CROWN FOREST ASSETS ACT 1989

RESEARCH REPORT

COMMISSIONED BY THE WAITANGI TRIBUNAL

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LAW

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SECTION 1 - INTRODUCTION

Purpose of Report

1. The Crown Forest Assets Act 1989 amended the Treaty of Waitangi Act 1975 to permit the Tribunal to make recommendations binding on the Crown over the Crown's exotic forest estate. The Waitangi Tribunal has concluded that the Muriwhenua land claims are well founded[1]. The Tribunal advised the parties that in its preliminary opinion recommendations should be made, and should include proposals for the transfer of substantial property. The Tribunal noted that, unless the parties agree otherwise, this would include binding recommendations in respect of Crown forests[2]. In order to have a better understanding of some of the practical and legal issues that might arise upon the issue of such a recommendation the Tribunal has commissioned this research report. The report looks at various aspects of the Crown Forests Assets Act 1989 ("the Act").

2. The direction from the Waitangi Tribunal commissioning this report is attached as Appendix 8. The report follows fairly closely the layout and structure envisaged by the research direction. However, in the course of preparing the report we have, in the interests of logical development and sequential flow, varied some of the order in which matters have been addressed.

Structure of the Report

3. We give a brief overview of the structure of the report as follows. Section 2 of the report identifies, in their context, the material events from 1985 to the enactment of the Act and the grant of the Aupouri Crown forestry licence. In this section we comment on the Parliamentary process, the subsequent forest sales and creation of the Crown forestry licences. The section concludes with a brief overview of the Crown Forestry Rental Trust, its purpose and functions. Section 3 of the report is a detailed overview of the Act, its purpose and functions. In this section we also identify the additional powers and functions of the Tribunal granted to it following enactment of the Act as well as its more general powers as a Commission of Inquiry and under the Treaty of Waitangi Act.

4. In section 4 of the report we discuss and identify the legal nature of the licence by reference to the appropriate provisions of the Act. We cover matters such as the registration of licences in the Land Titles Office and transferability of the licences. We then give a fairly detailed description and comment on the terms and structure of a Crown forestry licence by reference to the Aupouri Crown forestry licence. We also briefly consider legal developments (such as reported decisions and associated amendments to the Act).

5. Section 5 deals with matters of potential relevance to the Tribunal prior to making a binding recommendation. We discuss the role of the Tribunal should there be an

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1 Waitangi Tribunal, The Muriwhenua Land Report 1997, Wellington, GP Publications, p404.
2 Ibid.

impasse between the parties in terms of agreement on fundamental matters pertaining to the calculation of the compensation element. We discuss issues such as the status of the land on return. We consider the basis on which the Tribunal might want to consider issues such governance and accountability processes and procedures of the entity in whom the land will vest.

6. Section 6 contains a reasonably detailed description and discussion on aspects of the compensation element payable to Maori by the Crown on a return of licensed land. We illustrate the differences between the three compensation options and discuss why the claimants might prefer one over another. We identify some of the technical aspects of the compensation options and how these might lead to differences of view between the Crown and the claimants both in regard to the Aupouri Crown forestry licence and in terms of other Crown forestry licences. Finally, we identify the information requirements which we anticipate claimants will need to properly assess which of the three compensation options they might choose.

7. Section 7 of the report identifies and discusses the various issues that might arise when ownership of the land passes to Maori. For example, how does the Crown forestry licence handle the process by which both legal and physical possession of the land will be returned to Maori. Other aspects such as the position of any registered public access easements and the manner in which licence fees (payable to Maori on a return) will be adjusted as the land is progressively returned are considered.

8. In the appendices we have inserted copies of important documents. (For example the Agreement between the Crown, the New Zealand Maori Council and the Federation of Maori Authorities, being the basis by which the Crown obtained the support of Maori to the enactment of the Act.) Other appendices cover subsidiary matters. For example, Appendix 9 sets out the detail of the protective covenants and public access easements attached to the Aupouri Crown forestry licence. Appendix 11 contains a schematic location map of Aupouri Forest taken from the Crown's 1989 Sale Information Memorandum.

Exclusions

In order to provide an appropriate degree of focus certain matters were excluded from the ambit of the report. These matters are set out in paragraph 1(c) of the Research Direction (see Appendix 8).

SECTION 2 - CROWN FOREST ASSETS ACT 1989 - BACKGROUND

Introduction

In this section, by reference to major events and an overview of the process, we briefly describe the events that led to the enactment of the Act.

Background

1. In the mid-1980s, the Government decided to proceed on a programme of corporatisation and privatisation of Government departments that had a commercial purpose. The New Zealand Forest Service with its extensive exotic forest resource was a logical candidate. The principal piece of legislation to give effect to the Government's policy of corporatisation was introduced into the House in the form of the State Owned Enterprises Bill ("SOE Bill") in September 1986. The terms of the Bill triggered Maori opposition to the Government's plan. We discuss this and related matters leading up to the enactment of the Act and the grant of Crown forestry licences below. At the end of this section we provide a timeline of significant dates and events.

Legal Challenges by Maori

Waitangi Tribunal

2. Following the introduction of the SOE Bill, the Waitangi Tribunal issued an interim report on a series of claims known as the Muriwhenua claim (see Appendix One). The Tribunal's interim report was in response to submissions from counsel for claimants. Upon considering the submissions the Tribunal formed the view that the claimants were likely to be prejudicially affected by the proposed legislation. The Tribunal expressed the view that the transfer of Crown land to State Owned Enterprises, such as the Forestry Corporation, would result in the land ceasing to be Crown land, and the ability of the Crown to return the land to Maori, in accordance with a subsequent Tribunal recommendation, would be lost. The Tribunal's report recommended that the Crown not transfer land within the rohe of the claimants as envisaged by the SOE Bill, pending the outcome of the claim before the Tribunal. The Tribunal expressed concerns regarding the impact of the SOE Bill on existing claims and future claims. The Tribunal queried whether the SOE Bill itself was contrary to the principles of the Treaty. The Tribunal recommended amendments that continued the responsibility of the Crown for the return of land and restricted alienations by the proposed State Owned Enterprises.

State Owned Enterprises Act 1986

3. As a result the Bill was amended by the addition of new provisions including what are now sections 9 and 27. Section 9 provides that nothing in the State Owned Enterprises Act ("SOE Act") permits the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi. Section 27 deals with land which was subject to a claim made on or before 18 December 1986 and put in place certain

protective mechanisms. The SOE Act received the Royal Assent on 18 December 1986.

New Zealand Maori Council

4. In the landmark case of *New Zealand Maori Council v Attorney-General*[1] the New Zealand Maori Council (NZMC") sought a ruling that section 27 of the SOE Act was insufficient protection for the rights guaranteed under section 9 of that Act for claims lodged **after** 18 December 1986 and for future claims yet to be lodged. In a unanimous judgment the Court of Appeal found in NZMC's favour. The transfer of assets to State Owned Enterprises without any system to consider whether the transfers of particular assets or categories of assets was inconsistent with the principles of the Treaty of Waitangi and unlawful. The court directed the Crown to prepare a scheme of safeguards protecting existing or foreseeable claims against lands intended to be transferred to State Owned Enterprises. A declaration was also made that in the meantime the Crown would not take any further action under the SOE Act in relation to those assets. As a precaution, in case anything unforeseen should arise, leave to reapply was reserved to the NZMC.

The Compromise

5. Following discussion and subsequent agreement between the Crown and the Maori Council, the Government introduced the Treaty of Waitangi (State Enterprises) Bill into the House in December 1987. The Minister of Justice, in his introductory speech noted that the Bill made amendments to a number of pieces of legislation including the Treaty of Waitangi Act 1975 and the SOE Act. The principal effect of these amendments was to provide a system to protect existing and likely future claims before the Waitangi Tribunal relating to Crown land. Further, the Bill provided that following a recommendation of the Waitangi Tribunal the Crown shall resume ownership of Crown land that had been transferred to a State Owned Enterprise and transfer it to Maori. The Bill received the Royal Assent on 30 June 1988.

Forestry Asset Sales

6. In his budget speech in July 1988, the Minister of Finance announced the Government's intention to sell the State's commercial forestry assets.

Forestry Working Group

7. In August 1988 the Government established the Forestry Working Group ("FWG") to report to it on the most appropriate form by which the forestry assets could be sold at maximum value. In its report in October 1988, the FWG carefully considered the policy implications of the Treaty of Waitangi in terms of the proposed sale and noted that they were "highly significant" (see Appendix Two). In essence, the FWG proposed that ownership of the freehold estate in land be separated from cutting

[1] [1987] 1 NZLR 441

rights over the forest for a given period. Should a recommendation issue from the Waitangi Tribunal, the ownership of the freehold estate in land could be returned to the Maori claimants. In addition, the Waitangi Tribunal should be free to recommend compensation by the Crown to a successful claimant for the inability to use the returned land pending expiration of the cutting rights. The report concluded by recommending that the Crown initiate, in the spirit of partnership, discussions with Maori over sale arrangements that would take account of both a purchaser's need for security of tenure and the protection of Maori claimants by the Waitangi Tribunal.

8. The Government proposed a national hui in early 1989 to discuss the proposed asset sale. At the hui itself, the Government made it clear that the actual decision to sell the forestry assets was not negotiable.

New Zealand Maori Council

9. Accordingly, in February 1989, the NZMC applied to the Court of Appeal for a declaration that the Government's proposal to dispose of the forestry assets was inconsistent with the 1987 judgment of the Court of Appeal. As a preliminary question, the Crown argued that NZMC's application did not fall within the scope of the leave reserved by the Court of Appeal in 1987. The Court of Appeal found in NZMC's favour, and expressed the wish that the current dispute would be resolved in the spirit of partnership in accordance with the principles of the Treaty[2].

Agreement by Maori and the Crown

July 1989 Agreement

10. Subsequent to this decision, a Treasury report to the Minister for State Owned Enterprises suggested that the Federation of Maori Authorities Inc ("FOMA") could usefully assist in reaching an agreement[3]. In a remarkably short time, NZMC, FOMA and the Crown composed a short but comprehensive agreement which was duly executed on 20 July 1989 ("July 89 Agreement") (see Appendix Three). This Agreement contemplated and set out the framework for legislation to enable the Crown to sell the exotic forest resource in a manner that met Maori concerns. That legislation became the Crown Forest Assets Act 1989 ("the Act").

11. In essence, the Act puts in place the parties' agreement to a system whereby:

(a) Crown forestry assets (but not the underlying land) may be transferred to third parties;

(b) the legal nature of the interest that is transferred is defined (Crown forestry licence);

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[2] *New Zealand Maori Council v Attorney General* [1989] 2 NZLR 142.

[3] Birchfield R J, and Grant I .F: *"Out of the Woods - The Restructuring and Sale of New Zealand's State Forests"* Wellington, GP Publications, 1993, p179.

(c) the rights and obligations of licence holders are defined;

(d) claims by Maori under the Treaty of Waitangi concerning licensed land are protected, funded and processed;

(e) in the case of successful claims by Maori, land subject to a Crown forestry licence may be returned to Maori at the direction of the Tribunal;

(f) additional compensation may also be payable by the Crown.

12. The parties made a further agreement dated 17 October 1989 by way of Deed. The Crown agreed not to register Crown forest land not already registered under the Land Transfer Act 1952 pending settlement of Treaty claims so as to better protect Maori customary land claims (see Appendix 4).

13. The Crown was now free to sell its exotic forest resource. In 1990, the first round of sales reaped over $1 billion. Aupouri Forest was sold in this round.

Implementing the Agreement

14. In the balance of this section we provide some brief comments on the Parliamentary process involving the Act, provide some further details on the implementation of the Act; the sale process; and the creation of the Crown Forestry Rental Trust

The Parliamentary Process

15. The Crown Forest Assets Bill was introduced into the House on 27 July 1989 by the Minister for State Owned Enterprises. The Bill immediately generated controversy as it was introduced under urgency on budget night without going through the usual process of public submissions and scrutiny by a select committee. In his introductory speech, the Minister for State Owned Enterprises referred in some detail to the July 1989 Agreement and how the Bill would implement this agreement. The Minister also expressed satisfaction on the basis that without such an agreement between Crown and Maori the value from sales of Crown forestry assets might have been discounted by as much as twenty percent because of purchasers' concerns about tenure.[4]

16. In reply, a number of Opposition MPs expressed concerns related to conservation issues and the absence of a requirement to replant the land.

17. The Bill was introduced and read for the first time. An Opposition request to have the Bill referred to the Planning and Development Select Committee was overruled. The House then commenced reading the Bill for a second time. After some further debate the Leader of the House moved that the debate be adjourned to the next sitting day.

[4] S Rodger, 27 July 1989, NZPD, 1989, p11626.

18. In the event, the debate was eventually resumed on 5 October 1989. The Bill, at times under urgency, moved rapidly through the remainder of the Parliamentary process with the third and final reading being completed on 19 October. The Act received the Royal Assent on 25 October and came into force on that day.

The Debate

19. A consideration of the New Zealand Parliamentary Debates[5] for the relevant period highlights a number of consistent themes. These included:

(a) ***Planting:*** Whether or not there were adequate requirements to replant forests after harvesting. The House was advised that in forests with unstable soil conditions, special conditions would be attached to the Crown forestry licences requiring replanting. For example, sand dune forests such as Aupouri Forest;

(b) ***Other Conservation Issues:*** The House was advised that conservation and environmental issues would be dealt with in detail in the Crown forestry licences by inserting conservation covenants which would remain in place even if a licence was sold. That is, they were to be attached to the land and not to the licence as such. Subsequent supplementary order papers made a number of amendments to the Bill on environmental and conservation matters;

(c) ***Price:*** Whether or not the Government would receive a price that fully reflected the value of the assets;

(d) ***Taxation:*** Taxation implications should additional compensation become payable to Maori in terms of the First Schedule.

Scheme of the Act

20. In general terms, the passage of the Act enabled the Crown to:

(a) meet its objectives of completing the sale process;

(b) meet the Crown's contractual commitments (by amendment to the Treaty of Waitangi Act 1975) to give the Tribunal additional powers and functions in terms of Crown forestry assets;

(c) put in place measures to have its exotic forest resource managed pending sale;

(d) provide the framework for the subsequent development of the Crown forestry licence; and

[5] 27 July to 19 October 1989: 11625 - 11640, 12992 - *13021, 13252 - 13257, 13290 - 13296, 13308 - 13324.*

(e) establish and fund a claim settlement process for licensed land.

21. Elsewhere in our report, we discuss the structure of the Act, the nature of the Crown forestry licence and the role of the Waitangi Tribunal in more detail. Accordingly, in the balance of this section we conclude by briefly discussing:

(a) the actual forest sale process;

(b) the creation, role and function of the Crown Forestry Rental Trust.

Overview of the Forest Sale Process

Corporatisation

22. In late 1985, the Government had made a decision to concentrate the commercial functions of the Forest Service in a Forestry Corporation and to place the conservation orientated functions in a Department of Conservation[6]. In late February 1986, a Corporation Establishment Board headed by Alan Gibbs was appointed. The Board was to attend to the planning and process whereby the various assets and operations of the New Zealand Forest were to be divided. Following the Board's decision to adopt a corporate structure, the Board appointed the previous head of the Forest Service (Andy Kirkland) as interim Chief Executive to the Corporation. On 1 April 1987, the New Zealand Forestry Corporation ("the Corporation") was formally launched. Its operating structure consisted of the Corporation as a holding company with two operational subsidiaries.

23. It was envisaged that the Crown's exotic forest assets would at some point in time be transferred to the Corporation. However, an intense debate ensued between the Corporation and the Government (Treasury in particular) as to the value of the exotic forest estate to be transferred to the Corporation. Pending agreement on this issue the Corporation managed the exotic forest estate for the Crown. As the valuation debate between the Treasury and the Corporation continued to drag on without resolution it would seem that the Government became increasingly attracted to privatisation of the Crown exotic forest estate. In any event, the Government announced on Budget night in July 1988 it was going to privatise the exotic forest resource by offering it for sale on the open market.

The Sale Process

24. The Government had considered selling the forests by way of transfer into a SOE and subsequent sale of that company's shares. However, for a variety of reasons (including Treaty of Waitangi issues) it was decided to approach the sale on a forest by forest basis. The Government ran into significant obstacles in terms of its Treaty of Waitangi obligations and from complications arising from existing wood supply contracts. In the course of resolving these issues the suggestion by the 1988 Forest

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6 *A Kirkland, and P Berg:* "A Century of State-Honed Enterprise", Auckland, Profile Books, 1997, p120.

Working Group Report as to sale by way of cutting rights was refined. This resulted in the development of a new statutory instrument - the Crown forestry licence.

25. As noted the Crown also had to deal with two other major obstacles to the sale process, long term sale commitments to Tasman Forestry and Carter Holt Harvey respectively. It is outside the scope of the brief to consider in any detail the extent to which the Crown satisfied the private sector concerns. Suffice to say that in terms of the Tasman matter, the affected Central North Island forests were taken out of the bid process and transferred to a new subsidiary New Zealand Timberlands (Bay of Plenty) Limited (subsequently renamed Forestry Corporation New Zealand Ltd). The Carter Holt Harvey issue also resulted in a number of Hawkes Bay and Canterbury forests being withdrawn from the tender process in light of court action initiated by Carter Holt Harvey.

The Sale

26. Notwithstanding these difficulties the Crown contemporaneously continued to move through the sale process. Under the watchful eye of the Treasury the Corporation acted as the Government's sale agent. An assets sales group was formed within the Corporation and an advertising campaign carried on in forestry, financial and economic publications throughout the world. The assets sale team prepared a list of appropriate companies and organisations that would be sent information. A detailed slide presentation and introductory video was prepared. In addition to an overview prospectus type document a reasonably detailed technical information memorandum in respect of each of the forests was prepared (at Appendix Six we attach some extracts from the Aupouri Sale Memorandum). Some 600 companies and organisations expressed an interest in the forests. Prospective buyers carried out site visits and discussions with the Corporation and the Government. On the deadline for the receipt of bids (4 July 1990) over 50 bidders submitted prices.[7]

27. At the end of the process (which involved a further round of bids for some forests not sold in the first round) the Government had sold 43 of the forests on offer for a total price of $1.27 billion. In 1992 the Government sold the bulk of the remaining forests (other than the Central North Island Forests) for $363 million. In terms of the Central North Island forests the transfer to the Forestry Corporation of New Zealand Ltd ("FCNZ") was settled for $1.267 billion. FCNZ "paid" for the Crown forestry licences by way of debt back to the Crown. Later in 1992 FCNZ negotiated a more permanent capital structure with the Crown involving repayment of a portion of the Crown loans with equity and repayment of the balance of the loans over a two year period[8].

28. In April 1996 the Government decided to offer all the shares in FCNZ for sale. On 20 August 1996 the shares were purchased by a consortium consisting of Fletcher Challenge Limited, Brierley Investments Limited and Citifor (a subsidiary of the

[7] RJ Birchfield and IF Grant pg 228.
[8] Forestry Corporation - "*Sale Information Memorandum*" 1996 pp 129, 132.

Chinese Corporation) for $2.026 billion. The net proceeds to Government (after FCNZ debts were repaid) was $1.6 billion[9].

29. Apart from Crown forestry licences in the name of Timberlands West Coast Limited and some smaller forests managed by Crown Forestry Management Limited (a SOE) the sale of the Crown's exotic forest resource was now complete.

Crown Forestry Rental Trust

30. At clause 11 of the July 1989 Agreement, the parties agreed that:

(a) the annual rental payments from the grant of particular Crown forestry licences would be set aside in a trust fund;

(b) the fund would be managed by trustees appointed by Maori and the Crown;

(c) interest earned by the fund was to be made available to assist Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involved or could involve Crown forest licence land;

(d) the parties agreed that the Crown would provide the initial "seed money" of up to $5m for the trust by way of interest free advances (repayable);

(e) the parties agreed what would happen to money in the trust as claims were settled.

31. At section 34 of the Act, a statutory obligation was placed on the responsible Ministers (State Owned Enterprises and Finance) to establish, by deed, a Forestry Rental Trust pending settlement of the appropriate claims. Section 34(2) places an obligation on the Crown to collect all licence fees payable under Crown forestry licences and pay them into an account held in the name of the trust. Where Crown forest licence land becomes the subject of a binding recommendation from the Tribunal this obligation ceases.

The Trust Deed

32. By way of a Trust Deed dated 30 April 1990, the Crown met its statutory obligation to establish a trust. The trust was to be known as the Crown Forestry Rental Trust (see Appendix 5). At clause 2 of the deed the function and purpose of the trust is said to be:

"(a) Receive the rental proceeds from Crown forestry licences granted under the Act;

(b) Make the interest earned from investment of those rental proceeds available to assist Maori in the preparation, presentation and negotiation of claims

[9] Dr E M Bilek, 1996: "*The Sale of Forestry Corporation's Forests: An Economists Viewpoint*", Notes for a talk given to the New Zealand Institute of Forestry, Wellington Chapter, at the Ministry of Forestry, Head Office, 30 October 1996.

before the Waitangi Tribunal which involved or could involve licensed land."

33. Further points of note from the deed include:

(a) A beneficiary is defined as the Crown, claimants, or any other person who has registered under the Treaty of Waitangi Act a claim to Crown forest land as that term is defined in the Act.

(b) The number of trustees to be six with three appointed by Maori, (the NZMC and FOMA) and three to be appointed by the Crown;

(c) The deed expressly states that the trust is not an instrument of the Crown or the Government of New Zealand.

