

Financial and Commercial Redress

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Contents

Introduction	219
Financial and commercial redress amount	219
Crown determinants to redress amount	219
Non-historical redress	220
Other payments	220
Status of initial payments,	
Deed does not become unconditional	220
Interest on financial and commercial redress amount	220
Advance payments on interest	221
Crown properties – overview	221
Crown properties – surplus, leaseback	221
Crown forest licensed land	222
Settlement legislation – settlement licensed land	223
Crown forest licence	223
Management of Crown forestry licence prior to settlement	223
Affiliate Te Arawa Iwi and Hapū Covenant	224
Right of First Refusal (RFR)	224
Ngāi Tahu RFR – precedent removed	225
Deferred selection process (DSP)	225
Relativity	226
Other commercial redress	226
Valuation – Joint, Independent, Timing	226
Disclosure information and due diligence	227
Terms of transfer and conditions precedent	228
Conditions precedent for commercial redress	228
Committing funds prior to ratification	228
Advance on settlement	228
Appendices	
1 Valuation of urban properties	231
2 Valuation of Crown Forest Licensed land	239

KEY POINTS

- Ensure all substantive redress is agreed before signing the Agreement in Principle
- Get early expert specialist advice from specialists with Treaty settlement experience
- Accept only redress items that are suitable and useful to your claimant group - don't accept it 'just because it's there'
- Make sure Crown contributions towards the mandated body's negotiation costs are not part of financial and commercial redress
- Negotiate so interest accrues on the settlement quantum from the date the Deed of Settlement is signed – but try to get it to start from the date the Agreement in Principle is signed
- It is vital that negotiators seek expert valuation, commercial and legal advice on all matters related to Crown properties offered, get Crown agreement on valuation methodology
- Ensure the Crown has provided all appropriate disclosure information on redress properties before the Agreement in Principle is signed
- Crown forest licensed land can be a very valuable asset, it should be very carefully appraised by negotiators
- Right of First Refusal mechanisms are still evolving. Negotiators should familiarise themselves with RFRs in the Ngāti Whātua o Orākei AiP to see these developments

Remember...

- 'Buyer beware' – don't be rushed; be sure you can conduct thorough due diligence for all redress properties, including conditions precedent and terms of transfer
- Ask yourself 'Why doesn't the Crown want these properties?'
- Leaseback agreements can provide a reliable income stream from long-term Crown tenants
- Unresolved overlapping claims can greatly reduce the area of land over which the Crown is prepared to consider redress options
- Don't accept an inferior redress mechanism to other redress for similar Treaty claims

Financial and Commercial Redress

INTRODUCTION

Financial and commercial redress comprises a cash payment and the opportunity to purchase Crown (and other) properties either on the settlement date or later through commercial settlement redress mechanisms.

The commercial aspect of settlement redress usually catches the public eye more than any other redress item simply because it identifies the dollar value of the settlement. Members of the claimant group may also focus on this because they want to see the return of economic resources lost through Crown breaches of the Treaty.

As with all other settlement redress items, it is important for the mandated body to negotiate all *substantive redress* prior to signing the AiP.

The Red Book (page 87) defines financial redress as, *‘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.’*

The financial and commercial redress section of the Deed of Settlement is often quite brief, but is backed up by extensive appendices and detailed attachments, sometimes in relatively inaccessible legal and valuation language.

For each mandated body in a negotiation the ultimate value and subsequent use of any redress instruments is a complex matter with far reaching consequences, determined by a range of factors including the relevance of any redress items to the claimant group, and wider claimant group objectives. Accordingly, all mandated bodies should seek specialist advice from commercial advisors, valuers and lawyers when negotiating these aspects of their settlement. This is a specialist area so the mandated body is advised to engage professionals with experience in the Treaty sector.

As with cultural redress it is important for the mandated body to assess each redress mechanism in terms of suitability and usefulness for the wider claimant group. Do not push unnecessarily for a redress option just because others got it. For instance, a Right of First Refusal (RFR) will only be meaningful to a claimant group if there are sufficient Crown properties in the rohe over which the RFR can apply.

Given the varying nature financial and commercial redress between settlements, this chapter reviews the key aspects, namely:

- Financial and commercial redress amount
- Crown properties – general
- surplus Crown properties
- Crown properties – leaseback
- Crown forest licensed land
- Right of First Refusal (RFR)
- Deferred selection process (DSP)
- Relativity
- Other commercial redress
- Valuation
- Disclosure information and due diligence
- Terms of Transfer and Conditions precedent.

FINANCIAL AND COMMERCIAL REDRESS AMOUNT

The financial and commercial redress amount is the monetary value of the settlement (not including any monetary value associated with cultural redress). This has been referred to as the ‘quantum’ or ‘redress amount’.

CROWN DETERMINANTS TO REDRESS AMOUNT

The Crown takes a range of factors into account when it determines the value of its offer of financial and commercial redress.

- the amount of land lost to the claimant group through Crown breaches of the Treaty
- the relative seriousness of the breaches (for example, the Crown regards raupatu with loss of life is as more serious than non-raupatu losses), and
- the benchmarks set by existing settlements for similar grievances.

The Crown has stated it will also take into account certain secondary factors namely:

- the size of the claimant group today
- whether there are any overlapping claims, and
- any other special factors affecting the claim.

These are criteria the Crown takes into account when deciding what value it will offer for the financial and commercial redress amount.

These criteria have been established for a considerable time, and to alter them would require significant political change. They therefore provide the basis for negotiation.

Using these factors it is possible to determine what a claimant group’s ballpark financial and commercial redress amount might be, even before they enter negotiations with the Crown. Although Office of Treaty Settlements may be willing to provide information on the factors applying to past settlements, the mandated body should be prepared to undertake assessments of these factors itself. It would be more practicable, however, for

Financial and Commercial Redress

the mandated body to query or critically examine the information provided by the Crown.

The mandated body's negotiations strategy should be based on the Crown's criteria that guide the Crown's redress offer. The strategy builds on the claimant group's specific tribal circumstances and Treaty claims, and pushes the Crown's determining factors to the claimant group's advantage.

NON-HISTORICAL REDRESS

Te Arawa Lakes Deed of Settlement states that the Crown is to pay \$2.7 million to the governance entity on settlement date. The settlement also contains a provision for Annuity Redress, compensation for the Crown's failure over many years to index the Arawa Māori Trust Board annuities to inflation. In 2003 the Crown paid \$7.3 million Annuity Redress to an escrow agent to hold until the date of execution of the Deed of Settlement by the Arawa Māori Trust Board. The escrow agent would then pay that sum, plus interest, to the Trust Board.

The Crown and the Arawa Māori Trust Board acknowledge that payment of the Annuity Redress settles the Te Arawa Lakes remaining Annuity issues and represents a payment to capitalise the annuity from the Date of this Deed and to settle any remaining issues with the Annuity for the period from and including 21 September 1992.

This clause settled the historical claim and removed any contemporary claim for the same issue. The Trust Board also waived the right to receive any further annuity from the date of the Deed of Settlement.

This example is used to illustrate the possibility of negotiating a 'hybrid' financial and commercial redress settlement. While such settlements are possible only where circumstances permit, the mandated body should check whether it has this option available.

OTHER PAYMENTS

The Deed of Settlement might also note that the claimant group received a sum as a contribution towards negotiating costs *'but that those amounts are not redress and have not been deducted in determining the financial and commercial redress amount.'*

Although this is standard practice, the mandated body should always confirm that Crown contributions towards negotiations are not part of the financial and commercial redress amount. This should be discussed and confirmed in writing early in negotiations.

STATUS OF INITIAL PAYMENTS IF DEED DOES NOT BECOME UNCONDITIONAL

There is always a (usually remote) possibility that the Deed of Settlement will not proceed to settlement legislation. Consequently the Deed of Settlement may state:

If for any reason this Deed does not become unconditional:

- a) *The amount of any redress which the Crown becomes obliged to provide to discharge the Crown's obligations in respect of any of the claimant group's Historical Claims will be adjusted to reflect the amounts and the agreed value referred to [in the clauses which quantify the initial 'on account' payments]; and*
- b) *The Crown may produce this Deed to any Court or tribunal considering the quantum of any redress to be provided by the Crown in relation to any of the claimant group's Historical Claims to give effect to clause a).*

This means that if settlement does not proceed, any amounts the Crown has paid to the mandated body 'on account' will be deducted from any cash component that may be negotiated in any later settlement.

