

Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Bill

6 September 2004

Attorney-General

LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Bill - PCO 5336/7

Our Ref: ATT114/1298

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 Tuwharetoa (Bay of Plenty) 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 a settlement of Ngati Tuwharetoa (Bay of Plenty) claims (as defined in clause 14), to be affected 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 adequacy of the benefits provided to the Ngati Tuwharetoa (Bay of Plenty) people under the deed or the Bill (clause 15(3)). The Waitangi Tribunal's jurisdiction is specifically excluded (clause 16).

Section 27(2) 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. Clause 15 does limit the ability to bring judicial review. However, looked at in context, there is no *prima facie* breach of s 27(2) and in any event, if there were, it would be justified in terms of s 5. My conclusion that there is no *prima facie* 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 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."

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 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 other settlements. See our advice in respect of 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 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) 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 alleging failure to comply with a 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.

Yours faithfully

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