Chapter 6

Terms of Negotiation

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- All key terms and definitions in the Terms of Negotiation should be consistent with those used in the Deed of Mandate

Remember...

- Like politics, negotiation is the 'art of the possible' – do not waste time on issues that clearly are impossible to achieve
- But be prepared to 'think outside of the square' – be prepared to try something new
- Do not agree to anything that is inferior to previous settlements unless that provision is not relevant to your negotiation strategy

INTRODUCTION

This chapter discusses aspects of the Terms of Negotiations as they affect the claimant group and focuses on key concepts common across all Terms, particularly the most recent, as they are the most relevant for settlement negotiations. The most common headings used are presented in the order they typically arise in Terms of Negotiation.

A general description of the Terms of Negotiation between the Crown and mandated bodies (for and on behalf of the claimant group) is in the Red Book (pages 56–57).

The form and to a lesser degree the substance of the Terms of Negotiations has evolved over the years. The latest requirement for increased detail is in the interests of both the mandated body and claimant group. It aims to provide more certainty for both parties at the 'front end' of the negotiations process.

The mandated body needs to focus on the reality of the negotiations process, and what is coming up. The sooner they discuss and negotiate around key concepts for settlement, the better.

The Crown prefers a 'no surprises' approach on key Crown settlement policies further along the negotiations process. Realistically, reasons and rationale for a 'no surprises' environment may well be the same for both the Crown and mandated bodies.

STRATEGIC PLANNING – WHERE DO WE WANT TO GO?

Claimants who reach the strategic planning stage have carried out two important steps towards settlement of their Treaty claims:

- their mandate strategy resulted in a Deed of Mandate conferred by members of the claimant group, and
- that mandate has been formally recognised by the Crown, confirmed by a letter from the Minister in Charge of Treaty of Waitangi Negotiations and the Minister of Māori Affairs.

It is time to meet officials from Office of Treaty Settlements (OTS) to discuss the Terms of Negotiation.

MATTERS TO CONSIDER BEFORE MEETING OFFICE OF TREATY SETTLEMENTS OFFICIALS

During mandating the claimant group would have told the claim initiators of their primary aspirations and expected outcomes. Emphasis on key issues may differ depending on the claimant group, the type of Treaty breach, and the losses to the claimant group.

Deed of Settlement components

The Deed of Settlement has three main components:

(1) the historical account, acknowledgements and apology
(2) cultural redress, and
(3) financial and commercial redress.

The weighting each claimant group gives these components will differ and may have a bearing on how negotiators approach the Terms of Negotiation and subsequent discussions.

What is fairly certain is the mandated body will be forced to deflate often wildly over-optimistic redress expectations of claimant group members. It is hard to do this without being labelled a Crown 'stooge' or 'Uncle Tom'.

Refining claimant group expectations

At this point, negotiators want some idea of the expectations of members as to where they want their claimant group to be in a decade or so; in other words on the other side of grievance/claim process.

The Terms of Negotiations should help smooth the path to a successful settlement, rather than throw up unexpected problems that a comprehensive strategic overview might have anticipated.

The old saying goes, '*If you don't know where you are going you won't know how to get there*.' It is helpful to negotiators to approach the Terms of Negotiation process with the preferred outcome in mind.

TERMS OF NEGOTIATION – WHAT ARE THEY?

Terms of Negotiation are the 'rules of engagement' agreed between the Crown and the claimants' negotiators. They are the 'half way house' between the Deed of Mandate process in which the Crown is relatively 'hands off' and the negotiations (the Red Book, pages 56, 57 details Crown 'expectations').

Terms of Negotiation set out both the standards of behaviour in the relationship and the key objectives of the negotiation process. The terms are not legally binding.

No two Terms of Negotiation are identical, but all include:
- bottom line features that the Crown needs to give security to the planned talks, and
- bottom line matters particular to the specific claimant group.

It is essential to reach this level of agreement before serious talks begin, so neither party will be frustrated by the other 'moving the goalposts' halfway through negotiations. Well thought out, mutually agreed Terms of Negotiation reduce that possibility.

While the Terms of Negotiation are being negotiated – which may take several months – the mandated body should begin to work in earnest for the negotiations proper. This includes:
- getting early disclosure of Crown assets
- assurances of protection of those Crown assets from alienation
- an assessment of the claimant group's long term development strategy and aspirations, and
- careful thought on the actual negotiations strategy.

THE REAL WORLD: WHAT CAN WE LEARN?
Both the Crown and mandated bodies can use earlier negotiations to learn about streamlining the negotiation process.

Certain patterns of negotiation hardly vary while others have undergone significant changes. Some sections of a Terms of Negotiation are particularly important to the claimant negotiators, others merely procedural, ie 'bread and butter' process matters which deserve little attention.

The issue for the mandated body is to:
- identify those sections they consider to be of major importance, and
- have a clear idea on how they want those sections written in the Terms of Negotiation for their negotiation.

Key elements of six Terms of Negotiation signed between 1998 and 2006 are set out in the relevant analysis section of the Terms of Negotiation. They range from a single iwi with no major internal mandate issues, to some that have had significant mandate matters to resolve. The Terms of Negotiation for two 'large natural groups' (LNGs) are looked at in detail. In one the Crown preference was for discreet iwi to aggregate into one, from the iwi point of view, 'large *unnatural* group'.

Negotiators should not let these examples limit their exploration of other options. A claimant group may want other elements included in the Terms of Negotiation.

The numbers, names, and frequency and status of each section in the Terms of Negotiation are indicated in Table 6.1. It is followed by an analysis of each section. Examples of Terms of Negotiation are available on Office of Treaty Settlements website www.ots.govt.nz

	Section	Frequency and status in recent Terms of Negotiation
1	The Parties (to Terms of Negotiation)	Always identifies the parties
2	Background	Rare – case specific, sets context
3	Preamble	Rare – not used in last five years
4	Purpose (of Terms of Negotiation)	Always – standard
5	Guiding principles	Sometimes – probably at negotiators' request
6	Negotiation objectives	Always – vital section; negotiators must carefully consider implications of points here
7	Definition of claimant group	Always – negotiators need to ensure claimant definition reflects their view (in meeting Crown's needs)
8	Definition of Crown	Always – invariable
9	Definition of constituent iwi	Rare – vital for multi-iwi teams wanting provision for more than one Deed of Settlement or post-settlement governance entity
10	Definition of historical claims	Always – invariable
11	Matters concerning mandate to negotiate	Always – negotiators need to ensure their status cannot be upset by dissident side winds
12	Acknowledgements	Rare – not used in last five years
13	Waitangi Tribunal findings	Only if Waitangi Tribunal has published report
14	Subject matter for negotiation (process of negotiation)	Always
15	Stages of negotiation process (scope of negotiations)	Always – just a statement of fact
16	Recognising interests of individual constituent iwi	Only applies to negotiators in multi-iwi bodies wanting to protect ability to have more than one settlement or post-settlement governance entity
17	Historical claims settlement outcomes / process	Always – meets Crown, rather than claimant needs
18	Communication (and provisional information)	Sometimes (may be referred to in another section of the Terms of Negotiation)
19	Overlapping claims (previously cross claims or shared iwi interests)	Always
20	Not bound until Deed of Settlement (no agreement to commit to settlement)	Always – standard
21	Confidentiality	Always (may be included in procedural matters)
22	Negotiations to be 'without prejudice'	Always (may be included in procedural matters or guiding principles)
23	Governance structure for settlement assets (also governance entity or entities for settlement redress)	Always in recent Terms of Negotiation – negotiators may want to ensure possibility of more than one post-settlement governance entity in multi-iwi mandated bodies
24	Claimant funding	Always – standard
25	(Foregoing) other avenues of redress	Always – with some recent variations
26	Procedural matters	Always – standard
27	Amendments	Always – standard
28	Interpretation	Rare
29	Appendices	Always includes Deed of Mandate and Crown letter of recognition; includes other papers at claimant behest

Table 6.1: Terms of Negotiation: frequency and status by section

APPENDICES TO TERMS OF NEGOTIATION

Most Terms of Negotiation contain background appendices such as the Deed of Mandate and the Crown letter of recognition of Deed of Mandate.