(d) The Crown is not liable to contribute any sum towards any debts or liabilities of the trust other than the Crown's duty to pay rental proceeds in respect of Crown forestry licences.

(e) Any decision of the trustees requires the agreement of at least two of the Crown trustees and two of the Maori trustees.

(f) Rental proceeds are the capital of the trust. Interest earned from investment of the capital may be applied at the trustees sole discretion to:

- the expenses of the trustees;
- the trust; and
- qualifying claimants for the progress of Treaty claims which involve or could involve licensed land;

(g) The trustees decide the criteria as to qualifying claimants

(h) The fate of funds upon the issue of a binding recommendation from the Tribunal is agreed. The successful claimants to receive from the capital of the trust the rental proceeds received in respect of the licensed land.

The Annual Report for the Trust for the 1996/1997 year shows that accumulated rental fees total some $156 million dollars. The Trust is currently funding some 46 claimant groups.

TIMELINE OF SIGNIFICANT EVENTS AND DATES

DATE	EVENT
30 September 1986	Introduction of State Owned Enterprises Bill
8 December 1986	Waitangi Tribunal - Muriwhenua hearing, Te Hapua
8 December 1986	Waitangi Tribunal - Interim Report raising concerns in respect of the State Owned Enterprises Bill
18 December 1986	Royal Assent to the State Owned Enterprises Act 1986
1 April 1987	Corporatisation of the New Zealand Forest Service Launch of NZ Forestry Corporation
29 June 1987	*New Zealand Maori Council* v *Attorney-General* [1987] 1 NZLR 441 (Court of Appeal)
8 December 1987	Introduction of Treaty of Waitangi (State Enterprises) Bill
30 June 1988	Royal assent to Treaty of Waitangi (State Enterprises) Act 1988
July 1988	Government announces intention to sell State forests
August 1988	Forestry Working Group reports to the Government as to the most appropriate form in which the forestry assets might be sold.
January 1989	National hui at Rotorua organised by Government to 'consult' with Maori over proposed asset sales.
February 1989	Promotion of asset sales to potential purchasers begins.

DATE	EVENT
20 March 1989	*New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (Court of Appeal judgment).
June 1989	National hui at Wellington endorses draft agreement to address Maori concerns.
20 July 1989	Execution of Agreement between the Crown and New Zealand Maori Council and Federation of Maori Authorities Inc.
27 July 1989	Introduction of Crown Forest Assets Bill
25 October 1989	Royal as sent to Crown Forest Assets Act 1989
30 April 1990	Creation of Crown Forestry Rental Trust
14 January 1991	Execution of Aupouri Crown forestry licence

SECTION 3 - OVERVIEW - CROWN FORESTS ASSETS ACT

Introduction

1. In this section we give an overview of the Act's purpose, structure and form. We also look at the inter-relationship of the Act with the Treaty of Waitangi Act 1975 and the Commissions of Inquiry Act 1908. Finally, we note amendments to the Act since inception, the reasons for the same and identify relevant reported decisions concerning the Act.

Purpose Of The Act

2. The long title to the Act states as follows:

"An Act to provide for -

(a) The management of the Crown forests assets:

(b) The transfer of those assets while at the same protecting the claims of Maori under the Treaty of Waitangi Act 1975:

(c) In the case of successful claims by Maori under that Act, the transfer of Crown forests land to Maori ownership and for payment by the Crown to Maori of compensation:

(d) Other incidental matters."

In light of the background events leading to the introduction of the Act, we believe that the long title of the Act records in a concise clear manner the purpose of the Act.

Structure Of The Act

3. In addition to the interpretation section the Act is divided into 5 Parts and 3 Schedules. We comment on the general thrust of each part of the Act as follows.

Interpretation

4. Key definitions include *Crown forest land*, *Crown forestry assets*, *Crown forestry licence*, *Licensed land* and *transfer*. We cover the detail of these definitions in section 4 of this report. At Section 3 the Act binds the Crown.

Part 1 - Crown Forest Land

5. Under Part I of the Act all Crown forest land is made subject to the Act. Certain machinery sections follow, which we briefly describe. District Land Registrars are

required to record registered Crown forest land as being subject to the Act. The issue of a certificate from the Chief Surveyor as to land being Crown forest land subject to a particular Crown forestry licence is conclusive evidence of its status for the District Land Registrar. The responsible Ministers may acquire easements, grant easements, licences, leases and transfer the estate or interest in any Crown forest land.[1] The responsible Ministers may appoint a manager to manage Crown forest land, Crown forestry assets or Crown forestry licences on such terms and conditions as they agree.[2] This section also provides for the deemed transfer of contracts previously in the name of the New Zealand Forest Service or Director General of Forests. The responsible Ministers may in writing delegate to a manager certain of their powers granted under sections of the Act.[3]

Part II - Crown Forestry Assets and Crown Forestry Licences

6. At section 11 the responsible Ministers (or their agent) are authorised to transfer Crown forestry assets on such terms and conditions as they may agree provided that such a transfer is made in conjunction with the grant of a Crown forestry licence. At section 13 of the Act the division between Crown forestry assets and the land upon which they stand is made clear. The assets and the land are to be regarded as separate assets each capable of separate ownership.

7. In general terms Part II of the Act enables the Crown to ready the forest assets for sale and transfer by way of the Crown forestry licence. Accordingly, sections 14-33 deal with Crown forestry licences. This part of the Act:

   (a) establishes the legal nature of a Crown forestry licence[4];

   (b) deals in some detail with the placement of protective covenants, public access and other easements over the licensed land;

   (c) deals with the grant, registration, variation, review or cancellation of such easements or covenants[5];

   (d) covers registration of Crown forestry licences under the Land Transfer Act 1952[6];

   (e) contains machinery provisions[7] such as the Governor General being able to prescribe by Order in Council regulations concerning the registration of Crown forestry licences. States the non-applicability of certain aspects of the Resource Management Act 1991 (subdivisions).

8. Section 34 deals with the establishment of the Crown Forestry Rental Trust. (See Section 2 of this report for further detail). We examine the detail of these sections elsewhere in this report (See Section 4).

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1 Section 8, Crown Forest Assets Act 1989.
2 Section 9, Crown Forest Assets Act 1989.
3 Section 10, Crown Forest Assets Act 1989.
4 Sections 14-17, 22, Crown Forest Assets Act 1989.
5 Sections 18-28, Crown Forest Assets Act 1989.
6 Sections 30-31, Crown Forest Assets Act 1989.
7 Sections 32-33, Crown Forest Assets Act 1989.

Part III - Return of Crown Forest Land to Maori Ownership and Compensation

9. In this part of the Act the Crown agrees with certain restrictions on its ability to deal with Crown forest land and with certain obligations should a binding recommendation issue from the Tribunal. Part III consists of sections 35-37. Under section 35, save in respect of certain defined and fairly circumscribed situations, the Crown is prevented from disposing of or dealing with any rights or interest in any Crown forestry licence in the absence of an appropriate recommendation from the Waitangi Tribunal. Pursuant to section 37 where Crown forestry licence land is to be returned to the Crown then the Tribunal's jurisdiction under section 6 of the Treaty of Waitangi Act is extinguished.

10. Where any interim recommendation of the Tribunal becomes a final recommendation as to the return of Licensed land to Maori, the Crown is required to:

- return the Licensed land; and
- pay compensation in accordance with the First Schedule to the Act.[8]

11. At section 36(2) notwithstanding the return of Licensed land to Maori ownership then, save as otherwise provided in the Act, such return does **not** affect the terms and conditions or the rights of the licensee of any Crown forestry licence. The nature of the Crown's obligations to Maori under the Act is underlined by section 36(3) which notes that compensation payable by the Crown may, be paid to Maori without further appropriation.

Part IV - Amendments to Treaty of Waitangi Act 1975

12. Part IV of the Act (section 38-41) puts in place the process whereby:

(a) the Crown may transfer Crown forestry assets by way of a Crown forestry licence but at the same time the claims of Maori under the Treaty of Waitangi Act would be protected by reference to the Tribunal; and

(b) in the case of successful claims of Crown forest land is transferred to Maori ownership and compensation issues are determined.

It does this by a number of detailed amendments to the Treaty of Waitangi Act. Part 4 of the Act is deemed to be part of the Treaty of Waitangi Act. As this is a fundamental part we work through each of the clauses in Part IV in some detail.

13. Section 39 expands the functions of the Tribunal *"To make any recommendation or determination that the Tribunal is required or empowered to make under the First Schedule"* to the Act (compensation matters). The functions of the Tribunal are also extended to recommendations made in accordance with section 8HE.

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[8] Section 36, Crown Forest Assets Act 1989.

14. Section 40 of the Act inserts a number of provisions into the Treaty of Waitangi Act relating to recommendations from the Tribunal in terms of Crown forest land.[9] We look at each of these sections by reference to the section numbering as used in the Treaty of Waitangi Act. The full text of these sections is set out in Appendix 7.

Section 8HA

15. For the purposes of sections 8HB to 8HI of the Treaty of Waitangi Act references to; *"Crown forestry assets, "Crown forest land", "Crown forestry licence" and "licenced land"* have the same meaning as defined in the Act.

Section 8HB - Return of the Licensed Land

16. Where a claim submitted to the Tribunal under its general jurisdiction to consider claims[10] and:

(a) the claim relates to licenced land; and

(b) the Tribunal finds that the claim is well founded; and

(c) in terms of section 6(3) of the Treaty of Waitangi Act, the Tribunal believes that action should be taken to compensate for or remove the prejudice; and

(d) such compensatory acts should include the return to Maori ownership of the whole or part of the licensed land;

then the Tribunal may include in its recommendation under section 6(3) of the Treaty of Waitangi Act that the Licensed land (or part of it) be returned to Maori ownership. This recommendation shall be on such terms and conditions as the Tribunal considers appropriate. The Tribunal must identify the Maori or group of Maori to whom that land or that part of the land is to be returned.

Section 8HB(1)(b)

17. The Tribunal may find that the claim is well founded but return to Maori ownership of all or part of the Licensed land is not required.

Section 8HB(1)(c)

18. If the Tribunal finds that the claim is not well founded the Tribunal will recommend that the Licensed land not be liable to return to Maori ownership.

Section 8HB(2) - Improvements to the Land

19. There are certain restrictions on the Tribunal when considering whether or not to recommend the return of Licensed land. Specifically, the Tribunal is **not** to have regard to any changes that have taken place in:

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9 Sections 8HA-8HI, Treaty of Waitangi Act 1975.

10 Section 6, Treaty of Waitangi Act 1975.

(a) the condition of the Licensed land and any improvements to it; or

(b) the ownership or possession of the land or the presence of any other interests in the land

that have occurred or arisen by the grant of the Crown forestry licence.

Section 8HB(3) - Other Recommendations

20. The ability of the Tribunal to make other recommendations under section 6(3) or section 6(4) of the Treaty of Waitangi Act is specifically preserved. Provided that in making such other recommendations the Tribunal may take into account compensation payments made or to be made by the Crown in terms of the compensation provisions of the Act.

Section 8HB(4) - Offer Back Provisions

21. Sections 40-42 of the Public Works Act 1981 set out a process for offering land to former owners of land taken for public works when it is no longer required by the Crown, and do not apply upon a return to Maori.

Section 8HC - Status of a Recommendation as to Return

22. Section 8HC sets out the process following a determination that the claim is well founded.

23. Such recommendations are in the first instance interim recommendations. All parties to the enquiry are served with the interim recommendation and findings. After the date of the making of the interim recommendation a party to the inquiry has 90 days to initiate negotiations with a view to settlement of the claim. Prior to the expiry of the 90 day period each party is required to inform the Tribunal whether they have accepted or implemented the interim recommendations and, if that party made an offer to negotiate - the result of that offer. If the parties are able to settle a claim within the 90 day period the Tribunal shall, as the case may require, cancel or modify the interim recommendation and if necessary make a final recommendation. However, in the absence of a negotiated settlement then 90 days after the date of the making of the interim recommendation the interim recommendations become final recommendations. Section 36 of the Act is triggered.

24. The balance of section 8HC are machinery provisions to correct any clerical mistake or omissions in an interim recommendation.

Section 8HD-Rights to be Heard by the Tribunal

25. Section 8HD significantly restricts the class of persons entitled to appear and be heard by the Tribunal on any question that arises in relation to licensed land in the course of the claim inquiry. The restricted category of persons are:

(a) the claimant;

(b) the Minister of Maori Affairs;

(c) any other Minister of the Crown (subject to notice in writing that they wish to appear and be heard);

(d) any Maori who satisfies the Tribunal that he or she or any group of Maori which he or she is a member has an interest in the inquiry apart from any interest in common with the public.

26. Any of the above may, with the leave of the Tribunal, be represented by a lawyer or other representative. Section 8HD(2) goes on to specifically state the Tribunals general powers under the Commissions of Inquiry Act 1908 in this matter are expressly overridden and no one outside the restricted category of persons may appear and be heard. This in effect prevents a licensee making submissions to the Tribunal as to the wisdom or otherwise of a recommendation to return land to Maori. Whilst this may seem unusual it does underline the concept of the Crown Forestry Licence being separate from the underlying land and the issue of return a matter accepted by licensees.

Section 8HE - Recommendation - No return

27. This section affords the Crown or a holder of a Crown forestry licence an opportunity to seek a recommendation from the Tribunal that the whole or part of any licensed land **not** be liable to be returned to Maori ownership in a manner outside the normal claim inquiry process. The process is at the discretion of the Tribunal. The purpose of this section is, in our view, to give the Crown or licensee the opportunity to seek finality in terms of the claims process where claims do not exist or have lapsed. The process is as follows. A public notice in approved form[11] is published in both the Gazette and local newspapers. Among other things the notice invites any Maori who believe they have grounds for a claim under section 6 of the Treaty of Waitangi Act to submit a notice to the Tribunal within 90 days. If no appropriate claim has been submitted to the Tribunal (or in the case of an existing claim the parties to that claim have advised the Tribunal in writing that they consent to the making of the recommendation) then the Tribunal can make a recommendation that the land **not** be returned to Maori without being obliged to determine first whether or not any claim is well founded. The Tribunal advises the appropriate parties.[12] The balance of the amendments to the Treaty of Waitangi Act deal with machinery provisions eg in terms of the noting of land registry records, directions as to service.

Part V - Amendments to Other Acts

28. As originally enacted, sections 42 and 43 contained amendments to the Maori Affairs Act 1953 (the setting aside of Maori reservations) and the Income Tax Act 1976 (taxation treatment of compensation payments under the First Schedule).

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11 Section 8HH, Treaty of Waitangi Act 1975.

12 Section 8HI, Treaty of Waitangi Act 1975.

These sections have been replaced by amendments to those particular Acts in question. Section 44 sets out a number of consequential amendments to the Conservation Act 1987 in terms of the creation of Crown forest land under the Act and removal of that land from the ambit of the Conservation Act.

Schedules to the Act

First Schedule - Compensation Options

29. This schedule sets out the compensation payable under section 36 of the Act following a recommendation from the Tribunal to return to Maori ownership any Licensed land. The total amount of compensation payable is referred to as the "Specified Amount" and is calculated by reference to three different formulae or options. The choice of options lies with the claimants. The Tribunal has the ability to reduce the quantum. We deal with the First Schedule in sections 5 and 6 of this report.

Second Schedule

30. Under the definition of Crown forest land, land specified in the Second Schedule to the Act, (being land leased or licensed to the Crown for forestry purposes) is deemed **not** to be Crown forest land. The land set out in the Second Schedule is Maori owned land the subject of forestry joint ventures between Maori and the Crown. Again, in terms of the definition of Crown forestry assets the leases or licenses specified in the Second Schedule are excluded. We note that part of what is often referred to as "Aupouri Forest" contains land the subject of Second Schedule. We have ascertained that this land is outside the ambit of the Aupouri Crown Forestry Licence and understand it is still managed by the Crown through its agent. We understand that the Crown and Maori are currently working through processes and procedures by which the Crown might quit its obligations under such leases or licence. Such matters are outside the scope of this report.

Third Schedule - Initial Fixed Term

31. Some Crown forest licences were granted on the basis that they would run from year to year by way of automatic extension pending determination of any underlying Treaty claims.[13] However, for Crown forest licences granted in respect of the areas or forests listed in the Third Schedule the term of the Crown forestry licence so granted is treated a little differently by the creation of an initial fixed term.

32. In the case of the Aupouri Crown forest licence, the licence was granted for an initial fixed term of ten years. (Aupouri Forest falls within the Northland District referred to in the Third Schedule).

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[13] Section 17, Crown Forest Assets Act 1989.

Interrelationship of Other Acts

33. The original ambit of the Tribunal's powers was to make non-binding recommendations to the Crown for claims determined by the Tribunal to be well founded. Such recommendations to guide the Crown as to how it might take action to compensate for or remove the prejudice pleaded by the claimants. However, over time Parliament has decided that in certain situations, recommendations issued under section 6(3) have the status of recommendations binding on the Crown. The two most well known situations being binding recommendations in terms of land or interests in land transferred to a SOE in terms of the State Owned Enterprises Act 1986 and Licensed land under the Act. Conversely, Parliament has also restricted the jurisdiction of the Tribunal. For example, removing from its jurisdiction the power to inquire into or to make any finding or recommendation in respect of commercial fishing or commercial fisheries.

34. This process has built onto the original functions, powers and jurisdiction of the Tribunal a layer of amendments and interaction with other legislation in specific situations. In respect of the settlement of Treaty claims concerning licensed land we have seen how the Tribunal's general jurisdiction has been expanded to include the making of recommendations as to return of licensed land attaching such terms and conditions as the Tribunal sees appropriate.[14] Such a recommendation may become, through the process set out in section 8HC, a binding recommendation. As discussed this in turn triggers section 36 of the Act and places an obligation on the Crown to return the land and pay compensation. In respect of the latter point the Tribunal's functions were significantly extended by section 5(1)(ab) to include both recommendations and determinations. We discuss the meaning and effect of section 8HB(1)(a) and section 5(1) (ab) in more detail in section 5 of this report. These additional powers are in addition to the general powers of the Tribunal.

35. Accordingly, it seems appropriate to identify the general powers, abilities and functions of the Tribunal that might assist the Tribunal and/or interrelate in addressing some of the specific issues arising from the issue of a interim recommendation in respect of Licensed land.

Purpose of the Treaty of Waitangi Act

36. The long title of the Treaty of Waitangi Act states that it is an Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi. It does this by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether related matters are inconsistent with the principles of the Treaty.

Tribunal - Commission of Inquiry

37. At section 8 of the Second Schedule of the Treaty of Waitangi Act the Tribunal is deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1908.

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[14] Section 8HB(1)(a), Treaty of Waitangi Act 1975.

Subject to the provisions of the Treaty of Waitangi Act all provisions of the Commissions of Inquiry Act (except sections 11 and 12) are to apply accordingly. We briefly look at the Commissions of Inquiry Act in terms of how that Act might assist the Tribunal in matters pertaining to Licensed land. Points to note include:

(a) so long as members of any Commission act bona fide in the discharge of their duties no action shall lie against members for anything they may report or say in the course of the inquiry[15];

(b) a Commission has a wide discretion to receive as evidence statements or documents that in its opinion deal effectively with the subject of inquiry whether or not they would be admissible in a court of law;

(c) a Commission is given wide powers (and the ability to delegate the power) to inspect, examine, have produced and copy records under another person's control. Persons supplying information or answering questions put by the Commission have the same privileges as witnesses in courts of law[16];

(d) a Commission may summon witnesses. Witnesses have the same privileges and immunities as witnesses in counsel in courts of law;

(e) failure to appear before a Commission following a summons or failure to produce papers and documents without sufficient cause or wilfully obstructs or hinders the Commission is an offence;

(f) a Commission may refer disputed points of law arising in the course of an enquiry to the High Court for decision. This can be done by way of a case stated. The decision of the High Court is final and binding upon the parties and the Commission;

(g) where a member of a Commission is a judge or former judge of the High Court certain additional processes and procedure are available.

Section 6 - General Jurisdiction

38. Section 6 of the Treaty of Waitangi Act sets out the general jurisdiction to hear claims by Maori in terms of actual or possible prejudice arising from:

(a) legislation at any time passed after 6 February 1840; or

(b) or any act done or omitted by or on behalf of the Crown since 6 February 1840; or

(c) or any policy or practice of the Crown adopted or proposed to be adopted by or on behalf of the Crown; or

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15 Section 3, Commissions of Inquiry Act 1908.
16 Section 4(c), Commissions of Inquiry Act 1908.

(d) and such matters are believed to have been or are inconsistent with the principles of the Treaty of Waitangi.

39. At section 6(3) the Tribunal may, if it finds the claim well founded recommend to the Crown that action be taken to compensate for or remove the prejudice.

Maori Custom Issues

40. The Tribunal may refer for decision to the Maori Appellant Court or Maori Land Court by way of case stated issues of fact relating to Maori custom or usage.[17]

Second Schedule

41. The provisions of the Second Schedule to the Treaty of Waitangi Act are deemed to have effect in relation to the conduct of proceedings of the Tribunal. From this Schedule we note as follows:

(a) the Tribunal has the power to commission, research and receive reports in evidence in matters relating to claims under section 6 of the Act and section 8HE.[18] Parties to the proceedings are entitled to receive copies of such reports, make submissions on it to the Tribunal and cross examine the person by whom the report was made;

(b) in addition to the general ability of a Commission of Inquiry to **receive** evidence the Tribunal,[19] it is empowered to **act** on any testimony (sworn or unsworn) whether or not it would be legally admissible but for this section;

(c) section 9(a) to 9(d) of the Second Schedule gives the Tribunal a power to refer a claim submitted under section 6 of this Act to mediation. Where a claim has not been settled in any timeframe set down by the Tribunal then the mediator may be required to refer the claim back to the Tribunal together with a written record showing matters in which agreement was reached and matters in which no agreement was reached. If a settlement was reached the terms of the agreed settlement are to be supplied to the Tribunal who may include these terms in a recommendation under section 6(3) of the Treaty of Waitangi Act.

