THE
WAIMUMU TRUST
(SILNA)
REPORT
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(SILNA)
REPORT

WAII 1090
WAITANGI TRIBUNAL REPORT 2005
The cover design by Cliff Whiting invokes the signing of the Treaty of Waitangi and the consequent interwoven development of Maori and Pakeha history in New Zealand as it continuously unfolds in a pattern not yet completely known.
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<th>Description</th>
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<tbody>
<tr>
<td>AJHR</td>
<td>Appendix to the Journal of the House of Representatives</td>
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<td>ajis</td>
<td>Alan Johnston Sawmilling Limited</td>
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<td>app</td>
<td>appendix</td>
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<td>ArchivesNZ</td>
<td>National Archives of New Zealand</td>
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<td>ca</td>
<td>Court of Appeal</td>
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<td>consumer price index</td>
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<td>Department of Conservation</td>
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<td>GST</td>
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<td>KC</td>
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<td>MA</td>
<td>Maori Affairs file</td>
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<td>Ministry of Agriculture and Forestry</td>
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<td>NHF</td>
<td>Nature Heritage Fund</td>
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<td>PC</td>
<td>Privy Council</td>
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<td>RMA</td>
<td>Resource Management Act 1991</td>
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<td>RMWM</td>
<td>Rau Murihiku Whenua Maori</td>
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<td>ROI</td>
<td>record of inquiry</td>
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<td>s, ss</td>
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<td>SDP</td>
<td>Southland district plan</td>
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<tr>
<td>sec</td>
<td>section (of this report, a book, etc)</td>
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<td>SFP</td>
<td>Southern Forest Products</td>
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<td>SILM</td>
<td>South Island landless Maori</td>
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<td>SILNA</td>
<td>South Island Landless Natives Act 1906</td>
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<td>SOC</td>
<td>statement of claim</td>
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<td>vol</td>
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<td>Wai</td>
<td>Waitangi Tribunal claim (when used with a number)</td>
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Unless otherwise stated, footnote references to claims, papers, and documents are to the record of inquiry, which is reproduced in appendix iv.
Enclosed is our report entitled The Waimumu Trust (SILNA) Report. The claimants are the beneficiaries of the Waimumu Trust, which administers an area of 4440 hectares of indigenous forested land in central Southland, granted to their ancestors under the South Island Landless Natives Act 1906 (SILNA). The claim relates to the Forests Amendment Act 2004, and to the Crown’s indigenous forests and SILNA policies. We heard the claim urgently in Christchurch from 11 to 13 October, and reconvened in Wellington to hear closing submissions on 10 November.

In hearing this urgent claim, we have been conscious of the need not to make findings on matters which relate to other SILNA claims without hearing from those claimants, and not to treat this inquiry as if it were a full hearing of all SILNA issues. Our findings relate to the Wai 1090 claim alone. None the less, it may be some years before Wai 1090 (and other SILNA claims) can be fully heard. In our report, therefore, we have recorded our preliminary views on key issues, for the guidance of claimants and the Crown in any further discussions. We are satisfied that sufficient evidence was available for us to reach sound preliminary views, and that these should be of assistance to parties.

Our conclusions are summarised in chapter 5 of our report. The main focus of our urgent inquiry was, in the first instance, the claim that the Forests Amendment Act 2004 had removed the power of the claimants to export unsustainably logged timber, without compensation. The claimants argued that sustainable logging was uneconomic and would in any case only yield them $1.66 million. Unsustainable logging over five years would have earned $25.25 million (a difference of $23.59 million). The Tribunal does not consider this part of the claim to be well founded. The valuations were unsatisfactory, and there does not appear
to be an export market for the Waimumu Trust’s timber in any case. There has been no breach of the principles of the Treaty, and no prejudice to the claimants, arising from this part of the Forests Amendment Act 2004.

In terms of the domestic market, claimants and the Crown were in broad agreement that the Resource Management Act 1991 (RMA) and the Southland district plan have placed strong constraints on the owners’ ability to carry out unsustainable logging. This was especially the case, after the Environment Court accepted the Crown’s contention that the SILNA grants were not in a special category and requiring special treatment. As a result, the RMA is a key constraint on the claimants’ ability to make an economic use of their SILNA lands.

The Forests Amendment Act arose from the Crown’s SILNA and indigenous forest policies, as developed from 1990 to the present day. Parliament’s intention in 1906 was clearly to provide at least a partial remedy for the Crown’s failure to make adequate reserves for Ngāi Tahu in the nineteenth century. The Crown began negotiations with SILNA owners in the 1990s in the belief that their lands were a compensatory award, the intent of which would be defeated by its new indigenous forests policy. In 2000, the Minister of Forestry proposed to compensate all SILNA owners equally and to ensure that such a policy was consistent with the Treaty. His proposal was rejected, partly on the grounds that the historical evidence showed the SILNA awards were not in fact compensatory in nature. Such historical evidence was then subsequently and hastily commissioned. On the basis of the evidence available to us, this change of policy from 2000 onwards was probably inconsistent with both the historical facts and the principles of the Treaty.

In any case, we think that the Crown’s actions in the 1990s created a legitimate expectation that the Waimumu Trust would receive compensation as a result of a negotiated settlement. This expectation was created by the initial framework agreement, and then strengthened by moratorium payments and the settlements of the Waitutu and Rakiura claims. The settlement of the latter, while based on the value the Crown put on those owners’ forests for conservation purposes, was calculated on the basis of timber values. We think that the Crown has breached the principles of the Treaty of Waitangi by:

- abandoning negotiations for compensation without the concurrence of the Waimumu Trust; and
- imposing the NHF as the only effective alternative remedy, premised as it is on the low conservation value of the Trust’s forest and the cessation of payments based on timber value.

We consider that part of the Wai 1090 claim to be well founded.
Despite this Treaty breach, the claimants have not yet suffered any prejudice. The option of applying to the NHF is still open to them. The Crown ought, in our view, to enable the NHF to provide compensation negotiated on the basis of commercial timber values, and to thereby retrieve the situation and ensure the Crown's compliance with the Treaty of Waitangi.

Judge LR Harvey
Presiding Officer
CHAPTER 1

THE CLAIM, THE ISSUES, AND THE INQUIRY

1.1 INTRODUCTION

The claim which is the subject of this urgent inquiry was brought in November 2003 by the trustees of the Waimumu Trust. The trust administers an area of 4,440 hectares of indigenous forested land in 45 parcels in the Hokonui Hills in central Southland, granted by the Crown under the South Island Landless Natives Act 1906 (SiLNA). According to the records of the Maori Land Court, there are currently 4,166 beneficial owners of the land administered by the trust, all of whom are descendants of those Maori for whose support and maintenance the land was originally granted.\(^1\)

In essence, the claimants alleged that the enactment of the Forests Amendment Bill 1999 (now the Forests Amendment Act 2004), coupled with the Government’s revised policy for certain Maori-owned indigenous forests as announced in 2002, would ‘destroy the value of the Trust’s ownership of the Waimumu Forest’ by removing their right to export unsustainably harvested indigenous forest produce and by excluding compensation for any ensuing loss.\(^2\) The impact on the trust, they said, would be ‘immediate and possibly even irreversible. . . The Forest will be locked-up for conservation without compensation.’ The loss claimed for the Waimumu Forest was quantified by an expert valuation as being just over $20 million.\(^3\) On this basis, urgency was granted.

The decision to grant urgency was, and still is, contested by the Crown. It is therefore necessary to begin this report by outlining the circumstances surrounding the urgency application and the scope of the inquiry before describing the historical and contemporary background to the claim in chapter 2. Subsequent chapters deal in turn with the claimants’ case, the Crown’s case, and the Tribunal’s findings.

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1. The total of 4,166 beneficial owners was arrived at by adding the number of owners of each section. Some may therefore have been counted more than once.
2. Paper 2.2, para 4
1.2 The Application for Urgency

A major effect of the Forests Amendment Bill 1999 was to bring the indigenous forests growing on land owned by the beneficiaries of silna generally into line with the restrictions placed on the harvesting, milling, and export of other indigenous forests under the Forests Amendment Act 1993. There remained an exception, however: the silna owners were not required to manage the harvesting of their forests sustainably, and the Government proposed instead to negotiate individual settlements that would see them voluntarily coming under the sustainable management regime applied to other forests. After the change of Government in December 1999, the policy for the silna forests was modified. As announced in 2002, the policy provided some assistance for establishing sustainable forestry management plans through the Ministry of Agriculture and Forestry (MAF) and a ‘ring-fenced’ budget of $16.1 million in the Nature Heritage Fund (NHF) administered by the Department of Conservation (DOC) for conservation settlements of all remaining silna forests, under which harvesting would be prevented by covenant. The annual moratorium introduced in 2000 to provide silna owners with some income while they considered the options for the future of their forests was extended to 2005.

Political lobbying ensued, including by the trust’s lawyers, Chen Palmer. When that failed to move the Government, the trustees filed a claim with the Waitangi Tribunal, arguing that the Forests Amendment Bill and the Government’s silna policy in combination:

- breached the Treaty of Waitangi principles of partnership, active protection, and the Crown’s obligation as one partner in the Treaty to act in good faith towards the other partner, because the original purpose of the granting of the land under silna – to provide for the economic support and maintenance of the recipients and their descendants – was being frustrated;
- interfered with the private property rights, including the right to development, guaranteed under article 2 of the Treaty; and
- departed from the common-law principles of non-derogation from the grant and no expropriation of private property rights without compensation, as guaranteed under article 3.

The claimants also applied for an urgent hearing.

1.2.1 Jurisdiction of Tribunal to hear urgent claim

Questions of jurisdiction immediately arose. Section 6(6) of the Treaty of Waitangi Act 1975 prevents the Waitangi Tribunal from considering a parliamentary Bill before its enactment unless the Bill has been referred to it by a resolution of the House of Representatives under section 8. On receiving the statement of claim on 18 November 2003, the Tribunal’s registrar,

4. Documents a1(tb-1), (tb-3), (tb-4)
at the direction of the then acting chairperson, Chief Judge Joseph Williams, invited claimant counsel to comment on whether section 6(6) would prevent a hearing on the silna policy prior to the Bill’s enactment.

Claimant counsel argued that section 6(6) did not preclude consideration of the silna policy, because this was ‘quite separate from the Forests Amendment Bill implementing the policy. The claimants would still have a claim even if there was no Bill.’ While viewing as particularly prejudicial the clause in the Bill that removed the right to compensation, counsel also objected to the process by which the silna policy package had been arrived at and the level of assistance that it provided. Counsel submitted that, if the Tribunal were to find that the policy was in breach of the Treaty, Parliament might decide not to proceed with the Bill. Alternatively, if the Tribunal were to decide that there was no jurisdiction to consider the claim before the Bill was passed, the claimants would seek an urgent hearing as soon as it was.5

In light of the ‘substantive matters’ raised by counsel, the acting chairperson requested submissions from the Crown on the Tribunal’s jurisdiction, since this matter had to be determined before any final view could be reached on whether to consider the claim.6 Crown counsel responded that for two reasons the Tribunal could not inquire into the claim until the Bill was enacted. First, to do otherwise would render section 6(6) ‘meaningless’, since it could ‘never effectively prevent the Tribunal from inquiring into the policy behind a Bill before Parliament’. Secondly, the Crown rejected the distinction between the Bill and the policy, arguing that the Bill was the implementation of the policy and that ‘in the absence of the Bill there is no prejudice to the claimants’.7

Issuing his decision on 15 December 2003, the chairperson noted that ‘It is a long standing principle of constitutional and common law that the Courts and Tribunals have no place in inquiring into parliamentary proceedings.’ In this case, he determined that the Tribunal did not have jurisdiction to hear the claim before the Bill was enacted. He considered that ‘the substantive policy complained of is in two parts’: the first, the Government’s decision to remove the silna exemption from compliance with controls on the export of indigenous timber, was provided for in clause 3(1) of the Bill; the second, the decision not to pay compensation, was in clause 25(1). He concluded:

Though there are other aspects of the policy which are also complained of those matters are no more than ancillary to the two complaints to which I referred. To entertain claims in respect of those two matters would inevitably require the Tribunal to inquire into cl3(1) and cl25(1) of the Bill. Section 6(6) provides that I have no jurisdiction to undertake such an inquiry.8

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5. Paper 2.5, paras 2, 3
6. Paper 2.7
7. Paper 2.9, paras 14, 15, 21
8. Paper 2.10, pp.4–5
1.2.2

1.2.2 The issue of urgency

The chairperson then noted that urgency remained ‘a live issue’. Given that the Bill was well advanced in the legislative process, he was:

minded to deal with the question of urgency now on the basis that the Bill will be enacted in its present form. If I decide that urgency should be granted in principle, then the final timetabling for the usual short form urgency inquiry can follow once the Bill receives the royal assent.  

The chairperson sought submissions from counsel on this issue.

The claimants argued that urgency was still warranted essentially because, they claimed, ‘the impact of the Bill has already been felt through the loss of an important commercial logging opportunity’ and that its impact would become exacerbated over time as more such opportunities were lost. Counsel submitted that there were two options available to them under the silna policy, neither of which was viable. One was to log for export under a sustainable management plan and the other was to make an application to the nhf. However, the sustainable management plan prepared by maf had been assessed as uneconomic, and an application to the nhf was unlikely to succeed because the Waimumu Trust lands were not regarded as being of sufficiently high conservation value.

The response of Crown counsel identified possible procedural difficulties as well as disputing the likely outcomes. First, it was submitted that the Tribunal should defer its decision on the application for urgency until the Bill was enacted on the ground that urgency could be accorded only if the claimants could demonstrate that they were suffering, or were likely to suffer, ‘significant and irreversible prejudice as a result of current or pending Crown actions or policies’, and that to decide that an urgent inquiry was warranted before the Bill was enacted would be ‘to determine to some degree that the claim is well founded’. In addition, counsel submitted that this in turn could ‘unintentionally affect the manner in which the House receives and considers the Select Committee’s report [on the Bill]’. Following on from this, counsel also submitted that it was premature to consider the application for urgency at that point since the wording of the Bill could still change. The Crown’s second line of argument was to deny that the claimants were suffering, or were likely to suffer, any ‘significant or irreversible prejudice as a result of the Crown’s policy (announced in May 2002), or of the Bill’s enactment’. Two reasons were advanced for this: first, the claimants’ position was protected by the series of annual moratorium agreements that they had entered into with the Crown; and, secondly, that none of the outcomes of the three options available to the claimants under the Crown’s silna policy was likely to prejudice them. These three options were:

9. Paper 2.10, p 5
10. Paper 2.12, paras 2, 12–14
to enter into a voluntary conservation agreement with the Crown, with the possibility of a 'financial consideration' being available;

or

- to develop a sustainable management plan under which the harvest could be exported;

The Crown then submitted that the policy was 'of actual and potential benefit to the claimants' and that their position would not worsen while it was being implemented. Accordingly, it considered that there was 'nothing exceptional' about the claim that warranted the granting of urgency.\textsuperscript{11}

On 9 February 2004, the chairperson issued his decision. He dismissed the Crown's contention that to grant urgency would be to determine in some preliminary way whether the claim might be well founded:

It is usual in applications for urgency to give considerable weight to the issue of whether the claimants are able to demonstrate that they are likely to suffer significant and irreversible prejudice as a result of the Crown's policy complained of.\ldots I do not however consider that that requires an assessment of the merits of the claim in the sense pleaded by the Crown. In most urgency applications all that is available to be tested by the Tribunal is allegations\ldots and even in cases where evidence is filed with the application (as here), that evidence is completely untested. The substance of the claim is not inquired into at this stage in accordance with s 6(1). That comes during the hearing process. Instead an application for urgency merely requires the Tribunal to determine when that inquiry should take place, not what the outcome of the inquiry might be.\ldots The assessment I must make is rather whether the alleged impact on the claimants of the Act or policy is so significant as to warrant a reallocation of the Tribunal's resources so that the matter may be inquired into as a priority.\textsuperscript{12}

The chairperson also rejected the argument that granting urgency in principle while the matter was before the House could affect the way in which Parliament deliberates on the Bill:

On recent experience, that submission is scarcely credible but in any event the alleged connection is far too tenuous to consider that Parliament intended it to have been caught by s 6(6). If I were to grant urgency in principle\ldots it would be no more than a signal as to when an inquiry clearly within the Tribunal's jurisdiction would be undertaken. No more could or should be read into it than that.\textsuperscript{13}

As for the Crown's argument that the Bill was not yet in its final shape, the chairperson found that section 6(6) did not prevent him from considering an application for urgency in

\textsuperscript{11} Paper 2.13, paras 5, 8, 12, 18, 20–27

\textsuperscript{12} Paper 2.1, pp1–2

\textsuperscript{13} Ibid, p2
principle on that ground, adding: ‘In case there is a need to state that which is probably obvi-
ous, it follows that if the provisions are changed in any material way, the matter would have to
be revisited.’¹⁴

Having determined that urgency could be granted, the chairperson then considered
whether it should be granted:

There is no question that the loss complained of, if made out, is significant, even cripl-
ing. This is in my view clearly a case in which urgency is clearly warranted. Urgency is therefore
granted in principle on the basis that the particular provisions of the Forests Amendment
Bill of which the claimants complain, are enacted without material amendment. The claim-
ants may file a memorandum seeking to have the matter brought on once the royal assent
has been given to the Bill. Timetabling can be resolved by conference at that point.¹⁵

This was not the end of the matter, however. A critical document in the subsequent
exchange of evidence between the Crown and claimant counsel proved to be the expert
evidence of Noel Burn-Murdoch, a forest valuer. It was on the basis of Mr Burn-Murdoch’s
valuation of the Waimumu Forest in 2003 that the claimants alleged that the Forests Amend-
ment Bill 1999, if enacted, would cause an immediate and possibly irreversible loss in value
of the forest of at least $20 million. And it was on the basis of that allegation that urgency
was granted. In June, the Crown submitted that Mr Burn-Murdoch’s 2004 revised valuation
report was based on the value of the timber on the domestic market, and that the Forests
Amendment Act 2004 (as it by that time was) imposed controls on the unsustainable harvest-
ing of forest produce for export only, and not for other purposes. Accordingly, the Crown
argued that the ‘key piece of claimant evidence – which lies behind the decision to grant
urgency in the first place – does not address the effect of the Act’ and that the ‘other matters at
issue cease to be relevant if the fundamental allegation concerning loss cannot be supported’.
Because it appeared that the decision to grant urgency ‘may be affected by significant error’,
the Crown suggested the production of expert evidence that did address the impact of the
Act followed by a reassessment of the conduct of the urgent inquiry.¹⁶

The claimants responded that the Crown had known about the basis of Mr Burn-
Murdoch’s valuation since November 2003 (although that information had ‘inadvertently’
been omitted from the documents supplied to the Tribunal’s chairperson) and was seeking to
‘relitigate a matter which had already been determined’.¹⁷ Further, they argued that the Wai
1090 claim was wider than the Forests Amendment Act 2004, since the amended statement of
(RMA) and the Southland district plan (SDP), as well as the SILNA policy.

¹⁴. Paper 2.1, p2
¹⁵. Ibid
¹⁶. Paper 2.27, paras 2.3, 24, 25, 26
¹⁷. Paper 2.28, para 6
In reply, Crown counsel reiterated their previous arguments in more forceful terms, maintaining that:

The Tribunal must be satisfied that there is a tenable basis for the allegations of loss that led to urgency being granted. There is no point in proceeding to a hearing if there is manifestly no substance to those allegations. The Chairperson was entitled to assume that the representations as to loss had a reasonable foundation. The amendments to the Burn-Murdoch evidence only confirm that this was not so.  

Moreover, counsel maintained that urgency had been granted on a narrow basis and that “The alleged detriment of the export controls cannot be used as a Trojan horse, so that other complaints – not worthy of urgency in their own right, and more properly the subject of a wider silna inquiry – can be ventilated.”

The Tribunal noted that the granting of urgency in principle was based on the passage of the Forests Amendment Bill into law in the form complained of and that, because the Bill was so enacted, the granting of urgency then became full. Since the stances of the Crown and of the claimants on this issue remained polarised, the Tribunal considered that the best course of action was to continue to a hearing where all the evidence could be tested.

By directions dated 24 May 2004, the chairperson appointed Judge Layne Harvey the presiding officer for the inquiry. A further direction of 16 June authorised the appointments of Joanne Morris and Professor Hirini Mead as members, but then, by a direction of 8 September, Dr Angela Ballara replaced Ms Morris.

1.3 The Scope of the Inquiry

Similarly polarised positions on the issue of the extent of the inquiry were evident in attempts to produce an agreed statement of issues following directions from the presiding officer. Each party submitted its own very different statement of issues to the Tribunal.

The claimants, following their amended statement of claim, wished to deal with the historical background to the granting of the silna lands together with the suitability of the grant, before proceeding to the effects of the wider legislative and policy framework, including the forestry harvesting regimes permitted under both the rma and the Forests Amendment Act 2004, the value of the Waimumu Trust’s forests under the various statutory regimes, and ways for the claimants to secure an economic return from their land.

18. Paper 2.29, para 14
19. Ibid, para 4
20. Papers 2.21, 2.33, 2.42
21. Judge Harvey was appointed on 24 May 2004, four days after the Forests Amendment Bill received the royal assent.
22. Paper 2.30, p2
On the other hand, the Crown considered that, in accordance with the grounds on which urgency was granted, the ‘primary focus’ of the inquiry should be the effect of the Forests Amendment Act 2004 on Waimumu Forest. It wished to treat the issues associated with the development of that Act and the economic questions about the use of the silna forests as background issues only. Noting that the parties could not agree on the scope of the inquiry – whether the focus should be on the ‘alleged loss arising from the enactment of the 2004 Act’ or whether the inquiry was to be a ‘broad investigation of other complaints about silna policy in general and the effects of other legislation upon silna lands’ – the Crown reported that the difference in view was ‘fundamental’ and that an ‘impasse’ had been reached.\(^{23}\)

As a consequence, the Tribunal reviewed the statement of issues provided by each party and endeavoured to distil and prioritise those that were relevant, producing its own statement of issues. In a memorandum and directions dated 22 July, the Tribunal noted that ‘a brief review of the relevant historical background may assist in providing the proper context for consideration of the claimants’ principal and more contemporary claim’. However, the Tribunal emphasised that ‘the purpose of this inquiry is to focus on the effect of Crown indigenous forestry policy and the Forests Amendment Act 2004 on the claimants and their lands’.\(^{24}\)

Two further concerns of the Tribunal were outlined in the 22 July directions. One was the relationship between the Wai 1090 claimants and those involved in Wai 158, a claim concerning the effect of the Crown’s national indigenous forests policy on silna lands (to which the Waimumu Trust was a party), which was lodged with the Tribunal in July 1990 but not since advanced. Under section 10(1)(e) of the Ngai Tahu Claims Settlement Act 1998, Wai 158 was specifically excluded from extinguishment. The second matter concerned the Tribunal’s jurisdiction. The limitations imposed by both section 10 and section 462 of the Ngai Tahu Claims Settlement Act raised questions about how far the present Tribunal could properly inquire into matters before 1992. While noting that ‘It is not intended to revisit those parts of the mammoth 1991 Ngai Tahu inquiry [Wai 27] or 1998 settlement concerning silna issues’, the Tribunal sought submissions from counsel on this issue at the start of the hearing.\(^{25}\)

The claimants advised that Wai 158 was more extensive and that its principal claimant, Ken McAnergney, did not intend to participate in the Wai 1090 hearing. They did not make submissions on the jurisdiction matter. Crown counsel submitted that the Tribunal had jurisdiction to interpret both the Ngai Tahu Claims Settlement Act 1998 and the preceding deed of settlement, and ‘therefore to express an opinion on what they settle’. Although Wai 158 was excluded from that settlement by section 10 of the Act, Crown counsel noted that this exclusion did not apply to any part of Wai 158 ‘that might relate to the original allocation of land under silna 1906’. This they interpreted as meaning that ‘complaints about the original

\(^{23}\) Paper 2.31, pp 2–3
\(^{24}\) Paper 2.34, paras 2, 7, 8
\(^{25}\) Ibid, para 10
silna grants – their size, location, and quality, or whether they were an adequate response to the grievances of Ngai Tahu – are no longer within the Tribunal’s jurisdiction’. They did accept, however, that the Tribunal could seek to ‘understand how parliamentary intention in 1906 may reflect on the development of contemporary indigenous forest policy’.

1.4 The Postponement of the Hearing

The urgent hearing of Wai 1090 was originally set down for 9 to 11 August in Christchurch. On 22 July, the Tribunal directed that any additional evidence the parties intended to rely on must be filed and served by 5 pm on 4 August, as “The available time simply does not permit the presentation of extensive evidence at the hearing.” After a teleconference on 27 July, the presiding officer required the Crown to provide by 5 pm on 30 July a report by Cecilia Edwards on the origins and early implementation of the landless natives policy in the nineteenth and twentieth centuries and its accompanying document bank. The details of and the background to two recent silna settlements as embodied in the Waitutu Block Settlement Act 1997 and the Tutae-Ka-Wetoweto Forest Act 2001 were also sought. On 4 August, claimant counsel advised the Tribunal’s registrar that he had received at 2.30 pm that day the documents due on 30 July. Counsel then sought leave to produce further affidavit evidence to ‘address the substantial additional documentary evidence which the Crown has provided’ and to file such evidence at the hearing if necessary.

Meanwhile, on 30 July Crown counsel advised the registrar not only that it was proving difficult to copy and index the large volume of departmental documents relating to the development of Crown policy on indigenous forests from about 1990 to 2002 but that ‘a number of potentially relevant Cabinet papers have been located that were not supplied to the Waitumumu Trust in response to their Official Information Act request’. Release of the latter would require Cabinet Office approval, ‘which may occasion some delay. Any other material will be released as soon as possible.’ In the event, the Cabinet papers were not available by the deadline of 5 pm on 4 August, nor even the following day. Moreover, on 4 August Crown counsel advised the registrar that the Crown had not yet finalised the evidence of Alan Reid from MAF, who was to give evidence on the development of the Crown’s silna policy up to 2002. The Tribunal was to consider this evidence before the hearing in order to determine whether Mr Reid would be required to attend in person.

26. Paper 2.48, paras 5, 6, 10, 11
27. Paper 2.34, para 3
28. Paper 2.37, para 3
29. Paper 2.41, paras 2, 4
30. Paper 2.39, paras 2, 3
31. Ibid, para 4.3
Accordingly, in a memorandum dated 6 August, the Tribunal postponed the hearing, since ‘the inquiry cannot proceed without the evidence being filed in advance of hearing’. The Tribunal also noted that ‘The granting of urgency requires evidence to be filed and served in advance of hearing except in the most rare circumstances’. Subsequently, in a memorandum dated 10 September, the presiding officer rescheduled the hearing for 11 to 13 October in Christchurch. He also noted that the evidence required from all parties had still not been filed in full, and directed counsel to file and serve all outstanding evidence by 12 noon on 24 September, stating that ‘Any evidence filed after this date may not be included in the inquiry’. In any case, the agreed bundle of documents was not filed until two working days before the hearing, on the evening of 6 October. The hearing was held at the Environment Court in Christchurch from 11 to 13 October, and reconvened in Wellington on 10 November to hear closing submissions from counsel and to seek answers to a list of Tribunal questions for both the claimants and the Crown (see app 11). The claimants responded orally to those questions during the reconvened hearing. Crown counsel sought and were given a further five days to respond, but took seven days to do so. Not all documents quoted by Crown counsel in their response had been supplied to the inquiry and a further delay occurred while clearance was obtained to release one of them. This was finally made available on 26 November. Claimant counsel then responded to the Crown’s response on 1 December.

The Wai 1090 inquiry was impeded by other delays in obtaining documents. In April 2004, five months after the filing of the urgent claim, claimant counsel advised the Tribunal of the difficulties he was experiencing in obtaining important documents from MAF and asked the Tribunal to make directions for the production of evidence. He noted that a complaint had been lodged with the Ombudsman under the Official Information Act 1981. In June claimant counsel again sought the Tribunal’s help in expediting the review of information held by the Maori Land Court in Christchurch about the 45 parcels of land administered by the Waimumu Trust.

The Tribunal’s report was released on 28 April 2005 under embargo until 2 May. In letters to the Tribunal dated 28 and 29 April, Virginia Hardy of the Crown Law Office raised concerns about certain comments made in the report, and sought the opportunity to respond to them. The Tribunal agreed to extend the embargo by one week and to hear submissions from Crown and claimant counsel at a judicial conference on 4 May. As a result of submissions made and the filing of further documents, the Tribunal revised certain details in the report. These revisions had no effect on its findings.

32. Paper 2.42(a), paras 3, 4
33. Paper 2.43, p 2
34. The agreed bundle comprised 15 lever-arch folders initially compiled in apparently random order. The Tribunal was subsequently forced to ask for a reordering by subject and chronology.
CHAPTER 2

HISTORICAL CONTEXT AND CONTEMPORARY CROWN POLICIES

2.1 Introduction

The lands on which the Waimumu Forest stands were granted to the ancestors of the present claimants under the terms of silna. As noted in section 1.3, the silna lands formed part of the massive Wai 27 inquiry, which led to the Ngai Tahu Report 1991. This report was accepted by the Crown and led to the Ngai Tahu deed of settlement, given expression in the Ngai Tahu Claims Settlement Act 1998. Under the terms of that settlement, the Tribunal has no jurisdiction – and no desire – to inquire again into the adequacy of the original silna grants. What is of concern at this stage, because it has a significant bearing on the development of Crown policy towards the silna forests nearly 100 years later, is the intention of Parliament in passing silna in 1906. In order to understand the more recent shifts in Crown policy which have had a direct effect on the Wai 1090 claimants, it is necessary first to understand the background to the Act.

This has been extensively covered in chapter 20 of the Ngai Tahu Report 1991 and in two later reports of which the Tribunal has had the benefit: ‘Origins of Government Policy: South Island Landless Maori’, written by Cecilia Edwards for the Crown Law Office in 2000, and a critique of that report, ‘Report on Crown Historical Research on the South Island Landless Natives Act 1906’, prepared by Dr Jim McAloon for Te Puni Kokiri and Rau Murihiku Whenua Maori (a group of silna forest owners) in 2001. In an urgent inquiry of this kind, the Tribunal does not intend to traverse the subject-matter of these reports again. Rather, we will highlight the key features only, before moving on to consider the economic benefits that the Waimumu Trust beneficiaries have received from their lands since these were granted in about 1908, along with the development of Crown policy towards the silna forests since the late 1980s and the effects of this on recent efforts to exploit the Waimumu Forest resource.

2.2 Silna

silna was an attempt to address the plight of those Ngai Tahu (Kai Tahu) who had been rendered landless or nearly so by the Crown’s failure to prevent that from occurring as a result

1. Documents A4, A10
of its various land purchases in the South Island in the 1840s and 1850s. Starting in the
1870s, South Island Maori under the leadership of Hori Taiaroa, the member of the House of
Representatives for Southern Maori, began claiming that the promises of reserves and other
conditions of the Crown's land purchases had not been fulfilled. While there had been consid-
erable Government activity in investigating the claims, nothing had eventuated. With the
occupation of Omarama by Te Maiharoa and others from June 1877, the Grey Government
in February 1879 established a commission by TH Smith and FE Nairn to inquire into the
promises made at the time of the Otakou, Kemp's block, Murihiku, and Akaroa purchases
(including those for reserves) and whether they had been fulfilled. The Grey Government fell
in October 1879, however, and in June 1880 the new Native Minister, John Bryce, suspended
the commission, having already deprived it of the funding it needed to complete its work.
In their interim report, Smith and Nairn concluded that:

> to estimate the damage sustained by the Native owners of the land through failure, during
> so long a period, to fulfil promises made . . . is a task beyond our powers. In many ways
> the terms of the contract have been violated. To restore is impossible. A compromise of the
> claim for compensation is the only possible way of meeting the case.èmes

Their report was rejected by the Government.

