

CHAPTER 2

BACKGROUND

2.1 REPORT ON THE TE REO MAORI CLAIM (1986)

In 1986, the Tribunal responded to a claim lodged by Huirangi Waikerepuru and Nga Kaiwhakapumau i te Reo Incorporated (the Maori Language Board of Wellington) asking that the Maori language receive official recognition, ‘concentrating in particular on broadcasting, education, health and the Public Service’.¹ The claimants argued that the Crown had failed to protect the Maori language and that this was a breach of the Treaty of Waitangi. The Tribunal found in favour of the claimants. It held that by the Treaty the Crown did promise to recognise and protect the Maori language, and that that guarantee required affirmative action, but that educational policy over many years and the effect of the media in using almost nothing but English had ‘swamped’ the Maori language and done it great harm. In particular, the Tribunal’s broad findings and recommendations pertinent to the current inquiry were that:

- Te reo Maori is vitally important to Maori culture and this is encapsulated in the proverb ‘Ka ngaro te reo, ka ngaro taua, pera i te ngaro o te Moa’ (‘If the language be lost, man will be lost, as dead as the moa’).
- ‘O ratou taonga katoa’ in article 2 of the Treaty covers both tangible and intangible things, and can best be translated by the expression ‘all their valued customs and possessions’.
- Te reo Maori, an essential part of Maori culture, must be regarded as a taonga, a ‘valued possession’.
- The article 2 guarantee requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence, although it would be more profitable to promote the language than to impose it.
- In its widest sense, the Treaty promotes a partnership in the development of the country and a sharing of all resources, and it is consistent with the principles of the Treaty that the language and matters of Maori interest should have a secure place in broadcasting.
- In formulating broadcasting policy, regard must be had to the fact that the Treaty obliges the Crown to recognise and protect the Maori language.²

1. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed, Wellington, Brooker’s Ltd, 1993, p 3

2. *Ibid*, pp 1, 7, 20, 41, 51

The Tribunal recommended that te reo Maori should be restored to its proper place by making it an official language of New Zealand, with the right to use it ‘on any public occasion, in the Courts, in dealing with Government Departments, with local authorities and with all public bodies’. It also recommended that te reo Maori be widely taught from an early stage in the educational process and that instruction in Maori be available as of right to children whose parents sought it. It called for an urgent inquiry into the way Maori language and culture was taught in schools. It proposed the appointment of a Maori language commission to foster the Maori language, watch over its progress, and set standards for its use. And it sought that bilingualism be a prerequisite for certain State service positions.³

Some of the te reo Maori Tribunal’s further comments are relevant to the present inquiry. While that Tribunal acknowledged that ‘the claimants launched their attack on a very wide front’, including the areas of health, broadcasting, and justice, it noted that it had focused specifically on education and broadcasting. It did so because the evidence on education was greater than that in all other matters put together, and the largest body of evidence was directed at radio and television broadcasting.

In addition to this narrowing of the focus of the te reo Maori inquiry, the Tribunal did not feel able to deal with even those topics in other than a general way, despite the many specific recommendations (a large number of them related to education and broadcasting) sought by the claimants. In relation to education, the te reo Maori Tribunal thought itself insufficiently well informed or experienced in the education system. With regard to broadcasting, it was mindful that during its inquiry, while the claimants alleged that the then Broadcasting Corporation of New Zealand had not provided adequately for Maori radio listeners and television viewers, a royal commission was conducting hearings into a wide range of matters relating to broadcasting, and the Broadcasting Tribunal was at that time considering applications for the third television channel (one of the applicants for which had raised directly the extent to which Maori television programmes ought to be broadcast). The te reo Maori Tribunal was anxious not to be seen to interfere in the jurisdictions of those bodies. It decided that, although it had jurisdiction to make detailed recommendations, it would not exercise its power. It would confine itself to broad recommendations only. The Tribunal suggested that it might subsequently make additional recommendations, if necessary, after careful consideration of the findings of the other two bodies.⁴

2.2 THE REPORT ON CLAIMS CONCERNING THE ALLOCATION OF RADIO FREQUENCIES (1990)

The Tribunal’s 1990 *Report on Claims Concerning the Allocation of Radio Frequencies* was in response to claims by Sir Graham Latimer, for the New Zealand Maori Council, and Huirangi Waikerepuru, for Nga Kaiwhakapumau i te Reo Incorporated,

3. *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, pp 1–2, 51

4. *Ibid*, pp 37–41, 49

objecting to the proposed sale by tender of rights to radio spectrum frequencies for 20 years (Wai 150 and Wai 26 respectively).

