

# **Māori and the Spectrum**

## Statement of Position

from

### **A coalition of interested parties:**

Tuwhakairiora Williams - Te Pūtahi Paoho

Antony Royal and Mavis Mullins - Hautaki Limited

Daphne Luke - Te Huarahi Tika Trust

WAI2224 claimant group:

Te Huirangi Waikerepuru and Piripi Walker - Ngā Kaiwhakapūmau i te Reo

Whatarangi Winiata for the New Zealand Māori Council (to be confirmed)

Graeme Everton for WAI776 claim.

**to**

### **Māori Party Caucus**

**30 July 2012**

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## MĀORI AND THE SPECTRUM

### Why any allocation must include spectrum management rights; and How Māori have leveraged spectrum in the past to benefit the nation

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#### Ko te reo te kaupuri i te Māoritanga

*The reo is the repository of all that is Māori*

- Sir James Henare -

#### THE COALITION PARTIES

1. This paper has been prepared by a Coalition of those concerned with the allocation of 700MHz allocation made up of: Tuwhakairiora Williams for Te Pūtahi Paoho, Antony Royal and Mavis Mullins for Hautaki Limited, Daphne Luke for Te Huarahi Tika Trust and the WAI2224 claimant group including Te Huirangi Waikerepuru and Piripi Walker for Ngā Kaiwhakapūmau i te Reo, Whatarangī Winiata for the New Zealand Māori Council and Graeme Everton for WAI776 claim.
2. The Coalition has sought to develop kotahitanga amongst its members in terms of promoting an agreed position to the Māori Party caucus and to the Crown on the allocation of radio spectrum to Māori.

#### EXECUTIVE SUMMARY

3. The Coalition emphasise that the preferred method of engagement with the Crown on spectrum allocation matters is through direct engagement. The Coalition acknowledge Māori have been engaged in direct communications on the management of 700MHz spectrum for over 18 months and spectrum management and allocation more generally for 22 years.
4. The Coalition state that the Crown should engage in meaningful negotiations with Māori on 700MHz spectrum allocation. The Coalition believe Māori have a clear and legitimate expectation for the allocation of 700MHz spectrum on the basis of clear legal and policy precedent. A summary of relevant jurisprudence is attached at **Appendix A**.
5. **The Coalition seeks:**
  - (a) **Management of allocation, not compensation:** to uphold Treaty principles of tino rangatiratanga and the equality of citizens and in accordance with the purposes of the original "3G" allocation and the terms of the Māori Spectrum Charitable Trust;<sup>1</sup> and to these ends, to secure preferential allocation of 700MHz spectrum to manage for Māori and for the benefit of all New Zealand.
  - (b) **Government engagement:** Establish a Working Group (**Working Group**) to determine the nature and extent of spectrum allocation to Māori and any other arrangements to be put in place. The Working Group should be made up of the Ministers of Māori Affairs, Communications and Broadcasting and members of the

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<sup>1</sup> Māori Spectrum Charitable Trust, 3 July 2000. Note that the allocation examples includes allocation of 2.3GHz spectrum.

Coalition. The Working Group will agree to prepare a set of recommendations and present its report to Māori and the Crown by **30 September 2012**.

- (c) **A Management entity:** a government-funded statutory body to manage the allocation of spectrum on behalf of all Māori to be agreed by the Wai2224 claimants, Te Pūtahi Paoho, Te Huarahi Tika Trust, Hautaki Limited and the Iwi Chairs' Forum.
- (d) **Māori Party support:** support for the recommendations as outlined at the base of this report from the Māori Party.

6. The Coalition relies on:

- (a) **The Treaty relationship between the Crown and Māori** and, in particular, the relationship established in relation to the allocation and management of spectrum-based frequencies in radio broadcasting, Māori television, in 3G spectrum through the establishment of Te Huarahi Tika Trust<sup>2</sup>, and more latterly, in the Prime Minister's letter in December 2009 acknowledging the Māori interest in radio spectrum. A copy of that letter is attached as **Appendix C**.
- (b) **The state of Te Reo Māori:** an official language of this country, te reo Māori is languishing and the Crown must do everything in its power, together with Māori organisations and communities, to redress this deficit. The Wai 262 Tribunal recently reiterated a decision of the Court of Appeal in the *Whales* case, where Ngai Tahu were entitled to have "a reasonable degree of preference" over other ventures seeking a licence for whale-watching operations at Kaikoura.<sup>3</sup> With reference to this precedent, the Wai 262 Tribunal stated that "in decision-making about resource allocation te reo Māori is entitled to a 'reasonable degree of preference' and must receive funding that accords with this status".<sup>4</sup>
- (c) **22 years of extensive legal precedent and history:** The Courts and the Waitangi Tribunal have established:
  - that electromagnetic spectrum is a taonga;<sup>5</sup>
  - a precedent of allocation of spectrum to Māori;<sup>6</sup>
  - that management of spectrum is to be preferred over compensation;<sup>7</sup>
  - that Māori have a right to use and development of resources;<sup>8</sup> and
  - that the Crown have an active duty to protect te reo Māori as a taonga.<sup>9</sup>
- (d) **A proven history of effective management and contribution to the New Zealand economy:** An initiative of Te Huarahi Tika Trust was to establish an asset holding company for the Trust, namely Hautaki Limited. This was to facilitate the entry of a third mobile company, 2Degrees, to the New Zealand telecommunications industry.

<sup>2</sup> Established in May 2000 as the Māori Spectrum Trust

<sup>3</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 at 554 (CA).

<sup>4</sup> Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262 Report, 2011, p 452.

<sup>5</sup> Waitangi Tribunal *Final Report on the Radio Spectrum Management and Development Claim* (Wai 776) 1999.

