

11 November 2020

Attorney-General

**BORA Vet Advice: Ngāti Rangitihi Claims Settlement Bill (PCO 20387/3.12) –
Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/321**

1. We have considered the Ngāti Rangitihi Claims Settlement Bill (version 3.12) 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 Rangitihi historical claims as defined in the Bill.¹ It sets out a summary of the historical account, records the acknowledgements and apology given by the Crown to Ngāti Rangitihi, and provides for cultural and commercial redress. Measures for cultural redress include the issue of protocols for Crown minerals and taonga tūturu, statutory acknowledgement and deeds of recognition in respect of certain areas of land, a re-classification of the Lake Tarawera Reserve from scenic to historic,² and vesting in the trustees of the fee simple estate in certain cultural redress properties.³ Measures for commercial redress include the transfer of commercial redress properties and licensed land, access to protected sites, and rights of first refusal over land.

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 Rangitihi 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 Rangitihi, 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.

¹ Clause 13 defines Ngāti Rangitihi; clause 14 defines the historical claims.

² Lake Tarawera reserve is re-classified from Scenic to Historic for the purposes of the Reserves Act 1977 in Subpart 5 of Part 2 subject to the limitations expressed in the Bill. Note that the area is also classified as a whenua rahui area in Schedule 2 of the Bill.

³ Noting that under Schedule 2, the Te Tapahoro property is vested in fee simple subject to conservation covenant and the vesting of the Te Ariki site listed in Part 2 of Schedule 2 is specified separately in Subpart 8, ss 116-119 of the Bill.

Discrimination issues under s 20 and privative clause

4. The Bill provides in cl 15 that the settlement of the historical claims is final and excludes the jurisdiction of any court, tribunal or other judicial body to inquire or make a finding or recommendation in respect of the historical claims, deed of settlement, the Ngāti Rangitahi Claims Settlement Act or the redress provided other than in respect of the interpretation or implementation of the deed of settlement or the Ngāti Rangitahi Claims Settlement Act.
5. Legislative determination ought not conventionally to fall within the scope of judicial review.⁴ 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.
6. 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.
7. 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.⁵

Whether right to bring civil proceedings in s 27(3) at issue

8. 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.
9. This clause might be seen to raise an 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.⁶

⁴ *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC).

⁵ *Apirana Mahuika v New Zealand* Communication Number 547/1993 UN Doc CCPR/C/70/D/547/1993 (2000).

⁶ *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

- 10. In accordance with Crown Law's policies, this advice has been peer reviewed by Austin Powell, Senior Crown Counsel.



Kim Laurenson / Lilla Dittrich
Crown Counsel / Assistant Crown Counsel
027 307 1891

Encl

Noted / Approved / Not Approved



Hon David Parker
Attorney-General

19 / 11 / 2020