APPENDIX I

STATEMENT OF CLAIM

IN THE WAITANGI TRIBUNAL WELLINGTON

WAI 776

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF a claim by Rangiaho Theresa Everton (née Paurini) in respect of Maori Radio Spectrum Management and Telecommunications Development

STATEMENT OF CLAIM

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STATEMENT OF CLAIM

1. Te Tiriti o Waitangi

1.1 The Treaty of Waitangi legitimised the Crown's governorship of New Zealand by establishing in Article I of the Treaty the principle of kawanatanga subject to the fulfilment of the guarantees in Article II.

1.2 Article II guaranteed to the Chiefs and Tribes of New Zealand and the families and individuals of those tribes the full exclusive and undisturbed possession of their taonga.

1.3 Maori exercised rangatiratanga over all that came within the domain of Ranginui and Papatuanuku, including the natural resources of Te Ika a Maui and Te Wai Pounamu, and all things in their kainga, whether below, upon and above the surface.

1.4 The Treaty imposes a continuing obligation on the Crown to take active steps to assist in the preservation of te tino rangatiratanga o te Iwi Maori in respect of their taonga.

Part One – The Subject Matter of the Claim

2. The radio spectrum

2.1 The claim relates to a natural resource called the radio spectrum. The spectrum is the backbone for all modem communications. It has been said that 'no other natural resource has such an immediate impact on modern civilisation as the electro-magnetic spectrum' (Christian J Herter Jnr, 'The Electromagnetic Spectrum – A Critical Natural Resource' (1985) 25 *Natural Resources Journal* 651.

2.2 Electro-magnetic radiation is a form of oscillating electrical and magnetic energy capable of traversing space without the benefit of physical interconnections. This includes radiant heat, light and radio waves. The medium on which the electrical waves fluctuate through space is the electromagnetic spectrum.

2.3 The part of the spectrum known as the 'radio spectrum' can be defined for the purposes of this claim as spectrum exploitable by technology. The majority of the radio spectrum is used for communication purposes in one form or another. At the present moment this relates to spectrum between 3 kHz and 60 GHz. With improving technology this upper limit will rise.

2.4 Specific sectors or bands of spectrum are allocated for particular uses. These bands consist of frequencies for a wide range of services from radio and television broadcasting to mobile phones and satellites.

2.5 The term 'radio spectrum' should not be confused with that part of the spectrum used for radio (AM/FM) broadcasting. The way 'radio' is used in this claim is much wider than that, and encompasses telecommunications and information technology in general, with broadcasting itself a subset of that.

2.6 Under national and international conventions, the spectrum has been divided into bands of frequencies. The frequencies start from approximately 3 kilohertz (kHz) – one thousand cycles per second – and progress up to megahertz (MHz) – one million cycles per second – to gigahertz (GHz) – one billion cycles per second and beyond.

3. Radio spectrum management in New Zealand

3.1 Until 1989, the New Zealand spectrum was managed under a radio-licensing regime administered by the New Zealand Post Office. Under this system users were granted a licence to transmit at a particular frequency or frequencies on a first come first served basis.

3.2 In the 1980's, New Zealand saw a radical reform of spectrum management as part of a broader re-orientation of New Zealand's economic policy. From 1984–1989, the fourth Labour Government introduced a decisive turn away from State interventionism and in favour of the free market. Heavily regulated industries, including finance, communications, and transport, were liberalised or de-regulated.

3.3 In the communications sector, this de-regulation was achieved at a great pace. The state-owned Post, Telephone and Telegraph monopoly and a monopolistic public broadcasting corporation were all de-regulated.

3.3.1 In 1987, the telecommunications business was separated from the New Zealand Post Office, to become a State owned enterprise, Telecom Corporation of New Zealand Ltd (Telecom);

3.3.2 In 1990, Telecom was sold to two American telephone companies, Ameritech and Bell Atlantic for US$2.4 billion;

3.3.3 In 1989, Broadcasting Corporation of New Zealand (BCNZ) split into Television New Zealand and Radio New Zealand;

3.3.4 Also in 1989, the Radiocommunications Act was passed.

3.4 In drafting the reform plans, the New Zealand Government relied heavily upon the 'Spectrum Economics' literature developed in the United States, and in particular on a report commissioned from the British/American Consulting firm National Economic Research Associates (NERA). The NERA report blueprinted a radical reform of spectrum management along free-market lines. The report proposed creating permanent private property rights to the spectrum, tendering them off to private users, and permitting market exchanges among property owners to achieve a fair allocation of frequencies. The reform process was to be concentrated on the bands between 44 MHz and 3.6 GHz. The report became the basis for the new Radiocommunications Act 1989.

