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CHAPTER 7

IMPLEMENTING THE JOINT VENTURE

7.1 Introduction

In this chapter, we complete our account of the events necessary for the implementation and operation of the joint venture. Taking a chronological approach, we begin with the Maori Land Court's decision to amalgamate the 40 blocks and vest the title to the land in the Maori Trustee, the reasons for doubting the lawfulness of that decision, and the legislation that was passed very quickly to negate those doubts. We then outline the Maori Trustee's inquiry into the fairness of the joint-venture proposal and the consequent change to the log price clause.

Next, we outline the creation of TFL and the New Zealand Forest Service's role in negotiating TFL's sales and management agreements with Tasman. The reaction of the Maori members of Parliament to the statute that authorised MIL's creation is then examined briefly, and it provides a stark contrast to their reaction to the Maori Affairs Amendment Act 1967, passed just days earlier. An explanation of the key rules governing MIL's operation follows, together with a description of the condition of its shareholders' register.

Finally, we outline the terms of the compensation package that was agreed between Tasman and the Edwards family and was paid to the family in 1968 upon them vacating their home and farm on the Pokohu B3B block.

7.2 Reasons for the Court's Decision

Issued on 10 October 1966, Judge Gillanders Scott's decision put it 'firmly on record' that it was not the Maori owners' neglect that was responsible for the Tarawera Valley land not being used 'to proper advantage'. Rather, it was because the land 'simply could not and even now cannot be used with advantage for agricultural or pastoral or horticultural purposes'.[1] Judge Gillanders Scott then explored the meaning of the phrase 'more conveniently or economically worked or dealt with' in section 435 of the Maori Affairs Act 1953 and rejected the notion that the 'the mere wishes' of the owners for the land's utilisation were relevant. Instead, he concluded, the phrase connoted the use of land 'to proper advantage' in order to overcome

1. Document A34, p 2

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'scarcity and poverty'.[2] Having stated that it had been 'clearly demonstrated' to the court that it would be appropriate to make the amalgamation order, the judge continued:

> No person really testified or made any submission against the thought save that some owners represented by Mr McGregor contended (and he urged) that several lands should be excluded from the application and the owners thereof left to, as it were, work out their own salvation.[3]

In rejecting the Savage–Edwards family's case, Judge Gillanders Scott did not refer at all to their majority interests in some blocks but gave heavy emphasis to the rent charge and the 'real attitude of the family towards the Tasman proposal'. He dismissed the rent charge as ineffective, after describing it as a 'shabby document' and a 'bombshell' that had been produced on the third day of the hearing. The Savage family's 'real attitude' was revealed, the judge indicated, by the following matters:

- the family did not start planning to utilise the land until after the Tasman proposal was made;
- some family members supported the Tasman proposal;
- the family did not have the money to develop the land;
- the family did not oppose the land being used for forestry but preferred to retain the ownership of the land and 'get a share of the produce of the land in due course'; and
- the Edwards family were not gaining a livelihood from the land, their woodcutting activities began only after the Tasman proposal was made, and some of the family members seemed intent on driving the hardest possible bargain in return for them leaving the land.[4]

As for the Ngaheu family, the judge emphasised that they too had only started making plans to utilise the land after the Tasman proposal was made and that their farming plans would require a substantial level of financial investment – a level that was unavailable to them. As well, the judge drew attention to the limited time that Samuel Bowman Savage had to lead such a farming venture when he worked at the Kawerau mill and did other farming activities as well. Having devoted more than two pages of his judgment to what were described as 'principles in valuation best to be followed rather than ignored', Judge Gillanders Scott dismissed the valuation evidence given by Mr Warner for the Ngaheu family.[5] He also noted the novelty of the Ngaheu family's proposal that the 619-acre Matata B59 block be partitioned and they be put in it, when they had no interests in the block, their own interests totalled only 400 acres, and the views of the block's owners about the matter were unknown. For all those reasons, the judge concluded that the Ngaheu claim failed.[6]

2. Document A34, pp 2–3
3. Ibid, pp 3–4
4. Ibid, pp 6–7
5. Ibid, pp 9, 13
6. Ibid, pp 8–9, 13

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Having found no merit in the arguments of the Maori opponents of the application, Judge Gillanders Scott declared the court to be satisfied that an order under section 435 of the 1953 Act was 'meet and in the interests of the Maori owners'.[7] He then turned to consider the section 438 application to vest the amalgamated title in the Maori Trustee, beginning by setting out a number of earlier judicial statements about the civil standard of proof, which is on the balance of probabilities. Having noted that competing evidence was given to the court about how to value the Maori land, Judge Gillanders Scott observed that section 438 'is clearly designed for the preservation of Maori land as such subject only to the limited and incidental powers of alienation contained in subsection 9 thereof and even then only within the terms of the vesting order'.[8]

He then elaborated on the circumstances in which section 438 could be used to effect an alienation of Maori land:

> Alienation by way of sale is not precluded by the Statute. However, subsection 1 of section 438 is specific in that the Court may make such class of vesting order only if it has first satisfied itself . . . that the making of the order and the trusts therein are 'for the benefit of the owners of the land . . .'. Again a vesting order shall not be made if it appears to the Court that there is on the part of the beneficial owners, or any of them, a meritorious objection to the making of the order.[9]

The judge next referred to suggestions made by counsel opposing the application that the Crown supported the joint-venture proposal 'not because it was necessarily for the benefit of the Maoris concerned' but because the benefits to the Crown – of 'extra taxation' and 'associated fringe benefits' – would outweigh the disadvantages of an 'annual dividend return smaller than would be expected in an ordinary commercial transaction'.[10] He rejected that notion, recording his satisfaction that:

> the Crown and all others who have played a part in this case have disclosed everything reasonably required to ensure its proper despatch and conclusion and have demonstrated a compelling desire to assist the Maoris in every possible way.[11]

Judge Gillanders Scott noted at this point that he had to confine himself to the evidence before him and that 'public policy is an unruly horse, and dangerous to ride'.[12]

The judge then concluded that there was nothing in the evidence presented to him 'showing or for that matter even tending to show that a forestry scheme is otherwise than in the best interests of and for the benefit of the Maori owners', and he proceeded to consider the

7. Ibid, p 14
8. Ibid, p 15
9. Ibid
10. Ibid
11. Ibid
12. Ibid, pp 15–16

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terms of the trusts on which the land should be vested in the Maori Trustee.[13] At this point, Judge Gillanders Scott quoted at some length from Mr Groome's cross-examination about 'any alternative scheme for utilization of these lands as forest', noting first that, 'Although the Court cannot go all the way with Mr Groome, a forester, called by Mr O'Sullivan, his evidence was at times somewhat telling.'[14]

The passages quoted from Mr Groome's evidence touched on the matters of log pricing, the financing of the forest by Maori, the valuing of forestry land, and the Otakanini lease negotiations.[15] Judge Gillanders Scott continued:

> It could well be advantageous [for] the Maori owners to grant a long term lease of these lands for forestry purposes and that is open to them since leases of Maori land for use exclusively or principally for afforestation purposes may now . . . be granted for terms exceeding 50 years or for that matter in perpetuity. However a lessee must be forthcoming – not merely a lessee prepared to afforestate but one with the facilities for cutting, milling and disposing of the produce of the land. However a suitable lessee must be available or within reasonable prospect, but nowhere in the evidence is there mention or for that matter a hint that one could be found.[16]

Commenting that the evidence given by Messrs Souter, Poole, Beachman, and Davis was 'both frank and compelling' and 'added both substance and weight to the detailed (sometimes colourful) evidence of Mr Schmitt', the judge concluded that the application had 'immense merit' and that he found it 'difficult indeed to find even a slight doubt that somewhere along the line and in the future the Maoris may suffer even a slight detriment' from it.[17] He explained, however, that, because 'No section 438 order . . . should be so framed as to rob . . . the trustee of the usual discretions of a trustee', his order under that section was 'not quite in line with that sought in the application'.[18] The judge then commended all counsel as being 'most helpful' and, noting that about 500 applications for succession to deceased owners had had to be filed and dealt with, he thanked the registrar for the 'immense amount of work which he and his staff undertook in default of the Maoris concerned to bring the ownership schedules reasonably up to date'. Finally, Judge Gillanders Scott recorded that:

