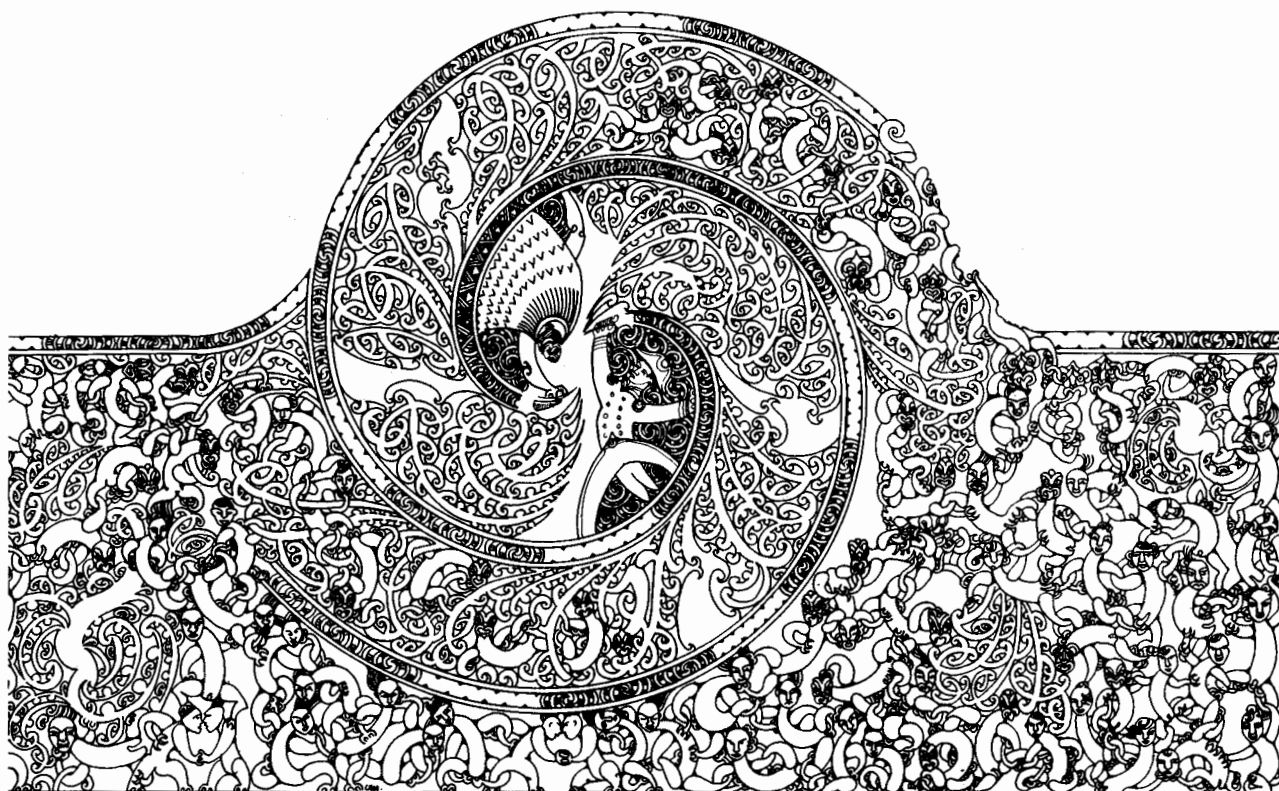


RADIO SPECTRUM MANAGEMENT AND DEVELOPMENT INTERIM REPORT



WAITANGI TRIBUNAL REPORT 1999



The Waitangi Tribunal
Wellington

The Honourable Tau Henare
Minister of Maori Affairs

Parliament Buildings
Wellington

Tena koe te Rangatira

We present this report as a result of an inquiry into a claim received on 9 March 1999.

The matter was heard by us under extreme urgency to meet the Crown's intention to auction management rights on 29 March 1999 to generate radio signals in the 2 Ghz range.

The finding of the Tribunal by its majority is that prima facie the claim is well founded and it makes recommendations including the postponement of the auction on pages 8 and 9. The minority finding is also set out within this report.

It was a matter of sadness to us that we were not able to reach a consensus. This lack of consensus is probably because the subject matter and the concepts involved are at the outer limits of Treaty jurisprudence as presently perceived. We have not been blessed with such time as we would have wished for to consider the matter and to seek a consensus.

We believe that we have listened to each other carefully and with good will and we retain a faith that we can work together with aroha and respect to produce a final report if that be necessary. Our respective fidelity to treaty principles as we see them has led us down different paths. That is perhaps not surprising, it may even be a healthy sign.