4. Radiocommunications Act 1989

4.1 The New Zealand government developed a strategic framework for radio spectrum management based on a *tradeable spectrum rights regime*. The framework is designed to facilitate competitive access to key radio frequency spectrum bands for the development of commercial telecommunications and broadcasting services.

4.2 The Crown's commitment to this strategy is contained within the Ministry of Commerce paper *A Strategic Framework for Radio Spectrum Management in New Zealand* (Wellington, September 1997, Document PB17, page 6):

> 'The New Zealand Government has stated that its objective is to establish and maintain efficient markets in telecommunications goods and services. To this end it has adopted policies and promoted statutory measures to facilitate competitive entry into those markets, and to maintain the conditions for effective competition. The key statutory provision in respect of spectrum is the Radiocommunications Act 1989. While facilitating the continuation of the traditional licensing regime based on technical regulation, the Act also provides for the establishment of tradeable, long term access rights to frequency bands.'

4.3 The Act defines 'radiocommunication' as 'any transmission, emission, or reception of signs, signals, writing, images, sounds, or intelligence of any nature by radio waves'. The radio waves referred to are frequencies between 9kHz and 3000GHz. Current technology in radiocommunications can only usefully exploit radio waves up to a limit of 30GHz.

4.4 The Act establishes a Register of Radio Frequencies which records all management rights and particulars of frequency transfers. Section 10(2) requires the Registrar to record all management rights (and transfers of management rights) upon application of the Secretary of Commerce.

4.5 Section 11(1) provides:

> 'Every record of management rights constituted under Section 10(2) of this Act shall, when recorded *name the Crown* acting by and through the Secretary *as the manager of the frequencies* to which the record of management rights relates.' (emphasis added)

4.6 A management right, as created under the Act, implies ownership of a nationwide band of frequencies for twenty years, and involves the legal right to issue licenses to use frequencies within a specified band (known as spectrum license rights). The nature of management rights is defined as in Part IV of the Act. They are tradeable, and can be mortgaged, or be subject to caveats, in a scheme very similar to the Land Transfer Act 1952.

4.7 Therefore, whatever subsequent transfers of rights may occur under the Act, the initial and underlying 'radical title' to the spectrum itself is vested in the Crown. (See also section 33(1): upon the expiry of the management right period, currently a maximum of twenty years, all rights are once again vested in the Crown.)

4.8 The only reference in the Strategic Framework document PB17 to the Crown's obligations under the Treaty of Waitangi can be found at section 3.4.2:

'The Radiocommunications Act 1989 makes no explicit provision for the Treaty of Waitangi in radio spectrum management matters. However successive governments have acknowledged the importance of broadcasting in the preservation and development of Maori language and culture, and in this context, it has been the practice of government to reserve frequencies for such purposes.'

4.9 Frequencies are also reserved on 'public policy grounds' for maritime and aircraft use, and emergency communications. The government also has international obligations as a member state of the International Telecommunications Union (ITU).

4.10 The auctioning policy, and the creation of management rights in the Crown under the Radiocommunications Act 1989 in general, was the subject of intense opposition by Maori groups in 1989, and in particular, the New Zealand Maori Council. That claim and its relevance to the present claim is addressed in Part Two of this statement of claim.

5. Radiocommunications Act Amendment Bill

5.1 Amendments to the Radiocommunications Act 1989 are proposed in the Radiocommunications Act Amendment Bill which is currently before the House. The most contentious amendment for the purposes of this claim is the proposal to create a management right of much longer duration than the current maximum of twenty years, and even a provision which will allow the renewal of a management right period before the expiry date. The Crown wishes to reduce the administrative costs of auctioning rights at regular intervals, and increase the value of the right for the purposes of development and investment.

6. The auction process

6.1 The government intends to progressively convert the spectrum identified as having commercial potential from the old radio-licensing regime to the new spectrum management rights regime. In some cases, only spectrum licences are issued and the management rights themselves are retained by the Crown. On the whole, the management rights over the spectrum bands themselves are to be allocated to the private sector by way of *multiple round auctions*.

