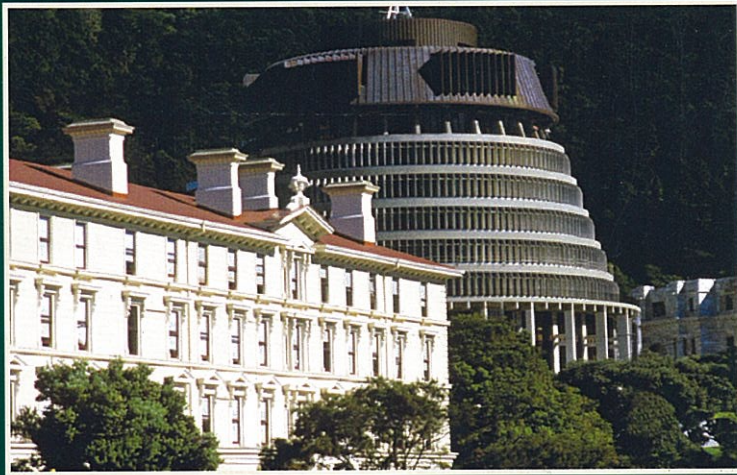


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SPECIAL CONFERENCE ISSUE: MMP AND THE CONSTITUTION

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Jonathan Boston and David Bullock

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UNIVERSITY OF WELLINGTON

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



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EXPERIMENTS IN EXECUTIVE GOVERNMENT UNDER MMP IN NEW ZEALAND: CONTRASTING APPROACHES TO MULTI-PARTY GOVERNANCE

*Jonathan Boston and David Bullock**

As expected, the advent of proportional representation in New Zealand has witnessed the formation of a series of multi-party governments. Thus far, most of these have lacked an absolute parliamentary majority. Distinctive, if not unorthodox, inter-party arrangements have been a feature of some of these governments. Such arrangements have resulted from the desire to manage inter-party dissent and, in particular, to maximise governmental effectiveness while at the same time protecting the identity and distinctiveness of the parties involved (and hence their electoral viability). We refer to this as the "unity–distinctiveness" dilemma. This article explores the contrasting approaches to multi-party governance adopted since the mid-1990s in New Zealand. In so doing, we consider the options available regarding the form and "tightness" of inter-party discipline and their respective strengths and weaknesses. Particular attention is given to the development of "agree to disagree" provisions in coalition agreements and the "hybrid" arrangements negotiated in both 2005 and 2008 enabling minor parties to participate in the executive while not being a part of the Cabinet. We argue that while these arrangements may have facilitated more durable and less fractious government, they do not appear to have assisted the various minor parties that have participated within the executive to maintain their electoral base.

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Necessarily such arrangements have required modifications to the application of the convention of collective responsibility, especially the principle of Cabinet unanimity or solidarity. These modifications appear to have been reasonably well accepted across the political spectrum – highlighted by the decision of the National-led Government in November 2008 to embrace similar governance arrangements to those adopted by the previous Labour-led Government.

I INTRODUCTION

The electoral referendum on proportional representation in 1993 and the subsequent advent of a mixed member proportional (MMP) system in 1996 marked a radical shift for New Zealand politics and sparked a steep learning curve in the political management of governments. A constitutional framework and political culture geared towards single-party majority government was forced to adapt to an electoral system that tends to promote multi-party government. As is evident from New Zealand's experience since the mid-1990s, multi-party government can take a variety of forms, including majority coalitions, minority single-party governments supported by one or more non-government parties and minority coalitions supported by one or more non-government parties. Indeed, a multiplicity of inter-party governing arrangements – perhaps better referred to as "governance" arrangements – have emerged over the past decade, in some cases involving significant departures from previously accepted political norms and practices. These new arrangements have not only altered the processes of executive and legislative policy-making but have also required modifications to the conventions of ministerial responsibility, most notably the doctrine of collective responsibility.

Two particular experiments in multi-party governance under MMP are worthy of note. The first has been the development, within a coalition context, of so called "agree to disagree" (or "party distinction") provisions. The first of these, between the Labour and Alliance Parties in 1999, provided for the two parties, under certain circumstances, to agree to take different policy positions in public and in Parliament, including on legislative matters. Similar provisions to those negotiated in 1999 characterised the relationship between Labour and its respective minor coalition partners throughout its period in office (1999-2008). Secondly, in 2005, Labour constructed a novel multi-party governance arrangement consisting of three separate kinds of agreements: a "coalition" agreement with the Progressive Party; separate "confidence and supply" agreements with New Zealand First and United Future; and a "cooperation" agreement with the Green Party. More remarkable than the number of agreements, however, were their content and implications. Under the two confidence and supply agreements, the leaders of New Zealand First and United Future received ministerial offices (foreign affairs and revenue respectively), yet they were not formally part of the coalition government or represented within the Cabinet. Likewise, under the cooperation agreement, several Green Party members of Parliament (MPs) became government "spokespersons" on particular policy issues and were granted direct access to, and the support of, departmental officials.

Bale and Bergman have described such a situation as a "grey area between opposition and office – in governance but not in government".¹ This "grey area" seems destined to be well occupied: following the general election in November 2008, the National Party negotiated confidence and supply agreements with three parties – ACT, United Future and the Māori Party. In each case these parties enjoy representation within the executive but outside the Cabinet.

By almost any standards, such arrangements are unorthodox. Not merely are they unprecedented in New Zealand's political history, but they also appear to have few direct parallels in other multi-party democracies. Admittedly, the Swedish experiments with what has been termed "contract parliamentarism" earlier this decade bear a modest resemblance to some of the arrangements in New Zealand since 2005, but in no case did members of non-government parties hold ministerial office or speak for the government.²

The logic for these new multi-party governance arrangements has been fundamentally political. In the absence of any single party having a parliamentary majority, one or other of the two major parties must seek support from enough minor parties to secure an overall majority on motions of confidence and supply. In most multi-party democracies, this typically results in the formation of majority coalition governments comprising two or more parties. But minority governments (whether formal coalitions or single-party in nature) are also relatively common. The formation of minority rather than majority governments can occur for a number of reasons. On the one hand, the major party best able to form a government may prefer (for a variety of reasons) to govern alone, and may be in a strong enough position politically to get its way (for example because it enjoys the unequivocal support of a sufficiently large captive party). On the other hand, the minor party or parties that hold the balance of power may prefer not to participate in a formal coalition because of the risk that they will suffer electoral damage as a result. The concern, in other words, is that by joining a coalition a minor party will lose its distinctive identity, thereby undermining its electoral base. Against this, minority governments run the risk of being less effective than those with a clear majority as well as appearing less cohesive – which may, in turn, damage most or all the parties directly associated with such governments. In political terms, then, the crucial dilemma is how best to balance the desire for unity or cohesion (and hence effectiveness) with the equally important electoral imperative to maintain party distinctiveness or differentiation. In this article, we refer to this as the "unity–distinctiveness" dilemma. There is also the separate challenge of how to structure multi-party governance arrangements in a manner that keeps faith with established constitutional rules and conventions.

1 Tim Bale and Torbjörn Bergmann "A Taste of Honey is Worse than None at All? Coping with the Generic Challenges of Support Party Status in Sweden and New Zealand" (2006) 12 *Party Politics* 189.

2 The concept of "contract parliamentarism" was first used in Torbjörn Bergman and Nicholas Aylott "Parlamentarism per kontrakt? Blir den svenska innovationen långlivad?" in *Riksdagens årsbok 2002/03* (Stockholm, Riksdagen, 2003) 4.

With these dilemmas and considerations in mind, this article explores the impact of MMP on the political executive in New Zealand, giving particular attention to the nature, significance and implications of the new modes of multi-party governance that have emerged. First, we outline the composition and structure of the various governments that have taken office since the electoral referendum in 1993 and briefly discuss the impact of MMP on governmental durability and effectiveness. Secondly, we examine the theoretical and empirical literature on the unity–distinctiveness dilemma and how different multi-party governments (and governance arrangements) in various countries have managed the issue of inter-party dissent. This includes discussion of the factors that influence the form or degree of inter-party discipline. Thirdly, we explore the management of inter-party dissent within New Zealand since the advent of MMP, with particular reference to the "agree to disagree" provisions in coalition agreements and the "enhanced" confidence and supply agreements negotiated following the 2005 and 2008 general elections. This includes an examination of how the various provisions and agreements (especially since 2005) were implemented and an exploration of their constitutional implications. Finally, we consider some of the broad lessons and implications arising out of New Zealand's recent experiments with multi-party governance and speculate on the possible further evolution of current arrangements.

A note about terminology is necessary before proceeding. Multi-party governments are typically described in the relevant literature as "coalitions".³ To be sure, it is recognised that coalitions can vary significantly in their nature and durability. Thus, distinctions are made between "tight" and "loose" coalitions (as discussed below), "formal" and "less formal" coalitions and "inner" and "outer" coalitions. Additionally, a distinction is drawn in the literature between "executive" coalitions and "legislative" coalitions, with the former defined as situations where two or more parties hold ministerial offices within the government while the latter refers to arrangements whereby non-government parties agree to support the government on specific pieces of legislation or perhaps on all votes of confidence and supply.⁴ Nevertheless, while these different kinds of coalitions can be delineated, it is not clear whether the word "coalition" is appropriate to describe all types of multi-party government. For instance, the arrangements negotiated in 2005 in New Zealand included the representation of two "support" parties within the executive branch but outside the Cabinet. Interestingly, all the parties involved in these particular arrangements argued that they did not constitute a coalition.

In these circumstances, more exacting terminology may be required to enable appropriate distinctions between different kinds of multi-party government. First, one needs to be able to distinguish between different types of executive arrangements – for example those where two or

3 Wolfgang C Müller and Kaare Strøm (eds) *Coalition Governments in Western Europe* (Oxford University Press, New York, 2000).

4 Michael Laver and Norman Schofield *Multiparty Government: The Politics of Coalition in Europe* (1 ed, Oxford University Press, Oxford, 1999).

more parties hold Cabinet positions (that is, a formal Cabinet coalition); those where there are ministers from two or more parties within the executive but not all are represented in the Cabinet; and those where there is some form of executive participation (for example a spokesperson role) but this falls short of ministerial responsibilities. It is not clear how best to characterise the latter two categories since there is as yet no agreed terminology. Be that as it may, all three types of executive arrangements might usefully be referred to as multi-party governance. Similarly, this term also encapsulates a wide range of legislative coalitions including confidence and supply arrangements and cooperation agreements (however broad or narrow in nature). For the purposes of this article, therefore, we use the term multi-party governance to refer to all types of arrangements where two or more parties cooperate on a regular basis to enable the business of government to be transacted.⁵

II OVERVIEW OF DEVELOPMENTS IN EXECUTIVE GOVERNMENT

There is a small but growing literature on the impact of MMP on executive government in New Zealand.⁶ It is neither necessary nor possible here to explore the manifold ways in which proportional representation has altered the composition of governments, the operations of the executive branch, the relationship between the executive and legislative branches, the policy-making process and the application of various constitutional conventions. But a number of points deserve mention.

