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SPECIAL CONFERENCE ISSUE: MMP AND THE CONSTITUTION

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



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"WHO'S THE BOSS?": EXECUTIVE— LEGISLATURE RELATIONS IN NEW ZEALAND UNDER MMP

Ryan Malone*

With the issue of electoral reform on the horizon, this article considers the impact of the change in 1996 from the first past the post electoral system to the mixed member proportional system on the balance of power between the executive and legislative branches of government. It examines why FPP governments were so strong vis-à-vis Parliament, and how the shift to a multi-party House of Representatives has fundamentally changed the dynamics of this relationship. This change is viewed through the lens of government control over government Bills, both before and after they are introduced into the House. The article suggests that the government formation process following the 2008 election provides an important signpost to the long-term permanence of the multi-party government model.

I INTRODUCTION

The story of how New Zealand adopted the mixed member proportional (MMP) electoral system is intriguing.¹ In 1992 a nationwide indicative referendum produced a landslide result in support of electoral system change. If the result was not a surprise, the magnitude of the victory was. The subsequent binding referendum of 1993 was marked by a fierce battle between those who campaigned in favour of MMP and those who mounted a tenacious rearguard action in defence of the existing first past the post (FPP) system. Ultimately the former triumphed and in 1996 the first MMP election was held, heralding the end of the single-member plurality system which had been used uninterruptedly since the 1914 general election.²

* Dr Ryan Malone BA (Pols) LLM PhD (VUW).

1 Keith Jackson and Alan McRobie *New Zealand Adopts Proportional Representation* (Ashgate Publishing Limited, Vermont, 1998).

2 See Neill Atkinson *Adventures in Democracy: A History of the Vote in New Zealand* (Otago University Press, Dunedin, 2003).

The history of MMP is doubly interesting because it reaffirms the notion that New Zealand goes about the business of constitutional reform in an ad hoc fashion, very much dependent on the personalities and political winds of the day. The public was only given the opportunity to vote on the electoral system by chance. In an election debate in 1987, Prime Minister David Lange misread his speech notes and committed the fourth Labour Government to a referendum on electoral system reform. Except for deputy Prime Minister Geoffrey Palmer and a handful of others, the Labour Party caucus showed scant enthusiasm for following up on this promise. Any possibility of a referendum looked doomed until then-Opposition leader Jim Bolger made his own promise of a referendum, not because he was an advocate of proportional representation, but to highlight the Labour Government's failure to deliver on Lange's initial pledge. Thus, it was a combination of accident and political one-upmanship that led to the 1992 referendum, rather than any adherence to a carefully planned constitutional roadmap.

On one level MMP has simply meant a change in the way that members of Parliament (MPs) are elected at each general election. A closer examination though reveals that MMP has had a major effect on New Zealand's constitution.³ In 1992 Palmer argued persuasively that the constitution was in a state of crisis on account of the strength of the political executive.⁴ His argument was backed by a litany of contributing factors: the lack of an entrenched bill of rights, a unicameral legislature, single-party majority governments, Cabinet dominance within the government caucus and highly disciplined parties in the chamber. MMP has put a spoke in the wheel of executive power. A proportionally elected House, bringing with it coalition and minority governments, has caused a significant change in the relationship between the executive and legislative branches of government.⁵ Parliaments under MMP have been stronger than they were under FPP, while governments have been weaker. From a constitutional perspective alone, this has been a much-needed change.

This article considers why the executive–legislature relationship has changed under proportional representation. It considers how the shift in power has been reflected in a number of areas where the executive and legislature interact with one another. The primary focus will be on the government's ability to control the Bills it seeks to have enacted into law (government Bills). Parliamentary influence over government budgets, non-legislative government policies and the fate of members' Bills will also be touched on briefly. The final part of the article briefly considers how executive–legislature relations might look in New Zealand in coming years.

3 Geoffrey Palmer and Matthew Palmer *Bridled Power* (4 ed, Oxford University Press, Auckland, 2004).

4 Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming Our Political System* (John McIndoe, Dunedin, 1992).

5 Ryan Malone *Rebalancing the Constitution: The Challenge of Government Law-Making under MMP* (Institute of Policy Studies, Wellington, 2008).

II EXECUTIVE–LEGISLATURE RELATIONS IN NEW ZEALAND

A Relations under FPP and MMP

1 FPP and single-party majority government

Single-member plurality electoral systems (FPP) are associated with two-party systems because they tend to produce disproportionate outcomes for third parties.⁶ In a classical two-party system, one of the parties will command a majority of seats on its own. In crude terms, the government "ayes" will always outvote the opposition "noes" provided that government members vote together as a single bloc in the chamber.⁷

The net consequence of this is that the single-party government caucus can effectively dictate legislative outcomes in advance. This was more or less the situation in New Zealand under FPP. From the 1930s onwards a two-party duopoly entrenched itself.⁸ The likes of the Social Credit and New Zealand Parties received few seats (if any) in the House despite significant nationwide voter support.⁹ Either National or Labour held office on its own, and whichever party was out of office knew that it could not outvote the government on the floor of the House.¹⁰ In this way, a unified and cohesive governing party can undermine the independence of a legislature, potentially to the point where it becomes an obliging rubber stamp for executive proposals. Of course, it is still capable of filling other valuable roles, such as providing a forum for grievances, putting across competing points of view, and providing an alternative government. However, the crucial law-making powers that a legislature possesses can remain firmly within the control of the governing party.

The internal dynamics of the governing party therefore become enormously important. Given the dominance of the government caucus within the chamber, if one group of government MPs can regularly carry the day on decisions made within the caucus, that group will effectively capture the law-making powers of the legislature for itself.

6 See generally Maurice Duverger *Party Politics and Pressure Groups: A Comparative Introduction* (Thomas Y Crowell, New York, 1972) 27-28.

7 This was nearly always the case in New Zealand under FPP. Jackson considered the National Party and Labour to be amongst the most cohesive parliamentary parties in the western world: Keith Jackson *The Dilemma of Parliament* (Allen & Unwin, Wellington, 1987) 46.

