



16 August 2023

Attorney-General

Te Korowai o Wainuiārua Claims Settlement Bill– Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/396

1. We have considered the Te Korowai o Wainuiārua Claims Settlement Bill (**the Bill**) for consistency with the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**). The Bill appears to be consistent with the Bill of Rights Act.

What the Bill does

2. The Bill effects settlement of historical Te Korowai o Wainuiārua 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 Te Korowai o Wainuiārua;
 - 2.3 provides for cultural redress in the form of:
 - 2.3.1 vesting sites of cultural significance;²
 - 2.3.2 an overlay classification to prevent specified values for certain areas of land from being harmed or diminished;
 - 2.3.3 protocols for Crown minerals and taonga tūturu;
 - 2.3.4 a statutory acknowledgement by the Crown of the association Te Korowai o Wainuiārua has with certain areas,
 - 2.3.5 the conferring of several official geographical names; and

¹ Section 13 of the Bill defines Te Korowai o Wainuiārua; 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): see s 63 of the Bill.

- 2.4 provides for commercial redress including the transfer of the fee simple estate in commercial redress properties or deferred selection properties, arrangements for licenced land, access to protected sites and rights of first refusal over land.

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 Te Korowai o Wainuiārua, 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 by Te Korowai o Wainuiārua, 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.

Whether the right in s 27(2) to apply for judicial review is engaged

4. Clause 15 of the Bill provides that settlement of the historical claims is final. This clause excludes the jurisdiction of any court, tribunal or other judicial body to inquire into, or make a finding or recommendation in respect of: the historical claims, the deed of settlement, the Te Wainuiārua Claims Settlement Act (Settlement Act), or the redress provided under the deed of settlement or the Settlement Act.
5. Although cl 15 extinguishes existing legal rights, the right in s 27(2) 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”.³ 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).⁴

Whether the right in s 27(3) to bring civil proceedings against the Crown is engaged

6. Clause 15 releases the Crown from “all obligations and liabilities” in respect of the historical claims, and removes the courts’ jurisdiction to inquire into the claims settled by the Bill. There is an issue as to whether, by extinguishing existing legal rights, cl 15 engages the s 27(3) right to bring civil proceedings against the Crown and to have those proceedings heard.

³ *Mangawhai Ratepayers and Residents Associate Inc v Kaipara District Council* [2015] NZCA 612, [2016] 2 NZLR 437 at [206].

⁴ 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 cl 15 (in the context of an 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 cl 15 was inconsistent with s 27(3) of the Bill of Rights Act. However, the Court declined to exercise its jurisdiction.

7. In *Westco Lagan*, 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”.⁵ 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 identically worded to cl 15. Cooke J observed:⁶

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.

8. 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.⁷
9. We consider that it is arguable that the s 27(3) right does not extend to protect against Parliament extinguishing legal rights.⁸ However, if cl 15 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. Excluding subsequent challenges is a legitimate incident of the negotiated settlement of claims, and gives effect to the intention that the settlement be final.
10. 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.

Clause 26

11. Clause 26 provides that 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 any failure by the Crown to comply with that protocol.
12. For similar reasons to those set out above in relation to cl 15, cl 26 does not engage s 27(3), because it concerns substantive rights and does not therefore fall within the ambit of s 27(3), which protects procedural rights. This argument is stronger in the context of cl 26 because it does not extinguish existing rights.

⁵ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) at [63].

⁶ *Wairarapa Moana Ki Pouākani Incorporation v Attorney-General* [2023] NZHC 2086 at [31].

⁷ At [41].

⁸ 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].

Rather, a new right is created (to enforce a protocol) but without a remedy in damages.

Review of this advice

- 13. In accordance with Crown Law's policies, this advice has been peer reviewed by Jason Varuhas, Senior Crown Counsel.



David Neild
Crown Counsel



Noted / Approved / Not Approved
Hon David Parker
Attorney-General
24 / 08 / 2023

Encl.