

**“MMP and the Constitution:  
Future Constitutional Challenges”**

by

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## Introduction

This symposium is both a retrospective and a prospective. My task was to proffer a *prospective* on Mixed Member Proportional (MMP) government, focusing on the challenges of the future. However, I propose to collapse the retrospective/prospective dichotomy and reflect on the synergies that connect the Westminster system and MMP. MMP politics have transformed the political process within a new context of minority coalition government. These politics have reconfigured the political landscape and the processes of executive government, although they have not changed the ground-rules of the Westminster system. If anything, MMP has had an illuminating effect. It has made the fundamentals of executive government more visible than under first-past-the-post (FPP), when single-party majority government was the norm. Confidence issues were more subliminal than real under FPP, when a solid government majority and strict whipping system guaranteed the cohesion of government.

My task was to explore the challenges MMP may face in the future. However, I do not see any new or unexpected challenges looming. The challenges MMP 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 sorts of issues that governments have encountered since the initial MMP elections in 1996. Every government must demonstrate that it holds the confidence of the House of Representatives. Minority coalition government has illuminated this sheet-anchor of the Westminster system and made it more visible than before. The need to demonstrate confidence was to the forefront when the National-New Zealand First coalition government collapsed in 1998, and when Helen Clark announced in October 2005 the make-up of her present government (2005-2008). In both instances, the question reduced to: Where does the confidence of the House lie? In 1998, it was asked: Can the caretaker Prime Minister, Jenny Shipley, demonstrate that she has the confidence of the House so as to claim the mandate to govern for the remainder of Parliament's term? And in 2005, it was asked: Which grouping of political parties can claim the support of the House on matters of confidence, and was it necessary that every member of the government be bound by collective responsibility?

I separate my paper into two sections. The first section reflects on the flexibility of Westminster arrangements to accommodate the reconfigured political landscape. This part identifies five changes MMP has wrought within the context of minority coalition government. The second part explores three issues for the future. These concern the separate Maori seats, national

demographics and the list seats, and the “\$64,000 question”: Will MMP survive the next 15 years?

## **Changes under MMP**

### **(a) *Indirect elections***

MMP introduced a system of indirect-election of government. The people elect their Parliaments but not *their governments*. This was also technically the position under the FPP system. Technically, the people voted in their members of Parliament and left it to them to work out who would form a government. But the reality under FPP was very different. The leader of one or other of the centrist parties (Labour or National) which won a majority of the seats on election day claimed the mandate to govern. Usually, the incoming or returned Prime Minister was known within a short while of the polls closing, with early returns from the weather-vane booths establishing 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 if their party won the election. However, all of that changed under MMP, which vested the prerogative of government-formation *in the political parties* that the people elect to Parliament.

Under MMP, the people surrendered the right of choosing their 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 cast their votes, they must step back and allow the coalition talks to commence. This distinguishes New Zealand from other countries such as the United States of America, which directly elect their governments. In America, national elections are held every four years to elect the President, in whom is vested all federal executive power.<sup>1</sup>

### **(b) *Government formation***

In politics, one card trumps all – occupying the Treasury benches. In the post-election *mêlée*, the driving imperative is to find a grouping of political parties that can claim the confidence of the House. Four features distinguish government-formation under MMP. First, the political parties

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<sup>1</sup> Constitution of the United States of America, Art II, Sec 1(1).

that gain representation must accept responsibility for producing a government. This obtains in two situations: following a general election, and following the collapse of a government mid-term. The party leaders must broker their coalition and support arrangements, and then 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 the democratic recourse of last resort, where the coalition negotiations end in impasse and there are no other means of resolving the political situation. New Zealand has happily avoided this recourse in 12 years of MMP government.

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 plank once the post-election options were known. Clark needed the support of one or more minor parties to take office but jettisoned the Greens once it was known that neither of the government's support parties (New Zealand First and United Future) would agree to the Greens being in government. MMP politics are intensely pragmatic and may call for robust strategies if that is what is required to form a government.

