OFFICIAL

WAITANGI TRIBUNAL

Wai 2224

CONCERNING the Treaty of Waitangi Act 1975

AND the Radio Spectrum and Telecommunications Urgent Claim

DECISION OF THE TRIBUNAL

Introduction

1. On 4 July 2013 a statement of claim and application for an urgent hearing on remedies was filed with the Waitangi Tribunal concerning the Crown's proposed auction of management rights to the 700 MHz radio spectrum (Wai 2224, #1.1.1(a)). The application was filed by Leo Watson, counsel for Emeritus Professor Whatarangi Winiata (on behalf of the New Zealand Māori Council), Dr Huirangi Waikerepuru (on behalf of Ngā Kaiwhakapūmau i Te Reo – Wellington Māori Language Board), and Graeme Everton (on behalf of the Wai 776 claimants). Mr Watson also filed a memorandum of counsel in support (Wai 2224, #3.1.3).

2. The applicants seek a Tribunal recommendation that the proposed allocation by the Crown of the 700 MHz management rights by way of auction not proceed until:

   a) a fair and equitable share of the 700 MHz management rights are reserved for Māori; and

   b) an agreed long-term plan is negotiated between the claimants and the Crown for the management of future allocations of spectrum management rights, including but not limited to 700 MHz (Wai 2224, #1.1.1(a)).

3. The current application seeks to revive an earlier application for an urgent hearing filed with the Tribunal on 10 December 2009 (Wai 2224, #1.1.1). The 2009 application sought an urgent hearing into proposed Crown decisions on the allocation, alienation and disposal of management rights to the radio spectrum; Māori participation in telecommunications and radio spectrum management and development; and the adoption of a management rights regime pursuant to the Radiocommunications Act and the Telecommunications Act relating to digital television and the Digital Switch Off, and in particular the policy to remove UHF licences held by the Māori Television Service. That application was adjourned *sine die* on 24 December 2009 following a request from the applicants and the Crown to allow the parties to work together to develop a process for Crown and Māori engagement over the matters (Wai 2224, #2.5.4).

4. Chief Judge Isaac, Chairperson of the Waitangi Tribunal, delegated the task of determining this urgent remedies application to Judge Savage, Professor Sir Hirini Mead and Tim Castle (Wai 2224, #2.5.6).

Background

5. The Waitangi Tribunal previously inquired into and reported on aspects of the allocation and management of radio spectrum. A summary of these inquiries appears in the background section of *The Radio Spectrum Management and Development Final Report*, released on 29 June 1999, which addressed the Wai 776 claim.

Wai 26/150

6. The Tribunal's *Report on Claims Concerning the Allocation of Radio Frequencies* was released in 1990. The Tribunal had urgently inquired into Wai 150 and Wai 26, claims brought by Sir Graham Latimer (for the New Zealand Māori Council) and Huirangi Waikerepuru (for Ngā Kaiwhakapūmau i te Reo Incorporated) respectively. These claimants objected to the proposed sale of rights to radio spectrum frequencies for 20 years. That Tribunal concluded that the claims were well-founded. It found that the allocation of radio broadcasting frequencies to Māori has Treaty implications, in that the Treaty accords to Māori access to resources in priority to others. In order to make informed decisions on these matters, the government needed to consult and co-operate with iwi (*Report on Claims Concerning the Allocation of Radio Frequencies*, p45).

7. That Tribunal recommended that the Crown suspend the operation of the radio frequency tender to allow further consultation to take place; make available to iwi independent technical advisers to ensure that informed decisions are made in assessing the needs of iwi and making appropriate allocations of radio frequencies to them; and ensure FM frequencies be made available for Māori broadcasting (*Report on Claims Concerning the Allocation of Radio Frequencies*, pp1-2).

Wai 776

8. In 1999, the Tribunal reported on Wai 776 in *The Radio Spectrum Management and Development Final Report*. An interim report was released in March 1999, and the final report in June 1999, again under urgency. The Wai 776 claim was filed by Rangiaho Everton, and concerned the Crown's intention to auction the right to manage the radio spectrum in the 2GHz range.

9. The Wai 776 claim had two main limbs: first, that Māori have a right to a fair and equitable share in the radio spectrum resource; and second, that Māori have a right to a fair and equitable share in the spectrum, especially where the Crown has an obligation to promote and protect Māori language and culture (*The Radio Spectrum Management and Development Final Report,* pp3-4).

