

The Governor-General, the reserve powers, Parliament and MMP: A new era

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This paper considers the reserve powers of the Governor-General to refuse a request for a dissolution of Parliament and to appoint a Prime Minister. Generally, these powers have not been the subject of much discussion or even considered to be of any great importance in constitutional debate. Yet the move to a mixed member proportional ("MMP") electoral system, endorsed by New Zealanders in a binding referendum in 1993, disturbs this previously settled consensus. MMP may mean that the reserve powers are called upon more often to solve constitutional dilemmas. Thus this paper seeks to address the issues that arise from the new context for the operation of the reserve powers and further, to suggest some new conventions which may go some way towards the resolution of those issues.

I INTRODUCTION

The 1993 binding referendum on electoral reform heralded a new era in New Zealand's constitutional future. On the 6th of November 1993, New Zealanders effected a sea-change in their constitution when they voted 53.8% in favour of changing the electoral system from First-Past-the Post to MMP.¹

The endorsement of MMP has sparked much discussion and serious writing on its likely effect on other facets of the constitution.² One little-discussed, but vitally important area of the constitution which now has a new context in which to operate is the reserve powers of the Governor-General - the residue of the Crown's original discretionary or arbitrary power to govern.³ Against this new backdrop of MMP, the reserve powers are thrown into sharp relief on the constitutional stage. Further elections under MMP raise the possibility of increased use of the reserve powers. Election results may not be as clear-cut as before. The Governor-General may be called on to appoint the Prime Minister or to dissolve Parliament and call another election. There may be

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1 See *The General Election and Electoral Referendum 1993*, New Zealand. Parliament. House of Representatives. Appendix to the journals, E.9: 170- 71.

2 See M Chen: "Remedying New Zealand's Constitution in Crisis: is MMP part of the answer?" [1993] NZLJ 22.

3 AV Dicey *Law of the Constitution* (Macmillan, London, 1960) 424-427. Parliamentary consent is not required for their exercise. Dicey's definition was cited by Lord Dunedin in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, 526.

more requests to the Governor-General to dissolve Parliament from a government unsure of its majority in a House where its support may not be guaranteed. Moreover, should she have to, our Governor-General will be the first head of state to exercise the reserve powers in an MMP context.⁴

This change to the method of determining the Parliament over which the reserve powers are exercised justifies a re-examination of the powers themselves.⁵ The immediacy of this requirement was underscored by the events that followed the general election held at the same time as the electoral referendum. The likely allocation of seats in Parliament as indicated by the preliminary vote count on election night was: National 49, Labour 46, Alliance 2, NZ First 2.⁶ The November 6 results appeared to have delivered a hung Parliament for the first time in over 65 years.⁷ In the days before the count was finalised⁸ and the writs endorsed and returned,⁹ there was much conjecturing that the Governor-General would be called upon to exercise her reserve power to appoint a Prime Minister, until the finalised count realised a parliamentary majority for National Party¹⁰ and ended the speculation.

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- 4 M Chen above n 2, fn 48 notes that the German Head of State is yet to exercise the reserve powers constitutional lawyers believe the President may have. Heads of State in other European proportional representation electoral systems have dealt with their 'reserve powers' in various ways. Questions of government formation are generally delegated to a neutral *informateur* (often the Speaker) who canvasses the political alliances and identifies a likely *formateur* to the Head of State (Sweden, Norway, Denmark, Belgium and Holland). The dissolution of Parliament is a more complicated issue, but in general, the matter is left in Parliament's hands. In fact, apart from the German situation, the French Constitution is the only one where the Head of State is given the power to dissolve Parliament unilaterally. See D Butler *Governing Without a Majority* (Collins, London, 1983) 57-64 and 129.
- 5 P Carpinter draws on systems theory to make a parallel analysis with regard to MMP and the public service: "If the existing system is in some sort of equilibrium, it can be predicted, with varying degrees of confidence, that major change to one part of the system will lead to changes in the other parts." See P Carpinter "MMP and Coalitions: Possible Effects on New Zealand's Public Service" in G Hawke (ed) *Changing Politics?* (Institute of Policy Studies, Wellington, 1993) 131-132.
- 6 Section 111(1)(b) Electoral Act 1956.
- 7 The 1928 election delivered a Parliament of the following composition: Reform 28, United 27, Independent Liberal 4, Labour 19, Country Party 1, Miscellaneous 1. See M Bassett *Three Party Politics in New Zealand 1911 -1931* (Historical Publications, Auckland, 1982) 67.
- 8 Section 115(2)(b) Electoral Act 1956.
- 9 Section 119(1)(a) Electoral Act 1956.
- 10 The National Party retained the seat of Waitaki on special votes, thus gaining the 50th seat required for a majority in Parliament. National's majority was later widened to two when Peter Tapsell (Labour, Eastern Maori) was appointed Speaker of the House. This meant that National retained its 50 seats while the Opposition was reduced to 48. The Speaker is bound to safeguard the Government's majority where the vote is tied by exercising a casting vote in the Government's favour on questions of confidence and supply. This of course still leaves the Government vulnerable to losing divisions in the House when Parliament goes into the Committee of the whole

Although the speculation over the Governor-General's use of the reserve powers in 1993 was not required to mature into advice concerning the formation of a government from a hung Parliament, there is no guarantee that such advice will not be required in the future. This increased possibility and the new setting for the reserve powers provide the catalyst for this paper, the aim of which is two-fold. Bearing in mind that "it is less easy to identify what the precise conventions are than to state that they exist"¹¹ but also that "in [the] event of [a] crisis....it will be of vital importance immediately to know what the rules are"¹², this paper focuses on the reserve powers to appoint a Prime Minister and to refuse a request for a dissolution of Parliament¹³ and attempts to suggest the conventions which might underpin these two powers, given the new context in which they will operate. Support for these suggested conventions will be drawn from relevant New Zealand and other Commonwealth precedents.¹⁴ Their suitability will be assessed by reference to established principles. Further, this paper also discusses the form these redefined conventions should take - if any.

House and the Speaker relinquishes the Chair in favour of the Chairman of Committees. In fact the Government has lost one division already in 1994. See below n 69. See Speaker Harrison New Zealand Parliamentary Debates, vol 448, 1982: 4917-4919; D McGee *Parliamentary Practice in New Zealand* (Government Printer, Wellington, 1985) 165. In the present Parliament, this apparently settled ruling is subject to the statement of Dr Tapsell that, although he would generally follow the rulings of Speaker Harrison, "in the event of any extraordinary circumstance occurring...[he] reserve[d] the right to use [his] judgment at that time." See New Zealand Parliamentary Debates, vol 539, 21 December 1993 - 21 March 1994: 6-7. Personal communication with the Office of the Clerk of the House suggests that Dr Tapsell's comments should be seen as an indication of Dr Tapsell's possible voting intentions, rather than be granted the status of a Speaker's Ruling. This should especially be considered the case given the apparent absence of any precedent for this "extraordinary circumstance" proviso.

- 11 Sir Geoffrey Palmer "MMP and Ministerial Responsibility" (address to the "Public Accountability in the MMP environment" seminar, Wellington, 11-12 April 1994) 7.
- 12 Sir Kenneth Keith "Canberra, 11 November 1975: What need New Zealand remember?" (address to the AULSA Conference, Christchurch, 22-25 August 1976) 12.
- 13 This is because it seems that these are the powers most likely to be in issue in an MMP Parliament.
- 14 Given the change in the parliamentary context, it should be noted that many precedents will no longer be applicable. Any precedents referred to have therefore been carefully selected.

II THE RESERVE POWERS

A *Discretion or Principle?*

The present constitutional position of the Governor-General is more that of symbolic authority than real power. Yet there is nonetheless scope for the Governor-General to wield real power in our constitution. Under the Constitution Act 1986 and the Letters Patent Constituting the Office of the Governor-General of New Zealand,¹⁵ the Governor-General is authorised to exercise the royal powers of governance. These include those conferred by statute and the reserve powers. The reserve powers have been severely restricted by both the Bill of Rights 1689 and the growth of democratic government.¹⁶ However, some still remain. They are: power to refuse to assent to bills; power to dissolve Parliament (or refuse to do so); power to summon Parliament; power to call an election; and the power to appoint a Prime Minister.¹⁷

Usually there is little opportunity for these powers to be exercised according to the Governor-General's discretion, as by convention, she must act on the advice of her responsible advisers.¹⁸ Her responsible advisers are those who appear to hold the confidence of the House of Representatives.¹⁹ The proviso inherent in this convention is that first the Governor-General must be clear as to who those responsible advisers are. In some cases this will not be clear.²⁰ At this point, an opportunity arises for the Governor-General to exercise the reserve powers at her discretion. The present Governor-General has suggested that to do so would "seriously undermine the democratic basis of our system."²¹ I agree. Future exercise of the reserve powers should be firmly fixed in the democratic context of our constitution. The possibility of the exercise of power in an arbitrary fashion does not sit well with a system of democratic government. Moreover, underlying principles are also necessary to provide a sound basis for future exercise of the reserve powers.