6.2 The auctioning process is in six stages:

6.2.1 The Ministry of Commerce issues a call for expressions of interest in the frequency band under consideration.

6.2.2 An engineering plan is formulated to define the rights, including the protection limits, the band size, transmission sites etc.

6.2.3 Cabinet approval for the tender is obtained, and the management or license rights are created. This involves a formal application to the registrar of radio frequencies.

6.2.4 A call for tenders is issued. The current auctions are being conducted via the Internet.

6.2.5 The bids are processed and the results announced. The results are subject to Commerce Commission clearance under the Commerce Act 1996 on competition policy grounds.

6.2.6 The management or license rights are transferred to the successful tenderers.

6.3 Since the Act was introduced, the Crown has created a limited number of licence rights and allocated them to private interests by tender. The majority have been for frequencies suitable for broadcasting.

6.4 Last year the Crown disposed of actual management rights to the non-broadcasting spectrum, as opposed to spectrum licence rights. These rights applied to spectrum in the 'Super High Frequencies' (SHF) which range from 3–30 Gigahertz.

7. Auction of frequencies 25–29 GHz – February 1998

7.1 On 22 November 1997, the Ministry of Commerce announced in the media that there was to be a sale of management rights in the 25–29 GHz range. The frequencies transmit and receive data via a local wireless data and communications distribution system known as LMCS/LMDS.

7.2 In American literature the term Local Multipoint Distribution Service (LMDS) means the same as Local Multipoint Communications Service (LMCS/LMDS) which is used mostly outside of America. New Zealand has generally adopted the term InterActive Multimedia Services (IMS) to describe the frequency band in which LMCS/LMDS reside.

7.3 A LMCS/LMDS distribution system is comprised of multiple low powered transmitter/receivers, each covering an area of approximately 2 to 5 kilometres. The coverage area of the tower and the transmitter/receiver channels are known as cells. A number of cells can be combined together to extend coverage over a larger area.

7.4 To date LMCS/LMDS has been extensively used overseas for subscription multi-channel television distribution, similar to services provided by cable networks. With the increasing demand for high speed data services to the home and advancements in technology a range of new digital services are due to be offered in the near future. These include telephone services, video teleconferencing, high-speed data access and interactive services.

7.5 Correspondence between Professor Whatarangi Winiata and the Minister of Communications had revealed that Maori were very concerned with the attitude of the Crown in proceeding to dispose of rights to the 25–29 GHz frequency range without addressing the wider issues of Maori participation in spectrum management. It was clear from correspondence that the Maori Treaty partner did not regard the Crown's obligations in relation to spectrum management as solely one of ensuring that frequency reservations were available for the preservation of te reo and Maori culture.

7.6 Repeated requests were made to the Crown (including requests from other Maori Members of Parliament) to postpone the auction process until a negotiated solution to these issues had been reached, or to 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 Maori.

7.7 The Crown refused to postpone the auction, or to reserve any frequencies, saying that it 'rejected' the notion that Maori could have any interest in the spectrum beyond that of the

preservation of the language. Furthermore, because the sale related to frequencies 'not suitable for broadcasting', there was no need to consult with Maori to determine whether the frequencies might have been useful for the protection and promotion of te reo and culture.

7.8 In fact subsequent research (including a report commissioned by the government) has shown that the frequencies would have been extremely effective for Maori purposes, both economically, and in the protection and promotion of te reo and the culture.

8. The 2GHz band of frequencies

8.1 In 1997, the Ministry of Commerce (MOC) produced a draft management plan for the progressive sale of frequencies within the 2GHz range (Ministry of Commerce, DP8). The 2GHz spectrum band is defined by MOC as frequencies between 1,700,000,000 Hertz (1.7GHz) and 2.3GHz.

8.2 The 2GHz spectrum is an extremely valuable economic resource, and has enormous commercial potential. It is part of a limited range of spectrum used to support advanced fixed and mobile cellular services.

