Te Ohu Kaimoana's response to New Zealand Parliament regarding the Maori Commercial Aquaculture Claims Settlement Amendment Bill

Te Ohu Kaimoana

Introduction

Thank you for the opportunity to make a submission on this Bill. Te Ohu Kaimoana wishes to be heard.

Our submission does not usurp the mana of Iwi to make their own individual submissions. Given our high level of engagement with Iwi – particularly those who will be most immediately affected by the amendments proposed in this Bill – we believe it to be reflective of their views. It is not intended to override or conflict with any submissions from Iwi.

About Te Ohu Kaimoana

Te Ohu Kai Moana Trustee Ltd (Te Ohu Kaimoana) is the trustee of two trusts:

- Te Ohu Kai Moana Trust (established under the Maori Fisheries Act 2004 (MFA) in November 2004), and
- Māori Commercial Aquaculture Settlement Trust (established through the Maori Commercial Aquaculture Claims Settlement Act 2004 (the Act) and commencing on 1 January 2005).

The purpose of Te Ohu Kai Moana Trust is to advance the interests of Iwi individually and collectively, primarily in the development of fisheries, fishing, and fisheries-related activities, in order to—

(a) ultimately benefit the members of Iwi and Māori generally;
(b) further the agreements made in the 1992 Fisheries Deed of Settlement;
(c) assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi; and
(d) contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement.

The purpose of the Māori Commercial Aquaculture Settlement Trust is to:

(a) receive settlement assets from the Crown or regional councils;
(b) hold and maintain settlement assets on trust until they are transferred to an Iwi Aquaculture Organisation (IAO)[1];
(c) allocate settlement assets to Iwi in accordance with the Act;
(d) facilitate steps by Iwi to meet the requirements for the allocation of settlement assets; and
(e) perform any functions that are necessary or desirable to facilitate consultation between the Crown and IAOs, Mandated Iwi Organisations, and Recognised Iwi Organisations for the purposes of sections 8 to 18 of the Act.

Our position on the proposed amendments to the is largely from the perspective of our work as Trustee of the Māori Commercial Aquaculture Settlement Trust. As these amendments are modelled on provisions in the MFA, we are also able to draw on our experiences as Trustee of Te Ohu Kai Moana Trust.

[1] *An organisation can only become an IAO if it is a Mandated Iwi Organisation under the Maori Fisheries Act 2004 and it constitutional documents include provisions that authorise it to act on behalf of the Iwi it represents in relation to aquaculture settlement matters.*

Background

In 2004 Ministers of the Government stated that Aquaculture was the "unfinished business of the Fisheries Treaty Settlement" and, to address that, the Government promoted and Parliament enacted the Maori Commercial Aquaculture Claims Settlement Act 2004. The Act legislated that the Government had and has ongoing obligations to provide Iwi with space or other assets representative of, or equivalent to, 20% of any space approved for aquaculture after 22nd September 1992.

Because all approval of aquaculture space takes place under the Resource Management Act 1991, the Act requires that the Crown settle its obligations to all the Iwi of a region collectively, with those regions generally being based on regional council boundaries (but with all the harbours included in Schedule 2 of the Act effectively designated as sub-regions).

All settlement assets are first transferred to the Māori Commercial Aquaculture Settlement Trust. Te Ohu Kaimoana as the Trustee of the Māori Commercial Aquaculture Settlement Trust then allocates and transfers the settlement assets to the Iwi of the region in accord with an allocation agreement between all the Iwi of the region.
The Act does not contain an allocation methodology to be applied for all settlements. Instead, it requires that all Iwi of a region must agree the allocation methodology to be applied to any settlement. Where agreement cannot be reached, there are disputes processes that ultimately involve the Māori Land Court making determinations based on coastlines of Iwi.
Both options require participation of the IAOs in the relevant region. Where this cannot occur, or any IAO refuses to participate, the relevant settlement assets must remain held in trust by Te Ohu Kaimoana for an indefinite period.
In contrast, the MFA provides additional options to the Trustee to be able to transfer a proportion of fisheries settlement assets in a partial allocation to the relevant Mandated Iwi Organisations (MIOs) or those segments of coastline that, in the opinion of the Trustee, will not be disputed while still retaining in trust the maximum amount of assets for those Iwi not willing or able to reach agreement (ie ensuring assets that they may have entitlements to are not be transferred).

