

CHAPTER 3

THE FIRST LIMB OF THE CLAIM

In our interim report, which is summarised in chapter 2, we supported the first limb of the claim, which is that Maori have a right to a fair and equitable share in the radio spectrum resource. We did this on the basis of the *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* and our understanding of the Treaty principles of partnership, the Crown's fiduciary duty, active protection, mutual benefit, the need to temper the exercise of kawanatanga with respect for tino rangatiratanga, and the right to development.¹

We accepted that Tribunal's view that under the Treaty Maori have a greater right of access to the newly discovered spectrum than the general public and that this right must be determined through consultation between Maori and the Crown. As a result of this substantive hearing, we see no need to modify our interim findings. We set out the reasons for this below in our summaries and discussion of the claimant's submissions and evidence, the Crown's submissions and evidence, and Treaty principles.

Under the Treaty of Waitangi Act 1975, the Tribunal is required to consider whether claimants have been prejudiced by any acts or omissions of the Crown that are in breach of the principles of the Treaty. We note that the Act refers to the principles, not the provisions, of the Treaty. We believe that it is the principles rather than the strict provisions of the Treaty that need to be taken into account in our findings. We discuss issues of Treaty interpretation more fully below.

3.1 CLAIMANT SUBMISSIONS

In her opening submissions for the claimant, Ms Cull said that the claim was based on two principles of the Treaty.² First, she specified the principle of partnership and said that where the Crown asserted exclusive authority over a resource, whether or not that resource was known when the Treaty was signed, it had an obligation to provide for the exercise of rangatiratanga over that resource by Maori. Secondly, she referred to what she called the 'principle of taonga' (valuable properties over which Maori

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

2. Document B18

were guaranteed rangatiratanga).³ The claim was concerned with two taonga: the radio spectrum, which is of value to Maori for economic, social, and cultural development; and the Maori language and culture. The Crown had not fulfilled its obligations to Maori language and culture and had failed to consult with Maori over the benefits that the new technology in the 2GHz band may offer. In the context of the radio spectrum, Ms Cull argued that the exercise of rangatiratanga meant that Maori had a right to control a fair and equitable share of the resource and to be consulted over management decisions affecting the resource. We consider these arguments below.

In the urgent hearing, the claimant argued that the spectrum was a natural resource that existed within the kainga and was therefore protected by the guarantee of tino rangatiratanga.⁴ This concept of the kainga was based largely on evidence by Professor Whatarangi Winiata that was originally heard in the allocation of radio frequencies hearing in 1990.⁵ However, counsel's opening submission in the substantive hearing made no reference to the spectrum as part of the kainga. Instead, she relied on the proposition that 'the radio spectrum is a taonga' that was of value to Maori for economic, social, and cultural development.⁶ Any alienation of management rights to commercial interests prevented Maori from exercising their rangatiratanga.

The presentation of additional evidence and legal argument has strengthened our findings. We summarise some of the key evidence here.

Dr Howard Frederick, the professor of communications studies at Victoria University, was of the view that Maori need to be involved in what he called the 'knowledge economy', whereby the generation and exploitation of knowledge play a predominant part in the creation of wealth. Since Maori are already disadvantaged socially and economically, he argued, they are 'more likely to miss out on the new economy than other segments of society'.⁷ Professor Frederick recommended a 'public set aside' of a portion of the spectrum for use by Maori in line with United States policy following a report of the Office of Technology Assessment in 1995. We discuss this report below. Professor Frederick explained that the set aside of part of the spectrum is regarded in the States as part of a:

federal trust responsibility in this sense, viewed no differently than lands and other natural resources ceded by [Native American] tribes to the US government over the last 200 years in return for monetary and other compensation.⁸

3. We do not regard single terms used in the Treaty, such as 'taonga', as stand-alone principles. However, used in conjunction with other words in the Treaty, they can become part of a principle. Taonga, like other resources, is subject to Crown protection and Maori rangatiratanga and can be dealt with under various principles, such as partnership and development (see sec 3.3).

4. Document A25, para 4.4

5. Document A21

6. Document B18, para 1.4.1

7. Document B2, p 3

8. Ibid, p 10

We believe that our Government has a similar trust or fiduciary responsibility under the Treaty of Waitangi, though there was no more mention of the radio spectrum in that Treaty than there was in the Native American treaties.

Professor Frederick is the predominant writer of a just-completed draft report for the Information Technology Advisory Group. The report has a chapter headed 'Matauranga tau Hokohoko – The Maori Dimension of Knowledge'. Although we did not sight this report, Professor Frederick quoted from it a variety of evidence that illustrated the low socio-economic status of Maori. Although they constitute 15 percent of the population, Maori users of the internet amount to only 6 percent of the total users. However, he stressed that it was not sufficient to get Maori knowledge on the 'information superhighway'; it was important for Maori to have control over their knowledge. To do that, it was necessary to have a highly skilled Maori workforce with strong information technology skills, 'well integrated with a Maori focus and cultural identity which draws on a Maori knowledge base'.⁹ Finally, Professor Frederick stressed that it was insufficient for Maori to be consumers of telecommunications owned and managed by others; they needed to have ownership of some of the spectrum, perhaps to be operated in joint partnership with others. This view was reiterated by other witnesses, notably Bruce Tichbon.

A copy of Mr Tichbon's report to Te Puni Kokiri, 'Implications of Radio Spectrum for Maori Language and Culture', was submitted as part of the supporting documents to Graeme Everton's evidence at our urgent hearing.¹⁰ However, Mr Tichbon was not available for cross-examination until we held our substantive hearing. His report was necessarily on the use of the spectrum for Maori language and culture, which we discuss in chapter 4, but we note here that the report discussed the use of the spectrum for a variety of broader social purposes, such as distance education and medicine.¹¹ Under cross-examination, Mr Tichbon noted that he became aware of 'broader needs' for Maori from the spectrum in preparing his report. Asked about the benefits to Maori of the ownership and control of some spectrum frequencies, he compared their situation with Native North Americans, where it was recognised that, if they did not have some of the spectrum, they would not be 'in the game'. It was not sufficient to regard Maori merely as consumers, or to provide them with equipment, or to give them training to work in systems owned by others. He said: 'If you don't have some ownership, some stake, some control, some real impetus to be in the game you are reduced to being a sometime observer or student.' He referred to Canadian Indians, and specifically to their company Blood Hills Communication, as being 'in the game'. Their reservation was connected by a loop from an optical fibre backbone that linked various urban centres; a useful example of ways in which remote communities can share in the benefits of sophisticated telecommunications. Though these Canadian Indians worked with a joint partner and had had some 'leg-ups' from their government, they were in control. Since Maori lacked the resources to operate

9. Ibid, p 22

10. Bruce Tichbon, 'Implications of Radio Spectrum for Maori Language and Culture', report commissioned by Te Puni Kokiri, December 1998 (docs A4, B8).