8.3 The 2GHz band is of great importance and value because cellular technologies are the next significant development of telecommunications overseas and in New Zealand. These developments are known as:

8.3.1 DCS 1800 – a second generation PCS (Personal Communication Service) cellular mobile system (Europe);

8.3.2 PCS 1900 – a second generation PCS cellular mobile system (USA);

8.3.3 IMT 2000 – a third generation cellular system developed by the ITU.

8.4 All three systems will provide advanced new services described below:

8.4.1 The quality of the service will equal that of a fixed network;

8.4.2 A diverse range of cellular technologies presently available can be unified under the new technology to give better service to users;

8.4.3 The equipment used in this band is mass-produced and so is cheaper and therefore more widely accessible to customers;

8.4.4 The integration of terrestrial and satellite services will provide extended opportunities for development and cheaper access to satellite technology;

8.4.5 Mobile terminals (even as small as pocket-size) will support fully operational video, multimedia, computing, and broadcasting facilities;

8.4.6 The capacity of existing spectrum services can be vastly increased (for example, digital TV has four times the capacity of one standard TV channel).

Part Two – The Tribal Interest in the Resource

9. Hierarchy of interests

9.1 The Tribunal has developed a consistent discourse dealing with the 'hierarchy of interests' in natural resources. This is based on the concept that the Crown's right of

governance is limited by the guarantees under Article II of the Treaty and derives support from North American and Canadian jurisprudence.

9.2 First in the hierarchy is the Crown's right, and duty, to manage or regulate resources in the interests of conservation and public safety. Second is the tribal interest in the resource. Third are the commercial and recreational interests in the resource.

9.3 The Crown has a right to regulate the radio spectrum in accordance with its interactional obligations, to protect against interference, omissions, and provide reservations of frequencies for emergencies, and public utilities like aircraft, ships, CB radio and the like. That is an accepted function of the right of kawanatanga.

9.4 The disposal of rights in the radio spectrum resource to private interests is a recognition of, and provision for, the commercial interest.

9.5 This claim concerns the nature of the tribal interest in the resource. The Crown regards the reservation of broadcasting frequencies for the protection and promotion of 'te reo and culture' as satisfying the tribal interest as guaranteed under Article II.

9.6 However the tribal interest is not, and has never been, so narrow.

10. Wai 26/Wai 150 report

10.1 The Waitangi Tribunal has already heard extensive evidence on the nature of the spectrum resource and its significance for Maori (*Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* Wai 26 and Wai 150). The statement of claim filed in the Wai 150 claim described the claim as 'in respect of the Maori language, culture and people in broadcasting.'

10.2 The Wai 26/150 report stated clearly in the introduction that its recommendations did not attempt to address broadcasting issues as a whole. Moreover the report did not traverse the wider issues of spectrum management. The recommendations were confined to the concerns which prompted the urgent hearing, namely, the allocation of AM and FM radio frequencies, and the threat to Maori language and culture under those circumstances.

10.3 However, in reaching its decision on those matters, the Tribunal analysed, and made actual findings on the nature of the Treaty relationship in regard to spectrum management (See Chapter 8: The Treaty, pages 39–44). Essentially, the Tribunal found that Maori had a tribal interest in the natural resource known as the spectrum, rooted in Article II of the Treaty. That tribal interest was above that of commercial or recreational interests.

10.4 The Tribunal's findings are a matter of record, and are summarised below:

10.4.1 No other natural resource has such an immediate and extensive impact on modem civilisation as the electromagnetic spectrum. (page 39)

10.4.2 That portion of the electromagnetic spectrum known as the radio spectrum is a limited natural resource and, at least for the present, a scarce resource. (page 39)

10.4.3 Equitable and careful management of the resource is therefore crucial at domestic and international levels. (page 39)

10.4.4 Even though the spectrum was not evident at the time of the signing of the Treaty, it has been part of the universe since the time of creation. (page 41)

10.4.5 In this way it is similar to the offshore fishery resource. Its use was to be a matter of negotiation between Maori and the Crown. (page 41)

10.4.6 The spectrum is a taonga to be shared by the tribes and by all mankind. Neither of the Treaty partners can have monopoly rights to this resource. (page 41)

10.4.7 The responsibility for the management of this resource is as important as the right of access, and the manner, nature and degree of the access must be the subject of effective consultation between the tribes and the Crown. (page 41)

10.4.8 The key principle in the management of the spectrum is partnership. (page 42)

10.4.9 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 over this resource. (page 42)

10.4.10 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 follows those who have commercial or recreational interests in the resource. (page 42)

10.4.11 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 the culture. (page 43)

10.5 The Tribunal's findings clearly apply to the radio spectrum as a whole and were not intended to be restricted to matters of language and culture only.

10.6 The recommendations contained in Chapter 9 apply these principles to the matters that were under urgency – the protection of Maori language and culture in broadcasting (radio and television).

