Chapter 7

Settlement redress

Settlement redress

Contents

KEY POINTS

- Negotiations generate a vast amount of work outside of formal meetings – be sure you have the human resources to keep up.
- Try and reach agreement with the Crown for a specific timetable and milestones for negotiations – do not let the momentum go out of talks
- Get copies of any Agreements in Principle and Deeds of Settlement for similar types of claims – read them carefully
- Begin to address overlapping claims with the Crown and other claimant groups as early as possible – you do not want the Deed of Settlement delayed or stopped by legal challenges
- Negotiators need to be certain they have all bases covered **before** they sign the Agreement in Principle – do not leave any significant issue to be resolved after the signing
- Ensure all defined terms in the Agreement in Principle are consistent with those used in the Deed of Mandate and Terms of Negotiation
- Any negotiations after the Agreement in Principle is signed should only be about the detail, nature and scope of redress agreed in the AiP – not new significant issues
- Do not initial the Deed of Settlement until fully satisfied with all aspects of the redress

INTRODUCTION

The Terms of Negotiation set the ground rules for the negotiation process. The Agreement in Principle (AiP) is the next stage towards a completed Deed of Settlement and settlement legislation. The Red Book (page 64) describes the AiP as: '*the basic outline of a proposed settlement between the Crown and a claimant group that will settle all of that group's historical claims against the Crown.*'

Claimant negotiators need to be certain they have all bases covered when they sign the AiP, and will not try bringing significant but as yet overlooked issues to the table when working the signed AiP towards a Deed of Settlement with the Crown.

Settlement, the ultimate goal of Treaty negotiations has three main areas of redress:

1. historical account, Crown acknowledgements and Crown apology
2. cultural redress, and
3. financial and commercial redress.

Agreement in Principle and Deed of Settlement are the two key stages to settlement redress. This section discusses the form, purpose and objectives of the AiP and Deed of Settlement, and then follows with the three main areas of redress found in the Deed of Settlement.

AGREEMENT IN PRINCIPLE

The AiP was formerly called a Heads of Agreement. It contained more detail but was not as user-friendly as AiPs which focus on the key items of redress. This is a positive attribute – as long as all those bases are covered. Neither party wants big surprises, either on the grounds of bad faith or as a result of one side not having done its homework properly.

The Agreements in Principle tend to be considered and formally approved (or rejected) by the mandated body or its sub-committee. They are not ratified by the claimant group but are publicly available documents on which claimants can comment to the mandated body.

This chapter focuses on commonalities in AiPs rather than exceptions. Negotiators are advised to obtain full copies of any AiPs they consider might help them develop the negotiation plan for their claim. For example if their claim is raupatu-based they should familiarise themselves with raupatu AiPs; if forest-focussed, read all the forestry AiPs.

There are no real shortcuts; homework has to be done, but hopefully this section can point negotiators towards useful material and reduce their research time.

The review and comment in this chapter is based mainly on three more or less contemporary AiPs:

- Ngā Rauru Kiitahi (2002)
- Affiliate Te Arawa Iwi and Hapū (2005), and
- Ngāti Whātua o Ōrākei (2006).

Their content and format is quite similar and shows the informal template the Crown seems to prefer.

ELEMENTS OF AGREEMENT IN PRINCIPLE

An AiP usually has several major headings each of which may have a number of sub-headings. This Guide summarises the usual content of a heading but in many cases the text is so consistent it is reproduced, word for word (or with minor variations without losing context) in italics. Below the quoted text are comment and analysis with parenthesis (rounded brackets) used to indicate the phrase is an 'extra' in some, but not all, AiPs.

1. Negotiations to date

This simple, descriptive, factual piece sets the scene – a mini-history of the negotiation process. There is no reason for this to be difficult. It summarises the stages leading to the AiP:

- the claimant group's initial contact with the Crown to register an interest to negotiate and become a mandated body
- Crown recognition of the mandate, and
- Terms of Negotiation.

The AIP may also identify constituent iwi/hapū groups in 'large natural group' configurations.

As noted, it is useful to formally record the Background and/or Preamble clauses in the Terms of Negotiation as historical information relating to the negotiation process can be lost in even a relatively short period. This is a valuable section which will enable current and future generations to better understand the entire settlement process.