However, if the settlement does not proceed due to no fault of the mandated body or claimant group, there would be a good argument that there should be no deduction or penalty to the claimant group in future years. This clause may be open to negotiation.

INTEREST ON FINANCIAL AND COMMERCIAL REDRESS AMOUNT

Once a Deed of Settlement has been ratified and signed the Crown might pay interest on the financial and commercial redress amount. If the negotiators agree to a cash sum of \$10 million dollars and do not have an interest clause, by settlement date at say seven percent interest per annum, \$700,000 income per year would have been forgone. Note that the Crown **might** pay interest. Negotiators should be aware of the precedent and carefully consider their potential loss if interest is not negotiated as part of the Deed of Settlement.

It can be up to two years between the signing of a Deed of Settlement and settlement date. Accrued interest is likely to be significant and could run into millions of dollars. The terms in recent Deeds of Settlement state that the interest paid will be at the official cash rate, will not compound, will be paid to the post-settlement governance entity on the settlement date and will be

Financial and Commercial Redress

subject to normal tax laws. It is in the interest of the claimant group to ensure that such a clause is in the Deed of Settlement.

It could be argued that the financial and commercial redress amount is ‘agreed’ once the AiP has been signed. This is not without precedent. In the case of the Waikato-Tainui and Ngāi Tahu settlements interest started accruing from the date the Heads of Agreement were signed. The mandated body may be able to negotiate such an arrangement – particularly where the financial redress amount is a sticking point for the claimant group.

ADVANCE PAYMENTS ON INTEREST

Until the Ngā Raurū Kaitahi 2003 Deed of Settlement, interest accrued was not paid to the governance entity until the settlement date. Once the Deed of Settlement is signed the governance entity has many tasks to complete before the settlement is implemented. In recognition of these costs, the Crown now provides a mechanism whereby the post-settlement governance entity can access interest accrued from the cash component of settlement, in regular instalments. The most recent example of such a clause is in the Affiliate Te Arawa Deed of Settlement.

CROWN PROPERTIES – OVERVIEW

One of the deepest and most pervasive aspects of Treaty grievances is the loss of ancestral land and the effect that loss had on the welfare of the claimant group. Consequently, negotiators are often under pressure to purchase certain Crown properties in lieu of cash and as a step towards economic regeneration within the rohe.

Depending on the circumstances of the particular claimant group and the settlement package negotiated by the mandated body, the Deed of Settlement will set out in detail what properties the claimant group will buy and receive, and on what terms.

Where this redress has been negotiated by a mandated body, the AiP will provide that the Deed of Settlement and settlement legislation will provide for the Crown to transfer selected commercial redress properties to the governance entity.

Some of these properties will be immediately leased back to the Crown. The market value of any property selected for transfer will be deducted from the total value of the financial and commercial redress.

The Deed of Settlement will typically (though not always) record agreed specific properties which the Crown considers surplus, or if not surplus, has available for

transfer but on the condition they are leased back to the current tenant.

If Crown forest licensed land is situated in the claimant group’s rohe it is likely the mandated body will have negotiated all or part of that in its settlement package. That will be recorded in the Deed of Settlement.

The Deed of Settlement may also record the terms of a number of redress instruments that will allow the governance entity to purchase Crown properties (currently not surplus) at some time after settlement. This is commonly referred to as deferred selection.

Each claimant group will have different commercial opportunities due to the varying Crown assets in its rohe. It is vital that the mandated body seeks expert advice on all matters related to Crown properties. This includes valuation, commercial and legal advice.

Surplus Crown properties

Claimant groups often hold the view that if the Crown has surplus Crown properties they should hand them back to the claimant group at no cost as well as provide the financial and commercial redress amount. The Crown does not and has never agreed with that stance. If the claimant group wants surplus Crown properties they will have to pay for them. However, the claimant group is not compelled to purchase surplus Crown properties.

Purchasing Crown properties either on or after settlement using a commercial redress instrument requires the claimant group to transfer real money to the Crown. Those properties will then be the responsibility of the post-settlement governance entity. If the expert advice is that they are too expensive or will be a commercial burden, a commercially based purchase would not be justified.

Finding replacement sites

Crown properties will be subject to a number of conditions. If these conditions cannot be satisfied, the mandated body should work with the Crown to identify and transfer other suitable replacement sites. Such a clause is not often evident in AiPs and the mandated body should ensure that such a clause is included to allow other sites to be considered.

CROWN PROPERTIES – SURPLUS

The Crown has a ‘landbank’ process whereby properties the Crown deem surplus (they no longer require them) for their (Crown) purposes, have been set aside for use in settlements. Surplus properties are typically land with

Financial and Commercial Redress

buildings or bare land. If such properties are purchased by the post-settlement governance entity they are typically (although not always) purchased free of any existing leases and licences, but subject to any other terms of transfer discussed in this chapter.

Landbanked Crown properties are of variable quality. Some are very valuable by virtue of location, some have excellent development potential and some are very poor propositions (by virtue of location, weed infestation or land instability). The mandated body must commission valuers and other experts to undertake a careful due diligence process early on in negotiations. The Crown will be able to provide information about the property and explain its landbanking policy and criteria for selecting properties for its landbank. This will assist the mandated body in what to look for in its own selection criteria and due diligence.

CROWN PROPERTIES – LEASEBACK

In some cases the Crown may offer to sell non-surplus Crown properties to the claimant group on a leaseback basis. Typically this means the mandated body may purchase the land but the buildings and improvements are retained by the relevant government agency which then leases back the land.

The AiP will detail the steps that the leaseback process will operate. This is explained as:

1. *the Crown provides the mandated body with a list of properties*
2. *the properties to be transferred will be negotiated the Crown and mandated body will establish the transfer value for the selected properties at fair market value following a valuation process*
3. *immediately after transfer the governance entity will grant the Crown a registrable ground lease on commercial terms to be agreed before the Deed of Settlement is signed.*

Leaseback properties provide the mandated body with a reliable stream of income from long-term tenants and a good return on investment. The governance entity will be the owner of the property, but it will have a tenant already in place. The Deed of Settlement typically records the long-term arrangement as follows:

In respect of each Leaseback Property, on the Settlement Date, immediately following transfer, the Governance Entity shall sign as landlord and the Transferor Agency or Crown shall sign as tenant a Memorandum of Lease on the terms and conditions described (in the relevant Schedule) (Ngāti Awa Deed of Settlement, page 156).

Negotiations will need to be finalised with Office of Treaty Settlements over the fee simple estate of the leaseback property and the terms of the future lease with the prospective government agency tenant. Arrangements are finalised during the Deed of Settlement.

CROWN FOREST LICENSED LAND

Crown forest licensed land is a very valuable asset which claimant groups invariably include in their settlement. This is because the value of the accumulated rentals generally provides a significant contribution to the purchase price of the underlying land.

In some areas claimant groups may be able to negotiate the return of Crown forest licensed land. The Crown approaches the entitlement to Crown forest licensed land on the basis of a 'threshold interest'. If the mandated body can demonstrate a threshold interest it may be provided with the opportunity to purchase land up to the value of the financial redress amount, with the possible negotiation of further purchases through the deferred selection process.

The transfer process is summarised below:

- the Crown forest licensed land is transferred to the post-settlement governance entity
- certain accumulated rentals that relate to that Crown forest licensed land go to the post-settlement governance entity (the accumulated rentals are in addition and separate to the financial and commercial redress amount)
- the post-settlement governance entity will become the licensor under the relevant Crown forest licence, and
- the post-settlement governance entity will be entitled to all future rentals arising under the Crown forest licence.

The claimant group may use part of its financial and commercial redress to buy the underlying land but not the trees or any improvements, as they are owned by the Licensee. This is typically reflected thus:

All trees growing or standing or, in the case of wind throw, lying on those areas of land; and

Subject to the terms of the Crown Forestry License, all improvements that have been acquired by any purchaser of the trees on that land or made thereafter by such purchaser or the Licensee (Ngāti Awa Deed of Settlement, page 155).

The commercial interests of the licensee who holds the Crown licence to use the forest are protected; namely the

Financial and Commercial Redress

trees they planned to harvest and any other improvements that have been made, for example roads and buildings.

Conditions specific to Crown forest licensed land will need to be carried over to the new owner, for instance appropriate legal access and other rights between the parts of the licensed Crown forest land. These need to be defined and agreed.

