

THE
TARAWERA FOREST
REPORT

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REPORT

WAI 411

WAITANGI TRIBUNAL REPORT 2003



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

A Waitangi Tribunal report

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ABBREVIATIONS

a	acre
app	appendix
c	circa
CA	Court of Appeal
ch	chapter
cl	clause
d	penny
doc	document
ed	edition, editor
fol	folio
inc	incorporated
J	justice (when used after a surname)
LEV	land expectation value
ltd	limited
MIL	Maori Investments Limited
NZED	New Zealand Electricity Department
NZFS	New Zealand Forest Service
NZIER	New Zealand Institute of Economic Research
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
OBE	officer of the Order of the British Empire
P	president of the Court of Appeal (when used after a surname)
p	perch
p, pp	page, pages
para	paragraph
PC	Privy Council
QC	Queen's Counsel
r	rood
rev	revised
ROI	record of inquiry
s	shilling
s, ss	section, sections (of an Act)
sch	schedule
sec, secs	section, sections (of a book, Tribunal report, etc)
TFL	Tasman Forest Limited
VHF	very high frequency
vol	volume

'Wai' is a prefix used with Waitangi Tribunal claim numbers

Unless otherwise stated, references to claims, papers, and documents in the footnotes are to the record of inquiry, which is reproduced in the appendix.

FREQUENTLY MENTIONED TASMAN AND GOVERNMENTAL FIGURES

TASMAN PULP AND PAPER COMPANY LIMITED

Mr DW Timmis, managing director

Mr GJ Schmitt, general manager, managing director (following Mr Timmis) (also first chairman of Tarawera Forests Limited)

Mr MH McKee, general manager, Kaingaroa Logging Company Limited

Mr IG Clinkard, secretary

Mr BW Neutze, solicitor

Mr JA Okeby, finance officer

Mr MH Kjar, commercial manager (second chairman of Tarawera Forests Limited)

Mr JM Mitchell, chief forester

Mr HD Chambers, assistant to commercial manager

NEW ZEALAND FOREST SERVICE

Mr AL Poole, Director-General of Forests

Mr AP Thomson, director of forest management, then Assistant Director-General of Forests

Mr AD McKinnon, assistant director of forest management

Mr D Kennedy, conservator of forests, Rotorua

Mr J Ure, assistant conservator, Rotorua

Mr M Buist, solicitor for Forest Service

Mr MB Grainger, forest economist

Mr HJ Beattie, forest economist

Mr GC Jupp, chief accountant

Mr JF Lysaght, forest management officer

DEPARTMENT OF LANDS AND SURVEY

Mr RJ MacLachlan, Director-General of Lands and Survey

Mr EJ Lynskey, Assistant Director-General of Lands and Survey

Mr FS Beachman, commissioner of Crown lands, Hamilton

Mr W Roberts, investigating officer

FREQUENTLY MENTIONED TASMAN AND GOVERNMENTAL FIGURES

DEPARTMENT OF MAORI AFFAIRS

Mr J M McEwen, Secretary for Maori Affairs and Maori Trustee

Mr B E Souter, Deputy Secretary of Maori Affairs and Deputy Maori Trustee

Mr J H W Barber, district officer, Rotorua, and registrar, Waiariki district Maori Land Court

Mr H Martin, assistant district officer and deputy registrar, Waiariki district Maori Land Court

Mr J A Dye, special titles officer

Mr R G Lockie, land utilisation officer

Mr D M Forsell, office solicitor

Mr A G Hercus, office solicitor

Mr A Mitchell, field supervisor

THE TREASURY

Mr N R Davis, Deputy Secretary to the Treasury

The Honourable Parekura Horomia
Minister of Maori Affairs
Parliament Buildings
WELLINGTON



The Waitangi Tribunal
110 Featherston Street
WELLINGTON

12 February 2003

Ko Te Ao e rere ana

Ko Te Ao tū

Ko Ao rere

Ko Ao pōuri

Ko Ao Pōtango

Ko Ao whēkere

Whakamaru te ati nuku

Ko te putanga

Ko Te Ūira

Ko Te Waiau

Ko Te Ao Mārama

Tāne tokorangi

Ranginui e tū nei

Kātahi ka whai mārama

Tū kē ana a Rangī puna

Tū kē ana a Papa

Ka tangi te hau mātao i raro rā

He ao mārama.

Ki te Hōnore Te Minita,

Piki mai kake mai ki te pīnakitanga kua pikitia e te wā, kua whakamātauria e ngā whakapēhi e ngā mānukanuka o te ngākau o te hinengaro tangata kia noho ai koe ki te tihi o Maungatūmanako e kore a muri e hokia ruatia.

Tēna koe i roto i te whakatao a te tangata nei a Aitūā me mate tūturu tātau te tangata, kia tangihia ai o tātau mate kia tipu ai te aroha i waenga i a tātau. Kāti rā ki o tātau waka whakarei kua pae ki uta, ngā hei māpuna kua riro tītapu, ngā timu herenga waka, ngā whakatōwawai o ngā kamo, kua parauku ngā marae ngā papa takahanga i nga kaiutu a Aitūā a hūpē raua ko roimata. Takoto i roto i te whakaritenga o te urunga tē taka, o te moenga tē whakaarahia, okioki i te whenua taurikura i te whenua houkura o te āke āke.

Tēnei te tāpaetia atu nei ki mua ki tou aroaro te whakataunga a mātau o Te Taraipiunara o Waitangi i ngā take whakapae a te hunga e noho rā hei huruhuru mo ngā waewae o tō rātau tipua maunga o Putauaki hei whakamāui i ngā mauri o o rātau waikaukau, waitapu, waikarakia waiora hoki o Rangitāiki o Tarawera. E Te Minita, ka tukua atu ēnei kōrero ki a koe i runga i te mōhio ki ngā tūtukinga waewae ki ngā pīere nuku ki ngā iwingohetanga i whakawhiua ki runga i a rātau i ngā hunga nei i kimihia ai e rātau ngā whakamahutanga i o rātau māiki mā roto atu i Te Tiriti o Waitangi.

Nā reira e Te Minita, kua whāia atu te pae tawhiti kia tata, ōhiti tūturu whakamaui kia tīnā, tīnā.

We present to you our report on claims relating to the development, finalisation, and implementation in the 1960s of the Tarawera Forest joint-venture scheme, a tripartite forestry scheme involving private enterprise (originally Tasman Pulp and Paper Company Limited), the Crown, and several thousand Maori. In essence, the claims assert that the Crown secured the involvement of the Maori participants in the scheme by means which were in breach of Treaty principles and which caused them prejudice. The relevant Treaty principles are those of active protection and partnership. The claimed prejudice is, first, the unnecessary and non-consensual loss from Maori ownership of more than 38,000 acres of land, including the sacred maunga Putauaki and, secondly, the loss of financial benefits that, it is said, should have been obtained from the joint venture by the Maori participants but were not.

The primary group of claimants (the Wai 411 claimants) represent the former owners of the 38,000 acres of Maori land and the current shareholders and debenture stock holders of Maori Investments Limited (MIL). MIL is a holding company created in 1968 for the specific purpose of administering the 10.8 per cent stake in Tarawera Forests Limited (TFL) that was obtained by the former owners of the Maori land in return for contributing their land to the venture. Supporting the Wai 411 claim but focusing specifically on the loss of ownership of Putauaki were the Ngati Awa (Wai 46) claimants. The other claim reported on here (Wai 872) was made by an individual Wai 411 claimant during the course of the Tribunal's hearing.

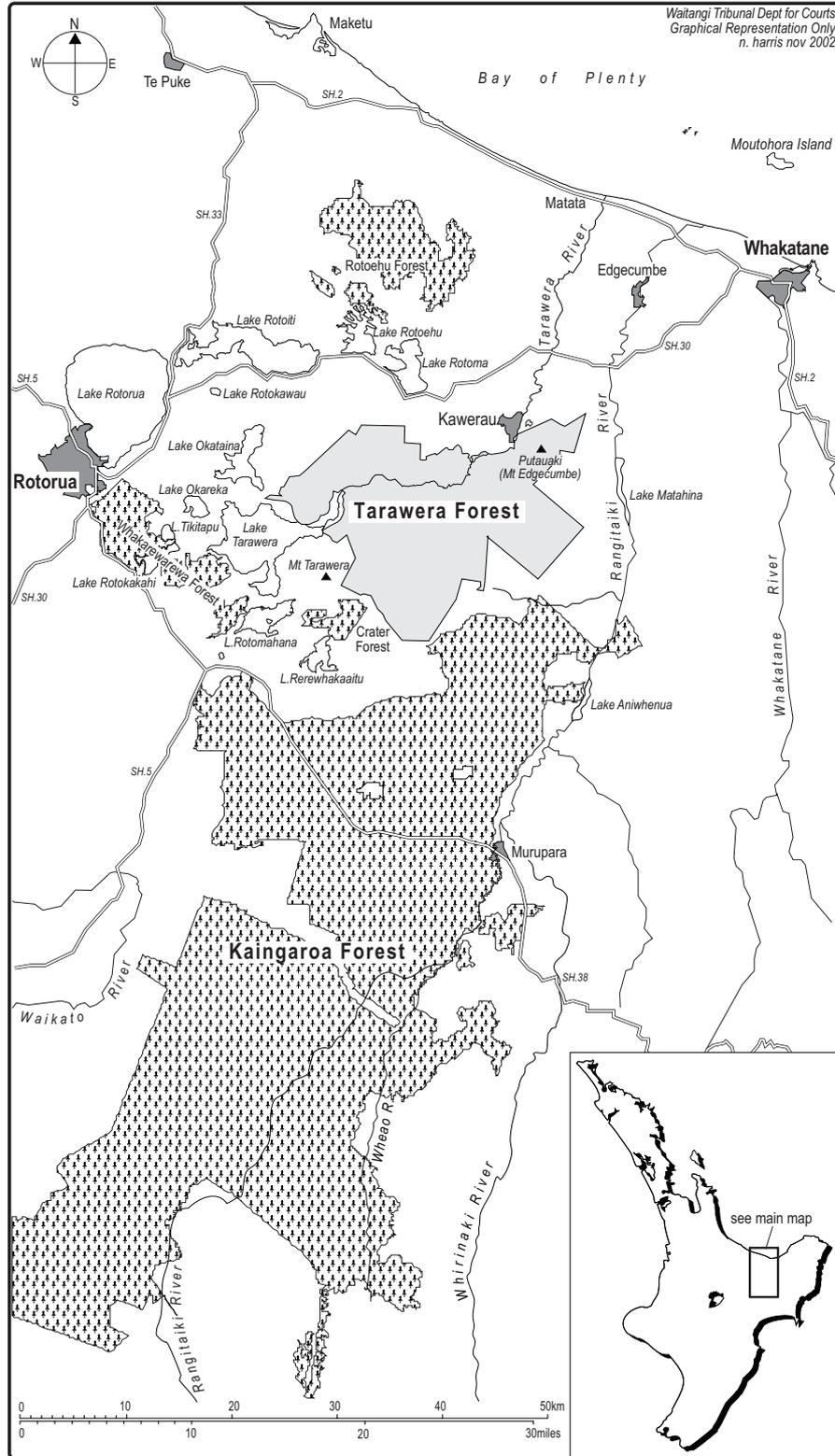
A key feature of the Tarawera Forest joint venture was that the ownership of the land contributed by the three venturers passed to TFL in return for a stake in that company. The claimants' land loss grievance rests on their view that the owners of the Maori land would have much preferred to lease it than lose title to it, and that a lease could have been achieved in place of the joint venture if only the Crown had acted consistently with its duty actively to protect Maori interests. Instead, the claimants allege, the Crown put its own interests ahead of those of the Maori landowners and secured their involvement in the

joint venture by a variety of unfair tactics, the effect of which was that the Maori owners did not sufficiently understand or consent to the venture's terms. The sense of grievance that surrounds the loss from Maori to private ownership of such a large area of land, including the taonga Putauaki, is exacerbated by the fact that the Tarawera Forest joint venture has proved to be a 'one-off' scheme. All other forestry projects utilising Maori land have involved leases, and some have enabled the Maori lessors to own the forest on their land at the end of the lease's term.

The claimants' second grievance is that the joint venture has not given to the Maori participants the returns promised to those who knew of it, let alone the returns that they claim they would have obtained if the venture had been negotiated fairly. At the heart of this grievance, too, is the view that the Crown put its own interests first and, by various unfair tactics, ensured that the Maori landowners became party to a venture on terms that were not to their greatest advantage.

The nature of the claims has required the Tribunal to undertake a detailed examination of the events surrounding the development and implementation of the Tarawera Forest joint venture. The first issue is the fairness, in terms of the Crown's obligations to protect Maori interests, of the process by which the joint venture was conceived and became a reality. The second issue is the attitude of the Crown throughout that process. We have found that the process followed in establishing the joint venture was inconsistent with what the Treaty principle of active protection requires of the Crown. We have also found, however, that the Crown was not motivated by bad faith in that process. Further, we are satisfied that the two claimant groups have been prejudiced by the loss of ownership of the former Maori land and the sacred mountain, and that the financial returns to MIL from the joint venture do not offset that loss. We are not satisfied, however, that the claimants have lost financial benefits due to them from their participation in the joint venture. Finally, we consider that the prejudice resulting from the loss of land ownership requires redress from the Crown, and we have made recommendations on that matter at the conclusion of this report.

Heoi ano



CHAPTER 1

THE CLAIMS, ISSUES, AND TREATY PRINCIPLES

1.1 INTRODUCTION

The claims which are the subject of this report relate to the creation in the late 1960s of a joint-venture forest development company, Tarawera Forests Limited (TFL). The designer and promoter of the joint-venture concept was the Tasman Pulp and Paper Company Limited (Tasman), owner of the Kawerau Mill and nearly 20,000 acres of land in the nearby Tarawera Valley. Its co-venturers were the other substantial landowners in the valley at the time: the Crown, which owned more than 18,000 acres, and some 4400 Maori, who owned 38,000 acres.

A key term of the joint venture was that Tasman, the Crown, and the Maori Trustee (who was acting on behalf of the Maori owners) would transfer the title to their lands to TFL in return for a shareholding in that company. In addition, Tasman would provide the development costs of the forest and secure a further shareholding in TFL. This would make Tasman both the majority shareholder in the forest development company and eligible for taxation savings, the benefit of which it agreed to pass back to TFL. However, the exact interest in TFL of each of the three venturers was to be determined in proportion to their capital contributions at the time when the company first returned a profit, estimated to be about 25 years after its establishment. Until that time, the venturers would not receive any income from their investment.

To establish the future value of each venturer's capital contributions, the three tracts of land were valued at the outset according to a common formula. The results were as follows:

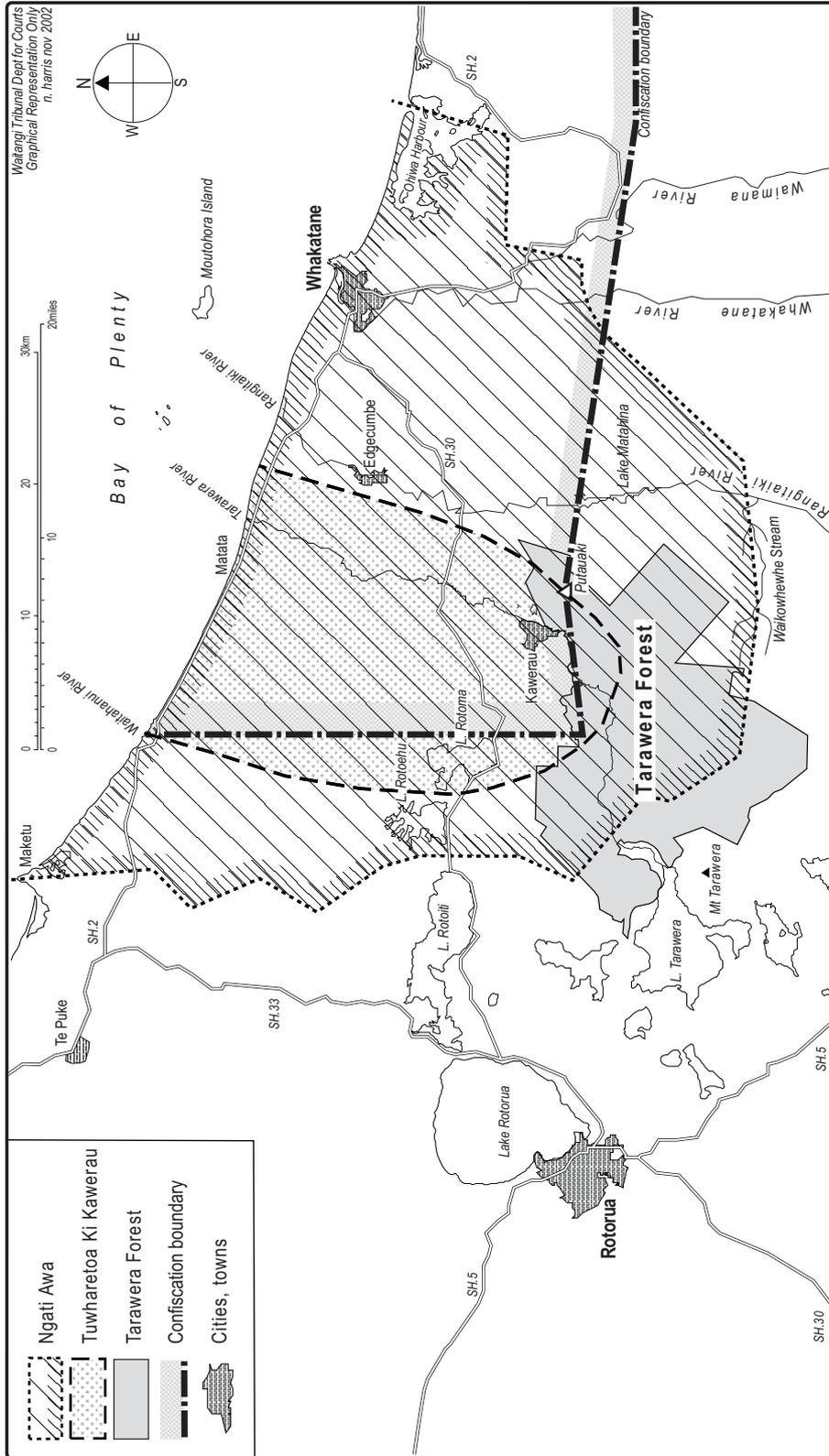
Land	Area (acres)	Land transferred to TFL (%)	Value (\$)
Tasman land	19,350	25.4	124,688.00
Crown land	18,691.6	24.5	159,524.00
Maori land	38,067.5	50.01	257,442.40

Source: Document A22, para 6; doc A22(a), p 58

At the outset of the venture, the value of each venturer's land was secured by TFL debentures earning 6 per cent interest compounding annually. The net value of the development

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1.1



costs to be provided by Tasman was also to be secured by debentures earning 6 per cent compounding annual interest. Having estimated the forest development costs over 25 years, Tasman predicted that, at the time that TFL became profitable and the co-venturers' debentures were converted to shares, their respective shareholdings in TFL would be as follows:

Tasman	75.64 per cent
The Crown	8.93 per cent
Former Maori landowners	14.43 per cent. ¹

Relying on those figures, Tasman guaranteed that its co-venturers' final shareholdings would be no less than three-quarters of the predicted amounts.

As it transpired, by the time TFL's shares were allocated in 1989, Tasman's expenditure on the development of Tarawera Forest had far exceeded its initial predictions. Indeed, but for the minimum shareholding guarantee, Tasman's capital contributions would have resulted in it owning more than 95 per cent of TFL, with the Crown and the Maori venturers owning, respectively, 2.05 and 2.93 per cent. The minimum guarantee has, however, secured the final shareholdings in TFL at:

Tasman	82.495 per cent
The Crown	6.6975 per cent
Former Maori landowners	10.8075 per cent

The 10.8075 per cent Maori interest in TFL is held and administered by a holding company, Maori Investments Limited (MIL). In the first decade after TFL became profitable, MIL received dividends and interest of more than \$30 million, and the prospect of ongoing returns to MIL from its stake in TFL seems assured.

The primary claim with which this report is concerned (Wai 411) was made by and on behalf of the former Maori landowners and MIL shareholders. It challenges the Crown's role in the process by which the Tarawera Forest joint venture was developed, finalised, and implemented. In particular, the claimants assert that the Maori landowners' interests were insufficiently protected in that process and that the landowners did not give meaningful consent to the venture's key terms, including the transfer of their land to TFL. The Wai 411 claimants were supported by the Ngati Awa (Wai 46) claimants whose primary grievance concerning the forest venture is that it involved the transfer to TFL of the ownership of the sacred mountain Putauaki (Mount Edgecumbe).

1. Tasman Pulp and Paper Company Limited, *Proposal by Tasman Pulp and Paper Company Limited to Maori Owners and the Crown to Participate in the Development of an Exotic Forest in the Tarawera Valley* (Kawerau: Tasman Pulp and Paper Company Limited, [1965]), p 4 (doc A4, vol 2, p122)

1.2 CLAIMS' RELATIONSHIP WITH EASTERN BAY OF PLENTY INQUIRY

While our inquiry focuses on events that occurred within living memory, the affected land has a far longer history, including nineteenth-century events which fostered other Maori grievances against the Crown. For example, part of the Tarawera Valley land was within the area of the eastern Bay of Plenty raupatu (confiscation) of 1866 (see map 2). The raupatu claims of Ngati Awa (Wai 46) and Tuwharetoa ki Kawerau (Wai 62) were the focus of an inquiry by the Waitangi Tribunal in the mid-1990s. The resulting interim report, the *Ngati Awa Raupatu Report*, was issued in 1999 and was intended to support tribal settlements of those claims and, the Tribunal hoped, claims concerning all other historical matters as well.²

1.2.1 Severance of Wai 411 and non-raupatu Ngati Awa claims

The eastern Bay of Plenty Tribunal explained that the Wai 411 claim was severed from its inquiry and deferred because it was of recent origin and was not a tribal claim. Also deferred were the non-raupatu claims of Ngati Awa, including the claim concerning the inclusion of Putauaki in Tarawera Forest. That claim, the Tribunal said, was allied to Wai 411 and would 'resurface' when Wai 411 was heard.³

The Tribunal's decision to defer the claims concerning the Tarawera Forest was supported by submissions made to it in August 1994 by counsel for the Wai 411 claimants, Rodney Harrison QC.⁴ At that time, Dr Harrison considered that Wai 411 could be suitable for settlement by direct negotiation with the Crown. However, in November 1999, he requested a hearing of the Wai 411 claim on the ground that the settlement negotiations between the Crown and Tuwharetoa ki Kawerau could not be resolved while Wai 411 remained undetermined.⁵ In response, the Tribunal's chairperson, Judge E T J Durie, noted that, although resources were fully committed elsewhere, the eastern Bay of Plenty Tribunal considered Wai 411 to be a discrete claim that could be heard in a week if pre-hearing conferences were used to advantage. An initial conference was arranged, to be conducted by Tribunal member Joanne Morris, to determine whether there was sufficient evidence to proceed to hearing.⁶

1.2.2 Tribunal agrees to separate hearing

At the conference on 10 April 2000, counsel's submissions revealed 'the conflicting views of the Crown and the negotiators for Tuwharetoa ki Kawerau and Ngati Awa as to the mandate for including the Wai 411 claim in settlements with those iwi'.⁷ Counsel for the Wai 46

2. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), p ix

3. Ibid, p 10

4. Paper 2.5, paras 8, 12

5. Harrison to director, Waitangi Tribunal, 12 November 1999

6. Paper 2.13

7. Paper 2.17, p 3

claimants, Layne Harvey, agreed with Dr Harrison that the Tribunal's inquiry into Wai 411 should focus on events since the 1960s rather than on historical matters affecting the Tarawera Valley lands. He advised that Ngati Awa wished to reserve their position on matters of a historical nature until a deed of settlement was concluded between their runanga and the Crown.⁸ The Wai 411 and Wai 46 claimants also agreed at that time to pursue the possibility of 'conducting Wai 411 as a sole claim with Ngati Awa input'.⁹

In a memorandum and directions dated 12 April, Ms Morris reiterated the view of the eastern Bay of Plenty Tribunal that Wai 411 should be dealt with independently of tribal settlements. Noting the readiness of the claim for hearing, she resolved:

that Wai 411 (as a single claim focusing on the events surrounding the formation of Tarawera Forests Ltd and such later events as are relevant to the claimants' allegation of prejudice) should be heard and reported on by the Tribunal at the earliest available opportunity.¹⁰

Early in May 2000, a Tribunal was constituted to hear the Tarawera Forest claims. It comprised Ms Morris (presiding), Keita Walker, Professor Wharehuia Milroy, and John Baird.¹¹ The Tribunal heard evidence and submissions from counsel during a week in June 2000 and another week in September 2000. (An outline of the hearing agenda is provided in the appendix to this report.)

Since that time, negotiations between the Crown and Ngati Awa and Tuwharetoa ki Kawerau have continued, and draft deeds of settlement have now been initialled and, in the case of the former, ratified.¹² The proposed settlement with Ngati Awa, if finalised in its present form, will settle all their Wai 46 claims, including the claim relating to Putauaki that was pursued before this Tribunal. It will not, however, settle the Wai 411 claim.¹³

1.2.3 Context provided by eastern Bay of Plenty inquiry

The eastern Bay of Plenty Tribunal's inquiry and report contains contextual information and findings relevant to the Tarawera Forest claims. With the Tarawera Valley land being mostly outside but partly inside the area confiscated by the Crown in 1866, customary title was converted to individualised title by one of two means – land returns ordered by the

8. Ibid, p 1

9. Ibid

10. Ibid, p 3

11. Paper 2.21

12. The draft deed of settlement with Ngati Awa was initialled in July 2002 and ratified in January 2003. The draft deed of settlement with Tuwharetoa ki Kawerau was initialled in October 2002.

13. Office of Treaty Settlements and Ngati Awa, 'Deed of Settlement to Settle Ngati Awa Historical Claims', initialled deed for presentation to Ngati Awa, 2002, cls 1.3.1(b)(i)(ff), 1.3.2(a). Clause 1.3.1(b) also makes plain that the proposed settlement covers Ngati Awa's claims concerning two nineteenth-century events which affected land now owned by TFL but which were not investigated by the eastern Bay of Plenty Tribunal: see Waitangi Tribunal, *The Ngati Awa Raupatu Report*, p 1. These are the claims concerning the Native Land Court's award of land outside the raupatu area and the claims concerning the Crown's subsequent acquisition of such land.

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1.2.3

Compensation Court or land awards made by the Native Land Court. On the matter of confiscated land being returned by the Compensation Court, the Tribunal found:

The compensation scheme . . . facilitated the transformation from a communal to individual form of ownership in which the entitlement of many was reduced to the rights of a few. Though a number of the larger awards were returned to individuals as ‘trustees’, it was never more than a temporary arrangement until the land could be divided into shares. In many cases, the individuals listed in the awards also had the power to alienate the land without recourse to the wider community. Only in some cases were restrictions on alienations applied or enforced. Even when such restrictions were enforced (as is the case of the Whakātane awards), they merely served to delay – as opposed to prevent – the eventual alienation of the land, with restrictions on alienation being removed under section 207 of the Native Land Act 1909, subject to the provisions of that Act. In no case were the rights and protections afforded by a communal title adequately compensated for or replaced.¹⁴

Lands outside the confiscation area, including the bulk of the lands eventually included in Tarawera Forest, were awarded by the Native Land Court to Maori in individual shareholdings. On that matter, the Tribunal observed:

The Native Land Court was strikingly similar in its operation and effect to the Compensation Court. Both were presided over by Chief Judge Fenton and both facilitated the alienation of land through the individualisation of title. Again, the Government agent responsible for returning confiscated land was heavily involved in settling the ownership of the land that had not been confiscated and in effecting purchases.¹⁵

The Tribunal then concluded that both means of converting customary to individualised title were contrary to the principles of the Treaty of Waitangi:

It was contrary to the principles of the Treaty of Waitangi that land returns and allocations were not effected by a fair and open process. It was also contrary to the principles of the Treaty that tribal land was converted to individual shareholding when the policy for change had not been approved by the affected people and was contrary to their customary preference. It is further contrary to the principles of the Treaty that tribal authority was therefore effectively ended and that the land was thereby exposed to alienation. There is nothing in the record to satisfy us that the Government complied with even minimal protective standards to maintain its fiduciary obligations to the Maori people. On the contrary, the record points to a Government plan to reduce the effectiveness of tribal operations and to acquire land for European settlement.¹⁶

14. Waitangi Tribunal, *The Ngati Awa Raupatu Report*, pp 91–92

15. *Ibid*, p 129

16. *Ibid*

Since *The Ngati Awa Raupatu Report* was issued, the Chatham Islands Tribunal has, after extensive analysis, reached the same conclusions about the effects on the Ngati Mutunga hapu of the land tenure reform that was effected and maintained by the Native Lands Act 1862 and ‘a plethora’ of later amending Acts.¹⁷ Of particular note for present purposes is a section of that Tribunal’s report entitled ‘Lasting Prejudice to Maori Land’. The Tribunal’s account there of the four most notable consequences of tenure reform appears equally apt to describe the remaining Maori-owned land in the Tarawera Valley in 1966. Those consequences are ownership fragmentation, title fragmentation, absentee ownership, and acculturation (the last of which is defined as ‘put[ting] the land forever beyond the reach of the tribe and its values’).¹⁸

1.3 WAI 411

1.3.1 The claimants

The primary claim in the present inquiry was filed with the Waitangi Tribunal in June 1993 and was registered in January 1994 as Wai 411. The original claimants were William Shuki Savage and Gavin Motai Park. They claimed on behalf of themselves and two groups of Maori whose membership overlaps to a large extent, namely:

- ▶ the former owners of the 38,067.5 acres of land now known as the Tarawera 1 block and their heirs and descendants; and
- ▶ the shareholders and debenture stockholders of MIL.¹⁹

At the time of filing Wai 411, Mr Savage was the chairperson of MIL and Mr Park was a director. Sadly, Mr Savage died early in 1999. In May 2000, the claim was amended so that Mr Savage’s niece, Beverley Rae Adlam, could replace him as the first-named claimant.²⁰ Ms Adlam, a director of MIL since February 1985, had succeeded Mr Savage as chairperson of the company in 1998.²¹ Monica Lanham, who was Mr Savage’s sister and Ms Adlam’s mother, had been the foundation chair of MIL, and she was also a leading member of a group of land-owners that appeared before the Maori Land Court in 1966 to argue that the joint-venture proposal made inadequate provision for the contribution of Maori land.

At the Tribunal hearing, claimant counsel Dr Harrison emphasised the fact that, before its inclusion in the forest venture, the Maori land was held in 40 blocks by some 4000 individual legal owners who affiliated to more than 20 iwi. This meant, he said, that the land was not tribal land at the time and, consequently, that the Wai 411 claim was not a tribal claim. He

17. Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 182

18. *Ibid*, p 196

19. Claim 1.1, p 1

20. Paper 2.20

21. Document A16, para 2

further submitted that the proper recipients of redress for the Treaty breaches alleged by the claimants were the MIL shareholders or MIL itself. This was because the former landowners and their successors are now more closely identified with that company than with any other entity.²² Ms Adlam also emphasised these points in her evidence to the Tribunal.²³ In particular, she asserted that tribally based redress would benefit numerous people who were not entitled to receive any, while depriving those who were rightfully entitled of their full and proper share.²⁴

In response to questions from counsel for the Wai 46 claimants, Ms Adlam agreed that the Maori land which became the Tarawera 1 block had been awarded by the Native Land Court primarily to Ngati Awa and to iwi with Tuwharetoa and Te Arawa connections. Ms Adlam also acknowledged that several of the other iwi with which MIL shareholders affiliate – including Ngati Kahungunu for example – had never been owners of the land. Accordingly, shareholders who affiliate with those iwi must have acquired their MIL shares through their connections to landowners, including by marriage.²⁵ Asked by the Tribunal why the Wai 411 claim had been made, Ms Adlam said that the claim was made on behalf of the Maori landowners, whose real grievance is based on loss of land and loss of control over the whole process. She then noted that whakapapa is relied on to determine succession to MIL shares. Ms Adlam agreed that there is a close relationship between the Wai 411 and Wai 46 claims but said that the forest venture had created tribal disharmony.²⁶ As chapter 9 reveals, the efforts of Ngati Awa to obtain the return of Putauaki appear to have been at the centre of that discord. The Tribunal hearing may have had a unifying effect, however, because the Wai 46 claimants made it plain to us that they no longer assert an exclusive claim to the mountain.²⁷

1.3.2 The claim

The Wai 411 claimants alleged that conduct and legislation inconsistent with Treaty principles blighted the process of developing and implementing the Tarawera Forest joint-venture scheme and caused the claimants to lose ownership of their lands and suffer financial prejudice.²⁸ The relevant Treaty principles, discussed later in this chapter, concern the Crown's responsibility to protect Maori interests, particularly their interests in land, and to deal with Maori reasonably and in good faith, including when consulting on matters of importance.

22. Document A22, paras 95–98

23. Document A16, para 27

24. *Ibid*, para 36

25. Oral comments of Ms Adlam in response to questions from Mr Harvey, 7 June 2000

26. Oral comments of Ms Adlam in response to questions from Mrs Walker, 7 June 2000

27. See, for example, document A27, para 16. At the Tribunal hearing, Te Rau o Te Huia Cameron stated that 'all the various tribal groups around the area have some right to associate themselves to the mountain' (7 June 2000, after presenting document A18), and Hirini Mead acknowledged that other iwi have customary interests in some places, like the mountain, which Ngati Awa hold dear (8 June 2000, after presenting document A21).

28. The general summary in this section is based on Dr Harrison's opening and closing submissions to the Tribunal (docs A22, B80).

The claimants asserted that, although the creation of the joint venture spanned a period of several years and involved a number of meetings with Maori landowners, the Maori owners were never meaningfully involved in the design or refinement of the venture's terms. Instead, they said, the Crown assumed for itself the role of representing and safeguarding the Maori landowners' interests when negotiating the joint venture with Tasman but failed to discharge that responsibility for reasons connected to its own conflicting interests in the venture. The alleged Crown conflict of interest arose, it was said, from a number of factors, including the Crown's roles as a minority shareholder in Tasman and as the recipient of taxation revenue from it. The result, the Wai 411 claimants asserted, was that the great majority of Maori landowners who became involved in the joint venture did so without knowing anything about it or without understanding the terms of their involvement. Accordingly, they could not and did not consent to the joint venture's terms, including the terms by which they lost ownership of their lands. Further, the claimants asserted that the financial returns to MIL from the joint venture have been inadequate; first, because the Maori landowners were promised a higher return and, secondly, because they would have obtained an even higher return had the Crown fulfilled its Treaty responsibilities.

The claimants contended that a variety of officials and bodies conducted themselves in ways that breached the Crown's Treaty responsibilities. Of particular importance, they said, were the acts and omissions of officials in the New Zealand Forest Service, the Department of Maori Affairs, and the Treasury, who participated in assessing the Tasman joint-venture proposal, publicising it to Maori landowners, and supporting it in the Maori Land Court and to the Maori Trustee. Also important and in breach of the Crown's Treaty responsibilities, the claimants said, was the conduct of the Maori Land Court and the Maori Trustee in examining and approving the joint-venture proposal, thereby paving the way for its implementation. Finally, the claimants asserted that the policy and provisions of certain Acts of Parliament involved in the venture's implementation were in breach of Treaty principles.

The primary prejudice which the Wai 411 claimants maintained that they have suffered is the unnecessary and non-consensual loss, to the individual owners, of 'ancestral lands in short supply in the region, including what was and is the most spiritually significant piece of land for the tangata whenua of the vicinity, Putauaki Maunga'.²⁹ In the words of Ms Adlam:

The loss of the Maori land which is now called Tarawera 1 has meant a significant loss of mana to the former owners and to the Maori people of the Region generally. It has resulted in a loss of spiritual inheritance, and also the development of inter-tribal disharmony and divisions between those iwi, hapu and whanau who belonged to this land. This loss of mana has been made greater, because all other Maori who became involved in forestry ventures, whether with the Crown or with private enterprise, have retained their lands and the mana associated with those lands.³⁰

29. Document B80, para 50

30. Document A16, para 13

The land loss was non-consensual, the claimants said, because the great majority of the Maori owners of the land at the relevant time were either uninformed, ill-informed, or misled about this critical effect of the project. Further, a minority of owners were actively opposed to losing ownership of the land,³¹ including the members of the closely related Savage and Edwards families, who were represented in the 1966 Maori Land Court proceedings which facilitated the joint venture's implementation. The loss of ownership was unnecessary, they said, because at the time the joint venture was implemented in 1968, or shortly afterwards, there were viable alternatives for utilising the land which did not require its alienation. In this regard, the claimants emphasised, and the Crown acknowledged, that neither before nor since the Tarawera Forest project has there been any other forestry development utilising Maori land that has involved its alienation. Instead, the leasing of Maori land for forestry purposes has become the norm; a trend that began shortly after the Tarawera project was implemented.

The claimants put forward alternative arguments about the likely timing and terms of a lease of the former Maori land that was instead acquired by TFL. At best, they contended, the land could have been leased to Tasman in 1967 or shortly afterwards on terms similar to those negotiated between the Lake Taupo Forest Trust and the Crown. Such terms, the claimants said, would have given a better financial return than the joint venture, while still retaining the land in Maori ownership. At the very least, they said, the land could have been left as it was in the late 1960s until such time as a forestry lessee offered terms that would have given a financial return equivalent to or even lower than that received from the joint venture. Since that outcome would have retained Maori ownership of the land, the claimants asserted that it would still have been more favourable to them than the joint venture's outcome.³²

In addition to the land loss grievance, the Wai 411 claimants said that they have been disadvantaged financially, because, as a result of the Crown's conduct and legislation in breach of Treaty principles, the outcome of the joint venture has been less favourable to them than it would otherwise have been. The alternative grounds on which the claimants advanced this grievance were summarised by their counsel, Dr Harrison, in closing submissions, as follows:

- ▶ Crown officials joined with Tasman in misrepresenting to the Maori landowners at the important Kokohinau Pa hui in December 1965 that the Maori shareholding in TFL would be 14.43 per cent; or
- ▶ the Crown failed to take up on behalf of the Maori landowners or, at least, to pass on to them, Tasman's August 1965 offer to include in the joint venture heads of agreement a minimum guarantee for Maori of 15 per cent of the venture; or
- ▶ the Crown was ultimately responsible for a variety of causes (including failing to consult with Maori, pushing the Tasman proposal through despite Maori opposition, and failing

31. Document B80, paras 37–54

32. *Ibid*, paras 46–48

to ensure that the Maori landowners received adequate representation and advice) which led to the Maori land being undervalued when it went into the venture and then not being protected against the consequences of inflation.³³

1.3.3 Remedies sought

Dr Harrison emphasised the primacy of the Wai 411 claimants' land loss grievance but made plain his clients' understanding that the Tribunal cannot recommend the return of the 38,067.5 acres of land acquired by TFL in 1968. That loss, Dr Harrison said, is:

seemingly, permanent, and certainly irreparable by the Tribunal's processes. There is and can be no mana in a share certificate, and again the contrast for the iwi, hapu and whanau affected, with the Lake Taupo Forest Trust, and indeed with every other forestry venture on Maori land in the country, is inevitable.³⁴

Therefore, by way of remedy for the alleged prejudice suffered as a consequence of the loss of ownership of the land, the Wai 411 claimants sought:

- ▶ an apology from the Crown; and
- ▶ the transfer to MIL of the Crown's shareholding in TFL, for distribution pro rata to the existing MIL shareholders.³⁵

In addition, as a remedy for the alleged financial prejudice, the claimants sought an amount equal to the difference between the returns MIL has received from TFL and the amount it would have received had it had a 15 per cent shareholding in TFL (estimated by the claimants, as at 1999, to be \$26,149,717).³⁶

In his written closing submissions, Dr Harrison also requested the Tribunal to recommend that the Crown cooperate with MIL to achieve legislative amendments to enable MIL to deal with unclaimed money or shareholdings, and the profits from these, to the greater benefit of the MIL shareholders and their whanau.³⁷ That request was later amended, however, when Dr Harrison stated that the board of MIL did not regard its powers as being unduly impeded by legislation and was open to suggestions from the Tribunal as to how MIL could be improved as a potential recipient and distributor of any financial remedy from the Crown.³⁸

33. Ibid, paras 6, 9, 11

34. Ibid, para 52

35. Ibid, paras 76.1–76.2

36. Ibid, para 76.3; doc B76(a), paras 12.1–15.1. We note, however, that in a submission to the Tribunal in February 2001, Dr Harrison stated that it was 'unnecessary and inappropriate' for the Tribunal to become preoccupied with precisely assessing the claimants' financial losses: paper 2.48, para 11.

37. Document B80, para 76.4

38. Oral submissions made by Dr Harrison at conclusion of presenting document B80(a), 22 September 2000

1.4 WAI 46

The Wai 46 claim was brought by Hirini Moko Mead for and on behalf of himself and Te Runanga o Ngati Awa. Originally filed in 1988, the comprehensive Wai 46 claim has been amended several times since, including for the purposes of the present inquiry.³⁹ The Ngati Awa claimants, represented by Layne Harvey, participated in the Tarawera Forest inquiry both to support the Wai 411 claim and to advance that part of the Wai 46 claim that relates to the inclusion of Putauaki in the forest venture.

In fact, a claim solely concerned with Putauaki's inclusion in the forest was lodged with the Tribunal in 1985. Registered by the Tribunal as Wai 23, the claim was made by Te Rau o Te Huia Cameron on behalf of her father, Eruera Manuera, the paramount chief of Ngati Awa during the period in which the Tarawera Forest scheme was developed and implemented. In elaborating on her claim, Mrs Cameron stated that Dr Eruera and many other Maori owners were unaware that the sacred mountain would be included in the lands taken over by the scheme. The Maori Trustee, she said, 'acted incorrectly in allowing it to be included in the deal'. As a remedy, she asked that the mountain be 'returned to the "iwi" and the title (mana) held by the Minister of Maori Affairs on behalf of the Maori people'. Mrs Cameron stressed that her father 'wanted the mountain to be returned to the "iwi" not a particular tribe'.⁴⁰ At the Tribunal hearing of the Tarawera Forest claims, Mrs Cameron gave evidence as a witness for the Wai 411 claimants. Subsequently, her Wai 23 claim was subsumed within Ngati Awa's Wai 46 claim.⁴¹

Ngati Awa's amended claim recorded the significance of Putauaki and the surrounding lands for Ngati Awa and other iwi and hapu. It noted that 2700 acres of 'Putauaki land' remained in Maori ownership until they were transferred to TFL. That alienation, the Wai 46 claimants alleged, was brought about by Crown conduct in breach of Treaty principles and has prejudicially affected them. The alleged deficiencies in the Crown's conduct match some of those identified by the Wai 411 claimants and relate to the Crown's role in promoting the joint venture when Maori involvement in, and understanding of, its design was inadequate to protect their interests.⁴² As is detailed in chapter 9, the essence of Ngati Awa's complaint is that they did not know that Putauaki was to be transferred to TFL until after that had happened and, in their persistent efforts to reclaim the mountain ever since, they have been treated as if they have no special interest in it.

A fundamental difficulty with the Wai 46 claim concerning Putauaki was noted by the eastern Bay of Plenty Tribunal: even if the claim were to be upheld, the Tribunal lacks jurisdiction to recommend the one remedy fervently desired by the claimants – the return of the mountain to Maori ownership.⁴³ This is because the mountain, along with the rest of the land

39. Claim 1.3(d)

40. Wai 23 ROI, claim 1.1

41. Claim 1.1(c)

42. Claim 1.1(d), para 14

43. Paper 2.9, p 2

comprising the Tarawera 1 block, is now privately owned by TFL and, by section 6(4A) of the Treaty of Waitangi Act 1975, the Tribunal is unable to recommend the return to Maori ownership, or the acquisition by the Crown, of any private land.⁴⁴ Mr Harvey stated that, while the Wai 46 claimants accept that the Tribunal lacks the relevant power, ‘they do not accept that as fair, just or consistent with the principles of the Treaty of Waitangi’.⁴⁵ Dr Mead explained, ‘We know you cannot recommend the return of private land, but we believe you can find that what was done to us was wrong.’⁴⁶ Accordingly, the Wai 46 claimants sought Tribunal findings on the cultural and historical importance of the mountain and on the sense of loss and grievance felt at the change in its ownership effected by the Tarawera venture.⁴⁷

In his submissions to the Tribunal, Mr Harvey referred frequently to the loss of several blocks of ‘Ngati Awa land’ that were included in the forestry joint venture, allegedly as a result of Crown conduct that was inadequate in Treaty terms. In addition to the 2700 acres of ‘Putauaki land’ noted earlier, the largest block he identified as Ngati Awa land which went into the forest was Pokohu D, of around 9000 acres.⁴⁸ The Wai 46 claimants’ understanding that all the Maori-owned lands put into the forest venture were ‘tribal lands belonging to particular iwi and hapu’⁴⁹ set them apart from the Wai 411 claimants and explains their different approach to the remedies that would be appropriate should the Tribunal uphold the claims. In his closing submissions, Mr Harvey asked the Tribunal to recommend, as specific remedies relating to ‘the loss of Putauaki and other Ngati Awa lands including Pokohu D’, that the Crown:

- ▶ pay financial compensation to Ngati Awa; and
- ▶ apologise for ‘the wrongful, improper and unnecessary taking’ of the mountain and the land, for ‘the failure of the Crown to properly consult with Ngati Awa over Putauaki’, and for Ngati Awa being ‘treated as outsiders’ since 1966 with regard to Putauaki.⁵⁰

1.5 WAI 872

Claim Wai 872 was made by David Potter in September 2000, during the course of the Tribunal hearing of the Wai 411 and Wai 46 claims about the Tarawera Forest venture.⁵¹ As a shareholder in MIL, Mr Potter is also one of the Wai 411 claimants and, in that capacity, gave evidence to the Tribunal at the June 2000 hearing before lodging his own claim.⁵²

44. Section 6(4A) was inserted by section 3 of the Treaty of Waitangi Amendment Act 1993.

45. Document B79, para 79

46. Document A21, para 52

47. Document B79, para 82

48. Document A27, para 62

49. *Ibid*, para 29

50. Document B79, paras 82–83

51. Claim 1.2

52. Document A19

Mr Potter is the son of Thomas Tangihia Savage Potter, a former landowner in several of the Pokohu blocks that were amalgamated into Tarawera 1 by the Maori Land Court in 1966.⁵³ Thomas Potter was a member of the Savage–Edwards family group of landowners who were represented in court and opposed the application in so far as it applied to their land. Evidence was before the court that the entire Savage and Edwards family group owned more than 1100 acres in the Pokohu A2 and B3 blocks, which had a total area of some 3000 acres.⁵⁴ While not all family members were part of the group that opposed the application to the court, it appeared that the court group included those who owned the largest land interests, and it is clear that the court group owned a majority of the shares in some of the Pokohu A2 and B3 blocks.⁵⁵

Mr Potter claimed that Crown conduct in breach of Treaty principles in connection with the Tarawera project caused him particular prejudice which warranted a specific remedy. He asserted that the Crown ‘totally disregarded’ not only his family’s clearly stated wishes to retain its land for farming purposes but also the ‘well researched farming proposal’ which it presented to the court and which would have enabled him to ‘productively farm upwards of a thousand acres of Savage family land’.⁵⁶ Mr Potter told the Tribunal that his elders had long promised him that he could farm in the Pokohu Valley and that, in anticipation of that future, he had, by the time he was 18 years old, saved for and bought a tractor and plough, discs and harrow.⁵⁷ Mr Potter also gave evidence about the nature of the Pokohu Valley land that he had always intended to farm and its use by members of the Edwards family, who were the sole inhabitants of any of the 40 blocks of Maori land that were amalgamated to become the Tarawera 1 block:

There was 230 acres of farm land up there. It was all fenced and grassed. It had a house on it and a nice orchard. It was actually a modern farm. It was a beautiful bit of land, flat on the river bank, the river ran along one side of it. From the hills above when you looked down on this farm it was really quite a picture in the valley there. We regarded the valuations put on it by Tasman as ridiculous and way under value. It was agreed amongst all the cousins including my father that the Savages did not want to sell. Between all of them, they had about 1010 acres, the Savage family. Our land was particularly good, flat, the best in the area. That is what the Savage family objected and fought against the Tasman proposal. We knew we had a valuable property. . . .

53. Document A19, para 3

54. Document A4, vol 2, p 55

55. The number of blocks was not established in court but was between four and seven: see sec 6.11. The conclusion that the Savage–Edwards family members represented in court included those with the largest interests follows from a comparison of the court group with the Savage family ownership interests and whakapapa: doc A4, vol 2, pp 148, 157–158.

56. Claim 1.2

57. Document A19, para 5

My cousin Henry Edwards had worked the farm. He died in I think about 1952. He had two or three sons and his widow and sons stayed on the farm. They did not really farm it much after his death. They had enough stock on it to keep the weeds down. The boys were not very old at the time, but they maintained the property reasonably well considering that the family had no father.⁵⁸

The remedy Mr Potter sought for the specific prejudice he claimed to have suffered was compensation for the loss of income he would have had from the land for the period, now some 35 years, since the creation of the amalgamated Tarawera 1 block and its subsequent transfer to TFL.⁵⁹

1.6 THE CROWN'S RESPONSE TO THE CLAIMS

The Crown denied that it had breached Treaty principles in the process by which the Tarawera Forest joint venture was developed, finalised, and implemented. Accordingly, it denied that the claimants had suffered prejudice as a result of a Treaty breach.

On the matter of process, Crown counsel, Peter Andrew, took care to remind the Tribunal of the social and economic context within which the Tarawera venture was developed. In particular, he highlighted the concern that the Crown and Maori then held for the fragmented state of Maori land title, the desire to develop unproductive Maori land to achieve greater economic opportunities for Maori, and, in those circumstances, the general acceptance of the Crown's paternalistic role in Maori land development.⁶⁰ Mr Andrew acknowledged that the paternalistic philosophy of the 1960s meant that the Maori owners of the 40 blocks that became Tarawera 1 were reliant on the Crown to obtain a fair outcome for them.⁶¹

The commercial nature of the Tarawera Forest venture was another contextual element emphasised by the Crown. Observing that there are risks and uncertainties in any commercial transaction, Mr Andrew submitted that the Crown's Treaty obligation to act reasonably does not require it to 'provide absolute protection against unanticipated variables, such as rampant inflation'.⁶² Similarly, it was submitted that the Treaty does not oblige the Crown to guarantee the best outcome to Maori in a situation where there is a range of commercial views (for example, about the relative merits of a sale or lease of land or the value of land to be used for forestry).⁶³ Further, Mr Andrew said, the Crown is not required by its Treaty duties to sacrifice its own interests in a commercial venture in favour of Maori interests so that the

58. Ibid, paras 4, 6

59. Claim 1.2

60. Document B81, paras 2.7–2.12

61. Ibid, para 3.9

62. Ibid, para 2.20

63. Document A30, paras 1.4–1.5

Maori party alone would obtain the benefit of a guaranteed protection against the inherent risks and uncertainties of the venture.⁶⁴

Tasman's independence from the Crown was a further factor emphasised by the Crown when denying the claimants' allegations of a Crown conflict of interest. Mr Andrew also contended that there was no evidence that, at the time of the joint venture's development, anyone apprehended that a Crown conflict of interest was an issue.⁶⁵ Accordingly, he submitted, the claims that the Crown did not provide the Maori landowners with full information, or independent advice about the venture, or legal representation in the Maori Land Court, rested heavily on 'contemporary notions of transparent and open Government'.⁶⁶

While accepting that the Tribunal's task inevitably involves it in the retrospective application of Treaty standards which have been articulated more recently, Mr Andrew urged the Tribunal to take a 'balanced' view of the situation, so as not to create a 'fictional past'.⁶⁷ Such a view, he submitted, would find that the process by which the joint venture was developed and implemented was not perfect but was reasonable, as is required by the Treaty. In particular, he submitted, while there were 'some inevitable raw aspects of the process',⁶⁸ the following factors made it reasonable overall:

- ▶ The fact that there were six consultation meetings with Maori leaders and landowners about the venture over a lengthy period.⁶⁹
- ▶ The crucial role of the New Zealand Forest Service, with its 'independent and critical view' of Tasman's proposal and its careful consideration and analysis of the proposal.⁷⁰
- ▶ The time that was available to Maori landowners to obtain independent advice, and the fact that some did obtain it.⁷¹
- ▶ The independent protection of the Maori landowners' interests that was provided by the Maori Land Court and the Maori Trustee.⁷²
- ▶ The fact that opponents of the joint-venture proposal were represented in the Maori Land Court.⁷³

Mr Andrew also submitted that the outcome of the Tarawera scheme for the Wai 411 claimants was crucial to an overall assessment of whether the claim was well founded. In fact, he contended that the questions of prejudice and Treaty breach were so entwined in the present situation that the central issue for determination by the Tribunal is whether the scheme 'has

64. Document B81, para 1.15

65. Ibid, para 2.22

66. Ibid, para 3.4

67. Oral comment made by Mr Andrew during presentation of document B81, at para 2.5

68. Document B81, para 3.5

69. Ibid, paras 3.37-3.56

70. Ibid, paras 3.25-3.36

71. Ibid, para 3.42

72. Ibid, paras 3.57-3.80

73. Ibid, paras 3.57-3.59

been so unfair and inequitable to Maori that it can properly be said that the Crown conduct in the formation of the scheme was in breach of Crown Treaty duties of protection'.⁷⁴

With regard to the claimed prejudice of land loss, the Crown emphasised that the Wai 411 claim was different from many historical Treaty claims where there has been 'an outright alienation of land and consequential lost opportunity for the provision of the future economic needs of the claimants'.⁷⁵ By contrast, Mr Andrew submitted, the joint venture:

was conceived precisely to appeal to Maori by avoiding an outright alienation, and it was envisaged that Maori should receive significant financial benefits from a stake in the ownership of the company that held the land. In this sense there was no complete severance of ties or interests with the land itself. Furthermore, the Maori landowners would have the opportunity to participate in the business and management of running the forest.⁷⁶

Further, the Crown submitted that there was 'a tension' between the claimants seeking compensation for land loss on the one hand and, on the other:

the fact, as the Crown contends, that the Tarawera Scheme has provided a significantly better financial return than the claimants would have received had the land been leased. A lease would have, of course, not involved an alienation in the sense now understood, but would not have provided the best financial return to Maori.⁷⁷

As for the claimants' assertion that they have suffered financial prejudice from the terms of the joint venture, Mr Andrew explained that, 'in a general sense', the Crown's response was that the Tarawera venture has in fact been a favourable bargain for them.⁷⁸ That response rested not only on the Crown's view that the joint venture has been more favourable financially than a lease but also on its view that all the joint venture's terms, including those regulating land value and log price, have proved to be fair to the Maori venturer.

The Crown's response to the Wai 411 claimants had equal application to Mr Potter's Wai 872 claim, and Mr Andrew did not make any further submissions responding to that claim. He did, however, respond separately to the Wai 46 claimants' specific concerns for the loss of ownership of Putauaki.

With regard to the inclusion of Putauaki in the Tarawera Forest, Mr Andrew stated that the Crown:

admits that the proposal could have been more explicit in stating how Putauaki was to be included in the scheme. However, it is submitted that the evidence of [Crown witness] Dr

74. Document A30, paras 1.6–1.8

75. Document B81, para 1.2

76. *Ibid*, para 1.4

77. *Ibid*, para 1.9

78. Oral comment made by Mr Andrew during presentation of document B81, at para 1.12

Battersby establishes that there was sufficient information and material before the Maori owners for them to reasonably deduce that Putauaki was to be included.⁷⁹

In his closing submissions to us, Mr Andrew said that, while the Crown did not accept the claimants' view of the events which led to the inclusion of Putauaki in the Tarawera Forest lands, the outcome was regrettable.⁸⁰ Noting that the mountain's status as private property limited the Crown's ability to provide redress, he stated that the Crown is 'prepared to facilitate a practical resolution to the claimants' concerns about Putauaki'.⁸¹

The extent to which the Crown is prepared to do that is now evident from the terms of the ratified Ngati Awa deed of settlement. To put the particular undertakings concerning Putauaki in their context, it must be appreciated that the proposed Ngati Awa settlement package is made up of three major elements: the Crown's acknowledgement of, and apology for, Ngati Awa's historical grievances; its provision of cultural redress by granting Ngati Awa various rights in relation to numerous sites of significance; and its provision of financial and commercial redress by the transfer to Ngati Awa of various properties and cash. Within the cultural redress provisions of the proposed settlement, the following specific undertakings are made with regard to Putauaki:

- ▶ the Minister will write to TFL, the owner of Putauaki, to ask that it consider meeting with Ngati Awa to discuss whether it 'would be willing to divest its interests in Putauaki and liaise with relevant iwi interests to explore appropriate options for acquiring title to Putauaki' from TFL;
- ▶ Ngati Awa will acknowledge that the Crown cannot compel TFL to attend any such meeting and, subject to the following point, the Crown will not have any further involvement in, or obligations in respect of, any discussion between Ngati Awa and TFL; and
- ▶ if such a meeting takes place within 24 months of the date of settlement, the Crown will meet the reasonable costs of hosting the meeting – in particular paying for the venue and for a facilitator agreed between the parties – but will not pay such costs for any subsequent meeting.⁸²

Finally on this matter, it is provided in the initialled deed of settlement that, if Ngati Awa approve the proposed settlement (as they have now done), the legislation giving effect to it will preclude the Waitangi Tribunal from making any inquiry, finding, or recommendation in respect of the claims included in the settlement.⁸³

79. Document B81, para 11.10

80. Oral comment made by Mr Andrew during presentation of document B81, at para 11.1

81. Document B81, para 11.20

82. Office of Treaty Settlements and Ngati Awa, 'Deed of Settlement to Settle Ngati Awa Historical Claims', cl 5.12

83. Ibid, cl 1.7(e). We note too that clause 1.3.1(b)(ii) identifies claim Wai 23 (in so far as it relates to Ngati Awa) as a claim that will be settled.

1.7 ISSUES FOR THE TRIBUNAL

Crown counsel's opening submissions identified four major areas of contention between the Wai 411 claimants and the Crown. These concerned the adequacy of the Crown's conduct, in terms of its Treaty responsibilities, in connection with:

- ▶ the consultation that occurred with Maori landowners before the joint venture was finalised;
- ▶ the alienation, rather than the leasing, of the Maori land to TFL;
- ▶ the joint venture's method of valuing the former Maori land; and
- ▶ the price Tasman paid for wood from Kaingaroa Forest and its relevance to the price that Tasman would pay for TFL's wood.⁸⁴

The exploration of these matters certainly occupied the majority of the nine days of the Tribunal's hearing. The first purpose of the Wai 411 claimants' arguments about them was to establish that, in addition to losing the ownership of their land, the claimants had suffered financial loss as a result of their involvement in the joint venture, rather than in some other kind of forestry scheme that they might have entered (the likelihood of which was itself a matter in contention). By contrast, the Wai 46 claimants' arguments were directed specifically at establishing that inadequate consultation with Maori was a major cause of their loss of ownership of Putauaki.

Another purpose of the Wai 411 claimants' arguments was to establish that their involvement in the joint venture had not delivered the financial returns that they claimed they were promised, let alone the higher returns that they contended they should have obtained. In support of their claims, the claimants produced a collection of evidence ranging from historical records of Crown activity to specialist forestry opinions and financial analyses. In defence of its position, the Crown – which had readier access to certain relevant information – produced an even more extensive collection of historical material and specialist analysis. The result, we believe, was that those involved in the Tribunal proceedings obtained a far more comprehensive view of the Tarawera Forest situation than had ever before been possible. The Wai 411 claimants acknowledged this during the hearing by modifying their original argument about the importance of the Kaingaroa-based log price clause in the joint-venture agreement and changing the emphasis of their arguments about land valuation.

Although the issues mentioned above occupied most of the hearing time, in fact there was a further set of complex points in issue between the parties. These arose from their diametrically opposed views of the nature and relevance of the involvement of the Maori Land Court and the Maori Trustee in the Tarawera Forest scheme. In brief, these issues concerned:

- ▶ whether the process by which the Maori Land Court amalgamated the 40 blocks and vested the land in the Maori Trustee was independent of inappropriate influence by Crown officers;

84. Document A30, para 2

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- ▶ whether the Maori Trustee's examination of the joint venture's terms was conducted independently of inappropriate influence by Crown officers;
- ▶ whether the Maori Trustee is, in law, an officer who acts 'by or on behalf of the Crown'; and
- ▶ whether any of the legislation involved in implementing the joint venture was inconsistent with Treaty principle.

In support of their positions on those matters, the Wai 411 claimants and the Crown produced a large amount of written evidence, including the 300-page typed transcript of the relevant Maori Land Court proceedings. Among the legal submissions that were made to us, the claimants made available the extensive submissions that had been presented by different claimants to an earlier Tribunal (the Wellington Tenth's Tribunal) about the Maori Trustee's status.

The result was that, in our hearing of the Tarawera Forest claims, the Tribunal was presented with arguments based on a large amount of detailed and technically complex evidence. Some of those arguments (for example, those about the various Crown agencies' roles in the process by which the joint-venture proposal was developed) could be tested only by a painstaking check of the evidence that was said to support them. That task could not be performed by the Tribunal within the confines of a relatively brief hearing and has had to be performed since. Other arguments made at the hearing required our comprehension of such diverse areas as forestry, economics, and law. They too have demanded considerable thought on our part since the hearing ended. Therefore, the task of examining the parties' claims and counterclaims in order to produce this report has proven unusually time-consuming. Further, despite our desire to produce a short and more easily read report, we have found it necessary to present our analysis of the evidence relevant to each of the issues in some depth, so that the reasons for our conclusions and findings are plain. The advantage of this approach is that it allows the story behind the claimants' grievances to be told in what we trust is as full a manner as it has ever been, and ever will be, told.

1.8 RELEVANT TREATY PRINCIPLES

The Tribunal is required by section 6(1) of the Treaty of Waitangi Act 1975 to inquire into certain claims that legislation or Crown policy or conduct 'was or is inconsistent with the principles of the Treaty [of Waitangi]'. Section 5(2) of the Act directs the Tribunal to have regard to both the Maori and the English texts of the Treaty, and to decide issues raised by the differences between them. If claims are well founded, the Tribunal may, if it thinks fit, recommend to the Crown that 'action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future' (s6(3)).

In the years that have elapsed since the Act was passed, a great deal of judicial and Tribunal thought has been dedicated to elucidating the principles of the Treaty of Waitangi and applying them to widely varying circumstances.⁸⁵ A helpful explanation of the difference between Treaty principles and the Treaty's actual words has been provided by the Privy Council:

The 'principles' are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. . . . With the passage of time, the 'principles' which underlie the Treaty have become much more important than its precise terms.⁸⁶

A vital feature of the Treaty, especially when an inquiry is concerned with contemporary or recent circumstances, is its 'positive and enduring role'.⁸⁷ The Tribunal explained this in its *Report on the Motunui–Waitara Claim*:

The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected. . . .

The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo, but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.⁸⁸

The forward-looking nature of the Treaty does not mean, however, that its principles change over time – a prospect that would surely give rise to concerns about 'presentism'.⁸⁹ Rather, as was said in *New Zealand Maori Council v Attorney-General* (the *Lands* case):

The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply. At its making all lay in the future.⁹⁰

The Tribunal explained this further in the *Muriwhenua Land Report*:

Although the Act refers to the principles of the Treaty for assessing State action, not the Treaty's terms, this does not mean that the terms can be negated or reduced. . . . As we see it, the 'principles' enlarge the terms, enabling the Treaty to be applied in situations that were not foreseen or discussed at the time.

85. A useful guide to judicial and Tribunal statements about the Treaty principles is Te Puni Kokiri, *He Tirohanga o Kawa ki te Tiriti o Waitangi* (Wellington: Te Puni Kokiri, 2001).

86. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

87. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 673 (CA), per Richardson J

88. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 52

89. 'Presentism', as explained by Crown counsel (see, for example, secs 1.6, 2.1) is the assessment of past events by contemporary standards that are inappropriate for judging the past.

90. *New Zealand Maori Council v Attorney-General* (CA), p 692, per Somers J

Conversely, a focus on the terms alone would negate the Treaty's spirit and lead to a narrow and technical approach. . . . The Treaty cannot be read as a contract to build a house or buy a car. It was a political agreement to forge a working relationship between two peoples and it must be seen in light of the parties' objectives. The principles of the Treaty are ventilated by both the document itself and the surrounding experience.⁹¹

When discussing the principles of the Treaty of Waitangi, there is a risk that they will be regarded as somehow separate from one another, like distinct items on a checklist. In fact, the unity of the Treaty's principles explains why there is considerable overlap between the various explanations that have been given of them. With that in mind, we turn now to discuss the principles that have guided our approach to the present claims.

1.8.1 Active protection of tino rangatiratanga

A fundamental principle of the Treaty of Waitangi is the principle of active protection, which signifies that the cession of sovereignty (kawanatanga) to the Crown by Maori in article 1 of the Treaty was in exchange for the protection by the Crown of Maori tino rangatiratanga, as stated in article 2.⁹² Accordingly, both the Crown's right of governance and Maori authority and control are qualified by the unique relationship that was forged by the Treaty. The Muriwhenua Land Tribunal saw the principle of active protection as embracing three other key elements of the Treaty relationship – honourable conduct, fair process, and recognition – each of which can also be regarded as a Treaty principle.⁹³

The essence of the principle of active protection is that, to the extent that is consistent with the Maori cession of sovereignty, the Crown is obliged to take positive steps to ensure that Maori interests are protected. Exactly which steps and what degree of protection are required in particular circumstances are questions that regularly face the Waitangi Tribunal. Critical to the search for answers is the nature of the Maori interests that are involved. In the context of tribal claims to natural resources, the courts and Tribunal have been concerned to elaborate on the nature of tino rangatiratanga. So, for example, in the Tribunal's *Report on the Muriwhenua Fishing Claim*, it was said:

There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically, and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations.

91. Waitangi Tribunal, *Muriwhenua Land Report* (Wellington: GP Publications, 1997), p 386

92. See, for example, Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 284

93. Waitangi Tribunal, *Muriwhenua Land Report*, p 388

Thirdly, the exercise of authority was not only over property but of persons within the kinship group and their access to tribal resources.⁹⁴

Likewise, in the earlier *Report on the Orakei Claim* (1987), the Tribunal had emphasised that, given the nature of Maori ownership and possession of their lands, recognition of tino rangatiratanga carries with it:

all the incidents of tribal communalism and paramountcy. These include the holding of land as a community resource and the subordination of individual rights to maintaining tribal unity and cohesion.⁹⁵

In examining Wai 414, a claim by Te Whanau o Waipareira, however, the Tribunal was required to consider tino rangatiratanga outside the tribal context. Emphasising that rangatiratanga resides in a community of leaders and members, the Tribunal described it as ‘a value that is basic to the Maori way of life, that permeates the essence of being Maori’.⁹⁶ It continued:

the principle of rangatiratanga appears to be simply that Maori are guaranteed control of their own tikanga, including their social and political institutions and processes and, to the extent practicable and reasonable, they should fix their own policy and manage their own programmes.⁹⁷

The Waipareira Tribunal also identified an important question to ask when considering whether the Treaty’s protection of tino rangatiratanga has been furnished: whether the Crown policies and practices at issue ‘enhance the solidarity and integrity of Maori communities and empower the people, or whether they divide and rule them’.⁹⁸

The different views of the Wai 46 and Wai 411 claimants about the nature of Maori land ownership in the Tarawera Valley in the 1960s raise the question of whether the Treaty promises protection not only of communally based Maori interests in land but also of individual interests. The answer is clear. Both kinds of interest are protected. The English version of article 2 of the Treaty confirms and guarantees:

to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession;

94. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 181

95. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed (Wellington: Brooker and Friend Ltd, 1991) p 149

96. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p 26

97. Ibid

98. Ibid, p 215

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The Maori version guarantees to ‘nga Rangatira ki nga hapu ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa’.

Dr Harrison submitted that the Maori owners in the Tarawera Valley lands were entitled to expect from the Crown a very high level of protection of their ownership interests. He cited the following explanations, from two Tribunal reports, of the Crown’s obligations in this regard. From the *Turangi Township Report 1995*:

Maori insistence on their right to retain tino rangatiratanga over their land resulted in the inclusion of article 2 in the Treaty, and was a measure of the depth and intensity of their relationship to their land and other natural resources. It follows that if the Crown is ever to be justified in exercising its power to govern in a manner which is inconsistent with and overrides the fundamental rights guaranteed to Maori in article 2 it should be only in exceptional circumstances and as a last resort in the national interest.⁹⁹

And, from the *Ngai Tahu Ancillary Claims Report 1995*:

there is no provision in the Treaty enabling the Crown to dispossess Maori of any of their lands or forests or other properties without their consent. These were guaranteed to them by Article 2.¹⁰⁰

Dr Harrison also maintained that, in the evolution of the Tarawera Forest joint-venture scheme, the Crown, without Maori knowledge or agreement, took upon itself the responsibility of representing Maori in the negotiations with Tasman, which heightened the Crown’s protective duty to that of a fiduciary or very much akin to it.¹⁰¹ The analogy of the Treaty partnership with a fiduciary relationship was drawn by the Court of Appeal in the 1987 *Lands* case and has been widely considered and explained since.¹⁰² For example, the Tribunal in its *Te Maunga Railways Lands Report* described that type of relationship and its relevance for the Crown and Maori in this way:

A fiduciary relationship is founded on trust and confidence in another, when one side is in a position of power or domination or influence over the other. One side is thus in a position of vulnerability and must rely on the integrity and good faith of the other. When the Treaty of Waitangi was signed the Crown undertook to protect and preserve Maori rights in lands and resources in exchange for recognition as the legitimate government of the whole country in which Maori and Pakeha had equal rights and privileges as British subjects. Because the Crown is in the powerful position as the government in this partnership, the Crown has a fiduciary obligation to protect Maori interests.¹⁰³

99. Waitangi Tribunal, *The Turangi Township Report 1995*, p 285

100. Waitangi Tribunal, *The Ngai Tahu Ancillary Claims Report 1995* (Wellington: Brooker’s Ltd, 1995), p 10

101. Document B80, paras 40–43

102. *New Zealand Maori Council v Attorney-General* (CA), p 664, per Cooke P

103. Waitangi Tribunal, *Te Maunga Railways Land Report* (Wellington: Brooker’s Ltd, 1994), p 68

Crown counsel Mr Andrew accepted that the Crown's Treaty duties are analogous to fiduciary obligations and that 'the reality' of the situation with which we are concerned 'was that Maori were reliant on the Crown'.¹⁰⁴ However, he denied Dr Harrison's submission that the law on fiduciary obligations – in particular, the reverse onus of proof as to the effect of duty breach – was to be imported into Treaty jurisprudence.¹⁰⁵ Our own view is that, for the purpose of elucidating Treaty principles, it is not necessary or desirable to equate them with specific legal principles – even those which originated in the equitable jurisdiction of our superior courts. The Treaty always warrants an approach that is focused on its own purpose and spirit. That is evident from the consistent reliance that is placed, by the courts and by the Waitangi Tribunal, on the context of the Treaty's signing.

Mr Andrew maintained that the Crown had met the required, quasi-fiduciary, standard of conduct with regard to the Maori landowners in the Tarawera Valley through the various efforts of Crown officers to obtain for those owners an outcome as beneficial as the joint venture had proven to be. As well, Mr Andrew highlighted the Crown-created roles of the Maori Land Court and Maori Trustee in providing what he described as further 'safeguards' protecting the Maori landowners' interests.¹⁰⁶

For the Wai 46 claimants, Mr Harvey relied on specific elements of the Crown's obligation actively to protect Maori – namely, its obligations to ensure that Maori groups are left with sufficient resources for their future needs and to be particularly vigilant to protect taonga of great importance to Maori.¹⁰⁷ He submitted that in the 1960s the Crown, as a result of its previous dealings with Ngati Awa and other eastern Bay Plenty Maori, knew or ought to have known about the 'parlous state of the Ngati Awa tribal base'.¹⁰⁸ With particular regard to Putauaki, Mr Harvey cited the Tribunal's opinion in the *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* that:

the degree of protection to be given to Maori resources will depend upon the nature and value of the resource. In the case of very highly valued, rare and irreplaceable taonga of great spiritual and physical importance to Maori, the Crown is under an obligation to ensure its protection (save in very exceptional circumstances) for so long as Maori wish it to be so protected. . . . The value attached to such taonga is essentially a matter for Maori to determine.¹⁰⁹

104. Document B81, para 3.9

105. *Ibid*, para 2.6

106. Document A30, para 3.4

107. See, for example, Waitangi Tribunal, *Report on the Orakei Claim*, p 147, and Waitangi Tribunal, *Muriwhenua Land Report*, pp 389–390

108. Document B79, para 68

109. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 32

1.8.2 Partnership and consultation

Another vital principle of the Treaty is that of partnership, which denotes the mutual obligations of the Crown and Maori to act towards each other in good faith, fairly, reasonably, and honourably.¹¹⁰ One memorable explanation which conveys the essence of this principle is that ‘Maori must recognise those things that reasonably go with good governance just as the Crown must recognise those things that reasonably go with being Maori’.¹¹¹

At our hearing, Mr Andrew emphasised the Treaty standard of reasonableness, urging the Tribunal to assess the Crown’s conduct – which, he maintained, was honest and fair – in light of what it was reasonable to expect of the Crown at the time. In particular, he warned against importing contemporary notions of what is reasonable into the very different State sector of the 1960s.¹¹² In support, Mr Andrew relied on a description of the relationship envisaged by the Treaty that was given by the Privy Council in 1994. The Treaty relationship, it was said:

should be founded on reasonableness, mutual co-operation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.¹¹³

Similarly, Mr Andrew emphasised the notions of ‘mutuality, accommodation and compromise’ in the Treaty relationship, referring to these statements in the Tribunal’s 1983 *Report on the Motunui–Waitara Claim*:

In our view it is not inconsistent with the Treaty of Waitangi that the Crown and Maori people should agree upon a measure of compromise and change.

In particular, it is not inconsistent with the Treaty that the Te Atiawa hapu should accept a degree of pollution in respect of certain of their fishing grounds, on the basis that other grounds will not be spoilt.¹¹⁴

A vital facet of the Treaty partnership is that the Crown will make informed decisions on matters affecting the interests of Maori and will need to consult with Maori in certain situations.¹¹⁵ With regard to the present claims, the Crown accepted that it had a duty to consult with the Maori landowners, and it maintained that the style and extent of the consultation

110. *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 304, per Cooke P

111. Waitangi Tribunal, *Te Whanau o Waipareira Report*, p 29 (citing Waitangi Tribunal, *Report on the Motunui–Waitara Claim*, pp 50–52)

112. One notable change since that time is the introduction of State-assisted legal representation (legal aid) in civil matters for low-income litigants.

113. *New Zealand Maori Council v Attorney-General* (PC), p 517

114. Waitangi Tribunal, *Report on the Motunui–Waitara Claim*, p 52

115. See, for example, *New Zealand Maori Council v Attorney-General* (CA), pp 682–683, per Richardson J

that was undertaken was reasonable in all the circumstances. Claimant counsel disputed that, while also highlighting an alleged absence of opportunity in the process by which the joint venture was developed for the Maori landowners to negotiate on their own behalf an arrangement that would have retained their ownership of the land.

Mr Harvey submitted that the Crown fell far short of satisfying the oft-quoted requirements of consultation identified by the Court of Appeal in *Wellington International Airport Ltd v Air New Zealand*. In summary, the court held that:

If a party having the power to make a decision after consultation held meetings with the parties it was required to consult, provided those parties with relevant information and with such further information as they requested, entered the meetings with an open mind, took due notice of what was said, and waited until they had had their say before making a decision: then the decision was properly described as having been made after consultation.¹¹⁶

In our view, the concept of consultation as described by the courts and the Tribunal is not appropriate to describe the totality of the interaction that was needed between the Crown and Maori in the situation with which we are concerned. Crown consultation with Maori is relevant when Maori have a particular interest in a matter that is within the Crown's authority to decide and the Crown needs to be informed about Maori attitudes to the matter. In the Tarawera Valley situation, however, it was the Maori landowners, not the Crown, who had the authority to decide what should happen with the matter at issue, because that matter was their land and the Treaty promised Crown protection of their interests in land. As owners, it was their right to accept or reject any proposal concerning their land. The fact that Crown conduct would be needed to facilitate the implementation of particular proposals did not make it the Crown's right to decide what should happen with the land. The fact that, for reasons stemming from nineteenth-century breaches of the Treaty of Waitangi, it was not easy for the owners to be identified in order to be informed about and make a decision upon proposals concerning their land, did not make it the Crown's right to decide what should happen to the land. Therefore, rather than being a situation in which the Crown had the authority to decide what would happen with a particular matter in which Maori were interested, the Tarawera Valley situation was, in its essence, one in which Maori had the authority to decide what would happen with a particular matter in which the Crown was interested. Accordingly, the concept of consultation would be relevant only to the extent that the Crown needed to inform itself of the Maori landowners' views about a matter that was within the Crown's authority to decide. One such matter, we consider, would be the nature of the measures that the Crown might employ to protect the Maori interests.

Since the concept of consultation is not sufficient to describe the quality of interaction that was needed between the Crown and the Maori landowners in the situation with which we are

116. *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671, 672 (CA)

concerned, we must look to other aspects of the Treaty principles for the relevant standard. In addition to those we have already outlined, we have also found guidance in the principles of equity and options, outlined next. In section 1.8.5, we will return to the matter of the relevant standard set by the Treaty principles for the interaction between the Crown and the Tarawera Maori landowners.

1.8.3 Equity and options

Article 3 of the Treaty, which, in the English version, extends to Maori the Queen's royal protection and 'imparts to them all the rights and privileges of British subjects', is commonly regarded as the source, or one source, of the Treaty principles of equity and options. The Wai 411 claimants' declared view of themselves – as individuals whose tribal affiliations were not relevant to their claim – raised the prospect that there was guidance to be found in these Treaty principles. Mr Harvey also invoked the principle of equity, which he summarised as promising Maori 'the same standards of protection as Europeans'.¹¹⁷ He submitted that Maori were dispossessed of their interests in the Tarawera Valley land without consent when it would have been inconceivable for an owner of general land who did not agree to sell and did not execute a memorandum of transfer to have had his or her interest alienated to another. That would have been 'more unimaginable', Mr Harvey said, if the owner had had no knowledge at all of the alienation proposal. Therefore, he concluded, the owners of the 40 blocks of Maori land did not get the protection promised by article 3 of the Treaty of Waitangi.

The principle of options has been described as assuring Maori of 'the right to choose their social and cultural path', whether that be 'to develop along customary lines and from a traditional base, or to assimilate into a new way . . . [or] to walk in two worlds'.¹¹⁸ Since these are matters of choice, Maori should not be forced down a particular path.¹¹⁹ The Ngai Tahu Tribunal, having described the principle as being concerned with the choice open to Maori under the Treaty, continued:

Article 2 contemplates the protection of tribal authority and self-management of tribal resources according to Maori culture and custom. Article 3 in turn conferred on individual Maori the rights and privileges of British subjects. The Treaty envisages that Maori should be free to pursue either or indeed both options in appropriate circumstances. The Crown is obliged to offer reasonable protection to Maori in the exercise of the rights so guaranteed them.¹²⁰

117. Document A27, para 42

118. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 65

119. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, p 195

120. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 274

1.8.4 Redress

The principle of redress for Treaty breaches flows from the Crown's duty to act reasonably and in good faith as a Treaty partner. The Tribunal has emphasised that the redress of Treaty grievances is necessary to restore the honour and integrity of the Crown and the mana and status of Maori. Generally, the matter of redress has been considered in connection with claims for tribal losses – and often where the losses are so extensive as to make compensation impossible. The purpose of redress for historical grievances was described by the Tribunal's chairperson in 1987 in this way:

an eye for an eye approach to reparation or an overly tortious trend, may head us on an impossible path, turning a Treaty of peace into a casus belli. . . .

There is an alternative approach. To compensate a tort is only one way of dealing with a current problem. Another is to move beyond guilt and ask what can be done now and in the future to rebuild the tribes and furnish those needing it with the land endowments necessary for their own tribal programmes. That approach seems more in keeping with the spirit of the Treaty and with those founding tenets that did not see the loss of tribal identity as a necessary consequence of European settlement. It releases the Treaty to a modern world, where it begs to be reaffirmed, and unshackles it from the ghosts of an uncertain past.¹²¹

An important point made by the Tribunal in the *Report on the Waiheke Island Claim* is that it is not consistent with the Treaty's spirit that the resolution of an unfair situation for one party creates an unfair situation for another.¹²² Notable, too, is the Tribunal's view, expressed in relation to historical grievances of Ngati Whatua, that when redress must involve a compromise, as often it will do, 'the mana to propose a compromise vests not in the Tribunal but [in] the affected claimant tribes'.¹²³

1.8.5 Treaty requirements of the Tarawera Forest situation

Our analysis has led us to identify a number of elements that were critical to the joint venture being developed, finalised, and implemented consistently with the principles of the Treaty of Waitangi. First, the Crown's duty of active protection required that it understood the nature of the Maori interests which it was obliged to protect. Consistent with Maori autonomy, only Maori can define their interests in particular matters, a fact that was underlined in the Tarawera Valley situation because Maori land was directly involved. A fundamental lesson learned by the Crown from New Zealand's history was that land was the foundation of

121. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 41

122. *Ibid*, p 47

123. Waitangi Tribunal, *Report on the Orakei Claim*, p 262

traditional Maori society and values. Another lesson was that the Crown had not always acted honourably in obtaining land from Maori. Further, as will be seen in the next chapter, it was widely known that the land remaining in Maori ownership in the mid-twentieth century was of insufficient quantity and quality to support a growing Maori population, and that the system of Maori land ownership introduced by the Crown 100 years earlier was beset with problems which had adverse social and economic consequences for Maori. Also, it was known that for many Maori the importance of owning even a small share of land was that it preserved in a tangible way their ancestral connections to that land.

All of those factors meant that there were various interests – social, economic, cultural, political, and spiritual – which the Maori landowners in the Tarawera Valley possessed as a result of their land ownership. The Crown had to understand the Maori owners' views of their interests, including their relative priority, so that it could do what was reasonable to protect them. Accordingly, unless it already had a thorough knowledge of those views, what the Crown needed to ensure was a fair process by which the owners could formulate and convey their views to it. In the circumstances, we consider that a fair process would be one which gave due weight to the fact that a very large number of owners were involved, all with property rights that were valuable for a variety of reasons. More specifically, we consider that a fair process would require the owners to be sufficiently informed about the impact on their various interests of the different options for their participation in a forestry scheme.

Only once the Crown understood the various interests of the Maori owners, and the relative priority accorded to them, could it begin to consider how it might conduct itself to protect those interests. That is because, as the discussion of Treaty principles reveals, the conduct reasonably required of the Crown to protect Maori interests depends very much on the nature of those interests. As a general assessment, however, the Tribunal considers that, whenever the Crown is involved in a situation in which it is possible that Maori could lose ownership of their land, then what is reasonably required from the Crown by way of protective conduct will be at the high end of the scale of possible responses.

The nature of the Maori interests involved is not, however, the only critical factor that influences the protective response required from the Crown. Also important is the nature of the situation that gives rise to the need for Crown protection. We consider that key features of the Tarawera Valley situation were that it was Tasman, a successful business enterprise, that wished to acquire the use of the Maori land, and that it promoted a novel approach to that end; that the Crown had a direct, although not controlling, interest in Tasman and had assisted it to achieve success (including by selling Tasman State forest wood at concessionary prices); and that Tasman's proposal would transform the land ownership of the Crown and Maori into a minority stake in a forestry company (TFL) that would be a subsidiary of Tasman's. In that situation, the Crown clearly saw that its protection of the Maori landowners'

interests was needed so that Tasman would not deal unfairly with them. However, the Crown's own various interests in the situation – ranging from being a shareholder in Tasman and a prospective shareholder in TFL through to being the driver of social and economic development in New Zealand generally and for Maori in particular – also suggested that it needed to be vigilant about the manner in which it acted to protect the Maori interests.

In saying that, we have in mind that, in any ordinary commercial situation involving large amounts of capital and unknown risks, it is common sense that each potential party should obtain independent advice and negotiate on its own behalf rather than trust the other to conduct itself so as to protect both their interests. There may be good reasons for departing from that position, however, such as, for example, where two potential parties have identical interests and one has complete faith in the other's knowledge and skills and so asks that other to act on its behalf. That was not the situation as between the Crown and the Maori landowners for a number of reasons, one of which was that the Crown stood to benefit in a number of ways from a forestry venture involving Tasman whereas the Maori owners could benefit only by contributing their land. Also, as noted earlier, history provided reasons why the interests of the Crown and Maori were not the same. A vivid reminder of this was the fact that, of all the land wanted for the venture, only the Maori land was held in multiple individual title – with all the problems to which that had given rise.

The Tribunal considers that the Crown's knowledge was such that it was well equipped to recognise that its own interests in the situation threatened its ability to protect the Maori landowners' interests and therefore that particularly strong safeguards needed to be put in place to keep separate the Crown's protection of its own interests from its protection of the Maori landowners' interests. One such safeguard would be a process of consultation with a representative group of owners who were provided with all relevant information about the matter in order to monitor the Crown's conduct.

With that introduction to the Tribunal's task, the objectives of the remainder of this report are to:

- ▶ examine the process by which the Tarawera forest joint venture was developed, finalised, and implemented; and
- ▶ determine whether the Crown's conduct involved breaches of Treaty principle.

If we find that the Crown's conduct did involve breaches of Treaty principle, we will assess whether the outcome of the joint venture for the former Maori landowners has caused prejudice to the claimants and we will consider and, if appropriate, make recommendations on the matter of redress for any such prejudice.

The next chapter sets the scene for our examination of those matters. It provides essential contextual information about Maori land and forestry, and Government policy on those matters in the 1960s.

1.9 SUMMARY

The key points made in this chapter are as follows:

- ▶ The Wai 411 (MIL) claimants contended that two distinct kinds of prejudice resulted from Crown conduct in connection with the Tarawera Forest joint venture which was inconsistent with Treaty principles:
 - the loss of ownership of the Maori land that was put into the forest; and
 - financial loss resulting from the joint venture not delivering what was promised to the landowners, let alone what they should have obtained from it.
- ▶ There was some ambiguity in the Wai 411 claimants' descriptions of the loss that they claimed they suffered upon the transfer of ownership of the Maori land to TFL. At times, it was emphasised that the individual owners suffered the loss despite their various tribal affiliations. At other times, the emphasis was on the loss of the owners' ancestral connections to the land.
- ▶ The Wai 46 (Ngati Awa) claimants focused on the loss of what they regarded as Ngati Awa's ownership of the land, and particularly of the sacred mountain Putauaki, as a result of Crown conduct that was allegedly inconsistent with Treaty principles.
- ▶ The now ratified draft deed of settlement between the Crown and Ngati Awa proposes to settle the Wai 46 claims concerning the Tarawera Valley land, including the claim concerning Putauaki.
- ▶ The Crown denied that it had acted inconsistently with Treaty principle in the role it took in developing, finalising, and implementing the joint venture, and it emphasised that the Tribunal's assessment should be mindful of the context of the times.
- ▶ The Treaty principles which have guided our analysis of the claims are those of active protection, partnership, equity, and redress.
- ▶ Key elements of the Treaty principles' requirements of the situation with which we are concerned are that:
 - the Crown needed to understand by means of a fair process the Maori landowners' views of their own interests and the priority they accorded them;
 - the relevant protective response from the Crown depended not only on the nature of the Maori interests but also on the interests of Tasman and the Crown; and
 - the Crown's own interests were such that it needed to be particularly vigilant to keep separate the protection of its own interests from its protection of the Maori landowners' interests.
- ▶ The major issues raised by the present claims concern:
 - the consultation with the Maori landowners;
 - the alienation, rather than lease, of the Maori land;
 - the land valuation and log price terms of the joint venture;
 - the Maori Land Court's process;
 - the Maori Trustee's role; and
 - the legislation involved in the joint venture's implementation.

CHAPTER 2

THE CONTEXT FOR THE CLAIMS

2.1 INTRODUCTION

Before examining the events that are central to the claims, it is important to understand the more general context in which the Tarawera Forest joint-venture proposal was formed. As Crown counsel observed before the Tribunal, there is a danger of ‘presentism’ in investigating matters from the past: of applying views prevailing now to a situation which the players at the time saw differently. This chapter begins by considering two matters which provide vital elements of the backdrop to the present claims: the problem of unproductive Maori land caused by fragmentation of title and the Crown-led drive to increase plantings of exotic forestry. We then narrow the focus to provide background information about the originator and chief proponent of the joint-venture proposal, the Tasman Pulp and Paper Company Limited, in order to understand the importance of the proposal to the company’s operations and overall growth plans.

2.2 CROWN POLICY FOR MAORI LAND DEVELOPMENT

2.2.1 The Hunn report, 1960

In the mid-1950s, the Department of Lands estimated that there were 4.07 million acres of Maori freehold land. The Department of Maori Affairs categorised some 1.3 million acres of that land as idle land and more than half of that amount (770,000 acres) as unsuitable for development as farmland.¹ One reason for what was perceived by successive governments to be the under-utilisation of Maori land was the chaotic state of the title to much of it. The introduction of multiple individual ownership of Maori freehold land in 1865, and the interpretation by the Native (later Maori) Land Court of the Maori customary law of succession, meant that by 1960 some Maori freehold titles had over 1000 owners.² The problems of fragmented title had long been evident by then, and it was common for administration costs to outweigh any financial returns to the landowner. In the words of JK Hunn, the deputy chairman of the

1. JK Hunn, *Report on Department of Maori Affairs* (Wellington: RE Owen Government Printer, 1961), para 122

2. *Ibid*, para 141

THE TARAWERA FOREST REPORT

2.2.1

Public Service Commission and Acting Secretary for Maori Affairs, in his 1960 *Report on the Department of Maori Affairs* (the ‘Hunn report’):

Everybody’s land is nobody’s land. That, in short, is the story of Maori land today. Multiple ownership obstructs utilisation, so Maori land quite commonly lies in the rough or grazes a few animals apathetically, while a multitude of absentee owners rest happily on their proprietary rights, small as they are.³

The reason why Maori owners wished to retain their ‘minute fractions’ of land was explained by Hunn as follows:

even the smallest interest in land will save that owner from being a ‘landless’ Maori, a person without ‘turangawaewae’ or standing to speak on the tribal marae.

A growing number of Maoris would readily sell their fractional interests in land; but, to the remainder, turangawaewae is an important feature of Maori culture.⁴

Absentee owners had become increasingly numerous as the ‘explosive growth’ in the Maori population led to the ‘urban drift’ of the 1950s and 1960s.⁵ In 1926, only 9 per cent of Maori lived in New Zealand cities and towns. By 1951, this had increased to 19 per cent, but just five years later, in 1956, 24 per cent of Maori lived in urban areas.⁶ And the trend was accelerating. In 1960, Hunn described this as ‘Maoris on wheels, heading fast for the towns’ in ‘an irreversible migration in search of work’.⁷ In the 1966 census, 55.8 per cent of Maori were recorded as living in urban areas, and by 1971 that figure was 68.2 per cent.⁸

The Hunn report proposed two remedies to the problem of idle Maori land: the reduction of land title to sole ownership by the elimination of ‘uneconomic interests’ through sale, conversion, and other consolidation measures and a ‘bold policy’ of rapid development of idle Maori land in ‘the national interest, including of course the Maori interest’.⁹ The engine for the latter was to be the Department of Maori Affairs, which Hunn described in terms which make plain the breadth and depth of its involvement in the lives of Maori at the time. While clearly best known for its work ‘building houses and developing land’ for Maori, the department’s ‘real interest’, as Hunn put it, was in ‘everything to do with’ Maori economic and social

3. Hunn, para 135. Hunn had been installed as Acting Secretary of Maori Affairs in January 1960 to ‘look at Maori affairs from every angle’, studying ‘the pace as well as the nature of what is being done for Maoris’ so that the Government could ‘tell whether their future is best served by going on as we are, or by changing the pace, or by changing the policy itself’: para 2.

4. Ibid, paras 136–137

5. Hunn records that the Maori population was 56,000 in 1920 and 158,000 in 1960 and that it was predicted to be ‘possibly 700,000 in 2000’: Hunn, para 6(2). In the 1966 census, the Maori population was 201,159, or 7.5 per cent of the total population: Joan Metge, *The Maoris of New Zealand* rev ed (London: Routledge and Kegan Paul, 1976), p 76.

6. Hunn, para 21

7. Ibid, para 55

8. Metge, p 78

9. Hunn, paras 123, 151–159

advancement.¹⁰ In this, ‘the scale of its activities is not nearly large enough to cope with the explosive growth of [the Maori] population . . . Relatively the Department is falling behind and needs to redouble its activities’.¹¹

Commenting on Hunn’s general conclusions, the Maori synod of the Presbyterian Church of New Zealand stated:

In all the problems which concern those charged with administration of Maori affairs, perhaps none is more complex and troublesome than that of the title and usage of the remnant of the land heritage of the Maori people.¹²

2.2.2 The Prichard–Waetford report, 1965

Following on from the recommendations of the Hunn report, in November 1964 the Minister of Maori Affairs established a two-member committee of inquiry to consider ‘measures to improve the titles to Maori land and to make for the better use of it’.¹³ Both members, Ivor Prichard and Hemi Waetford, were highly conversant with Maori land issues: the former was a retired chief judge of the Maori Land Court, the latter a special titles officer with the Department of Maori Affairs. However, despite having undertaken an extensive consultation with Maori during the year-long inquiry, their report received a generally hostile reaction from Maori.¹⁴

The 1965 report dwelled on what it described as the ‘evils of fragmentation’, for which ‘urgent drastic remedial work’ was needed.¹⁵ The report proposed extensive and very specific reforms, the most relevant here being its proposals that:

- ▶ the value of uneconomic interests in Maori freehold land be raised from £25 to £100 so that successors could not inherit shares of lesser value;
- ▶ the Crown, rather than the Maori Trustee, be empowered to compulsorily acquire (convert) uneconomic interests;
- ▶ the Crown be enabled to undertake a concerted approach to conversion for the purpose of promoting the utilisation of land;
- ▶ the Crown be enabled to sell converted interests with fewer restrictions than operated at the time; and

10. Ibid, para 14

11. Ibid, para 6(2)

12. Maori Synod of the Presbyterian Church of New Zealand, *A Maori View of the the ‘Hunn Report’* (Christchurch: Presbyterian Bookroom, 1961), p 19 (quoted in doc B81, p 10)

13. Ivor Prichard and Hemi Waetford, *Report of Committee of Inquiry into Laws Affecting Maori Land and Powers of the Maori Land Court* (Wellington: Government Printer, 1965), p 1

14. IH Kawharu, *Maori Land Tenure: Studies of a Changing Institution* (Oxford: Clarendon Press, 1977), pp 260–293

15. Prichard and Waetford, p 6

- ▶ an administrator of the estate of an intestate Maori be empowered to sell the person's land interests and, if, after two years of attempting to sell them, the interests remained unsold, the Crown be given the right to purchase them.¹⁶

Prichard and Waetford expressed their conviction that 'the great majority of Maori who were moving to town – nearly 100,000 of them in 12 years – do not wish to retain their small interests in Maori land and would much rather have the cash value of it to help them in the problems of relocation'.¹⁷ They compared this attitude with that of the Maori 'who remains in the country areas', asking about that rural dweller, 'Is he deeply, passionately and sentimentally attached to his land interests?' Their answer was 'he wants the utmost cash that the land can give him and that if any money is to be spent on his land it should be provided by the State'.¹⁸

Turning to the utilisation of Maori land and the role of the Maori Land Court, Prichard and Waetford declared that 'the Maori Land Court must in future concern itself much more with land and the user of it rather than with interests in land and the titles for it'.¹⁹ After discussing the growing importance over the previous 30 years of the district officer of the Department of Maori Affairs (acting as agent for the Maori Trustee) and the Maori Land Court registrar in 'arranging' agreements about Maori land, the report stated that 'the duty of the Court now is to find a solution which is both desirable and practical both as to size and boundaries of blocks and as to ownership[,] which solution is, at the very end, carried to conclusion by Court orders'.²⁰ The major example given in this connection was the Tarawera Forest venture, which had not been put to a general meeting of owners, let alone to the Maori Land Court, at the time that the Prichard–Waetford report was drafted. Despite that, the report appeared to caution the court against hindering the venture's implementation:

If the scheme is approved at meetings and if then applications for amalgamation of titles and transfer to the Company are placed before the Court there would be a feeling that if the Court did not agree it should have been present throughout the negotiations and have expressed earlier any dissatisfaction with the planning and the agreements which are being made.²¹

Hugh Kawharu summed up the Maori reaction to the Prichard–Waetford report as 'un-equivocal', with three dominant themes:

- (1) Fear that the proposed legislative reform would make the Maori more vulnerable than ever to the loss of his land through what in effect would be compulsory sale.

16. Prichard and Waetford, pp 6–14

17. Ibid, p 81

18. Ibid

19. Ibid, p 95

20. Ibid, p 112

21. Ibid, p 114

- (2) Belief in the latent ability of the Maori to make efficient use of the land himself.
- (3) Hope that the tools of finance and training would be made available on an adequate scale as the State's contribution to 'a joint enterprise made in the national interest'.²²

2.2.3 The Maori Affairs Amendment Act 1967

The Maori Affairs Amendment Act 1967, which gave effect to many of the Prichard–Waetford recommendations, was equally 'controversial' and was subsequently described as 'notorious'.²³ Introduced by the Minister of Maori Affairs on 3 May 1967, the first day of the parliamentary session, the 147-clause Bill was reported back from the Maori affairs select committee on 26 October, near the end of the session. Immediately, Mr MRata, the member for Northern Maori, moved that, instead of proceeding further in that session, the Bill should be referred back to the committee because of its complexity and the opposition expressed to its main principles in the large majority of the submissions made by Maori.²⁴ In the ensuing debate, the Minister described the Bill as 'the most far-reaching and progressive reform of the Maori land laws this century', and said that the select committee process had received more evidence and deliberated for a longer time than on any Bill within living memory.²⁵ All four Maori members opposed the Bill, however, a fact that was emphasised by other Opposition members in their calls for more time to be given for its consideration by Maori and by Parliament. The Government members won the vote for the Bill to proceed, however, and on 7 November, the Prime Minister moved that urgency be accorded to the Bill's committal. A vigorous debate followed, occupying 7½ hours (and some 68 pages of the closely typed *Parliamentary Debates*) and ending just before 2am on 8 November with a vote that saw the Bill proceed to its third reading, and passage by Parliament, on 21 November 1967. Kawharu records the 'private view' of one Maori member that the Bill had the effect of 'changing the whole attitude of Parliament towards Maori affairs and that the numbers choosing to speak reflected an awareness of the intense public interest in the issue'.²⁶

The debate on the Bill indicates that the Government saw it as addressing the problems of fragmentation of Maori land titles and idle Maori land in a way which would 'equalise' the laws governing Maori land and other land. As such, the Bill was thought to be a major contributor to the true equality of Maori and Pakeha, ending the treatment of Maori as 'children' unable to manage their own affairs. The Opposition, however, including its four Maori members, feared that the Bill failed to recognise vital differences between Maori and Pakeha and their relationship with land and so, by promoting conformity rather than equality, would

22. Kawharu, pp 71–72

23. Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), pp 19, 348

24. M Rata, 26 October 1967, NZPD, vol 353, pp 3655–3656 (doc B69, pp 97–98)

25. Document B69, p 198

26. Kawharu, p 292

actually have the effect of discriminating against Maori and hastening the alienation of their land. Some indication of the source of these views may be seen by referring to Parts I and II of the Bill, about which – as was widely acknowledged in Parliament – the Maori submitters to the select committee had expressed considerable concern.²⁷ Part I would compulsorily change the status of, or ‘Europeanise’, Maori land with four or fewer owners, whereas the Maori Affairs Act 1953 already allowed that result to be achieved voluntarily. Part II would create ‘improvement officers’ in the Maori Affairs Department, who would have considerable powers to initiate court-approved action to improve the condition of Maori land or its administration, yet there was no comparable regime for the far greater quantity of idle European land.²⁸ Another Part of the Bill, Part IV, proposed to change the concept of incorporation of Maori landowners, bringing it into line with general company law, so that the body corporate would be the owner of the land, which would cease to be Maori land. By contrast, under the 1953 Act, when owners incorporated, they retained ownership of the land and the land remained Maori land.

Among the many speeches made in Parliament which help illustrate the speakers’ understandings of Maori, their land, the role of the Crown, and the effect of the proposed change to Maori land laws, we quote here from just two. The first statements are by the Minister of Maori Affairs, the Honourable JR Hanan:

Maori land, like any other land, is owned by defined persons and in defined shares, and so far as the law is concerned and so far as the individual owners are concerned, it is their interest in the land which is important. There are no tribal rights as such, only the rights of owners. Obviously any blocks with a large ownership are pretty close to being tribal property since so many members of a tribe or sub-tribe may be owners, but if X, a Maori, owns 40 acres of land solely on his own account, that land is his and is in no way the concern of the tribe. . . .

One of the points upon which there is a great difference of opinion arises out of all this. To what extent should the rights of the individual owner to realise his interest to the best advantage to him be subordinated to the interests of the group wishing to hold property to the exclusion of outsiders? This is the dilemma. . . . My department constantly receives from the Maori people inquiries as to how they can sell their land interests to help them and their families live a better life in their present economic circumstances. They may want a deposit to

27. There were 24 submissions to the committee and, according to Opposition member of Parliament Mr Amos, who was on the committee, only three submissions gave ‘general or broad support’ for the Bill. Of those three submissions, two were from ‘European’ groups (one of them being the New Zealand Law Society): doc B69, p 199. The Minister of Maori Affairs stated that ‘extensive representations’ on the Bill had been heard by the committee, ‘from a total of over 20 organisations and individuals covering, I would think, all areas of Maoridom in New Zealand . . . [including] the New Zealand Maori Council and bodies representing the peoples of the East Coast, the people of the Arawa tribe, Wanganui, Taranaki, Tuwharetoa, King Country, and South Island and many others’: pp 207–208.

28. Document B69, pp 208–242

build or buy a house, or they may need finance to help them carry their children through to higher education. . . . They often say that they will never go back to their original districts; that their children will know nothing of the land and its history; and that Maori land has no relevance to their lives and problems. . . . It will probably be found, in general, that the supporters of the group idea consist of those people living in the original tribal areas, while those Maori people who argue the position of individuals are persons living away from their lands in the industrial surroundings of a town or a city. There is room to believe that there are at least as many of the latter as of the former.

This is a good Bill. The effects of it are beneficial to the Maoris, and are desired by many of the Maori people. The day has come when the law must be overhauled to reduce to a minimum the cases where the law as applying to Maoris is different to that applying to Europeans. In considering Maoris and Maori land we must modify our traditional view, which is weighted heavily on the side of the rural dwelling Maori hewing wood and drawing water, and we must pay some attention to the numerous Maori people and people of Maori descent whose problems are the same as those of their non-Maori neighbours.²⁹

The next statements are by the Opposition member for Southern Maori, Whetu Tirikatene-Sullivan:

Perhaps the most pertinent and most often repeated question asked by Government members has been, Does the Maori want equality with respect to his lands? May I answer in this way: Maori organisations, Maori landowners, and Maori Members of Parliament have asked for equality in this vital respect, the right to the same opportunity for self-determination with respect to their land and its use. . . .

. . . I say that in many respects the aspirations of Maori landowners to take over the management of their own affairs and to have available to them adequate finance with which to utilise their land, are not specifically provided for in the Bill.

I believe there has been ample evidence to demonstrate that the Maori people are best able to determine for themselves what is in their best interests. All too often in the history of this essentially bi-racial society the Maori has been told what to do, has not been consulted on policy directed at him, and has not been invited to participate and contribute in the devising of laws and regulations by which he was to be governed. Too often Maori opinion has been sought after a Government proposal has been formulated, and Maori spokesmen have been thrust into a defensive role, being heard as appellants rather than as policy initiators. This Bill is an instance of that, even though Government spokesmen have praised the abilities of competent Maoris. . . . Considering the limitations on Maori self-determination, the praises sung by the Minister and the Government sound hollow; they appear meaningless

29. Ibid, pp 208–209

2.2.4

platitudes smacking of an all too familiar paternalism, whatever the intentions are and however well meaning they may be. I do not question the intentions. . . .

The most fundamental desire of Maori landowners is that Maori land be retained in Maori ownership. I do not think Government members can deny that there is inadequate provision for this in the Bill. The Maori landowners want to have the right of self-determination in devising methods by which their land might best be utilised; they want an increasing share in the total administration and management of their lands.³⁰

Paul McHugh has concluded that ‘one of the biggest issues’ generated by both the Prichard–Waetford report and the amendment Act was ‘the extent and acceptability of the process of Maori consultation and consent said to lie behind both’.³¹ We note that the same issue lies behind the claims we are dealing with here.

2.2.4 Joint venture coincides with the height of State paternalism

Dame Joan Metge, writing in 1976, contrasted the 1967 amendment Act with the subsequent Maori Affairs Amendment Act passed by the Labour Government in 1974, which resulted from the adverse reaction to the earlier legislation:

The Maori Affairs Amendment Acts of 1967 and 1974 represent two opposing approaches to Maori land ownership, especially the question of Maori title. . . . The 1967 Amendment Act stresses individual rights and responsibilities and is based on the premise that Maoris should be allowed to handle their affairs like everyone else without special supervision or interference. The pre-1967 and the 1974 legislation is based on the view that the land is an asset which belongs to the Maori people, not individuals, and must be protected from alienation, exploitation and the selfish or irresponsible actions of individuals by special measures.³²

A similar point was made by Hugh Kawharu in a paper about Maori land title and development to a 1981 conference on Maori land law. He noted that in 1960:

The concept of a tribal group being trustees of the patrimony for all future generations, using, but not selling, [their land] had yet to be revived from where it had been displaced by the more pervasive belief that ‘my land is my business’, and by the paternalistic, authoritarian stance of the Crown and the Maori Trustee.³³

30. Document B69, pp 216–217

31. McHugh, p 19

32. Metge, p 111

33. I H Kawharu, ‘Maori Land Title’, paper to conference on Maori land law, 1981, p 5 (quoted in doc B81, p 10)

As will be seen, his observation of the ‘paternalistic, authoritarian stance’ of the Crown and the Maori Trustee in the 1960s is especially relevant to the present claims. It should also be noted that by 1975 opposition to the continuing alienation of Maori land had led to the famous Maori land march from Te Hapua to Parliament, and that in the same year the Labour Government had arranged the return to Maori ownership of the sacred mountains Taupiri and Taranaki.³⁴

The mid-1960s, when the Tarawera joint venture was being developed, therefore mark the high point of the paternalistic State. It took upon itself the role of arranging for what it saw as the best use of ‘idle’ Maori land in what it considered to be the best interests of both Maori and the country as a whole. In that environment, the alienation of Maori land would not be regarded as an obstacle to development. Less than a decade later, however, the prevailing attitude to the use and especially alienation of Maori land had changed radically.

2.2.5 The joint venture and the Maori Affairs Act 1953

A difficulty with the joint-venture proposal for the Department of Maori Affairs was that the Maori Affairs Act 1953, which was in force throughout the relevant period, did not provide particularly suitable machinery for implementing the scheme. As will be seen, departmental officers were casting about for solutions to this problem while Maori owners of land in the Tarawera Valley were making assumptions about what would happen, based on their own experiences with the workings of the Act. It is convenient to summarise here the provisions of the Maori Affairs Act that are referred to in later parts of this report. The following summary is based on the Act and Hugh Kawharu’s book *Maori Land Tenure: Studies of a Changing Institution*.

(1) Part xxii (ss269–303): Incorporation

Before the 1967 amendments to the Act, the owners of Maori freehold land (if there were more than three) could be incorporated by order of the Maori Land Court (s 269), and the resulting body corporate of owners could use the land in the ways listed in its objects. The possible objects were stated by section 270 and included farming the land, growing timber on it, mining it, alienating it by lease or sale, or doing any other thing specified in the order of incorporation. Importantly, the fee simple in the land was held by the body corporate on trust for the incorporated owners in accordance with their several interests (ss 273, 275). The body corporate, with perpetual succession, had all the powers of bodies corporate and all the powers expressly conferred by the Maori Affairs Act (s273), including the power to mortgage

34. Metge, p 112

2.2.5(2)

the land in order to pursue its objects (s288). It was run by a committee of management of between three and 11 persons (s292). ‘General meetings’ of incorporated owners were held as needed, with a quorum being the lesser of 20 owners or two-thirds of their total number (s300).³⁵

(2) Part xxiii (ss304–325): Powers of assembled owners

Part xxiii of the 1953 Act applied to all Maori freehold land (and European land owned by Maori), including land vested in a body corporate of owners, the Maori Trustee, or any other trustee (s304). The ‘owners’, in relation to any area of land, were the owners of the fee simple estate in that land and owners of lesser freehold estates, including life estates (s305). Part xxiii conferred various powers on the ‘assembled owners’ (s305), whose meetings were summoned by the Maori Land Court registrar, on the court’s direction, after application had been made to the court (s307). Every application had to specify the purpose for which the meeting was sought and be accompanied by the resolution or resolutions to be put to the meeting. Where the purpose of the meeting was to consider an alienation to the Crown, the board of Maori Affairs had to make the application.³⁶ Where the purpose was to consider an alienation to anyone other than the Crown, the application was to be made by the proposed alienee (s307(4)). Notice had to be given to the owners of the resolutions to be put at the meeting (s308).

Key features of the procedure at meetings (s309) were as follows: a quorum of three people entitled to vote had to be present throughout the meeting (s309(1)); proxies were allowed, but a proxy generally had to be an owner or husband or wife of an owner (s309(2), (6)); and no person claiming to be beneficially interested in the estate of a deceased owner could attend or vote until the court had made a vesting order in their favour (s309(4)). A recording officer had to be present at the meeting – either the registrar of the court or another Maori Affairs officer appointed by the registrar (s310). A resolution was carried if those in favour owned a larger aggregate share of the land affected than those who voted against (s311). Resolutions could be varied by the meeting (s312(2)). Every resolution passed had to be written down and signed by the recording officer and then reported to the Maori Land Court as soon as possible (ss313, 314). The court could be asked, by any person interested, to confirm a resolution passed at a meeting (s317).

As will be seen in the next two chapters of this report, at discussions with Maori of the Tarawera Forest joint venture, there were many references to a ‘formal meeting’ being

35. As has been noted, the Maori Affairs Amendment Act 1967 changed the nature of an incorporation so that, instead of the land being vested in the body corporate on trust for the owners, who retained their shares in the land, the body corporate became the owner of the land and the former owners became shareholders in the incorporation. As well, the land ceased to be Maori land. The outcome of the Tarawera Valley joint venture was similar, but the former Maori owners became only minority shareholders in the landowning body corporate TFL.

36. The board comprised the Minister of Maori Affairs, another member of the Executive Council, the heads of five named Government departments, and three other members appointed by the Governor-General in Council: Maori Affairs Act 1953, s 6(1).

required to approve the proposals, including references to a Part XXIII meeting. Hugh Kawharu explains that ‘formal meetings’ were not just Part XXIII meetings but meetings which took place in three broadly different sets of circumstances. The largest were meetings at which petitions were made, usually by a tribal group, to the Minister of Maori Affairs in person. There were also public meetings involving negotiation between, say, a tribal group and the Department of Maori Affairs over such things as development aid and legislation. (Both these types of meeting tended to concern tribal interests in blocks ranging in area from 1000 to 100,000 acres.) The third type of meeting, held under Part XXIII, were the most frequent and were concerned with family arrangements in small holdings – namely, those of less than 1000 acres (usually much less). Such meetings were often held in private.³⁷

(3) Part xxiv (ss326–385): Maori land development

The ‘main purpose’ of Part XXIV was to promote the occupation of Maori freehold land and the use of it by Maori for farming purposes (s326). The board of Maori Affairs could, after taking adequate steps to ascertain the wishes of the owners, declare Maori freehold land, European land owned by Maori, or (with the consent of the Minister of Lands) Crown land to be subject to Part XXIV (s330). Land subject to Part XXIV could be occupied and used by the board or its nominee or ‘disposed of’ by leasing. However, only Crown land subject to Part XXIV could be sold (s335). If the land was being leased, the preference was to lease to Maori (s342) and the maximum lease term was 50 years (s344). Any rent was paid to the Maori Trustee, who could be directed to pay some of it into a fund, to be used at the end of the lease to repay the lessee for improvements (s353). Section 376 allowed the board to enter into contracts to enable the use of land for any industry other than farming, where it thought it advisable to so use the land. In 1962, section 376A was added. It provided that, where the board thought it advisable to use any land subject to Part XXIV for the purposes of afforestation, it could do the work needed itself (ie, ‘the establishment, culture and maintenance of forests and the harvesting, use, transport, sale or other disposal of forest produce from the land’), or it could appoint the Minister of Forests as its agent for the purposes of forest management or enter into any contract or agreement or lease or licence with any person or body corporate for the purpose.

(4) Other provisions

The use of three other so-called ‘title improvement’ provisions was also discussed by Maori Affairs officers in connection with the proposed joint venture. The first was ‘combined partition’ (s182), which, in the words of Hugh Kawharu, was ‘in effect, a small-scale scheme of consolidation’ whereby:

³⁷ Kawharu, *Maori Land Tenure*, pp 212–213

the Court treats several blocks of land, contiguous or otherwise, held under different titles, as if they were all under one title. In so doing, it is empowered to parcel out to each of the several owners or groups of owners the sum of all their interests in the pre-existing titles.

It was, therefore, 'particularly useful in such aspects of land development as marae or housing projects'.³⁸ On consolidation, Sir Hugh writes: 'The principal object of a consolidation scheme is the redistribution of the interests of several Maori owners in their freehold lands, so that they can use them to better advantage'.³⁹

The two other provisions (ss 435 and 438) were contained in Part XXVIII of the Act, entitled 'Special Powers of the [Maori Land] Court'. Section 435(1) empowered the court to amalgamate titles when it was satisfied that any two or more areas of Maori freehold land held under separate titles 'could be more conveniently or economically worked or dealt with if it were held in common ownership under one title'. Section 438(1) empowered the court, subject to certain provisos, to make an order vesting Maori land in a trustee, to be held upon and subject to 'such trusts as the Court may declare for the benefit of owners of the land or of Maoris or the descendants of Maoris or for any specified class or group of Maoris or their descendants'. A section 438 trust order could not be made, however, if it appeared to the court that 'there is on the part of the beneficial owners, or any of them, a meritorious objection to the making of the order' (s 438(3)). Section 438(9) elaborated on the powers of a trustee to alienate the land held on trust. It provided that, subject to the terms of the court's order, a trustee appointed under section 438 had the same powers of alienating the land as if it were Maori freehold land not subject to a trust, and as if the trustee were the beneficial owner of the land.

