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The Wairakei-Whirinaki Transmission Line and the Mohaka-Waikare Blocks

A Report to the Waitangi Tribunal

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1. Introduction

1.1. **Qualifications etc.** My full name is Richard Peter Boast, I reside at Pukerua Bay, Porirua, and I am a senior lecturer in law at Victoria University of Wellington. Full details of my background and qualifications have already been given to this Tribunal. I have prepared a number of reports on the Mohaka-Waikare raupatu claim.

1.2. **General overview**: The core subject-matter of this report is the construction of a 220 k.v. transmission line which traverses the Pohokura, Tataraakina and Tarawera blocks. The line connects Wairakei with the Whirinaki pulp mill north of Napier. Construction of the line began in 1973 and it was completed in July 1975.[1] The line was originally built and operated by the New Zealand Electricity Department (NZED), which subsequently became the Electricity Division of the Ministry of Energy. The line is now owned by Transpower New Zealand Ltd, a state-owned enterprise, and is controlled by the Transpower regional office at Palmerston North. Owners of Maori freehold land within the three blocks mentioned were paid no compensation for the line constructed through their property. When attempts were made in 1982 and subsequently to obtain compensation from the Electricity Department the owners were informed that they were out of time and that the request for compensation had to be declined. Transpower, who now own and manage the national grid, have also insisted that no compensation is payable. The matter stands at an impasse at the present time.

1.3. **A Public Works claim:** This claim raises the question of the effects of public works takings on Maori freehold land. This issue has already received the scrutiny of the Waitangi Tribunal in a number of claims. In 1996 the Office for Treaty Settlements released a discussion paper entitled *The Crown's Policy Proposals on Treaty Claims Involving Public Works Acquisitions.* (The present author's submissions on the Proposals, prepared in association with D.A. Edmunds on behalf of the Wai 299 claimants are included as Document No. 11 in Appendix III.) The construction of a transmission line across one's property is, however, a particularly burdensome and trying form of interference with the rights of landowners. Essentially the Crown helps itself to a kind of easement. The land remains in private ownership but the construction of the transmission line has marked impacts on land use. To construct the line it was normal practice, if the land was in forest, to clearfell a swathe of land along the route of the line. Landowners were then restricted as to the kinds of land use they were able to enjoy in the vicinity of the transmission lines. These restrictions could often be severe. As the land was not, however, "taken" as such, the amount of compensation paid was usually very limited. Although transmission lines are

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1 Hugh Templeton, Acting Minister of Energy, to Peter Tapsell M.P., 17 Jan, 1984, [TP] NZED 23/169/3.

irksome and unsightly for farmers, they have even more severe impacts when the main landuse happens to be forestry.

1.4. **Documentation**: As Richard Moorsom has noted, there is no information on the transmission line in Maori Land Court files at Hastings.[2] The main source for this report has been the files held by Transpower New Zealand Ltd.[3] Some of these files are former New Zealand Electricity Department Files. This material was located by Jennifer Halder and Bruce Stirling of the Crown Forestry Rental Trust, and I would like to thank them for their assistance. Other relevant correspondence has been made available by the Wai 299 claimants. The facts of the matter, to repeat. are straightforward and uncomplicated and there is in fact not a great deal of documentation. The transmission line seems to have been built in compliance with formal legal requirements at the time, but these were so heavily weighted in favour of the Electricity Department this does not mean a great deal. The only compensation that was ever paid related to timber which had to be felled to make way for the line but which was too inaccessible to be removed for milling. That aside, it is beyond dispute that the owners of the Pohokura, Tataraakina and Tarawera blocks affected by the transmission line received not one cent in compensation; and when subsequently they tried to obtain some were informed that their claim was out of time and could not be considered.

1.5. **Role of the Maori Trustee:** Publics works issues aside, the only other issue of significance is the role of the Maori Trustee. In 1979 the Maori Trustee and the New Zealand Electricity Department entered into a compensation agreement by which $360 was paid by the Department to the Maori Trustee for 18 "towers" (pylons) on the Whirinaki-Wairakei line. This represents a compensation payment at the princely amount of $20 per pylon, which the Electricity Department itself thought was "very low, compared to other settlements".[4] This settlement related to

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2 Richard Moorsom, *Raupatu, Restoration and Ancestral Rights: the Title to Tarawera, Tataraakina and Te Haroto: Supplementary Report,* Wai 209 Doc#R9, Wai 299 Doc#C10 etc., 57. Citing a Waitangi Tribunal Direction of 20 March 1998 Moorsom notes that the Wai 299 claimants have stated that 26 acres was taken by the Electricity Department without payment of compensation. A figure of 26.5 acres for Tataraakina alone is given in a letter from D A Schollum (Sec for Tataraakina Incoporation) to B T Manga, Lines Supervisor, Powermark NZ Ltd, 21 December 1993 [Claimants]: "A survey of the intended forestry area revealed that 26.5 hectares is involved in the pylon strip and the potential loss of income over a rotation of thirty years has been estimated at $2.4 million."

3 Transpower is a State-Owned Enterprise regulated by the State-Owned Enterprises Act 1986. Its function is to own and operate the National Grid which transports bulk electricity at high voltage from ECNZ and other generating stations to consumers; Electricity supply sompanies in turn take the electricity from Transpower's bulk supply substations and sell and reticulate it to consumers. The current structure is quite different from that in operation in the 1970s. At that time the Electricity Department had a statutory monopoly on electricity generation, which it generated at its own power stations and transported on its own transmission lines to towns and cities, where the electricity was in turn reticulated and sold by Electric Power Boards and Municipal Electricity Departments (MEDs).

4 NZED Memo, 3 December 1979, [TP] NZED 23/169/3; the compensation agreement is on the same file.

a stretch of the line near Taupo (Part Tauhara Middle Block Pt 4A2B2C).[5] The Maori Trustee played no role with respect to the Pohokura, Tataraakina and Tarawera blocks. Why the Maori Trustee was willing to accept compensation at such a low level is an interesting point however.

[5] P.W.P. Chapman, District Manager, NZED, to Maori Trustee, 17 October 1979, [TP] 23/169/3 [Hamilton Office Papers, re compensation claims].

2. The Legal Background

2.1. **Two legal regimes**: There are two legal regimes in existence relating to electricity transmission lines. The key date is 1 January 1992. Since 1992 much more attention has been given to properly safeguarding the interests of landowners; however as the national grid infrastructure was already in place before 1992 this does not amount to a very costly concession.

The pre-1992 regime, which of course applied to the transmission lines at issue in this report, is usefully summarised in a Transpower publication, *Information for landowners and occupiers* (1996):[6]

> The New Zealand Government, through the State Hydro Department, the NZED, and lastly the Electricity Division of the Ministry of Energy, built many thousands of kilometres of transmission lines across private land. This was done without taking formal route easements.
>
> Each legal owner was entitled to a once only compensation payment calculated in terms of the Public Works Act, which could be claimed up to a maximum of six years after the line was built. This was calculated at a level sufficient to compensate the owner for the impact of the line on the property and was assessed in terms of the condition, market value, and actual land use pertaining at the the time the line was built. This amount was capitalised into a lump sum and was the maximum that could be claimed. Compensation for any damage and disruption that occurred during construction of the line, was of course additional.
>
> Subsequently, when a new owner buys any property with a line across it they are considered to have done so with the line as an obvious encumbrance, and at a free market price which reflects the presence of the line. They are not therefore entitled to further compensation.
>
> It follows, therefore, that Transpower will also not consider any form of rental payment for land containing transmission lines.
>
> The terms under which these pre-1992 lines were built do, of course, exist in law, but do not appear on property titles. They are spread through a number of statutes, and collectively constitute a notional easement along each line. Many landowners are unaware of this fact.
>
> These laws and regulations essentially provide:
> - for the right of the line to remain indefinitely on the property at no cost to the line owner (Transpower);
> - for the owner of the line to obtain access for maintenance, and to trim trees endangering the line etc.
>
> The right to utilise these provisions was transferred to Transpower along with the lines.

The post-1992 regime is described in the same publication in the following terms:

> Since 1992 Transpower has been following international practice. New lines on private land are only able to be built on easements purchased at a fair market

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[6] Trans Power New Zealand Ltd., *Information for landowners and occupiers: General information for people living, working or playing near transmission lines*, 1996.

price from each landowner. This system will not incur the problems which have occurred with older lines, because:

- it formalises the rights of each party within the easement; and
- the agreement is registered on the property title.

To purchase an easement, Transpower negotiates a single lump sum payment only.

The implicit suggestion is that the pre-1992 procedures did not follow "international practice". Certainly if something resembling the post-1992 processes had been operation in the 1970s the problems considered in this report would not have occurred.

The standard easement document used since 1992 is an elaborate document by which Transpower buys a registrable easement from the landowner and which deals with all relevant issues in a comprehensive way.

2.2. Statutory power to construct transmission lines: Electricity Act 1968 s.11. Section 11, forming a part of Part II ("Provision and Supply of Electricity") was the main statutory provision authorising the construction of transmission lines. This Act was enacted at a time when it was assumed that the state should have monopoly control of the generation and supply of electricity. No person was allowed to generate electricity "by the use of water" without Ministerial consent (s. 25). The relevant parts of s. 11 are as follows:

> 11. Minister may construct and maintain works for generation and supply of electricity - (1) Subject to the provisions of this Act, it shall be lawful for the Minister, on behalf of Her Majesty, to acquire, construct, operate, and maintain, any works for the generation of electricity, and generally to carry on the business in all its branches of the supply and sale of electricity.
>
> ...
>
> **(2)** Subject to the provisions of this and any other Act and without limiting the general provisions of subsection (1) of this section, the Minister may from time to time -
>
> (a) Construct, provide, and use such works, appliances, and conveniences as may be necessary, directly or indirectly, for generating electricity from any source of energy, for operating the national electrical system, and for the transmission, use, supply, and sale of electricity when generated:
>
> (d) Construct tunnels under private land, or aqueducts and flumes over the same, erect towers, pylons, and poles thereon, and carry wires over or along any such land, <u>without being bound to acquire the same</u> (emph added); and for these purposes the Minister shall have a right of way to and along all such works and erections:
>
> (e) Construct such electric lines and works, lay such lines and cables and construct and erect such towers, pylons, and poles, as may be necessary for the exercise of his functions under this Part of this Act.

2.3. Transmission line proclamations: Section 14 of the 1968 set out a special

procedure relating to transmission lines, by which the Minister could issue a "proclamation defining the middle line of that transmission line" in the same "manner as if a railway were to be constructed". This procedure was not used in the case of the Wairakei-Whirinaki line; instead the Minister's general powers (which were more than adequate, to say the least) were relied on..

2.4. **Rights of entry:** These were set out in s.15. Basically the Minister had the right enter land whenever he (or, rather departmental officials) were so minded. Section 15 provided as follows:

> 15. Right of entry - For the purpose of carrying out any works authorised by this Act the Minister shall have the right at any time or times to enter upon any land (whether vested in or occupied by the Crown or any other person or body corporate), and there to survey, construct, erect, lay down, maintain, renew, or repair all such cables, wires, and other things as are required for or in connection with any such works.

It should be noted that the Electricity Department was not required to give notice of any kind before entering land for the purposes of the Act. In practice the Department usually did its best to give notice before entering land to carry out surveys or build transmission lines, but these were seen as 'courtesy' notices: the Department seems to have had no legal obligation to give any kind of notice when carrying out surveys or constructing lines.

2.5. **Compensation:** This was dealt with in s.16. This provided:

> **16.Compensation for damage** - (1) Every person having any right, title, estate, or interest in any land or property injuriously affected by the exercise from time to time of any powers conferred by this Act shall be entitled to full compensation for all loss, injury, or damage suffered by him.
> (2) In default of agreeement between the parties, claims for compensation under this section shall be made and determined within the time and in the manner provided by the Public Works Act 1928, and the provisions of that Act shall, as far as they are applicable and with the necessary modifications, apply with respect to claims under this section.

2.6. **Analysis:** The Electricity Act 1968 was a product of its time, the post-war collectivist era in which it was assumed that key sectors of the economy should be controlled by the state. The Electricity Department had complete control over the generation and bulk distribution of electricity.[7] The provisions relating to transmission lines reflect this. Such lines could basically be built wherever the Department liked. The focus was on creation of the national infrastructure of power stations and transmission lines. The interests of landowners ranked a long way behind in this climate of opinion. The Crown's obligations under the Treaty

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[7] The Crown monopoly on electrical power generation, which began with the Water-power Act 1903, lasted until 1987, when it was repealed by s. 3 of the Electricity Amendment Act 1987. For a discussion of the general policy background see the Waitangi Tribunal's *Te Ika Whenua Rivers Report.* Wai 212, 1998, 41-7.

of Waitangi were not even thought of. This collectivist era basically ended with the Electricity Amendment Act 1987, when the Crown's monopoly control of electricity generation was abolished. At the same time a new SOE was set up, ECNZ (which owned and managed the former NZED generating stations). Subsequently in 1994 Transpower NZ Ltd, which took control of the national grid, became a separate SOE in its own right. Separation of generation and transmission assets was a key aspect of the 1987 reforms. In 1992 two key enactments were passed, the Energy Companies Act 1992 and a new Electricity Act. Both enactments further develop the new approach to electricity generation and distribution. The main issue arising for the purposes of this report with the 1992 Act are the responsibilities of landowners with regard to existing lines. This point is considered in Part 4.

3. The Wairakei-Whirinaki Transmission line

A. Construction of the line and notification of landowners

3.1. The Wairakei-Eskdale-Whirinaki transmission line was built during the 1970s "to meet power demands for the proposed pulp mill at Whirinaki, and to meet East Coast power requirements." The line was constructed in two stages, a 110 kV section between Eskdale and Whirinaki, and then the main Eskdale-Wairakei line. When the main section was completed the whole line was changed to 220 kV.[8] Construction of the line began in 1973 and was completed on 8 July 1975.

3.2. A preliminary notice advising that the line might cross private property was sent out on 7 March 1972. This notice stated that "preliminary investigations indicate that the... line may cross your property" and that in order to carry out a detailed survey it might be necessary to enter the property to conduct surveys. Landowners were told that if it was decided that the line would cross their land they would be further advised and that "a plan showing the route of the line and its approximate location on your property will be sent to you and you will be given information as to your compensation rights". These preliminary notices, sent before the precise route of the transmission line was determined, are usually referred to in the correspondence as "courtesy notices". It is clear from the notice that although the Electricity Department certainly did attempt to advise landowners of its plans as early as possible, nevertheless landowners had no option but to agree to the survey and to the positioning of the line. The document is one of notification, not consultation. The relevant NZED file, now held by Transpower, indicates that a copy of the preliminary notice was sent to Mrs O'Donnell. Who else it was sent to is not clear from the available documentation.

3.3. On 10 October 1973, following the detailed investigations and surveys, a second notice was sent out by the Electricity Department to affected landowners. This notice is a standard-form document which begins by invoking the statutory authority of ss 11 and 15 of the Electricity Act 1968 which "authorise the New Zealand Electricity Department to build transmission lines and telephone lines on private land without being bound to buy the land, and give the Department right of way to and along those lines." This notice (usually known as a "wayleave notice") indicated that construction would begin on or after October 31 1973. The notice also advised landowners that "unfortunately" it will be necessary to cut some "bush and scrub", which the Department would take steps to clear itself "unless you would prefer to attend to the cutting yourself, in which case the Department will be grateful for your co-operation." The notice also mentioned the matter of compensation, in the following terms:

> Section 16 of the Electricity Act provides for the payment of compensation where any property is damaged or injuriously affected by carrying out any work authorised by the

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[8] Preliminary notice to landowners, 7 March 1972, copy on [TP] NZED 23/169/3.

> Act. Should you wish to make a claim for compensation will you please write to me giving particulars of the property, and the amount which you consider would be fair compensation for each item. I will, if necessary, arrange for an officer of the Department to discuss the matter with you, with a view to reaching a mutually satisfactory settlement. You will appreciate that an assessment of the compensation payable cannot normally be made until the work on the property affected has been completed, but any claim should be made no later than 12 months after completion of the work.

The matter of compensation is left, essentially to the landowner. The Department announces its intention to construct the line and to clear the line, leaving it to landowners to assess the compensation themselves and suggest a suitable figure to officials. It is particularly to be noted that the wayleave notice gives no indication that there are statutory time limits relating to claims for compensation. The notice merely states that an assessment of compensation cannot be made until the work has been completed and that "any claim *should* [emphasis added] be made no later than 12 months after completion of the work". This is insufficiently clear. The notice should have specifically set out the statutory time limits. No reference is made to the Public Works Act in the notice, but it is the Public Works Act which was subsequently relied on when the Crown took the stance that the claim for compensation was out of time.

Mr Denis Schollum, the current secretary of the Tataraakina Incorporation has stated that "the business acumen of the Trustees who represented the block in 1973 was not of a standard where they would have fully appreciated the Trusts right to compensation".[9] Schollum notes further:

> It is only in the 1993 Maori Land Act that provision was included for the Maori Land Court Judges to have regard to the ability, experience and knowledge of individuals when appointing trustees. Several Trustees I deal with, who were appointed under the old Act, do not comprehend written letters, but react and understand issues a lot better if the facts are presented to them at a Hui.

3.4. From the NZED file it seems that copies of the second notice were sent to the following persons in respect of Tataraakina VII, VIII, XI, and XII:

1. Mrs L'O Donnell, P.O. Box 284, Hastings.
2. District Officer, Maori Affairs, Palmerston North.
3. Mr P. Sullivan, 16 James Foley Avenue, Napier.
4. Mr P. Tahau, c/o Post Office, Te Haroto.
5. Mrs H. Campbell, c/o Post Office, Paki Paki.
6. Mr D. Edmundson, c/o Lee, Heaps and Edmundson, Napier.

The notices were sent to these individuals in their capacity as the "Tataraakina Trustees". A copy was also sent to the Trust's (Incorporation's?) solicitor, a Mr W.H. Bloomer, on 9 November 1973 .[10] A notice was also sent in respect of

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[9] D A Schollum, Northern Branch Manager, AMP Perpetual Trustee Co N Z Ltd, Rotorua, to Bob Coombes, Station Manager, Transpower N Z Ltd, Palmerston North, 16 August 1994 [claimants].

[10] Filenote by W.J. Smith, 5 July 1982, on TP 23/169/3; J,R, Nixon, District Manager to H.Bloomer, Hallett O'Dowd & Co, Napier, 9 November 1973, on ibid..

Tataraakina to the Department of Maori Affairs, but Maori Affairs subsequently notified the Electricty Department that "this land has been vested in Trustees and the Maori Trustee has no authority to act".[11] Survey entry notices and wayleaves for Pohokura 3 and Pohokura 7A were sent to Laura Renata and Pat Hura, respectively, as representatives of the Maori owners of those two blocks, which were presumably not subject to trust orders at that time. As the Omahu Timber Co held the timber cutting rights over Pohokura 3 notice was separately sent to them.[12]

For Tarawera C6 the notices, also dated 9 October 1976, were sent to (1) Mrs H.Campbell, (2) Mrs L. O'Donnell, (3) Mr Philip Sullivan, (4) the District Officer, Department of Maori Affairs at Palmerston North, (5) the Commissioner of Crown Lands at Napier, and (6) Mr T. Nuku..[13] Jurisdiction over the line was divided between the Napier and Hamilton NZED regional offices. The Pohokura and Tataraakina Blocks were in the main dealt with through the Hamilton office, and the Tarawera Block from Napier, although for both Tarawera and Tataraakina the wayleave notices were sent out from Napier. From Tarawera C6 the line crossed Sect. 5 Tarawera Block IV (Crown Land at this time)[14]the Crown Land on the Waitara block (Glenfalls Farm Settlement) and from there into the Kaiwaka Block. The notices state that ten towers (pylons) are to be built on Tataraakina (in fact this is wrong: 22 were built),[15] 15 on Tarawera C6, and four on Sect. 5 Tarawera Blk, IV.

