

The Aquaculture Reform Bill

**Submission from the Treaty of Waitangi
Fisheries Commission**

27 September 2004

Summary

1 Introduction

This submission is from the Treaty of Waitangi Fisheries Commission. The Commission endorses the reform of the present aquaculture framework and supports the move made by the Government to settle Maori commercial claims to aquaculture.

While our submission has been prepared as far as possible in cooperation with iwi, the limited time available for analysis and consultation has meant that there are a number of issues that are still being resolved. As part of the process of preparing this submission, we have forwarded draft material to iwi for comment, and held a workshop with iwi representatives involved in aquaculture. We have continued to cooperate in the development of our respective submissions and have endeavoured to support each others recommendations as far as possible.

We have also participated in industry workshops and have reviewed draft submission material from industry organisations.

In general, there appears to be a measure of agreement by all parties about the nature of the problems that underpin the Aquaculture Reform Bill, although in some cases, there may be differences of opinion about the solutions. We would like to encourage the Committee to seek further advice from the Commission and iwi on potential solutions, particularly where there is disagreement or where issues are unresolved, as we believe there is potential to amend the Bill to the benefit of all parties.

2 Key outcomes sought from the reforms

In our view, the aquaculture reform and the Maori Commercial Aquaculture Settlement have tremendous potential to enhance the development of aquaculture in Aotearoa - New Zealand. The key outcomes the Commission seeks from the reforms (including the Maori Commercial Aquaculture Settlement) include the following:

- strong incentives for aquaculture development generally
- appropriate management of the environment effects of aquaculture
- timely receipt by iwi of their settlement assets
- the ability of iwi to utilise their assets to help spearhead new aquaculture developments in their regions.

However we believe that the intention of the Bill is well meaning, but aspects need to be refined to give it a clearer chance of delivering on these outcomes. The key issues we identify in our submission, along with recommendations for change, are summarised below.

3 The Maori Commercial Aquaculture Settlement

The settlement provides for the allocation of:

- authorisations for 20% of new space, defined within Aquaculture Management Areas (AMAs), to iwi whose coastline falls within relevant regional council boundaries
- compensation for 20% of “existing” space (allocated between 21 September 1992 and 31 December 2004), through allocation of authorisations for additional new space, Crown purchase of existing marine farms or cash.

These settlement ‘assets’ are to be allocated to coastal iwi through Te Ohu Kai Moana Trustee Ltd (TOKMTL). Iwi will be required to achieve status as “Iwi Aquaculture Organisations” (equivalent to a Mandated Iwi Organisation under the Maori Fisheries Act) in order to receive their assets. Once all iwi within a region achieve that status, they will have 12 months in which to agree on their respective shares and how those shares will be allocated. If they have not done so after that time, TOKMTL will determine the entitlements according to a process set out in the Bill.

At face value, the Fisheries Settlement approach to aquaculture is logical. However there are some distinct differences between fishing rights, in the form of Individual Transferable Quota (ITQ), and authorisations that enable iwi to apply for consents to establish marine farms. Quota, through the sale of Annual Catch Entitlements (ACE), has been able to be used by the Commission to achieve a commercial return from which iwi have benefited over the last ten years, even though the process of allocation has not yet begun. This has also been possible in the absence of full agreement on coastlines, or achievement by iwi of the status of “Mandated Iwi Organisations” (MIOs) now provided for under the Maori Fisheries Act.

Alternatively, the nature of aquaculture “authorisations” means that it will not be possible to realise their value until a resource consent has been successfully applied for and a farm is developed and producing. The timing of applications for resource consents will likely depend upon:

- the agreement of iwi in a region to their coastline shares, and the mechanism for identifying how each set of shares will be realised (for example, whether that be through shares in a collectively held company, or division of actual spaces amongst iwi on a mutually agreed basis)
- the availability of resources to invest in resource consent applications
- the ability of iwi to raise funds, including through joint ventures with other industry participants

- clear interim arrangements that enable TOKMTL to apply for consents on behalf of iwi prior to final allocation, and/or to purchase assets on their behalf.

These differences mean that further thought needs to be given to the following key aspects of the Bill:

the scope of the settlement

In our view the settlement should provide redress for all claims to commercial aquaculture, not just those that relate to space allocated since 21 September 1992. This would provide greater certainty for all participants, Maori, councils, the Crown and other industry participants in the future and be more consistent with the 1992 Fisheries Settlement.

the purpose and duties of TOKMTL as trustee

In our view the purpose and duties of the trustee set out in the Bill are too narrow and do not adequately provide for TOKMTL to be proactive in helping iwi participate in and get ready for aquaculture development prior to allocation. We recommend that a broader purpose and duties be included in the Bill, to the effect that the trustee may facilitate coastal iwi into the business and activity of aquaculture.

the allocation methodology

Aspects of the process set out in the Bill are potentially unworkable, particularly in relation to the distribution of settlement assets in a practical sense. We recommend that a clearer process and set of principles needs to be included in the Bill to provide appropriate guidance to TOKMTL.

interim development

We believe that the Bill is not clear or flexible enough to provide for the range of different circumstances in which interim development may be appropriate. We suggest that further consideration is given to a more flexible range of options.

harbours

The current provision for allocation to harbour iwi is problematic. We recommend further consideration be given to this issue in consultation with iwi and the Commission, with a view to providing greater equity for all coastal iwi of the region, while ensuring that any special interests of harbour iwi are reflected in the allocation of settlement assets.

obtaining value from the settlement

We do not believe that there is sufficient provision for input by iwi/TOKMTL in the process of identifying representative space, nor is there provision to challenge the allocation decisions of councils. We recommend provision is made for greater input by iwi/TOKMTL, and that an appeal process is included.

In addition, we consider that there is insufficient flexibility in the delivery of assets in lieu of existing space. We recommend more flexibility in the timing of options, including Crown purchase and cash, with greater choice of options for iwi. In particular we emphasise that if iwi are able to access a cash equivalent earlier in the process, they will be able to invest in the development of new space and work with other industry participants to open up new AMAs.

We believe that the Bill as presently drafted has the potential to ‘short-change’ iwi – particularly in relation to “existing” space. We recommend that a clearer and more equitable valuation approach is included in the Bill.

Finally, for consistency with the Fisheries Settlement, and to ensure that the settlement delivers benefits, we recommend that consideration be given to a suitable development fund to assist iwi into the business and activity of aquaculture.

frozen applications

The Bill proposes that frozen applications be classified as new space. There have been calls to change this so that they are classified as existing space. We do not support such a change. However we are uncomfortable that there will be occasions where applicants could suffer a demonstrable loss through the allocation to iwi of areas subject to their applications. We recommend a number of changes to address these situations.

4 Reform of the aquaculture planning framework

The Commission agrees that the regime for managing aquaculture needs to be improved. To that end, it is important to strike a balance between aquaculture development and the management of environmental effects, so that incentives needed for industry and iwi to invest in aquaculture are created. Without those incentives, it is unlikely that iwi will receive significant benefits from the settlement, as few new areas will be created for aquaculture.

We believe that many aspects of the new regime provided for in the Bill need to be amended in order to create the right balance between development and environmental management. These can be summarised as:

greater incentives for development

The Bill amends the Resource Management Act to create a regime that treats aquaculture in a way that is inconsistent with the treatment of any other activity irrespective of the degree of environmental impact. The fact that a general prohibition on aquaculture is being imposed could, we believe, unnecessarily constrain development because there appears to be little incentive for regional councils to invest in the research needed to define Aquaculture Management Areas in their plans. The special provisions designed to enable industry to take the initiative through Private Plan Changes are also problematic, in that they are subject to council processes that cannot be contested on merit.

We recommend changes to the Bill to enable a transition to a more flexible planning regime, subject to the obligation to provide 20% of new space to iwi, as well as additional new space in lieu of existing space where necessary.

improving the process for assessing undue adverse effects

The alignment of the Fisheries Act process for assessing the undue adverse effects of marine farming on fishing needs improvement. We suggest that it would be greatly improved through provision of a right to appeal to the Environment Court under the Fisheries Act, timed to coincide with any appeals under the Resource Management Act.

improving the voluntary negotiations process

We believe that the regime set out in the Bill is unworkable and it should be amended to provide better mechanisms to prevent “hold-out” by parties involved in negotiations. We recommend provision of a simple appeal mechanism to ensure that claims by parties that they are unduly adversely affected by a consent application are soundly based.

Other matters

Other matters we believe need to be addressed include:

- the power of the Minister of Conservation to give directions relating to the allocation of space: we don't believe this power is necessary
- use of tender revenue received by the Crown to support the involvement of iwi in aquaculture planning
- provisions for the renewal of coastal permits for marine farming: we believe these provisions can be simplified to provide greater certainty for incumbents.

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Introductory comments

This submission is made by the Treaty of Waitangi Fisheries Commission. The Commission is a Maori statutory body empowered, among other things, to:

- develop, in consultation with Maori, proposals for the allocation of the various assets and benefits that are derived from the 1989 interim and 1992 final settlement of Maori claims in respect of commercial fisheries
- facilitate the entry of Maori into, and the development by Maori of the business and activity of fishing
- secure the growth and development of assets managed on behalf of iwi collectively in recognition of the rights confirmed and guaranteed by the Treaty of Waitangi.

