

Te Atiawa Claims Settlement Bill

11 July 2014

Attorney-General

Te Atiawa Claims Settlement Bill (PCO 17855/1.31) – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/218

1. We have considered 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.

2. The Bill will effect a final settlement of the Te Atiawa historical claims as defined in the Bill. [1] It provides for acknowledgements and an apology to Te Atiawa as well as for cultural and commercial redress. Measures for cultural redress include the issue of protocols; statutory acknowledgment and deeds of recognition; a declaration of overlay classification; determinations relating to official geographic names; and representation on some committees of the Taranaki Regional Council. One cultural redress property (Taumata) is vested in fee simple; others are vested jointly in fee simple, some to be administered as wildlife refuges and conservation areas, and some as conservation areas.

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 Te Atiawa 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 Te Atiawa, 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.

Issues under ss 20 and 27(2) - Privative clause

4. The Bill provides in cl 14 that the settlement of the historical claims is final and excludes the jurisdiction of any court, tribunal or other judicial body to consider the settlement and historical claims, other than in respect of the interpretation or implementation of the Deed of Settlement or the Te Atiawa Claims Settlement Act.

5. Legislative determination ought not conventionally to fall within the scope of judicial review. [2] However, to the extent that any excluded matters could be susceptible to judicial review, cl 14 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 that 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 that the exclusion was consistent with articles 14 and 27 of the International Covenant of Civil and Political Rights, which are comparable to ss 20 and 27(2) of the Bill of Rights Act. [3]

Whether s 27(3) at issue

8. Clause 23(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 may be seen to raise the 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 23(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]

Review of this advice

10. This advice has been reviewed in accordance with Crown Law protocol by Martha Coleman, Crown Counsel.

Kristina Muller
Crown Counsel

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Footnotes

[1] Clause 12 defines Te Atiawa, cl 13 defines the historical claims.

[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 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.”