DATED at Wellington this 26th day of March 1999

P J Savage, Judge (presiding officer), J M Anderson (member), Professor M P K Sorrenson (member)

INTRODUCTION

The Crown intends to auction the right to manage radio signals in a specific frequency band – the 2 Ghz range on 29 March 1999.

The management rights would be for 20 years. They would give to successful tenderers the right to issue a licences to generate signals either to themselves or to operators purchasing or renting from them. The frequency has known potential for telecommunication and narrow casting but not broadcasting.

The claimant asserts that this action by the Crown is either a breach of Article 2 or the broader principles of the Treaty and in summing up expressed the matter in this way.

This claim has two main limbs:

Maori have a right to a fair and equitable share in the radio spectrum resource; and

Maori have a right to a fair and equitable share in the spectrum especially where the Crown has an obligation to promote and protect Maori language and culture.’

This Tribunal has heard this claim only to the point of attempting to ascertain if a prima facie case has been disclosed and as a matter of extreme urgency. The time frame between the lodging of the claim, the hearing on urgency and the hearing itself was very short. The claim was received by the Tribunal on 9 March 1999, registered on 10 March and the subject of an Urgency Conference on 15 March. The hearing commenced on Friday, 19 March and proceeded through the 23rd and 24th.

The proposed auction is for the 29th inst, one business day after the presentation of this report which is itself two business days after the conclusion of the hearing. The provisional nature of the findings will therefore be obvious.

MAJORITY FINDING BEING THE FINDING OF THE TRIBUNAL
(J M ANDERSON, PROFESSOR M P K SORRENSON)

We find that a prima facie case has been made that the claimant will be prejudiced by breaches of the principles of the Treaty of Waitangi if the Crown proceeds with its proposed auction, without coming to an agreement with Maori to allow them a fair and equitable portion of the 35 management rights which are due to be auctioned.

Our Finding is in agreement with that of the *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies*. This Report considered a similar set of circumstances, similar arguments from Claimants and the Crown and also recommended the postponement of a proposed sale of radio frequencies, pending further consultation with Maori and the allocation of certain frequencies to them.

In considering what Treaty principles should be applied, that Tribunal said that ‘the key principle in the management of the spectrum is partnership. In essence the Treaty signifies a partnership requiring each partner to act reasonably and with the utmost good faith towards the other partner, and that in turn involves an obligation to consult’ (p 42). The Wai 26/150 Tribunal’s discussion of the partnership principle was based on the ‘classic statement’ of the respective duties and obligations contained in the judgments of the Court of Appeal in *The New Zealand Maori Council and Latimer v The Attorney-General and others* in 1987. The Wai 26/150 Tribunal’s Report said 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 (p 42)’. That statement applies equally to the resources under claim before us. The Wai 26/150 Tribunal Report proposed a ‘hierarchy of interests’ in natural resources, giving priority to the Crown’s obligation to manage them in the interests of conservation, before ‘the tribal interest in the resource’, and finally commercial or recreational interests. The Report also stressed that the Crown could not ‘argue that Maori have no rights to the spectrum other than a general 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 the culture’ (pp 42–43). Again, we believe that those statements apply equally to the claim before us.

In applying the partnership principle, the Wai 26/150 Tribunal was especially concerned with the reservation of frequencies to assist in the preservation of language and culture. We are also concerned with the need for the Crown to assist with the preservation of Maori language and culture. However, the focus of our inquiry is broader, with more emphasis on the responsibility of the Crown to ensure that its

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Treaty partner obtains a fair and equitable share of spectrum that can be used for commercial, social and educational purposes in addition to language and culture.

In interpreting the principles of the Treaty, the Waitangi Tribunal has long been aware of the need to adapt the Treaty to new circumstances. In 1983, the *Motunui–Waitara Report* said that the Treaty ‘was not intended to fossilise the status quo, but provide direction for future growth and development.’ That Tribunal considered that the Treaty was ‘capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles’ (p 52). The President of the Court of Appeal, Sir Robin Cooke, has also taken up the notion, as he put it in delivering judgment in *Te Runanga o Muriwhenua Incorporated v Attorney-General* in 1990, that ‘the Treaty is a living instrument and has to be applied in the light of developing circumstances.(at p 656)’ It is evident with the claim before us that we need to interpret the principles of the Treaty to meet ‘developing circumstances’ as we approach a new millennium.

