

12 November 2021

Attorney-General

Maniapoto Claims Settlement Bill [PCO 21171/6.1] – Consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/349

1. We have considered the Maniapoto Claims Settlement Bill [PCO 21171/6.1] (**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.
2. We have previously advised you concerning this settlement in relation to the establishment of the post-settlement governance entity, requiring the dissolution of charitable entities and the transfer of assets to a non-charitable trust, Te Nehenehenui (advice dated 9 March 2021).
3. The Bill records the acknowledgements and apology given by the Crown to Ngāti Maniapoto in the deed of settlement and gives effect to provisions of the deed of settlement that settle the historical claims of Maniapoto.¹ It sets out a summary of the historical account and provides (in the main) for cultural, natural resources and commercial redress.
 - 3.1 Measures for cultural redress include the placement of a pou whenua on the Te Kauru Park Scenic Reserve, protocols for primary industries and taonga tūturu, statutory acknowledgement and deeds of recognition in respect of certain areas of land, an overlay classification, provisions for the conferring of geographic names, vesting in the trustees of the fee simple estate in certain cultural redress properties, the vesting and gifting back to the Crown of one property, provisions relating to the Waikato Conservation Management Plan and the Maniapoto Iwi Environmental Management Plan, the interests of Maniapoto in the exclusive economic zone, and access to cultural materials.
 - 3.2 Measures for natural resources redress, Raumairoa, provide for the manner in which the management of Ngā Wai Maniapoto is to proceed, including the Crown's acknowledgement of the statement of significance of Ngā Wai o Maniapoto to Ngāti Maniapoto, the requirements for a joint management agreement to be entered into, and the requirements relevant to relationship agreements.

¹ Clause 13 defines Ngāti Rangitīhi; clause 14 defines the historical claims.

- 3.3 Measures for commercial redress include the transfer of commercial redress properties and deferred selection properties, licensed land, access to protected sites, and a right of first refusal over land. Part 6 of the Act provides for the governance reorganisation foreshadowed in our advice on 9 March 2021.

Whether s 19 at issue

4. 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 Maniapoto 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 Maniapoto, 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 purposes of s 19 therefore arises by excluding others from the entitlements conferred under the Bill.
5. Clause 165 reserves a right of access to protected sites and owners of land on which a protected site is situated and others holding interests in or rights of occupancy of the land must allow access across the land to each protected site to “Māori for whom the protected site is of special cultural, historical, or spiritual significance.” It might be argued that this clause raises a s 19 issue in relation to a wāhi tapu site that also has, say, historical significance to non-Māori. However, the access right may be seen as an aspect of inchoate cultural redress in situations where the negotiation of cultural and commercial redress has to occur in a multi-iwi setting. Further, any limit on the right to freedom from discrimination would be justified by the objective of ensuring that Māori other than Ngāti Maniapoto are not inadvertently prejudiced by the settlement.

Privative clause and discrimination under s 20

6. The Bill provides in cl 15 that the settlement of the historical claims is final and excludes the jurisdiction of any court, tribunal or other judicial body to inquire or make a finding or recommendation in respect of the historical claims, deed of settlement, the Maniapoto Claims Settlement Act (**the Act**) or the redress provided under the deed of settlement or the Act, other than in respect of the interpretation or implementation of the deed of settlement or the Act.
7. Legislative determination ought not conventionally to fall within the scope of judicial review.² However, to the extent any excluded matters could be susceptible to judicial review, cl 15 constitutes a justified limit under s 5 of the Bill of Rights Act on the right affirmed by s 27(2). Excluding subsequent challenge is a legitimate incident of the negotiated settlement of claims.
8. 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.

² *Westco Lagan Limited v Attorney-General* [2001] 1 NZLR 40 (HC).

9. 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.³

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

10. Clause 28(3) 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.
11. Clause 223 of the Bill excludes compensation for technical redundancy (payment or any other benefit) on the ground that the position held by the employee with the Maniapoto Maori Trust Board or the Maniapoto Fisheries Trust has ceased to exist or the person has ceased to be an employee of the Board or that Trust as a result of the person's transfer to the trustees of Te Nehenchenui.
12. These clauses 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 individuals. However, cl 28(3) and cl 223 affect the substantive law and do not fall within the ambit of s 27(3) of the Bill of Rights, which protects procedural rights.⁴

Review of this advice

13. In accordance with Crown Law's policies, this advice has been peer reviewed by Helen Carrad, Crown Counsel.



Debra Harris
Crown Counsel

Noted / ~~Approved~~ / ~~Not Approved~~



Encl.

Hon David Parker
Attorney-General

18 / 11 / 2021

³ *Apirana Mabuika v New Zealand* Communication Number 547/1993 UN Doc CCPR/C/70/D/547/1993 (2000).

⁴ *Westco Lagan Ltd 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."