Subsequent Amendments to the Act

42. There have been a relatively small number of amendments made to the Crown Forests Assets Act in 1989. We also note only two decisions that deal directly with issues arising out of the Crown Forests Assets Act or Crown forestry licenses. As one of the decisions involved a dispute between the Crown and licensees as to the basis on which licensed rentals would to be reviewed and this subsequently lead to

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17 Section 6A, Treaty of Waitangi Act 1975.
18 Clause 5(a), Second Schedule, Treaty of Waitangi Act 1975.
19 Clause 6, Second Schedule, Treaety of Waitangi Act 1975.

clarifying legislation we discuss this case and the related legislation in section 5 of this report.

43. In terms of the other amendments to the legislation, they have been fairly straight forward in nature and relate to matters of classification. For example section 29A was inserted in 1989 and makes it clear that subject to the terms of the appropriate licence, Crown forestry licences are assignable by the Licensee. Some doubt arose over whether the registration of easements over Crown forest land for which no certificate of title has been issued was permitted. Section 8A was inserted in 1992 to clarify the matter. A further consequential amendment was made in 1993 in terms of the applicability of the Resource Management Act in certain circumstances. As required we discuss these amendments elsewhere in this report.

SECTION 4 - THE CROWN FORESTRY LICENCE

Introduction

1. In this section of the report we focus on matters relating to:

   - the legal form and nature of the Crown forestry licence as derived from the Act;
   - registration issues;
   - an overview of the structure and terms of a Crown forestry licence by reference to the Aupouri Crown forestry licence;
   - legal and other developments (such as reported decisions) concerning Crown forestry licences.

Key Definitions from the Act

Crown Forestry Assets

2. In the interpretation section of the Act the definition of Crown forestry assets is extensive and includes the following:

   2.1 Exotic trees grown or standing on Crown forest land;

   2.2 Improvements on that land such as buildings, roads, drains, accessways, firebreaks, bridges, culverts and so on;

   2.3 Plant and equipment;

   2.4 Forest records;

   2.5 Legal rights such as leases, licences, easements, agreements for sale and purchase, intellectual property rights and contracts entered into by the Crown in respect of Crown forestry assets.

Crown Forest Land

3. Land that can be the subject of a Crown forestry licence is limited to Crown forest land as defined in the Act. Crown forest land is all land that:

   > *"... immediately before the commencement of section 32(1) of the State Owned Enterprises Act 1986, was State forest land under the Forests Act 1949, Crown land, and other lands of the Crown, being land or lands*

shown as being allocated to New Zealand Forestry Corporation Limited ..."[1]

on certain approved plans. The categories of Crown forest land for the purposes of this definition is not closed and may be added to with the approval of the responsible Ministers. However, Crown forest land does not include any land specified in the Second Schedule to the Act. (Such land being Maori land leased or licensed to the Crown for forestry joint ventures.)

Licensed Land

4. Licensed land is land subject to a Crown forestry licence and includes land that's status has changed from Crown land but is still subject to a Crown forestry licence (ie following a return to Maori).

Crown Forestry Licence

5. A Crown forestry licence is a licence granted under section 14 of the Act.

Licensee

6. The Licensee is the holder (or grantee) of a Crown forestry licence and includes the Licensee's successors, executors, administrators and assignees.

Responsible Ministers

7. Responsible Ministers means the Ministers of Finance and State Owned Enterprises.

Crown Forestry Licenses in terms of the Act

Grant of Licence

8. In Part II of the Act Crown forestry assets may only be transferred to a person to whom it is proposed to grant a Crown forestry licence in respect of the land on which those assets are situated.[2] At section 14 of the Act the Responsible Ministers may, on behalf of the Crown, grant a Crown, forestry licence in respect of any Crown forest land to a person to whom Crown forestry assets on that land have been transferred. Such grant is to be on the conditions set out in the Act.

Successors in Title Bound

9. At section 15 of the Act the benefits and obligations of the Crown forestry licence are binding on successors in title to the Crown (eg Maori on a return). A Crown forestry licence is not affected by the transfer of Licensed land as permitted by

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1 Section 2(1) Crown Forest Assets Act 1989

2 Section 11, Crown Forest Assets Act 1989

section 8 of the Act or as a consequence of the lands return to Maori ownership under section 36 of the Act.

Not an Interest in Land

10. The degree of separation in legal terms of a Crown forestry licence (and its associated Crown forestry assets) from the underlying land is underlined by the Act. The definition of land includes any interest in land but does not include a Crown forestry licence. At section 13 of the Act notwithstanding any other Act or rule of law Crown forestry assets growing, standing or affixed to Licensed land are to be regarded as separate assets. The land and the assets are each capable of separate ownership. At section 16 of the Act a Crown forestry licence is deemed not to be an interest in land in that it does not transfer to or confer on a Licensee an estate or interest in land. Thus where a Licensee grants some form of security interest in respect of the Crown forestry assets the subject of the Crown forestry licence, that security interest does not attach itself to the underlying land.

Transferability

11. A licensee is free, subject to the appropriate terms of the Crown forestry licence, to assign the licence at any time. [3]

Annual fee

12. Every Crown Forestry licence is required to provide for the payment and periodic review of an annual fee for the use of the licensed land. [4] The annual licence fee is to be at a market rate. The rate is to either be agreed or is to be calculated in the manner set down in the Crown forestry licence. Annual licence fees are to be reviewed periodically. In terms of such a review the Act envisages (unless the parties agree otherwise) that the new annual licence fee will be a percentage based on the value of the Licensed land excluding improvements. As noted the Act goes on to make it clear that a number of categories of what might commonly be called improvements are not excluded when carrying out this valuation exercise. (See "Legal Developments" at paragraph 87 of this section of the report).

Term of Licence following a Tribunal Recommendation

13. The Act requires that every Crown forestry licence make clearly what happens if a recommendation under section 8HB(1) or section 8HE of the TOW Act is made. Firstly, once any initial fixed term has expired every Crown forestry licence shall then run from year to year by way of automatic extension. [5] The Act then defines a "termination period" as being a period of 35 years.

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3 Section 29A, Crown Forest Assets Act 1989
4 Section 29, Crown Forest Assets Act 1989
5 Section 17, Crown Forest Assets Act 1989

14. Thus, if a interim recommendation as to the return of all or part of Licensed land Treaty of Waitangi Act 1975 becomes a final recommendation[6] then:

(a) a termination notice is given by the Crown to the Licensee. If this is served **outside** the initial fixed term then the appropriate Crown forestry licence expires in 35 years (being the next 30th of September 35 years after the day on which the notice is given);

(b) for the duration of the Licence period (the termination period) the Licensee's rights are restricted to protecting, managing, harvesting and processing the tree crops standing on the Licensed land at the commencement of the termination period (that is the licensee cannot as of right **replant** following harvesting). The Licensee is required to exercise their rights in accordance with accepted forestry business practice;

(c) if a termination notice is served **within** the initial fixed term the termination period does not begin until expiry of this period. That is the Licensee can continue to replant.

15. Over the termination period the Licensee is required to give notice to the Licensor (the new Maori owners) as to parts of the land that are no longer required by the Licensee to exercise its rights. At such point the Licensor (the new Maori owner) is entitled to take possession of such land. The Licence ceases to apply to that land save for provisions that relate to the rights and obligations of the parties during the balance of the termination period. (In section 7 of this report we discuss these matters in more detail and provide a diagram of the process by which the new Maori owners recover both legal ownership of Licensed land and physical possession of the same).

Recommendation - No Return

16. The Act also goes into detail as to what happens where there is a recommendation that the Licensed land or part of it not be liable to be returned to Maori ownership. We do not consider this aspect in any detail.

Protective Covenants and Public Access Easements

17. As previously noted the issue of protective covenants for conservation and environmental purposes was the subject of some debate in the House. Accordingly, Sections 18 to 28 of the Act go into detail on the statutory scheme in respect of protective covenants and public access easements. They run with the land and bind successors in title to the Crown (Maori on a return). We discuss the relevant sections as follows.

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6 Section 8HB(1)(a)

Protective Covenants

18. Every Crown forestry licence shall as appropriate include covenants for conservation purposes, the protection of archaeological sites, Wahi Tapu, the protection of sites having historical or spiritual or emotional or cultural significance, water and soil covenants and forestry research areas.[7] The Act envisages that the terms of such protective covenants will be settled in consultation with the appropriate parties. Thus for example Wahi Tapu covenants shall be determined by the Responsible Ministers in consultation with such persons or Maori that in the opinion of the Minister have an interest in the proposed covenants.

19. Protective covenants may be varied or cancelled. The Act sets out a process to be followed before any variation or cancellation may be registered. Thus in the case of Wahi Tapu if the Responsible Minister can persuade the Minister of Maori Affairs that the variation did not significantly affect the protective covenant and the Ministers are prepared to sign a certificate to that effect then the change can take place without public consultation. However, if such a certificate is not appropriate then the Ministers are required by public notice to call for submissions and appoint a person to hear those submissions and to report back to the Ministers. The Ministers are to have regard to such submissions and any report or recommendation made by the person appointed. Because the life and fate of forestry research covenants are linked to the life of the crop they are not included in this process.

Protective covenants - return of land to Maori

20. Where Licensed land is returned to Maori ownership upon the issue of a final recommendation from the Tribunal the Licensor (The new Maori owners) may request a review of the need for the terms and conditions of any protective covenant. On receipt of such a notice the Responsible Ministers, plus the Minister of Conservation and the Minister of Maori Affairs jointly review the request. If they believe that the request is appropriate then they work through the consultation provisions of section 22 at the end of which the protective covenant may be varied or cancelled.

Public Access Easements

21. Every Crown forestry licence shall, where appropriate, include provisions for the creation and protection of public access rights over the licensed land. Again such public access rights are determined in consultation with other Ministers, and representatives of Maori.[8]

Public Access Easements - Return of Land to Maori

22. Where Licensed land is returned to Maori upon a recommendation of the Tribunal the Licensor (The new Maori owners) may seek a review of any public access

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7 Section 18 Crown Forest Assets Act 1989

8 Section 24 Crown Forest Assets Act CFA 1989

easements.[9] Upon receipt of such a notice the Responsible Ministers (together with the Minister of Conservation and the Minister of Maori Affairs) jointly consider whether the terms and conditions of the public access easement is still appropriate having regard to the fact that the Licensed land has been returned to Maori ownership. If following such discussions the Responsible Ministers are satisfied that the variation or cancellation is appropriate then the public consultation process must be worked through. Alternatively, the Responsible Minister and the Minister of Conservation can sign a certificate to the effect public consultation is not necessary. In passing we note that the terms of the Licenses we have considered expand the statutory provision relating to public access easements and place additional obligations upon the Licensee. We discuss this further at section 7 of this report.

Crown Forestry Licences - Registration Issues

23. From the view point of a prospective Licensee an important issue is how the Crown forestry licence (not being an interest in land) is brought into the registration system under the Land Transfer Act 1952 so as to obtain all the protections and advantages inherent in that system. Accordingly, the Act deals with registration both of a Crown forestry licence and in respect of protective covenants and public access easements.

Registration of Licences

24. Although a Crown forestry licence is deemed not to be an interest in land nevertheless a Crown forestry licence may be registered under the Land Transfer Act 1952.[10] Like much Maori land a significant amount of Crown land has not been surveyed. Accordingly, in many instances land the subject of a Crown forestry licence will not be the subject of an issued certificate of title (as for much of Aupouri Forest). In this situation the Act allows the Crown forestry licence to be brought under the Land Transfer Act by constituting it as "a folium of the register" and requiring registration accordingly.

Registration of Mortgages

25. Once a Crown forestry licence has been registered then every subsequent transfer, mortgage, transmission or other disposition of the licence may be recorded as with any similar dealing of Land Transfer Act land.[11]

Registration - Protective Covenants

26. The terms of protective covenants are to be incorporated in a certificate and registered to the appropriate District Land Registrar. The particulars of that certificate are to be registered against the appropriate certificates of titles or if no certificate of title for the land has been issued in a separate folium of the register.[12]

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9 Section 28 Crown Forest Assets Act 1989
10 Section 30(1) Crown Forest Assets Act 1989
11 Section 31(2) Crown Forest Assets Act 1989
12 Section 19(2) Crown Forest Assets Act 1989

The covenants are registered against the Licensed land and thus run with and bind the Licensed land and are notice to all of their existence.

Registration - Public Access Easements

27. Public access easements are to be incorporated into an easement certificate and registered on the relevant certificates of title. Where no certificate of title has been issued the District Land Registrar is directed to constitute the certificate a separate folium of the Register. Before a public access easement may be varied or cancelled a process (similar to that for protective covenants) must be worked through by the responsible Ministers (public consultation or a certificate signed by the responsible Minister and the Minister of Conservation). In passing we note that the creation of public access easements requires specific consultation with Maori but the variation or cancellation does not.

Registration - General Easements

28. Under section 8 of the Act there is a general power for the responsible Ministers to acquire or grant easements for the purposes of managing Crown forest land, Crown forestry assets or Crown forestry licenses as good business practice requires. Section 8A of the Act is a machinery provision. It makes it clear that such easements over Crown forest land for which no certificate of title has been issued may be registered in the appropriate Land Titles Office by constituting the easement as a separate folium of the register. Following such a registration the easement is to be treated for all purposes as if it had been created under the Land Transfer Act.

Terms and Structure of the Aupouri Crown Forestry Licence

Overview

29. The Aupouri Licence consists of two volumes. The operative part is divided into two parts comprising 17 sections, followed by a reasonably comprehensive guarantee. There are two Schedules and four Appendices.

Parties

30. The Licence is in the name of Her Majesty the Queen in right of New Zealand (the Crown) and the Licensee is Juken Nissho Limited. The Guarantor is Juken Sangyo Company Limited. This part of the Licence contains the detailed legal description of the land.

Part 1

31. Part I of the Licence consists of 13 sections covering most of the operational covenants and conditions which govern the Licence on a day to day basis.

Part II

32. Part II deals with the consequences of a recommendation by the Waitangi Tribunal. It is further sub-divided into various 'sub-parts'.

33. Part IIA contains termination period provisions that apply when all the Licensed land is deemed not liable to be returned to Maori ownership. Part IIB contains termination period provisions that apply when recommendations are made for return of all the land to Maori. Part IIC contains termination period provisions that will apply if part of the land is recommended to be returned to Maori.

Schedules

34. The First Schedule describes and lists the improvements acquired by the Licensee at the commencement of the Licence. The Second Schedule gives the form of termination notice and return notice to be used by the Crown on a Tribunal recommendation becoming final.

Appendices

35. There are four sets of Appendices. Appendix A to the Aupouri Licence contains eighteen protective covenants. Appendix B to the Aupouri Licence contains a public access easement. Appendix C is designed to cover any special management restrictions, however there are no such restrictions in the Aupouri Licence. Appendix D lists existing rights over the Crown forest land, and any rights in favour of the Crown forest land. The Contents page appears at the end of the Licence.

Aupouri Licence - Detail

Part I - Covenants and Conditions

36. Section 1 of the Aupouri Licence sets out the definitions and interpretations used in the Licence. As appropriate we will refer to these in the course of our discussion both in this section and elsewhere in this report.

Permitted Uses

37. Section 2 deals with use of the land by the Licensee. Clause 2.1 describes the Licensee's rights to use the land which are very broadly defined as follows:

> *"... to use the Land for any purpose whether or not it relates to the harvesting, planting, management or processing of the Trees on the Land."*

Clause 2.2 provides that the Crown is not to interfere unreasonably with the Licensee's rights to use the land. Clause 2.5 entitles the Licensee to quarry and use any shingle or sand or similar material on the land for the sole purpose of constructing or maintaining a road on the property.

Term of Licence

38. Section 3 of the Aupouri Licence defines the term of the Licence. It commenced on 10 December 1990 and has an initial fixed term of 10 years. Following the initial 10 year period the Licence runs from year to year by automatic extension (subject, of course, to the terms of the Licence).

Licence Fee and Review

39. Section 4 makes provision for the matters of licence fees, review provisions and outgoings. Clause 4.1 set the initial annual licence fee at $339,496 plus GST. Under clause 4.3 the licence fee is to be reviewed every 3 years ("General Review"). The reviewed licence fee is to be equal to 7% of the 'Land Value' as at the review date. Land Value is a defined term. Clause 4.7 provides that on 10 December 1999, and every nine years following that date, the basis for fixing the licence fee can be reviewed. (A "Periodic Review"). A detailed description of the procedures, including dispute procedures, to be followed during these review processes is set out in this section of the Licence. The importance of timely compliance with the processes and procedures set out in this section are discussed in paragraph 86 of this part of the report by reference to a dispute between the Crown and a licence holder involving this aspect of the licence. In particular we note that if notice of an assessment of the reviewed "Land Value" is not given by the due date then the rental will not be adjusted. Section 4 also makes provision for the payment by the Licensee of taxes, such as GST, default interest on overdue licence fees or other money and rates.

Assignment

40. Section 5 sets out the conditions under which all or part of the Licence may be assigned by the Licensee. In order to assign the Licence, the Licensee must not be in default under the Licence. A deed incorporating the terms of the Licence is to be signed by the proposed licensee. The Licensee is to procure such guarantees as are reasonably required by the Crown. If all of these conditions are met the Crown cannot withhold its consent to the assignment. Notwithstanding the grant of the Crown's consent the Licensee's obligations under the Licence continue in force for five years following the assignment.

Deemed Assignment

41. If the Licensee is a limited liability company not listed on the stock exchange and the effective control of that company is altered then this is regarded as a proposed total assignment and the Crown's consent is required. Under clause 5.7 the Licensee may sublicence part of the land without the Crown's consent but the Licensee's obligations under the Licence continue.

Security Interests

42. The Licensee is also entitled, under clause 5.8, to mortgage or charge its interest under the Licence, without the consent of the Crown. This seems appropriate given that the Licensee has paid for the Crown forestry assets and the Licence is not an interest in land and therefore the charge cannot attach to the underlying land. However, in the case of a forced sale or assignment of the Licence on default by the Licensee, the consent of the Crown is required. The Crown cannot withhold its consent if certain conditions are met.

Protective Covenants, Wahi Tapu

43. Section 6 makes provision for protective covenants, public access easements, public entry and Wahi Tapu. Under clause 6.1 both the Crown and the Licensee acknowledge that parts of the land are subject to protective covenants and a public access easement. They agree to observe and perform the terms of each of the protective covenants and the public access easement. We discuss the terms of the protective covenants in Appendix 9 hereto.

General Public Access

44. Clause 6.2 makes provision for general public access onto the land but only so long as "Her Majesty the Queen" is the Licensor. That is this provision ceases on a return to Maori.

Wahi Tapu

45. Again, while the Crown is the Licensor, then the Crown can give notice to the Licensee that certain parts of the land are Wahi Tapu and therefore no longer subject to the Licence. Compensation is to be given in terms of the Public Works Act. Clause 6.4 makes provision for the situation where the Licensee discovers artefacts or human bones. In that case, the Licensee is to notify the Licensor of the find and to comply with the Licensor's instructions in terms of the disposal of the artefacts or bones.

Management Restrictions

46. Section 7 makes provision for special management restrictions to be included in Appendix C. There are no special management restrictions in the Aupouri Licence.

Existing Rights

47. Under section 8 the parties acknowledge that the Licence is subject to the existing rights listed at Appendix D. These are rights such as access to water supply and rights of way. These remain in place following a return to Maori ownership according to their terms.

Survey Matters

48. At section 9 provision is made for survey and associated matters. This is to enable a plan to be deposited in the Land Titles Office pursuant to section 167 of the Land Transfer Act 1952. In a letter dated 2 August 1991 (attached to the search copy of the license) from the General Manager, Asset Sales of New Zealand Timberlands to Juken Nissho Ltd it was noted that the final survey information had been prepared and collated. The Licence was registered on 11 October 1991. Maori owners will no doubt want to ensure a Certificate of Title issues on a return.

Marginal Strips

49. At section 10 the parties acknowledge that the grant of the Licence may create marginal strips but that these will not be identifiable at the commencement date of the Licence. The Crown accepts all responsibility in terms of preparing any necessary plans and certificates. It is also agreed at clause 10.4 that the Land Value, for the purposes of assessing the licence fee, will be adjusted to accommodate any marginal strips at the next Review Date. Provision is also made for varying the Licence if the creation of a marginal strip makes a variation necessary. An endorsement on the search copy of the Aupouri License formally records the License as being subject to Part IVA of the Conversation Act 1987.

General Obligations of Licensee - Indemnity

50. Section 11.1 provides that the Licensee is to give the Licensor a general indemnity arising from any damage caused by an act of the Licensee or any visitor of the Licensee. Any liability arising under this clause becomes moneys owed under the licence and attracts the floating default rate set out in clause 4.9. The Licensee, under clause 11.3, must also keep a policy of public risk insurance for operations carried out in the land for an amount not less than prudent land management would require. Clause 11.4 provides that the Crown is not liable for fencing costs except when it is the owner of the adjoining property.

