Proposal to improve the allocation and transfer process provided in the Maori Commercial Aquaculture Claims Settlement Act 2004

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Making submissions

The Ministry for Primary Industries (MPI) is seeking feedback on proposals to improve the allocation and transfer process provided in the Maori Commercial Aquaculture Claims Settlement Act 2004 to better enable the allocation and transfer of aquaculture settlement assets to iwi.[1]

Having your say

You can send your submission to us in any of the following ways:

Online	Submissions can be made using the online submission template: [insert hyperlink here]
Email	Please email your feedback to: [insert submission email here]
Letters	While we prefer email or online submissions, you can send your response by post to: Consultation: Proposal to improve the allocation and transfer process provided in the Maori Commercial Aquaculture Claims Settlement Act 2004 Ministry for Primary Industries PO Box 2526 Wellington 6104

Submissions must be received by us no later than **5:00pm on late February 2020.**

Please include the following information:

- Your name and title
- Your contact details (your phone number, address, and email)
- Your organisation's name (if you are submitting on behalf of an organisation).

Your feedback is public information

Any submission you make becomes public information. Anyone can ask for copies of all submissions under the Official Information Act 1982. The Official Information Act says we must make the information available unless there is a good reason for withholding it. You can find those grounds in sections 6 and 9 of the Official Information Act.

[1] Fisheries New Zealand is a business branded unit within MPI. For the purposes of this paper direct references to MPI also includes Fisheries New Zealand.

Tell us if you think there are grounds to withhold specific information in your submission. Reasons might include that it is commercially sensitive or personal information. Any decision MPI makes to withhold information can, however, be reviewed by the Ombudsman, who may require the information be released.

1 | Introduction

About the proposal

This consultation document looks at how to improve the allocation and transfer process provided in the Maori[2] Commercial Aquaculture Claims Settlement Act 2004 to better enable the allocation and transfer of aquaculture settlement assets to iwi. It seeks your feedback on the options proposed, and whether there are any alternative options or implications in addition to what is set out.

The consultation is in response to a proposal Te Ohu Kaimoana, as corporate trustee of the Māori Commercial Aquaculture Settlement Trust, presented to the Minister of Fisheries in mid-2018[3]. Te Ohu Kaimoana highlighted a need to improve the allocation and transfer process provided in the Maori Commercial Aquaculture Claims Settlement Act to address the issue of iwi being unable to access their aquaculture settlement assets in circumstances where an agreement on allocation between all iwi in a region cannot be reached.

What is in scope for this proposal?

This consultation looks at proposed options to better enable the allocation and transfer process provided in the Maori Commercial Aquaculture Claims Settlement Act 2004.

What is out of scope?

Any broader aquaculture amendments not related to the allocation and transfer of aquaculture settlement assets are not considered as part of this proposal.

[2] For the purposes of this discussion document no macron has been used for the word '*Maori*' when it is used in reference to the Maori Commercial Aquaculture Claims Settlement Act 2004 as this is the title of the legislation and does not contain a macron in the original legislation. We have endeavoured to use the macron when using the word '*Māori*' more broadly.

[3] The Māori Commercial Aquaculture Claims Settlement Act 2004 established the Māori Commercial Aquaculture Settlement Trust. This trust operates under the working name of the Takutai Trust, which is a subsidiary of Te Ohu Kaimoana Trustee Limited. The Trust is responsible for receiving aquaculture settlement assets from the Crown or regional councils, and allocating these assets to iwi.

2 | Background

New Zealand's aquaculture industry

New Zealand's aquaculture industry contributes significantly to regional development and the national economy, generating $600 million in revenue in 2018 and employing 3,000 people, largely based in the regions[4].

New Zealand's aquaculture industry has built a strong reputation for sustainable, healthy and high-value products. Its goal is to reach $1 billion per annum in sales revenue by 2025.

Kaimoana (seafood) more broadly has long played a key role in the social, economic and cultural well-being of Māori people and communities. Māori have a significant presence in the aquaculture industry, which will increase over time as iwi acquire and develop their interests in the industry and realise their aquaculture settlement assets.

The potential scale of iwi involvement in the future of the aquaculture industry is such that the sector as a whole will not reach its full potential until iwi realise their aquaculture settlement assets[5].

The Government's new Aquaculture Strategy, released in September 2019, recognises the strong interests of Māori, and has a vision for New Zealand's aquaculture industry to be globally recognised as a world-leader in sustainable and innovative aquaculture management across the value chain[6].

The strategy commits the Government to work alongside the aquaculture industry to deliver economic growth and jobs for the regions as part of an ambitious goal for it to become a $3 billion industry by 2035. The strategy sets out key outcomes and objectives for a sustainable, inclusive and resilient aquaculture industry.

Alongside the $3 billion goal, the strategy focuses efforts on:

- The development of sustainable open ocean and land-based farming
- Increasing farm efficiency
- Increasing product value and environmental performance in existing inshore farming
- Building resilience to environmental change
- Supporting the development and adoption of new technologies and practices to reduce the industry's contribution to emissions.

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[4] Aquaculture is the general term given to the cultivation of any fresh or salt water plant or animal. It takes place in New Zealand in coastal marine areas and in inland tanks or enclosures.

[5] It is difficult to determine what the potential scale of contribution from Māori will be to the industry, but as an indication, in 2010, the Te Tau Ihu iwi, Hauraki and Ngāi Tahu successfully completed their pre-commencement space settlements with the Crown which resulted in a $97 million Deed of Settlement. Since then, several iwi have achieved similar settlements and are working through new space settlements.

