

# **The Aquaculture Reform Bill: Supplementary Submission**

## **Treaty of Waitangi Fisheries Commission**

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### **Introduction**

The Treaty of Waitangi Fisheries Commission lodged a provisional submission on the Aquaculture Reform Bill with the Primary Production Select Committee on 27 September 2004. That submission formed our main submission on the Bill. In this supplementary submission, we provide further information and recommendations to clarify and support the initial views expressed in our main submission.

We wish to acknowledge that the Aquaculture Reform Bill raises complex issues that have implications beyond the settlement. The Commission has worked with iwi and industry to develop constructive solutions to the complex challenge of balancing Treaty interests, incentives for aquaculture development, and management of the effects of aquaculture on fishing, and on the environment, and we wish to support the bulk of the submissions made by the Seafood Industry Council on aspects of the Bill as they relate to the planning regime, as well as the process for determining undue adverse effects and negotiating aquaculture agreements.

The Treaty of Waitangi Fisheries Commission has always considered that aquaculture is key to Maori involvement in the seafood industry. Provision for Maori interests in the Bill), has the potential to enhance the development of aquaculture in New Zealand and position Iwi as key players in the industry. However, Maori rights to aquaculture were not included in the 1992 Fisheries Settlement and since the mid 1990s, the Commission has supported Iwi to pursue recognition of their Treaty rights in aquaculture.

We expect that the overall outcome that all parties would wish to see from the reforms is that in 10 years time:

- Aquaculture planning and development is undertaken in a smooth well understood process that coordinates departments agencies and participants with the process allowing flexibility while respecting the rights recognised under various statutes
- aquaculture is undertaken in areas that are suitable from an environmental and economic point of view
- where aquaculture is a permitted activity, all approved aquaculture areas are developed and managed in an economically efficient manner, and not left "fallow"
- Iwi will have actively participated in generating new aquaculture space
- Iwi will be actively involved in managing their 20% of that marine farming space.

In this supplementary submission, we wish to highlight four key areas in part 5 of the Bill that we believe need to be amended if this outcome is to be achieved. These can be summarised as the need to:

1. enable Te Ohu Kai Moana Trustee Ltd (as the trustee) to work proactively with Iwi so that they are active participants in aquaculture development
2. establish consistent principles and processes for identifying the appropriate mix of settlement assets in any given region
3. make the allocation methodology more workable
4. establish clearer principles and criteria for interim development.

Our submission provides more detailed recommendations of a technical nature in respect of these issues.

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# **1 Enable Te Ohu Kai Moana Trustee Ltd (as the trustee) to work proactively with Iwi so that they are active participants in aquaculture development**

## **Clause 84: Purposes of trust**

### **Recommendation**

The Commission recommends that clause 84 of the Bill be amended to enable the trustee to facilitate coastal Iwi into the business and activity of aquaculture.

### **Rationale**

Before Iwi receive their settlement assets, they will be required to achieve status as Iwi Aquaculture Organisations and reach coastline agreements with all other Iwi in their region (defined as areas of regional councils' jurisdiction).

In addition they will need to agree on how their respective portions are going to be allocated amongst themselves, whether that be on the basis of a collective approach within a region, or an approach based on the transfer of specific assets directly to individual Iwi.

In the Commission's view it is important that TOKMTL is able to play an active role in helping Iwi to meet all three requirements, while positioning them to be active players in the marine farming industry. Therefore we think that TOKMTL needs to be able to do the following:

- **help build good working relationships between Iwi, councils and industry:** based on our experience with the Fisheries Settlement, we know that Iwi are at different stages of readiness to receive their assets. With aquaculture being a joint settlement in every region this means that until all Iwi in a region are ready, TOKMTL will need to coordinate and articulate Iwi views to industry and councils. There will need to be a contact point from day one to minimise any concerns or suggestions that the settlement will delay aquaculture development and the objectives of the reforms.
- **participate (in cooperation with Iwi) alongside other industry players to identify appropriate new Aquaculture Management Areas:** industry players have already signalled that they see advantages in working with Iwi, through TOKMTL, from day one.
- **facilitate the development of aquaculture space as soon as possible:** during the interim period, this would mean that TOKMTL would have flexibility to develop settlement space alongside other developers, creating potential for joint ventures and consortia, but subject to the protection of Iwi interests.