15 S/R 1983/225. See also M Chen and Sir Geoffrey Palmer *Public Law in New Zealand* (Oxford University Press, Auckland, 1993) 251-254.

16 ECS Wade and AW Bradley *Constitutional and Administrative Law* (10 ed, Longman, London, 1985) 245-247.

17 See HV Evatt and EA Forsey *Evatt and Forsey on the Reserve Powers* (Legal Books, Sydney, 1990) "Introduction"; FM Brookfield "No Nodding Automaton: A Study of the Governor-General's Powers and Functions" [1978] NZLJ 491, 499.

18 As the present Governor-General is a woman, all references to the Governor-General will be in the feminine gender, except for direct quotes from Constitutional provisions.

19 Despatch of the Duke of Newcastle, Colonial Secretary, to the Governor of Queensland, 26 March 1862 cited in RQ Quentin-Baxter "The Governor-General's constitutional discretions: an essay towards a re-definition" (1980) 10 VUWLR 289, 291.

20 Eg those outlined in Part I above.

21 Dame Catherine Tizard "Crown and Anchor: the present role of the Governor-General in New Zealand" (Founder's Lecture for the Friends of the Turnbull Library, Wellington, 26 June 1993) 9.

It is not the aim of this paper to argue that the reserve powers should not remain with the Governor-General.²² As long as New Zealand remains a constitutional monarchy there will always be the need for the Crown's role as the final safeguard against undemocratic government.²³ The point is rather that this role - and thus the means of carrying it out - should be democratic. The reserve powers should be exercised not according to discretion but principle.

B Principles

Having established that the reserve powers should be exercised according to principle, the question still remains: what should these principles be? It should also be remembered that as the reserve powers will be exercised in times of political crisis, the principles which guide their use should be flexible enough to take into account the political context in which they must operate.

The first consideration is that the Governor-General should not only act impartially but should be seen to be acting impartially. As Sir Kenneth Keith notes:²⁴ "[t]he strength of the Crown rests on the conviction that its neutrality is beyond suspicion." Thus the credibility of the reserve powers is inextricably linked to their impartial exercise. Should the Governor-General intervene in favour of one party or another, this would set a dangerous precedent for future crises. And if, under MMP, there are increased calls on the reserve powers it is essential that they be seen as an effective means of resolving constitutional dilemmas. This will not be the case if they are seen to be exercised in a partisan fashion. If the reserve powers are no longer held to be credible, there might be calls to do away with them or vest them in another body. The Governor-General's role as the last constitutional safeguard would be lost. To avoid this, it is necessary that the reserve powers be exercised in a way that does not appear to favour any particular political party over another.

The other principle which should underpin the exercise of the reserve powers has been identified as both the most fundamental²⁵ and also the hardest to define:²⁶ democracy. 'Democracy' is a term eminently capable of being interpreted according to the 'Humpty Dumpty' principle: "When I use a word", said Humpty Dumpty, "it

22 For a contrary view, see A Benn "Power, Parliament and the People" (1982) Sept/Oct New Socialist 9.

23 Should New Zealand take the step of becoming a republic, the reserve powers will need to be thoroughly re-assessed. The report of the Australian Republic Advisory Committee *An Australian Republic - The Options The Report* (Commonwealth of Australia, Canberra, 1993) 88-116 considers whether the reserve powers should be retained by a Head of State in an Australian republic, and if so, in what form: codified (wholly or partially) or as unwritten rules. Premature at this stage of constitutional change in New Zealand, the issue of the reserve powers in a republican New Zealand may yet become more relevant.

24 Above n 12, 12.

25 I Jennings *Cabinet Government* (3 ed, Cambridge University Press, London, 1959) 13-19.

26 Above n 12, 8.

means just what I choose it to mean - neither more nor less."²⁷ And it is undeniably true to the point of cliché that democracy can mean all things to all people. However, for constitutional lawyers, the democracy principle which infuses the reserve powers is usually understood to mean that "[P]arliament is not stifled by government, but that government is held responsible to [P]arliament, and every [P]arliament held responsible to the people."²⁸ Distilled to its essence, this means that the Governor-General should remember the *parliamentary* context in which she exercises the reserve powers. In future years New Zealand's parliamentary context will be that of MMP. A further investigation of what changes are likely to Parliament under MMP is needed before we can say what this might mean for the democracy principle.

C *The Reserve Powers in an MMP Parliament*

It is a somewhat difficult exercise to make predictions about Parliament on a weekly basis, much less predict how Parliament might operate under MMP in future years. However, from a cautious consideration of a future MMP Parliament, a few points do emerge with sufficient clarity to be stated below.

During the campaign over the electoral system referendum, MMP proponents made much of the fact that New Zealand has not been governed by a party with majority electoral support since 1951.²⁹ Although several interpretations can be made of the vote for MMP in 1993 (among them electoral disgruntlement with the present Members of Parliament), it seems fair to say - if we remember that the core issue during the referendum was a choice between a proportional and a non-proportional electoral system - that the vote for MMP in 1993 can be seen as a desire to change New Zealand's recent history of government by the party with the support of the largest minority of voters. The MMP endorsement can be interpreted as an electoral expression of desire for a government supported also by a majority of voters. This does not preclude minority government.³⁰ Yet it may be that the Governor-General has to take greater care to ensure that her responsible advisers do indeed (in whatever composition) have the support of a majority of the electorate, be that direct or indirect. This may mean that the Governor-General might require evidence of the alliances and/or

27 L Carroll *Through the Looking-Glass* (Golden Press, Racine, Wisconsin, 1970) 164. Lawyers of a literary disposition may be more inclined to attribute this phrase to Lord Atkin who employed it in his famous dissent in *Liversidge v Anderson* [1942] AC 206, 245 (HL(E)) rather than to Lewis Carroll. However, it should be noted that for both Lord Atkin and his American counterpart Frankfurter J who used it in his dissenting judgment in *Shapiro v United States* 335 US 1, 43 fn 5 (1948), difficulty of definition did not preclude definition.

28 Rt Hon A Meighen quoted in above n 17, 163.

29 See A McRobie "Electoral System Options: Three Proposals for reforming the Electoral System" in H Gold (ed) *New Zealand Politics in Perspective* (3 ed, Longman Paul, Auckland, 1993) 452, 454 (Table 1).

30 In fact, K Strom *Minority Government and Majority Rule* (Cambridge University Press, Cambridge, 1990) 90, notes that "the countries most influenced by the Westminster model of democracy seem inclined to turn to minority governments rather than majority coalitions when their two-party systems fragment."

guarantees of support in the House of those claiming to have its confidence (or otherwise).

With the increased likelihood of more parties in Parliament under MMP the chances of a single party being able to form the government decrease. Minority or coalition government seems more likely.³¹ Continued governance will depend on holding the confidence of the House of Representatives, which may not always be assured when the Government does not have a majority of the House's members. Thus the House of Representatives will regain its traditional function: the ability to make and unmake governments.³² Therefore, as this function returns to Parliament, the Governor-General should not usurp it by means of the reserve powers. The place for the testing of the confidence of the House should be the House itself.

Another possible effect of MMP is that it may produce a Parliament with a very stable policy agenda, irrespective of who the actual government is.³³ Although the actual policy mix should not be the concern of the Governor-General, it may be that elections are not necessary to prove which party holds the confidence of the House when the composition of government changes.³⁴ Thus, in this context, it may not be appropriate for the Governor-General to resort to elections to test the reserve powers. Rather, it may be more fitting for the Governor-General to exercise reserve powers within a framework that considers parliamentary reality.