> much special legislation is needed to implement the 'Tasman' scheme (if the Maori Trust decides to proceed with treatings to that end) – and it is this Court's most respectful recommendation that that aspect of the matter be undertaken as promptly as the circumstances admit.[19]

13. Document A34, p 16
14. Ibid
15. Ibid, pp 16–17
16. Ibid, p 18
17. Ibid
18. Ibid
19. Ibid, p 19

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7.3 The Prospects of an Appeal

No appeal was taken from the Maori Land Court's decision, but a confidential memorandum dated 21 October 1966 from Deputy Maori Trustee Mr Souter to the Rotorua district office referred to 'the fact that appeals [had] been lodged' against the decision.[20] Other evidence presented to the Tribunal reveals that the Lanham group considered an appeal but decided not to pursue it. That is clearly stated in a letter to the Maori Trustee written on 17 October 1966 by the group's lawyer, Mr O'Sullivan. The letter gave the reason for the decision as being 'the large latitude' allowed to the Maori Trustee by the terms of the trust, coupled with the trustee's liability for negligent conduct during his trusteeship. It also commended two aspects of the joint venture for the trustee's consideration – the land valuation and the log price – with the observation that the trustee would be able to obtain information about the log price that was not available to Mr O'Sullivan's clients because it was privileged (as well as being too expensive for them to obtain).[21] A final point of note from the letter concerns Mr O'Sullivan's statement that his clients' motive was to ensure that 'a fair bargain' was achieved, not to 'nullify the application' to the court. In support of this, Mr O'Sullivan stated that his clients might have succeeded in nullifying the application had they persisted in seeking the disclosure of the log sale agreement in court when Mr Forsell had claimed privilege for it but did not have the required certificate. According to Mr O'Sullivan, Mr Forsell had 'stated that he had been instructed to withdraw the application if the writer pursued his requests'.[22]

The only evidence that the Tribunal has of the Savage family's consideration of an appeal is David Potter's statement to us that, once the Maori Land Court's decision was known, members of the group spoke to their lawyer, Mr McGregor, about an appeal but were told it would cost £1200, an amount that they could not afford, coming as it did on top of the £800 that Mr McGregor had charged for his services up to that time.[23]

7.4 The Court of Appeal's Decision in *Hereaka v Prichard*

On 3 October 1966, some three weeks after the Maori Land Court had announced its decision and orders in the Tarawera Valley lands application but one week before it was to issue its reasons for them, the Court of Appeal issued its judgment in *Hereaka v Prichard*.[24] The case originated with a Maori Land Court decision to partition 168 acres of land on the shores of Lake Taupo so that its owners could sell residential sections. As part of the subdivision scheme, the court relied on section 438 of the Maori Affairs Act 1953 to vest a number of the

20. Document B1, vol 2, p 18
21. Ibid, pp 95–96
22. Ibid, p 95
23. Document A19, para 13
24. *Hereaka v Prichard* [1967] NZLR 18 (CA)

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sections in three trustees for certain purposes, one being to transfer an area of approximately 23 acres to the Taupo County Council for recreation reserves.[25] The purpose of the reserves was to provide both access to the lake to the owners of back sections and amenities for the public at large. A family of owners that was dissatisfied with the partition scheme brought a Supreme Court action against the chief judge of the Maori Land Court and others, alleging that the court had no power under section 438 to make the orders that it had made. The chief justice of New Zealand heard the case and dismissed it. The family then appealed to the Court of Appeal, where the sole issue was whether the Maori Land Court had jurisdiction under section 438 to vest land in trustees for the purpose of transferring it to the county council for recreation reserves.

Each of the three Court of Appeal judges delivered a separate judgment but they were unanimous in allowing the appeal, thereby overturning the chief justice's decision. The president of the court, North P, accepted that the provision of recreation reserves was necessary for the success of the subdivision scheme and that, in a sense, anything done by the Maori Land Court to further the scheme could be said to be 'for the benefit of' the Maori owners. Focusing on the words of section 438(1), however, he found that it was an 'inescapable conclusion' that the declared trust in favour of the Taupo County Council was 'really a trust providing for the alienation of the land to a stranger, and it cannot possibly be said that the land is held on trust for the benefit of Maoris'. Describing the trustee's power of alienation conferred by section 438(9) as 'clearly . . . an incidental power', North P explained that 'there must first of all be a trust under which the land is held for the benefit of Maoris'. However, 'in the present case the trust clearly is intended ultimately to benefit members of the public at large', with the result that the Maori Land Court had exceeded its jurisdiction.[26]

Justice Turner undertook a careful grammatical analysis of section 438 and held, first, that it authorised orders imposing trusts on the land, which was to be held (as opposed to alienated) subject to those trusts.[27] Further, he held that the words 'for the benefit of Maoris' in section 438(1) bore their legal meaning; namely, that Maori must be the *cestuis que trust* (beneficiaries) of the trust.[28] Therefore, his Honour held, 'It is in my opinion impossible to say that, because they indirectly benefit by the setting up of the trust in some way other than as *cestuis que trust*, the trust is for the benefit of Maori.'[29] On the meaning of section 438(9), Justice Turner stated that the subsection implied an incidental power of sale where alienation may become necessary by virtue of particular circumstances. However, it did not enable

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25. By the terms of the court's order, the trustees were required to effect the transfer (ie, they had no discretion in the matter).

26. *Hereaka v Prichard*, p 28

27. Ibid, p 34

28. The subsection authorises the making of an order vesting land in any trustees, 'subject to such trusts as the Court may declare *for the benefit of* Maoris or the descendants of Maoris or for any specified class or group of Maoris or their descendants' (emphasis added).

29. *Hereaka v Prichard*, p 36

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trusts to be set up 'whereunder the duty of the trustee is not to hold, but to alienate, the land the subject of the trust'.[30]

Justice McCarthy described the essence of the matter before the court in these terms:

> in determining whether there was a want of jurisdiction, we must have regard to the nature and substance of the particular order attacked. The documents before us make that substance perfectly plain. In form, the order is one vesting land in trustees on trust, but the revealed intention of the Court in making the order was not that the land, or even the proceeds thereof, should be held by trustees subject to the obligations of a trust, but instead that the land should be alienated, without compensation, to the Taupo County Council . . .[31]

His Honour found that the Maori Land Court's order 'was not, in its substance, an order to hold land upon trust for the benefit of Maoris; but was, instead, a device to effect an alienation not otherwise authorised by statute'. Agreeing with Justice Turner, Justice McCarthy held that 'the class of order intended by the section are trustee orders in the true sense, that is, orders which direct property (here land) to be held for beneficiaries who must be Maoris generally, or some specified class of Maoris.'[32]

7.5 Rapid Legislative Response – Amendments to Section 438

On 20 October 1966, just 2½ weeks after the Court of Appeal's decision was issued – and 10 days after Judge Gillanders Scott issued his reasons for the Tarawera Valley decision – Parliament enacted legislation repealing section 438(1) of the Maori Affairs Act 1953 and replacing it with new provisions which:

- enabled the court to vest land in trustees subject to trusts when 'it is satisfied that it will be for the benefit, direct or indirect, of any Maori' (s 438(1));
- made plain that any trust declared under section 438(1) which authorised or directed the trustee to alienate or dispose of the land would be valid (s 438(1A));
- subject to the next provision, retrospectively validated any orders purporting to have been made under section 438(1) before 20 October 1966 and any actions done by trustees in reliance on such orders (s 438(2)); and
- preserved unaffected any existing proceedings in the Supreme Court, Court of Appeal, or Maori Appellate Court (s 438(3)).[33]

As Dr Harrison submitted to the Tribunal, the amendment was 'plainly a response' to the Court of Appeal's decision in *Hereaka*.[34] Where the court had held that section 438(1)

30. Ibid, p 34
31. Ibid, p 39
32. Ibid
33. Maori Purposes Act 1966, s 6
34. Document B80, para 36

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required a trustee to hold land on trust for Maori beneficiaries (*cestuis que trust*), the amendment allowed a trustee to alienate the land if that was for the benefit of Maori, in the sense of 'for the good of Maori'. Further, the amendment validated all such orders made under the previous section 438(1) unless they were already the subject of appeals. While at first glance it may seem that the amending legislation was directed at validating the Maori Land Court's decision in the Tarawera Valley lands case, the point is arguable and, in the Waitangi Tribunal, counsel did argue the matter. We return to it in chapter 8.

