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Process Issues
in
Crown/Māori Treaty Negotiations

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I INTRODUCTION

A *The Impact of Process and Culture on Negotiation*

In the modern, post-colonial state, there is growing acknowledgement of the ambivalent status occupied by indigenous peoples, both historically and in the present. A negotiation industry has sprung up around the attempts of governments and indigenous peoples to resolve outstanding disputes. This has been the case in New Zealand where negotiations are taking place between the Crown and Māori.¹ At the time of writing, two major settlements have been reached through negotiation: the Fisheries settlement² and Tainui settlement.³ Two further large scale negotiations are on the agenda between the Government and the Taranaki and Ngai Tahu iwi. There are numerous issues coming out of these negotiations which require further analysis if Crown and Māori negotiations are to be worthwhile and lasting.

Against the backdrop of negotiations between the Crown and Māori, the discussion in this paper involves two concepts. The concept of fundamental importance in this paper is the **process** of negotiation. The goal of this paper is to determine what guidelines can be

¹ The "Crown" is part of the executive arm of government in New Zealand. The Government represents the Crown in all respects. The term "Māori" is used along with "iwi" and "hapū" in this paper. It is now generally accepted that iwi and hapū are the appropriate groups for the Crown to deal with. For comment on the mana motuhake (autonomy) of iwi and hapū, see W Dewes "Fisheries - A Case Study of an Outcome" (1995) 25 VUWLR 219, 220-221; *Report of Submissions: Crown Proposals for the Treaty of Waitangi Claims* (Wellington, 1995) 20, 93; S Heremaia and A Tunks "The "Iwi Status" Decision: Clash of Ethics in the Allocation of the Māori Fisheries Resource" (1996) 1 New Zealand Environmental Law Reporter 168-170.

² Crown and Māori representatives signed the Fisheries Deed of Settlement (the "Sealords Deal") on 23 September 1992. The Deed provides full and final settlement of all Māori fishing claims under the Treaty of Waitangi. For further information see J Munro "The Treaty of Waitangi and the Sealord Deal" (1994) 24 VUWLR 389.

³ The Tainui "Heads of Agreement" was signed in September 1994, and ratified by a postal ballot of Tainui people over the following months. The Tainui Deed of Settlement was agreed to in May 1995. For more information see R Mahuta "Tainui: A Case Study of Direct Negotiations" (1995) 25 VUWLR 157; I Macduff "Resources, Rights and Recognition: Negotiating History in Aotearoa/New Zealand" (1995) Cultural Survival Quarterly 30.

established for the process of negotiation between the Crown and Māori. Too often disputants⁴ focus on the outcomes they want from a negotiation. Disputants give inadequate consideration to the process that is to be followed during substantive negotiations. However, a flawed process detracts from the substantive outcome eventually reached by the parties. The inability to resolve process issues means that the substantive outcome is less satisfactory to the parties.

The second concept that this paper discusses is **culture**. Culture has an integral effect on process and final outcome. Cultural differences have a role in causing process inadequacy. Other causes are apparent, such as power imbalances and lack of resources. However, this paper contends that cultural difference is the biggest cause of the inability to establish an adequate procedure for negotiation, because it inhibits the ability to communicate effectively. In discussing culture, this paper looks particularly at the lack of ability to communicate, which is exaggerated by cultural assumptions.

In the last part of this paper, the author suggests some guidelines for Crown/Māori negotiations, with a particular focus on the establishment of an adequate procedure and the need for the parties to comprehend cultural differences.

B *The Context for Crown/Māori Disputes*

Ownership and control of land and resources, and political power, are the main interests involved in Crown/Māori disputes. This is also the case in disputes with indigenous peoples and states worldwide.

The dispossession of land and resources, breaking of traditional social structures and political alienation caused by former colonial powers has had severe effects on indigenous peoples, historically and in the modern world. "Colonised" indigenous peoples are among the poorest, unhealthiest, most incarcerated peoples in the world. The current governments of modern states have inherited the task of resolving these issues, as a result of the actions of their colonial predecessors.

⁴ Any reference to the "parties" or "disputants" is a reference to the Crown and Māori.

An anti-colonialist, anti-assimilationist trend has become apparent in recent years. There is a growing appreciation of the uniqueness of indigenous peoples and ethnic minorities. With this has come an awareness that the effects of dispossession subsist, and that some action is required to put right the ambivalent position occupied by the worlds' indigenous peoples. Indigenous peoples have forced governments to recognise these issues and enter negotiation by enforcing rights under treaties, legislation and through courts using the common law doctrines of aboriginal title and fiduciary duties. The relationship between the Crown and Māori is encapsulated in the Treaty of Waitangi. The Crown's historical breaches of the Treaty provide the basis for the disputes that currently require negotiation.

Before discussing the process and culture issues of Crown/Māori negotiation in more detail, it is necessary to define and discuss some academic approaches to negotiation.

II DEFINITION OF NEGOTIATION

A *Characteristics*

Negotiation encompasses behaviour that is basic and necessary in human society. Negotiation is inherent in everyday activities, from deciding who is going to use the bathroom first in the morning, to managing a workload with one's employer. Negotiation is one method that humans use to resolve the myriad of disputes that occur everyday. Negotiation is not confined to the small-scale dispute. Negotiation takes place at national and international levels, between governments, non-governmental groups, interest groups, corporates and other large-scale organisations representing a large group of people with similar interests. Negotiation also occurs intra- and inter-culturally, between or within groups with their own cultural backgrounds. Generally, the assumptions that different groups bring to a negotiation, whether those assumptions are conscious or unconscious, determines the make-up and outcome of the negotiation.

With the growth of the "ADR movement" in the last 20 years,⁵ a number of accepted definitions and models for negotiation exist. Two prominent authors describe negotiation as follows:⁶

Negotiation is a basic means of getting what you want from others. It is a back-and-forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed.

Negotiation is when two or more parties to a dispute communicate ideas, issues and emotions in an attempt to mutually agree to a solution for their problem.

⁵ "ADR" is an acronym for "Alternative Dispute Resolution". The term refers to a number of dispute resolution options that have become popular over the last few decades, as alternatives to litigation and arbitration. These options include different types of negotiation, mediation, facilitation, and conciliation, within forums like community law centres, government organisations, the marae and so on.

⁶ Fisher and Ury *Getting to Yes: Negotiating Agreement without Giving In* (Houghton Mifflin, Boston, 1981) page xi (Introduction).

The definition in the above paragraph is idealistic. The success of a negotiation depends on the personal attributes of those involved.⁷ Disputants often do not successfully communicate ideas, issues or emotions. The communication between disputants might not be "back-and-forth", but one-sided. An agreement might not be reached, or be as "mutual", in terms of being balanced and with equal input by the parties, as one (or several) of the disputants would wish. However, while idealistic, the above definition is helpful as a starting point for analysis.

Some characteristics appear to be common throughout most examples of negotiation. Negotiation is described as being flexible, involving concessions, and as preserving the relationship between the parties.

1 Flexibility

Flexibility is relevant in two respects. First, it allows the parties to deal with the dispute in any manner they wish. There are no rules or precedents for negotiation, except what are imposed by the parties and interested third parties.⁸ The limits which the parties or third parties seek to impose, may be in the form of appeals to morals, values, norms, sanctions, tikanga, kawa and so on. Secondly, flexibility allows the parties to decide from an infinitesimal amount of outcomes, including recompense, restitution, revenge, violence, humiliation, conciliation, education and restructuring the relationship.