This discussion identifies that the use of the reserve powers over an MMP Parliament should be constrained by two considerations. First, as the vote for MMP signifies an endorsement of a Parliament composed in proportion to its electoral support, the responsible advisers of the Governor-General must have the confidence of the House and so the people - directly or indirectly, and secondly, the Governor-General should require some evidence of that confidence, where the constitutional requirement that every potential government must hold the confidence of the House in order to wield the rights and powers of governance (amongst them the right to advise the Governor-General) assumes greater relevance and importance in MMP Parliaments. This is underpinned by the consideration that as MMP may shift power back to Parliament, this should be the reference point within which reserve power decisions are made.

With the principles of neutrality and democracy set down as underpinning the reserve powers, let us now examine how they might inform the conventions which guide the exercise of the powers which are the focus of this paper: the power to refuse a request for a dissolution of Parliament and the power to appoint a Prime Minister.

31 P Harris and E McLeay "The Legislature" in above n 5, 104.

32 This possibility has been noted by M Chen, above n 2, 24 and Sir Geoffrey Palmer "What Changes are Likely to the Legislative Process and other Functions of Parliament from MMP?" (address to the "MMP: Managing the Political/Public Sector Interface" seminar, Wellington, 24 March 1994) 1.

33 P Temple *Making your vote count* (John McIndoe, Dunedin, 1992) 38.

34 Above n 32, 2.

III EXERCISING THE RESERVE POWERS IN AN MMP PARLIAMENT

The convention that the Governor-General exercises her reserve powers on the advice of those who hold the confidence of the House is well established.³⁵ Thus it follows that it is most unlikely that the Governor-General would refuse to follow the advice of a majority ministry which holds the confidence of the House. It seems that only where a majority government attempts to subvert the democratic process may the Governor-General exercise the reserve powers independently.³⁶ This is axiomatic if we remember the Governor-General's role as the upholder of our democratic constitution. Such cases will be rare. Thus I focus instead on those situations where the Governor-General receives advice from a minority ministry or party. In these cases there is no convention that she must accede to it as it is not clear that her advisers hold the House's confidence.

A *The Power to Refuse a Request for a Dissolution before the Summoning of Parliament*

Should an election under MMP return a Parliament where no one party holds a majority of seats, is the Governor-General obliged to follow the advice of the leader of the largest minority that a fresh election be called in order that a majority government (or a larger minority) be elected, should this advice be tendered?

The combined weight of principle, New Zealand precedent and the opinions of constitutional writers bears against the acceptance of any such advice. Forsey states flatly:³⁷ "[there is] no right to an immediate second dissolution before the new House can meet." To grant a second dissolution would be a dismissal of the original electoral verdict by the Crown. This undermines the democratic foundations of our constitution. It is the role of the Governor-General to safeguard the constitution, not challenge it. Lord Haldane also considered that such a request should be refused on the basis that the Governor-General "cannot entertain any bargain for dissolution merely with a *possible*

35 See above Part II A.

36 Examples where an independent exercise of the reserve powers appears to be justified include refusing the advice of a ministry governing by corrupt means or a series of requests for a dissolution from a government with a small majority made with the sole intention of successively increasing that majority. See above n 17, 124 and 270; G Marshall *Constitutional Conventions* (Oxford University Press, Oxford, 1984) 38. KJ Scott *The New Zealand Constitution* (Clarendon Press, Oxford, 1962) 76 considers that these examples apply to New Zealand as well. Probably the most well-known (and commented on) example this century is the 1932 dismissal of the majority Lang Government of New South Wales by Governor Game. Few would go as far as Dicey and maintain that the Crown's power to dissolve Parliament is subject only to considerations of whether the Government is acting in accordance with the wishes of the electorate. See above n 3, 433-435. Governments often make unpopular decisions and using public opinion as the sole criterion for dissolving a Parliament with a majority government on the Crown's initiative is questionable to say the least.

37 Above n 17, "Introduction" xxv.

Prime Minister before the latter is fully installed. [She] cannot, before that event, properly weigh the general situation and the parliamentary position of the Ministry as formed."³⁸ This aligns with the New Zealand *Cabinet Office Manual* which states that the Governor-General acts on the advice of her Ministers.³⁹ Logically prior to this is the proposition that those who tender this advice must have a mandate to give it. In cases where the ministry is merely possible, its mandate to tender this advice must also be unconfirmed. Therefore the Governor-General should be under no obligation to accept it and, *a fortiori*, entitled to refuse it.

Principle also counsels against accepting this advice. Should the Governor-General consent to a further dissolution this could not be seen as anything other than partisan support for the party which proposed it, be it the defeated Government or its main Opposition. The precedent value of such an action should not be underestimated. To act so breaches the neutrality principle which should guide the Crown. Moreover, the democracy principle demands that the matter be referred to Parliament, not left in the hands of the Governor-General alone. By directing the question of dissolution to Parliament, the Governor-General not only affirms the resurgence of Parliament that MMP brings but removes the Crown from suspicion of party political bias by intervening on behalf of no party. This view is reinforced by the practices of New Zealand Governors-General during the days of uncertain Parliaments this century.⁴⁰ Governors-General presiding over the parliaments of 1912 and 1928 did not call for new elections but thought it best to summon Parliament as quickly as possible to let Parliament resolve the constitutional issues.

38 Quoted in above n 25, 424 (emphasis added).

39 (Cabinet Office, Wellington, 1991) 3.

40 For a full and detailed exposition of parliamentary practice in this era, see above n 7.

B The Power to Appoint a Prime Minister

Once the question of an immediate second dissolution is settled, the next question which arises where no clear majority in the House can be ascertained simply on the basis of seats held is: which party shall govern? Where no one party holds a majority of seats, recourse must be made to the Governor-General's reserve power to appoint a Prime Minister.

While hung Parliaments are unusual in the Commonwealth, they are not rare. The past 30 years have seen five such Parliaments in Australia alone, four in Canada, and one in the UK, the most recent being Tasmania in 1989.⁴¹ New Zealand history also furnishes us with a precedent from 1928.⁴² The precedents this century, as Brazier notes, provide the Governor-General with a "dazzling array" of options when using the reserve powers to address the issue of forming a government from a hung Parliament.⁴³ There could be a minority government with no support from other parties in the House,⁴⁴ a minority government with the pledged support of other parties on confidence matters,⁴⁵ a minority coalition, a majority coalition of two⁴⁶ or three⁴⁷ parties, a national coalition of all the parties⁴⁸ - almost every permutation possible is represented in history.

Yet whatever the composition of the government which emerges as a result of the Governor-General's exercise of her reserve power to appoint a Prime Minister, there remains one constant. That constant is the general rule guiding the exercise of this reserve power: that the Governor-General should appoint as Prime Minister that person who appears capable of securing the confidence of the House of Representatives.⁴⁹

41 South Australia 1968 and 1989, Tasmania 1969 and 1989, New South Wales 1991; Canada 1968 and 1979, Newfoundland 1971, Ontario 1985; United Kingdom 1974. See G Winterton "Tasmania's Hung Parliament" [1992] Public Law 423. See also D Butler and DA Low (eds) *Sovereigns and Surrogates: Constitutional Heads of State in the Commonwealth* (St Martin's Press, New York, 1991) Appendix II for a table of post-WWII hung Parliaments.

42 Above n 7.

43 R Brazier "Government Formation from a Hung Parliament" [1986] Public Law 387.

44 Eg the UK in 1924 and 1974.

45 Eg the UK in 1977-1978 and Tasmania in 1989.

46 Eg the UK in 1900-1905 and Ontario in 1985.

47 Eg the UK in 1931-1940.

48 Eg the UK in 1916-1922.

49 See above n 17, lxxii - lxxiv; above n 43: "that person who appears best able to command the support of a stable majority in the House ... or failing [that] that politician who seems able to form a government with a reasonable prospect of maintaining that administration in office."; above n 16, 236-237: "In appointing a Prime Minister the Sovereign must appoint that person who is in the best position to receive the support of the majority in the House"; SA de Smith and R Brazier *Constitutional and Administrative Law* (6 ed, Penguin Books, London, 1989) 161: "the general rule is that in appointing a Prime Minister, the Queen should commission that person who appears best able to command the support of a stable majority in the House"; above n 36, 82: "The Governor-General's overriding concern

Indisputable as it is that this principle should guide the power of appointment, the same cannot be said for the procedure by which the Governor-General is to ascertain the will of Parliament. How is this principle to be effected? It should be noted at this stage that any procedure decided upon should be firmly underpinned by the principles of Crown neutrality and framed by reference to the renewed vitality of Parliament which the MMP era is likely to bring.