3.5. The usual practice in constructing a transmission line was to peg and clear a strip 30-40 metres wide on either side of the line.[16]

3.6. Once the line was built it was standard NZED practice to send a further notice to landowners regarding the duties of landowners and NZED with respect to the transmission line.[17] This refers to the following matters:

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11 T.B. Henry, District Officer, Department of Maori and Island Affairs, Palmerston North, to District Manager, NZED, Napier, 18 October 1973, [TP] NZED 23/169/3.

12 Memorandum, P.W.P. Chapman, District Manager, NZED Hamilton to Chief Transmission Line Engineer, 20 December 1982, [TP] NZED 23/169/3.

13 Copies are on [TP] NZED Nap., 9 October 1973. In the case of the Tarawera wayleave notices the clause relating to timber felling has in all instances been crossed out.

14 For Sect. 5 Tarawera Block IV the wayleave notices were sent by NZED Napier to the Commissioner for Crown Lands at Napier and the Conservator of Forests at Palmerston North: query whether this block was Crown Land at this time?

15 Ten is the number as stated in the wayleave notice, but this is clearly wrong. The NZMS1 topographical map in fact indicates that 22 pylons are on Tataraakina. This same point is made in a letter sent by Mr Denis Schollum to D.A. Edmunds of 16 March 1998. This is an astounding discrepancy and is very difficult to explain. A map indicating the positioning of the pylons on Tataraakina C is on [TP] ECNZ Napier 10/10/17/2 which shows (by my count) 11 towers, but this map does not purport to show the whole route across Tataraakina.

16 Filenote by W.J. Smith, 5 July 1982, on [TP] NZED 23/169/3.

17 A copy of this standard letter can be found on [TP] EMEC (Ham.) 106/720 where it is annexed to a letter from V.G. Henderson (For NZED) to D.A. Schollum (for Tataraakina C. Incorporation); Henderson states that this letter deals with compensation, but this is clearly incorrect; rather it deals with the situation once the line has been completed. There seems to be no documentation establishing how many affected landowners received this further notification.

1. Trees

I would not recommend that you plant trees below or near lines if they are likely to grow up with or endanger the lines. If you do plant such trees after the lines have been built then either you must keep them adequately trimmed or the line maintenance staff will, under the authority of the Electricity Act 1963, arrange to trim or remove them and compensation will not be paid. The line maintenance staff will arrange to trim or remove any trees planted before the line is built. If you plan to trim or fell trees near the lines please contact the line depot beforehand.

2. Fires

You will need to be careful about lighting fires that might affect the lines...

3. General Farming Operations

In general, farming operations should not be affected. However, if any fencing is to be done under or near transmission lines particular care should be taken during straining to ensure that the fencing wires do not come into contact or close proximity to the conductors.

4. Erecting Buildings Under Lines

In general there is no danger in having buildings erected under lines provided a sufficient clearance is maintained....

5. Aerial Topdressing

If you arrange for aircraft to do any agricultural work over your land please remember to inform the contractors and pilots of the exact positions and routes of the lines.

3.7. As far as is known, no compensation of any kind was paid to the owners of the Pohokura, Tataraakina and Tarawera blocks affected by the line. The only arrangement made was an informal agreement drawn up in 1975 between the Department and the representatives of the Tataraakina C Incorporation relating to cut timber on the pylon route through Tataraakina. This agreement is dated 18 June 1975. NZED agreed to pay compensation for logs felled for the line but inaccessible.[18] The agreement stipulates that NZED would pay the incorporation $2.67 per 100 HD for logs of saw mill quality felled for construction of the line but inaccessible. The Incorporation for its part agreed to pay ECNZ $2.10 per 100 HD "for all logs of saw mill grade loaded out on truck at the bottom skids of Tataraakina". The agreement took the form of a letter to B. Henderson of the Electricity Department at Hamilton and is signed by V.J.R Keen, P Sullivan, G.M. Campbell, and L O'Donnell (there is one other indecipherable signature). Subsequently D.F. Edmundson, Chartered Accountant and one of the Tataraakina Trustees, who wrote to the NZED advising that the trustees intended to commence forest planting in the area adjacent to the line, and asking for advice on the area which should not be planted out.[19]

3.8. Standard NZED practice was to pay forest owners or developers compensation for loss of trees and for loss of land for timber production. This was certainly done in respect of other stretches of the line. Fletcher Timber Co., who owned a 2898 acre block near Taupo[20] were paid $2,159.00, calculated on the basis of $1,159.00 for

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18 A copy of the compensation agreement can be found on [TP] NZED 23/169/3.

19 D.F. Edmundson to District Manager, NZED, Napier, 23 July 1976, copy on [TP] NZED. 23/169/3.

20 The legal description is Lot 1 DPS 13506 being Part Tauhara Middle 4A,2B,2C, Blocks III, IV, VII and XII Tauhara S.D. and Blocks V and IX Otukara SD.

loss of trees and $1000 for loss of land for timber. (Fletchers had originally claimed $4535.41).[21] In another contested case C.K. Richardson, a farmer who owned 1,190 acres at Te Pohue who had six pylons on his land was paid $8942 after a great deal of correspondence, valuations etc.[22] Affected Maori landowners did not claim, and were paid nothing. (As noted above, there were 22 pylons constructed on Tataraakina and 15 on Tarawera C6). At issue, essentially is a question of onus: should the onus be placed on the landowner to articulate a claim, or on the Crown to assess the costs of its activities and make an offer of some kind? Those who went to the trouble and expense of fighting the issue out with NZED recived compensation; those who did not missed out.

3.9. The procedure used for notifying landowners and dealing with compensation used in the 1970s seems in retrospect to be somewhat minimalist and designed for the convenience of the Electricity Department rather than the proper protection of landowners. That owners of Maori freehold land ought to be entitled to some special consideration to ensure that all affected persons were aware of the line and surrounding legal circumstances seems to have occurred to no-one. Basically the NZED had authority to build transmission lines wherever it liked. The process was first to devise a general route for the line, check who the landowners were, and advise them that the route was being surveyed. Once the route of the line had actually been determined affected landowners then received a one-page notice telling them that (1) the line was going to built across their land; (2) advising the starting date for construction of the line; (3) raising the matter of bush/scrub clearance if relevant; and (4) raising the matter of compensation. There was no formal agreement or easement drawn up. The line was then built, whether landowners liked it or not. Landowners then received another notice advising them what they should or should not do in the vicinity of the lines. Only if the landowner made a claim was a compensation agreement signed, this also being a standard-form one page document. Things have now changed, an indication perhaps of how unsatisfactory were the earlier procedures. As noted above, the present practice is to draw up a formal grant of easement for the transmission of electricity with every affected landowner.

B. Subsequent claims for compensation

3.10 The issue of compensation for the pylons was first raised in 1982.On 21 June

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[21] See the correspondence on [TP] NZED 13/169/3, particularly the letter from Fletcher Timber (Forest Division) to NZED, 7 February 1975; P.J. Turnbull to General Manager, Fletcher Timber Co., 26 June 1975, and Compensation Agreement of 15 Jan 1976. This correspondence illustrates the difficulties of how the loss caused by the construction of such public facilities such as a transmission line should be assessed. Fletchers claimed on the basis of (1) actual expenditure on the area to date; and (ii) production loss. The production loss was a complex calculation taking into account 1974 stumpage values, increased at a rate of 4% compounded per annum and also taking into account the crop rotation for the exotic forest. The present author does not claim to understand the intricacies of this calculation, which was not in any case accepted by NZED. What it does indicate is that it would be impossible to quantify the costs of the transmission line on the owners of Tataraakina C without expert valuation assistance.

[22] The relevant correspondence is included in a bundle of miscellaneous information provided by Transpower to Crown Forestry Rental Trust researchers. This matter was settled in 1975.

Mrs L. O'Donnell wrote to the Minister of Energy on behalf of the Pohokura 7ATrust.[23] In her letter Mrs O'Donnell referred to the lines crossing Tataraakina and Pohokura and mentioned the difficulties the transmission lines were causing for forestry development:

> We cannot plant trees unless its 2 chain on [ ] of the pylons; calculated risks overpowering [ ] and loss of land use is a serious disadvantage for us, who are struggling to develop these areas.

Mrs O'Donnell raised the matter of compensation, naturally assuming something would be available:

> Compensation on a monthly or 6-monthly basis on Perpetuity [ ] justify our daily loss of income, your consideration Sir will be greatly appreciated.

It seems that the main catalyst which led to the compensation issue arising in the early 1980s were the attempts by the owners of Tataraakina and the other affected blocks to develop exotic forest plantations on their lands as a method of generating some income. A transmission line through native bush is a different matter from a transmission line running through an expensively-planted and carefully maintained exotic forest plantation.

3.11. Mrs O'Donnell's letter resulted in a very informative note being placed on the main NZED file by one B.E. Thomas. This makes the basic point that Mrs O'Donnell's claim was statute-barred as it was out of time. There was no point in offering an ex gratia payment of some kind as it was (and presumably is) firm Treasury policy to not allow payments of statute-barred claims, however meritorious. Mr Thomas' memo states:

> The extension of time for claiming compensation, beyond the statutory two years can only be approved by the Minister of Works, and then only up to a total of six years from completion.
>
> We have considered the possibility of an "ex gratia" payment in another case (Tauranga.Mt Maunganui 110 V line), some years ago (1971). That case was similar, except that there had been some difficulty in establishing the legal owners, and the District Maori Trustee had not helped enough.
>
> As it turned out, although we agreed to do this, and the Crown Law Office had raised the suggestion in the first place, the fact that the Crown Law Office had confirmed that the claim was "statute barred and no legal liability on the Crown" caused Treasury to not allow the payment. There have been other cases of claims not being made within the time limit, and in each case we have had to refuse payment.
>
> We are attempting to avoid these in future by ensuring that districts follow up all line construction and nudge owners into making a claim. If there is still no claim made, we at least ensure that there is documentary evidence of having tried

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[23] Mrs Lyndhurst O'Donnell to Minister of Energy, 21 June 1982, copy on [TP] NZED 23/169/3.

Following this, the Minister of Energy wrote to Mrs O'Donnell.[24] In this letter Mr Birch referred to the earlier informal compensation agreement for the timber taken out from Tataraakina:

> After the line was built, discussions were held with some of the trustees including yourself on some aspects of the effect of the line on the land. At their request the lands to be excluded from future plantings were marked out. In respect of the trees felled on the Tatara-a-kina block for line clearing, the Electricity Division paid compensation for the loss of millable logs left on the land, as being inaccessible for transport. No request was made during these discussions for compensation on account of the loss of land for forestry. This was not unusual, as most owners regarded the line clearings as firebreaks, and consequently excluded that aspect from their claims

Mr Birch advised Mrs O'Donnell that the compensation claim was out of time and could not be entertained.

3.12. That, however, was not the end of the matter. Although one of the Tataraakina Trustees, Mrs O'Donnell had raised the compensation issue in respect of Pohokura 7A. Then later in 1982 the Te Awahohonu Forest Trust (managing Tarawera C6) wrote to the Electricity Department wanting to know whether it was possible to use the land underneath the lines for forestry purposes and whether any compensation had been paid for the transmission lines. The letter was sent by the Trust's secretaries, Messrs Watson Blampied & Co, a firm of accountants based in Napier:[25]

> Trustees understand that a certain area beneath the power lines cannot be utilised by them by them for forestry purposes. (They are looking closely at their land utilisation at present.) Would you be able to confirm that this is so?
>
> Trustees are also rather eager to know exactly when the power line was put through their land and whether compensation to the owners was ever paid out, or whether it is now possible to receive some payment to compensate for the loss of use of the land affected by the power line.

This letter was responded to by K.D. McCool, the General Manager of NZED, on 8 March 1983.[26] His main point was that the claim for compensation was now out of time and had to be declined.

> In terms of section 78 of the Public Works Act 1981 (previously the 1928 Act) the owner should in the first instance made [sic] a claim within 2 yrs (previously 1 year) of the completion of work. There is provision to extend the time limit up to 6 yrs (previously 5 yrs). As the transmission line was completed and commissioned on 18 July 1975, it [sic] regretted that this division cannot accept any claim for compensation at this late stage as it is out of time.

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24 W.F. Birch to Mrs L.H. O'Donnell, 26 July 1982, [TP] NZED 23/169/3.

25 Watson, Blampied and Partners for Te Awahohonu Forest Trust, 17 November 1982, [TP] NZED 23/169/3.

26 McCool to Secretary, Te Awahohonu Forest Trust, 8 March 1983, [TP] NZED 23/169/3.

After denying the claim for compensation McCool went on to explain the necessary restrictions on land use arising from the transmission line:

> As regards restrictions on the use of land in the vicinity of the lines for forestry, it depends on the terrain. In general all trees likely to touch or fall on the line should be felled. On flat land a clear area of 40 metres on either side of the line is required. If the conductors are high enough, for example over a valley, it would be possible to use some of the land beneath the line for forestry. This division will be pleased to indicate to you, at site, the areas where forestry is permitted.

There is an obvious clash of perceptions here. As far as the Electrictity Department was concerned, they had complied with the law and did not want trees impinging on a transmission line which they were required to maintain for the public benefit. But landowners can hardly be blamed for feeling imposed upon. An unsightly transmission line which they did not want had been built across their property. When it turns out that the line has significant impacts on land use they ask for some compensation, only to be told none is available. At the same time they are told what land uses are "permitted" and what is "required" - as if it were NZED who were the landowners.

3.13. The Trustees were not happy with this advice and sought information as to what earlier advice had been given on the matter of compensation. In paragraph 3.3. above I suggest that the wayleave notices were defective in failing to clearly advise landowners that there were statutory time limits affecting claims for compensation. The owners had no awareness that there were time limits and the Department's response was an unpleasant surprise. In reply the Trust stated:[27]

> The Trustees are obviously disappointed that apparently the time limit in which they could file for compensation has passed...Would you please advise the Trustees through this office, what steps were taken by your Department to inform the owners that compensation might have been available upon application. For example, was this information advertised in a Daily Newspaper or was it made known to the owners care of the Trustees directly by letter.

3.14. In the meantime the Pohokura owners had taken the matter up with their M.P., Peter Tapsell. On 1 December 1983 Tapsell wrote to the Minister of Energy arguing that the denial of compensation was unjust and unfair, particularly in the case of Maori landowners who are "unskilled in the legal technicalities of making submissions":[28]

> They tell me that Pohokura is some 323 ha. and I gather lies 50k south east of Taupo and 90 k north west of Napier. They tell me that they have been denied compensation by virtue of the fact that they did not enter their claim soon enough...I do not know the block of land personally but if the allegations they

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27 Watson Blampied & Partners, Chartered Accountants, Napier (Secretaries to the Te Awahohonu Forest Trust) to K.D. McCool, General Manager, NZED, 14 April 1983, [TP] NZED 23/169/3.

28 Peter Tapsell MP to Hon W F Birch, Minister of Energy, 1 December 1983, [TP] NZED 23/169/3.

> make are correct it would seem to me utterly unjust that they be denied compensation for the loss of the use of land across which high voltage transmission lines are passing. I would have expected the Electricity Department to not only be fair, but to quite clearly be seen to be fair in matters such as this, for if they are to be denied their fair compensation by virtue of a technicality in the law, then clearly the confidence of Maori land owning groups will be undermined and in fact severely damaged by what can only seem as a grave injustice. You are aware I am sure that many of the trustees of blocks of Maori land are unskilled in the legal technicalities of making submissions, objections etc. and it would certainly seem to me as grossly unjust if their inexperience is to be used against the trustees in such a way as to be a detriment to the beneficiaries.

Tapsell's intervention ensured that the matter now had to be dealt with at Ministerial level. The Ministerial response was provided in effect by K D McCool, now Deputy Security of Electricity Division of the Minister of Energy, who prepared a memo for the Acting Minister of Energy (Mr Templeton) that the claim was out of time under the Public Works Act. Templeton's response is as follows:[29]

> In reply to your letter of 1 December 1983 on behalf of the Trustees of the Pohokura 7A Trust, Mr Birch was approached by the Trust on this matter in June 1982 and advised them at that time that the claim could not be considered as it had exceeded the statutory time limit.
>
> The construction of the Wairakei-Whirinakei 220 kV transmission line commenced in 1993 and was completed on 8 July 1975. In terms of the Public Works Act, a claim must be submitted within two years of completion of construction. This limitation period can be extended to six years from the date of completion of the project by the Minister. These submissions from the Trust are outside the six year limitation and therefore cannot be considered. On 10 October 1973 the trustees were notified of the commencement of the work and were requested to forward claims within 12 months of completion of construction.
>
> Discussions were held with the trustees on the effect of the line on the land and land to be excluded from future planting was identified and marked out. Compensation was paid for the loss of trees felled at the time but not recoverable because of inaccessibility to transport. Compensation was not requested for loss of land for forestry and this was considered normal as most owners regarded the line clearings to be useful as fire-breaks and did not claim for this loss.

3.15. The compensation issue resurfaced again in 1990, this time with respect to the Tataraakina block. The event which led to the resurfacing of the matter occurred when staff of a company named Electrix, who seem to have been contractors with ECNZ, entered onto the Maori freehold land at Tataraakina without permission in order to inspect the pylons. D.A. Schollum of AMP Perpetual Trustee N.Z. Ltd., secretary of the Tataraakina Incorporation, then wrote to Electrix requesting that

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[29] Hugh Templeton, Acting Minister of Energy, to Dr P. Tapsell M.P., Jan 17 1984, [TP] NZED 23/169/3.

in future permission be obtained before entering the land and seeking information on access agreements and the payment of compensation:[30]

> The Incorporation has experienced problems over recent years with unauthorised personnel entering the property and ask that in future you notify the writer when it is intended to enter the property for such inspections, to enable the Manager of the property to be informed.
>
> A perusal of records and the title to the property does not reveal any easement or agreement for the pylons over the Incorporation property. For administration purposes, could you please advise when this line was installed. Your advice also on whether any agreement was entered into at the time regarding access to the property, and if any compensation was paid to the Incorporation, would be appreciated.

Electrix referred this to EMEC (Electricorp Marketing Electrical Contracting), who replied that there was no access agreement as access was authorised by s. 11 of the Electricity Act 1968 and gave details of the dates of wayleave notices and the construction of the transmission line.[31] In respect of the query about compensation, this was said to be dealt with by means of the informal timber-fellling agreement of 1975. This, however, did not deal adequately with the compensation issue, as Schollum was quick to point out:[32]

> The letter you have referred to as compensation relates solely to the milling of timber that is to be felled on the Pylon route through the Incorporation property, and is not relation [sic] to the compensation in connection with the construction of Pylons over the Incorporation's property. Unless there has been compensation paid and a transmission line compensation agreement completed, it would appear to the writer that your Corporation should address this issue in the normal manner, and obtain a before and after valuation in terms of the Public Works Act 1981.

