

Aquaculture Reform Bill

20 August 2004

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: AQUACULTURE REFORM BILL

1. We have considered whether the Aquaculture Reform Bill 2004 (PCO 4761/18) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). This version of the Bill is to be considered by the Cabinet Legislation Committee on 23 August 2004.
2. The Bill raises *prima facie* issues of inconsistency with section 19(1) (freedom from discrimination) on the grounds of age, race and ethnic/national origin, and section 20 (rights of minorities). We have come to the conclusion that to the extent the Bill limits these rights, those limitations appear to be justifiable in terms of section 5 of the Bill of Rights Act.
3. We have also considered potential issues in relation to the rights to justice (sections 27(2), and 27(3)), but consider that the Bill is consistent with section 27.
4. The Bill therefore appears to be consistent with the Bill of Rights Act.
5. We have consulted with the Crown Law Office on this advice who agree with the conclusions we have reached.

Overview of the Bill

6. The Bill will amend the Fisheries Acts 1983 and 1996 and the Resource Management Act 1991 to provide for the reform of the management of aquaculture in New Zealand. The purpose of the Bill as outlined in the explanatory note accompanying the Bill is to enable the sustainable growth of aquaculture and ensure the cumulative environmental effects are properly managed while not undermining the fisheries regime or Treaty of Waitangi settlements. The Bill repeals the Marine Farming Act 1971.
7. The Bill:
 - clarifies the relationship between the Fisheries Acts and the Resource Management Act 1991 (the "RMA") to give regional councils responsibility for managing the impact of aquaculture development on the environment and the sustainability of fisheries resources;
 - simplifies the permitting requirements for aquaculture;

- provides regional councils with greater powers to manage the allocation of coastal space;
- establishes a mechanism whereby the Ministry of Fisheries will assess whether a proposed aquaculture management area will have an adverse effect on customary, commercial or recreational fishing;
- provides the Minister of Conservation with the power to direct regional councils in regard to allocation of space in the coastal marine area for purposes of government policy;
- provides for transitional matters relating to the repeal of the Marine Farming Act 1971, parts of the Fisheries Act 1983 and those parts of the Resource Management Act 1991 relating to the moratorium;
- is intended to be a full and final settlement of all Māori claims (current and future) in respect of commercial marine farming arising from 21 September 1992 onwards, in the coastal marine area; and
- provides the Maori Land Court with jurisdiction to resolve disputes arising out of the settlement.

Full and Final Settlement

8. A key intention of the Bill is to provide a full and final settlement of Maori interests in commercial marine farming post 21 September 1992. The Bill seeks to achieve this by providing Maori with 20% of the total of space allocated for commercial marine farming from 21 September 1992 onwards. Any Māori historical claims for marine farming space (i.e. claims relating to pre-September 1992 acts and/or omissions of the Crown) are to be addressed through the existing historical Treaty settlement process.
9. As noted above, the settlement relates only to Māori claims to commercial marine farming. It is understood that other Māori claims to interests in marine farming that are non-commercial in nature may be considered under the processes in the Foreshore and Seabed Bill.
10. There are two processes required to provide Maori with 20% of marine farming space since 21 September 1992. The first process relates to marine farming space that has been allocated post 21 September 1992 but before 1 January 2005. The second process relates to marine farming space that becomes available from 1 January 2005. This space is referred to as "new space" and is dealt with in Part 5 of the Bill. New space in this part of the Bill is defined as available space in an AMA that has become operative under the relative regional coastal plan but does not include space subject to an existing marine farm approval or an existing application for a marine farming approval [1](#) (other than applications frozen by the aquaculture moratorium under section 150B(2) of the RMA).

