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Changing the game plan: the Foreshore and Seabed Act and constitutional change

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Abstract The Foreshore and Seabed Act 2004 caused many New Zealanders grave concern. In this article I suggest that a number of the Government's actions since the passing of the Foreshore and Seabed Act bring into question several of its central claims for legislating and the subsequent overriding of Tiriti o Waitangi and human rights laws. As a result, I argue that the inadequacy in our constitutional arrangements requires a change of approach—a new game plan: constitutional change.

The second part of the article examines the work of the Maori Party. Its actions in encouraging an increasing level of Maori politicisation away from expression outside the State and towards the electoral process, arising out of opposition to the Foreshore and Seabed Act, constitute another changing of game plans.

The article concludes by emphasising how the Foreshore and Seabed Act has encouraged us to take a longer term vision in order to foster more positive relations, a vision that encompasses the need for genuine constitutional change based on respect for human rights and Te Tiriti o Waitangi.

Keywords Foreshore and Seabed Act 2004; Maori politics; constitutional change

INTRODUCTION

In June 2003, when the Government announced its intention to legislate regarding the foreshore and seabed, two of the Government's central claims were that they sought to protect the foreshore and seabed for “all New Zealanders” and that they were treating all New Zealanders in a fair and equal manner within the legislation and according to the procedures of parliament. In this article, I will firstly examine a number of events which have occurred since the passing of the Foreshore and Seabed Act 2004 and which I argue bring into question the Government's

claims surrounding the foreshore and seabed legislation.¹ Having the Government's actions characterised as breaching Te Tiriti o Waitangi and national and international human rights laws and standards suggests a level of inadequacy in our constitutional arrangements. It is in respect of this inadequacy that a change in game plan appears now to be required. When players change the game plan in rugby they completely change the tactics of their play. I suggest that given the inadequacies of our current constitutional arrangements, a change is needed to provide for constitutional development and to adequately protect Te Tiriti, human rights law, and subsequently Maori.

The second part of this article discusses the Maori Party. In particular, I will examine the ways in which the Maori Party is supporting and directing an increasing politicisation of Maori communities away from strategies based outside the State towards those associated with the electoral process. And it is these efforts which constitute the second change of game plan emphasised in this article. I argue that the Maori Party is encouraging a change in game plan both to Maori (to redirect politicisation away from activities outside the State to the electoral process) and to non-Maori politicians to halt actions which continue to normalise racism and injustice.

This article concludes by suggesting that the Government's breaches of Te Tiriti and human rights, and the Maori Party's encouragement of a change of game plan for Maori, offer ample and persuasive reasons of the need for constitutional change (as well as some forms which such change might reasonably be expected to take).

THE FORESHORE AND SEABED ACT

In the months after the Foreshore and Seabed Act came into effect in 2005, there were a series of events which raised doubts about two of the Government's claims surrounding the legislation: first, the claim of protection for all New Zealanders, and second, that of fair and equal treatment. The claim to be seeking to protect the foreshore and seabed was articulated quite specifically and is included in the introduction to the Act itself (Foreshore and Seabed Act 2004, 1: 3). The second claim of fair and equal treatment was a broader assertion regarding the conduct of the Government and was embodied in key statements made by the Prime Minister (Helen Clark), the Deputy Prime Minister (Michael Cullen), and the then Attorney-General (Margaret Wilson).² This broader claim to be treating everyone fairly and equally also tied back to the argument in other ways, including reinforcing insinuations made by the National Party leader Don Brash that Maori are somehow receiving "special privileged treatment".³ There are, of course, many other events and inconsistencies regarding, for example,

¹This article is a revised version of a paper originally presented in the "Maori Politics" series organised by Victoria University of Wellington's Centre for Continuing Education, held at the Victoria University School of Law in 2005. The paper, entitled "Calling an Audible: The Political Climate Post-Foreshore and Seabed Act", drew on an expression used in the game of gridiron in the United States, in which leadership is sometimes displayed on the playing field by the quarterback surveying the situation and opting to change tactics.

²See, for example: Clark (2004), Cullen (2004), and Wilson (2004).

