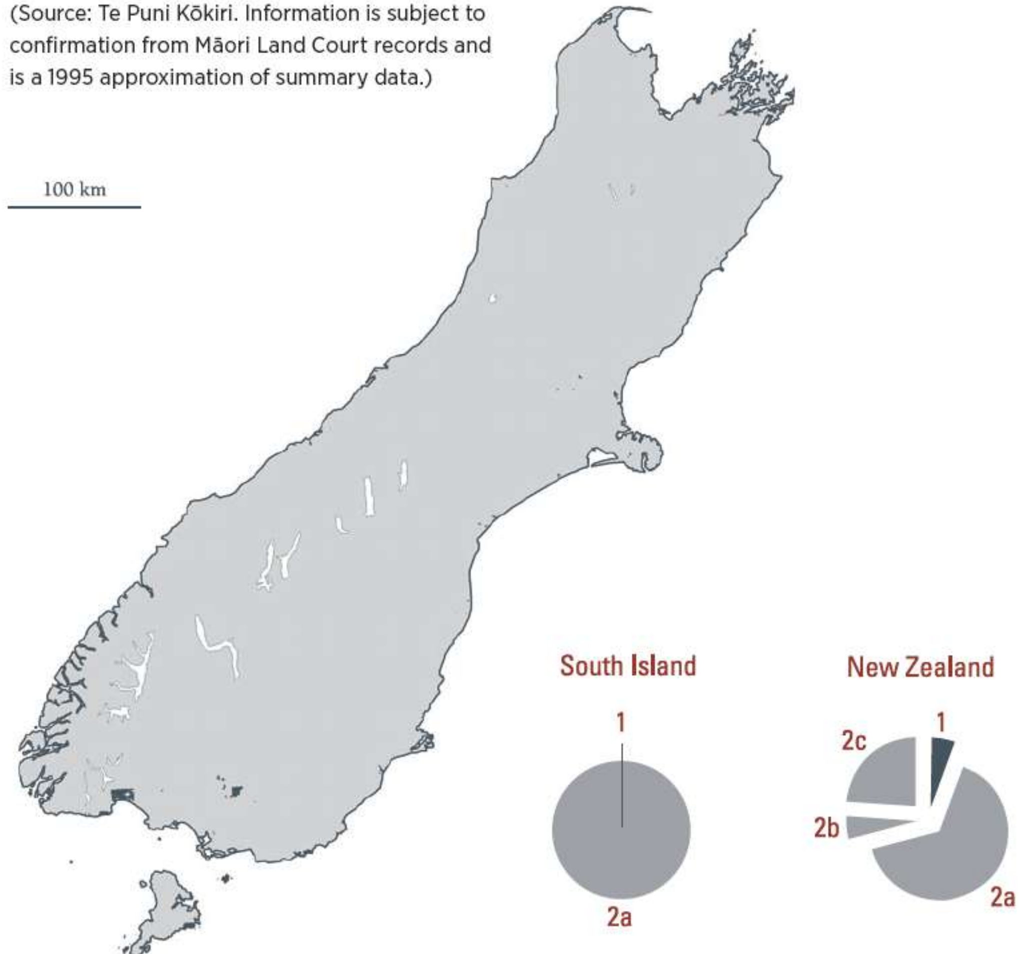
Large scale alienations of Māori land continued well into the 20th century by such means as the new Māori Land Boards, the Board of Māori Development and other government agencies, as well as through the Native/Māori Land Court. These alienations included approximately 3.5 million acres sold between 1910 and 1930. A great deal more was leased during the same period. By 1930, Māori retained only 6% of the land in New Zealand. Many grievances relate to these alienations, and also to Crown actions concerning Māori land development schemes and consolidation schemes. Grievances have also arisen in connection with the gifting of land by Māori to the Crown for specific purposes, such as schools. Often the Crown has not returned such gifted land to the rightful owners once the purpose has been fulfilled, but used it for other purposes or disposed of it. The Crown also accepts that the application of the Public Works Acts, particularly in the 20th century, sometimes disadvantaged Māori interests. For instance, there may have been inadequate consultation or compensation, or a wāhi tapu or site of cultural significance may have been lost.



	North Island Sq Km	North Island %	New Zealand Sq Km	New Zealand %
1. Māori Land	14,500	12.5	15,000	6
2. Alienated Land				
2a. Crown Purchases to 1860	21,500	19	174,000	65
2b. Raupatu (Confiscations)	14,000	12.5	14,000	5
2c. Post-1865 Purchases/Alienations	64,000	56	64,000	24
Total Land	114,000	100	267,000	100

(Source: Te Puni Kōkiri, Land Information NZ and NZ Historical Atlas – plates 39 and 41. Approximation of summary data only).

Figure 1.1: Māori land today and types of Māori land alienation 1840–1995, North Island



	South Island		New Zealand	
	Sq Km	%	Sq Km	%
1. Māori Land	500	0.5	15,000	6
2. Alienated Land				
2a. Crown Purchases to 1860	152,600	99.5	174,000	65
2b. Raupatu (Confiscations)			14,000	5
2c. Post-1865 Purchases/Alienations			64,000	24
Total Land	153,000	100	267,000	100

(Source: Te Puni Kōkiri, Land Information NZ and NZ Historical Atlas – plates 39 and 41. Approximation of summary data only).

Figure 1.2: Māori land today and types of Māori land alienation 1840–1995, South Island

Other dimensions of Māori claims – wāhi tapu and taonga, language, flora and fauna

The Māori concept of tūrangawaewae, 'a place to stand', indicates the close connections between land, tribal and personal identity and mana. Widespread loss and alienation of land undermined these connections. In the longer term, the loss and alienation of tribal lands contributed to the breakdown and dispersal of traditional communities, and the loss of Māori language and traditional knowledge.

Customary sources of food and other resources were also reduced, not only because Māori had less land, but because general changes in land use also had a harmful effect on many species and resources. For instance, the draining of wetlands and lagoons affects complex ecosystems of plants, birds and fish. Where such broader effects of land loss and alienation, combined with the general effects of European settlement, arise in hearings or negotiations, it is difficult to separate the results of any Crown actions or omissions from other factors at work.

Claims involving land loss and alienation have many consequences beyond loss of income and a resource base for future development. Wāhi tapu (sacred places) including urupā (burial grounds) were often destroyed, or access to them lost. Sometimes taonga, such as carvings, burial chests and buildings, have been destroyed or acquired from Māori in dubious circumstances.

Māori have also brought claims to the Tribunal relating to more general cultural concerns. These include claims that the Crown has breached its obligations to protect the Māori language as a taonga covered by Article Two of the Treaty. As with the loss of land, these cultural and spiritual concerns go beyond economic issues to questions of identity and self-determination.

Conclusion

As a result of these and other types of permanent alienation, Māori today possess only a small portion of the land that they held in 1840. The Crown accepts that excessive land loss has had a harmful effect on Māori social and economic development in general. This loss of land has been accompanied by the loss of access to forests, waterways, food resources, wāhi tapu and other taonga. In addition, the Crown has not always recognised Māori interests or customary values in relation to natural resources, nor has it protected these in laws and policies. As a result, Māori have lost most of their land as an economic resource and tūrangawaewae, and have also been deprived of traditionally used natural resources and places of spiritual and cultural value.

These historical events form the basis of the grievances of Māori that are being heard and addressed today through the Waitangi Tribunal and negotiations processes.

Milestones in the development of Treaty settlements policy

Māori have sought resolution of their grievances about Crown actions for over 150 years. Before the establishment of the Waitangi Tribunal, Māori communities and leaders brought many petitions to the Crown asking for recognition of their Treaty rights or for particular injustices to be put right. Sometimes the Crown responded with special commissions of inquiry (such as the Sim Commission during the 1920s on confiscations) and provided some redress. But the terms of reference for such inquiries were often very limited and there was no consistent policy underlying any resulting 'settlements', which were often neither negotiated nor ratified by the claimant groups. As a result, those settlements often failed to resolve the grievance and in many cases are now seen to be unfair.

Establishment of the Waitangi Tribunal

Dissatisfaction with such previous settlements and lack of action by the Crown on outstanding grievances led to increasing calls during the 1960s and early 1970s for a forum where Māori claims against the Crown could be heard. Action in the ordinary courts was not possible in most cases. A treaty such as the Treaty of Waitangi can only be enforced through the courts if it has been made part of New Zealand law through an Act of Parliament. This did not happen. However, as noted earlier, today some statutes do incorporate references to Treaty principles.

In 1975 the government of the day established the Waitangi Tribunal under the Treaty of Waitangi Act 1975. The main functions of the Tribunal at that time were to:

- hear claims by Māori against the Crown concerning breaches of the Treaty of Waitangi and its principles
- determine the validity of such claims, and
- make non-binding recommendations to the Crown on redress for valid claims.

In exercising these functions the Tribunal was given exclusive authority to determine the meaning and effect of the Treaty as embodied in the Māori and English texts, and to decide issues raised by the differences between them.

At that stage the Tribunal could only hear claims about grievances arising from Crown actions or omissions from 1975 onwards. Even so, establishing the Tribunal was an important step in recognising the importance of the Treaty and its principles.

During the 1980s, political and social interest in the Treaty and related issues continued to grow. This had an effect both on the law, as the courts interpreted it, and on the actions of the government.

Waitangi Tribunal in hearing

In 1985 the law was changed to allow the Waitangi Tribunal to hear claims going back to 6 February 1840. This paved the way for the Tribunal to be given additional functions and powers in the next few years in relation to State-Owned Enterprise land and licensed Crown forest land (see pages 15–16). The Tribunal's membership was also increased to enable it to progress more claims at a time.

1986 – Cabinet requirement to consult Māori

In 1986 Cabinet agreed that, in the area of policy development and legislation, appropriate Māori groups should be consulted on all significant matters affecting how the Treaty is applied. This reflected a major change in the broader public and political view of the Treaty and of Māori interests.

Treaty principles in the courts and legislation

THE 'LANDS' CASE (1987)

During the 1980s, in response to references to Treaty principles in legislation, judges increasingly showed that they would apply the 'principles' in a way that broadly protected Māori interests. The 1987 'Lands' case, New Zealand Māori Council v. Attorney-General [1987] NZLR 641, may be described as the fundamental recent case on the Treaty. This case involved Māori concerns about the proposed transfer of Crown land to the new State-Owned Enterprises. Section 9 of the State-Owned Enterprises Act 1986 stated: 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi', enabling the courts to define and apply Treaty principles to the Crown's actions under this specific legislation. When the 'Lands' case went to the Court of Appeal, the Court characterised the Treaty relationship as a special relationship 'akin to a partnership'. The nature of the relationship is reflected in the following four principles.

- Fiduciary duty: the relationship between the Treaty partners creates responsibilities similar to those of a trustee. The Crown has a duty to actively protect Māori interests.
- Full spirit of co-operation: the Treaty requires that each party act reasonably and in good faith towards the other. This would require the Crown to make informed decisions about matters of significance to Māori. In many cases where there are Treaty implications the responsibility to make informed decisions will require consultation.
- The honour of the Crown: the Treaty is a positive force in the life of the nation, and thus in the government of the country.
- Fair and reasonable redress: the Crown should not impede its capacity to give fair and reasonable redress.

As a result of the 'Lands' case, Parliament looked to improve statutory protection of Māori interests. For example, the State-Owned Enterprises Act 1986 was amended by the Treaty of Waitangi (State Enterprises) Act 1988. This amendment ensured that land transferred from the Crown to the new State-Owned Enterprises would still be available for settling Māori claims, through a process known as 'resumption'.

THE CROWN FOREST ASSETS ACT 1989 AND THE CROWN FORESTRY RENTAL TRUST

In 1989, the Court of Appeal twice confirmed its approach in the 'Lands' case in cases about Crown forest assets and coal assets. Further legislation followed in the Crown Forest Assets Act 1989. This protected Māori interests in former State forest land – land under mainly exotic forests (forests planted with non-native trees) – that the Crown had developed. The purpose of this legislation, apart from regulating the management of Crown forest assets, is:

- to permit the transfer of assets (cutting rights in the specified forests) to other parties – and to grant a Crown forestry licence that provides access to the land – while at the same time protecting the claims of Māori to the land, and
- in cases where claims by Māori under the Treaty of Waitangi Act are successful, to enable the Waitangi Tribunal to make binding orders to transfer licensed Crown forest land under the trees to Māori ownership, and for the Crown to pay Māori compensation for the fact that such land is being returned subject to the encumbrance of a Crown forestry licence (that another party retains the cutting rights).

Also, as part of the response to the Court of Appeal's decision on licensed Crown forest land, the Crown, the New Zealand Māori Council and the Federation of Māori Authorities agreed to establish the Crown Forestry Rental Trust (CFRT). The functions of CFRT are:

- to receive rentals from licensed Crown forest land and hold them in trust until Treaty claims relating to the lands concerned are resolved to use the interest from the accumulated rentals to fund research into Māori claims relating to Crown forest land, and to help claimants prepare for negotiations with the Crown
- when the resolution of a Treaty claim relating to licensed Crown forest land results in land being transferred to a claimant group, to transfer the accumulated rentals for that land to the claimant group, and
- when a Treaty claim relating to licensed Crown forest land is resolved without requiring the return of land to the claimant group, to transfer the accumulated rentals to the Crown.

More detail on the protection and possible resumption of licensed Crown forest land is provided on pages 140–141. More detail on claimant funding for negotiations is on pages 49-51.

Development of settlement policy and structures

The developments noted above meant that the government needed to co-ordinate its response to Māori claims under the Treaty and to develop clear and consistent policies for settlements. In 1989 the Treaty of Waitangi Policy Unit (TOWPU) was established in the Department of Justice to deal with these issues.

In 1993 Cabinet created the portfolio of Minister in Charge of Treaty of Waitangi Negotiations to give clear leadership to the negotiations process.

The government developed a set of policy proposals for settling claims, which were approved by Cabinet in late 1994 and published as the *Crown Proposals for the Settlement of Treaty of Waitangi Claims*. The Crown proposals were modified following submissions from Māori and others and, subsequently, provided the framework for later settlement negotiations and redress packages. Following a review of the settlement process and policy in 2000, six key principles were established to guide the Crown in future settlements of historical claims under the Treaty of Waitangi.

The principles are intended to ensure settlements are fair, durable, final and occur in a timely manner (see pages 25–26 for a full outline of the principles).

Figure 1.3: development of Treaty settlement policy

Development of Treaty settlement policy (1985 to present)	
1985	• Waitangi Tribunal jurisdiction extended to 6 February 1840
1989	• Establishment of the Treaty of Waitangi Policy Unit (TOWPU) within the Department of Justice
1992	• Cabinet approves Crown principles for settlement of historical claims
1994	• Based on experience in early claims and consultation, the 'Crown Proposals' for the settlement of historical claims, including the fiscal envelope, are developed and released
1995	• Public/iwi consultation on Crown Proposals • Report on submissions to Crown Proposals • OTS established
1996	• Cabinet review of policies in Crown Proposals, some changes made Coalition government ends the 'fiscal envelope' but existing settlements are benchmarks for future settlements
1997	• Additional non-commercial redress options are developed for natural resources
2000	• Review of policy and establishment of new principles
Present	• Ongoing and future negotiations may raise new issues for Crown and claimants to work through, possibly resulting in new applications of redress options

Who or what is the Crown?

The expression 'the Crown' is used a lot in this guide. It refers to the executive branch of government (which is the branch that carries out the administration of government) and stands for the historical authority of the sovereign (the Queen or King) as head of state. Today the executive government is made up of the Governor-General (the Queen's representative), Ministers who are Members of Parliament (the legislative or law-making arm of government), and their departments. The Queen herself has no real or personal authority.

While 'the Crown' is a convenient way of referring to one party involved in settlement negotiations, it can seem to be something rather abstract or impersonal. Because of our democratic system it can also be said that ultimate authority or sovereignty in fact rests with voters. In this sense the Crown also symbolises the people of New Zealand.

The diagram below shows the components of the Crown or Executive and some of the ministerial positions relevant to the negotiation of historical Treaty settlements.

How the Crown operates in negotiations

All major decisions in the negotiations process are made by Cabinet or by relevant Ministers acting under authority delegated by Cabinet. For instance:

- Cabinet approves Deeds of Settlement before they are signed on behalf of the Crown, and
- the Minister for Treaty of Waitangi Negotiations and the Minister of Māori Development jointly decide whether the Crown should recognise a Deed of Mandate from a claimant group.

The main government agency providing advice and assistance to Ministers and the Cabinet during the negotiations process is the Office of Treaty Settlements (OTS). OTS is also the main point of contact between the Crown and claimant groups.

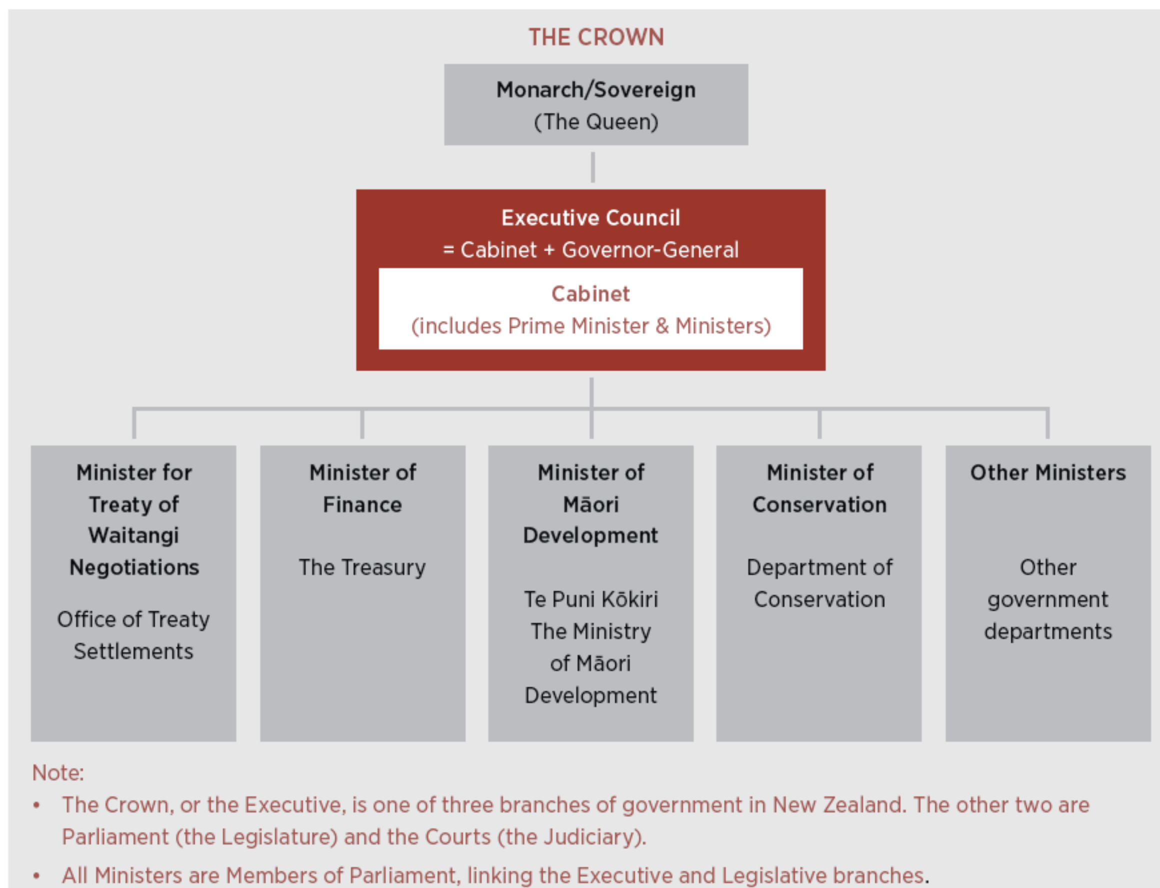


Figure 1.4: the Crown

About the Office of Treaty Settlements

The Office of Treaty Settlements (OTS) was created in January 1995. It is a separate unit within the Ministry of Justice and reports directly to the Minister for Treaty of Waitangi Negotiations on historical Treaty settlement issues.

What does OTS do?

The main jobs of OTS are to:

- negotiate settlements of historical claims directly with claimant groups, under the guidance and direction of Cabinet
- provide policy advice to the Minister for Treaty of Waitangi Negotiations and Cabinet on generic Treaty settlements issues and on individual claims
- co-ordinate the government departments that are involved in the negotiation and settlement process
- review and provide advice to the Minister for Treaty of Waitangi Negotiations about the mandates of claimant groups and their proposed post-settlement governance entities
- oversee the implementation of settlements, and
- administers the protection mechanism of Crown-owned land for Treaty settlement purposes.

This means that OTS is the main point of contact for claimant groups seeking resolution of their historical grievances through negotiations with the Crown. OTS works closely with claimant groups through all stages of the negotiations process to make sure that:

- claimant groups are fully informed about the negotiations process
- all agreed milestones along the route to a negotiated settlement are met, within agreed time limits
- the Crown understands the claimant group's grievances and what they want to achieve through settlement
- there is co-ordinated advice and information from all government departments involved in the negotiations
- the Crown and the claimant group work together, as far as possible, to achieve a negotiated settlement, and
- obligations in Deeds of Settlement, once signed, are carried out as intended and within the agreed time limits.

Structure and people

OTS is led by a Director who has overall responsibility for OTS and leads the policy and negotiations work. Below the Director are Deputy Directors and Negotiation and Settlement Managers.

Negotiation and Settlement Managers are each responsible for a set of specific claims within a region. Each team usually contains several policy analysts from OTS, an OTS historian and representatives from key government departments such as the Department of Conservation and the Treasury. For many claims, a specially appointed Chief Crown Negotiator may lead negotiations.

Teams each have responsibility for a number of claims and conduct active negotiations with claimant groups according to a work programme. This ensures that OTS's resources are used as effectively as possible and that proper care and attention is devoted to each claim.

Although OTS takes the lead role in negotiations, other departments are involved as follows:

- *Treasury* – advice on overall fiscal management of settlement process, and assessment of fiscal risks to the Crown for settlement redress options.
- *Te Puni Kōkiri* – advice on mandating and governance issues, and also monitors Crown action in response to Waitangi Tribunal recommendations.
- *Department of Conservation* – advice on issues affecting conservation land, plant, animal and freshwater fish species.
- *Crown Law Office* – advice to OTS on legal issues and the drafting of Deeds of Settlement and settlement legislation.
- *Ministry for Primary Industries* – advice on non-commercial sea fisheries issues.
- *Ministry for the Environment* – advice on resource management issues.
- *Land Information New Zealand* – advice on Crown landholding issues, including Public Works Act 1981 issues.
- *Parliamentary Counsel Office* – drafting of settlement legislation.

It should be noted at this point that the resources available to the Crown for the negotiation of settlements are, like those of all other Crown agencies, limited. This means that from time to time the Crown must work out which areas of its existing and potential workload have the highest priority. This may mean, for example, that claimant groups that have completed all the necessary research, and resolved all overlapping claims and mandate issues, are given a higher priority in the negotiations process by OTS.

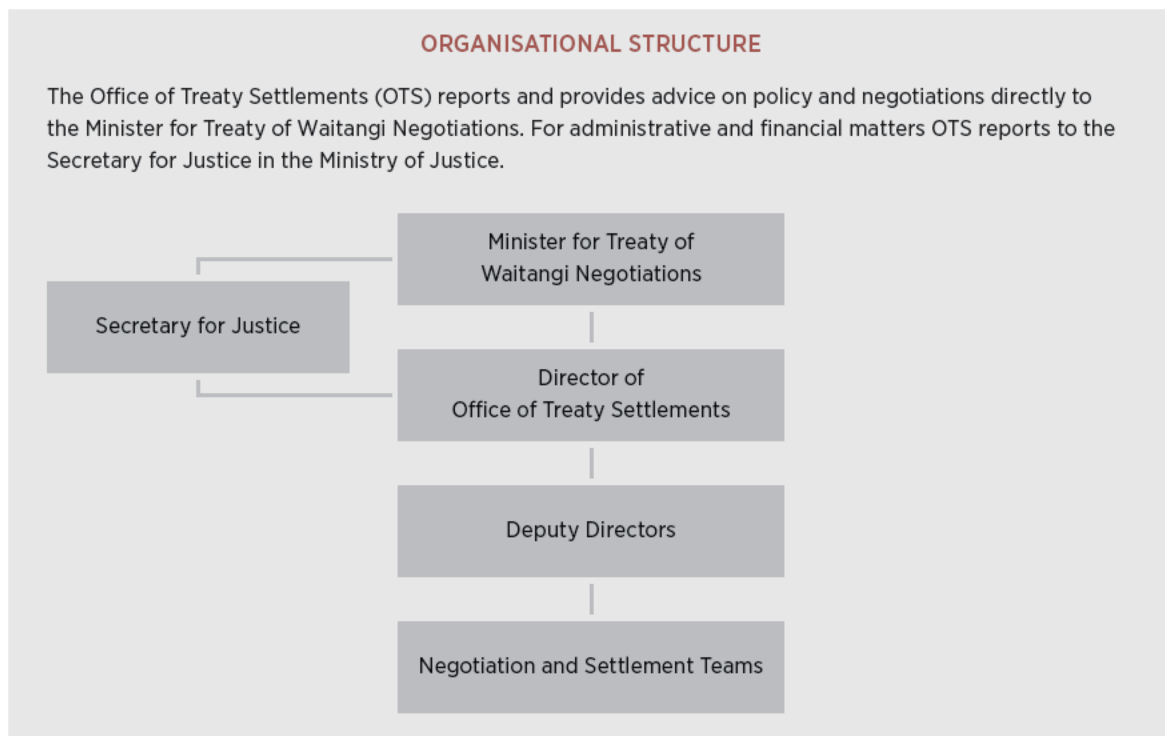


Figure 1.5: the Office of Treaty Settlements organisational structure

Progress with Treaty settlements so far

At a glance: summary of Treaty settlements to date

The current Treaty settlement process has resulted in a number of settlements. These range from the large Waikato-Tainui, Ngāi Tahu and Central North Island Collective settlements, to smaller settlements such as Hauai, Te Uri o Hau and Ngāti Tūrangitukua.

The nature and amount of redress provided in each settlement package largely depends on the severity of the breaches of the Treaty and their extent, as reflected in the amount of land alienated and how this was achieved (for instance, through confiscation or by purchase).

The settlements to date reflect a combination of a variety of redress options. Some early settlements consist solely of financial and commercial redress. Since 1997, most settlement packages have been made up of a Crown Apology, cultural redress and financial and commercial redress. Part 3 explains redress options in more detail.

The following table (Figure 1.6) sets out the settlements achieved to date. The dollar amounts do not include claimant funding or the value of any land that the Crown may have gifted to a claimant group.

Information on individual settlements is also available online at **www.govt.nz**.

Figure 1.6: Summary of Treaty settlements to date

Settlement	Date signed	Value of Settlement
Waitomo[1]	14/6/1990	n/a
Ngāti Whakaue[1]	23/9/1993	$5,210,000
Ngāti Rangiteaorere[1]	21/10/1993	$760,000
Hauai[1]	30/10/1993	$715,682
Waikato-Tainui Raupatu[2]	22/5/1995	$170,000,000
Waimakuku	20/12/1995	$375,000
Te Maunga	2/10/1996	$129,032
Rotomā	6/10/1996	$43,931
Ngāi Tahu[2]	21/11/1997	$170,000,000
Ngāti Tūrangitukua	26/9/1998	$5,000,000
Pouakani	19/11/1999	$2,000,000
Te Uri o Hau	13/12/2000	$15,600,000
Ngāti Ruanui	12/5/2001	$41,000,000
Ngāti Tama	20/12/2001	$14,500,000
Ngāti Awa	27/3/2003	$43,390,000
Ngāti Tūwharetoa (Bay of Plenty)	6/6/2003	$10,500,000
Ngaa Rauru Kiitahi	27/11/2003	$31,000,000
Te Arawa Lakes[3]	18/12/2004	$2,700,000
Ngāti Mutunga (Taranaki)	31/7/2005	$14,900,000
Te Roroa[4]	17/12/2005	$9,500,000
Affiliate Te Arawa Iwi and Hapū	11/6/2008	$38,600,000
CNI Forests on-account settlements[5]	25/6/2008	$14,669,640
Taranaki Whānui ki te Upoko o te Ika	19/8/2008	$25,025,000
Ngāti Apa (North Island)	8/10/2008	$16,000,000
Ngāti Whare	8/12/2009	$9,568,260
Ngāti Manawa	12/12/2009	$12,207,780
Waikato River[6]	17/12/2009	n/a
Raukawa/Te Pūmautanga o Te Arawa Upper Waikato River Co-Management[7]	9/3/2010	n/a
Ngāti Kuia	23/10/2010	$24,330,388
Ngāti Apa ki te Rā Tō	29/10/2010	$27,830,388
Rangitāne o Wairau	4/12/2010	$24,830,388
Ngāti Pāhauwera	17/12/2010	$20,000,000
Ngāti Porou	22/12/2010	$90,000,000
Ngāi Tamanuhiri	5/3/2011	$11,070,000
Maraeroa	12/3/2011	$1,800,000

Settlement	Date signed	Value of Settlement
Ngāti Mākino	2/4/2011	$9,600,000
Ngāti Manuhiri	21/5/2011	$9,000,000
Ngāti Whātua o Kaipara	9/9/2011	$22,100,000
Waitaha	20/9/2011	$7,500,000
Rongowhakaata	30/9/2011	$22,240,000
Ngāti Whātua Ōrakei	5/11/2011	$18,000,000
Te Aupōuri	28/1/2012	$21,040,000
Ngāti Raukawa	2/6/2012	$50,000,000
Ngāti Ranginui	21/6/2012	$38,027,555
Tāmaki Makaurau Collective[8]	8/9/2012	n/a
NgāiTakoto	27/10/2012	$21,040,000
Te Rarawa	28/10/2012	$33,840,000
Ngāti Toa Rangātira	7/12/2012	$70,610,000
Ngāti Rangiwewehi	16/12/2012	$6,000,000
Tapuika	16/12/2012	$6,000,000
Ngāti Koroki Kahukura	20/12/2012	$3,000,000
Ngāti Koata	21/12/2012	$11,760,000
Te Ātiawa o Te Waka-a-Māui	21/12/2012	$11,760,000
Ngāti Pūkenga	7/4/2013	$7,000,000
Ngāti Rarua	13/4/2013	$11,760,000
Ngāti Tama ki Te Tau Ihu	20/4/2013	$12,060,000
Maungaharuru Tangitū Hapū	25/5/2013	$23,000,000
Ngāi Tūhoe	4/6/2013	$168,923,000
Ngāti Rangiteaorere	14/6/2013	$750,000
Ngāti Hauā	18/7/2013	$13,000,000
Ngāi te Rangi	14/12/2013	$29,500,000
Ngāti Kuri	7/2/2014	$21,040,000
Te Kawerau ā Maki	22/2/2014	$6,500,000
Ngāruahine	5/8/2014	$67,500,000
Whanganui River	9/8/2014	$81,000,000
Te Ātiawa (Taranaki)	9/8/2014	$87,000,000
Tauranga Moana iwi Collective[8]	21/1/15	$250,000
Ngāti Hineuru	2/4/2015	$25,000,000
Taranaki Iwi	5/9/2015	$70,000,000
Heretaunga Tamatea	26/9/2015	$105,000,000
Ngāi Tai ki Tāmaki	7/11/2015	$12,700,000
Rangitāne o Manawatū	14/11/2015	$13,500,000
Ngatikahu ki Whangaroa	18/12/2015	$6,200,000

Settlement	Date signed	Value of Settlement
Rāngitane o Wairarapa-Tamaki Nui-ā-Rua	6/8/2016	$32,500,000
Ahuriri Hapū	2/11/2016	$19,500,000
Te Wairoa	26/11/2016	$100,000,000
Ngāti Tamaoho	30/4/2017	$10,300,000
Ngāti Tūwharetoa	8/7/2017	$77,612,740
Ngāti Hei	17/8/2017	$8,500,000
Ngāti Rangi	10/03/2018	$17,000,000

***Notes** to figure 1.6*

1. *These settlements were reached in relation to individual WAI Claims.*
2. *Settlement value excludes subsequent payments made under the Relativity Clauses agreed to in the deeds of settlement with these iwi.*
3. *Settlement value excludes $7.3 million paid to capitalise the annuity Te Arawa received from the Crown and address any remaining annuity issues.*
4. *Settlement value excludes ex gratia payments and redress provided through other appropriations.*
5. *This Central North Island settlement provided on-account redress for a collective of groups, including the Affiliate Te Arawa Iwi and Hapū. As each of these groups concludes comprehensive settlements, their share of the CNI settlement will be listed separately, and the total value listed against the CNI settlement will be reduced accordingly. Ngāti Rangitihi joined the CNI Collective on 4 November 2008.*
6. *The Waikato River settlement provides funding for co-management, clean up of the Waikato River, and other initiatives. These payments are not redress in settlement of Waikato-Tainui's historical claims.*
7. *Provides for co-management of Upper Waikato River. This is not redress in settlement of historical claims.*
8. *Financial redress is to be provided in the comprehensive settlements for the individual iwi.*

Settlement of Māori interests in fisheries

On 23 September 1992 the Crown and representatives of Māori signed a Deed of Settlement settling Māori interests in commercial fisheries and making provision for statutory recognition of Māori customary sea fisheries. The Deed was given effect by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

The Deed and legislation arose as a result of a dispute between the Crown and Māori about the Quota Management System (QMS). The Māori Fisheries Act 1989 was an earlier attempt to resolve the issues. It provided for the transfer from the Crown to Māori of 10% of the total allowable catch for all species then subject to the QMS.

However, there remained disputes between the Crown and Māori on the nature and extent of Māori fishing rights and their status. To finally resolve these, the Deed dated 23 September 1992 was entered into between the Crown and Māori representatives.

This Deed provided that:

- Māori would enter into a joint venture with Brierley Investments Limited to acquire Sealord Products Limited, a major fishing company
- the Crown would pay to Māori a sum of $150 million to be used for the development and involvement of Māori in the New Zealand fishing industry, including participation in the acquisition of Sealord Products Limited, and the Crown would introduce legislation to:
  - transfer to Māori 20% of any further quota allocation for additional species as they came under the QMS
  - recognise Māori customary fishing practices through regulations, and
  - reconstitute the Māori Fisheries Commission as the Treaty of Waitangi Fisheries Commission.

On 14 December 1992 the Treaty of Waitangi (Fisheries Claims Settlement) Act was passed to put the Deed into effect. The purpose of the legislation was threefold:

- to give effect to the settlement of claims relating to Māori commercial fishing rights
- to make better provision for Māori non-commercial, traditional and customary fishing rights and interests, and
- to make better provision for Māori participation in the management and conservation of New Zealand's fisheries.

The legislation constituted a full and final settlement of all Māori claims to commercial fishing rights. It also provided that non-commercial customary Māori fishing, relating to fish controlled by the Fisheries Act, could take place only within regulations made under that Act. Non-commercial customary rights and interests still give rise to ongoing Treaty obligations on the Crown, including when the Crown develops customary fishing regulations. Although issues relating to allocating the settlement assets (quota, shares in fishing companies and cash) remain outstanding, the settlement means that a significant asset is now controlled by and on behalf of Māori.

Ngati Ruanui toa at Deed of Settlement signing

The Crown’s general approach to Treaty settlements

Definitions of historical and contemporary claims

The Crown has made a distinction between two types of claim – ‘historical claims’ and ‘contemporary claims’. Historical claims are those arising out of Crown acts (things the Crown did) or omissions (things the Crown failed to do) before 21 September 1992. The acts or omissions include those done by or on behalf of the Crown or by or under legislation. Contemporary claims arise out of Crown actions or omissions after that date. This guide deals with negotiations for historical claims only.

The date of 21 September 1992 was chosen because that is when Cabinet agreed on the general principles for settling Treaty of Waitangi claims. A ‘cut-off’ date was needed so as to be able to make consistent comparisons between the redress provided to different claimant groups.

How are contemporary claims resolved?

The settlement of historical claims does not remove the Crown’s ongoing obligations under the Treaty or the law. However, greater awareness today of Treaty obligations is likely to reduce the risk of contemporary breaches. If they do occur, contemporary claims may be resolved in a number of ways, depending upon the kind of Crown action or omission that led to the grievance.

As with historical grievances, any Māori may bring a claim about a contemporary matter to the Waitangi Tribunal. In some cases, where specific Treaty obligations have been recognised in legislation, such as the Resource Management Act 1991, Māori may be able to bring a case in the courts or specialist tribunals.

The Office of Treaty Settlements is not responsible for the negotiation of contemporary claims. Any response by the Crown to such claims involves the government department or agency that has responsibility for the relevant policy area. For instance, the Ministry of Economic Development led the Crown response on contemporary claims about television and radio broadcasting rights and, once resolved, the responsibility for Crown policy in this area was passed to Te Puni Kōkiri. Similarly, the Crown’s response to contemporary claims on Crown minerals is managed by the Ministry of Business, Innovation and Employment.

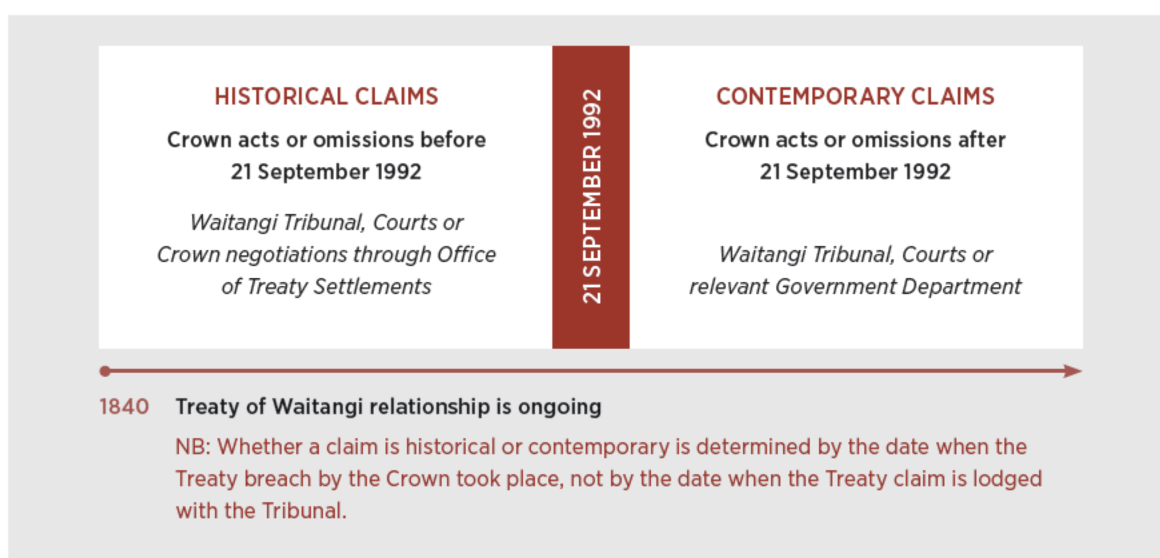


Figure 1.7: Historical and contemporary Treaty claims

Crown guidelines for the resolution of historical claims

The Crown wants to negotiate settlements of historical Treaty claims that are lasting and acceptable to most New Zealanders. It also wants to be consistent in its approach to the many claimant groups involved in negotiations, while acknowledging that each claimant group is different. To meet these objectives the following guidelines have been developed. These are:

- the Crown will explicitly acknowledge historical injustices – that is, grievances arising from Crown actions or omissions before 21 September 1992
- Treaty settlements should not create further injustices
- the Crown has a duty to act in the best interests of all New Zealanders
- as settlements are to be durable, they must be fair, achievable and remove the sense of grievance
- the Crown must deal fairly and equitably with all claimant groups
- settlements do not affect Māori entitlements as New Zealand citizens, nor do they affect their ongoing rights arising out of the Treaty or under the law, and
- settlements will take into account fiscal and economic constraints and the ability of the Crown to pay compensation.

The guidelines are explained under the following headings:

THE CROWN WILL EXPLICITLY ACKNOWLEDGE HISTORICAL INJUSTICES

The Crown's acknowledgement of and apology for well-founded breaches of the Treaty and its principles is vital to rebuilding the relationship between the Crown and claimant groups. It is also important for the claimant groups to record their agreement that their historical grievances have been finally settled, so that both parties can move on to a more positive future. Clear statements on these matters are included in Deeds of Settlement.

TREATY SETTLEMENTS SHOULD NOT CREATE FURTHER INJUSTICES – EITHER TO CLAIMANT GROUPS OR ANYONE ELSE

This includes the claimant group seeking redress, other claimant groups and other New Zealanders generally. In negotiating the settlement of historical claims, the Crown does not want to create new injustices. In practice this means:

- the settlement itself should be fair for the claimant group concerned
- in providing settlement redress to one claimant group the Crown should not harm the interests of other claimant groups, and
- existing private property rights should be respected.

THE CROWN HAS A DUTY TO ACT IN THE BEST INTERESTS OF ALL NEW ZEALANDERS

The Crown must govern in the interests of all New Zealanders. In considering redress options it must balance the grievances and aspirations of Māori claimant groups with matters such as continued protection of and public access to conservation areas, and the overall management in the national interest of resources such as water, petroleum and geothermal energy.

AS SETTLEMENTS ARE TO BE DURABLE, THEY MUST BE FAIR, ACHIEVABLE AND REMOVE THE SENSE OF GRIEVANCE

Settlements will not last if they are seen to be unfair and do not remove the sense of grievance. The process of negotiation is intended to ensure that the Crown and a claimant group sign a Deed of Settlement only when both parties are satisfied that it is fair, and the claimant groups agree that their grievances will be finally settled. Settlements must also be achievable in a practical sense. For instance, the loss of traditional seasonal migration routes and access to plant and animal resources are an important part of some claims. While this way of life can not be restored, the Crown and claimant groups have developed several redress instruments to recognise claimant groups' interests in such resources today.

THE CROWN MUST DEAL FAIRLY AND EQUITABLY WITH ALL CLAIMANT GROUPS

This means that the Crown must have consistent policies and processes and that the redress for each group should be fair in relation to the redress received by other groups. However, the Crown also acknowledges that each claimant group has different interests and particular claims against the Crown.

SETTLEMENTS DO NOT AFFECT MĀORI ENTITLEMENTS AS NEW ZEALAND CITIZENS OR ON-GOING TREATY OR LEGAL RIGHTS

Article Three of the Treaty guarantees to Māori that they will enjoy the rights and privileges of British citizens. These rights and privileges are in addition to the rights guaranteed under Article Two. Māori receive settlement funds and other assets as redress for historical Treaty breaches. The settlement of historical claims relating to Crown actions or omissions that occurred prior to 21 September 1992 does not limit current rights and benefits that Māori might be entitled to receive as New Zealanders, nor any existing rights under the Treaty of Waitangi or aboriginal title and customary law.

SETTLEMENTS WILL TAKE INTO ACCOUNT FISCAL AND ECONOMIC CONSTRAINTS AND THE ABILITY OF THE CROWN TO PROVIDE REDRESS

Because of the nature and size of the losses that Māori have borne, it is unlikely in most instances that redress made many decades later will fully compensate claimants financially. There are also difficulties in working out historical and contemporary values, and assessing the value of improvements made by the Crown or settlers. However, generations of Māori have suffered financial and other losses as a result of Crown Treaty breaches. Most of their original land has long since passed into non-Māori, private ownership. It is clear that the Crown is not in the position to meet the cost of putting right all wrongs. It is also clear that in many cases no economic compensation is possible for cultural losses.

The Crown aims to strike a balance to negotiate fair, just, and practical settlements that include a range of remedies to meet cultural aspects of claims as well as providing financial and commercial redress. Redress necessarily reflects present-day social and economic realities.

Crown negotiating principles

To complement the Crown guidelines, and following a review of the historical Treaty settlement policy framework at the beginning of 2000, the government developed a set of six principles. The principles are intended to ensure that settlements are fair, durable, final and occur in a timely manner.

The principles are as follows.

GOOD FAITH

The negotiating process is to be conducted in good faith, based on mutual trust and co-operation towards a common goal.

RESTORATION OF RELATIONSHIP

The strengthening of the relationship between the Crown and Māori is an integral part of the settlement process and will be reflected in any settlement. The settlement of historical grievances also needs to be understood within the context of wider government policies that are aimed at restoring and developing the Treaty relationship.

JUST REDRESS

Redress should relate fundamentally to the nature and extent of breaches suffered, with existing settlements being used as benchmarks for future settlements where appropriate. The relativity clauses in the Waikato-Tainui and Ngāi Tahu settlements will continue to be honoured, but such clauses will not be included in future settlements. The reason for this is that each claim is treated on its merits and does not have to be fitted under a predetermined fiscal cap.

FAIRNESS BETWEEN CLAIMS

There needs to be consistency in the treatment of claimant groups. In particular, ‘like should be treated as like’ so that similar claims receive a similar level of financial and commercial redress. This fairness is essential to ensure settlements are durable.

TRANSPARENCY

First, it is important that claimant groups have sufficient information to enable them to understand the basis on which claims are settled. Secondly, there is a need to promote greater public understanding of the Treaty and the settlement process.

GOVERNMENT-NEGOTIATED

The Treaty settlement process is necessarily one of negotiation between claimant groups and the government. They are the only two parties who can, by agreement, achieve durable, fair and final settlements. The government's negotiation with claimant groups ensures delivery of the agreed settlement and minimises costs to all parties.

The protection of potential settlement assets

As part of the development of an overall policy framework for the settlement of historical claims, the Crown has developed a number of ways in which Crown assets are protected if there is the possibility they may later be needed for use in Treaty settlements. Surplus Crown-owned land, for example, may be included in landbanks specifically set up to provide a ready source of Crown property for use in Treaty settlements.

There are 15 regional landbanks which together cover the whole of New Zealand. Where land is declared surplus, it is advertised and any Māori who has a claim registered with the Tribunal may apply to have it included in the regional landbank. If the Crown agrees, the property is included in the appropriate landbank.

The protection of potential settlement assets and the role of the Waitangi Tribunal

There are two ways in which the Waitangi Tribunal can become involved in the protection of potential settlement assets:

- Statutory memorials, and
- Statutory protection of Crown forest assets.

Statutory memorials were established under the Treaty of Waitangi (State Enterprises) Act 1988. This added a new section to the State-Owned Enterprises Act 1986 and required that memorials (a formal notation or record) be placed on all titles to Crown land transferred to State-Owned Enterprises under that Act. As a result and under certain circumstances the Waitangi Tribunal has the power to order the Crown to take back or 'resume' such land for use in a Treaty settlement, even if that land has been transferred to a third party.

The Tribunal has similar powers in relation to Crown-owned land that is subject to a Crown forestry licence. These powers are provided in the Crown Forest Assets Act 1989.

Generally speaking, the Crown hopes it can negotiate settlements with claimant groups without requiring resumptions.

For full details on how these protection mechanisms were established and how they work see 'protection of potential settlement assets' on page 134.

Key settlement policies

The development of the principles of the Treaty of Waitangi by the Waitangi Tribunal and the Courts, the Crown guidelines for the resolution of historical claims, the Crown negotiating principles and the completion of a substantial body of research into the historical background to grievances, have allowed a set of policies to be established which put into practice the Crown's intention to resolve historical claims under the Treaty of Waitangi. These policies are covered in more detail in both the preceding and subsequent chapters and references to these sections are noted in the following summary. In brief:

- Treaty settlement policy applies only to historical claims – claims arising from actions or omissions by or on behalf of the Crown or by or under legislation, on or before 21 September 1992 (see page 23).
- The Crown is ready to negotiate most claims involving raupatu, pre-1865 Crown purchases, subsequent Crown purchases and/or breaches arising from the operations and impact of the Native land laws. Provided that clear evidence of harm to the claimant group is available, exhaustive research is not required before starting negotiations (see page 36).
- The Crown seeks a comprehensive settlement of all the claims of a claimant group. This is to ensure all historical grievances have been addressed and enable the Crown and the claimant group to begin a new relationship (see page 38).
- The Crown strongly prefers to negotiate claims with large natural groupings rather than individual whānau and hapū.
- A secure mandate on the part of the claimant negotiators is required before negotiations can start. This assures both the Crown and the claimant group that their mandated representatives have been properly authorised (see pages 41–48). The claimant group must also ratify any resulting Deed of Settlement before it is binding (see pages 65–66).
- Overlapping claims or interests of other claimant groups must be addressed to the satisfaction of the Crown before the Crown will conclude a settlement involving any of the sites or assets concerned (see pages 53–54).
- A suitable governance entity is required before settlement assets can be transferred. The Crown does not dictate how settlement assets are to be used, but requires assurance that claimant groups have established an entity that is acceptable to the whole claimant group, and is representative, transparent and accountable (see pages 67–72).
- The Crown has to set limits on what and how much redress is available to settle historical claims. Redress must be fair, affordable and practicable in today's circumstances, bearing in mind settlements already reached, other matters for which the government must provide, and existing legal frameworks – for example, the Resource Management Act 1991.
- Settlements are final. In exchange for the settlement redress, the settlement legislation will prevent the courts, Waitangi Tribunal or any other judicial body or tribunal from re-opening the historical claims.
- Settlements are intended to be neutral in their effect on the continued existence of any Treaty of Waitangi or remaining aboriginal title or customary rights claimant groups may have. This means that Māori are still able to pursue claims based on the continued existence of aboriginal title or customary rights. The Crown also retains the right to dispute the existence of such title or rights in future. It also means that while settlements settle all claims arising from acts or omissions by the Crown prior to 21 September 1992, claimant groups retain the right to pursue claims for acts or omissions by the Crown after that date that may have resulted in breaches of the Treaty of Waitangi and its principles.

The negotiations process

This part:

- provides an overview of the four steps in the negotiations process including the key decision points for claimant groups and the Crown
- outlines the process followed by the Waitangi Tribunal and its relationship to negotiations with the Crown
- explains each of the four steps in more detail.

Overview of the negotiations process

The four steps of the negotiations process

Each negotiation with a claimant group is different because that group has different claims and interests. However, the negotiation of historical Treaty claims usually involves four steps. They are:

STEP 1 – PREPARING CLAIMS FOR NEGOTIATIONS

- agreement by the Crown and the claimant group to negotiate. This involves the Crown accepting that there is a well-founded grievance, and the claimant group meeting the Crown's preference for negotiating with large natural groupings (see page 39)
- the mandate of the claimant group representatives (including agreement on the claims to be negotiated) is conferred by the claimant group and then recognised by the Crown. The mandated representatives may conduct the negotiations themselves, or appoint negotiators to do so. We use 'mandated representatives' in the rest of this summary to cover both situations, and
- processes are put in place for mandated representatives to consult with claimant group members on settlement issues and develop a register of members (continues up to ratification).

STEP 2 – PRE-NEGOTIATIONS

- Terms of Negotiation are developed and signed, setting out the basis upon which negotiations will take place
- relevant Ministers approve the funding available to mandated representatives on behalf of the claimant group as a contribution to the cost of negotiations, and
- the claimant group identify the areas or sites and Crown assets in which they are interested in seeking redress and the types of redress they think are appropriate in relation to those sites or areas.

Figure 2.1: Four main steps of negotiations between a claimant group and the Crown

STEP 3 – NEGOTIATIONS

- formal negotiations begin. This involves the mandated representatives continuing to consult with members of the claimant group on settlement issues and, where relevant, seek their views on a governance structure for managing settlement assets
- after sufficient progress in negotiations, the Minister for Treaty of Waitangi Negotiations sends a letter to the mandated representatives outlining parameters of the Crown offer, including quantum (the total monetary value of the financial and commercial redress to be provided by the Crown, see page 82)
- alternatively, the Crown and mandated representatives can seek a more formal agreement. This is known as an Agreement in Principle. An Agreement in Principle outlines the nature and scope of all settlement redress agreed as the basis for the final Deed of Settlement. An Agreement in Principle is non-binding on the Crown and the claimant group, and
- usually (and certainly when requested to do so), the Minister presents an outline of the Agreement in Principle to claimant group members, including kuia and kaumātua, several weeks before it is signed.

