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**BUILDING CONFIDENCE IN ‘THE CONFIDENCE OF THE
HOUSE’**

An Assessment of the Formal and Organic Conceptions of Confidence and their Adoption in
Aotearoa’s Constitutional Arrangements

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Abstract

In Aotearoa, the survival of a government depends on it gaining and retaining the 'confidence of the house'. Despite the fact that this confidence convention is essential to our constitutional system, until now it has remained unclear in what circumstances that confidence can be lost.

There are two viable conceptions of confidence: the formal conception (which holds that confidence is lost only through defeat on a formal confidence vote) and the organic conception (which holds that confidence can be lost through clear and public indications by a majority of Parliament that they do not wish the government to continue in office).

I examine the normative arguments for both conceptions and argue the organic conception best channels democratic reality and constrains the illegitimate use of power. I assess which conception better reflects historical practice, constitutional materials and scholarly opinion. I conclude that the organic conception of confidence best fits these sources. Accordingly, I find that the organic conception should guide our understanding of when a government has lost confidence.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 13,626 words.

Subjects and Topics

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I Introduction

Constitutional change and development in Aotearoa is typically “a pragmatic and practical response to events.”¹ That approach is usually sufficient, since significant constitutional confusion arises rarely. But when Aotearoa does find itself in a constitutional crisis – where doubt exists about the constitutionally ‘correct’ course, hindering the regulation of power – our ‘pragmatic’ tendency leaves constitutional actors adrift.²

That was the case in 1984, when outgoing Prime Minister Robert Muldoon exploited constitutional uncertainty to defy urgent instructions from incoming Prime Minister David Lange to devalue the New Zealand dollar.³ It was only through the timely intervention of Muldoon’s Attorney-General that the crisis was resolved with the assertion of what we now know as the caretaker convention.⁴ Having already experienced a constitutional crisis over *what* restrictions apply to a dead government, it is more than possible Aotearoa’s next constitutional crisis will be over *when* we ought to consider a government to be dead.

These are the question I deal with in this paper: what do we mean by the ‘confidence of the House of Representatives’ – the lifeblood of a government – and when is it lost? By examining and answering these questions, I identify when a government has lost its democratic legitimacy and should be constrained in its exercise of power. This is particularly important given that democracy is arguably the ‘underlying principle’ of our constitution.⁵

To do so, I identify the different conceptions of the confidence of the House of Representatives (hereafter, ‘confidence’). Is it an ‘organic’ concept capable of being demonstrated or withdrawn at any time, or a ‘formal’ concept only capable of being tested at certain moments? I then show how confusion regarding which conception applies could cause a constitutional crisis by examining their implications for the caretaker convention and exercise of the reserve powers in the context of a mid-term governmental crisis or collapse.

Having demonstrated that uncertainty regarding which conception of confidence applies could cause a constitutional crisis, I set out the normative arguments for either conception. I find the organic conception better upholds the spirit of democracy and more accurately reflects political

¹ Dame Silvia Cartwright “The Role of the Governor-General” (2001) NZCPL Occasional Paper 15 at 15.

² Matthew Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565 at 571.

³ Philip Joseph *Constitutional and Administrative Law of New Zealand* (4th ed, Thomson Reuters New Zealand, Wellington, 2015) at 133.

⁴ At 133.

⁵ Kenneth Keith ‘On the Constitution of New Zealand’ in Cabinet Office *Cabinet Manual 2008* at 3.

reality. I consider the argument that adopting the organic conception could compromise the political neutrality of Governors General, with problematic consequences. I also note the argument that how the organic conception would work in practice is unclear. Ultimately, I conclude that those concerns are resolvable by reference to the principles governing government formation.

Finally, I consider whether the organic conception is compatible with previous practice, influential constitutional texts, scholarly literature and the experience of comparative jurisdictions. This review appears to be the first of its kind on this topic. I conclude that the organic conception is most compatible with these sources.

The conclusion that the organic conception is preferable and appropriate is crucial to the future of our parliamentary democracy. By adopting the organic conception, we can better constrain the power by governments which have lost democratic legitimacy and prevent such governments from manipulating uncertainties arising from a constitutional system based largely on convention.

II Understanding Confidence

A Clarity and Uncertainty in the Status Quo

For an executive government to form and operate, it must hold the confidence (literally, the support) of a majority of the House of Representatives.⁶ Without confidence, it has lost its democratic legitimacy. As David McGee, the former Clerk of the House of Representatives, explained: “The confidence of the House underpins any Government’s right to hold office; constitutionally, except in a caretaker capacity, it cannot do so without that confidence.”⁷

Until now, constitutional actors in Aotearoa have focused on the expression of confidence through formal confidence votes in Parliament – parliamentary events explicitly labelled as opportunities to test confidence. If a government loses a formal confidence vote, “it no longer has a mandate to govern and must announce that it remains in office as a caretaker administration.”⁸ Formal confidence votes come in three forms.

Express votes typically originate from parliamentary opposition parties, which may move motions of no confidence in situations where the “government’s whole performance [is] open to scrutiny.”⁹ Situations like this are rare: the rules of parliamentary debate only allow for such motions during

⁶ Joseph, above n 3, at 241.

⁷ David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia, Wellington, 2017) at 127.

⁸ Joseph, above n 3, at 241.