This led in turn to the now-standard reply that any claim for compensation was out of time and could not be considered:[33]

> In terms of Section 78 of the Public Works Act 1981 (previously the 1928 Act), the owners should have made a claim within two years of the completion of the work. As the transmission line was completed and commissioned on the 18th July 1975 some 15 years ago, this Corporation cannot accept any claim for compensation as it is now out of time.

3.16. The matter resurfaced in August 1993 when B.T.P. Manga, lines supervisor for

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30 D.A. Schollum to The Manager, Electrix Ltd., Hamulton, 27 June 1990 [Claimants]

31 V.G. Henderson, for M G Kodoor, Engineering Manager, EMEC Hamilton, to D A Schollum, District Manager, AMP Perpetual Trustee Co NZ Ltd, Rotorua, 21 August 1990 [Claimants].

32 D A Schollum, District Manager, AMP Perpetual Trustee Co NZ Ltd , Rotorua, to Engineering Manager, EMEC, 23 August 1990 [Claimants]

33 V G Henderson for M G Kodoor, Engineering Manager, EMEC Hamilton, to D A Schollum, District Manager, AMP Perpetual Trustee Co NZ Ltd, Rotorua, 29 August 1990 [Claimants].

Powermark N Z Ltd, a contractor with Transpower carrying out line maintenance on the Whirinaki-Wairakei line, asked the Tataraakina Incorporation for permission to enter their land to upgrade the access tracks so that the condition of the pylons could be investigated.[34] Mr D Schollum referred this request to the Incorporation, which (in Schollum's words) "did not receive favourable consideration":[35]

> As you aware [sic], the underlying reason behind the Incorporation's decision to deny access is the outstanding issue of compensation for the power pylons. This issue has recently been highlighted by current plans to plant the majority of Tataraakina in forestry. A survey of the intended forestry area revealed that 26.5 hectares is involved in the pylon strip and the potential loss of income over a rotation of thirty years has been estimated at $2.4 million.

Of course Transpower did not actually need the Incorporation's permission to enter the land (although understandably it prefers to work co-operatively with landowners rather than annoy them unduly). In a subsequent letter Schollum pointed out that Transpower and its agents had the right to enter, but they were nevertheless not going to consent to it as "the current Trustees do not wish to be seen as supporting what is considered as an 'unfair situation'".[36] Schollum also doubted whether the recipients of the notices in 1973 would have fully grasped their implications:[37]

(a) The business acumen of the Trustees who represented the block in 1973 was not of a standard where they would have fully appreciated the Trust's right to compensation.

(b) I have a copy of the notice of entry dated 10 October 1973 which was sent to all Trustees of the Block. This clearly sets out their rights under Section 16 of the Electricity Act 1968 but we have doubts whether the Trustees at the time fully understood those.

(c) Had an Easement or Right of Way been negotiated in 1973, as would be the case now, the Trust would have sought legal advice and their legal advisor would have ensured that the Trustees were fully aware of their rights to compensation.

3.17. Since then discussions have been ongoing. In June 1996 Bob Coombes of Transpower met with Schollum and a Tataraakina sub-committee (J H Wall, K Hill and J Young).[38] The discussion seems to have been amicable enough, Mr Coombes on behalf of Transpower did not budge from his stance that "Transpower would not be interested in considering compensation for the

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34 B T P Manga, Lines Supervisor, Powermark N Z Ltd to D. Schollum, AMP Trust, Rotorua, n.d., received 31 August 1993 [claimants]. This letter refers to an earlier meeting of 27 August.

35 D A Schollum, Northern Branch Manager, AMP Perpetual Trustee N Z Ltd to B T Manga, Lines Supervisor, Powermark N Z Ltd, Napier, 21 December 1993 [claimants].

36 D A Schoolum, Northern Branch Manager, AMP Perpetual Trustee Co N Z Ltd to Bob Coombes, Station Manager, Transpower N Z Ltd, Palmerston North, 16 August 1994 [claimants]. Rights of entry to existing works are protected by s. 23 of the Electricity Act 1992.

37 Ibid.

38 Filenote provided by D A Schollum, 2 June 1976 [claimants].

transmission lines as ECNZ [sic - i.e. NZED] provided the proper notification to the Maori authorities when the transmission lines were installed". There was some discussion over the matter of maitenance tracks; Coombes indicated "that PowerMark would be interested in assisting with the maintenance of access tracks in return for their continued access". This was followed up with a letter from Coombes to Schollum. This represents Transpower's latest statement on the compensation issue:[39]

- The Wairakei-Whirinaki A line was built under Sections 11 and 15 of the Electricity Act 1968. This Act gave the New Zealand Electricity Department the authority to build transmission lines on private land.
- Transpower will pay compensation for removal of trees that affect the operation of the lines, providing the trees were planted prior to the line being built between 1973 and 1975. This may apply to some existing stands of kanuka and is to be discussed with Mr Moody Hay of GEC Alsthom, who will act as Transpower's agent.
- In relation to trees being planted under the existing line; as discussed, if the Trust wish to plant trees for nursery purposes, or for firewood, this is acceptable to Transpower. However I must point out that it would be the Trust's responsibility to ensure that the trees are maintained so that they do not affect the operation of the line.

In July 1996 Mr Schollum, on behalf of Tataraakina C, sent the relevant correspondence to Bevan Taylor as Wai 299 claim co-ordinator and asked that the issue be included in the Wai 299 claim.

[39] R C Coombes, Asset Manager, Transpower NZ Ltd, Palmerston North, to Dennis Schollum, Secretary, Tataraakina C Block, 29 December 1996 [claimants].

4. Landowner's responsibilities regarding transmission lines

4.1. **Introduction:** It may seem strange at first sight that landowners should have duties or responsibilities of any kind when it comes to the maintenance of electricity pylons on their property. The transmission line is a kind of easement, and generally in law the possessors of a servient tenement are not expected to maintain the easement in any manner for the benefit of the owners of the easement, although obviously they may not intentionally or negligently cause damage to it. The principal problem with transmission lines is the risk of trees growing up through the wires or close to the pylons or wires. If a tree breaks a line this can interrupt supply and cause various hazards. If trees are too close to a line this can cause "flashover" even if the tree is not actually touching the wires (the higher the voltage the further the current can jump to a tree or other object: it is obviously crucial to keep trees well clear of high voltage lines). Section 19 of the Electricity Act 1968 dealt specifically with this:

> **19. Removal of trees causing damage to electric lines** - (1) If any tree growing on any land causes or is likely to cause damage to an electric line, the Secretary may give notice to the owner or occupier of that land to remove the tree or any part thereof, and if the owner or occupier fails to comply with the time specified therein (being not less than 7 days) the Minister or the licensee, as the case may require, may enter upon the land and remove the tree or any part thereof, but so that no unnecessary damage is done or incurred thereby.

There is, however, no equivalent of s. 19 in the current Electricity Act. Instead the matter of tree removal is controlled by regulation-making powers under s. 169 of the 1992 Act. A number of landowner organisations have expressed concern about their possible responsibilities under the 1992 Act and proposed regulations, which may (it is argued) impose duties on landowners to maintain Transpower's lines at their own expense and impose legal liabilities on them should they fail to do so. As the respective duties and responsibilities of landowners and operators are uncertain, landowners are concerned about the scope of civil liability attaching to them should they fail to prevent trees growing up through the transmission lines and possibly interrupting supply. To a large extent these questions (especially the scope of civil liability) are matters of legal argument and can be dealt with by counsel. In this report I will do no more than set out the core main statutory provisions and comment on the relevant discussion papers and other documents which deal with the issue.

4.2. **Electricity Act 1992:** Section 22 of the 1992 Act protects the legal rights of electricity operators and other owners of electrical works located on private land. In respect of the Wairakei-Whirinaki transmission line the effect of s. 22 is essentially to place Transpower in the same position as the former line owner, NZED:

> 22. Protection of existing works - Any existing works, lawfully fixed to or lawfully installed over or under any land that is not owned by the person that owns the works, shall continue to be fixed or installed until the owner of the works otherwise decides, and no person other than the owner of the works shall have any interest in any such works by reason only of having an interest in the land.

Section 23 similarly protects former rights of entry.[40] Section 35 allows owners and occupiers of private land to move at their own expense electrical works situated on their property with the consent of the owner of the works, hardly a realistic option in the case of the pylons traversing Tarawera and Tataraakina. Compensation is now dealt with by ss 57 and 58. Section 58(2) protects the former time limits and continues to disbar landowners in the position of the Tarawera or Tataraakina owners:

> In default of agreement between the parties, claims for compensation under this section shall be made and determined within the time and in the manner provided by the Public Works Act 1981, and the provisions of that Act shall, as far as they are applicable and with all necessary modifications, apply with respect to claims under this section.

4.3. Tree removal and the 1992 Act: As noted, s. 19 of the former Act is not repeated in the 1992 Act. Section 58 does make provision for compensation for "trees and vegetation removed" but this is payable *only if the tree or vegetation was growing on the land before the construction of the works.* Section 58 also refers to the "removal of any vegetation... pursuant to any regulations made under section 169 of this Act". Section 169 (2)(g) deals specifically with making regulations dealing with the matter of trees or vegetation growing in the vicinity of electrical installations. This states that regulations may be made:

> (g) Controlling the existence and location of the whole or any part of any tree or vegetation that is in the vicinity of, or may affect, any works or electrical installation, including (without limitation) -
>
> (i) Requiring the removal of the whole or any part of any tree or vegetation:
>
> (ii) Requiring the removal of any debris produced as a result of any work carried out pursuant to those regulations;
>
> (iii) Prescribing the person or persons who shall meet the costs of carrying out any work required pursuant to the regulations, and providing for the recovery of such costs:
>
> (iv) Providing for the payment of the costs of remedying any damage caused to any works by any tree or vegetation, or any part of any

[40] It is a matter of legal argument whether the wording of s.23 is broad enough to allow tree trimming, and if so whether compensation for such trimming would be payable under s. 57. It should be noted that legal advice given to the Ministry of Commerce is that section 23 would, in fact, allow the trimming of trees that are actually interfering with the lines. According to Cabinet documentation, however (CIE(95) 232: Report by Office of the Minister of Energy: para 8, p. 2), "the distributors do not share this view, and are unwilling to test it in the Courts. In any event they believe that the suggested circumstances (which amount to near emergencies) are not an adequate basis for prudent management of the problem."

> tree or vegetation, or any part of any tree or vegetation, where that damage arises (whether directly or indirectly) out of any failure to comply with the requirements of the regulations; prescribing the person or persons who shall pay those costs; and providing for the recovery of those costs.

4.4. **Consideration by Cabinet:** In 1995 the making of regulations to deal with trees growing near electric lines was considered by the Cabinet Committee on Enterprise, Industry and Environment. This and the various supporting papers, obtained under the Official Information Act, are included in Appendix III (Document #10).. The consultation process leading up to the 1995 Cabinet Committee discussion reveals an interesting divergence of opinion between landowners on the one hand and officials on the other. The views of landowners were as follows:[41]

> The arguments put forward for compensation included that the line(s) had been put in against the wishes of the landowner; and that compensation paid under the Public Works Act did not recognise the ongoing effect on land and crop management. Forestry interests suggested that additional fire risk and the inability to use the line corridor represented significant economic loss. The general thrust was that, now the energy companies were no longer public authorities but profit-making commercial entities, their lines (i.e. even their existing lines) should not have a position of privilege, and rentals or compensation should be payable.

The response of officials to these lines of argument were partly legal (invoking ss 22 and 23 of the 1992 Act) and partly in terms of underlying policy.[42] In considering the policy issue the following was asserted:

> When lines were initially put in place, the landowner at the time did either receive compensation (under the Public Works Act) for the "injurious affection" of the land, or "in kind", or, as quite often happened, waived the option of seeking payment in recognition of the benefits electrical reticulation brought to the wider community of the area. The Courts in the past have however declined to make awards for "foregone profits" in cases relating to compensation under the Public Works Act.

Landowner groups had also asserted that power operators should in fairness bear all the costs of trimming trees. The response was as follows:[43]

> Officials noted that it is the landowner who owns the trees, and even in the absence of regulations they would be open to suit under common law, where their property damaged that of a power company lawfully fixed on the land. Legislation since the turn of the century has recognised this responsibility. Where there has been a change is that [the] Electricity Act 1992 took away the power of

41 CIE (95) 232, Report of the Office of the Minister of Energy, Annex II, para 8.
42 Ibid. para 10.
43 Ibid, para. 13.

electricity companies compulsorily to enter land and trim trees hazarding their lines, where the landowner had refused to do so. Generally, where the entry power was exercised, the former electrical supply authorities had absorbed the costs. The purpose of the proposed regulations is to make more specific the rights and obligations of both landowners and power companies, but the regulations do not affect the fundamental responsibilities and liabilities of landowners associated with trees on their property.

4.5. The Ministerial recommendations to Cabinet committee were approved. The principal proposals were:

- there be certain minimum clearance distances between trees or vegetation and overhead works;
- in general tree owners are to be responsible for the costs of trimming or clearing trees on private land;
- in the case of live lines only "competent" persons may do the trimming work;
- "electricity distributors may recover from tree owners, as a debt, the cost of damage to the distributor's works caused by a non-compliant tree"[44];
- there will be a two-stage system of notices from electricity distributors to tree owners, the first "to identify and warn of the hazards associated with encroachment by trees on lines and with trimming or clearing work, and to advise the tree owner of his rights and responsibilities under the regulations",[45] and the second a "growth limit notice", the purpose of which is "to specify the time limit provided in the regulations by which the trimming work must be done".
- it is an offence, inter alia, for which fines may be imposed not exceeding $10,000 for a tree owner to fail to comply with a "growth limit notice".

It seems in other words that distributors can require that trees be trimmed by serving a "growth limit notice" on landowners, with which failure to comply is a criminal offence..

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44 CIE[95] 232, 4.

45 Ibid.

5. Summary and Conclusion

This report has attempted to deal as comprehensively as possible with the transmission line issue, and to situate it within its context of changes to the structure of the electricity industry. The core narrative is not difficult to grasp. The transmission line was built in the 1970s across two Pohokura Blocks, as well as Tataraakina and Tarawera C. No compensation was paid to the owners of these blocks. Representatives of all of these blocks subsequently sought compensation at a later time, only to be informed that the claims were out of time and could not be considered.

It seems that at the time the law was not breached by NZED, and therefore the real questions now relate to the adequacy of that law and whether it complied with the Crown's obligations under the Treaty of Waitangi, a matter of legal argument. A fitting note on which to end this report are Dr Peter Tapsell's remarks in 1983:

> [I]t would seem to me utterly unjust that they be denied compensation for the loss of the use of land across which high voltage transmission lines are passing. I would have expected the Electricity Department to not only be fair, but to quite clearly be seen to be fair in matters such as this, for if they are to be denied their fair compensation by virtue of a technicality in the law, then clearly the confidence of Maori land owning groups will be undermined and in fact severely damaged by what can only seem as a grave injustice. You are aware I am sure that many of the trustees of blocks of Maori land are unskilled in the legal technicalities of making submissions, objections etc. and it would certainly seem to me as grossly unjust if their inexperience is to be used against the trustees in such a way as to be a detriment to the beneficiaries.

Appendices

Appendix 1

Wairakei-Whirinaki Transmission Line
Chronology and Correspondence

1940 **(13 March):** General authorization under s. 311 of the Public Works Act 1928 allowing the Minister to construct works 'as may be necessary in connection with the utilization of water-power from Lake Taupo and the Waikato River.[44] The authorization is therefore in very wide terms and confers enormous powers on the Ministry of Works.

1968 **Electricity Act 1968.**
Sections 11 and 15 authorise NZED to build transmission lines without being bound to buy the land, and give the Department right of way to and along the lines.

1972 **(1 Feb)** J.R. Nixon, District Manager, NZED Napier, writes to the Maori Affairs Department seeking names and addresses of Tataraakina owners.[45]

1973 Construction of Wairakei-Whirinaki transmission line begins.[46]

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[44] NZG 13 March 1940, 1940 NZG 383: In pursuance and exercise of the powers vested in him by s 311 of the Public Works Act 1928, and of all other powers in anywise enabling him in this behalf, His Excellency the Governor General in Council...doth hereby authorize the Minister of Public Works to erect, construct, provide, and use such works as may be necessary in connection with the utilization of of water-power from Lake Taupo and the Waikato River, in the Land Districts of Auckland and Wellington, and in connection therewith to raise or lower the level of the said lake and river, and to impound or divert or control the flow of water from same for the generation and storage of electrical energy and in connection with the transmission, use, supply, and sale of electrical energy when so generated; also to use electrical energy so generated in the construction, working, or maintenance of any public work or for the smelting, reduction, manufacture, or development of ores, metals or other substances, also to construct tunnels under private land or aqueducts over the same, erect poles thereon, and carry wires over or along any such land without being bound to acquire the same, and with the right of way to and along all such works and erections; and also to supply and sell electrical energy and recover moneys due for the same.

[45] J.R. Nixon, District Manager, NZED Napier to District Officer, Maori and Island Affais, Palmerston North, 1 February 1972, copy on ABRX W4612 4/17 pt 5 [Tarawera Development Scheme], NA Wellington: "Further to recent correspondence and telephone conversation Couch/Bethell (31 Jan.) please send me a list of known addresses of owners listed in the Schedules for the Tataraakina and Tarawera C6 Blocks. As outlined in my memo. Of 21 January, survey entry notices for the above line can then be sent to these registered owners.// I also request you to make application with your Board of Maori Affairs that permission be obtained for the N.Z. Electricity Department to enter that land in Tarawera C6 Block affected by Part XXIV of the Maori Affairs Actm 1953, initially for the purpose of survey and eventually to erect a transmission line."

[46] Hugh Templeton to Peter Tapsell, 17 Jan 1984, copy on [TP] NZED 23/169/3.

(10 October): Trustees of the Pohokura 7A block are notified of the commencement of the work and are asked to forward claims within 12 months of completion of construction. .[47] At this time, according to Hugh Templeton, "discussions were held with the trustees [of Pohokura 7A] on the effect of the line on the land and land to be excluded from future planting was identified and marked out. Compensation was paid for the loss of trees felled at the time but not recoverable because of inaccessibility of transport. Compensation was not requested for loss of land for forestry and this was considered normal as most owners regarded the line clearings to be useful as fire-breaks and did not claim for this loss."

- Survey entry notices and wayleaves for the line are sent out as follows:[48]

Pohokura 3 - Maori owners, c/o Laura Renata. (For timber rights notice was given to the Omahu Timber Co.)
Pohokura 7A - Maori owners, c/o Pat Hura.
Tataraakina - Maori owners, c/o Trustees (Chairman: P. Sullivan).

1974 **(18 June)** Informal agreement drawn up by which NZED agrees to pay compensation for logs felled for the line but inaccessible.[49]

(8 July) Construction of the transmission line is completed.[50]

1975 **(23 July)** D.F. Edmundson, Chartered Accountant and one of the Tataraakina Trustees, writes to the NZED advising that the trustees intended to commence forest planting in the area adjacent to the line and asked for advice on the area which should not be planted out.[51]

1979 **(13 December)** Compensation agreement between NZED and the Maori Trustee.

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47 Hugh Templeton to Peter Tapsell, 17 Jan 1984, copy on [TP] NZED 23/169/3.

48 NZED memo, PWP Chapman, District Manager, Hamilton, to Chief Transmission Line Engineer, 20 December 1982, [TP] NZED 23/169/3.

