

'ALL IS CHANGED, CHANGED UTTERLY'? – THE CAUSES AND CONSEQUENCES OF NEW ZEALAND'S ADOPTION OF MMP

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New Zealand's political landscape experienced a seismic shift in 1993, when the country replaced the First-Past-The-Post (FPTP) voting system it had inherited from its British colonial past with a new Mixed Member Proportional (MMP) voting system. The move had immediate and deep ramifications for a whole range of issues: the range of interests represented in Parliament;¹ the way that governments are formed and function;² how the country's public sector agencies operate;³ the manner in which its electoral participants conduct their campaigns;⁴ and so on. Indeed, it is not too much of an exaggeration to say that every area of New Zealand's public and political life was touched in some fashion by the general 'systems change' produced by the country's decision to embrace MMP.⁵ These changes have effected shifts in what may be termed the 'political culture' of New Zealand; re-alignments in the relationships between various public and political institutions and bodies; as well as alterations to the formal legal rules that govern these institutions and bodies. Any sort of full and comprehensive consideration of the extent and nature of these various changes would require a book-length study, if not a multi-volume work.

Therefore, the present article has relatively modest ambitions.⁶ With almost a decade's worth of experience of 'MMP-in-practice' to reflect upon, we trace how this

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1 Fiona Barker and Elizabeth McLeay, 'How Much Change? An Analysis of the Initial Impact of Proportional Representation on the New Zealand Parliamentary Party System' (2000) 6 *Party Politics* 131, 144-7.

2 Jonathan Boston, *Governing Under Proportional Representation: Lessons from Europe* (1998).

3 Jonathan Boston et al, *New Zealand Under MMP: A New Politics?* (1996) 136-51.

4 Jonathan Boston et al (eds), *Left Turn: The New Zealand General Election of 1999* (2000) 23-68.

5 Paul Carpinter, 'MMP and Coalitions: Possible Effects on New Zealand's Public Service' in Gary Hawke (ed) *Changing Politics? The Electoral Referendum 1993* (1993) 131-2.

6 For a comprehensive overview of the impact of MMP on New Zealand's constitutional framework see Andrew Stockley, 'What Difference does Proportional Representation Make?' (2004) 15 *Public Law Review* 121.

change to New Zealand's voting system has impacted upon three particular themes running through New Zealand's wider electoral laws and practices. These themes are:

- ideals about, and institutions for, representation of the voters' will;
- changes in the constitutional balance of power; and
- continuing efforts to engage the voting population in the electoral process in general.

We believe these themes are pertinent as they encapsulate the 10 criteria identified by the Royal Commission on the Electoral System in its 1986 report as being relevant to any decision over which voting system would provide the greatest benefits for New Zealand.⁷ Following the application of these criteria, the Royal Commission concluded that MMP could best fill this role. In turn, this body's recommendations proved pivotal in New Zealand's decision to adopt MMP. Making use of these three themes as a prism through which to view the present state of the country's electoral law can thus enable us to explore the extent to which the promised advantages of MMP have been borne out in the actual, concrete, development of New Zealand's electoral laws and practices.

That being said, we are aware that any attempt to analyse the impact of MMP upon New Zealand's broader electoral laws and practices must take account of the fact that no simple, one-way, causal relationship exists in this area. It is true that, in the final analysis, the adoption of MMP constituted a judgement by the majority of New Zealand's voters that it supplies a 'better' means of measuring the preferences of the public at election time. Therefore, it can be said that by 1993 the MMP voting system had come to be viewed as providing a superior means of expressing the self-reflected political identity of (at least a majority of) the New Zealand public.⁸ However, the legal rules which a country adopts to govern its electoral processes, including the rules it puts in place to determine its voting procedures, will in turn impact upon the political experiences (and thus political identity) of the citizens of that country.⁹ There will thus be something of a feedback loop at work in this area: a society's judgement as to what constitutes a 'good' (or 'better') electoral system will, in part, come from that society's previous experience of democracy at work; even as the rules that determine how a country's elections are to take place will stem from its ideals about democracy as a method of collectively deciding how, and by whom, that society will be governed.

⁷ New Zealand, Royal Commission on the Electoral System ('RCES'), *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) 11–12. We see the Royal Commission's 10 criteria as mapping on to our three themes in the following way:

Theme One: *ideals about, and institutions for, representation of the voters' will* (Fairness between political parties; effective representation of minority and special interest groups; effective Māori representation; effective representation of constituents; effective parties.)

Theme Two: *changes in the constitutional balance of power* (Effective government; effective Parliament.)

Theme Three: *continuing efforts to engage the voting population in the electoral process in general* (Political integration; effective voter participation; legitimacy.)

⁸ See Boston, above n 3, ch 1.

⁹ Samuel Issacharoff and Richard Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process' (1998) 50 *Stanford Law Review* 643, 644. See also Samuel Issacharoff and Pamela Karlan, 'The Hydraulics of Campaign Finance Reform' (1999) 77 *Texas Law Review* 1705, 1734.

Therefore, exploring how New Zealand's change to MMP has impacted upon the three themes identified above is not a simple matter of mapping the present contours of New Zealand's electoral laws and processes on to an ideal blueprint laid out at some point in the past, and then assessing where these real-world practices match, or fail to correspond to, that exemplary model. What is instead required is some understanding of how the system of electoral laws and processes has developed over time; how the ideals it is expected to serve may have altered during that time; and how the experience of changing the voting system might resolve some issues previously seen as problematic, while simultaneously raising new challenges to be resolved.

With these caveats in place, we begin our account with a brief overview that locates New Zealand's MMP voting system in the wider context of the country's process of government. We then give a description of the reasons why, and process by which, MMP came to be adopted in place of the FPTP voting system. The various ways in which the adoption of this new voting system has impacted upon the three themes we have outlined above are then considered.

I MMP IN CONTEXT

A brief background to New Zealand's system of government and present voting system may be in order for those not fully *au fait* with these particular aspects of its society. New Zealand is a unitary state which continues to acknowledge the United Kingdom's Sovereign – in her guise as Queen of New Zealand – as its head of state,¹⁰ with a Governor-General representing the monarch *in situ*. It has a parliamentary system of government based on the Westminster system, with a unicameral legislature (the House of Representatives) that usually consists of 120 members. A general election for the House of Representatives must be held every three years,¹¹ but may be called earlier if the government so chooses. Following public endorsement in a referendum in 1993, and beginning with the 1996 general election, the MMP voting system is used to elect members of Parliament ('MPs').¹²

MMP is a form of proportional representation in which each voter casts two votes: a 'Party Vote' directly for his or her preferred political party; and an 'Electorate Vote' for the preferred candidate in the voter's local constituency, or electorate. Each of the country's 69 electorates – consisting of 62 general seats, and 7 Maori seats reserved for those voters of Maori descent who choose to enrol on the Maori roll – then return to Parliament the candidate who has obtained the greatest number of Electorate Votes. Additional 'list seats' are then apportioned amongst those political parties which cross a representation 'threshold' – winning either 5 percent of the Party Vote, or at least one electorate seat – in order to bring each qualifying party's total number of seats into line with its share of the overall Party Vote, as determined by the Sainte-Laguë formula.¹³ These additional list seats are filled from a ranked list of candidates drawn up by each political party prior to the election being held. Therefore, the most

¹⁰ *Constitution Act 1986* (NZ) s 3.

¹¹ *Ibid* s 17.

¹² A full account of how MMP operates is provided by the New Zealand Electoral Commission, <http://www.elections.govt.nz/elections/esyst/govt_elect.html> at 22 August 2004.

¹³ Although it is possible that this may lead to a parliamentary 'overhang' situation – a parliament of more than 120 MPs – this has not yet occurred in New Zealand.

important feature of this method of voting is that any political party which meets the representation threshold at an election will gain an allocation of the seats in Parliament that very closely matches its overall level of support amongst the community as a whole, as indicated by its share of the Party Vote.

II NEW ZEALAND'S ADOPTION OF MMP

MMP was introduced into New Zealand as the consequence of a simple majority vote in a referendum held alongside the 1993 general election.¹⁴ The full reasons behind the majority's decision to choose the novelty of proportional representation in place of the constituency-based, FPTP system used since New Zealand's first national, representative elections in 1853¹⁵ are understandably complex, and detailed accounts of the voters' motivations have been given elsewhere.¹⁶ That being said, and despite the risk of over-simplifying matters, the vote for change reflected a widespread feeling that the existing FPTP system was failing to give the voters adequate control over New Zealand's governing institutions.¹⁷ The source of this *zeitgeist* can in turn be found in New Zealand's then-recent political history. A set of neo-liberal economic policies, combined with a rather rapid series of changes to New Zealand's social fabric, were instituted first by the Fourth Labour Government (1984–90), and then continued under a National Government (1990–93). Many of these policies were adopted without previously being flagged in the election manifestos of those political parties, or even after having been expressly disavowed at election time. This experience resulted in deep and widespread disillusionment with the political parties and their individual representatives.¹⁸ Of course, the phenomenon of declining trust in political leaders and institutions was hardly peculiar to the New Zealand context. It was — and remains — something of a generic problem across the Western world,¹⁹ and so cannot by itself explain New Zealand's particular decision to switch electoral systems. However, what was perhaps different about New Zealand's experience was that the electorate's condemnation of these forms of political behaviour spread beyond the individual politicians involved to encompass the voting system that had been used to elect them to power.

¹⁴ *Electoral Act 1993* (NZ) s 2(1).

¹⁵ With the exception of the 1908 and 1911 elections, when a 'second ballot' voting system was used.

¹⁶ Jack Vowles et al, *Towards Consensus? The 1993 Election in New Zealand and the Transition to Proportional Representation* (1995). See also the sources cited in the following two footnotes.

