

# TE KŌKIRI NGĀTAHI

## *Treaty Settlements Hui 2009*

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### **7 ideas to accelerate the settlement process**

1. The following 7 ideas have been identified as potential options for accelerating settlements.
2. Most of these ideas are based on lessons learnt and distilled over the past 18 months. It would be useful to explore whether the ideas can / should be used more frequently or earlier to accelerate settlements.
3. Many of the ideas can be scaled: elements of the idea might be adopted without implementing in its entirety.
4. Some of the ideas might not apply to all settlements. They may be adopted in settlements with iwi who are open to these ideas.
5. Some of the ideas can be combined: All or parts of a number of the ideas could be used to accelerate the settlements with a group or within a region.
6. Where an idea would apply to all iwi in the settlement process (eg increased use of mediation within existing litigation processes and increased Crown transparency on who it intends to negotiate with and quantum) consensus on the value of these suggestions would be required to develop them further.
7. The order of these ideas is roughly equivalent to when they might arise in the settlement process.
8. The underlying assumptions in these ideas are settlements will be accelerated by:
  - greater use of a wide variety of dispute resolution techniques (facilitation, mediation) earlier
  - negotiations with larger groups (eg with iwi on a regional basis)
  - greater transparency by the Crown earlier
  - creating more opportunities for iwi to lead the settlement process, particularly around the selection of redress, and allocation of redress where more than one iwi has interest in the redress being offered.
9. There will be other ideas iwi may have to accelerate the settlement process.

## **Idea 1 More use of mediation before existing legal action options**

### **What would it look like and how could it work?**

1. This would build on recent experience where the Waitangi Tribunal and the Māori Land Court have undertaken successful mediations on an informal basis, particularly in relation to mandate and overlapping claim disputes.
2. Where mandate or cross claim disputes escalate to the point that one party seeks resolution via legal action, eg through the Waitangi Tribunal or the Māori Land Court, the parties would be directed to undertake mediation before the action is heard more formally. The mediation could be undertaken by the Waitangi Tribunal or the Māori Land Court, or an appropriate third party.
3. It could look like the process for resolving employment disputes, with the various steps set out in the Employment Relations Act: eg lodge a dispute, mediation before being heard by the Employment Relations Authority.

### **What would be different from now?**

4. This could be an extension of what sometimes happens informally now. The key differences could include:
  - better co-ordination of mediation / alternative dispute resolution options across agencies that already do this to some extent or another eg: the Waitangi Tribunal and the Māori Land Court
  - greater clarity around how intra / inter-iwi disputes can be resolved, with a clearer path on how they could be escalated if mediation is not successful
  - requiring mediation as a step before litigation.

### **Potential rewards**

5. Introducing mediation prior to proceedings could accelerate dispute resolution, at lower cost than litigation. It would be particularly helpful in resolving relationship based disputes, where mediation is more likely to result in a mutually acceptable resolution than the win / lose outcome than can arise from litigation.
6. Greater clarity around where groups can go to resolve disputes may also accelerate their resolution.

### **Other potential implications**

7. Requiring mediation, ahead of steps like urgency hearings and more formal litigation, could result in it taking longer to get a final decision where mediation is not successful.
8. It is assumed there is value in ensuring there is clearly a next step if mediation is not successful. It would be useful to ensure mediation does not take the dispute out of the queue for the next step in the original legal action.
9. There would be jurisdictional matters to resolve between agencies such as the Waitangi Tribunal and the Māori Land Court if this idea is progressed. It would be important to ensure the fundamental purpose of these institutions was not altered by such changes. These ideas may require legislation to make them happen more routinely. There could also be consequential resource and training requirements.