2.3 CROWN FORESTRY DEVELOPMENT POLICY

2.3.1 Forestry in the 1960s

By the 1960s, New Zealand governments had promoted exotic forestry for several decades, beginning with State-funded mass plantings in the 1920s. However, concerns about the economic viability of milling, processing, and marketing the new resource had created a crisis of confidence in the mid-1930s, and plantings were scaled down until the late 1950s. Towards the end of that decade, export markets had been established for sawn timber, logs, newsprint, and kraft (wrapping) paper, and the attainment of the export goal (in place since 1932) of 1.4 million cubic metres of timber a year was in sight. Further, it was predicted that New Zealand would face a substantial timber deficit by 1975. An extensive review in 1959 resulted in the adoption by the Crown of a new State Forest Service strategy. This led to a second

38. Kawharu, *Maori Land Tenure*, p 93

39. *Ibid*, p 94

planting boom in the 1960s, which was further encouraged by the signing of the New Zealand–Australia Free Trade Agreement (NAFTA) in 1965. The strategy centred on three targets:

- ▶ an increase in annual exports from 1.4 to 4.5 million cubic metres of timber;
- ▶ 800,000 hectares of exotic forest to be planted by the year 2000 and 1.2 million hectares by 2025; and
- ▶ an increase in the national annual planting rate to between 8000 and 12,000 hectares, to achieve a spread of age classes.⁴⁰

From the first, it was envisaged that this planting effort would be evenly divided between the New Zealand Forest Service and farmers on marginal land, and there was no specific role for forestry planting by private companies. Discussion of a role for companies tended to focus on the utilisation of the timber only, to reduce the country's dependence on meat, wool, and dairy exports.⁴¹ Hence, most Government measures in the 1960s were designed to encourage farm (and local authority) forestry investment through loan schemes, grants, and other financial incentives. Price controls on sawn timber, plywood, and veneers were also removed in 1965 (though they were reintroduced in 1970). In 1965, however, possibly in part because direct incentives to farmers had failed to achieve the targeted levels of planting, and because of lobbying by Tasman and other forestry companies, taxation changes made company afforestation more attractive by enabling expenditure on forest development to be claimed against any source of income.⁴²

2.3.2 Derivation of Crown forest leases

Throughout this period, the Forest Service was investigating the possibility of leasing land for long-term forestry. As indigenous forests were clear-felled in the 1950s and 1960s, the Crown was left with large areas of cutover native bush. Some of this land was duly cleared and converted to farmland and exotic forests, and private forestry companies expressed an interest in acquiring other areas for afforestation. However, it was seen as undesirable for the Crown to sell the land as it was, and there was no legal provision for the Crown to lease the land to others for forestry. A 1964 amendment to the Forests Act 1949 authorised the leasing of State forest land to private agencies for afforestation. At the same time, the Crown was negotiating with the Maori owners of the Parengarenga, Tainui Kawhia, and Otakanini Topu blocks in Northland in order to establish commercial forests on their land to protect against sand drift. Because these owners refused to sell to the Crown and it was not considered appropriate to take the land under the Public Works Act, the Crown also had to consider a leasing arrangement with itself as lessee.⁴³

40. Document B73, pp 3–5

41. Dr Michael Roche, *History of New Zealand Forestry* (Wellington: New Zealand Forestry Corporation, 1990), pp 330, 338

42. *Ibid*, pp 330–339; doc A4, vol 2, p 41; doc B73, p 6

43. Document B72, pp 4–5

The problem of designing a lease which could be widely applied and would be appropriate whether the Crown were the lessee or lessor was first addressed at a Forest Service meeting in February 1965, where the following needs were identified:

- a) Leases of Maori land for planting by the Forest Service.
- b) Leasing State forest land for planting by private agencies.
- c) Leasing Crown and State forest land to Tasman.

The aim of any leasing scheme had to be that the 'division of the profits must be fair and clearly understood by both parties'.⁴⁴

After discussing the weaknesses of the proposed Otakanini Topu lease, which was based on profit-sharing, the meeting decided that there would be advantages in expressing the lessor's rent from the outset as a predetermined share of stumpage revenue, or royalty.⁴⁵ The benefits included the avoidance of 'the inequities that may arise in a long-term investment owing to the changing value of money'.⁴⁶ The suggested terms for a royalty-based lease were that:

- (a) The lessor makes the land available at a peppercorn, nominal or economic rent.
- (b) The lessee establishes and manages a forest thereon (in accordance with an approved working plan).
- (c) From the production thinning stage onwards, stumpage (probably based on market value) is received for the produce and is shared on a predetermined basis between lessor and lessee.
- (d) The lessor's share covers rental he has forgone, together with compound interest thereon, plus the current rental plus a share of the profits.
- (e) The lessee's share covers the compounded costs of establishment and management (including rent if more than peppercorn), plus a share of the profits.
- (f) The proportion of the shares (80/20; 90/10; 50/50 etc) to be agreed by negotiation between the parties . . .⁴⁷

These principles indicate how each party would receive a share that allowed them to recover their respective fair accumulated costs, plus an equitable proportion of any surplus. The meeting recommended the further investigation of the royalty scheme, and Mr MB

44. F Allsop, 'Leasing Schemes', notes taken of 23 February 1965 discussions between A D McKinnon, J F Lysaght, M T Mitchell, and F Allsop, 26 February 1965, NZFS1/49/13, vol 1, Archives New Zealand (quoted in doc B72, p 5)

45. 'Stumpage' is the value of the wood on the stump – that is, the price per cubic metre for the logs delivered to the mill, less the costs of felling the trees, cutting them into logs, and loading and trucking them to the mill, together with allowances for marketing and for upgrading forest roads.

46. Memorandum from Director-General of Forests to Minister of Forests concerning leasing of land for afforestation, 25 June 1965 (quoted in doc B72, p 6)

47. Allsop, 'Leasing Schemes' (quoted in doc B72, p 6)

Grainger of the Economics Division of the Forest Service was asked to develop a leasing formula incorporating these principles.

Mr Grainger prepared an initial paper in April 1965 and a more comprehensive one in early July. These papers set out the basic theory of what was to become known as the 'Grainger lease'. The principles were further developed and, on 3 August, they were discussed with the Treasury, which requested clarification. This was provided on 17 August as follows:

The determination of a fair rental for land to be leased for afforestation presents difficulties . . . It was considered these difficulties could be overcome:—

(a) by deferring the assessment of a fair rental value until the tree crop was old enough to produce a saleable product;

(b) by charging a peppercorn rental only from the commencement of the lease until the tree crop was old enough to produce a saleable product;

(c) from the time the tree crop was old enough to produce a saleable product, by sharing the value standing (stumpage value) of the saleable product in proportion to the lessor's and lessee's investment in the tree crop at the time of main harvest at age 40 years.

ie lessor's interest – the deferred true rental value of the land compounded to age 40.

lessee's interest – the costs of planting and development of the tree crop compounded to age 40.

NB: The lessor's share (or rental value) to be expressed as a percentage of the stumpage value and to be called royalty.⁴⁸

The Treasury obtained conditional approval of the Grainger scheme from the Minister of Finance on 23 August 1965, allowing such leases to be discussed with prospective lessees and lessors, but no commitment could be entered into without the joint approval of the Minister of Finance and the Minister of Forestry.⁴⁹

Criticism and development of the Grainger leasing scheme continued over the next three years. Issues such as proximity value (an adjustment allowing for the closeness of the forest to the mill) and royalty reviews continued to be debated within the Forest Service. The scheme's complexity led to ambiguities and consequent misunderstandings by prospective lessors and other critics, both within the Forest Service and in other Government departments. A major misunderstanding by the Treasury of the application of the stumpage sharing model led to the setting up of an interdepartmental committee (comprising the Forest Service, the Valuation Department, and the Treasury) to review the scheme in October 1968. The committee finally endorsed the scheme, with further modifications, in August 1969.⁵⁰

48. Memorandum from Director-General of Forests to Minister of Forests concerning leasing of land on royalty basis, 17 August 1965 (quoted in doc B72, p 8)

49. Document B72, p 8

50. Ibid, pp 4-20

2.3.3 Maori land for afforestation

The Prichard–Waetford report in 1965 estimated that the total area of Maori land in the North Island was 3,680,656 acres, of which 515,166 acres were unoccupied but suitable for development and 399,844 acres were classified as ‘unoccupied and possibly suitable for forestry’.⁵¹ The idea of the afforestation of marginal Maori land – as opposed to its agricultural development – had been conceived only recently. In June 1962, the Forest Service wrote to the Secretary of Maori Affairs suggesting that Maori be encouraged to plant production forests on their land where it was close to prospective markets.⁵² At a meeting between Maori Affairs and Forest Service officers to discuss the matter in August 1962, the Acting Assistant Secretary of Maori Affairs, Mr R Law, stressed that his department was interested in afforestation for three main reasons: to provide employment; to put idle Maori land to some use and thereby mitigate pressure for its alienation; and to generate revenue from otherwise unproductive land. The Bay of Plenty, Northland, and the East Coast were seen as being particularly suitable. In his subsequent memorandum, Mr Law noted Forest Service officials’ advice that ‘any suitable land within reasonable distance from the existing Kaingaroa Forest, the Tasman Pulp mill [at Kawerau], or the Whakatane Board Mill Factory is an economic certainty for forestry development’.⁵³ He also recorded that the Forest Service was:

interested and anxious to acquire Maori land in this area for afforestation purposes and have themselves carried out a detailed survey of blocks which would be suitable. This shows a total of over 200,000 acres of Maori land in the Bay of Plenty area at present in scrub which is potentially suitable for developing.⁵⁴

Maori Affairs district officers were quick to approach owners, at least in the Rotorua area, about the prospect of afforestation. A report from Rotorua assistant district officer JE Cater to head office in November 1962 stated that it was ‘fairly clear’ from meetings of owners in the area that they would not sell their land but would favourably consider long-term leases, ‘if legislation is brought down enabling say 99 year leases’.⁵⁵ In fact, a Bill to that effect was introduced the same month and the resulting amendment to section 235(1) of the Maori Affairs Act 1953 allowed a lease of Maori freehold land for a period longer than 50 years where the land was to be used by the lessee exclusively or principally for afforestation purposes.⁵⁶ Mr Cater specifically noted the suitability for afforestation of ‘the Pokohu and other blocks in the area’, and, a year earlier, commenting on Tasman’s initial leasing proposal, the Treasury had noted the interest of both Tasman and the Forest Service in that same land.

51. Prichard and Waetford, p 96

52. Nichols for Director-General of Forests to Hunn, June 1962 (cited in doc A10, pp 8–9)

53. Law to Secretary of Maori Affairs, 20 August 1962, MA58/1, pt 1, Archives New Zealand, Wellington (cited in doc A10, p 9)

54. Ibid

55. Cater to head office, 8 November 1962, MA58/1 pt 1, Archives New Zealand, Wellington (cited in doc A10, p 9)

56. Section 235(1) was amended by section 18 of the Maori Affairs Amendment Act 1962.

2.4 TASMAN PULP AND PAPER COMPANY LIMITED

2.4.1 Establishment and ownership

Since the Tarawera Forest is the only example in New Zealand's forestry history of a three-party joint venture involving the Crown, Maori, and a commercial company, it is important to understand the genesis and requirements of the originator of the joint-venture proposal, the Tasman Pulp and Paper Company Limited. As will be seen, the extent of the Crown's interest in the company, and therefore its possible conflict of interest in negotiating with Tasman to gain the best terms for both itself and Maori involved in the Tarawera Forest joint venture, is of particular significance.

In 1951, in order to utilise the Kaingaroa State Forest's plantation crop, the New Zealand Government issued a worldwide invitation for experienced organisations to become involved with the New Zealand Forest Service in developing an integrated sawmill and pulp and paper mill. On offer was 23 million cubic feet (651,300 cubic metres) of exotic softwoods annually for 25 years, with rights of renewal for two further 25-year periods; that is, until the year 2030. The only firm proposal received was from the Tasman Pulp and Paper Group, of which the Fletcher organisation was the principal member. In July 1952, the Government agreed to proceed and the Tasman Pulp and Paper Company Limited was registered as a public company, with the Government taking a 16.66 per cent share in it as part of the arrangement. By virtue of its shareholding, the Crown was entitled to appoint three of the 10 Tasman directors – they were the Secretary to the Treasury, the Commissioner of Works, and the Director-General of Forests. Sir James Fletcher (the chair) and Mr JC Fletcher represented the Fletcher group, while the other five directors represented the other Tasman sponsors.⁵⁷ To ensure close management of its Tasman interests, the Crown also established a Cabinet committee for that purpose. By 1956, the Crown had increased its shareholding to 33 per cent, but that was revised again in 1959, when the Bowater Paper Corporation, a 'world-famous newsprint organisation', was invited to participate. Tasman's total share capital was increased to £8 million, with the Government stake remaining at £2 million, giving the Crown a 25 per cent shareholding. Bowater acquired a shareholding of £1.5 million, or 18.75 per cent, and £1 million (12.5 per cent) was retained by public subscribers.⁵⁸

To give effect to the Kaingaroa sales agreement, Tasman established a mill at Kawerau, the Crown assisted by establishing and improving the necessary rail and port infrastructures, and Tasman and the Crown formed a joint-venture company, the Kaingaroa Logging Company, to carry out the logging operations. In 1956, the Crown sold almost half its shares in the company to Tasman to make the two equal partners, and by 1963 it had sold its entire interest to Tasman.⁵⁹

57. Document B73, pp 8–9; Roche, pp 300–301; L Coughlan and A D McKinnon, *A Record of the Development of Tasman Pulp & Paper Co Ltd* (Wellington: New Zealand Forest Service, 1964), p 19

58. Ministry of Forests, *Report of the Director-General of Forests for the Year Ending 31 March 1960* (Wellington: Ministry of Forests, 1960), pp 27–28

59. Document B73, pp 8–9

2.4.2 Influence on prices for forest produce

The 'basic concept' of the Kaingaroa sale was:

to sell logs carrying as low a stumpage as possible, consistent with the recovery of growing costs so that the enterprise itself [ie, what became Tasman] may operate at a high profit rate and form as attractive an investment as possible. The real value of the raw material will be secured to the Government by sharing in the manufacturing profits through appropriate capital participation.⁶⁰

In his annual report for 1962, the Director-General of Forests, Mr AL Poole, described this price, which was a flat rate of threepence per cubic foot for all types of wood for 25 years, as 'very low'. He noted that, if the return from the raw material did not cover the costs of managing and improving the forest, there was 'a danger of depressing the quality of the forest itself'.⁶¹ In 1963, the original sales agreement was replaced. The new contract, starting on 1 April, was for 40 million cubic feet (1,132,673 m³) a year and was to end at the same time as the original contract and with the same extension rights. The price set was threepence per cubic foot until 1 April 1968, and threepence ha'penny from then until 1 April 1980, with no differentiation between sawlogs and pulpwood. The price was to be reviewed at the time that the contract was extended in 1980, when the sawlog price was to take account of 'current market prices', although the pulpwood price was to 'have regard to the basic concept' of the original sales agreement and any variation in production costs and quality.⁶²

In September 1965, the Crown invited applications for the purchase and use of a further 20 million cubic feet (566,336 m³), concluding on 31 March 1980, with varying rights of renewal. Tasman, which according to its then managing director, Mr GJ Schmitt, wanted to 'secure wood supply for a liner board machine that I planned to be installed following the negotiation' of NAFTA,⁶³ was the successful tenderer. The contract, concluded in October 1966, set a price of fourpence ha'penny per cubic foot for sawlogs and fourpence farthing for pulpwood, with provision for periodic price reviews until 1 April 1980, when, if the rights of renewal were exercised, all prices were to be reviewed.⁶⁴

The 1963 and 1966 agreements were known as the '40 million' and '20 million' contracts, and Crown witness Dr Andrew McEwen explained Tasman's dominance in the forestry market of the 1960s in these terms:

At the time the first contract commenced in 1955, the Tasman entitlement was equivalent to the total State forest production and to over 30% of production by all owners. The proportions dropped to about 50% of State production and 20% of national production in 1963,

60. Cited in doc B73, pp 8–9

61. Ministry of Forests, *Report of the Director-General of Forests for the Year Ending 31 March 1962* (Wellington: Ministry of Forests, 1962), p 19

62. Document B73, pp 8–10

63. Document B78, p 22

64. Document B73, pp 11–12

when the contract was renegotiated with the extra volume. With the signing of the 20 million sale in 1966, Tasman's entitlement rose to 90% of State forest production and 35% of national production.⁶⁵

As for the relationship between those contracts and the Tarawera Forest venture, in which Tasman undertook to purchase the entire crop, Dr McEwen stated:

The volume of wood available to Tasman under the two [1963 and 1966] contracts amounts to 3 to 3.5 times the annual production that could be expected from Tarawera forest once it was in full production (about 500,000 m³) sometime in the early 1990s.

From the foregoing it is obvious that the Tasman contracts, by their size, will have dominated the domestic sales of forest produce in the Bay of Plenty region and in the wider Central North Island since they were first entered into.⁶⁶

As will be seen, it was thought in the mid-1960s that the prices Tasman would pay for the Tarawera Forest produce under the joint-venture agreement would be based largely on the prices Tasman was to pay under the '40 million' and '20 million' contracts. Whether the Tarawera Forest prices were therefore 'concessionary' was a major issue both during the development and implementation of the joint venture and in evidence before the Tribunal.

2.4.3 Subsequent developments

The Crown, whose shareholding in Tasman appeared to increase to 43 per cent in 1979, sold all but a tiny fraction of its shares (0.000026 per cent) in 1980.⁶⁷ Hence, when the prices Tasman paid for timber under both contracts were reviewed in 1980 as part of the renewal negotiations, the second part of the 'basic concept' of the sale – that the State would recoup through its share in Tasman's overall profits the profits it relinquished in the sale of the Kaingaroa Forest produce – no longer applied. Crown officials therefore recommended that the price negotiations take account of 'growing costs, the return to government on its investment in forests and the overall profitability of forest including log exports'.⁶⁸ According to Dr McEwen, the April 1980 price review was based on the prices the Forest Service was obtaining from its sales at about that time.⁶⁹ The review resulted in substantial upwards adjustments, with some further annual adjustment and full reviews every five years. When those reviews fell due, because first the Forest Service and then its successor, the Forestry Corporation of New Zealand, failed to reach agreement with Tasman, the price reviews in both 1985 and 1990 were eventually determined by arbitration several years after the due date of review.⁷⁰

65. Ibid, p 12

66. Ibid, p 13

67. Ibid, p 9

68. Ibid, para 6.22.4, p 14

69. Ibid, para 6.27, p 17

70. Ibid, pp 10–12

In 1981, Tasman was incorporated into the enlarged Fletcher Challenge Group.⁷¹ By 1987, the Government had no shareholding in the company at all. Fletcher Challenge Paper was formed in 1996, and in that same year the company acquired the Forestry Corporation of New Zealand, which included the Kaingaroa Forest.⁷² In July 2000, Fletcher Challenge Paper was sold to Norske Skog, a Norwegian paper producer, which less than a year later, in April 2001, sold it to Carter Holt Harvey, Australasia's largest forest products company, which now runs the Kawerau mill.⁷³

2.4.4 Social impact

With its pulp and paper mill at Kawerau and its logging contracts in the Kaingaroa Forest, Tasman has been a substantial employer in the eastern Bay of Plenty, with consequent social effects on employment opportunities and housing, especially for Maori. The managing director of the Kaingaroa Logging Company, Mr MDH McKee, gave evidence at the Maori Land Court hearing on the joint-venture proposal in August 1966. He stated that, out of the company's total labour force of 479, just over 56 per cent (269 people) were Maori (as registered on the electoral rolls). At Murupara, the administrative centre of the forest, the company owned 293 houses, of which 157 (53.6 per cent) were leased to Maori; the company had also sold 24 of its houses to employees under long-term loans and, of these, 11 were sold to Maori. The figures for Kawerau were less precise, being based only on Maori names. Of the total Tasman labour force of 1640, a quarter had Maori names. Houses leased by Tasman to Maori were 150 out of 787 (14.6 per cent), and out of 115 houses sold to employees under long-term loans, 26 (22.5 per cent) were sold to those with Maori names. The court noted, however, that the forest and mill drew labour from all over the country.⁷⁴

In September 2000, in preparing the Crown's evidence for the Wai 411 inquiry, historian Dr John Battersby interviewed former managing director of Tasman Emeritus Professor Schmitt (as he is now). Professor Schmitt noted that:

very many of them [Maori] were employed in the Tasman sawmill and in Tasman's logging operations. The wage earning population of the area was very largely Maori . . . [and they] were employed because they were good loggers, saw-millers and machine operators, and they were in the area.⁷⁵

In response to the Tribunal's request for more information on the social effects of the Tarawera Forest joint venture, Tom Cass, the corporate manager of MIL (the Maori share and debenture holding company set up under the joint venture), compared the population and

71. Roche, p 363

72. <http://www.fcl.co.nz>

73. <http://www.norskeskog.no>; <http://www.chh.com>

74. Document A33, pp 1X1-1X2

75. Document B78, p 7

unemployment rates in Kawerau in the 1966 and 1996 censuses. According to Mr Cass, in 1966 the total population of Kawerau was 5826 and the unemployment rate 0.7 per cent. Over the previous five years, the population had increased by 29.7 per cent, as compared with 'a growth rate for Maori in the Bay of Plenty of 12.7%'. In 1996, he stated, the total population of Kawerau was 7830, having decreased by 6.1 per cent over the previous five years compared with a 7.2 per cent increase for the whole of New Zealand. Overall unemployment in Kawerau was 17.6 per cent, compared with 7.7 per cent for all of New Zealand, and the rate for Maori was 25.3 per cent, compared with 17.5 per cent for all Maori in New Zealand.⁷⁶ Against that backdrop, Mr Cass stated his view that, while some local labour was used in the developing and early harvesting of the Tarawera Forest, the Tasman mill had been a greater employer. Further, he said, 'The employment opportunities, in the main, advantaged the influx of people into the area rather than the original owners in the land.'⁷⁷

2.5 SUMMARY

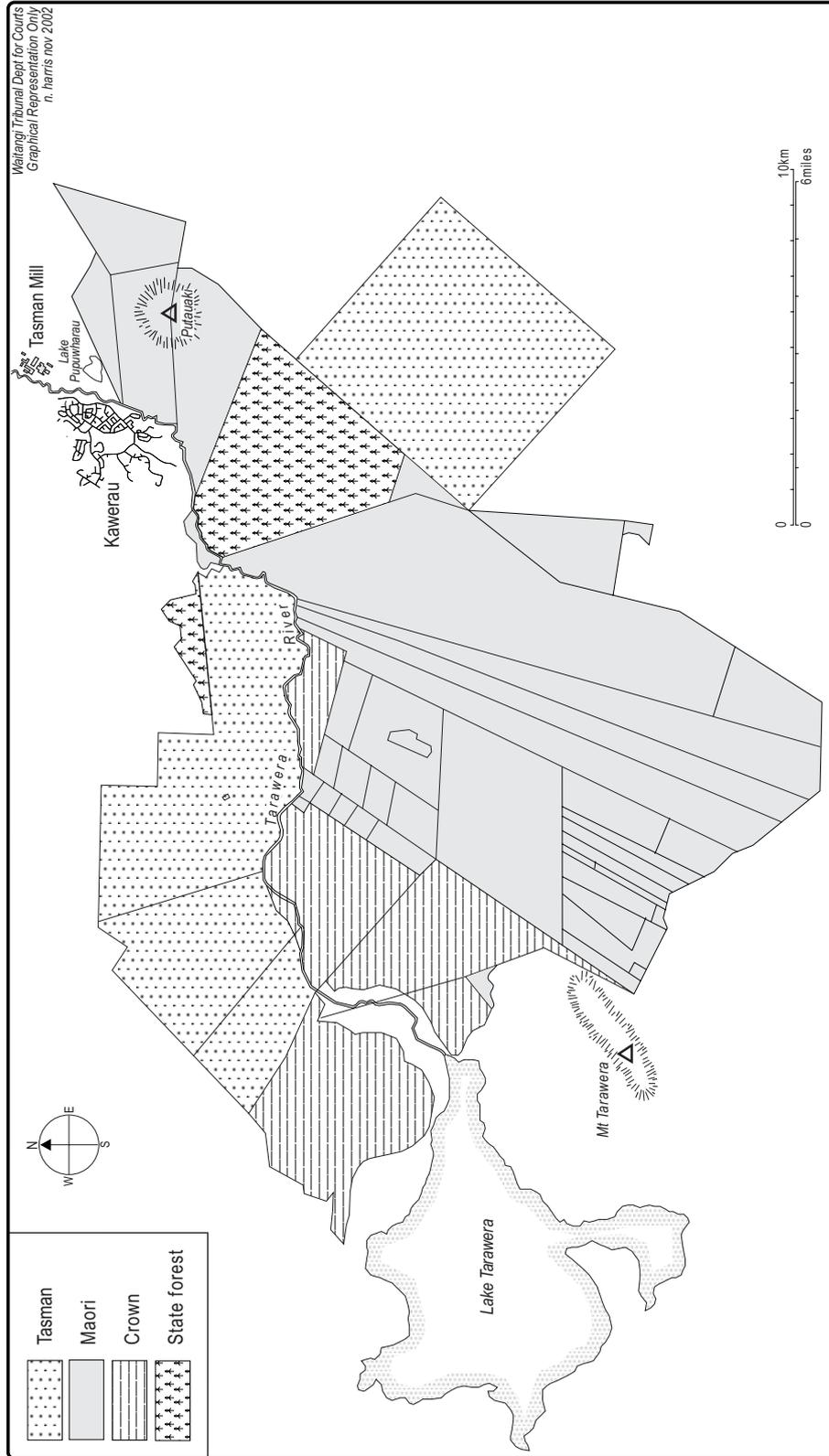
The key points made in this chapter are:

- ▶ The 1960s was a time of great concern by the Government for, and heightened interest among Maori in, the productive use of Maori land. In this, the Government adopted a paternalistic attitude, assuming that it knew best what was most suitable for Maori in the best interests of both Maori and the country as a whole.
- ▶ The 1960s was also a time of great interest in forestry development, especially on land unsuitable for agriculture. The State assumed a major role in developing forestry projects, and the Forest Service was devising a leasing formula that would give fair returns to both lessee and lessor.
- ▶ Tasman was a dominant player in New Zealand's forest produce processing industry.
- ▶ Tasman's joint-venture scheme did not fit comfortably with any of the existing legal machinery for dealing with Maori land.

76. Document B68, p 4

77. Ibid, p 4

THE TARAWERA FOREST REPORT



Map 3: Tarawera Forest land – areas formerly owned by Tasman, Maori, and the Crown

CHAPTER 3

DEVELOPING THE JOINT-VENTURE PROPOSAL FROM 1960 TO 1964

3.1 INTRODUCTION

A major element of the Wai 411 claim is that the Maori landowners were not properly involved in the design of a forestry scheme that would best meet their needs and aspirations. The claimants said that, by the time Tasman and the Crown approached the landowners in an open forum, it was to present them with a non-negotiable proposal which it was said they could either take or leave, yet neither of those options was one that the owners would have chosen to pursue had their interests been properly represented up to that point. Accordingly, they said that the Crown ‘took it upon itself – without in any way disclosing to the Maori partners that it was so doing – the responsibility and task of representing Maori in the ongoing negotiations leading up to the formation of the venture’.¹ Further, they said that the Crown ‘overcame opposition and uncertainty on the part of Maori by a process of deliberate non-disclosure of critical information; misrepresentation; and a steamrolling of opposition to the venture by all means at its disposal’. In doing so, they claimed, the Crown not only ‘plainly joined with Tasman and fully backed its aims and efforts’ but ‘was in a position of serious conflict of interest’ given its ‘25% shareholding in Tasman and thus obvious interest in ensuring the financial success of that company’s very extensive forestry and timber interests’.²

The Crown defended the process by which the joint-venture terms were developed and finalised, maintaining that ‘there were no material breaches of Treaty principles in failing to ensure greater disclosure’ than occurred.³ It maintained that:

before a meaningful consultation process can take place, it is necessary that there be a reasonably well-developed proposal upon which to seek a response. That the Crown and Tasman chose to develop a fully conceived proposal before seeking a response from the Maori owners is hardly surprising.⁴

1. Document B80, para 40

2. Ibid, para 19; doc A22, para 86.1

3. Document B81, paras 1.4, 1.8

4. Ibid, para 3.9

Further, the Crown says that, ‘in an era when emphasis was given to the development of un-productive Maori land’, the consultation process that was engaged in with the Maori owners was reasonable, ‘despite some inevitable short-comings and raw aspects’.⁵

The Tribunal’s analysis of the process by which the joint-venture proposal was developed reveals that, from its inception very early in the 1960s until the end of 1964, the Crown and Tasman were talking mainly between themselves about the terms on which they would participate in a Tarawera Valley forest venture. In this period, while it was envisaged that the Maori landowners would be invited to participate, the terms on which that might occur were left open. Towards the end of the period, there were three meetings between Tasman representatives, Crown officers, and small groups of Maori landowners. These were of a general exploratory nature and, significantly, preceded the agreement of key terms in the Tasman–Crown arrangement, which occurred in September 1965. After that, there were two further meetings with groups of Maori landowners (in October and November 1965) before, in December 1965, a meeting open to all the landowners was held. At that meeting, the owners’ approval of a clearly defined joint-venture proposal was sought.

The Tribunal therefore sees the process by which the joint-venture proposal was developed and then finalised as falling into two parts. The first part – the discussions between the Crown and Tasman, and the meetings with groups of Maori owners up to the end of 1964 – can be regarded as the development phase, with the aim of reaching the stage where a concrete proposal was ready to be put to all those involved. The second part – the meetings with particular groups of owners and then with all the owners in October–December 1965, and what followed – can be regarded as the finalisation phase, in which those directly affected by the proposal should have been consulted and given the opportunity to have their views taken into account before the proposal was finalised. The development phase is considered in this chapter and the finalisation phase in chapter 4. Chapter 5 presents the Tribunal’s analysis of the adequacy of the process followed in both phases.

What follows in these three chapters is necessarily a summary of a very complex and many-faceted process, and one for which the record is incomplete. To make sense of it, our account focuses on the four most contentious aspects:

- ▶ the valuation at which the land entered the joint venture;
- ▶ the prices to be paid for the forest’s produce;
- ▶ the alternatives to the joint-venture proposal, especially leasing; and
- ▶ the evidence of the alleged Crown ‘conflict of interest’.

Before describing this lengthy process, however, we must first picture the land in the Tarawera Valley, especially the Maori land which lies at the heart of the claims before the Tribunal.

5. Document B81, paras 1.4, 1.8

3.2 THE TARAWERA FOREST LAND

The Tarawera Valley runs north-east from Lake Tarawera, which drains via the Tarawera River into the Bay of Plenty near Matata. On its south-western flank lies Mount Tarawera, which erupted in 1886, burying two villages with the loss of 150 lives and destroying the famed Pink and White Terraces. At the foot of the Tarawera Valley lies the town of Kawerau, the location of the Tasman sawmill and pulp and paper plant, and just south-east of that, across the Tarawera River, is the sacred Putauaki maunga, a dormant volcano also known as Mount Edgecumbe. The valley is therefore strategically placed to the north of the State-planted Kaingaroa Forest and close to the mill at Kawerau. Hence, it was, as Mr R Law described in section 2.3.3, ‘an economic certainty for forestry development’ in the 1960s.⁶

3.2.1 Land holdings in the Tarawera Valley

Map 3 shows the relative location of the land areas contributed to the Tarawera Forest joint venture by the Crown (18,691.6 acres), by Tasman (19,350 acres), and by Maori (38,067.5 acres). Map 4 shows the names of the blocks contributed by each of the parties.

The Crown’s land comprised the blocks Pokohu A1 (3169 acres), Pokohu A2B2 (2980 acres), Pokohu B1 (794.9 acres), and Part Ruawahia 1 (5004 acres), plus the State forest blocks Putauaki 1 (5243 acres) and Part State forest 39 (580 acres).⁷ The Ruawahia and Pokohu A blocks were at the south-western end of the valley bordering Lake Tarawera, with about 2000 acres held in scenic lakeside reserves. A central belt of 3000 acres was considered more suitable for farming, and about 6000 acres unplatable. The area was administered by the Department of Lands and Survey, which had previously transferred the Putauaki 1 block near Kawerau to the Forest Service for planting.⁸

Tasman had been buying private farm and forestry land in the valley, and by November 1961, according to a Treasury report, owned 11,420 acres in the adjoining Te Haehaenga 1 (3560 acres) and Te Haehaenga 4 (7860 acres) blocks on the northern side of the Tarawera River, which it was already planting.⁹ Tasman subsequently bought the adjoining Te Haehaenga 5 block (2000 acres) in May 1962 and the Matahina Forest (Matahina A3B, 5930 acres) in February 1964.¹⁰ As will be seen, the timing of these purchases is regarded by the claimants

6. Document A10, p 9

7. Tasman Pulp and Paper Company Limited, *Proposal by Tasman Pulp and Paper Company Limited to Maori Owners and the Crown to Participate in the Development of an Exotic Forest in the Tarawera Valley* (Kawerau: Tasman Pulp and Paper Company Limited, [1965]), p 6 (doc A4, vol 2, p 123); ‘Order Cancelling Several Titles and Substituting One Title and Apportioning Rights and Obligations upon Amalgamation’, 19 August 1966, Judge Gillanders Scott, Maori Land Court, Waiariki, Whakatane Maori Land Court minute book 41, 73C–73E, sch 1 (doc A4, vol 1)

8. Beattie to senior investigating officer, New Zealand Forest Service, 14 May 1963, FS83/503, vol 1 (doc A5(6.13))

9. Treasury, ‘Crown Land for Tasman Company’, report to Minister of Finance in response to Cabinet paper TPP(61)M3, pt 2, of 18 September 1961, 30 November 1961 (doc A5(4.1)), pp 1–2

10. Document A33, p D4e. Since the three Te Haehaenga blocks were adjoining, it is hard to understand claimant witness JG Groome’s description of these four purchases as ‘scattered . . . parcels’ indicating that ‘Tasman were not building up a useful contiguous block for planting’: doc B70, p 4.

as significant, so it should be noted here that there is a discrepancy between the 1961 Treasury report and the dates subsequently given in evidence to the Maori Land Court hearing by Mr Schmitt.¹¹ In his prepared statement to the court, Mr Schmitt stated that Te Haehaenga 1 was bought in April 1962 and Te Haehaenga 4 in September 1962. What is not in question is that by 1964 Tasman owned 19,350 acres in the valley – virtually all the land that was not otherwise in Crown or Maori hands. The prices Tasman paid for this land were also regarded by the claimants as being below market value, so it is worth noting here that, according to Mr Schmitt (and accepted by claimant witness Mr JG Groome), the average price per acre (unimproved) paid by Tasman was £2 7s.¹²

The land owned by Maori that was to become part of the Tarawera Forest was owned in 40 different blocks. All of it, according to a 1967 report to the Maori Trustee by registered valuer Mr JR Sharp, was within 20 miles of Tasman's mill at Kawerau, and there was generally a downhill slope for log cartage from all areas of the land to the mill.¹³ Thirty-two of the blocks were subdivisions of the original 40,000-acre Pokohu block, which ran due south of the Tarawera River almost to the Kaingaroa Forest. These blocks were of hugely differing size and ownership, the two largest being Pokohu D (8980 acres) and Pokohu B2 (4105.7 acres).¹⁴ The Wai 46 claimants told the Tribunal that Pokohu D was the last remaining block of any significant size owned by Ngati Awa in the Tarawera region.¹⁵ In 1961, about 15,000 acres of the total Pokohu block was considered suitable for the immediate planting of exotics.¹⁶

Maori also owned about 3500 acres very close to Kawerau, in the Matata 59B1 block and the adjoining Putauaki 2 block, which together included Putauaki maunga. The history and chequered ownership of this sacred mountain is described in detail in section 3.2.6. The remaining Maori blocks were Part Kawerau B, the other subdivisions of Matata 59B (approximately 2000 acres), and the Matahina A1D and D2 blocks (1316 acres).¹⁷ The Wai 46 claimants highlighted the fact that, as a consequence of the titles to the 40 Maori blocks being amalgamated into Tarawera 1 in 1966, the blocks' traditional names, which recalled the exploits of tribal ancestors, were eliminated.¹⁸

3.2.2 Suitability of the Maori land for farming

Mr Sharp's valuation of the Maori land commented on the general quality of the Tarawera Valley land as follows:

11. Document B70, p 4

12. Document A33, pp D4e–D4f; doc B70, p 4

13. Sharp to Deputy Maori Trustee, 5 April 1967 (doc B1, vol 1, p 87)

14. Tasman Pulp and Paper Company Limited, *Proposal By Tasman Pulp and Paper Company Limited*, p 6 (p 123)

15. Document A27, para 34

16. Treasury, 'Crown Land for Tasman Company', p 2

17. 'Order Cancelling Several Titles', sch 1

18. Document B79, para 7

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3.2.2

The Tarawera Valley generally is regarded as unsuitable for grassland farming because of the coarse rubbly nature of pumice soil. Several attempts over a period of years have been made by Private individuals to develop as grassland blocks of land in the valley, all being unsuccessful. In more recent years, the Lands and Survey have developed a block at the lower end of the valley and this also has not proved too successful. The Department of Agriculture also generally regard the valley as unsuitable for grassland farming.

This coarse Tarawera Ash country is in direct contrast to the land about Rotorua, Taupo and Kinleith where generally it is considered ideal for either grassland farming or afforestation. In these areas there is keen competition by farmers and timber concerns to purchase land that is suitable for both grass and forests.¹⁹

The commissioner of Crown lands for the area, Mr FS Beachman, gave evidence in the August 1966 Maori Land Court proceedings concerning the land. He stated:

Although it is admitted that certain areas of less than a 20 degree slope would be suitable for developing into farm lands, there are not sufficiently large compact areas adjacent to warrant development into pasture. . . . Well over half the Maori lands are covered in bush and only suitable for afforestation purposes. They are also in the higher altitude areas, hilly and broken, and would only be suitable for the growing of trees. The easier contoured areas are mainly covered in fern and scrub, and are adjacent to the Tarawera River. If these lands were held by the Crown I would still be prepared to recommend them for tree planting purposes.²⁰

Also in the Maori Land Court hearing, counsel for Tasman described the Maori land, with its deep scoria soil, as useless and unproductive, adding:

there is only one dwelling on this 38,000 acres. A large number of blocks are gazetted as unproductive and as a consequence unratable. The soil content is unsuitable for agricultural development. There is no access, or doubtful access, and the shapes and sizes of the blocks in themselves prevent development of any kind.²¹

The one dwelling on the Maori land was on the Pokohu B3B2 block and belonged to the Edwards family. In the Maori Land Court, members of the Savage-Edwards family presented a case for retaining a number of blocks in the vicinity of the home and developing the land themselves. The applicant in the court proceedings, the court registrar, filed a report on the Edwardses' home and land use that had been compiled by Maori Affairs field supervisor Mr A Mitchell after visiting the area in January 1965. The report described the access as being, first, across land owned by the Crown, then across land owned by Tasman, and then via a bridge constructed and owned by Tasman. It continued:

19. Sharp to Deputy Maori Trustee, 5 April 1967 (doc B1, vol 1, p 87)

20. Document A33, p U4

21. Ibid, p D2

Coverage 65 acres approximately reverted to native grasses and weeds. No English pastures. The balance of the area is covered in small ti tree, fern, second growth native bush. Scattered patches of blackberry.

Fences poorly constructed.

Buildings: The house from the outside is in fair condition (40 years or more). The cowshed and implement shed in poor repair.

The occupiers are only using this area for a home. Any farming is for their own use. On inspection the only stock seen were 1 jersey cow and calf, 1 sheep and 2 horses. Any other stock would be run in the scrub and second growth.²²

In the court proceedings, Mr SR Hewitt, a farm advisory officer from the Department of Agriculture, gave evidence about the soils in the Tarawera Valley, with particular reference to the land sought to be retained and developed by the Savage-Edwards group of owners. He stated that the soil type varied considerably, depending on how far away the land was from Mount Tarawera (and therefore how much it had been affected by deposits of volcanic ash in the 1886 eruption). In the upper valley, where the Savage-Edwards family's farm was (about four miles from the chasm of Tarawera), the surface soil particles were much larger than lower down the valley, where the Crown had established farms (about 15 miles from the chasm). In the upper valley, Mr Hewitt considered that the potential for farming was 'very low' and that to establish an economic farm there would take many years of pasture development and would require an area of at least 2000 acres. He estimated that fertiliser costs would be between 30 shillings and £2 per acre each year and that the carrying capacity would be $\frac{3}{4}$ ewe equivalents per acre (and that only after a number of years). Mr Hewitt also stated that, before its purchase by Tasman in 1961 or 1962, the Duffy brothers' farm, the Te Haehenga 1 block, though of a suitable size, was 'not a successful farming venture' because the Duffys had not applied manure.²³

The exception to the general view that the Maori land was unsuitable for farming was the Matata 59B2B block, the most northern of the Maori blocks, which had an area of 619 acres and which adjoined land already being successfully farmed by the Department of Maori Affairs.²⁴ In the court hearing, a group of owners (members of the Ngahehu family) sought to have the block severed from the proposed forest. Mr Beachman agreed under cross-examination that it was one of the few areas in the proposed scheme that was capable of being put into productive pasture.²⁵ Mr Schmitt also conceded under cross-examination that it was 'probably true' that the land could reasonably be farmed.²⁶

22. Document A4, vol 2, p 155

23. Document A33, pp 1U5-1U6

24. Ibid, p 1Q4

25. Ibid, p U6

26. Ibid, pp N5-N6

3.2.3

Mr HR Warner, a farmer and farm salesman who gave evidence on behalf of the Ngaheu family, considered that the Matata 59B2B block was suitable for development as a sheep unit on its own or in conjunction with two smaller adjoining Matata 59B blocks. He described the land as 'all in fern with rolling hills, steep in one or two parts, flats, and some swamp area', at least '90 percent discable'.²⁷ Noting that it was at that time 'completely unimproved', he estimated its potential carrying capacity after heavy manuring and development for 20 to 25 years to be 4½ ewe equivalents per acre, and the total cost of development to be about £33,000 on then-current values.²⁸

Mr Hewitt was asked whether his estimate of a minimum of 2000 acres for an economic farming unit in the upper Tarawera Valley also applied to Matata 59B2B. He replied that there was no comparison between the two areas because the soil type was quite different, the Matata block being about 15 miles from the centre of the 1886 eruption. He estimated that an economic unit there would be about 600 acres.²⁹

3.2.3 The rating situation

Since the bulk of the Maori land in the valley was unsuitable for agricultural development, the rating demands of the local authority, the Whakatane County Council, had long been an issue. At the Maori Land Court hearing, Maori landowner Mr TG (Nira) Fraser stated that he had been trying to find ways of developing the Pokohu blocks since 1949. Options included mining them for gold or vesting the lands in the Maori Trustee or other receiver so that they could then be leased 'to best advantage', but neither of these schemes came to fruition. According to Mr Fraser, because of its lack of economic potential, 21,250 acres of the Maori land in the valley was gazetted in 1958 as being exempt from rates payments, whereupon the Whakatane County Council wrote off all the outstanding rates.³⁰

The clerk of the Whakatane County Council, Mr JE Grey, also gave evidence at the hearing. He listed the Matata 59B blocks exempted from rates in 1952, and the Putauaki and Pokohu blocks exempted in 1958, a total of nearly 24,000 acres. He stated that the rates due on the exempt blocks would have been sevenpence in the pound of the unimproved value for Matata 59B and ninepence in the pound for the others. He also stated that, because the Tasman proposal showed that 'the whole of the area' could be brought into production and 'used profitably', the council now considered that the rating exemption should be revoked.³¹

27. Document A33, p 1Q3

28. Ibid, pp 1Q3-1Q4

29. Ibid, p 1V1

30. Ibid, pp W3-W4

31. Ibid, p Z2

3.2.4 Survey, fencing, and access

Mr RG Lockie, a land utilisation officer with the Department of Maori Affairs and a registered surveyor, gave evidence at the Maori Land Court hearing about the various blocks of Maori land that it was proposed to amalgamate. He stated that the ‘Tarawera Valley blocks are poorly planned and [the] resulting shapes make many of them uneconomic as individual land holdings’, even though ‘they no doubt served their purpose in [the] distribution of native bush royalties’.³² He noted that, since most of the survey work had been done in 1927, the block boundaries would no longer be discernible and would have to be redefined: ‘The area is covered in heavy scrub and second growth and native bush and would demand many hours of line cutting in order to re-establish and flag the boundaries.’³³ He estimated that the surveying and periphery fencing of each block would cost £2 per acre, or £77,500 in total, whereas the survey work necessary to produce one title to the amalgamated blocks would cost £1027.

Mr Lockie had reported earlier that, to create an economic farm unit out of the Pokohu B3B blocks where the Savage–Edwards family were farming, fencing costing £6600 would be required.³⁴

Mr JA Dye, the special titles officer at the Rotorua branch of the Department of Maori Affairs, gave evidence that there were survey liens on the titles to most of the blocks of Maori land. These had been incurred as a result of the 1927 survey, the reduced levies for which remained unpaid.³⁵

The existing shape of the blocks also created problems of legal access. As described in section 3.2.3, to gain access to the land they were using, the Savage–Edwards family had to cross Crown and Tasman land, and use a bridge built and owned by Tasman. In his prepared evidence to the hearing, commissioner of Crown lands Mr FS Beachman stated:

The Maori owned blocks are entirely suitable for amalgamation into one compact unit for a major afforestation scheme. They will work in excellently with the Crown lands and the Tasman owned land to be included in the scheme. Almost all the individual blocks have problems of access – in fact no legal access, and if not included in the proposals could be virtually ‘cut off’ . . . Many of the blocks are of such a shape that they could not be economically developed except at ridiculously high costs. . . . They could not be developed for any purpose unless access can be provided.³⁶

32. Ibid, p 1w9

33. Ibid

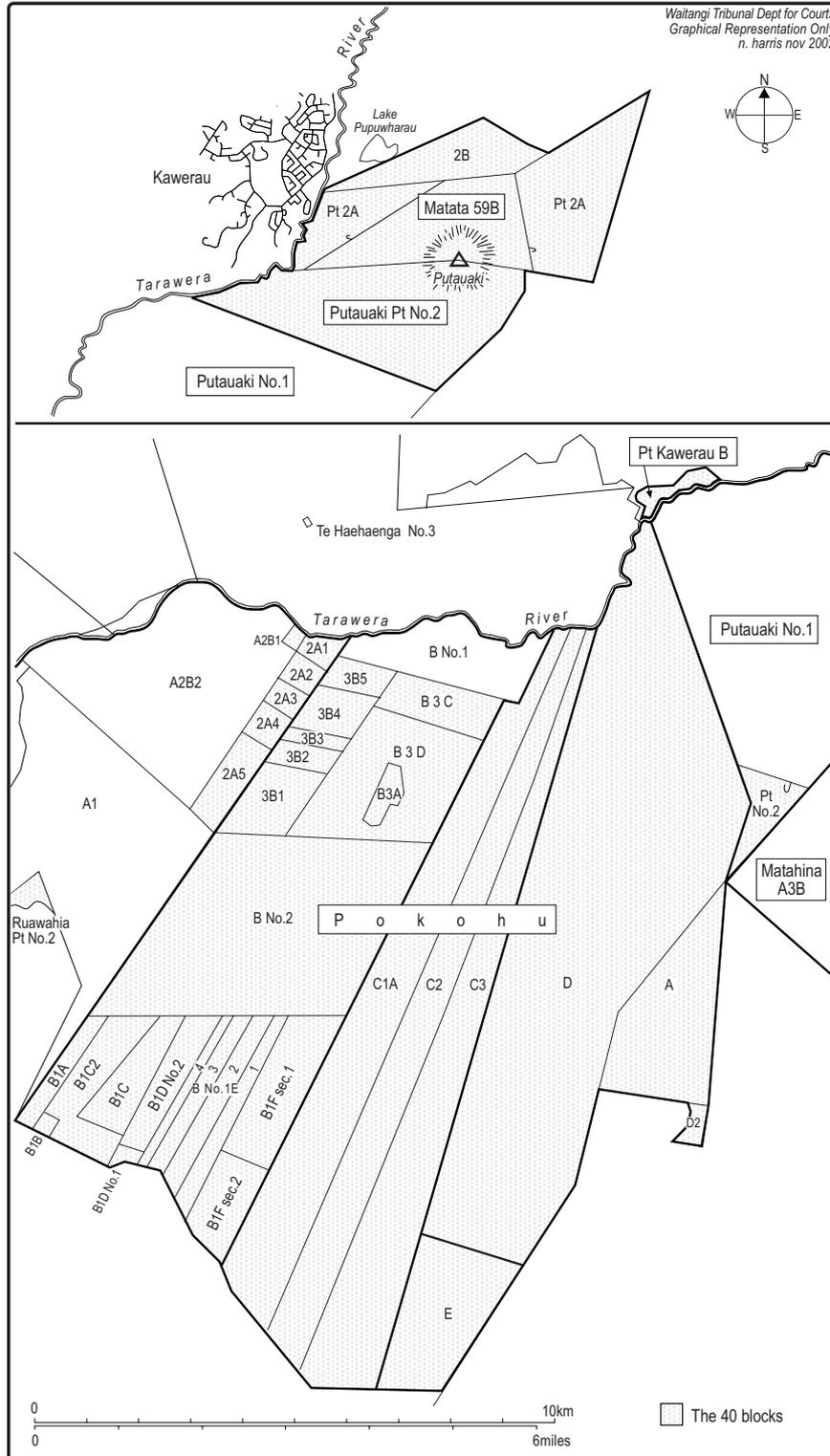
34. JM Mitchell, ‘Visit of Mr RG Lockie, Land Utilization Officer – Maori Affairs Department, 20 June 1966. p 2 (doc B1, vol 1, p 49

35. Document A33, p c4

36. Ibid, p u4

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3.2.4



3.2.5 State of the titles

Mr Dye also gave evidence of the large number of unsuccessful-to deceased owners recorded on the titles of the 40 blocks of Maori land. In the previous few months, he said, the court's deputy registrar had filed approximately 500 applications for succession in order to bring the blocks' ownership more up to date.³⁷ Mr Dye estimated that there would be approximately 4400 owners if the blocks were amalgamated.³⁸

Mr Dye later advised the court of his calculation of the proportion of owners whose interests were worth less than £25 and thus were classified as 'uneconomic' under the Maori Affairs Act 1953. He stated that, on Tasman's valuations of the land, some 3590 of the approximately 4400 owners would have uneconomic interests. On the lower Government valuations of the land, Mr Dye said that 'possibly none' of the owners would have interests worth more than £25.³⁹

In his evidence to the Maori Land Court, the Deputy Secretary of Maori Affairs, Mr BE Souter, described the fragmented state of Maori land ownership as generally 'impossible', and he made it plain that he saw the joint-venture proposal to exchange the owners' shares in land for shares in a company as a solution to that problem. As he noted, the minimum company shareholding was £1, whereas land shares could get smaller and smaller.⁴⁰

3.2.6 Putauaki maunga

Traditionally, Putauaki is important to both Ngati Awa and Tuwharetoa ki Kawerau.⁴¹ Ngati Awa's traditional expression of tribal identity begins 'Ko Putauaki te maunga, ko Ngati Awa te iwi' or, again, 'Ko Putauaki te maunga, ko Rangitaiki te awa, ko Te Rangitukehu te tangata'.⁴² The mountain is also mentioned in various Ngati Awa tauparapara, ngeri, waiata, and whakatauki.⁴³ Tuwharetoa ki Kawerau likewise state: 'Ko Putauaki te maunga, ko Aotahi te tangata, ko Te Takanga o Apa te wai' or, alternatively, 'Ko Putauaki te maunga, ko Tarawera te awa, Ko Tuwharetoa te tangata'.⁴⁴

Both groups refer to the existence of burial caves on the mountain containing the bones of their tipuna.⁴⁵ A letter dated 15 October 1879 from the Ngati Awa Committee to Government officials indicates that the caves must have been used for this purpose for many years:

37. Document A33, p c5

38. Ibid, p B4

39. Ibid, p w2

40. Ibid, p R1

41. The relationship between these two groups was discussed in chapter 1.

42. Te Roopu Whakaemi Korero o Ngati Awa, *Putauaki Maunga: Cultural Symbol of Ngati Awa: A Report Prepared in Support of Claim Wai 46* (Whakatane: Te Runanga o Ngati Awa, 1994) (Wai 46 RO1, doc B8), pp 1, 3, 26

43. Ibid, pp 25, 27; doc A21, para 23

44. Christine Peters, 'Putauaki', Tuwharetoa ki Kawerau submission to the Waitangi Tribunal, 1995 (Wai 46 RO1, doc 17), pp 9, 25; Jane Luiten, 'Historical Research Report', report commissioned by Te Runanga o Tuwharetoa ki Kawerau, 1995 (Wai 46 RO1, doc 15), cover verso

45. Claim 1.3(d), para 4; Te Roopu Whakaemi Korero o Ngati Awa, pp 27–29; Peters, pp 9, 23–25

Friend the Administrators of the Colony of New Zealand, this is our word respecting Putauaki (Mount Edgecumbe) from the top of this mountain Putauaki, right down to its base and encircling the whole of the mountain is a burial ground (our dead are buried under it). Let this mountain be set apart for a burial ground the caves in which the thousands of the dead are lying are Te Piripiri, Ta Takanga, Te Niho-o-te-Kiore, Pohaiturua and Rangitatau, let the Government be sure to give effect to this word of ours and let the Queen's seal be affixed to make this mountain Putauaki a burial ground.⁴⁶

That the caves were sacred to both Tuwharetoa and Ngati Awa is confirmed by the evidence of Penetito Hawea to the Native Land Court in 1881:

My tombs where my dead lie are at Mount Edgecumbe. All the dead of Tuwharetoa and N'Awa are in those tombs. When the Chiefs die they are taken to the peak on Mt Edgecumbe[;] the others are placed in other tombs. The name of the tomb on Mt Edgecumbe is Rangitatau. Another called Te Rahoo Maio is at the foot of Mt Edgecumbe where there is also another which name I have forgotten.⁴⁷

Among the chiefs buried on the summit of Putauaki was Rangitukehu of Ngati Awa.⁴⁸ The cave known as Te Niho-o-te-Kiore was the burial place of Te Rau o Te Huia, whose interment in 1858 was the last recorded burial on the mountain.⁴⁹ She was the aunt of Dr Eruera Manuera, the paramount chief of Ngati Awa at the time that the Tarawera Forest scheme was developed and implemented. At the Tribunal hearing, Dr Manuera's daughter, Te Rau o Te Huia Cameron, stated that most tribal traditions recorded the associations of different hapu of the district with the mountain, including the interment of their dead there. She confirmed that 'where people are interred, the mountain remains constantly in a sacred state'.⁵⁰

Putauaki was also of strategic importance. Set between the Tarawera and Rangitaiki Rivers, it dominates the plain that extends northwards to the Bay of Plenty coastline – an area that was once swampland but which has since been drained. Tuwharetoa ki Kawerau note that the pa of their ancestor Aotahi was at the base of Putauaki, and Ngati Awa recount that, when that pa was attacked and overcome by Te Arawa, a force of Ngai Te Rangihouhiri and Te Pahipoto fighting men came to the aid of Tuwharetoa and drove off the attackers.⁵¹ This was the battle of Parawera-nui, and the involvement of Ngai Te Rangihouhiri and Te Pahipoto, both hapu of Ngati Awa, underlines the close links between Tuwharetoa ki Kawerau and Ngati Awa.

The intersection of interests between the two groups is further evident in their descriptions of their rohe. As indicated in their evidence to the eastern Bay of Plenty Tribunal, the

46. Te Roopu Whakaemi Korero o Ngati Awa, p 60

47. Putauaki hearing, Whatakatane minute book 1, 1881, fol 205 (Wai 46 R01, doc 17(a), p 90)

48. 'Putauaki-Mt Edgecumbe', 24 December 1981, Tarawera file, Maori Land Court, Rotorua (cited in doc B67, p9)

49. Oral evidence of John Hunia, 9 June 2000, tape 11, side A

50. Oral evidence of Te Rau o Te Huia Cameron, 7 June 2000, tape 6, side A

51. Peters, p 7; Te Roopu Whakaemi Korero o Ngati Awa, p 23



Caroline Finn

Putauaki from the south-west

rohe of Tuwharetoa ki Kawerau extends inland from the coast between Otamarakau and Wahieroa, and takes in Putauaki – the mountain being one of their boundary markers.⁵² The rohe over which Ngati Awa claim manawhenua is considerably wider, embracing the whole of that area plus more land beyond.⁵³ As shown on map 2, it takes in the whole of Putauaki. Both groups thus have a shared interest in the fate of mountain – and, indeed, Ngati Awa have acknowledged that their attachment to Putauaki is not exclusive of the interests of other groups.⁵⁴ Tuwharetoa ki Kawerau, likewise, have acknowledged that the histories and interests of Ngati Awa and Tuwharetoa are closely intertwined.⁵⁵

(1) Confiscation and return of the northern half of the mountain

In 1866, Putauaki was selected to mark a boundary point of the Bay of Plenty confiscation district and, as a consequence, the northern half of the mountain was taken by the Crown. In 1874, following the investigations of the Compensation Commission, Putauaki was returned to Maori ownership as part of a 12,710-acre block designated lot 59 Matata Parish. It was granted, under the trusteeship of Rangitukehu, Hoani Tuhimata, and Tiopira Hukeke, to 86 named members of the Ngati Awa hapu Te Pahipoto and Nga Maihi, but was to be alienable with the consent of the Governor in Council.⁵⁶ A royal commission of inquiry into

52. Peters, p 9

53. Claim 1.3, para 3.1; doc A14, para 4; doc A21, paras 10–11

54. Document A21, para 12; doc A27, para 16

55. Peters, pp 14–20

56. 'Bay of Plenty District: Schedule No 29, 1872', *New Zealand Gazette*, 1874, no 60, p 789

3.2.6(2)

confiscated lands later noted that the award in lot 59 was 'strictly a compensation award', unrelated to ancestral 'takes' (rights). However, it continued, 'the owners took it upon themselves to arrange the shares', and 'this arrangement, at the wish of the Natives, was confirmed by the Court'.⁵⁷ This resulted in a smaller number of shares for Nga Maihi than for Te Pahipoto.⁵⁸

The Matata lot 59 block later underwent various subdivisions and, on 13 October 1920, the northern half of the mountain became part of the 1362.7-acre block Matata 59B1.⁵⁹ From the 1920s through to the middle of the twentieth century, several petitions were made to Parliament in connection with various of the confiscated lands in the Parish of Matata. On each occasion, however, the Native Affairs Committee (or its successor, the Maori Affairs Committee) declined to make any recommendation, and the ownership of the blocks concerned, including Matata 59B1, remained unchanged. The northern half of Putauaki, in Matata 59B1, therefore remained in Maori hands until it was amalgamated into the Tarawera 1 block in 1966 and then alienated to Tarawera Forest Limited.

(2) *The southern half of the mountain*

Title to the southern half of Putauaki was determined by the Native Land Court on 11 October 1881. Judge Brookfield awarded a block designated the 'Putauaki block' to Ngati Awa but stipulated that Hakopa Takapou, of the Ngati Aotahi hapu (Ngati Tuwharetoa), be included in the list of owners. At the hearing, the Ngati Awa claimants were led by Penetito Hawea, of the Nga Maihi hapu. Two groups of counterclaimants were present, being described as Ngati Rangitahi (of Te Arawa) and 'Urewera', but the judge found against them.⁶⁰

The Putauaki block was estimated to contain 7800 acres, and the land was to be 'inalienable by request of the whole tribe'. Only 10 days later, the block was subdivided, with the larger part, Putauaki 1, being 'awarded to 16 persons for the purposes of sale'.⁶¹ This block of 5243 acres was purchased by the Crown, whose agents had evidently been negotiating for it for the past two years, and 80 years later, at the time of the joint venture, was held by the Forest Service, which had already begun planting it in exotic forest.⁶² Putauaki 2, of 2116 acres and containing the southern half of the mountain, remained in Maori ownership until it too was amalgamated into Tarawera 1 in 1966 and then alienated to Tarawera Forest Limited.⁶³

57. 'Confiscated Native Lands and Other Grievances: Report of Royal Commission to Inquire into Confiscations of Native Lands and Other Grievances Alleged by Natives', AJHR, 1928, G-7, p 23

58. Nga Maihi can whakapapa to Te Aotahi, but both they and Te Pahipoto are accepted by Ngati Tuwharetoa as being part of Ngati Awa: Peters, p 22.

59. 'Order Cancelling Several Titles', sch 1

60. Putauaki hearing, 11 October 1881, Whakatane minute book 1, 1881, fols 270-274

61. Ibid, fols 338-340, 349 (cited in Harris Martin, 'Report', report commissioned by the Waitangi Tribunal, undated (Wai 46 RO1, doc 12), pt 1, sec (g), 'Putauaki')

62. Te Roopu Whakaemi Korero o Ngati Awa, pp 39, 63; area given in Treasury, 'Crown Land for Tasman Company', p 2)

63. The figure of 2116 acres was taken from the Tasman booklet, and was obtained by adding the area of the Putauaki 2 block given there and the area of mountain reserve 2.

3.3 ORIGINS OF THE JOINT-VENTURE PROPOSAL

In 1960, wishing to secure long-term economic supplies of wood for its planned development and expansion of its Kawerau pulp and paper plant, Tasman proposed that Crown land between Kaingaroa Forest and Kawerau should be leased to it for 99 years for the planting of production forests. The proposal was rejected by the Tasman Cabinet Committee on the ground that Crown land should be made available only to the Forest Service for the purpose of growing trees to supply Tasman.⁶⁴ Tasman repeated its proposal the following year, after a change of government, seeking a zone of 60,000 acres in the Bay of Plenty area. This time, the Tasman Cabinet Committee asked the Treasury to prepare a report.⁶⁵ The Treasury considered that there was 'justification' for assisting Tasman to 'obtain a total of around 60,000 acres' in the Tarawera Valley, a process that would involve 'some release of Crown land and such help as can properly be arranged in acquiring Maori land in the area near Kawerau'. The Treasury also noted that 'there seems no urgency in determining where and when the blocks can be made available', partly because the Forest Service and Tasman 'have enough land available now to proceed with their planting programmes for the next two or three years' and 'acquisition of the Maori owned blocks takes time, and will probably have to be done piecemeal'.⁶⁶ Cabinet accepted the Treasury's recommendations.⁶⁷

In communicating the Government's decision to Tasman in March 1962, the Minister for Lands and Forests, Mr R G Gerard, stressed that there was no urgency to resolve the matter.⁶⁸ However, the then managing director of Tasman, Mr D W Timmis, disagreed strongly in his reply of June 1962, claiming that Tasman had only enough land for its planting programme to last until the end of 1963. Mr Timmis also stressed that Tasman needed to secure control over all 60,000 acres of plantable land in the Tarawera Valley and that, if this were not possible, it would need to 'recast' its entire planting programme. He wanted the negotiations for the Crown land to begin immediately and noted that 'negotiations' were already under way 'for other parts of the area involved'.⁶⁹

3.4 CROWN-TASMAN DISCUSSIONS TO EARLY 1963

In late November 1962, the Tasman Cabinet Committee recommended that the Director-General of Forests, Mr A L Poole, begin negotiating with Tasman on the method of providing

64. Document A10, pp 5-6

65. Ibid, p 6

66. Treasury, 'Crown Land for Tasman Company' (cited in doc A10, pp 6-7)

67. Document A10, p 7

68. Gerard to managing director, Tasman, 20 March 1962, AAFD124/3/4, pt 1 (cited in doc A10, p 7)

69. Timmis to Gerard, 1 June 1962, FS83/503, vol 1 (cited in doc A10, p 8). Battersby states that the 'other parts' subject to negotiation were the Maori-owned Pokohu blocks. As it transpired, those blocks were not purchased by Tasman but were part of the 40 blocks of Maori land amalgamated into the Tarawera 1 block and, ultimately, transferred to TFL.

it with land for afforestation.⁷⁰ Within a month, Messrs Poole and Timmis had discussed what Crown historian Dr John Battersby describes as ‘a leasing scheme based on a stumpage formula’. Mr Poole then made a formal proposal to Tasman that Crown land be leased to Tasman for a low annual rental of 5 per cent of Government valuation, reviewable every 10 years, plus, at the time of harvesting, a delayed land rental amounting to half the ‘added or proximity value’ of Tarawera Valley wood compared with Kaingaroa Forest wood. He noted that, conventionally, any added value to the land brought about by outside influences accrues to the landowner only, and trusted that Tasman would appreciate the ‘unconventionally generous terms’ it was being offered in this stumpage formula.⁷¹

Although Maori land was not discussed in any detail, it was noted that, if Maori were willing to sell their land in the area, the Government would purchase it and lease it to Tasman. If, on the other hand, Maori would not sell, the Government would lease the land and then sub-let it to Tasman. Mr Poole also thought it ‘most desirable for the Crown to conduct all negotiations for the purchase or leasing of Maori land, otherwise the prices would be forced up’. He considered that, were this to happen, it would be likely that the higher prices or rentals paid by Tasman would be taken into account in the Government valuation of Crown lands, thus increasing the annual rental that Tasman would be required to pay.⁷²

On 4 March 1963, Tasman responded with an alternative – and novel – proposal that a joint-venture company be established to plant and manage a forest in the Tarawera Valley. Under this scheme, Tasman and the Crown would sell their land in the valley to the company, ‘at a fair and reasonable present-day price’, in exchange for debentures convertible into shares once the forest came into production. The finance to develop the forest would be provided by Tasman and would be included in its capital contribution to the company. The proposal stated that Maori land would be ‘acquired directly by the forestry company on lease or otherwise as may be negotiated with the owners. The participation in profit by Maori owners would be arranged to be similar in effect to the participation in profit by the Crown.’⁷³

Tasman’s general manager in the first half of 1963, Mr GJ Schmitt, much later shed some light on the thinking behind the joint-venture proposal, albeit coloured by subsequent events. Mr Schmitt claimed in a statement recorded in 1984, and revised in 1998, that he rejected leasing the Maori land for two reasons. One was that a forestry leasing proposal near Taupo that provided for a peppercorn rental during development and a share of the proceeds to the owners when logging commenced (such as that proposed by Mr Poole for the Crown land in the Tarawera Valley) was ‘subject to bitter challenge by Maori owners’.⁷⁴ The other was that

70. Poole to Thomson, 3 December 1962, FS83/503, vol 1 (doc A5(5.6)) (cited in doc A10, p 11)

71. Poole to Timmis, 20 December 1962, FS83/503 (doc A5(5.6)) (cited in doc A10, p 11)

72. Ibid

73. Tasman Pulp and Paper Company Limited, ‘Crown Land for Forestry – Tarawera Valley’, typescript, 4 March 1963, FS83/503 vol 1 (doc A5(6.1))

74. If that is a reference to the lease between the Crown and the Lake Taupo Forest Trust, which, the Tribunal was told, was negotiated between 1967 and 1969 (see sec 10.3.6), it would seem unlikely that Mr Schmitt could have relied on this reason in 1964.

Tasman wanted the forest established in perpetuity, and having 'a large and integral proportion of the land being held leasehold subject to periodic rental reviews' did not 'fit well' with that concept.

Mr Schmitt also claimed that he rejected outright purchase of the Maori land, again for two reasons. One was that it would involve 'overcoming the strong attachment of the owners to their land'. The second was that it 'raised the spectre that, in future years, when the [former] owners and their descendants saw a flourishing forest estate, they would feel and express resentment at having been taken down'. He therefore felt that Tasman:

had an obligation, and admittedly self-interest, in making an arrangement that would enhance good relations between Tasman and its neighbours. What was required was a method of enabling the Maori owners to gain a fair return on their land from its being put to use, while at the same time participating in its control and retaining an identifiable connection with it.

I therefore proposed that we should establish a joint venture of Tasman, the Crown and the Maori owners to develop the forest. I think we probably could have arranged to buy the Crown and Forest Service land but the presence of the Crown as a partner would give assurance to the Maori owners that Tasman in its management of the forest would not discriminate in its own favour against the interests of the Maori owners.⁷⁵

3.5 FOREST SERVICE EVALUATION OF THE TASMAN PROPOSAL DURING 1963

After the joint-venture proposal had been made, a long period of consideration ensued, during which various Government departments discussed and analysed the scheme. In general terms, the Treasury was supportive because of its desire for economic growth, and because Tasman, through its exports, was a big earner of foreign exchange. Similarly, Maori Affairs was keen to see the proposal advanced because of its desire to have idle Maori land brought into production. It was left mainly to the Forest Service to concern itself with the economic and forest management aspects of the scheme.

Initial correspondence between the Forest Service and Tasman established that the price Tasman had paid for private land for forestry in the Tarawera Valley was equivalent to £4 6s per acre of *plantable* land only, and that Tasman considered a 'fair and reasonable present-day market price' for the Crown land to be about £5 per acre of plantable land.⁷⁶ On that basis, the Forest Service's assistant director of forest management, Mr A D McKinnon, did an appraisal of the scheme at the end of March 1963. He recommended that the Crown land 'be made and remain permanent State Forest Land', that the Forest Service acquire or lease the

75. Document B78, pp 24-25

76. Poole to Timmis, 14 March 1963, FS83/50; Timmis to Poole, 18 March 1963 (doc A5(6.2))

Maori land and then lease all the land to Tasman, and that a profit-sharing arrangement between Maori, the Crown, and Tasman be entered into.⁷⁷ Early the following month, at a meeting of Tasman and Forest Service officials to discuss the proposal, the Forest Service reserved its position on whether the land should be sold or leased to the joint-venture company. Tasman agreed to buy all the wood from the forest at a price agreed between it and the owners of the future forest, thereby guaranteeing a market for its produce.⁷⁸

Although the Forest Service appears at this time to have supported the joint-venture proposal in principle, it stressed the need to compare it with lease-based models. Its chief accountant, Mr GC Jupp, did not recommend the scheme because the calculated return would be too low. He concluded that the proposed method of profit-sharing was unfair to the Maori landowners, that their participation should be on the same terms as the Crown, and that the Maori owners and the Crown would therefore be 'wise' to work together. Mr Jupp favoured an annual rental system based on Government land valuations revised every 10 years, with possibly a further delayed rental at the time of harvesting to recognise the enhanced land value.⁷⁹

Forest Service economist Mr HJ Beattie reported on the financial structure and profitability of the joint forestry company to be formed under Tasman's proposal. He favoured the Crown leasing its land to the company, with five-yearly rent reviews. Mr Beattie focused on Crown participation in the scheme and made only a passing comment about Maori involvement.⁸⁰ This comment does, however, imply that he foresaw Tasman leasing land from Maori and the profits that accrued from the forest.⁸¹ A report by Forest Service officer Mr DC McDonald strongly reaffirmed the view that the Crown should lease its land to Tasman rather than sell it.⁸²

On 20 May 1963, Mr AP Thomson, then director of forest management, gave Mr Poole his opinion on the Crown land question. He noted that elsewhere in New Zealand, such as at Otakanini Topu, the basis on which the Crown was negotiating leases of Maori land for afforestation was profit-sharing and that, therefore, similar arrangements should be made in the Tarawera Valley. He also thought that all Crown land in the valley should be leased to Tasman rather than sold, and that this should be on the same basis as Tasman leased the Maori land. Mr Thomson considered that at least part of the proximity value of the land should accrue to the landowners, be they Maori or the Crown.⁸³ He concluded that, if Tasman would not agree both to leasing rather than buying the land and to the type of profit-sharing

77. McKinnon to director of forest management, 27 March 1963, FS83/503, vol 1 (cited in doc A10, p 14)

78. 'Crown Land for Forestry – Tarawera Valley', 2 April 1963, FS83/503, vol 1 (cited in doc A10, p 14)

79. Jupp to director of forest management, 18 April 1963, FS83/503, vol 1 (cited in doc A10, p 15)

80. Beattie to senior investigating officer, New Zealand Forest Service, 14 May 1963, FS83/503, vol 1 (doc A5(6.13))

81. Ibid

82. McDonald to senior executive officer, 16 May 1963, FS83/503, vol 1 (cited in doc A10, p 16)

83. 'Proximity value' is the difference between the average landed cost of logs from different forests on account of one forest being closer to the mill where the logs are processed.

that the Forest Service favoured, the Forest Service should plant all Crown land in the Tarawera Valley itself.⁸⁴

Just two days later, forest management officer Mr JF Lysaght issued a short report on the Tasman proposal. He observed that the ‘weakness with the shareholding proposition is that there is no inducement to the Company to practice economy’, so that the more it spent on developing the forest, the higher its relative shareholding would be. Mr Lysaght stressed that Maori- and Crown-owned land in the valley should enter the scheme on the same basis. He thought that the Crown and Maori should not become shareholders in the company, and preferred a profit-sharing arrangement whereby the landholders accepted a 2 per cent rental with 7.5 to 9 per cent of stumpage, or no rental with 12.5 to 15 per cent of stumpage.⁸⁵

By this point, then, six Forest Service officers had presented various views on the merits of the joint-venture scheme. The flurry of activity was in preparation for a meeting between senior Forest Service officers and Tasman’s Mr Schmitt in the week beginning 20 May 1963,⁸⁶ of which, however, the Tribunal has no record. Subsequently, Mr Thomson asked Mr Beattie to do a further financial analysis of the scheme using alternative land values. This was completed in July, after Tasman had produced a written summary of the proposed capital structure. Mr Beattie concluded that the scheme ‘was a sound one which should be beneficial in its overall effects to all parties, and one which is in line with the existing Crown and Tasman tie-ups’. On the question of land values, Mr Beattie advised that between £5 and £15 an acre could be expected, and that the value should be made adjustable at five-yearly intervals to follow inflationary trends.⁸⁷ In supporting Mr Beattie’s conclusions, Mr McKinnon noted his own continuing preference for leasing, in view of ‘the strongly inflationary effect on land values, for forestry purposes, 20 to 30 years in advance of the crop being fully grown’.⁸⁸ On considering Mr Beattie’s report, Mr Thomson recommended that the Forest Service participate in the scheme and that all available Crown land in the Tarawera Valley be sold to the joint-venture company, provided that, among other conditions, the land was valued at £8 per acre and, if possible, provision was made for subsequent revaluations.⁸⁹

In response to Treasury proposals for the company’s capital structure, Mr Beattie analysed the Tasman scheme again in December 1963. He noted that the nature of Maori involvement in the scheme had yet to be determined and that Tasman was prepared to involve Maori on one of three bases – a full lease of their land, a lease with some form of share participation, or full involvement in the joint venture. Commenting that ‘it does appear advisable for the way to be left open for the Maoris to accept the scheme they find most attractive’, Mr Beattie thought that they were more likely to favour ‘a method which produces an immediate

84. Thomson to Poole, 20 May 1963, FS83/503, vol 3 (doc A5(6.15))

85. JF Lysaght, ‘Tarawera Forest Land’, file note, 22 May 1963, FS83/503, vol 1 (doc A5(6.17))

86. Schmitt to Poole, 1 May 1963 (doc A5(6.12))

87. Beattie to senior investigating officer, 4 July 1963, FS83/503, vol 1 (cited in doc A10, p 18)

88. McKinnon to Thomson, 11 July 1963, FS83/503, vol 1 (doc A5(6.24)) (cited in doc A10, p 18)

89. Thomson to Poole, 15 July 1963, FS83/503, vol 1 (doc A5(6.25)) (cited in doc A10, p 18)

3.6

income'. He therefore recommended that 'Purchase or use of the Maori land be obtained by the scheme which appeals most to the owners'. Mr Beattie also noted that the value ascribed to all the land was 'a most material factor in the scheme. Only if this value represents a fair forestry value for the land can the adequacy of the return be judged.' He accepted the Treasury's suggestion to have the price of land 'fixed realistically' and thought that Tasman's offer of £5 per acre achieved this.⁹⁰

3.6 CROWN-TASMAN DISCUSSIONS TO JULY 1964

In April 1964, the Treasury and Tasman agreed 'on the general principles for share of equity capital, namely that this would be proportionate to total outlay in money's worth of the parties'. It was also agreed to define the extent of Crown land that would go into the scheme, and to fix a value at which the land would be transferred to the new forest company. Because at that time the Forest Service was developing a forestry company incentive scheme (devised by a Mr MB Grainger of its economics division), a draft heads of agreement was proposed that specified the agreement as reached up to that point, so that 'the actual business of planting the forest' could be actioned even before the structure of the company had been finalised.⁹¹

On 17 June 1964, this first draft heads of agreement between Tasman and the Crown was produced by Tasman. It stated that the Government and Tasman had agreed on the terms upon which they would participate in the joint-venture scheme, and generally on the terms upon which participation would be offered to the Maori owners. It specified the terms for the formation of the forestry company, the basis on which the land would be transferred to it, Tasman's provision of the development costs, the debenture and shareholding arrangements, and Tasman's long-term management of the forest and utilisation of the forest's produce. It stated that the two parties also agreed that they would cooperate fully in discussions and negotiations with Maori owners about the terms of Maori participation, and that the Government would facilitate such participation by making provisions for the incorporation of the Maori owners. A section headed 'Maori Participation' stated that Maori were to be offered the opportunity to participate in the scheme in such a way that their share in the earnings and profits of the forest would be as nearly the same as if they had participated on the same basis as the Government. If Maori did not accept the Government's form of participation, three possible variants were contemplated:

- ▶ an immediate cash payment, to be treated either as a development cost to Tasman or as an advance on the Maori owners' eventual share of earnings from the forest;

90. 'Tasman Tarawera Proposals', senior investigating officer, [post 5 December 1963] (doc A5(6.39))

91. 'Forestry in the Tarawera Valley: Note of Discussion with Mr N R Davis', 21 April 1964, FS83/503, vol 1 (cited in doc A10, p 22)

- ▶ cash advances on the interest due on the debentures, again to be treated as a development cost to Tasman; and
- ▶ the leasing of all or some of the land to the forestry company instead of sale, with rental equivalent to the interest that would have been payable on debentures and a share of the profits equal to the dividend that would have been earned by their eventual shareholding in the company. Such a lease would be for not less than 99 years, with a right of compensation for improvements, including a growing crop of trees, and it would give the forestry company a perpetual right of access to forest on land owned by the forestry company.

These three ‘fallback’ options seem designed to meet possible objections by Maori that they would not get any money out of the scheme for 25 years or that their land would be sold to the company. The suggested leasing arrangement meets Mr Schmitt’s declared objection to leasing in that the terms would not require renegotiation, but it is not clear whether in this case Maori would remain partners in the joint venture.

The basis for valuing the land was to be the price set by Tasman. However, if Maori sought higher prices for their land, the price for the Crown and Tasman land would be raised accordingly to make the basis the same for all.⁹²

Accordingly, the land values proposed by Tasman were critical. On 18 June 1964, Tasman representatives met with the Forest Service’s director of forest management, Mr Thomson, in Wellington. Tasman first wanted to know how much Crown land might be available. Mr Thomson referred the matter to the Lands and Survey Department and arranged for a meeting with its Director-General, Mr RJ MacLachlan, the next morning. The other major matter discussed was Tasman’s proposed scale of land values, whereby land was categorised into six tiers according to its suitability for planting (or otherwise), together with the cost of afforestation and extraction of logs to Kawerau. Tasman had already categorised in this way the land that it had previously purchased in the Tarawera Valley, and it was proposing that the Crown and Maori contributions of land be valued according to these categories and the purchase price that Tasman had paid.

The categories proposed by Tasman ranged from class (a) – flat or slightly rolling land requiring little treatment – through to class (f) – areas in native bush which were too steep to plant or over 2000 feet above sea level. Values ranged from £10 an acre for class (a) through to nothing for class (f). Under Tasman’s schedule, the areas and average value per acre of the different landowners’ contributions, without taking proximity into account, were as shown in the table over.

Having set out this very clear table in its own discussion paper, Tasman then proposed reducing the values for Crown and Maori land to an average of £6 8s and £4 2s 8d respectively

92. ‘Draft Heads of Agreement between the New Zealand Government and Tasman Pulp and Paper Company Limited Concerning the Development of Exotic Forest in the Tarawera Valley Area’, 17 June 1964 (doc A5(7.14))

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3.7

Land	Area (acres)	Average value (per acre)
Tasman-owned land	13,420*	£2 9s 6d
State forest land	5243	£8 3s
Other Crown-owned land	5082	£8 2s 6d
Maori-owned land	41,548	£4 14s 9d

* Tasman was here counting only its three 1961–62 land purchases, which increased the average price per acre from the £2 7s quoted in section 2.5.1. It also included 5980 acres of land in class (f), valued at nothing, which had the effect of reducing the average per acre value from the £4 6s quoted earlier, which was for plantable land only.

Source: 'Notes on Valuation of Land: Tarawera Valley', typescript, 9 June 1964, FS83/503, vol1 (doc A5(7.12))

in order to compensate for their extra distance from the Kawerau mill.⁹³ In his report on the meeting, however, Mr Thomson, though noting the proposed reduction for lack of proximity, quotes the figures given in this table.⁹⁴ It is not clear whether he was given only these figures by Tasman or (like Dr Battersby later) simply overlooked the less prominent reduced value for extra distance.⁹⁵ Mr Thomson then stated that the valuations for Crown and State forest land were 'very much in line with' the minimum figure for consideration previously set by the Forest Service. He thought that this classification approach was sensible and had agreed to it in principle, but he had told Tasman that the Forest Service would have to check the classifications on the ground as well as the actual and relative values given to the different categories.⁹⁶

At the meeting the next day with Mr MacLachlan, Tasman made it clear that it wanted 'a concrete agreement with the Government over land available for planting so that they [Tasman] could then go to the owners of Maori land to invite their participation as a third party in the joint planting venture'.⁹⁷

3.7 DISCUSSIONS WITH MAORI OWNERS TO JULY 1964

Since Tasman was about to invite the Maori to participate, it is appropriate to pause at this point to see what efforts had already been made to ascertain whether Maori would be willing to do so. The picture is not clear.

93. 'Notes on Valuation of Land: Tarawera Valley Forest Development', typescript, 9 June 1964, FS83/503, vol1 (doc A5(7.12))

94. Thomson, 'Tarawera Valley Land', file note, [18 June 1964] (doc A5(7.22)). The note was presumably written on 18 June 1964, because the meeting with the Department of Lands and Survey was held on 19 June. For a report of this meeting, see 'Crown Land for Tasman Afforestation: Tarawera Valley', file note, 19 June 1964, FS83/503, vol1 (doc A5(7.22)).

95. Document A10, p 25

96. Thomson, 'Tarawera Valley Land', file note, [18 June 1964] (doc A5(7.22))

97. 'Crown Land for Tasman Afforestation: Tarawera Valley', file note, 19 June 1964, FS83/503, vol1 (doc A5(7.22))

In mid-1962, Mr Timmis, then managing director of Tasman, noted that negotiations were already under way for 'other parts [ie, not Crown-owned parts] of the area involved' in the Tarawera Valley. The only evidence that the Tribunal has of such 'negotiations' is a meeting on 13 January 1962 between Mr Timmis and Sir Turi Carroll (then the chairman of the New Zealand Maori Council), Mr J Boynton (a Waimana dairy farmer and a member of the Waiariki Maori Council), and Mr R Paku (a sheep farmer).⁹⁸ A file note about that meeting apparently states that Tasman 'did not want to necessarily purchase land from Maori Owners' but wanted to 'work on a cooperative basis'. It also states that 'The Maori representatives expressed their enthusiasm for a partnership but stressed that a certain sum be paid to the owners annually so the [sic] both present and future owners would receive some income'.⁹⁹

Mr Schmitt, in the Maori Land Court hearing in 1966, read a prepared statement of evidence which referred to the joint-venture proposal being discussed originally 'with the Government in 1963 and with the Maoris in 1964'.¹⁰⁰ Cross-examined as to whether this indicated Tasman's concern to obtain Government approval of the scheme before going to the Maori owners, Mr Schmitt sought to amend his statement so that 1963 was recorded as the date for the original discussions both with the Government and with the Maori owners. When questioned further about the discussions with Maori in 1963, however, he said that he could not remember how many discussions had taken place and that he had taken part in very few of them:

They were conducted by my officers informally in the course of their business getting around the area, except for the one discussion conducted by my predecessor in Kawerau with a group of whom Sir Turi Carroll was one. This would have been 1962 or 1963. It could not have been later than July 1963 because he was not my predecessor [then].¹⁰¹

In his interview with Dr Battersby in 2000, Professor Schmitt stated that he did not meet with either national or local Maori leaders to discuss the joint-venture proposal before or around 1964, but that he was confident that other Tasman staff had: 'They knew them and belonged to the same golf club and so forth'.¹⁰² In his brief of evidence to the Tribunal, Mr Schmitt stated that, in the three or four years following the genesis of the proposal, 'literally dozens of meetings with different groups of Maori owners were held'.¹⁰³

98. It is unlikely that any of these men had a direct connection with the Tarawera Valley land – two were Ngati Kahungunu. It seems that they were chosen as men of mana.

99. S Reidpath, file note, 16 November 1962 (cited in 'Main Features of the Tarawera Forest Proposal History', typescript, undated (doc A5(3.1)), p 1)

100. Document A33, p D4b

101. Ibid, p E2

102. 'Transcript of Interview between Dr J Battersby and Professor Schmitt, 1 August 2000' (doc B78, p 5)

103. Document B78, p 25

Apart from the January 1962 meeting, the Tribunal has been given no details about meetings with Maori owners before July 1964.¹⁰⁴ However, Mr Schmitt's recollection of meetings, or at least discussions, between Tasman representatives and some Maori landowners before July 1964 is supported by other evidence. During 1962, as noted in section 2.3.3, the Department of Maori Affairs and the Forest Service were considering Maori land thought to be suitable for forestry development. At the end of November 1962, the Director-General of Forests, Mr Poole, wrote to the Secretary of Maori Affairs setting out a schedule of Maori land blocks around the country identified by conservancy officers as being so suitable. Included were 'Pokohu-Putauaki (30,800 acres)' and 'Putauaki No 2 and Pt [Matata] 59B2A and 59B1 Blocks (5,000 acres)'. Alongside the names of those two groups of blocks is a note which reads: 'This area . . . meets all requirements and is possibly the most suitable of all these detailed. Its acquisition is regarded as being of considerable importance.'¹⁰⁵

By mid-1963, it seems that both Tasman representatives and Crown officers had, separately, been in contact with some Maori owners in the Tarawera Valley. A file note on 5 June by the Deputy Secretary of Maori Affairs, Mr BE Souter, records with regard to 'Pokohu-Putauaki' that 'Tasman Pulp and Paper Mills are conducting negotiations direct with owners. Are said to be making progress.'¹⁰⁶ Six weeks later, a letter from Mr MacLachlan to Mr Poole refers to 'preliminary enquiries' made by a Maori investigating officer in the Lands and Survey Department, Mr W Roberts, 'towards the Crown purchase of the Pokohu Blocks'.¹⁰⁷ After noting that those inquiries involved a meeting with 'tribal executives at the Kawerau Pa', the letter quotes from Mr Roberts's report that 'most of the tribal leaders' had understood that Tasman and the Crown were competing to acquire the Pokohu land and that 'some suspicion and concern' had been caused when Tasman representatives made it known that their company was endeavouring to obtain title to the adjacent Crown land.

Also quoted is Mr Roberts's request that he might 'take some of the leading tribal executives sufficiently into our confidence, so that suspicion is removed and the Crown's intentions and motives are understood'. Mr MacLachlan then comments:

The question of what is disclosed to the Maori owners at this stage is a matter which mainly affects the Forest Service but my own views are that we should be open with the Maori leaders.¹⁰⁸

104. Under questioning before the Tribunal, Dr Battersby conceded that the final sentence on page 27 of his report, in which he stated that the 'evidence suggests . . . that Tasman first consulted Maori elders on the proposal, and only after that, put it to the government in March 1963', could probably be deleted in the absence of any strong evidence: John Battersby, 9 June 2000.

105. Poole to Secretary of Maori Affairs, 30 November 1962, MA w2490 58/1, Archives New Zealand, Wellington

106. Souter, file note, 5 June 1963, MA w2490 58/1, vol 1, Archives New Zealand, Wellington

107. The brochure Tasman produced on the joint-venture proposal before the December 1965 meeting of owners at Kokohinau Pa referred to a 'special Government valuation' having been done for four of the Pokohu blocks in December 1963. This valuation may well have been undertaken in connection with discussions between the blocks' owners and Crown officials concerning the alienation of these lands: *Proposal By Tasman Pulp and Paper Company Limited*, p 2 (p 121).

108. MacLachlan to Director-General of Forests, 24 July 1963, LS10/92/27 (doc A5(6.28))

In his reply, Mr Poole agreed that the Maori owners should be told 'at some stage' what the Crown's attitude now was to their land in the Tarawera Valley. First, however, he thought that the Government 'should be in a position of having reached an agreement' on the proposed company arrangement by which Tasman and the Crown would develop Crown land. Accordingly, he wanted the Department of Lands and Survey to finalise the area and value of the Crown land that was to form part of the scheme and Treasury to give an opinion on its value. Once that information was to hand, Mr Poole envisaged 'a meeting of all three Departments to reach agreement before finalising negotiations with Tasman'. It was at that point, he said, that 'Tasman should negotiate with the Maori owners for their land'. In view of this scenario, Mr Poole stated that Mr Roberts 'could be advised to cease any negotiations on behalf of the Crown and he could probably indicate to the Maori owners the nature of the negotiations that are proceeding'. As well, Mr Poole thought it important that the Maori owners be told that the Government was 'anxious . . . to have as much land as possible planted in the Tarawera Valley'.¹⁰⁹

By April the following year, however, it seems that the Government had yet to convey its position to the Maori landowners in the Tarawera Valley. On 29 April 1964, the Hamilton commissioner of Crown lands, Mr Beachman, reported to Mr MacLachlan that some of the more influential owners had told him that they had been advised, through Tasman, that the joint-venture company had already been formed and that their lands were to be included. Noting that those owners 'had become suspicious of Crown dealings through the lack of approach or other information from the Crown on the proposal', Mr Beachman added that, if the owners' information 'does have some basis', then 'it would be more tactful for this department to keep the more senior and influential owners informed'. 'This would also keep the high respect for this department these people have been found to have and also assist in negotiations of a lesser value.'¹¹⁰

3.8 INVOLVEMENT OF MAORI OWNERS

At a meeting at the Maori Affairs Department offices in Rotorua on 1 July 1964, Tasman representatives discussed the joint-venture proposal with the district officer, Mr Barber, his assistant, Harris Martin, and special titles officer Mr J A Dye. They looked at the ownership of the Maori land to determine the numbers that might be affected and to find 'representative owners' who might be approached. It was decided that 'exploratory discussions' should be

109. Poole to Director-General of Lands, 7 August 1963, FS83/503, vol 1 (doc A5(6.33)) (cited in doc A10, p 20)

110. Beachman to Director-General of Lands, 29 April 1964, LS10/92/27, pt 1 (cited in doc A10, pp 22–23). The interpretation of the final sentence in the quotation was the subject of attention during the Tribunal hearing: under cross-examination by claimant counsel Dr Harrison, Dr Battersby maintained that 'negotiations of a lesser value' meant less significant negotiations and did not represent an attempt to keep prices for Maori land down.

held with ‘a select group of three or four of the most influential owners’, and then later with ‘twelve to fifteen representative elders – partly on a tribal and partly on an ownership basis’.¹¹¹

The ‘exploratory discussions’ took place on 28 July 1964, but beforehand, in two memoranda to Maori Affairs head office, Mr Barber speculated on the machinery available to implement the proposal. In the first memorandum, dated 7 July, he thought that, while special legislation might be required, both Part xxii and Part xxiv of the Maori Affairs Act 1953 could be used (see sec 2.2.5(1), (3)). He preferred the latter possibility, because it allowed ‘closer control of the land’ in the long term.¹¹² In his second memorandum two weeks later, Mr Barber thought that the new section 376A of the 1953 Act might be ‘sufficiently comprehensive’.¹¹³

Mr R J Blane of Maori Affairs head office, representing the Maori Trustee, replied on 27 July that Part xxiv was not suitable because it was intended mainly for farming purposes, and he suggested incorporation under Part xxii or, alternatively, the creation of trusts under section 438.¹¹⁴ Mr T B Henry, representing the Maori Trustee in Rotorua, responded on 19 August that Tasman did not favour dealing with a committee of management under the Part xxii incorporation provisions or with individual trustees under section 438. He thought that the best solution would be for all the lands to be vested in the Maori Trustee under section 438.¹¹⁵ Mr Blane in his reply of 31 August questioned the argument that Tasman ‘would not like dealing with a committee of management’, because, once the shares in the venture had been acquired, the shareholders ‘will have to go along with the scheme’. He continued to favour incorporation under Part xxii, and could see no ‘particular reason for bringing in the Maori Trustee’.¹¹⁶

After a second meeting of Maori owners on 1 October 1964, Mr Dye wrote in a memorandum to Maori Affairs head office on 27 October that Part xxii, which was intended for body corporates to deal with land, would not be suitable for a joint venture involving debentures and shares. The Rotorua district office was now considering whether a Maori trust board could be established to hold the debenture and shareholding in a joint-venture company, and it sought head office’s views on this idea.¹¹⁷

3.9 THE FIRST MEETING WITH MAORI LANDOWNERS, 28 JULY 1964

3.9.1 Attendance

As a result of the 1 July meeting, Messrs Barber and Dye and a Tasman representative, Mr MDH McKee (the general manager of the Kaingaroa Logging Company), met with four

111. Barber to head office, Maori Affairs, 1 July 1964, MA 58/2/1, pt1 (cited in doc A10, p 28)

112. Document B1, vol 1, pp 42–43

113. Ibid, p 39

114. Ibid, p 36

115. Ibid, p 37

116. Ibid, p 38

117. Ibid, p 35

Maori landowners at the Maori Affairs offices in Rotorua on 28 July 1964. The four – John Te Herekiele Grace, Phillip Howell, Pokiha Hemana (the paramount chief of Ngati Pikiao), and Albert Bennett (later the secretary of the Arawa Trust Board) – were all prominent in Te Arawa and Tuwharetoa.

Two sets of minutes of the meeting were compiled, one by Mr Dye and the other by Mr McKee.¹¹⁸

3.9.2 The joint-venture proposal outlined

Tasman produced a written outline of the proposal for the meeting. It stated that Government officials and Tasman had reached broad agreement on the terms on which both Tasman and the Government would participate in a joint forestry venture, and that it was ‘now desired to offer the Maori landowners a chance to join the forest venture on similar terms’. Each partner’s land would be exchanged for debentures in a new forestry company which were to be equivalent to the value of their land based on the cost to prepare it for forestry, its topography, and its proximity to Tasman’s mill. Once the forest had been planted and had come into production – a process expected to take 25 years – the debentures would be converted into shares equal to the initial value of the land plus compounded interest at 6 per cent per annum. Tasman’s development costs would also compound at that rate. The example was given that, if Maori contributed 40,000 acres with a value of £4 per acre, their proportion of the share capital after 25 years would be 14 per cent.¹¹⁹

3.9.3 The land involved

Mr McKee presented the proposal to the four landowners. He stated that, of the lands considered suitable for afforestation in the Tarawera Valley, Tasman had by then purchased approximately 20,000 acres, the Crown owned between 10,000 and 15,000 acres, and Maori possessed between 30,000 and 40,000 acres. He discussed the varying quality of the lands and how all lands placed in the scheme would be valued using the same criteria. He believed that the land in the Tarawera area was valued at about £2 10s per acre, while land in the Matata basin (lot 59 blocks) would be valued at around £6 to £8 per acre. He also said that Tasman intended to make an aerial survey of the land.¹²⁰

118. J A Dye, ‘Pokohu and Other Blocks (Near Kawerau) – Afforestation’ minutes of 28 July 1964 meeting, 30 July 1964, pp 1–2 (doc A4, vol 2, pp 1–2); minutes of 28 July 1964 meeting, undated, pp 1–3 (doc A4, vol 2, p 3–5)

119. ‘Development of an Exotic Forest in the Tarawera Valley’, [prior to 23 July 1964], MA58/2/1, pt 1; doc B1, vol 1, pp 40–41

120. J A Dye, ‘Pokohu and Other Blocks (Near Kawerau) – Afforestation’, p 1 (p 1)

3.9.4 Owners' reactions

Mr Grace then asked Mr McKee a range of questions which demonstrated his awareness that the valuation given to Maori-owned land at the inception of the scheme would greatly influence the final shareholding. In particular, according to Mr Dye, he was concerned that the shareholdings should be fixed at the outset, not in 25 years, since, 'owing to the variation of capital that might be contributed by Tasman, the Maori ratio of shareholding could decrease'.¹²¹

Mr McKee gives more detail. Mr Grace was concerned that:

while we could calculate the amount of capital and therefore the compounded value 25 years hence of land going into the proposal, this was not the case with forest costs. . . . It was considered that on present day values a fair and equitable value of land could be arrived at by placing a forest value on it but Mr Grace pointed out that this value may not necessarily be an equitable value of land in the future. While compounding at 6% interest of the value placed on land today might appear to give an equitable return, the costs of growing and managing a forest were also to be compounded at 6% and since many of these costs are not today's costs but future costs, any comparison between the compounded value of land and compounded value of forest costs as worked out on today's prices and costs must inevitably vary when actual future costs are involved. Since it is almost inevitable that future costs will rise, the result will be a lowering of the share of land in the final overall forest value.¹²²

Mr McKee continued, saying that the Maori owners present:

were concerned not only with what was reasonable and equitable for land value today but that those values would be reasonable and equitable in the future. They instanced cases of land leases where when the leases were set on terms of 21 to 40 years at what was recognized at the time . . . as a fair and equitable price, they were no longer even reasonable prices towards the end of the lease term.¹²³

The composition of the board of directors was then discussed, with Mr McKee reporting that it was proposed to have five directors: one appointed by the Crown, one by Maori, and three by Tasman. Attention turned next to title requirements and the possibility of amalgamation. Mr Dye suggested that 'it might be advisable to cancel the titles into three or four groups according to location'. Mr Barber responded that one title would be preferable but that within that title 'there could be subsidiary groups to provide for sub-tribal or hapu divisions'.¹²⁴

121. J A Dye, 'Pokohu and Other Blocks (Near Kawerau) – Afforestation', p 2 (p 2)

122. Document B25, pp 3–4

123. Ibid, p 4

124. J A Dye, 'Pokohu and Other Blocks (Near Kawerau) – Afforestation', p 2 (p 2)

It was decided finally that a further meeting would be held, with wider Government representation present, at which more information would be given on both the financial aspects and the land involved.¹²⁵

3.10 THE FOREST SERVICE CONTINUES ITS EVALUATION

By the beginning of August 1964, Tasman's schedule of land classifications and values (see sec 3.6) had been assessed by Mr D Kennedy, the conservator of forests at Rotorua. He advised Mr Poole that the schedule appeared to be 'reasonable in both conception and interpretation' and that it should be 'accepted in principle at this stage'.¹²⁶ He did, however, consider that a more precise classification of each partner's land contribution was necessary. He also disputed the low values attributed to class (e) and (f) land and the different values attributed to class (d) and (e) land; overall he felt that the values were 'on the low side'. Accordingly, he proposed a new schedule of values, in which land in classes (a) to (c) was increased by £1 per acre, the value of class (d) land was lowered, and the values for class (e) and (f) land (the latter being previously nil) was significantly increased. He then reassessed Tasman's proximity values, calculating that the Maori Putauaki block was worth '£1.8' more than Tasman land, the State forest land '£1.09' more and the Crown land '£1.45' less.¹²⁷ A week later, Mr Poole advised the Rotorua office that he had recommended to the Department of Lands and Survey that it accept both Tasman's approximate land classifications (at least until a more accurate classification could be made) and the revised values proposed by Mr Kennedy.¹²⁸

The second draft heads of agreement between the Government and Tasman was produced by Tasman on 10 September 1964. It followed the lines of the June draft very closely, but added a formula for valuing separately from the land the forest growing on the land, and associated improvements to the land that Tasman and the Crown were each contributing. It also added a new section providing explicitly that the full benefit of any future taxation allowances and incentives or other Government assistance for forestry projects would accrue to the forestry company, and that any special tax benefit gained by any partner from contributing to the cost of establishment or management of the forest would be deducted from that partner's compounded value of contributions to the joint venture.¹²⁹

125. Ibid

126. Kennedy to Director-General of Forests, 6 August 1964, p 1, FS83/503, vol 1 (cited in Battersby, p 30); 'Tarawera Valley Land', 17 August 1964, p 1, FS83/503, vol 1 (cited in Battersby, p 30)

127. A table setting out Tasman's June 1964 valuations and Kennedy's revisions can be found in document A10, p 32.

128. Poole to Forest Service, Rotorua, 24 August 1964, FS83/503 (doc A5(7.27))

129. 'Heads of Agreement between the New Zealand Government and Tasman Pulp and Paper Company Limited Concerning the Development of Exotic Forest in the Tarawera Valley Area', typescript, 10 September 1964 (doc A5(7.29)), pp 2-3, 5

3.11 THE SECOND MEETING WITH MAORI LANDOWNERS, 1 OCTOBER 1964

3.11.1 Attendance

A further meeting about the joint-venture proposal was held on 1 October 1964, this time with 15 Maori who were described by Mr Barber as ‘a nucleus or representation of the principal owners of the Maori owned lands’.¹³⁰ As with the first meeting, it seems that Maori Affairs officers selected the owners to be invited. In addition to the four prominent owners who had been at the previous meeting, those present were Mrs A Barnes, Joseph Bennett, Henry Fox, Nira Fraser, Jock Horne, Monica Lanham, Mrs E Pacey, Clement Park, Pat Raharuhi, Tame Waitere, and Pat Wihapi.¹³¹ The Tribunal notes that, numerically, Ngati Awa were not well-represented in that group.

Minutes of the two-hour meeting, which appear to be a near-verbatim record of what occurred, were compiled by the Department of Maori Affairs.¹³² In addition to Mr Barber and Mr Dye from Maori Affairs, the Crown was present in some force, being represented by Messrs Beachman (the commissioner of Crown lands in Hamilton), Kennedy (the conservator of forests in Rotorua), Poole (the Director-General of Forests), and NR Davis (the Assistant Secretary to the Treasury). The Tasman delegation was made up of Messrs McKee, Schmitt, JA Okeby (the finance officer), and IG Clinkard (the company secretary).

3.11.2 The joint-venture proposal outlined

The meeting began with Government officials and Tasman representatives outlining the scheme again. Mr McKee explained that the Government and Tasman had reached broad agreement on the terms of their participation and that it was ‘now desired to offer Maori land holders a chance to join this venture on a similar basis’. Indicating that land would be transferred to the company and valued on a ‘common basis’, he gave an example (whereby Maori contributed 40,000 acres valued at £4 per acre) which projected a Maori share of 14 per cent after 25 years.¹³³ Mr Poole emphasised that the land could be better utilised and more profitable if run ‘under one management’ than if individual owners developed ‘their own forests’.¹³⁴

Immediately after the outline had been presented, Nira Fraser (an owner in several Pokohu B blocks) asked what was wanted from the meeting. In response, Mr Barber stated that, if the owners present showed ‘an intense interest in the proposition and were favourably disposed towards it, the next step would be a formal meeting of owners’.¹³⁵ Mr Fraser commented that

130. Department of Maori Affairs, ‘Pokohu and Other Blocks (Near Kawerau) Afforestation’, minutes of 1 October 1964 meeting, [1964], p 3 (doc A4, vol 2, p 8)

131. Ibid, p 1 (p 6)

132. Ibid, pp 1–9 (pp 6–14)

133. Ibid, pp 1–2 (pp 6–7)

134. Ibid, p 2 (p 7)

135. Ibid, p 3 (p 8)

‘on the surface’ the proposals outlined ‘seem to be quite fair to all the owners concerned’. He then moved that the information distributed at the meeting be made available to ‘as many owners as possible’ and that a formal meeting be called in the near future to ‘further discuss and finalise the matter’. These last comments were supported by Pat Wihapi, who observed that ‘The whole project is . . . very hard to understand. We are given figures which mean nothing to us.’¹³⁶ Mr Barber then pointed out that the meeting was an opportunity to get as many facts clear as possible, and a discussion of the forestry and business aspects of the scheme ensued.

3.11.3 The land involved

Monica Lanham asked how much Maori land was wanted, to which Mr Dye responded that he had drawn up a schedule of ‘all the possible land that could be included. Not all included, just the possible land.’ He then indicated that, ‘roughly’, the area under consideration was:

The Pokohu blocks, Ruawahia No 2, possibly Rerewhakaitu, certain Matahina Blocks, possibly Te Haehaenga – couple of blocks there, the Kawerau group of Blocks formerly Matata 39A Blocks now known as Kawerau A blocks. Some of those are already leased and may not be affected but several are not leased at the moment or are vested on trust. Parish of Matata Lot 59 Subdivisions and Putauaki No 2 Block of over 2,000 acres in itself.¹³⁷

Mr Barber, too, underlined that this list was not firm, stating: ‘That is only a list of lands taken out in the vicinity – idle Maori lands.’¹³⁸

3.11.4 Owners’ reactions

Mrs Lanham then mentioned an alternative scheme whereby people were subsidised by the State for planting trees. She asked whether Tasman was going to claim the money back from the Government for afforesting the land, and she said she wanted ‘the full picture, not just part’. In response, Messrs Poole and Schmitt pointed out that the only alternative was the farm forest woodlots scheme, which was designed for much smaller areas and for which Tasman would be ineligible to receive any Government subsidies.¹³⁹

At the suggestion of Messrs Howell and Grace, the meeting next considered the issue raised at the first meeting of the value of the land contributions in relation to the cost of developing the forest.¹⁴⁰ Mr Davis stated that the proportion of the land contributions remained the same and that, if inflation occurred, any advantage that appeared to accrue to Tasman as

136. Ibid

137. Ibid

138. Ibid

139. Ibid, p 4 (p 9)

140. Ibid

the developer of the forest would be offset by a relative increase in the value of the forest and the wood it generated.¹⁴¹ Attention then turned to the proposed valuation of the land contributions. Mr Okeby stressed that all land contributions would be valued the same according to their classification. Mrs Lanham stated that she had to be 'clear on this', because 'I will have the job of explaining to others'.¹⁴²

Mr Grace pursued the question of land values, arguing that the £4 per acre given in the example was too low and that the values given in Tasman's five or six site classifications should be higher to offset the unknown factors in the development costs. He then stated:

The Maori people are quite in agreement with the principle [of the scheme]. What they are concerned about are the conditions and we cannot continue the discussions until such time as your company lays down the proposition [in writing]. We, on their behalf, agreed to the thing in principle but did not go any further than that last time.¹⁴³

Mr Howell, who had also attended the first meeting, then said that he cursed his ancestors for leasing some of his land, and wanted to do 'the right thing for the generation to come': 'As far as principle is concerned, we must have Tasman at all costs.'¹⁴⁴ Mrs Lanham, however, disagreed. She claimed that Tasman was unnecessary and questioned whether the terms of the proposed agreement were 'a fair go', wanting to be sure she was 'not being tramped on'. She continued:

I want something down on paper. Give us a chance to look at it before anything concrete is done. I did not know that these little discussions were going on. It is logical that Tasman should have that land but I don't want Tasman to take all the profit and I get left with a mere pittance. I want my fair share.¹⁴⁵

Shortly after this, Mr Barber raised the question of the Maori representation on the board of the proposed forestry company. Mr Grace responded that 'the Maori people feel that they should be entitled to more than 1'.¹⁴⁶ Mr Schmitt then discussed at some length the workings of boards of directors. He felt that a board of five, with three Tasman, one Crown, and one Maori representative, was most practical. Mr Barber noted that some people were concerned that the Maori were putting in twice as much land as the Crown and that 'they will only have one director', to which Mr Davis responded by noting that Tasman 'will put in money values a lot more than the other parties'. Mr Grace then said that the Maori 'will be only too happy to do the right thing in this project provided that you do the right thing by them'.¹⁴⁷

141. Department of Maori Affairs, 'Pokohu and Other Blocks (Near Kawerau) Afforestation', p 5 (p 10)

142. Ibid

143. Ibid, p 6 (p 11)

144. Ibid, pp 6-7 (pp 11-12)

145. Ibid, p 7 (p 12)

146. Ibid

147. Ibid, p 8 (p 13)

The rest of the meeting was mostly concerned with how matters would proceed from that point. Many of the owners present called for a more detailed written proposal to be prepared, and for this to be discussed at another meeting of owners.¹⁴⁸ Throughout the meeting, various references were made – by both the owners present and Crown officials – to there eventually being a ‘formal meeting’ of owners to finalise the scheme. For example, Mr Barber concluded the meeting by stating:

I believe that the Maori owners are favourably moved to co-operate in this proposition subject to details being ironed out to their satisfaction . . . I am hoping that you will be able to give your approval to the proposals so that we can go on to a formal meeting of all the owners.¹⁴⁹

It was agreed that another meeting be held, on 3 November 1964, in Rotorua, with those present to be the guests of Mr Schmitt for lunch at the Grand Hotel beforehand.¹⁵⁰

3.11.5 Crown views of the meeting

Mr Beachman subsequently described the meeting as being general, adding that ‘no finality was reached as the Maori owners thought that not sufficient information had been given’.¹⁵¹ An internal Maori Affairs memorandum cited by Dr Battersby confirms the department’s support for the scheme (support that was apparent at the meeting), noting that it ‘should be encouraged as being in the interests of the Maori people and bringing into production lands which possibly should not otherwise be used’.¹⁵²

3.12 THE FOREST SERVICE CONTINUES ITS EVALUATION

Before the third meeting of owners, Tasman produced a further written summary of the Tarawera Valley proposal and distributed it to the various Government departments involved.¹⁵³ The summary proposed that the land be transferred to the forestry company ‘at a market valuation’.¹⁵⁴ The day before the meeting, Mr Thomson sent a telexed message to Mr Kennedy (who was to attend) pointing out that, while the outline ‘reflected in principle’ what had been agreed up until then, the projected land values differed significantly from those that Tasman

148. Ibid, p 7 (p 12)

149. Ibid, p 9 (p 14)

150. Ibid

151. Beachman to Director-General of Lands, 2 October 1964, LS10/92/27, pt 1 (cited in doc A10, p 33)

152. ‘Pokohu and Other Blocks – Afforestation’, handwritten memorandum to Blane, 30 October 1964, MA58/2/1/, pt 1 (cited in doc A10, p 35)

153. ‘Offer to Maori Owners to Participate with Tasman Pulp and Paper Company Limited and Crown in the Development of an Exotic Forest in Tarawera Valley’, typescript, [20 October 1964] (doc A5(7.14))

154. Ibid

had previously submitted.¹⁵⁵ As noted in section 3.6, the average price had been put at £6 8s per acre for Crown land and £4 2s 8d per acre for Maori land, while the new values were £3 17s and £3 3s respectively.

Mr Thomson maintained that, on account of the ‘virtual halving’ of the values for Crown and State forest land, the Forest Service could not ‘agree to Tasmans latest figures even as a basis for discussion’. Noting that the higher the land is valued, the better the proportional return to the landowner, Mr Thomson observed that, although the Forest Service did not want the Crown and Maori owners to force the land values up to ridiculous levels, it did ‘want equitable returns for both’.¹⁵⁶

3.13 THE THIRD MEETING WITH MAORI LANDOWNERS, 3 NOVEMBER 1964

3.13.1 Attendance

In the afternoon of 3 November 1964, a meeting between Crown and Tasman representatives and various Maori landowners in the Tarawera Valley was convened in the television lounge of the Grand Hotel in Rotorua. As well as Messrs Barber, Dye, Beachman, and Kennedy, the Crown delegation included Mr Eru (a Maori Affairs interpreter) and Mr Briffault (from the Hamilton office of the Department of Lands and Survey). Representing Tasman were the same four from the previous meeting – Messrs Schmitt, McKee, Clinkard, and Okeby – as well as the company’s solicitor, Mr BW Neutze. At this meeting, the number of Maori representatives in attendance had expanded to 21. Although John TH Grace and Monica Lanham did not attend, all the others from the 1 October meeting were present. One of the eight newcomers, Sybil Young, stated that she was not ‘an invited member of this meeting’ but had come out of interest.¹⁵⁷ Four of the other seven newcomers were members of the Savage–Edwards family. Mr Barber indicated that he had chosen the group as being representative of the owners in the blocks involved, saying, ‘I tried to make a cross section of owners to the best of my ability’. The Tribunal notes again that, numerically, Ngati Awa do not appear to have been well represented.

The minutes of the meeting appear to be a near-verbatim record of what was said in English.¹⁵⁸ They record that the meeting began with a traditional welcome in Maori by Kepa Ehau, who then, in English, extended to all present ‘the traditional, conventional and customary welcome of my pagan race’. He then exalted ‘the civilised white race’:

155. Thomson to Kennedy (telex), 2 November 1964, FS83/503, vol 1 (cited in doc A10, p 36)

156. Ibid

157. The list of owners for Tarawera 1 shows that Sybil (Hepora) Young (née Raharuhi) had shares in at least one of the blocks amalgamated for the scheme, and a later document describes her as a ‘substantial shareholder’ in TFL: ‘Order Cancelling Several Titles’, sch 1; Dye to head office, Maori Affairs, 24 January 1968, MT12/441; doc B1, vol 2, p 2)

158. Department of Maori Affairs, ‘Pokohu and Other Blocks (Near Kawerau) Afforestation’, minutes of 3 November 1964 meeting, [1964] (doc A4, vol 2)

You are my brothers, my guardian, my protector and have made New Zealand what it is today. In your own particular sphere, with your experts, knowledge and with your abundance of the filthy lucre, Tasman does a great service.¹⁵⁹

3.13.2 The land involved

Immediately following the welcome, Tame Waitere, an owner in Matata 59B2A, raised the issue of his block's inclusion in the scheme and demanded that it be removed. In response to this, Mr Barber asked Mr Dye to 'run over the titles and explain them'. Mr Dye read out a schedule of blocks that the Department of Maori Affairs had prepared. The blocks listed totalled 34,828 acres – 1100 acres more than Tasman's estimate because it had omitted three blocks. There were 3835 owners of the land, but Mr Dye estimated that, with some owners having shares in more than one block, the actual number was closer to 3000.¹⁶⁰ On this basis, the Maori contribution would be about 45 per cent of the total land, but later in the meeting Mr Schmitt indicated that unplatable land on the margins of the proposed forest could be excluded without detriment to the venture.¹⁶¹

3.13.3 Proposed board membership

At the meeting, Tasman gave out copies of a four-page typewritten summary of its proposal, entitled 'Offer to Maori owners to participate with Tasman Pulp and Paper Company Limited and Crown in the development of an exotic forest in the Tarawera Valley', which had already been distributed to all those present at the previous meeting. Mr Clinkard read the summary out paragraph by paragraph. As he proceeded, the owners present asked numerous questions, which led to a detailed discussion of most aspects of the scheme. The first matter raised was the composition of the board of directors of the proposed forestry company, and Mr Bennett noted that another Maori director had been added, which should 'satisfy the Maori side of it'.¹⁶² Nobody was recorded as commenting on the fact that Tasman's representation had also increased by one, to four, making a seven-member board on which Tasman would still have a majority.¹⁶³

3.13.4 Proposed log price

The next matter discussed was the price at which Tasman would purchase logs from the proposed Tarawera Valley forest, which was stated as being equivalent to the cost to Tasman

159. Ibid, p 2 (p 16)

160. Ibid, pp 2–3 (pp 16–17)

161. Ibid, p 10 (p 24)

162. Ibid, p 3 (p 17). It is not clear from the minutes whether this was Mr JJ Bennett or Albert Bennett.

163. 'Offer to Maori Owners to Participate with Tasman Pulp and Paper Company Limited', p 1

at the mill of similar wood from all other sources. The paper stressed that this meant the Kaingaroa log price, but pointed out that, because the Tarawera Valley was so much closer, the wood from there would attract a cheaper transport premium equivalent to threepence per cubic foot. Mr Fraser suggested that, because the Kaingaroa log price was lower than the prices that Tasman was paying for other wood, the Kaingaroa price should be excluded. Mr Schmitt responded by saying that Tasman could not fix the log price on anything other than the Kaingaroa price because it did not get wood from any other source, and he added that 'the transport advantage' for Tarawera Valley wood would 'accrue for the benefit of the owners of this forest'. Mr Fraser responded that he had expected that answer and thought that the owners would accept it.¹⁶⁴

3.13.5 Proposed land prices

As Mr Clinkard read out paragraph 7 of Tasman's summary, on the values at which the land would be transferred to the joint-venture company, Kepa Ehau asked exactly what was meant by 'market value' and 'nominal value'.¹⁶⁵ This led to a discussion of how Tasman had fixed the land values, with Mr Schmitt explaining that they were based on the price that Tasman had paid for its land in the valley after negotiation between buyer and seller. Mr Savage commented that Tasman had 'had a very cheap buy' and asked whether Tasman expected the Maori owners to sell at the same cheap price.¹⁶⁶ Mr Schmitt countered that Tasman had paid a fair market price. Asked by Mr Waitere who the 'expert valuers' mentioned in paragraph 7 were, Mr Schmitt thought that they would be appointed independently by the Maori owners, the Crown, and Tasman, and would be told to agree on a price.¹⁶⁷

3.13.6 Proposed proportion of Maori shareholding

Later discussion centred on Tasman's estimate of the relative shareholdings in the forest company, under which Maori had 8.5 per cent. This led to a detailed explanation of how the relative shareholdings would be determined, especially the relationship between the contributions of land by Tasman, the Crown, and Maori, and the development capital supplied by Tasman. Mr Schmitt explained that the estimated compounded cost of planting and developing the forest was £4.5 million, and that this led to the projected shareholdings which gave Maori 8.5 per cent. He noted, though, that 'it may be that we will find we can plant the forest for less, [in which case] our share in the ultimate share capital will be smaller'.¹⁶⁸ Mr Schmitt

164. Department of Maori Affairs, 'Pokohu and Other Blocks (Near Kawerau) Afforestation', p 4 (p 18)

165. Ibid, p 5 (p 19)

166. Ibid. It is not clear from the minutes which of the two Savages present – Sam or John – this was.

167. Ibid, pp 5–6 (pp 19–20)

168. Ibid, p 7 (p 21). At this stage in the development of the joint venture, the taxation concession had not yet been provided for by law and so the gross costs of forest development were included in Tasman's projected share of the venture.

later offered to freeze the Maori share at 8.5 per cent, as was also suggested in the written summary.¹⁶⁹

Mr Savage complained that ‘This 4½ million upsets the whole percentage of Maori shares. I do not understand why this 4½ million should send Maori shares from 45% to 8½% . . . Tasman is at the bottom of the list then Tasman is at the top.’ He asked whether Maori could borrow money from the Maori Trustee so as to be able to contribute to the development costs. Mr Barber replied that the trustee did not have the £4.5 million that Tasman was proposing to invest in the forestry venture.¹⁷⁰ Mr Okeby then suggested that the proposal was analogous to a share-milking arrangement whereby the farm owner and the share milker shared the profits. Mr Savage quickly responded: ‘I would point out the difference. The land remains the farmer’s. In this proposal the land does not remain to the Maoris.’¹⁷¹

Mr Fraser then asked what would happen if the proposed forestry company was ‘wound up’, and expressed concern that Maori would have no say if they thought the company should be dissolved. Mr Schmitt replied that the consent of everyone – presumably meaning the shareholders and directors – was required when a company goes into liquidation and is wound up.¹⁷²

3.13.7 Forestry company to have title to the land

Discussion turned next to who would hold title to the land once the forest company was formed. Mr Ehau, for instance, thought that the freehold to the Maori land would be held in trust by the ‘Company or Incorporation’ and would remain the owners’ property. When Mr Barber said that this would not be the case, Mr Ehau asked for a legal opinion on the matter. Mr Barber responded by saying that seeking such advice was possible, but that ‘it is clear that the owners are putting their land in as part of a shareholding in a limited liability company’.¹⁷³

Mr Fraser then stated that, although the owners agreed with the scheme in principle, he considered that many would ‘jib’ when the ultimate decision was made, because ‘their land will be transferred to a company’. He went on to discuss the rates arrears on many of the blocks and speculated that, if the county council heard that the owners had rejected the proposal, it might well take the blocks upon which rates were owed under the Rating Act. When asked by Mr Barber if he had any alternatives in mind whereby title to the land would not be lost, Mr Fraser suggested that the company could lease the land off its owners.¹⁷⁴ This was the

169. Ibid, p 11 (p 25)

170. Ibid, p 8 (p 22)

171. Ibid, p 9 (p 23)

172. Ibid, pp 10–11 (pp 24–25)

173. Ibid, p 13 (p 27)

174. Ibid

only mention of leasing at the meeting. At this point, Mr Kennedy from the Forest Service said he could not assist the meeting any further and asked to be excused.