Urgency arose through the Crown's proposal to sell AM and FM radio frequencies. The Crown had promised to reserve certain frequencies for Maori and was involved in discussions about the Maori allocation. The claimants said, however, that the reserved frequencies (especially the FM frequencies) were inadequate to fulfil the Crown's obligations to protect the Maori language. The claimants filed a detailed request for an urgent inquiry on whether it was necessary for Maori to have available to them a fair share of the FM frequencies to ensure a secure place for their language and culture in broadcasting in New Zealand. They argued that the disposal of frequencies for up to 20 years would place a 'major impediment' on Maori broadcasting.⁵

The chairperson of the Waitangi Tribunal asked the Crown to postpone the sale of the frequencies pending the Tribunal hearing and report. The Minister of Communications respectfully refused. The claimants commenced an action in the High Court seeking a judicial review of the Minister's decision to proceed with the tender in the light of the claims they made. Their action was successful. On 21 September 1990, Justice Heron, in the High Court at Wellington, declared that the Crown should postpone the sale by tender for six weeks. The declaration was appealed to the Court of Appeal, which heard argument in October 1990. The majority of that court found that the Minister could not reasonably have decided to proceed with the tender without first awaiting the report of the Waitangi Tribunal.⁶

An urgent hearing was held. Two themes emerged. The first was the fragile state of the Maori language. The second was the speed with which consultations and the proposed sale process proceeded. Particular comments made by the allocation of radio frequencies Tribunal as a result of the urgency of the hearing are also of some relevance to us in hearing the current claim. That Tribunal noted, for instance, that its report did 'not attempt to address broadcasting issues as a whole'. But it hoped that 'the matters we have considered in relation to the limited issues before us will be borne in mind when other aspects of Maori broadcasting come up for consideration'.⁷ These comments have been taken on board by us in our consideration of the current radio spectrum claim.

Also worthy of note are the statements made by the claimants in the allocation of radio frequencies claim. The Wai 26 claimants noted that the broadcasting issues dealt with in the *Report on the Te Reo Maori Claim* were interim only, and that the Tribunal did not make a final recommendation on those matters. The Wai 150 claimants sought an urgent interim ruling and recommendation that nothing be done to pursue the spectrum management policy embodied in the Radiocommunications Act 1989 until or unless there had been a negotiated resolution of all the issues raised in the claim; the Tribunal had made its findings and recommendations; and any title

5. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*, Wellington, Brooker and Friend Ltd, 1990, p 11

6. *Ibid*, pp 11–13

7. *Ibid*, p 1

to spectrum products that was created by the Act be subject to a caveat that recognised and protected the Maori interest in radio frequencies. Not dissimilarly to the claim before us now, it sought findings that:

- (a) Maori have rangatiratanga over radio frequency allocation in that:
- (i) nothing in the terms of the Treaty of Waitangi allows or foreshadows any authority on the part of the Crown to determine, define or limit the properties of the universe which may be used by Maori in the exercise of their rangatiratanga over tikanga Maori;
 - (ii) where any property or part of the universe has, or may have, value as an economic asset, the Crown has no authority under the Treaty to possess, alienate, or otherwise treat it as its own property without recognising the prior claim of Maori rangatiratanga;
 - (iii) where any property or part of the universe has value as a cultural asset, because of its ability to assist or sustain an activity which represents the preservation and sustenance (or undisturbed possession) of tikanga Maori, the Crown has an obligation under the Treaty of Waitangi to recognise and guarantee Maori rangatiratanga over its allocation and use for that purpose;
 - (iv) the sale of exclusive licenses to propagate radio waves has the effect, de facto, of controlling the activity of broadcasting. It places restrictions and prohibitions upon Maori which prevent their guaranteed freedom to exercise rangatiratanga over tikanga Maori; and
 - (v) the Crown's kawanatanga does not empower it to create property rights in any part of the universe, or any activity which utilises a special quality of the universe, prior to negotiation with, and the express agreement of, rangatira Maori;
- (b) the sale of frequency management licenses under the Radiocommunications Act 1989 without negotiating an agreement with Maori would be in breach of the Treaty of Waitangi and prejudicial to the interests of Maori.⁸