<sup>6</sup> Waitangi Tribunal *Final Report on the Radio Spectrum Management and Development Claim* (Wai 776) 1999.

<sup>7</sup> Waitangi Tribunal *Final Report on the Radio Spectrum Management and Development Claim* (Wai 776) 1999.

<sup>8</sup> *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 at 556 (CA); Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report* (Wai27, 1992) at [13.11.1]; Waitangi Tribunal *The Radio Spectrum Management and Development Final Report* (Wai776, 1999) at [2.4.1]; See also Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai953, 2002) and Waitangi Tribunal *The Petroleum Report* (Wai796, 2003).

<sup>9</sup> Report on the Te Reo Maori Claim (Wai 11) 1986; Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai22, 1988) at [10.5.4].

Hautaki's experience with 2Degrees has had the net effect of leveraging spectrum into a \$2.24 billion economic benefit to the national economy.<sup>10</sup>

The terms and purposes of Te Huarahi Tika, 3 July 2000 (**2000 spectrum allocation**). This trust deed, and related statutory instruments,<sup>11</sup> acknowledged not just the Treaty relationship but also obligations flowing from the Human Rights Act 1993 to right inequalities between citizens. In this case, the equality being sought is a form of economic and social equality, through addressing existing inequalities between Māori and other New Zealand citizens relating to "Māori participation in the information and telecommunication sector in New Zealand".<sup>12</sup> Despite this acknowledgement, the arrangements put in place in 2000 fell well short of meeting the Crown obligations to their Treaty partner.

- (e) **Tikanga** to guide the process of a spectrum-management allocation relationship. The Coalition believe that Māori management of spectrum is in the national good. The Coalition base this presumption on a social, cultural and economic rationale.

7. **Alternative Remedies:** The Coalition indicates an intention to test the auction process in the Courts should the Crown proceed without making adequate provision for Māori management of new radio spectrum.

## A LEGAL HISTORY, GOVERNMENT ACTIONS, MĀORI AND SPECTRUM

8. The 1990s Court of Appeal broadcasting cases recognised the Crown's Treaty obligation to consult with Māori with respect to broadcasting regimes.<sup>13</sup> Significantly, the 1994 Privy Council decision cautioned the Crown that an undertaking to honour its Treaty obligations created a "**legitimate expectation**" on the part of Māori. The Crown's failure to comply with this expectation "could give rise to a successful challenge on an application for judicial review".<sup>14</sup>
9. **In addition**, the legal arrangements entered into by the Crown and Māori over "3G" in 2000, by way of the Te Huarahi Tika Trust<sup>15</sup> and other associated developments<sup>16</sup> adds further weight to the legitimate expectation of Māori that the Crown will act reasonably and in accordance with established policy. That policy was an allocation of spectrum management rights, not cash compensation or any other rights recognition regime. The Te Huarahi Tika Trust deed also clearly acknowledges, by reference to **s73 of the Human Rights Act 1993**, a Crown obligation to promote the economic and social equality of Māori with other sectors of the New Zealand population through increasing "the participation of Māori in the knowledge economy, in particular the information and telecommunications sectors".<sup>17</sup>

<sup>10</sup> *Economic study of the benefits to the NZ economy of new competition in the NZ mobile market*, Report by Venture Consulting, (September 2011)

<sup>11</sup> Māori Television Service Act 2003 establishing Maori TV and Te Pūtahi Paoho.

<sup>12</sup> Maori Spectrum Charitable Trust, 3 July 2000 at cl 3.

<sup>13</sup> *A-G v NZMC* [1991] 2 NZLR 129 (CA); *NZMC – A-G* [1996] 3 NZLR 140 (CA).

<sup>14</sup> *NZMC – A-G* [1994] 1 NZLR 513 (PC)

<sup>15</sup> Maori Spectrum Charitable Trust, 3 July 2000.

<sup>16</sup> For example, the Maori Television Service Act 2003 establishing Maori TV and Te Putahi Paoho.

<sup>17</sup> Maori Spectrum Charitable Trust, 3 July 2000, "Background" and cl 3 "Purposes".

10. The Waitangi Tribunal's Wai 776 report (1999):<sup>18</sup>
  - recognised the electromagnetic spectrum as a **taonga**;
  - found that the electromagnetic spectrum is subject to the **Treaty right of development**;
  - expressly recommended an **allocation of spectrum frequency** to Māori as opposed to mere compensation:

[a] fair and equitable portion of the frequencies for Māori... is preferable to some form of compensation by the Crown in lieu of spectrum frequencies. Māori must have hands-on ownership and management if they are to foot it in the 'knowledge economy', as we believe they must be in the coming millennium.
11. The Wai 776 report led to the establishment of Te Huarahi Tika Trust under an agreement with the Crown.
12. The earlier Wai 26 Radio Frequencies Report (1990) identified various Māori rights and interests which these spectrum arrangements protect. Wai 26 argued that Māori cannot assert prior "ownership", but because broadcasting is so intimately connected with Māori language and culture, broadcasting/ spectrum rights are more substantial than having mere access to spectrum.
13. The Tribunal's Te Reo Māori reports, Wai 11 and Wai 262 (chapter 5), provide further Tribunal recognition of Crown duties in relation to protecting te reo Māori. The Wai 262 Tribunal stated that:<sup>19</sup>