Appendices (see Table 6.2) can be helpful; they provide an opportunity for adding clarification documents to the Terms of Negotiation.

Note: The mandated body must remember that third parties can access such documents.

Appendix	Content
1. Deed of Mandate	
2. Crown letter recognising Deed of Mandate	
3. Description of the claimant group	Might include representation, hapū, area of claim, recognition of overlapping claims, the mandating process, accountabilities of negotiators
4. Map of claimant area	
5. Chart of governance and operational structure of the Runanga and statement on the composition of the negotiations team	
6. Deed of Agreement which backgrounds evolution of mandated body	Signed by mandated representatives; includes definition of beneficiary group, list of Wai claims, protocols
7. Definition of claims as related to Aboriginal title and customary rights	

Table 6.2: Possible Appendices to Terms of Negotiation

ANALYSIS: TERMS OF NEGOTIATION

1. The Parties (to Terms of Negotiation)

This section:

- makes clear who is involved in the negotiation
- identifies the parties as the Crown and the mandated body negotiating on behalf of the claimants – usually both are defined in the Terms of Negotiation.

Descriptions in more recent Terms of Negotiation reflect the requirement to accommodate the Crown's 'large natural grouping' preference.

A consequence of this requirement is that in future there may be a number of 'parties' to Terms of Negotiation for the claimant group as opposed to the more traditional method (compare the Terms for Kurahaupō and Ngāti Apa).

It is in the interests of the negotiators of 'large natural groups' to ensure each iwi identity is recognised separately in the 'Parties' section. This will facilitate separate settlements and governance entities for the member iwi – although this probably will not be the Crown preference. However, if the claimant body does not stress their separate identities strongly from the outset it will be difficult to achieve separation later in the negotiations.

2. Background

The Background is used in only some Terms of Negotiation, most recently the Port Nicholson Block Claims Team. It sets out the main events leading to the formation and Crown recognition of the mandated body. It may include the names of claimant negotiating team members.

The Background aims to give context to the negotiations. It is more likely to be used for bodies representing complex and multiple claimant groups, or where issues of mandate have already been an issue, or may arise later.

It is useful to formally record such matters as historical information about the process that led to negotiations can be lost in a relatively short period. A Background would be useful for both current and future generations; it would enable them to better understand the entire settlement process and how it came about.

In recent Terms of Negotiation the Background clause is redefined and reordered in an 'Acknowledgement' clause. This is discussed later in this chapter.

3. Preamble

A Preamble was used in early Terms of Negotiations. Its advantage is the early signal from the Crown that it acknowledges breaches of the Treaty. Previous preambles stated that the parties agree that:

a *The Crown has committed historical breaches of the Treaty and the principles of the Treaty which have prejudiced the claimant group*

b *Over the past decade the Crown has developed a policy framework for negotiating and settling historical Treaty claims and settlement redress packages to address those claims*

c *The Parties have agreed to engage in settlement negotiations for the resolution of the historical grievances of the iwi against the Crown.*

It may be useful to consider including a Preamble in the Terms of Negotiation, for essentially the same reasons as for the Background and Acknowledgement clauses.

4. Purpose (of Terms of Negotiation)

Most recent Terms of Negotiations have some variant of the following, to:

- set out the scope, objectives and ground rules for negotiation
- state the intention to negotiate in good faith, confidentiality and without prejudice
- note that the Terms of Negotiations is not legally binding to either party (they can walk away) and therefore does not create a legal relationship
- note that each party expects the other to comply with the Terms of Negotiation during negotiations.

The Purpose:

- lays the platform for behaviour, expectations and relationships between the parties; the text is unique to each negotiation but usually encompasses the four points noted above. Agreement in developing this section minimises the potential for either party to move the goalposts during negotiations.
- generally introduces certain key terms and concepts (referred to in more detail later in the Terms of Negotiation). A key phrase in the Purpose that is not always referred to elsewhere, is that the Terms are '*...not legally binding and do not create a legal relationship...*'

From a legal perspective the effect of this clause is clear. The Terms of Negotiation have no contractual legal effect. No party can sue or be sued by the other for a breach of any clause of the Terms of Negotiation, although it is not known if either the Crown or any mandated body has attempted to legally enforce the Terms of Negotiation.

The mandated body needs to appreciate that a number of clauses referred to in the Terms of Negotiations reflect fundamental Crown settlement policy. In that regard, the Crown will certainly expect to see those terms included in later agreements that are binding on the mandated body and claimant group.

5. Guiding principles (also Negotiation process principles)

Guiding principles have been included in some Terms of Negotiations. They may include any of the following principles:

- *good faith*
- *without prejudice*
- *constructive working relationship*
- *mana ōrite (equal partners)*
- *turangawaewae (ownership of the process)*
- *high standards of integrity*
- *tika*
- *transparent dealings*
- *recognition of each other's interests*
- *no surprises.*

The list is not exhaustive. Claimants may have other principles they hold important and wish to include in the Terms of Negotiation. Guiding principles are usually based on matters set out in the claimants' constitutional documents.

Negotiation process principles

These may state that the parties agree and intend that the negotiation be guided by the following principles:

- the Crown recognises that (the claimant group) has its own tikanga, and in the course of negotiations the Crown agrees to respect that tikanga, and
- both parties agree that the English and Māori versions of the Treaty and its principles will inform the negotiators.

Mandated bodies tend to use this section to ensure their values and 'iwitanga' are recorded. For example, Moriori expressed a strong interest in this as they wished to refer to the heart of their culture as being: the 'taonga of peace' and that this would influence how they negotiate with the Crown. Iwi negotiators appear to be endeavouring to level the 'cultural playing field' with this approach and thus enhance their cultural capital.

Multi-iwi bodies may emphasise the need to speak in unison in order to strengthen their individual iwi positions without diminishing the distinct identity and mana of the constituent iwi.

'Good faith' in the context of the Terms of Negotiation, generally means that the parties are engaging on the basis that there is a genuine desire to work together to negotiate an outcome. This does not mean that the parties necessarily will or have to achieve a settlement outcome.

Clauses on *Constructive Working Relationship* and *Integrity* and *Open and Transparent Dealings* are sometimes provided in the Guiding Principles section. (see *Terms of Negotiation between Te Runanga o Ngati Apa Society Incorporated and the Crown*, 27 July 2005.)

The overall intent of such clauses is straightforward. If the mandated body believes they will assist the overall negotiations, there is no harm including them.