The allocation of radio frequencies Tribunal found that:

- neither Treaty partner was aware of the existence of the radio spectrum as we know it today, nor of the potential use of this resource.
- the portion of the electromagnetic spectrum known as the radio spectrum is a limited natural resource.
- the radio spectrum is a taonga for the whole of mankind; neither Treaty partner can have monopoly rights to this resource.
- management of this resource, and the right, manner, nature, and degree of access, must be the subject of effective consultation between Maori and the Crown on the basis that the Treaty on the one hand guarantees the protection of taonga and on the other declares that its covenants were entered into 'in the full spirit and the meaning thereof'.
- the key principle in the management of the spectrum is partnership, requiring each partner to act reasonably and with the utmost good faith towards the other, and that in turn involves the obligation to consult and cooperate.

8. *Report on the Allocation of Radio Frequencies*, p 9

- the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources (again, neither Treaty partner can have monopoly rights in terms of this resource).
- the Treaty granted sovereignty and the delegation to govern but subject to the limitations of the special interests of tino rangatiratanga. This means that consultation between the partners is vital to the Treaty itself and to its spirit.
- there is a hierarchy of interests in natural resources based on the twin concepts of kawanatanga and tino rangatiratanga. First in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follow those who have commercial or recreational interests in the resource.
- the subject matter of the allocation of radio frequencies inquiry is an 'in between' situation. It is not simply a case where Maori can argue prior ownership before the Treaty. Nor can the Crown argue that Maori have no rights to the spectrum other than a general public right, nor a right only in terms of the language. The use of the radio spectrum is so intimately tied up with the use of Maori language and culture, and the protection and development of these things, that the Maori right to access must amount to more than this.
- tribal rangatiratanga gives Maori a greater right of access to the newly discovered spectrum. In any scheme of spectrum management, it has rights greater than the general public, and especially when it is being used for the protection of the taonga of the language and culture.⁹

The allocation of radio frequencies Tribunal noted that the Crown had already accepted that the Maori language is a taonga recognised and protected by the Treaty and that the guarantee of protection obliged the Crown to act affirmatively. It noted that the Crown had also accepted that, as part of these overall obligations, the Maori language and culture must have a secure place in broadcasting, and that Maori language must be promoted as a living language and as an ordinary means of communication. The Crown had also recognised that it had an obligation to consult Maori.¹⁰

The sum of these obligations, according to that Tribunal, required that the Maori partner be allocated a fair and equitable access to radio frequencies. But the Tribunal noted that equity in these terms did not mean a percentage or an arithmetically calculated share. Rather, it required an allocation on the basis of need and purpose. The state of the Maori language at the time of that inquiry and report was not that of a living language. The allocation of radio frequencies Tribunal noted that intense effort and special concentration of resources was urgently required.¹¹

As to the need to consult, the Tribunal stressed that more time had clearly been needed and that this time must be allowed without the threat of an intervening or coexisting tender process being perceived as removing available frequencies or

9. Ibid, pp 39–43

10. Ibid, p 43

11. Ibid

impeding full, free, and uninterrupted achievement of the goals and obligations that it had mentioned. In that Tribunal's view, it required a concerted approach of both Maori and the Crown to determine the precise extent of present and future needs on the one hand, and realistic obligations on the other, if informed decisions were to be made. That Tribunal found that the Crown had recognised the Treaty obligations in the allocation of radio broadcasting frequencies to Maori interests, but that it had failed to recognise the extent to which consultations with iwi would be necessary and the time that ought to have been allowed for this purpose prior to the Government's announcement of its allocation of frequencies to iwi. As a result, the Crown's decision to reserve frequencies did not adequately consider the needs of the people.¹²