[6] https://www.mpi.govt.nz/dmsdocument/15895-the-governments-aquaculture-strategy-to-2025.

The strategy recognises the need to partner with Māori and communities on opportunities to realise meaningful jobs, wellbeing and prosperity.

Aquaculture legislation

Marine aquaculture is managed under the Resource Management Act 1991 (the RMA), which promotes the sustainable management of natural resources. Under the RMA:

- Regional councils are responsible for planning and managing aquaculture in their coastal area between high tide and the 12 nautical mile limit[7]
- Any new marine farm must have a resource consent from the regional council[8].

Legislation was changed in 2011 to encourage sustainable aquaculture development and streamline planning and approvals for marine aquaculture. Changes were made to the:

- Resource Management Act 1991
- Aquaculture Reform (Repeals and Transitional Provisions) Act 2004
- Fisheries Act 1996
- Maori Commercial Aquaculture Claims Settlement Act 2004.

Prior to this, under the Aquaculture Reform Act, marine farmers could apply to set up new farms only in aquaculture management areas (AMAs) established by councils. AMAs were introduced as a management tool, but were considered to complicate and delay approvals for new aquaculture. The 2011 changes simplified the approval process by removing the need for AMAs.

The Maori Commercial Aquaculture Claims Settlement Act 2004

The Maori Commercial Aquaculture Claims Settlement Act 2004 (the Settlement Act), as amended by The Maori Commercial Aquaculture Claims Settlement Amendment Act 2011, provides for the full and final settlement of all Māori commercial aquaculture claims since September 1992. It establishes an obligation on the Crown to provide iwi, through Iwi Aquaculture Organisations (IAOs[9]), with aquaculture settlement assets equivalent in value to 20 per cent of all space created for aquaculture development. Where that space is:

- **Pre-commencement space** – aquaculture space applied for between 21 September 1992 - 31 December 2004 (if subsequently granted);

[7] The 12 nautical mile limit refers to the Territorial Sea which is an area of water not exceeding 12 nautical miles in width which is measured seaward from the territorial sea baseline (the line from which the seaward limits of New Zealand's maritime zones are measured).

[8] Marine farm refers to the cultivation of marine or freshwater organisms, especially food fish or shellfish such as salmon or oysters, under controlled conditions.

[9] Or mandated iwi organisations or recognised iwi organisations.

- **Interim Aquaculture Management Area space** – aquaculture space applied for between 1 January 2005 and 31 December 2010 (if subsequently granted); or
- **New space** – new aquaculture space (consented or forecasted to be consented) from 1 January 2011.

The Settlement Act is delivered on a regional basis[10]. Amendments to the Settlement Act in 2011 enabled the new space settlement obligation to be delivered through regional agreements[11] (the reforms did not change how the pre-commencement space obligations were delivered).

Delivering the aquaculture settlement assets

The Settlement Act currently delivers aquaculture settlement assets by having the Crown enter into regional settlement agreements with all relevant iwi in a region. The Crown must do so within the following periods:

- within two years after the commencement of the Maori Commercial Aquaculture Settlement Amendment Act 2011 for the following regions:
    - Northland
    - The east coast of the Waikato region
    - Tasman
    - Marlborough
- For all other regions, whichever is the later of the following:
    - Within three years after the commencement of the Maori Commercial Aquaculture Settlement Amendment Act 2011; or
    - Within two years after the receipt of the first resource consent application for the purpose of aquaculture activities after the commencement of the Maori Commercial Aquaculture Settlement Amendment Act 2011

The aquaculture settlement assets can be in the form of authorisations to develop aquaculture space, its cash equivalent, or a combination of both. Te Ohu Kaimoana, as corporate trustee of the Māori Commercial Aquaculture Settlement Trust, facilitates the Crown and iwi entering into these regional settlement agreements by providing the technical expertise on behalf of iwi in the estimation of the value of each settlement.

Once the Crown and all relevant iwi in the region have agreed and signed a regional settlement agreement, the amount and form of the settlement obligations for the entire region are transferred to Te Ohu Kaimoana and held until the iwi of the region reach agreement on how to allocate the assets amongst them.

Te Ohu Kaimoana facilitates discussions between iwi within a region to reach an agreement on how the assets should be allocated amongst them and then transfers assets in accordance with

[10] Allocation is done on a region-by-region basis, and is based around the jurisdictions of Regional Councils and Unitary Authorities as well as by the harbours that have been identified in Schedule 2 of the Settlement Act. Te Ohu Kaimoana, as the corporate trustee, makes its determinations on settlement assets allocation entitlements and its allocation of settlement assets separately on the basis of the region of each regional council and each harbour listed in Schedule 2 of the Settlement Act. Section 44 of the Settlement Act explains the determinations and allocations.

[11] Regional agreements are between the Crown, the Iwi Aquaculture Organisations that represents iwi in a region and Te Ohu Kaimoana as the trustee. Regional agreements can deliver a mix of settlement assets.

those agreements. These settlements contribute significantly to the asset base of iwi and facilitates their greater involvement in the aquaculture industry.

Requirements for allocating and transferring assets

The Settlement Act does not contain an allocation methodology to be applied for all settlements. Instead, it requires that all relevant iwi in a region must agree the allocation methodology to be applied to any settlement. Where agreement cannot be reached, there are disputes processes set out in the Settlement Act that can ultimately involve the Māori Land Court, with the Court able to make determinations based on the coastline lengths of iwi.