10.7 It is contrary to the spirit of the Treaty and contrary to the context of the Report to restrict the Tribunal's findings on the spectrum as a whole to matters solely concerning the protection of language and culture in broadcasting.

11. Application of Tribunal's report to present claim

11.1 This claim does not seek to re-litigate the findings made in the Wai 26/Wai 150 claim. Correspondence from Maori to the Minister of Communication consistently requests that those findings on 'partnership' and the 'hierarchy of interests' be given effect.

11.2 The claimant seeks from this Tribunal confirmation of those findings to force the Crown to negotiate with Maori over spectrum management. The matter is of urgency because the Crown insists on hastily pushing through its policy of privatisation.

12. Crown attitude to the tribal interest

12.1 The Tribunal findings have been consistently ignored by the Crown in its framing of its allocation strategy for radio spectrum.

12.2 The claimant apprehends there are four major elements to the Crown's attitude:

12.2.1 Firstly, the view of the Crown is that the Tribunal's report in Wai 26/150 does not refer to special provision for Maori in the radio spectrum itself, other than its use for broadcasting, and only then in relation to the protection of language and culture.

12.2.2 Secondly, the Crown has insisted that the exercise of the Secretary of Commerce's powers under the Radiocommunications Act 1989 in creating management rights and access rights to the spectrum is merely the right of regulation and the Crown was not asserting any authority or ownership beyond that.

12.2.3 Thirdly, the general right of Maori to enjoy the benefits of scientific and technological advances since the Treaty stem from Article III which granted Maori the same rights as British subjects. Maori should therefore tender for the spectrum with the rest of the population.

12.2.4 Finally, the Crown believes that 'consultation processes' in relation to the allocation of frequencies are in accordance with the Tribunal's findings on the partnership that should exist between Crown and Maori in the management of the spectrum.

12.3 The Maori view is to the contrary:

12.3.1 The Crown's refusal to acknowledge and discuss radio spectrum issues for Maori other than those that relate to the protection of language and culture through the medium of television and radio broadcasting is an unduly narrow interpretation of the Treaty partnership and not in accordance with the obligations of good faith.

12.3.2 The disposal of frequency by sale for 20 years (and possibly beyond) is not a regulatory or management role of the kind appropriate to kawanatanga, but more akin to the exercise of a proprietary right of ownership contrary to the Treaty guarantees of tino rangatiratanga and the Tribunal's findings. Because the resource was not known about at the time of the Treaty *neither* party can have monopoly rights in terms of the resource.

> 'As we see it, 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 this resource. Maori interests in natural resources are protected by the distinctive element of tino rangatiratanga' (Page 42).

12.3.3 The assertion that the Maori interest in the radio spectrum resource is an Article III right along with the rest of the population was relied on by the Crown in the Wai 26/150 hearings, but specifically rejected by the Tribunal (page 42–43):

> 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 . . . 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.

13. The Major Spectrum Users Advisory Group (MSUAG)

13.1 In deciding on its policy, the government sought advice from a wide range of commercial interests involved in the industry. That group, later known as the Major Spectrum Users Advisory Group (MSUAG), met first in May 1997, and continues to provide the government with advice and direction in terms of the policies to be implemented. Maori have not been involved with MSUAG or in any other spectrum advisory role, nor have Maori been invited to participate in this way. Oral entreaties have been made by Mr Graeme Everton to officials of the Ministry of Commerce but to no avail. The tribal interest in the resource has been effectively ignored, in favour of the commercial interest.

14. Benefits to Maori from the spectrum resource

14.1 The radio spectrum represents an opportunity for Maori to use spectrum resources to develop economic, cultural and social opportunities in the telecommunications sector.

14.2 Currently Maori are severely under-represented in the telecommunications field. No coordinated effort has been made to ensure Maori participation. The Crown's continued denial of Maori rights to spectrum resources risks alienating Maori permanently from becoming established in the telecommunications industry. Therefore while the claim is not specifically directed at the protection of language, it is concerned with the wellbeing and advancement of Maori culture in its broadest sense. Access to and the management by Maori of a reasonable share in the radio spectrum will enhance and promote Maori economic, social and cultural development.