Thirdly, the political leaders may entertain novel or unusual arrangements in their quest to form a government. Following the 2005 elections, caretaker Prime Minister Helen Clark jettisoned the Green Party in preference for support agreements with the New Zealand First and United Future parties. Labour held 50 seats (51 when Jim Anderton's one Progressive seat was added) and the Greens held six seats, leaving a Labour-Progressive-Green coalition four seats shy of a majority in the House. Four weeks after the elections, Clark announced that Labour had concluded "enhanced" confidence and supply agreements with New Zealand First (seven seats) and United Future (three seats), gaining for that political grouping 61 of the 121 seats.<sup>2</sup>

Fourthly, unexpected political courtships may produce unforeseen beneficiaries. No one had any inkling that the leaders of the New Zealand First and United Future parties, Winston Peters and

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<sup>2</sup> There was an "overhang" of one following the 2005 elections owing to the disproportionate number of electorate seats that the Maori Party won relative to its party vote.

Peter Dunne, would be government ministers outside Cabinet under the current Labour-led government (2005-2008).<sup>3</sup>

FPP politics lacked the political theatre that grips the country under MMP. FPP elections produced clinical and tidy electoral outcomes that were known within a short while of the polls closing. There were no post-election negotiations, accommodations or recriminations. The political actors played out a well-rehearsed script captured on national television. A few hours into election night, the defeated party leader ceremoniously telephoned his or her victor to concede defeat. At party headquarters, the Prime Minister-elect beamed with national pride and the party faithful celebrated into the night. Single-party majority government scripted the theatre. In contrast, only one MMP election has produced a certain electoral outcome on election night. On the hustings 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 once the special votes were counted. They ended with a combined total of 59 seats but the result was never in doubt. The Green party won seven seats and it announced that it would support a Labour-Alliance coalition under a confidence and supply agreement. Out-going Prime Minister, Jenny Shipley, maintained the FPP script of formally conceding defeat on election night.<sup>4</sup>

The other three MMP elections have produced less clinical outcomes. It took eight weeks of coalition talks following the inaugural 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 in advance of the Prime Minister-elect's announcement of the coalition and support arrangements.

(c) *Minority coalition government*

In the speech from the Throne in 2005, the Governor-General observed that minority coalition government was “now emerging as a normal feature of our political system”.<sup>5</sup> This observation was conservatively couched; as of 2005, minority government was firmly established as the

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<sup>3</sup> See PA Joseph, “Constitutional Law” [2006] NZ Law Review 123 at 124-130 for analysis of the 2005 elections and governmental arrangements entered into.

<sup>4</sup> See PA Joseph, “Constitutional Law” [2000] NZ Law Review 301 at 301-307 for analysis of the 1999 elections and coalition processes.

<sup>5</sup> Dame Silvia Cartwright, *Speech from the Throne*, 8 November 2005.

norm. Four of the five coalition governments have been minority administrations.<sup>6</sup> The National-New Zealand First coalition government sworn-in in 1996 has been the only majority government. It had a bare majority of one. In August 1998, that government collapsed after Jenny Shipley replaced Jim Bolger as Prime Minister and leader of the National party. The new government (1998-1999) that Shipley cobbled together survived the parliamentary term with the support of independents and loosely aligned factions on confidence and supply.<sup>7</sup>

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 may be defeated in the House without precipitating confidence issues, and governments must practise 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, and they must accept sometimes extensive select committee reworking of their bills in the absence of government majorities on the committees. Ministers must also accept non-government changes to their bills at the committee-of-the-whole-House stage, as the cost of getting their proposals through the House. The imperative to build cross-party support has instated a separation between the executive and legislative branches that was lacking under FPP.

(d) *Collective responsibility*

The governmental arrangements entered into 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 that strengthened the Prime Minister's control over his or her ministerial colleagues.<sup>8</sup> Identifying the true nature of collective responsibility was a matter of importance. Unlike rules of political practice, conventions have a constitutional role. Constitutional conventions are prescriptive rules that (a)

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<sup>6</sup> New Zealand has had five MMP governments, although it has had only four MMP elections. The National-New Zealand First coalition government collapsed in August 1998 and a second government was sworn in under National Prime Minister, Jenny Shipley, to see out the 1996-1999 parliamentary term.

<sup>7</sup> See PA Joseph, "Constitutional Law" [1997] NZ Law Review 209 at 209-217 for analysis of the 1996 elections and protracted government-formation process.