Allocation requires participation of all iwi through their IAO in the relevant region. Where this cannot occur because one or more iwi of a particular region are not yet represented by an IAO, or an IAO does not participate, the relevant aquaculture settlement assets of any settlement remain held in trust by Te Ohu Kaimoana until these issues are resolved.

The allocation (full or partial) of aquaculture settlement assets can only be made when there is a[12]:

- written agreement among all the relevant IAOs in a region; or
- determination through the dispute resolution process (which includes reference to the Māori Land Court).

All relevant iwi in a region **must** be represented by an IAO (or mandated iwi organisations or recognised iwi organisations) before they can enter into a written agreement to allocate aquaculture settlement assets, or participate in a dispute resolution process (including through the Māori Land Court). This is to ensure that all iwi have robust governance systems in place, prior to entering into binding agreements on aquaculture settlement assets.

Dispute resolution processes

If a dispute occurs regarding the allocation of aquaculture settlement assets and the parties are unable to reach a resolution through a mediation process, any party to the dispute may refer it to the Māori Land Court. The Court may refer the dispute back to the IAOs for them to seek a resolution or make a determination if it finds that the parties have already taken reasonable steps to resolve the dispute.

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

[12] An IAO may request that Te Ohu Kaimoana make a partial allocation of settlement assets if the iwi's allocation entitlement for the settlement assets has been determined, but the entitlement of one or more other iwi to the settlement assets is yet to be determined. Te Ohu Kaimoana may make a partial allocation of settlement assets only in accordance with: an agreement of the IAOs of all the relevant iwi; or failing that agreement, a determination through the dispute resolution process in the Settlement Act.

3 | Proposal Objective

The problem

The allocation and transfer of regional aquaculture settlement assets to IAOs could be expedited, if the process provided for in the Settlement Act was improved.

At present, the allocation and transfer of aquaculture settlement assets can **only** occur when there is unanimous agreement between all relevant IAOs (or mandated iwi organisations or recognised iwi organisations) in a region, or through the dispute resolution process (which includes reference to the Māori Land Court) provided for in the Settlement Act. If agreement on allocation entitlements cannot be reached by all IAOs in a region, no allocation and transfer can occur.

This requirement is causing frustration between iwi in certain regions (and may occur in other regions in the future) as some iwi are either unable or unwilling to participate in regional negotiations, therefore limiting their iwi neighbours from accessing their aquaculture settlement assets.

Some iwi are unable to participate as they do not have the required governance arrangements in place. Other iwi are unwilling to participate as they have objections to the Settlement Act and the Maori Fisheries Act 2004 more broadly.

The Settlement Act requires that all iwi in a region must be represented by an IAO (or mandated iwi organisations or recognised iwi organisations) before aquaculture settlement assets are able to be allocated and transferred.

The mandatory governance arrangements are not necessarily agreeable to all iwi, which is why some iwi have chosen not to adopt those arrangements. The reasons certain iwi disagree with some of the mandatory governance arrangements may vary, for example, some iwi would prefer different voting or asset holding structures than those imposed by the Settlement Act.

Currently, in two separate regions, it has not been possible to allocate and transfer regional aquaculture settlement assets. The disputes resolution process is unable to address this issue because:

- an iwi in one region is not represented by an IAO (or mandated iwi organisations or recognised iwi organisations) and, is unlikely to be in the near future, and is therefore unable to participate in the dispute resolution process; and
- an iwi in one region is unwilling to participate in the dispute resolution process provided for in the Settlement Act due to their objection to the Settlement Act as an issue of principle.

As a result, all IAOs in the two regions are facing indefinite delays in receiving aquaculture settlement assets[13]. This issue cannot be resolved through current legislation and similar situations

[13] These delays are affecting half the total number of IAOs who should receive aquaculture settlement assets as part of the Settlement Act.

are likely to occur in future regional agreement processes unless improvements are made to the allocation and transfer process provided in the Settlement Act.

The current dispute resolution process is proving insufficient in addressing the issues above as it relies on iwi having the appropriate governance arrangements to participate and an iwi has to be willing to take part in regional negotiations and any dispute resolution process.

The objective of the proposal

The objective of this proposal is to improve the allocation and transfer process provided in the Settlement Act to better enable the allocation and transfer of aquaculture settlement assets to iwi. This will improve delivery of the Crown's aquaculture settlement obligations and support iwi aquaculture aspirations, as well as further support the growth of the aquaculture industry.

Do you have any comments to make on the problem definition and objective of the proposal?

Do you agree with the problem as stated? Why/why not?

Do you agree with the objective of the proposal? Why/why not?

Please provide any evidence you may have for your reasoning, if available.

Criteria used to assess the proposal

The following criteria have been used to assess the options for addressing this problem:

1. Treaty of Waitangi (the Treaty) and its principles – in particular, working in partnership with iwi, ensuring iwi can participate in aquaculture activities and active protection of iwi rights and interests in aquaculture.
    - Does the intervention ensure the Crown is working in partnership with iwi to deliver its settlement obligations?
    - Does the intervention ensure iwi can participate in aquaculture activities?
    - Does the intervention actively protect the rights and interest of iwi in aquaculture?
2. Settlement Act – the intervention provides for the effective allocation and management of aquaculture settlement assets to iwi and aligns with the fundamental provisions of the Act.
    - Is the intervention ensuring the Crown is meeting its obligation to provide iwi, through IAOs, with aquaculture settlement assets equivalent in value to 20 per cent of all space created for aquaculture development?
    - Is the allocation within each region based on a collective agreement amongst the iwi in the region?
    - Does the intervention improve the allocation and transfer of aquaculture settlement assets? If so, to what extent?
3. Cost effectiveness – the intervention is cost effective for the Crown and iwi
    - Will the intervention achieve the objective with minimal costs to the Crown, iwi and industry?
4. Equity – Ensuring every iwi has equal ability to access their aquaculture settlement assets.
    - Will the intervention benefit all iwi?
5. Impact on Māori-Crown relations
    - What impact does the intervention have on Māori-Crown relations?

