

Maori Fisheries Bill 2003

10 November 2003

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990: MAORI FISHERIES BILL 2003

1. We have considered whether the Maori Fisheries Bill (the Bill) (PCO 5225/3), is consistent with the New Zealand Bill of Rights Act 1990. We understand that this Bill will be considered by the Cabinet Legislation Committee at its meeting on Thursday 13 November 2003.
2. The purpose of the Bill is to establish a system for the management of assets deriving from the deed of settlement given effect in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The Bill includes provision for the Treaty of Waitangi Fisheries Commission to set up trusts (i.e. Te Ohu Kai Moana which is empowered to establish the Te Putea Whatupu Trust and Te Wai Maori Trust) and companies (i.e. Aotearoa Fisheries Limited, Te Ohu Kai Moana Trustee Limited, Te Putea Whatupu Trustee Limited and Te Wai Maori Trustee Limited) to administer various components of the settlement and foster the development of those assets.
3. The Bill also:
 - establishes an iwi mandating system to facilitate Maori interface with the companies listed above;
 - provides for the allocation of specific settlement assets;
 - includes mechanisms for the review of companies established under the Bill and a resolution of disputes arising out of the operation of Te Ohu Kai Moana.
4. We have concluded that this Bill appears to achieve overall consistency with the Bill of Rights Act. We would, however, draw your attention to a number of the provisions of the Bill that could be argued to give rise to prima facie issues of consistency with section 19(1) of the Bill of Rights Act - i.e. everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

Section 19 Freedom from Discrimination

5. Section 19(1) of the Bill of Rights Act provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include race, ethnic or national origin and age.

6. In our view, taking into account the various domestic and overseas judicial pronouncements as to the meaning of discrimination, the key questions in assessing whether discrimination under section 19 exists are:

(i) Does the provision draw a distinction based on one of the prohibited grounds of discrimination?

(ii) Does the distinction involve disadvantage to one or more classes of individuals?

7. If these questions are answered in the affirmative, we consider that the provision gives rise to a prima facie issue of "discrimination" under section 19(1) of the Bill of Rights Act. Where this is the case, the provision is required to meet the justified limitation test under section 5 to remain consistent with the Bill of Rights Act.[\[1\]](#)

Discrimination on the grounds of race/ethnic or national origin

8. The Bill establishes a number of companies and organisations, which have responsibility for administering different components of the fisheries settlement. Appointment to the boards of these entities is made under a range of criteria including expertise in business and tikanga Maori. However, only Maori are eligible to be appointed to the boards. These provisions therefore draw a distinction based on prohibited grounds of discrimination related to race, ethnic or national origin. Examples of such provisions are: clause 17(1)(v); clause 23 (3); clause 36B(1); and clause 41B(a).

9. While these provisions purport to exclude non-Maori from serving on or benefiting from the companies and organisations created under the Bill we do not consider this results in any disadvantage. The purpose of the Bill is to make provision for the administration of fisheries assets derived from the settlement of a breach of the Treaty of Waitangi. Therefore the provisions in the Bill provide for those eligible to benefit from the settlement to determine how it is administered and to access their legitimate benefit. As non-Maori do not have an interest in the settlement, their exclusion from participating in the management of assets does not in our view amount to disadvantage. If we were wrong in this conclusion, we consider that the reasons for distinction clearly justify the provision in terms of section 5 of the Bill of Rights Act.

Intra-ground discrimination on grounds of ethnic origin

A/ Urban Maori

10. It could be argued that the Bill may give rise to issues of intra-ground discrimination on the grounds of ethnicity. 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.

