



Ministry of
Fisheries
Te Tautiaki i nga tini a Tangaroa

2010 Aquaculture Reforms

Māori Commercial Aquaculture Claims Settlement

**Discussion document:
Delivering the new space obligation**

Regional Hui December 2010



Introduction

1. The Crown has recently introduced legislation to simplify and streamline the way aquaculture happens in New Zealand.
2. New Zealand's aquaculture industry has set a target of \$1 billion per annum in sales revenue by 2025, an approximately threefold increase on current levels. The Crown is committed to enabling that growth: its key objectives for aquaculture reform are reducing cost, delays and uncertainty, promoting investment in aquaculture development, and providing for integrated decision-making.
3. The reforms will be implemented through the Aquaculture Legislation Amendment Bill (No 3) (the Bill). The changes are complex and the Bill will amend four different acts if passed, including the Maori Commercial Aquaculture Claims Settlement Act. Appendix B provides an overview of the reforms, and you can visit www.fish.govt.nz/en-nz/Aquaculture+Reform/ for more information on the reforms.

The Maori Commercial Aquaculture Claims Settlement Act 2004

4. The Maori Commercial Aquaculture Claims Settlement Act 2004 (the Settlement Act) provides for the full and final settlement of contemporary Māori claims to commercial aquaculture. It establishes an entitlement to the rights and values associated with 20% of space created for aquaculture. The intent of the Settlement Act was to ensure that Māori have access to space in the coastal marine area for the purpose of engaging in aquaculture. The Settlement Act includes separate mechanisms for space created:

- between 21 September 1992 and 31 December 2004 (*pre-commencement* space – this is space that was approved for aquaculture at the time the settlement was agreed); and
- after 1 January 2005 (*new* aquaculture space that would be created after that date).

5. Under the 2004 Settlement Act iwi (through the Takutai Trust¹) were to receive authorisations for a representative 20% of every Aquaculture Management Area (AMA) as soon as the AMA was approved by a regional council.

6. No new aquaculture space has been created under the current aquaculture regime²; therefore no settlement obligation has arisen since 1 January 2005.

7. Almost all of the Crown's obligations relating to pre-commencement space were addressed in early 2010 through the Maori Commercial Aquaculture Claims Settlement (Regional Agreements) Amendment Act 2010. The Crown is currently engaging with iwi (through Iwi Aquaculture Organisations and Mandated Iwi Organisations) in the remaining regions to discharge the Crown's outstanding pre-commencement space obligation. These settlements involve the Crown providing cash that was or will be agreed as equivalent to 20% of the aquaculture space approved between 1992 and 2004 (because the Settlement Act was not legislated at the time the space was approved).

New mechanisms for delivering the new space obligation will not affect the pre-commencement settlement.

¹Takutai Trust is the working name of the Māori Aquaculture Settlement Trust; it was established under the Settlement Act to deal with the allocation of space in the coastal marine area to iwi Aquaculture Organisations.

² Interim AMAs are in the process of being created in the Waikato and Tasman regions. Cabinet has agreed that they will be completed under the current law; iwi in those regions will receive authorisations for 20% of new space approved.

Impact of the reforms

8. The key change under the proposed reforms that affects the settlement is the amendment of the Resource Management Act to remove the requirement that aquaculture can only take place within AMAs. New space will now be created on a permit-by-permit basis and councils will no longer be able to issue authorisations on the basis envisaged under the Settlement Act. This creates the need to identify new mechanisms for the delivery of the settlement.

9. The changes also provide an opportunity for the Crown to facilitate iwi economic development and the sustainable growth of the sector. The Crown believes that a settlement delivery mechanism that delivers certainty to iwi and industry has the potential to advance the industry.

What is in the Bill?

