



28 August 2023

Attorney-General

**Te Pire Whakatupua mō Te Kāhui Tupua/Taranaki Maunga Collective Redress Bill
[PCO 20383/3.25] – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/394**

1. We have considered the above Bill for consistency with the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**). We advise that the Bill appears consistent with the Bill of Rights Act.

Background

2. The following iwi from the Taranaki region have settled their historical claims with the Crown: Ngaa Rauru Kiihahi; Ngāruahine; Ngāti Maru; Ngāti Mutunga; Ngāti Ruanui; Ngāti Tama; Taranaki Iwi; and Te Āti Awa (together, **Ngā Iwi o Taranaki**).
3. The individual settlements recorded that the post-settlement governance entities of each iwi will work with the Crown to develop an apology and cultural redress in respect of their historical claims relating to their Tūpuna Maunga.
4. The iwi agreed to negotiate collectively with the Crown in relation to this redress.
5. This negotiation resulted in a collective redress deed between the Crown and Ngā Iwi o Taranaki titled Te Ruruku Pūtakerongo, which will be signed on 13 September 2023.
6. The Te Pire Whakatupua mō Te Kāhui Tupua/Taranaki Maunga Collective Redress Bill (**the Bill**) gives effect to the elements of Te Ruruku Pūtakerongo that require legislation for their implementation. This includes by:
 - 6.1 Recording Te Pueatanga ki te Ao, the historical account, and the acknowledgements and apology given by the Crown to Ngā Iwi o Taranaki with respect to their historical grievances relating to their tūpuna maunga.¹
 - 6.2 Creating a legal person called Te Kāhui Tupua, which is comprised of Taranaki Maunga and other tūpuna maunga, including Pouākai and

¹ Part 1 of the Bill.

Kaitake, and their surrounding lands, and incorporating all their physical and metaphysical elements, and identifying Ngā Pou Whakaturua: Maunga values.²

- 6.3 Changing various official geographic names, including changing Egmont National Park to Te Papa-Kura-o-Taranaki and Mount Taranaki to Taranaki Maunga.³
 - 6.4 Establishing and empowering a statutory body called Te Tōpuni Kōkōrangī to be the human face and voice of Te Kāhui Tupua and perform functions in relation to Te Papa-Kura-o-Taranaki.⁴
 - 6.5 Protecting the name Te Kāhui Tupua by preventing others using it in particular circumstances without written approval from Te Tōpuni Kōkōrangī and providing Te Tōpuni Kōkōrangī mechanisms to object to the use of the name if required.⁵
 - 6.6 Providing Te Kāhui Tupua the right to own assets and setting out how this will function in practice.⁶
 - 6.7 Vesting specific land, including the land that makes up Te Papa-Kura-o-Taranaki, and minerals in Te Kāhui Tupua.⁷
 - 6.8 Providing for the development of a national park management plan, to be called He Kawa Ora mo Te Papa-Kura-o-Taranaki, and the management of Te Papa-Kura-o-Taranaki, and providing for the role of Ngā Iwi o Taranaki and Te Tōpuni Kōkōrangī within this.⁸
 - 6.9 Providing redress to assist Ngā Iwi o Taranaki to reconnect with Tūpuna Maunga.⁹
7. The Bill does not finally settle any historical claims. Settlement of the historical claims of each iwi and hapū comprising Ngā Iwi o Taranaki has occurred separately.

Bill of Rights Act consistency

Section 19

8. The Bill does not *prima facie* limit the right to freedom from discrimination affirmed by s 19 of the Bill of Rights Act by conferring assets or rights on Ngā Iwi o Taranaki that are not conferred on other people.

² Part 2, subpart 1.

³ Part 2, subpart 2.

⁴ Cls 27-37.

⁵ Cl 38.

⁶ Cls 41-51.

⁷ Cls 58-60.

⁸ Part 7.

⁹ Part 8.

9. Discrimination only arises if there is a difference in treatment on the basis of one of the prohibited grounds of discrimination between those in comparable circumstances, and the differential treatment causes material disadvantage to one group. In the context of this redress, which addresses specified historical claims brought by Ngā Iwi o Taranaki, no other persons or groups who are not a party to those claims 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 entitlements conferred by the Bill.

Section 14

10. Clause 38 of the Bill requires written authorisation from Te Tōpuni Kōkōrangī to use any name, title, style or designation that includes the name Te Kāhui Tupua when forming or registering any incorporated or unincorporated body, carrying on trade or business activities, or promoting commercial goods or services.
11. Although this provision represents a *prima facie* restriction on free speech for the purposes of s 14 of the Bill of Rights Act, we consider that it constitutes a justified limit on the s 14 right under s 5 of the Bill of Rights Act. Preventing trading off the name of a newly created legal person the subject of the negotiated settlement of historical claims is a legitimate incident of the settlement process, akin to the production of a trademark or copyright.

