

7 June 2017

Attorney-General

Ngāti Tamaoho Claims Settlement Bill (v 6.0) — Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/266

1. We have considered the above Bill for consistency with the New Zealand Bill of Rights Act 1990 (“the Bill of Rights Act”). We advise that the Bill appears to be consistent with the Bill of Rights Act.
2. The Bill will effect a final settlement of the Ngāti Tamaoho historical claims as defined in the Bill.¹ It provides for acknowledgements and an apology to Ngāti Tamaoho, as well as for cultural and commercial redress. Measures for cultural redress include:
 - 2.1 protocols for Crown minerals and taonga tūturu;
 - 2.2 acknowledgement of statements of association made by Ngāti Tamaoho,
 - 2.3 a deed of recognition for certain areas administered by the Department of Conservation;
 - 2.4 declaration of official geographic names;
 - 2.5 the vesting of certain properties in Ngāti Tamaoho; and
 - 2.6 a joint management scheme for Hūnua Falls reserve land.

Whether s 19 at issue

3. Notwithstanding that the Bill will confer assets or rights on Ngāti Tamaoho that are not conferred on other people, the Bill does not *prima facie* limit the right to freedom from discrimination affirmed by s 19 of the Bill of Rights Act. Discrimination arises only if there is a difference in treatment on the basis of one of the prohibited grounds of discrimination between those in comparable circumstances. In the context of this settlement, which addresses specified historical claims brought by Ngāti Tamaoho, no other persons or groups who are not party to those claims are in comparable circumstances to the recipients of the entitlements under the Bill.

¹ Clause 13(1) defines Ngāti Tamaoho, cl 14 defines historical claims.

Accordingly, excluding others from the entitlements conferred by the Bill is not differential treatment for the purposes of s 19.

Sections 20 and 27(2) of the Bill of Rights Act: privative clauses

4. The effect of cl 15 and 16 is that the settlement of historical claims is final and excludes the jurisdiction of any court, tribunal or other judicial body to consider the settlement and historical claims, other than in respect of the:
 - 4.1 interpretation or implementation of the deed of settlement with Ngāti Tamaoho;
 - 4.2 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Deed;
 - 4.3 Ngāti Tamaoho Claims Settlement Act (once enacted); and
 - 4.4 Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.
5. Legislative determinations ought not conventionally to fall within the scope of judicial review.² However, to the extent any excluded matters could be susceptible to judicial review, cl 15 constitutes a justified limit under s 5 of the Bill of Rights Act on the right affirmed by s 27(2). Excluding subsequent challenge is a legitimate incident of the negotiated settlement of claims.
6. To the extent the exclusion of subsequent challenge could be said to limit a claimant's minority rights under s 20 of the Bill of Rights Act, this would be justified on the same basis.
7. The United Nations Human Rights Committee upheld a similar exclusion under the 1992 Fisheries Settlement. The Committee found the exclusion was consistent with arts 14 and 27 of the International Covenant on Civil and Political Rights, which are comparable to ss 20 and 27(2) of the Bill of Rights Act.³

Whether s 27(3) at issue

8. Clause 25(3) of the Bill excludes damages or other forms of monetary compensation as a remedy for a failure of the Crown to comply with a Crown minerals or taonga tūturu protocol. If the Crown fails to comply with a protocol without good cause, the Ngāti Tamaoho trustees may enforce the protocol,⁴ and recover the costs of doing so in the ordinary manner.⁵
9. This clause appears to raise the issue of consistency 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.

² *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC).

³ *Apirana Mahuika v New Zealand* Communication Number 547/1993 UN Doc CCPR/C/70/D/547/1993 (2000).

⁴ Clause 25(2).

⁵ Clause 25(4)(b).

However, cl 25 affects the substantive law and does not fall within the ambit of s 27(3) of the Bill of Rights Act, which protects procedural rights.⁶

Review of this advice

10. This advice has been reviewed in accordance with Crown Law protocol by Vicki McCall, Crown Counsel.



Daniel Perkins
Crown Counsel
Constitutional & Human Rights Team Manager

Noted

A handwritten signature in black ink, appearing to read "C. F. Finlayson".

Hon Christopher Finlayson QC
Attorney-General
7 / 06 / 2017

⁶ *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40, 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 proceeding to enforce rights if such rights exist.”