## **Idea 2 Support iwi preparedness for negotiations**

### **What would it look like and how could it work?**

1. The Crown could provide information, support and possibly funding for iwi within a region. The objective could be to support early planning and preparation, so negotiations can be streamlined. This could extend to support in thinking about the role of the settlement in the longer term future of the iwi.
2. When the Government has capacity to enter negotiations within a region it could inform iwi on how to work effectively with the Crown and what is / is not possible within the settlement process. This could build on the work and resources of the Crown Forest Rental Trust (eg Aratohu mo nga Ropu Kaitono, Guide for Claimants Negotiating Treaty Settlements), and the Office of Treaty Settlements. Iwi could then have a better understanding of what they want from a settlement and what they might reasonably expect. They could choose to present proposed settlement packages for the Crown to consider, as an alternative to building it with the Crown.
3. Based on feedback from iwi the Crown may offer additional / different types of support to groups entering negotiations to assist them.

### **What would be different from now?**

4. The Crown could provide more information:
  - to a wider range of claimants
  - earlier in settlement process
  - at the same time to all negotiating parties
  - separate from negotiations meetings.
5. The above information is currently provided to negotiating groups later in the process.
6. From time to time the Crown has received redress package ideas from claimants, which have been picked up as the basis for negotiations.

### **Potential rewards**

7. Iwi with a good understanding of what they want, the redress options the Crown might accept, and a desire to progress quickly would be helped. This approach could also accelerate negotiations for cohesive groups who want to move quickly.

### **Other potential implications**

8. This approach may accelerate negotiations and reduce overall costs for both parties. There would be an increase in other operational costs for Government. There may be scope for other agencies and suitably experienced individuals to deliver this idea. The Crown needs to consider how it might provide more financial support to claimants and address any inequities between groups with access to the Crown Forestry Rental Trust.
9. This approach will tend to reward iwi who are prepared to accept types of redress that have been offered to others previously. It may increase frustration and delays for claimants who want, a more “personalised” approach, or redress that hasn’t been offered before. There is less scope for iwi to educate the Crown on their grievances.
10. The Crown will need to be very clear about what is in the ball park for settlement. Where iwi negotiators have a smooth or fast negotiation, it may be harder to demonstrate they got the best deal they could to their constituents.

### **Idea 3 Continue to recognise iwi coming together for joint or parallel negotiations**

#### **What would it look like and how could it work?**

1. Iwi would continue to be encouraged to form clusters, who would either negotiate jointly (eg Tūranganui a kiwa) or at the same time / in parallel (eg the top of the South Island iwi). Recognition for forming clusters could include:
  - negotiations with clusters being given priority with more Crown negotiating resource, beginning negotiations sooner
  - offering redress which would not otherwise be available (because the Crown may need to hold it in reserve for other groups who are not in negotiations)
  - the Crown being more flexible on its expectations of all of the groups in negotiations to make it easier to complete the settlement.
2. Iwi could agree to negotiate together. This may arise out of shared whakapapa, shared history in their relationships with the Crown, progression of claims through the Waitangi Tribunal process together or through the Crown encouraging them to work with neighbouring groups. If iwi decide they wish to negotiate together the detail could form part of agreeing how the negotiations will be conducted – agreeing the terms of negotiations.

#### **What would be different from now?**

3. For some groups not a lot. The Crown has recently used a regional approach to negotiations. The Office of Treaty Settlements is now more regionally structured to make this easier to achieve.

#### **Potential rewards**

4. Overall it is expected that settlements could be completed faster and potentially with a wider range of redress available. If all overlapping interests are represented within the iwi in negotiations, the Crown will not need to reserve redress for iwi in the region yet to settle. It should be easier for overlapping interests to be resolved if all of the major iwi are at about the same stage in negotiations and there is no perception of the Crown giving preference / priority to iwi it is in negotiations with at the expense of other iwi in the region.

#### **Other potential implications**

5. Iwi who don't want to form clusters could feel frustrated by the Crown's preference. What would iwi need to be interested in this idea? What efforts should be applied to encourage groups who might not otherwise want to be part of a cluster?
6. Iwi negotiating together may need to put more effort into working with neighbouring groups while in negotiations. This should accelerate resolving overlapping interests in the later stages of negotiations. Leadership of the negotiations by claimants could be more challenging. Iwi may need additional recognition for their efforts in forming clusters.
7. The Government will need to be consistent with groups to ensure fairness of treatment. Where clusters break down, in fairness to others, the Crown will need to adjust the redress offered.
8. There are potentially economies of scale in negotiations, particularly where groups agree to negotiate together rather than at the same time but separately.