7.6 The Maori Trustee

7.6.1 Identification of three matters to examine

Whether or not any appeals were ever lodged, Mr O'Sullivan's 17 October letter to the Maori Trustee must have been in Mr Souter's mind just four days later, when, as deputy trustee, he wrote to the Secretary to the Treasury outlining the trustee's role with regard to the proposed joint venture and seeking certain information.[35] Mr Souter's letter stated that the Maori Trustee must be satisfied, before entering into the joint venture on behalf of the Maori owners, that the terms were fair and reasonable to them. Indeed, Mr Souter noted that, if the trustee did not do that, 'he will find himself under a legal liability'. He then identified three matters that were 'in question': the land value, the log price, and 'The merits of leasing vis-à-vis a sale'.[36] On the land value issue, Mr Souter advised the Secretary to the Treasury that the Maori Trustee intended to obtain expert advice and would, if necessary, take the matter up with the other parties to the venture. With regard to the proposed log price formula, he noted that the Crown claimed privilege in court for the details of the Tasman–Crown Kaingaroa agreement that provided the basis for the price to be paid by Tasman for Tarawera Forest logs. He then asked for an assurance that:

> the terms of the agreement between the Crown and Tasman are such that at the time when Tarawera Forests Ltd commences to sell produce to Tasman, Tasman will be paying at least the equivalent of the current market price for produce from the Kaingaroa Forest. If we cannot get this assurance, then it seems to me that appropriate words will have to be included in the Heads of Agreement to provide that Tasman shall pay not less than the current market price for all produce from Tarawera Forests Ltd.
>
> The purpose of this memo is first to ask you if you can let us have such an assurance from the Director-General of Forests.[37]

35. Deputy Maori Trustee to Secretary to the Treasury, 21 October 1966, p 1 (doc A22(a), p 29)
36. Ibid
37. Ibid, p 2 (p 30)

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As for the relative merits of leasing or selling the land, Mr Souter's letter noted that these were discussed in court but the issue was never resolved. He then referred to a proposed lease between Parengarenga A Incorporation and the New Zealand Forest Service, the terms of which required only a 'peppercorn rental of 6d per acre per annum', plus 'approximately 20% of stumpage rate', to be paid to the Maori owners.[38] After noting the 10 per cent minimum guarantee to Maori owners under Tasman's joint-venture proposal, Mr Souter concluded by stating his request on this matter: 'The Maori Trustee would like the Director-General of Forests to confirm that the estimated return to the Maori owners from Tarawera Forests Ltd is at least as favourable as could be expected from a lease on the terms mentioned.'[39]

7.6.2 The land valuation

(1) Obtaining a land valuer

A filenote by Mr Souter dated 20 October 1966 records that two days after the court's reasons for its judgment were given, he telephoned the Valuation Department to obtain a recommendation for a suitable valuer to be employed by the Maori Trustee to report on the Tarawera Valley Maori lands. The valuer to whom he was referred was not available to do the work but recommended Mr J R Sharp, 'the Head Valuer for Wright Stephensons, Hamilton'. Mr Souter then contacted the manager of the Hamilton branch of Wright Stephensons, explained the Maori Trustee's requirements, and obtained an assurance that Mr Sharp would be available. He then sought confirmation from the Valuation Department that Mr Sharp was a registered valuer. This was obtained from a department officer who did not know Mr Sharp but who expressed 'complete confidence' in the judgement of the valuer who had recommended him. According to Mr Souter's filenote, the Valuation Department officer nevertheless recommended that confirmation be obtained from the Valuer-General that Mr Sharp 'was completely satisfactory as a valuer'.[40] The Tribunal has no evidence as to whether Mr Souter took that last step. However, the day after the filenote was made, Mr Souter sent a confidential memorandum to the Rotorua district officer stating that Mr Sharp had been asked to give his opinion on the value of the Maori land and asking that Mr Sharp be given 'any assistance he asks for'.[41]

(2) The Maori Trustee's valuation requirements

The Crown's historian, Dr Battersby, referred to instructions dated 20 October 1966 from Mr Souter to Wright Stephensons, which specified that:

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38. The 99-year lease, when finalised in November 1966, provided 18.75 per cent stumpage for the Maori owners and a review after 25 years.

39. Deputy Maori Trustee to Secretary to the Treasury, 21 October 1966, p 1 (doc A22(a), p 31)

40. Document B1, vol 1, p 97

41. Ibid, vol 2, p 18

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> an assurance was required that the valuations given by Tasman were fair, and in assessing this the special circumstances of the block needed to be considered, (i) that the 38,067 acres of Maori land was in one title, (ii) the land's suitability for afforestation and (iii) the closeness of the land to Tasman's mill.[42]

The brief valuation report prepared by Mr Sharp on 5 April 1967 contains further, but not entirely clear, evidence of the terms on which he was engaged by the Maori Trustee. The report opens with these words:

> Following your request for me to inspect the land comprising 38,067 acres situated in the Tarawera Valley I now report as follows.
>
> Extensive investigation has been made by me to arrive at the decisions which affect the value of this land to the Maori owners and also the suitability for afforestation or alternative farming systems also the lands situation in relation to the Tasman Mill at Kawerau.[43]

Towards the end of the report, however, is this statement: 'This report is in the nature of a general comment only, as requested without having completed detailed inspections or valuations of the individual Maori blocks.'[44]

On that evidence, the Tribunal concludes that Mr Sharp did not actually visit the Maori land amalgamated as the Tarawera 1 block but provided his assessment from information supplied to him about the land, including the method used by Tasman to value it, and from his own knowledge of factors relevant to land valuation. Crown counsel suggested to Mr Groome that the 'extensive investigation' that Mr Sharp had said he had conducted was borne out by the fact that, before he submitted his valuation report, he wrote to the Maori Trustee apologising for the delay involved in obtaining more information. Mr Groome acknowledged that he had seen that letter but remained critical of the quality of the valuation report.[45]

(3) The valuation

The five conclusions reached by Mr Sharp made up the larger part of his report but occupied less than one typed page. Stated even more briefly, they were as follows:

- the Tarawera Valley generally was regarded as unsuitable for grassland farming because of the 'coarse rubbly nature of pumice soil', by contrast with the land about Rotorua, Taupo, and Kinleith (which was generally considered ideal for either grassland farming or afforestation) and where there was keen competition by farmers and timber concerns to purchase land that was suitable for both grass and forest;

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42. MA58/2/1, pt 3 (cited in doc A10, p 129)
43. Document B1, vol 1, p 87
44. Ibid, p 88
45. Tribunal notes of questioning of Mr Groome on document B70, 18 September 2000

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- the fact that the land was available to be purchased in one title made negotiating simpler for the purchaser and ensured the purchase of all the land in the area, which would have been difficult to achieve otherwise;
- the Maori land was all within 18 to 20 miles of Tasman's mill, and there was generally a downhill slope for log cartage from all areas of the land to the mill;
- all the land, even that at higher altitude and the steeper areas, was considered ideal for growing trees; and
- the price offered for the land was generous, there being no comparative sales within the locality to support figures as high as those that were offered, and the method by which the price was arrived at was 'very sound . . . and fair for the respective owners'.[46]

7.6.3 Log price

The log price formula in the draft heads of agreement provided that Tasman would pay for Tarawera Forest produce an amount equal to the average cost to Tasman of equivalent material delivered to the Kawerau mill from all other sources.[47] The Maori Trustee, having asked the Treasury in October 1966 for an assurance from the Director-General of Forests that the formula meant that Tasman would be paying TFL 'at least the equivalent of the current market price for produce from the Kaingaroa Forest', had to wait more than six months for a response. In December 1966 and January 1967, Mr Souter wrote again to request a response and, late in February 1967, the Maori Trustee, Mr J M McEwen, himself wrote to the Treasury in strong terms:

