



19 August 2022

Attorney-General

**Ngāti Tara Tokanui Claims Settlement Bill [PCO 18987/7.12] – Consistency with the New Zealand Bill of Rights Act 1990**

**Our Ref: ATT395/362**

1. We have considered the Ngāti Tara Tokanui Claims Settlement Bill (**the Bill**) for consistency with the New Zealand Bill of Rights Act 1990 (**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 Tara Tokanui as defined in the Bill.<sup>1</sup> It:
  - 2.1 sets out a summary of the historical account;<sup>2</sup>
  - 2.2 provides for acknowledgements<sup>3</sup> and an apology<sup>4</sup> by the Crown to Ngāti Tara Tokanui;
  - 2.3 provides for cultural redress in the form of vesting sites of cultural significance,<sup>5</sup> a whenua rāhui applying to a certain area of land which puts obligations on the New Zealand Conservation Authority and Conservation Board,<sup>6</sup> a statutory acknowledgement by the Crown of Ngāti Tara Tokanui's cultural, historical, spiritual and transitional association with certain statutory areas,<sup>7</sup> and protocols for primary industries and taonga tūturu;
  - 2.4 provides for commercial redress including the transfer of deferred selection properties<sup>8</sup> and the vesting of certain Crown-owned minerals.<sup>9</sup>

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<sup>1</sup> Clause 13 defines Ngati Tara Tokanui; cl 14 defines "historical claims".

<sup>2</sup> Clause 8.

<sup>3</sup> Clause 9 and Part 2.

<sup>4</sup> Clause 10.

<sup>5</sup> Defined in cl 22; and see sch 1.

<sup>6</sup> Defined in cl 49; and see sch 2.

<sup>7</sup> Defined in cl 64; and see sch 3.

<sup>8</sup> Part 3, subpart 1.

<sup>9</sup> Part 3, subpart 2.

### Section 19 of the Bill of Rights Act: discrimination

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 Tara Tokonui 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.<sup>10</sup> In the context of this settlement, which addresses specified historical claims by Ngāti Tara Tokonui, 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.

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

4. Clause 15 of the Bill provides that the settlement of historical claims is final and:
- 4.1 excludes the jurisdiction of any court, tribunal or other judicial body (including the jurisdiction to inquire, to make a finding or recommendation) in respect of the historical claims, the deed of settlement, the Bill (Act), redress provided under the deed of settlement, and, to the extent it relates to Ngāti Tara Tokonui, the collective deed<sup>11</sup>, the Pare Hauraki Collective Redress Act 2022, and the redress provided under the collective deed and the Pare Hauraki Collective Redress Act 2022;
- 4.2 but does not exclude jurisdiction of a court, tribunal or other judicial body in respect of the interpretation or implementation of the deed of settlement, the collective deed, the Bill (Act) or the Pare Hauraki Collective Redress Act.<sup>12</sup>
5. Ordinarily, the courts will not judicially review legislative determinations.<sup>13</sup> 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.<sup>14</sup> The Committee found the exclusion was

<sup>10</sup> Human Rights Act 2001, s 21; *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [109].

<sup>11</sup> As defined in s 9(1) of the Pare Hauraki Collective Redress Act 2022.

<sup>12</sup> Clause 15(4).

<sup>13</sup> *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC).

<sup>14</sup> *Apirana Mahuika v New Zealand* UN Doc CCPR/C/70/D/547/1993 (2000).

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.

**Section 27(3) of the Bill of Rights Act: right to bring civil proceedings**

8. Clause 80 provides the Crown must comply with the primary industries and taonga tūturu protocol while they are 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 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, cl 80 concerns substantive rights and does not therefore fall within the ambit of s 27(3) which protects procedural rights.<sup>15</sup>

**Review of this advice**

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



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Abbey Lawson  
Crown Counsel

Encl.

~~Noted / Approved / Not Approved~~



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Hon David Parker  
Attorney-General

28/8 /2022

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<sup>15</sup> *Westco Logan Ltd*, above n 13, at 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."