6. Negotiation objectives

This section shows that a settlement includes any number of objectives, including, but not limited to the following:

- *A comprehensive, final, durable and fair (in the circumstances) settlement of all historical claims*
- *Accurately documents the history of the claimant group's historical claims in the historical account*
- *Restores and enhances the mana and tino rangatiratanga of the claimant group / achieve a settlement that provides a platform for affirming the identity and mana of the iwi*
- *Restores the honour of the Crown*
- *Enables a process of healing the past for both parties*
- *Provides the opportunity for an enhanced Crown-claimant relationship based on the Treaty of Waitangi (and its principles)*
- *Facilitates the enhancement of the claimant group's relationship with local government*
- *Recognises the nature, extent and injustice of the Crown breaches of its Treaty obligations to the claimants (and where appropriate acknowledges the effect those breaches have had on the claimants' cultural, social, political and economic well-being)*
- *Creates a platform for a new economic base to assist the claimants' cultural, social, political and economic development*
- *Demonstrates that both parties have acted honourably and reasonably during negotiations*

But will not:

- *Diminish or affect rights arising from the Treaty (and its principles)*
- *Extinguish any of claimants' aboriginal or customary* rights.

This chapter contains a number of defined objectives of fundamental importance to the Crown in terms of its

settlement policy, for example 'final and fair'. Accordingly, all these objectives will be required by the Crown in the Agreement in Principle, Deed of Settlement and Settlement Legislation.

For this reason, it is very important that the mandated body fully understands:
- what the above objectives mean
- their importance to the Crown, and
- their intent and potential impact on the claimant group.

The Guide next deals with each relevant term in the clause below as they are set out in the Terms of Negotiation. In this clause, the parties agree that the primary objective of the negotiations will be, to negotiate in good faith, a settlement of the claimant group claims that:

> *'...is comprehensive, final, durable and fair (in the circumstances)...'*

Comprehensive
When the Crown negotiates to settle claims, it wants to cover as many issues, for as many people and over as big an area (rohe) as possible. This in essence is what comprehensive means.

Changes in definitions may lead to challenges
When negotiating Terms of Negotiation, the degree of comprehensiveness for a settlement will, in legal terms be determined by the definition of the claimant group and the claims, and these definitions should be the same as in the Deed of Mandate. The mandated body should not agree to definitions wider than those conferred by the claimant group in the Deed of Mandate. To agree to a change would most likely lead to challenges at the ratification and settlement legislation stages.

Although the Crown prefers to negotiate settlements that are 'comprehensive', several settlements are not comprehensive in that sense. In these cases, political judgment would have been exercised by both Crown and claimant group initiators about the scope of comprehensiveness possible in the circumstances. For example, the Te Arawa Lakes Claim Settlement Act 2006 settles all historical and annuity claims in respect of Lakes only; the Deed of Settlement with the Affiliate Te Arawa Iwi/Hapū signed 30 September 2006 settles the historical claims of only some Te Arawa Iwi/Hapū.

Discuss non-comprehensive settlement option before signing the Deed of Mandate
While unlikely to be easy, there is precedent for non-comprehensive settlement negotiations. There may be good reasons for this from both claimant group and Crown perspectives. If negotiators believe 'a non-comprehensive settlement' applies to their circumstances, they should discuss it with the Crown during the Deed of Mandate stage, but should not expect the Crown to be enthusiastic.

Final
A key Crown settlement policy is that once claims are settled they cannot be re-opened, re-litigated, re-negotiated or re-settled. Although the claimant group legally binds itself to a settlement outcome when a Deed of Settlement is signed following ratification, technically speaking the finality of a settlement is confirmed by Parliament when the settlement legislation is passed. This underscores the political nature of Treaty settlements.

Durable
A common definition for durable is 'long lasting'. Clearly, the Crown wants settlements to last. In this context durable is meant to closely relate to settlement *finality*.

Fair
Over the years this term has been re-configured and re-worded. In some instances 'fair' is used in conjunction with the words '...in the circumstances'. This is probably the preferred statement for a mandated body rather than using the word 'fair' in isolation.

Mandated body rationale for including 'fair' in Deed of Settlement
This is a direct acknowledgement by the mandated body (and claimant group who ratify the Deed of Settlement) that the settlement is fair only when a range of other factors is taken into account. Some of those factors are usually recorded in the final Deed of Settlement. It is important that the mandated body:
- considers including those statements in their Deed of Settlement, and
- ensures that the relevant clause negotiated in the Terms of Negotiation, does not exclude such clauses in the Deed of Settlement.

It is considered, from a legal perspective, that the Crown requires a mandated body, and thereafter the claimant group when a Deed of Settlement is ratified, to agree to the term 'fair' to negate any implication of Crown duress on the negotiators in 'striking the deal'. This is politically desirable for the Crown as a means of securing adherence to sustainability of the key desired outcomes of *finality and durability*.

Given the prescriptive nature of Crown settlement policy and associated limited redress options and outcomes for the claimant group, many mandated bodies have difficulty accepting the term 'fair'. Experience shows that these terms are so fundamentally important to the Crown, that omitting or substantially amending them in Terms of Negotiation, and thus from the terms of settlement, would be very unlikely. The possibility remains however, that because settlements are political in nature, a different Government may vary its policy around the 'fairness' term.

It is suggested that 'fairness' is one of the important issues that initiators should consider when first deciding to enter negotiations with the Crown (see *Early Preparation* section in this Guide).

Will not diminish or in any way affect any rights that the claimant group have arising from Te Tiriti o Waitangi/The Treaty of Waitangi and its principles, except to the extent that claims arising from those rights are settled.

The intent and effect of this key Crown settlement policy is not always clearly understood. The intended outcome of a settlement negotiation is to settle claims that arose out of breach by the Crown of underlying interests or rights the claimant group has, based on The Treaty of Waitangi and its principles. Settlement of claims does not diminish or affect the underlying rights themselves, which are based on Te Tiriti o Waitangi/The Treaty of Waitangi and its principles. In other words, the underlying rights remain after settlement of the claim.

To illustrate this, take the rights that apply if the driver of a car who is at fault hits and damages your car. You can bring a claim against that person because they were at fault and damaged your car. You may take that person to Court or settle out of Court. In either case, all you settle is the claim you take against them for the specific accident. If they run into your car again and are at fault you can take another claim against them because your underlying rights as an owner of a car did not disappear (were not settled) when you settled your first claim.

Will not extinguish or limit any aboriginal or customary rights that the Claimant Group may have
This key Crown settlement term is not always understood, but the mandated body on behalf of the claimant group needs to fully appreciate what it means. It is generally (but not universally) accepted that aboriginal rights and customary rights still exist. The primary debate relates to what the rights are, to what extent they still exist, who holds them, and what is their effect?

In that sense the Courts continue to be tested. The most recent example was the Foreshore and Seabed Policy, culminating in the Foreshore and Seabed Act 2004. This rose out of a case where the potential existence of aboriginal and customary rights was tested (see *Alternatives to Settlement* subsection to *Early Preparation* in the Guide).

While the Crown does not acknowledge that the claimant group in fact has any aboriginal or customary rights, it does acknowledge (inherently) that they may have, and if they do then the settlement will not extinguish or limit them.

Effect on Māori Fisheries Act 2004
A clause stating that settlements will not affect the Māori Fisheries Act has been included in recent Terms of Negotiation, probably more as a comfort than anything else. As long as the correct claimant group and claim definitions are provided in the Terms of Negotiation, technically this clause is not necessary.

Other objectives clauses
Other clauses in typical Terms of Negotiation under the Objectives section are noted elsewhere in the Guide. Negotiators are urged to ensure that when negotiating their Terms of Negotiation they consider including such (and other) matters.