Although the allocation of radio frequencies Tribunal found that the Government and its officials had rushed the consultation stage of the process and that it was too confusing to be effective, leading to a 'legacy of distrust', it also found that the Crown's attempts to be a faithful Treaty partner were 'light years' ahead of any previous attempts. The Government and the Ministry of Commerce, through a series of measures, had 'really tried' to promote Maori interests, including adopting a policy of continuous consultations with Maori broadcasting interests as each block of the spectrum was to be prepared for allocation. In addition to this, further technical analysis was 'still being carried out to identify what possibilities there are for FM assignments as the indications are that in many cases these may be preferred to the AM allocated'.¹³ We wonder why these policies and ongoing analyses appear not to have been continued.

Also of relevance to our inquiry are the allocation of radio frequencies Tribunal's comments in relation to the active capturing of the rangatahi (youth) audience. That Tribunal noted that, in the context of the claim, consultation and informed decisions required that, if Maori wanted to use radio and broadcasting to reach young people and saw a need to do more in order to make their culture accessible to the nation and to enhance the status and use of their language, the opportunity be taken and the effort encouraged. The Tribunal also stated that:

Insufficient attention seems to have been directed to the need to utilise popular, fashionable, 'state of the art' technology to achieve the objectives which the Crown has recognised, and to the desirability of avoiding the perception that the denial of Maori access to FM frequencies in these targeted areas results from a downgrading of the Crown's responsibility to an unacceptable level, and makes way for the traditional perception that Maori are to be left with the 'second class' product.¹⁴

In relation to Maori economic development, the allocation of radio frequencies Tribunal also had some comment to make. It noted that, at the October 1984 Maori Economic Development Summit Conference, the Crown had undertaken to work over the following decade to eliminate the 'development gap' between Maori and

12. *Report on the Allocation of Radio Frequencies*, pp 44–45

13. *Ibid*, pp 28–29

14. *Ibid*, pp 31–32

non-Maori in all areas. It further noted that Koro Wetere, the then Minister of Maori Affairs, had pointed out that:

the pace of development for Maori had to be two steps to everyone else's one, if they were to catch up to non-Maori. The allocation process in our view did not allow for the extra pace necessary in the development of Maori broadcasting.¹⁵

These themes re-emerge in the current inquiry.

2.3 THE BROADCASTING ASSETS LITIGATION AND 25–29 GHz AUCTION

In 1988, the Crown amended the Broadcasting Act 1976 to restructure New Zealand broadcasting and create State-owned enterprises. Nga Kaiwhakapumau i te Reo and the New Zealand Maori Council made an application to the High Court claiming that such a transfer would breach the requirements of section 9 of the State-Owned Enterprises Act 1986, which specifies that nothing in that Act shall allow the Crown to act inconsistently with the principles of the Treaty.

The applicants argued that the Crown's failure to inform itself, by inquiry, as to the extent of its obligation to protect the Maori language in broadcasting and as to the impact of asset transfers upon that obligation was inconsistent with the Treaty. They alleged that decisions to transfer broadcasting assets were taken by the Crown without consultation, or evaluation against Treaty standards. They claimed that inconsistencies with the Treaty also arose from the Crown's failure to establish a system or process to ensure that asset transfer was consistent with Treaty principles. They also claimed that inconsistencies would arise from such transfers, particularly through the loss of the Crown's capacity to protect the language.

The May 1991 High Court judgment on the case dealt with radio and television broadcasting separately.¹⁶ The court was satisfied that, as long as adequate levels of funding continued, the Crown's proposals regarding radio were sufficient to fulfil its obligations in relation to te reo Maori, and it allowed the transfer of broadcasting assets destined for Radio New Zealand. But it was not satisfied with the Crown's proposals in relation to television. The court noted that, if the Maori language was to survive, it was important that 'some Maori language be heard on television, in prime time, and within a programme format which will be watched, by youth in particular', but that this was not happening.¹⁷ It suggested some possible solutions but noted that the means of discharging Treaty obligations to protect te reo Maori was a matter for the Crown, in consultation with Maori and with regard to existing or future recommendations of the Waitangi Tribunal. The court required the Crown promptly to:

15. Ibid, p 32

16. *New Zealand Maori Council v Attorney-General* unreported, 3 May 1991, Justice McGechan, High Court Wellington CP942/88

17. Ibid, p 84

make the necessary inquiries and proposed reservation arrangements, seek agreement from Maori if available, and whether or not agreement is available, come back to this Court for a declaratory release of the [Television New Zealand] assets concerned subject to any proper reservations.¹⁸

It set the date of 26 July 1991 for returning to the court.