Information Requirements

51. Under clause 11.5 the Licensee is obliged to supply information to the Crown to facilitate the deliberations of the Tribunal and the performance of the Crown's obligations under the Act. The Crown is to keep this data confidential except to the extent required by the Act. (See Section 6 of this report).

Access by Crown

52. Under clause 11.7 the Crown (anticipation of a return) rights of access across the land so as to gain access to any adjacent lands owned by the Crown. This is limited to access by foot, horseback or light vehicle. The Licensee can control this access for safety reasons or to protect trees or equipment on the land.

Default by the Licensee

53. Section 12 makes provision for the determination of the Licence in the event of the Licensee's default.

54. The Licensor may terminate the Licence if:

54.1 moneys payable under the licence are in arrears;

54.2 the Licensee defaults in the performance or observance of any covenants except a protective covenant or public access easement;

54.3 the Licensee is declared bankrupt or insolvent, or, in the case of a company, goes into liquidation, is wound up or dissolved, enters into a scheme of arrangements with its creditors, or a receiver or manager is appointed.

55. In the case of default by the Licensee in the observance or performance of the conditions or covenants of the protective covenants or public access easements the Licensor can enter the Land and remedy the default, without prejudicing any of its other remedies (except determination or forfeiture of the Licence).

28 Day Period

56. In terms of the breach of any other covenant or conditions the Licensor must serve notice on the Licensee specifying the breach and requiring it to be remedied or compensation paid within 28 days. If the breach is not remedied or compensation not received within that time then the Licensor may re-enter and determine the Licence. Alternatively the Crown can remedy the breaches itself and require the Licensee to reimburse the Crown for all expenses incurred.

Miscellaneous

57. Section 13 sets out a range of miscellaneous provisions. Clause 13.1 provides that the Licensee is to pay the Crown's costs for preparing any documentation regarding an extension, review or variation of the Licence, except for any documentation required as a result of a Waitangi Tribunal recommendation. The Licensee must also reimburse the Crown for any expense it incurs in remedying a breach of the covenants and conditions of the Licence by the Licensee. Clause 13.2 sets out the manner in which notices under the Licence are to be served. Clause 13.3 states that the law governing the Licence is the law of New Zealand. The parties agree to submit to the jurisdiction of the New Zealand courts.

58. Clause 13.5 outlines a general dispute procedure. Disputes relating to review of licence fees are excluded, as are matters relating to return areas on the return of all or part of the Licensed land to Maori. Separate dispute provisions are provided in respect of these matters. One party initiates the dispute procedure by supplying a written notice to the other outlining the dispute. The parties discuss the same on a "without prejudice" amicable basis. If this fails, and the parties agree, the matter is

referred to final and binding arbitration. (One arbitrator). (Note this is a little different to the dispute resolution procedure involving return issues where arbitration is not optional).

Part II - Recommendations by the Waitangi Tribunal

59. Section 14 is a machinery provision setting out in broad terms how the various parts of the Licence indicates which provisions will continue to apply in the situation where a recommendation is made by the Waitangi Tribunal to the effect that:

59.1 the land is not liable to be returned to Maori ownership; or

59.2 all of the land is to be returned to Maori ownership; or

59.3 part of the land is to be returned to Maori ownership.

Thus, where all of the Licensed land is to be returned then Part I, Part II, Part IIB and the guarantee continue to apply. Parts IIA and Part IIC do not. On a partial return the land not returned to Maori remains subject to the Licence pending the appropriate recommendation from the Tribunal.

Part IIA - Termination period provisions that apply when all land made not liable to be returned to Maori ownership

Notice Requirements

60. Clause 15.1 provides that on the issuing of a recommendation to the effect that the land is not liable to be returned to Maori ownership, the Crown is to give the Licensee notice that:

60.1 the Licence is deemed to have been granted for an initial fixed term of 35 years;

60.2 on the expiration of the 35 year initial fixed term the Licence runs from year to year by automatic extension; and

60.3 the Crown can, at any time, give the Licensee a 35 year termination notice.

Condition of Land

61. Upon expiration of the termination period the Licensee is to surrender possession of the land to the Crown. In doing so the Licensee is to have removed all slash (logging waste) and debris in order to make the land suitable for replanting. (Clause 15.3).

Improvements

62. Upon expiration of the Licence the Licensee is entitled to remove those improvements which are capable of removal. All improvements not removed then become the property of the Crown and the Crown must pay the Licensee fair market value of those improvements. (Clause 15.4). Clauses 15.5 and 15.6 determine how fair market value is to be assessed.

Part IIB - Termination period provisions that apply when recommendations made for return of all the land to Maori

Notice Requirement

63. Once a recommendation is made that all of the land be returned to Maori the Crown is to give the Licensee a 35 year termination notice. (Clause 16.1).

Termination Period

64. If the notice is given during the initial fixed term then the year to year extension will not apply and the 35 year termination period will begin on the 30th day of September following the expiration of the initial fixed term. Alternatively, if the termination notice is served after the initial fixed term has expired then the termination period begins from the 30th day of September following service of the notice. (Clause 16.2).

Crown becomes Proprietors

65. Upon return of the land to Maori ownership pursuant to section 36 of the Act, the terms "Crown" and "Crown's" are substituted by "Proprietors" and "Proprietors'" throughout the Licence, with limited exceptions. We discuss the nature of this substitution in more detail in section 7. "Proprietors" is defined under the Licence as:

> *" ... so long as the land is subject to the Licence. The persons in whose names the land or any part is held following the return by the Crown of the land ... to Maori ownership pursuant to section 36 of the Act and includes their successors and assigns and unless the context otherwise requires the servants and agents of the Proprietors,"*

Shared Arrangements on a Return

66. Clauses 16.7.6 through 16.7.11 contain various methods to negotiate the shared use of the land that will occur due to the gradual return of the land, including a formal agreement and provision for the granting of easements, restrictive covenants etc. These are discussed in more detail at section 7.

Access for Maori

67. From return the Maori owners have the right to enter and use the land, (subject to some control by the Licensee), for:

67.1 preserving and safeguarding the graves of Maori people; or

67.2 collecting traditional medicines and foods; or

67.3 fishing, hunting or trapping; or

67.4 other recreational purposes.

Restriction on Licensee

68. Clause 16.5 substantially reduces the rights of use the Licensee has over the licensed land. Following return of the land to Maori ownership the Licensee can only use the land, "*in accordance with accepted forest practice to protect, manage, harvest and process the trees standing or lying on the land at the commencement of such 35 year termination period.*"

Maori Owners to Replant

69. Bearing in mind Aupouri Forest is stabilised sand dune forest we note that clause 16.6 together with Protective Covenant No. 17 effectively imposes an obligation on the new Maori owners to replant.

Return of Physical Possession

70. Return of physical possession of the land is governed by clause 16.7. It provides that once the termination period has started, when the Licensee no longer requires an area to protect, manage, harvest and process the trees, it becomes a "return area". The Licensee is to surrender possession of any return areas which exist at the start of the termination period to the Proprietors upon commencement of the termination period. During the termination period the Licensee is to surrender possession of "return areas" as they become available. The terms of this clause will allow the Licensee to retain strategic areas such as quarries or gravel pits whilst they are required to facilitate the management of the remainder of the Licensed land.

Condition of Land

71. Before the Licensee surrenders possession of a return area it must clear the land of slash and debris so that the land is suitable for replanting, (clause 16.7.4) and give notice to the Maori owners specifying the particulars of the return area and the date of return. (Clause 16.7.3).

Improvements

72. The Licensee is entitled to remove those improvements capable of removal but all improvements remaining on return of physical possession become the property of the Maori owners without any payment or compensation.

Expiry of Termination period

73. At the end the termination period the Licensee is to yield up to Maori owners use of any land still in the possession of the Licensee.

Part IIC - Termination period - provisions that will apply if part of land returned to Maori

74. Upon the making of a recommendation by the Tribunal for the return of part of the land the Crown gives the Licensee a 35 year termination period for that part of the land.

Termination Period

75. The actual commencement date of the termination period depends upon the date of service of the termination notice in the same manner as discussed above for termination notices for return of all the land. (Clause 17.2).

Balance of the Land not returned

76. In respect of the balance of the land the covenants and conditions of the Licence continue to apply subject to any variation. (Clause 17.3).

Variation of Licence on a Partial Return

77. Clause 17.4 provides that prior to return of part of the land the Crown shall consult with the prospective Proprietors and the Licensee in terms of the land to be returned and the balance. Following consultation the Crown is required to effect the transfer by the creation of such rights over both parts of the land so as to reasonably protect the interests of each of the parties (eg easements) as may be agreed by the parties. Matters such as the shared use of roading and other facilities, rights of access, sharing costs of maintenance of improvements, and fire protection are referred to. If a dispute arises the dispute resolution provisions of clause 16.9 apply.

78. The Crown is then to draw up separate Licences for each part of the land in replacement of the existing Licence. Each such licence is to be on the same covenants and conditions of the existing Licence varied to adjust for the changed circumstances.

79. In passing we note that the partial return provisions of the Licence could give the parties some flexibility in other situations. For example where a large forest is

involved and well recognised Iwi boundaries divide the forest. If all the Licensed land was to be returned to Maori then it might be possible (with the co-operation of the Crown) to, by way of the partial return mechanism, vest the appropriate part of the Licensed land in one Iwi and the balance in the other by reference to agreed rohe boundaries. We stress this is a suggestion only and further consideration as to technical and practical issues would have to be undertaken in a particular fact situation.

Guarantee

80. The guarantee provisions are standard and specifically refer to both the Crown or the Proprietors (new Maori owners). In our view the terms of the Licence and the Contracts (Privity) Act 1982 cover any issues as to the identity of the new Maori owners at time of execution of the guarantee and hence enforcement.

Schedules

First Schedule

81. The First Schedule contains a detailed list of improvements as at the commencement of the Licence.

Second Schedule

82. The Second Schedule sets out the form of the termination and return notices to be used.

Appendix A

83. Appendix A contains the protective covenants. See discussion at Appendix Nine.

Appendix B

84. Appendix B contains the one public access easement (see Appendix Nine). At Appendix Nine we also attach extracts of the registered certificate required in terms of Section 19 of the Act.

Appendix C

85. Not applicable.

Appendix D

86. Appendix D lists the parties who have existing rights over the used land eg access tenancy agreements, grazing licenses, water supply arrangements are listed. It also lists rights in favour of the Licensed land.

Legal and Other Developments

Reported Decisions

87. There have been two reported decisions concerning the interpretation of aspects of the Act or a Crown forestry licence. The first, [13] concerned a dispute between a Licensee (Carter Holt) and the Crown as to the basis on which the review of the annual licence fee was determined. The issue had also been exercising the minds of other Licensees and effectively, Carter Holt was bringing a test case. Carter Holt sought a declaration in relation to issues concerning the construction of the terms of the licence.

88. The rental fee for the licence is 7% of the unimproved land value. Every three years the fee is to be reviewed. In 1993, as the licences came up for review Licensees were surprised to find the Crown claiming rental increases of up to 100%. In essence, the Crown was arguing that because the definitions of "improvements" in each Licence excluded drainage works, excavations and so forth, then these were necessarily included in the concept of "unimproved value". This approach significantly increased the base by which the annual licence fee was to be calculated.

89. However, Carter Holt pointed to section 29 of the Act which (at that time) stated that the review of the annual licence fee was to be based on market rates for the land in its unimproved state taking into account the terms and conditions of the Licence. Carter Holt argued the contractual arrangements of the Licence could not override the Act. Carter Holt filed proceedings in September 1994, to obtain a declaration that its interpretation was correct. In December of 1994 a Bill was introduced into Parliament (the Finance Bill No. 4) which proposed a number of amendments to the Act, and in particular section 29. In short, the amendments "tidied up" the Crown's position by aligning the definition of "Improvements" found in the existing licences. Further, the Bill provided for retrospective effect.

90. Carter Holt continued to press ahead with their proceedings. From a constitutional aspect it is interesting to note that the Judge carefully canvassed a number of decisions dealing with the restrictions placed on a court in view of impending legislation. However, the Judge was of the view that these previous cases could be distinguished from the one before him in a number of areas. For example, the New Zealand Bill of Rights Act 1990 reinforced the right of Carter Holt to bring the proceedings and to obtain judgment on them, the matters at hand were contractual matters where in other cases they were not.

91. The court was persuaded as to the logic of Carter Holt's argument. The Judge was of the view that the assessment of the licence fee should be based on the unimproved value of the land without reference to the definition of improvements set out in the Licence. The Judge went on to give Carter Holt the declaration it sought. Subsequently, by way of the Crown Forest Assets Amendment Act 1995, the Act was amended to reflect the Crown's position. The changes were retrospective. We

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[13] *Carter Holt Harvey Limited and Carter Holt Harvey Okuku Forests Limited v The Attorney-General* Unreported, HC Auckland, CL 39-94, 31 January 1995, Burker J

understand that the NZMC and the FOMA made submissions in support of the proposed amendment.

92. The second case[14], also concerned interpretation issues arising out of the licence fee review process. The Licence sets out a comprehensive notification procedure to be followed on a review date. Prior to the review date the Crown had to notify Juken Nissho in writing of the Crown's assessment of the land value. If the Crown does not give notice by the review date, then the Licence deems the Crown to have given notice that the land value would remain unchanged. On 29 October 1993 a representative of the Crown personally posted the appropriate notice. It was post-marked 31 October 1993 (Sunday) and arrived in Juken Nissho's office in Auckland on Monday, 1 November 1993 - one day late. The terms of the Licence state that service is effected two days after registered post or one day after a facsimile was sent. However, the Licence did not specifically address service by ordinary post.

93. In effect Juken Nissho claimed that time was of the essence for the giving of the notice. Accordingly because the notice was not received until after 31 October 1993, then the Crown could not increase the rental for the next three years. The Crown argued that the Acts Interpretation Act 1924 was applicable. This states that where legislation provides for anything to be done on a holiday then this is automatically extended to the next day which is not a holiday. The Judge disagreed. He was of the view that, on the facts, this was one of those occasions when time was of the essence. Case law shows that if a party fails to adhere strictly to the contractual time limits for notifying increases, then that party loses the ability to impose an increase. The fact that there was a delay of only one day was not relevant. In passing, the Judge noted that it would have been "simplicity in itself" for the Crown to have sent a fax notifying the new rental, particularly given that this mode of service was specifically allowed for under the Licence. The court found in Juken Nissho's favour.

94. A second issue in the case also concerned the importance of acting in a timely manner where time frames are set out in the contract. This aspect of the argument concerned the appointment of a valuer under the review provisions. Juken Nissho argued that the Crown was out of time in terms of notification as to appointment of its valuer. (In this situation the Crown is deemed to have agreed to use the valuer nominated by the licensee). Again, on the facts, the Judge found in Juken Nissho's favour.

The 1996 Working Group on Forestry Claims

95. Following various meetings with Te Arawa Mataatua by Government in 1985, a Working Group on Central North Island forest claims was set up. The group met regularly from May 1996. In July of 1996, they released an interim report to the principals. We have been able to obtain a copy. As the Working Group and report

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[14] *Juken Nissho Limited v The Attorney-General* Unreported, HC Auckland, CL52-95, 20 March 1996, Barber J

focuses on Central North Island claims the following represents only a brief overview of matters discussed in that report.

96. The Working Group was comprised of representatives of Te Arawa and Mataatua and their advisors, Crown officials from the Office of Treaty Settlements, Te Puni Kokiri, the Department of the Prime Minister and Cabinet, the Treasury and the Crown Law Office. The terms of reference agreed by the Working Group were as follows:

> *"The objective of the discussions is to identify the hindrances that claimants may be experiencing in the existing process of settling forestry claims in the central North Island, and how these may be overcome. To meet the objective, the group will:*
>
> *(i) identify any hindrances to progress towards settlement of the forestry claims in the central North Island;*
>
> *establish the causes of any hindrances and how these may be overcome;*
>
> *(ii) make an interim report to the principals by 30 June.*[15]

97. Under the heading of "Hindrances" the report canvassed issues such as:

- mandating and representation issues;
- co-ordination of agencies in the claims process;
- Crown policy and process;
- Waitangi Tribunal process;
- Crown Forestry Rental Trust process.

98. The report then discusses possible solutions to the identified hindrances. In terms of issues relating to a staged approach to progressing central North Island claims, it was clear that Maori representatives and Crown officials seemed still some way apart. Nevertheless, the Working Group went on to make a number of recommendations. We have attached the recommendations at Appendix 12 of this report.

99. As at the time of writing we have been unable to ascertain whether the Working Group is still active. We were also unable to ascertain whether any or all of the recommendations identified by the Working Group have been acted upon.

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15 *Working Group on Forestry Claims - Interim Report to Principals,* July 1996, p 8

SECTION 5 - MATTERS LEADING TO A RECOMMENDATION

Introduction

1. The purpose of this section is to identify and discuss issues specific to the licensed land should the Tribunal conclude that a claim over licensed land is well founded and return of licensed land is appropriate. The return of licensed land to Maori, and the calculation of associated compensation will almost certainly generate a variety of issues for resolution. Once an interim recommendation issues the legislation sets down a strict timetable.

2. As issues emerge there may arise a tension between the Tribunal facilitating the resolution of such matters through the usual process of hearings and submissions and the likely delays which will ensue. Some issues will be able to be resolved by reference to the terms and conditions contained in the Act and/or the terms of the Licence. Other issues may best be resolved following discussion by the parties to the claim. Still other issues may elude resolution by the parties and the parties may request the Tribunal to determine the issue. In the absence of such a request the Tribunal may believe it is required to or it is appropriate that the Tribunal determine the matter. In the latter case the Tribunal's manner or proposed manner of resolving the issue may not be to the liking of one of the parties to the inquiry. As a statutory body the Tribunal's decision and decision-making process is subject to review by the courts.

3. Accordingly we briefly identify some relevant issues, revisit the main empowering provisions of the Treaty of Waitangi Act as amended by the Act and then consider some potential issues and the Tribunal's role in more detail.

4. As we see it, issues consequential upon the return of licensed land to Maori could include:

   - Issues of mandate and corporate governance. The Tribunal is required to identify the Maori or group of Maori to whom the land is to be returned. Almost certainly, the land upon return will be vested in the legal representative or entity of those Maori or group of Maori. Should the Tribunal review the legal nature of the entity and corporate governance issues in terms of accountability and transparency of decision-making once the assets have been vested in that body?;

   - The status of land following a return. Is it Maori freehold land or general land owned by Maori. Should there be a choice?;

   - The basis upon which the Tribunal may recommend a lesser amount in terms of section 2(b) of the First Schedule;

   - Whether the Tribunal should require the claimants and the Crown to agree the Specified Amount in terms of options 1 and 3 and the manner in which the Specified Amount will be calculated in terms of option 2.;

- Whether the Tribunal should determine the Specified Amount if the parties are unable to agree on the calculation of the same;

- In terms of compensation issues is the ability of the Tribunal to make determinations/recommendations strictly limited to situations where the Tribunal is expressly directed or granted a discretion to determine First Schedule matters?;

- When do the claimants nominate their preferred option?

5. Before considering these issues and any consequential role of the Tribunal we consider in further detail the ambit of the Tribunal's powers and jurisdiction under the Act and the Treaty of Waitangi Act.

Treaty of Waitangi Act - Relevant Provisions

6. From a consideration of the background events, it seems reasonable to conclude that both Maori and the Crown wanted finality in terms of the settlement of Treaty claims to land underlying the forest assets. This required the extension of the Tribunal powers. The main empowering provisions inserted into the Treaty of Waitangi Act by the Act are:

- section 8HB(1)(a);

> *Subject to Section 8HC of this Act, where a claim submitted to the Tribunal under section 6 of this Act relates to licensed land the Tribunal may,-*
>
> *"(a) If it finds-*
>
> *"(i) That the claim is well-founded; and*
> *(ii) That the action to be taken under section 6 (3) of this Act to compensate for or remove the prejudice caused by the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission that was inconsistent with the principles of the Treaty of Waitangi, should include the return of Maori ownership of the whole or part of that land,-*
> *include in its recommendation under section 6 (3) of this Act a recommendation that the land or that part of that land be returned to Maori ownership (which recommendation shall be on such terms and conditions as the Tribunal considers appropriate and shall identify the Maori or group of Maori to whom that land or that part of that land is to be returned)*

- section 5(1)(ab).

> *"(b) To make any recommendation or determination that the Tribunal is required or empowered to make under the First Schedule to the Crown Forest Assets Act 1989:"*

Relationship

7. The above sections deal with two separate matters: One the return of land, the other compensation issues. However, in the wider context, they clearly operate together. For example a final recommendation as to return triggers the Crown's obligations to both return land and pay compensation. Some of the detail of the First Schedule is referenced back to the date of the final recommendation. Without a recommendation as to return, the issue of compensation does not arise. This interrelationship has the potential to create a number of timing issues. These issues are further complicated by the absence of express direction in terms of *"who does what and when"* in the course of ascertaining the quantum of compensation.

8. In the course of considering these issues and the Tribunal's powers and role in resolving potential issues, we consider;

- compensation issues;
- issues which might arise in terms of a return of land.

Compensation Issues

9. In section 6 we go into the detail of the compensation options available to claimants under the First Schedule. For the purposes of the following discussions we note: there are three options available to claimants, two "lump sum" options and one staggered payment income stream option. The calculation of the Specified Amount for the lump sum options is critical. There is potential for disagreement between the Crown and Maori as to the quantum of a Specified Amount in the case of the lump sum options. The detail by which the future income stream option will be calculated may also generate dispute. On a return, claimants get 5% of the Specified Amount as of right. The claimants get the balance (95%) unless the Tribunal recommends a lesser amount.