- **assisting iwi to achieve early agreement on how they will manage their assets:** to ensure that disagreements over allocation do not hold up development and prevent iwi receiving their assets, incentives for agreement need to be built into the legislation. As a party who is independent of iwi, TOKMTL should play a key role in facilitating agreement and, where 100% agreement is not possible, developing a plan to give effect to allocation entitlements within each region.

Consequential amendments will need to be made to reflect this amendment, particularly to clause 87 which lists the duties of the trustee.

## **2 Establish consistent principles and processes for identifying the appropriate mix of settlement assets in any given region**

As we highlighted in section 5 of our main submission, we believe that processes that generate settlement assets need to be improved in a number of ways to ensure that iwi obtain value from the settlement.

### **Clause 63: Allocations of authorisations to trustee**

#### **Recommendation**

The Commission recommends that in respect of clause 63:

- a new subsection be inserted requiring councils to consult the trustee, iwi and marine farming interests before identifying representative new space by public notice
- a provision for parties to contest the council's decision be included
- an additional provision should be inserted in subsection (7) that requires councils to have regard to any impacts in respect of applications to which section 150 B (2) of the Resource Management Act applies.

#### **Rationale**

In section 5.1 of our main submission, we expressed concern that there appears to be no process for affected iwi or the trustee to have any input into the selection of representative "new" space.

In our view, a more transparent process is required to ensure that:

- councils are able to draw on the knowledge and expertise of the trustee, iwi and the industry
- councils are held to account for their final decisions (a factor we believe is essential if the Crown's obligations are to be met in a principled way)
- opportunities are provided for the council, in cooperation with affected parties, to minimise adverse impacts on affected industry applicants, who may have invested considerable resources in making application for consents under s 150 B (2).

In making this recommendation, we note that SeaFIC and other industry participants have made submissions to the effect that "new space" should not include space covered by s 150 B (2) applications. For reasons outlined in section 6.1 of our main submission, we do not support these submissions, as there will be many instances in which applicants have invested few resources in making "pro-forma" style applications. However we would be prepared to endorse the exclusion of small extensions from the definition of new space, provided they continue to generate an obligation on the Crown in respect of existing space. Please refer to our main submission for further information.

## **Clause 73: Crown's obligations**

### **Recommendation**

The Commission recommends that:

- Clause 73 (2) be amended to ensure that the Crown has an absolute obligation to deliver assets to iwi in lieu of existing space by 31 December 2004
- Clause 73 (3) be amended to remove timing constraints on the use of a "cash equivalent" or "purchase" by the Crown, in delivering on its obligations in respect of existing space.

### **Rationale**

As we noted in section 7.3 of our main submission, the impression created by clause 73 (2) is that the Crown is seeking to avoid an absolute obligation to deliver space, farms or cash in respect of existing space, giving itself a requirement to only use "best endeavours". While we assume that best endeavours would only apply to the use of new space or Crown purchase, we also assume that where best endeavours fails in respect of those options, the Crown would still have an absolute obligation to use the option of a cash equivalent.

As we also pointed out in section 5.3 of our main submission, the Bill signals a clear preference for using new space to compensate for existing space. However, all indications are that the availability of such space could be very limited. Thus it seems likely that the Crown will end up paying cash in lieu of a reasonably high proportion of space owed, and we believe that a far simpler options all round we involving making cash (or in addition, Crown purchase - see below) available as an option earlier in the process. Advantages include:

- Iwi having access to funds to invest in aquaculture activities, independently or alongside other industry participants, thereby strengthening incentives for development generally
- Iwi would have the option of purchasing marine farming assets in their own right, which will better ensure that they receive the assets they want.

## **Clause 74: Preparation of plan**

### **Recommendation**

The Commission recommends that:

- clause 74 (2) be amended to include the trustee and recognised iwi organisations as parties to be consulted in the preparation of the plan

- an additional provision be inserted into clause 74 to enable iwi, on receipt of the plan, to have the option of choosing whether to wait for new space to be delivered, or to take an early cash payment.

## **Rationale**

After three years from the date of enactment of the Bill, it is probable that in some regions, not all affected iwi will have achieved status as Iwi Aquaculture Organisations (IAOs). In addition, coastline agreements and a plan to give effect to allocation entitlements through their transfer may not have been agreed. As noted earlier, we would envisage that the trustee will have been working actively with iwi to help them meet the requirements in the interim. Any Iwi that has not achieved status as an IAO will have a Recognised Iwi Organisation (RIO, see Schedule 4 of the Maori Fisheries Act). We believe that these organisations should also be consulted otherwise the interests of the iwi they represent will be overlooked in the development of the plan.