With the passing of the Maori Fisheries Act, which sets in place a process for allocating the various assets that derive from the 1992 Fisheries Settlement, the Commission is now in a position to commence the process of allocating fisheries assets to iwi, in the form of quota, cash and income shares that derive from the operation of Aotearoa Fisheries Ltd.

The Aquaculture Reform Bill affects the Fisheries Settlement interests of the Commission and iwi in a number of ways:

- First, Part 5 of the Bill, which deals with the Maori Commercial Aquaculture Settlement, proposes that Te Ohu Kai Moana Trustee Ltd (TOKMTL) act as the trustee of the new Maori Commercial Aquaculture Trust, which will receive aquaculture settlement assets, and hold them for eventual distribution to coastal iwi. As you may be aware, under the recently enacted Maori Fisheries Act, the Commission will become TOKMTL later this year. Thus the Commission has a keen interest in ensuring that the settlement provisions of the Bill are workable.
- Second, subsidiaries of AFL are involved in the business of aquaculture: their ability to grow in the aquaculture sector will depend upon the incentives for growth that are created by the new management regime set out in the Bill.
- Third, the Commission (on behalf of iwi), iwi and AFL all hold fisheries assets in the form of quota. The establishment of Aquaculture Management Areas (AMAs) has the potential to adversely affect the value of quota (for example by restricting access to fishing areas), and therefore all have an interest in ensuring that a principled process for managing those effects is in place.

The Aquaculture Reform Bill is stated to have the following broad objectives, which are significant for iwi and the aquaculture industry:

- To enable improved planning for aquaculture activities in the coastal marine area; and
- To provide a full and final settlement of Maori claims to commercial marine farming after 21 September 1992.

If iwi are to gain benefits from aquaculture development through the settlement aspects of the Bill, it will be essential to consider not only the provisions that relate to the settlement, but also those that relate to the planning regime. A workable relationship between these two aspects of the Bill will be important if iwi are to receive tangible benefits.

Part 1 of this submission comments on the settlement provisions contained in parts 5 and 6 of the Bill, and Schedules 3 and 4. It identifies issues for further consideration, and options that would make the current provisions more workable.

Part 2 of the paper comments on the overall planning framework for aquaculture (provided for in Parts 1 and 2 and Schedule 1A of the Bill).

Part One – The Maori Commercial Aquaculture Settlement

1 Background

Maori have been involved in the marine farming industry since its earliest days. However Maori development in the industry has faced a number of constraints including the lengthy and expensive resource consent process faced by all new entrants. In the case of some iwi and hapu this has been constrained by the current framework's lack of recognition of their Article II rights.

In late 2001, the Government released its proposals for reform of aquaculture legislation. Many iwi considered that the new framework put forward by the Government failed to address their interests. For that reason, Ngati Whatua, Ngati Kahungunu, Ngai Tahu, Te Atiawa, Ngati Koata and Ngati Kuia lodged a claim with the Waitangi Tribunal during 2002. In October that year, the Tribunal held an urgent hearing into the claim, and in December, it made its findings and recommendations known to the parties.

1.1 Ahu Moana: the Aquaculture and Marine Farming Report

In *Ahu Moana: the Aquaculture and Marine Farming Report*, the Tribunal found that Maori have a broad relationship with the coastal marine area and that, as an incident of that relationship, they have an interest in aquaculture, or more particularly, marine farming. They also found that the Maori interest in marine farming forms part of the bundle of Maori rights in the coastal marine area that represent a taonga protected by the Treaty of Waitangi.¹

The Tribunal also acknowledged that the full nature and extent of the Maori interest was still to be fully investigated and given the restrictions of time they could not undertake a full enquiry into the issue.²

The Tribunal recommended that the Crown and Maori should, through consultation and negotiation, jointly consider:

- A process for investigating the nature and extent of the Maori interest in marine farming
- A process for agreeing on the mechanism needed to protect Maori interests in marine farming, including a mechanism for preserving capacity to intervene once the full nature and extent of that interest is defined
- A process for assuring appropriate Maori participation in the development of AMA areas and tendering processes, and
- A mechanism for preserving the Crown's capacity to meet its Treaty obligations in the short term until such time as the longer planning issues are dealt with³.

¹ Waitangi Tribunal, p 76

² *ibid.* p 61

As a result of the Tribunal's report, the Crown carried out a consultation exercise with Maori, that focussed primarily on the second recommendation.

In order to provide iwi with information about the reforms, as well as options for addressing the interests of Iwi and Maori under the Treaty of Waitangi, an Iwi Aquaculture Steering Group, consisting of iwi involved in aquaculture issues was formed. The group developed a discussion document, *He Maara Mataitai*, and presented it to iwi at the series of consultation hui held by the Crown during April and May 2003.

In *He Maara Mataitai*, the Iwi Aquaculture Steering Group put forward a package of options intended to enable iwi and hapu to participate in aquaculture while longer term questions about the nature of Maori interests were more fully investigated and discussed. Elements of the packaged included: a process for investigating the nature and extent of the Maori interest in marine farming, provision for iwi to obtain guaranteed access to water space in the interim, proposals to improve the involvement of iwi in planning, and measures that would ensure that the Crown preserved its capacity to resolve any outstanding Treaty rights issues in the longer term.

In June 2004 that the Crown briefed various iwi, including members of the Iwi Aquaculture Steering group and the Commission, on its decisions to settle Maori claims to commercial aquaculture. The settlement is intended to fully and finally settle claims in respect of marine farming space allocated since 21 September 1992.

1.3 The Settlement provisions of the Bill

In our view, it is appropriate to provide certainty for all parties by promulgating a settlement of commercial claim to aquaculture. As with any settlement, if it is to be durable, it will have to provide iwi with tangible benefits.

Provisions intended to implement the Maori Commercial aquaculture settlement are summarised below and compared briefly to aspects of the Fisheries Settlement:

- When “new”⁴ marine farming space is defined within AMAs, 20% of the authorisations for that space is to be allocated through a trustee to coastal iwi within the relevant regional council boundary.
- The Bill also provides for iwi to receive authorisations for an equivalent to 20% of “existing space”.⁵ The Bill sets in place a ten year timeframe

³ *ibid.* pp76 – 77

⁴ “New” space is space that has not been allocated for marine farming.

⁵ “Existing” space is space allocated for marine farming between 21 September 1992 and 31 December 2004.

for the Crown to deliver on this, using a mix of additional authorisations for “new” space, purchase of existing farms, or cash.

- The “currency” underpinning the settlement consists of authorisations to apply for resource consents to establish marine farms. This currency is quite different from quota provided under the Fisheries Settlement. In the case of quota, Annual Catch Entitlements (ACE) can be sold from day one. ACE can be taken from anywhere within Quota Management Areas (QMAs). Access to this ACE has meant that iwi have gained benefit from the Settlement for some years, well before any allocation, and the Commission has had an income stream that has enabled it to undertake its functions.
- For the most part, the aquaculture settlement assets will take the form of authorisations to apply for resource consents. They will be divisible (within limits) but their value can only be realised at the specific locations in which they are granted.
- Authorisations will be provided for in regional council plans. These plans will take some time to be developed and will require input in their development. Resources will also need to be invested in applying for consents before any farm can be developed. It could take some years before any such marine farm will be generating sufficient income to have repaid the initial investment. The authorisations will have value but it will be difficult to determine that value until regional councils begin to offer them for tender⁶. It is also unclear what the Crown will be prepared to pay to deliver on existing space.
- The Bill provides for settlement assets (that is, authorisations and any other assets required to meet the Crown’s obligations, such as resource consents, farms or cash) to be allocated to iwi through Te Ohu Kai Moana Trustee Ltd (TOKMTL), who will be the trustee of the Maori Commercial Aquaculture Settlement Trust. In order to obtain their entitlements, iwi will have to form Iwi Aquaculture Organisations equivalent to Mandated Iwi Organisations under the Maori Fisheries Act 2004 and a scheme of allocation for the region must be agreed by all the Iwi within one year from the time of the last Iwi Aquaculture Organisation being formed, or a scheme of allocation set down by the trustee after that time.
- With aquaculture generally prohibited, it may be that a regional coastal plan will not provide AMAs off each iwi’s coastline. The Bill provides that the settlement assets are to be allocated to all iwi in a region rather than to each iwi based on the AMAs off their coastline. The allocation model uses the inshore fisheries model contained in the Maori Fisheries Act 2004 to identify the share each iwi receives of the overall settlement in a region: that is, iwi will receive their share of the 20% based on the proportion their coastline bears to the total regional

⁶ We note that iwi will not be required to tender for their portion.

coastline. However this general schema is altered within harbours, with the detailed provisions of the Bill including a provision that space within harbours is to be allocated only to iwi whose territory abuts the harbour.

- The Bill also provides for an interim allocation mechanism to enable iwi who are ready to develop some of their assets in situations where other iwi in their regions have not yet met the allocation requirements.

The Commission supports the intent of the Bill to address Maori claims to marine farming but considers that amendments are needed to make the provisions more comprehensive and workable. In this part of our submission we set out the issues we think need to be further considered to ensure that iwi obtain tangible benefits from the settlement.