This led to a series of Cabinet decisions made in July 1991, which were based on the report of an officials committee that had invited Maori views. Those decisions were that:

- Maori should get favourable access to Television New Zealand and Radio New Zealand production facilities and archives (and a one-off payment of \$15,000 to assist in achieving this).
- \$13 million be allocated over three years for ‘the purpose of promoting Maori language and culture in broadcasting, part or all of which could be used to assist in the development of special purpose Maori television’.
- this funding was to be reviewed before 31 March 1994.
- a Maori broadcasting funding agency, Te Reo Whakapuaki Irirangi (Te Mangai Paho), should be established to manage and disburse this additional funding, including funding for the access to or development of transmission and production facilities that may be required in the development of Maori television.
- the following time-frame for the development of special purpose Maori television and the extension of Maori language programming on commercial television (‘mainstreaming’) be followed:
 - by 30 September 1991, the Minister of Communications was to hold a hui in Wellington with invited Maori to discuss the broader themes raised during four regional hui on Maori broadcasting held in February and March 1991 and also during the three meetings on Maori television that were organised as part of the officials committee on Maori television’s consultations with Maori.
 - by 30 November 1991, the Minister of Communications was to publish a paper summarising the discussion at the Wellington hui.
 - by 31 January 1992, officials were to report to Ministers on proposals for the establishment and initial funding of Te Reo Whakapuaki Irirangi, and other assets of a draft policy for the development of Maori television.
 - arrangements were to be made for a first meeting of the Maori broadcasting funding agency by 30 April 1992.
 - by 31 May 1992, the Minister of Communications was to publish a discussion document on options for the development of Maori television.
 - in June or July 1992, a hui on Maori television was to be held.
 - Government policies on the development of Maori television were to be announced by 31 August 1992.

18. *New Zealand Maori Council v Attorney-General* unreported, 3 May 1991, Justice McGechan, High Court Wellington CP942/88, p 90

Although Maori sought some modifications to the Cabinet decisions, the Crown declined to accept any changes. On 29 July 1991, the court stated that it was satisfied that the Crown's protective scheme (the Cabinet decisions) would allow the transfer of assets to broadcasting State-owned enterprises consistent with the Crown's legal obligations. It declared that the Crown could now proceed with its proposed transfer of broadcasting assets.¹⁹

The following month, the New Zealand Maori Council and Nga Kaiwhakapumau i te Reo Incorporated appealed to the Court of Appeal. That court produced its judgment in April 1992. The appeal was dismissed, with a dissenting judgment from the president of the court.²⁰ The case was then appealed to the Privy Council, which delivered its judgment in December 1993. This appeal was also dismissed. Passages from the Privy Council judgment are contained in the body of our report.²¹ Further litigation initiated by various Maori groups in relation to the 1991 Cabinet decisions, and the development of Maori broadcasting, was unsuccessful.

The auction in late 1997 to early 1998 by the Crown of management rights to frequencies in the 25 to 29 GHz range substantially widened the issues in debate again to include those issues outlined in the claim to the Tribunal on the allocation of radio frequencies. While the above litigation had centred around section 9 of the State-Owned Enterprises Act 1986 and the Crown's obligations in relation to the protection of the Maori language, Maori concern about the auction of management rights to frequencies in the 25 to 29 GHz range centred around the provisions of the Radiocommunications Act 1989 and property rights to the radio spectrum, whether Maori had any economic use for the spectrum to be disposed of, and whether Maori themselves regarded the spectrum as useful for the fulfilment of the Crown's obligations to promote and protect te reo Maori and Maori culture. Identically to their concerns relating to the currently proposed Crown auction of management rights within the 2 GHz range of frequencies, Maori claimed that, prior to any announcement of auctions, they should have been consulted about and in agreement with the Crown on the above matters.

