

In Confidence

Office of the Minister of Fisheries
Chair, Cabinet Economic Development Committee

PUBLIC CONSULTATION ON THE PROPOSAL TO IMPROVE THE ALLOCATION AND TRANSFER PROCESS PROVIDED IN THE MAORI COMMERCIAL AQUACULTURE CLAIMS SETTLEMENT ACT 2004

Proposal

1. I am seeking Cabinet's agreement to undertake public consultation on a proposal to improve the allocation and transfer process provided in the Maori Commercial Aquaculture Claims Settlement Act 2004 (Settlement Act)¹.

Executive Summary

2. In June last year, Te Ohu Kaimoana, as corporate trustee of the Māori Commercial Aquaculture Settlement Trust, presented me with a proposal, which highlighted the need to improve the allocation and transfer process provided in the Settlement Act to ensure all relevant iwi could access their aquaculture settlement assets.
3. At present, the allocation and transfer of aquaculture settlement assets can only occur where there is unanimous agreement between all iwi, through their Iwi Aquaculture Organisations (or Mandated Iwi Organisations or recognised iwi organisations), in a region or a determination is made through the dispute resolution process or the Māori Land Court. Until this occurs, aquaculture settlement assets remain held in trust by Te Ohu Kaimoana for an indeterminate period.
4. Currently, [redacted] regions (which make up half of the total number of Iwi Aquaculture Organisations who should receive aquaculture settlement assets) are facing indefinite delays in receiving their aquaculture settlement assets from Te Ohu Kaimoana. This is due to the inability to reach unanimous agreement between all iwi in those regions about how the aquaculture settlement assets should be allocated amongst them. This is unlikely to be resolved through current legislation and there is a risk that similar situations will arise in future regional settlement processes.
5. My vision is that New Zealand is globally recognised as a world-leader in sustainable and innovative aquaculture management across the value chain. Iwi will have an important role in achieving this vision as they continue to acquire and develop their interests in the aquaculture industry. To ensure iwi can support this vision, improvements need to be made to better enable the allocation and transfer of aquaculture settlement assets to iwi. This will improve delivery of the Crown's aquaculture settlement obligation and support iwi to realise their aquaculture settlement assets, which will further support the growth of the aquaculture industry.

¹ The Settlement Act provides for the full and final settlement of all Māori claims to commercial aquaculture since September 1992 and provides for the allocation and management of aquaculture settlement assets.

6. The Settlement Act establishes the Crown's obligations to provide iwi with the equivalent of 20 per cent of the value of all marine aquaculture space, either in the form of authorisation to develop space, its cash equivalent, or a combination of both. These obligations are delivered on a regional basis where the Crown enters into regional settlement agreements with all relevant iwi in a region. Once a regional settlement agreement is signed, the amount and form of the settlement obligations for the entire region are transferred to Te Ohu Kaimoana.
7. Te Ohu Kaimoana will then facilitate discussions between all of the relevant Iwi Aquaculture Organisations representing iwi in a region to reach an agreement on how the assets should be allocated amongst them and then transfers assets in accordance with those agreements.
8. This paper seeks agreement to consult on the attached discussion document, which proposes options to improve the allocation and transfer process of the Settlement Act so that all iwi can access and develop their aquaculture settlement assets.
9. The options are:
 - **Option 1** - Maintaining the status quo, with no changes to legislation.
 - **Option 2** - Providing additional resources to Te Ohu Kaimoana to facilitate regional agreements, while maintaining the status quo with no changes to legislation.
 - **Option 3** – Amending the Settlement Act to provide Te Ohu Kaimoana with a limited discretionary power to allocate and transfer aquaculture settlement assets in circumstances where:
 - It has not been possible for all iwi in a region to conclude a formal agreement on the allocation of the assets for a particular settlement; or
 - The dispute resolution process provided for in the Settlement Act (which includes reference to the Māori Land Court) has been unable to resolve the issue.
10. At this stage, based on preliminary analysis, Option 3 is likely to be my preferred option, as I consider it to be the most likely to better enable the allocation and transfer of aquaculture settlement assets to iwi, while being consistent with the Treaty of Waitangi and its principles and enabling equal access to settlements assets for iwi.
11. However my final recommendations will depend on the outcomes of this consultation. No preferred option has been specified in the discussion document as I am interested in hearing the impartial and unbiased views of the public and iwi who are likely to be impacted by any changes.
12. It is important to consult on the options in the discussion document particularly with all Iwi Aquaculture Organisations, as they will need to consider what the likely implications of any changes might mean for them. I propose that public consultation take place over a ten-week period during late November 2019 and late February 2020.

