

Ngāti Manuhiri Claims Settlement Bill

29 February 2012

Attorney-General

Ngāti Manuhiri Claims Settlement Bill (PCO 15166 v 8.0): Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/168

1. I have considered the above Bill for consistency with the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act). I advise that the Bill is consistent with the Bill of Rights Act.

2. The Bill effects final settlement of the Ngāti Manuhiri historical claims as defined in the Bill [1]. The Bill provides cultural and commercial redress to Ngāti Manuhiri, including the vesting of property, a right of first refusal over the purchase of certain land, and enhanced participation in decision-making affecting areas with which Ngāti Manuhiri have a special association.

Discrimination

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 and/or rights on Ngāti Manuhiri that are not conferred on other people. Discrimination only arises 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 Manuhiri, no other persons or groups who are not party to these 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.

4. Further, even if the conferral of assets or rights on Ngāti Manuhiri and not other people did amount to differential treatment for the purposes of s 19, they do not result in the type of disadvantage that s 19 aims to protect against. That is, disadvantage arising from prejudice and negative stereotyping that perpetuates legal, social or political disadvantage faced by a marginalised group in our society.

5. Clause 107 reserves a right of access to wāhi tapu, on land transferred to Ngāti Manuhiri under the settlement, for “Māori for whom the protected site is of special cultural, spiritual, or historical significance.” It might be argued that this clause raises a s 19 issue in relation to a wāhi tapu site that also has, say, historical significance to non-Māori. However, the access right may be seen as an aspect of inchoate cultural redress in situations where the negotiation of cultural and commercial redress has to occur in a multi-iwi setting. Further,

any limit on the right to freedom from discrimination would be justified by the objective of ensuring that Māori other than Ngāti Manuhiri are not inadvertently prejudiced by the settlement.

Privative clause

6. The Bill provides in cl 14 that the settlement of the historical claims is final and excludes the jurisdiction of the courts, the Tribunal [2] and other judicial bodies from considering the settlement and historical claims, other than in respect of the interpretation and implementation of the deed of settlement or the Act.

7. Legislative determination of a claim would not conventionally fall within the scope of judicial review [3]. However, to the extent that any excluded matters could be susceptible to judicial review, cl 14 constitutes a justified limit on the right affirmed by s 27(2) of the Bill of Rights Act [4]. Excluding subsequent challenge is a legitimate incident of the negotiated settlement of claims.

8. Any limit on minority rights under s 20 of the Bill of Rights Act would be justified on the same basis [5].

9. The United Nations Human Rights Committee upheld a similar exclusion under the 1992 fisheries settlement. The Committee found that the exclusion was consistent with arts 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 [6].

Exclusion of remedy of compensation/Crown Forest Assets Act 1989

10. Clause 22(3) excludes any form of monetary compensation as a remedy for any failure of the Crown to comply with a protocol under Part 2 of the Bill. Clause 104(2) prevents any court or tribunal from doing or omitting to do anything, between the date of settlement and the date of registration of the transfer of Crown forest land to Ngāti Manuhiri, which is inconsistent with the deed of settlement. It might be argued that these clauses limit the right to bring civil proceedings against the Crown affirmed by s 27(3) of the Bill of Rights Act. However s 27(3) protects only procedural rights [7], while cls 22(3) and 104(2) affect the substantive law. Accordingly, no inconsistency arises.

Review of this advice

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

Ian Carter
Crown Counsel

Footnote 1:

Clauses 12 and 13.

Footnote 2:

Expressly provided for in cl 15.

Footnote 3:

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

Footnote 4:

Section 27(2) provides that “[e]very person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.”

Footnote 5:

Section 20 provides that “a person who belongs to an ethnic, religious, or linguistic minority in New Zealand should not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language, of that minority”.

Footnote 6:

Apirana Mahuika v New Zealand Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993(2000).

Footnote 7:

Westco Lagan v Attorney-General 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 that the Crown shall have no procedural advantage in any proceeding to enforce rights if such rights exist.”

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