## **Idea 4 Increased Crown transparency on who it intends to negotiate with and quantum**

### **What would it look like and how could it work**

1. The Crown could communicate a list of groups with whom it intends to negotiate. This might be regional collectives of groups who are not in negotiations, or the groups considered sufficiently large that the Crown would be prepared to negotiate with these groups directly. The list could be generated by the Office of Treaty Settlements.
2. At a very early stage in negotiations, the Crown could also communicate indicative quantum expectations (say in bands of potential value of redress) for each claimant group it intends to negotiate with. The communication of quantum needs a lot of development.

### **What would be different from now?**

3. The Crown has previously decided whether a group is large enough to negotiate with on a case by case basis. This idea would make the Crown's requirement more transparent and could eliminate claimant groups second guessing who the Crown will accept mandates from. This would also allow groups to begin planning and discussions on a realistic basis, well before the negotiations process begins.
4. Early communication of indicative quantum would be different in that, indicative offers are only made once a group is in formal negotiations. The indicative quantum may be in the form of bands / orders of magnitude rather than specific values.
5. The factors considered by the Crown in determining quantum offers are not expected to change significantly. They are important to maintain fairness between settlements.

### **Potential rewards**

6. This could remove some of the uncertainty, particularly for smaller claimant groups, on who the Crown intends to negotiate with.
7. Iwi can determine whether and how much effort to put into negotiating settlements. It could remove anxiety around the quantum for both parties in the negotiations.

### **Other potential implications**

8. Some iwi may strongly disagree with how they are treated in a list. This could either prompt a discussion with the Crown to persuade them to change the list, or could add to grievance.
9. A decision to communicate a list would be hard to undo. It may shift the focus of Crown / Māori discussions to the method for determining a list of who the Crown intends to negotiate with.
10. Early communication of indicative quantum offers would also be hard to undo. Care will be required in designing how this would work in practice. There could be wider / more intense scrutiny of any final settlements with a significantly different final value from the initial quantum.
11. Negotiation of cultural redress may become more intense, if early agreement is reached on financial redress.

## **Idea 5 More systematic use of Crown-funded facilitators and more senior Crown Chief Negotiators**

### **What would it look like and how could it work?**

1. This would build on current practice. There are three distinct roles, facilitators (Crown facilitators and Iwi facilitators), mediators and Chief Crown Negotiators.
2. Facilitators have been used to encourage groups to work together and keep negotiations on track. Facilitators are experienced senior leaders with an understanding of the Treaty settlement framework, how iwi work both internally and with their neighbours, tikanga Māori and managing complex negotiations. They are generally Crown funded but are expected to operate independently of iwi and Crown. There are different roles for a Crown or Iwi facilitator. Crown facilitators may be more focussed on helping iwi understand the Crown's expectations and processes. Iwi facilitators may be more advocates for iwi interests to the Crown. The decision to use a facilitator, and if so who, would be based on understanding the barriers to progress, the likelihood of success, the availability of a suitable person to act as facilitator and ideally jointly agreed.
3. Mediators need to be independent of the Crown and claimants and acceptable to both parties. They are only required when major disputes arise that parties can not resolve.
4. Chief Crown Negotiators, appointed by the Minister, have been used to great effect in larger or more complex negotiations. They can provide more day to day leadership of the Crown team. They can act as the Minister's representative, with a wider mandate than government officials, which means they can resolve more difficult or contentious issues faster.

### **What would be different from now?**

5. The difference is mainly one of increasing when these people are used. Facilitators might be used more frequently and earlier in negotiations. Chief Crown Negotiators may be appointed more frequently, and to smaller negotiations, than previously.

### **Potential rewards**

6. The additional expertise is expected to speed up settlements. Faster resolutions of potential stumbling blocks could also maintain or accelerate momentum. Senior external assistance would address some of the limitations on the Office of Treaty Settlements resources.

