"Resolving the Foreshore and Seabed Dispute"

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Political Leadership in New Zealand
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Foreword

Our world of global interconnectedness characterised by uncertainty, unpredictability and increasing mistrust has brought about a new and intensified period of change. This unrelenting change has created a prevalent concern about a lack of leadership to overcome these compelling challenges. Many of the significant current and emerging challenges are of a political nature and will require more and better political leadership.

There is an unfortunate tendency to think of leadership as a romantic simplicity. However, it is important to appreciate that leadership is complex, and if we are to develop more effective political leadership, then we need to take the time to reflect on and understand it.

Political Leadership in New Zealand takes seriously the responsibility of reflecting on and understanding political leadership. Its publication is a timely reminder that political leadership is not automatically conferred through a position or a title; rather, it manifests itself through transformative thinking and learning.

The New Zealand Leadership Institute is committed to enhancing the understanding of leadership in New Zealand and is proud to have played a role in the initiation of this book through its support of the planning workshop in June 2004.

The Institute is profoundly interested in creating a nexus between academic theory, research and practice to transform the understanding and practice of leadership in New Zealand.

This excellent book achieves this goal and creates a platform for the type of conversations that can lead to more and better political leadership. I congratulate Raymond Miller and Michael Mintrom and their fellow authors on this important initiative which has the capacity to create both more understanding and action.

Lester Levy
New Zealand Leadership Institute
The question of who has what rights to the foreshore and seabed in New Zealand is a defining issue of national identity at the beginning of the twenty-first century. The way in which we answer it tells us about the maturity of our political system, the identity of our culture(s) and the values of our society. The nature and quality of political leadership is important to this. In this chapter, I apply an approach to leadership developed by Ronald Heifetz, most notably in his acclaimed 1994 book, *Leadership without Easy Answers*. Central to that approach is a four-point diagnostic and normative framework of the principles of leadership that was developed from observations of the practice of leadership. The framework involves identifying adaptive challenges faced by a group or organisation; regulating distress for those involved; directing disciplined attention to the issues; and ‘giving the work back to the people’.

There is significant room for disagreement about how Heifetz’s framework should be applied to the case of the foreshore and seabed. I should make clear the extent to which its application in this chapter represents an intimately personal view. During the period 1995 to 2000 I was involved in providing advice to ministers on Crown strategy with respect to Treaty of Waitangi and customary rights issues generally, including the foreshore and seabed. My own ‘take’ on events from 2003 to 2005 is one of sadness and frustration. I understand the incentives operating on all the
key actors in the debate and do not believe the party political identity of
the government would have changed the dynamics. But I am very disap-
pointed at where they have led, in terms of the health of the relationships
between the Crown, Maori and other New Zealanders. We need a system
that generates better political leadership.

In what follows, I summarise salient features of Heifetz’s prescription
for leadership without easy answers and review the events and players
associated with the foreshore and seabed from 1997 to 2005. Through this
review and analysis, I show how the responses of political leaders to the
events of the foreshore and seabed can be seen as rational responses to
political incentives. The chapter concludes that that is not good enough.
Consequently, I suggest changes to our system of government and poli-
tics that might lead to the exercise of constructive leadership, in Heifetz’s
sense, to the foreshore and seabed issue in the future.

Heifetz’s Approach to Leadership
Ronald Heifetz distinguishes leadership and authority as operating in
dynamic tension:

[Leadership] can be usefully viewed as the activity of mobilizing people to
do work on their problems, while authority can be viewed as the activity of
restoring or maintaining equilibrium in the social system (1989, 541–2).

Heifetz elaborates:

On one hand authority basically stabilizes, while leadership, in stretching
the social system’s adaptive capacity, basically disturbs. On the other hand,
authority and leadership overlap at those times when authority acts to reduce
intolerable levels of urgency into a favorable range for work to proceed. For
example, autocratic rule in a chaotic situation may reduce overwhelming
disequilibrium and enable the constructive engagement of conflicting
factions (1989, 542).