¹⁷ Keith Jackson and Alan McRobie, *New Zealand Adopts Proportional Representation: Accident? Design? Evolution?* (1998) 315–7; James Lamare and Jack Vowles, 'Party Interests, Public Opinion and Institutional Preferences: Electoral System Change in New Zealand' (1996) 31 *Australian Journal of Political Science* 321, 336–7.

¹⁸ Dort Denemark, 'Choosing MMP in New Zealand: Explaining the 1993 Electoral Reform' in Matthew Shugart and Martin Wathenbergh (eds), *Mixed-Member Electoral Systems: The Best of Both Worlds?* (2001) 81–83; Hon Sir John Wallace QC, 'Reflections on Constitutional and Other Issues Concerning our Electoral System: The Past and the Future' (2002) 33 *Victoria University of Wellington Law Review* 719; Tim Bale and Nigel Roberts, 'Plus ça change ...? Anti-Party Sentiment and Electoral System Change: A New Zealand Case Study' (2002) 40 *Commonwealth & Comparative Politics* 1, 2–3.

¹⁹ Pippa Norris, *Critical Citizens: Global Support for Democratic Governance* (1999).

The aspect of the existing FPTP system that came under most intense scrutiny was its tendency to bestow inflated levels of representation upon large, established political parties, and to 'under reward' smaller parties for the support they had gained.²⁰ So long as the Labour and National parties — New Zealand's two dominant political entities during the post-war period — were viewed as presenting the voters with clear alternatives at the ballot box, this outcome of the FPTP voting process did not pose a particular threat to its perceived legitimacy.²¹ However, as a result of the broadly matching economic and social reforms pursued by both parties in the 1980s and 1990s, a large proportion of the voting public came to see Labour and National as basically interchangeable in terms of their policies and behaviour. At New Zealand's 1993 general election — the last to be held under FPTP — this disillusionment resulted in almost 1 in 3 voters choosing to leave the 'big tents' pitched by the Labour and National parties, and instead deliver their vote to some minor party. However, the casting of such 'protest' votes proved ineffective as a means punishing these two parties. Because candidates from the Labour or National parties still captured a plurality of the vote in the vast majority of constituencies, the FPTP voting system meant that these parties still retained virtually all of the seats in Parliament. Therefore, in spite of winning over 30 percent of the vote nationwide in 1993, candidates from the various minor parties still were elected to only 4 of the 99 seats in Parliament.²² Representatives from National and Labour were then returned in the other 95, with the 50 seats won by the National Party again allowing it to form a single-party majority government.

A But why MMP?

Against this historical background, the vote in favour of MMP is usually portrayed in the negative — as a rebellion by the voters against the political practices of the previous decade.²³ And it is certainly true that an aversion towards the concrete consequences of the existing FPTP voting process plays a particularly important part in the story of the introduction of MMP into New Zealand. Nevertheless, dislike of the outcomes produced by FPTP, and a desire to abandon it as a method of electing representatives into the Parliament, need not *necessarily* have led the majority of voters to choose to replace it with MMP. There were, after all, a variety of other voting systems available to be chosen from once the public had decided to move away from

²⁰ Maurice Duverger, *Political Parties: Their Organisation and Activity in the Modern State* (1951) 217. This effect was particularly pronounced in New Zealand; see Helena Catt, Paul Harris and Nigel Roberts, *Voter's Choice: Electoral Change in New Zealand?* (1992) 80–81.

²¹ Boston et al, above n 3, 3. That being said, the fact that the FPTP system did not reward even the major parties in a consistent fashion was a cause for some disquiet. For example, in both the 1978 and 1981 general elections the National Party was able to win a majority of seats in Parliament despite receiving fewer total votes than did the Labour Party.

²² The Alliance Party gained 18.2% of the total votes cast, but only 2 seats in Parliament. The NZ First Party also gained 2 seats, along with 8.4% of the nationwide vote.

²³ Jackson and McRobie, above n 17, 257–63; Jack Vowles et al, 'Public Opinion, Public Knowledge, and the Electoral System' in Jack Vowles et al (eds), *Proportional Representation on Trial* (2002) 160. However, a detailed study of the voters' motivations in the 1993 referendum has concluded that 'the vast majority of voters appeared to have good reasons for making their choice'; see Vowles et al, above n 16, 192.

the one currently in place.²⁴ Therefore, while voter disenchantment with the political status quo might account for why the majority of voters in New Zealand chose to turn their backs on the existing FPTP voting system, further explanation is required to clarify why they then viewed MMP as being the most desirable alternative electoral regime.

The particular decision to adopt MMP ahead of any other alternative to FPTP can be traced back to a report issued in 1986 by the Royal Commission on the Electoral System.²⁵ Established in 1985 by a consciously reform-minded Minister of Justice, Sir Geoffrey Palmer, this five-member, non-partisan body was given a broad brief to examine New Zealand's existing electoral system, and recommend what changes ought to be made to it. The central (and unexpected) recommendation contained in the resulting 302 page report was that the FPTP voting system ought to be replaced with the MMP electoral process, based upon the (then) West German model.²⁶ The Commission justified its conclusion on the basis that FPTP displayed 'severe weaknesses' in relation to fairness to major and minor parties, minority representation and Maori representation.²⁷ Of the alternatives to FPTP then considered by the Commission,²⁸ MMP was regarded as providing the most suitable replacement as it would be fairer to all the political parties and would lead to greater voter participation, improved representation of Maori and other groups, and therefore would be seen as having greater legitimacy by the voting public.²⁹ What is more, the Commission claimed that MMP could deliver 'comparable, though sometimes different' advantages to FPTP in relation to effective government, effective Parliament, representation of constituents, effective parties, and political integration.

Although initially ignored by the government which had commissioned it, this report ultimately proved crucial in New Zealand's move to MMP. Admittedly, most

²⁴ The referendums leading to the introduction of MMP actually took place in two stages. The first stage, a stand alone referendum which occurred in 1992, asked voters two questions. First of all, they were asked whether they wanted to retain the existing FPTP system, or whether they wanted to change it. They were then asked which of four voting systems they would prefer to the existing FPTP system. These four systems were: Supplementary Member; Single Transferable Vote; Mixed-Member Proportional; and Preferential Voting. For an account of how these voting systems work see Administration and Cost of Elections Project, *Electoral Systems Index* <<http://www.aceproject.org/main/english/es/es.htm>> (visited 13 August, 2003). This first stage resulted in a turnout of 55.2% of registered voters, with 84.7% voting in favour of changing away from FPTP, and 70.5% of these voters then favouring MMP ahead of the other three alternative voting systems. See generally Jackson and McRobie, above n 17, 237-42. The second referendum, held on election night in 1993, then gave voters a straight choice between FPTP and MMP. This resulted in a 46% vote for FPTP, and a 54% vote for MMP, with an 85.2% turnout.

²⁵ RCES, above n 7.

²⁶ One of the reasons the Commission preferred MMP was the overall good impression it gained of West Germany's experience with using the voting system. See Jackson and McRobie, above n 17, 118-9.

²⁷ RCES, above n 7, 28.

²⁸ The four alternative voting systems considered in detail by the Commission were the Single Transferable Vote (STV) system; the Preferential Vote system used to elect the Australian House of Representatives; the Mixed Member Proportional (MMP) system; and the Supplementary Member (SM) system.

²⁹ RCES, above n 7, 85.

voters did not trawl through the volume to discover for themselves the particular reasons underpinning the Commission's conclusions. Nevertheless, the fact that such a worthy body considered MMP to be the best available electoral process helped boost MMP's credibility as a practical alternative to FPTP. As the 1980s passed, and the previously described disillusionment with electoral 'politics-as-usual' spread, the conditions became ripe for electoral reform. Groups pushing for such change were then able to draw upon the Commission's conclusions to buttress their arguments, and point to its recommendations as providing a superior alternative to the status quo. The upshot was that by the time the 1993 referendum was held, a majority of the voters had become sufficiently convinced of the correctness of the Commission's judgment to cast their votes in favour of adopting MMP.

B Themes emerging from the introduction of MMP

Three broad themes emerge from this all-too-brief summary of the background to the introduction of MMP into New Zealand.³⁰ The first is that of representation, and the expectation that MMP could do a 'better' job than the existing FPTP voting system of converting the expressed preferences of the voters into members sitting in the country's Parliament.³¹ Under MMP, the focus of representation would shift from the individual candidate running in a particular constituency, to the national political parties competing for a share of the overall Party Vote. The strongly proportional nature of MMP would then avoid the distorting effects exhibited by FPTP in terms of its allocation of seats amongst the political parties, and would instead give each qualifying party an allotment of representation closely matching their support in the community at large (as demonstrated by their share of the Party Vote). Furthermore, by setting the 'threshold' for gaining representation in parliament at five percent of the party vote or one electorate seat, MMP would increase the opportunity for smaller and emergent political parties to enter into Parliament.³² These twin effects were expected to link representation in Parliament more closely to the preferences of the voters: both in terms of who was entitled to be represented (through broadening the range of parties that would be able to gain seats in Parliament); and the level of such representation (through closely tying the number of MPs from each party to the number of votes cast for that party).

The second theme in the adoption of MMP relates to the diffusion of executive power. Because MMP would most likely require some coalition arrangement between two or more parties in order to gain governmental power, rather than deliver a single-party majority government, it was expected to check the ability of any one party to unilaterally impose its particular policy agenda upon the country. This consequence

³⁰ A further theme, which cannot be fully recounted here due to space constraints, is that of blind chance. The decision to hold a referendum on the future of the electoral process can be partly ascribed to a televised election debate held prior to the 1987 general election, in which the then Labour Prime Minister misread his briefing notes and accidentally committed his party to put the matter to a public vote. This commitment then led the National Party to make a similar promise — one it then felt unable to resile from when it came to power in 1990. See Jackson and McRobie, above n 17, ch 7.

³¹ RCES, above n 7, 50–1, 63.