SETTLEMENT LEGISLATION RELATING TO SETTLEMENT LICENSED LAND

Owing to the existing legislative and commercial regime on the land at the time of transfer, the settlement legislation will seek to ensure that all parties' rights are protected after settlement date, and that existing legislative protective mechanisms will not apply. The Affiliate Te Arawa Deed of Settlement (page 92) states that settlement legislation will provide that in relation to the settlement licensed land:

... with effect from the Settlement Date the Governance Entity will be a 'Confirmed Beneficiary' under clause 11.1 of the Crown Forestry Rental Trust (that is, the Governance Entity will become entitled to Rental Proceeds (as defined in that trust deed) payable since the commencement of each Crown Forestry Licence) and all the provisions of the Crown Forestry Rental Trust shall apply accordingly; and ... the Crown must give a notice described in section 17(4)(b) of the Crown Forest Assets Act 1989 [...]. for the return of the Settlement Licensed Land, and the notice will have effect as if such a recommendation had been made (by the Waitangi Tribunal) and had become final. ... the Governance Entity will be the Licensor under each Crown Forestry Licence as if the Settlement Licensed Land had been returned to Māori ownership on the Settlement Date pursuant to section 36 of the Crown Forest Assets Act 1989, but section 36(1)(b) of that Act does not apply to that return.

The legislation will also provide that:
on the registration of the transfer of the fee simple estate in the Settlement Licensed Land to the Governance Entity, the land ceases to be Crown Forest Land...

The Ngāti Awa Deed of Settlement (page 157) also includes:

With effect from the Settlement Date and pursuant to its Trust Deed, the Crown Forestry Rental Trust shall pay the Ngāti Awa Governance Entity

the licence fees received by the CFRT since the commencement of the relevant Crown Forestry Licences;

These clauses clarify that the post-settlement governance entity is the new owner of the land and entitled to the rental income generated by those lands, including (part) rentals already earned by the forests and held in trust by the Crown Forestry Rental Trust. These sums can be considerable.

CROWN FOREST LICENCE

As with any lease or licence it is of fundamental importance that the mandated body is thoroughly familiar with the terms of the relevant Crown forest licence that will apply.

Most Crown forest licences are identical or very similar. Generally all licences will allow the licensee to progressively declare areas as 'return areas' when it no longer requires them. As the licensor, the mandated body (or governance entity) should be aware that such areas may be declared return areas on an 'ad hoc' basis which means the forest land does not form suitable management or economic blocks for some time.

Land Information New Zealand (LINZ) manages the terms and conditions of the Crown forest licences on behalf of the Crown.

MANAGEMENT OF CROWN FORESTRY LICENCE PRIOR TO SETTLEMENT

A clause in the Deed of Settlement is typically provided to clarify management responsibilities at any time after the signing of the Deed of Settlement noting that the Crown will manage the licensor's interests from the date of the Deed of Settlement until the settlement date, but adds:

From the Redress Licensed Land Settlement Date, the Governance Entity shall be responsible for all the licensor's obligations under the Crown Forestry Licence insofar as they relate to the Redress Licensed Land...

The purpose of such a clause is to ensure that the Crown acts in a prudent fashion until transfer occurs. This is important given the likely nature and scale of Crown forest licensed land and that settlement may be some way off.

It will be important for the mandated body to note specifically any matters it is aware of which may be relevant to them. For instance the Affiliate Te Arawa Deed of Settlement requires the Crown to have particular regard to any submissions made by them in respect

Financial and Commercial Redress

of licence fee reviews. This clause was inserted with the knowledge that a review would likely occur before settlement.

AFFILIATE TE ARAWA IWI AND HAPŪ COVENANT
Clauses 12.65 to 12.67.16 of the Affiliate Te Arawa Deed of Settlement provide a unique and noteworthy aspect relevant to Crown forest licensed land. This series of clauses imposes an obligation on the governance entity to use Crown forest licensed lands for forestry purposes only. The covenant is for 28 years with a 35 year termination period.

The limited uses specified in the Deed of Settlement are aimed at contributing to the obligations of the Crown in respect of carbon emissions. It also values the land for forestry use over a period of 60 years (rather than basing its value on best potential use). This has suited both the mandated body as it can purchase more land owing to its lower value under forestry, and the Crown, as it can meet its climate change commitments under the Kyoto Protocol and other environmental factors.

While no values are provided or ascribed to such a covenant in the Deed of Settlement they will have been part of the negotiated values between the parties. This is perhaps supported by the heading of this clause, *‘Covenant in Support of Agreed Transfer Values’*.

Nevertheless, this covenant has far reaching consequences and is likely to set a precedent for future settlements. Mandated bodies should seek expert advice on the fiscal implications of Crown and local government policies on forest land use (eg nitrate control, soil conservation and carbon storage).

RIGHT OF FIRST REFUSAL

Where this has been negotiated by a mandated body, the AiP will provide that the Deed of Settlement will provide for the governance entity to have a Right of First Refusal (RFR) over certain Crown-owned properties based on similar terms and conditions as in other recent settlements. In effect this means that the RFR provided to the claimant group will, in substance, be provided on similar terms to those provided in recent previous settlements, unless the mandated body is able to negotiate different terms.

The Crown thus limits the parameters of this redress by precedent. For instance the different terms of the Ngā Raurū Kīitahi and Ngāti Whātua Rights of First Refusal (50 and 100 years respectively) and the wider scope and effect of the Ngāi Tahu Right of First Refusal.

Right of First Refusal properties can include Transit New Zealand, District Health Boards, Defence Force housing, police stations, Housing New Zealand Corporation or any other Crown properties. In some cases geothermal assets and airport shares have fallen within a RFR. A Right of First Refusal area is usually agreed and defined and the map attached.

At the AiP stage the mandated body needs to assess each redress mechanism in terms of suitability and usefulness. For instance a RFR will only be meaningful to a claimant group if there are sufficient Crown properties in the rohe over which the RFR can apply.

In that regard the RFR mechanism in the Ngāti Whātua o Orākei AiP provides a number of interesting possibilities and *theoretically* provides scope for the boundaries of the most recently accepted RFR model to be extended somewhat ‘by negotiation’. How the Deed of Settlement reflects the Orākei AiP mechanisms will be of great interest to other claimants.

The sheer number and value of potential redress properties available to Ngāti Whātua, when read in conjunction with the sale and leaseback mechanisms with the 35 year rent free period, illustrates the importance of focusing effort in negotiation on ‘relevant’ redress. All mandated bodies should study this case very carefully and, if nothing else, hold it out as a precedent for the Crown moving beyond its then generally accepted settlement parameters.

The Red Book (page 91, Right of First Refusal flowchart) states that RFRs are not available where there are unresolved overlapping interests between claimant groups. Clearly the Crown does not want to jeopardise its redress position with other future claimant groups in the overlapping areas.

In the Te Uri o Hau Deed of Settlement the Crown kept its options open (section 8.2) by stating that the Crown may treat any land outside the Right of First Refusal Area:

‘as if the Deed of Grant of Right of First Refusal did apply to it or may give Te Uri o Hau Governance Entity an opportunity to tender for, or purchase, any such land if it becomes available for disposal.’

The Crown has anticipated the possibility of resolving any overlapping claims after the Settlement Date and freeing more properties for RFR purposes.

The Ngā Raurū Kīitahi Deed of Settlement notes that the Crown must provide a Right of First Refusal Deed to the governance entity by or on the settlement date.

The Right of First Refusal Deed will:

Financial and Commercial Redress

relate to the Right of First Refusal Area; be in force for a period of 50 years from the Settlement Date (the ‘RFR Period’); and have effect from the Settlement Date as if it had been validly signed by the Crown and the Governance Entity on that date.

Key elements of the Ngā Raurū Kaitahi Deed of Right of First Refusal include:

The Crown must, before disposing of an RFR property, give an RFR notice to the Governance Entity in respect of the property. The RFR Notice must specify any encumbrances affecting the property...

If the Governance Entity accepts by notice in writing to the Crown, by the Expiry Date, the offer set out in an RFR Notice, a contract for the Disposal of the RFR Property is constituted between the Crown and the Governance Entity at the price and on the terms and conditions set out in the RFR Notice.

In the event that the governance entity does not accept the offer, the Crown may dispose of the property within two years but not on terms more favourable than those offered to the governance entity.

