Crown Forestry Rental Trust

ARATOHU MŌ NGĀ RŌPŪ KAITONO
GUIDE FOR CLAIMANTS NEGOTIATING TREATY SETTLEMENTS

Summary Edition

Disclaimer

Every endeavour has been made to ensure that the content of this Summary Guide is accurate and that the views expressed by the various authors are reasonably well held by others in the Treaty sector at the time of publication. While the material is believed to be correct, no liability can be accepted for any incorrect statement or omission or for changes to policies or processes outlined in this publication.

Readers should note that Governments frequently change policies relating to Treaty Settlement negotiations processes. Consequently, any evolving Crown Treaty policy may ultimately differ from the content of this Summary Guide, which inevitably will become out of date to some degree. With that in mind the summary Guide is also available on the Trust's website and any significant changes from matters set out in the hard copies of the Guide will be regularly updated in the website.

Crown Forestry Rental Trust

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Guide For Claimants Negotiating Treaty Settlements

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Tihei mauriora – ki te whaiao, ki te ao mārama.

E mihi kau ana ki a koutou katoa e kaha nei te tiaki i ō tātou taonga tuku iho, arā, ngā maunga, ngā awa, te moana, ngā ika kei roto, ngā rākau a te Wao-nui-a-Tāne, me ngā manu e rere ana i runga. Kei whea ake te oranga mō ngāi tāua? Nā, e whawhai haere nei te iwi, hapū rānei, kia whakahokia mai te whenua me ōna hua, me maumahara ki a rātou kua ngaro atu. Ēngari ko te whenua, ka mau tonu.

Kia taea rā anō te whakarite, kātahi ka kīia kua wātea te huarahi mō ngā uri whakatipu, ko rātou hoki te oranga mō āpōpō.

The Crown Forestry Rental Trust has long identified a need for information that will cast light into the dim recesses of the Treaty settlement process and enable Māori to negotiate effectively and achieve just and durable Treaty settlements. With this purpose in mind, in November 2007 the Trust published *Aratohu mō ngā Rōpū Kaitono – Guide for Claimants Negotiating Treaty Settlements.* The Guide is meant to complement the Office of Treaty Settlements' publication *Ka tika ā muri, ka tika ā mua – Healing the past, building a future: a Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (commonly called the *Red Book*).

A key aim of the Guide is to enable claimant group leaders to develop an integrated strategy for the whole settlement process rather than treating each phase on an ad hoc basis. Consequently the Guide, at over 250 pages, is densely packed with information. It is a big read. In that light we realised the need for a more general summary edition written to be more accessible to all members of hapū and iwi. As a consequence we have published this Summary Edition.

By necessity, it contains a lot less information than the original Guide. Readers wanting a more detailed exposition, and all those who intend to embark on a negotiation process with the Crown, should read the full Guide as well as the Red Book.

Ben Dalton
Chief Executive

Contents

Chapter 1

Crown Forestry Rental Trust

The Trust was set up under the Crown Forest Assets Act 1989 after the New Zealand Māori Council and Federation of Māori Authorities took court action to protect Māori interests in the Crown's commercial forests.

The Trust is not directly involved in negotiating or settling claims but funds and supports eligible claimant groups by:

- Providing advice on matters concerned with Waitangi Tribunal inquiry processes, or the direct negotiation processes managed by the Office of Treaty Settlements.
- Funding settlement-related activities necessary for settlement negotiations with the Crown.
- Planning and funding research required to support the claimant's case.

The Trust considers and approves requests from claimants for comprehensive hearings or negotiations which include Crown forest licensed land.

HOW THE TRUST IS FUNDED

Currently the Trust holds over $570 million in trust. The interest earned on the accumulated annual rental fees is applied to assist any claimant to prepare, present and negotiate claims that involve or could involve licensed Crown forest land before the Waitangi Tribunal. Funding assistance is also provided to those mandated claimant bodies with interests in Crown forest licensed land engaged in direct negotiations with the Office of Treaty Settlements.

FUNDING FROM CROWN FORESTRY RENTAL TRUST

The Trust has established criteria for claimants to be recognised as approved clients. These are set out in the Trust's *Claimant Assistance and Research Services* booklet available from the Trust offices or the Trust website www.cfrt.org.nz. To be eligible for Trust funding an applicant must:

(1) be Māori, and

(2) have registered a claim with the Waitangi Tribunal or propose to register a claim which involves, or could involve, Crown forest licensed land.

The Trust can fund claimant groups to support them through all phases of settlement negotiations up to ratification of the Deed of Settlement and the post-settlement governance entity. Funding levels and eligible activities are at Trustee discretion and may change over time so it is essential that claimant groups talk with the Trust's relationship managers early in their business plan development process. More detail of requirements is set out in the *Claimant Assistance and Research Services* booklet.

Chapter 2

Early Preparation

Remember...

- Success depends on quality, not quantity, of negotiators
- Short cuts usually take you nowhere

WHAT IS A TREATY SETTLEMENT?

In short a Treaty settlement is the outcome when representatives of iwi / hapū negotiate with the Crown to resolve historical breaches of the Treaty by the Crown against that group. A key element of Treaty settlements is that they are final; in effect they "close the book" on the matter, which is then considered to be resolved.

A settlement usually includes an historical account and Crown apology, cultural redress (including return of sites of significance such as wāhi tapu, pā and other sites) and commercial and financial redress which may include return of land (including Crown forest licensed land) and cash.

The rest of this Guide will now address these matters in more detail.

STARTING OFF

Make no mistake, the road to a Treaty settlement is long. Typically, the process from seeking a Deed of Mandate to a negotiated Deed of Settlement through to the implementation of the Treaty settlement package can take five or more years. Thorough and early preparation is essential.

Develop knowledge of the settlement process

- First and foremost submit a claim to the Waitangi Tribunal at the very latest by 1 September 2008. This is the final date set by law for the Tribunal to receive historical claims, that is, those raising grievances from before 21 September 1992.
- Establish a claimant reference library.
- Gain an understanding of the settlement negotiations process.
- Get an understanding of what other claimant groups have achieved in their settlements.
- Determine what negotiations are going on in your region.
- Talk with as many people as possible who have experience in Treaty settlements.

Identify your resources

Take stock of people in your iwi who are available and able to assist and navigate your claim through the settlement process. The core attributes – leadership, people and relationship management – must come from within the claimant group. Check likely funding sources.

Develop a preliminary strategic plan
Develop a strategic plan for the full duration of settlement negotiations, from preparing a mandating plan through to implementing the settlement. The strategic plan should identify the goals, timetable, key resources, funding and personnel required for each phase of the Treaty settlement process. It should incorporate a communications plan, mandating plan and negotiations strategy.

The strategic plan would be delivered via an annual operational plan or business plan, which are crucial tools for managing the claimant group negotiating body through the settlement process.

PROJECT MANAGEMENT
An established project management team and good project planning are vital. The two key aspects to effective project management are an effective governance board and a management team with the range of skill sets required to support the negotiations. The governance board provides strategic leadership to the organisation, encompassing high-level direction-setting and purpose. The management team's focus is the day-to-day running of the organisation. The business plan sets out the organisation's annual work programme to pursue the goals and strategies.

FUNDING SOURCES
Claimants entering settlement negotiations have two primary sources of funding:

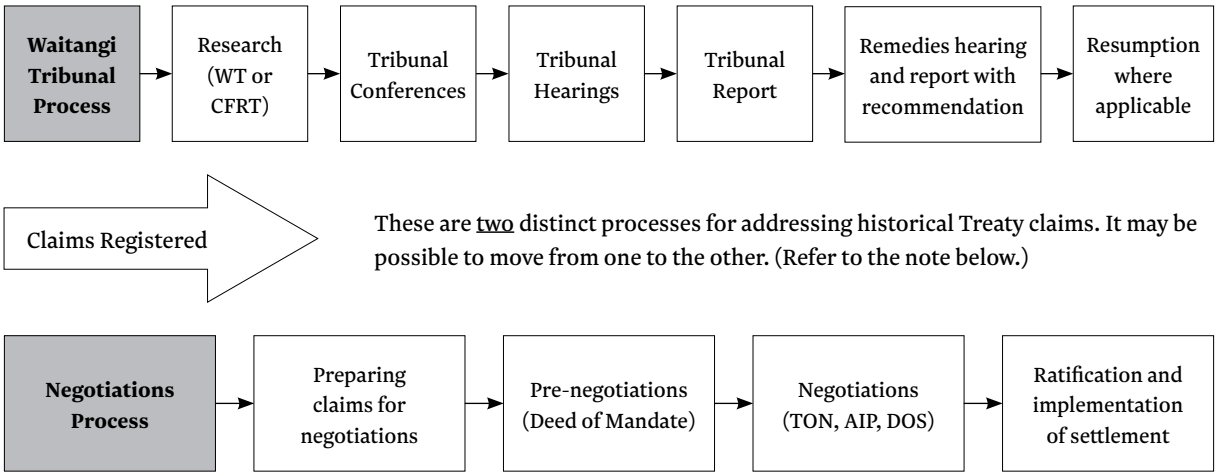
i. Crown Forestry Rental Trust – If a claimant group has Crown forest licensed land within its area of interest the Trust will provide funds to assist the full settlement process.

ii. Office of Treaty Settlements provides funding assistance to claimant groups in settlement negotiations with the Crown by making a contribution towards the costs of the settlement process.

Claimants may also be eligible for legal aid through the Legal Services Agency.

SETTLEMENT PATHWAYS
There are three courses of action:
- complete the Waitangi Tribunal hearings process before entering negotiations with the Crown, or
- have a fast-track modular Tribunal inquiry and, optionally, depart before its completion in order to begin settlement negotiations, or
- go directly into negotiations with the Crown without going through the Waitangi Tribunal process.