Process

10. As we see it, the process can be reduced to:

- nomination by the claimant;
- determination by the Tribunal as to any lesser amount;
- payment.

11. Once an interim recommendation issues time becomes of the essence. Within 90 days the interim recommendations become final. The Crown's obligation to pay compensation is then triggered. Payment (where a lump sum option is chosen) is required within 2 months of the final recommendation unless the Tribunal recommends otherwise. (If the income stream option is chosen then, in the context of Aupouri forest, payments commence within four months). No interest is payable on outstanding amounts.[1]

12. The valuation issues may prove particularly complex (given also that this is the first time the issues will be considered in detail) and will require significant analysis and consideration by the parties.

The Best Case Scenario

13. Prior to making an interim recommendation the Tribunal makes the parties aware of its proposed timetable and seeks their co-operation. The Tribunal facilitates the flow of the appropriate information from the Crown to the claimants. The Tribunal makes itself available to consider submissions from the parties on outstanding issues. The parties agree on the calculation of the Specified Amounts.

14. The Tribunal is then able to from a view on the balance of the Specified Amount the subject of the Tribunal discretion. The Tribunal is able to consider the use of its general ability to make recommendations and can consider whether payments made or to be made by the Crown under the Act should be taken into account when making any general recommendations[2]. The Tribunal then issues its interim recommendations.

The Worst Case Scenario

15. In this scenario the parties are unable to agree on the calculation of the Specified Amounts. The claimants argue this hinders the exercise of their right to nominate an option. Can the Tribunal make a determination to break the impasse as to determination of the Specified Amounts?

16. The First Schedule by express reference empowers the Tribunal to extend certain timeframes. There is no express reference to the Tribunal's powers in terms of determining the Specified Amounts for any or all of the options.

17. As noted Section 5(1)(ab) gives the Tribunal the power to make any recommendation or determination that the Tribunal is required or empowered to make under the First Schedule. On a narrow reading of Section 5(1)(ab) the Tribunal is not *"empowered"* to make a determination as to the Specified Amounts. Its ability to determine compensation issues is only where the Tribunal is expressly directed or permitted by the First Schedule (so it might be argued). This could mean lengthy delays pending the parties coming to agreement. One or other of the parties may see an advantage in such delays. Arguably when considering the words in the

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1 Section 9, First Schedule, Crown Forest Assets Act 1989.
2 Section 8HB(3), Crown Forest Assets Act 1989.

wider context and the purpose of both the Act and the Treaty of Waitangi Act this was not the intention of Parliament. To break the impasse, is the Tribunal *"required"* to make a *"determination"?* Before forming a view on this issue we briefly look at the appropriate statutory interpretation considerations.

Statutory Interpretation Considerations

The three main approaches to statutory interpretation are purpose, context and text.

18. The modern method of construction of statutes is the purposive approach. Recent judgments in New Zealand frequently make reference to the "object" or "purpose" of the legislation[3], "making the Act work as Parliament intended",[4] and to the "spirit" of the legislation.[5] Sir Ivor Richardson has said that the *"twin pillars on which an approach to statutes rests, are the scheme of the legislation and the purpose of the legislation"*[6]

19. Section 5(j) of the Acts Interpretation Act 1924 states that:

"Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit"

20. In passing we note that the Law Commission recommended[7] that this be reworded to state: *"the meaning of any enactment is to be ascertained from its text in light of its purpose and its content".*

21. The purposive approach works in the following way.

(a) A strained interpretation may be put on words if the purpose of the provision requires it, provided that the strained interpretation is one which the words can legitimately bear.[8]

(b) General words should be given a construction which complies with the purpose of the Act in question.

22. In the potential situation which the Tribunal faces, it is not a specific word or phrase which is open to interpretation, but rather a "gap" in the legislation. Nowhere does either the Treaty of Waitangi Act, nor the Act stipulate that the Tribunal is

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3 *Pacific Industrial Corporation of New Zealand* [1991]1 NZLR at 374 per Thomas J

4 For example *Northland Milk Vendors Association Inc v Northern Milk Limited* [1988] 1 NZLR 530 at 537, 538 per Cooke P; *Auckland City Council v Minister of Transport* [1990] 1 NZLR 264 at 289

5 For example *R v Lewis* [1991] 1 NZLR 409 at 411 per Cooke P

6 (1985) 2 Australian Tax Forum 3

7 The Law Commission Report No 17 *A New Interpretation Act* (1990) at 121

8 *R v Clayton* [1973] 2 NZLR 211

authorised to determine what the specified amount is referred to in the First Schedule, should the parties fail to agree.

23. Courts cannot fill gaps in legislation. They cannot write what Parliament has not included. However in a situation such as the one under discussion, where a question arises and where the legislation does not provide an express answer, it is possible to construct an answer by considering the purpose of the Act as a whole.

24. In *Northland Milk Vendors Association Inc. v Northern Milk Limited*[9] Cooke P emphasised that the court must try to make the Act work as Parliament intended and that it must give an interpretation which accorded best with the "intention" or "spirit" of the Act. Therefore even where the purpose of interpretation may not exactly be able to fill the gaps it may, "bridge a hiatus"[10].

25. In looking to the purpose of a certain section of an Act, it is necessary to look at the purpose of the Act as a whole. The purpose of the Act is also sometimes used to convey not only the purpose as enacted, but also the social, economic or other end which Parliament was hoping to achieve by enacting the particular piece of legislation.

26. The purposive approach is the dominant approach to interpretation at the moment. It produces a common-sense approach to interpretation which obtains the results that the framers of the Act intended. At times it can produce very different results from a purely literal interpretation which simply relies on a grammatical construction of the text.

Purpose of Act

27. In attempting to assess the purpose of the Act one must first look to the purpose as outlined by the long title. As noted, this is:

(a) *the management of the Crown's forest areas,*

(b) *the transfer of those assets while at the same time protecting the claims of Maori under the Treaty of Waitangi Act 1975,*

(c) *in the case of successive claims by Maori under the Act the transfer of Crown Forest land to Maori ownership and for payment by the Crown to Maori of compensation,*

(d) *other incidental matters.*

28. In looking at the Act as a whole the tight timeframe indicates that it was Parliament's intention that the process of returning land and payment of compensation was to be an expeditious one.

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9 [1988] 1 NZLR 530

10 Ibid. per Cooke P

29. It is also important to note that the Tribunal has been appointed as the body which makes all significant determinations and recommendations within the context of the Act. There is no express indication that any other body should make determinations.

30. The social and economic results which the Government intended to achieve by the enactment of the Act are the redress of legitimate Treaty grievances through the return of land and payment of compensation. The Tribunal has been set up as the instrument to achieve this purpose. When looking to "bridge the hiatus", the common sense approach would indicate that the Tribunal is the most appropriate decision making body to determine the specified amount.

31. Thus, while on a strict grammatical interpretation of the text it might be held that there is no specific section empowering the Tribunal to determine the specified amount, looking to the common-sense approach with regard to the purpose of the Act, the Tribunal would seems be the body most fit to make this determination.

Text

32. As noted, we are not assessing the meaning of a particular word or phrase, but rather looking to "bridge the hiatus" in the legislation. It is important that the section of the Act under consideration be read in light of the Act as a whole. The New Zealand courts, particularly the Court of Appeal, continually emphasise what they call the, "scheme of the Act"[11]. This means that no section should have an interpretation imposed upon it until the Act as a whole has been examined.

Context of the Act

33. When reading the Act as a whole a clear theme or enacted purpose is evident which, in our view, enables us to "bridge the hiatus".

34. While we are attempting to answer a question for which the Act makes no specific express provision, on a thorough reading of the Act as a whole there are a number of indications as to the direction of a legislature's thinking which are evident in the extended powers of the Tribunal, and the Tribunal's ability to make binding recommendations.

External Context

35. It is permissible in the interpretation of statutes to refer to materials outside the Act. Things which may be referred to include the existing legal landscape, earlier law, social and economic factors, and Parliamentary history. In the context of the Tribunal's concern, the social and political background is the most relevant. It is important to look at the role of the Tribunal as a decision making body constituted by Parliament for the purpose of settling Maori grievances. Parliament specifically created a Tribunal to settle these claims instead of having claims litigated in the High Court or decided by another body. It is the body Parliament intended to make

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[11] For example, see *Callender v Wellington City Council*[1980] 2 NZLR 55 at 63 to 64 per Richardson J

decisions pertaining to the return of licensed land and payment of compensation, subject of course to judicial review

Conclusion

36. If a strict adherence to the plain text is adopted, there is no direct reference to the Tribunal's ability to recommend or determine the specified amount. If however, the purposive and contextual approaches are adopted, the common-sense answer is that the Tribunal is empowered or required to make the determination by, in the words of Cooke P, "filling the gap in the Act".

37. In passing we note that the Tribunal could refer the issue of whether or not the Tribunal can determine the matter to the High Court[12].

Timing

38. Having formed the view that the Tribunal is the appropriate body to resolve this issue when does the Tribunal make the determination and how? It could, as part of its interim recommendations, put in place a process by which it advises the parties that if at the end of 90 days the parties are unable or unwilling to agree a compromise the issue will be determined by the Tribunal by way of a particular process. For example, by the Tribunal after receiving independent expert advice. The Tribunal might include a mediation process as per the Second Schedule to the Treaty of Waitangi Act.

39. The Act is silent as to when the claimants nominate their option. The claimants may wish to wait for the Tribunal's determination as to the value of the options. In theory, this creates a problem in terms of other general recommendations. (Although the Tribunal is not directed to consider the compensation payable - it may). A practical way around this impasse might be to focus on the most easily calculated and least controversial option (option 3) to form a "floor".

The 95% Component

40. As noted, pursuant to clause 2(b) of the First Schedule to the Act claimants receive the remaining portion of the Specified Amount unless the Tribunal recommends a lesser amount.

41. There are a number of matters which the Tribunal will want to bear in mind when considering its position on clause 2(b). Traditionally these fall under three heads:

- illegality;
- unreasonableness;
- unfairness.

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12 Section 10, Commissions of Inquiry Act 1908.

Illegality

42. Under this heading the Tribunal decision would be assessed against factors such as - failure to take into account relevant considerations, taking into account irrelevant factors. An example of an irrelevant consideration might be if the Tribunal was to be influenced in its decision by a consideration of the government's proposed policy known as the "Fiscal Envelope or Cap". This proposal has subsequently been withdrawn by government. Another example might be if the Tribunal looked to consider the issue in terms of its impact on national fiscal expenditure. The Crown in deciding to sell its forests entered into agreements with Maori and passed legislation embodying the terms of such agreement.[13] The Crown had adequate opportunity to consider its ability to meet its payment obligations should land be returned to Maori. Further, the Crown was paid what it considered a fair price for the assets and has had (and continues to have) the use of that money. An example of a relevant consideration might be to weigh the compensation amount against the economic and social consequences to Maori flowing from the acts or omissions of the Crown.

Unreasonableness

43. The decision maker must act reasonably and the decision must be made on a reasonable basis. An unreasonable decision is one which no sensible decision maker, acting with due appreciation of his/her responsibilities, would arrive at.[14] This head overlaps to a large degree with the other heads of judicial review.

44. Unreasonableness may be demonstrated where the supporting evidence leaves a gap of logic in reaching the decision - *"a leap which no reasonable authority could reach."*[15]

Unfairness

45. The two basic principles are:

- the duty to inform a party sufficiently to allow for submissions to be heard and to entertain those submissions; and
- the rule against bias, not to close one's mind to alternatives.

Conclusion

46. In the Tribunal's 1997 Muriwhenua Land Report the Tribunal has assessed the merits of the claim and consequences of the grievance. [16]Arguably, in order to issue the report the Tribunal has already met the requirements of the heads outlined above. However before making a decision the Tribunal may wish to hear further evidence.

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13 See also Section 36(3) of the Crown Forests Assets Act 1989.

14 *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 (CA).

15 Ibid

16 Waitangi Tribunal, *Muriwhenua Land Report 1997,* Wellington, GP Publication, 1997, p 404.

For example require an economic assessment of the economic loss suffered by the claimants as a consequence of the Crown's actions or require further submissions, say from the Crown, as to the basis of why anything less than the full 95% should be recommended.

Land Issues - Ambit of Tribunal's Power:

47. By reference to their ordinary meaning the ambit of the statutory words empowering the Tribunal to recommend the return of Licensed land *"on such terms and conditions as the Tribunal considers appropriate"* is very wide. When placed both in the context of the rest of the section, that is the return of Licensed land to Maori identified by the Tribunal, or the wider context of the purpose and ambit of the legislation, one is inexorably drawn to the same conclusion. That is, the Tribunal has very wide discretion to consider land return issues by way of attaching terms and conditions to the appropriate recommendations. Accordingly, we now consider some of the return of land issues identified previously.

Maori or Group of Maori

48. Section 8HB(1)(a) of the Treaty of Waitangi Act 1975 requires the Tribunal, when making a recommendation for the return of the whole or part of Licensed land, to:

> *"... identify the Maori or group of Maori to whom that land or part of that land is to be returned."*

49. This task of identifying the appropriate beneficiaries of the returned land will involve consideration of issues such as the Tribunal's approach to relief. These issues are outside the scope of our brief. However, in passing we note that the Tribunal invited the parties to the Muriwhenua hearing to make submissions on this issue.[17]

50. We have assumed that, in the event of a binding recommendation being made over the Aupouri forest, the Tribunal will identify a group of Maori rather than an individual as the appropriate recipient beneficiaries of the land.

51. Once the group of Maori have been identified the question that then arises is how to vest the land in order to ensure that it is genuinely returned to the identified group of Maori and their descendants. It is likely that in almost all cases a legal entity of some sort will be proposed. However, some care must be exercised to ensure that the legal entity is properly mandated by the identified beneficiaries. As noted by Judge Hingston of the Maori Land Court:

> *"... The creation of a corporate body confers no customary authority."*[18]

52. In the context of Treaty settlements issues of mandate are increasingly intertwined with the processes for accountability and ongoing governance issues.

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17 Ibid, p410.

18 Nelson Maori Land Court Minute Book 21, 8 December 1994 (Ngati Toa Decision) 1

> *"It is imperative to guarantee that land ownership, once resolved, is entrusted to legal entities which are not subject to shifting membership or temporary political groupings. The rights of owners and the rights of succession to land must be more durable than the next Annual General Meeting of the legal entity managing the land."*[19]

53. If the land is Maori freehold land and the land holding entity is an entity constituted in terms of Te Ture Whenua Maori Act (eg a Whenua Topu trust) the Tribunal may form the view that the land holding entity is sufficiently "controlled" by application of Te Ture Whenua Maori Act. Alternatively, given that there may be a number of hapu in such a Trust or the claimants may wish to place the land in an entity outside Te Ture Whenua Maori Act, the Tribunal may wish to see accountability and governance issues addressed in the trust order or constitution of the entity.

54. Before considering the question of whether the Tribunal has the power to determine issues of mandate and corporate governance, we consider the existing models for determining whether a legal entity has established an appropriate mandate.

55. There has been no legal statement as to what constitutes a mandate for the purposes of vesting settlement assets in Maori. However, we can look for guidance to the approach taken by the Crown and Te Ohu Kai Moana, the two bodies primarily involved in making policy in the area of mandating to date.

Crown processes for establishing a mandate

56. The Crown, in its publication *"Crown Proposals for the Settlement of Treaty of Waitangi Claim, Detailed Proposals"*, states:

> *"To prevent settlements being revisited, the Crown needs a number of assurances that it has fully met its duties under the Treaty of Waitangi. These assurances will reduce the likelihood of settlements being challenged in the first place, and will bolster the Crown's position in the face of any challenges that do arise. Specifically, the Crown needs to fell assured that:*
>
> - *The correct claimant group and its constituent members have been precisely defined...*
> - *The correct claimant group has fully and properly:*
>   - *mandated negotiators to pursue the claim;*
>   - *endorsed the governance system for managing settlement resources;*

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19 Aboriginal Lands Trust Review Team; Chairman Neville Bonner AO, *Report of the Review of the Aboriginal Lands Trust*, Western Australia, Aboriginal Affairs Department, 1996, p47.

* *ratified a draft Deed of Settlement.*

> *New grievances can arise if the Crown has not properly informed itself of the views of the full claimant group on these matters, or if the processes are deficient in some way, for example, if not all the group had a chance to express a view, or the proposals were presented in a misleading way.*

- *There is an appeal process over the governance system for managing the settlement resources. Of particular concern are that minority interests are protected against an oppressive majority, the majority against an unreasonable minority, and that criteria for becoming a member and having voting rights in the claimant group are open to independent appeal."*[20]

57. In the case of Waikato-Tainui a mandate for negotiation and settlement of their raupatu claim was obtained through a series of hui and a postal ballot. Following that process and prior to the signing of the Deed of Settlement the Tainui Maori Trust Board's mandate was challenged[21]. The plaintiffs sought injunctions to prevent the Tainui Maori Trust Board from signing the Deed of Settlement with the Crown until further consultation had been undertaken to resolve the issue of mandate. A commentator noted the Court's comments on the mandating process employed:

> *"The trust board could have proceeded either 'on traditional Maori lines until some kind of consensus emerged', used Trust Boards Act procedures, or held a referendum. It chose a multi-faceted approach. There was no single right answer. The board utilised a method which was democratic, but also used traditional Maori processes to some extent. The overall nature of the response to securing a mandate was the important thing."* [22]

58. Notably the Court commented that it considered this to be a political matter rather than a question of law and concluded that "[a]s to the overall interests of justice ... there is a compelling national interest in moving forward."[23]

Te Ohu Kai Moana processes for establishing a mandate

59. Te Ohu Kai Moana is the other policy making body working in the area of mandating issues. On 2 December 1996 they issued a memorandum for wide distribution within the Iwi entitled "Mandate Recognition of Iwi Organisations".(See Appendix 10)

60. In its earlier material Te Ohu Kai Moana emphasised the need for mandating processes to be open and fair, and to provide an opportunity to participate to a

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20 *Crown Proposals for the Settlement of Treaty of Waitangi Claims - Detailed Proposals*, Wellington, Te Puni Kokiri, 1995, p42.

21 *Greensill & Others v Tainui Maori Trust Board* (M117/95, HC Hamilton, 17 May 1995, Hammond J).

22 *Maori LR Jun 1995, p4*

23 A Mikaere [1995] New Zealand Law Review, 153

maximum number of Iwi members. While recognising that hui would not always be the most appropriate way to resolve a mandating issue, the following criteria were set down as an indication of the processes which should be follows:

- *any mandate hui must be publicly notified, with a reasonable interval allowed between notification and the hui, so that members of the Iwi have the opportunity to attend (copies of notices, and the media used, must be kept);*
- *the notice must clearly indicate that the agenda includes issues concerning the mandate to represent the Iwi on fisheries matters;*
- *the hui must be open to all Iwi members who have whakapapa affiliations;*
- *a list must be provided of those Iwi members who attended the hui [it is not expected that non-iwi members who have any voting rights at the hui];*
- *minutes of the hui must be provided; including voting records;*

61. In terms of a hui to secure a mandate we note the comments of McGechan J in a recent case, that the important thing in securing a mandate is the overall nature of the response:

> *"The Commission's quest is for a body (and there is to be only one) which "represents" the iwi and to which assets properly can be distributed. The Commission is not so naive as to expect unanimity through the voting processes directed. Maori argue and differ like all humankind, and sometimes passionately...The Commission obviously is prepared to accept as representative a body which received a majority of votes, even though not supported by a remaining minority. As counsel for the Commission observed, the Commission cannot and does not attempt to design a "blueprint" for the "perfect hui". It is less a matter of exact compliance with minute details, than an ability on the part of the Commission in the end to stand back and be satisfied that after widespread, informed, and fair opportunity to vote, a majority of those who actually troubled to vote did favour the body concerned, and it fairly can be said to be truly representative. As counsel likewise submitted, there may be situations, particularly where voting margins are small, where ultimate judgmental elements may be involved."*[24]

62. Importantly, TOKM has also signalled that all aspects of organisation and practice are relevant to assessing a mandate. This has grown into a set of policies listed and explained in the Memorandum dated 2 December 1996.

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[24] Te Runanga o Wharekauri Rekohu Inc v Treaty of Waitangi Fisheries Commission (No. 1) McGechan J, HC Wellington, CP 297/95, 11/9/97, at p11.

63. Essentially:

> *"The Commission has come to look for bodies which show accountability to all members of Iwi, regardless of factions, and transparency in operation. Specifically, there are to be regular elections of executive office holders, and audited accounts. Constitutional protections for members are to be entrenched (75%)."*[25]

64. We note that Te Ohu Kai Moana is specifically empowered under section 6(e)(ii) of the Maori Fisheries Act 1989 to:

> *"(ii) To develop, after full consultation with Maori, proposals for a new Maori Fisheries Act that is consistent with the Deed of Settlement and makes provision for-*
>
> *(A) The appointment, composition, and powers of any body succeeding the Commission; and*
>
> *(B) The development of a procedure for identifying the beneficiaries and their interests under the Deed of Settlement, in accordance with the Treaty of Waitangi, and a procedure for allocating to them, in accordance with the principles of the Treaty, the benefits from the Deed of Settlement:"*

65. Arguably, this is a more detailed direction than that given to the Waitangi Tribunal in section 8HB particularly when read in conjunction with other sections of the Maori Fisheries Act.