2. General

The following opening is more or less invariable and immediately identifies the key elements of the proposed settlement. This clause is of fundamental importance:

This AiP contains the nature and scope, in principle, of the Crown's offer to settle the [claimant group's] Historical Claims [...] in three components:

a. historical account, Crown acknowledgements and Crown apology;
b. cultural redress; and
c. financial and commercial redress.

Nature and scope in principle
The Red Book (page 64) states that:
'Once the broad outline of a settlement is agreed between a claimant group and the Crown, there are two possible ways of marking this milestone. The fastest way to do this is through [...] an Agreement in Principle.'

and goes on to say that the goal is to record, in an open and transparent manner, the basic outline of a proposed settlement between the Crown and claimant group that will settle all of that group's historical claims against the Crown. In that sense the AiP is a public document and any member of the public is able to view it.

The mandated body must record all matters of redress in the AiP
Although the Red Book describes the AIP as a '*broad outline*' or '*basic outline*' of the proposed settlement, it is the Crown's expectation that all core redress options and outcomes for settlement will be recorded in the AiP. It is therefore crucial that the mandated body record all matters of redress in the AiP.

The further negotiations leading to a Deed of Settlement are about providing the full detail to the nature and scope of the redress already agreed in the AiP; they are not about extending the nature and scope of the stated redress.

However, there have been instances where the nature and scope of *some* redress in Deeds of Settlement is wider in both scope and nature than that contemplated in the AiP. The flexibility for such change is consistent with key themes and clauses in both the Terms of Negotiations and the AiP.

The Terms of Negotiations are not 'legally binding' and negotiations are 'without prejudice'. The AiP further confirms that it is 'non-binding', 'does not create legal relations' and is 'without prejudice'.

Standard AiP text usually continues along the following lines:
'The AiP is entered into on a without prejudice basis; it:
a. is non-binding and does not create legal relations
b. may not be used as evidence in any proceedings before, or presented to, the Courts, the Waitangi Tribunal and any other judicial body or tribunal"

It normally also states that:
- *each party reserves the right to withdraw from the AiP by giving written notice to the other party*
- *the Terms of Negotiation continue to apply except to the extent affected by the AiP*
- *key terms are defined in a later section.*

A number of mandated bodies include acknowledgements or agreements by the Crown to offer 'other' redress in the 'Nature and Scope' clause. It is possible that 'other' redress might fall into one of the core Crown redress categories already noted, but what is important, is that these mandated bodies have identified one or more 'other' redress options, and have done this because the core Crown redress package may not be enough to complete a settlement.

After signing the AiP the parties work together in good faith to develop, as soon as reasonably practicable, a Deed of Settlement. The Deed of Settlement will include the full details of the redress to settle the Historical Claims, subject to conditions set out later in the AiP. Terms which warrant further consideration: good faith, reasonably practicable, right to withdraw and definition/ interpretation are discussed below.

Good faith
The pressure on the mandated body and the Crown to get a favourable settlement increases between an AiP and Deed of Settlement. As pressure increases it is useful to reflect on the good faith clause set out in the Terms of Negotiation.

Reasonably practicable
The Crown and mandated body are not likely to agree on what is 'reasonably practicable' in terms of time to complete a Deed of Settlement. This can be resolved, at least in part, by agreeing to a specific negotiation timetable and milestones; the parties should agree to a timetable and schedule of meetings based on the mandated body's negotiation work plan shortly after signing the Terms of Negotiations. Momentum must be maintained.

Various factors influence the time it takes to agree a Deed of Settlement after an AiP is signed. Office of Treaty Settlements is in negotiations with many mandated bodies at any one time. Therefore it is important that Office of Treaty Settlements negotiations team can commit to the mandated body's negotiation timetable to enable them to meet negotiation work plan deadlines.

Delays mean the mandated body's negotiation team can lose impetus – 'go stale'. If this happens, the risk of challenge to the mandate increases and the chance of achieving a settlement decreases.

National elections can slow progress considerably. Ministers are reluctant to put papers requiring major decisions to Cabinet in the months leading to elections. However, if negotiations have reached an impasse,

this can work to the advantage to the mandated body, particularly if they consider a new Government may provide a better settlement package for them. However, there may also be times when a Deed of Settlement is very close and the government wants to seal the deal for their electoral advantage.

Right to withdraw
This is consistent with the 'without prejudice' and 'legal relations' clauses of the AiP.