In particular, be mindful of certain clauses that may allow the claimant negotiators to lever up their redress when substantive negotiations commence, on the basis that the Terms of Negotiation recorded the importance of a settlement that will:

- provide a platform to assist development of an economic base
- enhance and improve the ongoing Claimant Group/ Crown relationship, and
- restore the honour of the Crown.

7. Definition of claimant group
Remember – only the mandated body should have a final sign off on a definition of the claimant group. In negotiations there may be pressure from the Crown to push the Claimant Definition as wide as possible. Negotiators should resist this if it leads to an outcome they are not comfortable with.

The Terms of Negotiation must make it clear that the claims are being negotiated, and then settled, on behalf of the claimant group. This section is vital to the interests of the negotiators. Tension can arise as negotiators wrestle with who the Crown '*thinks* the claimants are' (or were), as opposed to who the negotiators '*know* the claimant

group are'. The definition usually refers to the collective group who:

a descend from named ancestors
b are members of one or more of named hapū / descent groups.

The Terms of Negotiation often adds a rider that the claimant group is: '*every whānau, hapū or group of persons to the extent that that whānau, hapū or group includes persons referred to in 'a' and 'b' above.*' Marae may also be identified for clarity.

The Terms of Negotiation may include hapū which have been inactive for decades, '*... older tribal identities through which customary rights may have been exercised after 1840.*' The Crown is nervous about members of the claimant group 'falling through the cracks', so that the same Historical Claims issues may arise again after negotiators have settled.

That is why the Crown may insist that the claimant group definition includes hapū that have not been active for many decades – to ensure claims are not lodged at a later date on behalf of those hapū.

Avoid catch-all terms – use claimant group definition used in Deed of Mandate
The Terms of Negotiation should not seek to vary any fundamental terms of the Deed of Mandate, including the definition of the claimant group – the people whose claim is being negotiated for settlement. This has particular importance when recent 'catch all' terms that provide that the definition of the claimant group in the Terms of Negotiation '*...will be developed further over the course of the negotiations for inclusion in any Deed of Settlement that may be agreed between the parties' is examined.*

It may be prudent to always have the above note in the event that the claimant definition takes a path negotiators did not anticipate during discussions with the Crown. Mandated bodies and negotiators are urged to be very cautious in that respect. It is suggested that any further development should be only to clarify 'sub-set' definitions of the claimant group definition provided in the Deed of Mandate, not to widen it to create another 'set'.

'Wash up' clause sub-set restricted by recognised ancestor/customary rights requirement
It is common for this section to contain a 'wash up' clause to include other 'sub-set' classes for which no specific descent group was, for whatever reason, possible to define when the Terms of Negotiation were signed. A key restriction here is that a new 'sub-set' can only be included if there is a recognised ancestor/s of a set already noted in the Terms of Negotiation, and that these ancestors exercised customary rights within a certain area prior to 6 February 1840.

The definition may include the area over which the claimant group considers that it exercised customary interests.

The Crown's preference to enter into negotiations with large natural groupings has already resulted in 'multi-party' claimant group definitions. The claimant group needs to be attuned to this recent development.

8. Definition of constituent iwi
The definition of constituent iwi has only been used in recent multi-iwi negotiating bodies configured to meet the Crown's large natural group policies, for example the Kurahaupō ki te Waipounamu Trust. Negotiators want the definition to stand-alone so individual iwi are very clearly identified, rather than having it buried in a general 'Definitions' section. The definition may (1) include extensive lists of tūpuna and hapū, and (2) signal that detail of definition of the 'constituent iwi' will be further developed and included in any Deed of Settlement that may be agreed between the parties.

Considerations relating to 'large natural groupings'
In the case of 'large natural groups' formed to meet Crown expectations negotiators need to be firm to ensure that the mana of their constituent iwi is not diminished by a broad definition that loses the separate identity of some iwi. At a minimum any commonly recognised iwi within te ao Māori; for example, all of the iwi recognised in the Māori Fisheries Act 2004, should insist on a 'constituent iwi' definition.

The negotiators will want to ensure that the distinct identities of each iwi are not threatened by any outcomes of the Deed of Settlement. The Crown may be reluctant to include this type of definition – negotiators need to be firm to achieve this outcome. This definition will play a defining role when designing the claimant group members' registration form.

9. Definition of Crown
The Crown
- *means Her Majesty the Queen in right of New Zealand; and*
- *includes all Ministers of the Crown and all government departments, but*

does not include:
- *an Office of Parliament*
- *a Crown entity; or*

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

This is a standard definition. It may be buried in a 'Definitions' section but the trend appears to be that it stands alone.

Note: State Enterprises were not excluded in the first years of Treaty negotiations.

As opposed to the minimal effect for the Terms of Negotiation, it is possible that the amendment to the definition of the Crown may, over time, have an impact for claimant groups in terms of settlement redress. For instance, if negotiators are able to negotiate a right of first refusal (RFR) in their Deed of Settlement, a wider definition of 'the Crown' will have wider application and potentially greater benefit for the claimant group. This should be raised when discussing the definition of 'the Crown' for the Terms of Negotiation.

10. Definition of historical claims
The Definition of Historical Claims is usually worded along the following lines:
'Historical Claims' means all claims made at any time (whether or not the claims have been considered, researched, registered or notified) by any claimant(s) or anyone representing a claimant(s) that:
are founded on a right arising:
- *from the Treaty of Waitangi or its principles; or*
- *under legislation; or*
- *at common law (including customary law or aboriginal title); or*
- *from a breach of a fiduciary duty; or*
- *otherwise arising; and*

arise from or relate to acts or omissions before 21 September 1992:
- *by or on behalf of the Crown; or*
- *by or under legislation.'*

The Terms of Negotiations then usually identify all historical Wai claims within the claimant area known to fit these categories; and any claims that are specifically excluded from the Terms of Negotiation.

This is a standard section that does not vary in substance: it is an attempt to close the door on later claims. The Crown is not likely to agree to any amendments because of its importance in the issue of finality of settlement.

Negotiating bodies configured as 'large natural groupings' at the Crown's insistence may want to reword the first sentence to read.... *'by the [name of mandated body] or <u>its constituent iwi</u>, either individually or collectively ...'*

Treaty claims against the Crown after 21 September 1992 are not covered by the Terms of Negotiation.

The key objective of a settlement negotiation is to settle Treaty claims. Although not all claims are restricted by scope to historical claims, the core aspects of the definition of what is meant by 'claims' is now well established. *(For example, the Te Arawa Lakes Settlement Act 2006 settles all historical Treaty claims in respect of the Te Arawa Lakes and also annuity based claims.)*

From a legal perspective there are a number of important points to note:

Claims known or unknown
As a means of seeking to provide *finality*, a key Crown policy is that all claims will be settled whether or not they have been considered, researched, registered or notified. This means that if after settlement the claimant group is notified of or becomes aware of a further claim, they will have lost any legal right to pursue it. The full detail and meaning of this are discussed later in this Guide. Among other things this emphasises that negotiators need to confirm what their claims are before negotiations begin.

Basis of the claims and breaches
Detailed analysis of the basis of claims is discussed in the context of the Agreement in Principle and Deed of Settlement. Negotiators are urged to refer to and understand those sections before negotiating their Terms of Negotiation.

Exclusions
Although the Crown prefers to negotiate comprehensive settlements, many settlements are not comprehensive. While it is unlikely to be easy, there is precedent for non-comprehensive settlement negotiations. As in the past, there may be good reasons for this from both claimant group and the Crown perspective.