11. Part 5, subpart 2 of the Bill provides a mechanism for the allocation to Māori of marine farming space in recognition of marine farming space that became available for aquaculture activities between 22 September 1992 and 31 December 2004. Clause 73(2) requires the Crown to use its best endeavours to distribute 20% of this space to Te Ohu Kai Moana Trustee Limited ("TOKMTL") [2](#) by 31 December 2014. The Crown may comply with its obligations by directing regional councils to identify more than 20% of new space, but no more than 20% for allocation to Māori. The Crown may also purchase coastal permits for established marine farms on a willing-buyer/willing-seller basis and transfer the assets to TOKMTL; or pay TOKMTL an amount equivalent to the value of coastal permits for marine farming space (clause 73(3)).
12. Clause 21 of the Bill inserts a new Part 7A into the RMA. This Part of the Bill sets out the procedures for allocating, authorising, and managing new space that is available for the development of aquaculture management areas ("AMA").
13. As outlined above, the new Part 6A of the RMA establishes a framework and process for the allocation and management of marine farming settlement assets for Māori. Clause 63(4) of the Bill requires regional councils to identify 20% of any new space identified as available for applications for, or the allocation of, authorisations allowing marine farming in those areas. The 20% of new space identified under this provision is required to be representative of the new space that is available for applications for, or the allocation of, authorisations (clause 63(5)).
14. The assets received from the settlement are to be allocated to individual iwi. While the Bill does not define an iwi aquaculture organisation in overtly racial or ethnic terms, the Court of Appeal in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* was unanimous in finding that the word "iwi" meant tribe or group of hapu and that a traditional tribe was a group of Māori people claiming descent from a common ancestor, sharing a common culture and either, living in a specified geographical area, or descended from ancestors who lived in that area.

Relevant provisions of the Bill of Rights Act

15. The Bill gives rise to *prima facie* issues of inconsistency with section 19(1) (on the grounds of race and ethnic origin), section 20, and potential issues in relation to sections 27(2) and 27(3) of the Bill of Rights Act.

16. Section 19(1) provides:

Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

17. Section 20 provides:

A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

18. Section 27(2) of the Bill of Rights Act states:

Every 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.

19. Section 27(3) provides:

Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

20. We consider that a limit on a right can be justified in terms of section 5 of the Bill of Rights Act where it meets a significant and important objective, and where there is a rational and proportionate connection between the limitation on the right and that objective.[4](#)

Section 19 - The right to be free from discrimination

21. The Bill authorises allocations of commercial marine farming settlement assets to iwi. There are two mechanisms for the allocation. The first of these is through regional councils.

22. Once regional councils have identified the applicable 20% of new space, the regional council must allocate authorisations for this space to TOKMTL. TOKMTL is required to hold marine farming settlement assets until they can be allocated and transferred directly to iwi via an iwi aquaculture organisation. Iwi aquaculture organisations are responsible for receiving and holding settlement assets allocated to that iwi. Iwi aquaculture organisations have responsibility for establishing commercial entities that manage the settlement assets.

23. Clause 65 provides that the only person who may apply for a coastal permit to occupy the new space for aquaculture activities is an iwi aquaculture organisation. [5](#) Clauses 70 and 71 limit the ability of TOKMTL to transfer authorisations and coastal permits respectively. TOKMTL may only transfer authorisations and permits to an iwi aquaculture organisation; or a person nominated by the iwi organisation to receive the authorisation.

24. Obligations to allocate 20% of the space allocated between 21 September 1992 and 31 December 2004 are able to be fulfilled by the Crown in various ways. Firstly, the Crown may by Order in Council direct regional councils to identify up to 20% of new space for application for coastal permits or allocation of authorisations. Secondly, the Crown may purchase established marine farms on a willing buyer willing seller basis and transfer the assets to the Māori Commercial Marine Farming Settlement Trust ("MFS Trust"). Or alternatively, the Crown may pay MFS Trust an amount equivalent to the value of the space that became available (73(3)).

25. The allocation of 20% of coastal marine farming areas for the settlement of Māori interest in commercial marine farms and restrictions on transfers has the effect of preventing non-Māori from applying for, or being allocated authorisations to an AMA. We acknowledge that it might be argued that the allocation of the space may not raise an issue of discrimination because there is no other ethnic or national group in a comparable position to Māori. This is because the allocation of space is based on a settlement of existing and potential Treaty claims; non-Māori therefore do not have an interest in the settlement of such claims.
26. However, we consider that non-Māori do have an interest in the allocation of the new space available for application for, or allocation of, authorisations. This is because the 20% of new space relates to an already limited area of available space. Any allocation of space restricts the availability of space available to non-Māori to undertake aquaculture activities. By way of contrast, Māori are also entitled to apply for and receive authorisations to the new space that is available for non-Māori.
27. We therefore consider that there are instances where this distinction could result in disadvantage to non-Māori when trying to procure authorisations. We consider that this raises a *prima facie* issue of discrimination and have gone on to consider whether this is justified under section 5 of the Bill of Rights.

