



The Negotiations Process

The Negotiations Process

2

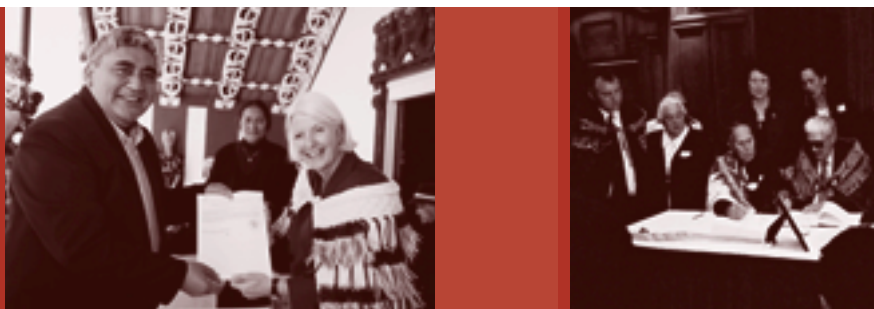




The Negotiations Process

THIS PART:

- provides an overview of the four steps in the negotiations process including the key decision points for claimant groups and the Crown
- outlines the process followed by the Waitangi Tribunal and its relationship to negotiations with the Crown
- explains each of the four steps in more detail



Overview

Overview of the Negotiations Process

The four steps of the negotiations process

Each negotiation with a claimant group is different because that group has different claims and interests. However, the negotiation of historical Treaty claims usually involves four steps. They are:

Step 1 – Preparing claims for negotiations

- agreement by the Crown and the claimant group to negotiate. This involves the Crown accepting that there is a well-founded grievance, and the claimant group meeting the Crown’s preference for negotiating with large natural groupings (see page 44)
- the mandate of the claimant group representatives (including agreement on the claims to be negotiated) is conferred by the claimant group and then recognised by the Crown. The mandated representatives may conduct the negotiations themselves, or appoint negotiators to do so. We use “mandated representatives” in the rest of this summary to cover both situations, and

- processes are put in place for mandated representatives to consult with claimant group members on settlement issues and develop a register of members (continues up to ratification).

Step 2 – Pre-negotiations

- Terms of Negotiation are developed and signed, setting out the basis upon which negotiations will take place
- relevant Ministers approve the funding available to mandated representatives on behalf of the claimant group as a contribution to the cost of negotiations, and
- the claimant group identify the areas or sites and Crown assets in which they are interested in seeking redress and the types of redress they think are appropriate in relation to those sites or areas.



Figure 2.1: four main steps of negotiations between a claimant group and the Crown

Step 3 – Negotiations

- formal negotiations begin. This involves the mandated representatives continuing to consult with members of the claimant group on settlement issues and, where relevant, seek their views on a governance structure for managing settlement assets
- after sufficient progress in negotiations, the Minister for Treaty of Waitangi Negotiations sends a letter to the mandated representatives outlining parameters of the Crown offer, including quantum (the total monetary value of the financial and commercial redress to be provided by the Crown, see page 88) and seeking an Agreement in Principle from the claimant group to the Crown offer
- alternatively, the Crown and mandated representatives can seek a more formal agreement. This is known as a Heads of Agreement, a document that outlines a Crown settlement offer in more detail than an Agreement in Principle. Both an Agreement in Principle and a Heads of Agreement are non-binding on the Crown and the claimant group, and
- usually (and certainly when requested to do so), the Minister presents an outline of the Agreement in Principle or Heads of Agreement to claimant group members, including kuia and kaumātua, several weeks before it is signed.

Once the Agreement in Principle or the Heads of Agreement has been signed by the Crown and mandated representatives, then:

- work begins on the detail of a draft Deed of Settlement. This is the final Crown offer to the claimant group for the settlement of their historical grievances, and will reflect the agreements made in the Agreement in Principle or Heads of Agreement
- where relevant, the mandated representatives continue to seek the claimant group's views on a governance structure for managing settlement assets
- the claimant group's mandated representatives continue to update the register of claimant group members

- mandated representatives approve and initial a complete Deed of Settlement (initialling indicates to the wider claimant group that their mandated representatives believe the Crown's final offer should be accepted), and
- the Crown reviews the proposed governance entity to ensure it is representative, accountable and transparent.

Step 4 – Ratification and implementation

- the mandated representatives engage in an extensive communication process on the initialled Deed of Settlement and (if not done later) the proposed governance entity by, for example, publishing summary information and holding communication hui

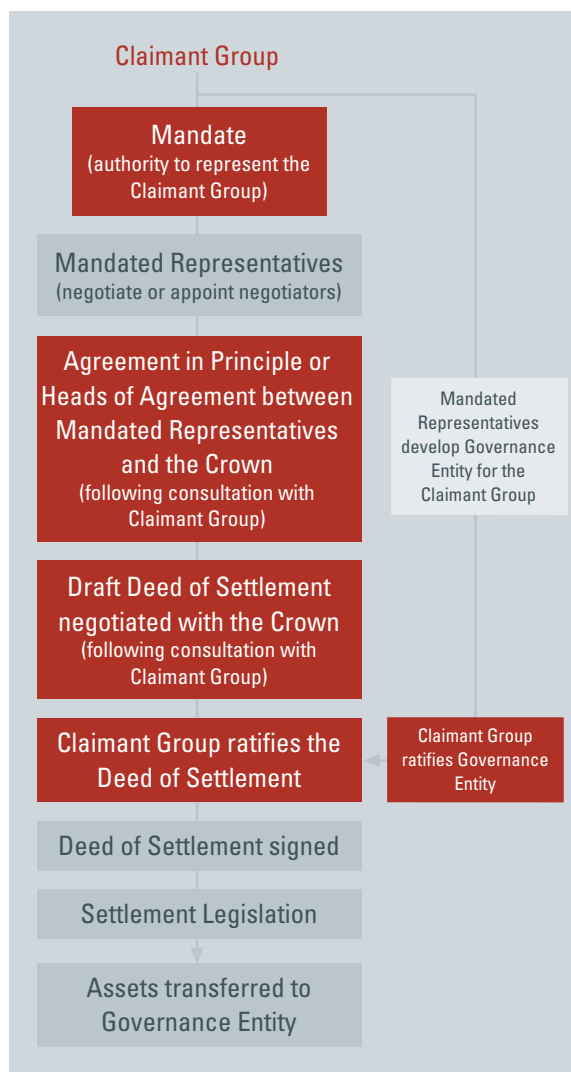


Figure 2.2: key decision points for claimant groups

- the mandated representatives hold a postal ballot of claimant group members on the initialled Deed of Settlement
- the mandated representatives will also hold a postal ballot of claimant group members on the proposed governance entity at this point or at a later date
- if a sufficient majority of claimant group members has ratified the settlement, their mandated representatives, as authorised through the ratification process, sign the Deed of Settlement, which is binding and subject only to the establishment of the governance entity and the passage of legislation to give effect to the settlement
- once the governance entity is ratified by the claimant group and established, the Crown introduces enacting legislation for the settlement, and
- following the legislation, both the Crown and claimants implement the agreements in the Deed, including the transfer of settlement assets and cultural redress.

Key decision points for claimant groups and the Crown

The diagram to the left shows the key points where the **whole claimant group** must be involved in decisions about the settlement of their claims. While the mandated representatives will consult and communicate with the wider claimant group throughout the negotiations process, there are some key points in the process where the whole claimant group should be involved. These are:

- mandating representatives for negotiations
- being consulted in the development of the settlement package, including the Agreement in Principle or Heads of Agreement, and draft Deed of Settlement
- approving the Deed of Settlement, and
- approving the claimant group’s proposed governance entity for the transfer of settlement assets.

The diagram to the right shows the key decision points and decision makers for the Crown during the various steps of negotiations.

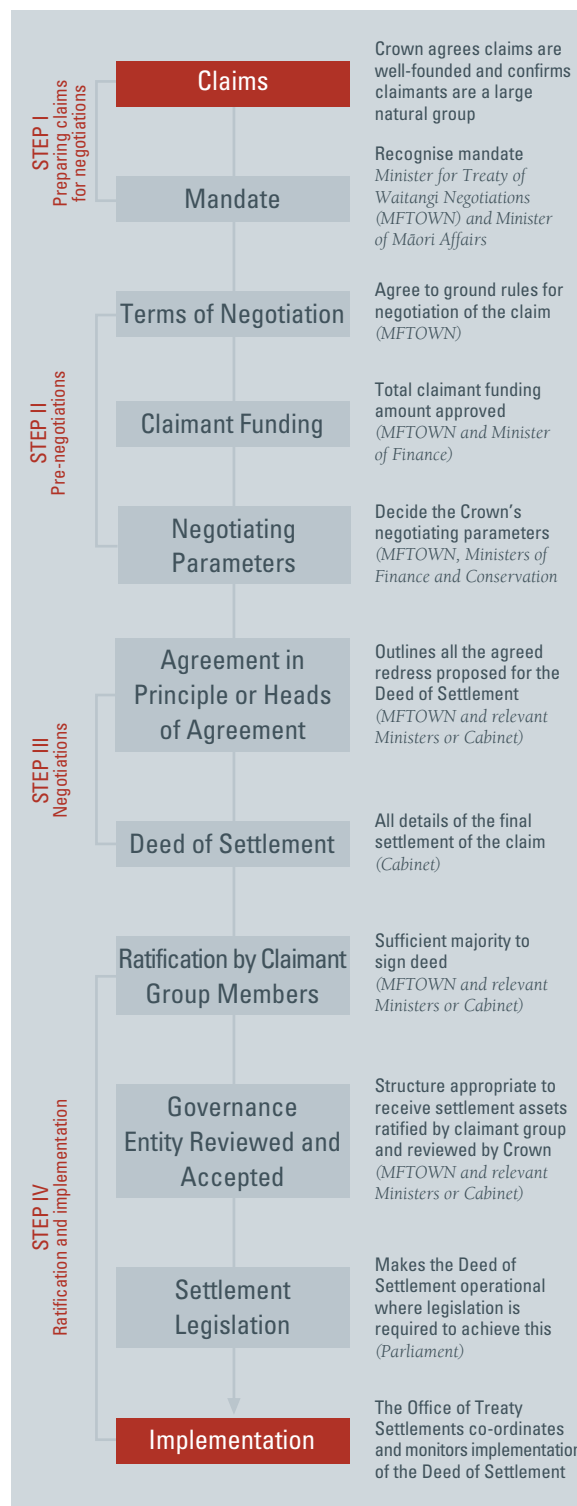


Figure 2.3: key decision points for the Crown

Tribunal

Negotiations and the Waitangi Tribunal process

Claimant groups first need to register their claims with the Waitangi Tribunal

Prior to a full explanation of the negotiations process between the Crown and claimant groups, some comments need to be made about the relationship between such negotiations and the Waitangi Tribunal's claims process.

Under the Treaty of Waitangi Act 1975, any Māori may make a claim to the Waitangi Tribunal. It is not necessary to have a mandate for making a claim. Claims need to be registered with the Waitangi Tribunal before the Tribunal can begin an inquiry or the Crown can begin negotiating with a claimant group. Once a claim is registered, claimant groups can seek negotiations with the Crown straight away, or may choose instead to have their claims heard by the Tribunal before entering negotiations. If a claimant group wants to enter into negotiations they must cease actively pursuing their claim or claims before the Tribunal. The Crown also requires claimant groups to forgo other avenues of redress such as a remedies hearing by the Tribunal or action in the High Court. This is to ensure that negotiations are conducted in good faith and both parties have a strong incentive to reach an agreement.

While any Māori may make a claim to the Waitangi Tribunal and it is not necessary to have a mandate to make a claim, in seeking a comprehensive, fair and durable settlement for all the historical grievances of a claimant group, the Crown seeks negotiations with mandated representatives and strongly prefers to negotiate with large natural groupings. In recent years, overlapping claimant groups and dissenters within claimant groups have tried to halt the work of mandated representatives by appeals to the Waitangi Tribunal or the High Court. Both the Tribunal and the Courts have been reluctant to allow these appeals where the mandated representatives

and the Crown can demonstrate that robust processes have been used to address mandate or overlapping claims issues. Any decision to complete the Tribunal process prior to seeking negotiations on a settlement with the Crown is a matter for the claimant group alone. It should be noted, however, that a completed Tribunal report may be helpful to the successful completion of a settlement with the Crown if a claimant group must also address significant overlapping claims from other groups.

Taking a claim through the Waitangi Tribunal

If claimants choose to pursue their claim through the Waitangi Tribunal, or to go back to the Waitangi Tribunal, the process would move through the following steps:

- research may be funded by the Tribunal or Crown Forestry Rental Trust according to priorities set by the Tribunal. Claims are usually grouped into District Inquiries and a “casebook” of evidence is put together from all the research for the registered claims in a District as a basis for the hearing
- the Tribunal then holds interlocutory conferences prior to hearings to identify issues of difference between the Crown and claimant groups and to facilitate resolution of mandate and overlapping claim issues
- a Tribunal hearing—this usually takes the form of a series of six to ten weeks of hearings spaced out over a period of up to 12 months for a single or multiple claimant groups, usually on their marae. Once claimants' and Tribunal evidence is completed, Crown evidence is then heard before all parties present closing submissions, and
- a Tribunal report is then drafted and completed (within six months to one year) and sets out whether or not the claims are well-founded. If the claims are well-founded, it may recommend that the claimants and Crown negotiate a settlement on the basis of the findings. It may go further and make general or specific recommendations, including how relief might be provided.

The process, from the start of research to the completion of a report, should take between three and four years.

Sometimes, as a result of problems in negotiations or for other reasons, claimant groups may choose to go back to the Tribunal for a remedies hearing. This is usually where claimant groups have a choice to utilise the Tribunal’s power to make binding orders with respect to State-Owned Enterprise land that has a resumptive memorial on its title, or to licensed Crown forest land. In this process, the Tribunal can make recommendations in the form of interim orders over the land, which, if no alternative is negotiated, become orders that bind the Crown after a period of 90 days. In the case of licensed Crown forest land, the order can include monetary compensation.

Apart from orders for the resumption of land, the Tribunal’s recommendations are not binding on the Crown. However, the government always considers any recommendations carefully.

How do the Waitangi Tribunal process and the negotiations process relate to each other?

Figure 2.4 below shows the two processes side by side:



Figure 2.4: comparison of the negotiations process and the Waitangi Tribunal process (more detail on resumption is given on pages 155-156).

How long does each process – negotiations or the Tribunal – take?