2.2.1 Mackay’s first Commission

Taiaroa continued to press the Government on the issue, however, and in May 1886, under the
Stout–Vogel administration and with John Ballance as Native Minister, Native Land Court
judge Alexander Mackay was commissioned to:

- inquire into all cases where Maori were unprovided with land (in relation to the Crown's
  undertakings to Maori at the time the land was ceded to the Crown);
- determine whether land that had been set apart for Maori in accordance with the terms
  of cession was adequate for their maintenance and support;
- inquire into all 'half-castes' who were unprovided for in land; and
- ascertain the names of those affected, and advise the means of allocating land for 'cultiva-
  tion and settlement' purposes.

A fifth task was added two months later: to find out whether any Maori were willing to accept
a grant of land 'in final settlement' of any claim on the Crown for non-fulfilment of the terms
of the earlier purchases (or of any promises made in connection with those purchases), and
to recommend how much land should be set aside for them and where.

2. Document A4, para 3.8; doc A10, p100
3. Document A10, p111
Mackay’s report a year later was wide-ranging, summarising the terms and promises associated with each of the Kemp, Akaroa, Murihiku, and Otakou purchases, and whether these had been fulfilled, before making recommendations to address the consequent landlessness. Mackay’s recommendations had two prongs: one was for a general tribal endowment and the other was to overcome destitution caused by individual landlessness. He recommended that the Crown set apart:

- reserves for endowment purposes to provide for education, health, social, and moral welfare and to enable Ngai Tahu to improve their land; and
- blocks of land for Ngai Tahu to occupy and use so that each adult would have 50 acres.  

The Stout–Vogel Government lost office in September 1887, and the incoming Atkinson Ministry regarded Mackay’s report coolly. In June 1888, a joint committee comprising nine members each of the House of Representatives and the Legislative Council was set up to consider the claims and Mackay’s recommendations. It filed three reports, one in 1888 dealing with the Kemp purchase, the second in 1889 dealing with the Kemp, Akaroa, and Murihiku purchases, and the third in 1890 dealing with the Otakou purchase. In essence, the reports ‘refuted the allegations of non-fulfilment of obligations’ relating to these purchases and found the Crown wanting only in its duty of care for the general welfare of Ngai Tahu Maori. It seems that member of Parliament William Rolleston, onetime under-secretary of the Native Department and former superintendent of Canterbury, had a strong influence on the committee reaching this position. In relation to the 1888 report, he argued that Mackay had exceeded the terms of his commission, that his inquiry may have raised ‘unrealistic expectations’ for Maori, and that the Government’s role in respect of ‘destitute Natives’ was to promote ‘habits of industry’, providing further reserves only where there was ‘absolute pauperism’ that could be clearly associated with landlessness.

Two recommendations arose from the joint committee’s three years of deliberations, both relating only to those who lacked means of support. The first was for another inquiry, to establish:

- the identity of the descendants of those Maori who had ceded land;
- the lands and means of support of those living descendants;
- the amount of land to be provided in each case where relief was deemed proper; and
- what land was immediately available and suitable.

The second recommendation was that the process be started without delay and that any lands allotted be made inalienable.

Thus, the joint committee had shifted the focus away from the settling of the wider grievances of Ngai Tahu, as implied in Mackay’s fifth term of reference and addressed in his first

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4. Ibid, p12
5. Ibid, pp13–14
6. Ibid, p16
recommendation, to concentrate on those worst affected. The terms of the recommendation made in the 1889 report are worth quoting in this regard:

careful inquiry to be made into the condition of the Ngai Tahu Natives; and if it be found that any have not sufficient land to enable them to support themselves by labour on it to take power from time to time to make further provision by way of inalienable reserves to meet such cases. [Emphasis added.]

2.2.2 Mackay’s second commission

At the end of 1890, Mackay was commissioned by the defeated Atkinson Government to make an inquiry such as was proposed in the joint committee’s report. The terms of reference were drawn directly from the reports, though the opening statement gave as the commission’s purpose ‘a final settlement of the claims of the Ngai Tahu Natives’. Otherwise, Mackay was confined essentially to considering eligibility, need, and the availability of suitable land, with stress on the principle of inalienability. Tairaroa, concerned at the limitations thus imposed, petitioned the Government that in ‘a matter of so much importance . . . both sides must first of all agree upon the subjects to be inquired into’, but to no avail.

Mackay first held a series of regional inquiries, at which he was forced to make it clear to sceptical Ngai Tahu that his purpose was to ascertain who had not been provided with land, not to hear evidence on their wider and long-standing claims about the inadequacy of the reserves previously granted and those refused. Such was the strength of feeling he encountered on this issue, however, that in 1891 he produced two reports. The main report in effect refuted the joint committee’s findings before presenting the results of Mackay’s own inquiries. His supplementary report dealt with the wider claim and the causes of Ngai Tahu poverty, noting that ‘making provision for the landless portion of the community does not comprise all they are entitled to expect in fulfilment of the promises made in the past’.

In December 1892, the Native Minister, Alfred Cadman, met with Ngai Tahu at Otago Heads, where he indicated that the Government would be prepared to make certain Crown lands available, although not ‘in a preferred location’, to those who had no or insufficient land. He later detailed this land to Tame Parata, by then the member for Southern Maori, as follows:

7. Document A10, p17
8. Document A4, para 75
10. Document A4, para 714
The Hokonui blocks, which included the present Waimumu Trust’s lands, were not included at this stage.

In July the following year, exchanges in the Legislative Council reveal the divergent attitudes to the purpose of making this land available. Edward Stevens, former chair of the 1888–90 joint committee, continued to maintain that:

no actual claims that could be substantiated as a matter of law were found, but that, as a matter of honour and good faith, the colony was bound to see to a certain extent to the well-being of the Maori inhabitants of that part of the colony. . . . where land held by Natives was found to be insufficient for their support, such supplemental grants should be made as would be sufficient to enable the Natives of that tribe who were insufficiently supplied with land to support themselves by their own labour.\(^\text{11}\)

Patrick Buckley, the Colonial Secretary and Attorney-General, who was standing in for Cadman, claimed that ‘the Native Minister . . . went with these Natives [Ngai Tahu] from place to place, and representatives of different hapus accompanied him and selected several pieces of land, which were agreed to in final settlement of the whole of their claims’. He continued that ‘it only required, to complete the matter and to set this question at rest, for the natives to select land in these blocks on a scale to be fixed, and then for the selections to be surveyed and allotted’.\(^\text{12}\)

Taiaora, by then a member of the Legislative Council, responded later:

The Natives, he might tell the Council, were quite willing to accept those lands, but it was understood they were simply a compassionate gift made by the Government. They did not consent to accept those lands as in settlement for any claims which they might have, for the Minister had already stated that he did not acknowledge their claims.

Taiaora declared that he would ‘never accept this gift of land now being made to the Natives in connection with or in settlement of any of the claims which they might have’. He warned his fellow legislative councillors that Ngai Tahu ‘would be sure to petition for further hearing of their claims, and it would not be fair to turn round and say to them that they had already had land in settlement of their claims’.\(^\text{13}\)
2.2.3 Mackay’s third commission

In December 1893, Mackay and the Surveyor-General, S Percy Smith, were appointed to complete a list of landless Maori and assign sections to them from within these blocks. From April 1894, Tame Parata assisted them in grouping the families, and in 1895 their jurisdiction was extended to all landless Maori in the South Island, not only Ngai Tahu. Work on determining eligibility and allocating the land continued slowly – the Government made minimal resources available and Mackay and Smith were working in their spare time – throughout the 1890s and into the 1900s, with families receiving their allocation as it became available after survey. By 1904, there was considerable concern about the suitability of much of the land provided for settlement, particularly its remoteness, ruggedness, and unsuitability for pastoral farming.

Mackay and Smith furnished their final report in September 1905. They cited as the most important reason for the protracted nature of the process the absence of suitable blocks of land to allocate once the claims had been verified, stating that, ‘In the end, lands have actually been found to meet all requirements as to area, but much of the land is of such a nature that it is doubtful if the people can profitably occupy it as homes.’ They also noted that:

- Legislation should be passed so that titles allocated to the land could be issued.
- Not all those provided for were entirely landless, but all who were landless or who had fewer than 50 acres, if adults, or 20 acres, if minors, were allocated land to bring their holdings up to those amounts, so that ‘land of a sufficient area for their future wants should be set apart for their maintenance’.
- Land had been allocated to Ngai Tahu south of the northern boundary of Canterbury on the basis above, but to those to the north the maximum allowance for adults was 40 acres, because the former were said to have had a ‘special claim to consideration in fulfilment of promises made at the cession of their territory, whereas those to the north had no such rights, and are indebted solely to the generosity of the Crown for the increased area’.

In the table of lands allocated by 1905, a total of 142,118¼ acres is listed as having been allocated to 4064 persons, an average of 35 acres each.

2.2.4 The passing of the Act

Mackay and Smith had appended a short draft Bill to enable title to be issued to the lands already allocated. While the Land Act 1892 contained the power formally to set aside land as native reserves, they doubted whether that Act could authorise the issuing of grants in the form they saw as necessary. Their draft Bill contained a preamble outlining the reasons for the

15. Ibid, pp1–2 (p992)
allocation of the lands and the purpose of the measure. In view of the later history of this preamble, it is worth quoting its opening points:

Whereas in consequence of numerous petitions received from the Natives of the South Island relative to the non-fulfilment of promises made them on the cession of their territory in that Island to the Crown, that additional land, sufficient for their future wants, should be set apart for them and their descendants, and several inquiries have been made under Royal Commission for the purpose of ascertaining their actual requirements . . . 16

The Bill itself provided for the Governor to issue warrants for the issue of land transfer certificates to the land already allocated to, or subsequently selected for, eligible Maori, whose names were to be published in the Kahiti or Gazette alongside the description of the land allocated to them. The Gazette notice would empower the issuing of the title, and would serve for the purposes of exchanging, subdividing, or reducing the area. The land would be inalienable by sale or by lease except to other eligible silna families. The Governor could lease silna land to Europeans after consulting with silna owners, to whom proceeds and rents were to be paid in proportion to their allocation. The Native Land Court was to administer the provisions for inheritance, exchange, and subdivision. Where subdivision resulted in surplus land, it would revert to the Crown. The draft Bill did not provide for the reservation of land for landless Maori, since the commissioners considered this power was already contained in the Land Act.

The 'Landless Natives Bill', as introduced by the Native Minister, James Carroll, included provision for temporary and permanent reservation, but otherwise closely followed the 1905 draft. In moving the second reading on 4 September 1906, Carroll suggested that Mackay and Smith had been appointed to deal with claims in a comprehensive manner 'both in its relationship to present and future requirements'. He later said:

we are coming now to a point when we will have to settle – when we will have to wipe off the slate, as proposed in this Bill – claims which, I regret to say, have been in existence too long. Generations have passed away with promises unfulfilled; but we have reached that stage now when, I think, these matters should be settled, so as to clear our consciences and rid the records of any stigma attachable to the reputation of the colony and the Government. 17

Carroll concluded his opening remarks, however, by leaving the question open:

Whether this settlement is equal really to the magnitude of the claims, or whether it gives all to which the Natives in the South Island are entitled to claim, is a question upon which I will not venture an opinion at present; but I do say this, in view of the absolute necessity of bringing these matters to a conclusion, in view also of the fact that it has been a blot on our

16. Percy Smith and Mackay, p3 (doc A10, p 41)
17. James Carroll, 4 September 1906, NZPD, vol 137, p 318
colonial reputation to have allowed these claims to remain unsettled and undetermined for so many years, the best solution we can obtain at the present day, no matter whether or not we reach the utmost bounds of what is just, so long as it is considered fair and reasonable, should be hailed with satisfaction.\textsuperscript{18}

William Herries, who followed, said that the Bill gave ‘a measure of tardy justice to claims well established by the Natives of the South Island’. He considered that ‘Whether it goes as far as those claims have a right to be considered by this House is very doubtful. I myself do not think half the claims have been satisfied.’ The claims had been ‘pushed away and neglected’ by different governments, and he congratulated the Minister on ‘bringing down something which these South Island Natives may probably through their member accept as a settlement of the difficulty’.\textsuperscript{19} Other members also saw the Bill as a settlement of a kind of the Ngai Tahu claims. William Field described it as ‘likely . . . to bring about a fair solution of a long-pending and well-grounded complaint from the South Island Natives’.\textsuperscript{20} Alfred Fraser said that ‘these Natives were robbed of their birthright forty or fifty years ago; it has been flogged from them, and now in satisfaction they are to be dealt out small inaccessible sections’.\textsuperscript{21} The new Prime Minister, Sir Joseph Ward, member of the House of Representatives for the Southland seat of Awarua, declared it to be ‘a practical settlement’: ‘I hail with supreme satisfaction the fact that the Natives in the South Island, who have suffered so long, have a fair prospect at last of getting redress.’\textsuperscript{22} Tame Parata, who had long been associated with the work of the commissioners, also welcomed the Bill but contested the view that the lands thus allocated had anything to do with the wider claims of Ngai Tahu, which were ‘an entirely distinct matter’.\textsuperscript{23} Apirana Ngata perhaps reflected the confusion in some members’ minds about the Bill’s purpose by stating on the one hand that, ‘On the face it, it is an ample and generous recognition, though tardy, of the claims which the South Island Natives undoubtedly have upon the Government’ and, on the other, that he was glad that Parata accepted the Bill’s provisions ‘without prejudice to such claims as the South Island Natives have for the “tenths” – for the fulfilment of the promises made . . . for the reserving of a large proportion of the lands that were sold’.\textsuperscript{24}

A major concern for members was the quality of the land available. John Stevens (the member for Manawatu) considered much of it ‘quite unfit for close settlement: ‘it would be a cruelty . . . to allocate to the individual Native the small area to which he would be entitled on the side of some mountain-peak’.\textsuperscript{25} Parata also noted that the Ballance Government

\textsuperscript{18} James Carroll, 4 September 1906, NZPD, vol 137, p 318; Waitangi Tribunal, Ngai Tahu Report 1991, vol 3, p 994
\textsuperscript{19} William Herries, 4 September 1906, NZPD, vol 137, p 319
\textsuperscript{20} William Field, 4 September 1906, NZPD, vol 137, p 320
\textsuperscript{21} Ibid, p 321
\textsuperscript{22} Document A10, pp 46–48
\textsuperscript{23} Tame Parata, 4 September 1906, NZPD, vol 137, p 323
\textsuperscript{24} Apirana Ngata, 4 September 1906, NZPD, vol 137, p 325
\textsuperscript{25} Ibid, p 319

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'did not take trouble to allocate land of the right description and in proper localities for this purpose', contrasting this with the efforts it made to acquire land for European settlement under the Land for Settlements Act 1894.26 Even so, he felt that 'in many instances the Maoris who are entirely landless will be prepared to accept even this small portion that is offered to them in satisfaction of their cry to be provided with land'.27 Because of the unsuitability of so much of the land, he proposed that, rather than having any surplus revert to the Crown, it should be set apart for school or hospital or similar endowments, 'which would be of some special benefit to the Natives themselves'28 and, the Tribunal notes, would go a little way towards meeting the first of Mackay's 1887 recommendations.

James Carroll in reply echoed his Prime Minister's comments about a 'practical settlement', saying that the claims issue had been before tribunals several times with no practical result in favour of Maori: 'Sympathy they have had in unmeasured quantity, but nothing of a tangible order to meet what I have always considered their just claims.'29 The passage of time had:

built over their equities to such an extent new conditions and interests that it is now impossible to extricate and bring them into the region of remedial operation. . . . It is too late in the day to propose with any chance of success the repurchasing or resumption of the settled lands in the South Island for the purpose of adequately meeting the full claims of the Natives in respect to the 'tenths'.30

The Bill was then referred to the Native Affairs Committee, which made two significant changes. One was to strike out the preamble. It was later claimed by JH Hosking kc in 1910, when presenting to the Native Affairs Committee another Ngai Tahu petition for an investigation to enable a final settlement of their claims about Kemp's 1848 purchase, that this was done at the request of Ngai Tahu because of the connection it was thought to make with the wider claims, which would be 'seriously impaired' as a result.31 The other change was to adopt Tame Parata's suggestion of setting apart any surplus land as an endowment for the recreation or education of Maori. The Bill as amended was read a third time, with 'South Island' being added to the title to overcome earlier criticisms that it failed to deal with the North Island situation.32 It then passed to the Legislative Council, where the Attorney-General, Albert Pitt,
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noted that, while the House of Representatives thought that Maori were probably entitled to more, ‘it was recognised that the Government were doing something which amounted to an attempt, at all events, to do justice, which had been so long denied to the Natives’. Acknowledging that much of the land was ‘not very valuable’ and ‘difficult of access’, Pitt claimed that there was little Crown land left in the South Island that was not equally unsuitable. He also referred to Parata’s comments in welcoming the Bill as ‘a large measure of justice to the Natives in fulfilment of that to which they consider themselves entitled’. There was an attempt in the Legislative Council committee stage to reintroduce a preamble (the one proposed appeared to be a replica of Mackay’s and Smith’s), but the move failed. The definition of ‘landless Natives’ was also changed from ‘aboriginal inhabitants’ to ‘those without sufficient land for support and maintenance [including] half-castes and their descendants’.34

2.2.5 The repeal of the Act

The restrictions on leasing had occasioned comment during the parliamentary debate, possibly as a result of the increasing recognition that the lands were unsuitable for occupation. In 1909, regulations were passed prescribing the leasing powers of the Governor in great detail. silna owners could request the Governor to lease their allotments, and commissioners of Crown lands were empowered to auction leases under delegation from the Governor. The arrangements for leasing were tightly controlled.

In the same year, however, both silna and the regulations were repealed by the Native Land Act 1909. Two months before the repeal took effect, commissioners of Crown lands were urged to finalise all survey work, so that silna lands and their owners could be gazetted. This work remained incomplete, however, when the Native Land Act came into force. The new Act was an ambitious attempt to consolidate all the legislation affecting Maori land into one measure – silna was just one of 99 Acts repealed – with the aim of sweeping away the previous restrictions on alienating land owned by Maori, bringing them generally into line with Europeans. One result of this wide-ranging compendium measure was that the particular purpose of the silna lands was lost sight of, and no provision was made for continuing silna’s unique vesting provisions. As a result, officials resorted to using the general provisions of the Land Act 1908. An investigation by the Solicitor-General in 1913 revealed considerable confusion over the legal status of the silna lands, with reserves made under the Land Act either having no leasing provisions or being unable to be vested in individuals. This problem, coupled with Ngai Tahu’s continuing complaints about the grave deficiencies of the allocated land and their pleas seeking a final settlement of their claims, led to another commission of inquiry in 1914.

33. Albert Pitt, 9 October 1906, NZPD, vol138, p175 (doc a10(a)(b60)); doc a10, p51
34. Document a10, p52
The Gilfedder–Haszard commission and its outcomes

The 1914 commission, headed by Michael Gilfedder and Henry Haszard, was established to investigate:

- the status of silna lands;
- whether the reserves had been used for their intended purposes;
- whether these purposes could be better achieved by:
  - consolidating or exchanging the silna lands for more suitable or conveniently located lands;
  - appropriating reserves for hapu or families rather than individuals; or
  - leasing the silna lands; and
- the best method of dealing with the lands so that the lands or rents and profits from them could be used to the best advantage.

The commission was, however, expressly excluded from considering ‘all requests or claims that additional lands should be reserved or set apart’.  

In their survey of the silna lands, the commissioners found that 142,463 acres had been set aside for 4064 people, the bulk of it (126,324 acres in 12 blocks) reserved under the silna but some under the Land Act 1892 (5642 acres in six blocks) and some under the Land Act 1908 (934 acres in two blocks). In four blocks, the list of names and shares had not yet been published, and there were three further blocks containing 9561 acres for which proclamations were still to be issued. Amending legislation would be required to validate the proclaiming of reserves and the issuing of grants made since the repeal of silna. The value of the lands varied in value from five shillings an acre to £2 10s.

The commissioners acknowledged that the ideal situation would be for each grantee to own and occupy his individual holding. However, in practice they found ‘insuperable difficulties’ with that, including that most reservations were remote from the present homes of the grantees, that some of the grantees were too young or too old to move to a new home in a strange locality, and that some of the land was not suitable for subdivision. Where grantees did wish to occupy the land personally, the commissioners found the approach taken by Mackay and Smith of appropriating reserves for hapu or families had been fairly successful. However, an overwhelming majority of grantees had indicated to the commission that they did not wish to occupy their land because of its remoteness from their homes and sources of income, and because its poor quality, including its ruggedness, poor soils, and distance from any roads or railways, meant that it did not offer a substitute living. Practically none of the reserves in Southland had been occupied. Of 270 certificates of title to silna lands prepared by the district land registrar in Invercargill, for example, only nine had been uplifted by the

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35. Michael Gilfedder and Henry Haszard, ‘Reserves for Landless Natives: Report of the Commission of Inquiry in Regard to the Existing Reserves for Landless Natives in the South Island and in the Waikato–Maniapoto Native Land Court District, and as to the Disposition Thereof’, 31 August 1914, AJHR, 1914, 6:2; doc 44, para 8.10
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2.2.6

owners. The commissioners felt that some drastic change in procedure was necessary to secure the utilisation of the land.

The 1909 regulations controlling leasing had been found to be ‘too cumbersome and practically unworkable’, since many of the owners were dispersed while others had died with no appointed successors, and the expense and uncertainty of obtaining the signatures required had prevented anything being done with the land. The commissioners therefore recommended that, where titles had not yet been taken up, the land should be vested in the district commissioners of Crown lands to be held in trust for the owners. The commissioners of Crown lands should have the reserves opened for settlement in suitable-sized sections with the leases to be balloted, reserving first preference for silna owners. Gilfedder and Haszard also recommended that Maori occupying their own sections be able to borrow money to improve their land from a State loan department or any person or body corporate and that, where sections contained timber of commercial value, the timber should be harvested and sold by the Crown before the land was opened for settlement, with the royalties (less 5 per cent for administrative expenses) being paid to the Maori owners. The commissioners concluded by noting the anomalous legal position the repeal of silna had placed the reserves in, because the definition of ‘Native’ in silna, which included all descendants of half-castes, was wider than that in the Native Land Act 1909, and the reserves were not ‘Native land’ within the meaning of that Act. Hence, the Native Land Court had no jurisdiction to partition or effect exchanges or to appoint successors or trustees to silna land.37

The Native Land Amendment Act 1914 partially addressed the commissioners’ findings but put the lands under the control of the district land boards established under the Land Act 1908. The amendment restored the mechanism for issuing title to individual owners, along with the ability to lease, both of which had been removed by the 1909 repeal. The power to alienate, however, was still confined to a lease of not more than 21 years or mortgage to a State loan department, in each case only with the permission of the Governor in Council. This amendment was itself subsequently amended in 1916 by rephrasing the terms of vesting to make it quite clear that control, but not the land itself, was vested in the district land boards, but in 1919 administration again reverted to the Governor.

Under the 1914 amendment, the Native Land Court and Native Appellate Court were to have the same jurisdiction over lands for which titles were to be issued for partition, exchange, and succession as if those lands were native lands (and their owners ‘natives’), as defined in the Native Land Act 1909. The differing definitions of ‘Native’ caused a further problem in 1916, when the Solicitor-General took the view that, if silna beneficiaries were deemed to be Europeans within the meaning of the Native Land Act 1909, the unrestricted powers of alienation available to European owners applied. This anomaly was remedied in the Native Land Amendment and Native Land Claims Adjustment Act 1923, by which all the

37. Document a10, pp59–60
beneficial owners and their descendants were deemed to be 'Natives' within the meaning of the 1909 Act.

The 1923 Act contained a more significant change – the permitting of permanent alienation. While the sale or exchange of silna land to or with anyone other than the Crown still required the consent of the Governor, the land could be sold to the Crown 'as fully and freely' as if it were 'ordinary native land'. Further, silna lands not being used through occupation or lease could be resumed as Crown land, with the former owners being entitled to compensation under the Public Works Act 1908. The only legislative differences remaining between the silna lands and ordinary native land were now the extended definition of 'Native' and the requirement for the Governor to consent to alienation. The 1923 provisions were repeated in the Native Purposes Act 1931, which replaced the Native Land Act 1909. The difficulty of dealing with silna lands that had been permanently reserved but not allocated continued until 1966, when the 1931 Act was amended so that such reserves could be dealt with as though they were 'ordinary Crown Land'.

2.2.7 Judge Rawson’s investigation in 1916–17

One other early aspect of the prolonged silna saga needs to be mentioned before we can move on to consider more contemporary issues. Tame Parata had made representations about those Maori who had not had a chance to put their claims to an award of land before the Mackay–Smith commission. In 1916, a Native Land Court judge, WE Rawson, was asked to determine who was eligible for such an award. He received a total of 850 applications (nearly half of them after the original deadline had expired) and applied to them five tests:

- applications received after 6 February 1917 were disallowed;
- anyone born after 31 August 1896 was ineligible for an award of land;
- Maori ‘half-castes’ and their descendants were required to prove that they held rights in the South Island and were landless;
- eligible Maori who were aged over 14 on 20 October 1906 could receive the adult grant; and
- any applications refused by the Mackay–Smith commission could not be reconsidered.  

Rawson recommended that grants totalling 3343 acres should be made to 135 persons. He remained open as to whether grantees should be able to sell or mortgage their land, but he considered that a right to exchange the grant for more suitable land should be allowed. Further, having heard the views of Maori wishing to remain in their districts, Rawson recommended that, in lieu of land, monetary assistance or a pension might be a better solution. Because of the shortage of suitable land (a result of the need to provide discharged soldiers with land for settlement), and because landless Maori wanted to remain in their own districts,
this ‘cash for land’ solution found favour with both the Minister of Lands and the Minister of Native Affairs. The latter recommended that eligible Maori be offered either land, inalienable by sale or mortgage, or a lump-sum payment based on the average value of silna land. The Under-Secretary of Lands recommended that £1500 be placed in the supplementary estimates to provide for cash payments, but no details of the uptake of each option were provided to the Tribunal.

2.3 The Hokonui Blocks

2.3.1 The land itself

The history of the Hokonui blocks from allocation to the late 1980s is hard to establish. The blocks, which embraced the largest area of indigenous forest in the centre of Southland and were surrounded by grasslands, were included late in the silna allocation process (see map 1). In their final report in 1905, Mackay and Smith listed two blocks in this district: the Hokonui block of 27,809 acres, allocated to 772 persons (an average of 36 acres each) but not yet surveyed, and the neighbouring Forest Hill block of 850 acres, allocated to 20 persons (an average of 42½ acres each) but not yet surveyed. The claimants’ research has provided somewhat different information. Four blocks totalling 13,780 acres in the Hokonui survey district were gazetted in 1908, along with five blocks totalling 3040 acres in the Forest Hill Hundred, and two blocks in the Lindhurst Hundred and three in the Waimumu Hundred, together totalling 14,700 acres. The latter gives a total silna land area in the district of 31,520 acres – well over a fifth of the total silna allocation.

The Gilfedder–Haszard commission in 1914 described the Hokonui block and the Forest Hill block in some detail. They contained:

some good dairying and pastoral land, which would be leased if offered in areas of from 200 to 300 acres. Some of the sections contain good milling-timber, and sawmilling has been carried on there in the past. Patches of the timbered ridges have been burned, but undergrowth and weeds have sprung up. The surrounding lands are settled, and mixed farming is being carried on. The value of the land varies from £1 to £1 10s an acre, and on the sections where good timber stands the value should rise to £2 10s an acre.

Evidence given to the commission by JH Tressider, a Public Works Department surveyor, suggests that these blocks were covered in bush and that sawmilling companies were interested in logging parts of them. Tressider described the land as broken country, very expensive to road, but potentially good dairying country, albeit less valuable to the east. The Waimumu

39. Paper 2.38, para 7
40. Gilfedder and Haszard, p8
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2.3.1

land was not so good: ‘None of these blocks could be worked in full areas. Not less than 200 acres would suffice for a family.’ James Collins, a ranger with the State Forest Service, thought that the Hokonui block was fairly good land but poorly timbered since mills had worked there previously. The Forest Hill block was sparsely timbered, rimu mills having been through, but there was enough left to warrant the erection of a mill. It was good dairying country, though the land was idle and growing weeds. The northern part was more broken, with more kahikatea, and it was too far from the railway station to work profitably. Collins thought that both blocks, if thrown open to European settlement, would soon be taken up.

41. Minutes of Gilfedder–Haszard commission, 7 July–22 August 1914, MA85/f1, ArchivesNZ, Wellington (doc A18(1)), p6
42. Ibid, p9

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Evidence given to the commission by the Maori owners suggests that few had visited their Waimumu lands and most would like them sold or exchanged for better land nearer their homes; failing that, they felt that the land should be leased through the commissioner of Crown lands and any timber sold. William Stirling was typical:

I am an owner in the Hokonui Block. I am in 442 and John is in 436 in Forest Hill Hundred. There are a large family of us. Timber was cut off years ago. Now overgrown with thistles. We have a man on the block cutting thistles and killing rabbit. He pays the rates. We can get no rent from it. We would like the Commissioner of Crown Land to lease the land in suitable areas for lessees to take up. The railway station is within three quarters of a mile. The land is worth £1 per acre.\(^{43}\)

Only one, Walter Te Maiharanui Anglem, the father of Rewi Anglem, one of the Wai 1090 claimants, wanted to occupy his land in Waimumu.

### 2.3.2 Exploitation of the Hokonui blocks’ resources

The commissioners were also petitioned by the Railway League of Hedgehope, which noted that, while the Hokonui and Forest Hill blocks had been available for four years, no one had yet taken up residence on them. European attempts to lease the land had been frustrated by the difficulty of locating owners. The league claimed that the land was ‘unsuitable for the Native mode of living, and the environment will not appeal to the Native mind’, and it strongly opposed ‘the locking-up of the said land as a reserve for landless Natives if the Natives will not come and reside on and improve the land’. In its unimproved state, the land harboured noxious weeds and rabbits to the detriment of the rest of the community: ‘The reserve is a veritable hotbed for the propagation of pests, and until it is closely settled it will be impossible to deal effectively with these.’ The league, among others, urged the commissioners to open up these reserves for European settlement so that the land could be improved and produce revenue. In the event that this lay outside the commission’s brief, the league suggested awarding Maori a larger area of land to make production sustainable, setting a deadline for the land’s occupancy, introducing a system of differential rating to provide for roading, and, where the Maori owners could not be located or chose not to occupy their reserves, offering the land to Europeans for settlement.\(^{44}\)

Instead, the poor quality of much of the land, the difficulties of dealing with it, and Crown inertia appear to have created almost insurmountable obstacles to its development. Forestry seemed the only solution. It appears that, at least initially, the State Forest Service was involved in issuing licences authorising the ‘registered native owners’ of a section to grant a

\(^{43}\) Minutes of Gilfedder–Haszard commission, 7 July–22 August 1914, MA81/1, ArchivesNZ, Wellington (doc A18(1)), p6

\(^{44}\) Gilfedder and Haszard, app c (doc A10, pp59–60)
licent to cut the standing timber on it, either by the owners or by a named company, subject to certain conditions. However, a letter from the Murihiku Sawmilling Company to the Minister of Lands in May 1922 about logging in the Forest Hill Hundreds states that lands in this block and in the Lindhurst and Waimumu Hundreds could not be dealt with because they had been vested in the Southland Land Board but no regulations for their administration had been issued. In February 1923, sections in each of the four Hokonui blocks, including those sought by the Murihiku Sawmilling Company, were withdrawn from the Southland Land Board’s control by Order in Council to enable the owners to deal directly with sawmilling companies for the grant of timber-cutting rights.