The terms of the Treaty clearly set out that the Crown's right to make laws carries a reciprocal obligation: to accord the Māori interest an appropriate priority... In the context of te reo, the Crown must therefore recognise that the Māori interest in the language is not the same as the interest of any minority group in New Zealand society in its own language. **Accordingly, in decision-making about resource allocation, te reo Māori is entitled to a 'reasonable degree of preference' and must receive funding that accords with this status.**
14. The Waitangi Tribunal's report (Wai 2336) on **Te Kohanga Reo** is about to issue. This will be the most significant report on te reo Māori as a taonga since Wai 11. The report is anticipated to significantly add to Treaty jurisprudence on the protection of te reo Māori, and the Crown's rights and obligations to Māori in that regard.
15. **Legal Status Quo:** the fact that the Te Huarahi Tika Trust was created, by agreement with the Crown, to protect Māori interests in broadcasting/ the spectrum adds weight to the "legitimate expectation" argument articulated by the Privy Council in 1994. The Crown's duties to protect te reo Māori and promote the social and economic equality of Māori are ongoing duties and must be honoured by up-dating the technology so that protection is maintained. Māori also have the right of development (recognised in Tribunal jurisprudence). By allocating management of 700mhz spectrum to Māori, the Crown here would be doing no more than "updating" the current spectrum arrangements to bring them into line with the new information and telecommunications technologies being made possible by a 700mhz spectrum roll-out (including "4G" mobile data capabilities).

<sup>18</sup> Radio Spectrum Final Report (Wai 776) at 52.

<sup>19</sup> Waitangi Tribunal, *Ko Aotearoa Tenei*, Wai 262 Report, 2011, p 452.

**B RIGHTS RECOGNITION REGIME: ALLOCATION NOT COMPENSATION**

16. The Coalition seek the allocation of spectrum and state that compensation as a proposed mechanism to recognise Māori rights and interests in spectrum is inadequate.
17. There are established legal and policy precedents in spectrum management rights and Māori rights to develop and use resources. A Court of Appeal judgement supports the right of Māori to develop assets and resources.<sup>20</sup> Specific to spectrum allocation, the Waitangi Tribunal has found that compensation is inadequate as a rights recognition regime and the appropriate form of recognition is the allocation of spectrum frequency:<sup>21</sup>

[a] fair and equitable portion of the frequencies for Māori... is preferable to some form of compensation by the Crown in lieu of spectrum frequencies. Māori must have hands-on ownership and management if they are to foot it in the 'knowledge economy', as we believe they must be in the coming millennium.
18. A range of options for spectrum distributions have been discussed by Māori and the Crown over the two decades. Māori and the Crown have engaged on spectrum management allocation since the beginning of 2010. Māori have proposed valid and tenable options for allocation and management of spectrum. The outcome of these engagements to date have not delivered results. A timeline of these engagements is attached at Appendix B.
19. The Coalition agrees with the claimant groups of Wai 2224 and Wai 776 that Māori assert rights over 100 percent of the radio spectrum.
20. The Crown has proceeded in assuming ownership of the spectrum and created property rights which are auctioned or otherwise transferred to third parties, many of these commercial entities. The Crown obviously derives significant fiscal advantage from these arrangements and continues to enjoy regulatory oversight over these rights.
21. Other assets that the Crown has can be traced through a process of acquisition, be it purchase, legislation and/or confiscation. These assets can be traced to such a process which alienated the resources from Māori in favour of the Crown. In the case of spectrum, no such alienation process has occurred, legal or otherwise.
22. The Crown has acknowledged that spectrum is an asset with associated property rights. It is the Coalition's position that spectrum, as an asset, has never been alienated from Māori ownership.
23. There is an immediate need for Māori and the Crown to reach an arrangement over the 700MHz spectrum which the Crown plans to auction within the next six to nine months. The Coalition, together with the Wai 2224 claimants, strongly oppose any auction or sale of spectrum before an equitable and Treaty-compliant agreement is reached with Māori. Such a pre-emptive sale would, the Coalition contends, be a breach of the Crown's Treaty duties to Māori, especially in light of the existing policy and practice of providing for Māori spectrum management rights.

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<sup>20</sup> In *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641.

<sup>21</sup> Radio Spectrum Final Report (Wai 776) at 52.

24. The Coalition had hoped that the engagement since early 2010 with the Crown over spectrum rights management, would have come to a satisfactory conclusion for Māori and the Crown by this time, such that substantive engagement over 700MHz specifically would have been unnecessary. We are disappointed that the opportunity to resolve these issues has not been taken.

### **C SPECTRUM MANAGEMENT**

25. The Coalition proposes a spectrum management regime to take into account the Treaty partnership, the Crown's duties to protect taonga, and the rights of Māori to manage and develop resources, specifically spectrum in ways that are distinctively Māori.
26. The basis for this proposal is that Māori have a legitimate expectation to spectrum allocation and management of that allocation. The basis for this legitimate expectation is the allocation of the 2GHz 3G spectrum licenses, the discounted purchase price and the \$5 million government grant in recognition of Māori rights and interests in spectrum in 2000. In addition, a block of spectrum has been put aside in the 2300MHz spectrum specifically for Māori through rights to be allocated to Hautaki, although with an associated purchase price.
27. In *Te Runanga o Muriwhenua Inc v Attorney-General*<sup>22</sup>(CA) Cooke P held:  
t]he Treaty is a living instrument and has to be applied in the light of developing circumstances.
28. The Coalition assert that Māori rights and interests in the technology itself should be recognised in light of "developing circumstances". The Coalition believe that allocation of spectrum rights accords with Treaty jurisprudence and the right to development.<sup>23</sup> The Coalition further assert that spectrum allocation and management cultivates Māori capacity to develop the taonga of te reo and culture through the most relevant telecommunication technology.
29. The Coalition propose the following spectrum management scheme:
- (a) **Entity to manage spectrum allocations**  
An entity to manage spectrum allocations should be protected by statute and should be charged with: engaging with its Crown Treaty partner in relation to radio spectrum management generally; receiving spectrum allocations, ensuring Māori participation in the ICT industry and the knowledge economy, and investing in ICT and spectrum economic opportunities.
- (i) Infrastructure and framework  
An entity to manage spectrum allocation needs infrastructure and a framework to operate within. This would include:
- legislated functions that give substance to a continuing Treaty-based relationship between Māori and the Crown;

<sup>22</sup> In *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641.