49 A copy of the compensation agreement can be found on [TP] NZED 23/169/3:
Electricity Department,
Hamilton.
Attention Mr B. Henderson.
Dear Sir,
Re. Cut timber on Pylon route through Tatara-A-Kina.
We will pay $2.10 per 100 HD for all logs of saw mill grade loaded out on truck at the bottom skids on Tatara-A-Kina.
Logs that are of saw mill quality and left as inaccessible, we will charge you at the rate of $2.67 per 100 HD measure.
These prices are standard with our current logging operations, we do not require compensation for logs that are pulled and loaded out by you, only those that are left."
This is signed by V.J.R. Keen, P Sullivan, [indec.], G.M. Campbell and L O'Donnell.

50 Hugh Templeton to Peter Tapsell, 17 Jan 1984, copy on [TP] NZED 23/169/3.

51 D.F. Edmundson to District Manager, NZED, Napier, 23 July 1976, copy on [TP] NZED 23/169/3: "The Trustees of the above property will shortly be commencing forest planting on the above property in the area adjacent to your Department's high tensions [sic] wires. It is understood that your surveyors will mark out the area which should not be planted. For a description of the area where planting is to be carried out, would you please contact Mrs L.H. O'Donnell, P.O. Box 284, Hastings."

This relates to 18 towers (pylons) at $20 per pylon, which NZED regard as "very low, compared to other settlements". This relates to a stretch of line in the Tauhara Middle block.[52]

1982 **(21 June):** Mrs Lyndhurst O'Donnell's letter to the Minister.[53] Her main concern is that the owners cannot plant trees within 2 chains of the pylons; "this is a serious disadvantage for us, who are struggling to develop these areas." Mrs O'Donnell is writing to the Minister on behalf of the Pohukura 7A trust but also mentions the line going across Pohokura 3B and Tataraakina.

1982 **(20 July):** A very informative note is placed on the main NZED file by one B.E. Thomas.[54]

1982 **(26 July)** W.F.Birch, Minister of Energy, writes to Mrs O'Donnell, declining her claim for compensation in respect of the Pohokura Block.[55]

1982 **(17 November)** Te Awahohonu Forest Trust writes to DGG, NZED, wanting to know whether the land underneath the lines can be used for forestry purposes and whether compensation was paid for the loss of land.[56] This letter is written by the Trust's secretaries, Watson Blampied & Co, accountants of Napier.

1983 **(8 March)** K D McCool, General Manager NZED writes to Te

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52 The agreement and associated file memo are on [TP] NZED Ham. 23/1/163.

53 Mrs Lyndhurst O'Donnell to Minister of Energy, 21 June 1982, copy on [TP] NZED 23/169/3.

54 This states: "The ~~extens~~ion of time for claiming compensation, beyond the statutory two years can only be approved by the Minister of Works, and then only up to a total of six years from completion.// We have considered the possibility of an "ex gratia" payment in another case (Tauranga.Mt Maunganui 110 V line), some years ago (1971). That case was similar, except that there had been some difficulty in establishing the legal owners, and the District Maori Trustee had not helped enough.//As it turned out, although we agreed to do this, and the Crown Law Office had raised the suggestion in the first place, the fact that the Crown Law Office had confirmed that the claim was "statute barred and no legal liability on the Crown" caused Treasury to not allow the payment. There have been other cases of claims not being made within the time limit, and in each case we have had to refuse payment.// We are attempting to avoid these in future by ensuring that districts follow up all line construction and nudge owners into making a claim. If there is still no claim made, we at least ensure that there is documentary evidence of having tried."

55 W.F. Birch to Mrs L.H. O'Donnell, 26 July 1982, [TP] NZED 23/169/3. Birch refers to the earlier discussions which took place in 1975: "After the line was built, discussions were held with some of the trustees including yourself on some aspects of the effect of the line on the land. At their request the lands to be excluded from future plantings were marked out. In respect of the trees felled on the Tatara-a-kina block for line clearing, the Electricity Division paid compensation for the loss of millable logs left on the land, as being inaccessible for transport. No request was made during these discussions for compensation on account of the loss of land for forestry. This was not unusual, as most owners regarded the line clearings as firebreaks, and consequently excluded that aspect from their claims." Also says that the compensation claim is out of time.

56 Watson, Blampied and Partners for Te Awahohonu Forest Trust, 17 November 1982, [TP] NZED 23/169/3: "Trustees understand that a certain area beneath the power lines cannot be utilised by them by them for forestry purposes. (They are looking closely at their land utilisation at present.) Would you be able to confirm that this is so?//Trustees are also rather eager to know exactly when the power line was put through their land and whether compensation to the owners was ever paid out, or whether it is now possible to receive some payment to compensate for the loss of use of the land affected by the power line.

Awahohonu Trust pointing out that no claim for compensation was ever made and that the claim is now out of time. Information is also given as to permissible land uses in the vicinity of the lines.[57]

1983 **(14 April)** Te Awahohonu Forest Trust writes to NZED expressing their disappointment that the time limit for compensation has passed and asking for information on "what steps were taken by your Department to inform the owners that compensation might have been available upon application".[58]

1983 **(1 December)** Peter Tapsell writes to W F Birch, Minister of Energy, on behalf of the Trustees of Pohokura 7A.[59]

1984 **(12 Jan)** K.D. McCool, Deputy Sec, Electricity Division, advises Templeton that the claim is out of time.[60]

1984 **(17 Jan)** Hugh Templeton, Acting Minister of Energy, writes to Peter Tapsell advising that the claim made by the Trustees of the Pohokura 7A trust is out of time and cannot be considered. .[61]

1987 Electricity Amendment Act.

1990 **(27 June):** D.A. Schollum of AMP Perpetual Trustee N.Z. Ltd., secretary of the Tataraakina Incorporation, writes to Electrix requesting that in future permission

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[57] McCool, GM NZED to Sec. Te Awahohonu Trust, 8 March 1983, [TP] NZED 23/169/3: "As regards restrictions on the use of land in the vicinity of the lines for forestry, it depends on the terrain. In general all trees likely to touch or fall on the line should be felled. On flat land a clear area of 40 metres on either side of the line is required. If the conductors are high enough, for example over a valley, it would be possible to use some of the land beneath the line for forestry. This division will be pleased to indicate to you, at site, the areas where forestry is permitted."

[58] Watson Blampied & Partners on behalf of Te Awahohonu Forest Trust to NZED Wellington, 14 April 1983, copy on [TP] NZED Ham. 23/169/83.

[59] Peter Tapsell to W.F. Birch, 1 December 1983, copy on [TP] NZED Ham. 23/169/3: "They tell me that they have been denied compensation by virtue of the fact that they did not enter their claim soon enough....I do not know the block of land personally but if the allegations are correct it would seem to me utterly unjust that that they be denied compensation for the loss of the use of land across which high voltage transmission lines are passing. I would have expected the Electricity Department to not only be fair, but to quite clearly be seen as fair in matters such as this, for if they are to be denied their fair compensation by virtue of a technicality in the law, then clearly the confidence of Maori landowning groups will be undermined and in fact severely damaged by what can only seem as a grave injustice. You are aware I am sure that many of the trustees of blocks of Maori land are unskilled in the legal technicalities of making submissions, objections etc. and it would certainly seem to me as grossly unjust if their inexperience is to be used against the trustees in such a way as to be a detriment to the beneficiaries."

[60] Memo, K D McCool, Deputy Secretary, Electricity Division, to Templeton, 12 January 1984, copy on TP 23/169/3.

[61] Hugh Templeton to Peter Tapsell, 17 Jan 1984, copy on TP 23/169/3: "The construction of the Wairakei-Whirinaki 220 kv transmission line commenced in 1973 and was completed on 8 July 1975. In terms of the Public Works Act, a claim must be submitted within two years of completion of construction. This limitation period can be extended to six years from the date of completion of the project by the Minister. These submissions from the Trust are outside the six year limitation and cannot be considered.

be obtained before entering the land and seeking information on access agreements and the payment of compensation:[62]

1990 **(29 August 1990)** Engineering Manager, AMEC advises Tataraakina Trustees that no compensation can be paid for the transmission line as the claim is out of time.[63]

1992 **Electricity Act 1992.** Key provisions are s. 22 (Protection of existing works), s. 23 (Rights of entry in respect of existing works). S. 57 (Compensation for damage), s. 58 (Compensation for trees and vegetation removed), and s. 169 (Regulations).

1993 **(August)** B.T.P. Manga, lines supervisor for Powermark N Z Ltd, a contractor with Transpower carrying out line maintenance on the Whirinaki-Wairakei line, asks the Tataraakina Incorporation for permission to enter their land to upgrade the access tracks so that the condition of the pylons could be investigated.[64] Schollum refers request to the Incorporation. [65]. Permission is refused. Leads to further discussion of compensation issue etc.

1995 **(26 September)** Proposed regulations for the control of trees near electric lines are brought before the Cabinet Committee on Enterprise, Industry and Environment.[66]

1996 **(17 July)** At the request of the Tataraakina C Inc. the pylons issue is included in the Wai 299 claim.

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62 D.A. Schollum to The Manager, Electrix Ltd., Hamulton, 27 June 1990 [Claimants]

63 V.G. Henderson for Engineering Manager, EMEC, to D.A. Schollum, AMP Perpetual Trustees, Rotorua, 29 August 1990, Emec (Ham.) 106/720. This notes the 'informal' forestry agreement, but otherwise (invoking s.78 of the Public Works Act 1981) advises that "as the transmission line was completed and commissioned on the 18th July 1975, some 15 years ago, this Corporation cannot therefore accept any claim for compensation as it is now out of time."

64 B T P Manga, Lines Supervisor, Powermark N Z Ltd to D. Schollum, AMP Trust, Rotorua, n.d., received 31 August 1993 [claimants]. This letter refers to an earlier meeting of 27 August.

65 D A Schollum, Northern Branch Manager, AMP Perpetual Trustee N Z Ltd to B T Manga, Lines Supervisor, Powermark N Z Ltd, Napier, 21 December 1993 [claimants].

66 See CIE (95) 232 and associated papers [Document bank #10)]

1997

APPENDIX 2
BIBLIOGRAPHY

List of Files Cited

1. [TP] NZED 23/169/3. This is a former NZED file now held by Transpower NZ Ltd. This file also also includes some papers relating to compensation and other matters from the Hamilton NZED office/
2. EMEC (Ham.)106/720, now held by Transpower.
3. [TP] NZED Nap. 10/10/17 Pts. 1 and 2. NZED Napier Office file now held by Transpower Ltd.
4. ABRX W4612 4/17 pt 5, Tarawera Development Scheme 1971-1978, National Archives, Wellington.

Legislation

Electricity Act 1968
Electricity Act 1992
Energy Companies Act 1992
Public Works Act 1928
Public Works Act 1981.

Publications etc

Richard Moorsom, *Raupatu, Restoration and Ancestral Rights: the Title to Tarawera, Tataraakina and Te Haroto: Supplementary Report,* Wai 209 Doc#R9, Wai 299 Doc#C10 etc, March 1998.

Trans Power New Zealand Ltd., *Information for landowners and occupiers: General information for people living, working or playing near transmission lines,* 1996.

Waitangi Tribunal. *Te Ika Whenua Rivers Report.* Wai 212, 1998

Other

Correspondence sent and received by claimants and their agents (cited as [Claimants] in footnotes.

Appendix 3:

Documents:

1. Sample wayleave notice sent to Trustees.[67]
2. Agreement relating to timber-cutting, 18 June 1975[68]
3. Letter from Mrs L O'Donnell to Minister of Energy, 21 June 1982. [69]
4. Filenote by B.E. Thomas, NZED, 20 June 1982. [70]
5. Letter from Peter Tapsell to Hon W F Birch 1 December 1983. [71]
6. Letter from Hugh Templeton, Acting Minister of Energy, to Peter Tapsell MP, 17 Jan 1984. [72]
7. Letter from D.A. Schollum, Northern Branch Manager, AMP to B T Manga, Lines Supervisor, Powermark New Zealand, 21 December 1993 [claimants].
8. Letter from D A Schollum to Bob Coombes, Station Manager, Transpower, Palmerston North, 19 August 1994.
9. Letter from R.C Coombes to D Schollum, 20 December 1996.
10. CIE (95) 232 and supporting documents.
11. R.P. Boast and D.A. Edmunds, *The Crown's Policy Proposals on Treaty Claims involving Public Works acquisitions: Submission on behalf of Maungaharuru Tangitu Society Inc.*, April 1996.

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67 [TP] NZED 23/169/3.
68 [TP] NZED 23/169/3.
69 [TP] NZED 23/169/3.
70 [TP] NZED 23/169/3.
71 [TP] NZED 23/169/3.
72 [TP] NZED 23/169/3.

Address Reply to—
District Manager,
New Zealand Electricity Dept.
P.O.Box 154,
NAPIER

In Replying Please Quote:
10/10/17/2

DOCUMENT 1

NEW ZEALAND ELECTRICITY DEPARTMENT

State Advances Building,
Hastings Street,
NAPIER
New Zealand

10 October 1973

Mrs L. O'Donnell,
P.O.Box 284,
HASTINGS.

TRANSMISSION LINES AND TELEPHONE LINES

Dear Mrs O'Donnell,

Sections 11 and 15 of the Electricity Act 1968 authorise the New Zealand Electricity Department to build transmission lines and telephone lines on private land without being bound to buy the land, and give the Department right of way to and along those lines.

Detailed investigation and survey show that the best route for the transmission (and) telephone line(s) from Wairakei to Whirinaki lies across the property owned by you, namely Tataraakina Block in Blks VII; VIII; XI; XII; Tarawera S.D.

and that there will be 10 ~~poles or~~ towers within your boundaries. The route of the line has been pegged through your property and is shown on the attached plan.

The construction of this line will be started soon and materials will be distributed to the pegged positions on or after the 31st day of October 1973.

In addition it will unfortunately be necessary to cut some bush and scrub * growing on your property. This work, too, will commence on or after the above dates unless you would prefer to attend to the cutting yourself, in which case the Department will be grateful for your co-operation subject to the work being completed in good time to avoid delaying the construction gangs.

Section 16 of the Electricity Act 1968 provides for the payment of compensation where any property is damaged or injuriously affected by carrying out any work authorised by the Act. Should you wish to make a claim for compensation will you please write to me giving particulars of the property, and the amount which you consider would be fair compensation for each item. I will, if necessary, arrange for an officer of the Department to discuss the matter with you, with a view to reaching a mutually satisfactory settlement. You will appreciate that an assessment of the compensation payable cannot normally be made until the work on the property affected has been completed, but any claim should be made no later than 12 months after completion of the work.

NOTE: As soon as the conductors are strung the line must be regarded as alive. The date of the commencement of actual transmission of power will be notified by newspaper advertisement.

If you should wish to discuss any matter arising from the execution or progress of this work, please contact my Transmission Line Engineer, Mr W. J. Smith at above address, Or ring Mr P. Toi, Bay View 425 collect.

Yours faithfully,

J. R. NIXON
District Manager.

Per: W. J. Smith
(W. J. Smith)

Attached: Plan

NZED 305

*Extent of cutting yet to be assessed in areas

(P) 23/K/169/3

NEW ZEALAND ELECTRICITY DEPT.
23 JUN 1975
HAMILTON

DOCUMENT 2

V.J.R. Keen,
P.O. Box 634,
TAUPO. 18/6/75.

Electricity Department,
HAMILTON.

Attention Mr B. Henderson

Dear Sir,

Re. cut timber on Pylon route through Tatara-A-Kina.

We will pay $2.10c per 100 HD for all logs of saw mill grade loaded out on truck at the bottom skids on Tatara-A-Kina.

Logs that are of saw mill quality and left as inaccessable, we will charge you at the rate of $2.67c per 100 HD measure.

These prices are standard with our current logging operations, we do not require compensation for logs that are pulled and loaded out by you, only those that are left.

I Remain
Yours faithfully,

V.J.R. Keen

FILE

T.L.E.
As Tui taken says NZED will be paid according to Committee costs.

Approved

G.M. Campbell
L.A. O'Donnell

D.M.	
D.O.E.	23.6
D.A.O.	
D.S.E.	

In this finish

RECEIVED
JUN 1982
IN THE OFFICE OF
HON W. P. BIRCH

DOCUMENT 3

Pohokura Trust:
Sec., P.O. Box 354.
Hastings Hawkes B.
21.6.82.

To
Hon. Minister of Energy,
Mr. W. F. Birch.
Parliament Buildings Wgtn.
Dear Sir,

I am writing to you Sir, this time on a different yet; it's all about the Energy Resources under you jurisdiction. We hope to extract a small amount that was left from a cut over in 1973-75 by Odlins Ltd Research is underway by Rotorua Conservancy & Service's Head Office Wgtn for a specific trial at Horo Horo Forest S.W. Rotorua, for an economic of recovering high quality wood from some fallen After clearance a new forest will be planted. Year.

My main concern is the High Voltage Power Lines generating from Wairakei to Whirinaki Mill utilising thousands of Acres over Maori Developed Blocks. Pohokura 3B consists of 3,620 Acres
" Pohokura 7A " " 798 " 0 roods
" Takaradakina " 36,730 "

We cannot plant trees unless it's 2 chains on e of the Pylons; calculated risks overpowering F and loss of Land Use and Income is a seri disadvantage for us, who are struggling to d these Areas.

As you are, Hon. Minister, of the most powerful personalities in the Generation system, could please be listened to? even though the echo ha reaches the walls of the Ministers Office. Compen on a monthly or 6 monthly basis on Perspicuity judicity and Loss of Income, your Co-ordinate Sir I will be greatly appreciated.

Thank You,
Yours faithfully
Mrs Lyn Thurston H. O. [illegible]

MINUTE SHEET

DOCUMENT 4

Department: .....

Subject: Ministerial 82/0602
Mrs L.H. O'Donnell

Section: 23/169/-

File No. .....

Date: 20/7/82

(F)

To- PD 20/7
Mr Duffield
Mr Thomas

Re your enquiry on draft reply - we is there some way we could accept a claim now, as the matter is certain to be pursued if we say 'no'.

Thank-you for these comments. Please place them on the file for this Ministerial for future information if necessary.

The extension of time for claiming compensation, beyond the statutory 2 yrs can only be approved by the Minister of Works, and then only up to a total of 6 yrs from completion.

We have considered the possibility of an "ex gratia" payment in another case, some years ago. Tauranga/Mt Maunganui motorway ← 1971
That case was similar, except that there had been some difficulty in establishing the legal owners, and the District Maori Trustee had not helped enough.

As it turned out, although we agreed to do this, and the Crown Law office had raised the suggestion in the first place, the fact that the Crown Law Office had confirmed that the claim was "statute barred & no legal liability on the Crown" caused Treasury to not allow the payment

Item 503

499105—120,000 pads/8/80 MK

Filed
Off Rv

MINUTE SHEET

Department: .....

Subject

Section: .....

File No. .....

Date: .....

To–

There have been other cases of claims not being made within the time limit, and in each case we have had to refuse payment.

We are attempting to avoid these in future by ensuring that district follow up all line contractors and nudge owners into making a claim. If there is still no claim made, we at least ensure that there is documentary evidence of having tried.