> As no reply has yet been received, I feel that I should impress upon you the fact that nothing which has taken place so far commits the Maori Trustee to the Tasman project. . . . the Court order leaves it open to the Maori Trustee to make other arrangements which would be in the best interests of the owners.
>
> As Maori Trustee, I have a legal duty towards the owners, and to nobody else – Crown or otherwise. It is my duty to ensure that the proposed Tasman project is the most profitable use to which the land can be put. Until I receive the assurances that have been asked for, I cannot satisfy myself or the owners that this is so. As you know, there is a section of the owners, backed up by a solicitor who is hostile to the Maori Trustee, who will seize any opportunity that presents itself to attack the actions of the Maori Trustee, and in common prudence, I must be sure that the proposed price-fixing arrangements are in the best interests of the owners.
>
> In the meantime, the terms of the Court order are not being fulfilled and a further lapse of time could become embarrassing. Unless the required assurances are given fairly soon, I

46. Document B1, vol 1, p 88
47. See, for example, Maori Trustee to Tasman, 9 May 1967, p 2 (doc A22(a), p 35)

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will be faced with the necessity for seeking some other means of using or disposing of the land in the best interests of the beneficial owners.[48]

A few days later, Mr Poole, on behalf of the Minister of Forests, wrote to the Minister of Finance observing that the finalisation of the Tarawera Forest scheme depended on the Treasury providing 'an assurance that the scheme is financially sound', that the Maori Trustee had already approached Treasury about this, and that it was desirable to 'clear this matter as soon as possible'.[49] Dr Battersby records that the Minister of Forests wrote again to the Minister of Finance at the end of March and received a response, dated 12 April, that the Secretary to the Treasury would be directed to contact the Maori Trustee, 'to discuss the matter with him to ascertain if he sees any reason why the terms of the draft agreement as already approved by Cabinet may react in any way unfavourably to the Maori owners'.[50]

Finally, on 5 May 1967, Mr Davis on behalf of the Secretary to the Treasury wrote to the Maori Trustee to 'confirm our discussions' of four days earlier.[51] Later correspondence from Mr Poole to the Treasury Secretary reveals that he too was present at those discussions.[52] By way of general introduction to the Treasury's position, Mr Davis's letter noted that, as 'a party to the development of the proposals', the Treasury would recommend the proposals' acceptance by the Government 'as being fair and equitable to all parties concerned'. On the log price issue, Mr Davis did not, as originally requested, convey an assurance from the Director-General of Forests but instead emphasised the Treasury's own view (which was likened to the adage 'a bird in the hand is worth two in the bush') that the value of an assured purchaser of the forest's entire output at a 'fair price' outweighed 'the risk' that some wood might be sold at a higher price but some might have no market or a limited market:

> The Agreement provides an assured outlet of [*sic*] the produce of the forest, properly managed, at the average cost of similar produce at the Tasman mill. It could perhaps be argued that this may not be the maximum price obtainable when the forest is being harvested. As against this the surety of an outlet must be weighed. Also there is no certainty of another user at a higher price for a forest established on the plantable area of the Maori land in question. There will undoubtedly be varying opinions on the question of utilisation and marketing in the period from 10 years ahead but these uncertainties must be considered against the certainty and the guarantee in respect of Maori participation set out in the draft Heads of Agreement.[53]

48. Document B1, vol 1, p 90
49. Ibid, p 89
50. Minister of Finance to Minister of Forests, 12 April 1967 (cited in doc A10, p 132)
51. Secretary to the Treasury to Maori Trustee, 5 May 1967, p 1 (doc A22(a), p 32)
52. Mr Poole's letter of 11 May 1967 to the Secretary to the Treasury refers to the Treasury's reply to the Maori Trustee as 'following a meeting with the Maori Trustee at which I attended': doc A22(a), p 36.
53. Secretary to the Treasury to Maori Trustee, 5 May 1967, p 1 (doc A22(a), p 32)

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The letter continued that, in light of the statements made by Tasman representatives about the scheme, the Treasury would be:

> quite prepared to say that on the basis of certainty the proposal as established will promote the best interests of the Maori owners. Anything beyond this is rather in the realm of speculation.

However, in a departure from the Treasury's previous position, Mr Davis then wrote that the Treasury would agree that:

> if the Maori Trustee so wishes in the discharge of his responsibilities to raise again with the Tasman Company the question of a revision of the pricing clause to provide either for market value of similar produce at the date of harvest or an average value of produce at Tasman mill excluding the original log sale agreement with the Crown, we would be prepared if requested to participate in such discussion.[54]

Mr Davis's letter was copied to the Director-General of Forests, who, six days later, wrote to the Treasury Secretary to clarify certain points. In particular, Mr Poole wrote:

> Since it might be assumed from your letter to the Maori Trustee that the Forest Service accepts all the conditions in the Heads of Agreement as being 'fair and equitable to all parties concerned' I must make it clear that, in the opinion of the Service, the price fixing clause contained in the Heads . . . is the very antithesis of being equitable to a forest owner.[55]

Citing extracts from his evidence to the Maori Land Court, Mr Poole summarised his attitude in court as being that he supported the scheme in principle but that he 'did not agree that forest owners would get reasonable prices for their wood under the scheme'. He observed that he could not pursue the point that he had made to the court – namely, that it might be argued that the Kaingaroa price was low – because 'it was not possible to divulge to the Court' the terms of the sale agreement between the Crown and Tasman. He continued:

> The pricing clause is such that the pulpwood sold under the original sale between the Crown and Tasman will have a dominating influence on returns to the owners of the proposed Tarawera Forest. You will recall that in the sale document between the Crown and Tasman there is a clause 6(3) which reads: 'For the purpose of deciding what variation (if any) is reasonable in the price to be paid for logs to be used as pulpwood . . . , regard shall be had to the Basic Concept of the Sale . . .'.
>
> 'The Basic Concept of the sale is to sell logs carrying as low a stumpage as possible consistent with the recovery of growing costs so that the enterprise itself may operate at a high profit rate and form as an [*sic*] attractive an investment as possible.'[56]

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54. Ibid, pp 1–2 (pp 32–33)
55. Poole to Secretary to the Treasury, 11 May 1967, p 1 (doc A22(a), p 36)
56. Ibid, pp 1–2 (pp 36–37)

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Mr Poole again described that method of stumpage as 'the very antithesis of equitability', observing that it 'could only be used by the State as an owner of timber and as a seller in its endeavours to start up an industry on a subsidised basis'. He concluded by stating that the amount of pulpwood sold under the first sale to Tasman 'must always be a much greater amount than will be obtained from Tarawera Forest', so that the prices for that Kaingaroa wood had to 'form the main basis' for the prices obtained for pulpwood from Tarawera Forest. 'There is little doubt', Poole concluded, that the effect would be to depress the stumpages obtained by the owners of Tarawera Forest, and that 'Such depression could be of substantial proportions'.[57]

There is no evidence that Mr Poole's letter was ever seen by the Maori Trustee, but plainly he too was not satisfied of the fairness to Maori of the proposed log price formula and proceeded to negotiate with Tasman for its amendment. A letter from the trustee to the secretary of Tasman, dated 9 May 1967, recorded that the terms of the Kaingaroa sale agreement were not disclosed at the Maori Land Court hearing but that Mr O'Sullivan 'argued strongly' that the agreement was 'particularly favourable' to Tasman and that the effect of the proposed log price clause for Tarawera Forest produce would enable Tasman to pay less than market price for it.[58] The Maori Trustee then stated that he was not satisfied with this aspect of the proposed heads of agreement, even after discussions with the Secretary to the Treasury, and proposed an amendment to the log price formula so that the 'equivalent price' to be paid for TFL produce would exclude any equivalent material obtained by Tasman at a price which, in the opinion of the directors of TFL, was less than a fair market price.[59]

Six weeks later, a Tasman board memorandum recorded that in recent discussions the Maori Trustee had accepted Tasman's suggestion that the log price clause be amended so that TFL would have the right to receive 'at its option, either a price based on the original "equivalent price" formula or a price which the parties agree is a fair market price'.[60] In his evidence to the Tribunal, Dr McEwen stated that Mr Poole had concerns about Tasman's proposed new formula and raised them with the Deputy Maori Trustee but was told that the formula had already been agreed to.[61]

The final version of the log price clause in the heads of agreement provided that TFL could elect, at intervals of no less than 10 years, whether to receive as the price to be paid by Tasman for its produce:

57. Poole to Secretary to the Treasury, 11 May 1967, p 2 (p 37)
58. Maori Trustee to secretary, Tasman Pulp and Paper Company Limited, 9 May 1967, p 2 (doc A22(a), p 35)
59. Ibid
60. Tasman Pulp and Paper Company Limited memorandum concerning Tarawera Valley Afforestation, 21 June 1967, p 1 (doc A22(a), p 39)
61. Document B73, pp 24–25. Dr McEwen does not cite a source for this information. He states that Mr Poole's concerns were with the meaning of 'substantial' in the alternative log price clause and with the election period being 10 years rather than five.