Need for amendment - difficulties in gaining agreement to allocation

Te Ohu Kaimoana's key roles within the aquaculture settlement framework are two-fold:

a. We work with Iwi to achieve Regional Aquaculture Agreements under the Act between the Iwi who have coastline in a region and the Crown on the amount and form of settlement assets that will satisfy the Crown obligations; and

b. We facilitate discussions between those Iwi to reach agreement on the allocation of those regional assets between all those Iwi and then transfer the assets in accordance with such agreements.

In most cases, the Iwi of a region are able to develop their own basis for agreement on allocation – but the approach to allocation is not uniform across the country, nor are the same bases necessarily always used in the same region for different settlement assets received over time. (There have now been 3 different aquaculture space approval regimes that apply to the settlements: from 22 September 1992 to 31 December 2004 (the Pre-commencement Settlement), from 1 January 2005 to 30 September 2011 (the Interim AMA Settlement), and from 1 October 2011 onwards (the New Space Settlement).

There is no compulsion for Iwi to reach agreement on allocation and it often takes several meetings to progress agreement. In a number of regions, it has taken several years to find the formulation that all the Iwi who have coastline in the region can agree to and will sign up to in a regional allocation agreement.

Iwi in the Northland and Bay of Plenty regions have not been able to conclude a formal agreement on an allocation methodology for aquaculture settlement assets held by Te Ohu Kaimoana, though in each region the form that allocation should take is broadly accepted by all.

In Northland this is due to one Iwi not accepting the Aquaculture Settlement and refusing to participate in any of the processes associated with it. While the Crown was able to engage with most Northland Iwi and reach agreement with them over the quantum of settlement assets, that non-participation meant there was no ability for the Crown to sign a Regional Aquaculture New Space Agreement with Northland Iwi. The default processes under the Act were employed to transfer the agreed new space aquaculture settlement assets to Te Ohu Kaimoana in November 2015. There is, however, currently no equivalent mechanism for overcoming the inability to obtain the agreement of all IAOs on allocation of those (and some earlier) Northland aquaculture settlement assets, as the same Iwi has refused to participate in any allocation processes and will not sign any agreements.

A different problem prevents the iwi that have coastline in the Bay of Plenty region from being able to conclude agreement on allocation of the aquaculture settlement assets held for that region, despite generally agreeing on the manner in which that allocation should occur. The Iwi agreed and signed a Regional Aquaculture Agreement with the Crown in 2014 – the Act allows Regional Agreements to be signed between the Crown and the Iwi that have coastline in that region where each Iwi has either an IAO or a Representative Iwi Organisation (recognised under the MFA). The Act however prohibits allocation and transfer of settlement assets can take place until all Iwi holding coastline in the region is represented by an IAO. One of the Bay of Plenty Iwi has chosen not to seek recognition as a MIO under the MFA and therefore cannot be an IAO under the Act and this is not likely to change in the short- to medium-term. As a result, allocation and transfer of the Bay of Plenty Aquaculture Settlement assets cannot occur without an amendment to the Act.

The two Iwi in the two regions referred to above that, for different reasons will not, or cannot, sign regional allocation agreements do not wish to frustrate the other Iwi in their regions. They are equally determined, however, that they will not be compelled to act contrary to their own principles and decisions on recognition of the settlements. They recognise and respect the rangatiratanga of each Iwi to decide its own path, just as they expect other Iwi to recognise and respect the decisions they make.

The number of Iwi involved in these regions and affected by this problem are approximately half the number of IAOs that should receive aquaculture settlement assets under the Act. The resultant inability for all IAOs in both these regions to conclude agreements on allocation of settlement assets under the existing provisions of the Act mean that all IAOs in those regions are facing indefinite delays in being able to receive their share of the aquaculture settlement assets pursuant to the Act. The Maori Land Court dispute resolution processes are not designed for situations such as these, where the issues arise from the status and non-participation of Iwi, rather than the substance of the form that allocation should take and size of respective shares different Iwi should receive. More flexible options are required in the Act in order to overcome such barriers to Iwi enjoying the benefits of their settlement assets.