³The notion of "special privileged treatment" for Maori has been critiqued by numerous sources. See, for example, Durie (2005a).

certainty and public access, which we could investigate in relation to the foreshore and seabed legislation.⁴ However, due to space constraints, this study limits itself to the claims of protection and fair and equal treatment.

The path to the Foreshore and Seabed Act itself began in June 2003 when the Court of Appeal ruled that the Maori Land Court had the jurisdiction to hear claims related to the foreshore and seabed. Shortly thereafter, the Government announced that it needed to legislate to protect the foreshore and seabed for all New Zealanders. The Act was passed in November 2004 and came into effect in January 2005. The Act vested the foreshore and seabed in the Crown and established a system under which Maori could take claims regarding customary rights to the Maori Land Court and territorial rights to the High Court. However, under the Act, these rights and remedies are of a radically lesser kind than would have been possible previously.⁵

The following series of events draw into question and make problematic the Government's claims of legislating in order to "protect" the foreshore and seabed. It is important to note that they are part of a broader and long-standing government approach which seeks to continue privatisation and corporatisation, while encouraging a greater role for the market mechanism in areas of the community previously governed in other ways (Bargh 2002; Hindess 2002). These particular examples, provided below, highlight the precise difficulties regarding the extent and limits of *kawanatanga* with regard to resource management and development, which I argue require addressing.

In early March 2005, information began to circulate about applications from national and international companies for licenses to explore and mine the ironsands from Raglan to Kaipara Harbour (Thompson 2005). Some mining had taken place in small sections of those areas, but the new applications were far more extensive and would involve mining and exporting huge quantities of ironsands. A number of environmental groups have argued that this kind of mining would have potentially devastating consequences for many species, including the Maui dolphin which lives in those waters and whose population now hovers at 100 (Thompson 2005).⁶

Also in March 2005, Steve Maharey (Minister of Research, Science and Technology) and Pete Hodgson (Minister for Land Information) announced a project to survey the ocean within our Exclusive Economic Zone and out to the edge of the continental shelf, which the Government has now submitted to the United Nations for inclusion in New Zealand's Exclusive Economic Zone (Torbit 2006). The survey, they announced, was for scientific and economic purposes (Maharey & Hodgson 2005). Steve Maharey stated that:

There has been a huge increase in the income New Zealand generates from the oceans over the last decades ... [and] there is potential for much greater increases in wealth ... in the future ... Future possibilities for new wealth that could be derived from the

⁴See, for example, the Waitangi Tribunal (2004) Report on the Foreshore and Seabed Act for a critique of certainty, arguing it could easily be conducted on a case by case basis. Regarding access, see the Land Access Strategy where the Office of the Minister of Rural Affairs (2004) admits that access to the "beach" (which the Government kept claiming the issue was about) is not covered by the Foreshore and Seabed Act 2004. Or see the Orakei Act 1991 for an example of legislation where Maori are trustees of land, and access is ensured without confiscation.

⁵See the Foreshore and Seabed Act 2004; and Jackson (2004).

⁶See also *Kiwis Against Seabed Mining*, www.blacksands.org.nz.

oceans are diverse. These opportunities could be in the biotechnology area; new species yet to be discovered could provide routes to novel substances. Or the microbiological community under the sea could provide new opportunities for a range of industrial and pharmaceutical processes. The mineral wealth could also provide considerable opportunities. (Maharey & Hodgson 2005)

In April 2005, it became public that the New Zealand Treasury was considering how the foreshore and seabed should appear in financial statements, and therefore how it was to be valued for the purposes of tendering out sections (for oyster farms or other exploitation) (Crewdson & Milne 2005).

In July 2005, Crown Minerals made public its decision to allow Seafield Resources Ltd to conduct gold exploration of the seabed on the West Coast of Te Waipounamu (South Island). The exploration is not simply of the seabed, as defined from the low-water mark to the edge of New Zealand's Exclusive Economic Zone, but also beyond towards the edge of the continental shelf (Madgwick 2005).

