

Ngati Awa Claim Settlement Bill

4 August 2004

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Ngati Awa Claim Settlement Bill (PCO 5119/13)

Our Ref: ATT114/1298(12)

1. I have considered the above Bill for consistency with the New Zealand Bill of Rights Act 1990 ("the Bill of Rights"). I advise that the Bill appears to be consistent with the Bill of Rights.
2. The Bill sets out in detail the settlement between the Ngati Awa people and the Crown, with a view to this being a final settlement under the deed of settlement and this legislation.
3. The Bill provides that the settlement of Ngati Awa claims (as defined in clause 14), to be effected by the deed of settlement and this legislation, is final (clause 15). The Bill excludes courts, judicial bodies and tribunals from considering the final settlement, including the validity of the deed of settlement and the adequacy of the benefits provided to the Ngati Awa people under the Deed or the Bill (clause 15(3)). The jurisdiction of the Waitangi Tribunal is specifically excluded (clause 16).

Section 27(2) BORA issue

4. The clauses in the Bill ousting the jurisdiction of courts and the Tribunal (clauses 15 and 16) raise an issue about compliance with s 27(2) of the Bill of Rights (the right to seek judicial review).
5. While clause 15 does limit the ability to bring judicial review, my view is that, looked at in context, there is no breach of s 27(2) and in any event, if there were, it would be a justified limit in terms of s 5. My conclusion that there is no breach of s 27(2) is based on the wording of that section.
6. Section 27(2) of the Bill of Rights provides that:

"Every person whose rights, obligations or interest 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."

7. There are two reasons why there is no breach of s 27(2). First, the section refers to a "determination" which is said to have an "adjudicative connotation" (*Chisholm v Auckland City Council* CA32/02 29 November 2002 at para 32). I

do not believe a negotiated settlement between two parties can be considered to be an "adjudication" of the matters in dispute. Negotiation and adjudication are quite distinct concepts. Secondly, the determination needs to be by a Tribunal like body for the section to apply (*Chisholm supra*). The Crown is not such a body.

8. Even if the ouster clause was to represent a *prima facie* breach of the rights of those persons (if any) within the iwi who dispute the mandate or the settlement process, I consider that the limitation on the right to judicial review to be justified. The limitation is justified because the legislation reflects a reciprocal agreement between two parties who have agreed on the effect settlement would have on their future claims. I also note that it is relevant that the deed of settlement was only signed after the Crown was satisfied there was the appropriate mandate to enter into such an agreement. Further, the Bill specifically does not exclude the jurisdiction of courts, judicial bodies or tribunals (including the Waitangi Tribunal) in respect of the interpretation or the implementation of the deed or the Act (clauses 15(4) and 16).
9. This analysis with respect to s 27(2) of the Bill of Rights is consistent with advice given in respect of the Ngai Tahu settlement (see our advice dated 24 March 1998), the Pouakani settlement (see our advice dated 12 September 2000), the Te Uri o Hau settlement (see our advice dated 22 November 2001) and the Ngati Tama settlement (see our advice dated 4 April 2003). Those in turn reflected the approach taken in respect of other Treaty settlements—the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Waikato Raupatu Claims Settlement Act 1995. The approach appears still to be sound.

Section 27(3) BORA issue

10. Clause 23(3) of the Bill raises the issue of compliance with s 27(3) of the Bill of Rights, 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.
11. Clause 23(3) of the Bill excludes damages as a remedy in respect of a public law action against the relevant Minister who issued a protocol alleging failure to comply with his or her obligations under the protocol. This clause affects the substantive law and does not in my view fall within the ambit of s 27(3) which protects procedural rights. Accordingly, clause 23(3) of the Bill is not inconsistent with s 27(3) of the Bill of Rights.

Section 14 BORA issue

12. Clause 21 of the Bill raises the issue of compliance with s 14 of the Bill of Rights. Section 14 protects the right to "freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form".
13. Clause 21 provides for protocols to be issued in the form set out in the deed of settlement. One of those protocols, the DOC Protocol, set out in Schedule 5.21 of the deed, raises freedom of expression issues. Clause 8.5(b) of the

DOC Protocol provides that the Department will ensure as far as possible, when issuing concessions to carry out activities on the land administered by the Department, that the terms of the concessions provide that the concessionaire consult with the governance entity before using information relating to Ngati Awa.

14. A requirement for consultation prior to use of information potentially limits the right to impart information protected by s 14. However, even if this were to represent a *prima facie* infringement of s 14, it would in my view be justified. First, it is not unreasonable to require a concessionaire to consult Ngati Awa before using information relating to it. Furthermore, it is a procedural limitation not a substantive one. It does not preclude the concessionaire from expressing a contrary view to that put forward by Ngati Awa.
15. It is also worth noting that clause 22 of the Bill expressly provides that the protocols do not restrict the ability of the Crown to perform its functions in accordance with the law, which necessarily includes the Bill of Rights. Accordingly, any protocol issued under clause 21 must comply with the Bill of Rights.
16. It may be prudent to bring this requirement expressly to notice by including in clause 22(a) a specific reference to the Bill of Rights. Whilst BORA is plainly included in the earlier expression of "in accordance with the law", the inclusion in the Act of such a reference might emphasise the need to ensure Protocols are BORA consistent. I stress, however, that the absence in the Bill of such an express provision does not raise a s 7 consistency concern.

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