The State Forest Service also seems to have been interested in acquiring the land itself and then onselling the cutting rights. A memorandum from forest ranger WHS Macfarlane to the district conservator of forests in Invercargill in 1922 assessed the milling potential and value of 21,055 acres in the four Hokonui blocks, but stated that the ‘greater portion’ of this area carried little timber of commercial value. A subsequent report by the conservator in July 1924 detailed the then-current sawmilling activity in the area and estimated the value of its production (but not the return to the owners). An appraisal of all the silna forests for this purpose in 1925 by forest ranger CM Smith gave six sections comprising 1650 acres in Hokonui block LXII as yielding 6000 super feet of timber per annum of matai, kahikatea, and rimu at a value of £3 per acre, but stated: ‘Remainder of unalienated land in this block not suitable.’ Smith also noted that 11,683 acres in the Waimumu blocks would yield only 2500 to 3000 super feet a year and that, since about two-thirds of the area was the catchment area for the Invercargill municipality water supply, the Forest Service should not attempt to acquire it. Further, in relation to the Lindhurst and Forest Hill Hundreds, Smith noted that ‘The Native land in these districts is so much cut over . . . that no recommendations can be made in respect of the few scattered areas that are left unalienated’ (emphasis added).

Nothing appears to have come of this appraisal until 1929, when, as part of Native Minister Sir Apirana Ngata’s Maori recovery programme, the economic development of the silna lands was more actively pursued. Two representatives of the Hokonui blocks, AE Wixon and T Bragg, were members of a committee of silna owners that conferred with Ngata in Wellington about procuring the ‘effective settlement’ of the lands or otherwise disposing of them to the Crown through the Departments of Forestry and Lands. The same six Hokonui sections that Smith had singled out were identified as being suitable for the Department of Forestry. A further 55 sections in the four Hokonui blocks were identified as being suitable for Maori occupation. The immediate result of this silna initiative was Cabinet’s approval of a grant of £1000 to the South Island Maori Land Board for development, but no evidence of any outcome specific to the Hokonui blocks has been provided to the Tribunal.

For the next 20 years, the record supplied to the Tribunal is virtually silent. Then, possibly

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45. CM Smith, report to Conservator of Forests, Invercargill, 14 October 1925, FO 8/0, vol 1, ArchivesNZ, Wellington (doc a18(14))
because it may have been unique, an almost complete record of the sale of cutting rights in section 54 of block 1 of the Lindhurst Hundred in the 1950s is available. This section (which is still in the hands of the Waimumu Trust) provides an interesting case-study. On 6 December 1951, following an application to the Maori Land Court for cutting rights by Alan Osborne Woodware Factory, the assembled owners at Masterton appointed the Minister of Forests as their agent for disposing of the timber. By September the following year, the Forest Service had conducted a detailed appraisal of the section, based on a 100 per cent measurement. The block contained 325 acres, and in 1931 cutting rights had been sold for £728 15s 10d to the Waitane Sawmilling Company, which however ceased operations in 1935 after milling only 92 acres. Of the 233 acres of millable bush remaining in 1952, nearly two-thirds (65.4%) of the timber was rimu, with kahikatea (13.6%), miro (10.5%), and matai (8.3%) being the other main species. Almost all of the totara, then the most valuable species, had been cut out from 1931. The total yield was estimated at 1,303,000 board feet and the upset price (the lowest acceptable selling price of the timber) at £1834 10s; the appraisal cost was £427. By May 1953, the adjoining section 53 had been added in and the timber-cutting rights on the two were offered for sale for a five-year term in one lot, with a combined yield of 3,086,000 board feet and an upset price of £7260, making a total of £8446 6s 5d, including appraisal costs and Maori Land Board charges. The highest tender, £10,036 by Osborne Woodware, was accepted and the price paid in full. At the end of the five-year term, Osborne had milled more than half of section 54 but had left section 53 uncut. The licence lapsed, and the remaining timber was revalued and offered to Osborne for a further five years on payment of the difference between the old and new values (£1397). The sum available for distribution to the owners of sections 53 and 54 pro rata after the deduction of Forest Service and Maori Land Board administration charges would therefore have been about £10,000; of that, £4290 was still being held in deposit by the Forest Service in November 1965. To conclude, section 53 had been ‘disposed of’ by 1988, when the Waimumu Trust was formed. Section 54 is the only one of the 45 parcels of land still remaining in the Waimumu Trust to have been fully milled, and the only one from which, on the evidence supplied to the Tribunal, a historical income to the owners (who currently number 430) from forestry can be established.

Apart from its history of these two sections, the record is silent until 1970, at which time the Board of Maori Affairs proposed to sell three sections in the Forest Hill Hundred to the New Zealand Forest Service. The sections, which totalled 968 acres and were valued at $3350, were to be developed in conjunction with the adjoining Hokonui State Forest 52. No outcome for this proposal was supplied to the Tribunal.

It appears that by this time the Hokonui silna lands still in Maori hands were being administered by the Maori Trustee. That situation continued until 1981, when the Ngai Tahu Maori Trust Board applied to the Maori Land Court to assume control of these lands. After a series

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46. According to the Reserve Bank’s New Zealand CPI inflation calculator, £10,000 in 1958 would have been worth $366,000 in 2004 values.
of hui held with the owners, the Waimumu Trust was formed in 1984 to take over the management of most of these lands, with the Maori Trustee continuing in the capacity of advisory trustee. Some section owners, however, chose to remain outside the Waimumu Trust. The trust was formally established in 1988 and reconstituted as an ahu whenua trust in 1993.47

By 2004, of the 28,659 acres (11,607 ha) (according to Mackay and Smith and Gilfedder and Haszard) or 31,520 acres (12,656 ha) (according to the claimants) originally allocated, only 10,971 acres (4,440 ha) remained in the Waimumu Trust’s hands (see map 2). This means that, since the law was changed to permit permanent alienation in 1923, nearly two-thirds of the original silna allocation at Hokonui has been permanently alienated either to the Crown for forestry and other purposes (TV transmitters, for example) or to private owners. Much of the latter appears to have been the better pastoral land on the periphery, while the poorer and more heavily forested land in the centre has remained in Maori control.

The matter of the amount of income derived from the Waimumu Trust lands since their allocation occupied considerable time before the Tribunal. According to Maori Land Court information supplied by the claimants, historical cutting rights to the 10,971 acres were licensed for no more than about 1,500 acres, but in the event logging was not carried out on about half of the area. The administration and other charges levied are not known. Therefore, it is not possible to quantify the historical income that the claimants and their ancestors derived from their land, except in the case of one section, for which an adequate documentary record survives. It is known, however, that $38,000 was received from the Forest Service in 1999 for harvesting that occurred on Waimumu section 58A and Lindhurst section 58 without the owners’ permission in 1996 and 1997. This payment was distributed to the owners pro rata according to their shares. In November 2003, $60,660 was received from Craig Pine, a forestry company that had inadvertently crossed a Waimumu Trust boundary line in planting exotics some 30 years earlier. Later, realising its error, the company paid a sum to the Waimumu Trust for both the timber value and the loss of use of the land for that period.

To complete the picture, we need to discuss some very recent attempts to exploit the Waimumu Forest resources. These attempts are better comprehended in the context of Government efforts to control the logging of all indigenous forests from the late 1980s, to which we turn now our attention.

2.4 Changes in Government Policy for Indigenous Forests from 1987

2.4.1 1987 to 1990

Although many areas of the Hokonui blocks had been cut over in the 1880s, and some in the 1920s, 1930s, and 1950s, sufficient virgin and regenerating indigenous forest remained for the

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The Waimumu Trust (silna) Report

2.4.1

Map 2: Areas administered by the Waimumu Trust, showing the forest cover as assessed in the 1999 MAF inventory
lands to attract interest as Government policy towards indigenous forests, both public and
private, began to change in the later 1980s. Of the 6.3 million hectares of indigenous forests
throughout New Zealand, about 1.1 million hectares were in private ownership and included
a high proportion of lowland forest types that were under-represented in the Crown's
indigenous forests. The 1.1 million hectares included about 440,000 hectares on Maori land,
of which about 200,000 hectares had commercial timber management potential. Growing
public pressure through the 1980s to conserve all indigenous forests, public and private, led
the Government to develop the policy objective of maintaining or enhancing, in perpetuity,
the existing area of indigenous forest through protection, sustainable management, or refores-
tation with indigenous species.

Following a discussion paper released in September 1989, the Government announced its
policy for indigenous forests on public and private land in March 1990. The policy included a
ban on the exporting of indigenous forest produce in the form of woodchips, logs, or sawn
timber, unless the produce was certified as sustainable. This ban, regulations for which were
introduced in July 1990 under the Customs Act 1966, prevented the exporting of beech wood-
chips from the silna forests in the Rowallan–Alton area of Southland, west of the Hokonui
forests. The policy also provided incentives for private owners to conserve and protect their
forests, which included:

- the contestable forest heritage fund (later renamed the nature heritage fund), to encour-
age voluntary agreements with the Crown to protect forests; and
- Nga Whenua Rahui, a contestable 'trust fund' to assist owners of Maori land to protect
  their indigenous forests.

At the same time, Cabinet asked the chairman of the Cabinet Committee on Treaty of
Waitangi Issues to ‘initiate immediate discussions with Maori owners of indigenous-forest-
covered land, which was allocated as compensation, on possible levels and mechanisms of
compensation for opportunity losses through implementation of this policy’. 48 Preliminary
discussions were held with trustees representing the silna indigenous forest owners in April
1990, and in June of that year negotiations began with them for what became known as the
‘framework agreement’. As a countermove, the silna trustees also formed Rau Murihiku
Whenua Maori (rmwm) to oppose the indigenous forests policy as it affected them, and
in July 1990 they filed Wai 158 (see sec 1.3) claiming ‘prejudice by the Crown's policy on
indigenous forests which is depriving us of an economic base’. 49 The framework agreement
between the Crown and the silna owners was reached on 7 August 1990 and noted the
“special case” circumstances of the spirit and intent embodied in the 1906 legislation. It also
specifically recognised the owners’ concern and advanced the solutions of:

a27(61)), p2
49. Paper 2.15, p16
awarding cutting rights in State exotic forests 'in compensation for loss of commercial opportunity in those virgin forests agreed to be under negotiation' (including Waimumu);

• other 'suitable modes of compensation for loss of commercial opportunity on virgin forests'; and

• 'modes of compensation for loss of commercial opportunity on modified indigenous forests'.

In addition, 'suitable delivery mechanisms of agreed compensation' were to be 'devised according to the nature of that compensation'. A Cabinet paper endorsing the framework agreement noted that the 'liquidation value' of the virgin forests (excluding Waimumu, which seems to have been an unknown quantity at that stage) was estimated at about $52 million, and the 'lost-opportunity commercial value' at about $10 million to $14 million.

At the same time, a Crown Law Office opinion had been sought on several factors, including:

• the Crown's liability for a claim for compensation for opportunity loss by Maori allocated land under SILNA and 'now adversely affected by' the indigenous forest policy;

• the differences between the Crown's liability under SILNA and its liability to compensate other landowners affected by the policy; and

• the impact of the Crown compensating Maori under SILNA on other such claims for compensation.

The opinion stated that any landowner who had an indigenous forest would be entitled to compensation on principles of fairness but that Maori who had been allocated land under SILNA might have an 'additional but separate claim to compensation, not based on but arising from the events that preceded the 1906 Act'. It was argued that SILNA was 'a Crown attempt to rectify a situation it was responsible for' by not fulfilling the terms of the original deeds of purchase, that the lands allocated were 'unfit for settlement and virtually valueless' but that a 'redeeming feature' was the 'valuable timber' on them, and that, because the land was fit for little else, the 'value of the timber was therefore a major part of the Crown's fulfilment of its obligations'. The opinion continued: 'The indigenous forest policy reduces this Crown fulfilment of its side of the bargain to virtually nothing... The Crown has in effect taken away part of the consideration “paid” as part of the original sale and purchase agreement.' As a consequence:

the claim of Southland Maori under the Act is completely removed from any claim any other landowner might have as it is based on their unique position of having been allocated land in the fulfilment of a Crown promise or obligation in a deed of sale from last century, and

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50. Framework agreement between Crown and SILNA owners, 7 August 1990 (doc A27(408)), secs A, D1, D2, D3, E2
51. Minister of Justice, 'Negotiations with Maori Owners of Southland Indigenous Forest Covered Land Allocated under the 1906 South Island Landless Natives Act', paper to Cabinet Committee on Treaty of Waitangi Issues, 20 August 1990 (doc A27(408)), paras 10, 12
the Crown action in regard to indigenous forest reducing the value of that consideration. As such the claim may be seen to be based on something like breach of contract or breach of promise, rather than principles of fairness.

The only precedent set would therefore be for other Maori who were in the same position as Southland Maori ‘who may have received something in fulfilment of a Crown promise or obligation which the Crown has subsequently taken away or reduced in value’. 52

The Cabinet Committee on Treaty of Waitangi Issues then directed officials to negotiate with the Wai 158 claimants on the basis of providing monetary compensation of up to $14 million for the loss of commercial enterprise opportunity. It should be noted that other private owners of indigenous forests were able to claim ‘adjustment assistance’ for ‘direct financial loss’ only, where existing contracts were adversely affected. Only one of the eight groups of silna owners was affected in this way, and they chose to join the Wai 158 claim instead. 53 The Treaty of Waitangi Policy Unit of the Ministry of Justice was also asked to obtain an independent estimate of the volume of merchantable timber in the main silna forests from the Forest Research Institute and Janett forestry consultants. This appraisal, which did not include the Waimumu Trust lands, was completed in June 1992 and became known as the Janett report.

2.4.2 1990 to 1993

The change of government in November 1990 did not result in significant change to the thrust of the indigenous forest policy. However, the unsustainable harvesting of indigenous forests was permitted to continue in Southland for silna forests as a transitional measure to support the local economy until local exotic forests could be harvested. Between February 1991 and September 1995, a total of 12 shipments of indigenous woodchips from Southland totalling 250,000 tonnes, together with associated exports of sawn timber, was approved for export by the Minister of Customs. Four contracts to export unsustainably harvested indigenous timber and woodchips from silna forests were signed with Alan Johnston Sawmilling Limited (ajs) in Southland between September 1992 and November 1995.

In 1992, the Government proposed to introduce the Forests Amendment Bill amending part IIIA of the Forests Act 1949 to require that the milling of privately owned indigenous forests be on a sustainable basis. Meetings between the Ministry of the Environment and the Treaty of Waitangi Policy Unit aimed at bringing the silna forests under this regime did not result in any agreement. Cabinet papers over this time referred consistently to the silna lands as having been awarded in compensation and with the purpose of providing a resource base. Aware that the

52. Executive Crown counsel, Treaty Issues Unit, to director, Treaty of Waitangi Policy Unit, Department of Justice, 10 August 1990; Dr Nora Devoe, submission to select committee on Forests Amendment Bill 1999 (doc a27(380)), app 3, para 10

Crown would otherwise be exposed to Treaty claims, in June 1992 Cabinet agreed to exempt the silna forests from the Bill. Instead, to honour the commitment in silna for these lands to provide an economic base for the owners, the Government would continue to negotiate with Maori landowners in an effort to reach an agreement to protect most of the land covered by the Act. In extending the date for the final report on these negotiations, Cabinet noted that, while the silna owners were exempted from the indigenous forest policy in the Forests Amendment Bill, they were ‘still restrained by the current export ban under the Customs Act 1966 and could also be restrained by local authorities under the Resource Management Act 1991’. The Forests Amendment Act as passed in March 1993 exempted four categories of forest from the sustainable management provisions—the silna forests, forests under the West Coast Accord, indigenous planted forests, and forests in the Conservation estate.

2.4.3 1994 to 1996

A marked shift in the Crown’s silna policy began early in 1994, when negotiations about another silna forest, the Waitutu block on the coastal plateau near Te Waewae Bay in western Southland, resumed in earnest. The 2171-hectare block contains prime rimu forest and adjoins the Fiordland National Park, a world heritage site. The owners, the Waitutu Incorporation, had been negotiating for more than a decade with the Crown for compensation for protecting the forest, but without result. In December 1993, they sold the cutting rights to Lindsay and Dixon, a subsidiary of the Paynter Group, and logging was about to begin. Negotiations between the Crown and the Waitutu Incorporation advanced more swiftly and led to a settlement in March 1996 under which the forest would be preserved in perpetuity, managed by the Crown but still owned by the incorporation. The Crown agreed to pay the incorporation $18.55 million over five years, $13.55 million of it in cash and the balance in cutting rights to the 12,000-hectare Longwoods second-growth beech forest. The sum agreed was based on commercial timber valuation and was made up of two parts: a special appropriation for the market value between clear-felling and sustainable management; and DOC funding for the market value between sustainable management and full protection. In return, the Waitutu Incorporation gave up its claims under Wai 27 and Wai 158.

The Government recognised that such a settlement might establish expectations for other silna owners, and identified four further blocks as having ‘high conservation significance’. In order of priority based on their ‘strategic value’ in February 1994, they were: the West

55. Cabinet, ‘Southland Indigenous Forests, Claim Wai 158’, minutes of 31 August 1992 meeting, CAB(92)M35/8a, undated (doc a27(100)), p1
Rowallan block (part of the Waitutu forest); the Tautuku–Waikawa blocks in the Catlins; the Rakiura blocks; and the Hokonui Hills.

By October 1995, the Hokonui Hills block had been relegated: whereas the conservation values of the others were rated as ‘significantly high’ or ‘high’, it was listed as ‘unsure’. The block did not reappear on later lists of silna forests with high conservation values, and it is clear that there was uncertainty about its precise composition.

At this time, the Waitutu situation was close to resolution, and Ministers were concerned about the ‘copycat’ effect it might have on other silna owners. Further, the effect of the Forests Amendment Act 1993 had been to drive up indigenous timber prices, and there was a risk that the longer the issue was left unresolved the greater the settlement costs based on commercial timber values might become. The worth of the major silna forests was then thought to be up to $77 million, and up to $54 million if the highest-priority Waitutu, Rakiura, and Rowallan–Alton blocks only were chosen.

Pressure on the Government mounted after the Waitutu settlement was announced, and the Royal Forest and Bird Protection Society began a campaign to resume the banning of the indigenous woodchip trade from Southland and to remove the silna forests exemption from the 1993 Act. On the first matter, approval was declined for ajs’s next shipment of indigenous woodchips from Southland, which was due in October 1995. On the second, on 1 July 1996 Cabinet noted a Crown Law Office opinion indicating that the removal of the silna exemption would be ‘unlikely to be a breach of the Treaty of Waitangi’. In a precursor to the events in 2000, further historical research was being undertaken to confirm the legal opinion, and following ‘satisfactory completion’ of this research, the Minister of Forestry, John Falloon, was to go back to the silna owners to discuss individual settlements, whether for total forest protection or sustainable management. This research appears not to have been completed, but Mr Falloon did talk with owners.

After an aerial inspection of the Waimumu Trust’s forests on 5 September 1996, Mr Falloon outlined to trust representatives:

- the Government’s desire to apply sustainable management principles to silna indigenous forests;
- the distinction between the process for achieving a solution for the silna forests and the resolution of the historical claims of Ngai Tahu under the Treaty of Waitangi;

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58. This opinion was not supplied to the Tribunal to maintain legal professional privilege; the passages quoted appear in Alan Reid, ‘Development of Policy for Forests on South Island Landless Natives Act 1906 (silna) Lands and Associated Legislation: Key Events’, paper prepared for Crown Law Office, undated (doc A17), p.5. See also Cabinet, ‘Applying Principles of the Forests Act to Lands Reserved under the silm Act 1906: Overview Paper’, minutes of 1 July 1996 meeting, CAB(96) M24/12, undated (doc A17(6)), p.2. Summaries of this opinion in a later draft Cabinet paper were removed before the latter was supplied to the Tribunal.

2.4.4

- the Government’s view that each forest would be considered on its merits and the Waitutu settlement was not to be regarded as a barometer for other SILNA settlements;
- the Government’s view that settlements may include assistance for and facilitation of (but not responsibility for) commercial operations, such as tourism ventures, consistent with forest preservation or sustainable management.

The Waimumu trustees indicated that they wanted to obtain a financial return for their land but had no firm proposals on how this would be achieved. They said that landowners would need to be consulted on any management proposal and that opinion might be divided on whether logging was an option they wished to pursue. A few days later, Waimumu trustee Rewi Anglem, who was not present at the meeting with the Minister, was reported as saying that a meeting of owners had decided to enter into a clear-felling contract. Later reports, however, made it clear that there was insufficient owner support for such a move.

At the same time as Mr Falloon was discussing their ‘aspirations’ with SILNA owners, the Crown was developing three options for resolving the situation:
- passing legislation (to remove the exemption for SILNA lands) without compensation;
- passing legislation with compensation; or
- negotiating to bring about voluntary sustainable management.

At this point, further advice was awaited from the Crown Law Office as to ‘the need or otherwise for compensation’. That advice has not been supplied to the Tribunal on the ground of legal privilege. A draft paper from the Minister of Forestry to the Cabinet Committee on Enterprise, Industry, and the Environment in October, in discussing the three options, noted that negotiated compensation could cost between $25.8 million and $49.2 million, based on the difference in value between unrestricted commercial timber harvest and sustainable management. It also suggested that the district plans required by the RMA (see sec 2.5) could provide sufficient protection for the forests.

2.4.4 1996 to 1999

After the 1996 election, the coalition agreement reached between the National Party and New Zealand First stated that the Crown would ‘negotiate to end clear-felling of indigenous forests in Southland and Otago by South Island Landless Maori’ and that there would be consultation with these Maori on the issue of compensation, which had a ‘recognised fiscal cost’.

By early September 1997, negotiations on the Ngai Tahu deed of settlement were well advanced. Cabinet agreed that Wai 158 would be excluded from the settlement, apart from

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60. Chris Baddeley, MAP file note 43/02/05, 5 September 1996 (doc a27(117))
61. Document A3, p17
62. Document A32, para 7
63. Document a27(301), paras 22, 66
64. Paper 2.5, p22
65. The deed was executed on 21 November 1997.
any claim that might relate to the original silna allocation.\textsuperscript{66} Meanwhile, AJS, which held four then-current contracts for the exporting of unsustainably harvested produce from silna forests, had had a number of applications for export permits declined since September 1995 and had woodchips from the Rowallan–Alton silna forests stockpiled on the wharf at Bluff, at the AJS mill, and at the forests. The company took proceedings in the High Court in May 1997 seeking judicial review of ministerial controls and decisions on indigenous timber and woodchip exports from silna forests, and the Crown Law Office advice was that the regulation under which the applications were declined was likely to be struck down as invalid. The implication was that timber from forests on silna land was exempt from any export ban or any requirement that the forest had to be managed under a sustainable yield regime. Cabinet therefore agreed in September 1997 that legislation should be introduced in that term of Parliament to make all remaining natural indigenous forests subject to the export control provisions introduced in the Forests Amendment Act 1993. The legislation would provide that no compensation would be paid for any resulting losses but that adjustment assistance to silna owners could be paid if their existing contracts were affected. However, it was assumed by officials that, by the time the proposed legislation took effect, the four silna contracts would have been fulfilled and that no or minimal assistance would be required.\textsuperscript{67}

This 'legislation without compensation' policy was confirmed by Cabinet in February 1998 after Te Puni Kokiri sought compensation for silna forest owners for loss of timber value. In addition, Cabinet wanted to protect selected forests with high conservation values and, by the end of 1999, to have concluded the negotiations with silna forest owners to cease unsustainable harvesting. As for the Wai 158 claim, it was considered that the Crown could either negotiate a settlement at the same time or let the claim go through the normal Treaty claims process. A four-year transitional period for phasing out current harvesting was proposed, during which a total allowable cut would be permitted based on the harvesting on silna lands between 1990 and 1992. A Crown negotiating team was formed in March, and preliminary discussions were held with BMWM, the Maori Trustee’s office, Te Runaka o Ngai Tahu, the Tautuku Waikawa Lands Trust, Rakiura Maori Land Trust, and the Waimumu Trust. As a result, Cabinet agreed in July to continue the negotiations, with incentives including the Crown buying back all of the total allowable cut, the protection of selected forests with ‘high conservation value’, and, to resolve Wai 158, the possible establishment of a sustainable management fund for silna lands.\textsuperscript{68}

\textsuperscript{66} Cabinet Committee on Industry and Environment, ‘Ending Unsustainably Harvested Indigenous Timber Exports’, committee paper, CIE(97)132, 22 September 1997 (doc A17(7))

\textsuperscript{67} Minister of Forestry, ‘Ending Unsustainably-Harvested Indigenous Timber Exports: Supplementary Information’, paper to Cabinet, 25 September 1997 (doc A17(7)), paras 2–3

\textsuperscript{68} Cabinet, ‘Ending the Unsustainable Harvesting of Silna Indigenous Forests, minutes of 27 July 1998 meeting, CAB(98)M26/5, undated (doc A17(9))
These proposals were put to the silna owners at a meeting at Rehua Marae in Christchurch on 31 October 1998. Present were the Minister of Conservation, Nick Smith, the Crown negotiating team (led by Brent Wheeler), and about 140 silna owners and trustees, including representatives of the Waimumu Trust. After a long debate, during which many speakers accused the Government of failing to consult before reaching its policy position, the proposals were rejected on the ground that they did not provide compensation for economic loss.  

The Government was asked to come back with an amended proposal based on what had been said at the hui. The mandate of RMWM to negotiate was confirmed. After the hui, the MAP representative on the Crown negotiating team, Bill Sutton, observed: 'In my opinion, it is now quite certain that the Wai 158 Treaty claim will not go away, except to the extent that individual owners may wish to withdraw from the claim, pursuant to negotiated deals with the Crown.'

While the Government was reconsidering its position, on 9 June 1999 the High Court decision on the ajs case was announced. As the Crown Law Office had predicted, the regulation banning the exporting of silna forest produce was struck down as unlawful. The High Court also found that there was evidence that the Government was seeking through the regulation to improve its negotiating position with the silna owners and to promote sustainable management. Both of these objectives were ‘remote and unconnected with the proper purposes of customs and excise legislation’. The court found that the agreement to exempt the silna forests from the Forests Amendment Act 1993 was made:

in recognition of the Crown’s explicit commitments given to silna owners in 1906 regarding their right to use the land and forests provided to them in a manner which would ensure their economic and social well-being. The lands were granted to silna owners as compensation for their treatment by the Crown in preceding decades.

The next month, the Government produced its amended proposals for discussion. In a policy package with funding of nearly $20 million, it would negotiate actively with individual groups of silna owners, with the aim of bringing their forests under the sustainable management regime of the 1993 Act voluntarily rather than legislating them under it compulsorily. The Government would also offer a voluntary moratorium to protect the silna forests from logging until a long-term solution could be found under a new Crown negotiator, George McMillan (who had negotiated the Waitutu settlement). silna representatives were called to a Beehive meeting with Nick Smith and officials, to be briefed on the proposals on the evening of 12 July 1999, literally on the eve of the introduction of the Forests Amendment Bill on 13 July. The Bill:

69. Brent Wheeler and Company Ltd to various Ministers, 19 November 1998 (doc a27(204)), p 2
71. Document A4, para 3.5
72. Document A17, pp 12-13
removed the existing silna exemption from the provisions of the Forests Act 1949;
prohibited the exporting of any indigenous timber from unsustainably managed indigenous forests;
allowed the exporting of indigenous timber, including woodchips and logs, from land under a sustainable plan or permit only;
prohibited the milling of indigenous timber except where the timber was harvested from forests sustainably managed under a registered plan or permit or from specified Maori land;
introduced a mechanism for specific silna land to come under the Forests Act by negotiated agreement;
removed any ability to argue a link between the RMA and any exemption enjoyed by silna land; and
removed any entitlement of silna owners to compensation for a loss in value of timber or land resulting from the Bill.

Introducing the Bill into Parliament, the Minister of Forestry noted that it recognised ‘the special circumstances of land returned to Maori’ by silna.73 The Bill was referred to the Transport and Environment Select Committee, which heard submissions but did not complete its consideration before the 1999 general election. The Bill was therefore carried forward and later referred to the Local Government and Environment Select Committee.

The proposals outlined above were put to another hui at Rehua Marae on 31 July 1999, which was attended by about 200 people, including the Ministers of Conservation and Forestry, the new Crown negotiator and other officials, and silna owners and trustees, including representatives of the Waimumu Trust. The hui resolved that the Bill should not proceed in its then-current form, that if it proceeded it should exempt the silna lands, and that the concept of a voluntary moratorium should be accepted, to be negotiated with individual groups of owners. The moratorium provided for goodwill payments of $34 per hectare of forest canopy coverage to be made, initially for one year but this was later extended. The Crown also undertook not to introduce legislation into Parliament making the land compulsorily subject to the sustainable management and milling provisions of the Forests Act.

During this time, the Crown had been negotiating with the Rakiura Maori Land Trust, initially under the chairmanship of Rewi Anglem, for the protection and future management of 3510 hectares of the virgin Tutae-Ka-Wetoweto Forest at Lords River on Stewart Island. The forest, the deed protecting it (which was signed on 9 October 1999), and the situation that gave rise to it were very similar to those in the Waitutu settlement, though management remained with the owners. The Crown paid the Rakiura Maori Land Trust $10.9 million, based on the commercial timber value, for a conservation covenant in perpetuity.

73. David Carter, 13 July 1999, NZPD, vol 579, p17,929
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2.4.5

The funding came from the $20 million allocated for negotiated settlements with individual silna owners.24

2.4.5 Since 1999

In early 1999, MAF began to update and complete the information on silna forest areas and timber volumes recorded in the 1992 Janett report. The 1999 survey assessed those forests (including the Waimumu Trust’s) that had not been included in the earlier report and updated others that had been logged in the interim. The final report, dated February 2000, summarised the commercial quantities of indigenous timber thought to be available in all the remaining silna forests.

At the end of 1999, there was a change of government. In August 2000, the existing silna policy of achieving sustainable forestry management by negotiated settlements was reviewed by a group of Ministers, and proposals based on a new policy were prepared. The new policy aimed to use existing mechanisms to achieve ‘some high priority conservation outcomes’ (emphasis added) and to ‘encourage sustainability’ by providing grants to silna owners to develop sustainable development plans and streamline consent processes. The then-current ban on the exporting of indigenous woodchips would be extended to include silna-owned land, and the Forests Amendment Bill 1999 amended to permit the exporting of any indigenous timber, including woodchips, from any area with a registered sustainable management plan or permit. The existing RMA mechanisms to promote sustainable management and to avoid, remedy, or mitigate the adverse effects of logging on the environment would be strengthened and used ‘more effectively’. The primary outcome of the policy, it was claimed, would be that the silna landowners were ‘left with unfettered rights to their land (subject to the RMA and the export ban)’. For those landowners who wished to log sustainably or seek conservation deals for lands that were a conservation priority, assistance of up to $20 million would be available. For conservation purchases, the amount available, $16.1 million, would be ‘a fixed value reflecting the conservation value of high priority silna blocks and not the timber value’ (emphasis in original). It was noted that:

The policy is not an attempt to distribute funding across silna landowners (or to achieve any social or ‘equity’ outcome for landowners or to address the owners’ Wai 158 claim). A significant portion of the funding ($16.15 million GST incl) is provided for conservation priorities, for which approximately 25% of silna forested area may be eligible. The financial expectations of many silna landowners will therefore not be met by this policy. [Underlining in original; italics added.]75

74. Document a32(b), para 68
75. Ibid, paras 2–4, 18
However, the new Minister of Forestry, Pete Hodgson, had reservations about this change of policy and sought a ‘more comprehensive and permanent solution to the “silna” issues’. He therefore proposed new legislation that would provide for the ‘payment of a consideration’ to all silna owners in exchange for them coming under the sustainable management provisions of the Forests Act. The legislation would also be referred to the Waitangi Tribunal under section 8 of the Treaty of Waitangi Act 1975 for a report on whether or not the Bill constituted a breach of the Treaty.\(^{76}\) Officials argued strongly against the Minister’s proposed course of action.

