

09 February 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Public Works (Prohibition of Compulsory Acquisition of Māori Land) Amendment Bill

Purpose

1. We have considered whether the **Public Works (Prohibition of Compulsory Acquisition of Māori Land) Amendment Bill** ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act'). In reaching that conclusion, we have considered the consistency of the Bill with section 19, the right to freedom from discrimination. Our analysis is set out below.

The Bill

2. The purpose of the Bill is to amend the Public Works Act 1981 ('the Act') by preventing Māori freehold land and customary land from being acquired by a Minister or local authority for public works, without the consent of affected Māori. The requirement for consent is implied in the Bill which provides that 'Māori Land' can only be acquired by agreement – this is assumed to be between the Crown and owners of 'Māori Land'.
3. The Bill amends the Act by inserting a new section 16(3) which excludes 'Māori land' from the compulsory purchase powers available to the Minister of the Act or local authority, except by agreement. It also repeals section 17(4) and (5) of the Act which allow the Minister or Local Authority to apply to the Māori Land Court for an order enabling notice of a transfer to be given to the Māori Land Court in place of the owners, and allows the Court to appoint a representative (in place of the owners) to sign any deed of transfer.

Consistency of the Bill with the Bill of Rights Act

Section 19 – Right of freedom from discrimination

4. Section 19(1) of the Bill of Rights Act provides that everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
5. Section 19(1) provides the right to freedom from discrimination on the grounds set out in section 21 of the Human Rights Act 1993. These grounds include race and ethnic or national origins.
6. The key questions in assessing whether discrimination¹ under section 19 exists are:

¹ *Quilter v Attorney-General* [1998] 1 NZLR 523; *Egan v Canada* (1995) 124 DLR

- a. Does the legislation, policy or practice draw a distinction based on one of the prohibited grounds of discrimination?
 - b. Does the distinction involve material disadvantage to one or more classes of individuals?
7. If these questions are answered in the affirmative, we consider that the legislation, policy or practice gives rise to a *prima facie* issue of 'discrimination' under section 19 of the Bill of Rights.
 8. The Bill purports to discriminate on the grounds of ethnicity, in that it draws a distinction between Māori land owners (owners of Māori customary land and Māori freehold land), and land owners of other ethnicities. Under the Bill, 'Māori land' is given the same definition as under section 2 of the Te Ture Whenua Māori Act 1993 ('the TTWMA').² Māori land is defined (in section 4 of the TTWMA) as Māori customary land and Māori freehold land.
 9. Definitions of Māori customary land and Māori freehold land are found in section 129 of the TTWMA. Section 129(2)(a), defines 'Māori Customary Land' as 'land that is held by Māori in accordance with tikanga'. Section 129(2)(b) defines 'Māori Freehold Land' as 'land, the beneficial ownership of which has been determined by the Māori Land Court by freehold order'. For the purposes of this advice therefore we have assumed that both of these definitions are intended to apply to the Bill under the single banner of 'Māori land'.³
 10. The Bill grants an advantage to owners of Māori land, in that such land is given special status under the Public Works Act 1981, exempting it from the compulsory acquisition powers open to the government. This means that consent of the owners would be required before such lands could be acquired by the Minister or local authority. Owners of non-Māori land would still be subjected to the existing provisions of the Public Works Act and would be at a disadvantage. In comparing owners of Māori Land with other landowners it appears that this Bill engages section 19 on the grounds of race and ethnic origin. Although the Bill distinguishes on the basis of the kind of land, rather than directly on the basis of ethnicity, we consider that section 19 is engaged because in practice, all Māori land is owned by Māori people. We therefore consider there is a *prima facie* issue of discrimination.⁴

Can the infringement of section 19 be justified in terms of section 5?

11. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act.
12. The section 5 inquiry may be approached as follows:⁵

² This appears to be a drafting error. The definition of 'Māori Land' is in section 4 of the TTWMA.

³ There is a lack of consensus as to whether Māori customary land is subject to acquisition by the Crown under the Public Works Act 1981. For the purposes of this advice, we have included Māori customary land in our consideration of the application of this Bill.

⁴ We note however, that it is arguable that no issue of discrimination arises. Under s 19(2) of BORA, measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged by unlawful discrimination do not constitute discrimination. Māori fall within the category of people disadvantaged by virtue of their ethnicity. The Bill purports to advance Māori by protecting their interests. Accordingly it is arguable that no discrimination arises. We also noted that section 20 of BORA may also be relevant, in that it provides protection to the language and culture of minority groups.

⁵ *Hansen v R* [2007] NZSC 7 [123].

- a) does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b) if so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
13. The general policy explanatory note stresses the purpose of the Bill, namely the need to protect Māori land from acquisition in light of the historical alienation of Māori land, and the need to actively protect Māori interests. The Bill's apparent objective of protecting Māori freehold and customary land from further acquisition, thus maintaining links of Māori people to Māori land, is significant. This objective is consistent with the Treaty of Waitangi which is recognised as part of New Zealand's constitutional arrangements. As such, we consider this to be a sufficiently important objective.
14. As set out in the explanatory note, the Bill seeks to protect Māori freehold and customary land from compulsory acquisition for public works and in turn give primacy to Article Two of Te Tiriti o Waitangi. In 2011, 5.5% of New Zealand's land mass was made up of Māori land. The Bill would limit the Crown's right to compulsorily purchase such land. Māori land could only be acquired with the consent of the owners. We consider this provision to be rationally connected to the objective. The Bill affects 'Māori Land' as defined under the TTWMA, that is, not all land owned by people of Māori descent. We consider that the specific, contained definition minimally impairs the right or freedom no more than is reasonably necessary to achieve the objective of protecting Māori land from acquisition.
15. Finally, in *New Zealand Māori Council v Attorney-General*, the Court of Appeal considered that '[t]he duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent.'⁶ The Bill's objectives reinforce this principle by aiming to prevent further detriment to Māori by way of compulsory acquisition of Māori land. The Crown duty of active protection of Māori is part of the context in which we consider whether the limitation is justified. We consider that in this context, the discrimination is in due proportion to the importance of the objective.
16. We therefore conclude that although the provisions in the Bill may appear to limit rights under section 19 of the Bill of Rights Act, such limitation is justified in terms of section 5 of the Bill of Rights Act.

⁶ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 647, 664.

Conclusion

17. We have concluded that the Bill appears to be **consistent** with the rights and freedoms affirmed in the Bill of Rights Act.

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