To:	Te Ohu Kai Moana Trustee Limited
FROM:	David Cochrane, Cochrane Advisory
SUBJECT:	Analysis of the proposed amendments to the Maori Fisheries Act to give effect to recommendations arising from the Review
DATE:	8 March 2023

Maori Fisheries Amendment Bill 2022 (the Bill)

Introduction

1. I have been engaged by Te Ohu Kai Moana Trustee Limited (Te Ohu) to undertake a legal and policy review to explain and highlight the response of the Government to the 2015 review and subsequent steps.

2. Te Ohu may choose to share this report with members of its Group, MIOs, the two remaining RIOs, and the RMOs, but it should be noted that this report has been prepared for and in conjunction with Te Ohu, and affected entities are encouraged to obtain their own legal or strategic advice as they consider necessary.

3. The bill was Introduced (filed with the Clerk) on 22 December 2022, and its First Reading began on 7 March 2023. It has been referred to the Maori Affairs Select Committee. The Committee will call for submissions, and likely on a tight timeframe so as to pass the legislation before the election. The date will be notified on Parliament's website.

Scope of review

4. In undertaking this review, I have considered the following:
   a) Te Ohu's First Report dated 30 September 2016 and Second Report to the Minister dated 28 August 2017,
   b) Summary of Proposals from MPI dated August 2022,
   c) an undated and partly redacted Cabinet Committee Paper relating to the Bill,
   d) Cabinet Legislation Committee minute of 15 December and related paper (both with redactions),
   e) The Regulatory Impact Statement and Department of Disclosure Statement (both MPI documents with redactions),
   f) the Bill, and some earlier drafts.

5. This review considers the amendments to the MFA proposed by the Government to give effect to iwi resolutions following the 2016 statutory review required by section 114 of the Act, and focuses on whether the resolutions are implemented appropriately and related issues. It does not address any other issues in relation to the Bill

Recommendation 1: Te Ohu Governance Restructure

6. The proposed change in the Bill removes the electoral-college system Te Kawai Taumata for appointing Te Ohu Kaimoana directors and, in its place, iwi directly appoint and remove the board of Te Ohu Kaimoana directors on a one vote per iwi basis.

7. A minor point, but at clause 25, section 29 should be deleted entirely as there is already an appropriate definition of representative Maori organisation in the same terms in section 5(1).

Recommendation 2: Iwi to hold all AFL shares

8. The proposed change in the Bill converts Te Ohu's interests in Aotearoa Fisheries Limited (AFL), which are voting shares (100%) and income shares (20%), to ordinary shares for distribution to the AHCs of the MIOs in proportion to the total number of income shares they currently hold.

9. Section 35(1)(e) of the Bill allows Te Ohu to acquire or dispose of ordinary shares in AFL in accordance with the provisions of Part 4. But Part 4 does not refer to shares of any kind, and it is not intended that Te Ohu acquire AFL shares.

10. The proposed insertion of "ordinary shares" in section 35(1)(e) by clause 30(2) of the Bill should be removed, and the deletion of "income shares" should remain as a deletion to resolve this discrepancy.

11. Further, although section 153 is fundamentally sound, under that provision, Te Ohu will hold ordinary shares in AFL on trust for the 2 RIOS, but should not be acquiring and disposing of them, and section 153 is not in Part 4. Section 35(1) confers discretions on Te Ohu, while section 153 imposes duties.

12. Also clause 30(1) if the Bill says that Te Ohu may engage in "other activities" "by special resolution or other approval". If the "other approval" is a directors' resolution it adds nothing to the current provision (which has no specific approval process). Otherwise it is unclear.

Recommendation 3: Distribution of Te Ohu's surplus (other than from levies)

13. At a special general meeting of Te Ohu a resolution was passed (without notice) by 28 to 23 votes to the effect that the distribution of any surplus funds other than from levy funding be on an equal basis regardless of iwi size, rather than proportionately based on national iwi population. The Minister noted in his (heavily redacted) paper to the Cabinet Legislation Committee that:
    1. Te Ohu had put forward the 2 options.
    2. Te Runanga O Ngai Tahu had commenced urgent High Court proceedings.[1]
    3. Without a significant majority supporting equal distribution, the Minister would not support equal distribution either.

    The proposed section 54H (clause 42 of the Bill) provides for proportionate distribution of any surplus funds.