3.13.8 Owners' reactions

Various owners then stated whether or not they were in favour of the joint-venture proposal. Mr Coates declared: 'I am not in favour of these proposals. The owners do not understand this scheme. Personally I am against all Maori land being sold.'¹⁷⁵

Sybil Young had earlier suggested to the owners that they get independent and qualified advice from, say, an accountant,¹⁷⁶ and Mr Howell said that he had sought advice from his accountant and solicitor and that they had endorsed the proposal. He also described the process that the owners were involved in:

what we are trying to do is narrow the thing down and knock off the rough edges and bring it before the people in the main meeting. There is no such thing as a stalemate and we are getting near to the stage where the owners will make a decision. It is still for the people to decide.¹⁷⁷

Mr Waitere endorsed Mr Howell's statement and told the meeting that he also had sought advice from his accountant, who 'gave me his blessing'. He also said it was hard for the Maori present 'to go back to their various Committees and have to answer their questions' on the proposal. Despite this, he undertook to 'go back to the committee at home and tell them of the proceedings of this meeting', and he expressed his view that the scheme would be accepted.¹⁷⁸

Mr Savage, however, was less enamoured of the scheme. He declared that the proposal was 'not acceptable': 'Tasman will have to draw up another proposal along the lines I have been trying to argue about. As it stands the people I represent will definitely vote against it.'¹⁷⁹ Later, he informed the meeting of 'two boys' – the Edwards brothers – who were living on some of the land within the proposed forest. Both of the brothers were present, and one spoke, saying that they had lived on the Pokohu B3B block all their lives, were farming it, and wanted it to be excluded. Mr Barber stated that the request had been recorded, that the issue would be closely examined, and that Mr Dye would consult with the Edwardses.¹⁸⁰

Other owners who spoke at the meeting supported the broad principles of the proposal. Albert Bennett thanked Tasman for coming up with the scheme:

175. Department of Maori Affairs, 'Pokohu and Other Blocks (Near Kawerau) Afforestation', p 13 (p 27)

176. Ibid

177. Ibid, pp 13–14 (pp 27–28)

178. Ibid, p 14 (p 28)

179. Ibid

180. Ibid, pp 15–16 (pp 29–30)

One does not have to be an expert to see that it is something that they have given a lot of thought to, and I feel that I should thank them for bringing up such a proposal to place before our Maori people. In my file I have a lot of rate demands from the Whakatane County Council . . . I feel that before turning down this proposition we must all have a deeper look into it and I feel that it should be put up to the people. I have noticed that all the objections that have come up before this meeting and the last meeting have been . . . by people who are living in the district. Perhaps they are in a position to see things closer than ones who are absentee owners . . . [But] I am very worried that if we do not grasp this opportunity this land will be taken away from us . . . it is a grand opportunity . . . We realise we are putting this land into this company. This land has gone but we will be part of this company . . .¹⁸¹

‘Endorsing the remarks of the previous speaker’, Mr JJ Bennett stated:

The thing in principle is a splendid idea. There seems to be only one thing – the fact that some of our old folk will have to realise that they will lose their land to the company. From the angle of our old Maori elders, they have lost so much land that in the future they do not want to lose any more. We will find it hard to make them realise that in parting with this land it is still theirs in the company.¹⁸²

At this point, Mr Barber interceded to say that this was a ‘crucial point’. He added:

I do not think you are giving your land away nor selling it. You are investing it in what appears to be a wise investment. Utilisation of this land is necessary. I cannot see any other utilisation, let alone any better utilisation.¹⁸³

When Albert Bennett reiterated that the elders did not want to lose their land, Mr Schmitt indicated that, if the venture failed, Tasman would ‘buy the land back from the creditors and give it back to the Maori owners. . . . Tasman will buy the land and give it back to you.’¹⁸⁴

3.13.9 The next step

Towards the end of the meeting, Mr Ehau invited Tasman to ‘lodge an application calling for a meeting of the Maori owners’. Mr Fraser, however, thought that one more meeting with representatives of the owners should be held and that it was premature to have a meeting of all the owners. Mr Savage supported this. Mr Barber took a contrary position, claiming that the ‘formal meeting’ could not take place until the end of January 1965 and that Mr Dye was available for consultation before then. He therefore thought that Tasman could be invited to make ‘a formal application to the [Maori Land] Court’. Albert Bennett thought that the stage had

181. Ibid, p 14 (p 28)

182. Ibid

183. Ibid, p 15 (p 29)

184. Ibid

been reached where the whole proposal could be taken 'back to the people to consider', and that a 'formal meeting of owners could be called'. He then moved a resolution accordingly.¹⁸⁵

Further discussion ensued, during which Mr Barber spoke of the need to amalgamate the titles of the affected lands, and he said that when the 'formal meeting of owners' was convened it could be adjourned if necessary to resolve any matters arising. He then read out the following motion:

That this representative meeting of the owners of these various blocks as enumerated earlier on invites the Tasman Pulp and Paper Company Limited to make a formal application to the Maori Land Court, bearing in mind the tone of the discussions that have taken place during the three meetings we had with them.

Ken Eru then repeated the motion in Maori and Mr Howell seconded it. The motion was carried unanimously. Mr Schmitt thanked all present and stated that the staff of Tasman could be contacted if anybody wanted to discuss any points from the meeting.¹⁸⁶

It is not clear from the resolution or the minutes what Tasman would be applying to the Maori Land Court for, nor what the 'formal meeting' might have involved. Some light is shed by Mr Dye in a report to Maori Affairs head office on 2 December 1964. Tasman had accepted that the first step was to amalgamate all the titles into one, he wrote, for which a list of owners and addresses would be required. The main concern of Mr Dye's report is with the costs and personnel involved in compiling the list of names and addresses. He concludes, however, by noting that, once the list had been completed:

we could arrange for a general meeting of all the owners to be called and put the amalgamation proposals to them. If approved this would be tantamount to an acceptance of the whole scheme and would almost guarantee the success of the formal meeting of assembled owners for which Tasman would no doubt apply in due course.¹⁸⁷

The process there outlined by Mr Dye indicates that he envisaged Tasman applying ultimately for a Part XXIII meeting of assembled owners.

3.13.10 Crown views of the meeting

The minutes of the 3 November 1964 meeting give an impression of a basic level of support for the proposal, but Mr Dye did mention the opposition expressed by 'certain elements' of the owners. The report of the Rotorua conservator of forests to the Director-General of Forests on 4 November was much fuller, and more pessimistic. Mr Kennedy, who left before the end of the meeting, referred to the 'considerable and not very fruitful discussion which

185. Department of Maori Affairs, 'Pokohu and Other Blocks (Near Kawerau) Afforestation', p 16 (p 30)

186. Ibid, pp 16-17 (pp 30-31)

187. Document B1, vol 1, p 33

denoted a fair measure of suspicion of the whole offer still in the minds of the owners present'. In particular, he noted that the Maori owners were 'opposed to handing over title to their land to a Company of which Tasman will have overwhelming control; and . . . anyway, they are not interested in parting with it on the values set out by Tasman, based on its own payment of £51,000 for 19,350 acres.' The 'two real snags' he saw were:

(a) the proposals involving the owners irrevocably parting with the land as a group of Maori individuals. All the eloquence in the world about shareholders' rights, directors' duties, protection afforded by the Companies Act and so on has certainly not so far overcome this deep-rooted objection to and suspicion of the Tasman offer.

(b) there is strong objection to Tasman's ultimate overwhelming and perpetual dominance in the project . . .

I do not see any early resolution of the radically conflicting points of view as represented by this meeting.¹⁸⁸

Mr Kennedy was concerned about a wrong impression held by some of those present that the Crown and Tasman had reached total agreement. He noted that he had pointed out to the meeting that in fact 'there was a welter of detail still to be hammered out'.¹⁸⁹ Points that concerned him were:

- ▶ the virtual 'concession' that Tasman had in the stumpage and rail freights paid on its wood supply from the Kaingaroa Forest, which raised the question of whether 'there is not some obligation under the Forests Act to make the position known to all potential parties to the current proposal';
- ▶ the equity of basing the value of the Crown and Maori land contributions on the price paid by Tasman for land in the same area, the effect of which was to 'place ridiculously low values on some of the best forest land in the country';
- ▶ the lack of provision for revaluing the land;
- ▶ the proposed method of share distribution, which 'places the total control of the company's activities and the land in the hands of Tasman'; and
- ▶ the impression that was being, 'if not created, at least not contradicted by Tasman, and possibly by the Maori Affairs Department,' that both Tasman and the Crown were 'in unanimous agreement on the current proposition as presented by the Tasman written offer'.¹⁹⁰

Mr Kennedy summed up by saying that 'Tasman's vaunted "ground work" amongst the Maori owners has borne little fruit to date' and that the proposal would need to be 'greatly simplified and more ably presented before it has a chance of success'.¹⁹¹ How that was done in 1965 is explored in the next chapter.

188. Conservator of Forests, Rotorua, to Director-General of Forests, 4 November 1964 (doc A5(7.36)), p1

189. Ibid, p 2

190. Ibid, pp 2-3

191. Ibid

3.14 SUMMARY

The key points made in this chapter are:

- ▶ The Maori land in the Tarawera Valley was, apart from the Matata block on the north-eastern edge of the proposed forest, mainly poor and steep and best suited to forestry.
- ▶ Putauaki, sacred to Ngati Awa and Tuwharetoa ki Kawerau and used by both as a burial ground, straddled two blocks of Maori land within the proposed forest area – Matata 59B1 and Putauaki 2.
- ▶ Tasman and the Crown took it upon themselves to develop the joint-venture proposal to a state where they felt it was ready to be put to Maori.
- ▶ Tasman's joint-venture scheme did not fit comfortably with any of the Forest Service's developing approaches to afforestation of Maori land and raised many concerns among Forest Service officers, particularly about the proposed land values.
- ▶ By the end of 1964, three meetings had been held with small groups of Maori landowners, with the number in each group increasing from four to 21. The owners were chosen by Maori Affairs officers apparently on the basis of influence or size of landholding, and Ngati Awa were not prominent among them.
- ▶ At the third meeting, Tasman had presented a written proposal giving details of the intended scheme, but this did not mention leasing as an option.

CHAPTER 4

FINALISING THE JOINT-VENTURE PROPOSAL IN 1965 AND EARLY 1966

4.1 LOW LEVEL OF ACTIVITY TO JUNE 1965

There is a paucity of records about the Tarawera Valley proposal in Government files between the end of 1964 and mid-1965. This suggests a low level of activity, which in turn suggests that Tasman was no longer in urgent need of the Maori land for planting. Professor Schmitt certainly told the Tribunal in his video conference in 2000 that ‘there wasn’t any hurry’ for Tasman to get negotiations under way for the purchase of the Tarawera Valley lands, pointing out that Tasman already had the ‘40 million’ contract and was about to negotiate the ‘20 million’ contract, both of which gave supply until 2005.¹ This view seems to contradict that expressed by his predecessor, Mr Timmis, in 1962 (see sec 3.3). Professor Schmitt’s view is supported, however, by the fact that in February 1964 Tasman had been authorised to begin planting on the Putauaki State Forest land without prejudice to the negotiations.²

It is also clear that Tasman had been lobbying for and was expecting taxation concessions for forestry companies. A year earlier, in April 1964, after discussions with the Treasury, Mr Schmitt recorded that the final formation of the forestry company ‘will be held over so that the structure of the company and the technicalities of subsidiary agreements can take fully into account any amendments in taxation law affecting forestry’ and that details of the proposed scheme would be made known to Government officials so that they could be taken into account ‘in formulating the incentive schemes’.³ At a meeting with Maori owners in October 1965, Mr Schmitt spoke of the recent legislation introduced to enable a company to claim a tax concession of 50 per cent of its capital expenditure on planting forests against its other income. This concession would be ‘of no advantage to Tarawera Forests Limited’ because it would have no income until the forest planting was completed. Therefore, Tasman ‘negotiated with the Government on this’. If Tasman as the parent company provided ‘the development cash’, it wanted to be able to claim the tax concession on behalf of its subsidiary

1. Evidence of Geoffrey Schmitt given by video link, 21 September 2000

2. Poole to Davis, 9 March 1964, FS83/50 (doc A5(7.4))

3. GJ Schmitt, ‘Forestry in the Tarawera Valley: Note of Discussion with Mr NR Davis, 21 April 1964’, typescript, 27 April 1964 (doc A5(7.8)), pp 1, 2

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company, TFL, provided it passed the benefit of that concession on to TFL. Mr Schmitt claimed: 'We asked the Government to change the law and it agreed to do this.'⁴

By effectively halving the development costs, the net effect of this benefit was to increase the landowners' projected share in TFL by about 70 per cent to just over 30 per cent. The use of this tax benefit to TFL was foreshadowed in the September 1964 draft heads of agreement, and it may be that Tasman was delaying the finalisation of the proposal until the tax concession was announced in the Budget in June 1965.

4.2 MID-1965: CROWN VIEWS ON MAORI PARTICIPATION

The earliest material located from this period is a report to the Minister of Finance by Mr NR Davis for the Secretary to the Treasury dated 18 June 1965, which outlines the general agreement that existed between the Forest Service and Tasman as to the principles of the joint venture and the area involved. The report referred to Tasman's entitlement to claim the taxation concession on forest development 'under the recent Budget announcement'. It also noted that the Maori landowners affected had not yet agreed to participate in the scheme, and that the Government and Tasman would proceed with it anyway if Maori refused to participate. The report continued that the Crown and Tasman had tentatively agreed that Maori should participate on the same basis as the Crown, but that it might be necessary to offer them different terms. The alternatives mooted were for Maori to sell their land immediately, to be paid interest on their contribution of land in cash, or to lease their land to the new forestry company rather than nominally sell. The possibility of paying more per acre for Maori land (if either purchased or leased) was also noted in order to ensure the 'maximum economic development of the forest area'. The report concluded:

It is apparent from initial discussions with Maori owners that they are interested in the proposal, but would like to know if the proposals . . . have Government agreement before committing themselves. Treasury and the Forest Service are satisfied that the proposal is a reasonable one, provided that the Crown land and State Forest land is transferred to the forest company at a price reflecting its value for forestry purposes and not at current Government valuation.⁵

This last proviso had been inserted at the suggestion of Mr AP Thomson, the Assistant Director-General of Forests, who also clarified that the proximity value of Tarawera Valley timber over Kaingaroa timber would accrue to the forest company and the landowners, not Tasman.

4. 'Minutes of a Meeting Held at Kawerau on 14 October 1965 at which Tasman Pulp and Paper Company Limited Outlined its Proposal for the Establishment of an Exotic Forest in the Tarawera Valley', typescript, [1965], p 8 (doc A4, vol 2, p 41)

5. Davis to Minister of Finance, 18 June 1965, FS83/803, vol 1 (cited in doc A10, p 48)

4.3 DEVELOPMENT OF THE GRAINGER LEASE

It was at this time that the Forest Service was developing the royalty-based leasing model for forestry joint ventures that became known as the 'Grainger lease' (see sec 2.3.2). In a handwritten note to Mr Poole on the Forest Service copy of Mr Davis's letter, Mr Thomson wrote: 'You have indicated that you would prefer the leasing scheme with royalty as a percentage of stumpage to the forest company proposal. So do I.' In his memorandum to Mr Poole on the matter, Mr Thomson wrote:

I also explained to Mr Davis that we were in [the] process of . . . seeking approval for a much simpler basis of leasing land than had previously been envisaged. It could well be that if this new basis is accepted by Maori owners at Otakanini-Topu and elsewhere, it would be preferred by the Tarawera Valley owners to the complicated Tasman scheme.⁶

Mr Poole's subsequent memorandum to the Minister of Forests made clear that the new leasing proposals:

could be applicable to the Tarawera Valley Scheme, and indeed could provide a more satisfactory basis for making land available to Tasman than the rather complicated scheme which Tasman has produced. I hope soon to put these leasing proposals before you. Under the circumstances it would be desirable for the Cabinet Committee [on Tasman] to delay consideration of the Tasman proposals until the alternative I propose is to hand.⁷

On 9 July, the Minister of Forests advised the Tasman Cabinet Committee of the Forest Service's lease plan and of his view that Tasman would be well advised to consider the scheme in dealing with the Maori owners of the land.⁸ On 13 July, Mr Poole and Mr Thomson met with Mr Schmitt and commercial manager Mr MH Kjar of Tasman to inform them of the leasing scheme and suggest it be used for the Tarawera Forest scheme instead of Tasman's joint-venture model. Mr Poole's file note describes Tasman's unfavourable reaction, and his own subsequent retreat:

Mr Schmitt, however, was somewhat dismayed about this development and did not wish any hitch in discussions with the Maori owners. He thought that if a completely new proposal was placed before them now, they might feel inclined to turn the whole scheme down. We said that Treasury was examining this alternative but I did agree, after some discussion, that it would be desirable for Tasman to pursue the course they had set and try and reach finality with the Maori owners. I also agreed that if such finality could be achieved it would be only logical for the Crown lands and State Forest to be included in the company arrangements.⁹

6. Thomson to Poole, 18 June 1965 (doc A5(8.3))

7. Poole to Minister of Forests, undated, T62/68/10, vol 1 (cited in doc A10, p 49)

8. Gerard to Marshall, 9 July 1965, T62/68/10, vol 1 (cited in doc A10, p 49)

9. 'Tarawera Valley Forest', file note, 15 July 1965, FS83/503, vol 1 (doc A5(8.7)) (cited in doc A10, p 49)

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Mr Poole's file note also indicated that:

Treasury would examine the alternate Forest Service proposal before asking for the Tasman Cabinet Sub-Committee to meet to examine the company scheme. The Forest Service should, therefore, get to Treasury as soon as possible the final details of the proposed leasing scheme.¹⁰

In a telex to Mr Kennedy in Rotorua on 15 July, Mr Thomson noted that Tasman 'did not react at all favourably to the idea' of adopting the Grainger lease, because 'negotiations with the Maori owners are so far advanced (and so likely to succeed) that it would be a pity to drop them at this stage and put forward a completely different alternative'. He thought that the leasing scheme was preferable because of its 'greater simplicity and, probably, greater equity', but because, with 'certain provisos', the Forest Service had agreed to the Tasman scheme it could not withdraw from that 'unless we have the support of Treasury and the approval of Government to do so'.¹¹

4.4 TASMAN PUTS THE PRESSURE ON

Tasman then began to apply pressure to finalise the joint-venture proposal. In early August, it submitted to the Lands and Survey Department a timetable seeking a 'decision from Government' within a month, a 'meeting with Maoris' in early October, and a Maori Land Court hearing on 9 November. It hoped that the timetable 'will be adhered to'.¹²

On 23 August, Tasman sent the Treasury another summary of its proposal in light of the taxation exemptions granted in the recent Budget, which gave the projected shareholdings in the company after 20 to 25 years as:

Land	Maori	14.4%
	Crown	8.6%
	Tasman	5.9%
Development	Tasman	71.1% ¹³

An appendix to a detailed paper on the whole proposal prepared by Tasman and sent to the Treasury, Maori Affairs, and the Forest Service only four days later revised these figures slightly to:

10. 'Tarawera Valley Forest', file note, 15 July 1965, FS83/503, vol 1 (doc A5(8.7)) (cited in doc A10, p 49)
 11. Thomson to conservator, 15 July 1965, FS83/503 (doc A5(8.6))
 12. Director-General of Lands and Survey to head office and commissioner of Crown lands, Hamilton, 12 August 1965, FS83/503 (doc A5(8.9))
 13. Schmitt to Davis, 23 August 1965 (doc A5(8.10)), p 2

Maori land	14.4 per cent
Crown and State Forest land	8.9 per cent
Tasman land	7.0 per cent
Development	69.7 per cent ¹⁴

The 23 August letter also proposed that an additional clause be inserted in the draft heads of agreement guaranteeing the Maori owners ‘a degree of participation of not less than 15 percent in the total forest venture such assurance to be subject to the Maori participation being on the same basis as the Crown’. Tasman also asked that, in order for the whole proposal to be approved at the next sitting of the Maori Land Court, ‘a decision from Government . . . be obtained as soon as possible’.¹⁵

A second letter from Tasman to the Treasury four days later, signed by Mr HD Chambers (assistant to the commercial manager) and accompanying its detailed paper on the proposal, stated: ‘The proportion of Maori ownership is shown as 14.4% and . . . the Heads of Agreement now provide that this proportion may be increased to a guaranteed 15% if such a guarantee is considered desirable’.¹⁶ This, of course, had not been agreed to, and the paper itself, which was to be ‘printed for despatch to the Maori owners as soon as possible’, made no mention of the 15 per cent guarantee to Maori.

Indeed, no further mention was ever made of this 15 per cent guarantee. The issues surrounding the making of the offer and its disappearance are explored in chapter 5, and suffice it to note here that it was intended to ‘overcome any hesitation that may be forthcoming from the Maori owners’.¹⁷

Mr Chambers’ letter to Mr Davis also claimed that the ‘formula for valuing the land has resulted in a scale of values which appear to be fair and reasonable’. Mr Chambers noted that the special Government valuation of Pokohu blocks C2, C3, D, and E (totalling 15,537 acres) in December 1963 was £26,400, an average of £1 14s per acre, and he compared it with the value of the same blocks under the formula, which was £46,750, or £3 2d per acre. He also pointed out that the formula produced a higher value for Tasman’s land than the company paid for it between 1961 and 1964. He then calculated that the ‘proportioning of the total compounded value of the forest and land at the end of the development period’ gave a ratio of more than 30 per cent to the land and just under 70 per cent to development, and compared that favourably with the profit-sharing basis of 25 per cent to the lessee and 75 per cent to the lessor under the Forest Service’s leasing formula.

14. Tasman Pulp and Paper Company Limited, ‘Proposal by Tasman Pulp and Paper Company Limited to Maori Owners and the Crown to Participate in the Development of an Exotic Forest in the Tarawera Valley’, typescript, undated (doc A5(8.9), app 2)

15. Schmitt to Davis, 23 August 1965 (doc A5(8.10))

16. Chambers to Davis, 27 August 1965 (doc A5(8.11))

17. Schmitt to Davis, 23 August 1965 (doc A5(8.10))

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Tasman's detailed paper on the proposal seems to have been a draft text for the illustrated booklet printed and sent to owners of Maori land in the Tarawera Valley in November.¹⁸ The paper was sent to Treasury by Mr Chambers on 27 August to submit to the meeting of the Cabinet Committee on Tasman scheduled for 31 August. Mr Chambers said that printing was to begin on 1 September – another example of the company applying pressure to finalise the proposal.¹⁹

Tasman also sent the paper to the Forest Service and Maori Affairs. The accompanying letters, signed by Mr Schmitt, made no mention of the 15 per cent guarantee and instead highlighted a change in the proposal concerning '806 acres comprising the upper slopes of Mount Edgecumbe – the Putauaki Burial Reserve', previously excluded. This was now to be incorporated 'as a means of avoiding partitioning of the land and to avoid the leaving out of the scheme land wholly enclosed within the boundaries of the proposed forest area', though it would remain unplanted and 'protected as a reserve'. For valuation purposes, it was proposed to 'include the Mount Edgecumbe area on the basis of a flat valuation of £1 an acre'.²⁰

None of the accompanying letters, however, mentioned that in the paper a significant change had been made to the area of the proposed forest (from 65,000 to 76,000 acres) and another tier had been added to the schedule of land values. Only the letter to the Treasury drew attention to the new land values overall, as just described. Compared with Tasman's June and November 1964 values, the changes were as shown in the table below.²¹

Land	Average land values per acre		
	June 1964	November 1964	August 1965
Tasman-owned	£2 9s 6d	£2 13s	£3 4s 5d
Crown-owned	£6 8s	£3 17s	£3 13s 6d
State forest	£8 2s 6d	£3 17s	£5 11s 4d
Maori-owned	£4 2s 8d	£3 3s	£3 7s 10d

The extent of all these changes, both explicit and silent, the rapid timetable advanced for approving them, and the different information provided to different parties involved suggest on Tasman's part either undue haste to finalise the joint-venture proposal on its terms or a more Machiavellian attempt to confuse or divert attention from critical issues. The Tribunal

18. Tasman Pulp and Paper Company Limited, *Proposal By Tasman Pulp and Paper Company Limited to Maori Owners and the Crown to Participate in the Development of an Exotic Forest in the Tarawera Valley* (Kawerau: Tasman Pulp and Paper Company Limited, 1965) (doc A4, vol 2)

19. Chambers to Davis, 27 August 1965 (doc A5(8.11))

20. Schmitt to Souter, 27 August 1965, MA58/2/1, pt 1 (cited in doc A10, p 51); Schmitt to Poole, 27 August 1965 (doc A5(8.12))

21. Dr Battersby gives the same table but with different figures for Crown and Maori-owned land in June 1964; this is because he failed to take into account Tasman's deductions for the extra distance from the Kawerau mill. The figure Dr Battersby gives for Tasman in November 1964 (£2 3s) is also quoted incorrectly: doc A10, p 52, fig 4.

cannot avoid the conclusion that, whatever Tasman's real motives, it found the Forest Service's reopening of the leasing alternative a threat to the joint-venture proposal.

In any event, the Forest Service was incensed at Tasman's changes to the proposal. Mr Thomson saw Mr Schmitt's accompanying 27 August letter as 'an attempt to bull-doze the Government into an early decision . . . it is quite unfair and unjustifiable tactics to amend the scheme and then to ask for a snap decision before the effects of the amendments can be thoroughly studied'. While he noted that 'we may be forced to adopt the Tasman company scheme', in his view 'it would be preferable to use the recently approved Forest Service leasing scheme', and he believed that once the Maori owners knew the details of it they would take the same view.²²

Mr Thomson's subsequent footnote to the memorandum states that Mr Grainger 'has refined his royalty formula' and would be ready to discuss its final shape after 6 September.²³

4.5 FOREST SERVICE CONSIDERS LAND VALUES TOO LOW WITHOUT CONDITIONS

Mr Poole held meetings in Rotorua with the Forest Service Economics Division and local officers on 31 August and 1 September 1965, and on the second day with Tasman. The next day the assistant conservator in Rotorua, Mr J Ure, who was present at both meetings, summarised the Forest Service's position on the method of valuing the land involved:

the interplay of intangibles such as forest development costs, yields and stumpages and imponderables such as technical developments and taxation policy defy any attempt to value Tarawera Valley land with sufficient precision and confidence to stand against generally accepted land valuation practice. . . . Nevertheless there can be no doubt whatsoever that the values proposed by Tasman are far too low.²⁴

The Forest Service recognised both the Government's assurance to Tasman of its support in making land in the Tarawera Valley available for afforestation and the progress that Tasman had made in negotiating with the Maori owners. It was therefore agreed that 'the Forest Service leasing scheme could not be substituted for the company scheme at this late stage'. Acknowledging also that forestry was the optimum land use for the valley, Mr Ure therefore proposed the 'only equitable solution which should satisfy all concerned':

(a) Accept Tasman's apportionment of company shares as a guaranteed minimum for all time thus:

22. Thomson, 'Tarawera Forests Limited', memorandum, 31 August 1965, FS83/503, vol 1 (doc A5(8.13))

23. Ibid

24. Ure to Poole (teleprinted message), 2 September 1965 (doc A5(8.21))

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Maori owners	15%
Crown	9%
Tasman	<u>76%</u>
	100%

(b) Subject to revaluation in 1990 (ie 25 years after inception) and issue of bonus shares to the land owners in the light of actual development costs and stumpage. At this point a true land value can be struck in the light of real values.

(c) Forest to be managed under a working plan approved by the Crown.²⁵

The following day, Mr McKinnon commented to Mr Poole that Tasman's classification of the land was reasonable and that 'The resultant land values appear to establish fairly the *relative* land values of each tenure class', although 'the values shown are below fair value by some pounds per acre (even though the values are greater than the most recent, 1963, Government valuation)'. Noting that 'The Crown should not prejudice the Maori owners' independence of negotiation with Tasman through agreeing to the scheme as affecting State Forest and Crown land in advance of Tasman's negotiations with the Maori owners', Mr McKinnon recommended that Mr Poole state the Forest Service attitude as being:

(1) That the Crown land be made permanent State Forest land and the State Forest land then be leased to Tasman for afforestation on the basis recently approved for leasing for such purposes;

(2) That if the Maori owners accept the scheme on the basis put forward by Tasman the Crown follow suit with respect to State Forest and Crown land providing the owners' share capital at time of utilisation of the crop is increased at that time to take into account the full production value of the land at that time;

(3) That if the Maori owners reject the Tasman proposal and are prepared to consider leasing only, the Crown follow suit.²⁶

The Tasman Cabinet Committee met in the evening of 8 September to discuss the Tasman proposal as outlined in Mr Davis's 18 June report. The accompanying memorandum from the Minister of Finance listed the third of three objectives for the proposal being 'to complete with the Maori land owners, whose participation is most desirable for the success of the project, a satisfactory agreement designed to give effect to these arrangements'.²⁷ Messrs

25. Ure to Poole (teleprinted message), 2 September 1965 (doc A5(8.21)). The share figures given are rounded versions of the projected figures Tasman supplied in appendix 2 of its 27 August paper (doc A5(8.9)).

26. McKinnon to Poole, 3 September 1965, FS83/503, vol1 (cited in doc A10, p 54); McKinnon to Poole (handwritten draft), 3 September 1965 (doc A5(8.13))

27. Minister of Finance, 'Tasman Pulp and Paper Company Ltd - Development of Tarawera Forest', memorandum to Cabinet Committee on the Tasman Pulp and Paper Company, TPP(65)2, 2 September 1965 (doc A5(8.17))

Davis, Poole, Souter, and Lynskey were in attendance. The committee approved the scheme in principle and authorised further negotiations in order to complete a full draft agreement for its consideration.²⁸ Mr Souter is recorded in the minutes as giving an oral report on ‘possible alternative methods of acquiring Maori land or dealing with Maori interests’, and on the same day, presumably for the meeting, Maori Affairs office solicitor Mr A G Hercus submitted a report on this subject to the Secretary of Maori Affairs.²⁹ After demonstrating the need for the amalgamation of the titles to the land, Mr Hercus discussed four possibilities for the land’s alienation:

- ▶ an outright sale of the land for cash;
- ▶ an outright sale of the land for shares in Government stock (if the land were sold to the Crown) or in Tasman (if the land were sold to it);
- ▶ a sale to the proposed forestry company, with the Maori owners then forming their own public company to hold the shares in the forestry company; or
- ▶ a long-term lease, of up to 250 years.

Mr Hercus considered that ‘the best alternatives would be an outright sale with distribution of the purchase money to the Maori owners in proportion to their shares or else a very long term lease’.

Mr Hercus also discussed the questions raised earlier by the Rotorua district office. He felt that a new Maori trust board would founder because its income was not divisible among the beneficiaries and some owners would want their cash out at some stage. It would also require special legislation. A section 438 trust was workable if leasing were proposed, but he thought the Maori owners would prefer to incorporate. If the land were sold to the forestry company, a Maori company would be more suitable, and the bankruptcy protection provisions of section 455 of the Maori Affairs Act 1953 should be extended to apply to the company shares as if they were shares in Maori freehold land.³⁰

Senior Forest Service officials, including Messrs Poole, Thomson, and Grainger, met the next day. Mr Grainger confirmed that, provided that the company scheme was based on Tasman’s expenditure being net after crediting all tax savings, the land was revalued for the shareholding at year 25, and the valuation reflected the full forestry value at that time, ‘we cannot be worse off than under the Leasing Scheme and ought in fact to be significantly *better off*’. His point was that the leasing formula did not take advantage of the tax concession available to Tasman, which was ‘regarded as being an incentive to the grower’.³¹

28. Cabinet Committee on the Tasman Pulp and Paper Company, minutes of 8 September 1965 meeting, TPP(65)M1, 13 September 1965 MA58/2/1, pt 1 (doc A5(8.24)) (cited in doc A10, pp 55–56)

29. Hercus to Secretary of Maori Affairs, 8 September 1965, MA58/2/1, pt (cited in doc A10, p 55); doc B1, pp 19–21

30. Document B1, p 20

31. Grainger to Thomson, 9 September 1965, FS83/503, vol 1 (doc A5(8.22)) (cited in doc A10, p 55); Thomson to Poole, 10 September 1965, FS83/503, vol 1 (doc A5(8.23)) (cited in doc A10, p 55)

4.6 THE FOREST SERVICE SEEKS A MINIMUM GUARANTEE, AND MAORI AFFAIRS A HOLDING COMPANY

A week later, Maori Affairs, Treasury, Forest Service, and Lands and Survey officers held a two-day meeting at the Treasury with Tasman officials to discuss the scheme. In advance, Mr Poole had discussed with Messrs Thomson and McKinnon the attitude the Forest Service should adopt.³² (In an earlier note to Mr Poole, Mr Thomson had pointed out that ‘for once we are in an extremely strong bargaining position’ because Tasman was at that stage also seeking the extra ‘20 million’ deal from the Kaingaroa Forest, and ‘we should be able to use it as a lever to gain concessions in the matter of the Tarawera valley land’.³³) Mr Thomson was still concerned that Tasman’s latest land values were both too low overall and lower than had been submitted in 1964: ‘The most disquieting feature is that Tasman has managed to increase the value put on its own land whilst significantly reducing the values of Crown and State Forest land,’ he said. Mr Poole, however, thought that the Rotorua officers were satisfied with the land values, albeit (as Mr McKinnon noted) as relative rather than absolute values.

In view of Mr Ure’s and Mr Grainger’s views on the need for a revaluation after 25 years, which Mr Poole ‘did not favour’, and the consequent ‘uncertainty as to how in fact the Tasman proposals would compare with our own’, Mr Thomson proposed and Mr Poole agreed that ‘it would not be unreasonable to ask Tasman for a guarantee of a minimum return to the land, on the principle that we should be at least as well off as we would be under the Forest Service leasing scheme’.³⁴

At the meeting, Tasman ‘naturally opposed’ a minimum guarantee, but the Forest Service pointed out that, provided that the relative land values were equitable, the absolute values would be less important if such a guarantee were given. If it were not given, the Forest Service would have to oppose the suggested land values as being too low to give a fair return to the owner. According to Mr Thomson’s file note of the meeting:

The Tasman view appeared to change when it became obvious that the Maori owners would not be persuaded to enter the scheme until they were satisfied that the Forest Service was 100% behind it and that without the guarantee of a minimum return the Forest Service was far from being 100% satisfied.

Before the lunch break, Mr Schmitt conceded that ‘some minimum guarantee may be justifiable’, and he suggested a figure of 80 per cent of the return under the leasing scheme.

32. The proceedings of this meeting are recorded in a Forest Service file note by Thomson: ‘Tarawera Forests Limited’, 22 September 1965, FS83/503, vol 1 (doc A5(8.29)). Dr Battersby confuses what was said by Forest Service officials in preparation for the meeting with what they said at the meeting. His comment, for instance, that at the meeting ‘Tasman was confronted about its land value discrepancies with (a) Forest Service estimates and, (b) with Tasman’s original proposals’ is incorrect – the discrepancies were discussed in these terms beforehand, but at the meeting itself, according to Thomson, the point that land values were not satisfactory ‘was not pressed home’: doc A10, p 56.

33. Thomson to Poole, 31 August 1965 (doc A5(8.13))

34. Thomson, ‘Tarawera Forests Limited’, file note, 22 September 1965, FS83/503, vol 1 (doc A5(8.29)), p 2

After lunch, he 'came up with the alternative offer that the land owners should be guaranteed 75% of the returns indicated in the latest Tasman proposals, ie, [75 per cent of] 31.5% of the company profits. Mr Poole accepted this immediately.' Mr Thomson thought that it appeared to be 'a satisfactory, even a generous guarantee as 75% of 31.5% comes to a profit ratio of 23.5% which on the face of it is higher than the Forest Service leasing scheme would give except under the most uniformly favourable circumstances'.³⁵

Most of the subsequent discussion at the meeting revolved around the Maori land, with Mr Souter of Maori Affairs leading. It was agreed that the best course of action was for the titles to the Maori land to be amalgamated and the land sold to the joint-venture forestry company. The Maori Trustee would be appointed under section 438 as 'agent of the owners to alienate the land' to the joint-venture forestry company and to set up a separate company to hold the Maori interests in the forestry company. The Maori owners would take shares in the holding company in accordance with their land holdings in the amalgamated title.³⁶

Mr Souter's file note records that Mr Barber 'emphasised that the Maori owners must be satisfied' that Tasman's proposals were 'equitable'. It was agreed that Treasury and Forest Service representatives 'would be available at meetings with the Maori owners to assure them that both the Crown and the State Forest Service were satisfied that the proposals were equitable', though Mr Souter noted that the Forest Service was 'not yet completely satisfied'. The next step was for Tasman to have a preliminary meeting with a 'representative group' of owners to get these proposals 'into more concrete form'. Then a meeting of the owners of all the blocks would be called to consider the amalgamation of titles, the sale of Maori land to the joint-venture forestry company, and the appointment of the Maori Trustee to alienate the land and to arrange for the establishment of the Maori holding company.³⁷

According to Mr Thomson:

The meeting ended on the note that if Tasman's offer to guarantee a minimum return to the land owners is proved by investigation to be as generous and as satisfactory as it seems to be, then the Forest Service will throw itself wholeheartedly behind the scheme and will do its best to assist Tasman in persuading the Maori owners to participate.³⁸

35. It is not clear where Thomson got his figure of 31.5 percent for the company profits from – Tasman's 27 August paper had put the land contribution at 30.03 percent, and 75 percent of that figure is 22.5 percent. A copy of Thomson's file note with annotations by Poole contains a marginal comment by Poole that at the meeting, before Schmitt conceded the minimum guarantee, 'The point was also made that Tasman's costs of development looked to be much too conservative.' The implication if this proved to be the case was that the estimated shareholdings of the Crown and Maori would be lower: Thomson, 'Tarawera Forests Limited', annotated file note, 22 September 1965, FS83/503, vol 1 (doc A5(8.30)), p 2.

36. Document B1, pp 23–24

37. 'Development of Tarawera Forest', memorandum for file, 15 September 1965, MA58/2/1, pt 1 (doc B1, p 23). The proceedings of this meeting are recorded in a Forest Service file note by Thomson: 'Tarawera Forests Limited', 22 September 1965, FS83/503, vol 1 (doc A5(8.29)).

38. Thomson, 'Tarawera Forests Limited', file note, 22 September 1965, FS83/503, vol 1 (doc A5(8.29)), pp 2–3

4.7 FOREST SERVICE COMPARES MINIMUM GUARANTEE FAVOURABLY WITH GRAINGER LEASE

Mr Grainger was asked to analyse the minimum guarantee proposal and to compare the results with what would have been obtained under his leasing scheme. In his report, dated 20 September, he noted that the proposed guarantee ‘completely alters the principle upon which the Forest Service had hitherto opposed the transfer of these lands at Tasman’s valuation’. He found that the guaranteed share of 22.5 per cent (previously said to be 23.5 per cent) of the net profit was equivalent to a royalty based on stumpage value of 19 per cent under his leasing scheme. He also found that under his scheme the average royalty payable on the Tarawera Valley land was 19 per cent. That figure was made up of two elements. The first came from applying his formula to the 76,000 acres of land involved according to his own classification system and taking the average, which produced a royalty of 10 per cent. The second element (which had not appeared in earlier papers on the leasing scheme³⁹) was a weighting for proximity value, which produced an additional royalty of 9 per cent. Accordingly, the Tasman proposal resulted in exactly the same profitability to Maori and the Crown as leasing. However, in a handwritten footnote, Grainger commented that:

Head Office have not yet accepted the principle of allowing for varying proximity as a differential in the Royalty rate. If proximity value is to be finally excluded from our formula, this can only make the Tasman guarantee much more attractive.⁴⁰

In fact, Mr Poole did not accept the idea of adding a proximity value to the landowner’s royalty share on the ground that ‘It is assumed that proximity or remoteness of markets will be reflected in stumpage’.⁴¹ Hence, the return to the landowners under Mr Grainger’s leasing scheme would be only 10 per cent.

In another handwritten footnote, Mr Grainger stated that the guaranteed shareholding of 22.5 per cent was equivalent to a land value of £19 per acre in the first year of the venture. He noted that this applied to the full 76,000 acres of land available, and that for the Putauaki State Forest alone the value was £23 per acre.⁴²

In early October, the Forest Service was becoming concerned that no written confirmation had been received from Tasman of the minimum guarantee to the Crown and Maori of 75 per cent of their predicted TFL shareholdings. Messrs Grainger and Beattie of the Economics Division did a further analysis of the proposal on 12 October, in which they also reiterated concerns about the lack of clear provision for silvicultural costs (for tending the growing trees) and the possible effect on returns to the landowner if the share capital/debenture

39. Document B72, p 9

40. ‘Note of the Agreement re Tarawera Valley’, 20 September 1965, FS83/503, vol 1 (cited in doc A10, pp 57–58)

41. Poole, ‘Leasing of Land for Afforestation’, memorandum to all regional conservators, 23 September 1965, NZFS1/49/13, vol 1 (cited in doc B72, p 11)

42. Document A5(8.22)

capital proportion in the company should ever be changed. Mr Grainger concluded that if 'clear-cut assurances are not forthcoming the landowners should avoid any firm commitment'.⁴³

Prior to the next meeting with representatives of the owners on 14 October 1965, Tasman prepared another outline of the scheme. No mention was made of the minimum guarantee. Just before the meeting, Mr Poole asked Mr Schmitt for an explanation of this omission. Mr Schmitt responded that he did not wish to inform Maori of the guarantee 'for the purposes of bargaining', but that, if pressed by the owners, he would make it clear that the guarantee stood.⁴⁴ In a subsequent letter to Mr Poole, Mr Thomson stressed the need to get clarification and the promised confirmation of the minimum guarantee from Mr Schmitt. He stated that the Lands Department was relying upon the Forest Service to get a fair return for Crown land and that 'from all accounts the Maoris will look to us and nobody else to see that their interests are safeguarded. We are thus under moral as well as administrative obligations to act.'⁴⁵

4.8 THE FOURTH MEETING WITH MAORI LANDOWNERS, 14 OCTOBER 1965

4.8.1 Attendance

On 14 October 1965, nearly a year after the last meeting at Rotorua, Crown officials, Tasman representatives, and Maori landowners met again at Kawerau. Although 48 landowners were invited to attend, only 38 were present.⁴⁶ Among them for the first time was Dr Eruera Manuera. The minutes of the meeting record that it began at 10.30 am and ended at 3 pm, with an hour's break for lunch.⁴⁷ As well as the key officials who attended the previous meeting in November 1964, the Government delegation included Mr Souter (the Deputy Secretary of Maori Affairs), Mr Lynskey (the Assistant Director-General of Lands), and Mr Poole (the Director-General of Forests). Among Tasman's representatives were Messrs Schmitt, Clinkard, McKee, Neutze, Chambers, Kjar, and JM Mitchell (the chief forester).

4.8.2 The joint venturers' relative positions

The meeting began with Mr Schmitt outlining the proposal as it then stood and then fielding questions from the assembled owners. Mr Poole and Mr Souter spoke in turn and responded to questions.

43. Grainger to director of forest economics, 12 October 1965, attachment ('Tarawera Valley Project') FS83/503, vol 1 (doc A5(8.34))

44. 'Tarawera Valley Afforestation', file note, 19 October 1965, FS83/503, vol 1 (cited in doc A10, p 64)

45. Thomson to Poole, 19 October 1965, FS83/503, vol 1 (cited in doc A10, pp 64-65)

46. 'Minutes of a Meeting Held at Kawerau on 14 October 1965', pp 1-2 (pp 33-34)

47. Ibid, pp 3, 18, 21 (pp 35, 50, 53)

Considerable attention was paid to the make-up of the board of directors of the proposed joint-venture company. In response to a question, Mr Schmitt explained that it would comprise a representative of the Crown, two representatives from the Maori owners, and four from Tasman. He stressed that, in terms of the relative capital contributions of the three parties, the ratio of directors favoured the Crown and Maori.⁴⁸ Later in the meeting, Nira Fraser pointed out that Tasman would have the controlling interest on the board of directors, and Mrs Hawthorne said that Maori should have at least three members on the board. Towards the end of the meeting, the issue was again returned to. On this occasion, Mr Souter stated that the directors 'are trustees for all the shareholders; they are there to look after the interests of all the shareholders. If they didn't they would end up behind bars.'⁴⁹

As at the previous meeting, several owners expressed disquiet about the size of the projected Tasman shareholding, even though it was now down to 76 per cent. Mr Bennett asked whether the money spent on developing the forest could be paid back to Tasman once the forest began making money, 'rather than have 69.6 percent for the development costs coming back to Tasman'.⁵⁰ Sam Savage then asked whether the development costs could be left out of the share allocation altogether. Mr Schmitt conceded that this was possible, although it would mean that Tasman was not the majority shareholder and therefore not eligible for the tax concession whereby it could write off half of the costs of developing the forest. This would make the development costs £5.3 million instead of £2.6 million, 'and the profitability of the whole venture would be impaired'.⁵¹

When Monica Lanham returned to the development costs later, Mr Barber was quick to comment on 'the most favourable' thing in his view; namely, the 'very considerable taxation concession' that could now be obtained in this way. He said, 'I cannot see that if the Maoris found £100,000 in cash they would get the same taxation concessions. It is so vital!' He invited Mr Schmitt to explain the 'value of the tax concession', after which explanation Mr Fraser established that the concession would still apply even if Maori leased their land to the proposed forestry company. Mr Fraser then commented that it was 'not necessary for the Maori Owners to come into the Company itself'.⁵² Mr Fraser later claimed that the development of the land was the Government's responsibility and it should therefore provide the finance.⁵³

48. 'Minutes of a Meeting Held at Kawerau on 14 October 1965', p 3 (p 35)

49. Ibid, p 16 (p 48)

50. Ibid, p 7 (p 39). It is not clear from the minutes which of the two Bennetts present at the meeting this was.

51. Ibid

52. Ibid, pp 8-9 (pp 40-41)

53. Ibid, p 13 (p 45)

4.8.3 Land values and lease prospects

Earlier in the meeting, Mr Fraser asked whether higher values for the land would be offered if the Maori owners pressed for it. Mr Schmitt responded that if values were increased they would have to be applied to the lands of both the Crown and Tasman to ensure equity between the parties.⁵⁴ Mr Fraser responded that:

The Crown are not in the same position as we are. There is no fair comparison between the Maori owners and the Crown. The Maoris have a personal and an historical interest in the land. It might be a fair valuation as far as the Crown is concerned but there is no fair comparison between the Crown and the Maori Owners.⁵⁵

Mr Fraser had previously asked whether, given that the 'Maori owners have the heritage' and 'the Crown have nothing', different formulae should not be used in valuing their respective lands.⁵⁶

At least some of the owners present were still uncomfortable about the prospect of their land passing out of their ownership. Consequently, the alternative of leasing the land was again discussed at various points. Mr Schmitt stated that leasing 'doesn't have the advantages that exist in this scheme under which we can and do assure everyone of their full share of the profitability of the forest and assure all the participants that the full produce will be taken'. Because Tasman was carrying the 'major financial risk during the development period', it had to be satisfied that it had a 'firm long-term arrangement'. He went on:

I am unable to see an arrangement based on leasing that has all the advantages of this scheme. The arrangement is very similar in its effect to a more or less permanent leasing arrangement with comparable rent being paid because the Maori owners get the full share of profits.⁵⁷

Mr Fraser later asked Mr Poole: 'Do you think the Crown would form a union with Tasman and lease the land?' In his reply, Mr Poole stressed the lack of control Maori would then have over the land: 'You leave it to Tasman and possibly the Crown to develop. Under the present arrangement, you do have membership on the Board and a voice in the management of the forest. I think that has a number of advantages.' He thought that the end results of the joint-venture proposal and leasing were 'fairly similar'.⁵⁸

54. Ibid, p 6 (p 38)

55. Ibid

56. Ibid, p 5 (p 37)

57. Ibid, p 8 (p 40)

58. Ibid, p 12 (p 44)

4.8.4

Mr Fraser later asked Mr Souter whether he agreed that 'if the Maori lands were leased the same results would be achieved'. In his reply, Mr Souter claimed that 'all they [the Maori owners] would get would be rent and it seems that it is much more favourable to have a share in the profits'. Mr Fraser responded by asking whether the Maori owners, 'by obtaining rental and a good royalty', 'would not receive an equally favourable bargain'. Mr Souter responded that 'It is pretty hard to say what royalty the Forest Company is going to pay you in 25 years' time.'⁵⁹

4.8.4 Possibility of excluding certain land

At the outset of the meeting, Alfred Edwards had declared that he wanted his blocks excluded from the scheme.⁶⁰ Towards the end of the meeting, Mr Fraser asked what would happen to the lands of those who opposed the scheme if the majority of landowners voted for amalgamation and the joint-venture scheme. Mr Souter replied that the Maori Land Court would decide on such matters when the application for amalgamation was heard and that, whatever the court's decision, people had a right to take an appeal to the Maori Appellate Court.⁶¹ This prompted Mrs Lanham to remark: 'The ones who want to exclude their land from the proposal – what rights are you giving them – just the necessity to spend more money in Court appearances?' Later, she asked why the Edwards family 'cannot take their bit out now before it goes to Court?'⁶²

4.8.5 Support for the proposal

Despite such comments, many owners at the meeting supported the proposal. For instance, Harry Semmens stated that the 'whole proposal sounds very, very good to me'. Kepa Ehau declared that in principle he and his fellow owners of the Pokohu D block would agree to everything. And even Mrs Lanham, despite her misgivings about some aspects, stated that 'Tasman's proposal is a great scheme'.⁶³ Phillip Howell did not agree to the land being leased because he believed that they would get nothing out of it, and he declared that 'Tasman is one of the greatest things that has ever come into the district'. Wary of the threat that unpaid rates posed to Maori retaining the land, he said: 'I cannot see any other way out of it. . . . If it doesn't go to Tasman, the County Council is the dog that I am afraid of.'⁶⁴

59. 'Minutes of a Meeting Held at Kawerau on 14 October 1965', p 17 (p 49)

60. Ibid, p 3 (p 35)

61. Ibid, p 16 (p 48)

62. Ibid, pp 17, 18 (pp 49, 50)

63. Ibid, pp 9, 12, 13 (pp 41, 44, 45)

64. Ibid, p 12 (p 44)

4.8.6 A Maori holding company

Mr Souter's address was particularly concerned with how titles to the Maori-owned land would be dealt with if the joint venture went ahead. He explained that the titles would be amalgamated and the lands vested in TFL. A separate company would then be formed in which the Maori owners of the land would hold shares in the same proportion as they currently held shares in the land. A lot of time was spent discussing various ways of dealing with land-holding shares worth less than £1, which would be the value of each share in the Maori holding company. In the course of that discussion, Mr Souter's enthusiasm for the scheme was evident, as in his statement that it 'enables you both to sell your land and to retain it. That's a pretty cunning sort of arrangement.'⁶⁵ He also stressed the evils of idle land: 'We also want to do the best for New Zealand and in New Zealand we cannot afford to have land lying idle.'⁶⁶

4.8.7 Further consultation planned

Mr Souter felt that the question of fractional interests should be left to 'a formal meeting of all the owners within the next few weeks'. Mrs Hawthorne then expressed concern that some owners 'do not know what is going on', saying that 'Everybody should be given an opportunity to hear what is going on in these meetings concerning Pokohu'. Mr Schmitt replied that 'a very full written statement of the proposals will be sent to every person with an interest in the land concerned well in advance of the proposed meeting. The details will be clearly set out in writing for all to see.'⁶⁷ He therefore felt that 'we are doing all we can'. Mr Barber also noted the 'very comprehensive endeavour' made by both Maori Affairs and Tasman to find all the owners, adding that 'After a most thorough examination and search a formal notice will go out three weeks in advance of the date of this formal meeting'. Shortly thereafter, Mr Fraser moved a motion 'that the Registrar of the Maori Land Court be requested to call a formal meeting of the Maori Owners to consider the proposals put forward by Tasman'. (Although the minutes of the meeting do not record that the motion was carried, it appears that it was, since the minutes do record arrangements for the proposed formal meeting of Maori owners.)⁶⁸

The registrar's involvement in the procedure that was envisaged for calling the formal meeting was consistent with it being called under Part xxiii of the Maori Affairs Act 1953, which required block-by-block voting on alienation proposals (see sec 2.2.5(2)). That this was the predominant understanding of the owners at the 14 October meeting tends to be confirmed by comments made at the final meeting on 11 December 1965 (see sec 4.11.6).

65. Ibid, p 14 (p 46)

66. Ibid, p 17 (p 49)

67. Ibid, pp 19–20 (pp 51–52)

68. Ibid, p 20 (p 52)

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4.8.8

4.8.8 Crown views on the meeting

Mr Poole, in his file note the next day, wrote: 'It was apparent and, in fact, openly expressed by some of the Maoris present, that there was agreement with the proposals and certainly general agreement with afforestation of the Tarawera Valley.' He thought that 'the consensus of opinion was that this seemed to be a good scheme and the owners were anxious to proceed with it'.⁶⁹

On 18 October, Mr Souter wrote to the Solicitor-General outlining the proposal and what had occurred at the 14 October meeting. He recorded that those at the meeting had agreed to 'Amalgamate the titles of the Maori land to be included in the scheme under section 182 of the Maori Affairs Act, 1953', and to 'Appoint a trustee (probably the Maori Trustee) under section 438' of the Act both 'to act as agent of the Maori owners to alienate the land included in the amalgamated title to Tarawera Forest Ltd' and 'to arrange for the setting up' of a Maori holding company. Having described the proposed structure of the company, which he referred to as Maori Holdings Limited, Mr Souter noted that special legislation would be needed to set it up and that the legislation would need to deal with both fractional interests and, since about a third of the owners would never be known, unclaimed shares. He asked the Solicitor-General to prepare a suitable draft, having noted that Maori Affairs' office solicitor, Mr DM Forsell, would do the same (his draft was submitted to the Crown Law Office on 22 October).⁷⁰ Crown counsel Mr G Cain replied on 28 October, enclosing a draft Bill and giving extensive advice on the legal machinery and other actions required to set up the proposed company.⁷¹

4.9 THE SAVAGE AND EDWARDS WHANAU MEETING, 4 NOVEMBER 1965

4.9.1 Attendance

On 4 November 1965, Mr J A Dye, the special titles officer of the Maori Affairs Department in Rotorua, chaired a lengthy meeting in Kawerau between Tasman representatives (including Messrs McKee, Neutze, Chambers, and Mitchell) and 25 members of the Savage and Edwards families.⁷² Presumably, this was the consultation that Mr Barber, at the November 1964 Rotorua meeting, had stated would occur between Mr Dye and the families wishing to have their land excluded from the scheme. It represents an attempt to sort out the exclusion issues identified in the previous meeting (see sec 4.8.4). The minutes of the approximately five-hour meeting are not as comprehensive as those for the previous meetings.⁷³

69. Poole, 'Tarawera Valley Afforestation', file note, 15 October 1965, FS83/50 (doc A5(8.39))

70. Document B1, pp 15, 17-18

71. Ibid, pp 12-16

72. 'Minutes of Meeting of Edwards/Savage Family Held in the Maori Community Centre, Kawerau, at 10 am on 4 November 1965', typescript, [1965] (doc A4, vol 2)

73. Ibid

4.9.2 Interests in the land

The meeting began with Mr Dye outlining the extent of the families' interests in the lands within the Tarawera Valley proposal. While they had interests in Pokohu blocks totalling some 3000 acres, 'the total Savage/Edwards ownership was 1,140 acres'. Of this total, the 'Edwards group' owned 132 acres exclusively.

Mr McKee, as the leading Tasman representative, then provided some background to the scheme. He noted that 'the people most likely to be concerned with the scheme will be the Edwards family who live in the area and secure their livelihood from it in the form of shooting, grazing and firewood cutting', and that, even if the Edwards family lands were consolidated, they would not be an economic farming unit owing to their small size and inferior soils.⁷⁴ He gave Tasman's land valuation of the Edwards family's ownership in all blocks (£845) and the 1963 Government valuation of the family's improvements (£855), and then he spoke of the 'difficulty of managing and protecting a forest around blocks which were not included'.⁷⁵

4.9.3 Compensation offered

Mr Chambers then outlined what compensation Tasman would offer the family, it being either compensation for improvements plus £1000, employment at Kawerau, and the purchasing of farm equipment at valuation or a Hammond-type house freehold in lieu of cash for improvement and disturbance, plus employment and the purchasing of equipment.⁷⁶ Tasman's chief forester, Mr Mitchell, noted that there was no legal access to the Edwards property and that Tasman was allowing unrestricted access via a road it owned.

Later, after lunch, Mrs Lanham asked if Tasman would be prepared to pay more to the Edwards family. Mr Chambers said Tasman would – perhaps providing a new Lockwood- or Hay-style home in Kawerau – though Mr McKee was quick to state that the company would not pay an exorbitant price for the land. He also pointed out that the compensation that Tasman paid to the Edwards family would be part of Tasman's forestry development costs. Mrs Lanham 'became angry at the thought that Tasman would eventually reap the cost of shifting [the] Edwards family off their farm and that the Maori share[holding in the forest] would be reduced by this amount'.⁷⁷ On a more conciliatory note, she stated that, if the Edwardses accepted Tasman's offer, she and the other members of the Savage family would feel free to put their land into the forestry scheme.⁷⁸

74. Ibid, pp 2-3 (pp 55-56)

75. Ibid, p 3 (p 56)

76. Ibid, pp 3-4 (pp 56-57)

77. Ibid, pp 6-9 (pp 59-62)

78. Ibid, p 9 (p 62)

4.9.4

Mr Chambers then made a further offer to the Edwardses on behalf of Tasman: a Hammond-type house plus £1500 in cash, the purchasing of equipment at valuation, and employment for the family. Mrs Lanham responded that, if the compensation were adequate, then ‘Edwards might bite’, and she reiterated that, the sooner this matter was cleared up, the sooner she would feel free to decide what to do with her shares.⁷⁹ Alfred Edwards, however, stated that if ‘we move out we lose on the deal considering the present offer’.

4.9.4 Ways of excluding land

Sam Savage had earlier asked if ‘all the objectors present and all other objectors such as the Ngahu’s [*sic*] and those who may wish to stay out of the Scheme’ could ‘amalgamate their shareholdings on the northern edge of the land being considered – near his present farm’. Mr Dye replied that the Maori Land Court would have to decide that.

After lunch, Alfred Edwards asked that five of the Pokohu blocks (B3B1, B3B2, B3B3, B3B4, and B3B5 – see map 6) be partitioned out and that they be left for his family to farm. He then stated his wish to farm some 3000 acres of land in which the Edwards and Savage families had interests. Mr Dye duly pointed out that much of this land was co-owned with others outside the family and that it could not be used as Mr Edwards was proposing. Mr Chambers then declared that the time was upon them for the family to decide between Tasman’s and the Edwardses’ schemes. Mr N Tierney stated that his family were the sole owners of one block and did not want to part with it. Various others, however, said that they wanted the land to be used to best advantage. Tom Savage and Elsie McDonald were not prepared to commit either way at that point. Mrs Lanham and Mr Savage were prepared to let the Edwardses farm some of the lands. Mr Dye then summed up that the ‘preponderant Savage family attitude was that the land be used and that it should return the owners an income’.⁸⁰

The meeting later returned to the possibility of the Edwardses remaining on the land. Annie Stowell stated that the owners present would cut out the 66 acres owned by the Edwardses and that they could stay and farm in the valley.⁸¹ At this point, Mr Dye interjected, saying that ‘he hoped he would not have to say this but it should go on record that when the [Maori Land] Court considers all the objections, if the objections are not based on a strong case the Court might rule that in the interests of all the other owners the family should move’. Continuing, Mr Dye observed that, if the block were owned entirely by one family, the Court ‘was not likely to rule against them’, but that if there were many other owners, ‘the Court would most likely consider the majority interest’.⁸²

79. ‘Minutes of Meeting of Edwards/Savage Family’, p 9 (p 62)

80. Ibid, pp 6–8 (pp 59–61)

81. Ibid, p 9 (p 62)

82. Ibid, p 10 (p 63)

4.9.5 Inconclusive conclusion

The meeting ended with Mr Dye asking Alfred Edwards if he would state what his requirements were to move off the land. Mr Edwards responded that he wanted time to think the matter over and that he would meet with Tasman officials before the meeting of owners scheduled for the following week.⁸³ However, it is unclear exactly what meeting Mr Edwards was referring to: there is no record of any meeting the following week, the next recorded meeting being the Kokohinau Pa meeting on 11 December 1965.

4.10 PREPARATION FOR THE FINAL MEETING WITH LANDOWNERS

4.10.1 Notice of meeting

By notice dated 19 November 1965, Mr JTW Barber, the registrar of the Waiariki district Maori Land Court, advised the owners of the blocks affected by the Tarawera Valley proposal that a 'meeting of owners' was to be held at Kokohinau Pa, Te Teko, on Saturday, 11 December 1965. At the 1966 Maori Land Court hearing, special titles officer Mr Dye stated that 'all identifiable owners whose addresses were known were notified personally by separate notice', and he estimated the number of these owners to be 'in the vicinity of 2,200'.⁸⁴ The notice stated that the purpose of the meeting was to consider three proposals:

- ▶ whether to combine or amalgamate (as the case may be) the titles of the blocks set out in an attached schedule into one title, under section 182 or section 435 of the Maori Affairs Act 1953;
- ▶ whether to appoint the Maori Trustee under section 438 to alienate the lands to TFL in exchange for shares and debentures in that company; and
- ▶ whether to authorise the Maori Trustee to form a Maori holding company, the assets of which would be the shares and debentures issued by TFL in exchange for the transfer of land.

The notice stressed that the meeting was '*not* one held in pursuance of part XXIII of the Maori Affairs Act, 1953, but is a general title meeting convened to approve or disapprove the proposals put forward' (emphasis in original).⁸⁵

A few days after the notice was issued, the Tasman Cabinet Committee recommended that Cabinet approve the drafting of special legislation that would authorise the establishment of the holding company for the Maori shares and provide for its particular needs.⁸⁶ These needs

83. Ibid

84. Document A33, pB5

85. 'Tarawera Valley Afforestation: Notice to Maori Owners', typescript, 19 November 1965, MLC45/97 (doc A4, vol 2, p114)

86. At that time, the committee comprised the Deputy Prime Minister, the Honourable JR Marshall (who chaired the committee); the Prime Minister, the Right Honourable KJ Holyoake; the Minister of Finance, the Honourable HR Lake; and the Minister of Lands and Forests, the Honourable R G Gerard.

4.10.2

included providing for the handling of the shares of missing owners and dealing with fractions of shares, and giving special taxation exemptions to the debenture interest payments owed to the Maori holding company by treating it as a Maori authority. The committee also recommended that Cabinet agree to exempt the company from registration and licence fees, and that the negotiations with the Maori owners on 11 December should be based on these proposals.⁸⁷

In his memorandum to the Tasman Cabinet Committee, the Minister of Finance noted that 'it is essential that the points to be covered in this special legislation be agreed upon' before the December meeting. He also noted that the Maori land would be alienated 'at the valuation of the land for forestry purposes'.⁸⁸

4.10.2 Tasman's booklet

Enclosed with the notice of the meeting was an illustrated booklet prepared by Tasman to explain the Tarawera Valley proposal and an accompanying letter signed by Schmitt.⁸⁹ The letter stated that the proposal 'will be submitted to you for approval at a formal meeting of owners'.⁹⁰ The booklet, entitled *Proposal by Tasman Pulp and Paper Company Limited to Maori Owners and the Crown to Participate in the Development of an Exotic Forest in the Tarawera Valley*, began by stating that Tasman wished to 'place before other owners of land in the Tarawera Valley a proposal for the development of an exotic forest on the currently unproductive lands of the Valley'.⁹¹ 'The basic concept' of the proposal was that:

- ▶ the Crown, Maori and Tasman would 'transfer' their land in the Tarawera Valley to a new public company to be known as Tarawera Forests Limited (TFL);
- ▶ Tasman would undertake and finance the development and management of the forest;
- ▶ all the partners in the joint venture would share in the capital of TFL in proportion to the value of their respective contributions in land and money;
- ▶ TFL would be run by a board of directors comprising two representatives of the Maori owners, one Crown official, and four Tasman representatives;
- ▶ Tasman would enter into a long-term contract with TFL to purchase all of the wood it produced 'at a price equivalent to the average cost to Tasman at the Kawerau mill site of similar wood from all other sources'; and

87. Cabinet Committee on the Tasman Pulp and Paper Company, minutes of 18 November 1965 meeting, TPP(65)M2, pt 1, 22 November 1965 (doc A5(9.11))

88. Minister of Finance, 'Joint Venture for Development of Tarawera Forest by Tasman Pulp and Paper Co Ltd, the Crown, and Maoris', memorandum to Cabinet Committee on the Tasman Pulp and Paper Company, TPP(65)3, 16 November 1965 (doc A5(9.8))

89. Tasman Pulp and Paper Company Limited, *Proposal By Tasman Pulp and Paper Company Limited*; doc A10, p 68

90. Form letter from Schmitt enclosing *Proposal By Tasman Pulp and Paper Company Limited*, 20 November 1965 (doc A4, vol 2, p 116)

91. Tasman Pulp and Paper Company Limited, *Proposal By Tasman Pulp and Paper Company Limited*, p 1 (p 120)

- TFL would therefore ‘have at all times an assured market for disposal of its produce’ and ‘because of the nearness of the forest to Tasman’s mill would be assured of a very satisfactory return’.

The proposed contributions of land of the three landowners were:

Maori-owned land	38,095.5 acres
Crown-owned	18,691.6 acres
Tasman-owned	19,350.0 acres
Total	<u>76,137.1 acres</u>

However, it was noted that not all of this land was suitable for afforestation owing to the steepness and vegetation cover of some of it. It was estimated that approximately 60,000 acres would be planted.⁹²

The booklet’s next section dealt with the classification and valuation of the land. The value of each block was determined by a formula based on the ease of clearing and planting the land and its distance from the mill at Kawerau. It noted that the formula used to determine the valuations had resulted in ‘a scale of values that is fair and reasonable and which is, in fact, considerably in excess of any other scale of comparable valuations or actual sales in the area’. It gave the example of the valuations for four of the Pokohu blocks – an area totalling 15,537 acres. Whereas a ‘special Government valuation’ of the blocks made on 1 December 1963 had given the lands a total value of £26,400, under the forestry proposal they had been valued at £46,750.⁹³

Under the heading ‘Financial Arrangements’, it was explained that Maori, the Crown, and Tasman would ‘transfer their lands’ to TFL and receive a debenture for their value. The costs incurred by Tasman in developing the forest, after all tax concessions had been deducted, would similarly be secured by a debenture. The sums secured by the debentures would compound at the rate of 6 per cent per annum until the income from the forest was sufficient to meet all the operational costs ‘and a surplus was available to be applied in payment of the interest on the debentures’, which was expected to take about 25 years. The values of the three landowners’ holdings in the Tarawera Valley, both the values at the time and the compounded values in 25 years, were set out as follows:

Land	Present value	Compounded value at year 25
Maori-owned	£129,019	£553,732
Crown-owned	£79,762	£342,330
Tasman-owned	£62,344	£267,574

92. Ibid, p 2 (p 121)

93. Ibid

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The booklet stated that a ‘very careful analysis of the probable cost’ of developing and maintaining the forest had been made, and that:

Under taxation legislation recently introduced, Tasman would be able to claim as a deduction against income obtained by it from other sources the cost involved in developing and maintaining the forest. The full benefit of this concession as well as any further concession granted in the future would be passed on to the Forest Company. Assuming that this concession would remain in force throughout the development period, it has been estimated that the compounded net cost of development and maintenance would be £2,672,786.⁹⁴

Based on this figure and the land valuations above, the booklet set out what each partner’s relative interest in TFL at the end of the development period would be:

Category	Contribution	Shareholding in TFL
Maori-owned land	£553,732	14.43%
Crown-owned land	£342,330	8.93%
Tasman-owned land	£267,574	6.97%
Development cost	£2,672,786	69.67%

The next part of the booklet covered what would happen to areas that were covered in native bush, the arrangements for public access and power transmission lines, and how taxation concessions worked. In this section, it was stressed that, if Maori undertook their own forestry project, it would be unlikely that they would qualify for the full benefit of the tax concession. The final section was a summary. This gave the anticipated value of the forest’s output (20 million cubic feet of wood per year, valued at between £650,000 and £700,000) and stressed the benefits of the scheme to Maori, which included bringing hitherto unproductive land into production, receiving a permanent share in company profits, and the opportunity for employment in the forest.⁹⁵

The booklet also contained three appendices. The first set out all the blocks within the proposed forest and their values, the second explained the method by which the lands were classified and valued, and the third described the proposed reserves within the forest area. These reserves were the Tarawera scenic reserve (which included Mount Tarawera, Lake Tarawera, and the Tarawera River from its source to the Tarawera Falls) and two Maori burial reserves, neither of which would be planted – the Te Haehaenga burial reserve (an area of four acres on Maungawhakamana peak) and the Putauaki mountain burial reserve.⁹⁶ The booklet stated:

94. Tasman Pulp and Paper Company Limited, *Proposal By Tasman Pulp and Paper Company Limited*, p 3 (p 121)

95. *Ibid*, pp 4–5 (p 122)

96. *Ibid*, pp 6–8 (pp 123–124)

Putauaki (Mt Edgecumbe) is the sacred burial ground of the forefathers of certain sub-tribes of the Arawa and it is, therefore, Tasman's wish that this area be protected and remain unplanted within a reserve. Notwithstanding [this] . . . Tasman proposes to value it at the base price of £1 per acre, which is the value of unplanted land within the scheme, and to include the sum so calculated as part of the Maoris' contribution to the Forest Company.⁹⁷

On 6 December, the conservator of forests in Rotorua, Mr D Kennedy, sent an urgent telex to the Assistant Director-General of Forests, Mr AP Thomson, noting that he had just received the Tasman booklet and that it 'offers no guarantee regarding landowners share in the company . . . and gives no assurance that this share will not be eroded away by development costs'.⁹⁸ Mr Kennedy noted that on 22 October Mr Grainger had sent Mr Thomson a draft letter to Tasman seeking assurances on this point. Mr Thomson noted on the telex that he had not seen the booklet and that Mr Grainger's draft had been 'too diffuse'.⁹⁹ The director of forest economics, Mr AD McKinnon, had redrafted the letter, and as a result it was sent to Tasman over Mr Poole's signature on 7 December.

This letter caused considerable confusion among both Forest Service officials and Tasman personnel, and this confusion was not resolved until March 1966. We will discuss the letter and its effects in section 4.13.2.

4.11 THE FINAL MEETING WITH LANDOWNERS AT KOKOHINAU PA, 11 DECEMBER 1965

4.11.1 Agenda, minutes, and attendance

On 11 December 1965, a meeting was held at Kokohinau Pa, Te Teko, to discuss the Tarawera Valley joint-venture proposal. An agenda has been found attached to a file note of Mr Poole's on the meeting, and Mr Barber refers to the agenda at the beginning, but it is not clear how widely circulated it was. The agenda proposed three resolutions for consideration:

(a) That the titles for the 40 blocks of Maori land as set out in the notice to owners of this meeting be combined or amalgamated (as the case may be) into one title, in terms of Section 182 and/or Section 435 of the Maori Affairs Act 1953 or by any other statutory power enabling except that in the Matahina A1D and Ruawahia No 2 Blocks, areas of only 1231 a 1 r 14 p and 99 a or 32 p respectively be included. Owners' shares in combined title to be based on forest values as set out in Tasman's booklet (Appendix 1).

(b) That the Maori Trustee be appointed, in terms of Section 438 of the Maori Affairs Act 1953, as trustee for the owners to alienate the land included in the combined title to a forestry company intended to be known as Tarawera Forests Limited.

97. Ibid, p 8 (p 124)

98. Handwritten notes by Thomson on Conservator to Thomson (telex), 6 December 1965 (doc A5(9.16))

99. Ibid

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(c) That the Maori Trustee be authorized and instructed to take all necessary steps to form a Maori holding company (suggested name Tarawera Holdings Limited) the assets of which would be the shares and debentures issued by Tarawera Forests Limited, and in which holding company all the Maori owners concerned (other than those whose interests were under £1 in value) would have a share in proportion to their respective interests in the land alienated.¹⁰⁰

Nominations were then to be called for directors of the Maori holding company.

Minutes of the meeting were later compiled by Mr Dye, using the record made by two typists from the Department of Maori Affairs who were also present.¹⁰¹ The minutes, which are 45 typed pages in length, appear to be a near-verbatim record of what was said in English during the meeting. At the outset, they record that 'approximately 350 Maoris were present' and that, while many of them were known owners, this number would include many prospective successors and possibly owners under names other than those which appeared in the titles. A list of 235 'established owners' who attended the meeting was appended to the minutes.¹⁰²

In addition to the Maori attendees, 13 Government representatives were present, including: from the Treasury, Mr NR Davis (the Assistant Secretary to the Treasury); from the Forest Service, Messrs AL Poole (the Director-General of Forests) and D Kennedy (the conservator of forests in Rotorua); from the Maori Affairs Department, Messrs BE Souter (the Deputy Secretary of Maori Affairs), JTW Barber (a district officer in Rotorua), JA Dye, and other officers; and, from the Lands and Survey Department, Messrs EJ Lynskey (the Assistant Director-General of Lands and Survey) and FS Beachman (the commissioner of Crown lands in Hamilton). Ten representatives from Tasman were also present, including Messrs GJ Schmitt (the managing director) and MH McKee (the general manager of the Kaingaroa Logging Company).

4.11.2 Opening addresses

Mr Barber chaired the meeting in his capacity as the registrar of the Waiariki district Maori Land Court. He opened the proceedings at 10.30 am, outlining briefly the dealings up to that point between Tasman, various Government officials, and 'a representative group of Maori owners' over the Tarawera Valley proposal. He stated that from the owners involved in the

100. 'Tarawera Valley Afforestation: Agenda for Meeting of Owners at Kokohinau Pa on 11 December 1965', [1965] (attached to Poole, 'Tarawera Valley Afforestation: Meeting of Maori Owners, Kokohinau Pa, 11/12/1965', file note, [1965] (doc A5(9.20))

101. Document A33, pB5

102. A list of owners who attended the meeting is attached to the minutes of the meeting: 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965 Regarding Tarawera Valley Afforestation Proposals', typescript, [1965], attachment (doc A4, vol 2, pp 111-113).

earlier meetings he 'had got the go ahead' to call this meeting of owners. Mr Barber explained that there were 4000 Maori owners in the blocks affected by the proposal and that the 'large gathering we have here today is a fairly representative group of all the owners, or I hope it is'.¹⁰³ He noted that 'Time is of course the essence of the contract', that 'It is important that you get a proper appreciation of the wide ramifications of the extensive proposals today', and that 'there will be no attempt to stifle discussion'. It was the largest meeting of Maori owners he had chaired in his district over the previous eight years and was 'a Maori meeting . . . so that I hope there will be a little bit of give and take'.

Mr S Watene, the member of Parliament for Eastern Maori, spoke in Maori and then in English, suggesting that the details of the proposed plan should be explained and the people allowed to ask questions.¹⁰⁴ Mr Barber agreed, and announced that it was 'perfectly in order' for people to speak in Maori and that John Rangihau (from Maori Affairs) would interpret. Shortly after, while Mr Schmitt was explaining the growth in value of the debentures issued, someone interjected that 'some of our Maori people do not understand' and asked for an interpretation. The minutes then record that Mr Rangihau 'interpreted at intervals throughout the meeting'.¹⁰⁵

Mr Schmitt then addressed the meeting, outlining the joint-venture proposal at some length and summarising the material in the booklet. As well as describing the basic workings of the proposal, how Tasman would buy all the logs from the forest, and the composition of the board of directors, he spent some time explaining the recently announced tax concession and how that would halve the cost of developing and maintaining the forest. He concluded by noting that the 'proposed arrangement represents, in the view of the Tasman Company, as fine a forest proposal as could be conceived or developed in New Zealand today' and that it 'represents good business for all the partners' and, he believed, 'especially good business for the Maori owners'.¹⁰⁶

Mr Schmitt then received several questions from the floor. Raniera Kingi asked whether Tasman would be prepared to sell part of its shareholding at the conclusion of the development phase so that Maori could increase their shareholding along with the Crown's to over 40 per cent. Mr Schmitt responded that Tasman had no objection to this possibility, so long as it maintained its majority shareholding. In relation to a question concerning the fees of the board of directors of the future forestry company, Mr Schmitt stated that, as a shareholder, Tasman 'would support any reasonable proposal for the payment of fees to Maori directors'.¹⁰⁷

Mr Poole spoke next, explaining why the Forest Service had 'wholeheartedly' accepted the joint-venture proposal. Towards the end of a lengthy account of his involvement in forestry in

103. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965', p 2 (p 66)

104. His Maori speech is not recorded in the minutes.

105. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965', pp 4, 5 (pp 68, 69)

106. *Ibid*, pp 4-8 (pp 68-72)

107. *Ibid*, pp 8-10 (pp 72-74)

New Zealand, he detailed two alternatives to the proposal that had been discussed at the earlier meeting with the representative owners. First, he addressed the point whether individual owners could plant up their own blocks. He observed that this was possible, and that such owners would probably be eligible for assistance under the Forest Service's farm forestry scheme. However, he stressed that such small-scale developments would not enjoy the benefits, such as coordinated planting, roading, and orderly sales, that would accrue if all the blocks in the area were developed in sequence. Secondly, he discussed the possibility of Maori leasing their land, as at Otakanini Topu, noting that again this would lack the advantages of a single coordinated scheme and that the Maori owners would not have representatives on the board of directors for the forest. He felt that Tasman's scheme was 'a much more satisfactory scheme for this particular area'.¹⁰⁸

Mr Davis then spoke very positively about the scheme. After noting that 'the Government believes that the long term value of forestry is well worth investing in', he stated that the Treasury's role was 'to ensure that the [Tasman] proposals were developed in the best interests of all parties concerned, and I firmly believe the proposal put before you achieves that. The Government believed it when it approved the proposal for final submission to the Maori owners.' Later, he announced that 'We believe this forest cannot fail' and that the scheme was 'soundly based'.¹⁰⁹

Mr Lynskey then declared the Department of Lands and Survey's support, noting that 'we are quite satisfied that there is no difficulty whatever . . . in providing adequate reserves for the public both Maori and Pakeha'.¹¹⁰ Mr Souter proclaimed his support too: 'I have examined this scheme closely and . . . I personally am satisfied that it will be of great benefit both to the Maori owners of the land and to the Maori people who live in this district.' He extolled the employment opportunities that the forest would afford Maori in the district, stressing that he meant not only 'menial employment' but also opportunities 'as executives, chemists, engineers and so on'.¹¹¹

4.11.3 Giving effect to the proposals

Next, Mr Souter discussed the need to amalgamate the 40 blocks into one title, and how that amalgamation would happen. If the meeting agreed to the proposals, an application would be made to the Maori Land Court for the amalgamation of the titles, and then 'Anyone who wishes to have anything to say about the matter can of course go along to the Maori Land Court and have his say. And if he does not like the order the Court makes he has the right to lodge an appeal.' At the same time as the application for amalgamation:

108. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965', pp 10–12 (pp 74–76)

109. *Ibid*, pp 12–13 (pp 76–77)

110. *Ibid*, p 13 (p 77)

111. *Ibid*, p 14 (p 78)

an application will be made to have the Maori Trustee appointed to act as agent of the owners to sell the land included in the amalgamated title to the company Tarawera Forests Ltd . . . for a consideration of approximately £129,000, which is the forestry value of the Maori land.¹¹²

However, 'before the Maori Trustee, if he is appointed, sells the land . . . he will first enter into an agreement with the Crown and Tasman which will set out in detail the terms upon which the company . . . is to be set up.' This agreement would be submitted to the Cabinet for approval, but first the Treasury would 'make a close examination' of it to see that it was 'fair and reasonable' as far as the Crown was concerned, and the Maori Trustee would do the same on behalf of the Maori owners. Mr Souter therefore claimed that the 'interests of the Maori owners are going to be fairly adequately safeguarded'; first, because Maori were entering the scheme on the same terms as the Crown and, secondly, because the Maori Trustee would be 'acting as a trustee, and is legally bound to . . . look after the interests of his beneficiaries'.¹¹³

Then, Mr Souter outlined the formation of TFL and the separate Maori shareholding company, the minimum share in which would be £1. Mr Souter described the machinery for dealing with shareholdings in the constituent blocks worth less than £1 and with fractions of shares, and he suggested that these small interests be purchased by either Tasman or the Maori Trustee, who would then offer them first to people who had interests of less than £1 and then to other shareholders in the Maori holding company. He next suggested a solution to the problem of deceased and unknown owners, whereby shares would be issued to all the owners of the land and 'vigorous efforts' would be made by Maori Affairs to locate the owners. After, say, 10 years, the shares of those owners who had still not been found would be transferred to 'a missing owners' shares reserve account', and, if the shares had still not been claimed after 25 years, they would finally be forfeited and vested in the remaining owners of the Maori holding company. Tasman had 'very generously' agreed to keep the company's share register, and it would charge only 'out-of-pocket expenses'.

Mr Souter then described the 'generous' offer of the Government to exempt the capitalisation of the debentures at 6 per cent per annum from the normal tax liability of 50 per cent. Further, when the cash interest on the debentures was paid to the Maori holding company in about 25 years, the company would be treated as if it were a Maori authority and the interest would be liable for tax not at the normal rate of 50 per cent but at the rate of 7.5 per cent.¹¹⁴ Finally, Mr Souter explained how the Maori holding company would receive shares in TFL once the forest started returning a profit. This company was 'the means whereby the identity of the Maori owners in the land will be retained', and it would enable them to decide what to do with the revenue from TFL.¹¹⁵

112. Ibid

113. Ibid, p 15 (p 79)

114. Ibid, pp 16–18 (pp 80–82)

115. Ibid, p 19 (p 83)

4.11.4

After Mr Souter had spoken, Mr Dye provided information on encumbrances on, and the rating status of, blocks affected by the proposed joint venture.

4.11.4 The after-lunch meeting

The meeting then adjourned for lunch. At 1.45 pm, when the meeting reassembled, the Maori owners requested permission to hold a short meeting among themselves. The chairman agreed, and the meeting finally resumed at 3:30 pm.¹¹⁶

4.11.5 Lack of time for consideration

Once the meeting resumed, Mr Rangihau, the interpreter, immediately complained about the lack of time given to consider the proposal: Tasman 'has had two years and the Maoris only this short day. There are angles which we have not taken into account.' He reported that, at the after-lunch meeting of owners, by 'a count of hands it was obvious that the people were for the proposal'. In the discussion that ensued, however, some confusion is apparent as to the actual voting figures: 71 to 62, 70 to 62, and 71 to 66 were variously mentioned. It is also apparent that a large number of Maori present did not vote and that a number of non-owners may have voted.¹¹⁷ Mrs Lanham drew attention to the large number of owners who had voted against the proposal and declared that 'their interests must be taken out'. This prompted several other owners, including other members of the Savage family, to declare that they wanted their interests excluded from the scheme. Koro Dewes, an observer at the hui, added that at the after-lunch meeting a number of people were unsure about certain conditions in the proposal, and he maintained that a postal ballot should be held.¹¹⁸

Mrs Lanham commented that the objectors were 'appealing not because they do not see anything good in the proposal' but because 'they are not satisfied with the financial arrangements'. 'She said that They feel that they should get a lot more' or that 'the Government should lend the money, this would bring them more favourable terms'. Mrs Lanham declared: 'We are voting against it because this sort of meeting is bulldozing us into agreeing . . . If this proposal is forced through now . . . all those ones who are swinging will back out. If they really want this proposal to go through it will go through even if it was 62 against 70.'¹¹⁹ Mr Barber responded that the question of more favourable terms could be discussed, since 'We do not have to reach a conclusion today, we can come back another day.'¹²⁰

116. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965', pp 19–20 (pp 83–84)

117. Ibid, pp 20–22 (pp 84–86)

118. Ibid, p 21 (p 85). Mr Dewes' name does not appear in the schedule of owners of Tarawera 1: 'Order Cancelling Several Titles and Substituting One Title and Apportioning Rights and Obligations upon Amalgamation', 19 August 1966, Judge Gillanders Scott, Maori Land Court, Waiariki, Whakatane Maori Land Court minute book 41, 73c–73f, sch 1 (doc A4, vol 1).

119. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965', pp 21–22 (pp 85–86)

120. Ibid, p 22 (p 86)

4.11.6 Part xxiii meeting instead

Nira Fraser then stated that the meeting should have been held under Part xxiii of the Maori Affairs Act 1953, which was 'the best medium of expression as far as alienations are concerned'. He said that, at the October 1965 meeting with the representative owners, he had successfully moved that an application be made to call a meeting of the owners of the blocks affected by the Tasman proposal, and he had been under the impression that such a meeting would be held under Part xxiii of the Maori Affairs Act. 'Only the owners in a particular block should have the right to say "Yea" or "Nay" regarding the proposals.' He objected to being able to 'move a resolution in respect of any other block than that in which I am interested', but it appeared that this was the form that the meeting was taking:

Any proposal to alienate Maori land should be subject to the wishes of the owners but in this case the owners have been subjected to the proposal and no manner of excuses can convince me otherwise . . . if you wish to object to the proposal you will have to place your objections before the Maori Land Court [instead of deciding the matter at a meeting held under Part xxiii]. . . . I think this is an unprecedented move as far as Maori alienations are concerned. I deplore the action of the people responsible.¹²¹

In response to a question from Lang Grace, Mr Barber made it clear that the meeting was not being held under Part xxiii. Mrs Lanham responded that she was under the impression that the meeting was to be called under that part, claiming that the 'individual owners of each block must be given the right to decide for themselves'. It was not fair for a small shareholder in a block to have the same voting rights as a major shareholder such as herself.¹²²

4.11.7 Relative shares

Another owner, Henry Bird, then commented that the lack of unanimity was not because the people did not want the proposal but because the meeting was 'being rushed . . . People did not have time to think'. What was worrying the Maori owners was 'the 14% for us . . . how can we bring our 14% up to 25%?' He suggested that the owners needed more time to get some legal advice and that Tasman might wish to pay the cost of this.¹²³ Mr Grace then asked for 'time to select 15 or 20 representatives to meet after Christmas and from that meeting we should be able finally to agree'.¹²⁴

Mr Fraser pointed out that he had attended all four previous meetings, and had obtained advice from accountants and lawyers, who agreed that the proposal 'is the best we can get': 'it is only a waste of time if you attempt to extract any more from the proposals'.¹²⁵ Mr Howell

121. Ibid

122. Ibid, p 23 (p 87)

123. Ibid, pp 23-24 (pp 87-88)

124. Ibid, p 24 (p 88)

125. Ibid, p 25 (p 89)

confirmed that he had done the same. Sam Savage then observed that Mr Howell had been agreeable to the 'original offer of 8½%' in October 1964, prompting Mr Schmitt to explain the reasons for the difference between that arrangement and the 14.43 per cent then being proposed. The then-current proposal was based on final instead of preliminary land valuations and benefited from the new tax concession on development costs: 'No question . . . that we were trying it on to see if we could get away with it, and then try to sweeten up the offer . . . no question of bargaining, our offers have been fair.'¹²⁶

Mr King stated that he had not sought advice from a lawyer or accountant, because 'Mr Schmitt explained things well'.¹²⁷ He then asked what would happen to the shareholdings of the respective parties if the cost of developing the forest differed from that estimated by Tasman. Mr Schmitt responded that 'it could obviously differ', if 'the wages and costs of development generally change more than we have allowed' or if 'the techniques of forest development' were developed, thus either reducing the cost or persuading all the partners 'to put more money in the development to produce a greater volume or higher quality of wood, or [to] increase the crop'. If the cost of developing the forest proved to be less than that estimated, the shareholding of the Maori landowners in the forest company would increase. However, if the company spent more on development, 'the extra money will be spent because it is going to yield a greater profit, and we will all share in the greater profit even if the percentage owned by Tasman might be greater'. He also reiterated that, if Maori could raise the capital, there would be no objection to Maori contributing to the development costs and thereby gaining a higher share in the forest company. In that event, however, the tax deductions on development expenditure would not be available to them: 'for every £1 they put in we plant £1's worth of forest, but for every £1 Tasman pays into the venture Tasman can plant £2's worth of forest'.¹²⁸

4.11.8 Could Maori develop their own forest?

Next, Mrs Lanham asked whether it would be possible for the Government to make finance available to the Maori owners under an arrangement similar to the farm forestry woodlots loan scheme. Mr Poole responded that that scheme was for small areas only. If they did that, it would mean that 'the area is planted piecemeal and each owner has to arrange for his own fire patrol, own roading, own management . . . Under one management you get a crop of greater value so that there is a greater benefit to the owners as a whole'.¹²⁹ Mrs Lanham then suggested that the Government loan money to Maori for the afforestation of the area and that Tasman manage the forest. Mr Poole responded that the Forest Service was interested in spending

126. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965', p 25 (p 89)

127. Ibid, pp 23–25 (pp 87–89)

128. Ibid, p 26 (p 90)

129. Ibid, p 28 (p 92)

what money it had in other areas: ‘We place priority on Nelson at the moment. Tasman place the priority here and will spend their own money here. . . . We will spend money elsewhere.’ This caused Mrs Lanham to observe: ‘You blokes have blanked your minds completely to any other opinion.’ Mr Poole then repeated that, if the farm forestry scheme was extended to Maori ownership, it would be using Government money that the Forest Service would prefer to spend elsewhere, when Tasman had money available to spend on this scheme: ‘We are quite satisfied with the figures. The Crown gets its pound of flesh and the same percentage goes to the Maori owners.’¹³⁰

Mr Davis thought that the Government:

would find it very difficult to allocate the extra money . . . required to make enough available to Maori owners to go ahead with a major planting which someone else would have to do for them anyhow. Tasman has to put up the capital to develop forest from its own resources, and the Government forgoes some revenue but will get back the money in overseas exchange. The Government gets its value from the trade value rather than from the taxation value.¹³¹

4.11.9 Puzzling points

Mr Dewes then summarised the three points still puzzling the owners. First were the projected relative shareholdings of the three parties – a major subject of discussion at the meeting after lunch – the central issue being why Tasman ended up with 75 per cent and the Maori owners, who put in half the land, only 14 per cent. Mr Schmitt explained again the valuation process for the lands and that, without Tasman investing large amounts of capital, there would be no forest. Again, he said that, if Maori could raise some finance, Tasman would welcome their contribution.¹³²

The second point was the Maori representation on the forest company board of directors, which was low in relation to the area of land contributed. Mr Schmitt responded that the board would look after the interests of TFL as a whole: ‘We will have complete unity of interest. Tasman cannot run against the interests of the Maori owners or the Crown without running against its own interests.’ However, he offered to reduce the Tasman representation to three.¹³³

Third was the conversion of Maori shares in the land to shares in the company. Mr Dewes noted that ‘At least at present they [the Maori owners] have substance in the soil’, and he asked: ‘What happens if the Company goes bung within the 25 years? Do we get the land back?’ Having explained the insurance arrangements and that, because Tasman had

130. Ibid, pp 27–28 (pp 91–92)

131. Ibid, pp 28–29 (pp 92–93)

132. Ibid, pp 29–30 (pp 93–94)

133. Ibid, pp 30–31 (pp 94–95)

undertaken to buy all its wood, the forest company was 'far less likely to do that [go broke] than any other forest company in New Zealand', Mr Schmitt assured the owners present that they 'should not consider that you are swapping the substance for the shadow when you exchange your share in the land ownership for a share in the company. You are really swapping the shadow for the substance.'¹³⁴

Mr Dewes then raised a fourth point, the projected saving of £250,000 a year in present-day transport costs because the Tarawera Forest was nearer to the Kawerau mill than was the Kaingaroa Forest. He wanted reassurance that this would be a saving to TFL. Mr Schmitt confirmed that it would. Mr Schmitt then put the transport differential in Tarawera's favour at threepence per cubic foot and later added that 'the Tarawera stumpage would be 7d or 8d a cubic foot' – which would make the Kaingaroa log price fourpence or fivepence (under the confidential terms of the 1963 '40 million contract' it was threepence to 31 March 1968, and threepence ha'penny from 1 April 1968 to 31 March 1980). Mr McKee then corrected Mr Schmitt by assessing the transport differential as fourpence per cubic foot. When asked by Mrs Lanham directly what the Kaingaroa stumpage was, Mr McKee replied: 'If Kaingaroa stumpage is 4d, Tarawera stumpage will be 4d plus 4d differential – equals 8d per cubic foot'.¹³⁵

4.11.10 Protection for objectors

Mr Fraser had earlier stated his deep concern that the rights of those who had legitimate objections to the scheme should be preserved. He therefore asked where the dissentients could 'air their objections' if the meeting approved the Tasman proposal. Mr Barber responded that he would rather keep the meeting focused on the clarification of doubts.¹³⁶

Mr Fraser later sought confirmation that all 40 blocks of Maori land described in the proposal would be needed to ensure its success. Mr Schmitt replied that 'many are essential in order to create an integrated forest' and that, although some parts of some blocks could be left out, 'no significant blocks' could be left out without 'gravely menacing the success of the whole venture'. Mr Fraser commented that 'There appears to be some suggestion that those who wish to withdraw their blocks will in the long run be dispossessed.'¹³⁷

Mr Edwards then declared that he wanted his shares in four of the Pokohu blocks excluded. In response, Mr Dye pointed out that the Edwards family's shares did not cover all that area, and that, according to Maori Affairs records, the family were farming around 60 acres, not the

134. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965', pp 30–31 (pp 94–95). This statement seems to be based on the much-quoted remark of Nopera Panakareao during the debate at the signing of the Treaty of Waitangi at Kaitaia in 1840, when he argued that under the Treaty 'the shadow of the land goes to the Queen, but the substance remains with us': 'Enclosures in Letter from Willoughby Shortland, Esq, to Lord Stanley', 18 January 1845, BPP, vol 4, p 512.

135. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965', pp 32–33 (pp 96–97)

136. Ibid, p 29 (p 93)

137. Ibid, p 33 (p 97)

1000 that Mr Edwards claimed. Mrs Lanham explained that the family was farming other families' land with their consent, but without any legal lease. Further, she said that the Savages would be pulling out their land, which she said amounted to about 3100 acres, if the financial arrangements 'are as they stand'.¹³⁸

Mr Fraser then observed that he had twice put a question to the table and that twice it had been evaded. Having stated that 'Any owner who wishes not to come into the scheme should be given the right to exclude at least their own share', he asked whether, if this meeting approved the Tasman scheme, 'the rights of these people [would] still be protected'. Mr Barber responded: 'That will be clearly reported to the Court, they will have every chance to have their rights protected.' Mr Fraser then asked whether in the long term such owners might still be dispossessed, to which Mr Barber gave the rather ambiguous answer that the 'Court will consider the possibility'. Mr Fraser finally asked, 'Can you assure us that the people who have objections will not be dispossessed. Will the Court after considering approve their withdrawal from the scheme or will they be dispossessed?', to which Mr Barber repeated, 'It will be fully reported to the Court. No doubt about that whatsoever.'¹³⁹

Mrs Lanham then asked: 'Is this proposal going forward now?' Mr Barber replied: 'No, definitely not.' It is not clear what proposal she was referring to. Mr Fraser then explained that, if the meeting approved the Tasman proposal, 'those who wish to object will have to take their objection to the Maori Land Court'. He was concerned that those who wished to object 'should be fully aware of what will happen if they do object'.¹⁴⁰

Mr Dewes then noted that there was an opening to be followed up for negotiations with the Savage and Edwards families. Mr Barber replied that it would be followed up and that he hoped that they could 'agree to the amount of land which they require to meet their needs'.¹⁴¹

After a brief discussion about the three solely owned Pokohu blocks, all of which had deceased owners, Mr Barber started to press the meeting to a conclusion: 'Could I remind you that the time is going on and it would be difficult for us to get together again here again in Te Teko. I want to be sure that you have got all your questions answered.'¹⁴²

4.11.11 Other points raised

Further discussion of aspects of the scheme ensued, covering succession orders for deceased owners, how rates would be paid once the forest was established, the taxation of share revenue, and the status of certain lands that had been mined for gold. Mr Dewes raised the possibility of vocational training for Maori forest workers, which enabled Messrs Barber and Schmitt to speak glowingly and at length of the opportunities that Tasman provided for

138. Ibid, pp 33-34 (pp 97-98)

139. Ibid, p 35 (p 99)

140. Ibid

141. Ibid, pp 35-36 (pp 99-100)

142. Ibid, p 36 (p 100)

Maori advancement and employment at the supervisory level and higher. The question of land values was raised again, to which Mr Schmitt replied, using the example of the Savage family blocks, which had a higher than average value. Overall, he believed that the valuation given was ‘the best and highest that a successful forest venture can . . . be expected to carry’.¹⁴³

After responding to a question about the possibility of buying more shares, Mr Souter spoke generally about the opportunity the scheme presented to the Maori owners of the land, and for ‘the Maori people in the district’, to ‘get into something that is good’. He observed both that ‘if you are going to enter into some co-operative venture of this nature then various people have got to give way for the common good’ and that ‘Opportunity knocks but once’. He concluded: ‘If you enter into this forestry venture you will be providing many opportunities for your children in the future. Not now but from now for hundreds of years to come.’¹⁴⁴

4.11.12 A resolution moved

Finally, Mr Fraser moved a resolution that the meeting agreed to:

the proposal of the Tasman Pulp and Paper Company Limited and to the amalgamation of titles provided that the Maori Affairs Department in conjunction with Tasman negotiates with the Savage family, and the Awarua Niao family and the Park family and the Ngaheu family and the Edwards family and the Erueti family and the Kereua family to include or exclude as much of their interests in the Tarawera Valley as is practicable.¹⁴⁵

Lang Grace seconded the resolution, though the minutes record that ‘Many others vociferously offered to second the motion.’ However, Mrs Lanham then wanted to amend the resolution so that ‘the blocks mentioned be excluded altogether, that they be left open for negotiation with Tasman . . . We want the right to keep out all if we feel like it. All or whatever we like with no strings attached.’¹⁴⁶ In response to the question of whether any compensation paid to objectors to the scheme would form part of Tasman’s development costs, Mr Schmitt confirmed that it would. Mrs Lanham reiterated that her family might stay out altogether – ‘You people who want to go into this proposal go ahead. It is a good thing, and if you are satisfied it is a very good thing, but I am not satisfied with it’ – though she was still willing to negotiate with Tasman. Following Mrs Lanham, three owners – two of whom, Tommy Horopapera and Mr Peranara, claimed to be large shareholders in the affected lands – spoke strongly in support of the scheme. Mr Barber then claimed:

143. ‘Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965’, pp 36–43 (pp 100–107)

144. Ibid, pp 41–42 (pp 105–106)

145. Ibid, p 43 (p 107)

146. Ibid

The motion is clear. Whether there is enough or whether there is not. The tone of the meeting is as clear as a bell to me now. Everybody is in favour of Tasman's proposal, which means that everybody is in favour of the amalgamation of titles with the exception of the Savage family group who do not want to be in it in any circumstances. That is clearly the position and a fair judgment of the meeting.¹⁴⁷

An unidentified owner then pointed out that some people did not receive notice of the meeting. Mr Barber responded that it was not 'humanly possible' to notify every living owner, but that enough were in attendance at the meeting to make it 'fairly representative'. He then asked if everybody understood the motion, and in the same sentence he instructed 'those in favour to say "Aye"'. The minutes record that there were many 'Ayes', but they give no indication that those against were even asked to vote. Mrs Lanham then reaffirmed that 'they' – presumably meaning the Savage family – 'will not amalgamate', to which Mr Barber responded: 'I am reporting all this to the Court.' Mr Dewes then asked about Mr Souter's proposal for dealing with shareholders' uneconomic interests. Mr Barber replied: 'Everybody is in favour of all three resolutions.'¹⁴⁸ What these resolutions were is not clear from the minutes, although it may be that Mr Barber was referring to the three points listed in the agenda or in the original notice of the meeting. Nor is it apparent whether the motion voted upon was Mr Fraser's original resolution or the resolution as amended by Mrs Lanham. Certainly, the amended resolution was not recorded as being seconded.

Mr Dye, who wrote up the minutes, stated in his evidence to the Maori Land Court hearing that the vote was on Mr Fraser's resolution. However, he also stated that the vote was taken by a show of hands, which were counted. He estimated that about only 120 to 130 people remained at the meeting and then, correcting his earlier statement that the vote was counted, he said that, although 'the total of each for and against wasn't taken', the voting was 'in the nature of . . . 72 in favour, 54 against'. The names of those who voted were not recorded, nor was any effort made to establish the shareholding they represented.¹⁴⁹

The meeting ended at 6.20 pm. The minutes record that after the meeting several owners of the Savage blocks 'came forward and said that they were in favour of the scheme and were not objectors, and did not want to be associated with the Savage group in that respect. They had not however felt disposed to express their views in the open meeting.'

These people were recorded as being Elsie McDonald (for the Hana Edwards group), Tame Potter (for the Amiria Savage line), and Annie Stowell (for the Hera Savage and Thomas Savage lines).¹⁵⁰

147. Ibid, p 45 (p 109)

148. Ibid, p 46 (p 110)

149. Document A33, pp B5–B6

150. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965', p 46 (p 110)

4.11.13

4.11.13 Crown response to the meeting

Mr Poole's subsequent note on the Kokohinau Pa meeting states that the resolution voted on was that recorded on the agenda paper – namely, the three parts quoted in section 4.11.1. He recorded that voting was done by voice only and that there the majority was in favour of the Tasman proposals.

Mr Poole's main concern was that, when the proportion of the profits to be allocated to the Maori landowners was discussed, Mr Schmitt did not do as he had expected and offer the minimum guarantee to Maori. Mr Poole states that Mr Souter discussed this with Mr Schmitt afterwards and 'evidently received a most unsatisfactory reply'. Mr Souter was clear that, if no guarantee were forthcoming, the court would not approve the scheme. Mr Poole stated that Mr Schmitt knew that the Forest Service would not support the scheme without a minimum guarantee.¹⁵¹

4.11.14 Owners' response to the meeting

The *Bay of Plenty Beacon* subsequently ran two stories on the meeting. On 13 December, it reported that Mrs Lanham had represented the dissenters and that she had said that they would not join the scheme unless better terms were offered, and it reported that the families opposed were still open to negotiation over the inclusion of their properties. However, the article made it clear that Mrs Lanham maintained that the Edwards family's property should remain out of the scheme.¹⁵²

The article also mentioned Nira Fraser's concerns about the rights of objectors to the scheme. Two days later, statements made to the press by Mr Fraser in which he was openly critical of the meeting were reported. Mr Fraser stressed how the meeting had not been held under Part XXIII of the Maori Affairs Act, under which owners would have voted on the proposal block by block. This would have had the effect that 'if the majority of owners in a particular block had rejected the proposal, it would have been the last they would have heard of it'. Mr Fraser was reported to be in favour of the proposal, provided the dissenters were 'given full protection in their right to negotiate further or withdraw entirely from the scheme'.¹⁵³

On 14 December, Mrs Lanham sent a telegram about the meeting to the Minister of Maori Affairs, the Honourable JR Hanan. She told the Minister that 'Proceedings must be stayed [on] Tasman Forestry Proposals' because the meeting and the outcome were 'unconstitutional and invalid'. Mrs Lanham requested the Minister's immediate intervention, and she advised him that she would write to him on the matter.¹⁵⁴ Mr Hanan replied on Christmas Eve.

151. 'Tarawera Valley Afforestation: Agenda for Meeting of Owners at Kokohinau Pa on 11 December 1965' typescript, [1965] (doc A5(9.20))

152. *Bay of Plenty Beacon*, 13 December 1965 (cited in doc A10, p 85)

153. *Bay of Plenty Beacon*, 15 December 1965 (cited in doc A10, pp 85–86)

154. Lanham to Hanan (telegram), 14 December 1965, MA58/2/1 pt1 (doc B1, p 9)

He noted that he had not received any further correspondence from her but that he did not consider that the meeting was ‘in any way unconstitutional or invalid.’ The meeting was ‘not a statutory one’ but was held merely to establish the views of the owners of the various blocks on the matter, and he understood that ‘a majority of the owners’ were in favour of the proposals. The Minister then reiterated that the question of whether or not the lands should be amalgamated was a matter to be determined by the Maori Land Court and that any owners who objected to the proposals would have the right to be heard by the court.¹⁵⁵

4.12 CLAIMANT VIEWS ON THE KOKOHINAU PA MEETING

As well as receiving a large amount of written evidence about the development and finalisation of the Tarawera joint-venture proposal, the Tribunal heard a significant body of oral evidence, much of it from people who attended the Kokohinau Pa meeting. Interestingly, some of their recollections called into question the written evidence that the Tribunal had before it.

4.12.1 Distribution and clarity of Tasman’s booklet

In the Crown’s defence of the adequacy of the consultation with Maori landowners, considerable importance was placed on the booklet which Tasman prepared and distributed before the December meeting. However, several of the claimant witnesses who appeared before the Tribunal and who also attended the 1965 meeting claimed not to have received the booklet.

Ngahuia Rowson, an owner in the Pokohu D block, stated that, although she had received notice of the meeting, she was sent no information on the scheme. This, she claimed, disadvantaged the Maori owners, especially the Pokohu D owners.¹⁵⁶ Similarly, John Hunia, an owner in Pokohu D and Putauaki 2, claimed that he had received no information prior to the hui and that he did not recall any information being given to the owners to read at the meeting itself. He did say, though, that the booklet was provided after the hui.¹⁵⁷

David Potter and Gavin Park both stated that they did receive the Tasman booklet. Mr Potter said that he and his father had read it before the meeting and that they were both well informed.¹⁵⁸ Mr Park stated that at the meeting he had voted in favour of the scheme on the basis of having read the booklet.¹⁵⁹ But under cross-examination, he stated that, although he had read the booklet, he did not appreciate that the land was to be sold: ‘you didn’t sell Maori land in those days’.

155. Hanan to Lanham, 24 December 1965, MA58/2/1, pt 1 (doc B1, p 8)

156. Document A13, p 2

157. Document A15, p 2

158. Document A19, p 1

159. Document A17, p 2

4.12.2 Confusion over key terms of the venture

Much of the claimant witnesses' evidence emphasised both how confusing they had found the meeting and that they had not realised that if the proposal went ahead they would lose title to their land. In his brief of evidence, Mr Hunia stated that:

Most of the people at the hui did not really understand the proposal at all. It was quite complicated and technical. Even today, if you ask people who went to the hui to explain the details of the project, they couldn't. They just didn't understand what was going on.¹⁶⁰

Mrs Rowson recounted that she did not recall ever being told that title to the land would be lost and that she found the information given at the meeting confusing. She stated that she still does not understand the proposal, just that the land has been lost.¹⁶¹ Under cross-examination, Mr Potter stated that only once at the meeting had a Tasman official said that the land would be sold.

Witnesses also recounted confusion among owners at the meeting as to the nature and extent of the shareholding that Maori would receive. Mr Samuel Te Hau o Te Rangi Tutua, who, although not an owner himself, attended the meeting on behalf of his recently deceased grandparents, referred to the owners being confused as to what their eventual shareholding in the company would be – 6, 10, or 15 per cent.¹⁶² Beverly Adlam, Mrs Lanham's daughter, was not present at the meeting. However, 'from discussions with MIL shareholders who did not understand that they were losing title to their land', she believed that many Maori at the meeting would have been confused as to what the shares Maori were to be issued were in – the land or the company (although her mother and the Savage and Edwards families clearly did understand this).¹⁶³

Mr Park presented another view: although many Maori understood that they would have a 14 per cent shareholding in the proposed joint-venture company, many thought that they would retain the ownership of the land as well.¹⁶⁴ This understanding was confirmed by Raniera te Tawhiti Kingi OBE in his evidence for the owners to the Maori Land Court (see also sec 6.5.2). Mr Kingi, who declared at the meeting that he did not need a lawyer or an accountant because 'Mr Schmitt explained things well', later claimed at the hearing that the Maori owners 'will be in partnership with Tasman and the Crown and they will still have their land'.¹⁶⁵ Another witness before the Tribunal, Mrs Te Rau Cameron, referred to confusion at the meeting generated by discussions 'not so much at the hui but at mealtime' about using a

160. Document A15, p 4

161. Document A13, p 3

162. Document A14, p 4

163. Document A16, pp 4

164. Document A17, pp 2, 3

165. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965', p 25 (p 89); evidence of Raniera Te Tawhiti Kingi, 'Maori Land Court: A Sitting Held in the War Memorial Hall, Whakatane, on Tuesday, 2 August 1966', typescript, undated (doc A5(2.33)), p 1T3

section 438 trust. She stated that many Maori were reasonably familiar with such trusts being used for the long-term lease of Maori land for forestry purposes and that there were some such leases in the area. Mrs Cameron said that, at the time of the meeting, 'and even now', some shareholders thought that MIL was 'under a section 438 trust'.¹⁶⁶ In his brief of evidence, Mr Potter stated that the Crown and Tasman officials present at the meeting focused on the potential returns from the scheme and that at 'no time did they clearly point out that the land would be lost to the people for all time'.¹⁶⁷

A factor identified by some witnesses as contributing to the confusion of the older owners present was that they did not understand the explanation of the scheme in English.¹⁶⁸ While an interpreter was present at the meeting, Mrs Rowson stated that the request for one was only grudgingly allowed – 'Part of Mr Barber's response was that if they could not speak English then it was too bad for them' – and that even then some old people still did not understand.¹⁶⁹ Under cross-examination by the Tribunal, she was evasive as to the quality of the interpreting. Mr Park, however, said that it was 'not satisfactory' and that 'family members were attempting continuously to translate for their old people as the proceedings went on'.¹⁷⁰ Mrs Te Rau Cameron told the Tribunal that the official translation was not clear. Mr Hunia stressed the difficulty of translating into Maori many of the concepts that were central to the proposal.¹⁷¹ Mr Park also pointed out to the Tribunal that the minutes of the meeting record only the English dialogue.¹⁷²

4.12.3 Unpreparedness of Tasman and Crown to consider alternative scheme or terms

A theme in the evidence of almost all the claimant witnesses was that the Crown and Tasman presented them with a *fait accompli* at the meeting, and that possible alternatives put forward by some of the owners were dismissed. Mrs Rowson complained that 'those running it [the meeting] and particularly Mr Barber had already made up their minds about the outcome. Mr Barber especially wanted to railroad the whole proposal through.' Although some owners 'raised other options which could have been better', these were not considered, 'due to the attitude of those in charge of the meeting'.¹⁷³ In his brief of evidence, Mr Tutua stated that, at the meeting, 'Quite a few people objected. They said the rental was too low. They said they did not want the land to be lost.' However, they were told that 'the Tasman scheme was the only option for us'.¹⁷⁴

166. Document A18, p 2; oral evidence of Mrs Te Rau Cameron, 7 June 2000

167. Document A19, p 3

168. Document A18, p 1

169. Document A13, p 3

170. Document A17, p 3

171. Oral submission of John Hunia on behalf of the claimants, 8 June 2000, tape 11A

172. Document A17, p 2

173. Document A13, pp 2, 3

174. Document A14, p 3

4.12.4

Mr Hunia complained that the owners at the meeting were spoken to rather than consulted: ‘Tasman and the Crown had the support of sections of the owners and they were not interested in what the rest of us thought.’¹⁷⁵ Mr Park recounted how ‘the meeting was run in a way which made it plain that the Crown and Tasman wished to push through a decision in favour of the Tasman proposal, and for that to happen that day’.¹⁷⁶

In her brief of evidence, Mrs Adlam (who was not present at the meeting) claimed that her mother’s proposal that the Maori owners be equal developers and retain ownership of the land was ‘ignored and indeed denigrated and obstructed by senior Crown officials working together with Tasman to achieve their own ends’.¹⁷⁷ Mrs Adlam also spoke of her mother’s opposition to the scheme, noting that she was opposed not to the afforestation of the land per se but to the structure of the proposal that was put forward, and that she thought that ‘the owners were bulldozed into the deal’ without realising the full impact of the land loss.¹⁷⁸ Mrs Adlam stated that there were still shareholders in MIL today who did not appreciate that they had lost their land. She believed that the scheme would not have gone ahead ‘if it had been clearly understood that Maori land owners were losing title to their land’. While acknowledging that some owners – including her mother and other members of the Savage whanau – appreciated that their land would pass out of their ownership, Mrs Adlam considered this group to be ‘very much in the minority’.¹⁷⁹

According to Mrs Rowson and Mr Hunia, another factor that swayed many of those present was the promise of employment from the scheme – even though they did not fully understand it.¹⁸⁰ Mrs Rowson commented: ‘Jobs for our young people was a strong selling point. Yet today, most of our rangatahi are without work. Tasman are laying people off and our land is still gone. Some deal!’¹⁸¹

4.12.4 Too little time to consider the proposal

A major issue for many of the claimant witnesses who were present at the meeting was that they were given insufficient time to consider the proposal. Consequently, they thought that a vote should not have been taken at the meeting. As Mr Hunia observed, ‘the whole thing was wrong from the start. We should have had more time to think about these complicated proposals. Our people really didn’t understand what was going on at the hui.’¹⁸² Similarly, Mrs Rowson stated in her brief of evidence that the Crown officials:

175. Document A15, p 2

176. Document A17, p 4

177. Document A16, p 4

178. Ibid, p 2

179. Ibid, p 3

180. Document A13, p 3; doc A15, p 2

181. Document A13, pp 3–4

182. Document A14, p 4

should never have had a vote on that day. It was all done too quickly. It was just wrong. This was the first time we had heard about the project. It reminded me of the olden days when Pakehas gave blankets for our land, even though our old people didn't know what was going on.¹⁸³

4.12.5 Confused process for determining owners' views

As well as criticising the fact that a vote was taken that day, claimant witnesses were also aggrieved at the way in which the vote was conducted. Mr Hunia stressed the chaotic nature of the proceedings: no one knew who was who, the vote was taken by voice only, and there were lots of non-owners present who may have voted.¹⁸⁴ Mrs Cameron shared similar concerns.¹⁸⁵ She also stated, in her evidence to the Tribunal, that many people had left the meeting at around 3 pm because they were employed at the mill and were on the 4 pm to midnight shift and they were therefore not present when the vote was taken.¹⁸⁶ Mr Potter recounted that after lunch many people drifted off, and that by the time the vote on the final resolution was taken after 6 pm, only a quarter of those who had originally been present remained. No checks were made at the meeting as to who was an owner, and many people who remained there did not vote at all. Mr Potter stated that by the time the vote was taken people were exhausted and just wanted the meeting to end. However, contrary to the minutes and Mr Hunia, Mr Potter recalled that this vote was by way of a show of hands, both for and against.¹⁸⁷ Mr Park confirmed, however, that 'The meeting seemed to go on and on and people ultimately became frustrated or bored with it. They either left or (if still there) expressed their general support for the final resolution, to get things over with.' He estimated that, by the end, over a third of those who had been present had left.