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Either

(a) Such prices that the delivered cost of such forest produce to Tasman's mill at Kawerau shall at all times be the same as the then average cost of equivalent material delivered to Tasman's mill at Kawerau from other sources;

or

(b) Such prices as may be agreed from time to time by Tasman and the Company being fair market prices having regard to sales in New Zealand of substantial quantities of forest produce concluded by parties negotiating 'at arm's length'.[62]

7.6.4 Comparative merits of the joint venture and a lease

The Maori Trustee's letter of 21 October 1967 to the Secretary to the Treasury sought from the Director-General of Forests confirmation that the estimated return to the Maori owners from TFL would be at least as favourable as could be expected from a lease with a 'pepper-corn rental' plus stumpage of approximately 20 per cent to the Maori owners. The Treasury's tardy response, dated 5 May 1967, did not convey any such confirmation. Instead, it stated that, since the Maori Trustee had satisfied himself, by means of an independent valuation, about the price at which the Maori land was to be conveyed to TFL, 'presumably therefore' the question of the comparative merits of the joint venture and a lease did not really arise.[63] Mr Poole, in his subsequent letter to the Treasury Secretary, noted that the Treasury had not posed that question in writing to the Forest Service, but he made no protest about the answer that had been given by the Treasury to the Maori Trustee.[64] Since Mr Poole attended the discussions between the Maori Trustee and the Treasury Secretary that were confirmed by Treasury's 5 May letter to the trustee, his failure to protest about this matter could indicate his agreement with the Treasury's view. That conclusion is strengthened by the fact that Mr Poole's letter proceeded immediately to clarify just one matter – that of the log price clause. Mr Poole protested that the Treasury letter might imply that the Forest Service accepted the price as being 'fair and equitable to all the parties concerned'.[65]

That the Maori Trustee accepted the Treasury's view is evident from the letter to Tasman of 9 May which conveyed the trustee's dissatisfaction with the log price formula. On the matter of a joint venture versus a lease, the letter simply repeats the Treasury's words: 'The Maori Trustee has satisfied himself that the price to be paid for the Maori land is reasonable and therefore that there is no need to pursue the question of leasing vis-à-vis a sale.'[66]

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62. 'Heads of Agreement between the New Zealand Government, Tasman Pulp and Paper Company Limited, The Maori Trustee, and John Charles White' 2 October 1967, cl 21(3) (doc A22(a), p 54)
63. Secretary to the Treasury to Maori Trustee, 5 May 1967, p 1 (doc A22(a), p 32)
64. Poole to Secretary to the Treasury, 11 May 1967, p 1 (doc A22(a), p 36
65. Ibid
66. Maori Trustee to secretary, Tasman Pulp and Paper Company Limited, 9 May 1967, p 1 (doc A22(a), p 34)

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7.7 Execution of the Heads of Agreement – 2 October 1967

A Tasman board memorandum of 21 June 1967 recorded that the completion of the heads of agreement 'is now of paramount importance', adding, in an apparent reference to the substantial amendments to the Maori Affairs Act 1953 that were enacted in November 1967:

> In view of the rather controversial atmosphere surrounding the general subject of Maori land which exists in the country at the present time, it would seem desirable that all formal action necessary to launch the venture should be completed as soon as possible.[67]

As a result of the inquiries and responses outlined in the preceding sections, once the log price formula was amended, the Maori Trustee was willing to execute the heads of agreement on behalf of the Maori owners of the Tarawera 1 block, and this occurred on 2 October 1967. The other signatories were Tasman, the Crown (through the Minister of Forests), and the Solicitor-General (as trustee for TFL before its formation).

7.8 Incorporation and Structure of TFL

TFL was also incorporated on 2 October 1967. In accordance with the joint venture's heads of agreement, TFL is a public company with an authorised capital of $500,000 divided into 500,000 ordinary shares of $1 each. Upon the company's formation, 502 shares were allotted to Tasman, 247 to the Crown, 247 to the Maori Trustee, and one to each of four Tasman nominees (a total of 1000 shares).[68] That share allocation ensured that TFL was a subsidiary of Tasman and so enabled Tasman to take and pass on to TFL the benefit of the tax concessions available for forest development.

The value of the 1000 allocated shares was accepted by Tasman, the Crown, and the Maori Trustee as part payment for the assets that they would transfer to the company, the balance of those assets being secured by TFL debentures earning 6 per cent compounding interest. The debentures would be convertible to shares, in amounts proportionate to the venturers' capital contributions to TFL, at the time that the company became able to pay the accumulated interest.[69]

The first meeting of the board of TFL took place on 6 December 1967. The foundation directors were: Messrs Schmitt (chairman), McKee, RN Mason, and JM Mitchell (representing Tasman); Mr Poole (representing the Crown); and Messrs Barber and Dye (representing the Maori Trustee).

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67. Tasman Pulp and Paper Company Limited memorandum concerning Tarawera Valley Afforestation, 21 June 1967, p 1 (doc A22(a), p 39)

68. The last four shareholders were needed to satisfy the Companies Act requirement of a minimum of seven shareholders: see 'Heads of Agreement', cl 6(1)(b) (doc A22(a), p 45).

69. See 'Heads of Agreement', pt A(1)(b) (doc A22(a), pp 42–47)

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Mr Schmitt retired at the end of 1967 and was replaced by Mr M H Kjar, who was elected chairman. At the end of 1968, once MIL was established and its representatives on the TFL board had been elected, Messrs Barber and Dye resigned and were replaced by Monica Lanham and Mr L R Grace.[70]

On 28 May 1968, the Maori Trustee conveyed to TFL the Tarawera 1 block.[71] It seems that more than £300 of unpaid survey liens on the block were written off by the Crown before the transfer.[72]

7.9 Management and Sales Agreements between TFL and Tasman

In late December 1967 and early 1968, negotiations were under way on the two detailed contracts required by the heads of agreement: the management agreement and sales agreement required, respectively, by clause 19 and clause 21. The Forest Service was particularly concerned about Tasman's dual capacity as manager of the forest and purchaser of the wood from the forest, and wanted to provide appropriate safeguards to protect the interests of the other parties. It insisted that matters between Tasman as manager and Tasman as purchaser had to be authorised by the TFL board. As Crown witness Dr Andrew McEwen noted, this was 'succinctly expressed' in a note from Forest Service lawyer Mr Buist to Mr Poole on 9 April 1968 about a phone call from Tasman's secretary, Mr Clinkard, to Mr Buist.[73] During that call, Mr Buist wrote, 'it suddenly came home to [Mr Clinkard] that we really mean Tasman *never* to act as Tarawera's agent. . . . He says it will add to costs. You can comment that it subtracts from risks' (emphasis in original).[74] The Forest Service was also concerned about particular points in the sales agreement.[75]

The Forest Service sent drafts of both agreements to the Crown Law Office for an opinion on 11 March.[76] Among other matters, the office was asked to confirm that it would be legally impossible, in terms of both documents, for Tasman to settle unilaterally, without reference to the TFL board, a range of matters in the sales agreement. These included elections for the disposal of wood surplus to Tasman's requirements; the minimum size of logs; the prices or election of pricing options; decisions on equivalent material; measurement of wood; the

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70. Document B35, p 6

71. Document B1, vol 2, p 19

72. A memorandum of 18 August 1967 from the Deputy Maori Trustee to the Rotorua office states that the Treasury had already approved the writing-off and that the matter was to be submitted to the Minister of Lands: doc B1, vol 2, p 7.