To assume that all negotiations are inherently flexible is to generalise too far. A number of factors will determine the amount of flexibility apparent in the negotiation. Some of these factors are the nature of the dispute, the severity of the crisis, and the balance, or imbalance of power between the parties. For example, the possession by one party, of

⁷ Even "success" is a relative term, as the parties may measure success in different ways. For example, for one party, making the other side concede more ground than they wanted might be considered success. For another party, success may be merely talking to the other side or getting them to the table.

⁸ Rules are also implicitly imposed by the values and sanctions of the cultures/societies to which the disputants belong.

a strong bargaining position, will give that party a considerable degree of flexibility. It has a comparatively wide range of options. In comparison, the other party has a weaker bargaining position, and consequently, less flexibility to order the process and outcome.

Flexibility is often used to compare negotiation to state-sanctioned forms of dispute resolution, like litigation and arbitration. When compared against these formal⁹ methods of dispute resolution, negotiation is more flexible because prima facie there are no rules or formalities in existence.

The current Crown/Māori negotiations process¹⁰ is an example of an inflexible process. The current process has been set by the Government and reflects the Government's strong bargaining position, in comparison to Māori. There is little opportunity for Māori to negotiate for a different type of process. The process has been set by the Government and must be adhered to.

2 Concessions

Another characteristic of negotiation is that the parties will make concessions to mutually agree to a solution. This is an obvious point, considering that a dispute arises when the parties take different stances over a particular issue. It follows, that to make a mutually satisfactory resolution, the parties have to move away from their original position. Again, this is a generalised point, as in some negotiations, the concessions may be completely made by one party, rather than both or all:¹¹

⁹ Litigation and arbitration are referred to as "formal dispute resolution" methods, because they involve many formalities and are constrained by state-sanctioned rules; for example, the High Court's Rules of Civil Procedure.

¹⁰ Discussed below, Part IV.

¹¹ *Gulliver Disputes and Negotiations: A Cross-Cultural Perspective* (Academic Press, New York, 1979) 5.

At least one party, but usually both, must move toward the other... . Although there may be a compromise of some sort, this is not inevitable since one party may be induced to move altogether to his opponent's position or, alternatively, there can be the joint, integrative creation of something new that is acceptable to both parties.

In Crown/Māori negotiations, there tends to be a disproportionate number of concessions made by Māori. In the Fisheries settlement, Māori "agreed"¹² to the following concessions:

- the repeal of section 88(2) of the Fisheries Act 1983;
- the promulgation of regulations governing non-commercial seafood rights;
- endorsement of the Quota Management System by Māori;
- discontinuance of High Court proceedings for which orders for injunctions still stood and an undertaking by Māori not to recommence any proceedings;
- satisfaction of all current and future claims and extinguishment of all commercial fishing rights under statute, common law and the Treaty; and
- non-commercial fishing rights not statutorily extinguished and still giving rise to Treaty obligations on behalf of the Crown, but having no legal effect against the Crown in the courts.

¹² Not all iwi agreed to, or signed the Fisheries Deed of Settlement. However, the Treaty of Waitangi (Fisheries Claims) Act 1992, which enacts the terms of the Deed, applies to all Māori. Therefore, non-signatory iwi were "drawn into" the Deed by the coercive legislation.

These concessions are considerable and reflect the imbalance in power between the Crown and Maori:¹³

There is a basic inequality of bargaining power between the Crown and Māori. The Crown wields control over the negotiation process; it has skilled and experienced advisors and negotiators; and it can, for the most part, pick when and on what terms it wants to negotiate, and whether or not to settle. Māori are in a comparatively weak position. They have few human and financial resources; they cannot enter into negotiations without a measure of political largesse or as a result of judicial favour; and they are often unable to walk away from a settlement, either because their needs are pressing, or for fear that, without settlement, the Crown will act or omit to act so as to prejudice Māori interests. This power imbalance can have a significant effect on outcome: there can be no guarantee in such circumstances that Māori will regard any settlement reached as legitimate.

3 *Preserving the Relationship*

Another observation made about negotiation, is that it usually, (or at least, most successfully) takes place when the parties have a continuing relationship, and must maintain it. Negotiation will either resolve the dispute and allow the parties to continue their former interaction, or restructure the nature of the relationship, so that it persists in a different form. The Crown/Māori relationship has an added dimension. The Treaty of Waitangi provides the basis for the relationship between the Crown and Māori. This relationship will always exist by virtue of the Treaty.¹⁴ However, the nature of the Crown/Māori relationship will change as every new generation reinterprets the relationship:¹⁵

¹³ J Munro, above n2, p397.

¹⁴ This may be an issue if New Zealand becomes a republic. However, it is the author's view that any new executive will have to inherit the responsibilities of the Crown, including the Crown's Treaty responsibilities.

¹⁵ C Wickliffe "Issues for Indigenous Claims Settlement Policies Arising in Other Jurisdictions" (1995) 25 VUWLR 204, 214.

In the Fisheries Settlement Report [n Wai 307] the Waitangi Tribunal had no doubt that a settlement policy should be looking to the future rather than seeking the extinguishment of rights or finalisation of the relationship that exists between Crown and Māori. In other words full and final settlements are inconsistent with the ongoing nature of the partnership established by the Treaty.

In comparison, adversarial forms of dispute resolution, primarily adjudication, tend to "pit" the parties against each other. This entrenching of positions and attitudes may work to destroy any relationship between the parties, if it has not already been destroyed. However, another analysis can be made. It is common for litigants to settle just before reaching the trial stage. Litigation is often used as a threat, to force disputants into negotiation. The same point can be made about Crown/Māori negotiations. Māori have used the courts to force the Crown into negotiations. The approach appears to have worked well for Māori and also overseas.¹⁶

B *The Distinction Between Process and Substance*

The distinction between process and substance is used in the analysis of many disciplines. Although both elements are integral to each other the distinction is a useful tool for analysis.

The **substance** of a negotiation is the actual communication that takes place between the parties: their arguments, conversations, discourse and actions. The substantive outcome of a negotiation is the final resolution that the parties reach. This is also referred to as the goal of the negotiation: the agreement that the parties are left with after the discourse has finished. Ideally, at the point the substantive outcome is reached, the dispute should be resolved.

¹⁶ C Wickliffe *Indigenous Claims and the Process of Negotiation and Settlement in Countries with Jurisdictions and Populations Comparable to New Zealand's* (Report prepared for the Parliamentary Commissioner for the Environment, Wellington, September 1994) 6, 8, 33-37.

The **process** of a negotiation can be described as the steps that the parties take in reaching the substantive outcome. Process is the method by which the parties go about resolving their dispute. Process can be analysed as the structure which is imposed upon the course of a negotiation. For example, disputing neighbours agree that they will meet in one person's home, to discuss who will be responsible for repairing the fence, and that they will do so in an amiable and reasonable manner. The disputing neighbours have established a process for their negotiation. They have identified a forum to negotiate in, the relevant issue, and a protocol for how they will treat each other.

The outcome is usually of primary importance to the disputants. The theory in this paper is that process is just as important as outcome. Before discussing this in more detail, it is necessary to look at the effect of cultural differences on the process of Crown/Māori negotiations.