2 The scope of the settlement

The Commission believes that all claims to commercial marine should be settled now rather than those relating to space allocated “post 1992”, as leaving them outside the scope of the Bill raises a number of problems. It would be more practical and make more economic sense for this issue to be resolved now, along with post 1992 marine farming space, for the following reasons:

- Inclusion of pre-1992 space would provide a cleaner arrangement: if the settlement is a clean up of “unfinished business” from the 1992 Fisheries Settlement, it would make more sense to settle the issue completely rather than continue to leave unfinished business to be dealt with later.
- Inclusion of pre-1992 space would also make the arrangement more analogous with the Fisheries Settlement. The Fisheries Settlement was concluded after extended consultation and negotiated agreement with Maori. The outcome was access to about 20% of existing and 20% future Individual Transferable Quota in perpetuity. In the longer term, if Maori are to accept that aquaculture is being dealt with as part of the Fisheries Settlement, it will be critical that they receive the result that is broadly consistent with that Settlement and are not left in a position where they can claim to that they are short-changed in the detail.
- The current proxy for quota is a right to apply for consents with marine farming space. This means that measures need to be put in place to provide iwi, through TOKMTL, with 20% of all existing space – both that granted under the Marine Farming Act 1971 as well as the Resource Management Act 1991. If this issue is not dealt with, the Crown is not offering a full 20%, consistent with the 1992 Settlement, but around 15% at best, depending on what space is made available through planning and RMA processes.

- Finally, the model for allocation is broadly consistent with the inshore fisheries allocation model. It requires iwi within the relevant regional council boundaries to reach agreement on coastline boundaries as a basis for agreeing on their share of the marine farming assets available in that area. Dealing with all claims now would allow iwi to focus on development and working together rather than pursuing individual (and possibly completing) claims that could prevent the achievement of coastline agreements.
- The Crown will have to provide redress at some time, and the main issue is one of timing. The Commission sees no benefit in delaying the process.

Recommendation 1

Include claims in respect of marine space allocated before 21 September 1992 within the scope of the Maori Commercial Fisheries Settlement, to enable the Crown to deliver 20% of all marine farming space allocated up to 31 December 2004.

3 The trustee

3.1 TOKMTL as the trustee

The Commission believes that TOKMTL is an appropriate body to act as trustee for the settlement. Despite the controversy that has existed over aspects of the Commission's role in respect of the Fisheries Settlement, we believe there are a number of advantages of TOKMTL taking on the trustee role. These include:

- an alignment of functions under the Maori Fisheries Act with similar provisions in the Aquaculture Reform Bill (for example relating to iwi recognition and coastline agreements)
- an understanding of the seafood sector through its involvement in the seafood industry
- a history of working with or supporting iwi on major issues, such as the Oceans Policy, Marine Reserves Bill, Foreshore and Seabed claims, the Foreshore and Seabed Bill, the Marine Farming claim and aquaculture reform generally.

What is clear however is that, given the history of litigation associated with fisheries legislation, it is in everyone's interest that the new roles TOKMTL is to have under this arrangement are as widely supported as possible, and clearly defined in the legislation.

At the same time we think it important that there is some flexibility for the trustee to carry out its functions in a way that is appropriate to the circumstances of iwi in different regions, on the basis of issues identified later in this submission.

3.2 Purpose and duties

The trustee's purpose and duties are set out in clauses 84 to 91 of the Bill. The purposes include receiving settlement assets from the Crown or regional councils, holding and maintaining those settlement assets pending transfer to iwi, administering the allocation of the settlement assets to iwi and to assist iwi prepare for transfer. There are a number of other things that will need to be done if iwi are to enjoy the maximum benefit of the arrangements. The essential issues are:

- what purpose/duties should the trustee have in implementing the arrangement;
- what rules and accountabilities should attach to those functions; and
- how those functions will be resourced.

The Bill is largely silent on any broader functions for the trustee, such as the interim management of marine farms should these be purchased by the Crown prior to a scheme of allocation being agreed; advocacy in encouraging councils to make space available for aquaculture and assistance to iwi applying for resource consents.

The trustee's role and functions are not well defined in the Bill as currently drafted. As an example, cl.78 provides that where the Crown has bought an existing, operational marine farm, it **may** offer the improvements on that farm to the trustee and the trustee **may** purchase them. Aside from the fact that the Crown is not obliged to include the improvements in the transfer (and could, in fact sell them to someone else), no guidance is provided in relation to:

- how the trustee will decide whether or not to purchase the improvements;
- whether and how affected iwi will be involved in that decision;
- how the trustee might fund such a purchase;
- what the trustee will do with any improvements after such a purchase – if an operational marine farm is purchased, how and by whom is it to be managed pending transfer to iwi, or should it be allowed to lie fallow?

It may be that not all the answers to these questions should be rigidly dictated in legislation. However there will need to be a clear understanding and agreed mode of operation developed between the trustee and the iwi concerned so that clear processes are developed and delegations agreed. This will be needed to allow opportunities to be taken without endangering any settlement assets or leaving iwi with unwanted liabilities.

Moreover, there are other relevant functions which are not mentioned in the legislation at all. For example, the key to iwi realising much of the value of this arrangement lies in encouraging regional councils to create new AMAs, ie. new space, and working with other industry participants in support of that objective. An obvious function for the trustee would be to assist iwi in advocating for AMAs in appropriate areas, but the trustee function, as currently drafted in the Bill does not appear to provide for such a role. Given that authorisations only arise after councils have provided AMAs in their regional coastal plans, one school of thought has been that there will not be anything for the trustee to do until these are promulgated.

Planning, whether by Councils or the private sector, does not however occur in a vacuum and all want to ensure any activity is successful. Given that the Bill identifies TOKMTL as the trustee having responsibilities in the Bill, and the fact that some applications caught by the moratorium are to be decided under the new arrangements, we envisage that TOKMTL will be called on by councils and industry to help facilitate iwi agreement on solutions. This role could commence from day one, or even before.

The role involves many of the duties implicit in the Bill and aims to promote agreement among iwi on development options, thereby enhancing agreement on entitlements. We expect that the success or otherwise of the trustee in carrying out that role in concert with iwi will have a significant effect on the future relationship with other aquaculturalists, councils and the community. Done well, it will provide positive opportunities at low costs; not done, or done badly, it could result in iwi being blamed for the reforms not working, and additional costs being imposed on all parties including iwi.

The basic functions of the trustee as set out in the Bill appear acceptable. Nevertheless, we believe that the purpose of the trustee needs to be more strategic and enable it to more actively support the participation of iwi in the development of aquaculture businesses. Assisting iwi to participate early in the planning process, and work with other industry participants who wish to spearhead new developments would help provide greater incentives for aquaculture development generally.

Overall, the trustee's functions could be aligned with a purpose statement along the lines of "facilitate iwi into the business and activity of aquaculture". A statement such as this would more closely tie together and align the activities of the trustee with the overall objective of enabling iwi to receive assets of value.

Recommendation 2

Amend cls. 84 and 87 to enable the trustee to work in a more flexible way to facilitate coastal iwi into the business and activity of aquaculture in their regions.

4 The allocation process

The settlement provides that authorisations for 20% of new marine farming space and an equivalent of 20% of existing space are to be allocated to iwi within regional council boundaries through TOKMTL. The share of each 20% is to be allocated on the basis of coastline. Although the Bill sets out a methodology and process for the agreement or determination of the relative shares in aquaculture settlement assets of iwi in a region, it provides little guidance as to how those shares are to be delivered.

In addition, more flexible interim mechanisms are necessary to enable iwi who are ready to benefit from the use of settlement assets to do so prior to final transfer to iwi. These issues are discussed in more detail below.

4.1 Allocation methodology

Aside from the provisions that require Iwi Aquaculture Organisations to be established to receive aquaculture settlement assets, there are two other aspects to the allocation of aquaculture settlement assets:

- identification of the shares that iwi will obtain from the 20%
- a decision on how the shares will be allocated in a practical sense.

Cl. 93 and 94 of the Bill deal with the allocation of settlement assets to iwi of the region. The Bill, through its provision for iwi shares to be identified on the basis of coastline, contains a clear default, including dispute resolution measures for the determination of the shares that iwi will receive. However the Bill appears to be silent on how the shares will ultimately be distributed. We note that cl. 95 of the Bill appears to signal a collective approach for iwi to hold their assets by providing that no settlement asset within an AMA can be divided without the agreement of iwi aquaculture organisations of the region. However its scope is unclear as it applies only to settlement assets that have been determined “within an AMA” and not within the region.

The main problem with the Bill in this regard is that it seems to treat marine farming space as if it were an endlessly divisible commodity, like fishing quota. For example, if an iwi is judged to have 16% of the coastline in a region, but cannot agree with its neighbours how that percentage is to be applied, it would appear that the trustee is required to transfer 16% of each relevant authorisation, coastal permit and/or operative marine farm to that iwi, rather than having any flexibility to rearrange the iwi’s entitlements so that it still receives 16% overall but translated into, say, 50% of a single authorisation at one location.

It is also unclear whether TOKMTL would be able to transfer the assets into a company owned jointly, in the appropriate shares, by the iwi in a region, if that was the iwi’s preference. Thus there are a number of possible default options and while it is desirable that iwi determine for themselves how they wish to

apply their shares, the current provisions appear to provide TOKMTL with little guidance where iwi cannot agree.