Heifetz’s resulting normative conception of leadership emphasises
that it is an activity (rather than a status or a set of personal characteris-
tics) and that its purpose is to accomplish adaptive work:
Adaptive work consists of the learning required to address conflicts in the values people hold, or to diminish the gap between the values people stand for and the reality they face. Adaptive work requires a change in values, beliefs, or behavior. The exposure and orchestration of conflict – internal contradictions – within individuals and constituencies provide the leverage for mobilizing people to learn new ways (1994, 22).

Further, Heifetz notes that

The point here is to provide a guide to goal formation and strategy. In selecting adaptive work as a guide, one considers not only the values that the goal represents, but also the goal’s ability to mobilize people to face, rather than avoid, tough realities and conflicts. The hardest and most valuable task of leadership may be advancing goals and designing strategy that promote adaptive work (1994, 23).

Heifetz’s diagnostic leadership framework can be well applied to the foreshore and seabed controversy in New Zealand.

Events and Players on the Foreshore and Seabed 1997–2005
Before applying Heifitz’s prescription for leadership to our case study, it is necessary to explore the background to the foreshore and seabed dispute.

The issues
Public and political consciousness of the foreshore and seabed issue in New Zealand largely dates from June 2003, when the Court of Appeal’s Ngati Apa decision came out (see generally Charters and Erueti 2006). The immediate legal origins of the controversy date back to the filing of proceedings in the Maori Land Court in 1997 by eight iwi – Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Rangitane and Te Atiawa – against the Marlborough District Council. The essence of the underlying legal issue in the litigation was whether the Maori iwi or hapu had common law rights in relation to specific areas of the foreshore and seabed in Marlborough, whether or not those rights had been extinguished by legislation and, if not, what the content of those
rights were. However consideration of this underlying issue has not been reached by the courts. At an early stage in the litigation the Crown and other defendants made a preliminary objection that common law and statute had extinguished Maori customary rights in the foreshore and seabed.

Judge Hingston of the Maori Land Court issued a decision in favour of the iwi in 1997. On appeal by way of a case stated to the High Court in 2001, the Crown obtained a determination of answers to eight specified questions regarding the law, the effect of which was that the Maori Land Court does have jurisdiction to examine whether the foreshore has the status of Maori Customary Land; the foreshore cannot have the status of Maori Customary Land unless it is contiguous with dry land that is Maori Customary Land; the seabed could not be Maori Customary Land; and there could be customary rights over the foreshore and seabed short of a right of exclusive possession.

The Maori plaintiffs appealed to the Court of Appeal. In response, in 2003, the Court overruled the 1962 Court of Appeal decision In Re Ninety-Mile Beach that the Maori Land Court cannot investigate title to the foreshore. The Court of Appeal found that the Maori Land Court does have such jurisdiction and that Maori customary title to the foreshore has not been extinguished by any general enactment. The Court did not make any finding regarding whether Maori customary title to particular portions of the seabed or foreshore had been extinguished by area-specific legislation or by particular Crown deed purchases.

In paragraph 8 of her judgment issued on Thursday 19 June 2003 the Chief Justice, Dame Sian Elias, cautioned that

The significance of the determinations this Court is asked to make should not be exaggerated. The outcome of the appeal cannot establish that there is Maori customary land below high water mark. And the assertion that there is some such land faces a number of hurdles in fact and law which it will be for the Maori Land Court in the first instance to consider, if it is able to enter on the inquiry.

On Sunday 22 June 2003, the Prime Minister Rt Hon. Helen Clark and Attorney-General, Hon. Margaret Wilson, issued a press statement playing down the significance of the Court of Appeal’s decision, describing it
as ‘narrow and technical’, with ‘no immediate practical effect’. However, in the post-cabinet press conference the next day Helen Clark and Margaret Wilson announced that the government considered that the possibility of a court finding that Maori have an exclusive title to the foreshore or seabed ‘is not necessarily desirable because it would exclude a traditional interest that all New Zealanders have in access to the sea and the foreshore. Therefore, it is the Government’s view that it is important that the legal status of the seabed and foreshore is made clear’ and that legislation would be passed to make it clear. In August 2003 the government issued its proposals for protecting public access and customary rights.