Significant and important objective

28. One of the objectives of this Bill is to settle Māori commercial interests in marine farming in line with the principles of, and consistent with, the 1992 Fisheries Settlement. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 does deal with some, but not all aspects of aquaculture. To the extent that aquaculture requires the harvesting of wild stock for the stocking of aquaculture farms, in the Crown's assessment, claims by Māori in respect of these aspects of aquaculture would appear to be settled. What the Fisheries Settlement does not address is claims to space - the use of coastal space for marine farming.
29. Part 7A of the RMA therefore supplements the Māori Fisheries Bill and the administration of fisheries assets received as part of a negotiated Treaty of Waitangi Fisheries Settlement. The allocation of 20% of the new space available for marine farming addresses the spatial aspects of Māori marine farming interests that were not addressed in the 1992 Fisheries Settlement.
30. We understand that one of the key policy objectives underlying the allocation to Māori in the Bill is the provision of certainty and stability for the aquaculture industry in New Zealand. In particular, the provisions in the Bill that allocate Māori a proportion of the total space available for aquaculture, are intended to bring certainty regarding the extent of the Māori interest in marine farming, and to reduce the risk of legal action and challenges to the allocation process. At the same time, Māori interests in marine farming are recognised and preserved.
31. The decision of the Waitangi Tribunal in WAI 953 recognises a Māori interest in marine farming. The interest in marine farming is part of the bundle of Māori rights

in the coastal marine area that represent a taonga protected by the Treaty of Waitangi. The Tribunal recognised the existence of a Māori interest in marine farming based on its evidentiary findings stating:

"...In our view there was some evidence that the claimants did traditionally engage in the practice of aquaculture, if one accepts, as clearly we do, the broader common usage of the term. The practices associated with aquaculture suggest a form of marine farming, however rudimentary and less detailed it may have been in terms of man-made infrastructure of the type that we now see for contemporary marine farms." [6](#)

However, it did not state what the nature of that interest might be nor its extent.

32. This has created uncertainty in the development of the marine farming industry in general. Legal certainty is desirable to foster the continued development of the marine farming industry in New Zealand - an industry that could play a major role in New Zealand's economy. The Minister of Fisheries has advised Cabinet that:

"Without resolution, this issue will create uncertainty for the marine farming industry and local government decision-makers through the ongoing risk of legal challenge by Māori, and has the potential to seriously undermine the progress of the aquaculture reforms. Indeed, it is possible that every Regional Coastal Plan [7](#) that seeks to implement an Aquaculture Management Area [8](#) will be subject to legal challenge on the basis that the establishment of Aquaculture Management Areas would be prejudicial to claimed Māori rights and interests in coastal space for marine farming."

33. We consider the provision of certainty and stability to the aquaculture industry through the settlement of Māori interests in marine farming to be of significance and importance. The settlement of such interests will ensure legal certainty for the marine farming sector in New Zealand, allowing it to develop in the future.

Rational and proportionate response

34. In assessing the allocation, we have considered carefully the rationality and proportionality of the 20% quantum. While there is no precise science involved in identifying an appropriate share in order to settle interests protected under the Treaty of Waitangi in this context, we consider that the allocation can be said to be a rational and proportionate response, if it can be said to be reasonable in all of the circumstances.

35. We understand from the Ministry of Fisheries, that the entitlement to 20% of the new space made available under this Bill represents what Māori would otherwise have received had the government decided to manage the spatial component of marine farming in the Quota Management System (which was also allocated on a 20% basis). It is a figure which in the context of the Fisheries settlement is not considered to be unreasonable given the fact that that was a negotiated settlement and accordingly could be viewed as a reasonable settlement to both Māori and the Crown.