<sup>8</sup> See my earlier writings: "The Honourable DF Quigley's resignation: Strictly political, not constitutional" (1982) 1 *Canta LR* 428; "Constitutional Law" [2000] NZ Law Review 301 at 306-307; "Constitutional Law" [2006] NZ Law Review 123 at 125-127, and *Constitutional and Administrative Law in New Zealand* (2nd ed), Wellington, Brookers, 2001, at 285-286. See now *Constitutional and Administrative Law In New Zealand* (3rd ed), Wellington, Thomson Brookers, 2007, at 229-231.

are binding on those to whom they apply, and (b) serve a necessary constitutional purpose.<sup>9</sup> Most conventions promote representative democracy and are indispensable to constitutional government. The convention that the Crown acts on ministerial advice facilitated cabinet government and transformed the Westminster system into a constitutional monarchy.

Conventions are *constitutional*. Governments may not waive, suspend or abandon an established convention. Such rules are part of the constitutional firmament that confers the authority to govern. Political practices are different. These inhabit the realm of pragmatic politics, not constitutional prescription. Governments may, at their whim, waive, suspend or abandon political practices and reap no recrimination. Cabinet meets weekly at 10.00 am each Monday. Successive governments have honoured this long-standing practice but it serves no constitutional purpose that would elevate it into a prescriptive constitutional rule. When Jenny Shipley was Prime Minister (1998-1999), Cabinet met fortnightly and no one alleged constitutional breach. Likewise, when the Labour Alliance Government (1999-2002) included the “agree to disagree” procedure in their coalition agreement, there were no calls of constitutional impropriety. This procedure allowed Ministers from the junior coalition party (or parties) to distance themselves from unpopular government decisions. They were free to dissent in order to protect their party branding without incurring prime ministerial rebuke. The Cabinet Manual subsequently sanctioned party differentiation clauses in recognition of the MMP environment.<sup>10</sup>

The present government configuration dealt the death knell to the contention that collective responsibility was a constitutional convention. When Helen Clark announced the government arrangements in October 2005, she redefined New Zealand’s political processes but breached no constitutional prescription. The leaders of the New Zealand First and United Future parties, Winston Peters and Peter Dunne, were given ministerial positions and were part of *the government* but were free to challenge government policy outside of their ministerial portfolios. Collective responsibility was a rule of pragmatic politics 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. This was an avowedly novel arrangement but it might conceivably establish a precedent for future governments, as a natural

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<sup>9</sup> See the majority judgments in *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1 at 90 (SCC).

<sup>10</sup> See now *Cabinet Manual 2008*, Wellington, Cabinet Office, Department of the Prime Minister and Cabinet, 2008, paras 5.25-5.28.

progression of MMP politics.<sup>11</sup> The Cabinet manual has now endorsed the arrangement as a permissible form of MMP government.<sup>12</sup>

(e) *“Government” and “Opposition” reconfigured*

MMP politics have redefined the labels, “government” and “opposition”. These are no longer the stark descriptors that personified the FPP duopoly under Labour and National. Modern arrangements place some parties half in and half out of government. Coalition arrangements and support agreements with opposition parties, coupled with ministerial appointments from them, blur the division between government and opposition. Peters and Dunne are part of *the government* (they are government ministers and Executive Councillors), yet they sit with their caucus colleagues on the opposition benches and lead opposition parties. MMP presages “mixed” politics, characterised by coalition arrangements, support agreements on confidence and supply, cross-party negotiations and shifting voting blocs, issue by issue. The “Ayes” and “Nos” lobbies are consigned to a past era. New Zealand has evolved an indigenous constitutional system that calls for imaginative responses to the machinations of MMP politics. The dispensation of collective responsibility for two ministers (Peters and Dunne) under the Labour-led government (2005-2008) is believed to be unique to proportional systems around the world.