With these events in mind, it is appropriate to consider the Government's specific claim that it needed to legislate to "protect" the foreshore and seabed for all New Zealanders. It is difficult to imagine how creating a system to exploit the foreshore and seabed for monetary gain, including increasing mining of the foreshore and seabed (activity which is generally destructive of the environment and of ecosystems), might contribute to a concept of "protection". It is clear from these projects that the exploitation of the foreshore and seabed in this way is not a random and unexpected development but rather part of a broader agenda of privatisation, commercialisation, and extension of the market mechanism, consistent with policies which the Government has pursued for some time and which played a key role in its unwavering intention to legislate.⁷ It also continues a much longer series of tensions between the Crown and Maori regarding the ownership of resources and how the benefits are to be distributed, highlighting the need for constitutional clarity on these points.

The second set of events, as noted at the outset, brings into question the broader government claim that the Foreshore and Seabed Act treated everyone fairly and equally. Margaret Wilson, while serving as Attorney-General, analysed the Foreshore and Seabed Bill to assess whether it was consistent with the Bill of Rights Act 1990. She argued that while it appeared that the Act discriminated against Maori, this was justified and therefore acceptable under section 5 of the Act, which allowed for discrimination if it can be "demonstrably justified in a free and democratic society" (Bill of Rights Act 1990).⁸ Prime Minister Helen Clark also clearly stated her view that the legislation was in her mind fair and equitable. In a letter to members of the community, Helen Clark explicitly stated: "the legislation is fair" (Clark 2004).

By contrast, however, after eight months of processing an application filed by Te Runanga o Ngai Tahu, the Treaty Tribes Coalition, and the Taranaki Maori Trust Board, the United

⁷For literature on neoliberal policies of privatisation in New Zealand see Kelsey (1993, 2002) and Jesson (1999).

⁸However, as highlighted by the Peace Movement Aotearoa (2004) submission on the issue, the test of whether or not a less discriminatory or non-discriminatory means by which the Government's objectives could be achieved was not satisfactorily applied in her report. It is clear that the Government did not consider any less discriminatory alternatives to this legislation, having announced directly after the Court of Appeal ruling that it would extinguish customary title, and moving inexorably in that direction from that point on.

Nations Committee on the Elimination of Racial Discrimination (CERD) released its report in March 2005, finding that the Foreshore and Seabed Act 2004 “appears ... on balance to contain discriminatory aspects against the Maori” (United Nations Committee on the Elimination of Racial Discrimination 2005). In the kind of diplomatic language that is expected of the United Nations committees, which includes acknowledging the New Zealand Government’s efforts, CERD urged the Government to resume a dialogue with Maori to reduce the discriminatory effects, including thorough legislative amendment (United Nations Committee on the Elimination of Racial Discrimination 2005). In response, Helen Clark and Michael Cullen made statements suggesting that those on the Committee were not qualified to make such a ruling, and dismissed the tribes who took the case (cited in Erueti & Charters 2005). Such behaviour from the leading representatives of the New Zealand Government does not assist in strengthening what could be viewed as the New Zealand Government’s somewhat declining compliance with international human rights requirements.⁹

In June 2005, the Federated Farmers launched a campaign during a protest outside Parliament against proposals to introduce a Bill on public access to waterways. Cabinet had been considering a Land Access Strategy since mid-2004 and had been expecting to introduce legislation prior to the election (Sutton 2004). A week after the small Federated Farmers protest at Parliament and the blocking of access across their land, Associate Rural Affairs Minister Hon. Jim Sutton announced that introduction of the Bill was to be postponed. In a press statement, Sutton argued that given the protests against the proposal, the Government was persuaded that it should pause the introduction of legislation and re-enter negotiations with “major stakeholders in search of greater consensus” (Sutton 2005). It was also revealed that the Government had agreed in principle to pay compensation for any public access arrangements (Berry 2005).