Do you have any comments to make on the criteria used for assessing the proposal?

Please provide any evidence you may have for your reasoning, if available.

4 | Proposed Amendment Options

MPI considered the following options for improving the allocation and transfer of aquaculture settlement assets. This consultation document describes and examines options against the criteria provided above. Further analysis of these options will take place following submissions and may result in further work.

The proposed options are:

- **Option 1 (status quo)** – Maintaining the status quo, with no changes to legislation
- **Option 2** – Providing additional resources towards facilitating regional agreements
- **Option 3** – Amending the Settlement Act to provide Te Ohu Kaimoana with a limited discretionary power to allocate and transfer aquaculture settlement assets in circumstances where:
    - It has not been possible for all iwi in a region to conclude a formal agreement on allocation of the assets for a particular settlement; or
    - The dispute resolution process provided for in the Settlement Act (which includes reference to the Māori Land Court) has been unable to resolve the issue.

Option 1: Status quo

What this option covers

Under option 1, there would be no legislative change required. The allocation of aquaculture settlement assets would continue to require unanimous agreement between all the relevant iwi in a region or a determination to be made through the dispute resolution process provided for in the Settlement Act.

How it would work

There would be no changes to the current processes outlined in the background section of this document. This option would continue to have:

- the Crown enter into regional agreements with the relevant iwi in a region to provide aquaculture settlement assets equivalent to 20 per cent of the value of all marine aquaculture space, either in the form of authorisations to develop aquaculture space, its cash equivalent, or a combination of both;
- the relevant regional aquaculture settlement assets be transferred to Te Ohu Kaimoana and held until all the iwi of the region reach agreement on how to allocate the assets;
- Te Ohu Kaimoana facilitate the allocation entitlement process between iwi in a region to reach an agreement on how the assets should be allocated amongst them and then transfers assets in accordance with those agreements;
- All of the relevant iwi in a region to be represented by an IAO (or mandated iwi organisations or recognised iwi organisations) before they can enter into a written agreement to allocate aquaculture settlement assets, or participate in a dispute resolution process including through the Māori Land Court.

Initial assessment of option 1 against the criteria

Consistent with the Treaty and its principles

We consider that continuing with the status quo would have little effect on addressing the current allocation and transfer issues that are occurring in some regions. Iwi may consider that the Crown is not acting consistently with the Treaty and its principles as it has not yet fulfilled its obligations until aquaculture settlement assets have been transferred to all eligible iwi within a region.

Aligns with the fundamental provisions of the Settlement Act

As no changes would have been made, this approach would most likely remain consistent with the purpose and provisions of the Settlement Act to provide for the allocation and management of aquaculture settlement assets to iwi, particularly for those IAOs who are able to conclude a regional agreement.

Cost effectiveness

Costs under this option would be neutral.

Current costs for Te Ohu Kaimoana to facilitate regional agreements are met through an annual funding agreement with MPI, which would be unchanged. However, there is a significant opportunity cost with respect to undeveloped aquaculture settlement assets that would continue to remain held in trust by Te Ohu Kaimoana on behalf of those iwi that should receive aquaculture settlement.

Equity

Under the status quo approach it is likely that not all iwi would benefit as not all iwi would have equal ability to access their aquaculture settlement assets. Several iwi in two regions would still be unable to realise their aquaculture settlement assets due to being inhibited by the position of another iwi neighbour who is either unwilling or unable to participate in regional negotiations. The same would likely apply to other iwi in future settlement processes if this issue continues.

Impact on Māori-Crown relations

Impact on iwi

This approach is likely to have an undesirable effect on inter-iwi relationships as relationships may deteriorate from one iwi inadvertently limiting other iwi from accessing their aquaculture settlement assets.

Impact on government

This approach may also have detrimental effects on the Māori-Crown relationship, as iwi may consider that the Crown has a responsibility to ensure that legislation can enable the allocation and transfer of aquaculture settlement assets.

Transitional requirements

No transition is required for this option.

Do you agree with the initial assessment of the status quo against the criteria? Why/why not?

Do you think adopting Option 1 would enable the allocation and transfer of aquaculture settlements in regions where this is currently inhibited?

Do you have any other comments?

Option 2: Providing additional resources towards facilitating regional agreements

What this option covers

Under option 2, there would be no legislative change required. The Government and Te Ohu Kaimoana would commit more resources towards facilitating agreements between all iwi in disputed regions to determine the allocation of aquaculture settlement assets.

How it would work

This option would work exactly like option 1, with the exception that Te Ohu Kaimoana would have more resources to facilitate the process between disputing iwi within a region to reach an agreement on how the assets should be allocated amongst them.

This would include, but is not limited to, more staff resourcing and strengthening mediation services. Increased resourcing would see Te Ohu Kaimoana provide a dedicated resource to each individual IAO to work through their position in a dispute and come to an agreement that is mutually beneficial for all involved.

