



19 August 2022

Attorney-General

**Ngāti Paoa Claims Settlement Bill [PCO 18990/5.28] – Consistency with the New Zealand Bill of Rights Act 1990**  
**Our Ref: ATT395/361**

1. We have considered the Ngāti Paoa Claims Settlement Bill (**the Bill**) for consistency with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**). We advise the Bill appears to be consistent with the Bill of Rights Act.
2. The Bill effects a final settlement of the historical claims of Ngāti Paoa as defined in the Bill.<sup>1</sup> It provides for acknowledgements and an apology,<sup>2</sup> as well as cultural and commercial redress.<sup>3</sup> Measures for cultural redress including the vesting of cultural redress properties, a primary industries protocol, a taonga tūturu protocol, and a statutory acknowledgement by the Crown of statements made by Ngāti Paoa of their association with certain areas. Commercial redress includes transfer of commercial and deferred selection properties, and the vesting of certain Crown owned minerals.

**Discrimination – s 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 Paoa that are not conferred on other people. 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 Paoa, 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. No differential treatment for the purpose of s 19 therefore arises by excluding others from the entitlements conferred under the Bill.
4. If s 19 was engaged, any differential treatment would be justified in light of the importance of settling historic Treaty claims to the Crown and society generally, and the importance of providing Ngāti Paoa redress in respect of those claims.

**Privative Clause**

5. Clause 15 of the Bill provides that the settlement of Ngāti Paoa's historical claims is final. It removes the jurisdiction of any court, tribunal or other judicial body to inquire

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<sup>1</sup> Clause 13 defines the claimant group Ngāti Paoa, clause 14 defines the historical claims settled: Ngāti Paoa Claims Settlement Bill [PCO 18990/5.28].

<sup>2</sup> Ngāti Paoa Claims Settlement Bill (PCO 18990/5.28) at Part 1.

<sup>3</sup> Parts 2 and 3, respectively.

into the historical claims, the deed of settlement, the Bill and the settlement redress. Jurisdiction remains in respect of the interpretation or implementation of the deed of settlement or the Bill.

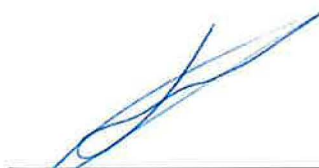
6. The legislative determination of a claim ought not conventionally to fall within the scope of judicial review.<sup>4</sup> However, to the extent that any excluded matters could be susceptible to judicial review, clause 15 constitutes a justified limit on the right affirmed by s 27(2) of the Bill of Rights Act. This is because excluding subsequent challenge is a legitimate incident of the negotiated settlement of claims.
7. Any limit on minority rights under s 20 of the Bill of Rights Act would be justified on the same basis.
8. 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.<sup>5</sup>

#### Exclusion of remedy compensation

9. Clause 117 of the Bill excludes damages and other forms of monetary compensation as a remedy for any failure by the Crown to comply with a protocol under the Bill.
10. This clause might be seen 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 these heard according to law in the same way as civil proceedings between individuals. However, clause 117 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.<sup>6</sup> Accordingly, no inconsistency arises.

#### Review of this advice

11. In accordance with Crown Law's policies, this advice has been peer reviewed by Vicki McCall, Crown Counsel.

  
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 James Watson  
 Crown Counsel

Noted / Approved / Not Approved

  
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Hon David Parker  
 Attorney-General

28 / 8 / 2022

Encl.

<sup>4</sup> *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC).

<sup>5</sup> *Apirana Mahuika v New Zealand Communication Number 547/1993 UN Doc CCPR/C/70/D/547/1993* (2000).

<sup>6</sup> *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC) at [61]: "there are conceptual differences between rights to fair hearing and unbiased determinations on the one hand, and rights to compensation for expropriation on the other". And, at [63]: "[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 the Crown shall have no procedural advantage in any proceeding to enforce rights if such rights exist."