B E Thomas

Item 503

49919E–120,000 pads/8/80

1983
CE OF
W. F. BIRCH

DOCUMENT 5

Parliament House
WELLINGTON

1 December 1983

Hon W F Birch
MINISTER OF ENERGY

Dear Mr Birch re: POHOKURA 7A TRUST & LAND RETIRED FOR HIGH VOLTAGE TRANSMISSION LINES

The trustees and several beneficiaries of the Pohokura 7A Trust have asked me to take up with you a matter in which they feel they have been unjustly treated. In that they have apparently been denied any compensation for land which they have been unable to plant by virtue of the Wairakei-Whirinaki high voltage transmission line crossing their property.

They tell me that Pohokura is some 323 h.a. and I gather lies 50k south east of Taupo and 90k north west of Napier. They tell me that they have been denied compensation by virtue of the fact that they did not enter their claim soon enough.

I do not know the block of land personally but if the allegations they make are correct it would seem to me utterly unjust that they be denied compensation for the loss of the use of land across which high voltage transmission lines are passing. I would have expected the Electricity Department to not only be fair, but to quite clearly be seen to be fair in matters such as this, for if they are to be denied their fair compensation by virtue of a technicality in the law, then clearly the confidence of Maori land owning groups will be undermined and in fact severely damaged by what can only seem as a grave injustice. You are aware I am sure that many of the trustees of blocks of Maori land are unskilled in the legal technicalities of making submissions, objections etc. and it would certainly seem to me as grossly unjust if their inexperience is to be used against the trustees in such a way as to be a detriment to the beneficiaries.

I believe that this is an extremely important matter and one which is bound to come up from time to time and I would earnestly ask that you look into this matter and see that the

Maori owners are fairly compensated for the loss of the use of their land.

I look forward to hearing from you in due course.

Yours sincerely

Peter Tapsell MP

PTM:JES
83/1440
23/169/3

Temporary File 23/169/3

23-169-3

C

DOCUMENT 6

17-1-84

Dr P Tapsell MP
Parliament Buildings
WELLINGTON

Dear Dr Tapsell

In reply to your letter of 1 December 1983 on behalf of the Trustees of the Pohokura 7A Trust, Mr Birch was approached by the Trust on this matter in June 1982 and advised them at that time that the claim could not be considered as it had exceeded the statutory time limit.

The construction of the Wairakei-Whirinaki 220 kV transmission line commenced in 1973 and was completed on 8 July 1975. In terms of the Public Works Act, a claim must be submitted within two years of completion of construction. This limitation period can be extended to six years from the date of completion of the project by the Minister. These submissions from the Trust are outside the six year limitation and therefore cannot be considered. On 10 October 1973 the trustees were notified of the commencement of the work and were requested to forward claims within 12 months of completion of construction.

Discussions were held with the trustees on the effect of the line on the land and land to be excluded from future planting was identified and marked out. Compensation was paid for the loss of trees felled at the time but not recoverable because of inaccessibility to transport. Compensation was not requested for loss of land for forestry and this was considered normal as most owners regarded the line clearings to be useful as fire-breaks and did not claim for this loss.

I regret I am unable to assist the trust with this particular claim.

Yours sincerely

Hugh Templeton

Hugh Templeton
Acting Minister of Energy

FILE
Initials
Date 18-1-84

Filed Off By Initial

23/169/5

PTM:JES
23/169/3
83/1440

12 January 1984

The Acting Minister of Energy
from Electricity Division

On 1 December 1983 Dr Peter Tapsell MP wrote to Mr Birch seeking a review of an earlier decision to reject a compensation claim for the effect of transmission line works on the property of the Pohokura 7A Trust.

A claim was submitted by the Trust in June 1982 but was declined as being outside the allowable time for consideration of such claims. The works commenced in 1973 and were completed in 1975 and discussions on compensation were held with the Trust at that time with payment being made for loss of trees cut down during construction works but no claims being lodged for loss of future production.

The Public Works Act provides a statutory limit of two years from the completion of the works with an extension of this time period to six years at the discretion of the Minister.

This claim falls outside the six year limit and cannot therefore be considered.

The attached letter is recommended for your signature.

for K D McCool
Deputy Secretary
Electricity Division

Encl.

DOCUMENT 7

AMP PERPETUAL TRUSTEE COMPANY N.Z. LIMITED - Rotorua
166 Fenton Street, P.O. Box 246
DX 11426, Rotorua
Telephone: (07) 347-7794
Facsimile: (07) 347 3403 Please note our new FAX No.

21 December 1993

Lines Supervisor
Powermark New Zealand Ltd
Private Bag 6011
NAPIER

ATTENTION: B T Manga

Dear Mr Manga

RE TATARAAKINA INCORPORATION

I refer to our telephone discussions and in particular your letter of 30 August 1993 regarding your request for permission to carry out maintenance work on the transmission lines.

Your request was submitted to the Incorporation at a recent meeting and unfortunately this did not receive favourable consideration.

As you aware, the underlying reason behind the Incorporation's decision to deny access is the outstanding issue of compensation for the power pylons. This issue has recently been highlighted by current plans to plant the majority of Tataraakina in forestry. A survey of the intended forestry area revealed that 26.5 hectares is involved in the pylon strip and the potential loss of income over a rotation of thirty years has been estimated at $2.4 million.

Yours faithfully
AMP PERPETUAL TRUSTEE COMPANY N.Z. LIMITED
THE SECRETARY FOR TATARAAKINA INCORPORATION

D.A. Schollum
Northern Branch Manager

AMP PERPETUAL TRUSTEE COMPANY N.Z. LIMITED - Rotorua
166 Fenton Street, P.O. Box 246
DX 11426, Rotorua
Telephone: (07) 347-7794
Facsimile: (07) 347 3403

16 August 1994

Bob Combes
Station Manager
TransPower NZ Ltd
PALMERSTON NORTH

BY FAX: (06) 357 0917

Dear Mr Coombes

RE: TATARAAKINA C BLOCK

I understand that your office controls the Wairakei-Whirinaki 220kv transmission line that transverses through Tataraakina's land.

I recently had a meeting with Moody Hay of Powermark in regard to their desire to obtain access to Tataraakina land to carry out maintenance on the transmission line. The Trustees of the land are aware that TransPower (or their agents) have legal authority to enter the land to carry out maintenance work; recent requests for the Trustees to consent to entry have been declined/ignored as the Trust never received compensation when the transmission line was erected in 1973, and the current Trustees do no wish to be seen as supporting what is considered as an "unfair situation".

The history of the installation of the transmission line has been considered and:

(a) The business acumen of the Trustees who represented the block in 1973 was not of a standard where they would have fully appreciated the Trusts right to compensation.

(b) I have a copy of the notice of entry dated 10 October 1973 which was sent to all Trustees of the Block. This clearly sets out their rights under Section 16 of the Electricity Act 1968 but we have doubt whether the Trustees at the time fully understood those.

(c) Had a Easement or Right of Way been negotiated in 1973, as would be the case now, the Trust would have sought legal advice and their legal advisor would have ensured that the Trustees were fully aware of their rights to compensation.

The issues I have raised above could easily relate to some current trusts I administer. It is only in the 1993 Maori Land Act that provision was included for the Maori Land Court Judges to have regard to the ability, experience and knowledge of individuals when appointing Trustees. Several Trustees I deal with, who were appointed under the old Act, do not comprehend written letters, but react and understand issues a lot better if the facts are presented in them at a Hui.

Taking the above issues into consideration, would you please advise if there is any possibility of considering a negotiation for compensation with the current Board of Trustees for Tataraakina.

Yours faithfully
AMP PERPETUAL TRUSTEE COMPANY N.Z. LIMITED

D.A. Schollum
Northern Branch Manager

Enclosed for your information is a list of the current Trustees for the Block.

Trans Power New Zealand Ltd
3rd Floor Inland Revenue Building,
Ashley Street, PO Box 840,
Palmerston North, New Zealand.
Telephone: 064-6-357 0919
Facsimile: 064-6-357 0917

TRANSPOWER

Our ref: 106/12/5

20 December 1996

Mr Dennis Schollum
Secretary
Tataraakina C Block
Opepe Administration Service Limited
PO Box 723
TAUPO

Dear Dennis

Thank you for the opportunity to meet with Nick Wall, Chairman of the Trust, yourself and Trust members.

Transpower requested the meeting to discuss outstanding matters. These included:

- The compensation for the Wairakei-Whirinaki A line construction.
- The claim for compensation for loss of plantation area as a result of the line crossing Trust land.
- General areas of mutual interest which included:

  i) insurance
  ii) track maintenance
  iii) letting of new line maintenance contracts
  iv) removal of trees under the line
  v) advice on bridge maintenance

Non payment of Compensation for Wairakei-Whirinaki A Line:

As discussed at the meeting, I outlined that Wayleave notices were sent to the Department of Maori and Island Affairs and Trust members. I confirm that these Wayleave notices were sent to the following people on 10 October 1973.

⇒ District Officer, Department of Maori & Island Affairs, Palmerston North.

and the following Trustees:

⇒ Mr P Sullivan, 16 James Foley Avenue, Pirimai, Napier.
⇒ Mr P Tahau, C/- Post Office, Te Haroto.
⇒ Mr H Campbell, C/- Post Office, Paki Paki.
⇒ Mr D Edmundson, C/- Lee, Heaps and Edmundson
⇒ Mrs L O'Donnell, PO Box 284, Hastings.

The Wayleave notices clearly outlined the process for applying for compensation. Compensation was not applied for by the Department of Maori Affairs, or by the Trust. In view of this, Transpower will not consider any claim for compensation.

Claim for compensation for loss of plantation area as a result of the line crossing Trust Land:

Further to the discussion at the meeting, I wish to confirm the following:

- The Wairakei-Whirinaki A line was built under Sections 11 and 15 of the Electricity Act 1968. This Act gave the New Zealand Electricity Department the authority to build transmission lines on private land.

- Transpower will pay compensation for the removal of trees that affect the operation of the lines, providing the trees were planted prior to the line being built between 1973 and 1975. This may apply to some existing stands of Kanuka and is to be discussed with Mr Moody Hay of GEC Alsthom, who will act at Transpower's agent.

- In relation to trees being planted under the existing line; As discussed, if the Trust wish to plant trees for nursery purposes, or for fire wood, this is acceptable to Transpower. However I must point out that it would be the Trusts' responsibility to ensure that the trees are maintained so that they do not affect the operation of the line. Mr Moody Hay will provide further advice on this matter if required.

General Issues Discussed:

Work carried out at Tataraakina C Block in the last twelve months:

- Upgrading of access to Towers 142 to 152 was carried out by Greg Lamb in October 1995. Transpower had a security gate manufactured and installed as per agreement with the Trust. It is noted that the Trust has not been paid for work they carried out on behalf of Powermark (now GEC Alsthom) this has been discussed with Moody Hay of GEC Alsthom.

Renewal of Line Contracts:

New line contracts have been let to the following Contractor's for the next three years. The line maintenance contract has been let to GEC Alsthom. The primary contact people are:

Mr Barney Manga, GEC Alsthom, Private Bag 6011, Napier. Ph: 06-8448896
Mr Moody Hay, GEC Alsthom, PO Box 80, Bunnythorpe. Ph: 06-3292120

The Lines Condition Assessment Contractor is Line Link. The primary contact person is:

Mr Ian Martin, 47 Sanders Avenue, Marewa, Napier. Ph: 06 8433553

These contractors all carry Transpower Warrants of Authority and except in the event of a fault will notify the Trust two weeks in advance for access to your property.

The issue of contractors carrying rifles was also discussed and Transpower will be writing to the individual contractors to reiterate that they are not to take rifles or dogs on to the Trust's property.

Insurance:

The Chairman, Mr Nick Wall, had recently discussed with me the issue of insurance, in the event that a transmission circuit caused a fire in the Trust's plantation. The position is, that if Transpower's transmission lines cause a fire through an act of God, Transpower would not be liable. The risk associated with a line failure was further discussed, as outlined; Transpower's Maintenance Contractor undertakes a six monthly patrol of the transmission circuits to ensure that the conductors and hardware are in good condition. This patrol also checks that all vegetation is clear of the conductors. The Asset Condition Contractor carries out an in depth inspection of the lines to monitor the long term condition of the lines. The frequency of the inspections carried out by the Asset Condition Contractor depends on the age of the line and its geographical location.

Access Track and Bridge Maintenance:

As discussed; Transpower require access to Tataraakina land for approximately ten days of the year, on average. It is acknowledged that Transpower contractors have to use Trust roading to access the transmission towers. It was agreed at the meeting that Mr Moody Hay would inspect the access tracks with Trust staff and prepare a report and recommendation for Transpower's consideration. It was also agreed that where ever possible, GEC Alsthom would employ, or sub contract, some of the work to the Trust members.

When Mr Hay is on site he will also provide advise on future bridge maintenance.

I would like to again thank you, the Chairman, and Trust members for the opportunity to discuss the above matters. I wish to ensure that there is ongoing communication between the Trust and Transpower and would suggest that as a minimum, we should meet yearly.

I note the comments from the Chairman regarding costs incurred by Trustees in attending these meetings and will address this before the next meeting.

Yours sincerely

R C Coombes

R C Coombes
Asset Manager
Palmerston North

CABINET COMMITTEE ON ENTERPRISE, INDUSTRY AND ENVIRONMENT

CIE (95) 232

26 September 1995

Copy No: 32

This paper is the property of the New Zealand Government. As it includes material for Cabinet or Cabinet Committee purposes it must be handled with particular care, and in accordance with any security classification or other endorsement assigned to it. The information in it may be released only by persons having proper authority to do so, and strictly in terms of that authority.

Title	ELECTRICITY ACT 1992 : PROPOSALS FOR REGULATIONS FOR THE CONTROL OF TREES NEAR ELECTRIC LINES
Purpose	The paper seeks the agreement of the Committee to the drafting of regulations, pursuant to the Electricity Act 1992, to control the growth of trees and vegetation near electric lines.
Previous Cabinet/ Committee Consideration	In November 1994 the Committee agreed to the release of the discussion document entitled "Control of Trees near Electric Lines: Proposals for Regulations under the Electricity Act 1992" to parties with an interest in the topic (CIE (94) M 40/4 refers).
Summary	The proposed regulations seek to resolve two key issues:

- Safety: "flashover" to trees or persons near them can occur even without direct contact, at distances which increase with the voltage of the line. Fires or other damage to property can result from contact by trees with lines.
- Reliability of Supply: outages (if a tree or branch breaks a line) create hazards, as well as disruption for economic activity. Voltage "spikes" resulting from contact can damage property or equipment connected to the line.

The key points of the proposed regulations are as follows:

— Minimum clearance distances: a table of minimum clearances is set for the distance to be observed between the lines for supply to persons other than the owner of the property ("works") and the non-insulated lines for supply to a property owner on his or her property;

— Notices: these apply in respect of "works". A two-stage system of notices from electricity distributors to tree owners, concerning encroachment on the minimum clearance distances, is proposed. A tree owner's failure to comply with the second notice is proposed to be an offence;

— Cost allocation: in principle, the landowner/person with an "interest" in the tree, is responsible for the work and the cost. There are three scenarios for negotiated departure from the principle. These are detailed in Annex I attached under CIE (95) 232.

The proposed regulations will also stipulate offences and liability, and set out a process of arbitration and dispensations to apply in individual cases.

Officials consider that consultation and negotiation with interested groups has produced a generally agreed regime. However, the Department of Conservation (DOC), Ministry of Forestry, and forestry/farm interests and the electricity industry have expressed some reservations. Their views are detailed on page 7, and Annex I attached under CIE (95) 232.

DOC is concerned that it should not face any additional costs over the present situation. The Ministry of Forestry believes the proposed regime is imbalanced, in favour of distributors of electricity. The electricity industry do not believe the proposed regime will be effective in the absence of a statutory power to ensure trees are trimmed.

Issues raised in consultations and officials' responses, are summarised in Annex II attached under CIE (95) 232.

Baseline Implications	There are no financial implications for the Crown.
Legislative Implications	Regulations are proposed to be made pursuant to the Electricity Act 1992.
Timing Issues	A transitional period of 18 months is proposed to enable distributors to prioritise the work required to establish compliance.
Announcement	None indicated.
Consultation	Ministry of Agriculture, Department of Conservation, Ministry for the Environment, Ministry of Forestry, Department of Internal Affairs, Department of Justice, Te Puni Kokiri, Ministry of Transport, Treasury, Federated Farmers, Forest Owners' Association, Farm Forestry Association, Local Government Association, Transit New Zealand, Trans Power, and Electricity Supply Association. The Minister indicates that consultation with Opposition parties/Caucus is not required.

The Minister of Energy recommends that the Committee:

a i note that encroachment on electricity lines may lead to safety hazards for the public, endangering lives and property and causing electrical outages;

ii note that in the absence of regulations, while common law or other remedies are available to the public and distributors for damages, preventive measures to ensure safe conditions cannot be enforced;

b agree that regulations be drafted pursuant to the Electricity Act 1992 to control the growth of trees near electric lines, whose encroachment on the lines may endanger human life or the integrity of the network, and that the regulations should provide for:

i APPLICATION - to all trees and vegetation near "works" (as defined in section 2 of the Act), and to lines of "electrical installations" which are bare, but in the case of new works, in respect of the clearance distances only (easements are expected to be taken for new works, and these may contain arrangements between the parties for the maintenance of the distances);

ii CLEARANCE DISTANCES

A in respect of overhead works, requiring specific minimum clearance distances to be maintained between trees or vegetation and the conductor(s) of works, and the bare conductors of electrical installations, in accordance with the table on page 3 of the submission under CIE (95) 232; and

B in respect of underground works, electricity distributors may sever and remove tree roots within 0.5 metres, either side of the works, where this is necessary to gain access for their repair, maintenance or replacement;

iii RESPONSIBILITY FOR OBSERVANCE OF CLEARANCES - a person may establish an "interest" in a tree, and thereby accept responsibility for maintaining the tree to the clearance distances of the regulations, and in the case of "wild" trees on the road reserve where the territorial authority has declined an "interest" any other person may do so (but without prejudice to the authority's ownership rights);

iv AN "INTEREST" DEEMED - owners of existing trees near existing works, or of new trees which at maturity can be expected to encroach the growth limit zone of a line will be deemed to have an "interest" in the tree, unless otherwise declared;

v COST OF TRIMMING OR CLEARING; "INTEREST" TREES

A in respect of public authorities and trees on public land, costs to be allocated by local agreements between electricity distributors and the relevant public authority;

B in respect of trees on private land, the tree owner to be responsible for the costs, but the electricity distributor may reach a local agreement with that person as to costs;

vi COSTS OF TRIMMING OR CLEARING; "NO INTEREST" TREES - subject to the grant of land access, electricity distributors to be responsible for the costs, but the tree owner to be responsible for the removal of the debris, unless other legislation applies; however if land access is not granted, then the tree owner remains responsible for the tree as if an "interest" had been declared;

vii DISPENSATIONS - electricity distributors may, at the request and risk of the tree owner, grant dispensations on the extent and timing of trimming required, in circumstances where the electricity distributor believes there is little risk to the safety of persons or danger to the line;

viii ARBITRATION OF DISPUTES - for arbitration of disputes on the need, timing and extent of trimming, which may modify the requirements of the regulations;

ix APPOINTMENT OF ARBITRATORS - by the Minister of Energy; with the same protection as a Justice of the Peace acting under Part VII of the Summary Proceedings Act 1957;

x PERSONS WHO MAY DO TRIMMING WORK - where the line is live or liable to become alive, and the tree or vegetation is at or above the level of the conductors of the line, or is within the growth limit zone, then only "competent" persons may do the work;

xi PRIOR ADVICE WHERE TRIMMING WORK IS TO BE DONE - tree owners are to give notice to electricity distributors and, in respect of trees on the road reserve, electricity distributors to give notice to road controlling authorities, where trimming work is to be done pursuant to these regulations;