This will depend very much on the circumstances of the claims. The full Tribunal process from lodging a claim to recommendations for resumption can take several years. Until recently, settlement negotiations have generally taken several years rather than months to resolve. However, the completion of a large body of research into land confiscations, Crown purchases prior to 1865 and the operation of the Native Land Court means the Crown now has a good understanding of the types of land-based historical claims and the amount of land lost by Māori in every region of the country. The Crown and claimant groups have also developed a wide range of possible redress options, so less detailed work in this area is now required. An outline of an agreement between the Crown and a claimant group can now be registered in an Agreement in Principle rather than a more detailed Heads of Agreement. These developments should see a decrease in the time it takes to negotiate settlements.

Similarly, the Tribunal's use of interlocutory conferences before hearings begin, the casebook method in the hearing process and the use of report writers in casebook inquiries have decreased the time required to hear and report on claims. Further innovations in this area by the Tribunal, such as the regional approach to hearings trialed in Poverty Bay in 2001 and 2002, have also streamlined the claims process. Claimants should talk to both OTS and the Tribunal about likely time-lines for their particular claims.

Step One

Preparing claims for negotiations



Figure 2.5: step I – preparing claims for negotiations

Preparing claims for negotiations involves:

- the claimant group providing the Crown with sufficient research to show that they have been harmed by Crown actions or omissions in breach of the Treaty of Waitangi and its principles
- the Crown accepting that it breached its obligations under the Treaty of Waitangi and its principles
- the Crown assessing whether the claimant group and the claims to be settled meet the criteria for comprehensive negotiations with a large natural group
- representatives of the claimant group obtaining a mandate from the claimant group to negotiate the claims, and
- the Crown assessing the mandate and deciding whether to recognise it.

Starting out

As noted previously, a claimant group wishing to enter negotiations must have a claim registered with the Waitangi Tribunal. Claimants initiate the settlement process for their historical claims by approaching either OTS or the Minister for Treaty of Waitangi Negotiations to begin negotiations.

Types of claim and Crown readiness to negotiate

Types of claim

Most historical Treaty claims involve one or more of the following types of land loss:

- purchases of Māori land by the Crown before 1865, including pre-Treaty purchases later investigated and validated (“Old Land Claims”), Crown purchases, and post-Treaty private purchases made during the Crown’s waiver of its pre-emptive right to purchase Māori land
- confiscation of Māori land by the Crown under the New Zealand Settlements Act 1863, and/or
- transactions after 1865 under the various Native land laws.

The Waitangi Tribunal, the Crown Forestry Rental Trust (see pages 20-21), claimants and the Crown have now done a great deal of historical research into these three types of claim. In particular, the Waitangi Tribunal’s Ngāi Tahu and Muriwhenua reports dealt with purchases before 1865, the Taranaki and the Ngāti Awa reports considered confiscation, and the Rangahaua Whānui National Overview Report summarised research on dealings in the Native Land Court, along with many other matters affecting the alienation of Māori land.

As a result of this and other research, the Crown now has a good understanding of the types of land-based historical claims in every area of the country and the amount of land that was lost by Māori. The Crown accepts that confiscating land after the warfare of the 1860s in Taranaki, Waikato and the Bay of Plenty was an injustice, and was in breach of the Treaty of Waitangi and its principles. Similar acknowledgements are likely to be appropriate in other districts where there have been confiscations (raupatu). The Crown also acknowledges that Crown purchases prior to 1865 had a widespread and enduring impact on Māori society, as did the operations of the Native land laws after 1865.

Crown readiness to negotiate

Because the Crown acknowledges that widespread breaches of the Treaty and its principles are likely to have occurred, it is willing, if claimant groups wish, to negotiate settlements of claims that include purchases before 1865, confiscation, and the operation and impact of the Native land laws after 1865. Claimants who want to negotiate to settle such claims do not need to go through Waitangi Tribunal hearings or provide detailed research on each and every Crown action or omission that they consider breached the Treaty and its principles. However, they do need to show the link between the Crown's acts or omissions and the harm to their tūpuna (ancestors).

For most claims involving large natural groups, the Crown expects that the Waitangi Tribunal's Rangahaua Whānui series, and research already completed by the Tribunal, the Crown Forestry Rental Trust, the Crown and/or claimants will provide a sufficient basis to begin negotiations. Because the Rangahaua Whānui reports are of a general and regional nature, further historical research is likely to be required in some areas to identify, at least at a broad level, which group was harmed. Claimants should also note that a Tribunal report may be useful where there are significant issues arising from overlapping claims with other groups.

Relationship between type of Treaty breach and redress

While the Crown is prepared to enter negotiations with claimant groups who suffered from breaches of the Treaty and its principles relating to any of the three main types of land alienation, it does not accept that the same amount of redress should be available in each case. Although the impact of land loss on Māori society was often similar regardless of the way land was lost, the culpability (extent to which a party is wrong or to blame) of the Crown does differ from case to case. The Crown believes that the seriousness of each type of breach is different and redress should reflect that, but this is a matter for discussion during the negotiations.

Assessing the research

OTS, with assistance from the Crown Law Office, assesses research on historical claims submitted to the Crown for the purpose of negotiations. This may include reports by the Waitangi Tribunal or research undertaken at the Tribunal's request.

So that a proper assessment can be made, the research should clearly set out the grievances and provide historical evidence to support them. It should be based on a broad and sufficient use of primary and secondary sources, including oral sources if appropriate, and show a good understanding of the historical context of the situation on which the claims are based. The Crown also requires research to be logically set out, written in an objective manner and to include references.

Need for extra research

During negotiations, the Crown and claimant negotiators may need to agree whether particular breaches of the Treaty and its principles occurred – for example, if the claimants want the Crown to apologise for a particular action. If the Crown does not initially accept that there has been a breach in that case, it will discuss its reasons with claimants. It may be that more research or analysis needs to be done. Extra research may also be needed on specific issues arising from a claim, for example, to find out whether more than one group is making claims over the same area or a particular site – what are known as *overlapping claims* or *cross-claims*. (In Waitangi Tribunal proceedings “overlapping” is used for minor overlaps and “opposing” is used for a high degree of overlap). How overlapping claims can be addressed

is discussed on pages 58-60. In any event, negotiations on cultural redress will be assisted by any research or information on a claimant group’s associations with a particular site.

Help with research

OTS does not directly help claimant groups with research, but can give advice on where more research is needed. The Waitangi Tribunal can also provide information about how to carry out research.

Any claimant funding provided by OTS is intended for the purpose of negotiations only and not for reimbursing research costs. However, if the claim involves licensed Crown forest land, a claimant group may be eligible for funding assistance from the Crown Forestry Rental Trust.

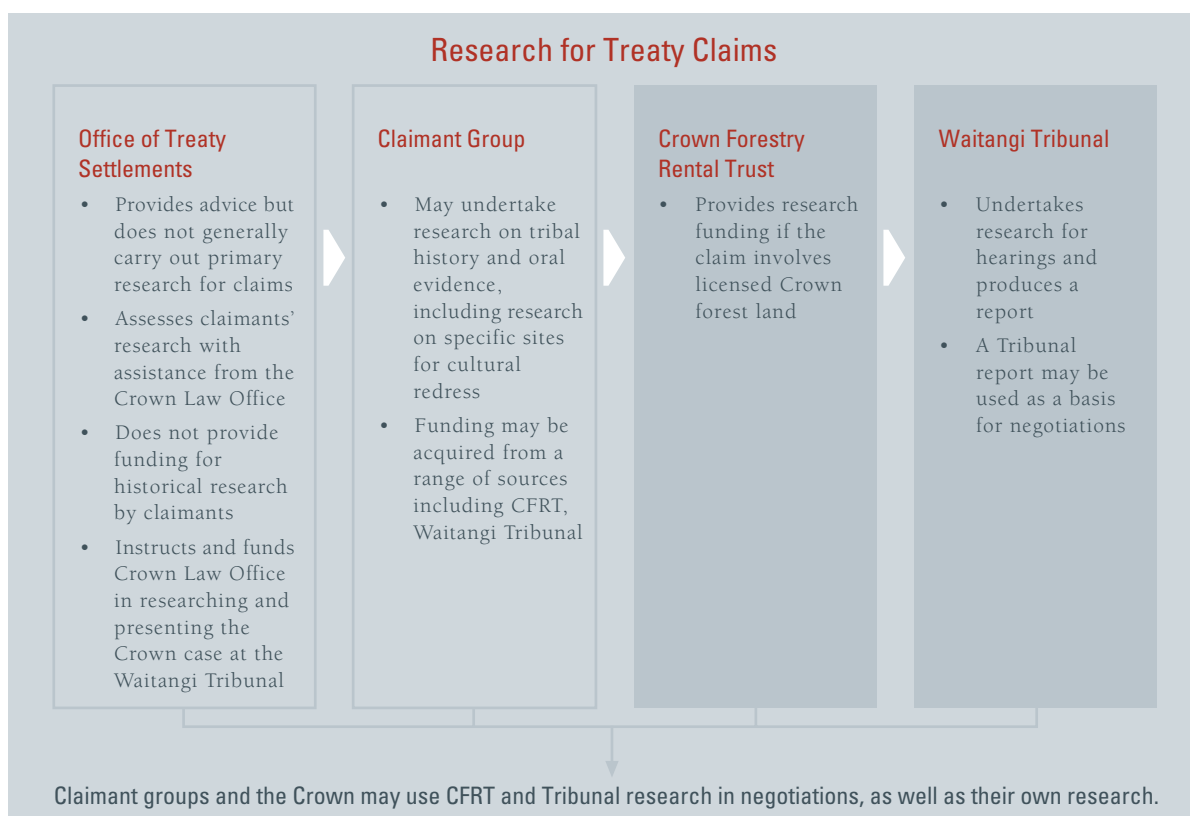


Figure 2.6: research for Treaty claims

Comprehensive negotiations

So that it can be sure that it has properly addressed all the historical claims of a claimant group, the Crown strongly prefers to negotiate settlements of all the historical claims (claims relating to acts or omissions by the Crown prior to 21 September 1992) of a claimant group at the same time. That is what is meant by *comprehensive* negotiations.

A key objective of negotiations for Treaty settlements is to help set right the grievances that claimant groups have about historical Crown actions. It is in the interests of both the Crown and claimant groups for this to be done as effectively and efficiently as possible. It therefore makes sense for settlements to be comprehensive, providing redress for all the wrongs done to a claimant group. Settlements made “bit by bit” over a long time-span would risk leaving the sense of wrong to linger, and might never achieve a sense of final resolution. Comprehensive settlements also reduce the costs and time involved in negotiations and implementation for both the Crown and claimant groups.

Negotiations with large natural groups

The Crown strongly prefers to negotiate settlements with large natural groups of tribal interests, rather than with individual hapū or whānau within a tribe. This makes the process of settlement easier to manage and work through, and helps deal with overlapping interests. The costs of negotiations are also reduced for both the Crown and claimants.

Comprehensive negotiations with large natural groups also allow the Crown and mandated representatives to work out a settlement package that includes a wide range of *redress*. Redress is the term we use for all the ways the Crown can make amends for the wrongs it has done. For instance, many of the Statutory Instruments available for cultural redress (see Part 3) are only workable and cost-effective for large natural groupings. Having a wide range of redress means that the settlement is more likely to be lasting because it meets a greater number of needs.

Attempts to have the Waitangi Tribunal or the High Court reject the Crown’s preference for negotiating settlements with large natural groupings and endorse negotiations with specific hapū and whānau have not been upheld by either body. In its Pakakohi and Tangahoe Settlement Claims Report 2000 (page 65), the Waitangi Tribunal says of the Crown’s preference for dealing with large natural groupings, that “this is an approach with which we have considerable sympathy. There appear to us to be sound practical and policy reasons for settling at iwi or hapū aggregation level where that is at all possible.”

Hapū or whānau interests

In some circumstances, it may be possible to deal with distinct hapū or whānau interests that are separate from the main tribal claims within a settlement. Distinct recognition for these groups can be part of a wider settlement package. This has been done in the Ngati Ruanui settlement, for example, see page 66.

Mandating for negotiations

What is mandating?

Mandating is the process by which the claimant group chooses representatives and gives them the authority to enter into discussions and agreements with the Crown on their behalf. In some cases, the claimant group may confirm the mandate of an existing representative organisation, for example, their iwi rūnanga. This mandate then gives the existing representatives the authority to appoint negotiators on behalf of the claimant group.

Mandating claimant representatives to negotiate is one of the most important stages in the Treaty settlement process. Many of the grievances of the past relate to agreements made between Māori and the Crown, where the Crown dealt with people who did not have the authority to make agreements on behalf of the affected community. A strong mandate protects all the parties to the settlement process: the Crown, the mandated representatives and the claimant group that is represented.

Mandated representatives need to demonstrate that they represent the claimant group, and the claimant group needs to feel assured that the representatives legitimately gained the right to represent them. This can only be achieved through a process that is fair and open.

The mandating process will usually involve a series of hui that allow members of the claimant group to express their views about who should represent them in negotiations with the Crown. These hui will need to be advertised widely so as many members of the claimant group as possible have the opportunity to participate. These discussions may be supplemented by pānui or newsletters that clearly explain the mandate being sought and the issues involved. These can be distributed to those on the register of members of the claimant group. Finally, a postal ballot of claimant group members may be carried out to assist in the choice of who should represent the claimant group. Those finally chosen as mandated representatives will also have a responsibility to keep claimant group members informed of progress throughout negotiations with the Crown.

To ensure that as many members of the claimant group are given a reasonable opportunity to take part in the mandating process, it is important that the process and any associated hui are well publicised. For this reason it may also be necessary to hold mandating hui outside the claimant group's rohe. There should be reasonable public notice before each hui and it is recommended that at least one public notice is published at least three weeks before each hui. The notice should state clearly that a mandate for negotiations is being sought. Such notices should also be placed in newspapers in Auckland and Wellington or in other locations where large numbers of the claimant group may live. The fullest possible participation by members of a claimant group at an early stage in the settlement process can reduce the possibility of delays to the completion of a settlement.

As in every community, there is often opposition from groups or individuals who reject those claiming to represent them. Sometimes opposing groups or

individuals may refuse to participate in the subsequent negotiations. Once mandated, the representatives should make clear that those individuals or groups have the opportunity to participate in the settlement process at any stage.

In its Pakakohi and Tangahoe Settlement Claims Report 2000 (page 65), the Waitangi Tribunal endorsed Ngati Ruanui's approach to mandating and described the process used by the Ngati Ruanui Working Party as a "bottom-up" approach. The Tribunal stated: "we consider as a general principle that a conjoint marae and hapū approach to mandating as adopted by the working party for its particular circumstances is fundamentally sound".