**Westminster ground-rules**

“The more things change, the less they change.” And so it is with MMP. MMP has wrought major changes to the New Zealand political landscape. It has changed the way New Zealand does the business of government but, remarkably, it has left untouched the ground-rules of Westminster government. The Cabinet system New Zealand inherited in colonial times has remained extraordinarily resilient. Sir Geoffrey Palmer reflected on this in 2005, after Helen Clark had announced the present government configuration. What is notable, he said, is “not how much it [the cabinet system] has changed but how little”.<sup>13</sup> From a constitutional perspective, there has been an almost seamless transition from the former plurality voting system to MMP. The New Zealand cabinet remains much as it was before. One departure has been the relaxation of the collectivity principle, with ministers outside of Cabinet being appointed from

<sup>11</sup> PA Joseph, “Constitutional Law” [2006] NZ Law Review 123 at 129.

<sup>12</sup> See above n 10, para 5.27.

<sup>13</sup> Sir Geoffrey Palmer, “The Cabinet, the Prime Minister and the Constitution”, Third Annual New Zealand Centre for Public Law Conference on the Primary Functions of Government: The Executive, Wellington, 24-25 November 2005, para 40.

opposition parties. However, those changes have necessitated little structural change. Retaining the confidence of the House remains the axis around which the entire system revolves. This imperative facilitates the democratic ideal and is the bedrock of the Westminster system. It has been so in this country ever since the first Cabinet was sworn in on 7 May 1856.

MMP has had a cathartic effect on Westminster government New Zealand-style. It has illuminated the essential ground-rules of the constitutional system and made them more visible. No one raised the spectre of confidence under FPP politics. With few exceptions, a government's mandate to govern was guaranteed.<sup>14</sup> The Prime Minister-elect was known within a short while of the polls closing on election day and governments were guaranteed to last their three-year term. Single-party majority governments and party discipline under the whipping system guaranteed the confidence of the House. National politics see-sawed between the two centrist parties, Labour and National. There were few surprises.

MMP has made politics much more contestable and uncertain. The new environment has sharply crystallised a government's need to hold the confidence of the House, as the mandate to govern. Governments must submit to a confidence vote 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 Impress Supply Bills.<sup>15</sup> The confidence vote was a formality under FPP but it is not so under MMP, where coalition and/or confidence and supply arrangements may leave a government's support in doubt. The issue of confidence also arises mid-term where a government collapses, as in August 1998 when the National-New Zealand First coalition collapsed. Caretaker Prime Minister Jenny Shipley acknowledged the constitutional obligation 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 Shipley submitted to and won a confidence motion on 8 September.

MMP politics have also sharply intensified the public duty on political leaders to resolve the question of who will be in government. This duty was never in issue under FPP; single-party majority government pre-empted any need to broker the support of the House. In contrast, the

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<sup>14</sup> Compare the years 1981-1984, when Prime Minister Robert Muldoon claimed he had a wafer-thin majority. Muldoon used this as a pretext for calling the 1984 elections earlier in the election year.

<sup>15</sup> See Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed), Wellington, Thomson Brookers, 2007, at 229.

imperative now on political leaders post-election is to make the necessary concessions that will enable them to cobble together a workable political grouping that can form a government. In post-election negotiations, the public interest may actively require the political leaders to entertain novel or unusual arrangements. The public interest was a powerful catalyst following the 2005 elections. National (48) was just two seats shy of Labour (50) but was never in a position to form a government. That fell to Helen Clark, who jettisoned the Greens in preference for support agreements with New Zealand First and United Future. The arrangement concluded was a pragmatic response to needs but one that served the public interest. The imperative was to find a government that could end the caretaker situation.

### **Future challenges**

The remaining sections of this paper anticipate three challenges ahead: two are of a systemic nature resulting from the MMP system as it was conceived in 1993; the third is of a political nature which might conceivably threaten the survival of the MMP system.

#### **(a) *Separate Maori seats***

The architects of the MMP system counselled against retaining the separate Maori seats under MMP.<sup>16</sup> The Electoral Commission on the Electoral System promoted MMP as the preferred proportional system to replace FPP, but recommended abolishing the four permanent Maori seats.<sup>17</sup> However, Maori rallied and successfully opposed that recommendation. The seats were retained and then tagged to the Maori electoral option, which enabled their number to increase progressively. The seats were increased to five in 1996, to six in 1999 and to seven 2002. Retaining the seats will have two effects: it will inflate the political representation of Maori beyond their relative national population base, and it will lead to a permanent “overhang” that will eventually skew MMP proportionality.