³² The Royal Commission actually recommended the threshold be set at 4 per cent, and suggested that this could be waived altogether for parties representing Maori interests if the Maori electoral seats were abolished. See *ibid.*

was considered especially important in light of the history of executive dominance of the New Zealand Parliament stemming from the cabinet system of government, combined with strong party discipline and an absence of any real constitutional restraints upon Parliament's power to act. With no upper house in the New Zealand legislature, no substantive review of legislative action by the courts, and no means of direct voter override of parliamentary action, a governing party – one with majority support in the House of Representatives – faces no formal constitutional checks as to how it might exercise law-making power. Requiring political parties to work together in order to govern was seen to be a way of counteracting the ability of a governing party to 'ram through' policy changes in the face of substantial public disquiet.

A third and final theme in this story emerges from a distillation of the public mood accompanying the introduction of MMP: electoral disenchantment, along with promised redemption. The existing FPTP system was abandoned due to the general dissatisfaction of the majority of voters with the way that New Zealand's processes of government were operating. MMP was then 'sold' to the public as a corrective measure, on the grounds that it would 'be a significant structural change that is bound to improve our politics. It has the potential to alter for the better the behaviour of the political parties toward each other.'³³

With these three themes identified, this article proceeds to examine how they have further developed following the introduction of MMP. This examination in part involves measuring whether, and to what extent, the reality of New Zealand's political experiences has meshed with the anticipated consequences of moving to the new electoral system. However, it also requires a dynamic approach – a recognition that a change to one part of a country's system of electoral regulation will inevitably create new issues that could not be fully foreseen at the time the change was made. With this in mind, the following three sections seek to explain just how the change to MMP has both resolved and bred problems within each of the three broad themes just outlined.

III THE EFFECT OF THE ADOPTION OF MMP ON ASSUMPTIONS ABOUT REPRESENTATION

Prior to the introduction of MMP, the regulatory regime governing New Zealand's electoral processes formally treated the issue of representation as being primarily a local constituency matter, rather than a national issue. Therefore, under FPTP, the law recognised the individual candidate, rather than the political party he or she represented, as the central campaigner come election time. Spending limits, along with a requirement to disclose election expenditures, were thus imposed on the campaigns of individual candidates as long ago as 1895, but not on those run by the national political parties. And while individual candidates (eventually) were entitled to include their party affiliation on the ballot paper,³⁴ the law placed no external restrictions on

³³ Comments made by the head of the Electoral Reform Coalition in the public debate over MMP: Colin Clark, 'MMP Seen as the Best Reform Option' *The Dominion* (Wellington, New Zealand), 9 November 1992, A8.

³⁴ This right was granted in 1975 by the *Electoral Amendment Act 1975* (NZ) s 33(1) (introducing a new s 87(2A) into the *Electoral Act 1956* (NZ)), only then to be removed by s 31(1) of the *Electoral Amendment Act 1980* (NZ). The *Electoral Amendment Act 1990* (NZ), s 40(1) reinstated the right to list a candidate's party affiliation on the ballot paper.

how the parties were to select candidates,³⁵ nor did it contain any requirement that a party register its existence or abide by any particular rules before it became entitled to endorse candidates. By contrast, the ability of individual candidates to access the ballot was subject to regulation, with a requirement that the candidate satisfy a nationality requirement,³⁶ be nominated by two voters enrolled in the constituency being contested, and pay a deposit before he or she was entitled to stand in any particular seat.³⁷

New Zealand's colonial pedigree provides one reason for this pre-MMP regulatory focus on the individual candidate – in particular, 'the rather quaint Victorian concept of the [British] House of Commons as 'geographical representation of the Kingdom' and 'congress of constituencies'.³⁸ One contemporary commentary went so far as to claim that New Zealand's electoral process took this Westminster ideal even further than did the United Kingdom, being 'in some ways more British than Britain'.³⁹ However, the regulatory regime's emphasis on the individual candidate also drew on Burkean notions about the proper role that an elected representative should play; that of an independent deliberator, who uses his or her reason and judgement to decide what is the best course for the nation as a whole.⁴⁰ Because candidates were assumed to be competing to gain election in particular geographic 'communities of interest', but thereafter going to Parliament to further the interests of the nation as a whole, electoral regulation was intended to do no more than provide the minimal safeguards required to ensure that the candidate selected to represent each constituency really was the individual most preferred by the voters in that specific area.

A Bringing the political parties out of the shadows

A consequence of this ongoing, candidate-centred focus of the regulatory framework for elections was that, right up until the eve of the introduction of MMP, New Zealand's electoral laws accorded the political parties only a kind of quasi-existence. The *Electoral Act 1956* (NZ) barely mentioned these organisations, and then only in passing references relating to membership of the body responsible for drawing the boundaries of electoral districts,⁴¹ the form the ballot was to take,⁴² or restrictions on

³⁵ At the most, a Returning Officer was entitled to 'require' a candidate to 'produce evidence ... of the candidate's eligibility' to claim accreditation with any party. See *Electoral Act 1956* (NZ), s 87A (as amended by the *Electoral Amendment Act 1990* (NZ), s 40(1)).

³⁶ *Electoral Act 1956* (NZ), s 25(1) (inserted by *Electoral Amendment Act 1975* (NZ), s 9). On the changing law relating to citizenship qualifications see Caroline Morris, 'On Becoming (and Remaining) a Member of Parliament' [2004] *Public Law* 11. See also Andrew Geddis, 'Membership of the House' [2004] *New Zealand Law Journal* 30.

³⁷ *Electoral Act 1956* (NZ), ss 80–81.

³⁸ Gerald Hogan, 'Federal Republic of Germany, Ireland, and the United Kingdom: Three European Approaches to Political Campaign Regulation' (1992) 21 *Capital University Law Review* 501, 523 (citations omitted).

³⁹ Rein Taagepera and Matthew Shugart, *Seats and Votes: The Effects and Determinants of Electoral Systems* (1989) 38.

⁴⁰ See Edmund Burke, 'Speech to the Electors of Bristol on Being Elected', in Iain Hampsher-Monk (ed), *The Political Philosophy of Edmund Burke* (1987) 108–11.

⁴¹ *Electoral Act 1956* (NZ), s 15(2)(b).

⁴² See above nn 34–35.

what campaign material could be publicly displayed on election day.⁴³ Therefore, even as late as 1993, a High Court judge was still able to state that 'for legal purposes, political parties are private bodies. They have no statutory or public duties.'⁴⁴ Justice Fisher instead concluded that parties were no more than unincorporated associations of like-minded individuals, whose sole purpose was to supply aid to individual candidates come election time.⁴⁵ The consequence of this analysis was that internal party matters were to be treated as a private law matter of contract between the party and its members, and the application of public law principles to political parties was regarded as inappropriate. Therefore, as far as the formal legal regulation of the electoral process was concerned, political parties as institutional actors largely were relegated to the subsidiary role of support organisations for the individual candidate, who remained the 'real' electoral contestant.

However, as the twentieth century progressed, the basic assumptions underpinning this regulatory framework increasingly failed to match the reality of electoral politics under FPTP.⁴⁶ As is the case in other Western democracies – with the possible exception of the USA – political parties as institutions quickly came to dominate New Zealand's electoral scene, with the large majority of voters casting their ballots on election day based on a candidate's party affiliation rather than his or her individual qualities. This centrality of party affiliation to representation in New Zealand under FPTP is demonstrated by the fact that no independent candidate was elected while bearing such a label after 1943, while for the latter half of the twentieth century, every movement attempting to gain representation in Parliament was organised into the form of a political party.⁴⁷ What is more, the development of internal systems of party discipline meant that far from filling the role of an individual deliberator, MPs became in all but the rarest of cases servants of their party's policies. Therefore, rather than an election providing voters with an opportunity to choose the individual candidate best qualified to represent them *as an individual*, it really gave voters the opportunity to pass judgement on the past performance of, and promised future actions by, the various national political parties. This was a point given great emphasis by the Royal Commission on the Electoral System:

It is the political parties inside and outside Parliament that in reality present the electorate with a choice of Government. They provide the candidates and prepare the policies between which the voters choose. ... [T]he principal purpose of elections is now in fact to enable the people to decide in accordance with the electoral law which of the competing political parties will provide the Government.⁴⁸

The events of the 1980s and 1990s, as outlined in the previous section, laid bare this disjuncture between the assumptions underlying the legal regulation of the FPTP

⁴³ *Electoral Act 1956* (NZ), ss 127(1)(e); 127(2) (inserted by *Electoral Amendment Act 1990* (NZ), s 32).

⁴⁴ *Peters v Collinge* [1993] 2 NZLR 554, 575, per Fisher J. See also Margaret Wilson, 'Political Parties and Participation', in Alan Simpson (ed), *The Constitutional Implications of MMP* (1998) 169.

⁴⁵ *Peters v Collinge* [1993] 2 NZLR 554, 556.

⁴⁶ See generally Neill Atkinson, *Adventures in Democracy: A History of the Vote in New Zealand* (2003).

⁴⁷ Elizabeth McLeay (ed), *New Zealand Politics and Social Patterns: Selected Works by Robert Chapman* (1999) 324.

⁴⁸ RCES, above n 7, 6.

voting system, and the reality of its actual operation. During that period, increasing numbers of voters came to regard FPTP as failing to reflect in an adequate manner the choice they had made between the political parties at election time. In particular, the tendency of FPTP to magnify the share of representation given to Labour and National – and thereby diminish the share given to alternative, smaller parties – reduced the voters' capacity to punish a misbehaving government through switching their votes between parties. This outcome was, in the opinion of the Royal Commission, 'unfair' to the minor parties and their supporters.⁴⁹ The Commission's recommended solution to this problem was to redress these inequalities in treatment by moving to a voting system which allocates representation to each party in close proportion to the number of votes it receives nationwide. Therefore, while MMP would retain an element of direct, local representation through the 69 electorate seats, the centrality of the Party Vote to determining the overall distribution of seats in Parliament would mean that the parties *qua* parties would become institutionalised as the central vehicles for representation.