8 R S Milne *Political Parties in New Zealand* (Oxford University Press, London, 1966).

9 In 1978 the Social Credit Party won 16.1 per cent of the nationwide vote, but won only a single seat, while in 1981 it received two seats for its 20.7 per cent of the nationwide vote. In 1984 the New Zealand Party won 12.3 per cent of the nationwide vote but won no seats at all.

10 Unless the government's majority was very small and a backbencher (or two) crossed the floor and voted with the opposition. The threat of this occurring effectively triggered the snap election of 1984: see Barry Gustafson *His Way: A Biography of Robert Muldoon* (Auckland University Press, Auckland, 2000).

In New Zealand under FPP, Cabinet was without rival within the government caucus. Not only were Cabinet ministers the most senior and experienced members of the party, but the non-ministerial members of the government caucus (the government backbenchers) were often in the minority.¹¹ Backbenchers also had incentives to minimise resistance to Cabinet's stated preferences, including the possibility of being appointed chairperson of an important select committee, post-retirement appointments, and most alluring of all, a future Cabinet position.¹²

This is not to suggest that the government backbenchers were immaterial to Cabinet decision-making. Ministers knew the limits of caucus's tolerance for certain issues (for example labour relations in the Labour caucus), and the caucus room could be a place for vehement debate.¹³ Ultimately, however, any government backbenchers intent on revisiting Cabinet policies would normally be outgunned and outnumbered. The hurried implementation of major reforming policies by the Labour and National Governments of the 1980s and early 1990s, often controversial and in many cases at odds with core party philosophies, demonstrated this clearly.¹⁴

2 *Multi-party government under MMP*

From 1951 onwards, neither Labour nor National managed to win over 50 per cent of the total votes cast at an FPP general election.¹⁵ This trend has carried over into MMP. The highest share of the nationwide party vote won by a party was National's 44.9 per cent in 2008. The key difference though is that under FPP National or Labour still won a majority of seats in the House, whereas under MMP the proportional translation of votes to seats has meant that no one party has been able to do so. Moreover, the party system has proliferated under MMP, with around six to eight parties winning seats in the House at each election.

This has meant that parties have formed coalitions in order to hold office: National and New Zealand First in 1996; Labour and the Alliance three years later; and Labour and the Progressive Party in 2002 and 2005. A feature of political life under MMP has also been the predominance of minority administrations. In 1999 the Labour–Alliance coalition Government did not hold a

11 Richard Mulgan *Politics in New Zealand* (Auckland University Press, Auckland, 1994) 109.

12 See Alan Robinson "Parliament in New Zealand" in John Marshall (ed) *The Reform of Parliament: Papers Presented in Memory of Dr Alan Robinson* (New Zealand Institute of Public Administration, Wellington, 1978) 129, 222 and Keith Jackson *New Zealand Politics of Change* (Reed Education, Wellington, 1973) 142.

13 See Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2 ed, Oxford University Press, Auckland, 1987) 71; Alfred E Allen "The Role of the Whips and the Caucus in the New Zealand Parliament" (1971) 52 *The Parliamentarian* 35, 37.

14 See Bruce Jesson *Fragments of Labour: The Story Behind the Labour Government* (Penguin Books, Auckland, 1989) 75; Michael Laws *The Demon Profession* (Harper Collins, Auckland, 1998) 184.

15 Electoral Commission *Electoral Compendium 2005* (Wellington, 2005). To be clear, voters chose between individual candidates not between parties per se.

majority of seats, nor did the Labour–Progressive coalition Governments of 2002 and 2005. Following the 2008 general election the National Party formed an administration on its own, thus making it a single-party minority government. All governments from 1999 onwards have relied on the backing of non-government parties to hold the confidence of the House. To this end, these governments have reached agreements with certain parties ("support parties") to provide the government with votes on matters of confidence (or to abstain from such votes to the benefit of the government) and to help implement its chosen policies.

In short, government under MMP has become a multi-party phenomenon. The ability of the executive to achieve satisfactory outcomes in the legislature no longer relies on its inherent ability to dominate a single government caucus. In the case of a coalition government, successful policy implementation requires the buy-in of multiple government parties. So a minister wanting legislative support on a particular issue will have to gain not only the approval of Cabinet and his or her own caucus (as under FPP), but also the approval of a coalition partner whose views on the matter may differ significantly. If the government is a minority administration, things are further complicated. To guarantee in advance that a vote in the House will favour the government, ministers must secure the support of a support party (or parties). This may be no easy task. While they are aligned with the government of the day, support parties have, to date, enjoyed considerable discretion as to the proposals they choose to lend their votes. In the event that the minister cannot draw together sufficient backing from its support party allies, the government may be forced to turn to the ranks of the opposition parties to secure a legislative majority. While it was not uncommon for the opposition party under FPP to vote in favour of government policy, particularly in bipartisan areas, very rarely was a government dependent on its votes to secure a legislative majority.¹⁶ If an MMP minority government finds that it has exhausted all viable sources of support amongst non-government parties, it will be forced to delay the proposal in the hope that one of the parties changes its stance, or to admit defeat and abandon the proposal altogether.

The formation of coalition governments under MMP, and the prevalence of minority governments, has meant that any proposed government policy requiring legislative approval cannot exist in isolation from the reaction it is likely to receive in the legislative chamber. For this reason MMP governments repeatedly ask themselves one question with almost obsessional fanaticism: "Do we have the numbers for this in the House?" For ministers to ignore the issue of a parliamentary majority for a proposal is akin to the captain of a ship ignoring a gaping hole in the hull. In other words, without enough votes in the House sooner or later the proposal will sink.¹⁷

16 Realistically this was only possible when the government's majority was under threat because of a possible breakdown in party discipline. Social Credit (admittedly a minor party) provided crucial support for the Muldoon government's Clyde Dam empowering legislation: see Gustafson, above n 10, 332.