10. The majority of the Tribunal concluded that both limbs of the claim were well-founded and the claimants would be prejudiced if the Crown proceeded with the auction of the 2GHz frequencies without reserving a fair and equitable portion for Māori. The Tribunal also found that the Radiocommunications Act 1989, to the extent it allowed the Crown to alienate management rights to the spectrum without consultation with Māori and without reserving a fair and equitable share for them, was in breach of the principles of the Treaty of Waitangi.

11. That Tribunal accepted that the electromagnetic spectrum is a taonga, and Māori have a right under the Treaty principles to the technological exploitation of that spectrum after 1840. Further, the Tribunal accepted that Māori language and culture are taonga, which the Crown is bound by article 2 of the Treaty of Waitangi to preserve (*The Radio Spectrum Management and Development Final Report,* p51).

12. It found that the Treaty principles applicable to the claim were partnership, rangatiratanga, fiduciary duty, mutual benefit and development. Firstly, in attempting to convert a regulatory regime into a property right, the principle of partnership requires the Crown to consult and negotiate with Māori right(s) to a fair and equitable share of that property. Secondly, the Crown cannot convert its kawanatanga right to regulate a resource in the public interest into private property without considering the Māori rangatiratanga right to own and manage its resources. Thirdly, the Crown has a fiduciary duty to protect Māori rights and property. Fourthly, Māori and the Crown should gain mutual benefits from colonisation, including benefits of new technologies. Finally, Māori are entitled to develop their properties, and to have a fair and equitable share in Crown-created property rights (*The Radio Spectrum Management and Development Final Report,* pp51-52).

13. The Tribunal made a number of recommendations. The Tribunal recommended that the Crown suspend their intended auction of the 2GHz frequency until they had negotiated with Māori to reserve a fair and equitable portion of the frequencies for Māori. Allocation of spectrum frequencies was preferred over some form of compensation. The Tribunal considered that Māori 'must have hands-on ownership and management if they are to foot it in the "knowledge economy"'. (*The Radio Spectrum Management and Development Final Report,* p52)

14. In the Tribunal's opinion, the Wai 776 claim concerned 'all Māori', and was 'in effect a national Maori claim'. The Tribunal therefore recommended that the claimant make arrangements with her iwi and with a national Māori body to negotiate the reservation of a portion of the spectrum with the Crown. The Tribunal further recommended that the Crown and Māori consider establishing a Māori trust, with any income potentially being used to develop infrastructure for remaining Māori frequencies or to educate Māori for employment in the telecommunications industry (*The Radio Spectrum Management and Development Final Report,* p52).

15. The Tribunal recommended that the Crown assist Māori to establish a 'properly mandated national body' to negotiate reservation of spectrum. Once an appropriate reservation had been negotiated, the two Treaty partners could then work out a long-term plan for the management of future allocations of spectrum rights (*The Radio Spectrum Management and Development Final Report,* p-53).

16. The claimants sought compensation from the Crown for a share of the revenue from the sale of frequency licences before and after the passing of the Radiocommunications Act 1989. The Tribunal did not uphold the claim to revenue from licences before the passing of the Act, but suggested that the claimants may have some claim to revenue from licenses after it. The Tribunal recommended that the claimants' request of costs for the bringing of the claim be granted (*The Radio Spectrum Management and Development Final Report,* p53).

17. The current Wai 2224 applicants rely on the findings of the Wai 150 and Wai 776 Tribunals.

Procedural History

18. On 10 July 2013, Crown counsel filed a proposed timetable for dealing with this application (Wai 2224, #3.1.5). A teleconference to discuss timetabling was convened on 11 July 2013 (Wai 2224, #2.5.5) and the proposed timetable was confirmed.

19. Applicant counsel filed affidavits of Piripi Walker and Antony Royal in support of the application on 16 July 2013 (Wai 2224, #A3 & #A4). Crown counsel then filed a memorandum opposing the application on 23 July 2013 (Wai 2224, #3.1.6), accompanied by an affidavit of Leonard Starling (Wai 2224, #A5).

20. A synopsis of the claimants' submissions, setting out the basis for the application and responding to the Crown's grounds of opposition, was received from applicant counsel on 29 July 2013 (Wai 2224, #3.1.7).

21. A teleconference to hear from the parties on the application was then convened on 30 July 2013. In attendance were Leo Watson for the applicant, and Craig Linkhorn, Jeremy Prebble and Liam McKay, all counsel for the Crown, accompanied by officials from Te Puni Kōkiri and the Ministry of Business, Innovation and Employment.

