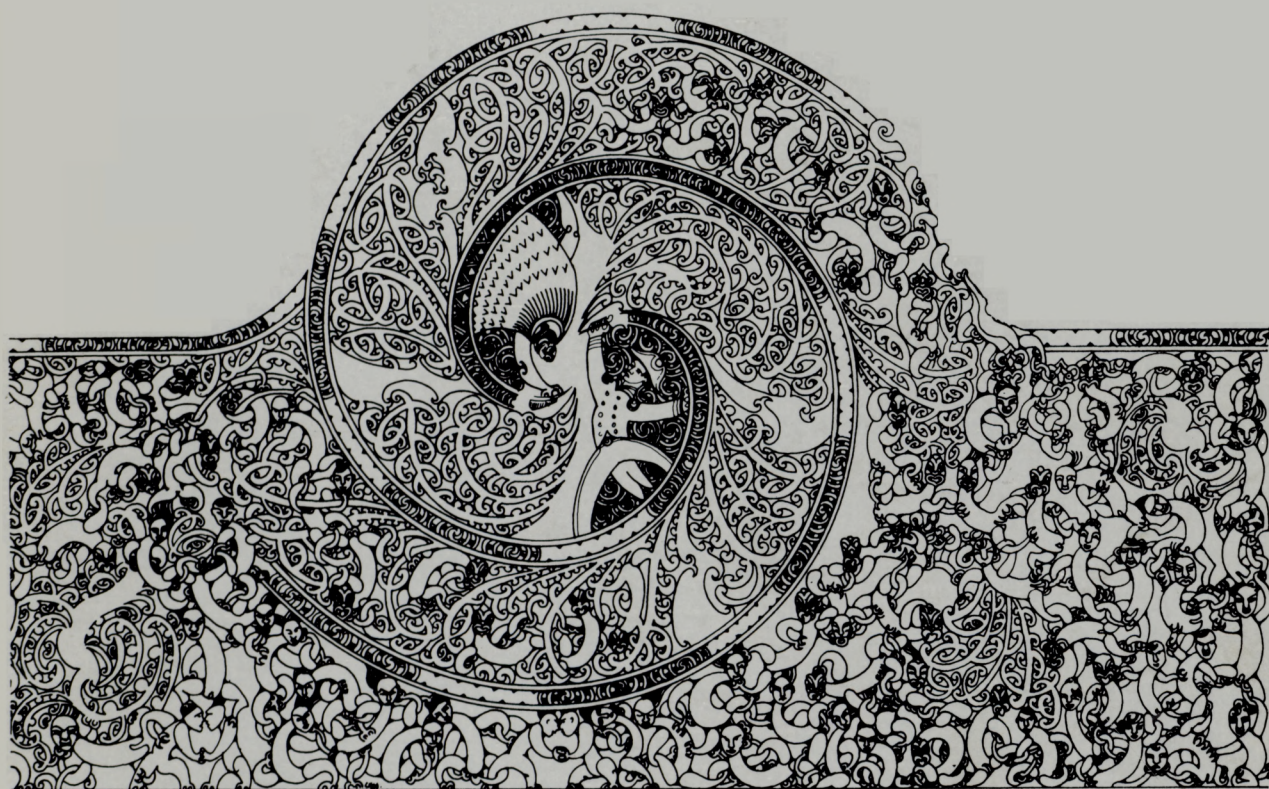


REPORT OF
THE WAITANGI TRIBUNAL
ON CLAIMS CONCERNING THE
ALLOCATION OF RADIO
FREQUENCIES



WAITANGI TRIBUNAL REPORT 1990

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THE WAITANGI TRIBUNAL
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ALLOCATION OF RADIO
FREQUENCIES

WAI 26, WAI 150

WAITANGI TRIBUNAL REPORT 1990



The cover design by Cliff Whiting invokes the signing
of the Treaty of Waitangi and the consequent interwoven development
of Maori and Pakeha history in New Zealand as it continuously
unfolds in a pattern not yet completely known

A Waitangi Tribunal report

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Chapter 1

Summary and Recommendations

Minister of Maori Affairs

Tena koe te Rangatira

We present this report as the result of our inquiry into a claim received on 26 June 1990 from Sir Graham Latimer for the New Zealand Maori Council and Mr Huirangi Waikerepuru for Nga Kaiwhakapumau i Te Reo Incorporated objecting to the proposed sale by tender of rights to radio spectrum frequencies for 20 years.

After a series of brief judicial conferences it was decided to undertake an urgent inquiry in view of the seriousness of the issues involved and of the Crown's decision to proceed with the sale.

The hearing of evidence occupied 10 days. During that time we heard from a wide variety of witnesses detailed in the report.

Two themes which emerged consistently from the evidence were the present fragile state of the Maori language, and the speed with which consultations and the proposed sale process proceeded.

Our report is brief. It was completed under the urgency imposed by injunction proceedings. It does not attempt to address broadcasting issues as a whole. We hope however that the matters we have considered in relation to the limited issues before us will be borne in mind when other aspects of Maori broadcasting come up for consideration. We hope also that the consultations which the Crown intended and planned for in this instance, will with the benefit of hindsight, and with a deeper insight into the real needs of the Crown's Treaty partner referred to in the report, be utilised by all Crown agencies in their dealings with Maori over Treaty issues, and that this in turn will help to ensure that the progress made during 1990 in understanding each other, and in according respect to one another, will continue to the benefit of our nation as a whole.

In summary, we have concluded that the claim is well-founded for the reasons we have detailed in the final section of the report. As a result *we recommend*:

1 That for a period of six months the Crown suspend the operation of the radio frequency tender called on Thursday 26 July 1990, to allow further consultation with iwi to take place.

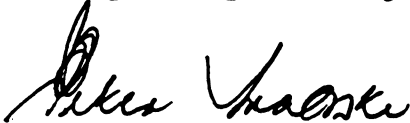
2 That the Government make available to iwi suitably qualified and experienced independent technical advisers to ensure that informed decisions are made in assessing the needs of iwi and in making appropriate allocations of radio frequencies to them.

3 That FM frequencies be made available for Maori broadcasting in Auckland and Wellington in the light of the matters raised in section 6.3 of this report.

4 That the Government contribute \$40,000 towards the costs and expenses of the claimants in assembling and presenting evidence for this tribunal.

DATED at Wellington this 27th day of November 1990

P J Trapski, presiding officer



M T A Bennett, member



E Ryan, member



Chapter 2

Te Wairua o Te Kaupapa

Ko to ringa ki nga rakau a te Pakeha
“Let your hand be armed with the technology of the Pakeha”

This line comes from the now revered proverb of Apirana Ngata to Rangi, a Te Arawa mokopuna, in the late 1940s.

E tipu e rea, mo nga ra o tou ao;
ko to ringa ki nga rakau a te Pakeha
hei ara mo to tinana,
ko to ngakau ki nga taonga a o tipuna Maori
hei tiketike mo to mahuna, a,
ko to wairua ki to Atua
nana nei nga mea katoa

The proverb addresses the full process of human development and growth from childhood to the blossoming of maturity and beyond. It speaks to Rangi of the need to acquire the skills and the technology of the Pakeha partner to provide the strength by which the physical needs of man are met along life's way. It recommends that she grasp the taonga of her tupuna to be for her an adornment upon her brow. It reminds her that her soul belongs eternally to the creator—the maker of all things—the alpha and the omega—the beginning and the end.

This proverb sets the context in which the wairua of this report develops. Both the proverb and the report affirm that the world and the universe in some mysterious way is in service to mankind.

So with the psalmist we also may well ask “What is man O Lord that thou art so mindful of him?”. Not only has he made us above the animals—he has made us just a little lower than the angels. He has put so much in the care of us, including this taonga of the spectrum to enable us to penetrate space—to walk on the moon—to be heard everywhere and to be seen at the press of a button. We can now record our whole life and put it on recall. It enables us to go through the water like a fish, to fly through the air like a bird and to spin around space like a star.

In our search for dealing together over the spectrum may we also find some way to help us walk on earth like men and women—ko tenei hoki te tino wairua o to tatou kaupapa!

Chapter 3

Background

3.1. Te Reo Report

On 29 April 1986 the tribunal issued its report on *Te Reo Maori* (1986) in respect of a claim made by Huirangi Waikerepuru and Nga Kaiwhakapumau i Te Reo Incorporated asking that the Maori language receive official recognition. During the inquiry into that claim the tribunal heard evidence from a number of experienced and prominent broadcasters directed to persuading it that the (then) Broadcasting Corporation of New Zealand had not provided adequately for Maori radio listeners and television viewers.

The tribunal decided not to make detailed findings on these complaints because first, a Royal Commission on Broadcasting was then proceeding and secondly, the Broadcasting Tribunal was at that time considering applications for the third television channel.

These latter proceedings before the Broadcasting Tribunal included an application from Aotearoa Broadcasting Systems which directly raised the issue of Maori involvement in television broadcasting. The tribunal was anxious not to be seen to interfere in the jurisdictions of those bodies, but it did make broad findings and recommendations that:

- (a) Article II of the Treaty guarantees protection to the Maori language;
- (b) the predominance of English in the media has had an adverse effect upon the Maori language;
- (c) in its widest sense the Treaty promotes a partnership in the development of the country and a sharing of all resources so that it is consistent with the principles of the Treaty that the language and matters of Maori interest should have a secure place in broadcasting; and
- (d) In the formulation of broadcasting policy regard must be had to the finding that the Treaty of Waitangi obliges the Crown to recognise and protect the Maori language.

The tribunal then decided to wait until the Royal Commission on Broadcasting and the Broadcasting Tribunal had made their decisions

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before deciding whether to make any additional recommendations. It decided that it could convene again and deliver a supplementary finding if that became necessary or desirable.

3.2. The Royal Commission on Broadcasting

In September 1986 the Royal Commission on Broadcasting released its report. Among its conclusions were:

- (a) that matters relating to Maori, including Maori broadcasting, should ideally occupy an unselfconscious and integral part of mainstream broadcasting in New Zealand;
- (b) that artificial stimulants were properly anathema to this type of transmission. Quotas should be irrelevant. Specific hours allocated to Maori broadcasting would inevitably signal self consciousness;
- (c) to achieve the ideal requires, initially at least, some kind of affirmative action;
- (d) the public service organisation had made slow progress indeed in translating good intentions into practical programming and, even after 25 years, little progress had been made;
- (e) there was a need for a wide variety of programmes which build on and explore Maori interests;
- (f) some programmes will be targeted at fluent speakers of Maori, some at those interested in Maoritanga, and some at a wider audience;
- (g) the announcement which had been made by Radio New Zealand in respect of a Maori network was to be commended and immediate implementation should follow; and
- (h) further relays of the Maori network should be kept in mind for the future. Such relays should be balanced with tribal or regional initiatives in respect of mini-stations, and such mini-stations should be in Maori hands.

The commission assumed that advertising would be combined with Maori stations' programme makeup as a normal element in New Zealand broadcasting and that these programmes, whether radio or television, were expected to appeal right across the spectrum of language skills among Maori people as well as to have an appeal outside to the population in general. Further, that Maori broadcasters would be testing as they went for the right balance between types of programmes rather than being able to assert before the event what the answer to those difficult questions might prove to be.

The Royal commission then made the following recommendations (inter alia) (p 312 ff):

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1. That programmes which build on and explore Maori culture and interests should be part of the mainstream broadcasting on all television channels in this country, but with special emphasis on the responsibilities of the public broadcasting system....

3. That as a function of public service broadcasting, Maori programming on radio and television is entitled to security of funding. No one would suggest an open cheque situation but there may be a need for an initial disproportionate allocation to redress previous neglect....

6. That if quality and volume are not achieved some form of specific minimum requirement should be imposed at the end of, say, three years....

9. That training programmes should be instituted within broadcasting organisations for bi-cultural education....

11. That existing programmes which are intended to develop and illustrate the Maori contribution to this society should be continued and enhanced.

12. That Radio New Zealand's proposals in respect of the Maori Radio Network should be implemented immediately

3.3. Maori Language Act 1987

In July 1987 in accordance with recommendations made in the tribunal's *Te Reo Report*, Parliament enacted the Maori Language Act, which:

(a) declared the Maori language to be an official language of New Zealand;

(b) entitled people to speak Maori in certain legal proceedings, whether or not they were able to understand or communicate in English or any other language; and

(c) established Te Komihana Mo Te Reo Maori (Maori Language Commission) with wide functions and powers.

In particular the commission was required by section 7(b):

Generally to promote the Maori language, and, in particular, its use as a living language and as an ordinary means of communication.

3.4. The Royal Commission on Social Policy

In April 1988 the Royal Commission on Social Policy presented its report. In dealing with the cultural alienation of Maori, the report (vol 1, p 268) states:

The alienation of Maori people from their own institutions and culture was regarded as a serious obstacle to economic and social progress. Of major concern was alienation from language, a fundamental cornerstone for wellbeing....

and refers to the limited opportunities for Maori adults to learn their own language and the concern that, unless similarly nurtured, the

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parents of Kohanga children would not be able to encourage the learning process, nor themselves participate in Maori society, and the disappointment in the reducing resources made available to primary schools to promote Maori language which was seen as part of a wider problem which had led to increasing alienation of Maori people from their own language.

In considering Maori education the report states (vol 4, p 10):

The Commission endorses the view that every New Zealander is entitled to the kind of education which provides the opportunity to live a worthwhile life. A range of indicative measures shows that present educational provision is clearly failing to provide such an education for Maori people. Further, the greater part of present provision denies Maori people knowledge of their language and tikanga.

Action is urgently required to implement policies that will enable Maori people to define their own reality; that will ensure that Maori people have and retain full possession of their language and tikanga; and that will provide opportunities for all other people in New Zealand to value and to develop knowledge and understanding of Maori language and tikanga.

The Royal commission then pointed to the success of Kohanga Reo and said that this left it in no doubt of the potential effectiveness of alternative arrangements which provide for a greater measure of self-determination for Maori students, families and communities over their education.

At vol 4 p 25 the Royal commission further considered social perspectives and notes:

The rapid and widespread urbanisation of the Maori people has posed a significant threat to their language and culture and has contributed to a loss of identity so typical of the overwhelming effects of introduced Western culture. The stemming of this engulfing cultural tide must be accomplished now, and by the use of every means at society's command.

And in considering broadcasting and related telecommunications in New Zealand, the Royal Commission on Broadcasting at p 308 states:

There is no doubt in our minds as to the validity of the demands for a greater share of the resources of broadcasting and the benefits of bi-culturalism.

We found these conclusions of both Royal commissions most helpful. They have confirmed conclusions which we arrived at in the course of our inquiry. We hope that detailed consideration will be given to these recommendations and findings wherever the topic of Maori involvement in broadcasting is being considered.

Chapter 4

THE CLAIMS

4.1. Wai 26

This claim was received in the form of a letter from Nga Kaiwhakapumau i Te Reo Incorporated on 12 June 1986. A copy of the claim is set out in appendix 1. It sought to re-open the proceedings commenced by the claimant on 10 April 1984 and which resulted in the tribunal's report on *Te Reo* six weeks before, on two grounds:

(a) that the action of the Crown in failing to await the recommendations of the tribunal before introducing a Bill on the Maori language was contrary to the principles of the Treaty; and

(b) that the failure of the Broadcasting Corporation to adhere to a financial agreement with Aotearoa Broadcasting Systems was also an action of the Crown contrary to the principles of the Treaty.

The claimants subsequently accepted that there was no power for the tribunal to re-open the matters which it had dealt with in the *Te Reo Report* but suggested that the broadcasting issues dealt with in the report were interim only, and that the tribunal did not make a final recommendation on those matters. It was suggested that they should proceed to a new claim with new evidence in view of the fact that the members of the tribunal which inquired into the original claim were no longer available.

At the initial stages of this inquiry counsel agreed that the Wai 26 claim should be amalgamated with the subsequent Wai 150 claim and that the two ought to be dealt with as one. The tribunal agreed to this course of action.

4.2. Wai 150

This claim was lodged in English and in Maori on the 6 June 1990. It is set out in appendix 2.

It sought an urgent interim ruling and recommendation that nothing be done to pursue the spectrum management policy embodied in the Radiocommunications Act 1989, until or unless:

(a) there has been resolution of all the issues raised in the claim, by negotiation;

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(b) there has been a finding and recommendations of the Tribunal;
and

(c) any title to spectrum products which is created by the Act be subject to a caveat which recognises and protects the Maori interest in radio frequencies.

And 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;

(iv) the sale of exclusive licenses to propagate radio waves has the effect, de facto, of controlling the activity of broadcasting. It places restrictions and prohibitions upon Maori which prevent their guaranteed freedom to exercise rangatiratanga over tikanga Maori; and

(v) the Crown's kawanatanga does not empower it to create property rights in any part of the universe, or any activity which utilises a special quality of the universe, prior to negotiation with, and the express agreement of, rangatira Maori:

(b) the sale of frequency management licenses under the Radiocommunications Act 1989 without negotiating an agreement with Maori would be in breach of the Treaty of Waitangi and prejudicial to the interests of Maori.

4.3. Request for Urgency

On 17 July 1990 the claimants wrote to the tribunal asking it:

to convene for a brief period on a marae, to hear the claim for full access to AM and FM radio frequencies, before the August selloff date. Tenders are, we believe, being called this week.

On 18 July 1990 the chairperson of the tribunal responded to that request by directing that notice of the claim be given to a number of

ministers of the Crown and directing and authorising Judge P J Trapski, a member of the tribunal, to preside over a conference of the claimants and Crown representatives, on Monday 6 August 1990 to consider how best to proceed with the claim and the request for urgency.

At that conference the Crown solicitor told the tribunal that the Crown believed that it had acted on the finding of the tribunal in the *Te Reo Report* by consulting with Maori and through other measures. He stated that if the claim related only to the application of those previous findings of the tribunal, then that could be negotiated, but that if the claim related to the issue of tino rangatiratanga over the radio spectrum, then the Crown would wish to deal with that at a full hearing of the tribunal. He said that the Crown had made available as many AM (amplitude modulated) frequencies as had been requested by Maori broadcasters, but acknowledged that FM (frequency modulated) frequencies were a different matter, particularly in Auckland and in other metropolitan areas where the Crown faced difficulties.