10. The proposed removal of AMAs would leave no provision in law for delivery of the settlement obligation for new space and new mechanisms need to be provided. Cabinet had agreed to a process of engagement with iwi to develop new mechanisms; however this process could not be completed before the Bill was introduced. In order to introduce the Bill, the gap in relation to the settlement needed to be addressed, and Iwi Leaders supported the inclusion of the following provisions in the Bill as a measure to protect both Crown and iwi interests in the interim:

7A Crown's obligations in respect of new space

(1) The Crown is responsible for meeting its obligations to deliver the settlement to Maori.

(2) The Crown's obligations must be complied with by way of either—

(a) ensuring that 20% of new space in the coastal marine area is transferred to the trustee for the purpose of aquaculture activities; or

(b) agreeing to an equivalent by way of a regional agreement.

(3) The Crown must comply with subsection (2) as soon as practicable.

11. The provision focuses on the obligation to deliver space, but adds the flexibility of regional agreements recognising that one size does not fit all. The principle that iwi will not need to keep or invest their settlement assets in aquaculture will be retained.

12. Following completion of engagement, including this series of hui, review of written responses, and discussions with iwi leaders, the Crown will amend the Settlement Act to ensure that it is best designed to deliver on the new space obligation.

The Crown is financially responsible for the settlement

13. It is established policy that private property or interests will not be used to fulfil historical Treaty settlement obligations. Based on this principle, the Crown has acknowledged that it is financially responsible for the settlement.

Why are we meeting with iwi?

14. The Crown is interested in identifying iwi values and aspirations in relation to aquaculture to enable amendments to the Settlement Act to be designed to best deliver on the settlement obligations.

15. There is no simple way to implement the mechanism set out in the Settlement Act in the new regulatory regime, and the Crown recognised, when agreeing to the reforms, that engagement was needed with iwi to develop suitable new delivery mechanisms.

16. Cabinet agreed to an engagement process that included establishing a leadership group of Ministers and Iwi Leaders assisted by a technical group of Crown and iwi advisors (see Appendix 1 for details). The role of the technical group is to develop draft options to discuss with iwi through a series of engagement hui, and to use feedback from iwi to refine the options to ensure the legislation provides the ability to deliver the settlement using a range of mechanisms.

17. The purpose of this paper is to provide information about the reasons for the change, and the options identified for new mechanisms to deliver the settlement, to assist iwi to engage in the discussion. We seek feedback on these options and whether there are any other options or implications in addition to what is set out here.

18. Our discussion is structured around two primary delivery pathways: regional agreements and a 'fall-back', ie, what could be done in the absence of regional agreements.

Questions:

1. In general, what are your aspirations and expectations about iwi participation in aquaculture?
2. What are the biggest barriers to iwi engaging in marine farming?

Regional agreements

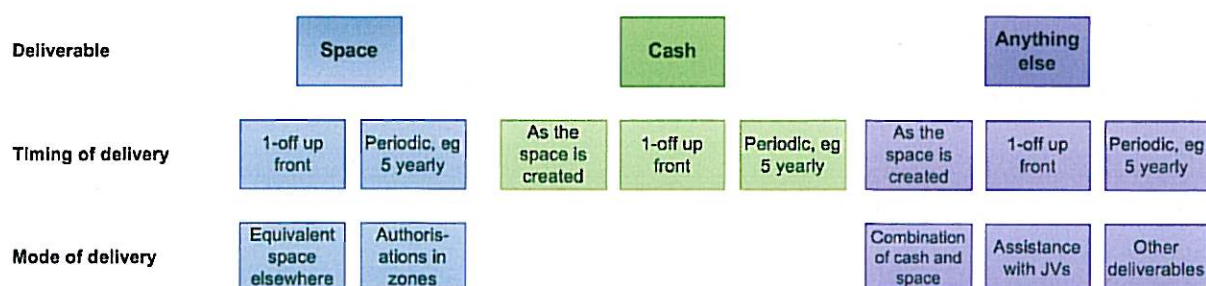
What is a regional agreement?