This is especially so in relation to development rights arising from the Treaty. As the recent *Te Ika Whenua Rivers Report* has noted ‘The traditional and somewhat muted approach on the right to development adopted by the courts must be contrasted with that taken by the Tribunal’ (p 120). One reason for this is that whereas the courts have not felt obliged to uphold the Treaty as a whole, or the principles of the Treaty unless these have been safeguarded in legislation, the Tribunal is obliged by its act, The Treaty of Waitangi Act 1975, to make findings on breaches of the principles of the Treaty by the Crown.

It has been generally conceded that there was a development right for properties specified in the Treaty, for instance for fishing as outlined in the *Muriwhenua* and *Ngai Tahu Fishing Reports*.

The position with ‘other properties’ (in the English text) or taonga (Maori text) has been less certain for the very reason that they were unspecified. It has been accepted that these can include intangibles such as language. But there has been a reluctance by the Crown and in some instances the courts to concede Maori a right of possession or development of properties that were unknown or little used by them in 1840. Gold was unknown to Maori in 1840 and was claimed by the Crown as a ‘royal metal’ under English common law. However when gold was discovered on Maori land at Coromandel in 1852 it was necessary for the government to negotiate agreements with Maori for the opening of the fields, and they received a portion of mining licence fees. Subsequently the government preferred to buy the freehold of auriferous lands to avoid the complications of access and paying subventions from licence fees (Robyn Anderson, *Goldmining: Policy, Legislation, and Administration*, Rangahaua Whanui National Theme N, 1996, ch 2).

With minerals of lesser value which were not clearly ‘royal metals’ it was necessary to legislate to establish Crown ownership. In 1937 a Petroleum Act declared all petroleum to be the property of the Crown, despite a vigorous protest from Sir Apirana Ngata in parliament. The Attorney-General had declared that Maori had no claim to resources of which they had been ignorant at the time of transfer of sovereignty. Ngata replied that, although Maori did not know of the existence or value

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of petroleum, gold and coal in 1840, they had a right to revenue from them now, if they were taken from Maori land. Indeed he even proposed a partnership with the Crown over oil, with Maori and the Crown each taking 50% of the royalties (NZPD, 1937, vol 249, p 1044). This is an important reminder that Maori claims to properties that were unspecified in the Treaty are not a recent invention.

More recently, in the 1989 *Tainui Maori Trust Board v Attorney-General*, the President of the Court of Appeal ruled in favour of Tainui, saying that ‘any attempt to shut out in advance a claim by Tainui to be awarded some interests in coal would not be consistent with the Treaty’, though he admitted that coal did not seem to have been important to Tainui when their coal bearing land was confiscated by the Crown in the 1860s (p 527).

Maori rights to geothermal energy, and thus to the development of geothermal energy, have been supported in the recent *Ngawha* and *Te Arawa Geothermal* Reports. In view of this line of decisions, Mr Justice Cooke’s 1994 ruling in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General*, ‘that however liberally Maori customary title and treaty rights might be construed, they never were conceived as including the right to generate electricity by harnessing water power’, is somewhat anomalous. Nevertheless the court did admit that Maori enjoyed some water rights under the Treaty and that if control over the rivers for the dams had been assumed by the Crown without Maori consent, that may well be the basis for a breach of the Treaty. The Tribunal’s subsequently released *Ika Whenua Rivers Report* has found that the Crown ‘failed actively to protect Te Ika Whenua’s Treaty rights, or to consult them, or to compensate them for loss of water power, . . . or to give thought or consideration to sharing power’ with Te Ika Whenua as a Treaty partner (p 135).

Although, like the Te Ika Whenua Rivers Tribunal, we must take note of the Court of Appeal judgment we are not bound by it since under s5(2) of the Treaty of Waitangi Act 1975 the Tribunal in exercising its functions has ‘exclusive authority’ to ‘determine the meaning and effect of the two texts of the Treaty.’

In doing so, we come back to the partnership principle we have enunciated above. We believe, as did the Wai 26/150 Tribunal before us, that neither partner can have monopoly rights over a resource. Indeed it would be a grave breach of the principle that the partners should act reasonably and with the utmost good faith towards one another, for one of those partners to arrogate to itself the whole resource, as we believe the Crown did for the radio spectrum under the Radiocommunications Act, and then alienate portions of that spectrum without ensuring, through consultation, that Maori received an equitable share of it. It was the Crown’s attempt to do that for some of the spectrum in 1990 that provoked the Wai 26/150 claim. A further segment of the spectrum was alienated last year. And, as we have noted, the Crown’s attempt to auction another segment provoked this claim. We believe it would be prejudicial to the claimant’s Treaty rights under the partnership principle for that alienation to proceed without giving proper consideration to the Maori claim to a share of the spectrum.

