

14 July 2020

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Maori Commercial Aquaculture Claims Settlement Amendment Bill**

### **Purpose**

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1. We have considered whether the Maori Commercial Aquaculture Claims Settlement Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 21861/10.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (Freedom of expression) and s 27(1) (Right to the observance of the principles of natural justice). Our analysis is set out below.

### **The Bill**

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4. The Maori Commercial Aquaculture Claims Settlement Act 2004 ('the Settlement Act')<sup>1</sup> provides for the full and final settlement of all Māori commercial aquaculture claims since September 1992 and provides for the allocation and management of aquaculture settlement assets.
5. The Bill amends the Settlement Act with the objective of improving the Act's allocations and transfer process of aquaculture settlement assets for iwi. Currently iwi in some regions are facing indefinite delays in receiving their aquaculture settlement assets from the Trustee, Te Ohu Kai Moana Trustee Limited ('the Trustee'). This is due to the inability of iwi in those regions to reach agreement, in accordance with the provisions of the Settlement Act, about how regional aquaculture settlement assets should be allocated among them.
6. The Bill provides the Trustee with a limited discretionary power to allocate and transfer aquaculture settlement assets to iwi when the Trustee is satisfied that the dispute resolution process provided for in the Settlement Act has been unable to resolve the issue or could not be used in the situation, and either:
  - a. it is clear that all iwi in a region are unable to reach agreement, in accordance with the provisions of the Settlement Act, about how regional aquaculture settlement assets should be allocated among them; or

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<sup>1</sup> The title of the Settlement Act does not include a macron over the 'a' in the word Māori. For consistency, we have referred to the title as it appears in the Act, which is without a macron.

- b. the Trustee is satisfied that it is unable to make a determination on aquaculture settlement allocation entitlements because it has not been able to recognise iwi aquaculture organisations for one or more iwi.
7. The Bill amends sections of the Settlement Act that relate to the allocation of settlement assets and aims to:
- a. ensure that iwi can access their aquaculture settlement assets within an appropriate timeframe;
  - b. improve the delivery of the Crown’s aquaculture settlement obligations;
  - c. protect the interests of iwi who do not wish to claim their aquaculture settlement assets; and
  - d. support iwi aquaculture aspirations and the growth of the aquaculture industry.

## **Consistency of the Bill with the Bill of Rights Act**

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### **Section 14 – Freedom of Expression**

8. Section 14 of the Bill of Rights Act affirms the right to freedom of expression. This includes the freedom to seek, receive, and impart information and opinions of any kind and in any form. This right has been interpreted as including the right not to be compelled to say certain things or provide certain information.<sup>2</sup>
9. Clause 7 of the Bill replaces existing s 49 of the Settlement Act with new sections 49-49E. These sections require the provision of information in the following circumstances:
- a. new s 49D requires that the Trustee, when they have determined to allocate and transfer assets in accordance with new s 49B, to notify in writing the iwi aquaculture organisations of the relevant iwi of the nature of the determination, the principal reasons for the determination, and the right to dispute the determination under the new s 49E. If a relevant iwi does not have an iwi aquaculture organisation, the Trustee must notify any recognised iwi organisation of the iwi, and
  - b. new s 49E(2) requires notification of a dispute under s 52(ca) within the period referred to in s 52(1)(a) to the Trustee, iwi aquaculture organisations of all relevant iwi, and the recognised iwi organisation of a relevant iwi that does not have an iwi aquaculture organisation.
10. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:
- a. Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. If so, then:

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<sup>2</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4<sup>th</sup>) 416; *Wooley v Maynard* 430 US 705 (1977).

- i. Is the limit rationally connected with the objective?
  - ii. Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
  - iii. Is the limit in due proportion to the objective?<sup>3</sup>
11. We consider that the objectives of the Bill are sufficiently important to justify some limitation to the right to freedom of expression and that the limits proposed by new sections 49D and 49E(2) in cl 7 of the Bill are rationally connected to the Bill's objectives. These new sections seek to ensure that all relevant parties, including the iwi who do not have an iwi aquaculture organisation, are notified of relevant determinations to allocate and transfer assets or of any disputes in relation to those assets.
12. We consider that the limits are no more than is reasonably necessary for, and proportionate to, the achievement of the Bill's objectives. The Bill only requires the provision of information necessary for achieving the objectives, and only to specified parties, who have an interest in the relevant assets and their distribution.
13. For these reasons, we conclude that any limits on the right to freedom of expression imposed by the Bill are justified under s 5 of the Bill of Rights Act.

#### **Section 27(1) – Right to Justice**

14. Section 27(1) of the Bill of Rights Act affirms that everyone has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law. Natural justice rights include the right to be heard on a determination of a matter that affects your rights or interests.
15. Clause 7 of the Bill enacts new s 49B, which allows for the Trustee to allocate and transfer any settlement assets to any iwi aquaculture organisation in accordance with circumstances specified in new s 49A. This may affect an iwi's right to natural justice.
16. However, we consider the powers contained in s 49B are justified. Section 49D requires notification of the decision to allocate and transfer assets to be given to the recognised iwi organisations of the relevant iwi, and new s 49E does not allow for the implementation of a decision to allocate and transfer assets if an iwi aquaculture organisation of a relevant iwi or recognised iwi organisation has initiated the dispute resolution process under sections 53 to 55 of the Settlement Act. This ensures that iwi have recourse to be heard and to challenge any decision of the Trustee.
17. Additionally, new s 49C does not allow an iwi aquaculture organisation or a new organisation to on-sell, exchange, or otherwise transfer assets until allocation is finalised. This avoids complications should a party initiate the dispute resolution process.

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<sup>3</sup> *Hansen v R* [2007] NZSC 7 [123]

## **Conclusion**

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18. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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