

Port Nicholson Block (Taranaki Whanui ki Te Upoko o Te Ika) Claims Settlement Bill

21 August 2008

ATTORNEY-GENERAL

Port Nicholson Block (Taranaki Whanui ki Te Upoko o Te Ika) Claims Settlement Bill PCO 13123/14.0: Consistency with the New Zealand Bill of Rights Act
Our Ref: ATT395/68

1. I have considered the above Bill for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). While issues arise in respect of the Bill under ss 27(2) and 27(3) of the Bill of Rights Act, I advise that the Bill nonetheless appears to be consistent with that Act.

2. The Bill would effect a final settlement of the Taranaki Whanui historical claims (defined in cl 9). The Bill would transfer various items of commercial and cultural redress in settlement of historical claims and also provides for the participation of the claimant group in resource management and related decision-making.

Section 27(2) issue

3. The Bill excludes courts, tribunals or other judicial bodies from considering any or all of the historical claims, the deed of settlement or the redress provided under the deed or Act (cl 10(4)). That exclusion may constitute a limit on the right to seek judicial review affirmed by s 27(2) of the Bill of Rights Act, which 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.”

4. The term “determination of any tribunal or other public authority” in the parallel provision in s 27(1) has been held to apply only to decisions of public authorities that are adjudicative in nature [\[1\]](#). Further, legislative determination of a claim would not, in any case, conventionally fall within the scope of judicial review [\[2\]](#). On either basis, the claims, settlement deed and the Bill are not decisions within s 27(2) and, accordingly, no issue arises.

5. Further, and in any event, even if s 27(2) were applicable to any of these actions or any related decision, I conclude that the limitation under cl 10 is justifiable in terms of s 5 BORA:[\[3\]](#)

5.1 The Bill reflects a reciprocal and negotiated agreement between two parties. In return for the compensation under the settlement, Taranaki Whanui ki Te Upoko o Te Ika has

agreed that the subject matter of its historical claims should not be the subject of further litigation. The Crown is satisfied there was the appropriate mandate to enter into such an agreement. This assessment is also consistent with the decision of the Court of Appeal in *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318.

5.2 In that context, exclusion of jurisdiction in respect of the claims, settlement deed and the Bill is an integral part of the settlement process.

6. I note, in this respect, the view of the United Nations Human Rights Committee that a similar exclusion under the Fisheries Settlement, in the context of a negotiated settlement, was consistent with the right of access to the courts under art 14(1) of the International Covenant on Civil and Political Rights, which is comparable to s 27(2) [\[4\]](#).

Whether s 27(3) issue

7. Clause 19(3), which excludes damages as a remedy for any failure of the Crown to comply with a protocol under Part 2 of the Bill may be seen to raise the issue of compliance with s 27(3) of the Bill of Rights Act, 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.

8. This clause affects the substantive law and does not fall within the ambit of s 27(3), which protects procedural rights [\[5\]](#). Accordingly, no inconsistency with s 27(3) of the Bill of Rights Act arises.

9. This advice has been reviewed, in accordance with Crown Law protocol, by Ben Keith, Crown Counsel.

Yours sincerely

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Footnotes

1. *Chisholm v Auckland City Council* [2005] NZAR 661 (CA); *Minister Of Fisheries And Ors v Pranfield Holdings Limited* CA CA48/07, 10 July 2008.

2. *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40.

3. The application of s 5 entails an assessment of whether the restriction is rationally connected to an important objective and is proportionate to that objective: see, most recently, *R v Hansen* [2007] 3 NZLR 1 (SC) at [70], [123], [203]-[204] and [271].

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

5. *Westco Lagan*, above n 2, 55: “[s]ection 27(3) ... cannot restrict the power of the legislature to determine what substantive rights the Crown is to have. Section 27(3) merely

directs that the Crown shall have no procedural advantage in any proceedings to enforce rights if such rights exist.”.

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