<sup>23</sup> More on the right to develop is discussed at: Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai212, 1998) at [10.2.4]; *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 at 560; Waitangi Tribunal *The Radio Spectrum Management and Development Final Report* (Wai776, 1999) at [2.4.1]; See also Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai953, 2002) and Waitangi Tribunal *The Petroleum Report* (Wai796, 2003).

- regular meetings with responsible Ministers to determine strategies, resources, and responsibilities;
  - guarantees that its administrative and operational costs will be met with annual mechanisms to negotiate increases directly with Ministers;
  - An ability to manage its own affairs on behalf of Māori
  - meaningful engagement with the Māori language strategy that is determined and monitored by Māori and is independent of the Crown stakeholder;
  - commitment from Crown agencies to working within a Treaty-based model and adopting a kaupapa Māori approach to ICT planning and allocation.
- (ii) Models of Māori engagement with spectrum and/or ICT

- Te Pūtahi Paoho (TPP) was established under the Māori Television Service Act 2003 to represent Māori stakeholder interests in Māori language television broadcasting. Amongst other functions, it has joint responsibilities with the Crown stakeholder (represented by the Ministers of Māori Affairs and of Finance) in the appointment of the Chair and Deputy Chair to the board of Māori Television Service (MTS), the approval of statements of intent, undertaking reviews of the Act, and in the review of the performance of MTS. TPP determines its membership, and acts as kaitiaki of spectrum to enable Māori language television broadcasting.

The model works because it not only defines the responsibilities and functions of both Māori and Crown stakeholders, but emphasises a Treaty-based relationship between the stakeholders. It demonstrates what is possible when the Crown is willing to share a substantial measure of responsibility and control with its Treaty partner to achieve positive outcomes in language revitalisation.

- Te Huarahi Tika Trust represents what is possible when allocation of spectrum is made to Māori. The Trust was instrumental in increasing competition in the telecommunications industry with the benefits of competition realised for all New Zealanders. It has also contributed to increasing Māori participation in ICT through training and employment, establishment of tertiary scholarships, and through investment in 2Degrees. The Coalition says that these achievements would have been even more considerable had the allocation of spectrum in 2000 not included the 5% discount condition, which has hampered development opportunities.
- The establishment of Ngā Pū Waea by Ministers Joyce and Sharples is an acknowledgement by the Crown of the importance of Māori participation in the broadband / ICT space. Ngā Pū Waea is charged with the responsibility of identifying the opportunities and benefits of Māori participation in this sector and for ensuring these are maximised.



- (b) **The Proposal:** That both Māori and the Crown agree to finding solutions to the question of 700MHz spectrum management that reflect the findings and recommendations of the 1990 Waitangi Tribunal *Report on Claims Concerning the Allocation of Radio Frequencies* (Wai 26):
- i) "The radio spectrum is a taonga for the whole of mankind; neither Treaty partner can have monopoly rights to the resource;
  - ii) Management of the resource must be the subject of effective consultation between Māori and the Crown. The key principle of management of the spectrum is partnership, requiring each partner to act reasonably and with the utmost good faith towards each other;
  - iii) There is a hierarchy of interests in natural resources: (a) Crown's duty to control and manage resources in the interests of conservation and the public interest, (b) tribal interest in the resource, (c) any commercial/recreational interest;
  - iv) The subject matter of the allocation of radio frequencies is an 'in between' situation. It is not simply a case where Māori can argue prior ownership before the Treaty. Nor can the Crown argue that Māori have no rights to the spectrum, nor a right only in terms of the language. The radio spectrum is so intimately tied up with the use of Māori language and culture, and the protection and development of these things that the Māori right to access must amount to more than this..."

The Coalition proposes that:

- i) the Ministry of Economic Development (Crown) and the Māori Trustee (interim representative of Māori partner<sup>24</sup>) jointly conduct the auction of 700MHz spectrum. This arrangement would recognise WAI 26 findings (a) to (d) providing opportunity for tino rangatiratanga and kawanatanga to co-exist in this activity;
- ii) the Crown and the Māori partner agree to an allocation of spectrum of 700Mhz sales and to share the cash proceeds from sales of the spectrum to industry;

It is our belief that this proposal is consistent with the comments of the Prime Minister in his letter of 15 December 2009 attached.

## **D ENABLING TREATY VALUES AND ECONOMIC GROWTH**

30. Tikanga demonstrating how these expressions are currently being made set out below.
31. **Manaakitanga:** Māori will add value to existing ICT arrangements serving Māori communities by leveraging off existing Māori asset and knowledge bases including farming, forestry, fisheries, education, health and tourism.

One example is in the forestry industry where Māori companies need to be close to the forests and their products and have to have access to the best technology and tools to

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<sup>24</sup> It is proposed that the Māori Trustee be used as an **interim** measure only until an appropriate Māori management entity can be agreed upon. The Coalition believes the Māori Trustee is suited to this task as it has credibility both with the Crown and with Māori.

operate their business. Māori use wireless spectrum technology to allow larger data parcels to be shared between the yard, forest owners and clients. Ensuring the delivery of more detailed information faster (in real-time) to forestry owners, and enabling them to increase the profitability of their log processing businesses.