⁹ At 239.

the Address in Reply debate (held at the opening of a new Parliament), after the Prime Minister's Statement (at the start of the parliamentary year), and during supply debates.¹⁰

Implied votes arise on votes on parliamentary activity which is so crucial that a loss would prevent the government from continuing to function, implicitly signaling an absence of confidence.¹¹ Examples include the annual Budget, imprest supply bills and bills setting annual tax rates, all of which a government must be able to pass in order to raise and spend funds.¹²

Votes by declaration of the government occur when a government declares through statements in or outside parliament that a parliamentary vote will be treated as one of confidence. This is conventionally, but not exclusively, done by a new government sworn in following a former government's collapse.¹³ For example, following the collapse of the National-New Zealand First coalition in 1998 and the negotiation of a new political settlement between National and Mauri Pacific, Prime Minister Jenny Shipley moved a confidence vote by declaration to demonstrate confidence.¹⁴

In the largely duopolistic political system which existed under the First Past the Post electoral system, gaining confidence through formal confidence votes was relatively straightforward: Labour or National only needed to win a majority of parliamentary seats, which would then be occupied by MPs who had already indicated they would support their party on matters of confidence and supply.¹⁵

The introduction of the Mixed Member Proportional (MMP) electoral system made confidence more relevant by helping minor parties enter Parliament, making it more difficult to win an outright majority.¹⁶ Minority government has become the norm (the only party to win a majority under MMP is Jacinda Ardern's Labour Party, which won a majority of votes and seats in the 2020 election).¹⁷ Governments typically secure confidence through coalition, confidence and supply or

¹⁰ At 241.

¹¹ At 239.

¹² At 239.

¹³ At 241.

¹⁴ Sir Michael Hardie Boys "The Constitutional Challenges of MMP: A Magical Demystification Tour" (Institute of Policy Studies Seminar on Government under MMP: The Constitutional and Policy Challenges, Wellington, 3 December 1998) at [28].

¹⁵ At 241: Crossing the floor was possible under First Past the Post, but rare – the anomalous situation of Marilyn Waring voting against the government of Robert Muldoon is one of the exceptions.

¹⁶ At 239 and 241.

¹⁷ At 16; Thomas Coughlan "Election 2020: Jacinda Ardern claims largest Labour victory in 50 years" *Stuff* (18 October 2020) <<https://www.stuff.co.nz/national/politics/300135131/election-2020-jacinda-ardern-claims-biggest-labour-victory-in-50-years>>.

cooperation agreements.¹⁸ Consequently: “[Whereas] under FPP politics, party discipline virtually foreclosed the possibility of a government’s collapse or defeat on a confidence motion ... MMP politics have made that scenario a distinct possibility.”¹⁹

The focus on formal votes of confidence, however, has resulted in doubt about whether and how confidence might be tested when formal votes are not possible. Consequently, our ability to constrain governments which have arguably lost democratic legitimacy is weakened – increasing the risk of undemocratic, illegitimate or harmful political behaviour.

Imagine the following situation. National forms a coalition government with New Zealand First. The two parties fall out over the privatisation of Wellington International Airport. New Zealand First indicates it intends to vote against National at the next formal confidence vote in Parliament, but that vote is months away. Consider another possibility. National wins a bare majority of seats in Parliament. One of its MPs becomes dissatisfied with National’s opposition to banning nuclear weapons in Aotearoa and indicates they intend to vote against National at the next formal confidence vote. Again, that formal vote is months away. Or imagine this final scenario. Labour is in a coalition government with New Zealand First, with a confidence and supply agreement with the Greens. Despite the outbreak of a global pandemic, Labour refuses to delay the election. This angers New Zealand First, who say they no longer have confidence in a Labour-led government. However, there is no remaining formal confidence vote at which they can formally express that.

In any of these situations it is unclear whether the governing party would have lost confidence – despite having lost the support of a majority of Parliament and therefore its democratic legitimacy. As will be explained later, if the governing party has lost confidence it must abide by the caretaker convention or relinquish its governing role entirely. If it has not, it could plausibly continue to govern without formal constraint by the caretaker convention. All these situations also raise questions about whether and how the reserve powers could be exercised by the Governor-General. Accordingly, whether a party in such circumstances has lost the confidence of the House is profoundly important.

Importantly, this issue is likely to arise in the future. The first hypothesised situation is closely adapted from the National-NZ First coalition crisis in 1998.²⁰ The second is adapted from the tussle between Prime Minister Robert Muldoon and National MP Marilyn Waring in 1984.²¹ The third

¹⁸ At 16.

¹⁹ At 14.

²⁰ At 132 and 133.

²¹ At 236.

is based on the recent controversy over the election date between Labour and New Zealand First.²² Given these precedents, a political dispute over the proper understanding of confidence is entirely possible.

The two possible conceptions of confidence – organic and formal – provide different answers to the question of what happens when the government may have lost the support of a majority of MPs, but there is no formal opportunity for that lack of support to be expressed.

B Formal and Organic Conceptions of Confidence

The formal conception holds that a government retains confidence until it loses a formal confidence vote.²³ Until that point – even if it was apparent it lacked support from the majority of parliamentarians – a government could continue to exercise executive power and operate the machinery of government without restraint under the caretaker convention. The organic conception holds that a government retains confidence only until it becomes apparent that a majority of Parliament has withdrawn its support – regardless of whether that comes through a formal vote or through public statements and political behaviour.²⁴

While the formal conception has a straightforward mechanism (a government holds confidence until it loses a formal confidence vote), the functioning of the organic conception is less obvious. I will later examine how we could analogise between the birth and death of governments. I find that, in both cases, the focus should be on political actions which demonstrate the *quantity* of support in Parliament with *clarity*. When set against the hypothesised circumstances above, the formal conception holds that the governing parties would retain confidence until a formal vote. The organic conception holds that the governing parties have lost confidence and must commence a period of negotiation to try and regain it, during which period its exercise of power would be limited by the caretaker convention.²⁵

C Constitutional Implications of Confidence's Different Conceptions

Whether we adopt the organic or formal conception has implications for three constitutional matters. First, it affects the principle of democracy and application of accountability in our political system. Second, it changes our understanding of when the caretaker convention comes into effect.