The idea, first noted in 1996, that the assumptions about the history of the silna forests that led to the 1993 exemption were ‘incorrect’ surfaces again in official thinking at this point. A draft Cabinet paper dated 6 October 2000 set out in detail the reasoning behind this idea before stating that ‘Further investigations may justify a policy decision that the historical assumptions behind the 1993 exemption were not soundly based, and that there are not strong reasons for continuing to treat silna lands as a special case’ (emphasis added).\(^{77}\) Cabinet was asked to note that ‘it appears that the reasons for the 1993 exemption, so far as they rely upon certain historical assumptions, may not be soundly based. Further research may be needed to confirm the position.’\(^{78}\)

About two weeks later, two historical research reports were commissioned by the Crown Law Office at the request of maf. One was ‘Origins of Government Policy: South Island Landless Maori’, which was researched and written in three weeks by historian Cecilia Edwards, with assistance from Brent Parker.\(^{79}\) At the same time, Mr Parker was also separately reviewing the historical assumptions behind the Crown’s silna policy from 1990 to 1993. These reviews were used to inform a Crown Law Office report entitled ‘A Review of the Origins and History of Government Policy Regarding the Lands Reserved under the South Island Landless Natives Act 1906’. That report was completed in April 2001. This review concluded that:

the main assumptions that lay behind the exceptional treatment of silna forests in the 1990s [were] not soundly based.

In particular, it appears to be a misapprehension that silna lands were granted in compensation for unfulfilled promises under the original deeds of purchase. At the time, the Crown and the representatives of Ngai Tahu it dealt with viewed this as a matter of providing a form of charitable relief.\(^{80}\)

In sum, the Crown now considered that there was ‘never anything special’ about the silna
lands that justified their being exempted from the sustainability requirements of the Forests Amendment Act 1993.\(^{(81)}\)

There is nothing further in the record supplied to the Tribunal about the fate of the Minister of Forestry’s proposal to treat all silna owners more equally, and to refer the legislation designed to achieve that to the Waitangi Tribunal for an opinion. On 8 April 2001, however, following completion of the Crown Law Office review of the origins and history of the silna lands, that and the Edwards report were presented to silna representatives, including Mr Anglem, by the Minister. RMWM subsequently commissioned professional historian Dr Jim McAloon to review these documents, with the Crown meeting the cost. Dr McAloon’s review, completed in October 2001, rejected their conclusions. Thus, there was no agreed position on the silna history between RMWM and the Crown.

In November 2001, the Minister of Forestry met with RMWM representatives, who asked to be consulted when the Government was ready to discuss its preferred policy option. That discussion took place on 25 March 2002. The policy package itself, substantially unchanged from that proposed in September 2000, was announced on 12 May 2002. Its starting-point was that the Government intended to reimpose export controls on all indigenous timber produce, including woodchips and logs; only the export of sawn timber and finished products would be allowed. The exemption of the silna owners from these requirements would be removed, and there would be no compensation for this change. The silna owners would, however, be free to sell unsustainably harvested produce domestically (this assumed that unsustainable harvesting would be permitted under the rma, as discussed in the following section). The voluntary moratorium would be extended for three years until March 2005.

Total funding of $19.7 million over seven years would be provided for conservation covenants, MAF-produced sustainable forestry management plans, Ministry of Environment assistance with applying the rma (including helping the Southland District Council to enforce its district plan), and the extended moratorium. Of this total, $16.1 million was available for conservation covenants through the nhf. The Government identified 5000 hectares of silna forests, primarily in Tautuku–Waikawa, West Rowallan, and Waitutu, as having priority for conservation settlements, and initiated discussions with their owners.

Another hui of Crown officials and silna landowners and trustees, organised by RMWM with Crown financial assistance and attended by about 150 people, was held at Tuahiwi Marae at Kaiapoi on 20 July 2002 to explain the policy package. Three issues dominated the discussion:

- dissatisfaction over the adequacy of ‘consultation’ leading up to the policy package;
- the nature of the conservation settlements and the limitations on funding available through the nhf; and
- the effects of the rma on silna lands.\(^{(82)}\)

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81. Document A17, p10
82. Director, Sustainable Resource Use Policy, MAF, to Minister of Forestry, 7 August 2002 (doc A17(22))
For silna owners, the change to the export provisions for woodchips and logs was the most significant amendment resulting from the 2002 policy package to the Forests Amendment Bill 1999 as introduced. Accordingly, submissions from silna trustees and owners were taken again by the Local Government and Environment Select Committee in mid-2003. The committee was divided in its view on the need to reimpose export controls, which was done by majority decision. Another significant change proposed by the select committee was the exemption from income tax granted for payments to silna owners entering conservation covenants. The committee noted: ‘We recognise this dispensation in part recognises the unique circumstances of silna lands that were granted and were intended to provide for the social and economic needs of silna owners.’ The Bill as amended was passed and assented to on 19 May 2004.

Owners of the silna lands that were accorded priority in entering voluntarily into conservation covenants through the nhf have not been quick to take up this option. To date, five sections have been secured, four of them in the Rowallan block in western Southland. The other was section 922 of Hokonui block lxiii, which was not part of the Waimumu Trust lands. In July 2003, the Government indicated that other silna forests of lower conservation value would be considered in a second phase using the remaining funds from the $16.1 million allocated. Approximately $5.8 million of this sum has been spent or committed to date. The Waimumu Trust has not been formally invited to apply to the nhf, nor has it applied for consideration itself.

2.5 The Effects of the rma

The revised approach to conservation and heritage issues evident in the Labour Government’s 1990 indigenous forests policy also saw expression in the massive rma. The purpose of the Act was ‘to promote the sustainable management of natural and physical resources’ (s5(1)),'sustainable management' being defined in section 5(2) as:

managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while—

(a) Sustaining the potential of natural and physical resources . . . to meet the reasonably foreseeable needs of future generations; and
(b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
(c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

In section 6, ‘matters of national importance’ included the ‘protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development’ (s 6(b)) and the ‘protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna’ (s 6(c)). Under section 31, district councils were required to prepare district plans to achieve the ‘integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district’. Under section 9, any departure from the rules governing land use set out in a district plan required a resource consent from the district council. Under section 8, all persons ‘managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi’.

The Waimumu Trust’s forests, along with those in West and East Rowallan, Waitutu, Alton, and Rakiura, fall within the boundaries of the Southland District Council. The council produced its proposed district plan in 1994. As a result of submissions it introduced a new rule, HER.3, controlling the cutting of ‘significant indigenous vegetation’. The effect was to make unsustainable logging of indigenous forest on silna land a controlled activity requiring a resource consent. Various interested parties, including both conservationists and the Maori Trustee acting for many silna owners, appealed to the Planning Tribunal (later the Environment Court). The Southland District Council found itself in ‘a great deal of difficulty and administrative confusion’ because of the ‘inadequate’ inter-relationship between silna, the RMA and the Forests Amendment Act 1993.84 By 1998, concerned about its liability for compensation if its district plan rendered silna land ‘incapable of reasonable use’, the council believed that the matter should be resolved by the national rather than the local government and considered the option of not taking enforcement action should logging activity begin.85 This suggestion was initially endorsed by the Minister for the Environment, Simon Upton, who also accepted that ‘the clarity of the relationship between the RMA, the Forest Act and the silna leaves something to be desired’. His subsequent retraction of his support for non-enforcement gained widespread publicity.86

The matter eventually went to an Environment Court hearing in December 2000, after references were lodged under the RMA by the Minister of Conservation and other interested parties, including Federated Farmers and the Royal Forest and Bird Protection Society. Acting on behalf of a number of silna owners, the Maori Trustee asked to be heard as a person having an interest greater than that of the public generally.87 At the hearing, Mr McPhail for the Maori Trustee argued that:

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84. Manager (resource management), Southland District Council, to Ministry for the Environment, Dunedin, 19 June 1996 (doc A27(115))
85. Chief executive, Southland District Council, to Minister for the Environment, 12 June 1998 (doc A27(168))
86. Minister for the Environment to chief executive, Clutha District Council, undated (doc A27(6)); Minister for the Environment to chief executive, Clutha District Council, 20 July 1998 (doc A27(176)); newspaper articles, undated (doc A27(221))
87. Minister of Conservation v Southland District Council unreported, 19 April 2001, Judge Sheppard, Environment Court, Auckland, A039/01, paras 1–8 (doc A27(330))
the Southland District Council was attempting through her.3, and, contrary to the principles of the Treaty of Waitangi (which it had to take into account under section 8 of the RMA), to remove rights in respect of lands granted as compensation under SILNA;

- the sdp was an attempt to enforce sustainable forestry management by a back-door method akin to that struck down in the ajs case; and

- rule her.3 was the result of an exercise of authority that the Southland District Council did not have, because since 1993 the RMA must be interpreted as having been curtailed in its application to the SILNA lands by the specific exemption of the lands from provisions in the Forests Amendment Act 1993.

The Environment Court, however, accepted the Crown's newfound argument that SILNA lands had not been granted as 'compensation'. It did this on the ground that no evidence to the contrary had been put before it. Nor did it accept the Maori Trustee's other arguments, finding that sections 6 and 8 were subordinate to the primary purpose of sustainable management in section 5.88

The sdp became operative on 27 June 2001, after all Environment Court appeals had been dealt with. Under the amended her.3, the extraction of indigenous timber as a permitted activity was limited to 50 cubic metres over a 10-year period for each certificate of title, regardless of the size of the section, provided that the trees had a diameter of more than 25 centimetres at breast height. Any greater quantity required a resource consent. Thus, a theoretical maximum of 2150 cubic metres could be extracted from the 45 Waimumu sections over 10 years without a resource consent. To be economically viable, however, the quantities taken from the Waimumu forests would have had to be greater and a resource consent would have been needed.

An expert opinion obtained by the claimants from resource management consultant Keith Hovell considered that the key factors to be taken into account in considering a resource consent in this case were likely to be the potentially significant effects of landscape impacts, visual impacts, and ecological impacts.

In the 1997 Boffa Miskell report Southland Regional Landscape Assessment, for the Southland Regional Council, the Hokonui Hills were described as being a 'characteristic' rather than an 'outstanding' landscape. In Southland, the characteristic landscapes were said to contain 'many prized landmarks, special features, views, and remnant areas of importance'. The Hokonui Hills in particular were described as enjoying 'a high profile, probably resulting from visibility from the main highways in the region'.89 Mr Hovell went a little further, considering that Hokonui Hills to be an 'outstanding natural feature at a district level' and worthy of protection:

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88. Ibid, paras 25–180
89. Document a13, paras 5.13, 5.14
They provide the backdrop to the Southland Plains and are a dominant physical feature viewed over an extensive distance. The cover of indigenous forest over much of the elevated ridge line contributes significantly to their character and their status as one of the natural icons of the area.90

Mr Hovell had ‘no doubt’ that:

On the faces of the highly visible elevated land (such as viewed from the state highways), where mature indigenous forest is continuous, . . . the visual impacts of a regime of clear felling would be significantly adverse for some time. . . . even the removal of up to 25% of the indigenous vegetation on a site would at best result in a ‘mottled’ vegetation cover with open pockets where a number of trees had been removed. There would be a loss in continuous canopy and a reduction in the integrity of the vegetation.91

According to the Boffa Miskell report, the Hokonui Hills also contained ‘important ecological values for flora and fauna’,92 and ‘Hokonui Maori Land’ was listed as a significant wildlife habitat in the sdp. Mr Hovell also considered that the Hokonui Hills contained areas of ‘significant indigenous vegetation and significant habitats of indigenous fauna’. Further evidence for this was provided in doc’s ‘Conservation Management Strategy for Mainland Southland/West Otago (1998–2008)’, which assessed the ecological values of the Hokonui landscape unit and listed several threatened plant and bird species in public and private indigenous forest areas there.

In addition, according to Mr Hovell, the sdp gave a very prescriptive definition of an ‘approved sustainable yield management plan’, which any application for a resource consent was likely to have to meet. Previous Southland District Council approval of resource consents for the selective logging of indigenous forests in similar situations had imposed very restrictive conditions.

For all these reasons, plus the high public interest in the logging of indigenous forests among conservation groups, Mr Hovell considered that any application from the Waimumu Trust for a resource consent to exceed the permitted extraction of indigenous timber would be publicly notified and probably opposed; at the very least, conditions would be sought. Referral to the Environment Court was therefore likely. For the large contiguous block of the Hokonui forest forming the ‘backbone’ of the hills, he considered the visual landscape and ecological values to be ‘outstanding’, and he thought that there was ‘absolutely no likelihood of this land being granted approval to clear felling’. Indeed, ‘even selective logging would

90. Document A13, para 6.8
91. Ibid, para 5.21
92. Ibid, para 5.18
be tightly controlled’. In his opinion, the situation would be the same for most peripheral sections, especially those including waterways, although he considered that other isolated sections of the forest containing mostly secondary growth could gain approval for clear-felling.

2.6 The Value of the Waimumu Forests

Forest valuation, which involves projection of future trends in prices and discounting them back to present-day values, is not an exact science – and even less so in the case of the Waimumu Trust’s forests, where it seems that no complete forest inventory has ever been made. While Maori Land Court records in Christchurch indicate that various valuations of different sections of the forest were done at various times, no indication was given to the Tribunal of the basis of these valuations; nor was there any one time at which the whole forest was valued. Waimumu Trust records provide no assistance here. The 1996 valuation of all the silna forests by the Ministry of Forests (see sec 2.4.3) was based on ‘estimated commercial timber values under either unrestricted cut or sustainable management’, and used a range of variables in projected timber prices and discount rates. This method established a net present worth for the Hokonui Hills silna forests, then considered to have an area of 5700 hectares, of $400,000 to $800,000 for clear-felling and $70,000 to $100,000 under sustainable management. By comparison, the Rakiura forests, with an area of 11,040 hectares, had a net present worth of $15 million to $32 million for clear-felling and $5 million to $8 million under sustainable management, a difference of $10 million to $24 million. Under the conservation covenant for 3150 hectares of these forests at Lords River in 1999, $10.9 million was paid to the Rakiura Maori Land Trust.

2.6.1 MAF forest inventory

Expert witnesses for both the claimants and the Crown in Wai 1090 produced their own valuations of the Waimumu Trust’s forests. Both were based on the 1999 MAF inventory of all the remaining silna forests, which itself relied on systematic sampling of forest crop-types rather than total tree counts. For the Waimumu forests, the MAF inventory failed to include the five blocks now known as the Hokonui blocks, totalling 380 hectares. For the rest, it divided the forests into three classes of cover. It showed 849.4 hectares of more or less unmodified mixed podocarp/hardwood forest, with rimu and kamahi dominating. In this cover class, 24 per cent of the total stems assessed had economic value. A further 846.6 hectares of forest had been modified by harvesting in the past but at least 20 per cent of the canopy was intact, the mean canopy height was more than seven metres, and the trees present
2.6.2

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Species | Sawlog volume (m$^3$) | Industrial-grade log volume (m$^3$)
--------|-----------------------|---------------------------
Rimu    | 82,822                | 3253                      |
Miro    | 4815                  | 68,610                    |
Matai   | 9400                  | 23,283                    |
Totara  | 36,903                | 11,840                    |
Rata    | 2180                  | 180,953                   |
Kahikatea | 3659                | 1460                      |
Kamahi  | 732                   | 218,972                   |
Other hardwoods | — | 25,578

Note: Sawlogs are higher-quality logs used to provide sawn timber, while industrial-grade logs are of inferior quality and are suitable only for chipping.

Table 1: Estimated standing log volumes (in cubic metres). Source: document a9.

had a minimum diameter of 25 centimetres at breast height and a sawlog length of at least 2.5 metres. In this cover class, 14 per cent of the stems assessed had economic value. The remainder, 2390 hectares, was scrub, forest not meeting the specification of the two previous classes, and land cleared of forest. The estimated standing log volumes are given in table 1.

2.6.2 Claimants’ valuation

The claimants’ valuation was done by forestry consultant Noel Burn-Murdoch of PF Olsen and Company after a site visit in May 2004. The summary above was taken from this valuation, which noted that the Waimumu forests were very variable in their volume content for each species and that these estimates were not precise. In terms of market, Mr Burn-Murdoch noted that industrial-grade logs were suitable only for chipping and that, because there was no domestic market for chipwood and exporting was prohibited, it was assumed that no industrial-grade logs would be removed. Further, because there was then no market for kamahi sawlogs and the prices offered for kahikatea logs were less than the cost of helicopter extraction, it was assumed that these two species would not be harvested. Otherwise, Mr Burn-Murdoch assumed that, under a clear-felling scenario, exporting was permitted for any indigenous species of timber other than in the form of woodchips and that, under a sustained yield scenario, export was permitted of any grade of sawn rimu or beech but not woodchips.93 He did not take into account actual or potential export markets for this produce.

The MAF survey also estimated the annual sustained yield harvest by species. From these two sets of figures, Mr Burn-Murdoch extrapolated the estimated harvest yield in recovered logs, assuming a sustained yield harvest once every 10 years and clear-fell harvesting over five years, as shown in table 2.

93. Document a8, pp.3, 10. It should be noted that the Waimumu Trust’s forests, unlike the silna forests in western Southland, contain no native beech.
Historical Context and Contemporary Crown Policies

2.6.3

The harvest costs estimated by Mr Burn-Murdoch for helicopter extraction produced a price per cubic metre of \$171.28 to \$174.28 for the sustained yield cut and \$113.59 to \$116.59 for the clear-fell cut. Annual operational costs at today’s values were estimated to be \$34,426, with an extra \$72,000 being required once every 10 years for the sustained yield harvest.\(^4\)

The prices for logs delivered to the mill, as estimated by Mr Burn-Murdoch, assuming a five-year clear-fell harvest, are given in table 3.

<table>
<thead>
<tr>
<th>Species</th>
<th>Sustained harvest, 10-year cycle</th>
<th>Clear-fell, one year’s cut</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rimu</td>
<td>3649</td>
<td>14,695</td>
</tr>
<tr>
<td>Miro</td>
<td>190</td>
<td>996</td>
</tr>
<tr>
<td>Matai</td>
<td>411</td>
<td>1728</td>
</tr>
<tr>
<td>Totara</td>
<td>1505</td>
<td>6448</td>
</tr>
<tr>
<td>Rata</td>
<td>73</td>
<td>455</td>
</tr>
<tr>
<td>Total</td>
<td>$828</td>
<td>24,592</td>
</tr>
</tbody>
</table>

Table 2: Estimated harvest yield in recovered logs (in cubic metres). Source: document A12, p12.

From all these figures, using a post-tax discount rate of 8.5 per cent derived from 17 market sales of plantation forests between 1995 and 2003, Mr Burn-Murdoch calculated the following values for the Waimumu Trust forests:

- Value if forest is harvested by sustained yield: \$1,664,000
- Value if clear-felled over five years: \$25,250,000\(^5\)

2.6.3 Crown valuation

The Crown valuation was done by forestry consultant Dennis Neilson, who reviewed Mr Burn-Murdoch’s valuation in three affidavits. In the first, he accepted with minor qualifications the harvesting data on which Mr Burn-Murdoch’s valuation was based, but he queried the assumptions behind a discount rate of 8.5 per cent. Mr Neilson’s objections here were twofold: the lack of hard information about the quality of timber in the forests and the lack of

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\(^4\) Ibid, pp21–22
\(^5\) Ibid, pp13–16, 25
an identifiable market for the timber produced, given increasing consumer resistance to use of wood from indigenous forests.\textsuperscript{96}

Because of the uncertainties thus generated, Mr Neilson considered the risk profile of the Waimumu forests to be different from those of the plantation forests on which Mr Burn-Murdoch’s valuations were based. He therefore chose a higher discount rate: 20 per cent for the clear-fell option and 10 per cent for sustainable yield, rather than 8.5 per cent for both.\textsuperscript{97}

This gave valuations of:

\begin{align*}
\text{Sustained yield} & \quad \text{\$1,580,382} \\
\text{Five-year clear-felling} & \quad \text{\$21,358,132}
\end{align*}

However, Mr Neilson qualified the latter valuation in the light of market forces, both domestic and international. According to Mr Burn-Murdoch, the total harvest of all indigenous logs in New Zealand in 2003 was 33,000 cubic metres. An annual harvest from the Waimumu Trust’s forests of 24,592 cubic metres would increase the supply of indigenous sawlogs and therefore sawn timber in New Zealand by 75 per cent. This, according to Mr Neilson, would produce an oversupply and drive down prices. He therefore adjusted his valuation of the five-year clear-felling option to compensate, producing the following valuation:

\begin{align*}
\text{Five-year clear-felling} & \quad \text{\$12,814,879}\textsuperscript{98}
\end{align*}

In the absence of the Forests Amendment Act 2004, Mr Neilson did not consider that there would be an international market for sawn timber from clear-felling the Waimumu Forest, stating that it would be ‘impossible to attract even one overseas buyer, let alone more than one, as this volume is such a small amount in international terms, based on an unsustainable temporary supply’.\textsuperscript{99}

In light of further information received, Mr Neilson further revised his clear-felling valuation. Noting that the volume of rimu logs (which would make up the bulk of the Waimumu forests harvest) delivered to mill in New Zealand had fallen from 52,000 cubic metres in 1999 to 4000 cubic metres in 2003, he considered the market risk to be even higher than he had estimated in his first affidavit. In addition, after reading the RMA analysis by Mr Hovell (see sec 2.5), he considered it unlikely that resource consent for clear-felling, even at the extraction rates of less than 25 per cent identified by Mr Burn-Murdoch from the MAF survey, would be granted by the Southland District Council in most areas of the forests, and any consents granted would have onerous conditions attached. These factors, coupled with the lack of detailed knowledge of the forest’s characteristics, led him not only to abandon altogether his earlier valuations based on five-year clear-felling but to reduce his valuation of a sustained

\textsuperscript{96}. Document A14, para 24
\textsuperscript{97}. Ibid, para 30
\textsuperscript{98}. Ibid, paras 49–57
\textsuperscript{99}. Ibid, para 59
yield harvest (‘the only one possibly feasible, but with substantial risks’) to between $500,000 and $1 million.  

Mr Neilson’s third affidavit was in response to a further affidavit from Mr Burn-Murdoch defending his choice of an 8.5 per cent discount rate. These affidavits largely involve technical arguments on approaches to forest valuation.

2.6.4 Recent attempt to exploit the Waimumu forests’ resources

A more recent attempt to exploit this land began at the end of 2002, when, according to the Waimumu trustees, they first learnt of the 1999 MAF inventory and gained a ‘detailed idea’ of their forests’ composition.  

The trustees, fully responsible only from 1988, also asserted that they had made no previous efforts to benefit from the land because in the 1990s they had been waiting for more trees to mature before harvesting them. On the assumption that the inventory found at least 272,000 cubic metres of harvestable rimu, matai, and miro timber in the Waimumu Trust’s forests, and on the erroneous view that existing use rights put the logging of them beyond the reach of the SDP, the trustees began preliminary negotiations with Southern Forest Products (SFP). This led to contractual negotiations for the extraction of up to 10,000 cubic metres of timber, predominantly rimu, every year for 15 years, subsequently revised at the end of May 2003 to 38,890 cubic metres of timber a year for seven years. Draft contracts were exchanged, and later versions included provisions allowing for the rapid termination of the agreement if harvesting were prevented by the Southland District Council or through threats of Crown action, and for 20 per cent of any money received by the Waimumu Trust through covenants not to extract logs to be paid to SFP.  

In the event, the misunderstandings between the parties and the lack of certainty about the timber volumes and the mix of species in the Waimumu forests, combined with market trends, the legislative and policy climate formed by the RMA and SDP, and the imminent Forests Amendment Act, led SFP to withdraw from the contract negotiations on 26 June 2003. Trustee Rewi Anglem, who had been handling the negotiations, told his fellow trustees that the SFP withdrew because ‘Lawyers argued between each other’.  

This experience has led the Waimumu trustees to expect a similar failure of any future deals with timber interests.

A MAF ‘desktop’ sustainable management plan for the trust’s forests, based on existing inventory data and produced in September 2003, was assessed as ‘uneconomic’ by SFP.  

Although it indicated that there have been other interested parties, the Waimumu Trust did not provide any details. At the time of the reconvened Tribunal hearing in November 2004, it had not signed a contract to log its forests.

100. Document A16, para 38
101. Document A5(b), para 10
102. Ibid; minutes of Waimumu trustees meeting, 11 July 2003
103. Document A1, para 22
CHAPTER 3

THE CLAIMANTS’ CASE

3.1 Introduction

As outlined in sections 1.2 and 1.3, after their initial application the claimants sought to widen the focus of the Wai 1090 inquiry to embrace the historical background to SILNA, the ‘suite of policies’ leading up to the Forests Amendment Act 2004, and the general statutory regime affecting the Waimumu Trust, including the RMA. The presiding officer, Judge Layne Harvey, allowed that, while the focus of the inquiry should remain on the effect of Crown indigenous forestry policy and the Forests Amendment Act 2004 on the claimants and their lands, a brief review of the historical background and related matters would serve to provide context.

In organising their evidence and submissions, the claimants relied on the statement of issues reached by the Tribunal. This was helpful in clarifying particular points. The Tribunal’s summary of the claimants’ case takes a thematic approach. For convenience, where particular points of fact rather than interpretation were contested by Crown counsel in closing submissions without challenge from the claimants, they are discussed in chapter 4 only.

3.2 SILNA Policy

By the time of the claimants’ closing submissions in November 2004, the Forests Amendment Act 2004 had shifted from being the primary focus of their claim to being merely ‘the most recent manifestation’ of the Crown’s SILNA policy, which in its totality, they claimed, was not honourable and was likely to affect them prejudicially. They argued that two provisions in the Act – the removal of the SILNA owners’ exemption from export controls and the removal of their ability to seek compensation for this – had been enacted despite the submissions and representations they had made to the Crown. Based on Mr Burn-Murdoch’s June 2004 valuation of the Waimumu Trust’s forests, they alleged that the losses they would suffer as a result were ‘in the region of $23.6 million’, and that this prejudice compounded the historical injustices experienced by them and their ancestors.1

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1. Document A28, paras 6–9, 21

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The claimants considered that the original intention of silna was to provide an economic base for landless Maori. Citing findings in the Ngai Tahu Report 1991 and the Ngai Tahu Ancillary Claims Report 1995, they maintained that the grants of land were intended as ‘(partial) compensation’ for the earlier loss of Ngai Tahu lands and not as a ‘gift’. As confirmation of their stance, they cited the views of Dr Jim McAloon that silna was ‘a special measure’ following a number of commissions of inquiry and not a ‘technical measure’, and that the lands granted were in the main not suitable for the purposes for which they were intended. Both the claimants and the Crown had experienced some difficulty in identifying precisely what economic use had subsequently been made of the Waimumu Trust forests (see sec 2.3.2).

In tracing the development of the Crown’s silna policy (as outlined in section 2.4), the claimants tabulated excerpts from Cabinet documents from 1990 to 2004, which, they maintained (though they did not demonstrate how), showed that the Crown’s attitude shifted to their disadvantage. They contended that in the early 1990s the Crown recognised that:

its then proposed sustainable management policies for indigenous forests would have significant implications for silna owners and that the Crown would negotiate compensation for lost opportunity with Maori owners or exclude their lands from the proposed policy.

Further, they maintained that the Crown also accepted that the ‘unilateral curtailment of silna owners’ opportunities to use their land would breach the Treaty of Waitangi’. Because the Crown could not reach agreement with the silna owners, their lands continued to be exempt from the constraints on the milling and export of indigenous timber enacted via the Forests Amendment Act 1993. The claimants maintained that this was not an interim measure, and that the Forests Amendment Bill 1999 was introduced in order to validate the Crown’s actions that had been found illegal in the Alan Johnston sawmilling case.

The claimants considered that in 2000 the Crown ‘“revisited” its previous view of the silna rationale’, and said that this new view had been influential. They asserted that the Edwards report ‘treats silna as an early twentieth century social welfare policy as opposed to a form of compensation (albeit partial)’ and that it was ‘very influential in “changing the Crown’s mind”’. The Crown ‘shut the door to the special case argument’ that had previously informed its silna policy, and announced its new policy in May 2002. This led to the enactment of the 1999 Bill in 2004 substantially unchanged.

Concerning the extent of consultation with the silna owners in this process, the claimants argued that, while there were discussions between the Crown and silna owners, including the Waimumu Trust, the Crown’s “consultation” focused on meeting without listening’. They

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2. Document a28, paras 28, 27
3. Ibid, paras 33, 34
4. Ibid, pp17–23
5. Ibid, para 52
6. Ibid, paras 52, 53
7. Ibid, paras 64, 65
maintained that this flawed process culminated in the ‘fait accompli of the Hon Pete Hodgson [Minister of Forestry] presenting the Edwards report to silna owners out of the blue in 2001’. The claimants disputed the Crown’s ‘openness to the strength of the arguments of silna owners . . . that they had suffered a loss which should be compensated’, arguing that the consultation process resulted in changes that were less favourable to those being consulted than at the outset. In their view, the discussions took place ‘against a backdrop of expectation of full compensation and against the recognition that silna was a special case’, and this changed with the introduction of the Forests Amendment Bill in 1999.8

Because of the Crown’s actions, the claimants argued, the only potentially favourable outcome for them from the new silna policy could be minor recompense for conservation through the nhf, ‘Yet this is not certain by any means’.9 Further, they claimed that the funds for silna conservation settlements remaining in the nhf were neither significant nor sufficient for all those forests of lower conservation value that were potentially eligible for consideration in the second phase of the 2002 silna policy.10

In a subsequent memorandum dated 1 December 2004, the claimants made further comment in reply to the Crown’s response to the first of three written questions from the Tribunal (see app ii). This question concerned the Crown’s decision in 1997 not to pay compensation to the silna owners for any losses resulting from the removal of their exemption from the Forests Act 1949. The claimants argued that the Crown’s response raised a new argument that “compensation” in the Cabinet papers does not bear the meaning attributed to it in everyday usage, which was the meaning adopted by the Tribunal at the hearing, the Claimants, and (until now), the Crown. They maintained that the Crown was suggesting that there was never in fact a Crown policy of providing compensation to silna owners, only ‘adjustment assistance’, and that there was therefore no change in policy. This suggestion, they submitted, was not only selective but incorrect, and they cited numerous Cabinet papers from 1990 and from 1996 to 1998 in support.11 The relevant record has already been outlined in section 2.4, and we return to this matter in chapter 5.

3.3 The Effects of the RMA

The claimants argued that up until the passage of the Forests Amendment Act 2004 their ability to log their forests unsustainably for export was no more than notional, because of the rules in the sdp. However, since the Southland District Council ‘did not apply the relevant provisions of the sdp strictly to silna owners’ until the Environment Court decision in 2001,
it appeared as if ‘there were opportunities for silna owners to derive a substantial economic benefit from their forests notwithstanding the restrictions contained in the legislation’. They cited the interest shown by Southland Forest Products and other logging companies in 2002 and 2003 in support. The claimants further contended that ‘clearfelling of the Trust’s land in all but a tiny minority [sic – minority?] of sections would breach the rma’ and that, where selective logging may be permitted under the sdp, it would be tightly controlled and there would be ‘significant opposition’ from interest groups. All these factors, they claimed, ‘represent major disincentives to logging on any basis, particularly when they have no resources to withstand challenges to logging, even where that is permitted under the sdp’.13

In their 1 December 2004 memorandum, the claimants also raised a new matter – the effect of the Resource Management (Foreshore and Seabed) Amendment Act 2004, which received the royal assent on 24 November 2004. They noted that the amendment Act inserted a new section 17A into the rma, and provided that a ‘recognised customary activity’ may be carried out despite sections 9 to 17 of the parent Act, or despite a rule in a plan or proposed plan (s17A(1)(a)). The claimants therefore argued that ‘The Crown can, when it considers it necessary to comply with the principles of the Treaty of Waitangi, exempt activities’ from the rma, but that this had not been done in the case of the claimants’ land.14

3.4 Market Opportunities

The claimants maintained that ‘in the earlier stages the market opportunities were export driven’ because of the demand for rimu overseas, but that they were unable to take advantage of these opportunities because their forest ‘had not yet matured to the extent that it has now’. At the same time, they noted that, because of the effects of the Forests Amendment Act 1993, the market for export became progressively more difficult.15

Claimant counsel considered that ‘there was in fact a large measure of agreement between the two experts’, Mr Burn-Murdoch and Mr Neilson, on the question of export and domestic markets. Counsel noted that Mr Neilson (and Mr Reid of maf) conceded under cross-examination that the market for indigenous forest products had been reduced by two interrelated factors – the Crown’s actions in imposing export controls and the increasing consumer demand for sustainably produced products – and that it was not possible to conclude ‘whether one cause was more significant than the other’. On this basis, according to the claimants, Mr Burn-Murdoch’s evidence was to be preferred because he too ‘acknowledged the

13. Ibid, paras 112, 113
14. Paper 2.55, paras 44–45
15. Document A28, paras 114–116
issue of what consumers wanted, but in a more thoughtful, considered and informed way than Mr Neilson.16

The claimants alleged that the prospective effects of the Forests Amendment Act 2004 on the market opportunities for timber from the Waimumu Trust forests were ‘substantial and very negative’. In particular, they maintained that the exclusion of the export market was ‘highly destructive of value over the longer term regardless of the current state of the export market for indigenous logs’. Citing Mr Burn-Murdoch’s evidence, they considered that there was a ‘minimal prospect’ of the export market being revived in the future, in part because the infrastructure would not be maintained. Citing Mr McPhail’s affidavit, they considered that the absolute prohibition on the exporting of indigenous forest products would, particularly in regard to silver beech and to a limited extent for other species, ‘by itself, force owners to cease unsustainable harvesting’.17

The claimants also pointed out that they had begun negotiations with Southland Forest Products for clear-felling the forests in 2002 and 2003. These negotiations were serious attempts to derive economic benefit from their lands, they said, but ended when ‘mutual difficulties’ developed.18

3.5 The Value of the Waimumu Trust Forests

Claimant counsel was at pains to define the terms used in Burn-Murdoch’s valuation of the Waimumu forests in June 2004. ‘Clear-felling’ here did not mean logging the entire forest but represented the ‘selected harvesting of particular tree species . . . of economic value’, which he claimed would be about 24 per cent of the volume of the trees.19 Counsel also noted that ‘sustainable yield’ assumed a best-case scenario, whereby the Waimumu Trust was permitted to log 10 years’ worth of sustainable yield in ‘one-off hits every 10 years’, but that permission for that aggregation was not guaranteed.20

The claimants’ case rests on Mr Burn-Murdoch’s June 2004 valuation. This found that the value of the forests to the Waimumu Trust was $25.25 million for clear-felling and $1.66 million under sustainable yield, a difference of $23.59 million.