As with option 1, the governance requirements would remain unchanged so that all of the relevant iwi in a region must be represented by an IAO (or mandated iwi organisations or recognised iwi organisations) before they can enter into a written agreement to allocate aquaculture settlement assets, or participate in a dispute resolution process including through the Māori Land Court.

This approach would focus on trying to facilitate successful agreement by all relevant IAOs in a region and where possible work with those iwi who do not have the required governance arrangements in place to understand why that is the case and whether there is scope for them to change their position. **Appendix 1** shows examples demonstrating how this process would work.

The success of this option to address the current issues outlined earlier is heavily reliant on the willingness of all iwi in a region to participate in regional negotiations and for all iwi to have the required governance arrangements in place (or at least be willing to establish them). It would not be able to address circumstances where an iwi in a region does not have the required governance arrangements and is therefore unable to participate in regional negotiations.

Initial assessment of option 2 against the criteria

<u>Consistent with the Treaty and its principles</u>

We consider this approach to be consistent with the Treaty and its principles as it is focussed on working in partnership with relevant IAOs in a region to get regional agreement to deliver aquaculture settlement assets. This option would look to ensure that iwi can participate in aquaculture activities while protecting the rights and interests of iwi in aquaculture more broadly. However, it is unlikely to do so in cases where an iwi in a region does not have the required governance arrangements.

Aligns with the fundamental provisions of the Settlement Act

It is likely this approach would remain consistent with the purpose and provisions of the Settlement Act in instances where iwi in a region can reach agreement on the allocation of aquaculture settlement assets. However, it would not address the issue if iwi do not have the required governance arrangements in place and refuse to establish them.

Cost effectiveness

Cost for government

Whilst this option does not require the additional resources needed for legislative change, it would require additional resources for Te Ohu Kaimoana towards facilitating agreements between all IAOs in disputed regions to determine allocation of aquaculture settlement assets. Once implemented, this option would cost more compared to the status quo.

Te Ohu Kaimoana's work in undertaking its duties under the Settlement Act is currently resourced through an ongoing funding agreement between Te Ohu Kaimoana and MPI. Te Ohu Kaimoana submits an annual plan to MPI that outlines the estimated budget resources required for the year ahead to undertake pieces of work and carry out its duties.

The Government would need to identify additional funding to support the implementation of this option.

If these facilitation resources are successful in concluding regional agreements then this option would be cost effective. Alternatively, if these facilitation resources are unsuccessful than this option would not be cost effective.

Cost for iwi

Iwi would not bear any financial cost as a result of this option.

Equity

Should the additional facilitation resourcing prove successful in achieving regional agreements then it is likely most (if not all) iwi would benefit as all iwi would have equal ability to access their aquaculture settlement assets. This approach would achieve greater equity compared to the status quo approach.

Impact on Māori-Crown relations

Impact on iwi

This approach would have positive effects on inter-iwi relationships as the additional facilitation resourcing would work with all IAOs to come to an agreement that would provide mutual benefits for all involved.

It is likely to have the opposite effect on inter-iwi relationships if IAOs are still unable to come to an agreement on how to allocate aquaculture settlement assets amongst them.

Impact on government

This approach would further strengthen the Māori-Crown relationship, as it would improve the delivery of the Crown's aquaculture settlement obligations and support iwi aquaculture aspirations, as well as further support the growth of the aquaculture industry. It is also likely that this approach would have detrimental effects on the Māori-Crown relationship if iwi are still unable to access their aquaculture settlement assets due to the issues they are currently facing.

Transitional requirements

A six month transition period is proposed to align with the timing of when Te Ohu Kaimoana is expected to submit its next annual plan to MPI in fulfilment of the funding agreement that exists between them.

It is likely that some transitional support may be required for this option, particularly as arrangements would need to be made around determining the level of additional resourcing required and how those resources would be implemented to support facilitating regional agreements.

We also consider that while implementation can occur reasonably quickly, the facilitation process itself could take a substantial amount of time to conclude a regional agreement or could be completely unsuccessful.

Do you agree with the initial assessment of this option against the criteria? Why/why not?

Do you think adopting Option 2 would enable the allocation and transfer of aquaculture settlements in regions where this is currently inhibited?

Do you have any other comments?

Option 3: Providing a new discretionary power

What this option covers

Under option 3, the Settlement Act could be amended to provide Te Ohu Kaimoana with a limited discretionary power to allocate and transfer aquaculture settlement assets in circumstances where:

- It has not been possible for all iwi in a region to conclude a formal agreement on allocation of the assets for a particular settlement; or
- The dispute resolution process provided for in the Settlement Act has been unable to resolve the issue through the Māori Land Court.

How it would work

This option proposes to amend the Settlement Act to provide Te Ohu Kaimoana with a limited discretionary power to allocate and transfer aquaculture settlement assets in the defined circumstances above.

This option would retain the core elements of the status quo option such as:

- The Crown would enter into regional agreements with the relevant iwi to provide aquaculture settlement assets equivalent to 20 per cent of the value of all marine aquaculture space, either in the form of authorisations to develop aquaculture space, its cash equivalent, or a combination of both.
- Once a regional agreement has been executed, the relevant regional aquaculture settlement assets are transferred to Te Ohu Kaimoana and held until all the relevant iwi in the region reach agreement on how to allocate the assets.
- Te Ohu Kaimoana would continue to facilitate the process between relevant iwi in a region to reach an agreement on how the assets should be allocated amongst them and then transfer assets in accordance with those agreements.
- All of the relevant iwi in a region must be represented by an IAO (or mandated iwi organisations or recognised iwi organisations) before they can enter into a written agreement to allocate aquaculture settlement assets, or participate in a dispute resolution process including through the Māori Land Court.