19. Under a regional agreement the Crown and iwi within a region could agree to a package of deliverables equivalent to 20% of new space.

20. Regional agreements would provide flexibility and choice in whether and how iwi engage in aquaculture. This could be passive involvement through investment, direct involvement through owning and operating a marine farm, involvement in a peripheral industry, or other options.

What could a regional agreement include?

21. The diagram below outlines possible elements of a regional agreement.



Deliverable

22. Under a regional agreement with the Crown, iwi would be able to choose space or cash, or a combination, or any other type of arrangement that would best deliver on the settlement obligation taking their aspirations into account. Regional agreements may also provide for more creative deliverables, such as assistance to enter into joint ventures with established operators in the industry.

23. A valuation methodology would need to be established, and its application confirmed in regional agreements, to ensure that the value of the space or other deliverables (including cash) provided is 'equivalent' to the 20% obligation.

24. Space may be delivered in more than one 'mode', that is, it may be delivered as equivalent space or as authorisations in the event that zones are created for the purpose of tendering. These modes are discussed in more detail below.

25. Space may not be the critical factor for iwi to establish a successful aquaculture enterprise. In some cases cash, or a combination of cash, space and other arrangements, may provide better flexibility and choice to iwi. However it should also be recognised that should iwi want to be involved directly in aquaculture they will need space; and having cash does not always mean that it is possible to obtain appropriate space for an acceptable price.

26. Regional agreements could assist iwi to bridge the gap between having access to space and accessing the finance to meet the considerable investment required to commence marine farming.

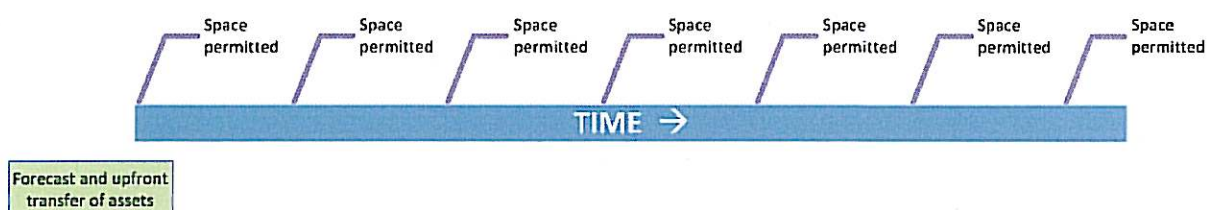
Pros	Cons
Space	
<ul style="list-style-type: none"> The deliverable envisaged in the Settlement Act Provides direct access to space 	<ul style="list-style-type: none"> As is the case for the current settlement mechanism, significant additional investment is required to actually start up and operate a marine farm Delivery costs may be out of proportion to the value of the asset delivered There are additional cons for the different delivery modes, please see <i>Mode of Delivery</i> below
Cash	
<ul style="list-style-type: none"> Flexible – allows iwi to seek to engage in aquaculture in the manner in which they feel most likely to be successful, or to invest elsewhere 	<ul style="list-style-type: none"> Space not delivered directly; it may not be possible to get appropriate space for an acceptable price

Timing of delivery

27. Through a regional agreements process iwi would be able to consider and negotiate in respect of whether they would prefer to receive their settlement asset incrementally, as space is created, periodically in aggregated packages (say every five years) or whether they would prefer to receive a one-off package up front. Iwi may also be able to negotiate different delivery timings for different elements of a regional agreement package.

