

6 March 2020

Attorney-General

Moriori Claims Settlement Bill – PCO 20386/14: Consistency with the New Zealand Bill of Rights Act
Our Ref: ATT395/312

1. We have considered the Moriori 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 Moriori historical claims as defined in the Bill.¹ The Bill provides for acknowledgements and an apology as well as cultural and commercial redress. Measures for cultural redress include protocols for Crown minerals, fisheries and taonga tūturu, a statutory acknowledgement by the Crown of the statements made by Moriori of their association with certain statutory areas together with deeds of recognition for all but two of the statutory areas and an overlay classification applying to certain areas of land.
3. The Bill also transfers to Moriori various items of cultural and commercial redress.

Discrimination – Section 19

4. 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 Moriori 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 Moriori, 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

5. Clause 15 of the Bill provides that the settlement of the historical claims is final. It excludes the jurisdiction of the Courts, the Tribunal and other judicial bodies to inquire into the historical claims, the deed of settlement, the Moriori Claims Settlement Act (“the Settlement Act”) or the redress provided. Jurisdiction remains in respect of the interpretation or implementation of the deed of settlement or the Settlement Act.

¹ Clause 13 defines Moriori, clause 14 defines historical claims.

6. Legislative determination of a claim ought not conventionally to fall within the scope of judicial review.² However to the extent 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. Excluding subsequent challenge is a legitimate incident of the negotiated settlement of claims.
7. Any limit on minority rights under s 20 of the Bill of Rights Act 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.³

Exclusion of remedy of compensation

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 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 24(3) 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.⁴ Accordingly, no inconsistency arises.

Review of this advice

11. This advice has been reviewed in accordance with Crown Law protocol by Peter Gunn, Team Manager.

Noted

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Hon David Parker
Attorney-General
/ /2020

² *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC).

³ *Apirana Mahuika v New Zealand* Communication Number 547/1993 UN Doc CCPR/C/70/D/547/1993 (2000).

⁴ *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC) at 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 the Crown shall have no procedural advantage in any proceeding to enforce rights if such rights exist.”