The ensuing political storm involved extreme statements, prejudice and racism. As Tahu Potiki, chief executive of Te Runanga o Ngai Tahu, stated in an address to an ACT Party conference: ‘Since [the Ngati Apa] decision the country has descended into a gutter debate in its most base form slugging each other, caveman like, with clubs of prejudice and racism.’

All political parties had difficulty grappling with the issues. The Labour-led minority coalition government pursued legislation that provided more legal clarity about the public right of access to the foreshore and provided a process for determining the validity of Maori claims to the foreshore and seabed. The resulting Foreshore and Seabed Act 2004 created instruments and processes for the recognition of Maori claims found to be valid but did not extend to requiring compensation for Maori if a common law claim would, but for the legislation, have succeeded. In the course of passage of the legislation, the Labour Party split, with two of its Maori MPs refusing to support the legislation and a minister, Hon. Tariana Turia, leaving the Labour Party and government in April 2004 to form the new Maori Party. There were 11 hui scheduled to discuss the Crown’s proposals in September 2003. The National Party and New Zealand First Party made political capital.

The Waitangi Tribunal held an urgent hearing into the Crown’s proposals in January 2004 and in March 2004 found (Waitangi Tribunal 2004, xiv–xv):

The policy clearly breaches the principles of the Treaty of Waitangi. But beyond the Treaty, the policy fails in terms of wider norms of domestic and
international law that underpin good government in a modern, democratic state. These include the rule of law, and the principles of fairness and non-discrimination.

The serious breaches give rise to serious prejudice:
(a) The rule of law is a fundamental tenet of the citizenship guaranteed by article 3. Removing its protection from Maori only, cutting off their access to the courts and effectively expropriating their property rights, puts them in a class different from and inferior to all other citizens.
(b) Shifting the burden of uncertainty about Maori property rights in the foreshore and seabed from the Crown to Maori, so that Maori are delivered for an unknown period to a position of complete uncertainty about where they stand, undermines their bargaining power and leaves them without recourse.
(c) In cutting off the path for Maori to obtain property rights in the foreshore and seabed, the policy takes away opportunity and mana, and in their place offers fewer and lesser rights. There is no guarantee to pay compensation for the rights lost.

A thousands-strong march on parliament by Maori coincided with the introduction of the Bill. The Foreshore and Seabed Act 2004 was eventually passed. And, as a sort of postscript, in 2005 the United Nations Committee on the Elimination of Racial Discrimination urged the government to resume a dialogue with Maori to lessen the discriminatory effects of the legislation (Charters and Erueti 2005).

Origins and options
The origins of these legal issues are much older than this litigation. They lie in the development of the English common law of aboriginal title and customary rights and in various New Zealand attempts to extinguish or codify these rights in the late nineteenth and early twentieth centuries (McHugh 2004a; McHugh 2004b; McHugh 2005). It has been apparent for over a hundred years that there has been a lack of clarity in the law governing the foreshore (Boast 1993). Attorney-General Sir John Findlay in 1908 observed generally that ‘There is no statutory chaos in the world at all equal to the jungle of our Native-land laws today . . .’ In 1935 the opinion of the Crown Law Office was that ‘The consensus of opinion (in which I fully concur) is that the claim of the Crown [to the foreshore]
is weak. The Department would prefer that the matter, if possible, be removed from the jurisdiction of the Native Land Court.5

In academic and legal circles the existence of this uncertainty has been clear. In the 1990s, in relation to this litigation, ministers were advised of that lack of certainty. Yet in 2003 it appears to have come as a surprise to the general public and apparently to politicians. Two sources of surprise can be identified. First, the relevant source of legal authority at issue in this controversy is not the Treaty of Waitangi. The Treaty, through legislation invoking it, was the primary source of legal claims by Maori from the 1980s onwards. The existence of an alternative, potentially more legally binding, source of Maori claims in the common law came as a surprise to the New Zealand public and also, though less excusably, to politicians.6 The second surprise seems to have been the proposition that there is legal uncertainty as to who ‘owns’, or has what property rights to, the foreshore and seabed.