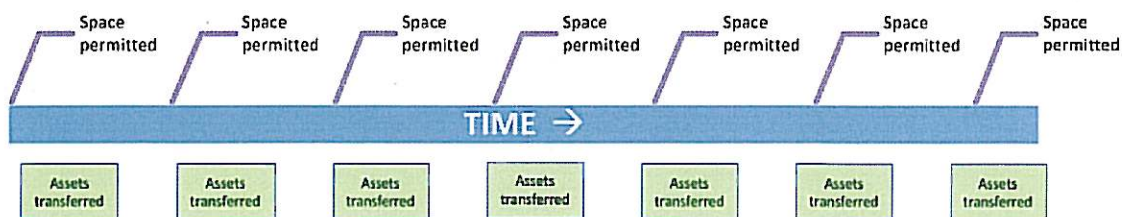
One-off up front

28. The settlement obligation could be delivered once, upfront, based upon a forecast. A forecasting methodology would need to be established which meets the expectations of all parties in respect of independence, accuracy, cost, etc. This option could be designed to include a review of its adequacy in the event that there was far greater expansion of marine farming than was estimated.



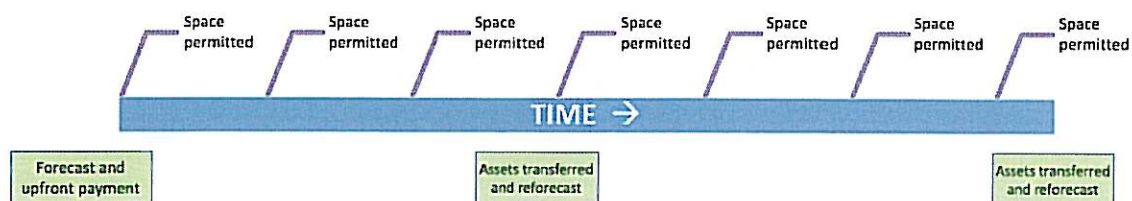
As space is created

29. The settlement obligation would be triggered at the point that a permit is granted. Settlement assets could, therefore, be delivered each time a permit is granted.



Periodic

30. The settlement could be delivered periodically, say every five years, based upon actual growth in aquaculture space. This could be retrospective, based on actual space creation, or delivered in advance based on a short-term forecast, with an adjustment and reforecast every five years.



Pros	Cons
As space is created	
<ul style="list-style-type: none"> The settlement would be delivered based on actual space created 	<ul style="list-style-type: none"> Settlement would be intermittent and may take significant time to build to a useful level
One-off up front	
<ul style="list-style-type: none"> Consolidated settlement assets provided ahead of time Allows earlier access to settlement assets, while space is more likely to be available Iwi could plan for their engagement in aquaculture on the basis of a known quantum 	<ul style="list-style-type: none"> The settlement would be based on projections, rather than actual space created It may be difficult to accurately predict developments in aquaculture practice and technology, which may allow more space to be farmed or add value to space by allowing other options at sites in the future
Periodic	
<ul style="list-style-type: none"> The settlement would be delivered based on actual space created Would allow for small increments to be aggregated and delivered as a parcel If forecast, allows earlier access to settlement assets projected for the period, while space is more likely to be available 	<ul style="list-style-type: none"> Settlement would be intermittent and may take significant time to build to a useful level If retrospective, may be provided too late to access desirable space

Mode of delivery

Equivalent space

31. Under this option, space of equivalent value would be allocated to iwi. The Crown could aggregate space entitlements until they reached an economic size and then apply for a marine coastal permit for iwi, or if necessary create a zone to provide for iwi permits through a change to the coastal plan. Alternatively the Crown could, following agreement with iwi, apply for space early and make it available progressively or immediately.

32. The valuation methodology would be used to ensure that the value of the space provided is 'equivalent' to 20% of the space permitted.

Authorisations in zones

33. If a council were to identify space (a zone) that it wished to tender for development, it could deliver a representative 20% of space to meet the new space obligation by allocating authorisations to iwi.