In addition, we note that the allocation model is based on a principle that all settlement assets within the region are “joint” assets, and that no transfer of assets can take place until all iwi have met allocation requirements. Therefore it is also important to include the trustee in the process to also ensure that issues that affect all iwi in a region can be appropriately conveyed to the Minister and reflected in the plan.

Depending on the progress that has been made by Iwi in meeting allocation requirements, it may be appropriate for iwi to make an active choice about the bundle of assets that should be delivered to meet any outstanding Crown obligations. We acknowledge that where not all iwi in a region have met allocation requirements, it may be difficult for any one iwi who has met the requirements to opt for any particular option for delivery of settlement assets. In that case, it may be appropriate to apply our proposed principles and criteria for interim development (see recommendations in respect of clause 96).

We would be prepared to work with officials to further develop provisions that enable Iwi to make such a choice where some iwi in a region have yet to meet allocation requirements.

## **Clause 75: Additional allocation of space to iwi**

### **Recommendation**

The Commission recommends that clause 75 be amended to include a requirement for councils, when directed by an Order in Council to:

- identify space that is representative

- consult the trustee, iwi and marine farming interests before identifying the representative new space by public notice
- a provision for parties to contest the council's decision be included
- require councils to have regard to any impacts in respect of applications to which section 150 B (2) of the Resource Management Act applies.

We note that subsection (5) states that section 75 overrides section 63. However we don't think there is any reason not to apply the same considerations, including those we have recommended be included in section 63, when councils identify additional space.

We also note that section 75 is unclear as to its effect on s 150 B (2) applications and, for the reasons outlined in section 6.1 of our main submission, we recommend that its application be consistent with clause 63 of the Bill.

## **Clause 77: Purchase of authorisations or coastal permits by the Crown**

### **Recommendation**

The Commission recommends that clause 77 be amended to:

- include a requirement for the Crown to consult with the trustee and iwi before purchasing any authorisations or permits
- include an additional provision in subsection (4) to the effect that processes and methods for valuation must reflect the interests of iwi, in that any relevant space must be comparable in value to the existing space that is subject to an obligation on the Crown to deliver 20%.

### **Rationale**

In section 5.4 of our main submission, we pointed out that in some instances, iwi may not wish to become the owner of a particular marine farming asset. In addition, if the settlement is to be durable, Iwi will need to be confident that they are receiving assets that broadly reflect that value of those they are being compensated for.

## **Clause 78: Purchase of coastal permits to occupy space for aquaculture activities, including purchase of improvements.**

### **Recommendation**

The Commission recommends that clause 78 be redrafted along the following lines:

- the Crown must consult the trustee and relevant iwi before purchasing any coastal permit that includes improvements
- before the Crown purchases an improvement, it must have regard to the interests of relevant iwi
- the Crown may provide the trustee with a right of first refusal to purchase the improvements
- before deciding to purchase the improvements, the trustee must have regard to the matters set out in (new) clause 96 (refer to discussion of clause 96 below relating to criteria and principles for interim development).

### **Rationale**

There may be instances in which the trustee and/or Iwi are not in a position to purchase improvements and in those cases, we do not believe that Iwi should be allocated coastal permits to areas in which the Crown has sold improvements to a third party, where the improvements are not relocated to another site.

Refer to our recommendations on interim development (clause 96) below. We recommend that any purchase of improvements by the trustee be subject to the criteria we propose be included in clause 96.

### **3 Make the allocation methodology more workable**

#### **Clauses containing provision for “allocation” and “transfer”**

##### **Recommendation**

The Commission recommends that relevant clauses of the Bill be reviewed and amended to make it clear when assets are to be allocated, and when they are to be transferred.

##### **Rationale**

The language used in the Bill to refer to the allocation process is unclear and confusing. However if Part 5 of the Bill is incorporated into the Maori Fisheries Act 2004, we assume that the definition of “allocate” provided for in that Act will apply. Section 2 of that Act states that:

##### **Allocate, -**

- (a) in respect of settlement assets, means the determination of the quantum of those assets to be transferred to an iwi; but
- (b) does not include-
  - i. the transfer of those assets by Te Ohu Kai Moana Trustee Limited
  - ii. distributions made under section 83 (b) or section 95 (b); or
  - iii. grants of assistance made under section 35 (1) (h)

Examples of areas in which clarification is advisable are contained in clauses 93 and 94, where the words “allocate” and “determination” are used interchangeably, and it is unclear whether it is intended that the clauses are also intended to include situations in which “transfer” is envisaged. The lack of any clear process enabling or empowering the trustee to “transfer” settlement assets to Iwi adds to this lack of clarity.