The claimants indicated that they sought a very limited response from the tribunal. The conference was adjourned to 14 August 1990 to allow the parties time to discuss and to negotiate. During the period of the adjournment the claimants formally requested the government to delay the sale of radio frequencies for a period of six months to allow the discussions to continue.

At the conference on 14 August the Crown position was made very clear. The tribunal was advised that Cabinet had decided the Crown was not prepared to postpone the radio frequency tender, and that:

- (i) the Crown accepted that the provision of opportunities for the protection and fostering of the Maori language is part of the function of government derived from the First Article of the Treaty of Waitangi;
- (ii) the Crown regarded the "Principle of Cooperation" set out in the *Principles for Crown Action on the Treaty of Waitangi* as the appropriate policy framework within which to work towards assuring "a recognised place" for the Maori language in "the life of the nation" as recommended by the tribunal in its *Te Reo Report*;
- (iii) the Crown had accordingly initiated consultations with the Maori Council and the Wellington Maori Language Board in May 1989 over the management regime which was established in the Radiocommunications Act;
- (iv) the Crown was then engaged in consultations with iwi organisations throughout New Zealand over the allocation of the radio frequencies which had been reserved for Maori use;

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(v) the Crown was not prepared to have its discussions with iwi organisations as to their radio spectrum requirements mediated by a pan-tribal organisation such as the New Zealand Maori Council, and in any event it doubted whether such a process would be acceptable to the iwi organisations concerned; and

(vi) the Crown believed that the reservations of frequencies and other provisions which it has made for the promotion of Maori language and culture would enable full coverage of tribal areas, should iwi organisations wish to achieve such coverage, and the Crown was accordingly not prepared to postpone the AM/FM tender.

The claimants on the other hand contended that they were in constant contact with iwi and that they had available to them experience and expertise which iwi did not have, although they acknowledged that the requirements of iwi still remained the dominant issue. They sought to proceed to a hearing on the preliminary issue which they had put to Cabinet.

The conference was then adjourned until Tuesday 21 August 1990 to allow the parties further time to consider their positions and in particular to consider whether there was a preliminary issue which could be heard without convening an inquiry by the full tribunal.

After the conference on 22 August the chairperson of the tribunal issued the following direction:

On 18 July 1990 Judge Peter Trapski was directed to preside over a judicial conference to consider a request for urgency for the hearing of this claim.

Urgency arose through the Crown's proposal to sell AM and FM radio frequencies. According to papers filed, the Crown promised to reserve certain frequencies for Maori and is currently involved in discussions about the Maori allocation. It is claimed however, that the reserved frequencies (especially FM) are inadequate to fulfil the Crown's obligations to protect the Maori language.

The Crown has confirmed that tenders for the frequencies close in September with the successful tenderers to be confirmed shortly thereafter.

Now the claimants have filed a detailed request for an urgent inquiry on whether it is necessary for Maori to have available to them a fair share of the FM frequency to ensure a secure place for their language and culture in broadcasting in New Zealand. It is argued that the forthcoming disposal of frequencies for up to twenty years will place a "major impediment" on Maori broadcasting. The preliminary findings of the Tribunal in relation to broadcasting in the Te Reo Report (Wai 11) were referred to as well as statements from the Court of Appeal.

Without looking to the substance of the claim, I am satisfied that an urgent inquiry is justified.

The Tribunal is heavily committed to other inquiries at this time however and this claim cannot be heard before October.

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Accordingly:

1 The claim is set down for hearing at Wellington on 23 October 1990 at a venue to be advised. It is expected that the hearing will take no more than 2 weeks and that a report will issue shortly thereafter.

2 Judge Trapski is hereby appointed as presiding officer (with other members of the Tribunal to be notified shortly).

3 Counsel for claimants is directed to file particulars of the issues to be raised by 1 October 1990.

In the meantime the Crown is asked to postpone the sale of frequencies pending the hearing and report.

Chief Judge ETJ Durie
Chairperson
WAITANGI TRIBUNAL

On the 12 September 1990 the Minister of Broadcasting responded in these terms:

Dear Chief Judge Durie

I hope you will not consider it improper for me to communicate directly to you the Government's decision in respect of the suggestion, made in your memorandum of 22 August 1990, that the tender of AM/FM radio frequency rights be postponed until the Waitangi Tribunal's hearing and report on claim WAI 150.

I do so out of the Government's respect for the important role of your Tribunal in our national life. You will see from the time that has elapsed since the receipt of your suggestion that the Government has given it extensive consideration.

My Cabinet colleagues have asked me to convey to you their response to your suggestion. While they are happy to cooperate to the fullest extent in the hearing which you have scheduled, and will of course give careful consideration to any recommendations which might result, the Cabinet has decided that it is unable to accept your suggestion that the tender be postponed.

In its broadcasting policy, the Government has aimed at ensuring that radio frequencies are available for the promotion of Maori language and culture which would enable full coverage of all tribal areas, should iwi organisations wish to achieve such coverage. Postponement of the AM/FM tender would not, in the Government's view, assist the achievement of that objective. On the other hand, postponement of the tender would impose real costs on all participating in the tender.

Yours sincerely

Jonathan Hunt
Minister of Communications

4.4. Court Actions

The minister's letter was received on 13 September 1990. The following day the claimants commenced an action in the High Court seeking judicial review of the minister's decision to proceed with the tender in the light of the claims they made. This action was successful. On 21 September 1990, the Honorable Justice Heron in the High

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Court at Wellington made a declaration that the Crown postpone the sale by tender for six weeks.

That declaration was appealed to the Court of Appeal who heard argument over 3, 4 and 5 October 1990. The judgments of each of the five members of the Court were issued on 1 November 1990. A majority of the members of the court found that the minister could not reasonably have decided to proceed with the tender without first awaiting the report of this tribunal and our inquiry proceeded under the protection and the urgency of that order.

On 5 October 1990 a sitting of the tribunal was constituted by the chairperson to hear the claim comprising P J Trapski as presiding officer, and M T A Bennett and E Ryan as members.

4.5. Procedure for the Inquiry

The inquiry was conducted over two weeks, mainly at the Waiwhetu Marae; two days were at the offices of the tribunal in Wellington. It was appropriate that our sittings should be at the Waiwhetu Marae for it was there that the tribunal sat to hear evidence in the original *Te Reo Maori* claim just over 4 years ago.

We heard evidence from kaumatua (elders), rangatahi (young people), linguists, anthropologists, economists, sociologists, broadcasters and from Maori groups involved in or hoping to set up radio stations. We also heard evidence from officials of the Ministry of Commerce who had been involved in the proposals for the management of the spectrum, the tender, and consultation with Maori, and from Mr Huri Maniapoto a kaumatua who had assisted officials from the Ministry of Commerce in their consultations.

Evidence was received in both oral and written form and in both Maori and English. When evidence was given in Maori it was translated to English. A record of the proceedings including a list of the witnesses is contained in appendix 3.

Chapter 5

The Restructuring of Broadcasting

5.1. Background

The Broadcasting Act 1976 and its regulations imposed economic and regulatory restrictions on the ability of broadcasters to enter the broadcasting industry in New Zealand. Intending broadcasters were required to make application to the Broadcasting Tribunal for a licence to broadcast and applications were dealt with in accordance with criteria set out in section 80 of the Act.

Prior to 1971 all licensed radio services in New Zealand were provided by the Broadcasting Corporation of New Zealand (BCNZ), although a number of illegal private stations were also operating at that time. With the establishment of the Broadcasting Tribunal in 1971 warrants were issued to enable the legal operation of private radio stations.

By 1988 there were 28 private commercial radio stations typically offering a popular music or talkback format, and four private non-commercial radio stations funded by subscription. BCNZ operated two non-commercial national networked services funded by the public broadcasting fee; the National Programme and the Concert Programme, and a non-commercial Access radio station. It also broadcast Radio New Zealand to the Pacific Islands. BCNZ also operated 35 mass appeal commercial stations, and four "popular" music commercial stations.

The entire broadcasting fee was received by and for the exclusive use of BCNZ, and there was no explicit requirement for the corporation to make any allocation from that fee for Maori broadcasting.

5.2. The New Policy

On 26 April 1988, in a document entitled "Broadcasting Policy Review", the government announced that it had decided upon a new policy for broadcasting. It intended to introduce more competition and flexibility into the industry while at the same time ensuring that certain basic social objectives were maintained or were met.

Broadcasting was to come within the jurisdiction of the Commerce Act and greater competition was to be permitted. Legislative

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economic restrictions on entry were to be removed, and new entrants would no longer be subject to the warrant system. Instead, all participants would be required to obtain a radio spectrum allocation from the Crown. The method of acquiring allocation was to be the subject of a separate review, but it was expected that frequencies would be allocated through a market-based system.

The stated social objectives included:

- (a) maintaining and developing broadcasting as a system of human communication to serve the people of New Zealand; and
- (b) reflecting and developing the New Zealand identity and culture by obtaining, commissioning, and broadcasting a range of programmes, including Maori programming and Maori radio, to inform, educate and entertain.

It was intended that the stated social objectives should be met through a system of publicly funded grants administered by a new Broadcasting Commission and that these grants would be bid for competitively by broadcasters.

The government then set about refining this general policy. It announced the major restructuring of BCNZ along state-owned enterprise lines, the establishing of the *Listener* as a separate joint venture business, the re-establishing of the New Zealand Symphony Orchestra as a distinct business unit, and the establishment of an independent body, then called the Broadcasting Assistance Commission, to fund the public service broadcasting objectives, which then included ensuring that a range of broadcasts was available to cater for the interests of minority groups in the community.

Under this new regime the collection and allocation of the broadcasting fee was to be removed from state-owned broadcasters to become the responsibility of the new commission which would allocate the fee revenue in accordance with more targeted objectives. Maori broadcasting interests and state broadcasters with Maori programming objectives were among those who were to be able to seek financial assistance directly from the commission for this purpose.

The government specifically noted the tribunal's recommendation to the Minister of Broadcasting in the *Te Reo Report* that in formulating broadcasting policy regard should be had to the tribunal's finding that the Treaty of Waitangi obliges the Crown to recognise and protect the Maori language. On 3 October 1988 it announced that it had decided that:

- (a) Aotearoa Maori Radio Board, which had been a BCNZ Committee, was to be established as a separate entity with an independent board appointed by the Minister of Broadcasting in consultation with

the Minister of Maori Affairs, and that it was to be asked to prepare proposals for its ongoing funding with a view to achieving self sufficiency, but with the ability to seek transitional funding from the new commission;

(b) the funding of Maori broadcasting would initially be the responsibility of the new commission;

(c) the new commission, when established, would be asked to develop in consultation with the Department of Maori Affairs, suitable systems for assessing and funding Maori broadcasting needs in accordance with its overall goals and objectives; and

(d) a minimum of six per cent of the revenue received from the public broadcasting fee was to be made available for Maori broadcasting purposes, including Maori language broadcasting.

5.3. **The n/e/r/a Report**

In July 1988 officials of the Department of Trade and Industry commissioned National Economic Research Associates (n/e/r/a) a London based group of economists, to study ways and means of managing the radio frequency spectrum to ensure allocative efficiency and financial return to the Crown from public ownership of the spectrum. The objectives of this study were to:

(a) maximise economic efficiency in usage of the spectrum in New Zealand;

(b) examine the scope for achieving a financial return to the Crown; and

(c) evaluate and recommend practical and equitable options for implementation of an allocation and management regime.

The report which n/e/r/a presented was prepared over a period of four months. It involved liaison with major users and interest groups, a close examination of the legal and engineering issues and projections of the likely demand for spectrum in New Zealand in the medium term. As its terms of reference required it was based upon ensuring a financial return to the government rather than upon social issues.

On 13 December 1988 the Minister of Commerce announced the adoption in principle of the proposals of the n/e/r/a report. The key change which this would bring about was said to be the creation of legal property rights which would allow for long term tenure, tradeability and the effective management of the spectrum by the holders of the rights themselves, but it would also recognise incumbents by a preferential arrangement within a tendering regime

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whereby a sealed bid "second price" system would be used. At the same time the system would be made compatible with the government's stated social objectives.

In a speech on 17 March 1989 the Minister of Broadcasting confirmed that the government had made provision for non-commercial broadcasters such as certain Maori services to acquire radio spectrum, and that the new Broadcasting Commission would be able to assist services to acquire spectrum. If necessary, additional support for spectrum costs would be made available to the commission.

The minister said that it was expected that the cost of purchase of radio spectrum rights in provincial locations would be modest, but in major metropolitan areas, and particularly in the case of FM, radio spectrum rights could be expensive. The monies that might be required to give financial support to Maori broadcasters seeking radio frequencies would be provided to the commission by the government, taking into account revenue that it would receive from the tendering process.

5.4. Broadcasting Act 1989

This Act came into force on 1 July 1989. It repealed the Broadcasting Act 1976 and set up the Broadcasting Commission. The functions of the commission are set out in section 36 and include the functions of:

(a) reflecting and developing New Zealand identity and culture by promoting programmes about New Zealand and New Zealand interests and promoting Maori language and culture; and

(b) ensuring that a range of broadcasts is available to provide for the interests of (inter alia) minorities in the community including ethnic minorities;

by making funds available, on such terms and conditions as the commission thinks fit for broadcasting and the production of programmes to be broadcast.

Section 37 imposes on the commission in exercising these funding functions, the obligation to consult from time to time with persons who have an interest in New Zealand broadcasting and the production of programmes in New Zealand and representatives of Maori interests who can assist in the development of the commission's funding policies, and to promote a sustained commitment to programming reflecting New Zealand identity and culture.

Section 44 requires the commission to have regard to the general policy of the government in relation to broadcasting as that policy is communicated to it by notice in writing by the minister, and to

comply with any directions given by the minister pursuant to any such policy. Where such notice is given to the commission, the minister is required to publish a copy of it in the *Gazette*.

Pursuant to this power on 1 June 1989 the Minister of Broadcasting gave notice to the commission that it was part of the general policy of government in relation to broadcasting, that (inter alia) Maori broadcasting should be actively promoted, and that funds should be made available from public broadcasting fee revenue for that purpose. He directed the commission to:

- (a) apply at least six per cent of the public broadcasting fee revenue, net of collection costs, to the promotion of Maori broadcasting, including broadcasting promoting the Maori language and Maori culture;
- (b) develop appropriate systems for assessing and funding Maori broadcasting needs;
- (c) make available funding of approximately \$1.44 million (exclusive of goods and services tax) to the Aotearoa Maori Radio Trust Board for the period 1 July 1989 to 30 June 1990 to maintain a continuous AM radio service in the Auckland area; and
- (d) seek as soon as practicable, expressions of interest in assistance from public broadcasting fee revenue in relation to the establishment or maintenance of specific Maori broadcasting ventures.

The Broadcasting Commission, as required, has consulted a number of Maori groups including the Maori Language Commission, the New Zealand Maori Council, government agencies and others and decided that for the year ending 30 June 1990 it will apply six percent of the net public broadcasting fee solely to Maori radio. The funding for Maori television programmes will be made available as a separate additional amount.

The result is that for the financial year ending 30 June 1990 the commission has made available just over \$11 million for Maori radio and television broadcasting. That is around 14 percent of the net public broadcasting fee.

The commission expects to follow the same expenditure pattern in the year to 30 June 1991, with funding for Maori television and Radio New Zealand's Te Reo O Aotearoa service being additional to the six percent minimum requirement directed by the Crown.

These figures are impressive. They indicate a practical commitment to Maori broadcasting which is worthy of commendation.

5.5. Radiocommunications Act 1989

On 19 December 1989 the Radiocommunications Act was passed. It was the final legislative measure to implement the new broadcasting policy and provides a radically different way of using the radio spectrum. It creates rights to use radio frequencies within the spectrum for periods of 20 years. These rights are accorded certain attributes of property including the right to transfer and to mortgage. They are recorded in a register in much the same way as land under the Land Transfer Act. Initially these rights may be entered in the register only on the application of the Secretary of Commerce, who on behalf of the Crown is the manager of the frequencies. The secretary as manager is then able to transfer any or all of these recorded rights to any person wishing to buy them.

The provisions giving the Crown these powers either implicitly or under the prerogative powers of the Crown, were the subject of a claim of *tino rangitiratanga* by the present claimants during the passing of the Act through its select committee stages.

There are various transitional and saving provisions for existing radio broadcasters in the Act. In particular section 170 accords licences to certain non-commercial existing broadcasters to their then operating frequencies and exempts them from payment of the annual 1.5 per cent levy. Five Maori broadcasters are covered by these provisions and named in the seventh schedule to the Act. They are:

Radio Ngati Porou
Aotearoa Maori Radio
Te Upoko o Te Ika
The Te Arawa Maori Trust Board
The Te Whare Awhina o Te Iwi Trust

5.6. Priestley and Shearman

Early in 1990 the Ministry of Commerce retained Priestley and Shearman of Sydney to produce a report on the capacity of the radio broadcasting spectrum in New Zealand. From their draft management plan the subsequent tender documents were drawn. The report contained an analysis of the then known requirements for Maori broadcasting. During the compiling of this analysis it was considered that the plan would have to provide for large coverage areas if broadcasting was to reach a high percentage of the Maori audience living in rural areas. To achieve this wide coverage it was decided to provide medium to high power AM stations. In some cases AM was not appropriate for either interference reasons or for coverage reasons and in these cases FM assignments were reserved. We deal with aspects of these allocations in the following section of this report.

5.7. The Tender

In accordance with an announcement made on 23 May 1990 the Ministry of Commerce on Thursday 26 July 1990 issued a call for tenders for 38 AM and 110 FM radio frequencies with a closing date of Monday 3 September 1990. Subsequently this date was extended to 17 September 1990.

The frequencies are to be disposed of to the highest bidder. It was originally planned that this process commence on 1 November 1990 but it has been postponed by order of the High Court pending the delivery of this report.

