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CHAPTER 1

THE CLAIM, THE ISSUES, AND THE INQUIRY

1.1 Introduction

The claim which is the subject of this urgent inquiry was brought in November 2003 by the trustees of the Waimumu Trust. The trust administers an area of 4440 hectares of indigenous forested land in 45 parcels in the Hokonui Hills in central Southland, granted by the Crown under the South Island Landless Natives Act 1906 (SILNA). According to the records of the Maori Land Court, there are currently 4166 beneficial owners of the land administered by the trust, all of whom are descendants of those Maori for whose support and maintenance the land was originally granted.[1]

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

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

1. The total of 4166 beneficial owners was arrived at by adding the number of owners of each section. Some may therefore be counted more than once.
2. Paper 2.2, para 4
3. Document A1, paras 8, 19; doc A1 annexure 'TB-2', p 4; doc A1 ('TB-3'), para 2

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1.2 The Application for Urgency

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

Political lobbying ensued, including by the trust's lawyers, Chen Palmer.[4] When that failed to move the Government, the trustees filed a claim with the Waitangi Tribunal, arguing that the Forests Amendment Bill and the Government's SILNA policy in combination:

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

The claimants also applied for an urgent hearing.

1.2.1 Jurisdiction of Tribunal to hear urgent claim

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

4. Ibid (TB-1, 3,4)

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at the direction of the then acting chairperson, Chief Judge Joseph Williams, invited claimant counsel to comment on whether section 6(6) would prevent a hearing on the SILNA policy prior to the Bill's enactment.

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

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

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

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

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

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1.2.2 The issue of urgency

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

> minded to deal with the question of urgency now on the basis that the Bill will be enacted in its present form. If I decide that urgency should be granted in principle, then the final timetabling for the usual short form urgency inquiry can follow once the Bill receives the royal assent.[9]

The chairperson sought submissions from counsel on this issue.

The claimants argued that urgency was still warranted essentially because, they claimed, 'the impact of the Bill has already been felt through the loss of an important commercial logging opportunity' and that its impact would become exacerbated over time as more such opportunities were lost. Counsel submitted that there were two options available to them under the SILNA policy, neither of which was viable. One was to log for export under a sustainable management plan and the other was to make an application to the NHF. However, the sustainable management plan prepared by MAF had been assessed as uneconomic, and an application to the NHF was unlikely to succeed because the Waimumu Trust lands were not regarded as being of sufficiently high conservation value.[10]

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

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9. Ibid, p5
10. Paper 2.12, paras 2(b), 12–14

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- to enter into a voluntary conservation agreement with the Crown, with the possibility of a 'financial consideration' being available;
- to develop a sustainable management plan under which the harvest could be exported; or
- to mill unsustainably for the domestic market only.

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

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

> It is usual in applications for urgency to give considerable weight to the issue of whether the claimants are able to demonstrate that they are likely to suffer significant and irreversible prejudice as a result of the Crown's policy complained of. . . . I do not however consider that that requires an assessment of the merits of the claim in the sense pleaded by the Crown. In most urgency applications all that is available to be tested by the Tribunal is allegations . . . and even in cases where evidence is filed with the application (as here), that evidence is completely untested. The substance of the claim is not inquired into at this stage in accordance with s6(1). That comes during the hearing process. Instead an application for urgency merely requires the Tribunal to determine when that inquiry should take place, not what the outcome of the inquiry might be. . . . The assessment I must make is rather whether the alleged impact on the claimants of the Act or policy is so significant as to warrant a reallocation of the Tribunal's resources so that the matter may be inquired into as a priority.[12]

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

> On recent experience, that submission is scarcely credible but in any event the alleged connection is far too tenuous to consider that Parliament intended it to have been caught by s6(6). If I were to grant urgency in principle . . . it would be no more than a signal as to when an inquiry clearly within the Tribunal's jurisdiction would be undertaken. No more could or should be read into it than that.[13]

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

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11. Paper 2.13, paras 5, 8, 12, 18, 20–27
12. Paper 2.1, pp1–2
13. Ibid, p2

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principle on that ground, adding: 'In case there is a need to state that which is probably obvious, it follows that if the provisions are changed in any material way, the matter would have to be revisited.'[14]

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

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

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

The claimants responded that the Crown had known about the basis of Mr Burn-Murdoch's valuation since November 2003 (although that information had 'inadvertently' been omitted from the documents supplied to the Tribunal's chairperson) and was seeking to 'relitigate a matter which had already been determined'.[17] Further, they argued that the Wai 1090 claim was wider than the Forests Amendment Act 2004, since the amended statement of claim (filed on 16 January 2004) brought in the effects of the Resource Management Act 1991 (RMA) and the Southland district plan (SDP), as well as the SILNA policy.

14. Ibid
15. Ibid
16. Paper 2.27, paras 24, 25, 2.3, 26
17. Paper 2.28, para 6

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In reply, Crown counsel reiterated their previous arguments in more forceful terms, maintaining that:

> The Tribunal must be satisfied that there is a tenable basis for the allegations of loss that led to urgency being granted. There is no point in proceeding to a hearing if there is manifestly no substance to those allegations. The Chairperson was entitled to assume that the representations as to loss had a reasonable foundation. The amendments to the Burn-Murdoch evidence only confirm that this was not so.[18]

Moreover, counsel maintained that urgency had been granted on a narrow basis and that 'The alleged detriment of the export controls cannot be used as a Trojan horse, so that other complaints – not worthy of urgency in their own right, and more properly the subject of a wider SILNA inquiry – can be ventilated.'[19]

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

By directions dated 24 May 2004, the chairperson appointed Judge Layne Harvey the presiding officer for the inquiry. A further direction of 16 June authorised the appointments of Joanne Morris and Professor Hirini Mead as members, but then, by a direction of 8 September, Dr Angela Ballara replaced Ms Morris.[20]

1.3 The Scope of the Inquiry

Similarly polarised positions on the issue of the extent of the inquiry were evident in attempts to produce an agreed statement of issues following directions from the presiding officer.[21] Each party submitted its own very different statement of issues to the Tribunal.