11. Matters concerned with mandate (to negotiate)
As discussed in the Deed of Mandate chapter, a strong mandate for the mandated body and negotiators is vital to the interests of both the claimant group and the Crown.

The 'Mandate to negotiate' section will be specific to each claimant group. It may note that the Deed of Mandate and Crown letter of recognition are appended to the Terms of Negotiation and may name the persons chosen to negotiate the claim. It will usually include:

- A dispute resolution process in the event of representation challenges to or within the mandated body that cannot be resolved internally, in which the Crown offers to discuss with the negotiators how to proceed and assist as the Crown 'considers appropriate'.
- An agreement to provide Office of Treaty Settlements with regular reports on the state of the mandate, and that the Crown agrees to provide negotiators with any correspondence or objections to their mandate.
- An agreement to reconfirm the mandate after a set period, for example, two years.

Where a Deed of Mandate has been recognised by the Crown in full knowledge of challenges to that mandate, the Terms of Negotiations may include sections such as:

- Certain hapū or marae whose interests must be protected, and processes to effectively represent them
- Any steps proposed by both parties to include any groups who consider that they are not adequately represented in the negotiations
- If serious mandate issues arise that cannot be resolved by internal agreement the Crown may review its recognition of the mandate.

In groups where the mandate has been a hot issue this is a very important section – negotiators need to be wary if it is likely that factions outside the mandated body will batter their mandate consistently. This section demonstrates that the mandated body is not shutting out certain members of the claimant group but is looking for ways to include them in the process. Negotiators need to 'bullet proof' their integrity and processes with this section.

Negotiators need be wary of the Crown reaction to challenges to the mandate which negotiators know have no substance, but into which they are drawn at the Crown's insistence to assist, as it 'considers appropriate'.

The Crown takes a less prescriptive stance in some Terms of Negotiation, with phrases such as, '*… the Crown will discuss with [the mandated body] a process to address those issues.*' This provides more latitude to the mandated body.

Claimant group reports to the Crown on the mandate
Negotiators may baulk at the need to provide regular reports on mandate or commit to a mandate reconfirmation process as an unnecessary burden placed on them by the Crown, but it is better to be 'safe than sorry'. The mandated body should be mindful of the Official Information Act 1982 risks identified in the Ratification chapter, when complying with the requirement to provide reports on the mandate to the Crown.

The mandated body may consider it fair for the Crown to also be required to provide a mandate report. In this context, it may be useful for the mandated body to receive regular updates from the Crown on settlement mandate, specifically: is Crown policy on settlement changing? If so, when? In what respects?

If claimant group negotiators agree with the Crown to include a dispute resolution clause in their Terms they are recommended to maintain control of any process that arises out of such a clause rather than simply accept a Crown template.

12. Acknowledgements
The Terms of Negotiation usually state that the parties acknowledge:

a the work the claimants have undergone to reach this point;
b the mandated body has forgone the opportunity of having certain Historical Claims heard in the Waitangi Tribunal in order to expedite settlement;
c the parties will draw on a number of sources to inform the negotiations including the relevant Waitangi Tribunal reports, and that those sources will not be binding on the parties;
d the parties will agree on the nature, extent and consequences of the Treaty grievances and any breaches of the Treaty and its principles on the part of the Crown;
e in the settlement the Crown will acknowledge and apologise for any agreed breaches and the nature and impact of those breaches where they can be established.

This approach, not used for some time, has certain attractive points from a negotiator's point of view. It signals good will on both sides, but note that the Crown is not conceding that it will accept all Waitangi Tribunal findings and recommendations.

In many respects the Acknowledgements clause replaces what used to be the Background clause. For the reasons stated above (in 2 Background) overall it seems a good idea to include such a clause in the Terms of Negotiation.

13. Waitangi Tribunal findings
For those claimant groups that have been through the Tribunal hearings process and received a Tribunal Report, the Terms of Negotiation is likely to include a clause on Tribunal Findings. This is irrelevant to those claimants who have elected to by-pass the Tribunal and negotiate directly with the Crown.

While such a clause might be useful in a general sense and provide a degree of historical background, the mandated body should consider keeping such a clause very brief and general, the main reason being that negotiations with the Crown on signing the Terms of Negotiation will not have commenced. Negotiators do not want the Terms of Negotiation, inadvertently or otherwise, to limit the scope of negotiations.

This section may include a recognition by both parties that any Waitangi Tribunal findings will act as a starting point for discussion, with the Crown reserving the right to challenge findings. The Crown may acknowledge and accept some findings as a starting point and these can be identified in the Terms of Negotiation. The Crown may also signal that other breaches may be acknowledged during the course of negotiations. It is clearly in the interests of claimant group negotiators to get as many Crown acknowledgements of Treaty breach as possible at this early stage – that will speed up the whole process.

Crown not bound by Tribunal findings
Except in very limited circumstances the Crown is not bound by Tribunal findings. If it disagrees with what the Tribunal has found the Crown will say so, or at least reserve the right to say so, in the Terms of Negotiation *(see Options for Settlement)*.

Do not rule out the possibility that the claimant group may not agree with the Tribunal report and findings. If that is the case, negotiators should say so in this clause, or at least reserve their right to do so.

14. Subject matter for negotiation
(also Scope of negotiations)
This section contains an agreement on what will be negotiated, and will include but not be limited to the following subject matter:
- *The Crown's apology and acknowledgements*
- *Cultural redress (including redress instruments that seek to enhance the relationship between the Crown and claimants)*
- *Financial and commercial redress.*

It may also include:
- *Ongoing Treaty of Waitangi relationships between the parties.*

The text of the 'Subject matter for negotiation' section has tended to be less detailed and limited to these general headings. A generic approach provides more flexibility to both parties. The part in parenthesis occurs in only some Terms of Negotiation; negotiators on both sides may prefer the flexibility that fewer words give.

For the purposes of the Terms of Negotiation, a mandated body should negotiate a wide 'non-exhaustive' clause at this stage. While the mandated body always has to contend with the Crown's core settlement redress policies, such a clause leaves open the possibility of discussing a wide range of redress options.

15. Stages of negotiation process
(also called Scope of negotiations / Process of negotiations)
The stages of the negotiation process are well established steps providing some level of certainty in claimant planning. They include, but are not necessarily limited to, broad descriptions of the following sequence:
- *Agreement in Principle* (earlier called Heads of Agreement) – summarises key elements, in principle, of the proposed settlement redress.
- *Initialled Deed of Settlement* – sets out terms and conditions of settlement.
- *Ratification* – the Deed of Settlement and proposed post-settlement governance entity are presented to registered members of the claimant group for their approval.
- *Deed of Settlement signed* – if ratified (by claimant group members).
- *Governance entity* – (approved by the Crown and ratified by claimant group members) is in place.
- *Settlement legislation* – passed and negotiation and settlement process completed.

It has become common for the Deed of Settlement and post-settlement governance entity to be ratified at the same time with two separate ballot papers. This makes sense as there are significant savings in time and costs; and it avoids a damaging lower voter turn-out in the second vote (which can make Ministers nervous).

16. Recognising the interests of individual constituent iwi
Most earlier settlements provided a process whereby the Crown transferred settlement redress to a single post-settlement governance entity. What that entity did with the redress was its own business, so long as it acted in accordance with its Constitution or Deed of Trust.

