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Treaty settlement deadlines: what will they mean?

The new Government has clearly signalled its intention to set a deadline for all historical Treaty claims to be settled.

When Parliament opened on 8 August 2005, Governor-General Dame Silvia Cartwright read out the programme of Prime Minister Helen Clark's new government. Her speech included the following statement:

"[the] government will be setting a final date for the lodging of historical Treaty claims by 1 September 2008 with the objective of having claims settled by 2020."

This statement itself comes as no surprise but what will it mean in legal and practical terms? In this article we examine some of the important issues that will arise from these deadlines.

The Treaty Settlement Process Deadlines

The Government's stated objective reflects a swell of public opinion in favour of a cut-off point for the lodging and settlement of historical Treaty claims. In the lead up to the election, each major party came out in support of imposing deadlines (or at least firm targets) for the settlement of all historical claims.

The process of settling historical claims began in 1985 when the Waitangi Tribunal's jurisdiction was extended to inquire into breaches of the Treaty dating back to 1840.

Currently about three Treaty claims are settled a year. The Office of Treaty Settlements estimates that there are up to 50 claims to go (unless there is a change to the Crown's "large natural grouping policy"). Labour has stated that it expects to reach a further 40-50 settlements.¹ Most significant claimant groups have either already settled, are already engaged in or awaiting hearings before the Tribunal, or are involved in or waiting to begin settlement negotiations with the Office of Treaty Settlements.

Implications of Deadlines

Historical claims

Deadlines will be imposed on historical Treaty claims only. An historical claim is one that dates from before 21 September 1992. Consequently, claims based on the Treaty of Waitangi which arise after this date will not be affected by these deadlines.

The durability factor

Treaty settlements are intended to constitute "full and final"² settlement of historical claims. Consequently, it is important that settlements are durable. The Crown prefers to enter into negotiations with "large natural groupings"³ which, in general, equate to groupings of several hapū/iwi, or a single large iwi.

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It is vital that all groups within this larger natural grouping are supportive of the settlement. If settlements are rushed as a result of impending deadlines, mandating, ratification and general communication processes may be put at risk. If these processes are not conducted in a robust manner they will be susceptible to challenge.

It will be important for these processes not to be rushed, and it is almost certain that the resources of the Office of Treaty Settlements and claimant resources will need to be increased to ensure that this happens. The Government's Confidence and Supply Agreement with NZ First states that it will ensure that:

“the Treaty settlements process is expedited both by additional resources for negotiations and the use of expert external negotiators and by using direct negotiations as far as possible, in order to avoid the need for expensive and lengthy claims before the Waitangi Tribunal.”⁴ Similarly, if claimants are under pressure to file and complete settlement within specified deadlines, then a case for greater claimant funding surely exists.

Will the role of the Waitangi Tribunal be reduced?

Deadlines on the settlement of all historical claims are likely to require an increasing number of claims to bypass the Waitangi Tribunal, with claimants proceeding straight to direct negotiations with the Crown. Despite streamlining its hearing processes in 2001, taking a claim through the Tribunal is still, generally, a slow process. In addition, in all but very limited circumstances, the Tribunal cannot make recommendations which are binding on the Crown. Once claimants have received a report from the Tribunal, they must still go through the direct negotiations process with the Office of Treaty Settlements before they can receive redress from, and “settle” with, the Crown.

Unless significantly more resources are given to the Waitangi Tribunal, it may not be able to hear the vast majority of these claims. The Government has not clarified whether it plans to increase the Tribunal's resources. However, the Confidence and Supply Agreement with NZ First hints that the direct negotiations process funding will be increased, and the Waitangi Tribunal will play a reduced role. The NZ First Confidence and Supply Agreement also states that there will be a review of the appropriateness of the Chair of the Waitangi Tribunal also holding an appointment as a Māori Land Court judge.⁵

Even if Waitangi Tribunal resources were increased significantly, it is still questionable whether it would have the capacity, at least in its current form, to hear such a heavy load of claims in such a short period of time. Given this, it does seem likely that the focus for settlements will now fall on direct negotiations, rather than the Tribunal.

A template for settlements

To meet new settlement deadlines, it may be possible to deal with certain settlement matters on a template basis. Some issues (for example relationship protocols between a claimant group and various Ministries) could automatically be included in each settlement. Considerable negotiation time could be saved if a template was drafted for each of these more generic issues,

While such an approach could raise questions as to the durability of these settlements, the reality is that there now exists a core basis of settlement redress precedent, which might now usefully be reflected in template form. Obviously the more unique aspects of a claim for each claimant group should be fully negotiated.

Human rights implications

It is still uncertain whether the proposed deadlines represent firm targets or definite cut-off dates.



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A definite cut-off date may give rise to human rights issues in certain instances. A group with a valid claim could be treated differently from other groups who had already settled, and denied redress, due solely to the operation of the deadline. However, in the lead-up to the election, Labour stated that in the unlikely event that a group discovered an historical breach after the cut-off date has passed, the government would be able to determine how such a claim would be dealt with on a case-by case basis.⁶ In any event, such a decision would be a political one to be made by the government of the day.

The importance of governance

One issue of fundamental importance to Māori, but which received little attention in the lead up to the recent election, is post-settlement governance. Once settlement negotiations are complete, it is vital that an iwi has a robust and representative structure in place to receive those settlement assets, and manage and grow them into the future. An appropriate iwi structure has a huge part to play in the successful future, or otherwise, of iwi organisations.

It is important that these matters are addressed early on, and all options canvassed. Once that is done, any "external" (i.e. Crown) requirements or criteria that need to be taken into account can be considered and provided for in the iwi structure.

In conclusion

The negotiation and settlement of historical Treaty of Waitangi claims is an extremely important process for claimants and the country in general. Given that the claims span many generations, it might be considered that settlement deadlines are contrary to the concept of durable settlements. Nevertheless, Treaty settlements are political in nature, and current public opinion requires an expeditious closure to the settlement process. However, even though the imposition of deadlines have shortened the timeframes for negotiations, there are certain processes that claimant groups can follow to ensure that their negotiations are not rushed and that their settlement is robust and will stand the test of time.

FOOTNOTES

1 Labour Party "Treaty Settlements: Questions and Answers" www.labour.org.nz.

2 Ka tika ā muri, ka tika ā mua, Healing the past, building a future: A guide to Treaty of Waitangi Claims and negotiations with the Crown, Office of Treaty Settlements publication.

3 Ka tika ā muri, ka tika ā mua, Healing the past, building a future: A guide to Treaty of Waitangi Claims and negotiations with the Crown, Office of Treaty Settlements publication.

4 Confidence and Supply Agreement with NZ First p3 available at <http://www.beehive.govt.nz>.

5 Confidence and Supply Agreement with NZ First p3 available at <http://www.beehive.govt.nz>.

6 Labour Party "Treaty Settlements: Questions and Answers" www.labour.org.nz

The Crown requires a claimant group's post-settlement governance structure to fulfil certain criteria before it will transfer settlement redress to it. Key Crown criteria include transparency and accountability.

In our experience, a number of other fundamental principles are relevant for most iwi governance structures. These include:

- the need to establish a structure where the individual iwi members have ultimate (although not necessarily direct) control;
- the legal capacity and powers of the structure are certain; and
- ownership and management functions are kept separate, as are commercial and non-commercial objectives.

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Bell Gully's Maori Services Team has extensive experience in both the settlement of Treaty of Waitangi claims and the establishment of effective post-settlement governance entities.

The team has represented eight claimant groups who have completed the direct negotiations process, and is representing several others who are currently in negotiations with the Crown.

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