ENFORCEMENT OF THE REGULATIONS

xii "NOTICES" - a two-stage system of "notices" from electricity distributors to tree owners, which are, the first, to identify and warn of the hazards associated with encroachment by trees on lines and with trimming or clearing work, and to advise the tree owner of his or her rights and responsibilities under the regulations, and the penalties and liabilities associated with non-compliance; the second, "growth limit notice" (to be delivered in accordance with the procedures for notices to shareholders in the Companies Act 1993) to specify the time limit provided in the regulations by which the trimming work must be done;

xiii RECOVERY OF DAMAGES - electricity distributors may recover from tree owners, as a debt, the cost of damage to the distributor's works caused by a non-compliant tree;

xiv OFFENCES - it shall be an offence against the regulations, (for which fines may be imposed not exceeding $10,000, and a further fine not exceeding $2,000 a day or part of a day during which an offence has continued) for:

1 a tree owner to fail to comply with a "growth limit notice";

2 any person to knowingly give false evidence to an arbitrator;

3 a tree owner to fail to give the stipulated prior notification to the electricity distributor, or an electricity distributor to a road controlling authority, of the time and place of trimming or cutting a tree pursuant to a notice under these regulations;

4 an electricity distributor (subject to the transitional provisions) to fail to advise a tree owner by notice when the distributor becomes aware that a tree or trees encroach the growth limit line;

5 an electricity distributor to fail to identify the dangers associated with trees' encroachment on lines, and with trimming in the vicinity of lines, in the notices to tree owners;

6 a person other than a "competent person" to undertaking trimmings or clearing work above the level of the conductors of the line, or where vegetation is in the growth limit zone;

7 a tree to be trimmed to a greater extent than 2.2 metres beyond the distances prescribed by these regulations without the express consent of the tree owner;

xv TRANSITION - for a transitional period of eighteen months from the commencement of the regulations, that:

1 it should not be mandatory for electricity distributors to issue "growth limit" notices to tree owners;

2 electricity distributors are to provide, on request, to owners of electrical installations whose lines are bare, a free disconnection and reconnection to facilitate the owners' trimming or removal of trees hazarding those lines;

3 (except in the case of horticultural shelter belt trees) electricity distributors are to meet the cost of a trim to compliance with the regulations, of trees in which an "interest" has been established that are within the growth limit zone of works which are bare, the landowner to be responsible for the removal of debris, subject to other legislation;

c invite the Minister of Energy to instruct the Chief Parliamentary Counsel to prepare draft regulations to implement the proposals in paragraph (b) above;

d note that, as in the Trees (Electric Lines) Regulations 1986 applying to horticultural shelter belt trees, it is intended that the system of special arbitrators proposed for the new regulations will be funded from the Electricity Levy, which is collected under the Ministry of Energy Abolition Act to meet the costs of the electrical safety regime;

e note that officials propose to make the paper under CIE (95) 232 available under the Official Information Act 1982, once the Cabinet decision-making process is complete; and subject to the concurrence of Parliamentary Counsel, to provide key parties represented on the Ministry of Commerce Working Group with an opportunity to comment on the regulations in draft form;

f direct officials to review the regulations as to cost-effectiveness two years after the commencement of the regulations, and to report to the Cabinet Committee on Enterprise, Industry and Environment on the outcome of that review approximately December 1997.

(Signed) Murray Newth

COPIES TO:

Cabinet Committee on Enterprise, Industry and Environment
Minister of Justice
Secretary for Justice
Minister of Local Government
Secretary for Internal Affairs (Local Government)
Minister of Maori Affairs
Chief Executive, Te Puni Kokiri
Minister of Internal Affairs
Secretary for Internal Affairs
Chief Executive, PM&C
Secretary to the Treasury
Secretary of Commerce (Energy)
Secretary for the Environment
Director-General, Ministry of Agriculture
Secretary of Forestry
Director-General of Conservation
Director-General, DOSLI
Secretary for Transport
Chief Parliamentary Counsel

Minister of Energy

The Chair
Cabinet Committee on Enterprise, Industry and Environment

SUBMISSION OF A CABINET PAPER LONGER THAN TEN PAGES

I seek your agreement to the submission of the attached paper, which requests the Committee's approval for the drafting of regulations under the Electricity Act 1992 ("the Act") to control trees near electric lines.

The paper extends to a total of 12 pages, as a result of the two-page Annex which summarises issues on which there is some objection to the proposals, and officials' responses to them.

The objections principally come from forestry and farm forestry interests. They seek to be compensated for the constraints on the use of land near "existing works", or to have the lines moved at the electricity distributors' expense. The Act provides to the contrary on both matters, and in any event they are beyond scope of the regulation-making power.

My officials believed it was nevertheless appropriate that these issues be brought to the attention of Ministers. It is possible that some objectors may raise them with Ministers when, as is proposed, the paper is made available under the Official Information Act once the Cabinet decision process is complete. (My officials have already received a number of requests for the paper.)

In view of the above, I seek leave to submit the paper notwithstanding that it exceeds the Cabinet Office guideline for length.

Yours sincerely

Hon Doug Kidd
Minister of Energy

PARLIAMENT BUILDINGS, WELLINGTON, NEW ZEALAND • PHONE (04) 471 9967 • FAX (04) 471 9970

OFFICE OF THE MINISTER OF ENERGY

The Chair
Cabinet Committee on Enterprise Industry and Environment

ELECTRICITY ACT 1992: PROPOSALS FOR REGULATIONS FOR THE CONTROL OF TREES NEAR ELECTRIC LINES

PROPOSAL

1. Approval is sought for the drafting of regulations pursuant to the Electricity Act 1992 to control the growth of trees and vegetation near electric lines, where the trees' encroachment on or interference with the lines could endanger human life or property, or disrupt the continuity of the supply of electricity.

EXECUTIVE SUMMARY

2. *Safety, and continuity of supply:* The purpose of the proposed regulations is to enable preventive trimming of trees near electric lines to be enforced. This is in order to maintain safe conditions and enhance the likelihood of continuity of supply, which are regulatory obligations on Trans Power and the energy companies ("electricity distributors"). The Electricity Act 1992 ("the Act") did not continue their former statutory powers of entry to land to trim trees where the landowner refused a request to do so. In the absence of regulations, common law rights available to the distributors (e.g. suit for damages) can only be invoked after the event of injury or damage. Distributors report they are increasingly encountering cases where tree owners know that preventive action cannot be enforced at present, and are refusing to keep their trees clear of lines, resulting in hazardous conditions. (In a sample, one of 19 cases of refusal reported by Southpower also caused a fire.)

3. *Consultations:* The proposed regulations have been subject to an extensive consultation process for over two years, through a series of discussion documents, and a Working Group established by the Ministry of Commerce in 1993. In addition to departments, the Group included representation from Federated Farmers, the Forest Owners' and Farm Forestry Associations, the Local Government Association, Transit New Zealand, Trans Power and the Electricity Engineers' Association. Negotiations in the Group have produced a generally-agreed regime.

4. There is however some opposition to the proposals from forestry and farm forestry interests, in respect of the responsibility of, and possible costs to, landowners. They want all costs to lie with electricity distributors, and also seek compensation for the ongoing costs of constraints on land use near existing lines. The main issues raised in consultations, including the question of compensation (which is beyond the scope of the regulations) are discussed in the Annex.

5. *The proposed regime:* The proposals are intended to provide an appropriate balance of incentives and costs among the various parties, to achieve the safety outcome. In order to assess the effectiveness of the regulations in achieving these objectives they should be reviewed

two years after commencement. The components of the regime are set out in the Recommendations. A set of minimum safety clearance distances between trees and lines will be prescribed. There will be a system of "notices" from electricity distributors to tree owners to ensure the latter are aware of the hazards their trees can cause, and their responsibilities. Owners of trees are subject to offence provisions (and liability for the costs of damage to a line) if they do not keep their trees clear of lines; but the allocation of the costs of the necessary trimming or clearing work is by and large to be determined by "local agreements" between the parties. Such local agreements are to apply in all cases between electricity distributors and public authorities (i.e. in respect of trees on public land and the road reserve). In the case of private land, it is expected that arrangements between distributors and landowners would be in the context of the landowner's grant (or refusal) of access to the property for the distributor to do the work. If access is refused, the landowner is exposed to the offence provisions if the tree(s) breach the minimum clearances, and potential action for damages. If access is allowed, the landowner could negotiate a cost-sharing arrangement.

6. There is to be a system of specialist arbitration, free to users, to assist the resolution of disputes about the need for, timing, and extent of trimming required. (The funding will be provided from the Electricity Levy, which is collected from the industry to defray the costs of the electrical safety regulatory regime.) Distributors may also grant dispensations from the clearance distances, at the request and risk of the tree owner, where the distributor believes that in the particular circumstance there is little practical danger to the line.

BACKGROUND

7. The concept of standard clearance distances, and provision for specialist arbitration of disputes, was initially put in place in the Trees (Electric Lines) Regulations 1986. These applied only to horticultural shelter belt trees, and lines up to 33 kV. They have been used as the model for the present proposals extending to all trees, and all "works".

8. Ministry of Commerce legal advice is that the provision for land entry for maintenance of electric lines in section 23 of the Act would in certain circumstances extend to trimming of trees that are actually interfering with lines. The distributors do not share this view, and are unwilling to test it in the Courts. In any event they believe that the suggested circumstances (which amount to near emergencies) are not an adequate basis for prudent management of the problem.

APPLICATION OF THE REGULATIONS

9. ***Lines:*** The proposed regulations are intended to apply to (a) "works" (the lines for electricity supply to persons other than the owner or occupier of the land on which they are located); and (b) the lines of "electrical installations" (the lines on private property which serve only the consumer on that property) where these are bare, i.e. not insulated or covered. The regulations are needed in particular for existing works, because under the previous legislation lines had not required easements over the land, which could have provided an alternative means for their ongoing protection from damage by trees. The owner of an electrical installation owns the line, and the safety of persons or property on those premises is of course the landowner's responsibility. Distributors will however provide, in the transitional period of the regulations, a free disconnection and reconnection to owners of electrical installations who wish to trim trees away from their lines.

10. *Trees*: The regulations would apply in full to trees near existing works, and trees planted or permitted to be planted near new works after their construction. In the case of trees near new works they would however apply only in respect of the clearance distances. (The construction of new works is governed by the consents process in District Plans under the Resource Management Act 1991, and where they are on private land distributors are expected to obtain easements.)

CONTENT OF THE REGULATIONS

Clearance distances: "the growth limit zone"

11. *Overhead lines*: A set of minimum safety clearances ("the growth limit zone") is proposed between all overhead electric lines which are not insulated to full working voltage, and trees which are growing in their vicinity. Lines whose conductors are at distances from trees or vegetation which meet or exceed the clearances, will be deemed electrically safe for the purposes of the Electricity Regulations 1993. It should however be an offence against the regulations to trim trees more than 2.2 metres further away from the conductors of the line than required by the relevant clearance distance, without the express consent of the tree owner. The distances are as set out in the following table:

Span length					
<150m		150-300m	300-500m	500-700m	>750m
V and H = same	V	4m	4m	4m	4m
kV m 66> 4 50 to 66 3 33 2.5 11 1.5 400/230v * 0.5	H(1)	4m	7.5m	15m	25m
	H(2)	8m	15m	30m	50m

*Legend: m = metres; kV = kilovolts; v = volts; * = where not insulated; V = vertical; H = horizontal; H (1) = first and last 15% of span; H (2) = centre 70% of span.*

12. *Dispensations*: A distributor may, however, grant a dispensation from the full extent of the distances in respect of overhead lines, on the request and at the risk of the tree owner, where the distributor believes that in the particular circumstances the risk to the line is minimal. An arbitrator may also recommend a dispensation.

13. *Underground works*: Mostly these are on the road reserve. It is proposed that electricity distributors may sever and remove tree roots within 0.5 metres of underground works, where this is necessary to permit safe repair of a cable which has faulted as a result of damage by the roots, or for some other reason.

TREES NEAR OVERHEAD "WORKS": RESPONSIBILITY FOR CLEARANCES

14. *"Interest" in trees*: A person declaring an "interest" in the particular tree or trees assumes responsibility for maintaining its clearance from the electric line. In the case of trees near existing works, the landowner or person controlling the tree (e.g. under leases, or Conservation or Reserves legislation) will be deemed to have an "interest" in the tree, unless otherwise declared. So will a person planting or permitting the planting of trees near new

works, after their construction, where the trees at maturity could encroach the growth limit zone. In the case of trees on the road reserve, the Local Government Association agreed that where a tree or trees are "wild" (i.e. self sown), but the Council does not want to accept the "interest", then other persons may declare it; this however would be without prejudice to the Council's ownership rights. (The most likely scenario is where a "wild" tree is acting as a screen for the adjoining landowner.) The declaration of "interest" in a tree would be expected to provide for communication between the person declaring it and the distributor as to the maintenance, transfer or relinquishing of the interest.

15. *"No interest" in trees*: Where the distributor has verified that there is "no interest" in a tree, then subject to being granted access to the land, the distributor assumes responsibility for trimming or felling it. Removal of the debris would however be the responsibility of the landowner or tree controller, subject to other applicable legislation. If access is not granted, all responsibility rest with the landowner or controller of the tree, as if they had an "interest".

16. *Cost allocation*: Where the tree is on private land, the interested person in principle has cost responsibility, but electricity distributors may opt to reach a local agreement with the interested person in relation to the trimming and costs. (This may be in the context of whether or not the landowner agrees to grant land access.) Where the tree is on public, or publicly controlled land, local agreements between electricity distributors and the public authority concerned are to govern arrangements for the work and costs to maintain the clearances distances.

ENFORCEMENT: THE "NOTICE" REGIME

17. It is proposed that the regulations be enforced through the operation of a two-stage "notice" regime, under which the tree owner would be notified of the requirements of the regulations. Failure to observe the second notice, the "growth limit notice" (which would stipulate a time by which trimming must be done) would be an offence against the regulations. Additionally, the electricity distributor would be able to recover from the tree owner the cost of any damage caused by a non-compliant tree, as a debt. (Damage relating to costs of loss of supply, whether to the electricity distributor or to affected consumers, is however not provided for in the regulation-making powers of the Act, so such affected persons would need to take legal advice on other avenues for redress.) After the expiry of the transitional period of the regulations, it should be an offence for an electricity distributor to fail to notify a tree owner when the distributor becomes aware that a tree or trees encroach the growth limit line.

18. The notices should be required to include: warning of the dangers posed by contact by trees with lines, advice of the safe clearance distances, of the hazards of trimming or clearing work in the vicinity of live lines (and who may do it); together with advice of the responsibilities and rights of the tree owner under the regulations, and the penalties of the regulations, including the tree owner's potential liability for damage caused to the line. They should also include warning of the tree owner's possible exposure to suit for loss of supply etc. to other parties. It should be an offence for an electricity distributor to fail to identify the dangers associated with tree encroachment on lines and with trimming work, in the advice or notice to a tree owner.

19. *First notice*: Two options for the first notice would be available to the electricity distributors; either targeted to particular tree owners, or "generic". If targeted, it is to be sent

to the tree owner when the electricity distributor becomes aware that a tree or trees had or were about to encroach a "notice line", which is one metre further away from the conductors of the line than the growth limit zone. In the "generic" option (which ensures that the notice reaches the owners of electrical installations as well as those with "works" on their properties) the electricity distributor is to send out, at least annually, explanatory material to all consumers.

20. *Second (Growth limit) notice:* A second notice is to be sent to the tree owner, where the distributor becomes aware that a tree has encroached or is about to encroach the growth limit zone. (The manner and timing of delivery should correspond to the requirements in the Companies Act 1993 for notices to shareholders.) It is to restate the previous notice, and give the tree owner 25 working days to trim or clear the tree to the compliance distance, subject to any arbitrated agreement. The tree owner's failure to comply would be an offence against the regulations. From the time of non-compliance, the tree owner also becomes liable for all damage caused to the line by the tree. If no notice had been sent to the tree owner in the previous three months, or if the "generic" advice option had been used as the first stage, then 20 extra working days, i.e. a total of 45 working days, must be given for the trimming or clearing to be done.

21. *Advice of trimming or clearing work: electricity distributors and tree owners:* It is appropriate also to require, and make non-compliance an offence, both tree owners and electricity distributors to give each other reasonable notice (10 working days, or such other period as may be agreed by the parties or provided in a dispensation by the electricity distributor), of where and when tree trimming is to take place in accordance with a "notice" under the regulations. This is respectively to enable distributors to take the system protection action which may be necessary; and the road controlling authority to make any necessary arrangements for their own operations.

ENFORCEMENT: PENALTIES FOR OFFENCES

22. The Act provides, in section 169 (1)(2)(31), for offences to be prescribed for the contravention of or non-compliance with any regulations made under the section. The amount of the fine which may be imposed in respect of any such offence is not exceeding $10,000 and, where the offence is a continuing one, a further amount not exceeding $2,000 for every day or part of a day during which the offence has continued. It is proposed that these penalties apply to offences constituted under these regulations. The provision in relation to continuing offences is important for the case of non-compliance with a "growth limit" notice.

ARBITRATION OF DISPUTES BETWEEN TREE OWNERS AND ELECTRICITY DISTRIBUTORS

23. The practical success of the Trees (Electric Lines) Regulations 1986 was greatly assisted by the use of a small panel of special arbitrators appointed by the Minister of Energy. The costs were originally Crown-funded but are currently paid from Electricity Levy funds. (The Levy is collected from the electricity industry under the Ministry of Energy Abolition Act 1989, and defrays the costs of the electrical safety regulatory regime.) It is proposed to continue this arbitration option, and funding, for the present regulations applying to all trees near lines.

24. *Scope of arbitration:* The arbitrators are required to have special knowledge or experience in respect of trees, and electricity systems. They may be called on by either party to resolve disputes between electricity distributors and tree owners about the need for trimming, the appropriate extent and the timing, in the particular local circumstance. An arbitrated agreement may modify the requirements of the regulations.

25. *Powers of arbitrators:* As in the Trees (Electric Lines) Regulations 1986, in performing their functions and duties, the arbitrators should have the same protection as a Justice of the Peace acting under Part VII of the Summary Proceedings Act 1957. They should be able to resolve disputes according to the substantial merits of the case, and in so doing should have regard to the law but not be bound to give effect to strict legal rights or obligations or to legal forms and technicalities. It would be an offence against the regulations for any person to knowingly give false evidence to an arbitrator.

WHO MAY DO THE WORK

26. Trimming trees near live electric lines has never formally been "prescribed electrical work" or "live line work" which only registered persons may do. Because of the hazard, however, the work was traditionally done by electric line mechanics. It is proposed to clarify the situation. Where the line is live or liable to become live, and vegetation is in the growth limit zone and/or in the areas of the tree above the conductors, tree trimming work should be restricted to "competent persons", and it should be an offence against the regulations for any other person to do the work in those circumstances. Competent persons are: registered electric line mechanics, or arborial workers trained pursuant to a Code issued or endorsed by the Secretary of Commerce.