Clauses that specifically acknowledge the requirement for the parties (the Crown and the mandated body) to consider whether particular redress should be linked or even provided directly to an individual group within the claimant group are now more frequent. This applies particularly when more than one iwi recognised in the Māori Fisheries Act have aggregated to meet the Crown's large natural group needs. Note that this aggregation meets Crown needs, but not necessarily the needs of the constituent iwi.

While such clauses have been (rarely) used in the past they may be of increasing relevance particularly where the Crown insists on negotiation with large natural groupings where constituent iwi interests are quite distinct.

Although more than one recognised iwi has agreed to seek one enveloping Deed of Mandate to negotiate, this section indicates the constituent iwi are determined that their individual interests will not be subsumed in one generic settlement. This is a matter of mana. It lays a foundation for more than one post-settlement governance entity as opposed to the Crown's preference for only one. This section usually states that:

> *'The parties acknowledge that the settlement package will need to recognise the interests of the individual constituent iwi [of the mandated body], and that this will be the subject of discussion during the negotiations.*

The parties agree that it may be appropriate for some redress to be linked, or provided directly to, the individual constituent iwi: this may include:
- *The return of particular wahi tapu sites*
- *The Historical Account, Crown Acknowledgements and Apology, and*
- *Certain other items of redress.'*

Expect the Crown to be unhappy about this approach. If separate iwi want to ensure their own post-settlement governance entity or parts of settlement, the iwi negotiators will need to hold a firm position on this point. It will be an uphill battle to get separate settlements and governance entities if this is not in the Terms of Negotiation.

17. Historical claims settlement outcomes
(what settlement of historical claims enables)
The claimant group negotiators and the Crown agree that the settlement of the claimant group's historical claims will enable:
- *Final settlement of all historical claims of the claimant group (and release and discharge of all Crown obligations and liabilities in respect of them);*
- *'Discontinuance' of the OTS land bank arrangement for protection of potential settlement properties for the claimant group;*
- *Removal of any resumptive memorials from the titles of land subject to the State Owned Enterprises Act 1986, the Railways Corporation Restructuring Act 1990, the Crown Forests Assets Act 1989 and the Education Act 1989, and for statutory protection for claims against the Crown to be removed;*
- *Removal of the jurisdiction of the courts, the Waitangi Tribunal or any other judicial body or tribunal in respect of the Historical Claims, Deed of Settlement, redress provided or settlement legislation;*
- *Discontinuance of any legal proceedings or proceedings before the Waitangi Tribunal in relation to the Historical Claims.*

It may also include:
- *An appropriate representative of the Crown to give an oral and written apology in an agreed form, at an agreed location, on an agreed date, and*
- *The receipt of appropriate cultural, financial and commercial redress by the post-settlement governance entity (or entities).*

All Terms of Negotiation have these phrases more or less as written, although the order varies. This is a particularly important section from the Crown's point of view. It clearly sets out where the Crown's Treaty obligations will end but also closes the door on new historical claims being given effect. Finality is emphasised. Negotiators need to ensure that this status is signalled to all members of the claimant group; ideally at an early stage as part of their communication strategy.

The clauses that the Crown will require in the Terms of Negotiation, the Agreement in Principle, the Deed of Settlement, and Settlement Legislation are now well established. It is unlikely that the Crown would agree to a Terms of Negotiation that did not encompass all the matters set out in this section.

These clauses are aimed at both securing the finality sought by the Crown and also removing any protections that were in place for the benefit of the claimant group before settlement of the Claims. The mandated body should consider those clauses in detail and ensure that at the very least, the terms are no different than those used in earlier settlements.

18. Communication (and provision of information)
This section notes the agreement of the parties to ensure 'regular and appropriate' internal consultation procedures but is mindful of the need to keep the claimant group informed, and confidentiality regarding third parties.
In theory this clause is fairly straightforward. In practice simple communication breakdown between the parties (as opposed to substantive issues of disagreement) has resulted in negotiations stalling. This is not good for the mandated body or its claimant group.

Given the importance of good communication between the parties, the obligation of confidentiality, and the potential effect of the Official Information Act, mandated body negotiators are recommended to ensure they discuss and formalise a communication strategy and/or protocol with the Crown.

19. Overlapping claims

(previously Cross claims, also Shared iwi interests)

When negotiating a redress package with a claimant group the Crown considers a number of factors, including whether:

- any overlapping claimant groups have customary interests in that area, and the nature of the interests
- alternative redress options are available for use in a later settlement with other overlapping groups
- it is appropriate to provide non-exclusive redress so as not to preclude similar redress for other overlapping groups in the same area.

There have been significant issues relating to overlapping claims for almost all settlements. In many respects this is due to various claimant boundaries not being set in stone. Accordingly, negotiators should spend time working on their overlapping claims strategy, and also work on it in conjunction with the Crown. It is important that negotiators follow up on their own overlapping claims strategy in a co-ordinated, concerted way.

It is important to get agreement at the start on how overlaps will be handled. Litigation can easily result if overlapping hapū/iwi perceive their interests are being undermined by the negotiations. Following the 2007 Ngāti Whatua o Ōrākei Waitangi Tribunal hearing lodged by Marutuahu iwi and others, the Crown will be very wary of how it deals with overlapping claims.

This section usually has words to this effect:

- *The parties agree that overlapping claim issues over redress will need to be addressed to the satisfaction of the (claimants and) Crown before a Deed of Settlement can be concluded;*
- *Certain items of redress may need to reflect the importance of the area or feature to other claimant groups;*
- *The negotiators will discuss their interests with overlapping claimants at an early stage in the negotiation process and endeavour to establish a process by which they can reach agreement on how such interests can be addressed;*
- *The Crown may assist the claimants as it considers appropriate and will carry out its own consultation with overlapping claimants.*

Some Terms of Negotiation have included '*claimants and Crown*' in the first bullet point; this limits the ability of the Crown to act unilaterally. The Terms of Negotiations may also note that:

- the Crown is negotiating with overlapping claimants and will keep these claimants apprised of developments (subject to confidentiality)
- addressing overlapping claims may delay the negotiations but they will continue in good faith and any such delays do not constitute a breach of good faith.

As seen in the text, the Crown encourages claimant groups to discuss the issue with other claimants at an early stage to establish a process by which they can reach agreement.

In the absence of any such agreement, Ministers will be the final arbiters, especially if negotiations are proceeding without a Tribunal report that might have otherwise helped determine the matter.

In reaching its decision, Office of Treaty Settlements states that it can only settle the claims of the group with which it is negotiating, not the claims of other groups with overlapping interests. The settlement process will not establish or recognise boundaries between claimant groups. This is a matter to be decided between the claimant groups themselves.

Lacking extrinsic aids such as a Tribunal report, in the case of forestry redress Office of Treaty Settlements will arrive at its decision after consulting with the overlapping claimants in order to ascertain whether they can demonstrate a 'threshold' level of customary interest. If other claimants have participated in preparing a casebook or otherwise engaged with a Tribunal inquiry, they will possess sufficient evidence for Office of Treaty Settlements to make its 'threshold' judgment.

The Crown does not seek to decide which group has predominant or exclusive interests in any given area, but rather seeks to maintain its capacity to provide redress to other claimant groups with legitimate and identifiable customary connections to the land. This can impact negatively on the first group to negotiate. For example, if seventy-five percent of the claimant group's area of interest is overlapped, that may mean the Crown is only prepared to offer land redress within the uncontested twenty-five percent. Definitely a case of where 'first up' might not be 'best dressed'.

