# Regulatory Impact Statement

**Aquaculture Legislation Reform Paper: Māori Commercial Aquaculture Claims Settlement Final Recommendations**

**Agency Disclosure Statement**

1. This Regulatory Impact Statement has been prepared by the Ministry of Fisheries. It summarises analysis of options to deliver the Crown's obligations to iwi under the Maori Commercial Aquaculture Claims Settlement Act 2004 in the new aquaculture regulatory regime.

2. The analysis summarised in this paper has been informed by the Aquaculture Technical Advisory Group's report and consultation on that report, engagement with iwi at seven regional hui, work with Iwi Leaders, written responses to a settlement delivery discussion document, and the work of the settlement technical group.

3. Issues relating to the settlement raised through the Select Committee process regarding the Aquaculture Legislation Amendment Bill (No 3) have been addressed through the departmental report and not this process.

4. Policy development has involved significant engagement with iwi, however, the exact form of some of the options included in this paper have not been subject to engagement or consultation.

5. Some options included in this paper would, if implemented, impose additional costs on the aquaculture industry. Some options would give rise to the risk of litigation by iwi or industry.

6. Officials consider that the initial valuation of the predicted settlement obligation (used in the analysis summarised in this Regulatory Impact Statement) is not sufficient in itself to support delivery of the settlement on a regional basis. As the valuation was undertaken on a national scale, it is now being supplemented by additional forecasting information that further addresses the rate of predicted aquaculture development at a regional level.

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27 May 2011

# 1 Introduction

1. The Aquaculture Legislation Reform Bill (No 3) (the Bill) seeks to implement a new aquaculture management regime. The new regime will better meet the government's objectives for aquaculture which are to: reduce cost, delays and uncertainty with the aquaculture regulatory process; promote investment in aquaculture development; and enable integrated decision-making.

2. The Bill is based on Cabinet decisions in March, April and July 2010. The Cabinet papers supporting these decisions and the associated Regulatory Impact Statements are available at www.fish.govt.nz.

3. Cabinet decisions on the process for engaging with iwi and developing settlement mechanisms were made in August 2010 [CAB Min (10) 31/8]. As part of this package of decisions, Cabinet decided that the Crown is financially responsible for delivering the settlement.

4. This paper summarises analysis of options considered for delivery of the Crown's obligations to iwi under the Maori Commercial Aquaculture Claims Settlement Act 2004 (the Settlement Act) in the new regime.

5. Options are considered for:

- Preliminary steps
  - Settlement authorisations
  - Forecasting
  - Valuation
- Delivery pathways
  - Regional agreements
  - Default mechanism
- Deliverables
  - Financial (full and final upfront, on-going)
  - Space (actual, equivalent, allocation tools).

6. Changes to the settlement mechanism currently contained in the Bill will be introduced by Supplementary Order Paper.

# 2 Status quo and problem definition

## The role of Māori in achieving the $1 billion industry goal

7. Industry has established a $1 billion target for aquaculture revenue by 2025. The $1 billion target is predicated on the full participation of Māori. Aquaculture New Zealand, which represents the industry, acknowledges that Māori are important participants in the aquaculture industry. Māori are key shareholders in a number of marine farms, through Aotearoa Fisheries Limited and Sealord (which is 50% Māori-owned).

8. In the report that underpins the industry target, Ernst & Young (a consulting firm) noted that "Māori have a significant presence in the aquaculture industry and this is likely to increase over time." Due to the value of the settlement assets Māori will receive, the report

noted, “It is therefore likely that Māori will become an increasingly dominant stakeholder in the aquaculture industry in the future, and a probable investor in any expansion that takes place in the short to medium term.”

9. To reach the $1 billion target the aquaculture industry developed a growth strategy and a ten point plan. The growth strategy noted that Māori are an integral part of the sector and that the settlement package (cash from the pre-commencement obligation and anticipated space through new space obligations) offers the opportunity for further development for iwi and industry as a whole. The ten point plan states that, “The scale of potential iwi involvement in the future of the industry is such that the sector as a whole will not reach its full potential unless iwi prosper.”

10. To illustrate the value that Māori can add to aquaculture, consider Eastern Sea Farms Limited, which is majority-owned by the Whakatōhua Māori Trust Board. In 2006 Eastern Sea Farms was granted a license for a 3,800-hectare marine farm to be established six kilometres off the coast of Pōtikï. The planned marine farm will be the largest aquaculture venture in New Zealand.

11. This venture will be a significant step in aquaculture development that could transform the District's economy. Ōpōtiki District Council estimates that aquaculture could:

- create more than 900 full-time jobs; and
- add more than $34 million a year to the district’s economy.

## The Maori Commercial Aquaculture Claims Settlement Act 2004

12. The Settlement Act provides for the full and final settlement of contemporary Māori claims to commercial aquaculture. The Settlement Act provides Māori with an entitlement to 20% of aquaculture space created on or after 21 September 1992 and provides for the allocation and management of aquaculture settlement assets by Te Ohu Kai Moana Trustee Limited (the trustee).

13. The Settlement Act addresses claims to aquaculture space created between 21 September 1992 and 31 December 2004 (*pre-commencement* aquaculture space) and claims relating to space created from 1 January 2005 (*new* aquaculture space).

14. The settlement is regionally based, with claims settled collectively with iwi in each region. Settlement assets are managed by the trustee until iwi in each region have been recognised as a mandated iwi organisation and / or agreed how assets would be allocated.

## Extent of the settlement obligation for new space

15. The Ministry of Fisheries commissioned consultants LECG (who developed the valuation methodology for the pre-commencement settlement) to provide an indication of the possible extent of the Crown’s obligation for new space under the Settlement Act.

16. Acknowledging that there are numerous variables in forecasting future growth, LECG advised that the projected value of the settlement component of new space that might be created is estimated to be in the ranges of $34-62 million by 2020 and $34-74 million by 2030.