Thus far there have been five general elections in New Zealand under MMP – late 1996, late 1999, mid-2002, late 2005 and late 2008. As expected, the move to proportional representation has brought an end to the long era of single-party majority government. All the administrations since the first MMP election have involved at least two parties. Indeed, most governments have included, in one way or another, the participation of at least three parties – with five of the eight parliamentary parties involved in the government between 2005 and 2008 and four of the seven parliamentary parties involved since the 2008 general election.

5 We also use the term "inter-party governing arrangements" to describe the same phenomena.

6 See for example Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government Under MMP* (3 ed, Oxford University Press, Auckland, 1997); Rt Hon Sir Geoffrey Palmer "The Cabinet, the Prime Minister and the Constitution: The Constitutional Background to Cabinet" (2006) 4 NZJPIL 1 ["The Cabinet, the Prime Minister and the Constitution"]; Ryan Malone *Rebalancing the Constitution: The Challenge of Government Law-Making Under MMP* (Victoria University of Wellington, Institute of Policy Studies, Wellington, 2008); and Jonathan Boston "Innovative Political Management: Multi-party Governance in New Zealand" (2009) 5(2) Policy Quarterly 52.

Table 1 State of the parties after the 1996, 1999, 2002, 2005 and 2008 general elections

	1993	1996	1999	2002	2005	2008
ACT Party	--	8	9	9	2	5
National Party	50	44	39	27	48	58
United (1996, 1999)	--	1	1	8	3	1
United Future (2002, 2005)						
New Zealand First	2	17	5	13	7	--
Labour Party	45	37	49	52	50	43
Alliance	2	13	10	--	--	--
Progressive Coalition/Progressive	--	--	--	2	1	1
Green Party	--	--	7	9	6	9
Māori Party	--	--	--	--	4	5
Total number of seats	99	120	120	120	121**	122**
Centre-right majority, including New Zealand First (1996)	1	20				
Centre-left majority (1999, 2002)			12	6		
Centre-left majority (2005)*					1	
Centre-right majority, including ACT and United Future (2008)						6

Notes:

* It is assumed that the centre-left parties in 2005 comprise Labour, the Progressive Party, the Green Party and the Māori Party. Such an assumption is consistent with the economic dimension dataset of Franzmann and Kaiser.⁷

** The Māori Party won four electorate seats in 2005, one more than its entitlement based on its party vote, thereby causing an "overhang". As a result, the total number of MPs increased to 121.

*** The Māori Party won five electorate seats in 2008, two more than its entitlement based on its party vote, thereby causing an "overhang". As a result, the total number of MPs increased to 122.

A significant proportion of governments since 1996 have lacked an absolute legislative majority. This has contributed to a shift in the relative power of the legislature and the executive.⁸ Under minority government, for instance, the successful passage of government Bills is no longer guaranteed; their success depends on gathering support from parties outside of government. Ideologically, the majority of the governments since 1996 have had a centre-left orientation – this, of course, reflects the balance of forces within Parliament (see table 1).

It was predicted prior to the introduction of MMP that multi-party governments would be less durable, and thus less effective, than their single-party counterparts. Measuring governmental durability is, however, not as straightforward as it might seem. There are conflicting definitions, for instance, of what constitutes a "change in government". At least five criteria have been suggested: a change in the party composition of the Cabinet; a change in prime minister; a change in the government's parliamentary status between majority and minority; the formation of a new

7 Simon Franzmann and André Kaiser "Locating Political Parties in Policy Space: A Reanalysis of Party Manifesto Data" (2006) 12 Party Politics 163.

8 Malone, above n 6.

government after a general election (even if the same parties are involved as previously); and the reconstruction of the same government after its resignation during an inter-election period.⁹ Measurements of government durability depend on which of these criteria (or which combination) are used to determine when a change of government has occurred. Nevertheless, on most of these criteria, governmental durability in New Zealand has declined since the advent of MMP. Having said this, the significance of such a finding should not be exaggerated. Most of the changes of government have involved only minor adjustments in personnel and/or policy, serious internal conflict has been limited and major continuities have been in evidence. For instance, the same Prime Minister (Helen Clark) served for almost nine years; there have been only two changes in the overall ideological orientation of the government since 1990 (in 1999 and 2008); and many ministers have served in Cabinet for two or more parliamentary terms.¹⁰

Partly for such reasons, there has been little evidence of any major decline in the ability of governments to pass legislation and no evidence of a significant loss of governmental effectiveness.¹¹ Admittedly, minority governments have had to consult with other parties and amend their original proposals in order to secure parliamentary support. As a result, the legislative process has typically been slower than under first past the post (FPP).¹² Against this, governments have not lost their ability to respond to crises or to maintain fiscal discipline.¹³

In New Zealand, executive power is concentrated in a Cabinet that is founded, in general, upon convention, not law.¹⁴ With single-party majority government the norm under FPP, a single party could control both the executive and the legislature thereby giving the Cabinet very considerable influence. This power was fittingly described by former Prime Minister Sir Robert Muldoon, who noted:¹⁵

9 Jonathan Boston, Stephen Church and Tim Bale "The Impact of Proportional Representation on Government Effectiveness: The New Zealand Experience" (2003) 62 *Australian Journal of Public Administration* 7, 10.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*, 13 and Malone, above n 6.

13 Boston, Church and Bale "The Impact of Proportional Representation on Government Effectiveness: the New Zealand Experience", above n 9, 15.

14 Palmer "The Cabinet, the Prime Minister and the Constitution", above n 6, 2.

15 Sir Robert Muldoon (25 February 1980) *The Press* Christchurch, cited in Philip A Joseph *Constitutional and Administrative Law in New Zealand* (1 ed, The Law Book Company, Melbourne, 1993) 218.

[T]he New Zealand Cabinet can meet, resolve that a change in the law is necessary, have it drafted immediately – and usually it is a fairly simple matter – get the approval of the government members in caucus, take it to the House, and force it through in a single sitting.

This has changed significantly under MMP with the increased frequency of multi-party Cabinets and minority governments. As a result, government formation has become more complicated and on occasions quite protracted. Nevertheless, the advent of MMP has not fundamentally altered the nature of Cabinet government, the role and responsibilities of individual ministers, the role of party caucuses in the policy process or the conventions surrounding the operations of the public service. There is but one major exception. Without doubt, the convention of Cabinet collective responsibility has been affected by the introduction of MMP. The convention has three elements: confidence, unanimity and confidentiality.¹⁶ Confidence requires the government to maintain the confidence of the House of Representatives in order to remain in office. Governments that lose a vote of no confidence are obliged to resign (which may in turn prompt an early election depending on whether there is another party or parties that are in a position to form a new government that can command the confidence of Parliament). This aspect of the convention of collective responsibility has not been affected by MMP – except that it has become rather more politically salient than was hitherto the case. Much the same can be said in relation to the principle of confidentiality, which requires that Cabinet discussions be kept confidential.

Under the principle of unanimity, as traditionally understood, all those holding ministerial office are obliged to support every decision taken by the Cabinet, irrespective of their personal views or involvement in the relevant deliberations.¹⁷ Ministers wishing to dissociate themselves from a decision with which they disagree must first resign, as they are not permitted to enjoy ministerial office without also accepting the consequent obligations. Strictly speaking, therefore, the doctrine precludes individual ministers (or groups of ministers) from publicly dissenting from Cabinet decisions – unless there is a formal decision to permit disagreement. Furthermore, the doctrine provides the basis upon which the Cabinet can collectively override decisions by individual ministers in their particular portfolios (unless there are provisions giving ministers independent

16 Matthew SR Palmer "Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?" (Institute for International Research Conference, "Analysing and Understanding Crucial Developments in Public Law", Wellington, 4 April 2001).

17 Michael Laver and Kenneth A Shepsle "Cabinet Government in Theoretical Perspective" in Michael Laver and Kenneth A Shepsle (eds) *Cabinet Ministers and Parliamentary Government* (Cambridge University Press, Cambridge, 1994) 298; Elizabeth McLeay *The Cabinet and Political Power in New Zealand* (Oxford University Press, Auckland, 1995) 198-203; Palmer and Palmer, above n 6; and Cabinet Office *Cabinet Manual 1996* (Wellington, 1996) para 3.5.

decision-making rights).¹⁸ Hence, in the event that a minister disagrees with a Cabinet decision, his or her officials are constitutionally obliged to follow the directives of the Cabinet.

In practice, the principle of unanimity is applied in parliamentary democracies with varying degrees of strictness.¹⁹ This reflects significant differences in political culture, party cohesion, the degree of ministerial autonomy, the political strength and preferences of the prime minister and the composition of the government (single-party or multi-party). Within western European democracies, the requirement for unanimity is taken more seriously in Austria, Denmark, Ireland, Germany and Norway than, for example, in Belgium, Finland (especially prior to the 1970s), Italy and the Netherlands.²⁰ The doctrine of collective responsibility is weakest in France, largely because of its hybrid presidential/parliamentary model.²¹

The principle of Cabinet unanimity is justified on three separate but related grounds: ethical, political and constitutional. Ethically, it can be argued that those who enjoy the benefits of office ought to accept its concomitant obligations. The system of Cabinet government involves individual ministers acting together via collective processes. This entails collaborative decision-making, negotiation and compromise. Public dissent from collectively agreed decisions by individual ministers undermines this collaborative process and the reciprocity on which it is founded.

Politically, public disagreement between ministers is likely to undermine public confidence in and support for the government. This is because it portrays an image of a fragmented and indecisive ministry. The political rationale for unanimity is encapsulated in the oft-cited quotation by Benjamin Franklin: "we must, indeed, all hang together, or most assuredly we shall all hang separately".

The constitutional basis for the principle of unanimity is the notion that Parliament and the public can only hold the government properly accountable for its actions and performance in a context of Cabinet solidarity. Some commentators, such as Philip Joseph, have argued that it is a misnomer to deem the unanimity aspect of collective responsibility a "constitutional convention".²² Joseph views unanimity as merely a "rule of pragmatic politics", lacking a sufficient constitutional

18 Matthew SR Palmer "Toward an Economics of Comparative Political Organization: Examining Ministerial Responsibility" (1995) 11 *Journal of Law, Economics and Organization* 164, 173.

19 Jean Blondel and Ferdinand Müller-Rommel (eds) *Cabinets in Western Europe* (MacMillan, Basingstoke, 1988) and Jean Blondel and Ferdinand Müller-Rommel (eds) *Governing Together: The Extent and Limits of Joint Decision-Making in Western European Cabinets* (Palgrave MacMillan, Basingstoke, 1993).

20 See Müller; Damgaard; Mitchell; Saalfeld; Narud and Strøm; De Winter, Timmermans and Dumont; Nousiainen; Verzichelli and Cotta; and Timmermans and Andeweg in Müller and Strøm, above n 3.