11. Although there is no New Zealand case law on whether intra-ground discrimination would constitute discrimination for the purposes of the Bill of Rights Act, Canadian case law suggests that unjustified differentiation between ethnic groups may be considered discrimination "on the basis of ethnicity".[\[2\]](#)
12. Under the provisions of this Bill, only mandated iwi organisations are eligible to receive specific entitlements accruing out of the settlement. A mandated iwi organisation is defined in clause 4 of the Bill as "an organisation recognised by Te Ohu Kai Moana Trustee Limited...as the representative organisation of that iwi." "Iwi" is further defined as, amongst other things, iwi listed in Schedule 4 of the Bill. The entitlements that mandated iwi organisations are eligible to receive include the right to receive settlement quota, the right to purchase settlement quota, or enter into binding agreements with other iwi over coastline claims (see for example clause 9). Representative iwi organisations such as the Manukau Urban Maori Authority are unable to derive any direct benefit from the settlement.
13. On the face of it, the Bill appears to differentiate between Maori who are unable to affiliate to a particular iwi and those who are able to. There has been some suggestion that such an arrangement discriminates against 'urban Maori'.
14. However, in terms of section 19 of the Bill of Rights Act, we consider that no issue of discrimination appears to arise for the following reasons:
 - (i) We do not consider that 'urban Maori' form an identifiable ethnic group for the purposes of the Human Rights Act. In *King-Ansell v Police* [\[3\]](#) the New Zealand Court of Appeal discussed the plain language meaning of 'ethnic origins'. Woodhouse and Richardson JJ considered that the test for ethnic origins should be a mixed subjective/objective test. Members of the group would have to have a subjective belief that they were alike and shared a historically determined social identity, beliefs and customs. The objective part of the test would be satisfied if the group was recognised by others as sufficiently distinguished in the community.[\[4\]](#) We consider that 'urban Maori' do not form a sufficiently homogeneous group to come within this definition. We understand that the representative Maori organisations are formed on the basis of kaupapa and not whakapapa and therefore lack the shared historical qualifications to be an ethnic group.
 - (ii) Even if 'urban Maori' could be regarded as an ethnic group, there is not necessarily a clear-cut issue of disadvantage. Some provisions of the Bill may be beneficial to 'urban Maori'. We note, for instance, that representative Maori organisations are able to participate in the appointment and removal of members of Te Kawai Taumata. The purpose of Te Kawai Taumata is to appoint and remove directors of Te Ohu Kai Moana Trustee Limited (i.e. the sole trustee of the Te Ohu Kai Moana trust). In other words, representative

Maori organisations are able to influence the decision-making of the organisation that administers the settlement. Furthermore, the Bill specifically provides in a number of places that the settlement should be for the benefit of all Maori (see clause 9D and clause 36A).

(iii) We consider that, should the terms of the implementation of the settlement contained in the Bill nevertheless raise prima facie issues of discrimination, they are likely to be justifiable for the following reasons:

- The Bill gives effect to a settlement under the Treaty of Waitangi which was entered into between the Crown, and representatives of the New Zealand Maori Council, the National Maori Congress and iwi.
- The settlement reflects the management of historical tribal rights, assets and interests.
- Measures will be taken to assist 'urban Maori' who are unaware of their iwi affiliations or who have lost touch with their iwi to establish their iwi affiliations.
- Distribution of the settlement to iwi is considered to provide for a fairer and more principled allocation of resources - a person's affiliation to an iwi is more definitive.

B/Inter-iwi

15. There is a different potential argument that the Bill may raise issues of discrimination between individual iwi. The Bill provides that the benefits of the settlement will be allocated on the basis of population and access to the coastline. The effect of the second factor could mean that some iwi benefit from the settlement to a greater extent than other iwi relative to their population. We have considered whether such distinctions made between iwi gives rise to an issue of intra-ground discrimination on the grounds of ethnic origin.

16. There is no settled caselaw specifically on the question of whether individual iwi amount to a distinct ethnic group. It can be argued that both limbs of the test laid down in *King-Ansell v Police* are met in the case of individual iwi and therefore each iwi is a distinct ethnic group. The arguments which support a conclusion that individual iwi have a distinct ethnic identity are:

- Individual iwi have a distinct social identity based on group cohesion and belief as to its own historical antecedents.
- Most New Zealanders are aware that there are different iwi and that iwi consider that they are distinct from one another.

17. There are also arguments which militate against such a conclusion. These arguments include the following:

- Iwi is one of many culturally based groupings Maori affiliate with (others include whanau, hapu and 'urban Maori') making it more akin to a subgrouping within an ethnicity rather than a separate ethnic group.

- The practice of whakapapa, which is integral to Maori culture, normalises the ability of individual Maori to affiliate and operate within multiple iwi simultaneously - further supporting the subgrouping position of iwi.
- On this approach it is "Maori" and not "iwi" that is to be viewed as the ethnic group in New Zealand.