Negotiators might want to remind the Crown that substantive talks with overlapping claimants who have not demonstrated a mandate, means the Crown is using

two different measures of mandate. There could be cases where overlapping claimants who carry no mandate slow the whole process. The Crown's view, however, would be that they have a responsibility to protect the interest of all claimants, with or without a mandate.

Shared iwi interests
In a 'shared iwi interests' approach the parties agree to develop a Protocol for the purpose of identifying and addressing any shared iwi interest issues; it will detail process, procedure and the manner by which matters will be dealt with, including:

- an agreement to share information
- an acknowledgement that negotiations will not unduly prejudice other claimant groups
- an acknowledgement that shared interests may concern issues of mana as well as assets
- a strategy for consulting with other claimant groups
- a statement of the Crown's role in resolving shared iwi interest issues
- an agreement that redress may sometimes need to reflect acknowledged shared iwi interests.

The parties agree that any shared iwi interests will need to be addressed to the satisfaction of both parties before a Deed of Settlement can be concluded.

'*Shared iwi interests*' is an early approach to the issue. This implies a higher degree of mana with the iwi negotiators as opposed to a top-down tone in the '*Overlapping Claims*' text.

20. Not bound until Deed of Settlement
(also No agreement to commit to a settlement)
The parties acknowledge that this document does not bind either party to reach a settlement and that any agreement reached in negotiation discussions (is confidential and) will not be binding until embodied in a Deed of Settlement (following ratification).

This is a standard and invariable clause that may note that full closure does not occur until settlement legislation is passed by Parliament. The confidentiality phrase is not always included. This clause further clarifies points made in the Terms of Negotiation.

21. Confidentiality
There may be a confidentiality clause with provision for release of information under the Official Information Act 1982. It is reasonable for both parties to want this clause. Confidentiality is easier to enforce on the Crown's side; claimants need to be vigilant, especially if they have big teams where 'leakage' can occur.

To assist in internal compliance with the confidentiality clause the mandated body should have clear rules (discussed in the Deed of Mandate chapter) about appropriate information flows.

22. Negotiations to be 'without prejudice'
The negotiations to be 'without prejudice' clause is invariably included in the Terms of Negotiation. The definition of this term has slight variations but the basic meaning should be 'without loss of any rights'. It is a term used when two parties are in dispute, and one makes a settlement offer to the other. The Crown puts 'without prejudice' on its offer to make it clear that the settlement offer should not be construed as a waiver of rights.

Importantly, communications marked 'without prejudice' cannot be used in evidence in court proceedings if attempts at settlement fail and the dispute comes to court.

23. Governance structure for settlement assets
(also Governance entity or entities for settlement redress)
The parties agree that an appropriate legal entity (or entities in the case of more than one constituent iwi) will need to be in place and ratified by members (in a manner agreed by both parties) before settlement legislation can be introduced. That entity would need to:

- *adequately represent the claimant group*
- *have transparent decision making (and dispute resolution) processes, and*
- *be accountable to members.*

For good reason, the Crown does not want settlement with a body that does not meet minimum representative standards. It should be noted that the three points above give a wide degree of latitude on the final form of the governance entity. Negotiators should be intimately familiar with the '*Governance Entities*' section and '*Twenty questions on governance*', in the Red Book (pages 71–77).

It is vital that at this stage, multi-iwi mandated bodies (formed to meet the Crown's large natural group policy) signal their intent to have more than one post-settlement governance entity. If they leave the statement out of the Terms of Negotiation it may be difficult to get the Crown to agree later. A precedent has been set in earlier negotiations.

In the past, mandated bodies have been concerned with the level of Crown involvement or interference with what is considered to concern their own in-house tribal affairs. Be that as it may, as discussed in the Post-settlement

Governance Entity and Ratification chapters, the Crown essentially does have a significant say on what the post-settlement governance structure is, and the process by which it is to be accepted by the claimant group.

24. Claimant funding

There is always a significant resource disparity between the parties. The Crown is well resourced financially, in terms of settlement continuity, institutional knowledge, and infrastructure. By comparison a mandated body is entering the settlement process for the first time. They have limited institutional knowledge of the settlement process – in most cases have to 'buy it in'. Most claimant groups are issues-rich but cash-poor, in many ways perversely a consequence of the very matters they now wish to negotiate with the Crown.

The Crown recognises that negotiators require resources, so Terms of Negotiation provide for claimant funding, but levels of funding provided can vary. Discussing levels of claimant funding before the Terms of Negotiation are signed is recommended (it need not need be in the Terms of Negotiation).

The claimant funding section usually notes that the Crown will make a contribution to negotiation costs, paid in instalments, for the achievement of specified milestones. The process will expect claimants to adhere to Crown claimant funding policy guidelines, including providing invoices to show funding was applied as agreed. Annual independent audited accounts will be part of the process.

Earlier Terms of Negotiation include notes that the Crown acknowledges:

- the disparity of resources
- the cost to the mandated body in reaching this point has been more than the Crown's contribution, and
- the cost of completing a settlement is likely to be more than the Crown's financial contribution.

Officials are answerable to Ministers for these funds and need a paper trail to show they were used for their designated purposes. It is also in the negotiators' interest to have a transparent process of accounts to show their members. This approach from the negotiators is useful in that it effectively has a Crown acknowledgement that the playing field is never really 'level'.

A mandated body should fairly expect to receive claimant funding comparable to that received by others claimant groups. A full list of funding paid to claimants is published every four months in Office of Treaty Settlements' regular reports.

The Crown Forestry Rental Trust is legally able to fund only those claimants whose claim involves Crown forest lands. If the mandated body has no Crown forest land (as defined in the Crown Forest Assets Act) in their rohe the Trust considers they have an issue to raise with the Crown that should help increase their level of claimant funding.

Effected claimants are urged to check carefully when negotiating claimant funding with the Crown to ensure they receive comparable overall funding – such as they would receive if also eligible for CFRT funding.

25. (Foregoing) other avenues of redress

In recognising that litigation by either party could jeopardise negotiations, the parties agree that during negotiations, '*neither party will pursue or initiate before any court or tribunal any proceedings for redress covering all or part of the subject matter of the negotiations*'.

The tone of this section varies among Terms of Negotiation. It is a delicate balancing act between good faith and having the ability to seek legal remedies if negotiators lose faith in the negotiation process.

When two parties are in negotiation, the aim of which is to resolve an issue or dispute, it is usually (though not always) agreed that while they are in negotiation no party will engage in any legal action that relates to the issue or dispute. This is common sense and reflects the fact that the parties have (for the time being) decided to try and resolve a matter through negotiation rather than litigation. While not all Terms of Negotiation have the same clause, in reality the underlying rights of both the claimants and the Crown for all Terms of Negotiation are no different. A number of observations can be made on the 'waiver' clause:

Firstly, that a mandated body is negotiating Terms of Negotiation with the Crown means they have, for the time being at least, decided to waive other avenues of redress. In arriving at that decision it is assumed the mandated body has weighed up all their options and decided to pursue a negotiated outcome with the Crown. That is an important decision. The more relevant legal and commercial factors to consider in such a weighting exercise are discussed in *Options for Settlement*.

Secondly, after signing the Terms of Negotiation it is possible that a mandated body may wish, or even need to initiate or pursue legal proceedings in respect of a matter that relates to the subject matter of the negotiations. Such instances may include where a Waitangi Tribunal hearing

is still proceeding for other claimants in an area that wholly or partly encompasses the mandated body's area of interest. In this case it is likely the mandated body will:

- want to retain the ability to participate in the Tribunal hearing to see what is going on, and
- provide submissions to protect their interests.