²² “Prime Minister Jacinda Ardern Changes Election Date to 17 October” *RNZ* (17 August 2020)

<<https://www.rnz.co.nz/news/political/423698/prime-minister-jacinda-ardern-changes-election-date-to-17-october>>.

²³ McGee, above n 7, at 127.

²⁴ Cabinet Office *Cabinet Manual 2017* at [6.59].

²⁵ Joseph, above n 3, at 14.

Third, it changes our understanding of when the reserve powers can be exercised by a Governor-General.

1 Democracy and accountability

The requirement that a government maintain confidence has two important and interconnected purposes: the guarantee of responsible, democratic government and the functioning of accountability. The right to vote for a parliamentary representative is ineffectual unless those representatives also have influence over the exercise of governmental power. As Robert Godley, a prominent Cantabrian and advocate of self-governance, declared in 1850: “To give us representative institutions without full powers is ... a mockery and a delusion”.²⁶

Confidence ensures that universal suffrage translates into democratic government. The Governor-General exercises power on the advice of her ministers. The confidence convention ensures these ministers are “collectively responsible to Parliament for the overall performance of the government, and individually responsible for the performance of their portfolios.”²⁷ Members of Parliament are then responsible to the voters who elect them. This chain connects governments to electors. The requirement of confidence is integral to democratic government; it ensures that if voters lose faith in a government, their representatives can exercise power over that government by threatening to withdraw or actually withdrawing confidence.²⁸

The requirement of confidence also ensures accountability, allowing the conduct of government and the exercise of power to be scrutinised and held to account. Accountability is a relationship between an actor and a forum.²⁹ The actor is obliged to explain their conduct to a forum empowered to query and judge that explanation. Failure to satisfy the forum might entail penalties. Here, the executive government is the actor and the legislature is the forum. As Joseph observed: “The political executive is answerable to the House of Representatives for the overall conduct of government.”³⁰ The House can demand explanations from the government through tools such as written and oral questions, which the government is incentivised to answer for fear of losing confidence and therefore its legitimacy.³¹ Accordingly, mistakes made and abuses perpetrated by the government can be exposed to voters (enhancing their ability to contribute to our democracy), penalised and learnt from (improving the efficacy of our government). Consequently, the

²⁶ Robert Godley “Speech to the Constitutional Association” (Wellington, 15 November 1850).

²⁷ Joseph, above n 3, at 13.

²⁸ Anne Twomey *The Veiled Sceptre* (Cambridge University Press, Cambridge, 2018) at 16.

²⁹ Mark Bovens “Assessing and Analysing Accountability: A Conceptual Framework” (2007) 13 *ELJ* 4 at 450.

³⁰ Joseph, above n 3, at 208; Twomey, above n 28, at 16.

³¹ Twomey, above n 28, at 503.

requirement of confidence ensures that the government functions democratically and effectively, giving it significant constitutional importance.

The way we understand confidence also has specific implications for two of Aotearoa's most sensitive constitutional issues: the constraints which apply during government transitions and the exercise of power by the Governor-General.

2 The caretaker convention

When a government loses confidence (through an election or a mid-term collapse in support), it has lost its democratic legitimacy.³² However there may be a period between the existing government losing confidence and a new government being formed.³³ Accordingly the existing government must continue to function, but by convention its ability to exercise executive power – particularly that of an urgent or long-lasting nature – is curtailed.³⁴ This 'caretaker convention' typically applies where it is not clear who will form the next government, or where it is clear who will form the next government, but that government has not yet been formed.³⁵

In the former case: "Decisions taken and specific policy determined before the start of the caretaker period may be implemented by a caretaker government" (though if it is significant and difficult to reverse, it may be appropriate for the caretaker government to consult with other political parties).³⁶ However when new matters arise which – by nature of their significance, controversial hue or long-term implications, among others – require decision, the caretaker government should (in order of preference) defer making a decision, put in place temporary holding arrangements, or decide after consulting with other political parties to ensure the decision has the support of a majority of parliamentarians.³⁷ In the latter case, the caretaker government should "undertake no new policy initiatives".³⁸ If a decision cannot be delayed, the caretaker government must "act on the advice of the incoming government".³⁹

These are significant conventional restrictions on the exercise of executive power. Accordingly, whether they apply to a government is a matter of considerable constitutional importance. And, crucially, the conception of confidence we choose could have significant implications for whether

³² At 502.

³³ At 502.

³⁴ Cabinet Office, above n 24, at [6.21].

³⁵ At [6.24].

³⁶ At [6.25.b] and [6.26].

³⁷ At [6.25.e] and [6.25.d].

³⁸ At [6.29].

³⁹ At [6.29].

the caretaker convention applies to a government. A formal conception of confidence would mean that so long as a government has not lost a formal confidence vote, it has not lost confidence and is therefore not subject to the caretaker convention. An organic conception of confidence would mean that so long as a government does not have the votes to win a formal vote, even if a formal vote has not yet been held, it has lost confidence and is subject to the caretaker convention.

3 The reserve powers

The cardinal convention of Aotearoa's constitutional system is that the Governor-General acts on the advice of her responsible ministers.⁴⁰ As with all conventions, there are certain exceptions. In some situations, the Governor-General may be permitted or compelled to act without or contrary to such advice.⁴¹ In these situations, the Governor-General is exercising her reserve powers. Crucially, the Governor-General's ability to exercise those reserve powers typically depends on whether her responsible ministers have confidence.

