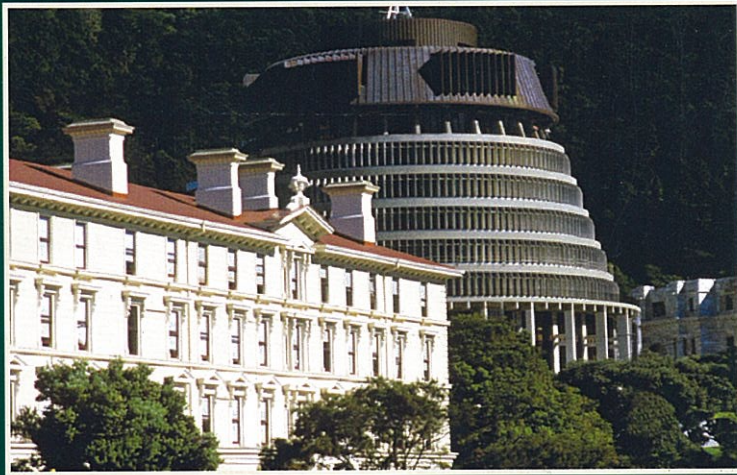


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SPECIAL CONFERENCE ISSUE: MMP AND THE CONSTITUTION

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Jonathan Boston and David Bullock

Jonathan Bradbury

Andrew Geddis

Philip A Joseph

André Kaiser

Stephen Levine and Nigel S Roberts

Ryan Malone

Raymond Miller and Jack Vowles

PG McHugh

Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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Te Kauhanganui Tātai Ture

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The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

MMP AND THE CONSTITUTION

*Philip A Joseph**

MMP has had a salutary effect. It has dispersed political power, tempered executive dominance and engaged a broader range of interests than under single-party, majority government. The political landscape is very different from that under the former plurality system. Yet, the changes have occurred seamlessly, without dislocation to the established constitutional system. This article identifies the primary changes and observes the illuminating effect they have had on the principles of Cabinet government. The article also examines three issues of the future: the separate Māori seats, the diminishing list seats and whether MMP will survive calls for change. The article concludes that, whatever the imperfections of MMP, the people would not want a return to the former plurality system.

I INTRODUCTION

This article is based on a paper delivered at a symposium on the mixed member proportional (MMP) voting system, held in August 2008. That symposium was both a retrospective and a prospective – "MMP and the Constitution: 15 years past; 15 years forward".¹ I was invited to explore future constitutional challenges but I do not see any new or unexpected challenges looming. The challenges MMP governments will face are, in truth, the challenges of the recent past revisited. These challenges revolve around government formation and survival and will raise the same issues that governments have encountered since the first MMP elections in 1996. An elected party (or combination of elected parties) that claims the mandate to govern must demonstrate that it holds the

* Professor of Law, University of Canterbury.

¹ "MMP and the Constitution: 15 years past; 15 years forward" (New Zealand Centre for Public Law, Victoria University of Wellington, 26-27 August 2008). For general texts on the MMP system, see Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (LexisNexis, Wellington, 2007) and Ryan Malone *Rebalancing the Constitution: The Challenge of Government Law-Making under MMP* (Institute of Policy Studies, Wellington, 2008). The MMP voting system originated in Germany following the Second World War (1939-1945) as part of that country's post-war reconstruction. The personalised proportional system (as it is known in Germany) was adopted in 1949 as part of the Basic Law to prevent any recurrence of the totalitarian government that gripped Germany under the Third Reich. The Basic Law (including the personalised proportional system) was intended to be provisional but it has remained essentially unchanged since 1949. Variations of MMP are now used in national or local elections in nine countries: Bolivia, Germany, Italy, Lesotho, New Zealand, Romania, South Africa, the United Kingdom (London, Scotland and Wales) and Venezuela.

confidence of the House of Representatives. That requirement can be especially testing in a multi-party Parliament that typically produces minority governments.

This article reflects on the cohesiveness of Westminster government and the MMP voting system. MMP has reconfigured the political landscape within a new context of minority coalition government. That landscape is very different from the one under the old electoral duopoly, which marginalised third party representation in Parliament. The question this article explores is: What effect have the new politics had on the fundamentals of Westminster constitutional government? The answer is "none", or at least "very little". If anything, the proportional voting system has had an illuminating and salutary effect. MMP politics have made the fundamentals of Cabinet government more visible than under the first past the post (FPP) system. Confidence issues were more subliminal than real under FPP, when single-party majorities under control of the party whips guaranteed the cohesion of government.

The article is divided into three parts. The first part reflects on the flexibility of Westminster arrangements to accommodate the reconfigured political landscape. This part observes the illuminating effect MMP has had in making the ground rules of Westminster government more transparent than before. The second part identifies five changes MMP has triggered within the context of minority coalition government. These changes account for the altered political landscape. The third part explores three issues of the future. These concern the separate Māori seats, national demographics and the list seats and the "\$64,000 question": Will MMP survive the next 15 years?

The paper on which this article is based was presented to the symposium 10 weeks before the 2008 general election. On 8 November 2008, the people elected a new government under National Party leader John Key. Key's government followed the precedent Helen Clark established in 2005 and advised the appointment of five ministers from the government's support parties who were not bound by collective responsibility outside their portfolio responsibilities. This article updates my symposium paper and incorporates the above developments.

II CHANGE AND CONTINUITY

The more things change, the less they change. MMP transformed the political landscape but without dislocation to New Zealand's constitutional system. MMP repudiated the Labour–National duopoly that had dominated FPP politics since the 1930s. The proportional voting system changed the make-up of governments, how they are chosen and how they go about their business. It facilitated a multi-party Parliament, broadened the range of sectional interests represented in national politics, and established minority government as the norm under confidence and supply arrangements. These macro-political changes were profound but they unfolded within the context of Cabinet government and the understandings codified in the Cabinet Manual.² Constitutionally, little

² Cabinet Office *Cabinet Manual 2008* (Wellington, 2008).

had changed. MMP politics continue to be organised around the linchpin of the Westminster system – the need for governments to secure and retain the confidence of the popularly elected House.

The Cabinet system New Zealand inherited in the 19th century has remained extraordinarily resilient. Sir Geoffrey Palmer reflected on this after Helen Clark announced the configuration of her third-term Government (2005-2008). What is notable, he said, is "not how much [the Cabinet system] has changed but how little".³ There has been an almost seamless transition from the plurality to the proportional voting system. The Cabinet system remains much as it was before, except for the relaxation of the collectivity principle for ministers appointed from the opposition support parties. This change in pragmatic politics necessitated no structural change. Retaining the confidence of the House remains the axis around which the entire system revolves. This imperative has sustained the democratic ideal ever since the first responsible ministry was sworn in under Henry Sewell in 1856.

MMP has illuminated the ground rules of the Cabinet system. No one raised the spectre of confidence under FPP politics. Governments must submit to confidence votes in three situations: at the end of the Address in Reply debate at the opening of a new Parliament; at the giving of the prime minister's statement at the beginning of each sitting year; and at the granting of supply under Appropriation and Imprest Supply Bills.⁴ 1928 was the last occasion that a government was defeated on a confidence vote and forced to resign.⁵ In the ensuing years, the Labour and National Parties evolved from the contesting political factions and their presence induced greater stability in government. With few exceptions, a government's mandate to govern was guaranteed.⁶ The prime minister-elect was known within a short while of the polls closing on election day and governments routinely lasted their three year term. Single-party majorities and party discipline under the whips guaranteed the confidence of the House. National politics see-sawed between the two centrist parties. There were few surprises.