The choice of mandated representatives is a matter for the claimant group

It is for the claimant group to decide who will represent them and to determine an appropriate way to select their representatives. The Crown does not wish to interfere in matters of tikanga (custom), but the Crown does need assurance that the mandate is secure before starting negotiations. That is because mandating is central to the durability of settlements and because public funds are involved in the settlement process. Therefore, some procedures for recording decisions and communicating with members of the claimant group may have to be adapted to provide sufficient evidence that the representatives have gained the necessary authority.

As noted earlier, the mandated representatives may be a body or a group of individuals. In either case, they will be referred to in this Guide as the claimant group's *mandated representatives*. Sometimes the mandated representatives may also be the negotiators but in other cases their role, once authorised, may be to appoint others to negotiate. Such negotiators must act within the instructions given by the mandated representatives and regularly report back to them. To ensure the widest possible representation of a claimant group during negotiations and to achieve durable settlements, claimant groups may also consider members who live outside the rohe as possible mandated representatives and/or negotiators.

Mandate is for negotiations only

Claimant groups may be concerned that in mandating representatives for negotiations they are also handing over control and management of settlement assets. This is not the case. A mandate to negotiate only gives the mandated representatives the authority to negotiate a draft Deed of Settlement. All members of the claimant group must then have a say on whether the Deed is accepted or not. Similarly, it should not be assumed that mandated representatives will, as of right, play a primary role in the administration of settlement assets. Control over settlement assets is known as post-settlement governance and involves setting up a legal entity for this purpose. As with the final Deed of Settlement, the governance entity is subject to ratification by the claimant group. The key decision points in the settlement process that require claimant group participation are shown in the diagram on page 36 and more detail about governance entities is on pages 71-77.

Importance of seeking early advice from OTS and Te Puni Kōkiri

Obtaining a strong mandate that the Crown can recognise can be a demanding process. Different groups will need to take different approaches (this is why a “real life” example is not included in this Guide), but OTS can give claimant groups examples of processes that have worked so far, and explain in more detail the specific requirements for a Deed of Mandate. OTS strongly advises any group wanting to obtain a formal mandate for negotiations to consult with the OTS Claims Development Team **before**

starting the mandating process. They should also seek advice from TPK.

Mandate recognition process

The Crown has developed a formal procedure to verify that:

- the Crown is dealing with the right claimant group representatives
- the representatives are properly mandated to negotiate an offer for the settlement of the claimant group’s historical Treaty claims
- the mandated representatives have a process in place to ensure they are accountable, and
- the mandated representatives have developed a process to identify as many claimant group members as possible – this usually involves establishing, if they have not already done so, a register of members.

Once the Crown is satisfied that the people seeking to represent the claimant group have provided sufficient evidence to verify the above information, it can recognise the representatives’ mandate to negotiate on behalf of the claimant group.

Confirming that the mandating process is fair and open

One way to ensure that the members of the claimant group see the mandating process as fair and open is to appoint neutral observers to witness the process. Te Puni Kōkiri, the Crown’s principal adviser on relationships with Māori, performs this role. Contact details for Te Puni Kōkiri are on page 169.



Figure 2.7: links between negotiators and the groups they represent

What is a Deed of Mandate?

The key document in the mandate recognition process is the *Deed of Mandate*. This is a formal statement prepared by the claimant group, which outlines information on what the mandate covers and how the claimant group approved it (a checklist of what must be included in the Deed of Mandate can be found on page 50).

A Deed of Mandate:

- defines the claimant group
- states the claims that are intended to be settled
- identifies the area to which claims relate, and
- states who has authority to represent the claimant group in negotiations with the Crown.

The following pages describe how each of the above matters might be developed in a Deed of Mandate.

Key elements of a Deed of Mandate

Claimant group definition

The claimant group definition is a description of those people whose claims would be settled by the settlement that results from the proposed negotiations. Such people would be eligible to become beneficiaries of the settlement. The claimant group definition usually has the following parts:

- a named founding ancestor (or ancestors) who is common to many (but not necessarily all) of the iwi and hapū
- a list of iwi and hapū names (this should include all historical descent lines, even if they do not form distinct communities today), and
- a description of a land area in which the ancestors of the claimant group exercised customary rights. This is often necessary to distinguish the claimant group from other groups, if the same iwi and hapū names, or the same descent lines, occur in other parts of the country.

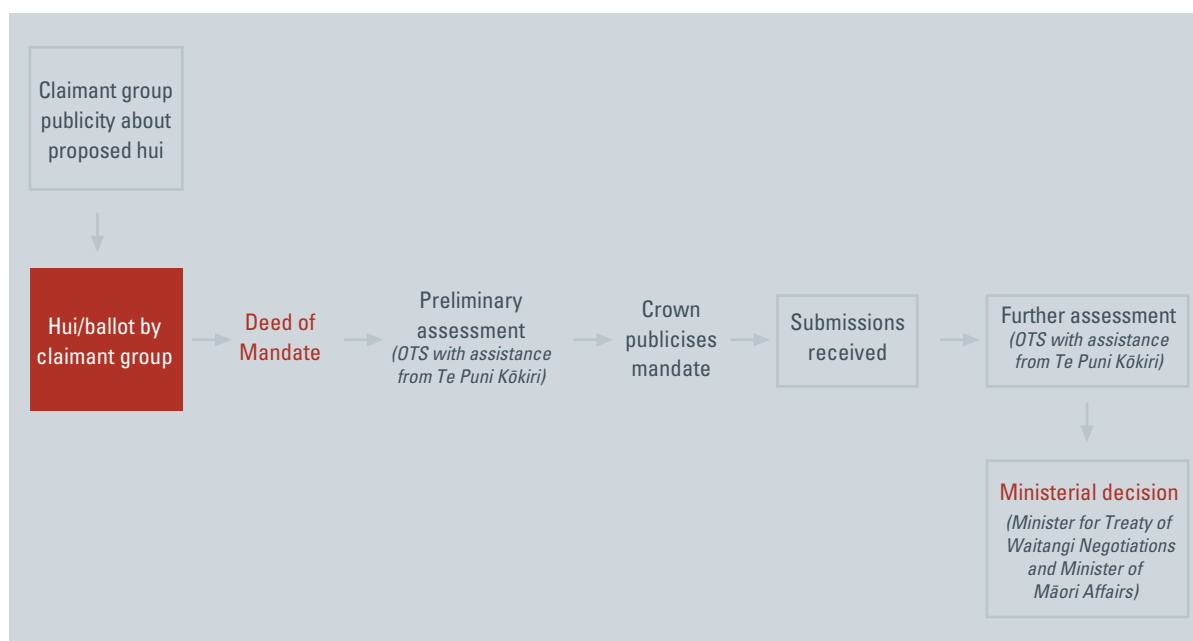


Figure 2.8: mandate recognition process

All those people who can trace descent from the named ancestor, or from recognised ancestors of any of the iwi or hapū, will be part of the claimant group as of right. The definition will need to be tailored for each large natural group. For example, if a hapū affiliates to more than one iwi, that hapū can be included within the definition of the claimant group. In doing so, the hapū will be included only in relation to its descent from a particular ancestor. Any other claims the hapū may have arising from other descent lines (and another claimant group) will not be settled.

Claims to be settled

The Crown prefers to negotiate comprehensive settlements covering all the historical claims of a group (that is, all claims arising from Crown acts or omissions before 21 September 1992). The scope of the claims to be settled arises directly from the definition of the claimant group.

Nevertheless, it is important that the Deed of Mandate clarifies what “all claims” means in practice. This helps individual members of the claimant group to know whether it is proposed that their claims will be part of the negotiations. The Deed of Mandate should therefore list:

- the specific claims registered with the Waitangi Tribunal that may be covered in part or whole by the proposed negotiations. The Waitangi Tribunal can provide claimant groups with a list of claims that have been lodged in their area. Claimant groups may need to obtain copies of these claims to see whether they are covered by or overlap with their claims, and
- specific issues that will be covered, especially claims concerning natural resources such as rivers, lakes, and harbours. This serves to highlight to the claimant group that all claims will be settled, unless otherwise stated.

If a claimant group thinks that some claims should be explicitly excluded, they should discuss this first with OTS. There may be a few cases where the Crown has already accepted that a particular claim will be addressed in a separate negotiation, or where a final settlement has already been reached for part of the claim. Any claims of an individual arising from descent from another tribal group (not included in the claimant group definition) will automatically be excluded from the negotiations.

Claim area

It is important for the Deed of Mandate to set out an area to which the claims mainly relate. This is used to help define the claimant group and to let neighbouring claimant groups know about any areas where they may claim overlapping interests. It also allows the claimant group to endorse an overall negotiating approach, including where redress will be sought. Claimant groups may wish to acknowledge any areas where they share interests with other claimant groups, and any areas that are regarded as mainly relating to their group only. Claimant groups may be able to reach agreement with neighbouring claimant groups on overlapping areas. This can simplify later negotiations with the Crown on appropriate redress in relation to these areas.

Note: The Crown does not attempt to define precise boundaries through the settlement process. Rather, general “areas of interest” are recognised within which redress may be made available to a claimant group, subject to overlapping claims being addressed to the satisfaction of the Crown.

Mandated representatives

The claimant group needs to mandate a body or a group of individuals who have the authority to negotiate and initial a draft Deed of Settlement. The mandated representatives may negotiate the settlement themselves, or authorise a set of negotiators to negotiate on their behalf.

In selecting representatives it is important that they are seen to be fairly representative of all the interests that must be taken into account, as well as having the necessary skills to negotiate. This is especially important for a large natural group, which may comprise many individuals, marae, and tribal groups.

The Deed of Mandate will also need to endorse a structure by which the mandated representatives are accountable to the wider claimant group. It will need to specify how decisions will be made, and provide for the claimant community to replace mandated representatives if necessary. It should also provide for the mandated representatives to report back to the claimant group on progress and specify consultation procedures on particular issues. For example, it might require negotiators to consult with certain sections of a claimant group on matters concerning them particularly. In all cases, the Deed of Mandate should state that the mandated representatives must present a draft Deed of Settlement to the members of the claimant group for ratification before it is signed by the mandated representatives.

The Deed of Mandate should set out the proposed entity to receive funding, and the proposed accountability arrangements for managing these funds. A claimant group might establish a legal entity to receive claimant funding from the Crown. Although it is the Crown's preference that a legal entity be established to receive claimant funding, this is not essential as long as the accountability of the mandated representatives for the use of claimant funding to both OTS and the wider claimant group is clear.

Deciding on representation and accountability during negotiations is separate from establishing a legal entity to represent members and manage settlement assets. This legal entity is commonly referred to as the post-settlement governance entity.

Review of Deed of Mandate by OTS

OTS reviews Deeds of Mandate, with advice from Te Puni Kōkiri (TPK). Final responsibility for the decision to recognise a mandate is held by the Minister for Treaty of Waitangi Negotiations and the Minister of Māori Affairs – see page 51.

OTS and TPK undertake separate reviews of a claimant group's Deed of Mandate. In so doing, they seek to determine whether the Deed of Mandate:

- clearly defines the claimant group and the claims to be settled
- shows that the wider claimant group members have been consulted and that they support the representatives seeking the mandate to pursue negotiations with the Crown
- provides authorisation for the representatives to negotiate a comprehensive settlement of all the claimant group's historical claims
- shows that representatives are accountable to the wider claimant group
- acknowledges any opposition to the mandate and describes the extent of that opposition, and
- identifies overlapping claims.

To assist claimant groups seeking to enter negotiations, OTS has developed a detailed checklist showing what is required in a Deed of Mandate. The Deed of Mandate checklist is shown on the next page.

It should be noted that OTS does not confer mandates. This can only be done by claimant group members. OTS does need to be certain, however, that the mandate is sound and that it has been conferred in an open process.

Deed of Mandate checklist

These are essential items - a claimant group can include additional material to reflect its own requirements and circumstances.

1. *Definition of the claimant group*

A statement outlining who the claimant group is:

- its name, any common founding ancestor(s), the names of iwi and hapū
- a list of the marae associated with the claimant group, and
- the area covered by its claims

It may also be useful to include an indication of the claimant group's core areas, and areas in which there may be shared or overlapping interests with other groups.

2. *Comprehensive settlement*

- a statement that the claimant group intends to seek a comprehensive settlement of all its historical claims (including all "Wai" numbers and any unregistered claims), and
- the claimant group should list all of the relevant Wai numbers in the Deed of Mandate.

3. *Mandated representatives (body or individuals)*

- the names and addresses of the representatives who are seeking Crown recognition of their mandate
- a description of the way those representatives will make decisions, and
- the process by which the representatives will appoint negotiators.

4. *How was the mandate obtained?*

A description of how the mandate was obtained, with all supporting evidence, including:

- advertisements in which the mandate agenda is clearly stated
- minutes of hui
- signed lists of attendees
- whether Crown (TPK) or independent observers were present at mandating hui, and
- any other methods used, such as postal ballots or mail-outs to members of the claimant group and the responses received.

5. *Accountabilities of the mandated representatives*

A statement outlining the accountabilities of the mandated representatives, in particular:

- the requirements of the representatives to report back to the claimant group and the ability of the claimant group to have input into key decisions
- the right of the members of the claimant group to take away authority from some or all of the mandated representatives or replace them, and
- the duty of the mandated representatives to present the draft Deed of Settlement to the members of the claimant group for their consideration before entering into any binding agreements with the Crown.

6. *Providing Deed of Mandate to other parties*

- an agreement that the Crown may make the Deed of Mandate known to the public and give the details of the Deed of Mandate to any claimant and outside claimant groups, if asked to.

Publicising the Deed of Mandate

If a Deed of Mandate meets the Crown's requirements, OTS will make known in local and national media that it has received the Deed of Mandate. OTS will also ask for views or comments on the Deed from interested parties. Usually four weeks are provided for people to send in their comments on the Deed of Mandate.

This step does not mean that the Crown doubts the mandate, or that it is bound to accept it. Publicising the Deed in this way means that the Crown is taking reasonable steps to seek the views of all those with an interest in the proposed negotiations. OTS, in consultation with TPK, then reviews any comments on the Deed. TPK is well placed to advise on these matters, as it has a regional network with links into Māori communities.

Decision by Ministers

After reviewing and considering any comments received on the Deed of Mandate, OTS, in consultation with TPK, reports to the Minister for Treaty of Waitangi Negotiations and the Minister of Māori Affairs. These Ministers decide, on behalf of the Crown, whether to recognise the mandate. Recognition of the mandate by Ministers is conditional on the representatives retaining their mandate to represent the claimant group throughout negotiations.

Mandates are monitored and mandated representatives are required to provide regular reports to OTS and TPK on the continued support for their mandate and on consultation with the wider claimant group.