The introduction of MMP eclipsed what belated justification the Maori seats had acquired last century. Four fixed seats helped mitigate the systemic under-representation of Maori in Parliament, relative to their national population. The seats were introduced in 1867 as a

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<sup>16</sup> This section of the paper is a précis of the writer’s publication, “The Maori Seats in Parliament”, *Te Oranga o te Iwi Maori: A Study of Maori Economic and Social Progress*, New Zealand Business Roundtable, Working Paper 2, May 2008.

<sup>17</sup> *Report of the Electoral Commission on the Electoral System: Towards a Better Democracy*, AJHR 1986, H.3, at 51-52, 63 and 91-106. See Joseph, above n 16, at 9-12.

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 Maori land holding into individualised Crown-derived estates.<sup>18</sup> The Colonial Office refused to make any exception in the colonies to the property qualification that circumscribed the right to vote under English law.<sup>19</sup> The Maori Representation Act 1867 conferred on Maori a temporary adult male franchise. The Act established four Maori 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. However, the Act’s sunset clause significantly underestimated the task of individualising Maori land tenure and the Maori Representation Act Amendment and Continuance Act 1972 extended the life of the 1867 Act until October 1877. The Native Land Court continued to struggle with the task of individualising Maori land holding, and in 1876 Parliament extended the life of the 1867 Act indefinitely. By default, the Maori seats became a permanent feature of the electoral landscape. Alan Ward wryly commented that separate Maori representation “stumbled into being”.<sup>20</sup>

Throughout last century, the four fixed seats under-represented Maori per head of capita. Even upon their introduction, a total of four seats was token representation. In 1867, Maori would have been entitled to around 14 seats based on the electoral quota and national Maori population. However, the introduction of MMP redefined the argument. Under the party list system, Maori have proportionate representation without need of the separate seats. These secure an electoral privilege based on race or ethnicity and are fundamentally at odds with Western democratic values (“one person, one vote, one value”). These values rail against electoral laws that discriminate on the grounds proscribed by human rights legislation (race, colour, ethnicity, sex, marital status etc).<sup>21</sup>

The Royal Commission on the Electoral System predicted that Maori and other ethnic groups would achieve fair representation through the party list system and rejected the need for separate seats.<sup>22</sup> MMP would encourage all parties to compete for Maori votes by placing Maori candidates high on the party list.<sup>23</sup> Statistics from the last two general elections support the

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<sup>18</sup> Maori Representation Act 1867.

<sup>19</sup> (1860) AJHR E-7, at 8 (discussed by Joseph, above n 16, at 6).

<sup>20</sup> A Ward, *A Show of Justice: Racial “Amalgamation” in Nineteenth Century New Zealand*, Auckland, Auckland University Press, 1995, at 209.

<sup>21</sup> See the Human Rights Act 1993. See further the discussion by Joseph, above n 16, at 14-17.

<sup>22</sup> *Towards a Better Democracy*, above n 17, n 16.

<sup>23</sup> See Sir John Wallace, “Reflections on Constitutional and Other Issues Concerning our Electoral System” (2002) 33 VUWLR 719 at 734.

commission's prediction. Nineteen members of the Parliament elected in 2002 were of Maori descent: nine were list members, seven were elected to the Maori seats and three held general electorate seats. The 19 seats represented 15.8 percent of Parliament's membership (1.8 percent higher than the relative national population of Maori (14.0 percent)). If the seven Maori seats were subtracted, the 12 general seats held represented 10 percent of Parliament's membership (4.0 percent below the relative national population of Maori).

Statistics from the 2005 elections indicate a rapid narrowing of the representational deficit. Twenty-two members elected in 2005 were of Maori descent, representing 19.0 percent of Parliament's membership (121 members owing to an "overhang" of one at the 2005 election). Fifteen were list members and seven held the Maori seats. Twenty-two members yielded a 5.0 percent higher parliamentary representation for Maori than their relative national population (14.0 percent). If the seven Maori seats were subtracted, the 15 list seats Maori hold would represent 12.4 percent of parliament's membership (1.6 percent below the relative national population). On these statistics, it is predicted that any Maori representational deficit will be eliminated following the 2008 elections. Retaining the separate seats will, in turn, create a distortion in electoral representation that will compound with each election. A progressive increase in the number of the Maori seats, coupled with the greater number of Maori gaining election through the list system, will disproportionately inflate Maori representation relative to the breakdown of the national population.