14. This amendment is addressed at section 54H (clause 32 of the Bill).

15. Other points relating to proposed section 54H include that RIOs do not qualify for distribution of surplus funds from Te Ohu under section 54H, but they do qualify for distribution of surplus levy funding under section 54G.

[1] I understand those proceedings were discontinued earlier this month.

16. There seems to be a mistake in section 54H(2), because section 54H(7) contemplates section 153 applying, and section 153(4) will refer to section 54H. Section 153 relates to Te Ohu holding assets on trust where there is no MIO.

17. The solution seems to be that RIOs should participate in both kinds of distribution of surplus, and sections 54H and 153(4) should be amended accordingly.

18. Of much more significance, sections 54G and 54H relate to returns of surplus if "TOKMTL determines". Companies decide or determine things in one of 2 ways; either by director resolution or by shareholder resolution. These sections need to be clear as to who makes these determinations, how they might be initiated, and notice requirements. Since continued solvency is a directors' responsibility, I suggest that the decisions should be those of the TOKMTL directors, I believe.

Resolution 4: Compulsory Levy

19. This proposed change will enable iwi or Te Ohu to implement an annual levy for Te Ohu, including enabling Te Ohu to initial a levy proposal should it require it to continue performing its duties and functions.

20. No substantial issues beyond a simple drafting point at the proposed section 54A. That is, resolutions do not usually "ask", and this term carries connotations of mere request or discretion. Preferred terminology would be, "direct" or "instruct". Alternatively, the term "authorise" could be used. This would leave the directors with a discretion as to whether or not to proceed. A majority of directors can initiate the process anyway.

Resolution 6: Dividend Process

21. This proposed change will enable AFL's shareholders to set the annual dividend level at an agreed level, noting that the current 40% dividend policy will continue in effect and would only be changed should the shareholders approve that on an annual basis.

22. Clause 51 giving effect to that change is legally sound, but in practice there may be a timing issue arising from the new section 76(6). If an annual general meeting (AGM) is held in the March after the previous year end, as is proposed, it seems that AFL cannot pay out any distribution before the AGM because it does not know what the shareholders might resolve.

23. Also, subsections (3) and (4) of section 76 putting obligations on AFL's subcompanies should include reference to subsection (6) as well as subsection (2); but that might be hard to do so long after the end of the financial year.

24. It would not be appropriate to set the dividend in advance, because circumstances change and directors have solvency issues to consider. While listed companies often have a dividend policy, they are always caveated.

25. The changes to section 76 tell the directors that they must continue to plan for at least a 40% dividend unless and until they can persuade the shareholders to relieve them of that obligation. The directors have to be satisfied as to ongoing solvency when approving dividends; see section 52 of the Companies Act 1993, as acknowledged in the proposed subsection 76(6).

26. Subsection (6) gives effect to para 151 of Te Ohu's Second Report of 28 August 2017, and so the shareholders can waive the 40% dividend requirement. The shareholders do not set a different dividend; they merely relieve AFL of the minimum 40% requirement. The directors could authorise a lower or even higher dividend, though they do not need a prior shareholders' resolution if they want to pay a higher dividend.

27. A possible solution might be to provide that section 76(6) does not prevent the directors from authorising payment of a dividend under section 52 of the Companies Act at any time if they consider it is appropriate to do so.

Recommendation 7: AFL major transactions

28. Following the amendments proposed byf the Bill, Te Ohu will no longer be responsible for approving major transactions for AFL, therefore it is proposed a 75% majority iwi voting threshold be set up for major changes to business activities in AFL. This would align with the standard "major transactions" provisions.

29. This is at section 61(3) (clause 46 of the Bill). Note that section 35(1)(c) does not require change because Te Ohu Group will no longer include AFL. However, section 35(1)(c) is amended by clause 30(1) of the Bill to refer to "special resolution or other approval" for other activities of TOKMTL, but it is not clear what "other approval" means.

Resolutions 8 and 9: Directors for Te Wai Māori Trust and Te Pūtea Whakatupu Trust

30. This would see an increase in the maximum numbers of directors for TWMTL and TPWTL from three directors to five with a majority quorum. It is also proposed that the appointment term of directors change from four years to three years with a removal on restrictions on the number of terms a director can serve.

31. No strictly legal issues, but the change from 3 directors to 3 to 5 directors, when considering the majority quorum provision, means that if at any point there are only 3 directors, the quorum drops to 2 directors. Iwi may like to consider this further.