The recognition of a Deed of Mandate may also be conditional. As noted earlier in this chapter, for example, where there are parts of a claimant group that oppose the approach taken to the negotiations, the Crown may require mandated representatives to reserve a place so that the hapū or whānau concerned can participate, should they wish to do so.

How long does a mandate review take?

The time taken to complete the mandate assessment and get the Ministers' decision depends on the size and complexity of the claimant group and their claims. For a straightforward mandate, this may take three months, including making the Deed of Mandate known and considering any views or comments received. During this period, OTS stays in contact with the representatives who put forward the Deed of Mandate, and provides them with copies of comments received. The Minister for Treaty of Waitangi Negotiations and Minister of Māori Affairs advises the mandated representatives of the decision when it is made.

Questions and answers about mandating

What funding is available for mandating?

Funding from the Crown is not available in advance for mandating processes. This is because it could be seen as taking sides before the claimant group has made a decision on who is to represent them in negotiations with the Crown. However, once the Crown has recognised the Deed of Mandate, it can consider providing funding for mandated representatives, including reimbursing some of the costs of obtaining the mandate. It is therefore important that groups seeking a mandate keep good records of their costs (see the section on claimant funding on pages 54-56). Funding to assist with mandating may also be available from the Crown Forestry Rental Trust for claims relating to licensed Crown forest land.

Do the mandated representatives or the claimant group they represent have to form a legal entity?

In some cases an existing legal entity may be mandated to represent the claimant group in negotiations. This could be an iwi authority, Māori trust board, or rūnanga. A legal entity means a formal legal structure that exists separately from the individuals belonging to it.

If there is no existing legal entity, claimant groups sometimes ask if they have to form one before starting negotiations. The Crown does not require this. Provided there is clear accountability for claimant funding provided to mandated representatives, and between the negotiators and the wider claimant group, the group may adopt the type of structure that suits them, or decide to have no formal legal structure (for instance, negotiations could be run by a mandated committee or working party). It is vital, however, that the claimant group agrees on a set of rules to govern the activities of their mandated representatives and/or negotiators. These rules need to cover, for example, the spending of claimant funding, how and when mandated representatives will communicate with the wider claimant group and the way in which mandated representatives and/or negotiators might be replaced.

What if there is a serious dispute about mandate?

The Crown realises that it would be unrealistic to expect any group to reach one hundred percent agreement on a mandate, or any other issue. There is no set level of support that ensures that the Crown will recognise the mandate. It is a matter of assessing all the information available, then Ministers must make a considered judgment on whether the mandate is secure enough for the Crown to start negotiations.

Sometimes there will be rival claims to mandate, with no clear majority emerging. If two or more groups each claim a large level of support within a claimant community, the Crown encourages the groups to work together to resolve their differences, and to approach the Crown again when the mandate is secure.

Another approach is to ask the Māori Land Court to give advice on who represents a particular group. This can be done under section 30 of Te Ture Whenua Māori Act 1993 and may enable a mandate to be put forward to the Crown. However, the usual requirements for a secure mandate must still be met. In some cases, the section 30 mandate may not resolve divisions within the claimant group. If the Crown concludes that the representatives appointed under section 30 do not have the support of the claimant group, it will not start negotiations, as any settlement is unlikely to be durable. Claimants should note that section 30 does not bind the Crown in matters relating to Treaty settlements.

What is a conditional mandate?

In other cases, there may be a clear majority of support for the mandated representatives, but a significant minority, perhaps a hapū or individual marae, is opposed. In such cases, the Crown may give *conditional recognition* to the mandate. In some cases, the conditions must be met before negotiations can begin. In others, the conditions must be met throughout the negotiations. OTS, with support from TPK, monitors conditional mandates to ensure the conditions are being met. The Crown may withdraw recognition of the mandate if conditions are not met.

How can a mandate be kept secure?

A mandate may be secure at first but can be lost if the mandated representatives lose the confidence of the wider claimant group. This can happen if the mandated representatives do not keep the wider group informed of progress and issues in the negotiations or if it is perceived that claimant funding is being managed unwisely. The result may be a challenge to the mandate or rejection of the Deed of Settlement when the time comes for ratification. To avoid this, the mandated representatives and the claimant group should agree before negotiations start on matters such as:

- how people will be kept informed (e.g. pānui, hui), and how often
- issues or stages in negotiations when the mandated representatives need to seek approval from kaumātua or the entire claimant group
- how and when groups, such as whānau or hapū with particular claims, should be kept informed, and
- transparent processes for claimant funding.

The mandated representatives must retain their mandate to represent the claimant group throughout the negotiations. If a serious mandate dispute arises during negotiations the Crown will encourage the members of the claimant group to work together to resolve the issue. This may include, for example, using a facilitator to crystallise the issues underlying the dispute and assisting the claimant group members to achieve a resolution.

How do negotiating mandates relate to the mandates required by Te Ohu Kai Moana for distributing commercial fisheries assets?

Te Ohu Kai Moana (the Treaty of Waitangi Fisheries Commission) is responsible for managing and distributing to iwi assets covered by the 1992 settlement of Māori commercial fishing claims. It also requires iwi to demonstrate a clear mandate and appropriate governance structures before distributing assets. See page 170 for contact details.

A mandate obtained for one purpose is not automatically acceptable for other purposes. But with careful planning, it is possible for claimant groups to create a process to meet both fisheries and claim negotiation mandate requirements at the same time. Claimants interested in taking this approach should talk to both OTS and Te Ohu Kai Moana first.

Step Two

Pre-negotiations



Figure 2.9: step II – pre-negotiations

During pre-negotiations:

- after discussion with the mandated representatives of a claimant group, the Crown decides how much funding it will contribute to help the claimant group with the cost of negotiations
- the Crown and mandated representatives discuss and formally agree on the objectives of the negotiations and the way they will negotiate. This agreement is set out in the Terms of Negotiation, and
- the mandated representatives prepare a Negotiating Brief and the Crown sets out its Negotiating Parameters. These provide information on the interests, issues, assets and resources they will be discussing in negotiations.

As part of the development of their Negotiating Brief, claimant groups are asked to identify the interests they wish to have addressed in the settlement, including identifying key sites or food gathering places and Crown properties claimant groups may wish to include in some way in their settlement redress.

Some of the interests identified may also be shared by other claimant groups or may be subject to claims by other groups and, as a result, processes will need to be established as early as possible in the negotiations

process to address overlapping claims or shared interests between claimant groups. Developing these processes may be critical in ensuring a settlement is completed in a timely manner.

Claimant funding to help with the cost of negotiations

The Crown does not necessarily provide funding for all the costs that a claimant group has to meet when negotiating its historical claims. But the Crown will **contribute** towards certain expenses for mandated groups:

- *the costs of pre-negotiations* - obtaining a mandate (payable once the Crown recognises the mandate), agreeing Terms of Negotiation, and starting formal negotiations
- *the costs of negotiations* - reaching a draft Deed of Settlement. This funding may also be used to develop a post-settlement governance entity, and
- *the costs of ratification* - carrying out a process for the claimant group to confirm a Deed of Settlement.

This funding will be *over and above* any money or other assets eventually given to the claimant group as redress for its historical Treaty claims, including any accumulated Crown forestry rentals.

The approval process

Soon after a claimant group's mandate has been recognised, OTS makes an assessment of the amount the Crown will contribute to the claimant group's costs for negotiations. The following factors are considered:

- the complexity of the claim - for instance, does it raise new issues that will be difficult to resolve?
- are there possible overlapping claim interests that need to be taken into account?
- is the claimant group in strong agreement about the proposed negotiations, or are there specific issues within the group that will need particular attention during the negotiations process – for example, between the iwi body and hapū, or the ahi kā groups (those still in the traditional rohe) and other members of the group?
- how big is the claimant group, and how scattered are its members throughout the country?, and
- is consultation likely to require hui (or other ways of communicating with the claimant group) to be arranged outside the rohe – for example, in the main city centres?

While the Crown does not intend to interfere in the claimant group's decision on how to organise themselves for negotiations, the Crown is interested in discussing how they propose to manage the negotiations, as this will have an impact on both the funding allocated and the Crown's planning for the negotiations.

OTS must then consult the Treasury before making a final recommendation to the Minister for Treaty of Waitangi Negotiations, and the Minister of Finance, on the amount of claimant funding the Crown will provide.

During this process, OTS will keep the mandated representatives informed of how their funding approval is progressing. This process may take up to six weeks to complete, after which the mandated representatives will be advised of the Ministers' decision by letter.

Accountability for funds

Mandated representatives are told the total amount of funding approved and what the terms of payment will be. A reasonable contribution to mandate costs that the claimant group has already met (for which accounts may be requested) will be paid in a lump sum. Apart from that, payments are made in advance (for example, funding to assist in developing Terms of Negotiation is paid before the document has been developed), with the Crown paying in amounts of no more than \$50,000 at a time. Each payment will be linked to progress in negotiations and reaching the most important milestones. This will provide a good indicator of progress throughout the settlement process and assist the mandated representatives with budgeting. The allocation of claimant funding to milestones will need to be discussed by the Crown and the mandated representatives in pre-negotiations meetings.

The funding will be paid directly to the mandated representatives on behalf of the claimant group. The Crown will only make payment if the mandated representatives:

- complete and provide payment requisition forms and a breakdown of expenses
- provide OTS every 12 months with independently audited financial statements for the funds they have received, and
- provide, if OTS asks for them, copies of invoices for expenses incurred in the negotiation process.

The Crown needs this information to make sure that the funding has been spent on activities that will help reach a settlement, and to comply with obligations under the Public Finance Act 1989. These requirements do not replace any existing reporting or accountability obligations the claimant group may have (for example, as a trust, company or incorporated society). OTS will also provide audit guidelines to ensure claimant groups are fully aware of how they can comply with these requirements.

Mandated representatives will also need to be able to account for the use of the funding to their wider claimant group, in order to assure the group that they are managing the claim properly.

It is also preferable that:

- claimant groups are advised by their mandated representatives of the amount provided and how it is intended to be used
- there is a legal entity in place to receive the funding, such as a trust
- internal processes and policies are in place for the management of the claimant funding, and
- all internal payments are authorised through appropriate processes so that, for example, individual mandated representatives should not approve their own payments.

OTS will be able to provide information on the costs a claimant group is likely to incur, including the costs of specialist advice needed to assist mandated representatives complete their task of negotiating a settlement.

Tax

Claimant groups need to take into account that all funding provided by OTS to assist in the negotiations process is inclusive of GST, if any. Claimant groups are urged to seek independent advice as early as possible on their liability for tax on this funding.

Savings

Once settlement is reached, any approved claimant funds that have not been spent will be paid to the claimant group's post-settlement governance entity, as well as the redress package they negotiate.

Shortfalls or unexpected costs

If claimant groups have costs over and above the amount of approved funding, the Crown may, in exceptional circumstances, consider providing extra funds to cover them. But if the extra amount is approved, it is likely to be payment of a "cash advance" on the final settlement. In other words, it will be deducted from the claimant group's eventual redress package, once settlement is reached. Such payments will be provided only if there is good

progress in negotiations and settlement is close. Alternatively, the claimant group may wish to seek additional funding from other sources.

Terms of Negotiation – setting the ground rules and objectives for negotiations

Following recognition of the Deed of Mandate, the Crown and mandated representatives need to discuss how they will run the negotiations. This involves agreeing on "ground rules" and objectives for the formal talks between the Crown and mandated representatives. These are called the Terms of Negotiation (or Terms) and are written into a non-binding agreement between the parties. The agreement is not binding because the parties at this stage have only agreed to negotiate. They should be free to "walk away" from negotiations at any time if they choose. However, it is expected that the parties will keep to the Terms while in negotiations. Signing Terms of Negotiation is therefore a significant milestone towards settlement and is often the first agreement claimant groups have signed with the Crown since the Treaty of Waitangi.

Key requirements of Terms of Negotiation

Each claimant group negotiates the wording of their Terms. However, parts of the Terms also set out the Crown's objectives and basic approach to Treaty settlements. Negotiations can only proceed if the claimant group accepts that the Crown also has objectives both generally, in relation to the Treaty settlement process, and in relation to specific settlements.

From the Crown's point of view, the Terms need to clearly define the claimant group who will benefit from the settlement. The definition of a claimant group is important because a key Crown objective of a successful settlement is that it be comprehensive. This means that a settlement accepted by the claimant group settles all the historical claims of a claimant group. Historical claims are defined as all the claims of a claimant group that result from the actions or omissions of the Crown prior to 21 September 1992. This covers all relevant claims registered with the Waitangi Tribunal and any other claims that the claimant group might have regarding

the actions or omissions of the Crown prior to 21 September 1992. It includes claims relating to the Treaty, legislation or common law (including customary law and aboriginal title).

Other Crown objectives set out in the Terms are that the settlement to be negotiated:

- is intended to remove the sense of grievance of the claimant group
- will be fair and durable, and
- provides the foundation for an improved relationship between the Crown and the claimant group based on the Treaty of Waitangi and its principles.

The Terms provide that, after reaching settlement of *all* historical claims of a claimant group:

- neither the courts nor the Waitangi Tribunal, nor any other body, will be able to consider the issues covered by the settlement (including the validity or adequacy of the settlement), and
- memorials on the titles of properties within the claim area not subject to claims by other groups will be lifted.

These provisions are essential if the settlement is to be final.

However, a comprehensive settlement will still allow a claimant group or a member of a claimant group to pursue claims against the Crown for acts or omissions after 21 September 1992, including claims based on the continued existence of aboriginal title or customary rights. The Crown also retains the right to dispute such claims or the existence of such title or rights. For more detail on the claims to be covered by a settlement see page 48.

The Terms also highlight that negotiations can only continue if:

- the mandated representatives fulfil any special conditions required by the Crown's recognition of their mandate and provide regular reports on that mandate, and
- the parties do not pursue their claims by any other means (such as High Court or Waitangi Tribunal hearings) while in negotiations.

Other matters covered by the Terms are:

- negotiations will be conducted in good faith
- negotiations are conducted in private and remain confidential, and media statements will only be made when the parties agree
- negotiations are “without prejudice” (that is, there is no admission of liability. Neither party is bound until the Deed of Settlement is signed and they can go back to legal proceedings if negotiations break down), and
- any Deed of Settlement remains conditional until the claimant group ratifies it and Parliament passes any necessary settlement legislation.

The Terms can also include:

- reference to breaches of the Treaty that the Crown has already conceded, and/or
- the aspirations the claimant group may have for the settlement.