36. The 1992 Māori Fisheries Deed of Settlement dealt with aquaculture to the extent that aquaculture requires the harvesting of wild stock for the stocking of aquaculture farms. Māori claims in respect of these aspects of aquaculture are settled under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. However, the 1992 Settlement does not address claims to space - the use or occupation of coastal space for marine farming. This Bill seeks to deal with this unresolved aspect of the 1992 Settlement.
37. In considering whether the 20% allocation can be said to be reasonable in the context of commercial aquaculture, we understand from the Ministry of Fisheries that, to the extent that consultation has taken place on the allocation with Māori and industry representatives, there has been a general expression of support, in principle, for the allocation.
38. It should also be noted that the allocation of marine farming space only provides iwi with the authority to *apply* for resource consent to undertake marine farming in a particular part of an approved Aquaculture Management Area. They are not entitled to undertake marine farming without meeting all general Resource Management Act requirements. These include the resource consent application process, resource consent expiry, environmental considerations, and coastal occupation charges.
39. In view of the important and significant policy objective that the allocation mechanism seeks to address, and given the rationality and proportionality factors outlined above, we consider that new Part 7A of the RMA, while *prima facie* discriminatory, is justifiable in terms of section 5 of the Bill of Rights Act.

Urban Māori

40. The Bill requires that regional councils allocate authorisations of new space available exclusively to iwi through TOKMTL. As the definition of an iwi aquaculture organisation excludes representative iwi organisations such as the Manukau Urban Māori Authority, [9](#) it might be argued that such an arrangement discriminates against 'urban Māori' because urban Māori who are not affiliated to an iwi will be unable to derive any direct benefit from the settlement.
41. Such an analysis is based on the idea of intra-ground discrimination. Intra-ground discrimination involves different treatment between individuals who come within the same prohibited ground of discrimination under the Human Rights Act 1993. While intra-ground discrimination is not referred to in the Human Rights Act 1993, the Bill of Rights Act or New Zealand case law, it is unlikely that the Courts would take a narrow, technical approach to the interpretation of the grounds of discrimination in the Human Rights Act. It is therefore possible that the Courts would accept that different treatment of groups within a ground could amount to discrimination. We note that the concept of intra-ground discrimination has been accepted and applied by Canadian Courts under both the Charter of Rights and Freedoms and various Canadian human rights statutes.

42. However, we have previously advised you in the context of the Māori Fisheries Bill that we do not consider that an issue of discrimination between urban and iwi Māori arises. Our reasons for coming to this conclusion are set out in that advice.[10](#) In addition, we also note that while only iwi aquaculture organisations, via TOKMTL, can be provided with authorisations in the first instance, the intent is that these can be transferred to other bodies at a later time if iwi so choose.

Inter-iwi

43. Clause 93 provides that commercial marine farming assets are only able to be allocated to iwi whose territory abuts the coastline of the region in which the assets are allocated (clause 93(2)(a)). In other words, the sole beneficiaries of the allocation process are to be those iwi who have coastal rohe. On the face of it, the restriction on which iwi are able to receive the benefit of the allocation raises issues of intra-ground discrimination on the grounds of ethnicity. The issue of discrimination between iwi was also discussed in the context of the Māori Fisheries Bill. On that occasion, we formed the provisional view that individual iwi did not have their own ethnic identity. While we remain of this view, we consider that only coastal iwi have a recognisable customary interest in coastal marine farming. Inland iwi are not in a comparable position to coastal iwi and therefore no issue of discrimination arises.

Age

44. Section 98 provides that an iwi aquaculture organisation may transfer authorisations or coastal permits if it has obtained the prior approval of 75 per cent of the adult members of the organisation. "Adult" is defined as a person 18 years of age or over. This appears to raise issues of consistency with section 19(1) on the prohibited ground of age. This provision is similar to that in the Māori Fisheries Bill where only 'adult' members of a mandated iwi organisation are able to vote on issues relating to the management of fisheries assets allocated under the Bill.
45. We therefore consider that limit on the right to be free from discrimination in section 98 is justifiable for the reasons set out in our advice on the Māori Fisheries Bill.[11](#)

Section 20 – rights of minorities

46. Clause 7 inserts a new section 12A into the RMA. New section 12A(1) provides that no person may occupy a coastal marine area for the purposes of undertaking an aquaculture activity unless that activity is authorised under the procedures set out in this Bill. New section 12A(2) goes on to provide that other activities requiring occupation of the coastal marine area may take place within a aquaculture management area only on the basis that such activity is a restricted discretionary activity, discretionary activity or non-complying activity for the purposes of the RMA. Furthermore, other activities that do not require occupation are only permitted where they are not incompatible with aquaculture activities (new section 12A(3)).