We now consider other Treaty principles.

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Besides its responsibilities under the partnership principle, the Crown also has a fiduciary responsibility that was spelled out in the Preamble of the Treaty and the 3rd Article. These promised Maori and their property the Queen's protection. That fiduciary responsibility needed to be observed in any alienation of resources by the Crown, whether they were known in 1840 or only discovered or became available through technology at a later date. Many Maori signed the Treaty in the expectation that, in allowing European colonization to proceed, they would also share the benefits, including new technologies, that foreigners brought to their shores. This expectation was described by the Tribunal's *Muriwhenua Fishing Report* as the principle of mutual benefit (p 195):

Both parties expected to gain from the Treaty, the Maori from new technologies and markets, non-Maori from the acquisition of settlement rights and both from the cession of sovereignty to a supervisory state power. For Maori, access to new markets and technologies necessarily assumes a sharing with settlers who provide them, and for non-Maori, a sharing in resources requires that Maori development be not constrained but perhaps assisted where it can be.

Finally there is the principle that any exercise of kawanatanga needed to be tempered by respect for tino rangatiratanga, already referred to in the discussion of the Wai 26/150 Report above. This meant that the Crown was obliged to consult Maori over a variety of matters in relation to the spectrum, to ensure that they were:

- given an opportunity to discuss at an early stage possible benefits of the new technology;
- consulted over reservation of some management rights;
- and joined in negotiation for a fair and equitable share of those management rights before the remainder were auctioned.

These procedures were vitally important in a developing situation in which the Crown was asserting exclusivity over the radio spectrum. However, although there was one attempt to inform Maori of what was being proposed, there was no adequate attempt to consult with Maori as equal Treaty partners. In so far as the Crown was prepared to consult, it attempted to confine any discussion and consideration of these issues to language in a broadcasting context only.

RECOMMENDATIONS

We recommend:

- That the Crown suspend the proposed auction of 2 GHz frequencies, due to begin on 29 March, and begin negotiations with Maori with a view to reserving for them a fair and equitable proportion of the management rights before the auction is resumed. We do not attempt to prescribe what that share should be, since that should be negotiated by the Treaty partners. Since the development of management rights is going to be costly, the possibility of Maori entering into joint partnerships or to sell or lease licences should be explored.

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- That the claimant make arrangements with her iwi and a national Maori body to create a credible authority to negotiate with the Crown for the reservation of management rights.
- That in the event of Maori and the Crown being unable to reach agreement, the claim be returned to the Tribunal for a substantive hearing and further recommendations.

MINORITY FINDING OF P J SAVAGE, JUDGE,
PRESIDING OFFICER

THE FIRST LIMB OF CLAIM

Maori have a right to a fair and equitable share in the radio spectrum resource.

The claimants view the Crown’s action as the creation and assignment of a property right in a resource. The Crown views the claim as an attempt to assert per medium of the Treaty an ownership right over radio waves. They may both be right.

This Tribunal should be wary of ascribing ownership rights to either Treaty partner unless they fall within Article 2 of the Treaty, and similarly aware that it is not the task or right of this Tribunal to issue policy statements designed to limit either Treaty partner in the future or through future generations or to bind future Tribunals. I will have more to say on the precedent value of Tribunal reports. But at the outset, of course, I acknowledge that the reports of the Tribunal are in a very real sense a taonga in themselves, a repository of learned views on the Treaty and its principles.

No radio waves were known in 1840. Some occur naturally. The radio waves we are concerned with cannot be generated or received other than by technology. The radio spectrum is part of the electromagnetic spectrum. A table accepted by the parties depicting this is shown.