Negotiating Brief for the claimant group and the Crown's Negotiating Parameters

Claimant group Negotiating Brief

The mandated representatives need to identify the interests that they want to promote through the negotiations for the settlement of their historical claims. This is usually referred to as a Negotiating Brief. A detailed explanation of “interests” in the context of negotiations is set out on page 97.

To prepare their Negotiating Brief, the mandated representatives need to:

- clarify what breaches and prejudice they consider should be included in discussions on the Crown's acknowledgements and apology
- identify the area of land affected by the claims
- identify culturally important sites and interests relating to them
- identify commercial Crown assets in their area of interest that they want the Crown to consider for potential use in settlement
- keep the wider claimant group informed of progress and consult with it as necessary, and

- resolve any issues that arise because other claimant groups also have an interest in a site or area. The Crown can only provide redress if it is satisfied that any overlapping claims have been addressed.

Mandated representatives will draw up a Negotiating Brief in discussion with members of the claimant group. OTS suggests that mandated representatives consider the types of redress developed in settlements so far in developing their Negotiating Briefs. These are explained in Part 3.

Crown Negotiating Parameters

The Crown needs to:

- discuss with the claimant group the general issues that the Crown needs to take into account, such as fairness between settlements, fiscal constraints and the wider public interest
- identify Crown properties in the claimant group's area of interest and assess their potential availability (land in the conservation estate is not generally available apart from individual sites of special cultural significance), and
- once it has precise information about the importance of specific sites and other interests of the claimant group, discuss with the mandated representatives and departments or agencies concerned redress options that may meet the claimant group's interests.

The Crown generally approaches the negotiations from within established policy parameters. A wide range of redress options has been developed to address claimant group and Crown interests and, where possible, the Crown prefers to use existing types of redress. Further detail on these redress options is provided in Part 3.

Specific approval by Cabinet or Ministers is required for:

- any new types of redress
- any exceptions to Crown policy
- the financial and commercial redress, and
- the redress in the draft Deed of Settlement before it is ratified by the claimant group.

Confidentiality

Material prepared for the negotiations, such as the claimant group's Negotiating Brief and papers written for Ministerial or Cabinet approval, may contain some comments or information that the parties do not necessarily wish to share with each other during negotiations. For this reason, such material is usually kept confidential.

Overlapping claims or shared interests

An overlapping claim exists where two or more claimant groups make claims over the same area of land that is the subject of historical Treaty claims. Such situations are also known as "cross claims". Addressing overlapping claims is a key issue for settlements, particularly in the North Island where there are many valid overlapping claims.

The settlement process is not intended to establish or recognise claimant group boundaries. Such matters can only be decided between claimant groups themselves. For example, any maps used during the settlement process or in subsequent communications are used only for specific purposes, such as determining the area where protocols with government departments might apply.

The Crown can only settle the claims of the group with which it is negotiating, not other groups with overlapping interests. These groups are able to negotiate their own settlements with the Crown. Nor is it intended that the Crown will resolve the question of which claimant group has the predominant interest in a general area. That is a matter that can only be resolved by those groups themselves.

The Waitangi Tribunal has discussed the nature of Māori boundaries in its Ngāti Awa Raupatu Report 1999 (page 133). In that report, the Tribunal stated, "the essence of Māori existence was founded not upon political boundaries, which serve to divide, but upon whakapapa or genealogical ties, which served to unite or bind. The principle was not that of exclusivity but that of associations. Indeed, the formulation of dividing lines was usually a last resort." The Tribunal applied this approach when

considering overlapping claims between Ngāti Maniapoto and Ngāti Tama. It upheld a revised Crown settlement offer to Ngāti Tama that provided for non-exclusive redress and the transfer of particular sites to Ngāti Tama in an area claimed by both groups, where Ngāti Tama's interests justified this (see the Tribunal's Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report 2001).

In areas where there are overlapping claims, the Crown encourages claimant groups to discuss their interests with neighbouring groups at an early stage in the negotiation process and establish a process by which they can reach agreement on how such interests can be managed. Addressing overlapping claims at an early stage will avoid delays - and the possibility of a challenge to the settlement package - at a later stage in the settlement process. The Crown will assist this process by providing information on proposed redress items to all groups with a shared interest in a site or property.

Disagreements relating to overlapping claims may arise from the Crown proposing a particular form of redress, such as the transfer of a site or property to one claimant group to the exclusion of another. Where there are overlapping claims, such exclusive redress may not always be appropriate. Often both groups have an interest, such as historical or cultural associations, in a site or property and these interests can be accommodated by a form of redress which is non-exclusive. This allows the interests of different groups to be recognised and accommodated.

Clearly, the Crown would prefer that disagreements over redress were settled by mutual agreement between claimant groups. However, in the absence of agreement amongst them, the Crown may have to make a decision. In reaching any such decision on overlapping claims, the Crown will be guided by two general principles:

- the Crown's wish to reach a fair and appropriate settlement with the claimant group in negotiations, and
- the Crown's wish to maintain, as far as possible, its capability to provide appropriate redress to other claimant groups and achieve a fair settlement of their historical claims.

Exclusive redress

Managing overlapping claims is an important issue for both the Crown and claimant groups. Some forms of redress that the Crown can offer claimant groups is only available in exclusive form. In other words, if the Crown provides this redress to one claimant group it is not available as redress for other claimant groups.

Examples of exclusive redress might be a commercial office building owned by the Crown or licensed Crown forest land. If it is provided to one claimant group in a settlement, it is clearly not available as redress for another claimant group. Similarly, if the Crown agrees to a camping licence (nohoanga or ukaipo) or an overlay classification (tōpuni or taki poipoia) for one group, that site will not usually be available to another claimant group (see Part 3 for a full discussion of redress options).

Where there are valid overlapping claims to a site or area, the Crown will only offer exclusive redress in specific circumstances. For example, when several groups claim an area of licensed Crown forest land, the Crown considers the following questions:

- has a threshold level of customary interest been demonstrated by each claimant group?
- if a threshold interest has been demonstrated:
 - what is the potential availability of other forest land for each group?
 - what is the relative size of likely redress for the Treaty claims, given the nature and extent of likely Treaty breaches?
 - what is the relative strength of the customary interests in the land?, and
- what are the range of uncertainties involved? The Crown is likely to take a cautious approach where uncertainties exist, particularly where overlapping claimants may be able to show breaches of the Treaty relating to the land, and would lose the opportunity to seek resumptive orders from the Tribunal.

The relative weightings given to each of these considerations will depend on the precise circumstances of each case. Broadly, a claimant group would not have to show the dominant interest in the forest land to be eligible to receive that land in redress, only a threshold level of interest. The strength of relative customary interests in the land is only likely to be the primary factor when there is limited forest land available.

The Waitangi Tribunal has found that this approach to addressing overlapping claims to licensed Crown forest land is consistent with the Treaty of Waitangi and its principles (see the Tribunal's Ngāti Awa Settlement Cross-Claims Report 2002, chapter 4). Although this approach was developed in the context of licensed Crown forest land, similar principles would be expected to apply to other commercial redress.

Exclusive redress may also be considered where a claimant group has a strong enough association with a site to justify this approach (taking into account any information or submissions about the association of overlapping claimants with that site). This exception would apply to sites, such as wāhi tapu, where no other site could be used as alternative redress.

Non-exclusive redress

Where overlapping claims exist and there is no agreement among groups about how these should be dealt with in a settlement, the Crown may offer non-exclusive redress. This may include legal instruments such as Statutory Acknowledgements, Deeds of Recognition and Protocols with government departments and agencies. These forms of redress, which allow more than one claimant group to gain redress in relation to a site or property, are explained fully in Part 3.

The Crown does not require the agreement of other claimant groups when it is offering non-exclusive redress in areas with overlapping claims, but such agreement is preferable.

Choosing and establishing a governance entity to manage settlement assets

It is very important to think about the post-settlement governance entity and begin work on developing that entity at an early stage in the settlement process. The governance entity represents the claimant group and holds and manages the settlement redress on their behalf. Determining the type and structure of that entity is, therefore, a very important decision for claimant group members. The process for developing the governance entity should involve the whole claimant group and they will need time to consider and contribute to its development.

The Crown cannot transfer the settlement redress to the claimant group until this entity has been developed and ratified by the members of the claimant group. For this reason, the Crown requires that the governance entity be ratified by a claimant group and established as a legal entity by the time the settlement legislation enacting the settlement package is introduced in Parliament. The introduction of settlement legislation normally occurs within six to twelve months of a Deed of Settlement being signed. Delays in establishing and ratifying a governance entity will result in delays in a claimant group receiving its settlement package.

Claimant groups should seek professional advice on their choice of a governance entity to ensure that it will meet their needs and purposes following a settlement. At first glance there is a wide variety of possible legal entities for claimant groups to choose from, but the experience of claimant groups who have passed through the settlement process is that, in practice, the choice is limited (for more information on governance entities see pages 71-77). It will also assist claimant groups and avoid possible delays if their mandated representatives discuss with OTS how they intend to establish a governance entity and the types of governance entity they are considering, at an early stage in the settlement process.

Whichever entity is chosen that entity must provide for accountable and transparent processes of governance. This means that the work of elected representatives is visible and that they are accountable to their wider claimant group membership.

Step Three

Negotiations

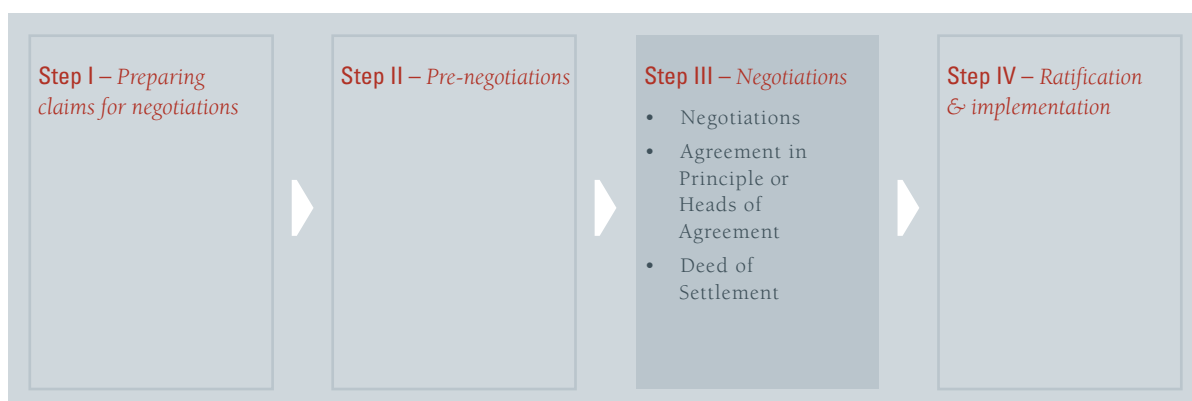


Figure 2.10: step III – negotiations

During the negotiations step, the Crown and the mandated representatives put forward their proposals for settling the claim and try to reach an agreement. If there is broad agreement, the discussions then concentrate on the details of those proposals. Usually the Crown and the mandated representatives exchange letters outlining an Agreement in Principle or, more formally, sign Heads of Agreement, to signal their agreement on the monetary value of the settlement (what is known as the “settlement quantum”), and the scope and nature of other redress to be provided. When all the details of the redress have been agreed, these are set out in a draft Deed of Settlement for approval by Cabinet and for ratification by the claimant group (see Step IV, page 69).

In this section we look more closely at:

- negotiating structures and processes
- who takes part in negotiations and how they actually work
- how claims of hapū and whānau can be addressed in comprehensive negotiations, and
- the role that third parties, such as local authorities, can have in negotiations.

Negotiating structures and processes

Who are the people involved on each side of the negotiating table and how do they work together? On each side, the actual negotiators report to and are accountable to the people or institutions who give them authority to negotiate.

The Crown

For most negotiations, Cabinet will entrust this responsibility to the Minister for Treaty of Waitangi Negotiations and other relevant Ministers. The Crown negotiating team, which is made up of officials, then negotiates on the Minister’s behalf. As outlined earlier, any redress outside established policy parameters requires the specific approval of Cabinet or Ministers. Cabinet must also approve the redress in the draft Deed of Settlement before it can be initialled by the Crown and the mandated representatives and put to claimant group members for ratification.

Crown negotiating team

OTS is responsible for co-ordinating the Crown negotiating team. The team will usually have three or more members and be supported by specialist advisers. Typically, the members of the team are:

- *Negotiations/Policy Manager* - an OTS manager who leads the negotiations on behalf of the Crown. She or he reports to the Director of OTS, who is accountable to the Minister for making sure the negotiations are within the limits of the established policy parameters. In some negotiations, the Crown team will be led by a Chief Crown Negotiator working on contract. She or he will work in tandem with the OTS Negotiations/Policy Manager.
- *Other Crown negotiators* - usually a senior official from the Department of Conservation and another from Treasury. The Department of Conservation is involved because many aspects of cultural redress relate to land held by the Department. Treasury participate because of the financial importance of the settlement to the Crown. Other government departments – for example, the Ministry of Fisheries or Land Information New Zealand – are involved in negotiations as issues relating to their area of responsibility are raised. OTS co-ordinates their involvement also.
- *Specialist advisers* - depending on the size and type of the claim, the Crown negotiating team could be supported by a lawyer from the Crown Law Office, a commercial lawyer or other professional adviser (for example, on forestry valuations).

Claimant group negotiating team

Mandated representatives represent the claimant group in negotiations. They may appoint a group of negotiators or be the negotiators themselves. Negotiating teams are accountable to mandated representatives and these representatives are accountable back to the claimant group (see page 49).

- *Negotiating team* – the size and make-up of this team is a matter for the claimant group - although experience has shown that a core team of about three to five is a practical size. Whether to have a “Chief Negotiator” is a matter for the claimant group.
- *Specialist advisers* – how to include specialist advisers on the negotiating team is a matter for the claimant group. Sometimes they are part of the core team. In other cases they are not on the team but provide advice on particular issues when required. OTS can provide information on the types of specialist assistance that might be required at different stages of the negotiations process.

Joint working groups

Usually there are many issues to be covered in negotiations, and for larger claims, the core negotiating teams may not be able to deal with each issue in detail themselves and move quickly towards settlement. One option is to set up joint working groups on key issues to enable a number of issues to be worked on at the same time. This frees up the core negotiating teams to look at the settlement as a whole. Working groups also provide an efficient way for experts in various fields to contribute to the settlement. Whether or not working groups are used, the negotiators will usually need to work through the following issues:

- *Crown Apology* – the historical basis of the claims, those matters the Crown acknowledges as breaches of the Treaty and its principles, and the wording of the Crown’s apology.
- *Financial and commercial redress* – working out the detailed terms on which agreed commercial settlement assets might be transferred - for instance, valuation matters, terms of leasebacks, disclosure of information about the assets. For more complex settlements, smaller sub-groups might be set up to look at types of assets such as forestry.
- *Cultural redress* – considering the application of specific redress options to meet claimants’ interests in wāhi tapu, resource management and access to traditional food and resources, and ongoing relationships with the Crown.