III THE EFFECT OF CULTURAL DIFFERENCES

A *Analysis of Culture*

The Concise Oxford Dictionary defines culture as "the customs, civilization, and achievements of a particular time or people".¹⁷ Another definition is "the totality of learned, socially transmitted behaviour".¹⁸ The one constant in a definition of culture is "people". It is people that create culture. A further delineation is "groups of people". Culture is created by groups of people, not individuals. A further requirement is "time". A culture forms over a period of time, over which practices are learned, developed and passed on to others. The next basic requirement for culture is a set of practices and beliefs. Culture is a way of doing things. Over time, values attach to this way of doing things. The attached values tell us that these cultural practices are acceptable, preferred and necessary ways of living our lives.

Culture is an environmental constant, but the types of culture we are subjected to are not constant. We are subjected to different cultures by reason of our sex, race, age, nationality, place of residence, place of work and so on. Culture is an external phenomena which ultimately shapes our individual personalities. Culture, combined with our individual personalities, gives us our identity.

The different cultures of the Crown and Māori are discussed in this paper. Unfortunately, assumptions often have to be made when discussing the cultures of large groups of people. This paper discusses "Māori culture", as opposed to specific iwi or hapū cultures. As many tikanga are common across iwi and hapū boundaries, it is convenient to discuss Māori, rather than iwi culture. However, the independence of iwi/hapū cultures should not be underestimated. Nor should the influence of individual personalities on iwi/hapū

¹⁷ RE Allen (ed) *Concise Oxford Dictionary* (8ed, Oxford University Press, 1990).

¹⁸ JA Axelson *Counseling and Development in a Multicultural Society* (Brooks/Cole Publishing Company, California, 1993) 3.

cultures be forgotten. A similar caveat must be applied when discussing "Pākeha culture". The term "Pākeha culture" in this paper means the culture of the mainstream, dominant Caucasian population.

Comparing Pākeha culture to Māori culture in a discussion on Treaty negotiations is dangerous because the parties to Treaty negotiations are Māori and the "Crown", not "Pākeha" generally. The obvious question is whether there is a Crown or Government culture that would be better used for this discussion. The Crown is an artificial, constitutional construct. It would be false to say there is a "Crown culture" evident in New Zealand. However, there is what might be called a Government subculture, and more generally, a political culture. There is a Government subculture because the Government operates according to the *mores* that it, and its National predecessors have established as acceptable, preferred ways of doing things.

This is a subculture because it feeds off the majority, mainstream, Pākeha culture. The majority of Government members are middle-class Pākeha men. It makes sense that the broader cultural grouping (Pākeha) affects any subcultures and therefore, the Government's subculture has its basis in Pākeha culture. The political system itself reflects Pākeha culture. The Government represents the majority of the electorate, 70% of which is Pākeha. Therefore, for political reasons alone, the Government will reflect Pākeha culture. It follows that Pākeha culture is the correct entity for comparison to Māori culture in this paper.

B *Misunderstanding through Miscommunication*

Cultural differences are the biggest cause of the inability to establish an adequate negotiation procedure. It is not the differences in themselves that cause the difficulties. It is the fact that groups cannot communicate their differences that causes the failure. Communication is most commonly impeded by the inability of the parties to truly listen to each other. Hearing what the other side says is impeded by much more than language constraints. Ethnocentrism, prejudice, racism, stereotyping, patronism and the making of assumptions generally are faults that all contribute to bad communication, and ultimately, ineffective procedural and substantive negotiation.

The introduction of the current process and the Crown proposals¹⁹ by the Government is an example of an overt lack of communication. The Government simply failed to involve Māori in the creation of the any process policy. It is also an example of how the Government assumes it can set settlement policy by itself. The reason for this assumption is the Government's political and constitutional position. Its powerful position gives legitimacy to any assumptions it makes about the groups it governs. However, such assumptions are not necessarily legitimate from a Māori point of view. It is generally true that Māori do not feel that the Government can legitimately make assumptions about settlements policy.

Furthermore, the differences in culture impact on the way that the parties view the issues and objectives. It impacts on the forum and protocols that each party finds acceptable. Culture determines the way each party handles internal matters. Disputants make assumptions about each other based on their own cultural biases. All of these situations lead to misunderstanding because differences are not discussed or understood.

¹⁹ Discussed in part IV below.

C *Conceptual Framework of Culture and Negotiation*

The previous section (IIIB) identifies the impact that culture has on disputing. It is possible to turn the analysis around. Disputing in itself is a cultural behaviour. The dispute itself might determine the way a party reacts to another.

In Crown/Māori disputes and negotiations, there is the potential for the creation of a "negotiation" subculture. There already seems to be some patterns in the way in which previous Crown/Māori negotiations have been structured. For example, the Crown always sets the process; huge concessions always seem to be made by Māori; Māori have to force the Crown into negotiation through litigation, and so on. It appears that certain patterns of behaviour in Crown/Māori disputes are repeating. It would be unacceptable for a culture of Crown/Māori negotiations to be created on this basis. Crown/Māori negotiations are marked by a huge imbalance of power in favour of the Crown, and any formation of cultural practices on this basis would inherently reflect this unfair situation.

Furthermore, process issues are simply not given enough consideration in current negotiations. The parties need to develop new cultural practices and values that recognise the importance of process in Crown/Māori negotiations. As a development of this idea, the inadequacies of the current and proposed methods for negotiation are discussed in the following parts.

IV CURRENT POLICY AND THE PROPOSALS

A *The Current Process*

The current process for negotiations between the Crown and Māori was established in 1990.²⁰ The current process has four stages:²¹

- acceptance onto a negotiations register;
- negotiation of a framework agreement;
- negotiation of an agreement in principle;
- finalisation of a detailed agreement.

It is unclear how successful the current process has been. Only two major settlements have been made since 1990. It does not appear that the Fisheries settlement was negotiated on the 1990 model. The Fisheries negotiations took place over only a few days, in secret, and under a commercial deadline. The process in the Fisheries settlement was driven by commercial imperative (the sale of the Sealords group of companies by Carter Holt Harvey Limited) and the ensuing lack of time.²² There does not appear to have been any time to sort out process issues, given these constraints.

²⁰ *The Direct Negotiation of Māori Claims* (Wellington, 1990).

²¹ *Proposals*, below n25, p30.

²² J Munro, above n2, p408.

The Tainui settlement seems to have been negotiated on yet a different model. Robert Mahuta²³ identifies three phases in the process of the Tainui negotiations:

Phase 1 requires the Crown and Tainui in this case to engage in preliminary discussions to ensure that the nature of the claim is fully understood. In this instance, the report of the Sim Royal Commission and Manukau Report of the Waitangi Tribunal clearly established the nature of the raupatu claim.

Phase 2 requires the development of a Crown position and brief for negotiations. Until recently, no position was conveyed by the Crown to Tainui. The December release of the Crown's policy proposal on the settlement of Māori claims came well after negotiations commenced and a likely settlement package had been considered. To this extent Tainui was operating on the original basis of land for land (accepting the Crown's land holdings of 90,000 acres as the "peg in the ground"). No natural resource policy had been mentioned; nor was "full and final" settlement considered an issue.

Phase 3 involved the negotiations themselves. What Tainui has found as the linch pin to effectively participate in this process is to do the home work, and to be better than the Crown in all aspects of the process. Handicapped by limited resources and concerned with its obligations to its people, achieving this was difficult.