The binding referendum on the electoral system in 1993 irrevocably changed New Zealand politics.⁷ MMP politics ousted the old duopoly, made national politics more contestable and illuminated the sheet anchor of executive government. The new environment sharply crystallised a

3 Sir Geoffrey Palmer "The Cabinet, the Prime Minister and the Constitution" (Third Annual Conference on the Primary Functions of Government: The Executive, New Zealand Centre for Public Law, Wellington, 24-25 November 2005) para 40.

4 See Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Thomson Brookers, Wellington, 2007) 229 [*Constitutional and Administrative Law*].

5 [1928] JHR 8.

6 Compare the years 1981-1984, when Prime Minister Robert Muldoon claimed he had a wafer-thin majority of one. Muldoon used this as a pretext for calling the 1984 elections earlier in the election year.

7 See Joseph *Constitutional and Administrative Law*, above n 4, 342 for the holding of the referendum, the results of the poll and the sequence of events that triggered the introduction of MMP.

government's need to secure the confidence of the House. Confidence votes are crucial where confidence and supply arrangements leave a government's support in doubt. In August 1998, the Shipley government collapsed mid-term and the question was whether Jenny Shipley could demonstrate that her new government had the necessary support to see out Parliament's term. Shipley acknowledged the need to submit to a confidence vote within a short while of her new ministry being sworn in. The swearing in was on 31 August and she submitted to and won a confidence vote nine days later, on 8 September.

Novel governmental arrangements may also raise confidence issues. Four weeks after the 2005 elections, Helen Clark announced the make-up of her third-term government (2005-2008). Could she claim the mandate to govern under a political arrangement that involved two support parties (New Zealand First and United Future) that were outside government but whose leaders (Winston Peters and Peter Dunne) were inside government? Some commentators were genuinely perplexed and questioned the propriety of the arrangement and whether, as a matter of practicality, it could secure the confidence of the House.⁸ Looking back, we know that the government survived its full term and that there was no real reason to doubt its propriety. The commentators had to address the question: Was it necessary that every member of Clark's Government (specifically, Peters and Dunne) be bound by collective responsibility? The answer was clearly "no". The airing of this question finally settled the nature of the collectivity principle: it was a rule of pragmatic politics, not a constitutional convention.⁹

MMP politics have sharply intensified another aspect of public life: the duty that lies on political leaders to resolve who will be in government. This duty obtained equally under FPP but was never in issue. Single-party majority government pre-empted the need to broker the support of the House. However, the dynamics changed when MMP introduced minority government. Following a general election, the political leaders must commence coalition negotiations and make whatever concessions are necessary in order to form a government. Winning office is the glittering prize but the public interest in ending the political uncertainty may also be a powerful incentive. Following the 2005 elections, National (48 seats) was just two seats shy of Labour (50 seats) but was never in a position to form a government. That fell to Labour leader Helen Clark. On the hustings, Clark had foreshadowed a Labour–Progressive–Green Party coalition but she abandoned that plank once the post-election options became clear. Clark jettisoned the Green Party and entered into support agreements with New Zealand First and United Future. The outcome, while a pragmatic response to needs, served the public interest. The imperative was to find a government that could end the caretaker situation.

8 See for example Jonathan Boston "An Unusual Government" (26 October 2005) *The Dominion Post* B5.

9 See the discussion below under part III D "Collective Responsibility".

III CHANGES UNDER MMP

A Indirect Elections

We elect our Parliaments, not our governments. MMP introduced a system of indirect election of government through the parties that gain representation. They – not the people – decide the make-up of government. That was also theoretically the position under the FPP system. The people voted in their members of Parliament and left it to them to work out who would form a government. But the FPP reality was very different. The leader of either Labour or National that won a majority of the seats automatically claimed the mandate to govern. The incoming or returning prime minister was known within a short while of the polls closing, with early returns from the bell-wether booths indicating the national voting trend. These realities established a system of virtual direct election of government. Voters voted for their preferred party, knowing who would be prime minister on election night if their party won the election. However, all that changed under MMP. The proportional voting system wrested the prerogative of government formation from the people and gave it to the political parties that the people elect.

Under MMP, the elected parties choose the prime minister and government. The first MMP elections in 1996 made that palpably clear: the New Zealand First Party held the balance of power but dashed expectations that it would join with Labour rather than National to form a government. Once the people have cast their votes, they must step back and allow coalition negotiations to commence. This distinguishes New Zealand from other countries which directly elect their governments through presidential or FPP elections. In the United States, national elections are held every four years to elect a president, in whom is vested all federal executive power.¹⁰ In the United Kingdom, elections must be held every five years, although governments frequently go to the country earlier. FPP elections in the United Kingdom routinely produce majority governments under a Conservative or Labour prime minister.

B Government Formation

In politics, one card trumps all – occupying the Treasury benches. MMP introduced a political theatre very different from that under FPP. The expression "government formation" was once synonymous for the very dignified formal swearing in ceremony at Government House. Today, it conjures a whole new process of political action. MMP elections typically produce uncertain and contestable outcomes. The imperative is for the party leaders to find a political grouping within the House that can claim its confidence and form a government.

1 Distinguishing features

Four features distinguish government formation under MMP. First, the political parties that gain representation must accept the responsibility of producing a government. The party leaders must

¹⁰ US Constitution, art II cl 1(1).

discharge this responsibility, whether following a general election or a mid-term collapse of a government. The leaders must broker their coalition and/or support arrangements and announce to the nation the outcome of their labours. The choice of prime minister and parties comprising the government, together with any non-government support arrangements, must be publicly announced, as a *fait accompli* for the Governor-General and the voting public. Fresh elections are a democratic recourse of last resort, where the coalition negotiations end in impasse without hope of any political resolution. New Zealand has happily avoided this recourse throughout five MMP elections (in 1996, 1999, 2002, 2005 and 2008) and one collapsed government (in 1998).

Secondly, pre-election commitments by parties to enter into coalition are not binding and may be abandoned once the electoral results are known. In 2005, Prime Minister Helen Clark electioneered on a Labour–Progressive–Greens coalition ticket but abandoned that proposal once the post-election options became clear. A Labour–Progressive–Greens coalition would have produced a net total of 57 seats, four seats shy of a majority. Clark jettisoned the Green Party and entered into confidence and supply agreements with New Zealand First and United Future. This configuration gave the Clark Government a bare majority of 61 seats (Labour 50 seats, New Zealand First seven, United Future three and the Progressive Party one).¹¹ Neither of Labour's support parties, New Zealand First or United Future, would agree to the Green Party forming part of the governing arrangement. MMP politics are intensely pragmatic. Political parties will utilise their leverage to maximise their political advantage.