Accordingly, the conception of confidence we take has significant implications for whether the exercise of the reserve powers is permitted and legitimate. Typically, the reserve powers may be used to:⁴²

1. Dismiss a Prime Minister;
2. Appoint a Prime Minister
3. Grant or refuse to grant a request to dissolve Parliament; and, arguably
4. Grant or refuse to grant a request to prorogue Parliament.

Of these, the most interesting for our purposes are the powers to grant or refuse to grant dissolution or prorogation. With regards dissolution, granting such a request would lead to an election, giving the Governor-General significant power over a government which might wish to cause or delay such a vote. Regardless of what the Governor-General themselves believe, as Joseph observed: "The Governor-General must grant the request where a Prime Minister retains the confidence of the House".⁴³ If a government does not retain confidence, then the Governor-General could exercise their independent judgment to refuse a dissolution and appoint a new government which does.⁴⁴

⁴⁰ *Crawford v Securities Commission* [2003] 3 NZLR 160 (HC) at 174.

⁴¹ Twomey, above n 28, at 18 and 19.

⁴² Joseph, above n 3, at 723 and 726; Twomey, above n 28, at 587.

⁴³ Joseph, above n 3, at 737.

⁴⁴ Twomey, above n 28, at 18 and 19.

With regards prorogation, allowing prorogation might help a government facing an imminent confidence vote which it is unsure whether it can win (a Canadian example of this will be discussed later in this paper).⁴⁵ Accordingly, some scholars and constitutional texts now assert that if a government has lost confidence or 'majority support', a Governor-General could refuse a request to prorogue.⁴⁶

Accordingly, the conception of confidence adopted is important. If we take a formal conception, it is arguable that a Prime Minister who had lost practical support in the House but had not lost a formal confidence vote could demand a dissolution from the Governor-General to prevent their parliamentary opponents from forming a government. If we take an organic conception, it is arguable a Governor-General would be entitled to refuse a request in such circumstances. In the lead-up to Aotearoa's first MMP election in 1996, there was significant concern about whether and how the reserve powers might be exercised.⁴⁷ These concerns turned out to be unfounded: according to Joseph, widespread respect for the caretaker convention, the personal and political incentives acting on politicians "to conciliate their differences if they are to take the Treasury benches", and the high-quality advice tendered by the Cabinet Office during moments of transition have all rendered the use of the reserve powers unnecessary.⁴⁸

It is worth noting, however, that there are moments in Aotearoa's not-so-distant history where these factors were less able to constrain political misbehaviour. The best example is that of the transition between Prime Ministers Muldoon and Lange, where Muldoon initially refused to act on the advice of the incoming Lange-led government.⁴⁹ Had Muldoon's own Attorney-General not intervened, it is not unreasonable to expect that some intervention by the Governor-General could have been necessary (although the fact that an election had already been conducted and the presence of legal difficulties concerning the appointment of members-elect as ministers constrained the potential use of reserve powers).⁵⁰ As always, the excesses of Prime Minister Muldoon demonstrate the importance of a well-accepted set of constitutional guard-rails.

III A Normative Examination of Confidence

The two different conceptions of confidence have profound democratic and constitutional implications. I now consider which of the two is preferable. In favour of the organic conception, I

⁴⁵ At 587.

⁴⁶ At 588.

⁴⁷ Joseph, above n 3, at 724.

⁴⁸ At 723.

⁴⁹ Twomey, above n 28, at 525.

⁵⁰ At 525 and 526; Joseph, above n 3, at 133 and 736.

note the importance of recognising democratic reality and the necessity of restraining the misuse of power. In favour of the formal conception, I note the uncertainty inherent to any attempt to identify where confidence lies and the importance of preserving the neutrality of the Governor-General. I conclude that the arguments in favour of the organic conception are strong, and that the concerns raised regarding uncertainty and neutrality are largely a matter of application and therefore resolvable.

A Recognising Democratic Reality

As previously mentioned, Sir Kenneth Keith has argued that democracy is the 'underlying principle' of our constitutional system.⁵¹ While many scholars complement that with other fundamental principles, few seriously contest his assertion.

Indeed, the history of our constitutional system can largely be understood as a series of pro-democracy reforms: the introduction of representative institutions in 1852; the reduction and abolition of any property requirement to vote in 1860 and 1879; the introduction of the Māori electorates and extension of the franchise in 1867; the introduction of women's suffrage in 1893 and their right to stand for office in 1919; the lowering of the voting age in 1969 and 1974; the extension of Māori voting rights to general electorates in 1975; the introduction of MMP in 1993.⁵²

The necessary implication of having democracy as the underlying principle of our constitutional system is that we must examine every constitutional issue in light of it. Occasionally, ensuring full compliance with the principle of democracy will be obstructed by some other constitutional rule (such as the ongoing disenfranchisement of prisoners serving a term of over three years).⁵³ However, where it is not so obstructed, the principle of democracy should guide us as we resolve constitutional confusion. There is no binding rule in the context of confidence which mandates a certain outcome. The principle of democracy can guide us here.

Given that, which of the two conceptions – formal or organic – is most democratic? In other countries the composition of the executive is directly voted on (for example, in the United States of America) and thus has its own democratic legitimacy; this is not the case in Aotearoa.⁵⁴ Instead it is "[t]he concept of representative and responsible government [which] gives New Zealand's

⁵¹ Keith, above n 5, at 3.

⁵² Dean Knight and Matthew Palmer *The Constitution of New Zealand: A Contextual Analysis* (1st ed, Hart, Wellington, 2021) at 58.

⁵³ At 59.