11. Ibid, p 12

alone, they too would need to form a joint-venture arrangement with one of the 'big players'. Mr Tichbon also provided details of alternative policies being applied overseas in the ownership and management of the 2GHz spectrum. He described the New Zealand model as the 'most laissez-faire' in the world and noted how other governments had provided assistance to consumers or disadvantaged groups. In Israel, for example, the government had awarded the spectrum not to the highest bidder but to the company that promised consumers the lowest call charges. In Canada and the United States, a portion of the spectrum was being used to support affirmative action policies for Native Americans and other disadvantaged groups. Mr Tichbon agreed with a suggestion from the Tribunal that, although this affirmative action policy was not 'treaty driven' in the States, it could be so driven in New Zealand, because 'we have a Treaty of Waitangi'. We discuss affirmative action as part of the active protection principle of the Treaty below.

In his submission, Piripi Walker reminded us, as he had reminded the radio frequencies Tribunal, that it was the Crown's attempts to sell licences to operate portions of the spectrum into private ownership that had provoked Maori claims to the Waitangi Tribunal. Maori were concerned with the Crown's 'commercial approach', which would see the alienation of the resource to powerful corporations.¹² On being recalled for further cross-examination, Mr Walker elaborated on these points. When he was asked by the Crown whether Maori could use all the new technologies without having ownership, he replied 'Yes', but added that Maori believed that they had a right to development under the Treaty. Maori saw the Treaty as a guarantee of their property rights, including their right to the spectrum. They had not transferred this to the Crown. Maori had difficulty with the Crown's assumption of rights to the spectrum but were prepared to share it with the Crown, their Treaty partner. Asked by the Crown whether Maori believed that they had a claim on any asset privatised by the Crown, Mr Walker replied that their claim could vary from one to 100 percent. He did admit that the Crown could use its kawanatanga right to regulate use of the spectrum to prevent interference, but not to sell it. In reply to a question from the presiding officer, Mr Walker said that Maori objections to the selling of the spectrum by the Crown arose from the 'finality' of that process.

Dr Charles Royal, the head of post-graduate studies and research at the Wananga o Raukawa, spoke of the uses of video conferencing and 'narrow-casting' in teaching but argued that, where a non-Maori organisation had ownership and control of the technology, Maori interests were likely to be ignored.

Dennis Sharman, one of few Maori in the information technology industry (he owns Sharman Consulting, a computer consultancy), described an audiographic network experiment that he had established at Ngata Memorial College in Ruatoria for Te Puni Kokiri. He noted how this project had increased technology and computer awareness among the pupils and encouraged several of them to seek careers in the industry. However, he also stressed the need for Maori to have control of spectrum frequencies if they were to have 'real and sustainable' employment in the industry.¹³

12. Document B6, p 2; comment added during the reading of his brief.

13. Document B4, p 4

The claimants submitted a 1995 report by the United States Congress Office of Technology Assessment, *Telecommunications Technology and Native Americans: Opportunities and Challenges*.¹⁴ The report was prepared at the request of the Senate Committee on Indian Affairs. It examined:

the potential of telecommunications to improve the socioeconomic conditions of Native Americans – American Indians, Alaska Natives, and Native Hawaiians – living in rural, remote areas, and to help them maintain their cultures and exercise control over their lives and destinies.¹⁵

We cannot adequately summarise the report here but note that it is concerned with Native Americans, whose socio-economic conditions are similar to those of native New Zealanders. In the United States, the Federal Communications Commission is responsible for the allocation of spectrum licences. In 1994, it extended preferences in the auction process to various disadvantaged groups, including Native Americans. The report recommends further affirmative action along these lines. However, preferential licences granted on racial grounds have been overruled by the courts and it has usually been necessary for Native American organisations to compete in the auction market with joint-venture partners. This has slowed the development of telecommunications facilities in reservations. Nevertheless, there have been some success stories, such as the Cheyenne River Sioux Tribe Telephone Authority, which owns and operates telephone, cable television, and satellite broadcast operations.¹⁶ It is significant that the report sees the improvement of socioeconomic conditions and the preservation of language and culture of Native Americans as intimately linked; as we do for the claim before us, though it is being pursued under two heads. Finally, we note that, although the report was prepared by an office of Congress, it was advised by an advisory panel, a majority of whom are Native Americans, and carried out extensive consultations with Native Americans in the field. Though the 350 or so Native American treaties, like the Treaty of Waitangi, do not specifically mention the spectrum as a protected property, it is generally recognised that Congress has a trusteeship obligation to Native Americans that stems from the treaties and other federal law. This is very similar to the Crown's fiduciary responsibility under the Treaty of Waitangi. As we shall argue below, we believe that this fiduciary responsibility obliges the Crown in New Zealand, in giving effect to the principles of the Treaty, to apply affirmative action to Maori.