17 The importance of cross-party consultation is now well entrenched in the Cabinet Manual.

The importance of building legislative majorities under MMP brings with it two major consequences. First, government policy has become more contestable in the sense that it is now exposed to the political wants and needs of multiple parliamentary parties, whether they are inside or outside the government tent. Thus, those commentators who prior to MMP predicted that political life under MMP would be characterised by cross-party negotiation and policy concessions have been proved correct.¹⁸ Secondly, the pressure of multi-party government under MMP has imposed a significant restraint on executive power. The notion of governments having "qualified control" over Parliament has been developed elsewhere.¹⁹ It proposes that the MMP governments are capable of controlling parliamentary outcomes, as evidenced by their successes on confidence motions, annual budgets, and the enactment of large numbers of government Bills within each term of Parliament. However, their ability to do these things is dependent on cooperation between coalition parties and, in the case of minority governments, varying combinations of non-government parties siding with the government.

Thus the restraint that MMP imposes on executive power is inherently political rather than legal (for example an entrenched bill of rights) or institutional (for example an upper chamber). It is sourced in the differences between the parties involved at any one time, including differences in size, ideology, core party brands, polling, policy expertise and resources. At the risk of over-generalising, these shifting variables make legislative outcomes more uncertain and difficult for MMP governments to achieve compared to FPP governments which dealt with a single, inherently malleable government caucus.

B Varied Forms of Parliamentary Influence

It is one thing to make abstract assertions that Parliament under MMP is stronger and the executive weaker compared to FPP. It is quite another thing to show it in practice. As will be discussed below, one of the most tangible demonstrations of the new executive-legislature relationship is to be found in the passage of government legislation through the House. However, the influence of parliamentary parties can be felt in other areas, including government budgets, non-legislative government policies and the improved prospects for members' Bills.

1 Government budgets

Following a general election, or even beforehand, parties will negotiate with each other with a view to forming or supporting a government.²⁰ As part of this process, it is possible that agreements

18 See for example Mai Chen "Remedying New Zealand's Constitution in Crisis: Is MMP Part of the Answer?" [1993] NZLJ 22 and Jonathan Boston and others *New Zealand under MMP: A New Politics?* (Auckland University Press, Auckland, 1996).

19 Malone, above n 5, 231.

20 See generally Jonathan Boston "Forming a Government" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001) 117.

will be reached over some aspects of the future government's budgets. Such agreements may be between coalition parties. For example, a perusal of the 1996 coalition agreement between National and New Zealand First shows a number of policy areas where the two parties agreed to spend specific amounts to achieve particular outcomes, for instance in education, health and police.²¹ Similarly, support parties can negotiate funding for areas of importance to those parties. Former Green Party co-leader Rod Donald laid claim to \$54 million worth of policy initiatives between 1999 and 2002.²² United Future leader Peter Dunne ventured that his party was responsible for some \$300 million worth of policies in the Labour–Progressive coalition's 2005 budget.²³ While it is difficult to isolate exactly which parts of a budget one party may be directly responsible for, it is clear that under MMP the allocation of budget monies for party projects can facilitate the formation of a government, and can help foster good inter-party relationships once that government has taken office.

2 *Government policies*

Not all government policies require statutory implementation. For example, the 2008 Labour-led Government's purchase of rail and ferry assets from Toll New Zealand did not require legislative approval by Parliament.²⁴ MMP has seen parliamentary parties increasingly influencing non-statutory government policy decisions. The earlier 2003 purchase of the national rail tracks, for example, was driven to a considerable extent by the Green Party.²⁵ In 2007, the regulatory changes to the daylight savings scheme announced by the Minister of Internal Affairs were partly attributable to the petition co-organised by United Future.²⁶ Non-government parties may also be involved in major policy reviews, as with the Green Party's participation in the preparation of the New Zealand Transport Strategy 2002.

3 *Members' Bills*

Members' Bills give parties (and for that matter government backbenchers) the opportunity to draw attention to a particular area of concern, or to promote an alternative policy to that which the

21 National and New Zealand First "The Coalition Agreement: National and New Zealand First" (10 December 1996) (accessible at www.executive.govt.nz/96-99/coalition/coalit.htm). It should be noted that many of the policies did not eventuate for a variety of reasons, the most obvious of which was that the coalition government did not survive the full term of Parliament.

22 Green Party of Aotearoa New Zealand "Green Initiatives Worth \$23 Million This Year" (23 May 2002) Press Release.

23 United Future New Zealand "Dunne: UF Delivers \$300m Budget Package" (19 May 2005) Press Release.

24 Helen Clark "Rail back in New Zealand Hands" (1 July 2008) Press Release.

25 Jeanette Fitzsimons "Greens Hail Rail Track Buy-Back" (6 June 2003) Press Release.

26 New Zealand Press Association "Daylight Saving to Be Extended Three Weeks" (30 April 2007) *The New Zealand Herald* Auckland 2.

government has adopted.²⁷ The prospects for opposition Members' Bills being enacted under FPP were limited. Mostly the government simply voted them down because they could. Nevertheless some Members' Bills did succeed. The chances of a Member's Bill passing into law rose considerably if the whips were removed and the vote was deemed to be matter of conscience, for example with the Contraception, Sterilisation, and Abortion Act 1977 and the Homosexual Law Reform Act 1986. A government might also officially adopt a Member's Bill as a government Bill if it considered that the Bill had some policy merit. But perceptions mattered enormously to FPP governments and they liked to be seen to be completely in control of what transpired on the floor of the House. Thus, a government might instead vote a Member's Bill down, only to introduce its own Bill more or less replicating the defeated Member's Bill.