B The law comes to the party⁵⁰

Therefore, once MMP was adopted in 1993, the intermediary role that political parties play in selecting individual MPs was deliberately brought to the forefront of New Zealand's electoral processes. This new recognition of the parties' representational role went hand-in-hand with changes to their legal status. Following the passage of the *Electoral Act 1993* (NZ), any party intending to contest the Party Vote is required to register with a (newly created) Electoral Commission.⁵¹ In order to become (and remain) registered, a party must meet a number of administrative demands, such as supplying the name and address of its secretary and auditor,⁵² and a copy of the party's membership rules and candidate selection rules.⁵³ Additionally, it must also meet the substantive requirement of demonstrating that it has at least 500 'current financial members' who are eligible to enrol as electors,⁵⁴ as well as making a statutory declaration that it intends contesting future elections.⁵⁵ These registration rules operate as gatekeeper provisions, designed to restrict the type of entity which may contest the all important Party Vote to those which have demonstrated the requisite 'seriousness' of purpose. Once registered, a political party is then required to abide by a number of further regulations governing its financial affairs. It must file an annual return of party donations listing the source and amount of all donations greater than \$10,000 received in the previous year.⁵⁶ The amount that a party may spend on 'election expenses' in

⁴⁹ Ibid 14.

⁵⁰ With due acknowledgment to Graeme Orr, 'The Law Comes to the Party: The Continuing Juridification of Political Parties in Australia' (2000) 3 *Constitutional Law and Policy Review* 41.

⁵¹ Political parties which do *not* wish to contest the Party Vote are not required to register.

⁵² *Electoral Act 1993* (NZ) s 63(2).

⁵³ Ibid s 71B.

⁵⁴ Ibid s 66(1)(b).

⁵⁵ Ibid s 71A.

⁵⁶ Ibid ss 214F–214G. See generally Andrew Geddis, 'Hide behind the Targets, in Front of all the People we Serve: New Zealand Election Law and the Problem of "Faceless" Donations' (2001) 12 *Public Law Review* 51.

any election campaign is restricted.⁵⁷ Following each general election, a registered party must file a declaration of all such election expenses incurred during its campaign with the Electoral Commission.⁵⁸ The Court of Appeal has upheld the Electoral Commission's right to require that the political party disclose in some detail exactly what these expenses went towards, and who received them.⁵⁹ Both a party's donation return and its election expenses return must be independently audited, and both returns are open to public inspection.

Furthermore, the way in which a registered political party selects its candidates for each election has been made the subject of express regulation. A registered political party wishing to contest the Party Vote must provide a ranked list of candidates for the list seats,⁶⁰ and in addition may 'bulk nominate' candidates for the electorate seats.⁶¹ Section 71 of the *Electoral Act 1993* (NZ) requires that all registered parties follow 'democratic procedures' when selecting these candidates, namely:

[To] ensure that provision is made for participation in the selection of candidates representing the party for election as members of Parliament by –

- (a) current financial members of the party who are or would be entitled to vote for those candidates at any election; or
- (b) delegates who have (whether directly or indirectly) in turn been elected or otherwise selected by current financial members of the party; or
- (c) a combination of the persons or classes of persons referred to in paragraphs (a) and (b) of this section.

The content of this requirement is perhaps not that exacting in practice, and its precise meaning has yet to be elucidated by a court. That being said, it does provide a mechanism by which an aggrieved party member can challenge in court any decision by the party to refuse to endorse him or her as a candidate, or the placement he or she is given on the party list.⁶²

C Just whom do MPs represent?

The point of the above analysis is this: the introduction of MMP made the direct vote for a political party as an institution the most important mechanism for determining the overall make-up of Parliament; and the formal regulatory oversight applied to the political parties has been strengthened in light of their new role. A driving force behind the adoption of this new method of selecting representatives was the desire to more closely align the voters' preferences with the actual allocation of seats in Parliament. In turn, this realignment was expected to restore the voters' faith that their views were being fully represented in Parliament – the evidence for which we

⁵⁷ *Electoral Act 1993* (NZ), s 214B. See generally Andrew Geddis, 'Regulating the funding of election campaigns in New Zealand: A critical overview' (2004) 10 *Otago Law Review* (forthcoming).

⁵⁸ *Ibid* s 214C.

⁵⁹ *Electoral Commission v Tate* [1999] 3 NZLR 174.

⁶⁰ *Electoral Act 1993* (NZ) s 127.

⁶¹ *Ibid* s 146B–146L.

⁶² While such challenges have been threatened on a number of occasions, none have yet reached the courts. However, a number of such cases have taken place in Australia: *Baldwin v Everingham* [1993] 1 Qd R 10; *Clarke v Australian Labor Party* (1999) 74 SASR 109.

consider in the last part of this article⁶³ – and to increase the overall diversity of representation in Parliament – an outcome which MMP has somewhat accomplished.⁶⁴ However, MMP also altered the basic assumption underlying representation from that of the individual being (in the final analysis) responsible to their constituencies, to the MPs as servants of their political party. This shift in representative ideals post-MMP has been underscored by a couple of further changes.

The first is largely symbolic: due to changes to Parliament's Standing Orders, votes in the House of Representatives are now taken on a party basis, rather than via individual MPs trooping into the lobbies of Parliament.⁶⁵ An individual MP may still abstain or vote against his or her party – although some risk is incurred by this choice, as shall be explained in the next paragraph. However, if an MP does *not* wish to deviate from the party line, the actual power to cast his or her vote as a representative wholly lies in the hands of their party leader. The practical effect of this was seen during the present parliamentary term when an Association of Consumers and Taxpayers (ACT) Party MP – Donna Awatere Huata – was suspended from her party caucus, which thereafter refused to include that MP's vote in the party's total tally.⁶⁶

The second change has had more far-reaching consequences. Following a bout of 'party hopping' that began in the 1993–6 parliamentary term as political actors prepared for the introduction of MMP, and which continued through the first MMP parliament with a further nine MPs leaving their parties in mid-term, Parliament passed the *Electoral (Integrity) Amendment Act 2001* (NZ).⁶⁷ This legislation sought to prevent such mid-term switches of allegiance, on the grounds that they upset the proportionality of representation that MMP was intended to deliver, and contributed to voter distrust of the political process as a whole. It worked by declaring an individual MP's seat to be 'vacant' – in effect sacking the representative from Parliament – should he or she resign from their political party; or should the party leader 'reasonably believe' he or she has acted in a way which 'has distorted, and is likely to continue to distort, the proportionality of political party representation in

⁶³ Jeffrey Karp and Susan Banducci, 'Issues and Party Competition Under Alternative Electoral Systems' (2002) 8 *Party Politics* 123, 141.

⁶⁴ Not only has there been an increase in the number of political parties represented in Parliament, but the diversity of individuals sitting as MPs has also increased under MMP. There are proportionately more women and Maori MPs sitting in Parliament than was the case with FPTP, and MMP has seen the election of the country's first Asian, Muslim, and transsexual MPs. See generally Jeffrey Karp, 'Members of Parliament and Representation', in Vowles et al (eds), above n 23, 130–145.

⁶⁵ Standing Orders of the House of Representatives 1999, S.O. 145.

⁶⁶ Mrs Awatere-Huata was a list MP, meaning that the effect of the move simply was to reduce ACT's overall vote in the House from 9 to 8. A second MP – Maurice Williamson – also was suspended for a period from the National Party's caucus. However, the Party continued to cast his vote in Parliament during his suspension, and he was restored to full party membership in December 2003.

⁶⁷ For an account of the background to this legislation, as well as its unintended consequences, see Andrew Geddis, 'Gang Aft A'gley: New Zealand's Attempt to Combat 'Party Hopping' by Elected Representatives', (2002) 1 *Election Law Journal* 557.

Parliament as determined at the last general election.⁶⁸ The practical consequence of this legislation is to force a dissenting MP to toe the party line, on pain of being ousted from Parliament should he or she consistently vote against the party's position.⁶⁹ While this legislation is set to expire on the date of New Zealand's next general election (expected in 2005), its implementation is indicative of the shift in perception of representatives under MMP from being first and foremost beholden to their individual constituencies, to now being representatives of the party whose label they bore at the previous election.

What remains uncertain at present is the extent to which the new recognition that has been given to the representational role of the political parties under MMP will change the treatment given to those entities by the courts. As Graeme Orr has remarked in the Australian context,⁷⁰ the statutory requirement for parties to register, along with the benefits provided by such registration, has proved to be a first step in the increased 'juridification' of the internal affairs of political parties. Certainly, the registration requirements, disclosure provisions, and other regulatory measures contained in the *Electoral Act 1993* (NZ) seem to render obsolete Fisher J's observation that New Zealand's political parties 'have no statutory or public duties.'⁷¹ The further question must therefore be the extent to which the role now given to the parties under MMP will attract public law duties in relation to elected representatives bearing some party's label, prospective candidates seeking the right to wear that label, and ordinary members of a party. Developments in this area have been slow to emerge, but given the issues at stake – as well as the law's abhorrence of a vacuum – they can be expected.

IV PARLIAMENT AND GOVERNMENT UNDER MMP

This Part considers the effect that MMP has had on New Zealand government, and in particular, the shifting balances of power between the different actors in the constitution: political parties; Parliament; the executive; and the Governor-General.

A The balance of power under MMP

While much was unknown and unpredictable about the change to MMP, one major adjustment for New Zealand's systems of party government could be foreshadowed with reasonable certainty. Duverger's law on the relationship between electoral systems and parties states that plurality systems tend to result in a two party system

⁶⁸ *Electoral (Integrity) Amendment Act 2001* (NZ), s 5 (inserting a new ss 55C–55D into the *Electoral Act 1993* (NZ)). A party leader also must gain the approval of two-thirds of the party caucus before using this power to oust an MP.