Role of Tribunal

66. Section 8HB(1)(a) of the Treaty of Waitangi Act 1975 does not expressly define the Tribunal's powers as to issues of mandate beyond the power to *"... identify the Maori or group of Maori to whom the land ... is to be returned ..."* However, the Tribunal's powers to attach terms and conditions to its recommendations are expressed in very wide terms.

67. As discussed in paragraphs 18-31 above, matters of statutory interpretation may assist in considering the ambit of the Tribunal's powers in this regard.

68. Parliament clearly had a number of objectives when it enacted the Act, one of these was the expeditious resolution of well-founded claims. Another key objective we suggest was to obtain clearly durable and final settlement of such claims. As noted above, the Tribunal has been given the pivotal role in facilitating the meeting of these objectives. It is empowered to determine whether a claim is well-founded, what redress is required for that claim, and to attach such terms and conditions to its recommendations as it considers appropriate. It is then the Crown's task to return the land in accordance with the Tribunal's recommendation. In our view it is reasonable to conclude that Parliament's intention was that the Tribunal interpret these powers

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[25] Ibid, p30

in a manner consistent with the overall purpose of the Treaty of Waitangi Act and the Act, i.e. enduring settlements for proven treaty grievances.

69. Having considered the processes and policies put in place by the Crown and Te Ohu Kai Moana it is clear that a fundamental aspect of ensuring that a settlement is durable and final is attaining some assurance that the legal entity in which the assets will be vested is genuinely representative of the rightful beneficial owners. This will involve consideration of issues of mandate and we suggest this includes an examination of issues of corporate governance.

70. If the Tribunal should choose to exercise its power to attach terms and conditions to its recommendation in respect of mandate and corporate governance of the vesting entity then it may do so in a number of ways.

71. It may name a particular legal entity and after discussion and consideration of submissions from the claimants develop appropriate terms as to corporate governance before issuing an interim recommendation with a condition that the land be vested in that legal entity. Alternatively the Tribunal might recommend return of the land subject to a more general term or condition that the land be vested in a legal entity which meets a set of criteria specified by the Tribunal.

Status of Land

72. Given the dual nature of the land system in New Zealand an issue arises as to the status of that land under Te Ture Whenua Maori Act 1993. The claimants may request this issue be clarified. The Tribunal may from a view, on policy grounds for example that it is appropriate for the Tribunal to attach as a consideration how the status of the land might be settled.

73. Crown land is land vested in the Crown, not held by any person in fee simple. When the land is returned to Maori ownership, the status of the land will change by definition. However, what will the new status be? Clearly, it will be privately owned land but there are a series of outcomes or options under Te Ture Whenua Maori Act 1993 which should be considered i.e. Maori freehold land, general land owned by Maori and general land.

74. The Land is currently Crown land, which is defined under the Land Act 1948 as follows:

> *"... land vested in Her Majesty which is not for the time being set aside for any public purpose or held by any person in fee simple;"*

75. Therefore, the transfer of the Land from the Crown into private ownership will necessarily involve a change of status.

Outcomes

76. In our view the options are:

- Maori freehold land;
- General land owned by Maori; or
- General land.

Maori freehold land

77. Maori freehold land is defined in section 129 of Te Ture Whenua Maori Act 1993 as follows:

> *"Land, the beneficial ownership of which has been determined by the Maori Land Court by freehold order ..."*

78. Generally speaking Maori freehold land is land which has not been out of Maori ownership. Moreover, under section 130 of Te Ture Whenua Maori Act land cannot acquire the status of Maori freehold land otherwise than by a status order of the Maori Land Court.

79. We note *Re: Tahora 2F2 Block*[26]. In that case, land formerly vested in the Crown had been transferred to Wairoa District Council for construction of a road. Having determined that Wairoa District Council held the land as fiduciary for the former Maori owners Savage J made a vesting order in favour of the former Maori owners and stated:

> *"... I now make a vesting order vesting this land in those persons who are the beneficial owners of Tahora 2F2, in their respective shares, as beneficial owners and the legal title in the applicant to the effect that this land is now general land owned by Maori and part of the corpus of the [Maori] Incorporation. The question of whether the land should become Maori freehold land ... [is] not before me."*

80. Clearly therefore, transfer of the land from the Crown to private Maori ownership will not of itself cause the land to become Maori freehold land. To Maori freehold land attach all the processes and procedures set out in Te Ture Whenua Maori Act. (In passing we note that there is no general provision in Te Ture Whenua Maori Act corresponding to section 2(2)(c) of the Maori Affairs Act 1953, which, but for its repeal, might have been determinative of the matter.)

General land owned by Maori

81. General land owned by Maori is defined in section 129 of Te Ture Whenua Maori Act as follows:

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[26] 96 Wairoa Minute Book 282-303

> *"Land (other than Maori freehold land) that has been alienated from the Crown for a subsisting estate in fee simple shall, while that estate is beneficially owned by more than 4 persons of whom a majority are Maori have the status of General land owned by Maori:".*

82. That definition would certainly apply in this situation depending on the manner in which the land was vested and in whom.

83. In addition, we note section 134 of Te Ture Whenua Maori Act which gives the Maori Land Court jurisdiction to make a vesting order in respect of Crown land and declare in that order that the land shall become Maori freehold land. It may also make such an order in respect of:

> *"General land owned by Maori that has at any time been acquired by the Crown or by any local authority or public body for a public work or other public purpose and is no longer required for that public work or other public purpose;"*

84. This appears to add some authority to the view that upon the transfer of the land from Crown ownership to a trust or some other body on behalf of the Maori owners the land would become *"general land owned by Maori"* rather than Maori freehold land.

General Land

85. The other option is general land which is defined by section 129 of Te Ture Whenua Maori Act as:

> *"Land (other than Maori freehold land and General land owned by Maori) that has been alienated from the Crown for a subsisting estate in free simple ...".*

86. Earlier in this section we discussed issues surrounding the legal entity in which the land will vest upon a return. Subject to clarification of that issue but on the assumption the land will be vested in say, a representative trust, then the beneficial ownership will almost certainly be held by more than 4 persons of whom a majority are Maori and the land automatically attains the status of *"general land owned by Maori"*.

Incidences of general land owned by Maori

87. We briefly consider the relevance of the classification "General land owned by Maori". As noted by Carter J of the Maori Land Court:

> *"There is no restriction in normal circumstances on sale of general land owned by Maori."*[27]

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27 *Re: Kahakaharoa No.1* Hauraki Minute Book Volume 97 Folio 247

88. However, the exception is when that land is vested in a trust constituted under Te Ture Whenua Maori Act. Section 228 of Te Ture Whenua Maori Act restricts the trustees powers to sell *"any land"*, not just Maori freehold land.

89. There are a number of other instances where the Maori Land Court has jurisdiction over general land owned by Maori including:

- jurisdiction to alter the status of the land to Maori freehold;
- in terms of the requirements and powers of assembled owners under Part IX of Te Ture Whenua Maori Act;
- when it is vested in a trust constituted under Te Ture Whenua Maori Act, and in terms of ss 237-245 of that Act when it is vested in any trust constituted in respect of any general land owned by Maori;
- in terms of title reconstructions under Part XIV of Te Ture Whenua Maori Act;
- jurisdiction to make partition orders;
- jurisdiction to make exchange orders;
- jurisdiction to make occupation orders;.
- jurisdiction on claims, disputes and questions under the Fencing Act 1978;
- a process for ascertaining a special Government valuation for some leases over general land owned by Maori.

Waikato - Tainui Approach

90. It is outside the scope of our report to consider in any detail the practical effect that classification as general land owned by Maori would have on the use and management of the returned land. However, we note that in the settlement of their Treaty claim Waikato-Tainui and the Crown clearly considered this issue and agreed that the settlement legislation would deem any land 'returned' under that legislation not subject to Te Ture Whenua Maori Act, as follows:

> *"Nothing in Te Ture Whenua Maori Act 1993 shall apply to the land holding trust or to any land that is registerable or registered in the name of the land holding trustee or in the name of Pootatau Te Wherowhero."*[28]

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[28] Section 22, Waikato Raupatu Claims Settlement Act 1995

Role of Tribunal

91. Again, in view of the nature of the basis of the return (recognition to particular Maori of past Treaty breaches) and bearing in mind the objectives and purposes of Te Ture Whenua Maori Act the Tribunal may form the view (after hearing submissions) that it is appropriate that the issue of status of the land be put beyond doubt. In this regard the ability of the Tribunal to attach terms and conditions to any return as it considers appropriate, would, in our view, allow the Tribunal to settle the matter eg by requiring a status order from the Maori Land Court. While general land owned by Maori may be the status of the land upon a straight return it is important to note section 36 of the Crown Forest Assets Act which provides that;

> *"The Crown shall -*
>
> *(a) Return the land in accordance with the recommendation ..."*

92. Clearly, this anticipates that the Tribunal may use its power to attach some conditions (specify a process for the return) in its recommendations. For instance, the Tribunal may consider it appropriate that the return be effected by an application by the Crown to the Maori Land Court to have the land vested in the new Maori owners and within that order declare the land to be Maori freehold. In any event, the Tribunal will no doubt wish to consider submissions from the parties.

Contaminated Sites

93. We thought it appropriate to mention the issue of contaminated sites as an area which claimants may request the Tribunal address by way of a term or condition attached to any recommendation as to the return of land.

94. In a forestry context the presence or absence of contaminated sites are generally associated with the processing facilities and, in particular, wood preservative treatment complexes. There have been significant clean up operations undertaken by the forestry sector in relation to Waipa Sawmill, Rotorua, (clean up of PCP (Pentachlorophenal) ground water contamination). Another area the subject of a clean up has been a timber preservation plant site and nearby buildings in the former Hamner State Forest. We are unaware whether Juken Nissho has, or continues to carry out, any activities that might involve the release into the general environment of hazardous chemicals. In any event, if they were then the Crown (and in due course the new Maori owners) would look to the terms of the general indemnity in the Licence to recover any costs incurred by them as landowners as a consequence of such contamination.

95. However, what is a potential issue is that if following a return of land to Maori, a contaminated site (for example as a result of the application of boron compounds using dip diffusion methods) was discovered, but the site dated back to Crown operations on the land. In this situation, as owner of the land, the new Maori owners might be required to clean up the site. Naturally, in such situations they would want to recover such costs from the Crown.

96. As a first step claimants would want to assess the risk for a particular Crown forest licence. The local Regional Council would be the first point of reference as to the likelihood of "at risk" activities having been carried out on the land. (By way of general background we note that the Ministry of the Environment published in 1994, a report entitled "Potentially Contaminated Sites in New Zealand - A Broad Scale Assessment"). If, following submissions from the parties, this is still perceived as a problem area then the Tribunal may think it appropriate to attach as a term or condition to the return of the land that the Crown indemnify the new Maori owners for such historical risks.

General Recommendations

97. Section 8HC of the Treaty of Waitangi Act envisages that the Tribunal may make a number of recommendations including a recommendation as to the return of land to Maori. In such a situation all of those recommendations become interim recommendations. In the 90 day period the parties may enter into negotiations for an alternative settlement of the claim. If the parties are unable or unwilling to settle the claim on modified or different terms then pursuant to section 8HC(6) the interim recommendations become final recommendations. The question arises as to what the recommendations (other than the recommendation pertaining to the return of land) might be. In our view guidance is given under section 8HB(3), the relevant part of which states that:

> *"Nothing in subsection (1) of this section prevents the Tribunal making in respect of any claim that relates in whole or in part to licensed land any other recommendation under subsection (3) or subsection (4) of section 6 of this Act..."*

98. Those sections cover the ability of the Tribunal, where it decides that any claim submitted to it under section 6 is well founded, to recommend to the Crown that action be taken to compensate or to remove the prejudice. Section 6(4) of the Treaty of Waitangi Act expands on subsection 3 in that it makes it clear that such recommendations may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

99. In our view the wording of section 8HB(3) is very wide although it does seem to assume that the Tribunal may be making recommendations in the context of a total relief package for a claim. The balance of section 8HB(3) goes on to say that the Tribunal **may** take into account payments made or to be made by the Crown by way of compensation under the First Schedule to the Act. Again, the proviso is not mandatory in tone ("may" as opposed to "shall").

100. Accordingly, in our view (save where the jurisdiction of the Tribunal has been specifically restricted for example by section 6(4A) of the Treaty of Waitangi Act) the Tribunal's ability to make general recommendations is very broad.

101. Whilst it would be helpful to the Tribunal if the Crown and claimants could agree on criteria for redress, in the absence of such agreement then there is little in the way of guidance to the Tribunal other than to be able to satisfy the matters discussed in paragraphs 41 to 45 of this section of the report.

SECTION 6: FIRST SCHEDULE - COMPENSATION PAYABLE TO MAORI

Introduction

1. Under the terms of the July 1989 Agreement the Crown and the Maori representatives agreed that the jurisdiction of the Waitangi Tribunal would be extended to include the making of binding recommendations on the return of Licensed land to Maori. The parties also agreed, that if the Waitangi Tribunal recommended a return of Licensed land to Maori additional compensation would be payable. This agreement was reflected in the Act. In this section we:

   - give an overview of the calculation of that additional compensation and the mechanics of the process;
   - illustrate by way of comparison and contrast differences in the three various compensation options; and
   - consider the role of the Tribunal in the compensation setting process and associated issues.

   In this section references to "forest" are references to the trees growing on the Licensed land at the time the underlying land becomes the subject of a binding recommendation to return the land to Maori.

Compensation Obligations

The Legislation

2. Section 5(1)(ab) of the Treaty of Waitangi Act 1975 empowers the Tribunal *"...To make any recommendation or determination that the Tribunal is required or empowered to make under the First Schedule to the Crown Forest Assets Act 1989"*. Section 36 of the Act is the operative compensation provision where an interim recommendation of the Waitangi Tribunal under the Treaty Of Waitangi Act becomes a final recommendation and the recommendation is for the return to Maori ownership of Licensed land. Section 36(1) of the Act is mandatory in tone and states that:

   "... the Crown shall -:

   (a) return the land to Maori ownership in accordance with the recommendation subject to the relevant Crown Forestry Licence; and

   (b) pay compensation in accordance with the First Schedule to this Act."

First Schedule

3. The First Schedule to the Act sets out how compensation will be calculated. The detail of the First Schedule repeats fairly closely the terms of the July 1989 Agreement as set out in clauses 8 and 9 of that Agreement.

Specified Amount

4. Compensation is calculated by reference to a "Specified Amount". Clause 3 of the First Schedule sets out three options whereby a Specified Amount may be calculated. The choice of option is to be determined by the Maori claimants. Once the Specified Amount is calculated, clause 2 of the First Schedule requires it to be divided into two components;

(a) An amount to be paid, as of right, (for compensation for the fact that the land has been returned subject to encumbrances). This component of the Specified Amount is set at 5%;

(b) The remainder of the Specified Amount (95%) is then payable to the successful claimants unless the Tribunal recommends that a **lesser** amount be paid.

Specified Amount - the Options

5. The successful claimant is entitled to choose one of the three options by which the Specified Amount will be calculated. In broad terms, these may be described as follows:

(a) The market value of the forest at the date the Tribunal's interim recommendation becomes final (a lump sum).

(b) The value of the forest on the land returned as the forest is harvested (series of payments).

(c) The net proceeds received by the Crown from the transfer of the forest and associated assets (Crown forestry assets) plus a return or "interest" component on such proceeds between the transfer and the date of the subsequent return to Maori (a lump sum)[1].

Put simply, the claimants choice is between two immediate "lump sum" options or a series of periodic payments over the harvesting cycle of the forest.

Why Three Options?

6. It is clear that the Maori representatives on the negotiating team had knowledge in forestry matters or had access to persons knowledgeable in forestry matters. The

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[1] Section 3 First Schedule to the Crown Forest Assets Act 1989.

negotiators were putting in place a scheme that covered Crown exotic forests up and down the country. The forests represented a diverse range of maturity, site productivity, terrain (logging difficulty), past management and silvicultural practices, size and distance to ports or other markets. All of these factors would impact on the value of the forest when offered for sale by the Crown. In a study of forests sold in the first round of sales, prices per productive hectare varied from $359 to $5552. The study concluded that much of the variation could be attributed to key factors such as those noted above[2].

7. By agreeing to these three options Maori representatives preserved the ability of Maori to obtain a "best fit" compensation package by reference to a particular fact situation and/or provide an alternative to the price actually received by the Crown.

Payment

8. Payment of the 5% component of the Specified Amount and the balance (if any) if one of the two lump sum options is chosen, is to be made by the Crown within two months of the date of the Tribunal's recommendation (or such later date as the Tribunal may direct or the parties may agree).

9. In terms of the third option (clause 3(b) of the First Schedule (staggered payment option)), as the forest is harvested, the value of the harvested crop is calculated at three monthly intervals and the appropriate value paid within one month.[3]

Late Payment

10. No interest is payable by the Crown in respect of the lag between the time compensation becoming payable in terms of section 36 of the Act and when it is actually paid in terms of the First Schedule (clause 9 of the First Schedule).

Quick Summary of Differences between the Options

11. By way of an overview summary we briefly identify differences between the options which a claimant might consider when making their choice over and above quantifying the Specified Amount.

Option One

12. In broad terms a claimant who chooses Option One is:

- opting for an immediate lump sum tax free;
- locking in current prices and costs;
- rejecting the price obtained by the Crown as too low given current conditions;

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2 Bell A, and Manley B: *"Analysis of the Value of the State Plantations sold in 1990"*. NZ Forestry, Nov. 1992 p 22.

3 Section 8 of the First Schedule to the Crown Forest Assets Act 1989.

- implicitly making an assessment as to future log price trends (ie, they will be static or decline);

- in the case of immature stands, factoring in growing costs;

- excluding the risk of future catastrophic natural disaster such as windthrow, fire, disease or pests.

Option Two

13. In broad terms a claimant who chooses Option Two is:

- opting for an income stream;

- making an assessment as to future log price trends (i.e. they will at least maintain their current value or increase in real terms);

- avoiding issues as to growing costs;

- rejecting the price obtained by the Crown as not reflective of the future value of the forest;

- accepting that such payments are not exempt income in terms of existing tax legislation;

- choosing an option that is technically less demanding in the short term than Option One (It does not require the claimant to agree with the Crown on forest valuation issues such as discount value or the projected harvesting pattern);

- making an assessment of natural disaster risk;

- accepting that the pricing process will require ongoing involvement with the Crown and the Licensee as harvesting of the forest proceeds (eg, identification of wood flows, agreement and calculation of prices).

Option Three

14. In broad terms a claimant who chooses Option Three is:

- opting for an immediate lump sum tax free;

- implicitly accepting that the price received by the Crown was a fair price;

- avoiding the technical forest valuation issues inherent in Options One and Two;

- accepting that the application of the two stage "return" or "interest" component of the formula has adequately maintained the real value of the original proceeds received by the Crown.

15. We now consider the options in more detail.

The Compensation Options - Discussion

Option 1 (clause 3(a) First Schedule)

16. Under Option 1 the Specified Amount is the market value of the trees on the land at the time the Tribunal's interim recommendation that the land be returned to Maori, becomes final. The value of these trees is to be determined on:

- the basis of a willing buyer and willing seller; and
- on the projected harvesting pattern that a prudent forest owner would be expected to follow.

Option 1 - Net Present Value

17. In our view the wording of Option 1 (and in particular the reference to "projected harvesting pattern") is such that it envisages a Net Present Value (NPV) approach rather than an immediate liquidation approach. We have rejected the immediate liquidation approach on the basis that in this approach young immature stands in the forest would be assigned a zero or low value to reflect their current value. A reference to "projected harvesting patterns" would be unnecessary if this approach had been chosen. The reference to projected harvesting patterns implies that the future value of existing immature stands at harvest time is to be factored into the calculation.

18. Under a NPV approach future wood volumes (and hence market value of the trees) is forecast by reference to matters such as:

- Site fertility;
- Management (silviculture) patterns (past or current);
- Rotation age (harvesting pattern or strategy).

The science of forecasting forest growth (and thus recoverable volumes and log types) for Pinus Radiata is well developed in New Zealand.

19. Accordingly under the NPV approach future wood volumes are forecast (each stand is 'grown' to harvest age). The likely volumes within each log grade are then multiplied by current log prices to give future cashflows. These future cashflows (less future costs - excluding non-cash costs such as depreciation) are then discounted to the present to give the forest value (NPV). In essence discounting is the reverse of compounding. It assumes that money today is worth more than the same sum in the future.

20. In our view, some of the more traditional issues in terms of forest valuation (for example whether a single rotation or a perpetual rotation is assumed) will not be

relevant in the particular fact situation (35 year termination period). Whilst debate may still arise as to the likes of optimum rotation age again, the particular limitations of the fact situation will serve to limit the practical impact of potential differences of view between the parties.

21. As can be quickly appreciated the NPV approach has some limitations for example;

- it relies on assumptions as to future events (eg growth rates, survival).
- requires the determination of an appropriate discount rate. (The higher the discount rate the lower the NPV).

The first point can be addressed in so far as it is possible by reference to historical data. The second point is more problematic.

22. The position taken by economists is that the discount rate is the opportunity cost of the capital being used. Where one is looking to invest money in a project then a simple way of calculating the opportunity cost might be by reference to:

(a) the cost of borrowing money; or

(b) the return on alternative investments[4].

Where "green field" or forestry establishment projects are being compared the internal rate of return or IRR is often referred to. This is the discount rate at which discounted costs equals discounted revenue. That is the NPV equal zero. Theoretically, the investor can borrow at the IRR. Borrowing at rates higher than the IRR results in a loss.