14.3 Moreover it has been widely acknowledged by Maori, the Tribunal and the Crown that fiscal constraints hinder the Crown's capacity to fully compensate Maori for the losses they have suffered as a result of the multiple breaches of the Treaty. Recent tribal settlements reflect perhaps 3% of the total estimated loss suffered. The spectrum, a relatively new resource to which the Crown and Maori have a legitimate interest, can provide an opportunity for the Crown to address the disparity in the compensation offered Maori under other settlements. Thus, not only does the Crown have an obligation to recognise and provide for the Article II interest in the resource, but the Crown has the further obligation to make good wherever possible, the lack of overall compensation. Such an obligation is inherent in the nature of the Treaty relationship of fairness, good faith and partnership.

Benefits of LMDS/LMCS frequencies

14.4 LMDS/LMCS offered Maori the opportunity to not only deliver Maori programming to homes but the ability to offer enhanced services such as voice and data communications and Internet access. Based on emerging high frequency wireless technology, LMDS/LMCS offered a fast cost effective means for Maori to make a realistic investment in the telecommunications industry.

14.5 For example using wireless technology allows new entrants to set-up a network quickly and at a lesser cost compared to a conventional wire/cable network. In the case of LMDS/LMCS technology Maori could have initially invested in developing a network in a high-density population/central business area for the best investment return.

14.6 The physical network could consist of a multi-node wireless transmitter/receiver system, spread throughout a defined area to achieve the widest coverage. The transmitter/receivers could be situated on either buildings or towers similar to cell towers and like cell phones offer a convenient and effective means of communicating. As connections are wireless based homes and business covered by the network would only require the installation of a small antenna and desktop box to receive services. Therefore customers could be set up quickly and at less cost compared to a wire/cable option. As wireless technology provides for high-speed data connections, this makes it possible for the network provider to offer a wider range of enhanced services from multi-language broadcasting to CD quality music play.

14.7 Assessing the potential uses and benefits of new technology is to a degree speculative, however the above examples illustrate that proper research needed to be conducted into the implications for Maori of the frequencies before the Crown could dismiss the tribal interest so categorically.

Benefits of the 2 GHz range

14.8 The Ministry of Maori Development (TPK) has commissioned a report by a Telecommunications Consultancy firm specifically to address the potential benefits of the 2 GHz range for Maori. That report has been obtained under the Official Information Act 1982 after considerable pressure was placed on Ministry officials who did not want the report released. This claim relies on the report's findings which are canvassed in the next section.

15. Commissioned report to Te Puni Kokiri

15.1 The Ministry of Maori Development commissioned a Telecommunications Consulting Company to undertake a report on the uses and implications of the 2 GHz radio spectrum and other frequencies generally, and more particularly as they apply to the protection and promotion of Maori language and culture. The report was presented in December 1998 (Te Puni Kokiri, *Implications of Radio Spectrum for Maori Language and Culture*, December 1998).

15.2 Despite the restrictions placed upon the consultants that the report should still focus on the te reo and culture aspects of Maori advancement, the report makes the following recommendations:

- *Spectrum and telecommunications are major issues for Maori, and the situation is rapidly evolving. Immediate action is recommended to develop a comprehensive policy on telecommunications issues as they affect Maori language and culture. Policies for broadcasting and telecommunications should be harmonised.*
- *The 2 GHz auction is an important step in determining the direction of telecommunications for the next 20 years. It is a 'one off' opportunity for Maori which should be acted on immediately. Long term strategies to enable Maori to position for future spectrum auctions outside 2 GHz, or for other structural changes in the industry, are also recommended.*
- *Research into the telecommunications services currently available to Maori and their current and future needs to be recommended.*

- *Further research into overseas precedents on the provision of radio spectrum to indigenous peoples is recommended.*
- *It is recommended that TPK participate in the MSUAG (Major Spectrum Users Advisory Group).*

15.3 The report vindicates the claimant's stance that the 2GHz frequency range does have enormous potential for the advancement of Maori.

15.4 The report also highlights the urgency of the situation, and the prejudice that Maori will suffer if the alienation by auction proceeds.

16. International obligations

16.1 The International Telecommunications Union (ITU) is a branch of the United Nations that coordinates international government and private sector co-operation in the development of telecommunication programmes, policies and standards. The ITU consists of three sectors. These are:

- Radiocommunications (ITU-R)
- Telecommunications (ITU-T)
- Development (ITU-D)

16.2 Of the three sectors the ITU-D is responsible for developing initiatives which advance universal access to telecommunication resources for both developing and developed countries. As part of its operation the ITU-D holds an international conference every four years called the World Telecommunications Development Conference (WTDC). The conference brings together both member states and sector members to develop policies and programmes which are then implemented by the ITU-D in the four-year period between conferences.