21 Jean-Louis Thiébaud "France: Forming and Maintaining Government Coalitions in the Fifth Republic" in Müller and Strøm, above n 3, 498, 512-514.

22 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3 ed, Brookers, Wellington, 2007) 230.

nature to be deemed a constitutional convention.²³ Unlike a convention, he argues, governments may waive, suspend or abandon political practices and rules, as has happened with the unanimity aspect of collective responsibility under MMP.²⁴ Against this, the importance of collective responsibility, including Cabinet unanimity, as an institutional rule should not be underestimated.²⁵ The unanimity principle serves a vital role in ensuring that the executive has the capacity both to govern and to maintain the confidence of the House. It also enables Parliament and the public to hold the Cabinet accountable for its actions and performance and lends credibility to the process of Cabinet government. Equally importantly, it provides the basis upon which the Governor-General can act on ministerial advice. To quote the Cabinet Manual:²⁶

The principle of collective responsibility underpins the system of Cabinet government. It reflects democratic principle: the House expresses its confidence in the collective whole of government, rather than in individual Ministers. Similarly, the Governor-General, in acting on ministerial advice, needs to be confident that individual Ministers represent official government policy. In all areas of their work, therefore, Ministers represent and implement government policy.

For such reasons, the convention of collective responsibility as expressed in the unanimity principle serves a clear constitutional purpose. A principle that "underpins the system of Cabinet government" can hardly be said to lack a constitutional nature. Moreover, the unanimity principle meets the three criteria for a constitutional convention as advanced by Sir Ivor Jennings:²⁷ there are well-established precedents; the actors consider themselves bound by these precedents; and there are clear constitutional imperatives for the rule.

Nevertheless, as highlighted later in this article, the principle of unanimity has been progressively modified and significantly weakened as a result of MMP, in order to accommodate the challenges of multi-party governance.²⁸ This has included explicit provision for parties represented in the Cabinet to disagree, on occasions, on important matters of public policy. It has also witnessed the construction of governing arrangements that do not require unanimity on the part of some of the parties represented within the executive, except in relation to specific portfolio areas. This form of

23 PA Joseph "Constitutional Law" [2006] NZ Law Rev 123, 126.

24 Joseph, above n 22.

25 Elizabeth McLeay "Buckle, Board, Team or Network? Understanding Cabinet" (2006) 4 NZJPIL 37, 45.

26 Cabinet Office *Cabinet Manual 2008* (Wellington, 2008) para 5.22.

27 See the description of these criteria in Joseph, above n 22, 220.

28 See Jonathan Boston "An Unusual Government: Coalition Politics and Inter-Party Arrangements Following the 2005 General Election" in Stephen Levine and Nigel S Roberts (eds) *The Baubles of Office: The New Zealand General Election of 2005* (Victoria University Press, Wellington, 2007); Jonathan Boston and Andrew Ladley "Efficient Secrets: The Craft of Coalition Management" (2006) 4 NZJPIL 55; and Nicola White "Deconstructing Cabinet Collective Responsibility" [2005] Policy Quarterly 4.

"selective collective responsibility", as Sir Geoffrey Palmer has called it, is unusual by international standards and certainly unprecedented in modern New Zealand politics.²⁹ Such arrangements, as previously noted, reflect the need for minor parties to have "political breathing space" if a multi-party government is to survive.³⁰ How these new arrangements have worked in practice will be discussed shortly.

III CONTRASTING APPROACHES TO THE MANAGEMENT OF MULTI-PARTY GOVERNANCE

A The Unity–Distinctiveness Dilemma

There is a substantial scholarly literature, both empirical and theoretical, on the formation, composition, structure and termination of multi-party governments. Thus far, however, the nature, forms and internal dynamics of multi-party governance, and in particular the varying levels of inter-party discipline and cohesiveness exhibited under different multi-party governance arrangements, have received much more limited attention.³¹ Yet the issue of inter-party discipline, within both the parliamentary and extra-parliamentary arenas, goes to the heart of the fundamental tension evident in all multi-party arrangements, namely the tension between effective government and party distinctiveness – or what we have termed the unity–distinctiveness dilemma.

In electoral terms, ineffectual, bickering multi-party governments are likely to shed votes, but so too are parties within or supporting those governments that, by losing their public profile and distinctiveness, are unable to demonstrate how they "add value" to an administration. Equally, where parties abandon previous policy commitments in the interests of governmental unity, they risk undermining their credibility in the eyes of voters. In general, a small party (or parties) within a multi-party governing arrangement is most at risk of losing its identity and credibility since the larger party (or parties) will typically dominate the policy-making process and hold most of the influential and high profile Cabinet positions, including that of prime minister. Be that as it may, the critical point is that if a multi-party governance arrangement is too tightly disciplined, it risks shedding parties that perceive the need to exit in order to preserve their electoral support. Yet if it is too ill-disciplined, it risks a loss of effectiveness and overall popularity – with potentially damaging consequences for each of the parties represented within (or actively supporting) the government. The dilemma, therefore, is how to strike a politically acceptable balance between public unity and public discord.

29 Palmer "The Cabinet, the Prime Minister and the Constitution", above n 6.

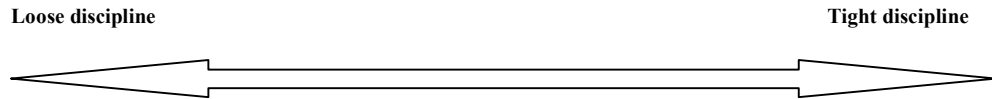
30 Rt Hon Winston Peters "The Next Step in the Evolution of New Zealand's System" [2006] *The Parliamentarian* 11, 13.

31 Wolfgang C Müller and Kaare Strøm "Coalition Governance in Western Europe: An Introduction" in Müller and Strøm, above n 3, 1.

B The Nature and Degree of Inter-Party Discipline

At a simple level, the degree of inter-party discipline or cohesiveness of a coalition (or indeed a wider governing arrangement) can be viewed as a continuum, which ranges from being very "tight" or unified at one end of the spectrum to very "loose" at the other (see figure 1).³² But in order to place different multi-party governance arrangements along such a continuum it is necessary to develop appropriate and meaningful criteria. In this regard, a number of distinctions and categorisations have been suggested.

Figure 1 Discipline in coalitions and other inter-party governing arrangements

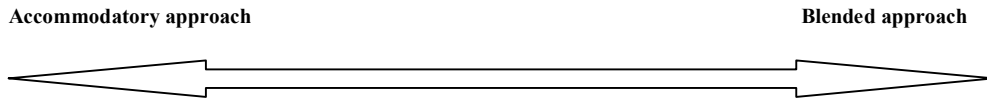


1 The Seyd approach

Seyd, for instance, distinguishes between two models or ideal types of coalition governance, each of which is associated with different levels of discipline (see figure 2).³³ Under the first model, which he calls "blended" coalition government, the governing parties behave more or less as a single entity or unitary actor. Strict legislative discipline is enforced, either with respect to all legislative matters or all such matters unless explicitly exempted (for example in a coalition agreement). Any exemptions are likely to be very limited in their number and scope. The second model, by contrast, involves an "accommodatory" approach under which the parties within a coalition are permitted to act more independently, at least in certain circumstances. In keeping with the accommodatory model there is only partial legislative discipline. That is to say, coalition discipline extends only to government Bills or perhaps only to those matters where agreement was reached at the time of the government's formation (or in subsequent negotiations).

32 Wolfgang C Müller and Kaare Strøm "Conclusion: Coalition Governance in Western Europe" in Müller and Strøm, above n 3, 559, 578.

33 Ben Seyd *Coalition Government in Britain: Lessons from Overseas* (The Constitution Unit, School of Public Policy, University College, London, 2002) 87.

Figure 2 Two types of coalition governance

While Seyd's approach has the virtue of simplicity, it is of limited value in distinguishing between, or explaining, quite varied coalition arrangements, let alone the distinctions between formal coalitions and other multi-party governance arrangements. For instance, both the blended and accommodatory models embrace a significant number of options with regard to the types and extent of legislative discipline. Equally, if the blended approach can embrace situations under which there are exemptions from strict discipline, while the accommodatory approach can embrace strict discipline on all government Bills, then the two models overlap and the distinction between them is ambiguous. Additionally, because the categories are so broad, there is little capacity to distinguish between different levels of discipline over time.

2 *The Müller and Strøm approach*

A more sophisticated framework for analysing coalition discipline has been advanced by Müller and Strøm.³⁴ This entails at least three steps:

- (a) distinguishing between four different arenas or domains within which coalition discipline is exercised (that is, election rules, law-making, other parliamentary behaviour and policy agreements);
- (b) delineating four categories of tightness in relation to law-making and other parliamentary behaviour:
 - category 1 – always disciplined;
 - category 2 – disciplined on all policies except those explicitly exempted;
 - category 3 – not disciplined, except on those policies explicitly specified;
 - category 4 – not disciplined at all;
- (c) distinguishing four categories of policy agreements: a comprehensive, commonly-agreed policy programme; a common policy programme with certain exceptions; a policy programme involving an agreement on only a limited number of issues; and no common policy agreement.

³⁴ Müller and Strøm, above n 31 and n 32.

On this basis, "tight" coalitions are those that are characterised by a high level of discipline in all four domains, while "loose" coalitions are those which exhibit little or no discipline in most, if not all, of the four domains.

In a detailed comparative analysis of 238 post-war coalitions in 13 western European states, Müller and Strøm and their colleagues found that the overwhelming majority fell into the first two categories, at least with respect to legislative behaviour.³⁵ For instance, there were 71 coalitions in category 1 and 145 in category 2, but only 18 coalitions in category 3 and 2 in category 4. By contrast, coalition discipline in "other parliamentary behaviour" (for example the questioning of ministers, investigative committees and appointments) was generally less tight, with 62 coalitions being located in category 1, 50 in category 2, 57 in category 3 and 69 in category 4. With respect to particular countries, the study found that coalitions in Austria, Denmark, Germany, Ireland and Norway were typically "tighter" (at least when judged on the basis of law-making and other parliamentary behaviour) than those in Belgium, Finland, France, Italy, Luxembourg, the Netherlands, Portugal and Sweden. Further, there is evidence that policy agreements have become more comprehensive in many countries over the past decade or two, thus increasing the tightness of coalitions.

As with Seyd's approach, however, Müller and Strøm's framework presents a number of difficulties. These are explored more fully elsewhere, but can be summarised as follows.³⁶ First, the authors of this comparative study rely heavily on coalition agreements to gauge the degree of coalition discipline in the countries analysed. But such agreements are often silent on the subject. Moreover, commitments specified in coalition agreements are not always implemented in practice and political understandings between party leaders are not necessarily adhered to, or at least may be interpreted differently by the leaders in question. Further, the tightness of the discipline within a coalition may vary over time.