23. This approach is commonly used by promoters of forestry syndicates. However for an existing forest the setting of the discount rate by reference to the IRR presents a number of difficulties. Namely that it requires the inclusion of compounded past costs. This violates the economic principle that past costs are sunk. It also cuts across the wording of the Act with its reference to "market value" which supports, in our view, that the calculation is one involving future costs and future revenues.

24. In terms of large forestry companies with diverse forest holdings who are required to value these forests on a regular basis for reporting purposes, currently, discount rates of 7 to 9% are being used by such companies[5]

25. The calculation of the Specified Amount in terms of option 1 is very much an assessment of future values today given the important assumptions as to willing buyer and seller and the projected harvesting pattern of a prudent forest owner. If the Crown and claimants have difficulty in agreeing a commonality of approach then

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4 T Fraser and G P Hogan, *An Introduction to Discounted Cash-Flow Analysis in Forestry,* in *NZIF 1995 Forestry Handbook,* D Hammond (ed), Christchurch, 1995, p 142.

5 Dr E M Bilek, *FCNZ: A Cash Flow Analysis,* Paper to NZ Institute of Forestry, and the Annual Report of Evergreen Forests Limited, 30 June 1997.

we recommend independent expert advice be sought to assist the parties and the Tribunal.

Option 2 (clause 3(b) First Schedule):

26. In Option 2 the Specified Amount is the value of the market stumpage of wood harvested from the forest from the date the Tribunal's interim recommendation becomes final. The market stumpage is to be determined in accordance with accepted forestry business practice.

27. "Stumpage" is a straightforward concept and refers to the "value" of a standing tree. That is the trees potential value as it sits on what, following cutting, will be its stump. Thus the price a grower needs to receive to cover the cost of growing the tree may be referred to as the "break-even stumpage". Where a grower receives a price for a stand but the costs of harvesting and sale of the crop are met by the buyer this may be referred to as a "stumpage sale" (from a grower perspective in a stumpage sale that stumpage price should be greater than the break-even stumpage).

28. In terms of deriving a market stumpage firstly, the volume and grade of wood harvested from the forest would be assessed from a combination of "scaling" (physical measurement of the logs) or weighbridge records. From the market price for logs of that grade and quality delivered to the agreed sale point would be deducted costs of harvest, removal, transport to the sale point and sale/administration costs. In this manner the value of the stand immediately prior to harvest i.e., the market stumpage, is derived.

Which Market?

29. On the assumption that satisfactory methods to monitor wood flows are put in place a key issue is the market price or put another way, "what is the agreed pricing point?"

30. From a seller's perspective the export log market has traditionally been the best "market" price. Domestic prices often reflected the reality that the State forests represented the bulk of the "uncommitted" wood and were or became the subject of preferential long term supply contracts or political pressure from interested groups as to price on a sale. The log export trade offered a window to world prices (and very attractive premiums) over the domestic market.

31. Any suggestion that the price achieved by the Licensee should be the appropriate "market price", and this was not obtained following an open sale process, would have to be treated with caution by the claimants. For example the Licensee may be supplying logs to a processing complex operated by a subsidiary or related company. Accordingly, where an active export log market exists it seems difficult to accept alternative pricing models that result in lower stumpages. However, in passing we note two matters concerning Aupouri Forest:

- the wood currently being harvested arises from production thinning operations as opposed to clear felling operations;

- the relatively long distance (and therefore cost) to the nearest existing export port (Whangarei some 180kms).

Factors such as these may, in a particular fact situation, impact on the appropriate pricing point.

32. Given the long term nature of this compensation option the Tribunal may wish to make it clear that the parties may refer future pricing point or other issues back to the Tribunal should subsequent events require.

Taxable

33. In passing we also note that under Option 2 moneys received by Maori may be taxable where moneys paid under the other two options are not[6].

Option 3 (clause 3(c) of the First Schedule)

34. In Option 3 the Specified Amount is calculated by reference to the net proceeds received by the Crown plus a return on those proceeds. The Act reflects the July 1989 Agreement process in terms of:

(a) the calculation of the "return" component;

(b) the position of how the proceeds would be calculated if there was a partial return of a forest; and

(c) if the forest to be returned was one of a number of geographically different forests sold as one parcel.

35. In order to fairly address any discount on the sale or transfer proceeds by the passage of time between sale by the Crown and the issue of a binding recommendation the parties agreed a two stage process. Firstly, for a defined period the "real value" of the proceeds would be maintained. Secondly, at the expiry of the relevant period the adjusted value of the proceeds is to compound by a rate being the then rate for one year New Zealand Government Stock plus an additional margin of 4%. This rate of return is to be revised on a annual or "rolling basis" until the land is returned to Maori (i.e., date the interim recommendation becomes final).

36. Neither the Act or the July 1989 Agreement stipulates the reference point by which any change in the real value over the relevant period might be calculated. Presumably because it was self evident that the real value of the proceeds is best reflected by reference to the inflation rate for the relevant period. By way of support for this approach we note that in the July 1989 Agreement the relevant period was

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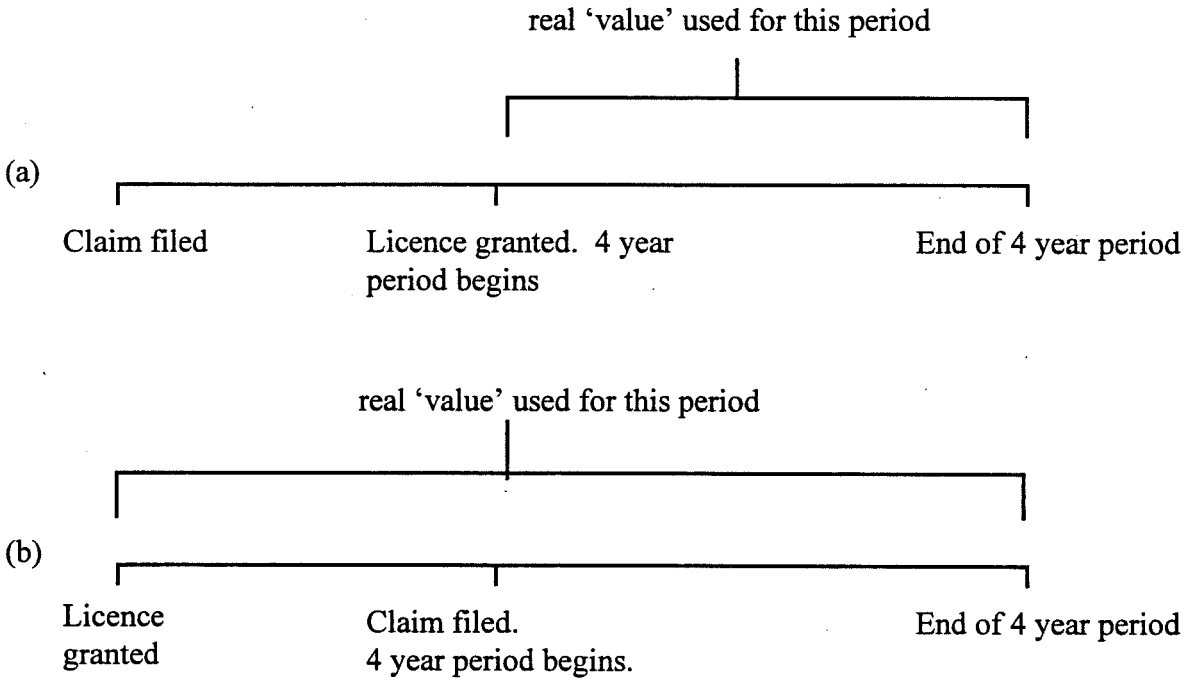
6 See Section CB5(1)(n), Income Tax Act 1994.

referred to as a "period of grace", presumably on the expectation that the inflation rate would be less than a commercial rate of interest. In our view the appropriate index would be the Consumer Price Index (all categories) for the relevant period.

37. A detail concerns the setting of the beginning and end of the initial period for which the "real value" was to be maintained. Where the claim was filed prior to the transfer the relevant period is four years from the date of the transfer. Where the claim was filed after the date of transfer the period in which the real value of the proceeds is to be maintained runs from *"the date of the transfer of the Crown forestry assets to the date of expiration of four years after the claim was filed"*. To illustrate the latter point if a transfer was made in January 1991 but no claim filed until January 1992 then the "rate of return" calculated by reference to one year Government stock plus 4% would not be used until January 1996. (That is the real value of the proceeds would be maintained by reference to inflation (CPI) for a period of some five years).

Setting the four year period



38. Two further points of detail should be noted:

- for the purposes of clause 5 of the First Schedule *"a claim shall be deemed to be filed on such date as is certified by the Registrar of the Tribunal*; and
- the four year period referred to clause 5(a) or (b) of the First Schedule *"... may be extended by the Tribunal where the Tribunal is satisfied -*

"(a) That a claimant with adequate resources has wilfully delayed proceedings in respect of a claim; or

(b) The Crown is prevented, by reasons beyond its control, from carrying out any relevant obligation under the agreement made on the 20th day of July 1989 between the Crown, the New Zealand Maori Council, and the Federation of Maori Authorities Incorporated"."

Partial Return

39. As noted in paragraph 37 above the Act reflects the agreement of the parties as to how the proceeds would be calculated where there was a partial return of a forest (lot) or one or more forests (lots) were sold as one parcel. In a partial return of one forest (lot) then the transfer proceeds for each hectare so returned is to be not less than the average price per hectare.

Sale by Parcel

40. Where two different forests were (because of, for example, regional proximity) sold as one parcel then the average price/hectare shall be based on the price for the total parcel. Provided that where the lot forming part of a parcel had an average age of less than five years, the average price for that lot would be calculated by the average price for all lots within the same New Zealand Forestry Corporation administrative district at the time of transfer. Clearly, this is aimed at reducing any valuation for a small young forest that happened to be in the proximity of a more even aged forest (and hence, on the face of it, have accessed a higher price per hectare by the averaging process). The resource description given in the sale information document suggests this aspect is not an issue here.

41. In the case of the Aupouri transfer our information is that the Licensee (Juken Nissho) paid $41.5 million dollars for the Aupouri and Otangaroa forests as a parcel.[7] Otangaroa is a small forest of some 2600 hectares located on the East Coast some 60 km from the Aupouri forest and, we understand, falls outside the Muriwhenua claim boundary.

Net Proceeds

42. The relevant provision in the July 1989 Agreement refers to:

"(b) The sales proceeds received by the Crown ..."

Clause 3(c) of the First Schedule of the Act refers to *"The net proceeds received by the Crown ..."*. We assume the insertion of the word *"net"* was to make it clear that the proceeds excluded goods and services tax (if not deemed a sale of going concern) or to exclude sale costs.

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[7] B Manley and A Bell, *"Analysis of the Value of the State Plantations sold in 1990"* - N.Z. Forests, 1992 p 22.

43. Alternatively given the various transfer mechanisms the Crown was considering in light of background events (see section two of this report) is the reference to *"net proceeds"* also designed to catch multiple transfers by the Crown? In the case of the Aupouri Crown Forestry Licence the point is not at issue. Pending transfer to a third party the Licence was managed by a State Owned Enterprise under a management contract. However the issue bears consideration in terms of some other Crown forestry licences in particular the central North Island forests.

44. As you will recall the Crown took these forests out of the initial sale round, and transferred these assets by way of Crown forestry licenses to what is now Forestry Corporation of New Zealand Limited ("FCNZ"). The transfer price was approximately $1.26 billion dollars[8]. Subsequently, in 1996 the Crown sold its shares in FCNZ for a net sum (after deduction of various liabilities of FCNZ) for around $1.6 billion[9]. As we see it claimants may wish to argue that in such situations the net proceeds received by the Crown is the sum of both figures.

45. From a legal point of view this approach has a number of difficulties. For example if claimants argue the net proceeds are the sum of the proceeds received by the Crown, what is the date of the transfer - the transfer to FCNZ or the sale of the shares to the third party? If the first date is taken then are claimants arguing that the subsequent share sale is analogous to a deferred settlement process and the subsequent proceeds are to be added to the initial transfer price?

46. Alternatively the Crown might argue that, legally speaking, the subsequent share sale was not a *"transfer"* of the Crown Forestry assets in question to the extent that what was transferred were shares involving no change in the legal entity holding the licence (FCNZ). Arguably, the definition of "*Transfer*" used in the Act does not assist the Crown. Transfer includes "*dispose of in any other way*". On the face of it, it seems that by the sale of the shares in the FCNZ the Crown disposed of its interest in the relevant Crown forestry assets.

47. Over the relevant period (from the initial transfer to the sale of the shares) the Crown received a healthy flow of dividends from FCNZ. Are these part of the proceeds? It should be born in mind that the compensation options are independent of the success or otherwise of a licensee's operations. Accordingly, so long as there is no suggestion that the dividend component was in fact part of the sale price, we see no reason why the Crown's subsequent dividend flows should form part of the "*net proceeds*".

48. Given the complexity of the issue (and bearing in mind that this is not an issue in terms of the transfer of Aupouri Forest) we have put this matter to one side with a recommendation that further work being done to consider the questions:

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8 *Forestry Corporation - Sale Information Memorandum 1996,* p 106.

9 Dr E M Bilek: *The Sale of Forestry Corporation's Forests: An Economist's Viewpoint* - Notes for a talk given to New Zealand Institute of Forestry, Wellington Chapter, at the Ministry of Forestry Head Office, 30 October 1996.

- when granting Crown forestry licences to a State Owned Enterprise did the Crown do so for a *"sale"* price.

- If yes, what was the basis of the determination of that price (was it set at arms length)? How was it paid?

- further consideration of the authorities as to the meaning of the word "transfer" bearing in mind its use in a Treaty situation and Treaty principles such as good faith and the existence of fiduciary duties.[10]

Information Requirements to Assess Options

49. Clearly claimants will want to make some assessment of the "relative value" of each of the options. The base data required to assess Options 3 is relatively straightforward. Although Option 2 is a compensation package based on what actually is harvested nevertheless, by computer growth modelling likely yields could be forecast and scenarios involving different pricing assumptions used to gain an appreciation of likely income streams to assist claimants decision making. Accordingly any assessment of Options 1 and 2 fall into the category of forest valuation exercises and the following type of information would be required:

- physical description of the land;

- description of forest area (growing characteristics, fertility);

- description of crop typing (eg, species, age, class distributions per species);

- record of stand history (silviculture work done or likely to be performed);

- description of yield estimates;

- description of costs (Option 1);

- pricing points and price specifications[11];

50. Given the passage of time between the transfer, the original sale information prepared by the Crown although of useful background relevance will in many instances no longer reflect the current forest. (We attach extracts at Appendix 6) Additional useful background information can be obtained from the appropriate regional study released by the Ministry of Forestry (Regional Studies Northland 1997). Ultimately however a major source of information will be the records of the Licensee. The claimants will need to access these records. The terms of the Licence at clause 11.5 anticipates the claimants information requirements as follows:

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10 *New Zealand Maori Council v A.G.* [1987] 1 NZLR 641.

11 BR Manley, *Forest Valuation,* in *NZIF 1995 Forestry Handbook*, D Hammond (ed), Christchurch, 1995, p 148.

"11.5 Licensee to Supply Information

To enable the Waitangi Tribunal to make recommendations in relation to the Land or any part or parts thereof under the Treaty of Waitangi Act 1975 and to enable the Crown to fulfil its obligations to Maori interests under section 36(1)(b) of the Act the Licensee will, in respect of the Land or any part or parts thereof, if called upon by the Crown so to do:

11.5.1 Make available in an expeditious manner to the Crown such records and data relating to the Trees growing or standing on the Land or any part or parts thereof; and

11.5.2 Allow the Crown access to the Land or any part or parts thereof for the purpose of valuing the Trees growing or standing thereon; and

11.5.3 Make available in an expeditious manner to the Crown such records relating to Trees harvested and sold as will enable a proper calculation of market stumpage to be made at three monthly intervals so that appropriate payments can be made to Maori within one month of the end of each three monthly period."

51. The Tribunal will want to ensure that the Crown will/has used the provisions of clause 11.5 of the Licence in a timely manner to obtain the appropriate information for study by the claimants.

SECTION 7: ISSUES ARISING ON RETURN OF LAND

Introduction

1. The Tribunal can make a range of findings and recommendations on claims relating to Licensed land, namely:

   (a) that the claim is well-founded and that the action to compensate for the breach of the principles of the Treaty should include the return to Maori ownership of all or part of the Licensed land; or

   (b) that the claim is well-founded but that a recommendation for return of the Licensed land is not required; or

   (c) that the claim is not well-founded and that the land not be liable for return to Maori ownership.

2. In this section we give an overview of the process and then discuss issues upon return of the land to Maori ownership. The resolution of some of these issues are found in the express wording of the Act or are set out in the terms of the Licence. As appropriate these have been covered in section 4 of this report.

3. As previously noted we considered the terms of three other Crown forestry licences. Based on this sample there seems a high degree of commonality between different licences. Accordingly, unless we state otherwise all references to terms and conditions of a Crown forestry licence are references to the Aupouri Crown forestry licence. Nevertheless, for a different claim the actual terms of the appropriate Licence will need to be reviewed.

General Process for Return of Land to Maori ownership

4. A recommendation for return of Licensed land is, in the first instance, an interim recommendation only. Upon issue of an interim recommendation the claimants and the Crown have 90 days to negotiate alternative arrangements.

5. If the claimant and the Minister of Maori Affairs settle the claim within the 90 day period then the Tribunal is required to issue a final recommendation in terms of that settlement.

6. If the claimant and the Crown are unable to reach a settlement within the 90 day period the interim recommendation becomes a final recommendation.

7. When an interim recommendation becomes a final recommendation the Crown is required under section 36(1)(a) of the Act to return the land in accordance with the recommendation.

8. The Crown is then required to give the Licensee a 35 year termination notice. This notice is to attach a copy of the interim and final recommendations including the terms and conditions attached by the Tribunal and the name of the Maori or group of Maori to whom the land is to be returned.

9. The termination date will depend on the terms of the individual licence and the date of service of the termination notice.

10. The Aupouri Licence has an initial fixed term of ten years which terminates on 9 December 2000. After that date the term of the Licence runs from year to year by automatic extension. A termination notice given during the initial fixed term negates the year to year extension (which would otherwise have occurred on 30 September 2001). The Licence runs until 30 September 2036 (ie the remainder of the initial fixed term plus 35 years).

11. Alternatively, if the termination notice is given after the initial fixed term has expired then the year to year automatic extension ceases as from the 30th September following the termination notice and the Licence expires 35 years following such 30th day of September.

12. The 35 year period is known as the Termination Period.[1]

Return of legal ownership

13. As soon as the Crown has returned legal ownership of the land the Maori owners effectively step into the shoes of the Crown in terms of both obligations and benefits under the Licence.

14. During the termination period the Licensee may only use the land to exercise any rights necessary to protect, manage, harvest and process the trees in accordance with accepted forestry practice. The Licensee is no longer entitled to replant following harvesting.

15. As the Licensed land is harvested by the Licensee the Licensee must remove and dispose of slash and debris from felling and logging operations so as to leave the land ready for replanting.

Return of Physical Possession

16. As parts of the Licensed land are no longer required by the Licensee, they become "return areas" and the Licensee surrenders possession to the Maori owners.