As noted above, Maori requested, in the 25 to 29 GHz auction, that the Crown either postpone the auction process until a negotiated solution to the above issues could be reached or reserve to Maori half of the spectrum to be sold until an accurate assessment could be made as to whether the frequencies would be useful to them. The Crown declined to postpone the auction or to reserve any frequencies (unlike its former practice). It did not agree that Maori interests in the spectrum extended to an economic interest in the resource, and it maintained that, because the frequencies to be auctioned were 'not suitable for broadcasting', they were not useful for the protection and promotion of te reo Maori and Maori culture.

19. Document B48

20. *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA)

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

2.4 RADIO SPECTRUM MANAGEMENT AND DEVELOPMENT INTERIM REPORT (1999)

2.4.1 The majority finding

Our majority finding on the urgent hearing of this claim was that a prima facie case had been made that the claimant would be prejudiced by breaches of the principles of the Treaty if the Crown proceeded with its proposed auction of the 2GHz range without coming to an agreement with Maori to allow them a fair and equitable portion of the 35 management rights that are (still) due to be auctioned.

This finding agreed with those of the *Report on the Allocation of Radio Frequencies*, set out above. In particular, we noted those aspects of that report involving the principle of Treaty partnership, the concept of a hierarchy of interests in natural resources, and the greater-than-general right of Maori (and concomitant duty of the Crown), especially with regard to the protection of Maori language and culture.²² We also thought that the current radio spectrum claim was broader than the allocation of radio frequencies claim, including the Crown's responsibility to ensure that Maori obtain a fair and equitable share for commercial, social, and educational purposes in addition to language and culture.

Our majority finding held that the Treaty 'was not intended to fossilise the status quo' and is 'a living instrument' to be applied in the light of developing circumstances.²³ This is especially so in relation to development rights arising from the Treaty.²⁴ We noted that it had been generally conceded that there was a development right for properties specified in the Treaty (eg, fisheries), but that the position with 'other properties', or 'taonga' (unspecified properties), has been less certain. These have been accepted to include intangibles such as language, but there has been a reluctance to concede to Maori a right of possession or development of properties unknown or little used by them in 1840.

We discussed examples of Crown appropriation of gold, petroleum, coal, geothermal energy, and water power. Our majority finding then noted that this Tribunal is not bound by the implications of Justice Cooke's 1994 judgment that 'however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power'.²⁵ The Tribunal has exclusive authority to determine the meaning and effect of the two Treaty texts in claims before it.

Our majority finding concluded, in relation to the principle of partnership, that neither partner can have monopoly rights over a resource. It is not reasonable, or in good faith, for the Crown to arrogate to itself the whole resource, as it did the radio spectrum under the Radiocommunications Act 1989, and then alienate portions of

22. *Report on the Allocation of Radio Frequencies*, pp 42–43

23. Waitangi Tribunal, *Radio Spectrum Management and Development Interim Report*, Wellington, Waitangi Tribunal, 1999, p 6; see also Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, Wellington, Government Printing Office, 1989, p 52; *Te Runanga o Muriwhenua Incorporated v Attorney-General* [1990] 2 NZLR 641, 656 (CA), per President Cooke

24. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, Wellington, GP Publications, 1998, p 120

25. *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, 24 (CA)

that spectrum without ensuring, through consultation, that Maori received an equitable share of it.

We also found that the Crown has a fiduciary duty in its promise that Maori and their property would receive the Queen's protection. This duty should be observed in any alienation of resources by the Crown, whether they were known in 1840 or were discovered or became available through technology at a later date. We then noted that Maori expected, in signing the Treaty, that European colonisation would allow them to share the benefits, including the technologies, of those peoples. This has been described by the Muriwhenua fisheries Tribunal as the principle of mutual benefit.²⁶

We supported the principle that any exercise of kawanatanga needs to be tempered by respect for tino rangatiratanga, and that in this instance it means that the Crown is obliged to consult in relation to a variety of matters concerning the spectrum. Our majority finding was that there was no adequate attempt to consult Maori over the auction of the radio spectrum – the Crown confined its consultation to discussion and consideration of language in a broadcasting context only.