Once the Agreement in Principle has been signed by the Crown and mandated representatives, then:

- work begins on the detail of a draft Deed of Settlement. The remaining issues are usually matters of detail and implementation. The Deed of Settlement is the final Crown offer to the claimant group for the settlement of their historical grievances and will reflect the agreements made in the Agreement in Principle
- where relevant, the mandated representatives continue to seek the claimant group's views on a governance structure for managing settlement assets
- the claimant group's mandated representatives continue to update the register of claimant group members
- mandated representatives approve and initial a complete Deed of Settlement (initialling indicates to the wider claimant group that their mandated representatives believe the Crown's final offer should be accepted), and
- the Crown reviews the proposed governance entity to ensure it is representative, accountable and transparent.

STEP 4 – RATIFICATION AND IMPLEMENTATION

- the mandated representatives engage in an extensive communication process on the initialled Deed of Settlement and (if not done later) the proposed governance entity by, for example, publishing summary information and holding communication hui
- the mandated representatives hold a postal ballot of claimant group members on the initialled Deed of Settlement
- the mandated representatives will also hold a postal ballot of claimant group members on the proposed governance entity at this point or at a later date
- if a sufficient majority of claimant group members has ratified the settlement, their mandated representatives, as authorised through the ratification process, sign the Deed of Settlement, which is binding and subject only to the establishment of the governance entity and the passage of legislation to give effect to the settlement
- once the governance entity is ratified by the claimant group and established, the Crown introduces enacting legislation for the settlement, and
- following the legislation, both the Crown and claimants implement the agreements in the Deed, including the transfer of settlement assets and cultural redress.

Key decision points for claimant groups and the Crown

Figure 2.2 shows the key points where the **whole claimant group** must be involved in decisions about the settlement of their claims. While the mandated representatives will consult and communicate with the wider claimant group throughout the negotiations process, there are some key points in the process where the whole claimant group should be involved. These are:

- mandating representatives for negotiations
- being consulted in the development of the settlement package, including the Agreement in Principle and draft Deed of Settlement
- approving the Deed of Settlement, and
- approving the claimant group's proposed governance entity for the transfer of settlement assets.

Figure 2.3 shows the key decision points and decision makers for the Crown during the various steps of negotiations.

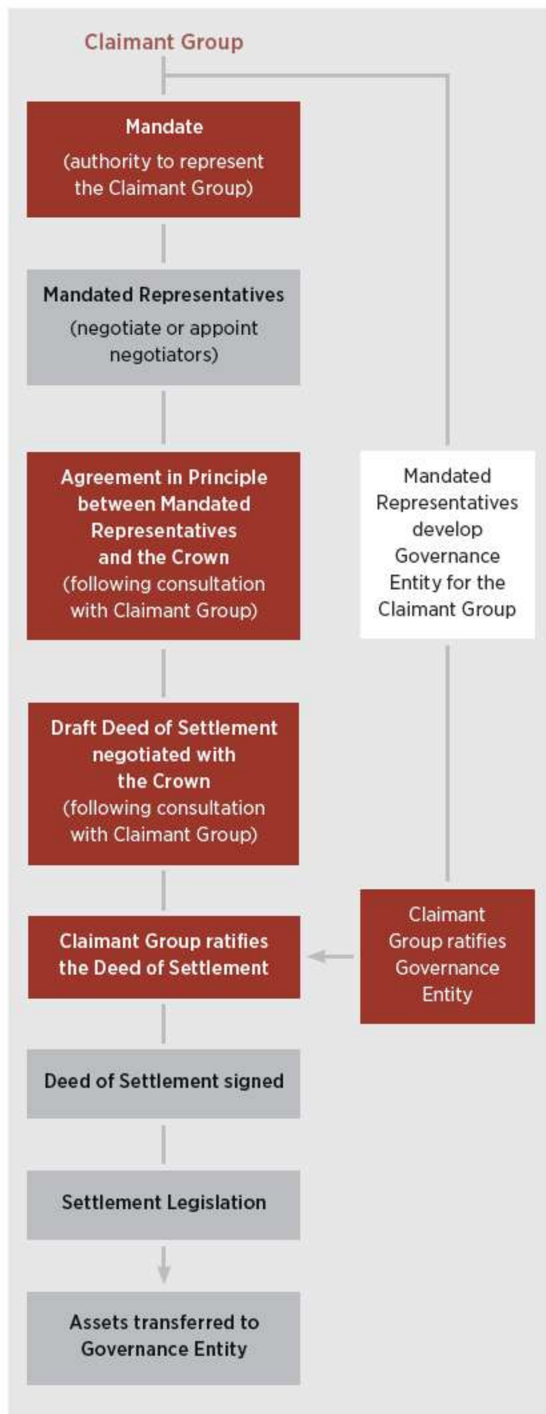


Figure 2.2: Key decision points for claimant groups

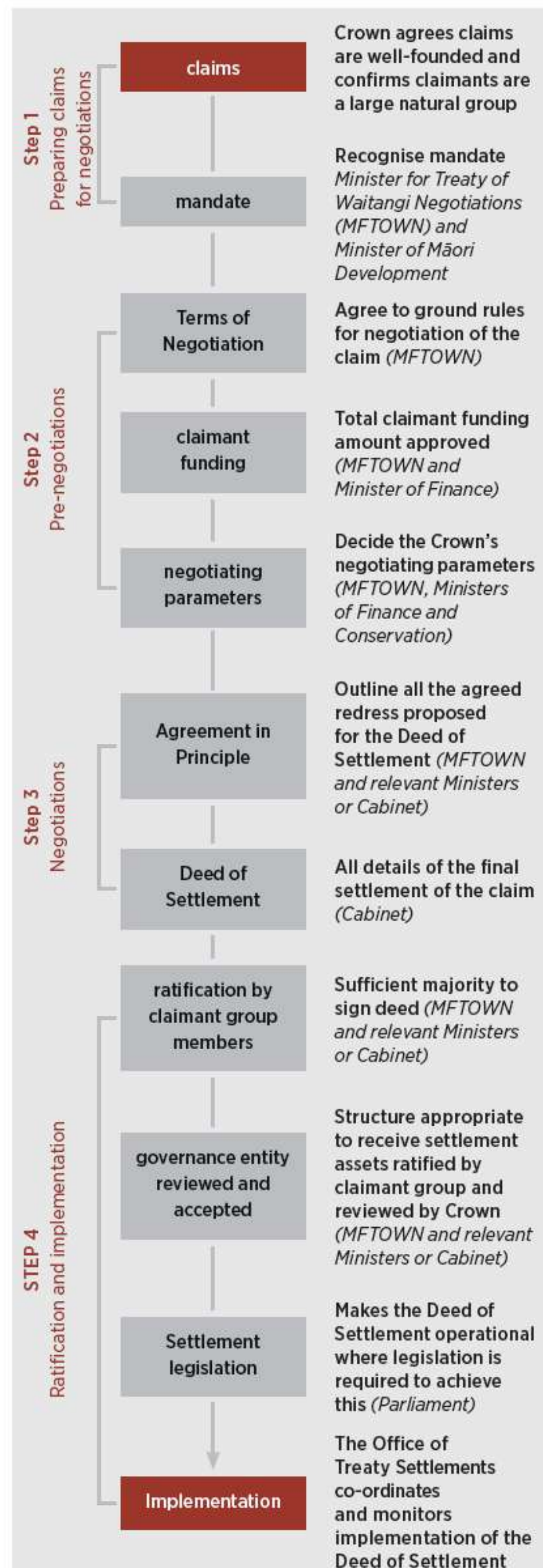


Figure 2.3: Key decision points for the Crown

Negotiations and the Waitangi Tribunal process

Claimant groups first need to register their claims with the Waitangi Tribunal

Prior to a full explanation of the negotiations process between the Crown and claimant groups, some comments need to be made about the relationship between such negotiations and the Waitangi Tribunal's claims process.

Under the Treaty of Waitangi Act 1975, any Māori may make a claim to the Waitangi Tribunal. It is not necessary to have a mandate for making a claim. Claims need to be registered with the Waitangi Tribunal before the Tribunal can begin an inquiry or the Crown can begin negotiating with a claimant group. Once a claim is registered, claimant groups can seek negotiations with the Crown straight away, or may choose instead to have their claims heard by the Tribunal before entering negotiations. If a claimant group wants to enter into negotiations they must cease actively pursuing their claim or claims before the Tribunal. The Crown also requires claimant groups to forgo other avenues of redress such as a remedies hearing by the Tribunal or action in the High Court. This is to ensure that negotiations are conducted in good faith and both parties have a strong incentive to reach an agreement.

While any Māori may make a claim to the Waitangi Tribunal and it is not necessary to have a mandate to make a claim, in seeking a comprehensive, fair and durable settlement for all the historical grievances of a claimant group, the Crown seeks negotiations with mandated representatives and strongly prefers to negotiate with large natural groupings. In recent years, overlapping claimant groups and dissenters within claimant groups have tried to halt the work of mandated representatives by appeals to the Waitangi Tribunal or the High Court. Both the Tribunal and the Courts have been reluctant to allow these appeals where the mandated representatives and the Crown can demonstrate that robust processes have been used to address mandate or overlapping claims issues. Any decision to complete the Tribunal process prior to seeking negotiations on a settlement with the Crown is a matter for the claimant group alone. It should be noted, however, that a completed Tribunal report may be helpful to the successful completion of a settlement with the Crown if a claimant group must also address significant overlapping claims from other groups.

Taking a claim through the Waitangi Tribunal

If claimants choose to pursue their claim through the Waitangi Tribunal, or to go back to the Waitangi Tribunal, the process would move through the following steps:

- research may be funded by the Tribunal or Crown Forestry Rental Trust according to priorities set by the Tribunal. Claims are usually grouped into District Inquiries and a 'casebook' of evidence is put together from all the research for the registered claims in a District as a basis for the hearing
- the Tribunal then holds interlocutory conferences prior to hearings to identify issues of difference between the Crown and claimant groups and to facilitate resolution of mandate and overlapping claim issues
- a Tribunal hearing—this usually takes the form of a series of six to ten weeks of hearings spaced out over a period of up to 12 months for a single or multiple claimant groups, usually on their marae. Once claimants' and Tribunal evidence is completed, Crown evidence is then heard before all parties present closing submissions, and
- a Tribunal report is then drafted and completed (within six months to one year) and sets out whether or not the claims are well-founded. If the claims are well-founded, it may recommend that the claimants and Crown negotiate a settlement on the basis of the findings. It may go further and make general or specific recommendations, including how relief might be provided.

The process, from the start of research to the completion of a report, should take between three and four years.

Sometimes, as a result of problems in negotiations or for other reasons, claimant groups may choose to go back to the Tribunal for a remedies hearing. This is usually where claimant groups have a choice to utilise the Tribunal's power to make binding orders with respect to State-Owned Enterprise land that has a resumptive memorial on its title, or to licensed Crown forest land. In this process, the Tribunal can make recommendations in the form of interim orders over the land, which, if no alternative is negotiated, become orders that bind the Crown after a period of 90 days. In the case of licensed Crown forest land, the order can include monetary compensation.

Apart from orders for the resumption of land, the Tribunal's recommendations are not binding on the Crown. However, the government always considers any recommendations carefully.

How do the Waitangi Tribunal process and the negotiations process relate to each other?

Figure 2.4 below shows the two processes side by side:

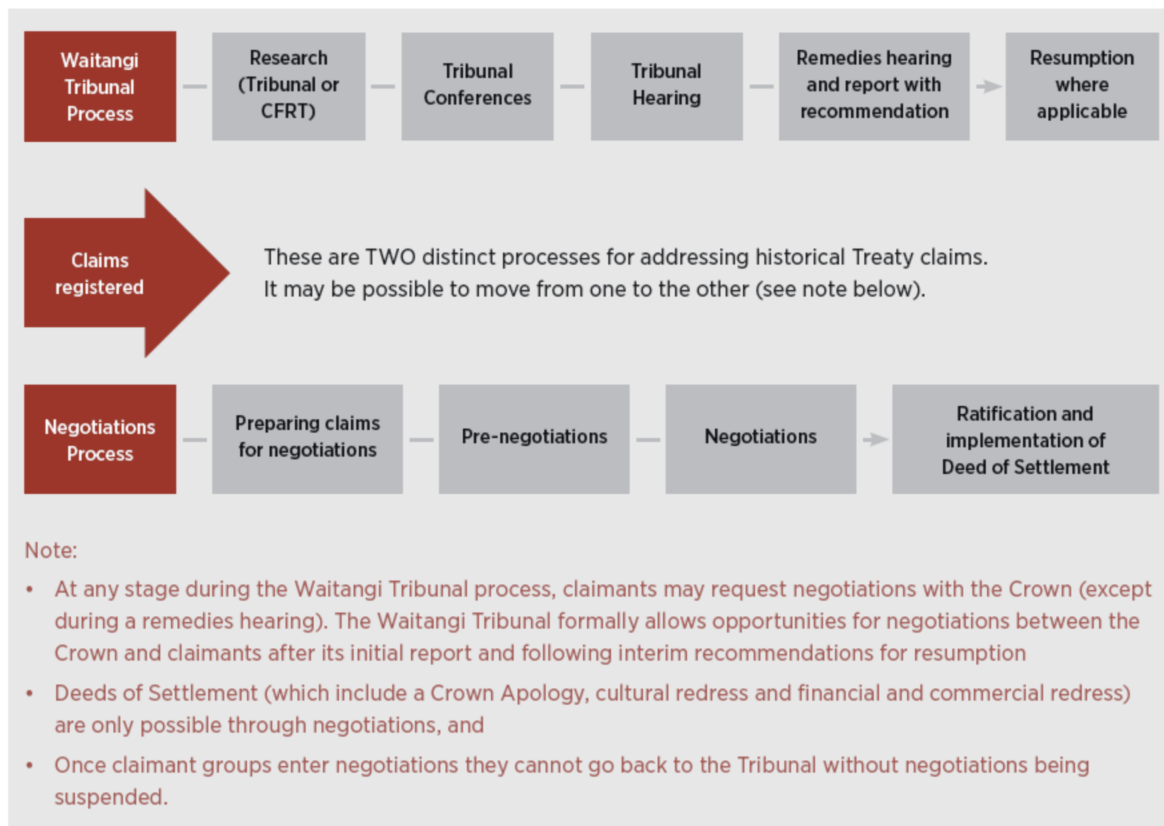


Figure 2.4: Comparison of the negotiations process and the Waitangi Tribunal process (more detail on resumption is given on pages 140–141).

How long does each process, negotiations or the Tribunal, take?

This will depend very much on the circumstances of the claims. The full Tribunal process from lodging a claim to recommendations for resumption can take several years. Until recently, settlement negotiations have generally taken several years rather than months to resolve. However, the completion of a large body of research into land confiscations, Crown purchases prior to 1865 and the operation of the Native Land Court means the Crown now has a good understanding of the types of land-based historical claims and the amount of land lost by Māori in every region of the country. The Crown and claimant groups have also developed a wide range of possible redress options, so less detailed work in this area is now required. An outline of an agreement between the Crown and a claimant group can now be registered in an Agreement in Principle. These developments should see a decrease in the time it takes to negotiate settlements.

Similarly, the Tribunal's use of interlocutory conferences before hearings begin, the casebook method in the hearing process and the use of report writers in casebook inquiries have decreased the time required to hear and report on claims. Further innovations in this area by the Tribunal, such as the regional approach to hearings trialed in Poverty Bay in 2001 and 2002, have also streamlined the claims process. Claimants should talk to both OTS and the Tribunal about likely timelines for their particular claims.

Step 1: Preparing claims for negotiations

Figure 2.5: Step 1 – preparing claims for negotiations

Preparing claims for negotiations involves:

- the claimant group providing the Crown with sufficient research to show that they have been harmed by Crown actions or omissions in breach of the Treaty of Waitangi and its principles
- the Crown accepting that it breached its obligations under the Treaty of Waitangi and its principles
- the Crown assessing whether the claimant group and the claims to be settled meet the criteria for comprehensive negotiations with a large natural group
- representatives of the claimant group obtaining a mandate from the claimant group to negotiate the claims, and
- the Crown assessing the mandate and deciding whether to recognise it.

Starting out

As noted previously, a claimant group wishing to enter negotiations must have a claim registered with the Waitangi Tribunal. Claimants initiate the settlement process for their historical claims by approaching either OTS or the Minister for Treaty of Waitangi Negotiations to begin negotiations.

Types of claim and Crown readiness to negotiate

TYPES OF CLAIM

Most historical Treaty claims involve one or more of the following types of land loss:

- purchases of Māori land by the Crown before 1865, including pre-Treaty purchases later investigated and validated ('Old Land Claims'), Crown purchases, and post-Treaty private purchases made during the Crown's waiver of its pre-emptive right to purchase Māori land
- confiscation of Māori land by the Crown under the New Zealand Settlements Act 1863, and/or
- transactions after 1865 under the various native land laws.

The Waitangi Tribunal, the Crown Forestry Rental Trust, claimants and the Crown have now done a great deal of historical research into these three types of claim. In particular, the Waitangi Tribunal's Ngāi Tahu and Muriwhenua reports dealt with purchases before 1865, the Taranaki and the Ngāti Awa reports considered confiscation, and the Rangahaua Whānui National Overview Report summarised research on dealings in the Native Land Court, along with many other matters affecting the alienation of Māori land.

As a result of this and other research, the Crown now has a good understanding of the types of land-based historical claims in every area of the country and the amount of land that was lost by Māori. The Crown accepts that confiscating land after the warfare of the 1860s in Taranaki, Waikato and the Bay of Plenty was an injustice, and was in breach of the Treaty of Waitangi and its principles. Similar acknowledgements are likely to be appropriate in other districts where there have been confiscations (raupatu). The Crown also acknowledges that Crown purchases prior to 1865 had a widespread and enduring impact on Māori society, as did the operations of the Native land laws after 1865.

CROWN READINESS TO NEGOTIATE

Because the Crown acknowledges that widespread breaches of the Treaty and its principles are likely to have occurred, it is willing, if claimant groups wish, to negotiate settlements of claims that include purchases before 1865, confiscation, and the operation and impact of the Native land laws after 1865. Claimants who want to negotiate to settle such claims do not need to go through Waitangi Tribunal hearings or provide detailed research on each and every Crown action or omission that they consider breached the Treaty and its principles. However, they do need to show the link between the Crown's acts or omissions and the harm to their tūpuna (ancestors).

For most claims involving large natural groups, the Crown expects that the Waitangi Tribunal's Rangahaua Whānui series, and research already completed by the Tribunal, the Crown Forestry Rental Trust, the Crown and/or claimants will provide a sufficient basis to begin negotiations. Because the Rangahaua Whānui reports are of a general and regional nature, further historical research is likely to be required in some areas to identify, at least at a broad level, which group was harmed. Claimants should also note that a Tribunal report may be useful where there are significant issues arising from overlapping claims with other groups.

RELATIONSHIP BETWEEN TYPE OF TREATY BREACH AND REDRESS

While the Crown is prepared to enter negotiations with claimant groups who suffered from breaches of the Treaty and its principles relating to any of the three main types of land alienation, it does not accept that the same amount of redress should be available in each case. Although the impact of land loss on Māori society was often similar regardless of the way land was lost, the culpability (extent to which a party is wrong or to blame) of the Crown does differ from case to case. The Crown believes that the seriousness of each type of breach is different and redress should reflect that, but this is a matter for discussion during the negotiations.

Assessing the research

OTS, with assistance from the Crown Law Office, assesses research on historical claims submitted to the Crown for the purpose of negotiations. This may include reports by the Waitangi Tribunal or research undertaken at the Tribunal's request.

So that a proper assessment can be made, the research should clearly set out the grievances and provide historical evidence to support them. It should be based on a broad and sufficient use of primary and secondary sources, including oral sources if appropriate, and show a good understanding of the historical context of the situation on which the claims are based. The Crown also requires research to be logically set out, written in an objective manner and to include references.

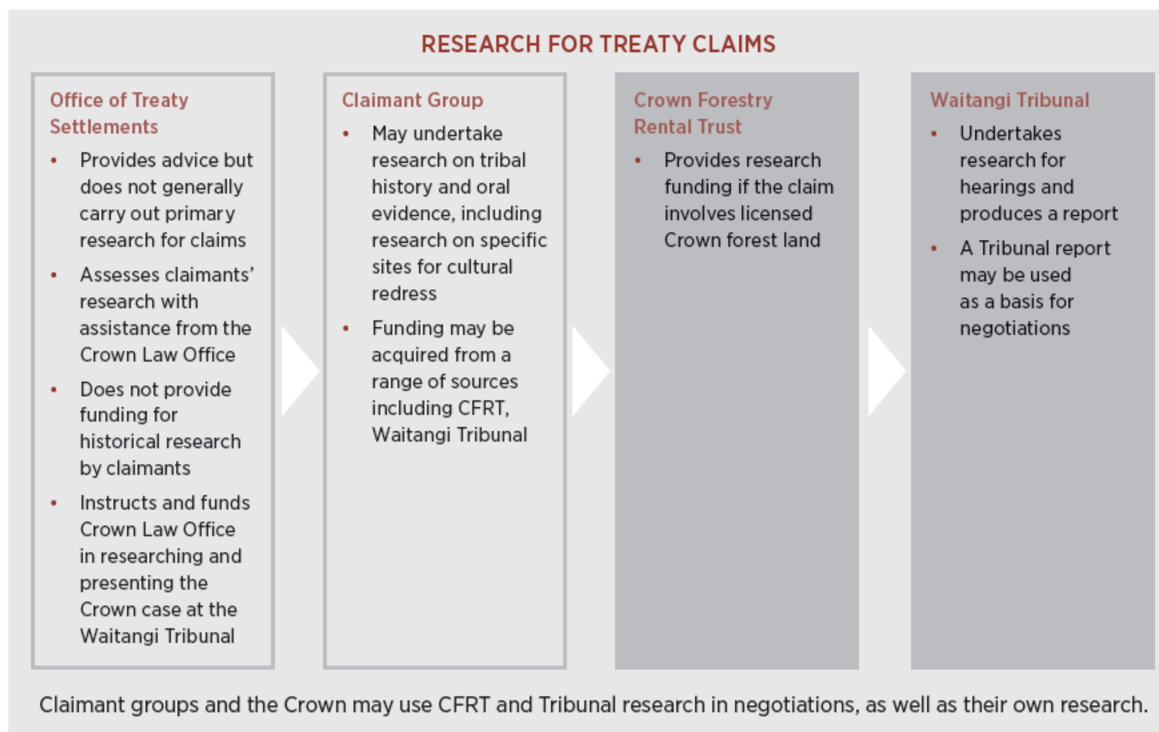


Figure 2.6: Research for Treaty claims

NEED FOR EXTRA RESEARCH

During negotiations, the Crown and claimant negotiators may need to agree whether particular breaches of the Treaty and its principles occurred – for example, if the claimants want the Crown to apologise for a particular action. If the Crown does not initially accept that there has been a breach in that case, it will discuss its reasons with claimants. It may be that more research or analysis needs to be done. Extra research may also be needed on specific issues arising from a claim, for example, to find out whether more than one group is making claims over the same area or a particular site – what are known as overlapping claims or cross-claims. (In Waitangi Tribunal proceedings 'overlapping' is used for minor overlaps and 'opposing' is used for a high degree of overlap). How overlapping claims can be addressed is discussed on pages 53–54. In any event, negotiations on cultural redress will be assisted by any research or information on a claimant group's associations with a particular site.

HELP WITH RESEARCH

OTS does not directly help claimant groups with research, but can give advice on where more research is needed. The Waitangi Tribunal can also provide information about how to carry out research.

Any claimant funding provided by OTS is intended for the purpose of negotiations only and not for reimbursing research costs. However, if the claim involves licensed Crown forest land, a claimant group may be eligible for funding assistance from the Crown Forestry Rental Trust.

Comprehensive negotiations

So that it can be sure that it has properly addressed all the historical claims of a claimant group, the Crown strongly prefers to negotiate settlements of all the historical claims (claims relating to acts or omissions by the Crown prior to 21 September 1992) of a claimant group at the same time. That is what is meant by comprehensive negotiations.

A key objective of negotiations for Treaty settlements is to help set right the grievances that claimant groups have about historical Crown actions. It is in the interests of both the Crown and claimant groups for this to be done as effectively and efficiently as possible. It therefore makes sense for settlements to be comprehensive, providing redress for all the wrongs done to a claimant group. Settlements made 'bit by bit' over a long time-span would risk leaving the sense of wrong to linger, and might never achieve a sense of final resolution. Comprehensive settlements also reduce the costs and time involved in negotiations and implementation for both the Crown and claimant groups.

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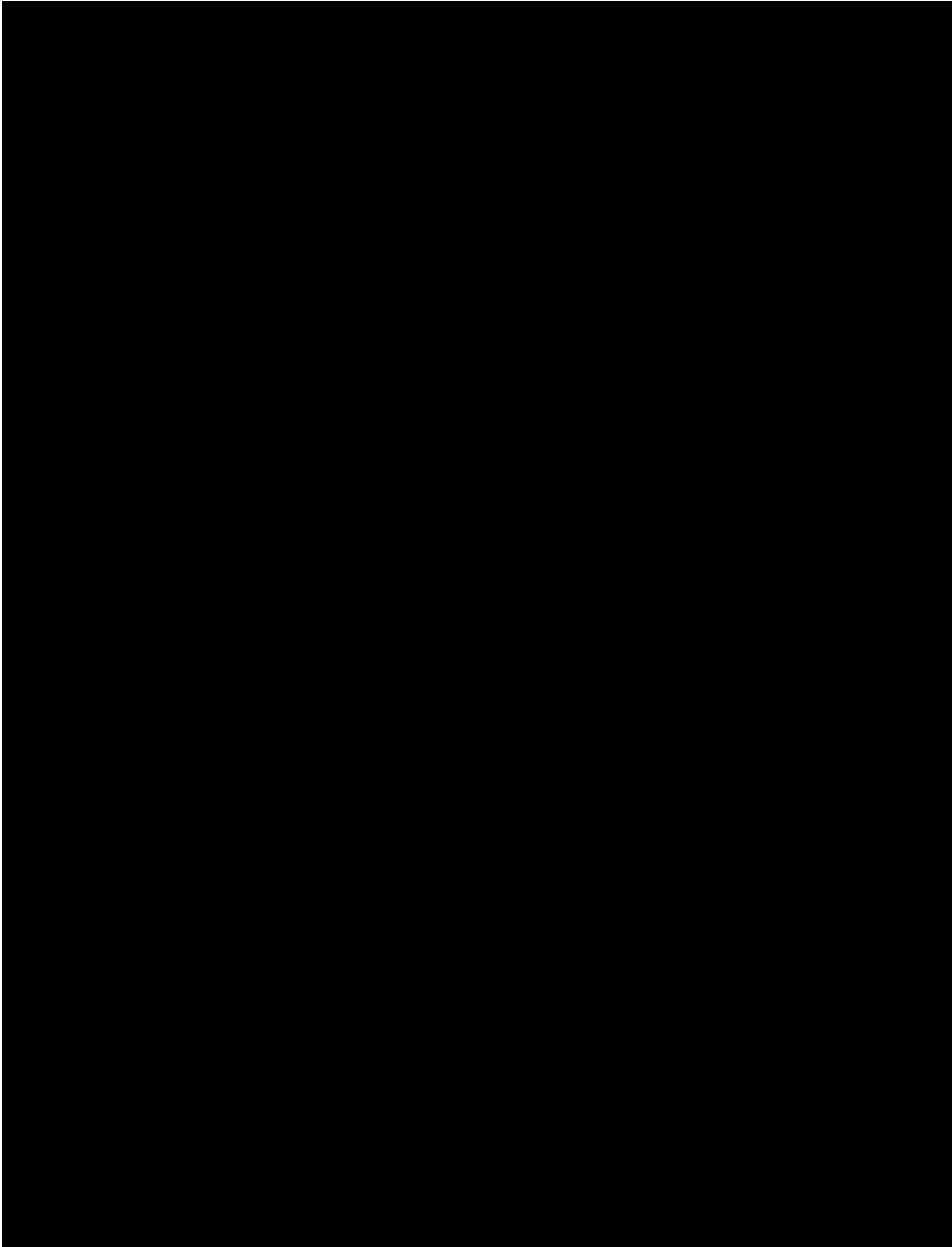

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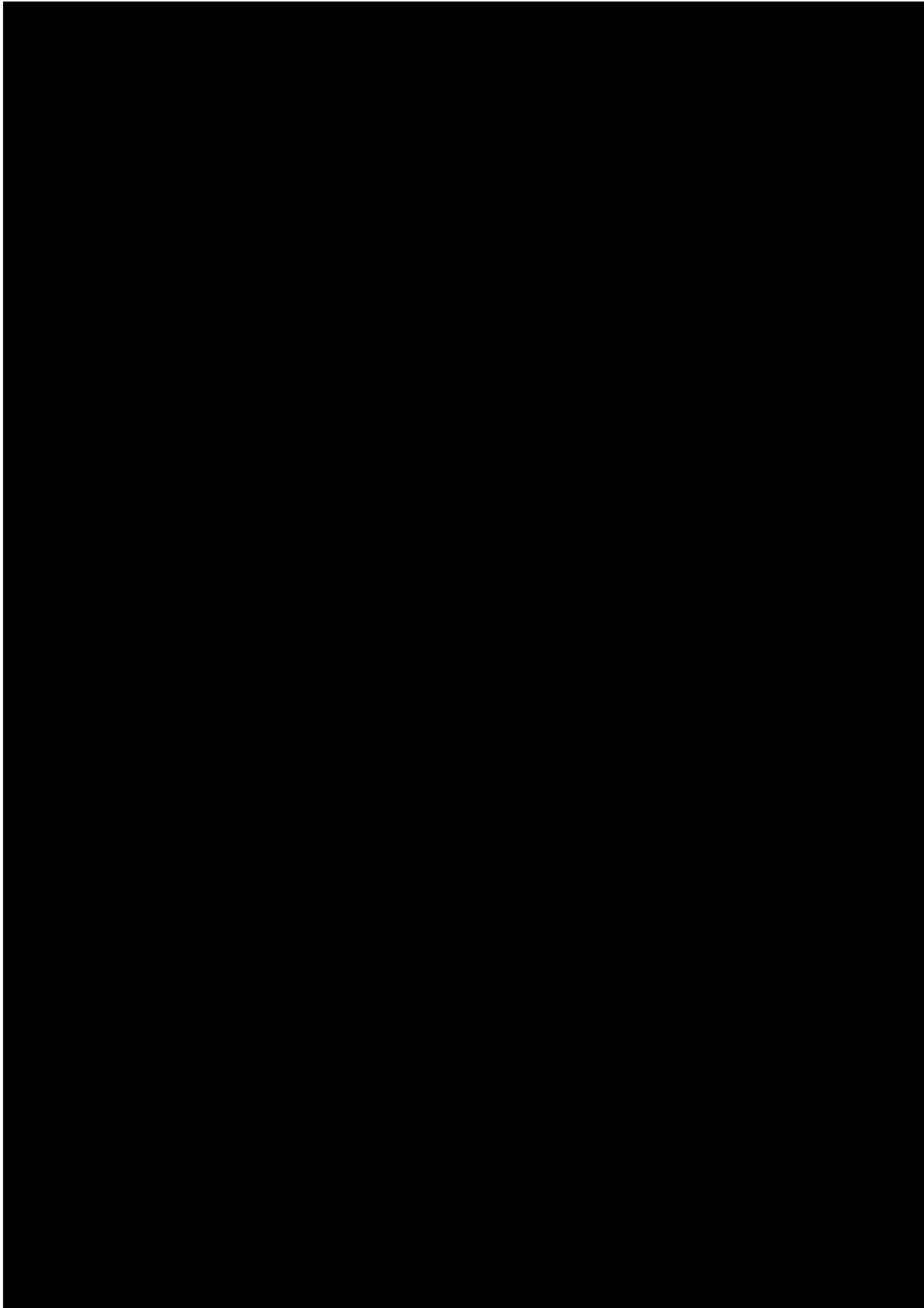

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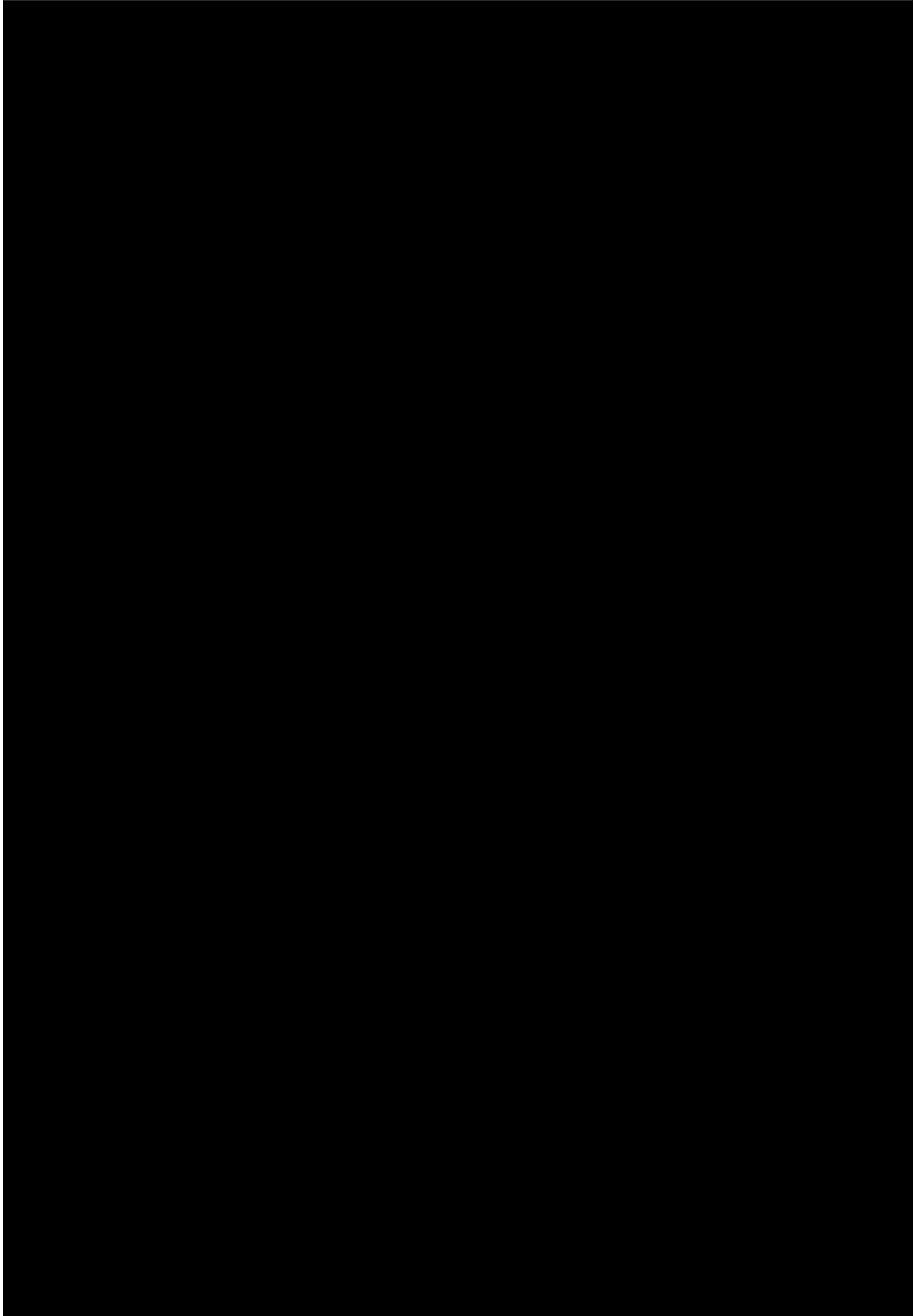

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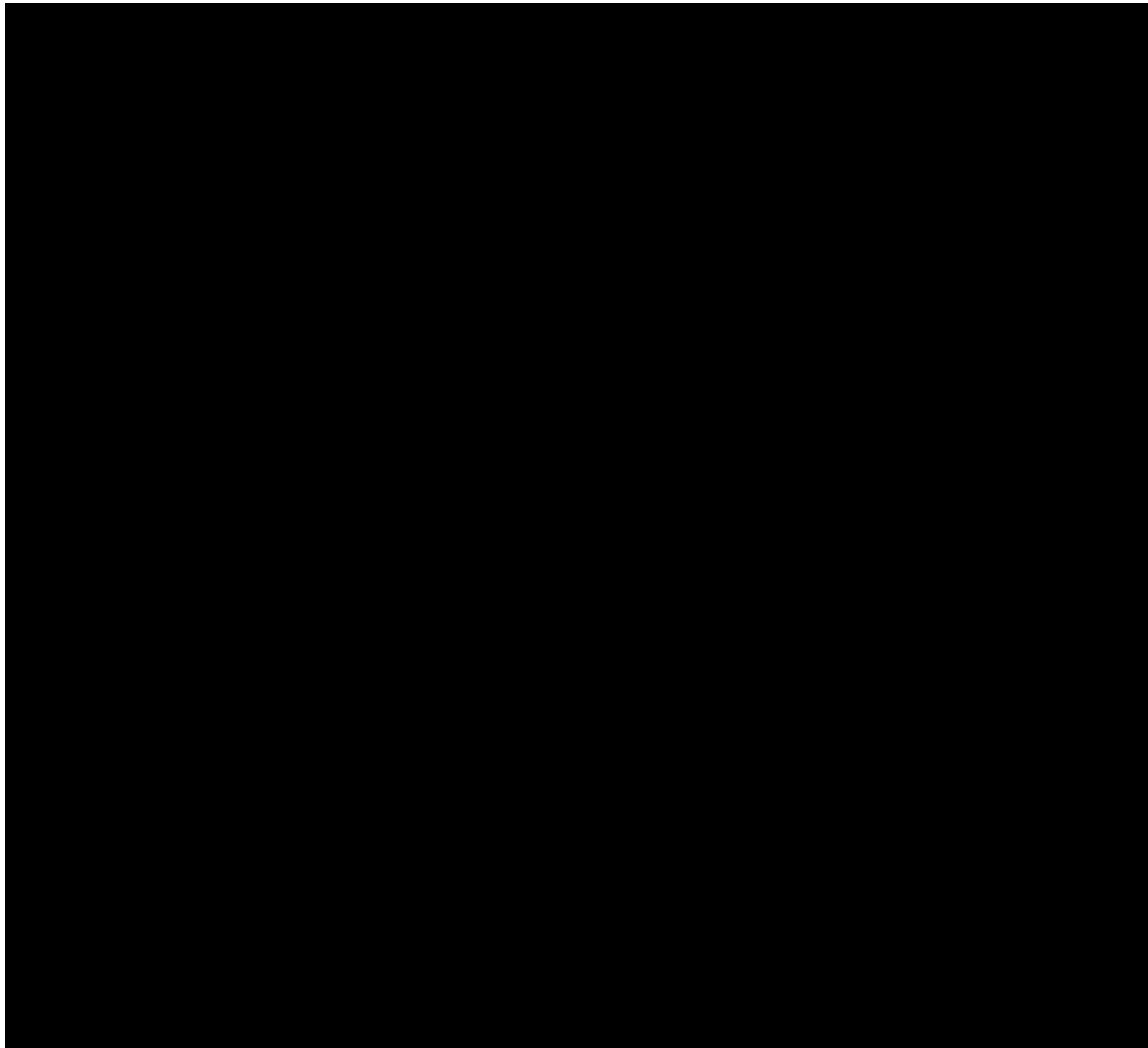

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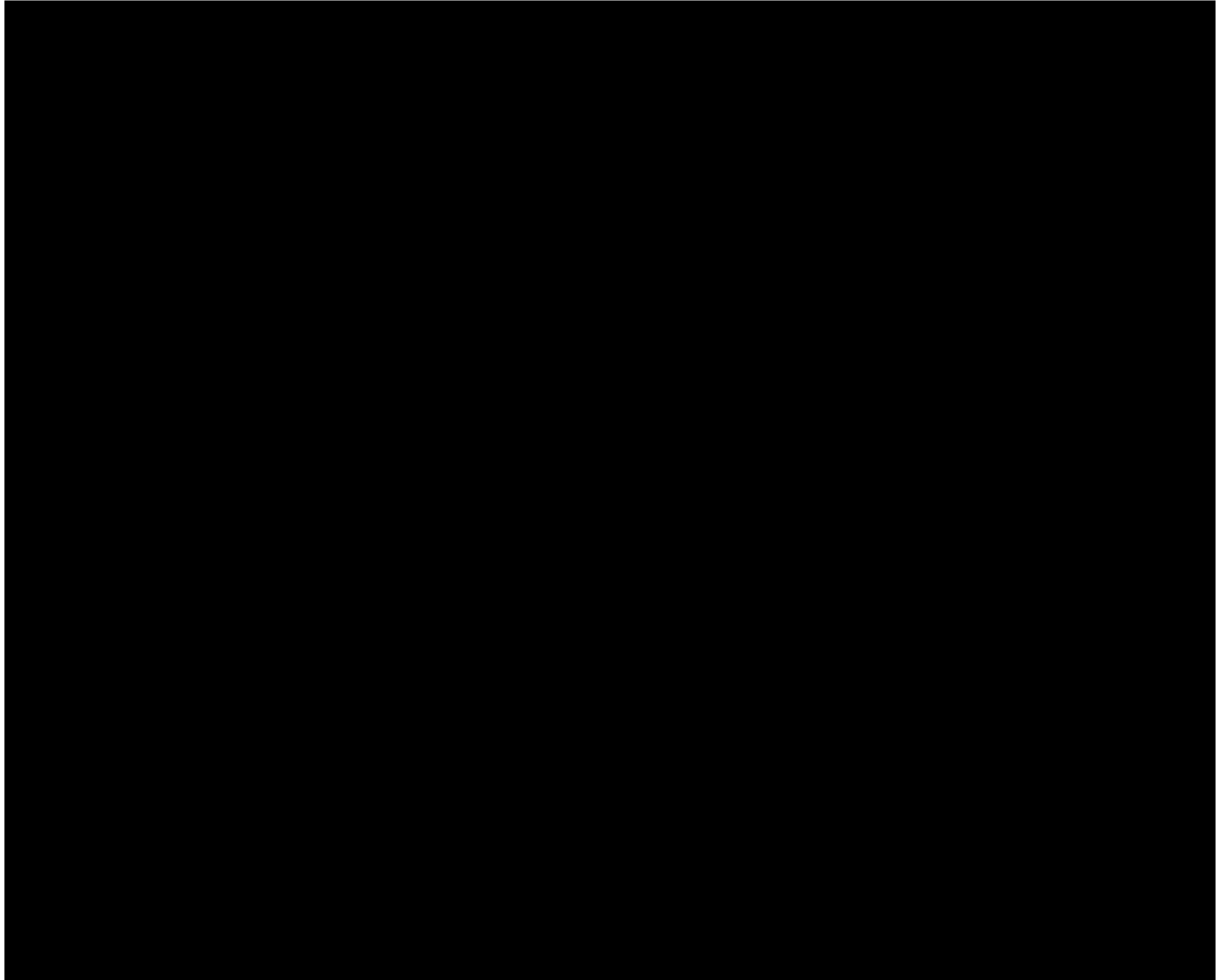

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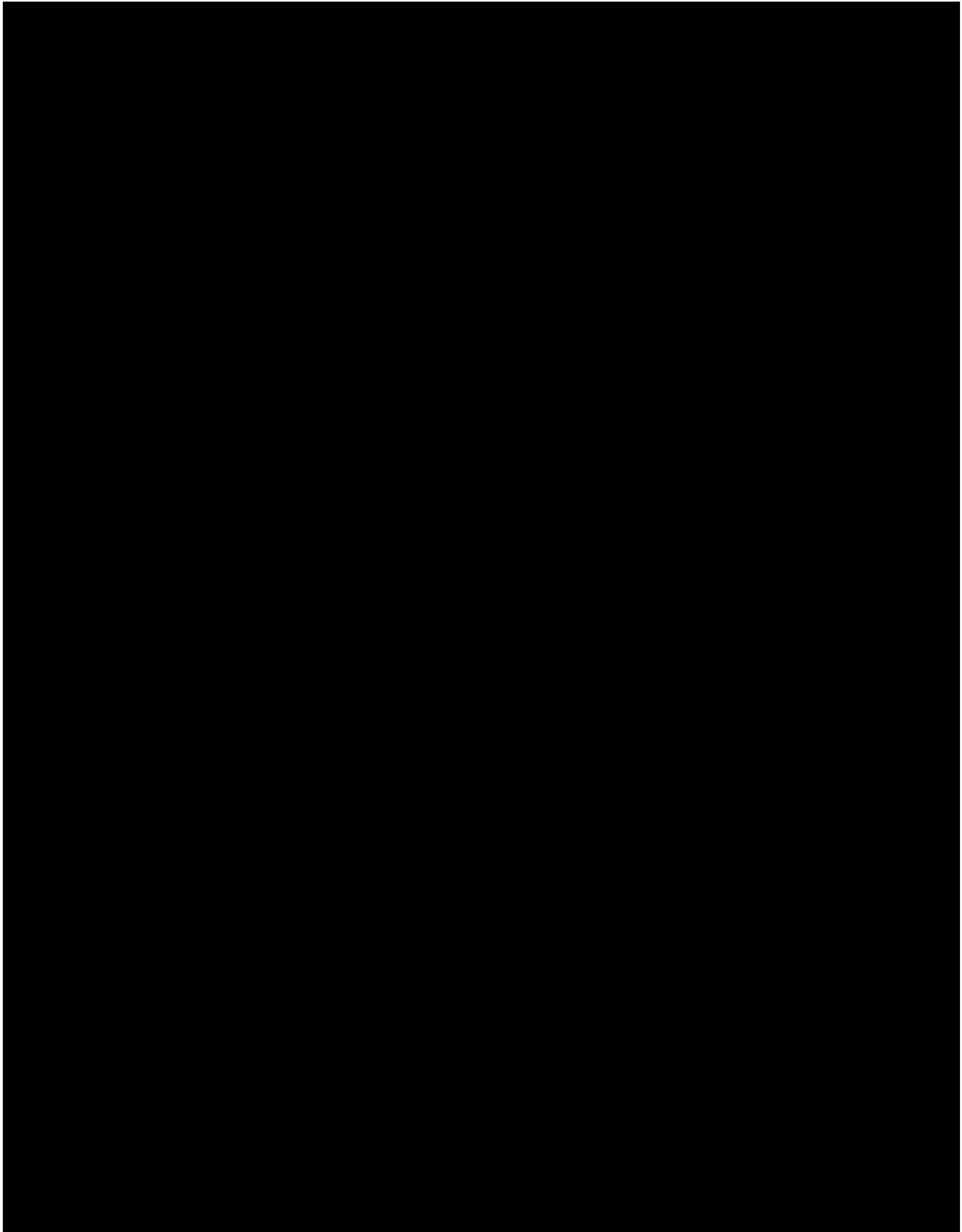

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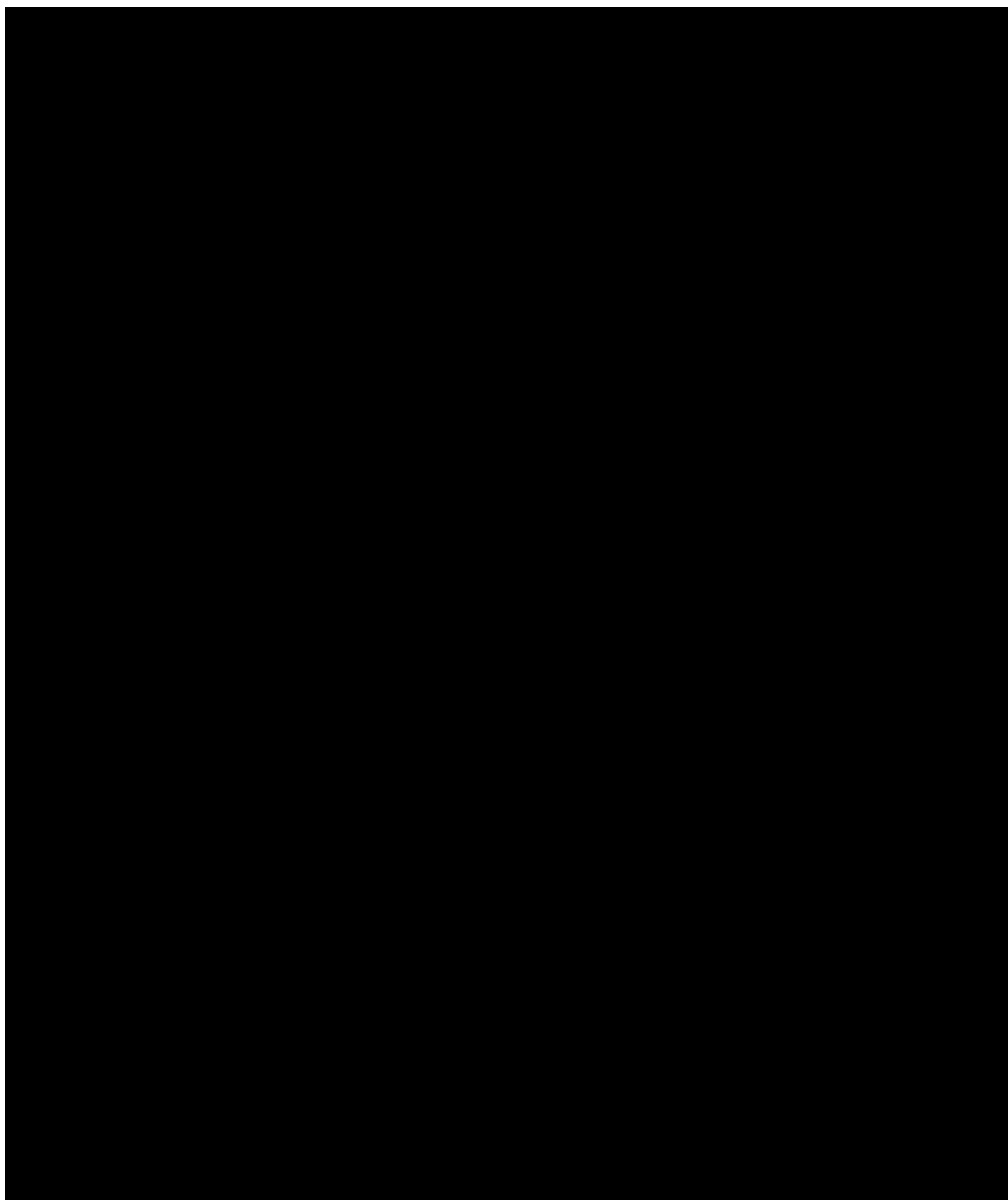

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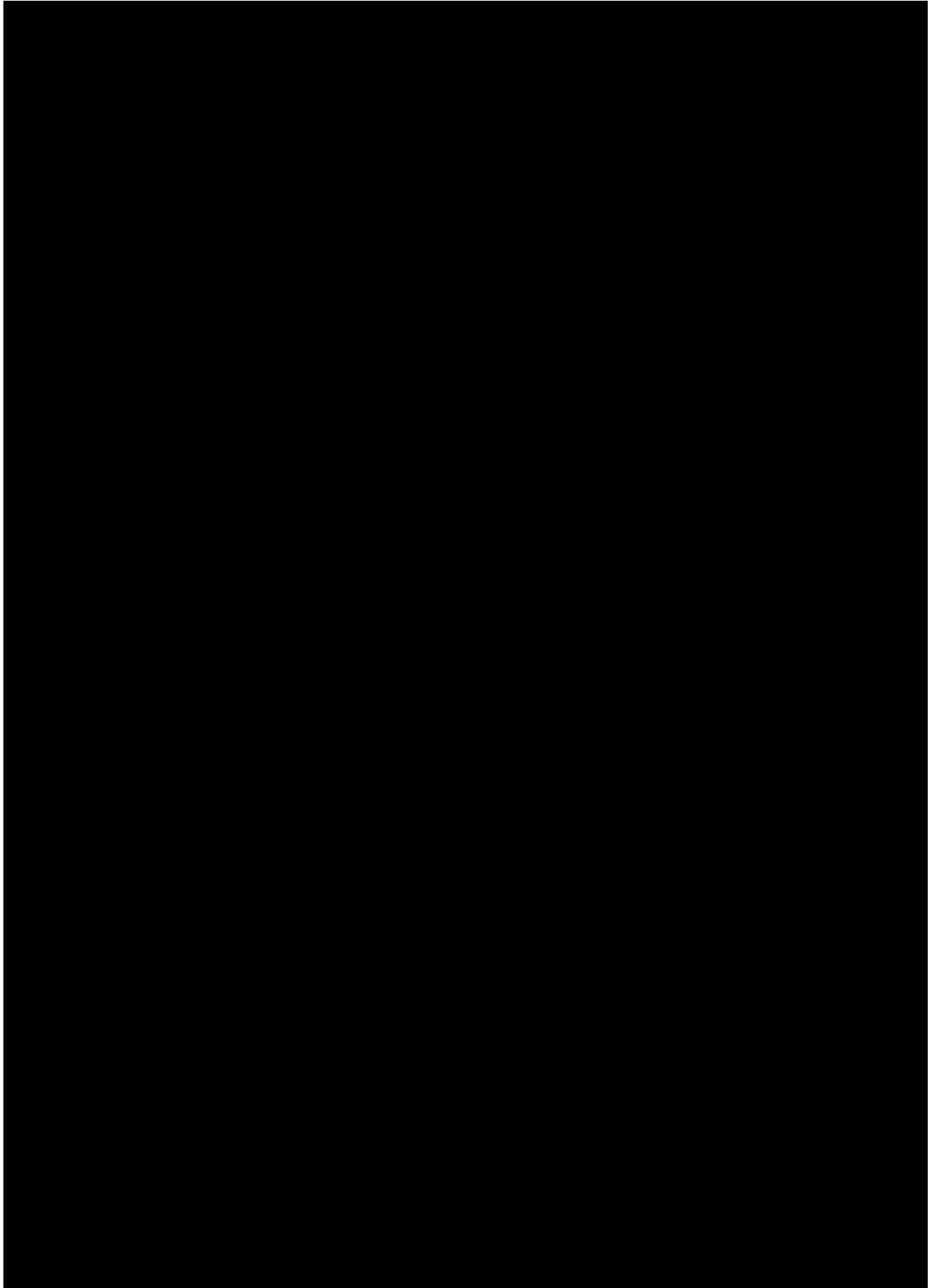

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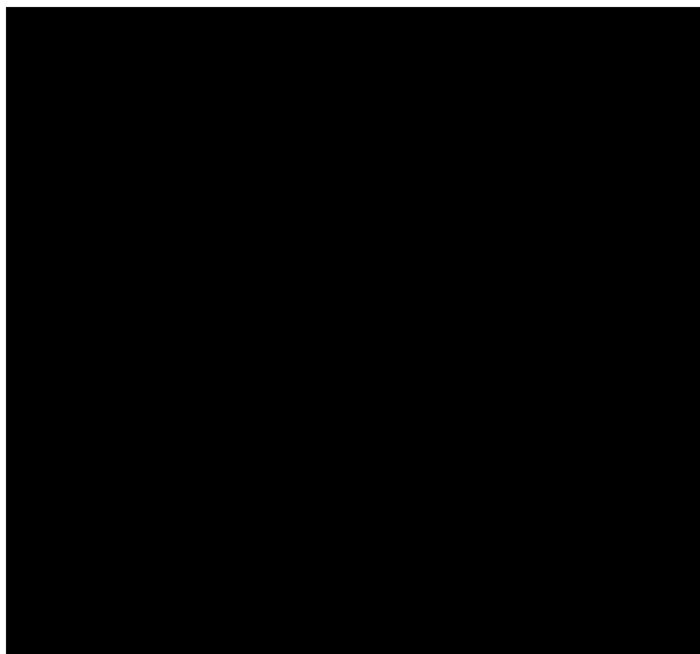


Step 2: Pre-negotiations

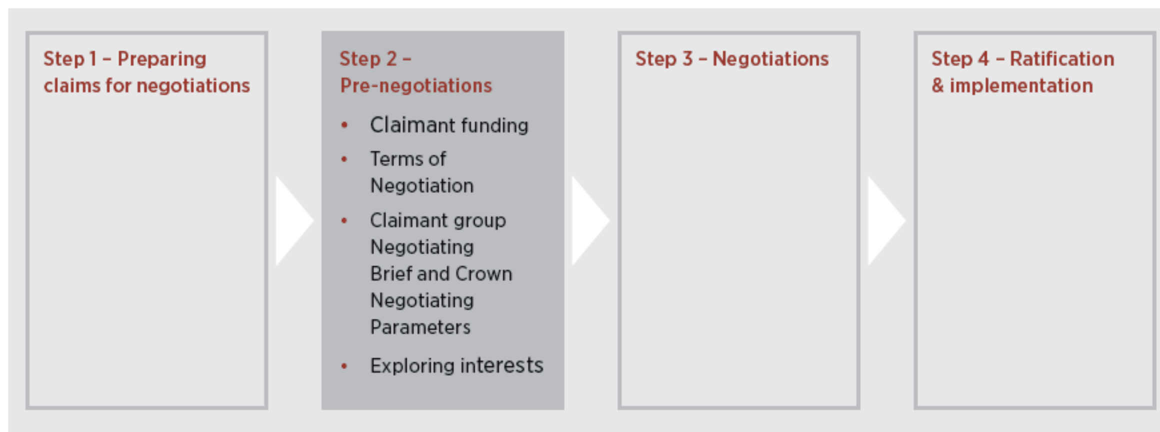


Figure 2.9: Step 2 – pre-negotiations

During pre-negotiations:

- after discussion with the mandated representatives of a claimant group, the Crown decides how much funding it will contribute to help the claimant group with the cost of negotiations
- the Crown and mandated representatives discuss and formally agree on the objectives of the negotiations and the way they will negotiate. This agreement is set out in the Terms of Negotiation, and
- the mandated representatives prepare a Negotiating Brief and the Crown sets out its Negotiating Parameters. These provide information on the interests, issues, assets and resources they will be discussing in negotiations.