Mrs Rowson stated in her brief of evidence that she had read the minutes of the meeting and questioned whether in fact 350 Maori were in attendance. The marae, she claimed, was too small to hold that many people.¹⁸⁸ At the meeting, a list of owners, totalling 235 names, was compiled. Under cross-examination, Mrs Cameron stated that she thought that the list of attendees was taken to determine the numbers for lunch. Mr Park told the Tribunal that the list of attendees was not accurate, and Mrs Cameron's evidence supported this: she had attended the meeting with her father, Dr Eruera Manuera, but he is not recorded as one of the attendees.

183. Document A13, p 4

184. Document A15, p 3

185. Document A18, p 2

186. Oral evidence of Mrs Te Rau Cameron, 7 June 2000, tape 5, side B

187. Document A19, p 3

188. Document A13, p 2

4.12.6

4.12.6 Other grievances

Claimant witnesses also referred to the discussion of Putauaki at the meeting. Mr Tutua said in his brief of evidence that it was stated that Putauaki would not be included in the Tarawera Valley forest development. After the development went ahead, he consequently thought that Maori still owned the mountain.¹⁸⁹ No discussion of Putauaki is recorded in the minutes, and so it must have occurred either at the after-lunch meeting or in the main meeting but in Maori, and so not been recorded. Mrs Cameron recounted how her father did not realise then that the land – including Putauaki – would pass out of Maori ownership if the scheme went ahead.¹⁹⁰

Mrs Rowson complained that the Crown and Tasman officials largely overlooked Ngati Awa and dealt mainly with Te Arawa and Tuwharetoa ki Kawerau.¹⁹¹ Similarly, Mr Hunia, a great-nephew of Dr Manuera, stated that their hapu – Pahipoto – were not consulted before the hui at Kokohinau Pa in December 1965.

Mrs Rowson summed up the grievances of the owners as: the Crown and Tasman proponents of the scheme moved too fast; not enough information was provided to the owners; the consultation was inadequate; the Kokohinau meeting should have been postponed or further discussion and consultation could have taken place afterwards; and, worst of all, they lost Putauaki.¹⁹² Chapter 9 is devoted to examining that last grievance.

4.13 DEVELOPMENTS BETWEEN DECEMBER 1965 AND THE MAORI LAND COURT HEARING IN AUGUST 1966

4.13.1 Complaints about the Kokohinau Pa meeting procedure

On 12 January, Mrs Lanham wrote to the Minister of Maori Affairs, Mr Hanan, as she had foreshadowed in her telegram. She restated her request that the resolution arising from the December 1965 meeting at Kokohinau Pa be annulled, and she protested that the meeting had not been held under Part XXIII of the Maori Affairs Act. She complained that some people at the meeting who had adopted the resolution were not landowners, and she criticised Maori Affairs for not having notified all the owners of the meeting (including some she thought were well known to the department in Rotorua). She also criticised Mr Barber's chairmanship of the meeting and considered that an independent chair should have been appointed. As for the vote on Mr Fraser's resolution, Mrs Lanham stated that Mr Barber had decided that it should be determined by acclamation, and that, in declaring that the motion was passed, he 'acted hastily and unconstitutionally . . . without any proper regard for previous events of the

189. Document A14, p 3

190. Document A18, p 2

191. Document A13, p 2

192. Ibid, p 4

meeting'. She maintained that the only proper course was to hold a secret ballot of verified owners and that Mr Barber's actions were inexplicable – especially since he knew of the close result of 'the adjournment vote' held amongst the owners. Mrs Lanham's letter concluded by protesting that 'dissenting owners could be forced into the proposals against their will and those rejecting the proposal could be dispossessed of their land'.¹⁹³

The Minister's reply stressed the impossibility of notifying all of the owners and rejected Mrs Lanham's claim that the meeting was unconstitutional. The Minister emphasised that it was the Maori Land Court that would formally deal with the amalgamation of titles and that the December 1965 meeting was analogous to a meeting held under Part xxiv of the Maori Affairs Act. Under those provisions, an application could be made to the court for the amalgamation of titles following a general meeting of owners.¹⁹⁴

4.13.2 Further Crown–Tasman negotiations on land values and the minimum guarantee

Meanwhile, the Forest Service was still pursuing the question of land values and the 75 per cent minimum guarantee. On 7 December 1965, as noted at the end of section 4.10.2, Mr Poole wrote to Tasman outlining his understanding of the position and seeking confirmation of it. He was concerned that, although the value of the land would be secured by a debenture that would earn interest at 6 per cent per annum over 25 years, it would remain nominally the same as at the outset of the scheme. Taking inflation into account – which he estimated as being 2 per cent per annum – 'the book value of the land after 25 years would be only 60 per cent of its real value'. As an example, Mr Poole postulated that, if the land values were increased by an average of £10 per acre in year 25, the landowners' combined contribution would be increased from 30.33 per cent to 41.87 per cent. He also discussed the minimum guarantee, noting that he took it to apply to the suggested share capital and to mean that 'whatever additional debentures are issued by the forestry company, the land owners will not be *less* favourably placed to participate in company earnings than they would be if the entire capital were issued in the form of shares' (emphasis in original).¹⁹⁵

Mr Poole's letter caused confusion among both Tasman personnel and Forest Service officials. In January 1966, Mr Grainger, who had originally drafted sections of the letter, sent a memorandum to Mr Poole stating that he had thought that the proposed guarantee from Tasman meant that the Forest Service would not press the issue of revaluation and that he 'was now by no means certain' that he knew exactly what the Forest Service 'was asking of Tasman'. He concluded that it was essential that people within the Forest Service were 'all talking the same language' before seeking any further assurances from Tasman.¹⁹⁶ Forest Service

193. Lanham to Hanan, 12 January 1966, MA58/2/1, pt 1 (cited in doc A10, p 92)

194. Hanan to Lanham, draft, undated, MA58/2/1, pt 1 (cited in doc A10, p 93)

195. Poole to Schmitt, 7 December 1965, FS83/503, vol 2 (cited in doc A10, p 93); doc A5(9.18)

196. Grainger to Director-General of Forests, 5 January 1966, FS83/503, vol 2 (cited in doc A10, p 94)

solicitor Malcolm Buist expressed a similar view the following month. After discussing the further ‘problems’ Mr Grainger’s memorandum raised, he emphasised the need for a single document that presented a complete formulation of the proposal as it then stood.¹⁹⁷

On 3 March, in response to Mr Buist’s comments, Mr Grainger set out to ‘clarify’ the ‘confusion’ within the Forest Service and he provided an unusually clear summary of the development of its thinking on the scheme. He concluded that ‘if the 75% guarantee is adopted and implemented any re-valuation that may be necessary will be automatically provided for in principle’. If Tasman declined to confirm the minimum guarantee ‘to our satisfaction’, the Forest Service should ‘insist on either (a) leasing the land as per the Forest Service formula or (b) re-valuation by arbitration at year 25’.¹⁹⁸

On 23 February 1966, Tasman had submitted another draft heads of agreement to the Forest Service. It was not well received.¹⁹⁹ In a file note to his deputy, Mr Thomson, Mr Poole observed that he could find no reference to the minimum guarantee and that Tasman’s desire ‘for maximum possible discretion and delegation of powers’ was ‘intended to eliminate any voice of the landowners’.²⁰⁰ Mr Thomson’s reply was emphatic: the draft was ‘completely unacceptable and under no circumstances should the Government consider signing such a document’. As well as failing to mention the minimum guarantee, it changed the previously agreed basis of payment to TFL from a guarantee to pay ‘a stumpage which would take heed of the locality value of the land’ based on the ‘average landed price as Tasman paid for logs from other sources’ – which was ‘the whole basis of the Crown agreeing to participate’ – to merely ‘a fair price to be agreed from time to time’ between Tasman and TFL. Mr Thomson considered Tasman’s actions in reneging on this promise to be ‘unethical and extremely cynical’ and grounds for breaking off negotiations. However, he felt that ‘the correct course of action’ was to lead Tasman ‘back to its previous position and to ignore what is obviously now a “try on”’.²⁰¹ Messrs Grainger and McKinnon both expressed similar views.²⁰²

Mr Buist also analysed the draft heads of agreement. He considered that the changes to previously agreed conditions were so significant as to make the latest proposal a new scheme. Importantly, he pointed out that it was not the scheme that the Maori owners had voted on in the 11 December meeting at Kokohinau Pa.²⁰³

After an interdepartmental meeting between the Forest Service, Maori Affairs, and the Treasury on 3 March 1966, Mr Davis wrote to Mr Schmitt giving detailed consideration to the

197. Buist to director, forest economics, 18 February 1966, FS83/503, vol 2 (doc A5(10.6)) (cited in doc A10, p 94)

198. Grainger to director, forest economics, 3 March 1966, FS83/503, vol 2 (doc A5(10.23)) (cited in doc A10, pp 94–95)

199. Document A10, p 95

200. Poole to Thomson, 28 February 1966, FS83/503, vol 2 (doc A5(10.9)) (cited in doc A10, p 95)

201. Thomson to Poole, 1 March 1966, FS83/503, vol 2 (cited in doc A10, p 95)

202. Grainger to director, forest economics, 3 March 1966, FS83/503, vol 2 (cited in doc A10, pp 95–96); handwritten comment by McKinnon on Thomson to Poole, 1 March 1966, FS83/503, vol 2 (cited in doc A10, p 96)

203. Buist to Director-General of Forests, ‘Tarawera Forest Limited’, file note, 2 March 1966, FS83/503, vol 2 (cited in doc A10, pp 96–97) (doc A5(10.22))

points at issue in the draft heads of agreement.²⁰⁴ He stated that the minimum guarantee to the Crown and Maori must be included, and added that this would help Tasman when the matter came before the Maori Land Court. He also offered advice from Maori Affairs about the court hearing, suggesting that:

- ▶ Government approval of the heads of agreement be obtained and made known to the presiding judge before the hearing.
- ▶ A solicitor be appointed to represent ‘the willing participants among the Maori owners’, noting ‘I think this is very important and it would appear that you would gain some advantage from this. It does of course imply that Tasman would foot the bill.’
- ▶ A local body representative attend the hearing to indicate the rating position, since it was believed that ‘Maori rating is in arrears’ and therefore ‘the County would have good reasons for supporting the proposal’.²⁰⁵

In February, the Government had granted permission in principle for Tasman to begin planting trees on the Crown land in anticipation of the deal going ahead.²⁰⁶ However, on 2 March, Mr Poole directed Mr Thomson to suspend this approval because of the dissatisfaction with the draft heads of agreement. It so happened that the Lands and Survey letter on the matter reached Forest Service solicitor Mr Buist for approval at the interdepartmental meeting on 3 March, and Mr Davis learnt of it. He opposed such an approach, considering that ‘it would not serve any useful purpose and may tend to antagonise Tasman’. However, Mr Thomson told Mr Davis that ‘a firm line by the Government at this stage would do nothing but good’, and letters from both the Forest Service and Lands and Survey withdrawing permission were sent on 4 March.²⁰⁷

A file note by Mr Thomson dated 10 March indicates that Mr Davis had rung him to say that Mr Schmitt had agreed by telephone with all the Government amendments to the heads of agreement. Mr Davis said that Mr Schmitt accepted the guarantee in principle but did not want it written into the heads of agreement at that stage, because he wanted to keep it as ‘a possible bargaining tool’, and there was some legal doubt whether that could be done before the court hearing since ‘it had not previously been mentioned to or discussed with the Maori owners’. Mr Thomson asked for Tasman’s acceptance of the guarantee to be put in writing, which Mr Davis did not think was necessary, because the Government could still refuse to sign the heads of agreement if the conditions were unsatisfactory. As an alternative, Mr Davis agreed to write to Tasman stating that the Government would not sign the heads of agreement unless the guarantee clause were inserted. Mr Davis then asked for the ban on Tasman’s

204. It is worth noting that Davis and Schmitt (who had earlier worked at Treasury) were on extremely cordial terms. This letter from Davis opens ‘Dear Geoff’ and closes with ‘Kindest regards’. Earlier letters from Schmitt to Davis (eg, that of 27 April 1964 (doc A5(7.7))) open ‘Dear Cop’ and close with ‘Kind regards’.

205. Davis to Schmitt, 3 March 1966, FS83/503, vol 2 (cited in doc A10, p 97)

206. Ure to Kennedy, 28 February 1966 (doc A5(10.20))

207. Thomson to Poole, 7 March 1966 (doc A5(10.26)); Kennedy to managing director, Tasman Pulp and Paper Company Limited, 4 March 1966 (doc A5(10.27)); Director-General of Lands and Survey to managing director, Tasman Pulp and Paper Company Limited, 4 March 1966 (doc A5(10.28))

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operating on Crown and State forest land to be lifted, but Mr Thomson was reluctant to do this until there was something specific from Tasman in writing. Mr Davis then noted that Mr Schmitt's acceptance of the guarantee was 'unconditional as far as Maori land' was concerned, but, for State forest and Crown land, it was 'conditional on existing tax concessions not being rescinded' – 'a new concept' to Mr Thomson.²⁰⁸

The Tasman Cabinet Committee was due to meet on 15 March to consider and approve in principle the draft heads of agreement ahead of the Maori Land Court hearing (which was scheduled to begin on 23 March but was in fact adjourned until August). Tasman had by then submitted a revised draft of the heads of agreement addressing most of the points raised in Mr Davis's letter of 3 March, although the minimum guarantee was not included. However, an accompanying draft guarantee clause was submitted with the suggestion 'It may be necessary to propose the guarantee at the Maori Land Court hearing but should this prove unnecessary it is confirmed that the clause will be included in the final Heads of Agreement'.²⁰⁹ The Treasury's memorandum to the Minister of Finance before the scheduled Tasman Cabinet Committee meeting describes the guarantee and notes:

It is not proposed that this guarantee be written into the Heads of Agreement at the moment *as it has not been previously discussed with the Maori owners*. If the Maori Land Court seeks some further protection for Maori interests it is proposed that the guarantee be then offered; otherwise it will be written into the Heads of Agreement subsequent to the Maori Land Court hearing if the Judge agrees to the amalgamation of titles and the vesting in the Maori Trustee. (The italicised clause was added at Mr Thomson's suggestion)

The memorandum also notes Tasman's proviso that, if any 'withdrawal or modification by the Government of taxation concessions at present in force' adversely affected the various interests, the guarantee should apply only to the Maori owners and not the Crown, 'since it would be action by the Crown which gave rise to such a change'. It concludes: 'This proposal seems not unreasonable.'²¹⁰ In fact, the scheduled Tasman Cabinet Committee meeting was cancelled on 15 March, the day it was to have been held.²¹¹

The response of the Secretary of Maori Affairs and Maori Trustee, Jock McEwen, to the idea of not revealing the minimum guarantee was immediate and vigorous. He telephoned Mr Davis, and then wrote to the Secretary to the Treasury:

I am not happy with the proposal . . . On principle, I questioned the propriety of an agreement on such a point as this without the knowledge of the third party in the proceedings.

208. Thomson, 'Tarawera Forests Ltd', file note, 10 March 1966 (doc A5(10.32))

209. Ibid

210. Secretary to the Treasury to the Minister of Finance, 15 March 1966, T39/6/38 (doc A5(10.38), p 3)

211. McEwen to Secretary to the Treasury, 16 March 1966, MA58/2/1, pt 2 (doc A5(10.41)); Thomson, 'Tarawera Forests Limited', file note, 18 March 1966, FS83/503, vol 2 (doc A5(10.42)). In document A10, at psge 98, Dr Battersby erroneously states that the Tasman Cabinet Committee met on 15 March.

Quite apart from this, I feel that, tactically, it would be a mistake for the minimum guarantee to be revealed only if the matter is raised by the Maori owners or by the Judge. I am sure that this would immediately raise the suspicion in the minds of the Maoris that there may be other unrevealed items of agreement and this would only endanger the chances of success. It seems to me that if the guarantee is to be made at some stage, then it should be brought out into the open during the Court proceedings without, as it were, having to be extracted.²¹²

Mr Thomson had had similar reservations, and had suggested other amendments to the memorandum to make it clear that the offer of the guarantee would be made by one of the Crown witnesses when giving evidence at the court hearing.²¹³ Mr Buist noted that:

the guarantee *must* be laid before the Court. If the scheme is approved minus the guarantee, Tasman can be legally advised that it would be improper to make any change in what the Court Order says. Also, the Crown should not be party to suppressing a condition it insists on as part of the price of its own consent.²¹⁴

Messrs Thomson and Poole recorded their support for Mr Buist's view on a copy of his letter given to the Treasury solicitor.²¹⁵

Mr Buist also noted that the proposed guarantee clause did not specify the minimum percentages of the share and debenture capital for the Crown or Maori.²¹⁶ On 16 March, Tasman wrote to Mr Poole stating its willingness to discuss and resolve Forest Service misgivings about the clause and seeking to have the ban on its development of State forest land removed.²¹⁷ On the same day, Mr McKee, representing Tasman, rang Mr Thomson to say that Tasman had accepted the guarantee in that letter – which in fact it had not – and that, because the Forest Service conditions had been met, the ban could be removed. Mr Thomson accepted this, provided that the Forest Service had received 'some definite commitment from Tasman in writing'.²¹⁸ On 18 March, Mr Poole agreed to let Tasman prepare the State forest and Crown land for planting but not to undertake planting until agreement had been reached on the guarantee clause. That agreement was finally reached at a meeting between Tasman and Crown officials in Wellington on 15 April (of which the Tribunal has no record), and the ban was lifted on 20 April.²¹⁹

212. McEwen to Secretary to the Treasury, 16 March 1966, MA58/2/1, pt 2 (doc A5(10.41)) (cited in doc A10, p 99)

213. Thomson, 'Tarawera Forests Limited', file note, 18 March 1966, FS83/503, vol 2 (doc A5(10.42)) (cited in doc A10, pp 99–100)

214. 'Tarawera Forests Ltd Draft Guarantee', Buist to Thomson, 15 March 1966 (doc A5(10.35))

215. Ibid, handwritten note

216. Ibid

217. 'Tarawera Forests Limited – Guarantee Provisions', Schmitt to Poole, 16 March 1966 (doc A5(10.39))

218. Thomson, 'Tarawera Forests Limited', file note, 18 March 1966, FS83/503, vol 2 (doc A5(10.42)) (cited in doc A10, p 100)

219. Poole to McKee, Poole to Lynskey, 20 April 1966 (doc A5(11.3))

4.13.3 Further refinement of the proposals . . .

On 15 July, in preparation for a meeting of the Tasman Cabinet Committee on 21 July, Mr Davis reported to the Minister of Finance. He noted that Tasman, the Forest Service, Maori Affairs, and the Treasury had reached agreement on the basis of the scheme, as reflected in a draft heads of agreement that was 'now acceptable to all parties'. This draft is presumably that of 31 May 1966.²²⁰ It included the 75 per cent minimum guarantee, but still did not specify the actual percentage of the interests in TFL guaranteed to Maori and the Crown.²²¹

Mr Davis also stated that 'a number of problems' had been found with the earlier proposal to treat the Maori shareholding company as a Maori authority to reduce its liability for taxation. He proposed that, instead of Maori holding shares in the company equivalent to the value of the land they owned, the company would issue one five shilling share and one interest-earning fifteen shilling debenture for each £1 value of land owned: 'In this way, the interest received by the Maori company will be completely offset by the interest paid to the Maoris and would attract no taxation.' It would also enable the Maori owners to take advantage of the provision whereby the first £30 of interest income was tax-free. Mr Davis noted 'the possibility that the Maoris might be suspicious of such a change being made' since it had not yet been conveyed to them, and that, if it attracted 'undue criticism', it might be necessary to return to the original proposal.²²² The change had in fact been suggested by Tasman at the April meeting, and then refined in May, to avoid any 'feeling among the Maori owners that they have been unfairly treated'.²²³

Mr Davis noted that special legislation would be needed to establish the Maori shareholding company, MIL, and to provide the machinery for dealing with missing shareholders and fractional interests. The legislation, which was not required until the following year, also needed to provide for the exemption from income tax of all interest on TFL debentures which was capitalised, and of all interest on debentures issued by MIL which was derived from capitalised interest and added to its debenture indebtedness. So that the revised heads of agreement could be submitted to the Maori Land Court judge, Mr Davis sought early approval by the Cabinet committee.²²⁴

The minutes of the 21 July meeting record that the Tasman Cabinet Committee 'noted' the information concerning the draft heads of agreement.²²⁵ In his brief of evidence to the Maori

220. '[Draft] Heads of Agreement between the New Zealand Government and Tasman Pulp and Paper Company Limited and the Maori Trustee', typescript, 31 May 1966 (doc A5(11.15)). This document is not in fact dated but it is generally consistent with references to the draft heads of agreement dated 31 May 1966 appearing in correspondence concerning the Tarawera Valley proposal appearing on Government department files. See, for example, Clinkard to Davis, 9 June 1966 (doc A5(11.9)).

221. '[Draft] Heads of Agreement between the New Zealand Government and Tasman Pulp and Paper Company Limited and the Maori Trustee', cl 7 (doc A5(11.15), p 7)

222. Davis to Minister of Finance, 15 July 1966 (doc A5(11.27))

223. Chambers to office solicitor, Treasury, 18 May 1966 (doc A5(11.6))

224. Davis to Minister of Finance, 15 July 1966 (doc A5(11.27))

225. Cabinet Committee on the Tasman Pulp and Paper Company, minutes of 21 July 1966 meeting, TPP(66)M3, pt 2, 28 July 1966 (doc A5(11.38))

Land Court, however, Mr Davis stated that on 21 July ‘formal Government approval was given to the proposal as embodied in the draft Heads of Agreement’.²²⁶

4.13.4 . . . and further doubts

The day before the Tasman Cabinet Committee meeting, a senior Treasury research officer, Mr JW Cook, commented on a meeting held the previous day involving Tasman and Treasury officials. He was concerned whether the pricing clause in the heads of agreement for timber sold to Tasman by TFL was ‘adequate to ensure a reasonable return for the forest company and its owners’, and he believed that there was ‘no certainty’ that Tarawera Forests would get a ‘fair price . . . for its pulp timber’. Mr Schmitt’s ‘reluctance to consider a possible rewording of the pricing clause to give some protection to the forest company,’ Mr Cook wrote, ‘immediately raises doubts in my mind as to whether Tasman are as concerned as they suggest, about a fair return to Tarawera Forests from its output.’ He concluded: ‘Even if the State is prepared to accept the position of selling timber to Tasman at what seems to me prices well below cost of production I can see no justification whatsoever in compelling Tarawera Forests to accept similar pricing restrictions for its pulp timber output.’²²⁷

Forest Service officials also continued to analyse the Tasman scheme. In a memorandum to the director of forest economics dated 20 June, Mr RWM Williams, a senior planning officer, questioned the financial aspects of the proposal.²²⁸ Noting that the Tasman booklet assumed an average stumpage for the Tarawera produce of fivepence per cubic foot (calculated, according to Dr McEwen, on the basis of the estimate in the booklet of £650,000 to £700,000 per year for the value of the wood and production of 20 million cubic feet a year²²⁹), Mr Williams claimed that the landowners would not receive ‘anything like their full entitlement for the proximity value of the land’ and would probably get only about 50 per cent of the transport differential or freight savings created by proximity.²³⁰ He thought that the plans should be scrapped or dramatically amended, and he stressed the need to define a basic stumpage value and assign proximity value to land contribution alone. He considered that leasing was the only practicable alternative that would secure a just return to the owners, and that, if it proved

226. Document A33, p 07

227. Cook to Davis, 20 July 1966 (doc A5(11.34))

228. Williams to director, forest economics, 20 June 1966, FS83/503, vol 3 (cited in doc A10, p 100). The Tribunal has been unable to locate this file in Archives New Zealand, and is reliant on Dr Battersby’s summary, which unfortunately gives no reasons for either Williams’s analysis or his conclusion. Our own conclusions are based on the brief accounts given by Dr McEwen (doc B73, pp 22–3) and Mr Moore (doc B72, p 12), and by Mr Grainger in document B73(e), which suggest that the argument focused on whether the final share due to the landowners should include the proximity value, as was apparently being proposed – again – for the royalty in the leasing formula, and whether, because of the costs of developing a new forest, that proximity value would be available.

229. Document B73, pp 22–23, fn 102

230. Document A10, p 100

that Maori did want a lease although Tasman did not, the Forest Service and Maori should go ahead without them.²³¹

Mr Williams' analysis precipitated counter-arguments from other Forest Service officials. In separate reports, both Mr DC McDonald and Mr MB Grainger argued that, without Tasman's mill at Kawerau, the land in the Tarawera Valley would have no proximity value and that therefore Tasman had created the proximity value. Mr McDonald then suggested that Tasman could therefore argue that the proximity value should be shared among all those putting in capital (whether land or development costs), especially since Tasman was carrying all the risk and had reduced its equity in the proposed forestry company owing to the available tax concessions. He concluded, however, that the landowners were getting 'less than their fair share under the present scheme' and that a better share would be 50 per cent.²³²

Mr Grainger made similar arguments, pointing out the 'major differences' between the principles underlying the leasing formula and the Tarawera scheme. He felt that the Forest Service was 'not being quite fair in attempting to secure the whole of the proximity value, in this particular case, for the landowners'. It offended his 'sense of justice to see the "sleeping partners" get the lion's share', while the partner who created the proximity value and carried the development risk and management responsibility drew 'a much lower net financial reward'.²³³ Because of the differences between the leasing formula and the Tarawera scheme, Mr Grainger suggested that a realistic economic model for the scheme be calculated to test the comparison. Further, because there was sufficient evidence to raise a doubt as to whether the Maori owners were getting the deal that they were entitled to expect, there should be a stay on proceedings until that was determined.²³⁴ He considered that 'the best solution overall is probably for the Maoris and the Crown to withdraw from the scheme and to operate their own forestry projects' and that Maori therefore 'should be strongly advised not to dispose of their land, but to offer it on lease or else arrange for the Forest Service to manage it for them'.²³⁵ The views expressed by Messrs Grainger and McDonald apparently confirmed Mr Williams' suspicions of the scheme. He recommended that the issues of concern to them be referred to the Government departments involved, with a view to reopening negotiations with Tasman.²³⁶

Mr Grainger returned to the matter on the same day as the Tasman Cabinet Committee approved the draft heads of agreement. In the covering letter with his report to the director of forest economics, he advised that the stated £250,000 transport saving was not available to the land but was fully committed for ordinary forest financing. He was convinced that 'Tasman's estimate for development costs [£2.673 million at year 25] will be greatly exceeded in

231. Williams to director, forest economics, 20 June 1966, FS83/503, vol 3 (cited in doc A10, p 100)

232. McDonald to senior planning officer, 22 June 1966, FS83/503, vol 3 (cited in doc A10, p 101); doc B73, p 23

233. Memo from Grainger to senior planning officer, 22 June 1966 (cited in doc B72, p 12)

234. Because the Tribunal could not locate the relevant file (FS83/503, vol 3) in Archives New Zealand, this summary is taken from document B73, p 23.

235. Grainger to senior planning officer, 22 June 1966, FS83/503, vol 3 (cited in doc A10, pp 101–102)

236. Williams to director, forest economics, 23 June 1966, FS83/503, vol 3 (cited in doc A10, p 102)

practice', probably by at least 50 per cent, and he stated that 'it seems almost certain that Tasman has deliberately assessed its development costs on a most optimistic basis in order to make the picture attractive to the other land owners'.²³⁷ (A handwritten note by Mr Thomson beside this point states: 'It was for these very reasons that a minimum return was insisted upon.') Mr Grainger then stated:

After a dispassionate analysis I have failed to discover any serious economic flaw in the Tasman scheme to the prejudice of the land owners' interests. Nevertheless along with various other officers I must confess that I share in those lingering doubts about the wisdom of parting with all rights in the land itself for an average price of £3.11.0 per acre.²³⁸

The report itself details Mr Grainger's reasoning. Three points he makes there are especially relevant to our inquiry. The first is that, because of the costs of developing a new forest, at fivepence stumpage the forest grower would lose money, even if the land were acquired for nothing, and the Tasman scheme was therefore economic only because of the threepence transport differential. Secondly, Mr Grainger stated that 'the practical effect of Tasman's guarantee is to place a *minimum* value of £6.3 per acre (average) on the Tarawera Valley lands', and he suspected that other Forest Service estimates of £8 to £10 for the Tarawera Valley land value were based on 'significant omissions or under-estimates'. Thirdly, he regarded it as 'a foregone conclusion' that the 75 per cent minimum guarantee would have 'to be invoked', but 'the *irreducible minimum* under the Tasman scheme' was still as good as the financial returns under the Forest Service's leasing scheme. Therefore, the 'Crown and Maoris stand to reap a very real advantage by shifting all major risks on to the shoulders of Tasman in return for a guaranteed minimum of 22½ of net profits'.²³⁹

Mr Grainger concluded that he found it 'quite impossible on economic grounds to argue that the Tasman Scheme is a bad scheme for the land owners; nevertheless I am convinced that leasing would provide the basis for a much *better* scheme on a long-term basis' (emphasis in original).²⁴⁰

His reasoning here is unclear, hinting at, but not explaining, some non-economic rationale for favouring a lease-based scheme. However, a telex message from Mr Grainger to Mr Williams the previous month sheds some light on his views. In this, Mr Grainger stated that his 'opposition to the [joint venture] scheme is really very limited and is aimed at preventing the outright sale of Maori land'.²⁴¹

In a report to Mr Poole on 28 July, Mr Thomson agreed with Mr Grainger's assessment of the minimum guarantee, indicating that, because it 'offsets the possible undesirable effects of

237. Grainger to director, forest economics, 21 July 1966, FS83/503, vol 3 (doc B73(e))

238. Ibid

239. M B Grainger, 'The Tarawera Valley Scheme', report to director of forest economics, 21 July 1966 (doc B73(e), pp 2-3)

240. Grainger to director, forest economics, 21 July 1966, FS83/503, vol 3 (doc B73(e)) (cited in doc A10, pp 103-104)

241. Grainger to senior planning officer, New Zealand Forest Service (telex), 24 June 1966 (doc A5(11.16))

low land values', he had always considered it a 'good justification' for supporting the Tasman proposal, but he did not feel as strongly about the leasing alternative as Mr Grainger did. Mr Thomson accepted Mr Grainger's assessment that Tasman's land values were not unreasonable, but he felt that the Forest Service 'should not object if the Maori owners press for higher land valuations', which might well be 'the outcome of the meeting of the Maori Land Court'. The Crown, as a landowner itself, 'would be well advised to support the Maoris in any reasonable demands for increases in land values, and Tasman would be well advised to accede to such requests'.²⁴²

4.13.5 Maori Affairs' quest for evidence

Only one other event that occurred before the Maori Land Court hearing needs to be described here. On 20 May 1966, Maori Affairs office solicitor Mr DM Forsell wrote to the Rotorua district office advising that there might be 'strong opposition' on behalf of Mr Edwards to the amalgamation of titles at the Maori Land Court hearing. In order to show that 'the lands could in consequence of amalgamation, "be more conveniently or economically worked or dealt with"', as required by section 435, he asked for evidence that the blocks in which Mr Edwards was interested were at that time in an unsatisfactory state because of:

- (a) Lack of legal access.
- (b) Lack of practical access.
- (c) Inordinate cost of doing any boundary fencing to the blocks respectively.
- (d) Inordinate cost of surveying the blocks insofar as they are not surveyed.
- (e) The physical shapes of the blocks involved.

Mr Forsell also sought expert opinions to show that the blocks could be more conveniently or economically worked if they were amalgamated.²⁴³

In a report of 21 June, land utilisation officer Mr RG Lockie noted that he found little evidence to support the contention that there was a lack of practical access, or inordinate costs of surveying or fencing, and he further noted that the blocks were 'reasonably shaped'. Mr Lockie also offered to provide some 'very positive evidence on the economics between grassland farming and forest farming'.²⁴⁴

On 28 June, Mr Forsell accepted the latter offer, asking for emphasis on the blocks 'in which the Edwards/Savage people are interested':

242. Thomson to Poole, 28 July 1966, FS83/503, vol 3 (cited in doc A10, p 104)

243. Document B1, p 62

244. Ibid, pp 60-61

We should like to know what sort of farming those people are in fact carrying on, what is the state or condition of any buildings, fences, pastures or other improvements on the lands involved, what sort of sheep or cattle are carried on such land etc. We suspect that, insofar as any farming is being carried out on such lands, it is of a low grade, peasant variety whereby feckless farmers are lackadaisically squeezing a meagre living from sour and unsuitable soil.

It may be difficult to get the detailed information we seek, but will you make endeavours to the end please. If a camera can be employed to take photographs of suitable features of or on the Blocks allegedly being farmed – eg stunted cattle, broken down dwellings, poor pastures, decayed fences and the like – so much the better. You will have to be discreet and circumspect in that regard.²⁴⁵

Mr Lockie's response is not recorded in the files.

4.14 SUMMARY

The key points made in this chapter are as follows:

- ▶ By the end of 1965, three further meetings had been held with groups of Maori landowners, including the final one at Kokohinau Pa, which was open to all Maori potentially affected.
- ▶ Special attention had been paid to the objections to the joint-venture scheme expressed by the Savage–Edwards family.
- ▶ The guarantee to the Crown and Maori landowners of a minimum share in the joint-venture scheme of 75 per cent of the projected returns had been extracted from Tasman, though not yet confirmed in writing. This minimum guarantee, and the reasons for it, had not been disclosed to Maori.
- ▶ The actual basis of the price to be paid for the Tarawera Forest's produce had not been disclosed to Maori.
- ▶ The alternative leasing options had not been explored with Maori.
- ▶ There was confusion among Maori about the information on the joint-venture scheme provided in Tasman's booklet and in the invitation to and at the Kokohinau Pa meeting.
- ▶ There was confusion among Maori about the terms of the Kokohinau Pa meeting, the conduct of the meeting, and its outcome.

²⁴⁵. Document B1, p 58. The typed document originally read 'It may be difficult to get the detracted information', but 'detracted' was scored out by hand and 'detailed' added.

CHAPTER 5

THE TRIBUNAL'S ASSESSMENT OF THE CROWN'S CONDUCT TO MID-1966

5.1 INTRODUCTION

This chapter examines the adequacy, in terms of the Treaty principles discussed in chapter 1, of the process followed in developing and finalising the joint-venture proposal prior to the August 1966 Maori Land Court hearing. A prerequisite for the Crown's fulfilment of its Treaty duty actively to protect Maori interests is that it must understand the nature of the interests it is being relied on to protect. The answer to the question of whether the Crown fulfilled that duty to the Maori landowners in the Tarawera Valley hinges largely on the sufficiency of the meetings that were held with Maori landowners for:

- ▶ informing the Crown of the nature of the Maori interests in their land;
- ▶ providing the owners with the information necessary for them to assess the effect on their various interests of the options available for participating in a forestry scheme; and
- ▶ allowing discussion to occur between the Crown and the Maori owners about measures which the Crown might take to protect their interests.

It follows that, if the Crown did not fulfil that duty, the reasons for its failure might themselves be in breach of another Treaty principle, that of partnership, which requires the Crown and Maori to act towards each other honourably, fairly, and in good faith.

Before we embark on our analysis of the meeting process in this light, it is useful to sum up what we have already learnt about the position of the various participants. In particular, we evaluate the different pressures driving them during the meeting process and their consequent attitudes to the joint-venture proposals.

5.2 PRESSURES ON THE PARTICIPANTS

5.2.1 Tasman

The joint-venture scheme was initiated by Tasman, and advanced in preference to a leasing scheme based on a stumpage formula proposed by the Forest Service. In order to plan for the company's expansion, Tasman wanted to secure its own supply of wood independently of the Kaingaroa contracts and at an economic and relatively predictable price. It also wished to

5.2.2

secure this supply in perpetuity, and so did not want the uncertainties of leasing schemes, which required periodic rent reviews and renegotiation of terms. Tasman recognised too that, had it purchased the Maori land and the forest proved a commercial success, that would have created bitterness among the former owners, and the company wanted to enhance good relations with its neighbours. Such a policy makes good sense commercially, but it should equally be noted that Tasman, as a large privately controlled company with duties only to its shareholders, had no need to concern itself with issues of social equity: that was the Government's role.

Tasman also saw on its doorstep a huge area of idle land that was ideally suited to planting and growing trees (but not much else) and which could be harvested with relative ease. It was, however, handicapped by the absence of any representative Maori entity with which it could deal. Given also the fragmented title to the Maori land, Tasman was forced to act through the district office of the Department of Maori Affairs, with its knowledge of the ownership of the various land holdings and of the owners with whom Tasman could test its proposal. This was just one of the four Government departments that Tasman had to deal with to advance its plan.

Tasman then invested a lot of time, energy, and money in advocating and refining the joint-venture scheme – to the extent that, when the Forest Service reopened the possibility of a royalty-based leasing scheme in mid-1965, Tasman was unwilling to entertain it. Indeed, it seems to have made Tasman all the more determined to achieve the joint-venture proposal, and no other.

5.2.2 The Crown

The various agencies of the Crown, though all involved in making Crown land available for afforestation by Tasman and offering assistance to Tasman in acquiring Maori land in the Tarawera Valley, had differing perspectives on the scheme. None of them had a clear coordinating role, though the Treasury, which was the conduit for advice to Cabinet on the scheme, came the closest to fulfilling that function. Nor was there a separate ministerial committee responsible for coordinating the various departmental activities in relation to the scheme; instead, this responsibility was subsumed by the Tasman Cabinet Committee, whose main focus was clearly on the future of Tasman.

The Treasury took the wider economic view of the joint-venture proposal. If Tasman bore the costs – and the risks – of developing the Tarawera Valley forest, that would free up the Crown's money for forestry development elsewhere. The Crown owned 25 per cent of Tasman, which it obviously wanted to see prosper. It may therefore have been prepared to take a lesser return from TFL because it would be getting its returns in other ways: in dividends from Tasman and from the taxation on Tasman's profit. The country also stood to gain from Tasman's extensive export earnings.

The Forest Service, for its part, found itself dealing with a totally new situation. On the one hand, it was required by the Government to devise a scheme to afforest Crown land in the Tarawera Valley in conjunction with Tasman and to assist Tasman to acquire Maori land in the valley. On the other hand, it was at this time evolving its own approach to developing new forests with other landowners, including Maori, and often for non-commercial reasons. Its thinking was geared towards profit-sharing leases, but it had not yet reached any final conclusions or a workable formula. Moreover, it had never had to engage with both a commercial enterprise and Maori landowners on the same forestry project, and had never had to deal with anything like a joint-venture scheme driven by a shrewd businessman and involving the sale of Crown and Maori land to a new commercial forestry company.

The Forest Service was therefore careful to evaluate every forestry aspect of Tasman's proposals, and used its evolving lease-based model as the comparative tool. Although its senior officers made key decisions in July 1963 and July 1965 to support the joint-venture scheme, subject to certain conditions, it found its officers often disagreeing among themselves on the implications of Tasman's proposals and, not surprisingly, falling back on leasing as the preferred alternative concept. While it clearly mistrusted Tasman's style of doing business, the main concern of the Forest Service throughout its prolonged evaluation processes was to achieve an outcome that was fair and equitable to all involved.

For the Department of Maori Affairs, the joint-venture scheme was novel too. While it was in favour of any project which would see idle Maori land with fragmented titles brought into productive and employment-generating use, the department had to grapple with the problem of finding the appropriate machinery for involving Maori equitably in what was a many-faceted commercial enterprise. The department was initially involved at the local level, and its various requests for assistance and its casting about for solutions reveal the extent of the mismatch between the proposed venture and familiar departmental procedures. There is no evidence to suggest that the department had significant concerns about the scheme itself or about the transfer of ownership of Maori land that was an essential part of it. Rather, in keeping with the spirit of the times, its officers saw their role as facilitating a progressive, long-term enterprise for what they regarded as the benefit of all the Maori owners involved, not to mention the general benefit of the nation – even over the objections of those who opposed the scheme.

The Department of Maori Affairs had a critical role in the interaction between the Maori landowners, Tasman, and the Crown officers most closely involved in testing Tasman's proposal, because it took on the job of managing all of the six meetings that took place. The Rotorua office of the department, with its forceful head, Mr Barber, was particularly influential in that process. Mr Barber initially invited head office opinion on any policy matters and on appropriate implementation machinery, but he was clearly an enthusiast for the joint-venture scheme because of the benefits he saw it bringing to his district. The role that Maori Affairs seems tacitly to have assumed was that of facilitating the proposal being put to Maori

once it had been accepted by the Government, and it seems not to have concerned itself with the relative merits of this proposal as against any other forestry proposal, which it saw as the Forest Service's job.

Also critical in the meeting process was the New Zealand Forest Service. During the 1964 meetings, while the terms of the Maori landowners' involvement remained open, the Forest Service was concerned to protect the Crown's commercial interests in relation to those of Maori. That was the basis for its position that, if the Maori owners, in direct negotiation with Tasman, achieved a higher price for their land, then the Crown wanted its price to be raised accordingly. By late 1965, however, it was obliged to protect the Crown's commercial interests in the novel forestry scheme that it was embarking on with Tasman while also being relied on by other parts of the Government, including Maori Affairs, to ensure that the scheme was fair to the Maori landowners. The effect was that the Forest Service came to bear the brunt of the Crown's responsibility for protecting the Maori landowners' interests. At this point, once it was satisfied that the Crown's commercial interests were protected, the Forest Service reasoned that its insistence upon equal terms for the Maori owners would also protect their interests.

5.2.3 The Maori landowners

Among the Maori landowners who knew about the joint-venture proposal, views were mixed. They did not have the resources to develop the land themselves, and they could not raise money from any private source on multiply owned land. They could succeed in doing something with their land themselves only if the Crown assisted them – and the Crown made it clear that, in this case, where a commercial company was prepared to put in all the development costs and so carry all the risk, it considered its money was better used elsewhere. When this scheme was proposed, no other development options were available to Maori. Tasman was the largest timber processor in the country and the only one in the area; there was no potential lessee in sight other than the Crown or Tasman. Some Maori owners had negative views of leasing, having had no experience of leases with rental review or profit-sharing provisions, and in addition Crown officials appeared to have been closely involved in developing the joint-venture scheme and seemed to be strongly supporting it. Some Maori therefore took the 'progressive' view and saw the potential benefits of the scheme – productive use of the land, employment opportunities, providing for future generations – as outweighing the loss of their land to the forestry company. Further, some connection with the land would be maintained through the Maori shareholding company and the future use of the land could be influenced through the two Maori directors of TFL.

Yet, there were deep suspicions about Tasman's dominance of the scheme, and in particular about its determining both the values at which land entered the scheme and the prices that the forest produce obtained. The Maori landowners saw that they were putting in 50 per cent

of the land and getting less than 15 per cent of the projected profit. Some therefore wanted to keep the land and have more control over its use, such as leasing might give; others wanted simply a better deal. A few were so suspicious, or wanted to maintain their connection with the land, whether or not it was being used, that they wished to keep their land out of the scheme altogether.

Behind all of this was the fear of the alternative, now that the land had been shown to have a productive use. If Tasman walked away from the scheme or Maori chose not to join it, they might lose their land altogether in another way. There was a real fear that the Whakatane County Council would levy rates on the previously exempt blocks and seek payment of rates arrears. If those charges could not be met, the council could take the land as payment. No evidence was presented to us that Maori were told directly that Tasman and the Crown had agreed to go ahead without them if necessary, but the way that the proposal was put to Maori – as an offer to join in a scheme already developed by Tasman and the Crown – must have suggested that likelihood to them. If Tasman and the Crown went ahead anyway, not only would the rates problem remain but long-standing problems to do with legal access and surveying and fencing costs for the Maori land would be exacerbated.

Moreover, under the joint-venture scheme, Tasman was carrying all the development risk and offering the benefit of tax concessions which would halve the costs of developing a forest on their land and for which the Maori landowners were not eligible. And, from mid-1965 on, Tasman was emitting 'now or never' signals. For many of the Maori landowners who knew about it, then, the scheme must have seemed like an opportunity they could not let slip. The issue for them became the actual terms of the deal: what land would or could be kept out of the proposed forest and what return would Maori get for putting their land in?

5.3 PARTIES' SUBMISSIONS ABOUT THE MEETING PROCESS AND THE TRIBUNAL'S VIEW

In essence, the claimants argued that there were five deficiencies in the process followed, these being that:

- ▶ 'In reality, there was never any negotiation by either Tasman or the Crown with the Maori owners or their authorised representatives'.¹
- ▶ 'Absolutely critical' information was withheld from Maori. This included the fact that negotiations were under way between the Crown and Tasman over acquiring the Maori land and information on 'the crucial leasing option'; on the Tasman offer of a 15 per cent minimum guarantee to Maori; on the 75 per cent minimum guarantee to the Crown and Maori landowners; on the Crown's 'serious concerns over low Tasman land valuations'; and on the "unconventionally generous terms" conceded by the Crown . . . in relation to log prices'.²

1. Document A22, para 15

2. Document B80, paras 23, 45.1; doc A22, paras 18.1, 18.4–18.5

- ▶ In addition to the non-disclosure outlined in point 2, statements made to Maori in relation to some of these points, and the projected 14.43 per cent Maori shareholding, ‘positively misrepresented’ the Tasman proposal by presenting ‘misleading information’.³
- ▶ ‘The Crown and in particular Barber manipulated the meeting process and outcome, leading to the Maori “consent” to the Tasman proposal proceeding.’⁴
- ▶ The Crown (and the Director-General of Forests in particular) was ‘in a position of serious conflict of interest’ because of its 25 per cent shareholding in Tasman, and that similarly Maori Affairs officials were involved in a conflict of interest because of their dual roles with the Maori Land Court or the Maori Trustee.⁵

The Crown, however, contended that:

- ▶ ‘Whatever scheme, lease or otherwise, was devised, Tasman was integral to it’ and that in the negotiations ‘the Crown had to ensure that the Crown position and that of the Maori landowners was represented in a way that would ensure the continuing interest of Tasman’.⁶
- ▶ There were inevitably ‘different levels of understanding of the scheme amongst the Maori owners’ about particular aspects of it, and that it was ‘reasonable for the Crown to rely on representative leaders to express views’.⁷
- ▶ Because the ‘status quo, namely unproductive land burdened with unpaid rates was clearly unacceptable’, it was ‘inevitable that there were some short cuts taken in . . . the process followed to obtain the owners consent’,⁸ but that, ‘Despite some inevitable short-comings and raw aspects of the process’, there were ‘no material breaches of Treaty principles in failing to ensure greater disclosure’.⁹
- ▶ ‘In assessing whether the outcome would have been significantly different’ had greater disclosure occurred, ‘the actual outcome of the Scheme, which has provided a handsome return to MIL, must be considered’.¹⁰
- ▶ The ‘claimants’ argument about disclosure rests heavily on contemporary notions of transparent and open Government . . . and the assumption of a Crown obligation to fund Maori to engage their own independent advisers . . . to assist them in evaluating the complexities of the scheme. There is no evidence of any request by Maori for any Crown funded legal advice’.¹¹
- ▶ The allegation of a conflict of interest because of the Crown’s involvement in Tasman should be rejected.¹²

3. Document A22, paras 22.3, 23

4. Ibid, para 22.5

5. Ibid, para 86.1

6. Document B81, para 2.18

7. Ibid, para 3.11

8. Ibid, para 2.19

9. Ibid, para 1.8

10. Ibid

11. Ibid, para 3.4

12. Ibid, para 2.22

The actual outcome of the scheme, and the financial and other prejudice that the claimants argued they had suffered as a result of what they called the Crown's failure to disclose critical information, are dealt with in chapter 10. Here, the Tribunal is concerned only with the adequacy of the process followed in the development and finalisation phases. In order to determine whether breaches of Treaty principle occurred in that process, we have identified three critical questions. The first two are:

- ▶ Did the meetings serve to inform the Crown of the Maori landowners' interests and their priorities for protecting their interests?
- ▶ Did the meetings provide Maori with the information they needed about all aspects of, and options for, the scheme in order to assess the relative impact of these options on their priorities?

If the meetings did not achieve either or both of those goals, that would constitute a breach of the duty of active protection of the Maori interests, as outlined in section 1.8. The third question is:

- ▶ If the Treaty principle of active protection was breached, were the Crown's actions done in bad faith, as the claimants allege?

If the Crown did act in bad faith, that would be a breach of the Treaty principle of partnership, also as outlined in section 1.8.2. Further, if prejudice was suffered as a result, that would influence our recommendations as to redress.

Because questions 1 and 2 are concerned with the totality of the interaction between the Crown and Maori, they are dealt with together, in section 5.4. The third question is dealt with in section 5.5.

5.4 THE INTERACTION BETWEEN THE CROWN AND MAORI

Here, we consider the three stages in the development and finalisation of the joint-venture scheme: the development of the proposal between Tasman and the Crown from the early 1960s to late 1964, the development meetings with small groups of Maori in the second half of 1964, and the finalisation meetings at the end of 1965. We do so in order to ascertain, first, what steps, if any, the Crown took to inform itself of the Maori landowners' interests and priorities and, secondly, how the Crown's understanding of the Maori landowners' interests influenced the actions that it did take.

5.4.1 Development of the proposal between Tasman and the Crown

The claimants' first complaint about the process was that the Maori landowners were not properly involved in its earliest stages. They submitted that the Crown assumed, without even informing them that it was negotiating with Tasman, that it could and would represent the

Maori landowners' interests in those negotiations. Accordingly, the claimants said that, from the outset, the Crown and Tasman intended to 'negotiate together not only in relation to their own interests but also in relation to the proposed acquisition of Maori land'.¹³ In support, they referred to Mr Poole's letter to Tasman of 20 December 1962, saying that it 'clearly shows the Crown taking upon itself the role of negotiating with Tasman in relation to the purchase or leasing of Maori land'.¹⁴ That may be so, but it is not the full picture.

Mr Poole's letter proposed that the Crown lease its land to Tasman, and that, if the Maori owners were willing to sell their land, the Crown would buy it and then lease it to Tasman; if they were not willing to sell, Mr Poole proposed that the Crown lease the land from them and sublet it to Tasman. In other words, at that time, the Crown was in the middle: it would negotiate with Maori over their land and then make it available to Tasman. Once Tasman had come up with its counter-proposal of the joint venture, however, the centre of gravity shifted to Tasman and its astute new managing director, and the Crown was thereafter always reacting to his proposals. Accordingly, the Forest Service first had to evaluate the embryonic Tasman scheme – the original proposal was less than a page – and then satisfy itself that the venture as it evolved through extensive negotiations was equitable to all parties, before the proposal was far enough advanced to be able to be put to Maori. Had the Forest Service at any stage rejected the Tasman scheme and continued with its own original leasing proposal, it would have been on familiar territory and been negotiating directly with Maori on the one hand and with Tasman on the other. Before rejecting the scheme, however, it had to be certain that the scheme was not as good as, or could not be made as good as, its own leasing alternative, and it had to satisfy the Treasury of this. That process, as we saw in chapter 3, took some time – and even then doubts remained.

Even with Tasman driving the proposal, it took 15 months for the parties to agree sufficiently on its terms to record them in a first draft heads of agreement, which was produced by Tasman in June 1964. This specified the agreement reached between Tasman and the Crown to that date and stated that the two would 'co-operate fully in discussions and negotiations with Maori owners of the land contemplated to be incorporated in the forest'.¹⁵ The opportunity to participate in the proposal was to be offered to Maori, giving several different options for their involvement (a main approach and, in case that did not find favour, three fallback options). As we have seen in chapters 3 and 4, once the agreement in principle had been reached with the Crown in mid-1964, Tasman approached the local Rotorua branch of the Maori Affairs Department for advice on the ownership of the Maori land that would be sought for inclusion in the scheme and the identity of owners with whom to consult.

We consider that, up to this point, it was reasonable that Maori were not involved in the complex negotiations by which details of the novel joint-venture scheme were thrashed out,

13. Document A22, para 13

14. Ibid, para 14

15. Director-General of Forests to Secretary to the Treasury, 9 March 1964, FS83/50 (doc A5(7.4))

both within the Forest Service and between the Crown and Tasman – the scheme was not sufficiently developed to allow that. Various options for Maori involvement were available, and the Crown had made it a condition that, if the Maori in negotiation with Tasman obtained better terms than the Crown had, it would get such terms too. The proposal was to be presented to Maori as an invitation to join Tasman and the Crown in the scheme. All of this indicates that nothing about possible Maori involvement was set in concrete at this stage. Accordingly, we find that there was nothing inherently wrong or counter to Treaty principles in Tasman and the Crown developing the forestry scheme as they did before mid-1964.

5.4.2 Tasman's testing of the proposal with select Maori owners: July to November 1964

We also consider it a reasonable approach, once the proposal had reached a fairly definite form by mid-1964, for Tasman to rely on local Maori Affairs officers for advice on which Maori to talk to first. For reasons which the eastern Bay of Plenty Tribunal found to be the legacy of past Treaty breaches,¹⁶ the owners of the Maori land in the Tarawera Valley were not organised in readily recognised or accessible groups and, as the Crown observed, 'There was no single representative Maori entity with whom the Crown and Tasman could deal.'¹⁷ In those circumstances, it might have been tempting for Tasman to deal primarily with a well-established and powerful tribal group with interests in the Tarawera Valley, such as Te Arawa, but we believe that the procedure followed was adequate to cover the different tribal connections to the land. As well, the people chosen to attend the 1964 meetings were, first, people of mana and, later, those with larger landholdings. No evidence was presented to us to suggest that these people were selected as being able to be easily influenced in favour of the proposal. Indeed, in our view, no one who was looking for 'yes men' or 'yes women' would start out with such independent thinkers and forthright critics as John Grace, Nira Fraser, or Monica Lanham.

Therefore, the issues for the Tribunal are: what information was put before the three 1964 meetings, what efforts were made by the Crown to establish the interests of the various Maori landowners and their priorities, and what advice about the process the Crown received from them. It is important to bear in mind here the distinction – and lack of coordination – between the various agencies of the Crown. Maori Affairs, which arranged the meetings and selected the attendees, saw its role as facilitating Tasman to put the scheme to the Maori owners, and it left it to the Forest Service to worry about the merits of possible alternative options. Both departments assumed that it was logical for Tasman to have the first opportunity to put its proposal to Maori, with the result that no single Crown agency undertook the responsibility for engaging Maori in the kind of process that we consider, as outlined in chapter 1, was necessary to ascertain their interests and their priorities for protecting those interests.

16. Waitangi Tribunal, *The Ngati Awa Raupatu Report* (Wellington: Legislation Direct, 1999), pp 99–102

17. Document B81, para 3.6

The assumption that it was appropriate to let Tasman dominate the way in which the proposal was actually presented to the Maori owners was, the Tribunal considers, the fatal flaw in the process followed. Tasman chose to adopt a business negotiation strategy based on providing the minimum information necessary to achieve one's goal. Thus, Maori were told only about the main proposal and were invited to discuss aspects of it that concerned them or that they did not understand. The other options that should have been on the table – the two ways of getting money to the Maori owners before the first harvesting in about 25 years and, crucially, the leasing alternative – were kept in reserve as bargaining chips to be used only if hostility to what was openly being proposed was sufficient to make that necessary. As the proponent of the joint-venture scheme, Mr Schmitt's aim at the 1964 meetings was to gain endorsement for the scheme as it stood, not to put the full range of options to Maori and let them decide in their own way on the one that best suited their needs and interests. Nor, as we have noted above, did any Crown agency see a need to follow such a process. Accordingly, all efforts were focused on persuading the few, but influential, Maori owners invited to the meetings to join this scheme.

That is not to say, however, that the Maori owners did not manage to achieve some advantages from the three 1964 meetings. Their objections concerning their lack of influence on the way in which the forest would be run were met with the subsequent offer to double Maori representation on the board of the proposed forestry company from one director to two. As well, requests for more written information, and for further meetings to discuss the proposal, were certainly met. We also note that no Maori at the meetings asked, or asserted the right, to participate in the negotiations between Tasman and the Crown, or sought financial assistance to obtain independent advice. Each of the three meetings in fact concluded with an endorsement by the Maori owners present for Tasman and the Crown to continue developing the proposal along the same lines. What was missing from all this, however, were two things:

- ▶ information on the full range of options available for advancing the proposal, including leasing; and
- ▶ any effort to enable the Maori landowners to form their own representative group to formulate a collective view on the proposal and to negotiate with Tasman and the Crown on those terms.

By the end of 1964, however, we consider that the situation was not so far advanced as to be irretrievable, and indeed both these matters were raised in the course of 1965. It is the Crown response to them that is critical.

5.4.3 Finalising the proposal between Tasman and the Crown

An understanding of the events that occurred from July to September of 1965, well before the next meeting with Maori owners in October, is critical to assessing the flaws in the process followed at the meetings with Maori towards the end of that year. In July 1965, with its Grainger

lease proposals reasonably well advanced, the Forest Service had revived leasing as an option for the Tarawera Valley. When that was put to Mr Schmitt, however, he squashed the idea, and the Director-General of Forests agreed to let him 'pursue the course he had set'.¹⁸ Mr Schmitt's stated reason at the time – that he was afraid that Maori might turn down any deal if a whole new proposal were put before them at that stage – may seem spurious. Indeed, at the Tribunal hearing, Crown historian Dr Battersby conceded under cross-examination that Maori 'would be unlikely to turn down a lease in principle', but he observed that the exact terms of such a lease were hypothetical.¹⁹ There is no doubt, however, that Mr Schmitt's negative response to the renewed lease proposal at this point had a powerful influence on the course of the subsequent negotiations between Tasman and the Crown (and, as we shall see, on the Maori Land Court's later assessment of the joint-venture scheme). Thirty-five years later, Professor Schmitt emphasised again, in his interview with Dr Battersby, that there was:

one matter upon which Tasman would not have moved at that time. If it were the case that nothing but a lease of the Maori land would have been accepted by Maori, and if I were the Managing Director, we wouldn't have gone ahead. . . . we just didn't have that time or inclination.²⁰

We consider that the Forest Service's decision to stop pursuing the leasing alternative was a critical failure in terms of the Crown's duty to protect the Maori interests. It meant that crucial information about alternatives to the proposed deal was not made available to the Maori owners. Had the Forest Service informed itself about the Maori interests in the land and not just assumed that it knew them, it might not have been so willing to let Mr Schmitt override the leasing alternative. However, the Forest Service's reason for promoting leasing again was economic – leasing would give a better return to the landowners – and was not prompted by the other Maori interests in the land – social, cultural, political, and spiritual.

By September 1965, however, the Forest Service was actively articulating how it saw its duty to protect the Maori interests. This is revealed in two statements made by Mr Thomson when he was negotiating with Tasman for the minimum guarantee to the Crown and the Maori owners of 75 per cent of their predicted returns. First, he said that Maori would not join the scheme unless the Forest Service indicated that it was 100 per cent satisfied with it. Secondly, he said that Maori 'will look to us and nobody else to see that their interests are safeguarded'.²¹ Again, however, it was assumed that these interests were solely economic and that the Forest Service's duty was to ensure that the Maori owners got the best deal possible in terms of the financial returns. The reasons that the Forest Service requested a minimum guarantee for Maori and the Crown, and accepted Mr Schmitt's offer of 75 per cent of the projected returns, were threefold:

18. Director-General of Forests, 'Tarawera Valley Forest', file note, 15 July 1965, FS83/503, vol 1 (doc A5(8.7))

19. Oral evidence of Dr John Battersby in response to questions from Dr Harrison on document B10, 9 June 2000

20. Document B78, pp 5–6

21. Document A10, p 65

5.4.4

- ▶ it would give at least as good a return as leasing;
- ▶ it overcame concerns about the low land values Tasman was proposing; and
- ▶ it removed the need for land revaluation after 25 years.

Because those reasons were so critical in overcoming the Forest Service's objections to the joint-venture scheme, the Tribunal considers that there was a duty on the Crown to make known to Maori both the existence of the guarantee and the reasons for accepting it. However, it did neither, and continued to allow Tasman to determine what information was presented to the Maori owners, and how. This was a second critical failure, the reasons for which we return to in section 5.5. At this point, we turn to the final meeting with Maori, at Kokohinau Pa on 11 December 1965.

5.4.4 The Kokohinau Pa meeting

The Tribunal considers that the Kokohinau Pa meeting, the first that was open to all Maori with interests in the Tarawera Valley, should have been the beginning of a process by which Maori were given an opportunity to formulate a way of articulating their interests and how best they might be protected in relation to the joint-venture proposal. Instead, it was the end of the process. Maori at the meeting had the proposal explained to them and their assent to it was sought, but they were offered no opportunity to have their responses considered and to have the proposal amended as a result. The options presented to them were simply 'take it or leave it'.

Moreover, the basis on which they were invited to 'take it or leave it' was incomplete, and to many incomprehensible. Had Maori been told of the 75 per cent minimum guarantee to the Crown and Maori landowners, that may well have turned them against the proposal as put to them. It would almost certainly have led to a discussion of the reasons for such a guarantee, which in turn would have inevitably led to a discussion of three crucial elements of the deal which had otherwise not been properly addressed:

- ▶ a comparison with the leasing option, which would have made clear whether it was indeed still a viable option;
- ▶ the ongoing issue of the low (and shifting) land values that Tasman was proposing; and
- ▶ the fact that the 14.43 per cent projected Maori share of the venture was simply an estimate, and could vary down to 10.8075 per cent as well as up.

Moreover, even the information that was provided was hard for the audience to grasp. Questions by Kepa Ehau, Mr Savage, and others even as early as the November 1964 meeting about the meaning of valuation terms and the relative shareholding percentages show that the basic concept of the joint-venture proposal was not easy to understand, let alone its details. So, and even more, does the confusion by many of the participants at the December 1965 meeting, so graphically related in section 4.12. There is also the telling complaint by the interpreter at the meeting, John Rangihau, that Maori needed more time to consider all the angles

– and the difficulties that he must have experienced in rendering complex abstract concepts of European law, economics, and forestry practices into Maori ‘on the spot’ can be readily imagined. Another telling example is the belief expressed by Mr Kingi at the Maori Land Court hearing that Maori would still have their land – a belief reaffirmed even though the judge questioned it.

Nor, in our view, was the Tasman booklet prepared for discussion at the Kokohinau Pa meeting written in ‘readily understandable’ English. The Tribunal considers that it would have been perfectly comprehensible to those well versed in the language of forestry, valuation, forest economics, and commercial law, but that was not its target readership. No doubt, as Mr Schmitt said, Tasman had done its best to explain these matters, but by the time the booklet was produced the company had worked on the proposal for up to three years, and familiarity would have blinded it to the complexities.

Finally, there is the conduct of the Kokohinau Pa meeting itself. At the start, Mr Barber invited the participants to take their time, and he held out the prospect of a further general meeting if necessary. By the end of the day, he was pressing matters to a conclusion there and then, even though it should have been obvious that at best there was no consensus and that, more likely, as the comment by Mr Rangihau above about lack of time shows, many were still confused. The outcome of the meeting was also confused, and it is questionable whether the vote taken could properly be interpreted as a mandate for the proposal to be advanced to the next stage.

5.4.5 What else might reasonably have been done?

We return to the issues surrounding the incompleteness of the information provided and the conduct of the Kokohinau Pa meeting in section 5.5. At this point, it is appropriate to consider what else the Crown could reasonably have done to improve the process described above according to the thinking current at the time.

First, there is the question of representation and informed negotiation. Despite the difficulties of dealing with more than 4000 owners of land in 40 blocks, the Crown, in the form of Maori Affairs, could have ensured that a truly representative body of owners was formed to engage in a dialogue with it and Tasman. Such a solution was in fact suggested by Mr Grace early on at the Kokohinau Pa meeting; he proposed that those present select a group of 15 or 20 representatives, who would then meet ‘after Christmas’, ‘come to some definite decisions’, and report back to a further meeting with Tasman and the Crown. At that next meeting, he said, ‘we should be able to finally agree’.²² Such a process would have ensured that the land-owners themselves got to choose their own representatives, who would then have been empowered to deal with the proposal in their own way. The Tribunal considers it likely that, if

22. Document A4, vol 2, p 88

5.4.6

such a group had been formed, the full range of Maori interests in the Tarawera Valley land and the priorities for protecting them would have emerged and been made evident to the Crown. This in turn should have raised questions about alternatives to the joint-venture proposal and led to a review of Mr Schmitt's adamant rejection of leasing in mid-1965. It might also have produced a request for independent expert advice to be provided to the group.

Secondly, and closely related to this point, is the question of the rights of the individual Maori landowners. The Crown could have ensured that, as indeed it seems many owners expected, the opportunity was provided for a meeting or meetings at which the individual owners would vote block by block, according to their recognised ownership shares, on whether each block should be included in the scheme. That would have been consistent with the belief expressed by some at the time that a Part XXIII meeting was the only way by which they could legally lose title to their land. It would also have ensured that the property rights of individual owners were not sacrificed as an overall majority view on the whole proposal was sought.

Thirdly, there is the question of the quality of the information provided. While the complexity of the explanations of the scheme given by its proponents indicates that they were unable to make matters any simpler, the fact that certain landowners, including Mr Fraser and Mr Grace, clearly did understand the scheme suggests that such people could have been facilitated to explain it to Maori in their own time and way at subsequent meetings. The Tribunal does accept, though, that this solution may have been a little unrealistic in light of the paternalistic attitude to Maori prevailing at the time. At the very least, however, more time for consideration at and after the Kokohinau Pa meeting, with provision for further discussion among and the recording of voting by the owners, should have been provided.

Finally, there is the question of the completeness of the information provided. As we discuss in section 5.5, the Crown's duty to the Maori landowners should have ensured that it found some way of revealing to them in confidence the terms of the Kaingaroa Forest sales agreement. Further, the omission of any mention of the 75 per cent minimum guarantee and its implications, both from the booklet and at the Kokohinau Pa meeting, was inexcusable. Because that meeting was regarded by those running it as decisive, either it should have been postponed until the guarantee was confirmed in writing or the Crown should have obtained an assurance beforehand that the guarantee would be raised there, and not left it to Mr Schmitt to use the matter as a bargaining chip (or not, as he chose).

5.4.6 Tribunal findings

As discussed in chapter 1, the Maori landowners had various interests in their lands in the Tarawera Valley – social, economic, cultural, political, and spiritual. The Crown seems to have assumed, first, that the Maori landowners' interests were primarily economic and, secondly, that if their economic interests were protected that would overcome any objections to the loss of any other interests they might have. We consider that the Crown made no conscious

attempt to ascertain what the Maori interests were, even though it was, or certainly should have been, aware that these were not identical with the Crown's interest. This point had been emphasised in the meetings when Mr Fraser twice stated that the Maori interests were personal and based on heritage, and was therefore of a different order from that of the Crown. It should also have been plain from the resolution proposed at the Kokohinau Pa meeting, which sought to protect the interests of the Savage-Edwards family, that retaining their land was vitally important to at least some of the Maori owners. We find that the Crown did not, therefore, follow a process that enabled it to be informed about the Maori owners' various interests and what should be done to protect them.

Further, by letting Tasman present the proposal in the way that it did, the Crown in effect acceded to the provision of incomplete information to those owners who received it, so that the view they then expressed was not based on full disclosure. Moreover, the process by which those owners' apparent agreement to the joint venture was obtained was itself flawed, in that the nature of the resolution being voted on and the voting itself was shrouded in confusion. For that, because Maori Affairs had assumed the role of managing the meeting process and its outcome, the Crown must bear primary responsibility. Accordingly, we find that actions and omissions by the Crown in the process by which the joint venture was finalised were deficient in terms of the Crown meeting its Treaty duty of active protection of the Maori landowners' interests.

5.5 CROWN ATTITUDE TO THE TREATY BREACHES

5.5.1 Introduction

Since we have found that the Treaty principle of active protection was breached, as above, the issue for the Tribunal now is whether the reasons for the breach were in themselves a breach of the Treaty principle of partnership, which requires the Crown and Maori to act towards each other in good faith, fairly, honourably, and reasonably. This is especially important in this claim because the Crown, at least in the guise of the Forest Service, believed by late 1965 that the Maori landowners were depending on it to achieve a fair deal for them. Mr Thomson's statements, referred to in section 5.4.3, reveal that this was the case. Therefore, the Crown was conscious that the relationship was akin to a fiduciary relationship, where 'one side is in a position of power or domination or influence over the other', and 'One side is thus in a position of vulnerability and must rely on the integrity and good faith of the other'.²³

We first consider the specific allegations of improper Crown conduct made by the claimants and then we assess whether what we find amounts to a breach of the Treaty principle of partnership.

23. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (CA), per Cooke P

5.5.2 Non-disclosures

The claimants identified several instances where ‘critical information’ was not disclosed to Maori by the Crown. We deal with these in turn, in order to assess, first, the validity of each claim and then, if we find that it is valid, whether the Crown was acting in bad faith.

(1) Leasing alternatives

The claimants made two linked arguments in regard to leasing alternatives. One was that the Maori landowners should have been informed that ‘leasing rather than outright sale was originally acceptable to Tasman and was the preferred option so far as the Crown was concerned – at least, for Maori – for the greater part of the time that the negotiations with Tasman were proceeding’.²⁴ The other was that the Maori owners should have been informed that leasing their land was a ‘viable option’ for them ‘as a means of participating in the Tarawera forest venture’, and ‘one which would even on the then predictions have provided as good a financial outcome for Maori as the Tasman proposal’.²⁵ In his closing submissions, claimant counsel went further, asserting that ‘crucial information concerning the achievability and benefits of the leasing option was not supplied to Maori, and indeed was systematically suppressed by Crown officials at all stages’.²⁶

The Crown responded that ‘it is by no means clear that a lease could have been negotiated at all given the clear preference of Tasman’s Managing Director for a joint venture’; that, even if a lease could have been negotiated, it would have delayed the start of the scheme, ‘with consequential losses to all involved’; and that any lease negotiated would have provided ‘inferior returns’ to those from the joint-venture company.²⁷

This is a critical issue, because a lease would have meant that Maori retained their land. The Tribunal thus considers it worth taking a little time to tease out the most likely situation.

Leasing was certainly originally acceptable to Tasman and, in the draft heads of agreement produced by the company, remained a fallback option in case of objections at least until September 1964. The information put to select groups of Maori owners in the second half of 1964, however, focused solely on Tasman’s joint-venture proposal, and endorsement of it in principle was received. Leasing was raised just once, by Mr Fraser at the November meeting, and then only as a possible alternative which did not require sale of the land. Because there was no major objection to the joint-venture proposal as outlined, leasing was not pursued by either side. By mid-1965, when the Forest Service revived leasing as an alternative, the Tribunal considers that Tasman was so committed to the joint-venture model that it would not have considered leasing unless there were clear signs that a joint venture would not be acceptable to

24. Document A22, para 18.2

25. Ibid, para 18.3

26. Document B80, para 14

27. Document B81, para 5.2

Maori. As has been seen, there were no such signs, but this was for reasons for which the Crown must ultimately take responsibility.

The Forest Service, for its part, originally used leasing as its comparative tool, because Tasman's joint-venture offer was a counter to the service's leasing offer. All of the officers who evaluated the scheme in March, April, and May of 1963 preferred the Forest Service's current approach to leasing, either because the returns from the joint-venture scheme could not be precisely gauged or because of the general land values suggested. Once the approach to land values had been revised, however, the Forest Service accepted the Tasman scheme in principle in July 1963, and its attention from then on until mid-1965 was focused almost entirely on ensuring the accurate and fair assessment of land values. At the time of the three meetings in the second half of 1964, there is nothing in the record to suggest that leasing was any longer a factor in the Forest Service's thinking. Even the long list of concerns about the scheme compiled by Mr Kennedy after the November 1964 meeting with Maori does not mention it.

The issue was revived by the Forest Service in mid-1965 only as a result of the development of the Grainger leasing model in the first half of that year, when its possibilities as an alternative to the Tasman scheme were seen. As we have seen, this was squashed by Mr Schmitt. After the Tasman Cabinet Committee had approved the joint-venture scheme in principle in September 1965, the Crown then had to determine ways of finalising it. Once the 75 per cent minimum guarantee to the Crown and Maori landowners had emerged as giving a return at least as good as, and probably even more attractive than, the alternative leasing model, the senior Forest Service officers dropped their opposition to the joint-venture scheme.

At the meetings with Maori in October and December 1965, therefore, the option of a lease was no longer seen as viable by either Tasman or senior Crown officials, which explains why the Forest Service did not canvass the matter at the meetings. When it was raised by Mr Fraser at the October 1965 meeting, Mr Poole in his reply stressed the advantages of unified management of the proposed forest and the continuing Maori influence on that management under the company structure, which it would not have if the land were merely leased to the company. There is no evidence to suggest that he was being dishonest or even disingenuous in these statements. We note that Mr Poole chose to raise the same subject in his opening address to the December 1965 meeting, where he stressed the same points, but the matter was not subsequently referred to there.

To sum up, the Tribunal considers that no one was concerned with leasing at the 1964 meetings with the few Maori involved, who were not well informed about leasing, and that by the time of the late 1965 meetings with Maori it was no longer an issue with the Forest Service management (though various of its economic specialists continued to debate the likely outcome of the joint venture long afterwards, and to fall back on leasing as more familiar and easily quantifiable). In the circumstances, we consider that, while the Crown's position on the leasing issue was not ill-motivated, it was also not excusable. This is because all available options for the Maori landowners' participation in a forestry scheme needed to be on the

5.5.2(2)

table for their appraisal if they were to have a genuine opportunity to prioritise their various interests in the land. Further, the issue of leasing would have come up, we consider, if the 75 per cent minimum guarantee, which in effect replaced the leasing option, had been discussed at the meetings. We return to this point below.

The claimants' other argument about outcome, or what hypothetical returns a lease might have given Maori compared with the actual returns of the joint venture, is dealt with in chapter 10.

(2) *The suggested minimum guarantee to Maori of 15 per cent of TFL*

The claimants argued that 'the Crown failure to take up on behalf of Maori – or at the very least pass on to those whose interests the Crown was purporting to represent' the offer from Tasman to include a minimum guarantee for Maori of 15 per cent of the equity and profit of the venture was a 'particularly critical non-disclosure'.²⁸ As outlined in the previous chapter, this notion was first mooted by Tasman in a letter dated 23 August 1965 from Mr Schmitt to Mr Davis, Deputy Secretary to the Treasury, and was intended to provide an assurance that 'should be adequate to overcome any hesitation that may be forthcoming from the Maori owners'.²⁹ Mr Schmitt did not make the basis entirely clear, but the assumption seems to have been that Tasman and the Crown would jointly guarantee this minimum percentage. Certainly, in his evidence to the Tribunal in September 2000, Professor Schmitt (as he by then was) said that, if the guarantee had to be invoked, Tasman and the Crown would each contribute to the 15 per cent of TFL in proportion to their own shareholdings in the company.³⁰ This would not have been an attractive proposition for the Crown, because, if the guarantee needed to be invoked, its own stake in TFL would be eroded not only in absolute terms but also relative to those of its co-venturers. One way of demonstrating this is to look at what would have been the actual outcome of the joint venture had the guarantee of 75 per cent of the projected returns to the Crown and Maori landowners not been in place. In that eventuality, the Crown would have been left with just under 2 per cent of TFL while Tasman would have held 83 per cent and the former Maori landowners 15 per cent.

The Treasury's reception of the proposal is not recorded anywhere in the files available to the Tribunal. Crown counsel accepted that the only explanation for the lack of further mention of it after late August 1965 is that Mr Davis must have shelved it.³¹ In particular, we note that there was no mention of the proposal at the important interdepartmental meeting with Tasman in September 1965, at which Tasman offered the Crown and Maori landowners the minimum guarantee of 75 per cent of their predicted stakes in TFL. In his interview with Dr Battersby in 2000, Professor Schmitt related both the reasons for the suggestion that the

28. Document B80, para 9; doc A22, para 20

29. Schmitt to Davis, 23 August 1965 (doc A5(8.10))

30. Oral evidence of Professor Schmitt, in response to questions from Mr Andrew and the Tribunal, 21 September 2000

31. Document B81, para 6.3

Maori owners be guaranteed 15 per cent of TFL and the fate of that suggestion. In essence, he said that the Forest Service, in addition to emphasising that the Crown and Maori should participate in the joint venture on equal terms, had been insisting on making the joint venture acceptable to Maori. Therefore, acting on the basis that acceptability to Maori had become 'a special factor' in itself:

I wrote to Cop Davis and suggested making an offer they [the Maori] couldn't refuse . . . we had better put some icing on the cake to get the thing through to the Maoris. I'd be quite happy about that, in order to ensure that the Maori owners can obtain a degree of certainty in their participation in the company, on the footing that the Crown was a grown-up and getting an estimate. The Crown knew an estimate was an estimate and Tasman the same. But Maori could be offered a greater degree of certainty.³²

Dr Battersby then asked whether the response was that 'the Crown needed to be given something of a guarantee as well?' Professor Schmitt replied: 'I think probably not.' When questioned about the 'probably', he said, 'I think probably Cop Davis thought "Fair go, we didn't need to go this far." . . . And that was the end of the matter.' He then added, 'Cop might also have seen some difficulty in explaining why the Maoris were getting a better deal in land, than [the] Crown.'³³

It appears then that, without reference to the Forest Service or any other part of the Crown, the Treasury rejected the suggestion of a joint Crown–Tasman guarantee to the Maori land-owners of a 15 per cent stake in TFL. In his closing submission, Crown counsel Peter Andrew argued that:

Such a Crown reaction is quite acceptable. The Crown was not prepared to participate in the offer . . . This would have subordinated the Crown's interests to those of Maori in what was proposed as a commercial joint venture in which the Crown was equally at risk from the effect of an increase in the costs required to develop the forest.'

Instead, he said, 'The Crown acted in the best interests of both itself and Maori in obtaining a 75% guarantee of projected shareholding for both itself and Maori.'³⁴

The Tribunal's assessment is that Tasman's idea of a joint Tasman–Crown guarantee to Maori of 15 per cent of TFL was never more than an idea. Indeed, we believe it may have been raised by Tasman with a view to strengthening the Treasury's support for the joint-venture terms as developed to that point (which lacked any guarantee) in an attempt to counter the Forest Service's suggestion that the new Grainger-model lease be used instead. The Treasury's reaction suggests that it found the 15 per cent idea to be completely unacceptable. We consider that was a reasonable reaction in light of the implications of the idea for the Crown's

32. Document B78, p10

33. Ibid, p11

34. Document B81, para 6.3

5.5.2(3)

eventual share of TFL, both in absolute terms and in relation to its co-venturers. Accordingly, we consider there was no obligation on the Crown to mention the idea at later meetings with Maori.

(3) The minimum guarantee to Maori and the Crown of 75 per cent of their projected shareholdings in TFL

There is no evidence that the Forest Service ever knew of Tasman's suggestion of a joint minimum guarantee to Maori of a 15 per cent TFL shareholding. It seems to have arrived independently at the concept of Tasman providing a minimum guarantee to Maori and the Crown as a counter to the low absolute land values that the company was proposing. As outlined in section 5.4.3, when Tasman's offer to the Crown and Maori landowners of a minimum of 75 per cent of Tasman's projection of their eventual stakes in TFL was found to meet the Forest Service's objections, the service was prepared 'wholeheartedly' to support the joint-venture scheme and do its best to assist Tasman in persuading the Maori owners to participate. An obvious question, then, is why was this crucial guarantee not described in the November 1965 booklet produced by Tasman or put to the meetings with Maori later in 1965?

Neither the Crown nor the claimants accounted directly for this. The Tribunal's assessment is that Tasman was extremely reluctant to make the guarantee public, and would have resiled from it if at all possible. When Mr Poole pressed Mr Schmitt to confirm it just before the October 1965 meeting with Maori, Mr Schmitt evasively wanted to keep it 'for the purposes of bargaining'. Mr Poole then expected him to raise it at the December meeting. When Mr Schmitt did not, Mr Souter tackled him afterwards and got a 'most unsatisfactory' reply. It took the Forest Service's withdrawal of Tasman's permission to plant on Crown land, a stern letter from the Maori Trustee, a more mollifying letter from the Treasury and a suggestion that the Government would not sign the heads of agreement before Tasman finally confirmed the guarantee in writing.

The situation with the 75 per cent minimum guarantee, therefore, is not clear-cut. Given that the Crown had agreed to let Tasman pursue the course they had set and, because of the guarantee, to offer its whole-hearted support in persuading the Maori landowners to participate, the senior Forest Service and Treasury officers at the meetings with Maori were careful not to go beyond their prescribed roles. The Tribunal's assessment is that this scrupulousness, coupled with the fact that the 75 per cent minimum guarantee had not then been confirmed by Tasman in writing, prevented them from disclosing it at the meetings when Tasman did not. Yet the Crown's relationship with the Maori landowners required them to do so. The contradiction suggests that the Crown was now unwittingly in an impossible situation, with its duties to Tasman as a partner in the joint venture in direct conflict with its duties to Maori. Therefore, while this non-disclosure reflects badly on the fulfilment of the Crown's Treaty duty of active protection, the Tribunal finds nothing ill-motivated in it.

(4) Concerns over land valuations

The claimants argued that the Crown failed to disclose its 'serious concerns over low Tasman land valuations'.³⁵ The Crown responded that 'it is important to consider the process overall and to evaluate the complaints made within the context of the overall process and its outcome', and noted that 'Ultimately, of course, the land price issue has proved to be irrelevant'.³⁶ The resulting financial prejudice, if any, will be discussed in chapter 10. Here, it should be observed that the Tribunal does not accept the proposition that a beneficial outcome excuses any flaws in the process by which the joint venture was finalised. A breach of Treaty principle remains a breach, whether or not any negative consequences are nullified by a subsequent turn of events.

The Forest Service's ongoing concerns over the low valuations that Tasman proposed to put on the land entering the scheme were a recurring theme throughout the two previous chapters. The service eventually accepted as fair Tasman's relative values for the different classes of land, but it maintained that the forestry value of the land was not being recognised. The proposed values were also a concern for the Maori owners right from the first meeting with Tasman in July 1964, where by detailed questioning Mr Grace showed his grasp of their importance to the overall share of the equity and profit that the landowners would obtain. At the second meeting, in October 1964, Mr Grace argued that Tasman's proposed values were too low, and at every subsequent meeting Maori expressed the same concern.

Neither the claimants nor the Crown presented evidence to us to account for why the Forest Service representatives present did not enter this discussion in 1964. It may be that, for reasons to do with the scrupulousness mentioned in the preceding section, they wished to leave the matter to Tasman to deal with in public. Or it may be that, given their ongoing analysis of Tasman's proposed scale of values, they preferred to deal with the issue behind the scenes only, as this was, after all, still the development phase, when the details of the proposal were being negotiated between Tasman and the Crown. Whatever the case, towards the end of 1965, the acceptance of the 75 per cent minimum guarantee not only overcame the Forest Service's concerns about land values but also possibly removed any sense of obligation on service officers to ventilate their previous concerns at the meetings with Maori. Again, however, we note that the Crown's failure to disclose the 75 per cent minimum guarantee reflects badly on its performance of its Treaty obligations.

(5) Log prices

The claimants argued that the Crown failed to disclose that during negotiations the Crown had conceded to Tasman 'unconventionally generous terms' in relation to log prices.³⁷ We

35. Document A22, para 18.4

36. Document B81, para 3.1

37. Document A22, para 18.5. This colourful expression was originally used by Mr Poole to describe the apportionment of the proximity value in his abandoned leasing proposal: Director-General of Forests to managing director, Tasman Pulp and Paper Company Limited, 20 December 1962 (doc A5(5.6)).

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5.5.2(5)

take this to mean that the price that Tasman would pay for the Tarawera Forest's produce (which was based on the average landed cost to Tasman of equivalent material from all other sources) would be, in effect, the price that Tasman was paying for wood from the Kaingaroa Forest (which was claimed to be concessionary). The Crown in response claimed that context was again important, that 'it is debatable whether in fact it [the price that Tasman paid] was concessionary', and that 'there is no evidence that TFL has been disadvantaged' by the pricing mechanism.³⁸ Again, we note that the financial prejudice of a 'concessionary' price, if any, is considered in chapter 10, and we repeat our observation in the preceding section that a beneficial outcome does not cure any flaws in the consultation process.

The price and terms that Tasman originally paid for the Kaingaroa Forest produce were clearly laid out in the 1962 report of the Director-General of Forests.³⁹ These terms were known to some of the Maori owners, as Mr Fraser's questions at the November 1964 meeting show. As described in section 2.4.2, the Kaingaroa contract was renegotiated in 1963, and its terms were confidential at that time. The claimants' argument here seems to be that the quasi-fiduciary relationship that the Crown had with the Maori landowners required it to reveal to them confidential details about a matter as crucial as the basis for the price to be obtained for the venture's produce, even if Tasman did not.

There are two points to be made at this stage. First, if the confidentiality agreement was to be respected, there was no authoritative representative of the Maori owners to whom this information could have been divulged in confidence – a situation which, as the eastern Bay of Plenty Tribunal found, had its source in earlier Treaty breaches. Secondly, Tasman had already given some Maori owners a fairly clear indication of what the log price was likely to be. At the November 1964 meeting, in response to a question from Mr Fraser, Mr Schmitt confirmed that the price to be paid for Tarawera Forest produce would be based on the Kaingaroa price, and he explained why. This point was developed in an exchange at the December 1965 meeting which the claimants argued involved 'a serious misrepresentation of the position by Mr Schmitt' – a misrepresentation which went 'wholly uncorrected by Crown officials such as Poole'.⁴⁰ It is therefore worth examining this exchange in some detail.

Mr Schmitt was speaking about the transport differential between Tarawera and Kaingaroa, and said that it was then threepence per cubic foot in Tarawera's favour. Shortly afterwards he said that the 'Tarawera stumpage would be 7d or 8d a cubic foot'. It can be inferred from the context, although it was not clearly stated, that he was using present-day prices, which would give the Kaingaroa stumpage as fourpence or fivepence a cubic foot (whereas in fact under the '40 million' contract negotiated in 1963 it was threepence until 31 March 1968, and threepence ha'penny from 1 April 1968 until 31 March 1980). Tasman representative Mr

38. Document B81, para 3.2

39. Ministry of Forests, *Report of the Director-General of Forests for the Year Ending 31 March 1962* (Wellington: Ministry of Forests, 1962), p 19

40. Document B80, para 28

McKee then corrected Mr Schmitt's transport differential, putting it at fourpence per cubic foot. Asked directly by Mrs Lanham what the Kaingaroa stumpage was, Mr McKee gave an example of the outcome if the Kaingaroa stumpage were fourpence per cubic foot.⁴¹

To deal with the claimants' allegation of misrepresentation first, it should be noted that Mr McKee had already corrected his boss, and that the inference from his correction was that the Kaingaroa stumpage was between threepence and fourpence. The Tribunal finds it hard to see what more Mr Poole could have contributed to this discussion without directly breaking the confidentiality agreement.

The picture, however, is clouded by two related factors. One is that, from September 1965, Tasman was negotiating with the Government over the so-called '20 million' contract, which took effect on 1 April 1966 and set stumpage for sawlogs at fourpence ha'penny and for pulp logs at fourpence farthing per cubic foot, with review provisions that were not tied to the 'basic concept of the sale'. These prices would also influence the price that Tasman would pay for the Tarawera Forest produce, and they would have been in Mr Schmitt's mind (and Mr Poole's) at the December 1965 meeting. The other factor is the lengths that Tasman apparently went to in order to avoid having the terms of the '40 million' contract revealed at the Maori Land Court hearing. The Tribunal therefore defers any conclusions on the log price question until chapter 8, after our account of the Maori Land Court hearing, when the principles at issue can be more sharply defined.

5.5.3 Was there misrepresentation?

The claimants argued that, in addition to the non-disclosures discussed above, there was 'positive misrepresentation' of the Tasman proposal 'by means of misleading information'.⁴² In support, they cited Crown comments on leasing and, indirectly, on the 14.43 per cent projected shareholding. The Crown did not address this issue directly.

(1) Leasing

On leasing, Dr Harrison for the claimants cited two instances of 'misrepresentation'. First, he argued that comments made by Mr Souter in response to direct questioning by Nira Fraser at the October 1965 meeting were 'quite false'.⁴³ Before examining this issue, some context is necessary. At the 14 October meeting, Mr Fraser had earlier asked Mr Poole: 'Do you think the Crown would form a union with Tasman and lease the Maori land?' Mr Poole's reply stressed that, if the Maori leased their land, they would have no control, the forest development being left entirely to Tasman, whereas under the joint-venture proposal Maori would have board membership and a 'voice in the management of the forest'. Notwithstanding this, he believed

41. Document A4, vol 2, pp 96-97

42. Document A22, paras 22.2-22.3, 23-24

43. Ibid, para 25

5.5.3(2)

that the ‘end results’ of the two options were otherwise ‘fairly similar’.⁴⁴ Mr Fraser later asked Mr Souter whether a lease would achieve the same results. Mr Souter replied that he did not ‘get this point about leasing’ because the joint-venture scheme gave Maori the opportunity to share in its profits, whereas all they would get from a lease ‘would be the rent’. When Mr Fraser mentioned a royalty as well, Mr Souter responded that ‘it is pretty hard to say what royalty the Forest Company is going to pay you in twenty-five years’ time. The royalty would be a fairly low figure – very conservative.’⁴⁵

Dr Harrison argued that Mr Souter misrepresented the Grainger lease first by omitting the royalty and then by claiming that the royalty would not be known initially. As indicated in chapter 2, the terms of the Grainger lease were still being refined at this stage. Indeed, they were not finalised until 1969, after considerable confusion and controversy about them within and between the Forest Service, the Treasury, and the Valuation Department. Mr Fraser’s question had been directed at Mr Souter in response to Mr Poole’s earlier comment that leasing and the joint-venture scheme gave similar results (which was presumably based on Mr Grainger’s very positive 20 September analysis). The Tribunal considers it not surprising that Mr Souter, as Deputy Secretary of Maori Affairs and present at the meeting not as an expert in forestry leases but to discuss the legal machinery for setting up the joint venture, was not well versed in the intricacies of the Grainger lease at this stage – as his comment ‘I don’t get this point about leasing’ shows. We also think it unlikely that anyone present would be misled by his comments on leasing, especially in light of Mr Poole’s earlier discussion of the matter.⁴⁶ Therefore, we do not uphold this complaint of ‘positive misrepresentation’.

Dr Harrison’s second instance connects Mr Poole’s commendation of the Tasman proposal at the 11 December 1965 meeting as being ‘a much more satisfactory scheme [than leasing] for this particular area’ with a comment he is reported to have made two years earlier about the Otakanini lease in north Auckland, which was that the lease ‘would probably set the pattern for future leases for Maori land for forestry purposes’.⁴⁷ However, since at the December 1965 meeting Mr Poole gave two reasons why he thought that, for the Tarawera Valley, the Tasman proposal was ‘much more satisfactory’ than leasing, we cannot find any basis for this complaint.

(2) *The projected 14.43 per cent shareholding for Maori*

The claimants argued that ‘Crown officials joined with Tasman in making and supporting a critical misrepresentation’ to those Maori who received the Tasman booklet or attended the Kokohinau Pa meeting on 11 December 1965; namely, that ‘Maori would receive a 14.43 per cent shareholding and debenture holding in the joint venture company’. So far as the

44. Tasman Pulp and Paper Company Limited, minutes of 14 October 1965 meeting at Kawerau, p 11 (doc A4, vol 2, p 44)

45. Ibid, p 16 (p 49)

46. Document A22, paras 23–25

47. Ibid, para 26

Tasman booklet is concerned, they argued that statements in it amounted to an 'express representation' that the final share of the Maori owners would be 14.43 per cent, and that it was nowhere pointed out that an increase in Tasman's development costs above 'the very careful assessment' that Tasman had said it had made might reduce the overall interest of the Maori owners to less than 14.43 per cent.⁴⁸ Further, they argued that this notion would have been more obvious if the proposed 75 per cent minimum guarantee had been described in the booklet, or at the Kokohinau Pa meeting.⁴⁹

The Crown responded that the statements in the Tasman booklet were not as categorical as the claimants maintained. It pointed out that 'the very careful assessment' referred to there was of the 'probable cost of developing and maintaining the forest' and that the compounded net cost of development and maintenance, on which the 14.43 per cent shareholding was based, was 'estimated' on the 'assumption' that the tax concession would remain in force. The Crown also pointed out that owners at meetings prior to Kokohinau Pa had raised and discussed the possibility that, if the development costs increased beyond those projected, the Maori shareholding would fall.⁵⁰

The claimants also argued that 'constant references' to a 14.43 per cent minimum shareholding for Maori at the Kokohinau Pa meeting gave the Maori owners there a clear overall impression that 14.43 per cent was the share of TFL which they would ultimately obtain. Further, the claimants contended that 'the concerted praise and commendation of the venture' by Crown officials present at the meeting, 'adopting and endorsing what was said by Tasman representatives', reinforced this impression.⁵¹ The Crown did not address this issue specifically.

The Tribunal has found three occasions in the minutes of the Kokohinau Pa meeting when the 14.43 per cent estimate was discussed or mentioned, all after lunch. The first came in the context of Henry Bird's question about increasing the Maori shareholding above 14 per cent. As outlined in chapter 4, Mr Schmitt first gave the reasons for the difference between the estimate of an 8.5 per cent shareholding given in November 1964 and the then-current estimate of 14 per cent, and shortly afterwards explained what would happen to the percentages if Tasman's development costs were less than the £2,672,000 estimated. In the course of this, he stated not only that the development costs 'could obviously differ' from the estimate and that the final figure could be 'more or less £2.8 million', but that 'whatever changes may occur in that figure of £2,672,000 will affect the ultimate percentages of the various shareholders'.⁵²

The second occasion that the estimate was mentioned was in Koro Dewes' summary of the three things puzzling the Maori owners, during which he referred to extensive discussion in

48. Tasman Pulp and Paper Company Limited, *Proposal by Tasman Pulp and Paper Company Limited to Maori Owners and the Crown to Participate in the Development of an Exotic Forest in the Tarawera Valley* (Kawerau: Tasman Pulp and Paper Company Limited, [1965]), p 3 (doc A4, vol 2, p 121)

49. Document B80, para 6

50. Document B81, paras 3.43, 3.44

51. *Ibid*, para 6

52. 'Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965 Regarding Tarawera Valley Afforestation Proposals', typescript, [1965], pp 24–26 (doc A4, vol 2, pp 88–90)

5.5.3(2)

the after-lunch meeting of Maori as to why they contributed 50 per cent of the land, but after 25 years ‘Tasman dominates the economic scene to the tune of $\frac{3}{4}$ ths and the owners to 14%’.⁵³ This prompted Mr Schmitt first to explain the relative value of the land contributions, and then to reiterate the basis for the development costs: ‘The reason that we land up with 69.67% of the Company on account of development costs is because we have spent £2,672,786 on making your land and our land into an earning asset.’⁵⁴

The only other occasion on which the figure of 14 per cent is mentioned is in a brief question by Mrs Lanham as to whether rates would be paid by area contributed or percentage shareholding.⁵⁵

Against this are the comments made to the Tribunal by Maori present at the Kokohinau Pa meeting concerning the general confusion about what was said at the meeting. These are recounted in section 4.12. Beverly Adlam, who was not present at the meeting, also maintained that ‘there were repeated representations both in the Tasman brochure and at the Kokohinau Pa meeting . . . that the Maori owners would end up with a 14.43% share in the venture’ and that, when that figure was reduced to 10.8075% in 1988, ‘this adverse outcome has greatly added to the sense of injustice and grievance felt by the former Maori owners and shareholders in MIL’.⁵⁶

The question posed by the claimants for the Tribunal was whether such statements amounted to a ‘critical misrepresentation’ by Tasman, which was tacitly supported by the Crown in its general endorsement of the scheme, though no Crown officials made any specific reference to the percentages of the proposed shareholding. ‘Misrepresentation’ in this context suggests a deliberate attempt to confuse the meaning of the proposal so that those who read or heard the words describing it would believe something other than what was in fact being proposed. We do not believe that that was what happened at the Kokohinau Pa meeting. However, we are sure that the wrong impression about the Maori share of TFL was gained by an unknown but, we think, not inconsiderable proportion of the Maori landowners at that meeting. Further, we are satisfied that this wrong impression was created by the failure of those advocating the scheme to make its proposals clear in terms that all could understand.

To explain, the Tribunal considers that the statements made about this aspect of the proposal in the Tasman brochure (as quoted in chapter 4) would indicate to commercially attuned readers or people already informed about the scheme that the figure of 14.43 per cent was not a promise, let alone a guarantee, but a careful estimate based on the assumptions stated in the text, which in turn were based on the economic conditions for forestry in 1965. Further, we believe that such people would not construe anything that was said by Tasman representatives at the Kokohinau Pa meeting (or indeed at the earlier meetings with Maori) as

53. ‘Minutes of a Meeting Held in Kokohinau Pa on Saturday 11 December 1965’, p 93

54. *Ibid*, p 94

55. *Ibid*, p 102

56. Document A16, p 5

representing the figure of 14.43 per cent as a guaranteed outcome. Indeed, by their questions and statements, some of those who attended the Kokohinau Pa and earlier meetings revealed that they understood that the 14.43 per cent figure was an estimate only and could vary up or down. Against that, however, we are satisfied, from our own analysis of the situation and in light of the evidence given to us by some of those present at the Kokohinau Pa meeting, that a reasonable conclusion on the part of owners who were not commercially attuned or already well-informed about the scheme was that Maori were assured of finishing up with a 14.43 per cent share of TFL.

The claimants linked this point to the non-disclosure of the proposed 75 per cent minimum guarantee in the booklet or at Kokohinau Pa, claiming that, had it been disclosed, it 'would perhaps have better focused attention on the fact that the Maori shareholding could fall below 14.43%'.⁵⁷ As noted in section 5.4, we agree.

5.5.4 Was there manipulation?

The claimants observed that, apart from the Savage-Edwards meeting on 4 November 1965, all the meetings with Maori were chaired by Mr Barber, who, they maintained, was 'an enthusiastic convert to the Tasman scheme and effectively blind to any other possibility'. According to them, his chairing of the Kokohinau Pa meeting in particular 'shows a determination to push things through against all dissent to a final, favourable resolution by those remaining present'.⁵⁸

They further argued that, at the initial meetings, Mr Barber 'held out to those present that the ultimate step would be a *formal* meeting of the owners' and that those present intended this to be held under Part xxiii of the Maori Affairs Act 1953. However, according to the claimants, 'he ultimately did no such thing'; what he 'purported to convene' was what he called "a general title meeting . . . to approve or disapprove the proposals put forward", at which "Any resolution passed will be based only on those owners present and not necessarily on actual share value", with no proxies being accepted'.⁵⁹

The claimants further argued that Mr Barber did this because 'Barber/the Crown quite plainly realised and foresaw that a meeting under Part xxiii would not approve the proposal and deliberately avoided that procedure'.⁶⁰ They cited as confirmation Mr Souter's very frank evidence to the Maori Land Court hearing, when he was cross-examined as to whether Maori Affairs ever considered 'the advantage' of having a meeting of assembled owners under Part xxiii. He stated, 'Yes. Where you have a large number of blocks you would never get past first base in that sort of method.' Asked whether he could 'take it for granted' that 'some of

57. Document A22, para 35

58. Ibid, para 38

59. Ibid, para 39

60. Ibid, para 4

the owners of some of the separate blocks would not pass resolutions to join in the scheme', Mr Souter agreed. Later, he accepted that the form in which the application had been made would affect the rights of different owners, saying 'that must inevitably happen' when a large number of blocks were to be amalgamated into one title, and that, 'where you are dealing with a large group of Maori owners and a large number of blocks . . . in many places the interests of the minority have to be sacrificed for the interests of the general majority.'⁶¹

From this, the claimants argued that 'Barber set out to utilise procedures which would not enable Maori owners of the blocks to vote in accordance with the extent of their interests in the individual blocks' or to vote on a block-by-block basis or by some other process that 'verified that all voters were indeed interested owners'.⁶²

The claimants also alleged deficiencies in the conduct of the Kokohinau Pa meeting itself, claiming that 'All requests for further discussions and a further meeting, complaints about shortness of time for consideration and the like, were simply overridden'.⁶³ They also claimed that the outcome of the meeting was 'inconclusive' and cited confusion over whether Mr Fraser's resolution or Mr Barber's 'inaccurate summary' of it was being voted on, which confusion was compounded by Mr Barber's statement that 'Everybody is in favour of all three resolutions' when there had been no vote on any three resolutions.⁶⁴

The Crown responded that, 'while aspects of the publicity and of the conduct' of the Kokohinau Pa meeting 'could have been improved', what was done 'meets the *Maori Electoral Option* test of reasonableness'.⁶⁵ It pointed to the thinking of the time, 'when the focus of both Maori and the Crown was on the importance of enabling Maori land to be developed and provide for the economic wellbeing of the owners', and to the difficulties in identifying the owners of the relevant land, given the lack of up-to-date addresses for owners and the number of owners who held uneconomic shares.⁶⁶ It argued that Mr Barber's earlier references to a 'formal meeting' could 'equally be regarded as referring to a publicly advertised meeting at which a vote would be taken', rather than the earlier 'informal meetings of selected owners'. It pointed out that Mr Barber's notice of the meeting emphasised that the meeting was not to be held under Part XXIII and was a 'general title meeting,' and that the notice listed three proposals to which Mr Barber's reference to 'the three resolutions' could be taken as referring. The Crown maintained that Maori owners therefore came to the meeting having had three weeks to consider and discuss the proposals, and it noted that some owners were already aware of

61. Document A33, pp P2-P3

62. Document A22, para 41

63. *Ibid*, para 44

64. *Ibid*, paras 42-43

65. Document B81, paras 2.4, 3.45. The reference is to the Court of Appeal's decision in *Taiaroa v Minister of Justice* [1995] 1 NZLR 411, where at page 418 it was said that the test for the sufficiency of publicity for a proposed course of action is 'reasonableness, not perfection': 'No more can reasonably be required than what was reasonable at the time.'

66. Document B81, para 3.45

the proposed scheme through attending earlier meetings or being informed about it by the representative Maori owners who did.

The Crown also argued that:

The meeting and the desire of the Maori Land Court Registrar to expedite matters must be assessed against the risk that if the votes were not taken on the proposal and the matter moved ahead there would be a real possibility of inertia . . . Maori Affairs officials assessed that they needed to take some decisive action and could have been criticised if they had not promoted and set in train the procedures necessary to promote the joint venture agreement.⁶⁷

As discussed in section 5.4, the Tribunal is persuaded that the conduct of the meeting was seriously deficient. Whatever the views of the 'top table', the negative comments made afterwards by those in the body of the hall seem to us to reflect genuine and long-held grievances. When coupled with the evident confusion that existed over whether it was a Part XXIII meeting, about the resolutions voted on, and about whether those who voted were entitled to do so, there can be no doubt that the outcome should not have been taken as a mandate in favour of the Tasman proposal. As we have discussed, all the evidence suggests that the Kokohinau Pa meeting should have been the *first* general meeting of owners, not the only one, and that the meeting should not have been pressed to a conclusion that day.

We are equally persuaded by the Crown's argument that those responsible for the conduct of the meeting were acting in what they genuinely saw as the best long-term interests of those present. While agreeing that Mr Barber in particular was an enthusiastic proponent of the scheme and did indeed push the matter through against evident dissent, we see nothing duplicitous or sinister in his actions or in other actions by the Crown, as is implied by the unfortunate choice of the term 'manipulation'. We also believe, as we discuss in section 8.6.2, that it may not have been possible to use the Part XXIII procedures.

5.5.5 Was there a conflict of interest?

The claimants go further, and argue that the Crown was ill-motivated because it was in a position of 'serious conflict of interest' as a result of its 25 per cent shareholding in Tasman and its 'thus obvious interest in ensuring the financial success of that company's very extensive timber and forestry interests'. The claimants maintained that, when 'the conflict between the Crown's financial and political interests and the Maori interests involved a critical clash . . . [it] was inevitably resolved in favour of the Crown's interests'. The only instance which the claimants cited in support was the Tasman offer of a joint minimum guarantee of 15 per cent to Maori, which 'the Crown promptly ignored . . . and set about negotiating the 75 per cent

67. Ibid, para 3.54

minimum guarantee, thereby protecting its own interests as a potential shareholder of TFL at the expense of Maori'.⁶⁸

The Crown rejected the allegation that 'because of its shareholding in Tasman it had a conflict of interest':

There is no evidence on the record that, at the time, there was apprehension by anyone that this was an issue. Mr Schmitt made it clear that the Crown had no control over Tasman – in any event the NZFS always took an independent and critical stance and was concerned for Maori interests.⁶⁹

The Crown also referred to Mr Schmitt's later evidence about 'the earnest and "sometimes tiresome" . . . endeavours by the NZFS to seek improvements and benefits [for] the Maori owners', and it rejected the contention that it 'sacrificed Maori interests in favour of its own in the process of concluding the ultimate terms of the minimum guarantee'.⁷⁰ It maintained that the Tarawera scheme was 'commercial' and that it:

was never intended to be a vehicle for the provision by the Crown of social or financial assistance to the Maori landowners. Crown Treaty duties do not require the Crown to sacrifice its own interests [in] a commercial venture in favour of Maori interests so that the Maori party becomes the sole party with the benefit of some guaranteed protection against the inherent risks and uncertainties of a commercial venture.⁷¹

Finally, the Crown argued that the 'ultimate outcome achieved, of a minimum guarantee shareholding for both minority shareholders, was . . . consistent with notions of compromise and accommodation inherent in Treaty principles'.⁷²

To deal with the single specific allegation first, the Tribunal considers that the claimants' yoking of the two guarantees, whereby a guarantee to Maori was supposedly sacrificed for a guarantee to the Crown and Maori, is artificial and seeks a conspiracy where none exists. There is no evidence to suggest that the Forest Service, as the proponents of a minimum guarantee for the Crown and Maori landowners, even knew of Tasman's earlier and unexpected suggestion of a 15 per cent minimum shareholding in TFL for Maori guaranteed by the Crown and Tasman jointly. All the evidence suggests that the Forest Service arrived at the concept of a minimum guarantee independently and out of a desire to achieve an equitable outcome for Maori and the Crown.

Before we consider the wider issues related to perceived conflicts of interests, we must first address another allegation by the claimants: that there were individual conflicts of interest

68. Document A22, para 86.1

69. Document B81, para 2.22

70. Ibid, para 3.26

71. Ibid, para 1.15

72. Ibid, para 1.16

among key participants in the finalisation of the joint venture, namely Messrs Poole, Barber, and Souter.

The claimants asserted that the Director-General of Forests had a conflict of interest between his positions as a director of Tasman and as an adviser to the Crown on matters concerning 'afforestation generally, and forestry ventures in relation to Maori land in particular'. They argued that, as a result, Mr Poole 'increasingly took upon himself in meetings with Maori the role of direct adviser to them, relying on his status as Director-General to commend the Tasman venture and persuasively argue with the weight of his position against all possible alternatives.'⁷³ However, the claimants provided no examples or analysis to sustain their assertion and the Crown made no direct submission on Mr Poole's role. Our own close scrutiny of the record of Mr Poole's statements at the meetings with Maori owners satisfies us that the grounds on which he endorsed the scheme were genuinely held, and that his silence on the 75 per cent minimum guarantee, and what flowed from that, probably arose out of a misplaced but scrupulous loyalty to the way in which Tasman had chosen to present the proposal. To suggest that this was because of his role as a Tasman director, however, is in the Tribunal's opinion to draw a very long bow indeed. Nevertheless, as we have said before, Mr Poole's failure to raise the matter of the 75 per cent minimum guarantee when Tasman did not was a crucial element in the Crown's failure to meet its Treaty duty of active protection.

The claimants also asserted that Mr Barber, as both Maori Affairs district officer and registrar of the Waiariki District Maori Land Court, 'can be seen as involved in something of a conflict of interest'. They argued that, because Mr Barber enthusiastically adopted and advocated the Tasman proposal wearing his Maori Affairs hat and then convened the Kokohinau Pa meeting wearing his court registrar's hat, the Maori owners present were 'effectively led to believe that they were participating in a meeting conducted with the approval and under the imprimatur of the MLC [Maori Land Court], when that was not the case'.⁷⁴ The Crown offered no comment on this point. The Tribunal notes that none of the participants who gave evidence to us suggested that this was their impression, even though a number were highly critical of Mr Barber's conducting of the meeting. We will return to this point in section 8.6.2, when determining the independence of the Maori Land Court's process in the Tarawera Valley lands case.

As for the claimants' assertion of a conflict of interest in the twin roles of Mr Souter as Deputy Secretary of Maori Affairs and as Deputy Maori Trustee, this is more germane to later events in the implementation of the joint venture. This point is therefore addressed in chapters 7 and 8.

To conclude our discussion of specific conflicts of interest up to this point, it is worth recording the vigorously phrased views of Professor Schmitt on the subject, as expressed to Dr Battersby in 2000:

73. Document A22, para 86.2

74. Ibid, para 86.3

5.5.6

The Crown should be concerned that the agreement should be fair and reasonable, they are not going to be screwing the Maori for a few bob one way or another because they have got some shares in Tasman. That is just nonsense, absolute nonsense.

It is quite preposterous. The whole thing is on the false assumption that anything Tasman could do, or the Crown could do to make a bob – unfairly and unscrupulously – out of Maori, they would have done.⁷⁵

5.5.6 Tribunal findings

We now sum up the wider issues to do with perceived conflicts of interest, and hence the Crown's motivation, in order to assess whether a breach of the Treaty principle of partnership occurred.

Crown counsel argued that the Crown actions and omissions towards Maori must be understood in the context of the attitudes prevailing in the 1960s, when the Crown–Maori relationship was based on paternalism, and that such paternalism was 'conceived in good faith', which is, of course, a vital element of the Treaty relationship.⁷⁶ Claimant counsel responded that 'the Crown appeal to the Tribunal not to judge events from the viewpoint of hindsight cannot be sustained':

Much of the Tribunal's jurisprudence and function involves doing precisely that. Indeed it can be said that the bulk of the Crown's Treaty breaches viewed historically would involve Crown actions which seemed 'reasonable' at the time, from the 'point of view' of those engaging in them and in particular the viewpoint of the Crown and the Pakeha majority of the population.

Thus while contemporary standards (particularly if themselves breached) are no doubt of relevance, neither they nor a blinkered approach of the Tribunal attempting to put itself in the shoes of the key participants – particularly the Crown – can possibly be determinative.⁷⁷

While accepting the claimants' admonition not to attempt to 'put itself in the shoes of the key participants', the Tribunal nevertheless considers that it is essential to understand the motivation of the key participants. Had the Crown been ill-motivated, or seeking deviously or duplicitously to attain an undeclared but negative outcome for Maori – like depriving them of their land for its own secret purposes – that would be a material factor in our assessment of

75. Document B78, p 15

76. Document B81, para 1.3

77. Document B80, paras 24–25

its conduct. In connection with the Tarawera Forest proposal, there is no evidence to suggest that any of the Crown participants had any adverse intentions for Maori.

Quite apart from the Forest Service's various concerns, as detailed above, there is the Treasury's concern that the financial aspects of the scheme should be as advantageous to Maori as possible, even if it lost the Crown significant taxation revenue. The legislation allowing Tasman to claim an exemption of 50 per cent of its subsidiary's forestry development costs, for instance, increased the Maori landowners' projected share in the joint venture from 8.5 per cent to 14.43 per cent, while the special legislation setting up MIL exempted the company from certain taxation provisions and (at Tasman's suggestion) the nature of the individual shareholding in MIL was changed in order to minimise both MIL's corporate and each MIL shareholder's personal tax liability (see sec 4.13.3).

The Tribunal concurs with Crown counsel that there is no evidence to suggest that the Crown deliberately advanced its own interests ahead of those of the Maori landowners. Rather, as the earlier comment from Mr Schmitt on the Forest Service's insistence on good terms for Maori implicitly acknowledged, the Crown found itself dealing with two competing sets of interests and wanted to do the best for both. On the one hand, it had obligations to the New Zealand public at large, which provided the rationale for its business interest in Tasman, its own separate participation in the joint-venture enterprise, and its support for Tasman in the businesslike manner of its presentation of the proposal to Maori. On the other hand, it wanted the best for Maori, not only in terms of social betterment through the productive use of idle land but also in the specific terms of the economic benefits of the joint-venture agreement.

The contradictions inherent in those roles led the Forest Service, in particular, into an ambiguous position whereby it negotiated hard with Tasman behind the scenes to get the best economic deal possible (even to the point of threatening to withdraw altogether if certain conditions were not met), while in the meantime it endorsed the deal in discussions with Maori (even to the point of pushing it through, lest Tasman withdraw altogether).

The role played by Maori Affairs served only to further complicate the situation. If any single Government agency was to have been responsible for ensuring that all the interests of the Maori landowners were protected, it should have been Maori Affairs. As we have seen, however, because the department was involved mainly at a local level and because its local officials saw only benefits for Maori in the district from the joint venture, those officials were enthusiastic proponents of it. It seems simply never to have occurred to any of them to consider any Maori interests other than economic, and certainly not to have consulted Maori first to ascertain the nature of those other interests and how they might best be protected. While at a higher level in the department various options for Maori involvement were still being canvassed, at the local level, where Maori Affairs officials were dealing with Tasman on a day-to-day basis on the ground, by mid-1965 the joint-venture scheme was clearly regarded as the

only feasible option. If anything had happened that had caused the scheme to be abandoned, those officials would have seen that as being only to the detriment of Maori.

That, in the Tribunal's view, was the practical reality of the situation. We do not find that there was anything sinister or duplicitous or ill-motivated in the Crown's conduct. As Professor Schmitt so colourfully put it, to suggest that the Crown was 'screwing the Maori for a few bob one way or another because they have got some shares in Tasman' is not, we consider, a tenable view. While there were critical omissions in the information provided to Maori – especially about the 75 per cent minimum guarantee, the possible availability of the leasing option, and the log price formula – and critical flaws in the conduct of the meeting process, we do not believe that the Crown was seeking to promote its own interests ahead of those of Maori (as it saw them at the time). We believe that the Crown was acting in good faith, but was not sufficiently careful to establish in this unique situation a process that would ensure that all Maori interests were properly protected.

In light of our findings of Treaty breach in the process by which the terms of the joint venture were finalised, the next questions for the Tribunal concern the effects of what happened next; namely, the implementation of the venture. The claimants maintained that the role of the Maori Land Court and Maori Trustee aggravated the situation to the point of occasioning further breaches of Treaty principle. By contrast, the Crown maintained that the roles of those institutions served to safeguard the Maori landowners' interests and that, for legal reasons, their conduct could not be found by the Tribunal to be in breach of Treaty principles.

