Chapter 1

Introduction

INTRODUCTION

Political landscape

Under the Treaty of Waitangi Act 1975 any Māori may make a claim to the Waitangi Tribunal. Crown Treaty settlement policy applies only to historical claims arising from actions or omissions by or on behalf of the Crown, by or under legislation on or before 21 September 1992.

The length of time Treaty settlement processes are taking is affecting both the general population (which includes many Māori) and Māori claimant groups, and has created dissatisfaction in some quarters. Office of Treaty Settlements, the Trust and other Treaty sector agencies are looking for ways to fine-tune procedures. Some progress has been made in providing for claimants' voices to be heard, but also to accelerate settlement processes. However, regardless of these changes the current process is likely to continue for the next few years.

Each year the Trust supports 40 to 50 claimant groups in Waitangi Tribunal hearings or settlement negotiation phases. The Trust has well developed systems to fund eligible, organised claimant groups to prepare for and engage in settlement negotiations with the Crown.

Settlement progress

In the last twenty years the Crown and twenty-one claimant groups have reached settlements with a total nominal value of just over $750 million. Settlements ranged from $170 million each for Waikato-Tainui (1996) and Ngāi Tahu (1997), to under $1 million for a claimant groups such as Hauai, and Ngāti Rangiteaorere and Rotoma. The $170 million of fishing quota for Māori commercial fisheries the Crown set aside in 1992 is steadily being transferred to Mandated Iwi Organisations.

Over the last ten years the Trust has provided around $117 million to assist Māori claimants prepare, present and negotiate the settlement of Treaty claims related to Crown forest licensed land. In the mid 1990s Trust funds assisted Tainui and Ngāi Tahu and since 2003 it has funded the claims of three further iwi that led to settlements:

- Te Uri o Hau, 2003 ($15.6 million)
- Ngāti Awa, 2005 ($42.4 million), and
- Tūwharetoa (Bay of Plenty), 2005 ($10.5 million).

The Te Arawa iwi and hapū affiliated to Ngā Kaihautu o Te Arawa signed a Deed of Settlement with the Crown in September 2006 and another claimant group is waiting for legislation to be enacted to transfer settlement assets to their respective iwi. Over twenty other claimant groups are just entering settlement negotiations or engaged in various phases of negotiations with the Crown. Based on its 2007/08 Business Plan, the Trust predicts that at the current rate of progress, it will be two to three years before other claimant groups with interests in Crown forest licensed land receive settlement assets.

Getting to settlement

During the last 15 to 20 years the Crown and claimant mandated negotiation teams have spent much time, energy and significant resources arguing, debating and finally determining Treaty settlement packages. Although each Treaty settlement includes unique aspects of redress, it is generally agreed that significant areas of redress are common across all settlements.

Claimant groups entering negotiations are not always familiar with the Treaty settlement process and what negotiation can achieve, so rely heavily on advice throughout the process, a process that can take several years. Claimant lawyers who are unfamiliar with previous settlement redress package details spend considerable time researching and evaluating earlier settlement packages. This leads to a 'reinvention of the wheel' with legal argument and debate on concepts and principles which are now generally accepted through precedent.

Discussing this duplication with claimants and others in the Treaty sector helped the Trust identify a need for claimant information that:

- enables claimant groups to fully comprehend and plan for the duration of the settlement negotiations, from achieving Deed of Mandate to the final transfer of assets to the post-settlement governance entity, and
- lists and analyses previous redress packages for similar claims, provides examples of legal documentation, and assists claimants in the detailed business of negotiations.

Widespread availability of such information will enhance claimant knowledge of the Treaty settlement process and enable them to negotiate effectively and optimise Treaty claim settlements.

Therefore, the Trust has prepared and published the "*Aratohu mō ngā Rōpū Kaitono – Guide for Claimants Negotiating Treaty Settlements*". The Guide is a companion to *Ka tika ā muri, ka tika ā mua – Healing the past, building a future: a Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (commonly called the *Red Book*) which is freely available from Office of Treaty Settlements.

Anyone involved in or expecting to enter settlement negotiations should become familiar with both the Guide for *Claimants* and the *Red Book*.

The Guide focuses on settlement negotiations as prescribed by the Crown. Other Treaty claim processes, in particular Waitangi Tribunal inquiries, are discussed to the extent that they are relevant to negotiating Treaty claim settlements.

The Guide does not advocate or direct claimants into any particular settlement pathway and the Trust supports claimants regardless of whether they enter a Waitangi Tribunal inquiry or enter direct negotiations with the Crown. The Trust's key objective is the return of Crown Forest Licensed Land as a result of successful settlement negotiations.