⁶⁹ The Court of Appeal recently has given the party hopping provisions a minimalist reading, as only applying to a change in the relativity of voting strength between a party and others represented in the House (*Awatere Huata v Prebble* [2004] NZLR 359, [98]). For comment on this case, see Andrew Geddis, 'Privilege, Parliament and the Courts' [2004] *New Zealand Law Journal* 302.

⁷⁰ Graeme Orr, 'Of Electoral Jurisdiction, Senate Ballot Papers and Fraudulent Party Registrations: New Developments in Electoral Case Law' (1999) 2 *Constitutional Law and Policy Review* 32; Graeme Orr, 'Overseeing the Gatekeepers: Should the Preselection of Political Candidates be Regulated?' (2001) 12 *Public Law Review* 89, 92–93; Orr, above n 50.

⁷¹ *Peters v Collinge* [1993] 2 NZLR 554..

(as with New Zealand's Labour/National duopoly from 1936–93), while proportional representation systems lead to multi-party systems.⁷² Thus, from an early stage, MMP was predicted – with both delight and dismay – to bring an increase in parties represented in the House of Representatives, along with the demise of single-party majoritarian government.

The Royal Commission reflected this orthodoxy when it opined that the introduction of MMP 'would be likely to increase the representation of minor parties in the House, and thus decrease the chances of [one] party gaining an absolute majority of seats.'⁷³ However, the Commission did not undertake any detailed examination of the possible range of government configuration, other than to note that coalition or minority government was not an *automatic* consequence of MMP. Ireland (employing STV), it pointed out, had seen single-party minority governments, minority coalitions, and majority coalitions. Therefore, it counselled against necessarily expecting change, stating that New Zealand's indigenous political traditions and history of single-party government may well not lead to coalition government.⁷⁴

The Commission's discussion, of course, took place many years before MMP was adopted. Once MMP had become a certainty, deliberation about government composition began to crystallise. In September 1995, the New Zealand Political Change Project (comprised of senior academic political scientists) undertook a survey of 'opinion leaders' to uncover their views on the impact of MMP on likely government formations.⁷⁵ For the 1996 election, only 16 percent thought that single-party majority government would eventuate. A further 27 percent thought that some kind of minority government would result, while most, 56 percent, considered that majority coalition government was the most likely outcome. In the long term, 76 percent of opinion leaders thought that the electorate's cultural preference for majority governments meant such coalitions would become the new norm. Interestingly, these views went against both international experience and academic writings, which indicate that Westminster systems accustomed to single-party majority government such as New Zealand settle into a pattern of minority government when changing to a proportionality based electoral system.⁷⁶

Given that majority coalition government was widely expected by the political elite (and presumably preferred by voters) as a short and long term consequence of MMP, what constitutional and political factors might be thought to affect the behaviour of parties in forming governments?

The New Zealand constitutional framework for forming a government under MMP (or indeed previously) can be characterised by its extreme simplicity. The *Electoral Act 1993* (NZ) provides no guidance: rather, the matter primarily is governed by

⁷² Duverger, above n 20, 239.

⁷³ RCES, above n 7, 57.

⁷⁴ Ibid.

⁷⁵ Opinion leaders were defined as, inter alia, political party executives, chief executives of public service ministries and departments, trade union leaders, education leaders, heads of interest groups, and MPs: see Boston et al, above n 3, 28.

⁷⁶ Kare Strøm, *Minority Government and Majority Rule* (1990) 90, states, 'countries most influenced by the Westminster model of democracy seem inclined to turn to minority governments rather than majority coalitions when their two-party systems fragment.'

constitutional convention.⁷⁷ The minimum qualification is that a government must command a simple, not an absolute or qualified, majority in Parliament on any vote of confidence and supply. Moreover, there are no restrictions on the size, composition or structure of the Cabinet (which remains a creature of convention rather than statute); no internal party rules limiting the range of parties with which coalitions can be negotiated; and no formal extra-constitutional or extra-parliamentary constraints on coalition formation (such as a requirement to include Maori representatives or have a gender-balanced composition).⁷⁸

Presiding over this constitutional landscape is the figure of the Governor-General. As in most Westminster systems that are constitutional monarchies, as the sovereign's representative, the Governor-General plays a largely symbolic role in government formation and the conduct of government. The potential exception lies with the reserve powers, those powers which represent the last vestige of the Crown's original power to govern, and which may, in certain circumstances, be exercised without executive advice.⁷⁹

Under FPTP, the Governor-General's exercise of the reserve power to appoint a Prime Minister (and thereby determine the government) was unproblematic. Convention dictated that the Governor-General would appoint the leader of the party securing a majority of seats in the House on the basis that he or she would be able to hold the confidence of the House. With only two parties usually represented in Parliament, it was generally clear which one was in the majority.⁸⁰

The introduction of MMP, with its capacity for delivering multi-party Parliaments, had the potential to disturb this established pattern. Where it was not clear which party or parties had a majority of seats, or the ability to secure the confidence of the House, the Governor-General would have the power to exercise independent judgement. This possibility caused quite some media speculation and academic comment prior to the first MMP election.⁸¹ Governors-General themselves are acutely

⁷⁷ The *Constitution Act 1986* (NZ), s 6 does contain some guidance on who is eligible to become a Minister of the Crown; however, the appointment of individual Ministers is still the preserve of the Governor-General upon the advice of the Prime Minister. See Philip Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed, 2001) 279–81.

⁷⁸ Jonathan Boston and Elizabeth McLeay, 'Forming the first MMP Government: Theory, Practice and Prospects' in Jonathan Boston et al (eds), *From Campaign to Coalition: New Zealand's First General Election under Proportional Representation* (1997) 207, 208–9.

⁷⁹ Those circumstances are the absence of 'responsible advisers' who hold the confidence of the House. In New Zealand, those responsible advisers comprise the Executive Council, the body which has formal legal executive authority. Where it is not clear which party will have the confidence of the House and be able to form the Government, the mandate of the Executive Council to tender advice to the Governor-General comes into question.

⁸⁰ The exception was the 1993 election, which appeared on election night to deliver a hung Parliament. This did not eventuate since one seat changed hands on special votes and the Speaker was appointed from the Labour party, thus securing the National party a two-seat majority.

⁸¹ Boston, above n 3, 105–10; Mai Chen, 'Remedying New Zealand's Constitution in Crisis: Is MMP Part of the Answer?' [1993] *New Zealand Law Journal* 22; Caroline Morris, 'The Governor-General, the Reserve Powers, Parliament and MMP: A New Era' (1995) *Victoria University of Wellington Law Review* 345; Andrew Stockley, 'The Governor-General and MMP' [1996] *New Zealand Law Journal* 213.

aware of the increased power MMP may place in their hands, as their public comments have made clear.⁸²

MMP thus had the potential to change the balance of power in New Zealand's constitutional arrangements, taking it out of the hands of parties, and delivering it to the Queen's unelected and unaccountable representative.⁸³ However, as shall shortly be considered, it seems that despite the predictions of greater gubernatorial influence that preceded MMP (and which return at every election), the pre-MMP status quo has remained. Successive Governors-General have kept their distance from the processes of government formation, thereby affirming the intensely political nature of making and unmaking governments.

Given the lack of constitutional constraints coupled with gubernatorial restraint, political parties have almost complete freedom to coalesce (or not) as they wish, once the electoral verdict is delivered. This freedom threw up a particularly startling result after the 1996 election. After almost two months of highly secretive multi-level negotiations which involved the two major parties simultaneously vying for the favours of the third-placed populist NZ First party, the incumbent National party went into coalition with NZ First, forming a majority coalition government.⁸⁴

This combination had not even been considered a remote possibility by the NZ Political Change Project (which listed six possible government configurations).⁸⁵ It was widely seen as contrary to political promises and electoral expectations (the leader of NZ First having campaigned on the basis that a vote for NZ First was the only way to remove National from power).⁸⁶ Therefore, it was not surprising that this marriage of unlikely political bedfellows proved unsustainable. The coalition (and the NZ First party) imploded mid-term. National remained in government by leading a minority administration reliant on varying degrees of support from some former members of NZ First, and the ACT and United parties.

During that term, it was thought that there might be further potential for the Governor-General to get involved in the political process, either via the change of Prime Minister in December 1997, or the later coalition breakdown. Central to the Governor-General's actions was the issue of the confidence of the House. At various times during these events, the Governor-General relied on public statements from various political leaders indicating whether the change of leadership or government would affect their confidence votes. So long as confidence was assured, the Governor-

⁸² Dame Catherine Tizard, 'Crown and Anchor: The Present Role of the Governor-General in New Zealand' (Speech delivered at the Founders Lecture for the Friends of the Turnbull Library, Wellington, 26 June 1993); Sir Michael Hardie Boys, 'Governing under MMP: The Constitutional and Policy Challenges' (Speech delivered at the Institute of Policy Studies, Wellington, 3 December 1998); Dame Silvia Cartwright, 'The Role of the Governor-General', New Zealand Centre for Public Law, Occasional Paper No 6 (8 October 2001).

⁸³ The reserve powers of appointment are not justiciable: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 418.

⁸⁴ For a detailed examination of the coalition negotiations, see Boston and McLeay, above n 78, 207-46.

⁸⁵ Boston et al, above n 3, 103.

⁸⁶ Boston and McLeay, above n 78, 218.

General allowed the political events to take their course without constitutional intervention.⁸⁷

This non-interventionist pattern was reproduced at the 1999 and 2002 elections. Indeed, gubernatorial activism seemed even less likely on those occasions, since the party (and thus the parliamentary) alliances were well-signalled during the election campaign, and did not take long to be formalised once the votes were in. In 1999 the Labour party formed a minority coalition with the Alliance (itself an umbrella party for four others)⁸⁸ as its junior partner. The Green party agreed to support the coalition on matters of confidence.

