

3 May 2019

Attorney-General

**Ngāti Hinerangi Claims Settlement Bill (PCO 19925/5.4) – Consistency with the
New Zealand Bill of Rights Act 1990**

Our Ref: ATT395/292

1. We have considered version 5.4 of 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. We will provide you with supplementary advice if, following review of any subsequent version, our advice needs to be changed.
2. The Bill will effect a final settlement of the Ngāti Hinerangi 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 Hinerangi, 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, an overlay classification for a certain area of land, and vesting in the trustees of the fee simple estate in certain cultural redress properties. 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 Hinerangi 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 Hinerangi, 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 Hinerangi; clause 14 defines the historical claims.

4. Clause 109 reserves a special right of access to land on which a protected site is situated. This right of access applies to Maori for whom the protected site is of special cultural, historical, or spiritual significance. It is conceivable that this clause raises a section 19 issue if the protected sites also have significance to non-Maori. However, the reasoning in paragraph 3 above also applies to clause 109 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 ss 20 and 27(2) – Privative clause

5. 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 Hinerangi Claims Settlement Act or the redress provided other than in respect of the interpretation or implementation of the deed of settlement or the Ngāti Hinerangi Claims Settlement Act.
6. Legislative determination 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, 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.³

Whether cl 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 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.⁴

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

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

⁴ *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
Crown Counsel

Noted

Encl.

Hon David Parker
Attorney-General
/ /2019