Thirdly, the political leaders may entertain novel arrangements in their endeavour to form a government. The 2005 elections produced a messy political situation that called for imaginative thinking. Four weeks after polling day, caretaker Prime Minister Helen Clark announced that Labour had concluded support agreements with the New Zealand First and United Future parties, under which their leaders, Winston Peters and Peter Dunne, would be appointed as ministers outside Cabinet. To cement this arrangement, Clark announced that neither Peters nor Dunne would be bound by collective responsibility. They were bidden to defend the Government's policies within their respective portfolios but were otherwise free to criticise and vote against the Government. The novelty of this arrangement challenged some commentators, who struggled for a more orthodox explanation. One commentator sought to force the political configuration into a standard coalition model and argued that the arrangement was a grand four-party majority coalition, holding 61 of the 121 seats.¹² This rationalisation defied realities. None of the political leaders believed they were

11 There was an "overhang" of one member following the 2005 elections owing to the number of electorate seats that the Māori Party won (four seats) relative to its party vote (an entitlement of three seats). Compare the 2008 election results, which produced an overhang of two Māori electorate members, making a total of 122 seats.

12 Boston "An Unusual Government", above n 8.

entering into a grand coalition as would drag the support parties into government. The arrangement was a distinctively local response to needs.¹³

Fourthly, unexpected political courtships may produce unforeseen beneficiaries. In 2005, no one had any inkling that Peters or Dunne would be appointed ministers outside Cabinet under the Labour-led Government (2005-2008).¹⁴ Peters, in particular, had reason to distance his party from the Government under his party's support arrangement. During the election campaign, he had pledged that New Zealand First would occupy the cross-benches and abstain on confidence issues, and that he personally would not accept the "baubles of office". Subsequently, he confounded the pundits by accepting Helen Clark's offer of joining her government as Minister of Foreign Affairs, Minister of Racing and Associate Minister of Health. Likewise, no one had touted Dunne as likely to become Minister of Revenue and Associate Minister of Health in a third term, Labour-led Government. It was a matter of simple arithmetic: the three seats United Future held secured for Clark the confidence of the House (61 votes).

2 *Political theatre*

FPP politics lacked the political theatre that grips the country under MMP. FPP elections produced tidy electoral outcomes that were known within a short while of the polls closing. There were no post-election manoeuvrings, negotiations or accommodations. Single-party majority government scripted the theatre. With a change of government, the defeated prime minister telephoned the victor to concede defeat, usually around 9.00-10.00 pm on election night, all captured on national television. At party headquarters, the prime minister-elect beamed with national pride and proclaimed "the people have spoken". The party faithful celebrated into the night. Celebrations were equally upbeat when the government was returned. The prime minister accepted victory with gravitas and humility, and thanked the team that worked tirelessly to return the government. Again, the party faithful celebrated into the night.

MMP elections tend to produce less clinical electoral outcomes. It took eight weeks of coalition talks following the initial 1996 elections to broker a government, almost two weeks following the 2002 elections and four weeks following the 2005 elections. In each case, the configuration of government was not known until the coalition and support arrangements were publicly announced. The 1999 and 2008 elections were an exception, where the electoral outcome was known on election night. In 1999, the Labour and Alliance Parties campaigned as coalition partners in waiting. On election night, they held a combined total of 63 seats, although their majority evaporated when the special votes were counted. They won a net total of 59 seats but the result was never in doubt. The Green Party, with seven seats, supported the Labour–Alliance coalition under a confidence and

13 See Palmer "The Cabinet, the Prime Minister and the Constitution", above n 3, para 91; Philip A Joseph "Constitutional Law" [2006] NZ Law Rev 123, 125-127 ["Constitutional Law" [2006]].

14 See Joseph, *ibid*, 124-130 for analysis of the 2005 elections and governmental arrangements entered into.

supply agreement. Outgoing Prime Minister, Jenny Shipley, rehearsed the FPP script of formally conceding defeat on election night.¹⁵

The 2008 elections also produced an electoral outcome on election night. Events followed the FPP script. Within a short while of the polls closing, Prime Minister Helen Clark conceded victory to National Party leader John Key and resigned as leader of the Labour Party. The new House of Representatives had a membership of 122 owing to an "overhang" of two Māori Party members, which required a majority of 62 members to form a government. National won 59 seats (later reduced to 58 seats when the special votes were counted) and ACT five seats, producing a clear centre-right victory. The ACT Party failed to cross the 5 per cent party vote threshold (a party vote of 3.7 per cent) but gained representation through Rodney Hide retaining his seat of Epsom. Before the elections, United Future leader Peter Dunne also announced that he would support a National-led government, and he likewise retained his electorate seat of Ōhāriu. ACT and United Future moved quickly to conclude support agreements with the National Party. In an historic move, the Māori Party also entered into a support agreement with National, under which it pledged to support the Key government on confidence and supply. The leaders of ACT and United Future, Rodney Hide and Peter Dunne, and the co-leaders of the Māori Party, Tariana Turia and Pita Sharples, were appointed ministers outside Cabinet, along with ACT deputy leader, Heather Roy.

C Minority Coalition Government

In 2005, the Governor-General commented that minority coalition government was "now emerging as a normal feature of our political system".¹⁶ This observation was conservatively couched; as of 2005, minority government was firmly established as the norm. Five of the six coalition governments have been minority administrations.¹⁷ The exception was the National–New Zealand First coalition Government which was sworn in in December 1996. It had a bare majority of one.¹⁸ In August 1998, that Government collapsed after Jenny Shipley replaced Jim Bolger as Prime Minister and leader of the National Party. The new government Shipley cobbled together (1998-1999) established the precedent that became the norm. It was a minority administration that survived the parliamentary term with the support of independents and loosely aligned factions on confidence and supply.

15 See Philip A Joseph "Constitutional Law" [2000] NZ Law Rev 301, 301-307 for analysis of the 1999 elections and coalition processes ["Constitutional Law" [2000]].

16 Dame Silvia Cartwright, Governor-General "Speech from the Throne" (Opening of 48th Parliament, Wellington, 8 November 2005).

17 New Zealand has had six MMP governments, although it has had only five MMP elections. The National–New Zealand First coalition Government collapsed in August 1998 and a second government was sworn in under National Prime Minister, Rt Hon Jenny Shipley, to see out the 1996-1999 parliamentary term.

18 See Philip A Joseph "Constitutional Law" [1997] NZ Law Rev 209, 209-217 for analysis of the 1996 elections and protracted government-formation process.

Minority government has transformed the dynamics of New Zealand politics. Governments cannot stage manage their legislative programme as they could under FPP. Legislative policy is fully contestable. Government Bills (other than appropriation Bills) may be defeated in the House without precipitating confidence issues. Governments must deploy political management strategies that can build legislative majorities at the pre-introduction stage. Ministers promoting Bills must negotiate with coalition or support parties (and sometimes opposition non-support parties) over the content and shape of their legislation. They must accept sometimes extensive reworking of their Bills in select committee and committee of the whole House as the price of having their proposals enacted. MMP governments do not enjoy the luxury of government majorities on select committees or in the committee of the whole House. The imperative to build cross-party support has instated a separation between the executive and legislative branches which was lacking under FPP.

D Collective Responsibility

The government arrangement adopted following the 2005 elections confirmed what had long been claimed about the (so-called) convention of collective ministerial responsibility. It was no convention at all but merely a rule of pragmatic politics. The prime minister was the beneficiary. Collective responsibility reinforced the prime minister's control over ministerial colleagues, who must collectively support the government's decisions or face the prospect of forced resignation.¹⁹

Identifying the true nature of collective responsibility is no idle matter. Unlike rules of political practice, conventions have a constitutional rationale. Constitutional conventions are prescriptive rules that:

- (a) are based in precedent;
- (b) are binding on those to whom they apply; and
- (c) serve a necessary constitutional purpose.²⁰

The third criterion identifies why a breach of convention is a breach of the constitution (viewed as a broad construct of legal and extra-legal rules). Most conventions promote representative democracy and are indispensable to constitutional government. The cardinal convention is that the Crown acts strictly on the advice of ministers, who collectively hold the confidence of the popularly elected organ. The evolution of this convention facilitated the transition from monarchical rule to constitutional monarchy under cabinet government.