Coalition negotiations were low-key and concluded swiftly. This may have been out of a desire not to repeat the unpopular and unfamiliar drawn-out negotiations which followed the previous election,⁸⁹ but is also likely to have been given a head start by the large degree of pre-election cooperation between Labour and the Alliance.

Expectations of coalition discipline have evolved and become more sophisticated as parties become more used to the messy realities of governing together. At a page-and-a-half, and largely devoid of policy matters, the Labour-Alliance coalition agreement was minimalist in comparison to the National-NZ First opus. Coalition unity was at first looser but better preserved than previously, with an explicit 'agree to disagree' clause in the coalition agreement.⁹⁰

By contrast, the coalition agreement between National and NZ First was an extensive document which sought to tie down the parties to a wide range of policy positions and outcomes.⁹¹ It may have been that either of the coalition partners, accustomed to majority government, were in the early stages of adjustment, unwilling to trade the comfort of the known for a more flexible arrangement that might have left them reliant on shifting parliamentary alliances and vulnerable to a vote of confidence. Indeed, for the duration of that coalition, party discipline was very tight.⁹²

Despite the difference in formal expectations of unity in relation to the Labour-Alliance coalition, government stability again proved difficult to maintain. In early 2002, the Alliance party broke apart on the issue of whether New Zealand should send

⁸⁷ Hardie Boys, above n 82.

⁸⁸ These were NewLabour, Mana Motuhake o Aotearoa, the New Zealand Democrats and the Liberals. The Greens had initially formed part of the Alliance, but contested the 1999 election under their own banner.

⁸⁹ Of course, such lengthy government formation periods are quite common in Europe: Boston, above n 2, 25.

⁹⁰ Labour-Alliance Coalition Agreement (1999) 1.

⁹¹ For a summary of the policy positions in the agreement, see Fiona Barker, 'Negotiating with New Zealand First: A Study of its Coalition Agreements with National and with Labour', in Jonathan Boston et al, above n 78, 254.

⁹² Barker and McLeay, above n 1, 142, observing that '[t]he governing style was that of a majoritarian administration: there was minimal consultation with the opposition parties [and] initially there was a high degree of continuity in the political culture.'

troops to Afghanistan.⁹³ In the end, the Prime Minister declared the confidence situation unsupportable and called an early election.⁹⁴

In 2002, Labour again became the senior partner in a minority coalition, this time with the tiny Progressive Coalition (formed from former members of the Alliance). Coalition negotiations again were quickly concluded, and an agreement similar to the Labour-Alliance agreement signed within a few days of the election. This outcome had been widely signalled during the election campaign. It was thought that the government-in-waiting might rely on support from the Green party.⁹⁵ However, election night revealed a sudden rise in fortunes of the centre-right United Future (previously United) party, moving them from one MP to eight, while a rebounding of support levels for NZ First saw them become the third largest party in the House with thirteen MPs.

This change in electoral fortunes meant that Labour and the Progressive Coalition had a wider range of potential supporters. They entered into a formal confidence and supply agreement with the United Future party, but have at times relied on Green support where their proposed legislation proved too left-wing for United and/or NZ First.

Interestingly, this reliance on multiple parties from different parts of the political spectrum to pass legislation seems to be proving more acceptable to the electorate than during the latter part of the 1996–99 term. It may be that the New Zealand electorate is becoming more comfortable with (coalition) minority government and in less need of a FPTP-style guarantee that the government will always get its legislation through without the need to consult other parties.

New Zealand has now experienced three elections under MMP. The first resulted in a majority coalition government which fragmented into a minority-supported government, the next two, minority coalitions. The form of government has clearly changed, as expected. After an early and perhaps anomalous hiccup, New Zealand government formation seems to be falling into the patterns predicted for it, not by its own political actors, but by those outside New Zealand's political and constitutional confines.

Within Parliament, the face of legislative power has also experienced a transformation. Due to the increased number of parties in the House, parliamentary select committees are no longer automatically headed by a member of the government or have a government majority. This has resulted in Parliament being able to affect the content of legislation at the select committee stage much more than previously. At

⁹³ They kept up a fiction of togetherness in the House to avoid triggering the 'party-hopping' legislation, but effectively fell into two camps for all other purposes. See Geddis, above n 67.

⁹⁴ *PM Announces Election Date* (Press Release, 11 June 2002). This ground for calling an early election has been questioned, since the Alliance had no incentive to face an early election, and was prepared to maintain the farce of togetherness to secure its parliamentary funding until an election was required. The Prime Minister was largely seen to be wishing to capitalise on the Labour party's relative strength in the polls.

⁹⁵ This support, however, was conditional on the Government extending the moratorium on the release of genetically-modified organisms. The moratorium expired on 30 November 2003. It has been speculated that this uncompromising approach led voters to seek alternative supporters for a Labour-led government.

times, explicit trade-offs have been made where changes to bills acceptable to a certain segment of voters are made conditional on the promise of a particular party's support in the House.⁹⁶ It has been noted that this aspect of MMP at first attracted some criticism from the public; with Sir John Wallace (who chaired the Royal Commission on the Electoral System) commenting that '[the voters] simply do not like the negotiatory aspects of coalition or minority government. ... They prefer the more straight-forward or predictable attitude of one side versus the other'.⁹⁷ This unease seems to have lessened with time.

The transition from governing alone to sharing power has proved difficult at times for the two major parties, which previously could rely on three years of unimpeded rule; similarly, minor parties in coalition, previously consigned to opposition or excluded from the House altogether, have found it hard to be part of the government yet maintain a separate identity. Opposition parties have been able to influence the content of legislation more so than under FPTP, and even where not formally part of government, have been included in the legislative programme.

Predictions that MMP governments would prove less effective than FPTP ones have not come to pass. In fact, as Sir John Wallace noted of all three MMP governments: 'government has been remarkably effective in the sense of achieving the passage into legislation of election policies and promises'.⁹⁸ He remarked that several government initiatives, particularly those from the National-led government, could quite correctly be characterised as 'controversial'.

In conclusion, governments have taken a different form under MMP than many in New Zealand expected. However, the efficacy of government has not lessened, while at the same time, legislative power has been shared amongst more parties than previously, making for a more participatory and powerful Parliament.

B Cabinet collective responsibility

Once formed, how has MMP affected the formal internal conduct of government? Constraints on government are few in New Zealand, with discipline being imposed by way of the conventions of collective Cabinet responsibility, individual and vicarious ministerial responsibility, caucus and party sentiment, and the electoral sanction.

The impact of MMP on the rules relating to the management of government has perhaps been most obvious in relation to the convention of Cabinet collective responsibility.⁹⁹ This is an essential part of successful Westminster government. Cabinet, bound to unanimity over its decisions, is thereby able to present a united face to Parliament and thereby seek or maintain the confidence of the House.¹⁰⁰ A Cabinet divided has lost its authority and is vulnerable to being replaced with an alternative administration. The enforcement of collective responsibility also enables the smooth

⁹⁶ Wallace, above n 18, 730.

⁹⁷ Ibid.

⁹⁸ Ibid 729.

⁹⁹ See also New Zealand State Services Commission, *Negotiations Between Political Parties to Form a Government: Guidelines on Support From the State Sector* (2002) for comment on the impact of MMP and coalition government on the conventions relating to caretaker government.

¹⁰⁰ Michael Laver and Kenneth Shepsle, *Cabinet Ministers and Parliamentary Government* (1994) 297.

running of government.¹⁰¹ Ministers unable to support publicly Cabinet decisions are required to resign.

Under FPTP Cabinet collective responsibility was relatively straightforward. Ministers had on occasion, resigned or been dismissed from Cabinet for being unable to support government decisions.¹⁰² The introduction of MMP was seen as bringing increased pressure to bear on this constitutional convention, due to the incentives, particularly for smaller parties, to differentiate themselves from their senior coalition partner, take credit for policy incentives they have pushed for, and disassociate themselves from decisions likely to be unpopular with their constituency.

In 1996 the *Cabinet Office Manual* was extensively revised in preparation for the first MMP government. However, no changes were made to the orthodox understandings of Cabinet collective responsibility.¹⁰³

The National–NZ First coalition agreement did not deviate from this position, stating: '[t]he established conventions of collective responsibility and confidentiality are accepted. ... It is agreed that every endeavour shall be made for decision making in Cabinet to be on a consensual basis.'¹⁰⁴ As noted, the National–NZ First government had largely agreed its policy positions in advance and imposed a high degree of discipline on its MPs. It may be therefore, that this approach sought to avoid the need to consider the implications for collective responsibility. However, this over-planning may have contributed to the downfall of the National–NZ First government. When the coalition partners unexpectedly found themselves unable to agree, the constraints of collective responsibility meant that the coalition simply fell apart.

The Labour–Alliance coalition agreement took a different approach. It recognised that, despite the parties having reasonably similar policy stances, on occasions they may find themselves in disagreement. Accordingly, the Labour–Alliance agreement had this to say about Cabinet collective responsibility:

Where either party leader considers that a distinctive policy matter raises a matter of importance to the party's political identity, the leader will raise this with the coalition management committee which will resolve an appropriate course of action, including possibly identifying the matter as one of 'party distinction'. In this event there may be public differentiation between the parties in speech and vote which will not be regarded as being in breach of the convention.¹⁰⁵

The *Cabinet Manual* was revised to reflect this changed understanding. The governing principle of collective responsibility was affirmed, but changes were made to recognise the introduction of 'agree to disagree' clauses in coalition agreements. However, such clauses were the only exception to the convention recognised. The Labour–Progressives coalition agreement negotiated in 2002 contains an identical clause, although it is yet to be invoked.

¹⁰¹ Simon James, *British Cabinet Government* (2nd ed, 1999) 6–7.