Given the new MMP context for reserve power decisions by the Governor-General, Commonwealth precedents are informative rather than determinative of any procedure our Governor-General should follow. In concert with constitutional writers, precedent points to three possible options: that the Governor-General should ask the defeated incumbent Prime Minister for advice as to his or her successor; that she should call on each party leader to form a government (or at the very least, for that leader's opinion on whether he or she could do so); and finally, that the Governor-General's role should be to consult party leaders in order to ascertain the party leader most likely to hold the House's confidence, but only once the politicians have themselves arrived at this outcome. In other words, the third option becomes a "political decision ... politically arrived at",⁵⁰ from which the Governor-General takes her cue as to who the government shall be.

1 *Seeking advice from the incumbent Prime Minister*

On at least two occasions (the United Kingdom in 1974 and Tasmania in 1989), the Crown has taken advice from the incumbent Prime Minister as to his successor.⁵¹ Premier Gray in Tasmania, heading a minority administration, informed the Governor that his Liberal Party should remain in office and continue to hold power on the basis that they held the most seats in the House. Later, he also expressed doubts about the ability of his opponents to adhere to the pact of political support they had negotiated. The Governor followed his advice and swore the Liberals into office.⁵²

should be a desire to obtain a Prime Minister who can obtain the support of a majority in the existing Parliament."

50 Above n 43, 389 and 393.

51 It is salient to note at this point that the outgoing Prime Minister is generally considered to have no right to give this advice but is nonetheless under a duty to give it if requested. See above n 17, lxviii and above n 43, 395-396. Contrast however *Practices Recognized and Declared by resolution of the Australian Constitutional Convention* (Parliament House, Brisbane, July 29 - August 1 1985) Practice B appended to C Sampford and D Wood "Codification of Constitutional Conventions in Australia" [1987] Public Law 231, which does not make a distinction between those situations where the incoming government is obvious and those where it is not.

52 Accounts of the proceedings are to be found in above n 41; A Castles "Post-election Constitutional Usage in the Shadow of Mount Wellington: Tasmania's Constitutional Crisis 1989" (1989) 12 Adel LR 292; ID Killey "Tasmania: A New Convention" (1991) 2 Public LR 221; "Documents Concerning the Constitutional Events which Surrounded the Tasmanian General Election in 1989" (1991) 2 Public LR 4.

This procedure is subject to a number of criticisms which cast doubts on its appropriateness for a New Zealand Parliament under MMP. The first is that the electoral mandate of the Prime Minister to tender that advice has expired. It may yet be reconfirmed by Parliament but that is not certain. Meanwhile, the Governor-General accords the advantage of a first hearing to a Prime Minister whose advice has the status of personal opinion only. While it has been claimed that the outgoing Prime Minister's advice would be backed by many years of political experience and there would be nothing wrong with the Governor-General utilising this experience to aid her in exercising the reserve powers,⁵³ the merits of this course of action are not convincing. The incumbent Prime Minister is foremost the leader of a political party rather than a neutral adviser to the Governor-General. He or she would obviously have a vested interest in retaining power and whatever advice was given would carry the taint of self-interest. It might even be the case that the Prime Minister would recommend that a further general election be held rather than any attempt be made to meet with Parliament at all.⁵⁴

Matters are further complicated when the Governor-General has had previous political affiliations, such as with the present Governor-General, Sir Paul Reeves and Sir Keith Holyoake. There is no guarantee that this will not be the case in future. In such a situation, the Governor-General's seeking advice from the Prime Minister would inevitably be vulnerable to further claims of political bias.⁵⁵

The combination of obtaining advice from the incumbent Prime Minister and the fact that the Governor-General may have his or her own political connections constitutes a direct breach of the principle of Crown neutrality. David Butler comments that "[i]t would be widely seen as outrageous if, in an essentially adversarial situation, the umpire had to act on the advice of one of the protagonists."⁵⁶ This comment achieves greater significance when there could be claims that the umpire is biased as well. Not only must the Crown act impartially, the Crown should also be *seen* to act impartially. This will not happen when the Governor-General calls on only the outgoing Prime Minister for advice.

2 *Calling on each party leader in turn*

To avoid allegations of bias in the Governor-General's exercise of the reserve powers, it has been suggested that the Governor-General should call on each party leader and ask him or her to form a government in turn.

This solution too is not without its attendant problems. Apart from the concern that no party leader has a confirmed mandate to advise the Governor-General, the Governor-

53 Above n 43, 396.

54 See above Part III A.

55 These issues are canvassed in the Auckland District Law Society Public Issues Committee publication *The Holyoake Appointment* (ADLS, Auckland, 1977).

56 Above n 4, 91.

General would have to be very careful about the order in which she called on the party leaders, or again, her impartiality would be in doubt. Although this could generally be avoided by calling on each leader according to that party's share of seats in the House, thus effecting the electorate's preference as reflected in the allocation of seats to each party, it would be a nice question for the Governor-General if two parties were to tie.⁵⁷

Further, suppose that each party were to meet with Parliament in turn, attempt to gain its confidence and fail because it had not the assured support of other parties required for a majority vote in the House. Of course, there is the additional possibility that some parties will not even wish to meet the House as defeat will be certain. In each case, the country will have been subjected to a succession of potential Prime Ministers. It is likely that the Governor-General would have to call a second general election as no party had proven itself capable of holding the confidence of the House.

3 *Consultation after political negotiations*

Both the options outlined above present problems both from the standpoint of preserving the Governor-General's neutrality and affirming Parliament's function of making and unmaking governments. It is preferable that the Governor-General should refrain from direct intervention in the political process. As Parliament has the task of determining which party (or parties) should govern through the convention that the government must hold the confidence of the House, it would be no great extension of that convention to expect that the parties themselves would find the parliamentary grouping (minority government or coalition or majority coalition) most likely to satisfy that convention before the confidence of the House is actually tested in Parliament.

Once the grouping likely to hold the confidence of the House has emerged from political negotiations, it would then be the responsibility of the Governor-General to satisfy herself that this is indeed the case. This however, would be a constitutional issue. The Governor-General would be seen to be removed from deciding political questions.

It is submitted that the most appropriate means of ascertaining whether or not the group which appears to hold the confidence of Parliament actually does so is by consultation with the relevant party leaders. This was the course followed by the Tasmanian Governor in 1989, who called individually on the Independent members of the Tasmanian Parliament in order to assure himself of their commitment to a pact pledging support for the main opposition Labor Party (the "Parliamentary Accord") which would give the Labor Party majority support in Parliament.⁵⁸ This was in addition to earlier consultation with the Labor Party leader to confirm that he felt

57 As they did in the UK in 1910.

58 Above n 41, 431. The Liberals held 17 seats, Labor 13 and the Independents 5 in the 35 seat Parliament.

assured of the Independents' support.⁵⁹ The Governor also had written evidence of this Independents/Labor pact in the Parliamentary Accord negotiated between them.

This course of action was presciently foreshadowed by RQ Quentin-Baxter, who wrote in 1980:⁶⁰

Where no party has a majority of seats, it will be the normal course for party leaders to conduct their own discussions until [the group which is likely to hold the confidence of the House] identifies itself and its leader. In such circumstances, the Governor-General will no doubt wish to satisfy himself by consultation that he understands correctly the alignment of parliamentary forces.

The proposition that the Governor-General should appoint the Prime Minister after consulting with the likely candidate and his or her supporters, once Parliament has identified that person, has the support of precedent and constitutional writers. It also has the desirable effect of removing the Governor-General from the arena of political decision-making, so upholding her neutrality, and gives back Parliament its role as government-maker. It is my opinion that should the Governor-General be called upon to use her reserve power to appoint a Prime Minister in an MMP Parliament, this is the course of action she should follow.

However, should the government formed according to this procedure fail shortly after its appointment, it is likely that the Governor-General's decision will be criticised. To pre-empt, or at least diffuse, this criticism, it is submitted that any negotiations of political party support upon which the Governor-General has based her decision should be put in writing. Alternatively, the Governor-General herself could put forth her understanding of the parliamentary situation in writing. Either, or both, of these documents could then be tabled in Parliament for the public record.⁶¹

In the event that no apparent government emerges from party discussions, the only course available for the Governor-General would be to summon Parliament and let it resolve the matter. In this, she would be following the same course as her predecessors in 1912 and 1928.⁶² Moreover, she would again allow Parliament to determine its government rather than imposing a solution on it from above. If even this option failed, there would be no other alternative but to dissolve Parliament and call another general election, leaving it to the electorate to determine the government more conclusively.