None of these three phrases specifically involves sorting out process issues. It looks as if process issues were mixed into phases two and three with the negotiation itself. The difficulties are acknowledged in the above quote. The Crown did not initially communicate its position to the Tainui negotiators; the new Crown proposals²⁴ were released when the negotiations were already underway; some interests (natural resources, full and final settlement) had not been discussed; and Tainui lacked resources for process issues. The thesis of this paper is that process issues must be negotiated before substantive negotiation takes place. It is important that process issues are resolved so that they do not interrupt the negotiation of substantive issues, and so that the outcome is not hampered by dissatisfaction over the process.

²³ R Mahuta, above n3, pp171-173.

²⁴ See the following paragraphs in Part IVB.

B The Crown Proposals

The Government has proposed a new settlements policy.²⁵ The Crown proposals contain the Government's policy on the fiscal envelope, claims affecting the conservation estate, natural resources and gifted lands the negotiation process, Māori/iwi representation, the legal structure of claimant groups, and finality of settlements. Māori have heavily criticised the proposals since their release.²⁶

The proposed negotiations process is set out in Part 5 of the Crown proposals. The process is as follows:²⁷

The Crown proposes four main stages in the negotiations process:

- acceptance onto a Negotiations Work Programme;
- negotiating redress for the breach, leading to a draft Deed of Settlement;
- ratification of settlement by the Crown and claimants, leading to the signing of a Deed of Settlement;
- implementation of settlement.

The Crown proposes that acceptance onto the Negotiations Work Programme will require the Crown to:

- accept that the historical basis for the claim has been determined;
- agree to a Crown position on the nature and extent of each of the alleged breaches;
- accept that the correct claimant grouping has been identified for the claim;
- accept that the claimant negotiators have been properly mandated by the claimant group;
- agree that the claim has sufficient priority to be included on the Negotiations Work Programme, in terms of the Government's overall settlement strategy, given resource and financial constraints.

²⁵ Office of Treaty Settlements *Crown Proposals for the Settlement of Treaty of Waitangi Claims: Summary/Ngā Kaupapa ā te Karauna hei Whakatau i ngā Kerēme o te Tiriti o Waitangi: He Whakarāpopototanga and Crown Proposals for the Settlement of Treaty of Waitangi Claims: Detailed Proposals* ("Crown proposals") (Wellington, 1994).

²⁶ T Rangihuea "The Role of Māori Women in Treaty Negotiations and Settlements" (1995) 25 VUWLR 195; I Macduff, above n3; *Report of Submissions*, above n1; M Durie "Proceedings of a Hui held at Hirangi Marae, Turangi" (1995) 25 VUWLR 109. ²⁶ ²⁶

²⁷ *Proposals*, above n25, pp29-30.

The Crown proposes that acceptance onto the Negotiations Work Programme will also be conditional upon the claimants:

- agreeing to negotiate a final settlement covering all of their claims unless the Crown makes an explicit exception;
- agreeing to negotiate knowing that the Crown's offer of redress will be based on the Crown's stated position on the nature and extent of the breach, despite the fact that the claim may include alleged breaches that are wider in nature and extent than those acknowledged by the Crown;
- agreeing to waive all other avenues of redress that may be available to them while in negotiations;
- acknowledging that a Crown condition of settlement will be the lifting of all memorials in the area, and other requirements to ensure finality.

The Crown proposes that the claimants' agreement to these conditions will be signified in a written record, to be subsequently referred to as the "Terms of Negotiation".

The Crown proposes that, after "without-prejudice" discussions with the claimants, it will develop a Crown negotiating brief for the claim before negotiations commence. The brief will establish the Crown's negotiation structure and specify procedures for consulting with third parties where they may be affected by a proposed settlement.

If Crown and claimants reach agreement, the Crown proposes that the claimants will ratify a draft Deed of Settlement and endorse proposals on how the benefits of settlement will be distributed and the resources managed. A final Deed of Settlement will not be signed, and therefore not be binding, until it has been ratified by both parties.

The Government claims that the proposals are an improvement on the current process.²⁸ However, the Crown created the proposals without any negotiation or consultation with Māori. The purpose of this paper is to show that preliminary negotiation is required between disputing parties, so that they establish a process together. The parties may have different conceptions of the process issues. If the Crown sets the process without input from Māori, then Māori are denied the opportunity to voice their ideas of the process issues. This may result in process issues being mixed into the discussion of substantive

²⁸ *Proposals*, above n25, p30.

issues, because they have not yet been adequately addressed. The long term result is dissatisfaction with the negotiations and the outcome, if a settlement is eventually reached. Dissatisfaction is incompatible with a settlement that is intended to be binding, lasting and mutually satisfying.

Furthermore, the current policy and the Crown proposals are based on the premise that one process can be set up for every negotiation that is to follow. The approach in this paper is that a new process should be negotiated every time the Crown and an iwi or hapū enter settlement negotiations. It is obvious that a process set by the Crown will not necessarily suit iwi or hapū. Similarly, the right process for one iwi or hapū, might not suit another iwi or hapū. Therefore, process issues should be newly addressed at each negotiation. It would be wrong to assume that a precedent structure can be imposed equally on all Māori who enter negotiations with the Crown. Each iwi/hapū must be allowed to exercise their own rangatiratanga and tikanga in respect of these process issues.

Another disadvantage of the current process and the Crown proposals is that the Crown has the power to "name" the parties to a negotiation. It is the Crown's policy to only negotiate with those it identifies, and the initiation of negotiation is dependent on the Crown. The Crown and Māori occupy the positions of "patron" and "supplicant" respectively. This exacerbates the imbalance of power that exists between the parties. The Crown's ability to pick who, where and when it negotiates, emphasises its dominance of Crown/Māori disputes. There is a distinct disadvantage for Māori in having this "patron/supplicant" relationship. Māori always have to be identified by the Crown. This is disadvantageous, because it emphasises the fact that the Crown is in charge and holds the greatest share of power.

The current process and the Crown proposals need revision. Part V of this paper provides more detailed thought on the revision of the Crown/Māori negotiation process.

V ISSUES IN THE PROCESS OF NEGOTIATION

Disputants do not always give full consideration to a process before entering negotiations. Gulliver notes that the pre-bargaining phase has not yet been seen as important:²⁹

This has meant a gross neglect of the wider processes and the dynamics of negotiations - a disregard for factors of crucial importance to the end game of bargaining. If, however, we are to understand real-life negotiations, it is essential to investigate how the parties actually get to that end game. This requires examination of the interconnected processes of information exchange, learning and the recurrent adjustments of expectations and strategies.

Because Crown/Māori negotiations involve many complex issues and are political and emotive, negotiating without a firm structure in place can lead to serious misunderstandings about issues and objectives.

The inability to resolve these process issues means that the final outcome is less satisfactory. A flawed process detracts from the substantive outcome reached. Therefore the situation becomes one of "dispute processing" (changing the form of the conflict and only prolonging it) rather than dispute resolution proper.³⁰ Therefore, to achieve an outcome that is acceptable to all involved, a process must be established and followed.