32. **Kotahitanga:** Māori will joint venture with others producing additional opportunities for Māori to give expression to kaupapa and to make significant contributions to regional wellbeing and to the national economy. Examples of Māori partnering with each other and with industry to give expression to kotahitanga include:

- Taitokerau Network Ltd where Te Rūnanga o Whaingaroa, Te Rūnanga o Ngāti Whatua and Te Rūnanga o Te Rarawa iwi have come together with industry to develop their own fibre network to serve their communities in the Taitokerau. The Taitokerau network will be built in seven phases, the first of which is the Auckland to Whangarei connection over 174km. The cost of the total build is \$9.1million.
- Hautaki Limited, developed co-investment arrangements with Trilogy International, KLR Hong Kong Ltd along with Māori investors Tuaropaki Kaitiaki Ltd and Wairapa Moana Inc to establish 2 Degrees Mobile in 2009. Since establishment, direct and indirect benefits to the NZ economy from increased competition in the mobile market have been reported at \$2.24m.<sup>25</sup>
- Torotoro Waea Limited Partnership, a group of 12 Māori investors (whānau, business and tribal groups) coming together to invest in a Wellington based layer two network company. A recent investment that is producing local employment, transfer of skills in civil construction, ICT and project management within the wider Wellington region.

33. **Pūkengatanga:** Māori innovation and the rediscovery of mātauranga Māori has been demonstrated through the establishment of a number of Māori initiatives to address the cultural threshold that Māori as a people have been on the precipice of for the past 100 years. One such response is Te Wānanga o Raukawa. The allocation of spectrum will see Māori establish research, innovation and training centres including incubators to concentrate and encourage our intellectual capital and advance various new technologies.

A key partner for Hautaki is Huawei Technologies Co. Ltd, a Chinese multinational networking and telecommunications equipment and services company headquartered in Shenzhen, Guangdong, China. It is the second-largest supplier of mobile telecommunications infrastructure equipment in the world (after Ericsson). Huawei has over 140,000 employees, around 46 percent of whom are engaged in research and development (R&D). It has 20 R&D institutes in countries including China, Germany, India, Russia, Sweden and the United States, and in 2010 invested CNY 16,556 million in R&D. Opportunities exist for Māori to expand technological advancements in hardware and software with Huawei.

34. **Whanaungatanga:** It is predictable that Māori will create ICT employment and self employment through business innovation centres, support of business groups i.e. Māori Digital Forum and trades involved in broadband rollout, maintenance and servicing. Currently, Māori have low levels of participation in ICT industries, at all levels (that is, as investors, owners and employees). There is consistent evidence that young Māori are not

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<sup>25</sup> *Economic study of the benefits to the NZ economy of new competition in the NZ mobile market*, Report by Venture Consulting, (September 2011)

developing high levels of ICT literacy through the formal education system (although they do make significant use of ICT devices in their personal lives).

Scholarships and educational initiatives designed to engage young Māori have been launched in the last twelve months including the 2-Degrees Hei Rere Mai scholarships, the Vodafone scholarships, the work of Accelerating Aotearoa is engaging with secondary school students.

35. **Wairuatanga:** Māori will continue to develop awareness of spectrum and ICT amongst their people and the contributions of technology to Being Māori. Just two examples are:

- Reo Smartphone : In association with 2-Degrees and Hautaki, Huawei produced the Te Reo phone launched in 2011 by the Minister of Māori Affairs. The Android smartphone has an extensive catalogue of almost 30,000 te reo words and phrases.
- Whānau Connect is an online Māori community, built by Te Rūnanganui o Taranaki Whanui ki te Upoko o te Ika a Maui for all Māori to connect with each other, share whānau resources and connect to their marae and iwi resources. It is "owned" by all Māori and was established and operates to benefit whānau in a digital age where our rangatahi and successive generations will increasingly use technology to get information, share and communicate.

36. **Kaitiakitanga:** Māori are putting management competency and commercial industry experience in place to manage the taonga sustainably. Workforce development is happening in a number of areas, the efforts of Ngā Pū Waea in the preparation of a national ICT workforce development strategy has seen industry, tertiary providers and Māori come together to plan skill development and recruitment strategies for the nation. The strategy will be launched in August/September 2012.

Ngā Pū Waea's relationship with Vodafone NZ has seen that company establish recruitment and employment processes that have been designed to increase their Māori staff profile, additionally, Māori employees have been supported to establish their own unit to develop ideas and initiatives to develop whanaungatanga and to assist the company to increase its Māori market share.

Similarly, Totoro Waea, working with Te Wānanga o Raukawa and industry have designed and implemented a succession programme that engages Wānanga staff directly alongside industry personnel in live network operations to ensure Māori build their capacity in civil construction, project management and in network design and management.

37. **Whakapapa:** Māori are connecting marae, hapū, whānau and Māori communities throughout the world (past, present and future). Haami Piripi, Chair of Te Rūnanga o Te Rarawa commented on the future opportunities for marae in Māori society:<sup>26</sup>

The marae is perhaps the last truly pre european institution that exists for hapū, whānau and iwi in Aotearoa. The marae has become the repository of information, knowledge and shared intellectual capital of its members, and over time has evolved

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<sup>26</sup> *Marae and Ultrafast Broadband*, Discussion paper prepared for Ngā Pū Waea (2012)

into the institution that it is today which expresses the culture, history and individual identity of each of its people.

The Marae and the collective strength gained from it by its individual members remains an essential element of modern Māori identity, direction and understanding. This is especially so for those affiliates who reside away from their home territories. The next generation of Māori may well be forced by circumstances to become more pragmatic in their future engagement with their Marae engaging in as many virtual as actual hui.