17. The methodology used to obtain the estimates focused on the value of space rather than the cost of obtaining it. This means that the cost of delivering the settlement obligation could (and is likely to) vary significantly according to the mechanism used.

## The current settlement mechanism

18. Under current law, new aquaculture space can only be created by establishing Aquaculture Management Areas. Councils must identify 20% of the new space and allocate authorisations for that area to the trustee. The space must be representative of the space within the Aquaculture Management Area and be economically viable. Authorisations provide iwi with the exclusive right to apply for coastal permits in the new aquaculture space and endure for the life of the Aquaculture Management Area.

19. Authorisations granted as settlement assets are enduring; this means that iwi retain the exclusive right to apply for a coastal permit for aquaculture activities in the space. Authorisations can be transferred to other parties but generally will lose their status as a settlement asset (some transfers allow settlement asset status to be retained).

## Interaction with Marine and Coastal Area (Takutai Moana) Act 2011

20. Under the Marine and Coastal Area (Takutai Moana) Act 2011 there is a risk that the creation of settlement authorisations over a specific area of marine space may create a conflicting use, which would have the effect of defeating a claim for customary title.

21. This risk can be mitigated by including in the Settlement Act a provision that expressly excludes settlement authorisations from the definition of occupation or use for the purpose of claims by iwi under the Marine and Coastal Areas Act 2011.

22. Iwi, hapu or whānau who have a customary marine title can exercise their veto right in relation to a coastal permit application for a marine farm; this is a risk for any applicant.

## Problem: New settlement mechanisms are required to deliver the Crown's settlement obligations under the proposed regime

23. The Bill seeks to remove the requirement that new aquaculture can only take place in Aquaculture Management Areas. As the current settlement mechanism is based on the creation of Aquaculture Management Areas, a new way of delivering the settlement will be necessary.

24. While the Bill preserves the settlement obligation under the proposed regime, the exact detail of the delivery mechanisms included in it has not undergone formal consultation. We have therefore not tested with stakeholders whether the mechanisms currently included in the Bill are the best way for the Crown to deliver on its settlement obligations under the proposed regime.

# 3 Previous work

## Cabinet decisions on the Settlement to date

25. On 30 August 2010 Cabinet agreed [CAB Min (10) 31/8 refers]:

a) that the Crown is financially responsible for the settlement;
b) to discussions between the Crown (represented by the Minister of Fisheries and Aquaculture, the Attorney-General, and the Minister of Māori Affairs) and Iwi Leaders to focus on the issue that the settlement will not work well under the proposed regime, and how best to deliver the settlement; and
c) that the discussions will be guided by parameters, including that the Crown will not renegotiate the settlement, i.e., the fundamental concepts of the settlement will not be stepped back from, including rights and values associated with 20% of new aquaculture space.

## Engagement with iwi

26. As agreed by Cabinet, Ministers met with Iwi Leaders to discuss the issue of the reforms and the delivery of the settlement. The Ministers and Iwi Leaders established a group of technical advisers to develop options and discuss them with iwi.

27. A series of seven regional hui concluded on 3 February 2011. Three primary themes emerged through the engagement process:

- **Principles**: Iwi want the integrity and value of the settlement to be maintained.
- **Space**: Iwi desire to engage directly in aquaculture and they consider that they require direct access to space; cash alone will not enable them to realise their aspirations. Space delivered must retain the value of authorisations that would have been delivered under the current law.
- **Preservation**: Iwi consistently expressed concern that the 'good' space would be gone before they would be in a position to take up their entitlement.

# 4 Assessment framework and summary of analysis

## Objectives and criteria

28. The objective is to enable the Crown to meet its settlement obligations to iwi for new aquaculture space, while supporting the objectives of the aquaculture reform. The reform objectives are to:

- reduce cost, delays and uncertainty with the aquaculture regulatory process;
- promote investment in aquaculture development; and
- enable integrated decision-making.

29. The following criteria were used to assess the options in relation to the requirements of the settlement:

- Durability – the settlement:
  - is satisfactory to both iwi and the Crown;
  - is sufficiently flexible to be able to deal with a variety of situations;
  - is based on regional (collective) iwi interests;
  - meets the commercial aspirations of iwi;
- Administrative simplicity – settlement assets are identified, allocated and transferred without complexity or design of a new regime;
- Equity – the settlement does not disadvantage particular participants or groups;
- Investment incentives – the settlement minimises adverse impacts on economic costs and incentives (including investment certainty);
- Financial cost of delivering settlement obligations is not increased;
- Responsibilities of regional councils – the level and nature of regional council involvement that would be required (the workload of regional councils) is fair and would be workable in practice; and
- Practicability (including the ability to obtain new space for settlement purposes).

30. The tables below outline options for delivery of the settlement under the new regime. The options are rated using up to three ticks or crosses according to the how the options contribute to the reform objectives and satisfy the assessment criteria. A question mark (?) is used where there is uncertainty, or the outcome is dependent on the specifics of an agreement.

