

WAITANGI TRIBUNAL

Wai 2844

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Te Reo Iriangi o te Upoko o
te Ika Claim

**DECISION
ON APPLICATION FOR AN URGENT HEARING**

27 March 2019

Introduction

1. This decision concerns an application for an urgent inquiry into Wai 2844, the Te Reo Irirangi o Te Upoko o te Ika Claim. The claim is brought by Tere Harrison, Secretary of Ngā Kaiwhakapūmau i te Reo, and Tamati Cairns, Chairperson of Te Reo Irirangi o Te Upoko o te Ika Trust.
2. The claim concerns the operation and ownership of the broadcasting licence for the 1161AM Te Reo Irirangi o Te Upoko o te Ika radio station (Upoko). The applicants allege that the Crown has breached the principles of the Treaty of Waitangi through its broadcasting policies which have effectively removed the applicants' interest in Upoko and driven the station to the point of imminent closure.

Procedural History

3. The Tribunal received the statement of claim and application for an urgent inquiry for Wai 2844 on 16 November 2018, with further information received on 20 November 2018 (Wai 2844, #1.1.1).
4. On 18 December 2018, the Crown filed its submissions in response (Wai 2844, #3.1.4), accompanied by an affidavit of Robert Galvin from Te Puni Kōkiri (Wai 2844, #A1).
5. The applicants filed submissions in reply to those of the Crown on 8 January 2019 (Wai 2844, #3.1.5), accompanied by an affidavit of Piripi Walker, Deputy Chairperson of Te Reo Irirangi o Te Upoko o te Ika Trust (the Trust) (Wai 2844, #A2).
6. On 4 February 2019, the Tribunal received an affidavit of Erana Keelan-Reedy, Chief Executive Officer of the Radio Ngāti Porou Charitable Trust, in support of the application (Wai 2844, #A3).

Background

7. Upoko started broadcasting in 1983 and is the oldest Māori radio station in New Zealand. Ngā Kaiwhakapūmau i te Reo was issued a licence for the 1161AM frequency by the Broadcasting Tribunal in 1985. After initially broadcasting only sporadically, the Upoko radio station began regular broadcasts in 1987.
8. The Radiocommunications Act 1989 changed the regime for issuing broadcasting licences. The Broadcasting Tribunal was disestablished, and the Ministry of Commerce became responsible for issuing broadcasting licences.
9. In 1991, a second licence was created for the 1161AM frequency for the hours Upoko was not broadcasting, and granted to Te Atiawa, Ngāti Toa and Ngāti Raukawa, as the iwi with mana whenua interests in the wider Wellington region. This licence had an expiry date of 2 April 2011. The Ministry of Commerce also stipulated the same expiry date for the broadcasting licence already held by Ngā Kaiwhakapūmau i te Reo.
10. Responsibility for Māori broadcasting policy was transferred from the Ministry of Economic Development (previously the Ministry of Commerce) to Te Puni Kōkiri in June 2000. Te Puni Kōkiri consulted in 2010 with iwi radio broadcasters and their licence holders on the introduction of new Crown and twenty-year spectrum licences to replace those expiring on 2 April 2011. The new Crown Licence Agreements "targeted the specific requirements of iwi broadcasters" (Wai 2844, #A1 at [11]). Te Puni Kōkiri's consultation on the future of the 1161AM licence appears to have focused on the prospect of Te Atiawa and Ngāti Toa ownership of the licence, rather than continued

ownership by Ngā Kaiwhakapūmau, because Ngā Kaiwhakapūmau was not a “recognised iwi authority” (see Wai 2844, #A1 at [12]-[14]).