¹⁰² For example, Minister Derek Quigley resigned in 1982 when he publicly criticised the government's 'Think Big' policies. The Prime Minister gave him the option of apologising to his Cabinet colleagues or resigning. Although see Philip Joseph, 'The Honourable DF Quigley's Resignation: Strictly Political – Not Constitutional' (1982) 1 *Canterbury Law Review* 428, questioning the relevance of the convention.

¹⁰³ Cabinet Office, *Cabinet Office Manual* (1996) 36, [3.4]–[3.5]

¹⁰⁴ National–NZ First coalition agreement, section 7.6.

¹⁰⁵ Labour–Alliance coalition agreement, 1.

Such 'agree to disagree' clauses are not new. They have occurred a number of times in UK history and are commonplace in Europe.¹⁰⁶ Their adoption by New Zealand's political parties to better reflect the complexities of governing under proportional representation should not come as a surprise.

Thus it may be concluded that internal government management has become more sophisticated under MMP. Collective Cabinet responsibility in New Zealand has evolved in response to the different pressures and requirements of coalition government, recognising the reality of different party stances and the need to acknowledge these to preserve government stability.

V MMP AND THE PEOPLE

As noted, it has been said that the drive to adopt MMP was sourced in considerable disillusionment with New Zealand's political institutions and electoral processes.¹⁰⁷ This Part considers the impact of MMP and companion initiatives in addressing these voter concerns.

A Direct democracy in the MMP era

In the same year as New Zealand's electoral future was being decided, the *Citizens Initiated Referenda Act 1993* (NZ) ('CIR Act') was enacted. The CIR Act provides for the holding of non-binding referendums, initiated by voters, and funded by the government.¹⁰⁸ There are almost no restrictions on subject matter (save for election results).¹⁰⁹

Some commentators have said that this measure was in part designed to appease voters' frustrations with FPTP governments' seeming unresponsiveness to the electorate once elected.¹¹⁰ An underlying objective may have been to minimise the attractiveness of MMP in the forthcoming referendum. The official word from the government was that the CIR Act was enacted to enhance New Zealanders' opportunities to engage in the democratic process.¹¹¹ Accordingly, it was supposed to be seen as a complementary rather than competing measure to MMP.

The early years of the Act saw proposed petition questions flooding in. However, in ten years, only three referendums have been held under the CIR Act's provisions.¹¹²

¹⁰⁶ Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th ed, 1998) 198. See also Jonathan Boston, 'Forming the Coalition Between Labour and the Alliance', in Boston et al, above n 4, 239, 258.

¹⁰⁷ See Bale and Roberts, above n 18.

¹⁰⁸ Under the Act, voters submit potential referendum questions to the Clerk of the House. Upon his approval of the question, they have 12 months to garner the signatures of ten percent of all registered electors supporting the holding of a referendum on that question. If these are collected, then the referendum will proceed.

¹⁰⁹ *Citizens Initiated Referenda Act 1993* (NZ), s 4.

¹¹⁰ Mark Gobbi, *The Quest for Legitimacy: A Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California and New Zealand* (LLM Thesis, Victoria University of Wellington, 1994) 225-8.

¹¹¹ New Zealand, *New Zealand Parliamentary Debates*, House of Representatives, 10 March 1992, vol 522, 6713 (Christine Fletcher MP).

¹¹² In 1995, a referendum was held on the appropriate number of firefighters to be employed. In 1999, two questions were asked in conjunction with the general election, one asking

Several reasons have been posited for this phenomenon. It seems unlikely that voters are so satisfied with MMP as a means of expressing their opinion to politicians that they no longer wish to speak with a direct voice. Rather, the Act contains several internal constraints that inhibit its attractiveness to potential users.¹¹³ However, most likely the greatest obstacle to public confidence in (and thus use of) the CIR Act is its non-binding character. On the three occasions that referendums have been held, the verdict has been overwhelming (over 80 percent in each case). Yet in two cases, the government declined to act on the result,¹¹⁴ and in the third, the response has been lukewarm.¹¹⁵

The CIR Act fulfils the warning of the Royal Commission on the Electoral System. While it acknowledged the benefits of referendums in legitimising democratic government, extending popular participation, and providing a restraint on government, the Commission cautioned against the use of referendums to solve complex policy issues and concluded that '[i]n general, initiatives and referenda are blunt and crude devices which need to be used with care and circumspection.'¹¹⁶

The CIR Act has proved itself to be such a 'blunt and crude' measure, engendering considerable citizen dissatisfaction with it.¹¹⁷ It has not contributed to higher feelings of civic engagement or trust in government,¹¹⁸ and has possibly increased voter cynicism in government responsiveness.

However, it is unlikely that MMP will be able to salve the wounds of increasing civic alienation. This is a problem widespread in western democracies, and transcends cultures, political party configurations, political histories, and electoral systems.¹¹⁹

B Participation and engagement

In the political science literature, voter turnout at elections has been taken as a form of shorthand for electorate confidence in the system and its institutions.¹²⁰ A high level of

whether the number of MPs should be reduced to 99, the other asking wide-ranging questions covering several aspects of criminal justice reform. It is interesting to note that use of the CIR Act by way of petition questions submitted was at its peak from 1993–94. The number of questions submitted has declined since, to the point where only two or three are submitted in each year (and in some years, none).

113 Some are sourced in the unrestricted, open-ended nature of the Act, which allows multi-faceted, unclear, and ambiguously worded questions to be approved. This in turn makes it difficult for voters to understand what the petition question might actually mean, and for the government, it becomes hard to respond when it cannot clearly interpret the public's verdict on the question. For further detail, see Caroline Morris, 'Improving Our Democracy or a Fraud on the Community? A Closer Look at New Zealand's *Citizens Initiated Referenda Act 1993*' (2004) 25 *Statute Law Review* 116.

114 These were the firefighters question, and the MPs question.

115 The government has instituted some reforms in the criminal justice area, mostly to do with sentencing, but has not implemented the specific reforms required by the referendum question.

116 RCES, above n 7, 175.

117 Witness the many petition questions proposing that referendums held under the Act be binding instead of indicative.

118 Thomas Cronin, *Direct Democracy* (1989) 228, posits that this may result from the adoption of direct democracy measures.

119 Norris, above n 19.

turnout confers a certain level of legitimacy on the government and evens out political influence across the electorate.

Voting is not compulsory in New Zealand. Registration is, but is not strictly enforced.¹²¹ Nevertheless, New Zealand has historically enjoyed high levels of turnout (speaking both comparatively and absolutely).¹²² The Royal Commission was hopeful that MMP might arrest and reverse the decline in turnout New Zealand was experiencing during the 1980s,¹²³ and which continued during the 1990s.

At first, their hopes seemed to have been realised. Turnout was 88.3% of registered voters at the 1996 election, probably reflecting the high level of interest in the new electoral system and increased feelings of political efficacy rather than a resurgence of confidence in parties or MPs.¹²⁴ However, this was not sustained in 1999¹²⁵ or 2002. Turnout at those elections fell to 83.1 percent and 77 percent, respectively. Turnout in the Maori electorates in 2002 fell to between 54 and 60 percent.¹²⁶ This steady decline in turnout goes against collective wisdom, which posits that a change to proportional representation usually boosts turnout by five to ten percent.¹²⁷

This has caused some concern amongst MPs, with Parliament's Justice and Electoral select committee turning its mind to this problem in its recent reports. The theme underpinning the Committee's discussions is that the decline in turnout is sourced in various barriers to voting, rather than a verdict on the electoral system. Accordingly, the Committee has recommended a number of initiatives to reduce barriers to voting. These include a consideration of various forms of electronic voting (phone voting, use of the internet), an increase in publicity campaigns, and accommodations to encourage Maori to vote. Whether any of these initiatives are implemented or have the desired effect remains to be seen.

In addition to declining participation, voters have continued to send mixed messages about their support for MMP in recent years. The MMP Review Committee, a parliamentary select committee established in 2000 to consider various aspects of MMP, undertook a survey to establish voter attitudes to MMP. That survey revealed that voters were able to make fairly sophisticated assessments of MMP: they appreciated its ability to increase the diversity of representatives in the House, but were less appreciative of its impact on government stability. MMP was rated a success for its impact on increasing consensus and consultation in politics;¹²⁸ it was branded unsuccessful in making 'MPs listen to voters more, making it harder for parties to

¹²⁰ Like all general rules, there are some notable exceptions: Switzerland and the US both have low rates of turnout, but are stable democracies.

¹²¹ *Electoral Act 1993* (NZ) s 82.

¹²² RCES, above n 7, 15.

¹²³ *Ibid*, 55.

¹²⁴ Jeffrey Karp and Susan Banducci, 'The Impact of Proportional Representation on Turnout: Evidence from New Zealand' (1999) 34 *Australian Journal of Political Science* 363, 367-8.

¹²⁵ This decline, stemming from voters' unease with the extended coalition negotiations in 1996 and the unexpected party alliances that resulted, were predicted by Karp and Banducci, *ibid* 375.

¹²⁶ Electoral Commission, *Report on the General Election 2002* (2002), Appendices to the House of Representatives, E.9, Part IX.

¹²⁷ Arend Lijphart, 'Turnout' in Richard Rose (ed), *International Encyclopedia of Elections* (2000) 314, 319.