4 *Gubernatorial responsibility for government stability*

The Governor of Tasmania in 1989 appeared to consider that it was part of his duty to appoint a Prime Minister to ensure that any decision he made would "result in stable

59 Above n 41, 430.

60 Above n 19, 307.

61 As was effectively done in Tasmania. See "Documents Concerning" above n 52.

62 See above n 7.

Government for a reasonable period of time."⁶³ Most probably he derived this view from the writings of Lascelles, who wrote in 1950 that the Sovereign should attempt to find a "Government for a reasonable period with a working majority in the House"⁶⁴ and Jennings, who considered that the proper function of a constitution was to provide a government with a stable majority.⁶⁵

However, if the Governor-General must consider the question of government stability, this necessarily draws her into a consideration of the merits of the parties - a political, rather than a constitutional consideration. If political considerations were to be factored into the exercise of the reserve power, the Governor-General's neutrality is again called into doubt. This should be avoided, if at all possible.

Moreover, the reserve power is that of appointing a Prime Minister, not securing stable government. The ultimate function of the reserve powers is to ensure that "Parliament ... shall in the long run give effect to the will of ... the political sovereign ie of the electoral body."⁶⁶ The Governor-General's role is therefore to ascertain the will of the people as represented in the Parliament they have elected. With MMP, the will of the people is more likely to be proportionately translated into parliamentary representation. Thus it may well be the case that a hung Parliament represents an electoral will for a "Government with a precarious and shifting majority."⁶⁷ It is submitted that the Governor-General should be cognisant of this will as to do otherwise would be to by-pass the will of the electorate and frustrate the democratic process by requiring a different result from that indicated by the electorate. Questions of stability should therefore play no part in the Governor-General's decision.

C *The Power to Refuse a Request for a Dissolution once the House is in Session*

Requests for a dissolution during a parliamentary session entail different considerations from those made before the House has had a chance to meet. In this case, a ministry has been installed and its mandate to tender advice confirmed by Parliament. That mandate is lost, and the consequent request for a dissolution made,⁶⁸ when the government fails to pass supply or loses a confidence vote.⁶⁹ As Parliament is now convened, the Governor-General should therefore take cognisance of it in making

63 As did the Lieutenant-Governor of Ontario in 1985. See ID Killey, above n 52, 223.

64 Quoted in above n 16, 240.

65 Above n 25, 427.

66 Above n 3, 429 - 430.

67 Above n 17, xvii.

68 Or as RQ Quentin-Baxter suggests in above n 19, 315, the other option for a Prime Minister who has lost the confidence of the House is to tender his resignation.

69 Occasional defeats on other matters should not be construed as meaning that the Government no longer has the confidence of the House. Only the loss of votes on supply and other confidence motions can have this import. This is well illustrated by the National Government's June 14, 1994 defeat on the procedural motion that a select committee report on the performance of the Electricity Corporation be accepted by the House. The Government neither resigned nor requested a dissolution.

her decision to refuse the request or not.⁷⁰ This is the orthodox expression of the general principle upon which a Governor-General may refuse a dissolution request from a minority government.⁷¹ The central consideration for the Governor-General is whether there exists in Parliament an alternative ministry capable of securing the confidence of the House.⁷² As the defeated government was a minority one, there is theoretically an alternative in the House. Underpinning the task of finding an alternative ministry is the question of proof. How much evidence should the Governor-General require of the existence of this new ministry?

It is submitted that when deciding whether or not to refuse a dissolution request, one method of satisfying the question of an alternative ministry is for the Governor-General to require written statements from party leaders outlining their party's voting intentions on the questions of supply and confidence, given the current state of play on the

70 It should be noted that New Zealand has witnessed only two requests for a dissolution before the usual expiry of the parliamentary term this century (1951 and 1984). Both were from majority governments. The risk of electorate disapproval of those seen to be seeking dissolution for political advantage or with doubtful justifications, as the 1984 request was widely perceived to be, should be enough of a disincentive to ensure that dissolutions are not actually requested unless a confidence measure has actually been lost by the Government.

71 See, for example above n 43, 118: "the Queen may properly refuse a Prime Minister's request for a dissolution if she has substantial grounds for believing (i) that an alternative government enjoying the confidence of a majority of the House of Commons, can be formed without a general election, and (ii) that a general election held at that time would be clearly prejudicial to the national interest."; above n 16, 240 (quoting Sir Alan Lascelles' May 2, 1950 letter to *The Times*) "If the Sovereign can be satisfied that (1) an existing Parliament is still vital and capable of doing its job, (2) a general election would be detrimental to the national economy, more particularly if it followed closely on the last election, and (3) he could rely on finding another Prime Minister who was willing to carry on his Government ... the Sovereign could constitutionally refuse to grant a dissolution to the Prime Minister in office."; BS Markesinis *The Theory and Practice of Dissolution of Parliament* (Cambridge University Press, London, 1972) 92: "an alternative government is a crucial factor."; Lord Simon quoted in Markesinis, 92: "can the defeated Prime Minister go to the Sovereign and demand another general election and is the Sovereign bound to grant this request? Of course not. But why not? Because there is an alternative Government available, without sending the electorate again to the polls." New Zealand Governors-General who have considered this principle in the context of the Byng-King affair (see below Part III C) have considered that this is the correct course of action. See Viscount Cobham "The Governor-General's Constitutional Role" in L Cleveland and AD Robinson *Readings in New Zealand Government* (AW & AH Reed, Wellington, 1977) 82, 85.

72 I exclude from consideration questions of the health of the economy, given the current diversity of views as to the preferred economic orthodoxy. Were economic health to be a consideration for the Governor-General and a decision made on that basis, this would appear to be an endorsement of a particular party's policy. This would be a direct contravention of the neutrality principle, and as I have already stated (above Part II C) the actual policy mix of the Parliament should not be the province of the Governor-General.

parliamentary stage. For instance, suppose that the minority government of party A has just been defeated on a vote declared to be a confidence matter. It asks for a dissolution. Party B and party C form the main opposition parties along with the smaller party D. Party B could govern in a majority coalition with party C or as a minority government with the pledged support of parties C and D. Rather than immediately call a general election with its attendant risks of "revolving door" Prime Ministers,⁷³ the Governor-General could call on the leaders of parties C and D and request that they make clear their voting intentions. This would establish the existence of an alternative ministry with the confidence of the House, or otherwise. These documents should be tabled in Parliament for the public record. Thus the grounds on which the decision was made would be transparent. This would absolve the Crown from any accusations of bias as the decision would be seen to be based on a calculation of the numbers in Parliament and not the Governor-General's own political judgment.⁷⁴ Moreover, New Zealand's Governor-General would avoid the controversy that has dogged the unfortunate Canadian Governor Lord Byng in the aftermath of his 1926 decision to refuse a dissolution to his Prime Minister Mr King on the basis that the Opposition's Mr Meighen could form an alternative ministry.⁷⁵ This proved not to be the case. Lord Byng was placed in the invidious position of having to grant Mr Meighen the dissolution he had refused Mr King. Mr King's Liberal Party was triumphantly returned to office. History is not kind to those who makes mistakes.⁷⁶ This system should ensure that the risk of making a similar mistake is minimised.⁷⁷

To further ensure that there is indeed an alternative ministry available, the Governor-General may refer the issue to Parliament, to be determined by a test vote in the House.⁷⁸

Of course, should no such support of party B be assured (or any other combination which may be able to form an alternative ministry) then the Governor-General would be

73 R Brazier *Constitutional Practice* (Clarendon Press, Oxford, 1988) 36.

74 R Brazier above n 43, 406 argues that the decision should be left with the Queen as her long experience as Head of State means that she is "ideally placed to moderate between any competing wishes of party leaders ... and indeed that she has ample expertise at her disposal to enable her to do so." However, New Zealand Governors-General serve as Head of State for a limited time (5 years) and so do not have the time to accumulate the political acumen imputed to the Queen. This is a strong reason for requiring the Governor-General to make her decision on the basis of information provided by the parliamentary actors.

