Ngati Mutunga Claims Settlement Bill

21 June 2006

Attorney-General

Ngati Mutunga Claims Settlement Bill -
Our Ref: ATT395/11

1. I have considered the above Bill (version 10) 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 would effect a final settlement of the Ngati Mutunga historical claims (defined in clause 14). It excludes courts, judicial bodies and tribunals from considering the settlement and the historical claims (clause 15). The Waitangi Tribunal's jurisdiction is specifically excluded (clause 16). Such bodies retain jurisdiction over the interpretation or implementation of the deed or the Act.

2. The Bill would transfer to Ngati Mutunga various items of commercial and cultural redress in settlement of historical claims.

Section 27(2) Issue - The Right to Judicial Review

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. That section provides:

"Every person whose rights, obligations or interests 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."

5. Section 27(2) applies to a determination by a Tribunal or public authority that is adjudicative in nature.[1] A negotiated settlement between two parties is not an adjudication of the matters in dispute. Nor can it be said the Crown is a tribunal or public authority.

6. Clause 15 precludes judicial review of any previous determination of rights and interests, such as the Waitangi Tribunal's preliminary report on the Taranaki claims. If this involves a breach of s 27(2), it is likely to be justified under s 5. The settlement Bill reflects a reciprocal agreement between two parties. In return for the compensation under the settlement, Ngati Mutunga has agreed that the subject matter of its historical claims should not be the subject of further litigation. This step was only taken after the Crown was satisfied there was the appropriate mandate to enter into such an agreement. The same justification would apply to those persons (if any) within the iwi who dispute the mandate or the settlement process.

7. This analysis is consistent with advice concerning the effect of other settlements[2] and the ruling of the Human Rights Committee of the United Nations on the Fisheries Settlement and Article 14 of the ICCPR.[3]

Section 27(3) Issue

8. 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.

9. Clause 23(3) of the Bill excludes damages as a remedy for any failure of the Crown to comply with a protocol under Part 2. 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 consistent with s 27(3) of the Bill of Rights.

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Footnotes

1 *Chishom v Auckland City Council* [2005] NZAR 661.

2 See our advice on the Te Arawa Lakes settlement (dated 17 February 2006), the Ngati Tuwharetoa (Bay of Plenty) settlement (dated 6 September 2004), the Ngati Awa settlement (dated 4 August 2004), the Ngati Tama settlement (dated 4 April 2003), the Te Uri o Hau settlement (dated 22 November 2001), the Pouakani settlement (dated 12 September 2000), and the Ngai Tahu settlement (dated 24 March 1998). Those opinions reflected the approach taken in relation to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Waikato Raupatu Claims Settlement Act 1995.

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

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