Concerning the evidence of the Crown’s expert witness, Mr Neilson, claimant counsel observed that he had never valued a New Zealand indigenous forest. The claimants also contended that there were ‘difficulties’ in the assumptions that he had made, which resulted from ‘his lack of experience in this area’. These difficulties were not specified, however. The claimants further noted that Mr Burn-Murdoch had actually visited the forest and relied on

16. Ibid, paras 138, 139
17. Ibid, paras 140, 151–153
18. Ibid, para 121
19. This view needs to be severely qualified: see section 5.5.
20. Document a28, paras 128, 135

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the 1999 MAF assessment, which had not been disclaimed by the Crown. They therefore main-
tained that Mr Burn-Murdoch’s valuation was reliable.21

As for alternative uses of the land, the claimants stated that ‘forestry is the natural fit’. The
land cannot be converted to dairy farming without cutting down the trees, which they con-
sidered, based on the evidence of Keith Hovell, was no longer likely to be permitted, ‘given
the strict effect of the SDP’. They also noted that in his supplementary evidence Mr Neilson
considered that the planting of exotics in the spaces created by the selective logging of
indigenous trees was unrealistic.22

Coming to the nub of their argument, the claimants contended that it was the combination
of the legislation and local government restrictions, as contained in the SDP, which deprived
them of opportunities to obtain significant economic advantages from their land. They
added:

This applies to the future as much as the past. The Crown says that SILNA owners have
been treated better than non-SILNA owners . . . This is not true. The Crown’s SILNA Policy,
the RMA and the Crown’s actions well before the 2004 Act have treated the claimants the
same as other non-SILNA owners; and in fact they are even worse off, since unlike other own-
ers they cannot derive an ongoing benefit from their lands because they will never be able to
be cleared in a way that permits a future alternative use.23

3.6 Breaches of the Treaty of Waitangi

The claimants listed eight ‘causes of action’ for Treaty breaches. In a preliminary aside, they
noted that, under section 20 of the Forests Amendment Act 2004, the only compensation
available is for contracts entered into before 13 July 1999. Since Mr Reid from MAF stated in
cross-examination that he was not aware of any such contracts, the claimants argued that
this provision was ‘window-dressing of the most obvious kind’ and that it demonstrated the
Crown’s lack of good faith.24 The eight causes of action are as follows.

3.6.1 Breach of Treaty principles of partnership, utmost good faith, and active protection

The claimants argued that the Crown’s SILNA policy:

will frustrate the purposes of the Crown grant of SILNA lands by further undermining the
compensatory purpose of the allocation of SILNA land and making the land incapable of

21. Ibid, paras 136, 137, 141
22. Document a28, paras 143, 145
23. Ibid, paras 146–47
24. Ibid, paras 159–160
The Claimants’ Case

3.6.3 Providing for the future economic support and maintenance of the [Waimumu Trust’s beneficiaries and their descendants.]

There were three stages in their line of argument. They contended:

- first, that the silna lands were originally granted to compensate Maori, ‘albeit inadequately’, because the Crown had earlier failed in its duty of active protection of the Maori concerned;
- secondly, that the established Treaty principles of partnership, the duty of active protection and the duty of utmost good faith required the Crown proactively to ensure the Waimumu Trust’s right to develop its resources so that it could ensure the economic support and maintenance of its beneficiaries; and
- thirdly, that these principles of the Treaty were breached by the Crown’s imposition of controls to restrict the trust’s ability to exploit its forests, its refusal to compensate the trust fully for the economic opportunities thus lost, and its support for the imposition of controls under the RMA that further constrained the exercising of the trust’s Treaty rights over its land.

3.6.2 Breach of undisturbed possession

The claimants’ allegation in respect of undisturbed possession followed the same line of argument. Because the silna lands were given by the Crown to compensate landless Maori for past wrongs and to provide for their economic sustenance, the Crown’s imposition of controls to restrict the trust’s ability to exploit its forest, its refusal to compensate the trust fully for the economic opportunities thus lost, and its support for the imposition of controls under the RMA that further constrained the trust’s Treaty rights over its land violated the guarantee of undisturbed possession under article 2 of the Treaty.

3.6.3 Breach of right to development

The claimants’ assertion concerning the right to development also followed the same line of argument. Citing the Waitangi Tribunal’s *Ngai Tahu Sea Fisheries Report 1992, Report on the Muriwhenua Fishing Claim, and Petroleum Report*, the claimants argued that the right to a resource includes the right to develop that resource as technology and evolving practices permit. They contended that this right was ‘especially acute’ in Wai 1090 because the purpose for which the silna lands were granted could not be achieved, especially in view of the

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25. Ibid, para 162
n nature of the lands, without development. Therefore, they argued, the Crown’s imposition of controls to restrict the trust’s ability to exploit its forests, its refusal to compensate the trust fully for the economic opportunities thus lost, and its support for the imposition of controls under the RMA that further constrained the exercising of the trust’s Treaty rights over its land breached the principle that the Crown must respect the right of the trust’s beneficiaries to develop their silna land.

3.6.4 Breach of non-derogation from grant
The claimants argued that there is an established common law principle of non-derogation from grant which ‘obligates the Crown as grantor of a property right in silna land not subsequently to act in a way that substantially interferes with the purposes of the grant’. Article 3 of the Treaty guarantees that Maori will enjoy the same legal rights as any other citizen of New Zealand, including the right to non-derogation from grant of property rights. The Crown is therefore required, it was argued, to ‘safeguard the ability of silna recipients to use and develop their land for the purposes for which it was granted’ or for ‘some better and different use’. By imposing controls and refusing full compensation for the economic opportunities lost, the claimants alleged, the Crown had restricted the Waimumu Trust’s ability to exploit and develop its land and had breached its duty to afford the trust’s beneficiaries the same protection as any other New Zealander.

3.6.5 Expropriation of private property rights without just compensation
The same line of argument was developed in relation to the constitutional convention that private property should not be expropriated without just compensation. Article 3 of the Treaty guarantees that Maori will enjoy the same legal rights as any other citizen of New Zealand, including the right to prompt, adequate, and effective compensation for the expropriation of private property rights. The Crown’s obligations were ‘especially acute’ in this context, it was argued, because of the purposes for which the silna land was originally granted. According to the claimants, the Crown had therefore breached not only the Treaty principles outlined in section 3.6.1 above but section 21 of the Bill of Rights Act 1990, which provides that ‘Everyone has the right to secure against unreasonable search and seizure, whether of the person, property, or correspondence or otherwise’. The claimants alleged that the Crown had also breached customary international law.

27. Document A28, para 173
28. Document A28, para 175
29. Ibid, paras 185, 192
3.6.6 Breach of legitimate expectation as to compensation

The claimants argued that they had a legitimate expectation that they would be granted 'just and adequate compensation by the Crown' for the proposed loss of their ability to carry out unrestricted logging of their silna land. This expectation arose, it was claimed, from 'many sources over many years':

- the Crown's policy papers and statements to Maori made in negotiations leading up to the framework agreement in 1990 and subsequently;
- the Crown's previous behaviour in entering into the Waitutu and Rakiura settlements, under which compensation was granted; and
- the fact that the silna lands were originally given as partial redress for Treaty wrongs.\(^{30}\)

In failing to provide compensation for the loss of economic opportunities, it was argued, the Crown had failed to abide by the undertakings it gave to the Waimumu Trust and silna owners, and it had therefore breached the Treaty principles of partnership and the duty of utmost good faith.

3.6.7 Failure to consult

The claimants further argued that they had a legitimate expectation that they would be consulted about the Crown's silna policy, and in particular about the policy options for land which did not have a 'sufficient level of heritage value'. This expectation arose, it was claimed, from:

- the Crown's past practice of consultation with the silna owners;
- statements for and on behalf of the Crown that consultation would occur, in particular the statements made in 1996 by the Minister of Forestry; and
- the importance of the silna forests to the Waimumu Trust and the significance to it of any changes to the silna policy.

This expectation had been breached, the claimants argued, by the Crown's implementing of its silna policy without consulting the Waimumu Trust in 'any real or meaningful fashion', and this in turn breached the Treaty principles of partnership and the duty of utmost good faith.\(^{31}\)

3.6.8 Breach of Treaty interest

The Waimumu Trust, the claimants argued, had a legal right to the 'unrestricted milling' of its forests so as to provide for the 'future economic support and maintenance' of its present and future beneficiaries. They claimed that the effect of the silna policy had been to ‘extinguish
the right of the Trust and its beneficiaries in a manner inconsistent with the principles of the Treaty, and that a Treaty interest had thus been created. This interest ‘entitles the Trust to a remedy, and obliges the Crown to negotiate redress’. 32

3.7 Remedies

The claimants sought the following relief:

- monetary compensation for the lost opportunity to fell and sell the timber growing on the forest land;
- compensation by the allocation of other lands and cutting rights to the Waimumu Trust;
- compensation by the allocation of State forest land to the trust; or
- such other relief as seems just to the Tribunal.

The claimants were willing to consider a combination of remedies ‘so long as the value of what they have lost’ was recognised. In this regard, the ‘most troubling’ loss to the claimants was not the ‘significant’ loss incurred as a result of the Crown’s actions in the 1990s but their ‘inability to now use the land for any other use with a substantial economic benefit’. The Crown’s silna policy, they claimed, left the remaining silna owners, including the claimants, in ‘an equation of rapidly diminishing returns. They have lost not just the present value of the unmilled forest but also its future use’. 33

32. Ibid, paras 210–212
33. Document A28, paras 224–227, 237
CHAPTER 4

THE CROWN’S CASE

4.1 Introduction

After an urgent hearing was granted, the Crown continued to maintain that the application for such a hearing was ‘influenced by error’. The reasons for this contention were outlined in section 1.2, but it is worth summarising them again here. In brief, they are that the claimants represented that the Forests Amendment Bill 1999 (now the Forests Amendment Act 2004) removed the ability of the Waimumu Trust to harvest its forests unsustainably for export, and that this would cause an immediate loss in value of more than $20 million. The Crown, however, argued that this loss in value was based on an assessment of the domestic market and that there was no export market for produce from the Waimumu Trust forests. Therefore, ‘the Act had no demonstrable impact on the Waimumu owners’ and the claim was not well founded.

In their closing submissions, Crown counsel observed that the Forests Amendment Act 2004 was ‘the reason the claim was granted urgency and is the focus of this inquiry’, a view that they said was reflected in the emphasis given in the statement of issues. They also noted that claimant counsel acknowledged during the hearing that, if his claim rested only on the effect of the Forests Amendment Act 2004, he would be ‘in trouble’, and they said that this was a tacit admission that the claimants sought to move attention away from the grounds on which the claim was granted urgency. Contending that the case for the claimants had been conducted as though the Wai 1090 Tribunal had been convened to hear the full Wai 158 claim, Crown counsel urged the Tribunal to resist the invitation to broaden the urgent inquiry, because there would be ‘significant procedural implications if the Tribunal granted urgency on a particular basis, but permitted the parameters of the inquiry to be redefined in hearing the claim’.

Accordingly, the Crown took a thematic approach in its closing submissions, focusing on the effects of the Forests Amendment Act 2004 and the RMA, the valuation of the Waimumu

1. Document A24, para 28
2. Ibid, para 26; doc A29, para 1.5
3. Document A29, para 1.3
4. Ibid, paras 12–13
Trust’s forests, and the expectations raised during the development of the Crown’s silna policy. The summary in this chapter, however, follows the thematic subheadings used in chapter 3.

4.2 silna Policy

The Crown visited the original granting of the silna lands only in so far as it informed the contemporary treatment of silna forests as a special category in policy-making. Crown counsel argued in opening submissions that the idea of silna lands as ‘compensation’ influenced policy in the early 1990s but that, from the middle of the decade, ‘confidence in this interpretation ebbed’. After the Edwards report in 2000, the ‘assumptions guiding initial silna policy in 1990 appeared untenable’. In its closing submissions, the Crown’s outline of the development of silna policy therefore concentrated on the expectations raised rather than on apparent changes of mind, taking the view that Crown policy processes, particularly in relation to negotiated settlements, do not ‘spring forth with clear answers at particular points and then never develop or reconsider or review those points of policy’.

Crown counsel approached the original grant of the silna lands via the perspective of Ngai Tahu themselves, arguing that Ngai Tahu’s stance was that the lands:

would be accepted for the relief of those who were deemed not to have enough for their subsistence, but it was to be distinctly understood that this step would have no connection with the settlement of their historical claims. From an official perspective, the landless natives policy was associated with an explicit rejection of the validity of those historical claims.

‘Compensation’ for acknowledged wrongs, it was therefore argued, was not in the minds of either Ngai Tahu or the joint committee whose findings were the ‘launching pad’ for the landless natives policy. Viewed against the full parliamentary history of silna, therefore, Sir James Carroll’s remarks in introducing the Bill were considered to be ‘obviously in the nature of a false step’. As a result, it was claimed that the settlement of Ngai Tahu’s historical claims and the Crown’s ‘failed attempt, via silna, to relieve the problems of inadequate land holdings, proceeded along separate tracks’.

Crown counsel then seized on and outlined with some care particular nuances in the development of the Crown’s contemporary silna policy. They emphasised the context of negotiation and claimed that it was not accurate to ‘juxtapose a number of Cabinet discussion papers and policy proposals and argue that these represent incontrovertible positions that

5. Document A24, para 41
6. Document A29, para 31
7. Document A24, para 46
8. Ibid, para 48; doc A29, para 18
9. Document A29, para 19
the Crown itself has taken and which the claimants can reasonably rely upon across decades of discussion and debate’. 10

The first aspect addressed by Crown counsel in this context was the framework agreement, which was claimed to be a ‘very tentative document’ that should not have given grounds for a ‘substantive expectation about compensation for economic loss’. It was, ‘essentially, an agreement to enter into negotiations’, with the Crown and Maori each having ‘very different views on what sort of compensation would possibly be part of the settlement’. Thus, the claimants, having agreed to negotiate without prejudice, ‘cannot now reasonably expect the very thing the negotiations failed to resolve’. 11

After the change of government in 1990, Crown counsel stated, the incoming Cabinet decided that the Crown ‘did not accept a liability to pay compensation but would consider assistance for those directly disadvantaged financially by the proposed policies’ and quoted the associated press release as stating that the Government ‘will consider claims for adjustment assistance from those who have suffered a direct financial loss as a result of the export ban’. From this, counsel claimed that in 1990 the Crown ‘had signalled that the government policy would be adjustment assistance aimed at direct loss, not compensation for economic loss’. 12

The next question was whether the silna exemption from the Forests Amendment Act 1993 was intended to be an interim step while negotiations continued. In response to the claimants’ assertion that Crown witness Mr Reid was unable to identify ‘a single contemporaneous document’ supporting that contention, Crown counsel referred to a 1998 MAF discussion paper (appended to Mr Reid’s affidavit), which stated that the 1993 exemption arose because the Government had not yet decided how to address the sustainable management issues involved, and linked it to the early stages of the negotiations on the Ngai Tahu settlement. 13 Crown counsel also claimed that Government statements supported this view. They cited the views expressed by the Minister of Forestry in introducing the Forests Amendment Bill in 1992 that the Government ‘will negotiate with Maori landowners in an effort to protect most of the land covered by the 1906 Act’, and by the chair of the select committee in reporting the Bill back to the House (quoted by Mr Reid), that ‘consideration must be given to bringing these forest lands within the scope of the general tenor of the Bill at the earliest opportunity’. Counsel claimed that the exemption ‘directly resulted from Crown consideration of owners’ views, and ongoing negotiations with owners . . . in the hope that further progress might be made through discussions with owners’. 14 At the reconvened hearing, they also submitted a press release by the Ministers of Conservation and Forestry dated 1 July 1992.

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10. Ibid, para 31
11. Ibid, paras 37, 39
12. Ibid, paras 41–43
which stated that the silna forests ‘stand outside the policy at present because there are still issues to be resolved’. 15

The next point at issue concerned the expectations aroused by the Waitutu and Rakiura settlements. The claimants said that they accepted the ‘goodwill’ moratorium payments in the expectation that they could reach a negotiated settlement of the kind achieved in those two cases. 16 Crown counsel contended that ‘The evidence of Mr McKenzie makes it clear that the claimants were told that the Rakiura and Waitutu settlements could not be considered to create expectations as to the type of compensation’. Since the Crown had indicated that conservation values were a significant aspect of its criteria, any ‘reasonable expectation’ held by the owners could be based only on those criteria and there could be ‘no expectation of a certain outcome’. Further, counsel argued that an expectation that negotiation might lead to settlement must be ‘rather loose’, because there could be ‘no guarantee of a substantive outcome’. 17

Crown counsel then devoted considerable attention to the genesis and progress of the Forests Amendment Bill 1999, as outlined in sections 2.4.3 and 2.4.4. They noted that Cabinet’s decision in September 1997 to introduce legislation removing the silna exemption from export controls and not allowing for compensation was preceded by discussions with the owners and followed by the formation of a Crown negotiating team. After the proposals put to the first hui at Rehua Marae in October 1998 were rejected, the Crown produced amended proposals, which, they claimed, were based on the owners’ concerns and included a voluntary moratorium on logging until a longer-term solution could be found.

Crown counsel rejected the claimants’ allegations that the silna policy changed after the introduction of the Forests Amendment Bill in 1999, claiming that the Bill remained unchanged until its enactment in 2004. The ability of silna owners to harvest unsustainably for the domestic market was left intact, retaining their differentiation from all other Maori and non-Maori owners of indigenous forest. Counsel also denied that the Edwards report was influential in changing the Crown’s mind about the extent of its obligations to silna owners and ‘shut the door to the special case argument’. They claimed that the report was not delivered to the claimants ‘as a kind of fait accompli’ and that instead silna owners were given a copy at the meeting between the Minister of Forestry and silna representatives, including Rewi Anglem, in April 2001 and invited to comment on it. The Minister indicated then that the Government ‘did not have a preconceived plan’ on how to handle the issue. The Crown also paid $15,000 for Dr McAloon to write his report in reply to the Edwards research. 18 When there was no meeting of minds over the historical research, there was a further meeting in November 2001, and the Government settled on its preferred policy

15. Paper 2.53, attachment 3, p2
16. Document a28, paras 94–95
17. Document a29, paras 52–54, 56
18. Ibid, paras 64–67
option in January 2002. The Minister of Forestry met twice with silna owners, including Mr Anglem, before the policy was announced on 12 May 2002.

In response to the first of the three written questions posed by the Tribunal (see app II), Crown counsel described in some detail the process by which the September 1997 decision was reached to introduce legislation removing the silna exemption from the Forests Act 1949 without providing compensation for any resulting losses. In essence, Crown counsel maintained that, in this context, the alternative to ‘no compensation’ was not ‘compensation’ but ‘adjustment assistance’, and that this was consistent with the view taken by the Government since August 1990.19

The Tribunal’s second question concerned the genesis of the review in 2000 of the historical assumptions behind the Crown’s silna policy, in which Crown counsel Dr Fergus Sinclair was involved. Dr Sinclair outlined the process briefly. The review originated from Crown Law Office advice on a proposed Cabinet paper on silna policy. Crown Law advised that there were arguments against continuing the exemption of silna lands from logging restrictions, and that these included the reasons for the original allocation of lands under silna. As a result, officials drafted a new Cabinet paper, which stated that ‘further investigations may justify a policy decision that the historical assumptions for the 1993 exemption were not soundly based, and that there are not strong reasons for continuing to treat silna lands as a special case’.20 Dr Sinclair informed the Tribunal that this paper led officials, with the knowledge of silna Ministers, to review the historical assumptions behind the 1990s silna policy. DrF asked Dr Sinclair to prepare a research proposal, the terms of which were used as the brief for the Edwards research. The full text of the letter containing the proposal was supplied to the Tribunal on 4 May 2005, subsequent to the judicial conference of that date.21

The Tribunal’s third question concerned the rma and is dealt with in the following section.

4.3 The Effects of the rma

Crown counsel discussed the effects of the rma in some detail. They argued that it is a statute of general application and that there is no inconsistency between its application to the silna lands and the 1993 exemption from the sustainability requirements of part iia of the Forests Act 1949.22 As the Environment Court concluded in 2001, the fact that silna owners were not affected by the 1993 amendment ‘did not mean that they were ever intended to be exempt from the scope of the rma’.23 In response to the Tribunal’s third question, Crown

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19. Document A.32, paras 22, 23
20. Document A.521(c), para 11
21. Paper 2.38, attachment 1
22. This view is contrary to that expressed by the Southland District Council and by the Minister for the Environment in 1999: see section 2.5.
23. Document A.29, para 14
counsel responded that the Act was the subject of considerable thought in the \textit{silna} policy development:

It was always understood that the \textit{rma}, as the overarching statute for managing the use of land, air and water throughout the country, would apply to indigenous forest owners (including \textit{silna} owners) whether or not they were also covered by Part 3a of the Forests Act 1949.\footnote{Document a32, para 33}

Counsel continued that the Forests Amendment Bill 1999 contained a clause to make it clear that part \textit{iii}\textit{a} did not limit the \textit{rma}'s application to indigenous forests and that this clause preceded the decision of the Environment Court in 2001. Counsel also maintained that there was no relationship between the Environment Court decision and the Edwards report.

As for the claimants’ complaint that the \textit{sdp} could curtail their right to harvest unsustainably for the domestic market, Crown counsel responded with several points. First, they said that the Forests Amendment Act 2004 ‘merely affirms what was already the case – that \textit{silna} forests, like all other land in the country, are subject to this general regulatory framework’. The \textit{rma} applied, they said, not as a result of the Crown’s \textit{silna} policy but as the effect of an environmental management statute of general application passed in 1991. Secondly, Crown counsel argued that there was nothing new in the imposition of land-use controls, citing Mr Anglem’s comment that 40 per cent of the trees in the Waimumu Trust’s forests could not be logged because of the requirements of the earlier Water and Soil Conservation Act.\footnote{Document a5, para 17; doc a29, para 17.2} Thirdly, they noted the ‘great difficulties’ in:

attempting to address philosophical issues about resource management in the context of an urgent inquiry into another Act. There are, for instance, problems of perspective. If there were to be an inquiry into the relationship between the \textit{rma} 1991 and the \textit{silna} lands, one would need to consider that question as a whole, by assessing the overall impact of the legislation. The issue cannot be analysed through the narrow lens of how the Act might apply to the Waimumu Forest.\footnote{Document a29, para 17.3}

Fourthly, counsel analysed Mr Hovell’s prediction that much, though not all, of the Waimumu Trust’s forests would be excluded from clear-felling by the \textit{sdp}. They noted that no proposal to clear-fell had been put to the Waimumu owners by the trustees and accepted, and they pointed out that there appeared to be some resistance to clear-felling among the owners. Further, because of the uncertain inventory information and the small scale of possible harvesting, the feasibility of logging operations in the forests was open to question. Counsel also noted both Mr Neilson’s view that the imposition of sustainability requirements by measures such as the \textit{sdp} tended to follow market demands rather than anticipate them and that the

\footnotesize{\textit{The Waimumu Trust (\textit{silna}) Report}}
effects of the RMA did not affect his valuation of the Waimumu Trust’s forests. Finally, counsel claimed that the reasons given by SFP for withdrawing from contractual negotiations with the Waimumu Trust were consistent with Mr Neilson’s observations.

In conclusion, Crown counsel returned to the ‘special case for the silna lands’, arguing that there were ‘significant difficulties with the idea that silna owners have a right to unrestricted exploitation of their lands by virtue of the alleged “compensatory” nature of the original grants’ (as described in section 4.2). Because the Ngai Tahu settlement settled all claims relating to the original allocation of silna lands, counsel argued that it could not be maintained that the silna forests ‘must be capable of full exploitation because they were granted for economic benefit’. They took the argument even further into the modern context, contending that:

to say that ‘compensation’ lands must be exempt from controls over land use implies that the properties received by Ngai Tahu as settlement of historical claims should also be exempt from the RMA 1991. That is plainly unreasonable in a modern setting. In the same way, it is unreasonable to propose that lands granted to address social conditions that no longer apply today should be exempt from basic controls over land use. The grant of properties is subject to the general law relating to such lands, as it changes from time to time. There is nothing to indicate that the grants made under silna 1906 were intended to be different in that respect.

If it is true to say that the silna lands are ‘special’ because they were given for the economic benefit of the owners, it is fair to assume that the retention of native forests by other Maori owners has probably involved an economic dimension as well. Seen in this light, it would be a glaring anomaly if 96% of Maori-owned native forest is subject to controls on land use while the 4% represented by silna forests is not.27

4.4 Market Opportunities

Crown counsel maintained that there was no evidence of an export market for rimu, the main species in the claim, in the period before the passage of the Forests Amendment Act 2004: ‘There is simply nothing to support the [claimants’] contention that export prices exceeded those in local markets because “the local market had not yet recognised the value of rimu to the extent it has now”.’ Counsel also claimed that there had been a strong domestic market that the claimants had taken no steps to exploit in recent years, and noted that that market was left open by the Act. Crown counsel further rejected as ‘untenable’ the argument that a podocarp forest had grown into a millable state during the period of modern silna policy.28

27. Ibid, paras 19–21
28. Ibid, paras 3–4
As for the possibility that Government policy had had what they called a ‘chilling’ effect on markets for silna timber, Crown counsel maintained that this notion applied only to the export market for hardwood chips, the main market on which the Government had placed controls in the 1990s, and that this market was not available to the Waimumu Trust because of the species composition of its forests. Further, counsel argued that there was no clear evidence before the inquiry that Government policy was the prime cause of the demise of the export trade in hardwood chips, citing Mr Reid’s evidence that the Government’s actions coincided with the decline in market demand for New Zealand beech pulp. While Crown action could not be excluded as a factor, this ‘falls short of establishing that government policy did in fact have the “chilling effect” contended’.

As for any likely export market in the future, the Crown cited Mr Neilson’s view that, for both environmental and commercial reasons, there would be no international market for the Waimumu Forest produce in the future unless it was harvested sustainably. Counsel further claimed that there was no evidence before the Tribunal to support the claimants’ assertion that the exclusion of the export market would be ‘highly destructive of value over the longer term’, arguing that ‘it is not possible to conclude, on the balance of probabilities that the export controls in the [Forests Amendment Act] 2004 [cause] any prejudice to the claimants whatsoever’. Mr McPhail’s assertion that the export ban would force owners to cease unsustainable harvesting was rejected on two counts: first, that it applied to silver beech products and was thus irrelevant to the Waimumu forests; and, secondly, on the basis of Mr Neilson’s expert opinion that it was ‘inconceivable’ that an overseas mill would seek to purchase unsustainably harvested native forest pulpwood from Waimumu (it was noted that Mr McPhail, a legal adviser to the Maori Trustee, did not purport to have expertise in the assessment of international markets for timber products). Finally, owing to a lack of evidence, the Crown rejected the claimants’ ‘speculation’ that an export market was unlikely to emerge because the necessary infrastructure would not be maintained. Counsel argued, based on Mr Neilson’s evidence, that the trend in milling operations was towards sustainable production – a trend reflected, they said, in the reasons for SFP withdrawing from the negotiations with the Waimumu Trust.

4.5 The Value of the Waimumu Trust Forests
Crown counsel began by noting the experts’ agreement, as discussed above, that there was no current export market for rimu and that it was unlikely there would be one in the future. They argued that Mr Burn-Murdoch’s valuation of the Waimumu Trust forests was generated...
from prices in the domestic market, which the Forests Amendment Act 2004 did not affect. Counsel then claimed that little had been said to justify the claimants’ reliance on the figure of $25.2 million for clear-felling over five years. On the issue of the relative backgrounds of the expert witnesses, they rebutted the claim that Mr Neilson was ‘inexperienced because he has not valued a New Zealand native forest’ with the claim that ‘it is not apparent from Mr Burn-Murdoch’s evidence that he is any better position’. On the issue of consumer demand, they pointed out that Mr Burn-Murdoch devoted ‘only a few paragraphs’ to the subject, whereas Mr Neilson addressed it in some detail, and from ‘a deep knowledge of commercial circumstances both within New Zealand and abroad’. Counsel rejected as having ‘no merit’ the claimants’ contention that, because the Crown had not ‘disclaimed’ the 1999 maf inventory, Mr Burn-Murdoch’s valuation must be ‘reliable’, on the ground that the maf assessment concerned timber volumes, not market conditions, extraction costs, or the value of the forest.

Crown counsel listed eight ‘major problems’ with Mr Burn-Murdoch’s analysis:

- The difficulties of transferring implied discount rates for plantation forests to the valuation of a native forest.
- The ‘flawed assumption’ that there had been a decline in discount rates.
- The ‘excessively optimistic’ assessment of how potential investors would regard the risks of investing in the Waimumu Forest.
- The ‘inadequate consideration’ of overseas consumer pressures and the likelihood of these being replicated in New Zealand, along with the ‘superficial’ treatment of New Zealand consumer trends.
- The failure to address the ‘unsatisfactory’ inventory information and its significance for investors.
- The failure to assess the impact of ‘flooding’ the market for native timbers by clear-felling over five years.
- The failure to address the volume and efficiency of production needed to attract investment in the Waimumu Forest.
- The failure to consider the impact on investment decisions of the RMA and the stance of environmental and iwi organisations, along with the absence of any assessment of due diligence costs.

The Crown contended that Mr Neilson had addressed all these matters in detail and had considered that they would ‘deter all but the most optimistic and speculative forest bidders. Or it [the forest] would attract a very low bid. I do not believe that any bidder acting prudently would bid on the forest.’ (Emphasis in original.)

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31. Ibid, paras 23–25
32. Ibid, paras 26, 28
4.6 Breaches of the Treaty of Waitangi

The Crown submitted that the claimants had failed to establish the prejudice that they alleged flowed from the passage of the Forests Amendment Act 2004. In the alternative, they submitted that there was no Treaty breach as pleaded by the claimants.