73. McEwen refers to Clinkard as Tasman's lawyer: doc B73, p 26.

74. Buist to Poole, 9 April 1968 (cited in doc B73, p 26)

75. According to McEwen, these were: the basis for measuring the forest's produce; ensuring that ownership of the logs passed to Tasman when the tree was felled (to avoid the possibility that Tasman could delay delivering logs to the mill and thus, because of their deterioration, pay a lower price); the costs of logging and transport; and providing for the use of timber that had been damaged by fire or insects: doc B73, p 26.

76. The chronology in this paragraph is taken from document B73, pp 26–27.

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price for damaged wood; and the method of payment. The Crown Law Office responded quickly, providing alternative wording to meet the Forest Service concerns. Subject to certain amendments and written confirmation of acceptance by the Minister of Forests and the Maori Trustee, the office advised that the drafts were acceptable to the Government and the Maori Trustee. Tasman, however, still disputed certain provisions in the management agreement, particularly those concerning its role as manager. The Forest Service again referred the matter to the Crown Law Office, which took up the points at issue with Tasman's solicitors and reported back to the Forest Service on 20 May with revised wording.

The two agreements were finally signed on 19 June 1968. As Dr McEwen noted, the four main features of the sales agreement were as follows (Dr McEwen's comments are summarised in parentheses):

- Tasman agreed to take all of TFL's production in perpetuity.
- The average price paid by Tasman for its wood from all other sources was set as the default. (Thus, TFL would benefit from any action other growers took to boost the prices paid by Tasman, without any effort by TFL.)
- If the market situation changed so that there were substantial sales of forest produce in arm's-length transactions, TFL could elect to switch to the market price. In making such an election, TFL was committed to it for a minimum of 10 years. (If market prices were to move above Tasman's average price, this commitment would seem a reasonable trade-off for the ability to move to a higher price.)
- If Tasman did not want all the forest produce from TFL, the company could sell the surplus elsewhere. If it did not elect to do so, Tasman was still required to take and pay for the produce. (This again gave TFL the opportunity to seek higher prices for some of its produce.)[77]

At the end of July, after receiving his copies of the agreements, Mr Poole wrote to the Maori Trustee describing 'the substantial and indeed vital dispute' with Tasman over its status as manager:

> We have succeeded in paring down the almost unlimited representative authority for which Tasman pressed very hard, so that Tasman has now been prevented from getting into a position as its legal agent to commit the Board. You will fully appreciate that neither the Crown nor the Maori interests could accept such a situation. The strenuous effort on the part of Tasman to resist appointment as an independent contractor, unable to spend the Company's money or pledge the Company's credit, has confirmed certain reservations I have held regarding the price arrangements set out in the Heads of Agreement and now embodied in the Sales Contract. You will remember that Treasury over-ruled the Forest Service on pricing matters. Because of this situation, the best I could do in giving evidence

77. Document B73, p 29

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before the Court was to indicate that the Tasman arrangement was better than other possibilities such as leasing or mortgage finance, particularly in respect of the 22.5% guarantee being given by Tasman. The relative advantage I referred to applied of course to the offer made by Tasman as the sole negotiator in the market. The 'average cost to Tasman of equivalent material' under clause 3(1)(a) of the Sales Contract is of course greatly influenced by the current sales to Tasman by the Minister of Forests, which, as I informed the Court, the Forest Service argues is low (though Tasman considers it high). Recent sales of logs to Japan make the price very low and Maori owners could have a legitimate cause for complaint in the future.[78]

7.10 The Tarawera Forest Act 1967

7.10.1 Parliamentary speeches on the Bill

The heads of agreement provided that MIL would be formed to succeed the Maori Trustee as a party to the agreement and to be a shareholder in TFL. On 24 November 1967, the Tarawera Forest Bill was passed into law, authorising the creation of MIL. The second reading of the Bill on 8 November occurred within hours of the passage through Parliament of the Maori Affairs Amendment Act 1967, referred to in chapter 2. The Minister of Maori Affairs, the Honourable J R Hanan, opened his explanation of the Tarawera Forest Bill by stating that the forest joint venture fitted in with the Government's policy of bringing Maori land into use at an accelerated rate. He continued: 'in so far as Maori people would be largely employed in developing this forest, it would be a case of the development of Maori land by the Maori people for the benefit of the Maori people.'[79]

At the end of his speech, the Minister again used language which suggested that the Maori landowners were retaining a substantial interest in the Tarawera Valley land:

> . . . I think we can say that the Maoris, to their great credit, have entered a scheme whereby their general interests in the land in that area and also Maori ownership can be retained as long as they so wish. Also, they will share with the pakeha a feeling of optimism and of satisfaction because, under this scheme, land which would have remained idle will now be brought into useful production.[80]

Mr M Rata (the member for Northern Maori) then spoke and expressed the support of the Opposition for the Bill. He noted that the Minister had referred to the Maori

78. Poole to Maori Trustee, 29 July 1968, FS83/503, vol 5 (quoted in doc B73, p 27)

79. Hanan, 8 November 1967, NZPD, vol 354, p 4096 (doc B1, vol 2, p 46). The day before, the Minister had used very similar words in connection with the Maori Affairs Amendment Bill, about which he had said 'This Bill . . . will promote the development of Maori agricultural land by the Maori people for the Maori people and release Maoris in many respects from the economic straitjacket that they have been in for many years': doc B69, p 210.

80. Hanan, 8 November 1967, NZPD, vol 354, p 4097 (doc B1, vol 2, p 47)

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landowners being granted certain 'privileges' (for example, relating to taxation exemptions and the waiver of company licence fees) and commented that 'it would be fair to say' that they were 'necessary incentives in such a long-term project'. Mr Rata continued:

> This is a new concept, and those responsible for bringing about this scheme deserve the commendation of the House. A great deal of time and thought have gone into the scheme. Many owners have attended meetings, and the participation of those people and of Government departments is to the credit of all concerned. As the Minister said, this joint venture by the Tasman Pulp and Paper Company, the State, and the Maori landowners is to convert this unproductive land into a revenue-producing asset, and it shows what can be done in a spirit of co-operation. In providing for a forestry scheme, the Bill excludes reserves and cemeteries in which the Maori owners have an interest.[81]

Revealing his own understanding of the meaning of the venture for the Maori landowners, Mr Rata concluded his speech by stating:

> This is a new concept for using unproductive land and giving Maori owners some participation, although it is limited to the election of board directors. However, it still means for them some degree of personal participation. This is in itself an important feature, because it is of no value to have an interest in a very large holding in which one has very little say.[82]

Mr Reweti (Eastern Maori) spoke next, saying he was satisfied that 'the approval of the majority of the owners was obtained' and voicing his hope that the scheme would be the forerunner of further similar projects that would be of social and economic benefit to the people in the area.[83]

Mrs Tirikatene-Sullivan (Southern Maori) was more fervent in her praise for the scheme:

> I express my immense delight at the principles incorporated in this measure; it is a shining example of the type of project Maori landowners want to be involved in. It has the essential factors which I believe will evoke from Maori landowners throughout New Zealand their full participation in farming projects by which their idle Maori land might be utilised. . . . Probably one of the most significant features which has led to the success of the project under discussion today is that not only were the Maori landowners consulted, not only did they enter into deliberations, and not only did they give their consent, but they are also in fact actually participating in the project; we see full participation by the Maori landowners in what promises to be a flourishing business concern . . .[84]

81. Rata, 8 November 1967, NZPD, vol 354, p 4097 (doc B1, vol 2, p 47)
82. Ibid, p 4098 (p 48)
83. Ibid
84. Ibid, pp 48–49

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Mrs Tirikatene-Sullivan then listed five 'vital features' of the joint-venture project which she believed made it a 'shining example of what Maori landowners want in preference to the Maori Affairs Amendment Bill':