16.3 The first WTDC conference was held in Buenos Aires in 1994 and resulted in the Buenos Aires Declaration and the Buenos Aires Action Plan (BAAP). Both the declaration and action plan set the frame work for development of international telecommunication policy, while providing the impetus for a number of international research projects and co-operative ventures assisting both developing and developed countries.

16.4 The second conference was held in Valletta Malta from the 23 March 1998 to the 1 April 1998. A paper (document 113) submitted by Professor Whatarangi Winiata was presented to the conference asking delegates to consider the plight of indigenous people when developing telecommunication policy. This was later followed by a paper (document 174) submitted by the New Zealand delegation asking the ITU-D to initiate a study question researching the role of telecommunications in the social and cultural development of indigenous people. It also proposed a resolution asking the ITU-D to pay particular attention in its work programmes and activities to the role of telecommunications in meeting the needs for economic, social and cultural development of indigenous people.

16.5 Both the study question and the resolution were adopted by the conference for inclusion in the final Valletta Declaration and Valletta Action Plan. The final draft was ratified at the ITU Plenipotentiary meeting in October 1998.

PART THREE – RELIEF

17. Breaches of the Treaty of Waitangi

17.1 The claimant states that the actions, omissions and policies of the Crown and its agents as referred to in this statement of claim have had prejudicial effects on te iwi Maori.

17.2 Radiocommunications Act 1989

17.2.1 failing to acknowledge te tino rangatiratanga residing in whanau, hapu and Iwi Maori over the radio spectrum;

17.2.2 assuming for itself the exclusive authority to manage the spectrum and in so doing ignoring the principle of partnership;

17.2.3 failing to establish, in consultation with Maori, adequate principles, policy and legislative framework for Maori partnership in spectrum management;

17.2.4 continuing to develop and pursue spectrum management policy, excluding the legitimate participation of Maori;

17.2.5 vesting in itself through the provisions of the Radiocommunications Act 1989 and its amendments the sole authority to create a property right in the form of a management right in the first instance and to sell that right on an exclusive basis and without consultation with or the agreement of Maori;

17.2.6 vesting in itself through the provisions of the Radiocommunications Act 1989 and its amendments the total revenue from the sale of management rights to the spectrum;

17.2.7 proposing a spectrum management policy which advocates the sale of frequencies and management rights to private interests over the next six years, while remaining silent on the rights of Maori to guaranteed access to radio spectrum resources for purposes other than the protection and promotion of Maori language and culture through broadcasting.

17.3 Disposal by Auction of Frequencies 25–29 GHz

17.3.1 Announcing in 1997 the sale by auction of frequencies in the 25–29 GHz range without informed consultation with and agreement of Maori on any of the following:

(a) The disposal of the control to the resource itself, which neither Treaty partner has a monopoly over;

(b) Whether Maori had any use for the spectrum to be disposed of, for their own economic advancement;

(c) Whether Maori, in their own wisdom, regarded the spectrum as useful for the Crown's obligations to promote and protect te reo Maori and the culture.

17.4 Proposal to Auction 2 GHz range

17.4.1 announcing on the 22 December 1998 the sale of radio frequency licenses and spectrum Management Rights for frequency bands 1.7 to 2.3 GHz, planned auction in the first three months of 1999 and frequencies in the UHF band suitable for Digital Terrestrial

Television (DTT), planned auction for August 1999, without informed consultation and agreement with Maori any of the following:

(a) The disposal of the control to the resource itself, which neither Treaty partner has a monopoly over;

(b) Whether Maori has any use for the spectrum to be disposed of, for their own economic advancement;

(c) Whether Maori, in their own wisdom, regard the spectrum as useful for the Crown's obligations to promote and protect te reo Maori and the culture.