As part of the development of their Negotiating Brief, claimant groups are asked to identify the interests they wish to have addressed in the settlement, including identifying key sites or food gathering places and Crown properties claimant groups may wish to include in some way in their settlement redress.

Some of the interests identified may also be shared by other claimant groups or may be subject to claims by other groups and, as a result, processes will need to be established as early as possible in the negotiations process to address overlapping claims or shared interests between claimant groups. Developing these processes may be critical in ensuring a settlement is completed in a timely manner.

Claimant funding to help with the cost of negotiations

The Crown does not necessarily provide funding for all the costs that a claimant group has to meet when negotiating its historical claims. But the Crown will **contribute** towards certain expenses for mandated groups:

- *the costs of pre-negotiations* – obtaining a mandate (payable once the Crown recognises the mandate), agreeing Terms of Negotiation, and starting formal negotiations
- *the costs of negotiations* – reaching a draft Deed of Settlement. This funding may also be used to develop a post-settlement governance entity, and
- *the costs of ratification* – carrying out a process for the claimant group to confirm a Deed of Settlement.

This funding will be *over and above* any money or other assets eventually given to the claimant group as redress for its historical Treaty claims, including any accumulated Crown forestry rentals.

THE APPROVAL PROCESS

Soon after a claimant group's mandate has been recognised, OTS makes an assessment of the amount the Crown will contribute to the claimant group's costs for negotiations. The following factors are considered:

- the complexity of the claim – for instance, does it raise new issues that will be difficult to resolve?
- are there possible overlapping claim interests that need to be taken into account?
- is the claimant group in strong agreement about the proposed negotiations, or are there specific issues within the group that will need particular attention during the negotiations process – for example, between the iwi body and hapū, or the ahi kā groups (those still in the traditional rohe) and other members of the group?
- how big is the claimant group, and how scattered are its members throughout the country?, and
- is consultation likely to require hui (or other ways of communicating with the claimant group) to be arranged outside the rohe – for example, in the main city centres?

While the Crown does not intend to interfere in the claimant group's decision on how to organise themselves for negotiations, the Crown is interested in discussing how they propose to manage the negotiations, as this will have an impact on both the funding allocated and the Crown's planning for the negotiations.

OTS must then consult the Treasury before making a final recommendation to the Minister for Treaty of Waitangi Negotiations, and the Minister of Finance, on the amount of claimant funding the Crown will provide.

During this process, OTS will keep the mandated representatives informed of how their funding approval is progressing. This process may take up to six weeks to complete, after which the mandated representatives will be advised of the Ministers' decision by letter.

ACCOUNTABILITY FOR FUNDS

Mandated representatives are told the total amount of funding approved and what the terms of payment will be. A reasonable contribution to mandate costs that the claimant group has already met (for which accounts may be requested) will be paid in a lump sum. Apart from that, payments are made in advance (for example, funding to assist in developing Terms of Negotiation is paid before the document has been developed), with the Crown paying in amounts of no more than $50,000 at a time. Each payment will be linked to progress in negotiations and reaching the most important milestones. This will provide a good indicator of progress throughout the settlement process and assist the mandated representatives with budgeting. The allocation of claimant funding to milestones will need to be discussed by the Crown and the mandated representatives in pre-negotiations meetings.

The funding will be paid directly to the mandated representatives on behalf of the claimant group. The Crown will only make payment if the mandated representatives:

- complete and provide payment requisition forms and a breakdown of expenses
- provide OTS every 12 months with independently audited financial statements for the funds they have received, and
- provide, if OTS asks for them, copies of invoices for expenses incurred in the negotiation process.

The Crown needs this information to make sure that the funding has been spent on activities that will help reach a settlement, and to comply with obligations under the Public Finance Act 1989. These requirements do not replace any existing reporting or accountability obligations the claimant group may have (for example, as a trust, company or incorporated society). OTS will also provide audit guidelines to ensure claimant groups are fully aware of how they can comply with these requirements.

Mandated representatives will also need to be able to account for the use of the funding to their wider claimant group, in order to assure the group that they are managing the claim properly.

It is also preferable that:

- claimant groups are advised by their mandated representatives of the amount provided and how it is intended to be used
- there is a legal entity in place to receive the funding, such as a trust
- internal processes and policies are in place for the management of the claimant funding, and
- all internal payments are authorised through appropriate processes so that, for example, individual mandated representatives should not approve their own payments.

OTS will be able to provide information on the costs a claimant group is likely to incur, including the costs of specialist advice needed to assist mandated representatives complete their task of negotiating a settlement.

TAX

Claimant groups need to take into account that all funding provided by OTS to assist in the negotiations process is inclusive of GST, if any. Claimant groups are urged to seek independent advice as early as possible on their liability for tax on this funding.

SAVINGS

Once settlement is reached, any approved claimant funds that have not been spent will be paid to the claimant group's post-settlement governance entity, as well as the redress package they negotiate.

SHORTFALLS OR UNEXPECTED COSTS

If claimant groups have costs over and above the amount of approved funding, the Crown may, in exceptional circumstances, consider providing extra funds to cover them. But if the extra amount is approved, it is likely to be payment of a 'cash advance' on the final settlement. In other words, it will be deducted from the claimant group's eventual redress package, once settlement is reached. Such payments will be provided only if there is good progress in negotiations and settlement is close. Alternatively, the claimant group may wish to seek additional funding from other sources.

Terms of Negotiation – setting the ground rules and objectives for negotiations

Following recognition of the Deed of Mandate, the Crown and mandated representatives need to discuss how they will run the negotiations. This involves agreeing on 'ground rules' and objectives for the formal talks between the Crown and mandated representatives. These are called the Terms of Negotiation (or Terms) and are written into a non-binding agreement between the parties. The agreement is not binding because the parties at this stage have only agreed to negotiate. They should be free to 'walk away' from negotiations at any time if they choose. However, it is expected that the parties will keep to the Terms while in negotiations. Signing Terms of Negotiation is therefore a significant milestone towards settlement and is often the first agreement claimant groups have signed with the Crown since the Treaty of Waitangi.

KEY REQUIREMENTS OF TERMS OF NEGOTIATION

Each claimant group negotiates the wording of their Terms. However, parts of the Terms also set out the Crown's objectives and basic approach to Treaty settlements. Negotiations can only proceed if the claimant group accepts that the Crown also has objectives both generally, in relation to the Treaty settlement process, and in relation to specific settlements.

From the Crown's point of view, the Terms need to clearly define the claimant group who will benefit from the settlement. The definition of a claimant group is important because a key Crown objective of a successful settlement is that it be comprehensive. This means that a settlement accepted by the claimant group settles all the historical claims of a claimant group. Historical claims are defined as all the claims of a claimant group that result from the actions or omissions of the Crown prior to 21 September 1992. This covers all relevant claims registered with the Waitangi Tribunal and any other claims that the claimant group might have regarding the actions or omissions of the Crown prior to 21 September 1992. It includes claims relating to the Treaty, legislation or common law (including customary law and aboriginal title).

Other Crown objectives set out in the Terms are that the settlement to be negotiated:

- is intended to remove the sense of grievance of the claimant group
- will be fair and durable, and
- provides the foundation for an improved relationship between the Crown and the claimant group based on the Treaty of Waitangi and its principles.

The Terms provide that, after reaching settlement of all historical claims of a claimant group:

- neither the courts nor the Waitangi Tribunal, nor any other body, will be able to consider the issues covered by the settlement (including the validity or adequacy of the settlement), and
- memorials on the titles of properties within the claim area not subject to claims by other groups will be lifted.

These provisions are essential if the settlement is to be final.

However, a comprehensive settlement will still allow a claimant group or a member of a claimant group to pursue claims against the Crown for acts or omissions after 21 September 1992, including claims based on the continued existence of aboriginal title or customary rights. The Crown also retains the right to dispute such claims or the existence of such title or rights. For more detail on the claims to be covered by a settlement see page 43.

The Terms also highlight that negotiations can only continue if:

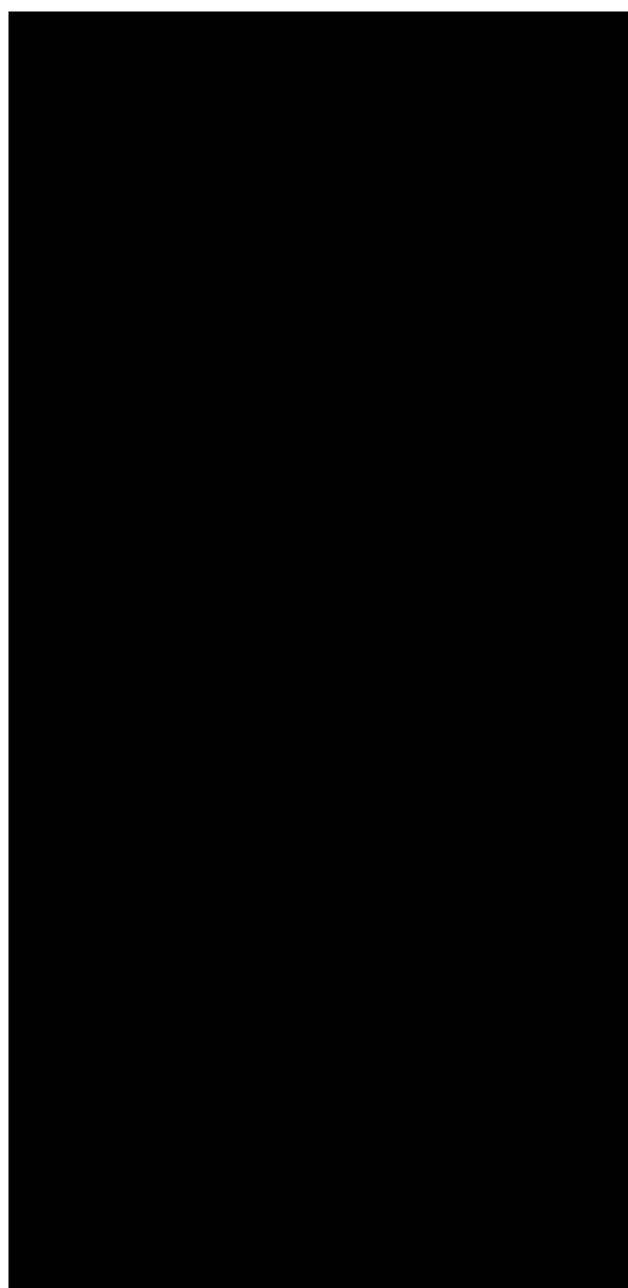
- the mandated representatives fulfil any special conditions required by the Crown's recognition of their mandate and provide regular reports on that mandate.

Other matters covered by the Terms are:

- negotiations will be conducted in good faith
- negotiations are conducted in private and remain confidential, and media statements will only be made when the parties agree
- negotiations are 'without prejudice' (that is, there is no admission of liability. Neither party is bound until the Deed of Settlement is signed and they can go back to legal proceedings if negotiations break down), and
- any Deed of Settlement remains conditional until the claimant group ratifies it and Parliament passes any necessary settlement legislation.

The Terms can also include:

- reference to breaches of the Treaty that the Crown has already conceded, and/or
- the aspirations the claimant group may have for the settlement.



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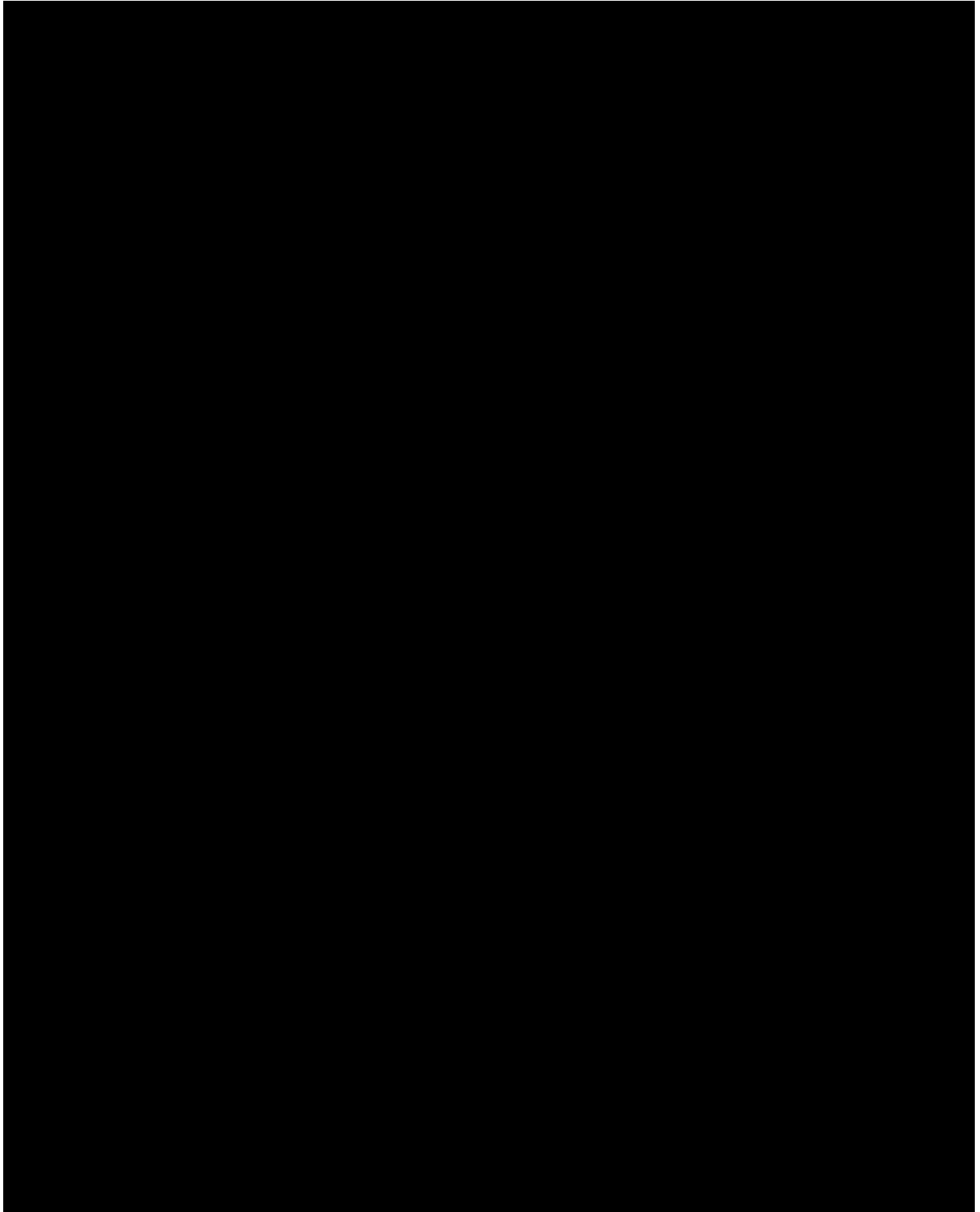

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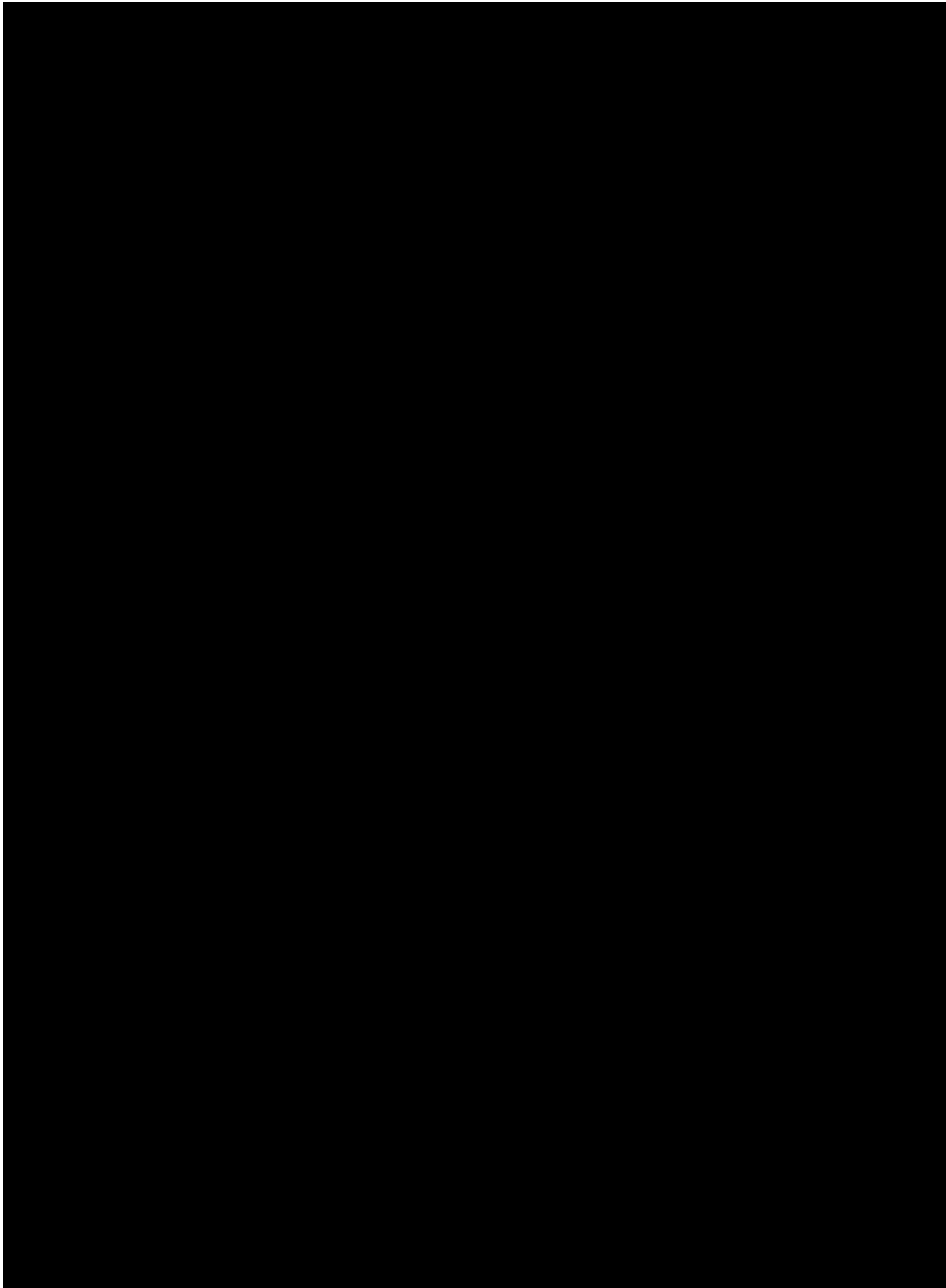

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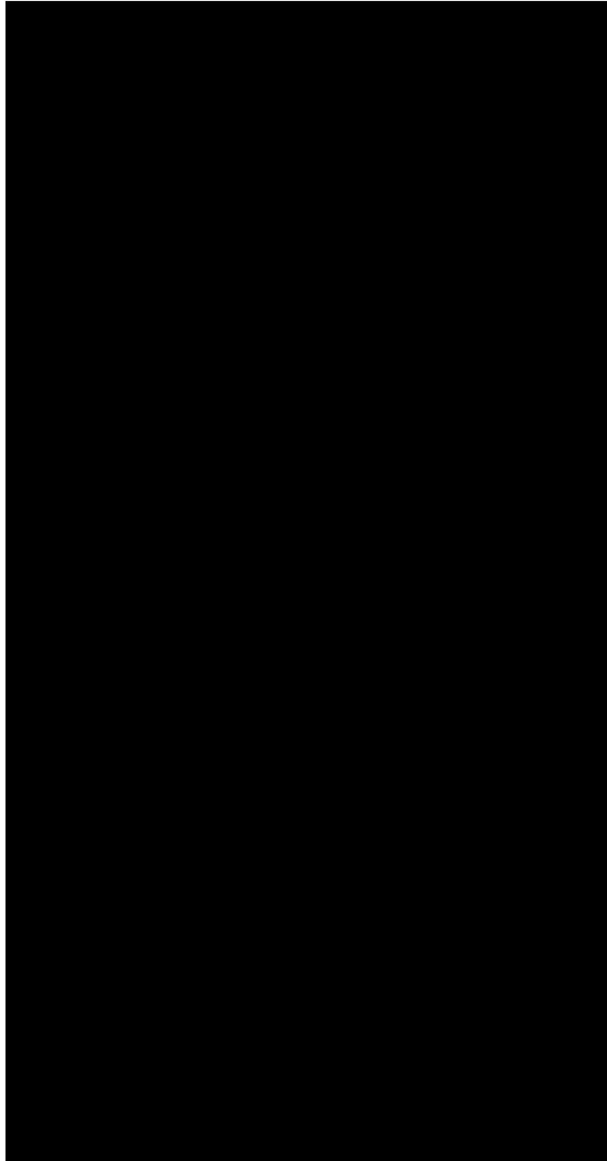

Choosing and establishing a governance entity to manage settlement assets

It is very important to think about the post-settlement governance entity and begin work on developing that entity at an early stage in the settlement process. The governance entity represents the claimant group and holds and manages the settlement redress on their behalf. Determining the type and structure of that entity is, therefore, a very important decision for claimant group members. The process for developing the governance entity should involve the whole claimant group and they will need time to consider and contribute to its development.

The Crown cannot transfer the settlement redress to the claimant group until this entity has been developed and ratified by the members of the claimant group. For this reason, the Crown requires that the governance entity be ratified by a claimant group and established as a legal entity by the time the settlement legislation enacting the settlement package is introduced in Parliament. The introduction of settlement legislation normally occurs within six to twelve months of a Deed of Settlement being signed. Delays in establishing and ratifying a governance entity will result in delays in a claimant group receiving its settlement package.

Claimant groups should seek professional advice on their choice of a governance entity to ensure that it will meet their needs and purposes following a settlement. At first glance there is a wide variety of possible legal entities for claimant groups to choose from, but the experience of claimant groups who have passed through the settlement process is that, in practice, the choice is limited (for more information on governance entities see pages 67–72). It will also assist claimant groups and avoid possible delays if their mandated representatives discuss with OTS how they intend to establish a governance entity and the types of governance entity they are considering, at an early stage in the settlement process.

Whichever entity is chosen that entity must provide for accountable and transparent processes of governance. This means that the work of elected representatives is visible and that they are accountable to their wider claimant group membership.

Step 3: Negotiations

Figure 2.10: Step 3 – negotiations

During the negotiations step, the Crown and the mandated representatives put forward their proposals for settling the claim and try to reach an agreement. If there is broad agreement, the discussions then concentrate on the details of those proposals. Usually the Crown and the mandated representatives exchange letters outlining an Agreement in Principle to signal their agreement on the monetary value of the settlement (what is known as the 'settlement quantum'), and the scope and nature of other redress to be provided. When all the details of the redress have been agreed, these are set out in a draft Deed of Settlement for approval by Cabinet and for ratification by the claimant group (see Step 4, page 64).

In this section we look more closely at:

- negotiating structures and processes
- who takes part in negotiations and how they actually work
- how claims of hapū and whānau can be addressed in comprehensive negotiations, and
- the role that third parties, such as local authorities, can have in negotiations.

Negotiating structures and processes

Who are the people involved on each side of the negotiating table and how do they work together? On each side, the actual negotiators report to and are accountable to the people or institutions who give them authority to negotiate.

THE CROWN

For most negotiations, Cabinet will entrust this responsibility to the Minister for Treaty of Waitangi Negotiations and other relevant Ministers. The Crown negotiating team, which is made up of officials, then negotiates on the Minister's behalf. As outlined earlier, any redress outside established policy parameters requires the specific approval of Cabinet or Ministers. Cabinet must also approve the redress in the draft Deed of Settlement before it can be initialled by the Crown and the mandated representatives and put to claimant group members for ratification.

CROWN NEGOTIATING TEAM

OTS is responsible for co-ordinating the Crown negotiating team. The team will usually have three or more members and be supported by specialist advisers. Typically, the members of the team are:

- *Negotiations/Policy Manager* – an OTS manager who leads the negotiations on behalf of the Crown. She or he reports to the Director of OTS, who is accountable to the Minister for making sure the negotiations are within the limits of the established policy parameters. In some negotiations, the Crown team will be led by a Chief Crown Negotiator working on contract. She or he will work in tandem with the OTS Negotiations/Policy Manager.
- *Other Crown negotiators* – usually a senior official from the Department of Conservation and another from Treasury. The Department of Conservation is involved because many aspects of cultural redress relate to land held by the Department. Treasury participate because of the financial importance of the settlement to the Crown. Other government departments – for example, the Ministry for Primary Industries or Land Information New Zealand – are involved in negotiations as issues relating to their area of responsibility are raised. OTS co-ordinates their involvement also.
- *Specialist advisers* – depending on the size and type of the claim, the Crown negotiating team could be supported by a lawyer from the Crown Law Office, a commercial lawyer or other professional adviser (for example, on forestry valuations).

CLAIMANT GROUP NEGOTIATING TEAM

Mandated representatives represent the claimant group in negotiations. They may appoint a group of negotiators or be the negotiators themselves. Negotiating teams are accountable to mandated representatives and these representatives are accountable back to the claimant group.

- *Negotiating team* – the size and make-up of this team is a matter for the claimant group – although experience has shown that a core team of about three to five is a practical size. Whether to have a ‘Chief Negotiator’ is a matter for the claimant group.
- *Specialist advisers* – how to include specialist advisers on the negotiating team is a matter for the claimant group. Sometimes they are part of the core team. In other cases they are not on the team but provide advice on particular issues when required. OTS can provide information on the types of specialist assistance that might be required at different stages of the negotiations process.

JOINT WORKING GROUPS

Usually there are many issues to be covered in negotiations, and for larger claims, the core negotiating teams may not be able to deal with each issue in detail themselves and move quickly towards settlement. One option is to set up joint working groups on key issues to enable a number of issues to be worked on at the same time. This frees up the core negotiating teams to look at the settlement as a whole. Working groups also provide an efficient way for experts in various fields to contribute to the settlement. Whether or not working groups are used, the negotiators will usually need to work through the following issues:

- *Crown Apology* – the historical basis of the claims, those matters the Crown acknowledges as breaches of the Treaty and its principles, and the wording of the Crown’s apology.
- *Financial and commercial redress* – working out the detailed terms on which agreed commercial settlement assets might be transferred – for instance, valuation matters, terms of leasebacks, disclosure of information about the assets. For more complex settlements, smaller sub-groups might be set up to look at types of assets such as forestry.
- *Cultural redress* – considering the application of specific redress options to meet claimants’ interests in wāhi tapu, resource management and access to traditional food and resources, and ongoing relationships with the Crown.

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When the parties have agreed in principle on the settlement redress, the claimant group will receive a letter from the Minister for Treaty of Waitangi Negotiations outlining an Agreement in Principle, to which the claimant group will then formally respond.

Crown and Te Uri o Hau working group

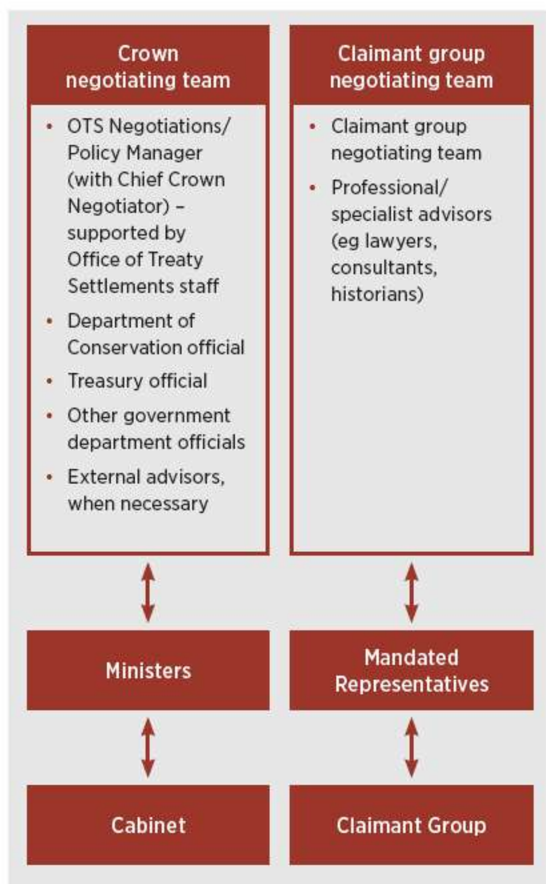

Figure 2.11: Crown and claimant negotiating teams – accountability

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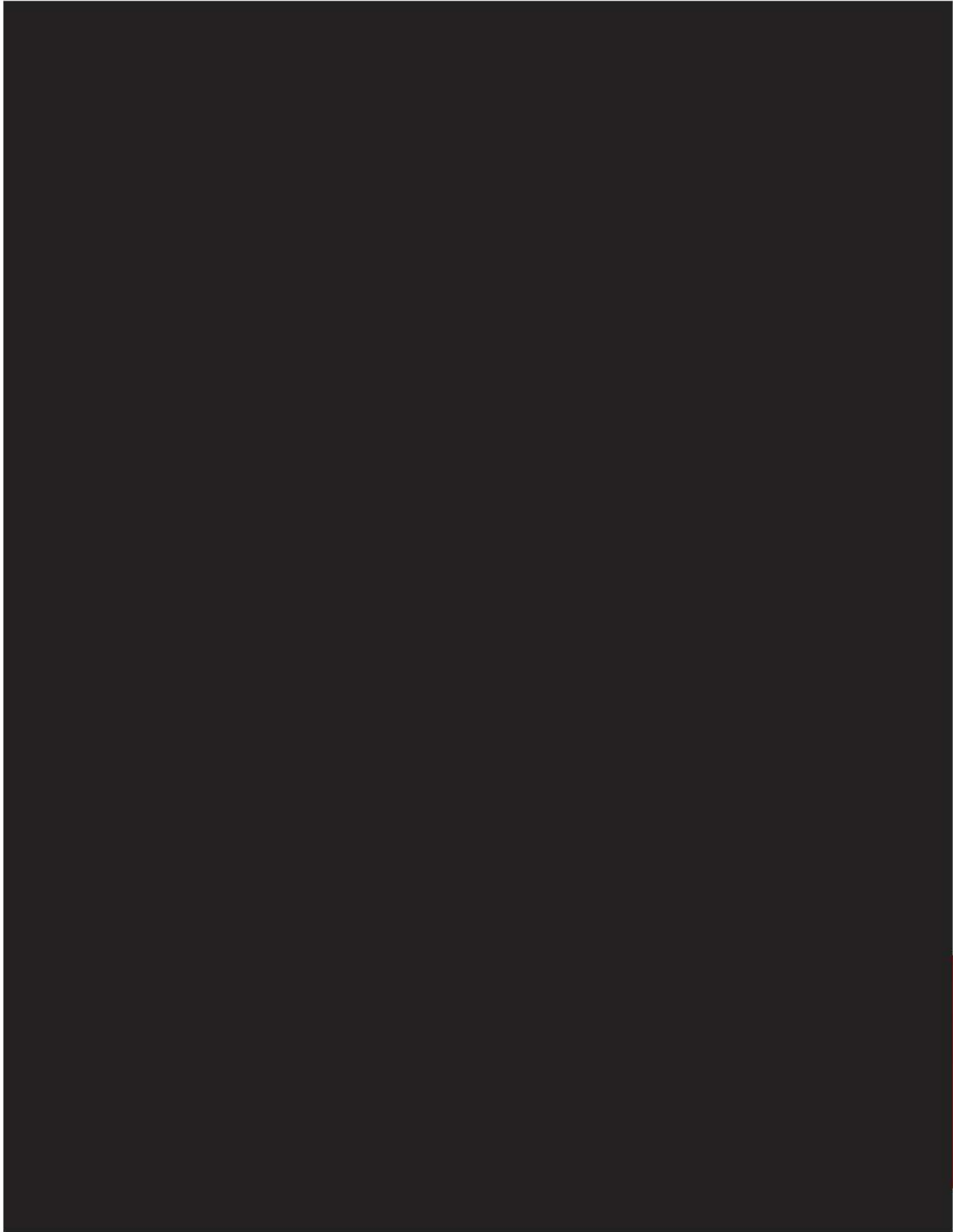

Deed of Settlement

A Deed of Settlement is the comprehensive and final agreement reached between the Crown and a claimant group. A Deed of Settlement sets out in detail the redress that the Crown will give to the claimant group in order to settle their claims. The redress may include the Crown's acknowledgements and apology, payment of cash, the transfer of lands within the claim area, and mechanisms for recognising other important interests that the claimants might have. It is essential that the Deed include:

- mutual acknowledgements about what is being settled – all historical claims (claims regarding actions or omissions of the Crown prior to 21 September 1992) of the claimant group
- a statement by the claimant group that the settlement is accepted as fair, final and comprehensive, and
- an acknowledgement that once the claims are settled, the jurisdiction of the courts and the Waitangi Tribunal over the claims is removed, any memorials on former SOE properties are removed and any landbank arrangements in relation to the claimant group are wound up.

The Deed can also include:

- the background to the negotiations, including a history of the claims, any previous investigations, hearings before the Waitangi Tribunal (if there have been any), and any relevant court decisions
- an outline of the negotiations and agreements leading to the current settlement, including an Agreement in Principle or any other undertakings entered into between the Crown and the claimant group
- the parties' intentions regarding the ongoing Treaty relationship between the Crown and the claimant group, and
- a statement that the settlement of all historical claims of that claimant group does not affect that claimant group's right to pursue claims against the Crown for acts or omissions after 21 September 1992, including any claims based on aboriginal or customary rights, and that the Crown also retains the right to dispute such claims.

Cabinet must approve the content of a Deed of Settlement before it can be initialled by mandated representatives prior to ratification by the wider claimant group. Usually, legislation is then required for the Deed to become unconditional. Prior to the introduction of legislation the claimant group will have ratified and established a governance entity to hold and manage the settlement assets. For some small claims, settlement legislation is not required and the Deed will state that it is a binding agreement on signing by the Crown and claimant group representatives.

In summary, the process from Agreement in Principle to final Deed of Settlement usually works like this:

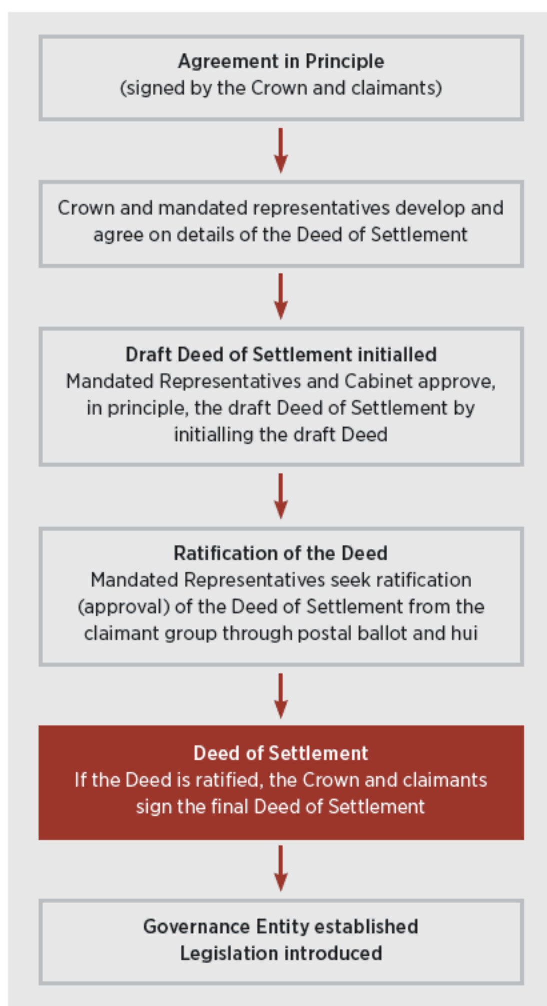

Figure 2.12: the process from Agreement in Principle to Deed of Settlement

Under step 4, the guide explains how the ratification process works and goes on to look at implementing the Deed of Settlement. Before doing so, the way in which the parts of a claimant group can receive specific redress in a comprehensive settlement is set out. This is followed by a discussion of the role of third parties in negotiations.

Hapū or whānau interests

As noted earlier, the Crown believes there are major benefits to both claimant groups and the Crown in having comprehensive negotiations with large natural groupings. This means that the various items of redress are not individually linked back to specific claims or grievances, but that the redress in total settles all the historical claims of the claimant group. It is then up to the claimant group, within its governance entity, to decide how to manage and distribute the benefits, taking into account the interests of hapū or whānau. This is usually a practical and realistic approach, given that the Crown does not provide full compensation for grievances, and changes in land ownership and use usually make it impossible to match grievance and redress on a site-by-site basis. The result is that smaller claims will usually be merged with a claim by a large natural grouping (see page 39 for more detail).

However, the Crown recognises that in some cases this comprehensive approach needs to take into account smaller, individual claims which can be addressed within the comprehensive settlement. This will only be considered where the grievances are very specific.

The Crown and mandated representatives need to discuss and agree on whether and how many claims of the claimant group should be given separate recognition and redress within the settlement. Generally, specific redress options for individual hapū or whānau should form only a small proportion of any overall redress package. This ensures that most of the benefits of settlement are available to all members of the claimant group.

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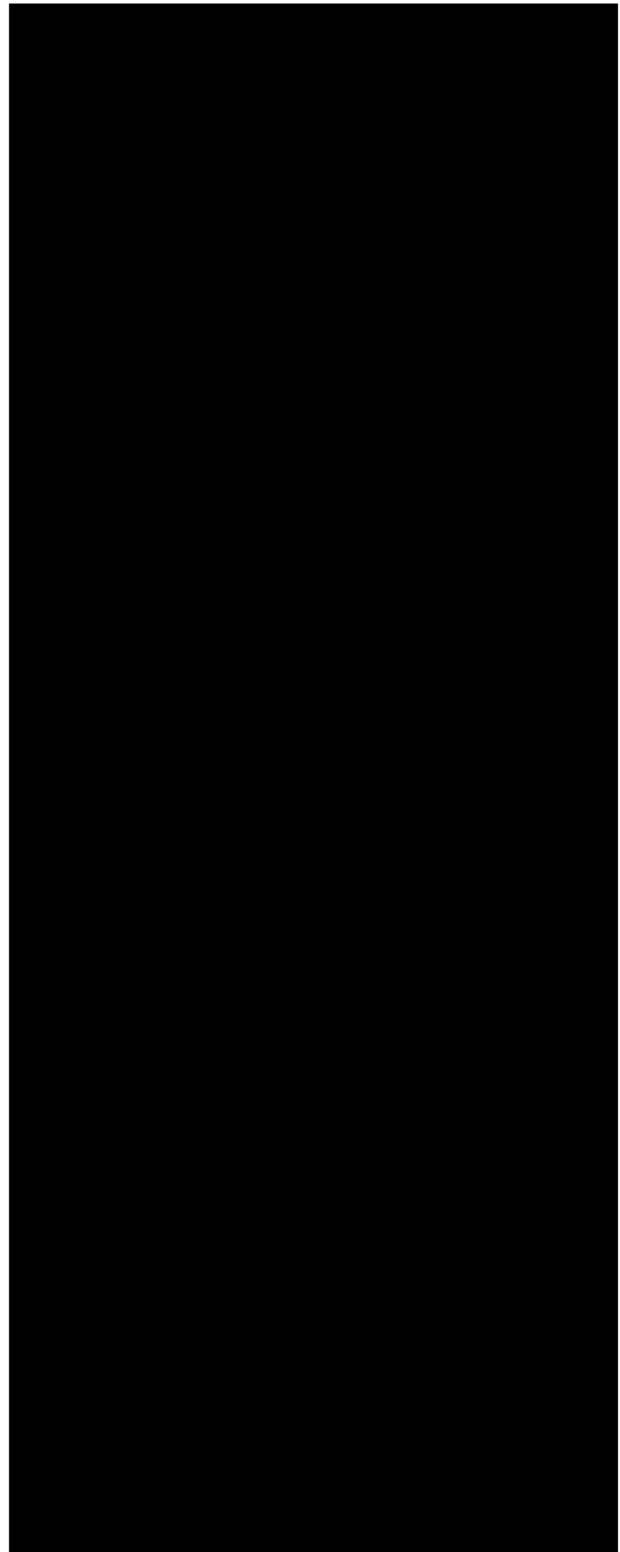


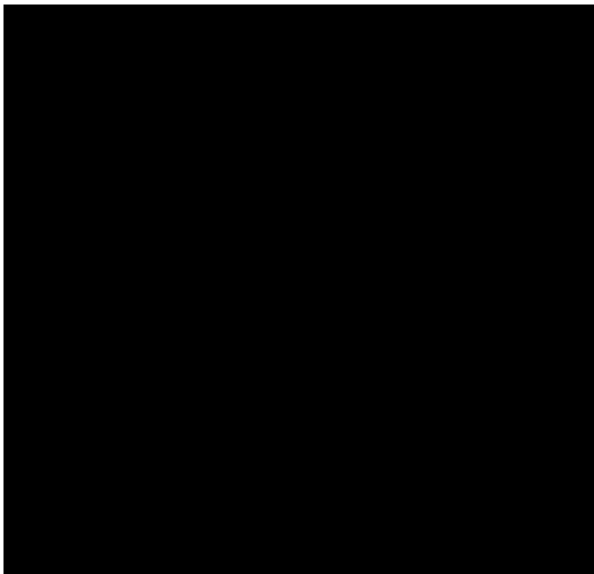
EXAMPLE – HAPŪ INTERESTS IN THE NGATI RUANUI DEED OF SETTLEMENT

The following examples show how particular hapū interests were met in the Ngati Ruanui settlement.

During the negotiations between the Crown and Ngati Ruanui, the Ngati Ruanui mandated representatives sought redress involving the Turuturu Mokai pā site. This site was particularly significant to one Ngati Ruanui hapū, Ngati Tupaia, as it was the site of an important battle they had fought during the Taranaki Wars. The mandated representatives sought the return of the site for Ngati Tupaia.

The Crown (and the South Taranaki District Council, who owned or administered parts of the site) agreed to transfer the site to the Ngati Ruanui governance entity, subject to on-going public access over part of the site. Following its transfer to the Ngati Ruanui governance entity, it is intended that the site will be transferred to Ngati Tupaia, once an appropriate entity to receive the site on behalf of Ngati Tupaia has been established.

Other settlements where separate provision for hapū or whānau interests have been agreed include the Ngāti Tūrangitukua settlement (1998) and Ngāi Tahu settlement (1997).



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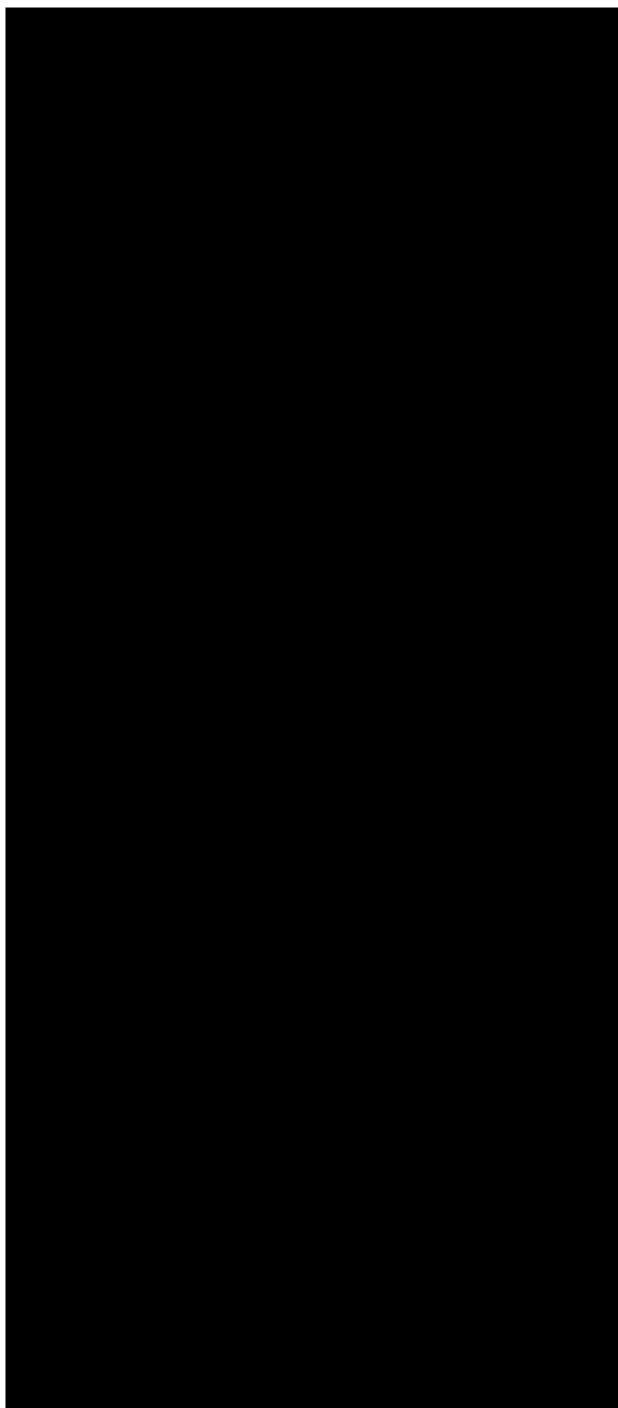

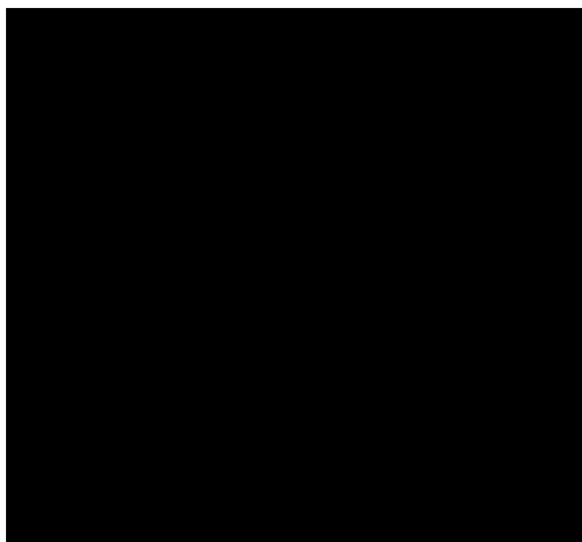

Step 4: Ratification and implementation

Figure 2.13: Step 4 – ratification and implementation

The last step of the negotiations process involves getting final approval for the settlement, and transferring the agreed redress to the claimant group. In particular this involves:

- ratification of the Deed of Settlement
- ratifying and establishing a governance entity for holding and managing settlement assets
- settlement legislation, and
- implementation.