4.6.1 Article 1

Crown counsel argued that the 2004 Act forms part of the wider statutory regime of forest sustainability and resource management in New Zealand, and that the Court of Appeal had confirmed that article 1 of the Treaty:

must cover power in the Queen and Parliament to enact comprehensive legislation for the protection and conservation of the environment and natural resources. The rights and interests of everyone in New Zealand . . . must be subject to that overriding authority.33

In setting national policy, therefore, the Crown was ‘entitled to take into account a wider range of interests than simply the Waimumu landowners’ interests’. The ‘broader policy considerations’ included ‘the importance of retaining remaining indigenous forest areas’. Here, Crown counsel argued, ‘it should be noted that the claimants have had applied to them the same restrictions on exporting indigenous timber as already applied to other Maori and non-Maori indigenous forest owners.’34

The claimants’ contention that the imposition of controls by the Crown constituted ‘an expropriation of private property rights’ was rejected by the Crown on the ground that ‘imposition of controls is not the same as an expropriation’. Further, the claim that the imposition of controls is itself a breach of the Treaty ‘ignores the Crown’s wider responsibilities’.35

4.6.2 Article 2

The Crown interpreted the claimants’ statement that the Crown’s SILNA policy interferes with the Waimumu Trust’s claimed Treaty right of undisturbed possession of SILNA lands and forests to mean that ‘the interference comes through the act of passing legislation that applies to the claimants’ lands’. Counsel argued that ‘It cannot be proof of a breach of the principles of the Treaty of Waitangi to simply say that the claimants are subject to legislation’, because the Crown’s policy and legislation ‘does not prevent the Waimumu Trust from possessing the land or the forest’ but ‘regulates the way the Waimumu Trust may harvest timber on that land’.36

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33. Ngai Tahu Maori Trust Board v Director-General of Conservation [1995] 3 NZLR 553, 558 (CA) (doc A29, para 80)
34. Document A29, para 81
35. Ibid, paras 82–83
36. Ibid, paras 86–88
As for the duty of active protection, Crown counsel cited the Privy Council’s statement in *New Zealand Maori Council v Attorney-General* that, in carrying out its Treaty obligations, the Crown was not obliged to go beyond that which was ‘reasonable in all the circumstances’, and that its protective steps ‘change depending on the situation which exists at any particular time’. In the present case, counsel argued that the Crown had to take into account the need to protect indigenous forests and their associated ecosystems, and that the duty of active protection and any development rights must be balanced against other factors. The duty of active protection, it was claimed, did not extend to preventing the Government from ending the *silna* owners’ exemption from export controls. Nor, Crown counsel contended, could any claimed right of development ‘reasonably be seen to trump the other policy factors considered by the Crown in light of its consultation with *silna* owners’.

4.6.3 Article 3

Article 3 of the Treaty guarantees Maori the same rights as Pakeha. According to the Crown, the claimants invoked this article in relation to ‘claimed common law or equitable doctrines’, but it should not provide Maori with legal rights that are any different from those available at common law to non-Maori.

The first breach claimed was that the Crown’s policy and legislation constituted a derogation of the grant. This argument, according to the Crown, was based on English law rather than Tribunal jurisprudence, and the Crown did not accept that any such conditions attached to the Waimumu lands. Counsel argued that, if non-derogation applied to *silna* lands in the manner claimed, ‘it would not be possible for Parliament to legislate in any way that affects the use of any land granted with a specific purpose in mind’. There is no valid rule of common law that limits the capacity of Parliament to pass whatever laws it sees fit, counsel maintained, and there is no legal authority to support such a claim. Further, it was argued that ‘A derogation of grant is, in effect, a breach of contract’ but there was ‘no contract here, because there is no consideration given on the part of the *silna* owners for the grant of land’.

The second breach claimed was the ‘failure to compensate for the expropriation of property’. Crown counsel argued that there was no prejudice to the claimants there, because there was no market. Further:

the [Forests Amendment Act 2004] does not expropriate property. It regulates the manner in which the owners may use their property. It does not regulate that property in such a way as to deny them any use or benefit from that property whatsoever. The amendment

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38. Document a29, para 91
39. Ibid, paras 94–96
complained of constitutes a regulation of property, and then only the regulation of the export of unsustainably logged timber.

In any event, Article Three rights must involve rights accruing through the common law. The claimants are incorrect to say that there is a common law right to compensation for expropriation. There is a common law presumption that a subject may apply for compensation from the High Court where Parliament is silent as to compensation. Where Parliament expressly determines that compensation is not payable, there is no breach of a common law rule. Rather, a particular presumption of statutory interpretation is displaced. [Emphasis in original.]

Crown counsel argued that section 19 of the Forests Amendment Act 2004 ‘unequivocally states that compensation is not available for certain acts of diminution’ and that section 20 provides for ‘criteria for compensation where a contract has been frustrated’ by the Act. ‘There can be no complaint that the claimants have been denied Article Three rights.’

As for the claim that there was ‘arguably’ a breach of section 21(g) of the Bill of Rights Act, the Crown contended that the section was not breached. Counsel cited a finding that this section did not apply to the taking of property without compensation, and that concepts of ‘natural justice’ could not extend to include a right to compensation for any expropriation of property.

40. Document A29, paras 99–100  
41. Ibid, para 104  
CHAPTER 5

TRIBUNAL ANALYSIS AND FINDINGS

5.1 INTRODUCTION

In granting the application for an urgent hearing of the Wai 1090 claim, the chairperson stated: “There is no question that the loss complained of, if made out, is significant, even crippling.” The first question for the Tribunal to determine is whether that loss has indeed been made out. It is also necessary, however, for the Tribunal to consider the contemporary Crown policies which led to the enactment of the Forests Amendment Act. The Tribunal’s statement of issues (see app 1) sets out the context which informed the Tribunal’s inquiry into the particular issues on which an urgent hearing was granted. As set out in preceding chapters, the issues are:

- the settlement of Ngai Tahu’s historical claims in 1998, with the exception (among others) of the silna claim, Wai 158;
- the development of the Crown’s indigenous forest policies from 1990 to 2002;
- the Crown’s decision to negotiate with silna owners on the basis that their lands formed a special case, requiring compensation;
- the nature and extent of ‘compensation’;
- the Crown’s eventual decision that the silna awards were not in fact a special case, its change of policy towards settling silna claims, and its settlements with some silna owners;
- the current opportunities available to the claimants, under the SDP and the NHF scheme;
- the provisions of the Forests Amendment Act 2004 (and its relationship with the RMA);
- and, in particular, the Act’s prohibition of exporting unsustainably logged timber without compensation, with alleged multi-million dollar prejudice to the owners of the Waimumu forest lands.

The final point above was the basis on which an urgent hearing was granted, and it is the claim issue with which we deal first. Some of the issues detailed above have been dealt with in a preliminary way, and others have been the subject of full inquiry and findings. We turn now to address the nature and scope of our inquiry into these issues.

1. Paper 2.1, p.2
5.2 The Scope of the Inquiry

The scope of this urgent inquiry was initially defined by the chairperson when he said that the two main complaints concerned the removal of the silna exemption from export controls on indigenous timber, and the decision not to pay compensation for any resulting losses. Both were features of the Forests Amendment Bill 1999, now the Forests Amendment Act 2004. All other matters were, in his view, ‘ancillary’ (see sec 1.2.1). This summation that the focus of the inquiry was the 2004 Act was also agreed to by Crown counsel (see sec 4.1). Crown counsel were anxious to confine the Wai 1090 inquiry to these matters rather than a broader inquiry which might be seen as an attempt to address by stealth the issues brought by the Wai 158 claim, a proceeding which they considered would result in undesirable procedural implications.

In considering the application for urgency, the first complaint identified by the chairperson concerned the removal of the unrestricted exploitation of the Waimumu Trust’s forests. The 2004 Act not only limits such exploitation by bringing the silna lands under the export controls embodied in part IIIA of the parent Act, the Forests Act 1949, but also, in section 18, confirms that the rma applies to all lands covered by the parent Act. It is common ground that the provisions of the rma and their practical applications via the sdp place further constraints on the use of the Waimumu Trust’s forests. Therefore some consideration as to the extent and effect of those limitations is necessary for a proper assessment of the claim. The argument that such matters are irrelevant to this inquiry cannot in our view be sustained.

The second complaint concerns the lack of compensation of silna owners for the loss or potential loss caused by the export controls imposed by the 2004 Act. The question of whether compensation should be paid turns on the historical interpretation of the reasons for which the silna lands were originally granted. As will be developed below, the Crown’s view was extensively revised in 2000. It is pertinent to note at this point that the 2004 Act did not spring fully formed into Parliament in the year it was passed. The Bill was introduced five years previously, in 1999, as a result of earlier developments in the Crown’s silna policy. An attempt to assess the claim without some reference to the historical context of the Crown’s developing silna policy would also be artificial. Put simply, the Act and its effect on the claimants cannot be addressed in a vacuum. The Crown’s evolving silna policy is relevant to the subject of this inquiry.

We also note that the chairperson granted urgency on 9 February 2004, after the claimants had filed an amended and extended statement of claim on 16 January 2004. In that amended statement of claim, the question of compensation was a necessarily broad one, involving the negotiations with the Crown from 1990 onwards, and not just concerning the specific compensation denied under the 2004 Act. The Crown argues in part that the prohibition of compensation contained in the Forests Amendment Act is irrelevant because its silna policy provides other remedies which ‘may yield an outcome satisfactory to the owners’ and should

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2. See doc A.2.4, para 59.1
be left to run their course. The remedies that the Crown argues are currently available to the claimants – sustainable logging under the RMA, or payment in exchange for a conservation order from the NHF – can be assessed only in the context of the Crown’s compensation negotiations, as argued in the claimants’ sixth and seventh causes of action. We do so in sections 5.5 to 5.7.

That said, the Tribunal is otherwise mindful of Crown counsel’s concerns about the implications of permitting the parameters of the inquiry to be expanded at hearing and eventual reporting. By definition, an urgent hearing is a confined and limited process that is simply inappropriate for a thorough inquiry into all the important aspects of the silna claims. The documents filed in this proceeding alone have revealed a host of issues that might be relevant to the development of Crown policy and its impact on silna landowners during the relevant timeframes. That material, and any additional documents that might emerge, must be carefully reviewed and considered by the parties and, ultimately, by the Tribunal. All silna claimants deserve no less. But our urgent inquiry could not pretend to do justice to such a task. The appropriate course in our view is for the completion of a general inquiry by the Tribunal into all silna-related claims not affected by the Ngai Tahu Claims Settlement Act 1998.

We are aware, however, that the Tribunal has prioritised the hearing of historical claims above contemporary ones, except where a case for urgency or priority is accepted by the chairperson. It may be many years before the Tribunal is in a position to inquire further into the silna claims. That being the case, we have adopted the approach of the Taranaki Tribunal, which recorded its preliminary views on the basis of the evidence available to it, for the assistance of parties. We have done the same, to provide guidance for the parties in any further discussions. For the avoidance of doubt, we have made full findings only on the matters which are the focus of this limited urgent inquiry, as previously determined – primarily, the effect of the 2004 Act on the value of the trust’s lands and the broader question of entitlement to compensation, taking into account the relevant historical background and context. None the less, we are satisfied that the evidence available to us enabled well-grounded preliminary views on other issues, which will be of value to the claimants and the Crown in the resolution of these important claims.

5.3 Preparations for an Urgent Inquiry

One of the factors the Tribunal is to take into account in deciding an application for urgency is that ‘the claimants are ready to proceed urgently to a hearing’. As noted in section 1.4, this

3. Document a29, para 1.1
4. Claim 1.1(a), paras 58–68
was manifestly not the case with this claim. Evidence kept being filed in defiance of the Tribunal’s timetabling directions. The problem seems to have had two principal causes. One was the seemingly limited cooperation from the Crown in providing adequate and timely information to the claimants. The other was the claimants’ attempt to broaden the scope of the inquiry. Each cause has had the effect of fuelling the other. As a result, in addition to the material filed before the hearing, the Tribunal had to consider 15 lever-arch files full of documents relating to the Crown’s silna policy from 1990 to almost immediately prior to the hearing. Upon review in the time available, it became evident that much of this material concerned administration rather than policy. Unsurprisingly, little use was made of it by either counsel, who both relied on only a few documents to support their positions. Even that apparently exhaustive record proved to be by no means complete. To obtain a better picture, the Tribunal had to seek other crucial documents as well as later elucidation via written questions of significant turning-points in the Crown’s evolving policy. This in turn produced yet more documents.

While noting the resource constraints of the parties, particularly, of course, of the claimants, the Tribunal nevertheless underscores its concern at these unsatisfactory events. Evidence for an urgent inquiry should be complete and ready at the time urgency is applied for, taking into consideration matters of availability, access, and disclosure. It ought to be obvious, then, that all parties before the Tribunal should cooperate to the fullest extent practicable in an effort to ensure the proper and expeditious disposal of proceedings. Where information that may be relevant is not immediately accessible, allowances can be made, but even reasonableness and patience in this context have their limits. There can be little doubt that during the interlocutory stages of this claim the process was unnecessarily hampered by particular events, for which both parties must bear some responsibility. The net result of this was the unnecessary elongation of the inquiry.

It should also go without saying that the evidence supplied should be confined to that which has a direct bearing on the issues in contention, and its relevance made clear in submissions. The Tribunal’s limited resources preclude the completion of original research and a line-by-line analysis of all the documents supplied. Those steps would of course be essential to the preparation of an accurate and complete picture appropriate for an inquiry into a general silna claim. Chapter 2 and the account that follows must therefore be read in light of these limitations.

5.4 The Forests Amendment Act 2004

As noted, the substance of the case for an urgent hearing of the Wai 1090 claim was premised on two complaints:
(a) that the The Forests Amendment Act 2004 prevents the claimants from harvesting their forests unsustainably for export purposes; and
(b) that, under the 2004 Act, no compensation will be paid for the loss of the claimants’ ability to export their forest produce.

The claimants are permitted to export sawn rimu and finished timber products, but only where that timber has been harvested under a \textit{maf}-certified sustainable management plan. Under the 2004 Act, they have (on paper) an unrestricted right to harvest unsustainably for the domestic market. At the same time, the Act provides legislative certainty (if any were in fact required after the Environment Court decision of 2001) that the provisions of the RMA apply to silna lands.

The first ground of complaint, therefore, is related solely to the imposition of controls on export. Two points should be noted here. One is the lack of any identifiable current or future export market for New Zealand indigenous timber or timber products. The Tribunal notes that the Crown played an acknowledged role in the destruction of this market by its (unlawful) regulation of indigenous exports. The question is whether this role was the only factor. The Crown’s expert witness, Mr Neilson, and Mr Reid of \textit{maf} observed that the demise of the export market since the mid-1990s was due mainly to two factors: the growing consumer resistance to the use of unsustainably harvested indigenous timber, and the Crown’s imposition of export controls on such timber. Nevertheless, they considered that the relative influence of each factor could not be determined accurately. This view was confirmed in the briefing paper supplied to the select committee considering the 1999 Bill in 2003.\footnote{Document a30, pp3–4} The second point is that the claimants to date have not harvested any of their forests, whether sustainably or unsustainably, for either the international or the domestic market. They did enter contract negotiations in 2003 to harvest five sections of timber unsustainably, but those negotiations broke down for a number of reasons, including the possible enactment of the Forests Amendment Bill 1999. They have also received a \textit{maf} sustainable management plan tailored to their forests, which was, however, assessed as uneconomic.

Turning to the second ground of complaint, to quantify their loss the claimants commissioned a forest valuation from Mr Burn-Murdoch (see sec 2.6.3). This set the value of their forest if clear-felled (i.e., harvested unsustainably over five years) at $25.25 million and if harvested sustainably at $1.66 million. The difference is $23.59 million. The claimants are claiming that difference in value as being the sum they have lost as a direct consequence of the enactment of the Forests Amendment Act 2004.

The validity of that claim rests on the accuracy of the forest valuation. The Crown identified eight problems it found with Mr Burn-Murdoch’s analysis, as summarised in section 4.5. Having reviewed those points, the Tribunal considers the following five factors to be most significant:

\footnote{Document a30, pp3–4}
(a) The estimates of the species and volume of merchantable timber in the Waimumu Trust forests were based on the 1999 maf inventory, which was itself incomplete and, as Mr Burn-Murdoch himself noted, lacked precision in its estimates of available volume.

(b) It was assumed that there was the immediate capacity to mill 24,500 cubic metres of sawlogs a year over the following five years and an export and domestic market ready to receive that quantity of timber on a short-term and finite basis, whereas in fact there is no export market now. Moreover, for rimu, the main species in the Waimumu Trust forests, the total volume of logs delivered to New Zealand mills in 2003–04 was 4000 cubic metres only.

(c) It was assumed that resource consents for clear-felling to the extent outlined above would be obtainable.

(d) The log prices estimated by Mr Burn-Murdoch were based on domestic prices only, there having been no export of indigenous sawlogs since 1998. For rimu, miro, and matai, the three merchantable species present in sufficient volumes, Mr Burn-Murdoch’s estimated prices were $100 higher than the prices quoted to the Waimumu Trust by sfp for high-grade logs in 2003.

(e) It was assumed that, for a part-regenerating southern South Island indigenous forest, it was reasonable to derive a discount rate from sales of recently planted exotic forests mainly in the North Island.

The Tribunal considers that, owing to the speculative nature of many of Mr Burn-Murdoch’s assumptions, particularly those concerning the available market for the Waimumu forest’s produce, the basis of his valuation is less than satisfactory.

Mr Neilson claimed that the market risk to any potential purchaser of the Waimumu Trust’s forests was far greater than Mr Burn-Murdoch allowed, and that a much higher discount rate was required. As his evidence developed over three affidavits and cross-examination at the hearing, he concluded that:

- If the Waimumu Trust clear-felled its forests over five years, this would create a serious oversupply of indigenous sawlogs on the New Zealand market and thus drive down prices.
- There would not be any overseas buyer interested in such a small amount of timber available as an unsustainable temporary supply.
- Obtaining resource consents to clear-fell most of the Waimumu Trust’s forests would be unlikely, and those granted would have onerous conditions attached.
- There was as yet no detailed knowledge of the forests’ characteristics.

Because of all these negative factors, Mr Neilson concluded that no prudent buyer would bid for the Waimumu Trust’s forests. He considered the sole value of the tree crop to be under a sustainable yield harvest for domestic consumption, and to stand in the range of $500,000 to $1 million.
In taking account of market realities, Mr Neilson’s overall approach was preferred by the Tribunal. However, much of his evidence was impressionistic and anecdotal. Moreover, his expertise lay in exotic forestry and, as the claimants noted, he had never valued an indigenous forest before.

Given the obvious differences in standards and methodology between them, neither valuation could be accepted as entirely satisfactory by the Tribunal. Moreover, we consider that no valuation can claim to be accurate until the species and volumes of merchantable timber in the Waimumu Trust forests have been fully assessed in relation to the harvesting capacity and markets procured for the sale of its produce. Anything else must remain speculative.

The Tribunal therefore considers that, while there may or may not have been a loss to the Waimumu Trust deriving to some extent from the 2004 Act, it is impossible to separate out the effects of that statute from all the other influences at work on markets for indigenous timber, and hence on the possible value of its tree crop. Nor has the quality of that tree crop ever been fully assessed on the ground. On the evidence presented, it is simply not possible to assess accurately the effect of the 2004 Act on the value of the Waimumu Trust’s forests with any degree of certainty. Accordingly, on the two complaints on which the grant of urgency was permitted, the Tribunal is unable to uphold the claim that the opportunity cost (or prejudice) of the Act has been a loss in value in the amount of $23.59 million.

In sum, the Burn-Murdoch and Neilson valuations are both unsatisfactory. The Tribunal could not rely on them. There is no means available, therefore, for determining with any degree of certainty, on a reasonable basis, the market value of the Waimumu Trust forest, and hence the extent of actual loss (if any). That part of the Wai 1090 claim is not well founded.

5.5 The RMA

The effects of the RMA are expressed through the sdp. After that plan became operative in June 2001 following the Environment Court hearing in 2000, the claimants should have been aware that their forests were subject to the constraints of that plan and that a resource consent would be needed for anything more than minimal harvesting. Other owners of silna forests in Southland had applied for such resource consents. Yet it appears that, as late as May 2003, the trustees considered that they had existing use rights under silna and were not required to obtain resource consents.

An opinion from the claimants’ expert witness, Mr Hovell, considered that, for large areas of the Waimumu Trust’s forests, there was no likelihood of approval for clear-felling and that selective logging would be tightly controlled. For some other areas he considered that resource consents for clear-felling could be obtained. This view was not challenged by the Crown, but the Tribunal notes that Mr Hovell’s interpretation of ‘clear-felling’ was based on the rather imprecise definition Mr Burn-Murdoch provided in his summary, which was
‘felling the species with economic value . . . [which] represent less than 24% of the total large trees within the forest’ (emphasis added). In the body of his report, Mr Burn-Murdoch makes it clear that his definition was derived from the 1999 MAF inventory, stating that ‘the term clearfell only applies to the merchantable stems. These comprise 24% of the PH croptype and 14% of the X croptype.’ The PH croptype is virgin forest and the X croptype regenerating native forest, and the two percentages apply to the total number of stems assessed by MAF.8 Mr Burn-Murdoch then excluded from his valuation all industrial-grade logs suitable only for chipping, and all kahikatea and kamahi logs, for which he considered there was no market. The MAF inventory estimated the total standing volume of logs cut from all species of stems of economic value to be 774,660 cubic metres, but Mr Burn-Murdoch’s ‘clear-felling’ valuation was based on felling trees that would yield only 136,320 cubic metres, or 17.8 per cent of the total estimated volume available.

On the evidence, it is not possible to draw an exact correlation between the number of stems and the volume of the yield from them. That said, the very precise definition of merchantable stems in the MAF report suggests that stems producing the types of logs Mr Burn-Murdoch considered suitable for extraction would have represented a very low proportion of the total stems considered by MAF to be merchantable. And they represented only a very low proportion of the total forest cover. The Tribunal considers that the ‘clear-felling’ scenario advanced by Mr Burn-Murdoch was based on extracting perhaps 5 per cent of the large trees in the virgin forest and possibly 3 per cent of the large trees in the regenerating forest. It is not clear from Mr Hovell’s report whether he was aware of the implications of adopting Mr Burn-Murdoch’s definition of clear-felling, though his reference to ‘the removal of up to 25% of the indigenous vegetation’ suggests that he was not.9

The Tribunal has taken some pains to develop this point, not to demonstrate the difficulties of forest valuation (though it does that), but to emphasise another hypothetical element in the claimants’ case. At the time of the reconvened hearing on 10 November 2004, the claimants had not applied for any resource consent for harvesting any part of their forests. Their claim that clear-felling would not be permitted and selective logging strictly controlled by the Southland District Council in most parts of their forests has not been tested by actually making an application and thus determining the matter.

None the less, there is broad agreement between the parties that the SDP and the RMA will strictly circumscribe the nature and extent of logging on SILNA lands. The Crown argued before us that it had authority under the Treaty to regulate the environment, and protect indigenous forests as habitats and as catchments, in the interests of all citizens. The passage of the RMA in 1991, therefore, and its effect on the SILNA exemption from the Forests Act of the time, is an important issue for our inquiry. We accept the substance of the claimants’ submissions as to the unlikelihood of their being able to utilise their forest for the domestic market in an

8. Document A8, pp 3, 8, 12; doc A13, para 1.16
9. Document A13, para 5.21
economic manner. This point was not seriously challenged by the Crown. We think it unlikely
that the SDP would have allowed unsustainable logging for export purposes (or domestic),
even if the Forests Amendment Act 2004 had failed to prohibit it. To that extent, one crucial
determinant of the Crown’s SILNA policy was in fact the way it was changed by the RMA in

At first, the Southland District Council thought that the special circumstances of the SILNA
lands might be something it would have to take into account when granting resource con-
sents. According to the owners, the council had to consider the special history of the land
when it took account of the principles of the Treaty of Waitangi. The council warned the
Government in 1998 that it might not take any ‘enforcement action’ if SILNA owners started
logging their forests. As far as the council was concerned, the special history of the land and
the need for compensation was a matter that central government must resolve, rather than
embroiling the council in expensive court proceedings and possible compensation pay-
ments.10 The post-RMA change to the Crown’s SILNA policy, rescinding its earlier view of the
SILNA lands as compensatory and therefore in a special category, removed this constraint on
the council. The final step in that process was the Environment Court decision of 2001, which
accepted the Crown’s revised interpretation of SILNA history, and effectively endorsed the
SDP. We will explore this policy change further below.

Here, we note that the effect of the RMA, more so than that of the Forests Amendment
Act, is the key constraint on the claimants’ ability to make an economic use of their SILNA
lands. As the claimants have not actually tested the parameters of this constraint by seeking
resource consents, we are unable to make a full finding on the matter. Our preliminary view is
that the RMA, which, as other Tribunals have found, requires decision-makers to take account
of but not apply or carry out the principles of the Treaty, will prevent the Waimumu Trust
from obtaining an economic return from their forest lands. The Crown may or may not be
justified in exercising its kawanatanga in this way. The key point, and here the SILNA policy
and the Forests Amendment Act again take priority, is that the claimants will receive no com-
pensation for their loss (whatever it may be quantified as), unless they take up the remedy
available to them from the Crown’s NHF. We turn now to the suitability of this remedy.

5.6 THE NHF

One element of the Crown’s SILNA policy as announced in May 2002 was the dedicated but
capped funding available through the NHF for conservation covenants on SILNA forests. The
claimants’ position was that any assistance available to them through the NHF is ‘likely to
be illusory’.11 That too has not been tested. Although Mr McKenzie said in evidence that the

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11. Document A28, para 156
Waimumu Trust lands did ‘not emerge as a high priority for settlement’, at the time of the reconvened hearing the claimants had not applied to the NHF, even though the second phase – for the forests of lower conservation value – for which they were eligible, had started in September 2003. This is not surprising, given their decision to file a claim with the Tribunal instead, and to seek findings on the validity of their claims to a different type and order of compensation. The claimants’ decision has left the Tribunal with the puzzle of another hypothetical situation. We note that the owners of section 922 of Hokonui block Lxiii have secured from the NHF a conservation covenant on their land for a payment of $356,375, or $2227 per hectare. This occurred after they had withdrawn from the Waimumu Trust and made a direct approach to the NHF themselves.

In evidence before the Tribunal, Mr McKenzie indicated that the Waimumu Trust’s remaining lands were of interest to the NHF’s administrators. He encouraged the claimants to apply, though he said they would not receive any preferential treatment. He also indicated that the Waimumu Trust’s lands were of high ecological if not conservation value, and that the committee was interested in covenancing entire ecological ‘catchments’ rather than ‘cherry-picking’ particular areas. In response to a written question from the Tribunal before the reconvened hearing, the Crown confirmed that the NHF’s administrators had not assessed the trust’s remaining lands and would not do so until invited by the owners or their representatives. The NHF had, the Crown argued, ‘no preconceived idea of the conservation and monetary values that might be placed’ on the Waimumu lands.

Mr McKenzie also said during cross-examination that the NHF is willing to pay up to $2500 per hectare for virgin forest, and up to $1000 per hectare for regenerating forest. While the Crown cautioned against extrapolating the value of the remaining Waimumu Trust forests from the price paid for section 922, under the NHF’s indicative maxima the trust could obtain up to $3 million for covenancing its forests – nearly twice the forest value assessed by Mr Burn-Murdoch under a sustainable yield scenario and three times that assessed by Mr Neilson. The Tribunal notes that, under section 7(1)(c) of the Treaty of Waitangi Act 1975, the Waitangi Tribunal may refuse to hear a claim where another ‘adequate remedy’ exists for the claimants reasonably to pursue. The claimants had available to them in September 2003, before they lodged their urgent claim, an acknowledged vehicle for obtaining some redress for their inability to utilise their land and timber. If they chose, they could set aside their lands for conservation purposes, as some other SILNA owners have chosen to do, and receive a payment consonant with what the Crown considered the conservation value of their forest to be. That vehicle is still available to them.

In terms of section 7(1)(c), the Tribunal is not satisfied that the NHF is necessarily an adequate or an alternative remedy. For any group, the decision to set their lands aside in perpetuity for conservation purposes is not simply an economic one. In other words, it is not

12. Document a15, para 26
13. Document a32, para 37
simply an avenue to obtain an economic return and therefore cannot be considered as merely an alternative to selective logging, which leaves the land untrammeled and the possibility of other, future economic exploitation open. It has far-reaching consequences. It is up to the claimants whether they choose to exercise their tino rangatiratanga in this manner, and up to the Crown to provide a fair, Treaty-consistent process if they so choose. The Tribunal acknowledges that this is a complicated question, and that the NHF solution is much more than an alternative means to an economic return on the land.

It may well be that, if they were to have a range of options available to them, the Waimumu Trust landowners would exercise their tino rangatiratanga in that direction and decide to preserve their entire forest in perpetuity. We heard evidence to the effect that some owners were opposed to ‘clear-felling’, however defined. But the owners have only two options. The first, as described above, is to seek resource consents for clear-felling, in the certain knowledge that, at a minimum, there will be opposition and expensive court battles to fight and that, at most, they might get limited and very circumscribed permission. Sustainable logging, as noted, is not an economic option. Secondly, the claimants can commit their forest to the nation’s conservation and ecological goals, for limited and uncertain compensation.

We accept that the exercise of tino rangatiratanga is balanced by the Crown’s legitimate exercise of its kawanatanga. This is the fundamental Treaty principle of reciprocity. Economic factors such as the availability of markets on the one hand, and the Crown’s conservation policies on the other, are matters which will affect the choices available to claimants in the exercise of their tino rangatiratanga. It is critical that in situations where the claimants’ choices are reduced almost to none that the Crown behave with scrupulous fairness. In the situation of the NHF, where negotiation will depend on the Crown’s evaluation of the conservation and ecological ‘value’ for second-class lands, and within the confines of a prescribed (relatively low) fiscal limit for all such lands, the claimants’ ability to obtain a fair outcome is in doubt. It has not yet been tested, so we are not in a position to make a definitive finding as to prejudice. In part, our view arises from a comparison of compensation as determined by timber ‘values’ (higher), as opposed to conservation ‘values’ (lower). We explore that issue below in section 5.7.3, where we look at wider issues of compensation. Here, we stress that we do not accept Crown counsel’s submission that matters should simply be left to take their course under the current policy.14

On the basis of the evidence available to us, our preliminary view is that the NHF, as currently constituted, is unlikely to provide an adequate remedy for the claimants. No prejudice has as yet occurred. We think it is within the power of the Crown actively to protect the claimants’ interests, if they do apply to the NHF, by ensuring a fair negotiation and the ability to award an appropriate level of compensation. Under the Treaty principles of partnership and reciprocity, and the Treaty duty of active protection, it is incumbent upon the Crown to do so.

14. Document a29, para 1.1
5.7 

5.7 SILNA Policy

The Tribunal considers that the complaint by the Wai 1090 claimants relating to the Forests Amendment Act 2004 is not, as far as it goes, well founded. Their allied complaints relating to the effects of the RMA and the NHF may well have substance, according to the preliminary view of the Tribunal. We have not made a definitive finding, however, since the resource consent and NHF processes have not been tested by the claimants.

We now turn to the broader issue of the Crown’s evolving SILNA policy as the context for both the Forests Amendment Act and the potential remedies currently available to the claimants. We rely on the evidence as recited in some detail in chapter 2. As noted in section 2.4.5, the shift in 2000 in the Crown’s view of the purpose of the original SILNA grants marks a turning-point in its SILNA policy. This shift has potentially been in breach of Treaty principles, and caused some prejudice to the claimants. We arrive at preliminary views on both matters.

In doing so, we have confined ourselves to considering the nature of Parliament’s intentions in 1906, and also whether those intentions were carried out, purely to determine the reasons for the Crown’s position from 1990 to 2002 as to whether the SILNA lands were and remained a special category, deserving of special treatment in its forest policy. We do not, therefore, trespass on the historical grievances settled by the Ngai Tahu Settlement Act 1998.