The Parties' Submissions

The Applicants' Initial Submissions

22. The application concerns the Crown's proposal to alienate, by way of contestable auction, the long term management rights to the 700MHz radio spectrum (with those rights expiring in 2031), and the Crown's decision not to set aside a specific allocation of that spectrum for Māori stakeholders (Wai 2224, #1.1.1(a)). The applicants drew to our attention the Crown's decision to investigate the establishment of a $30 million ICT development fund to promote and support Māori language and culture instead of an allocation of the spectrum.

23. Mr Watson, counsel for the applicants, submitted that the application 'is directed at the sole issue of remedies, given that the Waitangi Tribunal has already made findings and recommendations on the Maori/Crown relationship in radio spectrum management' (Wai 2224, #3.1.3, para 6). The applicants sought the remedies in reliance on the previous findings of the Wai 150 and Wai 776 Tribunals, which the applicants submit found the following claims to be well-founded:

    a) the electromagnetic spectrum is a taonga, and Māori have the right to the technological exploitation of that radio spectrum;

    b) the Crown cannot use its right of kawanatanga to convert access to radio spectrum frequencies into private property rights and thereby disregard the Māori rangatiratanga right to own and manage the resource;

    c) the Māori Treaty partner has a right to a fair and equitable portion of management rights allocated pursuant to the Radiocommunications Act;

    d) Māori have existing property rights in relation to radio spectrum management rights, which cannot be appropriated by the Crown without the prior informed consent of Māori following a process of good faith negotiation, including compensation and/or alternative management rights;

    e) Māori and the Crown are required to work out a long-term plan for the management of future allocations of spectrum management rights, including the facilitation of Māori participation in the telecommunications industry; and

f) no decisions on radio spectrum allocation should be made by the Crown until good faith negotiations have occurred between Māori and the Crown to agree on a long-term plan for the management of future allocations of spectrum management rights.

24. The applicants submit that the grounds for an urgent remedies hearing have been made out.

25. The applicants say that they are likely to suffer significant and irreversible prejudice as a result of the Crown's proposed decisions. In this regard, the applicants submit that the proposed decisions will dispose of the management rights to the 700MHz radio spectrum in a manner which is inconsistent with the principles of the Treaty of Waitangi, and which is contrary to the Waitangi Tribunal's earlier findings that Māori will benefit from fair and equitable access to the radio spectrum and enhanced participation in the telecommunications industry. The applicants note that they represent a large group, which represents those with interests in Māori telecommunications and radio spectrum management, and national hui have been undertaken to ensure the applicants maintain their representation on these issues. Finally, the applicants say that the remedy sought, being a fair and equitable share of the 700MHz spectrum management rights, is integrally related to the Treaty breaches established in the Wai 776 report.

26. The applicants assert that their claims challenge an important Crown policy, being the allocation of management rights to the 700MHz spectrum, and that there is no alternative remedy available which would be reasonable for them to exercise. The applicants contend that they have taken all reasonable steps to negotiate with the Crown on the relevant issues, including participation in a series of 'work programmes' and consultation processes, and correspondence with Crown Ministers requesting direct negotiation on radio spectrum management, but that no spectrum allocation for Māori has been forthcoming.

27. Finally the applicants submit that the balance of convenience lies with them. In this regard, the applicants say that there is no significant reason for the proposed decisions to be made by the intended deadline, and deferral of the decisions will not cause prejudice to the Crown or third parties. In contrast, the applicants say, the proceeding of the auction will result in Māori claimants losing their ability to control a fair and equitable share of the 700MHz spectrum.

The Crown

28. The Crown opposes the application (Wai 2224, #3.1.6). In particular, the Crown submits that the application cannot proceed as an urgent remedies hearing, and in any case does not meet the threshold for an urgent hearing (remedies or otherwise).

29. The Crown says that the current "application is misconstrued and should be declined accordingly" (Wai 2224, #3.1.6, para 3.1). Although the Crown acknowledges that the Wai 2224 applicants include the Wai 776 claimants, and the Wai 776 claim issues are in substance the same as those raised by the Wai 2224 claim, the Crown says that the identity of the applicant group and the existence of a well-founded claim are not sufficient to establish an entitlement to an urgent remedies hearing.