Ratification

The Deed of Settlement initialled between the Crown and the mandated representatives must be clearly approved by the wider claimant group before it becomes binding. This approval process is called ratification.

The key part of the ratification process is a postal ballot in which all members of the claimant group over the age of 18 are eligible to vote. Because many members of the claimant group will live outside their rohe, a postal ballot is an essential and not an optional part of the ratification process.

For this reason, it is essential that a claimant group has developed a register of its members by this stage in the settlement process. The register is a critical tool for providing members with the opportunity to take part in the ratification process through hui, receiving material explaining the settlement offer, and the postal ballot.

To gain approval, the claimant representatives must communicate with their hapū or iwi members about the details of the proposed settlement. This communication will build on earlier consultation between mandated representatives and the wider claimant group. Communication must also be open enough to make sure that all members of the claimant group, including those who live outside their rohe, can take a full part in the discussion that is part of this final decision-making stage. The mandated representatives usually publish a written summary of the Deed of Settlement, which is distributed as widely as possible. This publication complements the communication meetings organised by the mandated representatives. Because of the importance of the ratification process, it is essential to allow claimant group members enough time to consider the proposed Deed of Settlement. Experience has shown that communication with claimant group members during the ratification process is considerably enhanced if they have had regular opportunities throughout the negotiations process to discuss progress with mandated representatives.

MAKING SURE THE RATIFICATION PROCESS IS ADEQUATE

Like mandating, the ratification process is for the claimant group to work through, but the Crown will not sign a settlement if the process used was inadequate, or if the claimant group does not clearly support the proposed settlement. OTS therefore keeps in close contact with the mandated representatives to help them ensure that the ratification process will be acceptable to the Crown. The basic principle is that all adult members of the claimant group must have the opportunity to have a say. The most effective way of doing this is through a postal ballot.

FUNDING FOR RATIFICATION

The Crown makes funding available to the mandated representatives to cover ratification processes. Ratification involves significant costs to a claimant group. Therefore, claimant groups need to plan for this when assessing their funding needs at the start of negotiations.

HAPŪ CONSULTATION, HUI AND POSTAL BALLOTS

To help make this final decision on ratification, claimant groups may use a combination of postal voting, communicating directly through hui held inside and outside their rohe, and written material sent directly to members of the claimant group. In designing a ratification process, claimant groups will obviously need to consider the views of hapū and the tikanga of those affected. They also need to make sure that as many members of the claimant group as possible may take part in the decision. Postal ballots in particular are very important for gathering views if claimant group members are scattered throughout the country – as many claimant groups are today. For this reason, it is important that the claimant group register is as up to date as possible and everyone on the register has been verified as a member of the claimant group. Whakapapa is the basis for verification.

Postal ballots should be conducted by an independent returning officer. Voting forms should ask eligible voters whether they vote to approve or disapprove of the Crown settlement offer, and, if they approve, authorise that the Deed of Settlement be signed by a named individual or individuals on behalf of the claimant group. Often, but not always, those authorised to sign are the mandated representatives.

The Crown will also send officials from Te Puni Kōkiri as independent observers to hui where the Crown offer is discussed to ensure a fair and open process is followed.

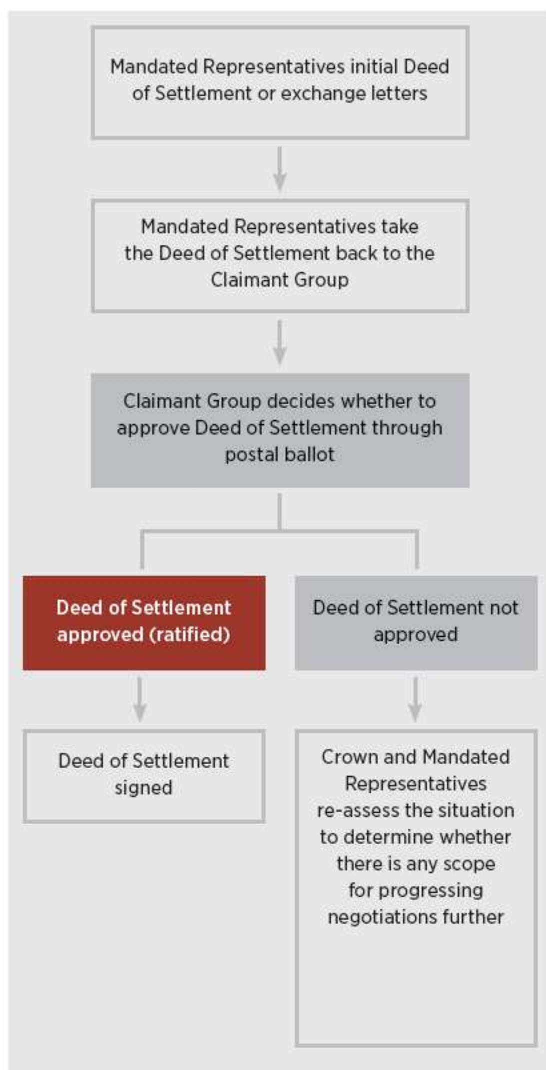

Figure 2.14: ratification of Deed of Settlement by the claimant group

GETTING INFORMATION TO ALL MEMBERS OF THE CLAIMANT GROUP

To make sure that all claimant group members understand what it means to ratify the settlement, claimant groups usually produce a detailed summary of the Deed of Settlement that can, for example, be sent out with postal ballot forms. Planning for writing and publishing the document should be built into the mandated representatives' work programme and included in budgets.

CLAIMANT GROUP'S DECISION

The mandated representatives then let the Minister for Treaty of Waitangi Negotiations know the results of the ratification process. If the Deed of Settlement has been ratified and the Crown considers that there is enough support for the Deed, the Crown and the person or persons authorised by the claimant community through the ratification process sign it. As noted on page 60, settlement legislation is then usually required for the Deed to become unconditional. A governance entity approved by the members of the claimant group must be established before the legislative process can begin. We explain the legislative process on pages 72–74.

SIGNING THE DEED OF SETTLEMENT

This is a very important ceremony for both the claimant group and the Crown, since it is both the end of negotiations and the start of the new relationship set out in the Deed. Most claimant groups prefer to host the ceremony at one of their marae so that as many people as possible can take part. The Crown is usually represented by the Minister for Treaty of Waitangi Negotiations, as well as other Ministers and officials involved in the negotiations. The claimant group may also wish to invite MPs, members of other iwi and local dignitaries.

Signing of the Deed of Settlement for Mātaatua Wharenui, Wairaka marae, 1996

Governance entities – Crown principles

By this time, mandated representatives should have developed their ideas about the type of governance entity that will best serve the needs of their claimant group after the settlement is completed. The term governance entity simply refers to the legal entity the claimant group will use to represent them and to hold and manage the settlement redress to be transferred by the Crown under the Deed of Settlement. This includes not just the commercial and financial assets to be transferred, but also the cultural redress. The latter includes Statutory Acknowledgements, Deeds of Recognition, camping entitlements, Protocols with government departments and agencies and other cultural redress.

It is a matter for the claimant group to choose a governance entity that will serve their needs and reflect their tikanga. However, to fulfil its responsibilities to taxpayers and all members of a claimant group, the Crown has developed a set of principles against which proposed governance entities are assessed. If the proposed governance entity is consistent with these principles – which are normally included in the Deed of Settlement – the Crown is able to transfer settlement assets to the claimant group, once any settlement legislation is enacted.

The Crown's principles for post-settlement governance entities are that the entity has a structure that:

- adequately represents all members of the claimant group
- has transparent decision-making and dispute resolution procedures
- is fully accountable to the whole claimant group
- ensures the beneficiaries of the settlement and the beneficiaries of the governance entity are identical when the settlement assets are transferred from the Crown to the claimant group, and
- has been ratified by the claimant community.

Ensuring that the governance entity is consistent with these principles means that the Crown is meeting its responsibility to all New Zealanders to ensure that settlement assets are managed by and for those who will rightfully benefit from the settlement. These concerns are, of course, equally important to members of the claimant group who will want to see good management of their settlement assets.

The Crown cannot transfer the settlement redress to a claimant group until they have a governance entity that has been considered and ratified by the members of a claimant group. For this reason, the Crown requires claimant groups to have ratified and established their governance entity by the time the legislation implementing a settlement is introduced to Parliament.

Choosing a governance entity

A governance entity is the body or entity that a claimant group chooses to represent members following a settlement. The governance entity also holds settlement assets and makes decisions on how these assets will be managed and how any benefits derived from these assets are used for the benefit of claimant group members.

Based on the experience of claimant groups, it is unlikely that an existing tribal governance entity will meet the needs and purposes of claimant groups following a settlement. Existing entities may not be legal entities, and may also lack transparency or not be representative of the entire claimant group.

Although on the surface the range of options for claimant groups seeking to develop a new governance entity is quite large, in practice the number of options that meet the needs and purposes of such groups following the conclusion of a settlement is relatively small. OTS urges claimant groups to seek appropriate professional advice when considering their options for a governance entity.

Increasing numbers of claimant groups have found that private trusts, with subsidiary trusts or companies to manage the settlement assets, meet their post-settlement objectives. The Crown is also comfortable about transferring settlement redress to such entities.

Two existing types of governance entity—a Māori Trust Board established under the Māori Trust Boards Act of 1955 and a governance entity established through private legislation – require some further comment at this point.

Māori Trust Boards are, by law, ultimately accountable to the Minister of Māori Development and not to the members of a claimant community. The Crown does not consider accountability to the Minister rather than to the members of a claimant group appropriate for the administration of a settlement. Beneficiaries of a Māori Trust Board also do not have a beneficial interest or rights to the use or benefit from property in such Trust Boards. Because of these factors, claimant groups may find Trust Boards too restrictive and lacking in accountability. Although a review of the Act governing these boards is under way, it is unlikely the results of this review will be implemented in time to accommodate claimant groups who are already in negotiations with the Crown or are considering entering the negotiations process.

Governance entities established through private legislation also tend to have more drawbacks than advantages. Firstly, an individual Member of Parliament must agree to sponsor the proposed law. Secondly, Parliament must be convinced that there is no other way of achieving the aims of the legislation within existing law. And, as with all legislation, it will be subject to public notification and consultation.

Such a Bill may also face extensive and public examination by a Select Committee during its passage through Parliament and that Select Committee may recommend changes to the legislation to which the claimant group is opposed. And, if subsequent amendments to the legislation establishing the governance entity are needed because of changes of circumstances, the claimant group will have to convince Parliament to make those amendments.

Private Bills also proceed on a timetable that is not within the control of either a claimant group or the government. As a result, the governance entity may not be established by the time a settlement has been concluded. Settlement legislation is not introduced to Parliament until the governance entity is established so it is possible that seeking to establish a governance entity through private legislation could lead to a delay in the transfer of the settlement assets to the claimant group.

A Private Bill can also be costly. Claimant groups must pay for any legislation to be drafted, devote a considerable amount of their own time to managing the process and meet the cost of any professional advisers used during the passage of a Private Act.

Any governance entity established under a Private Act must still comply with the principles set out at the beginning of this section. The Crown, as with any other post-settlement governance entity, does not provide tax advantages to governance entities established in this way.

Finally, claimant groups may find that matters they think are better discussed only among their members become subject to public debate through the legislative process. Internal hapū or iwi issues can thus enter the wider public arena.

Once again, choosing from the available options for a post-settlement governance entity is a matter for claimant groups and their members. OTS urges claimant groups to discuss this matter and seek professional advice as early as possible in the settlement process. The Crown cannot transfer settlement assets to a claimant group until their governance entity has been ratified and established.

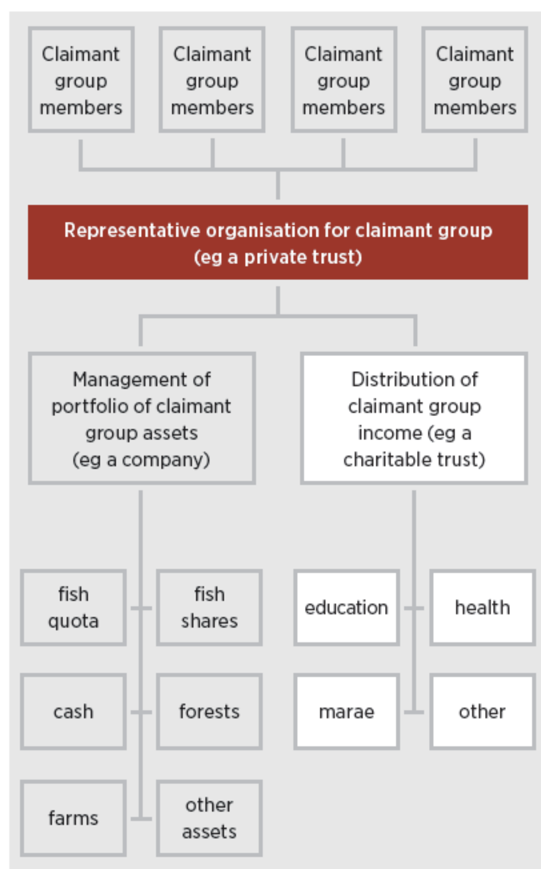

Figure 2.15: example of a governance entity for distribution of settlement assets (based on a model developed by Te Ohu Kai Moana)

Reviewing and ratifiying a governance entity

While a claimant group's mandated representatives will have the leading role in exploring and developing options for a governance entity, they must also give all members of the claimant group the chance to review and ratify their proposed entity.

The ratification process for a post-settlement governance entity may be carried out at the same time as the members of a claimant group consider whether or not to ratify a Deed of Settlement, or it can occur as a separate process. Whichever is the case, the proposed post-settlement governance entity must be ratified by the members of the claimant group and established as a legal entity before the Crown can introduce settlement legislation and transfer the redress provided in the settlement to the claimant group. The Crown must also have had the opportunity to assess the proposed governance entity against its principles before the wider claimant group membership is asked to ratify that entity. The Crown's review of the entity against the principles will take in any subsidiaries of that entity as well.

The ratification process for a governance entity will be similar to that used to ratify a Deed of Settlement and the Crown's review of the ratification process will also take a similar form.

DOES THE CROWN REQUIRE SETTLEMENT ASSETS TO BE USED FOR PARTICULAR PURPOSES?

No. Settlement assets belong to the claimant group and it is for members, through the governance entity, to decide how best to use their redress, provided that this is for the benefit of the claimant group. Of course, the Crown hopes that the use and distribution of settlements should help improve the social and economic status of Māori, but the way to achieve this is for each claimant group to decide.

The Crown has developed a set of questions that members of claimant groups can use during the ratification process to assess whether they will support the proposed post-settlement governance entity. These questions must be answered in any communication material used by mandated representatives of a claimant group during the review and ratification process for a post-settlement governance entity. The Crown also uses the answers to these questions to assess whether the proposed entity meets the principles of representation, accountability and transparency.

Twenty questions on governance

INFORMATION REQUIRED IN DISCLOSURE MATERIAL FOR GOVERNANCE ENTITIES

In the twenty questions:

- a **beneficiary** is a person who is entitled to benefits from a Deed of Settlement of historical claims between Maori claimants and the Crown
- **benefits** can take a range of forms, and it is up to the governance entity to make the decisions on how those benefits will be distributed. For example, scholarships, kaumatua flats, marae maintenance and health initiatives for members are various types of benefit. There could also be 'intangible' benefits such as the increased vigour and strength of a claimant group because of an increase in the number of members who speak te reo and are integrated into their own tikanga
- the **governance entity** is the representative, accountable and transparent body that receives and manages the settlement on behalf of the claimant group. It will:
  - represent the claimants in regard to the settlement
  - make decisions on how to manage any redress received in the settlement package (cash, properties and other redress), and
  - make decisions on how benefits (if any) are passed to the beneficiaries of the settlement
- a **member** is a beneficiary who is registered with the governance entity in relation to the Deed of Settlement, and
- a **representative** is a person who is elected to the governance entity.

GENERAL

1. WHAT IS THE PROPOSED GOVERNANCE ENTITY AND ITS STRUCTURE?
   - Briefly describe the governance entity, any bodies accountable to it (such as asset management and benefit distribution bodies), and the relationship between the governance entity and those bodies.

2. HOW WAS THE PROPOSED GOVERNANCE ENTITY DEVELOPED?
   - What opportunities were there for beneficiaries of the settlement to provide input in the development of the proposals?, and
   - To what extent were matters of tikanga and kawa considered in the development of the governance entity?

3. WHAT IS THE RELATIONSHIP BETWEEN THE PROPOSED NEW GOVERNANCE ENTITY AND EXISTING ENTITIES (IF ANY) THAT CURRENTLY REPRESENT THE CLAIMANT COMMUNITY?
   - What happens to the existing entities once the new entity is established?

REPRESENTATION

4. HOW CAN BENEFICIARIES OF THE SETTLEMENT PARTICIPATE IN THE DEVELOPMENT OF THE GOVERNANCE ENTITY?
   - Who are the beneficiaries of the settlement?
   - Are all beneficiaries entitled to register as members?
   - What are the benefits of registration?
   - Are there any registration requirements?
   - How will eligibility for registration be verified?
   - Who makes decisions on registration and how are those decisions made?, and
   - Can those decisions be appealed, and if so, how?

5. HOW DO MEMBERS HAVE A SAY IN WHO THE REPRESENTATIVES ON THE GOVERNANCE ENTITY WILL BE?
   - How many representatives will there be on the governance entity?
   - Who can be a representative?
   - Are they chosen on iwi, marae, hapū, whānau or other group basis?
   - How will they be chosen?
   - How do members know when an election is due?, and
   - How do members exercise their vote?

6. HOW OFTEN AND HOW WILL THE REPRESENTATIVES CHANGE?
   - What is the term of office for a representative?, and
   - Under what circumstances (if any) can a representative be removed?

ACCOUNTABILITY

7. WHAT ARE THE PURPOSES, PRINCIPLES, ACTIVITIES, POWERS AND DUTIES OF THE GOVERNANCE ENTITY AND ANY BODIES ACCOUNTABLE TO IT?
   - What are the duties and obligations of the representatives?

- Do the governance entity and any bodies accountable to it have to act exclusively for the benefit of beneficiaries?, and
- Who exercises control over any bodies accountable to the governance entity?

8. WHICH DECISIONS WILL MEMBERS HAVE A SAY IN AND HOW?

- As well as having a say in who the representatives on the governance entity will be, will members have a say in any decisions made by the governance entity?
- What notice, quorum and other relevant provisions will there be relating to meetings of members?
- What voting rights do members have at hui called by the governance entity (such as the AGM)?, and
- What majority will be required to pass a resolution at a meeting of members?

9. HOW ARE DECISIONS MADE BY THE GOVERNANCE ENTITY?

- How often do the representatives meet?
- What quorum and other relevant provisions will there be relating to meetings of the governance entity?
- How are these meetings publicised?, and
- Can members attend those meetings and what rights do they have at those meetings?

10. WHO WILL MANAGE THE REDRESS RECEIVED IN THE SETTLEMENT?

- Will different bodies manage different aspects of the redress?
- Are the relationships between the representational, commercial and social functions of the governance entity clearly defined?, and
- Are there any limitations on management decisions on holding or using assets, for example, do any transactions require the consent of members?

11. WHO WILL DETERMINE WHAT BENEFITS ARE MADE AVAILABLE TO BENEFICIARIES?

- Can the function of determining benefits be delegated by the governance entity?

12. WHAT ARE THE CRITERIA FOR DETERMINING HOW BENEFITS ARE ALLOCATED AND DISTRIBUTED?

- Are these criteria set in the constitution of the governance entity or are the decisions left to the representatives?

13. HOW WILL THE PEOPLE MANAGING ASSETS AND DETERMINING BENEFITS BE ACCOUNTABLE TO BENEFICIARIES?

- Will there be regular hui or other reporting processes for the representatives to report to beneficiaries?
- What reports will beneficiaries receive?
- How will roles and responsibilities be separated to clearly define the limits of power that each office holder has?
- Are there any limitations on liability of the representatives?
- Can the representatives be directors or employees of any bodies accountable to the governance entity?, and
- What would happen if a representative had a conflict of interest in a decision or transaction of the governance entity?

14. WHAT ARE THE RULES UNDER WHICH THE GOVERNANCE ENTITY AND ANY BODIES ACCOUNTABLE TO IT OPERATE?

- How do members get access to the rules (trust deeds or constitutions) of the governance entity and any asset management and benefit distribution bodies?, and
- What legislation is particularly relevant to the rules (such as Companies Act 1993, Trustee Act 1956, Perpetuities Act 1964, Te Ture Whenua Māori Act 1993)?

15. ARE THERE ANY INTERIM GOVERNANCE ARRANGEMENTS IN THE PERIOD BETWEEN THE ESTABLISHMENT OF THE GOVERNANCE ENTITY AND THE DATE THAT THE SETTLEMENT ASSETS ARE TRANSFERRED? IF SO, WHAT ARE THEY?

- Who will represent beneficiaries of the settlement during the interim period?
- What can they do?, and
- Will there be interim elections?

16. HOW WILL THE STRUCTURE AND THE RULES OF THE GOVERNANCE ENTITY AND ANY BODIES ACCOUNTABLE TO IT BE CHANGED?

- How can the structure and the rules of the governance entity be changed?
- Are there any rules that cannot be changed?, and
- How can the relationships with any bodies accountable to the governance entity be changed?

17. WHAT ARE THE PLANNING/MONITORING/REVIEW PROCESSES FOR DECISIONS OF THE GOVERNANCE ENTITY?

18. WHAT IF MEMBERS DO NOT AGREE WITH A DECISION MADE BY THE GOVERNANCE ENTITY?

- Can members call a special meeting of the governance entity?, and
- Are there dispute resolution procedures for particular issues?

TRANSPARENCY

19. HOW OFTEN WILL ACCOUNTS BE PREPARED AND AUDITED?

- Who prepares the accounts?
- How is the auditor chosen?
- Can a representative be the auditor?, and
- Will members have access to copies of accounts?

20. WILL BENEFICIARIES RECEIVE INFORMATION ABOUT DECISIONS THAT AFFECT THEM? HOW? HOW OFTEN?

- Can they get a copy of the rules of the governance entity (see question 14)?
- Will they get Annual Reports and other regular reports?
- Can they get minutes and resolutions of meetings of the representatives?, and
- Where do they get further information?

Settlement legislation

Nearly all Deeds of Settlement require settlement legislation to be passed. This means that the settlement does not take effect until Parliament has passed an Act for this purpose. Settlement legislation is needed:

- to ensure the finality of the settlement by removing the ability of the courts and Waitangi Tribunal to re-open the historical claims or the Deed of Settlement
- to provide for statutory instruments such as Statutory Acknowledgements or Overlay Classifications to be applied
- to remove statutory memorials from land titles in the claim area, and
- to vest land in the governance entity on behalf of the claimant group if normal administrative land transfer processes would not be appropriate.

DRAFTING SETTLEMENT LEGISLATION

The Parliamentary Counsel Office drafts bills for introduction to Parliament. The mandated representatives receive copies of the draft bill, so they can be sure that it gives full effect to the Deed of Settlement. Deeds include a provision that the claimant group agrees to support the legislation once it is introduced.

PARLIAMENTARY PROCESS

Figure 2.16 shows the various stages in passing a bill.

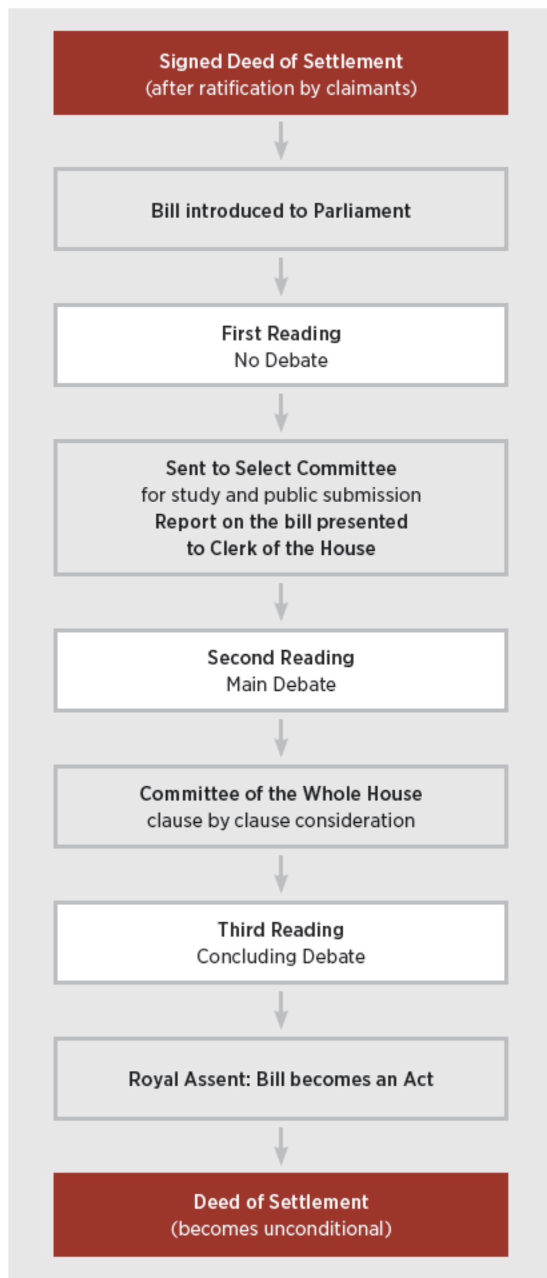

Figure 2.16: Finalising the settlement – the parliamentary process for passing legislation

SELECT COMMITTEE CONSIDERATION

Generally, legislation is referred to a select committee after its formal introduction and first reading. Parliament has several select committees, made up of Members of Parliament from different political parties. The number of MPs each party has on a select committee generally depends on that party's share of seats in Parliament as a whole, but the final make-up is decided by Parliament. Once a select committee has had a bill referred to it by Parliament, it invites the public to comment or make submissions on the bill so that the committee can take into account, and report back to Parliament, what the public and various organisations think about the bill. To do this, select committees usually advertise for submissions in the public notices column of newspapers and will often travel around the country to hear what people who made submissions have to say. Submissions are usually in writing, but a person or group may also appear before the committee to have their say and to answer any questions the committee may have of them.

The mandated representatives, and any individual member of the claimant group who may wish to, may make submissions to the select committee, using their rights as New Zealanders to participate in the democratic process.

The mandated representatives and OTS may also work together, with the committee's permission, to prepare material for reports to the committee. Claimant groups should be aware that if the settlement negotiation process has been a matter for strong debate within their group, dissenters may use the opportunity of a Select Committee hearing to seek further debate on the content of the settlement package and the process by which it was achieved.

Legislation giving effect to Treaty settlements is different from most other legislation in that it flows from an agreement already reached between the Crown and the claimant group. While Parliament may accept or reject the bill, the Select Committee can ensure that this is an informed decision through a thorough review of the bill. The purpose of such review is to ensure that the bill properly and effectively reflects the settlement, and to report to Parliament on the effect of the bill. It is not to re-negotiate the terms of the settlement by making amendments that would alter the substance of the Deed of Settlement. This reflects long-established Parliamentary practice that Parliament should not use its sovereignty (absolute power) to change legal agreements between the Crown and a third party, unless this is necessary in the national interest.

ROLE OF OTS IN THE LEGISLATIVE PROCESS

OTS is responsible for monitoring the passage of the bill through the select committee stage. This involves:

- preparing a briefing to the committee, which provides a summary and an examination of each part of the bill. The briefing is intended to assist the committee members in considering the bill
- providing further written reports to the committee if required to do so
- appearing before the committee to answer any questions the committee may wish to ask, and
- analysing the public submissions and providing a report on these to the committee.

Once this process is complete, the committee reports the bill back to Parliament. Parliament's Standing Orders require bills to be reported back within six months of referral to a Select Committee.

SECOND READING, COMMITTEE OF THE WHOLE HOUSE AND THIRD READING

After receiving the Select Committee's report, Parliament conducts a debate on the bill known as the Second Reading Debate. This debate is a general one on the aims and purposes of the bill. It then considers the bill in detail through a stage called the Committee of the Whole House. The Committee of the Whole House – which is made up of all Members of Parliament – may vote on the bill clause by clause or part by part. Amendments may also be put forward by any MP. If the Committee of the Whole House adopts the bill, it is given its third reading. The third reading is when Parliament formally votes to pass the bill. It then goes to the Governor-General for the 'Royal Assent', the signature that turns the bill into an Act of Parliament and makes it part of New Zealand law. The third reading of a settlement bill in Parliament is an historic occasion for the Crown and the claimant groups.

Special arrangements can be made through the Speaker's office to reserve seats in the public gallery for members of the claimant group, and for the singing of waiata at the end of the third reading.

OTHER STEPS TO FINALISE THE SETTLEMENT

Three other steps must be taken to finalise the settlement:

- the Waitangi Tribunal must be told that the claim or claims have been settled. This means filing a document called a 'memorandum', signed by the lawyers for both parties, with the Waitangi Tribunal. The memorandum advises the Tribunal of the terms on which the settlement has been reached and asks for the Tribunal's register to be amended to reflect this
- secondly, if court proceedings were suspended before entering into negotiations, the claimant group's counsel must provide the Crown with a document called a 'notice of discontinuance', ending the legal proceedings, and
- finally, any landbank arrangement within the area covered by the settlement comes to an end, except to the extent necessary to give effect to the Deed of Settlement.

Ngāi Tahu Third Reading

Implementation – making the settlement happen

By the time the implementation phase of a settlement begins, the claimant group will have established a governance entity to hold and manage the settlement assets. The governance entity will also have responsibility for managing the implementation of the settlement.

OTS oversees the implemetation of settlements on behalf of the Crown. OTS liaises with other government agencies involved in the settlement to ensure that all agreed deadlines for handing over settlement assets to the governance entity are met. OTS also monitors whether the Crown meets all other requirements of the settlement.

Other Crown departments and agencies have significant responsibilities during the implementation phase. Where redress involves an ongoing relationship between a department or agency and the governance entity, managing that redress is the responsibility of the department or agency concerned. In the case of a Conservation Area, for example, that is the Department of Conservation.

Among a governance entity's specific responsibilities during implementation are:

- applying for resource consents if needed, and/or
- deciding who will represent the governance entity if representation is part of the redress – for example, as a statutory adviser or member of a statutory board.

Among the Crown's key responsibilities are:

- raising title for property to be transferred
- execution of encumbrances (covenants, leases, licences) affecting settlement properties, and
- notifying other parties directly affected by settlements.

Both the Crown and mandated representatives need to develop detailed work plans for implementation, to ensure it is carried out as efficiently as possible.

Tainui's Te Kauhanganui building at Hopuhopu

Building a future

As the title to this guide suggests, settlements of historical claims are intended both to heal the past and build a future. While the cash or assets provided as settlement redress may not meet all the needs and aspirations of a claimant group, the Crown does contribute through settlements to a platform for future development. Once the initial phase of implementation outlined above is over, the future is largely in the hands of the claimant group. Their governance entity picks up the responsibility for managing and developing settlement assets. In doing so, it remains accountable to the wider claimant group through the decision-making and reporting processes approved by the claimant group.

Settlement redress

This part looks at the possible components of redress available in a negotiated settlement:

- the acknowledgements and apology made by the crown for the wrongs caused to the claimant group
- the ways in which Crown assets can be transferred to the claimant group to help meet economic or cultural interests.
- other ways in which the claimant group can be recognised – for instance, by involving it in decision-making about resources of cultural significance, and the legal mechanisms, known as Statutory Instruments, used to recognise cultural interests.

Settlement redress

So far this guide has looked at the Crown's policy framework and the negotiations process. It has also briefly mentioned some of the different types of redress available. This section looks in more detail at the options for settlement redress. This includes:

- the acknowledgements and apology made by the Crown for the wrongs caused to the claimant group
- ways in which Crown assets can be transferred to the claimant group to help meet their economic interests
- ways in which Crown assets can be transferred to the claimant group to help meet their cultural interests, and
- other ways in which claimant groups' interests can be recognised – for instance, by involvement in decision-making about resources of cultural significance.

Not all the redress options discussed will be relevant to every settlement – some settlements may involve only two or three different items of redress. New redress options, or new applications for existing options, could also be developed in future negotiations to meet different interests or circumstances. However, the existing options do offer a very wide range of redress to meet interests and values that claimant groups have so far identified as being important to them. They also have the advantage of existing Cabinet approval, and have become familiar to government departments, local authorities and others involved in settlement implementation.

Main aims of settlements

The overall aims of negotiations are to reach a settlement that:

- is intended to remove the sense of grievance
- is a fair, comprehensive, final and durable settlement of all the historical claims of the claimant group, and
- provides a foundation for a new and continuing relationship between the Crown and the claimant group, based on the principles of the Treaty of Waitangi.

How do settlements give effect to these aims? In practice, for a settlement to achieve these aims means that:

- the Crown recognises the wrongs done – it does this through the historical account, Crown acknowledgements and apology
- the Crown provides financial and commercial redress, in recognition of breaches by the Crown of the Treaty of Waitangi and its principles, which can be used to build an economic base for the claimant group, and
- the Crown provides redress recognising the claimant group's spiritual, cultural, historical or traditional associations with the natural environment, sites and areas within their area of interest – often called cultural redress.

Together these three areas of redress make up a balanced settlement package that the claimant group may accept in final settlement of their historical grievances.

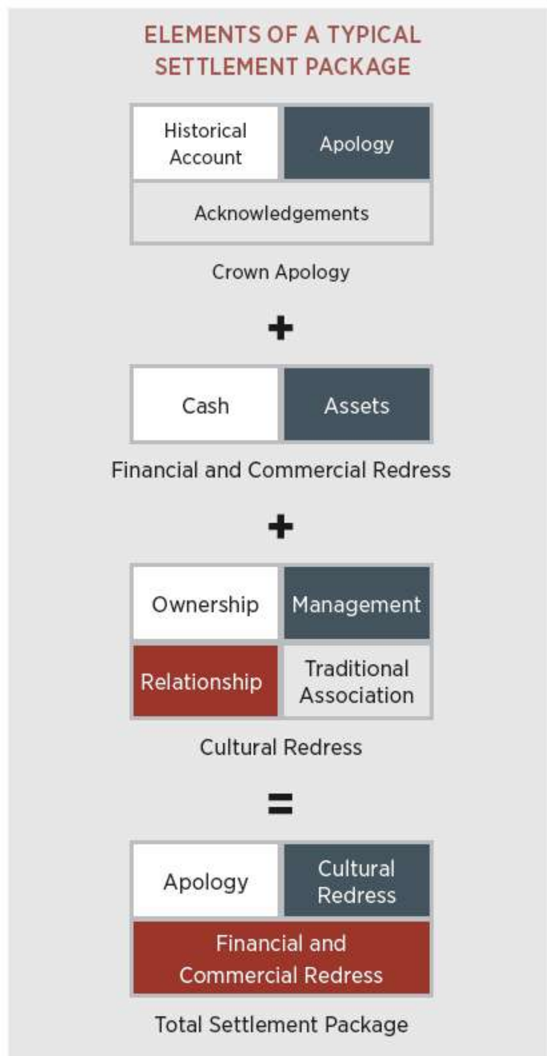

Figure 3.1: elements of a typical settlement package

It is now possible to look more closely at each of these three areas of redress – what do the various redress options involve, and what are the issues for claimant groups and the Crown to consider in negotiations?

Historical account, Crown acknowledgements of breach and apology

Significance

Among the first and most important items in a Deed of Settlement are the historical account, Crown acknowledgements and apology, collectively known as the Crown Apology. They may be seen as the first step in reconciling and healing the relationship between the Crown and the claimant group.

The historical account provides a basis for the Crown acknowledgements and apology. It summarises the key facts about the relationship between the claimant group and the Crown that gave rise to a breach or breaches of the Treaty of Waitangi and its principles, as agreed between the Crown and the claimant group. The Crown acknowledgements and apology go on to recognise these breaches and the losses, resentment and grief suffered by the claimant group. In turn, the Crown, by expressing its regret and unreserved apology, lays a foundation for settling the historical claims of the claimant group.

The Deed of Settlement may set out the historical account, Crown acknowledgements and apology in Māori and in English. Claimant groups may also wish to include opening karakia and waiata.

It is now possible to look more closely at each of the elements of the historical account, Crown acknowledgements and apology.

Contents of the historical account

The historical account is an agreed statement between the Crown and the claimant group that:

- narrates the events that form the factual background and foundation for the historical claims, and
- refers to the Treaty-based relationship between the Crown and the claimant group, and the events that led to the breakdown of that relationship.

The historical account does not need to be complex or long. It should be an accurate summary of the historical background. This gives the text authority and helps the general public to understand the basis for the settlement, because it puts the redress included in the settlement into proper context. In settlement legislation, the historical account or a summary may form the Preamble to the Act.

Content of the Crown acknowledgements

In the acknowledgements, the Crown accepts its responsibility for breaches of the Treaty of Waitangi and its principles and may go on to recognise:

- the pain and suffering caused by the grievances arising as a result of the Crown's breaches of the Treaty and its principles
- contributions the claimant group has made to the public benefit, and
- the consequences of the breach, including landlessness and social impacts.

Depending on their length and form, the Crown's acknowledgements may be included in the settlement legislation.

Contents of the apology

In the apology, the Crown formally expresses its regret for past injustices suffered by the claimant group and breaches of the Treaty of Waitangi and its principles. It is a clear response by the Crown to the matters set out in the historical account and Crown acknowledgements. The apology makes very significant steps towards:

- recognising the impact of the Treaty breaches on the claimant group
- restoring the honour of the Crown, and
- rebuilding the relationship between the Crown and the claimant group.

The scope and language of the apology should reflect the seriousness of the grievances for which the Crown apologises, and the nature of the settlement. It should highlight the key breaches and other wrongs for which the Crown accepts responsibility.

The settlement legislation will also include the text of the apology in Māori and English. This means that Parliament approves the apology as a statement of the Crown's views on its past Treaty breaches, and records the settlement of the grievances caused by those breaches.

Development of the historical account, Crown acknowledgements and apology

PROCESS

It is often useful to set up a working party to develop these documents, usually involving historians working for the Crown and claimant group negotiating teams. Usually the claimant group provides information about their view of the Treaty breaches and the events that gave rise to them. The Crown members of the working party may then prepare a draft text of the historical account to be discussed with the mandated representatives. When the working party has reached agreement on the text, they will refer it to the core negotiating teams for approval. A similar process would be followed for the Crown acknowledgements. Then, the Crown will draft its apology and discuss it with the claimant group. The apology will express the Crown's regret for the breaches of the Treaty and its principles described in the historical account and Crown acknowledgements.

CONCESSIONS ARE MADE ON A 'WITHOUT PREJUDICE' BASIS

As with all other aspects of negotiations, the Crown and the claimant groups are not bound by, and do not accept liability for, concessions they make in drafting the historical account, Crown acknowledgements and apology. They are not bound until they have signed the Deed of Settlement. Should negotiations break down, the matters discussed in negotiations cannot be used as evidence in Waitangi Tribunal hearings.

Financial and commercial redress

Financial and commercial redress means the part of the settlement that is primarily economic or commercial in nature, and which is given a monetary value. This value is the redress quantum. Financial redress refers to the portion of the total settlement the claimant group receives in cash and commercial redress refers to any Crown assets, such as property, that contribute to the total redress quantum. In this section we discuss:

- the aims of financial and commercial redress
- limitations on financial and commercial redress and how a redress quantum is negotiated, and
- forms of financial and commercial redress – these include cash and the ways in which Crown and, in some limited circumstances, memorialised State-Owned Enterprise or Crown entity land, can be used in settlements.

Aims of financial and commercial redress

The key aim of providing a redress quantum to claimant groups is in recognition and settlement of historical claims against the Crown under the Treaty of Waitangi. A guiding principle is that that the quantum of redress should relate fundamentally to the nature and extent of the Crown's breaches of the Treaty and its principles.

Financial and commercial redress also recognises that where claims for the loss of land and/or resources are established, the Crown's breaches of the principles of the Treaty will usually have held back the potential economic development of the claimant group concerned. The Crown does not provide full compensation based on a calculation of total losses to the claimant group, for the reasons explained on page 83, but it does contribute to re-establishing an economic base as a platform for future development.

The Crown does not spell out how claimant groups must use their financial and commercial redress. This is a matter for the claimant group to determine according to the rules of their governance entity. Claimant groups that have settled so far have invested their redress to produce income to fund their long-term development.

The development of the Crown's approach to financial and commercial redress

The task for the Crown in developing the current settlement policy was to devise an approach to financial and commercial redress that, within a negotiated settlement as a whole:

- enables the claimant group's sense of grievance to be resolved
- contributes to the economic and social development of the claimant group
- is fair between claimant groups, and
- takes account of New Zealand's ability to pay, considering all the other demands on public spending such as health, education, social welfare, transport and defence.

DISCONTINUANCE OF THE SETTLEMENT ENVELOPE

The concept developed by the Crown in the period 1992–94 to meet the concerns set out above was called the Settlement Envelope, also called the 'fiscal envelope'. The government of the time set the total dollar amount it assessed that New Zealand as a whole could afford to devote to Treaty settlements. The amount set aside in the Settlement Envelope was $1,000 million in 1994 dollars, to be spent over about 10 years.

The idea of a Settlement Envelope and the amount set aside for it by the government were not well received by Māori. Many Māori thought that it was too soon to set an overall limit or fiscal cap on redress for historical claims. Many were also worried that claims settled later would be at a disadvantage, despite the government's intentions. The total amount of $1,000 million was also seen by many as arbitrary and insufficient.

In 1996, after a number of settlements had been successfully negotiated, the fiscal cap was abandoned.

Crown policy was further modified by a new government in 2000. This policy states that:

- redress should relate fundamentally to the nature of the breaches suffered
- different claimant groups should be treated consistently, so that similar claims receive similar redress, and
- while maintaining a fiscally prudent approach, each claim is treated on its merits and does not have to be fitted under a predetermined fiscal cap.

We now look in more detail at what the redress quantum includes and the factors the Crown takes into account when considering particular claims.

What redress is included in the quantum?

The term *redress quantum* means the dollar value of cash and assets transferred to the claimant group in settlement of their historical claims. It is also called the *redress amount* and includes:

- cash, and/or
- the market value of commercial assets transferred to the claimant group by the Crown, and/or
- any cash or commercial assets provided to hapū or whānau as redress in recognition of particular hapū or whānau interests (see pages 61–62).

It does not include:

- redress gifted by the Crown, such as the return of wāhi tapu
- redress based on rights and processes rather than on cash or property (for example, a Statutory Acknowledgement or a Right of First Refusal), or
- claimant funding.

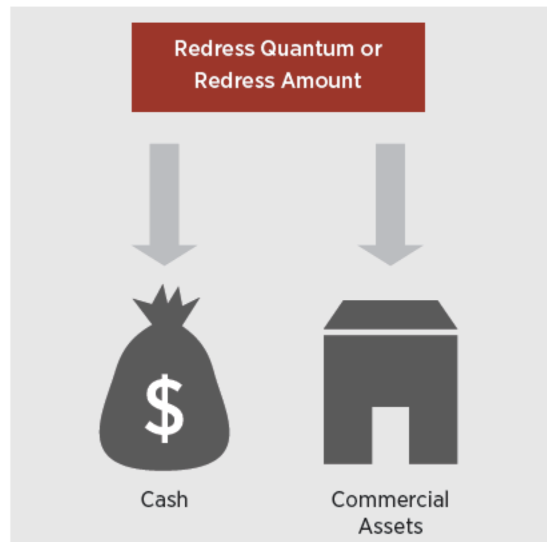

Figure 3.2: elements of financial and commercial redress

Negotiating the redress quantum

Treaty settlements involve more than money, and most claimant groups want to see spiritual, cultural and environmental concerns met as much as economic ones. Nevertheless, the quantum issue will usually be of critical importance in negotiations. The Crown's general approach can be considered under the following headings.

FULL COMPENSATION FOR ALL THE ECONOMIC LOSSES OF A CLAIMANT GROUP IS NOT AVAILABLE

It is impossible to put a precise value on the economic losses resulting from most historical Treaty breaches. This is because so much time has passed, and because identifying the effects of various causes on the economic status of the claimant group today is such a complex matter. Also, given the overlaps between many claimant groups, determining the loss to each claimant group would be impossible. European settlement has also brought benefits to Māori that cannot be easily expressed in money terms. However, many commentators estimate that the losses to Māori amount to tens of billions of dollars.

Even if an acceptable method of calculating the losses resulting from the Crown's Treaty breaches could be developed, and if the result was to establish that losses did amount to such huge sums, it is clear that a full compensation or 'damages' approach to redress would place too great a burden on the present and future generations of taxpayers. For that reason, it would not be practicable or generally acceptable to the New Zealand public. Negotiations are instead aimed at a fair level of redress, taking all the circumstances into account.

FACTORS THE CROWN TAKES INTO ACCOUNT IN DEVELOPING ITS QUANTUM OFFER

In deciding how much to offer, the Crown mainly takes into account the amount of land lost to the claimant group through the Crown's breaches of the Treaty and its principles, the relative seriousness of the breaches involved (raupatu with loss of life is regarded as the most serious), and the benchmarks (measures) set by existing settlements for similar grievances. Secondary factors are the size of the claimant group today, whether there are any overlapping claims and any other special factors affecting the claim.

By considering all these factors for each claim, the Crown aims to ensure fairness and consistency in the quantum offers made to claimant groups. Before determining its quantum offer, the Crown gives mandated representatives the information it has available on the types and amounts of land loss, and on population size. This allows the mandated representatives an opportunity to correct any errors of fact, or present information from other sources.

WHAT SCOPE IS THERE FOR CLAIMANT GROUPS TO NEGOTIATE ON THE QUANTUM OFFER?

After the Crown has presented its quantum offer, there will usually be a period of negotiation on the amount to be offered. The mandated representatives may wish to draw various factors affecting their claims to the closer attention of Ministers. A revised offer may be made if Ministers think this is appropriate. The quantum offered should be considered in the context of the settlement as a whole, taking into account the Crown's acknowledgements and apology and any cultural redress being offered.

The Crown will not, however, keep increasing the quantum offered simply to reach a settlement. The final offer must still be affordable and fair in relation to settlements already reached. If the final amount the Crown is prepared to offer is not acceptable to the claimant group, they may prefer to withdraw from negotiations.

Once the Crown and mandated representatives have agreed on the overall quantum or redress amount, there will usually be detailed discussions on the mixture of cash and assets that will make up the agreed amount.

CASH

Claimant groups may prefer to take all or part of their redress quantum in cash. A settlement wholly in cash might be suitable, for instance, if no Crown land in the claim area is available for transfer and the claimant groups would like to establish their own fund to purchase properties on the open market or to make other investments. The balance of cash and assets needs to be determined by the mandated representatives in consultation with the wider claimant group before the Deed of Settlement is signed. One benefit of a cash settlement is that it reduces the costs of implementing the settlement for both the Crown and claimant groups. Claimant groups may also see greater flexibility and opportunity in negotiating directly with third party vendors and with banks.

After settlement, investment decisions are a matter for the governance entity to make according to its rules.

Purchase of Crown properties – Treaty settlement landbanks and surplus departmental property

Often, key aims for claimant groups are to rebuild their land holdings and to invest for future development. This reflects the importance of land to cultural identity. One way to achieve this is by taking all or part of the redress quantum in the form of available Crown properties located in the claim area. In this process assets are transferred from the Crown to the claimant group at market valuation, in effect 'spending' the redress quantum.

The Crown operates a system of landbanks covering the whole country that hold a wide range of Crown properties available for use in settlements. The total value of these properties as at December 2017 was approximately $400 million. These properties have usually been placed in the regional landbanks at the request of claimant groups after they have been declared surplus to requirements by government departments. They are, therefore, expected to be the first choice of many claimant groups when they are considering their commercial redress. Because they have been set aside specifically for this purpose, choosing these properties allows claimant groups to receive properties that would otherwise have been sold.

Sometimes a property may relate directly to Crown breaches of the Treaty of Waitangi and its principles (for example, the property may be in an area that was confiscated under the New Zealand Settlements Act 1863). Generally, however, the Crown regards commercial properties as substitutable.

Claimant groups can only receive commercial assets if they are in their area of interest, but sometimes other claimant groups have claims that cover the same area. In such cases of overlap, the Crown will only transfer properties where these overlaps have been addressed by the claimant groups or where it is able to offer similar property to the overlapping group or groups.

Land managed by the Department of Conservation is not generally available as commercial redress, but individual sites of special cultural significance may be considered for transfer to claimant groups as part of cultural redress.

VALUATION

Because claimant groups may be taking all or part of their redress quantum in the form of commercial assets, their negotiators will want to make the best use of the money available, and assure the wider claimant group that fair transfer values have been agreed. Similarly, the Crown has a responsibility to taxpayers to ensure it receives fair value for assets transferred through the settlement process. Both these concerns can be met by providing that properties will be transferred at current market value using an agreed method of reaching a value. The transfer values will be included in the Deed of Settlement.

Where specific land and property held by government departments and agencies is not surplus but is sought by claimant groups it may be possible to consider two other options. These are a Right of First Refusal over specific Crown-owned property or the opportunity to own and lease back Crown property.

Right of First Refusal

Sometimes Crown land that would be very useful to the claimant group concerned is not available for immediate use in settlement. This may be because of the operational needs of the department concerned. In these cases, a Right of First Refusal (RFR) may be negotiated to provide the claimant group with an opportunity to purchase specific Crown properties if they become available in the future.

An RFR means that the claimant group has the right to purchase at market value, ahead of any other potential purchaser, specific surplus Crown land, if the relevant government department decides to sell it within a specified period in the future. An RFR is subject to existing third party rights and statutory requirements such as, for example, the offer-back provisions of the Public Works Act 1981.