Comparison of the Crown Negotiations Process and the Waitangi Tribunal Process*



Note:

- At any stage during the Waitangi Tribunal process, claimants may request negotiations with the Crown (except during a remedies hearing). The Waitangi Tribunal formally allows opportunities for negotiations between the Crown and claimants after its initial report and following interim recommendations for resumption.
- Deeds of Settlement (which includes an historical account, Crown apology, cultural redress, and financial and commercial redress) are only possible through negotiations.
- Once claimant groups enter negotiations they cannot go back to the Tribunal without negotiations being suspended.

* *Adapted from an OTS process diagram*

Waitangi Tribunal

Inquiries into historical claims

Once a claim is registered, it is grouped for joint inquiry with other claims in the district into which it falls. At the conclusion of the hearings, the Waitangi Tribunal considers the evidence and reports its findings. If the Waitangi Tribunal finds that Crown action has resulted in a Treaty breach against the claimant group it may make recommendations to the Government on ways in which that breach might be resolved.

Office of Treaty Settlements

As a first step the claimant group should approach Office of Treaty Settlements to discuss the scope of claims proposed to be covered, which tribal groups are proposed to be included in negotiations and whether the Crown would consider the group sufficiently large to be a priority for negotiations, what processes would meet the Crown's criteria for recognising a mandate and provide a sound base for negotiations, and, the research that claimant groups will require to support the claim upon entering negotiations.

Factors to consider: Tribunal first or direct negotiations with the Crown

A Waitangi Tribunal inquiry leading into direct negotiations:	
Pros	**Cons**
Is a forum for claimants, 'their day in court'. Is a public 'Truth and Reconciliation' process	May not be needed if the claimant group is thoroughly prepared before entering negotiations
Produces thorough research and investigation of the issues, usually followed by a comprehensive report	May cover unnecessary detail causing delay and risking damage to claimant group coherence
The body of research produced will assist subsequent settlement negotiations	May need to be boosted with additional research for specific points of negotiation
Leaves evidence which becomes part of the public record	
The Tribunal report can provide a solid platform and basis for settlement discussions and negotiations with the Crown	The Crown is not obliged to accept Waitangi Tribunal recommendations (unless they are binding) Tribunal process and report unlikely to influence or increase negotiated quantum redress
The Tribunal hearings may provide a common bond and unify the claimant group in common action	Divisions on identity and issues between claimant groups may persist, and small claims may be difficult to bind into cohesive larger groupings The process is too long for groups to sustain their enthusiasm, coherence and organisation
Overlapping claims may be resolved in the Tribunal environment	The Tribunal's forum could be exploited by competing groups to advance rival cases
A Tribunal inquiry may take four years (modular approach) or five+ years (standard process)	Process problems may lengthen the inquiry timeline Direct negotiations may achieve a quicker settlement if they go well, but take longer if a Tribunal inquiry is needed to pave the way
A fast-track modular inquiry speeds entry into negotiations and provides options for a partial, rather than, comprehensive inquiry	Reduced research, selective evidence and hapū not fully being heard may result, and the Tribunal report may be limited to either broad generic issues or a few high priority issues in depth

Direct settlement negotiations with the Crown (by-passing the Waitangi Tribunal)	
Pros	**Cons**
Bypasses the costs of a Tribunal hearing	
The settlement package is negotiated on a case by case basis – anything is possible	A Tribunal inquiry may better define the claim issues to be settled and the seriousness of the Treaty breach and prejudice
Can be a short-cut to reaching settlement, thus reducing the opportunity cost on income forgone in settlement investments	Under-researched or poorly defined claims may take much longer to settle
Informal hearings enable 'our stories' to be told	Tribunal hearings require the Crown to face up to the claimants' case in an accountable public forum
May increase goodwill by signalling confidence in the direct negotiations process	There is a risk of disillusionment if the process breaks down
Can reward well organised groups focussed on post-settlement goals	Members of claimant group may feel short-changed if claims not heard
Effective iwi leadership recognised and rewarded	Picking winners may damage relationships with overlapping groups and meet resistance from hapū feeling marginalised, possibly leading to lengthy delays

ALTERNATIVES TO SETTLEMENT NEGOTIATIONS
Claimants should be aware of other avenues to which they have recourse to settle their claims other than settlement negotiations with the Crown, but need to carefully weigh the costs, possible benefits and risks associated with pursuing alternative settlement negotiations.

The Trust does not fund claimants through general court proceedings or presentations at international bodies such as the United Nations. However, the Trust will consider funding support to a claimant group making an application to the Waitangi Tribunal for a resumption order as it relates to Crown forest licensed land.

RESEARCH
Good research is essential for key aspects of the various agreements which develop in the course of settlement with the Crown. The Trust provides research funding and other assistance to claimant 'collectives' or 'clusters'. Research is based around large natural groupings, collectives or 'clusters'. In Tribunal inquiries, research is focussed on issues, whether they are shared by many claimants or unique to particular claimants. Carrying out research for 'collectives' or large natural groupings is said to make the process more efficient by reducing the amount of detail and avoiding duplication of research.

The key point is that claimants should get the research which meets their interests in settlement negotiations. Ideally the claimants should begin the process by asking themselves, "What are our key grievances and what are the key things the Crown did to us that we need to discuss with them?", then generate their research programme from the answers to those questions.

Claimants who proceed directly into negotiations
Claimants may wish to proceed into direct negotiations without the benefit of Tribunal hearings or a Tribunal report. In this case a research programme will usually be developed and managed by the Trust in conjunction with claimants. Office of Treaty Settlements will insist that all grievances are fully set out in order to ensure finality and a comprehensive settlement.

For the Apology redress, Office of Treaty Settlements are driven by what the claimant group considers to be their key grievances and what type of text they will want in their historical account and apology. This usually requires less research than is generated for a Waitangi Tribunal hearing. Note, however that for cultural and commercial redress Office of Treaty Settlements may want more than is available through the research programmes generated for Tribunal inquiries. The quality and extent of this research should be at least equal to current Tribunal casebook standards. It should disclose the extent of historical land alienation and give a comprehensive and properly contextualised account of the processes which led to it.

Sites of significance
Sites of significance are places within the rohe which are particularly important to the claimant group. The Crown recognises the importance of cultural redress in contributing to what it describes as a 'balanced settlement package' that will meet the cultural as well as the economic needs of the claimant group. But Office of Treaty Settlements needs detailed evidence of cultural associations with these sites, particularly if a return of the site is sought.

As part of this process the claimants must accurately identify their sites and locate them on maps. Historians can assist in locating and compiling such information, but the main source of information will always be the claimants themselves. Research on sites of significance should be carried out early in the process.

Up to date information about the current legal status of the land is also crucial. This will indicate whether the land is in private or Crown ownership. Office of Treaty Settlements can assist with information about the extent and nature of Crown land in the claimant's area of interest.

Accurate land title information can be located by GIS technicians using a number of sources. Negotiators should obtain a copy of the DoC Conservation Management Strategy so that they can identify land in their area of interest which is in the conservation estate.

Crown lands database
A database – and perhaps also a series of maps – of all Crown-owned land and land owned by Crown entities within the claimant rohe should be compiled early in the negotiations. Such a database provides claimants and their expert advisors with the opportunity to assess current and potential use of land available as part of a settlement, and the present and future economic viability of these lands.

This information can be compiled by GIS technicians working with the claimant group, but keep in mind that the Crown can provide Crown land data generated from LINZ databases at no cost to the claimants.

Map books

Maps used for negotiation purposes serve a somewhat different purpose than those at a Tribunal inquiry because they must contain more detailed information about sites of significance than might have been presented to the Tribunal.

Map books setting out in graphic form the key historical aspects of the claims should form an integral part of any direct negotiation. They are particularly crucial if claimants choose direct negotiation in the absence of a Tribunal inquiry and report. As maps are a primary means of effectively presenting claims to Ministers and Office of Treaty Settlements officials it is crucial that the manner in which the information is presented is agreed by the claimants well before formal presentations. It is worth having a competent Information Technology person available to operate equipment.

Chapter 3

Deed of Mandate

Remember...

- If you decide to ignore Crown advice be aware of possible negative consequences
- Document and record everything
- Use expert (and often expensive) advice when you know you need it, not just because it's there
- Don't get sucked into 'mandate wars' with another section of your claimant group – the Crown will not recognise two mandates over the same claims
- It's human nature that some members will always oppose your mandate no matter how robust it is. Keep them in perspective – don't let the tail wag the dog
- Once the rules are written for the mandated body, stick to them
- A mandate does not last forever – it must be maintained
- Too much communication with iwi members is better than too little.

What is a mandate?
A Deed of Mandate signals that the mandated body has widespread support from members of the claimant group to carry out one specific task, namely to negotiate a settlement of perceived Treaty breaches by the Crown over the hapū and iwi to which those members belong. The Crown needs a high level of certainty that the mandated body with whom it is negotiating does have widespread support. The task during the mandating process is to get that support in such a way that any dissent can be seen as legitimate but not sufficient cause for the Crown to stop negotiating with the mandated body.

In the light of these potential difficulties the Crown insists that dispute resolution provisions are included in the rules or constitution of the proposed mandated body before the mandate strategy/Deed of Mandate is endorsed by the Crown.

The Crown's mandate expectations
Anyone who intends seeking a mandate to negotiate a Treaty settlement should familiarise themselves with the Crown expectations of the mandating process and outcomes before designing their mandate strategy (see the Office of Treaty Settlements' Red Book, pages 44–51).

The initiators of the mandate strategy may also need to remind members of the claimant group that the Crown does not give the mandate. Members of the claimant group give the mandate. The Crown simply decides whether it is able to recognise that mandate.

