in brief from
RAINEY COLLINS
LAWYERS
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NAU MAI HAERE MAI

… to the Summer 2010/11 edition of Rainey Collins in Brief Maori Issues newsletter.

In this edition we focus on different aspects of the Treaty claims negotiation process. In particular we discuss preparing for negotiations, mandating, negotiation teams, conservation land, and post-settlement governance entities.

With the Government deadline of 2014 for settling historical Treaty claims fast approaching, groups who wish to pursue negotiations need to ensure that they are ready.

I trust you find the information of interest and value and wish all our readers a Merry Christmas and a safe prosperous New Year.

Kia ora
Peter Johnston

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Preparing for Negotiations – 6 Key Tips

We are often asked by our clients about direct negotiations with the Crown. For Treaty claimants who are not yet in direct negotiations, some of the questions are: How early is too early to start thinking about negotiations? Who will negotiate the settlement of our claim? How do direct negotiations relate to the hearings process?

Preparing for negotiations is like building a house. It is essential for the future success of your settlement that you have done your groundwork and that you have laid strong foundations.

If you are participating in (or preparing for) Tribunal hearings you should always keep in mind the end result – the settlement of your Treaty of Waitangi claims. The Crown will not sit down with each individual group of Wai claimants. The Crown prefers to deal with representatives of groups by region, and those representatives must have a mandate to negotiate the claims of that group. So consider this – who do you want to represent your claim(s) when it comes time to negotiate?

Here are 6 key tips to help ensure that your foundations are strong:

1. **Up to date Registers.** Even before you begin the mandating process, it is essential that you have an up-to-date tribal register. You must convince the Office of Treaty Settlements (OTS) that you have a sufficient level of support to represent your group. A tribal register will be instrumental in doing this. As previous experience has shown, the sufficient level of support comes down to the number of people who support you.
2. **Good Communication.** A tribal register is also going to be a useful tool during the mandating process as large quantities of information will need to be sent out to the people you represent. Consider how you will keep in contact with people, and how you will ensure that your records are kept up to date.
3. **The Large Natural Grouping.** Start working early with other groups with whom you share common interests. Because OTS thinks regionally, it is more likely to want to negotiate with people who represent as many different groups as possible.
4. **Overlapping Interests.** You will need to have a plan to deal with the overlapping interests of other groups. OTS does not wish to disadvantage one group when settling with another. While OTS have processes in place to deal with overlapping interests, it is helpful if you are talking to the other groups early and looking to develop strategies to work together.
5. **Other Settlements.** Make sure you talk to groups in your area who have already started the negotiations process. Consider any overlapping interests you may have with them. You need to ensure that your interests are protected before they settle their claims.
6. **Landbanking and Surplus Lands.** Keep an eye on the surplus lands and landbanking processes. If you want lands returned to you, the Crown must still be the owner. Landbank your interests in order to protect them until you are ready to negotiate.

No matter what stage you are at with your Treaty Claim, remember that negotiations can be an intensive process. Laying strong foundations now will assist you in the long term.

To take your negotiations strategy to the next step call us on **0800 729 529**.

JO-ELLA SARICH

My group has finished hearings – what next?

The questions on the minds of many groups who have finished hearings is: What now? These groups need to give particular thought to next steps leading towards negotiations. Here are some things to consider:

- Remember that CFRT funding won't necessarily carry over to direct negotiations. Start thinking about how your 'clusters' may relate to the group(s) that eventually enter negotiations, if at all.
- Who should the representatives be? Remember not everyone gets to negotiate their individual claims. Hearings can be a good indication of support for possible representatives.
- What do claimants want? The claimant evidence from hearings should have provided a good steer on the types of redress claimants are seeking. Start thinking about the best way to achieve these outcomes strategically. Not all claimants can get exactly what they want and there is a real need to work together to decide what is going to benefit the group most.
- Get sound professional advice from someone experienced in negotiations.
- Develop a communication plan or strategy for keeping the various groups informed.

CAMPBELL DUNCAN

Ngati Porou negotiators recently initialled a Deed of Settlement with the Crown at Parliament.

Ngati Porou negotiators recently initialled a Deed of Settlement with the Crown at Parliament.

Rainey Collins are delighted to be the Legal Advisors for Ngati Porou in its negotiations with the Crown.

The initialled Deed of Settlement includes a historical account of the interaction between the Crown and Ngati Porou, an acknowledgement that the Crown has breached the Treaty of Waitangi in its dealings with Ngati Porou, and a formal apology from the Crown. It also includes a $110 million redress package from the Crown, and an additional $13 million in accumulated forestry rentals.

The Deed of Settlement is the result of over two years of negotiations between the Ngati Porou negotiators and the Crown. The negotiations have been conducted on behalf of Ngati Porou by a group called Te Haeata, a sub committee of Te Runanga o Ngati Porou made up of representatives of the Ngati Porou hapu/marae and the Runanga.

