

# Wai 776- The Radio Spectrum Management and Development

Update: 11 May 2009

## Background

### Regulation

1. New Zealand regulation of radio spectrum is managed under the Radiocommunications Act 1989. A substantial set of amendments were made to the Act in 2000 resulting in the Radiocommunications Amendment Act 2000.
2. There are two licensing regimes regulated under the Act, *Radio Licensing* and *Spectrum Licensing*. All managed spectrum in New Zealand operates under either one of the two schemes, with compliance policed by the Radio Spectrum Management (RSM) group within the Ministry of Economic Development. Licensing fees are prescribed in the Radiocommunications Regulations 2001 (which also includes the Radiocommunications Amendment Regulations 2003).<sup>1</sup>

### Licensing

3. **Radio Licensing** is operated for administrative purposes and used to regulate specific conditions of radio transmission. Radio licences are typically:
  - Specifies the type of transmitting device (transmitter)
  - Re-accessed on a yearly basis
  - Defines the equipment and transmission methods used
4. **Spectrum Licensing** consists of the Crown creating long-term (up to 20 years) property rights to be use exclusively by the spectrum manager. Spectrum Licensing provides for two basic types of spectrum rights. These are:
5. **Management Rights** cover a block of spectrum and allows the manager to issue sub-licences to use spectrum within the block.
6. **Spectrum Licences** are granted by the manager of a Management Right and are typically assigned for a defined period of time with licences usually non-specific about equipment or transmission methods.

## Māori Claims

### Te Reo Māori<sup>2</sup>

7. In June 1986, the claim Wai 26 was lodged with the Waitangi Tribunal by Huirangi Waikerepuru on behalf of Nga Kaiwhakapumau i te Reo claimed the Crown had breached the Treaty by failing to wait for the Tribunal's recommendations on Wai 11, the Te Reo Māori Claim, before introducing the Bill, Māori language Act, to Parliament. The Crown's actions further denied Māori access to radio frequencies and a television channel for Māori language broadcasting.

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<sup>1</sup> **Source:** Ministry of Economic Development Website- <http://data.rsm.govt.nz/legislation/index.html>

<sup>2</sup> **Source:** Knowledge-Basket website- <http://www.knowledge-basket.co.nz/waitangi/reports/wai26.html>

8. In June 1990, claim Wai 150 was lodged by Sir Graham Latimer on behalf of the New Zealand Māori Council seeking an urgent interim ruling and recommendation that nothing be done to pursue the spectrum management policy embodied in the Radiocommunications Act 1989 until there had been a negotiated resolution of all the issues raised in the claim and that any title to radio spectrum products created by the Act be subject to a caveat which recognised and protected the Māori interest in radio frequencies.
9. The claim sought findings that Māori have rangatiratanga over the allocation of radio frequencies and that, in the absence of an agreement with Māori, the sale of frequency management licences under the Radiocommunications Act 1989 would breach the Treaty of Waitangi and be prejudicial to the interests of Māori.
10. Claimants agreed to amalgamate Wai 26 and 150 into a single claim and in mid-July 1990 the claimants filed a request for urgency on the grounds that the Crown was planning to auction 20-year rights to AM and FM radio frequencies in August. The Minister of Communications indicated that the Government was not prepared to delay the tendering process. Claimants commenced High Court action seeking a judicial review of the Minister's decision. This action was successful. The Crown appealed to the Court of Appeal, which heard the case in early October and issued its judgement on 1 November.
11. A majority of the five members of that court found that the Minister could not reasonably have decided to proceed with the tender without first awaiting the report of the Waitangi Tribunal, and thereafter the Tribunal's inquiry proceeded under the protection and urgency of that ruling.
12. On 5 October 1990, the chairperson directed that Judge Peter Trapski, Bishop Manuhuia Bennett, and Erihana Ryan would constitute the Tribunal to hear the claim, with Judge Trapski presiding. The claims were heard over 10 days in Wellington, at Waiwhetu Marae and the Tribunal's offices, and the Report of the Waitangi Tribunal on Claims concerning the Allocation of Radio Frequencies was released in November 1990.
13. The Tribunal concluded that the claim was well founded. It recommended that the Crown suspend the radio frequency tender for six months to allow further consultation with iwi to take place; that it make independent technical advisers available to iwi to assess their needs and to ascertain what would be an appropriate allocation of radio frequencies; and that FM frequencies be made available for Māori broadcasting in Auckland and Wellington.
14. A general election was held in 1990 and the new Minister of Communications, the Hon. Maurice Williamson, issued a media release on 18 December 1990 indicating the Government had considered the Waitangi Tribunal's recommendations and had decided to proceed with the auction of the AM and FM frequencies, being satisfied that FM frequencies giving reasonable coverage for Māori broadcasting could be engineered for Wellington, and possibly Auckland.
15. Although the auction proceeded, further FM frequencies were reserved nationwide for promotion of Māori language and culture.