Office of Treaty Settlements and mandating
Claimants should engage with relevant staff from Office of Treaty Settlements from the early stages. The officials have a specific task – to provide advice and assistance to claimants to achieve a robust mandate. The mandate initiators can discuss issues and possible problems with officials at Office of Treaty Settlements, look for solutions to meet their needs, and confirm Crown requirements for a Deed of Mandate.

Role of Te Puni Kōkiri
Broadly speaking, Treaty settlements are a priority for Te Puni Kōkiri as the Minister of Māori Affairs, together with the Minister in Charge of Treaty of Waitangi Negotiations,

is delegated authority from Cabinet to recognise the mandates of claimant groups for the purpose of entering Treaty settlement negotiations, recognise claimant settlement ratification results, approve post-settlement governance entities, and make decisions about the addition to or release of properties from the Crown settlement landbank. The key Te Puni Kōkiri role is during mandating, and claimants should talk to Te Puni Kōkiri as well as Office of Treaty Settlements.

Importance of planning

The importance of planning cannot be overstated. From the outset, planning will require claimant group members to deliberately decide that they wish to promote the prospect of a mandate being obtained for the purposes of negotiation with the Crown in settlement of their Treaty claims. The process does not start or run by itself, it requires the initiative and input of specific members of the claimant group (the 'initiators'). The initiators need to draft and consider a claimant mandating strategy.

Completing and filing a Deed of Mandate with the Crown should not occur until the claimant mandating strategy has been agreed between initiators and officials.

Clarify the Deed of Mandate nature and scope

The key questions are:

- *Who* is the Deed of Mandate on behalf of?
- *What claims* will it apply over?
- *Which area* does it apply over?

In some cases, the *who, what* and *which* will be easier to define than in others. The particular facts of each case need to be carefully assessed and applied. When formulating a mandating strategy and then turning it into a Deed of Mandate process, if there are marginal areas in terms of the *who, what* and *which* questions, a prudent position for initiators will be to adopt a wider, rather than narrower position in the Deed of Mandate. Once a Deed of Mandate is filed with the Crown, the claimant body cannot easily go back to their claimant group to expand the Deed of Mandate.

Developing the mandate strategy

Seeking a mandate can be time-consuming, expensive and sometimes very stressful. It is worth doing once and worth doing properly.

Mandating named individuals

A fundamental problem with mandating individuals as opposed to a body or entity is that there is a major issue to deal with when an individual either no longer wishes to act, acts outside the scope of the mandate, or dies. The potential issues of accountability and certainty are sufficient in themselves to warrant mandating an entity or body rather than an individual. Neither the Trust nor Office of Treaty Settlements recommends mandating individuals.

Mandating a body or entity

The mandating of a body or entity (as opposed to individuals) is the most common practice. There is no set formula – it may be an existing body or a new one set up especially for the purpose.

Mandating strategy

	Action	Comment
1	Read Office of Treaty Settlement 'Red Book' contact relevant officials at Office of Treaty Settlements (OTS)	This will give an idea of Crown expectations and bottom lines and save unnecessary time and expense. Informal discussions with key OTS staff may help clarify issues and smooth the mandating process
2	Discuss at preliminary meeting with OTS whether the claimant group meets Crown 'large natural group' status	Do not proceed until OTS agrees in principle that your claimant group will meet large natural group (LNG) parameters set by the Crown
3	Identify all Wai numbers with interests likely to be included in the proposed negotiations; identify any (other hapū / iwi) to be excluded	The Crown will prefer to include all Wai numbers affiliated to the hapū / iwi in one settlement. Discuss exclusions with OTS
4	Identify other Treaty claim interest groups in the area who might seek an independent Deed of Mandate	Ensure that different groups do not end up pursuing the same Deed of Mandate
5	Discuss the issue of representation with the relevant iwi organisation (rūnanga)	Find out if the local iwi rūnanga will stand aside or compete for the mandate – resolve this before beginning
6	Meet OTS to confirm the proposed representation of the claimant group meets Crown 'large natural group' status	Do not proceed until OTS agrees that your claimant group will meet the large natural group parameters set by the Crown
7	Define the claimant group: all hapū (including a note of hapū no longer in existence) and associated marae	Listen carefully to OTS advice, but ensure that you hold the pen
8	Identify the claimant area of interest	It is essential to help identify overlapping claims from other hapū and iwi
9	Decide the mode of representation on the mandated negotiating body, from iwi whānui, hapū, marae or another combination (or use an existing representative organisation)	Designing a form of representation which ensures all members feel included is essential – any who feel excluded may oppose the mandate. Balance that with the need for a workable model
10	Plan the hui and consultation process	Work out the full consultation process
11	Write the resolution(s) members will be asked to approve	Give careful thought to the text Have OTS check to ensure all bases are covered
12	Produce public notice of hui and consultation process – what, when, where and how	Discuss the procedure with OTS
13	Carry out the consultation and mandating hui process	Ensure accurate records are kept to demonstrate a fair and open process and agreed outcome; neutral TPK observers are now a standard practice
14	Assemble all the necessary documents to support the Deed of Mandate. Present the Deed of Mandate to OTS	Meet OTS to review the papers and ensure all relevant details are included, as full and accurate records speed the Crown turn-around of the papers.

For a detailed discussion on mandating strategy, readers should obtain a full copy of the Guide.

Waiting for the Crown to recognise the Deed of Mandate
It may take many months between submitting a Deed of Mandate and having the mandate recognised. But there is plenty to do and there are far-reaching matters to consider, particularly the long-term strategic vision for the iwi, and the possible shape of the post-settlement governance entity which will receive and manage the redress on behalf of the claimant group.

Although the entity may have the mandate to settle the claim, the elected representatives to that mandated body might decide that they need 'bigger guns' or different sets of skills for the actual negotiation. In some cases the majority of negotiators may not be the representatives on the mandated body.

Register of members – get it right the first time
'Who are our members, and where are they?' The earlier this issue is addressed the better, because the Crown will later require members to ratify the Deed of Settlement and post-settlement governance entity.

Some claimant group members think that the act of registering gives their mandate at that point. That is not so. The covering letter with the registration form will need to make this clear and also make clear that their decisions on whether to give the mandate to the proposed body, or ratify the Deed of Settlement are issues to decide and vote on at a later date.

Legal issues also need to be considered, especially the Privacy Act 1993. It is prudent to have a reference to privacy issues on the registration form. The purpose of the registration form needs to be absolutely clear.

Freepost and 0800 number
Set up a Freepost facility with New Zealand Post so the mandated body pays postage only on envelopes actually sent back. Many mandated bodies have found an 0800 free phone number useful.

Te aka kūmara – keeping members informed with a website and pānui
A well thought out communication strategy pays dividends. If people feel included they are more likely to support the mandated body. Other than hui, the two most common methods are websites and pānui that can be mailed to members. Recently mandated bodies have learned a lot from earlier claimants and have developed highly sophisticated websites and pānui.

A website can be updated daily but regular pānui are useful, too. They can be emailed (saving postage) or sent by regular mail. When using regular mail use register-type software that recognises households, so that only one pānui goes to each household.

Project management: who will do the work?
The sooner the drivers of the claim set up project management the better, although this depends on resources – both people and money. An early objective, therefore, is to find someone with the right skills to act as project manager. The project manager needs to have an oversight of hui and travel organisation, communications, keeping records, and – not to be understated – to keep a firm hand on finances.

The team is going to need some office space, and if funds are scarce this can be nearly impossible. Financial pressure should be relieved once the Deed of Mandate is recognised because the Crown is now prepared to provide funds to assist the negotiators. The Trust recommends that the mandated body familiarise itself with Crown policy and engage in serious discussions with officials about the level of Crown funding for the negotiation process up to Settlement Legislation.

Risks to mandate, including mandate maintenance
Negotiators do not get a 'mandate' then put in a drawer and forget it – mandates need to be regularly reaffirmed. The Crown will require certain provisions in the Deed of Mandate to accommodate mandate issues. These may include:

- identifying certain hapū or marae whose interests must be protected
- establishing a dispute resolution process in the event of challenges to or within the mandated body
- having processes for the removal of representatives and the withdrawal of constituent parts of the claimant group such as hapū or marae
- having an agreement to provide regular reports on the state of the mandate
- having an agreement to reconfirm the mandate after a set period.

Take these matters seriously.

How to keep the mandate 'warm'
Effective communication is the short answer. If members are kept informed of developments they are more likely to vote to ratify the negotiated settlement.

Threats to the mandate

The most dangerous threats to a mandate are internal. If one or two representatives on the mandated body become unhappy with some aspects of the process, one of the first things they are likely to do is to try and take their hapū out of the mandated body. There should be a constitutional process, as closely aligned to tikanga as possible, that those representatives must follow. Unfortunately this does not always happen.

The most common misunderstanding is the role of each individual hapū representative. In most cases they have been granted representative status for their hapū on the mandated body. They usually do not have the authority to unilaterally withdraw their hapū from the mandated body. During the consultation process their hapū made two decisions, firstly to participate in the mandated body, secondly to appoint a representative to the mandated body. Logically, if the hapū representative wanted to withdraw their hapū a publicly notified hui would be expected to be held, at the same standard as was the original hui at which the hapū resolved to join. The new resolution would be on whether the hapū wished to stay with the mandated body. Should the hapū decide to stay in the mandated body they have to decide whether to keep their current representative. If that person expresses ongoing hostility to the kaupapa of the mandated body there is little point keeping them there. The mandated body has identified the Crown as the opponent – it can do without another one in the whare.

Rules or constitution of mandated body

The Courts and Tribunal will judge the mandated body on compliance and process. Assuming a Deed of Mandate is recognised by the Crown, and the mandated body is in place with its rules, it is very important to always comply with the rules of the mandated body/entity.