To date there has not been any substantial research comparing the fate of Members' Bills under FPP and MMP. This would be a worthwhile area of investigation. On the whole, Members' Bills appear to stand a better chance of being passed under MMP for at least two reasons. First, minority governments may be bound to vote in favour of a particular Member's Bill in accordance with the terms of a support agreement. In its 2005 support agreement with New Zealand First for example, the Labour-led Government pledged to vote in favour of two New Zealand First Members' Bills, namely the Principles of the Treaty of Waitangi Deletion Bill 2006 and the Young Offenders (Serious Crimes) Bill 2006. While the Government was obliged to vote in favour of these two Bills only until the select committee stage (both Bills were subsequently defeated), it produced the peculiar situation of the Government voting in favour of a Bill it had previously criticised and voted against.²⁸ The Government also supported the passing of the Minimum Wage (New Entrants) Amendment Act 2007, a Green Party Member's Bill, as per its cooperation agreement with the Green Party²⁹ and its support agreement with New Zealand First.³⁰

Secondly, from time to time MMP governments (particularly minority governments) will deem it prudent to support a particular member's Bill. While it is difficult to know a government's precise motivation in each instance, such support might be provided to ensure support for government legislation in an unrelated area (a New Zealand form of "logrolling" perhaps), to reward a support

27 Note that the number of Members' Bills before the House at any one time is capped by a ballot system: see David McGee *Parliamentary Practice in New Zealand* (3 ed, Dunmore Publishing, Wellington, 2005).

28 The Labour Party had earlier voted against the first reading of the Principles of the Treaty of Waitangi Deletion Bill 2005 (sponsored by New Zealand First leader Winston Peters) thereby ensuring its defeat: (8 June 2005) 626 NZPD 21184.

29 Labour and the Green Party "Labour-led Government Co-Operation Agreement with Greens" (17 October 2005) 3 (accessible at www.greens.org.nz/press-releases/labour-led-government-co-operation-agreement-greens).

30 Labour and New Zealand First "Confidence and Supply Agreement with New Zealand First" (7 September 2005) 3 (accessible at <http://dss.ucsd.edu/~mshugart/LabourNZF.pdf>).

party for being a reliable ally in the House or simply because the government is in favour of a Bill's policies and considers that it has no good reason to oppose it. Thus, in 2007 the Labour–Progressive Government helped two Green Party members' Bills pass into law, namely the Employment Relations (Flexible Working Arrangements) Amendment Bill 2005 and the controversial Crimes (Substituted Section 59) Amendment Bill 2005 (the "anti-smacking Bill").

C Executive Control of Government Bills

MMP has seen a significant change in the ability of governments to control their own legislation. In this context "control" is taken to mean their ability to determine:

- (a) which Bills they introduce into the House;
- (b) the content of those Bills before they are introduced;
- (c) the number and nature of changes to a Bill recommended by a parliamentary select committee;
- (d) the amendments incorporated into a Bill at the committee of the whole House stage; and
- (e) the speed and quantity of government Bills passed by Parliament.

Within the constraints of this article it is not possible to cover each of these five areas in any great detail.³¹ An overview of each area is given below.

1 Choice of government Bills

Under FPP, it could not be said that the sole government caucus played any significant role in prompting Cabinet to introduce particular Bills into the House. Government backbenchers did have some influence, possibly through contributing to the party's election manifesto or through the ongoing work of caucus committees.³² Generally speaking, however, the government caucus was expected to debate (and, for that matter, approve) Cabinet legislative proposals rather than initiate them.

MMP has seen a small but important change in this area. As with government budgets and members' Bills, as a result of the government formation process, governments may be committed to certain policies that require statutory implementation. The National–New Zealand First coalition agreement included an array of policies agreed to by both coalition partners, too many to mention here, which required an Act of Parliament to be brought into effect.³³ Support agreements may also compel a government to introduce legislation. For example, as a result of the negotiations between

31 For full analysis see Malone, above n 5, 59-226.

32 See generally Geoff Thompson "Observations of a Participant on the Roles of the Party Organisation and Caucus in Government Decision Making" (Council for Civil Liberties Seminar, Wellington, 19 April 1980).

33 National and New Zealand First "The Coalition Agreement: National and New Zealand First", above n 21.

the Labour–Progressive Government and United Future in 2002, the former agreed to establish a commission for the family. The result was the introduction and passing of the Families Commission Act 2003.

MMP governments may also be "prohibited" from introducing a particular Bill. For example, in the 1996 National–New Zealand First coalition agreement the government was barred from selling strategic state assets in line with New Zealand First policy (any such sale would have required statutory amendments to the State-Owned Enterprises Act 1986). Further examples of negative influence on a government's legislative programme are to be found in the Labour–Progressive Government's 2005 support agreements with New Zealand First and United Future.

Party influence over a government's legislative agenda exists beyond the parameters of the government formation process and stretches into the life of a government. Within the coalition, each government party will push for certain party policies to be the subject of government legislation. One example is the Parental Leave and Employment Protection (Paid Parental Leave) Amendment Bill 2001 which was introduced and passed by the Labour–Alliance Government. Paid parental employment leave following the birth or adoption of a child was a flagship Alliance Party policy.

Yet, experience with MMP to date suggests that it can be challenging for a junior coalition party to get its senior partner to commit to legislation that implements its policies.³⁴ One of the most lucid examples was Labour's repeated rejection of the Progressive Party's advocacy of four weeks annual employee leave.³⁵ It was only after the Progressive Party mounted a public relations campaign in favour of the proposal (including the introduction of a member's Bill to this effect) and after it publicly threatened to vote against the Holidays Amendment Bill 2004 (a government Bill before the House) that Labour eventually relented. That a government party was forced to resort to tactics normally associated with opposition parties says a great deal about how difficult post-formation life can be for a junior coalition party, especially one as small as the Progressive Party.³⁶

2 *Securing a pre-introduction majority for Bills*

Building legislative majorities for Bills can be difficult for MMP governments. This is certainly not the case with all Bills. Many uncontroversial or technical Bills pass through the House with little fuss or fanfare. However, Bills that implement major reforming policies or that are clearly ideologically driven can be hard work for a government.

34 The junior coalition partner is the smaller party in the coalition. To date this has been New Zealand First (National–New Zealand First Government), the Alliance (Labour–Alliance Government) and the Progressive Party (Labour–Progressive Governments).