While we outlined the circumstances that currently prevent the Iwi in two regions from reaching agreement that allows the transfer of settlement assets to them, we consider that – without amendment of the Act – similar issues could also occur in other regions in the future, frustrating the ability of affected Iwi to receive settlement assets and choose whether to invest in aquaculture in a timely manner.

Iwi consider, and Te Ohu Kaimoana agrees, that the Crown has not fulfilled its aquaculture settlement obligations to Iwi until the relevant regional aquaculture settlement assets are able to be allocated and transferred, and that the legislation must include processes that enable this to occur within a reasonable timeframe. The current provisions in the Act do not enable timely progress for the range of situations that Iwi face and the legislation should provide more options to better provide for the transfer of settlement assets to them.

Without amendments problems will grow and hinder early Iwi involvement in aquaculture

It is certain that the Crown will have further obligations to provide aquaculture settlement assets to regions across Aotearoa in the next few years. This includes both the Northland and Bay of Plenty regions.

In Northland, there is increasing interest in aquaculture (from Iwi and others) across a range of different species. It is expected that this interest will result in the creation of additional settlement obligations that will exceed those forecast of space met by the Crown in the default transfer in November 2015.

The 'New Space Plan' promulgated by the Minister of Fisheries in 2014 did not forecast further new aquaculture development in the Bay of Plenty beyond that already approved before 1 October 2011. That meant the Crown offered no New Space Regional Agreement to Bay of Plenty Iwi in 2014.

However, it is now clear that arising from the success of Whakatōhea in its aquaculture farm off the coast of Ōpōtiki and the infrastructure investment at Ōpōtiki, there will be substantial additional aquaculture development and that this will create aquaculture settlement obligations. The obligation will be substantial (~2000ha) providing significant opportunities for Bay of Plenty iwi if they can be sure to access those assets in a timely manner.

An extensive programme of work involving the Iwi, Fisheries New Zealand, Te Ohu Kaimoana and consultants is underway to assess the feasibility of profitable aquaculture in the Bay of Plenty for a wide range of species. Site investigations are also being carried out. It is intended that this will move to the next stage of aquaculture development in the Bay of Plenty after Iwi have decided their choices and their collective decisions will determine the detail of the form of settlement assets included in the Regional New Space Aquaculture Agreement between the Iwi of the Bay, the Trustee and the Crown that is expected to be signed in late 2021 or early 2022. Current indications are that a significant number of the IAOs intend to collectively use the settlement assets to invest in aquaculture in the Bay. It is likely that significant investment in aquaculture ventures will not proceed without access to settlement assets. Iwi will therefore need early certainty on that access. Delay will inevitably constrain the options Iwi consider. Such development using settlement assets will only be able to occur of course if the legislation is amended as per the Bill.

Under the Act, as it currently stands, though the Crown will have acted in good faith towards meeting its obligations, most of the eight IAO of Northland and eleven IAOs of Bay of Plenty will be further frustrated by not being able to access these new assets (or the assets currently held) and take up the opportunities those assets represent. Continuing the current legislative blockage would be contrary to the aspirations of Iwi and the Government's Aquaculture Strategy.

The Government's Aquaculture Strategy, released in September 2019, sets out objectives and actions to guide sustainable growth of New Zealand's aquaculture industry towards the goal of $3B in annual sales by 2035. The strategy sets aspirations for a sustainable, productive, resilient and inclusive aquaculture industry. The strategy includes an objective to deliver the Crown's aquaculture settlement obligations in a manner that facilitates early investment in new opportunities, with a specific action of reviewing the Act to improve the asset allocation process.

Proposal to amend the Act

Arising from their inability to access settlement assets, the Iwi in the Northland and Bay of Plenty regions directed Te Ohu Kaimoana to develop a proposal to amend the Act that would provide more flexible options for delivery of aquaculture settlement assets.