In view of the importance of the Office of Technology Assessment report to our inquiry, we sought further information on it and subsequent developments from one of the Native Americans consulted by that inquiry. We had a good demonstration of the prowess of new telecommunications when, thanks to the Evison Digital Media Centre, we were able to interview James Casey, a Cherokee attorney, in a

14. United States Congress: Office of Technology Assessment, *Telecommunications Technology and Native Americans: Opportunities and Challenges* (OTA-ITC-621), Washington DC, United States Government Printing Office, August 1995 (doc B17)

15. Ibid, p iii

16. Ibid, p 10

teleconference downloaded from satellite. Mr Casey has been involved in applications for tribal spectrum rights and noted that the Federal Communications Commission had set aside the C block spectrum in the 30 GHz range for minority groups, including several Native American tribes. Mr Casey discussed his involvement with some of these, including a group of Cook Inlet Indians. Nevertheless, he admitted that there had been only a few successful stand-alone allocations and a few joint ventures with outside corporations. Allocations made so far were for given localities, usually reservations, and not America-wide. As a result of the court actions, it had been necessary for the tribes to set up new rules defining themselves as small businesses, which would exempt them from the courts' anti-discriminatory ruling. Asked about the fate of the Office of Technology Assessment report, Mr Casey said that after a period of neglect its recommendations were now being actively considered. Finally, Mr Casey noted, in support of that report, that Native Americans did not separate economic and cultural matters, especially on reservations; the two were intimately related and telecommunications were just another tool for furthering both.

In her closing submissions, claimant counsel reiterated that the claim was based on the principles of partnership and 'taonga'.¹⁷ On partnership, she quoted from our interim report on 'the responsibility of the Crown to ensure that its Treaty partner obtains a fair and equitable share of spectrum'. She also quoted the *Report on Claims Concerning the Allocation of Radio Frequencies* finding that 'the ceding of kawanatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources. Neither Treaty partner can have monopoly rights in terms of the resource.' Finally, she quoted from the *Report on the Te Reo Maori Claim*, that 'In its widest sense the Treaty promotes a partnership in the development of the country and a sharing of all resources'.¹⁸

Having argued that Maori were entitled to a share of the spectrum under the principle of partnership, claimant counsel then discussed how best to protect that share. First, she considered the Crown argument, supported by Crown witness Katrina Bach, that the Crown was not completely alienating spectrum rights but merely selling management rights for 20 years, after which the original right reverted to the Crown. Claimant counsel argued that 'in fact those rights are more probably going to be subject to a 'roll over' policy'. The incumbent holders of rights would have considerable leverage through their investment in the resource, and this would 'reduce the ability of the Crown to recapture management rights'.¹⁹ In support, Ms Cull quoted Mr Casey, who said that licences granted in the United States for a mere 10 years were typically rolled over to the incumbent holders. We think that this is likely to happen in New Zealand. If Maori are not granted a share of the spectrum resource now, they are unlikely to get any in 20 years' time. As the Privy Council observed in *New Zealand Maori Council v Attorney-General*, 'if, as a matter of

17. Document B46

18. Ibid, paras 2.4–2.6 (quoting Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*, Wellington, Brooker and Friend Ltd, 1990, p 42, and *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed, Wellington, Brooker's Ltd, 1993, p 41)

19. Document B46, para 2.8

practical politics, once the assets are transferred they are most unlikely to be replaced, the fact that theoretically they could be is of little significance'.²⁰ Mr Casey told us that 20 years in technological terms is 'an eternity'. It is essential in our view for Maori to be involved in the technological developments arising from exploitation of the 2GHz spectrum from the beginning, not in 20 years' time.

Secondly, claimant counsel examined the question of where Maori stood in a hierarchy of interests. She cited a variety of overseas and New Zealand precedents for this, including the Canadian cases *Jack v the Queen* and *R v Sparrow*, which provided the precedent for the order of priorities listed in the Tribunal's *Report on the Allocation of Radio Frequencies*, which we noted above.²¹ This order of priorities means that the Crown, having ensured the proper conservation of a resource, must satisfy Maori Treaty rights before alienating any remaining resources to private commercial or recreational interests.

Thirdly, claimant counsel considered but rejected the notion that the Crown might meet its Treaty obligations by purchasing for Maori 'substitute' assets or other frequencies not included in the present auction proposal. We also do not support the 'substitute' proposal. Maori should be awarded an equitable share of the 2GHz spectrum before it is privatised, and thus get the opportunity to become involved in the telecommunications industry as owners and managers, not simply as employees and consumers. It is not sufficient to 'compensate' them with some other resource.

Claimant counsel's closing submission continued with an elaborate argument over whether the radio spectrum is a natural resource. We regard this issue as largely irrelevant, since the important issue in this claim is what happens to the resource once the Crown has proposed to alienate rights to use it.

However, Maori Treaty rights to a share of the spectrum still need to be discussed. Here, claimant counsel relied on what she called 'the taonga principle'. She quoted a wealth of opinion from previous Tribunal reports to the effect that taonga is not confined to objects of physical or tangible value, but can include intangibles as well. These included te reo Maori, customs, mauri (life force), ancient sayings, and even thoughts. In referring to a statement by Professor Hirini Mead, claimant counsel said, 'One cannot freeze the term taonga at what it might have meant in 1840. Taonga like the Treaty itself is growing and developing as we understand it more.'²²

Claimant counsel took up this issue in relation to the right of development. As she put it:

The Waitangi Tribunal has consistently acknowledged a Maori right of development of resources as a treaty right arising from article 11. . . . The right cannot be fossilised as at 1840 and limited only to resources known or used back then.²³

In relation to the development right, claimant counsel argued in a written submission of 14 May 1999 that this had three levels:

20. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 525 (PC)

21. *Jack v the Queen* (1979) 100 DLR (3rd) 193 (scc); *R v Sparrow* (1990) 70 DLR (4th) 385 (scc)

22. Document B46, para 5.9.3

23. *Ibid*, paras 6.1, 6.3

- the right to develop resources to which Maori had customary uses prior to the Treaty (development of the resource);
- the right under the partnership principle to the development of resources not known in 1840 (development of the Treaty); and
- the right of Maori to develop their culture, language, and social and economic status using whatever means are available (development of Maori as a people).²⁴

On the first level, claimant counsel observed that this development right had already been acknowledged in previous Tribunal reports; for instance, in regard to traditional fisheries, where it was already accepted that Maori had a right to use new technology to enhance traditional fishing methods. She saw the radio spectrum claim in the same light:

In the context of the radio spectrum, the evidence has illustrated that Maori had traditional knowledge of and used parts of the electromagnetic spectrum (Mead, Winiata, Waikerepuru). The development of part of that resource through technology able to channel radio waves into intelligible signals is a development to which Maori have a right.²⁵

The development right based on the second level applied to resources discovered and developed since 1840. Although the Crown could exercise its kawanatanga right to manage the radio spectrum in relation to such resources, this was ‘constrained by the guarantee of rangatiratanga. It is this argument that the claimants rely on to support the application to the principle of partnership.’²⁶ The exercise of rangatiratanga in the context of the radio spectrum meant that Maori had a right to be consulted over management decisions affecting the resource and a right to a fair and equitable share of access to that resource.