We are told that a considerable number of tenders have been received.

Chapter 6

The Consultation Process

6.1. The New Zealand Maori Council

In May 1989, in a letter from the Ministers of Commerce and Broadcasting to the chairperson of the New Zealand Maori Council, the government initiated consultations concerning its proposals for the management of the radio spectrum and the allocation of parts of that spectrum for Maori broadcasting. The consultations continued from April to December 1989. They were wide ranging, but the issue of tino rangatiratanga soon dominated. At the request of the council, cabinet decided on 16 August 1989 to contribute up to \$125,000 towards the cost of Maori preparing their argument on that specific issue.

In October 1989 the council presented the government with:

- (a) its claim to rangatiratanga over the spectrum;
- (b) a copy of a paper prepared for the council by Mr Brian Easton a well-known economist; and
- (c) the draft of the claim it has now made to the tribunal.

On 15 November 1989 the council wrote to the Minister of Commerce seeking government support for its proposal that further consideration of the Radiocommunications Bill by the Select Committee be suspended, and that the Bill be referred to this tribunal.

On 20 November 1989 the Ministers of Maori Affairs and Broadcasting wrote to the chairperson of the council to advise of decisions that had been taken by cabinet on the matters the council had raised. The letter stated that the government had taken account a number of points in applying its "Principles for Crown Action on the Treaty". They were:

- (a) that the Crown should take every reasonable step in discussions with its Maori partner to reach outcomes which both parties consider to be equitable;
- (b) that where one of the Treaty partners expresses strong concern over an issue, it should be given a full and fair hearing, irrespective

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of whether the arguments advanced in support of its case appear to be substantive;

(c) that the Maori language was found by the Waitangi Tribunal to be a taonga of the Maori people, and the Crown should therefore have regard to the tribunal's finding that the Treaty obliges the Crown to recognise and respect the Maori language; and

(d) that the "Rangatiratanga Principle", which guarantees to iwi Maori the control and enjoyment of those resources and taonga which it is their wish to retain, should be taken into account together with the "Kawanatanga Principle" as the Crown's right to make laws.

The letter then went on to state that in the particular instance of the radio spectrum:

(a) the government had considerable doubt about the strength of the rangatiratanga argument, and considered that correspondingly greater weight should be placed on kawanatanga, or the need for the Crown to make laws on behalf of all citizens of New Zealand; and

(b) the government did not agree that shared responsibility for management of the radio spectrum was necessary to ensure that the needs of Maori were adequately catered for, particularly given the extent of the proposed consultative procedures during the implementation stage of the regime.

The letter confirmed that the government had already accepted that it should have regard to the findings of the tribunal, and that specific reference to promoting Maori language and culture had been inserted into the Broadcasting Act 1989.

It confirmed that the government had decided that further concrete steps should be taken to promote Maori language and culture in broadcasting, and that it had decided:

(a) it would ensure that use of AM or FM frequencies would be made available for the development of radio services, including those directly sponsored by iwi authorities, whose primary objective was the promotion of Maori language and culture;

(b) the Radio Frequency Service of the Ministry of Commerce would undertake a technical study of the availability of frequencies, including those which might be used by new Maori radio stations, whether on a full time or on a time-share basis. That study was to be completed by 31 March 1990, and would involve appropriate consultation with Maori;

(c) expressions of interest in using frequencies for sound broadcasting purposes would be called, and iwi would be fully consulted on their spectrum requirements in the course of this process. If the

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requirements of iwi were to be properly provided for from the outset, these consultations must take a concrete form, focusing on what spectrum (ie AM or FM) was sought, where (ie at which sites) and by whom. Initial expressions of interest from all parties would be expected by early February 1990; and

(d) the findings of the Radio Frequency Service and the outcome of the expressions of interest process would be incorporated in plans for AM and FM frequency allocation to be published on or before 31 May 1990.

With regard to the council's request for the government to support its proposal that further consideration of the Radiocommunications Bill by Parliament be suspended and the Bill be referred to this tribunal, the letter advised that the government had decided that the arguments which had been advanced did not warrant such a course, but that if the council proceeded with a claim to the tribunal, any findings of the tribunal would be considered by the government.

That letter was received that same day, 20 November 1989, by the chairperson of the council at a hui at Te Herenga Waka Marae at Victoria University of Wellington. An immediate reply was sent. It said that:

(a) the letter had been discussed at length at the hui at which there were representatives from distant Maori councils, interim iwi authorities, Maori broadcasting groups, the Maori Women's Welfare League and various other Maori groupings;

(b) the hui considered that the Crown had failed to explain the basis on which it assumed the rights and privileges of tino rangatiratanga over taonga Maori;

(c) the Crown's presumption of tino rangatiratanga over airspace in general, and within that, over the radio frequency spectrum, was not explained;

(d) the inability of the Crown to make explicit the basis of its claim to tino rangatiratanga over the radio spectrum was a matter of deep concern to the hui, particularly since the Crown could be seen in the light of its letter, to be brushing aside the Maori position;

(e) the hui had expressed the view that the proposed consultation over concrete steps outlined in the letter could not proceed without express provision for the recognition of Maori tino rangatiratanga over the airspace and in particular the radio spectrum; and

(f) the hui had come to the view that negotiations were at a stage where they should be between Maori and ministers of the Crown,

and that no further progress was likely if negotiations were to continue solely between officials and Maori.

We were told by officials of the Ministry of Commerce that at that time, Maori rejected the Crown's undertakings as being inadequate; that consultations were suspended; and the Crown was served with an application to this tribunal in terms identical to the present application and advised that the only settlement of their claims with which Maori would be satisfied would have to include the provision of a Maori television station fully funded by government. We do not read the council's reply to the government's letter in these terms.

6.2. Iwi Consultations

In December 1989 some 200 copies of a booklet entitled *He Ara Hou mo Te Reo Irirangi* (A New Path For Broadcasting), printed in both Maori and English, was circulated widely by the Ministry of Commerce to Maori organisations and others known to have an interest in broadcasting. This booklet outlined the government's policies for Maori broadcasting and called for "expressions of interest" in frequencies from radio stations whose primary objective was the promotion of Maori language and culture.

It restated the Cabinet decision in this way:

The Government has undertaken to ensure that use of AM or FM frequencies is made available for the development of radio services, including those directly sponsored by iwi authorities, whose primary objective is the promotion of Maori language and culture.

The Radio Frequency Service of the Ministry of Commerce will undertake a technical study of the availability of frequencies, including those which might be used by new Maori radio stations, whether on a fulltime or on a time-share basis. The study will be completed by 31 March 1990, and will involve appropriate consultation with Maori.

Expressions of interest in using frequencies for sound broadcasting purposes are now being called, and iwi will be fully consulted on their spectrum requirements in the course of this process. It is intended that these consultations should take a concrete form, focusing on what spectrum (ie AM or FM) is sought where (ie at which sites) and by whom. Initial expressions of interest from all parties will be expected by early February 1990.

The findings of the RFS and the outcome of the expressions of interest process will be incorporated in plans for AM and FM frequency allocation to be published on or before 31 May 1990.

At the same time the Ministry of Commerce employed a Maori consultant, Mr Peter Waaka of Rotorua, to contact iwi organisations, current or intending Maori broadcasters, and others to urge them to respond to the invitation to register "expressions of interest" in AM or FM frequencies. In the main these contacts were made by telephone and 12 iwi or Maori broadcasters responded.

Allocation of Radio Frequencies

The time limits set for these processes were extremely tight. The document is dated 31 November 1989. Initial expressions of interest were required by early February 1990—within two months—leaving two months for consultation with iwi on their spectrum requirements and completion of the technical study on the availability of frequencies.

We would have expected that the expressions of interest would necessarily have had to precede the consultations, and that it was only after the consultations had been completed that the technical study could be commenced. It was impossible to achieve these goals within the time frame set, if in fact the consultations were to be meaningful, especially when expressions of interest were called for over the Christmas vacation when New Zealand traditionally closes down. We view this as important, as for a number of reasons there was a general lack of experience or expertise of Maori in broadcasting at that time, at least for the type of committed decisions which were being required. Subsequent documentation makes it clear that many expressions of interest were late in being received. That was hardly a good start to the consultation process.

Nevertheless the ministry proceeded with its planned programme at the pace it had previously set. The Minister of Broadcasting recommended to Cabinet that radio frequency assignments for Maori be made and on 11 April 1990 (11 days after the date initially proposed for the completion of the study) Cabinet agreed to reserve radio frequencies for Maori use in 28 broad areas, in order to give geographical coverage of these areas. In making these provisions it was the government's stated intention that Maori should have available to them frequencies which it, the government, considered would enable Maori to broadcast over the whole of each tribal area and which, with the proposed development of Aotearoa Maori Radio's additional network, would provide for Maori radio programmes promoting Maori language and culture to be disseminated throughout New Zealand.

On 26 April 1990, 15 days later and prior to the issue of the Priestley and Shearman report the government announced that AM and FM frequencies for Maori use had been assigned. This had been done on the basis of what the Ministry of Commerce considered on purely technical grounds would be best able to provide the geographical coverage which it considered would be necessary.

At that time many or most iwi were quite uncertain about what they needed, not only in terms of AM or FM or both, but also where stations could best be sited, what finance would be required and where this could be obtained. Generally speaking iwi were being advised that financial viability of the project was of prime importance; that Maori

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radio ventures must be financially successful and must not be allowed to fail, and that the opportunities provided must succeed. All iwi who were consulted were told continually and persistently not to rush and to take their time, as nobody wished to see a financial failure.

At the same time as the reserved frequencies were announced, a further booklet, a supplement to *He Ara Hou mo Te Reo Irirangi*, was issued by the ministry. It dealt with the process by which the government proposed to make available the AM and FM frequencies it had already reserved for Maori broadcasting. The booklet required comments within 3 weeks and made it clear that the expressions of interest which had been called for in January were a part of the government's preparation for tendering "unused" AM and FM frequencies later in the year. It sets out the conditions on which Maori broadcasters would hold the licences when they were issued. In a section entitled "Coverage of Licences" the booklet said:

In accordance with its earlier commitment, the Government will endeavour to meet all *reasonable* spectrum requirements of broadcasters whose objective is the promotion of Maori language and culture. It must be emphasised, however, that frequencies will be in short supply in some areas, and access to frequencies in such cases may need to be on a shared basis.

It then went on to confirm that the government considered that its first responsibility was "to seek to provide AM or FM coverage within the tribal area of iwi which have indicated an interest in radio broadcasting" clearly emphasising the government's view that the basic factor was to ensure geographical coverage.

The booklet then said:

Those iwi which have expressed interest in Maori broadcasting will be given an opportunity to discuss with the Government its specific intentions with respect to the provisions of AM and FM frequencies for Maori broadcasters. This process of consultation would be completed well before the tender so that there could be no room for doubt about the Government's intentions.

and later:

Many parts of New Zealand are not covered by any of the Maori broadcasting proposals which have been received by the Government. The Government proposes to reserve AM or FM radio frequencies in such areas for the future use of iwi.

With offers of consultation (with emphasis on those consultations being with the government rather than with the ministry) having a closing date of 16 May 1990, and with the emphasis on the consultation process being completed well before the tender so that there could be no room for doubt about the government's intentions, real concern started to emerge among interested Maori when on 23 May

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1990 the ministry announced the Crown's intention in July to dispose of 38 AM and 110 FM frequencies by tender for a period of 20 years.

At that same time, on 24 May 1990 in issuing the Priestley and Shearman report the ministry issued a paper summarising the frequencies that had been reserved for the use of Maori broadcasters. That paper identified the iwi or broadcasters who had expressed an interest in securing a frequency in the area concerned, and set out the comments which had been made by iwi/Maori broadcasters about the guidelines which the government proposed to use in the allocation of licences. None of those comments related to FM frequencies in particular, but the paper made two important points.

(a) The government's reason for insisting on iwi holding licences, was its view that this offered the means of ensuring that frequencies would be used for the promotion of Maori language and culture; and

(b) In relation to the suggestion that frequencies may have to be shared (the suggestion of one broadcaster was that this meant that Maori broadcasters were being given "second-rate" frequencies) it was said that the government was not seeking to give radio frequencies to iwi, but to promote Maori language and culture, or—failing that—non-commercial broadcasting.

It was also said that the Minister of Broadcasting had reviewed the responses and considered that discussions should proceed on the basis of the guidelines as proposed in *He Ara Hou mo Te Reo* supplement, but that the ministry would take a flexible approach to short-term licensing where iwi-based licences had not been issued and that there was no question of interrupting or delaying existing or new Maori broadcasting initiatives while the question of who should hold the licence in each area was being resolved.

The document then went on:

Please note that no licences will be issued until after both the completion of the tender round and the creation of management rights and licences by this Ministry under the Radiocommunications Act 1989 ie until November this year...

No deadline has been set for completion of the process of allocating licences for Maori broadcasters...

The primary concern of the Ministry of Commerce at this stage is to ensure that Maori broadcasters have a clear idea before the tender of AM and FM frequencies takes place in July/August of how the guidelines can be expected to apply to their proposal. If it is clear that what is proposed would lie outside the guidelines, and it will therefore be necessary to bid for a frequency or frequencies, the Ministry wishes this to be established well *before* the tender documents are issued. This will give plenty of time for bids to be prepared.

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Accordingly, if you would now like to discuss in terms of the guidelines your interest in licences for one or more frequencies which have been reserved, please telephone me...

All of this, the announcement of reserved frequencies on a coverage basis while consultations were still continuing, the allocation of frequencies while Maori interests were still in a steep learning curve, and the contemporaneous introduction of the tender process against the background of written assurances that the consultation process would be completed well before the tender process was commenced, was confusing, and a fertile breeding ground for the "legacy of distrust".

The laudable intentions of the government and its officials to involve the other Treaty partner in its decision making process, was in our view destroyed by allowing perceptions that:

- (a) the frequencies for Maori broadcasting had already been reserved, and no amount of consultation was going to change them and the balance were to be put up for tender;
- (b) it was only the matter of how these reserved frequencies would be allocated among Maoridom that was to be discussed; not the type, how many, or where; and that
- (c) if Maori required frequencies outside those which had been reserved, they would have to bid for them in the tender process.

Our view that these perceptions were valid is reinforced not only by the bringing of this claim, but by the fact that so many Maori came from distant parts to express their concerns and their frustrations to us, and to try and find out what was happening.

This is all very sad because the attempts by the ministry to be a faithful Treaty partner were in fact light years ahead of any previous attempts. The government and the ministry had really tried to promote Maori interests. They had:

- (a) openly adopted the finding of this tribunal to recognise and protect the Maori language and culture, and specifically incorporated that principal into the new Broadcasting Act;
- (b) protected existing Maori broadcasters through section 170 of the Radiocommunications Act 1989 by giving them automatic entitlement to a licence and exempting them from the 1.5 per cent annual levy;
- (c) directed the Secretary of Commerce pursuant to section 112 of the Radiocommunications Act 1989 that it was part of the government's policy that sound radio broadcasting services of short

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term duration having as their primary objective the promotion of Maori language and culture, should be facilitated;

(d) contributed \$125,000 toward the New Zealand Maori Council's cost of preparing its arguments on its claim to tino rangatiratanga over the radio spectrum;

(e) sought the advice of Manatu Maori and the Iwi Transition Agency on matters relating to Maori broadcasting;

(f) adopted a policy of continuous consultations with Maori broadcasting interests as each block of spectrum was to be prepared for allocation;

(g) employed Mr Peter Waaka to ensure that Maori broadcasters and those who might be interested in Maori broadcasting were made aware of the need to express their interest and how that was to be done;

(h) produced the *He Ara Hou mo Te Reo Irirangi* booklets and ensured their wide distribution;

(i) employed Mr Huri Maniapoto, a kaumatua, to accompany officials of the ministry to meet Maori interests and to ensure that Maori understood the processes they were being invited to be involved in;

(j) ensured geographical coverage of all tribal areas and reserved sufficient radio frequencies for this purpose;

(k) adopted the policy of allocating licences to iwi authorities to allow as much flexibility as possible while still ensuring that responsibility (tino rangatiratanga) for promoting te reo and tikanga Maori vested in iwi; and

(l) continued discussions and planned a further round of discussions.

It is however clear that something went wrong. We believe that the consultation stage of the process was all together too rushed and too confusing to be effective, especially while Maori were being told not to rush, and to take their time. It is clear that further technical analysis is even now still being carried out to identify what possibilities there are for FM assignments as the indications are that in many cases these may be preferred to the AM allocated. In particular we are told that the Wellington and Auckland areas are being investigated but these possibilities have not yet been placed before government.

We have been told that one of the major problems facing the planning process is the lack of clearly defined coverage areas. Much of the technical planning has had to be done using information that may not be accurate. A much clearer definition of the coverage requirements

is needed to allow for a full engineering analysis and the lack of properly defined broadcasting requirements has made the already difficult task of planning such a service an extremely difficult task.

Furthermore certain differences between AM and FM were repeatedly put to us during the presentation of evidence from Maori broadcasting interests. Many of these differences were disputed by the Crown but the fact that these differences remained unresolved clearly illustrated that the consultation process is still by no means complete. Indeed it seems that in many instances the proper or appropriate expressions of interest have not yet been possible. Some have not been completed but more importantly many iwi have not yet been able to decide how best to use the opportunities provided by the process.

6.3. FM Frequencies in Auckland and Wellington

The Crown has adopted a firm policy in relation to the allocation of FM frequencies in Auckland and Wellington. This was clearly expressed in an affidavit of the then Minister of Broadcasting sworn on 8 October 1990 and filed in the Court of Appeal.

That affidavit stated:

2. *I wish to make this affidavit in response to observations by the President of the Court which I understand were made during the concluding stages of the argument on appeal on Friday 5 October 1990.*

3. *I am advised that the President said:*

It is said for the respondents that to attract Maori youth particularly in metropolitan centres it is reasonably necessary that Maori have control not only of an AM frequency but also of an FM frequency so as to enable a youth oriented format which at the same time has significant Maori ingredients. Did the Minister consider that to be a reasonable argument and if so why did he not give effect to it in his policy.