At various points since the initiation of the Ngati Apa litigation, particularly in reaction to court decisions in 1997, 1998 and 2001, public surprise and political controversy could easily have flared up as it eventually did in 2003. That it did not was probably due to the attitude taken by the then government in dampening rather than exacerbating public concern, and in pursuing further technical legal avenues through the judicial system for legal certainty.

In 2003, the government appeared to be taken by surprise by the Court of Appeal decision and the complexity of the policy and political issues.7 Alternatives were available. They should have been canvassed calmly, as contingencies, before the Court of Appeal judgment was issued.

The government could have appealed to the Judicial Committee of the Privy Council. But doing so while simultaneously seeking the abolition of the right of appeal to that court may well have lacked political credibility. Or the government could have stuck to its initial line about the lack of immediate effect of the decision, and let the judicial process continue – with consideration by the Maori Land Court of the factual justification for the plaintiffs’ case and the ability to appeal and seek judicial review of those decisions. This course was not aided by some inflammatory statements by one or two Maori activists, nor by potential opposition fuelling those flames (potential that was realised dramatically in Don Brash’s speech entitled ‘Nationhood’ to the Orewa Rotary Club on 27
January 2004). Instead, the government clearly reached the view that the continued uncertainty about rights of access to beaches, associated with continuing down the judicial route, would be politically damaging. The Deputy Prime Minister, Hon. Dr Michael Cullen, who eventually acquired carriage of the issue stated in response to the Waitangi Tribunal’s report in March 2004:

> The government does not agree that matters can be allowed to drift on, perhaps for many years, to an unknown conclusion. In the meantime great uncertainty will occur. There is a serious risk of injunctions to prevent any foreshore and seabed activity occurring. Already this is beginning to happen.\(^8\)

The government’s management of the process of policy-making and legislation-making was, at times, ham-fisted and itself contributed to tension, especially with Maori. In particular, the aggressive tone of the initial government reaction to the Court of Appeal decision was ill-judged and exacerbated the volatility of the situation. Tone continued to be a problem for the government, leading to impressions from all sides of lack of good faith. But those processes were never going to be easy. And opposition politicians, especially Don Brash and Winston Peters, the leaders of the National and New Zealand First parties, were quick to exploit the fear, uncertainty and prejudice that surrounded the issue.

**In Search of Leadership**

So what can we say about the quality of political leadership in these events? Applying Heifetz’s framework, here I discuss the foreshore and seabed dispute in terms of identifying the adaptive challenge, regulating distress, directing disciplined attention to the issues and giving the work back to the people.

*Identifying the adaptive challenge*

The first step in Heifetz’s diagnostic is to identify the underlying gap or conflict at issue. A clue to the nature of the underlying gap or conflict here lies in the two surprises to public and political opinion identified above: that the relevant source of legal authority at issue in this controversy is not the Treaty of Waitangi; and that there is legal uncertainty as to who has what property rights over the foreshore and seabed.
An important source of the distress here lies in the intense cultural values associated with the enjoyment and use of New Zealand beaches (the foreshore) – both for Maori and for other New Zealanders. For Maori, there are often significant, deeply held cultural values associated with specific sites on the foreshore, whether as boundary markers, for fishing, as urupa or other wahi tapu. These values are long-established and cut to the heart of what it is to be Maori. At the same time, access to beaches for boating, fishing, walking, barbeques or Christmas holidays has become one of the few quintessential parts of New Zealand culture more generally. Different regimes, such as private beaches in the United States, evoke powerfully negative gut reactions in New Zealanders. Generations of Pakeha have formed a profound emotional attachment to New Zealand beaches that touches what it is to be a New Zealander.