We recommended:

- (a) that the proposed auction of 2 GHz on 29 March be suspended and negotiations begun with Maori, with a view to reserving for them a fair and equitable proportion of the management rights before the auction is resumed;
- (b) that the claimant make arrangements to create a credible authority to negotiate with the Crown; and
- (c) that, in the event of Maori and the Crown being unable to reach agreement, the claim be returned to the Tribunal for substantive hearing and further recommendations.

2.4.2 The minority finding

(1) *First limb*

The first limb of the claim is that Maori have a right to a fair and equitable share in the radio spectrum resource.

The minority finding in our interim report noted the claimant's allegation that the Crown has created and assigned a property right in a resource (the radio spectrum). It warned that the Tribunal should be wary of ascribing ownership rights to either Treaty partner, unless those rights are within article 2. This Tribunal cannot bind future Tribunals.

Our minority decision noted that radio waves were not known in 1840, and that their use requires technology. It proposed that the claimant's argument under the first limb could progress to a claim to light, or to the air that we breathe, the thrust of the argument being that: the resource exists; the Crown purports to regulate or assign it for money; and Maori are therefore entitled to a share.

The minority finding referred to Professor Winiata's view that the radio spectrum is encapsulated within the concept of 'kainga' (a spiritual construct between

26. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, pp 194–195

Papatuanuku and Ranginui), with 'kainga' containing all of creation. Professor Winiata had argued that it was through this concept that the spectrum was protected in article 2: article 2 protection of kainga allows for tino rangatiratanga over all creation. The minority disagreed that this interpretation was the concept of 'kainga' envisaged in article 2, especially in light of its insertion between 'wenua' and 'taonga', leaving little room for the legitimate exercise of kawanatanga.

Our minority decision found that the *Report on the Allocation of Radio Frequencies* appeared to have had a broader focus than the current inquiry, and that it was not laying down general principles. It was noted that sections 5 and 6 of the Treaty of Waitangi Act 1975 gave the Tribunal the power to deal with only that claim on that matter. In our minority's view, the allocation of radio frequencies Tribunal was clearly centrally concerned with the protection and fostering of te reo Maori – all other matters were obiter. That Tribunal's report was short and not intended to state a principle of such wide consequence. Although previous reports are of assistance, our minority stated that we cannot lock the Treaty or its principles into our particular time slot, and that material placed before another Tribunal may not necessarily be before subsequent ones.

With reference to the statement in the *Report on the Allocation of Radio Frequencies* that the radio spectrum is a taonga, our minority noted that the Treaty refers to 'o ratou taonga katoa'. Our minority understood this to mean that the taonga of Maori is reserved to them, not that the taonga of mankind is reserved to Maori in an appropriate share. That was the province of article 3.

With respect to Treaty development rights, our minority saw this as a right to develop a right; for example, fisheries or te reo Maori. It is not, in the minority view, a bare right to develop (which is a matter for social conscience, social equity, politics, and article 3, and not the business and the area of expertise of this Tribunal). Such a bare right would be contrary to President Cooke's judgment in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* that Treaty rights cannot include the right to generate electricity by harnessing water power.²⁷ In relation to the allocation of radio frequencies Tribunal's recognition of a 'hierarchy of interests' in natural resources, our minority saw this to be a reference to resources simpliciter, and noted that *Ngai Tahu Maori Trust Board v Director-General of Conservation* did not support this. There, the resource was linked back to recognised rights, and not claimed simply because it was a resource.²⁸

In relation to the duty to consult, our minority recognised that there is an obligation to consult. But it found that what the Crown did was adequate in the circumstances. The minority decision concluded that the first limb of the claim was not well founded.

27. *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, 24 (CA)

28. *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA)

(2) *Second limb*

The second limb of the claim is that Maori have a right to a fair and equitable share in the spectrum, especially where the Crown has an obligation to promote and protect Maori language and culture.

Our minority decision accepted provisionally that te reo Maori was in a parlous state. It had insufficient evidence that ownership of the radio spectrum is critical to fostering te reo, not simply the communications' content, or that the Crown is not adequately discharging its obligations to protect and foster te reo through education and broadcasting. Our minority concluded that it was unable, at the point of writing that section of the report, to find this limb of the claim to be prima facie well founded.