If within two years of the expiry date (of the first offer) the Crown chooses to dispose of the RFR property at terms more favourable than in the first RFR Notice, it must offer the RFR property on those new terms to the governance entity before going onto the open market.

In the case of Ngāti Tūwharetoa (Bay of Plenty), similar RFR provisions apply to the KA 30 Geothermal Bore, and for the Crown to provide a Deed of Grant of Right of First Refusal over Crown geothermal resources to be in force for 50 years from the settlement date. It will relate to the Crown geothermal resources held by the Crown at the date the Crown must give a Right of First Refusal Notice.

Although 50 years has been the standard RFR term, a precedent has been set by the Ngāti Whātua o Ōrākei AIP where the RFR period has been extended to 100 years.

NGĀI TAHU RIGHT OF FIRST REFUSAL – PRECEDENT REMOVED

The Right of First Refusal mechanism provided in the Ngāi Tahu Deed of Settlement has a number of differences from later RFRs. Key differences relate to the term, valuation and range of assets.

- Term – the Ngāi Tahu Right of First Refusal

mechanism will *last forever* in respect of a defined range of assets – more recent settlements are limited to a 50 (or in the case of Ngāti Whātua – 100) year term.

- Valuation – the Ngāi Tahu RFR requires a market valuation of the relevant property, and also requires the Crown to negotiate in good faith with Ngāi Tahu to agree the price, terms and conditions. This is an important difference. More recent RFRs are based on the market valuation of the property only.
- Range of assets – due to the size of the Ngāi Tahu area of interest and the nature and scale of Crown assets the RFR is of major significance to Ngāi Tahu. This is not necessarily the case for other claimant groups.

DEFERRED SELECTION PROCESS

The deferred selection process (DSP) mechanism is first negotiated in the AIP. It will typically provide that the Deed of Settlement will provide the governance entity with a right to select properties for the period of six months (sometimes longer) after the Settlement Date. Deferred selection applies to:

- any or all of the identified leaseback properties subject to agreement between the negotiators and the relevant Crown agency of the lease terms and conditions
- any or all of the identified Crown-owned properties.

The nature and number of deferred selection properties will be determined by what is available in the mandated body's rohe. For example, in some areas there will be opportunities to purchase assets such as geothermal bores.

The DSP gives more time for the post-settlement governance entity to consider the merits of certain properties, and arrange finance to purchase those properties that it wants. The DSP mechanism is prominent in the Ngāi Tahu and Affiliate Te Arawa Iwi/Hapū Deeds of Settlement. Where there are enough Crown properties this is a beneficial redress mechanism and should form part of a negotiation strategy.

NGAI TAHU DEED OF SETTLEMENT DEFERRED SELECTION PROCESS

The effect of the DSP for Ngāi Tahu is described in the Te Karaka special edition (pages 18, 19) as:

‘...allows the tribe to buy, if it wants to, Crown assets from a defined ‘pool’, within 12 months of Settlement Legislation being passed up to a total value of \$250 million. By doing so, the tribe has an opportunity to buy a range of assets, in a number of economic sectors and locations that

Financial and Commercial Redress

best produces the income required for social development [...]. An important feature of the DSP mechanism is that it gives the tribe time to choose. All DSP assets would be bought at their current market value as at the date the Deed of Settlement is signed.'

The deferred selection list for Ngāi Tahu was extensive and provided opportunity for it to purchase a wide range of assets such as 55 commercial properties, 54 farms, six commercial forests and 27 areas of Crown forest licensed land. Te Rūnanga o Ngāi Tahu asset base and wealth has grown significantly. Good governance and management has been a key factor in that growth, but it is also apparent that strategic use of the Deferred Selection Process mechanism played a key part in this growth.

RELATIVITY

The relativity clauses in the Ngāi Tahu and Waikato-Tainui Deeds of Settlement are no longer available to claimants. This section briefly looks at relativity and the benchmarking of settlements.

Crudely speaking the benchmarking policy for the assessment of a financial and commercial redress amount requires the Crown and mandated body to arrive at a figure that is similar in relative terms to 'like' claims that have been settled.

As recent events have shown, iwi have objected to the Crown's fiscal envelope and subsequent benchmarking policy. While these concerns were evident very early in the 1990s a number of claimant groups have nonetheless expressed their desire to settle their claims. Two of the large earlier settlements may not have proceeded if the Crown had not assured them that the relativities of their settlements to future settlements would be maintained.

Accordingly the Ngāi Tahu and Waikato Deeds of Settlement provide what is commonly referred to as the relativity clause (see section 18, Ngāi Tahu Deed of Settlement, 21 November 1997 and Attachment 9, Waikato Deed of Settlement, 22 May 1995). While there is slight variation in the relativity clauses and they are fairly detailed, the essence of the relativity clause is explained in the Ngāti Tahu Deed of Settlement ratification booklet *Te Karaka Special Edition* (page 21):

'A special 'top up' mechanism – a form of 'insurance' called the Relativity Clause – has also been negotiated. Under this mechanism, if the present value of all Treaty Settlements between 1994 and 2044 ends up being more than \$1,000 million, then Ngāi Tahu will be entitled to a top-

up payment to ensure its position is maintained relative to all other tribes that settle.'

Since the Ngāi Tahu Settlement in 1997 relativity clauses have not been available to claimants. This is confirmed in the Red Book (page 30) which states that:

'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.'

To increase the value of their settlement package, claimants should investigate other ways that redress items can be enhanced. This may be by way of a deferred section of properties or a period of time where the claimants have first right of refusal to Crown properties. Items of cultural redress may also provide future commercial opportunities. These matters were discussed earlier in this Guide.

OTHER COMMERCIAL REDRESS

Some mandated bodies have been able to assess and deliver relevant redress that might not typically be considered to be standard. For example:

- the Ngāti Tūwharetoa (Bay of Plenty) Deed of Settlement provides the governance entity with the opportunity to purchase a geothermal bore and a range of geothermal assets including supply contracts; and
- the Te Arawa Lakes Deed of Settlement provides the opportunity for the post-settlement governance entity to consent to and, if desired, charge for any new structures on the lake beds or any new commercial activities on the lakes;
- the Ngāti Whātua negotiations support the purchase by way of concessionary leaseback, significant and valuable properties over a period of time.

In all cases the mandated bodies will have been aware from the outset of key strategic goals and set out to achieve them. The redress was relevant to them and they secured them through negotiation.

VALUATION

All properties that mandated bodies wish to purchase from the Crown will need to be valued. Mandated bodies are therefore encouraged to engage the services of registered valuers to provide independent valuation assessments of property assets available from the Crown for settlement. Mandated bodies are encouraged to engage valuers early in the process to assist with the formulation

Financial and Commercial Redress

and agreement of valuations processes and principles. This should commence during AiP preparation.

The Trust has a preferred list of valuers that mandated bodies are recommended to use. The mandated body will rely on the valuation provided by the valuer to confirm the market value of the real estate asset, and ultimately use this value to assist in the final settlement process with the Crown. For valuation briefs for urban properties and Crown forest licensed land, see Appendices 1 and 2 at the end of this chapter.

For those sites available for transfer, the Crown will provide disclosure information to enable the mandated body to fully assess the merits or otherwise in committing part of the financial and commercial redress amount to purchase surplus Crown properties. This process is very important and will need to be completed before the AiP is signed.

Crown policy reflected in the Red Book, is that all Crown properties are to be transferred at 'market value'. The market value of any particular commercial redress property will be determined following an agreed valuation process. As noted, in respect of RFR properties, the Ngai Tahu Deed of Settlement requires a 'good faith' negotiation process to arrive at value. This process should apply for all negotiations.

The mandated body therefore has input through the negotiations processes, into agreeing a method of valuation. It is important that the relevant valuer and commercial and legal input is provided into the methodology *before* it is agreed with the Crown.

The method of valuation and process to be adopted for valuation can vary somewhat depending on the nature of the property being valued. Ways to do this are discussed below: joint valuation and independent valuation.

JOINT VALUATION

In previous settlements, parties have been able to agree that certain assets (properties) should be able to be valued by one valuer, and the market value arrived at by that valuer, will be the value at which the property will be transferred.

Typically a joint valuation is adopted when it is generally assumed that the value of the property will be below a certain threshold and the properties are not of a unique or complex nature. In such circumstances the likely cost of the property and the cost of a valuation do not warrant independent valuations.