35 See Malone above n 5, 80.

36 At this time Progressive was a two-member Party. By contrast, Labour had 52 MPs.

The first requirement for a minister seeking to legislate is to ensure the support of his or her own party, which, as evidenced by the Foreshore and Seabed Bill 2004, is not something that can be taken for granted.³⁷ It is more likely, however, that a coalition party will prove troublesome. In this context it needs to be recognised that although they form part of the same government, coalition parties are not politically indivisible. Throughout the life of any coalition administration there will be intra-government competition over policy and agreement over legislation will sometimes be difficult.³⁸ For example, the Alliance refused to support the New Zealand/Singapore Closer Economic Partnership Bill 2000 because it opposed the trade agreement upon which it was based.³⁹ The "agree to disagree" provision was used, and the Labour minister relied on the votes of the opposition National Party to pass the Bill. This is the nature of coalition government and should not be taken as a signal that something is necessarily "wrong" either with the government or the system generally. It is simply a case of allies competing with one another.

If the government is a minority administration, a further step in the process will be to secure the votes of sufficient non-government parties to build a legislative majority. Because they are aligned with the government to a greater or lesser extent, governments will typically turn first to support parties.⁴⁰ However, if the negotiations are protracted or become futile, a government may try its luck securing the necessary votes from an opposition party. For example, the Green Party was vehemently opposed to the Electoral (Integrity) Amendment Bill 1999 (the first "waka jumping" Bill), but the Labour–Alliance Government found a willing ally in New Zealand First which gladly offered its votes to the government given its past experience with defecting MPs.⁴¹

To build a legislative majority a government will invariably have to agree to make some changes to a Bill. Indeed, this is one of the reasons why relatively few Bills are permanently stranded for want of a legislative majority prior to introduction. By effecting changes to a Bill, not only does that Bill become more acceptable to a party from a policy point of view, but it can point to the changes it was responsible for as evidence of its relevance to government decision-making. The

37 Three Labour Party members (including one minister) stated their intention to either vote against the Bill or to abstain.

38 See Paul Mitchell "Coalition Discipline, Enforcement Mechanisms, and Intraparty Politics" in Shaun Bowler, David M Farrell and Richard S Katz (eds) *Party Discipline and Parliamentary Government* (Ohio State University Press, Columbus, 1999) 269.

39 See generally Jonathan Boston and Andrew Ladley "Efficient Secrets: The Craft of Coalition Management" (2006) 4 NZJPIL 55.

40 In some cases votes (or an abstention) from a support party will be virtually guaranteed. This will be the case on matters of confidence, and where the legislation is the product of joint policy development between the government and the support party as per the procedures outlined in the support agreement.

41 See Peter Aimer and Raymond Miller "New Zealand Politics in the 1990s" in Jack Vowles and others (eds) *Proportional Representation on Trial: The 1999 General Election and the Fate of MMP* (Auckland University Press, Auckland, 2002) 1, 10.

degree of influence a non-government party will have over a Bill depends primarily on the number of other parties willing to support it. Thus, if a party knows that the government is singularly dependent on its votes to pass a piece of legislation, the greater its position of strength will be. The passage of the Foreshore and Seabed Bill 2004 was a case in point.⁴² After several Labour MPs stated that they would not support the Bill, New Zealand First's support for the Bill became crucial, while United Future's support became superfluous. Accordingly, New Zealand First was able to make significant changes to the Bill, including the substitution of the "public domain" concept of ownership of the foreshore and seabed (a United Future proposal) with Crown ownership. Important too will be whether the party has policy expertise in the areas the Bill deals with. Smaller parties in Parliament enjoy fewer resources than the two main parties and must choose their legislative battles wisely. For example, with the Electricity Industry Bill 2000, Green Party co-leader Jeanette Fitzsimons was able to extract a number of important policy wins for her party from Labour Party Minister of Energy Pete Hodgson, in large part because of her thorough grasp of energy related issues.⁴³

3 *Select committees*

Parliamentary select committees in New Zealand are standing committees that exist for the life of a Parliament.⁴⁴ Since 1979, all government Bills are automatically referred to a select committee.⁴⁵ Select committees were highly valued under FPP – so much so that they were considered to be something of a *de facto* second chamber.⁴⁶ If the floor of the House was the battleground in which legislation was derided by the opposition and robustly defended by the government, select committees, in theory at least, were the place where legislation was examined dispassionately and both sides tried their best to improve the legislation. In addition, from the early 1980s onwards, government backbenchers demonstrated a greater willingness to support amendments of which the minister in charge of the Bill may not have approved.⁴⁷

Nevertheless, the presence of government majorities on each subject select committee (in keeping with a government's majority in the House) meant that a committee's recommendations remained within the control of the government caucus, and by implication, Cabinet. All the

42 For a general background to the Bill see Maria Bargh "Changing the Game Plan: The Foreshore and Seabed Act and Constitutional Change" 1 (2006) *New Zealand Journal of Social Sciences Online* 13.

43 See Malone, above n 5, 121-123.

44 This is in contrast to the British approach: Phillip Norton "Nascent Institutionalisation: Committees in the British Parliament" in Lawrence D Longley and Roger H Davidson (eds) *The New Roles of Parliamentary Committees* (Frank Cass, London, 1998) 143.

45 Unless a Bill bypasses the select committee stage if taken under urgency.

46 Jackson, above n 7.

47 *Ibid.*

chairperson positions for each subject committee were also held by government backbenchers, forging a further link between the minister and the committee.⁴⁸ Thus, parliamentary select committee scrutiny of government Bills under FPP was never truly independent of the executive.

Under MMP, two changes have added significantly to the independence of select committees. First, a number of the committees now have non-government members appointed as chairpersons.⁴⁹ Out of a possible 13 subject committee chair positions in the 48th Parliament (2005-2008), three were held by a member of a support party (the Green Party and New Zealand First), while two were held by a member of an opposition party (National).⁵⁰ In the 49th Parliament (2008-), two of the subject committees (Commerce and Government Administration) are chaired by members of the opposition Labour Party. Non-government chairs weaken the link with the executive as the chairperson will inevitably be less sympathetic to the government's policies and timetable pressures than would a government backbencher.