11. That year, Ngā Kaiwhakapūmau established the Trust, consisting of members from the mana whenua iwi and “taura here” (members of other iwi), to replace Ngā Kaiwhakapūmau as the owners of the original broadcasting licence and to take over the operation of Upoko. The Trust continued operations of Upoko under the two broadcasting licences until 2011 and from then continued operations until 2017 on temporary short-term licences approved by Te Puni Kōkiri.
12. In 2017, Te Atiawa and Ngāti Toa agreed to joint ownership of the 1161AM licence, and a new single licence was created for the 1161AM frequency and transferred to Te Rūnanganui o te Atiawa ki te Upoko o te Ika a Maui Incorporated and Te Rūnanga o Toa Incorporated (the joint licence holders). The Trust was not a licence holder but continue to operate Upoko through an agreement with the joint licence holders.
13. On 23 August 2018, the joint licence holders agreed to appoint the applicants as their broadcaster until 30 June 2019. Te Māngai Pāho has also granted the applicants funding to broadcast Upoko until 30 June 2019. The two iwi are now in talks with the applicants, Te Puni Kōkiri and other agencies regarding the long-term future of the radio station.
14. The claim relates to alleged actions of the following organisations:
 - a) The Ministry of Commerce, later known as the Ministry of Economic Development, now known as the Ministry of Business, Innovation and Employment.
 - b) Te Puni Kōkiri, the Ministry of Māori Development.
 - c) The New Zealand Broadcasting Commission Irirangi Te Motu, more commonly known as NZ on Air. Established under the Broadcasting Act 1989, NZ on Air is an autonomous Crown entity as defined in s 7 of the Crown Entities Act 2004.
 - d) The Māori Broadcasting Funding Agency Te Reo Whakapuaki Irirangi, more commonly known as Te Māngai Pāhō. Established under the Broadcasting Amendment Act 1993, Te Māngai Pāhō is an autonomous Crown entity as defined in s 7 of the Crown Entities Act 2004.
15. I note that the Crown reserves its position on whether the Tribunal has jurisdiction to consider the policies and practices of NZ on Air and Te Māngai Pāhō (Wai 2844, #3.1.4 at [13]).

Parties Submissions

Applicants' Submissions

16. The applicants allege that they have suffered and will continue to suffer prejudice as a result of Crown policies in relation to the allocation of broadcasting licences, the provision of funding and NZ on Air operational decisions that impact on Upoko.

The broadcasting licences

17. The applicants submit that the Crown, in breach of the principles of the Treaty of Waitangi, decided to grant the broadcasting licence for the 1161AM frequency to the joint licence holders, effectively removing the applicants' rights in relation to Upoko. The applicants submit that when the Crown granted the licence to the joint licence holders, “all the while assuring Te Reo Irirangi o Te Upoko o te Ika Trust Inc that the Trust would continue to be the broadcaster” (Wai 2844, #1.1.1 at [2]). However, the applicants later

discovered that the funding it received from Te Māngai Pāho would only be available if the joint licence holders agreed that the Trust should broadcast on their licence. The applicants have not been able to reach a long-term agreement with the joint licence holders for the Trust to continue broadcasting, and the agreement reached on 23 August 2018 will expire on 30 June 2019. The applicants submit that the funding implications of the joint licence holders owning the licence was not made known to them until after the licence had been granted, giving the Trust no opportunity to protect its interests.

18. While the applicants acknowledge the mana whenua status of the joint-holders, the applicants established Upoko as an inclusive station that would promote the Māori language and broadcast material in a way that reflected the urban and multi-iwi makeup of the Māori population living in the wider Wellington region. The applicants submit that if Upoko is forced to close, there is no other inclusive alternative in the greater Wellington region and Upoko's extensive experience in Māori language broadcasting and policy development would be largely lost.

Funding and operational issues

19. The applicants submit that Crown Māori broadcasting funding policy has already prejudiced the applicants significantly and will continue to cause them prejudice.
20. The applicants submit that in 1991 Ngā Kaiwhakapūmau was advised by NZ on Air that its policy had changed so that licences could no longer be held by the broadcaster. This was why Ngā Kaiwhakapūmau established the Trust to become the broadcaster. The Trust comprises of representatives of the three mana whenua iwi and also members of the many other tribes resident in the Wellington region. Despite this, the applicants submit that in 1993, NZ on Air reclassified Upoko from a pan-tribal station to an iwi station, which reduced their annual funding from \$600,000 to \$300,000. This forced the Trust to layoff Upoko staff and cancel a number of its radio programmes. Upoko has struggled since due to this low-level funding.
21. Further, due to funding from Te Māngai Pāhō being dependent on the joint licence holders agreeing for the Trust to continue operations of Upoko, the Trust has only been able to secure funding until June 2019. As a result, the Trust is unable to make financial and operational decisions that are essential to the survival of Upoko, such as paying for the lease to the building where Upoko operates and providing long-term employment security to its staff.
22. In addition, the applicants submit they are also suffering prejudice as a result of NZ on Air changing the transmitter which lowered the transmission range of Upoko significantly in 1991. They submit that the station lost coverage in areas from Wellington City to Wainuiomata, Upper Hutt, Horowhenua and Manawatū.