This approach does make sense and if adopted, the mandated body needs to be sure it has a fairly good idea that the value will be below (or around) the agreed threshold so as to not be surprised by, and bound to, a higher than expected value. In these situations the Crown, as owner, is likely to have a better idea of potential values than the mandated body.

INDEPENDENT VALUATION

Where the nature and/or possible value of the property is such that the parties do not agree to a joint valuation then an advocacy based valuation process is undertaken along the following lines:

- each party appoints their own valuers to arrive at their view of a 'market value' for the property
- the valuation reports are exchanged and the parties meet to try and agree a value
- if the parties cannot agree a value the matter goes to arbitration with the arbitrators decision binding on the parties. Valuation is more art than science. It is therefore possible for valuers with the same instructions to arrive at different market values. If this happens and the valuation is disputed the mandated body can refer the valuation to arbitration. This has not been required to date.

TIMING – VALUATION

Those mandated bodies that are able to secure a deferred selection process in their Deed of Settlement, should consider the benefits of a separate and earlier valuation date to the selection date. There are greater options for a mandated body where a DSP is in place and this can result in a more valuable property portfolio based on valuation movement alone. A financial advisor will be able to assist with this.

DISCLOSURE INFORMATION AND DUE DILIGENCE

As in all commercial transactions, purchase is a case of 'buyer beware'. Questions will arise around the quality of the property and encumbrances attached to its title. Will it end up as an asset or a burden to the claimant group?

To assess the merits of any property and its value on transfer, the mandated body needs to complete the processes of disclosure and due diligence. Office of Treaty Settlements will provide the mandated body with all material information it has on record in relation to each specific property. The information needs to be thoroughly reviewed by the mandated body and its professional advisors. Of particular interest will be any risks and liabilities that may 'transfer' along with the property.

Financial and Commercial Redress

As noted below in ‘terms of transfer’ the Crown will not warrant that the disclosure information is complete or the basis for any breach of contract in terms of the property itself. In that regard the mandated body must, with professional advisors, undertake all other necessary commercial and legal checks in respect of the property.

The mandated body must ensure it has enough time to undertake thorough and comprehensive due diligence especially where large and/or complex properties are involved.

TERMS OF TRANSFER AND CONDITIONS PRECEDENT
Terms of transfer

The transfer of properties is almost always subject to a number of conditions or encumbrances. The nature and degree of conditions and encumbrances attaching to any property can vary significantly across settlements. It is essential, therefore, that each and every condition and encumbrance is checked and thoroughly understood by the negotiators. They should be prepared to seek professional advice when in doubt.

The Deed of Settlement is likely to set out the terms of transfer for a property. The terms will vary depending on the property, although commonly they include:

- transfer of the property is subject to encumbrances listed in the Deed of Settlement (usually a detailed schedule)
- the Crown will pay any survey and registration costs required to effect the transfer (if any)
- Crown obligations for property ‘upkeep’ before settlement and no agreement to any major acts or omissions that might effect the property before settlement
- specific possession and settlement terms
- clarify risk and insurance issues before settlement
- confirm transfer value
- clarify boundaries and title
- clarify Crown obligations after settlement
- clarify effect and warranty (or not) in relation to disclosure information
- provide mechanisms to deal with any delay.

CONDITIONS PRECEDENT FOR COMMERCIAL REDRESS

The transfer of properties will likely be subject to a number of conditions precedent that may include:

- a. consent of the relevant Crown agency
- b. confirmation that no prior offer-back or other third party rights and obligations such as those under the Public Works Act 1982, exist in relation to the property; and any other statutory provisions which

- must be complied with before property can be transferred are able to be complied with
- c. any express provisions relating to specified properties that are included in the Deed of Settlement
 - d. standard terms of transfer and specific terms of transfer applicable to the specified property
 - e. any rights or encumbrances (such as a tenancy, lease, licence, easement, covenant or other right or interest whether registered or unregistered) in respect of the property to be transferred, either existing at the date the Deed of Settlement is signed, or which are advised in the disclosure information to be provided to the negotiators as requiring to be created
 - f. the creation of marginal strips where Part IVA of the Conservation Act 1987 so requires, except as expressly provided
 - g. Sections 10 and 11 of the Crown Minerals Act 1991
 - h. the Crown confirming the nature and extent of overlapping claims to the properties, and the Crown being satisfied that these interests have been appropriately safeguarded.

COMMITMENT OF FUNDS PRIOR TO RATIFICATION

Once settlement is complete the post-settlement governance entity is authorised, providing it complies at all times with its rules, to use the financial and commercial redress amount for any purpose it sees fit. This makes constitutional sense given that by that time, the entire claimant group would have voted and ratified both the Deed of Settlement and post-settlement governance entity.

However, before final settlement or even establishment of the governance entity, the mandated body is able to commit significant amounts of the financial and commercial redress amount for the purchase of surplus Crown properties. This highlights the importance of the mandated body acting in a prudent and robust manner when committing part of the cash component of settlement to purchase surplus Crown properties.

ADVANCE ON SETTLEMENT

The Crown will typically agree to pay the post-settlement governance entity interest on the financial and commercial redress amount for the period from the date the Deed of Settlement is signed until the settlement date.

If the mandated body considers the future governance entity will require funds to see them through to settlement it should include a clause to that effect in the AiP. However, it is possible to arrange this funding with the Crown at a later date by way of side letter.

Appendix 1

Financial and Commercial Redress

VALUATION OF URBAN PROPERTIES

Methodology for valuing urban properties provided to the Crown Forestry Rental Trust by Jones Lang La Salle Limited

This professional service brief applies to all urban property valuations including; residential, commercial, industrial and other property classes with the exception of rural land and forests. All claimants should be familiar with the service brief and be fully conversant with the brief prior to the appointment of any valuers, or before any valuations are undertaken.

1. APPOINTMENT OF VALUATION SERVICES

In the case of real property, the mandated body is required to appoint a valuer to prepare a valuation report in accordance with the following criteria:-

1.1 Valuation Brief

When instructing to undertake the valuation of a property asset, the mandated body should ensure that the valuation brief sets down clear guidelines and instructions to the Valuer. This should include the minimum reporting standards.

Where a valuation is required that is specialist in nature, or departs from a typical valuation requirement, the mandated body should seek further advice from the Trust as to who is the most appropriate professional to employ for this service. In these circumstances, the Trust may engage the services of an independent third party to assist in preparing the valuation brief.

1.2 Valuation Requirements

Valuations should be undertaken in accordance with the definition of Current Market Value, established by the International Asset Valuation Standards Committee and the New Zealand Institute of Valuers, which has been adopted within this report, is:

‘...The estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arms length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.’

If the asset being valued is of a specialist nature, the property should be valued in accordance with its existing use as well as assuming the property was to be sold under vacant possession basis.

1.3 Minimum Qualification Criteria

The Valuers engaged in the assessment of land and/or buildings should be able to demonstrate compliance with the following criteria and qualifications standards:

- Attained the qualification of Public Valuer, registered in accordance with the Valuers Act 1948;
- Hold a current Annual Practising Certificate for the 12 month period in which the valuation is to be undertaken; and
- Have a minimum of three years practical experience in the sector of property being valued.

1.4 Reporting Process

The valuation report should be prepared in accordance with The Property Institute of New Zealand (PINZ) and the New Zealand Institute of Valuers (NZIV) Professional Practice Standards and Guidelines, as amended from time to time.

Where the valuer can not fully comply with the above standards, the valuers must document where they depart from the standards and comment on any implications or impact this may have in determining the market value of the property, or any other implications for the mandated body and/or the Trust.

Valuers in preparing work at all times must comply with the requirements of the PINZ/NZIV Code of Ethics and Rules of Conduct, as amended from time to time.

Valuations undertaken during a period greater than six months from the date of consideration should be supported by an addendum confirming the valuation's ongoing relevance to the prevailing market.

Only those valuations addressed specifically to the mandated body are acceptable. The valuation must contain the name of the instructing party and an outline of the brief provided to the valuer at the time the valuation report was commissioned.

Financial and Commercial Redress

Valuations should be specifically addressed to the instructing party; however the valuer should consent to the distribution of the report to third parties.

1.5 Quotation Process

A minimum of *two valuation quotations* should be sought from the preferred valuer panel. If the valuer or valuation company is not on the preferred valuer list, agreement to use an alternative valuer is required by the Trust.