30. The Crown also submits that the Tribunal's *Guide to Practice and Procedure* provides that an application for an urgent remedies hearing can be made where the Tribunal has determined that a claim is well-founded, but has deferred its decision on recommendations for relief. The Crown submits that, in contrast, the Wai 150 and Wai 776 Tribunals did not defer their decision on recommendations for relief, but rather made comprehensive recommendations as to how the established Treaty breaches

could be remedied. Consequently, the Crown says that the inquiries relied on by the applicants are complete and the Tribunal is accordingly *functus officio* in respect of the Wai 150 and Wai 776 claims. The applicants cannot, the Crown submits, revive a completed inquiry in order to have their new claim prioritised. At the judicial teleconference Crown counsel referred to the Tribunal's "Petroleum Inquiry" in support of this proposition. Counsel for the Crown submit that the claimants sought to re-open that inquiry following the advent of further reforms; however the Tribunal declined to do so as the Chairperson was satisfied that the Tribunal had fulfilled its functions under the statute (Wai 796, #2.212). Counsel for the Crown submit that this decision evidences that the Tribunal has accepted that the maxim *functus officio* applies to it as a permanent Commission of Inquiry under its own statute.

31. The Crown also submits that the application does not meet the criteria for an urgent hearing. The Crown submits that the primary reason the applicants allege they will suffer significant and irreversible prejudice is because the Crown has failed to implement the past recommendations of the Tribunal. However the Crown says that this is not sufficient to give rise to significant and irreversible prejudice, and an interpretation otherwise would be inconsistent with the recommendatory nature of the Tribunal's powers. It is contended that the Crown is informed of the Tribunal's views on spectrum-related issues, and has taken those views into account in making decisions regarding the 700MHz spectrum. The Crown says that given the Tribunal's previous consideration of these issues, there is no merit in further resources being allocated to prioritise the Wai 2224 claim.

32. The Crown further contends that it has fully engaged with the applicants in developing its proposals for the 700MHz spectrum since 2009. The Crown says that this culminated in Cabinet's consideration of the allocation of the 700MHz band in February this year, and the decision that an allocation of spectrum in this band for the protection of Māori language and culture was not necessary. The Crown submits that Cabinet had good knowledge of the applicants' views, gained through the four year engagement process, and that the interests of the applicants and previous Tribunal findings and recommendations were considered in making final decisions. The Crown further submits that Cabinet's decision (being that the promotion of te reo Māori and Māori culture, as well as Māori economic development through involvement in ICT, could best be achieved through direct funding) was a substantive policy decision the Crown was entitled to make. The Crown says that where a range of options are available to meet its protection obligations, and the Crown chooses one of those options reasonably and in good faith, that will be Treaty compliant.

33. Finally, the Crown submits that substantively, the applicants are provided for and consequently will not suffer any significant or irreversible prejudice as a result of the auction of management rights in the 700MHz spectrum. In this regard, the Crown says that there are a range of available options the Crown can take to meet its obligations in respect of te reo and Māori culture, and its ability to achieve these objectives is not precluded by the auction of fixed-term management rights to the 700MHz band. The Crown says that its decision that these objectives could best be met through direct funding of initiatives was ultimately a policy decision for it to make. Again, the Crown says that it is entitled to decide, reasonably and in good faith, between the available options, as it has done.

34. Lastly in this regard, the Crown asserts that the applicants are already key participants in the telecommunications industry, the benefits of which will not be prejudiced by the Crown's decisions in relation to the 700MHz spectrum. Referring to the affidavit of Leonard Starling (Wai 2224, #A5), the Crown notes that 700MHz spectrum is desirable, but not necessary for a 4G network, and as such the applicants already have the ability

to participate in ownership of a such a network. The Crown further says that the positive outcomes envisaged by the applicants are not solely dependent on Māori having an allocation of the 700MHz spectrum; rather it is arguable that many of these have already been achieved through the applicants' current participation in the sector.

The Applicants' Reply

35. The applicants' submissions in reply were set out in a written synopsis filed prior to the judicial teleconference (Wai 2224, #3.1.7), and expanded on in oral submissions at that teleconference.

36. The applicants say that the Crown's submission that the Tribunal does not have jurisdiction as it has not deferred its decision on relief, is misconstrued. The applicants submit that the reference to the Tribunal having deferred its decision on recommendations for relief only appears in the summary of the two circumstances in which parties may apply for urgency, and no such threshold requirement is referred to in the substance of the criteria for applications for urgent remedies hearings. The applicants say that the substance of the Wai 2224 claim has been determined to be well-founded and there is no basis for an additional requirement to be met in order that an urgent remedies hearing be convened.

37. In response to Tribunal questioning at the judicial conference, applicant counsel, Mr Watson, acknowledged that before the Tribunal could make any recommendations, it would first need to establish there was a well-founded claim, i.e. that the Wai 2224 claim was a well-founded one. Mr Watson says that such a finding could be made in part by relying on the findings of the Wai 776 Tribunal, as well as on the evidence put before the current Tribunal.