Establishing Marae as portals to Māori communities will promote the use and benefits of high speed communication and generate a further expansion of connectivity into Māori homes. The demographic profile of Māori communities is unique and spread worldwide so high speed connectivity is highly useful to our families and businesses. From the governments perspective investing technology in Marae is also an investment in the cultural reserves of Māori communities which is an obvious obligation of nationhood arising from Te Tiriti o Waitangi.

38. **Te Reo:** The Crown recognises it has Treaty-based and legal obligations to promote and protect te reo Māori and, while these are perpetual, the manner in which these continue to be fulfilled are contextual.

Information and communication technologies (ICT) are critically important to contemporary New Zealand society, not only as tools for communication but as tools for the dissemination of content.

There is a compelling argument for the Crown to fulfil its obligations in the ICT sector. Māori must be enabled to take advantage of emerging capabilities, and to do so in a manner commensurate with others in this sector. As a partner language, access to te reo Māori content needs to be available on all platforms in order to contribute to its revitalisation. Māori need to lead this and to be in a position to leverage spectrum for linguistic, cultural, and economic development.

To celebrate Te Wiki o Te Reo Māori 2012, Hika Group Limited working with Auckland University and Vodafone NZ released Hika Lite, an i-pad/i-phone application that provides as unique approach to language translation and language learning in real time. The company has released 50,000 free applications. The Hika Lite product is a starter version with 602 words, a much more comprehensive product with over 2000 words that can be translated into 300,000 has been developed for the tertiary education sector.

The Māori Television Service and Iwi/Māori radio represent the ability of Māori to successfully utilise and manage spectrum.

Furthermore the convergence of the broadcasting and telecommunications/ICT sectors as a consequence of the rapidly changing technology requires the establishment of a Māori entity to assume responsibility for the management of spectrum allocation, present and future and associated resources, on behalf of Māori.

39. **Rangatiratanga:** Having a commodity to trade compels industry to engage with Māori, not just users of the technology, but as creditable investors and influencers. The Hautaki

experience is a good example of this, in recent months the company has been approached by one of the largest civil construction companies in New Zealand ICT to secure a licence for 2.3mhz spectrum that has been allocated to Hautaki. The parties have agreed in principle to proceed to a develop a commercial relationship that will see Hautaki have an equity stake in yet another new and exciting telecommunications opportunity with the potential to produce immediate and long term financial returns for the Trust and genuine benefits for Māori and the nation. The details of this opportunity are commercially sensitive at this time but are expected to be released to the public before the end of the year.

40. **Ukaipotanga:** Māori management of spectrum continues to contribute to the National economy through increased returns. The main principle of the digital dividend is the benefit that flows to consumers from spectrum allocation and not the proceeds of spectrum sales. The Hautaki experience with 2Degrees has had the net effect of leveraging spectrum into a \$2.24 billion economic benefit to the national economy.<sup>27</sup>

Additional benefits reported include:<sup>28</sup>

- creation of 574 new jobs to December 2011, forecasting 1460 new jobs to 2021
- direct expenditures of \$580m, likely to increase to \$4.7 billion to 2021
- consumer savings of \$1.36m, an average saving of 21%

41. It is these expressions of kaupapa tuku iho by Māori in telecommunications that are contributing not only to the national economy but to the survival of Māori as a people. The more significant of which are direct results of Treaty relationships and Māori management of spectrum matters.

## **E MĀORI ABILITY TO LEVERAGE SPECTRUM FOR THE NATIONAL GOOD**

42. Paramount amongst the benefits for Māori having management rights to the spectrum is that Māori will fulfil obligations to give expression to kaupapa tuku iho and in so doing, contribute to the survival of Māori as a people.
43. There are important benefits for the Nation from Māori having management rights to radio spectrum they include:
- (a) technology based participation through employment (including management) and governance within the industry. Māori innovation will be released through the expression of kaupapa tuku iho and Māori will be owners of spectrum related technologies.<sup>29</sup> Māori are here to stay in the industry and continue to signal sector that they are looking to engage for the benefit of Māori and, indeed, all of Aotearoa;
  - (b) a spectrum focus, for those charged with managing the asset ensures that the sector will attract investment by Māori including iwi.

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<sup>27</sup> Te Huarahi Tika Trust Annual Report 2011 at 6.

<sup>28</sup> Te Huarahi Tika Trust Annual Report 2011 at 6.

<sup>29</sup> Kaupapa tuku iho are inherited values each of which can be expressed in many different ways. The search for the most appropriate way, that which is "tika", of expressing kaupapa in any particular context will produce innovative options.

## F RECOMMENDATIONS

44. The Coalition recommends that the Māori Party caucus receive this paper.
45. As **interim measures** to achieve a mutually advantageous outcome for Māori and the Crown, the Coalition seeks the Māori Party's recommendation to the Minister of Māori Affairs and the Ministers of Communications and Broadcasting that they implement a dual approach to resolving spectrum management issues:

- (a) Direct the Ministry of Economic Development to engage with the Māori Trustee working with the Coalition, to:
- (i) co-manage the auction of 700Mhz spectrum to the industry;
  - (ii) make arrangements for the management of the spectrum on behalf of Māori;
  - (iii) make arrangements for the investment in short term securities of the Māori revenues from the 700MHz auction;

This will provide an framework for the Crown and the Māori to address the immediacy of the 700MHz spectrum allocation. Concurrently, to address the broader issues of spectrum allocation and Māori ITC activities:

- (b) Establish a Joint Working Group of seven members:
- (i) with a set of agreed principles in place, including that the Crown **agree** to allocate an amount of spectrum and that any management entity will be supported by legislation with governance and management functions appropriately funded;
  - (ii) that includes representatives of the WAI2224 claimant group, Te Pūtahi Paoho, Te Huarahi Tika Trust, Hautaki Limited and that a member of the Iwi Chairs Forum be invited to participate; and
  - (iii) is funded for all activities that will be outlined in a terms of reference to be negotiated with the Joint Working Group members.
46. The Joint Working Group would:
- (i) Conduct a series of five hui around the country to:
    - build awareness of benefits of ICT to Māori communities
    - engage with industry on spectrum allocation discussions
  - (ii) complete a review of the Māori ICT landscape to determine opportunities for improved efficiencies across those entities currently engaged in the sector;
  - (iii) work with government to develop a spectrum management framework (comprising legislation, policy, appropriate funding and implementation);
  - (iv) investigate and design a spectrum management entity;
  - (v) prepare a set of recommendations and present its report to Māori and the Crown by **30 September 2012**.