It is conceivable that Maori and Pakeha cultural values associated with the foreshore could be reconcilable by an innovative co-management regime. However, a more black-and-white perspective could lead easily to the perception that they could conflict. The Ngati Apa decision therefore represented a potential threat to be feared by Pakeha: uncertainty as to who has what control over beaches and the corresponding fear that Maori might exclude other New Zealanders from access to beaches. The fear of exclusion from access to beaches came up time and again in the media commentary and in parliamentary debates.

For Maori too there was fear – fear of, and ready anger about, how a potential Pakeha backlash would manifest itself. After 160 years of grievances about Crown breaches of the Treaty of Waitangi Maori were finally making some headway in the resolution of historical claims. Defeated militarily in the 1860s, with accompanying breaches of the Treaty, Maori had peacefully pursued avenues of working within the Pakeha political and legal system to seek redress. The 1980s saw increasing legislative reference to the Treaty of Waitangi and legitimation of the need to resolve historic grievances held by Maori over breaches of the Treaty. The 1990s saw the negotiation and resolution of a number of large historic grievances (e.g., Waikato–Tainui, Ngai Tahu) alongside a number of claims of contemporary breaches that appeared to many New Zealanders as far-fetched – for example, claims to trout, kiwifruit and airwaves. The late 1990s were a time of constant risk of racial backlash over Maori claims.
In addition to revealing uncertainty over the ability to pursue intensely held values, the Ngati Apa decision represented a whole new avenue of potential Maori claims, this time legally binding – the other surprise identified above. The Labour-led government was already perceived by some to be too politically correct and over-sympathetic to ‘fringe’ interests and issues. Opposition parties would be, and were, quick to play on prejudice and fear. Given the state of public opinion the government could not afford to cede political ground by being seen to be ‘soft’ on Maori. Government rhetoric post-Ngati Apa reflected that.

Yet the tone of the knee-jerk reaction that was expressed both by government and opposition politicians in their immediate reaction to the Ngati Apa decision symbolised for Maori a hypocritical attitude: pursue your claims through the courts according to law, but if you win we will change that law so you cannot win. Furthermore, political exploitation of prejudice and fear could be seen by Maori to be evidence of racism and cast doubt on the long-term effectiveness of a strategy of peaceful pursuit of claims within the law.

So, the explosive potential of uncertainty about access to the foreshore, generated by the intense values placed on it by Maori and other New Zealanders that could be perceived to conflict, was created by the contemporary context of New Zealand race relations. I have argued elsewhere that the Treaty of Waitangi expresses a desire for healthy ongoing relationships between Maori, the Crown and other New Zealanders (Palmer 1998; Palmer 2001; Palmer 2002; Palmer and Palmer 2004, ch 17; and see Coates and McHugh 1998; McHugh 2004). The challenge is to recognise this, and to create and use mechanisms to achieve it. This is also the underlying adaptive challenge facing New Zealand and its politicians in the foreshore and seabed debate: how to ensure that resolution of this issue enhances rather than degrades the health of the relationships between Maori, the Crown and other New Zealanders.

Regulating distress

Heifetz suggests (1994, 259) that it is necessary to ‘identify the tolerable range of distress and discern how to regulate its level within a particular setting’ in order that progress is able to be made. He suggests study of the characteristic responses of the community to disequilibrium, when breaking-points are reached, and what actions restore equilibrium.
I believe that these questions are insufficiently studied and understood in New Zealand. They reflect New Zealand culture and one aspect of New Zealand culture is a suspicion that introspection is self-indulgent and yields little of practical benefit. That suspicion is wrong-headed. Greater understanding of the characteristics of our national culture can help us resolve issues such as the foreshore and seabed more effectively and less painfully.