Rights of First Refusal therefore recognise the importance to claimant groups of rebuilding their land holdings, and their relationship to the land as tangata whenua. An RFR is not valued in monetary terms or counted against the settlement quantum.

An RFR is not usually available on designated properties where that property is in an area subject to unresolved overlapping interests between claimant groups.

Figure 3.3: the Right of First Refusal

HOW A RIGHT OF FIRST REFUSAL WORKS

The Crown may offer the claimant group an RFR over specific Crown-owned property. This will:

- last for a limited period of time (for example, run for 50 years from the Deed), and
- allow the vendor department to test value in the market before offering the property to the claimant group.

For each of the specified properties the vendor agency must not sell the land without first offering it to the claimant group. The RFR is subject, as noted earlier, to any existing legal rights to purchase or lease the property. Certain sales to a local authority, SOE or Crown entity are exempt from the RFR but any later sale by such organisations to a third party will be subject to the RFR. Under the RFR an offer will be made to the claimant group who will then have a defined period in which to consider it. If the claimant group does not accept the offer, the vendor department may sell the land on the open market but must not do so on terms more favourable than those offered to the claimant group.

Sale and lease back

If a property is neither surplus nor subject to a Right of First Refusal claimant groups may, in certain cases, be able to purchase the property from the government department or agency concerned if it undertakes to then lease back the property to that department or agency. Both the purchase and lease back are to occur at market value and need to be agreed between both the government agency concerned and the claimant group.

Use of licensed Crown forest land

Another form of Crown-owned property available for use in settlements is Crown exotic forest land. Crown exotic forest land forms a special category of commercial redress, reflecting the arrangements between the Crown and Māori in the Crown Forest Assets Act 1989 (see page 15). Claimant groups may use the settlement quantum to purchase forest lands.

Tūrangi Police Station, transferred to Ngāti Tūrangitukua and leased back to the NZ Police

If the Crown and claimant groups agree that licensed Crown forest land will form part of the settlement redress, the following points apply:

- the Crown own the land not the trees, so only the land is available for use in settlement
- the licence-holder owns the trees and the right to occupy the land to cut them
- land is transferred subject to existing Crown forestry licences, and the claimant group becomes the licensor instead of the Crown
- on settlement, the Crown issues termination notices to the licence holder(s)
- the termination period will be a maximum of 35 years
- as the last crop of trees is harvested on each area, the licence on that block terminates – this enables the claimant group owners to use the land as it becomes available
- the claimant group can receive the accumulated rentals held by the Crown Forestry Rental Trust. This is in addition to the redress quantum
- after transfer, the claimant group receives the future rentals from the licensee until the licence is extinguished when the last crop is harvested, and
- the settlement legislation will:
  - provide for the transfer of the land as if the Waitangi Tribunal has made a binding recommendation on the Crown forest land being used in settlement, and
  - provide that the claimant group can receive no further remedies under the Crown Forest Assets Act 1989 in relation to claims to licensed Crown forest land.

As with other commercial redress, there also needs to be a valuation process by which the market value of the land is determined so that it can be included in the Deed of Settlement as part of the total quantum of financial and commercial redress received by the claimant group. Other matters to be considered are whether any easements (such as rights of way) are required.

Where licensed Crown forest land is transferred and may contain sites of importance to other claimant groups, settlement legislation can provide for access to sites that are registered as wāhi tapu with the NZ Historic Places Trust.

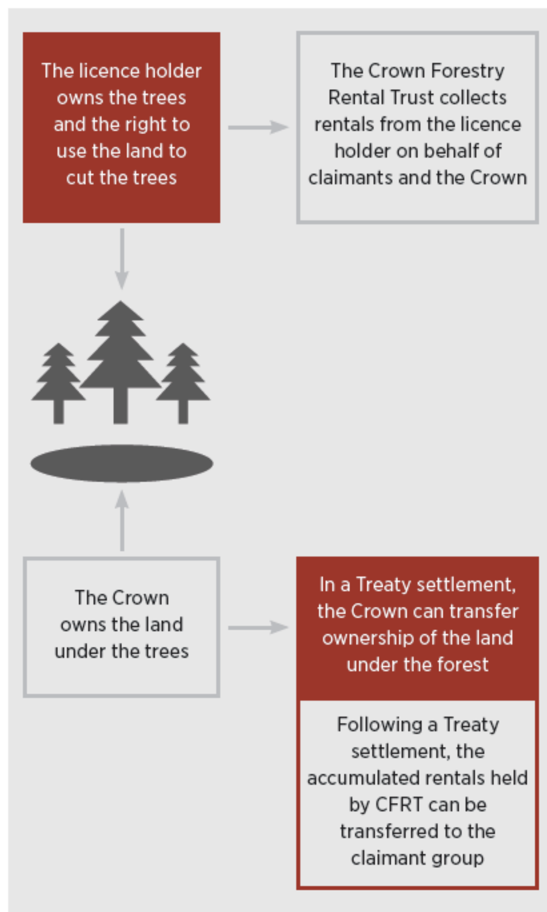

Figure 3.4: licensed Crown exotic forest land in settlement

State-owned enterprises and Crown entity land

State-owned enterprises (SOEs) are public companies owned by the Crown established under the State-Owned Enterprises Act 1986. Examples are New Zealand Post Limited and Land Corporation Limited (Landcorp). Crown land transferred to SOEs on their establishment is subject to the statutory memorial system noted on page 26. This memorial system also applies to land that was transferred to rail companies and tertiary education institutes. This enables the Waitangi Tribunal in specified circumstances to order the Crown to resume memorialised properties to resolve a well-founded Treaty claim. SOE land is generally not available for use in Treaty settlements.

Crown entities are listed in the Fourth Schedule of the Public Finance Act 1989 and include:

- District Health Boards (formerly Crown Health Enterprises)
- Crown Research Institutes
- Boards of Trustees for state schools, and
- tertiary education institutions.

In some cases, Crown entities such as hospitals may own the land they occupy. Crown entity property is not available for use in settlements unless it is surplus, or there are exceptional circumstances and the entity is a willing seller. Ministers cannot generally direct Crown entities about how they should deal with their land.

Also, for both SOE and Crown entity-owned land:

- the property must be cleared of any offer-back rights under section 40 of the Public Works Act 1981, or of other overriding third party property rights, and
- any overlapping claims must have been addressed to the satisfaction of the Crown.

Working through the processes to transfer SOE and Crown entity land is difficult and time-consuming, adding to transaction costs for both the claimant group and the Crown. The claimant group should consider whether cash to buy properties of their choice on the open market would be a better option.

SPECIALIST ADVISERS

Depending on the number and type of commercial properties involved in the settlement, both the Crown and mandated representatives will probably need to employ specialist advisers such as commercial lawyers, valuers and property consultants. This should be taken into account in planning and budgeting.

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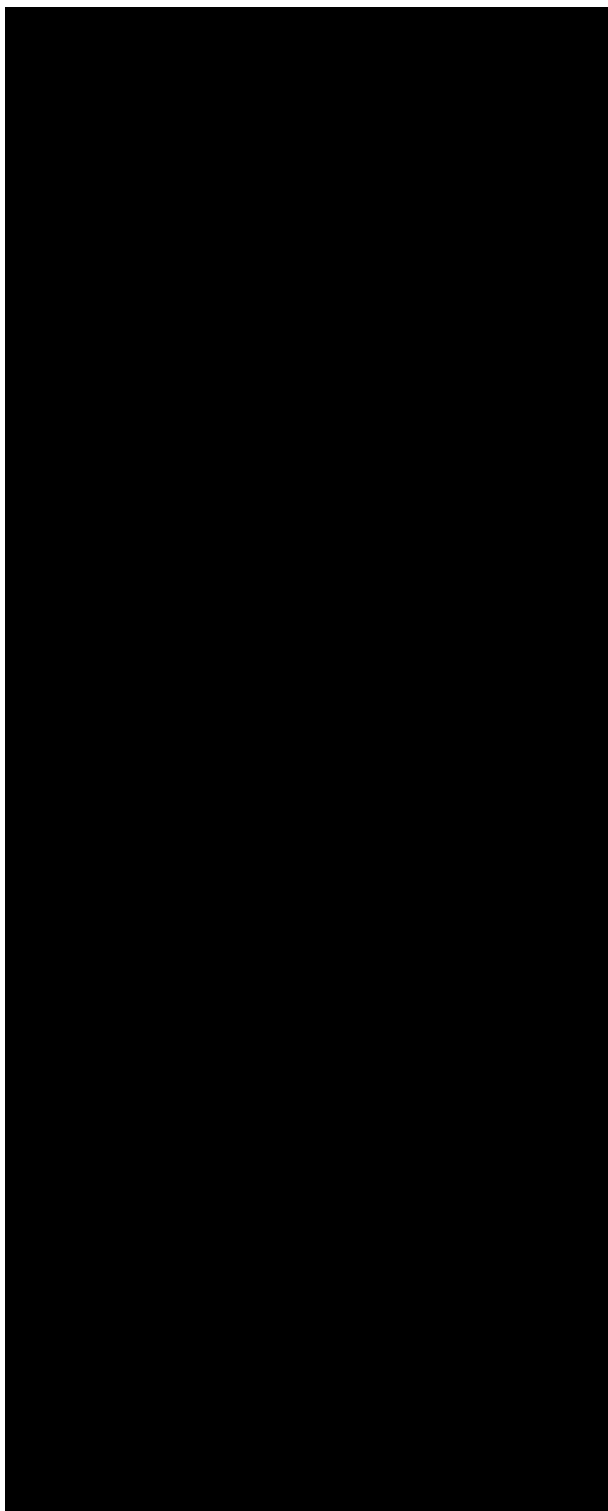

Taxation and interest on settlement redress

SETTLEMENT REDRESS IS NOT INCOME OR THE SUPPLY OF GOODS OR SERVICES

Redress is transferred to claimant groups to settle their historical claims against the Crown. It is the Crown's understanding that payments of this nature are not income (for the purposes of income tax), or the supply of goods and services (for the purposes of goods and services tax (GST)). In accordance with these understandings, the Crown may provide indemnities in Deeds of Settlement. This means that if a claimant group is found liable to pay either income tax or GST on the redress provided by the Crown, the Crown will pay the amount of the liability to the claimant group.

INCOME GENERATED FROM SETTLEMENT REDRESS IS SUBJECT TO APPLICABLE TAX

However, the indemnities provided by the Crown do not go beyond the initial transfer of the settlement redress. Any subsequent dealings with the settlement redress, and any income generated are subject to the same tax laws applying to everyone else. Claimant groups are, of course, able to seek independent advice on how to manage their Development for tax purposes. The Crown will not use settlement legislation to provide specific tax advantages to groups that have received settlement redress.

ANY PAYMENT OF INTEREST ON THE QUANTUM IS SEPARATE FROM REDRESS AND SUBJECT TO INCOME TAX

If settlement legislation is required to make a settlement complete, there may be a significant delay between signing the Deed of Settlement and the payment of cash or transfer of other assets. Depending on the expected length of the delay, the Crown and claimant groups may need to negotiate whether the Deed should provide for interest on the redress quantum from the date of the Deed to when it is actually paid. This will maintain the value of the settlement to the claimant groups. Interest is paid in a lump sum with the settlement quantum, but does not form part of the redress quantum. This is because it is a transaction cost rather than redress. If the Crown agrees to pay interest, the rate of interest will depend on market conditions and, as with any interest receipt, tax may be payable.

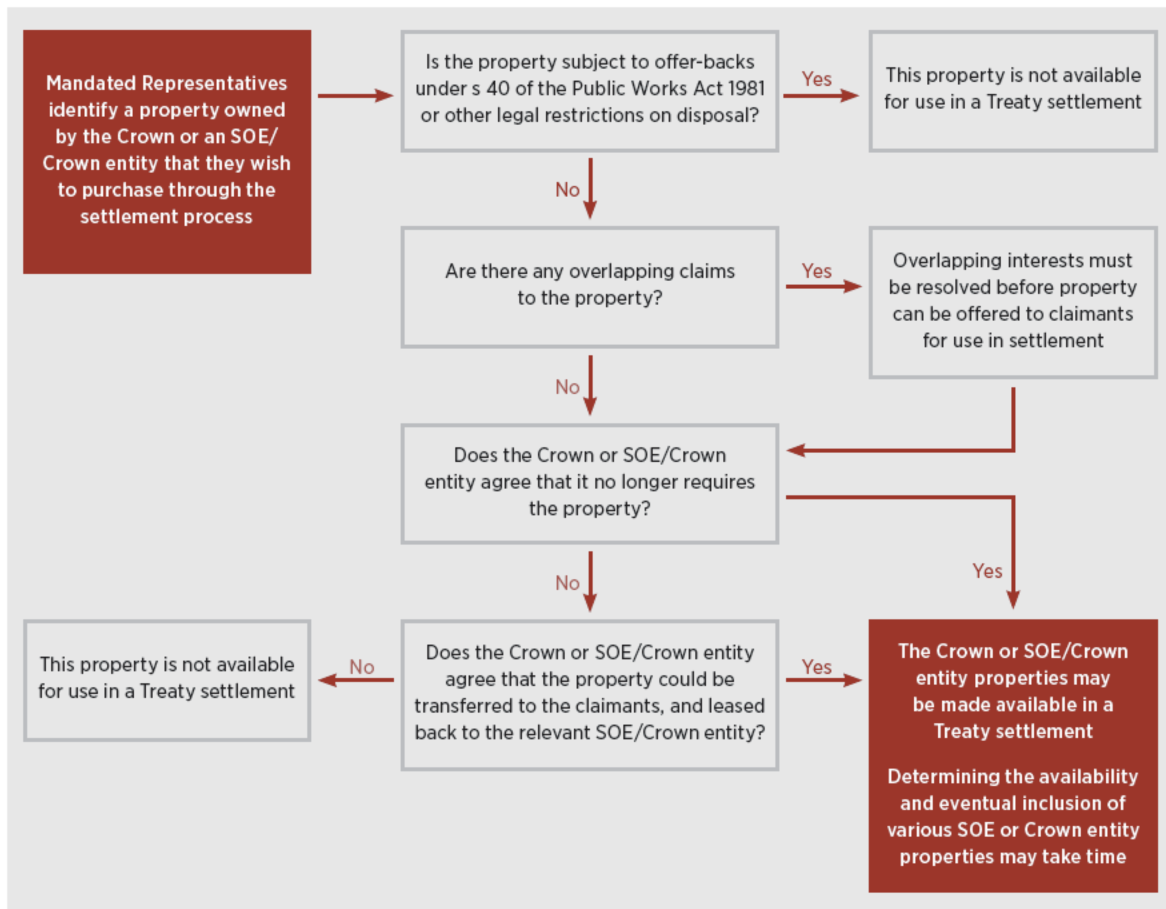

Figure 3.5: Selection process for commercial properties

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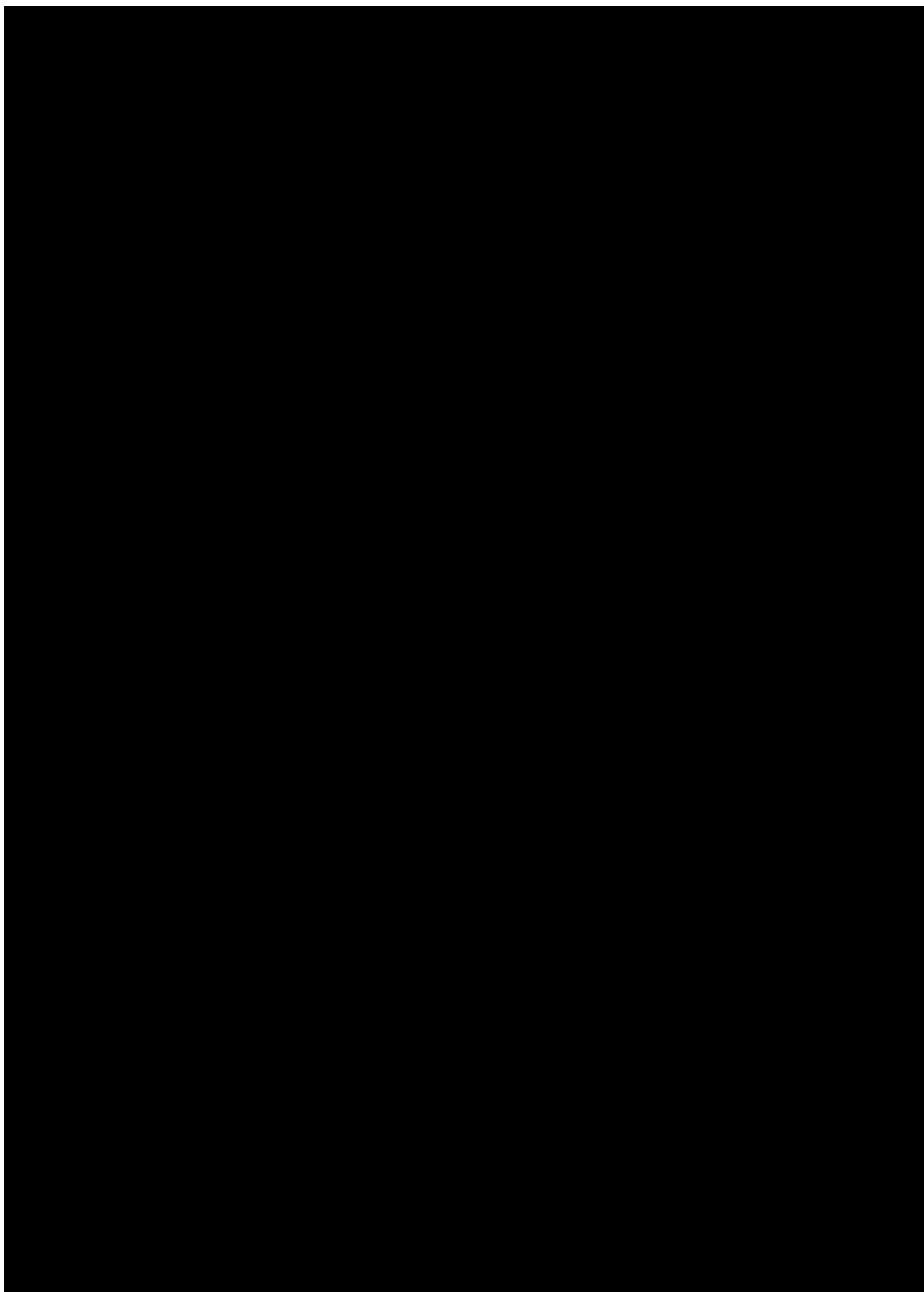

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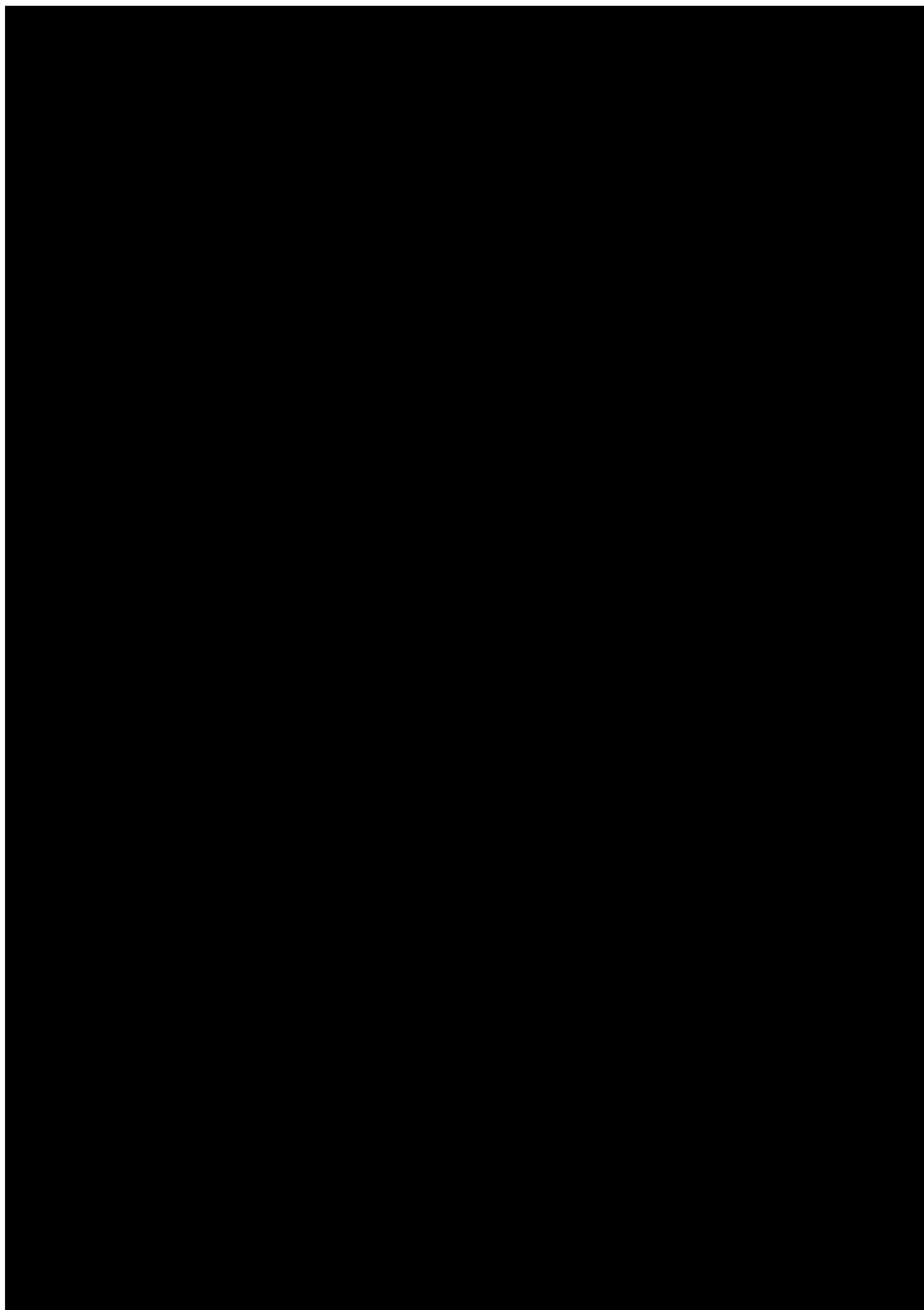

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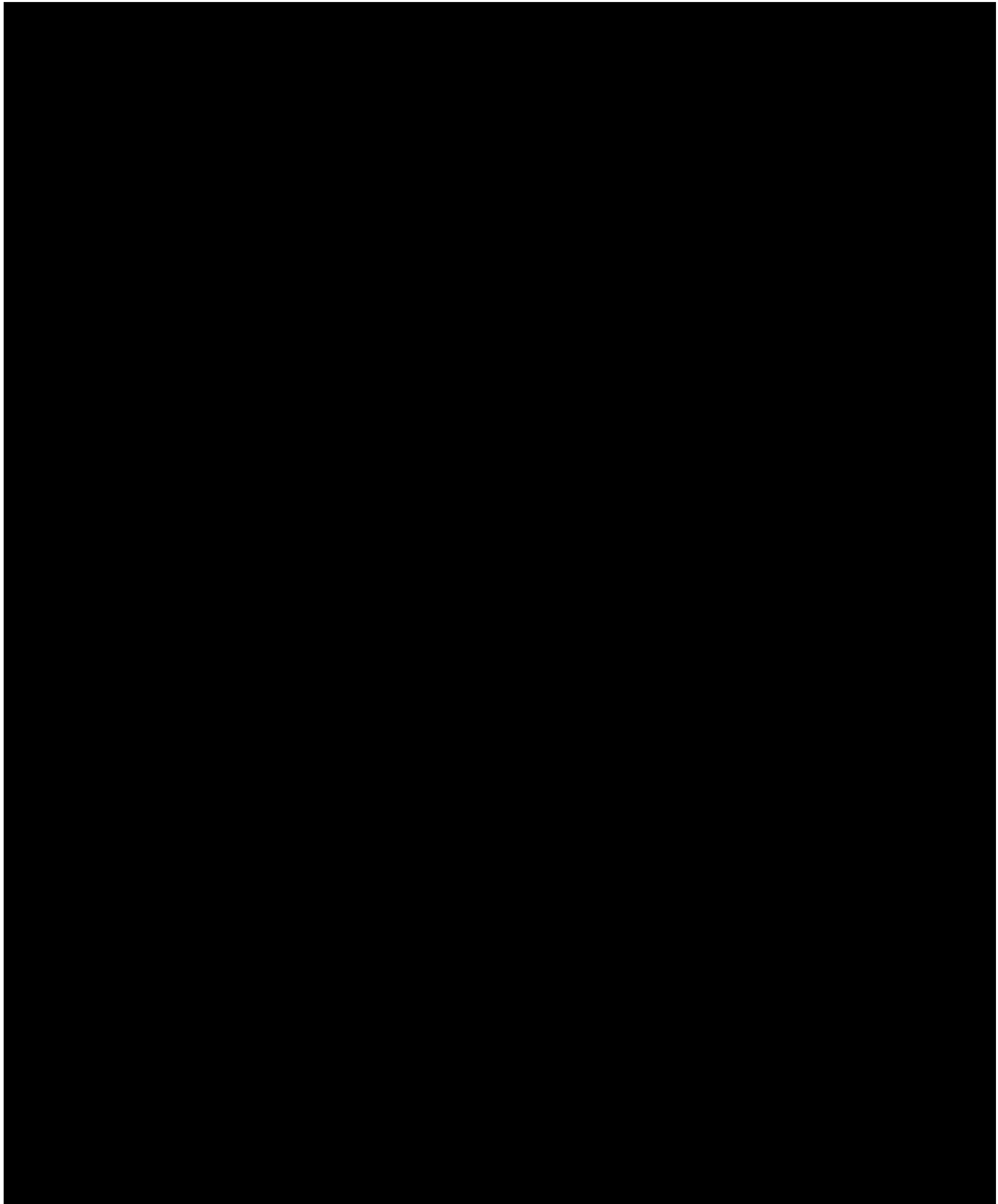

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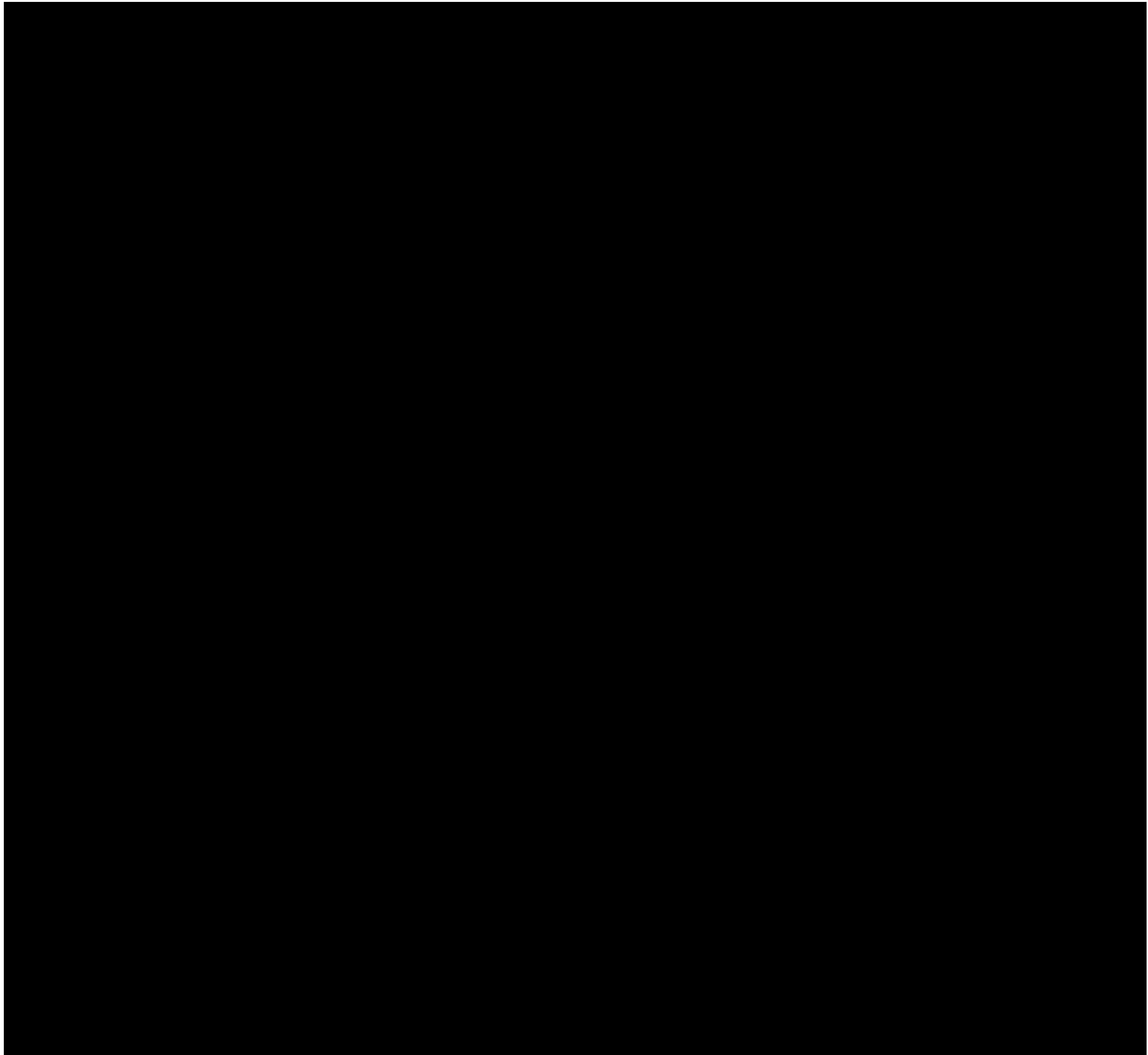

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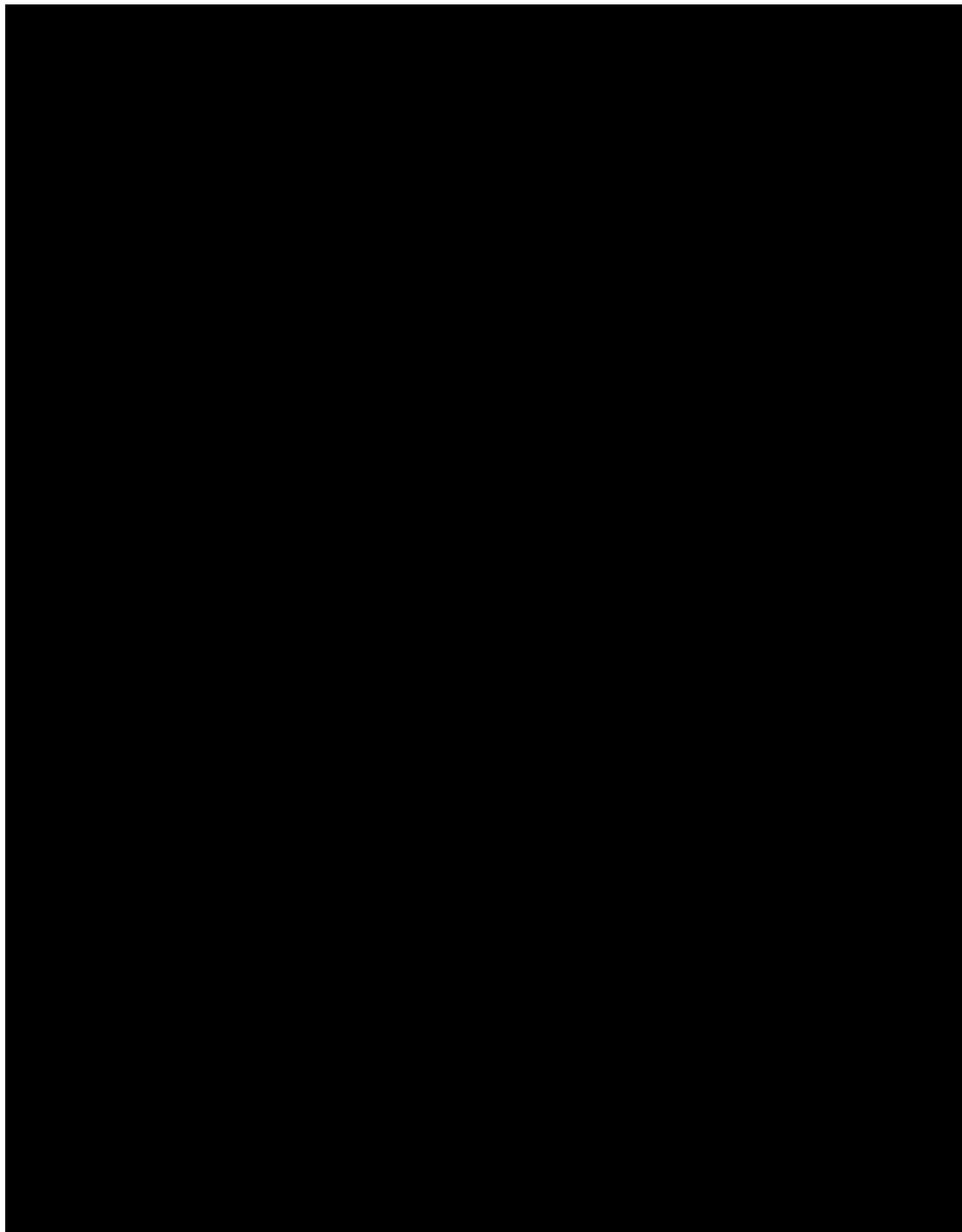

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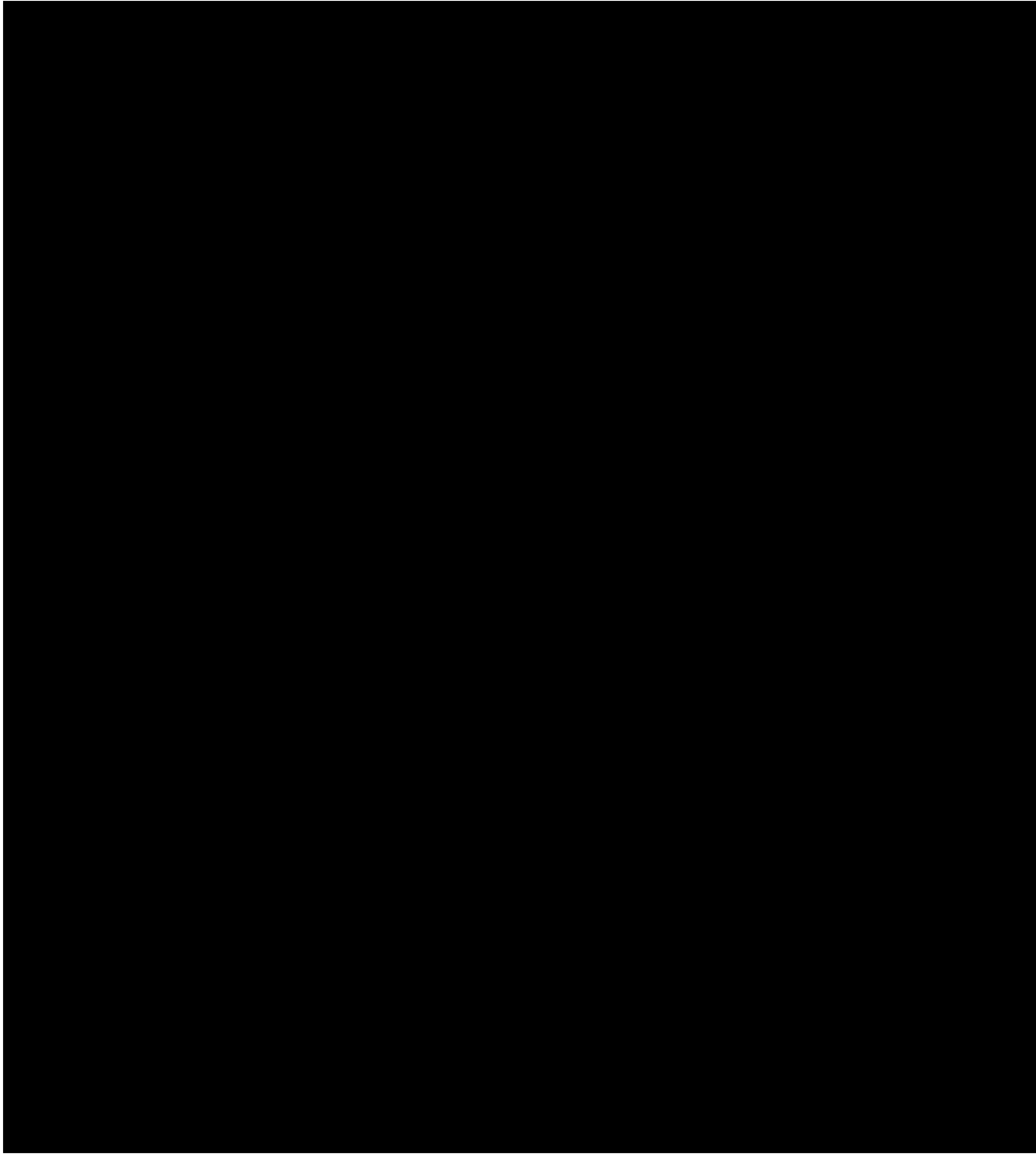

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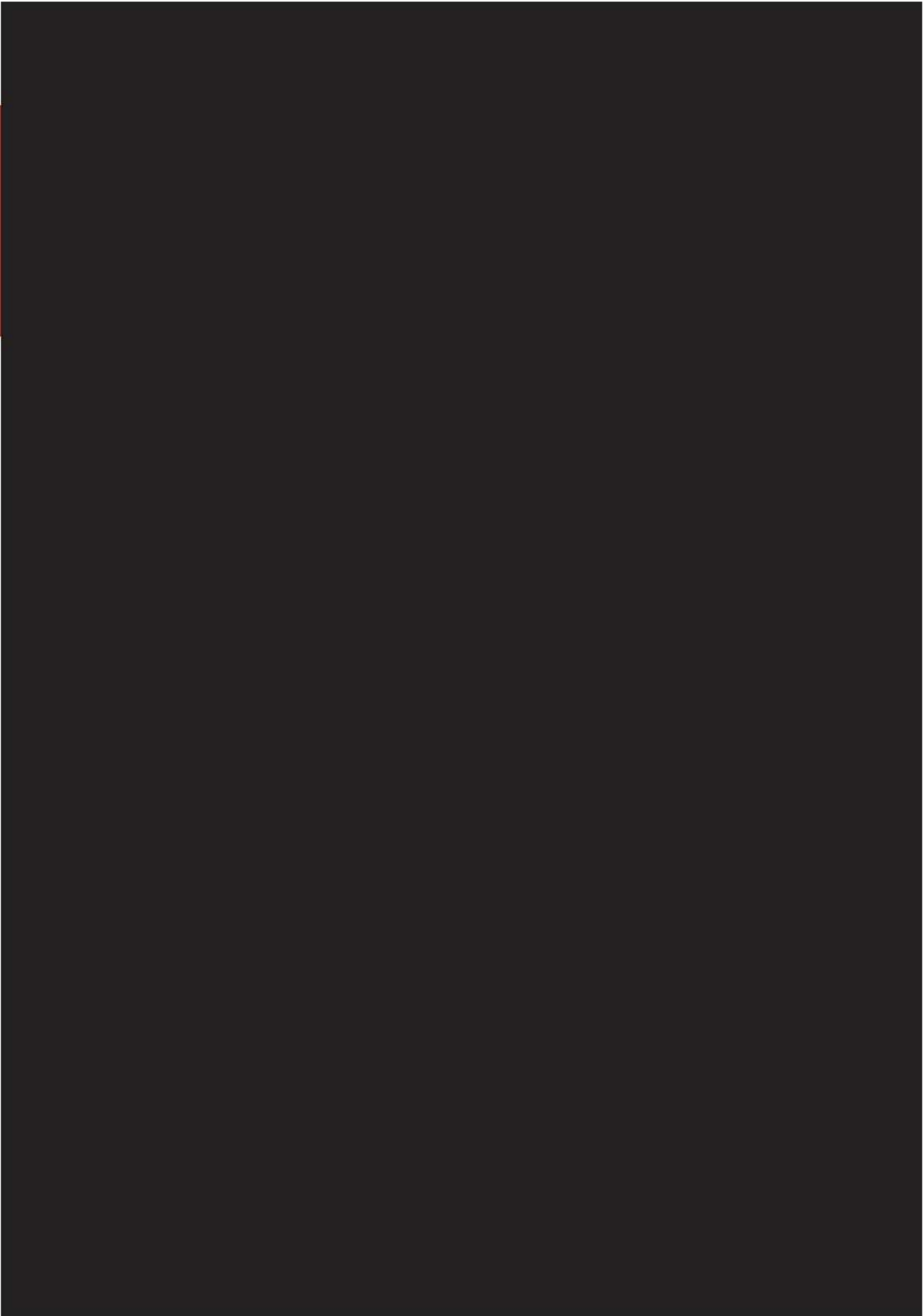

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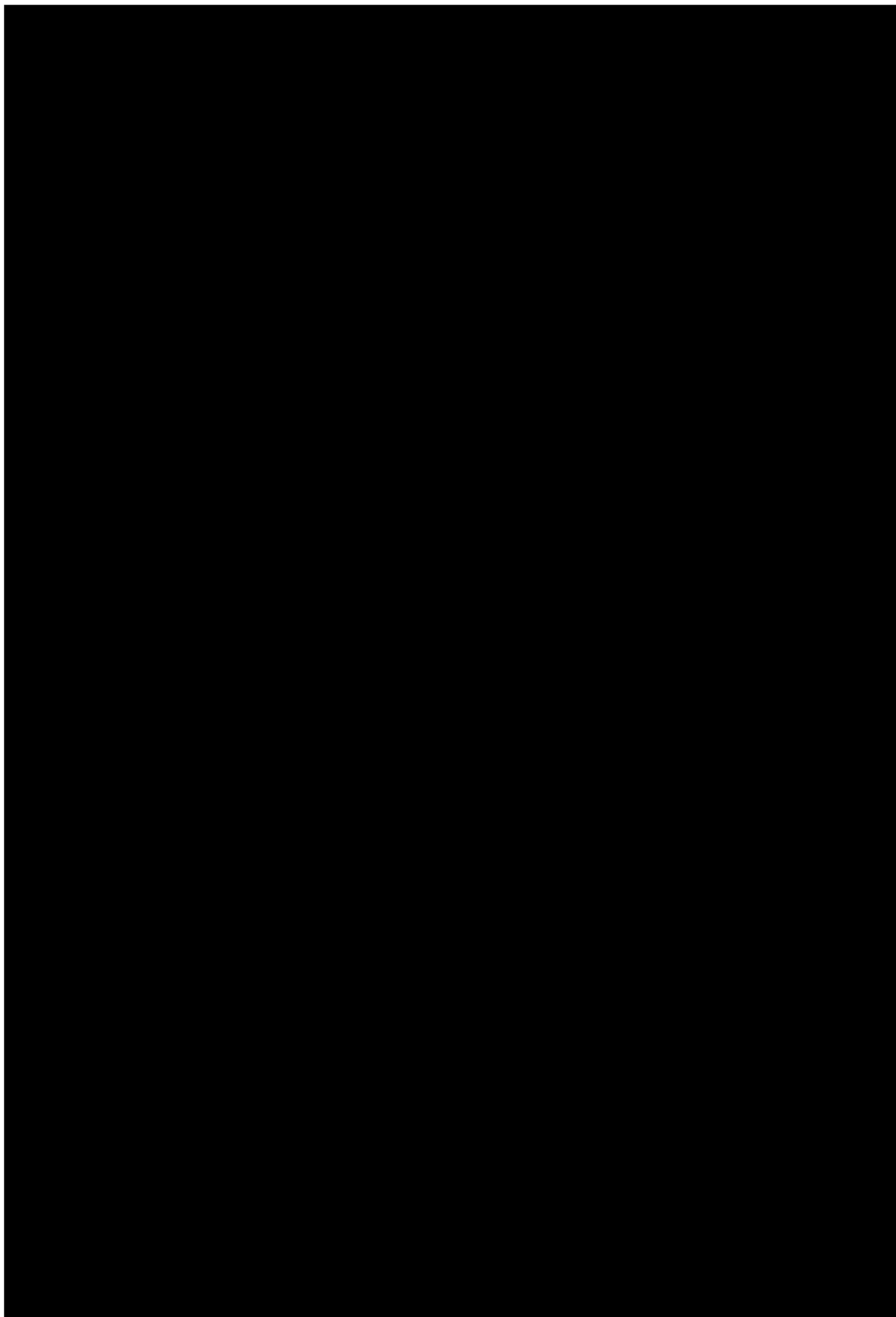

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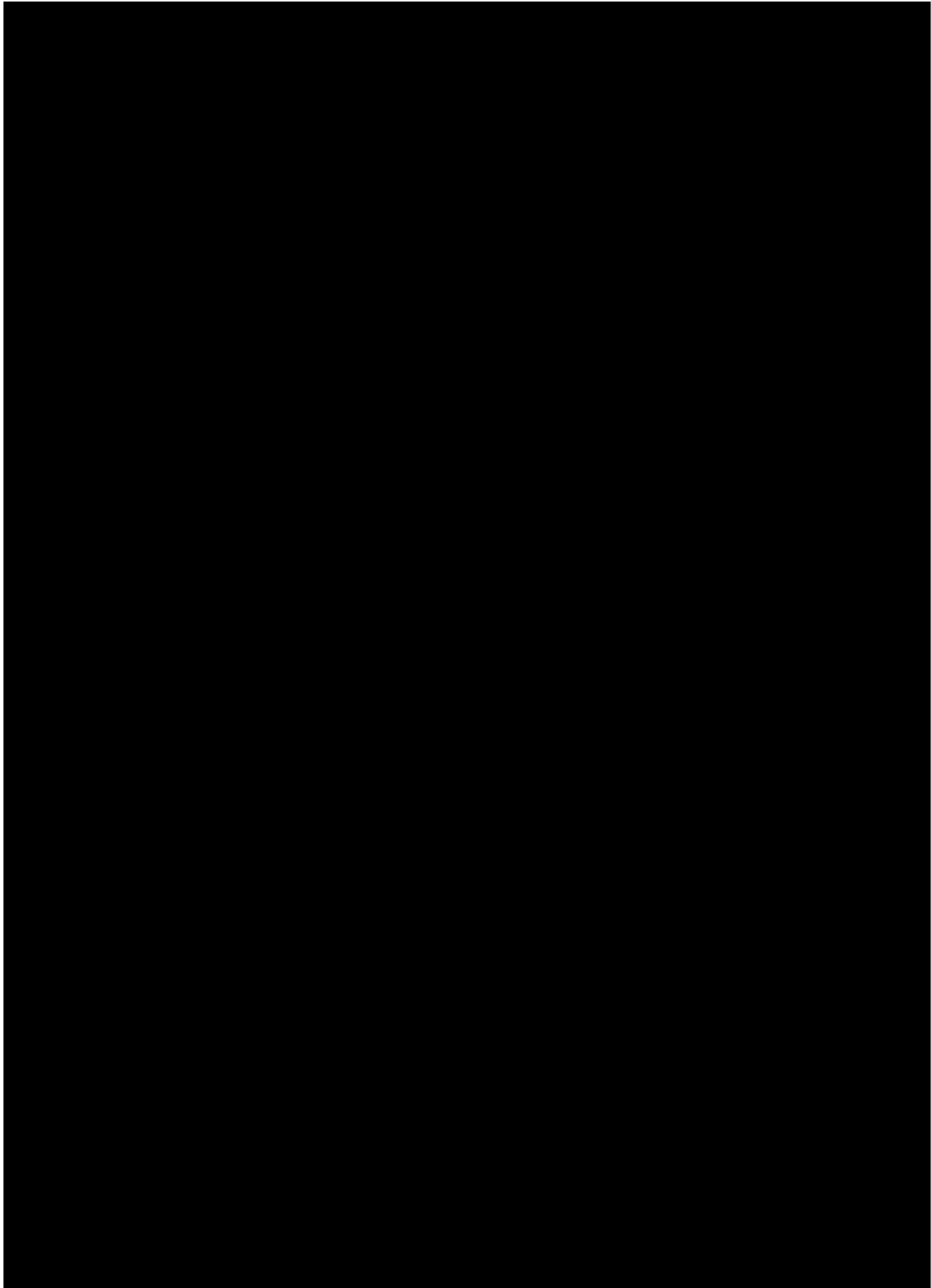

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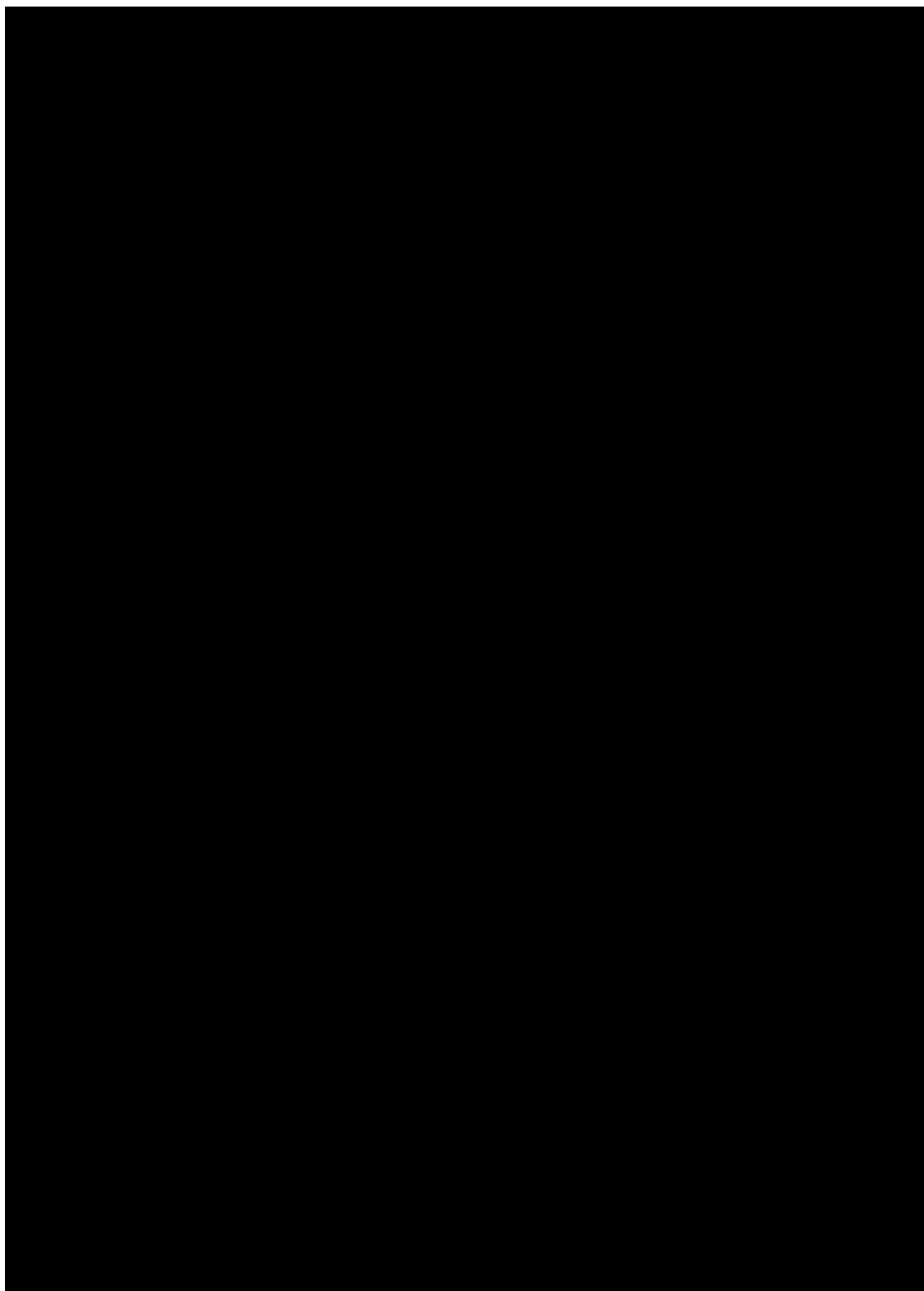