19 See my earlier writings: Philip A Joseph "The Honourable DF Quigley's Resignation: Strictly Political, not Constitutional" (1982) 1 *Canta LR* 428; Joseph "Constitutional Law" [2000], above n 15, 306-307; Joseph "Constitutional Law" [2006], above n 13, 125-127; Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 285-286. See now the current edition of my text *Constitutional and Administrative Law*, Joseph, above n 4, 229-231.

20 See the majority judgments in *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1, 90 (SCC).

Conventions are constitutional. Governments may not disavow, suspend or abandon an established convention. Such rules are part of the constitutional firmament that confers the authority to govern. Political practices are different. Governments may, at their whim, change, suspend or abandon political practices and reap no political recrimination. Cabinet meets weekly on most Mondays throughout the year. Successive governments have observed this time honoured practice but it serves no constitutional purpose. It would matter not whether Cabinet met on a Tuesday, Wednesday or any other day. Under Jenny Shipley's watch as Prime Minister (1998-1999), Cabinet met only fortnightly and no one alleged constitutional breach. Likewise, when the Labour–Alliance Government (1999-2002) included the "agree to disagree" procedure in the coalition agreement, there were no calls of constitutional impropriety. This procedure allowed ministers from the junior coalition party to distance themselves from unpopular government decisions. They could publicly dissent and protect their party branding without incurring prime ministerial rebuke. Amendments to the Cabinet Manual subsequently sanctioned party differentiation clauses in recognition of the MMP environment.²¹

The government configuration adopted following the 2005 elections dealt the death knell to the contention that collective responsibility was a constitutional convention. The Clark government's arrangements redefined New Zealand's political processes but breached no constitutional proprieties. The leaders of the New Zealand First and United Future parties held ministerial warrants and were part of the government but were free to challenge government policy outside of their ministerial portfolios. Collective responsibility was a rule that could be waived or reshaped to suit the political environment. For the prime minister, there were political management advantages in offering the leaders of the support parties ministerial positions. The psychology of being in government engendered a greater cohesiveness of purpose.

My MMP symposium paper reflected that the novel arrangement adopted was a natural progression of MMP politics and would establish a precedent for future governments.²² That prediction was born out when Prime Minister John Key announced the make-up of his government following the 2008 elections. Five ministers outside Cabinet were appointed from the government's support parties (ACT, United Future and the Māori Party), and these ministers were likewise relieved of collective responsibility beyond their particular portfolios. The latest edition of the Cabinet Manual has now endorsed this arrangement as a legitimate feature of MMP government.²³ MMP politics have evolved from coalition to single-party minority government, supported by ministers outside Cabinet from opposition parties.

21 See *Cabinet Manual 2008*, above n 2, paras 5.25-5.28.

22 Joseph "Constitutional Law" [2006], above n 13, 129.

23 *Cabinet Manual 2008*, above n 2, para 5.27.

E "Government" And "Opposition"

MMP politics have redefined "government" and "opposition". These are no longer the stark descriptors that personified the FPP duopoly under the Labour and National Parties. Modern arrangements place some parties half-inside and half-outside government. MMP presages "mixed" politics, characterised by coalition arrangements, support agreements on confidence and supply, cross-party negotiations and shifting voting blocs, issue by issue. These arrangements, coupled with ministerial appointments from opposition parties, blur the division between government and opposition. From 2005-2008, Winston Peters and Peter Dunne were ministers in the Clark government and members of the Executive Council, although they sat with their caucus colleagues on the opposition benches and led opposition parties. These parties were indispensable to the government retaining office but were free to attack it on matters not touching their leaders' portfolio responsibilities.

The same arrangements characterise the Key government (2008-). The leaders of ACT, United Future and the Māori Party hold ministerial warrants under confidence and supply agreements but these ministers may criticise or dissent from the government on matters outside their respective portfolios. The Māori Party wasted no time asserting its independence. In the first sitting of the new Parliament under urgency, the Māori Party voted against a government Bill to introduce a 90 day probationary period for new employees.²⁴ The Bill proposed that employment agreements might suspend for 90 days the personal grievance protection against unjustifiable dismissal.²⁵

The "ayes" and "noes" lobbies are consigned to a past era. These had relevance when the House was formally divided into government and opposition but they are superfluous in the MMP environment. The lobbies are sited on each side of the debating chamber, corresponding to the government and opposition benches ("ayes" on the left of the chamber, "noes" on the right). As spaces adjoining the chamber, their physical location bears no correlation to today's multi-party politics. The party vote under MMP has overtaken divisions and routine head counts in the lobbies. Party voting facilitates multi-party politics under which parties may vote with or against the government across the spectrum of issues on the order paper. Support parties might routinely vote with the government on confidence issues but exercise independent judgment on other issues. New Zealand has evolved an indigenous political system that calls for imaginative responses to the machinations of MMP politics. The dispensation of collective responsibility for ministers outside Cabinet has been one response that is unique to proportional systems around the world.

24 (9 December 2008) 651 NZPD 483.

25 See the Employment Relations Amendment Act 2008 (assented to on 15 December 2008), inserting ss 67A and 67B into the Employment Relations Act 2000.

F Comment

The changes MMP introduced represent a seismic shift in the way New Zealand governs itself. Multi-party politics and minority government are the antithesis of the former FPP system. Few people, including the media, had any real understanding of MMP when the voters endorsed it in the 1993 referendum. That referendum was held in 1993 in conjunction with the last FPP elections. When the people awoke the following day to a hung Parliament, headlines screamed out that the country was in a constitutional crisis. The election result was a cruel irony because hung Parliaments are the standard fare of MMP elections. MMP routinely produces no clear winner on election night.

New Zealand's experiment with the MMP system stands alongside several bold experiments that have mapped New Zealand's constitutional journey. Three periods of sustained social and economic transition signpost that journey. The first was under the Liberal Government from 1890-1912, which distinguished New Zealand as the "chosen land of the most daring experiments".²⁶ The colony took pride in its sweeping electoral reforms, universal pensions, factory legislation, minors' protection legislation, workers' compensation and compulsory conciliation and arbitration of labour disputes. In 1899, Sir Robert Stout reflected: "Is there anything, we ask, which the State cannot set right? And the reply to our query is, Nothing."²⁷ In 1904, French observer André Siegfried described the colony's obsession for legislative experimentation as "this perfect mania for appealing to the State."²⁸ Siegfried detected a national aggrandisement in the colonists' claim "to be in the advance guard of civilisation", and believing that the eyes of the world were upon them.²⁹

Two other periods of social and economic transition occurred under the First and Fourth Labour Governments from 1935-1949 and 1984-1990 respectively. The First Labour Government under Michael Joseph Savage set about constructing the welfare state ("from cradle to grave"), and the Fourth Labour Government under David Lange set about dismantling it under sweeping (monetarist) economic reforms.³⁰ The Lange government's policies brusquely, without warning, repudiated state welfarism and transformed the objectives of the modern state. The speed, reach and impact of its unannounced reforms helped to force the issue of electoral reform on to the national

26 André Siegfried *Democracy in New Zealand* (translated by E V Burns) (Bell & Sons, London, 1914) 48. See also William P Reeves *State Experiments in Australia and New Zealand* (vols 1-2, Grant Richards, London, 1902)

27 Sir Robert Stout "New Zealand" (1899) 76 *Contemporary Review* 539, 540 (reproduced in Siegfried, *ibid*, 55-56).

28 Siegfried, above n 26, 52.

29 *Ibid*, 48.