The intention of this approach is to create a mechanism whereby Te Ohu Kaimoana can allocate and transfer aquaculture settlement assets in circumstances where:

- It has not been possible for all IAOs in a region to conclude a formal agreement on allocation of the assets for a particular settlement; or
- The dispute resolution process provided for in the Settlement Act has been unable to resolve the issue through the Māori Land Court).

This would enable Te Ohu Kaimoana to allocate and transfer aquaculture settlement assets when two or more IAOs agree on a partial allocation (up to their collective maximum entitlement), without requiring all IAOs in a region to agree. Any disputed assets would still be held by Te Ohu Kaimoana until the relevant IAOs reach a resolution. **Appendix 2** shows an example demonstrating how this process would work.

Te Ohu Kaimoana would not be able to use its limited discretionary power until at least 24 months after receiving regional aquaculture settlement assets from the Crown. We consider this would

provide sufficient time for all IAOs in a region to negotiate and agree an allocation methodology that is acceptable to all of them (if that is possible)[14].

When making a partial allocation Te Ohu Kaimoana would have to notify relevant iwi of its decision. At this time all iwi would have an opportunity (30 working days) to lodge an objection, and should they do so the objection would be referred to the dispute resolution process.

To ensure the approach is practical and effective, this option would also require additional amendments to be made to the Settlement Act:

- amending the current requirement that assets must be transferred to iwi as soon as they are allocated, even where an IAO might not want to receive their assets, whether that is due to 'in principle' objections to the Settlement Act or other reasons;
- amending to enable where there has only been a partial allocation, Te Ohu Kaimoana only needs to work with those iwi who have not had all their entitlements transferred to them; and
- amending to ensure any relevant iwi in the affected region can use the dispute resolution process to challenge any use of the limited discretionary power by Te Ohu Kaimoana.

A broadly similar discretionary power exists under sections 135 and 136 of the Maori Fisheries Act 2004, which enables Te Ohu Kaimoana to allocate and transfer undisputed fisheries settlement assets to mandated iwi organisations. This power has been used successfully to transfer fisheries settlement assets to iwi.

Constraints on the exercise of the limited discretionary power

There are four explicit constraints on the exercise of the limited discretionary power:

1. For settlement assets derived from the Crown's new space or pre-commencement (non-harbour) settlement obligations, Te Ohu Kaimoana may only allocate the proportion of assets in a region that relates to the length of coastline of the relevant iwi and is unlikely to be disputed. The balance would be held in trust until a final agreement or other resolution is concluded. In practice, Te Ohu Kaimoana would need to be satisfied that agreement exists on partial allocation of settlement assets up to their collective maximum entitlement between a number of the relevant iwi and that the interests of iwi who are not part of that agreement are protected by having their assets remain held in trust by Te Ohu Kaimoana;
2. For settlement assets derived from the Crown's pre-commencement settlement obligations relating to a harbour listed in Schedule 2 of the Settlement Act, Te Ohu Kaimoana may only allocate settlement assets to those iwi whose territory abuts that harbour. Further, Te Ohu Kaimoana may only allocate the proportion of assets in a harbour that relates to the proportion of the harbour claimed by that iwi that is unlikely to be disputed with the balance in trust until a final agreement or other resolution is concluded;
3. Where the settlement assets are in a form other than cash, (i.e. an authorisation conferring an exclusive right to apply for a coastal permit and/or an existing coastal permit), any IAO that receives those assets may not alienate them and must transfer them (in whole or in part) to

[14] In other regions, 24 months has been a sufficient amount of time for regions to come to an agreement so that Te Ohu Kaimoana could allocate and transfer aquaculture settlement assets to iwi.

another IAO if necessary in order to comply with any final agreement or determination in relation to allocation; and

4. Affected IAOs would be given notice of Te Ohu Kaimoana's intention to exercise the discretion and would have a period of 30 working days, before that decision is implemented, in which any IAO that is dissatisfied with the exercise of the discretion would be entitled to have that exercise referred to dispute resolution and, ultimately, to determination by the Māori Land Court.

Initial assessment of option 3 against the criteria

Consistent with the Treaty and its principles

We consider this approach to be consistent with the Treaty and its principles as it provides scope for both iwi and the Crown to act in good faith and partnership to achieve the intended purpose of the Settlement Act. It also provides active protection for all IAOs in a disputed region as it is flexible enough to ensure all IAOs in a region are able to utilise their aquaculture settlement assets to the fullest extent practicable, while actively protecting minority rights should some IAOs choose not to realise their assets for whatever reason.

Aligns with the fundamental provisions of the Settlement Act

We consider that providing a limited discretionary power would remain consistent with the purpose and provisions of the Settlement Act to provide for the allocation and management of aquaculture settlement assets to iwi. The new power would address the issues some regions are currently facing and ensure the government is delivering on its obligations established under the Settlement Act.

Cost effectiveness

Cost for government

It is likely this option would have resourcing costs attached to it as it would require legislative change. We consider this option to be just as cost effective as option 2 as the resourcing required to progress legislative change could be met within existing baselines.

Cost for iwi

Iwi would not bear any financial cost as a result of this option. However, as this option looks to improve the allocation and transfer process, more iwi would be in a better financial position as they are able to acquire and develop their aquaculture settlement assets.

