Te Tari Ture o te Karauna
Crown Law

5 December 2018

Attorney-General

Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Bill (PCO 19924/20.0) – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/287

1. We have considered the above Bill for consistency with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). We advise that the Bill appears to be consistent with the Bill of Rights Act.

2. The Bill will effect a final settlement of the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua historical claims as defined in the Bill.[1] It provides for acknowledgements and an apology to Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua (including the requital of the apology) as well as for cultural and commercial redress. Measures for cultural redress include the issue of protocols; statutory acknowledgement and deed of recognition; declaration of official geographic names; and vesting of cultural redress properties in fee simple, with many of those properties to be administered as reserves.

Whether s 19 at issue

3. 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 Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua 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 Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua, 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 purposes of s 19 therefore arises by excluding others from the entitlements conferred under the Bill.

4. Clause 104 reserves a special right of access to land on which a protected site is situated[2]. This right of access applies to Māori for whom the protected site is of special cultural, historical, or spiritual significance. It is conceivable that this clause

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1 Clause 13 defines Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua; clause 14 defines the historical claims.

2 Clause 91 defines Protected site as meaning "any area of land situated in the licensed land that:

(a) is wāhi tapu or a wāhi tapu area within the meaning of section 6 of the Heritage New Zealand Pouhere Taonga Act 2014; and

(b) is, at any time, entered on the New Zealand Heritage Lis/Rārangi Kōrero as defined in s 6 of that Act".

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raises a section 19 issue if the protected sites also have significance to non-Māori. However, the reasoning in paragraph 3 above also applies to clause 104 and on that basis, section 19 is not infringed. To the extent that section 19 might be engaged, any infringement is justified by the objective of ensuring that related claimant groups are not prejudiced by the settlement in situations where the negotiation of cultural and commercial redress has to occur in a multi-iwi setting.

Issues under s 15 – Privative clause

5. The Bill provides in cl 15 that the settlement of the historical claims is final. It excludes the jurisdiction of any court, tribunal or other judicial body to consider the settlement and historical claims, the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Act or the Te Rohe o Rongokako Joint Redress Act 2018 and any redress provided, other than in respect of the interpretation or implementation of the Deed of Settlement, the Ngāti Kahungunu ki Wairarapa Tāmaki nui-a-Rua Claims Settlement Act or the Te Rohe o Rongokako Joint Redress Act 2018.

6. Legislative determination ought not conventionally to fall within the scope of judicial review.[3] However, to the extent any excluded matters could be susceptible to judicial review, cl 15 constitutes a justified limit under s 5 of the Bill of Rights Act on the right affirmed by s 27(2). Excluding subsequent challenge is a legitimate incident of the negotiated settlement of claims.

7. 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.

8. 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.[4]

Whether s 27(3) at issue

9. Clause 24(3) 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.

10. This clause may be seen to raise the issue of compliance with s 27(3) of the Bill of Rights Act, namely the right to bring civil proceedings against the Crown and have those heard according to law in the same way as civil proceedings between individuals. However, cl 24(3) affects the substantive law and does not fall within the ambit of s 27(3) of the Bill of Rights, which protects procedural rights.[5]

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

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

5 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40, 55: "[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 that the Crown shall have no procedural advantage in any proceeding to enforce rights if such rights exist."

Review of this advice

11. This advice has been reviewed in accordance with Crown Law protocol by Helen Carrad, Crown Counsel.

Debra Harris

Debra Harris
Crown Counsel

Noted

Hon David Parker
Attorney-General
7 / 12 /2018