30 See Joseph *Constitutional and Administrative Law*, above n 4, 139-142 for discussion of the three periods of social and economic transition in New Zealand.

political agenda. Public disquiet over government performance had been building during the Muldoon years (1975-1984) and became increasingly vocal during the Lange–Palmer years (1984-1990). A change of government in 1990 did little to stem the tide. The incoming National government under Jim Bolger (1990-1996) immediately reneged on its election promise to remove the unpopular surcharge on national superannuation that Lange's government had imposed. With increasing voter alienation, governments were seen as distant and unresponsive, driven by their own agenda.³¹

What does MMP tell us about the constitution? The great facility of the Westminster system is its flexibility. It accommodated the proportional voting system and synthesised the political changes without precipitating structural change. With one exception, none of the conventions that regulate the Cabinet system was revised in the transition to MMP. The reshaping of collective responsibility to accommodate MMP politics left unaltered the architecture of the Cabinet system. The one change involved the caretaker convention that had been adopted following the 1984 post-election impasse.³² This convention established that an outgoing government must act upon its successor's advice "on any matter of such great constitutional, economic or other significance that [it] cannot be delayed until the new government formally takes office".³³ In the lead up to MMP, this convention was extended to cover periods when it might be unclear who had the mandate to govern following a general election or a government's collapse. A government must remain in office in a caretaker role for the period between polling day and the appointment of a new government, or for the period following a government's collapse and the appointment of a successor or the holding of fresh elections.³⁴ Those modifications to the Cabinet system were all that was required to accommodate the new politics.

31 These reflections are not empirically sourced but are the writer's recollections from living through the various periods from 1975. For similar reflections see Jack Vowles "Systemic Failure, Coordination, and Contingencies: Understanding Electoral System Change in New Zealand" in André Blais (ed) *To Keep or to Change First Past the Post?: The Politics of Electoral Reform* (Oxford University Press, New York, 2008) 163, 181.

32 See Joseph *Constitutional and Administrative Law*, above n 4, 126-127 for the impasse between the incoming and outgoing governments over the devaluation of the New Zealand currency. The Officials Committee established to examine the rules to facilitate a change of government drafted the Bill that was introduced and enacted as the Constitution Act 1986.

33 Hon Jim McLay MP, Attorney-General (17 July 1984) Press Release.

34 *Cabinet Manual 2008*, above n 2, paras 6.16-6.35. See Joseph *Constitutional and Administrative Law*, above n 4, 227-228 for discussion of the caretaker convention.

IV ISSUES OF THE FUTURE

The following parts address three issues: two are of a systemic nature resulting from the MMP system as it was conceived in 1993,³⁵ while the third is of a political nature which might throw into question the survival of the MMP system.

A Separate Māori Seats

1 Party policies on the seats

Under former leader Don Brash, the National Party was committed to abolishing the Māori seats. Under John Key's leadership, the party softened its policy and resolved that it would not abolish the seats until all historic Treaty of Waitangi settlements had been concluded. The party's intention is to accelerate the settlements process and bring forward the end date to 2014. The National Party's support agreement with the Māori Party qualified that policy further. National undertook that it would not seek to remove the Māori seats without agreement of the Māori people.³⁶ This commitment now aligns with Labour policy to retain the seats until Māori are ready to do away with them. The minor parties (the Green Party, ACT, United Future and the Progressive Party) remain divided over the issue. This part examines the Māori seats and concludes that they compromise the integrity of the MMP system.

2 Recommendation of the Royal Commission

The architects of the MMP system counselled against retaining the Māori seats under MMP.³⁷ The Royal Commission on the Electoral System promoted MMP as the preferred proportional system to replace FPP and recommended abolishing the seats under that system.³⁸ The Bill to implement MMP adopted the Commission's recommendation but Māori successfully rallied against that proposal. Māori submitters to the select committee emphasised the cultural and constitutional importance of separate Māori representation and the need to align the seats with the number of voters on the Māori roll. The seats were reinstated under the MMP statute and then tagged to the Māori electoral option, with the number registered on the Māori roll determining the number of

35 See the Electoral Act 1993.

36 National Party and Māori Party "Relationship and Confidence and Supply Agreement between the National Party and the Māori Party" (16 November 2008) (accessible at www.national.org.nz/files/agreements/National-Maori_Party_agreement.pdf).

37 This section on the Māori seats is based on the writer's publication "The Māori Seats in Parliament" in *Te Oranga o te Iwi Māori: A Study of Māori Economic and Social Progress* (Working Paper 2, New Zealand Business Roundtable, 2008) ["The Māori Seats"].

38 Royal Commission on the Electoral System "Report of the Royal Commission on the Electoral System: Towards a Better Democracy" (Government Printer, Wellington, 1986) paras 2.134-2.136, 2.179-2.181, 3.41-3.88 (also cited as [1986-87] IX AJHR H 3) ["Towards a Better Democracy"]. See Joseph "The Māori Seats", *ibid*, 9-12.

Māori seats. The seats were increased to five in 1996, to six in 1999 and to seven in 2002. Retaining the seats will have two effects: it will inflate the political representation of Māori beyond their relative national population and it will lead to permanent "overhang" and distortion of MMP proportionality.

3 *Origin of the seats*

MMP eclipsed what belated justification the Māori seats had acquired during the last century. Four fixed seats partially offset the systemic under-representation of Māori in Parliament relative to their national population. The seats were introduced in 1867 as a temporary expedient but soon became a permanent feature of the electoral system. They were established for a period of five years to enable the Native Land Court to convert communal Māori land holding into individualised Crown-derived estates.³⁹ The Colonial Office refused to make any exception to the property qualification that circumscribed the right to vote under English law.⁴⁰ The Māori Representation Act 1867 conferred on Māori a temporary adult male franchise. The Act established four Māori electorates – three in the North Island and one in the South and Stewart Islands. These seats were declared to remain in force until October 1872, when the Native Land Court was expected to have completed its task. However, the Act's sunset clause significantly underestimated the complexity of individualising Māori land tenure and the General Assembly extended the life of the 1867 Act for a further five years, until October 1877.⁴¹ Throughout this further period, the Native Land Court continued to struggle with the task of individualising Māori land holding. When this period lapsed, the General Assembly extended the life of the 1867 Act indefinitely, until the General Assembly resolved to repeal it. By default, the Māori seats became a permanent feature of the electoral landscape. Alan Ward wryly commented that separate Māori representation "stumbled into being".⁴²

From the outset, the four fixed seats were token representation. In 1867, Māori would have been entitled to around 14 seats based on the electoral quota and national Māori population. The systemic under-representation of Māori continued throughout last century, notwithstanding the election of some members of Māori descent in the general seats.⁴³ Against that background, the Royal Commission on the Electoral System reported that MMP would return "real gains for Maori people in terms of effective representation."⁴⁴ The Commission expected Māori to achieve proportionate

39 Māori Representation Act 1867.

40 [1860] AJHR E 78 (discussed in Joseph "The Māori Seats", above n 37, 6).