27. The electricity industry, with the Waikato Polytechnic, is currently developing a voluntary Code of Practice for the training of arborial workers in the maintenance of trees near power lines. It is intended to be adopted under the Health and Safety in Employment Act 1992. If in the view of the Secretary of Commerce it meets the electrical safety requirements of the Electricity Regulations 1993, then is proposed that the Code may also be endorsed by the Secretary for the purposes of these regulations, pursuant to Part IV of the Act. This may require a small technical amendment to the 1993 regulations, which are currently also being drafted.

TRANSITION

28. A transitional period of 18 months is proposed, in which it will not be mandatory for electricity distributors to send out the "growth limit zone" notices to tree owners. This will enable the distributors to prioritise the work required to establish compliance, after more than two years have elapsed without regulations.

29. *Incentives for compliance:* Within the transitional period, the distributors will provide a (one) free trim to the compliance distances for "interest" trees that are in hazardous vicinity of works which are bare, subject to the landowner agreeing to access to the land for the purpose. The trim is to be to the reasonable conditions (e.g. the arborial codes of local authorities) of the "interested" person. The landowner would be responsible for removal of debris, subject to any other applicable legislation. This free trim provision applies to trees near works on both public and private land, but not to horticultural shelter belt trees. (The latter benefitted from this facility on the introduction of the Trees (Electric Lines) Regulations

1986.) The distributors are also to provide a free disconnection and reconnection to owners of electrical installations who wish to trim or clear tree(s) hazarding their own line.

CONSULTATION AND DEPARTMENTAL COMMENTS

30. The Ministry of Agriculture, the Department of Conservation, the Ministries for the Environment and of Forestry, the Departments of Internal Affairs and Justice, the Ministry of Transport (and Transit New Zealand) have been consulted. All but Justice and the Ministry of Transport have also participated in the Ministry of Commerce Working Group which considered submissions on the Ministry's two Discussion Papers, and further developed the proposals. (The Group also included representation from Federated Farmers, the Forest Owners' and Farm Forestry Associations, the Local Government Association and the Electrical Supply Engineers' Association.) Except for the matters noted in paragraph 4, and in the following two paragraphs, the regime proposed is as agreed by the Departments, and in the Working Group.

31. The Department of Conservation expressed concern about possible cost implications if responsibility for trimming were allocated to tree owners. They have commented *"The extent of the department's interest in land may mean that electricity lines have to cross protected areas. The department wishes to minimise the impact of those lines on the vegetation and ensure that electricity distributors accept responsibility for maintaining the line to the satisfaction of the department. In the case of existing works this will be dealt with in formalised agreements. In the case of new works, they will be subject to appropriate easement conditions if the lines cannot be located elsewhere."* Commerce believes the proposed "local agreements" between public authorities and electricity distributors can achieve this outcome.

32. The Ministry of Forestry believes the regime is imbalanced, in favour of distributors, and is sympathetic to the views of forest owners on the matter of compensation for economic land use foregone in the vicinity of "existing works". As noted in paragraph 4, this is outside the scope of the regulation-making powers in the Act. Further detail of objections to the proposals, and responses to them, is in the Annex.

FINANCIAL IMPLICATIONS

33. There are no financial implications for the Crown. It is intended, as under the Trees (Electric Lines) Regulations 1986, that the panel of arbitrators appointed by the Minister of Energy will have their expenses met from the Electricity Levy funding. (Other arbitration under the Arbitration Act 1908, is of course also available, in which case the financial arrangements will be up to the parties.) Treasury have nevertheless been consulted, in light of general policy concerns about compliance cost issues.

RECOMMENDATIONS

34. It is recommended the Cabinet Committee on Enterprise Industry and Environment -

a) **note** that encroachment on electricity lines by trees may lead to safety hazards for the public, endangering lives and property and causing electrical outages, but that in the absence of regulations, while common law or other remedies are available to the public

and distributors for damages, preventive measures to ensure safe conditions cannot be enforced;

b) note that, as in the Trees (Electric Lines) Regulations 1986 applying to horticultural shelter belt trees, it is intended that the system of special arbitrators proposed for the new regulations will be funded from the Electricity Levy, which is collected under the Ministry of Energy Abolition Act to meet the costs of the electrical safety regime;

c) note that officials propose to make this paper available under the Official Information Act 1982, once the Cabinet decision-making process is complete; and subject to the concurrence of Parliamentary Counsel, to provide the key parties represented on the Ministry's Working Group with an opportunity to comment on the regulations in draft form;

d) agree that regulations may be drafted pursuant to the Electricity Act 1992 to control the growth of trees near electric lines, whose encroachment on the lines may endanger human life or the integrity of the network, and that the regulations should provide for:

i *Application:* to all trees and vegetation near "works" (as defined in section 2 of the Act), and to lines of "electrical installations" which are bare, but in the case of new works, in respect of the clearance distances only (easements are expected to be taken for new works, and these may contain arrangements between the parties for the maintenance of the distances);

ii *Clearance distances: (a) in respect of overhead works,* requiring specific minimum clearance distances to be maintained between trees or vegetation and the conductor(s) of works, and the bare conductors of electrical installations, in accordance with the table on page 3; and *(b) in respect of underground works,* electricity distributors may sever and remove tree roots within 0.5 metres either side of the works, where this is necessary to gain access for their repair, maintenance or replacement;

iv *Responsibility for observance of clearances:* a person may establish an "interest" in a tree, and thereby accept responsibility for maintaining the tree to the clearance distances of the regulations, and in the case of "wild" trees on the road reserve where the territorial authority has declined an "interest", any other person may do so (but without prejudice to the authority's ownership rights);

v *An "interest" deemed:* owners of existing trees near existing works, or of new trees which at maturity can be expected to encroach the growth limit zone of a line will be deemed to have an "interest" in the tree, unless otherwise declared;

vi *Cost of trimming or clearing; "interest" trees: (a) in respect of public authorities and trees on public land,* costs to be allocated by local agreements between electricity distributors and the relevant public authority; *(b) in respect of trees on private land,* the tree owner be responsible for the costs, but the electricity distributor may reach a local agreement with that person as to costs;

vii *Costs of trimming or clearing; "no interest" trees:* subject to the grant of land access, electricity distributors to be responsible for the costs, but the tree owner to be responsible for the removal of the debris, unless other legislation applies; however if land access is not granted, then the tree owner remains responsible for the tree as if an "interest" had been declared;

viii *Dispensations:* electricity distributors may, at the request and risk of the tree owner, grant dispensations on the extent and timing of trimming required, in circumstances where the electricity distributor believes there is little risk to the safety of persons or danger to the line;

ix *Arbitration of disputes:* for arbitration of disputes on the need, timing and extent of trimming, which may modify the requirements of the regulations;

x *Appointment of arbitrators:* by the Minister of Energy; with the same protection as a Justice of the Peace acting under Part VII of the Summary Proceedings Act 1957;

xi *Persons who may do trimming work:* where the line is live or liable to become alive, and the tree or vegetation is at or above the level of the conductors of the line, or is within the growth limit zone, then only "competent persons" may do the work;

xii *Prior advice where trimming work is to be done:* tree owners are to give notice to electricity distributors, and, in respect of trees on the road reserve, electricity distributors to give notice to road controlling authorities, where trimming work is to be done pursuant to these regulations;

Enforcement of the regulations:

xiii *"Notices":* a two-stage system of "notices" from electricity distributors to tree owners, which are to identify and warn of the hazards associated with encroachment by trees on lines and with trimming or clearing work, and to advise the tree owner of his or her rights and responsibilities under the regulations, and the penalties and liabilities associated with non-compliance; the second, "growth limit notice" (to delivered in accordance with the procedures for notices to shareholders in the Companies Act 1993) to specify the time limit provided in the regulations by which the trimming work must be done;

xiv *Recovery of damages:* electricity distributors may recover from tree owners, as a debt, the cost of damage to the distributor's works caused by a non-compliant tree;

xv *Offences:* that it shall be an offence against the regulations, (for which fines may be imposed not exceeding $10,000, and a further fine not exceeding $2,000 a day or part of a day during which an offence has continued) for:

aa a tree owner to fail to comply with a "growth limit notice";

ab any person to knowingly give false evidence to an arbitrator;

ac a tree owner to fail to give the stipulated prior notification to the electricity distributor, or an electricity distributor to a road controlling authority, of the time and place of trimming or cutting a tree pursuant to a notice under these regulations;

ad an electricity distributor (subject to the transitional provisions) to fail to advise a tree owner by notice when the distributor becomes aware that a tree or trees encroach the growth limit line;

ae an electricity distributor to fail to identify the dangers associated with trees' encroachment on lines and with trimming in the vicinity of lines, in the notices to tree owners;

af a person other than a "competent person" to undertake trimming or clearing work above the level of the conductors of the line, or where vegetation is in the growth limit zone;

ag a tree to be trimmed to a greater extent than 2.2 metres beyond the distances prescribed by these regulations without the express consent of the tree owner;

xvi *Transition*: for a transitional period of eighteen months from the commencement of the regulations, that:

ba it should not be mandatory for electricity distributors to issue "growth limit" notices to tree owners;

bb electricity distributors are to provide, on request, to owners of electrical installations whose lines are bare, a free disconnection and reconnection to facilitate the owners' trimming or removal of trees hazarding those lines;

bc (except in the case of horticultural shelter belt trees) electricity distributors are to meet the cost of a trim to compliance with the regulations, of trees in which an "interest" has been established that are within the growth limit zone of works which are bare, the landowner to be responsible for the removal of debris, subject to other legislation;

e) agree that Parliamentary Counsel be instructed to prepare draft regulations accordingly;

f) direct officials to review the regulations as to cost-effectiveness two years after the commencement of the regulations, and to report to the Cabinet Committee on Enterprise Industry and Environment on the outcome of that review.

Hon Doug Kidd
Minister of Energy

Annex I.

PROPOSALS FOR REGULATIONS TO CONTROL TREES NEAR ELECTRIC LINES

What issues do the regulations seek to resolve?

- Safety. Electric currents always seek the route of less resistance. The moisture content of trees (and humans) provides this. "Flashover" to trees or persons near them can occur even without direct contact, at distances which increase with the voltage of the line. Fires or other damage to property can result from contact by trees with lines.

- Reliability of supply. This is a second-order effect of safety. Outages (e.g. if a tree or branch breaks a line) create hazards, as well as disruption to economic activity. Voltage "spikes" resulting from contact can damage property or equipment connected to the line.

How was the problem previously handled?

- By statutory entry powers. Since at least 1911 electricity distributors (the Crown/ECNZ and the Electrical Supply Authorities) had powers under successive Public Works and Electricity Acts to enter land and trim or clear trees hazarding, or potentially hazarding, their lines, where the landowner had refused a request to do so. The judgment of the hazard was the distributor's alone.

What are the key points of the proposed regulations?

- Minimum clearance distances. A table of minimum clearances is set, according to voltage of the line and length of the span, for the distance to be observed between "works" and the non-insulated lines of "electrical installations", and trees in their vicinity.
(NB: "works" are the lines for supply to persons other than the owner of the property on which they are located; "electrical installations" are the property owner's lines on his or her property.)

- Notices. These apply in respect of "works". A two-stage system of notices from electricity distributors to tree owners, concerning encroachment on the minimum clearance distances, is proposed. A tree owner's failure to comply with the second notice ("the growth limit notice") by the stipulated time, is proposed to be an offence.

- Cost allocation. In principle, the landowner/person with an "interest" in the tree, is responsible for the work and the cost. There are three scenarios for negotiated departure from the principle:

  (a) In the case of "interest" trees on private land, electricity distributors may reach local agreements with the landowner (expected to be in the context of the landowner agreeing to land access for the purpose of trimming) under which the distributor meets the whole or part of the cost;

  (b) In the case of "interest" trees on the road reserve, or on DOC or Reserve land, distributors shall reach local agreements with the public authority concerned as to costs, and work programmes;

  (c) In the case of trees in which there is "no interest", the distributors will meet the cost of clearing; the landowner to be responsible for removal of the debris.

- Offence and Liability provisions.

(a) Offences: A tree owner's non-compliance with a "growth limit notice" is to be an offence against the regulations. Penalties provided by the Act are fines not exceeding

$10,000, and where the offence is a continuing one, not more than $2,000 for every day or part of a day on which the offence has continued.

(b) Liability: Additionally, from the time of non-compliance, the tree owner becomes expressly liable for damage to the works caused by a non-compliant tree, and the costs of the damage may be recovered by the distributor as a debt.

- Negotiated modification of requirements in individual cases.

(a) Arbitration: Specialist arbitrators (funded from the Electricity Levy) to be appointed by the Minister of Energy to assist the resolution of disputes between tree owners and electricity distributors over the need for, timing and extent of trimming in particular cases of trees which are hazarding works.

(b) Dispensations: Electricity distributors may grant dispensations from the full extent of the clearances at the request of (and at the risk of) the tree owner, in circumstances where the distributors believe that in practice there is little risk to the line.

The extent of consultations?

- The proposals have been discussed with the electricity industry and affected interests for over two years. The Ministry of Commerce issued discussion papers in 1993 and 1994. It also established a representative Working Group in 1993 to assist the development and negotiation of agreed proposals. Departments consulted but not on the Working Group were Justice and Te Puni Kokiri (declined); and Treasury.

  Working Group participants were: (a) Departmental: Agriculture, Conservation, Environment, Forestry, Internal Affairs; (Transport agreed to be represented by Transit NZ); (b) Non-Departmental: Federated Farmers, Forest Owners' Association, Farm Forestry Association, Local Government Association and the Electricity Engineers' Association (including Trans Power).

Views of participants/issues?

- DOC was concerned that it should not face any additional expenditure over the present situation (where they have informal local agreements with the energy companies and their predecessors under which the latter generally absorb all costs). *Local agreements are to be compulsory, where the tree owner is a public authority.*

- Forestry, and Farm Forestry interests in particular (and a number of the personal submissions on the 1994 discussion paper), object to the constraints on land use caused by the presence of existing lines. Because these are now owned by commercial enterprises, they do not believe the lines should have any priority over other use of the land. They seek compensation or rentals from the energy companies for such existing lines, or the movement of the lines at the line owner's expense. *(The Act provides to the contrary in both matters.) These issues are discussed in more detail in the Annex to the main paper.*

- The Electricity industry want the previous statutory power of entry restored. They have formally requested that the Electricity Act be amended. *This will be handled separately.* They do not believe the proposed regime will be effective in the absence of an entry power to actually ensure the tree is trimmed. They are sceptical about the deterrent effect of the fines and damages provisions. Their experience under the previous legislation (where damages were also provided for) is that it is generally fruitless to pursue the costs of damage, because the scale is likely to be beyond the resources of ordinary persons.

ANNEX II

ISSUES RAISED IN CONSULTATIONS, AND OFFICIALS' RESPONSES

1. **No need for regulations:** The Rural Electrical Reticulation Council sees no need for regulations, saying that the common law situation is adequate, and it has not been demonstrated that insurmountable problems have occurred in the absence of regulations. Implicitly the argument is that electricity distributors should establish sufficient rapport with tree owners to take care of any problem, and thus that suffering the costs and risks of the common law situation would be a suitable penalty for distributors' failure in this regard. *This approach however ignores valid public safety concerns, for which preventive action within clear guidelines is appropriate.*

2. **Potential conflict with other legislation applying to public land:** The electricity and public works legislation always placed the primary responsibility on landowners to keep their trees from hazarding electric lines. However in the case of Conservation and Reserves land, other legislation protects the trees. On the road reserve, where an estimated 80% of the distribution network is located, the Local Government and Transit New Zealand Acts also apply.

3. On the road reserve, road controlling authorities may have planted trees for bank stability, or for other traffic-related reasons, or Councils may have planted trees on the road reserve for amenity reasons. These situations also involve tree trimming, unrelated to the presence of electric lines in their vicinity. The core issue is then the allocation of the costs of trimming, where there are multiple beneficiaries.

4. Over the years of the previous legislation, local agreements (most of them informal) have been reached about trimming or clearing work, and the allocation of costs, between the former electrical supply authorities and the Department of Conservation and/or the local Councils. Concern was expressed in the consultations that these agreements might be overturned if the regulations were to adopt a strict allocation of cost responsibility to tree ownership.

5. *Officials believe the proposed provisions in the regulations, to require "local agreements" between electricity distributors and public authority tree owners, should enable these issues to be resolved pragmatically, in light of the local circumstances.*

6 **Costs and compensation for existing works on private land:** Submissions from farming and forestry interests on the 1994 discussion paper raised a series of objections to the propositions that the landowner should have any responsibility, or bear any costs, relating to keeping trees clear of lines. They also sought compensation from electricity distributors for the costs of land use foregone, by the requirements to provide land corridors for the lines. The issues were also discussed in the Working Group.

7. (The discussion paper had proposed the allocation of costs to the tree owner. This was in line with the primary responsibilities of landowners under the previous legislation. It also reflected the fact that the distributors no longer have the power to enter land and trim the tree themselves - for which in the past they generally absorbed the costs - where the landowner had refused to do so.)

8. The arguments put forward for compensation included that the line(s) had been put in against the wishes of the landowner; and that compensation paid under the Public Works Act did not recognise the ongoing effect on land and crop management. Forestry interests suggested that additional fire risk and the inability to use the line corridor represented significant economic loss. The general thrust was that, now the energy companies were no longer public authorities but profit-making commercial entities, their lines (i.e. even their existing lines) should not have a position of privilege, and rentals or compensation should be payable.

9. *Section 22 of the Act however provides, in respect of "existing works" that "no person other than the owner of the works shall have any interest in any such works by reason only of having an interest in the land." Section 23 provides for the owner of those works to have access as of right to the land to inspect, maintain and operate them. Thus, as the landowner has no ownership rights to the works whatever, and may not withhold permission for the owner of the works to enter the land for the purposes of section 23, there is no basis for a landowner to charge rentals for the presence of such works.*

10. In the Working Group, officials outlined the policy background to these provisions. *When lines were initially put in place, the landowner at the time did either receive compensation (under the Public Works Act) for the "injurious affection" of the land, or "in kind", or, as quite often happened, waived the option of seeking payment in recognition of the benefits that electrical reticulation brought to the wider community of the area. The Courts in the past have however declined to make awards for "foregone profits" in cases relating to compensation under the Public Works Act.*

11. *It is taken as given that thereafter the value of the land adjusted to reflect the existence of lines, and that the price of the land in any subsequent sale reflected the encumbrance (and its effects on land use), which would be taken into account by the purchaser in making the decision to buy. Thus were any compensation or rental to be paid now for existing lines, this would constitute a double-payment to the original landowners, if they still own the property, or a "windfall" to any subsequent owner.*

12. In some cases officials are given to understand that the landowners want the line to be moved but are unwilling to pay for this as stipulated by section 35 of the Act. It seems possible some landowners may be using their refusal to trim, and the creation of hazard, as leverage to force the distributor to move the line.

13. The submissions also suggested that the power company that should bear all costs of trimming the trees. *Officials noted that it is the landowner who owns the trees, and even in the absence of regulations they would be open to suit under common law, where their property damaged that of a power company lawfully fixed on the land. Legislation since the turn of the century has recognised this responsibility. Where there has been a change is that Electricity Act 1992 took away the power of electricity companies compulsorily to enter land and trim trees hazarding their lines, where the landowner had refused to do so. Generally, where the entry power was exercised, the former electrical supply authorities had absorbed the costs. The purpose of the proposed regulations is to make more specific the rights and obligations of both landowners and power companies, but the regulations do not affect the fundamental responsibilities and liabilities of landowners associated with trees on their property.*

14. **Conclusions: Costs of trimming:** Officials believe that the current proposals relating to local agreements for tree trimming where land access is granted (which are amended from those put forward in the Ministry of Commerce discussion paper) may assist the resolution of some of the "cost" problems.

