

CHAPTER 5

FINDINGS AND RECOMMENDATIONS

5.1 FINDINGS

We find both limbs of the claim to be well founded and believe that the claimant would be prejudiced if the Crown were to proceed with the proposed auction of 2 GHz frequencies without previously reserving for Maori a fair and equitable portion of those frequencies.

We also find that the Radiocommunications Act 1989, in so far as it allows the Crown to alienate management rights to the spectrum from 9kHz to 3000GHz, without consultation with Maori and without allowing them a fair and equitable share of those rights, is in breach of the principles of the Treaty of Waitangi.

Our finding on the first limb of the claim follows the reasoning of the allocation of radio frequencies Tribunal (which also considered Crown proposals to allocate different parts of the spectrum). We also accept the claimant's argument that the electromagnetic spectrum, in its natural state, was known to Maori and was a taonga. And we accept that they have a right under Treaty principles to the technological exploitation of that spectrum after 1840, just as the Wai 26 and Wai 150 claimants had a right, in the view of that Tribunal, to a fair and equitable allocation of the radio frequencies then being offered by the Crown. Our finding on the second limb of the claim follows the reasoning of the *Report on the Te Reo Maori Claim*, which accepted that Maori language and culture were taonga, which the Crown was bound by article 2 of the Treaty to preserve.¹

The operative Treaty principles, which are applicable to both limbs of the claim, are as follows:

Partnership: whereby the Crown was obliged to protect the properties of its Treaty partner and, in any attempt to convert a regulatory regime into a property right, was required to consult and negotiate with its partner a fair and equitable share of that property.

Rangatiratanga: the Crown cannot use its kawanatanga right, which allowed it to regulate the resource in the public interest, to convert that right into private property (albeit technically for only 20 years) without considering the Maori rangatiratanga right to both own and manage that resource.

Fiduciary duty: the Crown has an additional fiduciary duty, running right through the Treaty, to protect Maori 'just Rights and Property' and, in the event of Maori

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

being adversely affected by the process of colonisation, to correct that imbalance by affirmative action.

Mutual benefit: Maori expected, and the Crown was obliged to ensure, that they and the colonists would gain mutual benefits from colonisation and contact with the rest of the world, including the benefits of new technologies.

Development: Maori expected and were entitled to develop their properties and themselves and to have a fair and equitable share in Crown-created property rights, including those made available by scientific and technical developments. The Treaty – or rather the two Treaties that the parties agreed to – needed to evolve to meet new and changing circumstances.

5.2 RECOMMENDATIONS

We recommend, as we did in our interim report, that the Crown suspend the auction of 2GHz frequencies until such time as it has negotiated with Maori to reserve a fair and equitable portion of the frequencies for Maori. In our view, such an arrangement is preferable to some form of compensation by the Crown in lieu of spectrum frequencies. Maori must have hands-on ownership and management if they are to foot it in the ‘knowledge economy’, as we believe they must in the coming millennium. Once again, we do not attempt to prescribe what the Maori share should be, since that is a matter for negotiation between the Treaty partners. We are also reluctant to specify what Maori should do with their share of the spectrum, though we consider that they should retain a substantial ownership stake, even if they decide to lease some of it or to enter into joint partnerships either with the Crown or with private enterprise.

We again recommend that the claimant make arrangements with her iwi and a national Maori body to negotiate with the Crown for the reservation of a portion of the spectrum. Although the earlier te reo Maori and allocation of radio frequencies claims were lodged by individuals, they were backed by wider Maori organisations and were regarded as national Maori claims. The allocation of radio frequencies claim was backed by the New Zealand Maori Council, which has merely had an observer status during our inquiry. We think that the council or one of the other national bodies should step forward, since this too is essentially a claim that concerns ‘all Maori’.

Because this is in effect a national Maori claim, we recommend that the Crown and Maori consider establishing a Maori trust, somewhat along the lines of the Crown Forestry Rental Trust, as Professor Winiata appeared to suggest in our hearing, but without that trust’s responsibility to use income to research Treaty claims. Any income that a Maori spectrum trust received – say, from the development or lease of frequencies – could be used to develop infrastructure for remaining Maori frequencies or to educate and train Maori staff for employment in that infrastructure or elsewhere in the telecommunications industry.

The claimant has sought recommendations from us that the Crown provide funding and other support for Maori to undertake urgent research and consultation amongst themselves into the implications of the Government's telecommunications policy for Maori, and on opportunities in the telecommunications industry. She has also sought a recommendation that the Crown and Maori negotiate a strategic framework for the long-term management of the spectrum. While we believe that these requests deserve support, they need to be reordered. It would be appropriate at this stage for the Crown to provide some assistance to Maori to sort out a properly mandated national body to negotiate with the Crown for the reservation of the spectrum – a matter of considerable urgency. Once that body has been selected and the two Treaty partners have negotiated an appropriate reservation for Maori of spectrum rights, as we have recommended above, we think that the two Treaty partners could then work out a long-term plan for the management of future allocations of spectrum rights. As we have suggested above, the ownership and management of spectrum frequencies, perhaps in joint-partnership operations, could facilitate Maori participation in the telecommunications industry.

The claimants have asked that the Crown compensate them for 'their share' of revenue 'expropriated' by the Crown from the sale of frequency licences before and after the passing of the Radiocommunications Act 1989. We cannot see that they have a good claim for revenue from licences before the Act came into force, but suggest that they may have some claim to revenue from licences after it came into force. However, any such claim would have to be offset against the value of licences that have already been granted to Maori.

Finally, the claimants have asked for costs for the bringing of this claim. We recommend that these be granted.