Definitions/interpretation
All key defined terms used in the AiP (which typically first arise in the *Negotiations to Date* clause) must be entirely consistent with those used in the Deed of Mandate and Terms of Negotiation. Amendment to or variation of any key definitions can lead to legal challenge so the mandated body must be particularly careful to use definitions consistently across documents. For example, 'claimant group' is defined in the Deed of Mandate and Terms of Negotiations. However, it is possible that the Crown may try to negotiate a modification of the definition of 'claimant group'.

To the extent that any key definition has been varied or modified (this should be *very rare*) through the course of negotiations leading to the AiP, the mandated body must keep a record of why the key definition was varied, in order to counter any legal challenges that may arise. If the mandated body cannot satisfactorily justify a variation to a definition, the variation should not be made.

Consultation on Agreement in Principle
There are very good reasons why the mandated body should take the AiP to claimant group members even though it is not a mandatory Crown requirement. In particular it will enable open discussion on issues around overlapping claims rather than having the discussions in the Waitangi Tribunal or Courts at a later stage.

DEED OF SETTLEMENT
Introduction
The Deed of Settlement is the final agreement between the mandated body (on behalf of the claimant group) and the Crown. It records the final terms of settlement. While settlement legislation is required subsequently to technically complete settlement, not all elements of Settlement Redress are set out in the legislation.

Once negotiations are complete and the negotiators satisfied that the best deal possible has been struck, the mandated body and the Crown 'initial' the Deed of Settlement. It is of utmost importance to the claimant group that the mandated body does not initial the Deed of Settlement as suitable for ratification purposes until such time as they are satisfied with all aspects of the Deed of Settlement.

This chapter on settlement redress reviews the core elements in six recent Deeds of Settlement:
- Te Uri o Hau (2000)
- Ngāti Tūwharetoa (Bay of Plenty) (2003)
- Ngā Raurū Kiitahi (2003)
- Ngāti Awa (2003)
- Te Arawa Lakes (2004), and
- Affiliate Te Arawa Iwi/Hapū (2006).

Other Deeds of Settlement are used to illustrate variance between settlements or where certain settlements have redress that may interest future mandated bodies.

While the Guide compares what has been achieved in past settlements, it is possible to negotiate other creative settlement redress. However, when proposing a novel item of redress, negotiators should weigh this against a number of factors: '*Will it stall the negotiations?*' '*Can we get a trade-off somewhere else?*' '*What will we do if we cannot achieve this goal?*'

CORE ELEMENTS OF DEED OF SETTLEMENT
Preface
The preface for a contemporary Deed of Settlement contains a brief karakia and mihi.

There is no particular legal effect to such sections. They must be consistent in nature and tone with the rest of the Deed of Settlement.

Background
As with the AiP it is useful at this stage to record background information in the Deed of Settlement and most Deeds of Settlement will commence with the Background clause. While the Background may appear an easily drafted 'light' read, as with all other parts of the Deed of Settlement, it will have taken time for the mandated body and the Crown to negotiate. This may be due in part to both parties appreciating that the background to the negotiations process and arrival at the final Deed of Settlement form part of the recorded history of interaction between the parties.

As it is possible that the Settlement process may have been subject to political and/or legal challenge since the AiP was agreed, the background to the Deed of Settlement should also record what transpired after the AiP was signed.

Definitions – Claimant group and claims
As discussed in the Deed of Mandate, Terms of Negotiation, and AiP chapters, the settlement needs to clearly state who the parties are, and what claims are being settled. Such definitions are toward the front of most Deeds of Settlement although cross-references to other parts of the Deed of Settlement may apply.

Key definitions must be substantially the same as those provided in the Deed of Mandate, Terms of Negotiation and AiP. If there are variations to the definitions, there must be a record of why changes occurred.

Claimant group
It is possible that the definition of the claimant group has changed since the Terms of Negotiations were signed. If that has happened, the mandated body should confine the changes to the 'sub-set' definition of the 'core set' claimant group definition provided in the Deed of Mandate and AiP. It is inadvisable to widen the definition to create another claimant 'set'.

Definition of claims
The definition of the Claims set out in the Deed of Settlement should be fundamentally the same as that set out in the previously agreed documents. As with the claimant group definition it is possible that following post-AiP research and negotiation, the list of Tribunal claims in the area of interest will have increased. This is only likely to occur where the reference is made to include claims to the Tribunal which may relate to more than one claimant group, but only so far '…as it relates to…' a claimant group's Treaty claim.