75 Lord Byng based his decision on Mr Meighen's assurances that he could form a government. These assurances were based on informal promises of support from a number of Progressive Party members. Yet the Governor-General did not consult the Progressives himself and in fact, the Progressives maintained that "Mr Meighen had no assurance from our group, nor did he seek any assuranceNo promise had been made." See above n 17, 134.

76 For a comprehensive examination of this incident see above n 17, 131-250.

77 At least on the Governor-General's part.

78 Adapted from a suggestion in HV Evatt "The Discretionary Authority of Dominion Governors" (1940) 18 Canadian BR 1, 4.

justified in granting Party A's request for a dissolution. Further, if the new government proves unable to govern (due to a breaking of alliances or a loss of members eg through a by-election) then it is proper for the Governor-General to allow the dissolution requested and let the electorate break the parliamentary deadlock. This would be on the basis that the House had now pronounced its confidence in both the old and alternative government and had found them both lacking.

This method satisfies the democracy principle posited above in that any possible alternative ministry will have to have the support of a majority of the House's members (and thus a majority of the electorate) - whether this be coalition or minority government. Further, the decision is made within Parliament and avoids recourse to a general election,⁷⁹ in line with Parliament's restored function under MMP of making and unmaking governments.⁸⁰ By effectively leaving the burden of proof of an alternative ministry in Parliament's hands, rather than the Governor-General's, this method also accords with the neutrality principle.

Precedents for refusing dissolution requests are rare. However, New Zealand does have its own precedent for this situation. It occurred in 1877. Some of the Governor's reasons are no longer relevant.⁸¹ However, amongst his reasons were his opinions that the question of the party which held Parliament's confidence "may yet be solved without a Dissolution" and that the Government had "produced no *evidence* in support of [its view that a working majority could be produced *only* by dissolution]."⁸² Thus both New Zealand precedent and orthodox constitutional theory support the Governor-general refusing a dissolution on the grounds that an alternative ministry capable of governing exists (with appropriate evidence) without recourse to a general election. Governor Normanby in 1877 included some considerations which are, it is submitted, matters of practical common sense to which any Governor-General should have regard: whether there was any great political question which should be submitted for the electorate's verdict;⁸³ and what the situation was with regard to supply.

The dissolution of Parliament is an issue which continues to fascinate those who involve themselves with constitutional matters. Occasionally, discussion strays from the traditional confines of the realm of Crown power and posits a new approach to the

79 Unless, of course, no alternative ministry appears. See above Part III C.

80 Frequent general elections would be disruptive and would mean that there was more electioneering than governing during our already short parliamentary term. It is hard to justify this as perpetual function of Parliament.

81 For instance, Governor Normanby included amongst his concerns the fact that an election would interfere with the harvesting and shearing seasons. See *Dissolution of Parliament (1877)* New Zealand. Parliament. House of Representatives. Appendix to the journals vol 1, A.7: 3 (emphasis added).

82 Above n 81, 3.

83 This was in fact the case when the Governor-General acceded to a request for an early dissolution in 1951. See Sir J Marshall "The Power of Dissolution as Defined and Exercised in New Zealand" (1977) LVIII *The Parliamentarian* 13, 15. If the fact that a great public issue needs to be decided is sufficient reason for granting a dissolution, then its absence should point towards refusal.

tricky questions which arise regarding when, and in which circumstances, Parliament should be dissolved. Tony Benn argued that "the best way to avoid [the Crown's involvement in political matters] would be to transfer the power of dissolution ... to the Speaker."⁸⁴ To this end, he introduced the Crown Prerogatives (House of Commons Control) Bill 1988. The Bill made provision for the Speaker to advise the Queen on the time of dissolution after confirmation by the House of Commons.⁸⁵ The Bill did not progress past its first reading⁸⁶ but it nonetheless raises an interesting question for New Zealanders: should such a measure be adopted here?

RQ Quentin-Baxter considered this question and answered it in the negative. My answer is the same.⁸⁷ The objectives of the Bill - affirming the sovereignty of Parliament and preserving the neutrality of the Crown - are already achievable here⁸⁸ without the need for legislation.⁸⁹ Decisions which are political need not be controversial if they are made according to clear principles. Moreover, if politicians take responsibility for the Governor-General's decision by means of written statements, then Mr Benn's dislike of unaccountable decision-makers is neutralised.⁹⁰

The Bill's suggested solution to dissolution difficulties also raises practical difficulties. What if a request to dissolve Parliament is made before Parliament meets and the incumbent Speaker has been defeated? A new Speaker cannot be elected before Parliament meets. There might be no one with the status to act. Yet the Governor-General is always appointed during, not between, parliamentary terms. Further, when the parliamentary arithmetic is complex, who is to say that a Speaker will not be appointed from what eventually transpires to be the Opposition?⁹¹ This may in itself change the likely vote. Vesting this power in the Speaker may also diminish his standing as a neutral arbiter of parliamentary debate. "It is one thing to make day-to-day

84 Above n 22, 14.

85 Section 2.

86 See Gt Brit Parliamentary Debates v 129 (1988): 1109.

87 See RQ Quentin-Baxter, above n 19, 306-307. However, his rejection of such a measure was based on a desire not to shorten further New Zealand's already short (by international standards) parliamentary term.

88 That is, if the guidelines discussed in Part III are adopted.

89 As G Palmer *Unbridled Power* (2 ed, Oxford University Press, Auckland, 1987) 139-140 notes: "New Zealand passes too many laws and it passes them too quickly. ...New Zealanders exhibit an innocent and misplaced faith in the efficacy of legislation. ...legislation is passed for which there is no legal need."

90 Part of the impetus for the Bill appears to have been that the right to advise a dissolution of Parliament rests solely with the Prime Minister in the UK. See R Blackburn "The Dissolution of Parliament: The Crown Prerogatives (House of Commons Control) Bill 1988" (1989) 52 MLR 837, 838. This does not appear to be the case in New Zealand. See A Quentin-Baxter *Review of the Letters Patent 1917 Constituting the Office of Governor-General of New Zealand* (Cabinet Office, Wellington, 1980) 116 para 143.

91 As did in fact occur in 1993.

decisions on procedural priorities, acting by precedent. It is quite another to be a political fixer in the grand manner. The two roles might well conflict."⁹²

The decision to refuse a request for a dissolution should remain with the Governor-General. In considering this request, the main criterion should be whether an alternative ministry exists already, capable of securing the House's confidence. Its existence should be confirmed either by a vote in Parliament or by written assurances of support from the Parliament. These methods not only uphold Parliament's regained function of government-maker but also ensure that the Crown appears impartial in its decision - thus ensuring the credibility of the reserve powers.

IV CODIFICATION OF THE RESERVE POWERS CONVENTIONS

An analysis of the reserve powers in an MMP Parliament in the light of precedent and principle provides three possible conventions which the Governor-General may choose to adopt to guide her when exercising her powers to refuse a request for a dissolution of Parliament and to appoint a Prime Minister. It is submitted that they should be stated as follows:

- (i) **Power to refuse a request for a dissolution of Parliament before the summoning of Parliament:** The Governor-General should refuse the request and instead call Parliament as soon as practicable so that it may resolve any necessary constitutional issues.
- (ii) **Power to appoint a Prime Minister:** The Governor-General should appoint that person who seems best able to hold the confidence of the House of Representatives. That person should be identified after party political negotiations and, once identified, the Governor-General should satisfy herself that this is indeed the case by consultation with the appropriate parties.
- (iii) **Power to refuse a request for a dissolution of Parliament when Parliament is in session:** Parliament should not be dissolved if an alternative government exists in the House. The Governor-General should request that party leaders make clear their intended parliamentary alliances (preferably in writing) in order to determine whether this possible alternative government exists. If no such government is evidenced, the dissolution request should be acceded to.

These posited conventions are as yet untried, much less accepted. They do not yet satisfy Jennings's test for the existence of a constitutional convention, which was approved by the Canadian Supreme Court.⁹³ The test for establishing the existence of a constitutional convention asks three questions:⁹⁴ [f]irst, what are the precedents;

92 Above n 4, 87.

93 *Reference Re Amendment of the Constitution of Canada* (1982) 125 DLR (3d) 1, 90.

94 I Jennings *The Law and the Constitution* (University of London Press, London, 1959) 136.

secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule?