5.6 SUMMARY

The key findings made in this chapter are:

- ▶ In its dealings with Tasman and the Maori landowners in connection with the joint venture proposal up to August 1966, the Crown failed to fulfil its duty of active protection of the Maori interests by failing to:
 - inform itself of those interests and the priorities of Maori in protecting them;
 - ensure that a process was followed which would allow Maori to formulate and prioritise their interests and make those known to the other parties; and
 - provide crucial information about aspects of the joint-venture scheme, and especially about the range of options available for Maori participation in it that might have better protected their interests.
- ▶ In so doing, the Crown was not actuated by sinister or duplicitous motives but acted in good faith towards Maori.

CHAPTER 6

THE MAORI LAND COURT

6.1 INTRODUCTION

At the meetings with landowners, Maori Affairs officers described the role to be performed by the Maori Land Court as providing an independent safeguard of their interests. Crown counsel submitted to the Tribunal that the court had indeed performed that role in its treatment of the application concerning the 40 blocks of Maori land. The claimants, however, submitted that the court had failed to act independently and so had failed to safeguard the Maori owners' interests. Their criticisms of the court ranged from alleged deficiencies in its hearing process through to alleged errors in its application of the relevant law.

The consequences of the Treaty breach that we have already found established, relating to inadequate consultation with the owners, could be aggravated or ameliorated by the Maori Land Court's treatment of the Maori owners. That treatment could also affect our assessment of what remedy, if any, is due to the claimants. Therefore, in this chapter we examine the court's hearing of the application concerning 'Pokohu A2A1 and other lands', focusing on its investigation of the issues raised in the claims to the Tribunal. In the next chapter, we outline the remaining steps involved in implementing the joint venture, paying particular attention to the role of the Maori Trustee. Then, in chapter 8, we deal with jurisdictional questions relating to the Tribunal's scrutiny of the Maori Land Court and Maori Trustee and present our findings on the full range of issues concerning the roles of the court and trustee in connection with the joint venture.

6.2 THE APPLICATION TO THE COURT

6.2.1 Sections 435 and 438 of the Maori Affairs Act 1953

Shortly after the Kokohinau Pa meeting, the Maori Land Court's Waiariki district registrar, Mr Barber, applied to the court to:

- ▶ amalgamate into one title the 40 blocks of Tarawera Valley Maori land; and
- ▶ vest the land in the Maori Trustee, subject to a trust to sell it to TFL at a price approved or fixed by the court.¹

1. Document A33, p B1

6.2.2

The application relied on sections 435 and 438 of the Maori Affairs Act 1953, contained in Part xxviii of the Act entitled 'Special Powers of the Court'.² As was outlined in chapter 2, section 435(1) empowered the court to amalgamate titles when it was satisfied that any area of Maori land held under separate titles could be 'more conveniently or economically worked or dealt with if it were held in common ownership under one title'.

Section 438(1) empowered the court, subject to certain provisos, to make an order vesting land in a trustee, to hold it on and subject to 'such trusts as the Court may declare for the benefit of owners of the land or of Maoris or the descendants of Maoris or for any specified class or group of Maoris or their descendants'.

Under section 438(3), however, a section 438 trust order could not be made if it appeared to the court that there was 'on the part of the beneficial owners, or any of them, a meritorious objection to the making of the order'.

Section 438(9) elaborated on the powers of a trustee to alienate the land held on trust. It provided that, subject to the court's order, a trustee appointed under section 438 had the same power to alienate the land as if it were Maori freehold land not subject to a trust and as if the trustee were the beneficial owner of the land.

6.2.2 Why not Part xxiii?

As was noted in chapter 5, during the court hearing, the deputy secretary of Maori Affairs was asked by counsel for the Savage–Edwards family group whether the department had ever considered 'the advantage of putting this alienation through' by meetings of assembled owners under Part xxiii of the 1953 Act. Mr Souter replied:

Yes. Where you have a large number of blocks like this you would never get past first base in that sort of method. The method used here is the same method I have used virtually hundreds of times in land development schemes and it seems to me the only way of dealing with a large number of blocks.³

Mr Souter then confirmed that he meant that some of the owners of the separate blocks would not pass resolutions to join the scheme. Asked whether the procedure chosen meant that the opposition of the Savage family 'would be reduced to a very small minority in the whole body of ownership', Mr Souter replied:

When one proceeds in this method the groups objecting to the proposal – and there are always such people – it is for the court to consider the merits of their objections, and I have

2. The application also relied on other provisions of the Act, including sections 173 and 182, which authorise partition. Those provisions are not mentioned further because the court's use of them was merely incidental to its use of sections 435 and 438: see, for example, doc A33, p 1Y2.

3. Document A33, p P2

considered the objections and have decided to go ahead with the scheme notwithstanding, but it is the court's prerogative to decide what should be done about these objections, not mine, not my prerogative.⁴

6.3 TIME AND PLACE OF THE HEARING

Originally, the application was set down to be heard at the Whakatane Maori Land Court during two days in February 1966.⁵ Possibly because of the absence overseas of Tasman's managing director, Mr Schmitt, in February, the hearing was rescheduled to occupy three days in late March.⁶ By mid-March, however, counsel for Mrs Lanham and others, a group of Maori landowners opposed to the application, sought a further adjournment to allow more time to prepare.⁷ The hearing was finally rescheduled to commence on 2 August 1966. It occupied four days, three in Whakatane (2–4 August) and the final day in Rotorua (8 August). In addition, Judge Gillanders Scott conducted a site visit on 5 August to the Edwards family's home and farm.⁸

6.4 THE PARTIES AND THEIR LAWYERS

The parties and counsel who appeared before the Maori Land Court were as follows. Those supporting the application and their counsel were: the applicant, Mr Barber, who was represented by Mr D M Forsell (the office solicitor of the Department of Maori Affairs); the Tasman Pulp and Paper Company Limited, which was represented by Messrs J D Dillon and B Neutze; Mr R Te T Kingi and others (being a group of Maori landowners), who were represented by Mr R A Potter; and the Whakatane County Council, which was represented by Mr C H Chappell.

The parties opposing the application and their counsel were: Waratana Ngahana and others, including Mrs Lanham (hereafter called 'the Lanham group'), who were represented by Messrs G T O'Sullivan and L A McKoy; Sam Savage, Albert Te Rire, and others (being members of the Savage, Edwards, and Ngaheu families), who were represented by Mr R D McGregor.⁹

4. Ibid, pp P2–P3

5. Barber to head office, 6 January 1966 (doc B1, p 6)

6. Document A33, pp C4–C5

7. Submission by Lawrence McKoy, 11 March 1966, MA58/2/1, pt 2 (cited in doc A10, p 91)

8. Document A33, pp 1–4, 1Q2

9. In the Tribunal, no reliance was placed on Mr Te Rire's evidence in the Maori Land Court nor the judge's rejection of it: see doc A33, pp 1S2–1S4; doc A34, p 14). Accordingly, this aspect of the court hearing is not mentioned further.

6.5 THE PARTIES' PARTICIPATION IN THE HEARING**6.5.1 The applicant**

Mr Forsell, representing the applicant, made a brief opening address to the court and called just two witnesses, both Government officers. The first was Maori Affairs special titles officer Mr JA Dye, who gave evidence about the condition of the title of the approximately 4400 owners of the 40 blocks of Maori land, supplementing information that was contained in a memorandum earlier filed with the court by the applicant. The memorandum stated that there was a considerable number of deceased owners, 'possibly totalling 900–1000', and that the intention was to attack the problem 'on a face'. It was observed that, should the titles be amalgamated, it might be more logical to arrange successions after that was done rather than before. Meantime, it was said, title staff were assembling relevant information but it could be out of date and a special panui (notice) about successions might be needed later.¹⁰ In court, Mr Dye stated that in recent months the deputy registrar of the court had filed about 500 applications for succession to the interests of deceased owners in the 40 blocks of Maori land. In response to a question from the judge, Mr Dye confirmed that the deputy registrar's efforts were 'in default of the successors apparent taking some steps themselves'.¹¹

The other witness called by the applicant was controller of assessments with the Inland Revenue Department Mr ST Pascoe, who explained the taxation implications of the joint-venture proposal. During the remainder of the hearing, Mr Forsell cross-examined four of the witnesses called by the Maori owners opposing the application, including Mr Groome and Mr SB Savage. He was unable to attend the final day of the court's hearing and subsequently made closing submissions in writing, which the Tribunal has not seen.¹²

6.5.2 Maori owners in support

The group of Maori landowners led by Raniera te Tawhiti Kingi OBE took a very limited role in the court hearing. The Tribunal does not know how large this group was and considers that the indicators of the matter are conflicting.¹³ Mr Kingi, a foundation member and, for 20 years, the secretary of the Te Arawa Trust Board, gave evidence as the group's sole witness.¹⁴ He spoke of several farming ventures on Maori land in the Rotorua area in which he was

10. Document A4, vol 2, p 153

11. Document A33, pp C5–C6

12. Ibid, pp 1V1, 1X3

13. As is noted in section 6.6, Mr Dillon told the court that between 60 and 75 per cent of owners were not represented in the court. On Mr Dye's estimate of 4400 owners, that would mean that up to 3300 owners were not represented and that at least 1100 owners were represented. It is not known how many owners opposing the application were represented by Mr O'Sullivan or supported that group, but Mr McGregor represented just 46 owners, with a further 40 or so said to be in support. That information suggests that Mr Potter's group may have numbered several hundred. Against that, however, is the limited role played by Mr Potter's group in court and the lack of mention of the size of the group – if it had numbered several hundred, one might have expected that fact to have been emphasised by the applicant and Tasman.

14. Document A33, pp 1S5–1T3

involved and stated, on the basis of his own experience, that there was no prospect of the Maori owners developing their Tarawera Valley land. Mr Kingi referred to the land's likely future liability for rates and the 'impossible situation' that this would produce for the owners.¹⁵ He said that he could not visualise anyone leasing the land and that, if a lease were possible, the rental would be too small to give a return to the many owners. By contrast, Mr Kingi supported the joint-venture proposal, which, he said, had been outlined in full and been the subject of 'full discussion' at the Kokohinau Pa meeting.¹⁶ Having stated that the detail of the joint-venture proposal was 'not all that could be desired', Mr Kingi went on to endorse the fairness of Tasman's land valuation method and the content of the heads of agreement generally.¹⁷ In answer to questions from Mrs Lanham's counsel Mr O'Sullivan, Mr Kingi explained that the aspect of the proposal that was not all that could be desired was that it nullified the desire of those owners who wanted 'to stay on there' or 'go and live there'.¹⁸ He also stated that he was 'quite sure' that, if the proposal were approved, the Maori owners would be in partnership with Tasman and the Crown and that 'they will still have their land'.¹⁹

Mr Kingi's counsel, Mr Potter, cross-examined Mr Groome (the witness called by Mrs Lanham's group) and, very briefly, Mr Fraser, the Maori landowner called by Tasman. Mr Potter's closing submissions reiterated Mr Kingi's negative points about the Maori owners' situation and then extolled the virtues of having the Crown and Tasman as partners in the proposed forestry venture. In his words, the venture would be 'virtually State guaranteed' and the Maori owners would have obtained, 'without any cost to themselves', the benefit of 'the best brains in the country in heads of Departments, Treasury and others' who had scanned the proposal and approved it.²⁰ Having denied Mr O'Sullivan's suggestions that the log price and land valuation terms of the venture were unfair to the Maori owners, Mr Potter adverted to the risk inherent in the proposal, which, he said, was a 'fair trade risk'. Indeed, he said, it was 'the lesser by far of two evils', granted that the Crown was a partner and would 'look after everybody in New Zealand, including ourselves'.²¹

6.5.3 Whakatane County Council

The Whakatane County Council took a minimal role in the hearing. Its counsel called one witness, council clerk Mr JE Grey, and took no further part at all. Mr Grey read a prepared statement about the rating situation of the 40 blocks of Maori land. As noted in chapter 3, it revealed that, while more than half the total land area was exempt from rates, the council now

17. Ibid, p 157

18. Ibid, p 158

19. Ibid, pp 157, 158

18. Ibid, p 172

19. Ibid, p 173

20. Ibid, p 125

21. Ibid, p 126

6.5.4

considered that the exemption should be revoked because ‘the proposals of the Tasman Pulp and Paper Co show that the whole of the area can be brought into production and used profitably’.²²

6.5.4 Tasman Pulp and Paper Company Limited

Mr Dillon, representing Tasman, assumed primary responsibility for presenting the case in support of the application to the Maori Land Court. His opening address highlighted the importance of the court proceedings, which he described as ‘historic’ and ‘the unfolding of another chapter in Maori Land law development’ that would establish ‘a precedent that could be followed the length and breadth of New Zealand’.²³ Mr Dillon then drew attention to the differences between a sale and purchase of Maori land and the joint-venture proposal. Owners of Maori land, he said, felt forced to sell it because of its complex ownership and a lack of finance, but a sale deprived them ‘of the benefits resulting from the development of their lands’.²⁴ By contrast, the proposal before the court involved:

a joint enterprise where the Maori owners jointly with the Crown and Tasman pool their resources, retain their interests in the form of shareholding, retain control in the form of directors and enjoy the profits derived from the establishment of a new 73,000 acre forest.²⁵

Having identified the problems associated with the ‘useless, unproductive’ Maori land involved in the application, Mr Dillon emphasised that the benefits of the proposed joint-venture scheme flowed from the 40 blocks being treated as one area. In particular, the ‘collective treatment’ ensured that the value given the land was substantially higher than the Government valuation.²⁶

For Tasman, Mr Dillon called 12 witnesses, whose evidence occupied nearly half of the hearing time. As well, Mr Dillon cross-examined all but one of the witnesses called by the opponents of the application. In the order in which they gave evidence, Tasman’s witnesses were:

- ▶ Mr G J Schmitt, the managing director of Tasman;
- ▶ Mr B E Souter, the deputy secretary of the Department of Maori Affairs;
- ▶ Mr A L Poole, the Director-General of Forests;
- ▶ Mr F S Beachman, the commissioner of Crown lands in Hamilton;
- ▶ Mr N R Davist, the deputy secretary to the Treasury;
- ▶ Mr T G Fraser, a Maori landowner supporting the joint-venture proposal;
- ▶ Mr M Buist, a solicitor for the New Zealand Forest Service;

22. Document A33, p22

23. Ibid, p c6

24. Ibid, pp c6–c7

25. Ibid, p c7

26. Ibid, p D2

- ▶ Mr JA Gleed, a Tasman forester;
- ▶ Mr LM Sole, a registered rural land valuer;
- ▶ Mr SR Hewitt, a farm advisory officer for the Department of Agriculture;
- ▶ Mr RG Lockie, a land utilisation officer for the Department of Maori Affairs; and
- ▶ Mr MDH McKee, the managing director of the Kaingaroa Logging Company.

The evidence given by these witnesses was directed at establishing that the joint venture would secure for the Maori landowners substantial benefits that could not otherwise be achieved from the land. In particular, the witnesses sought to prove that the terms of the joint-venture proposal were reasonable and fair in respect of the following elements:

- ▶ the value attributed to the Maori land;
- ▶ Tasman's guarantee of both a market and a price for wood from the new forest; and
- ▶ the taxation concessions involved in the joint venture.

Further, Tasman's witnesses sought to establish that all 40 blocks of land were essential to the forestry joint venture and that the owners who wished to exclude certain blocks from the venture had no reasonable prospect of developing the land themselves and so presented no obstacle to the court's exercise of its special powers under sections 435 and 438 of the Maori Affairs Act 1953. We will consider the evidence presented to the court about these matters after first outlining the role taken in the court proceedings by the parties who opposed the application.

6.5.5 The Lanham group

The group represented by Mr O'Sullivan did not oppose the concept of a forestry venture utilising the 40 blocks of Maori land, but it argued that the terms of the proposed venture were unfair to the Maori landowners. Opening his clients' case, Mr O'Sullivan told the court that the applicant and Tasman were supporting a cause that was 'at best a marriage of convenience' involving 'the land which Tasman has not got and desires, and the money which the Maori owners have not got and wished they had'.²⁷

Mr O'Sullivan rejected Mr Potter's statement that the Maori landowners could not finance any venture to develop their land. He suggested that, had 'appropriate bodies' investigated the matter, something better than the Tasman proposal might have resulted. Observing that Tasman did not say that its scheme was 'the only scheme', Mr O'Sullivan invited the court to consider 'possible alternatives' that would, he said, be suggested by the evidence.²⁸

At that point, Judge Gillanders Scott commented that, if Mr O'Sullivan's clients had an 'alternative scheme for the usage of these lands' that was 'any better or . . . more fortuitous', then that could constitute a 'meritorious objection' in terms of section 438(3) of the Maori Affairs Act. The judge also indicated that he assumed that Mr O'Sullivan would be presenting

27. Ibid, p w6

28. Ibid, pp w7-w8

evidence of such an alternative scheme. Mr O'Sullivan replied, however, that his evidence would not go quite that far: 'It will be demonstrated that the proposition as posed does have some meritorious objections to it, but it will not necessarily advance a cohesive alternative.'²⁹

Mr O'Sullivan's opposition to the joint-venture proposal stemmed from what he described in his opening submissions as the 'selfish ends' of Tasman and the Crown in ensuring that the venture went ahead and from the 'potential area of conflict' between those ends and the Maori landowners' interests. Tasman, he said, which was 'over 50% overseas owned', would gain a major additional, and close, source of supply of raw material from the proposed venture. The Government would see unproductive land earning overseas income and, being a 'major contributory' to Tasman, would participate in its 'profit and success story'. The potential area of conflict, Mr O'Sullivan submitted, stemmed from the Government making raw material available to Tasman at 'a depressed figure'. This meant that 'the Maoris are being asked to participate again at a depressed figure and at some sacrifice which is uncalled for having regard to their numbers and the national benefit that will accrue to the whole of the population'.³⁰ In his closing submissions, Mr O'Sullivan added that the very success of the joint venture depended on the land's suitability for growing trees. However, he said, in light of the Crown's other interests in the venture and Tasman's success due to its establishment with the support of public money and the favourable price paid for Kaingaroa material, the fact that Maori were supplying 50 per cent of the land was not being sufficiently recognised by the joint-venture proposal.³¹

Mr O'Sullivan was very active in cross-examining the witnesses called by Tasman and the applicant. He called one witness on behalf of his clients, Mr JG Groome, who at the time had 22 years' experience as a forester and consultant.³² Mr Groome's prepared statement of evidence made four main points, namely that:

- ▶ the Maori landowners would be well advised to include their land in the proposed forest, provided that reasonable terms of participation could be negotiated;
- ▶ it was 'basically unfair' to base the price for Tarawera Forest wood on the low stumpages paid by Tasman for Kaingaroa Forest timber;
- ▶ while the values offered by Tasman for the Maori land would be acceptable in a normal sale, 'recognised forestry valuation procedures' should be used in a joint venture for forestry purposes; and
- ▶ alternative methods of assessing 'an immediate land expectation value' and stumpage were to be found in the recently published Maraetai Land-Use Study, conducted by two leading forestry research economists under the general auspices of Lincoln College.³³

29. Document A33, p x1

30. Ibid

31. Ibid, p 1x6

32. Ibid, p 1c2

33. Ibid, pp x2A-x2C

Mr Groome stressed that it was vital to the Maori owners' participation in the joint venture that they obtain the best possible prices for their land and the forest's produce, because those two things alone would determine their final share and debenture holding in the forestry company. By contrast, Mr Groome stated, the Crown stood to benefit from other effects of the venture, such as increases in overseas earnings, employment, the use of rail and port facilities, and taxation.³⁴

6.5.6 The Savage–Edwards and Ngaheu families' group

The group represented by Mr McGregor comprised owners who wanted certain blocks of Maori land excluded from the proposed forestry scheme for use by members of their families. The number and identity of his clients was a matter that Mr McGregor was called on to clarify early in the court proceedings.³⁵ It transpired that Samuel Bowman Savage, who had engaged Mr McGregor, had drawn up two lists containing the names of 83 owners who he believed were opposed to the application. However, since Mr Savage had spoken with only 46 of those people, only those 46 owners could be represented by Mr McGregor.³⁶

Mr McGregor's task was complicated by differences in the circumstances of his clients. In brief, the closely related Savage–Edwards group opposed the section 435 application because they did not want particular blocks in which they had majority interests to be amalgamated with others. However, in the event that the court granted the amalgamation application and the section 438 trust application, the Edwards family members who lived on the land were bound to be in a different position to everyone else. This was because Tasman had already recognised that the convenient development of the forest depended on the Edwards family leaving their house and land, and it had offered the family a choice of compensation packages in return for doing that.

In support of the Savage–Edwards position, Mr McGregor called two witnesses: Mr SB Savage and David Potter. Much of Mr McGregor's cross-examination of witnesses called by the applicant and Tasman challenged both the adequacy of the consultation that had been conducted with the Maori owners about the joint venture and the degree of support for it among owners. The major part of Mr McGregor's submissions to the court on behalf of his Savage–Edwards clients questioned the court's jurisdiction to grant the amalgamation application under section 435 of the Maori Affairs Act 1953.

The position of the Ngaheu family was different because they needed the amalgamation application to succeed before their own plans, to farm the Matata B59B block on the edge of the proposed forest, could be advanced. Notable features of their situation were that they had not identified the extent of their interests in other blocks and did not own any shares in the

34. Ibid, p X2B

35. Ibid, pp A1–A5

36. Ibid, pp 1G4–1G5; lists reproduced in doc A4, vol 2, pp 148–150

Matata B59B block. Also, it seems that Mr McGregor was engaged very late in the piece to represent the Ngahehu group and was unable to assemble a cohesive argument on their behalf. He called three witnesses in support of their position: Mr SB Savage, Mr Warner, and Mr Dye.

We turn now to outline the information presented to the Maori Land Court about matters which were in contention between the claimants and the Crown in the Waitangi Tribunal. We begin with the information given to the court about the Maori landowners' attitudes towards the joint venture and their involvement in the process by which its terms had been developed and finalised.

6.6 EVIDENCE OF THE OWNERS' INVOLVEMENT TO DATE

With the application to the court, the registrar filed a memorandum which summarised the process that had been followed prior to the court hearing. It referred to 'negotiations' over 'the last 18 months or more to correlate and co-ordinate the various interests and factors involved, culminating in a very large meeting of Maori owners at Kokohinau Pa, Te Teko on 11 December 1965'. The minutes of that meeting were supplied to the court, as were the times, places, and general descriptions of the attendees at the five earlier meetings. The applicant described the three 'essential and desirable objects' that had been pursued with the owners, these being:

- ▶ their acceptance of the joint-venture scheme generally and their agreement to having their land included;
- ▶ their agreement to having all the titles to the Maori land amalgamated into one title; and
- ▶ their agreement both to the Maori Trustee being appointed to alienate the land to the proposed forestry company and to the setting up of a holding company.³⁷

Also supplied to the court was the Tasman booklet and the notice to owners about the Kokohinau Pa meeting.³⁸

On behalf of his Savage-Edwards family clients, Mr McGregor questioned several witnesses about the extent to which the Maori owners had been informed and involved in making decisions about the joint venture. From Mr Dye, he elicited information about the various meetings that had been held, with particular emphasis on the publicity for the Kokohinau Pa meeting, the attendance there, and the procedure that was adopted, including the voting procedure. The judge intervened after Mr Dye stated that only 120 or 130 owners were left at the meeting at 6pm when the vote was taken and that no effort had been made to identify the names or shareholdings of those who had voted. The judge asked whether the meeting was 'merely an exploratory meeting to get the general assessment of the views of the owners' and,

37. Document A4, vol 2, pp 151-152

38. Ibid, p 152

when told that it was, he asked Mr Dye whether it was the practice at such a meeting to ‘follow as closely as possible the procedure under either part 23 or part 24’. Mr Dye said that it was not the practice to do that and added, in response to a further question from the judge, that no one had ‘demanded’ a poll.³⁹

We noted in chapter 4 that it was unclear which resolution was voted on at the Kokohinau Pa meeting. In court, Messrs Dye and Souter both seemed to accept Mr McGregor’s view that it was Mr Fraser’s resolution that had been voted on, with its proviso about the lands of the Savage–Edwards and other families.⁴⁰ The judge also seemed to accept this. Referring to the proviso to that resolution – which was worded so as to ‘include or exclude’ as much of those families’ lands ‘as is practicable’ – Judge Gillanders Scott described it as a ‘two-way formal resolution’.⁴¹

In his response to questions from Mr McGregor, Mr Schmitt gave his opinion on the extent of the Maori owners’ understanding of the joint-venture proposal. He agreed with Mr McGregor that the Kokohinau Pa meeting was the first public meeting of owners, that the booklet revealed that all of the planning and procedure for effecting the venture had been decided between Tasman and the Crown, and that Mr Schmitt was not expecting any opposition at the meeting from the owners. Asked if he had expected that those who assembled at Te Teko would be ‘adequately informed about the substantial proposal before them’ so as to be able to ‘discuss it in an intelligent and informed fashion at such a meeting’, Mr Schmitt replied that he had. Reminded that this was the first public meeting of ‘any large body of owners’, Mr Schmitt elaborated:

I don’t know what constitutes a large body. There were a substantial number of people amounting to at least two railway busloads at the meeting in Kawerau some months before and at the previous meeting, and certainly all the people who displayed at any time an active interest for or against had already been at at least one and generally speaking two meetings prior to the meeting at Te Teko.⁴²

Finally on this matter, an observation made by Mr Dillon, counsel for Tasman, in his opening submission to the court is relevant. He stated that, in light of the number of owners represented in court, ‘possibly something between 60 and 75 per cent of owners or shareholders’ were not represented by counsel and so relied on the judge’s assessment of the merits of this application ‘as their counsel and their representation’. He added that, while a number of those owners not represented were deceased, for the remainder, ‘I suggest that their non-objection can mean acquiescence and approval of the application’.⁴³ Mr Souter endorsed that view when answering Mr O’Sullivan’s question as to whether the voting at the end of the

39. Document A33, p B6

40. Ibid, pp C1–C2, P2

41. Ibid, pp C2–C3

42. Ibid, p E3

43. Ibid, p D1

6.7

Kokohinau Pa meeting would have gone ‘very much the other way’ if all the attendees had been present. Mr Souter replied that he was ‘quite sure’ that the result would not have been different, adding that he had conducted ‘hundreds of meetings’ himself and that ‘If the majority were disagreeing they would be here today in large numbers protesting, and they are not.’⁴⁴

6.7 EVIDENCE OF THE LOG PRICE

6.7.1 Mr GJ Schmitt

On the first day of the hearing, Tasman’s first witness, Mr GJ Schmitt, read a lengthy prepared statement to the court before answering questions from counsel. His prepared statement described the joint-venture proposal’s log price arrangements in these terms:

Immediately after the formation of Tarawera Forests Limited, Tasman will enter into a long term contract to purchase the Company’s total output at a price equivalent to the cost to Tasman at the Kawerau mill site of similar wood from all other sources. This contract to purchase is fundamental to the whole proposal and is the foundation upon which the development of the Forest will depend. Although the major part of Tasman’s wood supply will no doubt continue to be obtained from the Kaingaroa Forest the Tarawera Forest will in due course become a very important source of supply and because of the saving in transport costs the wood from the latter forest will have a higher stumpage value. On today’s transport costs this premium on the ultimate sustained yield of the forest will approximate £250,000 a year. Tarawera Forests Limited will therefore have an assured market for disposal of its produce and because of the nearness of the Mill can be assured of a very satisfactory return.⁴⁵

When Mr O’Sullivan cross-examined Mr Schmitt, he referred to the Kaingaroa Forest log sale agreements between the Crown and Tasman and asked the judge whether he could cross-examine on them in open court. Mr Dillon for Tasman then explained that he had made ‘a [Kaingaroa] log sale agreement’ available to Mr O’Sullivan on the basis that it was not relevant to the application before the court because:

it provided for a stumpage rate which would not apply at the time when stumpage would have to be paid for this timber. In other words, in 25 years time when Tasman have to purchase the timber from Tarawera Forests Limited there is no agreement in existence which can be of assistance in settling what will be that price, and that is why all parties have included in the Heads of Agreement provision that Tasman must pay the price it is then paying for its other timber, because nobody at this stage can say in 25 years time what Tasman

44. Document A33, p Q5

45. Ibid, p D4d

will be paying. If they could it would have been included as a price. They can't say it and therefore Tasman agreed to pay that price.⁴⁶

The court adjourned to chambers shortly afterwards, 'to hear counsel on the point' of how the Kaingaroa agreements might be dealt with.⁴⁷ The transcript of the proceedings does not record what occurred during the adjournment but, immediately afterwards, Mr O'Sullivan declared to the court that he had had the opportunity to discuss 'certain matters' with counsel and that it appeared 'inapposite at this stage' to pursue the proposed cross-examination, 'in that the opportunity of clarifying the matter has been obtained'. The judge then stated that, 'in terms of the discussion and the arrangements of counsel in chambers', the right was reserved to Mr O'Sullivan and Mr McGregor to cross-examine Mr Schmitt on the matters to which Mr O'Sullivan was leading before the court adjourned to chambers.⁴⁸

Other evidence presented to the Tribunal indicates what transpired during the court's adjournment on this matter.⁴⁹ In brief, it seems that Mr Forsell, supporting Mr Schmitt's desire not to disclose details of the Kaingaroa log sales agreements, claimed that the information was exempt from being produced in open court because of the Crown's legal privilege not to disclose certain information. At the time that he made that claim, however, Mr Forsell had not obtained the necessary ministerial certificate to support it, so was vulnerable, had Mr O'Sullivan insisted on disclosure, to the court ruling against him. Mr O'Sullivan later recorded that Mr Forsell had indicated to him that, had Mr O'Sullivan insisted on disclosure of the Kaingaroa agreements, the application to the court would have been withdrawn immediately.⁵⁰ Mr O'Sullivan did not insist on disclosure and, on the third day of the hearing, Mr Forsell recalled Mr Schmitt to produce to the court a document signed by the Minister of Forests claiming privilege for the 1963 Kaingaroa log sale agreement.⁵¹ At that point, the judge upheld the claim to privilege in respect of that agreement.⁵²

While the details of the 1963 Kaingaroa log sale agreement were kept from the court, the terms of the Crown's original offer of the forest's produce, and of the initial log sale agreement, received some attention during the hearing. For example, Mr O'Sullivan, when cross-examining Mr Schmitt, read out the statement of the 'basic concept' of the agreement,⁵³ which, as has been noted in chapter 2, was 'to sell logs carrying as low a stumpage as possible

46. Ibid, p F6

47. Ibid

48. Ibid, p G1

49. Office solicitor, Forest Service, to conservator, Tarawera scheme, 3 August 1966 (doc A5(11.28)); Minister of Forests to Schmitt, annotated draft, 3 August 1966 (doc A5(11.28)); handwritten notes concerning Maori Land Court hearing and evidence, 15 August 1966 (doc A5(11.28))

50. O'Sullivan to Maori Trustee, 17 October 1966 (doc B1, p 95). Mr Groome stated in evidence to the Tribunal that Mr O'Sullivan perceived the pressure to withdraw the application to be coming from Tasman: oral comment made during questioning by Peter Andrew, 8 June 2000.

51. Minister of Forests to Schmitt, annotated draft, 3 August 1966 (doc A5(11.28))

52. Document A33, pp 1N1-1N2

53. Ibid, p H1

consistent with the recovery of growing costs so that the enterprise itself may operate at a high profit rate and form as attractive an investment as possible'.⁵⁴ He then asked Mr Schmitt whether Tasman was in a 'favoured position' and was obtaining 'preferential treatment' as a result of the agreements. Soon after, Mr O'Sullivan, referring to the 1962 annual report of the Director-General of Forests, Mr AL Poole, put it to Mr Schmitt that, having regard to the open market, the price that Tasman paid, 'and I am talking about published figures for stumpage from Kaingaroa Forest', was a depressed figure.⁵⁵ In response, Mr Schmitt was adamant that the prices Tasman was paying were not depressed and that the opinion of the director-general in 1962 was based on an obsolete view of the output of Kaingaroa Forest:

Certainly the opinion as to the sustainable yield of Kaingaroa Forest changed from the time this book was produced [1962] to the present time – a maximum of 28 million cubic feet from Kaingaroa Forest. We are using 40 million now and the Forest Service has on offer an additional 20 million cubic feet, making sixty. The price advertised in here as a price when you assume that the output of the forest was 20 million feet might have seemed cheap but when you know there is 60 million feet, it is not so cheap.⁵⁶

Soon afterwards, Mr O'Sullivan referred to 'public knowledge' that Tasman was paying threepence per cubic foot in 1962 for 26 million cubic feet from Kaingaroa Forest and asked Mr Schmitt if that was a 'fair market price'. Mr Schmitt replied:

I wouldn't even say that. I would say it was rather high in the practical actual circumstances of the pulp and paper forest industry in Australia and New Zealand at that time, it was if anything rather high.⁵⁷

Later, Mr O'Sullivan challenged the proposed log price formula, saying that it did not take account of the fact that Tarawera Forest was closer than Kaingaroa Forest to the Kawerau mill, which would save labour and freight costs. Again, Mr Schmitt was firm in his denial:

We have allowed that the value of the wood on the stump is the equivalent cost of the material landed in the mill from other sources, minus the cost of getting it from being a standing tree down to the mill-site. Between here and the mill as compared with between Kaingaroa and the mill is where those advantages accrue. This is clearly and unequivocally set forth in the document.⁵⁸

Mr O'Sullivan also put it to Mr Schmitt that, since the only two conversion units (mills) in New Zealand at the time (Tasman Pulp and Paper Company Limited and New Zealand Forest Products) both had secured sources of supply and were thus not in competition with one

54. Cited in doc A22(a), pp 36–37

55. Document A33, p H3

56. Ibid, pp H4–H5

57. Ibid, p H5

58. Ibid, p 16

another for raw material, they were ‘virtually . . . in the position of a monopoly’ and could ‘virtually dictate’ the price of logs.⁵⁹ Mr Schmitt answered:

the fact that there is one, at the moment, seller of wood and one, at the moment, buyer of wood, in New Zealand in these large areas we are talking about, because of the fact Forest Products owns its own forests at the moment, does not in any way limit the truth of the fact that this is a negotiation at arm’s length between a powerful seller and a pretty powerful buyer indeed, but this is a market price . . . the fact there is one buyer and one seller does not affect the fact this is a price negotiated with all the hurly-burly of the market, and this will be as satisfactory a price and a better, firmer, sounder basis of price than would be derived by making a complicated and difficult adjustment to bases of stumpage calculation used at any particular point of time in other countries, because while the formula[e] may be applied or purport to be applied, they will be applied favourably to the buyer or favourably to the seller in other countries depending on the intensity of the demand for wood or the intensity of the sellers of wood to get that wood sold. So the market forces are going to affect any formula whatsoever.⁶⁰

6.7.2 Mr AL Poole

The next witness to give evidence about the proposed log price was the Director-General of Forests. Mr Poole’s prepared statement did not mention the matter specifically but Mr O’Sullivan opened his cross-examination by suggesting that the return obtained by the New Zealand Forest Service from Kaingaroa was ‘not a true market value of such raw material’, and his later questions returned to the log price issue on several occasions.⁶¹ Mr Poole’s responses are of particular interest, because in later correspondence, discussed in the next chapter (see sec 7.6.3), he maintained that the joint venture’s proposed log price clause was, for the Maori landowners, ‘the very antithesis of equitability’ but he could not say so in court because the Treasury’s support of the clause had already won Government approval.

Mr Poole stated that the Kaingaroa price needed to be assessed in the context of the magnitude of the sale and the length of time necessarily involved in a contract for that amount of wood. He then said that the Kaingaroa stumpage reflected a fair market value for the produce ‘at this particular time’ and also at the time when the Tarawera Forest came into production. Confronted by Mr O’Sullivan with his own 1962 statement that the price for Kaingaroa wood was low, Mr Poole indicated that the statement reflected the situation before the change of Government policy that was implemented in the negotiations with Tasman for the 1963 contract, with its ‘considerably improved conditions’ for the additional Kaingaroa wood.⁶² When

59. Ibid, pp M5–M6

60. Ibid, pp N1–N2

61. Ibid, p R2

62. Ibid

Mr O'Sullivan next referred to Tasman buying 98 per cent of its wood from Kaingaroa Forest and said that in 25 years' time the Kaingaroa price would fix the price for Tarawera Forest produce, Mr Poole replied that 'The percentage is related but the conditions of sale will have changed by then.'⁶³ Asked again if the 'existing sale prices operating today are a fair market price', Mr Poole responded:

Not today. This is a matter of argument, as Mr Schmitt said yesterday, of the relationship between a seller and a buyer of a very large quantity of timber. You can sell certain proportions of that timber at better prices than we get from Tasman admittedly, but it is a matter of argument whether you can sell the whole lot at a better price. But I don't think it is profitable to discuss present day prices which are partly conditional on the original conception of sale by Government in relation to what Tarawera Forests will get when it sells timber.⁶⁴

When Mr O'Sullivan then asked whether the 'objects that the Government had in mind were not those that the Maori owners or Tarawera Forests should have in mind', Mr Poole stated, 'But the objects the Government had in mind when they made the original sale to get the industry going will be changed when it comes to sell the Tarawera timber.'⁶⁵

Mr O'Sullivan continued with the suggestion that the Kaingaroa stumpages 'are always likely to be depressed, at least within the contemplated period of the existing agreements', to which Mr Poole said, 'No, I would not agree with that', and indicated that the topic was 'getting rather close to the point reserved'. At that point, Mr O'Sullivan stated that he thought he 'should leave the matter severely alone'.⁶⁶ Later in his questions, however, Mr O'Sullivan returned to the log price issue when he referred to the Maraetai study and sought to have Mr Poole comment on the 'present day values' of wood from that forest and from Kaingaroa Forest. Mr Poole observed, however, that: 'Present day values will have no relation to the values Tarawera Forests will get when it comes into production . . . Kaingaroa stumpage rates today cannot be related to Kaingaroa stumpages of 1980.'⁶⁷

Finally, Mr O'Sullivan referred to the published stumpage figure of fourpence ha'penny per cubic foot for pulpwood from Maraetai Forest and asked Mr Poole if, having regard to current market values, he still said that the price paid by Tasman for Kaingaroa wood 'is a correct figure'. In a response which provides a succinct summary of much of his evidence on the matter, Mr Poole replied:

You have to take into account in a sale like this the magnitude of the sale and what you can get for it in bargaining if it is only one buyer. In this case the original concept of the sale persists at this date so you might argue that the value is low. On the other hand, you might

63. Document A33, p R3

64. Ibid

65. Ibid, p S1

66. Ibid, p S2

67. Ibid, p T1

argue that the value is reasonable. We argue that the value is low, and Mr Schmitt argues that the value is too high.⁶⁸

The only remaining point made by Mr Poole related to the Kaingaroa stumpage review period, which, he said, would be shorter from 1980.⁶⁹

6.7.3 Mr NR Davis

Mr Davis, Deputy Secretary of the Treasury, gave evidence soon after Mr Poole. His brief prepared statement of evidence highlighted the Government's consideration and approval of the joint-venture proposal.⁷⁰ Mr O'Sullivan opened his cross-examination of Mr Davis by asking him to estimate the amount of capital that the Government had expended in connection with the utilisation of Kaingaroa Forest. Mr Davis replied that, excluding the cost of the forest itself, the Government's participation in Tasman and in the development of rail, road, housing, and port facilities had cost about £21 million. When Mr O'Sullivan noted that Tasman was 'now in excess of 50 percent overseas owned', Mr Davis said that the Government had 'made no further participation to the company since it became overseas owned'.⁷¹ That would seem to be a reference to the Crown's recently formed view that Tasman should no longer receive preferential treatment from the Government.

After further questions about the operation of the tax concession for forest development and the value to the Government of its participation in Tasman, which Mr Davis could not quantify on the spot, Mr O'Sullivan turned to the log price and land value issues. He suggested to Mr Davis that the Kaingaroa stumpage was a 'depressed figure on the open market' and that the 'purposes' of the Crown were not the same as those of the Maori landowners, who were 'entitled to a greater return from the land than the Crown [was] prepared to accept and for different reasons'. Unfortunately, Mr Davis's reply is not clear:

I think there are two points in this. The Crown would not be a willing party to a scheme which was not going to secure that the Maori owners were not [*sic*] going to get fair treatment . . . but it so happens that the Crown and the Maoris have a similar degree of interest in the financial return. The Government has a particular interest in the welfare of the Maoris and of New Zealand as a whole. I think the two are entirely diverse.⁷²

Mr O'Sullivan then asked whether 'tying the Maoris down to the same price as the Crown is prepared to accept for Kaingaroa Forest plus the transport differential' was an equitable return compared with 'the Maori selling the produce on the open market'. Mr Davis replied:

68. Ibid, p 13

69. Ibid, p 11

70. Ibid, pp 16–17

71. Ibid, p 18

72. Ibid, p 12

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6.7.4

This may of course be a valid point of view on your side. As far as I am concerned, my principal interest in advising Government has been to ensure that the Maoris were getting a fair deal. I think the previous witness may or may not have convinced you that the return for the wood is fair, is satisfactory.⁷³

When Mr O'Sullivan asked Mr Davis whether the Maori landowners could possibly obtain a better deal, Mr Davis said that he could not see where, at the moment, they could get an assured sale at a fair price for a volume of wood aggregating at 20 million cubic feet at maturity, and he did not know of any other possible processes or conversion unit that might change the situation.⁷⁴

6.7.4 Mr JG Groome

The other witness to address the log price issue was Mr O'Sullivan's own witness, Mr JG Groome. It has been noted already that Mr Groome's prepared statement of evidence described as 'basically unfair' the joint venture's proposal to base the Tarawera Forest stumpage on the Kaingaroa stumpage. Mr Groome justified this view by reference to the benefits obtained by the State which made low stumpages acceptable to it; namely:

- (a) Earnings of Overseas currency.
- (b) A large avenue of employment.
- (c) The utilisation of a large neglected and hence low-grade forest resource.
- (d) The extensive use of Rail and Port facilities.
- (e) Dividends and capital accretion accruing to the State as a shareholder.
- (f) Taxation.⁷⁵

Referring to Forest Service statements about the natural advantages of the Kaingaroa Forest, Mr Groome concluded that the Forest Service was receiving only part of the 'true return' due to it as the grower and that:

The Maori land-owners are individuals and should not be expected to forego part of the returns due to them for the general social betterment of the Nation and the improved profitability of the parent utilisation company.

Some other basis for fixing stumpage should therefore be investigated and it is on this point that better terms should be available to the owners.⁷⁶

73. Document A33, p v3. The previous witness had been Mr Beachman, who did not discuss log prices. Mr Davis seems to be referring to Mr Poole, who gave evidence immediately before Mr Beachman.

74. Document A33, p v3

75. Ibid, p x2b

76. Ibid

Cross-examined by Mr Dillon for Tasman, Mr Groome referred to available information that the original Crown–Tasman agreement fixed the price for all wood (not merely the cheapest pulpwood) at a stumpage of threepence per cubic foot. He also referred to the March 1962 statement by the Director-General of Forests that that price was low. When asked by Mr Dillon, Mr Groome agreed that fourpence ha’penny per cubic foot was a market price for pulpwood from Maraetai Forest and added that freight costs would be substantially cheaper from Tarawera to Kawerau, ‘which should result in a higher pulp wood stumpage at Tarawera Forests’.⁷⁷

Later, Mr Groome gave his view of the Crown’s attitude towards the proposed tie of Tarawera prices to Kaingaroa prices:

in the proposed Tarawera Forest, three partners will be receiving dividends, estimated at 10 or 11%, the two figures to date. The Maori owners will then be paying tax on their share of that dividend. The Crown will not be paying tax. Therefore they will be quite happy to accept lower stumpage rates. The Crown would receive additional benefits. The new flow of tax money because of the additional 20 million cubic feet of wood that is being used each year.⁷⁸

At that point, Mr Dillon asked Mr Groome if he was suggesting it would be easy for there to be ‘some sort of conspiracy’ between the Crown and Tasman in order to keep the stumpage rates of TFL at a depressed level. Mr Groome asked whether Mr Dillon really wanted him to answer that question and, upon being told that Mr Dillon did, denied that he intended the ‘conspiracy’ suggestion. Asked by Mr Dillon what he did intend, Mr Groome said, ‘Whereas the Crown would be quite happy with the proposition before the Court the Maori owners would not possibly be quite as happy as the Crown.’⁷⁹

The judge then intervened to ask Mr Groome what inference the court was to draw from that statement. When Mr Groome replied, ‘Whatever inference it wishes’, the judge asked directly whether Mr Groome was suggesting there was some ‘jack-up’ between the Crown and Tasman for the purpose of ensuring that TFL obtained a lower stumpage from Tasman than would normally be expected. Mr Groome replied that he had not intended to suggest that but wished to state that:

if the Crown is happy with a low stumpage for Kaingaroa which the Director-General states in published statement is a low stumpage, they will also be happy with a low stumpage with Tarawera Forests. Therefore, the Maoris will have to be satisfied with a low stumpage as well.⁸⁰

77. Ibid, p 1A2

78. Ibid, p 1B3

79. Ibid, p 1B4

80. Ibid

Mr Groome's last words on this matter came at the conclusion of his evidence when the judge questioned him at some length and asked whether, in his 'heart of hearts', Mr Groome sincerely believed that there was anything underhand between the Crown and Tasman in respect of the joint-venture proposal. Mr Groome replied that he did not think that there was anything underhand, but he sincerely believed that the stumpage paid from Kaingaroa was 'not the full amount due to that wood'. The judge then suggested that Mr Groome's stance on protecting his own clients' land price information was comparable with the stance taken by the Crown and Tasman to protect the confidentiality of the Kaingaroa price agreements. Mr Groome replied that he thought some clauses in the Kaingaroa agreement needed to be kept secret from the public, and from competitors (such as some of his own clients). However, he said, Tasman and the Crown should disclose the Kaingaroa price agreements to the Maori landowners because they were the third party to the proposed joint venture.⁸¹

6.8 EVIDENCE OF THE VALUE OF THE MAORI LAND

6.8.1 Mr GJ Schmitt

Towards the end of his prepared statement of evidence, Mr Schmitt referred briefly to Tasman's guarantee to the Maori landowners of a minimum 10.8 per cent share in TFL.⁸² He then turned to the matter of Tasman's valuation of the proposed forest land. First, he set out the prices that Tasman had paid for each of the four blocks of Tarawera Valley land it had purchased in 1962 and 1964. The average price of those blocks, excluding improvements, was £2 7s per acre, and Mr Schmitt said that that 'market price' was 'a guide in the present instance' because the four blocks, totalling 19,350 acres, were included in the proposed forest. Stating next that a very comprehensive survey of all the land subject to the forestry proposal had been conducted, Mr Schmitt referred to Tasman's booklet as explaining the factors used in classifying the land. He then set out the Government valuation of all the Maori-owned blocks (£69,230) and Tasman's valuation of those blocks (£128,721, or an average of £3 7s 7d an acre).⁸³ The 'much higher Tasman values' had been arrived at, Mr Schmitt explained:

By ignoring the lack of any access to the majority of the Blocks; disregarding the irregular shape and size of a good many other Blocks and most important of all, treating the whole area *as one composite unit* rather than as separate units or blocks. In this way the serious

81. Document A33, p 1D4

82. Mr Schmitt explained that the guarantee had been provided even though the possibility of inflation 'does not normally form part of a commercial undertaking of this nature' and it would be reasonable to expect that any effects of inflation would be offset by higher payments by Tasman for the Forest Company's produce and by new techniques reducing development costs: doc A33, p D4E.

83. Document A33, pp D4E-D4F

disadvantages have been ignored and a value substantially in excess of Government valuation achieved. [Emphasis in original.]⁸⁴

In his cross-examination of Mr Schmitt, Mr O'Sullivan referred him to a fifth Tasman purchase – that of the 1241-acre Waimana block. The block was situated some 30 to 40 miles from the Kawerau mill near Taneatua, and Tasman had paid £5 6s per acre for it (the price included 'ring and internal fencing as well as grazing and access').⁸⁵ Mr O'Sullivan sought to have Mr Schmitt concede that the Waimana land was 'not as good forest-growing country' as the Maori-owned Tarawera Valley. However, Mr Schmitt was resolute in his view that the Waimana land was good country and that the price paid was 'entirely consistent with the sort of prices we are talking about' for the Tarawera Valley lands. Mr O'Sullivan also sought to have Mr Schmitt concede that the values that Tasman had ascribed to the Tarawera Valley lands were not 'true forestry values'.⁸⁶ This led Mr Schmitt to elaborate on his earlier explanation of Tasman's land valuation method:

we took as the point of departure the market price. We recognise that a significant premium on the market price could and should properly be allowed having regard to the aggregation of the total area of land into one economic producing unit and the only sort of economic producing unit for which it can be aggregated was of course the forest, but we based these things on market value.⁸⁷

Pursuing the 'true forestry value' of land, Mr O'Sullivan soon raised with Mr Schmitt the idea that forestry land was normally valued at its 'residual value', which was calculated by establishing the value of the end product and deducting a fair percentage for profit and depreciation on the machinery involved.⁸⁸ Mr Schmitt firmly rejected the relevance of such an exercise to the task of valuing land, saying:

I don't agree with the assertion that it is the normal forestry method of fixing land values. The authorities that I have referred to, that have been drawn to my attention by experts within my company, are to the contrary effect; that the basic way to fix the value of any forest land, of any other land for any other use, is the market value.⁸⁹

6.8.2 Mr JG Groome

The next witness to focus on the land valuation issue was Mr JG Groome. As has been indicated, he criticised Tasman's 'market value plus premium for aggregation' approach to valuing

84. Ibid, p D4G

85. Ibid, p L2

86. Ibid, p L3

87. Ibid

88. Ibid, p L5

89. Ibid

6.8.2

the Maori land, especially since there would be no return to the former landowners for approximately 25 years. Instead, he suggested, ‘recognised forestry valuation procedures’ should be used, and he identified as relevant the land expectation values used in the Maraetai study.⁹⁰ Mr Groome explained that, in its simplest form, the immediate land expectation value (LEV) of the land:

amounts to assessing the returns from growing a forest crop on a specific area of land, deducting the costs and arriving at a residual value. Into this calculation can be built varying rates of interest which may be a desired return on the income investment. The surplus available represents a residual land value or an expectation of land value.⁹¹

By far the largest part of Mr Groome’s extensive cross-examination by Messrs Forsell, Potter, and Dillon concerned the value of the Tarawera Valley land. Mr Forsell, counsel for the applicant, sought to discredit Mr Groome’s criticisms of Tasman’s valuation method by highlighting that he was neither a qualified valuer nor familiar with the Valuation Act’s requirements.⁹² Despite that, Mr Groome maintained that actual sales of land are the strongest indicator of market value only when there is competition for the land, because competition is what ensures an ‘open market’, where the seller is not forced to sell and the purchaser is under no compulsion to buy. Mr Groome’s view meant that he did not regard Tasman’s purchases in the Tarawera Valley as establishing the market value of the land because there was ‘only one forestry purchaser’ and, therefore, ‘no strong competition’.⁹³ Mr Groome also challenged the ‘market value’ paid by Tasman for its Tarawera Valley land by asserting that much higher prices had been paid recently for comparable land in the Tokoroa–Kinleith area. For reasons of client confidentiality, however, he was not prepared to disclose those prices.⁹⁴

A further difficulty for Mr Groome’s evidence was that his efforts to explain and apply the LEV method to the Tarawera Valley land were hindered by the unknown price that would be paid by Tasman for Tarawera Forest wood. The combined effect of these gaps in the information before the court meant that a good deal of the testing and elaboration of Mr Groome’s land valuation evidence occurred in the relatively unsatisfactory realm of the hypothetical. For example, Mr Groome considered that, on the basis of a 10 per cent return from a forest producing pulpwood (the lowest-quality wood), the LEV of the Tarawera Valley land would be in the region of £11 an acre.⁹⁵ However, on the basis of the land’s proximity to the Kawerau mill and actual sales of land close to the Kinleith mill in the Tokoroa area (the details of which

90. Document A33, pp X2A–X2C

91. *Ibid*, p X4

92. *Ibid*, p Y2

93. *Ibid*, p 1A5. In the Tribunal, Mr Groome mounted a new attack on these prices – the non-arm’s length attack, which Professor Schmitt said was ‘preposterous’ (see sec 5.5.5).

94. Document A33, p Y5

95. *Ibid*, p Y1

he did not disclose), Mr Groome's estimate of the average LEV of the Tarawera Valley land was 'in excess of £20 per acre'.⁹⁶ Urged by Mr Potter and the court to attempt to apply the LEV method to the situation then before them, even though the log price was unknown, Mr Groome later returned to the witness stand with some calculations, which he explained as follows:

I have computed a land value using the figures put forward in the hearing. I understand it is contemplated that the forest will be yielding a dividend of 10%. For the purposes of simplicity I have worked these figures out from a yield of a 20 year old forest by which time I expect it to yield 6000 cubic feet per acre and I have used a stumpage of 7d, which is the 3d Kaingaroa plus 4d freight differential which was mentioned in the minutes of one of the meetings. This would give a financial yield per acre at age 20 of £175 per acre, taking annual maintenance costs at 8s per acre per year, planting and other costs at £19, the land value would work out at £4 6s per acre. To interpret those figures means if it is the desire of the forest to return a dividend of 10% the stumpage could be as low as 7d a cubic foot in the future and the land cost could be £4 6s. In fact, the stumpage to be paid in the future will be greatly in excess of 7d, and consequently the land value will be higher.⁹⁷

Mr Dillon cross-examined Mr Groome on the reasons for each figure used in that calculation in an effort to show that 'guesswork' was unduly involved and that adjustments to any of the figures had significant effects on the resulting LEV.⁹⁸ Later, Mr Groome was questioned about his own use of LEVs in advising his clients and, in particular, whether he had ever recommended the purchase of land at a price 'other than compared with the market value and the comparative sales' of adjoining lands.⁹⁹ Mr Groome replied that, wherever there was competition for land, he would normally try to work out the maximum price that could be paid for its use for forestry so that his client could see the price to which he could go and still make use of the land economically. He also said that in at least three situations he had acted on other than market value or comparable sales. However, he was not prepared to divulge the details of those situations.¹⁰⁰

After being re-examined by Mr O'Sullivan, Mr Groome was asked a number of questions by Judge Gillanders Scott about LEV, including its relationship with the formula normally applied to value agricultural and pastoral land.¹⁰¹

96. Ibid, p 16

97. Ibid, p 23. When Mr Groome was re-examined by Mr O'Sullivan, he made adjustments to this LEV example, which increased the land's value to £5 5s per acre.

98. Document A33, pp 24-1A4

99. Ibid, p 1C1

100. Ibid, p 1C2

101. Ibid, pp 1D2-1D3

6.8.3

6.8.3 Mr HR Warner

Mr HR Warner was called by Mr McGregor for his Ngahehu family clients, who wanted to obtain ownership of the 619-acre Matata 59B2B block (see sec 3.2.2). Mr Warner's evidence was that the block could be developed as an economic farm over 20 to 25 years at an estimated cost of £53 per acre, and that the block's maximum present value was £12 an acre.¹⁰²

Cross-examined by Mr Dillon, Mr Warner stated that his valuation did not take account of the Government valuation for the block nor of any recent sales in the area. Rather, he had relied on his own knowledge of the importance of 'productive value', not 'silly sales that some people are doing today'.¹⁰³ At that point, Mr Dillon established that Mr Warner was not a registered valuer but had been a farm appraiser for the State Advances Corporation for five years in Gisborne, Hawke's Bay, and Dannevirke, and had farm experience outside the Kawerau area, in Katikati, Gisborne, and the Waikato.¹⁰⁴ Soon afterwards, Mr Warner explained that he had arrived at the £12 per acre value by 'doing my theoretical development of the country, the cost of development, and then what I would expect to receive for it at a fair sale value'. He also said that he was unaware that his valuation method was contrary to any 'accepted land valuation formula'.¹⁰⁵

6.8.4 Mr LM Sole

Towards the end of the hearing, Mr Dillon for Tasman called Mr LM Sole, a registered rural farm valuer, farm management consultant, and farmer who had conducted for Tasman the 'rural valuation' of all the blocks of Maori land involved in the application. The results of that valuation, recorded in the second column of a schedule produced to the court, show that Mr Sole valued all 40 blocks at £78,245, compared with the Government valuation of £69,250 and Tasman's valuation of £128,721.¹⁰⁶

Mr Sole explained that, in arriving at his figures, he had applied the principles as required under the Valuation of Land Act 1951, after having first inspected the country and taken into account recent sales in the area. He stated that Mr Warner's reliance on productive value was not relevant under the Valuation of Land Act and had not been since about 1950. As for Mr Groome's statement that undeveloped land in the Tokoroa-Kinleith area was commanding prices of up to £20 an acre, Mr Sole, who farmed at Atiamuri and had a 'fairly intimate knowledge' of the land in the Tokoroa-Kinleith area, said that it could not be compared with the Tarawera Valley land and that, as a valuer, he would not 'approach the thing in that way'.¹⁰⁷ In

102. Document A33, pp 1Q4-1Q5

103. Ibid, p 1R2

104. Ibid, p 1R3

105. Ibid, pp 1R5-1R6

106. Reproduced in doc A4, vol 2, p 144

107. Document A33, p 1U2

answer to Mr O'Sullivan's questions, Mr Sole elaborated on his reasons for not adopting the LEV approach to valuation:

Land expectation values as far as I can see come under the same heading as productive values. They are a highly theoretical approach and are not acceptable as far as I know under the Valuation of Land Act and I can find no basis for approaching them on a so-called forestry value basis.

I am not a forester by any means but I feel I have had considerable experience in valuation. That system is very similar to the productive valuation of farmland or any other land. I don't think productive values are accepted anywhere at present. They have become discredited by virtue of the fact that a slight error or misjudgment can mushroom up into a tremendous figure through compounding. Productive farm valuations are carried out on today's prices or 10-year average prices, the system you are talking about, the forestry, some 30 or 40 years hence which makes it even more difficult. However, I reiterate I am not a forester.¹⁰⁸

6.9 TAXATION CONCESSIONS

An important feature of the proposed joint-venture agreement was that it ensured that the forestry development company (TFL) would gain the maximum benefit from taxation concessions. Mr Schmitt's prepared statement of evidence explained that forestry development costs had been deductible for tax purposes only for a short time. The change had occurred after the Government had promised to legislate to allow a forest development company to deduct development costs from its own profits (if there were any). However, since that change would not have benefited TFL because it would not return a profit for some 20 years, Tasman had sought a further change to the law. The outcome, Mr Schmitt said, was that the 1965 legislation allowed a parent company to claim a taxation concession in respect of finance it provided to a subsidiary company for forest development during the period of that development.¹⁰⁹

In light of that law change, Mr Schmitt continued, the joint-venture proposal was designed so that the benefit of the taxation concession would be passed from Tasman to TFL. This would be achieved by debiting the subsidiary company with only the net costs that Tasman expended on the forest's development (ie, the actual costs minus the taxation concession).¹¹⁰ In light of the tax rates at the time, this meant that TFL's debt to Tasman for forest development would be halved.¹¹¹

108. Ibid, pp 1U2, 1U4-1U5

109. Ibid, pp D4c, D5

110. Ibid, p D4c

111. Ibid, p D5

The taxation advantage was further explained to the court by Mr ST Pascoe from the Inland Revenue Department.¹¹² In response to questions from Judge Gillanders Scott, Mr Pascoe stated that the taxation relief would not be available to the Maori landowners if they incorporated or formed a company to develop the forest. Nor would it be available, he said, to any lessee of the Maori land who undertook the forest development.¹¹³

Another taxation advantage built into the joint-venture proposal related to the 6 per cent capitalised interest on the debentures issued to the former Maori landowners. Mr Souter explained in his evidence that, since MIL was to be ‘merely an administrative vehicle to distribute to the former owners the income derived from the Maori land included in Tarawera Forests Limited’, the special legislation that would establish the company would also exempt it from paying taxation. The effect would be that MIL shareholders would pay tax only once on the dividends that they received, and at ordinary income tax rates, not the higher company tax rates.¹¹⁴

6.10 EVIDENCE AND SUBMISSIONS ABOUT A LEASE OF THE MAORI LAND

The Wai 411 claimants have alleged that the evidence presented to the Maori Land Court about the prospect of, and likely returns from, a lease of the Maori land was misleading. In particular, the claimants contend that the evidence of Mr Poole, the Director-General of Forests, was misleading for being ‘wholly dismissive’ of the option of leasing and for not disclosing to the court ‘the divergence of views within’ the Forest Service about the joint venture.¹¹⁵ This element of the court case therefore requires attention.

6.10.1 Mr JG Schmitt

Before Mr Poole gave evidence, Messrs Schmitt and Souter were cross-examined by Mr O’Sullivan, counsel for Mrs Lanham’s group, about the possibility of the Maori land being leased for forestry purposes. To Mr Schmitt, Mr O’Sullivan read out the answer that he (Mr Schmitt) had given at the 14 October 1965 meeting to the question of whether Tasman and the Crown would consider leasing the Maori land. The answer emphasised, as advantages of the joint-venture proposal, that the parties were assured of ‘their full share of the profitability of

112. Document A33, p 1T4

113. Ibid, p 1T5. It may be noted that there is nothing about a lease which, of itself, would disqualify a lessee forestry development company from being a subsidiary of a parent company. Presumably, however, Mr Pascoe was assuming that, if the Maori land were leased, the Maori landowners and the lessee would not be part of a joint venture of the kind before the court and, for that reason, there would be no subsidiary forestry development company with a profitable parent company which qualified for the taxation concession.

114. Document A33, p P1b

115. Document A22, para 50

the forest' and that 'the full produce will be taken'.¹¹⁶ It also emphasised that a lease was disadvantageous to Tasman because 'We have to be reasonably satisfied when we spend this sort of money that we have a firm long-term arrangement as we will carry the major financial risk during the development period.'¹¹⁷

Mr O'Sullivan asked Mr Schmitt whether it was correct that one advantage of a lease was that it would retain Maori ownership of the land. Mr Schmitt replied, 'Yes, assuming that this is an advantage to those who wish to obtain ownership of land per se, presumably it is an advantage.'¹¹⁸

Mr O'Sullivan then suggested that a lease would have a further advantage for the Maori landowners if there were another conversion company in competition with Tasman: the landowners could negotiate with that company a 'market price' for the produce of the forest. Mr Schmitt replied that, in the absence of a competitor to Tasman, he could see no feasible scheme that could be promoted by anyone in the near future which would have the benefit of an assured outlet for such a large quantity of wood. He also expressed his opinion that there would be no competitor to Tasman 'in another 20 years' because there was 'not the wood available on which to establish'.¹¹⁹

Later, in response to further questions from Mr O'Sullivan about the possibility of leasing the Maori land, Mr Schmitt made plain the strength of his opposition to such an idea. Asked if he would consider leasing the land if the titles to the various blocks were amalgamated, Mr Schmitt replied that he would not consider that to be 'appropriate or desirable . . . unless in fact it was a shadow of a lease'. Asked if he would 'categorically say here' that he would not be interested if the court came up with a proposition that the Maori owners lease the land to Tasman at a peppercorn rental and, after a period of time, take a royalty, Mr Schmitt replied, 'On an utterly perpetual basis, I would wish to oppose that because I think it would be an unwise decision, because it would contain the seeds of dissatisfaction.'¹²⁰

6.10.2 Mr BE Souter

The next Tasman witness, Deputy Secretary of Maori Affairs Mr BE Souter, was also referred to a statement he had made at the 14 October 1965 meeting with Maori landowners. He had said that, if some means were found by which the Maori leased their land, 'all they would get would be the rent', as opposed to a share of the profits, which appeared to be a much more favourable outcome.¹²¹ Asked by Mr O'Sullivan what were the advantages of the joint-venture proposal over a lease, Mr Souter's reply canvassed several points:

116. Document A33, p G4

117. Ibid

118. Ibid

119. Ibid, p H2

120. Ibid, p J5

121. Ibid, p Q1

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- ▶ any lease would need to be in perpetuity, because ‘Nobody is going to plant forest on land that is only leased for a time’, and granting a lease in perpetuity is, for all practical purposes, selling the land and getting a return;
- ▶ from ‘the point of view of the Department of Maori Affairs’, and granted that there were 4000 owners, a lease would mean that the ‘rules about amalgamation of title’ would be applied so that interests worth ‘under £25 would all be converted’ and lost to their owners;
- ▶ there would be no means now of fixing a lease’s future rent;
- ▶ the joint-venture proposal, with its capitalised land values and guaranteed minimum return to the Maori landowners, seemed to offer a better return than a lease; and
- ▶ ‘if things get bigger and better’, the Maori shareholders would get all the advantages of the company’s profitability, whereas ‘I can’t still see how they get those advantages through a lease’.¹²²

Mr O’Sullivan then asked Mr Souter if he was aware of the details of the proposed Otakanini–Topu lease.¹²³ Mr Souter said that he did not know the details and had not investigated the possible returns from such a scheme as compared with the returns from the joint venture. He added, however, that he had discussed that matter with representatives of the Forest Service and was sure that the joint venture was a better scheme.¹²⁴

6.10.3 Mr AL Poole

Mr AL Poole, the Director-General of Forests, was the next witness for Tasman. His brief prepared statement referred to his investigation of the joint-venture proposal and his role in the negotiation of its proposed terms. On the possibility of a lease of the Maori land, Mr Poole stated:

I am aware that the Maori landowners might plant and manage their own forests, or themselves arrange long-term afforestation leases. In my opinion, however, such piecemeal utilisation cannot bring to the owners returns as advantageous as will be available by means of a single, well-planned, comprehensive operation with a minimum of overhead and a maximum of overall organisation. I am in a position to form this opinion by reason of my experience with the planning and establishment of many large and small exotic State forests in New Zealand.

122. Document A33, p Q3. The statement in the second bullet point seems to assume that the court would be persuaded by the department to exercise its power, conferred by section 435(1A) of the Maori Affairs Act 1953, to recommend that the Maori Trustee compulsorily purchase (convert) all uneconomic interests in the 40 blocks.

123. This was a reference to the negotiations by which the Forest Service sought to lease for afforestation Maori-owned sand dune country at Woodhill in the far north. When the lease was finalised in 1969, it became the first example of a ‘Grainger’ lease in New Zealand: doc B72, pp 5, 21.

124. Document A33, pp Q4, Q6

I have given particular attention and thought to the proposal that the Maori landowners sell their land to Tarawera Forests Limited. I am able to refer to the experience of the New Zealand Forest Service in respect of the present practice of managing Maori timber land for purposes connected with the selling of timber.

In my opinion the main economic feature of successful exotic forestry intended for local utilisation is that permanent perpetual continuity of supply be planned by rotation of compartments. Very long-term tenure must accordingly be arranged. Therefore, any proposal that the Maori landowners should lease their land rather than sell it still results in their going out of possession and receiving a regular income instead of remaining in occupation. In this particular proposed scheme, increased profits, (including any currency inflation) will be reflected in increased dividends and share values.

I have further observed that Maori land tenure is becoming more and more a tenure by incorporation of the owners and this fact satisfies me that the present scheme is in line with present day trends that are in any event changing the system of Maori land holding.¹²⁵

Asked by Mr O'Sullivan to explain the proposed Otakanini-Topu (or Woodhill) lease, Mr Poole outlined its main features as being that:

- ▶ its terms were designed to apply whether the Forest Service was the lessor or the lessee; and
- ▶ the rent for the land was to be determined as a division of the stumpage between the lessor and the lessee, taking into account the relative cost of the initial clearing and development, with a peppercorn rental being payable until the forest came into production.¹²⁶

Mr Poole then likened those rental terms to the Tasman land valuation formula:

In other words, it is very similar to the proposed Tasman basis of assessing land values. We have a scale of the division of stumpages between lessor and lessee based on the relative costs of clearing, calculated compound interest, etc, and on the easiest land of all, that is land you can machine plant virtually, very light costs of clearing, the lessor, he gets 25 per cent or one quarter of the stumpage value and that goes right down to 1 per cent in the case of bush country you have to fell yourself with very high costs of development.¹²⁷

Asked whether he had thought of 'doing a comparison' between the Tasman proposal and 'a similar scheme using the basis you have thought about on the Woodhill scheme', Mr Poole replied:

We looked at this initially but my understanding of the situation was that there are big differences in taxation matters, and so forth, that really make the schemes separate, and all

125. Ibid, pp R1b-R1c

126. Ibid, p s4

127. Ibid

the advantages as far as Tarawera Valley lay on the company organisation. I know little about company law but I do understand taxation is more favourable under this scheme.¹²⁸

Mr O'Sullivan then asked if the Forest Service had made a 'survey and investigation' comparing the two schemes, to which Mr Poole replied that it had made 'an appraisal'. Next, Mr O'Sullivan asked what advantage the Tasman approach had over a lease in circumstances where all the land was amalgamated so that there was 'only one person to deal with'. At this point, the judge intervened to ask Mr Poole if the Forest Service would contemplate any leasing arrangement at all with the Maori owners if there were 40 independent but contiguous pieces of land. When Mr Poole said that the service would not contemplate it, Judge Gillanders Scott commented, 'That seems to me of vital importance on the conversion, which seems to have escaped everybody.'¹²⁹

It appears that the judge was referring to the point adverted to also by Mr Souter: namely, that, in the process of amalgamating the titles to the 40 blocks and issuing a new title in the names of the owners, all the interests worth less than £25 could, on the recommendation of the court, be compulsorily acquired (converted) by the Maori Trustee.¹³⁰ However, while technically possible, it seems that such a course of action would have been highly unusual in light of the unpopularity of, and the limited funds available for, conversion at the time. Crown counsel submitted to the Tribunal that there was never any intention to convert uneconomic interests in the Tarawera Valley lands.¹³¹ Instead, a possible inference is that the statements of Mr Souter and Judge Gillanders Scott about the matter were intended to highlight a 'threat', albeit more apparent than real, to the notion that a lease of the Maori land was possible and desirable.

Mr O'Sullivan next suggested to Mr Poole that the returns from the proposed Tasman scheme and a proposed leasing scheme would, in effect, be much the same. In response, Mr Poole said that, assuming the value of the wood was 'in order':

it comes down to a matter of the proportion that your land owners take out. Well, just looking at it fairly quickly it looks as though the Tasman scheme comes out best, because the land cheapest to develop for afforestation under our leasing scheme gives 25 per cent of the stumpage value. If you take the Tarawera Valley I think it would probably fall into the sort of bracket, our bracket of 15–20 per cent. There is a minimum guarantee under the Tasman scheme of 22 per cent, and I think there is every prospect of getting above that again.¹³²

128. Document A33, p 54

129. Ibid, p 55

130. See section 435(1A), which was inserted into the Maori Affairs Act 1953 in 1958.

131. Document B81, para 10.6

132. Document A33, p 55. It is not clear whether Mr Poole was referring to the cheapest land in the Tarawera Valley to develop for afforestation or all the land. As noted in section 4.7, the 'Grainger' classification of all the Tarawera Forest land resulted in an average stumpage of 10 per cent, not the 15 to 20 per cent stated by Mr Poole.

Mr Poole's reference to a 22 per cent minimum guarantee assumes that all three landowners (Maori, the Crown, and Tasman) would be guaranteed 75 per cent of the (31 per cent) share of TFL that Tasman estimated would be due to the land contributions: see doc B72, p 9, and see above sec 4.6.

Mr O'Sullivan then asked Mr Poole whether, in reaching his conclusions about 'the alternative best arrangement', he had taken account of the fact that, with a leasing scheme, the land would come back to the Maori owners at some stage with built-in advantages, such as roads and an established rotation of planting. Mr Poole said that he had taken account of those matters and that they would be dealt with as a matter of compensation by the lessor to the lessee:

Roughly the basis is that if the owners of the land like to forego their stumpage value for a period of about 20 years they can accumulate enough money to pay for compensation [for] the whole forest at the end of the leasing period. If they have a lease of a hundred years, at the end of the eightieth year they say we want to buy this forest and take it over eventually they can forego all the accumulated money that would be sufficient to pay for the forest, but they have no revenue for 20 years.¹³³

The idea of the Maori landowners being the owners of a forest on their land in the future was one which Mr O'Sullivan wished to pursue with Mr Poole. He asked how long it would take for them to own the forest on their land if the Forest Service established it and recovered its investment from the sale of the produce. Mr Poole replied that it would take 'quite a bit of calculation' and that the only relevant survey was of a sustained-yield forest towards the end of a 100-year period. He added that the Forest Service 'would not move in on a short term basis'.¹³⁴

At that point, the judge admonished Mr O'Sullivan for not giving Mr Poole advance notice of his questions through either Mr Forsell or Mr Dillon, so that Mr Poole could have prepared his answers and so been of 'material assistance' to Mr O'Sullivan and the court.¹³⁵

6.10.4 Mr JG Groome

Mr Groome's evidence was focused on the proposal before the court rather than on promoting an alternative type of forestry venture, such as one involving a lease. However, his answers to questions from counsel revealed that he favoured a different kind of arrangement, particularly one in which the Maori owners developed the forest on their own land. For example, after Mr Groome had read his prepared statement of evidence, Mr O'Sullivan asked if he could venture an opinion on the possibility of the Maori landowners planting forests on the land on their own or in conjunction with the New Zealand Forest Service, and the possible returns on any such forests. Mr Groome replied:

Yes. I have considered this possibility and have not brought evidence on it today because I studied the minutes of the earlier meetings and it was quite clear to me that the Tasman

133. Document A33, p 55

134. Ibid, p 56

135. Ibid, p 71

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proposal had gone to such a stage that the Government, from which the Maori would have to obtain their finance, favoured the Tasman scheme rather than any alternative, but if the Crown and the Maoris joined together in a scheme close to Kawerau as they are doing in other parts of New Zealand they could command a very high stumpage. There is one major utilization plant, the Directors of which admit that raw material will always be shorter than the demand they will have. They will have a ready market and all the desirable physical features will be in favour of such a forest.¹³⁶

Next, in the course of cross-examination, Mr Dillon, for Tasman, suggested that Mr Groome would not recommend that the Maori landowners try to finance the forest. Mr Groome contradicted him, saying:

If there was any hope of getting finance I think it would be an excellent idea. There is only one source of finance, and that is from the Crown, and they have made it quite clear that they won't provide it.¹³⁷

Mr Dillon later suggested that, since Mr Groome had 'recommended' the current joint-venture scheme, he could not recommend the 'North Auckland' (Woodhill) lease scheme for the Tarawera Valley land. Mr Groome again explained his position: 'I can't recommend it here because the Crown have made it so patent they won't contemplate the scheme. I am attempting to assist the Court in finalizing this scheme.'¹³⁸

At the conclusion of Mr Groome's re-examination by Mr O'Sullivan, the judge asked if, from his experience in the Waiariki district, Mr Groome had formed an opinion on whether it was 'in the interests of the Maori to alienate by way of sale or . . . preferable to alienate by one of the lesser forms of alienation such as leasing?'¹³⁹ Mr Groome replied that, due to the increasing value of land in the district, especially for forestry purposes, 'it is probably in the Maoris interests to retain some control of the land and preferable for him to lease or include it in a scheme such as this provided they get the right terms'.¹⁴⁰

6.10.5 Mr O'Sullivan's closing submissions

It was seen earlier that, both times that Mr O'Sullivan sought to elicit information about the Woodhill lease during cross-examination, he was criticised by the judge, who indicated that he had been closely involved with the Woodhill situation and considered that the purpose of the lease negotiations there – to plant forest to prevent sand drift – rendered its terms irrelevant for the Tarawera Valley situation.¹⁴¹ In his evidence to the Waitangi Tribunal, Mr Groome

136. Document A33, pp x4-x5

137. Ibid, p 1B5

138. Ibid, p 1C3

139. Ibid, p 1D3

140. Ibid

141. Ibid, p Q4

suggested that Mr O'Sullivan had not been well prepared on the subject of stumpage-based leases because he had expected the Forest Service to volunteer information about them to the court and to express a preference for such a lease of the Tarawera Valley Maori lands.¹⁴² The absence of that information and the Forest Service's preference certainly detracted from Mr O'Sullivan's concluding statements to the court, where he argued that the 'Grainger lease' concept should be investigated in connection with the Tarawera Valley Maori land. Describing it as 'the most important facet of this application', Mr O'Sullivan said that, under section 438 of the Maori Affairs Act 1953, the court had to 'positively decide' from the heads of agreement that the scheme was for the benefit of the owners. However, he submitted, there was nothing in the evidence upon which the court could base an affirmative decision on this point and that was why he had raised the 'Woodhill scheme'. Consistent with the very general exploration of the topic that had been conducted in court, Mr O'Sullivan then summarised the 'leasing advantages' as being that:

- ▶ a company or corporation 'facilitates disposal of interest' – a reference to the owners' ability to form an incorporation which could then lease the land;
- ▶ the problem of the increasing fragmentation of land interests would be avoided – a consequence of the owners' incorporation; and
- ▶ the peppercorn rental and royalties would give the owners 'reasonable participation in land potential'.¹⁴³

Elaborating on that last point, Mr O'Sullivan emphasised that, while the success of the proposed joint venture depended on the suitability of the land for growing trees, it was proposed that the Maori party, who was to contribute 50 per cent of the land, would receive only 10 to 14 per cent of the returns. That outcome, he said, did not give sufficient recognition to the fact that land increases in value while development expenditure 'is relatively static' and 'made only once'.¹⁴⁴

The solution urged by Mr O'Sullivan was that the court ensure 'an active investigation' was conducted into the Woodhill lease's possible adaptation as an alternative 'prototype for disposing of or utilising large Maori unproductive blocks'. Such an investigation could occur in one of two ways, he said: either the court could obtain independent expert assistance on the matter before reaching a decision on the application or it could grant the application and require the Maori Trustee to ensure that the investigation was conducted before the land could be dealt with in any way.¹⁴⁵ Mr O'Sullivan emphasised the public interest in the court being fully informed before making its decision on an application about a 'prototype' to which Government departments were committed. Pointing to the Crown's failure to give evidence of the log prices that would be payable to TFL by Tasman, and the resulting uncertainty as to

142. Oral comment made by Mr Groome during questioning by Dr Harrison, 8 June 2000

143. Document A33, p 1x5

144. Ibid, p 1x6

145. Ibid

the consideration due to the Maori landowners under the Tasman proposal, Mr O'Sullivan submitted that 'making haste slowly' was the appropriate course. It would be 'unsafe, unwise and inequitable', he said, for the court to 'accept without qualification the Tasman proposal'.¹⁴⁶

6.11 THE INCLUSION OF ALL 40 BLOCKS?

6.11.1 Tasman's and applicant's reasons for inclusion

A feature of Tasman's case was its emphasis on all 40 blocks being needed for the forestry venture. Tasman and the applicant also highlighted the difficulties that would face any Maori owners who choose to retain any blocks. This two-pronged argument was aimed at overcoming the opposition of Mr McGregor's clients, especially the Savage-Edwards group, who wanted to retain land in the centre of the proposed forest.

Mr Schmitt was very clear that the exclusion of any blocks from the proposed forest area would have a detrimental effect on the value of the remaining blocks:

The size of the forest itself as a total area and the observance of the natural boundaries of the area with everything within the forest coming within that natural boundary, constitutes two factors, one of sheer size as such, the other of integrated convenient and most economic working operation of the forest, which do affect the value of the forest and the forest land as a whole and therefore of course the value of individual blocks or acres of land within it.¹⁴⁷

Asked by Mr McGregor about the possibility of excluding blocks in which his Savage-Edwards clients were owners, Mr Schmitt highlighted the fire risk that would be posed by excluding such blocks. While acknowledging that it would be 'botanically possible' to exclude the blocks, it would, he said, be 'highly undesirable' and 'dangerous to the whole scheme' to do so.¹⁴⁸ As well, he said, the need to fence and create a fire break around any area excluded from the surrounding forest would mean that there would be 'a lot of land not growing trees'.¹⁴⁹

It was noted in chapter 3 that the report compiled by Maori Affairs field supervisor Mr A Mitchell after a visit to the Edwardses' farm in January 1965 had been filed with the application to the court. The report highlighted the lack of legal access to the farm and the low level of recent farming activity there. In his cross-examination of Mr Savage, outlined in the next section, Mr Forsell obtained information that was wholly consistent with that report. As well, the judge made a site visit to the farm after the third day of the hearing.

As for the Matata 59B2B block on the edge of the proposed forest, which Mr McGregor's Ngahehu family clients wanted to farm, Mr Schmitt acknowledged that the fire risk would not

146. Document A33, pp 1x7-1x8

147. Ibid, p N7

148. Ibid, p F2

149. Ibid, p F3

be so pressing in that case and that power lines over the land would partially limit its utilisation for forestry purposes.¹⁵⁰ However, he emphasised the desirability of including this area in the proposed forest:

all parts of the land in this proposed forest area are important to the whole, either because of contributing volume or of contributing special aspects and/or being important in relation to economics or access to the whole forest. This particular piece of land in this area here can be and is of importance partly because it is close to the common point of egress from the point of view of location, also because it straddles the general egress from the forest area. Therefore I would say this is an important piece of land to the whole forest venture.¹⁵¹

Other factors emphasised by Tasman witnesses were the cost of surveying and fencing individual blocks in order to exclude them from the proposed forest, and the consequent difficulties obtaining access to them. (These factors were discussed in section 3.2.4.)

As will be seen in the next section, Mr McGregor argued that the court should not amalgamate the blocks in which his Savage–Edwards clients had majority interests on the basis that their property rights outweighed the reasons put forward by Tasman and the applicant for including all 40 blocks in the forestry joint venture. Mr Dillon had the last word in court, closing the case for Tasman after Mr McGregor had made his final submissions. He accepted that, as the title stood at the time, the Savage family group had majority interests in four of the 40 blocks involved in the application, and that the value of those interests, as a proportion of the value of the entire 40 blocks, was in the region of 2.5 per cent. Those figures, he said, raised the ‘interesting speculation’ as to what percentage the court must take into account in preference to the large majority of the owners.¹⁵² He then emphasised what, in his submission, were the fair terms of the Tasman proposal, highlighting that:

we have 38,000 acres of Maori land, we have 40 blocks, we have 4,500 owners approximately, and I understand we have 3,700 owners or thereabouts whose interests are less than £25 in value. We have the cost of survey and fencing those blocks which it is estimated will cost something like £77,000.¹⁵³

After identifying the Maori opponents to the application as representing less than 8 per cent of the owners, Mr Dillon continued:

I do not stress the percentages because I am prepared to say that all owners are entitled to have their say, but it is a matter of relativity and that all the owners must be considered when it comes to a question of what is fair and reasonable taking the whole area and taking all the blocks in as one.¹⁵⁴

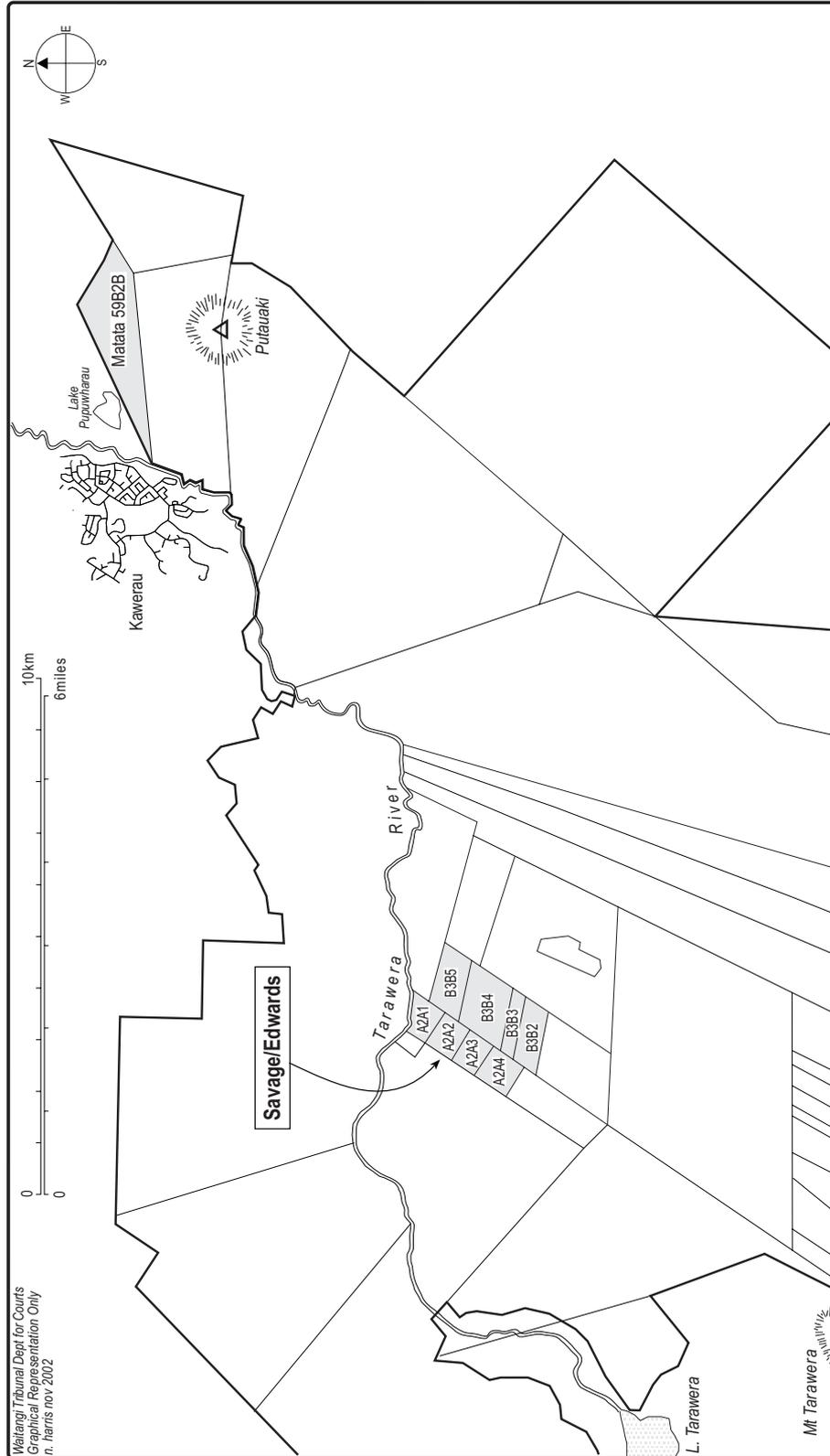
150. Ibid, pp 85–86

151. Ibid, p 85

152. Ibid, p 128

153. Ibid, p 129

154. Ibid



Map 6: Blocks in which the Savage-Edwards group owned shares, plus Matata 59B2B, sought by the Ngahehu group

6.11.2 The Savage–Edwards group’s reasons for excluding certain blocks**(1) Majority interests in the blocks**

Mr McGregor opened the case for his closely related Savage and Edwards family clients by stating that they wanted ‘no part in this scheme whatsoever’. He continued:

Their opposition was made known to all parties a long time ago and it was with something like annoyance that they found that notwithstanding the expressed notification of their opposition to the scheme, the blocks in which they were interested were in fact included in the application before this Court.¹⁵⁵

While Mr McGregor tallied his Savage–Edwards clients’ interests as comprising only 2 per cent of the 40 blocks, he emphasised that, because their interests were contained largely in 10 blocks, they owned a majority interest in seven of the 40 blocks.¹⁵⁶ In terms of acreage, Mr McGregor told the court that the blocks in which his clients had majority interests had a total area of 1013 acres and a total roll valuation of £4090.¹⁵⁷

In his main argument, Mr McGregor sought to persuade the court that its section 435 Maori Affairs Act power to amalgamate titles should not be used to override the wishes of owners who had majority interests in some of the blocks involved. In general support of that position, Mr McGregor referred to other provisions of the 1953 Act, including the well-known Part XXIII voting-based procedure for alienating Maori land, which, he said, revealed the Act’s general protectiveness of Maori land and Maori landowners’ rights. Mr McGregor also said that his clients believed that the Part XXIII procedure was the only way their land could be sold and that this was why they had not taken steps earlier, such as applying to the court for partition, to protect their position.¹⁵⁸ However, they wanted the court to exercise its powers to partition land so as to exclude from the proposed forest venture the blocks in which they claimed a majority share.¹⁵⁹ Soon afterwards, Mr McGregor put his argument in stronger terms. He submitted that the very nature of the proposal before the court, relying as it did on the composite use of sections 435 and 438 of the 1953 Act, was ‘almost an abuse of the procedure of the Maori Affairs Act’.¹⁶⁰ Those provisions, he said, were being used in an effort to compel unwilling owners into a commercial venture when that form of compulsion was ‘alien to British law as we know it’.¹⁶¹

155. Document A33, p 1E2

156. Ibid, p 1E6

157. Ibid, p 1Y1. It is not clear from Mr McGregor’s submissions whether those figures relate to the seven blocks he had identified (Pokohu A2A1, A2A2, A2A3, A2A4, B3B3, B3B4, and B3B5) or to those seven blocks plus Pokohu B3B2, in which he claimed his clients would carry the voting if two succession orders were obtained. As has been noted, Mr Dillon for Tasman contended that Mr McGregor’s Savage family clients had majority shares in only four blocks and that, on Tasman’s valuation of the land, those shares were worth approximately 2.5 per cent of the land’s value.

158. Document A33, p 1F2

159. Ibid, p 1F5

160. Ibid, p 1G3

161. Ibid

6.11.2(1)

Focusing more specifically on section 435, Mr McGregor argued that the section's reference to amalgamation where the whole area of land could be 'more conveniently or economically worked did not justify the court looking at the interests of all the owners as a composite group. Rather, he submitted, the court needed to examine the owners' interests block by block.¹⁶² Interestingly, the Deputy Secretary of Maori Affairs, Mr Souter, had lent some support to this argument when cross-examined by Mr McGregor. Mr Souter had been asked if he was suggesting that it was in the interests of the majority of the 40 blocks concerned 'that a minority group should give up their own block in which they have majority holdings for the good of the whole'.¹⁶³ Mr Souter replied:

I don't know about the majority holdings. I don't accept that proposition. I do say that where you are dealing with a large group of Maori owners and a large number of blocks that in many places the interests of the minority have to be sacrificed for the interests of the general majority.¹⁶⁴

In his closing submissions, Mr McGregor reiterated his 'ethical ground' that, as the owners of majority interests in certain of the blocks that were sought to be amalgamated with others, his Savage family clients were entitled to expect that their opposition to the application would prevail and not be subjugated to some public interest. More particularly, Mr McGregor argued that, when the court was considering the amalgamation of titles under section 435 of the 1953 Act, it could not act upon 'the apparent general good of the owners of all 40 blocks considered as a lump' but must give effect to the wishes of the owners of the individual blocks.¹⁶⁵ In support, Mr McGregor argued that the owners in each block were legally independent of the owners of adjoining blocks, and there was no duty to make the lot of adjoining owners any better.¹⁶⁶ This meant, he submitted, that if properly used section 435 enabled owners to group their lands in a way not apparent to them earlier. It was not 'a machine for impressing upon the owners a new type of situation which they themselves did not wish'. This led the judge to ask what would happen if one owner out of 5000 objected. Mr McGregor replied that he doubted that 'such a small minority' could upset the use of section 435. The judge then asked Mr McGregor what the 'denominator' was in applying section 435 and, specifically, whether it was 'a question of benefit or not'. Mr McGregor's reply reiterated the importance of the decision of the majority of the owners.¹⁶⁷

Mr McGregor also argued that if, contrary to his first argument, the public interest was material to the court's exercise of its section 435 jurisdiction, then there was insufficient public interest in the 'pure convenience' of having all 40 blocks included in the proposed forest

162. Document A33, p1F5

163. Ibid, p P3

164. Ibid

165. Ibid, p 1Y3

166. Ibid, p 1Y4

167. Ibid, p 1Y5

to outweigh the rights and wishes of his clients. Accordingly, Mr McGregor argued that his clients' blocks could and should be cut out from the forestry venture and that the public inconvenience of doing that 'must give way to the private property rights of the Savage family'.¹⁶⁸

Throughout Mr McGregor's closing submissions, Judge Gillanders Scott intervened to question their effects, particularly on the Savage family's ability to access and use their land if it was enclosed within a forest. He referred to the high cost of surveying and fencing the blocks, the lack of a concrete plan for the Savages to use the land, and the possibility of unpaid rates leading to the loss of the land. Mr McGregor appeared to agree that there was nothing before the court to show what the Savages wanted to do with the land.¹⁶⁹ He maintained, however, that all the matters raised by the judge were solely the owners' concern, not the court's under section 435. In support, Mr McGregor emphasised that there was no obligation on Maori landowners, just as there was none on Pakeha landowners, to positively utilise their land, and he argued that the court should not 'be moved by the fact that the land is idle'.¹⁷⁰ On this point, Judge Gillanders Scott said to him:

If I accept your premises when land is likely to be lost because rates are unpaid and charging orders made, it seems that this Court must close its eyes to the consequences, say, 'Let the Maoris stew in their own juice, let each block stand on its own feet and it does not really matter whether our neighbour sinks or swims.'¹⁷¹

Mr McGregor responded that the Maori Land Court could exercise its section 435 power of amalgamation where the owners of blocks which could be worked together agreed with the amalgamation or were so poorly represented that the court could infer their agreement.¹⁷² This position meant that he rejected the appropriateness of a suggestion made by the judge at one point: namely, that the court might make an order under section 435 'saying two or three of the Pokohu blocks will be excluded if fenced etc on or before a certain day'.¹⁷³

(2) Current use of, and plans for, the land

During Mr McGregor's opening submissions, Judge Gillanders Scott described as 'the ethical ground' the argument that the majority owners' wishes for their land should not be overridden.¹⁷⁴ He then said that Mr McGregor still needed to show that his clients' lands were being 'adequately used at the present time'.¹⁷⁵ By this statement, the judge was indicating his view that section 435 of the Maori Affairs Act 1953 authorised amalgamation even against the wishes of a majority of owners in particular blocks, unless their land was already being used

168. Ibid, p 1Y9

169. Ibid, p 1Y6

170. Ibid, p 1Y7

171. Ibid, p 1Y8

172. Ibid

173. Ibid, pp 1Y3-1Y4

174. Ibid, p 1F5

175. Ibid

6.11.2(2)

‘conveniently or economically’. While Mr McGregor had earlier sought to counter that line of approach by arguing that the law does not impose duties on owners to develop their lands, during the hearing his primary witness, Samuel Bowman Savage, had tried to convince the court that the families had viable plans for their land’s development. Mr Savage said that, when the family members had decided that they were not happy with the terms of Tasman’s offer, they realised that ‘the only way’ they could hold their land was to ‘do something to it, develop it, in some form’.¹⁷⁶ He acknowledged that not all the owners of the blocks in which the Savage–Edwards families had majority interests were opposed to the Tasman proposal, but he said that those who were had formed a committee to work the land. They had investigated various options which had turned out to be beyond their financial means to pursue, but recently a seed company had approached the family with a proposal to grow barley. Arrangements with the company could not be finalised, however, until the outcome of the court proceedings was known.¹⁷⁷ Mr Savage envisaged that the seed company would provide the materials and buy the produce and that ‘we would work the land ourselves’.¹⁷⁸

At that point, Mr Forsell, counsel for the applicant, cross-examined Mr Savage about the current access to the land over Tasman’s bridge and asked who, from the family, would work the land. Mr Savage said that he and two others (Messrs Tierney and A Edwards) would do the work and reinvest the profits in the land’s further development. He also said that he would not need to give up his job at the mill or his other farming activities in order to do that.¹⁷⁹ The judge then asked Mr Savage a series of questions which seemed to reveal some confusion on his part about the relationship between the plans of the Savage and Ngahehu families.¹⁸⁰ Mr Forsell followed, asking questions about Mr Savage’s current farming activities (on Ngahehu family land leased to Mr Savage).¹⁸¹ The judge continued that line of questioning and learned that Mr Savage had given up farming ‘in the pure sense’ and had reverted to grazing because of the cost of his family’s new house.¹⁸²

Judge Gillanders Scott then asked which land was being considered for growing barley. Mr Savage indicated that, while only land outside the proposed forest area had been discussed with the seed company, the Savage family wanted to use land inside the proposed forest area as well. That land was identified as Pokohu B3B3, very close to where the Edwards family home was located.¹⁸³ Mr Savage said that the family wanted to bring into the barley trial 100 acres of their interests, at a cost of £12 to £16 an acre.¹⁸⁴ When the judge asked how much money the Savages had to invest in developing the land, Mr Savage wrote down the answer

176. Document A33, p 1H1

177. *Ibid*, pp 1H1–1H2

178. *Ibid*, p 1H3

179. *Ibid*, p 1H4

180. *Ibid*, p 1H5

181. *Ibid*, p 1H6

182. *Ibid*, p 1H7

183. *Ibid*, p 1H8

184. *Ibid*, p 1J1

‘£100’.¹⁸⁵ Finally, the judge asked Mr Savage why he was not satisfied with the terms of Tasman’s offer. Mr Savage replied that his family group:

wished to retain the title to the land in any case and we thought that there was a possibility that Tasman would finance the Savage family in the pine growing, the same way as Lands & Survey and the Maori Affairs assisted the Maoris in breaking the land.

Mr Savage then agreed with the judge’s statement that he was not really opposed to the land being used for forestry but would prefer to see it ‘financed by Tasman with the Savage family owning the land’.¹⁸⁶

On the last day of the hearing, at the judge’s suggestion,¹⁸⁷ Mr McGregor called two members of the Edwards family, Emily Edwards and Alfred Edwards, to give evidence about the family’s current use of the land. By this time, the judge had conducted a site visit to the area. Mrs Edwards told the court that her late husband and their five adult children were owners in Pokohu B3B2 and that she had lived there for more than 40 years. Currently living with her were all of her children (three men and two women) plus her daughters’ two children.¹⁸⁸ Mr Edwards said that he and his two brothers had always lived on the land, that he had crops there, and that, for the past two winters, he and one brother had been ‘in the firewood business’.¹⁸⁹ In response to questions from the judge, Mr Edwards said that his two married sisters had been living with the family for the last few months.¹⁹⁰ He emphasised that his family did not want to leave but said that, if they were obliged to make a home elsewhere, he would like to live in Kawerau.¹⁹¹ Mr McGregor asked how the family felt about the proposals that Tasman had made in November 1965, including a proposal to supply the family with a:

Keith Hay 3-bedroom house, a freehold section in Kawerau, purchase of farm equipment at valuation, shares in the blocks being transferred to the company or sale, employment in Tasman and provision for your family to stay on the land for five years.¹⁹²

Mr Edwards said that the family would not leave the land unless they were ‘really forced to’ and that, in that event, ‘we should be offered something a bit better than we have been offered in the past’.¹⁹³ In response to questions from Mr Dillon, Mr Edwards agreed that, if his family were ‘treated right’, he would ‘perhaps unwillingly fall into line with what might be best for all the owners of the blocks’. Although he could not state the exact income he was making from the land, nor how much tax he had paid the previous year, Mr Edwards claimed, to the

185. Ibid, p 112

186. Ibid

187. See doc A33, pp 1Q2, 1R8

188. Document A33, p 1W1

189. Ibid, pp 1W1, 1W3, 1W7

190. Ibid, p 1W7

191. Ibid, p 1W2

192. Ibid, p 1W3

193. Ibid

6.11.2(3)

apparent disbelief of the judge and Mr Dillon, that his income from woodcutting was more than he would get from working for Tasman on the contract that it had offered him.¹⁹⁴ Mr Edwards also observed that Tasman's proposal required a 25-year wait 'before we get an income', whereas his farming and wood business already provided an income.¹⁹⁵ Twice, he said that what he wanted from Tasman was a lease.¹⁹⁶ Mr Dillon quantified the interest of Mrs Edwards' five children in Pokohu B3B2 as being $\frac{1}{360}$ of the land, or $\frac{3}{8}$ of an acre, and established from Mr Edwards that the family had never paid rent for the rest of the land they used.¹⁹⁷

A short time after Mrs Edwards and her son gave evidence, Mr Dillon told the court that further discussions had been held between Tasman and the Edwards family about the special compensation offers that the company had made, the details of which were before the court. Mr Dillon advised the court that Tasman was prepared to meet the family's latest request for compensation, and he indicated the nature of that offer. The judge then observed that the offer would be relevant only if the court decided to make the orders that had been sought. He also noted that the term of the offer allowing the Edwards five years' residence on the land might require the parties' further attention and left it to be worked out by Messrs Dillon and McGregor.¹⁹⁸

Soon afterwards, just before making his closing submissions to the court, Mr McGregor made plain to the judge that the Edwards family was prepared to agree to Tasman's offer of special compensation. The result, he said, was that he was instructed to disassociate his Edwards family clients from the Savage family. Accordingly, his closing submissions for the Savages did not relate to the Edwards family.¹⁹⁹

(3) The 'rent charge'

On the third day of the hearing, after Mr Savage had given evidence about the family's plans to develop the land, Mr McGregor called as a witness David Potter, then an 18-year-old bank teller. The gist of Mr Potter's evidence was that two days earlier he had been granted a 'rent charge' by his father over the latter's interests in three blocks covered by the amalgamation application and that he did not consent to those blocks being included in any amalgamation. This was significant because section 435(6) of the Maori Affairs Act provided that the court could not make an order amalgamating the title to any land affected by a 'lease, licence, mortgage, charge, or other encumbrance' without the consent of the person entitled to the benefit of it.²⁰⁰

194. Document A33, pp 1W3–1W8

195. Ibid, pp 1W3–1W4

196. Ibid, pp 1W4, 1W7

197. Ibid, pp 1W5–1W6

198. Ibid, pp 1X3–1X4

199. Ibid, p 1Y1

200. Ibid, pp 1J3–1L2

As it transpired, the rent charge element of the Savage family's case occupied at least two hours of the court's time. This was because, although Mr McGregor told the court that he took 'full responsibility' for the document creating the rent charge, several things about it appeared unusual. This led the judge to impound the document pending evidence that the rent charge had been made properly, at which point its effectiveness as an 'encumbrance' within section 435(6) could be tested.²⁰¹ Among the unusual features of the rent charge document and the situation more generally were that:

- ▶ Samuel Bowman Savage's name had been entered originally as the recipient of the rent charge but had been replaced with David Potter's name.
- ▶ David Potter had told the court that his father was a European (which was relevant to the question of whether court approval to the transaction was needed) but there was no other evidence to corroborate that statement.
- ▶ At age 18, David Potter was an 'infant' and, as such, was subject to legal rules about his ability to enter enforceable contracts.²⁰²
- ▶ Mr Savage had conceded that, 'to a certain extent', his own consideration of the possibility of a rent charge had been on the basis that it would be a 'method of stopping' his lands 'going into the Tasman proposal'.²⁰³

Eventually, after the judge and counsel had questioned Messrs Potter and Savage and the judge had considered counsel's legal arguments, the judge ruled that the document did not create an 'encumbrance' within the meaning of section 435(6) of the Maori Affairs Act 1953.²⁰⁴

6.11.3 The Ngahehu family's position

The Savage and Ngahehu families were connected through the marriage of Samuel Bowman Savage and his wife, Awarua.²⁰⁵ The Ngahehu family members represented by Mr McGregor did not own a majority share in any block but altogether owned about 400 acres spread across a number of the 40 blocks.²⁰⁶ They wanted the court to exchange those interests for the ownership of the 619-acre Matata 59B2B block at the northern edge of the proposed forest. (The suitability of that block for farming was noted at section 3.2.2.) While the family had no shares at all in Matata 59B2B, it adjoined their traditional family land, including the block, outside the proposed forest area, which the family leased to Mr Savage to farm.²⁰⁷

Before Mr McGregor opened the Ngahehu family's case, the judge asked Mr McGregor if his clients were among the owners in the Matata 59B2B block, saying that 'it would be quite

201. Ibid, pp 1J3–1J4

202. Ibid, pp 1J3–1K3

203. Ibid, p 1L4

204. Ibid, p 1M7

205. Ibid, p 1P1

206. Ibid, pp 1N2, 1N5

207. Ibid, p 1P2

contrary to the practice of this Court in a hundred years' for it to be suggested that people be relocated to a block in which they were not owners.²⁰⁸ In his opening submissions, Mr McGregor acknowledged that the Ngahehu group had taken few steps towards translating their hopes into reality. He explained that, while the Ngahehu group had made no application to the court and were as yet unsure of the area and value of their shareholding, they wished the court to amalgamate the titles to the 40 blocks and then partition out the Matata 59B2B block and place them in it. Mr McGregor indicated that he had been engaged by them only recently so had been unable to do more towards advancing their position than urge the court, at 'perhaps somewhat a late stage', to find a way to give effect to the family's wish, which, he submitted, amounted to a 'meritorious objection' under section 438 of the Maori Affairs Act to the court vesting the entire 40 blocks in the Maori Trustee.²⁰⁹

Special titles officer Mr Dye gave evidence on behalf of the Ngahehu family group, outlining the extent of their interests from his own research. The judge observed 'for the sake of the record' that there was no obligation on Mr Dye to work out 'the value and shares of persons who are seeking partition', and he asked Mr McGregor who was going to do that work. Mr McGregor replied that he understood that Mr Dye was volunteering to 'sort this out', to which the judge responded: 'I don't know. I want to come to a conclusion straight away, and I am not going to delay because of clients' lack of preparation for this case.'²¹⁰

When Mr Savage was recalled to give evidence for the Ngahehu family, he was cross-examined at length by Mr Forsell, for the applicant, about how the Ngahehu family planned to farm the Matata land and what they had done since they had learned of the Tasman proposal to arrange the successions that were needed to determine their land shares.²¹¹ One inference from Mr Forsell's line of questions was that it was unrealistic for anyone to expect Mr Savage to lead a Ngahehu family farming venture when he also intended to lead a Savage family farming venture and retain his job at the mill. A very clear implication from Mr Forsell's questions was that the Ngahehu family had no genuine interest in retaining or farming land in the area because they had taken only meagre steps towards that end since they had been made aware of the Tasman proposal. In particular, the family still did not know the area of their shares in the 40 blocks of land, despite claiming to have made efforts over the past three or four years to arrange successions. The following extract captures the tenor of Mr Forsell's cross-examination of Mr Savage:

Mr Forsell: Look you told me you started to try and ascertain the areas involved in the family four years ago. Do you mean to say it has taken four years to fix up the successions, to ascertain the areas and their value?

Mr Savage: Yes

208. Document A33, p N6

209. Ibid, pp 1N2-1N3

210. Ibid, pp 1N4-1N5

211. Ibid, pp 1P4-1P6

Mr Forsell: You have got nowhere. You can't tell the interest . . . I put it to you again, you have taken no real interest in these lands until Tasman came on the scene and made that offer, except perhaps lethargically dealing with a few successions, but you did nothing else?

Mr Savage: I wouldn't call it lethargic, sir.

Mr Forsell: Tell us exactly what you have done about these lands before Tasman came on to the scene two years ago?

Mr Savage: We didn't know what to do—

Mr Forsell: Talking?

Mr Savage: Being sent from pillar to post. . . We went to the Maori Affairs. We got lost. We got sent from one place to another place. We didn't know where to go.

At that point, Mr Forsell became highly critical of the fact that the Ngahehu family had not engaged a lawyer to arrange the necessary successions, despite Mr Savage's repeated claims that the cost of engaging a lawyer was the reason why the family had relied on its own efforts.²¹² Mr Savage was then questioned at length by the judge about the relationship between the Savage and Ngahehu families and their plans.²¹³ From his questions, it seems that the judge was suspicious that the two 'close knit' families had contrived to present claims to different parts of the proposed forest land, rather than to adjacent parts, in order to maximise the impact of their opposition to the application before the court. After ascertaining that the Ngahehu family had shares in various of the Pokohu C and B1F blocks, Judge Gillanders Scott asked Mr Savage if he had ever heard of the 'concept in your lifetime' where 'Maoris owning one block were taken out of it to allow complete strangers to come into that block?' At first, Mr Savage said that he had not heard of that happening but then said that he thought that he had heard of it in Kawerau A5. The judge said that he would have that checked.²¹⁴

6.12 THE COURT'S DECISION

The transcript of the court's hearing records that, after the four full days of evidence and legal argument on 2, 3, 4, and 8 August, the court sat on 15 August to receive further submissions and then it reserved its decision.²¹⁵ The Tribunal has no record of any further submissions made that day.

On 19 August, in open court in Rotorua, the court's orders were pronounced orally.²¹⁶ The effect of them was to grant the application under section 435 of the Maori Affairs Act 1953, thereby amalgamating the 40 blocks of Maori land into one block known as Tarawera 1. To a substantial degree, the application under section 438 was also granted, with title to the

212. Ibid, pp 1P5–1P6

213. Ibid, pp 1P7–1Q2

214. Ibid, p 1Q2

215. Ibid, p 4

216. Claim 1.1, app A

Tarawera 1 block being vested in the Maori Trustee subject to certain trusts.²¹⁷ However, where the application had invited the court to approve or fix the price at which the land would be alienated to TFL, the court did not fetter the Maori Trustee in that way. Instead, the trustee was empowered, ‘in his discretion’, to be a party to the proposed joint venture, provided that he secured in favour of the Maori owners any modification to the venture’s terms that he considered ‘should in justice be made’. The only relevant condition imposed by the court was that the term guaranteeing the Maori landowners a 10.8075 per cent minimum shareholding in the joint-venture company had to be retained.

The reasons for the judge’s decision were issued seven weeks later, on 10 October 1966, three days after the typed transcript of the hearing, which is some 300 pages long, was made available to the judge.²¹⁸ We outline those reasons at the start of the next chapter.

6.13 SUMMARY

The major points made in this chapter are:

- ▶ The application to the court was made by the court registrar and sought, first, to amalgamate the 40 blocks of Maori land into one, under section 435 of the Maori Affairs Act 1953, and, secondly, to vest the new block in the Maori Trustee, under section 438, in order that the trustee could sell it to TFL.
- ▶ The discussions at the Kokohinau Pa meeting and the earlier meetings were relied on as supporting the application.
- ▶ The issues before the court concerned the price to be paid for the joint venture’s produce, the value of the Maori land, the taxation concessions that the joint venture could attract, and the feasibility of leasing the Maori land instead.
- ▶ Objections to the scheme were made by the Savage–Edwards group, which owned the majority of the shares in several blocks and wished to exclude its land from the venture altogether, and by the Ngahehu family, which wished to have its interests transferred to a particular block and partitioned out of the scheme.
- ▶ The opponents of the scheme had no viable alternative proposals for the productive use of their land.
- ▶ The court largely granted the application, on the condition that the 10.8075 per cent minimum guarantee was explicitly incorporated into the agreement, but it also empowered the Maori Trustee to modify the terms in favour of the Maori owners.

²¹⁷ The trusts related to the trustee’s ability to manage and utilise the land and enter contracts in relation to it, his duty to safeguard ‘known graves, if any, of the Maori people, and all known settled historic or sacred places in or upon the land’, and his ability to be a party to the joint venture on behalf of the Maori owners of the Tarawera 1 block: claim 1.1, app A.

²¹⁸ Document A34, p1

CHAPTER 7

IMPLEMENTING THE JOINT VENTURE

7.1 INTRODUCTION

In this chapter, we complete our account of the events necessary for the implementation and operation of the joint venture. Taking a chronological approach, we begin with the Maori Land Court's decision to amalgamate the 40 blocks and vest the title to the land in the Maori Trustee, the reasons for doubting the lawfulness of that decision, and the legislation that was passed very quickly to negate those doubts. We then outline the Maori Trustee's inquiry into the fairness of the joint-venture proposal and the consequent change to the log price clause.

Next, we outline the creation of TFL and the New Zealand Forest Service's role in negotiating TFL's sales and management agreements with Tasman. The reaction of the Maori members of Parliament to the statute that authorised MIL's creation is then examined briefly, and it provides a stark contrast to their reaction to the Maori Affairs Amendment Act 1967, passed just days earlier. An explanation of the key rules governing MIL's operation follows, together with a description of the condition of its shareholders' register.

Finally, we outline the terms of the compensation package that was agreed between Tasman and the Edwards family and was paid to the family in 1968 upon them vacating their home and farm on the Pokohu B3B block.