Options

The process for the determination of each iwi's share of 20% are reasonably clear (although note comments about harbours below). However there is variety of options for dealing with the apportionment of physical assets. The first would involve one clear default option – which would be that all relevant iwi in a region hold their assets within a collectively owned company. The advantage of this would be:

- it provides a clear default for TOKMTL,
- it would still provide flexibility for the future, in that iwi could choose to divide their interests at some time in the future if all agree.

A variant on this would involve a clearer process and a set of principles to be followed by TOKMTL in determining how to distribute each iwi's portion of the settlement assets. For example, if iwi had not been able to agree on the distribution of their assets, TOKMTL could develop an allocation plan in consultation with the relevant iwi. The process would be designed to assist iwi towards resolution of the issue but where that is not possible, TOKMTL could make a decision. TOKMTL's decision could be guided by a set of principles that would need to be balanced, including:

- economic viability (for example economies of scale)
- the relationship between iwi and particular areas of the coastal marine area
- effect on pre-existing commercial arrangements
- fairness and equity (for example in relation to the quality of space)
- likely availability of new space in the future
- the degree of support to the allocation plan.

In principle, the regionally based collective approach to managing iwi aquaculture assets is most likely to make economic sense. However we appreciate that there will be situations where such an approach may be inappropriate, and a “mix and match” approach will need to be taken to gain maximum agreement.

Recommendation 3

Amend the Bill to provide a clearer process for determining the physical distribution of the settlement assets within each region, including:

- a default based on a collective company, but with the ability for the default to be varied to gain maximum agreement
- a process for TOKMTL to develop an allocation plan, guided by an appropriate set of principles.

We would like to emphasise to the Committee that give the short amount of time iwi and the Commission have had to analyse these provisions of the Bill,

we have not had the opportunity to work together to agree on an appropriate process or set of principles. However we urge the Committee to consider this issue in its deliberations. The Commission will endeavour to continue to develop our recommendation and will be available to advise the Committee further if the Committee wishes.

4.2 Interim development

The Bill is not clear or flexible enough to provide suitable opportunities for iwi in a region to agree to interim development of space, e.g. by applying for resources consents, up until the time that aquaculture settlement assets are determined and allocated. The uncertainty associated with this interim phase is likely to be highlighted when the future proponents of private plan changes seek to reach working agreements with the iwi who will be entitled to receive 20% of the benefits of those plan changes. Forming joint ventures may be one way for iwi to realise the value of their authorisations but disagreements about allocation could lengthen the time-frame for doing so.

As presently drafted, cl. 96 enables iwi aquaculture organisations wishing to develop a settlement asset to request the trustee to make an interim allocation decision and an interim division of the settlement asset. We don't think that the provision for division of the assets provides enough flexibility to suit the different situations that may arise before all settlement asset entitlements and an allocation plan are determined. These could include:

- only some iwi in a region have achieved status as iwi aquaculture organisations but they wish to develop their settlement assets
- some iwi in a region do not wish to develop their share at this time, but the majority wish to do so
- all iwi in a region wish to develop their settlement assets, but only some have achieved status as iwi aquaculture organisations
- all iwi in a region have achieved status as iwi aquaculture organisations but have yet to agree on their shares and an allocation plan, and some or all of those iwi wish to develop all or part of their assets.

Thus there will be situations in which the division of assets may be practical and appropriate, and others in which it is not possible because the relative shares of iwi cannot be determined by the trustee for the purposes on an interim allocation. In some instances, division of the assets may not be necessary for iwi to agree that an interim development should proceed.

Moreover, in the context of the Fisheries Settlement, Representative Iwi Organisations (RIOs) that have not yet achieved status as Mandated Iwi Organisations (MIOs) have entered into interim arrangements in respect of quota and Annual Catch Entitlement (ACE). These arrangements have had a number of advantages, including providing iwi with the ability to utilise

fisheries assets and benefit from them, as well as become familiar with the “business” of fishing as they ready themselves for allocation. In our view, RIOs should also be able to enter into agreements in respect of interim development.

In early feedback on the question of interim development, the Commission identified a set of graduated constraints that might be placed on TOKMTL as it considers interim development options. These were designed to enable development to occur while ensuring that interim decisions do not place iwi in a situation in which they are encumbered with liabilities without their consent. The following tiered set of constraints would link the consequences of a decision to the level of agreement that would be necessary from iwi:

- low impact issues such as applying for a resource consent or day to day management of any existing farm transferred if it has the agreement of the majority of Iwi Aquaculture Organisations in the region;
- medium impact issues, e.g. establishing a farm where a consent is obtained, including either in joint venture or incurring debt, or swapping areas where at least 75% of iwi in the region agree
- high or long-term impacts such as the sale of farms (unlikely to occur in transition) need 100% agreement of all Iwi in the region.

Clearly further consideration needs to be given to the different circumstances in which interim development can occur and some flexibility will be required to enable TOKMTL to assist iwi who wish to pursue interim development, without placing iwi who do not agree in an adverse situation.

Recommendation 4

Consider a wider range of options to enable interim development of aquaculture settlement assets, with further input from iwi and the Commission.

We note that the Bill is silent on the question of resources for development. TOKMTL would not wish to be put in a position of having to proceed with an interim development, including applying for a resource consent, without access to an appropriate source of funding (for example through use of relevant funds paid in lieu of existing space, or a development fund – see sections 5.3 and 5.7).

4.3 Harbours

A specific allocation methodology is proposed to be applied to aquaculture space located in harbours, with it being treated as analogous to inshore quota fished in harbours, and allocated only to iwi with shoreline adjacent to that harbour. While that appears logical in theory, in practice it could cause difficulties particularly with respect to settlement of existing space. For example it is not clear:

- what rule will apply when all of the ‘existing’ space in a region is located in open water, but the ‘new’ space which compensates for it is located in a harbour, or
- vice versa where all of the existing space is in a harbour but the ‘new space’ is located in open water, or alternatively
- whether existing space in harbours can only be matched with new space or existing farms in those harbours
- whether existing space in open water can only be matched with new space or existing farms in open water.

In addition, 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.

It is helpful to reconsider the basis of the harbour provisions of the Maori Fisheries Act, which reserve a portion of the 20% of quota for harbour iwi. These provisions were developed for a number of reasons, including:

- iwi in those harbours wished to count the coastline within harbours as part of their overall coastline entitlement
- there was a necessity to develop a sensible scale that “rounded” their coastline
- some harbours contain fisheries that have traditionally supported those iwi

When developing the fisheries allocation model, the Commission recognised that in some instances, if the length of coastline within harbours (e.g. the Kaipara Harbour) was counted as part of the overall coastline measurement within a Quota Management Area (QMA), it could distort the outcome heavily in favour of such iwi, particularly where there are few commercial species or only small quantities of fish in those harbours compared to the open sea.

Ultimately, the provision for harbour quota is a measure that intends to determine the relative shares that iwi should obtain of the 20% of quota allocated to iwi within QMAs. This arrangement does not restrict any iwi within a QMA from having their quota fished anywhere within that QMA (inside or outside harbours). Note also that the harbours contained in the Maori Fisheries Act, and incorporated as Schedule 4 to the Aquaculture Reform Bill, are based on surveys of commercial catches of specific fisheries. The harbours were identified as containing commercial fisheries for particular stocks. It also raises questions about the appropriateness of incorporating the same harbours in Schedule 4 of the Bill. More background information on the harbour provisions for quota allocation is provided in Appendix 1.

Applying this approach to the allocation of aquaculture settlement entitlements raises complex and difficult issues and requires further thought. While it would be open to iwi to agree on a regime for allocation within and outside harbours, the current provisions could lead to inequitable outcomes in that some coastal iwi will miss out altogether on a share of aquaculture in their region. This is not the outcome intended by the provisions for harbour quota contained in the Maori Fisheries Act. An alternative approach could contain the following elements:

- a default provision that enables all coastal (including harbour) iwi to share in the 20% of existing and new space regardless of its location within the region;
- a formula that enables a portion of the coastline length within harbours to be counted as part of the overall coastline measurement for iwi in the region (for example in recognition that the bulk of existing productive marine farming space exists within harbours).

Further thought would need to be given to the particular harbours that would attract such a formula. For example should it be all harbours, or only harbours within which “existing” space is located?

Alternatively, or in addition to this approach, the issue of harbours could be one of the criteria considered by TOKMTL where it is required to develop an allocation plan (see section 4.1 above).

In putting forward these proposals, we wish to emphasise that we have not had the opportunity to consult with iwi on a suitable approach. We urge the Committee to consider this matter and to seek further advice and input from iwi and the Commission before making any final recommendations to Parliament.

Recommendation 5

That the Committee consider an alternative approach to allocation of aquaculture settlement assets in harbours, and seek further advice from iwi and the Commission.

4.4 Dispute resolution

Many of the provisions relating to allocation of space as between iwi, particularly those dealing with dispute resolution and the role of the Māori Land Court, mirror those in the Māori Fisheries Bill. It will be necessary to undertake a detailed comparison between these sets of provisions now that the Māori Fisheries Act is enacted to identify the similarities and differences and consider the rationale for both. The Commission will continue to work on this issue and will provide additional information if necessary.