17.5 MSUAG/Maori Advisory Group

17.5.1 Failing to provide for any forum where Maori could advise the government on issues related to spectrum;

17.5.2 Failing to provide a guaranteed place on MSUAG, the industry advisory body to the government.

17.6 The Tichbon Report

17.6.1 The retention of vital information on the implications of the 2GHz spectrum for the benefit of Maori language and culture without due consultation with Maori on the ramifications of the report;

17.6.2 Maintaining that the sale of 2GHz has no relevance to Crown's obligations to protect and promote te reo and the culture in the face of the report which established the exact opposite;

17.6.3 Obstructing the right of the Maori to peruse the report, even in the face of an Official Information Act request, and knowing that the Maori would be directly affected by the contents of the report;

17.6.4 Allowing a sale of those frequencies that are the subject of the report to proceed, and ignoring all of the recommendations contained in the report.

17.7 International Obligations

17.7.1 Failing to consider or provide for its international Treaty obligations under the ITU for the recognition of the importance of telecommunications to the economic, cultural and social development of indigenous peoples.

18. Interim relief

18.1 The claimant seeks an urgent interim recommendation that the proposed auctions by the Crown of 2GHz management rights commencing on 29 March 1999 be postponed until a negotiated agreement with Maori on these issues has been reached.

18.2 The grounds for such relief are:

18.2.1 Significant prejudice will be caused to Maori if the proposed auctions proceed without a full and deliberate determination of the issues in this claim. The auctions will effectively alienate management rights in the 2GHz spectrum range to commercial interests, for a period of at least 20 years;

18.2.2 Through the denial of their rightful place in the partnership to the spectrum resource, Maori will lose their share of the valuable economic benefits to be gained from

participation in the telecommunications industry, and will lose their share to the revenue gained from the sale of the rights;

18.2.3 The Tichbon report has illustrated that urgent action is needed by TPK to protect Maori interests before the sale proceeds, however the recommendations have been ignored;

18.2.4 Maori have no resources with which to fully consult amongst themselves as to their aspirations for the use of the telecommunications spectrum, and the alienation of management rights in the higher spectrum frequency bands will deny them the opportunity to do so;

18.2.5 No great prejudice will be suffered by the Crown if the auctions are postponed. The policy of commercialisation and privatisation is at its early stages of implementation, and there is no need for haste in the pursuing of the policy;

18.2.6 The exercise of restraint by the Crown rather than pushing through its policy without justifying the underlying basis of their right to do so, will avoid costly and time-consuming legal challenges in the future;

18.2.7 There is no contractual obligation on the Crown to tender on that specific date or within such a tight timeframe. It is unlikely that third party interests will therefore be significantly affected;

18.2.8 There is a precedent for the situation where the Crown has postponed an auction. In January 1998, the auction of frequencies in the 25–29 GHz range was postponed due to technical failures (The Maori request to postpone was rejected).

19. Relief

19.1 The claimant seeks recommendations that:

19.1.1 the findings in the Wai 26/150 report did not apply merely to where Maori language or culture is at stake in broadcasting, but to the tribal interest in telecommunications generally;

19.1.2 Maori have a guaranteed right under the Treaty of Waitangi to participate in spectrum management and are entitled to benefit economically, culturally and socially from its management;

19.1.3 the Radiocommunications Act 1989 in so far as it vested in the Crown all management rights to the spectrum from 9 kHz to 3000 GHz without consultation with or the agreement of Maori assumed a monopoly over the resource and is in breach of the Treaty of Waitangi;

19.1.4 the Radiocommunications Act 1989 in so far as it alienates management rights without consultation with Maori is in breach of the Treaty of Waitangi.

19.2 And further, the claimant seeks recommendations that:

19.2.1 the current spectrum management policy be discontinued until a negotiated solution with Maori on the issues raised in this claim has been reached;

19.2.2 the Crown provide funding and other support for Maori to undertake urgent research and consultation amongst themselves into the implications of the government's telecommunication policy on Maori and opportunities for Maori participation in the telecommunications industry;

19.2.3 that the Crown support the active participation by Maori in the telecommunication industry and in negotiation with Maori reserve sufficient radio spectrum to ensure sustained and ongoing development;

19.2.4 the Crown and Maori negotiate a strategic framework for the long term management of the spectrum;

19.2.5 the Crown compensate Maori for their share of revenue which has been expropriated by the Crown from

(a) the frequency licences regime operating since before the Radiocommunications Act 1989; and

(b) the rights to spectrum revenue generated from the sale of management rights in frequencies under the Radiocommunications Act 1989; and

19.2.6 other recommendations the Tribunal thinks appropriate.

19.2.7 The claimants also seek costs.

20. Amendments

20.1 The claimant reserves the right to amend or add further to the claim as appropriate.