The mandated body should expect a number of claims to fall under this 'wash up' heading and that a number of claimants may not be happy with that. In some cases this will be due to a claimant holding the 'Wai number mentality' discussed in the Deed of Mandate chapter. In other cases the concern may be because the particular claimant does not appreciate that only part of their claim relates to this particular claimant group, and other parts of their claim relate to another claimant group whose claims are not part of this particular settlement.

In either case it is very important that the mandated body understands these subtle yet important differences and explains them to all relevant parties (claimant members, overlapping claimants and other settlement stakeholders) in a timely and efficient way.

Claim exclusions
A number of important and fundamental exclusions apply to the definition of 'Claims'. Those exclusions need to be provided here also. In some instances, it is possible that post-AiP the list of exclusions has increased, for example, where the claimant group definition has narrowed (see above) or (more unusually) as a consequence of intense political lobbying or discussions with the Crown (through Office of Treaty Settlements or otherwise). For example, the Affiliate Te Arawa Terms of Negotiations included Ngāti Rangiteaorere in the definition of the claimant group but did not include Ngāti Rangiteaorere in the Deed of Settlement.

DEED OF SETTLEMENT CLAUSES
The Deed of Settlement will typically contain a clause that describes the intent of the settlement and associated settlement redress. These clauses are discussed here. Commentary for matters with their own 'stand alone' clauses is provided later.

Enhancing relationships
One of the intentions of settlement is to 'enhance the ongoing relationship between the Claimant Group and the Crown'. Although the Deed of Settlement will be legally binding between the parties it is difficult to see how this clause could be enforced. For instance, what is the test for whether or not this intention has been satisfied after settlement? Who decides? If the intention is not satisfied what is the remedy?

The mandated body should perhaps consider setting out in the Deed of Settlement a process by which this clause will be affected.

Settlement of claims
This combination of clauses relating to the actual settlement of the claims is usually very brief yet it is of fundamental importance. It will normally provide that:
- the claimant group and Crown agree that the Deed of Settlement settles the claims from the settlement date, and
- the claimant group releases and discharges the Crown from all obligations and liabilities in respect of the claims.

These clauses will primarily comprise terms defined in detail elsewhere in the Deed of Settlement. It is therefore important to read these clauses in light of those later substantive clauses.

As noted, most, although not all claims to date have related solely to historical claims. To the extent that the mandated body has negotiated claims that include but are

not limited to historical claims, the relevant definition of claims needs to record that. This is very important. The mandated body must be clear from the outset and through the entire settlement process on the exact nature and extent of the claims it is negotiating to settle on behalf of the claimant group.

Furthermore, to the extent that the claims may relate to claims in addition to historical claims, the effective date of settlement for certain parts of the claims may also vary. For example, clause 2.3 of the Te Arawa Lakes Claim provides that Te Arawa releases and discharges the Crown from all obligations and liabilities in respect of:
'*...the Te Arawa Lakes Historical Claims from the Settlement Date; and*
...the Te Arawa Lakes Remaining Annuity Issues from the Date of this Deed.'

Correspondingly, the Te Arawa Lakes Settlement provides that the redress that relates to the non-historical claims (the Remaining Annuity Issues) was provided to Te Arawa on the date of the Deed of Settlement and is not subject to or conditional upon Settlement of the historical claims. Technically this meant that if the Te Arawa Lakes Historical Claims were never settled, Te Arawa would still nonetheless be entitled to the redress that related to the Remaining Annuity Issues. In part, this was likely to be due to the historical contractual nature of the arrangements between the Arawa Māori Trust Board and the Crown.

In future settlements it may be possible for a claimant group to have a range of claims that are not limited to historical claims. The Crown has already shown some flexibility in dealing with a range of claims. It is therefore incumbent on the mandated body to look at all options including the true nature of the claims and pursue them with the Crown on behalf of the claimant group.

Crown to provide redress
This clause will typically set out and cross-refer to the settlement redress that the Crown must provide as set out in the Deed of Settlement. While this clause states that the Crown must provide the settlement redress in the Deed of Settlement to the post-settlement governance entity, there are normally a number of important conditions to Settlement. These are discussed later in this guide.

Redress provided to governance entity
This clause confirms that the Crown will not provide redress unless and until a post-settlement governance entity has been established. Usually the settlement redress is transferred by the Crown directly to (and only to) the post-settlement governance entity. However, in some instances the claimant group has expressed a desire (sometimes strongly) to the mandated body that certain parts of the settlement redress should be provided in another manner.