4. *I did not consider that Maori had a reasonable argument for FM frequency in addition to AM in the metropolitan centres such as Auckland and Wellington to be applied to purposes of the kind summarised in the President's statement quoted above.*

5. *THE reasons why I did not give effect to that argument in the policy decisions made by me in consultation with my colleagues in Cabinet and in the further reconsideration that I gave the question following subsequent representations by Maori interests were as follows:*

(a) *I saw the force in that argument as coming from the potential to attract a younger audience to a Maori controlled station which might develop into a station with which young Maori would identify.*

(b) *Insofar as promotion of the Maori language and culture was concerned however I thought that the benefits that would be derived would be of an indirect kind and of limited value.*

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(c) I was conscious of both the limited availability of FM frequencies in such metropolitan areas and claims for them by other interests of both a non-commercial and commercial kind. The relevance of this scarcity factor was that I was not able to consider the request by Maori interests in isolation.

(d) (i) I was also conscious that the Government had after extensive consultation developed a policy aimed at promoting Maori language and culture through mainly AM frequencies using the extensive coverage available from that medium and providing for Iwi-based regional control.

(ii) When I first became Minister of Broadcasting in 1984 there were no permanent Maori radio stations. The Radiocommunications Act 1989 Seventh Schedule provided licences for five stations. The radio plan adopted by the Government in May 1990 provided for a total of 31 frequency assignments to be reserved for Maori broadcasting.

(iii) Bringing this policy to fruition is going to require an extensive contribution from public resources and I believed that this also had to be considered in deciding whether to make a further contribution to Maori broadcasting of a kind involved in agreeing to the request made.

(c) In the end I had to balance the above factors and reached the conclusion that I did not regard the case as strong enough to warrant a decision in favour of the request put to me.

6. *FOR* these reasons I took the view that the most appropriate course was to decline the request by Maori interests. This was the essence of my reasoning at the time of the original Cabinet decision on 21 May and although the issue later became more defined when Maori broadcasters made representations in writing and personally to me, after further consideration I was still of the same mind, namely that I should not agree to reserve such FM frequencies in metropolitan areas as requested.

We were informed that officials of the Ministry of Commerce did not consider this matter until June, well after the consultation process had started and after the frequency allocations of the Draft Radio Plan (the Priestley and Shearman report) had been made and promulgated. But no announcement of this decision was made until the question was raised in the Court of Appeal on 5 October 1990. That is most unfortunate. An announcement of the policy may well have led to better consultation and a more informed decision. We were told that the decisions taken were made without the benefit of briefing papers and in particular, without the benefit of briefing papers on access to young listeners. It is clear that scarcity of the resource was a major consideration.

We note that there is no reference in the affidavit to the demographic concentrations of Maori in Auckland and Wellington, nor to the need to have adequate access to those people. The emphasis continued to be on a geographical coverage.

Insufficient attention seems to have been directed to the need to utilise popular, fashionable, "state of the art" technology to achieve

the objectives which the Crown has recognised, and to the desirability of avoiding the perception that the denial of Maori access to FM frequencies in these targeted areas results from a downgrading of the Crown's responsibility to an unacceptable level, and makes way for the traditional perception that Maori are to be left with the "second class" product.

Little or no consideration seems to have been given to the requirement to provide not only for tangata whenua in the Auckland and Wellington areas but also for taurahere communities which are a significant proportion of the concentration of Maori in those areas.

It is our view that these matters are vital if one is to consider equitable access to a very effective resource and the need to achieve goals and obligations by the best means available.

With the benefit of better information, such as was available to us, the minister may well have come to a different conclusion. With respect, we cannot agree with the view that the benefits that would be derived by an allocation of FM frequencies would be of an indirect kind or of limited value. Indeed we are firmly of the contrary view, but we repeat we were fortunate in having had available to us much more information than was apparently available to the minister.

As a final consideration on this issue we note that at the Maori Economic Development Summit Conference in October 1984, the government undertook to work over the decade to eliminate the development gap between Maori and non-Maori in all areas. The then Minister of Maori Affairs, the Honorable Koro Wetere, pointed out that the pace of development for Maori had to be two steps to everyone else's one, if they were to catch up to non-Maori. The allocation process in our view did not allow for the extra pace necessary in the development of Maori broadcasting. The allocation of FM frequencies to Maori in Auckland and Wellington may provide an appropriate method of achieving this goal.

Chapter 7

Language, Culture and Broadcasting

Kua titaha te ra, kua tu-a-to,
Kei whiti atu te ra ki tua o Tawauwau

The sun is on its descent, it is about to go down,
Be careful, lest the sun set beyond the cliffs of Tawauwau

7.1. The Present State of the Maori Language

The importance of the language to the cultural development of Maori was stressed by our predecessors in the *Te Reo Report*. It is nevertheless important that we record that the evidence which we heard not only confirmed their findings, but elaborated and expanded on the link between cultural development and the vitality of the language as our nation enters the 1990s.

We were privileged to hear a host of impressive witnesses, continually emphasising in a beautiful way, the importance of the language to the preservation and development of Maori culture. Each in their own way stressed that for Maori, as for many other cultures, language and culture are inseparable; that te reo Maori is pivotal to the preservation and development of tikanga Maori; and that te reo Maori is a beautiful, powerful and expressive language, able to be used flexibly and creatively to cope with new situations in technology, agriculture, theology and law. It is indeed he taonga tuku iho no nga tupuna (a treasure bequeathed by the ancestors) in that it is the primary vehicle for the expression and transmission of Maori culture. As Sir Graham Latimer put it "The language is more important to Maori than castles are to the Scots".

The variety, status, and stature of those people who came before us to express their views so eloquently and so sincerely demands to be noted, for Maori people perceive the Waitangi Tribunal as the only authoritative forum available to them to show their Treaty partner their fear of identity loss. Unlike other minorities in New Zealand whose identity, language and cultures are secure in their original homelands the Maori of New Zealand is constantly under pressure to protect his minority position. Since 1840 Maori have had to deal with new pressures brought about by the changing nature of the body politic of their Treaty partner. The partner is no longer only of British

stock but is a multiracial, multicultural entity (the only way people are able to become New Zealanders is a requirement that they take the oath of allegiance to the Crown, without any reference to the Treaty, therefore they must stand on the Crown's side of the Treaty).

The Maori people who appeared before us were clearly intent on acquiring the skills necessary to use the new technologies to preserve their culture and therefore themselves in the technically sophisticated environment which is pushing us relentlessly into the twenty first century.

7.2. Maori Language and New Zealand Culture

The Maori language is a taonga for all New Zealanders; one which must be exposed, revitalised and developed.

We live in a unique land in the south west Pacific, where over the past 150 years a New Zealand culture has been developing from two separate cultures each with their own long histories. Both have contributed to the development of our New Zealand way of life. It is this bi-cultural development which must be respected, confirmed and promoted.

Because the Maori language is the key to understanding Maori culture, it is pivotal to the development of New Zealand culture. There is therefore a collective responsibility of all New Zealanders to preserve the language and to provide every means possible for its development. If Maori lose the language it is not only Maori culture that will die, but with it the essential elements of New Zealand culture also.

This point was made by Dame Joan Metge, an eminent anthropologist, in these terms:

Maori language and culture have value not only to those of Maori descent but also to other New Zealanders. They are an element of key importance in our identity as a nation. We cannot establish our distinctiveness on the world scene without calling on the Maori input. Presented in its full richness and depth, that input develops our knowledge of our land and its history, our knowledge of and pride in ourselves, as at the opening for the Commonwealth Games in January and many facets of the gathering at Waitangi on Waitangi Day in February this year.

In discussing those two memorable events which enabled us to see ourselves as others see us, Dame Joan pointed out that they removed Maori culture from the "concert party" mould and used it as an integral part of describing who we are as a nation. The introduction of the waka and the re-enactment of the Treaty signing, lifted the whole of that ceremony to a higher plane and enhanced the overall performance by ensuring that it was sustained on that higher plane.

These two events present a graphic illustration of the influence of

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Maori culture on the nation's bi-cultural way of life which can develop only if the people of each race have an understanding and respect for the vital and treasured elements of the culture of the other partner.

It is therefore of concern for us to have drawn to our attention the fact that in our nation's sesquicentennial year, the Maori language is still in a critical state.

In *Te Reo Maori* the tribunal found that the Maori language in New Zealand was not in a healthy state and that urgent action needed to be taken if it was to survive. It noted that the Maori people themselves had begun the task of revival but they were working under severe disadvantages, financial and otherwise (3.3.1). At the same time the tribunal pointed to what it described as "an extraordinarily vital development"—the Kohanga Reo movement—that was then taking place among the Maori people and placed great hope for the future in that movement.

The movement has certainly grown in size and in influence. The number of Kohanga Reo (Maori language pre-schools) has increased to the point where in September 1990 there were some 600 centres catering for over 10,000 children, and this year the government has agreed to integrate seven Kura Kaupapa Maori (Maori language primary schools) into the state funded system. That number will shortly increase to eleven.

But although the number of young children who have a good command of Maori is certainly very much larger than previously, the work of Kohanga Reo is being dissipated within a few weeks or months of those children entering primary school through a lack of follow up action.

The present resource of fluent Maori speaking adults is approximately 50,000 (the majority of whom are elderly).

According to Dr Richard Benton whose evidence so impressed our predecessors in the *Te Reo Maori* claim, even if we were to produce 3000 fluent Maori speakers per year, this will not make up for the loss of the present resource until after the year 2011 and the present resource will decline in number over the next two decades.

7.3. The Influence of Broadcasting

The pervasiveness of radio broadcasting has resulted in it becoming a powerful social influence as well as providing information and entertainment. Many people have a radio on, in the background, even when they are not actively listening to it. They receive subliminal messages. Television exerts a similarly pervasive impact on New Zealand society and on the development and maintenance of

language. Those who have visited the United States of America over recent decades will be aware of the influence the southern Californian dialect has exerted over the previously distinctive dialects of many other states through the movie and television industry of Los Angeles.

We heard from one witness, fluently bilingual, a graphic description of the effect on him of radio broadcasting. He lived his early years with older relatives in southern Taranaki. They spoke only Maori. He was forbidden to speak English as he was told that this was the language of those who had taken the mana and the land of his people but in particular he was forbidden from listening to the radio "lest your heart, your mind and your spirit be overtaken by the concerns of the European world".

Monolingual broadcasting has been the feature of radio and television transmission in New Zealand. The component of Maori language transmitted on radio is less than 0.1 per cent of total radio hours, and less than 1 per cent of total television transmission. The high component of imported television programmes results in more emphasis on American and English culture than New Zealand, with negligible emphasis on Maori. Spoken radio contains more of the New Zealand identity, but most broadcast music is imported. In balance the amount of Maori broadcast on radio is negligible.

Bicultural transmissions increase the cultural pride, ethnic identity and status of minority groups. They enable native languages and traditional customs to be preserved and to contribute to the development of a national culture and identity.

We are convinced that the broadcasting media, radio and television, plays a key role in the maintenance or loss, development or stagnation of language and culture, not only by what they do, but by what they do not do. The virtual absence of Maori language from radio and television has been a potent factor in the decline in the number of fluent speakers of Maori over the last forty years, to the point where its survival is problematic. This must be rectified.

7.4. The Revitalisation of Maori Language

If Maori is to be a living language and an ordinary means of communication it must be broadcast freely, not only so that people will become familiar with it and learn it, but so that it will be seen to have prestige such that people will want to learn it and use it as a means of communication. When a language is confined to the privacy of the home and to the traditional rituals of ceremony and religion it loses value, even to its own speakers, because it is not seen to have any usefulness or prestige in the wider society.

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A number of experts, from overseas as well as from New Zealand illustrated for us that broadcasting is perhaps a nation's most conspicuous social institution and cultural manifestation. Broadcast languages are accorded an authoritative status as disseminators of desirable culture. Broadcasters are among society's leading language brokers. They have the opportunity not only to reflect our society's norms but to lead change. In this area we believe they ought to be leading change.

Whilst any language will eventually die out if it is not used by people on a daily basis, popular usage of itself will not guarantee a language's survival in this technological society unless it also has access to the major channels of public communication. No matter how diligent the attempts by parents and teachers to speak an ethnic dialect within the home and at school, living languages have become critically dependent upon broadcasting for their continued vitality.

The task of preserving, maintaining and developing te reo as a living language will require considerable effort. It will require a commitment on every available front. The wise use of the broadcast medium could make the difference between maintenance or loss. Content in music and programming is not the only consideration. It is the total idiom that is important. Maori radio has a "special character" in format and approach. This also must be considered when radio as a means of preserving and developing the language is being evaluated.

7.5. The Needs and Demands of Rangatahi

The population structure of Maori is different from that of the non-Maori. The majority of Maori are under 19, while only about one third of Pakeha are 19 or younger. The Maori population is largely urban. The Royal Commission on Social Policy noted that Maori rates of urbanisation have been the most rapid of an indigenous population anywhere, to the extent that an increasing proportion of Maori, probably a majority, have now been born and raised in urban areas. Eighty one per cent of Maori under the age of 14 live in those urban areas. Auckland and Wellington between them have one-third of New Zealand's Maori population. Eighty per cent of Auckland's Maori population are under 35 years of age.

Radio and television have tremendous drawing power and appeal to young people especially as the source of all that is up-to-date and currently fashionable in their favoured areas of interest. Previous broadcasting practices have denied young Maori listeners the opportunity for immersion in their own language, an essential condition of language learning and retention. It has reinforced in their minds in particular, and in those of the general population, that Maori is a language of marginal importance, unable to cope with the demands

of the modern world. Traditionally the younger generations have been expected to pursue their own musical and sporting interests while the elders debated social and political issues, often literally in separate houses. This would seem as applicable in the present day as in the past.

Rangatahi are based in a contemporary culture, which includes contemporary music. We heard them with examples of contemporary Maori music which were relevant and attractive to Maori youth. That was impressive, but what was more impressive was that they were bilingual. If ever there was a proof of the pudding it was there. If rangatahi are to be the instruments of revitalising Maori language and culture to the point where it is living and in everyday use its status must be worthwhile to them and radio must broadcast programmes which bring that language and culture within their contemporary culture.

Quite simply, if there is to be a policy of change then it is the young who must be targeted. They must have the opportunities presently presented by the Kohanga Reo movement but in a way that is tailored to their needs. The transmission of relevant entertainment and credible news in their own language in "state of the art" telecommunications is what Maori youth are demanding. In this context they must be heard and their message heeded.

We were emphatically told by rangatahi and others that for broadcasts to be attractive to rangatahi they must be in FM. Whereas other factors like programme content may have some importance, the evidence is overwhelming that for whatever reason FM has strong appeal, particularly for youth. This was confirmed in the n/e/r/a report, in government papers and in the broadcasting industry's own clear moves to the FM frequencies.

Chapter 8

The Treaty

8.1. The Subject Matter of this Claim

In 1901 on a hill in Newfoundland, Guglielmo Marconi, using a copper wire antenna suspended from a kite flying 400 feet in the air picked up a radio signal sent by a transmitter in England. Since that time science and technology have developed rapidly to where today different bands of the radio frequency spectrum are exploited for a wide range of purposes.

Clearly in 1840 neither Treaty partner was aware of the existence of the radio spectrum as we know it today, nor of the potential use of this natural resource which makes modern communication so efficient. No other natural resource has such an immediate and extensive impact on modern civilization as the electromagnetic spectrum.

As a natural resource it is a part of the natural environment of the earth and the space around it. In general, natural resources which are within the geographic boundaries of a nation are owned by that nation. Other natural resources which form the boundaries between two nations or traverse them constitute shared natural resources, the uses of which under current law, are enjoyed by each nation on an equitable basis. And then there are common property resources such as the high seas and outer space which are accessible to all and not subject to appropriation by any one nation or person. The electromagnetic spectrum has many of the attributes of a common property resource. It is freely accessible to all. 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. Technological innovation continually expands the capacity of the radio spectrum to carry more information over greater distances and in new directions, but whether technology can keep up with the demand is by no means certain. Over-use and over-crowding cause interference and lead to situations where the use of the radio spectrum can be severely impaired.

Equitable and careful management of the spectrum is therefore crucial at domestic and international levels. Legal regimes based on conventions, rules and regulations have been put in place for the

purpose, and institutional arrangements are functioning both domestically and internationally.

It is because of the importance of the radio spectrum that this claim has been brought in the way that it has.

8.2. **The Arguments**

The claimants asserted first, that the radio spectrum was a taonga in terms of the Treaty, and as such was protected by the guarantee of tino rangatiratanga in article 2 so that the Crown must bargain for any use of the spectrum in the broader public interest. A direct comparison was drawn with fisheries considered by the tribunal in the *Muriwhenua Report*.

Alternatively, the claimants argued that the principles of the Treaty imposed an obligation on the Crown to ensure that Maori had sufficient access to the spectrum to maintain cultural integrity and security, and that this was a wide obligation going beyond simple protection of the language.

The Crown agreed that the Treaty required it to sustain and protect Maori language and culture and to provide a secure place for Maori language in broadcasting, but it could not accept that the spectrum is a taonga in terms of the Treaty, saying that Maori rights to the spectrum as such, were the same as for any other group in society. It asserted that apart from any allocation of radio spectrum frequencies which Maori might receive as a result of the Crown's duty to protect Maori language and culture, Maori must tender for rights to the spectrum with the rest of the population. The general right of Maori to enjoy the benefits of scientific and technological advances since the Treaty said the Crown, stems from the pledge in article 3 that they would have the same rights of citizenship as the people of England, so in that sense, Maori stand in no different position with regard to the spectrum than any other group.

8.3. **Taonga**

"Taonga" are things valued or treasured. They may include those things which give sustenance and those things which support taonga. Generally speaking the classification of taonga is determined by the use to which they are put and/or their significance as possessions. They are imbued with tapu (an aura of protection) to protect them from wrongful use, theft or desecration.

Taonga may be the possession of he tangata (an individual), he whanau (a family), he hapu (a sub-tribe), or he iwi (a tribe). There are many kinds of taonga in various categories and in a wide range of classifications. They may be things which are not yet known.