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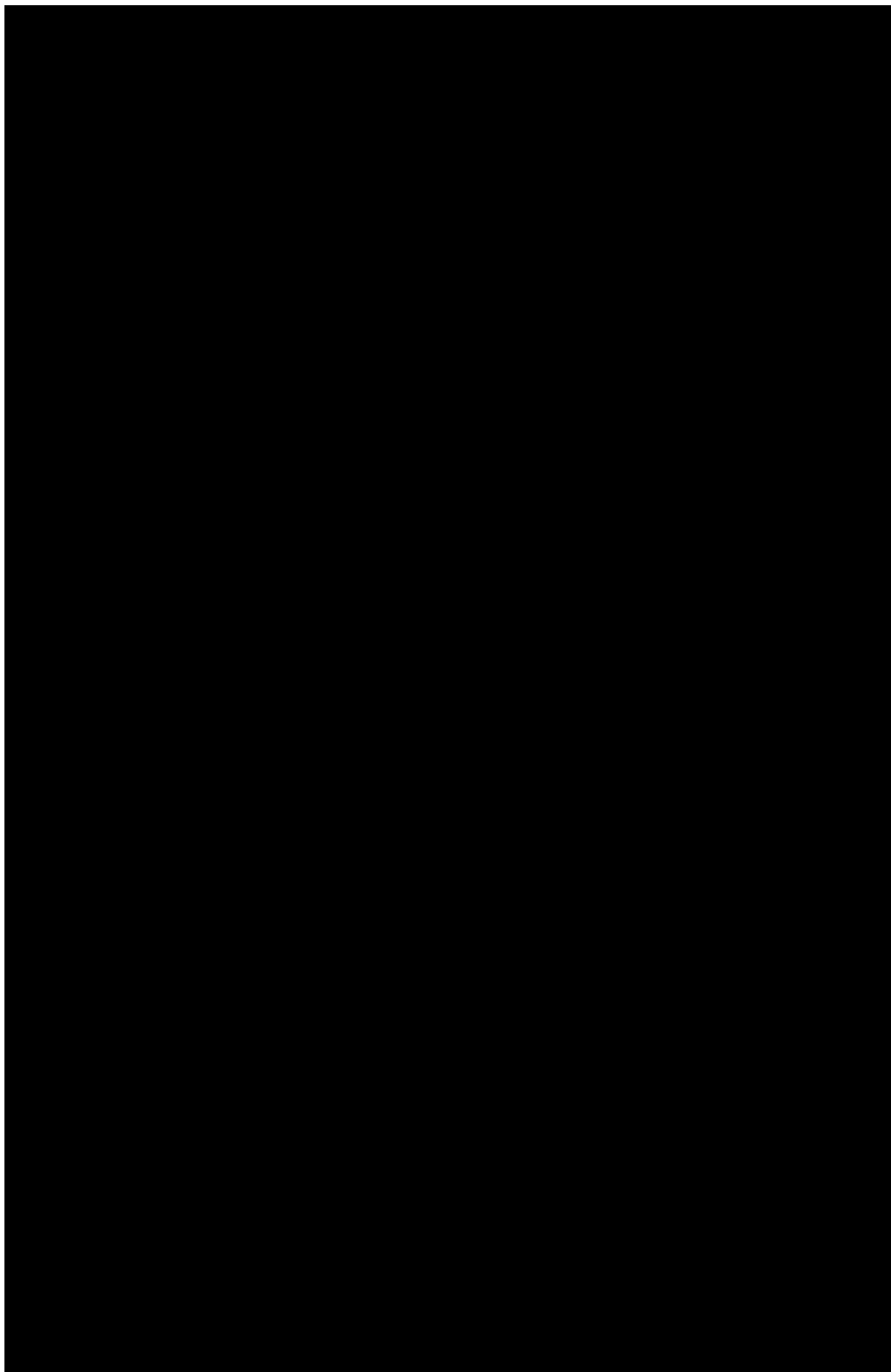

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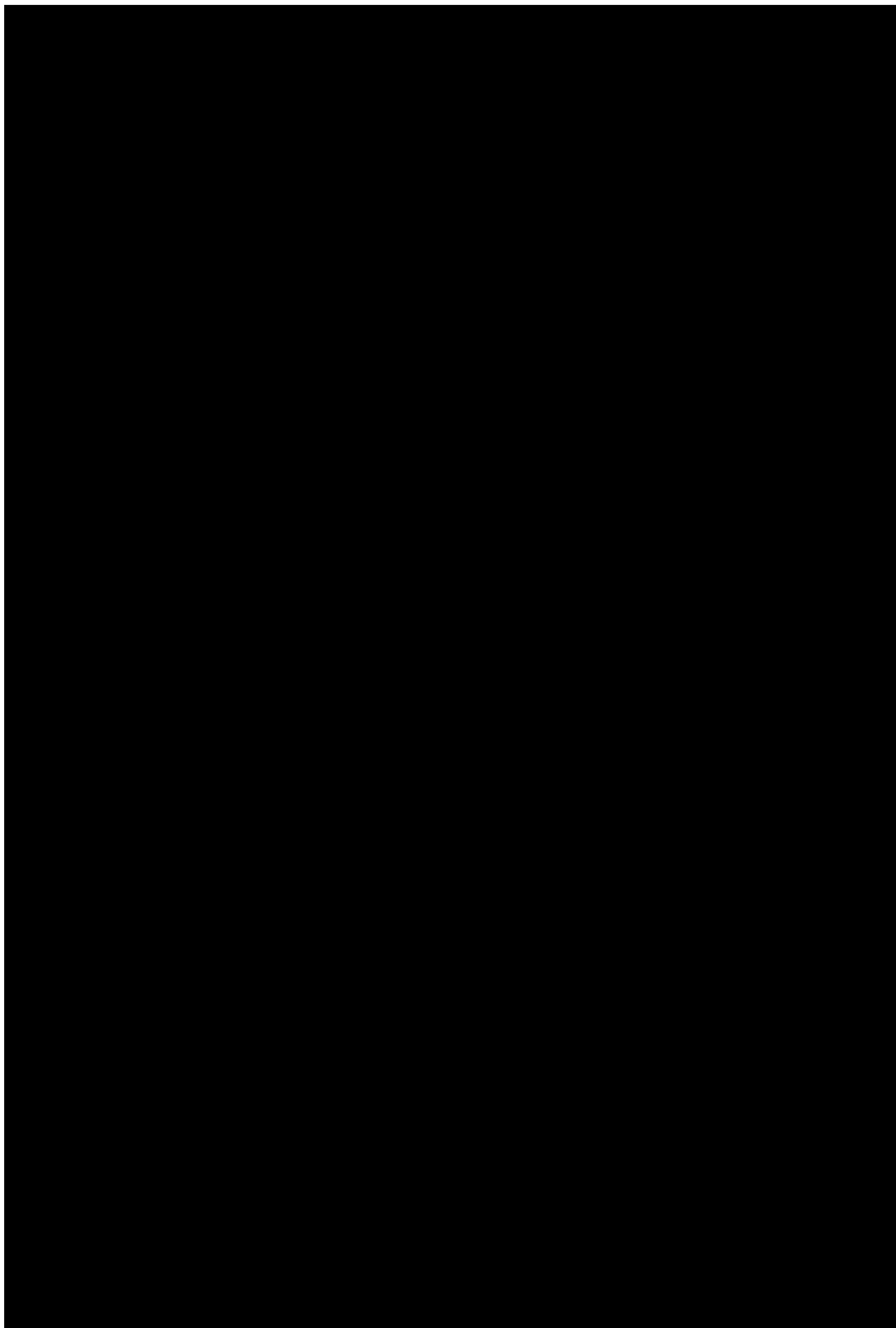

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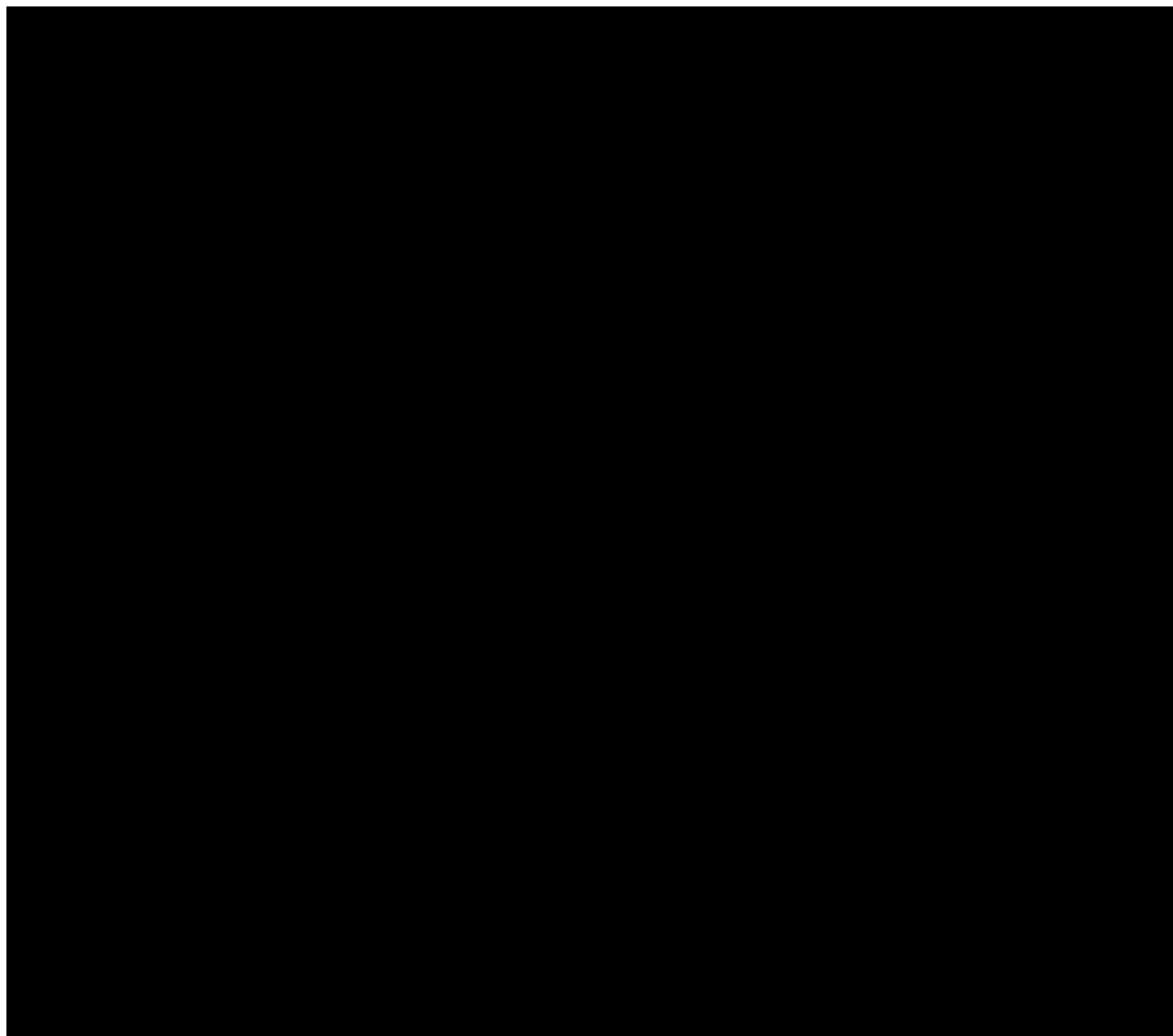

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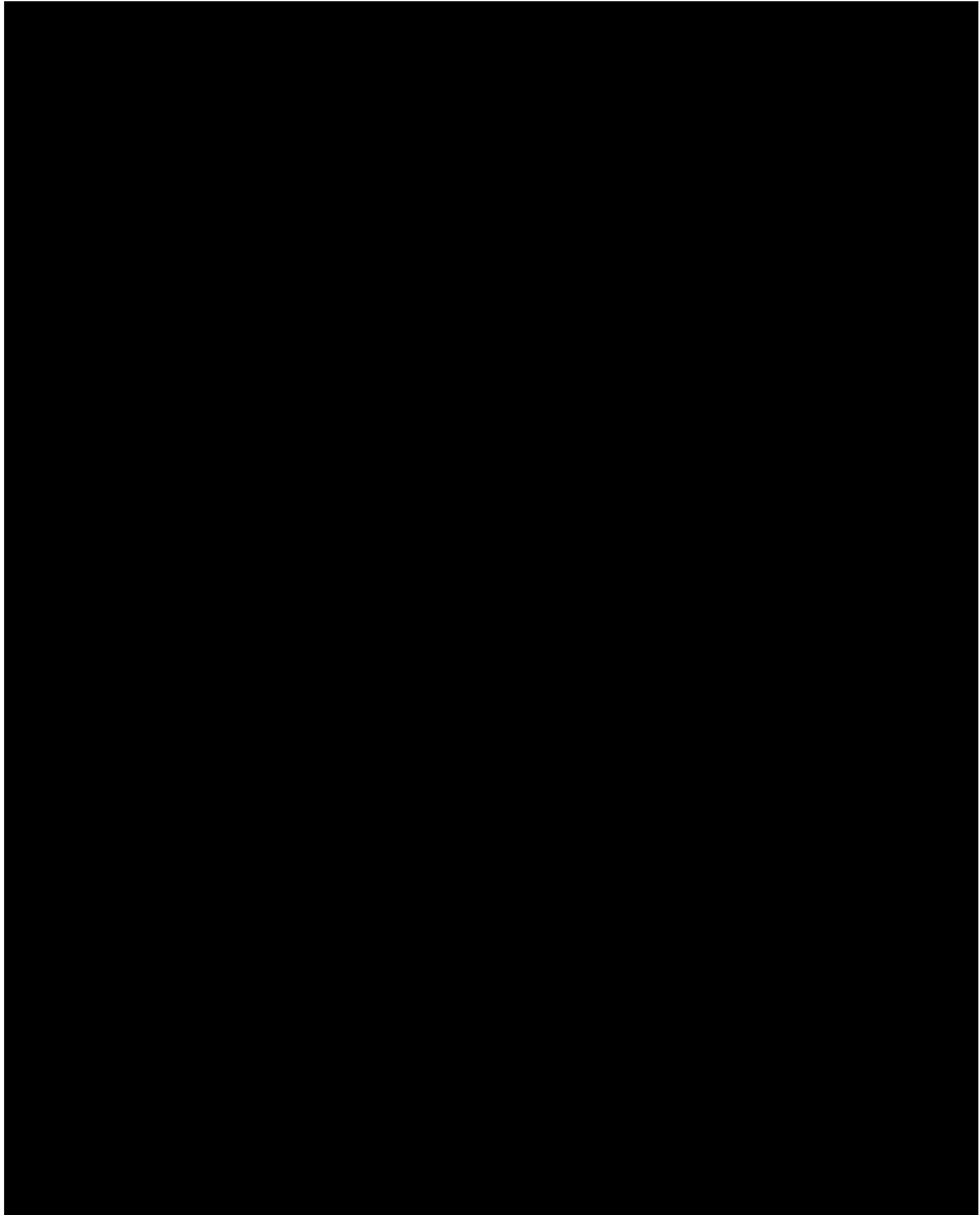

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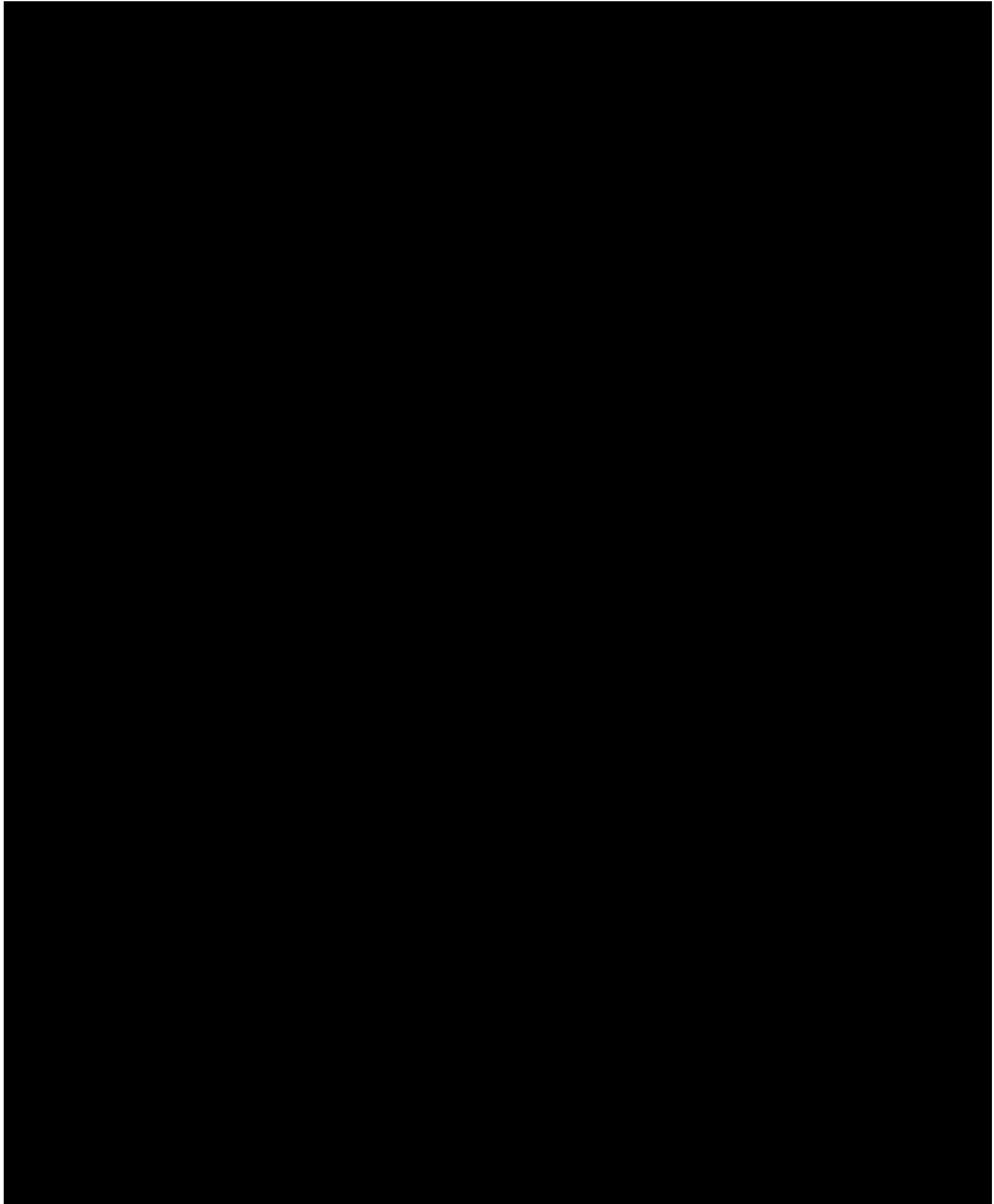

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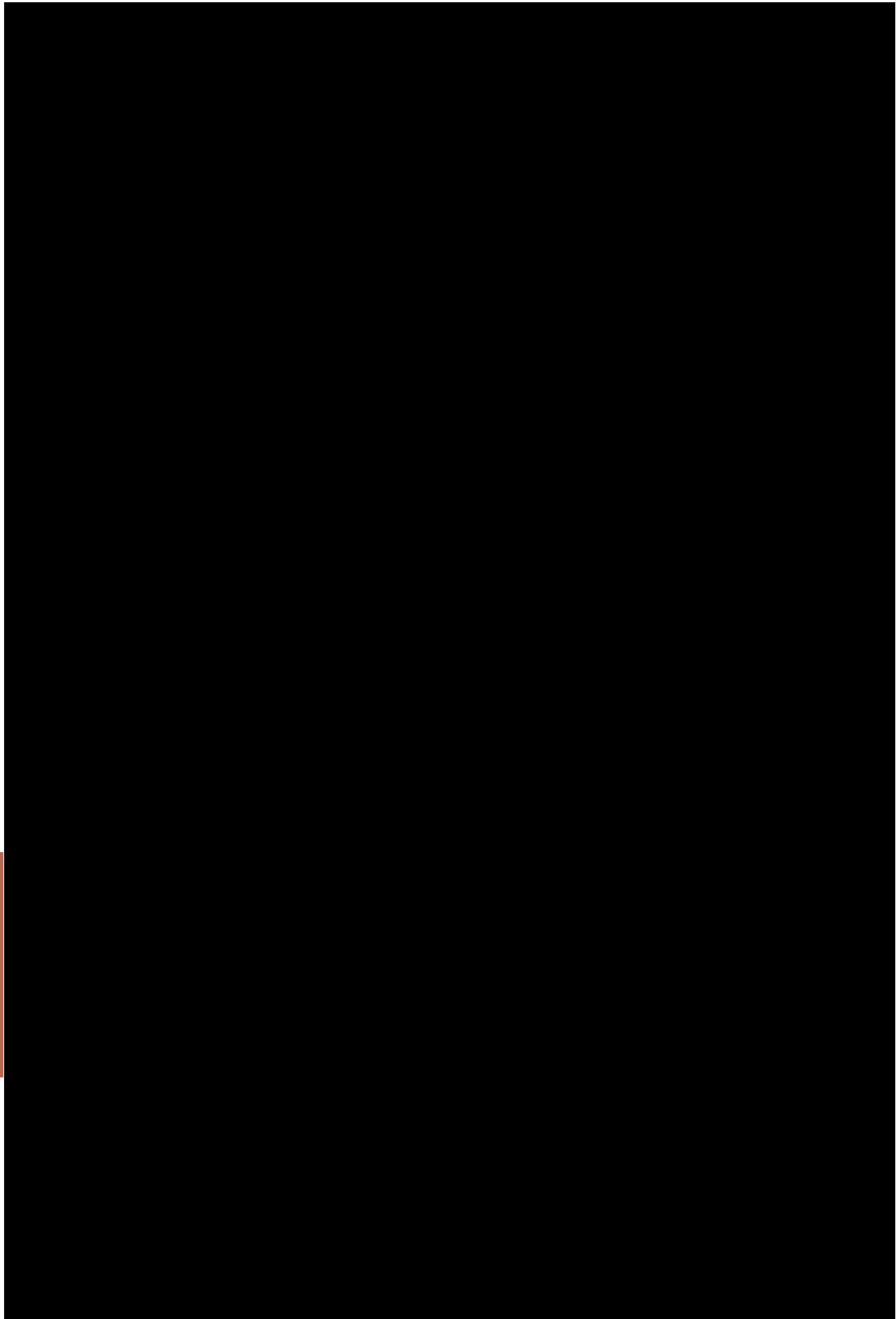

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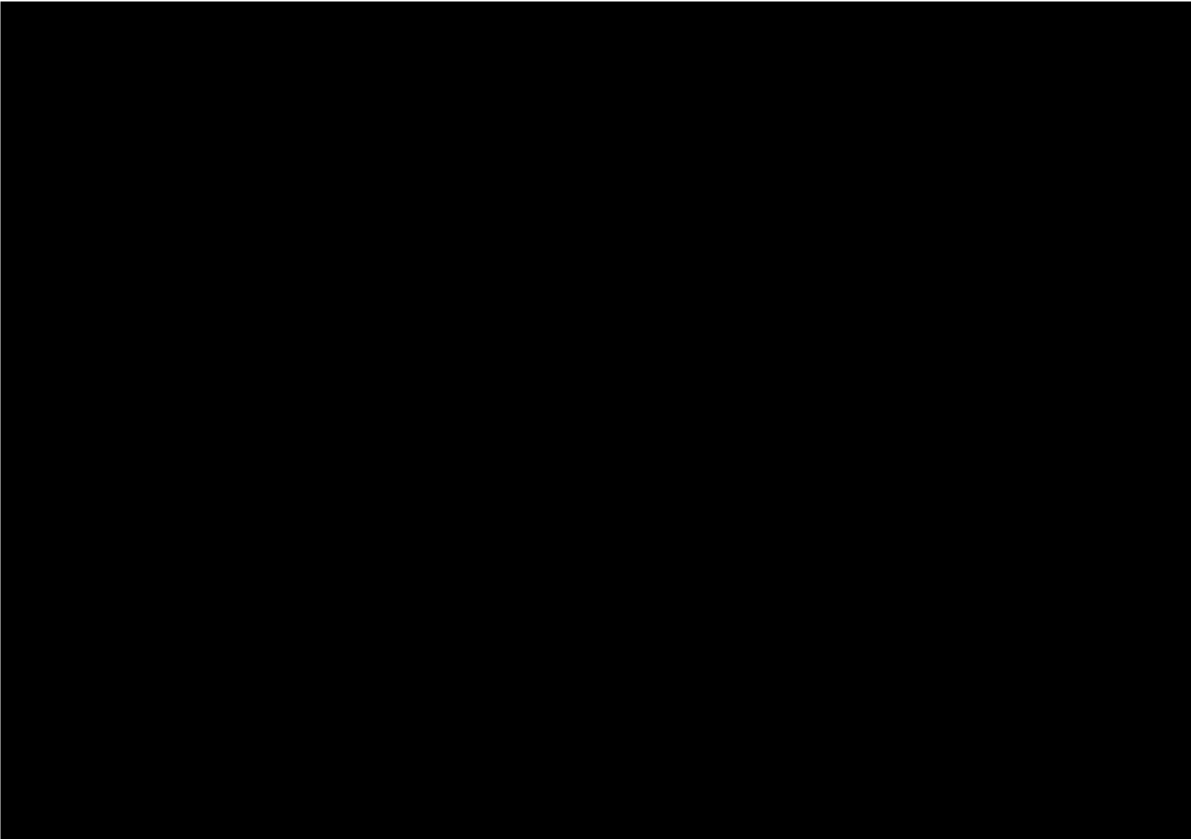

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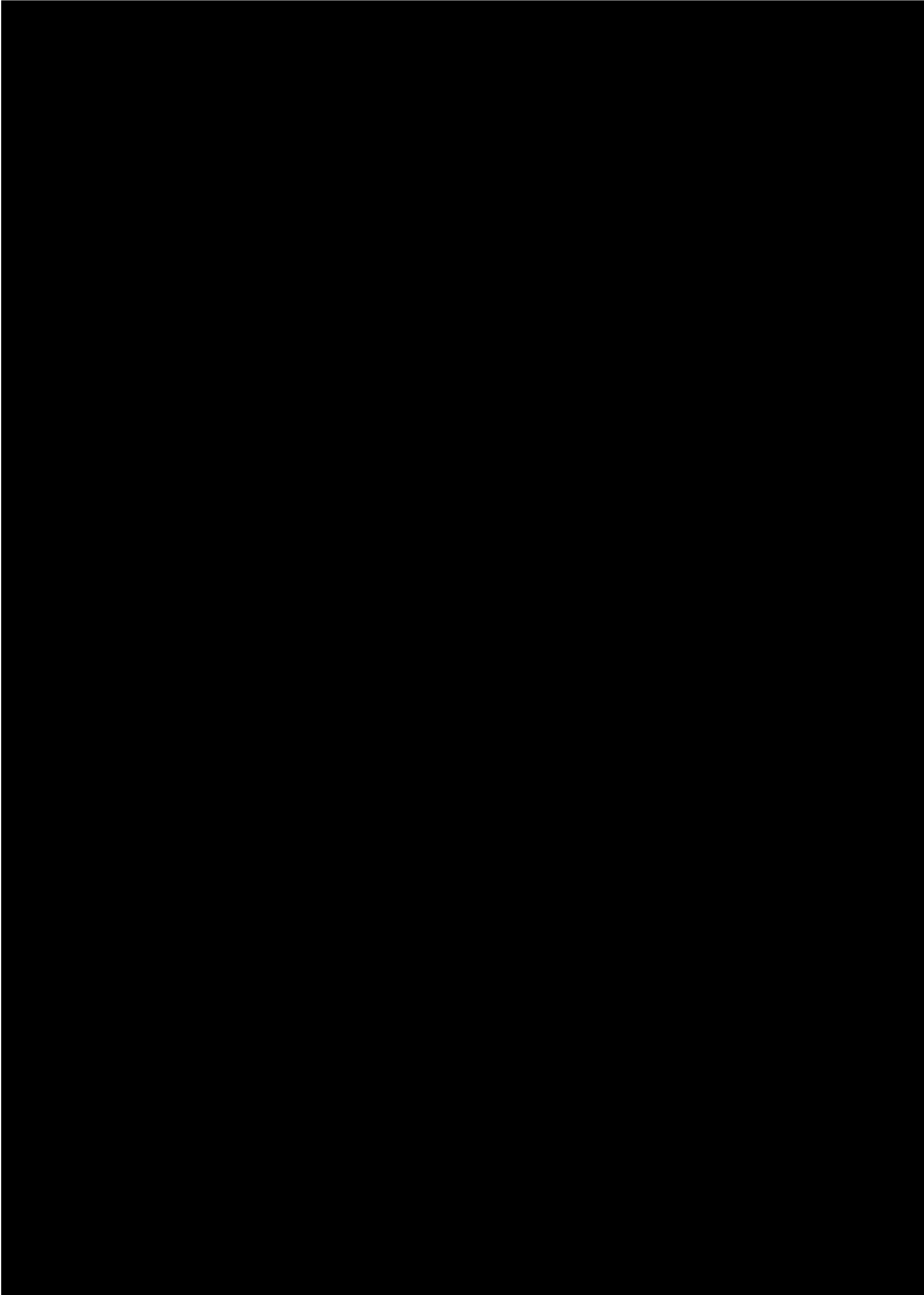

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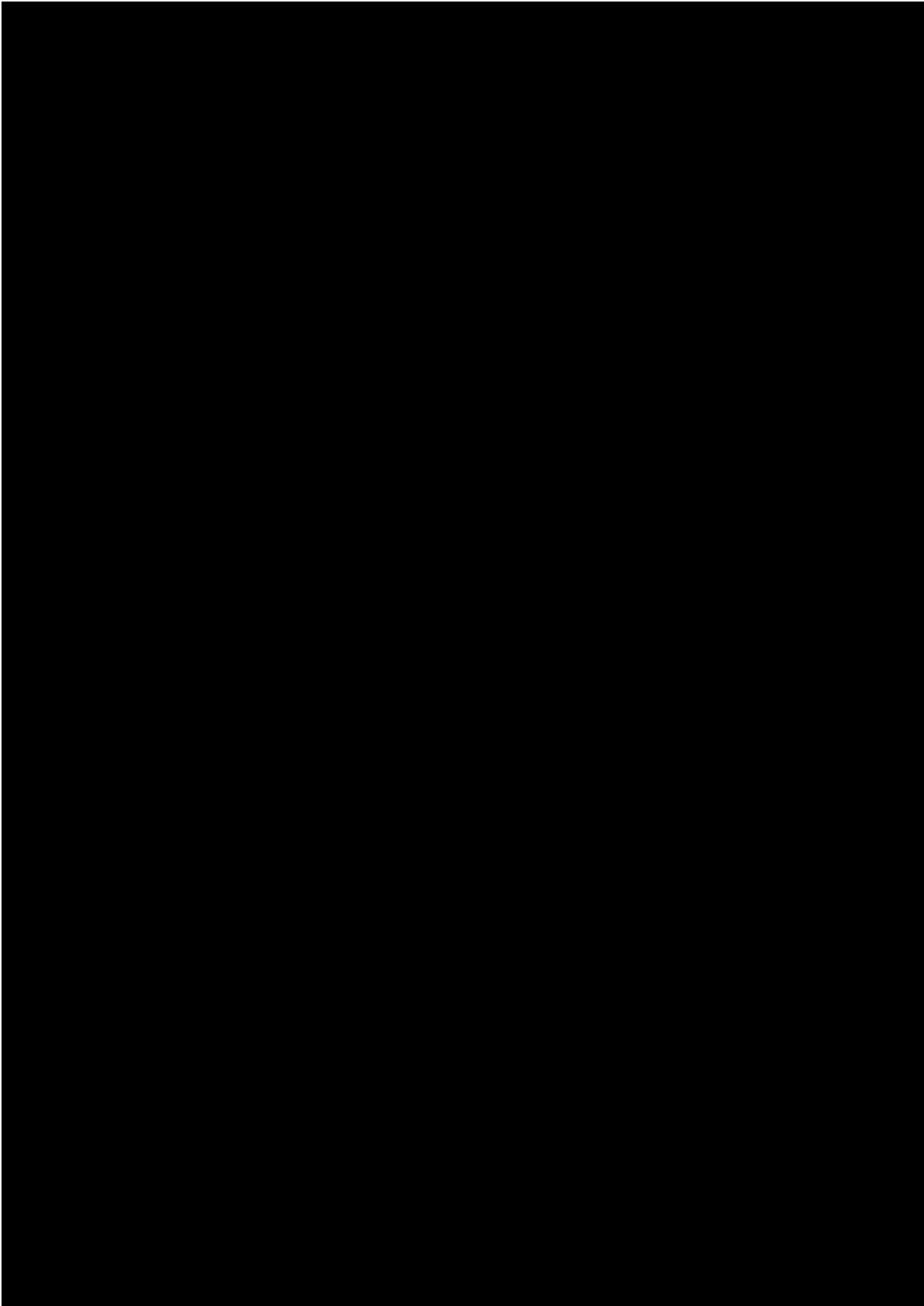

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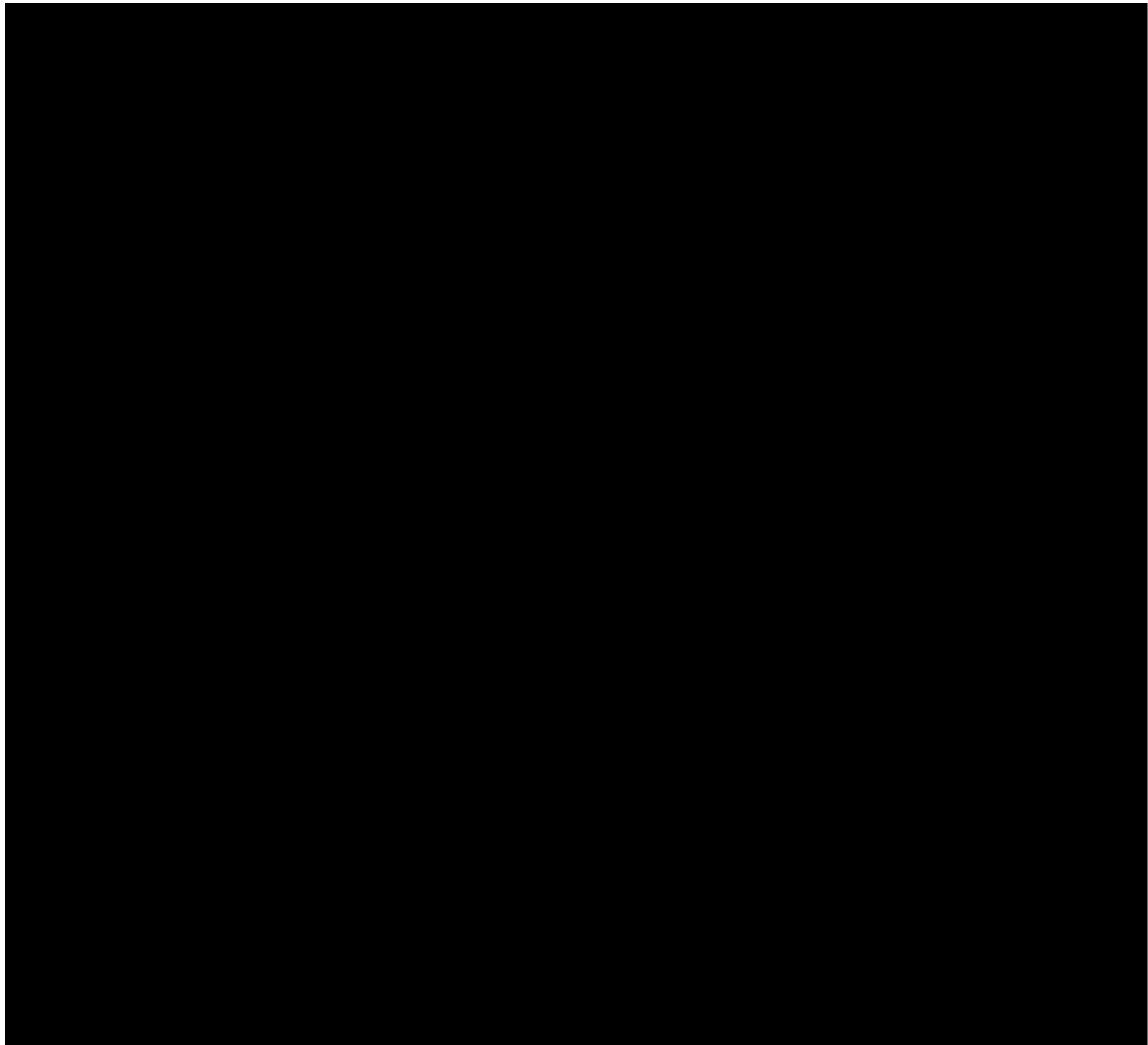

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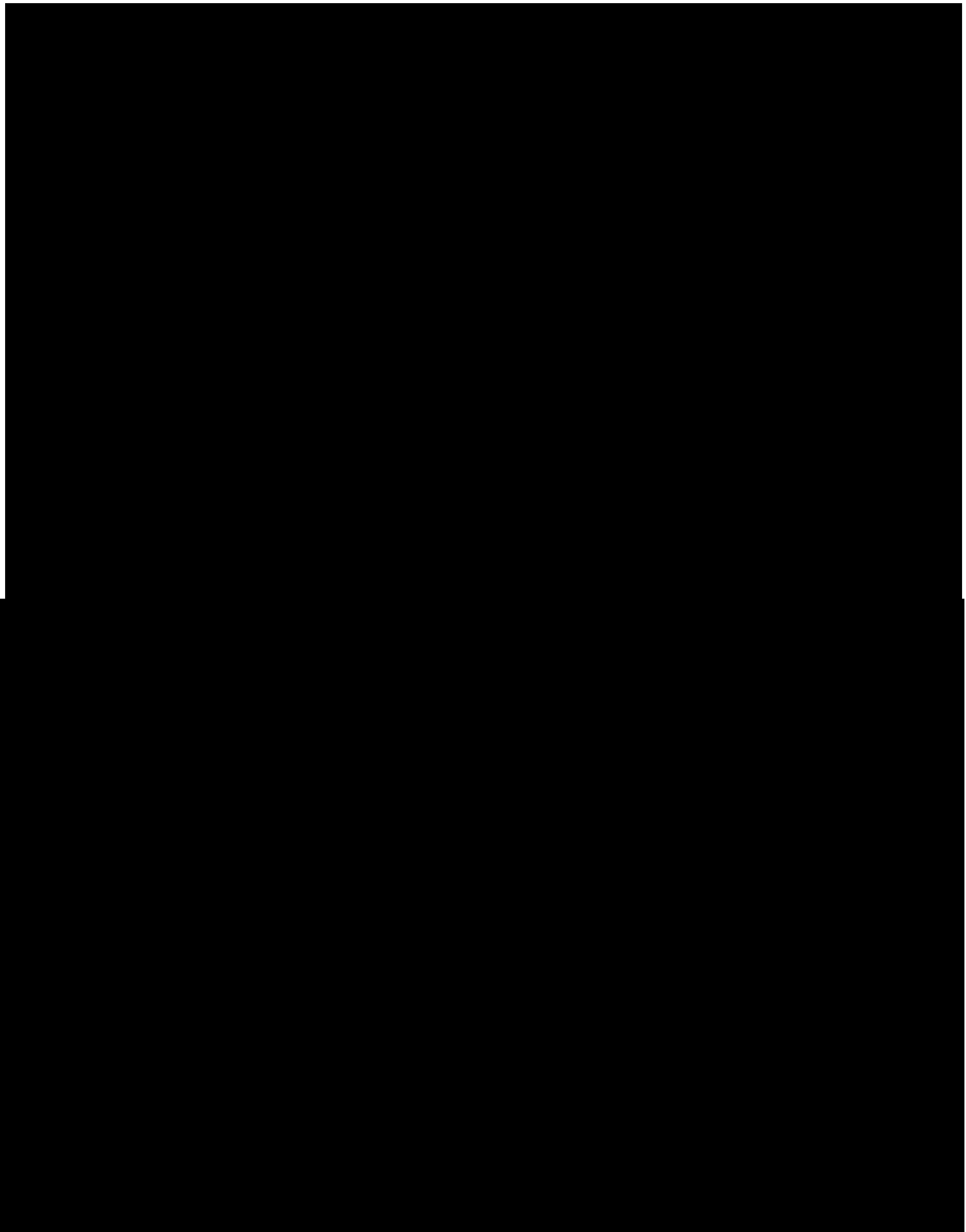

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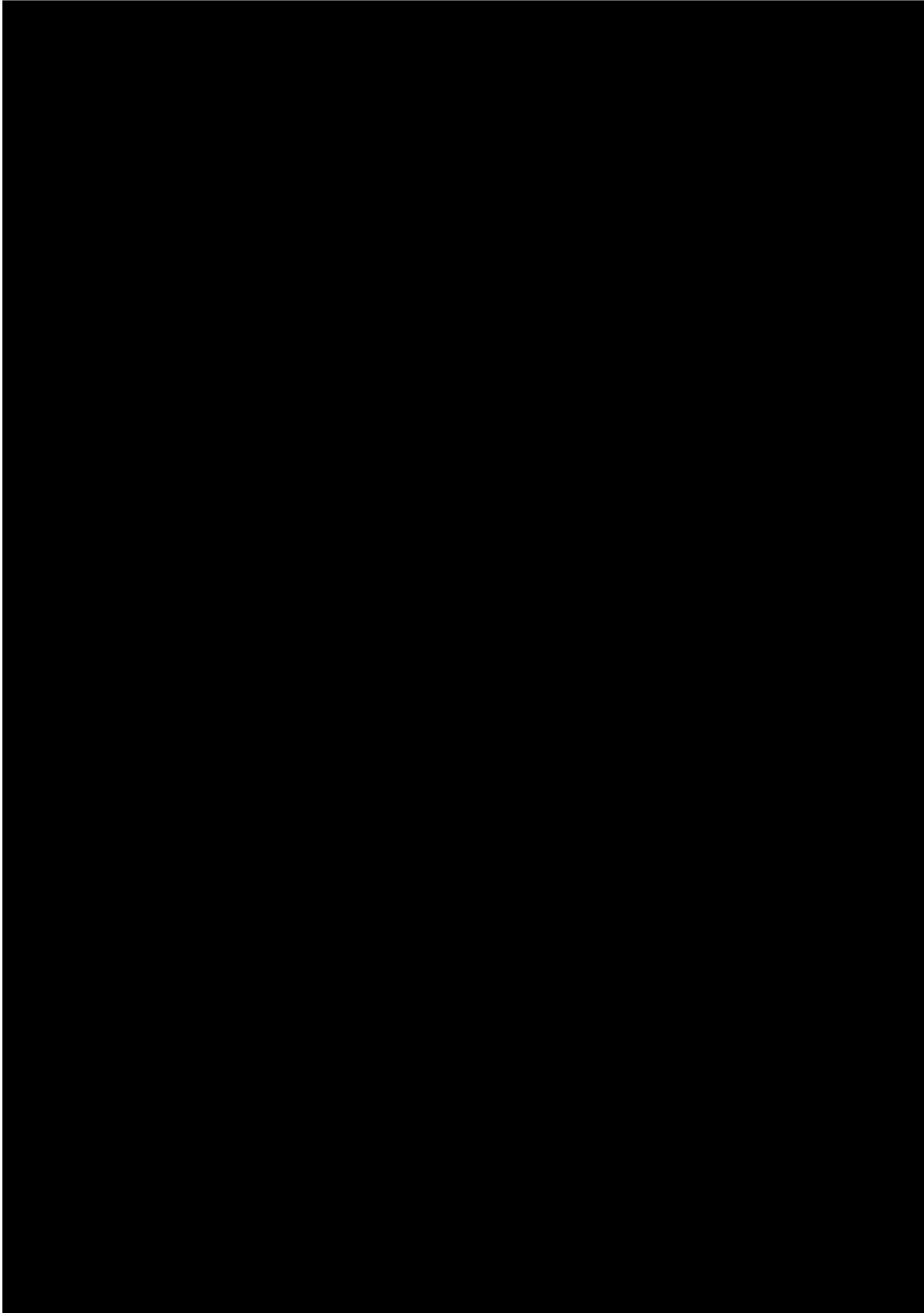

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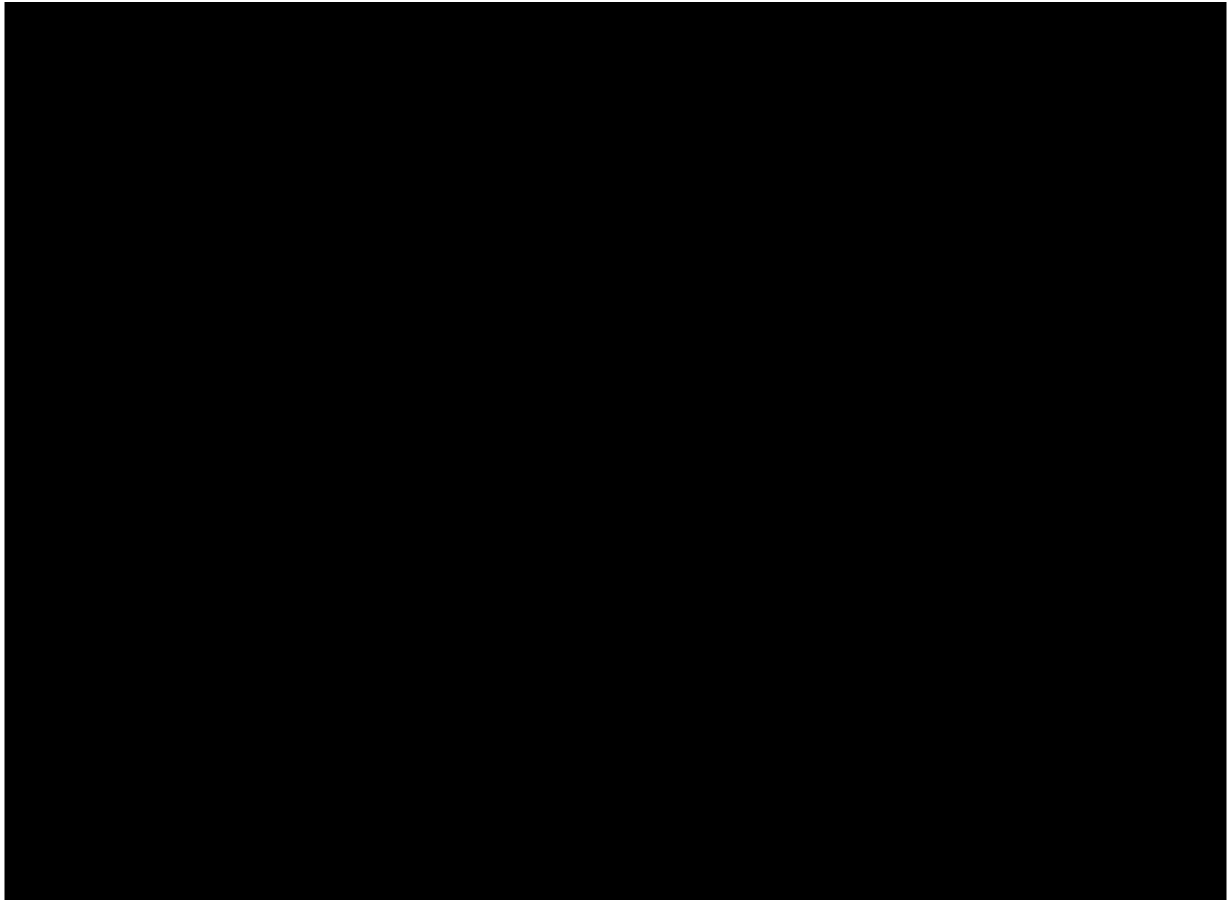

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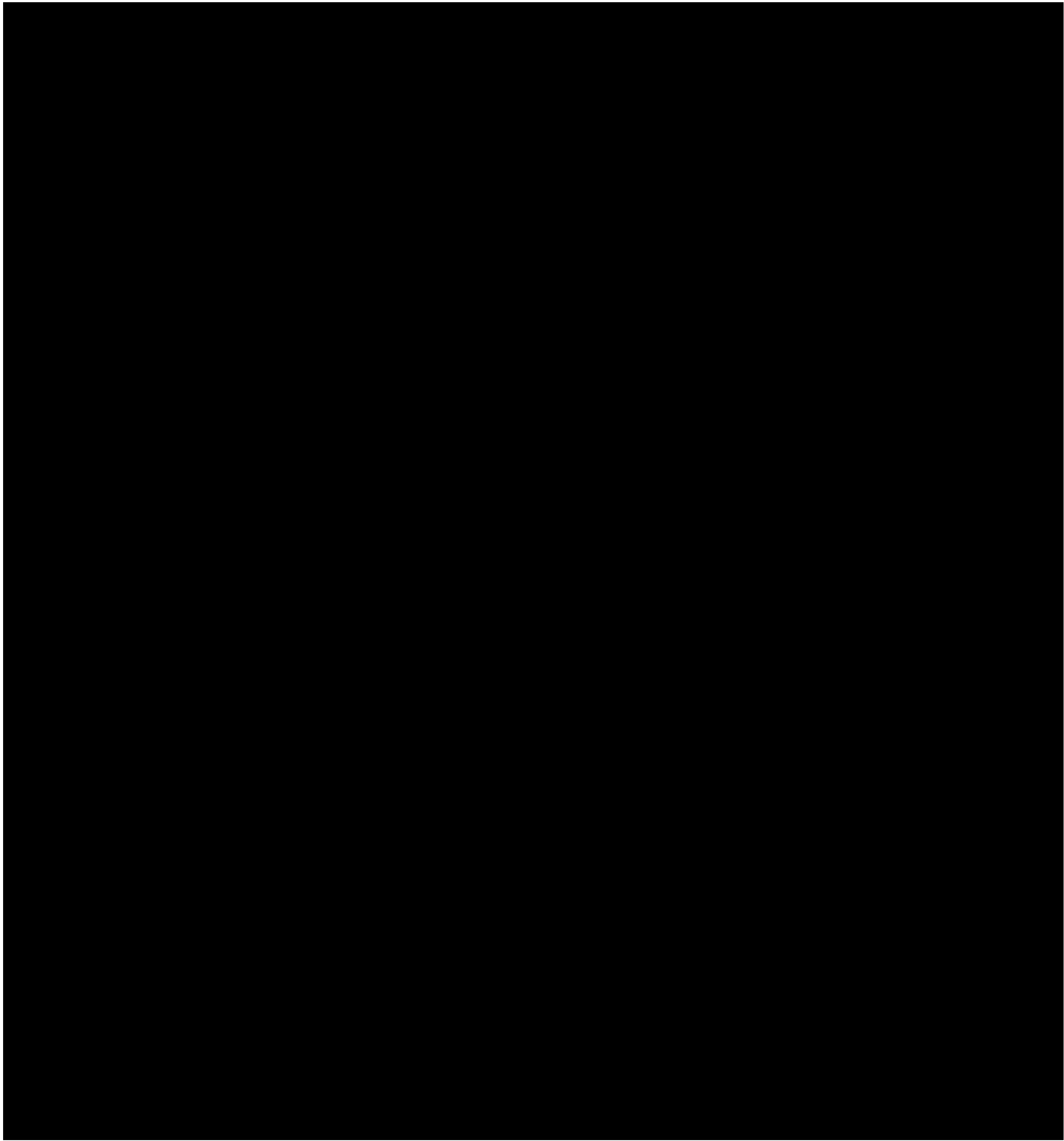