⁵⁴ Janet McLean and Alison Quentin-Baxter *This Realm of New Zealand* (Auckland University Press, Auckland, 2017) at 34.

constitutional framework its democratic legitimacy.”⁵⁵ The composition of the executive is indirectly voted on through the election of parliamentarians. It gains democratic legitimacy by virtue of being responsible to a democratically elected Parliament. Given that, if the will of Parliament changes, the best way to give effect to democracy is to give effect to Parliament’s will.

Returning to Godley’s statement from 1850, it is a “mockery” and “delusion” to have representative institutions which cannot constrain or direct the exercise of executive power at key constitutional moments.⁵⁶ If we adopt the formal conception of confidence, the will of Parliament regarding the composition of the executive can only be recognised through formal confidence votes – the number of which is limited. If we adopt the organic conception of confidence, the will of Parliament can be recognised more frequently and flexibly. The organic conception better reflects the principle of democracy.

B Constraining Illegitimate Use of Power

Regardless of whether a government possesses confidence or not, it always retains full executive authority.⁵⁷ Typically when a government has lost confidence, given it has lost its democratic mandate, the caretaker convention takes force to significantly limit the exercise of those powers.⁵⁸ Adopting the organic conception would ensure this convention is consistently applied.

The importance of the caretaker convention to the regulation of public power can be seen in the constitutional crisis which unfolded following the 1984 election. Prime Minister Robert Muldoon’s National Party had lost the election and was presiding over a ten to fourteen day transition period before David Lange and the Labour Party took office.⁵⁹ Faced with an economic crisis, however, Muldoon refused to follow explicit advice from the incoming government to devalue the New Zealand dollar – which only he, as Minister of Finance, had the power to do.⁶⁰ Muldoon only capitulated after his own Attorney-General intervened in favour of following the incoming Labour government’s advice, which prompted the formation of the caretaker convention.⁶¹

This historical episode demonstrates the importance of having constitutional guardrails which deter or stop governments from exercising power when they do not have democratic legitimacy. It

⁵⁵ At 55.

⁵⁶ Godley, above n 26.

⁵⁷ Joseph, above n 3, at 76.

⁵⁸ At 76.

⁵⁹ At 133.

⁶⁰ At 133.

⁶¹ At 133.

is unclear, however, whether the caretaker convention would apply to a government to which a majority of parliament has expressed opposition but which has not lost a formal confidence vote. It is possible to imagine such a government insisting that it is not restrained by the caretaker convention and is able to continue unconstrained.

If a majority of Parliament opposes a government's continuation in office, that should be considered an indication that the government's democratic legitimacy is questionable. Former Governor-General Sir Michael Hardie Boys made this point with regards the minority government of Jenny Shipley in 1998, when he wrote that by calling a vote of confidence on the new government: "Its legitimacy – which might otherwise have been open to question – was established beyond doubt."⁶² Accordingly, adopting the organic conception of confidence would ensure that a potentially illegitimate government could not misuse its power.

Adopting an organic understanding of confidence – and thus accepting that the caretaker convention will apply during periods where parliament has expressed doubts about or opposition to a government remaining in office – would have two effects. The first would be on politicians. By explicitly establishing that the convention applies during such moments, politicians may be deterred from testing and pushing the boundaries of constitutionally acceptable behaviour. The second, and more important, effect would be on government officials. Establishing that the caretaker convention applies during such moments would legitimise officials' refusal to support or give effect to any significant or long-lasting executive decisions during that period. This would create another buffer between a government and behaviour which is constitutionally inappropriate due to an absence of or lack of clarity regarding that government's democratic legitimacy.

C Navigating Political Uncertainty

Proponents of the formal conception of confidence, however, are not opposed to *democracy* – they are in favour of *clarity*. A proponent of the formal conception of confidence might note that arguing for 'giving effect to Parliament's will' and preventing the misuse of power obscures the real issue: what it would actually mean to give effect to Parliament's will 'more frequently and flexibly'?

The formal conception of confidence is primarily valuable because it provides certainty about when confidence has been lost: the outcome of a formal confidence vote can only be victory (through majority support or a draw) or defeat for a government. By contrast, what would count as a 'loss of confidence' under the organic conception is unclear from the limited scholarly

⁶² Hardie Boys, above n 14, at [28].

discussion of this issue. Knight and Palmer write that among the things indicating loss of confidence would be “actions or statements which indicate that one of the parties of government has repudiated the coalition, confidence-and-supply or support agreements on which the government grouping was predicated”.⁶³ However they do not explain what such ‘actions or statements’ would be, or indicate what other things would show loss of confidence. For example, would it be sufficient for a parliamentarian to withdraw from the governing party’s caucus and refuse to comment on whether they would support the government (in this hypothetical scenario, assume it has a single seat majority) on matters of confidence?

The goal of this examination is to resolve “doubt [regarding] the constitutionally ‘correct’ course of action, hindering the regulation of public power”. If the reach and implications of the organic conception are unclear, then adopting it could significantly expand the frequency and degree of doubt regarding the constitutionally ‘correct’ course of action – directly contradicting that aim. However, this is precisely why we assign the task of resolving those doubts to the Governor General – a constitutional actor charged with acting independently and consistently. As I will later show in my examination of previous statements by Governors General, we already have clear principles governing how Governors General resolve questions of confidence which minimise this uncertainty. Accordingly, this is not a significant issue.