The Maori seats have the potential to create further distortion within the electoral system. It is predicted that the seats will produce "overhang" at the 2008 elections that may distort the equity of proportional representation. Commentators extemporise about a party winning over 50 percent of the party vote and governing as a single-party majority government. This scenario is unlikely to happen, notwithstanding the National Party's polling during the first half of 2008. On past experience, the gap between the major parties invariably narrows as the elections approach. However, even were National to win an emphatic victory, the party might encounter unexpected obstacles. United Future leader, Peter Dunne, has raised the spectre of a Maori Party veto of a National government that won over 50 percent of the party vote.<sup>24</sup>

The overhang of one member at the 2005 elections did not create any electoral distortions. The Maori Party won four of the Maori seats on a party vote that entitled it to only three seats. Under

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<sup>24</sup> Peter Dunne, "Time to let the people decide", *Dominion Post*, 18 March 2008 (see Joseph, above n 17, at 20-21).

a Parliament comprising 121 members, the number of confidence votes needed remained at 61. For some commentators, however, the 2008 elections auger a more spectacular overhang, of up to five or even six members. They speculate that the Maori Party may win all seven of the Maori seats without increasing its share of the party vote (an entitlement of three seats). Furthermore, Jim Anderton is expected to retain his Wigram seat, although his Progressive Coalition Party is polling at only 0.1 percent of the party vote. His return in Wigram would create a further overhang of one.<sup>25</sup> The United Future party is also scarcely registering in the polls (0.4 percent of the national party vote), although party leader Peter Dunne is expected to retain his Ohariu-Belmont seat.<sup>26</sup> This places Dunne likewise on the cusp of overhang. On this analysis, the Parliament of 2008-2011 might conceivably have a membership of 126.

Overhang may profoundly affect the outcome of the electoral process. An overhang of four Maori members would increase the confidence votes needed to form a government from 61 to 63. An overhang of 6 members (four Maori Party members plus Anderton and Dunne) would increase the number of confidence votes needed to 64. A party that reaped over 50 percent of the party vote but fell short of winning 63 or 64 seats would have cause for complaint: “A party that garnered 50 percent or more of the popular vote but could not govern would represent an undemocratic outcome and would indubitably arouse deep resentment.”<sup>27</sup> In this scenario, overhang would trump proportionality. Overhang might also produce further distortions. The inflated representation of the Maori Party relative to their party vote would give the party disproportionate leverage in coalition talks. The influence that the minor parties exert over the make-up of government has been a recurring criticism of the MMP system.

Calls to retain the Maori seats in 1993 should have been resisted. The Royal Commission on the Electoral System advanced principled argument for their abolition.<sup>28</sup> Furthermore, retaining the seats will lead to overhang, creating electoral distortions. Strategic vote-splitting between the Maori and Labour parties may make overhang a permanent feature of the MMP Parliament.

(b) *National demographics and the list seats*

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<sup>25</sup> Collin James, “Polls spell more trouble for Peters”, *NZ Herald*, 30 July 2008 (statistics based on the (then) most recent four-poll average).

<sup>26</sup> *Ibid.*

<sup>27</sup> Joseph, above n 16, at 21.

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, causing the number of list seats to diminish progressively. It is predicted that there will come a time when the list seats will be too few to guarantee proportionality as between the parties gaining representation.

The diminishing seats were an inbuilt feature of the MMP legislation,<sup>29</sup> inherent in the formula for allocating the total number of electorates (general and Maori). The number of general electorates in the South Island is fixed at 16. To determine the number of North Island electorates, the South Island's general electoral population (GEP) is divided by 16. This establishes the electoral quota, which represents the average population for each general and Maori electorate. The North Island's GEP is then divided by the electoral quota to determine the number of general electorates to be allocated to the North Island. This process is repeated every five years following each national census. The Maori electoral option is also held every five years, and provides a similar statistical basis for calculating the number of Maori electorates. The number of Maori registering on the Maori electoral roll provides the Maori electoral population (MEP), which is then divided by the electoral quota that is used to determine the number of North Island general electorates. The quotient represents the total number of Maori electoral districts, which comprise approximately the same population base as the general electorates.