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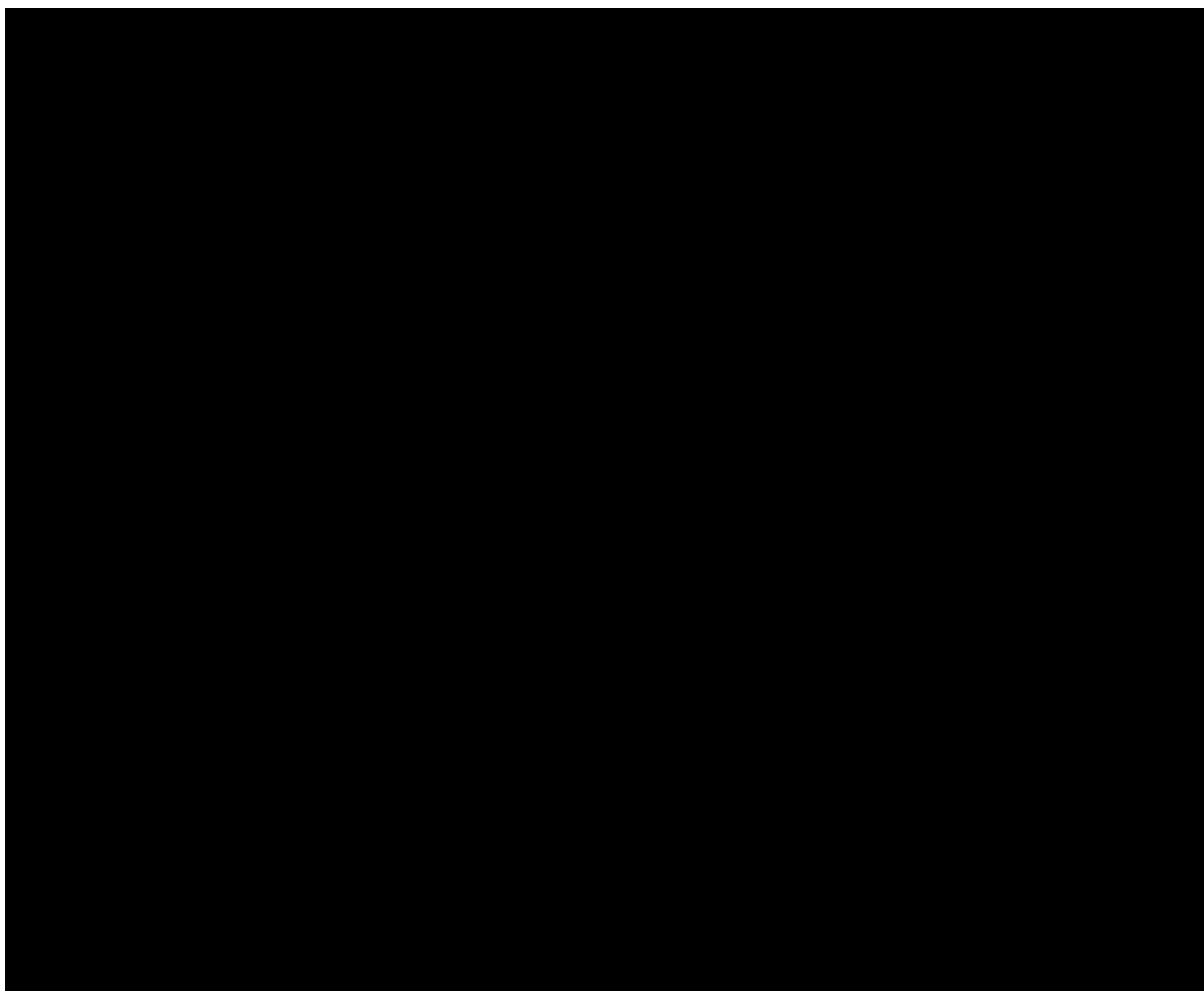

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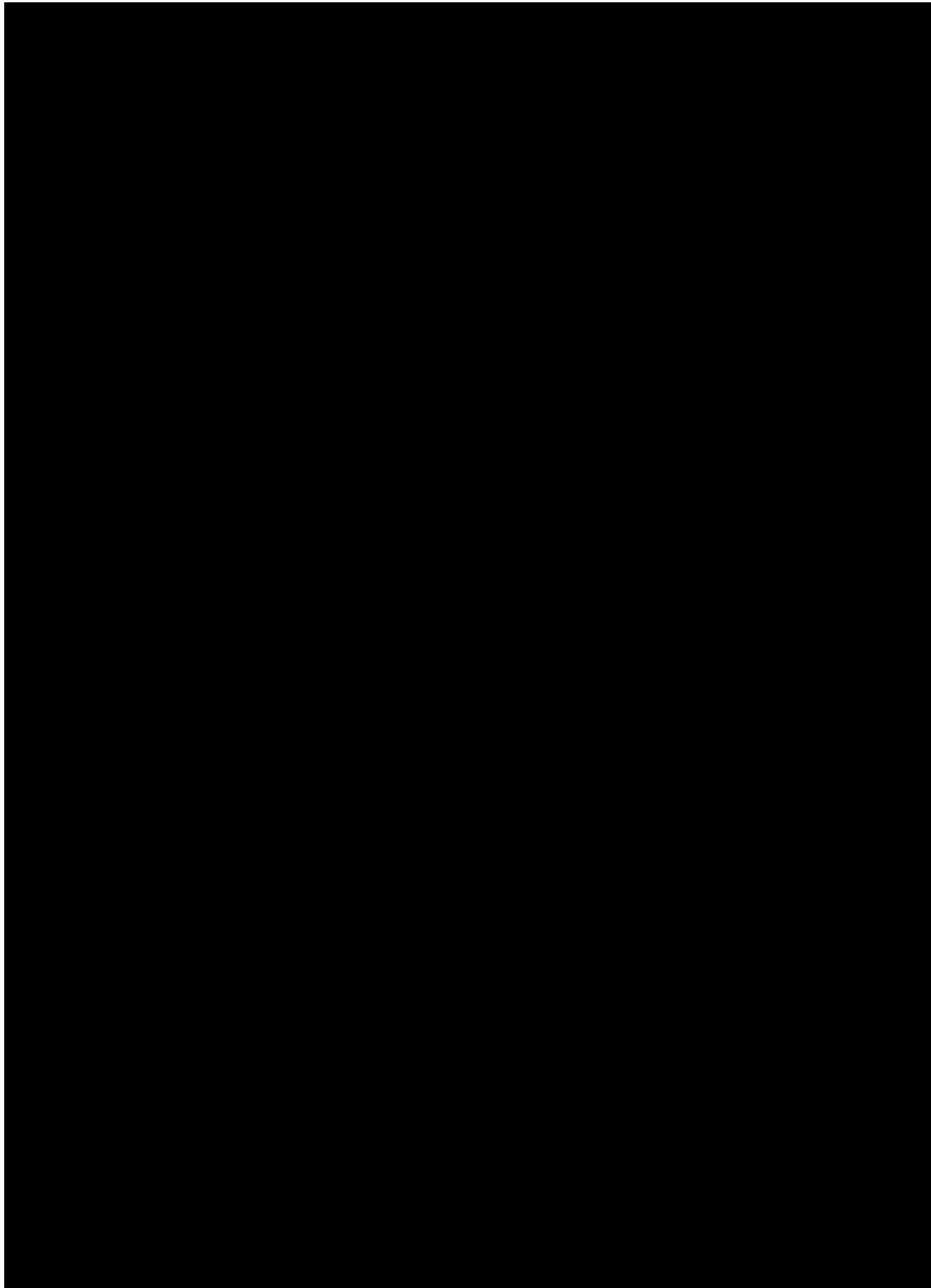

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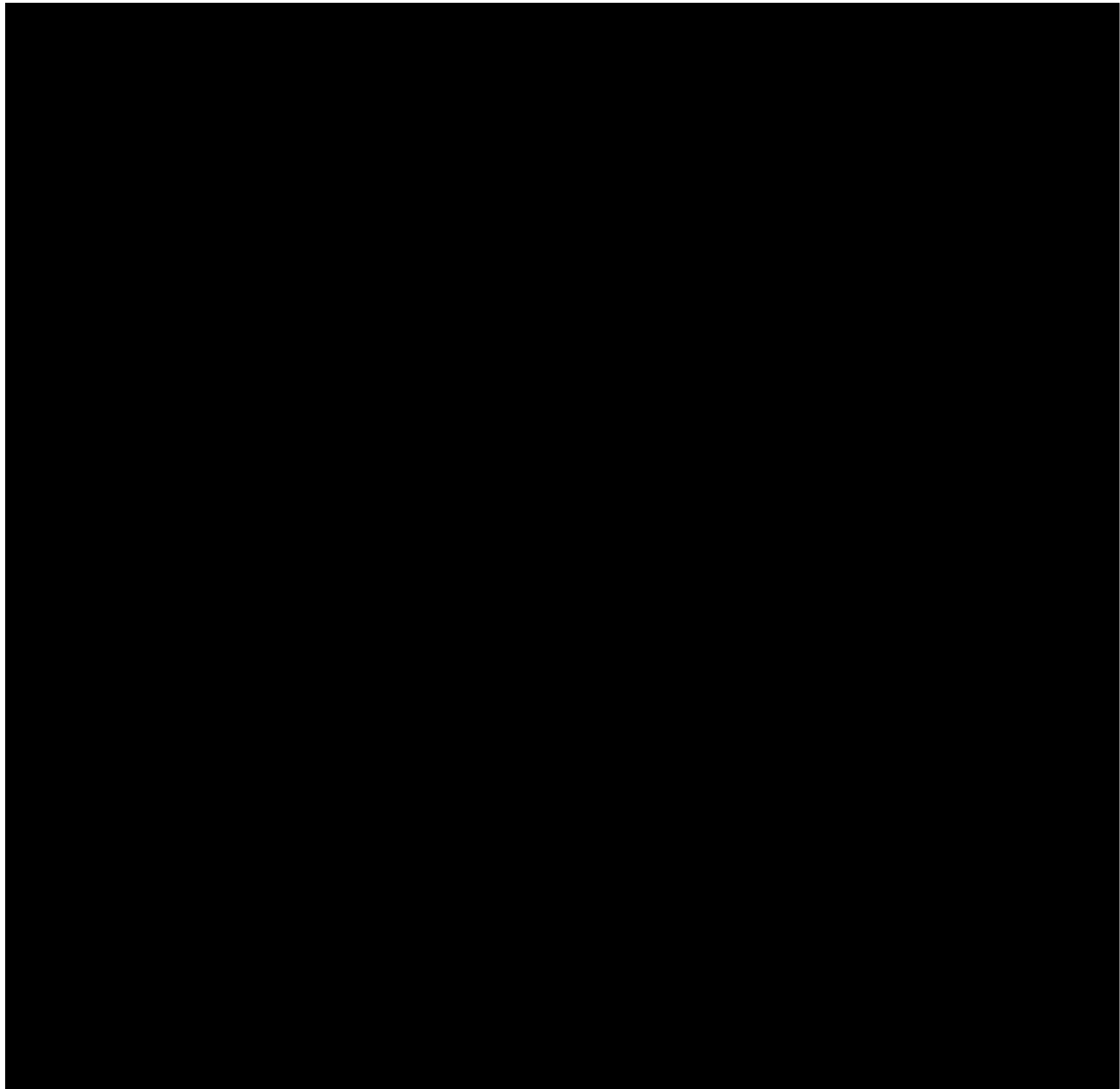

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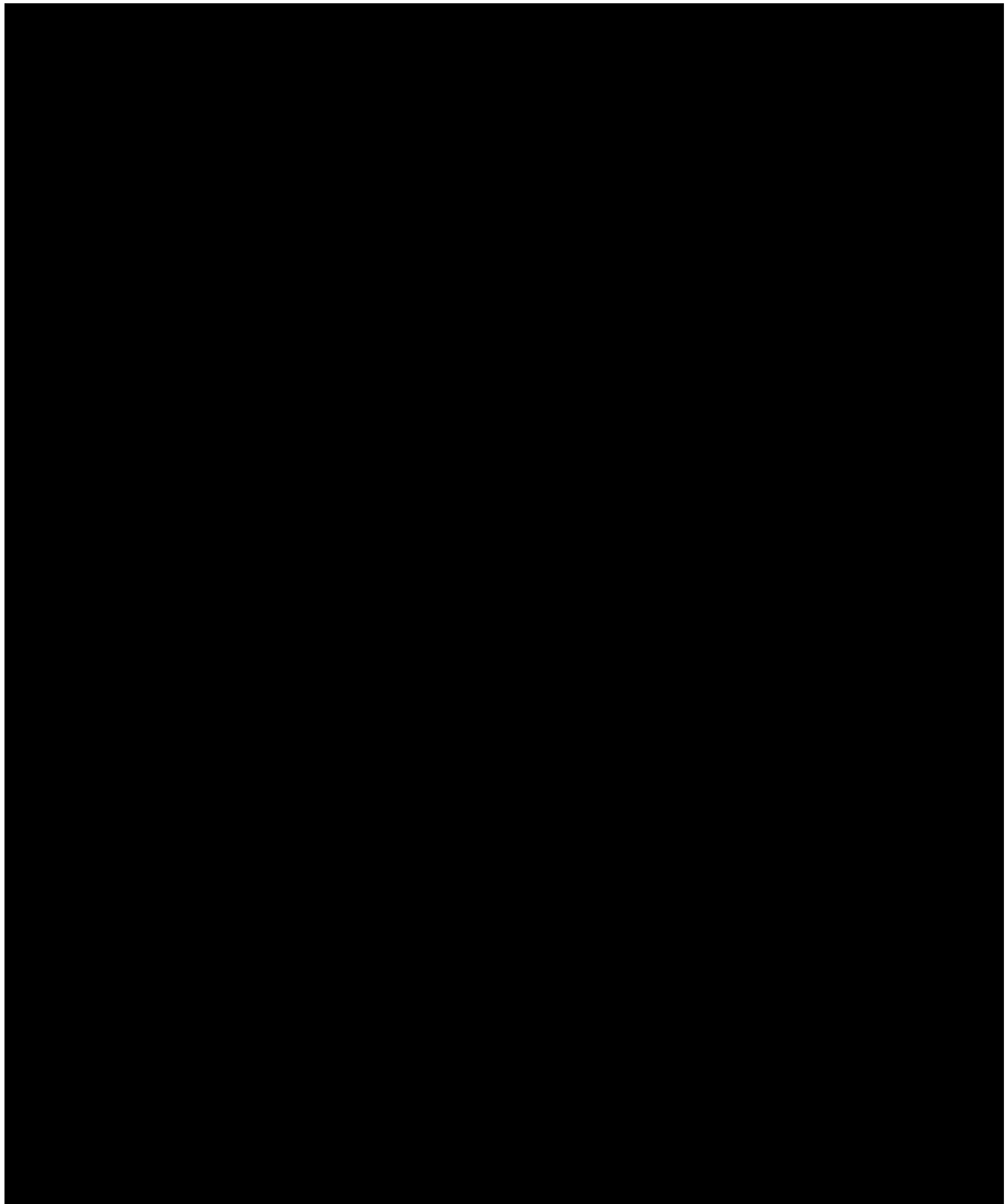

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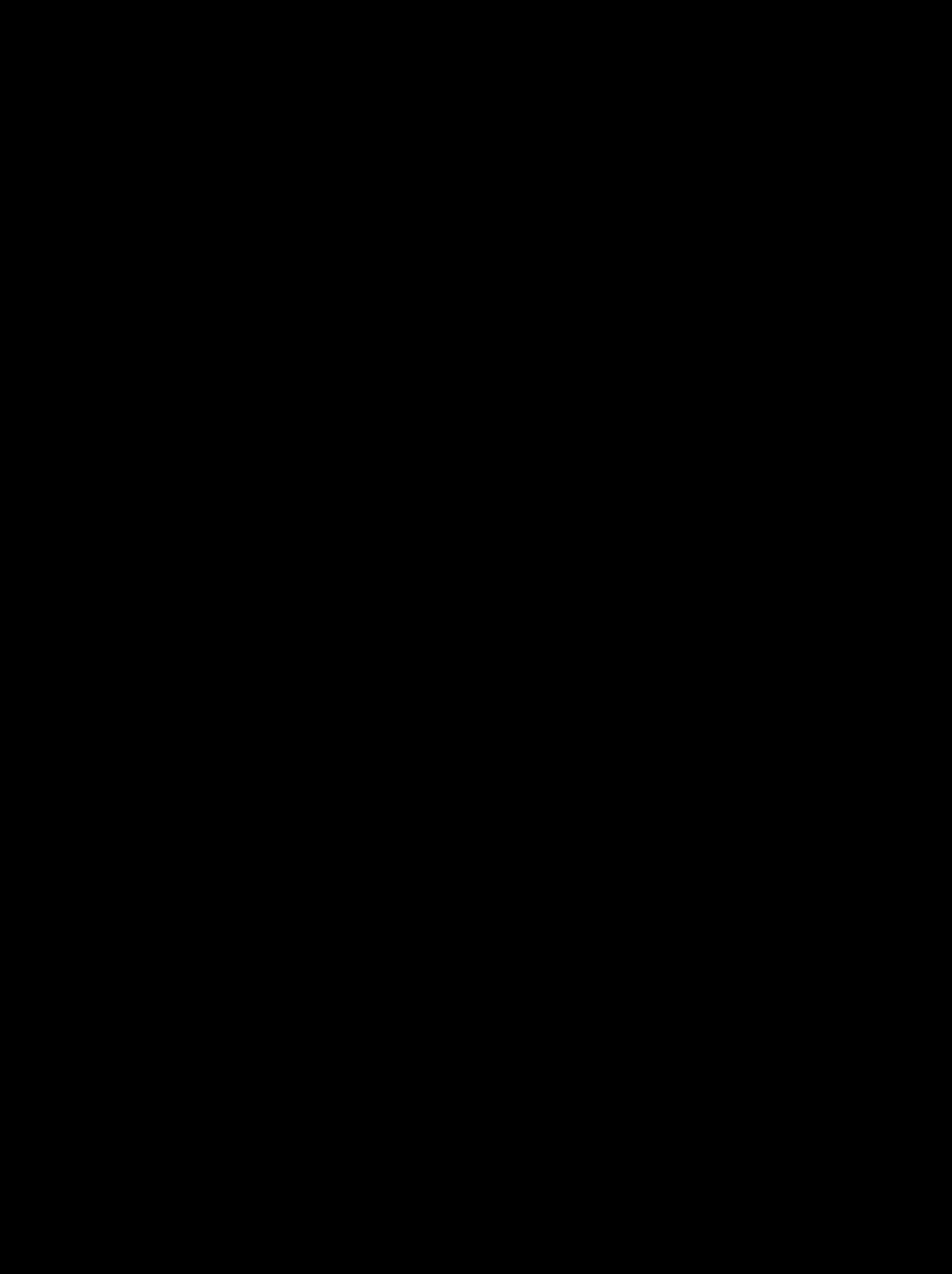

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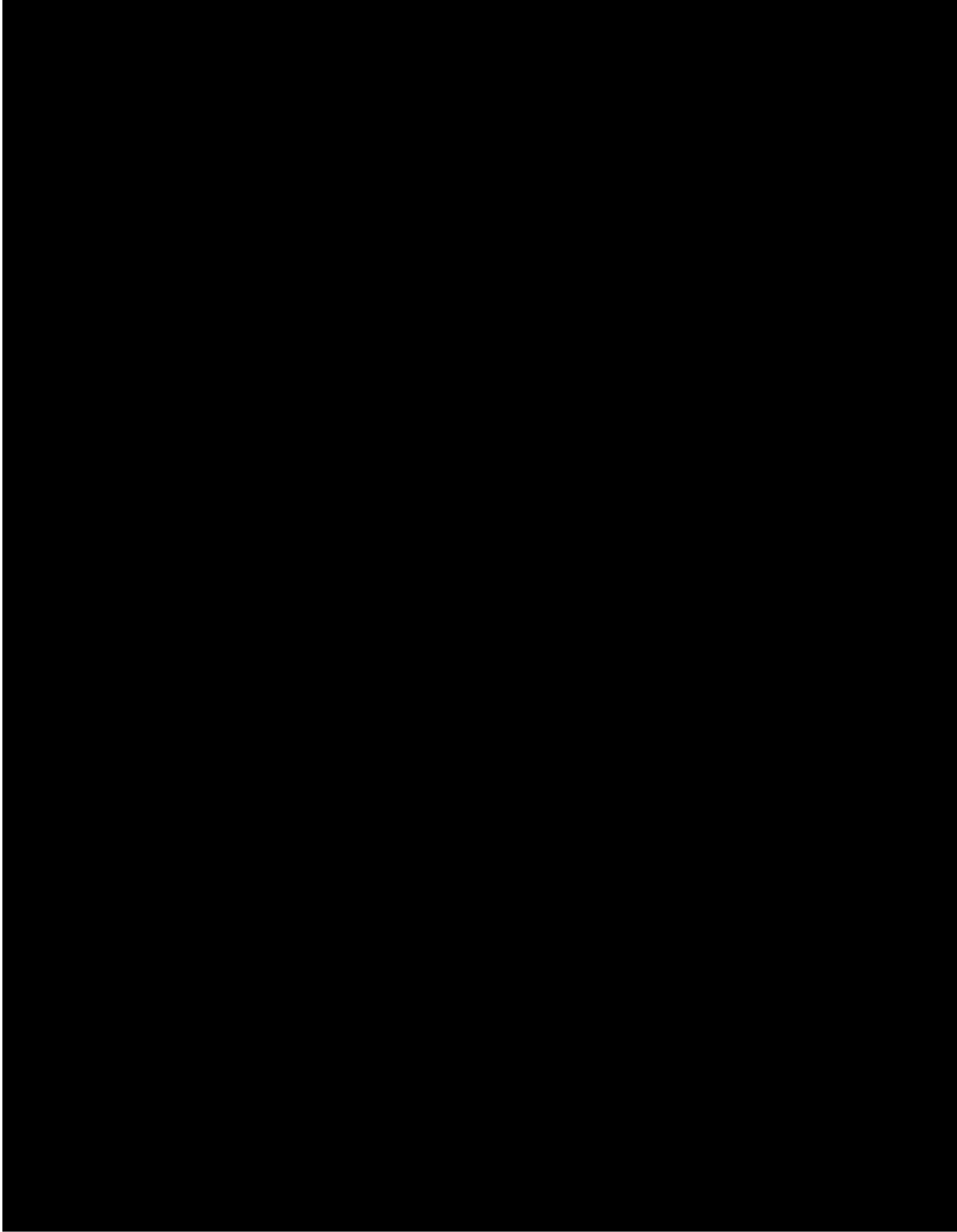

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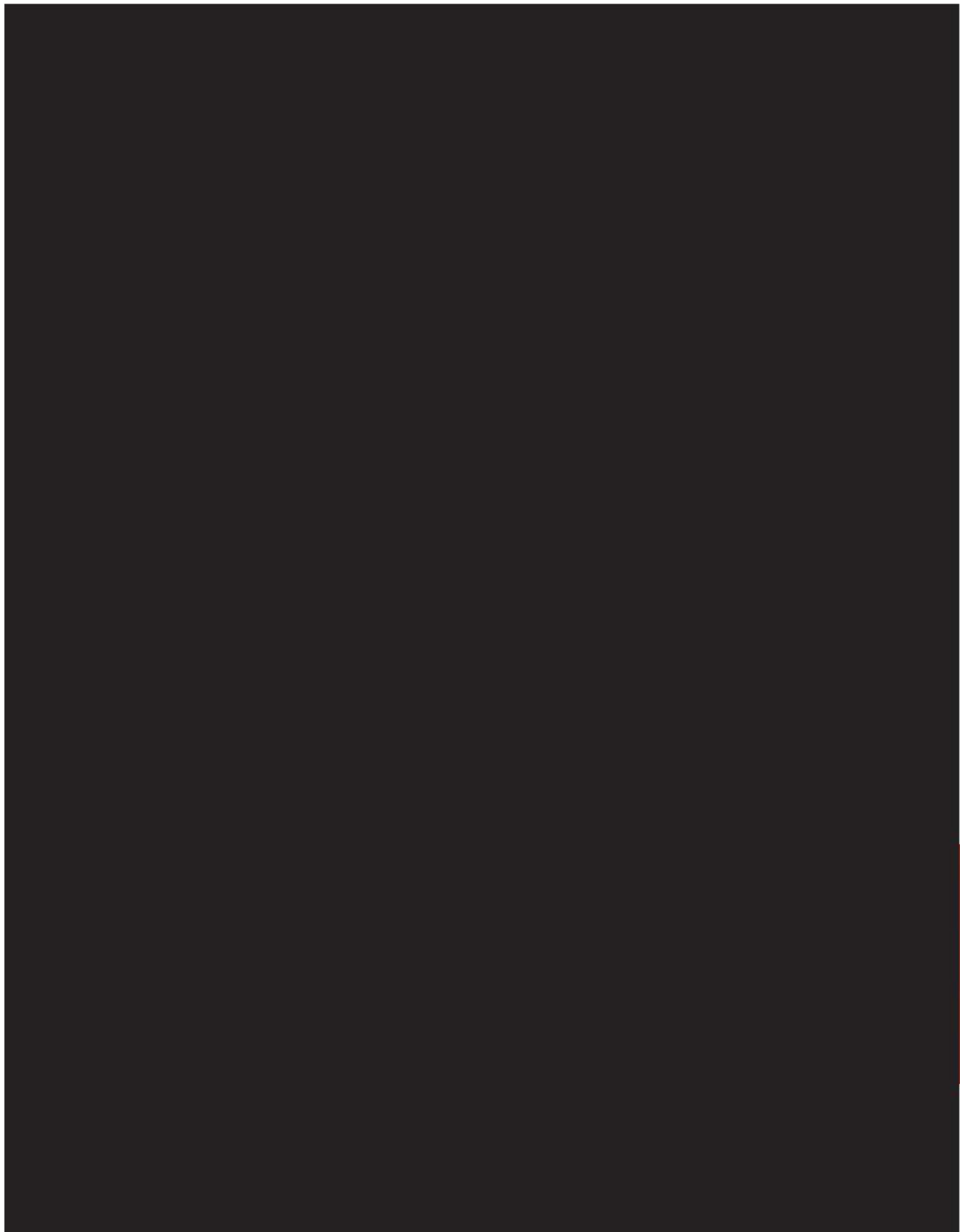

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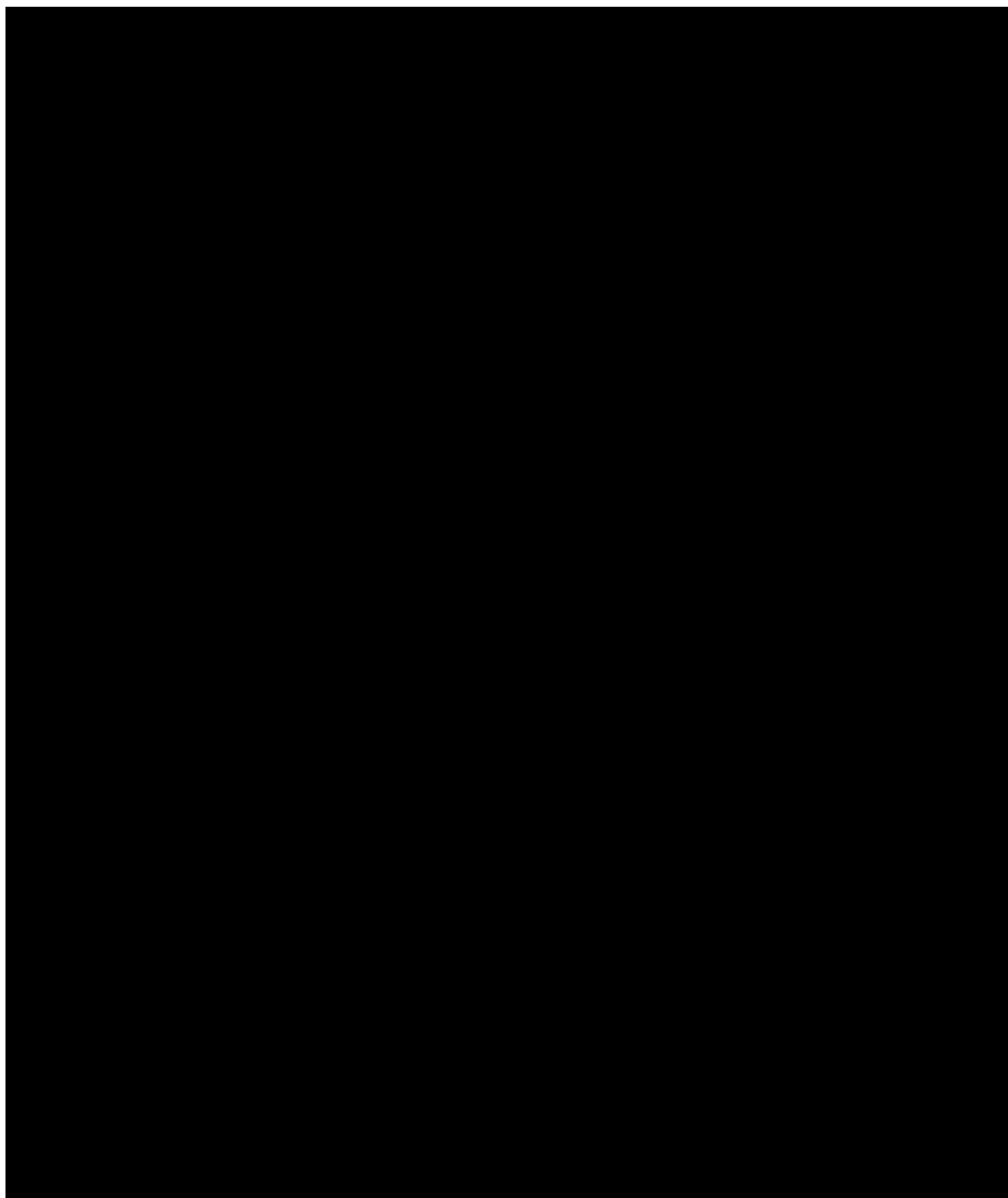

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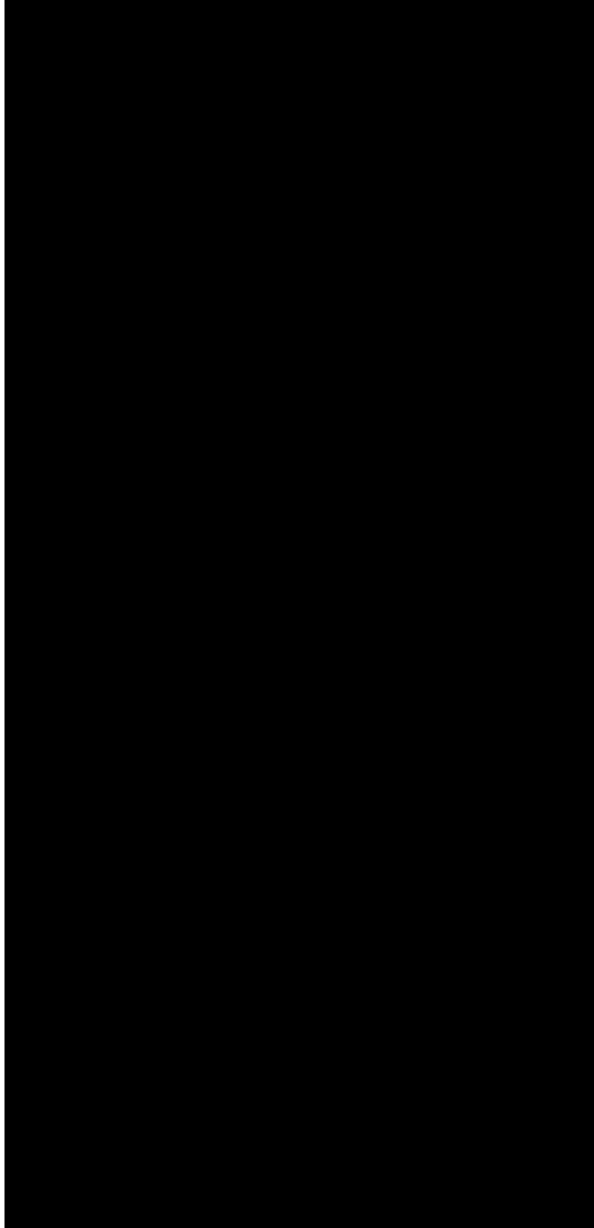

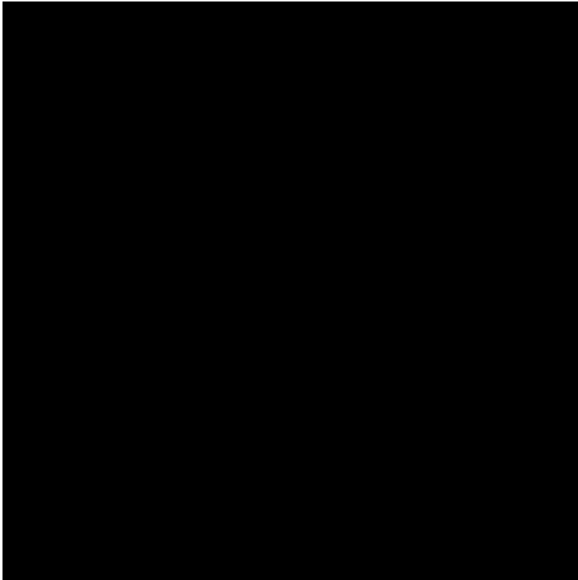

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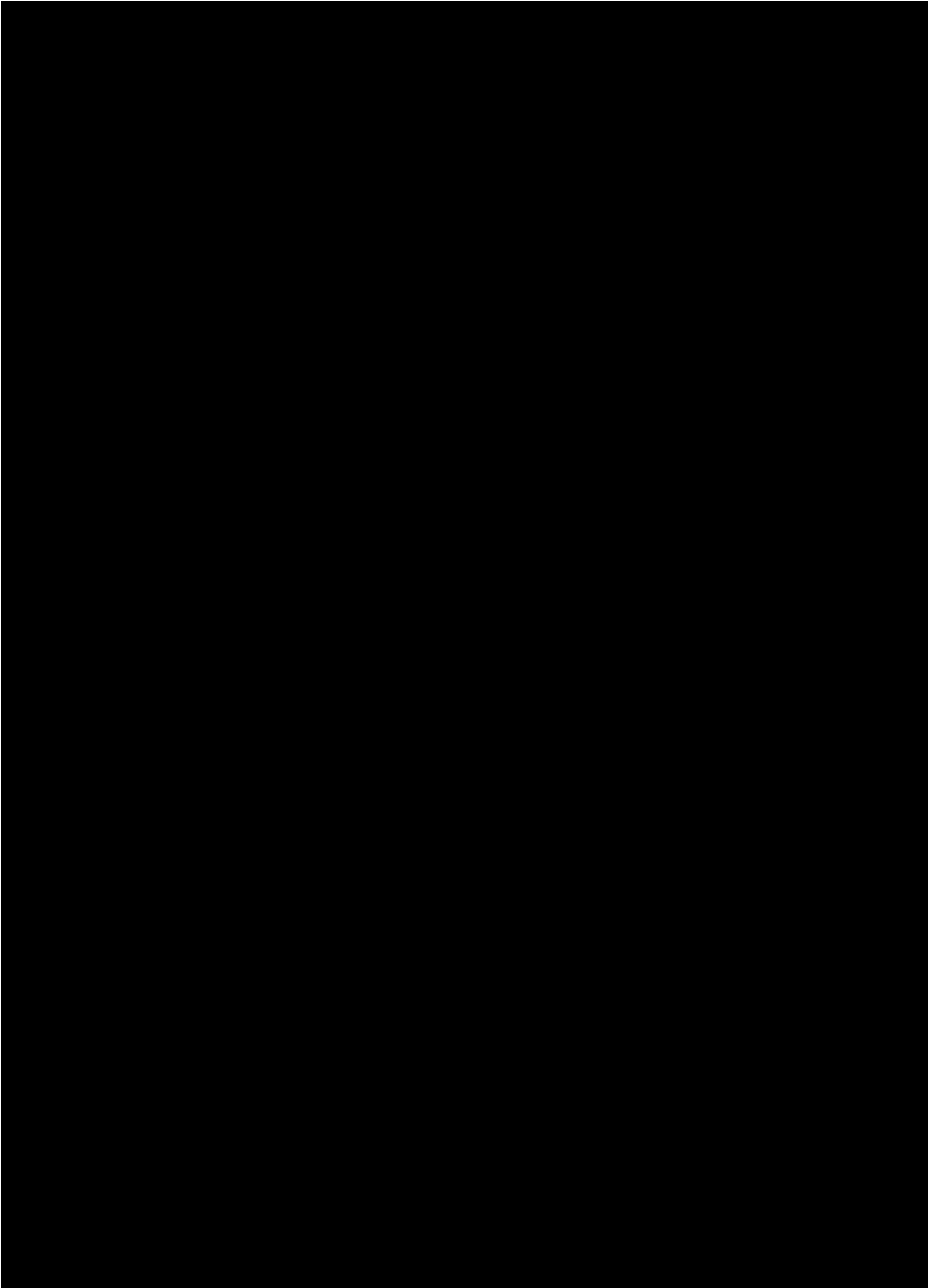

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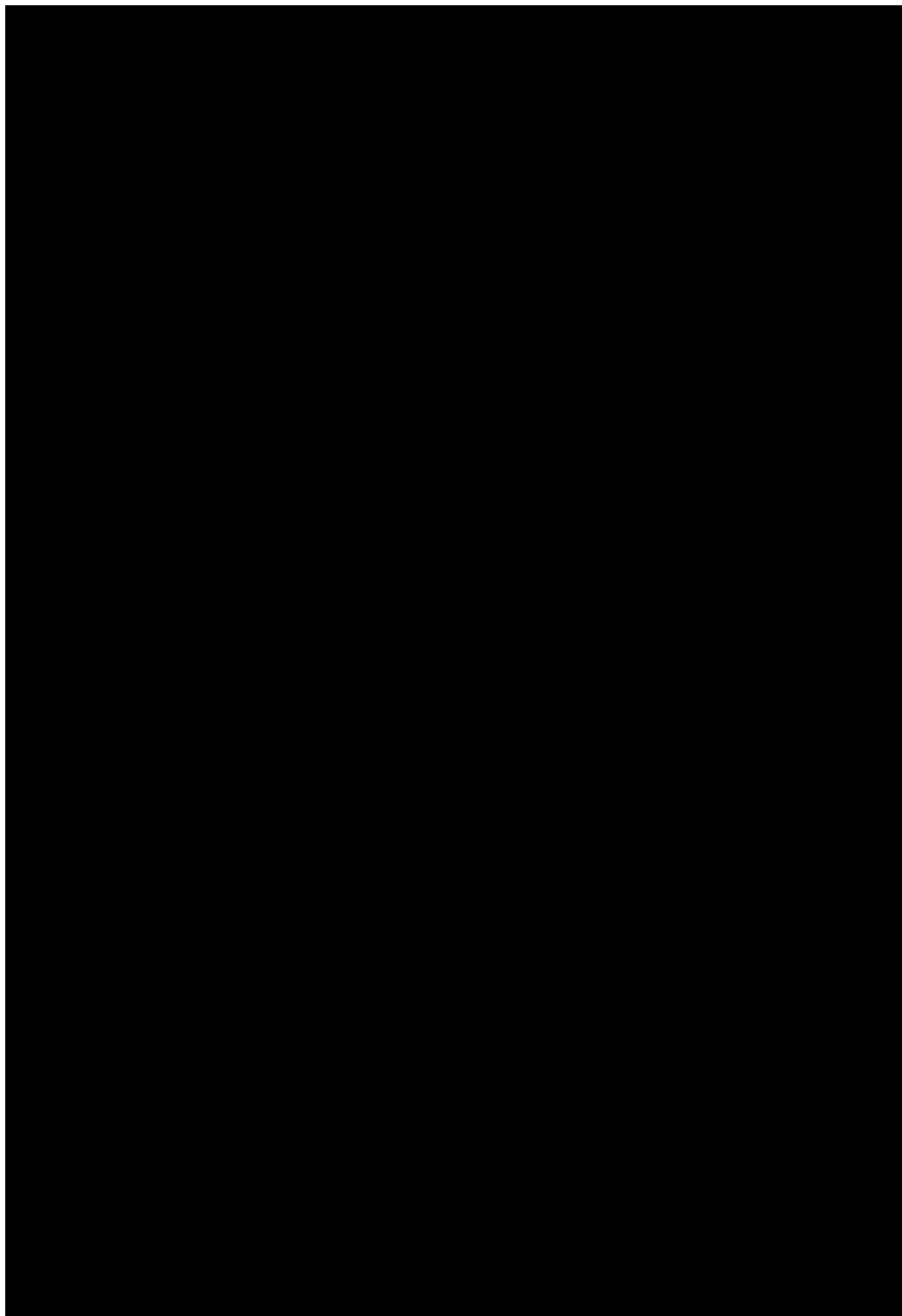

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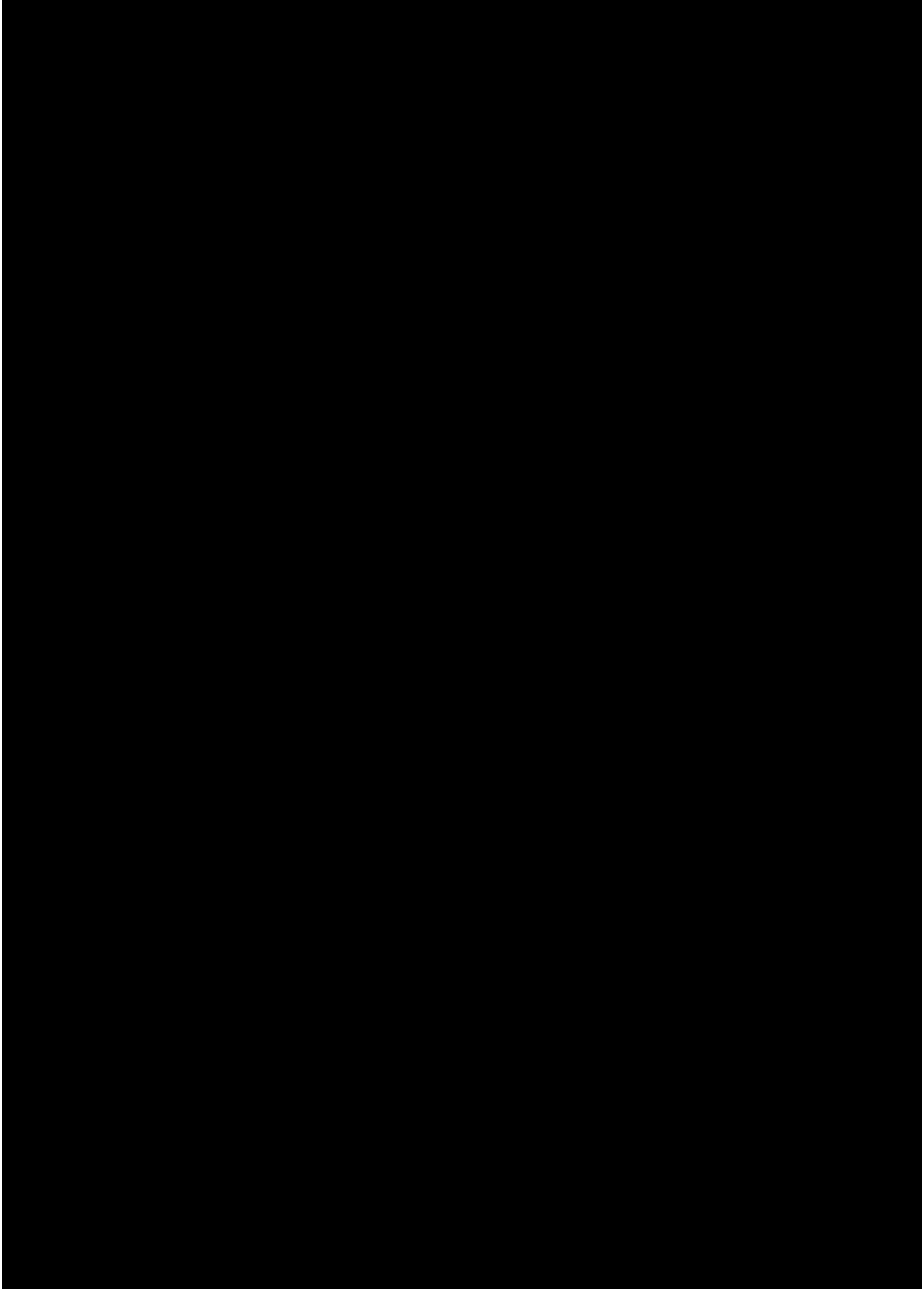

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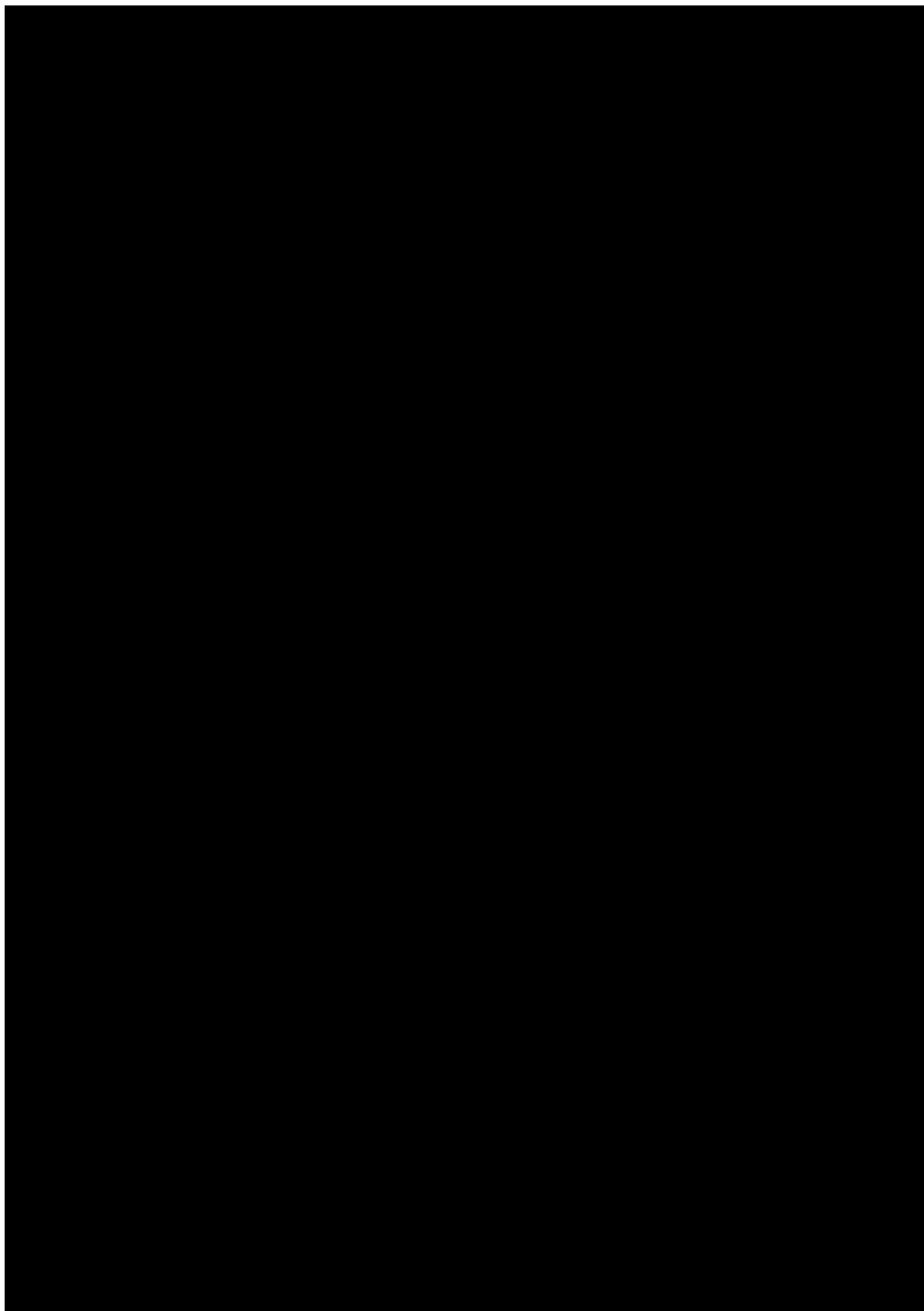

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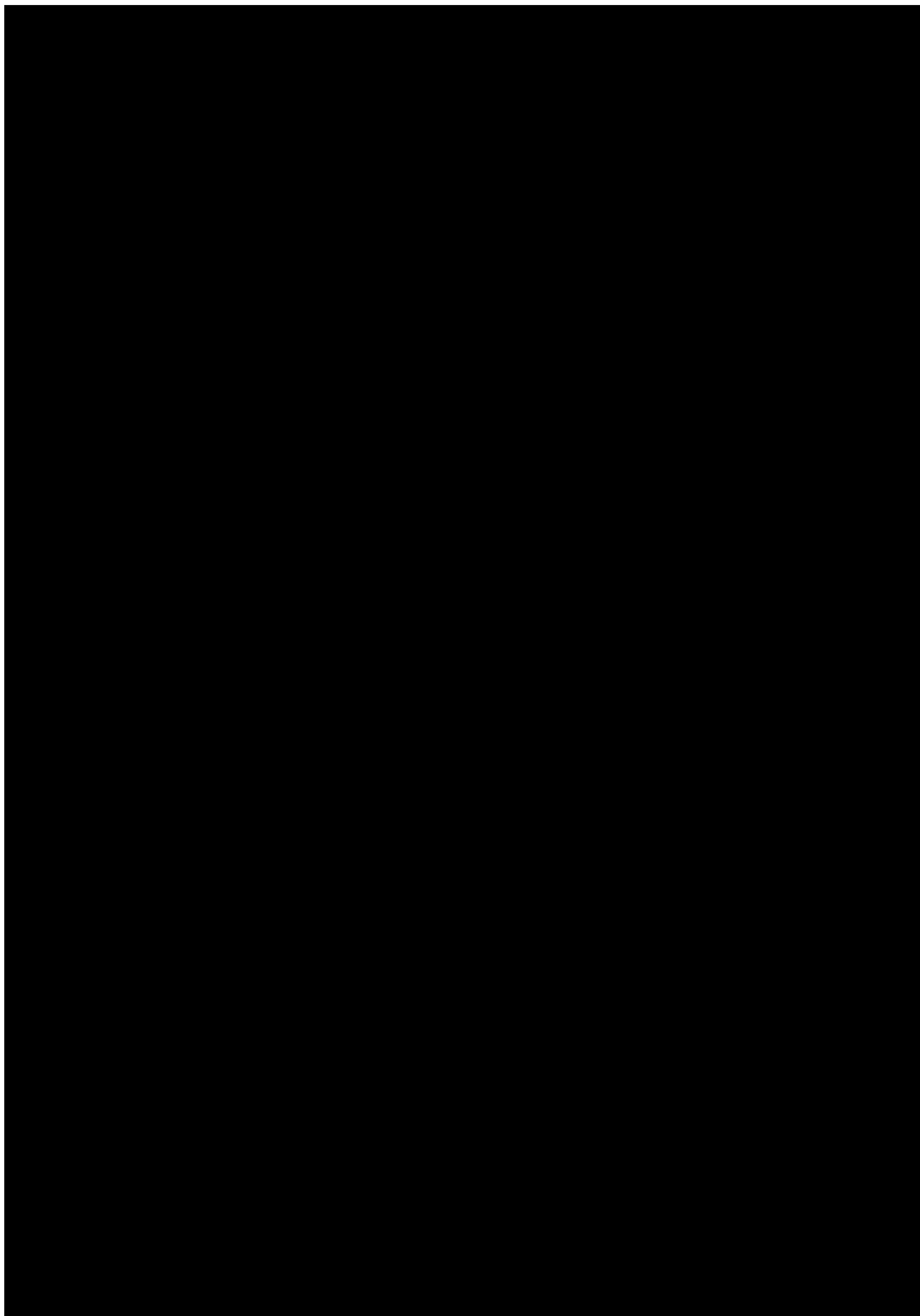