5 Ensuring iwi obtain value from the settlement

The Commission believes that processes for delivery of assets needs to be improved in a number of ways to ensure that iwi obtain value from the settlement. Key issues are summarised below.

5.1 “Representative [new] space”

Cl.63 (5) – (8) requires Councils to identify new space for transfer to the trustee that is “representative” of all new space available. While cl.63(7) provides some direction as to what will constitute “representative” space, there appears to be no process for affected iwi or the trustee to have any input to that selection, or to contest the Council’s decision on this point, other than seeking a judicial review.

Recommendation 6

Amend cl.63 to explicitly provide for iwi/TOKMTL input to the determination of “representative” space and provide a mechanism other than High Court judicial review to challenge such decisions.

5.2 New space in lieu of existing space

Cl. 75 enables the Minister of Fisheries to recommend to the Governor-General that she/she may direct a council, by Order in Council, to identify space (over and above 20% of new space) to a maximum of an additional 20%. This space can be used to meet the Crown’s obligations in respect of existing space. However there appear to be no guidelines as to the quality of the additional space that can be utilised for this purpose and we assume that the intention is that it will be provided on a per hectare basis, rather than to reflect representative characteristics. In the interests of a durable settlement, any new space provided in lieu of existing space should reflect, or be equivalent to the average productive capacity of the relevant existing space.

Recommendation 7

Amend the Bill to ensure that new space allocated in lieu of existing space reflects the average productive capacity of that space.

5.3 Cash in lieu of existing space

The Bill enables the Crown to deliver its obligations in relation to existing space within a ten year time-frame using new space, existing farms or cash. The Crown is not obliged to use any particular mix of the three options however the use of new space (referred to in section 5.2 above) is the first option, with the ability to purchase farms after year three, and use of a cash equivalent at year 9.

It is possible that unless the current proposals for aquaculture development are refined (see Part 2 of this paper), there will not be significant new areas of aquaculture and much of the iwi entitlement in relation existing space will remain unsatisfied at the end of the ten-year delivery period, to be satisfied with a cash equivalent at that point. The question, therefore, is whether it would be preferable for that cash equivalent to simply be paid by the Crown now.

The Bill makes it clear that the Crown is not required to use any particular mix of the three options for delivery on its obligations in respect of existing space. However the Bill signals a clear preference for using new space to compensate for existing space, but as noted earlier, all indications are that the availability of such space could be very limited. The next option is for the government to buy existing marine farms on the open market, but it is questionable whether the government is the most appropriate party to carry out such purchase. The last option comes into effect only at year nine, with the Crown able to then opt to pay the cash equivalent of the value of the existing space still owed.

It seems likely that Crown will end up paying cash in lieu of a reasonably high percentage of the space owed. Given that, it can be argued that it would be cleaner for all involved if it were simply to pay that cash equivalent earlier in the piece, or if the iwi concerned were given the option of seeking the cash payout rather than waiting.

The Commission believes that iwi should be given the option of taking a cash equivalent far earlier in the process than year 9, perhaps from year 3. We see a number of advantages for iwi and for industry development generally:

- an early cash payment would provide some iwi with a fund for investment in the 'new' space they are allocated, eg. in applying for resource consents.
- an early payment could also provide iwi with the cash needed to work with other industry interests to utilise the private plan change process to develop new AMAs. We believe that the involvement of iwi in these processes has the potential to create greater leverage for the acceptance by councils of private plan change proposals (see section #)
- iwi could opt to use the cash to buy existing farms in their own right, rather than with the Crown as the intermediary, or, indeed, to invest in a totally different industry altogether.

While some iwi may prefer to have the chance of securing a greater amount of space and/or existing farms (even if that takes longer), we suggest that far greater flexibility is required to enable iwi to invest resources “up front”.

Recommendation 8

enable the Minister of Fisheries to utilise a cash equivalent earlier than year 9 if that is the approach the relevant iwi wish to take, from year three onwards.

5.4 Crown purchase of marine farms

Cl.77 establishes the parameters for the Crown’s purchase of existing marine farms in order to satisfy its obligations in respect of existing space. Subclause (2) provides that such purchases must be on a “willing seller, willing buyer basis”. While that has been the understanding throughout (and the Commission supports the concept) it is an unusual phrase to write into the legislation and begs the question what its effect is, or how it might be interpreted.

Subclause (3) sets out the characteristics of the processes and methodology for determining the value of authorisations/permits and does not appear to include any element addressing the interests/risks to iwi. Rather, they focus on avoiding price ratcheting and achieving cost effectiveness for the Crown. In addition there is no indication that iwi or the trustee will have any input to the development of the valuation process/methodology. In particular, there is no suggestion that there would be an opportunity for iwi to indicate that they did not wish to become the owner of a particular marine farm which the Crown was intending to purchase on their behalf. This could be the case, for example, where iwi were aware of past problems with the farm, or had opposed its establishment because it interfered with customary fishing.

Recommendation 9

Amend cl.77 to ensure that the characteristics of the valuation methodology include the interests of iwi and that there is an opportunity for some involvement by iwi/TOKMTL in the valuation/purchasing process.

5.5 ‘Perpetual’ authorisations

Cls.64 – 69 establish the enduring nature of “iwi” authorisations as the mechanism for achieving the perpetual nature of the 20% entitlement, despite the less than perpetual nature of coastal permits. Obviously, this is an important element of the arrangements, however there is a downside. If an

iwi is granted an authorisation for 20% of new space and applies unsuccessfully for a coastal permit, that iwi will be left with an authorisation that it is unable to translate into usable space, but the authorisation continues to count against their 20% entitlement.

Cls.65 & 66 appear to compound this problem in respect of authorisations that are subject to Ministry of Fisheries reservations, ie. for which an agreement with affected commercial fishers must be reached before a coastal permit can be applied for.

Cl.66 provides, while the clock does not start ticking until the authorisation is in the hands of the iwi, once it has started, an agreement must be reached within six months. Three problems arise:

- There doesn't seem to be any mechanism for an agreement to be reached as part of an interim arrangement (ie. before the authorisation formally transfers to the iwi); and
- even if no agreement is reached with commercial fishers, the authorisation survives and fulfils part of the Crown's obligation to the iwi, even though it is impossible for it to be translated into a coastal permit
- unlike settlement space, non-settlement space subject to a reservation will be deleted from the relevant AMA if no aquaculture agreement can be reached. While iwi are entitled to 20% of new space, and 20% of reserved space, this situation has the potential to reduce the overall entitlement to useable space by iwi by upsetting the balance between reserved and "unreserved" space.

The result could therefore be that the Crown considers the iwi in a region to have received their full entitlement to "new" (and possibly existing) space because they are holding authorisations for the appropriate amount of space, but the iwi are unable to secure a single resource consent to establish a marine farm.

In the case of reserved space, one way to maintain the overall balance between reserved and "unreserved" space would be to retain all reserved space within an AMA until the relevant regional coastal plan is revised.

5.6 Provision of a development fund

The main value of an authorisation in respect of new space lies in its potential. As noted elsewhere, the provision of an authorisation may be of marginal benefit to many iwi who do not have the resources to invest in resource consents.

The Commission wishes to emphasise that if this settlement is to be consistent with the Fisheries Settlement, resources will need to be provided to

iwi to assist them to realise its benefits. We believe that provision by the Crown of a development fund would be consistent with the interim and final Fisheries Settlements, help iwi realise the benefits of their assets, and ultimately, mitigate many of the problems inherent in the current planning framework (for example by enabling iwi to work with industry to develop new AMAs – see section 6.2 below). In the interim Fisheries Settlement, a “potea” of \$10 million was provided as part of facilitating Maori into the business and activity of fishing; in the final Settlement, a similar fund was provided for the purchase of Sealord Group Ltd, as well as quota.

A development fund could be used instead of, or alongside earlier provision to iwi of cash in lieu of existing space.

Recommendation 10

Consider an appropriate amount of funding to assist iwi into the business and activity of aquaculture, and make provision that amount in a development fund

6 Potential effects on other parties

6.1 “Frozen” applications

As noted earlier there are a number of applications lodged with regional councils before the moratorium and which have been “frozen”. The Bill provides for these applications to be processed following the lifting of the moratorium provided they are located within an AMA. The Bill also defines these applications to be included in the definition of “new space” allocated to iwi.

While it is doubtful that those who have lodged frozen applications have any legal rights, many affected applicants consider that the Crown is settling one grievance while creating another and that the Crown should pay for the settlement, not them.

While acknowledging the principle of not settling one grievance by creating another, we envisage that there will be a range of situations faced by applicants. Some may have invested large amounts in the preparation of their applications, while others may have lodged a pro forma application and invested little, if anything. The applications will not be considered unless they are located in an AMA that is included in a regional coastal plan. If they are, the relevant AMA may well be larger than the area covered by the application. The area allocated to iwi would be identified before any application is processed.

Another issue to consider is that if 20 – 40% of an AMA in which a “frozen” application is located is allocated to iwi, and the iwi share overlaps with the

area subject to that application, iwi will need to find the funds to apply for a separate consent (and probably carry out an assessment of the cumulative effects of their proposed marine farm). There may well be an incentive for a cooperative approach to progress an application, for example through a joint venture.