Secondly, as is acknowledged in the study, in most parliamentary democracies category 4 (that is, the complete absence of legislative discipline, if not an explicit commitment to having no such discipline) is not politically viable.³⁷ Equally, referring to an inter-party arrangement that requires no joint action by the parties involved as a "coalition" stretches the meaning of the word beyond what is reasonable. How, then, might one distinguish between coalition partners and opposition parties?

35 Müller and Strøm "Conclusion: Coalition Governance in Western Europe" in Müller and Strøm, above n 3, 580.

36 See Michael Appleton and Jonathan Boston "Managing Inter-Party Dissent: Contrasting Approaches to Coalition Discipline" (unpublished paper, Victoria University of Wellington, 2003).

37 Müller and Strøm "Coalition Governance in Western Europe: An Introduction", in Müller and Strøm, above n 3, 16.

Thirdly, the analysis by Müller and Strøm does not distinguish adequately between government and non-government Bills, or between votes on the substantive contents of a Bill and votes on procedural matters. Arguably, there is a good case, when considering the tightness of a coalition, for giving greater weight to the level of discipline on government Bills than non-government Bills, and for attaching more significance to votes concerning substantive matters than votes dealing with procedural issues (although it is readily acknowledged that some procedural motions are of considerable political salience).

Fourthly, under Müller and Strøm's framework a key indicator of coalition discipline is the degree to which the relevant coalition agreement includes a comprehensive, commonly agreed policy programme. In other words, it is argued that a high degree of discipline is characterised by the negotiation of a comprehensive and detailed policy agreement, while a low level of discipline is characterised by the absence of any such agreements. But in practice the nature of any policy agreement at the outset of a coalition is only a very loose indicator of how much discipline a coalition is likely to exhibit.

Finally, Müller and Strøm apply their framework only to formal coalitions; they do not address the issue of distinguishing between different levels of discipline (or cohesion) in other types of multi-party governing arrangements, such as those witnessed in New Zealand in recent years. Yet, as suggested earlier, while the nature of coalition discipline is critically important, coalitions are only part of the contemporary fabric of multi-party governance.

3 *Overview*

Accordingly, any approach to analysing and categorising discipline in inter-party governing arrangements needs to take into account the following considerations.

First, it is desirable to be able to distinguish between the different types of multi-party governance in parliamentary democracies, including formal Cabinet coalitions, legislative coalitions and various hybrid arrangements.³⁸

Secondly, in evaluating the level of coalition discipline, a distinction must be made between public disagreements of an inter-party nature and those of an intra-party nature (the degree of party discipline). It is the former disagreements – that is, situations where the parties in office take different approaches on an important matter of public policy – that are of primary interest in assessing coalition discipline. Having said that, significant intra-party disagreements on policy matters are likely to have implications for the capacity of coalition partners to avoid inter-party strife.

38 See the discussion under Part III C below.

Thirdly, in determining the degree of discipline amongst coalition parties, it must be recognised that there is a hierarchy of political behaviours – some are clearly more pivotal or salient than others, and hence of greater importance in gauging the level of inter-party and intra-party cohesion. For example, the degree of unanimity displayed by coalition partners in votes on government Bills is typically more important than the degree of unanimity on non-government Bills and procedural motions. Likewise, inter-party agreement over critical policy matters that do not require legislation (for example major foreign policy matters) is usually of greater political significance than similar agreement over more minor issues. It is also important to distinguish between the extent of unanimity displayed by members of the executive and that exhibited by government MPs who are not part of the executive. Public disagreement amongst ministers on significant policy matters (whether of a legislative or non-legislative nature) is plainly more significant politically and a stronger indicator of the level of coalition discipline than disagreement amongst backbencher government MPs.

Fourthly, the degree of cohesion (or alternatively, dissent) displayed in relation to "other parliamentary behaviour" is clearly relevant to the task of assessing the level of coalition discipline. But so too is behaviour that extends beyond the parliamentary arena, such as public speeches by government MPs and cooperation during an election campaign. However, in order to analyse such matters in a rigorous fashion, it would be necessary to specify the full range of such behaviours and distinguish between those areas where coalition discipline is politically salient and those where it is not (or where a degree of independence is expected on the part of government MPs who are not part of the executive).

In summary, any assessment of coalition discipline should give primary weight to:

- (a) the actual, rather than expected, level of discipline;
- (b) the behaviour of members of the executive, rather than those outside the executive; and
- (c) the degree of inter-party unanimity exhibited in relation to government Bills and other major policy issues.

On this basis, a high level of coalition discipline ("tight" discipline) would be characterised by inter-party unanimity (and/or strong cooperation) in all of the relevant dimensions of political behaviour and especially those relating to government Bills and other important matters of public policy. At the other end of the spectrum, a low level of coalition discipline ("loose" discipline) would be characterised by relatively frequent public disagreements (for example with coalition parties taking different positions on important legislative and/or non-legislative issues) and much lower levels of inter-party cooperation in regard to electoral matters and other kinds of parliamentary behaviour.

The degree of discipline exhibited by inter-party governing arrangements that fall short of formal executive coalitions can also be analysed on a similar basis, although with the exception of

hybrid approaches the distinction between the behaviour of members of the executive and those outside the executive is not relevant.³⁹

C The Options for Structuring Multi-Party Governance and Managing Dissent

As will be evident from the preceding discussion, there are a variety of options available to a major party that lacks an overall parliamentary majority if it wishes to form a viable government. In broad terms these fall into two categories: the negotiation of a formal executive coalition with one or more minor party; and the negotiation of governing arrangements that fall short of a coalition. Under either approach there are a variety of sub-options, each with distinctive implications for inter-party discipline, cohesion and differentiation. Furthermore, each sub-option entails certain costs and benefits for the parties involved, and these are likely to vary depending on the wider political context. Combinations of options are also possible (for example a mix of coalition and non-coalition arrangements).

1 Formal executive coalitions

A formal executive coalition is characterised by two or more parties being represented in the Cabinet and the parties agreeing, at a minimum, to vote with each other on all parliamentary motions of confidence and all legislative votes that are regarded as confidence issues. Unanimity in this regard applies equally to members of the executive and other members of the relevant parliamentary parties. As will be evident from the preceding discussion, the degree of unanimity on non-confidence matters can vary from unanimity on all issues (especially by members of the executive) through to more flexible arrangements where the coalition parties agree in advance that different policy positions can be taken from time to time (without necessarily specifying what these might be). A commitment to unanimity on all issues will tend to strengthen the veto capacity of the smaller party (or parties) within a coalition, all the more so in situations where the major party has little prospect of securing the necessary parliamentary support from another party (or parties). It may also result in the failure by the government to address an issue of fundamental importance, with potentially damaging consequences.

Provision for disagreement within a coalition can take a number of forms, including the specification in advance that any such disagreement will be limited to a small number of issues of high political salience and more open-ended arrangements. The main advantage of such approaches is that they enable the relevant parties to keep faith on critical electoral commitments and maintain their distinctive positions on the policy dimensions in question. Limiting any areas of possible public disagreement in advance runs the risk of being unduly restrictive and constraining the options available in the face of unforeseen policy problems. More open-ended arrangements for inter-party

³⁹ See the discussion under Part III C 2 below.

dissent, by contrast, may be destabilising and reduce the capacity of a government to function effectively.

2 *Other governance arrangements*

As already noted, a range of other (that is, non-coalition) governance arrangements are also possible. These include:

- (a) Agreements (formal, written documents or more informal understandings) on confidence and supply with one or more parties that are not represented in the executive. In accordance with such agreements, a minority government, whether comprising a single party or a coalition, is assured of the necessary level of parliamentary support on motions of confidence and key budgetary matters. Support for other legislative proposals will typically be negotiated on a case by case basis. There is thus typically only limited formal legislative or other parliamentary discipline.
- (b) Agreements (formal, written documents or more informal understandings) that fall short of explicit commitments on confidence and supply but which entail cooperation between a minority government and one or more minor party on a range of matters.
- (c) Hybrid arrangements of various kinds that combine elements of coalition and non-coalition governance, or what some have termed "contract parliamentarism".⁴⁰ These include "enhanced" confidence and supply agreements of the kind negotiated in New Zealand in 2005 and 2008 (where representatives of minor parties serve within the executive but outside the government) and arrangements like those in Sweden earlier this decade where members of support parties located some of their staff in particular ministries such that they were almost part of the government.⁴¹ The requirements of pure contract parliamentarism have been described as:⁴²

[A] case in which (a) the Cabinet has an explicit written contract with one or more parties that remain outside the Cabinet. This contract (b) has to commit the partners beyond a specific legislative deal or temporary commitment. In addition, we stress that (c) the "contract" has to comprise a written agreement, however bare-bone, and that (d) this contract must be available

40 Bergman and Aylott "Parliamentarism per kontrakt? Blir den svenska innovationen långlivad?", above n 2.

41 Tim Bale and Torbjörn Bergman "Captives No Longer, but Servants Still? Contract Parliamentarism and the New Minority Governance in Sweden and New Zealand" (2006) 41 *Government and Opposition* 422.

42 Nicholas Aylott and Torbjörn Bergman "Almost in Government, But Not Quite: The Swedish Greens, Bargaining Constraints and the Rise of Contract Parliamentarism" (Paper presented in workshop 6 "New Parties in Government", European Consortium for Political Research joint sessions, Uppsala, April 2004) (accessible at www.ecprnet.eu).

to the public. In its fully developed form, (e) the opposition parties also appoint representatives to serve at high levels, but below Cabinet level, in the government administration.

Incidentally, the reference to "opposition" parties in (e) is questionable. Such parties are better regarded as "support" parties. Be that as it may, hybrid arrangements of this nature have thus far involved relatively loose inter-party discipline. Also, they may exist in conjunction with, or independent of, formal coalition deals with other parties.

3 *Factors influencing the choice of multi-party governance*

Many factors – constitutional, cultural, political and even psychological – appear to influence which of the above multi-party arrangements are chosen in any particular context. Such factors include:⁴³

- (a) the prevailing interpretation of the convention of Cabinet collective responsibility and especially the principle of Cabinet unanimity;
- (b) recent political history, including the experience of previous multi-party governance arrangements;
- (c) the composition of the Parliament, including the number (and relative size) of parties required to secure an overall majority and the tightness or otherwise of this majority;
- (d) the dimensionality of the party system;
- (e) the policy and ideological connectedness of the parties involved;
- (f) the internal cohesion of the relevant parties;
- (g) whether the minor parties involved are captive parties or positioned close to the middle of the dominant issue dimension;
- (h) the expected life span of the government, and the relative ease with which a component party (or parties) can switch political allegiances, thus bringing about a change of government;
- (i) the level of trust between the parties and especially the party leaders.