Our assessment of the historical context of the Crown’s SILNA policy deals with three aspects in turn:

- the purpose of the original SILNA grants;
- the rationale for the revised view of the purpose of the SILNA grants, as reached in 2000; and
- views of what loss was being compensated, and the expectations that flowed from that.

5.7.1 The purpose of the SILNA grants

In 2000, the Crown set about reviewing the historical assumptions on which the SILNA exemption from the Forests Amendment Act 1993 was based, and concluded that there was nothing to justify continuing to treat the SILNA lands as a ‘special case’. In considering the historical context, the principal question for the Tribunal is whether the Crown’s revised view is tenable, and its resultant policy consistent with the principles of the Treaty of Waitangi.

SILNA emerged from and was part of the context of Ngai Tahu petitions concerning the failure of the Crown to carry out its promises of extra reserves, given at the time of the original purchases. The landlessness which SILNA was designed to remedy arose from that Crown failure. The insistence by Ngai Tahu leaders such as Tame Parata and HK Taiaora that the SILNA grants were a compassionate gift and separate from any settlement of Ngai Tahu grievances stemmed directly from their fears that the SILNA grants would be the only settlement granted by the Crown. To approach the matter of Parliament’s intention in passing the SILNA in 1906 from the perspective of Ngai Tahu alone is therefore to distort the issue. Indeed,
to rely solely on one brief statement by a tribal leader in the House of Representatives as to Parliament’s intention would be a novel but unorthodox approach, which we decline to adopt.

We accept the Crown’s submission that the joint committee of the late 1880s rejected Ngai Tahu’s claims, and ordered the development of the landless natives policy along the lines of a welfare allocation for subsistence purposes. In engaging Mackay to carry out this work, however, the Government to some extent defeated this object and re-introduced Mackay’s view of the matter. This was particularly important when we consider the amount of land set aside, in which Mackay made a crucial differentiation between northern South Island Maori and Ngai Tahu; a distinction ultimately accepted by Parliament when it enacted s.11a in 1906. His allocations were based on the fundamental concept that Maori in the south deserved 10 acres more each than those in the north, because of their longstanding grievances deriving from the original purchases. This became the basis of the grants made under s.11a and its successor legislation.

We accept, therefore, that there were changes of approach as different governments took office in the period from the late 1880s to 1906. The joint committee’s view remained important in the 1890s. We do not accept, however, Crown counsel Dr Fergus Sinclair’s conclusion that the Ngai Tahu Report 1991 supports his position. Dr Sinclair pointed out the Tribunal’s statement that ‘neither the Ngai Tahu nor initially the government saw the allocation as anything other than a “compassionate” gesture made to alleviate poverty’. He suggested that the Tribunal’s ‘qualification’ of the Government’s position probably related to what he called the Native Minister’s ‘gloss’ when he explained the purpose of the South Island Landless Natives Bill to Parliament in 1906.15

The Ngai Tahu Tribunal was indeed referring to the period before 1905.16 We note from the reports of Ms Edwards and Dr McAloon that the reference to the landless natives reserves as a ‘compassionate’ gesture came during an exchange between Tairora and Stevens in the Legislative Council in 1893. For the Government, Stevens argued that Ngai Tahu had not ‘suffered actual wrong from the non-fulfilment of promises given to them when they sold their land, except in the promise of general care’. He argued that that promise must now be fulfilled in the form of landless natives reserves, which would enable Ngai Tahu individuals to support themselves. Tairora remained adamant that such a ‘compassionate gift’ would not in fact settle Ngai Tahu’s claims.17

The key period for the question of Parliament’s intentions, however, was not the 1890s but that covering the drafting of a South Island Landless Natives Bill in 1905, and its enactment by Parliament in 1906. We have examined the evidence as to Parliament’s intentions at some length in chapter 2. It is clear from the parliamentary record that, apart from Tame

15. Document A.2.4, para 48
Parata, Parliament itself considered the Bill to be a settlement of a kind, an attempt to give a measure of justice to Ngai Tahu. The senior Ministers who spoke – the Minister of Native Affairs (who was in charge of the Bill), the Prime Minister, and, in the Legislative Council, the Attorney-General – all spoke in those terms. In our view therefore, we find unconvincing the interpretation urged on the Tribunal by Crown counsel that the remarks of the Minister of Native Affairs, James Carroll, a most knowledgeable man of his time on Maori land issues, were ‘obviously in the nature of a false step’.18 Carroll’s views reflected those of the Government of the time; Parata’s and Taiaroa’s those of Ngai Tahu.

In addition, as we noted in section 2.2.4, the Bill had a preamble which stated that the land was to be set aside for the ‘future wants’ of landless South Island Maori, in response to their petitions about the Crown’s failure to keep its earlier promises in that respect. Much was made of the fact that this preamble was dropped by the Native Affairs Committee during the Bill’s progress through the Lower House. At the same time, however, Mackay’s original idea of a tribal endowment was inserted in the Bill, broadening the scope of the legislation from a measure directed only at providing land for the support of individuals. The inclusion of that clause may have been a partial attempt (however limited) to address the non-fulfilment of promises for the provision of education. An attempt to restore the preamble was later defeated in the Legislative Council. To that extent, the Government was willing to meet the concerns of Ngai Tahu, at whose request the preamble had been excised. None the less, the sentiments expressed in the Government’s statements about the Bill make it clear that, despite the deletion of the preamble, the purpose of the legislation had not, in its view, been altered.

This is made clear by the Attorney-General’s speech explaining the Bill (minus the excised preamble) to the Legislative Council:

\[\ldots\] I should just like to explain to the Council the reason for the Bill being submitted to Parliament. Probably, honourable members are aware that from time to time numbers of petitions have been presented to Parliament on behalf of the Native inhabitants of the colony, and especially in the South Island, complaining that faith has not been kept with them in reference to reserves which were promised to be made for their benefit by various Governments from time to time, and especially, as they alleged, at the time the Natives of this colony ceded certain of their property to the British Crown. I believe some years ago a Joint Committee of both Houses of Parliament was set up to inquire into this matter, but apparently no satisfactory result was arrived at, and two or three years ago a Commission was appointed, consisting of Mr Percy Smith and Mr Alexander Mackay, to make recommendations for reserves in the South Island which should be set apart for landless Natives. It was not stated in the petitions that the promises of the Governments had been wholly unfulfilled, but I understand there were a number of Natives who had no land who apparently in some way were excluded

18. Document 1.24, para 48
from the benefit of the reserves made from time to time for the benefit of the Natives. The result of this Commission was that the reserves which are affected by the Bill now before the Council, amounting altogether to 142,118 acres of land in various parts of the colony, have been set apart in Southland, Otago, Stewart Island, Westland, Nelson, and Marlborough, and the number of Natives who are interested in them is 4,064. The Bill was referred to the Native Affairs Committee in another place, evidence was taken, and the Bill was discussed at very considerable length upon its second reading in the House of Representatives; and although there were complaints that probably the Natives were entitled to more than is given them under this Bill, it was recognised that the Government were doing something which amounted to an attempt, at all events to do justice, which had been so long denied to the Natives. It was not the fault of the late Government, or the fault of any particular Government. Apparently, almost ever since the foundation of the colony it has been complained that an injustice has been done to the Natives in respect of these lands and in respect of these reserves; and here, I say, is a solid attempt made to remedy that injustice. The Natives themselves are not slow to recognise that the Government have gone a very long way in that attempt; and so far as the Bill goes, I understand that, apart from the fact that the Natives think they are entitled to more, it is recognised by them that the Government are doing a very good thing in bringing the measure before Parliament.¹⁹

The next issue for consideration is the purpose of the grants of land. Were they intended to provide an economic base for the grantees or were they merely regarded, as the Edwards report would have it, as a 'charitable gesture'? In our preliminary view, the evidence supports the interpretation that the silna lands, including those of the Waimumu Trust, were granted originally with the intention that the owners would be able to derive a measure of economic support from them. And not just sufficient to prevent their becoming destitute, but to enable them to live economically productive lives. This is where the link with the reserves that Alexander Mackay felt were owed to Ngai Tahu for both their landless members and the people's future becomes important. The Tribunal considers that the silna grants were intended as at least some substitute for those reserves. Parata's successful inclusion of a provision for 'surplus' land to form a tribal endowment for the purposes of education and recreation confirms us in this view.

Nor did the Government lose sight of Parliament's 1906 intention, in the light of further complaints from Ngai Tahu. It commissioned the Gilfedder–Haszard inquiry in 1914 to establish what use had been made of the lands and how they could be better used to achieve the purpose of the grants. The need for such a commission reflects administrative and political concern that that purpose was being frustrated by the remoteness and inadequacy of much of the land granted. The same concern prompted Judge Rawson, in his investigation in 1916–17, to suggest monetary compensation as an option. Such investigations echoed expressions of

¹⁹. Albert Pitt, 9 October 1906, NZPD, vol.138, pp.174–175 (doc.a10(a)(60))
concern in Parliament at the time of the original enactment of silna as to the appropriateness of the land for achieving Parliament’s intentions. The failure of the Crown to provide proper redress after these investigations has been settled as part of the Ngai Tahu Claims Settlement Act 1998. The issue for this Tribunal is the interpretation placed on these historical facts by the Crown in determining its silna policy from 1990 to 2002.

The final question to be examined in determining the ‘special status’ of the silna grants is the nature and subsequent history of the Act itself. The Crown claimed that ‘no grand symbolism’ was attached to silna, which was merely a machinery measure for granting title and was repealed in the Maori Land Act 1909, when it was (in today’s jargon) ‘mainstreamed’ with other Government policies on Maori land.  

silna did provide a mechanism for granting title in unusual circumstances, but it also placed particular restrictions on alienation of silna lands. Its repeal as part of a vast consolidating measure removing the previous restrictions on alienating Maori land created anomalies that required special legislative provision to overcome. The mechanism for issuing title to individual owners and the ability to alienate by leasing, both of which had been removed by the 1909 repeal, were restored in the Native Land Amendment Act 1914. Further legislative amendments were required to preserve the special status of ‘Natives’, as defined in the 1906 Act. A restricted form of permanent alienation was permitted in 1923, but it is not clear on the evidence before the Tribunal when the silna lands could finally be alienated as if they were ordinary Maori land. Certainly, two unique provisions for them were perpetuated in the Native Purposes Act 1931, which replaced the Native Land Act 1909. Their special status therefore outlived the Act that is supposed to have repealed it.

All of this signifies to the Tribunal that, historically, there was continuing political and administrative recognition that the silna lands were indeed a ‘special case’. This view was confirmed by the Crown in 1990 in relation to its new indigenous forest policy, and prevailed until 2000. The next question for us to consider, then, is why this view was so suddenly reversed.

5.7.2 The rationale for reviewing the special status of silna forests

The Crown’s need in 2000 to review its own thinking about the historical assumptions behind the silna exemption from the Forests Amendment Act 1993 appears to have sprung from several sources:

- the desire to ‘mainstream’ this anomalous ‘special case’ so that it was aligned with all other privately owned forests, including those owned by other Maori;
- the growing concern after the Waitutu and Rakiura settlements that the cost of conservation covenants would have to be capped; and

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20. Document A24, para 56; doc A29, para 73
the concern that silna owners had an unrestricted right to exploit their lands on the grounds that these had originally been granted as compensation and were intended to provide for their economic benefit, and that this view might be accommodated in the SDP.

The Tribunal has had to infer these reasons from the evidence put before it. In response to written questions about the rationale for the review, Dr Sinclair replied that, on 17 September 2000, the Crown Law Office commented ‘at short notice’ on the Treaty implications of a proposed Cabinet paper on silna policy. The office advised that:

In light of the reasons for the original allocations of land under silna and the circumstances that now prevail, there are various arguments against the continued exclusion of these blocks from the restrictions on unsustainable logging. These arguments do not appear to have been fully considered when past exemptions were granted.\textsuperscript{21}

As noted in section 2.4.5, this view was developed in a draft Cabinet paper for the silna Ministers on 6 October 2000, which stated: ‘Further investigations may justify a policy decision that the historical assumptions for the 1993 exemption were not soundly based, and that there are not strong reasons for continuing to treat silna lands as a special case’ (emphasis added). That research, which was to be done ‘in the shortest time possible’, was commissioned on 18 October. The resulting report from Ms Edwards was completed by 15 November.\textsuperscript{22}

The situation seems to us to have been influenced by political factors. One was the ‘strong advice of officials’ not to continue with the Minister of Forestry’s September 2000 proposal to compensate all silna owners equally, instead of according to the conservation value of their forests, for coming under the sustainable management provisions of the Forests Act. He planned to refer a Bill to that effect to the Waitangi Tribunal for an opinion.\textsuperscript{23} Officials’ arguments for not pursuing the proposal to treat all silna owners equally included:

- The silna owners’ expectation that this would create an obligation to compensate them for the difference between the clear-felled value of their forests and the sustainable management value. This difference was assessed in 1996 as between $25.8 million and $49.2 million.
- The Crown, in consultation with the owners, would have to agree on a formula for forest valuation and a further formula for determining ‘the proportion of that price to be paid’ to the owners. Both formulas would then have to be considered by the Waitangi Tribunal.

\textsuperscript{21} Document A32, para 26
\textsuperscript{22} Ibid, paras 27, 31
\textsuperscript{23} Document A32(c), para 40
The Waimumu Trust (silna) Report

The legislation, while fair to silna owners, ‘would be potentially unfair to other indigenous forest owners, including other Maori landowners who had received no such payments’. 24

The Minister proposed referring the legislation to the Tribunal ‘to seek an opinion that the Government’s actions had not constituted a breach of the Treaty. Such a move would be intended to give confidence to Parliament and silna owners that the proposals were fair and just.’ The main reasons given for not following this course of action were:

- The Tribunal could see the referral as ‘an invitation to comment on how much of a financial consideration is necessary before the Crown could legitimately restrict the right to log . . . and the Tribunal is unlikely to respond positively to a reference that steered it towards a particular conclusion (eg favourable to the Crown)’.
- The issue involved ‘balancing the property rights of the owners, against various national interests in the preservation of forests’. This ‘calls for an understanding of the competing calls on the Crown’s resources and the exercise of political judgement’, which was ultimately a task for the Crown.
- Referring the matter in this way ‘raises the presumption that the Government will follow the [Tribunal’s] recommendations, or at least treat them seriously. This might limit policy options or become embarrassing if the recommendations go beyond what the Government is prepared to consider.’
- The referral might ‘inflate the expectations of owners, and a subsequent discarding of an unfavourable ruling could carry a high cost in terms of relationships with Maori and the Tribunal’.
- This procedure would be the first use of section 8 of the Treaty of Waitangi Act 1975 and would therefore be of ‘considerable significance and precedence’.
- There was ‘some potential’ for such a referral to ‘create a claim from other Maori forest owners, especially as there are no compelling reasons for exceptional treatment of silna forest owners’ (emphasis added). 25

In the event, the Minister’s proposals were not pursued (presumably for the reasons advanced by the officials). Instead, as a result of the meeting of Ministers at which these issues were discussed, the Crown commissioned Ms Edwards’ historical report.

Another political factor seems to have been the possibility that, following the line taken in the High Court decision in the ajs case in 1999, which found that the ‘effect and intent of the exemptions granted to silna lands in part IIIA of the Forests Act, cannot be undone by regulation’, 26 the Environment Court could uphold the view that the silna lands should be exempted from the heritage provisions of the sdp. A Crown Law Office opinion in 1999 apparently considered that the RMA did apply to the silna lands, but in September 2000 officials

24. Document A32(c), paras 23, 25, 27, 29
25. Ibid, paras 30, 32–34, 36, 37
26. Document A32(b), para 37
were sufficiently concerned as to recommend seeking a declaratory judgement on the matter from the High Court. A less favoured alternative was a reference to the Environment Court by the Minister of Conservation, supported by the Minister of Forestry, over provisions in the proposed SDP.  

In the event, the first public expression of the Crown’s revised view that the Silna lands were granted not as compensation but as provision of practical welfare came at the Environment Court hearing, which began on 4 December 2000. There, the Maori Trustee argued that the compensatory nature of the Silna grants brought with it the obligation to permit full use of the land, and that the proposed rule HER.3 would prevent the Silna owners from optimal use of their forests. Crown counsel at the hearing expressed the same revised view of the purpose of the Silna grants as is found in the Edwards report, completed three weeks before: that *Silna* was an ‘administrative mechanism’ to ‘give effect to social welfare initiatives’. The Tribunal asked Dr Sinclair whether there was an association between the Edwards report and the Environment Court hearing. Dr Sinclair explained that there was no link between the Environment Court case and the Crown’s decision to commission the Edwards report. He noted that a draft report was available by November 2000, and that ‘Crown counsel involved in that proceeding would have been aware of its existence’. The draft Edwards report was not made public at that time. Dr Sinclair also stated that the Environment Court submissions do not refer to the research, and draw ‘brief inferences from the Silna Act itself’. At our conference on 4 May 2005, Virginia Hardy clarified for us that the incorporation of the results of the Edwards research into the Crown’s submissions to the Environment Court came late in those proceedings. Counsel was made aware of the ‘research and thinking’ on Silna historical issues by December 2000, and she added a summary of them in the form of ‘evidence from the bar’. The outcome of the Environment Court case on this point was of critical importance to the claimants, as we noted in section 5.5.

In sum, it seems to the Tribunal that in 2000 Government officials considered that the view that the Silna landowners had ‘special property rights’ was creating too many anomalies, not to mention other policy and enforcement difficulties, and therefore decided that the best way to deal with the situation was to find ways of denying the special status of the Silna lands. This led to the commissioning of historical research that did, indeed, produce such an outcome. In that research, much turned on Taiaroa’s use of the term ‘compassionate gift’. We do not consider that this should be used in an attempt to escape from the legal and equitable consequences of Parliament’s original intentions in granting the Silna lands.

After carefully considering the historical research of Ms Edwards and Dr McAloon, we have reached the preliminary view that the Crown’s decision in the early 1990s to accord a

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27. Ibid, para 49
28. Crown counsel, submissions on behalf of MAF to Environment Court, undated (doc A27(330)), paras 10, 13
29. Document A32, para 35
30. Virginia Hardy, oral submission, 4 May 2005
special status to silna landowners was in accordance with the historical facts, and consistent with the principles of the Treaty of Waitangi. Conversely, we think that the decision to change this policy in 2000 for what appear to be reasons of political expediency is likely to have been in breach of the Treaty. The Crown could provide no justification other than that compensation of all silna owners would be expensive, and a formula for calculating compensation would be difficult to negotiate with owners. We accept the contention that the Crown must balance competing interests and take account of available resources. There was no suggestion, however, that the difference as calculated by officials ($23.4 million in 1996) was actually beyond the means of the Government to pay at the time in order to achieve the important objects of preserving forest habitat and catchments. Indeed, given that the Minister of Forests proposed a policy to compensate all silna owners equally, and to ensure that the Crown’s compensation policy was consistent with the Treaty, there was clearly an alternative course of action possible for (and considered by) the Crown. The Minister’s proposal to introduce Treaty-consistent legislation, however, was rejected partly because officials successfully challenged the concept that the silna grants were a special case – followed immediately thereafter by the Edwards research.

The only issue of principle advanced in opposition to the Minister’s proposals was the concept that non-silna Maori owners of indigenous forest, who did not have a special title to their lands, would be treated inequitably. Given our view that there was in fact a special nature to the silna grants, that reasoning appears to us to be incorrect. Special circumstances lead to different or exceptional treatment; there is nothing inherently unfair in that. We do not make a definitive finding of Treaty breach, however, since we could not conduct a full and exhaustive inquiry into the historical facts behind the 1997–2000 policy change.

5.7.3 Expectations of compensation

If there was no ‘meeting of minds’ between the Crown and the silna owners on the rewriting of silna history, the same could be said of their attitudes to compensation. The notion that special compensation would be paid to the silna owners affected by the indigenous forests policy can be traced to the Cabinet meeting on 12 March 1990 which approved that policy. The chairman of the Cabinet Committee on Treaty of Waitangi Issues was asked to ‘initiate immediate discussions with Maori owners of indigenous-forest-covered land, which was allocated as compensation, on possible levels and mechanisms of compensation for opportunity losses through implementation of this policy’ (emphasis added).31 Here appeared the two concepts which were to feature in subsequent negotiations. First is the view that the silna lands were ‘allocated as compensation’, a view that, as we have just seen, informed


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Government policy until it was revised in 2000. Second is the view that this made the silna owners a unique group to whom special compensation was due.

Much Crown - and later Waitangi Tribunal – time was to be taken up in assessing what opportunities were being lost and what sort of ‘compensation’ was due. In essence, it appears that two kinds of ‘compensation’ must be distinguished. One was the ‘adjustment assistance’ available to all those who suffered ‘loss of commercial enterprise opportunity’ under the indigenous forest policy introduced in 1990, including the July 1990 export ban. The Crown was anxious to avoid liability for compensation for those adversely affected by the policy, and chose to call this form of compensation – which was to be for ‘direct financial loss’ where existing contracts were affected – ‘assistance’ to help such people ‘adjust to the new conditions’.

The other form of compensation was the separate need identified by the Crown and confirmed in the framework agreement that compensation was due to all silna owners for ‘lost commercial opportunity’ under the indigenous forest policy, including the one group affected by the export ban. A separate sum of up to $14 million was then made available for the silna compensation, which was to be based not on the effect on existing contracts but on the commercial timber value of the forests.

The Tribunal therefore does not accept Crown counsel’s submission that the framework agreement was a ‘very tentative document’ that ‘should not have given grounds for a “substantive expectation about compensation for economic loss”’. A need for compensation and ways of providing it, including cutting rights in State exotic forests, was identified in the agreement, and a substantial sum specified in Cabinet’s endorsement of that agreement. We therefore consider Crown counsel’s observation, in response to a Tribunal question, that the silna compensation was intended to be on ‘a similar basis to the general adjustment assistance process’ to be incorrect.

We also consider his contention in submissions that in December 1990 the Crown ‘had signalled [to the silna owners] that the government policy would be adjustment assistance aimed at direct loss, not compensation for economic loss’ to be unsustainable.

We note that both the Cabinet paper (at least in the heavily excised version released to the Tribunal) and the press release cited by Crown counsel refer to the Government’s indigenous forest policy in general, not to the silna owners in particular. The press release mentions neither compensation nor the framework agreement nor the silna owners, and in the context cannot apply to them. We do accept, however, counsel’s observation that the ‘term “compensation” appears to have been used rather loosely at times in reference to adjustment assistance such as that approved in 1990’.

33. Document A29, para 37
34. Document A32, para 23.2
35. Document A29, paras 41–43
36. Document A32, paras 23.2–23.3
between the Crown and the Rau Murihiku Whenua Maori on the form and extent of compensation meant that the silna lands were exempt from the Forests Amendment Act 1993.

The Government’s desire to settle the silna issue became more acute as the negotiations over Waitutu advanced and it appeared that other silna owners might attempt to emulate the more direct approach to the issue of clear-felling advanced in that case. The Waitutu situation was eventually settled in March 1996 for $13.5 million in cash and $5 million in forestry rights.

What might be called the Waitutu solution came to be applied to other silna forests: reaching individual settlements with the owners of forests that had high conservation values by providing monetary compensation and other forms of assistance, in return for forgoing the right to harvest their timber. Compensation was to be based not on lost commercial opportunity but on the timber value of the forests. Initial estimates put the cost of this form of compensation as high as $77 million – at a time when the fiscal envelope of $1 billion for all Maori claims was being promulgated – though the cost was later assessed at $25.8 million to $49.2 million. As Ministers discussed individual settlements with groups of silna owners, three policy options for dealing with the general silna situation were being developed, and were put to Cabinet in October 1996. They were:

- legislation (to remove the exemption for silna lands) without compensation;
- legislation with compensation; or
- negotiations to bring about voluntary sustainable management.

These options were developed further and put to Cabinet again on 29 September 1997.

Asked by the Tribunal to outline how the policy of legislation without compensation was decided on at that point, Crown counsel described the views of the different Crown agencies, which could not agree on the need for or the form of ‘compensation’. It is worth taking time to analyse his account of their views, based on a Cabinet paper dated 16 September 1997:

- Treasury wanted no compensation paid, arguing that this would place silna forest owners on an equal footing with other forest owners affected by the 1990 export ban.
- The Ministry of Forestry disagreed, noting that forest owners affected by the 1990 ban were eligible for adjustment assistance and that a ‘no compensation’ policy would not place newly affected owners on an equal footing with previously affected owners.
- Te Puni Kokiri also disagreed with Treasury, arguing that compensation was required since the silna lands were granted to the recipients to be used for their economic and social well-being.
- The Crown Law Office advised that adjustment assistance was the minimum relief to which the silna owners were entitled if they were affected in the same way as other forest owners.
- The Ministry of Forestry proposed that the Government should offer the silna owners ‘adjustment assistance’ similar to that paid to other forest owners affected by the July 1990 export ban.
Crown counsel noted that the Ministry of Forestry view prevailed at the Cabinet meeting on 29 September. 37

There is a confusing lack of specificity here about what ‘compensation’ might include and whether different Crown agencies regarded ‘adjustment assistance’ to owners with existing logging contracts as compensation. Crown counsel’s account also offers no indication that the Ministry of Forestry’s position was influenced by knowledge of the AJ5 case and of the consequent vulnerability of the Crown’s policy, as advised by the Crown Law Office. A review of the relevant evidence reveals that the Ministry considered ‘it would be prudent to prepare a fall-back position based on new legislation to control indigenous timber exports’. 38 Cabinet’s decision was also influenced by an important paper, dated 25 September, to Cabinet from the Minister of Forestry, which described the vulnerability of the Crown’s policy to the AJ5 legal proceedings in considerable detail. That paper also considered the likely cost of adjustment assistance. Officials knew of only four existing SILNA logging contracts, all of which would be completed before the proposed legislation took effect, and considered: “Therefore the best estimate of adjustment assistance payable is zero”. 39

In opting for ‘legislation without compensation’ but offering ‘adjustment assistance’ instead, Cabinet was in effect, after seven years of negotiation on compensation with SILNA owners, reverting to the situation that applied to owners of non-SILNA forests in 1990. Worse, Cabinet knew that in effect it was offering the SILNA owners nothing. The Tribunal considers that the fact that such assistance was offered as the resolution of the SILNA issue in the knowledge that it was highly unlikely to be taken up was not an action consistent with the good faith required by the Treaty principle of partnership. It is possible that, as well as the AJ5 court case, the $1 billion fiscal envelope and relativities with the impending Ngai Tahu settlement, which was executed two months later and provided $170 million to settle all of Ngai Tahu’s historical grievances but exempted aspects of the Wai 158 claim, played a part in informing Cabinet’s decision.

In February 1998, after representations from Te Puni Kokiri that the ‘legislation without compensation’ policy discriminated against owners who had not entered into logging contracts because it did not compensate them for loss of timber values – which suggests that the Ministry was not privy to the real reasons for Cabinet’s decision – Cabinet confirmed its 1997 decision to prepare new legislation removing the SILNA exemption. It also sought negotiations with the SILNA owners. It is interesting to observe that the proposals developed from this point were more generous in spirit. In the event, of course, the whole question soon

38. Minister of Forestry, ‘Ending Unsustainably-Harvested Indigenous Timber Exports’, paper to Cabinet Committee on Industry and Environment, 16 September 1997 (doc A17(7)), para 36. Cabinet was alerted to the risk of judicial review with regard to export regulations as early as May 1990: doc A27(68), p21.
became academic when these proposals were roundly rejected by the silna owners. The concept of compensation in the form of ‘adjustment assistance’ seems to have died at this point. The concept of compensation itself lived on, however, appearing for example as a ‘risk’ to the Crown in Cabinet papers in 2001.40

In mid-1999, the Forests Amendment Bill was introduced. While this provided that no compensation would be paid for loss of timber value, it was accompanied by proposals for voluntary negotiations with groups of silna owners to bring their forests under sustainable management, together with a voluntary moratorium on logging while these negotiations were conducted. The funding available was up to $20 million. Soon after, the Rakiura settlement, in the negotiations of which Waimumu trustee Rewi Anglem was closely involved, introduced a different concept of compensation: a covenant for the preservation and protection of the forest in perpetuity in exchange for a lump sum based on timber value ($10.8 million for Lords River on Rakiura).

The silna policy package proposed in September 2000, and announced substantially unchanged in May 2002, developed the concept of voluntary conservation covenants, but imposed its own fiscal envelope in setting aside $16.1 million for this. That sum was what the Government was prepared to pay in total, using the Rakiura settlement as a benchmark. The idea was gone that compensation was related to timber value. Instead, negotiations would be held on the basis of the conservation value of each forest as assessed by the nhf, with certain forests identified as having priority and the others, including the Waimumu Trust’s, being relegated to a second round. According to Mr McKenzie, the 2002 policy announcement created:

a strong perception and expectation . . . that a much higher figure perhaps akin to the Wai- tutu settlement would be forthcoming from the Crown. However, this was not envisaged by the Government at the time of that settlement . . . [and this] was communicated to owners during the consultation process.41

The consultation referred to is not specified but is presumably that by Minister Falloon in mid-1996 (see sec 2.4.3); if so, the Tribunal considers that such a view would have been superseded by the Rakiura settlement.

The question for the Tribunal, then, is what sorts of expectation were raised in the minds of silna owners in general and the Waimumu trustees in particular during this process. In the discussion that follows, we are not concerned with the semantic arguments advanced by the Crown over the nature of its ‘adjustment assistance’, nor with the fine nuances drawn about the character of negotiations in general. In our view, the correct approach is to try to assess the issue of reasonable expectations in this situation, based on the events of the time and the relevant surrounding circumstances.

40. See, for example, doc a27(253), paras 47, 64
41. Document a15, para 24
Two overlapping phases are evident in the Crown’s evolving silna policy. In the first, firm promises of compensation were made at the beginning. After seven years of negotiation, these had been reduced to the hollow offer of ‘adjustment assistance’, which would have discriminated against those owners who had not already entered into contracts to log their forests, including the Waimumu Trust. Unsurprisingly, that form of ‘compensation’ was rejected outright by the silna owners.

The second phase, which began in 1994, was prompted by the Waitutu situation and raised great expectations that were confirmed, at least for the Waimumu trustees, by the Rakiura settlement and by the moratorium, which to them held out the promise that a ‘fair solution’ was within their grasp. In this phase, settlements would be reached with individual groups of owners depending entirely on how the Crown rated the importance of their forest for conservation purposes. The price paid in the Waitutu and Rakiura settlements was based on timber value, and we consider that, in entering the moratorium, the Waimumu trustees had a reasonable expectation that any settlement with them would be on a similar basis. Under the 2002 policy, however, the price to be paid is determined by nhf administrators on the basis of how they see the conservation values of each forest. This price is much lower than the timber value and is limited to a share of a fixed sum which runs out in 2009. Because of the relatively low conservation values ascribed to its forests, the Waimumu Trust has not been accorded priority by nhf administrators. Nor has the trust applied to the nhf.

The Tribunal considers that there has been a clear expectation among silna owners from the beginning that compensation for loss of rights under the indigenous forest policy would be paid, and that it should be related to timber value. That expectation is hardly surprising, given the various references to compensation evident throughout the period under review. The introduction of conservation values based on the unique situation of each forest (including its virginal state and proximity to a national park) has created a somewhat artificial situation whereby some silna owners, because of accidents of history, geography, and timing, found themselves owning forests regarded as being of greater value than others (for conservation rather than economic purposes) at the end of the twentieth century. This raises further issues of equity in the Crown’s treatment of different groups of silna owners, all with the same ‘special’ grants, in implementing its indigenous forest policy – issues that were raised by the Minister of Forestry in 2000, but whose proposals to resolve them appear to have been abandoned on the advice of officials.

The Crown’s negotiation with silna owners in general is not the province of this urgent inquiry. With regard to the Waimumu Trust, we have come to the following conclusions:

- The Crown entered negotiations with the silna owners (including those currently represented by the Waimumu Trust) prior to the settlement of Ngai Tahu’s historical claims. It did so on the basis that the silna grants were compensatory in nature and therefore, in

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42. Document a1, paras 10–13
its own view, had a special status, and entitled their holders to separate compensation. The Crown's indigenous forest policy, it was thought, would defeat the initial purpose of the grants.