Negotiating environment
The Crown does want negotiations to succeed – successive Governments do not want to carry the costs in financial and political terms indefinitely.

But this does not mean the Crown will be a pushover – there are points beyond which Crown negotiators will not go. Some are set in concrete and history shows there is little point wasting time and resources trying to move the Crown on such matters. There are, however, quite a few areas where the Crown has softened its stance subject to determined and expert negotiation by the claimants. The Guide tries to indicate where those points may be.

Although claimants may not agree with the Crown's mandating and negotiating policies they do need to be fully aware of them. While negotiators may persuade the Crown to modify its stance on some issues the Crown will signal that other policies are non-negotiable. Remember, negotiating a settlement is the 'art of the possible' in which claimants ultimately have a 'can do' list and a 'can't do' list.

At the end of the day if the 'can't do' list is too extreme claimants may decide it is not worth pursuing negotiations in that climate – that decision is always available. The Crown will have a similar point of view if they think the claimants 'can do' list is unrealistic.

Claimant negotiators may have a 'no compromise' bottom line on some issues before they begin negotiations – this could mean their principles stop the negotiation dead in its tracks; for example a stance of, 'Kua riro atu te whenua – ka hoki mai te whenua' / '*All land lost; all land back*' is simply never going to happen.

It is in the negotiator's interest to know in advance the likely outcome of sticking to each bottom line. It is a judgement call with examples from other settlements available as a guide.

The Guide makes no recommendations on either where to draw that line or whether negotiators should walk away from negotiations. This rests entirely with the mandated negotiation team. What matters is that negotiators are aware of the likely consequences of each bottom line stance. They may decide that continuing is not justified, or decide to move a bottom line up a little.

The Guide tries to identify what is definitely achievable, what has not yet been achieved, and the grey area in between.

Structure of the guide
The Guide starts with a description of the Trust, why it was set up, funding to support claimants through settlement, then follows the prescribed pathway of the Crown's settlement negotiations. The process starts with the claimant mandating required to enter negotiations, negotiations proper which culminate in a Deed of Settlement, and finally ratification, legislation then the transfer of assets.

The Early Preparation chapter lists those tasks an aspiring claimant negotiating team should do before entering negotiations and summarises funding available to support claimants through the settlement process. A summary of Waitangi Tribunal and settlement negotiations processes leads into a brief description of the principle alternatives to negotiating a settlement and concludes with an overview of the research claimants must complete to support their negotiations.

The first step in the process is achieving a Deed of Mandate to negotiate on behalf of the claimant group. The concept of 'mandate' and Crown expectations of claimant mandate are discussed, followed by a mandating plan (steps claimants consider to achieve a mandate). Finally, the chapter lists issues the mandated body's business rules must address.

The chapter Negotiating a Settlement, covers the negotiating brief, ie setting out the negotiation strategy and tactics in preparation for negotiations.

Next, in preparing the Terms of Negotiation, the Guide describes the key elements of several Terms of Negotiation signed over the last eight years. Each element is discussed in terms of frequency or the particular nature or legal effect of their inclusion.

Negotiations proper begin in Settlement Redress. The chapter examines the content of an Agreement-in-Principle (AiP), the differences and legal effects these have or can have on subsequent negotiations and preparing the Deed of Settlement, and gives the details underpinning a Deed of Settlement. The three parts of a Deed of Settlement are examined separately:

1. Historical Account, Crown Acknowledgements and Apology
2. Cultural redress, and
3. Commercial and financial redress.

Case studies, property valuation methodologies and the commercial options claimants can elect to incorporate in their settlement package are discussed.

The constitution and structure of the Post-settlement Governance Entity is crucial to the long-term vitality and commercial prospects of the iwi. The advantages and disadvantages of governance options available to receive settlement assets are outlined in this chapter.

Claimant group ratification of the post-settlement governance entity and settlement package is a critical milestone towards settlement. The Ratification chapter looks at the process by which the mandated body achieves ratification of the settlement package and the body established to receive the settlement assets.

Achieving a signed Deed of Settlement is a very significant occasion for a claimant group, but not the end of the journey. The final chapter describes the legislative process for enacting the Deed of Settlement and explains why claimant leaders or members of the post-settlement governance entity must be involved at a number of points to ensure the intent of the settlement is reflected in the draft Settlement Bill.

The chapter ends with the settlement implementation phase, that is, the processes required to transfer the assets to the post-settlement governance entity once settlement is enacted.