Quotations should be tendered *exclusive* of GST and inclusive of disbursements.

The acceptance of the valuation quotation should be made in writing by the mandated body.

1.6 Minimum Valuation Requirements – Common Report Headings

The following summary outlines some of the key headings to be included in urban valuation reports.

Financial and Commercial Redress

Executive Summary	A summary of the pertinent points of each section of the valuation, to be presented on a single page, confirming the value ascribed.
Instructions / Introduction	An outline of the nature of the instruction, required purpose of the valuation, a summary as to the valuation scenario(s) adopted, and the inspection and effective date of valuation
Location	A general description of the surrounding location and environment, outlining the property's proximity to infrastructure, major points of interest and locational draws. Special features of the location which affect value, rentability or saleability should be noted, together with any potential for future upgrades / changes.
Resource Management	An overview of the Resource Management issues surrounding the property, including statements as to the governing Territorial Local Authority, prevailing zoning, development standards, permitted activities, compliance of the existing use or potential for intensification, future changes in zoning and all ancillary matters related consents.
Environmental Issues	An affirmative statement outlining the potential for contamination, including commentary relating to the prior uses of the property, soil conditions and site history.
Rating Valuation	The current rating (Government) valuation, being presented on a Land Value, Improvements Value and Capital Value basis.
Legal Description	Details of the legal nature of the property, including its tenure (Freehold / Leasehold), lot and deposited / survey plan references, and Computer Freehold Register Identifier, together with an outline and description of any registered memorials of particular note such as Consent Notices, Covenants and Easements.
Improvements Description	A structural description of the improvements, including lettable floor areas (provided in accordance with the Property Council / Property Institute of New Zealand Method of Measurement), and narrative relating to the internal layout and standard of specification. Comments should be made as to any matters of environmental consideration (asbestos) and economic or physical obsolescence should be outlined. Compliance issues relating to Building Warrant of Fitness should be noted.
Occupancy Overview	A comprehensive review of all occupancy arrangements relating to the property, including where appropriate outgoings and the impact of specific lease conditions.
Market Commentary	A macro-economic overview of factors affecting economic conditions, together with a more locational specific outline of conditions affecting value and commentary as to future trends.
Valuation Basis / Methodology	An outline of an over-arching assumptions and the methodology adopted in the assessment, taking account of the guiding principle of highest and best use.
Market Evidence	Detailed analysis of transactional evidence (rentals, sales) which have been utilised in the determination of value. That evidence of particular relevance to the subject should be subject to further commentary. Where no reliable market data exists, alternative methods of assessment and the source of inputs should be disclosed.
SWOT Analysis	An analysis of the property's Strengths, Weaknesses, Opportunities and Threats commenting on matters related to the property's physical, locational, and legal characteristics as well as the sustainability of income and ability for the property to hold its value.
Valuation Confirmation	Confirmation of the value ascribed and identification of its relevance ('as is' / 'as if complete') including the effective date of valuation and the treatment of GST.
Disclosure & Limitations	Any limitations that if not present would affect the assessment of value together with any disclosures which may affect client relationships or the ongoing relevance of the assessment.
Signatories & Involvement	Confirmation as to the valuers involved in the assessment and their respective roles.
Qualifications & Disclaimers	General qualifications and disclaimers, being those which do not contradict standards established by the Property Institute of New Zealand.

Appendix 1

1.7 Mandatory Reporting Requirements

Provided below is a list a *mandatory requirements* for any urban valuation report commissioned by a mandated body.

- i. Name and address of valuer and a brief description of the registered valuer's qualifications, stating that the valuation report is made by the registered valuers as an independent registered valuer.
- ii. A description of the real property and general location.
- iii. A list of any covenants, conditions, restrictions, easements, and any other estates or interest that appear on the Certificate of Title in respect of the real property as at the date of the independent registered valuer's report.
- iv. The present use of the property.
- v. The nature of any regional or district plan rules, existing use rights, resource consents or any other statutory requirements relating to the real property.
- vi. The rateable value of the real property.
- vii. Leasehold interest or tenancy arrangements in respect of the real property, including any material matters concerning any leasehold interest or tenancy arrangements.
- viii. The registered valuer's opinion of the market value of the property.
- ix. The basis upon which the registered valuer's valuation of a property is made, and any assumptions used in making the valuation.
- x. Any other matters concerning the real property that the registered valuer considers to be material according to standards usually applied by registered valuers in conducting valuations of real property.
- xi. A statement that the registered valuer has consented to the distribution of the registered valuer's report to the mandated body, for specified for the purpose of crown settlement, and as at the date of the report, the registered valuer has not withdrawn consent.

VALUATION COST EXAMPLE – PROVINCIAL VALUATION

Specialised Commercial Property – Small Scale

Valuation Scope – Inspection of the property, resource management and legal description investigation, perusal of lease documentation (if applicable), analysis and review of comparable rental and sales evidence, applying basic investment and sales comparison valuation methodologies, authoring an abbreviated valuation report and assessing Current Market Value

Associate Valuer – mid point \$100 per hour	\$800 per Working Day
Time Required	0.5 Working Day
Senior Valuer – mid point \$215 per hour	\$1,720 per Working Day
Time Required	2 Working Days
Cost Estimate (Excluding Disbursements)	\$3,840 + GST

Professional Service Charges – Portfolio (Bulk Allowance) Discount

A bulk discount should be requested by mandated bodies to their respective valuers who have been engaged to complete multiple assessments of *5 properties or more* for the claimant. The extent of the discount should reflect the location of the assets, number of assets to be valued and any other potential savings the valuer achieves by way of replication of approaches, evidence, and the like.

2. GENERAL GUIDELINES**2.1 Valuation Methodologies**

A minimum of two valuation methodologies are required to determine the current market value of the property.

Financial and Commercial Redress

2.2 Valuation Methodology for Residential Property

Sales comparison approach using net rate analysis, and/or other appropriate comparison techniques.

The depreciated replacement cost approach should only be used as a check method, or where a market based approach is not deemed to be reliable.

2.3 Valuation Methodology for Commercial Property

Market based income approaches are deemed to be the most reliable sources of assessing market value, including the capitalisation of income, and discounted cash flow approaches (if applicable).

The depreciated replacement cost approach should only be used as a check method, or where a market based approach is not deemed to be reliable. A full rationale supporting the valuation, including details of sales/letting of any relevant properties, which have recently sold, indicating which sales are considered most comparable and why.

The reasons as to why one method of valuation may be deemed to be most reliable and should also be provided. A replacement/summation approach should only be used as a check method or in the case of specialised property where no market comparables exist.

For specialist assets, properties can be valued on a replacement cost basis, however, valuers should also consider alternative use/ vacant possession basis, based upon highest and best use scenario.

2.4 Valuation Methodology for Properties or those with an Alternative Use/Future Alternative Use

In the case of land holdings or properties that are deemed to have an alternative use or a more intensive use; residual based techniques such as the Hypothetical Subdivision Approach should be considered.

For those properties that may have a *future alternative use*, the valuer should also comment upon the likely impact this will have on the property's value at a future date.

2.5 Other Information

Documentation – The valuer is to retain for seven years, a complete set of documentation used in preparing the valuation on behalf of the claimant.

Tenancy Details – Review all leases, licenses or other occupancy agreements. If leases have not been sighted, the valuer is to clearly state this in the report.

Specialist Commercial Building – eg: Courts Building, Library, Civic Administration

Valuation Scope – Inspection of the property, resource management and legal description investigation, perusal of lease documentation (if applicable), analysis and review of comparable rental and sales evidence, applying various valuation methodologies and scenarios (vacant possession), consideration of alternative uses, authoring a valuation report and assessing Current Market Values.

Senior Valuer–\$25,000 Per Month (Mid-Point)	\$1,250 per Working Day
Time Required	2–3 Working Days
Valuation Director–\$32,500 Per Month (Mid-Point)	\$1,650 per Working Day
Time Required	1–2 Working Days
Cost Estimate (Excluding Disbursements)	\$4,150–\$7,000 + GST

The above fee estimates are *exclusive* of GST and often *exclusive* of disbursements.