The Fisheries settlement is an example where there is dissatisfaction with the outcome because the process was dissatisfactory. Since the Deed's signing there has been much dissent and litigation. In the Court of Appeal,³¹ Māori appellants complained that the Deed was a settlement on behalf of all Māori, when many iwi were not represented or even in concurrence with the deal. They also complained about the settlement's permanence and the fact that Treaty rights were extinguished, a concept that is preposterous to many

²⁹ Gulliver, n11, p73.

³⁰ SE Merry "Disputing without culture" (1987) 100 Harvard Law Review 2057.

³¹ *Te Runanga o Wharekauri Rēkohu v Attorney-General* [1992] 2 NZLR 301.

Māori. A claim was also made to the Waitangi Tribunal.³² Recent debate centres around the allocation of the fisheries resource by Te Ōhu Kai Moana (the Treaty of Waitangi Fisheries Commission), and it has been pointed out that:³³

...the ideological dispute between iwi based claimants and the Crown about what extent of the fishery Māori "control" has merely been transferred to the TOKM forum.

The conclusion is that, in relation to the Fisheries settlement, the Crown and Māori have undertaken "dispute processing"³⁴ rather than dispute resolution.

An acceptable process is of the utmost importance in Crown/Māori negotiations because the negotiators are acting with the interested and critical electorate and iwi watching closely. On either side, the negotiators represent the interests of an extremely large group of people with many divergent opinions. Each person has an interest in the negotiation. Therefore, to ensure that the electorate and iwi/hapū are satisfied with the course of the negotiation and the outcome, it is essential that the process taken is seen as fair and accessible. This political factor, the need to be seen as doing things right, is one that is absent from negotiations involving individuals, family members or business groups.

A *Preliminary steps to reaching a process*

With a focus on process, as opposed to outcome, it becomes apparent that many of the issues surrounding Crown/Māori negotiations occur before any "negotiation" proper takes place. Defining a process is a preliminary step to substantive negotiation, and, there are preliminary organisational steps before a process can be defined. These are discussed below.

³² Waitangi Tribunal *Fisheries Settlement Report* (Wai 307, 1992).

³³ S Heremata and A Tunks, above n1, p168.

³⁴ SE Merry, above n30.

1 Acknowledge the dispute, negotiation, parties

Before the parties can decide upon any matter, they must agree that there is in fact a dispute. They must also realise that negotiation of the dispute is necessary. At this preliminary stage, there may only be an informal indication by both sides that the differences need sorting out. There may be a recognition that talking, an airing of grievances is required, with an unspoken or unconscious desire for resolution. The parties, especially in a small-scale "neighbourhood" dispute, would probably not even use the formal language of negotiation to describe their intentions.

To recognise that a dispute exists, means that at least two parties are identifiable to each other. In Crown/Māori disputes it is easy for iwi to identify its opposing disputant. In all cases, it will be the "Crown" as represented by the relevant government. However, it is harder for the Crown to recognise its opposition. Some disputes involving the Crown and Māori, and concerning land or resources, are extremely complex, with large numbers of claimants and cross-claimants to the Waitangi Tribunal. It would be completely irresponsible for Crown/Māori negotiations to be undertaken where there are a large number of cross-claimants and the interests are conflicting. The danger is that, in identifying a party or parties to negotiate with, where the right to claim resources amongst iwi/hapū is contested, marginalisation of other interested but excluded groups will occur. The effect of such marginalisation is two-fold. First, it offends all notions of fairness, mana and rangatiratanga to exclude interested parties from negotiations involving resources to which they have an entitlement.

Furthermore, the legitimacy of any substantive outcome that does not include all rightful disputants will be questioned by those excluded. There are many examples in New Zealand, where the Māori Land Court, government commissions, or government officials have made arbitrary assessments as to which iwi or hapū are interested in disputed lands and resources. These settlements are constantly contested. It is apparent that revisiting and renegotiation of many disputes is necessary. The cost of revisiting settlements in

terms of finance and resources is extensive and can be avoided if some care is taken when identifying disputants. Also wasted is the cost in human terms, due to the distress, despair and angst caused by dispossession and the disallowance to assert mana over resources.

In summary, it is contended that identification of a dispute and the disputants is the most important initial step in setting up a process for negotiation. This is especially the case in Crown/Māori negotiations where the disputes are complex and the parties not always easily identifiable.

2 *Intra-party negotiation and identification*

At the initial stage, the parties must recognise that they have a dispute. They must recognise that the other party is the proper group with which to enter a negotiation, and they must agree that some negotiation towards resolution is needed. In fact, the parties must agree that resolution is desired, rather than prolonging the dispute. There must also be some recognition of the importance of negotiating a process, before substantive negotiation for settlement takes place.

At the next stage, or while the initial recognition is taking place, the parties must turn their focus inwards.³⁵ Each party must be able to identify who it represents, and who will be its representatives. There must be intra-party consensus on the issues and arguments it wishes to make, and identification of the tactics and bargaining stance it will use. Each of these issues is addressed separately below.

³⁵ R Mahuta, above n3, pp173-174.

(a) **Representation**

For the Crown, identification of the appropriate negotiators is easy as the positions are occupied by the relevant Ministers (usually the Minister in Charge of Treaty Negotiations) with the assistance of other public servants and officials. Accordingly, there is no need for a mandate of the Crown's negotiators as they are acceptable due to their office.

The appointment of negotiators for Māori is much more complex. Generally, it is the people who are perceived as being iwi leaders who obtain negotiator's positions. However, there is no consistency in the methods by which negotiators have come to represent certain iwi. It appears that negotiators of this decade have obtained their positions because they are well-known, move in political circles and are public figures. The phrase "the brown table" has recently become popular as a disparaging description of this group.

Whether or not the criticism is unfair, it is to be expected considering that most public figures are criticised by those they represent. It does show there is some gap between iwi/hapū members and those that lead and negotiate on their behalf. It also shows that there is some conflict amongst the people about "who" is truly acting in the interests of iwi/hapu. There sometimes seems to be a clash in ideologies between those who negotiate and those who are represented:³⁶

For a number of reasons, certain Māori leaders from various tribes in New Zealand have assumed major positions of influence and have been identified as key representatives of Māoridom. This leadership has come under increasing attack in recent times... . This controversy over Māori leadership has major ramifications for the effective negotiation and settlement of Māori claims. It therefore impacts on the certainty and durability of the negotiation and settlement process, and thus has consequences for the ... outcomes that may be achieved.

³⁶ C Wickliffe, above n16, p93.

Modern structures exist through which appropriate leaders can be chosen by the iwi.³⁷

A number of options are already available through which claimant representation can be determined:

- voluntary resolution;
- section 30 of Te Ture Whenua Maori Act 1993;
- section 6A of the Treaty of Waitangi Act 1975;
- legislated settlements.

It has been suggested that the only way to adequately find representatives for negotiations is to conduct a poll or vote of all identifiable iwi/hapū members.³⁸

A reasonable and fair method to establish representative capacity and a conclusive mandate to settle is needed. This may require conducting a poll of all identifiable members of a whānau, hapū or iwi requesting their views on who has the right to represent all their interests in negotiation including the right to settle all their claims. Alternatively, as in Canada, it may require a vote of all affected identifiable members. The vote would ratify and authorise the finalisation of a settlement option. The question of capacity to settle is a very real problem for the Crown, and it is an issue that the Crown must address if good outcomes are to be achieved and if all interests are to be dealt with equitably.

This would be a difficult and expensive task, but not necessarily impossible.