38. The applicants submit that the Crown's submission on *functus officio* is also misconstrued and that the Tribunal's decision in relation to the Petroleum Inquiry is distinguishable, as the claimants there sought to re-open the inquiry. Mr Watson submits that the applicants rely on the findings made by the Wai 776 Tribunal, and seek to apply those findings to this new claim. The applicants say that they are not seeking to re-open the Wai 776 (or Wai 150) hearings. Wai 2224 is a distinct claim filed in 2009 and amended in 2013 which raises distinct allegations of prejudice in relation to Crown decisions concerning the allocation of management rights to the 700MHz spectrum. These issues, the applicants say, were not raised in 1999. In relation to the recommendations, they were specific to the 1999 auction, and they are not relied on or sought to be re-litigated.

39. The applicants further contend that the fact that an issue has already been heard and reported on previously does not preclude the Tribunal granting urgency to a claim which traverses the same issues. In support of this proposition, the applicants refer to the reasoning of Chief Judge Williams (as he then was) in relation to Wai 955 (Wai 955, #2.7, p16):

> ... Consider for example, a situation where a Tribunal report has found Crown breaches of Treaty principles, and later, a new claim is made about very similar circumstances. The advent of the fresh claim may indicate continuing problems with the Crown's ability or willingness to comply with its Treaty obligations in the particular circumstances. Should that be so, a Tribunal practice of accepting that the Crown will have taken due account of the earlier report and that no useful purpose could be served by a Tribunal inquiry into the new claim could be seen to encourage, or at least countenance, the Crown's non-observance of Treaty principles.

In response to the Crown's submission that the Tribunal also said that, given its limited resources, it would not embark lightly on another inquiry which traverses the same subject matter as already reported on, Mr Watson submitted at the judicial conference that this is still consistent with the applicants' submission; namely that there is no jurisdictional bar to the Tribunal considering similar issues again. Mr Watson further submitted that any consideration of the utility of a further report is a secondary consideration and should not be treated as a 'gloss' on the jurisdictional point. The Tribunal must first establish whether there is a well-founded claim and significant prejudice.

40. In response to Tribunal questioning at the teleconference regarding what the Tribunal would inquire into if the application was granted, Mr Watson submitted that the Tribunal would be asked to address the remedies sought. In particular, the Tribunal would be asked to hear evidence relating to the 700MHz spectrum, and to determine whether Māori are correct in contending that the appropriate remedy is an allocation of spectrum.

41. In their written submissions, the applicants also expand on the significant and irreversible prejudice they say they will suffer if a remedies hearing is not urgently convened. The applicants say that radio spectrum is a taonga to which Māori are entitled to a fair and equitable portion of any allocation of management rights. The proposed auction will alienate management rights to the 700MHz spectrum for at least twenty years, removing the spectrum from the Crown's control without reserving a portion for Māori. The applicants say that the evidence of Mr Royal shows the necessity of holding management rights to the 700MHz spectrum for ongoing Māori participation in telecommunications. The applicants submit that the Wai 776 Tribunal found that prejudice existed in similar circumstances.

42. The applicants submit that it is not sufficient for the Crown to say it is well-informed of the applicants' views and then proceed to make a unilateral decision. The applicants say that such an approach is inconsistent with the principles of the Treaty of Waitangi; consultation is a means to an end, the objective of which is a negotiated outcome between the Treaty partners. The applicants then refer to the Tribunal's role in the context of remedies hearings as a 'circuit-breaker'; where the Tribunal has recommended that the parties negotiate, but those negotiations have broken down and Tribunal intervention is required. The applicants say that the current application fits squarely within the Tribunal's role as a 'circuit-breaker': negotiations have taken place as recommended by the Tribunal, but a breakdown has resulted between the parties. The applicants say that the Crown's assertion that it is well-informed of the applicants' perspective does not preclude the Tribunal now undertaking its "circuit-breaker" role.

43. In response to the Crown's submission that it has chosen a policy from a range of available options, and that is a policy decision the Crown is entitled to make, the applicants say that such a submission assumes that the policies are Treaty compliant. In contrast, the applicants submit that the Tribunal has already found that the allocation of management rights in the manner now proposed by the Crown breaches the principles of the Treaty.

44. The applicants also respond to the Crown's submission that it has retained the ability to promote te reo and Māori culture. The applicants say that, on a prima facie basis, their evidence demonstrates that Māori objectives are most significantly benefited by an allocation of management rights to the radio spectrum.