When the parties have agreed in principle on the settlement redress, the claimant group will receive a letter from the Minister for Treaty of Waitangi Negotiations outlining an Agreement in Principle, to which the claimant group will then formally respond, or the two parties will sign a Heads of Agreement.

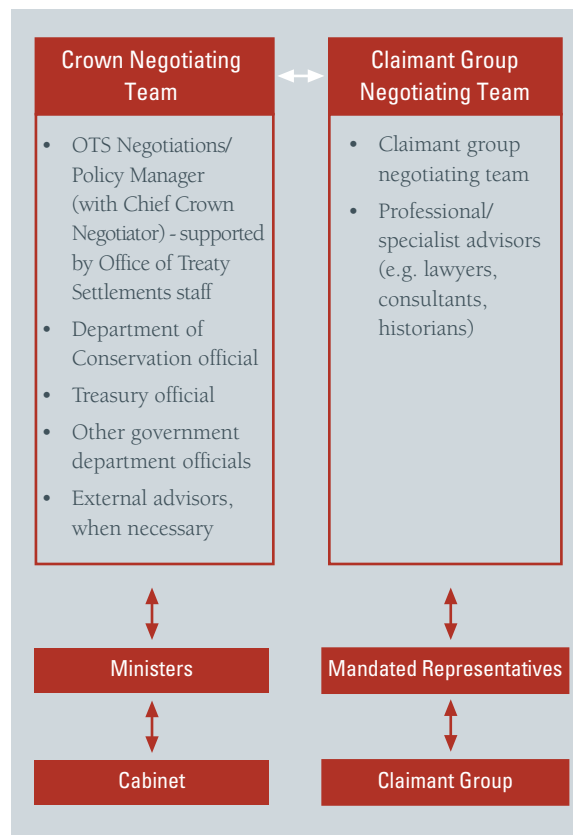


Figure 2.11: Crown and claimant negotiating teams - accountability



Crown and Te Uri o Hau working group

Agreement in Principle or Heads of Agreement

Once the broad outline of a settlement is agreed between a claimant group and the Crown, there are two possible ways of marking this milestone. The fastest way to do so is through an exchange of letters between the Minister for Treaty of Waitangi Negotiations and the mandated representatives of a claimant group noting the outline of a settlement. This is known as an Agreement in Principle. A more formal approach is to sign a Heads of Agreement. The common goal of an Agreement in Principle and a Heads of Agreement is to record – in a manner which is open and transparent – the basic outline of a proposed settlement between the Crown and a claimant group, that will settle all of that group’s historical claims against the Crown.

An exchange of letters outlining an Agreement in Principle contains less detail than a Heads of Agreement, but has a similar legal status. It is “without prejudice” and does not legally bind the claimant group or the Crown. It is also intended to be widely distributed among the members of a claimant group. Generally speaking, an Agreement in Principle is a faster way of making progress towards a Deed of Settlement.

Alternatively, a Heads of Agreement is a document signed by both parties that outlines the nature and scope of all the redress agreed as the basis for a final Deed of Settlement. It means that the Crown and claimant groups have agreed on all significant questions and on the content of the redress package. By signing a Heads of Agreement, the parties are saying that the remaining issues to be included in the final Deed of Settlement are matters of detail and implementation only.

As with the Agreement in Principle, it is “without prejudice” and does not legally bind the claimant group or the Crown. The document is a kind of political compact between the parties, but neither party is legally bound until both parties have ratified (that is, approved) and signed the final Deed of Settlement.

If the final settlement is to be acceptable, it is vital that the contents of either an Agreement in Principle or the Heads of Agreement be made widely known throughout the claimant group. To help with this, the Minister for Treaty of Waitangi Negotiations may make a formal presentation of the Agreement in Principle or the Heads of Agreement to the mandated representatives and kaumātua of the claimant group several weeks before it is signed. The Crown may also ask the mandated representatives to report on how they are publicising the Agreement in Principle or Heads of Agreement.

After accepting an Agreement in Principle or signing a Heads of Agreement, the Crown and mandated representatives continue to work together to develop and agree on all the details that must be included in the final Deed of Settlement. This can include matters such as the details of the acknowledgements and apology, legal descriptions and valuations of properties, or the precise location of camping entitlements.

Both an Agreement in Principle and a Heads of Agreement become public documents. This allows both the wider members of a claimant group and any other parties that may have an interest to view and understand the broad content of a settlement package.



Signing of Ngati Ruanui Heads of Agreement

Deed of Settlement

A Deed of Settlement is the comprehensive and final agreement reached between the Crown and a claimant group. A Deed of Settlement sets out in detail the redress that the Crown will give to the claimant group in order to settle their claims. The redress may include the Crown's acknowledgements and apology, payment of cash, the transfer of lands within the claim area, and mechanisms for recognising other important interests that the claimants might have. It is essential that the Deed include:

- mutual acknowledgements about what is being settled - all historical claims (claims regarding actions or omissions of the Crown prior to 21 September 1992) of the claimant group
- a statement by the claimant group that the settlement is accepted as fair, final and comprehensive, and
- an acknowledgement that once the claims are settled, the jurisdiction of the courts and the Waitangi Tribunal over the claims is removed, any memorials on former SOE properties are removed and any landbank arrangements in relation to the claimant group are wound up.

The Deed can also include:

- the background to the negotiations, including a history of the claims, any previous investigations, hearings before the Waitangi Tribunal (if there have been any), and any relevant court decisions
- an outline of the negotiations and agreements leading to the current settlement, including an Agreement in Principle, Heads of Agreement or any other undertakings entered into between the Crown and the claimant group
- the parties' intentions regarding the ongoing Treaty relationship between the Crown and the claimant group, and
- a statement that the settlement of all historical claims of that claimant group does not affect that claimant group's right to pursue claims against the Crown for acts or omissions after

21 September 1992, including any claims based on aboriginal or customary rights, and that the Crown also retains the right to dispute such claims.

Cabinet must approve the content of a Deed of Settlement before it can be initialled by mandated representatives prior to ratification by the wider claimant group. Usually, legislation is then required for the Deed to become unconditional. Prior to the introduction of legislation the claimant group will have ratified and established a governance entity to hold and manage the settlement assets. For some small claims, settlement legislation is not required and the Deed will state that it is a binding agreement on signing by the Crown and claimant group representatives.

In summary, the process from Agreement in Principle or Heads of Agreement to final Deed of Settlement usually works like this:



Figure 2.12: the process from Agreement in Principle or Heads of Agreement to Deed of Settlement

Under Step IV, the Guide explains how the ratification process works and goes on to look at implementing the Deed of Settlement. Before doing so, the way in which the parts of a claimant group can receive specific redress in a comprehensive settlement is set out. This is followed by a discussion of the role of third parties in negotiations.

Hapū or whānau interests

As noted earlier, the Crown believes there are major benefits to both claimant groups and the Crown in having comprehensive negotiations with large natural groupings. This means that the various items of redress are not individually linked back to specific claims or grievances, but that the redress in total settles all the historical claims of the claimant group. It is then up to the claimant group, within its governance entity, to decide how to manage and distribute the benefits, taking into account the interests of hapū or whānau. This is usually a practical and realistic approach, given that the Crown does not provide full compensation for grievances, and changes in land ownership and use usually make it impossible to match grievance and redress on a site-by-site basis. The result is that smaller claims will usually be merged with a claim by a large natural grouping (see page 44 for more detail).

However, the Crown recognises that in some cases this comprehensive approach needs to take into account smaller, individual claims which can be addressed within the comprehensive settlement. This will only be considered where the grievances are very specific.

The Crown and mandated representatives need to discuss and agree on whether and how many claims of the claimant group should be given separate recognition and redress within the settlement. Generally, specific redress options for individual hapū or whānau should form only a small proportion of any overall redress package. This ensures that most of the benefits of settlement are available to all members of the claimant group.

Example – hapū interests in the Ngati Ruanui Deed of Settlement

The following examples show how particular hapū interests were met in the Ngati Ruanui settlement.

During the negotiations between the Crown and Ngati Ruanui, the Ngati Ruanui mandated representatives sought redress involving the Turuturu Mokai pā site. This site was particularly significant to one Ngati Ruanui hapū, Ngati Tupaiā, as it was the site of an important battle they had fought during the Taranaki Wars. The mandated representatives sought the return of the site for Ngati Tupaiā.

The Crown (and the South Taranaki District Council, who owned or administered parts of the site) agreed to transfer the site to the Ngati Ruanui governance entity, subject to on-going public access over part of the site. Following its transfer to the Ngati Ruanui governance entity, it is intended that the site will be transferred to Ngati Tupaiā, once an appropriate entity to receive the site on behalf of Ngati Tupaiā has been established.

Other settlements where separate provision for hapū or whānau interests have been agreed include the Ngāti Tūrangitukua settlement (1998) and the Ngāi Tahu settlement (1997).

Role of third parties in settlement negotiations

OTS is often asked about the role of parties other than the Crown and claimants in settlement negotiations.

Negotiations are between the Crown and the claimant group concerned. Other parties such as local authorities, private individuals or special interest groups may have a strong interest in the outcomes of the negotiations, but this does not give them a “seat at the table”. However, communicating with other parties appropriately during the negotiations can both improve the redress available, and improve acceptance and understanding of the eventual settlement. Examples of how this can occur are considered next.

Local authorities

Local authorities are often responsible for managing many of the reserves in their area. These reserves may cover both land owned by the council and land owned by the Crown that has been set aside as a reserve. Land owned by or vested in a local authority is not available for use in Treaty settlements, unless the local authority offers it for use. The Crown also prefers that the consent of a local authority administering a Crown-owned reserve is obtained, if it is to be used in a settlement.

If a claimant group is interested in a Crown-owned reserve administered by a local authority, the Crown, claimant group and local authority can work together to meet the interests of all parties concerned. Options include transferring title to the claimant group but with the local authority retaining control and management, perhaps with input from the claimant group. Retaining rights of public access to reserves will usually be a condition of use if the reserves become part of a settlement.

Local authorities can also be involved in discussions on natural and physical resource management issues, airports or street names, as well as reserves that they own outright. Because local authorities are not part

of the Crown, they cannot be bound to commitments on their part in a settlement unless settlement legislation affects their rights and duties. However, they may well agree to undertake certain actions (such as working on water quality or changing a street name) and this is often recorded in the Deed of Settlement as having happened. The main example of redress with a general impact on local authorities in a claim area is the Statutory Acknowledgement (see pages 132-133).

The Crown recognises that the long-term success of settlements will depend very much on effective working relationships at the local level. Good consultation during the negotiations lays the foundation for this. To promote such relationships, the Crown is willing to facilitate discussions between claimant groups and local authorities. The Crown, through a letter from the Minister for Treaty of Waitangi Negotiations, can encourage local authorities to enter into Memoranda of Understanding with claimant groups.

Private individuals or organisations

As previously noted, private land is not available for use in settlements. Many areas of Crown land are also subject to private property rights for the benefit of third parties. These rights include easements, licences and leases. The Crown ensures that third parties are notified and their interests are suitably protected in settlement arrangements. For instance, a proposed camping entitlement might be located on Crown land that is subject to a grazing licence. In such a case, OTS or the relevant department would contact the licence holder to ensure that they are aware of the proposal and have the opportunity to raise any concerns.

The general public and public interest groups

In negotiating with Māori to settle historical Treaty claims, the government is aware that there is widespread public interest in the Treaty claims settlement process, particularly if it involves conservation land or a change in the way it is managed. It is generally not practical or appropriate to discuss settlement options publicly until there is a broad measure of agreement between the Crown and mandated representatives. Both parties need confidentiality to explore ideas and express themselves freely.

However, as a negotiated settlement develops, there are situations where a certain level of public communication is not only helpful, but vital for wider acceptance of the settlement. This may happen through contact with a number of national conservation organisations that represent the public interest in conservation matters. For example, the New Zealand Fish and Game Council has authority by law to advise the Minister of Conservation on matters affecting sports fish and game and the New Zealand Conservation Authority has been established by law to advise the Minister of Conservation on matters affecting conservation legislation. There are also a number of established public interest groups, such as the Federated Mountain Clubs of New Zealand and Federated Farmers, with whom it may be appropriate to consult from time to time.

The Crown acknowledges the value of communicating with the public, and with local authorities and special interest groups, about settlements that concern public conservation land, or Crown lands administered by local authorities. However, communication does not give third parties the right to veto any aspect of the settlement or to alter agreements reached between the Crown and a claimant group. Nevertheless, such communication does enable both the Crown and claimant group to make decisions about the settlement redress from a good understanding of the potential impact on the wider community. It also helps make settlements better understood and more acceptable to the public at large, and therefore more durable.

Step Four

Ratification and implementation

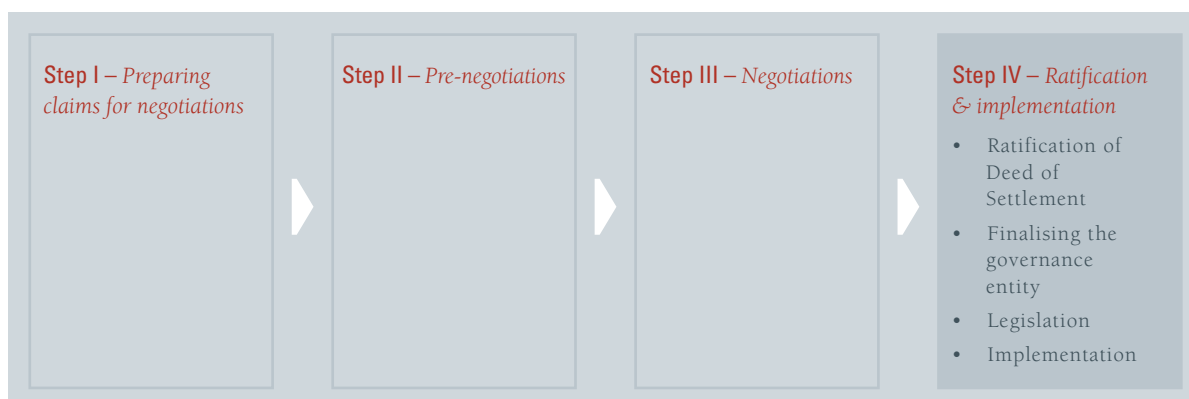


Figure 2.13: step IV – ratification and implementation

The last step of the negotiations process involves getting final approval for the settlement, and transferring the agreed redress to the claimant group. In particular this involves:

- ratification of the Deed of Settlement
- ratifying and establishing a governance entity for holding and managing settlement assets
- settlement legislation, and
- implementation.