Chapter 4

Negotiating a Settlement

KEY POINTS

- be prepared
- talk with claimant groups who have concluded their negotiations
- assemble a competent and experienced negotiation team
- remember that the onus is on the mandate body and negotiators to strongly advocate the interests of the wider claimant group, it is not the Crown's role or responsibility
- understand the Crown's negotiating position and settlement policies and plan your negotiating strategy accordingly
- know your own strengths and weaknesses and those of the Crown
- know when and which negotiation tactics are being applied and how to combat, respond, or exploit them to your advantage
- control communications – keep critical information confidential to the mandated claimant group.

INTRODUCTION

The task of negotiating a Treaty settlement is a serious business and should not be undertaken lightly: it is not a simple exercise, nor is it a quick process, and initiators of the settlement process should keep in mind that they need a good mix of skills in the negotiation team.

PLANNING FOR NEGOTIATIONS

The mandated body will need to consider strategic and micro issues at the planning stage, including:

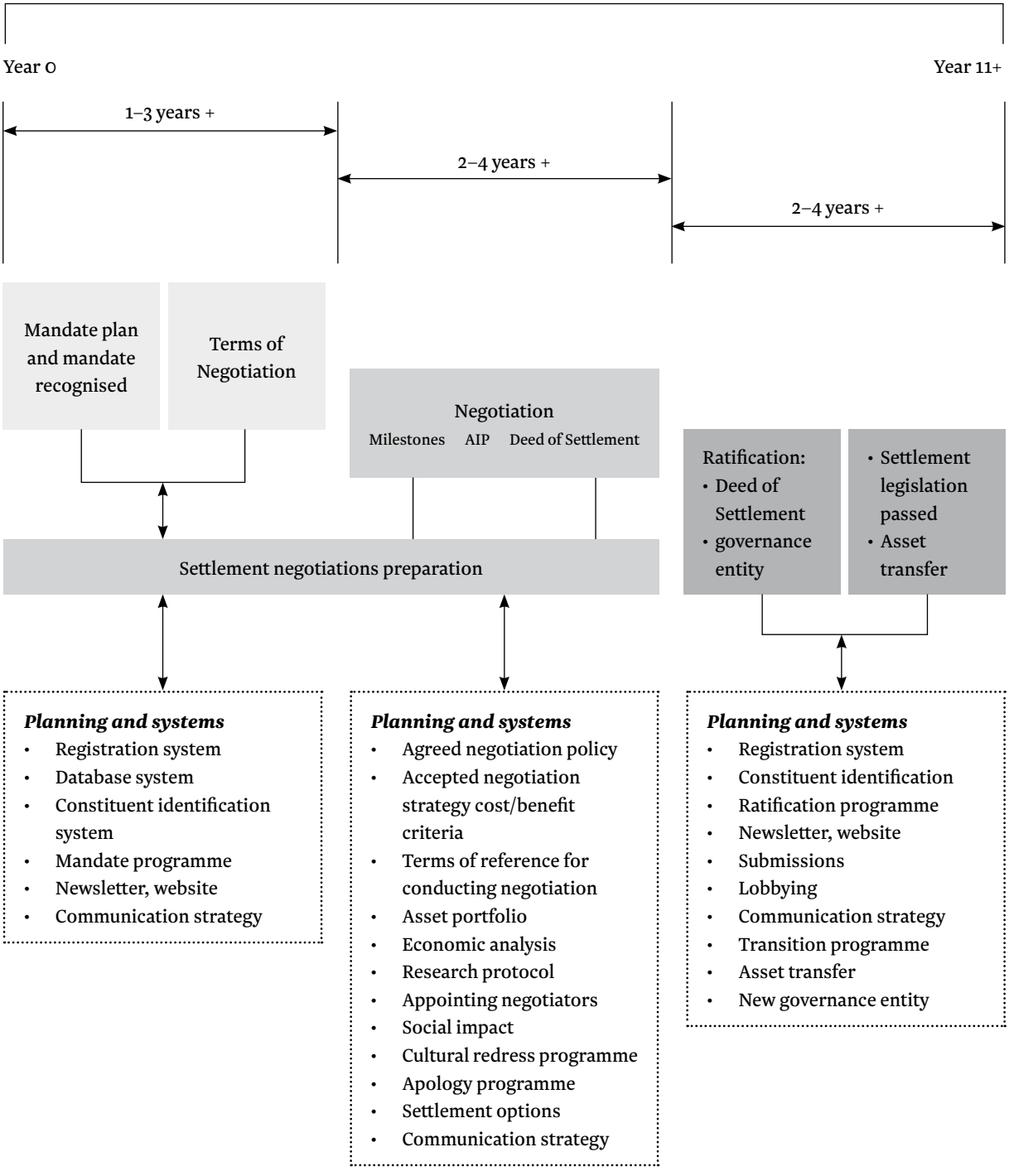
- setting overall goals and outcomes
- collecting detailed information relating to potential settlement assets, cultural sites and tribal demographics
- establishing internal management planning and support systems.

The diagram below illustrates some of the planning and systems claimant groups will require at different stages of the negotiations process. It also indicates a timeframe (from 5 to 11+ years) for achieving the settlement milestones, from mandate through to passing settlement legislation, and settlement date.

There is no right way to negotiate as all settlement negotiations are unique. However, a key requirement for all stages is the need for preparation. Responding impulsively must be avoided. It is up to the mandated body to determine how much and what type of information will be needed to support their negotiations. Knowing that the settlement will be 'final' and have serious, long-lasting consequences should indicate the depth of preparation required.

All members of the mandated body will need to agree to maintain confidentiality as part of the Terms of Negotiation. Likewise, any of the negotiators or advisors appointed by the mandated body will be bound by a confidentiality agreement.

Negotiations – indicative timetable and planning arrangements



The negotiation team
The key attributes of a successful claimant negotiation team are:

- Competent negotiators
- An identified leader or lead negotiator
- The ability to work as a team
- A project manager (or project management team)

The role of kaumātua / kuia in the confidential negotiations process is up to the mandated body to decide according to tikanga and the rules the group has agreed on for negotiation.

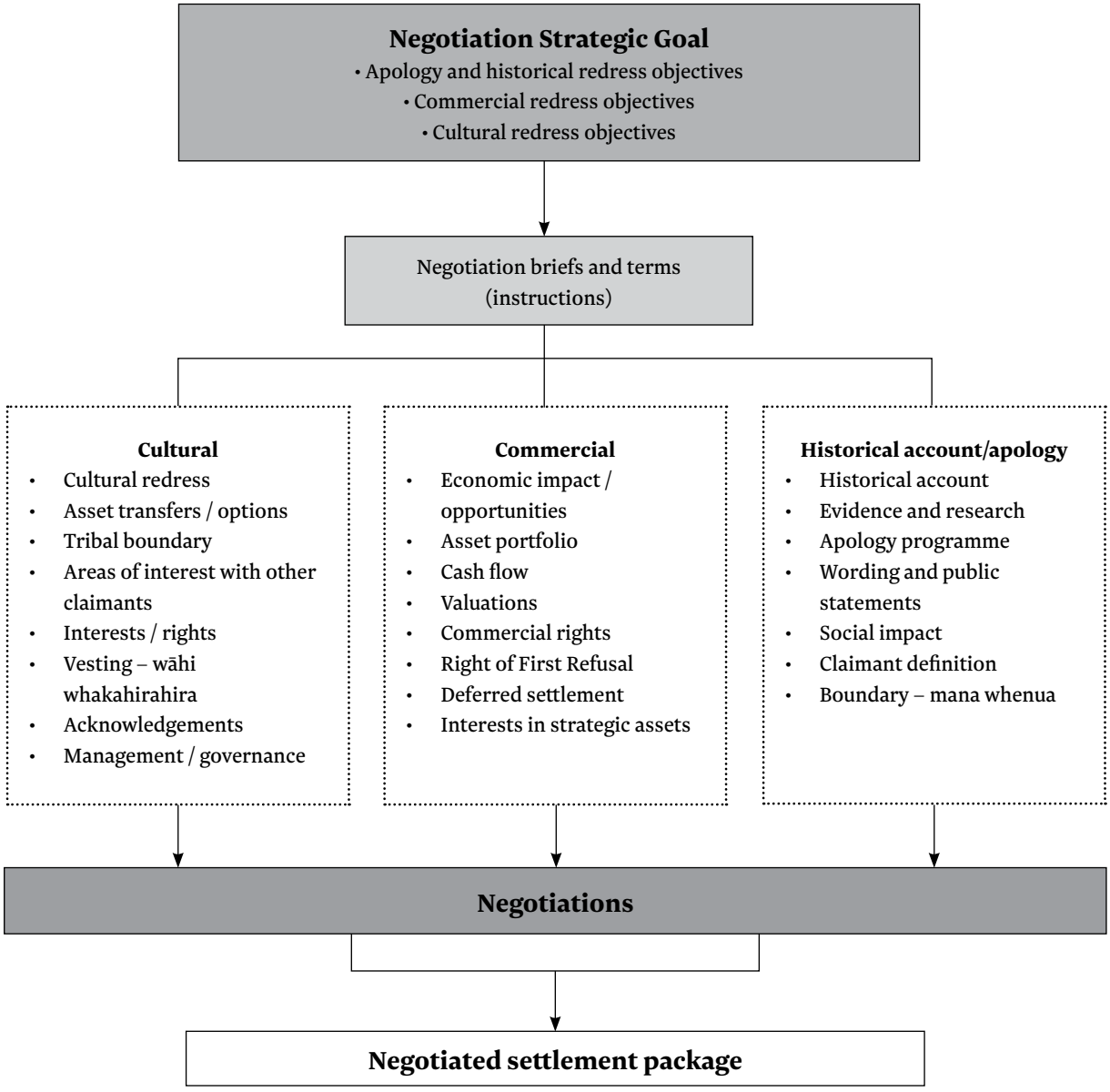
The claimant negotiation team should expect to spend many hours preparing for and attending negotiation meetings over a span of months and often years. The negotiation team must know exactly what it wants and what it does not want, what the Crown wants and does not want, what its fall-back position is and what it is prepared to give away, its points of leverage, the background and experience of the Crown negotiators, and its own negotiating strategy, policies and negotiation briefs to a high degree of understanding.