This applies where certain cultural and/or commercial sites are generally agreed within the claimant group to be more relevant to one part of the claimant group (for example, one hapū or iwi) than others. Another example is where it is acknowledged that another claimant group not yet in negotiations with the Crown has an interest in a particular site, yet it is important to the claimant group currently in negotiations that the site be transferred on (and for) settlement of their claims.

The Crown generally insists that all settlement redress must be provided directly to the post-settlement governance entity. What the governance entity then does with the settlement redress is up to it. The post-settlement governance entity can transfer a specific site by entity to a specific hapū or iwi after settlement. However, it is likely that the transfer will incur associated costs and taxes. To minimise or mitigate such issues the governance entity and/or hapū/iwi would then have to enter into a fairly complex transaction that would in turn have associated costs. Furthermore, in the context of sites where another claimant group has an interest, the key risk to post-settlement transfer is that other claimant groups would object (legally and/or politically) which may result in the site not being transferred to the claimant group at all.

The Crown has approached this issue a number of ways in the past. For instance, the Ngāti Ruanui Deed of Settlement provides that subject to appropriate legal arrangements, the Turuturu Mokai site will be vested in Ngāti Tupaia hapū after the Settlement Date. The Ngāti Ruanui Deed of Settlement also provides a mechanism to take account of other claimant group interests in the same site. However, the post-settlement transfer has not yet been actioned although the settlement itself occurred in 2001.

The Ngā Raurū Kiitahi Deed of Settlement also provides a mechanism whereby a site can be shared with another claimant group altogether.

The mandated body needs to discuss this with the Crown early on if it is relevant to it. This is because it is often easier for the Crown to transfer settlement redress assets to a post-settlement governance entity only. If a robust and mutually agreed process is conducted and it is clear that a site should be transferred directly to one part of the claimant group or held partly to take account of other

claimant group interests, the Crown should facilitate that process in a manner that minimises both risk and costs for the claimant group.

Crown's ability to provide other cultural redress
This clause should reflect what is already provided in the AiP. It confirms that as far as the Crown is concerned other claimant groups may have interests in the claim area that may need to be recognised in future settlements.

Some mandated bodies may object to this as they may consider their claim area is exclusive. This has been debated and negotiated in detail by other mandated bodies over many years. Suffice to say the Crown is unlikely to change its stance on this clause in the near future.

Nevertheless, Crown Treaty Settlement policy does and has changed over the years so negotiators should not put this issue aside if they think it important to them.

Settlement does not effect certain rights or decisions
The settlement is not to effect certain rights of the claimant group or certain decisions that may affect them. The particular rights and decisions mentioned in this part of the Deed of Settlement should be the same as those negotiated between the mandated body and the Crown in respect of the Terms of Negotiations and AiP.

Joint acknowledgements concerning settlement and settlement redress
As noted, there can be significant variation in the joint Crown/claimant group acknowledgements between various Deeds of Settlement.

Mandated bodies should consider in detail what acknowledgements they will require and what are likely to be required by the Crown. Joint acknowledgements are negotiated. These examples of acknowledgements may assist mandated bodies in their negotiation:

- the foregoing of full compensation by the claimant group is intended to contribute to the development of New Zealand *(The intention here, among other things, is to publicly record that full compensation was not paid, and that the country as a whole will ultimately benefit by the claimant group forgoing full compensation)*
- the decision of the claimant group in relation to the settlement is a decision they take for themselves alone and does not purport to affect the position of other tribes *(One inference here is that the claimant group does not want to bind any future settlements by way of precedent. In reality, most significant redress elements have been set already so in most core areas precedent has already been set)*
- the settlement represents the result of intensive negotiations conducted in good faith and in a spirit of co-operation and compromise *(From the claimant group perspective this is really a neutral statement. Perhaps the most that can be taken is that it records the fact the negotiations were intensive and co-operation was required. The claimant group is likely to have compromised much more than the Crown and if so it should be recorded as such).*

There are some joint acknowledgements which the Crown will expect to see in a Deed of Settlement which the mandated body may consider less beneficial or which do not 'sit well' with it. Such acknowledgements include:

- The Crown has acted honourably and reasonably in relation to the settlement *(A number of mandated bodies are likely to have an issue with this – on the other hand it is a statement the Crown will insist on. In some Deeds of Settlement this applies to both parties and is suggested to be the better position, that is, both parties acted honourably and reasonably).*
- Taking all matters into consideration (some of which are specified herein) the Settlement is fair in the circumstances *(this was discussed in the context of the Terms of Negotiation).*

