

# Waikato-Tainui Raupatu Claims (Waikato River) Settlement Bill

10 November 2008

Attorney-General

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Bill 302-1: Consistency with the New Zealand Bill of Rights Act

Our Ref: ATT395/80

1. Further to brief advice provided through the Cabinet paper process in respect of this Bill, I have set out the basis for the conclusion given at that time that the Bill appears to be consistent with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”).

2. The Bill has two broad and connected purposes: it gives effect to a final settlement of Waikato-Tainui historical raupatu claims relating to the Waikato River (“claims”) and establishes, through a range of existing and new mechanisms, joint management arrangements for restoring and maintaining the river.

## Issues arising from settlement of claims

3. The Bill raises one substantive issue in respect of the Bill of Rights Act. Clause 43 of the Bill provides for final settlement of the claims and cl 44(2) excludes, other than in certain respects, the jurisdiction of the courts, the Waitangi Tribunal and “all other judicial bodies and tribunals” in respect of the claims, the deed of settlement, the redress under that deed and the Bill itself.

4. To the extent that any of these matters may have amounted to decisions or actions susceptible to judicial review, that exclusion constitutes a limit on the right to seek review affirmed by s 27(2) of the Bill of Rights Act. Legislative determination of a claim would not, in any case, conventionally fall within the scope of judicial review<sup>[1]</sup>. To the extent that the s 27(2) right is limited, however, it is accepted that exclusion of subsequent challenge is a necessary and legitimate incident of negotiated settlement.

5. Similarly, the settlement of the claims, so far as they relate to cultural practices, could be said to limit the claimants’ rights under s 20 of the Bill of Rights Act:

*“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.”*

6. Once again, however, any such limitation can be seen as justified as an incident of the negotiated settlement of the claims.

7. In particular, I note that the United Nations Human Rights Committee upheld a similar exclusion under the 1992 Fisheries Settlement as consistent with the right of access to the courts as affirmed by art 14(1) of the International Covenant on Civil and Political Rights and with art 27, which parallels s 20<sup>[2]</sup>.

### **Whether any issue in respect of claimants' role in joint river management**

8. As noted, the Bill provides not only for the transfer of settlement assets and associated rights to the claimants but also deals with joint management of the Waikato River. The effect of these provisions – including, for example, a right of engagement on the part of Waikato-Tainui in the event of any proposed creation or disposal of property rights in the river (cl 34(3)) – can be characterised as conferring rights of participation upon Waikato-Tainui but not on other people.

9. I do not, however, consider that any issue arises under the Bill of Rights Act in respect of these provisions. The Bill proceeds on the basis that Waikato-Tainui have and/or are entitled to have certain rights and interests in respect of the Waikato River. As addressed by the negotiated settlement, those entitlements are in part reflected by settlement assets but also by the various participatory rights conferred. The limitation of those rights to Waikato-Tainui raises no issue because, in the context of the present settlement, no other person or group can assert those entitlements and, more to the point, the settlement only addresses entitlements of Waikato-Tainui.

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

Yours sincerely

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### Footnote

1 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40.

2 *Apirana Mahuika v New Zealand*, Communication No. 547/1993, U.N.Doc.CCPR/C/70/D/547/1993 (2000).

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