Claimant advisors
Claimant advisors provide valuable technical input to negotiations. Advisors must have clear terms of engagement and instructions from the mandated body. Advisors should have professional and technical competence, experience in settlement negotiations and objectivity.

Claimant work groups
As well as the teams mentioned, it is common to have a second level of negotiation work occurring. This may involve bringing together a team of people from the wider claimant group to assist with managing information for negotiations.

CONDUCTING NEGOTIATIONS
The old adage ‘knowledge is power’ is important. The negotiation team will need as much information as possible to achieve the specific redress objectives and the overall settlement package. Negotiation briefs are papers that clearly outline the redress specifications to be negotiated. The negotiation briefs are likely to be drafted by the project manager (or team) with assistance from technical advisors. The negotiation team should meet and be briefed before each negotiation meeting with the Crown. This is where tactics, statements, information, and possibly speaking rights are discussed and finalised.

Negotiating the settlement package



Negotiation tactics

Some common negotiation tactics are presented below.

Tactic	Approach
Controlling communication (particularly your own communications)	Be well prepared; identify what you will not say and who is to speak; prepare key questions; think through the scenario of responses (beforehand); be absolutely succinct and concise when you speak
Taking time to respond	Take time and consider your answer or position; avoid impetuous statements
Using silence	Silence is a powerful tool – it is part of your armoury so take your time and watch their body language carefully
Using time out (caucus) and break-out groups	Call for time-out where your team wants to discuss an issue that has come up in negotiations – it is a powerful tool
Listening carefully	Listen more than talk – use as few words as possible to get to the point without being blunt – then listen very carefully and gain more information
Limits on authority	At negotiations, Crown officials have limited authority – the final decisions are made by Cabinet Ministers; it is important to be able to access the decision-makers at key points during negotiations

Crown negotiation team: Political environment

Crown negotiators are focussed on negotiating a settlement that endeavours to meet the interests of the claimant group, while protecting the interests of the New Zealand public.

Key Crown agencies in Treaty settlements

Key Crown agencies in Treaty settlements	Area of advice
Office of Treaty Settlements (OTS)	Has the lead role in negotiations and settlement policies
Treasury (TRY)	Looks at fiscal risk
Crown Law Office (CLO)	Protects Crown interests, does risk analysis, does legal work
Department of Conservation (DoC)	Manages Conservation land, flora and fauna, cultural redress properties
Te Puni Kōkiri (TPK)	Looks at mandating and governance issues
Land Information NZ (LINZ)	Manages landholdings including the administration of Crown Forest Licensed Land, public works, disposals
Ministry of Fisheries (MFISH)	Manages non-commercial fisheries issues
Ministry for the Environment (MfE)	Does resource management
Ministry of Culture and Heritage (MCH)	Administers the Protected Objects Act – Taonga Tūturu
Parliamentary Counsel Office (PCO)	Drafts settlement legislation

Office of Treaty Settlements
Office of Treaty Settlements is the Crown's lead agency for settlement negotiations. Claimant negotiators should be aware that, although not holding ultimate decision-making authority, officials do influence the settlement outcome through advice to their Minister, the Minister in Charge of Treaty of Waitangi Negotiations.

Other Crown agencies involved in negotiations
Other agencies may have representatives present at particular negotiation meetings depending on the nature of discussions. For example, officials from the Department of Conservation Head Office Treaty team will generally attend negotiation meetings where cultural redress relating to Department of Conservation land or indigenous flora and fauna is to be discussed.

Roles of Ministers and Cabinet
The Minister in Charge of Treaty of Waitangi Negotiations is responsible for leading Treaty settlement negotiations on behalf of the government and has a number of roles. Most importantly the mandated body should expect the Minister to meet with the mandated body and claimant group leaders to discuss high level issues on an as-needed basis.

Chapter 5

Terms of Negotiation

KEY POINTS

- Consider what outcome you want from negotiations. Plan the full negotiation strategy
- Aim to create a 'no surprises' negotiating environment
- Beware of the Crown wanting to redefine your claimant group in a way that is wider than the definition used in the Deed of Mandate
- Be wary of a Crown desire for one settlement and only one post-settlement governance entity if your mandated body for 'large natural groups' comprises more than one commonly recognised iwi
- Ensure that the agreed approach to overlapping claims meets your needs rather than the Crown's
- Discuss levels of claimant funding **before** the Terms of Negotiation is signed
- Note that 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
- Be prepared to 'think outside the square'
- Do not agree to anything that is inferior to previous settlements unless that provision is not relevant to your negotiation strategy

TERMS OF NEGOTIATION – WHAT ARE THEY?

Terms of Negotiation set out the standards of behaviour in the relationship between the mandated body and the Crown, and the key objectives of the negotiation process. 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' part-way through negotiations. Most recent Terms of Negotiations have some variant of the following purpose, ie, to:

- set out the scope, objectives and ground rules for negotiation
- state the intention to negotiate in good faith, confidentially and without prejudice
- note that the Terms of Negotiations is not legally binding to either party 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. The table below illustrates elements found in a selection of past recent Terms of Negotiations.

Terms of Negotiation: frequency and status by section

	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	Acknowledgement	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 – a standard inclusion
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 – a standard inclusion
20	Not bound until Deed of Settlement (no agreement to commit to settlement)	Always – a standard inclusion
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 – a standard inclusion
25	(Foregoing) other avenues of redress	Always – with some recent variations
26	Procedural matters	Always – a standard inclusion
27	Amendments	Always – a standard inclusion
28	Interpretation	Rare
29	Appendices	Always includes Deed of Mandate and Crown letter of recognition; includes other papers at claimant behest

Chapter 6

Settlement Redress

KEY POINTS

- 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
- Cover all negotiation bases **before** negotiators 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
- Ensure that any negotiations after the Agreement in Principle is signed can only be about the detail, nature and scope of redress agreed in the AiP
- Do not initial the Deed of Settlement until fully satisfied with all aspects of the redress

The Agreement in Principle and Deed of Settlement are the two key stages to settlement redress.

AGREEMENT IN PRINCIPLE

The Agreement in Principle tends to be approved by the mandated body or its sub-committee. These documents are not ratified by the claimant group but are publicly available documents on which claimants can comment to the mandated body.

ELEMENTS OF AGREEMENT IN PRINCIPLE ('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 crucial, therefore, that the mandated body records all matters of redress in the AiP. The following opening is more or less invariable and immediately identifies the three 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.*

After signing the AiP the parties work together in good faith to develop, as soon as reasonably practicable, a Deed of Settlement. The mandated body should take the AiP to claimant group members as part of its inclusive communications strategy, even though it is not a mandatory Crown requirement.

INITIALLED DEED OF SETTLEMENT

When the negotiators have agreed on the content of the Deed of Settlement it is initialled by both parties and the mandated body takes the Deed and the proposed post-settlement governance entity to members of the claimant group for ratification. That is, members of the claimant group have the opportunity to vote to accept or reject the proposed settlement. If ratification is successful the Deed of Settlement can then be signed.

DEED OF SETTLEMENT

The Deed of Settlement is the final agreement between the mandated body and the Crown and formalises and adds detail to the AiP. The Deed of Settlement will typically contain a clause that describes the intent of the settlement and associated settlement redress. Some of the other key clauses are briefly discussed here.

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 usually provide that the claimant group and Crown agree that the Deed of Settlement settles the claims from the settlement date, and that the claimant group releases and discharges the Crown from all obligations and liabilities in respect of the claims.

Redress only provided to governance entity

The Crown will not provide redress until a post-settlement governance entity has been established.

Crown's ability to provide other cultural redress

This clause 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.

Acknowledgements by claimant group concerning settlement finality

These 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 and finality of the 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, and effective removal of protective legislative mechanisms.

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.

Settlement removes jurisdiction of Waitangi Tribunal

The settlement legislation will remove the jurisdiction of the Tribunal in respect of the claims.

Termination of landbank arrangements

The Crown may, after the settlement date, cease to operate the landbank arrangement for the relevant claimant group.

Chapter 7

Historical Account, Crown Acknowledgements and Apology

KEY POINTS

- Negotiators should consider what their people want to see in the historical account, Crown acknowledgements and apology
- Negotiators should ensure that they have a comprehensive body of evidence before beginning talks with the Crown
- Attain the initiative by writing the first draft of the historical account rather than leaving it to the Crown
- In the historical account, let the story speak for itself
- Be wary of the Crown wanting to re-litigate historical arguments for Treaty breaches already identified in the Waitangi Tribunal process
- Ensure you obtain copies of all Crown acknowledgements and apologies that align with your Treaty claim
- Consider working on the Crown acknowledgements and apology at the same time as drafting the historical account

INTRODUCTION

The Apology redress originated out of a desire from some groups to have the Crown proffer an apology. It is through the negotiation of the Apology redress that the negotiators and Crown directly discuss the historical grievances of the claimant group. Apology redress has usually consisted of an historical account, Crown acknowledgements of Treaty breach and an apology.

HISTORICAL ACCOUNT

The 'historical account' provides claimants with an opportunity to record a description of events and Crown actions leading to their key grievances, and sets the parameters for the Crown's acknowledgement and apology and reference to historical grievances.

Historical accounts tend to be summaries of the events that led to the Treaty grievance and claim and are usually cast in a factual, neutral manner. The facts are able to speak for themselves. To produce a comprehensive historical account, claimants require an extensive body of evidence produced to a high professional standard – mere unsubstantiated assertion is not sufficient. The historical account usually begins with a description of the claimant group, their rohe, and their associations with the land. Paragraphs dealing with the key historical issues follow.