(b) **Interests and desired outcomes**

Each party must identify its interests and what outcome it seeks from a negotiation resolving the dispute. It is the main contention of this paper that too much focus is placed on outcome, with only a cursory examination of procedural issues. At a procedural level, it is important for each party to define its desired outcome so that they have some incentive to progress forward. It is important for parties to agree internally on what is desired. The appearance of different goals and interests within one party, can create

³⁷ *Proposals*, above n25; p33.

³⁸ C Wickliffe, above n16, p93.

factions, especially if the negotiation is already underway. Factionalisation may be worse where the negotiations have concluded, and it becomes apparent that what some members thought would be the outcome, is different from the actual outcome.

In Crown/Māori negotiations, the interests negotiated for on each side are slightly different. In particular, Māori claims for resources and land are overlain with a desire for political power and autonomy, which is not acknowledged by the Crown:³⁹

Māori have rejected the fiscal envelope as a legitimate settlement model primarily because there is no recognition of our tino rangatiratanga. The fiscal envelope is a red herring - the main issue for Māori is absolute sovereignty - the ability to manage our own affairs.

It is also contended that Māori have interests that are unconsciously non-negotiable, causing some conflict of what interests are in fact negotiable and can be conceded.⁴⁰ If there are rights that Māori believe could never be extinguished, then the Crown is off-track in demanding extinguishment of these rights for full and final settlements.

There are also issues about the interests that the Crown represents. It is unclear whether Crown negotiators represent only the Crown or also other third parties, like industrial and environmental interest groups. It may be that interest groups have legal, moral or political rights to be consulted or informed of aspects of Crown/Māori negotiations. It is less clear whether such interest groups have a right to be involved in the negotiations. It is the writer's belief that they do not. Interest groups have considerable political power, through lobbying and the media. Interest groups are inherently represented by the government, because any matter that will attract or lose votes will get political attention. Interest groups do seem to capture the sympathies of a significant part of the voting public. Unfortunately, many interest groups tend to manipulate and encourage the fears and ignorance of "white" New Zealand. It follows that the Crown's interests are shaped by practical, political concerns.

³⁹ T Rangitūia, above n26; see also I Macduff, above n3.

⁴⁰ J Munro, above n2, 416-417; I Macduff, above n3.

(c) **Issues**

It is also necessary for both parties to define the substantive and process issues. This is a necessary step towards the identification of a party's interests, and will give guidance for the formulation of an outcome. It is necessary for each party to have the issues clear because it may become apparent that each side conceives the issues differently.

(d) **Deciding on tactics**

A party must decide what bargaining tactics it will use in the negotiations to follow. It can decide to be confrontational, concessionary, indignant or conciliatory. There is no limit to the stance a party takes. Bargaining tactics will be dictated to a large extent by a party's interests, the dispute, the respective strengths of each party and the personal attributes of the negotiators.

An important issue, that requires intra-party discussion before negotiation has started, is on what issues concessions can be made. A party must also decide on what issues it will not concede any ground. A party may have a degree of concessionary points between the two extremes. Unfortunately, this is an issue upon which there may be fierce disagreement within one party. For example, in an iwi, interests and opinions differ widely, especially on specific points. Accordingly, some iwi members may think it acceptable to concede a particular block of land, or ownership to a resource, or a particular Treaty, common law, or statutory right. Others may be completely opposed to making these concessions.

While gaining agreement on these points is difficult enough at iwi level, it is much more complex at "pan-Māori" level. This is demonstrated aptly by the Fisheries settlement in which negotiators for Māori agreed to concede all Treaty, common law and statutory rights

to commercial fisheries and enforcement rights in respect of customary fishing (amongst other things). It has become apparent that this concession is simply not acceptable to a large proportion of Māori.

Therefore, deciding tactics, concessions and non-negotiable issues is extremely important, and must be decided internally before any negotiation with the other party takes place. The risk of not sorting out these issues (as best as they possibly can be sorted out) is that members of one party will be dissatisfied, and through various means, call the resolution of the dispute into doubt.

B *Pre-substantive Negotiation*

In the previous part it was recognised that, before a process can be negotiated, the parties must take the preliminary steps of identifying the dispute, acknowledging the need for resolution, and the identity of each other, and focusing on achieving intra-party cohesion by addressing relevant internal issues first.

Before substantive negotiation can take place, a preliminary negotiation must be entered with the purpose of establishing a process suitable to both parties. Process must be negotiated because it is not satisfactory for one party to set the process. Such an approach would allow that party to order the process in its favour, to the detriment of the other party. Ideally, the process should reflect a method that both parties feel comfortable in. The only instance where it may be suitable for one party to set the process is where there is a disparate imbalance in power between the parties. In this case, allowing the disadvantaged party to set the process may provide a "level disputing field" in which both parties start on an equal footing. The opposite has occurred between the Crown and Māori. The Crown has the greater share of power and has set the process, and now proposes a new process.

Because we place so much emphasis on what we want from the opposite party, there is often a single-minded focus on reaching the outcome. The objective is to reach a goal, to the detriment of what occurs along the way. This is particularly true of Crown/Māori negotiations, where there is an obsession with legal and constitutional issues and land and resource ownership. To create an ordered process is to bring order to the substantive negotiation and subsequently, the relationship itself. The next issue is to determine what elements the parties need to negotiate to establish a process.

C *Process Issues*

The following part identifies and analyses the issues that need to be negotiated before a process for substantive negotiation can be agreed upon by the parties. The issues discussed are, in the author's opinion, the most important. Neglect of these process issues could be damaging to the eventual outcome. However, it is acknowledged that other process issues could arise simply because every dispute is unique and, therefore, different issues are apparent.

1 *Issues*

Before entering any negotiation, each side must identify for itself, what it thinks the issues in the dispute are. At the preliminary level, where process is discussed, each side should present its view of the issues. This is of fundamental importance because the parties could enter a dispute with entirely different conceptions of the issues. A failure to address this difference will result in the parties "talking past each other", making the negotiation a waste of time.

It would be a rare occasion where the parties agree on the issues. The parties are disputing because they have differing views over some point. Because the stand-points are different, the conceptualisation of the issues will be different. Cultural differences add one more layer of distortion to the manner in which the parties view the issues.

The issues may also be viewed differently by degree. One party may focus on the broader, conceptual issues, and the other party may focus on the specific problems. For example, for Māori, the prime issue may be whether constitutional recognition should be given for the "wrongs" committed historically. The Crown may regard the fundamental issue as being whether a particular resource can be returned to Māori ownership and/or control.

It would be patronizing to suggest that the parties are so unsophisticated as to have only one or two narrow issues in mind. It is expected that each party will have conceptualised a range of issues, from the broad to the narrow and from different viewpoints. What is important is how each party's issues match up to the other's. It may be that Māori have some issues in mind that are not apparent to the Crown, (and vice versa). Identifying that this is the case will lead the parties to understand that there are differences in the way that each disputant views the problems between them. Identifying an "issue" for one party where the other sees no issue, allows the parties to discuss whether this problem is one that needs addressing or not. It prevents misunderstanding later on in the substantive negotiation where one party may feel as if its concerns have not been considered or taken seriously by the other side. Alternatively, one party may feel that the other is distracted with cursory or side issues that are irrelevant, misunderstanding the importance with which the opponent considers the issue.