Electromagnetic spectrum

Frequency (Hz)	Wavelength (m)	Nomenclature	Typical source
10^{23}	3×10^{-15}	Cosmic photons	Astronomical
10^{22}	3×10^{-14}	γ -rays	Radioactive nuclei
10^{21}	3×10^{-13}	γ -rays, x-rays	
10^{20}	3×10^{-12}	x-rays Positron–electron annihilation	Atomic inner shell
10^{19}	3×10^{-11}	Soft x-rays	Electron impact on a solid
10^{18}	3×10^{-10}	Ultraviolet, x-rays	Atoms in sparks
10^{17}	3×10^{-9}	Ultraviolet	Atoms in sparks and arcs
10^{16}	3×10^{-8}	Ultraviolet	Atoms in sparks and arcs
10^{15}	3×10^{-7}	Visible spectrum	Atoms, hot bodies, molecules
10^{14}	3×10^{-6}	Infrared	Hot bodies, molecules
10^{13}	3×10^{-5}	Infrared	Hot bodies, molecules
10^{12}	3×10^{-4}	Far-infrared	Hot bodies, molecules
10^{11}	3×10^{-3}	Microwaves	Electronic devices

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Electromagnetic spectrum

Frequency (Hz)	Wavelength (m)	Nomenclature	Typical source
10^{10}	3×10^{-2}	Microwaves, radar	Electronic devices
10^9	3×10^{-1}	Radar, interstellar hydrogen	Electronic devices
10^8	3	Television, FM radio	Electronic devices
10^7	30	Short-wave radio	Electronic devices
10^6	300	AM radio	Electronic devices
10^5	3000	Long-wave radio	Electronic devices
10^4	3×10^4	Induction heating	Electronic devices
10^3	3×10^5		Electronic devices
100	3×10^6	Power	Rotating machinery
10	3×10^7	Power	Rotating machinery
1	3×10^8		Commutated direct current
0	Infinity	Direct current	Batteries

One can see that it includes cosmic photons, gamma rays, x-rays, all visible light, microwaves, radio waves, induction heating and electricity. The radio waves that we are particularly concerned with are diagrammatically depicted on the facing page.

On questioning, it was clear that the claimant’s arguments for this narrow band of spectrum under the first head of claim (shorn of the te reo Maori factor) could be just as apt and would promote a claim to the light that comes from the stars or from our star (the sun) or the particles of air we breathe or the space that those particles occupy.

The thrust of the claimant’s argument when pared back to its basics is:

1. the resource exists
2. the Crown purports to regulate or assign it for money
3. Maori are therefore entitled to a share.

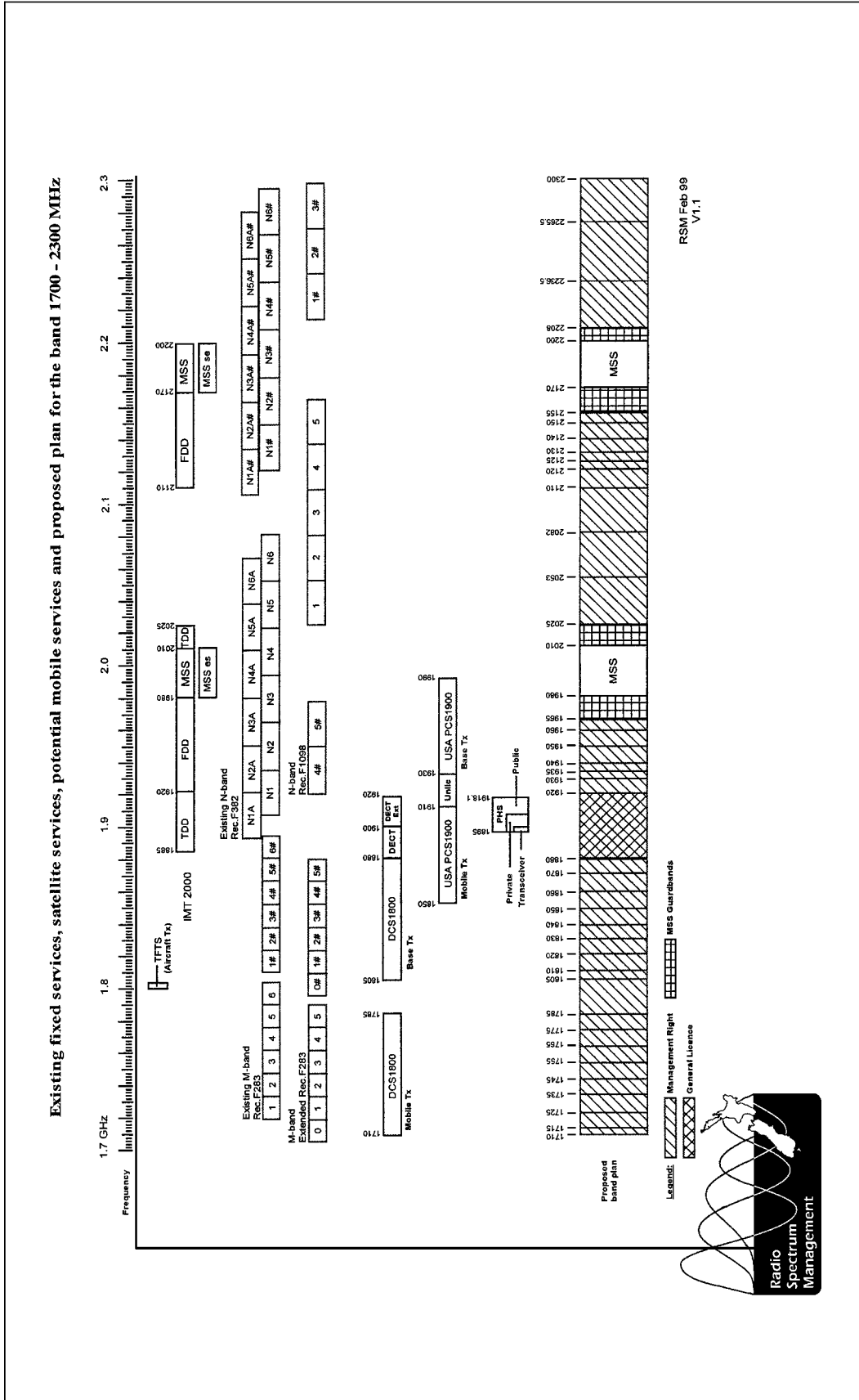
Professor W Winiata explained that in his view the radio spectrum is part of the kainga that exists as a spiritual construct for Maori between papatuanuku and ranginui. He claimed therefore that the radio spectrum had a Maori dimension or was encompassed by the words ‘o ratou kainga’ or in the alternative by the words ‘me o ratou taonga katoa’ in Article 2.