Pros	Cons
<i>Equivalent space elsewhere</i>	
<ul style="list-style-type: none"> • Allows for space to be aggregated rather than delivered in small, scattered parcels • No shared boundary with other marine farmers • In some circumstances could be the most expedient way to ensure access to space 	<ul style="list-style-type: none"> • May prove difficult to deliver – the Crown cannot guarantee space • May be less efficient than if iwi obtained cash and applied for space themselves • Equivalent space may not be available unless it is set aside early
<i>Authorisations in zones</i>	
<ul style="list-style-type: none"> • Similar to the delivery mechanism as set out in the Settlement Act • Can be delivered in conjunction with other modes of delivery • Likely to deliver space of 'economic size' • Zones could be used in 'high demand' situations; this mechanism would mean iwi would have access to desirable space 	<ul style="list-style-type: none"> • Zones unlikely to be established on the same basis of AMAs, eg, may not have had detailed research or Undue Adverse Effects test completed – additional expense required to gain a permit

Questions:

3. What are your experiences with regional agreements?
4. What other options or elements should be available for regional agreements?

In the absence of regional agreements

34. Where there is no regional agreement, a fall-back provision must be provided in legislation to ensure that the settlement obligation is delivered. The fall-back provision will need to define clear processes to deliver the obligation without requiring any agreement between iwi and the Crown. The technical group has identified two options for discussion:

- 20% of actual space created
- Equivalent space

20% of actual space created

35. Under this option, each time a new marine farm is permitted, or a zone is created, for example for space to be tendered for development, iwi would receive 20% of the actual space created. For individual farms, this would mean that iwi would receive a representative 20% of the actual space permitted.

Deliverable	Space
Mode of delivery	20% of actual marine farms / zones
Timing of delivery	As the space is created

36. In the case of zones created for tendering, iwi may be able to have the option of receiving 20% of the space through authorisations, or 20% of the marine farms when they are permitted. This is a complex mechanism, and the way it might work is not yet fully understood.

37. This option is not preferred by the Crown as it would deliver small, scattered parcels, which would be difficult to aggregate and manage effectively. The Crown's view is that this option would unduly impact on private applicants for coastal permits for marine farming and may act as a disincentive to investment, which would have a negative impact on growth in aquaculture space, including the settlement component.

38. Iwi Leaders consider that this option must be included for discussion as it is the only option that would ensure delivery of space.

Pros	Cons
20% of actual marine farms	
<ul style="list-style-type: none"> • Direct delivery of space 	<ul style="list-style-type: none"> • Delivery cost may be out of proportion to the value of the asset delivered • The settlement would deliver small, scattered parcels, which may be difficult to manage comprehensively as an asset (see figure 1, below) • Space selected and permitted by others may not be suitable in terms of location or type of marine farming; consent conditions may not allow flexibility to engage in aquaculture as desired • It may be difficult for private applicants and iwi to agree on the representative 20% that will be handed over • Risk of disputes in relation to shared boundary • This approach may act as a disincentive to investment in aquaculture and reduce growth overall as well as the settlement increment

20% of authorisations in zones

- Similar to the delivery mechanism as set out in the Settlement Act
- Can be delivered in conjunction with other modes of delivery
- Likely to deliver space of 'economic size'
- Zones could be used in 'high demand' situations; this mechanism would mean iwi would have access to desirable space
- Zones unlikely to be established on the same basis of AMAs, eg, may not have had detailed research or Undue Adverse Effects test completed – additional expense required to convert to permit

As space is created

- The settlement would be delivered based on actual space created
- Delivery cost may be out of proportion to the value of the asset delivered
- Settlement would be intermittent and may take significant time to build to a useful level