Identifying and matching up the issues thought of by both sides should also provide the parties with a chance to reflect on the underlying messages in the other party's stance. The parties should ask why a particular issue is so important to the other, when it considered the issue to be irrelevant. Similarly, what does it say about their relationship that the parties can agree that A, B, C are important issues, but then disagree on X, Y and Z? The parties must ask themselves what kinds of values, principles and concepts lie behind the conceptualisation of certain issues.

Advocating this type of reflective questioning is an attempt to suggest that the parties should try to understand where the other side comes from. This is procedural because if greater understanding is reached, communication will be less restricted and

misunderstood. Therefore, the process will be enhanced, leading to a more satisfactory outcome. This reflective exercise can also be undertaken when the parties identify or reveal their objectives for negotiating, discussed below.

In summary, the parties need to identify the issues that they wish to discuss in the substantive negotiation. At this preliminary stage, no discussion is needed of the substantive problem - just an identification of the problems that will be the focus of the discussion to follow. In undertaking this task, each party should also take the opportunity to reach a better understanding of the other, by making an analysis of why certain issues are important, and others not. This stage will also reveal where the parties view issues differently, or not at all, from the other side. Revealing these gaps at this preliminary stage will prevent the parties from talking past each other, because of different and misunderstood problems.

2 Objectives

In a vein similar to mutual identification of issues, the parties must identify what objectives govern the course of the negotiations. This will consist of discussing what each party desires from the negotiation. Again, similar to the discussion on issues (above), the parties' objectives may be defined broadly or narrowly. Identifying these objectives should assist the parties to see differences in opinion before entering substantive negotiation, and thus, assist communication by preventing misunderstanding.

It is obvious that the closer the parties' objectives correlate, the more incentive and reason there will be for reaching a mutually satisfying and beneficial outcome. However, the parties' objectives can never be 100% the same, as such a situation would lead to the logical conclusion that no dispute exists at all, denying the need for negotiation. It is much more likely that the parties agree on broad objectives, but not on the detailed options. For example, Crown and iwi might agree that the fundamental objective for negotiation is to provide redress for past wrongs and promote a relationship acknowledging respect and

consideration for the Treaty "partnership". However, it is very likely they will disagree on the detailed objectives: the kind of compensation, the quantum of compensation, particular resources and so on.

It may be possible for objectives to differ at the broad level, without causing disruption to the substantive negotiation itself. For example, the broad iwi objective may be to obtain economic independence by exploiting a diverse and sufficient resource base. The broad Crown objective may be to settle the dispute to obtain political stability. The objectives differ, but are not mutually exclusive.

Upon learning the other side's objectives, the parties again have the chance to analyse the stance taken. A disputant must ask "why" a particular objective is important. What does it signal about the other party's values, view of the dispute and so on?

Identifying the objectives desired and the reasons for them, will enable the parties to set out roughly what they hope to achieve by the end of the substantive negotiation. However, the author is not contending that the issues to be discussed and objectives to be gained should be inflexibly set in a process and adhered to throughout the substantive discussions. There must be some flexibility to allow for the fact that different, perhaps better, issues and objectives may become apparent only on the discussion of substantive points. It would be ideal if all issues and objectives could be identified first at a preliminary procedural stage, as the appearance of new material at a later stage may only confuse, cause misunderstanding, or give the impression to others outside the immediate discussions that the negotiation is going "off-track". This is the reason it is contended that all issues and objectives should be identified as far as possible at a preliminary level. However, it is recognised that no matter how well prepared the parties are procedurally, new matters may arise. A combination of strong procedural preparation and the ability to be flexible enough to allow some changes to the procedure already established, should allow the parties to deal with their situation adequately.

3 *Forum and Timing*

Working out the forum for the dispute and the time constraints needs discussion. The preferences that each party may have in respect of forum and timing will be heavily influenced by their respective cultural backgrounds.

Time is a concept which is viewed differently amongst many cultures. In European or "Western" cultures, time is a constraint, and something that must be worked within strictly. Examples of this concept of time are readily available. "Time is of the essence" is a commercial phrase that is used and drafted into contracts. It means that the time and date constraints set out in the contract must be adhered to strictly.

The current Government places much political significance on time, as shown by its announcement in December 1994 that its policy is to resolve all Treaty of Waitangi claims by the year 2000. This policy is an attempt to placate voters who are nervous and perhaps ignorant about the effect Māori claims have on them individually. This shows that there is a fear that a dispute will drag on and therefore, a considerable amount of time will be wasted. Related to this is the importance, especially in "business" culture, of the concept of "certainty". Certainty, or the lack of it, is essential in business. Investors want to be assured of certainty before they spend. The current Government is keen to keep attracting foreign investment in New Zealand. To do so, the Government must try to diminish the uncertainty caused by Treaty claims. One of the factors causing uncertainty is the unpredictability of the claims in respect of time. Placating foreign investors is perhaps a better rationale for the Government's announcement in 1994.

In comparison, Māori have traditionally, and even in the modern world, viewed time very differently. Time is less of a restraint. Importance is placed on what people feel they need to say, that they have an opportunity to do so, and that the appropriate kawa and tikanga is followed throughout and completed. It is commonplace at hui for a timetable to be only roughly adhered to. It would be insulting to interrupt a speaker (whether on the paepae

or not) or hurry a person along, simply because the next item on the agenda needs discussion. Speakers will only be interrupted in the most extreme situations; for example, where tikanga has been breached.

The phrase "Māori time" has been coined to describe this disregard for time constraints. It is used rather disparagingly and is considered to be racist as it has connotations of Maori being slow, unpunctual and lazy. However, a revisionist approach could interpret the phrase in a positive light. It describes the Māori refusal to be constrained by an artificial construct, with the main focus on people and what they have to say. There are exceptions. The structure of the modern world constrains every person in much the same way, as the working day has to be attended to, and the natural world is no longer the sole guide of time.

Given that time is viewed so differently, discussion is needed amongst the parties to determine what rules can be applied. It is important that the parties resolve any timing issues at the procedural stage so there is no misunderstandings, with one party perhaps feeling rushed, or the other feeling that the process is too slow with nothing being achieved.

Choosing an appropriate forum is another relevant issue. The most appropriate Māori forums for resolving disputes are the marae-atea and the wharenuī. The wharenuī and marae-atea are structured so that large groups of people can congregate, so that the entire whānau or hapū can be involved in any hui that takes place, whether that hui be for celebration, tangihanga, meeting or dispute resolution. As this is the forum that is most familiar to Māori, it is probable that most Māori would prefer negotiations with the Crown to be undertaken on the marae.

Assuming that Crown negotiators are Pākehā, the most familiar forum for Crown negotiators is likely to be a boardroom, office of some other place of business. In Pākehā culture, choosing an appropriate forum depends entirely on the dispute. Accordingly, intimate, family disputes are considered to be more adequately dealt with in the home, or

if need be, in private family conferences or mediation facilitated by other third parties, like counsellors. In comparison, business disputes are dealt with in a business forum like a boardroom or office. In both forums, confidentiality can be kept. This displays the importance in Pākehā culture of having clear demarcations between private family life, public family life, business concerns and so on. There are appropriate forums for disputes in each of these areas.

The importance of environmental surroundings should not be underestimated. Negotiating in an environment that feels foreign can be intimidating and prevent a party from communicating clearly and effectively. Therefore, in Crown/Māori negotiations it would be ideal if a half-way solution was used, where negotiation took place on the marae and in the boardroom.