On the third level of development right, claimant counsel appealed to the human rights convention that supported the right of indigenous peoples to develop as peoples. Since that right is not driven by the Treaty of Waitangi, we do not pursue it, though we note that claimant counsel also appealed to article 3 of the Treaty, which guaranteed Maori the same rights and privileges as British subjects. However, she argued that Maori could not access their article 3 right to develop to the level of non-Maori in view of their social and economic disparities compared with non-Maori. In our view, the Treaty as a whole provides support for the Maori right to develop as a people.

Claimant counsel further argued that the Maori right to development could not be effective where an ‘untempered’ market-based approach was applied to the allocation of radio frequencies so that ‘efficient use’ predominated over ‘equitable access’. We note that this limb of the claim seeks a fair and equitable share of the spectrum for Maori. An equitable share must take into account socio-economic factors. Claimant counsel noted how the ITU had suggested the reservation of some prime frequencies for lesser developed countries. Since New Zealand is member of the ITU, it should be

24. Document c3, para 4.2

25. Ibid, para 4.5

26. Ibid, paras 46–47

aware of this recommendation. As we have noted elsewhere, the American Federal Communications Commission has reserved spectrum licences for disadvantaged groups, including Native Americans.

We discuss partnership, taonga, and the development right more fully in our Treaty principles section below (see sec 3.3).

3.2 THE CROWN'S SUBMISSIONS

In her opening submissions to the substantive claim for the Crown, Ms Hardy rejected the first limb of the claim.²⁷ She rejected the claim to the spectrum based on either 'o ratou kainga' (though this was not repeated in the claimant's opening submission to the substantive claim) or on the ground that it was a taonga. In rejecting the claim that the spectrum was a taonga, the Crown argued that the management rights to be auctioned 'are rights to artificially generated radio waves', not a 'natural resource' that existed in 1840, and therefore not a resource to which Maori have a development right under the Treaty. As we have said, we regard this argument as largely irrelevant, since it is the economic aspect of the resource that is created by technology and enhanced in value by the Crown's proposal to sell monopoly rights, which the claim is all about. The Crown submission then asserts that:

The extremity of the claim is that Maori own all resources in New Zealand and that the Crown might manage those resources for the benefit of all New Zealanders only with the agreement of Maori.

This is a radical claim which in essence asks the Tribunal to rework the entirety of the Crown's social and economic policy in a fundamental way . . . That . . . the Government can manage resources only with the agreement of Maori . . . what is really being challenged is the constitutional role of government and government's broad social and economic policy.²⁸

In our understanding, these statements distort what is at issue in the claim. It is not the Crown's management of spectrum rights that is being contested, but the Crown's proposal to sell those rights (for a considerable sum) into private ownership, initially for a period of 20 years. The purchaser receives a monopoly to operate particular bands within the spectrum, or to on-sell that right. It is that monopoly that becomes a valuable resource.

More fundamental, so far as this Tribunal is concerned, is that we are only obliged by our principal Act to investigate the claim before us, not some hypothetical claim that might arise in the future. Any such claim would be investigated by another Waitangi Tribunal, specially appointed to hear that claim. It may well be that the claim before us has been provoked by this Government's exercise of a particular policy – the

27. Document B30

28. Ibid, paras 3.1, 4

policy of privatising ‘State’ assets. However, the claim comes under our purview only if such policy is in breach of the principles of the Treaty, according to section 6 of the Treaty of Waitangi Act 1975. That section allows any Maori who claims to have been prejudiced by any legislation, policies, practices, acts, or omissions of the Crown since 6 February 1840 to submit a claim to the Tribunal. Section 6(1)(c) refers to ‘any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown’ that may be inconsistent with the principles of the Treaty and therefore could become the subject of a claim to the Tribunal.

It is well known that the policy of privatisation of State assets, which has been carried on by several administrations, has provoked numerous claims to the Tribunal, many of which have been upheld. As we have indicated, the claim before us is in many respects a repeat of the radio frequencies claim. It was lodged because the Crown proposed to privatise another segment of the radio spectrum. The radio frequencies Tribunal found that the Crown’s proposal to sell rights to radio spectrum frequencies was in breach of the principles of the Treaty. The claimant witnesses and their counsel in our hearing have complained that they should not have to ‘re-litigate’ their claim every time the Crown proposes to privatise more of the spectrum, when the Tribunal has already found such a policy in breach of the principles of the Treaty. We agree with that view. This raises the question of whether repeated breaches by the Crown, in pursuit of a policy that has already been held to be in breach of the principles of the Treaty, constitute a further breach of the principles of the Treaty in defiance of the Crown’s legislation, the Treaty of Waitangi Act. Are such breaches to continue ad infinitum? A similar situation was commented on by the Privy Council in its 1993 judgment *New Zealand Maori Council v Attorney-General* when it said that ‘especially vigorous action’ may need to be taken by the Crown to fulfil its Treaty obligations for the Maori language. It added:

This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown’s responsibility.²⁹

The Crown supported its submission on the first limb of the claim with the following evidence, much of which was brought forward from the urgent hearing.

Dr John Yeabsley, a senior fellow at the New Zealand Institute of Economic Research, argued that privately held spectrum rights were, for most commercial uses, the best way to ensure that spectrum use maximised value to society as a whole. He believed that the auction would be so structured that the rights would end up in the hands of the most efficient users, but added that this objective could be departed from if the Government were to allocate portions of the spectrum to Maori for promoting economic development, language, and culture. He believed that it would be too costly for Maori to develop a separate infrastructure and that it would be preferable for them

29. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC)

to work with a joint partner. However, Dr Yeabsley did not believe that it was necessary for Maori to own the spectrum to ensure that they got training in the telecommunications industry, or for them to use telecommunications services as consumers. Though he discussed various ways of reserving a portion of the spectrum for Maori, he believed that any such reservation would deter potential bidders for the remainder. As an alternative to reserving the spectrum for Maori, Dr Yeabsley suggested ‘simply providing Maori with cash’, which they could use to foster economic development.³⁰ He concluded that anything that hindered the development of effective communications infrastructure would have possibly significant repercussions on the ability of all New Zealanders to participate fully and competitively in the knowledge economy.