47. New section 165C of the RMA provides that regional councils have the discretion to specify what activities might be undertaken inside an AMA. That is, councils may, for example, specify the type of aquaculture activity to be undertaken in an AMA and the character, scale or intensity of the activity (section 165C(1)(b)). The regulation of activities within an AMA appears to have the effect of limiting the range of customary practices that Māori might undertake within an AMA.

48. As restrictions on the use of coastal marine area could be argued to infringe Māori customary fishing interests; new section 12A could appear to be inconsistent with section 20 of the Bill of Rights Act. Section 20 affirms the right of minorities¹² not to be denied their right to engage in cultural activities.¹³ Such a view is consistent with the approach of the United Nations Human Rights Committee.

49. The Committee has observed that culture:

"...manifests itself in many forms, including a particular way of life associated with land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting..." ¹⁴

50. Although new sections 12A and 165C of the RMA do not constitute a total denial of the right of Māori to engage in customary fishing practices, we consider these provisions limit the right to engage in this activity. We have therefore gone on to consider whether this limit can be justified under section 5 of the Bill of Rights Act.

Significant and important

51. As discussed more fully above at paragraphs 6 to 9, the key aim of the Bill is to secure a sustainable future for New Zealand's aquaculture industry whilst realizing the potential of the marine farming industry in New Zealand by providing certainty around the nature and extent of Māori interests in aquaculture and removing the potential for legal challenges to the allocation process. In order to achieve these objectives it is important that the industry, including participants who enter the industry via the Māori allocation mechanism, fall under the regime laid out in the RMA. The overriding purpose of the RMA is to promote the sustainable management of natural and physical resources. Therefore resources must be managed for use, development and protection, with a requirement to meet the needs of future generations.¹⁵ We consider this to be an important and significant objective.

Rational and proportionate response

52. The possibility of conflict between the principles of the Treaty and the aquaculture reforms in the Bill has been raised in claims before the Waitangi Tribunal (WAI 953). The allocation of 20% of the total marine farming space allocated since 1992 to Māori is intended to address these conflicts. The recognition of Māori interests in marine farming must be considered a crucial mitigating factor to those parts of the Bill that preclude marine farming from anywhere in the coastal marine area other than inside an AMA. We also note that the government has a legitimate role in regulating the aquaculture industry by subjecting all forms of aquaculture, whether

customary or not, to a regime (in this case the RMA) on the basis that the government is compelled to protect and conserve the environment of New Zealand. On this point we note the comments of Cooke P in *Ngai Tahu Māori Trust Board v Director-General of Conservation*: [16](#)

"Clearly, whatever version or rendering [of the Treaty of Waitangi] is preferred, the first article must cover power in the Queen in Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources. The rights and interests of everyone in New Zealand, Māori, Pakeha and all others alike, must be subject to that overriding authority."

53. We also note that the Bill provides a number of mechanisms to protect customary practices by:

- Requiring the Chief Executive of the Ministry of Fisheries to assess whether an AMA proposed by a regional council will have an undue adverse effect on customary, recreational, or commercial fishing. If it has such an effect on customary or recreational fishing, the affected areas will be removed from the AMA (new Schedule 1A of the RMA);
- Requiring the Chief Executive to consult with persons and organisations that he or she considers represents classes of persons who have customary interests in proposed aquaculture management area (new section 186E(3)(a) of Fisheries Act;
- Enabling the Crown (Department of Conservation) to have a role in the planning process for AMA through a power to direct councils to provide for iwi settlements and potentially wider Treaty purposes;
- Requiring voluntary agreements to be reached between quota owners and aquaculture interests before any application can be made in respect of any part of an AMA where an undue adverse effect on commercial fishing has been determined; and
- Providing regional councils with the discretion to offer authorisations for coastal permits for the occupation of space in the coastal marine area for activities other than aquaculture (new section 165F of the RMA).