Research underpinning the claims

It serves the interest of all parties if the claimants have a body of research covering all aspects of their claims, given that finality and comprehensive settlement is the desired outcome. Claimants whose research meets casebook standards or who have a Tribunal report will be well equipped to engage with the Crown over the historical account. Claimants who enter negotiations before a Tribunal inquiry or before the casebook is prepared will develop their research programme in conjunction with the Trust and Office of Treaty Settlements. Their historical account will flow from this.

Constructing the draft

The Crown's key concern in the historical account process will be getting a sense of what issues are most important to the claimant group, and those are often things that

the claimant group speaks most convincingly on. In most negotiations claimants have chosen to drive the historical account drafting process from within their own negotiation team, using the skills of a professional historian either behind the scenes or on an 'as needed' basis. Even if their team does not necessarily have 'historian' skills they have considered it important that they own the process, get to talk directly to the Crown about their grievances without professional assistance, and are able to explain the finally agreed text to their people in their own terms.

It is more difficult for claimants who rely on district 'overview' research produced in connection with a 'modular' claim by an historian they may have met only briefly. In such cases the Trust plays an important role in matching the claimant group with an appropriate historian, and ensuring the relationship is conducted and maintained in a way that ensures mutual trust and confidence. This is essential.

CROWN ACKNOWLEDGEMENTS

The acknowledgements are made only by the Crown but they do form part of the settlement redress package in any Deed of Settlement. All mandated bodies are encouraged to participate proactively with the Crown to secure the acknowledgements desired by the claimant group.

CROWN APOLOGY

Some negotiators have debated the merits of the Crown making an apology to the claimant group. On the other hand, a number of claimant groups have demanded it as their key item of redress. The reality is that the Crown insists on making an apology, even if the negotiators do not want one. It is vital, therefore, that the historical account contains all matters and events that the negotiators consider to be significant, and that the Crown acknowledges them.

Chapter 8

Cultural Redress

KEY POINTS

- Consider what cultural redress outcomes you want
- Make sure you have a good understanding of all the types of cultural redress relating to land
- Be prepared to push for variations of cultural redress (for land) not yet used in a Deed of Settlement – but be realistic
- Do not sign an AiP until you are sure all major aspects of cultural redress are covered in sufficient detail

Remember...

- Carefully estimate the level of management and costs associated with each type of cultural redress land
- Consider priorities: If particular redress mechanisms will not add value (in financial or cultural terms), do not accept them just because they are on offer. Do not let the Crown make the settlement look bigger with inconsequentials.

INTRODUCTION

Cultural redress is a significant part of most settlements. It is a non-commercial type of redress focussed on, but not exclusive to, sites or areas of cultural, spiritual, historical or traditional significance to the claimant group. While there are limits on the redress the Crown will provide, it is up to negotiators to investigate other unique redress options if they consider that these suit their claimant group better. The mandated body should focus on considering what cultural redress will have most relevance for the claimant group, and not seek a standard redress option if it is not relevant to the claimant group or will impose excessive maintenance costs.

Negotiating for cultural redress sites

Negotiators are recommended to become familiar with the Crown position in the Red Book so they can make positive progress towards cultural redress. A common view is that it is significantly more advantageous for negotiators to seek to shape the cultural redress offer before it is made by the Crown. One possible route could be to:

1. Create a list of all sites of significance to the claimant group
2. Obtain as much information about the sites as possible, such as legal description and ownership
3. Do the groundwork for each site, review site suitability and access, complete due diligence and any other relevant matters
4. Clarify the claimant group's redress aspirations for each site

Negotiators and the mandated body might want to 'think outside the square' if no existing redress mechanism meets the claimant group's interests. In that case negotiators should be prepared to shape realistic alternatives to put to the Crown.

SITES OF SIGNIFICANCE

Sites of significance are places within the rohe that are particularly important to the claimant group, such as pā sites, awa, maunga and wāhi tapu. The Crown recognises the importance of cultural redress in contributing to what

it describes as a *'balanced settlement package'* that will meet the claimant group's cultural and economic needs. But there is an important proviso; if the Crown owns and manages resources of cultural or spiritual significance to the claimants it must act both in the best interests of New Zealand as a whole and in accord with Treaty principles. The Crown must therefore balance a *'wide range of interests'*. This means that returning ownership of a site or resource may not be possible.

Categories for sites of significance are summarised in the following two tables. The first table has seven models in the *Level 1, Exclusive fee simple sites,* and the second table describes the five models in the *Level 2, Crown retains ownership of land* sites.

Level 1: Exclusive fee simple sites
Fee simple vesting directly to the governance entity is the most comprehensive redress, but the sites are often transferred subject to a range of conditions. In other words, vesting of the sites may result in ownership – but with 'strings attached'. It is vital, therefore, that the mandated body has a clear understanding of what the conditions mean and exactly what they are getting.

It is critical to understand the specific status of each component of redress. The mandated body should seek specific specialist advice on any conditions and encumbrances such as existing leases or licences or a particular statutory or legislative status that applies to the land. Their range and nature can vary significantly and be settlement and site specific. It is very important for the mandated body to assess such issues on a case-by-case basis, using specialist advice where necessary.

Level 1: Exclusive redress: Vesting of fee simple estate in governance entity

	Status	Administering body	Crown influence	Advantages	Disadvantages
1	'Freehold'	Ownership not influenced by Reserves Act 1977	None; rights equal to any other freehold land	Full mana whenua and management rights	All costs lie with governance entity; any encumbrances may hinder development
2	Protected private land (s76 Reserves Act)	Governance entity manages site	Minister may revoke status	More flexible than s17 – s23 reserves; weight of Crown could enhance protected status; land may be sold	All costs lie with governance entity
3	'Freehold' with conservation covenant (s77)	Governance entity manages site	Covenant is reached by agreement with Minister	More flexible that s17 – s23 reserves; Crown could enhance protected status	Costs lie with governance entity but the Department of Conservation may pick up some
4	Recreation (s17) or Historic (s18) reserve; Scenic (s19) is rare	Governance entity manages site	Consent of Minister of Conservation needed for some matters	Governance entity can be administering body; costs may be negotiable with Department of Conservation	Ministerial consent dilutes mana whenua; may have encumbrances
5		Governance entity has joint management with local authority	Minister's powers from Reserves Act	Costs fall on local authority; governance entity chair has casting vote on the joint management body	Funding decisions remain with local authority
6	Managed as if it is a reserve (s38)	Local authority (may be joint with governance entity)	Minister appoints administering body	Governance entity may have no costs (joint management or local authority is body)	Not full expression of mana whenua; limited iwi role
7	Vested recreation reserve (s26)	Local authority	Minister's powers from Reserves Act	No costs fall on governance entity	Iwi only has titular mana whenua; no managing rights

Hierarchy of Whenua cultural redress

Level 2: Crown retains ownership of land

	Status	Administering body	Crown influence	Advantages	Disadvantages
8	Site vested in claimant group and gifted back to Crown	Crown	High – sites tend to be National Park status	All costs with Crown; iwi associated with iconic site	No management role
9	Overlay classification	Crown	High – on conservation estate	Iwi values acknowledged; can agree on protection principles for site; generally exclusive redress to iwi	No ownership
10	Statutory Acknowledgement (SA)	Crown	Consent authority must 'have regard to' the SA	No management costs fall on governance entity; enhances RMA 'affected party' status of iwi	Status limited to 'advisory' management role; non-exclusive redress; consent authority not compelled to 'have regard' to their views
11	Deed of Recognition (always with SA)	Crown	Minister's powers from Reserves Act	Minister 'must have regard to' governance entity's view	Non-exclusive; Minister not compelled to 'have regard'
12	Camping entitlement	Crown	Minister's powers from Reserves Act	Exclusive to iwi	Only 210 days per year; all other laws/by-laws apply to use; Crown can withdraw right

Hierarchy of Whenua cultural redress (continued)

Keep in mind that in some cases, just keeping the grass mowed can run into thousands of dollars each year. Is the post-settlement governance entity going to be structured and staffed to adequately manage and maintain all cultural redress properties?

LEVEL 2: CROWN RETAINS OWNERSHIP OF THE LAND
There are many examples of redress where the Crown has not been prepared to relinquish ownership of a site, for example on the grounds of a wider public interest. In all these models the Crown retains ownership but a range of mechanisms recognise the relationship of the claimant group with that site.

It is up to the mandated body to consider whether a particular form of this redress is desirable. For example, a certain type of redress may simply put an unwelcome administrative load on the post-settlement governance entity with no real return in value to the claimant group. In this instance 'value' does not refer just to financial issues, but to cultural, historical and other values held by the claimant group.

The negotiators need to be especially aware that certain of these redress instruments will almost certainly need to be managed and monitored by staff of the governance entity. In some instances the settlement may be of such a size that carrying sufficient staff in the governance entity for such purposes would be difficult if not impossible. Negotiators should not anticipate that trustees would be able to carry out the administrative functions in a post-settlement governance entity which is not big enough to employ staff. This seldom works in the long run.

Level 3: Relationships with other parties
There are a number of other redress mechanisms that do not relate to sites but which provide for stronger relationships between the claimant group and various branches of government. These include:

1. Protocols between the governance entity and various Ministers that set out how the government agency intends to exercise its functions, powers and duties in relation to specified matters within its control in the Protocol area, interact with the governance entity, and enable that entity to have input into its decision-making processes.

2. Ministers encouraging relevant local authorities to enter into a Memorandum of Understanding with the governance entity concerning the performance of the council's functions and obligations, and the exercise of its powers, in the claimant group's Area of Interest.

3. Relevant Ministers writing to bodies such as the New Zealand Historic Places Trust and Fish and Game New Zealand, encouraging them to enter into MOUs/ protocols with the governance entity concerning information exchange and matters of common interest within the area over which the relevant protocol relates.