The concept of a kainga between ranginui and papatuanuku and what occupies it was explored. It is envisaged as containing all that exists – all of creation.

The idea for me that all of creation has a Maori dimension is inarguably right but it strains Treaty principles to the point of injury to carry the matter further and suggest Treaty rights arise in that way.

The idea that this kainga is what is referred to in Article 2 does not commend itself to me. It is an assertion of tino rangatiratanga over all creation. It would be peculiar and otiose to insert such a concept between the reference to the whenua and the

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reference to taonga in Article 2. It leaves little if any room for the legitimate exercise of kawanatanga. It is not consistent with well-known translations of the word 'kainga' by Sir Hugh Kawharu and it is not consistent with the use of the word ratou to which I will refer later.

The claimants say that the radio spectrum is a taonga and in one sense it is. The Crown points out that it does not exist as an entity and is simply a description or method of describing the range of frequencies of radio waves. On the larger scale the same applies to electromagnetic frequencies. They are intellectual constructs.

This matter has been dealt with by this Tribunal before, particularly in the report on claims concerning the allocation of radio frequencies (Wai 26/150). That report related to broadcast frequencies but appeared to have a broader focus. The scope of the claim can be seen from page 9 where the claimants sought findings that:

- (a) Maori have rangatiratanga over radio frequency allocation in that:
 - (i) nothing in the terms of the Treaty of Waitangi allows or foreshadows any authority on the part of the Crown to determine, define or limit the properties of the universe which may be used by Maori in the exercise of their rangatiratanga over tikanga Maori;
 - (ii) where any property or part of the universe has, or may have, value as an economic asset, the Crown has no authority under the Treaty to possess, alienate, or otherwise treat it as its own property without recognising the prior claim of Maori rangatiratanga;
 - (iii) where any property or part of the universe has value as a cultural asset, because of its ability to assist or sustain an activity which represents the preservation and sustenance (or undisturbed possession) of tikanga Maori, the Crown has an obligation under the Treaty of Waitangi to recognise and guarantee Maori rangatiratanga over its allocation and use for that purpose;

At page 42 the Tribunal opined:

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. The Treaty granted sovereignty and the delegation to govern but subject to the limitations of the special interests of tino rangatiratanga. This means that consultation between partners is vital to the Treaty itself and to its spirit.

There is a hierarchy of interests in natural resources based on the twin concepts of kawanatanga and tino rangatiratanga. First in the hierarchy comes the Crown's obligation or duty to control and manage those resources in the interests of conservation and in the wider public interest. Secondly comes the tribal interest in the resource. Then follows those who have commercial or recreational interests in the resource.