This treatment of protesting farmers stands in sharp contrast with the treatment of those opposed to the Foreshore and Seabed Act, who participated in numerous protests including the Hikoi to Parliament; who wrote and presented submissions; and who attempted peacefully through various events to halt the foreshore and seabed legislation. At no point did the Government consider not legislating on the foreshore and seabed issue, despite overwhelming opposition throughout their supposed “consultation” hui around the country, opposition in the streets, and also opposition in the form of 94% of the approximately 4000 submissions to the select committee considering the Bill (Fisheries and Other Sea Related Legislation Committee 2004). The alternatives put forward by hapu and iwi representatives—that is, covenants to guarantee public access and non-saleability—were never given due consideration by the Government.

In addition, it may be noted that at no point did the Government agree to pay compensation for the effective expropriation of the foreshore and seabed or for denying Maori the legal capacity to bring particular cases to court. Under the Foreshore and Seabed Act, if Maori groups achieve a favourable ruling regarding territorial customary rights in the High Court, they can enter into negotiations with the Attorney-General and the Minister of Maori Affairs, including

⁹Other breaches include those noted by UN committees monitoring compliance with conventions regarding the rights of the child, and against torture, which have also made criticisms of New Zealand policy in recent years. The Waitangi Tribunal in its report on the Foreshore and Seabed proposals, as well other commentators, had already warned the Government, prior to legislating, that it breached human rights and the Treaty by doing so; however, these concerns were dismissed.

discussions on possible compensation, but there are no guarantees and no mechanisms for appeal if negotiations break down (Foreshore and Seabed Act 2004). Given the huge power inequalities in current Crown-devised Treaty of Waitangi settlements between iwi and the Crown, it can reasonably be assumed that negotiations regarding the foreshore and seabed would experience those same inequalities.

It is important to acknowledge the very different circumstances in each of these cases. Arguably, in the foreshore and seabed case, the Government was under pressure from a large proportion of the Pakeha public to resolve quickly the question of foreshore and seabed rights, including property rights. In the public access to waterways case, however, the Government may not have felt the same sense of urgency. Nevertheless, the Government's treatment of those opposing the foreshore and seabed legislation, and those opposing the public access to waterways proposals, proved inconsistent.¹⁰ The treatment of Maori within the Foreshore and Seabed Act itself has also been inconsistent to that afforded to other New Zealanders: the Act is inherently racially discriminatory.

The different treatment of peoples within the legislation and in the legislative process aptly demonstrates the inadequacy of New Zealand's current constitutional arrangements. In particular, it highlights the way in which Maori are not adequately protected from racial and other forms of discrimination. Specifically, I am here referring to the notion of absolute parliamentary supremacy and the idea that Parliament has the right to legislate without being overly constrained by human rights law, the Bill of Rights Act 1990,¹¹ the Human Rights Act 1991, and by the Courts, as in the case of the *Ngati Apa* ruling (*Attorney-General v Ngati Apa* 2003) on the foreshore and seabed issue. In a democratic polity in which the majority rules, it is difficult to see how absolute parliamentary supremacy can be capable of protecting minority rights, in this case Maori rights, when these are in jeopardy. The discrimination against Maori surrounding the Foreshore and Seabed Act specifically highlights this inadequacy. It is for this reason that a change of game plan seems appropriate, indeed overdue, an issue to which I will return shortly.

It is also important to note at this point that under the Bill of Rights Act (section 7) the Attorney-General is required to report to the House of Representatives on any provision of a Bill which is introduced which appears inconsistent with the Bill of Rights (Thomas 2002). Despite the generally unproblematic operation of this function, in the case of the Foreshore and Seabed Bill the tension within this provision was unmistakeable and constitutionally questionable, given that the Attorney-General had been overseeing the drafting of the very Bill—the Foreshore and Seabed Bill—on which, acting as Attorney-General, it was necessary to advise the House with respect to its compliance with (or breach of) the Bill of Rights Act. The extent of this tension can be seen in the Attorney-General's acknowledgement that there might appear to be discrimination but that on the whole it was justified—a view problematic in itself, and in contrast to the view taken by a UN body, CERD, which emphasised that the Act

¹⁰Let us put to the side for the moment the fact that some of these people may be the same and recognise that the majority of people who comprise the Federated Farmers Association are non-Maori.