| Option | Contribution to reform objectives | | | Assessment criteria [1] | | | | | | Key risks, drawbacks and mitigation |
|---|---|---|---|---|---|---|---|---|---|---|
| | Reduces costs, delays and uncertainty | Promotes / incentivises investment | Integrated decision making | Durability | Administrative simplicity | Equity | Financial cost of delivering settlement obligations | Responsibilities of regional councils | Practicability | |
| **Ensuring space is available for settlement purposes (preliminary steps)** | | | | | | | | | | |
| Settlement authorisations | – | ✔ | – | ✔<br>✔<br>✔ | ✔ | ✔ | ✔<br>✔ | ✔<br>✔<br>✔ | ✔<br>✔ | - High risk that the public will potentially perceive this as preferential treatment of iwi in light of issues around Marine and Coastal Areas Act. Communications will explain that this is not a new settlement, but rather delivery of an existing settlement obligation reached in 2004. Also noting that authorisations do not preclude the public from undertaking other activities not inconsistent with aquaculture.<br>- Risk of incorrect forecasting. The Crown will use its best efforts to indentify as accurately as possible space which is representative of the 20% obligation.<br>- Risk that this will hold up industry development in the area. Settlement authorisations will be limited to a specific area representative of the forecast obligation and will be held for a finite time only, after which any unneeded space will be released. The early release of unneeded space will be facilitated by prioritising negotiation in those regions which have the greatest opportunities for aquaculture development in the immediate future,<br>- Risk that frozen applications may be impacted by the creation of settlement authorisations. Forecasting which is underway to identify settlement space is required to take into account any frozen applications. |
| **Mechanisms for delivering the settlement obligation (delivery pathways)** | | | | | | | | | | |
| Regional agreements | – | ✔<br>✔<br>✔ | – | ✔<br>✔ | ✔ | ✔<br>✔<br>✔ | ✔<br>✔ | ✔<br>✔<br>✔ | ✔<br>✔ | - Negotiations could be lengthy and carry high transaction costs. Timeframes will be introduced within which agreements must be concluded.<br>- Risk of incorrect forecasting; this would be mitigated by the inclusion of review provisions in agreements. |
| Default (in the absence of regional agreements) | – | ✔ | – | ✔ | ✔ | ✔<br>✔<br>✔ | ✔<br>✔ | ✔<br>✔<br>✔ | ✔<br>✔ | - Less flexibility than regional agreements, however, necessary if a regional agreement is not reached – unlikely that region will choose this pathway.<br>- Greater risk associated with being a passive recipient; however this would be mitigated by allowing iwi to opt for cash in a default situation. |

[1] Although 'Investment incentives' is one of the assessment criteria, it is not included in this table as it is analogous to the reform objective "promotes investment".

| Option | Contribution to reform objectives | | | Assessment criteria [2] | | | | | | Key risks, drawbacks and mitigation |
|---|---|---|---|---|---|---|---|---|---|---|
| | Reduces costs, delays and uncertainty | Promotes / incentivises investment | Integrated decision making | Durability | Administrative simplicity | Equity | Financial cost of delivering settlement obligations | Responsibilities of regional councils | Practicability | |
| **Financial** | | | | | | | | | | |
| General | | | | | | | | | | - Cash alone is not what iwi desire.<br>- Does not directly provide aquaculture space to iwi.<br>- No guarantee financial settlement will enable iwi to access space.<br>- Negotiations could be lengthy and carry high transaction costs.<br>- Iwi may choose not to invest in aquaculture; Māori involvement in aquaculture has been identified as critical to achieving the industry $1 billion goal.<br>- Could give rise to litigation by iwi as to whether the Crown has approached delivery of the settlement in the new regime in good faith. |
| Full and final upfront | – | ✔<br>✔ | – | ✔ | ✔<br>✔ | ✔<br>✔<br>✔ | ✔<br>✔<br>✔ | ✔<br>✔<br>✔ | ✔<br>✔<br>✔ | - It may be difficult to determine the financial value of future space.<br>- Periodic reviews may be necessary. |
| Periodic financial payments | – | ✔ | – | ✔ | ✕ | ✔<br>✔<br>✔ | ✕ | ✔<br>✔<br>✔ | ✔ | - Uncertain ongoing fiscal cost to Crown.<br>- On-going delivery would require repeated negotiation and agreement and opportunities to re-litigate previous payments. |
| **Space** | | | | | | | | | | |
| Equivalent space | – | ✔ | – | ✔ | ✕<br>✕ | ✔<br>✔<br>✔ | ✔? | ✔<br>✔<br>✔ | ✔ | - No guarantee that the Crown will be able to deliver 'representative', or any, space. However the 2004 settlement did not guarantee space.<br>- High level of uncertainty in delivering coastal permits.<br>- On-going liability for the Crown unless delivered upfront through a regional agreement.<br>- Relationships between the Crown and industry, and iwi and industry could become strained due to possible competition for suitable space. |
| Alternative allocation tools | ✕ | – | – | ✔ | ✕<br>✕ | ✔ | ✔ | ✕ | ✔ | - High level of uncertainty in delivering coastal permits.<br>- Relationships amongst Crown, iwi and industry could be strained due to competition for space. |
| Additional allocation in areas of high demand | ✕<br>✕ | ✕<br>✕ | – | ✔ | ✕ | ✕<br>✕ | ✔ | ✕ | ✕ | - May unduly impact private applicants where more than 20% of high demand space is allocated to iwi.<br>- Although the power to allocate more than 20% would be discretionary, iwi expectations may be that the power will be exercised. |

[2] Investment incentives in relation to the Settlement requirements are covered by the 'Promotes incentives/investment objective of the reforms.

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| 20% of individual permits | ✗ ✗ ✗ | ✗ ✗ ✗ | – | ✔ | ✗ ✗ ✗ | ✗ ✗ ✗ | ✗ ✗ | ✗ ✗ ✗ | ✗ ✗ ✗ | - Difficult to fully compensate applicants for all costs.<br>- Settlement space likely to be fragmented and difficult to aggregate and manage economically.<br>- May result in iwi receiving unwanted space.<br>- Difficult to plan and make best use of settlement assets as the type, size and timing of assets would depend on the underlying permit application developed by another party.<br>- Complex and costly administrative arrangements.<br>- May create unsuitable and vulnerable relationships.<br>- The maximum life of a permit and therefore settlement currency (if no extra protections measures exist) would be 35 years.<br>- Applicants would need to apply for larger spaces; gives rise to additional costs and risks.<br>- Identification of the specific 20% parcel likely to be difficult, litigious. |

# 5 Regulatory impact analysis – analysis of options

31. Options have been identified for preliminary steps, delivery pathways, and deliverables. The primary options for deliverables are cash and space; however under each of those there are additional options to consider.