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The taonga of the spectrum is different in essence, in terms of its discovery, its development and its usage from any other taonga known by or used by any of the tribes. Even though the spectrum was not evident at the time of the signing of the Treaty, in hindsight we know that it has been part of the universe since the time of creation.

In this way it is similar to the offshore fishery resource. In the *Muriwhenua Report* (1988) the Tribunal found that while the in-shore fishery was known to and owned by Maori at 1840 and remained in their exclusive use, the offshore resource was not so known and owned. Its use was therefore to be a matter for negotiation between Maori and the Crown.

In *Te Reo Maori* the Tribunal found that language is a taonga, because if Maori had been asked in 1840 if they considered their language and culture was protected by the Treaty they would have answered, "Of course!". But the radio spectrum was at that time still undiscovered, still unused in its modern form by either party to the Treaty. Thus the question "Do you consider that the radio spectrum is protected?" could not have met with the same response.

For these reasons the radio spectrum cannot be regarded in the same way as other taonga, especially "taonga tuku iho i nga tupuna" (taonga handed down from the ancestors).

Furthermore, the spectrum is a natural resource, enveloping the whole of the earth at the same time. As such it is for the whole of mankind. It cannot be possessed by one person or by one group; it can only be used by them. The available right is the right of access shared with all other members of the human race. 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.

The responsibility for the management of this resource is as important as the right of access, and the manner, nature and degree of that access must be the subject of effective consultation between the tribes and the Crown on the basis that the Treaty on the one hand guarantees the protection of taonga and on the other declares that its covenants were entered into "in the full spirit and the meaning thereof". As has been said elsewhere of the Treaty, "what matters is the spirit".

8.4. **The Principles to be Applied**

So what are the principles of the Treaty which should be applied in our inquiry?

We believe 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 the obligation to consult.

The classic statement of the respective duties and obligations of the partners are contained in the judgments of the Court of Appeal in *The New Zealand Maori Council and Latimer v Attorney General and others* [1987] 1 NZLR 641. For the purposes of this inquiry we single out two statements from those judgments which we consider are of paramount importance in our consideration of this claim. In the first the President of the Court spoke of the rights and obligations of the government at p 665:

The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try and shackle the Government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other co-operation.

In the second statement Sir Ivor Richardson dealt with the obligation to make informed decisions (p 683) in these terms:

In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.

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 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.

8.5. The Application of the Principles

The Crown has accepted that;

- (a) the Maori language is a taonga recognised and protected by the Treaty;
- (b) the guarantee of protection obliges it to act affirmatively to sustain and protect the Maori language; and
- (c) as part of these overall obligations the Maori language and culture must have a secure place in broadcasting.

It has also accepted that the Maori language must be promoted as a living language and as an ordinary means of communication (see section 7(b) of the Maori Language Act 1987) and that the Crown has an obligation to consult which places a basic obligation on each partner to act with the utmost good faith in their dealings with the other.

The sum of these obligations require that the Maori partner be allocated a fair and equitable access to radio frequencies. Equity in these terms does not mean a percentage, or an arithmetically calculated share. Rather it requires an allocation on the basis of need and purpose. In this instance it requires an allocation of frequencies quite different from those necessary to achieve mere geographical coverage of areas. It requires the ability to satisfy perceived needs of Maori in these areas so that different qualities and different quantities will be necessary in different areas.

Furthermore the present state of the Maori language in today's environment must be considered. It has not achieved the status of a living language which can be used as an ordinary means of communication. Intense effort and a special concentration of resources are urgently required, now, if the language is to be brought to a point where it requires a mere sustaining operation.

Centres of population may well require more in terms of quantity to reach that population, and different in terms of qualities to cover the different requirements of that population. In particular in Auckland

and Wellington with their greater concentrations of Maori people and of rangatahi, the allocations made to Maori broadcasting must centre on their needs, their preferences and their demands if the goals and obligations the Crown has accepted are to be achieved.

As to the need to consult, more time is clearly needed. This was acknowledged by various officials of the Crown in the course of our inquiry. But this time must be allowed without the threat of an intervening or co-existing tender process being perceived as removing available frequencies or impeding the full free and uninterrupted achievement of the goals and obligations we have mentioned. It involves ensuring coverage of a tribal area before the remaining frequencies are sold. It requires the concerted approach of both Maori and the Crown to determine the precise extent of present and future needs on the one hand, and realistic obligations on the other, if informed decisions are to be made.

In the context of this claim, consultation and informed decisions require that if Maori want to use radio and broadcasting to reach young people, and see a need to do more in order to make their culture accessible to the nation, and to enhance the status and use of their language, this opportunity must be taken and the effort encouraged.

Finally, consultation must recognise (as in this case it does) that Maori are not a homogenous group and that the Treaty talks of tribes rather than an amorphous body now called "Maoridom". The protection of tino rangatiratanga means that iwi and hapu must be able to express their autonomy in the maintenance and development of their language and their culture. This inevitably involves taking more time over the consultation process, but this may provide a refreshing experience and an opportunity to get it right the first time, in pragmatic terms. We would be suprised if the general New Zealand population considered this would be detrimental.

Chapter 9

Conclusions

As a result of our inquiry we conclude:

- 1 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. The responsibility of making informed decisions on these matters is such that consultation and co operation is necessary. The government recognises these matters; but in a manner inconsistent with the Treaty principles, it failed to recognise the extent to which consultations with iwi would be necessary, and the time which ought to have been allowed for this purpose.
2. The way in which the government's policies of promoting Maori language and culture were implemented were inconsistent with the principles of the Treaty, in that insufficient time was allowed for consultation prior to the government's announcement of its allocation of frequencies to iwi. By that act the consultations were effectively terminated in an incomplete state and the allocation became a unilateral act impeding the process of protection, promotion and development.
3. In default of iwi being able to make their real requirements known within the time stipulated by the government, the government made reservations of specific frequencies based on the need to geographically cover tribal areas. It did not adequately consider the needs of the people within those areas, or where the concentrations of population lay, or the needs or perceived needs of those concentrations of population. These requirements are quite different from the requirement of geographical coverage of a tribal area.
4. Discussion and consultation is an integral part of tikanga Maori. It is an important element of marae life. In the context of the allocation of broadcasting frequencies, discussion and consultation assume even greater importance because:

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(a) these consultations were properly directed to iwi rather than to a single pan-tribal organisation, and

(b) Maori, particularly at iwi level, are relatively lacking in expertise and experience in the respective technical and practical implications of using FM and AM radio frequencies for the needs of individual iwi.

The allowance of insufficient time for the consultation process was inconsistent with Treaty principles and is the main reason why our inquiry became necessary. The tribunal hearing, under the protection of the injunction ordered by the High Court, itself became the forum for meaningful consultation on matters of importance. Maori came to the tribunal to express their concerns and their fears, and to learn. Through the tribunal the government provided explanations to Maori people, and while it was involved in this process or in preparing for it, important elements of policy were modified and clarified.

5. The injunction declaration ordered by the High Court allowed the consultations to be meaningful. Such progress as was made, could not have been made if the tender process had been allowed to intervene before our inquiry concluded.

6. The cost to the claimants of assembling and presenting evidence to the tribunal is great. In our view much of this expense could have been avoided if the process of consultation had been allowed to run its course before the reservations of frequencies for Maori broadcasting were announced and the call for tenders made. In these circumstances we consider that the Crown should make some direct contribution to the overall expenses of the claimants in this regard.

It is on the basis of these findings and in terms of section 6(1) of the Treaty of Waitangi Act 1975 that we find the claim to be well founded and we make the recommendations set out in the opening section of this report.

Appendix 1

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1 I, Huirangi Waikerepuru, bring these further matters to the attention of the Waitangi Tribunal, on behalf of Nga Kaiwhakapumau I Te Reo (Inc), of which I am both Chairman and member.

2 We ask that the Tribunal regard the following matters as questions of justice and as part of the original claim of April 10 1984, and that the Tribunal examine them in relation to the discharge of its own functions under S.6.ss 2&3 of the Treaty of Waitangi Act 1975, in respect particularly of our claim on the Maori language, and generally in respect of the need of the Tribunal to operate effectively.

3 We, Nga Kaiwhakapumau I Te Reo, are prejudicially affected by the omission of the Crown in failing to await, examine and consider the decision of the Waitangi Tribunal on the Maori Language of April 29 1986, before designing and introducing the Maori Language Bill to Parliament, and in omitting to do so, proceeding without the benefit of the Tribunal's finding on our language rights under the Treaty, and omitting to hear the findings of the Tribunal on the relationship between a full recognition of our language and its ultimate survival.

4 We are prejudiced by the above omission of the Crown which has led to a denial of rights of the Maori people to a fair hearing as partners in the signing of the Treaty of Waitangi, through the means of the Waitangi Tribunal. The Crown appeared not to want to hear the Tribunal's decision on the extent of official recognition, and its premeditated haste is in conflict with the principles of the Treaty, particularly in view of the need for the Crown to avoid 'sharp dealing' in administering the Treaty as determined in the Tribunal's decision of April 29 1986 (Para 4.3.7.)

5 As claimants to the Waitangi Tribunal Nga Kaiwhakapumau have suffered the gravest prejudice through this diminishing of the only avenue of justice available to them under the Treaty of Waitangi. The Treaty principle of fairness bids the Crown to await the Tribunal's recommendations on claims it considers, before taking major decisions, if this can possibly be done. The Treaty speaks to the Crown through the Tribunal, and acts thereby on the process of Governorship which was initiated and sanctioned and given mana, for the common good of our two peoples by the Treaty of Waitangi.

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This mana is subverted by the haste of the Government's action, and by its omission to hear the Tribunal and hence the Treaty, on the lack of legal status, and neglect of our greatest taonga.

6 We ask also that the Tribunal make a further special plea at this hour on behalf of the taonga in question. The understandings of our kaumatua on language and culture at the time of the signing of the Treaty were central to their agreement. It is a taonga that lies near the core of the Treaty, in that its equality with English and our equality with British subjects were guaranteed under Articles II and III, but this promise has not been kept. We ask that the Tribunal ensure that we do not suffer its loss though any further neglect, as it is the only forum where such issues relating to the Treaty can be brought before the Crown and is also the appropriate guardian of its own mana and recommendatory powers.

7 Subsequent to the deferment by the Waitangi Tribunal of final consideration of the Broadcasting Sections of our claim:

We have been prejudiced by the failure of the Broadcasting Corporation of New Zealand to adhere to its financial agreement of September 1985 with the Aotearoa Broadcasting System, as a result of which the only Maori contender for a third channel warrant before the Broadcasting Tribunal has lost its financial backing. We are prejudiced also by the inadequacy of the directive issued by the Minister of Broadcasting, of 15 November 1984, which ignored the need to actively protect the Maori language. The evidence placed before the Waitangi Tribunal during our claim by linguists and experts on the language confirmed our view that without a television channel broadcasting in Maori the chances of regeneration of the language will be severely reduced. The claim by Maoridom for a channel and resources in television, and radio frequencies, is being denied. In the case of television, it has been reversed for many years by the financial weakening of the Aotearoa Broadcasting System by the Broadcasting Corporation, and the inadequate actions of the Minister of Broadcasting on this matter to date. We ask that the Waitangi Tribunal call evidence on this part of our original claim, as the prejudice to ourselves and our language is major, and will be irreversible, if matters are left to themselves.

Huirangi Waikerepuru
Chairman
Nga Kaiwhakapumau I Te Reo Inc

Appendix 2

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RADIOCOMMUNICATIONS ACT 1989

1. *RANGATIRATANGA*

1.1 In and before 1840, the Maori chiefs and nations were in possession of, and had tino rangatiratanga over, the whole of New Zealand; all that was below, upon and above the surface. Tino rangatiratanga embraced the absolute and independent activity of Maori over the whole of the realm between Ranginui and Papatuanuku. Tino rangatiratanga also included the absolute and independent authority of Maori over their own affairs, their culture, and the Maori way of life including te reo Maori.

1.2 Rangatiratanga is more than a narrow matter of ownership and property, although it contains many of the incidents of ownership and property. It is a matter of responsibility for sustenance of the body, and also of the mind, and the language and culture of the Maori people.

2. *THE TREATY OF WAITANGI*

The Treaty of Waitangi created the Crown's kawanatanga within New Zealand and guaranteed to Maori their tino rangatiratanga. The creation of kawanatanga is perfected only if the guarantees are fulfilled.

2.1 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.

2.2 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.

2.3 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.

2.4 This claim refers to the specific properties of the physical universe which permit the propagation of radio waves through space. The ability to propagate radio waves may confer upon the broadcaster or transmitter of such waves economic and/or other (social/cultural/political) benefits. Possession of the ability to transmit radio waves, however acquired, is therefore an economic and a cultural asset.

3.0 THE RADIOCOMMUNICATIONS ACT 1989

3.1 The Crown has, by the Radiocommunications Act 1989 (henceforth referred to as "the Act"), created exclusive licenses which confer upon their possessors the right to propagate radio waves within given technical restrictions. The Crown has claimed for itself the sole authority to dispense these exclusive licences, and has made itself the sole beneficiary of the income generated by the sale of licenses.

3.2 To the extent that the Act serves the purpose of separating broadcasters by time, area and frequency in order to prevent interference, and to the extent that the Act also allows commercial broadcasters to deal with their right to broadcast as they would any other asset, the Act creates a management regime which may be a legitimate exercise of the Crown's kawanatanga.

3.3 To the extent that the Act creates property out of the Crown's authority, and vests sole ownership of that property in the Crown, and to the extent that the alienation of the right to broadcast into private hands pre-empts the exercise of Maori rangatiratanga over tikanga Maori, the Act is expropriatory and in contravention of the Treaty of Waitangi.

4.0 BREACHES

4.1 The Act is in breach of the terms of the Treaty of Waitangi in the following respects:

4.1.1 The sale of exclusive licenses to propagate radio waves has the effect, de facto, of controlling the activity of broadcasting. It places restrictions and prohibitions upon Maori which prevent their guaranteed freedom to exercise rangatiratanga over tikanga Maori.

4.1.2 The Crown's kawanatanga does not empower it to create property rights in any part of the universe, or any activity which utilises a special quality of the universe, prior to negotiation with, and the express agreement of, rangatira Maori.

4.1.3 The Act embodied a policy which is silent about the social, cultural and political effects of broadcasting. The right to broadcast conferred by the Act creates no correlative obligations upon the

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broadcaster which recognise these effects. Previous frequency allocation regimes had the power to impose such obligations. The Act therefore disposes of part of the Crown potential power to protect and guarantee te reo Maori. The Act will ensure that Maori language and culture continue to be swamped in the mainstream media.

4.2 The actions of the Crown in respect of the Act are in breach of the principles of good faith and partnership in the following respects:

4.2.1 In developing the policies embodied in the Act, the Crown had no regard for the Treaty of Waitangi, or any of the principles that have been construed from the Treaty.

4.2.2 The Radiocommunications Bill was introduced to Parliament before there had been negotiation with Maori, and amidst demands that Maori formulate and justify their claims to authority over the radio frequency spectrum. The Crown assumed prior authority and possession as of right, with no attempt to formulate or justify the reasons for its assumption.

4.2.3 The provisions within the Act which set aside frequencies for the use of Maori broadcasters only recognise existing Maori use of frequencies. No provision for future growth of Maori broadcasting was made, nor would the Crown negotiate such provision prior to the passage of the Act.

5.0 RELIEF

5.1 The claimants seek an urgent interim ruling and recommendation that nothing be done to pursue the spectrum management policy embodied in the Radiocommunications Act 1989, until or unless:

5.1.1 There has been resolution of all the issues raised in this claim, by negotiation.

5.1.2 There has been a finding and recommendations of this Tribunal.

5.1.3 Any title to spectrum products which is created by the Act be subject to a caveat which recognises and protects the Maori interest in radio frequencies.

5.2 The claimants seek a finding that:

5.2.1 Maori have rangatiratanga over radio frequency allocation in the respect alleged in this statement of claim.

5.2.2 The sale of frequency management licenses under the Radiocommunications Act 1989 without negotiating an agreement with Maori would be in breach of the Treaty of Waitangi and prejudicial to the interests of Maori.

5.3 The claimants seek such recommendations in relation to the Maori interest in broadcasting as the Tribunal sees fit.

PARTICULARS OF CLAIM

THE CLAIMANTS

1. New Zealand Maori Council is a body corporate pursuant to the Maori Community Development Section 1962 with the statutory duty to advance the educational cultural and general well being of the Maori people of New Zealand prejudicially affected by the acts policies and defaults of the Crown specified below, and it brings this claim in that capacity.

2. **Sir Graham Latimer** is chairman of the New Zealand Maori Council and brings this claim on behalf of himself and the Chiefs and Tribes of New Zealand as Maori prejudicially affected by the acts policies and defaults of the Crown specified below, and for the purpose of section 6 of the Treaty of Waitangi Act 1975.

3. **Nga Kaiwhakapumau i Te Reo Inc.** is an incorporated society with the objective of protecting and promoting the Maori Language and culture in Wellington and generally; and brings this claim in that capacity in respect of the acts policies and defaults of the Crown specified below, by which it and those it represents have been and will be prejudicially affected.

4. **Huirangi Waikerepuru** is chairman of Nga Kaiwhakapumau i Te Reo and brings this claim on behalf of himself and the Maori people of New Zealand as Maori prejudicially affected by the acts policies and defaults of the Crown specified below and for the purposes of section 6 of the Treaty of Waitangi Act 1975.

THE CLAIM IS MADE AGAINST

5. **Her Majesty the Queen** in right of New Zealand as successor to obligation of the British Crown under the Treaty of Waitangi, made on 6 February 1840.

6. **The Minister of Commerce** in respect of his responsibility for the development of policy and his actions and defaults in relation for the radio spectrum, past, present, and in prospect, in breach of the Treaty of Waitangi in the respects specified hereunder.