13. I intend to report back to Cabinet in early April 2020 following consultation seeking agreement on final policy proposals to improve the allocation and transfer process provided in the Settlement Act.

Background

New Zealand's aquaculture industry contributes significantly to the economy

14. New Zealand's aquaculture² industry contributes significantly to regional development and the national economy, generating \$600 million in revenue in 2018 and employing 3,000 people, largely based in the regions.
15. Aquaculture has huge potential to sustainably grow its contribution to the New Zealand economy. Particularly, as global wild capture fisheries are at near capacity. Aquaculture is a highly efficient way to produce protein and a proven way to increase seafood production within environmental limits.
16. Māori have a significant presence in the aquaculture industry, which will increase over time as iwi acquire and develop their interests in the industry and realise their aquaculture settlement assets.
17. The Government's new Aquaculture Strategy, released in September 2019, recognises the strong interests of Māori, and has a vision for New Zealand's aquaculture industry to be globally recognised as a world-leader in sustainable and innovative aquaculture management across the value chain.
18. The strategy commits the Government to work alongside the aquaculture industry to deliver economic growth and jobs for the regions as part of an ambitious goal for it to become a \$3 billion industry by 2035. The strategy sets out key outcomes and objectives for a sustainable, inclusive and resilient aquaculture industry. The strategy also recognises the need to partner with Māori and communities to realise meaningful jobs, wellbeing and prosperity.

The Māori Commercial Aquaculture Claims Settlement Act 2004

19. The Settlement Act provides for the full and final settlement of all Māori commercial aquaculture claims since September 1992 and provides for the allocation and management of aquaculture settlement assets.

² Aquaculture is the general term given to the cultivation of any fresh or salt water plant or animal. It takes place in New Zealand in coastal marine areas and in inland tanks or enclosures (e.g. Salmon and Mussel farms).

20. The Settlement Act establishes the Crown's obligations to provide iwi with the equivalent of 20 per cent of the value of all marine aquaculture space³. These settlement assets may be in the form of authorisation to develop aquaculture space, its cash equivalent, or a combination of both.

Delivering the Settlement Act obligations

21. The Settlement Act obligations are delivered on a regional basis⁴ where the Crown enters into regional settlement agreements with all relevant iwi and Te Ohu Kaimoana to provide aquaculture settlement assets.
22. Te Ohu Kaimoana facilitates these regional settlement agreements providing technical expertise on behalf of iwi in the estimation of the value and form of each settlement. Once a regional settlement agreement is signed, the amount and form of the settlement obligations for the entire region are transferred from the Crown to Te Ohu Kaimoana.
23. Te Ohu Kaimoana then facilitates discussions between all the relevant Iwi Aquaculture Organisations representing iwi in a region to reach an agreement on how the assets should be allocated amongst them and then transfers assets in accordance with those agreements.
24. The allocation and transfer of aquaculture settlement assets to iwi can only be made where there is a:
- written agreement among all of the Iwi Aquaculture Organisations in a region; or
 - a determination is made through the dispute resolution process (which includes reference to the Māori Land Court).
25. Where this does not occur or an Iwi Aquaculture Organisations refuses to participate, aquaculture settlement assets for the region remain held in trust by Te Ohu Kaimoana.
26. All relevant iwi in a region must be represented by either an Iwi Aquaculture Organisation, a Mandated Iwi Organisation or a recognised iwi organisation. This needs to happen prior to entering into an allocation agreement to ensure that all iwi have robust governance systems in place prior to entering into binding agreements on aquaculture settlement assets.

³ Where that space is either: Pre-commencement space - marine farming space applied for between 21 September 1992 – 31 December 2004 (if subsequently granted); Interim AMA space - marine farming space applied for between 1 January 2005 and 31 December 2010 (if subsequently granted); or New space - new marine farming space (consented or anticipated) from 1 January 2011 onwards.

⁴ Allocation is done on a region-by-region basis, and is based around the jurisdictions of Regional Councils and Unitary Authorities as well as by the harbours that have been identified by the second schedule of the Settlement Act.

Dispute resolution processes

27. If a dispute occurs regarding the allocation of assets and the parties are unable to reach a resolution through a mediation process, any party to the dispute may refer it to the Māori Land Court⁵. The Court may refer the dispute back to the Iwi Aquaculture Organisations for them to seek a resolution or make determination if it finds that the parties have already taken reasonable steps to resolve the dispute. All parties to a dispute must participate in any dispute resolution process employed. Iwi must also be represented by either an Iwi Aquaculture Organisation, a Mandated Iwi Organisation or a recognised iwi organisation in order to participate in the dispute resolution processes.