- The Crown's initial negotiations created an expectation on the part of the Waimumu Trust that it was entitled to compensation, and would receive it through a negotiated settlement.

- This expectation was further entrenched by the Waitutu and Rakiura settlements, where owners of forests of high conservation value received compensation calculated on the basis of timber values. The expectation was also strengthened by moratorium payments.

- The Crown's change of policy, in which it no longer recognised the silna grants as a special case, led to the imposition of the NHF and its system of protecting forests for conservation purposes, according to their conservation values. Forests like that belonging to the claimants, with a low conservation value, would receive compensation later in the piece and from a fixed, relatively small sum. The policy change involved the end of a negotiation approach and the imposition of the alternative NHF process. This was done without the consent of the other parties to the abortive negotiations.

In section 5.6, we discussed the question of whether the NHF process provided an equitable alternative to the economic use of the land. Here, we note that this alternative was imposed without consent, and that the Crown abandoned negotiations commenced by the claimants in good faith. The Crown also changed the valuation of 'compensation' from a timber-based one to a significantly lower, conservation-based one. That much is clear, even without the benefit of a reliable technical valuation of the Waimumu Trust's timber. Above, we came to a preliminary view on whether the Crown's change of policy, based on its revised view of Treaty principles. Here, we consider the issue of whether its withdrawal from negotiations with the silna owners, commenced in good faith and giving rise to legitimate expectations of compensation, was in breach of the Treaty with particular respect to the Waimumu Trust.

The Treaty of Waitangi involved the Maori cession of kawanatanga to the Crown in return for the Crown's promise to protect Maori tino rangatiratanga over their lands, kainga, forests, and other taonga. In modern terms, this exchange is considered to have created a partnership between Maori and the Crown. Many Tribunals have enunciated the Treaty principles of partnership and reciprocity, and the duty of acting in the utmost good faith that arises from them. 43 We note Crown counsel's view that a negotiation cannot bind the parties to initial positions. We accept this proposition, but with the proviso that negotiations must move on from original positions by agreement. There has been no agreement in this case. Instead, the Crown has created legitimate expectations on the part of its Treaty partners,

43. These principles were most recently discussed in Waitangi Tribunal, The Te Arawa Mandate Report: Te Wahanga Tuarua (Wellington: Legislation Direct, 2005), pp.71-73.
made settlements with some but not others among like claimants, and imposed a new framework that provides a remedy based on an inequitable system of valuation. For these reasons, we find the Crown in breach of the Treaty principles of partnership and reciprocity. The substance of the claimants’ sixth and seventh causes of action, with regard to their legitimate expectation of negotiated compensation, is well founded.\footnote{Document a28, paras 198–209}

As noted above in section 5.6, the Waimumu Trust claimants have not as yet made an application to the\footnote{Ibid, paras 185–197} NHF. We are unable to find, therefore, that they have suffered any prejudice as a result of the Crown’s breach of the principles of the Treaty of Waitangi. We think that there is still time for the Crown to ensure that the NHF is adequate to provide a fair outcome for the Waimumu Trust, based on timber values, if the owners choose to exercise their tino rangatiratanga by setting aside their forest lands for conservation purposes. The honour of the Crown may be retrieved, and a Treaty-consistent solution obtained.

\section*{5.8 Other Treaty Issues}

Having come to the preliminary view that the Crown was correct to view the Silna lands as a special case, it follows that we do not need to decide some of the more contingent arguments put forward by the claimants. We do not, for example, need to consider how the Crown should have given effect to the guarantee of tino rangatiratanga and ‘undisturbed possession’ if the trust’s lands had just been ordinary forest lands. Some issues put forward by the claimants with regard to article 2 rights, including the right to development, would need to be considered only if they had not demonstrated (to our preliminary satisfaction, on the basis of the evidence before us) that they were already a special case.

There are some outstanding matters, however, which we need to resolve. First, the claimants argued that the Forests Amendment Act 2004, with its explicit denial of compensation, was a breach of the plain terms of article 3 of the Treaty. Under that article, Maori are entitled to the rights of British subjects, including the full protection of the rule of law. The claimants argued that the extinguishment of the right to log their timber unsustainably for export is in fact an expropriation of private property rights. Any such expropriation must, under the common law, be compensated.\footnote{Document a29, paras 98–104} The Crown replied that neither the forest nor the land is being expropriated, and that the Crown’s regulation of logging is not expropriatory in nature. In any case, there is only a common law presumption of compensation if not explicitly extinguished by statute, which is in fact explicit in the Forests Amendment Act 2004.\footnote{Document a29, paras 98–104} We accept the substance of the Crown’s submission. Its policy, whilst it circumscribes the use that the trust can make of its timber, and does in fact encourage the claimants to set their land aside
for conservation purposes, does not amount to an expropriation of private property rights in the strictest legal sense. We think that the claimants do have a right to be compensated fairly for their actual loss, but that it does not arise (as argued here) from a common law right extinguished by specific legislative enactment. The Crown's enactment of the Forests Amendment Act 2004 is not a breach of the Treaty in this respect.

Secondly, the claimants argued that the extinguishment of their right to log their timber unsustainably was akin to the Crown’s extinguishment of Maori ownership rights in petroleum. Their eighth cause of action relied on the Petroleum Report, where the Tribunal considered that a particular resource, which had its own distinct history of expropriation (without compensation) and its own particular importance to claimants, might require separate and additional redress in a Treaty settlement, over and above the general settlement of historical claims. Claimants have a “Treaty interest” subsiding in that resource, until their claim is settled. The Crown did not make a submission on this point.

This Tribunal does not have a view on the general concept of a “Treaty interest”. We do not, however, accept that there is a true parallel between the Crown’s nationalisation of petroleum in 1937 and the restrictions placed on the Waimumu Trust in logging its timber.

Finally, the claimants argued that, if the special nature of the silna grants was accepted, then it followed that the indigenous forests policy (and also the RMA and Forests Amendment Act 2004) had caused a derogation of their grants. This is a complicated legal question, and it was not argued fully before us. In the absence of full legal argument, we make no findings on the claimants’ fourth cause of action.

5.9 Other silna Claims

There are currently four other silna claims before the Waitangi Tribunal. One is the general Wa 158 claim, which has not been activated since it was lodged in 1990, and has since lost the owners of the Waitutu and Lords River forests. The others are Wa 783, lodged in 1999, and Wa 994, lodged in April 2002. Both concern sections in the Tautuku–Waikawa blocks in eastern Southland and are similar to Wa 1090 in thrust. Counsel for the Wa 994 claimants made himself known to the Wa 1090 Tribunal and briefly addressed its resumed hearing in Wellington. A further silna claim, Wa 709, concerning another Tautuku section, was received in February 1998 and grouped for inquiry with Wa 158.

Our preliminary views, as described above, have been reached without hearing from these claimants. We make no findings on their claims, although we think our preliminary view on generic issues should assist the Crown in formulating policy with respect to all those silna

47. Document a28, paras 210–213
49. Document a28, paras 174–184
owners still awaiting a settlement. Our findings are restricted to the Waimumu Trust alone. The chairperson may now wish to consider whether priority should be granted for the full hearing of all silna claims.

5.10 The Tribunal’s Conclusions

The main focus of our urgent inquiry was, in the first instance, the claim that the Forests Amendment Act 2004 had removed the power of the claimants to export unsustainably logged timber, without compensation. The claimants argued that sustainable logging was uneconomic and would in any case yield them only $1.66 million. Unsustainable logging over five years would have earned $25.25 million (a difference of $23.59 million). The Tribunal does not consider this part of the claim to be well founded. We were not satisfied with the valuations provided to us by either party. The trust may have suffered a loss, but it is unquantifiable on the basis of the evidence before us. In any case, there does not appear to be an export market for the Waimumu Trust’s timber. There has been no breach of the principles of the Treaty, and no prejudice to the claimants, arising from this part of the Forests Amendment Act 2004.

The claimants’ valuation (and calculation of loss) was actually based on unsustainable logging for the domestic market. Here, we noted the agreement of the claimants and the Crown that the rma and the sdp have placed strong constraints on the owners’ ability to carry out unsustainable logging for the domestic market. This was especially the case, after the Environment Court accepted the Crown’s contention that the silna grants were not in a special category and requiring special treatment. The Southland District Council also thought at first that the silna lands might require special treatment, but this idea had lapsed by the time the sdp was promulgated. As a result, the rma is a key constraint on the claimants’ ability to make an economic use of their silna lands. We do not make a full finding on the matter, however, because the claimants have not actually tested the parameters of this constraint by seeking a resource consent. Our preliminary view is that the rma, which requires decision-makers to take account of but not apply or carry out the principles of the Treaty, will probably prevent the Waimumu Trust from obtaining an economic return from their forest lands. There seems little doubt of this, hence the Crown’s alternative of setting aside the lands for conservation purposes under the nhf, which we return to below.

The Forests Amendment Act, and the provision of a capped sum of money for payment under the nhf process, arose from the Crown’s silna and indigenous forest policies, as developed from 1990 to the present day. On this wider policy context, we mainly reached preliminary views on the basis of the (incomplete) evidence before us. Parliament’s intention in 1906 was to provide at least a partial remedy for the Crown’s failure to set aside any or adequate reserves for Ngai Tahu in the nineteenth century. The Ngai Tahu Tribunal found that this was not in fact an adequate remedy, and the Crown has settled historical claims relating to these
grievances in its Ngai Tahu Settlement Act 1998. None the less, the Crown began negotiations with silna owners in the 1990s on the basis that it thought their lands to be a special case; a compensatory award, the intent of which would be defeated by its new indigenous forests policy. The Crown’s change of heart on this point, which we think influenced the Environment Court and the district council, was probably inconsistent with both the historical facts and the principles of the Treaty.

In 2000, the Minister of Forestry proposed to compensate all silna owners equally and to ensure that such a policy was consistent with the Treaty. His proposal was rejected, partly on the ground that the historical evidence showed the silna awards to be of a different nature than previously thought. Such historical evidence was then subsequently and hastily commissioned. Our preliminary view is that this policy change was probably in breach of Treaty principles, although we make no findings in the absence of hearing from other silna claimants, and with no opportunity to carry out a full inquiry into the historical facts.

Even more pertinently for the Waimumu Trust, we think that the Crown’s actions in the 1990s created a legitimate expectation that they would receive compensation as a result of a negotiated settlement. This expectation was created by the initial framework agreement, and then strengthened by moratorium payments and the settlements of the Waitutu and Rakiura claims. The settlement of the latter, while based on the value the Crown put on those owners’ forests for conservation purposes, was calculated on the basis of timber values. We think that, in abandoning negotiations for compensation without the concurrence of the Waimumu Trust and imposing the nhf as the only effective alternative remedy, premised as it is on the low conservation value of the trust’s forest and the cessation of payments based on timber value, the Crown has breached the principles of the Treaty of Waitangi.

Despite this Treaty breach, the claimants have not yet suffered any prejudice. The option of applying to the nhf is still open to them. We think that there is opportunity for the Crown to review the basis on which the nhf will provide a monetary payment (and the cap on such a payment), and to therefore arrive at a settlement with the Waimumu Trust that will retrieve the situation and ensure its compliance with the Treaty. We note, however, that the claimants must first exercise their tino rangatiratanga and decide that they do in fact wish to set aside their forest lands for conservation purposes. This is not just a choice about economic use. It has wider ramifications for the claimants and we acknowledge that. If the claimants choose not to deal with their lands in this manner, then it will be incumbent on the Crown to find another, fair solution.
Dated at Wellington this 5th day of May 2005

LR Harvey, presiding officer

A Ballara, member

HM Mead, member
APPENDIX I

STATEMENT OF ISSUES

The following statement of issues was produced by the Tribunal after the parties were unable to agree on a joint statement of issues.

BACKGROUND

1. With regard to the South Island Landless Natives Act 1906 why did Parliament enact this legislation?

2. What economic benefits, if any, have the claimants obtained from the use of silna lands and resources?

POLICY ISSUES

3. In respect of Crown policy:
   (a) Why was silna forest land excluded from the provisions of Part IIIA of the Forests Act 1949 (enacted by the Forests Amendment Act 1993)?
   (b) To what extent did differing interpretations of the historical background referred to in issue 1 influence the development of the silna policy announced in 2002 and then implemented by the Forests Amendment Act 2004?
   (c) What consultation did the Crown undertake with silna owners, including the Waimumu Trust, during the development of Crown indigenous forestry policy from the early 1990s and leading up to the silna policy announcement in May 2002?
   (d) What is the purpose of the voluntary moratorium and what, if any, expectations did it give rise to?

PREVIOUS LEGISLATION

4. Before the enactment of the Forests Amendment Act 2004:
   (a) What harvesting and milling regimes were permitted for the Waimumu Trust forest under the Forests Act 1949 (as amended) and the Resource Management Act 1991?
What effect did those regimes have on the claimants’ ability to use their forest land for economic advantage?

What domestic and export market opportunities were available for indigenous timber of the types growing on the claimants’ land and if there were any limitations on such opportunities, what were the reasons for them?

What advantage, if any, did the claimants take of any such markets, and if not, why not?

In light of issue 4 what can be deduced about the value of the Waimumu Trust forest prior to 2004?

Apart from forestry, what opportunities exist for the claimants to utilise the Waimumu Trust land for economic advantage and what has been the effect of legislation or Crown policy on any such opportunities?

**Forests Amendment Act 2004**

In respect of the Forests Amendment Act 2004:

(a) What has been the effect of this Act on domestic market and export market opportunities for timber from the Waimumu Trust forest and what is the value of any prejudice thereby caused to the claimants?

(b) What assistance has the Crown provided for the claimants in the Act and its silna policy generally?

**Remedies**

What is the basis for the claimants’ expectation of entitlement to compensation in respect of their forests and what are the Crown’s reasons for denying compensation?

What are the differences and similarities, if any, between the claimants’ position and the two legislated settlements Waitutu and Tutae-Ka-Weteweto?

What is known about the criteria and funding for phase two of the Nature Heritage Fund and when will the details be finalised?

If the Crown has acted inconsistently with the principles of the Treaty of Waitangi by, inter alia, enacting the Forests Amendment Act 2004, and prejudice to the claimants is established, what can now be done to remedy the situation?
APPENDIX II

TRIBUNAL QUESTIONS FOR CLAIMANTS AND CROWN

The following questions were circulated to counsel on 9 November 2004, before the Tribunal heard closing submissions on the Wai 1090 claim on 10 November 2004.

Questions for the Crown

In October 1996, Cabinet was still considering compensating the silna owners for the proposed loss of exemption from the Forests Act 1949. The coalition agreement after the 1996 election said that there would be negotiations with Maori on the issue of compensation. In September 1997, Cabinet agreed both to introduce legislation to remove the silna exemption and that no compensation would be paid for any resulting losses. The documents supplied to the Tribunal do not make it clear why a policy of no compensation was decided on. Can the Crown outline for the Tribunal the process by which this decision was reached?

In 2000, the Crown embarked on a review of the historical justification for its silna policy. The documents supplied to the Tribunal do not make it clear why it was considered that a review was necessary. Can the Crown outline for the Tribunal the reasons behind the review of the silna history, including who decided on the review and when? What were the terms of the commissioning brief for the Edwards report?

In the silna policy development process, what importance was given to the likely effects of the Resource Management Act 1991, direct or indirect, on the silna forests? In particular, what was the association between the Edwards report and the December 2000 Environment Court hearing?

Questions for Claimant Counsel

Mr Anglem records that he had some involvement in the Waitutu and the Rakiura settlements. What was his role in the negotiations for each settlement?

Has Mr Anglem (or any trustee), on behalf of the Waimumu Trust, ever sought a resource consent for felling timber? If not, why not? If so, what was the outcome?

Can the Waimumu Trust confirm it has not applied to the Nature Heritage Fund for consideration of its forests? If not, why not?
APPENDIX

The Waimumu Trust (silna) Report

The 2003 negotiations with Southern Forest Products concerned five sections initially. What consultation was there with the owners of each section before the Trustees entered contract negotiations with SFP?

The Tribunal notes in Mr Anglem’s evidence of 22 October 2004 that the draft audited accounts for 2004 list receipts from Craig Pine totalling $60,660. Annexure RA9 records that the income was for ‘trees planted on our lands’. Can counsel explain what the payment was for?

The Tribunal notes that the Burn-Murdoch valuation of Waimumu Forests uses a return of $425 per cubic metre for rimu logs, yet in their own negotiations with Southern Forest Products the Waimumu Trustees were seeking a return of $325 per cubic metre for rimu logs. How was the difference arrived at?

RE CLAIMANT COUNSEL’S CLOSING SUBMISSIONS

At paragraph 228: can counsel identify to the Tribunal which sections ‘cannot be logged at all’?

Paragraph 233: ‘almost none of their land could be harvested sustainably because of the sdp.’ Can claimant counsel explain what is intended by this and define: ‘almost none’?

Also at paragraph 233: ‘alternative land uses are unavailable as the forest is uncleared or partially uncleared and will stay that way.’ The 1999 MAF inventory notes that about 1700 hectares of the Waimumu Forest is in virgin or regenerating forest and that 2390 hectares is in scrub, cleared land and unmillable timber. What are the Trustees’ plans for the area that bears no forest?

RE HOKONUI BLOCK LXIII, SECTION 922

This section was apparently sold to DOC under the Nature Heritage Fund in 2003 (Refer doc A15 Mr McKenzie, para 35). Was this section ever part of the Waimumu Trust and if so, by what process was it separated out and sold to DOC? To what extent does the price paid ($356,375) reflect the conservation values of other areas of the Waimumu Forest?
APPENDIX III

RECORD OF INQUIRY

RECORD OF HEARINGS

Tribunal Members
The Tribunal constituted to hear the South Island Landless Natives Act claims comprised Judge Layne Harvey (presiding), Dr Angela Ballara, and Professor Hirini Moko Mead.

Counsel
Matthew Andrews appeared for the claimants, Dr Fergus Sinclair for the Crown.

The Hearing
The hearing was held at the Environment Court in Christchurch from 11 to 13 October 2004, after which it was adjourned. It was reconvened in Wellington on 10 November 2004.

RECORD OF PROCEEDINGS

1. Claims

1.1 Wai 1090
A claim by Rewi Anglem, Taare Bradshaw, and Kemble Roderique on behalf of the Waimumu Trust concerning the Crown’s South Island Landless Natives Act indigenous forests policy, 18 November 2003
(a) Amended statement of claim, 16 January 2004
2. Papers in Proceedings

2.1 Chairperson, decision granting urgency, 9 February 2004

2.2 Claimant counsel, submissions in support of granting of urgency, 18 November 2003

2.3 Claimant counsel, amendment to claim 1.1, 20 November 2003

2.4 Registrar, letter to claimant counsel seeking submissions on jurisdiction of Tribunal to consider Crown's revised SILNA policy, 26 November 2003

2.5 Claimant counsel, submissions on jurisdiction of Tribunal to consider Crown's revised SILNA policy, 2 December 2003

2.6 Crown counsel, memorandum requesting copy of 26 November 2003 letter to claimant counsel seeking submissions on jurisdiction of Tribunal (paper 2.4) and seeking opportunity to make submissions in response in the event the Tribunal finds it has jurisdiction, 3 December 2003

2.7 Acting chairperson, memorandum seeking submissions from Crown counsel on jurisdiction of Tribunal to consider Crown's revised SILNA policy, 4 December 2003

2.8 Claimant counsel, memorandum seeking right of reply to Crown submissions on jurisdiction of Tribunal, 5 December 2003

2.9 Crown counsel, submissions on jurisdiction of Tribunal to consider Crown's revised SILNA policy, 8 December 2003

2.10 Acting chairperson, memorandum setting out decision on jurisdiction of Tribunal to consider Crown's revised SILNA policy and seeking submissions on granting of urgency, 15 December 2003

2.11 Crown counsel, memorandum seeking extension to filing date for submissions on granting of urgency, 19 December 2003

2.12 Claimant counsel, submissions in support of granting of urgency, 22 December 2003

2.13 Crown counsel, submissions on jurisdiction of Tribunal, granting of urgency, and potential prejudice to claimants, 22 December 2003
2.14 Claimant counsel, memorandum giving notice of amended statement of claim and responding to Crown submissions on jurisdiction and urgency (paper 2.13), 16 January 2004

2.15 Chairperson, memorandum to registrar directing latter to register claim 1.1(a) as Wai 1090, 13 April 2004

2.16 Claimant counsel, memorandum seeking urgent hearing and issuing of directions concerning production of evidence and statements of issues and response, 16 April 2004

House of Representatives, Order Paper, final order paper 146, 8 April 2004


Claimant counsel, letter to Crown counsel concerning forthcoming hearing, Crown’s position in regard to the claimants’ amended statement of claim, 7 April 2004

2.17 Crown counsel, memorandum concerning production of evidence and timetabling, 19 April 2004

2.18 Claimant counsel, memorandum responding to issues raised in Crown counsel’s 19 April 2004 memorandum (paper 2.17), 20 April 2004

Claimant counsel, letter to Crown counsel requesting Crown plead to amended statement of claim, 20 April 2004

2.19 Claimant counsel, letter enclosing copy of Forests Amendment Act 2004 and seeking urgent consideration of requests for timetabling directions made in paper 2.16, 20 May 2004

Forests Amendment Act 2004

2.20 Claimant counsel, memorandum seeking directions for production of evidence, 24 May 2004

2.21 Chairperson, memorandum appointing Judge Harvey presiding officer of Wai 1090 Tribunal, 24 May 2004

2.22 Presiding officer, memorandum convening teleconference to discuss timetabling of hearing and evidence to be called, 25 May 2004

2.23 Crown counsel, memorandum setting out Crown’s initial position in respect of matters to be discussed in teleconference, 25 May 2004
2.24 Crown counsel, statement of response filed in respect of claimants' amended statement of claim, 31 May 2004

2.25 Crown counsel, amended version of statement of response (paper 2.24), 8 June 2004

2.26 Claimant counsel, memorandum seeking Tribunal direction that Maori Land Court make available in Wellington certain specified files, 9 June 2004

2.27 Crown counsel, submissions on granting of urgency, effect of Forests Amendment Act 2004, and significance of Burn-Murdoch valuations, 18 June 2004

2.28 Claimant counsel, submissions in reply to Crown counsel's 18 June 2004 submissions (paper 2.27), 23 June 2004

2.29 Crown counsel, submissions in reply to claimant counsel's 23 June 2004 submissions (paper 2.28), 25 June 2004

2.30 Claimant counsel, letter to registrar enclosing claimants' draft statement of issues, 25 June 2004

2.31 Crown counsel, memorandum concerning attached Crown's draft statement of issues and views of claimants and Crown on scope of inquiry, 29 June 2004

2.32 Claimant counsel, letter to registrar expressing claimants' preference for their draft statement of issues over the Crown's draft, 29 June 2004

2.33 Chairperson, memorandum appointing Joanne Morris and Hirini Mead to Wai 1090 Tribunal, 16 June 2004

2.34 Presiding officer, memorandum setting out date and venue of hearing and dates for filing of evidence and submissions; requesting submissions on appended draft statement of issues, extent of Tribunal's jurisdiction, and status of Wai 158 claimants; and convening judicial conference, 22 July 2004

2.35 Claimant counsel, memorandum in response to paper 2.34 concerning status of Wai 158 claimants, draft statement of issues, and cross-examination of witnesses, 26 July 2004

2.36 Crown counsel, memorandum in response to paper 2.34 commenting on draft statement of issues, 26 July 2004
2.37 Presiding officer, memorandum enclosing statement of issues, setting deadlines for filing of evidence and submissions, and requesting draft hearing timetable, 30 July 2004

2.38 Claimant counsel, memorandum concerning lands under claim and beneficial owners, 30 July 2004

2.39 Crown counsel, memorandum outlining probable scope of Crown evidence and draft hearing timetable, 30 July 2004

2.40 Claimant counsel, letter to registrar concerning Crown counsel’s memorandum (paper 2.39) and advising that leave may be sought to file further evidence, 2 August 2004

2.41 Claimant counsel, memorandum seeking leave to file further evidence, 4 August 2004

2.42 Chairperson, memorandum appointing Dr Angela Ballara to Wai 1090 Tribunal in place of Joanne Morris, 8 September 2004

(a) Presiding officer, memorandum postponing hearing to allow parties time to examine evidence filed late, 6 August 2004

2.43 Presiding officer, memorandum setting dates for filing of evidence and opening submissions and setting date and venue for hearing, 10 September 2004

2.44 Crown counsel, memorandum seeking extension for filing of opening submissions, 15 September 2004

2.45 Presiding officer, memorandum advising of change of venue for hearing, scheduling conference to discuss implications of late filing of evidence and submissions, and granting Crown counsel leave to file additional evidence, 8 October 2004

2.46 Claimant counsel, memorandum concerning proposed hearing timetable, 8 October 2004

2.47 Crown counsel, memorandum seeking leave to file further evidence of Dennis Neilson (doc A16(a)) and GIS transparency of Waimumu sections, 6 October 2004

2.48 Crown counsel, memorandum concerning Tribunal’s jurisdiction in relation to Ngai Tahu Claims Settlement Act 1998 and Ngai Tahu deed of settlement, undated
2.49 Presiding officer, memorandum concerning filing of additional evidence by claimant counsel and setting date for closing submissions, 15 October 2004

2.50 Presiding officer, memorandum setting date for hearing of closing submissions, granting extensions for filing of closing submissions, and requesting further information from claimant counsel on 4035 hectares referred to in paper 2.38, 29 October 2004

2.51 Notice of hearing of closing submissions to be held on 10 November 2004, 2 November 2004
Registrar, declaration that notice of hearing of claim Wai 1090 given, 2 November 2004
Registrar, notice of hearing of claim Wai 1090, 2 November 2004
List of parties sent notice of hearing of claim Wai 1090, 2 November 2004

2.52 Claimant counsel, memorandum concerning location and ownership of 4035 hectares referred to in paper 2.38, 9 November 2004

2.53 Crown counsel, memorandum enclosing three documents, undated
Minister of Forestry, handwritten note to adviser concerning document A4, 23 October 2001
Bruce Chapman, printout of e-mail summarising 22 November 2001 meeting between Minister of Forestry and SILNA owners, 26 November 2001

2.54 Crown counsel, memorandum enclosing draft Cabinet papers, 26 November 2004

2.55 Claimant counsel, memorandum in response to Crown’s 26 November 2004 memorandum, 1 December 2004

2.56 Crown counsel, submissions concerning embargoed Tribunal report, 3 May 2005

2.57 Claimant counsel, submissions concerning opportunity for Crown to respond to Tribunal findings on Crown-commissioned historical research, 4 May 2005

2.58 Crown counsel, memorandum to Tribunal following 4 May 2005 chambers hearing, 5 May 2005

2.59 Claimant counsel, submissions concerning 18 October 2000 briefing letter to MAF from Crown counsel, 4 May 2005
A Documents Received

A1 Taare Bradshaw, affidavit supporting Wai 1090 urgency application, 17 November 2003


(TB-2) ‘Business Statement’, notice listing Bills to be given priority in Parliament the following week, 6 November 2003

(TB-3) Letter from Chen Palmer and Partners to Minister Responsible for Forests Amendment Bill requesting that Government not progress Forests Amendment Bill until compensation has been agreed with Waimumu Trust, 5 November 2003

(TB-4) Letter from Chen Palmer and Partners to Minister Responsible for Forests Amendment Bill concerning effect of Government’s Silna policy on Waimumu Trust beneficiaries’ ability to derive economic benefit from their lands, 10 November 2003

(TB-5) Letter from Minister Coordinating Silna Policy to Chen Palmer and Partners rejecting request not to progress Forests Amendment Bill, 12 November 2003

(a) Taare Bradshaw, affidavit supporting Wai 1090 claim, 6 October 2004

A2 Douglas McPhail, affidavit supporting Wai 1090 urgency application, 26 November 2003


A5 Rewi Anglem, affidavit supporting Wai 1090 urgency application, 23 June 2004

(a) Rewi Anglem, affidavit supporting Wai 1090 claim, 6 October 2004

A6 Kerry Noble, affidavit concerning correspondence sent by claimant counsel to Ministers, 23 June 2004

A7 Noel Burn-Murdoch, brief of evidence concerning valuation of Waimumu and Hokonui forest crops, June 2004
The Waimumu Trust (silna) Report


   (a)(1)–(86) Supporting documents to document A10, various dates
   (b) ‘Deed of Settlement between Her Majesty the Queen and the Proprietors of Waitutu Incorporated’, 8 March 1996
   (c) Grant of rights to Waitutu Holding Company to cut and remove timber by Minister for State-Owned Enterprises and Minister of Finance, 2 October 1996
   (d) ‘Deed between the Rakiura Maori Land Trust and Her Majesty the Queen’, 9 October 1999

A11 Sir Tipene O’Regan, affidavit concerning silna lands and Ngai Tahu, 4 August 2004

A12 James McAloon, affidavit supporting Wai 1090 claim, 3 August 2004

A13 Keith Hovell, brief of evidence concerning resource management assessment of proposal to extract native timber, undated

A14 Dennis Neilson, brief of evidence concerning valuations of Waimumu Forest by PF Olsen and Company (doc A8) and impact of Forests Amendment Act 2004 on future markets for Waimumu Forest products, undated

A15 Allan McKenzie, brief of evidence comparing position of Wai 1090 claimants and Waitutu and Tutae ka Wetoweto settlements and discussing criteria and funding for NHF, undated

A16 Dennis Neilson, brief of evidence revising valuations of Waimumu Forest (cf doc A14), 27 September 2004
   (a) Dennis Neilson, brief of evidence concerning 30 September brief of evidence of Noel Burn-Murdoch (doc A19(a)), 8 October 2004
   (b) Table of operations costs and revenue, undated

A17 Alan Reid, brief of evidence concerning background to Government’s silna policy and silna policy towards forests in 1990s, undated
A17—continued
(1)–(22) Supporting documents to document A17, various dates
(a) Map with transparency, 11 October 2004

A18 James Parker, comp, 'Milling of SILNA Lands', compendium of archival material concerning milling of SILNA lands in Hokonui blocks and Forest Hill, Waimumu, and Lindhurst Hundreds, 27 September 2004
(1)–(27) Supporting documents to document A18, various dates

A19 Noel Burn-Murdoch, brief of evidence concerning valuation of Waimumu and Hokonui forest crops, 5 August 2004
(a) Noel Burn-Murdoch, brief of evidence in reply to document A14, 30 September 2004

A20 Entry vacated

A21 Richard Wickens, brief of evidence concerning Maori Trustee and SILNA, 1 October 2004

A22 Index to assorted documents agreed to by Crown and claimant counsel (docs A27(1)–(484)), undated

A23 Claimant counsel, opening submissions, 4 October 2004

A24 Crown counsel, opening submissions, 6 October 2004

A25 'Waimumu Trust Individual Land Blocks', table, undated

A26 Rewi Anglem, brief of evidence concerning Southern Forest Products' draft offer to Waimumu Trust, 22 October 2004
(RA-1)–(RA-12) Supporting documents to document A26, various dates

A27(1)–(484) Assorted documents agreed to by Crown and claimant counsel, various dates
(a) Revised index to documents A27(1)–(448), 22 October 2004

A28 Claimant counsel, closing submissions, 1 November 2004

A29 Crown counsel, closing submissions, 8 November 2004

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A30 ‘Economic Values of silna Forests’, briefing paper for Local Government and Environment Select Committee, undated

A31 ‘Comparison between Crown Research on Milling of silna Lands (Document A18) and Claimants’ Research on Waimumu Trust Individual Land Blocks from Maori Land Court Records in Christchurch (Document A25)’, table, 9 November 2004

A32 Crown counsel, Crown’s responses to three questions posed by Tribunal, 17 November 2004
(b) Covering letter concerning silna policy from officials’ working group to the Ministers of Finance, Conservation, Forestry, and Maori Affairs, the Minister in Charge of Treaty of Waitangi Negotiations, the Ministers for the Environment and Te Tai Tonga, and the Associate Ministers of Finance and Conservation, 29 September 2000