One of these variables – the dimensionality of the party system – deserves some clarification. Party systems can be classified as either uni-dimensional or multi-dimensional. Uni-dimensional systems are characterised by the existence of a single issue dimension (usually the left–right ideological dimension or what is sometimes called the socio-economic dimension) with the parties positioned at various points along the relevant continuum. In a multi-dimensional system there are two or more important issue dimensions. These might include divisions based on geographic, ethnic

43 See Müller and Strøm, above n 3 and Seyd, above n 33.

or religious cleavages or political divisions over key policy issues. Public disagreement between coalition partners is more likely to occur, and be tolerated, in a context of multi-dimensionality and in particular where two or more parties that are otherwise closely connected in ideological terms hold long established and strongly divergent views on one or more politically salient issue dimensions. In such situations, it may not be possible for a coalition to form unless the relevant parties are prepared to tolerate public disagreement on the issue(s) in question. Examples of this include the Swedish centre-right coalitions of the late 1970s and early 1980s where the relevant parties had contrasting positions on the then-crucial issue of nuclear power⁴⁴ and the centre-right coalition in Norway in the late 1980s where the parties were deeply divided over the issue of the country's membership of the European Union.⁴⁵

IV CONTRASTING APPROACHES TO MANAGING MULTI-PARTY GOVERNMENT: THE NEW ZEALAND EXPERIENCE

Although New Zealand's experience of multi-party governance is relatively recent, it has already witnessed a wide variety of approaches to inter-party discipline. Some of these, as indicated earlier, have been novel and thus worthy of close scrutiny. This part of the article comments briefly on the initial coalitions formed during the mid-1990s and then explores in more detail the various arrangements negotiated since 1999. The focus is on the issue of discipline within Cabinet coalitions and related multi-party arrangements rather than on other aspects of executive government. Note that any quantitative analysis of inter-party dissent is inherently difficult. First, there are only a limited number of relevant quantitative measures, such as parliamentary votes on legislation and such measures do not adequately capture the extent of inter-party disagreement. Secondly, the issue of dissent is inherently subjective; it is difficult to assess objectively what constitutes dissent and how serious it is. Finally, much of what would be considered dissent occurs, and is resolved, behind closed doors; it thus remains secret. This obviously poses serious measurement issues.

A Early Approaches to Coalition Discipline

The first fully-fledged coalition following the electoral referendum in 1993 was formed in February 1996 between National (the leading centre-right party) and United (a new centrist party) and lasted until the election at the end of that year. Under the terms of the agreement negotiated between the two parties, collective responsibility was to apply in the normal way – there was to be tight coalition discipline. Nevertheless, United was given the right to continue to support several

44 Torbjörn Bergman "Sweden: When Minority Cabinets are the Rule and Majority Coalitions the Exception" in Müller and Strøm, above n 3, 192, 222.

45 Hanne Marthe Narud and Kaare Strøm "Norway: A Fragile Coalitional Order" in Müller and Strøm, above n 3, 158.

specified legislative initiatives with which it had already been identified, even though National was opposed to them.⁴⁶

The subsequent National–New Zealand First coalition, which took office in December 1996, committed itself to an even tighter level of inter-party discipline. Not only did the lengthy coalition agreement demand unanimity on all government legislation but it also required the parties to oppose all opposition policies or legislative initiatives "unless or until the consent in writing has been obtained by both parties to the Coalition".⁴⁷ In the event, the attempt to achieve such tight discipline failed. For one thing, New Zealand First found it difficult to distinguish itself from its more experienced and dominant partner and quickly lost much of its electoral support. For another, the leader of New Zealand First, Winston Peters, was unable to impose a high level of discipline on his eclectic, unruly and inexperienced MPs. Within 18 months the coalition had collapsed and New Zealand First had suffered a damaging split. From the midst of this political turmoil a new National-led coalition emerged. However, unlike its predecessor no detailed coalition agreement was negotiated and a much looser regime of coalition discipline was tolerated. This was partly because the National Party was dependent for its slender majority on a diverse and ill-disciplined grouping of former New Zealand First MPs and partly because it had no desire to force an early election (given its low level of electoral support). During the tenure of this National-led administration there were many examples of public disagreements on policy matters, including explicit breaches of the principle of unanimity.⁴⁸ It is difficult to know to what extent these regular displays of disunity were politically damaging to the parties involved, but for all practical purposes there was little that then-Prime Minister, Jenny Shipley, could do about it.

B Agreeing to Disagree: The Party Distinction Provision

By 1999 the political community was well acquainted with the problems of both excessively tight and excessively loose coalition discipline. Following the election in late November 1999, there was a clear centre-left majority (see table 1). On the final count, Labour secured 49 seats, the Alliance 10 seats, and the left-leaning Green Party seven seats in the 120 seat Parliament. With the Green Party offering support on confidence and supply, a minority Labour–Alliance Government was formed in early December 1999. Interestingly, a protocol between the coalition government and the Greens was drafted but never signed.⁴⁹ Under this protocol, it was agreed that the Green Party

46 Jonathan Boston "Forming the Coalition Between Labour and the Alliance" in Jonathan Boston and others (eds) *Left Turn: The New Zealand General Election of 1999* (Victoria University Press, Wellington, 2000).

47 National and New Zealand First "The Coalition Agreement: National and New Zealand First" (10 December 1996) para 4.2 (accessible at www.executive.govt.nz/96-99/coalition/coalit.htm).

48 Marie Shroff "The Role of the Secretary of the Cabinet – The View from the Beehive" in *Occasional Papers – The New Zealand Centre for Public Law* (Wellington, 2001) 19.

49 Tim Bale and Christine Dann "Is the Grass Really Greener? The Rationale and Reality of Support Party Status: A New Zealand Case Study" (2002) 8 *Party Politics* 349, 354 ["Is the Grass Really Greener?"].

would be kept informed about policy proposals and given the opportunity to contribute to the budget and other policy processes in areas of particular interest (for example environmental policy matters).⁵⁰ While the Green Party offered to support the government on issues of confidence and supply, they did not agree to support all government Bills – this was a matter for negotiation on a case by case basis. In the event, the Green Party rarely voted against government legislation.⁵¹ This reflected the shared ideological positions of the relevant parties rather than some de facto inter-party discipline.⁵²

With respect to the issue of coalition discipline, the leadership of Labour and the Alliance had been exploring various options since at least 1996⁵³ and their efforts to find a mutually acceptable model intensified during the period leading up to the 1999 general election. A key aim was to ensure effective and cohesive government while at the same time enabling a certain degree of party differentiation, even on government Bills – albeit through a carefully planned and managed process. In this context, the three models employed since early 1996 by the various National-led governments were discarded as being either far too inflexible or far too loose and unpredictable. Also rejected, because of its rigidity, was the idea of a long, detailed, highly prescriptive coalition agreement. Instead, the coalition planners favoured a more open-ended opportunity for the two parties to disagree over policy matters. The net result of the inter-party deliberations was the crafting of an "agree to disagree" or "party distinction" provision, which was incorporated into the short coalition agreement signed on 7 December. The relevant provision stated that:⁵⁴

Where either party leader considers that a distinctive policy matter raises an issue 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 [of collective Cabinet responsibility]. Such issues are expected to be infrequent and the parties recognise that dealing with them openly and responsibly is critical to the credibility of the coalition. Differentiation on such issues will not detract from the overall acceptance that the two parties are taking joint responsibility for the actions of the government.

50 Jonathan Boston and Stephen Church "The Budget Process in New Zealand: Has Proportional Representation Made a Difference?" (2002) 54(2) *Political Science* 21.

51 Boston and Ladley "Efficient Secrets: The Craft of Coalition Management", above n 28, 85.

52 Bale and Dann "Is the Grass Really Greener?", above n 49, 356.

53 Graeme Speden "Deals Could Be Made to 'Agree to Disagree'" (25 September 1996) *The Dominion* Wellington 1.

54 Labour and the Alliance "The Coalition Agreement between the New Zealand Labour Party and the Alliance Party of New Zealand" (6 December 1999) para 5 (accessible at www.executive.govt.nz/coalition).

In accordance with this provision, therefore, one or other of the coalition parties would, at least in theory, be able to move amendments to a government Bill or to support a member's Bill that was opposed by its coalition partner. In such situations, with the government split, the fate of the relevant amendment or Bill would depend on the positions taken by the other parliamentary parties. The provision would also facilitate the possibility of the coalition partners taking a different stance on important issues of a non-legislative nature (for example foreign policy or defence policy). The basic goal, of course, was to manage tensions rather than letting them build up between the parties.

In an effort to allay concerns that the new mechanism might undermine the convention of collective Cabinet responsibility, the coalition agreement stated that any application of the party distinction provision would "not be regarded as being in breach of the convention" and that regardless of any public disagreements each coalition partner would be obliged to take "joint responsibility for the actions of the government". This understanding was subsequently enshrined in a revised version of the Cabinet Manual.⁵⁵ Under the heading "collective responsibility" several new paragraphs were added:⁵⁶

Coalition governments may decide to establish "agree to disagree" processes, which may allow Ministers to maintain, in public, different party positions on particular issues or policies. Once the final outcome of any "agree to disagree" issue or policy has been determined (either at the Cabinet level or through some other agreed process), Ministers must implement the resulting decision or legislation, regardless of their position throughout the decision making process. "Agree to disagree" processes may only be used in relation to different party positions within a coalition. Any public dissociation from Cabinet decisions by individual Ministers outside the agreed processes is unacceptable.

Subsequently, in a major public address, the Secretary of Cabinet took the view that the party distinction was consistent with New Zealand's constitutional conventions:⁵⁷

If Cabinet *agrees* to disagree, then the differentiation is arguably contained within the overall bounds of Cabinet collective responsibility, as the issues on which the parties may agree to disagree must themselves be collectively mandated.

From this perspective, while the party distinction provision entailed a modification in the application of the doctrine of collective responsibility, giving the convention greater flexibility, it did not necessarily weaken it. Indeed, the new provision represented a strengthening of the doctrine when compared to the National-led coalition from mid-1998 to late 1999, in the sense that it

55 Note that the Cabinet Manual 2001 removed the 1996 Cabinet Manual's reference to the need for ministers who breached unanimity to resign: Palmer "The Cabinet, the Prime Minister and the Constitution", above n 6.

56 Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) paras 3.23-3.24.

57 Shroff "The Role of the Secretary of the Cabinet – The View from the Beehive", above n 48, 20 (emphasis in the original).

supplied Cabinet legitimation for the dissent in question. Against this, however, the new provision represented a lower standard in relation to the principle of unanimity (compared with the pre-MMP practice in New Zealand) and provided the precedent for a further modification of the convention.