Improving the allocation and transfer process of the Settlement Act

28. Iwi [redacted] are facing indefinite delays in receiving their aquaculture settlement assets from Te Ohu Kaimoana as it has not been possible to get unanimous agreement by all iwi in those regions⁶.
29. Currently, there are [redacted] Iwi Aquaculture Organisations [redacted] who are unable to access their aquaculture settlement assets. This is due to [redacted] Iwi Aquaculture Organisation [redacted] who is unwilling to participate in regional negotiations and the dispute resolution process [redacted].
30. A similar situation has occurred [redacted] where [redacted] Iwi Aquaculture Organisations are facing indefinite delays as [redacted] iwi does not have the required governance arrangement in place to participate in regional negotiations or participate in the dispute resolution process⁷. There is a risk that similar situations will arise in future regional settlement processes. These issues are unlikely to be resolved through the dispute resolution process provided in the Settlement Act.
31. Iwi [redacted] have expressed their frustration to Te Ohu Kaimoana at their inability to access their aquaculture settlement assets due to the positions of a minority few and consider this to be an issue that needs improvement. Iwi have worked with Te Ohu Kaimoana to identify solutions that would result in the allocation and transfer of aquaculture settlement assets.
32. In late 2017, Te Ohu Kaimoana developed a proposal, which highlighted the need to improve the allocation and transfer process provided in the Settlement Act to ensure all relevant iwi could access their aquaculture settlement assets. Te Ohu Kaimoana's proposal suggested amending the Settlement Act to provide it with a limited discretionary power, as it considered it would be the best solution to resolve the allocation and transfer issues.

⁵ There have only been two disputes referred to the Māori Land Court to date. In both instances, the Court was reluctant to make binding determinations and instead repeatedly referred the disputes back to iwi for them to resolve through further discussions. The Court considers arrangements to be more durable when iwi are able to come to an agreement themselves. Further, the Court has also expressed concern that external arbitration, rather than agreement between iwi, will only extend an iwi's sense of discrimination at a settlement imposed on them.

⁶ These [redacted] account for half of the total number of Iwi Aquaculture Organisations who should receive aquaculture settlement assets as part of the Settlement Act.

⁷ [redacted]

33. Te Ohu Kaimoana's proposal was modelled on a similar discretionary power available to Te Ohu Kaimoana under sections 135 and 136 of the Maori Fisheries Act 2004, which enables Te Ohu Kaimoana to allocate and transfer undisputed fisheries settlement assets to Mandated Iwi Organisations.
34. Te Ohu Kaimoana consulted on its initial proposal between December 2017 and May 2018 prior to presenting it to me in June 2018. During this time Te Ohu Kaimoana met several times with affected iwi and Iwi Aquaculture Organisations Obligation of confidence who endorsed the proposal.
35. Te Ohu Kaimoana also forwarded a copy of its proposal to all Iwi Aquaculture Organisations in New Zealand and consulted at a national forum of Mandated Iwi Organisations and Iwi Aquaculture Organisations in March 2018. Although no formal resolutions were passed at that forum, Te Ohu Kaimoana considers that there was general support for the proposal.

Comment

36. I propose to consult on the proposed options outlined in the discussion document attached as Appendix 1.
37. The options are focused on resolving the issues preventing the allocation and transfer of aquaculture settlement assets. The options are:
 - **Option 1** - Maintaining the status quo, with no changes to legislation.
 - **Option 2** - Providing additional resources to Te Ohu Kaimoana to facilitate regional agreements, while maintaining the status quo with no changes to legislation.
 - **Option 3** – Amending the Settlement Act to provide Te Ohu Kaimoana with a limited discretionary power to allocate and transfer aquaculture settlement assets in circumstances where:
 - It has not been possible for all iwi in a region to conclude a formal agreement on the allocation of the assets for a particular settlement; or
 - The dispute resolution process provided for in the Settlement Act (which includes reference to the Māori Land Court) has been unable to resolve the issue.
38. More information on these options is below.
39. At this stage, Option 3 is likely to be my preferred option, as I consider it to be the most likely to better enable the allocation and transfer of aquaculture settlement assets to iwi. This option is consistent with the Treaty of Waitangi and its principles, it provides for the allocation and management of aquaculture settlement assets and is likely to ensure every iwi has equal ability to access their aquaculture settlement assets, while protecting the rights and interests of those iwi who are currently unwilling to participate in the process by retaining their assets in the trust.
40. Te Ohu Kaimoana has also indicated that option 3 is its preferred option as it aligns with its proposal.