## Failure to deliver the settlement obligation for new space

32. The settlement for new aquaculture space is established in existing law. While the mechanism for delivery has been removed, the obligation remains.

33. Should the Crown fail to effectively honour the settlement, this could result in protracted and costly litigation which would stymie the growth which the reforms are designed to facilitate. There would likely be considerable backlash from Maori and a high risk of legal challenge in relation to failure of the Crown to deliver its obligations. Furthermore, there is a potential risk of creating a new Treaty grievance. This may also result in iwi seeking to challenge individual applications for aquaculture permits, which would significantly delay industry growth

34. As noted above, the basis of industry's $1 billion target is predicated on participation by Māori, a key component of this is derived from delivery of the settlement obligation. Non-delivery of the settlement obligation in respect of new space would seriously impair industry efforts to achieve its $1 billion goal.

## Preliminary steps

### *4.1. Settlement authorisations (part of preferred option package)*

35. Based upon the forecast, the Crown would use its best efforts to create settlement authorisations for 20% of projected new aquaculture space within each region. A new power is sought to allow the Minister of Fisheries and Aquaculture, in consultation with the Minister of Conservation, to gazette space over which authorisations for settlement purposes would be created.

36. Any settlement authorisations created would be held by the Crown for settlement purposes and could be delivered through either of the pathways described below. Forecasting and spatial planning work is currently underway to identify suitable space.

37. Settlement authorisations would be held by the Crown for no more than 2-3 years to allow time for regional agreements, as described below, to be concluded. Any space which is not required for regional agreements, or to discharge the Crown's obligation in the absence of a regional agreement, would be released and be available for private applicants.

38. A settlement authorisation would provide iwi with the exclusive right to apply for permits in that space for the purposes of aquaculture. Under the current law, settlement authorisations are enduring (unlike general authorisations which lapse after a certain amount of time). The enduring nature of the settlement authorisations will be maintained under the reforms and is a point of difference from authorisations granted under Part 7A of the Resource Management Act 1991.

39. A cash increment may be payable in conjunction with settlement authorisations to cover the lower value of settlement authorisations under the new regime as compared to the old Aquaculture Management Area regime. An authorisation within an Aquaculture Management Area would have been allocated after considerable research as to suitability, and after the Undue Adverse Effects test. Under the new regime, these steps will be undertaken at the cost of the applicant.

| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • Safeguards space for iwi until regional agreement can be reached.<br>• Not a general prohibition across the country.<br>• Does not prevent economic development – temporary measure only. Settlement authorisations will only be held by the Crown for a finite time, after which the space will be released.<br>• Supports early investment by iwi: rather than waiting for settlement assets to accrue over time, iwi will be able to initiate marine farming early in the new regime and begin contributing to the industry target.<br>• Provides certainty to industry from the outset as to what space will likely be used for settlement purposes.<br>• Less onerous for regional councils than delivery of authorisations under the current law. | • Risk of inaccurate forecasting leading to creation of authorisations over too much or too little space. *Mitigation: -The Crown will use its best efforts to ensure the accuracy of forecasting. If there is a discrepancy between forecasting an actual development the Crown will use its best efforts to reconcile this.*<br>• High risk that the public will potentially perceive this as preferential treatment of iwi in light of issues around Marine and Coastal Areas Act. *Mitigation: -Communications will explain that this is not a new settlement, but rather delivery of an existing settlement obligation reached in 2004. It will also note that authorisations relate to aquaculture activities and do not prevent activities that can co-exist with aquaculture.*<br>• Risk that this will hold up industry development in the area. *Mitigation: - Settlement authorisations will be limited to a specific area representative of the forecast obligation and will be held by the Crown for a finite time only, after which any unneeded space will be released. The early release of unneeded space will be facilitated by prioritising negotiation in those regions which have the greatest opportunities for aquaculture development in the immediate future, for example, Northland and top of the South Island*<br>• Risk that frozen applications may be impacted by the creation of settlement authorisations. *Mitigation: - Forecasting which is underway to identify settlement space is required to take into account any frozen applications.* |

### *4.2. Forecast (underway, not an option, but included for information)*

40. A forecast of growth in aquaculture space is currently being undertaken by region and by species. The forecast will be useful in general, but will be used to support delivery of the settlement. This is expected to be completed for priority regions (being Northland, Waikato East (Coromandel), Marlborough and Tasman) in June 2011. Forecasts for the remainder of the regions should be completed by early - mid 2012.

### *4.3. Valuation (not an option, but included for information)*

41. For the financial and equivalent space options, it will be necessary to develop and agree with iwi a valuation methodology. The valuation methodology used for pre-commencement space will be adapted for this purpose.

## Delivery pathways

42. The settlement obligation can be delivered either by way or regional agreements or by another mechanism. This other 'default' mechanism is also required to ensure that the settlement obligation can be delivered if a regional agreement cannot be reached in a particular case.

### *4.4. Regional agreements (preferred delivery pathway)*

43. Under this option, regional agreements would be negotiated between the Crown and iwi within regional council boundaries. Regional agreements could incorporate cash, space (settlement authorisations or coastal permits), a combination or anything else that can be agreed between iwi and the Crown.

44. Regional agreements can be tailored to suit the aspirations of iwi in relation to aquaculture and the realities of aquaculture development of each region. Regional agreements would therefore be a very flexible means to deliver the settlement obligation. Due to the flexibility of regional agreements and their negotiated nature, they incorporate many of the benefits associated with the different options outlined below, while mitigating many of the risks.

45. Regions have been prioritised into two stages for purposes of negotiation based upon the growth potential in their respective regions. Stage 1 regions will have two years to conclude agreements with the Crown and Stage 2 regions will have three years.