54. We have also been notified by the Ministry for the Environment that other customary practices (i.e. other than customary fishing and customary commercial marine farming) will be protected in the Foreshore and Seabed Bill by the granting of Customary Rights Orders. These Orders recognise legitimate customary activities and protect any limit on their exercise. The Ministry has stated:

"The current drafting of that Bill [Foreshore and Seabed] provides that the Customary Rights Orders operate outside the section 9-17 controls [of the RMA] (refer clause 75 of the Foreshore and Seabed Bill). This will include section 12A when it is enacted. So section 12A(2) will not have any effect on a person carrying out a recognised customary activity

(provided they act within the scope of the CRO). The CRO activities are only regulated by controls imposed by the Minister of Conservation under the proposed Schedule 12 process."

55. In addition, we also note the provisions in the RMA that require public hearings to be held when a resource consent is being considered. Under section 40 of the RMA every person who has made a submission and stated that they wished to be heard at the hearing, may speak and call evidence. We consider this provides an important opportunity for those who consider they have a customary interest in a certain area to inform the relevant regional council so that this might be taken into account when deciding to grant the consent. The Ministry of Fisheries has also stated that:

"One of the primary reasons why the Bill provides for the Ministry of Fisheries to take an assessment on the effects of an AMA on customary fishing is to prevent an infringement of Māori customary fishing interests. If it is considered that any AMA or part of an AMA could have an undue adverse effect on customary fishing then the AMA, or that part of the AMA, will not proceed. This is in addition to the general RMA provisions that councils need to comply with to ensure that their decisions do not result in unreasonable impacts on Māori customary interests."

56. For these reasons we therefore consider the measures used to achieve the objectives listed above are rational and proportionate. It follows that the provisions of the Bill that might limit the rights affirmed in section 20 of the Bill of Rights Act are justifiable under section 5 of that Act.

Section 27(2) – right to apply for judicial review

57. New section 186I of the Fisheries Act 1996 and clause 149 of the Bill provide that any person seeking a judicial review of a determination or reservation made in accordance with the RMA must do so within 3 months after the public notification of the determination or reservation. A determination for the purposes of the Bill is defined as being a decision by the Chief Executive of the Ministry of Fisheries that he or she is satisfied that a proposed aquaculture management area will not have an undue adverse effect on fishing. A reservation, on the other hand is a decision to the effect that the Chief Executive is not satisfied that the area will not have an undue effect.

58. On the face of it, restrictions on the period within which a person may apply for judicial review of a determination are inconsistent with section 27(2) of the Bill of Rights Act. However, section 27(2) affirms the right of any person affected by a decision made by a public authority to apply for judicial review of a determination *in accordance with the law*. As the White Paper notes, this phrase recognises that the law may regulate review proceedings by imposing time periods within which proceedings may be brought so long as the regulation of the period does not amount to an effective denial of the right.¹⁷ We consider that a requirement to seek review within 3 months after the public notification of the determination or reservation is not tantamount to a denial of the right. In reaching this conclusion we note that the range of persons who would have an interest in the outcome of the determination would have been consulted over the proposed aquaculture management area and

the issues involved (see new sections 186D - 186H). In other words, those potentially affected by the decision will have received forewarning about the pending decision and had time to consider potential options for legal challenge.

Section 27(3) – right to bring civil proceedings against the Crown

59. Part 5 of the Bill contains the framework for settling Māori commercial marine farming claims. Clause 59 of the Bill sets out the purpose of this part of the Bill . It states that Part 5 provides, amongst other things, a full and final settlement of Māori claims to commercial aquaculture after 21 September 1992. The purpose clause is reinforced by clause 61 of the Bill. We have reproduced clause 61 for your reference.

61 Settlement of claims

*(1) The claims specified in **subsection (2)** are fully and finally settled, satisfied, and discharged.*

*(2) **Subsection (1)** applies to all claims (current and future)—*

(a) by Māori in respect of commercial aquaculture activities arising after 21 September 1992, in the coastal marine area -

(i) whether the claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise; and

(ii) whether in respect of sea, or coastal, aquaculture activities including any commercial aspect of traditional aquaculture

activities; and

(iii) whether or not the claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal; and

(b) in respect of, or directly or indirectly based on, rights and interests of Māori in aquaculture activities after 21 September 1992.

(3) The obligations of the Crown to Māori in respect of commercial aquaculture activities after 21 September 1992 are fulfilled, satisfied, and discharged.