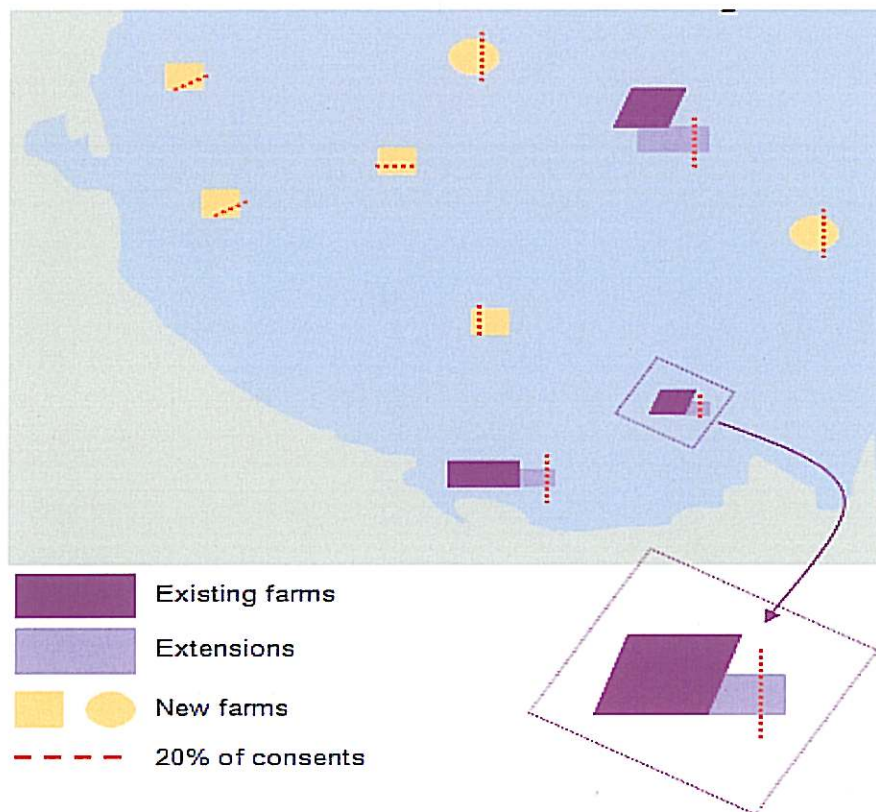


Figure 1: 20% of actual space created (small scattered parcels)

Equivalent space

39. Under this option, rather than deliver a piece of an actual marine farm, the Crown would deliver equivalent space elsewhere. Delivery would be periodic, and retrospective based on actual permitted space.

Deliverable

Space

40. The Crown would be obliged to use its best efforts to access space to deliver as soon as practicable. Delivery could take up to five years owing to the complexity of purchasing and consenting processes (including appeals). In some cases a cash payment may be required instead.

Mode of delivery

Equivalent space elsewhere

Timing of delivery

Periodic, eg 5 yearly, retrospective

41. The Crown would need to establish a process to value space in order to identify the space or cash equivalent. As a default or fall-back provision, this cannot rely on negotiation or agreement with iwi, although the Crown would engage with iwi to the extent possible in identifying alternative space. The Crown cannot guarantee the delivery of equivalent space.

Pros

Cons

Equivalent space elsewhere

- Allows for space to be aggregated rather than delivered in small, scattered parcels
- No shared boundary with other marine farmers
- May prove difficult to deliver; could result in delivery of cash instead

Periodic

- The settlement would be delivered based on actual space created
- Would allow for small increments to be aggregated and delivered as a parcel
- Settlement would be intermittent and may take significant time to build to a useful level

Questions:

5. What is your reaction to these two options?
 - 20% of actual space created, delivered at the time it is created
 - Equivalent space, delivered periodically
6. Are there other fall-back options the Crown could use to deliver on its new space obligation in the absence of regional agreements?

Assessment criteria

42. In finalising our proposal, we will need to ensure that it is consistent with:
- Treaty principles as expressed in the Te Puni Kōkiri publication: *He Tirohanga ō Kawa ki te Tiriti o Waitangi*
 - The commitments established in the Settlement Act:
 - i. rights and values associated with 20% of new aquaculture space;
 - ii. entitlement is on a regional basis;
 - iii. entitlement is on an Iwi Aquaculture (or Mandated Iwi) Organisation basis;
 - iv. allocation within each region is based on a collective agreement amongst the iwi in the region;
 - The objectives for Aquaculture Reform: reduce costs, delays and uncertainty; promote investment in aquaculture development; enable integrated decision-making
 - Crown fiscal responsibilities: particularly in relation to fiscal balance and risks

