

## ***Te Arawa Lakes Settlement Bill***

17 February 2006

Attorney-General

### LEGAL ADVICE

CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:

Te Arawa Lakes Settlement Bill

Our Ref: ATT114/1370

1. I have considered the above Bill (version 17) 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 affect a final settlement of the Te Arawa Lakes historical claims (defined in clause 13). It excludes courts, judicial bodies and tribunals from considering the settlement, including the validity of the deed of settlement and adequacy of the redress. (Clause 15) The Waitangi Tribunal's jurisdiction is specifically excluded. (Clause 16)
3. In broad outline, the Bill would vest title to the bed of the Rotorua lakes in Trustees of the Te Arawa Lakes Trust. Those beds are currently vested in the Crown by the Maori Purposes Act 1922. The vesting is expressed to be a form of "cultural redress" for certain historical events accepted as having breached the principles of the Treaty of Waitangi.
4. The vesting of the fee simple estate under clause 22 is subject to a number of qualifications. The Crown retains ownership of the water and airspace above the bed. There are various protections of recreational activities, existing structures and commercial activities, a category of "public utilities".
5. The Bill provides for other forms of "cultural redress". These include the issuing of "protocols" by various Ministers of the Crown. The protocols will describe how a particular ministry will interact with the Trustees. There are "statutory acknowledgements" to which certain bodies must have regard.

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

6. 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 New Zealand Bill of Rights Act 1990. That section provides:

"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. Clause 15 removes the ability to apply for judicial review of any matter concerning the historical claims, the validity of the deed of settlement or the adequacy of the redress. This involves is no *prima facie* breach of s 27(2). That section applies to a determination by a Tribunal or public authority. The requirement has been held to mean determinations of an adjudicative nature. 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.
8. 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 in terms of s 5 NZBORA. The legislation reflects a reciprocal agreement between two parties, Te Arawa having accepted the effect that 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) to interpret the deed or the Act or consider its implementation. See clauses 15 and 16.
9. This analysis is consistent with advice concerning the effect of other settlements. See our advice on the Ngati Tuwharetoa (Bay of Plenty) settlement (6 September 2004) 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.

### **Section 27(3) issue**

10. Clause 54(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 54(3) of the Bill excludes damages as a remedy for any failure of the Crown 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 54(3) of the Bill is consistent with s 27(3) of the Bill of Rights.

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