We recommend for the avoidance of any doubt that the words “allocate” or “determine” be used whenever they are intended to be consistent with the definition of “allocate” contained in the Maori Fisheries Act 2004. Where it is intended that assets be “transferred” to Iwi, the word “transfer” should be used.

Note that clause 98 contains the word “transfer”, where it refers to circumstances in which authorisations or coastal permits may be sold by an Iwi Aquaculture Organisation. We suggest this clause also be reviewed and amended if necessary to avoid confusion.

#### **Clause 94: Basis of allocation of settlement assets - harbours**

##### **Recommendation**

The Commission recommends that the Committee consider one of three options for amending subsection (4) with a new provision for allocation to Iwi with territory abutting harbours:

- option one: amend subsection (4) with a new formula for measuring coastline length, so that iwi with territory abutting harbours have a portion of their harbour coastline counted as part of their comprehensive coastline claim
- option two: provide for 50% of any harbour assets to be allocated to iwi whose territory abuts a harbour, and 50% to coastal iwi
- option three: if the current provisions are retained, develop criteria that make it clear to whom, in a region containing harbours, new space in lieu of existing space is to be allocated.

### **Rationale**

In section 4.3 of our main submission, we noted that the general approach to allocation is that iwi within a regional council boundary share 20% of existing and new space within that region.

For iwi who share coastlines outside harbours, there is no presumption in favour of allocation according to a relationship between iwi and a particular area of the coast. For example an iwi in the southern part of a region has a right to a share of an AMA in the northern part of the region. The approach for harbours leans more towards a specific relationship between harbour iwi and relevant harbours. It is likely however to result in iwi indicating a preference for development in a location which maximises their coastline allocation rather than suitability for aquaculture and in some cases, could mean that where the only space available is within harbours, coastal iwi will receive no assets.

In addition, as noted in our main submission, it is unclear what rules are intended to apply when all of the existing space in a region is located in open water, but all new space is located in a harbour – or vice versa. As such it is not clear whether existing space in harbours can only be matched with new space in the same harbours, or whether existing space in open water can only be matched with new space or existing farms in open water.

For all the reasons outlined in our main submission, we believe that the first two options outlined above provide a practical and more equitable approach to the allocation of settlement assets located in harbours. If neither option is acceptable to the Committee, we recommend that at a minimum, option three be adopted.

### **Clause 95: Division of settlement assets**

#### **Recommendation**

The Commission recommends that clause 95 be redrafted to provide for:

- the development of a plan to give effect to the allocation of each of the settlement assets once all settlement asset entitlements within a region have been apportioned to the lwi
- the ability for lwi within a region to agree to an allocation plan within 12 months of the date from which all settlement asset entitlements have been apportioned
- a requirement for the trustee to develop an allocation plan in consultation with lwi where they have not agreed to a plan in accordance with (2) above
- a clear default allocation that provides that the assets are held in a company with each lwi holding shares based on their overall proportions.
- The Bill should allow for variation from this but there should be:
  - a requirement that the plan may only provide for assets to be transferred to lwi separately where no lwi with an entitlement to the assets will be disadvantaged by such a separate allocation, compared to allocation on a collective basis. In preparing the plan, lwi, or the trustee as appropriate, must have regard to:
    - i. whether all lwi are treated equitably (in relation to the value and quality of the assets that are to be transferred to them, regardless of their percentage share)
    - ii. the desirability of allocating portions of an economically viable size
    - iii. any pre-existing commercial arrangements entered into by affected lwi.
  - other matters that should be addressed in the plan including the basis for the transfer of any future settlement assets, and any agreement in respect of future sales or transfers
  - a provision empowering the trustee give effect to the allocation of settlement asset entitlements by transferring all settlement assets to lwi in accordance with the plan.

### **Rationale**

The purpose of clause 95 as currently drafted is unclear. It could be interpreted as a provision for interim development within an AMA, or alternatively, for a division of assets once settlement asset entitlements have been determined.