45. The applicants submit that the Crown's assertion that the 700MHz radio spectrum is desirable but not necessary, and that benefits from the telecommunications sector can be achieved other than through reservation of spectrum, would be the focus of an urgent

remedies hearing. Prima facie, however, the applicants say that their evidence establishes that the Crown proposals do not substantively provide for their interests.

46. The applicants draw an analogy with the *New Zealand Māori Council v Attorney-General*[1] case ('the Freshwater Case'), where the Supreme Court stated that the proposed privatisation would be inconsistent with the principles of the Treaty if it would 'impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty'. The applicants submit that, with reference to the Wai 776 Tribunal findings, the proposed auction of the management rights to the 700MHz spectrum is inconsistent with the Treaty, and the Crown would be materially impaired in providing redress (in the form of spectrum management rights) if the auction occurs. The applicants also say that, having regard to previous reservation of spectrum for Māori, that form of redress (being access to, and control of, spectrum management rights) is in reasonable or substantial prospect. The applicants further submit that a parallel can be drawn in the present situation with the 1987 *Lands Case*,[2] in that the auction will remove spectrum management rights from Crown control for at least 20 years. Finally in relation to the Freshwater Case, the applicants submit that the Supreme Court relied on the Crown's assurances that reforms to water regulations were taking place, and that the sale of the Crown's stake would not chill the Crown's commitment to resolving Māori freshwater claims. The applicants say that here there is no equivalent assurance that Māori spectrum interests will be addressed in any meaningful way.

47. In their reply, the applicants finally submit that this claim raises 'exceptional' matters which justify the diversion of Tribunal resources. In this regard, the applicants say that the claim is brought for the benefit of all Māori; the fiscal implications of the proposed Crown decisions are significant; and the claimants have no alternative remedy available to them as, once sold, the 700MHz management rights will be out of the reach of Māori. The applicants also reject any allegation of delay in bringing these proceedings, and refer to the significant and sustained efforts pursued by the applicants to reach a negotiated solution with the Crown.

Grounds for an Urgent Remedies Hearing

48. The criteria which the Tribunal considers in determining whether to grant an application for an urgent remedies hearing are set out at paragraph 2.5 of the Tribunal's *Guide to Practice and Procedure ('The Guide')*:

> The Tribunal will consider an application for an urgent remedies hearing only if the applicants have a report of the Tribunal in which their claim or claims have been determined to be well-founded.
>
> In considering whether to grant urgency to an application for a remedies hearing, the Tribunal has regard to a number of factors. Of particular importance is whether:
>
> - the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice if a remedies hearing is not urgently convened;
> - there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
> - the claimants can demonstrate that they are ready to proceed urgently to a hearing.

[1] *New Zealand Maori Council v Attorney-General* [2013] NZSC 6.
[2] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

In assessing whether the claimants are suffering or are likely to suffer significant and irreversible prejudice if a remedies hearing is not urgently convened, the Tribunal may have regard to the factors set out in *Haronga v Waitangi Tribunal*, namely:

- the size of the group represented by the claimants, and whether the claimants can show clear support for their application from this group;
- the connection between the remedy or remedies sought to be awarded and the original Treaty breach or breaches, including, where the return of land is sought as a remedy, whether this land was the subject of the well-founded claim or claims from which the application arises; and
- where there are current negotiations between the Crown and a mandated settlement body to reach an agreed settlement of the well-founded claim or claims, whether the remedy or remedies sought are addressed by the negotiations, and whether the Tribunal's jurisdiction to hear the claimants on remedies is likely to be imminently removed by legislation as a result of these negotiations.

Where any claimants apply for the Tribunal to exercise its binding powers under sections 8A to 8HJ of the Treaty of Waitangi Act 1975 as a remedy for their well-founded claim or claims, the Tribunal shall have particular regard to whether, if urgency is not granted for a remedies hearing, the Tribunal's jurisdiction to hear the claimants on remedies is likely to be removed by imminent legislation.

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

49. While *The Guide* is helpful, it is only a guide and we are mindful that it will not fit the circumstances of every case. Each application for an urgent remedies hearing has to be considered on its own merits.

Discussion

50. The application before the Tribunal is that dated 1 July 2013: "Statement of Claim and Application for an Urgent Hearing on Remedies" (Wai 2224, #1.1.1(a)).