There appear to be several reasons for why a boardroom approach might be favoured by Crown and Māori negotiators. All negotiations are confidential and not open to either the general public, members of the negotiating iwi, other Government officials, or interested third parties. The reasons for secrecy are commercial and political. In contrast, the marae is an open area where whānau and supporters are expected to attend. Confidentiality could not be kept on the marae.

4 Protocol

The parties must also decide in what manner they will present their arguments and the protocol with which they will treat each other. The parties must decide what language they will negotiate in. In New Zealand, the greater part of a negotiation will be in English, it being the common language. It is very unlikely that Crown negotiators have the ability to communicate in Māori.

A decision must be made as to what amount of tikanga attends the negotiation. Will the parties start with an appropriate karakia? Will the tikanga as to speaking, listening and not interrupting apply? Alternatively, the parties may set up, either formally or informally, an etiquette to apply to the negotiations. They may decide an order for speaking so that each side and person gets an opportunity to speak in turn.

It is unclear what type of etiquette was applied in the settlements to date, as all proceedings were taken secretly and in confidence.

5 Information Dissemination

The dissemination of information can take place at two stages: first, during the course of the negotiations; secondly, after the dispute has been resolved. Several issues are apparent. Should information about the course of the negotiations, while they are still on, be disseminated, or will this endanger continuing negotiation? To whom should this information be disseminated? What information should be disseminated after the dispute is settled, how soon after, and to whom?

The current procedure provides for all negotiations to be undertaken in confidence. Only the negotiators themselves are privy to what occurs at the substantive stage. There are several viable reasons for this approach. It allows the negotiators to do their jobs unhindered, without critical constituents and the public criticising tactics they perhaps do not fully understand. It prevents the media from completely sensationalising issues and misinforming the public. Unfortunately, this is commonplace in news items involving Treaty claims and Māori issues.

However, the confidential approach does not accord with tikanga Māori. The resolution of a dispute involves every person affected, and whānau, hapū and iwi members are not excluded from attending hui. This is not just the case for disputes or issues involving all people. Even in disputes where an individual has been wronged, the entire whānau or

hapū has the right to claim redress against the whānau or hapū of the wrongdoer. This is because a "wrong" or "hara" insults the mana of all, not just the individual. Accordingly, the entire group is affected and entitled to be present and have their say.

However, a concession to tikanga on this point may not be practical, or even beneficial to anyone, given the diversity of interests within iwi, the commercial sensitivities and need to progress on a fairly tight timeframe. Unlike earlier times when Māori social structures were more cohesive, the interests of hapū and whānau members may differ widely. This may mean that dissemination may have to give way to confidentiality, where it is appropriate. However, negotiators should not withhold information that could be given to their people without affecting the settlement. This occurred in the Fisheries settlement:⁴¹

The Crown and the Māori negotiators decided...to take the deal to national hui and some twenty-three marae throughout the country for ratification. These hui became surrounded by considerable controversy. Māori, it was claimed, did not understand the full content and implications of the [deal]; there was no time for proper consideration; full and frank disclosures were not always made - some negotiators would not reveal the contents of the Memorandum [of Understanding] on the grounds of commercial sensitivity; iwi were not assisted by lawyers or financial advisors; and no negative aspects of the deal were presented.

Withholding information when it is supposed to be disseminated (for example, at hui) is simply not acceptable. The Crown and Māori negotiators need to decide how they will release information before they start substantive negotiations.

⁴¹ J Munro, above n2, p408-409.

6 *Summary of Part VC*

To establish an adequate negotiations process, the parties must undertake a large amount of preparatory work. The parties must acknowledge that they have a dispute that requires negotiation. They must also be able to adequately identify each other. This has been a problem in Crown/Māori disputes where it has sometimes been difficult for the Crown to identify the appropriate iwi with which to negotiate.

Each party must undertake to resolve internal issues before attempting substantive negotiation. This involves each party discussing its representation issues, its interests, the issues it wants to negotiate on, its bargaining tactics and the forum it would prefer to be in.

When internal issues have been sorted, the parties must enter a negotiation, for the purpose of establishing a process. In addition to identifying the substantive issues, objectives, forum, timing, protocol and information release, the parties should attempt to understand their opponent's cultural values and practices. The parties should only enter substantive negotiations when the process has been mutually established through this preliminary negotiation.

D *Preparation for Substantive Negotiation*

After the parties have agreed to the type of process they will follow, they should undertake further preparation before entering substantive negotiation. There may be further housekeeping matters that require attention.

1 *Further internal organisation*

Once the process is established, the negotiators must go back to their respective parties and discuss any further housekeeping, procedural or substantive issues that arise. The process negotiation may provide an opportunity for new issues to surface and these need internal discussion.

The process that has been established may warrant a change in tactics or approach. Negotiators will have to ensure that they are familiar with the process they have agreed to, because aspects of the process may affect the way negotiators talk, argue, and present themselves.

2 *Substantive Negotiation*

It is only when the process has been established and internal matters are satisfactory, that the negotiators should undertake substantive negotiation. The negotiation of substantive issues should now be streamlined. The process will facilitate the negotiation so that main issues can be discussed, and not be mixed-up with procedural issues.

VI CONCLUSIONS

The goal of this paper is to suggest some guidelines for the process of negotiations between the Crown and Māori. In Crown/Māori negotiations, there tends to be a focus on the legal and constitutional issues and the settlement outcomes. However, the parties need to focus more on process issues. This inability to resolve process issues means that the outcome is less satisfactory, which is demonstrated by the Fisheries settlement. A flawed process detracts from the substantive outcome reached.

Ineffective communication is the cause of most process issues. Cultural differences cause ineffective communication. The reason for cultural misunderstanding is the inability to communicate differences and the inability to comprehend differences. Lack of an ability to communicate is exacerbated by racial and cultural assumptions and the fact that different substantive goals are envisaged by each party, but not understood.

It is impossible to dispute without culture, it being a necessary context for each disputant. The parties must try to understand each other's culture and attempt to negotiate on understood ground. The only other option is to allow one party to override the cultural practices and interests of the other through greater power. This is the case in Crown/Māori negotiations where the Crown controls all aspects of the negotiation process because of the imbalance of power in its favour.

Two stages in the establishment of a negotiations process have been identified in Parts VA, VB and VC of this paper. At the earliest stage, the parties must acknowledge that they have a dispute. They must recognise that negotiation is required. Furthermore, they must be able to identify one another.

At the next preparatory stage, the parties must each look at internal issues. Each party must discuss the following issues:

- representation;
- interests and desired outcomes;
- issues for negotiation;
- bargaining tactics;
- forum for negotiation.

When the parties have each sorted these internal issues, they must enter negotiations for the purpose of establishing a process. At this pre-substantive negotiation stage, the parties should try to resolve the following procedural issues:

- issues for negotiation;
- objectives of negotiating;
- forum and timing;
- protocol and etiquette;
- information dissemination.

When discussing the above issues, the parties should each consider how cultural values, ideals and practices are reflected in their opponent's conceptualization of the issues and objectives. In taking this step, the parties are making an effort to try to understand, or at least be aware of, their opponent's differences. This is necessary if the barriers imposed by cultural differences are to be broken down. It is hoped that this is a goal that both Crown and Māori will work towards achieving.

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