## Economic Development<sup>3</sup>

16. Claim Wai 776 was received on 9 March 1999 and registered the next day. It was lodged by Rangiaho Everton and related to radio spectrum used for telecommunications purposes delivering applications such as high-speed digital wireless, mobile calls and video conferencing.
17. The claim was brought under urgency as the Crown was preparing to auction 20 year licences to 2 GHz radio spectrum. The auction was planned to start on 29 March 1999.
18. On 15 March 1999, the claim was the subject of an urgency conference presided over by Judge Hingston. An urgent hearing of the claim followed, at which the claimant sought an urgent interim recommendation that the impending auction be postponed until a negotiated agreement with Māori on the issues had been reached.
19. The Tribunal of Judge Patrick John Savage (presiding), Josephine Anderson, and Professor Keith Sorrenson made an interim majority finding that prima facie the claim was well founded. The Tribunal recommended that the auction be suspended and that negotiations be commenced with Māori, with a view to reserving for them a fair and equitable portion of the management rights.
20. The Crown decided to delay the proposed auction for three months to allow time for a substantive hearing to take place and for the Tribunal to report to the Government. That hearing was held between 30 April and 12 May, and the report was presented to the Minister of Māori Affairs and the claimants on 29 June 1999.
21. The Tribunal in a majority decision concluded that there was a breach of the principles of the Treaty of Waitangi and that the claimant would be prejudiced if the Crown were to proceed with the auction without first reserving for Māori a fair and equitable portion of the frequencies. The Tribunal also found that the Radiocommunications Act 1989 was in breach of the principles of the Treaty of Waitangi. In reaching its findings, the Tribunal cited the Report on the Te Reo Māori Claim and the Treaty principles of partnership, rangatiratanga, fiduciary duty, mutual benefit, and development. The Waitangi Tribunal final findings and recommendations were:

The majority finding was that:

- The claimants would be prejudiced if the 2 GHz auction were to proceed and should be suspended until a fair and equitable portion of spectrum rights (that is the radio to generate radio waves) are reserved for Māori.
- The Radiocommunications Act 1989 is in breach of the Treaty in that it permits alienation of spectrum rights without consultation with Māori, or without allowing Māori a fair and equitable share of those rights.

The minority finding was that:

- The right to generate radio waves was not protected by the Treaty
- The Crown had breached its obligation to protect Māori language and culture and that the measures taken by the Crown to remedy the decline of the Māori language were insufficient.
- It would be an improper use of the Treaty to address the problem of language decline by providing spectrum rights to Māori, however a portion of the proceeds of the 2 GHz auction should be applied to promoting Māori language and culture.

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<sup>3</sup> Sources: Knowledge-Basket website: <http://www.knowledge-basket.co.nz/waitangi/reports/wai776.html>

22. The Tribunal recommended that the Crown suspend the auction until it had negotiated with Māori.
23. The Government considered the report but declined to accept the findings and recommendation. The Minister of Communications, the Hon. Maurice Williamson, announced the 2GHz auction would therefore proceed. The Government did agree, however, to make an additional \$15M of funding available for the promotion of Māori language and culture, which became the Ma Te Reo Fund.
24. A Labour-Alliance coalition Government was elected in November 1999. While the new Government upheld the previous National Government decision in regard to the WAI 776 claim but agreed to set aside one of the four 15Mhz (3G) blocks of third-generation spectrum on offer for a pan-Māori trust at a five per cent discount to the average auction price. The 2GHz auction commenced on 10 July 2000 and concluded on the 18 January 2001.
25. An application to the High Court by Māori claimants, Māori Council and Rangiaho Everton for an injunction stopping the auction was dismissed on the 7 July 2000.
26. On 13 July 2000 the Government postponed the auction pending the Court of Appeal's decision on the appeal of the New Zealand Māori Council and Rangiaho Everton to halt the auction. The application was dismissed and the auction recommenced on the 14 July 2000.
27. In 2007 after various submissions from Māori interests on the Governments plans to auction 2.3/2.5 GHz spectrum suitable for Wimax services (high-speed wireless broadband), the Government conditionally allocates to Te Huarahi Tika Trust a Management Right consisting of 25 MHz's of spectrum in the 2.5 GHz band.

## Ongoing

28. There have been 11 auctions and one tender of radio spectrum since 1996 listed on the MED website worth a total of \$169,835,013.00 (Excluding Gst).
29. The Government receives substantive ongoing revenue from licenses through yearly Administration Charges.
30. There has been ongoing submissions made by Māori groups on spectrum policy and spectrum allocation. These include but not limited to:
  - **2000:** Submission by Maui Solomon/Leo Watson to the Ministerial Enquiry in to Telecommunications 2000
  - **2005:** Various communication by Graeme Everton/Te Wānanga o Raukawa with TPK/MED/Government requesting reservation of Spectrum in the 3.5 GHz spectrum (Wimax)
  - **2006:** Te Wānanga o Raukawa purchases 3.5 GHz spectrum
  - **2007:** Various communication with TPK/MED/Government by Graeme Everton over allocation of 2.3GHz/2.5GHz spectrum to Māori
  - **2007:** Submissions to a MED discussion on Radio frequency auction: 2.3 GHz and 2.5 GHz bands was made by Graeme Everton, AwaFM, Hautaki Ltd, NZ Communications, Radio Kahungunu, Te Huarahi Tika Trust, Te Taura Whiri I te Reo Māori, Tuhoe and Tuhoe Waikaremoana
  - **2008:** Submission to the Government from Te Pūtahi Paoho: Broadcasting and New Digital Media: Future of Content Regulation advocates for the allocation of Māori broadcasting spectrum to be made in perpetuity.