Equity

This option allows for greater equity compared to options 1 and 2 as it ensures every iwi has equal ability to access their aquaculture settlement assets. This option is flexible enough to allow those IAO who are able to agree on an allocation to realise their aquaculture settlement assets, while protecting the rights and interests of those iwi who are unable or unwilling to participate in a regional agreement.

Impact on Māori-Crown relations

Impact on iwi

This approach is likely to have positive effects on inter-iwi relationships. Iwi who agree to an allocation (full or partial) are able to realise their aquaculture settlement assets and those who remain unwilling or unable to participate can maintain their position without inadvertently limiting their iwi neighbours from benefitting from their aquaculture settlement assets. Likewise any disputed assets are protected in a trust until a resolution can be determined.

Impact on government

This approach would strengthen the Māori-Crown relationship, as it would improve the delivery of the Crown's aquaculture settlement obligations and support iwi aquaculture aspirations, as well as further support the growth of the aquaculture industry.

Transitional requirements

As this option would require legislative change it may take time to implement. MPI would need to work with Te Ohu Kaimoana in the interim to communicate the impacts of any legislative change and what it might mean for those likely to be impacted.

Do you consider 24 months to be a sufficient amount of time for all IAOs in a region to negotiate and agree an allocation methodology that is acceptable to all of them? Why/why not?

Do you agree with the initial assessment of this option against the criteria? Why/why not?

Do you think adopting and implementing Option 3 would enable the allocation and transfer of aquaculture settlements in regions where this is currently inhibited?

Do you have any other comments?

Other options considered

Another legislative option that was considered was changing the criteria for all IAOs in a region to have unanimous agreement about how the aquaculture settlement assets should be allocated amongst them. The option proposed to amend the Settlement Act to allow Te Ohu Kaimoana to implement agreements between the majority (rather than all) of the IAOs of a region in certain circumstances. However, such a mechanism would make it difficult to adequately protect minority rights for those who may be unwilling or unable to participate in any agreement with others at the present time.

5 | Implementation and Monitoring

Changes to regulation

Option 1 – the status quo would not require any legislative changes.

Option 2 – providing additional resources towards facilitating regional agreements would require no legislative changes, although it would mean increasing the level of funding provided to Te Ohu Kaimoana.

Option 3 – providing Te Ohu Kaimoana with a limited discretionary power to allocate and transfer aquaculture settlement assets in certain circumstances would require amendments to the Settlement Act for the option to be implemented and enforced.

Implementation

Under the first and second option Te Ohu Kaimoana would continue its role facilitating regional agreements. The second option however would require MPI to increase the level of funding provided to Te Ohu Kaimoana through the existing funding agreement process so that Te Ohu Kaimoana has more resource to devote to facilitating regional agreements.

Under the third option, MPI would need to work with Te Ohu Kaimoana to assist IAOs to understand what any changes would entail and what the likely implications would mean for them.

Monitoring

Under the first and second option Te Ohu Kaimoana would continue to update MPI on the progress of its work through its annual reporting process.

Under the third option, Te Ohu Kaimoana would be required to develop and maintain policy on when and how the new discretion would be exercised.

Te Ohu Kaimoana would also be required to report to relevant iwi and the Crown each time the new discretionary power is used.

These requirements would be effected through the annual reporting process that Te Ohu Kaimoana employs, both with MPI – through the annual funding arrangement that exists between both organisations – and directly with iwi.

Overall, what is the best way to ensure that aquaculture settlement assets are allocated and transferred to iwi?

What are the most important things the Crown can do in delivering on its commitments to ensure iwi that wish to can participate in aquaculture activities?

6 | Conclusion and Next Steps

Conclusion

This discussion document sets out the reasons we are consulting on this proposal to amend the Settlement Act, what we want to achieve, and the estimated impact each option could have.

We have aimed to provide you with enough information so you can make an informed submission, including information about:

- The nature of the problem we are trying to solve (i.e. increasing the number of aquaculture settlement assets that are able to be allocated and transferred to iwi); and
- The feasible options available to do this by.

Based on the information provided, we welcome your views in response to the questions we have asked throughout this document. Please feel free to submit other relevant information.

Next steps

We are interested to hear your thoughts on whether or not the allocation and transfer process provided in the Settlement Act should be improved, and if so, how?

Te Ohu Kaimoana consulted on their initial proposal with IAOs between December 2017 and May 2018. We intend to have targeted hui with all relevant iwi and IAOs from late November 2019 through to late February 2020, as well as have this consultation document publically available for broader submissions.

Once we receive submissions from interested parties we will consider all of the new information and perspectives that have been provided. We will use this to further inform our policy analysis and any further work required on each option. A summary of the information we have received through consultation will be made available.

A final proposal will be prepared for Ministers to consider. Cabinet will make final decisions on any proposals to improve the allocation and transfer process provided in the Settlement Act in early April 2020.

7 | Appendices

Appendix 1- Scenario examples of option 2

Appendix 2 – Scenario example of option 3

Appendix 1: Scenario examples of option 2

Scenario example of option 2: one iwi is unwilling to participate in negotiations

EXAMPLE: In this scenario there are six iwi as illustrated below:

- The allocation for iwi A-C is agreed;
- Iwi D is not disputing its boundary with iwi C;
- Iwi D and E are in dispute over some, but not all of their entitlements (the disputed area is shown in orange). This dispute does not affect the other iwi;
- Iwi F is unwilling to participate in any negotiations as they have opposed the Settlement Act from its inception.

Currently, the unwillingness of iwi F to participate in negotiations with other iwi, and inability to resolve this through the dispute resolution process, prevents Te Ohu Kaimoana from completing the allocation and transfer to any iwi in the region. No partial allocation and transfer is possible because this would still require iwi F to participate in the process and agree to this outcome.