- 'The Maori Land Court cleared the way by amalgamating 40 separate titles. That is the essential, initial, and vital part that I believe the Maori Land Court must play if land is to be developed.'
- The project showed that 'multiplicity of ownership is not necessarily an obstacle to the utilisation of Maori land'.
- 'The majority of the owners gave their approval.'
- 'The presence of expertise – the expertise of the New Zealand Forest Service and of the Tasman Pulp and Paper group – . . . lending their insight towards the development of land that would otherwise be idle.'
- Adequate finance had been provided through the Tasman Pulp and Paper Company to get the project under way.[85]

A further 'very vital aspect' of the project was then identified by Mrs Tirikatene-Sullivan; namely, that it conformed to 'the Maori traditional concept of tribal trusts' in that future generations would benefit from it. She concluded her speech by expressing her wish that the project would be a forerunner of other programmes of Maori land development, explaining:

> This is preferable to an immediate sale. It embodies the significant aspirations of the Maori landowners. It is not the immediate return from land interests realised into ready capital in the urban situation that is sought, so much as the provision of continuing revenue . . . Significantly, too, Maori psychological needs are satisfied inasmuch as they are active participants in their land development schemes, whilst also satisfying their future aspirations. This self determination and participation in something where the land is being developed to bring in a return for them and their successors is essentially what Maoris want.[86]

7.10.2 The Act's main provisions for MIL

There were four reasons why special legislation was needed to create MIL:

- To overcome the obstacle to MIL's incorporation under the Companies Act 1955 that was posed by the very large number of its intended shareholders and by the fact that many were unknown.
- To provide machinery for handling the shares and debentures of missing persons.
- To provide machinery for dealing with fractional interests worth less than £1.
- To exempt shareholders from taxation laws that would otherwise apply.[87]

85. Ibid, p 49
86. Ibid
87. Secretary to the Treasury to Minister of Finance, 15 July 1966, p 3 (doc B1, vol 1, p 107)

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The Tarawera Forest Act 1967 provides that the Maori Trustee is to establish the company as soon as practicable (s 6(1)) and transfer to it all the shares and debenture stock allotted to him by TFL (s 7). The 'principal objects' of MIL are 'to administer its interests' in TFL and 'to receive all money and other property' due to it from the Maori Trustee or TFL (s 6(1)(d)), but it is not prevented from having other objects (s 6(2)). The Act also provides that, upon the transfer to MIL of its TFL shares and debenture stock, it shall allot to every person with a beneficial interest in the amalgamated Tarawera 1 block one share (worth 50 cents) plus debenture stock worth $1.50 for every $2 he or she held in the nominal value of the block (s 8(1)). Every interest in the block worth less than $2 (including fractional interests) is to be aggregated and the Maori Trustee shall receive one 50-cent share plus $1.50 of debenture stock for each $2 worth of those interests (s 8(2)). Anyone with an entitlement worth less than $2 can then, within one year of MIL's incorporation, make up the difference in cash and receive the equivalent in shares and debenture stock (s 11(1)). The Maori Trustee is directed to offer the remainder of the aggregated shares and debenture stock for sale, in accordance with MIL's articles of association, and to pay the proceeds, minus reasonable charges and expenses, to the company (s 10).[88]

With regard to the MIL shareholders who would never be located, section 12(1) of the Act provides that, 10 years after its incorporation, the company will prepare a list of 'missing shareholders'. The shares and debenture stock owned by that group will vest in the directors of MIL and then be dealt with as follows:

- for a period of 10 more years, the directors shall hold the shares and debenture stock in trust for the missing shareholders;
- during that period, anyone who establishes a claim to any of the shares and debenture stock shall be registered as their proprietor; and
- on the expiry of the further 10 years, all the unclaimed shares and debenture stock shall be sold in accordance with the company's articles of association and the proceeds held in trust for the company (s 12(2)).

7.11 Incorporation and Structure of MIL

7.11.1 March 1968 meeting to appoint directors

On 16 November 1967, a week before the Tarawera Forest Act was passed, Deputy Maori Trustee Mr Souter wrote to a Mr Wilson advising him that, once the legislation was passed, the Maori Trustee would proceed to form MIL, but first a meeting of the 'former owners of Tarawera 1' block would be held 'in the new year' to find out who they wished to have as

88. Among the costs and expenses deducted by the Maori Trustee, it seems, was a fencing charge of £122 4s 11d: doc B1, vol 2, p 7.

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directors of MIL.[89] Early in January 1968, Mr Dye wrote to Mr Neutze of Tasman advising that the meeting would be on 23 March and that the venue, tentatively, was Kokohinau Pa. Mr Dye added that the Deputy Secretary of Maori Affairs would attend the meeting and bring 'the owners' up to date 'in all respects as to matters in connection with the formation of [TFL and MIL], future policy and so on'. In closing, Mr Dye noted that 'the matter of catering' had arisen and that, with '2–300' owners expected to attend, 'Mr Eruera Manuera has estimated that the cost of suitable refreshments . . . will cost $80–$100.' Mr Dye stated that the Maori Trustee could not find such a sum and 'it is desired to know therefore if the cost could be treated as a preliminary or administrative cost of Tarawera Forests Limited'.[90]

The Tribunal has no evidence of who attended the meeting, or who paid for lunch, but we have seen the notice, dated 4 March 1968 and signed by Mr Barber for the Maori Trustee, which advertised the meeting's time (10.30 am) and venue (Kokohinau Pa) and described its purpose and who should attend. A note at the foot of the notice suggests that it was posted to all recorded owners of the Tarawera 1 block.[91] The notice itself was one page of typed text and explained a number of things; namely, the origin of the Tarawera 1 block; that all the land in the joint venture was by then 'under the control of a new company known as Tarawera Forests Limited'; that the meeting would 'put the Maori owners fully in the picture' about what had been done to that date and 'the probable future course' of MIL; the principal objects of MIL; the fact that directors would be selected at the meeting; how a person could be nominated before the meeting; and how 'owners in Tarawera 1 with less than one whole share' could become shareholders in MIL. The notice concluded by advising that the meeting was important and that 'all persons entitled to be shareholders' in MIL were urged to attend 'if at all possible, although it should be understood that such attendance is at owners' or prospective shareholders' own expense'.[92]

It is notable that in March 1968, when the notice was issued and the meeting held, the Tarawera 1 block remained vested in the Maori Trustee: it was not transferred to TFL until May 1968. This fact is reflected in the mix of language used by Messrs Souter, Dye, and Barber in the three communications outlined above to describe the Maori joint-venture party as, variously, the 'former owners of Tarawera 1', the 'owners', and the 'owners or prospective shareholders'.

A memorandum of 26 March 1968, by Mr Clague for the Maori Trustee, contains the names of the seven MIL directors selected at the 23 March meeting.[93] Since the notice advertising the meeting had stated that 'the present suggestion' was for five directors to be selected, it seems plain that the meeting reached its own decision on that matter. Mr Clague's

89. Document B1, vol 2, p 6
90. Ibid, p 3
91. The note reads: 'The addressee's share in Tarawera No 1 is shares out of a total of 128721.2. (Please retain envelope with notice)' (ie, there was a blank space for the number of shares): doc B1, vol 2, p 30.
92. Document B1, vol 2, p 30
93. Ibid, p 26

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memorandum originally had attached to it the minutes of the meeting, but the Tribunal does not have them. Instead, with the memorandum we have a paper entitled 'Summary of Forest Operations', which appears to be the content of an address given at the 23 March meeting by Tasman's Mr J M Mitchell.[94] It contains a considerable amount of information about the new forest: its planting, mapping, construction of roads for, clearing of land, 'blanking and release cutting', low pruning, extraction thinning, and labour.