Jenning's test cannot be regarded as satisfied as the conventions suggested in this paper cannot reach precedent status until they are actually employed. Nonetheless, suppose that in future years, these possible conventions realise actual convention status. Once this stage has been reached, calls for codification are likely. This part of the paper assesses the arguments for and against codification in both statutory and extra-statutory form. Extra-statutory codification could take place in the *Cabinet Office Manual* or be effected by adoption of the convention by resolution of the House.⁹⁵ However, for the main part, the debate over codification centres on the enactment of conventions in statutory form. Therefore, this shall also be the focus of this part of the paper.⁹⁶

The most ardent advocate of codifying the reserve powers' underlying conventions was the highly respected HV Evatt. His argument was that the reserve powers were unclear and vague; that the circumstances in which they could be validly exercised were uncertain; that precedent and writers of authority on the powers furnished conflicting general rules for crisis situations; and that, in any event, there was no "independent tribunal" to make a final determination on any general rule or its application.⁹⁷ As a cure for these ills, he proposed the remedy of codification.⁹⁸ The formulation of precise rules would bring certainty to this grey area of the constitution; otherwise, he maintained, with dark foreboding, "the near future must see the end of political democracy."⁹⁹

With all due respect, the statutory codification of constitutional conventions does not appear to have been the necessary pre-condition for continued democracy in Australia, New Zealand, Canada or the United Kingdom in the years since Evatt issued his pessimistic prediction. History has shown that continued democracy cannot be the determining factor propelling us towards codification.

The more important reason for codification must therefore be certainty. In constitutional crises, the Crown must know what its powers are, how to exercise them

95 This was the suggestion of RQ Quentin-Baxter, above n 19, 314.

96 However, my remarks should generally be taken to apply to extra-statutory codification as well.

97 Above n 17, 269-288 and see especially the summary of Evatt's argument on page 288.

98 Evatt never answers the question of definition which precedes codification ie how are the content and the scope of the reserve powers he intends to codify to be decided? Instead he blithely asserts that "there should not be any insuperable difficulty in reaching agreement as to the rules governing the exercise of the reserve powers and prerogatives, either in England or in any of the Dominions", above n 13, 281. This is an interesting statement given that he had just devoted the previous two chapters to demonstrating the difficulty constitutional writers had had in formulating general rules from the conflicting precedents.

99 Above n 17, 281.

and where to find them - preferably in a statute. Although this requirement of certainty is indisputably important, it is not so undisputable that enactment in statutory or extra-statutory is the only way to achieve this goal. The wheels of the New Zealand constitutional system are oiled daily by numerous conventions which exist nowhere in written form but are none the less certain for all that. The role and powers of Cabinet in modern government is one such example.

Moreover, attempts to make certain the powers of the Governor-General by statutory enactment have proved exceedingly difficult. This is because the reserve powers, by their very nature, are powers which are spotlighted only when Parliament cannot fulfil its normal function. It is difficult to envisage what these circumstances may be, much less set out "in detail, comprehensively and with precision"¹⁰⁰ what the Governor-General should do when faced with the dilemma which arises out of parliamentary breakdown.

These problems are well demonstrated in the Constitutions of countries which have adopted Evatt's suggestion. In fact, such Constitutions tend to leave the Governor-General with very little guidance as to how her discretionary powers should be exercised. For instance, on the question of appointment, "Malaysia, Singapore, Nigeria, Sierra Leone, Uganda and Kenya [provide in their Constitutions] that the Prime Minister 'is to be a person who appears "likely" to command the support of the majority of the members of the lower House', while in British Guiana, Malta, Jamaica and [Malawi] it [is] the person who appears 'best able' to command such support."¹⁰¹ In the Constitutions of the more recently established states, the Governor-General's discretion is even more clearly emphasised. For example, the Constitutions of Antigua, Barbuda, the Bahamas and Belize stipulate that where it "appears" to the Governor-General that a clear government has not emerged from the elections, the Governor-General "shall appoint the member ... who in his judgment is most likely to command the support of the majority."¹⁰² The situation is similar in Barbados where the Governor-General "shall, acting in his discretion" appoint as Prime Minister the person who "in his judgment, is best able to command the confidence of a majority of members."¹⁰³ In Mauritius the Governor-General is to act "in his own deliberate judgment" and appoint "the member ... who appears to him best able to command the support of a majority of the members."¹⁰⁴ Finally, in the Cook Islands, the Queen's Representative appoints as Prime Minister "a member of the Parliament who commands the confidence of a majority of members"¹⁰⁵ when the House is in session, and when it is not, "a member of the Parliament who in the opinion of the Queen's

100 Above n 17, lxxxiii.

101 Above n 17, lxxii.

102 Constitutions of Antigua and Barbuda s 69(2); the Bahamas ss 73(1) and 79(1)(a); Belize s 37(2) cited in above n 17, lxxxiii.

103 Constitution of Barbados ss 65(1) and 65(3) cited in above n 17, lxxxiii.

104 Constitution of Mauritius s 59(3) cited in above n 17, lxxxiii.

105 Article 13(2) (a), Constitution of the Cook Islands, cited in above n 17, lxxxiii.

Representative, acting in his discretion, is likely to command the confidence of a majority of members."¹⁰⁶

The picture seems the same when we investigate constitutional provisions regarding requests for dissolutions. In Jamaica it appears that the Governor-General must act on the advice of the Prime Minister to dissolve Parliament with no discretionary power to refuse.¹⁰⁷ In other Commonwealth states with written constitutions, the Jamaican practice is stated as a general rule. Exceptions to this general rule are then given which appear to confer a wide discretion on the Governor-General to refuse a dissolution request. For instance, in Belize, St Lucia and St Vincent and the Grenadines:¹⁰⁸

If the Prime Minister advises a dissolution and the Governor-General, acting in his own deliberate judgment, considers that the government ... can be carried on without a dissolution and that a dissolution would not be in the best interests of [the country], he may, acting in his own deliberate judgment, refuse to dissolve [Parliament].

A further example is furnished by the Constitutions of the Bahamas, Barbados, Mauritius and St Kitts and Nevis where, if:¹⁰⁹

the office of Prime Minister is vacant, and the Governor-General, acting in his own deliberate judgment, considers that there is no prospect of his being able to find within a reasonable time to make an appointment to that office ...[he] shall dissolve Parliament.

Although this example does not speak directly to the issue of refusing a dissolution request, it does show how wide a discretion is conferred on the Governor-General with respect to dissolving Parliament.

It is difficult to discern in these various codifications of the reserve powers any guidance as to how exactly the reserve powers of appointing a Prime Minister or refusing a request for a dissolution. If anything can be said, it is that the framers of these Constitutions have *not* been able to pin down with certainty the conventions which regulate the exercise of the reserve powers and have instead preferred to err on the side of discretion. Underlining this point is the fact that the Australian Constitutional Convention of 1983 expressly declared that the conventions underpinning the powers of

106 Article 13(2)(b), Constitution of the Cook Islands, cited in above n 17, lxxiii.

107 Constitution of Jamaica ss 71(2) and 71(3) in above n 17, xxxiv.

108 Constitutions of Belize s 84(4)(a); St Lucia s 55(4)(a); St Vincent and the Grenadines s 48(5)(a), cited in above n 17, xxxiv.

109 Constitutions of the Bahamas ss 66(2) and 79(1); Barbados ss 6(2) and 32; St Kitts and Nevis s 47(4) cited in above n 17, xxxv.

appointing a Prime Minister and refusing a dissolution request were "Practices NOT Recognized and Declared"¹¹⁰ by it and RQ Quentin-Baxter's consideration that:¹¹¹

[a]t least in the New Zealand situation, there is no need for wide and ill-defined discretions to refuse a Prime Minister's advice to dissolve Parliament, or in any way to influence the processes by which an existing Parliament finds, or fails to find, a ... majority among its own members.

As well as proving difficult for the drafters of constitutions to outline, when the courts have been faced with this question, they have proved themselves unable to offer any further guidance than that expressed in law, which, as already noted, is precious little.

The case of *Adegbenro v Akintola*¹¹² concerned the interpretation of various provisions of the Constitution of Western Nigeria. Article 33(10)(a) provided that: "the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly."

The Governor dismissed the Premier after he had received a letter signed by more than half of the members of the House, stating that they no longer supported the Premier, even though there had been no vote of no confidence passed in the Premier prior to his dismissal.