46. In some regions of New Zealand, such as West Coast and Taranaki, it is expected that there will be no or very little aquaculture development in the next 20 or so years and therefore no aquaculture settlement obligation will arise. In such cases it is unlikely to be a priority for iwi or the Crown to enter into regional agreement negotiations, and it may be difficult for prospective agreements to be reached. In these regions, the two year timeframe to reach a regional agreement should start from the date of receipt of the first resource consent application for aquaculture after commencement of the new law. However, this will not prevent iwi and the Crown reaching a regional agreement at an earlier stage.

| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • High flexibility.<br>• Negotiated agreement promotes mutually beneficial outcome.<br>• There is precedent in the form of the pre-commencement space negotiations.<br>• Agreements would be negotiated once only.<br>• Allows agreements to be negotiated when assets are realised (for non-aquaculture development areas). | • Could be lengthy and carry high transaction costs (especially where ongoing rather than upfront delivery is agreed). *Mitigation: - timeframes will be imposed within which regional agreements must be reached or default provisions will be applied.*<br>• Risk of incorrect forecasting. *Mitigation: - inclusion of review provisions in regional agreements.* |

### *4.5. Default (in the absence of regional agreements – part of preferred option package)*

47. A default delivery mechanism is required in the event that regional agreements are not able to be concluded in one or more regions.

48. In a default situation the Crown would discharge the settlement obligation by delivering any settlement authorisations it had created for the region. Settlement authorisations could be accompanied by a cash top up to cover any shortfall in value between an authorisation allocated under the current regime and a settlement authorisation under the new regime.

49. Where it is impracticable for the Crown to deliver space (by transferring any settlement authorisations it had already created), the settlement obligation will be discharged through a financial payment equivalent in value to the 20% obligation based on the forecast.

50. A settlement authorisation only confers an exclusive right for iwi to apply for a coastal permit; it does not guarantee a coastal permit will be granted. Therefore, iwi would be responsible for processing settlement authorisations through to permits to undertake aquaculture activities. Iwi would be able to opt for cash if they felt that the risks associated with converting settlement authorisations to coastal permits were too great.

51. The establishment of deadlines for the default pathway would provide impetus for iwi to engage in the preferred pathway of regional agreements. The default pathway would also provide a final choice between settlement authorisations and cash to ensure that they can mitigate their risks to the extent possible.

| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • Provides a means to deliver the settlement if a regional agreement cannot be reached.<br>• Crown will make best efforts to provide space.<br>• Still allows some choice between space and cash. | • Less flexibility than regional agreements, however, is necessary in the event that a regional agreement is not reached – this is unlikely to be the first choice of iwi.<br>• Greater risk associated with being a passive recipient. *Mitigation: - iwi can opt for cash in a default situation.*<br>• Iwi may not be successful in converting settlement authorisations to permits. This may result in the potential of a litigation risk if iwi perceive that what they are getting under the default is less than the settlement obligation – space. *Mitigation: - The Crown may provide a cash top up to cover the costs of processing settlement authorisations through to coastal permits where necessary to provide equivalent value*. |

## Financial deliverables

52. Under this option, the Crown would discharge the settlement obligation through cash payments to each region. The financial equivalent of 20% of new space would be determined using an agreed valuation methodology.

53. There is a precedent for cash payments: the Crown has paid $97 million to iwi of the South Island and Coromandel to discharge most of the settlement obligation for pre-commencement space. Cash may also be provided if the Crown's best efforts to deliver space are unsuccessful. The Crown would need to demonstrate that it used its best efforts to deliver space in order to mitigate any risk of litigation in relation to the delivery of cash.

| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • Provides flexibility in the extent and timing of iwi involvement in aquaculture.<br>• Would not limit iwi to a particular aspect or stage of the aquaculture industry (the settlement could promote iwi involvement beyond the production stage).<br>• Less impact on industry than space-based options.<br>• May be used by iwi to enter into private ventures.<br>• Provides most certainty for industry. | • Cash alone is not what iwi desire.<br>• Does not directly provide aquaculture space to iwi (as preferred to some extent by most iwi).<br>• No guarantee financial settlement will enable iwi to access space.<br>• Negotiations could be lengthy and carry high transaction costs.<br>• Iwi may choose not to invest in aquaculture; Māori involvement in aquaculture has been identified as critical to achieving the industry goal of $1 billion in annual revenue by 2025.<br>• Could give rise to litigation by iwi as to whether the Crown has approached delivery of the settlement in the new regime in good faith. *Mitigation: - if cash were offered as part of a regional agreement in which iwi had the opportunity to negotiate a package that balanced cash and space to address their aspirations, ability and risk tolerance in relation to aquaculture.* |

54. Cash could be provided through either one-off upfront payments, or periodic payments. In addition to the benefits, risks and drawbacks discussed above for financial deliverables in general, there are specific benefits, risks and drawbacks related to the different modes of delivery. These are discussed below.

### *4.6. Full and final upfront financial payment*

55. The Crown would deliver an upfront, one-off full and final financial payment based on the forecast and the agreed valuation methodology.

| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • Iwi would gain benefit from having access to full settlement assets at an early stage.<br>• Would be administratively simple and would discharge Crown's obligation quickly. | • Risk of incorrect forecasting. *Mitigation: Periodic reviews to ensure the settlement accurately reflects the actual amount of new space created.*<br>• It may be necessary to undertake periodic reviews, to ensure the accuracy of the payments. |

### *4.7. Periodic financial payment*

56. Ongoing payments could be made either as space was approved or at regular periods (e.g. every five years for a thirty year period).

| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • Lower upfront delivery cost.<br>• Allows for the settlement to be made over time in parallel with aquaculture development.<br>• Able to more accurately ensure that the financial equivalent of 20% of new aquaculture space is provided (as the settlement would occur incrementally as development progresses). | • It may take some time for assets to aggregate to a useful quantum as development of space occurs incrementally.<br>• LECG estimates are based upon net present value; the actual cost of on-going delivery would be greater than upfront payments.<br>• A periodic settlement would be an ongoing liability for the Crown and would require ongoing administration.<br>• On-going delivery would require repeated negotiation and agreement and opportunities to re-litigate previous payments. |

## Space-based deliverables

57. The Settlement Act provides Māori with an entitlement to 20% of new aquaculture space. Options considered included delivering actual space (a 20% 'slice' of each new permitted marine farm), and providing equivalent space elsewhere.