7.11.2 First meeting of MIL directors

MIL was incorporated on 24 October 1968 and held its first meeting of directors on 17 December that year. The foundation directors were Monica Lanham (chairman), Ani Ngahoari Hunt, Lang R Grace, Richard Te Matua Park, Rupuha Wi Hapi, Tanira Gladding Fraser, and Rewi Wi Hare.[95] The Tribunal was told by MIL's corporate manager, Tom Cass, that Tasman agreed to provide accounting and secretarial services to MIL (with Tasman's lawyer Mr Neutze serving as company secretary) and to keep its register of shareholders until MIL received income from TFL, claiming 'out-of-pocket' expenses only.[96]

7.11.3 Past and present condition of MIL share register

In 1966, when the 40 blocks of Maori land were amalgamated into the Tarawera 1 block, there were 4613 owners of the 128,721.2 shares in the block.[97] Mr Cass informed us that the Tarawera Forest Act's provision for aggregated fractional interests resulted in 1783 MIL 50-cent shares and 1783 $1.50 debentures being transferred to the Maori Trustee. While all the shares were subsequently sold by the trustee, Mr Cass reported that 1171 debentures remained unsold and were eventually returned to MIL in 1994. He also observed that the Maori Trustee seemed not always to adhere to the rules in MIL's articles of association which restricted the sale of shares to 'members of the bloodline and their spouses'.[98]

MIL's first annual report, to 31 October 1969, reveals that, of its authorised capital of 132,000 50-cent shares, 128,721 fully paid up ordinary shares had been issued. Mr Cass's evidence was that, at the outset of MIL's existence, there were 3316 shareholders and, of those, very close to 1000, owning nearly 30,000 shares, had never been located.[99] In Mr Cass's view, while the

94. Document B1, pp 27–29. The handwritten numbers '161–163' are on that paper and the number 167 is on the memorandum. This suggests that the two documents relate to the same event and that the absent pages were either the minutes of the 23 March meeting or another document relating to that meeting. Further, from its content, the summary of forest operations was compiled after 1967 but before 1970.

95. Document B2, p 5; doc B1, vol 2, p 26

96. Document B68, attachment deed 27 June 1994. In the Maori Land Court in 1966, Mr Souter gave evidence of this agreement: doc A33, pp P1C–P1d.

97. Document A4, vol 3

98. Document A29, p 1

99. Ibid, p 4; doc B68, p 2. Mr Cass put the outset of MIL's existence at 1967 (doc A29, p 4), but it was not that early.

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number of unknown owners in the Tarawera 1 block was not unusually high, the problems of locating MIL shareholders had been aggravated by the apparent failure, at the time the block was created, to identify the people with ownership in several blocks and amalgamate their shares.[100] Mr Cass also noted that in 1989, when MIL first began to receive income from TFL, it took over the accounting and secretarial functions from Tasman but discovered what were later called 'major deficiencies and omissions in Tasman's management' of the share register. As reimbursement of the costs incurred by MIL in correcting these errors, Tasman paid MIL nearly $60,000 in 1994.[101]

The twin problems of the fragmentation of shareholdings into uneconomic interests and the consequent increase 'due to apathy' in the number of unknown shareholders have continued to bedevil MIL.[102] The company's constitution was revised in 1997 so that holdings of fewer than 10 shares could be retained and transferred but not reduced, and holdings of 10 or more shares could not be reduced below 10. The provisions governing those to whom shares could be transferred were also made more specific. With an average price of more than $100 per share in 2000,[103] these changes made it worthwhile for owners to consolidate their shareholdings. Even so, Mr Cass informed us that in August 2000, out of a total of some 5500 shareholders, 2540 were unknown.[104] It seems that the unknown shareholders own approximately 58,000 shares, worth some $5.8 million.[105] In 2000, MIL was employing 1.5 fulltime equivalent staff members to identify and locate missing shareholders and to maintain the share register.[106] Also at that time, Mr Cass stated, the balance of funds held on trust for the unknown shareholders totalled $9.15 million. Of that sum, $4.7 million was owed to the 992 people for whom MIL did not have addresses in 1968 and who have not been located since.[107]

7.12 Tasman's Payment of Compensation to the Edwards Family

During the first week of the Waitangi Tribunal hearing, the claimants, including Mr Potter (who made his individual claim at the end of that week), had no knowledge of the fact that the Edwards family had received compensation from Tasman for the loss of their home and farm. At the first hearing, the only evidence available was of the compensation offers which Tasman had made to the Edwards family at the Savage–Edwards meeting in November 1965

100. Document B68, p 1
101. Deed between MIL and Tasman Forestry Limited, 27 June 1994 (doc B68, app)
102. Document A29, p 3
103. Ibid, p 4
104. Document B68, p 2
105. Document A29, p 4. Document A29, which was presented by Mr Cass in June 2000, states that at that time there were 2896 unknown shareholders, and they owned 58,063 shares. Two months later, Mr Cass's evidence was that the unknown shareholders numbered 2540, but he did not state how many shares that smaller group held.
106. Document B68, p 2
107. Ibid

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but which were rejected.[108] Soon after that hearing, evidence became available that Alfred Edwards was seeking 'something in the vicinity of £18,000 for improvements' on the farm property which, in Tasman's view, 'on a liberal valuation, were worth no more than £2,300'.[109] It was not until the second week of the hearing that the Crown produced documentary evidence, which was accepted by the claimants, showing that, on 4 July 1968, seven members of the Edwards family agreed to accept cash compensation totalling $10,560 from Tasman and that they received that amount in full on 25 October 1968, the day after they vacated their house on the former Pokohu B3B block.[110]

A notable feature of the compensation arrangement is that Tasman alone bore the cost of it, rather than including it as part of TFL's forest development costs, as had previously been intended. The change of approach occurred at a meeting of TFL directors on 25 July 1968 when the chairman, Mr Kjar from Tasman, asked Messrs Barber and Dye (representing the Maori Trustee before MIL was formed) whether they could remember any discussion 'during the negotiation stages of the joint venture' as to how the cost should be borne. Neither man could recall any such discussion, but Mr McKee recalled that, at the Savage family meeting late in 1965, Mrs Lanham had objected to any compensation being included in TFL's development costs. While several TFL directors commented on the logic of TFL paying the cost, the chairman wanted all to be satisfied that it was fair and equitable. Mr Barber then said that the only adverse thing about TFL paying the compensation would be that 'the other Maoris were indirectly paying something to get the Edwards off the land'. Mr Mason from Tasman raised the further point that, if the Edwards family's improvements had been included in the sale of the Tarawera 1 block, all the owners of the block on which the improvements were situated would have benefited by its increased value. At that point, Messrs Barber and Dye suggested that it would be a 'most generous gesture' if Tasman agreed to bear the cost of the compensation arrangement, and the chairman stated that 'enough doubt had been raised' on the merits of charging the compensation to TFL for him to conclude that Tasman alone should bear the charge. He then moved, and Mr Mason seconded, that the proposed resolution in the board's papers – that TFL pay the compensation costs – be deleted. The minutes of the meeting then recorded that 'Tasman Pulp and Paper Company Limited has signified its agreement to bear at its own expense the compensation, namely, the sum of $10,560, payable to the Edwards family' in terms of the agreement of 4 July 1968.[111]

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108. Document A4, vol 2, pp 56–57

109. Document B1, vol 1, pp 46, 51

110. Document B74, app 1. The agreement records that the payment is for the Edwardses' house, outbuildings, and farm improvements, with $5960 of the total amount being 'for disturbance'. The amount received by each family member is also recorded.

111. Document B74, app 1

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7.13 Summary

The key points established in this chapter are:

- The Maori Land Court's reasons for its decision emphasised the practical difficulties that would face the Savage–Edwards group if the forestry venture proceeded without the blocks in which they were owners.
- The Maori Trustee satisfied himself that the land valuations were fair and that the question of leasing was not relevant, and he negotiated an addition to the heads of agreement specifying an alternative option, that of 'fair market price', for TFL to elect as the basis of the price to be paid by Tasman for Tarawera Forest produce.
- The heads of agreement was finally signed and TFL was incorporated in October 1967.
- The Tarawera Forest Act setting up MIL was passed in 1967 with strong endorsement of the joint venture by Maori members of Parliament.
- MIL made strenuous efforts to locate its missing shareholders, but in 2000 nearly half of its 5500 shareholders were still missing and it was holding shareholders' funds worth more than $9 million and shares worth about $5.8 million in trust on their account.
- The Edwards family accepted compensation from Tasman for the disturbance of leaving their home and the loss of the improvements that they had made to the land.

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