

POSTSCRIPT

Dealing with issues surrounding the negotiation and settlement of claims is not a novel exercise for this Tribunal. What has been unusual about this inquiry has been the layering of internal tribal politics. This Tribunal heard evidence attempting to progress hapu/iwi disputes, which are matters beyond our jurisdiction, or even our desire, to inquire into. Much of this evidence demonstrated that Maori people have to assume more responsibility for practising the politics of inclusion rather than exclusion, of adopting or adhering to good governance and management practices, and of embracing more rigorous and transparent decision-making processes.

Much of this evidence of internal disputation and poor governance and management also created a smokescreen behind which several major flaws relating to representivity and accountability were obscured. It was only following a careful review of the events as they unfolded within Te Arawa that any smoke disappeared. There may not always be time for such careful analysis to take place. In our view, if standards of best practice are not developed, then, as negotiations proceed at pace, the greater is the likelihood of mistakes being made by both parties to the Treaty of Waitangi.

It is also likely that the Tribunal will be asked, from time to time, to exercise its jurisdiction to assess the adequacy or otherwise of the Crown's process for recognising the mandate of tribal leaders charged with the negotiation and settlement of their people's claims. Mistakes will be made unless some basic standards are developed.

With that in mind, and although too late to address the specific claims before this Tribunal concerning Te Arawa, the following Treaty-compliant standards of best practice should be considered by the Crown and Maori for adoption to progress the negotiation and settlement of claims. These are merely suggestions, since their utility may be limited in the context of a specific claimant community.

1. SHORT TERM: SUGGESTED BEST PRACTICE CRITERIA

1.1 Possible process requirements for scrutinising a mandate plan

A robust process for scrutinising a mandate plan could include inquiring into whether:

1. The credentials of those purporting to facilitate the mandating process were identified.
2. Independent advice was obtained from other Crown agencies (particularly TPK) and Maori organisations as to the suitability of any facilitators to conduct the mandating process.

3. A list was drawn up of those Waitangi Tribunal claimants potentially affected by the negotiations.
4. An adequate hapu/iwi or confederation profile was produced. (The plan should have provided some general information about the groups involved, including the population of different hapu and iwi to be consulted during the mandating process.)
5. A rationale was established for explaining why a particular hapu/iwi or marae community has to be consulted.
6. An appropriate number of hui was held, given the size of the group. (The selection of venues for hui and meetings should have taken into account issues such as claimant communities, tikanga, and the ancestral connections of those to be consulted.)
7. The key claimants, hapu/iwi leaders, marae committee members, and Maori reservation trustees to be directly consulted were identified.
8. A schedule of hui for particular hapu/iwi and or confederation of iwi was prepared.
9. Draft public advertisements notifying the date, venue, and agenda of hui were disseminated to all relevant media.
10. A procedure was established for adoption at hui. (The procedure should have included minute taking, the transparent selection of chairpersons and scribes, and the recording of resolutions, votes in favour, abstentions, and dissent.)
11. An outline of the presentations to be given at each hui was prepared. (The presentations should have included information on the structure used to arrive at selected hapu/iwi representatives and negotiators.)
12. Provision was made for an independent scrutineer of the process, either TPK or a consultant commissioned by TPK, which scrutineer should have attended all scheduled hui.

1.2 Possible process requirements for scrutinising a deed of mandate filed with OTS

A possible robust process for scrutinising a deed of mandate, once filed with OTS, could include inquiring into whether:

1. An appropriate number of hui was held, given the size of the group. (The selection of venues for hui and meetings should have taken into account issues such as claimant communities, tikanga, and the ancestral connections of those to be consulted.)
2. A report was prepared on the views of key claimants, hapu/iwi leaders, marae committee members, and Maori reservation trustees.
3. Advertisements notifying the date, venue, and agenda of hui were published.
4. A report was prepared on the procedure adopted at hui, including minute-taking, the transparent selection of chairpersons and scribes, and the recording of resolutions, votes in favour, abstentions, and dissent.

5. A report was prepared on the presentations given at each hui, including the structure used to arrive at selected hapu/iwi representatives and negotiators.
6. A report was prepared assessing whether the negotiating structure was properly designed to ensure accountability from the negotiating body back to the constituents.
7. A record was kept of the outcomes of hui.
8. An independent report from the scrutineer of the process was prepared.
9. A final report from the facilitator was prepared assessing the success of the mandate plan and identifying any problems. (This report should also identify any additional meetings or hui held over and above those identified in the mandate plan and their purpose.)
10. A list was drawn up of those Waitangi Tribunal claimants affected by any draft deed of mandate.

1.3 Possible process requirements for ensuring acceptability of deed of mandate

A robust process for ensuring that the deed of mandate is acceptable to the hapu/iwi or confederation of iwi could include requirements for:

1. Public advertisements notifying that the deed of mandate has been received and inviting public submission or comment.
2. The circulation of the deed of mandate to all Tribunal claimants affected by it.
3. The circulation of the deed of mandate to hapu/iwi leaders, marae committee members, Maori reservation trustees, and major hapu/iwi organisations, with a letter explaining the impacts and inviting submission or comment.
4. A careful assessment of the nature of the submissions or comments received, including an assessment of whether the submitters represent significant hapu or iwi groups or clusters.
5. OTS, TPK, and independent scrutineer meetings with submitters where the latter clearly object to aspects of the deed of mandate.
6. An OTS, TPK, and independent scrutineer meeting with facilitators to ascertain responses to submissions and comments.
7. A written response based on facilitator feedback sent to submitters inviting their comments.
8. An OTS and TPK review of all objections and results of meetings and correspondence with submitters and facilitators. (This review to take place with the assistance of the independent scrutineer.)
9. Instructions to facilitators to rectify any issues and or problems clearly identified.
10. A report from the facilitator on the rectification of any issues or any failures to rectify.

1.4 Possible requirements for a robust process for reporting to Ministers on deed of mandate

A robust process for reporting to the Ministers of the Crown on the deed of mandate could include requirements for:

1. An outline showing compliance with the above standards.
2. An assessment of the strengths and weaknesses of the deed of mandate.
3. Notice of any risks associated with proceeding to recognise the mandate.
4. Notice and enclosure of the final report of the independent scrutineer assessing the deed of mandate.
5. An explanation of any divergence in opinion from that of the independent scrutineer.
6. Recommendations as to whether or not the deed of mandate should be recognised.
7. A meeting between Ministers, officials, facilitators, submitters, and hapu/iwi representatives or negotiators.
8. The final decision to be made by Ministers of the Crown.

2. LONG TERM: POSSIBLE LEGISLATION

The submission from counsel for Wai 996 regarding the need for legislative intervention and the development of policy on a Treaty claims settlement Act has, in our view, much to commend it. It would inject some objectivity into a negotiation and settlement process that some may perceive to be in danger of becoming subsumed by political rather than Treaty-compliant priorities.

Dated at this day of 20

CL Wickliffe, presiding officer

J Baird, member

GH Herbert, member