15. **The rental and compensation issues raised** are however outside the scope of the proposed regulations. It is nevertheless clear from the submissions that opposition to the present provisions for "existing works" in sections 22 and 35 of the Act is keenly felt, and this spills over into adverse reaction to proposals that landowners should have responsibility, or meet any costs, for keeping trees clear of electric lines on their property.

THE CROWN'S POLICY PROPOSALS ON TREATY CLAIMS INVOLVING PUBLIC WORKS ACQUISITIONS

SUBMISSION ON BEHALF OF
MAUNGAHARURU TANGITU SOCIETY INC

BY

RICHARD P BOAST and DEBORAH A EDMUNDS

April 1996

1.0 Introduction

1.1. This is a submission on *The Crown's Policy Proposals on Treaty Claims Involving Public Works Acquisitions.* The proposals have been released in the name of the Minister in Charge of Treaty of Waitangi Negotiations and we assume that the proposals have been drafted by staff of the Office of Treaty Settlements.

1.2. This submission has been prepared by Richard Boast, Senior Lecturer in Law at Victoria University of Wellington, and Deborah Edmunds, Partner, Kensington Swan, Barristers and Solicitors, Wellington, on behalf of the Maungaharuru-Tangitu Incorporation. This Incorporation has been established as the governing claimant organisation for the confiscation of the Mohaka-Waikare block in Hawke's Bay. This is a major claim involving raupatu, Crown purchasing and public works issues, for which the research is now substantially complete and which will soon be set down for hearing by the Waitangi Tribunal. Public works issues affecting the claimants include the taking of land for road construction at Tangoio, the compulsory establishment of access roads by the Native Land Court, land taken at Lake Tutira for a Ministry of Works construction camp, and land taken adjacent to the Napier-Taupo road for road deviations, bridge construction and so on.

1.3. We object to the Proposals on several levels. Firstly we query the need for a specific policy on public works acquisitions when the origins and grounds of compulsory acquisitions are so diverse. The nature of the acquisitions will differ depending on the specific legislation involved and the overall consequences will depend on the surrounding circumstances and/or other adverse Crown actions. Secondly we feel that it is premature to attempt to formulate such a policy when so little research work has been done on the actual effects of Public Works legislation on Maori communities. Thirdly there are a number specific issues which are of concern.

2.0 General concerns

2.1. It is very unclear quite what the scope of the *Proposals* might be. The title of the proposal document indicates that the policies relate to "public works acquisitions". The introduction mentions "public works grievances" and "public works takings". Apparently then, the intention is to cover all those situations where land has been "acquired" or "taken" (the two terms are *not* synonymous) for "public works". This, in law, will include land in a number of categories:

> (a). Maori freehold taken by the Crown or local bodies under the specific Public Works legislation for public works (such as roading, power station construction, military purposes etc.);

(b). Maori freehold land acquired by the Crown under express powers of acquisition in Departmental legislation or other public works empowering legislation (eg Coal Mines Act 1979);

(c). Land set aside for roads etc by the Maori Land Court under the Native Lands/Maori Affairs legislation;

(d). Donations of Maori land to the Crown by Maori in the expectation of roads and other public works being constructed by the Crown or local bodies;

The *Proposals* seem to be written on the assumption that only (a) listed above is of any significance, but this is far from the case.

2.2. The impact of the Public Works legislation (and other statutes which have allowed compulsory taking of Maori freehold land for public purposes, such as the Scenery Preservation Acts) on Maori land is a very complex matter. Hundreds, perhaps thousands of parcels of land have been affected. The legislative history is itself extremely complex and has never been thoroughly researched. It is not correct to state that "public works claims tend to involve small parcels of land of relatively modest value". For example entire Maori-owned thermal areas at Waiotapu, Awakeri and Orakeikorako have been compulsorily acquired, and these areas can hardly be characterised as small areas of modest value. Indeed "value" is a culturally relative matter and some places that have been taken may have a highly significant cultural value to the local Maori people. Our main point, however, is that it is essential to recognise the sheer scale and complexity of this subject. In our view not enough is known about it and in the absence of the necessary detailed consideration of the question it is premature to be formulating policies at this stage. We do not believe that the subject is well enough understood for policies to be formulated and general settlements contemplated at the present time.

2.3. One aspect of this complexity are the many uncertainties relating to the legal effects of the Public Works legislation. The law is in many respects still unsettled. There is, for example, real doubt as to whether many takings were effective to extinguish Maori ownership of minerals. This is not a remote possibility but actually arose at Maioro (Waikato Heads) at the time when Nganeko Minhinnick and Ngati Te Ata were protesting about the discovery of human skeletal material in the conveyers conveying slurry form Maioro to the Glenbrook steel mill. The present authors drew the attention of the Waitangi Tribunal and the responsible Ministers to the fact that the Maori people of Maioro had not lost mineral ownership when their lands were compulsorily taken for forestry purposes in the 1950s. In fact the ironsands still arguably belonged to Ngati Te Ata. Complaints about mining disturbing burial sites necessitated negotiations with the Crown in recent years.

2.4. A further problem is that the effect of Public Works Acts takings is impossible to assess in isolation. Often taking of land under the Public Works Acts is simply but one aspect of a long history of acts or omissions of the Crown relating to a particular area. An example of this would be the compulsory taking of land at Tangoio for roading purposes in the 1940s. The areas that

were taken happened to be one of the few remaining parcels in Maori ownership at the end of a long history of confiscation and carelessly conducted Crown purchasing.

2.5. We would also stress that when it comes to Maori land the process of "taking" land is rather different from the taking of private land, and we wonder whether the authors of the Proposals really do fully comprehend these differences. In addition Maori land and resources have been subject to several regimes of compulsory or "forced" acquisitions. The scope of all these regimes should be considered together in any policy paper which purports to consider Treaty obligations to Maori in respect of public works or "public good" acquisitions. Apart from the Public Works legislation, other regimes include:

(a). The Maori Land Court was given powers under such statutes as the Native Lands Acts 1909 and 1931 to set aside parcels of Maori land for roading during partitions, or for making orders setting aside roads and road lines across Maori land for the benefit of non-Maori landowners or the Crown. For example in the 1940s a private forestry company named Gardners obtained orders from the Maori Land Court so that roading access to Gardners' own property across Maori freehold land in the Tarawera block could be made. This was done despite the strenuous objections of the owners. The Public Works Act was not used during this process but from the point of view of Maori owners the process was just as coercive as if the Public Works Act had been used. In our view it is essential that the scope of "takings" of Maori land be clarified fully before any proposal regarding settlement can even be entertained. The existing document is far to slight and lightweight a document for this purpose. We believe that a full review of the history of powers of taking Maori land is essential as a basic prerequisite. We would argue further that a broad, rather than a narrow, approach ought to be taken. If it is intended to limit the Proposals strictly to takings of Maori land under the ordinary processes of the Public Works Act the reality is that many, perhaps most, such takings may be left out of account.

(b). Various statutes have compulsorily taken or expropriated resources for "Public good" purposes such as the Scenery Preservation Acts.

(c). Planning or environmental legislation has controlled the use of land and resources to the extent that the value of that land and resources have diminished.

(d). Anomalous provisions, such as the provisions in the Geothermal Energy Act 1953 where, to save itself the costs of compulsorily taking Maori land near Kawerau the Crown granted itself rights to take equivalents of profits a prendre (i.e. rights to enter land for the purpose of taking or extracting a benefit, in this case geothermal energy). Another example might be the recent legislation introduced into the House to circumvent a finding by the Maori Land Court that geothermal wells on Maori land were fixtures and arguably to avoid the necessity to negotiate acess rights in an open market.

2.6. One last aspect of the complexity of the subject is that there are a number of instances

where Maori donated land to the Crown for the establishment of roads and other public works. Not always were the promised roads constructed and yet the land has remained in the hands of the Crown. In the 1920s the Tuhoe donated to the Crown 60,000 acres of lands as a contribution to the costs of estbalishing arterial roads. The arterial road up the Waimana valley to Maungapohatu and Te Waiiti was never constructed (see J. Binney et al, *Mihaia: the prophet Rua Kenana and his community at Maungapohatu,* Oxford University Press, Wellington, 1979.) Is it intended that the current *Proposals* relate to situations of this kind?

2.6. In our view the current document gives little sign that its anonymous authors have any grasp of the scale and complexity of the subject they are dealing with. A full enquiry into the subject of Maori land and public works is necessary before any policy proposal can even be considered. Should such a proposal should consider the extent to which other compulsory or "forced" acquisition regimes are analogous and the reasons for that approach.

3.0 The Treaty of Waitangi and compulsory acquisition

3.1. In the introduction to the *Proposals* it is stated that "the Crown does not accept that public works takings, under various pieces of public works legislation since 1840, are Treaty breaches per se." This statement is too broadly phrased. We consider that in some circumstances compulsory acquisition per se *is* contrary to the Treaty of Waitangi. It depends on the land and resource taken and its significance to the tangata whenua. In our view it is certainly the case that compulsory taking of a prized piece of land or water in the face of strenuous local Maori objection would be contrary to the Treaty of Waitangi. With other parcels of land it may be that a compulsory taking might not be a breach of the Treaty.

3.2 It appears that the policy proposal document has been premised on the basis that "Treaty breach" equates to a "bad government" issue. The document expressly considers whether Crown action give rise to a "Treaty breach ... or good government issues" in particular circumstances. In law, breach by the Crown of its constitutional and statutory duties and breach of its Treaty duties do not equate. It is not clear what the authors of the policy document mean by "good government" and what they consider to be the extent of such a duty. In law the Crown is bound to comply with its constitutional law and its statutory powers and functions. There is a presumption at common law that no government should take private property without the payment of proper compensation. In the United States of America this concept is enshrined in the Constitution. In New Zealand however this presumption has been displaced many times by express statutory powers. As a consequence the Crown has been able to take Maori land and resources without adequate (or sometimes any) compensation quite legally. However this does not mean that a breach of the Crown's duties under the Treaty would not have occurred.

3.3. It is our view, therefore, that the "takings" issue does not go simply to the matters of compensation and consultation discussed in the *Proposals.* There are some areas and places that simply should not have been taken if the tangata whenua were opposed to it. Some criteria need to be formulated as to when compulsory taking is, and is not, appropriate. That this problem is not addressed in the *Proposals* is in our view a serious deficiency.

4.0. Lack of adequate compensation

4.1. It is stated in the *Proposals* that a "well-founded" grievance "may" exist where "the Crown did not pay Maori landowners adequate (or any) compensation (based on current market value) for their land at the time it acquired it for a public work". We certainly accept that the failure of the Crown to pay any or adequate compensation for takings of Maori land is a serious problem. We are aware of a number of instances where no compensation whatever was paid (as, for instance, with the islands in Napier lagoon). However this statement is also phrased in a very broad and general way and does not engage with the underlying problem or "current market value" in the context of Maori freehold land.

4.2. The matter of payment of compensation for takings of Maori land cannot be considered in isolation from the broader problems associated with Maori freehold land and overcrowded titles. The "market value" of such land would often be, in the eyes of valuers applying principles appropriate for General (European) land, very low, indeed the land could be regarded as virtually worthless. The land could be improperly surveyed, lack a registrable title, have many owners, and be virtually worthless as a security for obtaining mortgage finance. A valuer, taking these factors into account, could hardly be blamed for giving the land a very low market valuation, but to do so in fact only compounds the problems Maori have faced in managing Maori freehold land. In many cases these problems can be attributed to failures by the Crown to carry out undertakings given to Maori or other Treaty breaches. This matter was considered by the Waitangi Tribunal in its *Manukau Report* (1985) when dealing with the taking of the Te Papawhero, Waiaraponia, Te Kuo and Tangitangina blocks. These blocks were taken in 1939 and 1959. At that time the descendants of the original owners were unknown. No compensation was paid until 1972. For one block of 30 acres, Waiaraponia, the compensation paid was $58 (plus interest).This paltry sum may be said to represent a "market" valuation, but only because of the extremely difficult and confused legal situation affecting these blocks.

4.3. A further issue is that the criterion of "market values" may not reflect the value of a particular parcel to tangata whenua. An example is the thermal area at Orakeikorako, which comprises the taonga of the hot springs and thermal features of the Ngati Tahu people of the North Taupo-Reporoa area. (Such thermal areas have been found to be a taonga protected by the Treaty by the Waitangi Tribunal in its *Ngawha* and *Te Arawa* reports). Such spiritual and cultural values as well as the direct economic value of the resource to Maori as an alterntive source of heating and cooking energy, however, are not always reflected in the "market" price ; indeed the very features which may make it especially valuable to local Maori might actually *decrease* its "market" value in the eyes of a valuer. "Value" is a culturally relative concept, and the insistence on "market" values is actually to impose a culturally-specific criterion of value on Maori without consultation. Payment of "market" value may well be legal in terms of the formal requirements of the Public Works Act but that is a different matter from the Crown's obligations under the Treaty of Waitangi.

4.4. For this reason we are resistant to accepting a 'fair market value' criterion. If this means that the artificial dimunition of value due to land tenure problems is not going to be taken into

account or the ignoring of other "values" then we object strongly to this criterion.

5.0. Adequate consultation

5.1. We have no real difficulty with this section of the *Proposals*. We would however stress that the problem of "consultation" is subordinate to the basic point that compulsory taking of Maori freehold land is inextricably linked to the general law of Maori land tenure. Thus for many years the practice was for payments for takings of Maori freehold land to be paid not to the owners but to the Maori Trustee. It was then apparently up to the owners to lodge a claim to the money, and failure to do so could mean that a claim could lapse. "Consultation" (or the lack of it) depended on special processes applied by law only to Maori freehold land. The real problem is not so much "consultation" but the fairness and adequacy of the whole process of taking Maori land. As we mentioned at the outset no really adequate research has so far been done on the evolution of the law and policy.

5.2 The policy document suggests that where there had been inadequate consultation and the taking resulted in one of a number of negative impacts on Maori, some fiscal redress may be appropriate. However we find it illogical that lack of consultation followed by compulsory acquisition should give rise to fiscal redress, but mere compulsory acquisition in the same circumstances should not, despite the same consequences occurring. In the context of compulsory acquisition, "consultation" as a Treaty principle (if it is one) appears to have little relevance and is of less significance than the Treaty principle of active protection.

6.0. Failure to offer back surplus land

6.1. At page three of the policy proposal document the statement is made that "no Treaty breach exists" where the Crown *pre-1981* failed to offer back land previously taken for a public work to former Maori or non-Maori owners or their successors. The policy proposal appears to suggest that since the offer back obligation did not have any counterpart in earlier legislation, the Crown did not have any stautory duty to offer back and therefore that no Treaty breach occurred for a failure to offer back. As already discussed in paragraph 3.2. above the policy document appears to confuse the formal legal duties of the Crown with its duties under the Treaty. It does not follow that since there was no breach of the Crown's statutory duties, there is no corresponding breach of its duties under the Treaty.

6.2 It cannot be the case that even though there was no statutory duty to offer land back there was no Treaty duty to do the same. This issue was raised prior to the 1981 Act in respect of the Raglan Golf Course when the Crown having taken land for defense purposes planned to dispose of the land to the local golf course. This has been considered by commentators to be one of the reasons for the 1981 provisions. We do not see that it can be said, in Treaty terms, that a failure to offer back before 1981 can *never* amount to a breach of the Treaty. It must be a matter of consideration on a case by case basis.

6.3 At page 3 the statement is made, concerning post-1981 disposals, that the Crown intends

to "further consider" whether grievances exist for those situations where the Crown has failed to offer back land to Maori owners for reasons *other than* the specified exemptions in section 40. In other words, apparently, it will be "considered" whether there is a "grievance" where the Crown has for some reason failed to comply with the Public Works Act. This is a startling statement. In such a situation there will be nothing to "consider" as it will be clear that the Crown has acted unlawfully. If the Crown has decided not to offer back on grounds other than those in section 40, it is well settled law that the former owners will have a cause of action at common law, by means of a judicial review action. It will not be necessary for them to establish any Treaty breach because the Crown officer concerned (the Chief Executive of the Department of Lands and Survey) will have been in breach of his/her statutory duty and his/her decision will be reviewable and the decision may be overtuend in the ordinary courts. Thus the proposition advanced hardly amounts to any kind of concession: the Crown must always comply with its ordinary statutory duties.

6.4 In terms of Treaty duties the issues may or may not go beyond the Crown's existing statutory obligations; whether it does or not will depend on the circumstances of each case.

7.0 Actions of local authorities and statutory bodies

7.1. The statement is made that "the Crown is not responsible for the acts or omissions of local authorities or statutory bodies". We doubt that such a broad formulation is accordance with the Crown's obligations under the Treaty of Waitangi. The Crown after all has established the statutory powers of local authorities enabling them to take land. Such powers are in fact a delegation from the Crown pursuant to statute. Local authorities exist only by statute and have no inherent or common law rights to take land or extinguish Maori title. If the terms of such a delegation are inappropriate, if the supervision of local authorities was inadequate, if the Crown failed to adequate redress against Maori complaints relating to local body takings we fail to see why the Crown is entitled to wholly absolve itself of responsibility. The Crown can make statements of this kind but this does not mean that they are agreed to, that they reflect the law or that the Courts or the Waitangi Tribunal will accept the Crown's position.

7.2 The argumemt has often been made in the Waitangi Tribunal that certain "non-Crown" bodies such as Harbour Boards and the Native Land Court cannot be considered by the Waitangi Tribunal which is empowered only to have regard to "acts or omissions of the Crown". These arguments have proved unsuccessful. The Tribunal's view is that the Crown is answerable for the statutory framework it has established to start with. The Crown cannot escape critical scrutiny of the Native Lands Acts just because the legislation transferred certain functions to an independent court; and it seems obvious to us that the same reasoning must apply to legislation vesting powers of compulsory acquisition in local bodies.

8.0. Offer back at current market value

8.1. Again statements are made which reduce a very complex legal and historical situation to a simplistic generalisation that no government could realistically expect affected parties to

accept. Sometimes offering back at current valuations will be appropriate and at other times it certainly will not be. Often the land will have come into the Crown's hands at a very low or practically zero valuation due to the tenurial problems associated with Maori freehold land. An example is the block described above for which the Crown paid compensation of $58. Freed of its tenurial complexities such a block in the Crown's hands at the present time might have a very substantial valuation which bears no relation to what the Crown paid for it. A much fairer criterion in the case of Maori freehold land would be that the original owners are entitled to have it back at the inflation-adjusted price of what the Crown paid for it. Sometimes this will equate to current market values, although usually it will amount to far less. We do not see that the Crown should benefit financially through takings of Maori land.

9.0 Summary

It is encouraging that the Crown has begun to consider the issue of takings of Maori land for public works. The matter however needs much fuller and more careful consideration. The legal history is complicated and not well understood. We think it is impossible for Policy proposals on such a complex legal problem to be formulated without a full understanding of the history of the subject and a proper analysis of the law by persons competent to do so.

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Richard P. Boast

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Deborah A. Edmunds