(4) No court or tribunal has jurisdiction to inquire into -

(a) the validity of the claims:

(b) the existence of rights and interests of Māori in commercial aquaculture activities after 21 September 1992; or

(c) the quantification or the adequacy of the benefits to Māori provided by or under this Part.

60. The effect of clause 61 is to make it clear that this Bill is to fully determine the extent of Māori commercial marine farming interests from 21 September 1992 and to fully discharge the Crown's obligations to Māori in respect of these interests. It would therefore appear that Māori will not be able to go to the courts or to the Waitangi Tribunal to challenge the extent of Māori interest in commercial marine farming interests post September 1992 as determined by the Crown. On the face of it, such a clear and broad limit on the ability of individuals or groups of individuals to bring proceedings against the Crown might appear to be inconsistent with section 27(3) of the Bill of Rights Act.
61. However, as Huscroft [18](#) points out, section 27(3) of the Bill of Rights Act only protects the right to equality in litigation involving the Crown; it does not prevent Parliament from introducing and passing legislation which may affect an individual's substantive rights. Parliament is entitled to pass legislation that it deems to be in the public interest. Clause 61 therefore appears to be consistent with section 27(3).
62. This interpretation of section 27(3) is consistent with the approach adopted by McGechan J in *Westco Lagan Ltd v Attorney-General*.

Conclusion

63. We have concluded that the provisions of the Bill do appear to be consistent with the rights and freedoms contained in the Bill of Rights Act.
64. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. Copies are also attached for referral to the Minister of Justice, Minister of Fisheries, the Minister of Conservation, the Minister for the Environment and the Minister of Māori Affairs if you agree.

Margaret Dugdale	Allison Bennett
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cc. Minister of Justice
Minister of Fisheries
Minster for the Environment
Minister of Conservation
Minister of Māori Affairs

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reproduction of the advice provided to the Attorney-General, neither the Ministry of Justice nor the Crown Law Office accepts any liability for any errors or omissions.

Footnotes

1. As defined in Clause 60
2. TOKMTL is established under the Māori Fisheries Bill.
3. [2000] 1 NZLR 285 (see page 324 line 46, page 329 line 15, CA paras [23], [33], [204]).
4. *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9
5. Subject to an authorisation for new space and an aquaculture agreement under section 186ZE of the Fisheries Act 1996.
6. Waitangi Tribunal *The Aquaculture and Marine Farming Report: Wai 953* (Legislation Direct, Wellington, 2002) at p. 60
7. Regional Coastal Plans are developed by regional councils under the first schedule of the Resource Management Act 1991 to manage the use of space in the coastal marine area of their region.
8. Under the Bill Aquaculture Management Areas will be established by regional councils under their Regional Coastal Plan. Marine farming will only be able to occur in the coastal marine area within an Aquaculture Management Area.
9. See clause 82(a) - the iwi aquaculture organisation must be a mandated iwi organisation under the Māori Fisheries Act 2004.
10. The Ministry's advice is available on our website.
11. The Ministry's advice is available on our website. For the discussion on age see paragraphs 19-21.
12. In *Mahuika v New Zealand* Communication No 547/1993, 15 November 2000, paragraph 9.3, the HRC recorded that it had not been disputed by the New Zealand Government that Māori were, for the purposes of art 27 ICCPR, a 'minority'. We accept for the purposes of this opinion that Māori would constitute a 'minority' under section 20
13. *Te Runanga O Whare Kauri Rekoku Inc v Attorney General* HC Wellington, 12/10/92 CP 682/92. As noted above, the Waitangi Tribunal recognised Māori interests in aquaculture.
14. UN General Comment 23, *The Rights of Minorities* para 3.2.
15. See section 5(2) of the RMA for the full definition.

16. [1995] 3 NZLR 553

17. 1985 White Paper "A Bill of Rights for New Zealand", tabled in the House of Representatives by the then Minister of Justice, Hon Geoffrey Palmer paragraph 10.175. See, too, Grant Huscroft (2003) "The Right to Justice" in Rishworth, Huscroft, Optican, Mahoney *The New Zealand Bill of Rights Act*, Oxford University Press p763.

18. G Huscroft (2003), "The Right to Justice" in *The New Zealand Bill of Rights Act* Oxford University Press, pp 764-765.

19. *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC), 55.