



2 June 2023

Attorney-General

Whakatōhea Claims Settlement Bill (PCO 21173/24.0) – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/377

1. We have considered the Whakatōhea Claims Settlement Bill (**the Bill**) for consistency with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**). We advise the Bill appears to be consistent with the Bill of Rights Act.
2. The Bill effects a final settlement of the historical claims of Whakatōhea, as defined in the Bill. It provides for acknowledgement and an apology, as well as cultural, commercial and relationship redress. The cultural redress provided includes the issue of protocols for Crown minerals, primary industries and taonga tūturu, a statutory acknowledgement by the Crown of statements made by Whakatōhea of their association with certain areas, changes to official geographic names, vesting of cultural redress properties, joint management of reserves and inclusion of Whakatōhea in conservation management.
3. Measures for commercial redress include the transfer of commercial redress and deferred selection properties, a right of first refusal over land, and exclusive rights to apply for aquaculture permits in a reserved area of the coastal marine area.
4. The Bill also provides for natural resources arrangements by establishing the Whakatōhea Kaitiaki Forum, whose purpose relates to the rivers and catchments in the Whakatōhea rohe and providing for joint management agreements between trustees and certain councils.

Discrimination – s 19 of the Bill of Rights Act

5. The Bill does not *prima facie* limit the right to freedom from discrimination affirmed by s 19 of the Bill of Rights Act through conferring assets or rights on Whakatōhea that are not conferred on other people. Discrimination arises only if there is a difference in treatment on the basis of one of the prohibited grounds of discrimination between those in comparable circumstances. In the context of this settlement, which addresses specified historical claims brought by Whakatōhea, no other persons or groups who are not party to those claims are in comparable circumstances to the recipients of the entitlements under the Bill.

No differential treatment for the purpose of s 19 therefore arises by excluding others from the entitlements conferred under the Bill.

Privative Clause

6. Clause 15 of the Bill provides that settlement of Whakatōhea's historical claims is final. It removes the jurisdiction of any court, tribunal or other judicial body to inquire into the historical claims, the deed of settlement, the Bill and the settlement redress. Jurisdiction remains in respect of the interpretation or implementation of the deed of settlement or the Bill. Clause 15 also provides that the Waitangi Tribunal has jurisdiction to complete its North Eastern Bay of Plenty inquiry including the jurisdiction to make findings but not recommendations in respect of the historical claims.
7. The legislative determination of a claim ought not conventionally to fall within the scope of judicial review.¹ However, to the extent that any excluded matters could be susceptible to judicial review, clause 15 constitutes a justified limit on the right affirmed by s 27(2) of the Bill of Rights Act. This is because excluding subsequent challenge is a legitimate incident of the negotiated settlement of claims.
8. To the extent the exclusion of subsequent challenge could be said to limit a claimant's minority rights under s 20 of the Bill of Rights Act this would be justified on the same basis.
9. The United Nations Human Rights Committee upheld a similar exclusion under the 1992 Fisheries Settlement. The Committee found the exclusion was consistent with articles 14 and 27 of the International Covenant on Civil and Political Rights, which are comparable to ss 20 and 27(2) of the Bill of Rights Act.²

Exclusion of remedy compensation

10. Clause 25 of the Bill excludes damages and other forms of monetary compensation as a remedy for any failure by the Crown to comply with a protocol under the Bill.
11. This clause might be seen to raise the issue of consistency with s 27(3) of the Bill of Rights Act, namely the right to bring civil proceedings against the Crown and have these heard according to law in the same way as civil proceedings between individuals. However, clause 25 affects the substantive law and does not fall within the ambit of s 27(3) of the Bill of Rights Act, which protects procedural rights.³ Accordingly, no inconsistency arises.

¹ *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC).

² *Apirana Mahuika v New Zealand* Communication Number 547/1993 UN Doc CCPR/C/70/D/547/1993 (2000).

³ *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC) at [61]: "there are conceptual differences between rights to fair hearing and unbiased determinations on the one hand, and rights to compensation for expropriation on the other". And, at [63]: "[s]ection 27(3) ... cannot restrict the power of the legislature to determine what substantive rights the Crown is to have. Section 27(3) merely directs the Crown shall have no procedural advantage in any proceeding to enforce rights if such rights exist."


Review of this advice

12. In accordance with Crown Law's policies, this advice has been peer reviewed by Kim Laurenson, Crown Counsel.



Helen Carrad
Crown Counsel

Encl.

~~Noted / Approved / Not Approved~~


Hon David Parker
Attorney-General
7/6 /2023