¹¹There is no provision under the Bill of Rights Act 1990 for judges to declare inconsistent legislation invalid. See McHugh (2002) and Thomas (2002).

had discriminatory features.¹² What occurred was a clear conflict of interest for the Attorney-General, one which casts a shadow over the legislative process and the degree of protection given to New Zealanders' rights as intended by the section 7 provision.

Despite numerous human rights breaches, such as the right to freedom from racial discrimination, the right of access to and protection from the law, the right to own property, individually or collectively, and not to be arbitrarily deprived of it, the right to enjoy one's own culture, and the right to self-determination, the post-foreshore and seabed political environment can perhaps be seen as an example of the almost tragically hopeful persistence of Maori. Throughout the past 160 years, despite the Crown constantly breaching the Treaty of Waitangi, Maori have continually regrouped, creating new political formations and testing new and established avenues to achieve change. In the face of blatant racism and other breaches of human rights, Maori have continually used non-violent means to achieve the goals of *tino rangatiratanga*.

It is in this context that the formation and experience of the Maori Party can be considered. It is quite a feat to be politicising and mobilising so many Maori who have previously been unconvinced of the efficacy of participating in this particular form of governance—the formal electoral process—as it can not, of course, be assumed that Maori are not participating in other forms of decision-making in the community.

THE MAORI PARTY AND THE POLITICISATION OF MAORI

The increased politicisation taking place in Maori communities can not be solely attributed to the Maori Party. For many Maori it was the foreshore and seabed issue, and the meetings and educational campaigns of people such as Moana Jackson and Mereana Pitman, surrounding and during the Hikoi, which reminded people of the legitimacy of Maori perspectives and the crucial need for constitutional change. This increased politicisation was strengthened and facilitated by the participation of Whare Wananga and Maori Television. It needs also to be acknowledged that the impact and heightened level of public displays of racism following Don Brash's 2004 Orewa speech may have highlighted for many people the stakes involved: that is, what a country can be reduced to in a climate of human rights abuses.

By directing this politicisation into the electoral process, the Maori Party is encouraging Maori to continue pursuing avenues for change within the State system. Politicisation within the electoral process represents a distinct departure from the politicisation which surrounded the initial reactions to the Government's unrelenting intention to legislate on the foreshore and seabed. At that time there was a great deal of disillusionment amongst Maori and Pakeha regarding the process, and the very legitimacy of government, when the Government was seen to be pursuing legislation despite overwhelming opposition and in defiance of criticisms of the legislation as blatantly breaching national and international human rights laws and standards as well as the Treaty of Waitangi.¹³ There were numerous groups questioning how long

¹²Ex-Judge of the Court of Appeal E. W. Thomas has argued that there are procedures available if it is thought inappropriate to entrust the Attorney-General of the day with the responsibility of assessing the inconsistency of legislation with the Bill of Rights Act; however, these procedures were not invoked in this case. See Thomas (2002).

¹³See, for example, Takutai Moana Poneke Collective (2004).

Maori could and would continue to respond in a non-violent manner to such human rights and Treaty breaches. Professor Margaret Mutu suggested that the Government's actions could be interpreted as a "declaration of war" (Mutu 2004), while Maori Language Commission CEO Haami Piripi warned that civil war could potentially ensue from the legislation given that it "destroys any confidence we might have in Parliament and in Government to govern fairly" (Haami Piripi cited in Milne 2004). Direct action and other forms of protest further demonstrated the level of frustration and anger which existed in various communities. The New Brighton Pier was occupied in Christchurch and numerous other protests took place at bays around the country including Mātāuri Bay. There was also an axe attack on the Prime Minister's Auckland electoral office as well as various non-violent street protests.¹⁴ These kinds of reactions can not be perceived as totally unexpected and are certainly not without precedent here or internationally in cases where human rights are violated and/or where historical injustices are not addressed and in fact continue to be committed.

It is the actions of the Maori Party, directed at increasing politicisation in the electoral process, which can be described as encouraging a change in the game plan. In the face of blatant discrimination against Maori, it is not unexpected that various groups would feel compelled to deploy civil disobedience and direct action to achieve goals which appeared to be unachievable through the courts and the legislative process, as in the case of the foreshore and seabed. The Maori Party's encouragement of a change in the game plan therefore can be understood as in part a message to the Maori community, to focus that frustration and despair away from resistance outside the State to the electoral process, and also, I would suggest, towards non-Maori politicians, some of whom are normalising public and overt displays of racism and injustice.