51. It bears repetition that the applicants specifically and only seek recommendations on remedies as set out at paragraph 1(a) and (b) at page 5 of the application (Wai 2224, #1.1.1(a)) and as we have set out at paragraph 2 of this decision. We must treat the application accordingly.

52. Immediately for consideration in our view is the issue of whether the claim, i.e. Wai 2224, meets the statutory requirement that it be well-founded before we can consider remedies. In our view there has been no finding that the claim Wai 2224 is a well founded claim. We simply cannot bypass that requirement. On its own without such a finding we cannot consider remedies or recommendations.

53. If the applicants were seeking an urgent inquiry into well-foundedness of the claim and, thereafter, a remedy, we would proceed to consider such an application and to consider urgency. But here, the applicants do not seek such an urgent inquiry. They seek an urgent hearing on remedies. We do not consider we can with propriety choose to treat the application as anything other than that which is actually before us. So in our view the application in the Wai 2224 claim that we convene an urgent remedies hearing fails at the first fence: there is no "well-founded" finding for this claim upon which the applicants can rely.

54. Next we consider whether the Wai 2224 applicants can rely upon earlier Tribunal findings in radio spectrum and frequencies claims (Wai 150 and Wai 776) as

determinative of well-foundedness so as to overcome the first hurdle and have us proceed immediately to a remedies hearing. This proposition requires us to confront (as it does also the applicants) squarely the proposition that in respect of those Wai 150 and Wai 776 claims the Tribunal is *functus officio* and cannot re-open those claims in order to consider their importation into Wai 2224.

55. In our view the maxim or principle of "functus officio" applies to the deliberations under statute of the Waitangi Tribunal.

56. Under provision 8 of Schedule 2 of the Treaty of Waitangi Act 1975 the Waitangi Tribunal is deemed to be a Commission of Inquiry under the Commissions of Inquiry Act 1908 and subject to the provisions of the Treaty of Waitangi Act 1975, all provisions (excepting those specifically identified) of the Commissions of Inquiry Act 1908 are to apply to the Tribunal.

57. The Commissions of Inquiry Act 1908 establishes the purposes for which a Commission of Inquiry might be appointed (generally expressed to be matters of public importance) to "inquire into and report upon". Neither in that Act nor in the Treaty of Waitangi Act 1975 is there a provision which could be interpreted as foreclosing on the proposition that once an inquiry into the matter for which (in the case of the Waitangi Tribunal) a panel has been appointed has been completed that that specific Commission of Inquiry is then *functus officio* in respect of it. This must, in our view, be particularly clear if the Tribunal panel has completed its inquiry work with a report and recommendations. Once done, its work is over. In this case it is clear to us that the Tribunal's inquiry into the Wai 150 and Wai 776 claims has been completed. In such circumstances we cannot re-visit or re-open them under the guise of considering the Wai 2224 claim. In effect we are asked to sit as if we are a resuscitated version of the Wai 776 Tribunal. We particularly note that the remedy we are asked to provide is the same set of recommendations made by that Tribunal.

58. The Tribunal previously addressed the issue of *functus officio* in respect of Wai 796, the Management of the Petroleum Resource Inquiry (Wai 796, #2.212). This decision concerned a request from the claimants for interim recommendations following the issue of the Tribunal's *Report on the Management of the Petroleum Resource.*

59. The Wai 796 claimants stated that the Tribunal had made recommendations in its report as to how the Crown should approach the lack of environmental protection for New Zealand's Exclusive Economic Zone (EEZ), including that the Crown should consider Māori interests and involve Māori in the development of environmental protection legislation. The claimants submitted that proposed EEZ protection legislation, which had been drafted without the substantive involvement of Māori, was shortly to be introduced in Parliament. The claimants therefore sought an interim recommendation that the Crown take no further action regarding its proposed EEZ Environmental Effects legislation until it had engaged substantively with Māori, or an urgent inquiry had been held to determine whether the legislation adequately protected Māori interests.

60. In determining whether the Petroleum Tribunal had jurisdiction to hear the matter, the Chairperson noted (Wai 796, #2.212, para 33):

> The term functus officio refers to an official body, having performed its office, being "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished". Thus, the question is whether the Tribunal panel constituted to hear the Management of the Petroleum Resource inquiry is indeed without further legal authority because its duties and

> functions have been fully accomplished. This question turns on the provisions of the Treaty of Waitangi Act 1975.