The most important change, however, under MMP has been that governments no longer have automatic majorities on the subject committees. Table 1 shows that the proportional allocation of committee seats has meant that MMP governments do not often enjoy a majority on a subject committee. In a number of cases they have been outnumbered by opposition members.

Table 1 Balance of power on subject select committees in MMP Parliaments

Year	Government majorities	Split committees	Government minorities	Total committees
1996		0	12	12
1999	1	10	2	13
2002	1	2	10	13
2005	0	3	10	13
2008	5	3	5	13

The data in table 1 are based on the appointment of voting members for each subject select committee at the commencement of the 45th, 46th, 47th, 48th and 49th Parliaments. The figures for the 49th Parliament do not include the Emissions Trading Scheme Review Committee. Note that a "government majority" occurs where the governing parties have more seats on a committee than non-government parties, while a "split committee" occurs where the numbers of government and

48 Although a non-subject select committee, the Regulations Review Committee by convention has been chaired by a member of the opposition.

49 This is not required in Standing Orders but done for political reasons.

50 For a full breakdown of the party basis of select committee chairs in MMP Parliaments see Malone, above n 5, 144.

non-government members are equal. A "government minority" occurs where the government members on a committee are outnumbered by non-government members.

The reduced number of government majorities on subject committees means that MMP governments have to think carefully about the committees to which they refer their Bills; more so than did FPP governments. The first option is to send a Bill to a committee where the government is confident it can construct a majority for itself. A minister will look to see whether a non-government party that is backing the Bill in the House (usually a support party) is represented on a particular committee and whether it will be able to join forces with that party to ensure that the committee's recommendations are favourable. As a consequence, the support party's leverage over the Bill increases, and the government may have to agree to further changes to it. This may be in addition to changes already made to the Bill prior to its introduction into the House.

A second, less frequently used option is to establish an ad hoc committee to examine a Bill, as with the appointment of the Auckland Governance Legislation Committee to consider the Local Government (Auckland Council) Bill 2009. This may ensure a more favourable membership balance as well as the added bonus of a government chair.⁵¹ A third option is for the government to throw caution to the wind and simply allow a committee to make recommendations as it sees fit.⁵² This will in turn oblige the government to try to overturn those recommendations it cannot stomach at the committee of the whole House stage – provided it has the numbers to do so. The Resource Management (Waitaki Catchment) Amendment Bill 2003 was a good example of this.⁵³

4 *Committees of the whole House*

The committee of the whole House stage comes after a Bill has been examined by a select committee but before the third reading stage. The Bill is examined part by part (formerly clause by clause) to determine whether its provisions properly reflect the principles of the Bill agreed to at the second reading.⁵⁴ This stage provides a valuable insight into executive–legislature relations for two reasons. First, unlike select committees where it is not clear who proposed which amendments, Hansard for the committee of the whole House stage identifies the member responsible for each amendment, which parties voted in favour of it and whether it was voted up or down. Secondly, the stakes can be lower than at other stages in the legislative process. A party may be more likely to vote against an individual government amendment, for example, than to risk jeopardising the entire Bill by voting against it at the first, second or third reading stage. Consequently there is always a

51 Marcus Ganley "Select Committees and Their Role in Keeping Parliament Relevant: Do New Zealand Select Committees Make A Difference?" (2001) 16(2) *Australasian Parliamentary Review* 140, 145.

52 A government may also have to take this third course of action in the event that its preferred committee cannot take the Bill given its existing workload.

53 (1 September 2004) 619 NZPD 15281.

54 Standing Orders of the House of Representatives, SO 297(1).

risk that the government loses control of its Bills and a hostile House dismantles important parts of them.

Under FPP this risk was low. On the government side, ministers were the ringmasters, confidently moving their amendments and vetoing opposition amendments with the comfort of an automatic majority behind them. Unlike in the United Kingdom Parliament, government backbenchers dutifully refrained from moving any amendments to their ministers' Bills.⁵⁵ Under an MMP coalition majority government, ministers similarly enjoy a government majority in each committee. They do face the additional challenge of having to get two government caucuses to agree to proposed amendments rather than just one. As with gaining caucus approval prior to a Bill's introduction into the House, proposed amendments can be the subject of inter-party policy contest between coalition partners. But in practice this has not generally proven to be a difficult task.

The committee of the whole House stage under MMP minority government is less certain. As with the Bill as a whole, the government must rely on parties outside of the government to support ministerial amendments and to vote down those amendments it opposes. Mostly this support will be forthcoming.⁵⁶ But it can come at a price. The support party (or opposition party if it forms part of the government's legislative majority) may require that changes be made to the minister's amendments, or it may veto some of them altogether. Furthermore, the party may want to inject more of its own policies into the Bill and so the minister's set of proposed changes (usually set out in a supplementary order paper) may reflect certain aspects of support party policy. Thus, the last minute removal of the controversial "marginal strips" regime from the Overseas Investment Bill 2004 was a direct result of pressure from the United Future Party.⁵⁷

Alternatively, the support party may table its own set of amendments in favour of which it expects the government to vote. This latter approach gives the support party clearer "ownership" of the changes, and it provides a tangible sign to voters (those that are interested at least) that the party holds some sway in the policy game. This is particularly the case where the amendments receive media attention, as for example with the Green Party's amendments to the New Organisms and Other Matters Bill 2003.⁵⁸ While any agreement on the part of the government to vote in favour of a support party's amendments will have been negotiated in advance, it is a further sign of the increased influence Parliament has over government legislation under MMP. The only amendments FPP governments supported were their own.

55 The exceptions were if the Bill was treated as a matter of conscience, or if a disaffected government "rebel" moved amendments in an attempt to criticise the government. This was not common.

56 Although not always. See the treatment accorded to the New Zealand Public Health and Disability Bill: Malone, above n 5, 193-194.