7.2 REASONS FOR THE COURT'S DECISION

Issued on 10 October 1966, Judge Gillanders Scott's decision put it 'firmly on record' that it was not the Maori owners' neglect that was responsible for the Tarawera Valley land not being used 'to proper advantage'. Rather, it was because the land 'simply could not and even now cannot be used with advantage for agricultural or pastoral or horticultural purposes'.¹ Judge Gillanders Scott then explored the meaning of the phrase 'more conveniently or economically worked or dealt with' in section 435 of the Maori Affairs Act 1953 and rejected the notion that the 'the mere wishes' of the owners for the land's utilisation were relevant. Instead, he concluded, the phrase connoted the use of land 'to proper advantage' in order to overcome

1. Document A34, p 2

‘scarcity and poverty’.² Having stated that it had been ‘clearly demonstrated’ to the court that it would be appropriate to make the amalgamation order, the judge continued:

No person really testified or made any submission against the thought save that some owners represented by Mr McGregor contended (and he urged) that several lands should be excluded from the application and the owners thereof left to, as it were, work out their own salvation.³

In rejecting the Savage–Edwards family’s case, Judge Gillanders Scott did not refer at all to their majority interests in some blocks but gave heavy emphasis to the rent charge and the ‘real attitude of the family towards the Tasman proposal’. He dismissed the rent charge as ineffective, after describing it as a ‘shabby document’ and a ‘bombshell’ that had been produced on the third day of the hearing. The Savage family’s ‘real attitude’ was revealed, the judge indicated, by the following matters:

- ▶ the family did not start planning to utilise the land until after the Tasman proposal was made;
- ▶ some family members supported the Tasman proposal;
- ▶ the family did not have the money to develop the land;
- ▶ the family did not oppose the land being used for forestry but preferred to retain the ownership of the land and ‘get a share of the produce of the land in due course’; and
- ▶ the Edwards family were not gaining a livelihood from the land, their woodcutting activities began only after the Tasman proposal was made, and some of the family members seemed intent on driving the hardest possible bargain in return for them leaving the land.⁴

As for the Ngahehu family, the judge emphasised that they too had only started making plans to utilise the land after the Tasman proposal was made and that their farming plans would require a substantial level of financial investment – a level that was unavailable to them. As well, the judge drew attention to the limited time that Samuel Bowman Savage had to lead such a farming venture when he worked at the Kawerau mill and did other farming activities as well. Having devoted more than two pages of his judgment to what were described as ‘principles in valuation best to be followed rather than ignored’, Judge Gillanders Scott dismissed the valuation evidence given by Mr Warner for the Ngahehu family.⁵ He also noted the novelty of the Ngahehu family’s proposal that the 619-acre Matata B59 block be partitioned and they be put in it, when they had no interests in the block, their own interests totalled only 400 acres, and the views of the block’s owners about the matter were unknown. For all those reasons, the judge concluded that the Ngahehu claim failed.⁶

2. Document A34, pp 2–3

3. Ibid, pp 3–4

4. Ibid, pp 6–7

5. Ibid, pp 9, 13

6. Ibid, pp 8–9, 13

Having found no merit in the arguments of the Maori opponents of the application, Judge Gillanders Scott declared the court to be satisfied that an order under section 435 of the 1953 Act was 'meet and in the interests of the Maori owners'.⁷ He then turned to consider the section 438 application to vest the amalgamated title in the Maori Trustee, beginning by setting out a number of earlier judicial statements about the civil standard of proof, which is on the balance of probabilities. Having noted that competing evidence was given to the court about how to value the Maori land, Judge Gillanders Scott observed that section 438 'is clearly designed for the preservation of Maori land as such subject only to the limited and incidental powers of alienation contained in subsection 9 thereof and even then only within the terms of the vesting order'.⁸

He then elaborated on the circumstances in which section 438 could be used to effect an alienation of Maori land:

Alienation by way of sale is not precluded by the Statute. However, subsection 1 of section 438 is specific in that the Court may make such class of vesting order only if it has first satisfied itself . . . that the making of the order and the trusts therein are 'for the benefit of the owners of the land . . .'. Again a vesting order shall not be made if it appears to the Court that there is on the part of the beneficial owners, or any of them, a meritorious objection to the making of the order.⁹

The judge next referred to suggestions made by counsel opposing the application that the Crown supported the joint-venture proposal 'not because it was necessarily for the benefit of the Maoris concerned' but because the benefits to the Crown – of 'extra taxation' and 'associated fringe benefits' – would outweigh the disadvantages of an 'annual dividend return smaller than would be expected in an ordinary commercial transaction'.¹⁰ He rejected that notion, recording his satisfaction that:

the Crown and all others who have played a part in this case have disclosed everything reasonably required to ensure its proper despatch and conclusion and have demonstrated a compelling desire to assist the Maoris in every possible way.¹¹

Judge Gillanders Scott noted at this point that he had to confine himself to the evidence before him and that 'public policy is an unruly horse, and dangerous to ride'.¹²

The judge then concluded that there was nothing in the evidence presented to him 'showing or for that matter even tending to show that a forestry scheme is otherwise than in the best interests of and for the benefit of the Maori owners', and he proceeded to consider the

7. Ibid, p 14

8. Ibid, p 15

9. Ibid

10. Ibid

11. Ibid

12. Ibid, pp 15–16

terms of the trusts on which the land should be vested in the Maori Trustee.¹³ At this point, Judge Gillanders Scott quoted at some length from Mr Groome's cross-examination about 'any alternative scheme for utilization of these lands as forest', noting first that, 'Although the Court cannot go all the way with Mr Groome, a forester, called by Mr O'Sullivan, his evidence was at times somewhat telling.'¹⁴

The passages quoted from Mr Groome's evidence touched on the matters of log pricing, the financing of the forest by Maori, the valuing of forestry land, and the Otakanini lease negotiations.¹⁵ Judge Gillanders Scott continued:

It could well be advantageous [for] the Maori owners to grant a long term lease of these lands for forestry purposes and that is open to them since leases of Maori land for use exclusively or principally for afforestation purposes may now . . . be granted for terms exceeding 50 years or for that matter in perpetuity. However a lessee must be forthcoming – not merely a lessee prepared to afforestate but one with the facilities for cutting, milling and disposing of the produce of the land. However a suitable lessee must be available or within reasonable prospect, but nowhere in the evidence is there mention or for that matter a hint that one could be found.¹⁶

Commenting that the evidence given by Messrs Souter, Poole, Beachman, and Davis was 'both frank and compelling' and 'added both substance and weight to the detailed (sometimes colourful) evidence of Mr Schmitt', the judge concluded that the application had 'immense merit' and that he found it 'difficult indeed to find even a slight doubt that somewhere along the line and in the future the Maoris may suffer even a slight detriment' from it.¹⁷ He explained, however, that, because 'No section 438 order . . . should be so framed as to rob . . . the trustee of the usual discretions of a trustee', his order under that section was 'not quite in line with that sought in the application'.¹⁸ The judge then commended all counsel as being 'most helpful' and, noting that about 500 applications for succession to deceased owners had had to be filed and dealt with, he thanked the registrar for the 'immense amount of work which he and his staff undertook in default of the Maoris concerned to bring the ownership schedules reasonably up to date'. Finally, Judge Gillanders Scott recorded that:

much special legislation is needed to implement the 'Tasman' scheme (if the Maori Trust decides to proceed with treatings to that end) – and it is this Court's most respectful recommendation that that aspect of the matter be undertaken as promptly as the circumstances admit.¹⁹

13. Document A34, p 16

14. Ibid

15. Ibid, pp 16–17

16. Ibid, p 18

17. Ibid

18. Ibid

19. Ibid, p 19

7.3 THE PROSPECTS OF AN APPEAL

No appeal was taken from the Maori Land Court's decision, but a confidential memorandum dated 21 October 1966 from Deputy Maori Trustee Mr Souter to the Rotorua district office referred to 'the fact that appeals [had] been lodged' against the decision.²⁰ Other evidence presented to the Tribunal reveals that the Lanham group considered an appeal but decided not to pursue it. That is clearly stated in a letter to the Maori Trustee written on 17 October 1966 by the group's lawyer, Mr O'Sullivan. The letter gave the reason for the decision as being 'the large latitude' allowed to the Maori Trustee by the terms of the trust, coupled with the trustee's liability for negligent conduct during his trusteeship. It also commended two aspects of the joint venture for the trustee's consideration – the land valuation and the log price – with the observation that the trustee would be able to obtain information about the log price that was not available to Mr O'Sullivan's clients because it was privileged (as well as being too expensive for them to obtain).²¹ A final point of note from the letter concerns Mr O'Sullivan's statement that his clients' motive was to ensure that 'a fair bargain' was achieved, not to 'nullify the application' to the court. In support of this, Mr O'Sullivan stated that his clients might have succeeded in nullifying the application had they persisted in seeking the disclosure of the log sale agreement in court when Mr Forsell had claimed privilege for it but did not have the required certificate. According to Mr O'Sullivan, Mr Forsell had 'stated that he had been instructed to withdraw the application if the writer pursued his requests'.²²

The only evidence that the Tribunal has of the Savage family's consideration of an appeal is David Potter's statement to us that, once the Maori Land Court's decision was known, members of the group spoke to their lawyer, Mr McGregor, about an appeal but were told it would cost £1200, an amount that they could not afford, coming as it did on top of the £800 that Mr McGregor had charged for his services up to that time.²³

7.4 THE COURT OF APPEAL'S DECISION IN *HEREAKA V PRICHARD*

On 3 October 1966, some three weeks after the Maori Land Court had announced its decision and orders in the Tarawera Valley lands application but one week before it was to issue its reasons for them, the Court of Appeal issued its judgment in *Hereaka v Prichard*.²⁴ The case originated with a Maori Land Court decision to partition 168 acres of land on the shores of Lake Taupo so that its owners could sell residential sections. As part of the subdivision scheme, the court relied on section 438 of the Maori Affairs Act 1953 to vest a number of the

20. Document B1, vol 2, p 18

21. Ibid, pp 95–96

22. Ibid, p 95

23. Document A19, para 13

24. *Hereaka v Prichard* [1967] NZLR 18 (CA)

sections in three trustees for certain purposes, one being to transfer an area of approximately 23 acres to the Taupo County Council for recreation reserves.²⁵ The purpose of the reserves was to provide both access to the lake to the owners of back sections and amenities for the public at large. A family of owners that was dissatisfied with the partition scheme brought a Supreme Court action against the chief judge of the Maori Land Court and others, alleging that the court had no power under section 438 to make the orders that it had made. The chief justice of New Zealand heard the case and dismissed it. The family then appealed to the Court of Appeal, where the sole issue was whether the Maori Land Court had jurisdiction under section 438 to vest land in trustees for the purpose of transferring it to the county council for recreation reserves.

Each of the three Court of Appeal judges delivered a separate judgment but they were unanimous in allowing the appeal, thereby overturning the chief justice's decision. The president of the court, North P, accepted that the provision of recreation reserves was necessary for the success of the subdivision scheme and that, in a sense, anything done by the Maori Land Court to further the scheme could be said to be 'for the benefit of' the Maori owners. Focusing on the words of section 438(1), however, he found that it was an 'inescapable conclusion' that the declared trust in favour of the Taupo County Council was 'really a trust providing for the alienation of the land to a stranger, and it cannot possibly be said that the land is held on trust for the benefit of Maoris'. Describing the trustee's power of alienation conferred by section 438(9) as 'clearly . . . an incidental power', North P explained that 'there must first of all be a trust under which the land is held for the benefit of Maoris'. However, 'in the present case the trust clearly is intended ultimately to benefit members of the public at large', with the result that the Maori Land Court had exceeded its jurisdiction.²⁶

Justice Turner undertook a careful grammatical analysis of section 438 and held, first, that it authorised orders imposing trusts on the land, which was to be held (as opposed to alienated) subject to those trusts.²⁷ Further, he held that the words 'for the benefit of Maoris' in section 438(1) bore their legal meaning; namely, that Maori must be the *cestuis que trust* (beneficiaries) of the trust.²⁸ Therefore, his Honour held, 'It is in my opinion impossible to say that, because they indirectly benefit by the setting up of the trust in some way other than as *cestuis que trust*, the trust is for the benefit of Maori.'²⁹ On the meaning of section 438(9), Justice Turner stated that the subsection implied an incidental power of sale where alienation may become necessary by virtue of particular circumstances. However, it did not enable

25. By the terms of the court's order, the trustees were required to effect the transfer (ie, they had no discretion in the matter).

26. *Hereaka v Prichard*, p 28

27. *Ibid*, p 34

28. The subsection authorises the making of an order vesting land in any trustees, 'subject to such trusts as the Court may declare *for the benefit of* Maoris or the descendants of Maoris or for any specified class or group of Maoris or their descendants' (emphasis added).

29. *Hereaka v Prichard*, p 36

trusts to be set up 'whereunder the duty of the trustee is not to hold, but to alienate, the land the subject of the trust'.³⁰

Justice McCarthy described the essence of the matter before the court in these terms:

in determining whether there was a want of jurisdiction, we must have regard to the nature and substance of the particular order attacked. The documents before us make that substance perfectly plain. In form, the order is one vesting land in trustees on trust, but the revealed intention of the Court in making the order was not that the land, or even the proceeds thereof, should be held by trustees subject to the obligations of a trust, but instead that the land should be alienated, without compensation, to the Taupo County Council . . .³¹

His Honour found that the Maori Land Court's order 'was not, in its substance, an order to hold land upon trust for the benefit of Maoris; but was, instead, a device to effect an alienation not otherwise authorised by statute'. Agreeing with Justice Turner, Justice McCarthy held that 'the class of order intended by the section are trustee orders in the true sense, that is, orders which direct property (here land) to be held for beneficiaries who must be Maoris generally, or some specified class of Maoris'.³²

7.5 RAPID LEGISLATIVE RESPONSE – AMENDMENTS TO SECTION 438

On 20 October 1966, just 2½ weeks after the Court of Appeal's decision was issued – and 10 days after Judge Gillanders Scott issued his reasons for the Tarawera Valley decision – Parliament enacted legislation repealing section 438(1) of the Maori Affairs Act 1953 and replacing it with new provisions which:

- ▶ enabled the court to vest land in trustees subject to trusts when 'it is satisfied that it will be for the benefit, direct or indirect, of any Maori' (s 438(1));
- ▶ made plain that any trust declared under section 438(1) which authorised or directed the trustee to alienate or dispose of the land would be valid (s 438(1A));
- ▶ subject to the next provision, retrospectively validated any orders purporting to have been made under section 438(1) before 20 October 1966 and any actions done by trustees in reliance on such orders (s 438(2)); and
- ▶ preserved unaffected any existing proceedings in the Supreme Court, Court of Appeal, or Maori Appellate Court (s 438(3)).³³

As Dr Harrison submitted to the Tribunal, the amendment was 'plainly a response' to the Court of Appeal's decision in *Hereaka*.³⁴ Where the court had held that section 438(1)

30. Ibid, p 34

31. Ibid, p 39

32. Ibid

33. Maori Purposes Act 1966, s 6

34. Document B80, para 36

required a trustee to hold land on trust for Maori beneficiaries (*cestuis que trust*), the amendment allowed a trustee to alienate the land if that was for the benefit of Maori, in the sense of ‘for the good of Maori’. Further, the amendment validated all such orders made under the previous section 438(1) unless they were already the subject of appeals. While at first glance it may seem that the amending legislation was directed at validating the Maori Land Court’s decision in the Tarawera Valley lands case, the point is arguable and, in the Waitangi Tribunal, counsel did argue the matter. We return to it in chapter 8.

7.6 THE MAORI TRUSTEE

7.6.1 Identification of three matters to examine

Whether or not any appeals were ever lodged, Mr O’Sullivan’s 17 October letter to the Maori Trustee must have been in Mr Souter’s mind just four days later, when, as deputy trustee, he wrote to the Secretary to the Treasury outlining the trustee’s role with regard to the proposed joint venture and seeking certain information.³⁵ Mr Souter’s letter stated that the Maori Trustee must be satisfied, before entering into the joint venture on behalf of the Maori owners, that the terms were fair and reasonable to them. Indeed, Mr Souter noted that, if the trustee did not do that, ‘he will find himself under a legal liability’. He then identified three matters that were ‘in question’: the land value, the log price, and ‘The merits of leasing vis-à-vis a sale’.³⁶ On the land value issue, Mr Souter advised the Secretary to the Treasury that the Maori Trustee intended to obtain expert advice and would, if necessary, take the matter up with the other parties to the venture. With regard to the proposed log price formula, he noted that the Crown claimed privilege in court for the details of the Tasman–Crown Kaingaroa agreement that provided the basis for the price to be paid by Tasman for Tarawera Forest logs. He then asked for an assurance that:

the terms of the agreement between the Crown and Tasman are such that at the time when Tarawera Forests Ltd commences to sell produce to Tasman, Tasman will be paying at least the equivalent of the current market price for produce from the Kaingaroa Forest. If we cannot get this assurance, then it seems to me that appropriate words will have to be included in the Heads of Agreement to provide that Tasman shall pay not less than the current market price for all produce from Tarawera Forests Ltd.

The purpose of this memo is first to ask you if you can let us have such an assurance from the Director-General of Forests.³⁷

35. Deputy Maori Trustee to Secretary to the Treasury, 21 October 1966, p 1 (doc A22(a), p 29)

36. Ibid

37. Ibid, p 2 (p 30)

As for the relative merits of leasing or selling the land, Mr Souter's letter noted that these were discussed in court but the issue was never resolved. He then referred to a proposed lease between Parengarenga A Incorporation and the New Zealand Forest Service, the terms of which required only a 'peppercorn rental of 6d per acre per annum', plus 'approximately 20% of stumpage rate', to be paid to the Maori owners.³⁸ After noting the 10 per cent minimum guarantee to Maori owners under Tasman's joint-venture proposal, Mr Souter concluded by stating his request on this matter: 'The Maori Trustee would like the Director-General of Forests to confirm that the estimated return to the Maori owners from Tarawera Forests Ltd is at least as favourable as could be expected from a lease on the terms mentioned.'³⁹

7.6.2 The land valuation

(1) *Obtaining a land valuer*

A filenote by Mr Souter dated 20 October 1966 records that two days after the court's reasons for its judgment were given, he telephoned the Valuation Department to obtain a recommendation for a suitable valuer to be employed by the Maori Trustee to report on the Tarawera Valley Maori lands. The valuer to whom he was referred was not available to do the work but recommended Mr J R Sharp, 'the Head Valuer for Wright Stephenson, Hamilton'. Mr Souter then contacted the manager of the Hamilton branch of Wright Stephenson, explained the Maori Trustee's requirements, and obtained an assurance that Mr Sharp would be available. He then sought confirmation from the Valuation Department that Mr Sharp was a registered valuer. This was obtained from a department officer who did not know Mr Sharp but who expressed 'complete confidence' in the judgement of the valuer who had recommended him. According to Mr Souter's filenote, the Valuation Department officer nevertheless recommended that confirmation be obtained from the Valuer-General that Mr Sharp 'was completely satisfactory as a valuer'.⁴⁰ The Tribunal has no evidence as to whether Mr Souter took that last step. However, the day after the filenote was made, Mr Souter sent a confidential memorandum to the Rotorua district officer stating that Mr Sharp had been asked to give his opinion on the value of the Maori land and asking that Mr Sharp be given 'any assistance he asks for'.⁴¹

(2) *The Maori Trustee's valuation requirements*

The Crown's historian, Dr Battersby, referred to instructions dated 20 October 1966 from Mr Souter to Wright Stephenson, which specified that:

38. The 99-year lease, when finalised in November 1966, provided 18.75 per cent stumpage for the Maori owners and a review after 25 years.

39. Deputy Maori Trustee to Secretary to the Treasury, 21 October 1966, p 1 (doc A22(a), p 31)

40. Document B1, vol 1, p 97

41. Ibid, vol 2, p 18

THE TARAWERA FOREST REPORT

7.6.2(3)

an assurance was required that the valuations given by Tasman were fair, and in assessing this the special circumstances of the block needed to be considered, (i) that the 38,067 acres of Maori land was in one title, (ii) the land's suitability for afforestation and (iii) the closeness of the land to Tasman's mill.⁴²

The brief valuation report prepared by Mr Sharp on 5 April 1967 contains further, but not entirely clear, evidence of the terms on which he was engaged by the Maori Trustee. The report opens with these words:

Following your request for me to inspect the land comprising 38,067 acres situated in the Tarawera Valley I now report as follows.

Extensive investigation has been made by me to arrive at the decisions which affect the value of this land to the Maori owners and also the suitability for afforestation or alternative farming systems also the lands situation in relation to the Tasman Mill at Kawerau.⁴³

Towards the end of the report, however, is this statement: 'This report is in the nature of a general comment only, as requested without having completed detailed inspections or valuations of the individual Maori blocks.'⁴⁴

On that evidence, the Tribunal concludes that Mr Sharp did not actually visit the Maori land amalgamated as the Tarawera 1 block but provided his assessment from information supplied to him about the land, including the method used by Tasman to value it, and from his own knowledge of factors relevant to land valuation. Crown counsel suggested to Mr Groome that the 'extensive investigation' that Mr Sharp had said he had conducted was borne out by the fact that, before he submitted his valuation report, he wrote to the Maori Trustee apologising for the delay involved in obtaining more information. Mr Groome acknowledged that he had seen that letter but remained critical of the quality of the valuation report.⁴⁵

(3) The valuation

The five conclusions reached by Mr Sharp made up the larger part of his report but occupied less than one typed page. Stated even more briefly, they were as follows:

- ▶ the Tarawera Valley generally was regarded as unsuitable for grassland farming because of the 'coarse rubbly nature of pumice soil', by contrast with the land about Rotorua, Taupo, and Kinleith (which was generally considered ideal for either grassland farming or afforestation) and where there was keen competition by farmers and timber concerns to purchase land that was suitable for both grass and forest;

42. MA58/2/1, pt 3 (cited in doc A10, p 129)

43. Document B1, vol 1, p 87

44. Ibid, p 88

45. Tribunal notes of questioning of Mr Groome on document B70, 18 September 2000

- ▶ the fact that the land was available to be purchased in one title made negotiating simpler for the purchaser and ensured the purchase of all the land in the area, which would have been difficult to achieve otherwise;
- ▶ the Maori land was all within 18 to 20 miles of Tasman's mill, and there was generally a downhill slope for log cartage from all areas of the land to the mill;
- ▶ all the land, even that at higher altitude and the steeper areas, was considered ideal for growing trees; and
- ▶ the price offered for the land was generous, there being no comparative sales within the locality to support figures as high as those that were offered, and the method by which the price was arrived at was 'very sound . . . and fair for the respective owners'.⁴⁶

7.6.3 Log price

The log price formula in the draft heads of agreement provided that Tasman would pay for Tarawera Forest produce an amount equal to the average cost to Tasman of equivalent material delivered to the Kawerau mill from all other sources.⁴⁷ The Maori Trustee, having asked the Treasury in October 1966 for an assurance from the Director-General of Forests that the formula meant that Tasman would be paying TFL 'at least the equivalent of the current market price for produce from the Kaingaroa Forest', had to wait more than six months for a response. In December 1966 and January 1967, Mr Souter wrote again to request a response and, late in February 1967, the Maori Trustee, Mr JM McEwen, himself wrote to the Treasury in strong terms:

As no reply has yet been received, I feel that I should impress upon you the fact that nothing which has taken place so far commits the Maori Trustee to the Tasman project. . . . the Court order leaves it open to the Maori Trustee to make other arrangements which would be in the best interests of the owners.

As Maori Trustee, I have a legal duty towards the owners, and to nobody else – Crown or otherwise. It is my duty to ensure that the proposed Tasman project is the most profitable use to which the land can be put. Until I receive the assurances that have been asked for, I cannot satisfy myself or the owners that this is so. As you know, there is a section of the owners, backed up by a solicitor who is hostile to the Maori Trustee, who will seize any opportunity that presents itself to attack the actions of the Maori Trustee, and in common prudence, I must be sure that the proposed price-fixing arrangements are in the best interests of the owners.

In the meantime, the terms of the Court order are not being fulfilled and a further lapse of time could become embarrassing. Unless the required assurances are given fairly soon, I

46. Document B1, vol 1, p 88

47. See, for example, Maori Trustee to Tasman, 9 May 1967, p 2 (doc A22(a), p 35)

will be faced with the necessity for seeking some other means of using or disposing of the land in the best interests of the beneficial owners.⁴⁸

A few days later, Mr Poole, on behalf of the Minister of Forests, wrote to the Minister of Finance observing that the finalisation of the Tarawera Forest scheme depended on the Treasury providing 'an assurance that the scheme is financially sound', that the Maori Trustee had already approached Treasury about this, and that it was desirable to 'clear this matter as soon as possible'.⁴⁹ Dr Battersby records that the Minister of Forests wrote again to the Minister of Finance at the end of March and received a response, dated 12 April, that the Secretary to the Treasury would be directed to contact the Maori Trustee, 'to discuss the matter with him to ascertain if he sees any reason why the terms of the draft agreement as already approved by Cabinet may react in any way unfavourably to the Maori owners'.⁵⁰

Finally, on 5 May 1967, Mr Davis on behalf of the Secretary to the Treasury wrote to the Maori Trustee to 'confirm our discussions' of four days earlier.⁵¹ Later correspondence from Mr Poole to the Treasury Secretary reveals that he too was present at those discussions.⁵² By way of general introduction to the Treasury's position, Mr Davis's letter noted that, as 'a party to the development of the proposals', the Treasury would recommend the proposals' acceptance by the Government 'as being fair and equitable to all parties concerned'. On the log price issue, Mr Davis did not, as originally requested, convey an assurance from the Director-General of Forests but instead emphasised the Treasury's own view (which was likened to the adage 'a bird in the hand is worth two in the bush') that the value of an assured purchaser of the forest's entire output at a 'fair price' outweighed 'the risk' that some wood might be sold at a higher price but some might have no market or a limited market:

The Agreement provides an assured outlet of [*sic*] the produce of the forest, properly managed, at the average cost of similar produce at the Tasman mill. It could perhaps be argued that this may not be the maximum price obtainable when the forest is being harvested. As against this the surety of an outlet must be weighed. Also there is no certainty of another user at a higher price for a forest established on the plantable area of the Maori land in question. There will undoubtedly be varying opinions on the question of utilisation and marketing in the period from 10 years ahead but these uncertainties must be considered against the certainty and the guarantee in respect of Maori participation set out in the draft Heads of Agreement.⁵³

48. Document B1, vol 1, p 90

49. *Ibid*, p 89

50. Minister of Finance to Minister of Forests, 12 April 1967 (cited in doc A10, p 132)

51. Secretary to the Treasury to Maori Trustee, 5 May 1967, p 1 (doc A22(a), p 32)

52. Mr Poole's letter of 11 May 1967 to the Secretary to the Treasury refers to the Treasury's reply to the Maori Trustee as 'following a meeting with the Maori Trustee at which I attended': doc A22(a), p 36.

53. Secretary to the Treasury to Maori Trustee, 5 May 1967, p 1 (doc A22(a), p 32)

The letter continued that, in light of the statements made by Tasman representatives about the scheme, the Treasury would be:

quite prepared to say that on the basis of certainty the proposal as established will promote the best interests of the Maori owners. Anything beyond this is rather in the realm of speculation.

However, in a departure from the Treasury's previous position, Mr Davis then wrote that the Treasury would agree that:

if the Maori Trustee so wishes in the discharge of his responsibilities to raise again with the Tasman Company the question of a revision of the pricing clause to provide either for market value of similar produce at the date of harvest or an average value of produce at Tasman mill excluding the original log sale agreement with the Crown, we would be prepared if requested to participate in such discussion.⁵⁴

Mr Davis's letter was copied to the Director-General of Forests, who, six days later, wrote to the Treasury Secretary to clarify certain points. In particular, Mr Poole wrote:

Since it might be assumed from your letter to the Maori Trustee that the Forest Service accepts all the conditions in the Heads of Agreement as being 'fair and equitable to all parties concerned' I must make it clear that, in the opinion of the Service, the price fixing clause contained in the Heads . . . is the very antithesis of being equitable to a forest owner.⁵⁵

Citing extracts from his evidence to the Maori Land Court, Mr Poole summarised his attitude in court as being that he supported the scheme in principle but that he 'did not agree that forest owners would get reasonable prices for their wood under the scheme'. He observed that he could not pursue the point that he had made to the court – namely, that it might be argued that the Kaingaroa price was low – because 'it was not possible to divulge to the Court' the terms of the sale agreement between the Crown and Tasman. He continued:

The pricing clause is such that the pulpwood sold under the original sale between the Crown and Tasman will have a dominating influence on returns to the owners of the proposed Tarawera Forest. You will recall that in the sale document between the Crown and Tasman there is a clause 6(3) which reads: 'For the purpose of deciding what variation (if any) is reasonable in the price to be paid for logs to be used as pulpwood . . . , regard shall be had to the Basic Concept of the Sale . . . '.

'The Basic Concept of the sale is to sell logs carrying as low a stumpage as possible consistent with the recovery of growing costs so that the enterprise itself may operate at a high profit rate and form as an [*sic*] attractive an investment as possible.'⁵⁶

54. Ibid, pp 1–2 (pp 32–33)

55. Poole to Secretary to the Treasury, 11 May 1967, p 1 (doc A22(a), p 36)

56. Ibid, pp 1–2 (pp 36–37)

Mr Poole again described that method of stumpage as ‘the very antithesis of equitability’, observing that it ‘could only be used by the State as an owner of timber and as a seller in its endeavours to start up an industry on a subsidised basis’. He concluded by stating that the amount of pulpwood sold under the first sale to Tasman ‘must always be a much greater amount than will be obtained from Tarawera Forest’, so that the prices for that Kaingaroa wood had to ‘form the main basis’ for the prices obtained for pulpwood from Tarawera Forest. ‘There is little doubt’, Poole concluded, that the effect would be to depress the stumpages obtained by the owners of Tarawera Forest, and that ‘Such depression could be of substantial proportions’.⁵⁷

There is no evidence that Mr Poole’s letter was ever seen by the Maori Trustee, but plainly he too was not satisfied of the fairness to Maori of the proposed log price formula and proceeded to negotiate with Tasman for its amendment. A letter from the trustee to the secretary of Tasman, dated 9 May 1967, recorded that the terms of the Kaingaroa sale agreement were not disclosed at the Maori Land Court hearing but that Mr O’Sullivan ‘argued strongly’ that the agreement was ‘particularly favourable’ to Tasman and that the effect of the proposed log price clause for Tarawera Forest produce would enable Tasman to pay less than market price for it.⁵⁸ The Maori Trustee then stated that he was not satisfied with this aspect of the proposed heads of agreement, even after discussions with the Secretary to the Treasury, and proposed an amendment to the log price formula so that the ‘equivalent price’ to be paid for TFL produce would exclude any equivalent material obtained by Tasman at a price which, in the opinion of the directors of TFL, was less than a fair market price.⁵⁹

Six weeks later, a Tasman board memorandum recorded that in recent discussions the Maori Trustee had accepted Tasman’s suggestion that the log price clause be amended so that TFL would have the right to receive ‘at its option, either a price based on the original “equivalent price” formula or a price which the parties agree is a fair market price’.⁶⁰ In his evidence to the Tribunal, Dr McEwen stated that Mr Poole had concerns about Tasman’s proposed new formula and raised them with the Deputy Maori Trustee but was told that the formula had already been agreed to.⁶¹

The final version of the log price clause in the heads of agreement provided that TFL could elect, at intervals of no less than 10 years, whether to receive as the price to be paid by Tasman for its produce:

57. Poole to Secretary to the Treasury, 11 May 1967, p 2 (p 37)

58. Maori Trustee to secretary, Tasman Pulp and Paper Company Limited, 9 May 1967, p 2 (doc A22(a), p 35)

59. Ibid

60. Tasman Pulp and Paper Company Limited memorandum concerning Tarawera Valley Afforestation, 21 June 1967, p 1 (doc A22(a), p 39)

61. Document B73, pp 24–25. Dr McEwen does not cite a source for this information. He states that Mr Poole’s concerns were with the meaning of ‘substantial’ in the alternative log price clause and with the election period being 10 years rather than five.

EITHER

(a) Such prices that the delivered cost of such forest produce to Tasman's mill at Kawerau shall at all times be the same as the then average cost of equivalent material delivered to Tasman's mill at Kawerau from other sources;

OR

(b) Such prices as may be agreed from time to time by Tasman and the Company being fair market prices having regard to sales in New Zealand of substantial quantities of forest produce concluded by parties negotiating 'at arm's length'.⁶²

7.6.4 Comparative merits of the joint venture and a lease

The Maori Trustee's letter of 21 October 1967 to the Secretary to the Treasury sought from the Director-General of Forests confirmation that the estimated return to the Maori owners from TFL would be at least as favourable as could be expected from a lease with a 'pepper-corn rental' plus stumpage of approximately 20 per cent to the Maori owners. The Treasury's tardy response, dated 5 May 1967, did not convey any such confirmation. Instead, it stated that, since the Maori Trustee had satisfied himself, by means of an independent valuation, about the price at which the Maori land was to be conveyed to TFL, 'presumably therefore' the question of the comparative merits of the joint venture and a lease did not really arise.⁶³ Mr Poole, in his subsequent letter to the Treasury Secretary, noted that the Treasury had not posed that question in writing to the Forest Service, but he made no protest about the answer that had been given by the Treasury to the Maori Trustee.⁶⁴ Since Mr Poole attended the discussions between the Maori Trustee and the Treasury Secretary that were confirmed by Treasury's 5 May letter to the trustee, his failure to protest about this matter could indicate his agreement with the Treasury's view. That conclusion is strengthened by the fact that Mr Poole's letter proceeded immediately to clarify just one matter – that of the log price clause. Mr Poole protested that the Treasury letter might imply that the Forest Service accepted the price as being 'fair and equitable to all the parties concerned'.⁶⁵

That the Maori Trustee accepted the Treasury's view is evident from the letter to Tasman of 9 May which conveyed the trustee's dissatisfaction with the log price formula. On the matter of a joint venture versus a lease, the letter simply repeats the Treasury's words: 'The Maori Trustee has satisfied himself that the price to be paid for the Maori land is reasonable and therefore that there is no need to pursue the question of leasing vis-à-vis a sale.'⁶⁶

62. 'Heads of Agreement between the New Zealand Government, Tasman Pulp and Paper Company Limited, The Maori Trustee, and John Charles White' 2 October 1967, cl 21(3) (doc A22(a), p 54)

63. Secretary to the Treasury to Maori Trustee, 5 May 1967, p 1 (doc A22(a), p 32)

64. Poole to Secretary to the Treasury, 11 May 1967, p 1 (doc A22(a), p 36)

65. Ibid

66. Maori Trustee to secretary, Tasman Pulp and Paper Company Limited, 9 May 1967, p 1 (doc A22(a), p 34)

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7.7

7.7 EXECUTION OF THE HEADS OF AGREEMENT – 2 OCTOBER 1967

A Tasman board memorandum of 21 June 1967 recorded that the completion of the heads of agreement 'is now of paramount importance', adding, in an apparent reference to the substantial amendments to the Maori Affairs Act 1953 that were enacted in November 1967:

In view of the rather controversial atmosphere surrounding the general subject of Maori land which exists in the country at the present time, it would seem desirable that all formal action necessary to launch the venture should be completed as soon as possible.⁶⁷

As a result of the inquiries and responses outlined in the preceding sections, once the log price formula was amended, the Maori Trustee was willing to execute the heads of agreement on behalf of the Maori owners of the Tarawera 1 block, and this occurred on 2 October 1967. The other signatories were Tasman, the Crown (through the Minister of Forests), and the Solicitor-General (as trustee for TFL before its formation).

7.8 INCORPORATION AND STRUCTURE OF TFL

TFL was also incorporated on 2 October 1967. In accordance with the joint venture's heads of agreement, TFL is a public company with an authorised capital of \$500,000 divided into 500,000 ordinary shares of \$1 each. Upon the company's formation, 502 shares were allotted to Tasman, 247 to the Crown, 247 to the Maori Trustee, and one to each of four Tasman nominees (a total of 1000 shares).⁶⁸ That share allocation ensured that TFL was a subsidiary of Tasman and so enabled Tasman to take and pass on to TFL the benefit of the tax concessions available for forest development.

The value of the 1000 allocated shares was accepted by Tasman, the Crown, and the Maori Trustee as part payment for the assets that they would transfer to the company, the balance of those assets being secured by TFL debentures earning 6 per cent compounding interest. The debentures would be convertible to shares, in amounts proportionate to the venturers' capital contributions to TFL, at the time that the company became able to pay the accumulated interest.⁶⁹

The first meeting of the board of TFL took place on 6 December 1967. The foundation directors were: Messrs Schmitt (chairman), McKee, RN Mason, and JM Mitchell (representing Tasman); Mr Poole (representing the Crown); and Messrs Barber and Dye (representing the Maori Trustee).

67. Tasman Pulp and Paper Company Limited memorandum concerning Tarawera Valley Afforestation, 21 June 1967, p1 (doc A22(a), p 39)

68. The last four shareholders were needed to satisfy the Companies Act requirement of a minimum of seven shareholders: see 'Heads of Agreement', cl 6(1)(b) (doc A22(a), p 45).

69. See 'Heads of Agreement', pt A(1)(b) (doc A22(a), pp 42-47)

Mr Schmitt retired at the end of 1967 and was replaced by Mr MH Kjar, who was elected chairman. At the end of 1968, once MIL was established and its representatives on the TFL board had been elected, Messrs Barber and Dye resigned and were replaced by Monica Lanham and Mr LR Grace.⁷⁰

On 28 May 1968, the Maori Trustee conveyed to TFL the Tarawera 1 block.⁷¹ It seems that more than £300 of unpaid survey liens on the block were written off by the Crown before the transfer.⁷²

7.9 MANAGEMENT AND SALES AGREEMENTS BETWEEN TFL AND TASMAN

In late December 1967 and early 1968, negotiations were under way on the two detailed contracts required by the heads of agreement: the management agreement and sales agreement required, respectively, by clause 19 and clause 21. The Forest Service was particularly concerned about Tasman's dual capacity as manager of the forest and purchaser of the wood from the forest, and wanted to provide appropriate safeguards to protect the interests of the other parties. It insisted that matters between Tasman as manager and Tasman as purchaser had to be authorised by the TFL board. As Crown witness Dr Andrew McEwen noted, this was 'succinctly expressed' in a note from Forest Service lawyer Mr Buist to Mr Poole on 9 April 1968 about a phone call from Tasman's secretary, Mr Clinkard, to Mr Buist.⁷³ During that call, Mr Buist wrote, 'it suddenly came home to [Mr Clinkard] that we really mean Tasman *never* to act as Tarawera's agent. . . . He says it will add to costs. You can comment that it subtracts from risks' (emphasis in original).⁷⁴ The Forest Service was also concerned about particular points in the sales agreement.⁷⁵

The Forest Service sent drafts of both agreements to the Crown Law Office for an opinion on 11 March.⁷⁶ Among other matters, the office was asked to confirm that it would be legally impossible, in terms of both documents, for Tasman to settle unilaterally, without reference to the TFL board, a range of matters in the sales agreement. These included elections for the disposal of wood surplus to Tasman's requirements; the minimum size of logs; the prices or election of pricing options; decisions on equivalent material; measurement of wood; the

70. Document B35, p 6

71. Document B1, vol 2, p 19

72. A memorandum of 18 August 1967 from the Deputy Maori Trustee to the Rotorua office states that the Treasury had already approved the writing-off and that the matter was to be submitted to the Minister of Lands: doc B1, vol 2, p 7.

73. McEwen refers to Clinkard as Tasman's lawyer: doc B73, p 26.

74. Buist to Poole, 9 April 1968 (cited in doc B73, p 26)

75. According to McEwen, these were: the basis for measuring the forest's produce; ensuring that ownership of the logs passed to Tasman when the tree was felled (to avoid the possibility that Tasman could delay delivering logs to the mill and thus, because of their deterioration, pay a lower price); the costs of logging and transport; and providing for the use of timber that had been damaged by fire or insects: doc B73, p 26.

76. The chronology in this paragraph is taken from document B73, pp 26–27.

price for damaged wood; and the method of payment. The Crown Law Office responded quickly, providing alternative wording to meet the Forest Service concerns. Subject to certain amendments and written confirmation of acceptance by the Minister of Forests and the Maori Trustee, the office advised that the drafts were acceptable to the Government and the Maori Trustee. Tasman, however, still disputed certain provisions in the management agreement, particularly those concerning its role as manager. The Forest Service again referred the matter to the Crown Law Office, which took up the points at issue with Tasman's solicitors and reported back to the Forest Service on 20 May with revised wording.

The two agreements were finally signed on 19 June 1968. As Dr McEwen noted, the four main features of the sales agreement were as follows (Dr McEwen's comments are summarised in parentheses):

- ▶ Tasman agreed to take all of TFL's production in perpetuity.
- ▶ The average price paid by Tasman for its wood from all other sources was set as the default. (Thus, TFL would benefit from any action other growers took to boost the prices paid by Tasman, without any effort by TFL.)
- ▶ If the market situation changed so that there were substantial sales of forest produce in arm's-length transactions, TFL could elect to switch to the market price. In making such an election, TFL was committed to it for a minimum of 10 years. (If market prices were to move above Tasman's average price, this commitment would seem a reasonable trade-off for the ability to move to a higher price.)
- ▶ If Tasman did not want all the forest produce from TFL, the company could sell the surplus elsewhere. If it did not elect to do so, Tasman was still required to take and pay for the produce. (This again gave TFL the opportunity to seek higher prices for some of its produce.)⁷⁷

At the end of July, after receiving his copies of the agreements, Mr Poole wrote to the Maori Trustee describing 'the substantial and indeed vital dispute' with Tasman over its status as manager:

We have succeeded in paring down the almost unlimited representative authority for which Tasman pressed very hard, so that Tasman has now been prevented from getting into a position as its legal agent to commit the Board. You will fully appreciate that neither the Crown nor the Maori interests could accept such a situation. The strenuous effort on the part of Tasman to resist appointment as an independent contractor, unable to spend the Company's money or pledge the Company's credit, has confirmed certain reservations I have held regarding the price arrangements set out in the Heads of Agreement and now embodied in the Sales Contract. You will remember that Treasury over-ruled the Forest Service on pricing matters. Because of this situation, the best I could do in giving evidence

77. Document B73, p 29

before the Court was to indicate that the Tasman arrangement was better than other possibilities such as leasing or mortgage finance, particularly in respect of the 22.5% guarantee being given by Tasman. The relative advantage I referred to applied of course to the offer made by Tasman as the sole negotiator in the market. The 'average cost to Tasman of equivalent material' under clause 3(1)(a) of the Sales Contract is of course greatly influenced by the current sales to Tasman by the Minister of Forests, which, as I informed the Court, the Forest Service argues is low (though Tasman considers it high). Recent sales of logs to Japan make the price very low and Maori owners could have a legitimate cause for complaint in the future.⁷⁸

7.10 THE TARAWERA FOREST ACT 1967

7.10.1 Parliamentary speeches on the Bill

The heads of agreement provided that MIL would be formed to succeed the Maori Trustee as a party to the agreement and to be a shareholder in TFL. On 24 November 1967, the Tarawera Forest Bill was passed into law, authorising the creation of MIL. The second reading of the Bill on 8 November occurred within hours of the passage through Parliament of the Maori Affairs Amendment Act 1967, referred to in chapter 2. The Minister of Maori Affairs, the Honourable JR Hanan, opened his explanation of the Tarawera Forest Bill by stating that the forest joint venture fitted in with the Government's policy of bringing Maori land into use at an accelerated rate. He continued: 'in so far as Maori people would be largely employed in developing this forest, it would be a case of the development of Maori land by the Maori people for the benefit of the Maori people.'⁷⁹

At the end of his speech, the Minister again used language which suggested that the Maori landowners were retaining a substantial interest in the Tarawera Valley land:

. . . I think we can say that the Maoris, to their great credit, have entered a scheme whereby their general interests in the land in that area and also Maori ownership can be retained as long as they so wish. Also, they will share with the pakeha a feeling of optimism and of satisfaction because, under this scheme, land which would have remained idle will now be brought into useful production.⁸⁰

Mr M Rata (the member for Northern Maori) then spoke and expressed the support of the Opposition for the Bill. He noted that the Minister had referred to the Maori

78. Poole to Maori Trustee, 29 July 1968, FS83/503, vol 5 (quoted in doc B73, p 27)

79. Hanan, 8 November 1967, NZPD, vol 354, p 4096 (doc B1, vol 2, p 46). The day before, the Minister had used very similar words in connection with the Maori Affairs Amendment Bill, about which he had said 'This Bill . . . will promote the development of Maori agricultural land by the Maori people for the Maori people and release Maoris in many respects from the economic straitjacket that they have been in for many years': doc B69, p 210.

80. Hanan, 8 November 1967, NZPD, vol 354, p 4097 (doc B1, vol 2, p 47)

landowners being granted certain 'privileges' (for example, relating to taxation exemptions and the waiver of company licence fees) and commented that 'it would be fair to say' that they were 'necessary incentives in such a long-term project'. Mr Rata continued:

This is a new concept, and those responsible for bringing about this scheme deserve the commendation of the House. A great deal of time and thought have gone into the scheme. Many owners have attended meetings, and the participation of those people and of Government departments is to the credit of all concerned. As the Minister said, this joint venture by the Tasman Pulp and Paper Company, the State, and the Maori landowners is to convert this unproductive land into a revenue-producing asset, and it shows what can be done in a spirit of co-operation. In providing for a forestry scheme, the Bill excludes reserves and cemeteries in which the Maori owners have an interest.⁸¹

Revealing his own understanding of the meaning of the venture for the Maori landowners, Mr Rata concluded his speech by stating:

This is a new concept for using unproductive land and giving Maori owners some participation, although it is limited to the election of board directors. However, it still means for them some degree of personal participation. This is in itself an important feature, because it is of no value to have an interest in a very large holding in which one has very little say.⁸²

Mr Reweti (Eastern Maori) spoke next, saying he was satisfied that 'the approval of the majority of the owners was obtained' and voicing his hope that the scheme would be the forerunner of further similar projects that would be of social and economic benefit to the people in the area.⁸³

Mrs Tirikatene-Sullivan (Southern Maori) was more fervent in her praise for the scheme:

I express my immense delight at the principles incorporated in this measure; it is a shining example of the type of project Maori landowners want to be involved in. It has the essential factors which I believe will evoke from Maori landowners throughout New Zealand their full participation in farming projects by which their idle Maori land might be utilised. . . . Probably one of the most significant features which has led to the success of the project under discussion today is that not only were the Maori landowners consulted, not only did they enter into deliberations, and not only did they give their consent, but they are also in fact actually participating in the project; we see full participation by the Maori landowners in what promises to be a flourishing business concern . . .⁸⁴

81. Rata, 8 November 1967, NZPD, vol 354, p 4097 (doc B1, vol 2, p 47)

82. Ibid, p 4098 (p 48)

83. Ibid

84. Ibid, pp 48-49

Mrs Tirikatene-Sullivan then listed five ‘vital features’ of the joint-venture project which she believed made it a ‘shining example of what Maori landowners want in preference to the Maori Affairs Amendment Bill’:

- ▶ ‘The Maori Land Court cleared the way by amalgamating 40 separate titles. That is the essential, initial, and vital part that I believe the Maori Land Court must play if land is to be developed.’
- ▶ The project showed that ‘multiplicity of ownership is not necessarily an obstacle to the utilisation of Maori land’.
- ▶ ‘The majority of the owners gave their approval.’
- ▶ ‘The presence of expertise – the expertise of the New Zealand Forest Service and of the Tasman Pulp and Paper group – . . . lending their insight towards the development of land that would otherwise be idle.’
- ▶ Adequate finance had been provided through the Tasman Pulp and Paper Company to get the project under way.⁸⁵

A further ‘very vital aspect’ of the project was then identified by Mrs Tirikatene-Sullivan; namely, that it conformed to ‘the Maori traditional concept of tribal trusts’ in that future generations would benefit from it. She concluded her speech by expressing her wish that the project would be a forerunner of other programmes of Maori land development, explaining:

This is preferable to an immediate sale. It embodies the significant aspirations of the Maori landowners. It is not the immediate return from land interests realised into ready capital in the urban situation that is sought, so much as the provision of continuing revenue . . . Significantly, too, Maori psychological needs are satisfied inasmuch as they are active participants in their land development schemes, whilst also satisfying their future aspirations. This self determination and participation in something where the land is being developed to bring in a return for them and their successors is essentially what Maoris want.⁸⁶

7.10.2 The Act’s main provisions for MIL

There were four reasons why special legislation was needed to create MIL:

- ▶ To overcome the obstacle to MIL’s incorporation under the Companies Act 1955 that was posed by the very large number of its intended shareholders and by the fact that many were unknown.
- ▶ To provide machinery for handling the shares and debentures of missing persons.
- ▶ To provide machinery for dealing with fractional interests worth less than £1.
- ▶ To exempt shareholders from taxation laws that would otherwise apply.⁸⁷

85. Ibid, p 49

86. Ibid

87. Secretary to the Treasury to Minister of Finance, 15 July 1966, p 3 (doc B1, vol 1, p 107)

The Tarawera Forest Act 1967 provides that the Maori Trustee is to establish the company as soon as practicable (s6(1)) and transfer to it all the shares and debenture stock allotted to him by TFL (s7). The ‘principal objects’ of MIL are ‘to administer its interests’ in TFL and ‘to receive all money and other property’ due to it from the Maori Trustee or TFL (s6(1)(d)), but it is not prevented from having other objects (s6(2)). The Act also provides that, upon the transfer to MIL of its TFL shares and debenture stock, it shall allot to every person with a beneficial interest in the amalgamated Tarawera 1 block one share (worth 50 cents) plus debenture stock worth \$1.50 for every \$2 he or she held in the nominal value of the block (s8(1)). Every interest in the block worth less than \$2 (including fractional interests) is to be aggregated and the Maori Trustee shall receive one 50-cent share plus \$1.50 of debenture stock for each \$2 worth of those interests (s8(2)). Anyone with an entitlement worth less than \$2 can then, within one year of MIL’s incorporation, make up the difference in cash and receive the equivalent in shares and debenture stock (s11(1)). The Maori Trustee is directed to offer the remainder of the aggregated shares and debenture stock for sale, in accordance with MIL’s articles of association, and to pay the proceeds, minus reasonable charges and expenses, to the company (s10).⁸⁸

With regard to the MIL shareholders who would never be located, section 12(1) of the Act provides that, 10 years after its incorporation, the company will prepare a list of ‘missing shareholders’. The shares and debenture stock owned by that group will vest in the directors of MIL and then be dealt with as follows:

- ▶ for a period of 10 more years, the directors shall hold the shares and debenture stock in trust for the missing shareholders;
- ▶ during that period, anyone who establishes a claim to any of the shares and debenture stock shall be registered as their proprietor; and
- ▶ on the expiry of the further 10 years, all the unclaimed shares and debenture stock shall be sold in accordance with the company’s articles of association and the proceeds held in trust for the company (s12(2)).

7.11 INCORPORATION AND STRUCTURE OF MIL

7.11.1 March 1968 meeting to appoint directors

On 16 November 1967, a week before the Tarawera Forest Act was passed, Deputy Maori Trustee Mr Souter wrote to a Mr Wilson advising him that, once the legislation was passed, the Maori Trustee would proceed to form MIL, but first a meeting of the ‘former owners of Tarawera 1’ block would be held ‘in the new year’ to find out who they wished to have as

88. Among the costs and expenses deducted by the Maori Trustee, it seems, was a fencing charge of £122 4s 11d: doc B1, vol 2, p7.

directors of MIL.⁸⁹ Early in January 1968, Mr Dye wrote to Mr Neutze of Tasman advising that the meeting would be on 23 March and that the venue, tentatively, was Kokohinau Pa. Mr Dye added that the Deputy Secretary of Maori Affairs would attend the meeting and bring ‘the owners’ up to date ‘in all respects as to matters in connection with the formation of [TFL and MIL], future policy and so on’. In closing, Mr Dye noted that ‘the matter of catering’ had arisen and that, with ‘2–300’ owners expected to attend, ‘Mr Eruera Manuera has estimated that the cost of suitable refreshments . . . will cost \$80–\$100.’ Mr Dye stated that the Maori Trustee could not find such a sum and ‘it is desired to know therefore if the cost could be treated as a preliminary or administrative cost of Tarawera Forests Limited’.⁹⁰

The Tribunal has no evidence of who attended the meeting, or who paid for lunch, but we have seen the notice, dated 4 March 1968 and signed by Mr Barber for the Maori Trustee, which advertised the meeting’s time (10.30 am) and venue (Kokohinau Pa) and described its purpose and who should attend. A note at the foot of the notice suggests that it was posted to all recorded owners of the Tarawera 1 block.⁹¹ The notice itself was one page of typed text and explained a number of things; namely, the origin of the Tarawera 1 block; that all the land in the joint venture was by then ‘under the control of a new company known as Tarawera Forests Limited’; that the meeting would ‘put the Maori owners fully in the picture’ about what had been done to that date and ‘the probable future course’ of MIL; the principal objects of MIL; the fact that directors would be selected at the meeting; how a person could be nominated before the meeting; and how ‘owners in Tarawera 1 with less than one whole share’ could become shareholders in MIL. The notice concluded by advising that the meeting was important and that ‘all persons entitled to be shareholders’ in MIL were urged to attend ‘if at all possible, although it should be understood that such attendance is at owners’ or prospective shareholders’ own expense’.⁹²

It is notable that in March 1968, when the notice was issued and the meeting held, the Tarawera 1 block remained vested in the Maori Trustee: it was not transferred to TFL until May 1968. This fact is reflected in the mix of language used by Messrs Souter, Dye, and Barber in the three communications outlined above to describe the Maori joint-venture party as, variously, the ‘former owners of Tarawera 1’, the ‘owners’, and the ‘owners or prospective shareholders’.

A memorandum of 26 March 1968, by Mr Clague for the Maori Trustee, contains the names of the seven MIL directors selected at the 23 March meeting.⁹³ Since the notice advertising the meeting had stated that ‘the present suggestion’ was for five directors to be selected, it seems plain that the meeting reached its own decision on that matter. Mr Clague’s

89. Document B1, vol 2, p 6

90. *Ibid*, p 3

91. The note reads: ‘The addressee’s share in Tarawera No 1 is shares out of a total of 128721.2. (Please retain envelope with notice)’ (ie, there was a blank space for the number of shares): doc B1, vol 2, p 30.

92. Document B1, vol 2, p 30

93. *Ibid*, p 26

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memorandum originally had attached to it the minutes of the meeting, but the Tribunal does not have them. Instead, with the memorandum we have a paper entitled ‘Summary of Forest Operations’, which appears to be the content of an address given at the 23 March meeting by Tasman’s Mr JM Mitchell.⁹⁴ It contains a considerable amount of information about the new forest: its planting, mapping, construction of roads for, clearing of land, ‘blanking and release cutting’, low pruning, extraction thinning, and labour.

7.11.2 First meeting of MIL directors

MIL was incorporated on 24 October 1968 and held its first meeting of directors on 17 December that year. The foundation directors were Monica Lanham (chairman), Ani Ngahoari Hunt, Lang R Grace, Richard Te Matua Park, Rupuha Wi Hapi, Tanira Gladding Fraser, and Rewi Wi Hare.⁹⁵ The Tribunal was told by MIL’s corporate manager, Tom Cass, that Tasman agreed to provide accounting and secretarial services to MIL (with Tasman’s lawyer Mr Neutze serving as company secretary) and to keep its register of shareholders until MIL received income from TFL, claiming ‘out-of-pocket’ expenses only.⁹⁶

7.11.3 Past and present condition of MIL share register

In 1966, when the 40 blocks of Maori land were amalgamated into the Tarawera 1 block, there were 4613 owners of the 128,721.2 shares in the block.⁹⁷ Mr Cass informed us that the Tarawera Forest Act’s provision for aggregated fractional interests resulted in 1783 MIL 50-cent shares and 1783 \$1.50 debentures being transferred to the Maori Trustee. While all the shares were subsequently sold by the trustee, Mr Cass reported that 1171 debentures remained unsold and were eventually returned to MIL in 1994. He also observed that the Maori Trustee seemed not always to adhere to the rules in MIL’s articles of association which restricted the sale of shares to ‘members of the bloodline and their spouses’.⁹⁸

MIL’s first annual report, to 31 October 1969, reveals that, of its authorised capital of 132,000 50-cent shares, 128,721 fully paid up ordinary shares had been issued. Mr Cass’s evidence was that, at the outset of MIL’s existence, there were 3316 shareholders and, of those, very close to 1000, owning nearly 30,000 shares, had never been located.⁹⁹ In Mr Cass’s view, while the

94. Document B1, pp 27–29. The handwritten numbers ‘161–163’ are on that paper and the number 167 is on the memorandum. This suggests that the two documents relate to the same event and that the absent pages were either the minutes of the 23 March meeting or another document relating to that meeting. Further, from its content, the summary of forest operations was compiled after 1967 but before 1970.

95. Document B2, p 5; doc B1, vol 2, p 26

96. Document B68, attachment deed 27 June 1994. In the Maori Land Court in 1966, Mr Souter gave evidence of this agreement: doc A33, pp P1C–P1d.

97. Document A4, vol 3

98. Document A29, p 1

99. Ibid, p 4; doc B68, p 2. Mr Cass put the outset of MIL’s existence at 1967 (doc A29, p 4), but it was not that early.

number of unknown owners in the Tarawera 1 block was not unusually high, the problems of locating MIL shareholders had been aggravated by the apparent failure, at the time the block was created, to identify the people with ownership in several blocks and amalgamate their shares.¹⁰⁰ Mr Cass also noted that in 1989, when MIL first began to receive income from TFL, it took over the accounting and secretarial functions from Tasman but discovered what were later called ‘major deficiencies and omissions in Tasman’s management’ of the share register. As reimbursement of the costs incurred by MIL in correcting these errors, Tasman paid MIL nearly \$60,000 in 1994.¹⁰¹

The twin problems of the fragmentation of shareholdings into uneconomic interests and the consequent increase ‘due to apathy’ in the number of unknown shareholders have continued to bedevil MIL.¹⁰² The company’s constitution was revised in 1997 so that holdings of fewer than 10 shares could be retained and transferred but not reduced, and holdings of 10 or more shares could not be reduced below 10. The provisions governing those to whom shares could be transferred were also made more specific. With an average price of more than \$100 per share in 2000,¹⁰³ these changes made it worthwhile for owners to consolidate their shareholdings. Even so, Mr Cass informed us that in August 2000, out of a total of some 5500 shareholders, 2540 were unknown.¹⁰⁴ It seems that the unknown shareholders own approximately 58,000 shares, worth some \$5.8 million.¹⁰⁵ In 2000, MIL was employing 1.5 fulltime equivalent staff members to identify and locate missing shareholders and to maintain the share register.¹⁰⁶ Also at that time, Mr Cass stated, the balance of funds held on trust for the unknown shareholders totalled \$9.15 million. Of that sum, \$4.7 million was owed to the 992 people for whom MIL did not have addresses in 1968 and who have not been located since.¹⁰⁷

7.12 TASMAN’S PAYMENT OF COMPENSATION TO THE EDWARDS FAMILY

During the first week of the Waitangi Tribunal hearing, the claimants, including Mr Potter (who made his individual claim at the end of that week), had no knowledge of the fact that the Edwards family had received compensation from Tasman for the loss of their home and farm. At the first hearing, the only evidence available was of the compensation offers which Tasman had made to the Edwards family at the Savage–Edwards meeting in November 1965

100. Document B68, p 1

101. Deed between MIL and Tasman Forestry Limited, 27 June 1994 (doc B68, app)

102. Document A29, p 3

103. *Ibid*, p 4

104. Document B68, p 2

105. Document A29, p 4. Document A29, which was presented by Mr Cass in June 2000, states that at that time there were 2896 unknown shareholders, and they owned 58,063 shares. Two months later, Mr Cass’s evidence was that the unknown shareholders numbered 2540, but he did not state how many shares that smaller group held.

106. Document B68, p 2

107. *Ibid*

but which were rejected.¹⁰⁸ Soon after that hearing, evidence became available that Alfred Edwards was seeking ‘something in the vicinity of £18,000 for improvements’ on the farm property which, in Tasman’s view, ‘on a liberal valuation, were worth no more than £2,300’.¹⁰⁹ It was not until the second week of the hearing that the Crown produced documentary evidence, which was accepted by the claimants, showing that, on 4 July 1968, seven members of the Edwards family agreed to accept cash compensation totalling \$10,560 from Tasman and that they received that amount in full on 25 October 1968, the day after they vacated their house on the former Pokohu B3B block.¹¹⁰

A notable feature of the compensation arrangement is that Tasman alone bore the cost of it, rather than including it as part of TFL’s forest development costs, as had previously been intended. The change of approach occurred at a meeting of TFL directors on 25 July 1968 when the chairman, Mr Kjar from Tasman, asked Messrs Barber and Dye (representing the Maori Trustee before MIL was formed) whether they could remember any discussion ‘during the negotiation stages of the joint venture’ as to how the cost should be borne. Neither man could recall any such discussion, but Mr McKee recalled that, at the Savage family meeting late in 1965, Mrs Lanham had objected to any compensation being included in TFL’s development costs. While several TFL directors commented on the logic of TFL paying the cost, the chairman wanted all to be satisfied that it was fair and equitable. Mr Barber then said that the only adverse thing about TFL paying the compensation would be that ‘the other Maoris were indirectly paying something to get the Edwards off the land’. Mr Mason from Tasman raised the further point that, if the Edwards family’s improvements had been included in the sale of the Tarawera 1 block, all the owners of the block on which the improvements were situated would have benefited by its increased value. At that point, Messrs Barber and Dye suggested that it would be a ‘most generous gesture’ if Tasman agreed to bear the cost of the compensation arrangement, and the chairman stated that ‘enough doubt had been raised’ on the merits of charging the compensation to TFL for him to conclude that Tasman alone should bear the charge. He then moved, and Mr Mason seconded, that the proposed resolution in the board’s papers – that TFL pay the compensation costs – be deleted. The minutes of the meeting then recorded that ‘Tasman Pulp and Paper Company Limited has signified its agreement to bear at its own expense the compensation, namely, the sum of \$10,560, payable to the Edwards family’ in terms of the agreement of 4 July 1968.¹¹¹

108. Document A4, vol 2, pp 56–57

109. Document B1, vol 1, pp 46, 51

110. Document B74, app 1. The agreement records that the payment is for the Edwardses’ house, outbuildings, and farm improvements, with \$5960 of the total amount being ‘for disturbance’. The amount received by each family member is also recorded.

111. Document B74, app 1

7.13 SUMMARY

The key points established in this chapter are:

- ▶ The Maori Land Court's reasons for its decision emphasised the practical difficulties that would face the Savage–Edwards group if the forestry venture proceeded without the blocks in which they were owners.
- ▶ The Maori Trustee satisfied himself that the land valuations were fair and that the question of leasing was not relevant, and he negotiated an addition to the heads of agreement specifying an alternative option, that of 'fair market price', for TFL to elect as the basis of the price to be paid by Tasman for Tarawera Forest produce.
- ▶ The heads of agreement was finally signed and TFL was incorporated in October 1967.
- ▶ The Tarawera Forest Act setting up MIL was passed in 1967 with strong endorsement of the joint venture by Maori members of Parliament.
- ▶ MIL made strenuous efforts to locate its missing shareholders, but in 2000 nearly half of its 5500 shareholders were still missing and it was holding shareholders' funds worth more than \$9 million and shares worth about \$5.8 million in trust on their account.
- ▶ The Edwards family accepted compensation from Tasman for the disturbance of leaving their home and the loss of the improvements that they had made to the land.

CHAPTER 8

**THE TRIBUNAL'S ASSESSMENT OF THE MAORI LAND COURT,
MAORI TRUSTEE, AND MAORI AFFAIRS ACT 1953**

8.1 INTRODUCTION

The Wai 411 claimants and the Crown disputed whether the Waitangi Tribunal can inquire into the Treaty consistency of decisions of the Maori Land Court and actions of the Maori Trustee. The claimants submitted that it is within the Tribunal's jurisdiction to make those inquiries, at least in the specific factual circumstances concerning the Tarawera Forest joint venture. They also submitted that the court's and trustee's conduct constituted independent and significant breaches of Treaty principle. The Crown denied that the Tribunal has the jurisdiction contended for by the claimants but maintained that this did not prejudice the claimants in any way. The reason, Crown counsel submitted, is that the Tribunal has undoubted jurisdiction in relation to so much of the other conduct, and the legislation, involved in the joint venture's development, finalisation, and implementation. Therefore, the Crown concluded, the Tribunal's findings and any recommendations were unlikely to be materially affected by its lack of jurisdiction in relation to the Maori Land Court and Maori Trustee.

In this chapter, we examine and resolve the jurisdictional issues raised by the parties and present our analysis of the Treaty principles' application to the roles of the Maori Land Court and Maori Trustee, and to the provisions of the Maori Affairs Act 1953, in implementing the joint venture. Overall, we conclude that the process by which the joint venture was implemented did not cure the defects of inadequate Maori landowner involvement in the earlier parts of the process, and so did not provide an effective safeguard for the Maori landowners' interests. Our major findings are that the court hearing was conducted independently of any inappropriate Crown influence but that the result of the court's decision, while lawful, was inconsistent with the Treaty principle of active protection of Maori interests. Since the court's decision was authorised by sections 435 and 438 of the Maori Affairs Act 1953, we also find that those statutory provisions were inconsistent with the Treaty principle of active protection. A further consequential finding is that the Crown's response to the court's decision – which involved various final steps to ensure that the joint venture was implemented – was also inconsistent with the same Treaty principle.

8.2 TRIBUNAL JURISDICTION

Section 6 of the Treaty of Waitangi Act 1975 confers the Tribunal's jurisdiction to inquire into claims. Its relevant provisions are:

6. Jurisdiction of Tribunal to consider claims—(1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—

- (a) By any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council . . . , or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or
- (b) By any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or
- (c) By any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
- (d) By any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—

and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

8.3 SUBMISSIONS ON JURISDICTION: MAORI LAND COURT

The Wai 411 claimants contended, and the Crown denied, that the Tribunal has jurisdiction in relation to the Maori Land Court under either or both of paragraphs (b) and (d) of section 6(1).

8.3.1 Section 6(1)(b): 'orders'

Claimant counsel Dr Harrison submitted that a court order is within the class of orders referred to in section 6(1)(b) and, therefore, the Tribunal has power to examine the Maori Land Court's orders relating to the 40 blocks of Tarawera Valley land for their consistency with Treaty principle.¹ The claimants' reasons for arguing that the court's orders were defective in Treaty terms (namely, for alleged paternalism and *ultra vires*) are outlined in the next section.

1. Document A22, para 58

Crown counsel Mr Andrew opposed the claimants' interpretation of section 6(1)(b), arguing that its precise wording shows that all the items listed there are statutory instruments, and thus the only kind of order covered by the provision is one made in the exercise of legislative, not judicial, power.² That result, he said, is consistent with the focus of section 6 upon 'Treaty responsibilities that can fairly and legitimately be sheeted home to the Executive or to Parliament'.³

8.3.2 Section 6(1)(d): 'acts and omissions by or on behalf of the Crown'

(1) *Claimant submissions on the court's process*

For the claimants, Dr Harrison accepted the Chatham Islands Tribunal's conclusion that, as a matter of law, the Maori Land Court is not part of 'the Crown' within section 6(1)(c) or section 6(1)(d) of the Treaty of Waitangi Act 1975.⁴ He submitted, however, that as a matter of fact the court's hearing process and its outcome in the Tarawera Valley case constituted conduct 'by or on behalf of the Crown' within the Tribunal's jurisdiction under section 6(1)(d) of the Act.⁵ The claimants' view of the indivisible nature of the Maori landowners' treatment by the Crown, Tasman, and the court is captured in this statement of Dr Harrison's:

Outmanoeuvred behind the scenes by the Crown and Tasman acting in concert, manipulated in public, outgunned in court, without central organisation(s) or the resourcing to obtain essential legal and forestry expert advice available to their opponents (coming in the guise of allies), they were, ultimately, with but a few ultimately futile exceptions, as lambs to the slaughter.⁶

More particularly, the claimants submitted that the Maori Land Court process was inconsistent with Treaty principles, first, because the Maori owners were unfairly disadvantaged by 'the overwhelming extent of the Crown (and Tasman) support' for the joint-venture proposal.⁷ In this regard, the claimants again highlighted the fact that the application to the court invoked its special powers under Part xxviii of the Maori Affairs Act 1953 rather than the more familiar, and more owner-controlled, process provided by Part xxiii. Secondly, the claimants challenged the integrity of the process by which the court registrar had made the application to amalgamate the 40 blocks and vest them in the Maori Trustee for the purposes of sale to TFL when, in his 'other hat', as Department of Maori Affairs' Rotorua district officer, Mr Barber had been so actively engaged in promoting the joint venture. Thirdly, the

2. Document B81, para 9.5

3. Ibid, para 9.6

4. Document A22, para 62; memorandum from Chatham Islands Tribunal to parties concerning jurisdiction of Tribunal to inquire into actions of Native Land Court, 5 October 1994 (Wai 64 RO1, paper 2.67), p 21 (doc A22(a), p94)

5. Document A22, para 62

6. Document B80, para 54

7. Document A22, para 45

8.3.2(2)

claimants noted that the Maori owners received no assistance from the Crown, financial or otherwise, to prepare and present their cases to the court.⁸ Fourthly, the claimants submitted that the Crown's and Tasman's support for the joint venture was presented in court in a 'slanted and indeed misleading way'.⁹ Their elaboration of this charge focused very largely on the evidence presented to the court by the Director-General of Forests about the comparative merits of the joint-venture proposal and a different kind of arrangement involving a lease of the Maori land.¹⁰

(2) Claimant submissions on the court's decision and orders

In addition to their criticisms of the court's process, the claimants were critical of the outcome of the proceedings, alleging, first, that it resulted from a highly paternalistic approach to Maori land rights which was contrary to the principles of the Treaty of Waitangi.¹¹ In support, Dr Harrison stated that:

The cavalier way in which the Savage/Edwards family objections and their somewhat puny (because so badly under-resourced) attempts to come up with a viable alternative for the use of their family land and farm were brushed aside by the Court sits particularly ill with the fundamental guarantee of full exclusive and undisturbed possession by Maori of their lands under Article 2 of the Treaty. In effect, the legislation and the legal proceedings were treated as imposing on the Savage/Edwards family an insurmountable legal burden. That was to demonstrate that their proposals for land use and retention of their own lands were better and more desirable *for all owners*, than were the Tasman proposals. [Emphasis in original.]¹²

Secondly, the claimants alleged that the 1966 Court of Appeal decision in *Hereaka* shows that, in two fundamental respects, the Maori Land Court acted outside the powers conferred on it by section 438 of the Maori Affairs Act 1953.¹³ The first alleged legal error was that the court purported to establish a trust for the primary purpose of selling the trust property when that was not authorised by section 438. The second alleged error was that the court failed to identify the beneficiaries of the supposed trust, contrary to the specific provisions of section 438 and the law of trusts generally.¹⁴

Dr Harrison argued that the Tribunal has jurisdiction to determine the legal question of whether a court has acted *ultra vires* (without authority), although it cannot determine the

8. Document A22, para 46

9. Ibid

10. Ibid, paras 46–50

11. Ibid, para 51

12. Ibid

13. *Hereaka v Prichard* [1967] NZLR 18 (CA)

14. Document A22, paras 53–56; doc B80, paras 30–35

matter conclusively.¹⁵ He suggested that such a determination in this instance would reinforce the claimants' position that the Maori Land Court's hearing and decision about the Tarawera Valley land breached Treaty principles, including the guarantee of Maori rangatiratanga.¹⁶ Further, it was submitted, the court's alleged Treaty breach was not cured by the legislation passed on 20 October 1966 to override the Court of Appeal's decision in *Hereaka v Prichard*.¹⁷ As was noted in the last chapter, that legislation retrospectively validated certain earlier uses of section 438, arguably including its use in relation to the Tarawera Valley land. The claimants' submission was that the lawfulness of the court's conduct did not make it consistent with the principles of the Treaty of Waitangi.

(3) Crown submissions on the court's process

The Crown emphasised that, as a matter of law, courts are not part of the Crown within the meaning of that term in section 6 of the Treaty of Waitangi Act 1975.¹⁸ Further, the Crown rejected the claimants' view that, as a matter of fact, the court process was, to use Mr Andrew's words, 'effectively highjacked' by the Crown and Tasman.¹⁹ Instead, the Crown submitted, the merits of the joint-venture proposal justified the style and content of the application to the court and the evidence that officials gave in support of it. As well, Mr Andrew highlighted elements of the court process which he submitted showed that it acted independently and that it safeguarded the interests of all the Maori landowners. Among those elements were that:

- ▶ the hearing took place some eight months after the Kokohinau Pa meeting, having been postponed at the request of one group of opposing owners to allow them more time to prepare;
- ▶ three groups of Maori owners, including two groups opposing the joint venture, were represented before the court;
- ▶ the evidence of Mr Groome, the witness for one opposing group of landowners, generally supported the joint-venture scheme and emphasised some of its advantages;
- ▶ the key issues of the land value, the log price, the 75 per cent minimum guarantee, and the prospect of leasing were all addressed before the court and were the subject of cross-examination; and
- ▶ the court's order did not require the Maori Trustee to commit to the joint venture but required the trustee to be satisfied of the justice of its terms to the Maori owners before committing them to it.²⁰

15. Document A22, paras 63–64; doc B80, para 27

16. Document A22, paras 57, 93

17. Section 6(1) of the Maori Purposes Act 1966 repealed section 438(1) of the Maori Affairs Act 1953 and substituted new subsections (1), (1A), (2), and (3).

18. Document B81, paras 9.6–9.7

19. *Ibid*, para 9.8

20. *Ibid*, paras 3.57–3.68

(4) Crown submissions on the court's decision and orders

Crown counsel's submission that courts are not part of the Crown within the meaning of section 6 of the Treaty of Waitangi Act provided the major plank of the Crown's response to the claimants' criticisms of the Maori Land Court's decision and orders.²¹ However, the Crown did not contend that the court's decisions were wholly outside the Tribunal's area of inquiry. Rather, relying on a 1994 High Court decision,²² Crown counsel submitted that the Tribunal cannot relitigate Maori Land Court cases but can 'complain about systemic problems and also consider claims that the Crown failed to deal with alleged injustices arising from the decision'.²³ This would mean, for example, that if a court decision has effects that are inconsistent with Treaty principle and the Crown fails to remedy them, the Crown's failure would be subject to the Tribunal's scrutiny.

With regard to the situation before the Tribunal, the Crown defended both the court's decision and the Crown's response to it as being consistent with Treaty principle. That defence was based on what the Crown submitted were the overall merits of the scheme and the reasonableness of the process by which it was developed. On the matter of what is reasonable in Treaty terms, Mr Andrew cautioned the Tribunal against 'presentism', submitting that the acknowledged paternalism of the Crown in the 1960s was conceived in good faith, and in fact played a role in contributing to the success of the scheme.²⁴ Further, while acknowledging the claimants' concern at the loss of ownership of the Maori land, Mr Andrew submitted that its transfer to TFL was not an outright alienation and was not regarded at the time as 'a case of land alienation such as it would be viewed today'.²⁵

In response to the claimants' *ultra vires* submission, Mr Andrew argued that it was not a legitimate function of the Tribunal to determine the legality of a Maori Land Court order because that was a matter within the supervisory jurisdiction of the High Court. Besides, he submitted, the Tribunal should not attempt the task here because the legal questions involved were particularly complex. One reason for that, he said, was that *Hereaka* concerned a fact situation that was different in material respects from the Tarawera Valley situation.²⁶ Another reason he gave was that the differences in the separate judgments meant that the Court of Appeal did not actually decide that a trust for the purpose of alienating the trust property could not be established under section 438. Finally, Mr Andrew submitted that the court's

21. Document B81, paras 9.3–9.7

22. *Te Runanga o Wharekauri Rekohu Incorporated v Waitangi Tribunal, Attorney-General and Ors* unreported, 12 May 1994, Heron J, High Court, Wellington, CPM8/94

23. Document B81, para 9.10

24. *Ibid*, paras 1.3, 2.12

25. *Ibid*, para 1.4; see also paras 1.10, 2.13–2.14; doc A30, para 1.3

26. In particular, Mr Andrew submitted that in *Hereaka* the purpose of the trust – to alienate land for public recreation reserves – was not 'for the benefit of' Maori (as *cestuis que trust*) in the direct way required by the Court of Appeal. By contrast, he said, in the Tarawera Valley case the purpose of the trust – to alienate the land in return for the former owners obtaining shares in a joint-venture company – was 'for the benefit of' the former owners (as *cestuis que trust*) in a direct way. In support, Mr Andrew also submitted that the list of owners of the Tarawera 1 block sufficed to define the beneficiaries (*cestuis que trust*) of the section 438 trust: doc B81, paras 9.14–9.15.

identification of the owners of the 40 blocks for the purposes of the section 435 amalgamation satisfied the requirement to identify the beneficiaries of a section 438 trust.²⁷

8.4 THE MAORI AFFAIRS ACT 1953

The parties agreed that section 6(1)(a) of the Treaty of Waitangi Act 1975 gave the Tribunal jurisdiction to examine Acts of Parliament for their consistency with Treaty principle. Relying on that provision, the claimants submitted that, to the extent that the Maori Land Court's 'paternalistic' approach to the rights of the Maori landowners was authorised by the Maori Affairs Act 1953 (including the amendments to section 438 made in 1966 in response to *Hereaka*), then the Act was in breach of Treaty principle.²⁸ The Crown acknowledged that earlier Tribunals had found the Crown's imposition of the system of multiple individual ownership of Maori land to be inconsistent with Treaty principle. However, Mr Andrew submitted, that did not mean that all laws within the system were inconsistent with Treaty principle. He also contended that it was necessary to evaluate the claimants' complaints about the law 'in the context in which such laws were conceived and administered'.²⁹ An important part of the context in which to assess whether sections 435 and 438 of the 1953 Act were Treaty-consistent, Mr Andrew submitted, was that there were 'fundamental problems associated with Maori land and many took the view that some decisive action was required to redress some of these difficulties'.³⁰

8.5 SUBMISSIONS ON JURISDICTION: MAORI TRUSTEE

8.5.1 Claimant submissions

The claimants submitted that the Waitangi Tribunal has jurisdiction under section 6 of the Treaty of Waitangi Act 1975 to examine the Maori Trustee's conduct because:

- ▶ section 6(1)(a) empowered the Tribunal to examine conduct which is authorised by an Act of Parliament; or
- ▶ 'more directly and specifically', the trustee's conduct amounted, in fact, to acts 'done or omitted . . . by or on behalf of the Crown' within section 6(1)(d); or
- ▶ the trustee's conduct amounted, in law, to such acts.³¹

In support of that last submission, Dr Harrison summarised and relied on parts of the extensive submissions made in 1996 by counsel for the claimants to the Tribunal constituted

27. Document A30, para 3.5; doc B81, paras 9.16–9.18

28. Document B80, para 45.6

29. Document B81, para 2.15

30. *Ibid*, paras 2.15–2.17

31. Document A22, paras 78–79

8.5.2

to hear the Wellington Tenth Trust claim.³² In essence, the Wai 411 claimants contended that the structure and role of the Maori Trustee's office conformed with the legal tests that had been developed to determine whether a body is an agent of the Crown (the 'functions' and 'control' tests).³³

The claimants put forward 'two key reasons' why the Maori Trustee acted in a manner which was inconsistent with Treaty principle: he was not sufficiently independent and he was not provided with information crucial to the task of assessing the Tasman proposal.³⁴ Elaborating on those points, Dr Harrison submitted:

The Maori Trustee and in particular Souter, who appears to have done the bulk of the work of purporting to assess the merits of the Tasman proposal and the Heads of Agreement, were not sufficiently independent, first because the Trustee was part of Maori Affairs which had already espoused the proposal and the Heads of Agreement in meetings and before the MLC; and secondly because Souter himself quite plainly was strongly committed to the Tasman proposal proceeding; [and/or]

Just as with Maori before him, the Trustee/Deputy Trustee was not provided with crucial information held by other Government Departments, necessary for the purposes of a realistic and effective appraisal of the Tasman proposal as against other possible alternatives. In particular, the Trustee/Deputy Trustee does not appear to have been provided with the internal NZFS appraisals of the profitability and viability of the leasing alternative, nor was he ever advised of the Tasman offer of a 15% guarantee for Maori. At the end of the day, the Trustee/Deputy Trustee allowed himself also [to] be fobbed off by an evasive response to the crucial question which he posed, as to the merits of leasing vis-à-vis a sale.³⁵

8.5.2 Crown submissions

The Crown responded to the jurisdictional point by relying on a summary of its submissions to the Wellington Tenth Tribunal, the effect of which was that, as a matter of law, the Maori Trustee is independent of 'the Crown' and so not one of the institutions able to be examined by the Tribunal under section 6(1) of the Treaty of Waitangi Act 1975.³⁶ Further, the Crown submitted that, as a matter of fact, the Maori Trustee acted independently of the Crown in respect of the joint-venture proposal for the following reasons:

The Maori Land Court Judge vested the Maori land in the Maori Trustee as an independent statutory entity to act on behalf of the Maori beneficiaries and not either by or on behalf

32. Submissions of Wai 145 claimant counsel concerning jurisdiction of Waitangi Tribunal to inquire into actions of Maori Trustee, 11 September 1996 (Wai 145 RO1, doc G8) (doc A22(a), pp 107–146)

33. Document A22, paras 79–80

34. Ibid, para 77

35. Ibid, paras 77.1, 77.2

36. Document B81, para 9.20

of the Crown. He sought his own independent valuation of the land. Furthermore, he was not prepared to accept assurances from Treasury (ie the Crown) on the issue of log price. He re-negotiated a change to the issue of log price in the Heads of Agreement because he was not satisfied with the assurances that he had been given by the Crown. The correspondence from the Trustee to the Crown at the time indicate[s] that the Trustee was aware that he was an independent statutory officer and accountable not to the Crown but to the Maori beneficiaries.³⁷

8.6 TRIBUNAL FINDINGS: MAORI LAND COURT PROCESS

8.6.1 Section 6(1)(b)

The Tribunal agrees with Crown counsel that, as a matter of statutory interpretation, section 6(1)(b) of our empowering Act does not include court orders but is confined to various kinds of legislative instrument.³⁸ Accordingly, the Tribunal does not have jurisdiction under this provision to inquire into the Treaty consistency or otherwise of the Maori Land Court's orders.

8.6.2 Section 6(1)(d) – court's hearing process

The multi-faceted nature of the claimants' submissions has required us to examine a number of features of the court's hearing process (outlined in chapter 6) and to consider some complex legal arguments about its decision. On the matter of process (see sec 8.3.2), the claimants argued that the Maori owners were disadvantaged by the combined strength of the Crown's and Tasman's support for the application. By contrast, the Crown highlighted aspects of the court's hearing process which, it submitted, meant that the hearing was procedurally fair.

Before addressing the claimants' specific allegations, we record our agreement with Crown counsel that the features to which he drew our attention are indicators of a fair judicial process. In addition, we are impressed by other procedural elements of the court hearing, one being the length of the hearing, which, at four full days (plus a site visit), was longer than had been scheduled and certainly provided the opportunity for all parties to present their cases and test each other's evidence. Also, we note that it was the judge's own initiative to conduct the site visit to the Edwardses' home and farm and it was at his insistence that evidence was given by members of that family – the sole inhabitants of the entire area of Maori land involved in the application. Our view of these matters does not, however, answer the claimants' specific allegations and it is to those that we now turn.

37. Ibid, para 9.21

38. We note that this was also the view of the Chatham Islands Tribunal in its 5 October 1994 memorandum at page 14 (doc A22(a), p 87).

8.6.2(1)

(1) *The application to the court*

A recurring complaint of the claimants was that the application to the Maori Land Court did not utilise Part xxiii of the Maori Affairs Act 1953, with its requirements for block-by-block voting, but relied instead on the court's special powers under sections 435 and 438 of the Act. Consistent with the reasons for our finding of Treaty breach in chapter 5, we are sympathetic to the essence of this complaint and will return to it when we consider sections 435 and 438. For now, we merely reiterate our view that the decision not to utilise Part xxiii was not the product of any ill-motivated desire by Maori Affairs officers to evade its requirements. We believe that Mr Souter was unashamedly telling the truth, from the standpoint of a senior Maori Affairs officer of the time, when he said in the Maori Land Court that a scheme involving a large number of blocks would not 'get past first base' with a Part xxiii process, but that the process followed had the built-in safeguard that the venture's terms would be examined by the court, which had the lawful right to decide if there was merit in the objections to it (see sec 6.2.2).

Also, we are not convinced that the Part xxiii process could have been used to seek the owners' approval to the alienation of their land to TFL. This is because section 307(4) of the Act provided that only the proposed alienee (ie, TFL) could apply for a meeting of assembled owners to consider a proposed alienation. Yet TFL was not in existence, and could not be brought into existence, until the Maori owners were agreeable to the joint venture. The resulting 'chicken and egg' situation exemplifies the mismatch between the novel joint-venture concept and the pre-existing statutory procedures for dealing with Maori land. Further, we note that Mr Martin, a former deputy registrar of the Maori Land Court, indicated to the Tribunal that the Part xxiii process was not able to be used in connection with applications to amalgamate land titles under Part xxviii of the Maori Affairs Act 1953. He also said, however, that he would have expected the owners' interests and voting to be recorded at a general meeting such as the Kokohinau Pa meeting, which would have ensured that the court would have before it the most accurate record possible of the owners' views.³⁹ From our findings in chapter 5, our own view will be evident that, even if the Part xxiii procedure was not applicable, the Maori owners' attitudes to the joint-venture proposal should have been gauged by a Part xxiii type procedure, whereby attendees' land interests were recorded and their voting analysed in the light of that information.

Another element of the claimants' concerns was that the applicant to the court was its registrar, Mr Barber, who, both before and after making the application, was active in promoting the joint venture in his other role as Maori Affairs district officer. In court, Mr McGregor made this point when he stated that the application had been brought 'by the Department of Maori Affairs in the name of its Registrar'. The judge asked him if that was a 'proper premise to put' and then said that, if Mr McGregor wanted to adduce evidence 'to show the Registrar is just a stooge in this matter', he was at liberty to do so. Mr McGregor replied that 'Mr Souter

39. Oral evidence of Harris Martin in response to questions from the Tribunal, 18 September 2000

already admitted that' – a reference, it would seem, to the Deputy Secretary's evidence that the Part XXIII procedure had not been used because the venture would never have 'got past first base'.⁴⁰

Of relevance is the fact that it was not uncommon in the 1960s for the Maori Land Court registrar and the Maori Affairs district officer to be the same person, just as dual roles in the Department of Maori Affairs and the office of the Maori Trustee were not uncommon. Also, as was outlined in chapter 2, it was not unusual for the district officer to be actively engaged in Maori land improvement measures. As well, Mr Martin told us that it was not unusual for the court's registrar to be the applicant in certain proceedings.⁴¹ Certainly, section 27(1) of the Maori Affairs Act 1953 permitted the registrar to be the applicant 'in any matter', except where the Act expressly provided otherwise. However, Mr Martin also said that the Tarawera Valley application was unusual for invoking the court's special powers to effect the alienation of such a large area, and thus it would not have been usual for the registrar, or indeed anyone, to be the applicant to the court in connection with such a scheme.⁴²

The basis of the Wai 411 claimants' concern with this situation is that it provided insufficient protection against the risk of the court being swayed in favour of the application as a result of the judge's prior knowledge of the applicant and of the policies underlying the applicant's Maori Affairs work. The only way to assess the grounds for that concern is to examine the process adopted by the court to deal with the application made to it, a matter we are pursuing in this section. It would not be sound to conclude that, because the situation 'looked bad', it must have been bad – a conclusion that would effectively undermine the integrity of the entire Maori Affairs, Maori Trustee, and Maori Land Court institutions during the period with which we are concerned, and beyond.

(2) Parties' unequal strength

The next element of the claimants' concern with the court's process relates to the power imbalance between the Maori owners opposing the application and the combined strength of Tasman and the Crown supporting it. A particular matter that Dr Harrison drew attention to was the lack of any State-assisted professional help, including legal representation, for the opponents of the joint venture. Mr Andrew for the Crown said that such assistance was a modern development and that, besides, the Maori owners did not seek it.

We consider it inevitable that there would be a 'David and Goliath' air to the court proceedings, with two small groups of landowners opposing the combined forces of the State and a major corporate enterprise. The inequalities inherent in that situation included their respective financial resources for professional assistance and their access to relevant information. However, we doubt that any system could guarantee the equality of litigants in these respects,

40. Document A33, p 1F1

41. Document B71, p 1

42. Oral evidence of Harris Martin in response to questions from the Tribunal, 18 September 2000

8.6.2(3)

particularly in a situation where the State is a party. In light of that, we have asked ourselves what advantages might have accrued to those who opposed the application if they had received State-assisted professional help – perhaps of the kind that civil legal aid has provided in more modern times. One answer is that they would not have been so stretched to pay their lawyers' fees and so might have pursued an appeal from the Maori Land Court's decision. But, from our close examination of the court's proceedings, we are not persuaded that more resources for the opponents' court case would have made a decision in their favour more likely. That is not to say that we believe the opponents' cases to be without merit. On the contrary, we believe the majority interests of the Savage–Edwards group in some of the 40 blocks gave rise to a very strong claim on their part for continued ownership. However, in all the circumstances – with the law as it was and the land as it was, and with forestry not a well-established use of non-Crown land at the time – we consider it highly unlikely that the outcome of the case would have been different had any of the opponents of the application had different legal counsel and better access to relevant information.

As for counsel, we consider that, overall, Messrs O'Sullivan and McGregor represented their clients' interests very well, and certainly in a manner that was well comprehended by the judge, who was never backward in testing their arguments and indicating the points on which he needed to be persuaded. The judge's 'style' warrants particular mention here, for it is evident from the transcript of proceedings that, on occasion, Messrs O'Sullivan and McGregor, and also the witness Mr SB Savage, experienced its most challenging and abrupt aspects. Overall, however, as we continue to explain, we are satisfied that the court hearing was conducted in a procedurally fair and independent manner.

The question whether the opponents of the application might have, with Crown assistance, secured better access to relevant information, thus improving their case, leads us to make two observations. First, we consider that limited access to relevant information was not a significant impediment to the Savage–Edwards group's chances of constructing a successful case about alternative viable uses of their land. Rather, we consider, the very nature of the land posed the most substantial obstacle to their success on that point. The separate question of whether the group's objections should have been treated in the manner that they were is one we discuss later, in connection with sections 435 and 438 of the Maori Affairs Act 1953.

Secondly, for the reasons we elaborate on next, we consider it unlikely that the case of the opponents of the application would have been improved by Crown assistance to enable them to gather and present better information about leases.

(3) Crown support for the venture – evidence on leasing

The claimants' next assertion was that Mr Poole's evidence about leasing made the Crown's support for the joint venture in court 'slanted and indeed misleading'. In expanding on this complaint, the claimants emphasised that Mr Poole did not volunteer any evidence on the

division of views within the Forest Service about the comparative merits of the joint-venture proposal and a stumpage-based lease. That is true but, as was seen in chapter 4, the 'division of views' within the upper echelons of the Forest Service had dissipated with Tasman's offer of a minimum guarantee to the Crown and Maori landowners of 75 per cent of their predicted shareholdings in TFL. Therefore, by the time of the court hearing, that division was a matter of the past.

Further, to the extent that individual Forest Service officers, including Mr Grainger, continued to prefer a lease-based scheme, that view was not based on any clearly stated appreciation of the relationship between Maori and land. Rather, it would seem to have been based, in part, on the fundamental feature of a lease that the lessor retains land ownership and so will obtain the benefits of the land's increased value over time and, for the rest, on the fact that the Forest Service was familiar with the factors involved in leasing. Certainly, that view was not based on an in-depth comparative study of the financial outcomes of the Tasman scheme and the still-developing Grainger lease.

There can be no doubt that it would have been ideal for a comparative study to have been conducted and its results made available before the Maori landowners were invited to join the joint-venture scheme. That was simply not possible, however, because of the fledgling state of the Grainger lease. Further, in all the circumstances, we believe that, if the court had required such a comparative study to be conducted after its hearing in August 1966, that would have caused Tasman, led by Mr Schmitt with his, by then, firm anti-leasing attitude, to abandon the prospect of involving the Maori landowners in any forestry venture.

In addition to the evidence on this point that was discussed in chapter 5, we note that Mr Schmitt made it very plain to the Maori Land Court that he was set against the notion of a lease of the land. Also, Mr Groome's evidence to the Tribunal confirmed that, during the court hearing, Tasman was emitting 'now or never' signals about the joint venture going ahead with Maori involvement. Mr Groome told the Tribunal that Mrs Lanham's group was very aware that their opposition in the Maori Land Court could cause Tasman to withdraw its proposal to the Maori landowners. For that reason, he said, his own evidence to the court was framed very carefully so that he neither directly challenged the joint-venture concept nor volunteered his own view that a lease-based arrangement would be preferable for the Maori owners.⁴³ As well, the letter written by Mr O'Sullivan to the Maori Trustee shortly after the court's decision was issued reveals that he too believed that the application concerning the Maori land would have been abandoned had he persisted in seeking to have evidence of the Crown–Tasman Kaingaroa agreements presented to the court (see sec 7.3).

In all the circumstances then, we do not believe that, by August 1966, Tasman, with Mr Schmitt at its helm, could still have been persuaded to lease the Maori land. We found in chapter 5 that it was Crown conduct inconsistent with Treaty principles that allowed Tasman's

43. Oral evidence of John Groome in response to questions from Mr Andrew and Dr Harrison, 8 September 2000

8.6.2(4)

attitude against leasing to harden as it did. Just as that Crown conduct was not ill-motivated, however, neither, we consider, was Mr Poole's failure to volunteer to the court information about the preference of some of his staff for a lease-based arrangement for the Maori and Crown land. Therefore, rather than Mr Poole's evidence about leasing being 'slanted and misleading', as the claimants alleged, we regard it as a consequence of the earlier conduct that was inconsistent with Treaty principles. Like ripples made by a stone dropped in a pool, the effects of the original Treaty breach were unstoppable but, taken on its own, the existence of those effects was not in itself evidence of ill-will, as the claimants seemed to assert.

A closely related assertion made by the Wai 411 claimants was that Mr Grainger should have been called as a witness by Tasman or the applicant to give his views to the Maori Land Court about stumpage-based leases and their relevance to the Tarawera Valley land.⁴⁴ For the same reasons as we have just given, we cannot agree that Mr Grainger's absence as a witness indicates the Crown's intention to keep from the court, and the Maori owners opposing the application, evidence of a viable lease-based alternative to the joint-venture proposal.

(4) Crown support – evidence of log price

In chapter 5, we summarised the complex set of facts bearing on the question of whether and, if so, how, the 1963 Kaingaroa log sales agreement was relevant to the price clause in the heads of agreement (see sec 5.5.2(8)). The question was avoided in the Maori Land Court when the Crown successfully claimed privilege against disclosing that agreement's terms to the court. However, Tasman's counsel, Mr Dillon, assured the court that there was no agreement in existence which could assist in determining the price that Tasman would be paying for Tarawera Forest produce. Further, the evidence of Mr Poole was that the prices Tasman would be paying TFL would be free from the then-current concerns about low Kaingaroa prices because conditions would have changed by then. Both he and Mr Davis testified that the Government was committed to ensuring a fair deal for the Maori landowners. Some nine months after the court hearing, however, Mr Poole wrote to the Treasury saying that the price-fixing clause in the heads of agreement was 'the very antithesis of being equitable to a forest owner' and that TFL would obtain depressed prices for pulpwood because of the dominating effect of the '40 million' sale prices.

In his evidence to the Maori Land Court, Mr Groome acknowledged that Tasman and the Crown had reason to keep the Kaingaroa sales terms secret from people such as his forestry clients and himself, but he said that the Maori landowners, as a party to the proposed joint venture, should have had the terms disclosed to them (see sec 6.7.4). In the Tribunal, Crown witness Dr Battersby, cross-examined by Dr Harrison, acknowledged that the Kaingaroa log prices should have been disclosed to the Maori party.⁴⁵ Dr Harrison submitted to us that the suppression of that information in court, through the exercise of the Crown's privilege

44. Document A22, para 50

45. Oral evidence of Dr John Battersby in response to questions on document A10, 9 June 2000

against disclosure, indicated that the Crown's attitude to the prospective Maori venturer was not consistent with Treaty principles. We agree, as we now explain.

We consider that, throughout the development of the joint venture's terms and up to and including December 1965, when the Kokohinau Pa meeting was held, senior Crown officers in a position to assess the proposed log price clause were satisfied with its fairness to all parties. As Mr Poole was at pains to highlight in the court, the advantage of an assured sale of the forest's entire output should not be underestimated. Further, Tarawera Forest was closer to Tasman's mill than Kaingaroa Forest, and the log price clause entitled TFL to reap the benefit of the consequential transport savings – estimated in Tasman's 1965 booklet to be, on then-current prices, £250,000 a year and by Mr McKee at the Kokohinau Pa meeting to be fourpence per cubic foot. About mid-1966, however, some six weeks before the court hearing, the ongoing analyses within the Forest Service raised the question of whether TFL would receive the full benefit of the transport differential (see sec 4.13.4). Just two weeks before the court hearing, the Tasman Cabinet Committee approved the heads of agreement, and, in that process, according to the letter Mr Poole wrote to the Maori Trustee nearly two years later (see sec 7.9), the Forest Service was overruled on 'pricing matters' by the Treasury. Therefore, by the time Mr Poole gave evidence in the Maori Land Court, it seems that he doubted his own previous level of comfort with the log price clause but knew that the Treasury and Cabinet were satisfied with it. His doubts cannot have been allayed in court when, in response to the proposal from counsel for Mrs Lanham's group to question Mr Schmitt about the Kaingaroa log sales agreements, counsel for the applicant claimed Crown privilege for the 1963 agreement, apparently to prevent Tasman from abandoning the proceedings.

The result, we consider, is that it was not clear-cut what the precise relevance of the '40 million' sale (renegotiated in 1963) would be to the prices TFL would receive under the clause in the heads of agreement, especially once the '20 million' sale (which took effect from April 1966) was under negotiation. Then, for a new set of reasons, the situation became muddled around the time of the court hearing. At that time, the Forest Service began to doubt Tasman's credibility about the effect of the transport differential on TFL's log prices. That this doubt persisted is also supported by Mr Poole's July 1968 letter to the Maori Trustee concerning the negotiation process that the Forest Service had conducted with Tasman for the sales and management agreements with TFL. Mr Poole wrote there that the process had confirmed 'certain reservations' he had held regarding the log pricing arrangements in the heads of agreement.

In those uncertain circumstances, in which, however, there was a generally held view that the unknown terms of the 1963 agreement were relevant to the joint-venture proposal, we agree with claimant counsel that the Crown should have ensured that the Maori landowners were provided with all the information that could impact on the final prices TFL would receive under the proposed log price clause. Whatever the motivation for the Tasman–Crown reaction in court to the prospect of the 1963 Kaingaroa sales agreement's disclosure, we consider that the result was inconsistent with the Crown's duty to the Maori landowners actively

8.6.2(5)

and in good faith to protect their interests. Had the Crown insisted on non-disclosure in court but found another way to inform the Maori landowners of the Kaingaroa agreement, in circumstances where they could fully consider its possible effects on TFL produce prices and negotiate any consequential changes to the log price clause, then that would have fulfilled its duty. As it was, however, the Crown did not volunteer the information at any stage, not even to the Maori Trustee who was charged with the task, on behalf of the Maori landowners, of being satisfied with the justice of the joint venture to them.

(5) Crown support – evidence of land value

A further point of some concern to us is that, for all the evidence that was given to the court about the method and results of Tasman's land valuation, there was very little mention of, let alone emphasis on, the minimum guarantee that Tasman had agreed to provide for the Crown and the Maori owners. Certainly, Mr Schmitt explained the minimum guarantee in his prepared statement of evidence and Mr Souter mentioned it.⁴⁶ Mr O'Sullivan, representing Monica Lanham's group, also questioned Mr Schmitt about the guarantee. The effect of that exchange was to reveal that Mr Schmitt considered that the eventual Maori share of TFL was just as likely to exceed the estimated 14.41 per cent as it was to be less than that amount.⁴⁷ At that point, the judge sought and obtained from Mr Schmitt confirmation that the minimum guarantee was for the benefit of those who contributed land to the venture.⁴⁸

However, since the minimum guarantee was the very feature of the joint venture which overrode the Forest Service's previously deep and abiding concerns about the fairness of the (absolute) land values that Tasman was proposing, we find it puzzling that it was not emphasised by Mr Poole, at least, in his evidence to the Maori Land Court. Indeed, we note that neither Mr Poole nor Mr Davis referred at all to the minimum guarantee in their prepared statements of evidence. Nor did Mr Dillon, for Tasman, or Mr Forsell, for the applicant, make submissions about it. We acknowledge that the predominant view of the time was that the guarantee would never need to be invoked but, even so, we are left somewhat perturbed about this point.

(6) Court's insistence that minimum guarantee remain

Despite the limited attention given to the minimum guarantee in court, one of the few matters upon which the judge's decision insisted was that it be retained as a term of the joint venture. In the circumstances outlined above, we consider that the judge's attention to the minimum guarantee is further evidence that his approach to the case before him was both careful and independent of any undue influence from Crown officers.

46. Document A33, pp D4e, P1d

47. Ibid, p M4. (Mr O'Sullivan referred to the predicted Maori share of TFL as being 14.41 per cent, although 14.43 per cent was the figure stated in Tasman's booklet.)

48. Document A33, p M4

(7) Court's reservation of power to Maori Trustee

Mr Andrew submitted that one of the indicators that showed that the court had acted independently was that it did not grant the applicant exactly what had been sought. Certainly, the applicant wanted the court to finalise the joint venture's terms and approve its implementation but, instead, the court's order set up a further step in the process, empowering the Maori Trustee to be a party to the proposed joint venture provided that he secured any modification to its terms in favour of the Maori owners that he considered 'should in justice be made'. We have examined the likely reason for this order and, as the discussion below reveals, have concluded that the judge reserved that power to the Maori Trustee not because he had significant doubts about the justice of the proposed venture's terms but because he considered that the law required that the trustee be left with scope to exercise his own judgement about the matter. In reaching that conclusion, Judge Gillanders Scott departed from the court's previous and, apparently, regular, use of section 438 to establish trusts under which the trustees had no discretion with regard to the tasks with which they were charged. (The situation in *Hereaka* provides one example (see sec 7.4), and Mr Martin supplied us with numerous other examples of section 438 trusts from 1955 to 1967, many of which appear to relate to situations similar to that in *Hereaka*.⁴⁹) Again, we consider that Judge Gillanders Scott's caution in the Tarawera Valley case with regard to this aspect of section 438 provides further support for our view that the hearing was conducted carefully and independently.

Before the court hearing, it seems that Maori Trustee officers envisaged that the role that the court would confer on them would be administrative in nature. For example, in his evidence to the court, Mr Souter explained that MIL would be formed by the trustee, 'whose duties in relation to the venture are really those of a midwife. His job is to attend to the birth of the enterprise, then to fade out of the picture.'⁵⁰ That view would be consistent with the role that the trustee had undertaken in numerous situations, including in *Hereaka*, where the court had left no room for the trustee's judgement about the very substance of the trust.

During the court hearing, the nature of the Maori Trustee's possible role with regard to the Tarawera Valley land and the joint venture was the subject of an exchange between Mr O'Sullivan and the judge. Mr O'Sullivan wanted the court to order an in-depth study of the Tasman proposal as compared with the Woodhill lease, and Judge Gillanders Scott, who was doubtless thinking who might take responsibility for such further tasks, asked whether the role of the Maori Trustee under a section 438 trust was 'really . . . to act as a convenient vehicle for the effectuating of a simple contract'. Mr O'Sullivan replied that the trustee's role would depend on the terms of the court's order, to which the judge asked whether the order should 'rob a person entirely of his powers of imagination and of reasoning and of bargaining?' He then stated that 'one could not conceive the Heads of Agreement is necessarily the final document which will carry the proposal into effect' and put it to Mr O'Sullivan that 'the mere fact'

49. Document B71, sch (examples of pre-1967 section 438 vestings for sale)

50. Document A33, p P1a

8.6.2(7)

that the court had vested land in the Maori Trustee on trust 'does not rid the Maori Trustee of responsibility and liability if he makes a bad bargain'. Mr O'Sullivan seemed to agree with that as a statement of law but argued that there was 'a moral issue' at stake; namely, that 'a large number of Maoris do tend to identify the whole of their dealings through this Court with the Maori Trustee'. He therefore suggested to the judge that the court's orders should leave the Maori Trustee 'in a much safer position'.⁵¹ Soon afterwards, however, Mr O'Sullivan stated that the Maori Trustee, 'by virtue of being identified', was 'backing this scheme even though it has been launched by the Court'. 'He has given his approval to it. He has virtually identified himself with the whole situation.'⁵²

The judge replied, apparently looking at section 438's requirements, that the trustee had not been involved in any way and could refuse to accept a court-ordered appointment as trustee. He also observed, with regard to Mr Souter's evidence in favour of the joint venture, that 'Nowhere does he say he is acting for the Maori Trustee, he only says he is Deputy Secretary for Maori Affairs'.⁵³ Mr O'Sullivan then said that, since it was not known 'what attitude the Maori Trustee would take', all that had happened to date was 'the first stage of a case that can be re-opened', and he urged that 'all the contingencies that are possible should be given due weight and possibly investigated where the information is not adequate for the Court'. To Mr O'Sullivan's suggestion that the court rather than the Maori Trustee should take responsibility for ensuring that any scheme the court approved was workable, the judge replied that the court could always appoint another trustee if the Maori Trustee did not accept the trusts that the court ordered. That prompted Mr McGregor to observe that, if that were to happen, it would seem that the scheme was not workable.⁵⁴

In the reasons for his decision, Judge Gillanders Scott cited a number of extracts from Mr Groome's evidence which indicated that:

- ▶ Mr Groome could not help the court on the matter of a North American formula for fixing pulpwood values;
- ▶ he had not investigated the possibility of the Maori owners financing the forest because, while an 'excellent idea', the only source of finance was the Crown, which would not provide it, with the result that Mr Groome was 'in favour of the scheme as it stands';
- ▶ the Maori owners, if they had undertaken the afforestation by themselves, would not have had the benefit of the taxation concessions available to the joint venture;
- ▶ Mr Groome would not divulge details of the three occasions he had 'not acted on market value or comparable sales' but that the result obtained by using the LEV method he espoused, while not tied to comparative sales in the area, 'had some relation' to the result obtained from comparable sales and 'might come to much the same figure'; and

51. Document A33, pp 1X8–1X9

52. Ibid, p 1X9

53. Ibid, pp 1X9–1Y1

54. Ibid, p 1Y1

- ▶ Mr Groome would not recommend the Otakanini scheme because the Crown had made it so patent it would not contemplate it.⁵⁵

The judge also noted that, while it 'could well be advantageous' for the Maori owners to grant a long-term lease of their lands for forestry, 'nowhere in the evidence is there mention or for that matter a hint that one could be found'. He then concluded that a trust order should not be framed so as to rob the trustee of the usual discretions of a trustee: 'there must be room for manoeuvring, for bargaining and for "cutting his cloth" according to time and circumstance.'⁵⁶

From the points traversed above, we consider that the judge was well aware of the doubts that could be raised about the merits of the proposed joint venture's terms but that, equally, he was aware that the foundations of those doubts were not readily able to be tested. First, if the details of the 1963 Kaingaroa log sale agreement were relevant to the log price clause in the Tarawera Forest heads of agreement – and Messrs Poole and Dillon had said they were not – then the Crown's privilege against disclosing certain information provided a lawful obstacle to the testing of any doubts about the fairness of that clause. Next, with regard to land values, Mr Groome's doubts, which he had said were verified by transactions whose details he would not disclose, were actually countered by the valuation methods authorised by law. Finally, even if the doubts about the joint venture had been more authoritatively established, so that the idea of an alternative scheme then obtained stronger support, the logical alternative – a lease-based scheme – was not in fact available to the Maori owners according to Mr Schmitt.

It is in light of all those matters that we believe that the main reason why the court orders reserved to the Maori Trustee the discretion to bargain for better terms for the Maori owners was that Judge Gillanders Scott considered that the law required him to do that. He did not, we consider, have any significant doubts about the merits of the proposed joint venture's terms. The praise he bestowed on the scheme in his decision supports that conclusion, as does his endorsement of the evidence presented by Crown officers and other witnesses in favour of the application. For example:

This Court was most favourably impressed by [by] far the bulk of the evidence adduced before it, and at the end of the hearing was quite satisfied that the scheme was one not merely of benefit to the Maori land owners concerned but one of such benefit that Court orders should be made promptly and be followed later by the reasoning therefor when the evidence was typed and available. Further consideration of that evidence has only reinforced the Court's earlier views.⁵⁷

Then, later:

55. Document A34, pp 16–17

56. Ibid, p 18

57. Ibid, p 1

8.6.2(8)

I am satisfied that the Crown and all others who have played a part in this case have disclosed everything reasonably required to ensure its proper despatch and conclusion and have demonstrated a compelling desire to assist the Maoris in every possible way. Public policy is an unruly horse, and dangerous to ride. The Court confines itself to the record of the case and matters outside the record are of no moment or consequence to it.⁵⁸

(8) Conclusion concerning Maori Land Court process

Our own close examination of the court transcript and other relevant evidence, and the submissions made to us by counsel, has led us to conclude that, procedurally, the Maori Land Court conducted its Tarawera Valley lands inquiry independent of inappropriate influence by Crown officers. Therefore, we reject the claimants' submission that the court's hearing process was so flawed that it acted, in fact, 'by or on behalf of the Crown' within the meaning of section 6(1)(d) of the Treaty of Waitangi Act 1975. This means that we also reject the claimants' further submission that, because the court was acting 'by or on behalf of the Crown', this Tribunal can examine the court's decision and orders for their Treaty consistency. It was in furtherance of that submission that Dr Harrison contended the Maori Land Court's decision was *ultra vires* and involved a paternalistic interpretation of sections 435 and 438 of the Maori Affairs Act 1953, both of which matters, it was submitted, indicated breaches of Treaty principle. While our finding means that we have no cause to explore those matters directly here, we do address the statutory interpretation point when considering the result of the court's decision and sections 435 and 438 of the Maori Affairs Act. We turn to those matters now.

8.7 TRIBUNAL FINDINGS: THE RESULT OF THE COURT'S DECISION AND SECTIONS 435 AND 438 OF THE MAORI AFFAIRS ACT 1953

We agree with the Crown and claimants that a court is not part of 'the Crown' within paragraph (c) or paragraph (d) of section 6(1) of the Treaty of Waitangi Act 1975 (see sec 8.3.2). Accordingly, those provisions do not confer jurisdiction on the Tribunal to examine a Maori Land Court decision for its consistency with Treaty principles. It seems clear, however, that the Tribunal can consider whether the result of a court decision is inconsistent with Treaty principles for the purpose of then considering, if inconsistency is found, whether the Crown should have responded in a manner different from the way it did respond.⁵⁹

In addition, under section 6(1)(a) of the 1975 Act, the Tribunal has jurisdiction in relation to Acts of Parliament which are alleged to have prejudicially affected Maori. Sections 435 and

⁵⁸. Document A34, pp 15–16. In the last two sentences quoted, the judge would appear to be referring to the Crown's successful claim not to disclose the 1963 Kaingaroa sales agreement to the court.

⁵⁹. See *Te Runanga o Wharekauri Rekohu Incorporated v Waitangi Tribunal, Attorney-General and Ors*; Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 33

438 of the Maori Affairs Act 1953 authorised the Maori Land Court's decision to amalgamate the titles of the 40 blocks and vest them in the Maori Trustee subject to particular conditions.⁶⁰ The claimants submitted that, in so far as the Maori Affairs Act authorised the court's decision (the effect of which, they alleged, prejudiced the Maori landowners), the Act itself was inconsistent with the Treaty principle of active protection.

Under each of the above approaches, the Maori Land Court's decision and the reasons for it are central to the inquiry which we now undertake.

We observe first that, had sections 435 and 438 not been part of the Maori Affairs Act, it is not clear how the joint venture might have been progressed. As was seen in chapters 3 and 4, although other parts of the Act were considered by Maori Affairs officers as possible sources of authority for a scheme involving the afforestation of a large tract of Maori land in conjunction with a commercial enterprise and the Crown, they were rejected as being inapplicable or inappropriate. Our own view is that the Crown's commitment to the joint venture from late 1965 was such that, had it considered, or had the court held, that the Maori Affairs Act did not authorise the venture, special legislation would have been passed to implement it.

In court, however, only Mr McGregor (for the Savage–Edwards group) queried the lawfulness, and the propriety, of using the combination of powers conferred on the court by sections 435 and 438 to achieve the progress of the novel joint-venture proposal. Other counsel had no reason to lend support to that point. The applicant and Tasman were satisfied that the application was supported by a sufficient number of owners and that, for the rest, the court was the proper institution to decide whether or not to approve the application on their behalf. Mrs Lanham had earlier challenged the pre-court process as being 'unconstitutional and invalid' but, in court, the attention of her group was focused on achieving changes to the proposed terms of the joint venture.

Mr McGregor highlighted the fact that, had the Part XXIII procedure been followed, his Savage–Edwards clients, as majority owners in particular blocks, could have guaranteed that those blocks would be excluded from the proposed joint venture. Instead, with the application to the court being made as it was – with no statutory requirement for any sort of owners' meeting, or voting – his clients' interests risked being 'submerged' in the very large number of interests in the entire 40 blocks, and there was no clear process available to remove their land from the reach of the proposal. When cross-examining Mr Souter, Mr McGregor asked if it was the attitude of the Department of Maori Affairs that it presented the application and then left it to the court to decide what was in the interests of the Savage and Edwards family. Mr Souter replied that the department 'must do' that. Mr McGregor then said that that attitude amounted to a suggestion that the court was in a better position to decide the future of the

60. It is not necessary for us to offer a view on whether the court's decision was authorised by those provisions' terms as they stood in August 1966 or whether it was authorised retrospectively by the amendments that were enacted in October 1966.

Savage and Edwards land than the owners themselves. The judge intervened at that point to say:

That would be an improper question if I were of a mind to take it as such. The Statute is there. If you are critical of the court's function or the Statute, take some steps to have the Statute amended.⁶¹

That comment reveals the strength of the judge's view that it was appropriate for the court's special powers to be invoked to bring the Tarawera Valley lands application before the court for its approval or otherwise, despite the opposition of some owners of land within the ambit of the application, including majority owners in particular blocks. The judge's view would have been reinforced by the fact that the court routinely dealt with proposals concerning Maori land which some individual owners did not support, including development proposals under Part xxiv of the Act and applications for amalgamation of title in other contexts. Indeed, Mr Souter said in evidence that the method used for the Tarawera Valley lands was the 'same method' he had used 'virtually hundreds of times in land development schemes', and that it seemed 'the only way of dealing with a large number of blocks'.⁶²

Plainly, the novelty of an applicant relying on the court's special powers in respect of the unique joint-venture proposal did not cause the judge to rule the application unlawful. That is explicable as a straightforward matter of statutory interpretation: nothing in the 1953 Act excluded the application of sections 435 and 438 to the situation. Both provisions, however, were worded in discretionary language, for they provided that the court 'may' make an amalgamation order and 'may' vest land in trust where it was satisfied of certain things. In light of that, and the novelty of the joint-venture proposal (in terms of both the extensive land area involved and the prospect of its alienation), it could be expected that the judge's decision would explore any reasons suggested by counsel for the court to exercise its discretion to decline the application. One such reason urged by Mr McGregor was the opposition to the application of his Savage–Edwards group of clients, who were the majority owners in a number of blocks. He argued that their interests included a legitimate expectation that their wish to retain ownership of the land would not be overridden by what the court perceived to be the interests of a much larger group of owners of a much larger area, in which, inevitably, the Savage–Edwards shares would constitute just a small minority. Mr Souter also lent some weight to the view that majority owners in particular blocks should not have their wishes overridden (see sec 6.11.2). The judge's decision, however, does not mention this point at all. Instead, the judge rejected its significance in court when he said that, despite the 'ethical' argument about the Savage–Edwards' majority ownership in certain blocks, section 435 required Mr McGregor to show that they were already using their land adequately.

61. Document A33, p P4

62. Ibid, p P2. Mr Martin, the former deputy registrar, did not agree entirely with that statement. He told the Tribunal at its hearing on 18 September 2000 that the practice of the time at general meetings of owners was to record both the blocks in which owners held interests and how the owners voted.

Another notable element of the court's treatment of the application is the apparent lack of emphasis placed on the Maori landowners' involvement in either the pre-court meeting process or the court proceedings and, therefore, on the strength or otherwise of the owners' support for the joint-venture scheme. Whereas we have found the owners' involvement in the meetings to be defective in Treaty terms, the judge neither sought to explore with any witnesses nor expressed any qualms about such matters as the level of attendance at the various meetings, the lack of explanation of any alternatives to the joint-venture proposal, and the level of understanding of that proposal among the owners. Indeed, in his judgment, Judge Gillanders Scott did not refer at all to the quantity or quality of support for the joint venture among the Maori landowners. Instead, he dissected and rejected the opposition of the Savage–Edwards and Ngaheu groups, noted the argument of the Lanham group for better terms, and, without mentioning the views of any other owners, proceeded to make orders under sections 435 and 438. The judge was, however, well aware that only 235 established owners (out of an estimated 4400) were among the 350 people at the Kokohinau Pa meeting and that only a minority of the owners were represented in court as either supporters or opponents of the application.⁶³

We accept that the judge's interpretation of the court's special powers was wholly consistent with the broader context, outlined in chapter 2, of Crown policy in connection with Maori land. To our mind, however, that explanation cannot excuse the result of the court's decision and orders, which was that the property rights of Maori landowners counted for very little indeed in a lawful process that was capable of substantially affecting those rights. As our discussion has highlighted, on the one hand the court did not explore at all the quantity or quality of the Maori owners' support for the joint-venture proposal, while, on the other, it discounted in a summary manner the opposition of the majority of owners in particular blocks. In light of these matters, and our findings in chapter 5, we have no doubt that not only the effect of the Maori Land Court's decision but also the provisions of the Maori Affairs Act 1953 which authorised it were inconsistent with the Treaty's guarantee to Maori of the Crown's active protection of their interests in land.

In terms of the Rekohu Tribunal's approach, our finding on the effect of the court decision means that we should next consider the response to it that was made by the Crown. We do not include the conduct of the Maori Trustee as part of the Crown's response for reasons that are explained in section 8.8.⁶⁴ Rather, we regard that response as comprising the various acts of Crown officers, and the Tarawera Forest Act 1967, by which the joint venture was finally implemented (see secs 7.7–7.10). It is our view that those last Crown steps which implemented the joint venture entrenched the earlier Treaty defects in the venture's development

63. That information, filed in the court in a list appended to the minutes of the meeting, was referred to by the judge when Mr Dye was giving evidence: doc A33, p B7.

64. In brief, we do not reach a determination on whether, in law, the Maori Trustee was acting by or on behalf of the Crown, and on the facts we consider that there are sufficient indicators that the Maori Trustee acted independently of inappropriate Crown influence.

and finalisation. Accordingly, we consider that the Crown's response to the court decision was also inconsistent with the Treaty's principles. However, because those later Treaty breaches occurred by means of the 'domino effect' of the earlier, more significant, breaches, we consider that they did not compound the claimants' grievances concerning the joint venture.

With particular regard to the court's powers under Part xxviii of the Maori Affairs Act 1953, and being mindful of the Crown's cautions against 'presentism', we have asked ourselves what the legislation could reasonably have provided in order to ensure that the Treaty's promises of protection concerning Maori land were upheld. Consistent with our findings in chapter 5, we believe that the first thing that the Act could and should have provided was an adequate process to ensure that the owners' views on any proposal affecting their land were, first, discovered and, secondly, respected to the fullest degree possible. As an initial part of this, it would have been reasonable, we believe, for the Act to have provided a means of ensuring that, before the court heard an application that could affect owners' rights, as many successions to the shares of deceased owners were made as was possible. The aim of such a provision would be to enable the 'true' owners of land to be discovered, so that they could then be involved in any process affecting their interests. As matters stood, while the judge praised the registrar and his staff for their recent title update work, it had not been done at the court's direction for the purpose of discovering owners and their attitudes towards the joint-venture proposal. Instead, it had been done to clear the way somewhat for the anticipated amalgamation of the 40 blocks and the subsequent vesting of the land's title in the Maori Trustee.