18. We do not consider it necessary to reach a final view on the issue for the purposes of this advice. We consider that if individual iwi were a distinct ethnic group, the allocation of assets would give rise to issues of prima facie discrimination on grounds of ethnic origin. If this was the case, the prima facie issue of discrimination would appear to be justifiable in terms of section 5 of the Bill of Rights Act for the following reasons:

- The nature of the settlement concerns Maori traditional relationship to fisheries resources, and this requires recognition of iwi associations with those resources. This would therefore mean that certain iwi have a closer association with those fisheries resources than other iwi.
- The settlement also takes into consideration that not all iwi have a traditional association with the fisheries resource. However, the Bill recognises that all Maori have an interest in the fisheries resource. Therefore, as a way of ensuring that all Maori derive some benefit from the settlement, a population indicator is included in the allocation model.
- The mechanism used for the allocation of assets and benefits accruing from the settlement is a means of managing the distribution in an equitable manner.

Discrimination on the grounds of age

19. Clause 4 of the Bill defines an "adult" as meaning a person 18 years of age or over. Only adult members of mandated iwi organisations are eligible to vote on matters relating to the management of iwi assets arising out of the settlement. Clauses 28H, 62 and 63C provide examples where the exercise of voting rights by adult members of the mandated iwi organisation in respect of provisions concerning the disposal of income shares from Aotearoa Fisheries Ltd and the classification and sale of settlement quota.

20. "Age" under section 21 of the Human Rights Act 1993 is defined as commencing with the age of 16 years. It could be argued that Maori between the ages of 16 and 17 are disadvantaged under the provisions of this Bill because they are unable to become involved in the administration of iwi mandated organisations by reason of their age. Therefore, the definition of "adult" appears to raise a prima facie discrimination on grounds of age.

21. The requirement that only persons aged 18 years of age and over can exercise the voting rights appears to be designed to ensure that only those who are considered to have the requisite judgement and decision-making skills are able to participate in the decision-making process. The age of 18 is used as a proxy for competence. We consider this objective to be important

as it relates to the functional process of administering the settlement. We also consider that measure is rational and proportionate for the following reasons:

- This age restriction within the Bill is limited to certain business of mandated iwi organisations and is not applied in any other criteria in the Bill such as the director positions for Te Ohu Kai Moana, Te Putea Whakatupu Trust and Te Wai Maori Trust or the member positions for Te Kawai Taumata.
- The age restriction is based on the age at which it is generally held people are competent to vote in national and local body elections. It is also noted that the benchmark of 18 as an age of eligibility to vote is reflected in the definition of "adult" in the Electoral Act 1993.
- Section 12 of the Bill of Rights Act itself gives the right to vote to those who are of or over the age of 18.
- The voting rights relate to decision-making that has significant administrative and financial implications for mandated iwi organisations such as the sale of Aotearoa Fisheries income shares.

Conclusion

22. We have concluded that the provisions of the Bill do not appear to be inconsistent with the rights and freedoms contained in the Bill of Rights Act.

23. In accordance with your instructions, we attach a copy of this opinion for referral to the Minister of Justice. A copy is also attached for referral to the Minister of Fisheries, if you agree.

Cheryl Gwyn
Deputy Secretary for Justice (Public Law)

Val Sim
Chief Legal Counsel

cc Minister of Justice
Minister of Fisheries
Copy for your information

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Footnotes

1. In applying section 5, the Ministry of Justice has regarded to the guidelines set out by the Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.
2. The Canadian Courts have only discussed this issue in the context of disability. The leading case is *Battlefords and District Co-operative Ltd v Gibbs and Others* [1996] 3 SCR 566. Although the issue of intra-ground discrimination on the grounds of ethnicity was raised in *Lovelace v Ontario* [2000] 1 SCR 950, the Canadian Supreme Court did not decide this issue as no issue of discrimination arose.
3. *King-Ansell v Police* [1979] 2 NZLR 531
4. The approach of the Court of Appeal was subsequently endorsed by the House of Lords in *Mandla v Dowell Lee* [1983] 2 AC 548, 562