7. **The Chief Executive of the Ministry of Commerce** in respect of his responsibility for the development and implementation of policy and his actions and defaults in relation to the radio spectrum, past present and in prospect, in breach of the Treaty of Waitangi in the respects specified hereunder.

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8. The Minister of Broadcasting in respect of his responsibility for the development of policy, and his actions and defaults in relation to the radio spectrum, in breach of the Treaty of Waitangi in the respects specified hereunder.

THE TREATY OF WAITANGI

9. The Treaty of Waitangi gave to the Crown the governorship of New Zealand and guaranteed to the Maori Chiefs tribes and people all that belonged to them and sustained them as a people in possession of their strength and their culture.

10. The chiefs and tribes were in possession and had chieftainship of the whole of New Zealand in and before 1840, all that was below, upon and above the surface.

11. The Treaty enjoined that they retain their possession and chieftainship unless and until they freely gave it up to the Crown.

12. The governorship given to the Crown did not and does not entitle the Crown to appropriate those things the Maori stood and stand possessed of and over which their authority has not been surrendered.

13. The Treaty contemplated that there would be many matters over which Crown and Maori would need to deal in order to ensure the proper government of New Zealand, and the continued performance of the guarantees given to Maori in exchange for the legitimacy Maori conferred by the Treaty upon the Crown's governance.

14. The Treaty is a constitutional document which was intended to govern the relations between the signatories to it. The Treaty is therefore always speaking in circumstances applying when it is called upon and to the people who call upon it. Neither the Treaty, nor the circumstances to which it applies are frozen at 1840.

15. The Treaty of Waitangi describes the fundamental relationships between the Crown and Maori. The transfer of kawanatanga from Maori to the Crown was made in exchange for certain guarantees. The retention by Maori of their tino rangatiratanga and the protection of taonga, including the language, were among these.

16. The transfer of kawanatanga is perfected only if the guarantees are fulfilled.

17. The relationship created by the Treaty required:

- that neither party act against the interests of the other;
- that where the interests of the parties are in conflict neither party forces its views on the other;

- that differences be negotiated as between equal partners;
- that in such negotiation the parties act towards each other with the utmost good faith;
- that the Crown act as would a fiduciary towards a beneficiary;
- that the will or policy of one party will not be pursued at the expense of the covenants and guarantees in the Treaty except by a negotiated agreement;
- that Maori will not impede the governance of the Crown, provided the governance is not exercised in breach of the Treaty in the absence of negotiated settlement; Governance contrary to the Treaty is unreasonable, and is in breach of the fiduciary and good faith obligations it imposes.

THE RADIO SPECTRUM

18. The existence of radio waves was discovered by Heinrich Hertz in about 1886, and their development was initiated by Guglielmo Marconi at the turn of the century. Neither man was a British subject.

19. The resource existed in economic terms before then, and in 1840, even though, like oil, the capacity of land for grazing, or orange roughly, it had zero value until it was discovered and the technologies to use it were developed.

20. Whether discovered or not, the chiefs and tribes had absolute chieftainship over all resources, discovered and undiscovered, in New Zealand in 1840, just as a sovereign state makes similar claims in respect of such resources within its own borders. Maori could not be expected to surrender such resources to the discoverer because of the discovery, any more than a modern state would to the Italian Marconi or his descendants.

21. The transfer of Kawanatanga under the Treaty of Waitangi did not involve the transfer of any property and rangatira rights. This principle is well understood and accepted.

22. The Treaty left this authority intact in Maori. The Treaty, like the prior authority in Maori, applied to everything it touched, and could be seen to do so when a particular resource was discovered.

23. The time of discovery of the existence or value of the resource is irrelevant:

- the Treaty always speaks
- the Crown has the corresponding responsibility to guarantee that the Maori partner has the right to develop since such development is essential to the survival of the people.

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24. A question to be asked under the Treaty is whether the resource in question constitutes, at the time it is in issue: kainga, whenua, taonga of Maori or any of them to which the guarantees in Article II—of rangatiratanga/chieftainship/authority, apply.

25. This authority or rangatiratanga is more than a narrow matter of ownership and property, although it will include many of the incidents of ownership and property. It is a matter under the Treaty, of responsibility for sustenance (implicit in kainga, whenua, taonga) of the body and also of the mind and of the language and culture of the Maori people, not only in the present, but in the future.

26. When the radio spectrum is a means at the material time for the sustenance of Maori in this way, and if it has not been expressly alienated under the pre-emption right, then rangatiratanga over it is guaranteed by the Treaty, and any attempt to deal with it without the agreement of Maori will be in breach of the Treaty.

27. Rangatiratanga in respect of this resource has always subsisted in the manner described in paragraphs 22-24. In practical terms, the question of rangatiratanga does not arise in relation to the spectrum while there is no competition for it, while it is freely available for use by Maori, any more than it does in relation to the four winds or the air we breathe.

28. When, on the other hand, it is treated as a commodity to be traded, when restrictions are placed upon its use, and when for a variety of reasons Maori do not have acknowledged authority over or access to the resources, then they are entitled to and must exercise the rangatiratanga guaranteed by the Treaty, the Crown partner is obliged to respect and guarantee that, and then the parties negotiate a just outcome. Such exercise, and the honouring of the guarantee, are made necessary by scarcity or inaccessibility of the resource.

29. The discovery and development of the spectrum has marched hand in hand with a massive increase in the European population, the Maori dispersal to the cities, and the swamping of their language to the point where it is in grave danger of extinction.

30. The radio spectrum provides a significant means in these circumstances for the preservation and sustenance of the Maori language and culture as has universally been acknowledged.

31. The spectrum is in our time perhaps the most significant means of sustenance of the people and their fundamental identity. They insist upon their rangatiratanga over it, and upon the Crown's performance of its guarantee of that authority and responsibility.

32. This guarantee extends to assuring Maori of the means to use it (to the extent that those means are not available to Maori from their own or other resources) for its sustaining purposes.

THE SALE OF THE SPECTRUM

33. To date the Crown has regulated spectrum use by a variety of means, including a licensing process under the Telecommunications Act 1987 and its predecessors, a warrant involving application to a Broadcasting Tribunal under the Broadcasting Act 1976, and by its control of a large proportion of the publicly funded means of transmission—through the former Broadcasting Corporation of New Zealand and its predecessors.

34. The Crown has assumed control over the allocation of frequencies and it has developed a public broadcasting system after sixty years in radio and thirty years in television.

35. The Crown, Crown Agencies and Tribunals, and successive Ministers of Broadcasting have failed during this process to assure to the chiefs and tribes their rangatiratanga in respect of the spectrum, and the medium has not been available to Maori for use for the purpose of sustaining their language and culture in a significant or adequate way.

36. The Waitangi Tribunal has found that the Crown has failed to provide adequate guarantees for the language. The Tribunal cited Education and Broadcasting and with respect to the latter, it argued that the broadcasting system had followed policies and practices which have been damaging to the language.

37. These findings of the Tribunal concerning the harmful effects of broadcasting on the Maori language came as no surprise to the Maori partner. The language is swamped on two television channels which go to air for 11,000 hours per year and which can find only 90 hours per year for Maori language programmes.

38. Maori have repeatedly protested at these failures, and have lodged claims with the Tribunal in relation to them.

39. The Crown by the respondents hereto have now developed policies which involve the sale of spectrum or spectrum management, some of it scarce, to the highest bidder.

40. The Crown has not established or explained the alleged source of its claimed right to deal with the spectrum in this way.

41. In economic terms, the sale of such rights in this way will constitute the wrongful assertion of a property right, of authority, which denies the rangatiratanga of Maori guaranteed under the Treaty in the way described in paragraphs 22-24 above, and which will have

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the effect of further distancing Maori from this crucial means of sustaining their language and culture in today's world.

42. The latest sale policy has also been developed as a result of a process of government commissioned reports (one, the crucial NERA report commissioned from British consultants), in which the Maori interest received scant regard.

43. The Crown has purported in The Broadcasting Act 1989 to set up a Broadcasting Commission which will use the license fee to arrange for the production of programmes including Maori programmes. The body denies the Maori authority, is toothless, and despite some minor amendment at Maori behest, was set up without consultation with or the approval of Maori. The Maori Radio Board was a BCNZ, largely English language initiative, with much less than its promised funding, which will in any case use up most of the Broadcasting Commission's express Maori allocation.

44. The Crown says that Maori may tender for the spectrum like everybody else. That is not an acceptable response to a Treaty partner seeking to assume its authority over a fundamental resource, and to negotiate a mutually beneficial outcome.

45. The Bill to empower the spectrum sale policy has been introduced before there has been consultation with Maori and amidst demands that Maori formulate and justify their claims, and there is, it appears, a determination to enact the legislation by 1 December 1990.

46. The Maori right in the spectrum is not being protected by the Crown. The Crown is proceeding in the absence of a negotiated settlement. It is not acting in good faith, and is acting contrary to its fiduciary duty. Maori as usual are having to expend limited resources to try and slow the process to achieve the negotiation which is guaranteed under the Treaty.

47. The 'right to govern' does not mean that the Government may proceed with its chosen, expropriatory, policy (whose necessity in the national interest is not established) without establishing a proprietary or other basis for doing so, and in disregard of Treaty obligations (themselves actions or consequences contrary to the national interest).

TOWARDS SOLUTIONS

48. Maori would not expect, at the end of the negotiations, to come away with 100 percent of the spectrum. Both parties to the Treaty should expect to benefit from the discovery of telecommunications. The exercise of responsibility, good faith and rangatiratanga call for recognition of this.

49. Maori have views as to their ultimate objectives, which, at the risk of disclosing their negotiating "hand" might include:

- A television channel largely dedicated to Maori concerns and Maori language—available to all New Zealanders
- A series of tribal radio stations, with the eventual capacity to network, building on what is being done on a shoe string at present;
- Sufficient Maori presence on mainstream broadcast media to ensure that Maori people, especially the young, are seen and see themselves, as a part of New Zealand Society, rather than as ill reported and marginal,
- Spectrum arrangements which will preserve these objectives and assist their realisation.

50. Maori are quite happy to discuss their claims and ideas in relation to the spectrum, and appropriate means and timetable for achieving them, without preconditions. The Crown having acknowledged the status and need for protection of the Maori language, and culture, has yet to work out how to recognise and implement the Treaty guarantee of their protection.

BREACH

51. The matters alleged above constitute breaches of the Treaty of Waitangi which, if permitted to continue, will have very serious consequences for the Maori people, their language and culture.

52. The Act is in breach of the terms of the Treaty of Waitangi in the following respects:

- The sale of exclusive licenses to propagate radio waves has the effect, de facto, of controlling the activity of broadcasting. It places restrictions and prohibitions upon Maori which prevent their guaranteed freedom to exercise rangatiratanga over tikanga Maori.
- The Crown's kawanatanga does not empower it to create property rights in any part of the universe, or any activity which utilises a special quality of the universe, prior to negotiation with, and the express agreement of, rangatira Maori.
- The Act embodies a policy which is silent about the social, cultural and political effects of broadcasting. The right to broadcast conferred by the Act creates no correlative obligations upon the broadcaster which recognise these effects. Previous frequency allocation regimes had the power to impose such obligations. The Act therefore disposes of part of the Crown potential power to protect and guarantee te reo Maori. The Act will ensure that Maori

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language and culture continue to be swamped in the mainstream media.

53. The actions of the Crown in respect of the Act are in breach of the principles of good faith and partnership in the following respects:

—In developing the policies embodied in the Act, the Crown had no regard for the Treaty of Waitangi, or any of the principles that have been construed from the Treaty.

—The Radiocommunications Bill was introduced to Parliament before there had been negotiation with Maori, and amidst demands that Maori formulate and justify their claims to authority over the radio frequency spectrum. The Crown assumed prior authority and possession as of right, with no attempt to formulate or justify the reasons for its assumption.

—The provisions within the Act which set aside frequencies for the use of Maori broadcasters only recognise existing Maori use of frequencies. No provision for future growth of Maori broadcasting was made, nor would the Crown negotiate such provision prior to the passage of the Act.

RELIEF

54. The claimants invite an urgent Crown response to these particulars.

55. The claimants seek an urgent interim ruling and recommendation that nothing be done to pursue the spectrum management policy embodied in the Radiocommunications Act 1989, until or unless:

—There has been resolution of all the issues raised in this claim, by negotiation.

—There has been a finding and recommendations of this Tribunal.

—Any title to spectrum products which is created by the Act be subject to a caveat which recognises and protects the Maori interest in radio frequencies.

56. The claimants seek a finding that:

—Maori have rangatiratanga over radio frequency allocation in the respect alleged in this claim.

—The sale of frequency management licenses under the Radiocommunications Act 1989 without negotiating an agreement with Maori would be in breach of the Treaty of Waitangi and prejudicial to the interests of Maori.

57. The claimants seek such recommendations in relation to the Maori interest in broadcasting as the Tribunal sees fit.

NGA KAIKOKIRI TONO PUTAKETAKE
O TE RUNANGA WHAKAWA O WAITANGI

NGA KAIKOKIRI TONO PUTAKETAKE

1. Ko te ingoa tuatahi o nga kaikokiri putaketake, ko te Kaunihera Maori o Aotearoa, he runanga kua kaporeitangia hei whakakotahi mai i nga mahi me nga nawe o te iwi Maori o Aotearoa e whakapae nei kei te takahia kinotia ratou e nga ture, e nga tikanga whakahaerenga me nga hapa a te Karauna e tohu whaimuri iho nei.

2. Ko te ingoa tuarua he Kaumatua Maori no Te Taitokerau e kii ana kei te takahia kinotia te mana tangata e nga ture, e nga tikanga whakahaerenga, me nga hapa a te Karauna, e tohu whaimuri iho nei.

3. Ko te Kaunihera Maori o Aotearoa, he runanga i taunahatia e te Ture Tekihana Whakatairanga i nga Maori 1962, hei kokiri i te matauranga me te hauoratanga o te iwi Maori o Aotearoa, e takahia kinotia nei e nga ture me nga tikanga whakahaerenga, tae atu, ki nga hapa a te Karauna e tohu whaimuri iho nei.

4. Ko Ta Kereama Ratima, te Tumuaki o te Kaunihera Maori o Aotearoa e kokiri nei i tenei Tono Putaketake, mona ake me nga Rangatira, me nga Maori o Aotearoa, e takahia kinotia nei e nga ture me nga tikanga whakahaerenga, tae atu ki nga hapa a te Karauna, e tohu whaimuri iho nei.

5. Ko Nga Kaiwhakapumau i Te Reo KK., ara, he ropu kua kaporeitangia, a, ko tona kaupapa hoki he manaaki, he whakatairanga i te Reo Maori me ona ahuatanga katoa i roto o te Whanganui-a-Tara puta noa; a, he kokiri ano hoki i tenei Tono Putaketake e hangai tonu nei ki nga ture me nga tikanga whakahaerenga, tae atu ki nga hapa a te Karauna, e tohu whaimuri iho nei.

6. Ko Huirangi Waikerepuru, te Tumuaki o Nga Kaiwhakapumau i Te Reo, e kokiri ana i tenei Tono Putaketake mona ake, me nga Maori o Aotearoa, na runga i te mea e takahia kinotia ana e nga ture, me nga tikanga whakahaerenga, tae atu ki nga hapa a te Karauna, e whaimuri iho nei a, mo te take hoki o te Tekihana 6 o te Ture Tiriti o Waitangi 1975.

E WERO ANA TENEI TONO PUTAKETAKE I

7. Te Kuini o Ingarangi mo Aotearoa, ko ia hoki te taatai uri ki nga here o te Piritihi Karauna i roto i te Tiriti o Waitangi i hainatia ai i te ono o nga ra o Pepuere 1840.

8. Ko te Minita Hokohoko kei aia hoki te mana whakatakoto kaupapa mo nga tikanga whakahaerenga e oti ai, e kore ai ranei e oti i aia, nga ahuatanga e pa ana ki te Ara-Tu-Atea-Irirangi, o mua, o naianei, o muri ake ranei, i hara ai ki te Tiriti o Waitangi, ara, e tohu whaimuri iho nei.

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9. Ko te Tumuaki Kaiwhakahaere o te Minitatanga Hokohoko, kei aia nei te mana whakahaerenga me te mana whakahau i nga tikanga whakahaerenga, tae atu ki ana mahi, koremahiri ranei, e pa ana ki te Ara-Tu-Atea-Irirangi, o nehera, o naianei, o muri ake ranei, i hara ai ki te Tiriti o Waitangi, ara, e tohu whaimuri iho nei.

10. Ko te Minita Pahotanga Irirangi i roto i taana mahi kei aia hoki te mana mo nga tikanga whakahaerenga tae atu ki ana mahi, koremahiri ranei e pa ana ki te Ara-Tu-Atea-Irirangi, a, e hara ai ki te Tiriti o Waitangi.

TE TIRITI O WAITANGI

11. Na te Tiriti o Waitangi i tuku te Kawanatanga o Aotearoa ko te Karauna me te whakatau pumau kei nga rangatira, kei nga iwi o ratou taonga katoa, a, he iwi e pumau tonu ana te ihi, te tapu, te wehi me te mana Maori.

12. Ko nga Rangatira me nga Iwi—i noho mana tonu i roto i te Rangatiratanga ki te katoa o Aotearoa, i mua atu, a, tae tonu ki te tau 1840, me te mou tonu hoki o te mana ki nga taonga o raro i te whenua, o te mata o te whenua, o runga ake o te whenua.

13. Ko te whakatau o te Tiriti o Waitangi. Kia pumau tonu te mana me te Rangatiratanga o te iwi Maori, tae ra ano ki te wa e tukuna mariretia ai ki te Karauna.

14. Ko te mana Kawanatanga i tukuna ra ki te Karauna, kaore e ahei te Karauna ki te tango noaiho, tango pohehe, kaiaa ranei i era o nga taonga kei nga Maori tonu te mana, a, kaore ano nei kia tukuna mariretia taua mana ki te Karauna.

15. Ko te Tiriti e whakahau ana, he nui ke noatu nga take kia whiriwhiria e te Karauna me nga Maori, e totika ai te Kawanatanga o Aotearoa, me te haere tonu o nga pumautanga ki nga Maori mo te tukunga o te mana Kawana i tohua ai e te Tiriti.