As for the process that should have been provided by the legislation for discovering the owners' views, in both the Maori Land Court and the Tribunal it was said that the Part xxiii process would have sufficed. In fact, that process was not a shining example of protection for multiple individual landowners' rights, particularly with respect to a proposal affecting a large number of blocks, a large area of land, and a large number of owners.⁶⁵ Our own view is that a sound process for determining the reactions of the owners to such a proposal would be more complex than Part xxiii's requirements. We consider that, as a minimum, the legislation should have required that the views of the owners be recorded in the same sort of way as occurred at a Part xxiii meeting, that the result be made known to the court, and that the court respect the results of that process, especially the wishes of owners with an outright majority of shares in a block. Any exceptions to that rule would then need to be openly provided for in the legislation by Parliament identifying the situations in which, or the purposes for which, and the extent to which, the property rights of some owners might be overridden.

Another thing that we consider that the Act could and should have secured in a situation such as arose with the joint-venture proposal was that the burden of the 'inconvenience' of partitioning out owners' interests, especially of majority owners in particular blocks, did not automatically fall solely on those owners' shoulders. We have no doubt that the judge was

65. Three owners in a block constituted a quorum, and a proposal was carried if it was supported by the owner or owners present with the greater number of shares.

correct in law in his approach to such matters as fencing, surveys, and access, but we believe that the circumstances highlight the unfairness – and inconsistency with Treaty principle – of the law ascribing only to those owners who did not wish to join a particular proposal the financial burden of staying out of it. We believe that the possibility of those costs being apportioned or, indeed, being borne entirely by others, and the desirability of that occurring in certain situations, should have been made plain by the legislation. In that way, the Treaty's promised protection of Maori landowners' rights would be more readily upheld.

Finally, we consider that the legislation should have included safeguards specifically designed to alert the court to the importance of preserving the Maori ownership of tribal taonga of such significance as Putauaki, or the last large tract of tribal land still owned by the people of an area. Our account of the Maori Land Court's hearing in chapter 6 did not include any mention of those matters only because they were not mentioned at all by the court. In the next chapter, we examine the circumstances surrounding the inclusion of Putauaki in the joint-venture scheme and the protests that have been made about the situation ever since. That information, we consider, provides further and very strong support for our conclusion that the effect of the Maori Land Court's decision, and the legislation which authorised it, were inconsistent with the Treaty principle of active protection.

Before moving to chapter 9, our final task here is to deal with the submissions made to us about the role of the Maori Trustee in connection with the joint venture.

8.8 TRIBUNAL CONCLUSIONS: MAORI TRUSTEE

The claimants' first, brief, submission was that the Waitangi Tribunal has jurisdiction in relation to the Maori Trustee because that office was created by an Act of Parliament and section 6(1)(a) of our empowering Act confers jurisdiction with respect to claims that Maori have been prejudicially affected by an Act of Parliament. Crown counsel did not respond to this submission and we do not accept it. We consider that section 6(1)(a) confers jurisdiction on the Tribunal in relation to the policy underlying, or particular provisions of, an Act of Parliament where there is a clear link between the policy or provisions and the prejudice claimed to have been suffered by Maori. That interpretation is consistent with the Rekohu Tribunal's finding that it could consider the 'structure and jurisdiction' of the Native Land Court because those matters 'came from the Crown' – by means of an Act of Parliament.⁶⁶ Significantly, that Tribunal did not find that it had jurisdiction in relation to the court's every act or omission. Nor was that meaning borne by its further finding – that it could consider whether the result of the court's awards to Ngati Mutunga was inconsistent with Treaty principles so that, if it was, the Tribunal could consider whether the Crown should have intervened.⁶⁷

66. Waitangi Tribunal, *Rekohu*, p 33

67. *Ibid*

The claimants' next argument was that the Tribunal has jurisdiction in relation to the Maori Trustee because, as a matter of fact in this particular case or as a matter of law generally, the Trustee acted 'by or on behalf of the Crown' within the meaning of section 6(1)(d) of the Treaty of Waitangi Act 1975. In response, the Crown contested the claimants' factual and legal points. We consider the factual point first.

8.8.1 The Maori Trustee's investigation

The Wai 411 claimants maintained that Mr Souter's dual roles – as Deputy Secretary of Maori Affairs and as Deputy Maori Trustee – meant that the Maori Trustee could not conduct an independent examination of the joint venture's terms that would safeguard the Maori owners' interests. Certainly, in his Maori Affairs role before the court hearing, Mr Souter had been active both in promoting the joint venture to the owners and in identifying possible methods of implementing it. Further, it does seem that he played a major role, as Deputy Maori Trustee, in carrying out the court's orders. Dr Harrison pointed to Mr Souter's 'midwife' statement in the Maori Land Court as supporting the idea that the Maori Trustee's office was not inclined to conduct an independent inquiry into the joint venture's terms because its officers, in their Maori Affairs roles, had already decided that those terms were acceptable. However, we do not agree. Rather, we consider that Mr Souter's statement was made at a time when it was thought that, if the court approved the venture's terms, the Maori Trustee would be required to perform purely administrative tasks in connection with its implementation. By contrast, once it was clear that the court was leaving the trustee discretionary powers to inquire into the justice of the venture's substance, the Maori Trustee took quite a different approach. That is evident, we consider, from Mr Souter's letter to the Treasury dated 21 October 1966, in which he stated that the Maori Trustee would be under a legal liability if he did not satisfy himself that the joint venture's terms were fair and reasonable to the Maori owners (see sec 7.6.1). With Mr O'Sullivan having written to the Maori Trustee just a few days earlier to issue thinly veiled 'threats' of legal action in the event of the trustee's negligence, we believe that there is no reason to doubt that the Maori Trustee was taking very seriously indeed the responsibility conferred by the court's orders. Mr McEwen's February 1967 letter to the Treasury is even more plain in setting out that the Maori Trustee's legal duty was to the Maori owner and not to the Crown or anyone else (see sec 7.6.3).

Mr O'Sullivan's letter had highlighted for the Maori Trustee's consideration the two matters of log price and land value, which helps explain the decision to inquire into them. The privilege claimed in court by the Crown for the 1963 Kaingaroa log sales agreement, and the judge's reference to that in his decision, may have provided further stimulus for the trustee to investigate the proposed Tarawera Forest log price clause. The decision to seek more information about the comparative returns from a stumpage-based lease and the joint venture,

despite the court's conclusion that there was no potential lessee, must have been based on the Maori Trustee's assessment of that issue's underlying importance.

We believe that the Maori Trustee's negotiation of changes to the log price clause supports the conclusion that his pursuit of that matter was conducted independently. The matter of the land valuation is less clear. To the Tribunal, Mr Groome was very critical of the quality of the valuation done by Mr Sharp for the Maori Trustee. Mr Groome maintained that it was a 'shoddy piece of work' that merely responded to the questions put to Mr Sharp by Mr Souter in a way that supported the Tasman proposal. He believed that the valuation should have included the prices paid for land used for forestry in the Rotorua, Taupo, and Kinleith areas, prices which he also said would have been available to the Maori Trustee (and the court) from the Land Valuation Office.⁶⁸ Against that, however, can be put the fact that the minimum guarantee meant that Tasman's valuation method (which Mr Sharp praised) was concerned with relative rather than absolute land values. Mr Souter certainly knew about the minimum guarantee, being one of the few witnesses in the Maori Land Court to mention it.

Dr Harrison was particularly critical of the fate of the Maori Trustee's inquiry into the returns from a stumpage-based lease and the joint venture. He contended that the trustee allowed himself to be 'fobbed off' by the Treasury's oblique reasoning that, with a satisfactory land valuation completed, the issue was no longer relevant. We have considered whether the Treasury's choice of words on this point might be a shorthand reference to its discussion of the matter with the Maori Trustee, at the meeting attended by Mr Poole. If, for example, the Maori Trustee had been told by the Treasury or Mr Poole that, at this stage of events, Tasman simply would not entertain a lease and would abandon the Maori landowners rather than 'go back to the drawing board' on the point, the trustee's adoption of the Treasury's words in his own subsequent letter to Tasman would be comprehensible. As we have already made plain, it is our own view, based on the wealth of evidence that we have studied, that by late 1966 and early 1967, when the Maori Trustee was making his inquiries, Tasman had been set against the idea of a lease for some two years and that, had the matter been pursued at that stage, it would have abandoned the Maori landowners.

From our examination of the evidence, we consider that, as a matter of fact, there are sufficient indicators that the Maori Trustee's inquiry into the joint venture's terms was conducted independently of undue influence from Crown officers. Therefore, we do not accept the claimants' submission that the Maori Trustee was, as a matter of fact, acting 'by or on behalf of the Crown' within section 6(1)(d) of the Treaty of Waitangi Act 1975. This leaves us with their further submission that, as a matter of law, the Maori Trustee acted 'by or on behalf of the Crown'.

68. Document B70, pp 8–9. Mr Groome's expectation that the court would obtain for itself the land price information that he did not wish to disclose seems misplaced. If counsel wishes information to be considered by a court, it is their responsibility to ensure that that information is presented in evidence. Therefore, if a particular witness does not wish to give certain evidence that is considered important, counsel must find another way to present it.

8.8.2 The question of law

The parties' submissions on this question were not comprehensive and we have not attempted to conduct the careful study of law and historical fact that would be needed to reach a sound answer to it. Had we regarded the answer as being material to the outcome of our inquiry, we would have embarked on the necessary study. We are satisfied, however, that our findings and recommendations are not affected by its omission. One reason why we believe that further focus on the Maori Trustee would not change the outcome of our deliberations is the nature of our findings concerning the result of the Maori Land Court's decision and sections 435 and 438 of the Maori Affairs Act 1953 (see sec 8.7).

8.9 SUMMARY

The findings that have been made in this chapter are:

- ▶ On the facts, we consider that the Maori Land Court hearing of the application concerning the Tarawera Valley lands was conducted independently of undue Crown influence so that the court was not, in effect, acting 'by or on behalf of the Crown' within the meaning of section 6(1)(d) of the Treaty of Waitangi Act 1975.
- ▶ The effect of the court's decision was, however, inconsistent with the Treaty principle of active protection, as were the provisions of the Maori Affairs Act 1953 which authorised that decision.
- ▶ On the facts, we consider that there are sufficient indicators that the Maori Trustee also acted independently of undue Crown influence.
- ▶ The Tribunal has not embarked on the extensive inquiry that would be required to determine whether, in law, the Maori Trustee acted by or on behalf of the Crown within section 6(1)(d) but that is immaterial to the outcome of our inquiry.

CHAPTER 9

PUTAUAKI MAUNGA

9.1 PUTAUAKI AND THE DEVELOPMENT OF THE JOINT VENTURE

9.1.1 Introduction

The geography, tribal history, confiscation, and subsequent title division of Putauaki maunga have been described in section 3.2.6. In chapters 3 to 8, we have described and analysed the events leading up to the creation of the Tarawera 1 block in 1966 and its transfer in 1968 to TFL's ownership. In this chapter, we revisit those events but with a specific focus on Putauaki's inclusion in the land that became TFL's. Then we trace subsequent events relating to the mountain, particularly its use since 1968 and the protests that have been made about its ownership. For that task, we rely on the evidence presented to us primarily by the Wai 46 claimants and Crown historian Dr John Battersby and also on evidence presented to the eastern Bay of Plenty Tribunal. That Ngati Awa provided the lion's share of the relevant claimant evidence is consistent with the fact that Putauaki's fate has long been at the heart of their Treaty grievances. By contrast, the Wai 411 claimants, while emphasising that their primary grievance concerned the loss of ownership of the 40 blocks of Tarawera Valley land, did not give pre-eminence to the loss of the sacred mountain. That position would seem to reflect the Wai 411 claimants' more diverse membership and their continuing tangible connections with Putauaki – as MIL shareholders with representatives on TFL's board.

The events related in this chapter provide a unique case-study of the nature of the involvement of the Maori owners in the Tarawera Forest joint venture's development, finalisation, and implementation. That such a potent cultural symbol as Putauaki was included in the forestry venture on the terms that it was is very revealing, we believe, of the dynamics of the situation in which Tasman, various Crown agencies, and some Maori landowners were involved. We are satisfied that the breaches of Treaty principle that we have already found to be established in connection with the Tarawera Forest venture (see chs 5, 8) are exemplified by the story of Putauaki since the early 1960s. In particular, there was no meaningful agreement by the Maori landowners to the inclusion of Putauaki in the forest venture on the terms by which it was done. We do not, however, believe that the owners' lack of understanding of the proposal's effect on the mountain was deliberately fostered by either Tasman or the Crown.

We reserve for the next chapter our overall assessment of the effects of the loss of Maori ownership of the Tarawera Valley lands. As this chapter reveals, however, one result of the Crown's failure actively to protect the taonga of Putauaki is the profound and justifiable sense of grievance that has persisted to this day among the Wai 46 claimants.

9.1.2 Crown–Tasman discussions before July 1964

Early activity relating to Tasman's acquisition of Maori land in the Tarawera Valley makes no mention of either of the two blocks – Matata 59B1 and part of Putauaki 2 – that included the mountain. The November 1961 Treasury paper which described the blocks involved did not mention these two, and they were not included on the accompanying map.¹ In addition, the record of the meeting on 13 January 1962 between Tasman and Sir Turi Carroll, J Boynton, and R Paku did not specify any blocks.²

The first mention of the blocks containing the mountain came in the second half of 1962, in the general consideration of afforesting Maori land. The November 1962 letter from the Director-General of Forests to the Secretary of Maori Affairs, which set out a schedule of Maori-owned blocks that conservancy officers considered suitable for afforestation, included 'Pokohu–Putauaki (30,800 acres)' and 'Putauaki No 2 and Pt [Matata] 59B2A and 59B1 Blocks (5,000 acres)'. Alongside the names of these two groups of blocks was the note: 'This area . . . meets all requirements and is possibly the most suitable of all these detailed. Its acquisition is regarded as being of considerable importance.'³

A Maori Affairs file note in June 1963 indicated that Tasman, the Forest Service, and Maori Affairs were discussing the acquisition of at least some of these blocks for forestry purposes. It set out a list of blocks and the current situation with each. Included was 'Pokohu–Putauaki', about which it was noted: 'Tasman Pulp and Paper Mills are conducting negotiations direct with owners. Are said to be making progress.'⁴ It is not clear, however, whether the term 'Pokohu–Putauaki' was being used there simply to cover the 30,800-acre area listed in the November 1962 schedule, or more generically to include the area embraced by the Putauaki 2 and Matata 59B blocks.⁵

1. Treasury, 'Crown Land for Tasman Company', report to Minister of Finance in response to Cabinet paper TPP(61)M3, pt 2, of 18 September 1961, 30 November 1961 (doc A5(4.1))

2. Reidpath, file note, 16 November 1962 (cited in Tasman Pulp and Paper Company Limited, 'Main Features of the Tarawera Forest Proposal History', typescript, undated (doc A5(3.1)))

3. Poole to Secretary of Maori Affairs, 30 November 1962, MA W2490 58/1, Archives New Zealand, Wellington

4. Souter, file note, 5 June 1963, MA W2490 58/1, vol 1, Archives New Zealand, Wellington

5. In archival documents of the time, the name 'Putauaki' has been used variously to refer to the Putauaki blocks, the Putauaki State Forest, or the mountain.

9.1.3 First meeting with Maori owners

On 28 July 1964, Tasman representative Mr McKee and two Maori Affairs officers from Rotorua, Messrs Barber and Dye, met with four Maori landowners, whom Dye later described as 'leading Maori elders' of the area (see sec 3.9).⁶ The Tribunal does not have any evidence suggesting that any of the four were owners in Putauaki 2 or Matata 59B1.

The minutes of the meeting indicate that the emphasis of the discussion was on the scheme and its economics rather than the land blocks involved. However, Mr McKee stated that Tasman was planning an aerial survey of all the areas, to be completed by 'about November'.⁷ There was some discussion of amalgamation, and Mr Barber observed that 'one title for the lot would be preferable but possibly there could be subsidiary groups within that title to provide for sub-tribal or hapu divisions'.⁸ At the next meeting planned, Mr McKee was expected to have more information and to be able to 'say definitely what Maori blocks were required for the scheme'.⁹

9.1.4 Second meeting with Maori owners

The next meeting between Maori, the Crown, and Tasman was on 1 October 1964, and this time 15 Maori owners were present (see sec 3.11). When Mrs Lanham asked how much Maori land was wanted, Mr Dye responded that he had drawn up a schedule of 'all the possible land that could be included. Not all included, just the possible land.' He then indicated that, 'roughly', the area under consideration was:

The Pokohu blocks, Ruawahia No 2, possibly Rerewhakaitu, certain Matahina Blocks, possibly Te Haehaenga – couple of blocks there, the Kawerau group of Blocks formerly Matata 39A Blocks now known as Kawerau A blocks. Some of those are already leased and may not be affected but several are not leased at the moment or are vested on trust. Parish of Matata Lot 59 Subdivisions and Putauaki No 2 Block of over 2,000 acres in itself.¹⁰

Barber, too, underlined that this list was not firm, stating: 'That is only a list of lands taken out in the vicinity – idle Maori lands.' Apart from a brief query about the Kawerau blocks, the listing of lands seems to have elicited no particular response from those present, and discussion moved on to a consideration of the forestry and business aspects of the scheme.

Clearly, there was no concern at this stage over the fact that Matata lot 59 and Putauaki 2 were being considered for inclusion in the scheme. However, it is not certain that any of the

6. Document A33, pB7

7. Document A4, vol 2, p 1

8. Ibid, p 2

9. Ibid

10. Ibid, p 8

owners present would have known that Putauaki 2 included part of the maunga, much less Matata lot 59, whose name gave no clue as to its link with the mountain. A map was apparently circulated, but it does not appear to be any of the maps that were presented to the Tribunal in evidence and we cannot be sure that it showed the location of the mountain.¹¹

9.1.5 Third meeting with Maori owners

At the third meeting between Maori, the Crown, and Tasman, on 3 November 1964, the number of Maori owners present increased to 21, with Mr Barber indicating that he had chosen them as being representative of the owners in the blocks involved (see sec 3.13).¹²

The minutes of the meeting indicate that, immediately following the welcome, Tame Waitere, an owner in Matata 59B2A, demanded that his block be removed from the scheme. In response, Mr Dye 'read out details of blocks'. From the ensuing discussion, it is evident that those present also had a map of the various blocks proposed for inclusion in the scheme, to which they were referring. However, the only mention of either of the blocks containing Putauaki maunga was an oblique one: in identifying Matata 59B2A on the map, Mr Dye described it as partly adjoining the land in Matata 59B1.¹³ From the phrases he used, the map referred to would appear to be one that was provided to the Tribunal and which clearly shows Matata 59B1 and Putauaki 2 in the area to be included in the scheme. No comments were made about this.

As in the two previous meetings, much of the discussion centred on the business and forestry aspects of the scheme. However, later in the meeting there was some further mention of land being excluded when one of the owners asked whether a particular area of 'unplantable Maori land on one side' could be left out. Mr Schmitt, the new managing director of Tasman, replied: 'Probably certain Maori land on [the] fringes if people desire to leave it. Most is on one extremity and could be excluded without detriment to the forest venture.'¹⁴ It is not clear from the minutes which land was the object of the query, but Mr Schmitt's response implied that the blocks to be included in the scheme were still not set in stone.

There was also brief mention of some reserve land being excluded. The first was a strip of land on each side of the Tarawera River, starting at the outer edge of the area proposed for the scheme. Mr Beachman, the commissioner of Crown lands in Hamilton, stated:

11. In referring to the map, Mr McKee mentioned 'areas in brown which are Maori lands lying to the north of Putauaki 2 block', but this description does not fit any of the maps submitted to the Tribunal: doc A4, vol 2, p 9.

12. Document A4, vol 2, p 15

13. Ibid, p 17. From Dye's description, the map likely to have been used at the meeting is the one attached to the 'Offer to Maori Owners to Participate with Tasman Pulp and Paper Company Limited and Crown in the Development of an Exotic Forest in Tarawera Valley', [20 October 1964] (doc A5(7.14)). Some of the block descriptors on this map are inaccurate, but they correspond with the names he used.

14. Document A4, vol 2, p 24

The Crown will require access up the river to the lake. In a disposition of any Crown land, it is customary to provide a reserve along the river. There is no reserve along the Tarawera River and that will be one of the conditions. I think Tasman is already aware of that.¹⁵

The second piece of land discussed was Pokohu B3A (the 'gold mine reserve'), which Alfred Edwards, an owner, described as already being a 'special reserve'. The owners of this block had been granted a mining concession when they formed an incorporation in 1925.¹⁶ The land was situated near the middle of the area proposed for inclusion in the venture, and Mr Edwards requested that it be excluded. The response was non-committal, with Mr Barber suggesting that Messrs Dye and Edwards should discuss the matter further. The Tasman representatives, for their part, appear not to have commented at all.¹⁷ In neither case was there any obvious opposition to the idea of land being excluded from the forestry scheme as reserves. Furthermore, as will be seen shortly, there is evidence that the upper slopes of Putauaki were being regarded by Tasman at this time as a burial reserve that was to be excluded.

9.1.6 Crown–Tasman discussions before October 1965

There were no more meetings between the Crown, Tasman, and Maori landowners until 14 October 1965. However, in the intervening period, various details of the scheme were being further refined between Tasman and the Crown.

A significant reference to the mountain came on 27 August 1965, when Mr Schmitt wrote to the Deputy Secretary of Maori Affairs, Mr Souter, and the Director-General of Forests, Mr Poole, about the valuation of the land that would go into the scheme. Mr Schmitt noted that the initial values had excluded an area of '806 acres comprising the upper slopes of Mount Edgecumbe – the Putauaki Burial Reserve'. However, he said that it was now considered necessary to include the area 'as a means of avoiding partitioning of the land and to avoid the leaving out of the scheme land wholly enclosed within the boundaries of the proposed forest area'. Mr Schmitt nevertheless stated that Putauaki would remain unplanted and would 'remain protected as a reserve'. For valuation purposes, it was proposed to 'include the Mount Edgecumbe area on the basis of a flat valuation of £1 an acre'.¹⁸

We note that the letter contradicts the Crown's assertion that 'Tasman always anticipated that Putauaki would be included in the scheme'.¹⁹ More importantly, the letter shows that all

15. Ibid, p 26

16. Ibid, p 107

17. Ibid, p 30

18. Schmitt to Souter, 27 August 1965, MA 58/2/1, pt1, p1; Schmitt to Poole, 27 August 1965, FS83/503, vol1 (doc A5(8.12))

19. Document B81, para 11.12

discussion about the forestry scheme with Maori owners before late August 1965 had been on the basis that the upper slopes of the mountain would be excluded as a burial reserve.²⁰

In Tasman's detailed paper on the proposal sent to Maori Affairs, the Forest Service, and the Treasury on 27 August 1965, it was specified that the boundary of the 806-acre area had been 'selected in consultation with certain Tribal Elders'. The proposal further specified that the boundary would 'mark the limit of the afforestation activities of the Forest Company'.²¹ Exactly which elders were consulted is not clear. The booklet, which was later distributed to owners and which also referred to the boundary as having been 'selected in consultation with certain tribal elders', went on to describe the area as being the sacred burial ground of 'certain sub-tribes of the Arawa'.²² A possible inference is that the elders were Arawa, or were regarded as such by Tasman officials.

When asked by the Tribunal, John Hunia could not recall which kaumatua were involved in defining the boundary of the burial reserve.²³ Two men – Arapeta Te Rire (Ngati Tuwharetoa) and Phillip Howell (Ngati Rangitihi) – were mentioned in Mr Hunia's written evidence to the eastern Bay of Plenty Tribunal as having been closely connected with 'the formative stages' of the proposal and are therefore possible candidates.²⁴ In 1976, Mr Howell was reported as saying that he had discussed the scheme, and the reserve, with Dr Eruera Manuera, but it was not reported when that occurred or whether Mr Howell was involved in defining the boundary. However, it was implied that Mr Howell knew the proposed extent of the reserve by the time that the conversation took place, for he said that he had:

gone to Mr Eruera Manuera personally and discussed the Tarawera Proposal including the acquisition of Mt Edgecumbe. He had specifically mentioned that planting was to go only half-way up the mountain and that the balance was to be held as a reserve within Tarawera Forest.²⁵

At an MIL board meeting in 1979, John Mitchell, Tasman's chief forester, stated that Tasman 'had consulted elders (including Messrs W Moko and A Te Rire) from time to time regarding

20. Section 439 of the Maori Affairs Act 1953 governed the creation and terms of Maori reservations at this time. Created by the Governor-General by Order in Council on the recommendation of the Maori Land Court, land set apart for a Maori reservation was vested in trustees and held for the common use or benefit of a specified group of Maori. While the reservation subsisted, the land was inalienable, subject only to limited exceptions unlikely to apply to a burial ground. A reservation could be varied or revoked by the Governor-General on the recommendation of the Maori Land Court, in which case the land would be revested in those who owned it at the time that it was set apart as a reservation.

21. Tasman Pulp and Paper Company Limited, 'Proposal by Tasman Pulp and Paper Company Limited to Maori Owners and the Crown to Participate in the Development of an Exotic Forest in the Tarawera Valley', typescript, undated (doc A5(8.9), p 7)

22. Document A4, vol 2, p 124

23. Oral evidence of John Hunia after presentation of document A15, 8 June 2000

24. Document A6, para 2.1

25. Maori Investments Limited, 'Seventh Annual General Meeting', minutes of 14 August 1976 meeting, 20 August 1977 (doc A5(2.26), p 2)

the removal of remains from caves or securing of caves'.²⁶ These various consultations certainly appear to relate to the reserve area, but they cannot be pinpointed in time and there is no mention of boundaries being discussed. Then again, in 1977, Mr Mitchell referred to a site visit by a group of elders from Onepu and Te Teko. He did not mention Messrs Moko and Te Rire in connection with this, but stated:

Prior to the formation of Tarawera Forests Ltd in 1967, the Forests Manager accompanied by a group of Maori elders from Onepu and Te Teko, drove around Mount Edgecumbe. The general location of a number of caves used as burial sites was pointed out. Subsequently, provision was made for these areas to remain undisturbed and unplanted.²⁷

Another, later, statement by Mr Mitchell may refer to the same visit:

Prior to the meeting of owners [in December 1965], I had invited a group of Elders from the Kokohinau (Ngatiawa), and Onepu Springs Road (Ngatituwharetoa), areas to visit Putauaki with me and to point out any known burial sites in order that they might not be interfered with during roading or clearing operations.²⁸

Again, Mr Mitchell did not refer to any discussion of the reserve's boundaries as such. However, if this visit had, in fact, been as early as the middle of 1965, the group of elders in question could be the ones referred to in Tasman's August 1965 paper on the scheme. We will return to the significance of this visit in section 9.1.9. We also note, in passing, that Mr Mitchell's statement quoted above indicates an awareness on his part of the rightful interest of Ngati Awa in matters relating to Putauaki. This contrasts with a later letter from him stating that Ngati Awa had no traditional landholding in the mountain (see sec 9.4.2).

Meanwhile, Tasman's detailed paper (unlike the later booklet) did not refer specifically to Te Arawa in connection with the caves but instead to Maori generally:

Tasman recognises that the Maori people, as a whole, revere Mount Edgecumbe as the sacred burial ground of their forefathers and it is the Company's wish that this area be protected within a Reserve.²⁹

Despite this assurance, a later section headed 'Access on Putauaki' stated that the company wished to 'support the Post and Telegraph Department in securing limited, private access to the summit of Putauaki'. The same section revealed that the Post and Telegraph Department was 'negotiating with the owners of Putauaki to secure access to the summit of Putauaki in

26. Maori Investments Limited, minutes of 27 October 1979 board of directors meeting, 16 February 1980 (doc A5(2.27)), p 3. Wetini Moko and Arapeta Te Rire, both Tuhourangi, were trustees for the Kawerau B block: doc A33, pp 1S2-1S4.

27. Mitchell to Roberts, 27 April 1977, MT12/441/3, vol 2, p 3 (cited in doc B67, p 14)

28. 'Putauaki-Mt Edgecumbe', 24 December 1981, Tarawera file, Maori Land Court, Rotorua (quoted in doc B67, pp 8-9)

29. Tasman Pulp and Paper Company Limited, 'Proposal by Tasman Pulp and Paper Company Limited', p 7

9.1.7

order to install radio-telephone equipment'. It noted that other organisations had also indicated an interest in such access, and further commented that 'the summit would provide a superb site for a forest fire lookout giving excellent coverage of the whole of the proposed Tarawera Forest area as well as coverage of Matahina Forest'.³⁰

The mention of negotiations between 'the owners of Putauaki' and the Post and Telegraph Department was possibly a reference to an approach to the Putauaki Tribal Executive, which represented Ngati Awa marae, about using the summit of the mountain (see sec 9.1.8). However, as far as can be ascertained, the suggestion about the fire lookout had not been put to landowners at any of the previous meetings with Tasman. Nor did it appear to be included in the paper on the Tarawera proposal that was prepared for the October 1965 meeting. Indeed, the paper did not mention the mountain at all.³¹

9.1.7 The meeting of 14 October 1965

In preparation for the 14 October meeting between the Crown, Tasman, and Maori, invitations were extended to 48 landowners. Thirty-eight attended, including, for the first time, Dr Eruera Manuera. Mr Dye was later to describe them as 'prominent Maoris . . . , all owners and residing in Rotorua and Bay of Plenty'.³² Among those present may have been some not on the original invitation list. Mrs Hawthorne, for one, was to complain during the meeting about the lack of information available to owners, and she stated that, even 'as Chairman of one Tribal Committee', she 'did not know that this meeting was going on today'. Ten Government officials and nine Tasman representatives were in attendance, which brought the total number of attendees to 57.

The meeting opened with an address by Mr Schmitt, during which he referred to the great amount of detailed work that had been carried out in developing the Tarawera proposal, 'some of which can be seen in the maps and the model shown here'.³³ According to Dr Battersby's evidence for the Crown, the model was a one inch to 20 chains (ie, 1:15,840) scale model of the area that had been constructed by Tasman earlier that year. It was not produced to the Tribunal, having apparently been disposed of in 1995, but was said to have 'topographically depicted the entire area proposed for the scheme, including Mount Putauaki and showed the planting boundaries on the mountain itself'.³⁴ Mr RG Lockie, a land utilisation officer of the Department of Maori Affairs, described it in 1966 as 'a very fine built up topographical model of [the] area showing relative block boundaries'.³⁵

30. Tasman Pulp and Paper Company Limited, 'Proposal by Tasman Pulp and Paper Company Limited', p 7

31. Document B67, p 2

32. Document A33, p B7

33. Tasman Pulp and Paper Company Limited, 'Address by Mr G J Schmitt Managing Director Tasman Pulp and Paper Company Limited to a Meeting of Maori Owners, Government Departments and Tasman to Discuss Forestry Development in the Tarawera Valley', typescript, undated (doc A5(8.37)), p 4

34. Document B67, p 8; doc B67(a), p 2

35. Lockie to district officer, Rotorua, 21 June 1966 (doc B1, p 61)

Following Mr Schmitt's address, one of the first issues raised, as in the meeting the previous November, was a request for particular pieces of land to be excluded from the scheme – here, a member of the Edwards family demanded that his blocks be left out.³⁶ However, Mr Souter, the Deputy Secretary of Maori Affairs, intervened to move the discussion to the business side of the venture, indicating that land issues would be discussed later in the meeting.³⁷

When that discussion eventuated, Mr Souter stated that he was 'not going into details' about the amalgamation process, and there was no discussion of individual blocks.³⁸ In response to a suggestion from Nira Fraser that small landowners would have 'very little say when the final proposition is put to them', Mr Souter replied that people could apply to the Maori Land Court or Appellate Court to have their block excluded:

What will happen is that an application will be made eventually to the Maori Land Court to amalgamate these titles into one. Some will support the amalgamation application and some will oppose it and say they want their block excluded. Whatever his decision may be, anyone has the right to lodge an appeal with the Maori Appellate Court. The decision as to the fate of any particular block of land does not lie in our hands. It will be decided by the Maori Land Court or by the Maori Appellate Court. Adequate justice will be done. Anyone has the right to appeal.³⁹

Monica Lanham then questioned the equity of having to take the matter to the courts: 'The ones who want to exclude their land from the proposal – what rights are you giving them – just the necessity to spend more money in Court appearances?'⁴⁰

Mr Souter responded that the best interests of the country, for Maori and Pakeha alike, lay in the scheme proceeding, and implied that he thought the hurdle of having to argue in court for the exclusion of particular land blocks was not unreasonable:

The Department is concerned that Maori land shall not remain idle or be used unprofitably. . . . We are all citizens of New Zealand. Maoris and Pakehas and all of us are citizens of one country. We want to do the best for New Zealand and in New Zealand today we cannot afford to have land lying idle. Here is a wonderful opportunity to make profitable use of the land. We may have to include some land in the application where owners don't think it is a very good idea; but it is for the Court to decide.⁴¹

No queries about reserves were raised by owners, but Mr Lynskey, the Assistant Director-General of Lands, mentioned the matter in connection with the Crown land that was being put into the scheme. He stated:

36. There were two Edwardses at the meeting, Alfred and Takawai: doc A4, vol2, p34. On the basis of his statements at the previous meeting, we believe it was Alfred Edwards who made this request.

37. Document A4, vol 2, p35

38. Ibid, p 46

39. Ibid, p 48

40. Ibid, p 49

41. Ibid

The Lands Department has an interest in . . . the retention of sufficient reserve land for the general use of the public, particularly around rivers and lakes. There is a need to provide adequate access along Tarawera River. This has been discussed with Tasman and it has agreed that if the venture goes ahead then access will be reserved on both sides of the river. The other reserve is around Lake Tarawera and adjacent to Mt Tarawera. Those lands which are at present owned by the Crown and required for reserve purposes are being excluded from this forest venture, so that there is no fear that the pines will be planted right down to the lake edge.⁴²

There was no further discussion of reserves, but the above statement may have been sufficient to create, in the minds of some listeners, a firm link between the notions of reserve land, unplanted land, and land excluded from the scheme. This is particularly significant in light of Dr Manuera's attendance at the meeting and his subsequent claim to have misunderstood the nature of the proposals as they would affect Putauaki. Certainly, Phillip Howell may have discussed the Putauaki reserve with Dr Manuera, either before or after this October 1965 meeting (see sec 9.1.6). Indeed, Mr Howell may even, as he asserts, have 'put the Tarawera proposal to Mr Manuera twice, once alone and once with Mr M McKee'.⁴³ Nevertheless, the Tribunal considers that knowing other unplanted reserve areas were to remain *outside* the scheme was sufficient to cause ongoing confusion and misunderstanding about the status of the proposed Putauaki reserve. Indeed, even Harris Martin, the deputy registrar of the Waiariki Maori Land Court from 1962 to 1973, told the Tribunal that he believed Putauaki mountain to be a Maori reservation – although he later corrected his error.⁴⁴

The meeting ended with the promise of a 'formal meeting', to be held in about four weeks. As was discussed in section 4.8.7, it seems that many Maori present would have thought from that description that the next meeting would be called under Part XXIII of the Maori Affairs Act 1953. Therefore, they would have expected that shareholders in each block would vote individually on whether to accept the joint-venture proposal as it affected their block.

9.1.8 Meeting of the Putauaki Tribal Executive, 20 October 1965

In his evidence to the eastern Bay of Plenty Tribunal, John Hunia stated that in the late 1960s the Putauaki Tribal Executive had been approached by Whakatane radio-telephone users requesting permission to erect a radio transmitter on Putauaki.⁴⁵ Formed in the 1950s, the Putauaki Tribal Executive represented all Ngati Awa marae in the Rangitaiki district, and it seems probable that this was the body with whom the Post and Telegraph Department had

42. Document A4, vol 2, p 46

43. Maori Investments Limited, minutes of 27 October 1979 board of directors meeting, 16 February 1980 (doc A5(2.27)), p 4

44. Document B71(a)

45. Document A6, para 2.7

been ‘negotiating’ earlier in 1965 to secure access to the summit of Putauaki to install radio-telephone equipment (see sec 9.1.6).⁴⁶ From the recently published biography of Dr Eruera Manuera written by his daughter, Mrs Te Onehou Phillis, it seems that application had been made to the Putauaki Tribal Executive by both the Post and Telegraph Department and the Electricity Department, supported by Tasman, to erect a mast on the summit of Putauaki. She wrote ‘No te wa i takoto ai te tonoa a te Poutapeta, a te Tari Uira me te Tahimana kia whakaaetia ratau ki te whakatu pouhiko ki te tihi o te maunga’ (‘At that time, the request from the Post Office, the Electricity Department and Tasman was put to them to agree to the erection of a mast on the summit of the mountain’).⁴⁷

This appears to be confirmed by a letter from Dr Manuera himself, in which he states that a meeting of the Putauaki executive was held at Te Mahoe on 20 October 1965 to discuss the Pakeha request to erect a mast.⁴⁸ As a result of that meeting, the executive suggested that the ‘Waiariki Board’ (presumably the defunct district land board) be asked to call a hui, so that all those with an interest in the mountain, and notably all the rangatira, could participate in the decision-making process.⁴⁹ Their request received no response:

Ko Kapua Te Ua te Tiamana, ko Ron Morrison te Hekeretahi. Ko ta raua whakautu, ‘Kai te pai, he mangai noaiho te komiti nei no te iwi. Inoitia ki te Poari o Waiariki kia karangatia he hui ma nga rangatira katoa o Tenei maunga, a me tae mai ano hoki tetahi whakamohiotanga ki to ratau komiti whanui.[’]

Mai i taua ra taemai ki tenei wa, kaore ano he kupu mai a he reta ranei e mohio iho nei matau koinei te hunga whakahaere whakatikiatika hoki i nga take katoa e pa ana ki te iwi.⁵⁰

This translates as:

Kapua Te Ua was the chairman, Ron Morrison the secretary. Their response was ‘That’s fine [but] this committee is only a mouthpiece for the iwi. Ask the Waiariki board to call a hui for all the rangatira of this mountain, and let the information go back to their committees.’

But from that time to this, there was no word or letter that would inform us that this is the appropriate body to deal with all the issues associated with the people.

Apparently, the next thing the Putauaki Tribal Executive heard was news of the ‘general title meeting’ to discuss the Tasman forestry proposal, about which notice was distributed on 19 November.⁵¹

46. Tasman Pulp and Paper Company Limited, ‘Proposal by Tasman Pulp and Paper Company Limited’, p 7

47. Te Onehou Phillis, *Eruera Manuera* (Wellington: Huia Publishers, 2002), p 239

48. Eruera Manuera, undated (cited in Te Rau o Te Huia Cameron, ‘Putauaki te Maunga, Rangitaiki te Awa, Rangitukehu te Tangata’ (Wai 46 ROI, doc A39), p 2)

49. District land boards were abolished in 1952 by the Maori Land Amendment Act of that year.

50. Eruera Manuera, undated (cited in Te Rau o Te Huia Cameron, p 3)

51. Te Onehou Phillis, p 239

9.1.9 Site visit to identify wahi tapu

At some point prior to December 1965, as noted in section 9.1.6, Tasman's Mr Mitchell visited the mountain in the company of several Maori elders 'from Onepu and Te Teko'.⁵² In recounting this visit later, he stated that it was to 'point out any known burial sites in order that they might not be interfered with during roading or clearing operations'. The elders who had been invited were, he specified, from Ngati Awa and Ngati Tuwharetoa. He then went on to list three burial areas that they had identified, and said that he had assured them that these sites would be 'safeguarded against disturbance by forestry activities'.⁵³

This is the only clear mention that we have of any Ngati Awa elders being involved in site visits with Tasman officials, and it is therefore significant inasmuch as Ngati Awa (and, in particular, Pahipoto) have stated that they had tended to be excluded from consultation.⁵⁴ However, no evidence about this visit has been produced from the Maori side, and we have no knowledge of who the elders were.

Crown witness Dr Battersby observed that 'Had the elders understood that the mountain would be excluded, it is unclear why they would have participated in Mitchell's visit or required assurances that certain areas on the mountain would not be disturbed'.⁵⁵ We agree that if the elders were seeking to ensure the safety of *specific sites*, on an individual basis, then it would indicate that they knew that the mountain as a whole was to be included in the scheme. Certainly, this is what Mr Mitchell thought they were doing. However, as we have no contemporary evidence from the Maori side, we have no certainty that this is how the elders interpreted the purpose of the visit. It is equally possible that they believed they were identifying the sites to Mr Mitchell in order to ensure the safety of the *whole area* from roading, clearing, and forestry activities – that is, to ensure that all of Putauaki would be excluded from the scheme. This would accord with the visit having been the one that led to the defining of the reserve's boundary.

9.1.10 The 'reserves' as explained in Tasman's booklet

Although Mr Barber later commented that it would never be possible to get a notice of the Kokohinau Pa meeting into the hands of 'every living owner', he believed that Maori Affairs had 'done everything possible to get the notice out and get every owner whose address we knew properly informed'.⁵⁶ Enclosed with the notice was the booklet that had been prepared by Tasman. Dr Battersby noted that 2200 copies of the booklet were sent out.⁵⁷ Given its wide

52. Mitchell to Roberts, 27 April 1977, p 3, MT12/441/3, vol 2, p 3 (cited in doc B67, p 14)

53. 'Putauaki-Mt Edgecumbe', 24 December 1981, Tarawera file, Maori Land Court, Rotorua (quoted in doc B67, p 9)

54. Document A6, paras 2.1, 3.5-3.6; oral evidence of Ngahuia Rowson, 9 June 2000

55. Document B67, p 9

56. Document A4, vol 2, p 109

57. Document A10, p 68

distribution, it is likely to have been a major source of information for many owners in the Tarawera Valley lands – and possibly the prime source of information for some. As such, it warrants close scrutiny with regard to how it may have influenced the thinking of those owners who had an interest in Putauaki.

Most of the booklet was devoted to explaining the proposed venture from a business point of view. However, a short paragraph on page 2 noted that ‘Certain reserve areas have been excluded from this proposal’, and it directed the reader to appendix III, where those areas were ‘discussed fully’.⁵⁸ Appendix III listed three reserves or proposed reserves, but the ‘full discussion’ consisted of two short paragraphs on each.

The first reserve listed was ‘Tarawera Scenic Reserve, including Pokohu A3’. The booklet stated:

The probable boundary of the Tarawera Scenic Reserve, which will include both Mount Tarawera and Lake Tarawera in addition to the Tarawera River (from its source to the Tarawera Falls) and Pokohu A3, is shown on the plan marked ‘A’.

Pokohu A3, of 101 acres, is an Eeling Reserve which which [*sic*] is held in trust for all the Maori owners of Pokohu ‘A’. It is likely that this Block will be incorporated in the proposed Scenic Reserve.⁵⁹

The inference from this description, when taken in conjunction with plan ‘A’, which showed the reserve as being outside the boundary of the scheme, is that the land concerned was indeed ‘excluded from this proposal’.

The second reserve mentioned is Te Haehaenga 3 burial reserve, ‘a 4 acre Maori Burial Reserve which is situated on the top of the peak known as Maungawhakamana’. Noting the reverence in which the Maori people hold the graves of their ancestors, the brochure stated specifically that ‘it is not the intention of Tasman that this block should be included in the proposal or planted in trees’.⁶⁰

The last reserve listed is the Putauaki mountain burial reserve. The booklet states:

The Putauaki Mountain Burial Reserve is an area of 806 acres comprising parts of two Maori Blocks, Matata 59B1 and Putauaki Pt No 2. It is proposed that this boundary, which has been selected in consultation with certain tribal elders, will mark the limit of the afforestation activities of the forest Company.

Putauaki (Mt Edgumbe) is the sacred burial ground of the forefathers of certain sub-tribes of the Arawa and it is, therefore, Tasman’s wish that this area be protected and remain unplanted within a reserve. Notwithstanding that the Putauaki Burial Reserve will not be planted, Tasman proposes to value it at the base price of £1 per acre, which is the value of

58. Document A4, vol 2, p 121

59. *Ibid*, p 124

60. *Ibid*

unplatable land within the scheme, and to include the sum so calculated as part of the Maoris' contribution to the Forest Company.⁶¹

Omitted from the booklet, and from the written proposal presented to the October 1965 meeting, was any reference to the summit of the maunga making a 'superb site for a forest fire lookout' (see sec 9.1.6).

The Crown has said that placing a valuation on the land should have alerted the reader to the fact that it was to be included in the scheme.⁶² A sharp-eyed reader with a head for figures might also have noted that the acreages shown for 'Mtn Reserve 1' and 'Mtn Reserve 2', listed on page 6 of the booklet among the lands to be transferred to the scheme, together totalled just over 806 acres – the area of the Putauaki burial reserve. As Dr Battersby noted in his evidence for the Crown, the smaller mountain reserve, number 1, doubtless corresponded to that part of the mountain which lay in Matata 59B1, while the larger mountain reserve, number 2, would have been the part that lay in Putauaki 2.⁶³

Nevertheless, we consider that the cumulative effect of the information given about the first two reserves (Tarawera and Te Haehaenga) would have coloured the reader's interpretation of Tasman's discussion of the third. Both the first two reserves were clearly to be excluded from the scheme. Furthermore, like Putauaki, Te Haehaenga was a burial reserve and involved a mountain. Also, like Putauaki, it was within the confines of the area proposed for the scheme. Yet again, like Putauaki, it was not to be planted. It is not hard to see how the inference might have been drawn that Putauaki was also to be excluded. Maanu Paul, in his evidence to the eastern Bay of Plenty Tribunal, was emphatic that this was the conclusion reached by those who read the booklet: 'The brochure was quite clear and everybody understood it was to be excluded, the mountain was to be excluded.'⁶⁴

Further, the accompanying plan 'A' was ambiguous. While it showed 'Mt Edgecumbe' as being clearly situated within the area proposed for the scheme, a boundary line was marked around it which, according to the key, represented the limits of the 'Proposed Putauaki Reserve'. No acreages were given and, taking the map alone, it is not clear how much of the mountain was within this boundary. Furthermore, the legend has the same wording as was used to describe the boundary of the 'Proposed Tarawera Scenic Reserve', which was to be excluded. It gives no indication that there was to be any difference in status between the two reserves or, more particularly, that the Putauaki 'reserve', but not the Tarawera reserve, would be owned by TFL. Indeed, Tasman's chief forester, Mr JM Mitchell, later described the use of the word 'reserve' in connection with Putauaki as 'perhaps unfortunate' since 'it may have led some to believe that this area was to be made a Maori Reservation'.⁶⁵

61. Document A4, vol 2, p 124

62. Document B67, p 7

63. Ibid, pp 7–8

64. Transcript 5.1, p 11

65. 'Putauaki–Mt Edgecumbe', 24 December 1981, Tarawera file, Maori Land Court, Rotorua, p 3 (quoted in doc B67, p 7)

The Tribunal considers that the ambiguity of this booklet was sufficient for many, and perhaps most, of the readers to be left with the impression that Putauaki was 'safe' in a reserve and, as such, would not be lost from Maori ownership.

9.1.11 The meeting of 11 December 1965

In response to the November notice, some 350 Maori attended the advertised meeting at Kokohinau Pa on 11 December 1965. A list attached to the minutes gives the names of 235 known owners who were present. It does not include Dr Manuera, although his daughter, Mrs Te Rau o Te Huia Cameron, and others have said that he was there.⁶⁶ The scale model that had been displayed at the 14 October meeting was also present.⁶⁷ The minutes contain no reference to it, but the secretary of TFL and MIL later asserted that it had indeed been on display and, furthermore, that it showed the location of each block.⁶⁸

In the addresses by Mr Schmitt and various Crown officials that took up all the morning, reserves were mentioned only twice. The first time was when the Assistant Director-General of Lands, Mr EJ Lynskey, stated that his department was 'quite satisfied that there is no difficulty whatever on this point in providing adequate reserves for the public both Maori and Pakeha'. But he did not elaborate further on this.⁶⁹ The second occasion reserves were mentioned was when Mr Dye went through the list of Maori blocks to be included in the scheme. He included both Matata 59B1 and Putauaki 2 and observed that all the 40 blocks together, 'less certain reserve areas which are mentioned in the Tasman booklet', totalled 38,095 acres. He then mentioned several blocks by name, mainly in connection with leases, timber grants, and rates exemptions, but made no further comment about the reserves.⁷⁰ Nor did he mention any prominent landmarks, as Maori would normally have done, to assist the owners in identifying the location of the blocks and the extent of the area to be included in the scheme.

The accuracy and comprehensiveness of the discussion held once the main meeting had resumed in the mid-afternoon have been detailed in chapter 4. Suffice it to note here that most of the Maori present had been grappling with the concepts involved in the formation of the forestry company, and on getting a fair deal, rather than focusing on the land that would be put into the scheme. While some Maori landowners had sought legal or financial advice on the proposal prior to the meeting, few would have seen any need to seek legal advice on Putauaki maunga if, as it appeared from the booklet, it was to be put into a reserve or, as some still believed, excluded completely. As the Crown pointed out, 'the issues upon which legal

66. Document A4, vol 2, pp 64, 67; doc A18, para 2; doc A6, para 2.4; transcript 5.1, p 1; brief of evidence of B W Neutze, 26 March 1980 (doc A5(2.11)), p 5

67. Document B67, p 8

68. Brief of evidence of B W Neutze, 26 March 1980 (doc A5(2.11)), p 6

69. Document A4, vol 2, p 77

70. Ibid, pp 83-84

advice was sought or requested by the owners . . . revolved around the details of the scheme itself – not the mountain'.⁷¹

The Crown also noted that no objections were raised during the meeting about the inclusion of Putauaki in the scheme. We agree that there is no mention of any such objections in the minutes. However, claimant witnesses have stated or implied that the mountain was discussed at some point during the day. Samuel Te Hau o Te Rangi Tutua told the eastern Bay of Plenty Tribunal that the owners did, in fact, object to the mountain being included 'in the lease'.⁷² To the present Tribunal, he stated his recollection that people had been told that Putauaki would not be included in the forest project, and that he had supported Dr Manuera in saying that the mountain was sacred.⁷³ He said that they were given an assurance that planting would occur at the bottom of the mountain and extend only as far up as the burial cave named Te Niho o Te Kiore. He also stated that Tasman asked if it could put a lookout on top of the mountain, and the owners agreed, although they were careful to stipulate that there should be no road or anything else.⁷⁴

Ngahuia Rowson also said that there was discussion both about wahi tapu on Putauaki and about the fact that they were to be set aside as reserves.⁷⁵ Mrs Te Rau o Te Huia Cameron commented that her father, Dr Manuera, had not realised that the land, including the mountain, would pass out of Maori ownership if the scheme went ahead.⁷⁶

Moreover, what discussion there was during the meeting about individual land blocks centred on the blocks in which members of the Savage–Edwards family had interests, including the block on which the Edwardses' home was situated. The blocks containing the mountain, being uninhabited, had no natural 'community of interest' to be personally affected by their alienation in such an immediate way. Further, the mountain's division into two blocks owned by numerous individuals, as a result of the confiscation and native land legislation, did not foster its protection. Traditionally, tribal leaders would have been the kaitiaki for such a potent symbol of the tribe's mana, but that was not reflected in the mountain's ownership.

Regardless of whether objections were made at the meeting, we consider two factors to be of prime importance in interpreting the attitudes and actions of Maori owners with ownership or other interests in the Putauaki mountain blocks. First, we are persuaded that many did not realise that the land would be sold. Gavin Park, an owner in both blocks embracing the mountain, gave evidence to this effect and said that he believed that many others shared that view.⁷⁷ Several other witnesses have said the same. We also note Mr Tutua's reference, cited above, to the land being 'leased', not sold. Secondly, we believe that a majority felt that, over

71. Document B67, p 9

72. Transcript 5.1, p 30

73. Document A14, para 8

74. Ibid, para 9

75. Transcript 5.1, p 1

76. Document A18, para 6

77. Document A17, p 5

and above any consideration of the status of the land blocks in general, there was no need to worry about the mountain because it was to be put in a reserve and thus, as they understood it, excluded from the scheme. We therefore believe that the Putauaki 2 and Matata 59B1 owners – and indeed anyone for whom the mountain was important – would have been preoccupied, rather, with trying to make sense of the sheer volume and complexity of the business details relating to the scheme in general.

We consider that later events support the view that the joint-venture scheme, and its effect on the status of Putauaki, were not well understood by Maori both at the time of the meetings with owners and later, when the Maori Land Court and Maori Trustee were involved. With particular regard to Putauaki, for example, Mrs Lanham stated at a meeting of the board of TFL in 1972 that there was, even then, considerable ignorance on the part of Maori about the precise status of Putauaki and the set-up of TFL.⁷⁸ A letter written by Dr Manuera to the Minister of Maori Affairs at the end of 1975 highlighted another source of confusion as to whether the mountain was included in the forest. There, Dr Manuera explained the formation of TFL as being ‘for the purpose of taking over and planting trees in that area known as “Te Pokohu”’ (emphasis in original). He continued, ‘As an elder of Ngatiawa, I had always regarded the area known as Te Pokohu, as that tract of land between Putauaki and Tarawera mountains, neither mountain being included.’⁷⁹

9.1.12 Events from January to July 1966

In the weeks following the meeting at Kokohinau Pa, there seems to have been no activity to indicate any concern among the owners of the blocks containing the mountain as to its future status.

Around February 1966, Peter Wairua applied to the Maori Land Court, under Part xxiii of the Maori Affairs Act 1953, for a meeting of owners of the Putauaki 2 block. However, the application was not, apparently, in relation to the inclusion of the mountain in the forestry scheme. Rather, Mr Wairua wished to put to the owners a resolution seeking to obtain the release of 500 acres of the block (ie, about a third of the area, not including the mountain) for farming purposes. A memorandum for the judge notes that Tasman filed a notice of intention to appear to oppose Mr Wairua’s application.⁸⁰ We have no evidence indicating whether the application was granted and, if it was, whether any meeting took place, but it is certain that no part of Putauaki 2 was excluded from the scheme.

78. ‘Minutes of Meeting of Directors of TFL on 23 November 1972’, 30 November 1972, FS83/503, vol 6 (cited in doc B73, p 36)

79. Manuera to McIntyre (Wai 46 ROI, doc B13)

80. Memorandum for judge, 4 February 1966, p 4, MA58/2/1/2, pt 1 (cited in doc A10, p 91)

9.2 PUTAUAKI AND THE IMPLEMENTATION OF THE JOINT VENTURE

9.2.1 The Maori Land Court hearing and decision

The transcript of the four-day court hearing in August 1966 shows that no objections were raised about the inclusion of the two Putauaki mountain blocks in the amalgamation. Indeed, the only time either of the two blocks was mentioned was in connection with rates exemptions.⁸¹ The mountain itself was mentioned just twice, and then only incidentally in the discussion of other matters.⁸²

The court's order under section 435 of the Maori Affairs Act 1953 included both Puatauki 2 and Matata 59B1 in the new Tarawera 1 block. Its further order, under section 438 of the Act, vested Tarawera 1 in the Maori Trustee upon trust, among other things, 'to safeguard, to the best of his ability, the known graves, if any, of the Maori people, and all known settled historic or sacred places in or upon the land'.⁸³

9.2.2 The Maori Trustee's role

(1) Site inspection

The Maori Trustee's inspector of securities, Mr MJ Coughlan, was charged with the task of establishing the location of the sites to be safeguarded. A memorandum from Mr Barber to Maori Affairs' head office stated that this was a task 'of some magnitude' which would take time to complete. He also indicated that Mr Coughlan would require the assistance of 'knowledgeable Maori people such as Phillip Howell, Eruera Manuera, Nira Fraser and others'.⁸⁴ In the event, Mr Coughlan's inspection was carried out in a single day, on 15 November 1966, in the company of only Mr Howell, described as 'a local representative of the Maori owners', and John Mitchell, Tasman's chief forester. Dr Manuera was not involved, and it is not clear whether he had ever been contacted about the visit. There is no indication that any new tapu sites were identified on Putauaki, and the dotted line marking the limit of the 'reserve' remained where it had been on earlier maps.⁸⁵

(2) Response to requests to use the mountain top

Meanwhile, on 25 August 1966, officials from the Department of Maori Affairs and the Department of Post and Telegraph had met with representatives from the Kaingaroa Logging Company and Tasman to discuss the erection of a very high frequency (VHF) mast on the summit of Putauaki. Mr Mitchell also indicated Tasman's interest in 'forming a road to the

81. Document A33, pp B3, W4, Z2

82. Ibid, pp 1T6, 1V1

83. Orders of Judge K Gillanders Scott concerning Pokohu A2A1 and other lands, 19 August 1966 (claim 1.1, app)

84. Barber to head office, Department of Maori Affairs, 28 September 1966, MA58/2/1/2 (doc B67(c), app 2)

85. Coughlan, file note, 11 November 1966, MT12/441 (doc B67(c), app 4); Coughlan to Maori Trustee, 12 December 1966, MT12/441

top for fire protection purposes'.⁸⁶ The meeting did not, however, include any of the Maori owners.

On 21 December 1966, Mr Mitchell telephoned Mr Souter, the Deputy Maori Trustee, to indicate that Tasman would like to 'make some investigations about the suitability of the top of Mt Edgecumbe for setting up a fire protection station'.⁸⁷ Two days later, Mr Mitchell wrote to the Maori Trustee requesting permission to do surveying in connection with the laying of access roads in Tarawera 1. One of the roads mentioned was to give access to the summit of Putauaki for 'fire lookout and radio services'.⁸⁸ The trustee gave his permission in January 1966. Mr Souter's letter to Tasman warned, however, that care should be exercised during the survey work, so as not to trespass on the burial reserve:

You will be aware that the Putauaki burial reserve on the top of Mt Edgecumbe is one of the sacred places which must be preserved. I am sure that you will take care not to trespass on this reserve during the course of your survey of a road route up the face of Mt Edgecumbe.⁸⁹

The letter was also careful to stress that giving permission for the survey work 'should not be taken to imply that the Maori Trustee accepts the present proposals put forward by Tasman for development of a forest on the Tarawera Block'.⁹⁰

9.2.3 Tarawera mountain reserve

Parallel to these events, and indeed for some time previously, negotiations had been taking place between the Department of Lands and Survey, the Forest Service, and the Maori owners of the Ruawahia 2 block about acquiring Tarawera maunga for a scenic reserve. By September 1966, Mr Beachman, the commissioner of Crown lands in Hamilton, was writing to Mr MacLachlan, the Director-General of Lands and Survey, to inform him that 'the more influential owners have suggested that the time is now ripe for a proposition to be put to a meeting of assembled owners'.⁹¹ For the most part, he stated, these owners were the same as those involved in the Tarawera forestry proposal. Mr MacLachlan then wrote to Mr Poole at the Forest Service stating that 'certain of the owners' had 'expressed interest in selling the block if payment [were] made by way of shares in the proposed afforestation company, Tarawera Forests Limited'.⁹² Mr Poole responded that he entirely agreed with the proposals

86. Martin to district officer, 25 August 1966, MT12/441, pt 1 (cited in doc B67, p 3)

87. File note, 21 December 1966, MT12/441, pt 1 (cited in doc B67, p 3)

88. Mitchell to McEwen, 23 December 1966, MA58/2/1, pt 3 (cited in doc B67, p 15)

89. Souter to Mitchell, 24 January 1967, MA58/2/1, pt 3 (doc B1, vol 2), p 10

90. Ibid

91. Beachman to Director-General, 26 September 1966, LS7/963 (cited in doc B67, p 12)

92. MacLachlan to Director-General of Forests, 4 October 1966, LS10/92/27, 7 (doc A5(11.4))

9.2.4

and had 'always been of the opinion that this mountain should be created a National Reserve of some kind'.⁹³

Crown historian Dr Battersby asserted that Maori reaction to these negotiations for Tarawera indicated that the Crown had no reason to suspect any potential grievance on the part of Maori about Putauaki: 'Mount Tarawera was not intended to be used for afforestation, but was sought by the government instead for reserve purposes.' Likewise, 'While the lower slopes of Mount Putauaki were intended for afforestation, an 806 acre area – comprising burial sites – was to be left unplanted and, according to Tasman, kept as a reserve'.⁹⁴ The situations, he implied, were analogous.

Our opinion is that there was a significant difference. Although Maori were forgoing ownership of their maunga Tarawera, it was to be put into a national reserve to which they would continue to have free and ready access. Putauaki, however, was to go into private ownership. The Crown knew this, but it would appear that many Maori did not. The private ownership of Putauaki is at the heart of the Wai 46 claimants' grievance concerning the forest venture and is an element of the primary grievance of the Wai 411 claimants.

9.2.4 Crown lands commissioner's doubts about private ownership of Putauaki

The difference in status between private and public ownership of the mountain was not lost on Crown officials of the time. On 18 August, the day before Judge Gillanders Scott pronounced the amalgamation and trust orders for Tarawera 1, Mr Beachman wrote to Mr MacLachlan:

This [Putauaki] is probably the most prominent feature in the Whakatane area and *I wondered whether I should negotiate with Tasman over its future*. There seems little doubt that the application by the Maori Trustee for inclusion of the Maori lands in the scheme will be approved and it may be that you might consider it advisable that the future of the Mount should be discussed. [Emphasis in original.]⁹⁵

Mr Beachman's concern seemed to be that the mountain would be lost not only to Maori but also to the people of the area in general.

Mr MacLachlan responded that he had considered the possibility of obtaining Putauaki for a public reserve but had decided against it for the present time:

I have given some thought to the possibility of our negotiating to obtain the summit of Mount Edgumbe as a public reserve but feel that it would be best not to take any action at

93. Poole to Director-General of Lands and Survey, 7 October 1966, FS83/503 (doc A5(11.48))

94. Document B67, p 13

95. Beachman to Director-General of Lands, 18 August 1966, LS10/92/138, vol 1 (cited in doc B67, p 10)

this stage . . . I think it best that we do not raise the question of making this land a public reserve at least until the new company is established and has title to the lands.⁹⁶

He gave two reasons for his decision. First, he noted that the safety of the burial reserve had already been secured by an undertaking from Tasman not to plant within its boundary. Secondly, he indicated that he did not want to ‘take any action that could possibly upset the overall proposal’.

9.2.5 TFL acquires ownership of Putauaki

The end result of the Maori Trustee’s examination of the joint-venture proposal was, of course, that on 2 July 1968 the mountain passed into private ownership. In chapter 7, we have outlined the events and legislation that were prerequisites to TFL’s and MIL’s creation and operations (see secs 7.7–7.10). In the discussion in the remainder of this chapter on the subsequent events concerning Putauaki, it needs to be remembered that two of the seven directors on TFL’s board are also MIL directors.

9.3 TFL’S MANAGEMENT OF THE MOUNTAIN RESERVE

9.3.1 The radio huts, masts, powerline, and helipad

In October 1967, some eight months before the Tarawera 1 block was transferred to TFL by the Maori Trustee, the question of VHF masts surfaced again when the New Zealand Electricity Department (NZED) approached the Department of Maori Affairs about constructing a radio-repeater station on the north-western rim of the Putauaki crater.⁹⁷ The request was forwarded to the board of the newly formed TFL for consideration. A letter from Mr BW Neutze, the secretary of TFL, to Mr Souter at the Maori Trustee’s office indicates that the NZED had put forward two alternative proposals, neither of which would involve road access, since ‘all servicing would be carried out either by helicopter or by parties on foot’.⁹⁸

On 6 December 1967, the TFL board approved the application, with the proviso that the Maori Trustee should confirm that the work would not involve the disturbance of known graves, settled, or historic sacred places.⁹⁹ As before, Mr Coughlan was charged with carrying out the necessary investigation, which again included a site visit by himself and Mr Howell. The latter was of the opinion that the proposed site in no way desecrated any old graves,

96. MacLachlan to commissioner of Crown lands, Hamilton, 6 September 1966, LS10/92/138, vol 1 (cited in doc B67, p 11)

97. Shanks to district officer, Rotorua, 11 October 1967, MT12/441, pt 1 (cited in doc B67, p 15); ‘Grant of Licence to Erect and Operate VHF Radio Repeater Station’, 12 August 1971 (doc A5(2.30))

98. Neutze to Souter, 13 December 1967, MA58/2/1 (doc B1, vol 1, pp 115–116)

99. Ibid

stating that ‘such old burial areas that do exist are located below the rim of the mountain, the nearest being in the vicinity of the Trig station and not on the summit of Mount Edgcumbe’.¹⁰⁰

It should be noted here that Putauaki has two peaks, Te Matapihi-O-Rehua and Te Tauru-O-Terangi, and that the former, the one on which the trig station is sited, is in fact slightly higher than the latter, the one on which the masts were to be situated.¹⁰¹ Te Matapihi-O-Rehua is regarded by Maori as being the true summit, which accords with it having been chosen as the burial site for chiefs of the area.¹⁰²

Mr Barber then wrote to Maori Affairs’ head office in Wellington saying that ‘After consultation with elders of the Maori owners it has been ascertained that the proposal for the siting of the Station will not in any way interfere with old burial areas’.¹⁰³ There is, however, no evidence to show who these elders might have been, other than Mr Howell.

On 12 August 1971, three years after TFL had obtained ownership of the Tarawera 1 block, a licence to erect and operate a VHF radio-repeater station was finally issued by TFL to the NZED, in the person of the Minister of Electricity. It gave the licensee permission to erect a radio-repeater station (consisting of a radio hut and one transmitting mast) on ‘the summit of the mountain; to ‘establish and maintain a helicopter landing pad’ there; and to construct and maintain the transmission line that would be needed to supply power to it.¹⁰⁴ However, the licence was deemed to have commenced on 1 June 1968, and the construction of the radio-repeater station and the connecting transmission line had already been completed by the end of November that year.¹⁰⁵ TFL’s annual report dated 20 February 1970 recorded that ‘The Electricity Department’s VHF radio-repeater station . . . has been operating for more than a year.’¹⁰⁶

In May 1971, a virtually identical licence – but this time for a radio hut and three transmitting and receiving masts – which included a similar provision for a helicopter landing pad had also been issued to the Whakatane Radio Telephone Users Association. That licence gave, in addition, permission to construct and maintain a transmission line that would connect the licensee’s radio base station to ‘the New Zealand Electricity Department’s radio base station

100. ‘Tarawera Valley Lands: Application by Electricity Department for a Radio Repeater Station’ (Coughlan), 5 February 1968, AAMK869/1313B (cited in doc B67, pp 15–16)

101. See map attached to ‘Deed between Tarawera Forests Limited and New Zealand Broadcasting Corporation’, 11 September 1972 (doc A5(2.29)); Christine Peters (comp), ‘Supporting Documents: Putauaki’ (Wai 46 ROI, doc 17(a)), p 21

102. Putauaki hearing, Whatakataane minute book 1, 1881, fol 205; Christine Peters (comp), ‘Supporting Documents: Putauaki’, p 90; ‘Putauaki–Mt Edgcumbe’, 24 December 1981, Tarawera file, Maori Land Court, Rotorua (cited in doc B67, p 9)

103. Barber to head office, 6 February 1968, AAMK869/1313B (cited in doc B67, p 16)

104. ‘Grant of Licence to Erect and Operate VHF Radio Repeater Station’, 12 August 1971 (doc A5(2.30)), p 1

105. Ibid, p 2; ‘Minutes of a Meeting of the Directors of Tarawera Forests Limited’, 21 November 1968 (doc B74, app 1), p 3

106. Document B36, p 6

power supply'.¹⁰⁷ It too was backdated, but only to 1 August 1970.¹⁰⁸ Mention of the Electricity Department's installations implies both a prior knowledge of that department's activities and a degree of coordination between the two bodies on the timing of negotiations for their licences.

This would also accord with Mr Hunia's recollection of a letter from the 'Whakatane Radio users' to the Putauaki Tribal Executive 'in the late 1960s', requesting permission to erect a radio transmitter on Putauaki.¹⁰⁹ According to Mr Hunia, the executive refused the request but the transmitter was erected anyway. 'It was then,' he says, 'that Eruera [Manuera] realised that the mana of the mountain had been lost.'

9.3.2 Dr Manuera's realisation that Putauaki was lost

The question of when exactly Dr Manuera realised that the mountain was lost is disputed. Both his daughters have said that it was immediately after the December 1965 meeting at Kokohinau Pa.¹¹⁰ The Ngati Awa Research Team, on the other hand, has stated that it was the day after the Tarawera Forest Act became law, which occurred on 24 November 1967.¹¹¹ A subsequent registrar of the Waiariki District Maori Land Court, for his part, observed that 'the loss of control and mana over the transfer of the mountain has been a sore point with Eruera and others of his Tribe ever since the transfer by the Maori Trustee was effected [ie, 2 July 1968]'.¹¹²

John Hunia, Dr Manuera's great-nephew, implied that Dr Manuera's realisation of the loss came around the time the transmitters were erected – work which had probably started, as we have seen, as early as mid-1968. This would accord with the registrar's observation. Mr Hunia also mentioned an incident involving the removal of some bones to Kokohinau Pa, which he said occurred around the time that Tasman was indicating its intention to plant trees on part of the mountain. (This planting could have started any time after 1 November 1967, when TFL gained 'Physical possession and use of all lands' transferred to it.¹¹³) Mr Hunia stated that Dr Manuera became concerned that the mountain was no longer being treated as sacred, whereupon he decided that the Pahipoto people should remove the bones of their tipuna to the vicinity of their marae to ensure their safety. He then said: 'It was shortly after this episode *in 1968* that Eruera received a visit from two people who told him in Maori "good job you've lost your mountain"' (emphasis added).¹¹⁴

107. 'Grant of Licence to Erect and Operate VHF Radio Repeater Station', 10 May 1971 (doc A5(2.31)), p 1

108. Ibid, p 2

109. Document A6, para 2.7

110. Te Rau o Te Huia Cameron, p 2; Te Onehou Phillis, pp 239–240

111. Te Roopu Whakaemi Korero o Ngati Awa, *Putauaki Maunga: Cultural Symbol of Ngati Awa: A Report Prepared in Support of Claim Wai 46* (Whakatane: Te Runanga o Ngati Awa, 1994) (Wai 46 ROI, doc B8), p 48

112. Patrick to secretary, TFL, 4 October 1979, MT12/441/3, vol 2 (quoted in doc B67, p 18)

113. Document B35, p 5

114. Document A6, paras 2.8–2.9

This anonymous visit was also recalled vividly by Dr Manuera's daughters, but they located the event straight after the Kokohinau Pa meeting. Mrs Cameron wrote: 'Kia mutu ke te hui katahi ano ka ki ake, "Kaitoa kua riro to maunga!"' ('It was not until the meeting was over that they said, "Serves you right, your mountain is lost!"')¹¹⁵ Again, the Ngati Awa Research Team put this visit on the day after the passing of the Tarawera Forest Act on 24 November 1967, and identified this as the moment at which Dr Manuera realised the mountain was lost:

The day after the Tarawera Forest Act became law in 1967, chief Eruera Manuera received two early morning visitors, one from Tuwharetoa (at Kawerau) and one from Ngati Rangitahi. They knocked on his door and when he opened the door for them they said:—
'Kaitoa, e koro, kua riro to Maunga!'

Only then was Eruera Manuera aware that Putauaki had been . . . included in the forestry project.¹¹⁶

On balance, we think it probable that the visit by the two people was indeed the event that alerted Dr Manuera to the loss of title to the mountain, and we consider that, given the evidence, early to mid-1968 was the most likely timing of the visit. Had Dr Manuera received the visit immediately after the Kokohinau Pa meeting, there would still have been time to react to the news and to lodge an objection with the Maori Land Court. But, as we have already noted, no such objection was lodged. Yet both his daughters emphasise his distress on realising the loss, and we find it hard to believe that he would have stood by and not protested if there were still time to do so.

The erection of the radio masts, at least one of which was already in place by the latter part of 1968, would further have brought home to Dr Manuera that 'the mana of the mountain had been lost'.¹¹⁷ For other owners, too, this appears to have been the first sign that things had changed:

It was not until Broadcasting masts appeared on the mountain that Maori owners (now designated shareholders) became alarmed and realised that the title had passed to Tasman.¹¹⁸

9.3.3 The television station, tower, powerline, road, and fire lookout

By the end of 1970, testing had begun for a television transmitting station on top of Putauaki. The annual report of the TFL directors dated 11 February 1971 noted that:

115. Te Rau o Te Huia Cameron, p 2

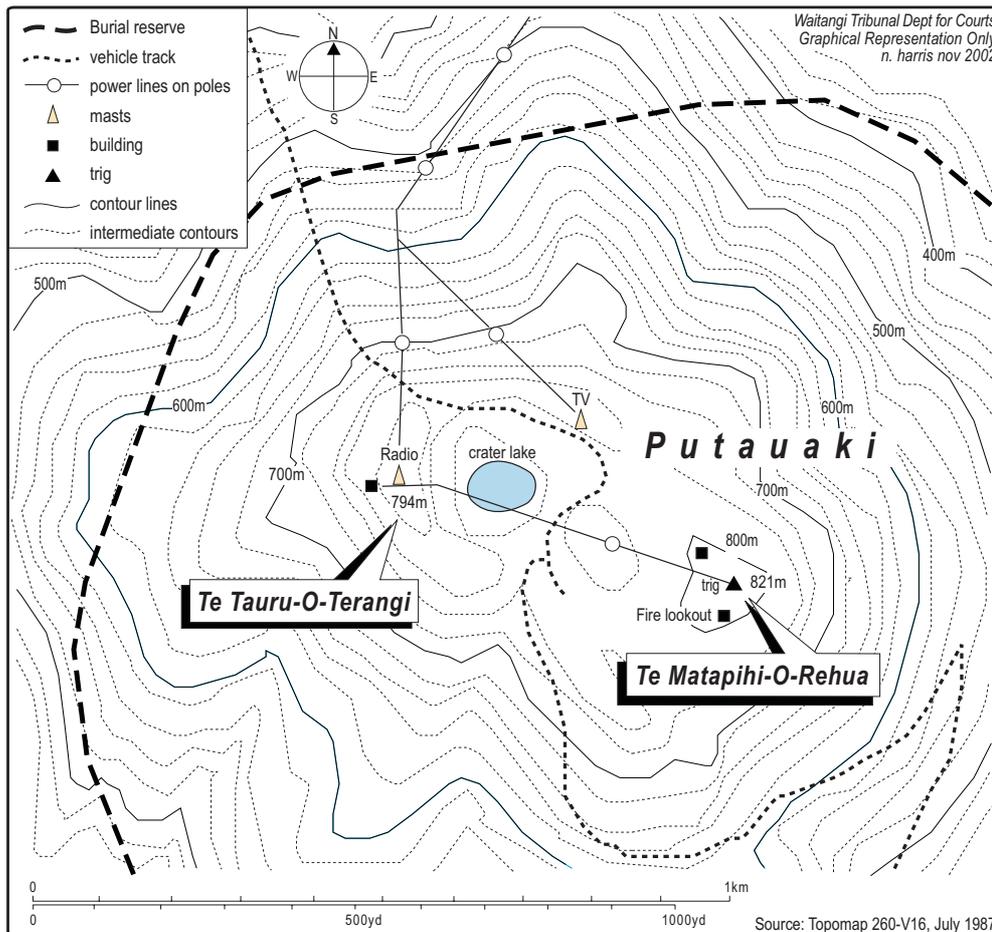
116. Te Roopu Whakaemi Korero o Ngati Awa, p 48

117. Document A6, para 2.7

118. Wai 23 ROI, claim 1.1

PUTAUAKI MAUNGA

9.3.3



Map 7: Putauaki's two peaks and the structures on the mountain

Permission was granted to the NZ Broadcasting Corporation to carry out tests from the summit of Mount Edgecumbe to ascertain the suitability of siting a television transmitting station thereon to serve the Eastern Bay of Plenty. Although no formal application for permission to erect the station has yet been received from the Corporation, it would appear that the tests were most favourable.¹¹⁹

The report continued, however, that any application would need careful vetting to ensure that Maori graves would be left undisturbed and that the necessary towers and buildings would not be unsightly.¹²⁰ Arapeta Te Rire was to state in 1979 that Dr Manuera knew about the intention to erect a 'tv translator' and that he approved it, but no other evidence has been adduced on this point.¹²¹

119. Document B37, pp 4-5

120. Ibid, p 5

121. Maori Investments Limited, minutes of 27 October 1979 board of directors meeting, 16 February 1980 (doc A5(2.27)), p 4

By mid-April 1971, TFL's board had apparently agreed to lease an area at the summit to the New Zealand Broadcasting Corporation (NZBC) for the erection of a television transmitter, and the decision had been endorsed by the board of MIL.¹²² In August 1972, TFL endorsed the NZBC's application to establish a television transmitter station on Putauaki and to construct a service road for access. Again, however, the board reiterated its concern that sites of special significance to Maori should be respected:

In giving permission to the New Zealand Broadcasting Corporation to construct an access road to the summit of Mount Edgecumbe and to erect a transmitting station thereon, it was stipulated by the Company that the Corporation must protect and leave undisturbed burial grounds . . .¹²³

On 11 September 1972, a licence was issued to the NZBC giving it permission to:

- ▶ erect and operate a television transmitting and receiving station at the summit of the mountain;
- ▶ install a power transmission line; and
- ▶ construct and use a service road 'suitable for access by four wheel drive vehicles under normal weather conditions over and along the south-eastern part of the said land and thence up to the summit'.¹²⁴

The licence was deemed to have commenced the previous month, on 1 August, and was to remain valid for 21 years.¹²⁵

A map attached to the deed of licence shows the site of the installation, the path of the access road, and the line followed by the transmission cable. From this, it is plain that the transmission station is located on Te Tauru-O-Terangi, the lower peak, and not on Te Matapihi-O-Rehua, which has been identified as the site of burial caves.

The installation of the 61-metre high transmission tower was finally completed in February 1975, but it took slightly longer to finish building an adjacent concrete-block building to house the equipment.¹²⁶ By the time the television tower was in place, a fire lookout station had also appeared on the mountain top. Despite numerous expressions of intent to build such a lookout in the late 1960s, nothing seems to have been done until 1973 or 1974 – TFL's annual report for the year ended 31 October 1973 noted that 'Provision has been made for the old Matahina Forest fire tower to be dismantled and moved to the summit of Mt Edgecumbe', and the following year's report noted that the tower was duly lifted into place by helicopter.¹²⁷

122. TFL to Forest Service, 13 April 1971, FS83/503, vol 5 (cited in doc B73, p 34)

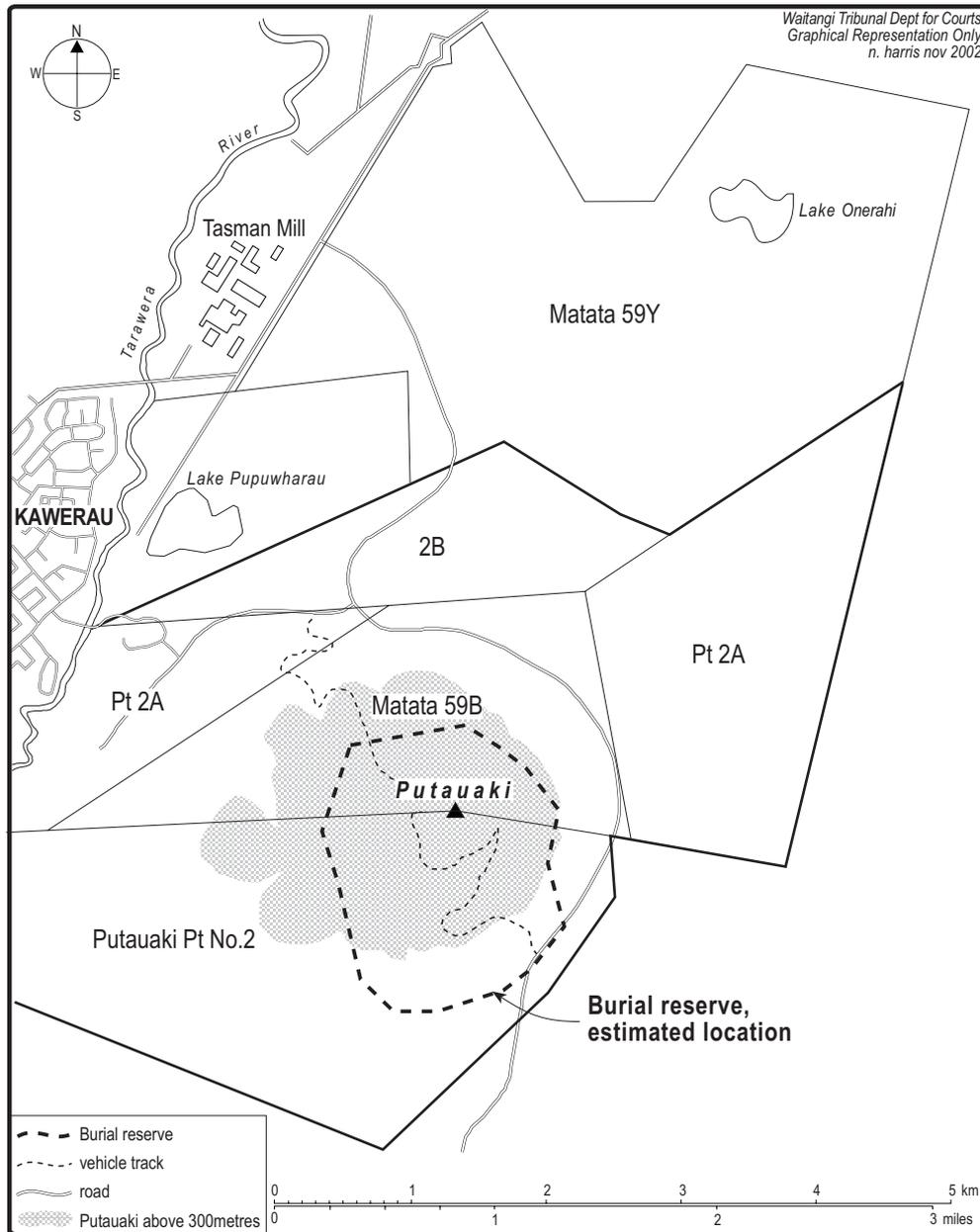
123. Mitchell to Roberts, 27 April 1977, p 4, MT12/441/3, vol 2 (cited in doc B67, pp 16–17)

124. 'Deed between Tarawera Forests Limited and New Zealand Broadcasting Corporation', 11 September 1972 (doc A5(2.29)), p 1

125. Ibid, p 2

126. Document B7, p 8

127. Document B40, p 7; doc B41, p 10



Map 8: Putauaki burial reserve and roads

When the 4.6-kilometre road was finished, an inspection of it and the developments at the summit was conducted by Judge Gillanders Scott, Mr Cater from the Maori Affairs district office in Rotorua, Mr Patrick, at that time the titles officer in Rotorua, and the directors of Tasman and MIL.¹²⁸ TFL stated that special care was taken with the road's alignment, 'in order

128. Document B7, p 9; doc B40, pp 4, 6

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to safeguard the native vegetation and also the area from erosion'.¹²⁹ Despite this, it would appear that heavy rainfall caused problems on several occasions over the ensuing years.

In 1975, the TFL directors reported that 'the steep gradient and higher than usual rainfall had caused maintenance problems'.¹³⁰ Likewise, their report for the following year stated:

Heavy rainstorms in October caused two major slips on the access road to the summit. These were repaired by using extensive timber crib walls to restrain further movement below the road. The road was subsequently re-established. The provision of a large number of culverts along its length has facilitated the protection of the road from run-off. However, the road requires some attention after every heavy rain storm.¹³¹

The directors noted that, under the terms of the licence, the broadcasting company was responsible for all maintenance costs for a period of three years from the date of completion of the road.¹³²

The situation was clearly not satisfactory and, in November 1976, Tasman representatives met with Mr FJ Sheppard, a consultant engineer to the Broadcasting Corporation of New Zealand (BCNZ) (as it was by then), to discuss the future maintenance of the road. It was agreed that TFL would 'inspect and report on the road and supply labour, plant and materials for [its] regular maintenance'. 'Emergency maintenance and improvements', however, would be carried out at the direction of the BCNZ engineer.¹³³

The licence to build the road expressly provided that 'all Maori burial grounds on or in the neighbourhood of . . . the access road' should be safeguarded.¹³⁴ It appears that the cave known as Te Niho o te Kiore was sited well away from the road, as were two other caves known to have held human remains.¹³⁵ However, the need for extensive earthworks, and the subsequent problems with slips and erosion, would not have eased concerns about the adequacy of the protection afforded to the mountain by its status as a burial reserve within the Tarawera Forest.

To conclude this discussion of the use made of Putauaki since 1967, it should also be noted that the area which remains unplanted is rather larger than the 806-acre burial 'reserve' set aside under the terms of the joint venture. The unplanted area was variously cited by Tasman

129. Document B40, pp 4, 6

130. Document B41, p 8

131. Document B42, p 7

132. Ibid

133. Document B43, p 9

134. 'Deed between Tarawera Forests Limited and New Zealand Broadcasting Corporation', 11 September 1972 (doc A5(2.29), p 4)

135. Mitchell to Roberts, 27 April 1977, p 3, MT12/441/3, vol 2 (cited in doc B67, pp 14-15); 'Putauaki-Mt Edgcombe', 24 December 1981, Tarawera file, Maori Land Court, Rotorua (cited in doc B67, p 9)

officials in the late 1970s as being 972 acres or 1200 acres, the difference in estimates due mainly to ‘the contour of the mountain’.¹³⁶

9.4 PROTEST AND EFFORTS TO SECURE THE RETURN OF THE MOUNTAIN RESERVE, 1972–81

9.4.1 Dr Manuera’s exchange proposal

Mr Hunia stated that it was the ‘early 1970s’ when Dr Manuera first unsuccessfully approached Tasman to try to secure the return of the mountain.¹³⁷ The exact date and circumstances of this approach have not been specified, but it seems likely that it was at the time that negotiations took place concerning the Matata 59Y block. This block, also known as Putauaki development block or Putauaki Farm, is immediately to the north of what was Matata 59B2B, and Tasman was negotiating for 14 acres of it in order to construct a road that would link Tarawera Forest to the mill. Certainly, Dr Manuera raised the question of the mountain at this time. The TFL annual report for 1973 noted:

The proposal to exchange 41 acres of planted land from the Forest to the Farm owners for 14 acres of roadline was unsuccessful. Chief Eruera Manuera proposed the return of the unused portion of Putauaki to the original owners.¹³⁸

Referring to the same negotiations, Mr Neutze later gave further details:

It was not until 25 February 1973 that the Directors of Tarawera Forests Limited became aware that there was a movement afoot amongst Ngati-awa for the return of Mt Edgecumbe to Maori owners. Tasman personnel had been meeting with owners of Matata 59Y Block (Putauaki Development Block) for the purpose of trying to procure a direct access route over the Development Block from the Tasman mill-site to Tarawera Forest. The Tasman representatives at that meeting had indicated that they would promote the proposition with Tarawera Forests Limited and Maori Investments Limited that the unplanted portion of Mt Edgecumbe . . . be returned to Maori owners provided the owners of the Putauaki Development Block agreed to the access route sought. However, no agreement was ever reached on this basis.¹³⁹

136. Document B67(c), app 3, ‘Ministerial Number 1977/136 – Planting of Trees on Mt Edgecumbe’, Roberts to Maori Affairs, Wellington, 29 April 1977, MA58/2/1; Maori Investments Limited, minutes of 27 October 1979 board of directors meeting, 16 February 1980 (doc A5(2.27)), p 3

137. Document A6, paras 3.1–3.2

138. Document B40, p 6

139. Brief of evidence of B W Neutze, 26 March 1980 (doc A5(2.11)), pp 7–8

9.4.2

A letter from Mr Neutze to the Minister of Maori Affairs, the Honourable M Rata, on 22 June 1973 claimed that Tasman had ‘for some time’ been considering ‘the return of the unplanted portion of Mount Edgcumbe’, and that it was ‘favourably disposed’ to this, subject to the exclusion of the parts used for the transmitting stations and the access road.¹⁴⁰ The implication is that Tasman had been considering the idea even prior to the negotiations over Matata 59Y.

9.4.2 Putauaki Tribal Executive approaches to the Minister and TFL

Mr Neutze’s letter also mentioned ‘recent newspaper reports’ apparently relating to Putauaki.¹⁴¹ A letter by Mr Mitchell to Mr Hunia, as the chairman of the Putauaki Tribal Executive, six days later indicates that the articles criticised the decision to allow the transmission mast and road to be constructed, and that they were concerned about the likelihood of grave sites being disturbed. Mr Mitchell stated that Tasman had at no time observed any disturbance to ancient graves, and that ‘In fact Senior Tribal Elders have indicated that the only known “graves” were cavities in rocky outcrops below the trig station from which all human remains have long gone.’¹⁴² Mr Mitchell did, however, concede that other known burial areas at the base of the mountain had been identified by tribal elders prior to afforestation development, and that such areas had been excluded from planting or other disturbance.¹⁴³

Mr Mitchell also stated that Tasman regarded the two Maori members of the TFL board as representing ‘all the Maori owners in the forest’ and that the members had been ‘careful to exercise their best judgement on behalf of the people they represent, as well as the Forest Board, in approving these developments on Putauaki’. Earlier in the letter, he had implied that the Maori members’ duties of representation did not extend to the interests of Ngati Awa, stating explicitly that Ngati Awa were ‘not involved as shareholders in the Forest or in the previous ownership of Putauaki’.¹⁴⁴

This raises questions about the adequacy of consultation during this period. It would appear that Tasman was relying largely on advice from the two Maori TFL board members. The exception was when it called in ‘senior tribal elders’ on matters relating to burial sites, and we note that the only names mentioned in this context have been Phillip Howell, Arapeta Te Rire, and Wetini Moko. It could be that, with the land in the private ownership of TFL, Tasman felt no obligation to anyone other than TFL shareholders. Nevertheless, despite Mr Mitchell’s assertions to the contrary, those shareholders included Maori from all the hapu and tribes of the area, including Ngati Awa. Overall, we consider that there is some justification for Ngati

140. Neutze to Rata, 22 June 1973 (doc A5(2.24))

141. Ibid

142. Mitchell to Hunia, 28 June 1973 (Wai 46 ROI, doc B13)

143. Ibid

144. Ibid

Awa feeling that they were excluded from consultation at this time, especially given their strong links to the mountain.

Mr Neutze's 22 June 1973 letter to the Minister of Maori Affairs concerned an approach to the Minister by the Putauaki Tribal Executive for the return of the mountain:

We understand from Mr J E Cater, District Officer of the Maori and Island Affairs Department, Rotorua, and from recent newspaper reports, that a certain Maori group known as the Putauaki Tribal Executive will be making submissions to you on Saturday, 23 June 1973, in support of the proposition that Putauaki (Mount Edgecumbe) be returned to Maori owners.¹⁴⁵

The executive subsequently met with the Minister at Kokohinau Pa, Te Teko, and the Minister evidently agreed to look into the matter.

Meanwhile, three days after the Te Teko meeting, representatives of the TFL board met with Mr Cater and Judge Gillanders Scott to 'discuss the mechanics of the proposed land transfer' – presumably the proposed exchange involving the 14 acres of Matata 59Y wanted for a logging road.¹⁴⁶

In the Minister's eventual response to the Putauaki Tribal Executive, some eight months later, he implied that he saw no problem with the way that the Tarawera forestry project had been set up, and he further noted that 'the former owners of the Mountain still retain an interest in the land through their considerable share-holding in this Company'. However, he did mention the Matata 59Y negotiations and his understanding that TFL might, under certain conditions, be willing to negotiate the return of the mountain:

I am given to understand that the Company Management is sympathetic to the Maori owners' request to have the Mountain returned to them and is disposed to return the unplanted portion subject to the exclusion of areas occupied by certain transmitting installations and the road used by the New Zealand Broadcasting Corporation.

At the present time, the Company is negotiating with the owners of Putauaki Development Scheme for the provision of a logging access road over the Scheme block by taking 14 acres of Scheme land . . . in exchange for 41 acres of planted Company land which adjoins the Scheme. In addition to the 41 acres the Company is prepared to return the unplanted part of the mountain blocks subject to the conditions already mentioned.

As your Committee is probably aware, there is an application before the Court for the owners of Putauaki Scheme to form an Incorporation or vest the land in trustees pending the wind-up of the Scheme in a year or so.

It appears to me, therefore, that your Committee and the Committee of the Incorporation or trustees to be appointed for the Scheme block, can conclude negotiations for the return of the mountain without the necessity for any intervention on my part.

145. Neutze to Rata, 22 June 1973 (doc A5(2.24))

146. Document B40, p 6

I would suggest, therefore, that when the Development Scheme is incorporated or vested in trustees, that your Committee combine with them on the approach to the company to resolve the present question of returning the mountain to the owners. If for any reason negotiations are not successful, then I shall be pleased to consider the matter again with a view to any assistance that I may then be able to give.

Your Committee will appreciate, of course, that until the mountain has been returned to Maori ownership, no steps can be taken to have any part of it declared a Maori Reservation.¹⁴⁷

No such agreement to return the mountain was ever reached, however.

Meanwhile, after the June 1973 meeting but before receiving the Minister's response in February 1974, the Putauaki Tribal Executive had evidently written to TFL again expressing concern about possible damage to ancestral graves on Putauaki. In its minutes of 23 November 1973, the TFL board noted:

[The executive] sought details of the permission granted to the Electricity Department to erect a VHF station on the summit of Mt Edgecumbe and expressed concern at the desecration of Maori ancestral graves. Mrs Lanham mentioned that there was considerable ignorance on the part of Maoris of the precise status of Mt Edgecumbe and the set up of TFL. They were naturally concerned that the graves of their ancestors would not be disturbed in any way. Mr Mitchell had discussed the subject with the secretary of the Tribal Executive and he had accepted the position. . . . Mr McKee said he had inspected the summit of the mountain with Maori Affairs personnel and a Maori elder and it was ascertained that no graves were sited where the installations were subsequently erected.¹⁴⁸

In passing, we note that, in the same minutes, there is also the implication that planting was being carried out on parts of the mountain where there were graves: 'Mr Mitchell had also discussed the possible location of graves with two tribal elders and trees had not been planted on the indicated locations.'¹⁴⁹

We assume that these graves were located outside the boundary of the burial reserve, since Tasman had given an undertaking that there would be no planting within it, and we are confident that this has been respected. This entry in the minutes also ties in with Mr Mitchell's June 1973 statement to Mr Hunia, mentioned above, that other known burial areas near the base of the mountain were also identified by tribal elders prior to major afforestation development and, by specific arrangement, such areas were excluded from planting or other disturbance.

147. Rata to Hunia, 20 February 1974 (Wai 46 ROI, doc B13)

148. 'Minutes of Meeting of Directors of TFL on 23 November 1972', 30 November 1972, FS83/503, vol 6 (cited in doc B73, p 36)

149. Ibid

9.4.3 Dr Manuera approaches the new Minister

In early 1975, according to his daughter Mrs Cameron, Dr Manuera wrote to the Maori Council, apparently in an attempt to enlist its support in his struggle to have Putauaki returned to Maori ownership: ‘i te tau 1975 (14 Feb 1975) ka tuhi atu ia ki te Kaunihera Maori mo tona mamae me tana tangi tonu ki a Putauaki’ (‘In the year 1975 he wrote off to the Maori Council about his pain and his grief for Putauaki’).¹⁵⁰ Mrs Cameron did not record whether any response was made.

In July and October of the same year, local newspapers carried articles in which Dr Manuera again declared that Putauaki had been wrongly taken from Maori. At some point during the year, Ngati Awa made representations to the MIL board requesting that Putauaki be returned to Maori owners.¹⁵¹ No information has been given in evidence about these, but MIL’s annual report for 1975–76 noted that there was ‘no further development arising from the proposal that the unused parts of Putauaki be returned to the original owners’.¹⁵²

In December 1975, following a change of government, Dr Manuera wrote to the new Minister of Maori Affairs, the Honourable Duncan McIntyre, expressing his consternation and grief at the loss of the mountain and sadness about its afforestation with pine trees. ‘Our sacred mountain has been desecrated,’ he wrote.¹⁵³ He ended with a request for the Minister’s assistance in having the mountain returned. Dr Battersby stated that Mr McIntyre, like Mr Rata before him, responded that he could do nothing in regard to the mountain and recommended direct negotiations between Ngati Awa and TFL.¹⁵⁴ Mrs Cameron also confirmed that the response was negative, adding: ‘Ki toku mohio, e wha nga Minita i whakapa atu ia . . . kaare tonu i tutuki tana tonu’ (‘To my knowledge, he contacted four Ministers . . . none of them met his request’).¹⁵⁵

Meantime, also in December 1975, the Maori Lands Board agreed to allow Tasman to construct the logging road across the Putauaki development block (Matata 59Y).¹⁵⁶ The suggestion that the return of Putauaki might form part of this deal had presumably disappeared.

9.4.4 Further approaches to MIL, the Minister, and TFL

On 14 August 1976, MIL held its seventh annual general meeting, and the issue of Putauaki surfaced again. John Hunia made a submission for the return of the mountain but was unsuccessful.¹⁵⁷ Mr Neutze later recorded that ‘the consensus of the meeting was that the mountain

150. Te Rau o Te Huia Cameron, p 2, annex

151. Document B8, pp 2, 9

152. Ibid, p 9

153. Manuera to McIntyre, 30 December 1975 (Wai 46 ROI, doc B13)

154. Document B67, p 19

155. Te Rau o Te Huia Cameron, p 2

156. Ibid, annex

157. Maori Investments Limited, ‘Seventh Annual General Meeting’, minutes of 14 August 1976 meeting, 20 August 1977 (doc A5(2.26)), p 2; Te Rau o Te Huia Cameron, p 3

should stay under present ownership'.¹⁵⁸ In February 1977, according to the ninth MIL annual report, 'a group of Maori Elders under the leadership of Mr Wetini Moko' made a site visit to Putauaki and located two burial caves, 'the material from one being relocated in the second cave which was sealed up'.¹⁵⁹

On 19 March 1977, the Minister of Maori Affairs attended a meeting at Kokohinau Pa at which submissions were made to him for the return of Putauaki to Ngati Awa.¹⁶⁰ Subsequently, the Minister asked his department for clarification of the matters raised. Mr CA Roberts, the Maori Affairs district officer in Rotorua, responded on 29 April.¹⁶¹ Among the issues addressed were the planting of trees on the mountain; the alleged desecration of the graves; and the decision to allow the erection of the radio and television masts. On these matters, Mr Roberts said that there was 'little substance in the complaints made to the Minister at Kokohinau'. As for the mountain's status, Mr Roberts noted that the only way the top of the mountain could be made into a Maori reserve was by changing the legislation, and he doubted 'whether there is really sufficient demand by owners and interested parties for this to be considered'. Nevertheless, he advised the Minister that there was to be a meeting between Tasman, TFL, and Ngati Awa at Kokohinau Pa on 30 April, and he stated, 'This is at least a hopeful sign that, in fact, the Companies concerned and the Maori owners are getting down to discussion. Only good should come from such a meeting.'

According to Mr Neutze, the formal approach from Ngati Awa for such a meeting between themselves and TFL to discuss the possible return of Putauaki had first been made in March.¹⁶² The TFL annual report for 1977-78 notes that, 'although there had been much acrimonious comment in the past on the status of Putauaki, the concerned parties had not previously met to state their respective views. The meeting was valuable in this respect.'¹⁶³ Present at the meeting were Messrs McKee, Syminton, Neutze, and Mitchell from Tasman, Monica Lanham, Lang Grace, and three others from MIL, and Dr Eruera Manuera and a small group of Ngati Awa.¹⁶⁴ Mr Roberts had instructed his senior community officer, Mr Jaram, 'to be present to ascertain, briefly, what matters are raised and to note if any decisions are made which could affect the Department', but it is not clear from the records whether Mr Jaram actually attended.¹⁶⁵

In the event, to quote Mr Neutze, 'no finality was achieved'. Instead, Ngati Awa were advised to take their submissions to the next annual general meeting of MIL, to be held on 20

158. Brief of evidence of BW Neutze, 26 March 1980 (doc A5(2.11), p 9); Maori Investments Limited, 'Seventh Annual General Meeting', minutes of 14 August 1976 meeting, 20 August 1977 (doc A5(2.26)), p 2

159. Document B43, p 16

160. Ibid

161. Roberts to head office, Maori Affairs, 'Ministerial 1977/136 - Planting of Trees on Mt Edgecumbe' (doc B67(c), app 3)

162. Brief of evidence of BW Neutze, 26 March 1980 (doc A5(2.11)), p 8

163. Document B44, p 12

164. Ibid

165. Roberts to head office, Maori Affairs, 'Ministerial 1977/136 - Planting of Trees on Mt Edgecumbe' (doc B67(c), app 3); doc B44, p 12

August. This was because, Mr Neutze said, ‘Tarawera Forests Limited was guided and advised by Maori Investments Limited on Maori matters’, since ‘Maori Investments Limited represented the Maori interest in Tarawera Forests Limited’. It would appear, however, that no such submissions were made to MIL – presumably because the previous year’s approach by Mr Hunia had failed to meet with a positive response – and the issue of Putauaki was not discussed at the August meeting.¹⁶⁶

9.4.5 Dr Manuera’s application to the Maori Land Court and MIL opposition

Around September 1979, Dr Manuera decided to apply to the Maori Land Court, under section 439 of the Maori Affairs Act 1953, to have the unplanted part of the mountain made a Maori reservation.¹⁶⁷ The application was set down for hearing on 30 January 1980 at Whakatane.

The pending court hearing was discussed fully at the October 1979 meeting of MIL’s board. Mr Mitchell attended the meeting and stressed the care taken by Tasman to honour its undertakings to Maori, and to the Maori Land Court, in respect of the mountain. As part of his briefing to the MIL directors on the implications of the possible withdrawal of the mountain burial reserve from the venture, Mr Mitchell referred to various facilities that had been erected at the summit. To declare the area a Maori reservation would involve an expensive survey, he said, ‘and the road up to the summit and the areas occupied by the fire lookout station would have to be excluded’.¹⁶⁸ The fire hazard would also be greater because TFL would no longer be legally able to prevent entry to Putauaki, and fires could easily start in the dry scrub on the mountain slopes in summer. Mr Mitchell did, however, recognise (in contradiction to his earlier assertion – see section 9.4.2) that ‘the mountain, prior to transfer to Tarawera Forests Limited, was in two ownerships, Ngati-awa and Tuwharetoa’.¹⁶⁹

MIL board members Arapeta Te Rire, Phillip Howell, and Shuki Savage then spoke in support of Mr Mitchell’s comments, as did Romana Kingi, who had also been invited to attend the meeting. The board passed a resolution opposing Dr Manuera’s application on three main grounds:

1. That the Board is happy with the present ownership of Putauaki Mountain and the manner in which entry onto the mountain is carefully controlled and regulated and burial grounds and other sacred lands are safe-guarded.

166. Brief of evidence of B W Neutze, 26 March 1980 (doc A5(2.11)), p 8

167. Maori Investments Limited, minutes of 27 October 1979 board of directors meeting, 16 February 1980 (doc A5(2.27)), p 2; registrar, Waiariki Maori Land Court, to Manuera concerning Maori Land Court application 23998, 12 December 1979 (Te Rau o Te Huia Cameron, app)

168. Maori Investments Limited, minutes of 27 October 1979 board of directors meeting, 16 February 1980 (doc A5(2.27)), p 3

169. Ibid; Mitchell to Hunia, 28 June 1973 (Wai 46 ROI, doc B13)

2. That it would be a retrograde step, with a consequent loss of current careful screening and control of visitors and of fire surveillance measures in respect of the upper slopes of Putauaki mountain, if the same were declared a Maori reservation.

3. That the Board members, as the duly elected representatives of all the former owners of Tarawera No 1 Block, including Putauaki Mountain, consider themselves as the lawful representatives and trustees of Maori owners for the purpose of ensuring, inter alia, that Tarawera Forests Limited and the Forestry Department of Tasman Pulp and Paper Company Limited comply with their obligations to safeguard Maori graves and other sacred land – it being acknowledged that the latter have always faithfully complied with any direction by the Board of Maori Investments Limited in that behalf.¹⁷⁰

When the application came before the Maori Land Court at Whakatane in January 1980, Dr Manuera appeared without legal representation. MIL was supported by various groups and appeared with a Queen's Counsel. The judge hearing the case, Judge ETJ Durie, suggested that Dr Manuera might like to consider acquiring legal counsel.¹⁷¹ A further session of the court was held in Whakatane in March, and it was possibly for this that Mr Neutze's statement of 26 March 1980 was made.¹⁷² However, the hearing was adjourned *sine die*, 'to allow the various parties to get together to find a solution'.¹⁷³

According to TFL's next annual report, the hearing was to have resumed at the Maori Land Court in Rotorua on 20 March 1981. This did not happen, although some people from two of the parties attended an ad-hoc meeting at the court:

the Registrar of the Court advised Counsel and representatives of Tasman Pulp and Paper Company Limited and the Company [TFL] that the Court hearing had been cancelled for various reasons. Despite this advice, the Court did convene later on that day for the purpose of recording a purported agreement between Ngatiawa people supporting Mr Manuera and certain members of Maori Investments Limited – who unaware that the Court hearing had been officially cancelled attended the Court premises – to set Mt Edgecumbe apart as a Maori Reservation and to appoint Trustees. The Court Registrar had arranged an ad hoc meeting between the persons present at the Court and Ngati-awa. This occurred in spite of clear advice of opposition to this move by such official representatives of Maori Investments Limited and Tarawera Forests Limited as were present at the Court premises earlier in the day but had subsequently departed because they had been advised the Court hearing had been cancelled.¹⁷⁴

170. Maori Investments Limited, minutes of 27 October 1979 board of directors meeting, 16 February 1980 (doc A5(2.27)), pp 4–5; Te Roopu Whakaemi Korero o Ngati Awa, pp 51–52

171. Document A21, para 36

172. Document B48, p 7; brief of evidence of BW Neutze, 26 March 1980 (doc A5(2.11))

173. Document B48, p 7

174. Ibid

At its meeting the following month, the MIL board was determined to dispel any confusion about its intentions and ‘unanimously reaffirmed earlier resolutions’ to oppose Ngati Awa’s application to have the mountain made into a Maori reservation. It likewise disassociated itself from ‘the resolution made at the ad hoc meeting at Rotorua on 20 March’¹⁷⁵ and ‘further resolved to take such action to have the proceedings of the 20 March meeting reviewed and the minutes of such meeting removed from the Court records’.¹⁷⁶

The strong line taken by the MIL board was backed by the TFL board at its next meeting in April, when the directors ‘reaffirmed their support for the Directors and shareholders of Maori Investments Limited in their opposition to the application to declare Putauaki a Maori Reservation’. The directors also resolved, ‘if other measures were not successful’, to support MIL in an application to the High Court to have any mention of an alleged agreement struck from the Maori Land Court records.¹⁷⁷

9.4.6 Maori Affairs investigates Professor Mead’s request

At some point in that same year, 1981, it would appear that Professor Hirini Mead also approached the Government about Putauaki. Certainly, another investigation into the mountain was carried out, apparently at the instigation of the Secretary of Maori Affairs.¹⁷⁸ As Dr Battersby observed, the findings were fairly critical of Ngati Awa. They effectively depicted Ngati Awa as a small dissident group composed of ‘Professor Mead and his party’, agitating against the ‘formidable body of Maori opinion’ that was MIL. In his confidential report to the Secretary of Maori Affairs, the chief registrar of the Maori Land Court wrote:

I now consider that it would be inappropriate and unfortunate, if not in fact improper, if you were to be involved in any way in an approach with, or at the request of, Professor Mead to all or any of [the] Directors of Tasman to secure a release of any part of the mountain for the purpose of a Maori reservation . . .

Professor Mead and his party cannot succeed without the goodwill of Maori Investments Limited and they should be encouraged to increase their consultation with its Board of Directors.¹⁷⁹

The Maori Land Court proceedings were never completed, and Ngati Awa’s application to have Putauaki made a Maori reservation lapsed. MIL’s thirteenth annual report records that

175. Presumably, this is a reference to the agreement reached, at the ad hoc meeting at the court, to set Mount Edgecumbe apart as a Maori reservation and to appoint trustees.

176. Document B48, p 7

177. Ibid

178. Document B67, p 20

179. ‘Return of Putauaki (Mount Edgecumbe)’, confidential memorandum for Secretary of Maori Affairs, 13 January 1982 (cited in doc B67, p 20)

9.4.7

‘in any event, Judge Norman Smith is doubtful that the Court has any jurisdiction to hear the application.’¹⁸⁰

9.4.7 The lodging of Wai 23 with the Waitangi Tribunal

In 1985, Mrs Te Rau o Te Huia Cameron, on behalf of her father, lodged a claim with the Waitangi Tribunal concerning Mount Putauaki (see sec 1.4). Dr Manuera died on 15 June 1990¹⁸¹ and the Wai 23 claim was later merged with Ngati Awa’s Wai 46 claim. The Tribunal was told by Professor Hirini Mead that Dr Manuera ‘lived with the loss of the mountain’ and thought it was his fault:

He should have had lawyers and experts to advise him, but the people had no money for such advice. The leaders of Ngati Awa felt at the time that the company, with the help of the Crown, took advantage of them and had no qualms about doing so. Eruera Manuera, quite unfairly, accepted the blame and responsibility for the loss of Putauaki and our other lands.¹⁸²

9.5 THE GUARDIANS OF PUTAUAKI

During the 1981–82 financial year, Lang Grace was replaced on the MIL board by Mrs Cameron. In the same year, the board set up the ‘Guardians of Putauaki’ as a subcommittee, ‘in an attempt to find the vehicle for a just solution which will not prejudice any one party’.¹⁸³ Chaired by Richard Te Matau Park of the MIL board, the subcommittee was to have one Ngati Awa and one Tuwharetoa representative. Its role was ‘to ensure that historical, spiritual and cultural interests of all parties in the mountain be preserved and to make recommendations regarding forest management, protection and access in respect of the Mountain to MIL’.¹⁸⁴ Mrs Cameron was chosen to represent Ngati Awa and Arapeta Te Rire to represent Tuwharetoa, although Mrs Cameron told us she was uncertain how the choice was made.¹⁸⁵

Since then, Mrs Cameron said, the guardians have functioned as a ‘sounding board’ for TFL whenever matters relating to the mountain have arisen:

If TFL Directors want to talk about anything to do with the mountain, they call a meeting of the Guardians. Sometimes they call us together, for example, if they want to put structures on the mountain.¹⁸⁶

180. Document B14, p 8; doc B49, p 6

181. Onehou Eliza Phillis, p 315

182. Document A21, para 32

183. Document B14, pp 4, 8; doc B49, p 6

184. Document B73, p 50

185. Ibid, p 52; oral evidence of Te Rau o Te Huia Cameron, 8 June 2000

186. Oral evidence of Te Rau o Te Huia Cameron, 8 June 2000

It is not clear whether the guardians were involved in TFL's move to block mineral exploration in the Tarawera Forest. After an application to explore some 70 per cent of the forest was lodged with the Department of Energy by Amoco Minerals New Zealand Limited, TFL filed an objection.¹⁸⁷ Amoco subsequently modified its application to exclude Putauaki and, as heard by the Planning Tribunal on 20 September 1983, the application was for a licence to explore around 60 per cent of the forest.¹⁸⁸ Despite TFL's protests, on 8 June 1984 the Minister of Energy granted the licence, subject to 'the safeguards sought by Tarawera Forests Limited and recommended by the Planning Tribunal'. The safeguards included a requirement that the licensee should 'consult with the land owner to identify known Maori burial sites and historic or sacred places within Tarawera 1 Block and safeguard such sites to the best of its ability'.¹⁸⁹

Meetings were certainly arranged between TFL and the guardians in the year from July 1983 to June 1984, however, and discussions were also held with the Whakatane Radio Telephone Users' Association about further development on the mountain top. Among other things, the construction of a 'spur road' or walking track giving improved access to the association's facilities on the mountain was 'fully investigated and approved by the Guardians following two visits to the summit to walk the actual route'.¹⁹⁰ The chairman of the MIL board subsequently noted that the application was considered reasonable, in that the proposed route did not 'traverse or interfere with Maori burial sites or other sacred sites'.¹⁹¹ The construction of the road was scheduled to start the following year.

In the 1984–85 year, the guardians met four times to discuss matters relating to Putauaki. These included a request from the Whakatane Radio Telephone Users' Association to 'form vehicle access to their transmission buildings and facilities on the Eastern section of the summit', and one from Whakatane Radio to 'gain access to the summit to allow FM radio transmission testing'.¹⁹² It was known that the testing, if successful, would lead to a further application for permission to construct facilities enabling FM broadcasting to proceed. The guardians refused both requests, giving as their reason a desire to reduce rather than expand summit development. In recording the activity of the guardians, MIL's annual report noted:

It is considered imperative that the integrity of Putauaki and possible burial sites be maintained and any request for activity which may impinge on such integrity must be declined.¹⁹³

Meetings with the guardians were similarly held when in 1985–86 the BCNZ proposed to extend its control building on the summit of the mountain in order to house the Post Office

187. Document B16, p 4

188. Document B14, p 9; doc B16, p 4

189. Document B14, pp 2, 8–9

190. Document B51, p 7; doc B16, p 4

191. Document B16, p 5

192. Document B17, p 4

193. *Ibid*, p 5

toll circuits serving the eastern Bay of Plenty.¹⁹⁴ However, the result of these meetings is not recorded.

During the same year, the guardians were also consulted during ‘the formation of proposals concerning the proposed new quarry site’.¹⁹⁵ They had already visited the proposed site, ‘on the southern fringes of Putauaki’, the previous year, and had declined to give their approval pending further investigations.¹⁹⁶ It is not recorded what opinion the guardians finally gave, but TFL in due course applied to the Whakatane District Council for planning consent to ‘open a quarry adjacent to planted areas south of Putauaki’.¹⁹⁷ The application apparently met with ‘Maori cultural objections that the area concerned was “tapu”’, and the council refused to grant approval. The objectors are not specified, but TFL’s annual report noted that the company planned to have further discussions with them, ‘in an attempt to get them to withdraw their objections’.¹⁹⁸

In subsequent years, the guardians were involved in more discussions about expanding broadcasting and transmission facilities on the mountain.¹⁹⁹ The proposed changes included modifying the terms of the BCNZ’s licence to allow the addition of FM equipment to its transmitting facilities, and the corporation also indicated its interest in providing for a third television channel.²⁰⁰ In addition, Radio Bay of Plenty sought permission to ‘work in with Electricorp and use the latter’s mast to hang their equipment on and to extend the existing building to house a generator’.²⁰¹ Despite their earlier reservations about summit development, the guardians also acceded to this request, although with a proviso that the agreement would be revised when the lease came up for renewal three years later.

According to the chairman of the TFL board, the guardians ‘exercise control’ over matters regarding the summit of the mountain and ‘matters of wahi tapu over the forest’.²⁰² Mrs Te Rau o Te Huia Cameron, however, told the Tribunal that ‘We didn’t have any authority. During the nineteen years we have been in existence we are simply servants of TFL.’ She also said, ‘I am very uncomfortable with my position as a Guardian of Putauaki because it’s my sense that we are being used to ease the way in, for instance if they wish to put a road up the mountain’.²⁰³

In light of the examples given above, our impression is that the real situation lies somewhere between those opposing statements.

194. Document B53, p 7

195. Ibid

196. Document B17, p 5

197. Document B53, p 4

198. Ibid

199. Document B55, p 10; doc B56, p 9

200. Document B20, p 7

201. Ibid

202. Document B56, p 9

203. Oral evidence of Te Rau o Te Huia Cameron, 8 June 2000

9.6 SUMMARY

The key points demonstrated in this chapter are:

- ▶ Putauaki maunga is a sacred site to Ngati Awa and Tuwharetoa ki Kawerau, with ancestral burial caves on and around the summit.
- ▶ The division of Putauaki by the Crown in the 1860s has exacerbated tribal differences about the management of the mountain.
- ▶ The information provided about the Tarawera Forest scheme failed to make it clear that Putauaki was to be included in the scheme, as is evidenced by the distress of Ngati Awa leader Dr Eruera Manuera when he discovered that the mountain had passed into the private ownership of TFL.
- ▶ Subsequent access to and development of the summit of the mountain for communication and fire lookout purposes has respected the known ancestral burial sites.
- ▶ Repeated efforts by Ngati Awa to have the ownership of Putauaki returned to Maori or the mountain made into a Maori reservation have so far been fruitless, and have been opposed by MIL and TFL on forest management grounds.