Appendix 2

Financial and Commercial Redress

VALUATION OF CROWN FOREST LICENSED LAND

Methodology for valuing Crown forest licensed lands provided to the Crown Forestry Rental Trust by Reid and Reynolds limited

Suitably Qualified Registered Valuer

The engaged valuer must be able to show the following qualifications and experience:

- attained the qualification of Public Valuer, registered in accordance with the Valuers Act 1948
- hold a current Annual Practising Certificate for the 12 month period in which the valuation is undertaken
- carry adequate professional indemnity insurance
- a working knowledge of Crown forest licensed land plus all associated statutes and relevant case law
- a good working knowledge and is conversant with the forest industry
- a minimum of two years experience within this specific sector of the rural real estate market.

Suitably Qualified Forestry Consultant

The engaged consultant must be able to show they have the following qualifications and experiences:

- Attained recognised tertiary qualification
- Appear in the Directory of Registered Forestry Consultants produced by the New Zealand Institute of Forestry
- A working knowledge of Crown forest licensed land plus all associated statute and relevant case law
- Carry adequate professional indemnity insurance

1. Suggested Instructions to Forestry Valuers**1.1 Introduction**

The Agreement in Principle (AiP) for the Settlement of the Historical Claims [**the claimant group**] (the AIP) provides the opportunity for [**the claimant group**] to acquire the licensor's interest in the Crown Forest Land that is subject to the [identified selection area] Crown forestry licence (the Crown Forest Land).

The valuation of the licensor's interest in the Crown Forest Land is to be undertaken in the context of the AiP.

The licensor's interest is the interest as proprietor of that land and is to be assessed on the basis that the Crown forest licensed land will transfer as a result of a deemed recommendation from the Waitangi Tribunal and that the restrictions of the Crown Forest Assets Act 1989 such as prohibition on sale no longer apply (i.e. the licensor is assumed to be [**the claimant group**] not the Crown, for the purpose of the valuation).

The principals, being the Crown (acting through Land Information New Zealand in respect to valuations) and [**the claimant group**], wish to obtain market valuations of the Licensor's interest for specified parts of the Crown Forest Land available for selection.

1.2 Requirements

The principals have agreed the following requirements for these valuations:

Any transfer of the Crown forest licensed land to [**the claimant group**] would be deemed to be the result of a recommendation from the Waitangi Tribunal under section 8HB of the Treaty of Waitangi Act 1975. This would trigger the relevant sections of Part II of the Crown forestry licences.

The Crown Forest Land is to be valued in specified units as identified in [Attachment] to the AiP, as follows:

Each unit is to be valued as though:

- a each unit will transfer subject to the Crown forestry licence;
- b unit boundaries internal to surveyed parcels that follow forestry roads are, for the purposes of valuation, along the centre line of that road;
- c the termination period of the licence will begin on 30 September following the giving of the termination notice (assumed to be 30 September [**effective year**]); and
- d the provisions of Section 14.3 and Part IIC (Section 17) of the licence will apply to the land; and
- e the Crown will be responsible for carrying out and completing the survey necessary to define the boundaries between the part selected and the balance of the licensed land; and

Appendix 2

- f a computer freehold register has been issued for the unit to be valued and is subject to and together with the encumbrances identified in the disclosure data together with any subject and appurtenant easements arising from consultation under Section 17.4.1 of Part IIC of the Crown forestry licence. This however must be read in conjunction and have regard for all appropriate case law and any proposed access agreements.

1.3 Comment

Dependent upon the area on offer, clauses contained within the Crown Forest Licence relating to access may be adequate. However a recent Court of Appeal decision states access to return areas cannot be guaranteed. Furthermore, in the case of the Kaingaroa suite of licences, a proposed Kaingaroa Forest Road Network Deed has been drafted. This addresses issues relating to cross licence access. At the same time the Crown is currently negotiating with Ngāti Awa to provide access across their lands. The instructions should also address rights of access beyond Crown forest licensed lands to the Kawerau Mill and the Murupara Railhead. Therefore on a case by case basis, this section of instructions must be reviewed and agreement reached with Land Information New Zealand prior to the signing of an AIP.

Each valuer is required:

- a to provide valuation reports as at [Date to be inserted when agreed] (the Valuation Date);
- b to provide for each selection unit, the market value of the licensor's interest as defined;
- c market value is defined as the amount, exclusive of GST, subject to the specific terms and conditions of the licence at which the Licensor's interest in the Crown Forest land might be expected to exchange, on the Valuation Date, between a willing buyer and a willing seller, in an arm's length transaction, after proper marketing, where the parties had each acted knowledgeably, prudently and without compulsion;
- d in accordance with established valuation principles the highest and best use of each individual selection area must be established. Having regard for restrictions and implications arising from the Crown forest licensed regime and other factors which affect the land's reasonable use, the valuation should proceed on the basis that the highest and best use for each selection area is restricted to ongoing commercial forestry;
- e if however for any reason the valuers cannot agree the land's use is restricted to forestry, each valuer will advise his or her principal. The principals will provide direction or if they cannot agree, the principals will jointly instruct the Arbitrator to rule on that point of difference. The determination of the Arbitrator shall be final and binding on the valuers.

The Valuers are to:

- a At the convenience of the licence holder, jointly inspect the various selection areas;
- b Obtain full disclosure from the Crown and copies of all documents that may be relevant to their respective assessments.
- c Reach agreement on all relevant factors pertaining to the physical and legal characteristics of each selection area upon which the assessment is reliant. This will include an agreed schedule identified by year, the amount of land to be returned. The location of the returned areas should be identified and agreed upon;
- d Produce a Joint Memo addressed to the Principals identifying all issues identified in the paragraph 4.8c including where agreement can and cannot be reached. The Principals will then jointly resolve these specific matters and where agreement cannot be reached, refer such matters to Arbitration;
- e Jointly inspect, investigate and analyse all market evidence which the assessment is reliant upon;
- f Produce a Joint Memo addressed to the Principals identifying all issues identified in the paragraph 4.8e including where agreement can and cannot be reached. The Principals will then jointly resolve these specific matters and where agreement cannot be reached, refer such matters to Arbitration;
- g Reach agreement on all resource management issues which will impact upon the value of the licensor's interest;
- h Produce a Joint Memo addressed to the Principals identifying all relevant resource management issues upon which the assessment is reliant, including where agreement can and cannot be reached, the Principals will then resolve these specific matters by reference to arbitration;

The market value of the Licensor's interest in the Crown forest licensed will be dependent upon determining the freehold equivalent value of the selection area plus a forecast of cash flows generated until all lands have been returned.

Financial and Commercial Redress

In determining the present value of the land's freehold equivalent value, the following hierarchy of bona fide transactional evidence should be relied upon:

- a previously forested lands awaiting replanting;
- b sales of pastoral lands acquired for commercial forestry;
- c the value of forestry lands fixed by either the courts or as a result of an arbitration.

For the second class of evidence the valuers must have regard for all relevant case law.

Until the next review period, current rental streams are to be relied upon. Future rental streams must be based on all available market evidence. The hierarchy of this is:

- a Arm's length market evidence of new lettings for the establishment of a new rotation of trees most comparable to those growing on the selection area. This evidence must reflect the outcome of an arm's length transaction after proper marketing in which each party had acted knowledgeably, prudently and without compulsion.
- b In the absence of new lettings then it is mutually agreed recently negotiated Crown Forestry Licence Fees for individual selection areas is the second tier of evidence. Adjustments however must then be made in order to reflect the future affordability of commercial forestry.

The Crown has entered into a number of similar settlements some of which are subject to binding confidential agreements with claimant groups. It is acknowledged the outcome of these settlements may have been influenced by accumulated rentals, access benefits and other factors. For this and other reasons the valuers must acknowledge these settlements were not the result of normal market forces and were influenced by other issues. For these reasons caution must be exercised.

The Crown and the mandated body shall attempt to agree and appoint a person who is suitably qualified and experienced in determining disputes about values of assets similar to the Crown forest licensed land no later than 10 days after the valuers have been appointed. If no agreement or appointment has been made by that date, the mandated body shall, within 5 Business Days, request the President of the New Zealand Institute of Valuers make such an appointment.