16. Ko te Tiriti, he tikanga tuturu i whakaturengia hei tikanga whakahere i te whanaungatanga i waenganui o te hunga kua whakaingoatia. No reira, kei te korero tonu te Tiriti ki nga take i te wa e hiahiaatia ana, tae atu ki nga tangaata e huri ana ki te Tiriti. Kore rawa te Tiriti me nga ahuatanga take i whakakohatutia i te tau 1840.

17. E taatai ana te Tiriti o Waitangi i te tino whanaungatanga i waenga i te Karauna me nga Maori. Ko te whakawhitinga atu o te mana Kawanatanga ki te Karauna ka noho mai ko etahi tino whaihuatanga ki nga Maori, me te noho pumau tonu o te Tino Rangatiratanga, te manaakitanga o nga taonga, kei roto nei hoki ko te reo Maori teteahi o enei.

18. Ko te mana Kawanatanga kua hurihia nei ki te Karauna kei roto rawa i te whaihuatanga o nga ture whakapumau ka noho tonu ai te mana Kawanatanga.

19. Ko te whanaungatanga kua waihangatia mai e te Tiriti, e hiahia ana:

(i) Kia kua rawa teteahi o raua e mahi kino ki nga whaipanga o teteahi.

(ii) Mehemea ka haukoti nga whaipanga, kia kua rawa e taamia teteahi, e nga whakaaro me nga tikanga o teteahi.

(iii) Ko nga nawe, ko nga raruraru kia whakariteritea me te mahara ano ki te orite o te mana o teteahi ki teteahi.

(iv) I roto i era o nga whakariteritenga, kia mahora tonu te maungaarongo o teteahi ki teteahi.

(v) Ko te Karauna kia manaaki i nga Maori kia orite ki te manaaki a te Tangata Whenua i tana Manuwhiri.

(vi) Kia kua rawa e whaaia ko nga whakaaro, ko nga tikanga whakahaerenga ranei o teteahi, mehemea ka ngaro ko nga Kawenata me nga tikanga pumau o roto o te Tiriti, engari ma te eke o te Kaupapa i whiriwhirihia ki tera e taea ana i runga i te whakaaetanga.

(vii) Kia kua rawa e araia e nga Maori te mahi Kawana a te Karauna mehemea ko taua mahi Kawana kaore i te hapa ki te Tiriti, a, kaore ano kia whakatauria he tikanga mo nga whiriwhiringa kaore ano kia mutu.

Mehemea ka mahia te Tikanga Kawanatanga kia rereke atu i tera o te Tiriti, kaore tenei e pai, a, e hara ana hoki ki te tikanga manaaki a te Tangata Whenua i tana Manuwhiri me te whakaaro pai o roto i te Tiriti.

TE ARA TU ATEA REO IRIRANGI

20. Ko te tinanatanga o te ara kawae irirangi, he mea kite na Heinrich Hertz i te tau 1886, a, ko te whakatupuranga mai he mea timata na Guglielmo Marconi i te huringa o te rau tau. Tokorua raua e hara i te momo Piritihi.

21. Ko tenei taonga e noho hua whaioranga ana i mua atu o tera wa, a, i te tau 1840, ahakoa, ko te hinu maione, ko te momona o te whenua ki te whangai kararehe, a ko te rawherawhe ranei, kore rawa he whaiorangatanga, tae ra ano ki te wa i kitea ai e nga matauranga me nga tikanga whakahaerenga.

22. Ahakoa kitea, kore ranei e kitea, kei a ratou tonu, kei nga rangatira me nga iwi te mana Tino Rangatiratanga ki runga ki te katoa o nga paanga kua kitea, kaore ano ranei kia kitea i Aotearoa i te tau

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1840, ka orite ano ki teteahi mana Kiingitanga e pupuru ana i te mana o nga whaiorangatanga o roto tonu o tona ake rohe. Kia kaua rawa e whakaarohia ake ka tukuna maariretia e nga Maori nga whaiorangatanga ki teteahi atu tangata ahakoa naana nei i kite, ranei hoki e teteahi atu mana Rangatiratanga o enei wa, e tuku atu ki a Marconi, a, ki ana uri ranei.

23. I te whakawhitinga atu o te mana Kawanatanga i raro i te Tiriti kore rawa i whakawhitia atu te mana whaipaaanga me te mana Tino Rangatiratanga. Kei te mohiotia tuturutia tenei tikanga.

24. Ko tenei mana tuturu i waiho pokai tonu e te Tiriti nga iwi Maori. Ko te Tiriti, pera me te mana Rangatiratanga o mua atu ra, i noho mana hangai tonu ki runga ki te katoa o nga paanga, tae atu hoki ki te wa i kitea ai enei taonga.

25. Kihai rawa he korero e hangai atu ana ki te wa o te kiteatanga, o te nohonga huna mai, me te whaiorangatanga mai o enei paanga:

—kei runga tonu te Tiriti e korero ana

—kei te Karauna te tikanga e tutuki ai nga whaihuatanga e taea ai e te HOATIRITI (Treaty Partner) ki te whakamahi i aua paanga, no te mea me penei rawa e piki ai te hauorangatanga o nga Maori.

26. Ko te patai hei patai i raro i te Tiriti, mehemea ko te paanga e whakawaatia ana i taua wa ka noho ai hei take: ara, nga kainga, nga whenua, nga taonga Maori, a, ko teteahi ranei o enei e noho pumau ana i roto i te Wahanga II (o te Tiriti)—o te Rangatiratanga, o te Arikitanga, o te Mana e hangai atu ana.

27. Ko tenei mana, ko tenei rangatiratanga ehara i te mea iti e pa ana ki te mana motuhake me nga whaipaaanga ahakoa noa e apiti mai ana etehi ahuatanga mo enei taonga. He take o raro i te Tiriti, ara, o te tikanga manaaki i te hauorangatanga (ara, o te kainga, o te whenua, o te taonga) mo te tinana, mo te ngakau, mo te reo me nga ahuatanga katoa o te ao Maori, ehara anake o enei wa, engari mo nga wa e whai muri ake nei.

28. Mehemea ka noho ko te Ara-Tu-Atea-Irirangi, hei hauorangatanga penei mo te ao Maori, a, mehemea kaore ano kia riro i raro i te tikanga hokohuna, na ko te rangatiratanga o taua taonga kei te noho pumau tonu i raro i te Tiriti, otira, mehemea kei te whakamahia (e te Karauna) kaore ano nei kia tautokona e te iwi Maori, kei te noho hapa tenei tikanga ki te Tiriti.

29. Ko te Rangatiratanga e pa nei ki tenei paanga e noho tarewa ana, a, i ata whakamaramatia i roto i nga whiti 22-24. No reira kaore he patai nowai te Ara-Tu-Atea-Irirangi i te wa e kore ana e whakataetaetia ana, i te wa e watea noaiho ana ki nga Maori, e rite ai ki te ahua ki o

tatou whakaaro mo nga hau e wha e ngongo ake nei tatou hei whakaputanga i te nga tangata.

30. Na, kia huri ake ki tenei korero, ki te rawa, ki te paanga hei hoko, hei tuku, hei koha, e utaina atu ai nga here rahui ki runga kia kore ai e taea, ahakoa he aha te take i kore ai e tautokona te mana Maori, me te kore watea hoki o nga huarahi ki te whakamahi i enei rawa. Na tenei ahua kua ahei nga Maori ki te aki i te Rangatiratanga i Whakapumautia e te Tiriti, no reira e tika ana kia manaakitia e te Karauna, kia noho ai nga Hoatiriti ki te whiriwhiri tikanga hei whakamauru i te nawe i roto i te tika. Na te kore huarahi ki enei paanga me huri nga mahi me te mounahara ano ki nga tikanga pumau o te Tiriti.

31. Ko te kiteatanga me te whakatairangatanga o te Ara-Tu-Atea-Irirangi kua haere tahi me te tino pukai tonu o te iwi Pakeha me te matiri haere o te iwi Maori ki nga taonenui me te taamia haeretia o te reo Maori e tata nei ki te whakangaro atu ki te ngaronga atu o te moa.

32. Kua mohiotia whaanuitia i te ao he taonga tino tika te Ara-Tu-Atea-Irirangi mo enei wa, mo enei ahuatanga hei tiaki, hei whakamaru, hei whakapakari i te reo me nga ahutanga katoa o te ao Maori.

33. I roto i tenei wa o to tatou ao, tena pea ko te Ara-Tu-Atea-Irirangi te tino taonga e noho hauora ai nga Maori i roto i to ratou ake putaketanga. E taki pumau tonu ana ko to ratou ake rangatiratanga ki runga tonu ki taua taonga, a, kia tika hoki nga mahi a te Karauna mo nga tikanga pumau o taua rangatiratanga me nga whakahaerenga.

34. Ko tenei tikanga pumau e whatoro ana te manaakitanga ki te iwi Maori e taea ai te whakamahi i enei taonga (engari, kaore enei huarahi taonga ranei i a ratou, ahakoa no whea) e u tonu ai te reo Maori.

TE HOKO I TE ARA-TU-ATEA-IRIRANGI

35. Taemai ki tenei wa, kua oti te whakariterite i etchi momo tikanga whakahaere i te Ara-Tu-Atea-Irirangi, ko te tikanga raihana tetehi o enei i raro i te Ture Terekawe 1987, me ona tuakana ture penei, me tono raihana rawa ki te Runanga Paho Irirangi, e noho maru ana i raro i te Ture Paho Irirangi 1976, me tona mana ki tetehi wahanga nui o te putea moni e riro ana ki te utu i te kawenga irirangi ma roto mai o te Kaporeihana Pahotanga Irirangi o Niu Tirenei, o mua atu ra me ona tuakana tari.

36. Ko te Karauna kua tango pohehe i te mana whakahaere i nga tikanga tohatoha i nga putuputu wahanga Ara-Tu-Atea, a, kua oti hoki te waihanga i tetehi tikanga paho irirangi tu watea ki te iwi whanui i roto i te rima tekau tau mo te reo irirangi me te toru tekau tau mo te whakaata irirangi.

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37. Kore rawa te Karauna, nga tari a te Karauna, nga runanga whakawa, tae atu hoki ki nga Minita Pahotanga Irirangi e tatai heke nei, i manaaki i nga rangatira me nga iwi, ki to ratou ake rangatiratanga ki te Ara-Tu-Atea-Irirangi, me te kore watea mai hoki o enei taonga ki nga Maori hei whakapakari i te tupu o te reo me nga ahuatanga katoa o te ao Maori, i roto i te tika, i roto hoki i te pono.

38. Kua kitea e te Runanga Whakawa o Waitangi, te korenga e totika o te whakatakoto i etehi tikanga pumau o te Tiriti mo te reo. Ka puta te kii a te Runanga Whakawa mo te Matauranga me te Pahotanga Irirangi e whai tonu ake nei, e tohe pehei ana, ko nga tikanga pahotanga irirangi e whai ke ana i nga tikanga whakahaerenga me nga mahi takurukuru i te reo (Maori).

39. Na nga tirotirohanga e te Runanga Whakawa o Waitangi ki nga mahi kino a te pahotanga irirangi ki te taami i te reo Maori. Kore rawa te Hoatiriti Maori e hinana ohore ki enei korero i runga i te mohio. Toremi ana te reo i runga i nga korerenga whakaata irirangi e rua e paho ana mo te 11,000 haora i te tau e kitea ai ko te 52 haora anake i te tau mo te reo Maori!

40. Kua roa tonu te whati ngaru mai o nga takariri whakahe ki enei ketepakaru, koinei e hora atu ana i tenei Tono Putaketake ki te aroaro o te Runanga Whakawa o Waitangi mo enei ahua.

41. Ko te Karauna me ana kaihautu kua waihanganga tikanga e taea ai te hoko i te Ara-Tu-Atea me ona whakahaerenga, ahakoa te ruarua o etehi, ka hokona atu ki tera e teitei ana te tutohu.

42. Kaore ano te Karauna kia whakaatu, kia whakamaarama ranei i te tuuturutanga o tona mana ake hei whakatau i nga tikanga me nga whakahaerenga o nga ahuatanga e pa ana ki te hoko i te Ara-Tu-Atea.

43. I roto i nga whakahuatanga whaioranga, e he ana tenei tuahua mana hoko, na runga i te mea kaore i te Karauna, te mana ki nga paanga nei, ki te mana e arai nei i te rangatiratanga o nga Maori, i pumautia ra i roto i te Tiriti ara, e whakamaramatia ra i nga whiti 22-24 o mua atu ra, a ka tino tawhiti atu nga Maori i nga kaupapa hei whakamaru i te reo Maori me nga ahuatanga o te ao Maori i roto i tenei ao.

44. Ko te kaupapa hoko katahi ano nei ka whanau mai, i waihangatia i muri mai o nga ripoata i komihanatia e te Kawanatanga (ara, o te ripoata NERA i tonoa ra ki nga tohunga Piritihi), a, paku noaiho te wahanga o nga korero e pa ana ki te iwi Maori.

45. Kua kii te Karauna i roto i te Ture Pahotanga Irirangi 1987 kia whakatu Komihana hei tohatoha moni raihana, hei mahi whakaritenga kaupapa, kua apitingia nei etehi ahuatanga Maori. Ko tenei Komihana e arai ana i te rangatiratanga Maori, he kore niho, ahakoa i

minamenatia etehi wahanga na runga ano i nga totohe Maori, a, ka whakaturia taua Komihana ahakoa kaore i pataitai ki nga Maori me to ratou tautoko hoki. Ko te Poari Irirangi Maori he kaupapa na BCNZ, ko te nuinga o te kaupapa kei te reo Pakeha, a, me te iti ke hoki o te putea i whakatauria ai i te tiimatanga, ka riro hoki te nuinga o nga moni a te Komihana Pahotanga i whakaritea ai mo nga kaupapa Maori.

46. Ko te Karauna e kii ana ka ahei nga Maori ki te tono mo teteahi wahanga o te Ara-Tu-Atea pera me etehi atu ropu e hiahia ana ki te hoko. Kaore e tika ki te mahi penei ki teteahi o nga Hoatiriti e hiko ana te whakaaro ki te tango atu ano i te mana ki taua paanga.

47. Ko te Pire e tuku mana nei mo te tikanga hoko, i kokuhungia i mua o te haerenga o nga whiriwhiringa korero ki nga Maori, a, i waenga tonu o nga tono ki nga Maori kia horahia atu nga korero whakamarama, a, e tautoko ana i ta ratou Tono Putaketake, a, ko teteahi atu mea ko te ahua nei, e hohoro ana nga nekenekhangia kia oti te ture i mua o te tahi o nga ra o Tihema.

48. Kaore te mana o nga Maori i te tiakina e te Karauna. Ko te Karauna kei te taki haere tonu ahakoa kaore ano kia ata whiriwhiringia he whakataunga. Kaore te Karauna i te kawe i nga tikanga i roto i te whakaaro pono, kei te mahi rereke ki te tinanga o te manaaki tangata. Ka hoki ano nga Maori ki te whakapou i a ratou moni, i o ratou kaha, ahakoa kaore i tino rahi, kia ahua poturi ano te haere o nga nekenekhangia kia taia ai pea he whakataunga e tohungia ra i raro i te Tiriti.

49. Ko te mana kawana, ehara i te mana i tukuna hei whakahaere tikanga tango paanga (kaore he tootikatanga ki te motu whanui e kitea ana) i mua o te whakataunga, kei te tika ranei te tango, kei te he ranei, a, i roto i te whakahawea ki nga tikanga o te Tiriti.

(o nga mahi, o nga ahutanga e rereke ana ki te tika, ki te painga mo te motu whanui.).

E AHU ANA KI NGARONGO

50. Kaore nga Maori i te whakaaro kia riro te kotahi rau o rau o te Ara-Tu-Atea i a ratou anake. Ko nga Hoatiriti e rua e tika ana kia whaioranga i te taonga terekawe kua kitea nei. Me haere ko te tika, ko te pono, ko te rangatiratanga hei whariki.

51. He whakaaro ano to nga Maori mo nga tirohanga taumata, engari na te ngawari ki te tupato kei mohiotia to ratou whiringa kaupapa, tena pea ko etehi o enei:

—He ara whakaata irirangi e whakaari ana i nga awangawangatanga me te take o te reo Maori hei matakitaki ma te katoa o nga tangata Aotearoa

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–He whakatutu pou reo irirangi-a-iwi ki tena rohe, ki tena rohe me te mataara o te titiro ki te waihanga irirangi-a-kupenga, me te whakawhanui atu i nga mahi e mahia ake nei i te toenga harakeke

–He whakarahi ake i te nui o nga Maori i roto i nga wahanga paho irirangi, kia pai ai te kitea o te Maori, ara, o nga taitamariki kia mohio tuuturu no Aotearoa ratou, ehara anake ko nga panui whakaheke mana, waihmea ranei.

Tae atu ki nga whakahaerenga e manaakitia ai enei tirohanga taumata kia eke, kia tutuki.

52. E hari koa ana nga Maori ki te whiriwhiri i ta ratou Tono, me o ratou whakaaro e pa ana ki te Ara-Tu-Atea me nga tikanga me te maramataka e whakaatu ana i te wa hei whakaotinga, engari i runga i te ngawaritanga. Ko te Karauna, maroto i to ratou tautoko i te mana me te mohio me ata tiaki ano te reo Maori me nga ahuatanga katoa o te ao Maori, me huri ano ki te whakarite me pewhea te whakatakoto kaupapa, e oti ai ki te pumautanga i roto i te Tiriti.

TE HAPANGA

53. Ko nga take kua whakapaetia i runga ake nei e whakaari ana i te hapanga o te Karauna i te Tiriti o Waitangi. Mehemea ka tukuna tenei hapa kia ora tonu kua noho hei mate nui mo nga Maori, mo to ratou reo me nga ahuatanga katoa o te ao Maori.