Cumulative effects

23. The applicants submit the accumulation of these Crown actions has meant that Ngā Kaiwhakapūmau and the Trust have gone from holding the licence and running Upoko to effectively being a third party to all arrangements between the Crown and the joint-licence holders. Although the Trust and joint licence holders were able to reach an agreement for Upoko to continue broadcasting until June 2019. The applicants submit that the uncertainty of the station's future has caused on-going prejudice and Upoko is now facing "imminent closure" unless the Tribunal intervenes. The applicants seek a "three-yearly funding" agreement that would enable them to continue broadcasting Upoko.
24. The applicants submit that these Crown actions are inconsistent with the principles articulated in the *Report of the Waitangi Tribunal on Claims Concerning the Allocation of*

Radio Frequencies (Wai 26 and Wai 150) and *Te Whānau o Waipareira Report* (Wai 414). They submit that the *Radio Frequencies* report found that in Māori broadcasting, Māori living in urban areas require special consideration and that in the *Waipareira* report, the Tribunal found that non-tribal Māori groups may have rights guaranteed by the Treaty in relation to social welfare.

25. The applicants further submit that the Crown's decisions in relation to the broadcasting licence are inconsistent with its own Treaty settlement policies, in that the Crown's policy is not to use private property to settle Treaty claims, and inconsistent with other decisions regarding Māori radio stations.

Crown's Submissions

26. The Crown opposes the application for an urgent hearing on the basis that it does not meet the Tribunal's criteria for an urgent inquiry, as the applicants have:
 - a) failed to demonstrate that they are suffering prejudice as a result of the Crown's broadcasting policies and actions;
 - b) failed to demonstrate that they are suffering or likely to suffer significant and irreversible prejudice as a result of the Crown's current or pending policies; and
 - c) alternative avenues, through direct engagement with the joint licence holders, to continue their involvement in broadcasting Upoko.
27. As noted above, the Crown reserves its position on whether or not the Tribunal has jurisdiction to consider the policies and practices of Te Māngai Pāho or NZ on Air.

The broadcasting licence

28. The Crown submits that the decision to grant the licence for Upoko to Te Runanganui o Te Atiawa and Te Rūnanga o Ngāti Toa is not causing significant and irreversible prejudice to the applicants. Ngā Kaiwhakapūmau has not held the broadcasting licence for Upoko since 2011. The Crown submits that Te Puni Kōkiri consulted with iwi radio broadcasters and their licence holders on the introduction of new Crown licence agreements in 2010. Te Puni Kōkiri chose to engage with Te Rūnanga o Te Atiawa and Te Rūnanga o Ngāti Toa regarding ownership of the licence because they are the iwi authorities in the Wellington central district. Following discussions between 2010 and 2017, those iwi authorities agreed to joint ownership of the broadcasting licence and the licence was transferred to them in 2017. The applicants have continued to broadcast Upoko through short-term agreements with the joint licence holders. Robert Galvin, for the Crown, deposes that it is "the prerogative of the licence holder to choose their own broadcaster" (Wai 2844, #A1 at [6]).
29. Counsel submits that the applicants continue to be involved in discussions with Te Puni Kōkiri and the joint licence holders around a long-term solution for Upoko. As such, the Crown submits that the applicants have not demonstrated that they are suffering or are likely to suffer any significant and irreversible prejudice as a result of Crown actions.

Funding and operational issues

30. The Crown submits that broadcasting funding is allocated by Te Māngai Pāho on an annual basis. Te Māngai Pāho's statutory function is to "promote Māori language and Māori culture by making funds available, on the terms and conditions that it thinks fit, for broadcasting; and producing programmes for broadcasting; and archiving programmes" (the Broadcasting Act 1989, s 53A). Mr Galvin states that in accordance with this statutory

function Te Māngai Pāho funds 21 iwi radio stations to deliver eight hours of Māori language content each day (Wai 2844, #A1). He states that it grants funding on an annual basis, and that to his knowledge funding has never been on a three-yearly basis, as the applicants claim.

31. The Crown submits that the applicants are not suffering any prejudice from Crown funding policies as Te Māngai Pāhō has granted the applicants funding until 30 June 2019 and Upoko has continued broadcasting as a result.
32. The Crown has not responded to the applicants' allegations in relation to the actions of NZ on Air.