D Minimising Political Instability

By expanding the potential legitimate indicators of withdrawal of confidence, it is plausible that adopting the organic conception would increase the frequency with which our political settlements are renegotiated (through the collapse or renegotiation of coalitions, during which period the caretaker convention would be enforced). Some might see this as problematic – Sir Jerry Mataparae, for example, has previously noted that New Zealanders “place a high value on stable government”.⁶⁴ In a similar vein, Janet McLean and Alison Quentin-Baxter favour the formal conception because – given how short Aotearoa’s three-year parliamentary term is – “the constitution should be weighted towards the continuity, during that short period, of both the government and the Parliament.”⁶⁵ In 1986 the Royal Commission on the Electoral System made ‘effective government’ one of its criteria for evaluating alternative electoral systems, partly on the basis that significant “changes of personnel and policy are not, in the long term, always conducive to effective government”.⁶⁶ It emphasised that “a Government must have sufficient stability and

⁶³ Knight and Palmer, above n 52, at 101.

⁶⁴ Sir Jerry Mataparae “Speech to the Press Gallery Dinner” (Government House, Wellington, 9 November 2013).

⁶⁵ McLean and Quentin-Baxter, above n 54, at 189.

⁶⁶ Royal Commission on the Electoral System “Report of the Royal Commission on the Electoral System: Towards a Better Democracy” (December 1986) at 2.43.

capacity for decisive action to be able to implement its policies” and noted concerns about “lengthy periods where Government [comes] to a standstill with no workable majority to be found”.⁶⁷ Constitutional discourse in Aotearoa has long recognised political stability as an important factor to consider. One could therefore argue that we ought to adopt the formal conception in order to minimise the number of times that political stability is challenged.

However this argument assumes that by creating an institutional structure which obstructs challenges to a government, we can avoid political instability. That is not necessarily the case. If a majority of parliamentarians disapprove of a government remaining in office, they are likely to voice that opinion. If we adopted the formal conception, the result would be a government which had clearly lost its democratic legitimacy but could nonetheless remain in office – tainting every action it took, likely causing public outrage and almost certainly prompting widespread concern about our constitutional settings: the kind of political uncertainty which scholars like McLean and Quentin-Baxter believe we should avoid.

Such an argument also takes for granted that incumbent governments are unlikely to take concerning and anti-democratic actions which would merit a rapid withdrawal of confidence. McLean and Quentin-Baxter assert that given Aotearoa’s institutional settings, “we think it unlikely that a Prime Minister would request that Parliament be temporarily suspended, or prorogued, in order to avoid a vote of no confidence”.⁶⁸ This focus on prorogation is misleading: multiple governments and political actors have contemplated or embarked upon anti-democratic courses of action (see for example the earlier discussion of Muldoon during the 1984 currency crisis or Joseph’s to-be-discussed observations regarding the Shipley government’s options).⁶⁹ Given these historical experiences, it is difficult to believe that future governments will uniformly act in a constitutionally appropriate manner which renders constitutional penalties unnecessary.

Moreover, the whole premise of our democratic system is that political parties and parliamentarians are judged by the public for their political choices – which includes the choice to voice disapproval of a government. If voicing disapproval and triggering a loss of confidence will cause unreasonable and unpopular political instability, political parties and parliamentarians are likely to recognise that fact and avoid taking such a step. If they do so regardless, it is better to trust the electorate to assess the circumstances, weigh whether such a move was merited and mete out punishment accordingly than to create a rigid institutional structure which prevents meaningful challenge to potentially illegitimate governments.

⁶⁷ At 2.154

⁶⁸ McLean and Quentin-Baxter, above n 54, at 190.

⁶⁹ Twomey, above n 28, at 525; Joseph, above n 3, at 725.

E Preserving Regal Neutrality

If it remained unclear what counted as a loss of confidence under the organic conception, the task of resolving competing claims and determining whether a government had confidence would fall to the Governor-General. This poses an issue, since, as Hardie Boys has observed, in Aotearoa:⁷⁰

... the head of state must be, and must be seen to be, politically neutral, removed, aloof from politics, [therefore] it is the responsibility of politicians to protect her and her representative from the need to make what is, or may be seen to be, a political decision.

Perhaps the most persuasive argument in favour of adopting the formal conception is that, given the importance of preserving the neutrality of Governors General, we should insist on formal confidence votes to minimise the risk of a situation where confidence is unclear and the Governor-General is forced to endanger their reputation by exercising their independent judgment.

As I will show later in this paper, Hardie Boys has both a strongly organic view of confidence and been explicit about his preference for distancing the Governor-General from political processes. In one speech he favourably examined a number of comparative constitutional examples. In each, wrote Hardie-Boys, “the head of state is explicitly distanced from the political negotiation and receives very public advice on its conclusion.”⁷¹ With these comparative examples in mind, he emphasised that while the job of the Governor-General is to “ascertain the will of Parliament ... It is for the politicians themselves to provide the necessary information.”⁷²

This principle – that government formation and collapse is a political process – is entrenched in our scholarly discourse regarding confidence. Knight and Palmer have written that: “Governors General in New Zealand have wisely treated the process of government formation as a political one, to be undertaken by politicians”.⁷³ By doing so, they uphold the need for Governors General “to be – and to be perceived to be – politically neutral”.⁷⁴ As Gavin Phillipson has observed (in the context of the British Fixed-Term Parliaments Act), should the Queen or a Governor-General be pushed to exercise their reserve powers in instances where confidence is unclear, “there would

⁷⁰ Sir Michael Hardie-Boys, Governor-General of New Zealand “The Role of the Governor-General Under MMP” (Speech to the Institute of International Affairs, Wellington, 24 May 1996) at [61].

⁷¹ At [56].

⁷² At [64].

⁷³ Knight and Palmer, above n 52, at 69.