The Crown's preference

43. The Crown's preference is for a cash settlement, paid up front through regional agreements. The Crown believes that this will be the most expedient way to deliver the settlement, and that it delivers the following benefits:

- Timely delivery:
 - reduces the risk of late entry into the market for space when desirable space may be unavailable
 - other options for timing of delivery are intermittent and may take significant time to build to a useful level
- Allows flexibility and choice as to whether, when and how iwi engage in aquaculture
- Provides the opportunity for iwi to develop long-term investment plans based on a known quantity of funding
- Allows for iwi to decide how to split the funds to strike a workable balance between investment in space and in infrastructure and start up costs
- Avoids negative impacts on private applicants that could create a disincentive for general investment in aquaculture, which could reduce the settlement increment
- Avoids delivery of small, scattered parcels of space that would be difficult to aggregate and farm efficiently
- Avoids the risks that could arise over shared boundaries
- Avoids the risks in relation to the Crown attempting to access space on behalf of iwi – the Crown cannot guarantee the delivery of equivalent space

Iwi preference?

44. Preliminary discussions indicate that iwi could prefer space in the first instance along with the ability to vary this through regional agreements with the Crown to provide arrangements that best suit the iwi in the region. This could provide iwi with greater flexibility in that they will gain space rather than find, subsequent to a cash settlement, that no suitable space is available to them. Iwi are concerned with receiving an effective aquaculture settlement that offers the ability to participate in development as it occurs.

Questions:

7. Overall, what is the best way to ensure that iwi can access the space they want?
8. What are the most important things the Crown can do in delivering on the new space obligation to ensure that iwi that wish to can establish marine farms?

What's next / Feedback

45. The technical group will consider all of the feedback provided at the hui and any written responses, and will prepare a final proposal for Ministers and Iwi Leaders. Cabinet will make final decisions on amendment of the Settlement Act.

46. Written responses are invited on this discussion document.

Written responses to *this discussion document* must be received by 18 February 2011 in order to be considered as we finalise the proposal.

Please send written responses to this discussion document by post to:

The Ministry of Fisheries
Aquaculture Reform Team
PO Box 1020
Wellington
Attention: Tania Gerrard

or email to aquaculturereform@fish.govt.nz.

47. This process will run in parallel with submissions to the Primary Production Committee on the Bill.

Note that *submissions on the Bill* must be made directly to the Primary Production Committee.

Submissions on the Bill can be posted to:
Committee Secretariat
Primary Production
Parliament Buildings
Wellington

Or you can submit online at
www.parliament.govt.nz.

Appendix A: Leadership and technical group

For this engagement process, the Crown is represented by the Minister of Fisheries and Aquaculture, the Attorney-General, and the Minister of Māori Affairs.

The Iwi Leaders are:

- Sir Tumu te Heuheu
- Naida Glavish
- Matiu Rei
- Harry Mikaere
- Mark Solomon
- Tukoroirangi Morgan
- Sir Wira Gardiner
- Sonny Tau

The Iwi Leaders have been involved in this process in terms of the following principles:

- The role of the Iwi Leaders is limited to advising the Crown on the development of options;
- Members of the Iwi Leaders do not speak for, or represent, any iwi other than their own;
- The Iwi Leaders do not have a mandate to negotiate or reach agreements on behalf of any iwi;
- The Iwi Leaders report back to iwi, both directly, through e-pānui and hui as required, and through regularly Iwi Chairs' Forums; and
- Engagement between Ministers and the Iwi Leaders does not derogate from, and is no substitute for, direct engagement between the Crown and iwi.

The technical group comprises of Crown and iwi technical advisors with a range of expertise and experience in aquaculture, resource management, policy development, local government processes, kaitiakitanga, and iwi development.