Under cross-examination, Dr Yeabsley admitted that the open auction procedure that he favoured might allow one big bidder to get a monopoly and that, if that happened, it would be necessary to rely on the Commerce Commission to police its behaviour. Asked about the effects of Maori control in joint ventures, Dr Yeabsley replied that this would cost the partner something and therefore have a detrimental effect.

Wayne Wedderspoon, who had presented evidence to the urgent hearing, was further cross-examined on that evidence.³¹ As a technical expert in the Ministry of Commerce, Mr Wedderspoon answered questions of this nature but was reluctant to comment on Treaty implications of the Ministry’s decisions. Such questions were referred to Ms Bach, who also presented evidence to the urgent hearing.³²

Ms Bach is the director of the Resources Directorate in the Ministry of Commerce and is also the Ministry’s principal Treaty adviser. Asked by Crown counsel whether the Government had considered granting Maori management rights to part of the spectrum, she replied, ‘Yes, the matter was considered at length and debated vigorously’. The discussions appear to have taken place on several levels – in the Ministry, in an officials’ Treaty strategy committee, and in Cabinet – before the Government finally decided not to offer Maori management rights.

Dr Alan Jamieson, an electrical engineer and telecommunications consultant, and Dr Andrew McEwan, the scientific director of the National Radiation Laboratory, also appeared for the Crown. However, their evidence was largely of a technical nature.

In her closing submissions, Crown counsel argued that:

the first limb [of the claim] can be swiftly rejected. The Treaty simply does not support the proposition that management rights to the radio spectrum are protected under Article 2.³³

She said that the economic value of management rights was created by the Crown in regulating the resource, a proposition that we accept. But Ms Hardy went on to say that the Maori claimants were asserting ownership rights:

30. Document B15, para 31

31. Document A13

32. Document A15

33. Document B49, para 5

quite distinct and apart from any interest that the New Zealand community generally might have in the resource. On such a basis, Maori would have a property right to any 'resource' created [by] Crown activity, such as income from drivers' licence fees.³⁴

It seems to us that Crown counsel has created a red herring. Maori have not contested the Crown's kawanatanga right to regulate the use of the spectrum (let alone traffic licences); what they are contesting is the Crown's privatisation of management monopolies. Maybe, if the Crown were also to privatise the levying of taxes, including traffic licences, as in the ancient regime of pre-revolutionary France, Maori would also claim a share of that tax farming. But, as we have said, that would be another claim, for another Tribunal.

Crown counsel went on to examine the claimant's use of kainga and taonga as a basis for her claim to the spectrum. Ms Hardy said that there is no historical evidence of nineteenth-century usage of kainga as a description of the space between Ranginui and Papatuanuku. This may be so, but we do not need to pursue the matter since claimant counsel abandoned the kainga justification in her closing submission. Ms Hardy dismissed taonga as a basis for the claim to the spectrum on the ground that the radio spectrum was unknown to 'people' (not just Maori) in 1840 and could therefore not be part of their taonga ('o ratou taonga katoa'). She added that the Maori claim to the spectrum as taonga was no more valid than a claim by them to coal or gold, which also existed but were unexploited by Maori in 1840. The spectrum claim has some analogy to Maori claims to coal and gold, but probably has a better analogy to oil, since in 1840 the technology did not exist to recover oil any more than it existed to utilise the radio spectrum. As we noted in our interim report, the Crown's claim to petroleum was asserted by legislation in 1937. This was contested by Sir Apirana Ngata, who said that Maori had the right to oil under their land. Whether or not Maori have a claim to such resources under the Treaty relates more to the principles than the strict and somewhat ambiguous terms of the Treaty. We discuss this more fully under Treaty principles below.

In her closing submissions, Crown counsel examined the principles of the Treaty under two heads: development right and partnership. She argued, with the support of quotations from President Cooke in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* and *Ngai Tahu Maori Trust Board v Director-General of Conservation*, and the Tribunal's *Kiwifruit Marketing Report 1995*, that the principles of development and partnership apply only when attached to specific provisions, such as 'their taonga' known in 1840, and to extensions of rights based on those words.³⁵ Crown counsel asked: 'How can an activity and concept unknown in 1840 develop into something that the Treaty now protects?'³⁶ She quoted a statement from the Tribunal's *Report on the Orakei Claim* that:

34. Document B49, para 10

35. *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20, 24 (CA); *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 559–560 (CA); Waitangi Tribunal, *Kiwifruit Marketing Report 1995*, Wellington, Brooker's Ltd, 1995, pp 11–12

36. Document B49, para 32

the essence of the Treaty of Waitangi transcends the sum total of its component written words and puts narrow or literal interpretation out of place. . . . A consideration of the provisions of the Treaty in a vacuum is a barren exercise and not calculated to assist in the formulation of the principles of the Treaty.³⁷

However, Crown counsel turned that statement on its head and submitted that:

a consideration of the principles of the Treaty in a vacuum divorced from the words is a similarly barren exercise. The principles of the Treaty must arise from the words of the Treaty if they are to be ‘Treaty’ principles. To speak of a principle that has no nexus with the words is to demean the mana of the words of the Treaty and the Treaty itself.³⁸

But we must ask: which words, and which Treaty texts? We discuss these and other questions of Treaty interpretation below.

Following the completion of the hearing, Crown counsel submitted two written memoranda. The first, of 14 May 1999, was concerned with the question of consultation with Maori prior to the decision to proceed with the spectrum auction. Here, Crown counsel quoted statements by President Cooke and Justice Richardson from their Court of Appeal judgments in *New Zealand Maori Council v Attorney-General*.³⁹ From these, she had concluded that, so long as it was properly informed about Treaty responsibilities, ‘the principles of the Treaty do not require the Crown to consult its Treaty partner on every proposal or policy that might affect Maori interests’.⁴⁰ This may be so, but in this claim we consider that, in view of the previous claims and litigation over radio frequencies, the Crown was obliged to consult Maori as fully as was practicable. Although there was some contact with Maori, or at least correspondence between Ian Hutchings of the Ministry of Commerce with Professor Winiata and Mr Everton, that hardly amounted to consultation. It was more in the nature of a confrontation between men with made up minds.