41 Māori Representation Act Amendment and Continuance Act 1872.

42 Allan Ward *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (2 ed, Auckland University Press, Auckland, 1995) 209.

43 Joseph "The Māori Seats", above 37, 12.

44 Royal Commission on the Electoral System "Towards a Better Democracy", above n 38, para 3.2.

representation under the party list system without need of the separate seats. When that finally occurs, the seats will convert into an electoral privilege based on race or ethnicity, fundamentally at odds with western democratic values ("one person, one vote, one value"). These values run contrary to electoral laws that discriminate on the grounds proscribed by modern human rights legislation (inter alia race, colour or ethnicity).⁴⁵

4 *Māori representation under MMP*

The Royal Commission predicted that Māori and other ethnic groups would achieve fair representation through the party list system.⁴⁶ MMP would encourage all parties to compete for Māori votes by placing able Māori candidates high on the party list.⁴⁷ At the first MMP elections in 1996, Māori representation in Parliament roughly doubled, rising from 6 per cent to 12.25 per cent (15 members identified as being of Māori descent). The 1999 election results showed a marginal increase in Māori representation (16 members of Māori descent representing 13.3 per cent of Parliament's membership). However, the next three general elections (2002, 2005 and 2008) produced mixed results. Following the 2002 elections, 19 members of Parliament were of Māori descent: nine were list members, seven were elected to the Māori seats and three held general electorate seats. The 19 seats represented 15.8 per cent of Parliament's membership (1.1 per cent higher than the relative national population of Māori, which was 14.7 per cent). If the seven Māori seats were subtracted, the 12 general seats held represented 10 per cent of Parliament's membership (4.7 per cent below the national Māori population).

The 2005 election results showed a rapid narrowing of the representational deficit. Twenty-two members elected were of Māori descent, representing 19 per cent of Parliament's membership (121 members owing to an overhang of one).⁴⁸ Fifteen were list members and seven held the Māori seats. Twenty-two members produced a 4.3 per cent higher parliamentary representation for Māori than their relative national population (14.7 per cent). If the seven Māori seats were subtracted, the 15 list seats Māori held represented 12.4 per cent of Parliament's membership (2.3 per cent below the national Māori population). In the years 2002 to 2005, the representational deficit had narrowed from 4.7 per cent to 2.3 per cent. Based on those figures, my MMP symposium paper predicted that the November 2008 elections would eliminate the remaining Māori representational deficit. It concluded that retaining the separate seats would then produce a distortion in electoral

45 See the Human Rights Act 1993. See further the discussion in Joseph "The Māori Seats", above n 37, 14-17.

46 Royal Commission on the Electoral System "Towards a Better Democracy", above n 38, paras 3.1-3.4, 3.74-3.75.

47 See Hon Sir John Wallace QC "Reflections on Constitutional and Other Issues Concerning our Electoral System: The Past and the Future" (2002) 33 VUWLR 297, 312.

48 Information provided by Parliamentary Information Service, Parliamentary Library, Wellington, 2 October 2007. Compare the Parliamentary Library's breakdown of the 2005 election results, which lists 21 members elected in 2005 who were of Māori descent.

representation that would compound with each election. A progressive increase in the number of Māori seats, coupled with the greater number of Māori gaining election through the list system, would inflate Māori representation above the national Māori population.

The 2008 election results did not bear out my prediction. In the new Parliament, 20 members identify as being of Māori descent (down from 22 members in the previous Parliament).⁴⁹ These members represent 16.4 per cent of Parliament's membership. At the 2006 census, those who identified as being of Māori descent represented 17.7 per cent of the population (up 3 per cent from 2001). These figures produce a representational deficit of 1.3 per cent. If the seven Māori seats were subtracted, Māori would hold 13 general seats representing 10.7 per cent of Parliament's membership (7 per cent below the national Māori population). These latest figures do not support the Royal Commission's optimism that MMP would fully remedy the historical under-representation of Māori.

Might there be an explanation for the widening of the representational deficit? The 2008 election results trend in the opposite direction from previous elections, which raises the question whether they might be aberrant results. The following two general elections should confirm whether the list system can produce proportionate representation in the MMP Parliament. Two further questions also warrant exploring. First, might the Māori seats hamper the potential representation of Māori? Abolition of the seats might accelerate the number of general seats held by Māori. Political parties would be encouraged to promote able Māori candidates in list and electorate seats, as a strategy to entice voters previously on the Māori roll. Secondly, would abolition of the Māori seats encourage Māori voters to give their party vote (rather than or in addition to their electorate vote) to the Māori Party? At present, Māori voters can split their party and electorate votes knowing that the Māori Party will gain representation through the separate seats. Removing the seats would place in issue the Māori Party's survival as a distinct voice for Māori in the MMP Parliament. On polling at the 2008 elections, the Party would need to increase its share of the party vote by 2.8 per cent to cross the 5 per cent electoral threshold for parliamentary presentation.

5 *Overhang*

The Māori seats threaten to create further distortion within the electoral system. My MMP symposium paper predicted that the seats would produce overhang at the 2008 elections that could skew the equity of proportional representation. Overhang occurs where a party wins a greater number of electorate seats than its entitlement under its share of the party vote. Overhang inflates the House membership by the number of additional seats the party wins. As events transpired, the overhang predicted at the 2008 election did not occur. The election returned a Parliament of 122 members. The Māori Party won five Māori seats (not seven as speculated) on a party vote of 2.2 per

⁴⁹ *Final Results for the 2008 New Zealand General Election*, Parliamentary Library Research Paper 2008/05, 9.

cent (entitling it to three seats). Some commentators had also predicted that Progressive leader Jim Anderton and United Future leader Peter Dunne would compound the overhang, owing to their negligible party vote polling. However, both Anderton and Dunne were returned in their electorates with increased party votes that avoided overhang.

Throughout 2008, commentators tracked closely the polls and speculated whether the National Party might win over 50 per cent of the seats at the elections. These polls consistently recorded over 50 per cent support for National, which suggested the party might govern as a single-party majority government. However, this was always an unlikely scenario. On past experience, the gap between the major parties narrows as the elections approach. Nevertheless, the hypothesis of the National Party winning an emphatic victory raised the spectre of the party encountering unexpected obstacles. United Future leader Peter Dunne warned of a Māori Party veto of a National government where the party had won over 50 per cent of the party vote.⁵⁰

An overhang of one at the previous 2005 elections entailed no electoral distortion. In a Parliament comprising 121 members, the confidence votes needed to form a government remains at 61. However, the commentators believed that the 2008 elections augured a more spectacular overhang, of up to five or even six members. They speculated that the Māori Party might win all seven Māori seats without increasing its party vote entitlement of three seats. They also predicted further distortions. Jim Anderton was expected to retain his Wigram seat, although his Progressives party was polling at only 0.1 per cent of the party vote. On these polls, Anderton's return in Wigram would have created a further overhang of one.⁵¹ Peter Dunne was also expected to retain his electorate seat of Ōhāriu, although United Future was likewise scarcely registering in the polls (0.4 per cent of the party vote). As with Anderton, Dunne's return to Parliament would have created a further overhang.⁵² It was not inconceivable that the Parliament elected in 2008 could have had a membership of 126.