My own instincts are that the key New Zealand values relevant to resolution of disputes at a national level are authority, pragmatism, innovation, flexibility and fair play.

- New Zealand has a tradition of strong, almost authoritarian leadership: ‘King Dick’ Seddon in the 1890s, the first Labour Government of the Second World War and post-war conscription; the Muldoon administration in the 1970s economic crisis; the fourth Labour Government at the crossroads of 1984. Until MMP arrived in 1996 the ‘unbridled power’ of New Zealand executive government was the most streamlined form of democratic government in the world (Palmer and Palmer 2004).
- New Zealanders value pragmatism and flexibility but also innovation. The pragmatism usually means we adopt an incrementalist approach to dealing with problems. And we are happy to change things as we need to. But if a problem is big enough New Zealanders are uninhibited about starting from scratch and inventing a completely new way of dealing with it – as long as we can change that too if we want to in future.
- Egalitarian fair play and honesty is also a strong New Zealand value. Everyone should have a ‘fair go’. Injustices should be remedied. And those responsible should front up and admit it.

So, New Zealand’s characteristic general response to disequilibrium seems to me to lie firstly in an instinctive invocation of authority, a willingness to contemplate change, a distrust of solutions that are ‘set in concrete’ and a concern for justice.

Historically, disequilibrium in relationships between Maori and Pakeha have been most intense in conflict over land, leading to violence and civil war. Since 1970, the major conflicts between Maori and Pakeha
have continued to concern rights to land, particularly Maori grievances over the unjust past loss of land and resolution of those grievances – the 1975 land march or hikoi, the 1986 challenge to the removal of land from the Crown to State-Owned Enterprises (SOEs) and the 1995 reaction by Maori to the ‘fiscal envelope’ proposals to limit the amount of government funds for resolving Treaty settlements.

Historically, the restoration of equilibrium has come in the form of resort to force and armed conflict – especially in the New Zealand wars of the 1860s. In the 1970s and 1980s, more process-oriented solutions were pursued:

- the Treaty of Waitangi Act 1975 established the Waitangi Tribunal to hear, prospectively, grievances about alleged breaches of the Treaty of Waitangi;
- the Treaty of Waitangi Amendment Act 1985 retrospectively extended Waitangi Tribunal jurisdiction to include historic grievances;
- the State-Owned Enterprises Act 1986 included a general reference to the Treaty of Waitangi, in response to a Tribunal claim; and
- the Treaty of Waitangi (State Enterprises) Act 1988 responded to Maori litigation by enacting a procedure, negotiated with the New Zealand Maori Council, for making land transferred to SOEs available for compulsory resumption by order of the Waitangi Tribunal.

From the 1990s, substantive solutions began to appear:

- a pan-Maori settlement of the fisheries claim was negotiated in 1993 (and has taken more than ten years to implement);
- the terminology of the 1995 ‘fiscal envelope’ proposals were quietly dropped, but their substance continued to be adhered to by governments in case-by-case negotiation of settlements with Maori claimants; and
- settlements of historical grievances have been negotiated on a case-by-case basis since the Waikato–Tainui settlement in 1995.
The characteristics of these substantive solutions to problems reflect the general characteristics of New Zealand culture identified above. In particular, the difficult issues at stake in each set of negotiations engaged leaders on both sides deeply and tended to yield innovative solutions, often involving flexibility and lateral thinking and the setting up of further processes for resolving particular issues.

However, most of the innovation – in devising means of protecting the ability to resolve future Treaty claims in the 1980s and in devising the mechanisms of those resolutions in the 1990s – has tailed off. In the current decade, governments have pursued more formulaic negotiations to resolve historical claims, invoking mechanisms devised previously. Consequently, neither government nor opposition politicians have had to engage in depth with significant challenges to the relationship with Maori. The lack of that thinking and experience showed in the foreshore and seabed debate. This is perhaps the most important lesson for political leadership regarding the relationship between the Crown, Maori and other New Zealanders. If political leadership is to be effective in regulating the distress that issues in these relationships cause, the leaders themselves have to commit themselves to understanding the nature of these relationships. They are much more subtle, complex and multifaceted than other political dynamics in New Zealand – and there is a much higher risk to the nation in approaching them superficially or hastily.