Crown counsel’s second written memorandum, of 18 May 1999, was a response to claimant counsel’s written memorandum of 14 May 1999. However, this needs little comment, since it once again complained that the claimants had failed to identify the implications of their claim – this time asking whether the claim to the spectrum could also apply to genetic engineering or solar energy. As we have said, such matters are irrelevant to this Tribunal. Replying to the claimant’s complaint that she was being required to re-litigate the issue, Crown counsel said that the first limb of the claim was a new claim from the radio frequencies claim, which she said was about only language and culture. Because of the urgent nature of its inquiry, the allocation of radio frequencies Tribunal did not attempt to address broadcasting issues as a whole, but both the Wai 150 statement of claim and the Tribunal’s findings (set out in chapter 2 above) make reference to the broader issues involved. We note that the allocation of radio frequencies Tribunal anticipated that the matters it had ‘considered in relation

37. Ibid, para 33 (quoting Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim*, 2nd ed, Wellington, Brooker and Friend Ltd, 1991, p 192)

38. Document B49, para 34

39. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665, 683 (CA)

40. Document C2, paras 2–3

to the limited issues' before it may be of future relevance. It hoped that these matters would be borne in mind when other aspects of Maori broadcasting came up for consideration.

Finally, Crown counsel complained that it was only in her 14 May memorandum that claimant counsel had raised article 3 in support of her claim. Crown counsel replied that, although claimant counsel had argued that article 3 was a guarantee of economic outcomes to New Zealanders, including Maori, the Crown submitted that 'there is no such guarantee of outcome to citizens requiring transfer of economic assets'.⁴¹ What both counsel have ignored in article 3 is that the Queen extended to Maori 'Her royal protection' as well as imparting to them the rights and privileges of British subjects. That royal protection was also extended to Maori 'just Rights and Property' in the preamble to the Treaty. It is the source of the Crown's fiduciary duty to Maori and needed to be observed in any alienation of resources into private ownership by making provision for Maori to enjoy a fair and equitable share. Any action of the Crown that furthered the disparities between Maori and non-Maori would ignore the Crown's fiduciary responsibility. We discuss the fiduciary principle more fully below.

We now discuss the principles of the Treaty in relation to the respective arguments of the claimant and the Crown, previous assessments by the Tribunal and the courts, and our own understanding.

3.3 THE PRINCIPLES OF THE TREATY REVISITED

Before proceeding to any re-examination of our statements on relevant Treaty principles in our interim report that may be required as a result of the substantive hearing, we think it necessary to expand on the question of principles, as opposed to provisions, of the Treaty. A *Concise Oxford Dictionary* definition of 'principle' as a noun describes it as a 'fundamental source, a primary element, a fundamental truth as a basis for reasoning'. What, then, are the fundamental sources, the fundamental truths, of the Treaty of Waitangi?

In considering such matters, we have to remember that there is not one Treaty of Waitangi, but two, one written in Maori, the other in English, and neither is an exact translation of the other. As the country's leading scholar of Maori, Professor Bruce Biggs, has reminded us, the Maori text of the Treaty, composed by the Reverend Henry Williams and his son, was written in what another scholar of the Treaty, Ruth Ross, called 'missionary' Maori.⁴² As Professor Biggs pointed out, some of the words that were used, including 'kawanatanga' for governorship or sovereignty, were transliterations of English words grafted onto a Maori root (kawana = governor; tanga = ship). Sometimes, traditional Maori words were made to bear new meanings. 'Tino rangatiratanga [full chieftainship] o o ratou wenua [of their lands]' is translated

41. Document c4, para 9

42. 'Humpty-Dumpty and the Treaty of Waitangi,' in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, I H Kawharu (ed), Auckland, Oxford University Press, 1989, pp 300–312

as ‘full exclusive and undisturbed possession of their lands’ in the English text, with no mention of chiefly control over those lands. The two texts promise different things, and English and Maori speakers take different meanings from them.

It is not surprising that the British (Hobson and his officials) and Maori had different expectations of the Treaty. Different expectations were kindled by what was said about the Treaty at Waitangi and at numerous other places where the Treaty was signed by Maori. These expectations have to be taken into account, according to the *contra proferentem* principle, which was enunciated in the *Jones v Meehan* case in the United States Supreme Court in 1899 and is widely accepted in international law relating to treaties.⁴³ This said that treaties were to be construed ‘in the sense in which they would naturally be understood by the Indians’. In other words, in the event of ambiguity, a provision was to be construed against the party that drafted that provision. The relevance of this to the Treaty of Waitangi, and the Tribunal’s responsibilities in interpreting it, was pointed out by the Tribunal as long ago as 1983 in the *Report on the Motunui–Waitara Claim*.⁴⁴ That report also noted that the Treaty of Waitangi Act 1975 recognised that there were differences between the two texts of the Treaty and gave the Tribunal exclusive authority in claims before it ‘to determine the meaning and effect of the Treaty as embodied in those two texts, and to decide issues raised by the differences between them’. The report added that:

A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place.⁴⁵

The legal drafter of the Treaty of Waitangi Act sensibly relied on the principles rather than the provisions of the Treaty in view of the different texts, the different meanings for Maori and Pakeha of many of the words in those two texts, their different understandings and expectations flowing from those texts, and all that was said about them at the time. Somehow we – and all other Waitangi Tribunals – have to steer a middle ground between those two texts and the understandings and expectations of them in our endeavours to find the principles underlying them. Fortunately, there is now a wealth of interpretation in previous Tribunal findings and court judgments for us to refer to. We shall quote only one: the statement by the Privy Council in *New Zealand Maori Council v Attorney-General*, which neatly balances principles against provisions:

the ‘principles’ are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the

43. *Jones v Meehan* 175 US 1 (1899)

44. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim*, 2nd ed, Wellington, Government Printing Office, 1989, p 49

45. *Ibid*, p 47

Treaty.) With the passage of time, the ‘principles’ which underlie the Treaty have become much more important than its precise terms.⁴⁶

In giving more emphasis to principles rather than provisions, we are following that advice, though we are bound to do that anyway in terms of the Treaty of Waitangi Act.