Overhang may affect the outcome of the electoral process. An overhang of four would have increased the confidence votes needed to form a government to 63. An overhang of six (four Māori Party members plus Anderton and Dunne) would have swelled the votes needed to 64. A party that won over 50 per cent of the party vote but fell short of winning 63 or 64 seats would have cause for complaint. In an earlier paper, I observed: "A party that garnered over 50 per cent of the popular

50 Peter Dunne "Time to Let the People Decide" (18 March 2008) *The Dominion Post* B5 (see Joseph "The Māori Seats", above n 37, 20-21).

51 Colin James "Polls Spell Out More Trouble for Peters" (30 July 2008) *The New Zealand Herald* A6 (statistics based on the (then) most recent four poll average).

52 Ibid.

vote but could not govern would represent an undemocratic outcome and would indubitably arouse deep resentment."⁵³ In that scenario, overhang would trump proportionality.

Overhang compounds the most persistent criticism of the MMP system (discussed below). Many object that the minor parties exert disproportionate leverage in coalition talks and the formation of government. A minor party might poll at little more than 5 per cent of the party vote (or less if it wins an electorate seat) and hold the power of decision over whether Labour or National will lead the government. Overhang exacerbates the problem as it inflates minor-party representation and distorts proportionality. In 2008, for example, the Māori Party won five seats on a party vote entitlement of three seats. It was serendipitous that the 2008 elections produced a clear electoral outcome, notwithstanding the need for 62 confidence votes to form a government.

6 Summary

Calls to retain the Māori seats in 1993 should have been resisted. The Royal Commission on the Electoral System advanced principled argument for their abolition.⁵⁴ Notwithstanding the 2008 elections, the historical under-representation of Māori will trend down with each election until representational parity is achieved. The seats will then acquire negative impact: they will confer an electoral privilege based on race or ethnicity, and they will entrench overhang as a permanent feature of the MMP Parliament. Many Māori will continue to split their votes between Labour and the Māori Party – the party vote going to Labour and the electorate vote to the Māori Party. The Labour Party retains strong historical links with Māori through its alliance with the Ratana movement, dating from the 1930s.

B National Demographics and the List Seats

National demographics will necessitate adjustments to the electoral system in the medium to long term. The population of the North Island increases at a faster rate than that of the South Island, which impacts upon the formula for fixing the number of general electoral districts. The number of North Island general electorates will increase progressively and the number of list seats will diminish commensurately. One list seat is lost for every new electorate established. On a simple extrapolation, there will come a time when the list seats will be too few to guarantee proportionality as between the parties gaining representation.

53 Joseph "The Māori Seats", above n 37, 21.

54 See Wallace "Reflections on Constitutional and Other Issues Concerning Our Electoral System: The Past and Future", above n 47, 312. Sir John was a member of the Royal Commission who lamented the campaign to retain the seats, with Māori leaders not conveying to their iwi the significance of increased Māori representation under MMP.

The diminishing seats were an inbuilt feature of the MMP legislation.⁵⁵ The formula for fixing the number of electoral districts accepts that the North Island general electorates will continue to grow. The South Island general electorates are fixed at 16.⁵⁶ To determine the number of North Island electoral districts, the South Island's general electoral population is divided by 16.⁵⁷ The quotient establishes the electoral quota, which represents the average population for each electorate (general and Māori). The North Island's general electoral population is then divided by the electoral quota to determine the number of North Island general electoral districts.⁵⁸ This process is repeated every five years following each national census.⁵⁹ The Māori electoral option is also held every five years, and provides a similar statistical basis for calculating the number of Māori electorates.⁶⁰ The number of Māori registering on the Māori roll provides the Māori electoral population, which is then divided by the electoral quota used to determine the number of North Island electoral districts.⁶¹ The quotient represents the number of Māori electoral districts, comprising approximately the same population base as the general electorates.

The above formula produces a progressive increase of general seats and commensurate reduction of list seats. The total number of seats remains fixed at 120, although it was always known that the North Island's population growth would in time cause an imbalance between the seats. Three censuses have been held since MMP was introduced: in 1996, 2001 and 2006. In the 45th Parliament (1996-1999) there were 60 general seats, five Māori seats and 55 list seats; in the 46th Parliament (1999-2002) there were 61 general seats, six Māori seats and 53 list seats; in the 47th Parliament (2002-2005) there were 62 general seats, seven Māori seats and 51 list seats; and in the 48th Parliament (2005-2008) the configuration remained the same but for an overhang of one. The 2006 census results took effect with the election of the 49th Parliament (2008-). There are currently 63 general seats, seven Māori seats and 50 list seats. Thus, in the period 1996-2008 the list seats reduced from 55 to 50 (a loss of five seats over three census periods).

When will the attrition of the list seats pose logistical problems? One writer estimated "within about two generations, if not sooner".⁶² There are three solutions: increase the size of the House

55 Electoral Act 1993.

56 Ibid, s 35(3)(a).

57 Ibid, s 35(3)(b).

58 Ibid, s 35(3)(c).

59 Ibid, ss 35(4)-(8) and ss 38-44.

60 Ibid, s 45.

61 Ibid, s 45(3)(a).

62 Alan McRobie "The Electoral System" in Philip A Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 313, 328.

beyond the 120 seat maximum; abolish the Māori seats and increase the list seats by the same number; or reduce the number of general seats in order to top up the list seats. The second option is preferred (abolish the Māori seats), although it would not be free of controversy. Any proposal to abolish the Māori seats will invite resistance. The first option (increase the size of the House) would also invite resistance. There is no public appetite to increase Parliament's membership. Margaret Robertson's citizens initiated referendum in 1999 asked whether the House should be reduced from 120 to 99 members and the people voted overwhelmingly "yes".⁶³ The third option would invite the least resistance, although it would compromise the effectiveness of local representation. Enlarged general electorates, with an increased population base and larger geographical footprints, would distance electorate members from rank and file constituency matters.

The attrition of the list seats does not pose an immediate problem. The issue might even be overtaken by developments. The following section chronicles National Party policy to hold a referendum on the future of the MMP system.

C Will MMP Survive?

National Party leader John Key announced that his party is committed to holding a two stage binding referendum on MMP. The first referendum flagged for the 2011 election would ask voters: "Are you satisfied with MMP as a system or would you prefer a change?"⁶⁴ If the public mood was for change, the second referendum would offer a choice between different voting systems. Key has not committed to a date for the second referendum, although he touted the 2014 election as one possibility. Nor has Key been explicit about the choice of voting systems the referendum might offer. One question would be whether New Zealand favoured a return to FPP elections, although it is unlikely that the people would wish to turn back the clock. Key himself does not favour FPP and would be surprised if the people opted for a return to the former system.⁶⁵ Presumably, the referendum choices would include a similar range of proportional systems that were put to the vote in the 1992 indicative referendum.