¹²⁸ But see the comments of Wallace, above n 18.

break their election promises, providing stable government, fostering a sense of national unity or ensuring sound economic policies'.¹²⁹ A majority of submitters to the MMP Review Committee wanted to retain MMP by a ratio of 2:1.¹³⁰ The survey of the public revealed that 47 percent of voters wished to revert to FPTP; over 40 percent would retain MMP, although that percentage would increase to 47 if MMP were modified.¹³¹

These final figures reflect the public's somewhat unsettled attitude towards the MMP voting system in practice. It is clear that many voters at the 1993 referendum had unrealistic expectations of the potential impact of MMP on MPs' behaviour, thinking that MMP would result in a consensual political utopia and grand all-party coalition government.¹³² As noted earlier, nothing of the sort eventuated, leaving some who had voted for MMP disappointed.¹³³ Bolstering the thesis that support levels for MMP are directly related to voters' views on the behaviour of MPs and parties, support for MMP fell to less than 50 percent after the National–NZ First coalition was established,¹³⁴ and a number of calls for the reinstatement of FPTP were made. MMP's stock with the public reached its low point of 35 percent in July 1998¹³⁵ – the period just before the National–NZ First coalition broke down – and remained feeble going into the 1999 election, as voters were wary of being hoodwinked by parties saying one thing and doing another.

In addition, the overwhelming Citizens Initiated Referenda vote in favour of reducing the number of MPs from 120 to 99 that year was also widely interpreted as a condemnation of MPs' behaviour rather than a verdict on MMP *per se*. For many voters, the early experience of MMP was that far from improving the behaviour of MPs, as the public had wished,¹³⁶ or the behaviour of parties, as the Royal Commission had hoped, the new voting system appeared to create new incentives for poor political behaviour.¹³⁷ In a multi-party system, there is a greater need to differentiate one's party from the others and raise its profile, but there has not been a corresponding increase in the number of opportunities and outlets to do so. Therefore, party politics may well have become more adversarial under MMP rather than less. This goes against a major pre-MMP electorate expectation that MMP would somehow lead to a consensual grand coalition, devoid of partisan adversarialism. More experienced MPs (who remain the majority of members), already adept at the political

129 MMP Review Committee, *Inquiry into the Review of MMP* (2001), Appendices to the House of Representatives, I.23A, 83.

130 *Ibid* 7.

131 *Ibid* 81–80.

132 *Ibid* 81.

133 As Vowles notes, there is 'little evidence that MMP has so far facilitated a less polarised and adversarial parliamentary culture': Jack Vowles, 'Evaluating Electoral System Change: the Case of New Zealand' (Paper presented at the XVIII World Congress of the International Political Science Association, Quebec City, August 1–5 2000) 15.

134 *Ibid* 9.

135 *Ibid*.

136 In 1993, a nation-wide opinion poll conducted by Insight Research revealed that 80 percent of New Zealanders thought that MMP would create more consensus in government decision-making, and 52 percent thought that MPs' behaviour would improve under MMP: see Graeme Hunt, *Why MMP Must Go* (1998) 79.

137 Bale and Roberts, above n 18.

game, may have adapted better to the multi-party environment than MPs from parties previously denied representation. Reinforcing this, the MMP Review Committee undertook its own research on the question, and concluded that the worst-behaved MPs¹³⁸ were the more established MPs, elected under FPTP.¹³⁹

However, since the initial unexpected outcomes at the 1996–99 term, support for MMP has gradually risen. After the 2002 election, support for MMP rose to 54.2 percent over FPTP's 30.3 percent, but turnout in that contest had again declined.¹⁴⁰ If, as the MMP Review Committee noted, 'judgements on MMP are inextricably linked with the level of general satisfaction with politics and politicians'¹⁴¹ then the anticipated ability of MMP to encourage New Zealanders to engage with the political system may well have been overstated.

VI CONCLUSION

Our intention here has been neither to praise nor bury MMP, but rather to reflect upon the impact that the new voting system has had upon different aspects of New Zealand's public and political life, as well as to trace some of the responses of New Zealand's legal ordering to these new developments. In this final section, we try and draw some of these diverse individual insights together into a couple of broader, more generalised lessons that may be taken from New Zealand's experience with electoral reform.

The first lesson is the danger involved in over-emphasising the likely benefits that will be gained by altering the electoral process. This risk stems from the process required to achieve change in this field. In order to overcome institutional inertia with respect to electoral reform – incumbent political actors who have achieved success under the existing rules will have a vested interest in retaining them – often it will be politically necessary to present a vision of 'better things' to which the voting public can aspire. However, raising expectations about the consequence of some particular amendment to the way in which a society's electoral politics are regulated can breed disillusionment if the promised outcome does not appear.

A constant theme in New Zealand's experiments in electoral reform has been the role of the people as participators in government. MMP was expected to bring about a change in political responsiveness. However, politics remains an adversarial enterprise: the bounds of inter-party co-operation at the government and parliamentary level are carefully delimited, and arguably, governments still feel able to engage in electorally-unpopular activities just as they did under FPTP. Citizen participation in elections was also expected to rise on the back of a swell of feelings of voter efficacy. Yet voter turnout continues to decline under MMP, thus perhaps pointing to a greater malaise that MMP alone cannot cure. Other mechanisms for granting the people some voice in government, such as the CIR Act, have also failed to deliver on expectations.

Arguably, many of those who advocated switching to MMP fell into the trap of over-expectation in the lead-up to the 1993 referendum. Changing the voting system

¹³⁸ Measured by requests to withdraw and apologise and/or evictions from the Chamber.

¹³⁹ MMP Review Committee, above n 130, 35.

¹⁴⁰ 'MMP gaining support', *New Zealand Herald* (Auckland, New Zealand), 5 August 2002.

¹⁴¹ MMP Review Committee, above n 130, 9.

was predicted to be a panacea for a host of political ills, ranging from inequalities in the spread of representation, through to society's general lack of trust in politicians. In particular, when describing the likely effect of MMP upon the behaviour of individual political actors, proponents of reform seemed to forget James Madison's timeless insight: 'If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.'¹⁴² Consequently, when perceived self-serving political behaviour reasserted itself during the first MMP parliament of 1996–99, a large segment of the public felt misled. This belief may then have exacerbated the widespread distrust of political actors and institutions that MMP was supposed to cure.

Following on from this first insight, a second lesson might be grandly termed 'issue displacement and the ubiquity of the regulatory instinct'; or, less extravagantly, 'unintended consequences and the perceived need for ongoing reform'. This insight is by no means unique to the field of electoral management: it arises any time that attempts are made to apply legal controls to a particular area of social life. Simply put, the adoption of some reform measure will often fail to resolve the problem that sparked the change, but rather transmute it into a new form or pattern. The failure to finally lay the issue to rest can then lead to further reform measures being put in place, which in turn may only displace the original problem to a new site. Therefore, electoral reform may be best viewed less as an exercise in resolving problems once and for all, and more as a way of trying to give them a less objectionable appearance.

In the New Zealand context, this lesson is illustrated by the way in which regulatory attention has come to be directed towards the political parties following the introduction of MMP. On the one hand, the change to a system of proportional representation based upon the Party Vote was intended to more closely align the distribution of parliamentary representation to the expressed preferences of the voting public. However, in doing so the voting system now acknowledges that seats in Parliament are the 'property' of the political parties *qua* parties. Consequently, the problem of representation re-emerged in two different forms following the adoption of MMP. First of all, the issue of 'party hopping' MPs – representatives who abandon the party under whose banner they were elected in order to sit in Parliament under a different guise – rose to the fore. And secondly, through questions about the internal democracy of the parties as institutions, and the ability of the party leadership to control the selection of candidates.

The advent of these concerns has resulted in the expansion of legal regulation of the behaviour of individual MPs,¹⁴³ as well as the internal workings of the political parties.¹⁴⁴ However, these regulatory moves simply raise further questions with regards to the issue of 'representation'. Does giving the leadership of a political party (with caucus approval) the power to expel rebel MPs from Parliament diminish the freedom of conscience of the individual representative to such an extent that they effectively can no longer oppose the leadership in the name of those who voted for the

¹⁴² James Madison, 'The Federalist No 51' in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (first published 1788, 1961 ed) 320, 322.

¹⁴³ *Electoral (Integrity) Amendment Act* (2001) (NZ).

¹⁴⁴ *Electoral Act 1993* (NZ), s 71.

party?¹⁴⁵ Will the increasing 'juridification' of internal party issues move political disputes into a forum in which only certain party members – those with the resources to fund court action – can participate? These remain live issues in the New Zealand context, and as such, the 'problem' of representation under MMP remains one which is unresolved.

It would be a mistake to assume from the forgoing that we advocate some sort of Popperian conclusion that all reform should take the form of 'piecemeal social engineering',¹⁴⁶ or even a position that all electoral reform is ultimately futile. For what it is worth, both authors support the wholesale adoption of MMP in place of the previous FPTP system, and have argued elsewhere in favour of particular electoral reform proposals.¹⁴⁷ However, we would argue for a certain modesty of ambition when approaching the issue. Inevitably, there will be limits to what can be achieved by using legal means to change a society's electoral processes, given that such moves are a process based response to what are often substantive problems. Simply put, some issues – declining turnout rates at elections, for instance, or the capacity of representatives to deliver on election promises – have their roots in fields which the law can touch but obliquely. What we would argue is that it is better to recognise these limits in advance, and candidly acknowledge their existence, than to see all questions of electoral change as amenable to an immediate legal response.

¹⁴⁵ The majority of the Court of Appeal in *Awatere Huata v Prebble* [2004] NZLR 359, was anxious to prevent such an outcome from occurring. As Hammond J wrote (at [153]):
reasoned dissent and balanced debate must be the very essence of a healthy democratic society. Rigid adherence to the party line might have held some attraction at other times, under the pre-MMP system of governance. But today (whether as an interpretative guide or norm, or as a matter of legal policy) if weight is to be given to one side or another, both for intrinsic and instrumental reasons, the sturdy independence of Parliamentarians in New Zealand should be preferred. In any event, the independence of Parliamentarians should not be displaced save on the unequivocal utterances of Parliament itself.

¹⁴⁶ Karl Popper, *The Poverty of Historicism* (2nd ed, 1961).

¹⁴⁷ See Geddis, above nn 56, 57; Morris, above n 113.