

Undiscovered in 1840? We own it, claim Maori

A furore was inevitably whipped up when the government decided Maori should be allowed cut-price access to the radio spectrum. Mostly the fuss was political.

National and ACT politicians expressed their disgruntlement that an invidious precedent would be set if Maori were given a commercial advantage over non-Maori business interests.

The principles brought to bear on the spectrum decision differed from those applied when Maori were given a substantial chunk of the country's fishing industry. The government of the day then recognised Maori ownership rights to the fish under the Treaty of Waitangi.

No such rights have been recognised in the case of the radio spectrum, the key to huge telecommunications opportunities. Rather, privileged access to the spectrum is being offered to Maori as part of the "closing the gaps" policy. Maori should be given a break, the reasoning goes, because generally they are poorer than the rest of us.

National and ACT critics of this beneficence challenge the wisdom of closing the so-called gaps by granting favours on an ethnic basis. Anyway, they ask, how can we be sure the rewards flow through to the under-privileged people the government is trying to help?

But, just as inevitably, there are Maori factions who complain they are being hard done by under a deal offering them a part of the spectrum if they pay 95% of the market price. They own it already, they insist, and so should not have to pay for it.

Furthermore, their share should be for the benefit of all Maori, not just for those who can afford to buy into the 95% bargain price.

They apply a simple logic. They talk of invisible channels, or waves, that have been in the air between earth and sky for a long time. Since Italian and German scientists discovered them in the 1880s, these invisible passageways have been combined with emerging technologies to send radio, television and all sorts of other signals between one place and another.

They see further big technological developments in the telecommunications domain happening every day, including video conferencing and databases on small cell phones.

But at the time the Treaty of Waitangi was signed, neither "the Crown" nor the claimants' ancestors knew about these pathways in the air.

The **Independent** *BUSINESS WEEKLY* **Editorial**

Maori have not sold these pathways; nor have they leased them or given them away. "Accordingly, they must be ours or, at least, partly ours," they argue.

Others with an interest in what happens should be grateful the claimants are not demanding full ownership rights. Rather, they describe the radio spectrum as a taonga - a treasured item - protected under article 2 of the Treaty of Waitangi. The Crown therefore has no right to claim for itself the exclusive right to own and manage radio spectrum without recognising its treaty partner, they say.

The Waitangi Tribunal in two reports issued last year agreed with the claimants. It also said the two partners to the treaty should negotiate.

But the Crown has declined to do this, the Maori claimants grumble. Therefore they went to the High Court last week, determined to take matters to the Appeal Court and the Privy Council if need be to prevent what they regard as an attempt at confiscation by the Crown.

If the Crown gets away with it, they argue, "all of our future claims to the discoveries between Ranginui and Papatuanuku and in Papatuanuku, including what is below Tangaroa, could be lost to us." Those words embrace the contents of the earth, the sky and the sea. What's at stake, in other words, is of huge economic importance.

"Future claims" would include oil, minerals, geothermal activity and, as the claimants themselves covetously express it, "all known and unknown natural resources that were part of our kainga at the signing of the treaty."

The claim has not popped up from nowhere. Issues of ownership and control of the radio spectrum date back more than 10 years, from tribunal and court action in 1990 to tribunal action

in 1999.

Those questions are not readily resolved and there was a minority finding from the tribunal in 1999. It was eloquently expressed at great length, but basically rejected the proposition promoted by Professor Whatarangi Winiata that the word "kainga" was intended to refer to the universe and all that's in it.

Important constitutional questions are being raised too, however.

Among his arguments for rejecting the High Court application last week, Justice Doogue said many people would be inconvenienced if the auction of a chunk of the spectrum was stopped, including the Maori who have accepted the government's deal and joined the Spectrum Trust.

But apart from the Maori Women's Welfare League, Winiata argues in rebuttal, "members of the trust have no mandate to represent Maori." The other trust members "were selected by the Crown and that gives them no status from which to speak on behalf of Maori people."

So who appointed them? At least some were nominated by Maori MPs.

But this, it seems, is not good enough for Winiata, who says the Maori MPs do not represent Maori. They are now part of the Crown and sit in a body the Crown has formed to legislate.

He accepts they were elected and that several were elected by Maori constituents. But he says "they're part of the Crown and Maori must have a separate body and separate opportunities to debate the issues."

The ramifications of this logic are profound. Most obviously, we should dispense with the Maori seats in Parliament because they are being filled by members of parliament who do not represent their electors.

This would be warmly welcomed by substantial numbers of people who see the special seats as an anachronism under a system of proportional representation.

But there is a constitutionally awkward caveat in Winiata's reasoning. There must also be a Maori-only forum, he is demanding, for Maori to thrash out the issues that affect them - as if they have no effects on the rest of the population.

It might mollify some Maori. But it looks like a formula for widening the gaps, not closing them.