4. Monitoring the provisions of the Resource Management Act, in which the Governance Entity will be given an opportunity to express to Ministry for the Environment their views on how the Treaty of Waitangi provisions and other relevant provisions of the RMA 1991 are being implemented in the area of interest. After the Settlement Date, the Ministry for the Environment will monitor the performance of local government in implementing those provisions in the area of interest.

5. Establishing joint advisory committees – this mechanism is used to meet claimant group interests on Crown land that is not being vested back to the governance entity. The Joint Management Committee may advise on or manage a site or area of importance to both the claimant group and the Crown, and will comprise representatives of the claimant group and the Department of Conservation.

Chapter 9

Financial and Commercial Redress

KEY POINTS

- Seek expert valuation, commercial and legal advice on all matters related to Crown properties offered, and get Crown agreement on valuation methodology
- Ensure the Crown has provided all appropriate disclosure information on redress properties before the Agreement in Principle is signed
- Don't accept a redress mechanism which is inferior to other redress for similar Treaty claims

Remember...

- 'Buyer beware' – don't be rushed; be sure you can conduct thorough due diligence for all redress properties
- Ask yourself 'Why doesn't the Crown want these properties?'
- Note that leaseback agreements can provide a reliable income stream from long-term Crown tenants
- Note that unresolved overlapping claims can greatly reduce the area of land over which the Crown is prepared to consider redress options

INTRODUCTION

The Red Book (page 87) says that "Financial redress refers to the portion of the total settlement the claimant group receives in cash, and commercial redress refers to any Crown assets, such as property, that contribute to the total redress quantum". As with all other settlement redress items, it is important for the mandated body to negotiate all substantive redress before signing the AiP. This is a specialist area and mandated bodies should seek specialist advice from commercial advisors, valuers and lawyers when negotiating these aspects of their settlement.

As with cultural redress, it is important for the mandated body to assess each redress mechanism in terms of suitability and usefulness for the wider claimant group. Do not push unnecessarily for a redress option just because other claimants got it.

FINANCIAL AND COMMERCIAL REDRESS AMOUNT

The financial and commercial redress amount is the monetary value of the settlement (not including any monetary value associated with cultural redress). This is known as the 'quantum' or 'redress amount'.

Crown determinants to redress amount

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

- the amount of land lost to the claimant group through Crown breaches of the Treaty;
- the relative seriousness of the breaches; and
- the benchmarks set by existing settlements for similar grievances.

The Crown has stated it will also take into account certain secondary factors, namely the size of the claimant group today, whether there are any overlapping claims, and any other special factors affecting the claim.

Interest on financial and commercial redress amount

Once a Deed of Settlement has been ratified and signed the Crown might pay interest on the financial and commercial

redress amount. Note that the Crown **might** pay interest. Negotiators should be aware of the precedent and carefully consider their potential loss if interest is not negotiated as part of the Deed of Settlement.

Crown properties – overview

One of the most pervasive aspects of Treaty grievances is the loss of ancestral land and the effect that loss had on the welfare of the claimant group. Consequently, negotiators are often under pressure to purchase certain Crown properties. The Deed of Settlement will set out what properties the claimant group will buy and receive, and on what terms. The market value of any property selected for transfer will be deducted from the total value of the financial and commercial redress.

Surplus Crown properties

The Crown has a 'landbank' process whereby properties the Crown deems surplus for Crown purposes have been set aside for use in settlements. Purchasing Crown properties either on or after settlement using a commercial redress instrument requires the claimant group to transfer real money to the Crown. Those properties will then be the responsibility of the post-settlement governance entity, If the expert advice is that they are too expensive or will be a commercial burden, a commercially based purchase is not recommended.

Crown properties – leaseback

In some cases the Crown may offer to sell non-surplus Crown properties to the claimant group on a leaseback basis. This means the mandated body may purchase the land but the buildings and improvements are retained by the relevant government agency which then leases back the land. Leaseback properties provide the mandated body with a reliable stream of income from long-term tenants and a potentially good return on investment.

Crown forest licensed land

All claimant groups with CFRT funding may be able to negotiate the return of Crown forest licensed land. The Crown approaches the entitlement to Crown forest licensed land on the basis of a 'threshold interest' and if the mandated body can demonstrate a threshold interest it may be provided with the opportunity to purchase land up to the value of the financial redress amount, with the possible negotiation of further purchases through the deferred selection process. Crown forest licensed land is a very valuable asset because the value of the accumulated rentals generally comes with the underlying land.

The claimant group may use part of its financial and commercial redress to buy the underlying land but not the trees or any improvements, as they are owned by the Licensee. The commercial interests of the licensee who holds the Crown licence to use the forest are protected, namely, the trees they planned to harvest and any other improvements that have been made. Conditions specific to Crown forest licensed land will need to be carried over to the new owner.

RIGHT OF FIRST REFUSAL

The Deed of Settlement may provide for the governance entity to have a Right of First Refusal (RFR) over certain Crown-owned properties based on similar terms and conditions in other recent settlements. RFRs are not available where there are unresolved overlapping interests between claimant groups. Clearly the Crown does not want to jeopardise its redress position with other claimant groups in the overlapping areas. In the event that the governance entity does not accept an RFR offer, the Crown may dispose of the property within two years but not on terms more favourable than those offered to the governance entity.

DEFERRED SELECTION PROCESS

The Deed of Settlement may also allow the governance entity to purchase Crown properties at some time after settlement. This is commonly referred to as deferred selection. The deferred selection process mechanism is first negotiated in the AiP.

RELATIVITY

The benchmarking policy for the assessment of a financial and commercial redress amount requires the Crown and mandated body to arrive at a figure that is similar in relative terms to 'like' claims that have been settled. The relativity clauses in the Ngai Tahu and Waikato-Tainui Deeds of Settlement are no longer available to claimants.

VALUATION

Crown policy is that all Crown properties are transferred at 'market value' which is determined following an agreed valuation process. It is important that the relevant valuer and commercial and legal input is provided into the methodology *before* it is agreed with the Crown. Mandated bodies are therefore encouraged to engage the services of registered valuers to provide independent valuation assessments of property assets available from the Crown for settlement. This process should commence during AiP preparation. For those sites available for transfer, the Crown will provide disclosure information to enable the mandated body to fully assess the merits or otherwise in committing part of the financial and commercial redress amount to purchase surplus Crown properties. This process is very important and will need to be completed before the Deed of Settlement is signed.

Chapter 10

Post-Settlement Governance Entity

KEY POINTS

- Read *Twenty Questions on Governance* in the Red Book and discuss them within the mandated body
- Begin discussions with Crown officials early in the negotiations and, at the same time, start scoping the post-settlement governance entity
- Use the representation that suits your iwi tikanga
- Obtain copies of governance entity constitutions similar to the options you are considering

Remember...

- The governance entity constitution sets out how representatives **must** behave – this document cannot be ratified then ignored
- If you have a mandated iwi organisation (established under the Māori Fisheries Act 2004) in place, consider whether its function be combined with the post-settlement governance entity? Does your claimant group need (and, can it *afford*) more than one Governance entity?
- You must present a proposal for your governance entity to the Crown. They must accept it before claimant group members can ratify it
- Keep claimant group members informed and consult them while developing the governance entity – they will then be more likely to 'own' it
- The governance entity must be ratified and established before settlement legislation is introduced to Parliament

INTRODUCTION

The purpose of a post-settlement governance entity is to hold and manage the settlement redress transferred to the claimant group under the Deed of Settlement. The Crown will not complete settlement until a single, overall governance entity has been legally established and ratified by the claimant group.

Developing a governance entity

In the early stages of a settlement negotiation most effort is directed towards achieving the AiP then the Deed of Settlement. However, work on a governance entity and constitution options should start during the early stages of AiP negotiations. Early in its planning the mandated body must agree when and how to share its preferred governance entity model or models with the claimant group. Claimant group members are more likely to understand and accept the proposed governance entity if they have had plenty of time to consider the options and give feedback to the mandated body. Early involvement increases the likelihood that the claimant group will buy into and accept the final governance entity proposal.

CROWN REQUIREMENTS

The Crown's key minimum requirements for a governance entity are that the governance entity must:

- adequately represent all members of the claimant group
- have transparent decision-making procedures
- have transparent dispute resolution procedures

- be fully accountable to the whole claimant group
- ensure the beneficiaries of the settlement and the beneficiaries of the governance entity (the claimant group) are identical when settlement redress is transferred from the Crown, and
- be ratified by the claimant group.

DEED OF SETTLEMENT REQUIREMENTS

Key Crown requirements are typically restated in the Deed of Settlement. The Deed will provide that the Crown must be satisfied the governance entity will:

- be appropriate to receive the settlement redress,
- have a structure that provides for claimant group representation, transparent decision-making processes, transparent dispute resolution processes, accountability to claimant group members, and:
- have been ratified by the claimant group (by a process agreed in writing by the mandated body and the Crown) as appropriate to receive the redress provided under the Deed of Settlement.

Post-settlement governance entity options

In the past the Crown accepted a range of legal entities as post-settlement governance entities, including common law trust, statutory body, Ahu Whenua Trust under Te Ture Whenua Māori Land Act 1993, and charitable trust and whānau trust, under Te Ture Whenua Māori Land Act 1993.

Under current Crown policy not all the above entities are now suitable. The most common form of entity, a common law trust, is the most acceptable to the Crown. However, the mandated body should not feel constrained by this and may wish to investigate other entity models such as cooperative companies or statutory bodies.

In two instances the Crown accepted statutory bodies as post-settlement governance entities. Te Rūnanga o Ngāi Tahu and Te Runanga o Ngati Awa were established by their own Acts of Parliament which also effected the replacement of a prior Māori (statutory) Trust Board. In both cases the mandated bodies sought to establish their entity by private legislation. This option is costly and complex and not favoured by the Crown.