Nā Te Huirangi Waikerepuru and Piripi Walker for Ngā Kaiwhakapūmau i te Reo, Whatarangi Winiata for the New Zealand Māori Council (interim), Graeme Everton for WAI776 claim, Tuwhakairiora Williams for Te Pūtahi Paoho, Antony Royal and Mavis Mullins for Hautaki Limited and Daphne Luke for Te Huarahi Tika Trust.

## Appendix A

### LEGAL CHRONOLOGY OF MĀORI, BROADCASTING RIGHTS AND SPECTRUM RIGHTS

#### Legal Chronology

- **2003:** Māori Television Service Act 2003: established Māori TV (ss 7-11) and Te Pūtahi Paoho (ss 12-16), and transferred UHF rights to Māori TV for a period of 10 years (expires at the end of 2013) (ss 21-24)
- **2000:** Her Majesty the Queen and Hautaki Limited, Management Rights Deed, 7 July 2000: Enabled Hautaki Limited (Trustee of Hautaki Trust, whose primary beneficiary is the Māori Spectrum Charitable Trust (aka Te Huarahi Tika Trust) to purchase management rights in respect of the radio frequencies in the range 1965 – 1980MHz and 2155-2170MHz (3G) at a discounted rate (cl 3).
- **1999:** Final Report on the Radio Spectrum Management and Development Claim (Wai 776): Claimants objected to the proposed auction of the 2 GHz range, without agreement with Māori to allow them a fair and equitable portion of the 35 management rights. Majority of the Tribunal found the claim to be well founded, and accepted the claimant's argument that the electromagnetic spectrum, in its natural state, was known to Māori and was a taonga. The report also found that the spectrum was subject to the Treaty right of development, which it defined as a Māori expectation and entitlement "to develop their properties and themselves and to have a fair and equitable share in Crown-created property rights, including those made available by scientific and technical developments". The WT made the following recommendations:
  - (a) Suspend the auction of 2 GHz frequencies until such time as it has negotiated with Māori to reserve a fair and equitable portion of the frequencies for Māori (such an arrangement is preferable to compensation, because Māori must have a "hands-on ownership and management if they are to foot it in the 'knowledge economy'");
  - (b) Any income a Māori spectrum trust received could be used to develop infrastructure for remaining Māori frequencies or to educate and train Māori staff for employment in telecommunications industry;
  - (c) Crown should provide assistance to Māori to establish a properly mandated national body to negotiate with the Crown for reservation of the spectrum;
  - (d) Treaty partners could then work out a long-term plan for the management of future allocations of spectrum rights.
- **1996:** *Privatisation of Radio New Zealand* case:<sup>30</sup> applicant challenged government decision to privatise the Crown's commercial radio assets, held by Radio NZ Ltd. CA upheld Crown's Treaty obligation but dismissed application for review. The Crown could discharge its obligations by means other than retaining ownership of the assets.

<sup>30</sup> NZMC – A-G [1996] 3 NZLR 140 (CA)

- **1994:** *Broadcasting Assets* case:<sup>31</sup> applicant sought to prevent the assets vested in the Broadcasting Corporation being transferred to the state-owned enterprises, Radio NZ and TVNZ. Litigation centred on section 9 of the SOE Act. CA rejected application, holding that the assets themselves could not be the subject of a Treaty claim – the particular assets were not essential for Māori broadcasting and were fully “substitutable” by grants of public funding. The Privy Council affirmed CA decision, but cautioned that the Crown’s Treaty obligations created a “legitimate expectation”. The Crown had guaranteed Māori access to broadcasting and television, and was obliged to do what was reasonably necessary. Its burden increased if taonga was in a vulnerable state, or if erosion of taonga was attributable to past breaches of the Treaty.
- **1991:** *Radio frequencies* case:<sup>32</sup> CA upheld interim injunction delaying the tender of radio frequencies until the WT had published its report on Māori broadcasting (Wai 26, discussed below). Crown was bound to take account of WT recommendations. However, the Minister was free to act against the views of Māori and the WT, without breaching Treaty principles. Minister considered WT report and resolved that tender of spectrum should proceed. NZMC sought further relief which was declined by the HC and CA.
- **1990:** *Report on Claims Concerning the Allocation of Radio Frequencies* (Wai 26): Claimants objected to the proposed sale by tender of rights to radio spectrum frequencies for 20 years. HC granted an interim injunction postponing the sale for six weeks (upheld by CA, as discussed above). WT identified two major themes: the fragile state of the Māori language, and the speed with which consultations and the proposed sale process proceeded. WT concluded the claim was well-founded, and made a number of findings and recommendations, including:
  - (f) The radio spectrum is a taonga for the whole of mankind; neither Treaty partner can have monopoly rights to the resource;
  - (g) Management of the resource must be the subject of effective consultation between Māori and the Crown. The key principle of management of the spectrum is partnership, requiring each partner to act reasonably and with the utmost good faith towards each other;
  - (h) There is a hierarchy of interests in natural resources: (a) Crown’s duty to control and manage resources in the interests of conservation and the public interest, (b) tribal interest in the resource, (c) any commercial/recreational interest;
  - (i) The subject matter of the allocation of radio frequencies is an ‘in between’ situation. It is not simply a case where Māori can argue prior ownership before the Treaty. Nor can the Crown argue that Māori have no rights to the spectrum, nor a right only in terms of the language. The radio spectrum is so intimately tied up with the use of Māori language and culture, and the protection and development of these things that the Māori right to access must amount to more than this.
  - (j) The Tribunal recommended that the Crown suspend the radio frequency tender for 6 months to allow further consultation with iwi to take place;