As indicated in the coalition agreement, it was expected that the party distinction provision would be applied sparingly, thus avoiding any threat to the credibility or viability of the government. The Alliance was mindful that on issues where the coalition partners parted company, only the Green Party was likely to lend it support. Accordingly, while invoking the party distinction provision might enable the Alliance to curry favour with its activists and supporters (and demonstrate that it was not abandoning its ideals), it was unlikely to gain the party any kudos in the wider political community. On the contrary, the Alliance ran the risk of highlighting its isolation and relative impotency. In short, given the composition of the Parliament and the position of the Alliance on the dominant socio-economic issue dimension, the party distinction provision was subject to powerful political constraints.

As matters transpired, the provision was invoked on only a handful of occasions during 1999-2002 and only one of the policy issues in question – the proposal for a free trade agreement between New Zealand and Singapore – was of major political significance. Indeed, apart from the trade issue, only two cases in which the coalition partners voted differently attracted attention – the Alliance's proposed amendment to the Responsible Gambling Bill and later in relation to the issue of the commercial release of genetically modified organisms.

The Alliance had made it clear early in the life of the new Government that it wanted to invoke the party distinction provision over the trade agreement with Singapore. While Labour would have preferred a joint approach, it accepted that the issue was of such importance to the Alliance (and especially to its core support base) that an agreement to disagree was virtually inevitable. Its willingness to countenance the use of the party distinction provision, however, was no doubt influenced by the fact that it could rely on the support of most of the other parliamentary parties, including National. Had Labour been faced with a parliamentary defeat on the free trade agreement, it would almost certainly have been less willing to accommodate the Alliance's concerns.

Politically, the invocation of the party distinction provision in this instance was relatively well-managed. The issues were fully discussed in the Cabinet and a joint strategy was agreed. Given that the proposed treaty was a matter of major foreign policy significance, the Government made every effort to appear calm, measured and in control, with the Alliance downplaying any reservations about the concept of free trade and emphasising instead that it was concerned about some of the technicalities in the particular agreement.⁵⁸ Further, the Government gave the impression that its divisions on the issue were, in fact, a coalition success story – a copybook case of the coalition

⁵⁸ Ruth Laugesen "Alliance to Break Ranks on Trade Agreement" (10 September 2000) *Sunday Star Times* Auckland 2.

partners trying to work things out and, when that failed, maturely agreeing to disagree with the least amount of fuss in order to promote stable government. The Alliance leader hailed the situation as "the way MMP is supposed to work".⁵⁹ Media commentators, as one might expect, were rather more critical and emphasised the deep rifts within the coalition highlighted by the divisions over the trade deal. Nevertheless, there is little evidence that the display of disunity caused any serious concerns in the wider community or reduced public support for the government.

Despite the party distinction provision, the Alliance struggled to differentiate itself from Labour during 2000-2002. The Alliance's poll ratings fell steadily during 2000-2001, contributing to a split in the party prior to the general election in 2002. In the event, the rump of the Alliance failed to secure any seats at the 2002 election, although a new party – the Progressive Coalition – led by the former Alliance leader Jim Anderton managed to win two seats (see table 1).

Following the 2002 election, Labour formed a minority coalition with the Progressive Coalition (with Jim Anderton serving in the Cabinet). The party distinction provision, more or less as crafted in 1999, was incorporated into the new coalition agreement.⁶⁰ The provision attracted little attention during the 2002-2005 parliamentary term. It seems that matters of disagreement were dealt with behind closed doors, either through compromise or simply agreeing to take the matter in dispute no further. There appear to have been no instances where there was an agreement by Labour and the Progressives to disagree publicly on any matter of importance.

In addition, Labour negotiated an agreement after the 2002 election on confidence and supply but this time with United Future rather than the Green Party.⁶¹ The agreement was very similar in nature to the unsigned protocol drafted in 1999, although United Future secured a number of explicit policy concessions, the most significant being an agreement by Labour to establish a new Families Commission. Like the Green Party in 1999, United Future was not bound by collective responsibility. It was, however, expected to support the Government on policies that had been jointly formulated and agreed upon. For its part the Green Party, disillusioned with Labour over its policies on genetic modification, entered into what was called a "cooperation agreement". This provided for the Green Party to be consulted by the Government on policies of interest to the party. It imposed no obligation on the Green Party to vote with the Government, even on matters of confidence and supply.

59 Ruth Berry and Brent Edwards "Alliance Free to Oppose Labour" (6 October 2000) *The Evening Post* Wellington 2.

60 Labour and the Progressive Coalition "Coalition Agreement between the Labour and Progressive Coalition Parties in Parliament" (8 August 2002) (accessible at www.beehive.govt.nz).

61 Labour and United Future "Agreement for Confidence and Supply between the Labour/Progressive Government and the United Future Parliamentary Caucus" (8 August 2002) (accessible at www.beehive.govt.nz).

C Going Beyond the Party Distinction Provision

The 2005 general election produced the most complicated parliamentary arithmetic under MMP thus far (see table 1), with neither of the major ideological blocks (the National Party and ACT on the one hand and Labour, the Progressive Party and the Green Party on the other) securing an overall majority. This, together with the need for the various party leaders to keep faith with important pre-election commitments, gave rise to a relatively complicated and protracted process of government formation. The details of this are described elsewhere and need not be repeated here.⁶² In short, after a month of strategising, intensive negotiations and moments of high political drama, a centre-left government was formed comprising Labour, Progressive, New Zealand First and United Future, supplemented by an "enhanced" cooperation agreement with the Green Party (see table 2).

Table 2 Multi-party governance arrangements 2005-2008

Option	Progressive Party	New Zealand First	United Future	Green Party	National, ACT, Māori Party
Full coalition	*				
Enhanced confidence and supply		*	*		
Ordinary confidence and supply					
Enhanced cooperation				*	
Ordinary cooperation					
No formal arrangement					*

With 61 seats in the 121 seat chamber, the four parties represented within the executive ostensibly gave the new government the first parliamentary majority since 1998. But it was no ordinary majority coalition government.⁶³ Indeed, from the Prime Minister's perspective, the new government constituted a two-party minority coalition, not a four-party majority coalition. This assessment was based on the fact that there was only one coalition agreement – that between Labour and Progressive.⁶⁴ The agreements with New Zealand First and United Future were referred to as "enhanced" confidence and supply agreements. They were enhanced in the sense that they provided

62 See Boston "An Unusual Government: Coalition Politics and Inter-Party Arrangements Following the 2005 General Election", above n 28 and Jonathan Boston "Forming a Government" in Raymond Miller (ed) *New Zealand Government and Politics* (4 ed, Oxford University Press, Auckland, 2006) 336. See also Martin Kay "Winston Looks Wobbly On Coalition Tightrope" (1 August 2005) *The Dominion Post* Wellington 7.

63 Boston "An Unusual Government: Coalition Politics and Inter-Party Arrangements Following the 2005 General Election", above n 28; Palmer "The Cabinet, the Prime Minister and the Constitution", above n 6; and White "Deconstructing Cabinet Collective Responsibility", above n 28.

64 The coalition agreement between Labour and the Progressive Party was similar (although even shorter) than the agreement in 2002. In relation to the party "distinction" provision, it stated that the parties had agreed to "further develop the process", but did not specify what this might mean in practice: Labour and Progressives "Coalition Agreement: Labour and Progressive Parties in Parliament" (17 October 2005) (accessible at www.beehive.govt.nz/Documents/Files/Progressives.pdf).

the leaders of the respective parties with ministerial posts within the executive (although outside the Cabinet): Winston Peters was made Foreign Minister, Minister of Racing and Associate Minister for Senior Citizens; Peter Dunne became Minister of Revenue and Associate Minister of Health. In most other respects, the two agreements were similar to previous confidence and supply arrangements.

The assertion that these parties were not part of the new "coalition government" was prompted, at least in part, by the need to find a way around Peters' firm pre-election commitment not to enter a "coalition". Of course, from an international perspective it is usually assumed that if a party holds one or more ministerial offices then it is necessarily part of "the government"; further, if two or more parties hold ministerial offices they constitute "a coalition". Accordingly, the governing arrangements devised in October 2005 were unusual in comparative terms – both in their form and in how they were presented publicly.

Four other features of the new arrangements attracted particular scrutiny and comment. First, New Zealand First and United Future, notwithstanding their different parliamentary strengths, were allocated the same number of ministerial posts (one). Secondly, as noted, the prestigious portfolio of foreign affairs was allocated to a minister outside the Cabinet and whose party was not deemed to be part of the "coalition government". This was the first time in several generations a New Zealand foreign minister had not been a member of the Cabinet.

Thirdly, the cooperation agreement with the Green Party included a provision under which several senior Green Party MPs were designated as spokespersons for the government in specific policy areas (for example energy conservation and efficiency).⁶⁵ It was agreed that these MPs would be granted direct access to departmental officials, have the right to request reports from officials and attend the relevant Cabinet committees dealing with policy issues in their designated areas. This led to the novel situation in which departmental officials advised not only their responsible minister but also a non-ministerial and non-government MP.⁶⁶ Moreover, the cooperation agreement gave the Green Party even greater participation in the government than the arrangements negotiated in 1999 and 2002. The areas of consultation included: the broad outline of the legislative programme; key legislative measures; major policy issues; and broad budget parameters.⁶⁷ The nature of the cooperation included:⁶⁸

- (a) access to relevant ministers by designated Green Party MPs;

65 Labour and the Green Party of Aotearoa "Labour-led Government Co-operation Agreement with the Green Party" (17 October 2005) (accessible at www.beehive.govt.nz).

66 White "Deconstructing Cabinet Collective Responsibility", above n 28.

67 Labour and the Green Party of Aotearoa "Labour-led Government Co-operation Agreement with Greens", above n 65.

68 Ibid.

- (b) regular meetings between the Prime Minister and the Green Party co-leaders;
- (c) advance notification to the other party of significant announcements by either the government or the Green Party;
- (d) briefings by the government on significant issues before any public announcement; and
- (e) input into the budget process and inclusion of Green Party budget initiatives in each of the three years.

Fourthly, the two "enhanced" confidence and supply agreements included a significant departure from the agree to disagree provisions in the earlier coalition agreements between Labour and the Alliance (and the Progressive Party). In sections under the heading "collective responsibility" both agreements stated that:⁶⁹

[The party] agrees to fully represent the government position and be bound by Cabinet Manual provisions in respect of any areas within the portfolio responsibility of the Leader of [the party] and to support all areas which are matters of confidence and supply. In other areas "agree to disagree" provisions will be applied as necessary.

Any straightforward interpretation of these words would suggest the following: within their respective portfolio areas Peters and Dunne would be obliged to represent the government's position and be bound by collective responsibility. In other non-portfolio areas agree to disagree provisions would be applied and they would be able to dissent from government policy, subject to agreement. But this interpretation makes little sense if the meaning of "agree to disagree" is the same as it was under the Labour–Alliance and Labour–Progressive coalitions – that is, a means of circumventing the normal bounds of collective responsibility. Logic suggests that, if the two ministers were not bound by collective responsibility in respect of non-portfolio matters, they would be free to speak about such matters and take such policy positions as they saw fit, without any need to invoke the agree to disagree provision. Why was such a statement included in the two agreements if it was essentially redundant?