As we pointed out in section 4.1 of our main submission, the Bill is unclear on how allocation will be given effect in a practical sense, what the process will be for lwi to agree, and how any disagreements will be resolved. In our view, the Bill therefore needs to be amended to provide for two things:

- a process for iwi to agree on a plan that gives effect to the allocation of the assets (for example by transferring them to iwi on a collective basis, or variations thereof).
- a role for the trustee in facilitating an outcome where iwi have not agreed on a plan within a specified time.

Under the Bill as currently drafted, where Iwi disagree on this issue, it could be assumed that they can go directly to the Maori Land Court to resolve the matter. However unless the trustee is able to act to facilitate an outcome in the first instance, it is highly likely that the Maori Land Court will receive multiple allocation schemes from different Iwi or groupings of Iwi within a region. In addition, the Court will have no guiding objective or principles to consider. We believe there is potential for stalemate, and for “gaming” to occur under these circumstances.

Note that our recommendation builds in a default that favours the transfer of settlement assets to Iwi on a collective basis. In principle, we believe this approach makes the most sense from a practical and economic point of view. For example, if a number of AMAs contain settlement space subject to a reservation, it would make more sense for aquaculture agreements to be negotiated with fisheries rights holders by Iwi collectively, rather than on an individual basis. In addition, there will most likely be economies of scale, in which the costs of administration of the assets can be shared by all Iwi.

In spite of the above, our recommendation recognises that there will be cases where separate allocations will be appropriate, as long as no Iwi is disadvantaged in comparison to the collective approach.

We note that the Bill should provide an empowering provision that enables the trustee to carry out the actual transfer of the assets.

We also note that the dispute resolution procedures in Subpart 7 of the Bill may need to be amended as a consequence of these recommendations, and we would be happy to work with officials to identify options for amendment if the Committee wishes.

## **4 Include principles and criteria for interim development**

### **Clause 96: Development of settlement assets**

#### **Recommendation**

The Commission recommends that clause 96 be redrafted along the following lines:

- Where the iwi of a region wish to develop settlement assets, the trustee may facilitate that development by:
  - applying for a resource consent
  - negotiating agreements with fishers regarding impacts on their activities
  - purchasing assets to establish a marine farm where a resource consent has been secured
  - carrying out any other aquaculture activity the iwi wishes to carry out.
- Where the majority of iwi agree to carry out a development, and the trustee is satisfied that the development will not have more than a minor impact on all relevant iwi, the trustee may facilitate that development
- Where 75% of iwi in a region agree to carry out a development, and the trustee is satisfied that the development will not have more than a moderate impact on all relevant iwi, the trustee may facilitate that development.
- In all cases, the trustee must be satisfied that the likely outcome of any development will not be inconsistent with the principles that iwi or the trustee must consider when developing a plan to give effect to the allocation of settlement assets (see above).

#### **Rationale**

The Bill as currently drafted enables TOKMTL, before final allocation entitlements are determined, to carry out an interim allocation and interim division of settlement assets on behalf of the majority of iwi in a region if they wish to develop their share of the assets.

The current provisions are potentially unworkable because in many cases, it is likely that a division of the assets won't be practical before all entitlements are determined and an allocation plan agreed. However we accept that in some instances, interim division may be appropriate and practical, for example if the trustee is satisfied that a division will not be inconsistent with the principles referred to earlier.

There is danger however that if interim development is limited to the above circumstances, then in most cases, development will not happen until after iwi have met all allocation requirements. That means they may ultimately miss out on joint ventures and other opportunities for cost sharing.

There will be a variety of circumstances facing iwi depending upon the region and the particular groupings of iwi. This means that some flexibility and discretion will be required for the trustee to act. It would be appropriate for any action by the trustee to be carried out in accordance with a set of principles and criteria. In addition, these should not prejudice the ability of iwi to achieve a final allocation scheme that is consistent with the principles that guide the final allocation plan (refer to discussion of allocation principles above).

### **Clause 97 Finalisation of interim allocations**

We note that as a consequence of our recommendations in respect of clauses 95 and 96, clause 97 (1) appears to be redundant.

Clause 97 (2), which enables a division of assets, could be moved to follow on from our proposed clause 95 (i.e. the plan for giving effect to allocation), to enable the division of any assets that is required as a result of the plan.

## **Concluding comments**

While the recommendations contained in this supplementary submission are designed to complement and support those made in our main submission, we are aware that additional matters of a technical nature remain to be addressed. The Commission is happy to work with officials to iron out any additional technical problems if the Committee so wishes.