Applicants' Reply

33. The applicants submit that the Crown has interpreted their claim narrowly, focusing primarily on the funding issues. The applicants reiterate that their claim also concerns the following:
 - a) the reclassification of Upoko to a iwi radio station and the prejudicial financial and operational implications this had on the applicants;
 - b) changing transmitters and the prejudice suffered as a result; and
 - c) the alienation of the applicants and taura here from their rights and interests in Upoko.
34. Despite the current agreement with the joint licence holders, the applicants submit that the fact that the joint licence holders extended the Trust's broadcasting rights until June 2019 does not guarantee that the applicants will not suffer prejudice once the current agreement expires. The applicants argue that if their claim is not granted urgency and if the Tribunal does not inquire into, report on and make recommendations on their claim, Upoko is very likely to close down. They submit that "the survival of Upoko depends on the grant of urgency" (Wai 2844, #3.1.4 at [14]).
35. The applicants further submit that the Trust's agreement with the joint licence holders to continue broadcasting Upoko does not change the fact the applicants are still suffering prejudice due to Crown broadcasting policies. The applicants are still unable to make simple financial commitments without any assurances that Upoko will continue to broadcast beyond June 2019. Third party businesses also allegedly continue to lose confidence in Upoko and the applicants may miss out on potential investment opportunities.
36. With regard to the applicants continued engagement with the joint licence holders and Crown agencies, the applicants submit that this is not an alternative remedy as there can be no presumption that these discussions would have a positive result for the Trust and remedy the prejudiced caused by the Crown's policy and actions. The applicants further add that their own confidence in the reliability of the Crown as a partner in Māori broadcasting will be affected if Crown policy leaves Te Māngai Pāhō with no option but to cease funding Upoko beyond June 2019.
37. The applicants' submissions also discuss the significance of Upoko in the history of Māori broadcasting and the revitalisation of te reo Māori and tikanga in the wider Wellington region. The affidavit of Piripi Walker, Deputy Chairperson of the Trust and Ngāti Raukawa appointee to the Trust, provides further context to the history of the applicants, Upoko and its experience with Crown broadcasting policy (Wai 2844, #A2).

Urgency Criteria

38. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

In deciding an urgency application, the Tribunal has a regard to a number of factors. Of particular importance is whether:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Discussion

39. It is not for me to decide on the ultimate merits of the claim. I confine myself to the matter of the grant of urgency. If I do appear to have a view on the merits, that is not to be taken in any way as an inclination of the view that might be taken by the panel who ultimately determine the matter.
40. The issue in this claim is the Crown's decisions regarding the licencing of the 1161 AM radio frequency. I immediately acknowledge that Ngā Kaiwhakapūmau i te Reo and the Trust have been pioneers in Māori radio broadcasting and staunch advocates for the revitalisation and growth of te reo Māori.
41. It cannot be overlooked, however, that their management rights, control and ownership over Upoko had steadily diminished over the last 30 years. They have continued as operators and will do so until at least June 2019. They, however, have not held a licence for Upoko for approximately 8 years. They have simply been allowed, as a matter of grace, to use the rights of the holders of the licence.
42. The joint licence holders are not parties to this urgency application. Their rights in the frequency are akin to a property right. Within the limits of the legislation and the terms of licence, they can deal with it as they decide. The Tribunal is unlikely to make findings or recommendations suggesting that the property rights be interfered with.
43. There is no sufficient evidence to support the applicants' submission that they are the only alternative in the greater Wellington region that could provide an inclusive Māori voice and perspective.

44. There is no sufficient evidence as would lead me to the view that if urgency is not granted then Māori radio broadcasting and the revitalisation of te reo Māori would be in any way diminished.
45. So far as the issue of the transmitter is concerned, that can only be seen as context. It happened 30 years ago and cannot form the basis of a claim because section 6AA of the Treaty of Waitangi Act 1975 precludes it.

Decision

46. Urgency is declined. This claim will now progress before the Tribunal in the usual manner.

The Registrar is to send a copy of this direction to counsel for the applicants, Crown counsel and those on the notification list for Wai 2844, the Te Reo Iriangi o te Upoko o te Ika Claim.

DATED at Wellington this 27th day of March 2019



Judge P J Savage
Deputy Chairperson

WAITANGI TRIBUNAL