57 Michael Cullen "Overseas Investment Bill" (31 May 2005) Press Release 187.

58 See Malone, above n 5, 192.

5 *Speed and quantity of government Bills*

In 1979, Geoffrey Palmer wrote that: "New Zealand passes too many laws and it passes them too quickly. Legislative overload is not unique to New Zealand, although it is more pronounced here than in most other countries."⁵⁹

The problem according to Palmer was governments' uncontrollable urge to legislate coupled with executive dominance of Parliament. Other authors expressed similar concerns.⁶⁰ The advent of MMP has seen a significant change in both of the areas Palmer singled out.⁶¹ Table 2 shows that under MMP an average of 107 government Bills per calendar year were enacted between 1997 and 2006. The average for the previous 10 years under FPP was 160 Bills. This amounts to a 33 per cent reduction in the average number of government Bills passed per year under MMP.⁶² Coinciding with the reduction in the quantity of government Bills enacted is the speed with which they are typically passed. It has been shown elsewhere that Bills now take significantly more sitting days on average to progress from their introduction to the third reading stage compared to FPP.⁶³ MMP has slowed the legislative process down considerably.

This further highlights the changed executive–legislature relationship under MMP. Governments remain no less enthusiastic for legislative solutions than in 1979 when Palmer lodged his complaint about legislative overload. The difference now is that governments cannot push their legislative agendas through Parliament at such speed. Parliament has become less of a roaring Ferrari and more of a sensible family wagon. Whether this has been a positive development is a moot point. It is nevertheless the new reality.

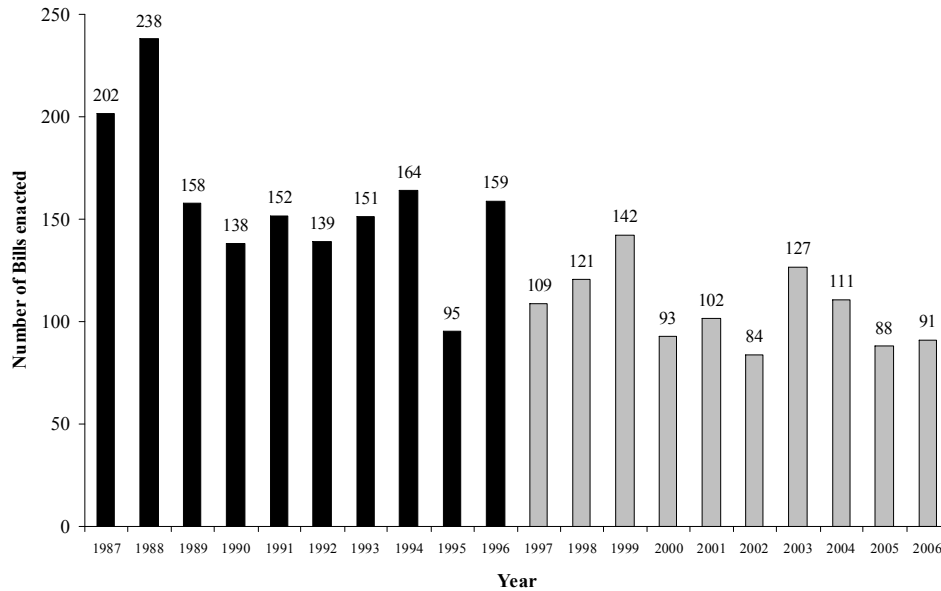
59 Geoffrey Palmer *Unbridled Power?: An Interpretation of New Zealand's Constitution and Government* (1 ed, Oxford University Press, Wellington, 1979) 77.

60 See Jackson, above n 7, 109 and John F Burrows and Phillip A Joseph "Parliamentary Law Making" [1990] NZLJ 306.

61 Compare David McGee "Concerning Legislative Process" (2007) 11 Otago LR 417.

62 Comparing the number of government Bills passed per year is fraught with difficulty. Amongst other reasons, an omnibus Bill may be divided into 20 or more separate Bills at the committee of the whole House stage thereby introducing enormous variability into the statistics. The rules governing the use of omnibus have changed under MMP: see McGee, above n 27.

63 Malone, above n 5, 216.

Figure 1 Number of government Bills enacted per calendar year

Source: *Journals of the House of Representatives of New Zealand*. Note that the first MMP Parliament was summoned in 1996, but sat for only two sitting days in that year. For this reason, 1996 has been classified as an FPP year.

Part of the reason for this change has been the time it takes to negotiate cross-party support for Bills, both before and after introduction into the House. The primary reason though for the slowing of the legislative process has been the difficulty minority governments have experienced to date in securing urgency for their Bills.⁶⁴ Under FPP, the government's inbuilt majority meant that it could take urgency more or less as it wished. While this allowed the government to push through controversial Bills in relatively short time, it was also used to clear legislative backlogs. Urgency is considerably more difficult for minority governments to secure because they need the votes of support parties (or occasionally opposition parties) to win an urgency motion. In this regard the Labour-led Governments were hamstrung because the Green Party was fundamentally opposed to the use of urgency and so rarely agreed to urgency motions. In the 48th Parliament (2005-2008) another government ally, United Future, was more open to the idea of urgency, but usually on the condition that it was used to clear some space on the order paper rather than being used to push through controversial Bills in quick time. This said, the latter is still possible under an MMP

⁶⁴ Urgency allows a government to move a Bill (or Bills) through multiple stages in the same sitting day, hence its inherent attractiveness for governments.

minority government situation as evidenced by passing of the Electoral (Vacancies) Amendment Act 2003 and the Electoral Finance Act 2007. This remains a concern in some quarters.⁶⁵

III LESSONS FROM THE 2008 GENERAL ELECTION

New Zealand has now experienced five MMP elections spanning more than a decade. Peering ahead, how might executive–legislature relations look in the next decade or so? The answer to this question may largely be found in events subsequent to the 2008 general election. This election was noticeable not only for the change in government, but for the continuation of multi-party government as the dominant feature of political life under proportional representation.