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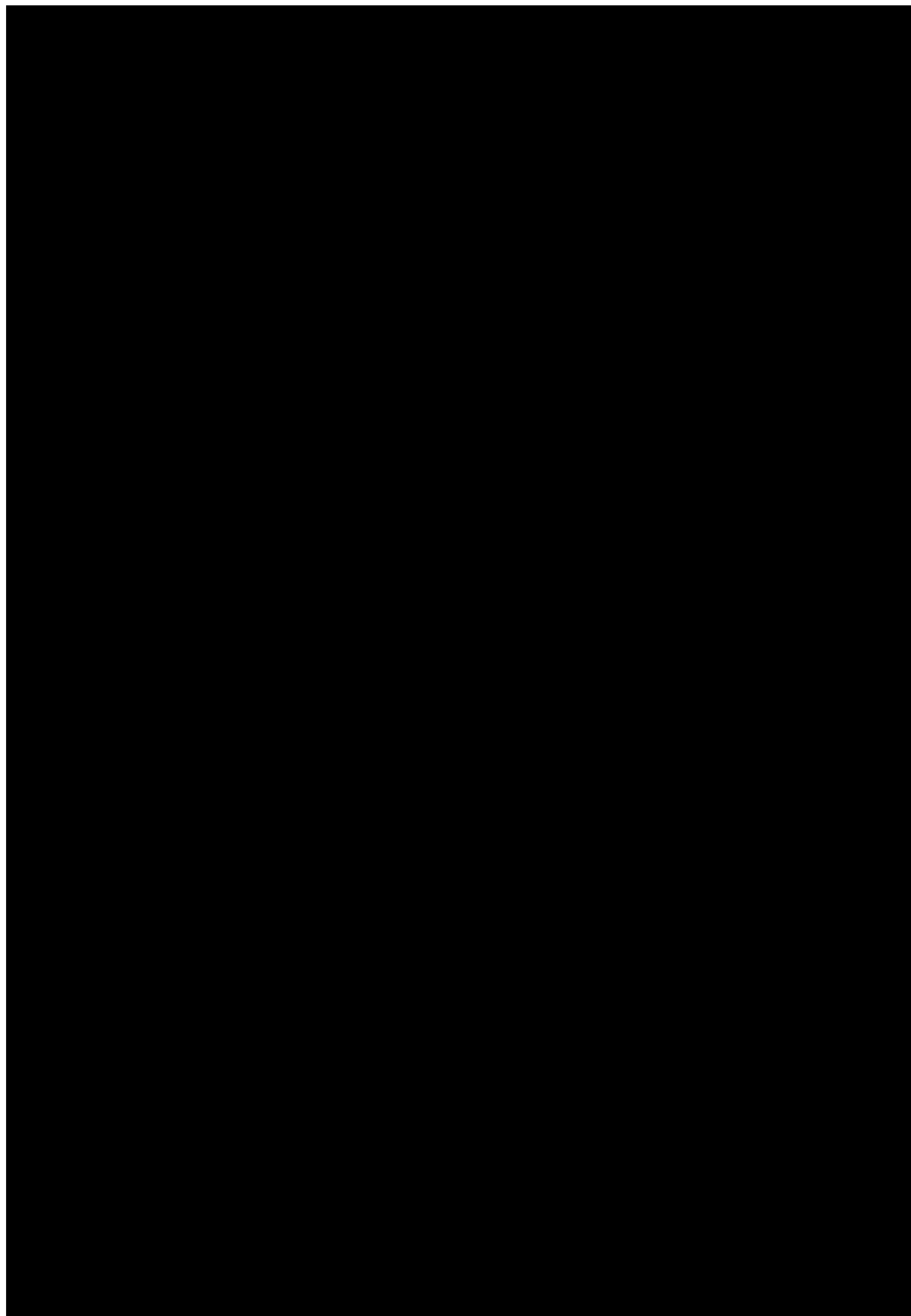

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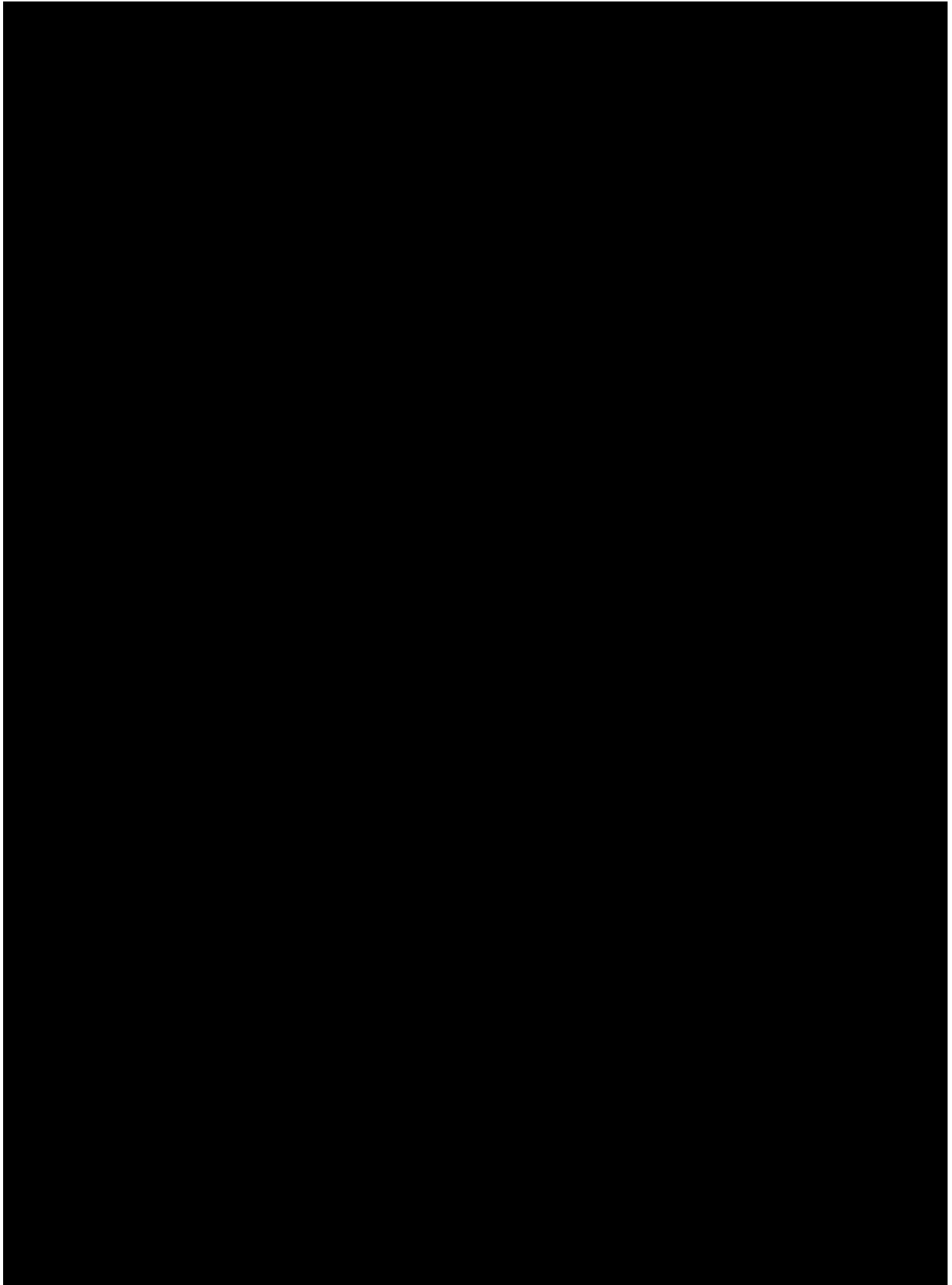


Supporting information

Protection of potential settlement assets

This section explains how the Crown protects the following assets for potential use in settling historical Treaty of Waitangi claims:

- surplus Crown-owned land
- Public Works Act land held by the Crown and sought by local authorities
- Crown-owned land transferred to State-Owned Enterprises and tertiary education institutions, and
- licensed Crown forest land.

Claimant groups are often concerned that the Crown will sell land that could be used to settle claims before a settlement is negotiated. The Crown is committed to ensuring that it retains sufficient assets to settle all historical claims. However, in doing so, the Crown must also be able to conduct its day-to-day business efficiently. In order to ensure that both of these objectives can be met, the Crown has provided both statutory and administrative processes to enable assets to be used in settlement.

These are:

- 'landbanking' processes managed by OTS
- consultation process for Public Works Act land held by the Crown and sought by local authorities
- statutory protection of Crown forest assets, and
- statutory memorials (such as under section 27B of the State-Owned Enterprises Act 1986).

The term Protection Mechanism is used to describe all of these ways of protecting Crown assets for possible use in future Treaty of Waitangi settlements. The term can also be used in a narrow sense to describe the landbanking process by which the Crown protects surplus Crown land for future settlements and holds that land in Treaty settlement landbanks until the settlements in which the land might be used are completed.

This section explains each of these processes, and also outlines the process managed by Te Puni Kōkiri for protecting or transferring sites of significance (wāhi tapu) outside the settlement process.

The Protection Mechanism – surplus Crown-owned land and Treaty settlement landbanks

The Protection Mechanism is run by OTS and ensures that surplus Crown-owned land is considered for possible use in Treaty settlements before it can be sold on the open market. This preserves the capacity of the Crown to provide redress for well-founded claims. Properties that meet the criteria for protection (see page 135) are bought and landbanked (that is, held by the Crown until the claims in the area concerned have been settled). Separate funding is used to pay for properties for landbanking, so claimants do not have to pay for the properties being landbanked. Nor does the Protection Mechanism affect the money available to settle claims.

This Protection Mechanism applies to all Crown (departmental) land, Crown Research Institute land, and District Health Board land that has become surplus and on which all statutory obligations – such as any obligations under the Public Works Act to offer land back to the original owners – have been cleared, and the department or agency wishes to sell. Land owned by SOEs and some other Crown entities is protected by the statutory memorial system described on page 153.

When a property is landbanked it is then available for use in settlement. As claims are settled, claimant groups can include landbanked properties in the settlement. In such cases the properties will be part of the overall settlement quantum and will be transferred to claimants at market value. If properties available for a particular settlement are not included in that settlement, they are sold on the open market on behalf of the Crown, unless the properties are also subject to overlapping claims from other claimant groups. Following settlement of all claims – including any overlapping claims – in a landbank area, the landbank for the area concerned ceases to operate.

Figure 4.1: Landbank overview

Treaty settlement landbanks

There are 15 regional landbank areas that together cover the whole country. When Crown-owned land in these areas is declared surplus, it is publicly advertised and any Māori who has registered a claim with the Waitangi Tribunal for the relevant area may apply to have the land protected and placed in the regional landbank.

If the Crown agrees to protect the property that has become surplus, Land Information New Zealand (LINZ) will buy it and hold it in a Treaty settlement landbank. Properties not landbanked are released and sold on the open market. Each regional landbank is subject to a financial cap that limits the total value of property that can be protected for each region, although this does not apply in Raupatu Areas (see below).

Property protected in regional landbanks is not held for any particular claimant group, even though it may have been protected on the basis of one group's application.

RAUPATU AREAS

In recognition of the significance of the breaches of the Treaty associated with raupatu, or confiscation, surplus Crown-owned properties in Raupatu Areas are treated slightly differently.

The Raupatu Areas are: East Wairoa, Waiuku, Tauranga, Bay of Plenty, Taranaki and Mohaka-Waikare.

Surplus Crown-owned properties within these areas are automatically considered for landbanking whether or not an application is received. However, the information provided in an application may increase the likelihood a property will be landbanked. Also, there is no financial limit to the total value of properties landbanked in the Raupatu Areas.

Criteria for landbanking

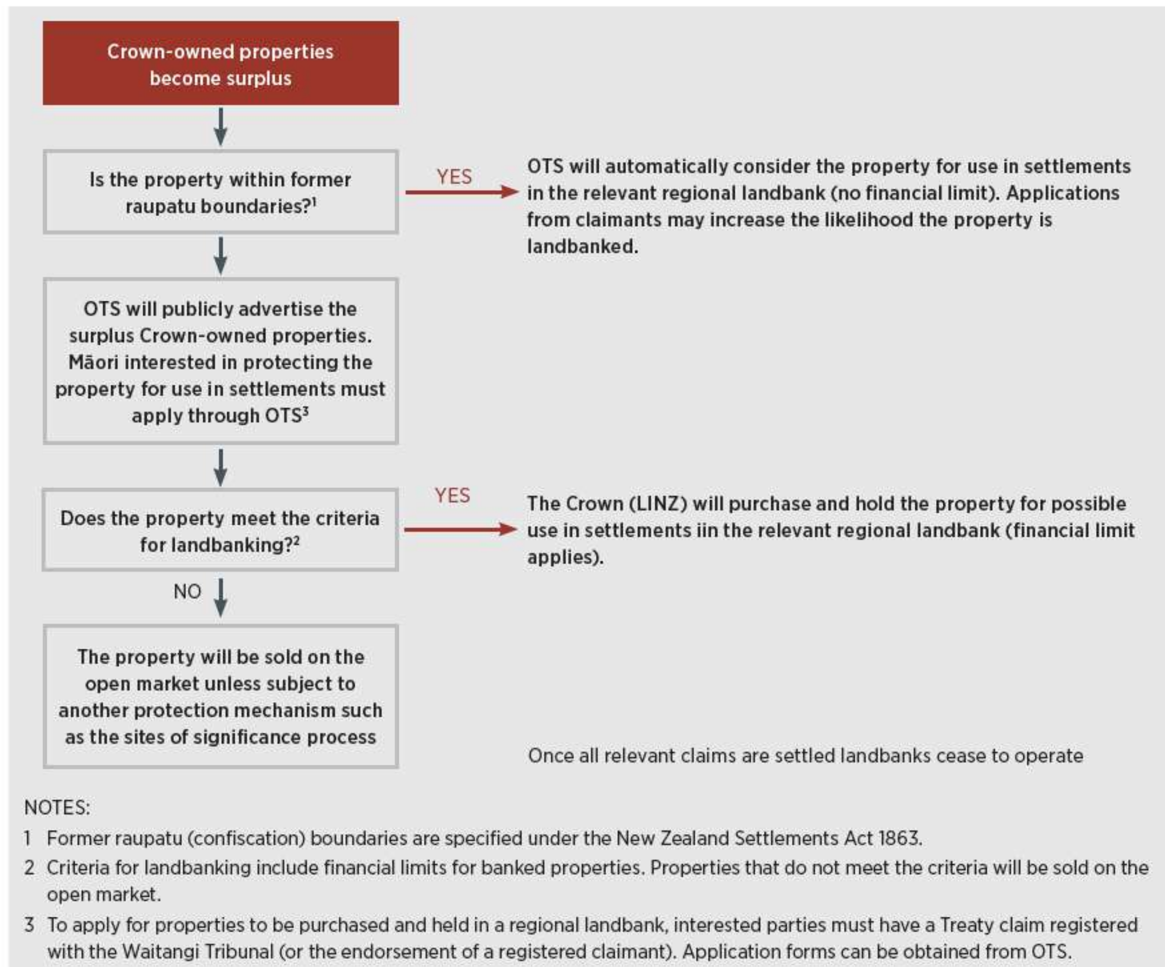
Under the Protection Mechanism process properties may be landbanked in a regional landbank based on the following criteria, applied on a case-by-case basis:

- the applicants have given sufficient reasons to show the significance of the site to them
- there is a strong enough justification for meeting the costs of holding the property
- there is room within the financial limit, and
- if the limit has been reached, the property is of such significance that an exception should be made and the property should be protected anyway.

Once property is approved for landbanking, the vendor agency and LINZ begin to negotiate and finalise the transfer at market value from the department or agency selling the property.

It is important to note that before property is considered for landbanking, it must have been cleared from the requirement to offer it back to former owners under section 40 of the Public Works Act 1981 or section 23 of the New Zealand Railways Corporation Restructuring Act 1990. Any other legal obligations affecting the Crown's ability to dispose of the land must also be resolved.

Landbank property – Anson House, Tauranga



NOTES:

1 Former raupatu (confiscation) boundaries are specified under the New Zealand Settlements Act 1863.

2 Criteria for landbanking include financial limits for banked properties. Properties that do not meet the criteria will be sold on the open market.

3 To apply for properties to be purchased and held in a regional landbank, interested parties must have a Treaty claim registered with the Waitangi Tribunal (or the endorsement of a registered claimant). Application forms can be obtained from OTS.

Figure 4.2: OTS Protection Mechanism process

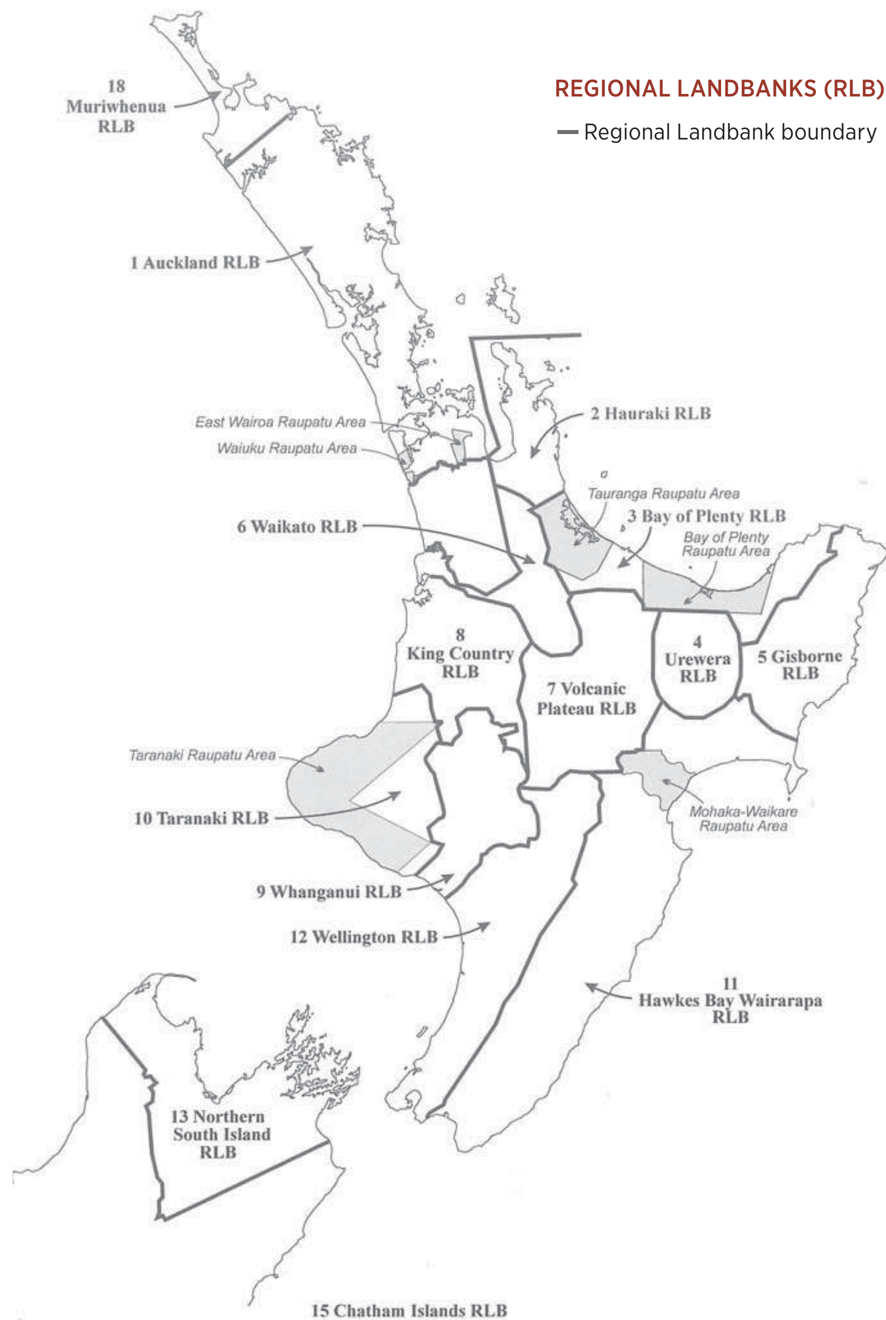


Figure 4.3: map showing coverage of the various landbanks

VENDOR PREFERENCE EXEMPTION

Cabinet has agreed that in exceptional circumstances Ministers may, on a case-by-case basis, consider exempting a property from landbanking to allow it to be sold to a specific third party. This policy may be applied, for example, when surplus land is required to provide continuing community services. Cabinet will consider such exemptions only after applications from Māori have been received and considered under the Protection Mechanism.

If such an exemption is agreed, provision may be made through a Right of First Refusal for the Crown to

reacquire the property if the community service stops operating from the property. If the Crown does reacquire the property, and it is declared surplus, it can be reconsidered for landbanking.

Further information on landbanking is available from the Settlement Advisor - Protection Mechanism, Office of Treaty Settlements (see OTS contact details on inside front cover).

MANAGEMENT OF LANDBANKED PROPERTIES

Land Information New Zealand (LINZ) has overall responsibility for managing landbanked properties and is required to act as a good landlord and to maintain the properties to at least the standard they were in when acquired. LINZ must also manage the landbank so that it recovers the costs of holding properties and obtains a commercial rate of return.

Transfer of Public Works Act land held by the Crown to a local authority for a public work

A consultation process introduced in 2001 deals with the situation when a local authority wants to obtain land acquired by the Crown under the Public Works Act for a local work, such as a road or sewerage system. As part of this process the interests of Māori are considered and, if confirmed, protected. This process aims to make sure that, if possible, the relevant land is not lost to the Treaty settlement process, and that matters relating to sites of significance are addressed. It weighs up the competing interests of local authority requirements for land for a local work and the interests of Māori.

As part of this process, OTS and Te Puni Kōkiri use the Protection Mechanism processes to identify any Māori interests, and then advise on how these interests may be appropriately taken into account. The Minister for Land Information (the Minister) considers this advice in deciding to either approve or decline the transfer to the local authority under section 50 of the Public Works Act.

The relevant considerations that the Minister takes into account in making a decision include:

- the nature of the work and its importance to the community
- the availability of other sites for the public work, and
- the significance of the property to Māori and the issue of any encumbrances that could be placed on the land to protect Māori interests.

The Minister balances Māori interests against the wider community interest in the proposed public work when she or he assesses what, if any, measures should be adopted to protect those Māori interests.

WHAT DO CLAIMANTS HAVE TO DO AND WHY?

OTS will seek comments from the relevant claimant group or groups from the perspective of protecting land for use in Treaty settlements. Claimant groups will provide site-specific information, where possible, on the significance of the property. The following types of information would be useful, but are not limited to:

a the historical or cultural significance of the particular property

b any specific features of the property that mean it could not be substituted by another property

c whether the property is the specific subject of a Waitangi Tribunal claim, and

d the intended future use by the claimant group of this property if it were transferred in a Treaty settlement.

OTS will also invite claimant groups to make any comments in support of the local work proposal.

It is possible that these properties will not be surplus to the requirements of the Crown agency. In such cases if the property is not transferred to the local authority then the Crown agency will continue to hold the land for the existing public work. If the property becomes surplus at some time in the future the standard processes for the disposal of surplus Crown land will be applied.

Statutory protection: memorials noted on land titles

Following the challenge by the New Zealand Māori Council, in the Lands case referred to earlier (page 15), to the Crown's intention to transfer land to the then newly created State-Owned Enterprises, Parliament passed the Treaty of Waitangi (State Enterprises) Act 1988. This provided a new section 27A in the State-Owned Enterprises Act 1986, requiring that memorials (a formal notation or record) be placed on all titles to Crown land transferred to State-Owned Enterprises under that Act.

The effect of such a memorial is that under section 27B of the State-Owned Enterprises Act 1986 the Waitangi Tribunal, in specified circumstances, can order the Crown to take back or 'resume' a property to be used in settling a Treaty claim, unless the Crown and claimant groups first agree on a settlement. These memorials have become commonly known as section 27B memorials.

There is provision for similar memorials to be noted on the titles of former Crown railway land, and land transferred by the Crown to tertiary educational institutions. However, the provisions for railway land have never come into play to date, as such land has been leased rather than sold to operators.

These memorials remain on the titles even if they are sold to third parties, and are not removed until claims over the area concerned have been settled or affected Māori groups agree to their removal. The memorial warns third parties that the property may be used for settling Treaty claims through resumption by the Crown. If this happens compensation is paid as if the property was being acquired under the Public Works Act 1981.

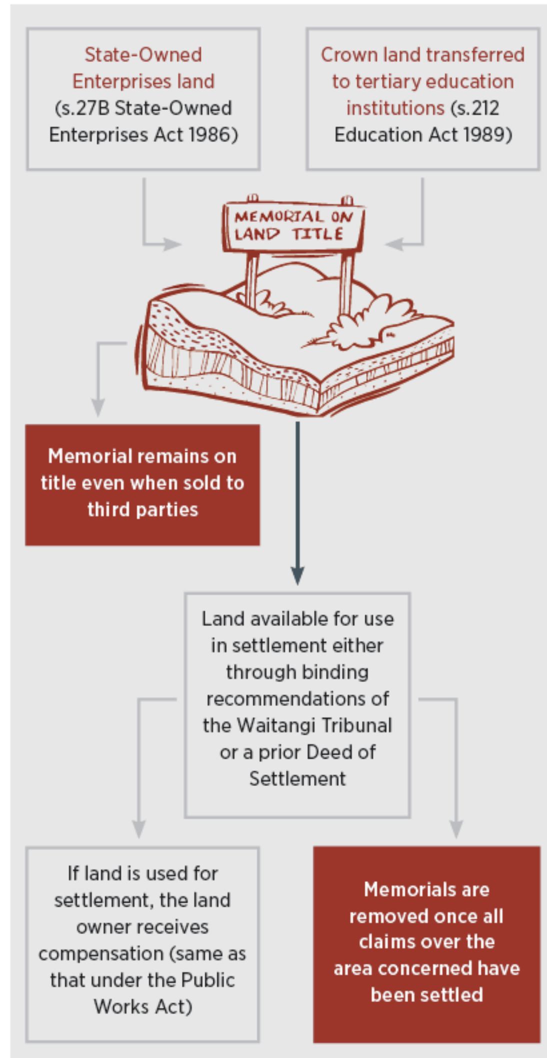


Figure 4.4: 27B and other memorials on land titles

Statutory protection of Crown forest assets

As well as the protections just noted, there are provisions in the Crown Forest Assets Act 1989 that prevent the Crown from disposing of land over which there is a Crown forestry licence.

As with section 27B and similar memorials, these provisions arose from Māori concerns that the Crown's plans to sell assets – in this case the land under exotic forests – would greatly reduce assets available for settlement. The Waitangi Tribunal has similar powers to make binding recommendations over Crown forest land as it has over memorialised land. There are further requirements affecting the return of Crown forest land, which are explained in more detail on page 86.

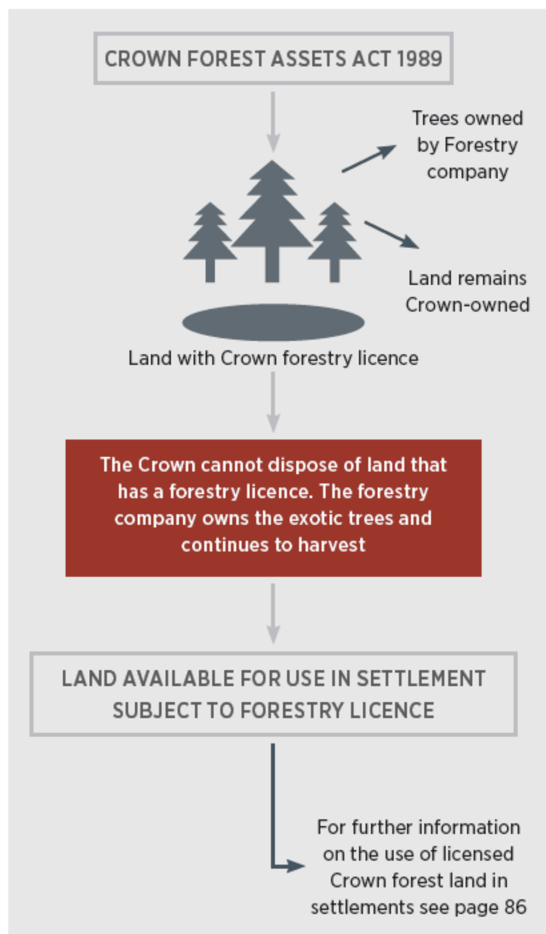


Figure 4.5: protection of Crown forest assets

When can the Waitangi Tribunal order 'resumption'?

The Waitangi Tribunal can make recommendations for resuming memorialised lands when:

- a claim is registered with the Waitangi Tribunal relating to the memorialised land, and
- the Waitangi Tribunal finds that the claim is well-founded, and
- returning all or part of the memorialised land to Māori ownership is required to compensate for or remove the prejudice caused by the Crown action or omission in breach of the Treaty and its principles.

Recommendations for resumption are first made as interim orders, that is, they are not binding immediately. The legislation allows the claimant group and the Crown 90 days to negotiate a settlement. This may or may not include the properties covered by the interim orders. If a negotiated settlement is not reached in 90 days, the recommendations become final and binding and the Crown must resume the properties for transfer to the claimant group.

Figure 4.6: Waitangi Tribunal resumption order

Has the Waitangi Tribunal ever used its resumptive powers?

In 1998 the Tribunal made interim recommendations for resumption of SOE land in the Ngāti Tūrangitukua claim area. The scope of the recommendations took account of the Crown's position on existing claim relativities, and did not include all 'resumable' properties in the claim area. The Crown and Ngāti Tūrangitukua reached a settlement in September 1998, before the recommendations became binding. The settlement included one of the properties recommended for resumption.

Use of memorialised properties in negotiated settlements

Alternatively, memorialised properties may be considered for use in a negotiated settlement. Whether or not a specific property is used will depend on the particular circumstances affecting that property.

WHAT COMPENSATION DOES THE OWNER OF A MEMORIALISED PROPERTY RECEIVE?

When a property is acquired through resumption, the owner of the property gets compensation from the Crown as if the property had been compulsorily acquired under the Public Works Act 1981. This is because it is the Crown, rather than the owner, who bears the cost of settling Treaty claims. The Public Works Act sets out a process for determining the market value of the property and specifies other costs that owners can recover. If the use is by agreement, the Deed of Settlement will provide for market valuation and how this is worked out.

Additional protection for wāhi tapu – the 'Sites of Significance' process

Apart from the landbank processes and separate from the Treaty settlements process, there is another source of land protection for Māori. As a matter of good government, the Crown accepts a responsibility to protect wāhi tapu and other sites of historical, spiritual, and cultural significance to Māori.

This responsibility is administered by Te Puni Kōkiri through a 'Sites of Significance' process that is separate from, but works in tandem with, the Protection Mechanism and is concerned primarily with protecting sites of significance on surplus Crown land. The process is open to any Māori who can establish an association with the site, whether or not they have a Treaty of Waitangi claim. The criteria that these sites should meet, and the details on how to apply for protection, are set out in the Te Puni Kōkiri publication Sites of Significance Process (see page 150 for contact details).

Glossary of technical terms

Words in italics are defined elsewhere in this Glossary or in the Glossary of Māori Terms. Page references are to relevant text.

Term	Definition	Page
Aboriginal title	an indigenous property right recognised at common law sometimes used interchangeably with customary title or *customary rights*. Title generally refers to interests in land, while rights refers to use rights such as fishing or gathering plants	27
Agreement in Principle	an agreement between the Crown and a claimant group, marked by the signing of a formal document or, in some cases, the exchange of letters between the claimant group and the Minister for Treaty of Waitangi Negotiations. The Agreement in Principle outlines the nature and scope of all settlement redress and is the basis for the final Deed of Settlement. An Agreement in Principle is non-binding on the Crown and claimant group.	58
Alienation	general term for loss of ownership of land, whether through sale, confiscation or other means such as acquisition under the Public Works Act 1981 or similar legislation	6–11
Apology	the Crown's formal expression of regret for breaches of the Treaty and its principles in relation to the claimant group	79
Claimant group definition	a description of those people whose claims will be settled and who will be the beneficiaries of the settlement and the *governance entity*	42
Claimant funding	Crown funding provided to a claimant group as a contribution towards the costs they incur in negotiating their settlement	49
Coastal Marine Area	expression used in the Resource Management Act 1991 for the foreshore, sea and seabed out to the 12-mile limit	107
Common law	system of judge made law applied in New Zealand from 1840, and derived from the English legal system	51
Comprehensive negotiations	negotiation of all *historical claims* of a claimant group at the same time	38
Contemporary claims	those claims arising from Crown acts or omissions after 21 September 1992 (see also *historical claims*)	23
Crown	executive branch of government	17
Crown acknowledgements	those matters that the Crown acknowledges as breaches of the Treaty and its principles. These form the basis of the apology in a *Deed of Settlement*	79
Crown Negotiating Parameters	particular parameters of redress agreed by Ministers as available for discussion between the Crown and the claimant group's mandated representatives	52
Customary rights	*Common law* recognition of traditional rights of indigenous people – for instance, rights to fish or to gather plants, – sometimes used interchangeably with *aboriginal title*, but 'title' more correctly refers to interests in land	22

Term	Definition	Page
Deed of Mandate	a formal statement prepared by a claimant group stating who is appointed to represent them in negotiations with the Crown, and how the mandate was approved by the claimant group	42
Deed of Recognition	Deed issued by Minister of the Crown responsible for an area of Crown land covered by a *Statutory Acknowledgement*, recognising a statement of the claimant group's associations with the area and allowing for consultation with the claimant group on specified matters	123
Deed of Settlement	the complete, detailed and formal settlement agreement signed on behalf of the Crown and the claimant group	60
Easement	rights that a third party or the public may have over land – for instance, a right of way, the right to drain water over or under the land, or a right of access for specified purposes	63
Fee simple estate	full legal ownership of or title to land, also known as freehold title	116
Fiscal envelope	see Settlement Envelope	81
Governance entity	the representative, accountable and transparent body which eventually receives and manages settlement assets on behalf of the claimant group	67
Hapū or whānau interests	interests of specific hapū or whānau within the larger claimant group and distinct from the collective claims of the larger claimant group, which may be given specific recognition in a settlement	61
Historical account	narrative of historical basis for the claims being settled by a Deed of Settlement, the context for the Crown's acknowledgements and apology	79
Historical claims	those claims that may arise out of or relate to Crown acts or omissions before 21 September 1992	23
Landbanking	a process to protect surplus Crown-owned lands for future use in the settlement of Treaty claims (see also Protection Mechanism, Treaty settlements landbank)	134
Lease	a contract providing for exclusive possession of land for a defined period, creating the relationship of landlord and tenant (or lessor and lessee)	63
Licence	in the Treaty settlement context, this refers to permission from a landowner to go onto or use land for specified purposes – for instance, a grazing licence	63
Licensed Crown forest land	land under Crown exotic forests, subject to the Crown Forest Assets Act 1989. Cutting rights to trees may be licensed, and the Waitangi Tribunal can order the Crown to transfer land and other compensation to a claimant group in specified circumstances	86

Term	Definition	Page
Mandating for negotiations	process by which the claimant group chooses representatives and gives them the authority to negotiate with the Crown on behalf of the group (see also Deed of Mandate)	39
Memorials	statutory notations on certificates of title of the power of the Waitangi Tribunal to order resumption of the land by the Crown for return to Māori	139
Overlapping claim or shared interest	where two or more claimant groups make claims over the same area of land which is the subject of historical Treaty claims. Also known as a 'cross claim'	53
Overlay classification	statutory instrument that applies to specified land managed by the Department of Conservation, allowing for recognition of claimant group values in the management of the site without altering the underlying classification of the land, for example, as part of a National Park. Known as Tōpuni in the Ngāi Tahu settlement, Taki Poipoia o Ngati Ruanui in the Ngati Ruanui settlement, and Kirihipi in the Te Uri o Hau settlement	121
Protection Mechanism	a generic term for the processes by which the Crown ensures that Crown land can be retained for use in settlements. It is also used to refer specifically to the process – administered by OTS – through which surplus Crown-owned lands can be retained in landbanks until claims for which the land may be used in settlement, have been completed (see also landbanking)	134
Protocol	statutory instrument comprising a statement issued by a Minister of the Crown, or other statutory authority, setting out processes for how a particular government agency intends to interact with a claimant group and enable that group to have input into its decision-making process	123
Quantum	total monetary value of the redress in terms of cash and assets provided to a claimant group in settlement of their historical claims. It also refers to the total amount of financial and commercial redress in a settlement package	81
Resumption	where the Waitangi Tribunal makes a binding recommendation ordering the Crown to resume (take back ownership of) land subject to a memorial as redress in settling well-founded Treaty claims	140
Right of First Refusal	the right of a claimant group to have the opportunity, ahead of any other potential purchaser, to purchase specified surplus Crown land when such land is available for disposal by the vendor agency	85
Section 40 offer-back	the right, under section 40 of the Public Works Act 1981, of a former owner of land acquired by the Crown for a public work to have that land offered back, should the land no longer be required for the public work	136
Settlement Envelope	concept, developed by the Crown in 1992-1994, used to describe the total sum set aside for the settlement of historical Treaty claims (also called the 'fiscal envelope'). It was discontinued at the end of 1996	81

Term	Definition	Page
Statutory Acknowledgement	statutory instrument in which the Crown recognises (in settlement legislation) the claimant group's statement of its cultural and traditional links with a specified area or feature, such as rivers, lakes, mountains, coastal areas, wetlands, etc.	122
Statutory instruments	generic term for redress options recognising a range of cultural interests in settlements, through the use of arrangements set out in settlement legislation, for example, a Statutory Acknowledgement	115
Terms of Negotiation	a written agreement between the Crown and a claimant group setting out the agreed objectives and ground rules for negotiations	51
Treaty settlements landbank	overall term for the regional landbanks of properties for potential use in Treaty settlements, managed by Land Information New Zealand.	135
Vendor agency	government department involved in the transfer of properties in settlements or under a Right of First Refusal, or through the protection mechanism operated by OTS (see also Protection Mechanism)	85
Vesting	statutory transfer of fee simple estate (title or ownership) in land. A type of statutory instrument available in settlements	116

Glossary of Māori terms

Term	Definition	Page
Ahi kā	tribal fire, symbolising rights of possession based or continuous ongoing occupation	50
Hapū	subtribe, grouping of related whānau	7, 39
Hui	meeting, assembly	39, 65
Iwi	used in this text to mean whakapapa-based tribe	7, 39
Kaitiakitanga	the practice of guardianship, care and wise management of, for example, natural resources. Kaitiaki (guardian) refers to the person(s) exercising kaitiakitanga	100
Karakia	prayer	79
Kaumātua	elders	29
Kāwanatanga	government or governorship	1, 7
Kirihipi	sheepskin, used in the Te Uri o Hau (Ngāti Whatua hapū) settlement to describe an overlay classification. It refers to a re-affirmation of the Treaty of Waitangi by Ngāti Whatua written on a sheepskin and known as Kirihipi te Tiriti o Ngāti Whatua	121
Kuia	female elder	29
Mahinga kai	food resource or place where such a resource is found	90
Marae	the reserved area on which meeting and dining houses are located. The space in front of the wharenui (meeting house) is the marae ātea	32, 101
Maunga	mountain	101
Pā	fortified place, stockaded village	8, 101
Pouwhenua	carved and decorated post of hard wood, used in settlements to signify the presence of a particular claimant group	113
Rangahaua Whānui	broad research by theme or district (used by Waitangi Tribunal)	36
Rangatira	chief, person of high rank	1
Rangatiratanga	chieftainship, the exercise of customary authority, see also tino rangatiratanga	1, 7
Raupatu	confiscation of land	9, 36
Rohe	district, area, region	40
Rūnanga	assembly, iwi council	39
Taki Poipoia	refers to wāhi tapu or places of spiritual significance and is used in the Ngati Ruanui settlement to describe an overlay classification	121
Taonga	treasure	1, 113
Tikanga	customs, rituals, lore	1, 40

Term	Definition	Page
Tino rangatiratanga	highest chieftainship, authority. In this context the Crown interprets this to mean Māori self-management or autonomous authority of Māori groups over their Development and resources	1
Tōpuni	dogskin cloak, used to signify chiefly protection, and used in the Ngāi Tahu settlement to describe an overlay classification	121
Tūpuna	ancestors	36
Urupā	burial ground	101
Wāhi taonga	treasured or special place. This guide generally uses wāhi whakahirahira to indicate places of significance other than wāhi tapu, this includes wāhi taonga	101
Wāhi tapu	sacred place	101
Wāhi whakahirahira	treasured or significant place	101
Waiata	song, chant	79
Whānau	extended family group	39, 61

Frequently asked questions about Treaty settlements

Q *What if the Crown knows that a claimant group has made a mistake in negotiations to the claimant group's disadvantage?*

A The Crown has an obligation to negotiate in good faith. If claimant groups have not recognised something in their claim to which they are entitled, or which would benefit them in negotiations, then the Crown, if it knows of the mistake, will ensure that such matters are brought to the claimant group's attention. Otherwise the settlements are unlikely to be durable. Terms of Negotiation record the Crown's and the claimant group's agreement to negotiate in good faith, so this is a mutual obligation on both parties.

Q *Is there still a 'settlement envelope'?*

A The 'settlement envelope' or 'fiscal envelope' no longer exists. Existing settlements will only be used as benchmarks where appropriate, such as similar claims requiring similar levels of redress. Appropriations are set aside every year for the settlement of historical Treaty claims, but these reflect the expected number of settlements in any given year and not a pre-determined fiscal cap.

Q *Are Māori customary rights extinguished when a claim is settled?*

A Settlements do two things. First, they provide redress for breaches of rights, including Treaty and any customary rights, up to 21 September 1992. Secondly, the settlement may recognise those rights in modern-day structures, for example, commercial fishing quotas. Customary rights may also have been previously extinguished by statute or other legal act. Settlements do not try to define every customary right that may still exist. Claimant groups can seek to advance claims to customary rights in the future. Of course, the Crown reserves the right to challenge the validity of any such claim.

Q *Haven't there been full and final settlements before?*

A There have been a number of attempts in the past to resolve certain Māori grievances. However, these 'settlements' were negotiated in a different context and often did not fully address all aspects of the grievances of the groups concerned. Nor were members of wider claimant groups consulted about the content of such settlements. Settlements under the current policy take all historical grievances into account and fulfil the principles of the Treaty of Waitangi, and Crown responsibilities under it. In addition, it is only in recent years that the courts have begun to articulate the principles of the Treaty, now being reflected in settlement policy.

Q *Are settlements under the negotiations process final?*

A Yes. Claimant groups and their members cannot re-litigate their claims before the Waitangi Tribunal or courts after a settlement is reached. However, settlements still allow groups that have received them to pursue claims against the Crown for acts or omissions after 21 September 1992, including claims based on the continued existence of aboriginal title or customary rights. The Crown also retains the right to dispute such claims or the existence of such title rights.

Q *Does anyone challenge the evidence of the claimants at the Waitangi Tribunal?*

A Yes. Crown lawyers take a major role and ensure alternative evidence is put forward where necessary.

Q *Is private land available for use in Treaty settlements?*

A No, private land is not available for use in Treaty settlements, with two exceptions. The first exception is where, before the property passed into private hands, it was subject to a resumptive memorial provided for by law. This means that, at the time the private owner acquired it, they knew the government could compulsorily reacquire such land (at market value) if the Waitangi Tribunal upheld a Treaty claim and made an order that the land be returned to Māori ownership. It is the Crown's preference to seek negotiated settlements with claimants, without having to resume properties now owned by third parties. The second exception is where there is a willing seller/willing buyer. Such purchases are very rare and are likely to be small wāhi tapu.

Q *Why isn't there a cut-off date for claims and settlements?*

A One of the key objectives of Treaty settlements is to remove the sense of wrong that Māori feel about the Crown's actions by acknowledging the grievances that they have suffered. A specific 'cut-off' date would too rigidly confine the process, possibly resulting in well-founded claims not being dealt with. The Crown, while wishing to address all claims as soon as possible, cannot force any claimant group to begin negotiations. Also, claimant groups often wish to work through Waitangi Tribunal hearings and/or need to address mandating issues prior to entering negotiations, and these processes can take time. Moreover, there is a practical limit to the number of claims that the Crown can deal with at any time, and Māori should not be disadvantaged by this.

Q *How does recognition of the rights of Māori under the Treaty fit in with the principle of equality under the law?*

A English common law, which New Zealand inherited, recognises the customary rights and aboriginal title of indigenous people. The Treaty of Waitangi also recognised such rights. Recognition of such rights is therefore consistent with a legal system which itself recognises such property rights, and does not conflict with the general principle of equality under the law.

Q *What is the legal definition of a Māori?*

A The term 'Māori' is defined in the Treaty of Waitangi Act 1975 and means 'a person of the Māori race of New Zealand; and includes any descendant of any such person'. This definition means that, as long as a person can trace descent from a Māori ancestor, such a person may identify as Māori. Using this definition results in all members of a claimant group sharing the benefits from settling their claim. Under the law it is therefore not possible to exclude people on the basis of specified 'percentages' of Māori ancestry.

Q *Does redress for historical grievances mean that the government no longer has to pay social welfare benefits to Māori?*

A No. Claimant groups receive settlement monies and other redress, such as cultural recognition, in settlement of their historical Treaty claims. A settlement does not extinguish the rights and privileges guaranteed to them as New Zealanders under Article 3 of the Treaty. Settlement redress would be meaningless if it involved a corresponding drop in other entitlements.

Q *Can conservation land be used in settlements?*

A Generally, conservation land (Crown land managed by the Department of Conservation) is not available for use in Treaty settlements. However, individual sites of special cultural significance may be transferred to claimant groups. If appropriate, the transfer may be subject to conditions to protect public access and environmental values. Claimant group interests in conservation land can be met through a number of other statutory instruments. These are explained in Part 3.

Q *Are the public's rights affected by settlements?*

A Generally no, but camping entitlements, which are entitlements to temporarily occupy a piece of Crown-owned land up to one hectare in size near traditional food-gathering areas, are for the exclusive use of members of a group that has received a settlement. They provide rights similar to those contained in other leases or licenses granted by the Department of Conservation. Camping entitlements are allocated so as not to affect public access to waterways.

Contact details for other organisations

Contact details for other organisations mentioned in this guide:

WAITANGI TRIBUNAL (TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI)

Established under the Treaty of Waitangi Act 1975 to hear claims by Māori against the Crown for breaches of the Treaty of Waitangi and its principles. The Tribunal funds historical research into claims other than those relating to licensed Crown forest land.

SX11237
Wellington
New Zealand

Phone 04 914 3000
Fax 04 914 3001
Website **www.waitangitribunal.govt.nz**

TE PUNI KŌKIRI (MINISTRY OF MĀORI DEVELOPMENT)

Te Puni Kōkiri is the lead department for advice to the government on Māori issues. Te Puni Kōkiri can assist claimant groups with information on mandate and governance issues, and also administers the Sites of Significance Process for the protection of wāhi tapu outside the direct negotiations or Protection Mechanism processes.

Head Office
PO Box 3943
Wellington
New Zealand

Phone 04 819 6000
Fax 04 819 6299
Web **www.tpk.govt.nz**

CROWN FORESTRY RENTAL TRUST (NGĀ KAITIAKI RETI NGAHERE KARAUNA)

If a claim concerns licensed Crown forest land, CFRT can assist with research, Waitangi Tribunal hearings and preparing for negotiations to the point where the Crown recognises a Deed of Mandate.

PO Box 2219
Wellington
New Zealand

Phone 0800 2378 2378 /04 915 1500
Fax 04 916 7806
Web **www.cfrt.org.nz**

MĀORI LAND COURT (TE KOOTI WHENUA MĀORI)

The Māori Land Court holds records of Māori land ownership since the establishment of the Native Land Court in 1862. Its Minute Books record the proceedings that brought blocks of Māori customary land under statutory Māori freehold title. Today the Court administers Te Ture Whenua Māori 1993 governing transfer of and succession to Māori freehold land and associated administrative matters.

Head Office
SX11203
Wellington
New Zealand

Phone 04 914 3102
Fax 04 914 3100
Web **www.maorilandcourt.govt.nz**

TE OHU KAIMOANA (TREATY OF WAITANGI FISHERIES COMMISSION)

Te Ohu Kaimoana is responsible for the management of commercial fisheries settlement assets and developing an allocation method for distribution to iwi, to be approved by the Minister of Fisheries. Iwi seeking a share of settlement assets must have a mandate and governance structure meeting TOKM's requirements, and can obtain advice and information on these matters from TOKM.

PO Box 3277
Wellington
New Zealand

Phone 04 931 9500
Fax 04 931 9518
Web **www.teohu.maori.nz**

DEPARTMENT OF CONSERVATION (TE PAPA ATAWHAI)

The Department of Conservation is responsible for the management of New Zealand's conservation lands, including National Parks and reserves. Publications are available on a range of issues, including cultural redress involving DOC in the Ngāi Tahu settlement. The Department's Treaty Settlement Unit participates as part of the Crown Negotiating Team in settlement negotiations.

Head Office
PO Box 10-420
Wellington
New Zealand

Phone 04 471 0726
Fax 04 381 3057
Web **www.doc.govt.nz**

MINISTRY FOR PRIMARY INDUSTRIES (MANATŪ AHU MATUA)

The Ministry for Primary Industries is responsible for the sustainable management of commercial fisheries through the Quota Management System, and of Māori customary sea fishing under regulations.

Head Office
PO Box 2526
Wellington 6140
New Zealand

Phone 0800 00 83 33
Fax 04 894 0720
Web **www.mpi.govt.nz**
www.fish.govt.nz

MINISTRY FOR THE ENVIRONMENT (MANATŪ MŌ TE TAIAO)

The Ministry for the Environment reports on the state of the New Zealand environment and the way that environmental laws and policies work in practice as part of advice to the government on action necessary to improve environmental management. Most of the responsibility for day-to-day environmental management rests with local government, particularly the regional councils. The Maruwhenua unit within MFE provides advice and support on Māori issues and perspectives.

Head Office
PO Box 10-362
Wellington
New Zealand

Phone 04 439 7400
Fax 04 439 7700
Web **www.mfe.govt.nz**

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