The settlement package will be the full and final settlement of all Ngati Porou historical Treaty of Waitangi clams against the Crown.

Lead legal counsel James Johnston acknowledges the many efforts of those involved in the negotiations including the Te Haeata negotiators and the team of Rainey Collins lawyers who had worked closely with Te Haeata throughout the negotiations.

JAMES JOHNSTON

Mandating....a crucial step in the Negotiations Process

One of the first, and the most important, issues for claimant groups to consider is the issue of mandate.

A mandate is where the claimant group gives authority to a representative body or individuals (mandated representatives), to negotiate the terms of the settlement agreement with the Crown.

It is important to ensure any mandate is properly obtained, and that the procedures involved are robust. Remember that the mandate process will be scrutinised thoroughly by the Crown, and possibly by a Court! The costs and delays associated with Court challenges can be substantial and therefore it is important to get your processes right from the outset.

The key to a successful mandating process is communication. It is important that all members of the claimant group have an opportunity to know what is going on and, also, that they have had a fair opportunity to have their say and/or participate during the mandating process.

There are normally a series of hui involving members of the claimant group. While these hui may concentrate in the claimants' geographical area, they are also often held throughout the country and occasionally in Australia. This ensures that everyone has an opportunity to hear who the negotiators are likely to be, and is also a chance for people to have their say.

These hui need to be advertised widely and well in advance. Sound planning is key. Advertisements normally go in the main newspapers throughout the country. Radio is also often used. It is also increasingly important to use the Internet and social media to get the message across. In fact, social media is now a good way for two-way communication – they both advertise the process and give opportunities for people to have their say.

It is for the claimant group to decide who will represent them and to determine an appropriate way to select their representatives. The Crown must be satisfied that the mandated representatives (individuals or a group) have sufficient support of the claimant group.

The mandate only gives representatives the authority to negotiate with the Crown – it does not give them the authority to make a decision on the settlement. Any final decision on the settlement package must be approved by the claimant group.

This means that even once the representatives have a valid mandate, they need to maintain this mandate from the group throughout the negotiations. Therefore, ongoing communication with your people is critical to the success of your settlement.

Thought also needs to be given to a process for managing challenges to the mandating process. Challenges sometimes arise even when there has been a robust mandating process.

Did You Know?

We have further articles on Maori land issues. You can review these on our website www.raineycollins.co.nz.

ANDREW GREIG

5 Tips: Who should be in your negotiations team?

Groups who have obtained a Crown negotiations mandate from their people, then enter into direct negotiations with the Crown. They will need to appoint negotiators who are responsible for achieving the best settlement deal possible on behalf of their people: they have an important role and immense responsibilities.

Mandated groups need to ensure that the right negotiators are appointed. The following five tips will help mandated groups avoid any potential pitfalls and enter negotiations with a well equipped team.

1. ***Appoint negotiators based on their skills*** The skills and experience of each person nominated to be a negotiator should be assessed against an agreed set of requirements. These requirements could range from knowledge of specific matters, to previous negotiations experience, or professional skills.

   Negotiators of differing ages and genders should be given equal consideration. This ensures that no skills are overlooked and may also result in the appointment of a representative negotiations team.

2. ***Negotiators and specific tasks*** A negotiating team functions well if each member is assigned to specific tasks from the outset. For example, some negotiators could be assigned the task of negotiating the commercial redress cash, while others focus on conservation redress.

3. ***Negotiators and conflicts of interest*** Negotiators should be asked to declare any potential conflict of interest and to step back if an actual conflict of interest arises.

4. ***Teamwork*** During the long and sometimes stressful negotiations process the negotiators must be able to work well together. They must also be prepared to undertake their share of the workload.

   The team should understand that differences of opinion are acceptable, and at times valuable, and that processes are in place for resolving disagreements.

5. ***Desired long term outcomes*** Negotiations can often be an intense process. Therefore, it is important for negotiators to keep an 'eye' on the long term goals and desired outcomes of the negotiations.

These five tips will help mandated groups, and the negotiating team, in commencing and undertaking the important task of negotiating a settlement.

DR BRYAN GILLING

Quick facts:

What is an historical claim?

An historical Treaty claim is a claim against the Crown for breaches of the Treaty of Waitangi by the Crown before 21 September 1992. Although you can no longer file a historical Treaty claim against the Crown (the cut-off date for doing so was 1 September 2008), you can still file a contemporary claim with the Waitangi Tribunal. The Office of Treaty Settlements negotiates the Settlement of historical claims.

What is a relativity clause?

The 'relativity clause' is an 'insurance' clause negotiated by Ngai Tahu and Tainui in their settlements. Under this mechanism, if the value of all Treaty settlements ends up being more than $1 billion, then these iwi will be entitled to a top-up payment to ensure their position is maintained relative to other tribes that settle. This clause can have an impact on your negotiations.