A number of joint acknowledgements have appeared in recent years which the Crown may not necessarily push as vigorously as those above and which future mandated bodies may wish to exclude or vary. These include:

- the Crown has to set limits on what and how much redress is available to settle historical claims *(While this may be the case this is not necessarily something the claimant group would want to acknowledge. Even if it may not be possible at this time to fully compensate a claimant group it may be possible to deliver instruments which enabled fuller compensation over time)*
- it is not possible to fully compensate the claimant group for all loss and prejudice suffered *(Most mandated bodies would consider that full compensation is technically possible but that it is in fact the Crown's Settlement policy which prohibits that. A claimant group might have difficulty with agreeing to this joint statement)*
- land in the public conservation estate is not generally available for use in Treaty settlements apart from individual sites of special cultural significance *(Again, most mandated bodies would consider that technically this is possible but that it is the Crown's Settlement policy which prohibits that. A claimant group might have difficulty with agreeing to this joint statement)*

- the Crown has applied a set of general guidelines during these negotiations to ensure a fair approach to the negotiations while also seeking to treat each claim on its merits *(While the Crown may consider this is the case there may be little benefit for a claimant group in acknowledging this and quite possibly the claimant group may not agree with this at all)*
- the Crown seeks to achieve fairness between claims so that similar claims receive a similar level of financial and commercial redress *(While this may be the case there may be little benefit for a claimant group in acknowledging this and the claimant group may not agree with this at all).*

Acknowledgements by claimant group concerning settlement finality

There are a number of important acknowledgements the claimant group will typically be required to make in a Deed of Settlement. Many have been discussed in the Terms of Negotiations and AiP chapters. It would be difficult to exclude such acknowledgements – they should be of no surprise to the claimant group given what will have been agreed in the Terms of Negotiations and AiP. Such acknowledgements usually relate to the:

- binding nature of the settlement
- finality of settlement
- release of the Crown from its obligations in respect of the claims
- removal of the jurisdiction of courts and tribunals in respect of the claims
- effective removal of protective legislative mechanisms
- claimant group agreement not to object to removal of the protective legislative mechanisms.

The Deed of Settlement itself may record a number of acknowledgements not necessarily provided in the Terms of Negotiations or AiP including:

- It is intended that the benefits of settlement will be for the benefit of the entire claimant group but certain parts of the redress may be for the benefit of particular individuals or groups in the claimant group
- The process for the issue of certificates in respect of certain cultural and/or commercial redress properties.

It is possible that some settlement redress items, namely cultural redress properties and to a lesser degree commercial redress properties do not have their own legal titles or certificates. If that is so, the mandated body must insist that the Crown agrees to a process by which titles can be created.

Ratification of Deed of Settlement, post-settlement governance entity and agency

The Deed of Settlement will contain a section that records the outcome of the ratification processes as well as clarifying certain roles and authorities of the mandated body and post-settlement governance entity during a specific period. This section should not be controversial for the mandated body.

A typical scenario is that once the initialled Deed of Settlement has been ratified the mandated body will sign the Deed of Settlement for and on behalf of the claimant group. The post-settlement governance entity is then ratified and the governance entity, once established, will sign an agreement (called the Deed of Covenant) that will contractually bind the governance entity to the Deed of Settlement in place of the mandated body.

It is possible to ratify both the Deed of Settlement and the governance entity at the same time. If this is done, the governance entity could sign the Deed of Settlement immediately rather than the mandated body. This will eliminate the need for both a Deed of Covenant to be signed and the application of the agency provisions in the Deed of Settlement in the meantime.

Ratification of the Deed of Settlement and the post-settlement governance entity are discussed in the chapters that follow.

Settlement legislation

The requirement for settlement legislation is discussed in detail in that chapter. However, a number of observations are made in the context of the Deed of Settlement.

Timing of settlement legislation and meaningful input to process

All recent Deeds of Settlement contain a provision that the Settlement Legislation cannot be introduced into Parliament until the post-settlement governance entity has notified the Crown that the draft Settlement Bill is satisfactory. The Deed of Settlement will set a time limit within which the settlement legislation must be introduced to Parliament.

