8 December 2004

Attorney-General

**LEGAL ADVICE**
**CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: FIORDLAND MARINE MANAGEMENT BILL**

1. We have considered whether the Fiordland Marine Management Bill 2004 (PCO 6255/8) is consistent with the New Zealand Bill of Rights Act 1990 (the "Bill of Rights Act"). This version of the Bill is to be introduced into the House on 9 December 2004.

2. The Bill raises *prima facie* issues of inconsistency with section 20 (rights of minorities). We have come to the conclusion that to the extent the Bill limits this right those limitations appear to be justifiable in terms of section 5 of the Bill of Rights Act.

3. The Bill therefore appears to be consistent with the Bill of Rights Act.

## Overview of the Bill

4. The Bill does two things. Firstly, it establishes a geographic entity known as the Fiordland Marine Area over which the Bill applies ("the FMA"). Secondly, it gives effect to aspects of the Fiordland Marine Conservation strategy – a strategy developed by a locally-based society that is representative of all major stakeholders who have an interest in the Fiordland marine environment.

5. To give effect to the strategy the Bill:

   - creates eight Marine Reserves (a total area of nearly 10 000 hectares) with special conditions;
   - amends the proposed Southland Regional Coastal Plan as it applies to Fiordland;
   - creates the Fiordland Marine Guardians Advisory Committee;
   - requires the Ministers and government departments responsible for resource management, fisheries and marine reserves, and Environment Southland to recognise and have regard to the advice of the Fiordland Marine Guardians Advisory Committee; and
   - requires a review of the effectiveness of the management measures to be undertaken after 5 years.

6. The FMA will also be subject to the Marine Reserves Act 1971, although any necessary modifications will apply.

## Relevant provisions of the Bill of Rights Act

7. The Bill gives rise to *prima facie* issues of inconsistency with section 20 of the Bill of Rights Act.

8. 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.*

9. 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.[1]

## Section 20 – rights of minorities

10. Schedule 2A stipulates certain general conditions that are attached to specific activities that occur within the FMA. Clause 1, for example, places conditions on the removal of pounamu, whilst clause 2 places similar conditions on the taking of dead marine mammals.

11. As restrictions on the collecting and taking of pounamu and marine mammals appear to infringe Māori customary practices, Schedule 2A appears to be inconsistent with section 20 of the Bill of Rights Act.

12. Section 20 affirms the right of minorities[2] not to be denied their right to engage in cultural activities. [3] .

13. The United Nations Human Rights 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…"[4]

14. Although Clauses 1 and 2 of Schedule 2A do not constitute a total denial of the right of Māori to engage in customary practices, we consider these provisions limit the right to engage in this activity. In coming to this view we note that under the Ngai Tahu (Pounamu Vesting) Act 1997 pounamu vests in and becomes the property of Te Runanga o Ngai Tahu. We also

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[1] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9

[2] 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.

[3] *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.

[4] UN General Comment 23, *The Rights of Minorities* para 3.2.

note that 3 types of whale are listed in schedule 97 of the Ngai Tahu Claims Settlement Act as being the taonga of Ngai Tahu. 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*

15. Fiordland is a globally unique marine environment that contains both exceptional marine biodiversity and valuable marine resources. The Fiordland marine environment is also an important economic area, but one that faces an escalation in human activity. It has been determined that the marine area of Fiordland needs careful management at a local level to ensure the preservation of all resources.

16. Therefore resources must be managed for use, development and protection, with a requirement to meet the needs of future generations.[5] We consider this to be an important and significant objective.

*Rational and proportionate response*

17. Activities within the marine environment are subject to a number of regulatory controls that are imposed with the aim of preserving the environment and preserving resources. The restrictions on the collection and harvesting of pounamu and marine mammal body parts are consistent with these objectives. The government has a legitimate interest in regulating the marine area by subjecting all forms of activity, whether customary or not, to a regime (in this case the Resource Management Act 1991 and the Crown Minerals Act 1991) on the basis that the government is compelled to protect and conserve the environment of New Zealand.

18. On this point we note the comments of Cooke P in *Ngai Tahu Māori Trust Board v Director-General of Conservation*:[6]

> "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."

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

- Providing a regulatory framework that would allow a member of Ngai Tahu, who has the required consents and approvals under clause 1(2), to collect pounamu, provided that—
  (a) they take no greater weight of pounamu than that which they can carry on their own in one trip;

[5] See section 5(2) of the RMA for the full definition.
[6] [1995] 3 NZLR 553

(b) they do not use machinery or cutting equipment to collect pounamu; and
(c) the collection of pounamu must not disturb the foreshore, seabed, or marine life in more than a minor way (Clause 1(3)).

- Permitting a member of Ngai Tahu Whanui who has obtained a permit for this purpose in accordance with clause 2(2), to take collect bones, teeth, ivory, or ambergris from a deceased marine mammal found within the FMA, provided that the material is —
  (a) naturally separated from a marine mammal; and
  (b) have been found in a marine reserve established under the Bill (clause 2(3)).

20. 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.

**Conclusion**

21. We have concluded that the provisions of the Bill appear to be consistent with the rights and freedoms contained in the Bill of Rights Act.

22. 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, the Minister of Conservation, and the Minister for the Environment if you agree.

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cc. Minister of Justice
Minster for the Environment
Minister of Conservation

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