The Commission does not wish to undermine the cooperative and constructive relationships that have developed between the marine farming industry in general, iwi and the Commission. Nor do we wish to see real grievances created through the allocation of space to iwi. In order to find a solution that suits the different circumstances facing applicants and iwi, a number of alternative options could be considered, including:

- classify frozen applications which are effectively for an extension to existing marine farms as 'existing' rather than 'new' space
- establish a process that would provide some form of compensation to applicants who face a demonstrable loss
- enable TOKMTL and iwi to have input into the identification of new space by councils (see recommendations under section 5.1 above). The involvement of TOKMTL and iwi in the process would provide an opportunity to identify joint solutions with affected applicants where possible.

Recommendation 11

Develop a suite of options that address the different concerns and levels of investment that have been made by parties whose applications are frozen.

6.2 AMAs developed through private plan changes

The Bill provides that 20% of any AMA created through a Private Plan Change is to be allocated to iwi.

It could be argued that private interests will be resourcing a process for the benefit of iwi. As in the case of areas covered by "frozen applications" we believe it is important to take a pragmatic approach to this issue, as councils will have little incentive to create AMAs themselves and little space will become available unless industry interests take the initiative themselves. It can also be argued that at the very least, industry interests know in advance that they will only gain up to 80% of the space they apply for and can factor the issue into their planning.

We believe that it is possible to turn the situation to the advantage of industry interests and iwi, as:

- iwi will wish to have input into the establishment of areas from which they will benefit, so the process needs to provide the right incentives for iwi to be involved early, and to work with relevant industry

proponents

- the involvement of iwi may provide an added incentive for councils to accept a private plan change
- iwi may wish to propose private plan changes in their own right, and seek joint venture arrangements with other parties.

The ability of iwi to be proactive will depend partly on how far they have met the allocation requirements of the Bill and the ability of TOKMTL to assist where appropriate.

A further issue to consider is the cost of funding a private plan change. Its cost will be substantially greater than that of an application for a resource consent (which could well in itself be substantial). However it is likely that the process will cost roughly the same, regardless of the size of the area concerned. Thus there is the potential for a “win-win” situation where iwi are in a position to be proactive, share costs and provide leverage for the establishment of new AMAs. The Commission believes that by making funding available earlier in the settlement process, iwi and TOKMTL will be in a good position to create that leverage, and help “kickstart” the development of new aquaculture management areas.

See recommendations in sections 5.3 and 5.7 above.

7 Other matters requiring clarification

7.1 ‘Claim definition’

The definition of what is included in the claims that are settled needs to be clear and explicit.

Cl.61 describes the claims that are “fully and finally settled, satisfied, and discharged” by the Bill, ie. the rights that Māori lose in return for the ‘redress’ provided by Part 5 of the Bill. As already noted, the expectation, arising from Government policy announcements, is that only ‘post-1992 claims’ will be affected by these arrangements, with historical issues untouched and free to be prosecuted through individual iwi settlements⁷, but the drafting of cl.61 is such that the dividing line between pre- and post-1992 claims is potentially blurred.

Ultimately, if the Crown does not intend to include pre 1992 claims and therefore make no provision to address them, then the Bill should clearly say so.

⁷ Although, see the discussion above about the merits or otherwise of seeking to have pre-1992 issues explicitly included in the arrangements.

We note that cl.61 is modelled on those used in historical Treaty settlements, but does not seem well-adapted to dealing with a settlement of contemporary (ie. post-21 September 1992) claims/rights. In particular, the clause refers to “rights and interests of Māori in aquaculture activities after 21 September 1992”, whereas the standard Treaty settlement formulation would be to settle/extinguish the opportunity to claim that the Crown breached the Treaty in respect of Māori rights/interests in relation to aquaculture activities by an act/omission that took place after 21 September 1992. The key point is that it should not be the timing of when the Māori rights/interests existed that is the difference between historical and contemporary claims, but the timing of the Crown action(s)/omission(s) infringing those rights.

This lack of clarity is highlighted by cl.61(2)(a)(ii), which refers to:

claims... by Māori in respect of commercial aquaculture activities arising after 21 September 1992... including any commercial aspect of traditional aquaculture activities”.

The linking of post-1992 claims and traditional aquaculture activities has the potential for interpretations which restrict the capacity to bring claims in relation to pre-1992 matters.

Recommendation 12

Redraft Cl.61 to clarify that while Māori are to lose the ability to prosecute claims in relation to Crown actions/omissions in breach of the Treaty post-1992, no other rights or claims are affected in any way;

[Note that if the Crown decides to settle all commercial claims to aquaculture, the amendment will need to reflect the extended scope of the settlement].

7.2 ‘Existing’ space: 20% of whole Coastal Marine Area (CMA) or by regions?

It is understood that the policy is that the ‘settlement’ is being addressed on a region-by-region basis and where there is no aquaculture in a region, no provision is being made. However entitlements could arise in the future if technology enables that to happen, and the regional coastal plan allows aquaculture development in the future. Clause 72 and following clauses suggest however that, in respect of ‘existing’ space, the Crown’s obligation is to provide to iwi the equivalent of “20% of the space in **the coastal marine area**” that became available for aquaculture post-21 September 1992. This is, at least, open to an interpretation that the whole of the CMA can be treated as a totality, rather than entitlements being established and compensated for a regional level.

The references to the CMA, rather than the CMA of each region, in cls.72-74 appear to authorise the Crown to deliver the equivalent of 20% on a nation-

wide basis, rather than a region-by-region basis, as previously understood. This would create potential of the Crown using ‘new space’ opened up in Southland to compensate for the lack of available space in Marlborough Sounds, except that the space accrues only to those iwi with coastline in the region.

Recommendation 13

Amend cls.72-74 to clarify that the Crown’s obligation relates to the coastal marine area of each region, rather than to the coastal marine area of the country as a whole.

7.3 “Best endeavours” to deliver equivalent to 20% of ‘existing’ space

Cl.73(2) provides that the Crown must use its “best endeavours” to provide to iwi the equivalent to 20% of existing space by 31 December 2014 by using new space, established marine farms purchased by the Crown for the purpose (only after 1 January 2008) or cash (only after 1 January 2013). The impression created by cl.73(2) is that the Crown is seeking to avoid an absolute obligation to deliver space, farms or cash in respect existing space, giving itself only a requirement to use “best endeavours”.

We assume that “best endeavours” applies only to the use of new space or Crown purchase to deliver on the Crown’s obligations in respect of existing space, and that if those options cannot be delivered, the Crown recognises an obligation to deliver a cash equivalent.

Recommendation 14

Amend cl.73 to make it clearer that the Crown will use best endeavours to deliver space rather than a cash equivalent where iwi wish⁸, but that this is ultimately an absolute obligation to deliver in some way.

7.4 Provision for review

The drafting of cl.61 is so wide as to potentially prevent the Courts from dealing with disputes as to the interpretation and implementation of the arrangements set out in the Bill.

The standard form of Treaty settlement claim settlement/extinguishment clauses, after they set out the claims that can no longer be brought before the Tribunal and the Courts, is to explicitly preserve the jurisdiction of the Courts to consider cases relating to the interpretation and implementation of the

⁸ Although see the discussion above about the merits or otherwise of seeking an undertaking for the Crown to pay cash equivalents earlier rather than later.

legislation. The omission of such a 'savings provision' in this case could mean that if, for example, an iwi wished to dispute the way in which the Crown had valued its entitlement to 'existing' space, the Courts could refuse to hear such as case on the basis that it is a dispute as to "the quantification or the adequacy of the benefits to Māori provided for or under this Part" (cl.61(4)(c)).

Recommendation 15

Amend cl.61 so as to explicitly retain the jurisdiction of the High Court to adjudicate in relation to the interpretation and implementation of the arrangements provided for under the Bill.

Part 2: Planning and allocation issues

1 Background

The aquaculture law reform process commenced at least four years ago. The problems the reform was intended to address include:

- an unclear relationship between the Resource Management Act and the Fisheries Act
- inefficient staging/timing of the roles of regional councils and Ministry of Fisheries
- decision-making that is not transparent (Fisheries Act)
- insecurity of tenure
- increased competition for growing areas.

The primary policy decisions underpinning the Aquaculture Reform Bill were announced towards the end of 2001, when legislation to implement the moratorium on marine farming applications was introduced. As a result of analysis carried out by the Commission, iwi and the industry, a number of concerns about the framework have emerged. These have not been fully addressed in the Bill.

It is important not to lose sight of the outcomes originally sought through the reform process that has concluded with the Bill. These were stated to be:

“to provide a legislative framework for aquaculture that can provide certainty to all participants including administrators. This framework should enable the greatest benefit to be obtained from the use of coastal space, without undermining the rights of fishers, or allowing undue adverse effects on the aquatic environment (from “Join the Discussion”).

“ to increase the contribution of aquaculture to the national economy while not undermining the regime established to sustainably manage fisheries, undermining Treaty settlements or allowing adverse effects on the environment” (from Cabinet proposals).

Thus there is a balance to be struck between development and environmental management, while resolving the claims of Maori, and it is not clear that the Bill, as presently drafted, provides that balance. The planning framework for aquaculture should provide incentives for investment in aquaculture development, while ensuring that environmental effects are well managed. In addition, efficient mechanisms to manage competition are needed. The framework should work hand in hand with any settlement provisions that provide guaranteed access to iwi. In respect of these issues, the provisions in the Bill are unbalanced.