One answer might be the agreements were negotiated with such haste that the full implications were not adequately thought through. Be that as it may, the Prime Minister's understanding of the nature of the agree to disagree provisions soon became clear:⁷⁰

69 New Zealand First and Labour "Confidence and Supply Agreement with New Zealand First" (17 October 2005) (accessible at www.beehive.govt.nz) and Labour and United Future "Confidence and Supply Agreement with United Future" (17 October 2005) (accessible at www.beehive.govt.nz).

70 Interview with Rt Hon Helen Clark, Prime Minister (Garth Bray, Agenda, TV One, 22 October 2005) (accessible at www.agendatv.co.nz) (emphasis added).

[The confidence and supply agreement] means that collective responsibility applies to the portfolios which [Winston Peters] holds and the same for Peter Dunne but neither [Mr Peters] nor Mr Dunne or their parties are expected to speak for the government or in line with the government on issues outside those portfolios.

...

[I]n this case neither New Zealand First nor United are in coalition but when they accept a ministerial portfolio collective responsibility applies. Were they to have a disagreement with government policy on *those portfolio areas* then one would need to invoke the differentiation procedures but it's far too early to say whether that would even arise as an issue.

In Helen Clark's view, therefore, Peters and Dunne were bound by collective responsibility only in relation to their portfolios. The agree to disagree provisions applied to possible disagreement on policy matters within the ministers' respective portfolios. Outside their portfolios they were free to speak as they wished. A similar position was enunciated in early November 2005 by Peter Dunne:⁷¹

I'm not a cabinet minister, I'm a minister outside cabinet, but as part of the agreement that we have, the collective responsibility applies only in the areas relating to the agreement itself and to my specific portfolios and on matters relating to foreign policy or any other issue that are not governed by the agreement I'm perfectly free to speak out and to promote my own party's policy and I'll do that.

But while this interpretation made sense, it was not consistent with the wording of the confidence and supply agreements: this clearly suggests that the agree to disagree provisions applied in those areas where the unanimity principle was not operative.

A Cabinet Office Circular following the new arrangements provided some clarification on how the new arrangements were expected to work in practice. After restating the collective responsibility provisions of the confidence and supply agreements, the circular continued:⁷²

7. Accordingly, Mr Peters' and Mr Dunne's participation in the government is expressly limited to certain specified or agreed areas. When Mr Peters and Mr Dunne speak about the issues within their portfolios, they speak for the government and as part of the government. When they speak about matters outside their portfolios, however, they may speak as political party leaders and MPs rather than as Ministers, and do not necessarily represent the government position.

8. When Mr Peters or Mr Dunne represent the government internationally, they speak for the government on all issues discussed with them in their official capacity as Ministers.

71 Interview with Hon Peter Dunne (Simon Dallow, Agenda, TV One, 5 November 2005) (accessible at www.agendatv.co.nz).

72 Cabinet Office Circular "Coalition, Confidence and Supply and Support and Cooperation Agreements – Administrative Arrangements" (22 August 2006) CO 06/04.

This interpretation is consistent with that of both the then-Prime Minister and Peter Dunne. In simple terms, Peters and Dunne wore two "hats", one as minister and one as party leader. They wore their ministerial hat on matters within their portfolio and were bound by collective responsibility; on any other matters they were permitted to wear their party leader hat and freely dissent from the government position.⁷³

Paragraphs 7 and 8 of the circular were included, verbatim, as paragraph 5.27 in the updated *Cabinet Manual 2008*. The Cabinet Manual's only reference to the agree to disagree provision comes in the preceding paragraph, in the specific context of parties in coalition. The implication, then, is that agree to disagree provisions were only relevant in the context of a Cabinet coalition where the parties involved accepted that their representatives within the executive would be bound by the convention of Cabinet collective responsibility, unless otherwise explicitly agreed.

Following the 2008 general election, National negotiated three "enhanced" confidence and supply agreements – with ACT, United Future, and the Māori Party (see table 3). In two cases – namely the agreements with ACT and United Future – there were no references to agree to disagree provisions. Given the arguments above, the absence of such wording is utterly appropriate (unless, of course, there was any intention by National to enable the respective ACT and United Future ministers to speak against government policies from time to time in those areas where they have portfolio responsibilities). The agreement with the Māori Party, however, states that "[t]he 'agree to disagree' provisions apply as necessary".⁷⁴ Why this sentence was included is unclear but it is doubtful that National intends Māori Party ministers to enjoy a greater right to dissent than their counterparts in the other support parties. After all, the agreement states firmly that the Māori Party agrees "to be bound by collective responsibility in relation to their Ministerial portfolios and their Associate Minister responsibilities".⁷⁵

73 Note that the Circular also states that "The 'agree to disagree' provisions are expected to be exercised consistently with the good faith and no surprises provisions in the agreements". Cabinet Office Circular, "Coalition, Confidence and Supply and Support and Cooperation Agreements – Administrative Arrangements", *ibid*, para 9.

74 National Party and the Māori Party "Relationship and Confidence and Supply Agreement between the National Party and the Māori Party" (16 November 2008) (accessible at www.national.org.nz).

75 *Ibid*.

Table 3 Multi-party governance arrangements 2008-

Option	ACT	Māori Party	United Future	Green Party	Labour, Progressives
Full coalition					
Enhanced confidence and supply	*	*	*		
Ordinary confidence and supply					
Enhanced cooperation					
Ordinary cooperation					
Memorandum of understanding				*	
No formal arrangement					*

Be that as it may, how did the novel governance arrangements agreed in late 2005 operate in practice and in particular how were the provisions relating to the selective application of collective responsibility applied? A rather obvious challenge was the difficulty of distinguishing what matters fell within a minister's portfolio and what matters lay outside. After all, ministerial portfolios cannot be delineated with absolute precision – there are overlaps and complex interactions which provide many "grey areas". Previously this was not a problem, since all ministers (subject, of course, to any agree to disagree provisions) were bound by collective responsibility. Under the support arrangements agreed in late 2005, however, distinguishing whether or not a matter fell within a minister's portfolio area was vital in managing the business of the government and minimising political risk. For the most part, the approach adopted was to give both Peters and Dunne the benefit of the doubt on issues that fell within the grey area. This was necessary as both Peters (foreign affairs) and Dunne (revenue) held portfolios that were broad and overarching, encompassing many matters of general policy. For instance, many areas of economic policy fell, at least to some degree, within Dunne's revenue portfolio. This did not prevent him, however, from criticising the government's economic policies from time to time. Likewise, matters of trade, immigration and defence, while each having their own ministers during 2005-2008, could all be said to be encompassed by the foreign affairs portfolio. But the Labour-led Government was very careful to distinguish between these matters and the many other issues that arose in the field of foreign policy.

Politically, the effort to draw such distinctions was not always successful. A good example arose in 2008 over the decision of New Zealand First to oppose the Government's free trade agreement with China. Negotiations with China had been in progress since well before the 2005 election and the Government did its best to pre-empt and accommodate New Zealand First's likely opposition to the agreement. Part of this strategy was to separate the responsibilities for trade policy and foreign policy, with the experienced Phil Goff being appointed Minister of Trade (and also Minister of Defence). Nevertheless, when Peters subsequently, and very publicly, opposed the free trade

agreement (arguing that New Zealand "could have done so much better")⁷⁶ and his party ran advertisements in many major newspapers criticising the deal, most commentators found it hard to understand the logic of the foreign minister openly opposing one of the Government's most significant foreign policy initiatives yet remaining within the government – and, moreover, continuing to represent the Government internationally. The Prime Minister responded that Peters was not responsible for trade matters and was thus free to criticise the free trade agreement – albeit only while in New Zealand. It was also noted by some commentators that Peters' criticisms were relatively muted and limited to the argument that the agreement could have been better.⁷⁷ Not surprisingly, however, there were many calls for Peter's resignation; even Dunne could not see how Peters could stay.⁷⁸

From the standpoint of the "enhanced" confidence and supply agreement between Labour and New Zealand First, there are two possible ways of defending Peters' actions. If trade issues are deemed to lie outside the foreign affairs portfolio then Peters was entitled, under paragraph 5.27 of the Cabinet Manual, to speak as a political party leader and as such was within his rights to criticise the Government's policy. If, on the other hand, the claimed distinction between trade policy and foreign policy is rejected, it could nonetheless be argued that Peters was entitled to invoke the agree to disagree provision on the issue in question. If Labour was prepared to allow Peters to disagree – as was in fact the case – then, at least in procedural terms, the matter was resolved. Whether either argument carries conviction in such a sensitive policy area is open to debate.

Another potential problem emerged during the course of Peters' dissent. Both Peters and Dunne were bound by collective responsibility, without exception, when representing the Government overseas. Peters claimed that his criticisms would only be made to domestic audiences and, after some early hesitancy, he confirmed he would relay the Government's position when he was overseas. Yet what is said domestically is often reported internationally and ministers of foreign affairs are constantly required to articulate and defend the government's position to the representatives of foreign governments, even when in New Zealand. Physical location is thus hardly relevant. All this illustrates is that whenever Peters or Dunne wanted to dissent from the government's official position they walked a fine line between their role as party leaders and their role as ministers.

Notwithstanding the conflict between the Labour-led coalition and New Zealand First over the free trade agreement with China, serious public disagreement between the parties represented within

76 Audrey Young and Fran O'Sullivan "Winston's Message" (9 April 2008) *The New Zealand Herald* Auckland A1.

77 John Armstrong "Peters' Critics Have a Hidden Agenda" (12 April 2008) *The New Zealand Herald* Auckland A24.

78 Colin Espiner "Dunne Calls for Peters to Quit" (10 April 2008) *The Press* Christchurch A1.

the executive during 2005-2008 was relatively rare. In part, this was due to the extensive consultations between the parties over policy matters. In relation to the Government's legislative proposals, for example, areas of disagreement were identified early in the policy process and compromises were reached. Where deals could not be struck, Labour sought support elsewhere in the House. If this was not forthcoming, the proposed legislation did not proceed. Sometimes a party was willing to commit to support a Bill through its first reading but made no commitment to back it any further. United Future, for instance, adopted this stance on a number of issues, including the Electoral (Integrity) Amendment Bill, the Climate Change (Emissions Trading and Renewable Preference) Bill and the Real Estate Agents Bill. This enabled Bills to get to the Select Committee stage where wider consultation could occur and amendments could be adopted.

In sum, during 2005-2008 the two parties with "enhanced" confidence and supply agreements were given significant freedom by the Labour-led coalition to differentiate themselves. This was largely dictated by political necessity. Nonetheless, in the context of the unity–distinctiveness dilemma the government managed to balance the twin requirements of unity and distinctiveness in a way that hitherto had not been thought possible. As noted earlier, the relative success of these governance arrangements prompted National to negotiate similar accommodations with its three support parties following the 2008 general election.⁷⁹ It is too early to undertake a full assessment of how the inter-party governance arrangements are operating under the new centre-right government but thus far there have been few significant problems.