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<sup>31</sup> NZMC – A-G [1994] 1 NZLR 513 (PC)

<sup>32</sup> A-G v NZMC [1991] 2 NZLR 129 (CA)



- (k) 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;
  - (l) That FM frequencies be made available for Māori broadcasting in Auckland and Wellington;
  - (m) That the Government contribute \$40,000 towards the costs and expenses of the claimants.
- **1986:** *Report on the Te Reo Māori Claim (Wai 11)*: Claimants argued that the Crown had failed to protect the Māori language in breach of the Treaty, and sought recognition of te reo Māori as an official language of Aotearoa. WT found in favour of claimants. The Crown promised to recognise and protect te reo Māori, and that guarantee required affirmative action. But Crown policy over many years had "swamped" the Māori language and done it great harm. Te reo Māori must be regarded as a taonga. Importantly, the WT held that it is consistent with Treaty principles that the language and matters of Māori interest should have a secure place in broadcasting.
  - **1984-1987** Aotearoa Broadcasting Systems 3rd TV Channel Bid VHF Frequencies
  - **1988-1993** Broadcasting Corporation Assets (including frequencies) Case to High Court, on access to mainstream radio and television Court of Appeal and Privy Council
  - **1989-1990** Treaty of Waitangi Right to Radio Frequencies Cases to High Court, Court of Appeal and Waitangi Tribunal (Wai 150)

## Appendix B

### Record of Radio Spectrum Activity / Table of Meetings 2009 – 2012

<i>Date and Time</i>	<i>Hui Description</i>
15 Sep 09	Te Puni Kōkiri and Min. Economic Development stakeholders hui on spectrum. Consultation with Māori and others on Digital Dividend. Radio NZ House, Wellington. Sponsored by Te Huarahi Tika Trust & MED
5-6 Nov 09	National Hui called jointly by NZMC, Ngā Kaiwhakapumau and Wai776 claimants to discuss digital dividend Kokiri Marae, Seaview, Wellington
15 Dec 09	Urgent Hearing Judicial Conference before Waitangi Tribunal, Tribunal Rooms, Wellington
24 Dec 09	Negotiation with Crown Law on Waitangi Tribunal Hearing Wellington
10 Feb 10	Preliminary Engagement Min. Economic Development, Wellington
22 Feb 10	Working Level Meeting #1 Te Puni Kokiri, Wellington
26-27 Feb 10	Second National Hui Ngā Whare Waatea Marae, Mangere, Auckland
19 Mar 10	Engagement Meeting #2 Te Puni Kokiri, Wellington
29 Mar 10	Working Level Caucus Meeting Te Puni Kokiri, Wellington
12 Apr 10	Working Level Caucus Meeting Min. Economic Development, Wellington
27 Apr 10	Engagement Meeting #3 Te Wānanga o Raukawa, Ōtaki
6 May 10	Meeting with Ministers Joyce and Sharples The Beehive, Wellington
27 May 10	Working Level Meeting Te Puni Kokiri, Wellington
10 Jun 10	Working Level Meeting, Min. Economic Development, Wellington
29-30 Jun 10	Third National Hui Kairau Marae, Waitara, Taranaki
30 Jun10	Working Level Caucus Meeting Te Puni Kokiri, Wellington

<i>Date and Time</i>	<i>Hui Description</i>
26 Nov 2010	Fourth National Hui Brentwood Hotel, Kilbirnie, Wellington
1 Aug 2011	Preparatory Hui Parliament Buildings, Wellington
2 Aug 2011	Working Level meeting Te Puni Kokiri, Wellington
30 Aug 2011	Min. Economic Development Hui on 700MHz MED Building, Bowen Street, Wellington
8 Sep 2011	Min. Economic Development Industry Hui on 700MHz Auckland
27 Feb 12	Te Huarahi Tika Trust meeting with Amy Adams to discuss spectrum and related ICT matters Bowen House, Wellington
11 Apr 12	Te Huarahi Tika Trust and Hautaki Limited meeting with Min. Economic Development representatives Tracey Black to discuss 700MHz submissions Min. of Economic Development, Bowen Street, Wellington
	Te Huarahi Tika, Te Pūtahi Paoho and Ngā Pū Waea meeting with Te Puni Kōkiri officials to discuss spectrum matters and an approach to reviewing the Māori ICT landscape Te Puni Kōkiri, Wellington
21 May 12	Te Huarahi Tika, Te Pūtahi Paoho and Ngā Pū Waea meeting with Minister of Māori Affairs and officials to discuss spectrum management and Māori ICT landscape Bowen House, Wellington
19 Jun 12	Second meeting of Te Huarahi Tika, Te Pūtahi Paoho and Ngā Pū Waea meeting with Te Puni Kōkiri officials to discuss spectrum matters and an approach to reviewing the Māori ICT landscape Te Puni Kōkiri, Wellington
17 Jul 12	Coalition meeting with Māori Party caucus Bowen House, Wellington