The above formula produces a progressive increase in the general and Maori seats, matched by an equivalent reduction in the number of list seats. The total number of seats remains fixed at 120, although it was always known that the North Island's population would increase at a faster rate than the South Island's, resulting in a net reduction of list seats over time. Three census have been held since the introduction of MMP: in 1996, 2001 and 2006. In the 45th Parliament (1996-1999), there were 60 general seats, five Maori seats and 55 list seats; in the 46th Parliament (1999-2002), there were 61 general electorates, six Maori electorates and 53 list seats; in the 47th Parliament (2002-2005), there were 62 general seats, seven Maori electorates and 51 list seats; and in the 48th Parliament (2005 - ), the configuration remained the same

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<sup>28</sup> See Wallace, above n 23, at 734. Sir John was a member of the royal commission who lamented the campaign to retain the seats, with Maori leaders not conveying to their iwi the significance of increased Maori representation under MMP.

<sup>29</sup> Electoral Act 1993.

(except for an overhang of one member). The results of the 2006 census will take effect as from the election of the 49th Parliament in October or November of this year.

It is not known how long it will take for the attrition of the list seats to pose logistical problems. One writer estimated that problems will occur “within about two generations, if not sooner”.<sup>30</sup> During the first two MMP Parliaments, the list seats reduced in number from 55 to 51 (a loss of four seats over two census periods). There are three possible solutions: increase the size of the House beyond the 120 seat maximum; abolish the Maori 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 preferable, although it would not be free of controversy. This option might be expected to encounter resistance, given the often vociferous reaction to reasoned discussions on Maori issues. The first option might also encounter resistance. There is no public appetite to increase the membership of Parliament. The Margaret Robertson citizens’ initiated referendum held in conjunction with the 1999 elections posed the question whether the size of the House should be reduced from 120 to 99 members, and the people overwhelmingly voted “yes”.<sup>31</sup> The third option would produce the least “heat and light” but would compromise the effectiveness of local representation. Enlarged general electorates, having an increased population base and a larger geographical footprint, would distance electorate members from rank and file constituency matters.

The attrition of the list seats does not pose an immediate problem, and 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 leader John Key announced that his party is committed to holding a two-stage binding referendum on MMP. The first referendum would be held at the 2011 election and would ask voters: “Are you satisfied with MMP as a system or would you prefer a change?”<sup>32</sup> If the public mood was for change, the second referendum would offer a choice between different voting

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<sup>30</sup> A McRobie, “The Electoral System” in PA Joseph (ed), *Essays on the Constitution*, Wellington, Brookers, 1995, 313 at 328.

<sup>31</sup> See Joseph, above n 15, at 293.

<sup>32</sup> R Laugesen, “MMP future in doubt under National”, *Sunday Star Times*, 18 May 2008. See also “No Labour support for MMP poll”, *Otago Daily Times*, 4 August 2008; Editorial, “Referendum due on MMP”, *NZ Herald*, 6 August 2008; “Referendum ‘No’ wouldn’t need to spell end for proportionality”, *NZ Herald*, 9 August 2008.

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 would offer. One choice would be whether the voters favoured a return to FPP elections, although it is unlikely that New Zealand 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 that voting system.<sup>33</sup> One assumes that the referendum choice would include a similar range of proportional systems that were put to the vote in the 1992 indicative referendum on the electoral system.

Key's announcement will garner political support. When the people voted-in MMP in 1993, they expected another referendum to be held within a short while that would allow them to cast their verdict on the new voting system.<sup>34</sup> A review was promised after two elections and this was widely construed as entailing a national referendum. However, that expectation was dashed when the MMP statute mandated a select committee review to be completed by June 2002.<sup>35</sup> The MMP Review Committee was established in April 2000 and was chaired by then Speaker of the House, Jonathan Hunt. The Speaker brought forward the reporting date of the committee by one year (to June 2001) in anticipation of the 2001 census and the setting of new electoral boundaries.<sup>36</sup> 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.<sup>37</sup> Most submitters who opposed a referendum believed that it was too early to make an informed judgment on the merits of MMP.