### **Other potential implications**

7. There is a limited pool of sufficiently senior and experienced people to do these roles well. It is important that only the best people are used, both for success and to ensure the Crown's appointments demonstrate how important each negotiation is. The effectiveness of this assistance would need regular review and it would be important to ensure that any change in personnel does not adversely affect negotiations. The Crown may need to put more effort into ensuring consistency in approach across negotiations.
8. Parties need to be clear exactly what role a person has. This will be particularly important to ensure there is no confusion about whether a person is speaking on behalf of the Minister.
9. Additional operating expenses associated with greater use of facilitators and Chief Crown Negotiators may be offset by overall reduced costs if settlements are achieved faster. Faster negotiations should reduce costs for the claimants.

## **Idea 6 Reduce the role of the Crown in allocation of redress – where requested**

### **What would it look like and how could it work?**

1. This could look like the Central North Island Forestry Settlement: a group of iwi and the Crown agree to a high level settlement and the member iwi then determine the allocation of redress amongst themselves. These settlements could be:
  - settlements for a large region covering a number of claimant communities
  - national / large regional settlements of a type of redress.
2. These settlements are likely to work best where the iwi are already:
  - reasonably unified or have a common focus - this could be via leadership or a single governance entity for example
  - familiar with the settlement process.

### **What would be different from now?**

3. This approach could be used by a group of iwi who are negotiating a settlement with high value commercial and / or cultural redress.
4. The Central North Island forestry experience shows, there would be more up front work to design a settlement that meets the needs of multiple iwi. Once agreed the Crown would make fewer fine judgements over entitlements of individual iwi. It may take some time for the Crown to establish some general principles for this approach to settlements. The Crown would need to have a clear sense of its expectations going into these types of settlements.

### **Potential rewards**

5. It may be possible to transfer more redress faster to Māori and therefore the benefits of settlements could arise sooner. Iwi could determine how much effort to put into the allocation or redress between them.

### **Other potential implications**

6. There would be a less direct relationship between the Crown and each iwi covered by the settlement. This may affect smaller iwi more. The Crown may need to be more flexible in its approach to elements of the settlement process to make this work. The Crown may also need to be prepared to involve itself in the inter iwi allocation of redress to ensure that the final settlements are fair to all member iwi.
7. There could be increased work for iwi to complete the settlement and they should be resourced accordingly. There may be larger up front costs for both parties. Economies of scale are also expected. It may be easier for claimant communities to set up an entity to manage collective redress.
8. Distribution of redress from an umbrella body to specific iwi may not be any faster than the current approach.
9. Partial settlements around specific assets (eg forests) would not be consistent with the Crown's preference for comprehensive settlements.

## **Idea 7          Streamlining the legislative process**

### **What would it look like and how could it work?**

1. These ideas would lead to settlement legislation being completed faster and / or with fewer demands on Parliament. There could be less delay between iwi ratifying and signing the deed and the settlement being implemented.
2. There is a combination of three ways this could happen:
  - drafting the deed of settlement and the settlement bill at the same time
  - passing settlement legislation for iwi at the same time (say as part of a regional / collective settlement or where more than one deed of settlement is completed at about the same time)
  - using as much consistent legislative drafting as possible.

### **What would be different from now?**

3. Drafting of the deed and bill at the same time builds on recent experience with the Central North Island Forestry, Waikato River and Wellington settlements. Using as much consistent drafting for legislation has been used before.
4. Passing settlement legislation for more than one settlement at about the same time would be new for treaty settlements – in part because there has been no opportunity previously.

### **Potential rewards**

5. All of these options should reduce the time to complete settlements, and the costs to claimants and the Crown of the implementation of the settlement.

### **Other potential implications**

6. Drafting the deed and bill at the same time is more resource intensive but over all it would significantly reduces rework between the two documents.
7. Passing settlement legislation for multiple iwi at the same time would significantly reduce the work load for Parliament, which could accelerate its passage. Iwi could have their settlement act, but it is less likely that each iwi would have a lot of Parliamentary attention of their settlement until the final stages.
8. Greater consistency in legislative drafting would reduce the costs of this stage for both claimants and the Crown. This would be at the expense of personalisation for iwi and potentially the attention paid by Parliament to a specific settlement.