As noted above, consistent with the above focus on process solutions, the initial responses by government in the 1990s to the foreshore and seabed litigation were, also, to seek further process-oriented solutions – within the judicial system. By 2003 the government considered that that option was no longer politically credible. Its instinctive reaction was to resort to the authority of legislation by parliament.

Directing disciplined attention to the issues

Heifetz (1994, 260–2) suggests that if traditionally used mechanisms for restoring equilibrium to social systems do not work, then ‘work avoidance’ mechanisms will often emerge that divert attention from the real problems. Was this what was going on in the foreshore and seabed debate in 2003?

Before working through the application of Heifetz’s framework I would have answered ‘no’ to this question. Now, having identified the
underlying adaptive challenge as the health of relationships between the Crown, Maori and other New Zealanders, and considering the recent pattern of the tailing off of in-depth engagement between the Crown and Maori, I think the answer is a qualified ‘yes’.

The current pattern of engagement between the Crown and Maori is stuck. The rocky resurgence of iwi and hapu identity has diminished the legitimacy of the New Zealand Maori Council, with which the Crown negotiated in the 1980s. The major settlements of historical grievances of breaches of the Treaty of Waitangi have been reached. The Clark government took a political hit early in its term, in 2000, of being ‘soft on Maori’ through its ‘closing the gaps’ policy to deal with social and economic disadvantage of Maori and reacted by reversing that policy and trying to avoid similar issues. Before the foreshore and seabed issue, it had not had to deal with Maori over a significant generic issue. Opposition leaders in 2003 had either had a pattern of political exploitation of prejudice against Maori or have not seriously engaged with Maori.

Finding a process to resolve the foreshore and seabed issue was undoubtedly difficult. In particular there was no legitimate ‘pan-tribal’ Maori organisation that government could engage with to negotiate a solution. And the transaction costs of negotiations with every iwi in New Zealand would have been too high for a politically sustainable process. And how would negotiation with Maori over an issue that also mattered to Pakeha sit with Pakeha?

Recourse to the ordinary legislative process, preceded by government consultations over a discussion paper was an understandable option. It resonates with New Zealanders’ cultural preference for authority. However, the foreshore and seabed issue is sufficiently important to Maori that the way in which it is resolved directly affects the health of the relationship between the Crown, Maori and other New Zealanders. Adopting an ordinary legislative process ignores that. How to ensure that these relationships are healthy is an underlying challenge with which New Zealand has not yet adequately grappled. In my view the legislative process used by government, and supported by the majority of opposition politicians, and the tone of that process, degraded the health of those relationships. That was foreseeable and should have been foreseen.
Giving the work back to people
Heifetz (1994, 262–3) suggests that ‘a community can fail to adapt when its people look too hard to their authorities to meet challenges that require changes in their own ways’. I agree and I think the foreshore and seabed debate exemplifies it. The authoritarian-regarding tendency is well rooted in New Zealand political culture. And politicians respond accordingly. The nature of the political leadership New Zealand achieves is not an accident. If a significant portion of the New Zealand electorate did not respond positively to exploitation of prejudice and fear, politicians would not undertake it.

In Heifetz’s framework, leadership involves giving the work ‘back to people’ to lead them to examine their views and values and the potential gains and losses to be made by keeping them or changing them. Here, I identify the relevant underlying views and values to be those concerning the relationship between the Crown, Maori and other New Zealanders.

The choice is not whether those relationships exist or not. They are inherently present, as long as Maori culture is vibrant. All New Zealanders therefore need to figure out what the qualities of those relationships should be and how they should be managed. Our current political incentive structures do not easily lend themselves to this.