61. Referring to s 5(1)(a) of the Treaty of Waitangi Act 1975 ('the Act'), the Chairperson noted that the Tribunal's principal function is to make recommendations upon claims submitted to it under s 6. The Chairperson also referred to s 6(3) of the Act, which provides that, if the Tribunal finds that a claim is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

62. Having considered the jurisdiction of the Tribunal under the Act, the Chairperson said (Wai 796, #2.212, para 39):

> With respect, even the most liberal interpretation of sections 5 and 6 cannot mean that every time the Crown takes action or chooses not to take action on a matter of policy or law relating to a claim that has previously been inquired into and not been subject to settlement legislation that the Tribunal is able to or obliged to make further recommendations. This proposition is not supported by the Supreme Court's Haronga decision.

63. Rather, the Chairperson found that the Petroleum Tribunal had fulfilled its duty under s 6(3) of the Act. Having established the claim was well-founded, the Petroleum Tribunal proceeded to make recommendations that remedial action be taken to remove the prejudice caused to Māori, including explicit recommendations as to remedies in relation to the management of the petroleum resource in the EEZ. Although not binding recommendations, the Chairperson noted that these were recommendations in accordance with s 6(3) of the Act.

64. The Chairperson also rejected claimant counsel's interpretation of the Supreme Court's decision in *Haronga*, being that 'the only exception to the open ended nature of the Tribunal's work was if the Tribunal explicitly declared that it had nothing more to say on a matter' (Wai 796, #2.211). Rather, the Supreme Court's comments cited in support of this proposition were, according to the Chairperson, to emphasise that the Tribunal had not determined whether it should make recommendations under s 8HB(1) of the Act. The Chairperson further found that even if the Supreme Court's comments in this regard 'were relevant to the exercise of non-binding recommendatory powers, they cannot be read to mean that any Tribunal's work continues until it explicitly declares that it has nothing more to say on the matter. That is to stretch interpretation too far' (Wai 796, #2.212, para 45).

65. Having considered all of these factors, the Chairperson found that the Petroleum Tribunal had completed its task and was without jurisdiction to continue its original commission. The Chairperson indicated that the correct approach would therefore be for the claimants to file a fresh claim, possibly accompanied by an application for urgency.

66. This claim – Wai 2224 – lodged in 2009 as a discrete claim – is not yet the subject of a finding of well-foundedness. In the earlier claims Wai 150 and Wai 776 the Tribunal made findings and recommendations. In doing so the Tribunal brought these inquiries to a close. In respect of them the Tribunal is *functus officio*, applying the principles and reasoning of the Wai 796 Tribunal. We do not agree that there is valid basis for distinguishing that reasoning in that claim on this point.

67. The Crown has exercised its Treaty right of selecting an option, which is open to it, for the delivery of a mechanism for the preservation of Māori language and culture, albeit

an alternative to spectrum allocation to Māori ahead of the auction or tender of the 700MHz management rights. On the face of it the option selected may be Treaty compliant. This has the following outcomes:

a) To the extent there remains an issue of whether or not that option selection is inconsistent with the principles of the Treaty and is prejudicial, there is no finding of well-foundedness yet in claim Wai 2224 as to that issue; and accordingly the Tribunal cannot proceed to remedies.

b) To the extent that earlier Tribunal findings and recommendations have been made in Wai 150 and Wai 776, the Tribunal is *functus officio* in respect of them.

c) The findings in Wai 150 and Wai 776 cannot simply be transported into the Wai 2224 claim in order to clothe that claim with well-foundedness requiring specific spectrum allocation of the new spectrum management rights when following some four years of dialogue and negotiation the Crown has exercised its right to investigate different means of delivering on its Treaty language and culture protection promises.

68. Even had we found that we had jurisdiction we would decline to grant urgency on this application. It is clear that Wai 776 involved the same issues, the same parties, the same allegations, in relation to the same topic. The present claim involves the same spectrum but just a slightly different frequency. The Crown has already had the benefit of a report and recommendations. The Crown is unlikely to be further informed by the repetition of those recommendations as is now sought. As against that there are so many claimants with important claims who have been waiting a very long time for their hearings.

Decision

69. The application for an urgent remedies hearing is therefore declined.

The Registrar is directed to send a copy of this direction to counsel for the applicants, Crown counsel, and all those on the distribution list for Wai 2224, the Radio Spectrum and Telecommunications Urgent Claim.

DATED at Wellington this 17th day of September 2013

Judge P J Savage	Tim Castle	Professor Sir Hirini Mead
Presiding Officer	Tribunal Member	Tribunal Member
WAITANGI TRIBUNAL	**WAITANGI TRIBUNAL**	**WAITANGI TRIBUNAL**