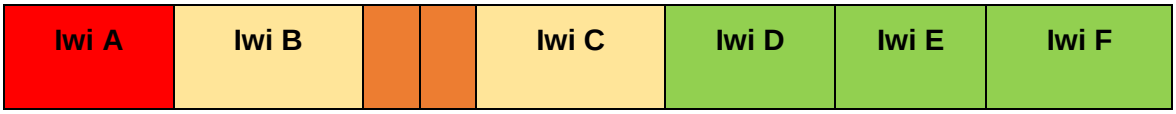
Under option 2, providing additional resources towards facilitating regional agreements would enable the following outcomes from this scenario:

- A dedicated resource would work with iwi F to determine if iwi F would come to a compromise.
- Iwi F is willing to participate in negotiations so as not to inadvertently prevent its neighbouring iwi from accessing their aquaculture settlement assets.
- Iwi F agrees to a partial allocation and transfer.
- Iwi A-C – Te Ohu Kaimoana would be able to allocate and transfer aquaculture settlement assets to them as they agree their entitlements;
- Iwi D and E - Although they dispute their entitlements, Te Ohu Kaimoana would be able to allocate and transfer any agreed portion of their aquaculture settlement assets. Te Ohu would continue to hold disputed portions of the aquaculture settlement assets;
- Iwi F – Assuming this iwi still opposes the Settlement Act, Te Ohu Kaimoana would continue to hold the assets attributable to its coastline until such a time a resolution could be found.

In order for option 2 to be successful, it relies heavily on iwi F's willingness to compromise and participate in regional negotiations. In this example, iwi F has compromised as it does not want to prevent neighbouring iwi from accessing their aquaculture settlement assets and to a limited extent it allows them to maintain their position (as their assets remain held in Trust by Te Ohu Kaimoana). However, this is unlikely to be the case for every situation as different iwi would likely have their own reasons for not participating in the process.

Scenario example of option 2: one iwi in unable to participate in negotiations

EXAMPLE: In this scenario there are six iwi as illustrated below:



- The allocation for iwi D-F is agreed;
- Iwi C is not disputing its boundary with iwi D;
- Iwi B and C are in dispute over some, but not all of their entitlements (the disputed area is shown in orange). This dispute does not affect the other iwi;
- Iwi A is unable to participate in any negotiations as it does not have the required governance arrangements in place

Currently, iwi A is not represented by an IAO (or mandated iwi organisation or recognised iwi organisation) so is unable to participate in negotiations with other iwi, and this is unable to be resolved through the dispute resolution process. This prevents Te Ohu Kaimoana from completing the allocation and transfer to any iwi in the region. No partial allocation and transfer is possible because this would still require iwi A to participate in the process and agree to this outcome.

Under option 2, providing additional resources towards facilitating regional agreements would enable the following outcomes from this scenario:

- A dedicated resource would work with iwi A to understand why they do not have the required governance arrangements in place and whether there is scope for them to change their position.
- Iwi A operates a hapū level governance structure so that whānau can directly benefit from their assets.
- Iwi A are adamant that there is no scope for them to change their governance arrangements as they have always worked at a hapū level as it is the most suitable for the needs of their people.
- The dedicated resource is unable to facilitate a regional agreement as iwi A remains unable to participate in negotiations. The aquaculture settlement assets for this region would continue to remain held in trust by Te Ohu Kaimoana.

In this scenario, option 2 is unlikely to improve the current issues that consultation document is trying to address any more than the status quo option.

Appendix 2: Scenario example of option 3

EXAMPLE: In this scenario there are six iwi as illustrated below:

- The allocation for iwi A-C is agreed;
- Iwi D is not disputing its boundary with iwi C;
- Iwi D and E are in dispute over some, but not all of their entitlements (the disputed area is shown in orange). This dispute does not affect the other iwi;
- Iwi F is unwilling or unable to participate in any negotiations

Currently, the refusal of iwi F to participate in negotiations with other iwi, and inability to resolve this through the dispute resolution process, prevents Te Ohu Kaimoana from completing the allocation and transfer to any iwi in the region. No partial allocation and transfer is possible because this would still require iwi F to participate in the process and agree to this outcome.

Under option 3, amending the Settlement Act to provide Te Ohu Kaimoana with a new discretionary power would enable the following outcomes from this scenario:

- Te Ohu Kaimoana would work with all IAOs to come to an agreement. If after 24 months an agreement is not reached, Te Ohu Kaimoana would notify affected IAOs that it intends to use its discretionary power*. IAOs would then have 30 working days before a decision was implemented. If no IAOs object to the use of the discretionary power the following scenario would occur.
- Iwi A-C – Te Ohu Kaimoana would be able to allocate and transfer aquaculture settlement assets to them as they agree to their entitlements';
- Iwi D and E – Although they dispute their entitlements, Te Ohu Kaimoana would be able to allocate and transfer any agreed portion of their aquaculture settlement assets. Te Ohu Kaimoana would continue to hold disputed portions of the aquaculture settlement assets;
- Iwi F – Assuming this iwi remained unwilling or unable to participate in negotiations, Te Ohu Kaimoana would continue to hold the assets attributable to its coastline until a resolution could be found.

*When making a partial allocation Te Ohu Kaimoana would have to notify relevant iwi of its decision. At this time all iwi would have an opportunity (30 working days) to lodge an objection, and should they do so the objection would be referred to the dispute resolution process.