Neither is the hard work all on the Crown side. The quality of Maori leadership needs attention. In particular, there seems to me to be merit in Maori considering the creation of a democratic, accountable body of Maori leaders with recognised legitimacy in dealing with the Crown over pan-Maori issues. Sir Douglas Graham suggested in 1997:

What is needed is a redefinition of the relationship between Maori and non-Maori and a recommitment to build a cooperative friendship so that everyone can benefit. It is the future, not the past which beckons us. We must stop talking past each other. The future relationship between Maori and the Crown depends on the trust between the two. If we have learned anything from the past it is that where Maori are likely to be affected by government policy they must be consulted. And to avoid mistakes it may be time to establish a joint council – perhaps up to 10 Maori leaders from Maori organisations, and 10 from government (Ministers or their Chief Executives). It could meet monthly so that each could be made aware of the other’s concerns. Meetings could be chaired by a former Governor-General.
In this way potentially difficult issues could be discussed and problems could be avoided before they arise. Such a development would close the gap in communications which still exists despite valiant attempts to close it (Graham 1997, 93).

It may be that the diversity within Maoridom itself is now too widespread to feel effectively represented by such a structure. Certainly it would be criticised by those holding an ‘iwi-fundamentalist’ perspective. Yet the existence of some authoritative body, developed by Maori, for Maori, might hold out the potential for healthier relationships with other New Zealanders. For example, it might have been possible for such a body to have negotiated a resolution of the foreshore and seabed issues in a way which could have positively enhanced relationships between the Crown, Maori and other New Zealanders. Certainly, it would have been harder for the Crown to ignore.

**Conclusion**

Questions over the quality of relationships between the Crown, Maori and other New Zealanders can be emotionally fraught. The foreshore and seabed debate demonstrates that – on all sides. Ultimately, the shape of the mechanisms for safeguarding the quality of these relationships is a constitutional issue – in the widest sense of a constitution as the structures, processes, principles, rules, conventions and even culture that constitute the ways in which government power is exercised. And New Zealanders shy away from apparently abstract and difficult constitutional issues.

But every time a ‘practical’ issue arises that puts at stake an issue of importance to the relationships between the Crown, Maori and other New Zealanders, the absence of constitutional mechanisms for dealing with them will encourage the temptation to New Zealanders and their politicians to avoid the real underlying issues. And down that path lies further damage to these relationships and to the fabric of our society. True leadership involves identifying the relationship conflict underlying the superficial issues, and creating a process where all New Zealanders can create mechanisms for managing these relationships. We should demand true leadership.
From 1995 to the end of 2000 I was Deputy Secretary for Justice (Public Law). For part of that period I chaired the Officials Treaty Strategy Committee that advised on strategic issues involving the Treaty of Waitangi and aboriginal title and customary rights. Thanks to Jonathan Boston, Sir Douglas Graham, Gary Hawke, Paul McHugh, Patricia Sarr, Ruth Wilkie and a staff seminar at the Victoria University of Wellington School of Government for comments on a draft of this paper and to Nick Whittington for research assistance. No responsibility for the views expressed here should be attributed to anyone but me.

3 See http://www.act.org.nz/item.aspx/24760
4 144 New Zealand Parliamentary Debates, 64.
6 It is important not to overstate the substantive importance of the distinction between the common law and the Treaty of Waitangi. The same dynamics underlie both (McHugh 2004b).
7 The Ministry of Justice Briefing Papers for the Incoming Government at the 1999 election raised this litigation squarely as a significant set of issues. However, they were not mentioned in the 2002 briefing (see www.justice.govt.nz).
9 As an exception, see papers by Bill Manhire, Philip Temple and others presented to the Constitutional Conference in 2000 (James 2000).

Attorney-General v Ngati Apa [2002] 2 New Zealand Law Reports 661 (High Court).