⁷⁴ At 47.

be controversy whichever way the Queen and her advisors decided".⁷⁵ Accordingly, Phillipson endorses the formal conception as a way of eliminating uncertainty and the risk of a regal figure being perceived to be interfering in political matters.⁷⁶

The constitutional risks of a Governor-General being perceived to enter the political fray can be seen in Canada's Byng-King dispute. As previously mentioned, following Canada's general election in 1925 no clear parliamentary majority had emerged.⁷⁷ By June 1926, Prime Minister King led a minority government and faced possible parliamentary censure. He chose to seek a dissolution of Parliament.⁷⁸ Believing that an alternative government could not be formed, he expected Governor-General Byng to comply.⁷⁹ Byng did not, prompting King's resignation.⁸⁰ An alternative government could not be formed, prompting an election which King won by campaigning directly against Byng.⁸¹ King subsequently raised his concerns with other Commonwealth countries via the Imperial Conference of 1926, which fundamentally reshaped the constitutional role of the Governor-General from being a representative of the British government to being a personal representative of the sovereign.⁸² Byng departed Canada in 1926 as a maligned political figure.

For a more recent demonstration of the risks associated with direct interference in political matters by Governors General, we can look to the dismissal of Australian Prime Minister Gough Whitlam in 1975 by Governor-General John Kerr. The parliamentary opposition had used its control of Australia's upper chamber to block supply to the government and had urged Kerr to dismiss Whitlam as prime minister.⁸³ When Whitlam sought a new election for the upper chamber, Kerr dismissed him without warning.⁸⁴ The Liberal opposition became the government and won a subsequent election in a landslide, but Kerr's remaining tenure as Governor-General became fraught.⁸⁵ Whitlam's Labor party boycotted Kerr, who ultimately chose to resign in 1977 – earlier than he had planned.⁸⁶ His subsequent attempts to hold public office were opposed and he was so

⁷⁵ Gavin Phillipson "Written evidence submitted by Professor Gavin Phillipson (University of Bristol) to the Joint Committee on the Fixed-Term Parliaments Act 2011" at [14].

⁷⁶ At [15].

⁷⁷ J.E Esbrey 'Personality and Politics: A New Look at the Byng-King Dispute' (1973) 6 Canadian Journal of Political Science 1 at 47.

⁷⁸ At 49.

⁷⁹ At 49.

⁸⁰ At 49.

⁸¹ At 50.

⁸² At 53.

⁸³ Paul Kelly *November 1975* (Allen & Unwin, Sydney, 1995) at 256-257.

⁸⁴ At 254.

⁸⁵ At 307.

⁸⁶ At 284.

reviled a figure among some Australians that his death in 1991 was not publicly announced until after he had been buried.⁸⁷

These case studies demonstrate that political controversy and constitutional strife loom as the risks of direct involvement or interference by the Governor-General in political matters. Adopting the organic conception of confidence would require a Governor-General to identify potential indications that confidence has been withdrawn, assess whether those indications are sufficiently clear, confirm those indications with relevant political actors, and decide whether to act on that basis – this is what is meant by a Governor-General exercising ‘independent judgment’ in the exercise of their reserve powers. By contrast, adopting the formal conception of confidence significantly reduces the scope of a Governor-General’s ‘independent judgment’ – loss of confidence could only occur following a formal confidence vote to that effect. By limiting the scope of a Governor-General’s ‘independent judgment’, we would force the onus onto politicians and limit the risk of a Governor-General making a decision which a significant portion of the country considered inappropriate, which could prompt a loss of confidence in the Governor-General themselves.

F Conclusion

Our constitutional emphasis on democracy and the need to constrain illegitimate exercise of executive authority both weigh in favour of adopting the organic conception. Meanwhile, the risks of political uncertainty and compromised regal neutrality apply *regardless of which conception we adopt*. Whether our conception of confidence is organic or formal, there will always be circumstances in which the Governor-General must exercise their independent judgment. The best example is when they determine which potential grouping of parties can command the confidence of the House following an election and therefore ought to be recognised as the government. Recognising this necessity, multiple Governors General and scholars have set out a framework within which that independent judgment is to be exercised.

Accordingly, our preference for minimising uncertainty and preserving regal neutrality does not *exclude* the organic conception: they simply require that we build a framework around the *application* of that conception. Adopting an organic conception governed by such a framework would allow us to give effect to the principle of democracy and constrain illegitimate exercise of authority.

⁸⁷ “Sir John Kerr: Overturned Government of Australia” *Los Angeles Times* (Los Angeles, March 30 1991).

Moreover, the argument that we should construct a system which weighs against political instability does not give sufficient respect for the fundamental principle of democracy, the need to constrain illegitimate governments or the fact that instability will arise whether or not we adopt the organic conception.

Weighing these normative arguments together, my preference is for the organic conception. In the next section, I test whether this preference is consistent with past practice, key constitutional materials and scholarly thinking. I also draw on these sources to build a framework governing the application of the organic conception. In doing so, I demonstrate that it is not only normatively preferable but practically viable as a mode of constitutional thinking.

IV Confidence in Current Thinking

It is important to consider whether adopting the organic conception would be consistent with current constitutional thinking and culture in Aotearoa. I will examine historical instances where the question of confidence arose in Aotearoa. I will look to texts such as the Cabinet Manual (an authoritative explanation of our constitutional conventions which is authored by the Cabinet Office under the supervision of the Cabinet Secretary, who also serves as the Governor-General's primary advisor) and David McGee's *Parliamentary Law and Practice in New Zealand* (which is accepted as the authoritative guide to the rules and procedures of parliament by legislative staff). Finally, I will conduct a close reading of influential scholarly writing and refer to the practice of other Westminster or MMP jurisdictions.

I conclude that a significant amount of our constitutional materials and scholarly opinion favour the organic conception. Given the normative preference for the organic conception, we can dismiss the comparatively few materials which favour the formal conception.