58. The reforms change the Resource Management Act (RMA) by removing the requirement that aquaculture can only take place in Aquaculture Management Areas. The options set out below do not propose any further change to the RMA – the Crown would use its best efforts to deliver space using existing regional council and RMA processes.

| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • Space is the preference of iwi.<br>• Would ensure direct iwi engagement in aquaculture development.<br>• Provision of space could potentially impose lower costs on the Crown than financial settlement. However, the overall cost of this option would be largely dependent on the specific mode of delivery. | (See specific modes of delivery below.) |

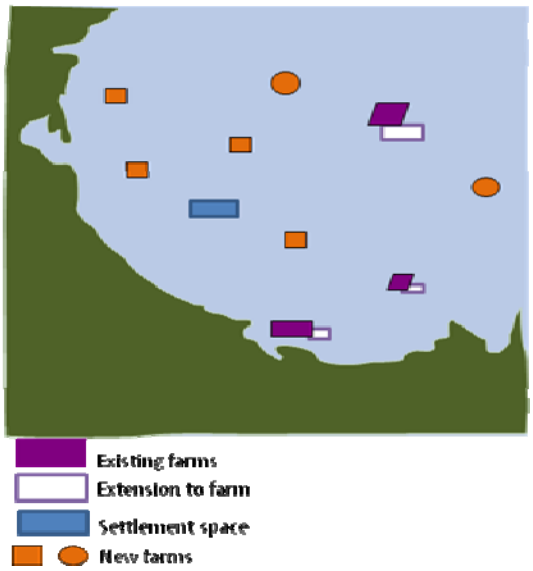
59. Space could be delivered in the form of equivalent space, through the application of alternative allocation tools, or as 20% of permitted farms. In addition to the benefits, risks and drawbacks discussed above for space-based deliverables in general, there are specific benefits, risks and drawbacks related to the different modes of delivery. These are discussed below.

### *4.8. Equivalent space*

60. Under this option, rather than deliver a piece of a newly permitted marine farm, the Crown would use its best efforts to deliver equivalent space elsewhere.

61. Entitlements (created as individual permits are granted) would be aggregated and the Crown would either apply for coastal permits for iwi or if necessary create a zone to provide for iwi permits through a change to the coastal plan.

62. Alternatively, settlement authorisations could be created and transferred to the trustee (on behalf of iwi) and accompanied by cash where necessary to address any shortfall in value between an authorisation in an Aquaculture Management Area and a settlement authorisation under the new regime.



| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • Less impact on industry than delivering 20% of an individual permit.<br>• Allows space to be aggregated into economic parcels.<br>• Gives iwi the flexibility to determine the type of aquaculture activity that will be undertaken in the space.<br>• Maintains the value and integrity of the settlement currency: space.<br>• Less risky as a component of regional agreements, than as the primary deliverable | • No guarantee that the Crown will be able to deliver representative, or any, space. This is the status quo. The 2004 settlement never guaranteed space.<br>• High level of uncertainty associated with creating new space (money may be spent on unsuccessful applications, potentially increasing the cost of delivering the settlement obligation). *Mitigation:* - a value threshold would be determined to ensure the cost to create the space was proportional to the value of the obligation.<br>• Would be an on-going liability for the Crown unless delivered upfront through a regional agreement.<br>• Relationships between the Crown and industry, and iwi and industry could become strained due to possible competition for suitable space. |

### *4.9. Alternative allocation tools*

63. Where regional councils use alternative allocation tools, such as tendering in high demand areas, provision could be made to ensure that 20% of whatever currency the allocation tool provides is allocated to give effect to the Settlement obligation. The Crown would be responsible for converting the currency to permits.

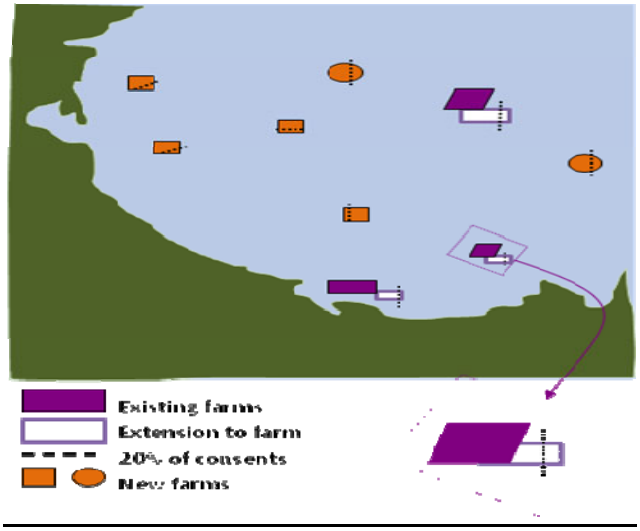
| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • Ensures iwi access to space where alternative allocation tools are used, particularly in areas of high demand.<br>• Allows for provision of the 20% settlement obligation upfront, as soon as space is created. | • Not compatible with the prospective nature of the default delivery pathway.<br>• Could be seen as 'double-dipping' if settlement already provided for in the area. *Mitigation: regional councils to notify the Crown when they intend to establish a new aquaculture zone or adopt an alternative allocation tools for aquaculture, to enable the Crown to assess whether it will utilise this option.* |

### *4.10. Additional allocation in areas of high demand (not recommended)*

64. The Minster of Fisheries and Aquaculture could also have the discretion to allocate more than 20% of space in high demand situations to satisfy the settlement (this is an existing mechanism under the pre-commencement settlement).

| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • Ensures iwi access to space in areas of high demand. | • May unduly impact private applicants where more than 20% of high demand space is allocated to iwi.<br>• Although the power to allocate more than 20% would be discretionary, iwi expectations may be that the power will be exercised. |

### *4.11. 20 % of individual coastal permits (not recommended)*




65. Under this option, iwi would receive 20% of each individual coastal permit granted to marine farm applicants. This space would need to be representative and economic. If the space was not economic, the Crown would need to create space elsewhere.