The Commission is aware that detailed submissions have been made about the planning framework by the Seafood Industry Council (SeaFIC) and other

industry organisations. In general we endorse the concerns they identify in relation to the planning framework and do not intend to duplicate their more detailed recommendations. However we wish to make the following general comments.

2 The general prohibition on aquaculture

One of the underlying problems with the approach taken in the Bill is the imposition of a blanket prohibition on aquaculture activities outside Aquaculture Management Areas (AMAs). The prohibition is imposed through the Bill, (rather than by individual councils on a region by region basis through the RMA planning process itself), and it is up to regional councils to amend their plans to enable aquaculture to develop. This is problematic in that it dampens incentives for aquaculture development as councils have little incentive themselves to invest ratepayer funds in aquaculture development.

There is no other activity that is similarly prohibited under the Resource Management Act, and we think it is likely to lead to a number of problems:

- it is inconsistent with the basis of the RMA that activities should be managed on the basis of their effects;
- it is inconsistent with the original purpose of the reforms, which was to make better provision for aquaculture;
- it generates a lengthy planning process because a plan change has to be implemented in order to provide for any new aquaculture
- it creates barriers for innovation and new technology because it assumes all aquaculture activities have the same effects – this means that low impact experimental farming cannot take place without first obtaining a plan change;
- it requires councils to second guess commercial matters such as best sites for aquaculture development.

There are a number of options for managing the effects of aquaculture while providing access to iwi. Note that options would need to be integrated with changes to other parts of the framework, including refinements to Part 5 (the Maori Commercial Aquaculture Settlement), as recommended in Part One of this submission.

Managing rights under the Fisheries Act and effects under the RMA

The first option could involve a dual permitting arrangement under the Fisheries Act and the RMA. The Commission put forward this approach in its submission on the aquaculture law reform in 2001. Under this option, marine farmers would have to obtain an “aqua-permit” in order to harvest any species they wish to develop through marine farming. Iwi would hold 20% of the aqua-permits consistent with the Fisheries Settlement. In addition, marine farmers would also be required to obtain a resource consent under the RMA, to establish any necessary structures in the coastal marine area.

A similar approach could be taken using the Quota Management System (QMS), in which the right to harvest species would take the form of Individual Transferable Quota and would also require a resource consent for any necessary structures.

This kind of approach was not supported by the marine farming industry and was rejected by the Government following its consultation round on the reforms in 2001. The Commission believes these types of approaches have a great deal of merit, however we note that a considerable extension of the current time-frame for enactment of the legislation would be necessary to develop the approaches any further.

Allocating rights under the RMA

A second alternative, based on the current RMA framework, would build on the current approach, and could involve:

- a transition from the status quo under the RMA (i.e. the moratorium) to a planning regime that enables aquaculture, like other activities, to be managed through the full range of planning tools available under the RMA. Aquaculture would not be prohibited except in areas where adverse effects justify prohibition.
- provision for AMAs in which aquaculture is the primary use – but consistent with the comment above, AMAs would be only one of several available planning tools under the RMA. Specifically, aquaculture should also be allowed (not as a primary use) outside AMAs subject to rules in a regional plan (for example a restricted discretionary, discretionary or non-complying uses) and consistent with the obligation to provide iwi with 20% of new space
- providing councils with the tools necessary to deal with spatial allocation issues (such as those provided in the Bill, that provide for councils to tender the opportunity to apply for a resource consent; and allocation to Maori) both within and outside AMAs.

Allocation of 20% (and additional space where necessary during the 10 year delivery phase for “existing space”) is still possible within this framework but will require more flexibility to deal with consent applications outside AMAs.

For example:

- an obligation to deliver 20% would be generated by consents that are approved for small areas or extensions to existing farms without it necessarily being taken from those areas
- regional councils could identify large areas within which aquaculture is a non-complying activity, but stipulate that only a certain number of hectares will be available for development within a specified timeframe.

Iwi would be allocated 20% of the total number of hectares available, providing incentives for industry interests to work with iwi in the development of consent applications.

Recommendation 16

Consider providing a transition to a more flexible planning regime that enables councils to utilise all available planning tools under the RMA, subject to the ongoing obligation to provide iwi with 20% of new space, and additional new space in lieu of existing space where necessary.

3 Private plan changes

Under the existing provisions of the RMA, it is possible for prospective marine farming interests to apply for a private plan change, which they would then fund. However the Bill provides that authorisations to apply for consents will be tendered once new AMAs are established, and there is no guarantee that the proponents will obtain an authorisation to apply for a consent.

Thus to encourage the option of Private Plan Changes, the Bill includes a special provision for marine farming interests to apply for private plan changes and be guaranteed preferential access to up to 80% of any resulting AMA (with 20% to be allocated to iwi through TOKMTL).

Alongside the new private plan change provisions, the Bill also gives councils the ability, by public notice, to identify areas in the coastal marine area as “excluded areas”, within which private plan changes are not to be sought or accepted.

Despite the intention that the new provisions provide more flexibility for private interests to fund a private plan change, the process is initiated at council discretion. In addition, it is of concern that councils may create “exclusion” areas by public notice, with none of the normal appeal provisions to the Environment Court. Private plan changes that apply to any excluded area are not to be accepted by councils.

The RMA is designed to provide a suite of tools to enable councils to manage the environmental effects of activities in a way that matches their intensity and scale. As noted earlier, the blanket prohibition for aquaculture outside AMAs is being imposed by legislation rather than through the normal consultative planning process, which is subject to appeal to the Environment Court. That process provides for interested parties to debate and clarify the intensity and scale of the effects of proposals and through that process to identify the most appropriate management tool for any given situation. The ability to appeal to the Environment Court on matters of substance builds a body of case law that helps guide decisions over time. The ability for councils to identify “exclusion

zones” by public notice, and without a right of appeal to the Environment Court, provides a “double negative” against aquaculture.

The Bill provides for councils to allocate up to 80% of space within an AMA created through a private plan change to those who initiate and fund the process, however there are no clear criteria for councils to base their decision upon, aside from the requirement to establish a fair and reasonable process.

For AMAs created as a result of the process, councils are required to meet the Crown’s settlement obligation to provide 20% benefits to iwi through the trustee. Some concern has been expressed by industry participants that iwi will obtain benefits at the expense of private plan change proponents. We believe there is potential to turn this situation to the advantage of industry and iwi (see section 6.2, Part One).

With or without a more flexible planning regime along the lines of that recommended in section 2 above, private plan changes should follow the standard process currently provided for in the RMA, without the preliminary process of councils identifying excluded areas and inviting plan change applications. Any AMA created through a “regular” private plan change could still require authorisations for 80% of the area to be allocated to the proponent, and 20% to iwi.

The process to identify “excluded” areas contained in the Bill is flawed and the identification of such areas should be subject to the normal planning process, so that regional councils identify prohibited areas as part of the transition to a more flexible planning regime.

An additional measure that would help “kickstart” aquaculture in regions would involve some amendments to the settlement provisions of Part 5 the Bill to ensure that iwi have the resources and assistance to participate early in the process (see recommendations in sections 5.3 and 5.7).

4 Tender revenue

In the Bill, provision is made for councils to receive 50% of any tender monies, and for the Crown to receive 50% (clause 21 new section 165U). Cl. 76 enables councils to retain an additional amount, based on a set formula, where space that is to be allocated by tender is allocated to TOKMTL as the trustee, for eventual allocation to iwi.

The Bill provides that the council portion of any tender monies is “tagged”, so that it can only be used to achieve the purpose of the Act in the coastal marine area in its region. However the use to which the Crown may put its funds is not specified.

Given the need to provide support to iwi to participate in the planning process, part of the Crown portion could be set aside as part of a fund to support iwi participation in planning for aquaculture. The fund could be held by TOKMTL, with the funds required to be spent in the region from which they derive.

Recommendation 17

Provide for the Crown portion of any tender monies to be utilised to support iwi participation in aquaculture planning.

5 Undue Adverse Effects test

The Bill sets out a process for the Ministry of Fisheries to assess whether an AMA being proposed by a regional council will have an undue adverse effect on fishing. The Commission agrees that the current process set out in the Fisheries Act, and its relationship to the RMA, need amending and we support aspects of the new provisions set out in the Bill, including:

- the retention of the UAE test in the Fisheries Act (this is seen as a significant protection for fisheries rights holders, including iwi)
- the capacity for voluntary negotiations between fisheries rights holders and potential marine farmers; and
- integration of the Fisheries Act UAE test and RMA planning processes to the greatest extent possible.

However, despite the more positive aspects of the process, some parts need to be further refined:

- alignment of UAE and planning process: the fact that any appeals on the UAE assessment need to be determined before the regional coastal plan is notified adds unnecessary time to the process
- definition of “undue adverse effect”: while the nature of the effects to be considered is broadly set out in the Bill, it is not clear how the concept of “undue” will be defined and interpreted. As appeal on the Ministry’s assessment can only be made through an application for judicial review, the concept of “undue” will remain undeveloped as the process rather than the substance of decisions will be reviewed.
- timing of aquaculture agreements: a legislated requirement that authorisations can only be allocated to those who hold an aquaculture agreement will undermine the purpose of a tender process and will have the effect of reducing the number of parties who will tender
- potential for “hold-out”: the proposed negotiation process, commercial rights holders have the potential to “hold out” over marine farming interests, as there is no process for dispute resolution. While this may not be a problem where iwi wish to reconcile their own fishing and marine farming interests, they are unlikely to be the only party with commercial fishing interests in an AMA. Other commercial fishing interests could hold out over iwi by refusing to agree to a marine farm being established in an area subject to a reservation.