V LESSONS AND IMPLICATIONS

The advent of proportional representation in New Zealand has led to a number of relatively novel developments in the art and craft of multi-party governance. A key driver of these experiments has been the desire to find an acceptable balance between the need for parties to preserve their identity and distinctiveness (and hence maintain their electoral base) and the need for credible, coherent and effective government. How successful have these experiments been and are they likely to prove durable?

In terms of governmental effectiveness, the evidence thus far has been positive. Between 1999 and 2008, Labour managed to govern successfully with an assortment of coalition partners, support parties and cooperative arrangements. It secured support for most of the legislation it wanted to enact and achieved many goals in areas not requiring legislation. Without doubt, the agree to disagree provisions in the various coalition agreements between 1999 and 2008 provided a useful and necessary safety valve. At the same time, political constraints and realities meant that such

79 National Party and the Māori Party "Relationship and Confidence and Supply Agreement between the National Party and the Māori Party", above n 74; National Party and ACT "National-ACT Confidence and Supply Agreement" (16 November 2008) (accessible at www.national.org.nz); and National and United Future "Confidence and Supply Agreement with United Future" (14 November 2008) (accessible at www.national.org.nz).

provisions were used only sparingly. As a result, the objective of enabling minor parties within a coalition to preserve their identity was not fully realised. As Jim Anderton commented in late 2005:⁸⁰

It is very unusual in any country for a Cabinet Minister of a political party to vote against a Cabinet decision in this way and remain in the Cabinet or the government. We've made that work here. But it has also been at the cost of visibility for the party. So we haven't yet solved the riddle.

In fact, as the general election results since 1999 have highlighted, even where minor parties within a coalition have had the opportunity to disagree publicly with their major coalition partner, they have failed to maintain their previous electoral support. The Alliance, having split in the early part of 2002, lost all its seats at the subsequent election. The Progressive Party clung on to two seats, but lost one of these in 2005. This seat was retained by the party leader in 2008, albeit with a reduced majority. For the Alliance and the Progressives, therefore, the party distinction provision seems to have been largely ineffective, at least electorally.

Despite this, the precedent for having such provisions in coalition agreements has now been set and it seems highly likely that future agreements will embrace similar provisions. Having said this, the question arises as to whether minor parties will seek formal coalition arrangements in the future given the other options that are now available ("enhanced" confidence and supply arrangements and "enhanced" cooperation agreements). After all, why would a small party choose to join a Cabinet coalition if it can enjoy all the benefits and influence of participating in the executive without the associated constraints of being "in coalition"? An immediate response to this question might be to challenge the assumption that minor parties outside a coalition yet within the executive actually have the same level of influence as those that join a coalition. Unfortunately, any assessment of the relevant power differentials is likely to be problematic because of the many factors that affect the influence of a minor party on policy – the quality of its political leadership, the level of policy expertise, the size of the party and its position on the salient issue dimensions, the wider political context and so forth.

But even if it could be demonstrated that, other things being equal, a minor party outside a coalition yet part of the executive is likely to enjoy as much influence as a similar sized minor party within a coalition, this does not mean that minor parties will necessarily prefer the former state of affairs. Nor does it mean that arrangements like those negotiated following the 2005 and 2008 elections will become the norm in New Zealand politics. Much will depend on the parliamentary arithmetic and, in particular, the relative strength of the respective parties that may wish to form or contribute to the government.

⁸⁰ Hon Jim Anderton "Speech to Kellogg Rural Leadership Programme" www.progressive.org.nz (last accessed 18 August 2008).

There are, of course, potential benefits for the major partner in negotiating hybrid arrangements. Such arrangements may, for example, assist with the management of inter-party dissent, thereby increasing the durability of the government and the major party's ability to implement its policy programme. Another possible advantage is that without the formal ties of a coalition it may be easier for the major party to dissociate itself from controversial (and sometimes politically unpopular) policy positions advocated by a support party. For example, when Peters criticised the China free trade agreement Clark was able to distance her Government in a manner that may have been less feasible had Labour been in a formal coalition with New Zealand First. For such reasons, in Dunne's view, the 2005-2008 arrangements were to the advantage of all the parties involved, including Labour.⁸¹ Similarly, National's decision not to form a coalition with ACT in 2008 may well have been prompted partly by its concern that ACT's policy positions on some issues would be electorally damaging.

The results of the 2008 general election suggest that the hybrid arrangements negotiated in 2005 may be no more beneficial for small parties than coalition agreements with agree to disagree provisions. New Zealand First lost all its seats in Parliament in 2008 as a result of its failure to reach the 5 per cent threshold for party votes or secure an electorate seat. United Future lost one of its two MPs and the party leader came close to losing his electorate seat. Of course, whether these two parties would have fared any better under different arrangements is unclear. Nevertheless, if neither the option of agree to disagree provisions in coalition agreements nor the option of hybrid arrangements help protect the identity and electoral viability of minor parties that choose to participate in executive arrangements, what will? It is hard to see, for instance, how the freedom of manoeuvre enjoyed by New Zealand First and United Future during 2005-2008 could be extended any further. Even for a party that is of the government but not in the coalition, looser discipline than that which applied during 2005-2008 would simply not be politically credible. Likewise, for minor parties that choose the coalition option, there will be inevitable political constraints on the frequency with which any agree to disagree provision can be exercised.

Turning to other matters, the experiments in multi-party governance since the mid-1990s highlight that the unanimity principle within the doctrine of collective responsibility is sufficiently flexible to cope with the political realities of MMP. Overall the key political actors and those others affected (for example departmental officials) have accommodated the new arrangements with relatively little fuss or anxiety. Dunne believes that agreements like those of 2005 and 2008 that clearly show where collective responsibility will apply are easier to implement than agreements that specify where collective responsibility will not apply. These arrangements have given minor parties that are represented within the executive the ability to dissent more or less at will on matters other than those of confidence or supply and have also given ministers from such parties an avenue to escape the bounds of collective responsibility in the name of their party's identity. But there is still a

81 Interview with Hon Peter Dunne (the author, Wellington, 16 July 2008).

question mark over how far the unanimity principle can be stretched before it becomes politically unworkable and constitutionally unacceptable. How many times, for instance, would it be feasible for a minister representing a minor party to oppose government policies in his or her portfolio area before the political credibility of the arrangements became untenable? One suspects that the answer is "not many".

The point here is that, despite the relative freedom provided by the "enhanced" confidence and supply agreements negotiated in 2005 and 2008, there are still limits to inter-party dissent. New Zealand's experience suggests that there is an implicit understanding that the dissent of support parties will not be as vigorous as that of an opposition party. The party distinction provisions are intended to release tension within a multi-party government; they are not designed to facilitate an all-out frontal attack on the government. Dissent such as Peters' criticism of the China free trade agreement, even if within his rights, is only tolerable politically if rare. Frequent dissent of this kind would not only harm the government's credibility but also the credibility of the dissenting party.

While MMP has changed the composition of, and the political dynamics within, the New Zealand executive, its day to day functioning has changed relatively little. According to Dunne, who has served as a minister in a single-party majority government, a minority coalition government and the recent hybrid arrangements, the actual role of ministers has changed little under MMP.⁸² In his assessment, the overall operations of the executive have remained fundamentally the same – his officials do not treat him any differently because he is outside the Cabinet, the reporting lines are the same, he is accountable to Parliament, he introduces legislation and he attends Cabinet committees. As a minister outside the Cabinet, however, he rarely attends Cabinet meetings (at least during 2005-2008). In Dunne's view, the relative success of the hybrid arrangements since 2005 is due to the fact that, while the composition of the executive has changed, the processes themselves have not.

VI CONCLUSION

New Zealand's experience since the mid-1990s demonstrates that there are many different approaches to structuring and managing multi-party governance in an MMP environment. Such approaches can embrace Cabinet coalitions, legislative coalitions and hybrid arrangements (and combinations of all three). Moreover, within each of these approaches there is potential for varying degrees of inter-party cooperation and discipline and different levels of participation by minor parties in the policy process. The range of combinations and permutations is thus large.

Which of these approaches provides the best solution to the unity–distinctiveness dilemma remains unclear. Nevertheless, it is evident that a process of experimentation and "learning by doing" has been in progress. In particular, political pressures have led to a movement away from

82 Ibid.

formal Cabinet coalitions marked by very tight discipline to looser and more flexible arrangements. The basic aim has been to enable minor parties that wish to be part of the government to have some freedom to maintain and publicly defend their core policy principles while nevertheless holding office within the executive. As discussed, the party distinction provision negotiated in 1999 (and subsequently incorporated into coalition agreements in both 2002 and 2005) enabled junior coalition partners to hold different views on key issues, albeit infrequently. The arrangements negotiated in 2005 (and repeated in 2008) went even further, with ministers from minor parties being granted the right to promote, at their discretion, policy positions in direct opposition to official government policy, except (perhaps) in those areas where the minor party representatives held portfolio responsibilities. The latter arrangements are very unusual by international standards and were initially the product of the complicated parliamentary arithmetic following the 2005 election, together with the preparedness of party leaders to innovate and modify previously accepted practices.

These hybrid arrangements have had implications for the doctrine of collective responsibility, especially the unanimity principle. In effect, collective responsibility has become more finely and selectively focused, with ministers from minor parties who are outside the Cabinet only being formally obliged to abide by the unanimity principle in respect of their specific portfolio responsibilities. This has not thus far affected the application of the principle to members of the Cabinet (unless, of course, any agree to disagree provision is invoked) and does not appear to have altered the degree of discipline expected of ministers within the major governing party. Equally, the government as a whole has remained accountable to Parliament for its policies and performance.

As to how multi-party governance will evolve in the future, a number of observations can be proffered. First, future coalitions in New Zealand are unlikely to embrace the very tight discipline that characterised the coalition agreement between National and New Zealand First in late 1996. This is because it is doubtful that such arrangements will be politically acceptable, especially to minor parties. Secondly, while further refinements to the various multi-party arrangements negotiated since 1999 cannot be ruled out, there are obviously political and constitutional constraints on the extent to which current boundaries can be pushed. Even looser inter-party discipline than that exhibited since 2005 is likely to have damaging political consequences. Thirdly, the chosen form of multi-party governance will continue to depend largely on the prevailing political circumstances (especially the bargaining power of the relevant parties), coupled with the assessments of the key actors regarding the respective advantages and disadvantages of the available options. In this regard, the experience of previous multi-party governance arrangements will no doubt exercise a significant influence on the preferences of party leaders – although it is certainly possible that their assessments of the available options will differ. Finally, developments in other multi-party democracies may from time to time influence the thinking of New Zealand party leaders. Whether New Zealand's novel arrangements since 2005 will be replicated elsewhere, however, remains to be seen.

