



19 August 2022

Attorney-General

Ngāti Hei Claims Settlement Bill [PCO 18984/8.33] – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/360

1. We have considered the Ngāti Hei Claims Settlement Bill (**Bill**) for its consistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**). The Bill appears to be consistent with the Bill of Rights Act.

What the Bill does

2. The Bill effects final settlement of historical Ngāti Hei claims as defined in the Bill.¹ It:
 - 2.1 sets out a summary of the historical account;
 - 2.2 records the Crown's acknowledgements and apology to Ngāti Hei;
 - 2.3 provides for cultural redress in the form of vesting sites of cultural significance,² an overlay classification to prevent the values stated for certain areas of land from being harmed or diminished, protocols for Crown minerals and taonga tūturu, a statutory acknowledgement by the Crown of the association Ngāti Hei has with certain areas, and confers several official geographic names; and
 - 2.4 provides for commercial redress including the transfer of the fee simple estate in commercial redress properties or deferred selection properties, access to protected sites and rights of first refusal over land, the vesting of certain Crown-owned minerals and the amounts payable by the Crown in respect of vested minerals.

Section 19 of the Bill of Rights Act

3. The Bill does not *prima facie* limit the right to freedom from discrimination affirmed by s 19 of the Bill of Rights Act through conferring assets or rights on Ngāti Hei not conferred on other people. Discrimination arises only if there is a

¹ Section 13 of the Bill defines "Ngāti Hei" and s 14 defines "historical claims".

² Cultural redress property means properties vested in fee simple or in fee simple to be administered as reserves (including jointly in some cases), or subject to a conservation covenant: see schedule 1.

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 by Ngāti Hei, no other persons or groups not party to settled claims effected by this Bill are in comparable circumstances to the recipients of entitlements under the Bill. No differential treatment for the purposes of s 19 therefore arises by excluding others from the entitlements conferred under the Bill.

Privative clause

4. Clause 15 of the Bill provides settlement of the historical claims is final. This clause excludes the jurisdiction of the courts, the Waitangi Tribunal and other judicial bodies to inquire, or make a finding or recommendation in respect of, the historical claims, the deed of settlement, the Ngāti Hei Claims Settlement Act (Settlement Act), the redress provided, and (to the extent they relate to Ngāti Hei) the Pare Hauraki Collective Redress Act 2022 or the Pare Hauraki collective deed. However, the jurisdiction of those bodies remains in respect of the interpretation or implementation of the deed of settlement, the collective deed, the Settlement Act or the Pare Hauraki Collective Redress Act.
5. Ordinarily, the courts will not judicially review legislative determinations.³ To the extent any excluded matters could be susceptible to judicial review however, cl 15 constitutes a justified limit on the right affirmed by s 27(2) under s 5 of the Bill of Rights Act. Excluding subsequent challenge is a legitimate incident of the negotiated settlement of claims.
6. In addition, 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 articles 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.⁴

Whether right to bring civil proceedings in s 27(3) at issue

8. Clause 130 provides the Crown must comply with a protocol while it is in force but excludes the availability of damages and any other forms of monetary compensation as a remedy for the Crown's failure to comply with that protocol.
9. This clause might be seen to raise an 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

³ *Westo Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC).

⁴ *Apirana Mahuika v New Zealand* Communication Number 547/1993 UN Doc CCPR/C/70/D/547/1993 (2000).

individuals. However, cl 130 concerns substantive rights and does not therefore fall within the ambit of s 27(3) which protects procedural rights.⁵

Review of this advice

10. In accordance with Crown Law's policies, this advice has been peer reviewed by Abbey Lawson, Crown Counsel.


Debra Harris
Crown Counsel

 Noted / Approved / Not Approved

Hon David Parker
Attorney-General

 18/8/2022

Encl.

⁵ *Westo 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.”