The question for the Privy Council was the meaning of the phrase "it appears to him that the Premier no longer commands the support of a majority of members." It was argued for the dismissed Premier that the words implicitly embodied the United Kingdom convention that the question of support can be registered only by the vote tally from the House. No other method of determining whether the Premier enjoyed the House's support was constitutional and thereby legal.

The Privy Council was not convinced by this argument, declaring that statute must supplant convention, and where it did, "in the end [it is] the wording of the constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated into the formulae [of the Western Nigerian Constitution]."¹¹³

110 *Practices NOT Recognized and Declared by resolution of the Australian Constitutional Convention* (Parliament House, Adelaide, April 26-29 1983) appended to above n 51 (emphasis in original). Note that in 1985, the Convention did attempt to lay down a procedure for the appointment of a Prime Minister, see above n 51, which has been questioned by Forsey, above n 17, lxviii.

111 Above n 19, 311.

112 [1963] AC 614 (PC).

113 Above n 112, 632 per Viscount Radcliffe

Their Lordships' eventual conclusion was that the Governor was under no legal restriction as to whom he may consult or the material he may use in coming to his decision.

Thus judicial consideration of codified conventions appears not to provide any greater assistance for Governors-General than codification itself. The certainty sought by Evatt does not appear to have been delivered by the solution he posed. As A Quentin-Baxter said:¹¹⁴

it is possible to give written expression to the conventions which specify the conditions which must exist before the Governor-General may exercise a reserve power but it is extraordinarily difficult to specify the manner in which those conditions are satisfied. ...[N]o written provision conferring discretionary powers requiring the exercise of a political determination can provide for every imaginable contingency.

The effects of codification are also questionable. From a strict separation of powers viewpoint it does not seem desirable to have political questions of the highly sensitive nature which the Governor-General seeks to answer when she exercises the reserve powers to become the province of the judiciary. The New Zealand Court of Appeal acknowledged as much in *Burt v Attorney-General*¹¹⁵ where Cooke P approved the dicta of Lord Roskill in *Council of Civil Service Unions v Minister for the Civil Service*¹¹⁶ who considered that:¹¹⁷

Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, *the dissolution of Parliament and the appointment of Ministers* are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place [to determine these matters].

CCSU dealt with the reserve powers at common law. However, if codified in statutory form, the reserve powers would seem to be covered by the provisions of the Judicature Amendment Act 1972.¹¹⁸ Thus they would be subject to review and furthermore, there seems to be no provision in the JAA which would enable the courts to decline to review the reserve powers, even though the question they investigate is intensely political in nature and their powers of elucidation limited. It is also difficult to envisage what sort of remedy the courts would devise for breach of such a rule and indeed, whether Parliament would take any notice of a court's pronouncements on the subject. It is a fascinating question whether the courts would be obliged to review the reserve powers once codified¹¹⁹ although there is support for tentatively concluding that

114 Above n 90, 250.

115 [1992] 3 NZLR 672, 677 - 687.

116 [1985] AC 374 (HL) (*CCSU*).

117 Above n 116, 418.

118 Section 3(b) "a power or right conferred by or under any Act ... to exercise a statutory power of decision" (JAA).

119 And one which is beyond the scope of this paper.

they would not do so. Richardson J in *CREEDNZ Inc v Governor-General*¹²⁰ remarked:¹²¹

the willingness of the Courts to interfere with the exercise of discretionary decisions must be affected by the nature and subject-matter of the decision in question and by consideration of the constitutional role of the body entrusted by statute with the exercise of the power ... And where ... it is the decision of the Governor-General which is impugned, the realities of decision-making at that level must be recognised.

If the courts refuse to review the reserve powers we return to certainty as the justification for codifying the reserve powers. Given that the ability of codification to provide certainty in this area is uncertain itself, we must also consider whether we wish to purchase this doubtful certainty at the price of flexibility. Conventions, as unwritten rules, are flexible and elastic, free to be adapted as the circumstances require or to fall into desuetude when no longer appropriate. They often grow from constitutional crises and are used to help resolve them. Just as we cannot predict constitutional crises, can we so confidently attempt to prescribe the remedy before we know the exact nature of the illness? In fact, it could be argued that to codify conventions creates or at least exacerbates constitutional crises. The post-1984 election constitutional crisis arose from the inflexibility which resulted from codifying in section 9 of the 1950 Civil List Act the convention that Ministers were required to be members of Parliament. Another constitutional convention had to be imported from Australia to resolve the problem until the matter was clarified by section 6(2)(a) of the Constitution Act 1986.¹²² Although further crises were effectively foreclosed by statutory intervention, it is salient to note that the initial crisis arose from the inflexibility of codified convention and was solved by another, this time non-codified convention, adapted to fit the situation.

EA Forsey, Evatt's equally well-respected contemporary made a characteristically eloquent argument against codification with which it is fitting to close this section:¹²³

Conventions are essentially, and intensely practical. They rest ultimately on common sense. They are accordingly, flexible, adaptable. To embody them in an

120 [1981] 1 NZLR 172.

121 Above n 120, 197-198 and 201; appvd *Ashby v Minister of Immigration* [1981] 1 NZLR 222, 230.

122 Section 6(2)(a) "A person who is not a member of Parliament may be appointed and may hold office as a member of the Executive Council or as a Minister of the Crown if that person was a candidate at the general election of members of the House of Representatives held immediately preceding that person's appointment as a member of the Executive Council or as a Minister of the Crown but shall vacate office at the expiration of the period of 40 days beginning with the date of the appointment unless, within that period, that person becomes a member of Parliament." See also above n 17, xci and G Palmer *Constitution in Crisis* (John McIndoe, Dunedin, 1992) 45-47.

123 Above n 17, xc.

ordinary law is to ossify them. To embody them in a written Constitution is to petrify them.

V CONCLUSION

The reserve powers customarily occupy the top shelf in New Zealand's constitutional cupboard, shrouded in the dust of popular misunderstanding about or, more likely still, popular ignorance of their existence. It is only when constitutional crisis occurs, or seems imminent, that they are taken down from the top shelf, dusted off and put to work - work which is most important and fundamentally necessary. The reserve powers represent the last safeguard of our democratic constitution: they are necessary for its continued existence and, for that reason, important. They assume greater importance in light of New Zealand's endorsement of the MMP electoral system at the 1993 referendum. Using the MMP system to determine the composition of Parliament raises the possibility that the Governor-General's reserve powers will be called on more often. She may be required to appoint a Prime Minister when the government is not clear or to consider requests for a dissolution of Parliament from a government unsure of its support in the House - or in some cases, from a potential government before Parliament has declared its support of any government.

If the Governor-General is required to use the reserve powers more often, it is vital that they be credible and effective. Credibility and effectiveness can only come, it has been submitted, by the powers being exercised according to clear guidelines, soundly based in principle. These principles are those of Crown neutrality and democracy, meaning that the Governor-General should not only exercise her powers impartially but that she should also be seen to do so; and that the reserve powers should be exercised with reference to the renewed vitality of Parliament it is predicted that MMP will bring.

An analysis of the reserve powers of the Governor-General in the new context of an MMP Parliament, concludes with three new possible conventions which may guide the exercise of the reserve powers, practices which are founded in principle and buttressed by precedent. These suggested conventions, if adopted, should remove the Governor-General from the realm of political power-broking, yet retain a flexibility in our constitutional arrangements which is essential for their continued adaptation to the changing constitutional and political context.

The final question in this examination of the reserve powers and their underlying understandings is whether they should be codified or not. Codification has been posited as the solution for the sometimes uncertain nature of the reserve powers. Yet an analysis of various attempts to codify the reserve powers shows that these attempts provide little certainty or guidance for the Head of State in reserve power decisions. Moreover, judicial interpretation of these statutes also furnishes little elaboration on how the general discretion conferred on the Head of State is to be effected. Further, there remains the concern, acknowledged by the judiciary themselves, that such matters are not appropriate for judicial scrutiny. Codification would thus appear to serve little

purpose. It also brings with it an "ossifying"¹²⁴ effect that prevents these conventions from developing and adapting to the political arena wherein they must operate.

To conclude, should the possible conventions outlined and suggested in this paper evolve into true conventions in future years, there must be an even greater sea-change to New Zealand's constitution before we can consider the drastic step of codification an attractive option.

124 Above n 17, xc.