Section 27(2)

12. Clause 16 of the Bill excludes the jurisdiction of any court, tribunal or other judicial body in respect of Te Ruruku Pūtakerongo, the Bill, or the redress provided under the Bill or Te Ruruku Pūtakerongo.
13. Although cl 16 extinguishes existing legal rights, the right in s 27(2) of the Bill of Rights Act to apply for judicial review of a determination by a tribunal or public authority is not engaged. The Court of Appeal has held that s 27(2) does not include “a right to have the existing law preserved against retrospective amendment”.¹⁰ Where a statutory decision-maker makes a decision inconsistent with the Bill, the courts will retain the jurisdiction to review the decision, consistent with the right in s 27(2).¹¹

Section 27(3)

14. As above, cl 16 extinguishes legal rights. Clause 120(2) also extinguishes legal rights by excluding compensation as a remedy for the expiry of the term in office of a member of the Taranaki Māori Trust Board as a result of the commencement of the Bill.

¹⁰ *Mangawhai Ratepayers and Residents Associate Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [206].

¹¹ See *Wairapara Moana Ki Pouākani Incorporation v Attorney-General* [2023] NZHC 2086 at [11]. In that case Cooke J also held that the wording of an almost identically worded section in a 2022 settlement Act did not oust the Court’s jurisdiction to hear and determine an application for a declaration that the section was inconsistent with s 27(3) of the Bill of Rights Act. However, the Court declined to exercise its jurisdiction.

15. There is an issue as to whether these clauses engage the right in s 27(3) of the Bill of Rights Act to bring civil proceedings against the Crown and to have those proceedings heard.
16. In *Westco Lagan Ltd v Attorney-General*, the High Court held that s 27(3) “cannot restrict the power of the legislature to determine what substantive rights the Crown is to have” but “merely directs that the Crown shall have no procedural advantage in any proceedings to enforce rights if such rights exist”.¹² In *Wairarapa Moana Ki Pouākani Incorporation v Attorney-General*, the High Court addressed a similar argument in the context of a provision in a 2022 Treaty settlement Act, which was (in effect) identically worded to cl 16 of this Bill, except that this Bill does not settle any historical claims. Cooke J observed:¹³

While there might be scope for arguing that the Act did not limit the right of access to the Court affirmed by s 27(3), including because it changed the substantive law rather than the ability to access the Court, its provisions on their face appear to do so.

17. The Court in *Wairarapa Moana* did not expressly consider *Westco Lagan*, and the passage above is obiter. It was unnecessary for Cooke J to reach a conclusion as to whether s 27(3) was engaged. Although he found that the Court had jurisdiction to do so, he held that the Court should not consider granting a declaration of inconsistency and dismissed the proceedings using the Court’s inherent jurisdiction.¹⁴
18. We consider that it is arguable that the s 27(3) right does not extend to protect against Parliament extinguishing legal rights.¹⁵ However, if cls 16 and/or 120 were considered to engage s 27(3), the provision would constitute a justified limit on the right affirmed by s 27(3) pursuant to s 5 of the Bill of Rights Act. While the Bill itself does not finally settle any historic claims, as this has been done with the individual iwi and hapū comprising Ngā Iwi o Taranaki, the Bill provides collective redress with respect Ngā Iwi o Taranaki historic claims relating to their Tūpuna Maunga. Excluding subsequent challenges to this redress is a legitimate incident of the settlement process and gives effect to the intention that this be final.

Section 20

19. To the extent the Bill 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 set out above at paragraph 18.

¹² *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [63].

¹³ *Wairarapa Moana Ki Pouākani Incorporation v Attorney-General* [2023] NZHC 2086 at [31].

¹⁴ At [41].

¹⁵ There is support for this approach in the United Nations Human Rights Committee decision *Apirana Mauika v New Zealand* Communication Number 547/993 UN Doc CCPR/C/70/D/547/1993 (2000). Section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 excluded the courts’ jurisdiction to inquire into “the existence of rights and interests of Māori in commercial fishing”. The Committee found the exclusion was consistent with article 14(1) of the International Covenant on Civil and Political Rights (“All persons shall be equal before the courts and tribunals”). Although the Act “displaced the determination of Treaty claims in respect of fisheries by its specific provisions”, it “still give[s] the right to access to the court, for instance in respect of the allocation of quota and the regulations governing customary fishing rights”: at [9.11].

Review of this advice

- 20. In accordance with Crown Law's policies, this advice has been peer reviewed by Anna Bloomfield, Crown Counsel.



Abbey Lawson
Crown Counsel

Encl.

~~Noted / Approved / Not Approved~~


Hon David Parker
Attorney-General
31 / 8 / 2023