The referendum proposal is likely to attract popular support. When the people voted for MMP in 1993, they were promised a review after two elections and this was widely construed as entailing a

63 See Joseph *Constitutional and Administrative Law in New Zealand*, above n 4, 293.

64 Ruth Laugesen "MMP Future in Doubt under National" (18 May 2008) *Sunday Star Times* Auckland A1. See also New Zealand Press Association "No Labour Support for MMP Poll" (4 August 2008) *Otago Daily Times* Otago (accessible at www.odt.co.nz/16282/labour-would-not-support-mmp-referendum-clark); Editorial "Referendum Due on MMP" (6 August 2008) *The New Zealand Herald* Auckland A12 and Claire Trevett "Referendum 'No' Wouldn't Need to Spell End for Proportionality" (9 August 2008) *The New Zealand Herald* Auckland A6.

65 Laugesen "MMP Future in Doubt under National", above n 64; Trevett "Referendum 'No' Wouldn't Need to Spell End for Proportionality", above n 64.

national referendum.⁶⁶ However, that expectation was dashed when the MMP statute mandated a select committee review in lieu. The MMP Review Committee was established in April 2000 and was chaired by then Speaker of the House, Rt Hon Jonathan Hunt. The review was to be completed by June 2002⁶⁷ but Hunt brought forward the reporting date by one year (to June 2001) in anticipation of the 2001 census and the setting of new electoral boundaries.⁶⁸ One of the Committee's terms of reference was whether another binding referendum should be held on the electoral system. Seventy-one submitters responded: 36 opposed a referendum, 24 favoured a referendum and 11 favoured a referendum only if the Committee proposed major changes to the MMP system.⁶⁹ Most submitters who opposed a referendum believed that it was too early to make an informed judgment on MMP.

Three recurring criticisms have been directed at the proportional system. First, it is objected that the party lists are "closed". Closed lists empower the party hierarchy at the expense of the electorate, which has no say over the allocation and ranking of list places. It is widely perceived that MMP has produced two classes of member of Parliament: elected electorate members and unelected list members. FPP mentality lingers. Elected members are held in higher esteem than unelected members.

The second criticism is also directed at the list system. Some see party lists as denying the people the right to vote out of Parliament unpopular electorate members. A member might be decisively defeated only to be returned through the party list. Labour and National politicians with high list rankings are assured of a seat in Parliament. For some, loss of the right to vote out members of Parliament is as disenfranchising as loss of the right to vote in members of Parliament.

The third criticism is the most persistent. Many lament that the minor parties wield disproportionate power ("the tail wagging the dog"). The MMP system was designed to end the electoral duopoly of Labour and National and to promote representational diversity through minor party representation. FPP had entrenched the centrist parties, even where a third party had polled credibly well. During the Muldoon years (1975-1984) the Social Credit Party had enjoyed widespread support but could not translate that support into seats. At the 1981 elections, the party won 20.65 per cent of the popular vote but entered Parliament with only two seats (East Coast Bays and Rangitikei). Under a proportional system, the party's polling would have translated into 18 seats

66 See for example Editorial "Referendum Due on MMP", above n 64.

67 Electoral Act 1993, s 264. For the establishment of the MMP Review Committee and its terms of reference and findings see Joseph "Constitutional Law" [2000], above n 15, 307-308; Philip A Joseph "Constitutional Law" [2001] NZ Law Rev 449, 466-473 ["Constitutional Law" [2001]].

68 See MMP Review Committee "Inquiry into the Review of MMP: Report of the MMP Review Committee" [2001] AJHR I 23A.

69 See Joseph "Constitutional Law" [2001], above n 67, 469.

in a 92 member Parliament. The systemic under-representation of third parties was a compelling factor that contributed to New Zealand adopting the MMP system.⁷⁰ The irony should not be lost now that these parties are seen to represent an inflated power bloc in the MMP Parliament.

The first MMP elections in 1996 did the proportional system no favours. The coalition negotiations that unfolded caused intense voter frustration. New Zealand First held the balance of power and conducted a Dutch auction with the Labour and National Parties. New Zealand First leader, Winston Peters, strung out the negotiations for eight weeks. For many, frustration turned to anger when Peters took New Zealand First into coalition with the National Party, which had been in office since 1990. The power of the minor parties is most visible when the centrist parties must broker coalition or support arrangements. The minor parties also exert considerable influence throughout the parliamentary term, although without the media spotlight that illuminates coalition negotiations. All governments from 1998 have been minority administrations that have had to negotiate the support of the minor parties on government legislation. Governments must frequently change the detail and sometimes the architecture of their legislation in order to build the necessary cross-party support.

Every electoral system has its imperfections and MMP is no exception. The Key government proposes to hold binding referenda on the proportional system but what is the likelihood of that happening? The government would need parliamentary appropriations to authorise the expenditure and it would struggle to gain the parliamentary support. The Labour Party does not support a referendum and the minor parties rely on MMP for their parliamentary representation.⁷¹ A popular expression around Parliament is that a turkey does not vote for an early Christmas.

V CONCLUSION

The impact of MMP on national politics has occurred within the context of traditional Cabinet government. Except for the caretaker convention, none of the understandings regulating Cabinet government was altered or discarded in the transition to MMP. The relaxation of the collectivity principle under the "agree to disagree" procedure entailed no alteration to constitutional convention.⁷² Constitutional aficionados would applaud MMP for highlighting the fundamentals of the Cabinet system. The linchpin is the need for governments to demonstrate Parliament's confidence and government formation under MMP has illuminated this need.

70 Other contributing factors were the election results of 1978 and 1981, where Labour won a majority of the popular vote but fewer seats than National, and failed to take the Treasury benches. At the 1981 elections, Labour's share of the popular vote was 39.1 per cent compared to National's 38.77 per cent; yet National won 47 seats to Labour's 43 seats. The remaining two seats were won by Social Credit Party members Bruce Beetham (Rangitikei) and Gary Knapp (East Coast Bays) (92 seats in total).

71 New Zealand Press Association "No Labour Support for MMP Poll" (quoting then-Prime Minister Helen Clark), above n 64.

72 *Cabinet Manual 2008*, above n 2, paras 5.25-5.28.

My symposium paper made two judgment calls: first, that the proportional voting system has had a salutary effect. MMP was touted as a means of dispersing political power and tempering executive dominance. Those expectations have not been dashed. MMP politics have increased the contestability of political decision-making and engaged a broader range of interests than under single-party, majority government. Today, no legislation can pass the House without cross-party support. Minority government is the norm under coalition and/or confidence and supply arrangements. The proportional voting system has energised national politics, although the separate Māori seats and diminishing list seats are two issues that will need to be addressed.

My second judgment call was that the people would not want a return to FPP, even if the Key government offered them the choice. Two periods of FPP government within living memory produced widespread voter alienation: the first under Robert Muldoon's three-term National Government (1975-1984); the second under David Lange's two-term Labour Government (1984-1990). These administrations engendered an overwhelming belief that FPP had created a system of elective dictatorship, regardless of the party in office.⁷³ Governments pursued unannounced agenda, were oblivious to rule of law issues and were unresponsive to voter concerns. After 12 years of MMP governments, New Zealanders would not have the stomach for the politics of the Muldoon/Lange era. Proportional representation is now well bedded in the national psyche.

A final feature commends the proportional system – one that appeals to purely selfish instincts. From a public lawyer's perspective, MMP has a beguiling and seductive attraction; it has made the political process more contestable, subtle and absorbing. There is more to get excited about than when national politics were contested under the old electoral duopoly.

⁷³ See Lord Hailsham *The Dilemma of Democracy: Diagnosis and Prescription* (Collins, London, 1978) ch 20 who coined the expression "elective dictatorship".