41. However, the discussion document does not specify a preferred option as I am interested in hearing the impartial and unbiased views of the public and iwi who are likely to be impacted by any changes. My final recommendations to Cabinet will include consideration of the outcomes of consultation.

Contents of the discussion document (Appendix One)

Summary of proposed options

Option 1: Maintaining the status quo

42. Under Option 1, there would be no legislative change required. The Crown would still be obligated to provide iwi with the equivalent of 20 per cent of the value of all marine aquaculture space and the process for delivering the settlement obligations would remain the same as outlined in the background section of this paper.
43. It is likely that, several iwi would continue to be unable to realise their aquaculture settlement assets due to the inability of all iwi in a region being unable to reach unanimous agreement.
44. Undesirable inter-iwi relationships may develop as iwi who are willing and able to participate in regional agreements remain frustrated with a minority few who are inadvertently preventing them from accessing their aquaculture settlement assets. Detrimental effects on the Māori-Crown relationship may also occur as iwi may consider that the Crown is not ensuring every iwi have equal ability to access their aquaculture settlement assets, and that this option may not be consistent with the Treaty of Waitangi and its principles.

Option 2: Providing additional resources to Te Ohu Kaimoana to facilitate regional agreements while maintaining the status quo

45. Under Option 2, there would be no legislative change required. The Government and Te Ohu Kaimoana would commit additional resources towards facilitating regional agreements between all iwi in disputed regions to determine allocation of aquaculture settlement assets. The Crown's obligations would remain unchanged and the process for delivering the settlement obligations would be the same as outlined in the background section of this paper.
46. Increased resourcing by the Crown could see Te Ohu Kaimoana provide a dedicated resource to each individual Iwi Aquaculture Organisation to work through their position in a dispute and work towards an agreement that is mutually beneficial for all involved.
47. This option would focus on trying to facilitate successful agreement by all the relevant Iwi Aquaculture Organisations in a region. This could include, where possible, work with those iwi who do not have the required governance arrangements in place to understand why that is the case and determine whether there is scope for them to change their position.
48. The success of this option is heavily reliant on the willingness of all iwi in a region to participate in regional negotiations and for all iwi to have the required

governance arrangements in place (or at least be willing to establish them). It does not provide for circumstances where a regional agreement cannot occur.

49. This option could have positive effects on inter-iwi relationships as the additional facilitation resource would work with all Iwi Aquaculture Organisations to come to an agreement that would be mutually beneficial for all involved. It would likely have the opposite effect if Iwi Aquaculture Organisations were still unable to come to an agreement on how to allocate aquaculture settlement assets amongst them.
50. If successful, this option could strengthen the Māori-Crown relationship, as iwi would be able to realise their aquaculture settlements and the Crown would be able to deliver on its settlement obligations. At the same time, the Crown would be able to support iwi aquaculture aspirations and the growth of the industry. It is likely to have detrimental effects on the Crown-Māori relationship if iwi are still unable to access their aquaculture settlement assets.

Option 3: Providing Te Ohu Kaimoana with a limited discretionary power under the Settlement Act to allocate and transfer aquaculture settlement assets in certain circumstances

51. Under option 3, the Settlement Act could be amended to provide Te Ohu Kaimoana with a limited discretionary power to allocate and transfer aquaculture settlement assets in circumstances where:
 - It has not been possible for all iwi in a region to conclude a formal agreement on the allocation of the assets for a particular settlement; or
 - The dispute resolution process provided for in the Settlement Act (which includes reference to the Māori Land Court) has been unable to resolve the issue.
52. This option would retain the core elements of both options 1 and 2, where the Crown's obligations would remain unchanged and the process for delivering the settlement obligations would be the same as outlined in the background section of this paper.
53. A limited discretionary power would enable Te Ohu Kaimoana to allocate and transfer aquaculture settlement assets when two or more Iwi Aquaculture Organisations agree on a partial allocation, without requiring all Iwi Aquaculture Organisations in a region to agree. Any disputed assets would still be held by Te Ohu Kaimoana until the relevant Iwi Aquaculture Organisations reach a resolution.
54. Te Ohu Kaimoana would not be able to use its limited discretionary power until at least 24 months after receiving aquaculture settlement assets from the Crown. This would provide sufficient time for all Iwi Aquaculture Organisations in a region to negotiate and agree on allocation methodology that is acceptable to all involved (if that is possible). When making a partial allocation Te Ohu Kaimoana would have to notify relevant iwi of its decision. At this time all iwi would have an opportunity (30 working days) to lodge an objection, and should they do so the objection would be referred to the dispute resolution process provided in the Settlement Act.