Why is Crown Forest Licensed Land important?

Crown exotic forest land can be a valuable type of property to include in a settlement, because accumulated rentals that are held by the Crown Forestry Rental Trust are transferred with the land. In addition, the group will receive an ongoing income stream from rental on the land.

What's up with DOC Land?

When we ask our clients what they want out of a settlement, we most often hear that they would like their land returned. Sometimes, however, the Crown may be reluctant to return Crown-owned land in a region because of its conservation values. This can be frustrating for negotiating groups, as often this land holds very high cultural significance for the iwi. Also, the reality is that not a lot of conservation land has million-dollar resorts on it. Sometimes conservation land may be expensive to maintain and not generate a lot of income.

It is important for groups to think strategically at an early stage about the type of land they want returned, and whether they are likely to get it back. Our experience has shown that even if you don't get conservation land back, there may be other ways of recognising your interests in the land and its significance to you. For example, a group has recently succeeded in negotiating for a strategic partnership over conservation land in their rohe which was not being returned in the settlement.

This partnership provides for the group's input into strategic long-term planning at a high level.

If you do include conservation land in your settlement, there may be ways to manage the ongoing cost. It is now possible for the Crown to take responsibility for some of these costs through a management agreement over returned conservation land.

And remember, ongoing relationships with agencies such as DOC can be key. It is important to try and negotiate robust relationship agreements with Crown agencies, both for involvement in activities on the ground and at a planning level.

There are many laws affecting conservation and reserve land, and working out your strategy for this type of land can be tricky. We recommend you seek advice early if you are thinking about redress involving conservation land in a settlement.

MEGAN CORNFORTH-CAMDEN

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Post-settlement governance entities

It is common for groups in negotiations with the Crown to focus on what they will get from the Crown in terms of redress such as cash, land and other redress, without focussing on what will happen when those assets are actually given to the group.

A Post-Settlement Governance Entity (often called a "PSGE") is the organisation that is responsible for looking after the settlement assets received from the Crown on behalf of your group. As your PSGE will potentially hold millions of dollars worth of money and property it is important that it meets the needs of your group. It is crucial that groups negotiating with the Crown start thinking about their PSGE well before the settlement agreement with the Crown is signed.

There are a number of important things to consider when thinking about what your PSGE will look like. We look at just a handful of these in this article.

Name
While this may seem very simple, the name of your PSGE is important – this organisation is representative of your group. You may also be surprised about how hard it is for groups to agree on a name! So, get thinking about the name of your PSGE early.

Representation
One of the most important aspects of a PSGE is the people who are responsible for governing it. For example, if your negotiating group is an iwi, think about whether each hapu or marae of your iwi will have a representative on the PSGE, or whether the representatives will be chosen by rohe, or by another method.

Structure
The structure of your PSGE is also crucial. Many PSGEs are trusts, but this is not always the case. As well as the actual PSGE, your group should also think about the organisations that will form part of your PSGE – for example, it is common to have at least one company to carry out the commercial functions of the PSGE and at least one charity to carry out the social and cultural functions of the PSGE. This is something that requires a lot of consideration and should be thought about with your group's legal and accounting advisers.

Existing Entities
As many groups that are negotiating with the Crown already have existing organisations, it is necessary to consider what will happen to those groups after settlement. The Crown will not recognise a Maori Trust Board as a PSGE, so if your group already has a Maori Trust Board, you will need to have a new organisation as your PSGE.

Membership
It is important to think about who can be members of the PSGE and what rights members will have. For example, do people have to whakapapa to a particular hapu or iwi to become a member? Will those people on your group's register automatically become members of your PSGE? Will all members get to vote in representative elections and at the AGM, or will this be limited to adult members only? Will there be established processes for dealing with disputes between members and representatives?

There are many things to consider when thinking about establishing your PSGE. But remember, this article only looks at a handful of the most important things to consider – there's much more to think about, so make sure you and your group start thinking early about what your PSGE will look like and what it will do!


RONETTE DRUSKOVICH

What about MIOs?

Many negotiating groups are iwi that already have Mandated Iwi Organisations ("MIO") that hold the iwi's fisheries settlement assets. This can be a complicating factor for iwi setting up a PSGE. Many groups want just one organisation after settlement, rather than having several different organisations for different functions (such as one to hold fisheries assets and another to hold Treaty settlement assets). Currently, the Maori Fisheries Act does not allow a MIO to be changed to a new organisation, such as a PSGE. However, the government is in the process of changing the law surrounding this – so soon it may be possible for your new PSGE to also be the MIO for your iwi.

In recent negotiations an iwi negotiated with the Ministry of Fisheries and Te Ohu Kai Moana so that its PSGE could be the iwi's MIO. This may be another option for those iwi who settle with the Crown before the law changes. If you have a MIO, it is important to obtain sound advice about the law changes and options to ensure you get the best post-settlement structure for your iwi.


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