There have been two recurring criticisms of MMP: first, that the party list system empowers the party hierarchy at the expense of the electorate, which has no say over the allocation and ranking of list places. The popular perception is that MMP has produced two classes of member of Parliament: elected electorate members and unelected list members. The FPP mentality lingers that elected members are to be held in higher regard than unelected members. The list system also spawns a further criticism: it denies the people the right to vote out of Parliament unpopular

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<sup>33</sup> "MMP future in doubt under National", *Sunday Star Times*, 18 May 2008; "Referendum 'No' wouldn't spell end for proportionality", *NZ Herald*, 9 August 2008.

<sup>34</sup> See eg Editorial, "Referendum due on MMP", *NZ Herald*, 6 August 2008.

<sup>35</sup> Electoral Act 1993, s 264. For the establishment of the MMP Review Committee and its terms of reference and findings, See PA Joseph, "Constitutional Law" [200] *NZ Law Review* 301 at 307-308; [2001] *NZ Law Review* 449 at 466-473.

<sup>36</sup> See Report of the MMP Review Committee, *Inquiry into the Review of MMP*, AJHR, 2001, I.23A.

<sup>37</sup> See PA Joseph, "Constitutional Law" [2001] *NZ Law Review* 449 at 469.

politicians, who may lose their seat but regain entry through the party list. Labour and National politicians with high list rankings are virtually assured of a seat in Parliament.

Secondly, many believe that the minor parties wield disproportionate power under MMP. MMP was intended to benefit the minor parties, which were virtually denied parliamentary representation under FPP, even where they had polled credibly well. Nevertheless, it is a continuing source of frustration that the minor parties are perceived as representing an inflated power bloc in post-election, coalition talks. Intense voter frustration was expressed following the 1996 elections, when the New Zealand First party held the balance of power and party leader, Winston Peters, conducted a Dutch auction with Labour and National. For some, 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 post-election, when the two major parties must broker coalition or support arrangements. However, the minor parties also exert considerable influence throughout the parliamentary term. All administrations from 1998 have been minority governments that have had to negotiate cross-party support to pass their legislation. Governments must frequently change the detail and sometimes the architecture of their legislation in order to build the support needed for its passage.

Will MMP survive? Most likely “yes”, if the issue comes down to the minor parties. National might commit to electoral referenda but lack the political traction. A National-led government would need parliamentary appropriations to authorise the expenditure and it would struggle to gain the necessary cross-party support. The Labour Party has said that it will not support a referendum on MMP and the minor parties rely on MMP for their parliamentary representation.<sup>38</sup> A popular expression around Parliament is that a turkey does not vote for an early Christmas.

## **Conclusion**

My paper concludes by making two judgement calls: first, the proportional voting system has had a salutary effect on the New Zealand political process, and secondly, the people would not vote for a return to FPP even if a National government offered the people the choice. Two periods of FPP government had produced intense voter alienation: under Robert Muldoon’s three-term National Government from 1975-1984, and under David Lange’s two-term Labour

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<sup>38</sup> “No Labour support for MMP poll”, *Otago Daily Times*, 4 August 2008 (quoting Prime Minister Helen Clark).

Government from 1984-1990. There was an overwhelming belief that FPP had created elective dictatorship, regardless of the party in power.<sup>39</sup> Governments pursued their own agenda and were unresponsive to voter concerns. The Muldoon/Lange years made the people receptive to change.

MMP was touted as a means of dispersing political power and trumping executive dominance. The public's expectation has not been frustrated. Minority coalition has become the norm under MMP, with political parties having to broker coalition and/or support arrangements as the quid pro quo of holding office. After 12 years of MMP, it is unlikely that New Zealand would return to FPP politics. Proportional representation has whetted the people's appetite. There is also another feature that commends the proportional system – one that draws on selfish instincts. From an analyst's viewpoint, MMP has a seductive allure; it has made the entire political process more subtle, absorbing and interesting. There is much more to get excited about than when politics were contested under the old party duopoly.

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<sup>39</sup> Attributions to Lord Hailsham, *The Dilemma of Democracy*, London, Collins, 1978, ch 20 who coined the expression "elective dictatorship".