We now discuss, and to some extent build on, the relevant principles that we identified in our interim report. We also make some reference to submissions on principles made by the claimant and Crown counsel. It should be noted that the principles we list are not necessarily exclusive and that there is some flow on from one to another.

3.3.1 Partnership

Partnership has been so widely described by the Tribunal and the courts as a principle of the Treaty that we hardly need to explain it further. In the claim before us, the argument has been over not the existence of the partnership principle but the rights and obligations of the respective partners. The claimant has asserted that, under the partnership principle and in exercising their rangatiratanga, Maori are entitled to a fair and equitable share of the available spectrum that can be used for commercial, social, and cultural purposes, in addition to language and culture. The Crown, while not unmindful of its obligations to protect Maori language and culture (which we discuss under the second limb of the claim), does not accept a partnership obligation to allocate Maori a share of the spectrum for commercial, social, and cultural purposes. The Crown is of the view that Maori could bid for the spectrum, in competition with others, and that it is not necessary for them to own it, since they could have access to it as consumers.

In our interim report, we noted the finding of the *Report on the Allocation of Radio Frequencies* that partnership was ‘the key principle in the management of the spectrum’. That report also said that the partnership principle required each partner to act ‘reasonably and with the utmost good faith’ towards the other, and that ‘the ceding of kawatanga to the Queen did not involve the acceptance of an unfettered legislative supremacy over resources’. ‘Neither Treaty partner,’ it said, ‘can have monopoly rights in terms of the resource.’⁴⁷ This is accepted by the Wai 776 claimant, who has said that under the partnership principle the Crown had a duty to consult Maori, amongst other things, over the allocation to them of a share of the spectrum.⁴⁸ The *Report on the Allocation of Radio Frequencies* proposed a hierarchy of interests in the allocation of resources and said that tribal rangatiratanga gave Maori greater rights of access to the newly discovered spectrum than the general public. We agree with those findings and think that they are equally applicable to the claim before us. However, in its handling of further spectrum allocations since the radio frequencies report, the Crown has ignored the findings of that report. If it were to proceed with

46. *New Zealand Maori Council v The Attorney-General* [1994] 1 NZLR 513, 517 (PC)

47. *Report on the Allocation of Radio Frequencies*, p 42

48. Claim 1.1

the proposed auction of 2 GHz spectrum rights, without giving prior consideration to Maori rights, the Crown would be in breach of its partnership obligation.

The *Report on the Allocation of Radio Frequencies* said that the obligation of the Treaty partners to act ‘reasonably and with the utmost good faith’ towards one another ‘involves the obligation to consult’.⁴⁹ As we have noted above, the Crown in its memorandum of 14 May 1999 does not consider that the principles of the Treaty require it to consult its Treaty partner on every proposal affecting Maori interests.⁵⁰ So far as the proposed auction of further frequencies within the spectrum was concerned, the Crown considered it sufficient to be ‘properly informed’, through its officials, of any Treaty obligation before proceeding with the auction. Since the officials decided that Maori had no claim under article 2 of the Treaty to the spectrum frequencies to be auctioned, they advised Cabinet to go ahead with the auction. Professor Winiata was not consulted but informed of an established position. Consultation between Treaty partners acting reasonably and with the utmost good faith to one another required, in our view, fully fledged discussion, preferably in an atmosphere that respected Maori tikanga, with every attempt to find an agreed position that was in accord with Treaty principles. In view of the background to the proposed alienation of further spectrum rights, and especially the *Report on the Allocation of Radio Frequencies*, we believe that the Crown was obliged to consult Maori as fully as practicable before proceeding with the auction of more spectrum rights.

3.3.2 Rangatiratanga

Rangatiratanga and kawanatanga have sometimes been regarded as stand-alone principles of the Treaty, but it is inappropriate to consider them separately. The Tribunal has usually taken the view that the Crown’s exercise of kawanatanga, or governance, needs to be tempered by respect for rangatiratanga, or chieftainship. The meaning of ‘rangatiratanga’ has been variously interpreted. It certainly means more than ‘possession’ (the translation used in the English text of the Treaty) and includes chiefly authority and self-management. The cession to the Crown of kawanatanga did not, in the words of the *Report on the Allocation of Radio Frequencies*, ‘involve the acceptance of an unfettered legislative supremacy over resources’, or give either Treaty partner monopoly rights over them.⁵¹ In our view, the Crown was entitled to use its kawanatanga authority to manage the spectrum in the public interest; for instance, to ensure that there was no jamming of frequencies according to international standards. However, it was not entitled to sell management rights without consideration of Maori rangatiratanga rights. This required, in our view, full consultation and negotiation from an early stage to ascertain the Maori interest and ensure that Maori secured a fair and equitable proportion of the spectrum before the remainder was auctioned. Though it is acknowledged that the Crown sometimes has

49. *Report on the Allocation of Radio Frequencies*, p 42

50. Document c2, para 2

51. *Report on the Allocation of Radio Frequencies*, p 42

difficulty in finding a mandated Maori authority with whom to negotiate, we note that the New Zealand Maori Council has had a long involvement with radio frequency claims and was an appropriate starting point.