66. Cabinet has previously agreed that the Crown is financially responsible for the settlement. This means that applicants or councils would need to be compensated for any space transferred to iwi under the settlement.

| *Benefits* | *Risks, drawbacks and mitigation measures* |
|---|---|
| • Would correspond directly to the actual pace and nature of industry expansion into new space with no forecasting or estimating required.<br>• Would guarantee delivery of 20% of new space.<br>• Provides an opportunity for iwi to leverage the coastal permits to form a business relationship with the private applicant. | • It may be difficult for the Crown to compensate applicants for all of the impacts of the 20% settlement obligation, for example the potential difficulties arising from shared boundaries.<br>• Settlement space is more likely to be fragmented and uneconomic, and therefore difficult for iwi to aggregate and manage economically.<br>• May result in iwi receiving unwanted space.<br>• Could constrain iwi ability to plan and make best use of settlement assets as the type, size and timing of assets would depend on the underlying permit application developed by another party.<br>• Would require complex and costly administrative arrangements.<br>• Private applicants and iwi may be faced with potentially unsuitable and vulnerable joint venture arrangements or immediately adjacent aquaculture operations.<br>• The maximum life of a permit and therefore settlement currency (if no extra protections measures exist) would be 35 years.<br>• Applicants would need to apply for larger spaces than they require for their own needs giving rise to additional costs and risks on marine farm applicants.<br>• Identification and agreement of the specific 20% representative parcel is likely to be difficult and may give rise to litigation and difficulty in managing relationships between iwi and the private applicant.<br>• May reduce the amount of useable space if a buffer is required between the applicant's and iwi's part of the marine farm. |

## Preferred package of options

67. After analysing the options set out above, a preferred package of options has been identified. The net economic benefits to New Zealand as a whole are broadly similar—they are in the same order of magnitude. On the other hand, distributional and equity concerns (whose rights are affected, how economic opportunities are allocated etc.) are relatively large, and it is largely in consideration of these that the Ministry of Fisheries has determined its preferred options.

68. The package includes:

**Preliminary step – settlement authorisations:** The creation of settlement authorisations will mitigate the risk that all the 'good' space will be gone before iwi are able to conclude regional agreements with the Crown.

*Risks:* - There are two key risks concerning the creation of settlement authorisations. The first, that the public will perceive this as providing preferential space for iwi. The second risk is that this may hold up industry development in the area.

*Mitigation:* - The first risk is a public perception issue that can be dealt with by clear communications which outline the nature of the 2004 settlement. In relation to the second risk, as discussed earlier, the settlement authorisations will be created based on forecasting which will identify as close as possible space which is representative of the 20% obligation within each region. Settlement authorisations will be created over this space and will be held by the Crown only until such time as regional agreements are reached (but no longer then 2-3 years). Any unneeded space will be released. In the interim, development of the surrounding areas may continue. It is worth noting that the $1 billion industry target is predicated on the participation of iwi in aquaculture. Ensuring space is available for iwi once regional agreements are concluded is fundamental to achieving iwi participation.

**Delivery pathways:**

- Regional agreements – these could include cash, space (using settlement authorisations), or anything else that can be agreed between the Crown and iwi. Regional agreements could include any of the space or financial options discussed. While some of the options analysed are not desirable as a primary deliverable due to the risks identified, the process of negotiating a regional agreement would allow the Crown and iwi to put controls in place to mitigate these risks.

  *Risk:* There is a concern that regional agreements may take time to negotiate and that in the interim industry development will be delayed.

  *Mitigation:* Timeframes will be imposed on concluding regional agreements. Priority regions will have two years from commencement to conclude regional agreements. Remaining regions will have three years (this is to allow for forecasting in these regions to be undertaken).

- Default: Inclusion of the default delivery pathway mitigates the risk of the Crown not delivering on the settlement obligation in the event that a regional agreement cannot be concluded. The default is limited to space created for settlement

purposes and cash. Limiting the deliverables under this pathway reduces the otherwise significant complexity that would be associated with this option.

*Risk:* Given the limitations on deliverables and the pace of negotiation, this pathway may not deliver optimal packages of deliverables and this is unlikely to be the first choice of iwi. Also iwi may consider that space under the default (settlement authorisations) does not have the same value as what is provided under the current settlement (an authorisation in an Aquaculture Management Area).

*Mitigation:* The default provisions are triggered only after 2-3 years. There may be a cash top up to cover any shortfall in value between an authorisation under the current regime and a settlement authorisation under the new regime. Where iwi consider the risk of processing a settlement authorisation through to a coastal permit are too high they may opt for cash in order to mitigate those risks.

69. Providing assets prospectively will enable iwi to engage in aquaculture more quickly and begin contributing to the growth target. Using forecasting and valuation methodologies, along with periodic reviews of growth in new space will help to mitigate the risk of providing the wrong level of assets.

70. Overall the package would enable the settlement to be delivered effectively under the new aquaculture management regime. It provides flexibility to best meet the aspirations of iwi, and contains features (including the Crown using its best efforts to provide space, a fall back to cash, regional agreements, and authorisations) that are consistent with the provisions in the Settlement Act for pre-commencement space and new space.