We find the subject matter of our inquiry to be in an 'in between' situation. It is not simply a case where Maori can argue prior ownership before the Treaty. Nor can the Crown argue that Maori have no rights to the spectrum other than a general public right, nor a right only in terms of the language. The use of the radio spectrum is so

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intimately tied up with the use of Maori language and culture, and the protection and development of these things, that the Maori right to access must amount to more than this. Tribal rangatiratanga gives Maori a greater right of access to the newly discovered spectrum. In any scheme of spectrum management it has rights greater than the general public, and especially when it is being used for the protection of the taonga of the language and the culture.

and then at page 45 as a conclusion:

The allocation of radio broadcasting frequencies to Maori interests is a matter with Treaty implications. The Treaty accords to Maori access to resources in priority to any others, not only because they are the only people who are party to a solemn treaty with the Crown, but also because that Treaty affords iwi the continuing protection of a right of access to broadcasting resources.

Although that Tribunal might be seen as laying down general principles, in fact its terms of reference per ss 5 & 6 of the Treaty of Waitangi Act 1975 were to deal with that claim on that matter and at its broadest to recommend to prevent other persons from being similarly affected in the future.

When the report is read as a whole and in terms of its history, that Tribunal consistently returned in its decision to a centre of gravity relating to the protection and fostering of te reo Maori and the other matters I have referred to were obiter.

It is beyond belief that that Tribunal in that short report has intended to state a principle of such wide and dramatic consequence. Professor Winiata acknowledged that it would support the potential for claims for the light from the stars and the air we breathe and then as an aside asked 'who gave the Government permission to regulate air space anyway?'

I am wary of reading too much into that report. Even if it were there to be read I cannot help but think on this – can this Tribunal be so presumptuous that we believe what we say must or should be followed by a subsequent Tribunal on a related matter?

The answer to me is no, and I ascribe that view to the authors of Wai 26/150.

We cannot lock the Treaty or its principles into our particular time slot any more than the Crown can hold its Treaty partner in the compact to 1840.

Wai 26/150 is therefore of help to me but I give it no greater potency than that.

It ought also to be noted that material placed before another Tribunal may not necessarily as a matter of course be before subsequent ones unless there is the opportunity to cross-examine and lead contrary evidence.

Neither party is in any sense estopped by earlier reports.

Wai 26/150 tells us that the radio spectrum is a taonga. Subject to the acceptance of its very existence that is so. In light of the evidence we now have it may be more proper to say that the capacity to generate and receive radio waves is a taonga. For present purposes I will accept that this is so but the Treaty does not refer to taonga, it refers to 'o ratou taonga katoa'. Professor Winiata frankly conceded that the word ratou indicates or means 'their' or 'belonging to them'. The taonga of Maori is reserved to them. The Treaty and the Treaty principles do not state that the taonga of mankind is

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reserved to Maori to the level of an appropriate share. That is the province of Article 3 and citizenship.

It is said that there is a developmental right involved here and when this was discussed by witnesses it appeared that there was confusion on a number of levels. For me treaty development rights envisage a right to develop a right. For instance to develop offshore deep water fishing from the right to inshore fishing or the right to develop te reo Maori per medium of broadcasting or other appropriate technology.

For me treaty principles do not refer to a bare right to develop. That is a matter for social conscience, social equity, politics and Article 3 and not the business and the area of expertise of this Tribunal.

It is also to be noted that Wai 26/150, if interpreted as the claimants contend, is in direct conflict with what was said by Lord Cooke in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 (CA) at 24:

‘The Treaty of Waitangi 1840 guaranteed to Maori, subject to British kawanatanga or government, their tino rangatiratanga and their taonga, or in the official English version ‘the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties . . .’. In doing so the treaty must have been intended to preserve for them effectively the Maori customary title, as mentioned in the fisheries case at p 655. But, however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840. No authority from any jurisdiction has been cited to us to suggest that aboriginal rights extend to the right to generate electricity. Nor was the argument for the appellants put to the Court in that way. It was not contended that the dams are themselves taonga.’

In para 9.1 of the Statement of Claim, the claimant pleaded ‘The Tribunal has developed a consistent discourse dealing with the ‘hierarchy of interests’ in natural resources.’ This is a reference to resources simpliciter and not associated with other rights. The only discourse that the claimant could point to was Wai 26/150 and counsel could not refer to any similar statements post the judgment of Lord Cooke above.

Even in *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) the resource was linked back to recognise rights (taonga/fisheries) and not claimed simply because it was a resource.