Te Ohu Kaimoana prepared a proposal for amendments to the Act to provide additional options to assist Iwi in resolving allocation problems. Our amendment proposal was designed such that, in circumstances where full agreement cannot be reached by all IAOs in a region, not all IAOs will participate in the dispute resolution processes, or not all Iwi are represented by an IAO, though adequate time has been available for the agreement/allocation processes to occur, then:

- Te Ohu Kaimoana would be able to exercise a limited discretion to make determinations on allocation entitlements for individual IAOs in a region based on respective coastline lengths that Te Ohu Kaimoana is satisfied are unlikely to be disputed;
- If that discretion was exercised, all the relevant Iwi would be notified that a determination to allocate assets based on the undisputed coastline lengths has been made, the nature of the determination, the principal reasons for the determination, and the right to dispute the determination;
- A reasonable period is included in the legislation during which time transfer of the affected assets cannot occur allowing any relevant IAO to initiate the dispute resolution process under the Act,;
- Te Ohu Kaimoana would have the ability to subsequently transfer those assets, where no dispute process has been initiated, and the relevant Iwi requests that transfer;
- Te Ohu Kaimoana would be required to continue to hold aquaculture settlement assets even after allocation has been determined (but transfer has not been requested by the relevant Iwi) or where entitlements are disputed; and
- When a partial allocation has occurred and settlement assets have been transferred on that basis, then for the remaining assets that continue to be held, only those relevant Iwi are entitled to participate in resolution of allocation of those assets.

Key elements of our proposed amendments were modelled on the existing precedent in sections 135 and 136 of the MFA which enable Te Ohu Kaimoana to allocate and transfer undisputed fisheries settlement assets to MIOs even where full agreement has not been reached.

We consulted with IAOs on the proposal between December 2017 and May 2018. Extensive consultation over several meetings was undertaken with the particularly affected IAOs in Northland and the Bay of Plenty. The participating Iwi in both of these regions endorsed the Amendment Proposal. Both of the Iwi that do not, or cannot, participate in regional allocation agreements in those regions indicated their support for the amendment proposal.

In addition to the extensive consultation with the Iwi in these regions, Te Ohu Kaimoana staff circulated the amendment proposal to all IAOs throughout the country and consulted at a national forum of MIOs and IAOs in March 2018.

Te Ohu Kaimoana provided our amendment proposal to the Minister of Fisheries in June 2018.
Between December 2019 and February 2020, the Minister consulted on options to improve the allocation and transfer mechanisms under the Act. Te Ohu Kaimoana and several Iwi responded to the consultation document to ask that the Minister advance Option 3, which would amend the Act to provide Te Ohu Kaimoana with a limited discretionary power to allocate and transfer aquaculture settlement assets in certain circumstances. Option 3 was modelled off the amendment proposal we first submitted to the Minister in June 2018.

In May 2020, Cabinet agreed to progress Option 3 and to amend the Act. In the time since, we have worked closely with Ministry for Primary Industries officials and the Parliamentary Counsel's Office on the draft Bill.

Use of section 135 and 136 in the Maori Fisheries Act

As noted above, the amendments set out in the Bill are modelled on sections 135 and 136 of the MFA. These provisions have been helpful in the context of fisheries settlement assets, even though they have only been applied in two situations to date. The first of these was to allow Ngāti Mutunga (Taranaki) to receive settlement assets in September 2014, rather than having to wait for neighbouring Iwi, Ngāti Tama, to have a MIO in place. The second was in the transfer of some fisheries settlement assets to Ngāi Tahu on both coasts of Te Waipounamu where Ngāi Tahu, Ngāti Toa Rangatira and Rangitane could not reach full agreement, but agreed that a portion of the assets in question were not in dispute between them. This was actioned in December 2014.

Conclusion

The Bill contains proposed amendments that are intended to make a broader range of options available to Iwi to assist in allocating and transferring settlement assets to Iwi in instances where the provisions of the Act currently prevent Te Ohu Kaimoana from doing so. The proposed amendments also set out the rules that will apply to the more flexible powers that are not currently available in the Act, though equivalent powers do exist in the related MFA.

We are confident the Bill achieves the aims of our amendment proposal and therefore, when enacted, will give effect to Iwi aspirations. More importantly, we consider that the Bill reflects the Crown's obligation under Te Tiriti to provide statutory mechanisms that are effective in actively protecting the the rights and interests of Iwi, and in empowering Iwi to make their own choices.

Te Ohu Kaimoana therefore strongly supports the Amendment Bill and requests its urgent passage through Parliament.
As noted earlier we wish to be heard.

Contact person

Please contact Laws Lawson at Te Ohu Kaimoana (laws.lawson@teohu.maori.nz or +64 21 529 701) if there is any additional information we can provide that would assist the Committee or to schedule our appearance.

Te Ohu
Kaimoana