## 6 Implementation

71. Cabinet decisions on the proposal will be incorporated into the Aquaculture Legislation Amendment Bill (No 3) by way of Supplementary Order Paper.

72. As outlined in previous Cabinet decisions [CAB Min (10) 24/10], the Tasman Interim Aquaculture Management Area will proceed under the current law. The settlement obligation generated from all other new aquaculture space will be delivered under the mechanisms that will be enacted through the Bill.

73. Implementation following enactment will depend on Cabinet's decisions on the proposal. However, in all cases, the Crown will engage with iwi regarding their aspirations and the delivery of the obligation as well as with other stakeholders, including regional councils and industry, regarding the implications of settlement. The Crown will work with the trustee regarding delivery of settlement assets.

74. To facilitate an early start to negotiations to expedite the regional agreement settlement it is appropriate to establish a group of Ministers with power to establish a negotiation strategy. Pending Cabinet's decision delegated authority is sought for the Minister of Fisheries and Aquaculture, Minister of Finance, the Attorney-General, the Minister of Conservation and the Minister of Māori Affairs to approve a negotiation strategy to settle the Crown's new space obligation.

75. Space-based mechanisms will rely heavily on the Aquaculture Unit (within the Ministry of Fisheries) working with regional councils and the aquaculture industry to identify suitable space.

76. The cost of delivering the settlement is expected to be within the range of $34-74 million predicted by the LECG forecast, but this will depend on the specific options implemented. As the figures are net present value, ongoing delivery could exceed these values.

77. If the preferred options package is agreed, including the creation of settlement authorisations, there is a key risk that iwi would be unsuccessful in converting settlement authorisations to coastal permits. The risk of achieving a permit in the new regime is significantly higher for all applicants given that the research and the Undue Adverse Effects test will be undertaken in relation to an application rather than an Aquaculture Management Area.

78. To mitigate this risk, in a default situation the Crown could redress the difference in value between an authorisation under the current regime and a settlement authorisation under the new regime, by way of a cash top up. Alternatively, iwi would be able to opt for cash if they felt that the risk associated with converting permits was too great.

79. Iwi could also mitigate this risk, if the preferred package of options is agreed, by negotiating a regional agreement with the Crown that provides the balance of cash, space and other items that suits their risk tolerance.

80. Business compliance costs will be low as the Crown will bear the cost of the settlement. The actual space option of providing 20% of individual coastal permits would impose the greatest compliance costs as it would use space created by private applicants and councils for the settlement. This would be mitigated by the Crown compensating affected parties; however, it would be difficult for the Crown to compensate applicants for all of the impacts that could arise if actual space is provided.

## 7 Monitoring and Evaluation

81. Evaluation of the delivery mechanisms will be based on their ability to deliver the settlement obligation.

82. Delivery of the settlement will require ongoing monitoring to ensure that the obligation is being met. This will involve the monitoring of the actual space created for aquaculture in order to ensure it is commensurate with the settlement package delivered. Review clauses would likely be negotiated as part of regional agreements. In the absence of a regional agreement, reviews could occur periodically, say initially after five years and then every ten years after that.

## 8 Consultation and engagement

83. The analysis summarised in this paper has been informed by:

- the Aquaculture Technical Advisory Group's report;
- consultation on that report between 5 November and 16 December 2009;
- discussions between Ministers (the Minister of Fisheries and Aquaculture, the Attorney-General and the Minister of Māori Affairs) and iwi leaders;
- the technical group's work between October 2010 and February 2011;
- seven regional hui between December 2010 and February 2011;
- written responses to a settlement delivery discussion document;
- discussions with other government agencies; and
- the Settlement Technical Advisory Group's report.

### Engagement with iwi

84. The Minister of Fisheries and Aquaculture, Minister of Māori Affairs, and the Attorney-General have met with Iwi Leaders and the trustee to discuss a revised settlement delivery mechanism.

85. Ministers and Iwi Leaders appointed a technical group to develop options and discuss them with iwi. The group met regularly between October 2010 and February 2011. The technical group prepared a discussion document, which was released and discussed at seven hui and posted on the Ministry of Fisheries website. The hui were held in Whakatane, Whangarei, Wellington, Napier, Thames, Blenheim and Christchurch.

86. The hui were generally well attended and were held in regions where there is existing aquaculture or prospects of aquaculture development. Iwi with interests in the Auckland region attended either the Whangarei or Thames hui. Taranaki iwi interests were represented at the Wellington hui.

87. The regional engagement hui aimed to:

- inform iwi that the new space settlement obligation is difficult to deliver under the proposed new law;
- discuss options with iwi to best deliver new space settlement obligation under the proposed new law; and
- identify iwi values and aspirations in relation to aquaculture.

88. Following the hui, iwi and others were invited to provide written feedback on the proposed options for delivery of the new space settlement.

89. On 18 January 2011, the Ministry of Fisheries wrote to all Iwi Aquaculture Organisations/Mandated Iwi Organisations, customary forums and fisheries protocol holders. This letter provided information on the outcomes of the regional engagement hui and copies of the discussion document for those who were unable to attend.

90. Iwi and others were also invited to comment on the Bill (which includes minimum changes to the new space settlement delivery) through the Primary Production Committee's consultation process (written submissions closed 11 February 2011).

## 9 Conclusion

91. A new delivery mechanism is needed in order to best deliver the Crown's settlement obligation with regard to new aquaculture space in the proposed regime.

92. Following engagement with iwi and the work of the Settlement Technical Advisory Group, it appears that the best way of delivering the settlement is through regional agreements between iwi and the Crown. Regional agreements offer a high level of flexibility that would likely result in the best overall outcomes. However, in absence of regional agreements, an alternative 'default' mechanism would be required.