Reference is made by the claimants to the duty to consult and its alleged breach. The Crown before reaching a final decision had before it a number of reports including reports from this Tribunal and a report commissioned by Te Puni Kokiri and wrote to Maori indicating an intention and offering to keep Maori fully informed. It is of note that the views of the claimant and Professor Winiata in particular given in evidence before this Tribunal do not contain any new matter unknown to the Crown. Professor Winiata had been consistent and forthright in expressing those views and the pertinent facts.

The duty to consult will wax and wane according to subject matter. Here the Crown said, and having regard to the capacity of the radio waves, with some justification that

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the matter of the sale of spectrum did not intrude into Te Ao Maori and did not recognise Treaty implications. It does, however, have some Treaty implications but on balance what was done by the Crown was adequate. No more than adequate but adequate nonetheless. Therefore for me, fidelity to the kaupapa of the Treaty of Waitangi Act 1975 means that I do not find on this part of this claim at this point in the hearing that the claim is well founded in the sense that it has not yet disclosed to me that it is prima facie well founded.

THE SECOND LIMB OF CLAIM

Maori have a right to a fair and equitable share in the spectrum especially where the Crown has an obligation to promote and protect Maori language and culture.

Mr Solomon put it to us that te reo Maori was in a parlous state and at a critical point. The evidence of that was unsatisfactory but for the purposes of this finding I accept that that is so.

Ownership and management of radio waves on the evidence before me only relates in an indirect way to the fostering of te reo Maori. Perhaps this is a reflection of the evidence rather than the objective facts but I can only work within the time constraints and the evidence I have. That evidence is that ownership or management is not what is critical, it is content. What is received, not who owns or operates the transmitter.

The following issues are dominant for me on this point.

This is a telecommunication frequency. It does not involve broadcasting. It is short range and most of it will operate in not much more than line of sight or within a very few kilometres. It has high capital costs, high risk and is leading edge technology. Its future development is a matter for speculation. It does not lend itself to reaching larger groups as does television or radio.

The grant of the management right for a relatively short time span (ie, 20 years), means that both treaty partners maintain a reasonable ability to reconsider their position as time reveals all.

Katrina Mary Bach, the Director of the Resources Directorate and Networks branch at the Ministry of Commerce told us this:

The Crown currently meets its Treaty obligation in respect of Te Reo in several ways, in particular, through education and broadcasting. Broadcasting has been recognised by the Tribunal and the Government as an important component of the Crown's overall strategy for protecting the Maori language. In this regard, the Government has taken a variety of steps to promote the Maori language through broadcasting. These include:

- reserving a number of AM and FM radio frequencies designed to provide coverage to approximately 30 areas throughout New Zealand for the delivery of Maori language radio services.

- reserving UHF frequencies for the development of a nationwide Maori television channel to broadcast Maori language programmes. A management right in respect of reserved UHF frequencies is to be transferred to a Maori television

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trust. In addition, a one off sum of \$11.3 million for establishment of a Maori television channel will be provided to the trust.
establishing a Maori broadcasting funding agency, Te Reo Whakapuaki Irirangi (Te Mangai Paho), to manage and disburse funding allocated for the promotion of Maori broadcasting. The sum of \$16,875,000 per annum is being made available to Te Mangai Paho for the promotion of Maori language on television. Te Mangai Paho receives an additional \$14,000,000 (approximately) from the public broadcasting fee.'

Obviously the Crown believes it is fairly and honestly discharging its obligations to protect and foster te reo Maori.

We received no evidence to the contrary and in particular no evidence from those who are experts in the area of fostering and developing te reo Maori. I note that a Bill presently before Parliament appears to relegate the promotion of Maori culture by Te Mangai Paho to a position merely ancillary to the promotion of language. But that is not the focus of this claim at this point and I do not wish to comment further.

As a Commission of Inquiry we might ourselves have sought more information on the issue of status of te reo Maori and the adequacy of the Crown's response but time constraints do not permit that.

On the material available to me I am unable at this point to find that this limb of the claim is well founded as a prima facie matter.

I wish to end by saying that for me the sadness at our failure to reach a consensus is heightened for we believe that we are the first Tribunal to be constituted comprising solely of members of Maori descent. I believe that the differences in our findings demonstrate that we each in our own way have seen our duty as being to the Treaty rather than to one particular partner in the compact.

CONCLUSION

The finding of the Tribunal is contained in a majority finding. The findings are provisional and a substantive hearing may well result in a varied or different finding.

Dated at Wellington this day of 1999

Judge P J Savage (presiding officer), J Anderson (member), Professor M P K Sorrenson (member)