Once agreement has been reached or the decision of the Arbitrator known, then the valuers will provide their Principals with a report which will be exchanged. Each valuation report shall:

- a include an assessment of the market value as at the Valuation Date, identifying the key issues affecting value, if any;
- b meet the requirements of:
 - i instructions to valuers;
 - ii the Code of Conduct for Expert Witnesses in the Fourth Schedule of the High Court Rules;
 - iii the Property Institute of New Zealand's Valuation Standards, API/PINZ Professional Practice 2006;
 - iv other relevant standards, insofar as those requirements are relevant, including but not limited to the PINZ/NZIV;
 - v Code of Ethics and Rules of Conduct of PINZ/NZIV, as amended from time to time.
- c include an executive summary containing:
 - i a summary of the valuation along with key valuation parameters;
 - ii a summary of key issues affecting value, if any;
 - iii the name of the valuer and his or her firm; and
 - iv the signature of the valuer and lead valuer if applicable; and
- d attach appendices setting out:
 - v a statement of valuation policies;
 - vi a statement of valuation methodology; and
 - vii relevant market and sales information.

1.4 Timing

- Principals appoint respective valuers.
- Principals appoint a suitably qualified Arbitrator.
- Prior to undertaking their respective assessments, the valuers agree on all relevant inputs.
- If agreement cannot be reached, those issues in dispute will be resolved by the Arbitrator whose findings are binding.
- Valuers submit draft reports to respective principals (XX Business Days incl arbitration if required).

Appendix 2

- Principals provide comments to respective valuers (XX Business Days).
- Valuers finalise reports and deliver to their respective principals (XX Business Days).
- The final reports are shared and negotiations by the Principals over valuation differences commence (XX Business Days from the appointment of the valuers).

Definition

In these valuation instructions, Business Day means the period of 9am to 5pm on any day other than:

- Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, Labour Day, and Waitangi Day;
- a day in the period commencing with 25 December in any year and ending with the close of 15 January in the following year; and
- the days observed as the anniversaries of the provinces of Wellington and Auckland.

1.5 Reporting Format

To assist the Trust with a benchmark of content and conclusions, a report commissioned to determine the Licensor's value in lands subject to a Crown Forestry Licence should contain and comment on the following information.

- 1) Executive Summary
 - Identify selection unit
 - Confirm instructions and basis of valuation
 - Confirm requirements of instructions have been followed and adhered to, if not, provide reasons
 - Effective date of value
 - Freehold equivalent value of land
 - Assessed licence fee
 - Assessment of Licensor's interest
- 2) Introduction
 - Identify area under assessment and effective date
 - If effective date is more than three months in advance of the reporting date, identify no significant changes in the marketplace are anticipated and if they do occur, reserve the right to amend report
 - Confirm all joint actions, information provided by either the claimant or the Crown, and other relevant information relied upon
 - Identify all market evidence relied upon
- 3) Legal Description
 - Description and area of land in question
 - Crown forest license assumptions
- 4) Access
 - Confirm basis of access which the report is reliant upon, both within and beyond the selection areas
 - Assumptions valuation is reliant upon obtaining access to return areas
- 5) Crown Forest Licence
 - The parties
 - Area
 - Summary of definitions with the licence and their impact upon value
 - Land
 - Term
 - Periodic review
 - General review
 - Termination and return provisions when lands are to be returned to Māori
 - Protective covenants
 - Memorandum of Variation if applicable
 - Impact of special management restrictions, if applicable
- 6) Case Law
 - Which cases have been relied upon and brief description of relevant issues
 - Appropriate directions
 - Conclusion and impact on value, if any

Financial and Commercial Redress

- 7) Rating Valuation
 - Is this subject to objection?
 - Acknowledgement that this assessment is based on an unencumbered freehold Title
- 8) Resource Management Act
 - Regional Land Management Plan content and conclusions
 - District Plan content and conclusions
 - Environmental Audit
 - Conclusion and impact on land use and value
- 9) Kyoto Protocol
 - Content
 - Conclusions – impact on land use and value
- 10) Locality
 - Predominant land use
 - Availability of skilled labour force
 - Availability of other supporting services
 - Conclusion
- 11) Lead to:
 - Mills or processing facility
 - Ports
 - Rail heads
 - Impact upon value
- 12) Climate
 - Rainfall
 - Sunshine hours
 - Wind
 - Frost
 - Snow
 - Winter duration
 - Impact of climatic conditions and associated risks
- 13) Soils
 - Description
 - Deficiencies
 - Suitability
- 14) Aspect and elevation
 - Impact upon productivity
- 15) Contour
 - Area of land by extraction type
 - Area of non productive area
 - Impact on value
- 16) Cover
 - For each selection area a table of species by area in order to determine return profiles
- 17) Productivity
 - Range of site indices
 - Range of 300 index
 - Estimated total recoverable volume assuming a given forest regime to be harvested at a given date
 - Impact on value
- 18) Roading
 - Return provisions of licence
 - How these impact upon value and conclusions
- 19) Valuation methodology
 - Discussion on most appropriate methodology or methodologies which have been relied upon to resolve the value of the Licensor's interest in the selection area
 - Discussion on comparable sales evidence

Appendix 2

- Sale of bare land for forestry purposes
- Discounted cash flow methodology
 - Evidence relied upon
 - Implied market discount rate
 - Implied market inflation rate
- Rental streams
- Hierarchy of sales evidence
 - Freehold equivalent
 - Market rental streams
 - Awards – have these been relied upon and if so, to what extent?
- Other settlements – have these been relied upon and if so, to what extent and what adjustment have been applied?
- Where the land's highest and best use is pastoral conversion, then the report should include commentary on the following:
 - Sales of comparable land acquired for forestry conversion
 - Impact of ongoing Forestry Right
 - Associated costs of pastoral development
 - Identified margins between equivalent developed pasture lands and gross costs of conversion

20) Market evidence

- Schedule of analysed evidence showing mean elevation, mean site index, mean lead distance, adjustments to account for infrastructural improvements, trees if any plus removal of gorse etc. prior to planting
- Estimated price paid for bare land in total and by extraction type
- Rental evidence – new lettings identifying similar criteria to above and any adjustments relied upon for purposes of comparison

21) Other

- Forest forecasts
- Recorded change of Producer Price Index inputs and outputs
- Level of new plantings
- Other relevant market factors

22) Conclusion

- A short summary identifying all major value drivers and how these impact upon the valuers' final assumptions and conclusions

23) Valuation

- A concise statement and shown workings of the freehold equivalent value of the selection area
- If DCF modelling has been relied upon then a discussion should be included identifying how the implied discount rate and if any land inflation rate has been resolved. As the selection of these is extremely critical to outcome, then it is essential they are derived from the same source which accurately reflects the relationship between these two factors.
- The licence fee is reviewed at three yearly intervals. The report must therefore include a discussion and table identifying the assumed market rentals at each three yearly interval until all lands are returned. Within this calculation an allowance must also be made to reflect management costs. This allows for the net rent to appear in the discount cash flow as opposed to a gross rental stream.
- Adjustments within the discount cash flow must also reflect the impact piecemeal handback has upon the Licensor's interest and if other than forest land value, adjustments must also reflect environmental factors and risks associated with land use regulations following national or local policies to mitigate effects of climate change, nitrate leaching to waterways or soil erosion.
- The clients must also receive the DCF modelling in an electronic form, allowing a second party to interrogate the internal consistency of the model adopted.

1.6 Reliance upon External Advice

The decision making process of the forest industry is reliant upon discount cash flow modelling in order to ensure identified internal rates of return are achieved. The same modelling technique is also adopted in determining the price a forester can afford to pay for land while also achieving their desired internal rate of return. This method of land

Financial and Commercial Redress

valuation is known as land expectation value (LEV). It is acknowledged this is a theoretical construct and is no substitute for market evidence. It does nevertheless represent thought processes adopted and relied upon by prudent corporate foresters.

As earlier mentioned, one of the problems valuers must face is the lack of transactional evidence when valuing forest lands. Where this does occur, difficulties can then arise in drawing rational conclusions with other forestry blocks. Due to levels of variability such as growing costs, harvesting costs and transport costs, land expectation value modelling provides a basis upon which rational conclusions can be drawn. It can therefore be seen that while a land expectation value cannot produce a market value, it does have credibility in determining relativity between both transactional evidence and relativity between various selection areas. For this reason land valuers experienced in forestry matters rely upon external advice from suitably qualified forestry consultants.

Inquiries within the industry indicate that experienced and suitably qualified forestry consultants are charging somewhere between \$1,000 and \$1,500 per day, plus GST and disbursements.

Suitably qualified valuers who have a sound knowledge of both the forestry sector and implications arising from the Crown forest licence contracts generally charge on a daily basis between \$1,200 and \$1,600 per day plus GST and disbursements.