The main changes we suggest are:

- providing opportunity to appeal (at the planning stage) on the substance of any UAE designation; under this approach, the only statutory requirement would be that, if an area was flagged as having a UAE on commercial fishing, a marine farmer would not be able to make application for a consent until an agreement with commercial fisheries rights holders had been registered in the prescribed manner;
- de-coupling the voluntary agreement process from the tender process, leaving it up to prospective marine farmers to choose whether they endeavour to reach agreements before or after they tender for an authorisation; and
- providing a simple appeal process at the end of the voluntary agreement process to remove the potential for “holdout” by fisheries rights holders who are not unduly adversely affected by a marine farming proposal. This appeal would be to the Environment Court, under the Fisheries Act.

In our view, there are benefits of providing for an appeal process including:

- development of a body of case law to clarify the meaning of “undue adverse effect”;
- removal of the decision from political interference;
- ensuring that all claims that AMAs would have an undue adverse effect on commercial fishing are soundly based; and
- providing a forum for those who consider that they will be adversely affected to challenge the substance of the decision.

Recommendation 18

Amend the Bill to provide for:

- an opportunity to appeal on the substance of any UAE decision at the planning stage
- an aquaculture agreement to be required only at the resource consent stage
- a simple appeal stage as part of the aquaculture agreement process, to ensure that undue adverse effects claims are soundly based.

6 Areas subject to a reservation

We note that where areas are set aside as the result of a reservation, and where no aquaculture agreement can be reached, the Bill provides that the area will be deleted from the AMA. We also note that the space affected by a reservation that is allocated to iwi does not get deleted from the AMA. There

are two issues of concern here. First, we believe it is unnecessary to delete these areas. The second concern is that if iwi are left with reserved space, and the remaining reserved space is deleted, iwi will potentially be left with a disproportionate amount of space that they cannot utilise.

In our view the most sensible approach would be to leave all reserved areas in the AMA until the regional coastal plan is revised, leaving it open for iwi to continue to endeavour to reach agreements over their space, and others to do the same (see also section 5.5, Part One).

Recommendation 19

Amend the Bill to enable space within an AMA that is subject to a reservation to remain in place until the relevant regional coastal plan is revised.

7 Renewal of consents

The current provisions of the RMA deal with the renewal of consents on a first come first served basis. The Bill contains an amendment that is designed to provide more certainty to incumbent marine farmers by enabling them to have some priority over any other applicant when renewing their consents, but it seems unduly cumbersome and falls short of achieving the objective in some respects.

While the move to give incumbents greater certainty is positive, the provisions as drafted are cumbersome and continue to create a level of uncertainty in two areas.

The first is at the time an applicant applies to renew their consent. The process in the Bill provides that if an application is made by a person who is not the permit holder, it must be held until three months before the expiry of the existing permit. During that time, the consent authority cannot accept any other applications from anyone other than the existing permit holder. If that person applies to renew their consent, they will gain approval subject to compliance with the relevant regional coastal plan, the conditions of their consent and the use of current industry good practice for any current aquaculture activities.

There appear to be no obvious benefits to be gained from applying for a resource consent where a permit has already been granted, unless the new applicant is aware that the incumbent does not wish to renew their consent. It seems more logical to enable the incumbent marine farmer to have a preferential right to apply for a new resource consent. In addition, the use of “current good industry practice” as worded in the Bill is problematic and is open to interpretation by the council. It would be more prudent to incorporate specific industry practices as conditions on consents where relevant.

We note that while the Bill provides that iwi will have perpetual authorisations to apply for consents as far as settlement assets are concerned (as long as they continue to be located within an AMA), that would not be the case for marine farms they establish in “non-settlement” space.

The second area that needs improvement involves the ability for councils to override these provisions for a preferential right of renewal by opting, in their coastal plan, for some other mechanism for allocating rights at the time consents come up for renewal, for example to provide for a first come first served approach, or re-tendering. There are no apparent benefits of re-allocating rights to coastal space to a different user if the nature of the use remains the same.

Recommendation 20

Amend the Bill to allow incumbent to have priority at renewal stage (Part 1, Subpart 3).

Remove the ability for the consent renewal process to be overridden by regional plans.

8 Power of the Minister of Conservation to give directions

The Bill contains a power for the Minister of Conservation to give directions relating to the allocation of space (cl 165O). The purpose of this power is stated to:

- (a) give effect to government policy in the coastal marine area
- (b) to preserve the ability of the Crown to give effect to any of its obligations under any agreement in principle or deed of settlement between the Crown and any group of Maori claimants or representative of any group of Maori claimants in relation to a claim arising from, or relating to, any act or omission by or on behalf of the Crown or by or under any enactment before 21 September 1992.

Such a direction power is not necessary to give effect to future settlements, as they are invariably realised through their own legislation, which could include any necessary provisions in relation to aquaculture, in the same way that some settlements have already included provisions relating to tendering of coastal space. The use of the power to give effect to government policy is of concern, as there are no guidelines or criteria provided as the basis for such a direction, which increases uncertainty and undermines incentives for AMA development. Note that the RMA already provides the Minister of Conservation with a number of powers to intervene and influence coastal planning, for example the Minister approves regional coastal plans and makes decisions on certain consent applications (restricted coastal plans).

Recommendation 21

Remove the provision for the Minister of Conservation to give directions relating to the allocation of space.

Appendix 1: Harbour quota

Extract from *He Kawai Amokura*, Treaty of Waitangi Fisheries Commission, 2003, p 74

Harbours with commercial catches

29. A number of Iwi with coastlines within harbours (for example Kaipara Harbour) have wanted the coastline lengths within these harbours to form part of the coastline used to calculate their entitlement to quota on the basis that the fisheries within those harbours have traditionally supported them. However, because some harbours have extensive coastlines within them, the outcome would be very heavily distorted in favour of such Iwi, particularly where there are few commercial species or only small quantities of fish in those harbours compared to the open sea.
30. Notwithstanding this, the Commission recognised that a specific allowance should be made for Iwi bordering harbours which had recognised commercial catches provided that it did not distort coastline measurements. The Commission therefore proposes, on a species by species basis, to identify, isolate and allocate to Iwi whose rohe abut harbours that support a commercial fishery, a proportionate amount of the quota for the relevant QMA. The Commission considers that this is fair and reasonable and recognises local environmental and abundance issues on a fishstock by fishstock basis. The harbours that have been recognised by the Commission are set out in the Draft Maori Fisheries Development Bill.⁹
31. In 1996, a survey was carried out to determine the percentage of PRESA QMS fishstocks commercially taken within harbours. The work involved identifying the relevant harbours by examining Ministry of Fisheries records and then carrying out a field survey of commercial fishers using their local knowledge to arrive at the percentage of fishstocks caught within each harbour. The list of PRESA harbours that support a commercial fishery and the proportion of the TACC in these harbours are set out in Schedule 3 of the Draft Maori Fisheries Development Bill.
32. No POSA fishstocks were included in the survey, but it is expected that POSA harbours assessment will be completed before allocation and Iwi will be advised of the results in due course. The survey will include all current POSA fishstocks and will also assess those fishstocks that the Crown has announced it intends to introduce into the QMS before 2005. Any POSA fishstocks that the Crown introduces prior to 2005, but which are not covered in the POSA harbours survey, or any POSA fishstocks introduced after 2005, will be assessed in a later survey that Te Ohu Kai Moana will carry out. In all cases the Draft Maori Fisheries Development Bill provides that Te Ohu Kai Moana may by notice in the *Gazette* specify POSA Harbour Quota for any of the harbours set out in Schedule 3 of the Bill.

⁹ See section 54 and Schedule 3 of the Draft Maori Fisheries Development Bill.

33. Where a commercial catch is taken from a harbour, the Commission will use the results of the survey and take the highest of the range of catches over the five years as the percentage of the catch within the harbour that will be applied to the quota held by the Commission in the relevant fishstock. The resultant amount of quota will be reserved for allocation to those Iwi who have a boundary that abuts that harbour. Iwi who have a rohe boundary which abuts a harbour will still receive a proportion of quota based on the juridical bay formula.
34. Where more than one Iwi is involved, it is proposed that the reserved quota is divided by agreement between those Iwi or, where agreement cannot be reached, by using Te Ohu Kai Moana's proposed dispute resolution procedures.¹⁰
35. After the deduction and separate allocation of the Harbour Quota from the quota held by the Commission for those relevant QMA, the balance of the quota will be allocated on the usual formula. It is anticipated that all Harbour Quota will be Inshore Quota and therefore it will be allocated to those Iwi with rohe adjacent to the relevant QMA. The fact that an Iwi has been allocated Harbour Quota in relation to a particular QMA, does not preclude Iwi from also being allocated quota for the balance of the QMA, provided they have a seaward coastline within the QMA.

¹⁰ See discussion in Part E of this Report and Part 9 of the Draft Maori Fisheries Development Bill.