Chapter 11

Ratification

KEY POINTS

- Begin developing your register of members immediately your Deed of Mandate is recognised by Ministers (if you have not already begun registrations)
- Discuss the ratification process with Crown officials and ensure they endorse the plan (there is no point having a ratification the Crown will not recognise)
- Plan a ratification ballot for the Deed of Settlement and post-settlement governance entity at the same time – it saves time, labour and money (have two distinct voting papers)
- Prepare a Ratification Booklet summarising the proposed settlement and/or post-settlement governance entity – discuss this with Crown officials
- Hold a series of hui both in and outside the rohe to explain the Deed of Settlement and governance entity, and give members a chance to ask questions and give feedback
- Use an independent returning officer to conduct the ballot and count the votes

Remember...

- 'Having Crown observers at hui protects the mandated body from unjust accusations the mandated body did not use a fair process (Crown observers keep the mandated body honest too)
- A high 'yes' vote from the claimant group is more likely if the mandated body has had effective and open communications with members from the start (no surprises)
- Taking short cuts on the ratification process may take you straight to the High Court or Waitangi Tribunal.

INTRODUCTION

Before settlement can be completed the claimant group must ratify the initialled Deed of Settlement and the proposed governance entity that will receive and manage the settlement assets. These two stages used to be ratified at different times but recently some mandated bodies have completed them at the same time. It is a critical step in the settlement process. The Crown will not sign the Deed of Settlement if they find that the processes are inadequate or provide an insufficient level of support for settlement.

RATIFICATION WORK PLAN

As with all key settlement stages the mandated body should prepare a ratification work plan, ensuring that sufficient time is set aside for the process. The plan should start six to nine months before the estimated Deed of Settlement signing date so the plan will be confirmed and ready to go well in advance of the actual voting. The Crown must review and agree to the proposed ratification work plan. If the plan does not have Crown approval, there is no point in the mandated body implementing it.

CLAIMANT GROUP REGISTER

A key requirement of the Crown is that all eligible claimant group members must be able to exercise a postal vote. Too often, little attention is paid to setting up and maintaining the claimant group register at the early stage of negotiations. Only members of the claimant group are eligible to have their names on the register. Eligibility is of fundamental importance to the robustness and accuracy of a register for registration purposes. If the register holds the names of ineligible claimant group members, the validity of any postal vote can be called into question.

The Privacy Act 1993 applies to the collection and storage of personal information held in registers and contact databases. Therefore, a 'Privacy Act' clause must be included in the application form. After ratification the governance entity will own and manage the claimant group register. To ensure it does not have to replicate the registration process the application form should include a clause which specifically allows the applicant's personal information to be transferred to the governance entity once the role of the mandated body concludes.

RATIFICATION BOOKLET

Part of the ratification process includes sending eligible registered members a ratification pack containing a ratification booklet and postal voting form. The booklet summarises the proposed settlement (and/or governance entity). The ratification booklet should not be too detailed or peppered with lengthy Deed of Settlement specific terms. On the other hand it needs enough detail to inform eligible claimant group members.

Office of Treaty Settlements and Te Puni Kōkiri officials will want to view, comment on and sign off the ratification booklet before it is sent to eligible claimant group members. This is to ensure it accurately reflects the intent and content of key elements of the Deed of Settlement.

RATIFICATION HUI

The purpose of ratification hui is to explain the Deed of Settlement/post-settlement governance entity. It is important that the mandated body hold hui both inside and outside the traditional rohe. Hui are usually held mid-way through the ratification process after claimant group members have had time to receive and consider the ratification booklet.

As with the Deed of Mandate, the Crown will want observers (usually from Te Puni Kōkiri) at the ratification hui. They are particularly interested in numbers attending, issues raised and the discussion. Keep in mind that Ministers will be reluctant to move forward if different factions claim different outcomes from the hui.

POSTAL BALLOT AND INDEPENDENT RETURNING OFFICER

The Crown's basic principle in relation to ratification is that all adult members of the claimant group must have an opportunity to consider the issues and have their say. The Crown considers that a postal ballot is the most effective way of reaching the maximum number of members and recording their will, and that the vote should be taken and counted by an independent returning officer.

CROWN APPROVAL OF RATIFICATION

Office of Treaty Settlements and Te Puni Kōkiri officials monitor and observe the hui and ratification processes the mandated body conducts. If the processes are inadequate or there is insufficient support for settlement, the Crown will not sign the Deed of Settlement.

Once ratification is complete, officials from the Office of Treaty Settlements and Te Puni Kōkiri each write a report and make a recommendation to their respective Minister about the adequacy of the ratification process and whether the results show a sufficient level of support within the claimant group.

The Crown always maintains discretion to accept an outcome or not. However, levels of support for ratification for past settlements are on the public record. The Office of Treaty Settlements may provide these results to the claimant group in advance of ratification so they get a sense of what the likely threshold of an acceptable result will be.

Chapter 12

Settlement Legislation

To complete settlement, legislation must be drafted, introduced and passed by Parliament. In a typical Deed of Settlement, the Crown undertakes to introduce settlement legislation into Parliament within a certain period once:

- the Crown is satisfied the mandated body has established a post-settlement governance entity
- the claimant group has ratified the Deed of Settlement and governance entity, and
- the governance entity has signed a Deed of Covenant undertaking to comply with the terms of the Deed of Settlement.

All matters to be implemented by settlement legislation must be included in the Deed of Settlement. A common phrase in the Deed of Settlement is '*The Settlement Legislation will provide that…*'

Crown flexibility on settlement legislation
The Crown is willing, in limited circumstances, to agree to settlement legislation wider than the Deed of Settlement if it will assist the claimant group overall. This is a positive initiative. Nevertheless, the mandated body will need to seek such provisions if it wants them in the Settlement Bill.

Participation in drafting the Settlement Bill
The Deed of Settlement will give a date by which settlement legislation must be drafted and introduced into Parliament, typically six to nine months. The mandated body must be involved in drafting, agreeing to and signing off the settlement legislation before it is introduced into Parliament. Experience shows there is a risk of gains and benefits agreed to in the Deed of Settlement being diluted or even changed during legislative drafting. Accordingly the mandated body should ensure that the Deed of Settlement ensures they can be closely involved in the drafting process. The mandated body and the Crown should agree a timeframe for passing the settlement legislation.

Select committee process
One of the most gruelling and demanding processes for the mandated body towards the end of the settlement is the Parliamentary Select Committee. Once the settlement legislation (Settlement Bill) has been introduced and passed its first reading it is referred to the relevant select committee; for a Settlement Bill, this is the Māori Affairs Select Committee. The select committee formally calls for and receives submissions on the Settlement Bill and reports back to Parliament.

The Deed of Settlement includes a provision that the claimant group must support the settlement legislation once it is introduced to Parliament. In practice this means that the governance entity and/or mandated body and the Crown, through Office of Treaty Settlements, work closely together during the entire select committee process. This is very important; in many ways the select committee is the last opportunity for those opposed to the settlement to express their views.

Binding Deed of Settlement versus select committee powers
The Settlement Bill must reflect the agreement reached in the Deed of Settlement between the Crown and the claimant group (signed by the mandated body or the post-settlement governance entity). This limits the degree to which the select committee can change the effect of the Settlement Bill if such changes impact on the effect of the Deed of Settlement.

Chapter 13

Settlement Implementation

Settlement implementation requires the mandated body to set out a detailed plan on what they need to do leading up to and immediately following settlement. The nature and scope of what is required will vary depending on the specific settlement negotiated and recorded in the Deed of Settlement and/or settlement legislation.

Settlement legislation is not introduced to Parliament until the governance entity has been established so there is plenty of time before settlement to draft a settlement implementation plan. It is likely that there will be an interim or establishment period where representatives of the mandated body ensure the settlement is implemented in a seamless manner. For this reason, it makes sense to have continuity of representation during the 'implementation' period.

It is vital that the interim representatives who hold office to implement the settlement restrict their actions to doing just that. They must not act in a further capacity unless the ratification process for the governance entity has specifically authorised that action.

ACTIONS TO COMPLETE SETTLEMENT

Settlement implementation is about putting in place what has already been agreed. It makes sense for the governance entity to work with the Crown on what is to be done, where, when, how and by whom. Office of Treaty Settlements' monitoring role includes providing all relevant government agencies and the governance entity with a Crown implementation plan. The plan:

- details all the tasks required to satisfy the obligations falling out of the Deed of Settlement and settlement legislation, and
- includes for example, contact names, addresses and phone numbers, identifies tasks, the responsible party and any third parties and the timing or date of task completion.

As part of the overall settlement implementation plan the governance entity should ensure it has a 'final sign off' process in place to enable it to satisfy itself that all specific matters agreed in the Deed of Settlement and/or settlement legislation are delivered by the Crown.

ONGOING DEED OF SETTLEMENT COMPLIANCE

Once ratified and signed the Deed of Settlement is binding between the Crown and the governance entity on behalf of the claimant group. On the settlement date, cash, certain commercial properties and probably certain cultural properties will transfer from the Crown to the governance entity. After those transfers the Crown will have discharged its obligation to the governance entity in respect of those components.

The Deed of Settlement also contains components of settlement redress that establish an ongoing direct or indirect relationship between the Crown and the governance entity. As discussed earlier, they may include (direct) protocols and (indirect) statutory acknowledgements. Leading into and following settlement, the governance entity needs internal plans, policies and personnel in place to deal with this ongoing relationship.

The Deed of Settlement was the result of an intensive, time consuming and costly negotiations process. It is incumbent on the governance entity to ensure the settlement redress maintains its mana in the future.


Ngā Kaitiaki Rēti Ngahere Karauna
Crown Forestry Rental Trust