TE WHAKANGAWARITANGA

54. E inoi atu ana nga Kaikokiri Tono ki te Karauna kia hohoro te whakahoki ki enei ahuatanga.

55. E inoi atu ana nga Kaikokiri Tono Putaketake mo tetei whakatau, me te whakapa atu kia kaua e whaia te hokotanga atu o te Ara-Tu-Atea me nga tikanga whakahaerenga i mua:

- (a) O te otinga o te katoa o nga whiriwhiringa take, a,
- (b) O te otinga o tetei whakataunga korero me nga tohutohu o tenei runanga whakawa.

56. Ko nga Kaikokiri Tono Putaketake e rapu ana i te whakataunga korero e kii ana:

- (a) Kei nga Maori te rangatiratanga mo te Ara-Tu-Atea i runga ano i nga whakaritenga kua horahia atu i roto i tenei Tono Putaketake.
- (b) Kei te hapa i te Tiriti o Waitangi mehema ka hokono nga tikanga me nga whakahaerenga o te Ara-Tu-Atea i mua o te otinga o nga whiriwhiringa ki runga i te hiahia me te tautoko o nga Maori.

57. Ko nga Kaikokiri Tono Putaketake e whaihua atu ana ki etehi atu tutohutohunga e pa ana ki nga paanga Maori ara o te Ara-Tu-Atea Reo

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Irirangi i runga ano i nga tirotirohanga me nga wetewetenga e whakaarohia ana e te Runanga Whakawa o Waitangi.

Appendix 3

Record of Proceedings

1 *Claims*

1.1 Statement of claim of Sir Graham Latimer for the New Zealand Maori Council and Huirangi Waikerepuru for Nga Kaiwhakapumau i Te Reo Inc received on 6 June 1990 (Wai 150)

1.2 Statement of claim of Huirangi Waikerepuru and another for Nga Kaiwhakapumau i Te Reo Inc received on 12 June 1986

2. *Papers in Proceedings*

2.1 Tribunal direction of 18 July 1990 registering claim Wai 150 and appointing P J Trapski to preside over a conference

2.2 Registrar's statement on notification and distribution of the claim

2.3 Registrar's note of a conference meeting held on 6 August 1990

2.4 Registrar's note of a conference meeting held on 14 August 1990

2.5 Registrar's note of a conference meeting held on 21 August 1990

2.6 Tribunal direction of 22 August 1990 setting date for an urgent hearing

2.7 Tribunal direction of 5 October 1990 appointing Tribunal members for the urgent hearing

2.8 Memorandum of issues from counsel for the claimants of 17 October 1990

2.9 Amendment to memorandum of issues from counsel for the claimants

2.10 Summons of Heughan Bassett Rennie, solicitor, 23 October 1990

3. *Proceedings*

CONFERENCES

6 August 1990 Databank House, Wellington.

14 August 1990 Databank House, Wellington.

21 August 1990 Databank House, Wellington.

APPOINTMENTS

The Tribunal was constituted to comprise:

Peter Trapski (presiding officer)
Bishop Manuhuia A Bennett
Dr Erihana Ryan

—Rameka Cope and Pohipi Mahuika assisted the Tribunal as interpreters.

HEARINGS AND APPEARANCES

Waiwhetu Marae 23, 24 and 26 and 29-31 October 1990 and 1-2 November 1990, Databank House, Wellington 25 October 1990 and 12 November 1990

For the Claimants:

Sian Elias QC
Martin Dawson

For the Crown:

Colin Young
Anthony Hill

Also Appearing:

23 October 1990

Sir Graham Latimer—New Zealand Maori Council
Huirangi Waikerepuru—Nga Kaiwhakapumau i Te Reo
Professor Hirini Mead
Apirana Mahuika

24 October 1990

Rev Maori Marsden
Heughan Rennie
Vernon George Talbot

25 October 1990

Brent Wheeler
Andrew Jack
Dame Joan Metge
Nganecko Minhinnick
Edward Douglas
Mr Waru
Mr Noble Thomson Curtis
Dickson Chapman
Deanna Isherwood

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Agnes Hedley
Piripi Walker

26 October 1990

Piripi Walker
Taura Eruera
Mahuta Pitou Williams
Te Pare Kaui Joseph
Sir Kingi Ihaka—Maori Language Commission
Mark Metekingi
Whiti Te Ra Kaihau

29 October 1990

Piripi Walker
Patricia Kinloch Laing
Matiu Rei
Ngatai Huata

30 October 1990

Mr John Te Maru
Hori Chapman
David Rangitauira
Dr Allan Graeme Bell
Derek Fox
Dr Richard Benton
Huia Webster Winiata
Professor Whatarangi Winiata

31 October 1990

Richie Luke
Mr David Alexander Galt—Ministry of Commerce

1 November 1990

David Harcourt—Ministry of Commerce
Brent Impey
Carolyn Anne Lane
Richard Cecil Rayner—Independent Broadcasters Association & Radio
New Zealand

2 November 1990

David Harcourt—Ministry of Commerce
Huri Maniapoto
George Railton—Ministry of Commerce

12 November 1990

Merwyn Norrish—Broadcasting Commission

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Submissions and Evidence were also received from:

Rapata Rauna Tataingaoterangi Kaa (A14), Emare Nikora (A24), Koroneihana Cooper (A41), Hemi Peita (A42), R R Karaitiana (A49), Kevin Bradley (A54), William K Hastings (A55), Brian H Easton (A56), R P Boast (A58).

Appendix 4

Record of Documents

First hearing at Waiwhetu Marae, Lower Hutt 23, 24 and 26 October 1990, Databank House, Wellington, 25 October 1990, Waiwhetu Marae, Lower Hutt, 29-31 October 1990 and 12 November 1990.

Document:

- A1 Letter of 17 July 1990 from Piripi Walker, Secretary, Nga Kaiwhakapumau i Te Reo, to Chairman Waitangi Tribunal regarding further detail requested on request for an urgent hearing. Five attachments:
- a) Letter of 27 October 1989 from Whatarangi Winiata for the NZ Maori Council to the General Manager, Ministry of Commerce, enclosing papers:
 - "The Maori Claim to the Rangatiratanga over the Radio Spectrum"
 - "Maori Views on the Radio Spectrum"
 - "A Pakeha Economist's Perspective on the Maori Broadcasting Claim" by Brian Easton
 - Draft Statement of Claim to the Waitangi Tribunal
 - b) Letter of 19 October 1989 NZ Maori Council to Ministry of Commerce enclosing submissions on the Radiocommunications Bill 1989
 - c) Letter of 20 November 1989 of Ministers of Broadcasting and Maori Affairs to Sir Graham Latimer responding to papers sent on 27 October 1989
 - d) Discussion Document on Crown Management of the Use of Radio Apparatus. No date or author.
(Mr Walker)
- A2 Letter of 18 July 1990 to the Registrar Waitangi Tribunal from the Office of the Minister of Broadcasting enclosing correspondence between the Minister and the claimants regarding radio frequency allocation
(Mr Trevor Cudby)
- A3 Outline for Conference on Monday 6 August 1990 for Claimants
(counsel for claimants)
- A4 Memorandum on Behalf of Claimants for Conference on 21 August 1990. Attachments:
- a) Correspondence between Crown and Claimants regarding Tribunal claim and frequency sale
 - b) Radio Frequency Tender Document 26 July 1990
 - c) Correspondence between Crown and Claimants regarding Tribunal decision on request for an urgent hearing
(counsel for claimants)

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- A5 Letter of 24 August 1990 to Registrar Waitangi Tribunal from Ministry of Commerce advising of technical corrections to the frequency tender (Ministry of Commerce)
- A6 Papers filed in the High Court in the an action for judicial review between NZ Maori Council and others and A-G and others concerning broadcasting assets (counsel for claimants)
- A7 Letter of 12 September 1990 to Chairperson advising response to Tribunal request for the sale of radio frequencies to be delayed (Minister of Broadcasting)
- A8 Maori Language Act 1987 (Registrar)
- A9 Excerpts from Royal Commission Report on Broadcasting and Related Telecommunications in New Zealand. September 1986 (Registrar)
- A10 Letter of 16 October 1990 of Radio NZ to the Registrar seeking right to appear in the proceedings (Radio NZ)
- A11 Memorandum as to Issues from Counsel for the Claimants 17 October 1990 (counsel for the claimants)
- A12 Submission of Professor Hirini Mead to Select Committee on the Radiocommunication Bill. 3 October 1989 (Professor Mead)
- A13 Te Tino Rangatiratanga: Hereditary Chieftainship and the Treaty of Waitangi. Submission to Tribunal considering the Te Reo Maori claim (Wai 11). 24 June 1985 (Professor Mead)
- A14 Statement of Rapata Rauna Tataingaoterangi Kaa, Co-ordinator, Radio Ngati Porou (Mr Mahuika)
- A15 Opening Submissions on Behalf of Claimants (counsel for claimants)
- A16 Case on Appeal in the Court of Appeal of NZ between the A-G and others and the NZMC and others concerning broadcasting
 - a) Vol 1 (contains an index to volumes)
 - b) Vol 2
 - c) Vol 3(counsel for the claimants)
- A17 Letter of 11 September 1987 of Huirangi Waikerepuru, Tumuaki of Nga Kaiwhakapumau i Te Reo to Chairman Waitangi Tribunal regarding reopening of

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Te Reo Maori claim (Wai 11)
(counsel for the claimants)

A18 Evidence of Beverley Anne Wakem Director-General, Radio NZ to Tribunal sitting to hear the Te Reo Maori claim (Wai 11)
(counsel for claimants)

A19 Letter of 7 April 1989 of Chairman TVNZ Ltd to Ministers of State Owned Enterprises, Broadcasting and Finance regarding implications of Maori application to the High Court on broadcasting assets
(counsel for claimants)

A20 Memorandum of Ministers of Broadcasting and Maori Affairs for Cabinet Policy Committee on Maori Interest in the Radio Spectrum. No date
(counsel for claimants)

A21 Correspondence:
a) Letter of 20 November 1989 to Sir Graham Latimer from Ministers of Broadcasting and Maori Affairs regarding Maori papers on radio spectrum and other matters
b) Letter of 20 November 1989 of Nga Kaiwhakapumau and NZ Maori Council to Minister of Maori Affairs responding to Crown letter of same date
(counsel for claimants)

A22 Brief of evidence of Heughan Bassett Rennie, former Chairman of Broadcasting Corporation of NZ
(Mr Rennie)

A23 Brief of evidence of Vernon George Talbot, broadcasting technician
(Mr Talbot)

A24 Statement of Emare Nikora, Manager Te Reo Irirangi o Raukawa
(Mr Talbot)

A25 Statement of Whiti Te Ra Kaihau, Station Manager, Te Reo Irirangi O Tainui
(Registrar)

A26 Royal Commission on Social Policy Extracts. April 1988
(Registrar)

A27 Brief of Evidence of Phillip Brent Wheeler.
(counsel for the claimants)

A28 Brief of Evidence of Andrew Jack
(Mr Jack)

A29 Brief Of Evidence of Dame Joan Metge
(Joan Metge)

A30 Brief of Evidence of Edward Douglas
(Mr Douglas)

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A31 Brief of Evidence of Raymond Richard Waru

- a) Table showing station shares
(Mr Waru)

A32 Brief of Evidence of Dickson Ellis Chapman

(Mr Chapman)

A33 Te Reo O Tuwharetoa Radio Survey

- a) Results of Survey. Deanna Isherwood. 24 October 1990

A34 Brief of Evidence of Piripi Walker, Maori Views on Radio Spectrum

(Mr Walker)

A35 Brief of Evidence of Piripi Walker, Submission No 1

(Mr Walker)

A36 Brief of evidence of Piripi Walker, Consultations and Reservation of AM/FM Frequencies for Maori and Preliminaries to Court Action

(Mr Walker)

A37 Affidavit of Taura Eruera, musician and iwi consultant

- a) Letter of 13 September 1990 of Te Runanga o Ngati Whatua to the Manager Radio Frequency Tender
(Mr Eruera)

A38 Brief of evidence of Mahuta Pitou Williams, representative of Te Reo Irirangi O Pare Hauraki

(Mr Williams)

A39 Statement of Te Pare Kau Joseph, Manager/Trustee Te Reo Irirangi o Maniapoto

(Mr Joseph)

A40 Statement of Sir Kingi Ihaka, Maori Language Commissioner

(Sir Kingi Ihaka)

A41 Statement of Koroneihana Cooper

(Mr Kaihu)

A42 Statement of Hemi Peita, trustee of Te Reo Irirangi O Tamaki Makaurau

(Mr Kaihu)

A43 Memorandum as to interim relief

- a) Copies of Court of Appeal decisions referred to
(counsel for claimants)

A44 Evidence of Dr Patricia Kinloch Laing, anthropologist

(Dr Laing)

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- A45 Evidence of Matiu Rei, Te Runanga O Toa Rangatira
(Matiu Rei)
- A46 Submission of Tainui Maori Trust Board
(Mr Te Maru)
- A47 Evidence of Hori Chapman, Tautoko Radio
a) Supplementary evidence
(Mr Chapman)
- A48 Evidence of Mr David Rangitauira for Te Runanganui o Te Arawa
(Mr Rangitauira)
- A49 Submission of R R Karaitiana, Waitaha Management Inc
- A50 Evidence of Allan Graeme Bell
a) W J Howell "The Fourth World: Broadcasting in Culturally Pluralistic Societies"
1986
(Dr Bell)
- A51 Evidence of Dr Richard Benton
a) supplementary paper
(Dr Benton)
- A52 Evidence of Rev Maori Marsden
(Rev Marsden)
- A53 Evidence of Huia Webster Winiata
(Mr Winiata)
- A54 Letter of Kevin Bradley for Radio Ngati Porou
- A55 Submission of William Kenneth Hastings, Lecturer in Law
- A56 Submission of Brian Henry Easton, Economist
a) Timeline: Maori and broadcasting
- A57 Evidence of Professor Whatarangi Winiata
(Professor Winiata)
- A58 Submission of R P Boast
a) "The Electromagnetic Spectrum: A Critical Natural Resource" Christian A
Herter 1985
- A59 Evidence of Vernon Winitana
(Vernon Winitana)
- A60 Evidence of David Alexander Galt, Manager Telecommunications and Broadcasting
Policy, Ministry of Commerce

Waitangi Tribunal Reports

- a) He Ara Hou mo Te Reo Irirangi. A New Path for Broadcasting. November 1989
- b) He Ara Hou mo Te Reo Irirangi Supplement. AM FM Radio. April 1990
- c) Letter of 13 July 1990 Secretary of Commerce to Minister of Communications
- d) Correspondence between Nga Kaiwhakapumau i Te Reo and Minister of Broadcasting. June & July 1990
- e) Statement of Government Policy to Secretary of Commerce under the Radiocommunications Act 1989. NZ Gazette 11 January 1989
- f) Extract from Priestly and Shearman report
- g) Cabinet Policy Committee paper POL (90) 82 on Non Commercial and Maori Broadcasting. 10 April 1990
- h) Extract from NERA report "Management of the Radio Frequency Spectrum in New Zealand"
- i) Further extract from NERA report.
- j) Letter of Manatu Maori to Secretary, Ministry of Commerce. 23 August 1989
- k) Radio NZ Ltd Statement of Corporate Intent 1989-1990
- l) Television NZ Ltd Statement of Corporate Intent 1990
(Mr Galt)

A61 Letter of 24 October 1990 from Chairman, Te Runanganui o Te Tau Ihu o Te Waka a Maui to Nga Kaiwhakapumau i Te Reo

- A62 a) Evidence of George Hugh Railton, Radio Engineer
- b) Further evidence of George Railton
 - c) Further evidence of George Railton
(Mr Railton)

- A63 Evidence of David Harcourt, senior adviser on broadcasting policy, Ministry of Commerce
- a) Draft report of Peter Waaka Consultancy
 - b) Letter of 16 May 1990 to General Manager Iwi Transition Agency from Secretary for Commerce
 - c) Letter of 12 June 1990 to Ministry of Commerce from Manatu Maori
 - d) Letter of 15 June 1990 to Ministry of Commerce from Manatu Maori
 - e) List of persons attending meeting of Ministry of Commerce officials with Te Arawa regarding radio
 - f) Ministry of Commerce papers concerning Tainui application for reservation of radio frequencies
 - g) Letter of 27 October 1990 to Ministry of Commerce from Manatu Maori
 - h) Further affidavit of Jonathon Hunt, Minister of Broadcasting to Court of Appeal 8 October 1990
 - i) Letter of 17 January 1990 from Vern Talbot to Radio Frequency Service
(Mr Harcourt)

A64 Evidence of Radio New Zealand and Independent Broadcasters' Association
(Mr Impey)

- A65 Evidence of Merwyn Norrish, Chairperson of the Broadcasting Commission
- a) Directions of Minister of Broadcasting to Chairperson Broadcasting Commission re funding activities 1 June 1990
 - b) Broadcasting Commission Discussion paper on Maori radio 23 April 1990
 - c) Correspondence: Maori responses to Commission paper on Maori radio March-June 1990

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- d) New Zealand Gazette notice 1 June 1989 Directions to Broadcasting Commission in Relation to Funding of Broadcasting Activities
- e) Consultants report on Aotearoa Maori Radio to Aotearoa Maori Radio Trust and the Broadcasting Commission February 1990
- f) Draft Broadcasting Commission guidelines on Maori radio 12 September 1990
- g) Broadcasting Commission Annual Report 1989-90
(Mr Norrish)

A66 Closing Submissions on behalf of claimants

- a) Notes of cross-examination of Crown witnesses
- b) Results of survey by Te Reo o Tuwharetoa
- c) Cost estimates for clearance of VHF land mobile band
- d) Chart of NZ advertising industry turnover 5 October 1990
- e) Newspaper clipping re ending of production of Waka Huia television programme "Dominion" 9 November 1990
(Ms Elias)

A67 Closing submissions on behalf of the Crown (Mr Young)

A68 Evidence of Ngatai Huata and Black Katz Trust (Ngatai Huata)

A69 Memorandum of Crown Counsel concerning the tender process.

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