Drafting settlement legislation

The process of drafting settlement legislation will require the initial input of the Parliamentary Council Office (PCO). The PCO and Office of Treaty Settlements will exchange various drafts before a draft is provided to the governance entity for review and comment.

The post-settlement governance entity needs to ensure it has enough time to participate in a meaningful way in the process. The Deed of Settlement provides for the post-settlement governance entity to 'sign off' the settlement legislation, but obviously the governance entity needs access to legal resources and other advice before its signs off the settlement legislation.

The governance entity may find it in their interest to ensure that a clause is inserted in the Deed of Settlement that provides for the drafting and introduction of the settlement legislation within a certain period. It has been done before. For example, the Affiliate Te Arawa Deed of Settlement provided that the settlement legislation must be proposed for introduction to Parliament within nine months '*...(and earlier if possible)...*'

Content of settlement legislation
The Deed of Settlement will provide that the settlement legislation must include all matters required by the Deed of Settlement to be included in the settlement legislation. Not all matters in the Deed of Settlement require settlement legislation and the Deed will specify where settlement legislation is required. The mandated body needs to work closely with the Crown to ensure that the Deed of Settlement clearly identifies and sets out where settlement legislation is required.

Post-settlement governance entity support for other legislation
The Deed of Settlement will provide that the governance entity must support the passage of the settlement legislation through Parliament. This is to be expected and should be of no surprise to the post-settlement governance entity. As noted, the settlement legislation cannot be introduced until the governance entity has signed it off.

Some recent Deeds of Settlement also require the governance entity to support *any other legislation* needed to support the settlement.

For example the Affiliate Te Arawa Deed of Settlement provides that the governance entity must also support any other legislation required to: give effect to the Deed, to achieve certainty in respect of the obligations undertaken by a party, and to achieve a final and durable settlement.

Mandated bodies should take heed of this development. The major issue is that the governance entity is required to support other legislation without the same signing off veto it has to its own settlement legislation.

Future mandated bodies should discuss this point with the Crown.

Other actions to complete settlement
Most or all of the following clauses will have been provided in the Terms of Negotiations and/or AiP. Most are straightforward although a few matters are worthy of note.

Discontinuance of all proceedings related to claims
A key outcome of Settlement is that the claims will be settled. Neither the governance entity nor any member or group of members of the claimant group will have the ability or right to pursue those claims in the future. To that end, the Deed of Settlement will require the governance entity to use its best *endeavours* to deliver to the Crown notices of discontinuance to all proceedings related to the claims.

The threshold of 'best endeavours' imposed on the governance entity is quite high and amounts to more than 'reasonable endeavours'. Furthermore the requirement to deliver notices 'signed by the applicant or plaintiff' in some instance simply may not be able to be met by the governance entity due to the applicant or plaintiff being against settlement in the first place.

To avoid any breach of this clause the governance entity needs to be mindful of its obligations. Although the Deed will provide a clause which allows the Crown to 'mop up' such proceedings by introducing legislation, that clause will not absolve the governance entity of its own obligations.

Settlement removes jurisdiction of Waitangi Tribunal
The settlement legislation will remove the jurisdiction of the Tribunal in respect of the claims. The Crown also typically requires a clause in the Deed of Settlement which enables them to advise the Tribunal about the settlement and to request the Tribunal to amend its register to reflect the settlement.

Termination of landbank arrangements
The Deed of Settlement will require that the Crown may, after the settlement date, cease to operate the landbank arrangement for the relevant claimant group. The essence of this is that the landbank is no longer required due to the Deed of Settlement containing all settlement redress the claimant group has agreed to.

While that makes sense, it is important for the post-settlement governance entity (and associated claimant group) to be aware of two things:

First, it is quite possible and even likely that the landbank will remain in place for some time to settle *other* claimant group claims. If that is an issue for the governance entity it needs to discuss this with the Crown at the outset;

Second, the landbank may still, in effect, operate for the governance entity in a limited manner – to the extent the governance entity has been able to negotiate a Deferred Selection Process and/or Right of First Refusal. This is discussed later.

SUMMARY OF REDRESS

Assuming the relevant clause of the most recent Deed of Settlement is replicated in any future Deed of Settlement this clause is not commented on as it contains a summary only and is specifically stated as not being an operative part of the Deed of Settlement.

The guide is now at the 'meat' of the Treaty settlements. The next chapters discuss key elements of the three main redress components. A glossary of terms is attached as an appendix at the end of this Guide.