CHAPTER 10

**THE OUTCOME OF THE JOINT VENTURE
AND THE TRIBUNAL'S FINDINGS AND RECOMMENDATIONS**

10.1 INTRODUCTION

The claimants argued that they had suffered two distinct kinds of prejudice as a result of the Crown's Treaty breaches. The first was the non-consensual loss of the 38,067 acres of Maori land – which they called the 'land loss grievance'. Secondly, they asserted that the joint venture's outcome disadvantaged them financially compared with what they should have obtained had the Crown's Treaty obligations been upheld – this, they called the 'unfavourable bargain grievance'.

The Crown in response intertwined its arguments about process and outcome. It maintained that, because the Tarawera Forest scheme is today a 'profitable commercial venture providing significant returns to the claimants', the Wai 411 claim was 'of a different order than many other historical Treaty claims where there was an outright alienation of the land and consequential lost opportunity for the provision of the future economic needs of the claimants'.¹

In relation to the 'land loss grievance', the Crown first contrasted attitudes in the 1960s with attitudes prevailing today. It maintained that 'Government thinking about the Tarawera Scheme was driven by a perception of an economic opportunity for the Maori landowners' and that therefore, while the scheme involved 'the transfer of Maori land to a non-Maori entity, namely TFL', it was not regarded at the time as 'a case of land alienation such as it would be viewed today'. Indeed, the Crown contended, the scheme was 'conceived precisely to appeal to Maori by avoiding an outright alienation' – 'In this sense there was no complete severance of ties or interests with the land itself' and the Maori landowners would 'have the opportunity to participate in the business and management of running the forest'.² It then argued that 'there is a tension between, on the one hand, the seeking of compensation for the land loss claim, and on the other, the fact . . . that the Tarawera Scheme has provided a significantly better financial return than the claimants would have received had the land been leased'. While accepting that a lease would not have involved 'an alienation in the sense now

1. Document B81, paras 1.1–1.2

2. Ibid, para 1.4

understood', the Crown claimed that a lease 'would not have provided the best financial return to Maori'.³

In relation to the 'unfavourable bargain grievance', the Crown pointed out that 'Much of the evidence is directed at this issue and it is clearly a key aspect of the claim'. It argued, however, that much of the claim based on financial prejudice is based on speculation, and that a 'well founded Treaty claim cannot be based upon speculation'. The 'central issue' here, therefore, is 'whether the Tarawera scheme has been so unfair and inequitable to Maori that it can properly be said that the Crown conduct in the formation of the scheme is in breach of Crown Treaty duties of protection'.⁴

In chapters 5 and 8, the Tribunal found that the Crown had breached its Treaty duty of active protection of the Maori interests. We noted in section 5.5.2(4), and repeat here, our view that a breach of Treaty principle remains a breach, whether or not any negative consequences are nullified by a subsequent turn of events. We do not accept, therefore, that, if the joint venture turns out to have been as financially advantageous to Maori as the Crown claims, that would nullify the Treaty breach in itself. Such an outcome would, however, influence our findings as to redress.

In order to determine this issue, the Tribunal must first trace what actually occurred. In this chapter, therefore, we focus first on the actual outcome of the joint venture, including the effects of those terms in the scheme which have been at issue throughout the previous chapters – the log price and the land values. We then consider the likely outcome of the hypothetical alternatives that the claimants argued they were promised or could have negotiated had they been properly informed. Having thus dealt with their 'unfavourable bargain grievance', we are then in a position to evaluate their 'land loss grievance'.

Finally, we sum up our findings, before turning our attention to possible remedies.

10.2 THE FINANCIAL OUTCOME OF THE JOINT VENTURE

10.2.1 TFL in operation

The signing of the management and sales agreements on 19 June 1968, as described in chapter 7, marked the end of the establishment phase of TFL. At the time that the heads of agreement was signed in 1967, about 14,500 acres had already been planted, all on land contributed by the Crown or Tasman and most within the previous five years. The first major decision made by the TFL board therefore came in 1975 and concerned the price to be paid for production thinnings. The board agreed that the original log price clause (the 'default clause' – see section 7.6.3) in the sales agreement would apply because there were no 'current or recent sales in New Zealand of substantial quantities of equivalent material', as required by the alternative

3. Document B81, para 1.9

4. Ibid, paras 1.11–1.12

clause added by the Maori Trustee. The board defined 'substantial' to mean not less than one million cubic feet a year for a period of not less than five years, and 'equivalent material' to mean radiata pine of 10 (later lowered to nine) to 20 years old and of similar diameter and length. It also established a procedure for determining the average price paid by Tasman.⁵

Throughout the 1970s, thinnings were generally sold to Tasman, and other produce (posts and poles, and indigenous logs salvaged from land clearing) to other customers. The first production of sawlogs began in 1979–80, when some small areas were clearfelled. In 1980, the Government renewed the two major Kaingaroa Forest contracts with Tasman, resulting in greatly increased prices for the wood.

In 1982, the Forest Service reviewed the pricing options for TFL wood sold to Tasman. It was concerned that the transport differential between Kaingaroa produce and Tarawera produce was not being reflected in the stumpage differential between the prices paid by Tasman for equivalent produce from the two forests. The 'log and cart' costs of thinnings from Kaingaroa by road were \$6.30 per tonne, but the stumpage differential for first and second thinnings from Tarawera was only 28 cents and \$2.65 per tonne respectively. The transport differential in favour of Tarawera was being eroded by the high cost of production of its relatively young thinnings.⁶ After examining prices and costs applying in other parts of the North Island, the Forest Service concluded that, 'if the total output [from Tarawera] is regarded as pulpwood then the landed cost method (a) [ie, the default clause] is preferable'.⁷

By 1983, 54,000 acres, or 97 per cent, of the final plantable area of Tarawera Forest had been planted and large-scale harvesting was due to begin in two years' time. A management plan was prepared in readiness for this in which the company's objectives were revised to maximise the return to shareholders in the long term, subject to:

- ▶ the requirements of Tasman's existing and planned domestic processing plants in the Kawerau area, as Tasman's new paper machine was due to start up in 1987–88;
- ▶ the availability of funds for forest management; and
- ▶ the demands of a non-declining sustained yield.⁸

In 1984, Tasman confirmed its view that 'substantial quantity' should be about one million cubic feet and that wood would be defined as pulpwood or sawlogs on the basis of dimension and quality according to specifications set by current industry practice. The actual use of the wood was not relevant – that is, if Tasman were to pulp sawlogs, which attracted a higher price, it would be expected to pay sawlog prices.⁹ The sale price options continued to be

5. Document B73, pp 30–31

6. Ibid, p 32

7. Paper by Ure for agenda item 5 at meeting of directors on 24 March 1983, Crown forestry management file B16.1, vol 5 (quoted in doc B73, p 32). (Ure was a former Forest Service conservator at Rotorua and an alternate TFL board member and is now a forestry consultant.)

8. *Draft Tarawera Forest Management Plan*, August 1983, under cover of file note from A Kirkland (director of forest management, Forest Service), file FS83/503, vol 7 (cited in doc B73, p 33)

9. Document B73, p 34

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examined almost every year, but the status quo was maintained. Small quantities of sawlogs and pulpwood were sold on the export market.¹⁰

By 1987, the clearfelling of early plantings was about to begin on a sustained basis, and longer-term decisions were needed under the 10-year election clauses of the sales agreement. In December 1987, the board elected to sell surplus produce to purchasers other than Tasman, and it appointed Tasman Forestry to act as its agent to market the surplus for an initial term of 10 years. On the question of the best pricing option, in November 1988 the Crown director of TFL produced data showing that the prices the company was receiving from Tasman were better than the prices being received by the Forestry Corporation (as the Forest Service had become) from all pulpwood sales other than the Kaingaroa contracts. The TFL board therefore elected to maintain the existing mechanism for the next 10 years.¹¹

The issue was revived again in 1994, however, as the arbitration decision on the five-yearly review of the Kaingaroa Forest contract prices was finally due. (It had been under negotiation since 1990.) The board decided to apply the arbitrated price from 1 July 1993 only. Since at this time Tasman was sourcing pulpwood not only from Kaingaroa but also from other Tasman Forestry enterprises and other owners – some as far away as Nelson – there was also debate as to whether the TFL sales price should be based on the average price of these wider sales (the ‘big basket’) or Kaingaroa only (the ‘small basket’). The TFL directors opted for the ‘big basket’ approach, which prompted Tasman to ask for a review of the sales agreement.¹² When the options for the disposal of surplus produce and the sales pricing mechanism came up for review in 1998, the board decided both to reappoint Tasman Forestry as its agent to market surplus produce and to continue the existing pricing mechanism.¹³ The alternative pricing mechanism added by the Maori Trustee – ‘fair market prices’ based on arm’s-length sales of substantial quantities of forest produce – has in fact never been invoked.

10.2.2 Allocating the shares

In 1987, it was anticipated that there would be a net cash surplus for the 1987–88 year, and this position was expected to be maintained in the future. Under the heads of agreement, the TFL board was preparing to consider the allocation of the unissued share capital in the company. The directors’ meeting in November 1987 was told that the then-current equity structure was Tasman 95.02 per cent, MIL 2.93 per cent, and the Crown 2.05 per cent. Because the proportion of debentures and shares held by Tasman exceeded the 76.64 per cent of the total value of debentures and shares that it had projected, the basis for distribution would be the minimum

10. Document B73, pp 34, 35

11. *Ibid*, pp 37, 38–39

12. *Ibid*, pp 40–41, 43

13. *Ibid*, p 44. By this time, following the 1990s restructuring of Fletcher Challenge, Tasman Forestry had become Fletcher Challenge Forests.

guarantee provisions as set out in clause 7 of the heads of agreement. It was proposed that all equity be pooled and redistributed as follows:

	Current		Proposed		Forfeit/gain
	\$	%	\$	%	
Tasman	26,224,342	95.02	22,767,200	82.4950	- 3,457,142
Crown	565,818	2.05	1,848,395	6.6975	+ 1,282,577
MIL	808,119	2.93	2,982,684	10.8075	+ 2,174,565
Totals	27,598,279	100.00	27,598,279	100.00	

Thus, Tasman, by exceeding the development costs projected in its original proposal, was to lose nearly \$3.5 million.¹⁴

It was also proposed that the holdings of shares and debentures be adjusted as follows:

	Percentage	Shares	Debentures
Tasman	82.4950	412,475	22,354,725
Crown	6.6975	33,487	1,814,908
MIL	10.8075	54,038	2,928,646
Totals	100.0000	500,000	27,098,279

Such an outcome, however, should not have been unexpected, since it was foreshadowed as far back as the 1983 annual report for MIL. This set out the share allocation model and indicated that, on then-current figures, because development cost inflation had exceeded expectations, the relative shares would be Tasman 94.4 per cent, the Crown 2.3 per cent, and MIL 3.3 per cent. The report noted that the shareholding would therefore be in accordance with the guarantee.¹⁵

At the November 1987 TFL board meeting, a decision on the allocation of capital was deferred until MIL had discussed and understood the matter. In June 1988, the board was advised that MIL was seeking a higher shareholding, and the board felt that the capitalisation issue should be deferred again until MIL was happy to proceed.

On 4 November 1988, counsel for the directors of MIL, Dr Rodney Harrison, wrote to the Associate Minister of Finance, Peter Neilson, outlining a 14-page claim by MIL against the Crown and Tasman as 'the culmination of long years of deeply felt dissatisfaction and grievance by the former Maori owners of land transferred to TFL by the Maori Trustee . . . over the methods employed by both the Crown and Tasman to ensure the participation of the Maori owners in TFL'. The claim sought a 25 per cent share in the equity of TFL - 'what it would have

14. Ibid, p36

15. Document B75, p18

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received had the Maori owners been permitted to bargain independently’ – to be contributed by both the Crown and Tasman.¹⁶ In his reply to the Minister, the Maori Trustee rejected the allegations against his predecessor, noting that ‘Any opportunity the Maori owners had to obtain a larger share was conditional upon them having the cash to do so. It was clearly obvious that they did not have this.’¹⁷

Meanwhile, at a TFL board meeting on 8 November 1988, the directors passed a series of resolutions concerning the allocation of unissued share capital, without prejudice to any necessary adjustments arising out of the MIL claim. This enabled dividends to be paid.

10.2.3 MIL in operation

MIL had previously tried to increase its shareholding in TFL. In 1987, the Forest Service was being turned into a State-owned enterprise, the Forestry Corporation, with a view to selling the State’s commercial forests to private enterprise. MIL decided to bid for the Crown’s shares in TFL when that shareholding was being transferred to the new Forestry Corporation. While that bid was declined,¹⁸ MIL’s aspirations with regard to the Crown’s TFL shareholding have remained. Corporate manager Mr Cass told the Tribunal in June 2000 that the dividends policy of the MIL board was to pay out 85 per cent of net profits, leaving retained earnings ‘as a reserve against the possibility of some considerable expense being incurred in obtaining additional equity in Tarawera Forests Ltd to bring MIL’s holding up to at least the level advertised in the original Tasman brochure’. In mid-2000, MIL’s retained earnings totalled \$4.476 million.¹⁹

In chapter 7, we noted the difficulties that MIL has had in maintaining an accurate record of its shareholders and the changes that were made to its constitution in 1997 to reduce uneconomic shareholdings. The new constitution aimed to meet the company’s ongoing financial needs while also protecting ‘the special nature of MIL with regard to its shareholders and their ancestry’.²⁰ The company’s objects, as set down in its mission statement, are as follows:

Ko te Tumanako o Te Poari e hari nei i nga ahuatanga e pa ana kia Tarawera me Putauaki (Maori Investments Limited).

He rapu i nga ahuatanga katoa e nui ake ai nga painga mo koutou mo te hunga e whai paanga ana ki nga ngahere (paina) o Tarawera me Putauaki.

Maori Investments Limited (MIL) is an innovative Company which will create value and maximise returns for its shareholders by sound progressive business practises and incorporating Maori values and aspirations.

16. Harrison to Neilson, 4 November 1988, file Crown Forestry Management B16.1, vol 1 (doc A5(3.3))

17. Parore to Neilson, 3 August 1989 (doc A5(3.4))

18. Document B73, p 55

19. Document A29, p 2

20. Ibid, p 4

MIL has a minority representation on the board of TFL, or two out of seven members, four of whom are Tasman representatives. In their evidence to the Tribunal, Mr Cass and Ms Adlam made it clear that they were acutely aware of MIL's minority status. Mr Cass observed: 'As a minority shareholder in TFL, even if our directors felt very strongly about an issue, the power is very heavily weighted in favour of the majority shareholder.' Ms Adlam commented: 'We do our best at TFL meetings to question all that's going on, but we're just a minority shareholder and our job at MIL is to receive the dividends.'²¹ These statements give voice to the Wai 411 claimants' sense of disappointment and frustration at MIL not having more influence over the management of Tarawera Forest and the former Maori land that makes up half of it. They also highlight how limited and unfamiliar is the role that MIL was created to fulfil.

10.2.4 MIL's financial situation

It is difficult to quantify exactly how much MIL has received from its investment in TFL since 1988. According to a Crown witness, forest economist Howard Moore, the value of its past returns – that is, the income from dividends and debenture interest paid, after tax – was \$35,923,739 as at 30 June 1999.²² A claimant witness, forensic accountant David Vance, estimated the total income from dividends and debenture interest received since 1988 (presumably to 30 June 1999) to be slightly lower, at \$33,639,392.²³ A subsequent independent report that the Tribunal commissioned from the New Zealand Institute of Economic Research (NZIER) put the figure lower again, at \$30,516,281.²⁴ The difference between Mr Moore's and the NZIER's figures is accounted for by the use of a different compounding factor: Mr Moore assumed a constant nominal post-tax rate of 8 per cent per annum whereas the NZIER took an average compounding factor of 6.3 per cent, based on actual wholesale interest rates in each year, while noting that Mr Moore's assumption 'may be standard practice in forestry'.²⁵ Mr Moore calculated that, in the 32 years since the joint venture's inception, the rate of return to MIL on its land contribution at the values ascribed to it in 1967 had been 28.5 per cent per annum nominal (ie, including inflation) before tax, or approximately 11 per cent in real terms after tax.

Mr Moore also calculated the value of the shares and debentures held by MIL in TFL on 30 June 1999 to be \$33,888,974.²⁶ Ms Adlam stated in her brief of evidence that the MIL equity in TFL, based on 10.8075 per cent of the net equity value of TFL as at 30 June 1999, was \$30,960,228. The NZIER noted, however, that shareholders' equity in TFL had fallen significantly by June 2001. On the assumptions identified above, it valued the MIL share of TFL

21. Oral comments made by Ms Adlam during presentation of document A29, 9 June 2000

22. Document B72, p 32

23. Document B76, para 18.4

24. Document C1, p 3. This report was made available to the parties, and their submissions on it were invited and, where made, circulated and entered on the record of inquiry.

25. Document C1, p 3

26. Document B73, p 32

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at \$30,960,532 in June 1999, and, because of the fall in timber prices, at \$24,050,015 in June 2001.²⁷

10.2.5 The outcome challenged

The claimants argued that they had suffered financial prejudice in the actual outcome of the joint venture for two reasons:

- ▶ because the prices TFL achieved for its produce were artificially depressed; and
- ▶ because the value attributed to the Maori land when it entered the scheme was similarly understated.

We will examine each of these allegations in turn.

10.2.6 Log prices

This element of the claimants' case altered during the course of the Tribunal's hearing. As we have seen in previous chapters, the question of the price to be paid by Tasman for TFL produce was a point of contention in the development and implementation of the joint venture. Initially, claimant evidence to the Tribunal was directed at showing that the prices paid by Tasman for TFL timber under the formula stated in the sales agreement were depressed because of their relationship to the prices paid by Tasman for timber from the State's Kaingaroa Forest. The Kaingaroa prices, it was alleged, were concessionary, and the Crown and Tasman, who alone were privy to the arrangement's details, failed to inform the Maori landowners about their effect on the prices that TFL would obtain. Indeed, as described in section 6.7, in the Maori Land Court the Crown claimed and was granted privilege for the Kaingaroa price information that was sought to be disclosed by counsel for Mrs Lanham's group.

The Crown responded that the claimants' concern that the 'concessionary' log price was never disclosed to them 'needs to be evaluated in the overall context'. It questioned whether the price was in fact concessionary, pointing out that the size of the Tasman contracts was such that they would immediately have a significant impact on any log price negotiated, and that ultimately the Maori Trustee negotiated the alternative clause in the heads of agreement to 'provide some advantage to TFL' on the log price. The Crown also argued that there was no evidence that TFL had been disadvantaged by the application of the pricing clause in the sales agreement, and that it had in fact benefited from it.²⁸ There is also the point made by Mr Davis (by then Secretary to the Treasury), in response to the Maori Trustee's concerns on this issue, that the heads of agreement provided an assured outlet for all the TFL produce and that there was 'no certainty of another user at a higher price'.²⁹

27. Document C1, p 4

28. Document B81, para 3.2

29. Document A22(a), p 32

The Crown's case was based on evidence presented to the Tribunal by its witness Dr Andrew McEwen that the formula in the sales agreement had not in fact proved prejudicial to TFL. He pointed out that the Forest Service was well aware that the Kaingaroa contracts had price review clauses applying at 1 April 1980, before significant quantities of material would be harvested from Tarawera Forest.³⁰ The 1980 review resulted in prices close to those assessed by the Forest Service and significantly above the prices offered by Tasman, and introduced more frequent (ie, five-yearly) reviews. The 1985 and 1990 reviews went to prolonged arbitration between the Forest Service and Tasman, and negotiations directly increased the prices received by TFL, without imposing any costs on it.³¹ Dr McEwen also noted that sawlogs have generally been sold by TFL to customers other than Tasman under the 'surplus produce' provision of the sales agreement, and that, despite the availability of the alternative 'fair market' pricing option negotiated by the Maori Trustee, the TFL directors have not yet used it.³²

In consequence, at the conclusion of the Tribunal's hearing, Dr Harrison explained that the claimants were 'not now alleging' that the evidence of the Kaingaroa prices and the Tasman-TFL pricing arrangement supported a finding of financial prejudice to the claimants. Instead, their position was that the Crown deliberately failed to disclose relevant information about the Kaingaroa Forest pricing deal and that this vitiated the Crown's claim that it acted in the best interests of Maori.³³ That claim has been addressed in earlier chapters, and will be returned to in our findings below.

On the log price issue, the Tribunal concludes that, while the pricing arrangement could have been regarded as 'soft' at the time, from late 1965 the Crown and Tasman knew that the soon-to-be-completed '20 million' Kaingaroa Forest contract would mean that Tasman was paying considerably higher prices for wood than under the 1963 '40 million' contract. Moreover, as Tasman and the Crown both stated in the Maori Land Court, they also knew that the 1980 review provisions of the two Kaingaroa Forest sales agreements would have a significant influence on the price TFL obtained for its produce, almost all of which would not be harvested until about 1987, and that the effect of the revisions could not be estimated in 1966. Further, as events turned out, when those contracts came to be renegotiated in 1980, the Crown had virtually no shareholding interest in Tasman Pulp and Paper at all, so that even 'the basic concept' of the Kaingaroa pulpwood price – that the stumpage would be as low as possible consistent with recovering growing costs, because the Crown was gaining its return through the profits derived from its shareholding in Tasman – was no longer relevant. The shorter review terms and arbitration provisions negotiated in 1980 also meant that TFL obtained the benefit of subsequent price increases without any effort on its part. As noted in the introduction to this chapter, the Tribunal believes that this fortuitously favourable outcome does not

30. Document B73, p 25

31. *Ibid*, p 48. During the negotiations, the Forest Service became the Forestry Corporation.

32. Document B73, pp 45–46

33. Oral submissions in reply made by Dr Harrison, 22 September 2000

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mitigate the breach of Treaty principle inherent in the Crown's failure to reveal to the Maori landowners the basis for the Kaingaroa Forest prices.

10.2.7 Land values

As we have seen in previous chapters, the question of the value of the land contributed by each party was an issue throughout the development and implementation of the joint-venture scheme, and also in submissions to the Tribunal. At the heart of it all was the Forest Service's continuing concern that the Tasman valuations of the land were too low, thereby increasing the proportion of its development costs in relation to land values, and so giving it a higher percentage overall in the final apportionment of the joint-venture shares. Details of the various points in contention have been recounted in previous chapters, and here we summarise the submissions made to the Tribunal on this issue. As a reminder, we record below the actual average price paid for the land contributions of each party under the 1967 heads of agreement.³⁴

Contribution by	Price paid	Acreage involved	Average price per acre
Maori	\$257,442 (£128,721)	38,067.5	\$6.76 (£3 7s 7d)
Crown	\$159,524 (£79,762)	18,691.6	\$8.53 (£4 5s 4d)
Tasman	\$124,688 (£62,344)	19,350	\$6.44 (£3 4s 5d)

The claimants' view of the extent of the financial prejudice resulting from what they claimed to be unduly low land values altered somewhat during the course of the Tribunal hearing. Initially, through their witness John Groome, the claimants relied on the evidence Mr Groome had given in the Maori Land Court (see sec 6.8.2) about the value of the Tarawera Valley Maori land at that time. His evidence was that the value of the land for forestry purposes was considerably higher than the average of £3 7s 7d at which it was valued in the 1967 heads of agreement by Tasman. While Mr Groome had felt constrained by client confidentiality from telling the Maori Land Court the prices paid for other forestry land in recent sales, he gave evidence that similar land was fetching far higher prices and that, on a LEV method of valuing the Maori part of the land, it was worth some £11 an acre. Mr Groome also claimed in evidence to the Tribunal that the Forest Service itself used a form of LEV in calculating forestry values of land.³⁵

The Crown argued that Mr Groome's 1966 evidence was 'simply his professional view as to the future risks of forestry for the land concerned', and that LEV, the basis for his figure of £11 per acre, was rejected by the land valuation experts before the court.³⁶ Crown witness

34. Document B76, para 2.15

35. Document B70, p 6

36. Document B81, para 4.6

Howard Moore also pointed out that 'The whole point of LEV calculations was to enable a fair comparison of different investment strategies for the same land.' He accepted that the Forest Service may well have used LEV to determine the relative merits of competing forestry regimes, but stated that there was 'no evidence that they used LEV as a basis for buying land, or (other than in the Grainger leases) as a basis for determining land rentals'.³⁷ In support, Mr Moore cited a 1968 technical paper by Mr RWM Williams (by then director of forest economics):

Land expectation values are used notionally in forestry as a means of comparing management regimes. They are not to be confused with market values. The only meaningful values at any given time are the current market values. Future market values will depend on future costs and realizations and foresters have no more special skill in foretelling future values than anyone else.³⁸

Mr Groome also complained about Tasman's method of valuing the land, which was based on 'current market values', or the prices it had paid for its four land purchases in the Tarawera Valley between 1961 and 1964, with a premium allowed for the fact that the 'serious disadvantages' of lack of access to, and the irregular shapes of, the Maori land blocks would be overcome by their being amalgamated into one block. He argued that, because this land was in 'scattered parcels', Tasman was buying it not for planting but to 'purportedly' establish current market values. He also stated that 'negotiations with the Crown for the planned Tarawera Forests company scheme were well under way' at the time of these purchases. He also claimed that the largest area was purchased from the Kauri Timber Company, which was a subsidiary of the Fletcher Timber Company, and he stated that, because Fletchers had an interest in Tasman – as he put it, the buyer and seller were 'virtually the same' – this was not an arm's-length sale, and 'the price could have been set at any figure'.³⁹

The Crown rejected this suggestion as a 'bald assertion' unsupported by evidence and noted that it was 'emphatically rejected' by Professor Schmitt.⁴⁰ In his interview with Dr Battersby in 2000, Professor Schmitt claimed that Fletchers and Tasman were 'quite distinct' and that this suggestion was 'absolute nonsense' and a libel.⁴¹ The Tribunal has also established that Mr Groome's other statements about the land purchases are not tenable. First, the land was not in scattered parcels, but the three blocks Tasman bought in 1961–62 (Te Haehaenga 1, 4, and 5) were in fact 'a useful contiguous block for planting', and were bought months or years before Tasman had even proposed the joint-venture scheme to the Crown in March 1963. The fourth, Matahina A3B, was not in fact the largest block (that was Te

37. Document B72, p 35

38. 'Some Basic Considerations on Leasing of Land for Forestry', 11 October 1968, NZFS1/49/13, vol 2, Archives NZ (cited in doc B72, p 35)

39. Document A8(a), p 13; doc B70, p 4

40. Document B81, para 4.11

41. Document B78, p 15

Haehaenga 4) but already had a substantial crop of trees growing on it; it adjoined the Forest Service's Putauaki 1 block and was not purchased until 1964, well after the Forest Service has agreed in principle to participate in the joint venture.⁴²

Mr Moore later presented evidence to the Tribunal to show that 'the whole debate on land value is largely irrelevant' because the 'final shareholdings were not actually sensitive to land value'. As noted in section 10.2.2, the implementation of the 75 per cent minimum guarantee ensured that MIL received 10.8075 per cent of the share and debenture capital of TFL, instead of less than 3 per cent. On that basis, Mr Moore calculated that the value of the Maori land could have been as high as £12 10s 5d an acre, or 3.69 times higher than was obtained, and 'still MIL would have received no more than its present shareholding'.⁴³

Subsequently, in the second week of the Tribunal's hearing, and at the request of the Tribunal, Mr Groome produced a table of the prices paid for land suitable for forestry purposes in the central North Island between mid-1962 and mid-1967.⁴⁴ The table, which listed 39 transactions in total and three for 1967, had been prepared for the claimants by a registered land valuer, Mr A Wilson of Rotorua, using information (from the Valuation Department) available at the time that the Tarawera joint-venture scheme was implemented. From that table, claimant witness and forensic accountant David Vance posited that the average price paid per acre in 1967, which he calculated at \$22.31 (£11 3s 1d), would have been an appropriate base value for the Tarawera Valley Maori land. Had that been so, the Crown land (which Tasman valued more highly) should have been valued at \$28.15 (£14 1s 6d) per acre, and the Tasman land (which Tasman valued at less than the Maori land) should have been valued at \$21.25 (£10 12s 6d) per acre. Mr Vance then added the amount of \$4 (£2) per acre to the value of the Maori land, to recognise what Mr Groome had previously argued was the benefit to Tasman of the Maori land having been amalgamated by the Maori Land Court into one title, saving Tasman survey and fencing costs.⁴⁵ (At the court hearing, Maori Affairs officer Mr Lockie had put those costs at \$4 (£2) an acre.⁴⁶) Accordingly, the claimants contended that, at the outset of the joint venture, the land in the Tarawera Forest venture should have been valued as follows:

- ▶ \$26.31 per acre for the Maori land;
- ▶ \$28.15 for the Crown land; and
- ▶ \$21.15 for the Tasman land.⁴⁷

The Crown disputed these valuations. It pointed out that the Wilson report contained no

42. See doc A33, pp D4e–D4f; Tasman Pulp and Paper Company Limited, *Proposal By Tasman Pulp and Paper Company Limited to Maori Owners and the Crown to Participate in the Development of an Exotic Forest in the Tarawera Valley* (Kawerau: Tasman Pulp and Paper Company Limited, [1965]), p 6 (doc A4, vol 2, p 123)

43. Document B72, pp 39–40

44. Document B70, app 1

45. *Ibid.*, para 11

46. Document A33, pp 1W8–1W9 (see sec 3.2.5)

47. Document B76, para 2.15

analysis of factors such as land cover and the different market conditions in the catchment area for the Kinleith mill, which could affect the prices paid.⁴⁸ The Tribunal has also established from Mr Wilson's schedule that the 1967 average price of \$22.31 (£11 3s 1d) per acre was based on three sales only, two for farming use near the Kaimanawa Range south-east of Taupo, with an average price of \$20 (£10) per acre or less, and one small block (of 289 acres) for forestry about 25 or 30 miles from Kinleith, purchased by the adjoining owner for \$42 (£21) per acre. We consider that such a small sample of land that is so dissimilar to conditions in the Tarawera Valley can hardly be taken as a representative average for the year.

The Crown also disputed the validity of attributing £2 per acre to the Maori land for survey and fencing costs.⁴⁹ Questioned by the Tribunal, Mr Groome stated that he thought Mr Lockie's estimate was 'a convenient and valid way of recognising the amalgamation' because the Maori owners did not ask for it but Tasman obtained it, and that therefore it represented an extra value to Tasman. Asked whether the same extra value should not apply to the Crown and Tasman land because it had already been surveyed, Mr Groome maintained that it depended on the money that needed to be spent on the ground. He said that Tasman did not have to spend that money because the Maori Land Court had amalgamated the titles, and that, because Tasman's lawyer gave evidence of the costs of surveying and fencing to support the amalgamation proposal, the benefit of that should be added to the Maori land price.⁵⁰ Questioned by the Tribunal on this subject, Mr Moore said that the amalgamation, and the money that would not have to be spent because the land was to be used for forestry, not farming, was already reflected in the price calculated by Tasman.⁵¹

We will return to the validity of these valuations by Messrs Groome and Vance shortly. Here, we pursue the inferences derived from them. Mr Vance went on to argue that, in addition to what he called the 'undervaluing' of the Maori land, under the heads of agreement the 'contributions of land were denominated in 1967 dollars . . . whereas the ongoing development costs were allowed to have substantially more weight due to the impact of inflation throughout the 20–25 years of the forest development period'.⁵² He claimed that the impact of inflation 'should have been foreseen when the structure was being put in place' – as in fact it was, though in a different way, as will be seen in section 10.3.2. Mr Vance's way of allowing for inflation appears to be a creation of the later twentieth century, when inflation became rampant. He described it as the 'simple matter' of including in the agreement a requirement that the land development costs be recognised in 1967 dollars, the same dollars in which the land contributions were recognised.⁵³ He recalculated what he called 'the balances of the

48. Document B81, para 4.10

49. Ibid, para 4.3

50. Oral evidence of John Groome, 18 September 2000

51. Oral evidence of Howard Moore, 19 September 2000

52. Document B76, para 10.2. According to Mr Vance, the average yearly inflation between 1967 and 1987 was 11.3 per cent, so \$1 in 1967 was worth \$8.70 in 1987: para 2.7.

53. Ibid, para 10.3

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debentures' held by each party in 1987, which we take to apply to the relative proportions of the share and debenture holdings, had this been done. The 'restated position' then becomes:

MIL	\$807,871	5.88 per cent
Crown	\$565,570	4.11 per cent
Tasman	\$12,375,449	90.01 per cent

Mr Vance acknowledged that this adjustment did not in itself take the shareholding percentage of MIL up to the level of the 10.8075 per cent that it obtained in fact. However, he claimed that it did affect the actual interest charged on the debentures to TFL, presumably because all Tasman's development costs would have been expressed in 1967 dollars and would therefore have been lower, and this would have affected the interest paid by TFL on the debentures. Thus, he claimed that, had the land development costs been recognised in 1967 dollars, TFL's profits would have been greater by about \$2.6 million.⁵⁴

The Crown responded to Mr Vance's contention that Tasman's development costs should have been converted back to 1967 dollars by saying that it proceeded 'on the highly speculative assumption that . . . there would have been no other changes to the scheme'. Because Tasman was taking the bulk of the risk, it 'may well have insisted on trade-offs in other areas'.⁵⁵

Be that as it may, Mr Vance then considered the combined effects of what he saw as the original low land values and the failure to allow for inflation. In a series of calculations that he did not demonstrate, he took what he regarded as the 'appropriate sale price' for the Maori land of \$26.31, as described above, restated Tasman's total development costs in 1967 dollars, and recalculated the share due to Maori as being 17.9 per cent.⁵⁶ From this, the claimants contended that MIL should have obtained 17.9 per cent of TFL at the time of the share allocation. Claimant counsel Dr Harrison observed in his closing submissions:

had the twin questions of land values and adjustments of the land contributions for inflation been properly addressed at the time, as they would most likely have been had the Treaty breaches not occurred, Maori stood ultimately to receive a 17.9% interest in the venture, rather than the 10.8075% eventually received.⁵⁷

We will return to the question of the allowance for inflation in section 10.3.1. Here, we note that, while Dr Harrison said at the start of his closing submissions that this 17.9 per cent grievance was the second most important element of the 'irreducible minimum' of the claimants' case, later he observed that the 17.9 per cent figure depended on two matters that were disputed by the Crown: the 1967 land valuations and the allowance of £2 per acre extra for the Maori land because it would not require survey and fencing. He then concluded that:

54. Document B76, paras 2.9, 2.10

55. Document B81, para 8.8

56. Document B76, para 2.16

57. Document B80, para 12

In the circumstances, the claimants are, without withdrawing this aspect of their claim, content to have it treated as advanced only as an alternative 'back-up' to the 15% and 14.43% claims for redress.⁵⁸

We will summarise our conclusions on this grievance in the next section. At this point, however, we are able to make our final assessment of this protracted land valuation issue. We are persuaded by Mr Williams's 1968 statement to believe that LEV was not a practicable method of setting a purchase price for forestry land in New Zealand in the 1960s. We are also convinced by Mr Moore's calculation that, because of the 75 per cent minimum guarantee, the value of the Maori land could have been as high as £12 10s 5d per acre, or 3.69 times higher than was set, and the outcome of the joint venture would still have been no different. We accept the Crown's contention that the basis for calculating the value of the Maori land in 1967 as being \$22.31 per acre depends on too many unquantified variables to be reliable, and that Tasman's valuation of the Maori land included sufficient allowance for the fact that the land would be amalgamated into one block so as to rule out the need for a further £2 per acre to allow for the saving of surveying and fencing costs. We therefore conclude that the values at which the Maori land entered the scheme were fair in relation to the values set for the other parties, but that the values overall were low by the forestry standards of the day. We consider, however, that no one at the time ever suggested a price for the Maori land in excess of £12 10s 5d, and hence find that the claimants have suffered no financial prejudice as a result of the value at which their land entered the scheme.

10.3 HYPOTHETICAL ALTERNATIVES TO THE JOINT VENTURE

10.3.1 Introduction

We turn now to consider the various alternative arrangements to the joint-venture scheme which the claimants argued could have been achieved by the Maori owners and would have given them a better return. In particular, we consider the four points that claimant counsel Dr Harrison described as 'an irreducible minimum – a hard core – to the claimants' case'. In his description and 'ascending order', these are:

- ▶ the representation that Maori would receive a 14.43 per cent share in the joint-venture company;
- ▶ the Crown's failure to include in the heads of agreement a minimum guarantee for Maori of 15 per cent of the venture;
- ▶ the shareholding shortfall (said to be the difference between 10.8075 per cent and 17.9 per cent) that Maori suffered as a consequence of the undervalue at which their land

58. Ibid, para 71

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went into the joint venture and the lack of provision for the protection of their interests (as valued) against the consequences of inflation; and

- ▶ the unnecessary loss to Maori of their land.⁵⁹

10.3.2 The 14.43 per cent estimate

The claimants argued that Crown officials joined with Tasman in making and supporting to those Maori who received the Tasman brochure or attended the Kokohinau Pa meeting on 11 December 1965 a critical misrepresentation that Maori would receive a 14.43 per cent share in the joint-venture company. We have concluded at section 5.4.4 that the statements made were unclear and certainly created the wrong impression among some owners but that there was no deliberate misrepresentation of the situation.

Relevant to our discussion here is the accuracy of the 14.43 per cent estimate and the reason that it was considered necessary to invoke the 75 per cent minimum guarantee. Behind that is the question of why the guarantee was included: did anyone in 1965 or 1966 seriously consider that it would be invoked? The Tribunal has been able to find only one such person – Mr Grainger – who, in July 1966, gave a passing opinion that it was ‘a foregone conclusion’ that the guarantee would need to be invoked. He thought this because he considered that Tasman’s development costs would be at least 50 per cent higher than estimated – not as a result of inflation, however, but because they had originally been understated.⁶⁰ Earlier analysis in the Forest Service concluded that the 75 per cent minimum guarantee represented a protection rather than a prediction for three reasons. First, it overcame objections to the low overall land values, which in fact it did, as we have seen above. Secondly, it overcame the need for a land re-valuation after 25 years, an exercise which no one has attempted, so far as we know. Lastly, it was thought that it would give a return at least as good as a Grainger-style lease, which is a matter we explore below.

Professor Schmitt himself, interviewed by Dr Battersby in 2000, claimed that he did not think that the guarantee would have to be implemented: ‘any clever chap that foresaw at the time and took a firm opinion and judgment on what was going to happen being what did happen to inflation over the next 10 or 20 years would really have needed some divine inspiration’.⁶¹ In his view, therefore, inflation was the factor that increased Tasman’s development costs to the point where the guarantee was implemented. According to Mr Vance, inflation averaged 11.3 per cent per annum in the years between 1967, when the heads of agreement was signed, and 1987, when the share distribution was to be made, with the highest rates between 1974 and 1982 and between 1985 and 1987.⁶² In the mid-1960s, such high rates were not

59. Document B80, paras 6–15

60. Document B73(e), p 3

61. Document B78, p 12

62. Document B76, para 2.7, app 5

anticipated. In the Maori Land Court hearing, Mr O'Sullivan asked Mr Schmitt about the factors which would result in the 'variation in 14.41% down to 10.8075%'.⁶³ Mr Schmitt replied:

The factor in the minds of some people is as I explained yesterday in my evidence, namely, that the value of money may decline over a period of years and that therefore the costs of carrying out the work of development in the forest may increase so as to exceed the forecast expenditure for this purpose as set forth in the booklet. Should this happen then there is the point of view with which I do not personally agree to any significant extent, but it is a point of view which has some merit, which says that the percentage interest in the total venture of the partners who are contributing land in the first instance should not be allowed to decline too significantly because of that factor.⁶⁴

Mr Schmitt later estimated inflation over the last 25 years to be 'about 3%' and stated that the present value of money could devalue or revalue at 3 per cent per annum. When Mr O'Sullivan put to Mr Schmitt that the Maori owners' share of TFL would be in the order of 10 per cent, Mr Schmitt did not agree, saying, 'I think it is just as likely to be of the order of 20. Just to go 4% the other way, to rise as to fall.'⁶⁵

In his 2000 interview, Professor Schmitt also claimed that the 6 per cent compounding interest on the debentures was 'twice any expected inflation . . . They were getting 6% with inflation generally expected at 3%'. Mr Groome obliquely confirmed this point in his statement to the Tribunal that 'The indexing of debentures at 6% did not recognise any potential increase in the value of land, only the decrease in the value of money.'⁶⁶ Professor Schmitt also pointed out that in 1968 'Tasman entered into new newsprint contracts limiting increases in the price of newsprint for 15 years to not more than 3% in any one year', and he claimed that 'it was evident that Tasman in writing in the 6%, was acting bona fide in providing a substantial hedge for inflation.'⁶⁷

We return for a moment to Mr Vance's contention in section 10.2.7 that inflation could have been allowed for in another way, by converting the development costs back into 1967 dollars. By his calculation (which he does not demonstrate), that would have increased the Maori share to 5.88 per cent only. If Mr Vance is correct, this method of allowing for the rampant inflation that subsequently occurred would, in fact, have produced a return to the Maori owners of just over half that of the 10.8 per cent guarantee.

Whatever caused the minimum guarantee to be invoked – whether rampant inflation, understated forest development costs, or some combination of the two – it is clear that most of

63. Mr O'Sullivan referred to Tasman's estimation of the Maori share of TFL as being 14.41 per cent, not the 14.43 per cent cited in Tasman's booklet.

64. Document A33, pM3

65. Ibid, pM4

66. Document A8(a), p 17. In the same document, however, Mr Groome claims that the 6 per cent interest on the debentures 'did not even cover the inflationary effect over the first rotation period': p 13.

67. Document B74(a), p 5

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those involved in evaluating the terms of the venture felt that 14.43 per cent was a reasonable estimate at the time, and many considered that the likely return would be even higher. Inflation at the rates that subsequently occurred was not a factor in anyone's mind when the joint venture was being developed and implemented. Accordingly, we consider that the claimants' contention that the Maori owners were entitled to a 14.43 per cent share of the joint venture is exaggerated, and fails to take into account the risks and uncertainties of a speculative commercial venture, let alone one where a minimum of 25 years had to elapse before that share would be finally determined. Overall, we conclude that, in asking the Tribunal for a remedy that makes up the difference between the 10.8075 per cent that they were guaranteed and the 14.43 per cent that some Maori thought they were entitled to, the claimants are attempting to revive the assumptions made at the inception of a speculative, long-term commercial venture in a commercial reality that for many years has been very different.

10.3.3 The suggested minimum guarantee to Maori of 15 per cent of TFL

The second element of the claimants' 'irreducible minimum' is what they call 'the Crown failure to take up on behalf of Maori – or at the very least pass on to those whose interests the Crown was purporting to represent' – the offer from Tasman to include in the proposed heads of agreement a minimum guarantee for Maori of 15 per cent of the venture.⁶⁸ This was addressed in section 5.4.3, where we found the idea of a 15 per cent guarantee for Maori only was never more than an idea, one floated by Tasman to test the waters. It was quickly found unacceptable by the Crown on reasonable grounds and let drop.

In relation to this claim of financial prejudice, Crown counsel considered that, had the idea of a 15 per cent guarantee for Maori been pursued, 'it is a matter of speculation how it might have ended up'. Mr Andrew conjectured that, had the concept been discussed more widely, it is 'highly likely' that the Crown would have continued to reject it and would instead have asked for a guarantee for both itself and Maori from Tasman. The net result, he said, would have been a minimum guarantee along the lines of the one that ultimately eventuated. As noted in section 5.4.6, he concluded that 'It would not be reasonable to suggest that the Crown should have given up its own guarantee in return for a higher minimum guarantee for Maori. Had the Crown shareholding not been guaranteed it would be worth significantly less today.'⁶⁹

The Tribunal concurs. Accordingly, we do not support the claimants' contention that the Crown's conduct deprived them of the difference between 10.8075 per cent and 15 per cent of TFL.

68. Document B80, para 9

69. Document B81, paras 6.4, 6.5

10.3.4 The 17.9 per cent projection

We return briefly to the claimants' 'back up' projection (see sec 10.2.7) that, had the Maori land been valued on different principles and due allowance been made for inflation, Maori would have gained a 17.9 per cent shareholding in TFL. The principles of the land valuation were detailed in section 10.2.7, and the impact of inflation was assessed in section 10.3.2. As our conclusions to both those sections make plain, we also reject this claim of financial prejudice.

10.3.5 Retention of land ownership through leasing

The fourth and most serious of the claimants' grievances concerned what they called the 'unnecessary' loss of their land. By 'unnecessary', they meant that the Maori landowners were deprived of their land when an alternative arrangement – leasing – was available and could have been negotiated, and under which they would have retained the ownership of, and hence the right to control and benefit from the future development of, the land.

The claimants argued that, had the Crown upheld its Treaty responsibilities in the Tarawera Forest negotiations, a lease of the Maori land could have been achieved at or shortly after the time that the joint venture was implemented, and that the terms of such a lease would have assured them of financial returns to date comparable with, or better than, the returns that they have already had from the joint venture. However, even if a lease had returned less to date than the joint venture, the claimants said that the financial differential would have been more than compensated for by the lease's retention of land ownership. Further, with their land ownership intact, they said, the lease that could and should have been negotiated more than 30 years ago would have assured them of far greater financial returns in the longer term. Indeed, they claimed that, like the Lake Taupo Forest Trust, they could have expected to have been the owners of the forest on their land at the end of the lease's term.

The Crown responded that it was 'by no means clear that a lease could have been negotiated, given the clear preference of Tasman's Managing Director for a joint venture'. Secondly, the Crown contended that, even if a lease could have been negotiated, it would likely have 'delayed the commencement of the scheme with consequential losses in revenue for all involved'. Thirdly, the Crown argued that any leasing option negotiated would have provided inferior returns to the company structure that became TFL.⁷⁰

Much time and argument before the Tribunal were taken up with comparing the outcome of the actual joint venture, as described above, with the likelihood and terms of a hypothetical lease. The main points of contention between the claimants and the Crown on this matter were:

70. Ibid, para 5.2

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- ▶ whether a lease of the Maori land, either to Tasman or to the Crown, was feasible;
- ▶ if a lease had been negotiated, what its terms would have been; and
- ▶ if a lease had been negotiated, what its outcome would have been.

The first point, whether a lease would have been feasible, has been dealt with in section 5.5. In brief, our conclusions there were that leasing the Maori land was an option for Tasman until September 1965 and that, had the Crown fulfilled its Treaty duty of active protection of the Maori landowners' interests, it would have remained an option after that time. What might have happened in that event is a matter that we will consider by addressing the two remaining hypotheses. As will be seen, this task takes the Tribunal far further into the realm of the unknowable than any other aspect of the claims concerning the forestry joint venture. Although we are uncomfortable at being in that realm, we acknowledge that the circumstances which led the claimants to take us there were not of their own making.

10.3.6 What sort of lease might have been negotiated?

The claimants maintained that, had Maori been fully informed about the leasing alternative, they could have negotiated for themselves, 'if need be over a period of years', a satisfactory lease of their land to the Crown or to Tasman.⁷¹ They argued that:

- ▶ Tasman had 'a very real need for the whole of the land area in question';
- ▶ the Crown was in a strong bargaining position, and the Maori position was no weaker;
- ▶ the Crown remained willing to entertain the idea of leasing if Maori rejected the Tasman proposal;
- ▶ the Maori land, 'dividing and separating as it largely did the land of the Crown and Tasman', was of strategic importance to the project;
- ▶ Tasman would not have behaved towards Maori in 'a purely commercial, hard-nosed way'; and
- ▶ high stumpages and stumpage review provisions were evolving in lease negotiations with Maori elsewhere, which would have set a precedent.⁷²

The Crown argued instead that Tasman was the 'key player' in the joint venture, since it was contributing the total cost of developing the forest. It pointed out that Mr Schmitt was not attracted to the leasing option and wished to 'pursue and promote' the company joint-venture approach. Finally, the Crown asserted that:

To conclude more than 30 years after the event that a lease could have been readily negotiated is to enter into the realm of the unknown and to make assessments about nebulous matters such as bargaining strength.⁷³

71. Document B80, para 48

72. Ibid, para 49.1

73. Document B81, para 5.3

We have already acknowledged the unsatisfactoriness of entering the realm of the unknown. We consider, however, that our findings of Crown Treaty breach oblige us to pursue the issue of what sort of lease might have been negotiated.

Several possibilities were advanced in evidence. One was a lease similar to Otakanini Topu and the other north Auckland leases. As was explored in chapter 6, at the 1966 Maori Land Court hearing, the Director-General of Forests, Mr Poole, provided a general comparison of the proposed terms of the Otakanini Topu lease and the Tarawera joint venture and favoured the joint-venture company structure for the Maori owners of the Tarawera land. Further, the judge observed that the purpose of the north Auckland leases – to plant forest to prevent sand drift – rendered their terms irrelevant for the Tarawera Valley. To the Tribunal, Crown counsel pointed out in closing submissions that the stumpage rates for the north Auckland leases bore no relation to the Grainger classification of the land, that the Crown was the lessee and motivated by the desire to protect the environment, and that the Crown regarded the Otakanini royalty as ‘exceptionally generous’ as a result of unique circumstances.⁷⁴ Crown witness Howard Moore noted that the Otakanini Topu lease made no provision for a royalty review.⁷⁵ He also pointed out that the negotiations over Otakanini Topu took eight years to resolve on a leasing option and a further 21 months for the terms of that lease – a stumpage formula – to be settled. When it was signed in April 1969, the Otakanini Topu lease was the first Grainger lease to be concluded.⁷⁶

As will be explored shortly, Mr Moore maintained that any lease of the Maori land to Tasman would most likely have been on the same terms as the Crown would have obtained had it leased its own land to Tasman. Mr Moore then contended that the terms might have been very similar to those that the Crown negotiated with New Zealand Forest Products in the lease relating to the Mamaku Forest. He argued that, in both cases:

- ▶ the Crown was the lessor;
- ▶ a commercial forestry enterprise was the lessee;
- ▶ the lessee had an integrated processing plant;
- ▶ the forest was close to that processing plant;
- ▶ there was the prospect of off-highway delivery to the mill;
- ▶ the Grainger-type royalty based on land condition was about 10 per cent; and
- ▶ the area of forest was roughly similar (Mamaku, 26,700 acres; Tarawera Crown land, 19,000 acres).

The Mamaku lease, which was negotiated between 1968 and 1972, gave a royalty of 9.5 to 10 per cent, with non-prescriptive provision for review.⁷⁷

74. Ibid, para 5.20. Document B74, app 2, gives the stumpage rates as varying between 18.75 per cent for Parengarenga and a ‘whopping’ 30 per cent for Otakanini Topu, the latter mainly to gain ‘a connecting route between South Head and Woodhill’.

75. Document B72, pp 12–13

76. Ibid, pp 21, 22

77. Ibid, pp 24–25

The claimants challenged Mr Moore's postulation of a Mamaku-type lease. They claimed, first, that the comparison was not valid because New Zealand Forest Products was in a strong bargaining position. Secondly, they claimed that the 10 per cent stumpage would not 'have survived the negotiating process without challenge from Maori in a properly resourced and conducted negotiation'. Thirdly, they claimed that the only Crown alternative to the Tasman proposal was 'the Grainger lease and no other'.⁷⁸ We note that only the third point is verifiable. In reply to it, the Crown stated that in 1965 'The Grainger lease . . . was in the initial stages of development. No Grainger type leases were executed until 1969 – three years after the commencement of the Tarawera Forests joint venture.'⁷⁹

Claimant witness John Groome maintained that, because between 1967 and 1969 the Crown negotiated a forestry lease for 74,000 acres of Tuwharetoa land east of Taupo with the Lake Taupo Forest Trust, the Maori owners in the Tarawera Valley could have negotiated a lease on similar terms. The significance of those terms will be discussed in the next section, but here we concern ourselves with the validity of the comparison. Mr Groome argued that the land involved was very similar, with both localities having 'recent volcanic soils with fairly good topography and good growing conditions', but that there was an extra, proximity value for the Tarawera land.⁸⁰

Mr Moore pointed out that there were significant differences between the two schemes. He stated that the Crown wanted to control the development of the land around Lake Taupo for scenic and conservation reasons but had no particular interest in the Maori land near Tarawera. Further, the Taupo arrangement was between two parties only, Maori as lessor and the Crown as lessee, whereas in Tarawera a privately controlled third party, Tasman, would have been the lessee. In Taupo, the lessee (the Crown) had non-profit objectives and therefore discouraged private afforestation, whereas in Tarawera the lessee (Tasman) had 'strictly profit objectives' and the Crown was encouraging private afforestation. In terms of land value, the Grainger royalty based on land condition in Taupo was 16 per cent, whereas in Tarawera the land was more expensive to clear and plant, and the royalty would thus have been 10 per cent. We note, however, that with Taupo the royalty percentage was in fact adjusted upwards to 18.5 per cent to reflect the existence of riparian rights, power lines, and reserves to meet the Crown's concerns for environmental protection.⁸¹ As for proximity value, Mr Moore observed that in Taupo the lessee had no processing plant and there was no prospect of off-highway delivery, whereas in Tarawera both were present.⁸² However, under the Grainger lease as finalised the proximity value was recognised only in the overall stumpage on which the royalty was based.

78. Document B80, paras 49.3–49.4

79. Document B71, para 5.6

80. Document A8(a), pp 24–25

81. Document B81, para 5.19

82. Document B72, p 28

Mr Moore concluded that, if the Maori owners had insisted on a lease, the most likely outcome would have been that the Crown would have negotiated a lease with Tasman and that the Forest Service would have insisted that Tasman then 'offer terms no less favourable to the Maori landowners', even though the Maori land was more difficult to clear. As Mr Grainger had calculated a royalty of 10 per cent for the full 76,000 acres involved, of which Maori owned half, the Maori landowners would have received in effect a 5 per cent royalty on the total stumpage income of the forest. Mr Moore then claimed that a lease on these terms was unlikely to have been acceptable to Maori for two reasons: first, that it was going to be less than half of their guaranteed share of the profit of the joint venture and, secondly, that it compared unfavourably with the 16 to 18.5 per cent being negotiated in the Lake Taupo lease in 1968. Even assuming that a lease on those terms would have been acceptable to Maori, Mr Moore estimated that the lease terms would have been for up to 99 years and, because of delays due to the refining of the Grainger leasing scheme and the further negotiation of its terms with Maori, the establishment of the forest would have begun at least three years later (ie, in 1969) than under the joint-venture company. He argued that, while the Maori landowners would have retained title, 'the land would have been effectively alienated for the full term of the lease'.⁸³

In his closing submissions to the Tribunal, Dr Harrison contended that Mr Moore's evidence 'cannot withstand scrutiny'.⁸⁴ The reasons he gave were cited at the start of this section. For convenience, we repeat them on the left-hand side of the table over, with our own comments added on the right-hand side.

Dr Harrison also claimed that, if the Maori landowners had rejected the Tasman proposal, they could have leased to the Crown alone. The reasons he gave were Tasman's 'strong need' for the project to proceed and the Crown's 'documented commitment to assist'.⁸⁵ The Tribunal considers that this argument ventures even further into the realm of the unknown than Mr Moore's contention above that the Crown would have negotiated a lease with Tasman and then insisted that Tasman offer a lease on no less favourable terms to Maori. The nature of these speculations is such that we are simply unable to reach any conclusion on this issue. We also note the reservations expressed in the independent report by the NZIER about the complexities inherent in adopting any such comparators as valid.⁸⁶

In light of the evidence presented to us on the matter, and while recognising the inherent difficulties that the claimants face in attempting to show what might have been had the Crown fulfilled its Treaty duty, the Tribunal is nevertheless persuaded by the less speculative and more realistic nature of the Crown's arguments on this aspect of the claim. Of the three main leasing scenarios postulated, the Mamaku comparison appears to us to be the most

83. Ibid, pp 28–30

84. Document B80, para 49

85. Ibid, para 49.2

86. Document C1, p 7

Claimants' critique of Mr Moore's evidence of most likely lease terms	Tribunal comment
Tasman had 'a very real need for the whole of the land area in question'.	This may have been so in 1962, but by 1965–66, when the '20 million' contract was being negotiated, this need was greatly reduced.
The Crown was in a strong bargaining position, and the Maori position was no weaker.	This is based on Mr Thomson's letter to Mr Poole of 30 August 1965, which related to the start of negotiations on the '20 million' contract. That position would certainly not have remained for the period of years that may have been necessary to conclude a leasing arrangement.
The Crown remained willing to entertain the idea of leasing if Maori rejected the Tasman proposal.	This is based on a recommendation from Mr McKinnon to Mr Poole on 3 September 1965, and was not adopted as policy. The policy was that enunciated by Mr Davis in his letter to the Minister of Finance on 18 June: 'in the event that the Maori owners do not participate in the scheme, the Crown and Tasman will!'.*
The Maori land, 'dividing and separating as it largely did the land of the Crown and Tasman', was of strategic importance to the project.	The Maori land lay either to the south or to the north-east of the Tasman and Crown land, which lay more or less in an east-west belt; moreover, the document cited in support of this claim was describing a proposal for 123,000 acres, of which the Maori land contribution would have been about 55,000 acres. [†]
Tasman would not have behaved towards the Maori in 'a purely commercial, hard-nosed way'.	The claimants cite the offer of a 15 per cent minimum guarantee to Maori only as evidence; see sections 4.4 and 5.5.2(2).
High stumpages and stumpage review provisions were evolving in lease negotiations with Maori elsewhere, which would have set a precedent.	Such precedents are discussed immediately above.

* Document A5, vol8, docs 8.1, 8.13

† Document B1, p43

plausible, because of its greater similarities with the Tarawera Valley situation, in which the Crown had no special conservation and other protection objectives to achieve. Therefore, the Tribunal concludes that, in the event that a lease had been negotiated sometime after September 1965, its terms were most likely to have followed the scenario outlined by Mr Moore.

10.3.7 Possible outcomes of a hypothetical lease

The likely return to the Tarawera Maori landowners from a hypothetical lease compared with the outcome of the joint venture was also explored at some length before the Tribunal. First, there is the undisputed fact that, under a lease, Maori would have retained their land and, with it, their identity and their mana, for which no financial return can compensate. As

counsel for the claimants memorably said, there is 'no mana in a share certificate'.⁸⁷ The uniqueness of the Tarawera Forest joint venture also means that the claimants' situation stands in stark contrast to that of other Maori landowners whose lands have been developed for forestry purposes in the years since the mid-1960s. Mr Groome informed us in 2000 that not only has the joint-venture scheme never been repeated but, in the previous 39 years, 'much more favourable schemes' had been put in place 'no fewer than 153 times'. In his words: 'None of the alternatives require the alienation of the land and all allow for future reviews of the terms of the partnership or termination should that be desired.'⁸⁸

Because the claimants' land loss is 'seemingly permanent' and 'certainly irreparable by Tribunal processes', the claimants' focus was on the financial prejudice that they claimed to have suffered.⁸⁹ Pursuing their Lake Taupo Forest Trust comparison, they argued that it would have been possible to negotiate a lease with terms 'at least as profitable [to them] as the Tasman venture'. The Lake Taupo forest lease provided for future stumpage reviews, which could be initiated by lessee or lessor, and it transpired that, at the first stumpage review, due after 20 years, the Maori share of that lease was revised upwards to 21.3 per cent.⁹⁰

Three different outcomes for a Tarawera Forest lease were put before the Tribunal. It is important here to bear in mind that these outcomes represent possible financial returns only, and that the incalculable advantage of any lease would have been that the Maori owners would have kept their land.

Claimant witness David Vance calculated the returns to MIL from 1987 to 1999 from two leases – one based on 19 per cent of the stumpage value and one based on 10 per cent of that value, which he obtained by deducting the cost of sales from the amount of the log sales. At 19 per cent, he claimed, MIL would have received \$63,304,000 and, at 10 per cent, \$33,319,000. However, his calculations were flawed in that he assumed that the whole return from the landowners' stumpage would go to MIL, not 50 per cent of it. Mr Vance's figures just quoted should in fact be halved, giving MIL a return of about \$31,650,000 at 19 per cent, and \$16,600,000 at 10 per cent.⁹¹

Crown witness Howard Moore did a similar calculation, based on a 99-year lease with a lessor's stumpage share of 10 per cent. However, he took the start of the lease period to be 1969 because of the likely delay in forest establishment if a lease had been negotiated, and the total value to be to the year 2000. He calculated that, if a lease had been signed in 1967, the total value of the income to the Maori landowners in 2000 would have been \$16,826,516 and, if it had been signed in 1969, \$12,035,188.⁹² At the conclusion of such a 99-year lease, Mr Moore calculated that the total return to Maori would be \$22,183,188 at today's values,

87. Document B80, para 52

88. Document A8(a), p 9

89. Document B80, para 52

90. Document B77, para 20

91. Document B76, para 18.3

92. Document B72, p 32

compared with a net present value (ie, including future earnings) for the joint venture of \$69,812,713.⁹³

The NZIER, in its independent report, calculated the value to the Maori landowners in 1999 of the income of a Grainger lease signed in 1967 at a stumpage rate of 10 per cent to be \$14,425,303 and, if signed in 1969, \$10,606,414.⁹⁴ (The differences due to different assumptions over the choice of the post-tax compounding factor by Moore and the NZIER were discussed in section 10.2.4.) The total return at the end of a 99-year Grainger lease with 10 per cent stumpage signed in 1967 at today's values would be \$27,558,236. Because the Tribunal wished to see the impact of changes in the stumpage rates, the NZIER also did calculations at stumpage rates of 11 per cent and 12 per cent. It calculated the return to 1999 to be \$15,582,190 and the total return to be \$30,227,241 at 11 per cent, and at 12 per cent \$17,293,300 and \$32,910,954. By comparison, the NZIER's calculation of the total value of the shareholding in MIL at today's values is \$64,405,459.⁹⁵

In light of the variables involved in any calculation of the returns from a hypothetical lease, the Tribunal was heartened by Dr Harrison's comment, in his submission in response to the NZIER report, that it is 'unnecessary and inappropriate for the Tribunal to become too pre-occupied with assessing quantum of the claimants' financial losses, in precise dollar terms'.⁹⁶ Indeed, that comment is wholly consistent with the explanation of the Treaty principle of redress given in the *Report on the Waiheke Island Claim* and quoted in section 1.8.4. In the situation before that Tribunal, the inappropriateness of an 'eye for an eye' approach was contrasted with an approach that asks 'what can be done now and in the future to rebuild the tribes and furnish those needing it with the land endowments necessary for their own tribal programmes'.⁹⁷

We return to such large questions shortly. First, however, we consider that some general conclusions about the possible outcomes from a hypothetical lease can be arrived at. As noted in the preceding section, the Tribunal believes that the most plausible of the hypothetical outcomes to do with leasing put to us is that advanced by Mr Moore: a 10 per cent stumpage-based royalty with non-prescriptive provision for review akin to that negotiated for the Mamaku Forest. We consider that the question of whether the stumpage rates for any such hypothetical Tarawera Forest lease would subsequently have been reviewed upwards, like the Lake Taupo forests lease, is simply too speculative for us to pass an informed opinion on: it is piling speculation upon hypothesis. On that basis, we consider the most likely return to the Maori landowners by 1999 or 2000 to be in the order of \$16.5 million (or less if the NZIER assumptions are accepted) – that is, about half the return to MIL in the same period, as

93. Document B72, pp 31, 32

94. Document C1, p 5

95. *Ibid*, pp 3, 8

96. Paper 2.48, para 11

97. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Waiheke Island Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 41

described in section 10.2.4. Assuming that the lease ran for 99 years, which we believe is a plausible assumption in light of Tasman's interests as declared by Mr Schmitt, its total return to Maori would also appear to have been about half of their earnings from the joint venture. Our conclusion, therefore, is that, from this perspective of financial return only, the claimants have suffered no prejudice from the Tarawera Forest joint venture. We therefore find that the unfavourable bargain grievance cannot be sustained.

10.4 THE LAND LOSS GRIEVANCE

10.4.1 Introduction

Before proceeding further, it is helpful to summarise the key features of the joint venture that have been identified so far. They are as follows:

- ▶ *Breaches of Treaty principle:* In the process by which the joint venture was developed and implemented, the Crown's Treaty duty actively to protect Maori interests was not fulfilled.
- ▶ *Loss of ownership of Maori land:* The implementation of the joint venture involved the transfer to private ownership of more than 38,000 acres of Maori land, including the sacred mountain Putauaki – a feature that has not been repeated in any New Zealand forestry venture involving Maori land.
- ▶ *Maintenance of connection between MIL and the land:* The former owners' connections with the land have not been entirely broken but are maintained through their shareholding in MIL, the company created to hold and administer the former landowners' minority ownership share in TFL, the forest company which owns the land.
- ▶ *MIL representation on TFL board:* MIL's guaranteed representation on the TFL board, through two directors (out of seven), allows the former owners and their successors who are known shareholders the opportunity to influence the direction of TFL, and therefore the use of the land.
- ▶ *Independence of TFL board:* Although the MIL representatives are aware of their minority status, the TFL board has shown that it has acted in the best interests of TFL even when that has run counter to Tasman's interests – for instance, TFL's decision to opt for the 'big basket' approach to log sales to Tasman in 1994.
- ▶ *TFL and the Guardians of Putauaki:* There has been some opportunity for MIL to promote Maori values in TFL's operations through TFL's recognition of a sub-group of MIL directors as 'Guardians of Putauaki', who have an advisory role.
- ▶ *MIL's control over its objects:* MIL has the opportunity, through changes to its own constitution, to promote whatever purposes and values it wishes to promote in its own operations.

10.4.2

- ▶ *Significant and ongoing financial return to MIL:* MIL's shareholding in TFL has secured a significant financial return to date (between \$30 million and \$35 million to 1999, depending on which economist's view is favoured), with every prospect of further significant returns in the future.
- ▶ *Joint venture's returns to MIL exceed possible returns from a lease:* As we have explained in the previous sections, the Tribunal is satisfied that, in financial terms, any possible lease of the Maori land would have been significantly less advantageous than the joint venture has proven to be.
- ▶ *Not all former owners benefit from joint venture:* MIL's knowledge of its shareholders, through no fault of its own and despite its best efforts, is seriously deficient as a result of the original problems of the fragmented ownership of the 40 blocks of Maori land and the absence of an effective system to update the title to multiply owned Maori land.
- ▶ *Accretion of shares and funds due to unknown shareholders:* By mid-2000, some \$5.8 million worth of shares and \$9 million of funds was held by MIL on trust for its unknown shareholders, with more than half that amount being due to about 1000 people who have not been known since the company's formation in 1968.

In light of those features, we have considered whether any prejudice has been caused to the claimants as a result of the loss of ownership of the former Maori land and, if it has, what remedy, if any, it would be appropriate for the Tribunal to recommend.

10.4.2 Claimant views of the nature of the prejudice

The Wai 46 claimants described in terms of loss of rangatiratanga and mana the prejudice that they claim to have suffered as a result of the Maori land, and most particularly Putauaki, passing into private ownership upon the implementation of the forestry joint venture. Losses of that nature are the inevitable consequences of a Maori community losing control of its natural resources, and are compounded when that has occurred without their leaders' knowledge or consent. In reaching their position, the Wai 46 claimants rejected the notion that Ngati Awa had already lost its land and mountain in the nineteenth century with the individualisation of the land's title. Instead, they regarded the title granted to individuals by the Native Land Court and Compensation Commission as having been awarded because of those individuals' tribal affiliations.

The Wai 411 claimants emphasised the joint venture's consequence as being that the former individual landowners lost their property rights. The basis of this position was that the rights of landowners under the introduced system of multiple individual ownership of Maori land are distinct from the communally based customary rights of traditional Maori society and, therefore, the loss of the individual owners' rights should be approached and remedied in a way that is not influenced by the earlier loss of traditional rights. For that reason, the Wai 411 claimants originally submitted that MIL was, or its shareholders were, the appropriate

recipient of a remedy for the prejudice caused by Crown breaches of Treaty principle, rather than any tribally based group connected to the Maori land that went into the Tarawera Forest. That position had changed somewhat, however, by the end of the hearing. At that point, the Wai 411 claimants invited the Tribunal's advice on how MIL might ensure that it was the appropriate recipient and distributor of redress for any prejudice caused by a Treaty breach in the process by which the Tarawera Forest joint venture became a reality.

10.4.3 Claimant views of appropriate remedies

The claimants' differing views of the prejudice caused by the loss of ownership of the former Maori land accounts for their differing views of appropriate remedies (see secs 1.3.3, 1.4, 1.5). All accepted that the Crown cannot return the land, for it is not the Crown's to return. That leaves the prospect of a Crown apology and the provision of financial redress. The Wai 411 claimants contended that a remedy comprising both elements is due to MIL. Moreover, they claimed that the amount appropriate to redress the land loss element of their claim would have to recognise the lost potential that a lease could have secured for the landowners: that at the end of the lease period the Maori landowners would have owned not only their land but also the forest on it. The Wai 46 claimants contended that a remedy comprising an apology and financial redress is due directly to Ngati Awa. For them, no remedy to the MIL shareholders can offset the loss to Ngati Awa of its taonga.

10.4.4 Tribunal findings

We have concluded earlier that the financial returns to MIL from the joint venture have significantly exceeded those from a possible lease. To the extent that this is so, we consider that the former Maori owners' loss of ownership of the land has been recognised and offset. We have also concluded that, had the joint venture not proceeded, the most likely lease that could have been obtained was one with terms akin to the Mamaku lease. That conclusion reduces the strength of the Wai 411 claimants' contention that, at the end of the term of a possible lease, the Maori landowners could well have owned the land and the forest growing on it. While we doubt that forest ownership would have been the result of the most likely lease that could have been negotiated in place of the joint venture, we acknowledge that the very fact of the land's retention at the end of any lease would leave open the possibility of such a result being negotiated in the future.

Having considered the nature of the prejudice that may have been caused to the claimants from the loss of Maori land ownership, we are unable to accept the Wai 411 claimants' submission that it is unconnected with any tribal rights to the land. Indeed, if the prejudice were fully described as the loss of individual owners' rights in the land, we would be inclined to

conclude that it would have been fully offset by the financial returns to MIL from the joint venture.

Instead, we accept that the individuals who owned the land in 1966 were owners because of the tribal affiliations of those through whom they inherited their interests. Seen in that way, the Wai 411 claim does not simply spring out of the loss in the twentieth century of the private land ownership rights of particular individuals but has its foundations in the loss, a century earlier, of tribal rangatiratanga and mana over the land which occurred upon the introduction of the system of multiple individual ownership of Maori land. To the extent that individual Maori continued to hold title to the lands of their hapu or iwi, it may be thought – as the Wai 46 claimants believe – that there was a sense in which the loss of tribal rangatiratanga over that land was not quite complete. Once that individual title was also lost, however – and especially by means that the individuals concerned did not comprehend or consent to – the earlier loss was made complete: the situation became irreparable for the groups with customary affiliations to the land.

This perspective on the Wai 411 claimants' land loss grievance was in fact apparent in their own descriptions of it. As was noted in chapter 1, Ms Adlam explained that:

The loss of the Maori land which is now called Tarawera 1 has meant a significant loss of mana to the former owners and to the Maori people of the Region generally. It has resulted in a loss of spiritual inheritance, and also the development of inter-tribal disharmony and divisions between those iwi, hapu and whanau who belonged to this land. This loss of mana has been made greater, because all other Maori who became involved in forestry ventures, whether with the Crown or with private enterprise, have retained their lands and the mana associated with those lands.⁹⁸

Further, that understanding of the genesis of MIL shareholders, and the impetus for their future relationship, is evident in the company's new rules about who can become a shareholder. Before its constitution was changed in 1997, MIL shares were allowed to be transferred to any existing shareholder or to a shareholder's spouse, child, or remoter issue, parent, brother, or sister (including a half-brother or half-sister). Since 1997, the share transfer rules are more concerned to promote the connections between new shareholders and the land that was amalgamated to form the Tarawera 1 block. Accordingly, the rules now provide:

No share shall be transferred except:

- a. To an existing shareholder.
- b. To the child or remoter issue of the transferring shareholder.
- c. To a whanaunga of the transferring shareholder who is associated in accordance with Tikanga Maori with the Block.

98. Document A16, para 13

- d. To the spouse of the transferring shareholder but only by way of an interest for life with the remainder to any other of the potential transferees listed in this clause.
- e. To a trustee who is proven to the satisfaction of the directors to be a trustee exclusively for any one or more of the other potential transferees listed in this clause;
- f. To a descendant of any person who, according to the records of the Maori Trustee and the records of the Maori Land Court, had, on 20 November 1967 (the date of passing of the Tarawera Forest Act 1967) a beneficial interest in the [Tarawera 1] block and who is or was a member of a hapu associated with the block.⁹⁹

Another insight into the Wai 411 claimants' view of themselves is gained, we consider, by their open admiration for the situation and aspirations of the Lake Taupo Forest Trust. As Richard Te Heu Heu informed us, that entity, which also has a large number of unknown shareholders, deals with the interest on unclaimed dividends through a charitable trust established in 1997.¹⁰⁰ In his closing submissions, Dr Harrison likened the Lake Taupo charitable trust to a trust established under section 438 of the Maori Affairs Act 1953 to deal with the uneconomic or fragmented shares of landowners. He said that such a trust could specify as its beneficiaries in respect of those shares, 'Maori generally, say of a particular iwi or hapu or whanau affiliation or of a particular locality or localities – in effect a trust for "charitable" purposes as to particular defined classes or groups'.¹⁰¹

In light of all these matters, we are satisfied that there has indeed been prejudice caused to the claimant groups by the development and implementation of the Tarawera Forest joint venture in breach of the Crown's Treaty obligations. The prejudice consists of the loss of Maori ownership of lands that are of special significance because they are lands in which the owners' tipuna held customary rights. It is not this Tribunal's task to deal with any Treaty-breaching situations by which the rights of those tipuna were lost – they are the subject of the tribal settlements now in various stages of negotiation. In addition, Ngati Awa's initialled deed of settlement, which has recently been ratified, will settle all Ngati Awa claims concerning their tribal lands, including their claim concerning the loss of ownership of Putauaki to TFL. That loss has been particularly keenly felt and, as chapter 9 has shown, has been the source of consistent efforts by their leaders to find a remedy. The outcome of our inquiry into the circumstances by which Putauaki was included in the Tarawera Forest has, we consider, vindicated not only the grievance felt by the Wai 46 claimants but also the appropriateness of the Crown now proposing to support relevant Maori groups' future efforts to align the mountain's future with its past. Beyond that, we feel that it would be unwise for us to venture, especially in light of the current state of Ngati Awa's settlement negotiations.

99. Document A29, pp 4–5

100. Document B77, para 19

101. Document B80, para 19

As for the Wai 411 claimants – we agree with them that two wrongs do not make a right. We have found that it was wrong in Treaty terms for the Maori land in the Tarawera Valley to be included in the joint venture by means of the process that was adopted. But we believe that it would also be wrong to conclude that the resulting prejudice was caused only to the group that is now represented by MIL. One reason for this, which has occurred through no fault of MIL's and despite its best efforts, is that MIL does not in fact represent the large number of people who are entitled to be its shareholders but who are unknown and will never be located. Another reason is that, beyond the group of known and unknown MIL shareholders is the wider group of Maori whose ancestors belonged to the Tarawera Valley and whose own remaining connections with the land were weakened by its transfer from Maori to private ownership by means of a process in which Crown Treaty duties to Maori were not upheld.

10.5 TRIBUNAL RECOMMENDATIONS

In considering the most appropriate recommendation that we might make to the Crown concerning a remedy for this complex situation, we have been drawn to these words of an earlier Tribunal:

It is the group, not the individual, to whom the land belonged; it is the group, not the individual, that has been most deprived of benefit; and the Maori loss has been the loss of society that the group represents . . . The money should stay where the land is, for the people belong to the land, not the land to the people.¹⁰²

In light of all the matters discussed in this report, we consider that the appropriate remedy for the prejudice suffered should involve two major elements. The first is an apology from the Crown to the Maori groups with affiliations to the Tarawera Valley lands for the loss of rangatiratanga that has been caused by the transfer in the late 1960s of such a large area of Maori land to private ownership by means of a process in which the Crown's Treaty duties to Maori were not upheld.

The second element of the appropriate remedy must be financial because the land itself is neither the Crown's to deal with nor within this Tribunal's power to discuss. Here, we are attracted to a particular feature of the Wai 411 claimants' submissions as to remedy; namely, that the Crown's shareholding in TFL is a fitting source of an appropriate remedy. Also, we are impressed by the seeds of a solution that is, we believe, within the Wai 411 claimants' own power to nurture. We refer to MIL's power to establish a charitable trust fund to be applied for the benefit of any person who is or was a member of a hapu which in 1968 was associated with the lands that became the Tarawera 1 block or for the benefit of any descendant of any such

102. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996), p 276

person. It is the marrying of those two ideas which, we believe, will provide an appropriate remedy. Our own idea, without wishing to stifle others that may better combine the twin elements that we have identified, is that MIL and the Crown should contribute equally to a trust whose purposes would be determined by MIL in consultation with representatives of the wider group of beneficiaries to which we have referred. We do not make any suggestion about the amount of the contribution to be made by MIL, and to be matched by the Crown, except to state our view that MIL's contribution to the trust should not exhaust the funds available for unknown shareholders who may be located in the future.¹⁰³

It remains to record that we do not consider that there are grounds for recommending any specific remedy to the Wai 872 claimant, David Potter. From all the evidence we have examined, we are satisfied that the farming future he wished and strove for as a boy and as a very young man was unlikely to have been the rosy one he believed to be possible. Accordingly, while acknowledging that his family's situation provided the most visible example of the flaws in the process by which the joint venture came into being, we do not consider that this gives rise to a valid claim by any individual to a remedy that is distinct from that we have already recommended.

Finally, in their statement of claim, the Wai 411 claimants asked the Tribunal to recommend that the Crown pay the reasonable costs of their preparation for and representation at the Tribunal hearing. The Wai 46 claimants made no specific request to that effect. It will be apparent that the Tribunal has upheld the Wai 411 and Wai 46 claims in respect of the Tarawera Forest to a substantial extent, although not in respect of the Crown's alleged motives in failing actively to protect the Maori landowners' interests. Therefore, we consider it appropriate, and so recommend, that the Crown should reimburse the Wai 411 and Wai 46 claimants' costs to an extent commensurate with the extent to which we have upheld their claims.

103. We note that section 12(2)(c) of the Tarawera Forest Act 1967 requires unclaimed shares and debenture stock to be sold 20 years after MIL's incorporation and the proceeds to be held in trust for the company. We understand that, 35 years after MIL's incorporation, the company continues to seek out unknown shareholders in order to pay them their unclaimed moneys. We assume that funds from this source, and from the company's retained earnings, can be readily transferred to a trust of the type that we have outlined.

Dated at *Wellyton* this *12th* day of *February* 2003

JR Morris

JR Morris, presiding officer

J Baird

J Baird, member

JW Milroy

JW Milroy, member

K Walker

K W Walker, member



APPENDIX

RECORD OF INQUIRY

RECORD OF HEARINGS

THE TRIBUNAL

The Tribunal constituted to hear Wai 411, concerning the Tarawera Forest, comprised Joanne Morris (presiding), John Baird, Professor Wharehuia Milroy, and Keita Walker.

THE COUNSEL

Rodney Harrison QC appeared for the Wai 411 claimants; Layne Harvey with Spencer Webster for the Wai 46 claimants; and Peter Andrew, Helen Carrad, and David Soper for the Crown.

THE FIRST HEARING

The first hearing took place at the Novotel Hotel in Wellington from 6 to 9 June 2000.

On 6 June, opening submissions were heard from Wai 411 claimant counsel Dr Harrison (doc A22).

On 7 June, evidence was heard from Beverley Adlam (doc A16), Gavin Park (doc A17), David Potter (doc A19), Mrs Te Rau Cameron (doc A18), and John Third (docs A11, A5).

On 8 June, opening submissions were heard from Wai 46 claimant counsel Mr Harvey (doc A27), and evidence was heard from John Groome (docs A8, A8(a)), John Hunia (doc A15), Dr Hirini Mead (doc A21), Ngahuia Rowson (doc A13), Mrs Te Rau Cameron, and Sam Tutua (doc A14).

On 9 June, opening submissions were heard from Crown counsel Mr Andrew (doc A30), and evidence was heard from Dr John Battersby (docs A10, A12) and Tom Cass (doc A29).

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THE SECOND HEARING

The second hearing took place at the Novotel Hotel in Wellington from 18 to 22 September 2000.

On 18 September, evidence was heard from Dr John Battersby (docs A10, A12), Tom Cass (doc B68), John Groome (doc B70), Harris Martin (doc B71), and David Vance (docs B76, B76(a)).

On 19 September, evidence was heard from Dr Andrew McEwen (docs B73, B73(b)), Howard Moore (docs B72, B72(a)), and Richard Te Heu Heu (doc B77).

On 20 September, evidence was heard from Dr John Battersby (docs B67, B67(a), B74) and Dr Andrew McEwen.

On 21 September, closing submissions were heard from Wai 46 claimant counsel Mr Harvey (doc B79) and Wai 411 claimant counsel Dr Harrison (doc B80), and evidence was heard from Professor G Schmitt by videolink (doc B78).

On 22 September, an addendum to his closing submissions was presented by Wai 411 claimant counsel Dr Harrison (doc B80(a)), closing submissions were heard from Crown counsel Mr Andrew (docs B81, B81(a)), and Dr Harrison also made an oral reply to the Crown's closing submissions.

RECORD OF PROCEEDINGS

1. CLAIMS

1.1 Wai 411

A claim by William Savage and Gavin Park on behalf of the former owners of the Tarawera 1 block, and their heirs and descendants, and the shareholders of Maori Investments Limited concerning the Tarawera Forest scheme, 14 May 1993

(a) Amendment to claim 1.1, 26 April 2000

1.2 Wai 872

A claim by David Potter concerning loss of family lands at Pokohu, Tarawera Valley, under section 438 of the Maori Affairs Act 1953, 5 September 2000

1.3 Wai 46

A claim by Hirini Moko Mead and Cletus Maanu Paul on behalf of themselves and Ngati Awa concerning confiscation of Ngati Awa lands and loss of tino rangatiratanga, 11 March 1988

(a) Amendment to claim 1.3, 18 July 1989

(b) Amendment to claim 1.3, 8 November 1990

(c) Amendment to claim 1.3, 16 December 1990

(d) Consolidation of claims 1.3, 1.3(a), and 1.3(b), undated

(e) Amendment to claim 1.3, undated

2. PAPERS IN PROCEEDINGS

2.1 Memorandum from chairperson to registrar directing latter to register claim 1.1 as Wai 411, 19 January 1994

2.2 Declaration that notice of registration of claim 1.1 given, 7 February 1994
List of parties sent notice of registration of claim 1.1, 7 February 1994

2.3 Memorandum from Tarawera Forests Limited to Tribunal opposing return of Tarawera 1 block, as requested in claim 1.1, and questioning jurisdiction of Tribunal to make recommendations in respect of that land, 4 July 1994

Memorandum from Tarawera Forests Limited to Tribunal opposing return of Putauaki, as requested in claim 1.1, and questioning jurisdiction of Tribunal to make recommendations in respect of that land, 4 July 1994

2.4 Memorandum from Tasman Pulp and Paper Company Limited to Tribunal opposing return of Putauaki, as requested in claim 1.1, and questioning jurisdiction of Tribunal to make recommendations in respect of that land, 6 July 1994

2.5 Memorandum from Wai 411 claimant counsel to Tribunal concerning hearing of Wai 62 and Wai 411 claims, 1 August 1994

2.6 Letter from counsel for Te Ika Whenua to registrar concerning hearing of evidence on Tarawera Forest and possible prejudice resulting therefrom, 9 September 1994

2.7 Memorandum from chairperson to registrar directing latter to release document A5, 14 November 1994

2.8 Memorandum from chairperson to registrar directing latter to register claim of Wahiao Gray as Wai 501, 1 May 1995

2.9 Memorandum from chairperson to parties concerning various matters raised by counsel at the eleventh and twelfth hearings of the Wai 46 claim, 13 December 1995

2.10 Memorandum from Tarawera Forests Limited to Tribunal concerning Putauaki, 6 March 1996

2.11 Memorandum from Tasman Pulp and Paper Company Limited to Tribunal concerning Putauaki, 2 April 1996

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2.12 Memorandum from Wai 46 claimant counsel to Tribunal concerning part of paper 2.11, 11 June 1996

Letter from Wai 46 claimant counsel to counsel for Tasman Pulp and Paper Company Limited concerning part of paper 2.11, 11 June 1996

2.13 Memorandum from chairperson to registrar directing latter to arrange conference to determine whether Wai 411 could proceed to hearing and authorising Joanne Morris to conduct that conference, 25 February 2000

2.14 Memorandum from Joanne Morris to parties identifying issues needing to be clarified at 10 April 2000 conference, 6 April 2000

2.15 Facsimile from Wai 501 claimant Wahiao Gray to Wai 411 claimant counsel detailing former's inability to attend 10 April 2000 conference and requesting meeting, 7 April 2000

2.16 Facsimile from environmental manager, Fletcher Challenge Paper, to Tribunal concerning intended non-appearance of company at 10 April 2000 conference and future involvement in Tribunal process, 7 April 2000

2.17 Memorandum from Tribunal to parties concerning issues raised by Crown and claimant counsel at 10 April 2000 conference and advising of Tribunal's intention to proceed with hearing of Wai 411 claim, 12 April 2000

2.18 Memorandum from Wai 411 claimant counsel to Tribunal concerning proposed dates and venues for, and evidence to be presented at, hearing of Wai 411 claim and enclosing amended statement of claim substituting Beverley Adlam for the late Shuki Savage as principal claimant (claim 1.1(a)), 20 April 2000

2.19 Facsimile from Wai 46 claimant counsel to Tribunal concerning availability of counsel and witnesses for proposed hearing dates of Wai 411 claim, 26 April 2000

2.20 Memorandum from chairperson to registrar directing latter to register amended statement of claim 1.1(a), 4 May 2000

(a) Declaration that notice of registration of claim 1.1(a) given, 5 May 2000

Form letter from Tribunal to parties advising them of registration of claim 1.1(a), 5 May 2000

List of parties sent notice of registration of claim 1.1(a), 8 May 2000

2.21 Direction of chairperson constituting Tribunal of Joanne Morris (presiding), John Baird, Keita Walker, and Professor Wharehuia Milroy to hear Wai 411 claim, 4 May 2000

- 2.22** Memorandum from Tribunal to parties concerning dates of, and venues, evidence, and witnesses for, proposed first and second hearings and jurisdiction of Tribunal, 18 May 2000
- 2.23** Notice of first hearing, 18 May 2000
- 2.24** Declaration that notice of first hearing given, 18 May 2000
Form letter from Tribunal to parties advising them of first hearing, 18 May 2000
List of parties sent notice of first hearing, 18 May 2000
- 2.25** Memorandum from Wai 46 claimant counsel to Tribunal concerning dates of, and venues, evidence, and witnesses for, proposed first and second hearings, 10 May 2000
- 2.26** Letter from Wai 411 claimant counsel to registrar advising latter of former's prior professional dealings with Tribunal member Professor Wharehuia Milroy, 23 May 2000
- 2.27** Letter from Crown counsel to registrar advising latter that Crown has no objection to Professor Wharehuia Milroy continuing to serve as a member of Wai 411 Tribunal, 25 May 2000
- 2.28** Memorandum from chairperson to registrar directing latter to release document B1, 5 July 2000
- 2.29** Memorandum from Tribunal to parties advising them of postponement of July 2000 judicial conference to 25 July 2000 and listing matters on which Tribunal requires additional evidence or submissions, 10 July 2000
- 2.30** Memorandum from Tribunal to parties concerning 25 July 2000 judicial conference, research in respect of section 438 trusts and role and responsibilities of Maori Trustee, and evidence to be presented at, and agenda for, second hearing, 1 August 2000
- 2.31** Memorandum from Wai 411 claimant counsel to Tribunal concerning proposed Crown evidence, 24 August 2000
Letter from counsel for Fletcher Challenge Forests Limited to Wai 411 claimant counsel concerning latter's information request, 3 August 2000
- 2.32** Memorandum from chairperson to registrar directing latter to release document B71, 24 August 2000
- 2.33** Notice of second hearing, 5 September 2000
(a) Notice of second hearing, 5 September 2000

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2.34 Memorandum from chairperson to registrar directing latter to register claim 1.2 as Wai 872, 7 September 2000

2.35 Notice of Wai 872 claim, 7 September 2000

2.36 Memorandum from Crown counsel to Tribunal concerning relevance of supplementary evidence of Dr John Battersby, evidence of Professor Geoffrey Schmitt proposed to be introduced when witness unavailable for cross-examination, and powers of Tribunal to receive evidence, undated

2.37 Memorandum from Wai 411 claimant counsel to Tribunal concerning admission of evidence when witness unavailable for cross-examination, 5 September 2000

Badger v Whangarei Refinery Expansion Commission of Inquiry [1985] 2 NZLR 688

2.38 Memorandum from Tribunal to parties summarising matters canvassed at 6, 7, and 8 September 2000 judicial teleconferences, 13 September 2000

2.39 Memorandum from chairperson to registrar directing latter to register amendment to Wai 46 claim, 13 September 2000

2.40 Notice of amendment to Wai 46 claim, 14 September 2000

2.41 Memorandum from chairperson to registrar directing latter to release document B71, 25 August 2000

2.42 Memorandum from Tribunal to parties enclosing report of NZIER (doc C1) and requesting claimant submissions thereon, 23 November 2001

2.43 Form letter from registrar to Wai 411 claimant counsel, Wai 46 claimant counsel, and Wai 872 claimant advising them of intention of Wai 872 claimant and Wai 411 claimant counsel to file submissions on report of NZIER, 10 December 2001

2.44 Printout of e-mail from Wai 872 claimant to registrar advising latter of former's intention to file submissions on report of NZIER, 6 December 2001

2.45 Facsimile from Crown counsel to registrar commenting on report of NZIER and requesting leave to make submissions in reply to other parties' submissions on report, 13 December 2001
Form letter from registrar to presiding officer, Wai 411 and Wai 46 claimant counsel, and Wai 872 claimant advising them of submission of Crown counsel on report of NZIER, 13 December 2001

2.46 Letter from Wai 411 claimant counsel to registrar requesting leave to file late submissions on report of NZIER, 18 December 2001

2.47 Memorandum from Wai 872 claimant to Tribunal commenting on report of NZIER, 14 December 2001

2.48 Submission of Wai 411 claimant counsel concerning report of NZIER, 29 January 2002
Memorandum from chairman, Groome Forestry Consulting Limited, to Wai 411 claimant counsel commenting on report of NZIER, 25 January 2002

3. RESEARCH COMMISSIONS

3.1 Memorandum from John Third to Tribunal outlining progress on commissioned report, [July 1994]

3.2 Memorandum from Tribunal to Peter Clayworth commissioning him to collate information on aspects of Wai 411 claim not already fully documented and on role of Maori Trustee in setting up of Tarawera Forests Limited, 14 April 2000

Memorandum from Tribunal to registrar directing latter to add document B1 to Wai 411 record, 5 July 2000

3.3 Memorandum from Tribunal to Harris Martin commissioning him to prepare report on section 438 trusts and sales of Maori land, 10 August 2000

4. SUMMATIONS OF PROCEEDINGS

There are no summations of proceedings.

5. TRANSCRIPTS AND TRANSLATIONS

5.1 Crown Law Office transcription of evidence of Ngahuia Rowson, Maanu Paul, Layne Harvey, and Te Hau Tutua concerning 11 December 1965 meeting and inclusion of Mount Putauaki in Tarawera Forest project, September 1994

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RECORD OF DOCUMENTS

A DOCUMENTS RECEIVED PRIOR TO END OF FIRST HEARING

A1 Topographical map of Whakatane region with two overlays showing boundaries of confiscated land and Rotoehu and Tarawera Forests, undated

A2 Brief of evidence of Ngahua Rowson concerning 11 December 1965 meeting between local Maori, Tasman Pulp and Paper Company Limited, and Department of Maori Affairs on Tarawera Forest project, undated

A3 Te Runanga o Ngati Awa (comp), 'Tarawera No 1', compilation of minutes of meetings held between 1964 and 1984 to discuss Tarawera Forest project and related documentation, August 1994

A4 Te Runanga o Ngati Awa (comp), 'Tarawera No 1', 3 vols, research report, August 1994, vol 1 (compilation of lists of original owners of Putauaki, Pokohu, Matata, Matahina, and Ruawahia blocks prior to their amalgamation into Tarawera 1 by Maori Land Court)

Te Runanga o Ngati Awa (comp), 'Tarawera No 1', 3 vols, research report, August 1994, vol 2 (compilation of minutes of meetings held between 1964 and 1984 to discuss Tarawera Forest project and related documentation)

Te Runanga o Ngati Awa (comp), 'Tarawera No 1', 3 vols, research report, August 1994, vol 3 (compilation of lists of original owners of Tarawera 1 following 1966 amalgamation by Maori Land Court)

A5 John Third, 'Tarawera Forests', report commissioned by Waitangi Tribunal, September 1994

(1.1)–(1.4) Supporting documents to document A5, May 1993 – January 1994

(2.1)–(2.33) Supporting documents to document A5, August 1966 – May 1994

(3.1)–(3.4) Supporting documents to document A5, November 1965 – August 1989

(4.1)–(4.2) Supporting documents to document A5, November 1961 – December 1961

(5.1)–(5.6) Supporting documents to document A5, June 1962 – December 1962

(6.1)–(6.40) Supporting documents to document A5, March 1963 – December 1963

(7.1)–(7.39) Supporting documents to document A5, February 1964 – December 1964

(8.1)–(8.46) Supporting documents to document A5, June 1965 – October 1965

(9.1)–(9.26) Supporting documents to document A5, November 1965 – December 1965

(10.1)–(10.50) Supporting documents to document A5, June 1966 – March 1966

(11.1)–(11.64) Supporting documents to document A5, April 1966 – December 1966

(12.1)–(12.21) Supporting documents to document A5, February 1967 – July 1967

- A6** Brief of evidence of John Hunia concerning Tarawera Forest project and attempts to have Putauaki returned, undated
- (a) 'Minutes of a Meeting held in Kokohinau Pa on Saturday 11 December 1965 Regarding Tarawera Valley Afforestation Proposals', typescript, undated
- (b) *In the Matter of Pokohu A2A1 and Other Lands* unreported, Maori Land Court, Judge K Gillanders Scott, Rotorua, 10 October 1966
- A7** Memorandum from counsel for Tasman Pulp and Paper Company Limited and Tarawera Forests Limited to Tribunal concerning scope of interim report. 30 November 1995
- A8** JG Groome, 'Maori Investments Limited: Waitangi Tribunal Claim Report', Groome Pöyry report 177/1995, August 1995
- (a) JG Groome, 'Maori Investments Limited', revised and updated edition, Groome Forestry Consulting Limited report, June 2000
- A9** Barry Rigby, 'A History of the Aupouri State Forest', report commissioned by Waitangi Tribunal, December 1999
- A10** John Battersby, untitled report commissioned by Crown concerning establishment of Tarawera Forests Limited, May 2000
- A11** 'Summary of Evidence: Tarawera Forests, Waitangi Tribunal Claim Wai 411', typescript, undated
- A12** John Battersby, 'Summary', summary of document A10, May 2000
- (a) Tasman projection chart, undated
- A13** Brief of evidence of Ngahua Rowson concerning 11 December 1965 meeting between local Maori, Tasman Pulp and Paper Company Limited, and Department of Maori Affairs on Tarawera Forest project, undated
- A14** Brief of evidence of Samuel Tutua concerning 11 December 1965 meeting and alienation of Putauaki, undated
- A15** Brief of evidence of John Hunia concerning 11 December 1965 meeting and alienation of Putauaki, undated
- A16** Brief of evidence of Rae Adlam concerning adverse effects of Tarawera Forest project on shareholders of Maori Investments Limited, undated

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- A17** Brief of evidence of Gavin Park concerning 11 December 1965 meeting, undated
- A18** English summary of evidence given by Mrs Te Rau Cameron in Maori concerning 11 December 1965 meeting, undated
- A19** Brief of evidence of David Potter concerning 11 December 1965 meeting and August 1966 Maori Land Court case, undated
- (a) Additional evidence of David Potter, undated
- A20** Summary of revised and updated report by J G Groome, undated
- (a) Curriculum vitae of J G Groome, undated
- A21** Brief of evidence of Hirini Mead concerning Ngati Awa historical traditions, 1866 raupatu, Tarawera Forest project and alienation of Putauaki, and establishment of Ngati Awa Trust Board and Te Runanga o Ngati Awa, undated
- A22** Opening submissions of Wai 411 claimant counsel, 5 June 2000
- (a) Supporting documents to document A22, various dates
- A23** GJ Schmitt, 'Address by GJ Schmitt Managing Director Tasman Pulp and Paper Company Limited to a Meeting of Maori Owners, Government Departments and Tasman to Discuss Forestry Development in the Tarawera Valley', typescript, undated
- A24** 'Note on the Agreement Re Tarawera Valley', typescript with handwritten annotations, 20 September 1965
- A25** Memorandum from AP Thomson to D Kennedy concerning 3 November 1964 meeting with Maori landowners and land values, 2 November 1964
- A26** Brief of evidence of John Groome concerning advisability of Maori landowners participating in the Tarawera Forest project, undated
- A27** Outline of opening submissions of Wai 46 claimant counsel, 8 June 2000
- A28** Letter from JR Sharp, registered valuer of Wright Stephenson and Company Limited, to Deputy Maori Trustee recommending that Department of Maori Affairs accept Tasman Pulp and Paper Company Limited's offer for 38,067 acres in Tarawera Valley for Tarawera Forest project, 5 April 1967

A29 Brief of evidence of Thomas Cass concerning requirements for shareholding in Maori Investments Limited, 8 June 2000

A30 Opening submissions of Crown counsel, undated

A31 Brief of evidence of Huia Pacey concerning mother's loss of title and access to, and ability to gether resouces from, Pokohu, 9 June 2000

A32 Letter from JA Dye to J Te H Grace seeking meeting to discuss proposed afforestation of Maori land between Lake Tarawera and Kawerau by Tasman Pulp and Paper Company Limited, 7 July 1964

A33 Transcripts of Maori Land Court sitting 2 August 1966, Whakatane

A34 *In the Matter of Pokohu A2A1 and Other Lands* unreported, Maori Land Court, Judge K Gillanders Scott, Rotorua, 10 October 1966

B DOCUMENTS RECEIVED PRIOR TO END OF SECOND HEARING

B1 Peter Clayworth (comp), 'Wai 411 Tarawera Forests Claim: Documents Relating to the Role of the Maori Trustee', assorted documents, July 2000, 2 vols

B2 Maori Investments Limited, *Maori Investments Limited First Annual Report and Accounts: For the Period 24 October 1968 to 31 October 1969* (Kawerau: Maori Investments Limited, 1970)

B3 Maori Investments Limited, *Maori Investments Limited Second Annual Report and Accounts: For the Period 1 November 1969 to 31 October 1970* (Kawerau: Maori Investments Limited, 1971)

B4 Maori Investments Limited, *Maori Investments Limited Third Annual Report and Accounts: For the Period 1 November 1970 to 31 October 1971* (Kawerau: Maori Investments Limited, 1972)

B5 Maori Investments Limited, 'Report of the Directors', paper presented at fourth annual general meeting of Maori Investments Limited, [1972-73]

B6 Maori Investments Limited, *Maori Investments Limited Fifth Annual Report and Accounts: For the Period 1 November 1972 to 31 October 1973* (Kawerau: Maori Investments Limited, 1974)

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B7 Maori Investments Limited, *Maori Investments Limited Sixth Annual Report and Accounts: For the Period 1 November 1973 to 31 March 1975* (Kawerau: Maori Investments Limited, 1975)

B8 Maori Investments Limited, *Maori Investments Limited Seventh Annual Report and Accounts: For the Period 1 April 1975 to 31 March 1976* (Kawerau: Maori Investments Limited, 1976)

B9 Maori Investments Limited, *Maori Investments Limited Eighth Annual Report and Accounts: For the Period 1 April 1976 to 31 March 1977* (Kawerau: Maori Investments Limited, 1977)

B10 Maori Investments Limited, 'Maori Investments Limited Statement of Accounting Policies, Forming Part of the Financial Statements for the Year Ended 31 March 1978', typescript, 1978
Tarawera Forests Limited, *Tarawera Forests Limited Tenth Annual Report and Accounts: For the Period 1 April 1977 to 31 March 1978* (Kawerau: Tarawera Forests Limited, 1978)

B11 Tarawera Forests Limited, 'Tarawera Forests Limited Statement of Accounting Policies, Forming Part of the Financial Statements for the Year Ended 31 March 1979', typescript, 1978

B12 Maori Investments Limited, 'Maori Investments Limited Financial Statements, 1980', typescript, 1980

B13 Maori Investments Limited, 'Maori Investments Limited Financial Statements, 1981', typescript, 1981

B14 Maori Investments Limited, *Maori Investments Limited Thirteenth Annual Report and Financial Statement: For the Year 1 July 1981 to 30 June 1982* (Kawerau: Maori Investments Limited, 1982)

B15 Tarawera Forests Limited, 'Tarawera Forests Limited Financial Statements 1983', typescript, 1983

B16 Maori Investments Limited, *Maori Investments Limited Fifteenth Annual Report and Financial Statement: For the Year 1 July 1983 to 30 June 1984* (Kawerau: Maori Investments Limited, 1984)

B17 Maori Investments Limited, *Maori Investments Limited Sixteenth Annual Report and Financial Statement: For the Year 1 July 1984 to 30 June 1985* (Kawerau: Maori Investments Limited, 1985)

B18 Maori Investments Limited, *Maori Investments Limited Seventeenth Annual Report and Financial Statement: For the Year 1 July 1985 to 30 June 1986* (Kawerau: Maori Investments Limited, 1986)

- B19** Maori Investments Limited, 'Maori Investments Limited Financial Statement for 1986/87', typescript, 1987
- B20** Maori Investments Limited, *Maori Investments Limited Nineteenth Annual Report and Financial Statement: For the Year 1 July 1987 to 30 June 1988* (Kawerau: Maori Investments Limited, 1988)
- B21** Maori Investments Limited, *Maori Investments Limited Annual Report & Balance Sheet, 1989* (Kawerau: Maori Investments Limited, 1989)
- B22** Maori Investments Limited, *Maori Investments Limited Annual Report & Balance Sheet, 1990* (Kawerau: Maori Investments Limited, 1990)
- B23** Maori Investments Limited, *Maori Investments Limited Annual Report & Balance Sheet, 1991* (Kawerau: Maori Investments Limited, 1991)
- B24** Maori Investments Limited, *Maori Investments Limited Annual Report & Balance Sheet, 1992* (Kawerau: Maori Investments Limited, 1992)
- B25** Maori Investments Limited, *Maori Investments Limited Annual Report & Balance Sheet, 1993* (Kawerau: Maori Investments Limited, 1993)
- B26** Maori Investments Limited, *Maori Investments Limited Annual Report & Balance Sheet, 1994* (Kawerau: Maori Investments Limited, 1994)
- B27** Maori Investments Limited, *Maori Investments Limited Annual Report & Balance Sheet, 1995* (Kawerau: Maori Investments Limited, 1995)
- B28** Maori Investments Limited, *Maori Investments Financial and Operating Report – 1996* (Kawerau: Maori Investments Limited, 1996)
- B29** Maori Investments Limited, *Maori Investments Financial and Operating Report – 1997* (Kawerau: Maori Investments Limited, 1997)
- B30** Maori Investments Limited, *Maori Investments Financial and Operating Report – 1998* (Kawerau: Maori Investments Limited, 1998)
- B31** Maori Investments Limited, *Maori Investments Financial and Operating Report – 1999* (Kawerau: Maori Investments Limited, 1999)

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B32 Synopsis of submissions of Crown counsel concerning jurisdiction of Tribunal to consider allegations against Maori Trustee, September 1996

(a) Supporting documents to document B32, various dates

B33 Submissions of counsel for Wellington Tenth Trust concerning jurisdiction of Tribunal to inquire into actions of Maori Trustee, 11 September 1996

(a) Supporting documents to document B33, various dates

B34 Summary of oral submissions of Crown counsel in response to submissions of counsel for Wellington Tenth Trust concerning jurisdiction of Tribunal to inquire into actions of Maori Trustee, 17 September 1996

B35 Tarawera Forests Limited, *Tarawera Forests Limited First Annual Report and Accounts for the Period 2 October 1967 to 31 October 1968* (Kawerau: Tarawera Forests Limited, 1969)

B36 Tarawera Forests Limited, *Tarawera Forests Limited Second Annual Report and Accounts for the Period 1 November 1968 to 31 October 1969* (Kawerau: Tarawera Forests Limited, 1970)

B37 Tarawera Forests Limited, *Tarawera Forests Limited Third Annual Report and Accounts for the Period 1 November 1969 to 31 October 1970* (Kawerau: Tarawera Forests Limited, 1971)

B38 Tarawera Forests Limited, *Tarawera Forests Limited Fourth Annual Report and Accounts for the Period 1 November 1970 to 31 October 1971* (Kawerau: Tarawera Forests Limited, 1972)

B39 Tarawera Forests Limited, *Tarawera Forests Limited Fifth Annual Report and Accounts, 1972* (Kawerau: Tarawera Forests Limited, 1972)

B40 Tarawera Forests Limited, *Tarawera Forests Limited Sixth Annual Report and Accounts for the Period 1 November 1972 to 31 October 1973* (Kawerau: Tarawera Forests Limited, undated)

B41 Tarawera Forests Limited, *Tarawera Forests Limited Seventh Annual Report and Accounts for the Period 1 November 1973 to 31 March 1975* (Kawerau: Tarawera Forests Limited, undated)

B42 Tarawera Forests Limited, *Tarawera Forests Limited Eighth Annual Report and Accounts for the Period 1 April 1975 to 31 March 1976* (Kawerau: Tarawera Forests Limited, undated)

B43 Tarawera Forests Limited, *Tarawera Forests Limited Ninth Annual Report and Accounts for the Period 1 April 1976 to 31 March 1977* (Kawerau: Tarawera Forests Limited, undated)

B44 Tarawera Forests Limited, *Tarawera Forests Limited Tenth Annual Report and Accounts for the Period 1 April 1977 to 31 March 1978* (Kawerau: Tarawera Forests Limited, undated)(Wai 46 ROI, doc M88)

B45 Tarawera Forests Limited, *Tarawera Forests Limited Eleventh Annual Report and Accounts for the Period 1 April 1978 to 31 March 1979* (Kawerau: Tarawera Forests Limited, 1971)

B46 Tarawera Forests Limited, 'Tarawera Forests Limited Statement of Accounting Policies, Forming Part of the Financial Statements for the Year Ended 31 March 1979', typescript, [1979]
Tarawera Forests Limited, 'Tarawera Forests Limited Balance Sheet as at 31 March 1979', typescript, [1979]

Tarawera Forests Limited, 'Tarawera Forests Limited Notes to the Accounts, Forming Part of the Financial Statements for the Year Ended 31 March 1979', typescript, [1979]
Gilfillan, Morris and Company and Hutchison, Hull and Company, 'Report of the Auditors to the Members of Tarawera Forests Limited', typescript, [1979]

B47 Tarawera Forests Limited, 'Tarawera Forests Limited Statement of Profit for the Year Ended 31 March 1980', typescript, [1980]

Tarawera Forests Limited, 'Tarawera Forests Limited Balance Sheet as at 31 March 1980', typescript, [1980]

Tarawera Forests Limited, 'Tarawera Forests Limited Notes to the Accounts, Forming Part of the Financial Statements for the Year Ended 31 March 1980', typescript, [1980]

B48 Tarawera Forests Limited, *Tarawera Forests Limited Thirteenth Annual Report and Accounts for the Period 1 April 1980 to 30 June 1981* (Kawerau: Tarawera Forests Limited, 1981)

B49 Tarawera Forests Limited, *Tarawera Forests Limited Fourteenth Annual Report and Accounts for the Year 1 July 1981 to 30 June 1982* (Kawerau: Tarawera Forests Limited, 1982)

B50 Tarawera Forests Limited, 'Tarawera Forests Limited Statement of Accounting Policies, Forming Part of the Financial Statements for the Year Ended 30 June 1983', typescript, [1983]

Tarawera Forests Limited, 'Tarawera Forests Limited Balance Sheet as at 30 June 1983', typescript, [1983]

Tarawera Forests Limited, 'Tarawera Forests Limited Notes to the Financial Statements, Forming Part of the Financial Statements for the Year Ended 31 June 1983', typescript, [1983]

Tarawera Forests Limited, 'Tarawera Forests Limited Statement of Changes in Financial Position for the Year Ended 30 June 1983', typescript, [1983]

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B51 Tarawera Forests Limited, *Tarawera Forests Limited Sixteenth Annual Report and Accounts for the Year 1 July 1983 to 30 June 1984* (Kawerau: Tarawera Forests Limited, 1984)

B52 Tarawera Forests Limited, 'Tarawera Forests Limited Statement of Changes in Financial Position for the Year Ended 30 June 1985', typescript, [1985]

Tarawera Forests Limited, 'Tarawera Forests Limited Notes to the Financial Statements, Forming Part of the Financial Statements for the Year Ended 30 June 1985', typescript, [1985]

Tarawera Forests Limited, 'Tarawera Forests Limited Balance Sheet as at 30 June 1985', typescript, [1985]

Tarawera Forests Limited, 'Tarawera Forests Limited Profit and Loss Account for the Year Ending 30 June 1985', typescript, [1985]

Tarawera Forests Limited, 'Tarawera Forests Limited Statement of Accounting Policies, Forming Part of the Financial Statements for the Year Ending 30 June 1985', typescript, [1985]

B53 Tarawera Forests Limited, *Tarawera Forests Limited Eighteenth Annual Report and Accounts for the Year 1 July 1985 to 30 June 1986* (Kawerau: Tarawera Forests Limited, 1986)

B54 Tarawera Forests Limited, *Tarawera Forests Limited Nineteenth Annual Report and Accounts for the Year 1 July 1986 to 30 June 1987* (Kawerau: Tarawera Forests Limited, 1987)

B55 Tarawera Forests Limited, *Tarawera Forests Limited Twentieth Annual Report and Accounts for the Year 1 July 1987 to 30 June 1988* (Kawerau: Tarawera Forests Limited, 1988)

B56 Tarawera Forests Limited, *Tarawera Forests Limited Twenty-First Annual Report and Accounts for the Year 1 July 1989 [sic] to 30 June 1989* (Kawerau: Tarawera Forests Limited, 1989)

B57 Tarawera Forests Limited, *Tarawera Forests Limited Twenty-Second Annual Report and Accounts for the Year 1 July 1989 to 30 June 1990* (Kawerau: Tarawera Forests Limited, 1990)

B58 Tarawera Forests Limited, *Tarawera Forests Limited Twenty-Third Annual Report and Accounts for the Year 1 July 1990 to 30 June 1991* (Kawerau: Tarawera Forests Limited, 1991)

B59 Tarawera Forests Limited, *Tarawera Forests Limited Twenty-Fourth Annual Report and Accounts for the Year 1 July 1991 to 30 June 1992* (Kawerau: Tarawera Forests Limited, 1992)

B60 Tarawera Forests Limited, *Tarawera Forests Limited Twenty-Fifth Annual Report and Accounts for the Year 1 July 1992 to 30 June 1993* (Kawerau: Tarawera Forests Limited, 1993)

- B61** Tarawera Forests Limited, *Tarawera Forests Limited Twenty-Sixth Annual Report and Accounts for the Year 1 July 1993 to 30 June 1994* (Kawerau: Tarawera Forests Limited, 1994)
- B62** Tarawera Forests Limited, *Tarawera Forests Limited Annual Report for the Year Ended 30 June 1995* (Kawerau: Tarawera Forests Limited, [1995])
- B63** Tarawera Forests Limited, *Tarawera Forests Limited Twenty-Eighth Annual Report and Accounts for the Year 1 July 1995 to 30 June 1996* (Kawerau: Tarawera Forests Limited, 1996)
- B64** Tarawera Forests Limited, *Annual Report, 30 June 1997* (Kawerau: Tarawera Forests Limited, 1997)
- B65** Tarawera Forests Limited, *Annual Report, 30 June 1998* (Kawerau: Tarawera Forests Limited, 1998)
- B66** Tarawera Forests Limited, *Annual Report, 30 June 1999* (Kawerau: Tarawera Forests Limited, 1999)
- B67** Dr John Battersby, untitled report concerning Mount Putauaki and the Tarawera Forests project, August 2000
- (a) Summary of document B67, September 2000
- (b) Map, undated
- (c) Letter from Dr John Battersby to Crown counsel enclosing various documents requested by Tribunal, 21 September 2000
- B68** Statement of Thomas Cass in response to Tribunal memorandum of 10 July 2000 (paper 2.29), 16 August 2000
- B69** Peter Clayworth (comp), 'Documents Relating to Amendments to Section 438 of the Maori Affairs Act 1953 Introduced by the Maori Affairs Amendment Act 1967', report commissioned by Waitangi Tribunal, 18 August 2000
- B70** Supplementary brief of evidence of John Groome concerning valuation of forestry land, undated
- B71** Brief of evidence of Harris Martin concerning use of section 438 of the Maori Affairs Act 1953, 15 August 2000
- (a) Letter from Harris Martin to Tribunal concerning public notice, attendance, and minutes of owners' meeting, 19 September 2000

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B72 Brief of evidence of Howard Moore concerning derivation of Crown forest leases and forestry land values, undated

(a) Summary of document B72, undated

B73 Brief of evidence of Andrew McEwen concerning development of Tarawera forest project and operations of Tarawera Forests Limited, August 2000

(a) Summary of document bank, undated

(b) Summary of document B73, undated

(c) File note from AP Thomson and AL Poole, 13 July 1965

(d) Letter from AD McKinnon, 3 September 1965

(e) Letter from MB Grainger to director, forest economics, enclosing report on Tarawera Valley scheme, 21 July 1966

MB Grainger, 'The Tarawera Valley Scheme', report to director of forest economics, 21 July 1966

(f) Graph, undated

B74 Supplementary brief of evidence of Dr John Battersby concerning compensation paid to Edwards family and Otakanini Topu lease negotiations, August 2000

(a) Transcript of interview between Dr John Battersby and Professor Schmitt concerning Tasman Pulp and Paper Company Limited and Tarawera forest project, 1 August 2000

B75 'Notes on Minutes of Maori Investments Ltd Re Tarawera Forest Claim (From Maori Trust Office Files, Rotorua)', notes from directors' meetings, annual general meetings, and annual reports, 1968–91, undated

B76 David Vance, untitled report commissioned by Maori Investments Limited concerning financial implications of Wai 411 claim, undated

(a) Summary of document B76, 18 September 2000

B77 Brief of evidence of Richard Te Heuheu concerning establishment and present situation of Lake Taupo Forest Trust, undated

B78 Brief of evidence of Professor Geoffrey Schmitt concerning Tarawera Forest project, 15 September 2000

(a) Letter from Professor Geoffrey Schmitt to Crown counsel clarifying evidence given earlier, 21 September 2000

B79 Closing submissions of Wai 46 claimant counsel, undated

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B80 Closing submissions of Wai 411 claimant counsel, 21 September 2000

(a) Addendum to closing submissions of Wai 411 claimant counsel concerning evidence of Professor Geoffrey Schmitt, undated

B81 Closing submissions of Crown counsel, 22 September 2000

(a) Professor I Hugh Kawharu, 'Maori Land Title', paper to conference on Maori land law, 1981

B82 Closing submissions of Wai 46 claimant counsel in response to closing submissions of Crown counsel, 5 October 2000

B83 Geoffrey Schmitt, vhs videotape of evidence to Tribunal given by video link, 21 September 2000

C DOCUMENTS RECEIVED SUBSEQUENT TO SECOND HEARING

C1 John Yeabsley and Ian Duncan, 'Wai 411 – Forestry Leases: Final Report', report to Waitangi Tribunal from New Zealand Institute of Economic Research Incorporated, November 2001