Ratification

The Deed of Settlement initialled between the Crown and the mandated representatives must be clearly approved by the wider claimant group before it becomes binding. This approval process is called ratification.

The key part of the ratification process is a postal ballot in which all members of the claimant group over the age of 18 are eligible to vote. Because many members of the claimant group will live outside their rohe, a postal ballot is an essential and not an optional part of the ratification process.

For this reason, it is essential that a claimant group has developed a register of its members by this stage in the settlement process. The register is a critical tool for providing members with the opportunity to take part in the ratification process through hui, receiving material explaining the settlement offer, and the postal ballot.

To gain approval, the claimant representatives must communicate with their hapū or iwi members about the details of the proposed settlement. This communication will build on earlier consultation between mandated representatives and the wider claimant group. Communication must also be open enough to make sure that all members of the claimant group, including those who live outside their rohe, can take a full part in the discussion that is part of this final decision-making stage. The mandated representatives usually publish a written summary of the Deed of Settlement, which is distributed as widely as possible. This publication complements the communication meetings organised by the mandated representatives. Because of the importance of the ratification process, it is essential

to allow claimant group members enough time to consider the proposed Deed of Settlement. Experience has shown that communication with claimant group members during the ratification process is considerably enhanced if they have had regular opportunities throughout the negotiations process to discuss progress with mandated representatives.

Making sure the ratification process is adequate

Like mandating, the *ratification process* is for the claimant group to work through, but the Crown will not sign a settlement if the process used was inadequate, or if the claimant group does not clearly support the proposed settlement. OTS therefore keeps in close contact with the mandated representatives to help them ensure that the ratification process will be acceptable to the Crown. The basic principle is that all adult members of the claimant group must have the opportunity to have a say. The most effective way of doing this is through a postal ballot.

Funding for ratification

The Crown makes funding available to the mandated representatives to cover ratification processes. Ratification involves significant costs to a claimant group. Therefore, claimant groups need to plan for this when assessing their funding needs at the start of negotiations.

Hapū consultation, hui and postal ballots

To help make this final decision on ratification, claimant groups may use a combination of postal voting, communicating directly through hui held inside and outside their rohe, and written material sent directly to members of the claimant group. In designing a ratification process, claimant groups will obviously need to consider the views of hapū and the tikanga of those affected. They also need to make sure that as many members of the claimant group as possible may take part in the decision. Postal ballots in particular are very important for gathering views if claimant group members are scattered throughout the country - as many claimant groups are today. For this reason, it is important that the claimant group register is as up to date as possible and

everyone on the register has been verified as a member of the claimant group. Whakapapa is the basis for verification.

Postal ballots should be conducted by an independent returning officer. Voting forms should ask eligible voters whether they vote to approve or disapprove of the Crown settlement offer, and, if they approve, authorise that the Deed of Settlement be signed by a named individual or individuals on behalf of the claimant group. Often, but not always, those authorised to sign are the mandated representatives.

The Crown will also send officials from Te Puni Kōkiri as independent observers to hui where the Crown offer is discussed to ensure a fair and open process is followed.

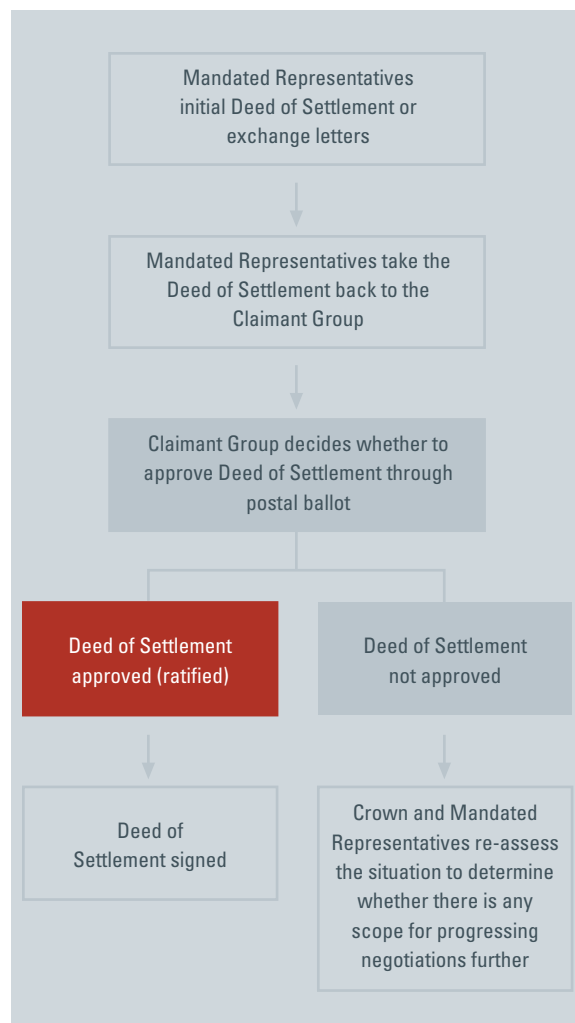


Figure 2.14: ratification of Deed of Settlement by the claimant group

Getting information to all members of the claimant group

To make sure that all claimant group members understand what it means to ratify the settlement, claimant groups usually produce a detailed summary of the Deed of Settlement that can, for example, be sent out with postal ballot forms. Planning for writing and publishing the document should be built into the mandated representatives' work programme and included in budgets.

Claimant group's decision

The mandated representatives then let the Minister for Treaty of Waitangi Negotiations know the results of the ratification process. If the Deed of Settlement has been ratified and the Crown considers that there is enough support for the Deed, the Crown and the person or persons authorised by the claimant community through the ratification process sign it. As noted on page 65, settlement legislation is then usually required for the Deed to become unconditional. A governance entity approved by the members of the claimant group must be established before the legislative process can begin. We explain the legislative process on pages 77-79.

Signing the Deed of Settlement

This is a very important ceremony for both the claimant group and the Crown, since it is both the end of negotiations and the start of the new relationship set out in the Deed. Most claimant groups prefer to host the ceremony at one of their marae so that as many people as possible can take part. The Crown is usually represented by the Minister for Treaty of Waitangi Negotiations, as well as other Ministers and officials involved in the negotiations. The claimant group may also wish to invite MPs, members of other iwi and local dignitaries.

Governance entities – Crown principles

By this time, mandated representatives should have developed their ideas about the type of governance entity that will best serve the needs of their claimant group after the settlement is completed. The term *governance entity* simply refers to the legal entity the claimant group will use to represent them and to hold and manage the settlement redress to be transferred by the Crown under the Deed of Settlement. This includes not just the commercial and financial assets to be transferred, but also the cultural redress. The latter includes Statutory Acknowledgements, Deeds of Recognition, camping entitlements, Protocols with government departments and agencies and other cultural redress.

It is a matter for the claimant group to choose a governance entity that will serve their needs and reflect their tikanga. However, to fulfil its responsibilities to taxpayers and all members of a claimant group, the Crown has developed a set of principles against which proposed governance entities are assessed. If the proposed governance entity is consistent with these principles - which are normally included in the Deed of Settlement - the Crown is able to transfer settlement assets to the claimant group, once any settlement legislation is enacted.



Signing of the Deed of Settlement for Mātaatua Wharenui, Wairaka marae, 1996

The Crown's principles for post-settlement governance entities are that the entity has a structure that:

- adequately represents all members of the claimant group
- has transparent decision-making and dispute resolution procedures
- is fully accountable to the whole claimant group
- ensures the beneficiaries of the settlement and the beneficiaries of the governance entity are identical when the settlement assets are transferred from the Crown to the claimant group, and
- has been ratified by the claimant community.

Ensuring that the governance entity is consistent with these principles means that the Crown is meeting its responsibility to all New Zealanders to ensure that settlement assets are managed by and for those who will rightfully benefit from the settlement. These concerns are, of course, equally important to members of the claimant group who will want to see good management of their settlement assets.

The Crown cannot transfer the settlement redress to a claimant group until they have a governance entity that has been considered and ratified by the members of a claimant group. For this reason, the Crown requires claimant groups to have ratified and established their governance entity by the time the legislation implementing a settlement is introduced to Parliament.

Choosing a governance entity

A governance entity is the body or entity that a claimant group chooses to represent members following a settlement. The governance entity also holds settlement assets and makes decisions on how these assets will be managed and how any benefits derived from these assets are used for the benefit of claimant group members.

Based on the experience of claimant groups, it is unlikely that an existing tribal governance entity will meet the needs and purposes of claimant groups following a settlement. Existing entities may not be legal entities, and may also lack transparency or not be representative of the entire claimant group.

Although on the surface the range of options for claimant groups seeking to develop a new governance entity is quite large, in practice the number of options that meet the needs and purposes of such groups following the conclusion of a settlement is relatively small. OTS urges claimant groups to seek appropriate professional advice when considering their options for a governance entity.

Increasing numbers of claimant groups have found that private trusts, with subsidiary trusts or companies to manage the settlement assets, meet their post-settlement objectives. The Crown is also comfortable about transferring settlement redress to such entities.

Two existing types of governance entity—a Māori Trust Board established under the Māori Trust Boards Act of 1955 and a governance entity established through private legislation – require some further comment at this point.

Māori Trust Boards are, by law, ultimately accountable to the Minister of Māori Affairs and not to the members of a claimant community. The Crown does not consider accountability to the Minister rather than to the members of a claimant group appropriate for the administration of a settlement. Beneficiaries of a Māori Trust Board also do not have a beneficial interest or rights to the use or benefit from property in such Trust Boards. Because of these factors, claimant groups may find Trust Boards too restrictive and lacking in accountability. Although a review of the Act governing these boards is under way, it is unlikely the results of this review will be implemented in time to accommodate claimant groups who are already in negotiations with the Crown or are considering entering the negotiations process.

Governance entities established through private legislation also tend to have more drawbacks than advantages. Firstly, an individual Member of Parliament must agree to sponsor the proposed law. Secondly, Parliament must be convinced that there is no other way of achieving the aims of the legislation within existing law. And, as with all legislation, it will be subject to public notification and consultation.

Such a Bill may also face extensive and public examination by a Select Committee during its passage through Parliament and that Select Committee may recommend changes to the legislation to which the claimant group is opposed. And, if subsequent amendments to the legislation establishing the governance entity are needed because of changes of circumstances, the claimant group will have to convince Parliament to make those amendments.

Private Bills also proceed on a timetable that is not within the control of either a claimant group or the government. As a result, the governance entity may not be established by the time a settlement has been concluded. Settlement legislation is not introduced to Parliament until the governance entity is established so it is possible that seeking to establish a governance entity through private legislation could lead to a delay in the transfer of the settlement assets to the claimant group.

A Private Bill can also be costly. Claimant groups must pay for any legislation to be drafted, devote a considerable amount of their own time to managing the process and meet the cost of any professional advisers used during the passage of a Private Act.

Any governance entity established under a Private Act must still comply with the principles set out at the beginning of this section. The Crown, as with any other post-settlement governance entity, does not provide tax advantages to governance entities established in this way.

Finally, claimant groups may find that matters they think are better discussed only among their members become subject to public debate through the legislative process. Internal hapū or iwi issues can thus enter the wider public arena.

Once again, choosing from the available options for a post-settlement governance entity is a matter for claimant groups and their members. OTS urges claimant groups to discuss this matter and seek professional advice as early as possible in the settlement process. The Crown cannot transfer settlement assets to a claimant group until their governance entity has been ratified and established.

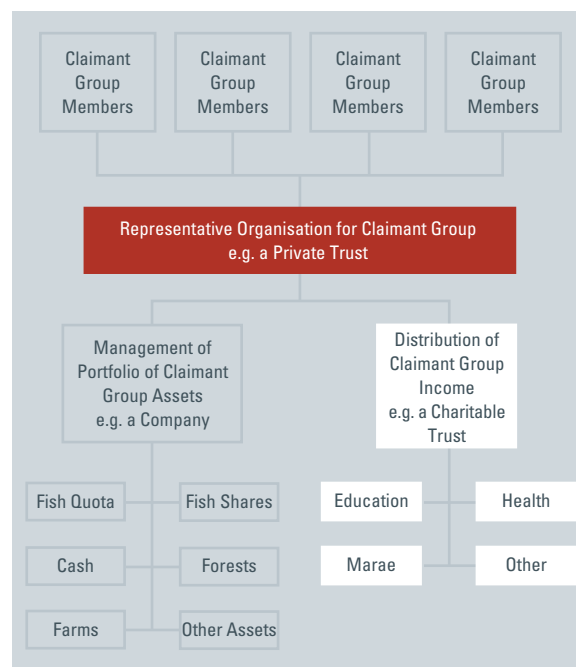


Figure 2.15: example of a governance entity for distribution of settlement assets (based on a model developed by Te Ohu Kai Moana)

Reviewing and ratifying a governance entity

While a claimant group's mandated representatives will have the leading role in exploring and developing options for a governance entity, they must also give all members of the claimant group the chance to review and ratify their proposed entity.

The ratification process for a post-settlement governance entity may be carried out at the same time as the members of a claimant group consider whether or not to ratify a Deed of Settlement, or it can occur as a separate process. Whichever is the case, the proposed post-settlement governance entity must be ratified by the members of the claimant group and established as a legal entity before the Crown can introduce settlement legislation and transfer the redress provided in the settlement to the claimant group. The Crown must also have had the opportunity to assess the proposed governance entity against its principles before the wider claimant group membership is asked to ratify that entity. The Crown's review of the entity against the principles will take in any subsidiaries of that entity as well.

The ratification process for a governance entity will be similar to that used to ratify a Deed of Settlement and the Crown's review of the ratification process will also take a similar form.

The Crown has developed a set of questions that members of claimant groups can use during the ratification process to assess whether they will support the proposed post-settlement governance

Does the Crown require settlement assets to be used for particular purposes?

No. Settlement assets belong to the claimant group and it is for members, through the governance entity, to decide how best to use their redress, provided that this is for the benefit of the claimant group. Of course, the Crown hopes that the use and distribution of settlements should help improve the social and economic status of Māori, but the way to achieve this is for each claimant group to decide.

entity. These questions must be answered in any communication material used by mandated representatives of a claimant group during the review and ratification process for a post-settlement governance entity. The Crown also uses the answers to these questions to assess whether the proposed entity meets the principles of representation, accountability and transparency.