Prior to the 2008 general election some opinion polls had indicated that National could win a sufficient share of the valid party vote to govern on its own.⁶⁶ Some opinion polls preceding the 2002 general election suggested that Labour was on track to do the same.⁶⁷ Ultimately neither party did so, and both relied on other parties, through coalitions or arrangements with support parties, to form a government. This suggests that the electorate as a whole remains unwilling to grant one party a monopoly on power and control Parliament through a single caucus, as was the case under FPP. This is not to say a single-party majority government will never hold office under MMP. Simply that on the evidence to date it appears unlikely.

Perhaps the more important point though is not that single-party majority governments are improbable, but that both the Labour and National Parties appear comfortable with the idea of multi-party government, and indeed may actively seek it to a degree beyond that which is strictly necessary. The 2008 general election results were such that the National Party (58 seats) was in a position to form a government with the sole support of the ACT Party (five seats) in a House of 122 members.⁶⁸ Despite this, National made additional support agreements with the Māori Party (five seats) as well as with United Future (one seat). In short, National signed up more support parties than it needed to in order to form a government.

Exactly why it did so will be known only to the key players, but the reasons are not difficult to discern. Watching from the opposition benches, National would have observed how the Labour-led governments were in the strongest position when they had multiple support parties to whom they could turn for support for legislation, as with the United Future and Green Parties between 2002 and

65 Jeremy Waldron "Parliamentary Recklessness: Why We Need to Legislate More Carefully" (Annual John Graham Lecture, Maxim Institute, Auckland, 28 July 2008).

66 New Zealand Press Association "Latest Poll has National Able to Govern Alone" (20 September 2008) *The New Zealand Herald* Auckland.

67 John Armstrong "Labour Senses It Can Pull off a Mission Impossible" (20 May 2002) *The New Zealand Herald* Auckland A7.

68 The 2008 election produced a parliamentary "overhang" of two seats caused by the Māori Party winning five electorate seats when its share of the party vote entitled it to three seats.

2005.⁶⁹ In particular, it would have noticed how the bargaining power of one support party was significantly tempered where another party was waiting in the wings as an alternative source of legislative votes.

In this sense, the National Party has simply replicated a winning formula. Under the current governing arrangement, the National Government can turn either to the ACT Party for its five votes, or to the Māori Party for the same number of votes when it negotiates support for its Bills (both before and following introduction to the House).⁷⁰ In April 2009, National also signed a Memorandum of Understanding with the Green Party, thereby further broadening its base of parliamentary allies. In addition, National's support arrangement with the Maori Party has an eye to the future. It is the first serious step towards building a long-term relationship with a significant party to its political left. Clearly then, multi-party government holds no great fears for either major party and can in fact be something that is voluntarily pursued in the interests of more predictable and satisfactory legislative outcomes in both the short and long terms.

The flipside of this control is that to form a government, and for that government to continue to hold office and implement its policies, the two main parties must cede something in return to the minor parties. As outlined in this article, this may extend to policy influence over government legislation, budgets and non-statutory policy choices. It may also involve the granting of ministerial positions. This has been a feature of the last two post-election government formation processes.⁷¹ Having criticised Labour for providing ministerial positions to United Future and New Zealand First as support parties in 2005,⁷² the National Party did likewise by granting a variety of ministerial positions to the leaders of its three support parties three years later. This development further demonstrates the political restraint that MMP imposes. Not only must the government rely on legislative votes from sufficient numbers of non-government parties in order to govern, but the leaders of some of those parties serve as ministers alongside government ministers and directly control the levers of executive power in their respective areas.

The advent of MMP has forced a serious reassessment of the executive–legislature relationship in New Zealand. If the New Zealand Parliament was a mere rubber stamp to executive proposals

69 See Malone, above n 5, 119–120.

70 This is particularly important in light of the recent decision by ACT to allow its MPs a conscience vote (or "free" vote) on all Bills that are not matters of confidence in the National Government. As Armstrong noted, "[t]he decision to allow a free vote could potentially block some pieces of government legislation if the ACT caucus is split": John Armstrong "Act Gives MPs Right to Vote Against Caucus Line" (16 March 2009) *The New Zealand Herald* Auckland A4.

71 See Jonathan Boston "An Unusual Government: Coalition Politics and Inter-Party Agreements following the 2005 General Election" in Stephen Levine and Nigel S Roberts (eds) *The Baubles of Office: The New Zealand General Election of 2005* (Victoria University Press, Wellington, 2007) 389, 410.

72 For example see (8 November 2005) 628 NZPD 39.

under FPP as some critics claimed, it is no longer. Governments simply have to work too hard to ensure that they get their way in the chamber and in select committees for this to be the case. Indeed there is an argument that the scales have tipped too far in Parliament's favour and that governments are too often prevented from implementing their chosen policies because the party system is overly fractured. The validity of this claim can be difficult to assess from the outside. It will not always be public knowledge that a government contemplated legislation but abandoned the idea early on because a parliamentary majority was unlikely.

Nevertheless, what is known is that it is uncommon for an MMP government to publicly commit itself to a policy only to have to abandon it altogether because it cannot muster sufficient votes to implement the legislation.⁷³ The flexibility of governing arrangements adopted by the Labour-led minority governments allowed for the building of legislative majorities for even the most controversial legislation, including the Supreme Court Act 2003, the Foreshore and Seabed Act 2004 and the since-repealed Electoral Finance Act 2007.

That the successor National Government has created a parliamentary environment in which it has different party combinations available to it means that it too will pass significant – and no doubt at times controversial – legislation during the current term of Parliament. With a referendum on electoral reform scheduled to be held in conjunction with the 2011 general election, this is likely to be a crucial component of the debate. The high legislative strike rate of past Labour-led administrations, and the relatively strong position of the current National Government, points firmly towards MMP having delivered a more relevant and influential Parliament while retaining the capacity for efficacious government. As Chen has suggested, it is possible that this reality will fatally undermine the case for electoral system change in the minds of the voting public.⁷⁴

73 One such example was the legislation necessary to bring into effect the New Zealand-Australia therapeutic products agency: see Malone, above n 5, 111-112.

74 Mai Chen "Is the MMP Referendum Likely to Result in Electoral Reform?" (1 May 2009) *NZLawyer* Auckland 12.