17. Upon a "return area" becoming available the Licensee is to give the Maori owners notice that physical possession of that area is to be returned. This notice must specify the area to be returned, the date it will be returned, what buildings and structures are to be removed by the Licensee and what rights over the "return area"

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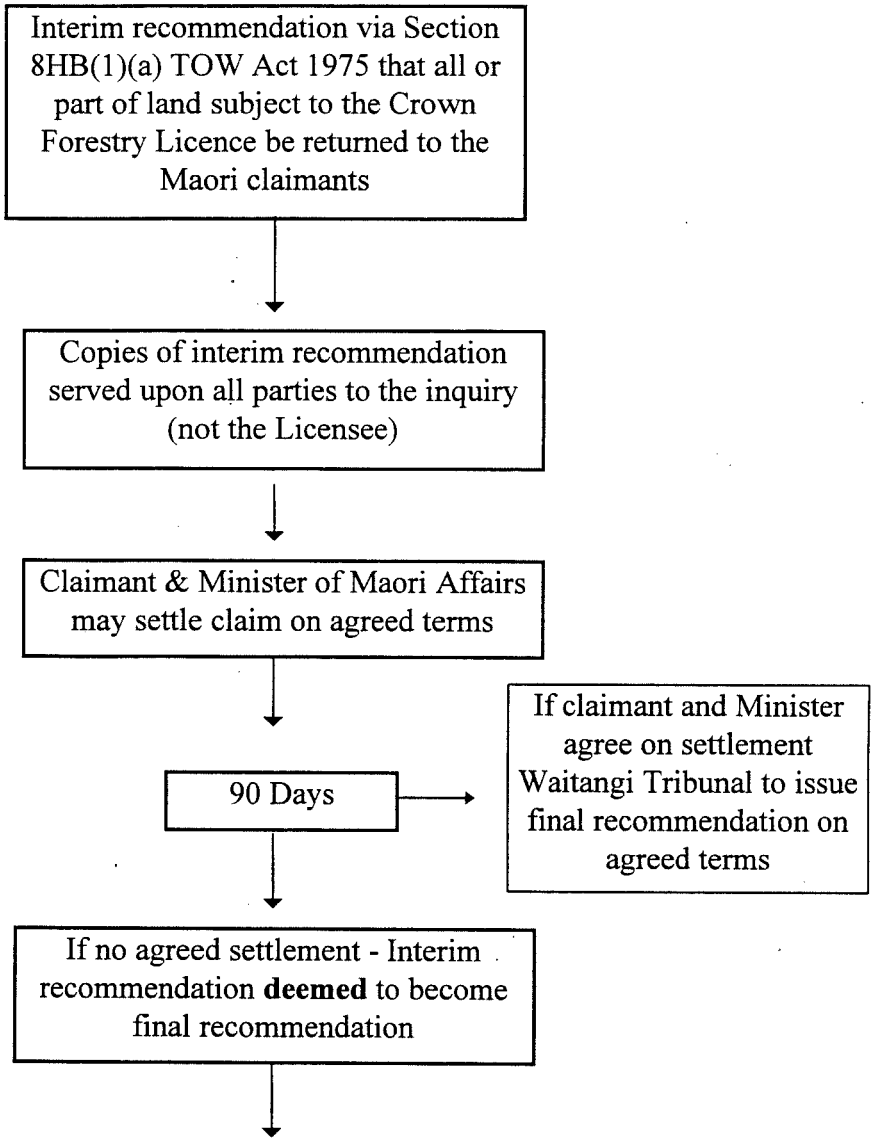
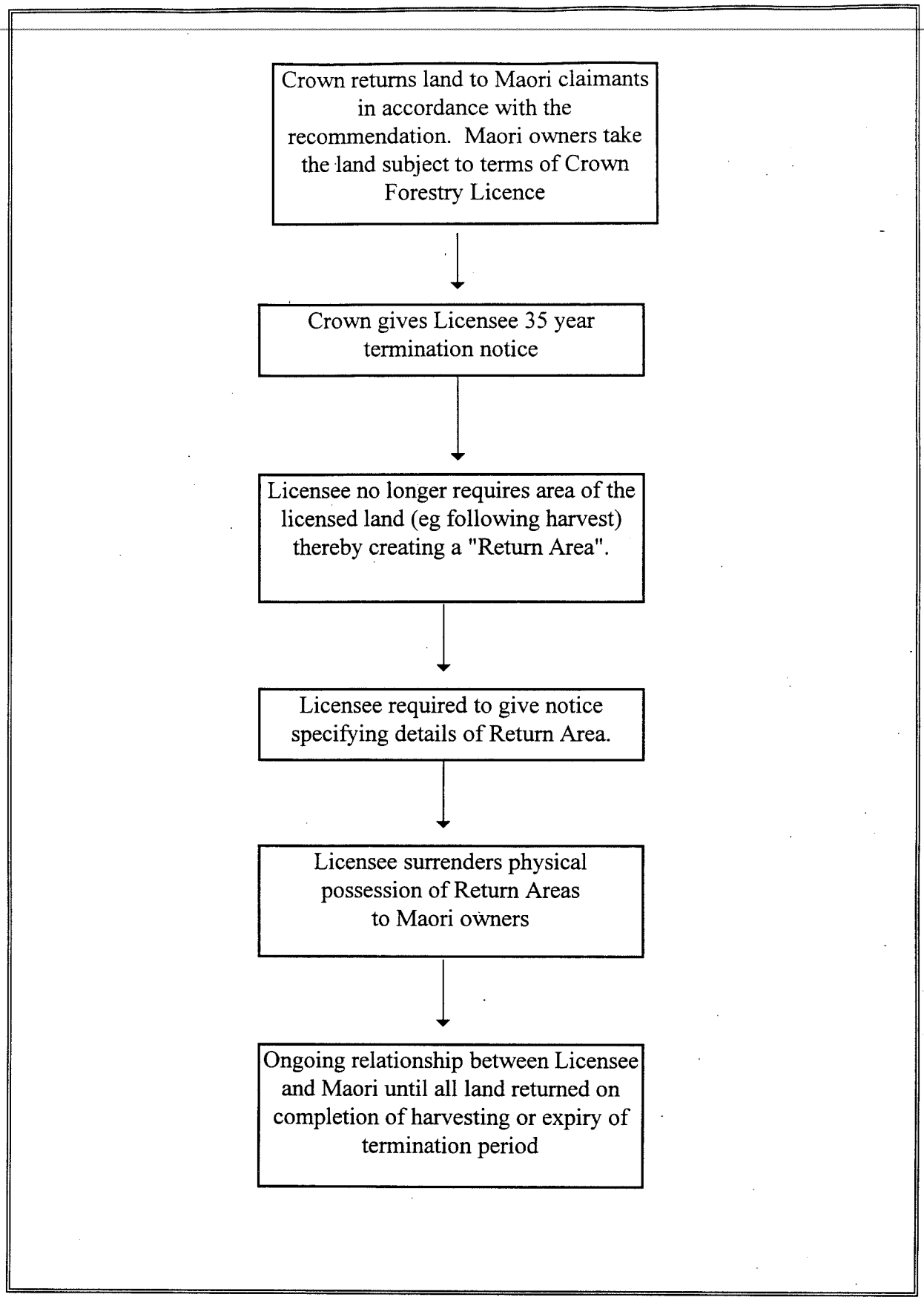
[1] Section 17(1), Crown Forest Assets Act 1989.

the Licensee will require so as to continue exercising its rights over the balance of the Licensed land.

18. For ease of reference we set out an overview of the process below.

RETURN PROCESS - OVERVIEW




Crown returns land to Maori claimants in accordance with the recommendation. Maori owners take the land subject to terms of Crown Forestry Licence
Crown gives Licensee 35 year termination notice
Licensee no longer requires area of the licensed land (eg following harvest) thereby creating a "Return Area".
Licensee required to give notice specifying details of Return Area.
Licensee surrenders physical possession of Return Areas to Maori owners
Ongoing relationship between Licensee and Maori until all land returned on completion of harvesting or expiry of termination period

Potential Issues - Overview

19. A range of issues will fall out of the return process. In legal terms some issues arise immediately upon return of legal ownership to the Maori claimants, others may not surface until the Licensee starts the gradual process of surrendering possession of "return areas". We briefly identify some of these issues below.

Maori as Licensor/Landowner

20. As soon as legal ownership is transferred the Maori owners become the Licensor. What exactly is their position under the Act and the Licence? Is it a straight substitution for the Crown or is the situation more complex ie how does the position of the Maori owners as Licensor differ from the Crown as Licensor? What rights, if any, has the Crown retained? If so, how do the dynamics operate between the three parties; the Licensee, the Crown and the Maori owners?

Public Access Easements

21. Also relevant at this stage of the process is the question of the continuing effect of the various protective covenants and the public access easement under the Aupouri Licence.

Operational Considerations

22. The staggered nature of the return of physical possession raises a whole new set of issues. This process will inevitably lead to a "mosaic" of forest ownership which will almost certainly involve the shared use of roading, the need for access to various parts of the forest, sharing of outgoing costs and maintenance of improvements, mutual forest protection operations and so on. How does the License/Act assist?

Rental Fees

23. How do License fees adjust as physical possession of "return areas" is gradually surrendered?

Condition of the Land

24. An important issue at this time will also be the physical condition of the land, and the Licensee's obligations in that regard.

Status of Land

25. What is the status of the land upon return? Crown land is land vested in the Crown, not held by any person in fee simple. When the land is returned to Maori ownership, the status of the land will change by definition. We discuss this issue in detail in section 5 of this report.

26. As the return process progresses the parties will need to constantly reassess their roles and positions. For the Maori owners the process will involve a metamorphous from traditional owners, kaitaiki and claimant; to owner and Licensor; to owner, joint occupier and forest manager.

Position of Maori Land Owners as compared to the Crown.

27. The Act binds successors in title to the Crown (eg Maori) to the terms of the Crown Forestry Licence. In the language of the Licence the new Maori owners are the *"Proprietors"*.

28. However the process is not entirely a straight substitution. Clause 6.3 of the Licence provides:

> *"From and after the date that the Land has been returned by the Crown to Maori ownership pursuant to section 36 of the Act:*
>
> *16.3.1 The Proprietors shall become the Licensor hereunder and all references to "the Crown" or "the Crown's" in clauses 1.3, 6.1.3, 6.1.4 and 6.4 and sections 2, 4, 5, 11 (excluding clauses 11.5 and 11.6), 12 and 13 shall be replaced by references to "the Proprietors" or "the Proprietor's" as the case may be and the Licence shall henceforth be read and construed accordingly."*

29. Many of the 'missing' clause references in clause 16.3 are on the basis that they

- imposed no obligations upon the Licensor; or
- because they governed issues which arise only upon execution of the Licences or the consideration of a claim by the Tribunal.

We comment on the exclusions in clause 16.3.1, where material, as follows.

Clause 3 - Term

30. Clause 3 sets the term of the Licence. Clearly, if the land is returned to Maori then the term of the Licence will be altered.

Change to Public Access Rights on a Return

31. Clause 6.2 makes provision for public entry onto the land. It provides as follows:

> *"The Licensee acknowledges that so long as Her Majesty the Queen is the Licensor hereunder the public shall at all times during the term of this Licence have the right to enter and use the Land for recreational purposes."*

32. The omission of clause 6.2 from clause 16.3.1 acknowledges that upon return of the Land into private Maori ownership this general right of public access ceases, **except** as provided for in the Public Access Easement.

Protective Covenants

33. Clauses 6.1.2 and 6.1.5 provide that the Crown will continue to enforce the provisions of all protective covenants and public access easements following transfer of the Land to Maori ownership.

Wahi Tapu

34. Clause 6.3 provides that the Crown can give notice to the Licensee to the effect that any part of the Land which the Crown considers is wahi tapu will become subject to a protective covenant. Loss of use is compensatable. Whilst this change is appropriate it raises the issue of how the new Maori owners can require the Licensee to give up the use of an area if Maori wish to declare a new area of Wahi Tapu following a return. At this point in time if the issue cannot be resolved amicably it would fall to be resolved under the general dispute provisions.

Existing Use Rights

35. Prospective new Maori owners should review these existing use rights and in the case of current rights review their terms.

Other Areas of Change or Consequential on a Return

36. Under the terms of the Licence the Maori owners also acquire certain rights and obligations upon transfer which the Crown did not have.

Traditional Access Rights

37. The Maori owners under the terms of the Licence immediately gain a right for themselves and their families to enter the Land to:

- preserve and safeguard any urupa;
- collect traditional medicines and food;
- fish, hunt or trap; and
- engage in any other recreational purpose.

38. This right of access is limited by the Licensee's right to control entry to ensure the safety of persons entitled to enter the land or of persons working on the land, and to protect trees, buildings and related items.

Replanting

39. Clause 16.6 together with Protective Covenant No. 17 effectively imposes a obligation upon the Maori owners to replant. There is no equivalent provision imposing the same obligation on the Crown.

Improvements

40. Under clauses 16.7.5 and 16.8.3 any improvements not removed by the Licensee are vested in the Maori owners, as Licensors, free from any payment or compensation.

Survey Issues

41. We do not consider there are any issues as to unsurveyed land for the Aupouri forest. As noted all survey information for Aupouri forest had been gathered in order to register the Licence. The creation of the appropriate Certificates of Title should be straightforward.

Stamp Duty

42. No stamp duty is payable on any instrument of conveyance directly from the Crown.[2]

Partial Return

43. Different provisions apply if only part of the land is returned to Maori. In that case provision is made for the renegotiation of rights, prior to the return of the land, in order to protect the interests of the Maori owners, the Crown and the Licensee. Following negotiation, separate licences are then to be granted.

Issues arising from the staggered nature of the return of physical possession

The Process

44. In essence as the return land is harvested Maori have the opportunity to take possession of that land. The age structure of a forest and the location of harvest areas in a forest will not necessarily follow a 'North/South' pattern. In any one year harvesting may be taking place at a number of sites. This should lead to a 'mosaic' of returned areas and areas still the subject of the Crown forest licence. The Act makes no provision for the method of return of physical possession of the land. It is the Licence which provides guidance in this regard. The Licence provides that as areas of land, when they are no longer required by the Licensee to protect, manage, harvest and process the trees on the land, are to be surrendered to the Maori owners thus becoming "return areas".

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2 Section 13, Stamp and Cheque Duties Act 1971.

Licensee/Maori Owner Share Agreements

45. In acknowledgement of the multiplicity of issues which may arise due to the staggered nature of return of possession and the "mosaic" of forest ownership that will follow, the Licence has made provision for the negotiation and execution of agreements to facilitate the process as much as possible. Clause 16.7.9 provides that:

> *"Where part of the Land is to be returned under this clause 16.7 it is acknowledged that a formal agreement may be necessary during the remainder of the 35 year termination period for the interests of the Proprietors and the Licensee to be protected for their mutual benefit and advantage including (without limitation) the shared use as appropriate of roading and other facilities, rights of access, the sharing of outgoings and of the cost of maintenance of improvements in shared use and the procedures and steps necessary to ensure continuing protection against fire, pests, disease and other hazards;"*

46. The Licensee is to notify the Maori owners of the impending return in a form set out in the Licence. Included in this notice is to be a description of any rights over the return area that:

> *"The Licensee may reasonably need in accordance with accepted forestry business practice to enable the Licensee to continue to exercise its rights under this Licence over the balance of the Land remaining subject to the Licence."*

47. If any such rights are specified in the notice then the Licensee and the Maori owners are to execute the necessary documentation in order to preserve those rights eg easement, deed of covenant.

48. Provision is made for execution of a 'partial surrender' document to record the fact. This seems a practical way around the problem of trying to vary the Licence in terms of registration at the appropriate Land Titles Office.

Dispute Resolution as to Return Issues

49. If the parties cannot agree about any aspect of this process then the dispute is to be settled pursuant to clause 16.9 of the Licence.

50. Clause 16.9 provides that the person raising the dispute must define the dispute in a written notice to the other party and that the parties then meet to attempt to resolve the dispute amicably. If no agreement is reached by this method then the matter is to be submitted to arbitration on a final and binding basis (one arbitrator).

51. The Licence states that the documents necessary to preserve the Licensee's rights are to be executed before execution of the partial surrender of Licence. Any disputes over the continuing rights of the Licensee over the return area may potentially delay

return which may be the basis for the more direct route to arbitration rather than disputes resolution process provided for other matters.

52. The Licence requires that there be consultation and negotiation between the Maori owners and the Licensee before execution of any agreement as discussed in paragraph 45 above.

53. Once again, if a dispute arises it is to be resolved pursuant to clause 16.9.

Position of Public Access and other Protective Covenants or Easements on a return

54. We have discussed the statutory basis of these instruments in detail in section 4 of this report but note that sections 18-23 of the Act make provision for protective covenants. Sections 24-28 make provision for public access easements.

Protective Covenants

55. Section 18 of the Act provides for five types of protective covenant: Each Crown forestry licence is to specify the nature and terms of each covenant and to define its boundaries. The terms of the various covenants are to be determined by the responsible Ministers in consultation with various parties depending on the nature of the covenant. More detail on the covenants contained in the Aupouri Licence is set out at Appendix Nine.

Review on Return

56. Upon return of the land to Maori ownership, the Maori owners can require any protective covenants on the land to be reviewed. The responsible Ministers, together with the Minister of Conservation and the Minister of Maori Affairs must be unanimous in their decision that the covenant be either varied or cancelled before a variation or cancellation can be effected.

Aupouri forest - Public Access

57. There is one public access easement in Appendix B of the Aupouri Crown Forestry Licence. See Appendix Nine for details. At the request of the Maori owners they may be reviewed on a return. Claimants may wish to make submissions to the Tribunal as to a recommendation on Public Access Easements to assist in any review requested by them.

58. The land subject to the easement is *"Hukatere Road from Whalers Road to the western boundary of the forest, over part Lot 1 DP 136868 and part Lot 1 DP 137713 and being shown marked A and B on DP140315".*

59. The Public Access Easement continues to apply in respect of the access areas notwithstanding the termination of the Crown forestry licence. In passing we note that there is a suggestion by some that by operation of the definitions of Licensed land in the Act a Public Access Easement terminates upon the land ceasing to be

Licensed land. Among the difficulties we see with this suggestion is that the Public Access Easement will be registered in the Land Titles Office against the land and run with and bind the land and be notice to the world of its terms until removed.

Role of the Tribunal

60. Given the detail pertaining to these instruments in the Act, in our view the Tribunal has no direct role in issues pertaining to protective covenants and public access easements on a return. However, the Tribunal may consider it appropriate following submissions from claimants to comment on whether a protective covenant or public access easement should subsist, be varied or be cancelled following return of the land to the Maori owners. This may be useful to the Ministers making a decision on any review.

Physical Condition of the Land

Replanting

61. During the debate on the Crown Forest Asset Bill, many Members of the House expressed concern that there was no requirement in the Bill for a Licensee to replant on termination of the Licence.

62. In the event, there is no requirement to replant contained in the Act. Neither does the Act make direct provision as to the condition in which the land must be left in upon expiration of the licence. However, (in addition to any requirements under other legislation eg, the Resource Management Act 1991) following a binding recommendation the Licensee must exercise its rights in *"accordance with accepted forestry business practice"*.

63. The Licence offers some guidance as to the meaning of the later term. Clause 16.7.4 of the Licence provides that:

> *"...the Licensee shall, in accordance with prudent forestry management practices, remove and dispose of slash and debris from felling and logging operations to make the Return Areas suitable for re-establishment of forests;"*

If a dispute arose as to whether a licensee was meeting this standard it would in the first instance go to dispute resolution.

64. In addition, clause 16.6 provides that the Licensee may be required to plant or replant trees by the Northland Regional Council or by the covenants or conditions of the Licence in a return situation. It is important to note that although the requirement is expressed as a burden on the Licensee, in fact it is the Proprietors who must replant at their own cost if the Northland Regional Council or a covenant or condition of the Licence so require. Only in cases of breach of a requirement by the Northland Regional Council or a covenant or condition of the License, will the Licensee be required to replant. Protective Covenant No. 17 of the Aupouri Licence

is a water and soil covenant containing replanting obligations. Clause 3 of the Covenant provides that the covenant is to apply in respect of the covenant area notwithstanding the termination of the Licence. The covenant can only be varied or cancelled in accordance with sections 21 or 23 of the Act. See Appendix Nine for further details of the Covenant.

65. The Licensee must leave the land in a condition suitable for replanting. The Licensee is under no obligation to replant unless the Licensee breaches any requirement of any Authority or any condition or covenant of the Licence.

Improvements

66. The Licence makes provision for the status and ownership of improvements.

67. Clause 1.14 of the Licence defines Improvements as including: *"All buildings and other structures affixed to the Land, All roads, tracks, accessways, airstrips, firebreaks, bridge, culverts, irrigation works, erosion works, water-races, drainage works, water storage and all works related to the prevention detection or fighting of fire".*

Excluded are matters such as:

> *"1.1.4.3 The draining, excavation, filling, reclamation or stabilising of the Land, or the making of retaining walls or other works appurtenant to that draining, excavation, filling, reclamation or stabilising; or*
>
> *1.14.4 The grading or levelling of the Land or the removal of rocks, stone, sand or soil therefrom;"*

68. If a recommendation has been made by the Waitangi Tribunal for return of the Land, Clause 16.7.5 applies in terms of the treatment of improvements.

69. Clause 16.7.5 provides that:

> *"On or before the Return Date, the Licensee shall be entitled to remove from the Return Area such buildings and other structures as are capable of removal (the Licensee making good at its own expense the sites upon which the same stood) but all Trees and other Improvements then remaining (including without limitation roads, tracks, boundary fences, bridges and culverts) shall rest in and become the property of the Proprietors free from any payment or compensation whatever:"*

70. In our view several factors should stop the Licensee from looking to take advantage of any loopholes created by the exclusions to the definition of Improvements. Firstly they must make good the site, secondly the likelihood of an ongoing relationship with the Licensee and thirdly many of the exclusions would not fall into the category of structures capable of removal.

Management decisions of the Licensee

71. Prior to a termination notice being served upon the Licensee, the management decisions of the Licensee are effectively governed by section 2 of the Licence and the general law.

72. Clause 2.1 provides as follows:

> *"Subject to any enactment or rule of law, the Licensee shall, unless otherwise provided in this Licence, have the right, while this Licence remains in force, to use the Land for any purpose whether or not it relates to the harvesting, planting, management or processing of the Trees on the Land."*

73. As noted, during the termination period the Licensee's rights are significantly curbed to *"... enable the Licensee in accordance with accepted forestry practice to **protect, manage, harvest and process** the Trees growing, standing or lying on the Land at the commencement of such 35 year termination period." (Clause 16.7)* (emphasis added)

Licence Fee Income

74. There are two forms of consideration paid by the Licensee for the benefit of the Licence. An initial one-off lump sum for the grant of the Crown Forestry Right and the associated Crown Forestry assets. Secondly, an annual rental fee. Maori receive the rental fee, upon a return.

Annual Fee - During termination period

75. During the 35 year termination period which follows return of ownership of the Land, the Licensee will gradually surrender possession of *"Return Areas"*.

76. Clause 16.7.6 provides as follows:

> *"... This Licence shall from and after the Return Date cease to apply to the Return Areas and any necessary proportionate adjustment will be made to the amount of the licence fee..... payable by the Licensee...."*.

77. Therefore the Licence fee is to decrease in direct proportion to the amount of land surrendered.

78. It is important for Maori claimants to note that the Licence provides for periodic review of the Licence fee on 10 December 1993 and every third year thereafter so that the yearly licence fee for the next three year period is 7% of the land value at that date (clause 4.3). However, clause 4.7 provides that prior to the review of the licence fee on 10 December 1999 and every ninth year thereafter, the **basis** for fixing the licence fee can be reviewed. The significance of timing issues upon any review is discussed in section 4 (legal and other developments).

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