The claimants, following their amended statement of claim, wished to deal with the historical background to the granting of the SILNA lands together with the suitability of the grant, before proceeding to the effects of the wider legislative and policy framework, including the forestry harvesting regimes permitted under both the RMA and the Forests Amendment Act 2004, the value of the Waimumu Trust's forests under the various statutory regimes, and ways for the claimants to secure an economic return from their land.[22]

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18. Paper 2.29, para 14
19. Ibid, para 4
20. Papers 2.21, 2.33, 2.42
21. Judge Harvey was appointed on 24 May 2004, four days after the Forests Amendment Bill received the royal assent.
22. Paper 2.30, p2

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On the other hand, the Crown considered that, in accordance with the grounds on which urgency was granted, the 'primary focus' of the inquiry should be the effect of the Forests Amendment Act 2004 on Waimumu Forest. It wished to treat the issues associated with the development of that Act and the economic questions about the use of the SILNA forests as background issues only. Noting that the parties could not agree on the scope of the inquiry – whether the focus should be on the 'alleged loss arising from the enactment of the 2004 Act' or whether the inquiry was to be 'a broad investigation of other complaints about SILNA policy in general and the effects of other legislation upon SILNA lands' – the Crown reported that the difference in view was 'fundamental' and that an 'impasse' had been reached.[23]

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

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

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

23. Paper 2.31, pp 2–3
24. Paper 2.34, paras 2, 7, 8
25. Ibid, para 10

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silna grants – their size, location, and quality, or whether they were an adequate response to the grievances of Ngai Tahu – are no longer within the Tribunal's jurisdiction'. They did accept, however, that the Tribunal could seek to 'understand how parliamentary intention in 1906 may reflect on the development of contemporary indigenous forest policy'.[26]

1.4 The Postponement of the Hearing

The urgent hearing of Wai 1090 was originally set down for 9 to 11 August in Christchurch. On 22 July, the Tribunal directed that any additional evidence the parties intended to rely on must be filed and served by 5pm on 4 August, as 'The available time simply does not permit the presentation of extensive evidence at the hearing.'[27] After a teleconference on 27 July, the presiding officer required the Crown to provide by 5pm on 30 July a report by Cecilia Edwards on the origins and early implementation of the landless natives policy in the nineteenth and twentieth centuries and its accompanying document bank. The details of and the background to two recent silna settlements as embodied in the Waitutu Block Settlement Act 1997 and the Tutae-Ka-Wetoweto Forest Act 2001 were also sought.[28] On 4 August, claimant counsel advised the Tribunal's registrar that he had received at 2.30pm that day the documents due on 30 July. Counsel then sought leave to produce further affidavit evidence to 'address the substantial additional documentary evidence which the Crown has provided' and to file such evidence at the hearing if necessary.[29]

Meanwhile, on 30 July Crown counsel advised the registrar that not only was it proving difficult to copy and index the large volume of departmental documents relating to the development of Crown policy on indigenous forests from about 1990 to 2002 but 'a number of potentially relevant Cabinet papers have been located that were not supplied to the Waimumu Trust in response to their Official Information Act request'. Release of the latter would require Cabinet Office approval, 'which may occasion some delay. Any other material will be released as soon as possible.'[30] In the event, the Cabinet papers were not available by the deadline of 5pm on 4 August, nor even the following day. Moreover, on 4 August Crown counsel advised the registrar that the Crown had not yet finalised the evidence of Alan Reid from maf, who was to give evidence on the development of the Crown's silna policy up to 2002. The Tribunal was to consider this evidence before the hearing in order to determine whether Mr Reid would be required to attend in person.[31]

26. Paper 2.48, paras 5, 6, 10, 11
27. Paper 2.34, para 3
28. Paper 2.37, paras 3(a), (b)
29. Paper 2.41, paras 2, 4
30. Paper 2.39, paras 2, 3
31. Ibid, para 4.3

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Accordingly, in a memorandum dated 6 August, the Tribunal postponed the hearing, since 'the inquiry cannot proceed without the evidence being filed in advance of hearing'. The Tribunal also noted that 'The granting of urgency requires evidence to be filed and served in advance of hearing except in the most rare circumstances'.[32] Subsequently, in a memorandum dated 10 September, the presiding officer rescheduled the hearing for 11 to 13 October in Christchurch. He also noted that the evidence required from all parties had still not been filed in full, and directed counsel to file and serve all outstanding evidence by 12 noon on 24 September, stating that 'Any evidence filed after this date may not be included in the inquiry.'[33] In any case, the agreed bundle of documents was not filed until two working days before the hearing, on the evening of 6 October.[34] The hearing was held at the Environment Court in Christchurch from 11 to 13 October, and reconvened in Wellington on 10 November to hear closing submissions from counsel and to seek answers to a list of Tribunal questions for both the claimants and the Crown (see app II). The claimants responded orally to those questions during the reconvened hearing. Crown counsel sought and were given a further five days to respond, but took seven days to do so. Not all documents quoted by Crown counsel in their response had been supplied to the inquiry and a further delay occurred while clearance was obtained to release one of them. This was finally made available on 26 November. Claimant counsel then responded to the Crown's response on 1 December.

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

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

32. Paper 2.42(a), paras 3, 4
33. Paper 2.43, p2
34. The agreed bundle comprised 14 lever-arch folders initially compiled in apparently random order. The Tribunal was subsequently forced to ask for a reordering by subject and chronology.

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