55. It is likely to have a positive effect on inter-iwi relationships as it would mean that in disputed regions those Iwi Aquaculture Organisations who are willing to participate in regional negotiations would be able to access and develop their aquaculture settlement assets. At the same time it would actively protect the rights and interests of a minority should some Iwi Aquaculture Organisations choose not to realise their assets for whatever reason.
56. This option could strengthen the Māori-Crown relationship as iwi are able to realise their aquaculture settlements assets and the Crown is able to deliver on its settlement obligations while supporting iwi aquaculture aspirations and industry growth.
57. However, this option also has the potential to aggravate tensions between iwi and the Crown if iwi consider the exercise of the discretionary power to be discriminatory and seen as imposing the settlement on them.

Criteria used to assess the options

58. Each of the options were assessed against a set of criteria that are outlined in the appended discussion document.

Consultation process

59. I propose that public consultation take place over a ten week period from late November 2019 to late February 2020. This reflects agency feedback about ensuring there is enough time for meaningful consultation either side of the Christmas holidays.
60. Consultation has been designed around the discussion document, and will be supported by targeted meetings with Te Ohu Kaimoana and iwi [redacted]
Obligation of confidence [redacted]
[redacted] as well as a national forum meeting with all Iwi Aquaculture Organisations in New Zealand.
61. I expect there will be positive views on the discussion document across Iwi Aquaculture Organisations and the wider aquaculture industry as it considers options to resolve issues that iwi have raised. The approach to consultation aims to ensure a broad reach of the discussion document across Iwi Aquaculture Organisations and everyone with an interest in aquaculture. To make it easier for people to have their say, officials will also develop a range of submission options, including an online submission form.

Departmental consultation

62. The Ministry for the Environment, the Department of Conservation, Te Puni Kōkiri, the Ministry of Justice and Te Arawhiti were consulted on this paper and their feedback has been incorporated.
63. Free and frank advice

Financial Implications

64. There are no financial implications arising from this paper.

Legislative Implications

65. There are no legislative changes arising out of the release of the discussion document.

Regulatory Impact Analysis

66. The discussion document substitutes for a Regulatory Impact Assessment. The Ministry for Primary Industries has reviewed the discussion document and has confirmed that it is likely to lead to effective consultation and support the delivery of Regulatory Impact Analysis to support subsequent decisions.

Human Rights

67. The proposals in this paper are consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Publicity

68. Subject to Cabinet agreement I will issue a media statement announcing the release of the discussion document and consultation process. The discussion document will be published on the Ministry for Primary Industries' website. There is likely to be moderate interest in this proposal given recent media attention on aquaculture issues.

Proactive Release

69. Following Cabinet consideration I intend to consider the release of this paper on the Ministry for Primary Industries' website in whole or in part, subject to appropriate redactions under the Official Information Act 1982.

Recommendations

The Minister of Fisheries recommends that the Cabinet Economic Development Committee:

1. **Note** that the Maori Commercial Aquaculture Claims Settlement Act 2004 (the Settlement Act) provides for the full and final settlement of all Māori claims to commercial aquaculture since September 1992.
2. **Note** that while the fundamental provisions of the Settlement Act are sound and performing well, there is an opportunity to improve the allocation and transfer process.
3. **Note** that option 3 is my preferred option, as I consider it to be the most likely to better enable the allocation and transfer of aquaculture settlement assets to iwi.
4. **Agree** that the appended discussion document be released for public consultation between late November 2019 and late February 2020.
5. **Authorise** the Minister of Fisheries to make decisions on any subsequent minor amendments to the discussion document before its release.
6. **Invite** the Minister of Fisheries to report back to Cabinet in early April 2020 following consultation with final policy proposals to improve the allocation and transfer process provided in the Maori Commercial Aquaculture Claims Settlement Act 2004.

Authorised for lodgement

Hon Stuart Nash
Minister of Fisheries

Appendix One: Discussion document – Proposal to improve the allocation and transfer process provided in the Maori Commercial Aquaculture Claims Settlement Act 2004

Proactively Released