32. Presumably the change in director numbers is being made because there is a desire to have more than 3 directors. If there are 4 or 5 directors, a majority is 3.

33. The provisions could say "a majority, but not less than 3", so nothing changes if a 4th director dies or resigns, and a replacement has not been appointed. Admittedly, that means unanimity, but unanimity is the default provision for trustees generally, and there might be an incentive created for Te Ohu to maintain/ restore the number of directors to at least 4. There is also the possibility that the number of directors available to vote on any issue could be reduced by conflicts of interest.

34. The reduction in term from 4 years to 3 years does not require legislation to remove any current Director who has served more than 3 years, because sections 87(2)(c) and 100(2)(c) allow Te Ohu to remove Directors at any time, and without reasons being given. Transitional provisions have been added to the Bill at Schedule 1AA clauses 12 and 13 anyway, though they do not seem to be essential.

35. Also, sections 89 and 102 will be repealed. This means that Te Ohu can appoint as directors of TWMTL and TPWTL any number of its own directors, AFL directors, or directors of the other Trust. Iwi may feel this does not give them, as opposed to Te Ohu, greater direct control of the 2 Trusts, as all appointments are made by Te Ohu, and the only way for iwi to influence appointments is through their appointment of Te Ohu's directors. At present, only one Te Ohu director can be a director of either Trust, nobody can be a director of both Trusts, and no director of AFL or its subcompanies, can be a director of either Trust.

Resolution 10: Trading processes

36. Current transparency provisions of asset sales within the Māori pool will be removed and replaced with a model that will mean iwi can sell their settlement assets to a willing buyer within the Māori pool without the approval of 75% of adult iwi members who vote on the proposal, or running a bidding process. The proposed sale will have to comply with the sales policy as expressed in the constitutional documents of the MIO, and these documents will need to provide for the terms on which the MIO can authorise sales of settlement quota and the process for approval. It will be for each iwi to decide what restrictions, if any, that they want to impose in their MIO's constitutional document regarding sales of settlement quota. Sales must still be to another MIO, or part of the AFL Group.

37. This amendment is provided for in the new section 162. This section refers to sales of quota, but section 167(2A) assumes section 162 applies to other types of transactions (presumably those in section 167(1); but section 162 is for sales only. Section 162 does apply, but only because section 167(1) and (2) have the effect of extending the normal meaning of sale.

38. It could be made much clearer by having section 162 refer to section 167 transactions directly, rather than applying the sales rules in section 162 to transactions that are not sales. It is expected that TOKMTL will submit that this be clarified.

39. Note, that the exclusion of the Te Ohu Group means that Te Ohu will not be able to purchase quota on behalf of the 2 remaining RIOs.

Trading and the Crown

40. A potentially much more significant change that is not contemplated in the Recommendations or Resolutions has been included in the Bill for section 167. The Crown is being excluded from the definition of third party in section 167; and so has the potential to acquire settlement quota through exercising its rights under options, mortgages, other security interests, and guarantees.

41. That seems anomalous when the Crown will not have the right to purchase settlement quota from MIOs directly, and it is not clear what the Crown would or could do with the quota. If that means the settlement quota leaves the "Māori pool" and reverts to the Crown permanently, then iwi may be concerned? There are controls in the Fisheries Act 1996 on what "third" parties who acquire settlement quota under those various instruments must do by way disposal of the quota, designed to protect the "Māori pool" overall; but exclusion of the Crown as a third party means that those controls would not apply to the Crown, and it may be that the Crown can do whatever it wishes with the quota, including diminishing the "Māori pool"?

42. From an iwi perspective, is there any appetite for iwi being able to meet commitments to the Crown by granting interests over settlement quota, then defaulting and forfeiting that quota? Section 167 was originally drafted to prevent that happening with any other party, including the Crown; that is, protection of the "Māori pool" that is settlement quota was paramount.

43. A further point is that "third" party in section 167 is something of a misnomer. Although often used colloquially, there will only be two primary parties to the transaction in section 167; the MIO, and the option, security, mortgage, or guarantee holder.

44. So, section 167(3) should refer to "any party to a transaction referred to in subsection (1) that is not a MIO, AHC, or a subsidiary of a MIO or AHC". As I see it, MIOs should be able to use settlement quota in security transactions between themselves and with AFL, because if there is a default, the settlement quota will not leave the wider Māori settlement quota pool.