As a strategy of resistance, or as part of the quest for achieving *tino rangatiratanga*, Maori have a long history of involvement in the electoral process and Parliament. Since 1868, there have been 79 Maori MPs in Parliament at various times and in various combinations.¹⁵ In the early 1900s, the Young Maori Party also had ideas about working within the parliamentary system to improve the status of Maori. More recently we have seen Mana Motuhake, Mana Maori, and arguably the "tight five" in New Zealand First representing themselves as specifically pro-Maori and part of a broader set of goals for Maori development.¹⁶ The idea therefore of attempting political change within Parliament is far from an untested one for Maori.

What may perhaps differentiate the Maori Party from other Maori individuals, parties, and representatives who have been in Parliament could be its claims to be representing the Maori component of the Treaty of Waitangi, that is, as the "Treaty partner of the Crown in parliament" (Maori Party 2005). For instance, election material for the Maori Party's Te Tai Tonga candidate, Monte Ohia, states: "Maori Party: your vote for the Treaty Partner" (Maori Party 2005).

¹⁴See, for example Mair (undated); The New Zealand Herald (2004); and Takutai Moana Poneke Collective (2005).

¹⁵For a list of all Maori Members of Parliament see www.ps.parliament.govt.nz/schools/texts/maorimp.shtml

¹⁶Mana Motuhake and Mana Maori were small parties seeking to represent Maori interests. The "tight five" refers to five Maori MPs elected to Parliament for New Zealand First at the 1996 election, winning all of the then five Maori seats (traditionally held by Labour).

There are three issues which might make problematic the notion of the Maori Party as the Treaty partner in Parliament. Firstly, it is almost certain that party votes for the Maori Party will come from both Maori and non-Maori, meaning that the party's support base is not exclusively Maori. Those who signed te Tiriti, however, represented whanau, hapu, and iwi exclusively. This creates a tension, therefore, if the Maori Party seeks to represent itself as literally the Treaty partner, if that is to mean only Maori, when its support base is not exclusively Maori. Secondly, votes for Members of Parliament come from individuals representing themselves, whereas again those who signed te Tiriti signed on behalf whanau, hapu, and iwi or on behalf of themselves as part of these larger social units. The third issue which might make problematic the notion of the Maori Party being the Treaty partner in Parliament is the question of whether those who enter Parliament and particularly those who form Government consequently comprise the Crown. Definitions of the Crown generally emphasise the executive or Cabinet as fulfilling that role (Office of Treaty Settlements 1999: 22). However, if we understand the Crown as those authorities which engage in the functions of governing, then government departments, local government, and Parliament can all be seen as the Crown in a broader sense (Potaka 1999).

The Maori Party's suggestion that it will represent the Maori Treaty partner in Parliament also has significant implications for how New Zealand's constitutional arrangements are to be considered or conceptualised. If we utilise a "Maori Party as Treaty partner" framework, then our parliamentary democracy begins to lean more towards a dual house model, with political representation and decision-making divided in new ways. This is in fact consistent with a model of governance explicated by Professor Whatarangi Winiata, the president of the Maori Party, which envisages a Tikanga Maori House, a Tikanga Pakeha House, and a senate or Treaty of Waitangi House (Durie 2005b). Recently, Winiata has indicated that this framework is consistent with the Maori Party's goals in Parliament (Winiata 2005). He argues that the two lower houses could effectively be placed "into the one house that we know as parliament". Winiata appears to see no inconsistency with the Maori Party as the Treaty partner potentially involved in the exercise of Crown duties and those of tino rangatiratanga. He argues that "the Maori Party, jointly with all other parties, would be responsible for kawanatanga and rangatiratanga ..."