3.3.3 Fiduciary duty

As we have noted above, the preamble to the Treaty and article 3 impose on the Crown a duty to protect Maori 'just Rights and Property'. That fiduciary duty is also carried over to article 2 with its guarantee (in the English text) of 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties ... so long as it is their wish and desire to retain the same in their possession'. Where there was doubt over what was included as taonga (or 'other properties'), the Crown had an obligation to ascertain Maori views to see what they regarded as 'their taonga' and, under the fiduciary obligation, to ensure that they were protected. Although there was provision for a Crown right of pre-emption to acquire such land as Maori were willing to sell, there was no provision for the acquisition by the Crown of 'other properties'. It is difficult to sustain an argument that the Crown therefore had a right under the Treaty to other, unspecified (or indeed undiscovered) properties, no matter what other rights it might claim under English common law. When the Treaty was negotiated, Maori were not told that under the common law the Crown would claim the radical title to all land in New Zealand, despite what the Treaty said. Nor were they told that, under the common law, 'royal metals' were reserved for the Crown, as were the seas below the high-water mark to a limit of three miles. Later, where the common law was insufficient, the Crown was to establish title to other properties by legislation, including the Petroleum Act 1937 and the Radiocommunications Act 1989. Such encroachments on properties undefined in the Treaty not only used the Crown's right of kawanatanga to overcome Maori rangatiratanga but defied the Crown's fiduciary obligation under the Treaty to protect Maori 'just Rights and Property'.

3.3.4 Active protection

It might be said that the Crown's fiduciary obligation to protect Maori rights and property is not merely a passive obligation to protect Maori while also actively promoting European colonisation of the country. The Crown's fiduciary obligation meant that it had actively to protect Maori from spoliation during that process of colonisation. It failed to do so, and many of the claims before the Waitangi Tribunal are a consequence of that failure. A good many of those claims have been heard and reported on by the Tribunal or dealt with by direct negotiation between the Crown and claimants, and settlements reached. The Crown deserves credit for settlements that have been concluded. These have done much to restore or compensate for lost resources. However, there is also a need for affirmative action directed towards correcting an imbalance in the socio-economic situation of Maori compared with non-Maori, which is a long-term consequence of colonisation and the loss of Maori

resources. An equitable share of the spectrum could help to correct the present imbalance. The Crown's duty of active protection continues today when resources to which Maori assert a Treaty-based claim are alienated into private ownership. It is important that the Crown in handling such issues does not itself provoke more Treaty-based claims such as the one before us.

3.3.5 Mutual benefit

In our interim report, we drew attention to the expectation of many Maori, when they signed the Treaty, that by allowing European colonisation to proceed they would share in the benefits, including new technologies, that foreigners brought to their shores. We quoted an extract from the Tribunal's *Report on the Muriwhenua Fishing Claim* to this effect.⁵² That report called this sharing of new technologies the principle of mutual benefit. We think that it applies particularly to the claim before us. However, it must be a real sharing, in which Maori participate as owners and managers, possibly in joint partnerships, and not merely as consumers.

3.3.6 Development

As we noted in our interim report, there have been differences between the courts and the Tribunal, and indeed between different Tribunals, over the extent to which the Treaty allowed development rights. While it has been generally accepted that there is a development right (which includes the use of technology unknown in 1840) for properties specified in the Treaty, such as land, forest, and fisheries, there has been little agreement over the unspecified 'other properties' or taonga. The Crown accepts the development right for specified properties, such as fisheries, and some taonga, such as language and culture. However, it does not accept that the radio spectrum was a Maori taonga in 1840 and therefore does not accept that Maori have a special right to share in the use of the spectrum that subsequent technology has made possible. The claimants, on the other hand, say that Maori knew of the existence of the electromagnetic spectrum, regarded it as a taonga, and are entitled to share in the exploitation of those parts of the spectrum that post-1840 technology has made possible. As we have said, we do not need to get into the argument of whether the radio spectrum is a 'natural resource'. It is sufficient to say that radio waves existed in nature – as light and sound – and could be captured to a certain extent by humans through their eyes and ears. But in 1840 there were few technical devices that could be used to extend human sight and sound. Maori were aware of the existence of various natural phenomena, made good use of some of them – for instance, the use of light emitted by stars for navigation – and incorporated them into their own philosophical world view. One example of this cited by Professor Mead was Tawhaki climbing the heavens to bring to earth knowledge, education, and sacred incantations for the

52. Waitangi Tribunal, *Radio Spectrum Management and Development Interim Report*, Wellington, Waitangi Tribunal, 1999, p 8 (quoting Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed, Wellington, Government Printing Office, 1989, p 195)

spiritual wellbeing of the people.⁵³ Maori were therefore using radio waves for their own purposes, though they (along with all others) lacked the technology that we have today to enhance sight and sound.

We therefore accept claimant counsel's submission of 14 May 1999 that 'Maori had traditional knowledge of and used parts of the electromagnetic spectrum', that it was in these ways their taonga, and that they have a Treaty right to the development of that taonga through technology that has subsequently become available.⁵⁴ We also accept the second level of claimant counsel's submission that Maori have a right under partnership and other principles specified above to the development of resources that were not known about in 1840 or that were used in a traditional manner. In doing so, we note the opinion of previous Tribunals and court judgments that the Treaty must not be fossilised at 1840 but be interpreted to meet new and changing circumstances. We also note that the radio frequencies Tribunal concluded that there were 'many kinds of taonga' and that they may include 'things which are not yet known'. However, that Tribunal said that the 'taonga of the spectrum is different in essence . . . from any other taonga known by or used by any of the tribes', including 'taonga tuku iho i nga tupuna' (taonga handed down from the ancestors). Since the spectrum was a 'natural resource' enveloping the whole of the earth, it could not be possessed by any one person or group; it was 'a taonga to be shared by the tribes and by all mankind'. Neither of the Treaty partners could have monopoly rights to it.⁵⁵ We agree with those conclusions.

Finally, we comment on development rights today. Commenting on the same issue in 1990, the *Report on the Allocation of Radio Frequencies* picked some comments from the even earlier 1984 Maori Economic Development Summit Conference, which had undertaken to work over the following decade to eliminate the 'development gap' between Maori and non-Maori in all areas. Koro Wetere, the then Minister of Maori Affairs, had said that 'the pace of development for Maori had to be two steps to everyone else's one, if Maori were to catch up with non-Maori'. The radio frequencies Tribunal said that the allocation process in radio frequencies did not allow for that extra pace necessary for the development of Maori broadcasting.⁵⁶ All those observations are as true today as they were 10 or 15 years ago. It is equally necessary for Maori to have frequency allocations in the 2 GHz spectrum if they are to take those extra steps forward.

53. Document B10, para 3.8.1

54. Document C3, para 4.5

55. *Report on the Allocation of Radio Frequencies*, pp 40–41

56. *Ibid*, pp 31–32