45. That wording would be more accurate, and clearer. There would be no need for subsection (4). The Crown could be added to the wording above for subsection (3), but only if there is a case for that. I am not aware of any discussions having been held on that policy point.

Resolution 11: Further reviews

46. This proposed change implements a future review requirement to take place not sooner than seven years but no later than 10 years from the time the current proposed changes take effect.

47. This is addressed at section 116 (clause 68).

48. The effect of section 116 is that reviews can be deferred forever, or extinguished, by not passing special resolutions, whether by omission or intent.

49. If desired, this could be reversed so that if there are no reviews before October 2035, a review is required unless a special resolution says "NO", rather than requiring a resolution to have a review.

50. Also note that RIOs are excluded from section 113(1), although they are not there now.

Resolution 12: Distributions to charities

51. This proposed change would allow Te Ohu to distribute funds directly to charitable entitles within the MIOs or PSGEs structures without being liable for tax.

52. No issues with the implementation of this in the Bill

Resolution 13: Conversion of preference shares

53. The proposed change would convert Te Ohu's redeemable preference shares in AFL into income shares, which are then converted to ordinary shares to be distributed back to iwi.

54. The implementation would be within 6 months of an uncertain date but Te Ohu believes it can manage the process.

Additional Proposal 15: MIO elections

55. MPI states that Te Ohu seeks legislative change to clarify the electoral provisions of MIO (set out at Kaupapa 1) under Schedule 7 of the MFA, and specifically, to change 'Kaupapa 1 and 2' to clarify that all adult members of an iwi have the opportunity to elect all directors, trustees and office holder of the MIO of an iwi.

56. Kaupapa 1 of Schedule 7 as amended by the Bill at clause 98 allows participation (which might not be direct) in the election of one or more directors, which is what is wanted, but is not the same as all adult members having the opportunity to elect all directors (as would be the default in a typical public company and might be the case with the current wording). I believe Te Ohu intends to clarify the situation and request a clear statement that the participation may be direct or indirect.

Additional Proposal 16: PSGEs as MIOs

57. Te Ohu has proposed that a simplified recognition process of a PSGE as a new MIO be implemented. This would see the removal of current restraints to enable AHCs to directly transfer assets to the new MIO and removes a 15-month time limit which is often not met due to delays in negotiation and/or process.

58. Section 12(1)(d)(ii) prescribing functions and requirements for PSGE and MIOs could include a reference to new section 18B(3) and possibly 18E(3), though perhaps not strictly necessary.

Additional Proposal 17: Director restrictions for AHCs

59. Te Ohu has proposed the current restrictions on MIO directors from being appointed as directors of AHCs be removed.

60. There are no legal issues with allowing MIO directors to also be AHC directors.

Other issues for consideration

Suggested drafting amendments

61. I have identified a number of suggested amendments to the Bill, mainly to improve clarity of language and to highlight where there are inconsistencies throughout the Bill. This is being provided to Te Ohu separate to this report.

Subsidiary documents

62. There would be merit in looking at the subsidiary documents (constitutions and trust deeds, including the AFL constitution) as soon as practicable so as to identify any implementation issues that need to be addressed in the Bill. I note that this process is already underway.

63. While the Bill will come into force 2 years after enactment to allow constitutions and trust deeds to be amended, that is of little comfort if the reorganisation of the Group, especially the substantial changes to the Te Ohu structure and the AFL constitution, reveals a need for changes to the legislation.

RIOs receiving Te Ohu annual plan

64. It seems anomalous (but consistent with the current Act) that recognised iwi organisations do not get copies of the Te Ohu draft annual plan (ref section 36(1)(c)) but they do get a right to approve the new strategic plan (section 36A(3)(b), and when reporting on the annual plan and strategic plan Te Ohu has to report to recognised iwi organisations (new section 38(2). There appears to be a case to include recognised iwi organisations in section 36(1)(c), or exclude them from the new section 38(2). Section 28(1) is a complicating factor, but the intent there suggests inclusion of RIOs, rather than their exclusion.

Taxation implications

65. It is important to note that taxation implications of the changes made by the Bill are not addressed in it. All affected parties will need to take their own advice on tax issues.

David Cochrane

Cochrane Advisory

8 March 2023