Twenty Questions on governance

Information required in disclosure material for governance entities

General

In the Twenty Questions:

- a **beneficiary** is a person who is entitled to benefits from a Deed of Settlement of historical claims between Maori claimants and the Crown
- **benefits** can take a range of forms, and it is up to the governance entity to make the decisions on how those benefits will be distributed. For example, scholarships, kaumatua flats, marae maintenance and health initiatives for members are various types of benefit. There could also be "intangible" benefits such as the increased vigour and strength of a claimant group because of an increase in the number of members who speak te reo and are integrated into their own tikanga
- the **governance entity** is the representative, accountable and transparent body that receives and manages the settlement on behalf of the claimant group. It will:
 - represent the claimants in regard to the settlement
 - make decisions on how to manage any redress received in the settlement package (cash, properties and other redress), and
 - make decisions on how benefits (if any) are passed to the beneficiaries of the settlement
- a **member** is a beneficiary who is registered with the governance entity in relation to the Deed of Settlement, and
- a **representative** is a person who is elected to the governance entity.

1. ***What is the proposed governance entity and its structure?***

- Briefly describe the governance entity, any bodies accountable to it (e.g. asset management and benefit distribution bodies), and the relationship between the governance entity and those bodies.

2. ***How was the proposed governance entity developed?***

- What opportunities were there for beneficiaries of the settlement to provide input in the development of the proposals?, and
- To what extent were matters of tikanga and kawa considered in the development of the governance entity?

3. ***What is the relationship between the proposed new governance entity and existing entities (if any) that currently represent the claimant community?***

- What happens to the existing entities once the new entity is established?

Representation

4. ***How can beneficiaries of the settlement participate in the affairs of the governance entity?***

- Who are the beneficiaries of the settlement?
- Are all beneficiaries entitled to register as members?
- What are the benefits of registration?
- Are there any registration requirements?
- How will eligibility for registration be verified?
- Who makes decisions on registration and how are those decisions made?, and
- Can those decisions be appealed, and if so, how?

5. ***How do members have a say in who the representatives on the governance entity will be?***

- How many representatives will there be on the governance entity?

- Who can be a representative?

- Are they chosen on iwi, marae, hapū, whānau or other group basis?

- How will they be chosen?

- How do members know when an election is due?, and

- How do members exercise their vote?

6. ***How often and how will the representatives change?***

- What is the term of office for a representative?, and

- Under what circumstances (if any) can a representative be removed?

Accountability

7. ***What are the purposes, principles, activities, powers and duties of the governance entity and any bodies accountable to it?***

- What are the duties and obligations of the representatives?

- Do the governance entity and any bodies accountable to it have to act exclusively for the benefit of beneficiaries?, and

- Who exercises control over any bodies accountable to the governance entity?

8. ***Which decisions will members have a say in and how?***

- As well as having a say in who the representatives on the governance entity will be, will members have a say in any decisions made by the governance entity?

- What notice, quorum and other relevant provisions will there be relating to meetings of members?

- What voting rights do members have at hui called by the governance entity (such as the AGM)?, and

- What majority will be required to pass a resolution at a meeting of members?

9. ***How are decisions made by the governance entity?***
 - How often do the representatives meet?
 - What quorum and other relevant provisions will there be relating to meetings of the governance entity?
 - How are these meetings publicised?, and
 - Can members attend those meetings and what rights do they have at those meetings?
10. ***Who will manage the redress received in the settlement?***
 - Will different bodies manage different aspects of the redress?
 - Are the relationships between the representational, commercial and social functions of the governance entity clearly defined?, and
 - Are there any limitations on management decisions on holding or using assets, for example, do any transactions require the consent of members?
11. ***Who will determine what benefits are made available to beneficiaries?***
 - Can the function of determining benefits be delegated by the governance entity?
12. ***What are the criteria for determining how benefits are allocated and distributed?***
 - Are these criteria set in the constitution of the governance entity or are the decisions left to the representatives?
13. ***How will the people managing assets and determining benefits be accountable to beneficiaries?***
 - Will there be regular hui or other reporting processes for the representatives to report to beneficiaries?
 - What reports will beneficiaries receive?
 - How will roles and responsibilities be separated to clearly define the limits of power that each office holder has?
- Are there any limitations on liability of the representatives?
- Can the representatives be directors or employees of any bodies accountable to the governance entity?, and
- What would happen if a representative had a conflict of interest in a decision or transaction of the governance entity?
14. ***What are the rules under which the governance entity and any bodies accountable to it operate?***
 - How do members get access to the rules (trust deeds or constitutions) of the governance entity and any asset management and benefit distribution bodies?, and
 - What legislation is particularly relevant to the rules (e.g. Companies Act 1993, Trustee Act 1956, Perpetuities Act 1964, Te Ture Whenua Māori Act 1993)?
15. ***Are there any interim governance arrangements in the period between the establishment of the governance entity and the date that the settlement assets are transferred? If so, what are they?***
 - Who will represent beneficiaries of the settlement during the interim period?
 - What can they do?, and
 - Will there be interim elections?
16. ***How will the structure and the rules of the governance entity and any bodies accountable to it be changed?***
 - How can the structure and the rules of the governance entity be changed?
 - Are there any rules that cannot be changed?, and
 - How can the relationships with any bodies accountable to the governance entity be changed?
17. ***What are the planning/monitoring/review processes for decisions of the governance entity?***

18. *What if members do not agree with a decision made by the governance entity?*

- Can members call a special meeting of the governance entity?, and
- Are there dispute resolution procedures for particular issues?

Transparency

19. *How often will accounts be prepared and audited?*

- Who prepares the accounts?
- How is the auditor chosen?
- Can a representative be the auditor?, and
- Will members have access to copies of accounts?

20. *Will beneficiaries receive information about decisions that affect them? How? How often?*

- Can they get a copy of the rules of the governance entity (see question 14)?
- Will they get Annual Reports and other regular reports?
- Can they get minutes and resolutions of meetings of the representatives?, and
- Where do they get further information?

Settlement legislation

Nearly all Deeds of Settlement require settlement legislation to be passed. This means that the settlement does not take effect until Parliament has passed an Act for this purpose. Settlement legislation is needed:

- to ensure the finality of the settlement by removing the ability of the courts and Waitangi Tribunal to re-open the historical claims or the Deed of Settlement
- to provide for statutory instruments such as Statutory Acknowledgements or Overlay Classifications to be applied
- to remove statutory memorials from land titles in the claim area, and
- to vest land in the governance entity on behalf of the claimant group if normal administrative land transfer processes would not be appropriate.

Drafting settlement legislation

The Parliamentary Counsel Office drafts bills for introduction to Parliament. The mandated representatives receive copies of the draft bill, so they can be sure that it gives full effect to the Deed of Settlement. Deeds include a provision that the claimant group agrees to support the legislation once it is introduced.

Parliamentary process

Figure 2.16 shows the various stages in passing a bill. (See page 78).

Select Committee consideration

Generally, legislation is referred to a *select committee* after its formal introduction and first reading. Parliament has several select committees, made up of Members of Parliament from different political parties. The number of MPs each party has on a select committee generally depends on that party's share of seats in Parliament as a whole, but the final make-up is decided by Parliament. Once a select committee has had a bill referred to it by Parliament, it invites the public to comment or make *submissions* on the bill so that the committee can take into

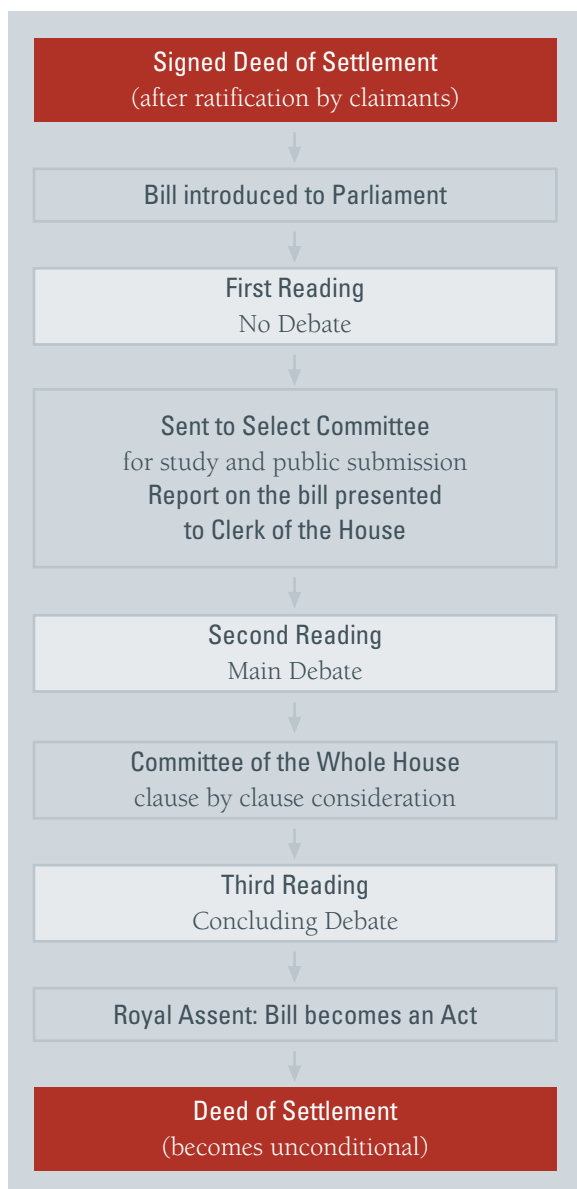


Figure 2.16: finalising the settlement - the parliamentary process for passing legislation

account, and report back to Parliament, what the public and various organisations think about the bill. To do this, select committees usually advertise for submissions in the public notices column of newspapers and will often travel around the country to hear what people who made submissions have to say. Submissions are usually in writing, but a person or group may also appear before the committee to have their say and to answer any questions the committee may have of them.

The mandated representatives, and any individual member of the claimant group who may wish to, may make submissions to the select committee, using their rights as New Zealanders to participate in the democratic process.

The mandated representatives and OTS may also work together, with the committee's permission, to prepare material for reports to the committee. Claimant groups should be aware that if the settlement negotiation process has been a matter for strong debate within their group, dissenters may use the opportunity of a Select Committee hearing to seek further debate on the content of the settlement package and the process by which it was achieved.

Legislation giving effect to Treaty settlements is different from most other legislation in that it flows from an agreement already reached between the Crown and the claimant group. While Parliament may accept or reject the bill, the Select Committee can ensure that this is an informed decision through a thorough review of the bill. The purpose of such review is to ensure that the bill properly and effectively reflects the settlement, and to report to Parliament on the effect of the bill. It is not to re-negotiate the terms of the settlement by making amendments that would alter the substance of the Deed of Settlement. This reflects long-established Parliamentary practice that Parliament should not use its sovereignty (absolute power) to change legal agreements between the Crown and a third party, unless this is necessary in the national interest.

Role of OTS in the legislative process

OTS is responsible for monitoring the passage of the bill through the select committee stage.

This involves:

- preparing a briefing to the committee, which provides a summary and an examination of each part of the bill. The briefing is intended to assist the committee members in considering the bill
- providing further written reports to the committee if required to do so
- appearing before the committee to answer any questions the committee may wish to ask, and
- analysing the public submissions and providing a report on these to the committee.

Once this process is complete, the committee reports the bill back to Parliament. Parliament's Standing Orders require bills to be reported back within six months of referral to a Select Committee.

Second Reading, Committee of the Whole House and Third Reading

After receiving the Select Committee's report, Parliament conducts a debate on the Bill known as the Second Reading Debate. This debate is a general one on the aims and purposes of the Bill. It then considers the bill in detail through a stage called the Committee of the Whole House. The Committee of the Whole House – which is made up of all Members of Parliament – may vote on the bill clause by clause or part by part. Amendments may also be put forward by any MP. If the Committee of the Whole House adopts the bill, it is given its third reading. The third reading is when Parliament formally votes to pass the bill. It then goes to the Governor-General for the "Royal Assent", the signature that turns the bill into an Act of Parliament and makes it part of New Zealand law. The third reading of a settlement bill in Parliament is an historic occasion for the Crown and the claimant groups.

Special arrangements can be made through the Speaker's office to reserve seats in the public gallery for members of the claimant group, and for the singing of waiata at the end of the third reading.

Other steps to finalise the settlement

Three other steps must be taken to finalise the settlement:

- the Waitangi Tribunal must be told that the claim or claims have been settled. This means filing a document called a "memorandum", signed by the lawyers for both parties, with the Waitangi Tribunal. The memorandum advises the Tribunal of the terms on which the settlement has been reached and asks for the Tribunal's register to be amended to reflect this
- secondly, if court proceedings were suspended before entering into negotiations, the claimant group's counsel must provide the Crown with a document called a "notice of discontinuance", ending the legal proceedings, and
- finally, any landbank arrangement within the area covered by the settlement comes to an end, except to the extent necessary to give effect to the Deed of Settlement.



Ngāi Tahu Third Reading

Implementation – making the settlement happen

By the time the implementation phase of a settlement begins, the claimant group will have established a governance entity to hold and manage the settlement assets. The governance entity will also have responsibility for managing the implementation of the settlement.

OTS oversees the implementation of settlements on behalf of the Crown. OTS liaises with other government agencies involved in the settlement to ensure that all agreed deadlines for handing over settlement assets to the governance entity are met. OTS also monitors whether the Crown meets all other requirements of the settlement.

Other Crown departments and agencies have significant responsibilities during the implementation phase. Where redress involves an ongoing relationship between a department or agency and the governance entity, managing that redress is the responsibility of the department or agency concerned. In the case of a Conservation Area, for example, that is the Department of Conservation.

Among a governance entity's specific responsibilities during implementation are:

- applying for resource consents if needed – for example, to use a camping entitlement, and/or
- deciding who will represent the governance entity if representation is part of the redress – for example, as a statutory adviser or member of a statutory board.

Among the Crown's key responsibilities are:

- raising title for property to be transferred
- execution of encumbrances (covenants, leases, licences) affecting settlement properties, and
- notifying other parties directly affected by settlements.

Both the Crown and mandated representatives need to develop detailed work plans for implementation, to ensure it is carried out as efficiently as possible.



Tainui's Te Kauhanganui building at Hopuhopu

Building a future

As the title to this Guide suggests, settlements of historical claims are intended both to heal the past and build a future. While the cash or assets provided as settlement redress may not meet all the needs and aspirations of a claimant group, the Crown does contribute through settlements to a platform for future development. Once the initial phase of implementation outlined above is over, the future is largely in the hands of the claimant group. Their governance entity picks up the responsibility for managing and developing settlement assets. In doing so, it remains accountable to the wider claimant group through the decision-making and reporting processes approved by the claimant group.