In some cases the Crown may acknowledge the right of claimants to initiate proceedings, subject to ten working days' notice. For example the Port Nicholson Block Terms of Negotiation provides that other avenues of redress can be sought – but if they do the Crown will withdraw from negotiations once proceedings occur. It is clear, however, that the Crown prefers claimants to waive the right to initiate court or tribunal proceeding during negotiations.

The retention of such a right is important in those circumstances. Accordingly it is important to discuss this with the Crown before Terms of Negotiation are signed. If they do not agree to vary this clause, negotiators should seek a side letter from them that will authorise the claimant group to participate in the Tribunal hearing for such a purpose, without breaching the Terms of Negotiation.

It is also possible to seek side letters from the Crown during the negotiations process. These are typically used to provide comfort to the mandated body in circumstances when unforeseen matters have not been incorporated into public documents, or where important side issues can be agreed, but not in the context of settlement documentation on the table.

A final yet important point to remember is that ultimately legal rights to initiate and pursue any legal proceedings relating to the subject matter of the negotiations will not end until settlement itself is completed.

26. Procedural matters

In many respects the Procedural matters part of the Terms of Negotiation typically restates a number of matters already provided for. It usually states that the parties agree that:

- *Negotiations will be on a 'without prejudice' basis and will be conducted in good faith and in a spirit of co-operation (and in accordance with the Treaty of Waitangi)*
- *Negotiations will be private and confidential unless agreed otherwise (such as when consultation with third parties is necessary) or when the Crown is required to release information under the Official Information Act 1982*
- *Either party may withdraw if negotiations become untenable*
- *Media statements concerning the negotiations will only be made when mutually agreed by both parties*
- *The location, times and frequency of meetings will be suitable and convenient to both parties*
- *Negotiators will report to the Crown on steps taken to consult with and inform the claimant group of progress in negotiations*
- *Office of Treaty Settlements will provide information on relevant Crown assets potentially available for redress, including possible transfer.*

This is the basic 'rules of engagement' section which sets out expected standards of behaviour. Both parties may note that accountability obligations to constituents may limit the extent to which negotiations can be conducted on a completely confidential basis.

The second to last point may seem paternalistic to negotiators but it does mean that Office of Treaty Settlements can keep Ministers informed, especially as a rebuttal to common and often mischievous accusations that the negotiations are being carried out 'in secret' or that negotiators 'are not telling us anything'.

Exceptions to the rules

In some instances slight variations on the terms used earlier in the Terms of Negotiation are proposed. These need to be identified and understood. For instance, while there is prior reference to the need for negotiations to remain confidential, exceptions often arise, such as when consultation with third parties is necessary or when the Crown is required to release information under the Official Information Act 1982. A number of important considerations arise out of these exclusions.

Firstly, when is consultation with third parties 'necessary', who are the 'third parties', and who determines this? Experience has shown the mandated body and Crown views on this may differ.

Secondly, a mandated body needs to understand that the Crown is legally obliged to release information to third parties under the Official Information Act 1982 whether they like it or not. While there are grounds for the Crown to refuse to release information under that Act, those grounds are limited. This being the case, it is very important for the mandated body to be aware that almost every written communication between themselves and the Crown can, at some stage, be released to third parties.

Given the limited grounds for the Crown to refuse to release information under that Act the most prudent course of action for a mandated body is to assume that

all written communications and information sent to the Crown can be released. If that is accepted, the mandated body should be constantly aware of that when compiling and sending *any* information to the Crown.

Clear understanding on communication and releasing information
Both points – clear understanding on communication and releasing information – highlight the importance of there being a very clear understanding between the parties on the scope, nature and limits of disclosure of information to third parties. It is recommended that the parties formally discuss this point specifically and agree a detailed protocol or set of rules by which information disclosure can occur.

Media statements
Most Terms of Negotiation will contain a provision which states that:
'*...media statements concerning the negotiations will only be made when mutually agreed by both parties*'.

From a process perspective, a more detailed understanding relating to media statements could be agreed as part of formal discussions between the parties relating to the detailed protocol or rules, as noted above. However, on the basis of experience, it is recommended that negotiators be wary of the following:

Firstly, be clear with the Crown on what they consider is meant by: '*...concerning the negotiations...*' Is this confined to their specific negotiations or does it extend to any matter related to the negotiations process? It is expected that negotiators would consider that any matter that relates to the negotiations would be covered by this clause.

If this is the negotiators' view, it needs to be discussed in formulating the Terms of Negotiation and implemented as part of the agreed protocol or rules discussed above.

Secondly, and related to the first issue, the Crown is very large. There are many matters which negotiators are likely to consider *concern* and are *related* to their negotiations, which arise out of any one or more of the Crown arms. Accordingly, although Office of Treaty Settlements will front the negotiations, the clear message needs to be sent that this clause in the Terms of Negotiation does apply to the Crown as a whole and not just Office of Treaty Settlements. Negotiators should ensure that the Crown consults with them before making public statements. Public debate over proposed settlements can have unpredictable and often negative effects on the claimant group.

Location of meetings
The Terms of Negotiation typically provide the location of meetings will be 'suitable and convenient to both parties'. A mandated body needs to assess for itself what this means, but it is important to recognise the cost of meetings – in most cases this is a time and travel cost for the mandated body.

In view of the significant resource and funding disparities between the parties, negotiators could consider whether all or the majority of meetings occur in their rohe. In most cases this will save significant costs to the mandated body. For example, assuming negotiations occur over twenty-four months and the mandated body has to fly three negotiators to Wellington every second week at a cost of $400 per person (with other negotiation meetings being in their rohe), the saving is $28,800.

Because there is also a travel cost to the Crown they are likely to argue against having all negotiation meetings in the rohe, but given the significant resource and funding disparities, the mandated body has good grounds to support such an argument. This needs to be discussed and agreed before the Terms of Negotiation are signed. There will be occasions, however, when availability of specialist advisers or the Minister will necessitate meetings in Wellington.

27. Amendments
This is a standard 'no surprises' provision, which protects both parties.

The parties acknowledge that it may be necessary to amend these Terms of Negotiation from time to time and agree that no amendment is effective until approved by both parties and recorded in writing.
All Terms of Negotiation provide an amendment clause, where the Terms of Negotiation can be amended by mutual agreement. An important factor to remember when any amendments are proposed is that there are many parts of the Terms of Negotiation that derive from a specific Deed of Mandate process. Therefore, while mere process or form amendments could be authorised, it is suggested that no amendments be made to the Terms of Negotiation that in any way seek to vary any of the fundamental terms of the Deed of Mandate.

For instance, fundamental terms of the Deed of Mandate include the claimant group and claim definitions. It would not be expected that such terms could be varied in the Terms of Negotiation by the parties themselves as the mandate was conferred by the claimant group, not the parties. If amendments of such a fundamental

nature were proposed, it would be expected that such amendments would first need to be put to and accepted by the claimant group.

28. Interpretation
A legal note that states that where a word or phrase is defined, (see 'Definitions') it shall carry that meaning throughout the agreement.

This has been used only occasionally, for example in the Port Nicholson Block Claim. Terms of Negotiation are not usually large documents and as such, 'interpretation' or 'definition' clauses are not normally required.

29. Appendices
The Appendices usually include a copy of the Deed of Mandate and the letter from the Minister in Charge of Treaty of Waitangi negotiations that advises of the Crown's recognition of the mandate. It may also include other papers at the request of the mandated body.