The third house referred to in Winiata's proposal could presumably be the Waitangi Tribunal, which currently has the function of investigating claims brought to it by Maori regarding breaches of the Treaty and consistency of legislation with the principles of the Treaty. Amendments to the Tribunal's funding arrangements and powers would presumably need to be made to provide the capacity to deal with any broader tasks. In his report, the United Nations Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples, Rudolfo Stavenhagen, made a number of recommendations which would complement a strengthening of the powers of the Tribunal. The Special Rapporteur was in New Zealand in November 2005 to investigate the human rights situation of Maori, in large part as a consequence of the CERD decision. In addition to recommending that the funding and powers of the Tribunal be expanded, he also recognised the need for constitutional reform to "clearly regulate the relationship between the Government and Maori on the basis of the Treaty of Waitangi and the internationally recognized right of all peoples to self-determination" (Stavenhagen 2006).

There have also been suggestions that the Maori Party would seek to caucus all Maori MPs to foster a sense of common Maori kaupapa which might have the potential to destabilise

the adversarial nature of party politics within Parliament. While the Maori Party might have intended to foster this manner of cooperation with Maori in other parties, this might prove difficult given the extent to which the Maori Party continues to highlight the foreshore and seabed issue and thus the complicity of the Maori Labour MPs, in particular, in the passing of that Act.¹⁷

It remains to be seen whether directing energy to a political party is the best way to achieve constitutional change. However, in the interim, the experience and outlook of the Maori Party raises some interesting issues to consider.

CONCLUSION

While the intensity of the issues surrounding the post-foreshore and seabed climate may well have appeared in 2005 to be election year posturing, there remains a continuing sense of Tiriti and human rights breaches and a sense of injustice stemming from the Foreshore and Seabed Act. There is a clear sense that once again in the history of our nation-state, those who hold particular positions of decision-making power have failed to be convinced by a calm and longer term vision of the great potential of fostering positive race relations. Some hope is provided, however, by the extensive mobilisation going on in Maori communities, where a non-violent response continues despite intense provocation.

In summary, it has been noted that the Government's actions post-Foreshore and Seabed Act have brought into question its claims for legislating in the first place. With that legislation breaching Te Tiriti o Waitangi as well as national and international human rights laws and standards, the flaws in our current constitutional arrangements are once again apparent. The foreshore and seabed legislation is not the only statute aimed specifically at removing Maori culture, rights, and property. This episode is part of a sad and sorry history and it is essential now that we change the game plan so that legislation is not used in such a manner in the future.

The use of absolute parliamentary supremacy to enable these human rights breaches to be committed is a reminder of the inherently problematic nature of this notion, and the system which arises from it, one that fails to adequately protect Maori (and indeed other New Zealanders). This country does not simply require constitutional change if, by that, we are considering merely matters of institutional arrangements and legislative procedure. There is also a need for constitutional change to be grounded in a memory and a vision of who and where we are and where we come from. This should also be premised on Maori tino rangatiratanga and Te Tiriti o Waitangi. It is not too late to repeal the Foreshore and Seabed Act and to conduct ourselves in a manner which is respectful of human rights and which fosters positive race relations.

This article has been entitled “changing the game plan” as this is what the Maori Party is attempting to do—change the playing tactics. But the game plan needs to be changed to bring to an end the human rights and Te Tiriti o Waitangi breaches, and instead to encourage the pursuit of constitutional change and positive race relations.

¹⁷Lindsay Te Ata o Tu MacDonald has suggested that the Maori Party needs to “build on the numbers of Maori in Parliament, rather than replacing those already there” (MacDonald 2004: 10).

As one avenue for exploring game plans and remaining within the sporting metaphor with which this article began, I would like to turn for a moment to the rugby game between the Maori and Lions teams that took place in June 2005. Let us think of what it means to have a national Maori rugby team which plays in a game with other nations, nation versus nation. This situation—which some might call separatism—has not destroyed the nation-state: indeed, it is seen as positive. Consider also the way in which on the night of that Maori-Lions game the definition of Maori often stood in for New Zealanders or the way that people conceived of the Maori team as being in some ways a partner to the All Blacks, another national team. It reminds us that we do have a number of polities existing and flourishing in this country at the flax-roots and grassroots. It is well past time for us to extend this to our national constitutional arrangements.

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