A Statements of Governors-General

The Governor-General is "the sentinel of confidence within the House."⁸⁸ They are responsible for assessing where confidence lies and presiding over the formation of government accordingly. Recognising the significance of this role, multiple Governors General have set out the principles which will guide their behaviour when confidence is unclear. Most prominent among them is Hardie Boys, who presided as Governor-General over two fraught constitutional moments: the first MMP election in our history in 1996 and the fractious coalition collapse in 1998.

⁸⁸ Knight and Palmer, above n 52, at 70.

Prior to the former, he set out the principles which would guide his actions regarding the formation of governments in a speech to the New Zealand Institute of International Affairs. Subsequent to the latter, he set out the principles which would guide his actions regarding the mid-term collapse of governments in a speech to the Institute for Governance and Policy Studies. These statements have formed the basis of subsequent Governors General's approach to their constitutional duties. By examining both, we can see that the organic conception should be preferred. By drawing on the statements of Hardie Boys and other Governors General, we can also derive governing principles which might govern how the organic conception would be applied in practice.

Following the introduction of MMP in 1996, some concerns were raised about the role a Governor-General would play in the reformed process of government formation. To address these doubts, then-Governor General Sir Michael Hardie-Boys set out the principles which would guide his actions.⁸⁹ In the parts of his speech focused on the principles which would guide him in the specific matter of appointing a Prime Minister, he indicated that a formal confidence vote was just one means of communicating the maintenance or loss of confidence – supporting the organic conception. In the brief part of his speech focused on the *loss* of confidence partway through a government's term, however, he indicated that his baseline is a formal conception of confidence.

In Hardie-Boys' 1996 speech to the Institute for International Affairs, he emphasised that, "the real responsibility [for government formation] rests with the political parties. They are the ones who, through negotiation, must find a viable government in the Parliament."⁹⁰ Having come to an agreement, those parties must then authoritatively communicate their decision to the Governor-General. Hardie-Boys set out a number of ways in which this might take place:⁹¹

- a. a formal vote in the House before a Prime Minister is appointed (as in Ireland);
- b. public and separate advice to the head of state on who to appoint (along the lines of the Royal Investigator process in Denmark which I have described); or
- c. a clear and public process by which the head of state is provided with information on the initial position of political parties in the negotiations, and on the progress and outcome of those negotiations.

⁸⁹ Hardie-Boys, above n 66.

⁹⁰ At [58].

⁹¹ At [59].

He caveated these points with the note that: “We will no doubt work out our own New Zealand answers.”⁹² Nevertheless, he wrote, “against that weight of international practice, it is hard to see why the principles should be any different in the New Zealand context.”⁹³ Importantly, a formal confidence vote is only one of the viable options Hardie Boys presented, which supports the organic conception of confidence. However, he said this in the context of communicating Parliament’s support for an incoming government – not the communication of Parliament’s opposition to an existing government – and thus his observation cannot be treated as authoritative.

At another point in his speech, Hardie Boys dwells specifically on the issue of when a government *loses* confidence. He said that:⁹⁴

Where the outcome of the election is not clear, the incumbent Prime Minister may continue in office ... If, during this waiting period, it becomes clear that there is a majority against him, he may be wise to resign.

Crucially, Hardie-Boys does not say that there is a resignation obligation on a Prime Minister who is clearly not supported by a majority of Parliament, but who has not lost a confidence vote. He characterised it rather as a matter of political ‘wisdom’ – establishing the formal conception as the constitutional baseline, but allowing that governments may choose to act in line with the organic conception if they wish. Given how fleeting Hardie Boys’ observation is, however, it cannot be given significant weight.

In sum, Hardie Boys’ 1996 speech lent some credence to both conceptions of confidence – illustrating the lack of clarity which has characterised scholarly and constitutional discussions of this issue. His refusal to specifically engage at length with the implications of a potential government’s collapse mid-way through the term means his observations either way are not authoritative.⁹⁵

Recognising the limitations of his previous speech, in 1998 Hardie Boys delivered a second speech intended to “identify the key principles that I believe guide the interlocking roles and responsibilities of the politicians and the Governor-General during a mid-term period of political uncertainty.”⁹⁶ This speech set out a strongly organic view of confidence.

⁹² At [60].

⁹³ At [60].

⁹⁴ At [70].

⁹⁵ In his 1998 speech, Hardie Boys characterised his refusal to specifically engage with the implications of a mid-term governmental collapse as “quite deliberat[e]”.

⁹⁶ Hardie Boys, above n 14, at [12].

First, his speech dealt with the appointment of a new Prime Minister when the former Prime Minister had lost their party's, or Parliament's, confidence. Hardie Boys noted that in appointing Jenny Shipley as Prime Minister, following her coup against Jim Bolger, "I was satisfied (on the basis of public statements in the media and Mrs Shipley's own assurances) that she did command ... confidence, and I appointed her accordingly."⁹⁷ In doing so, he echoed his previous speech's conclusion that alternatives to formal confidence votes are at least initially sufficient in the formation of a government.

Secondly, and more importantly for our purposes, his speech dealt with assessing whether confidence had been lost. Hardie Boys began by noting that, "the political events were relevant only to the extent that they might have brought into question the Government's majority on questions of confidence and supply."⁹⁸ This statement is crucial – it establishes that he believes political events (which by implication extend beyond formal confidence votes) are capable of challenging a government's hold on confidence.

Hardie Boys' most conclusive statements on the issue of confidence come in a section of his speech titled 'The Confidence of the House'. First, Hardie Boys wrote:⁹⁹

Once the Government establishes the support of the House at the beginning of its term, it retains the confidence of the House, unless some event or series of events brings that support into question. From time to time, however, the Government faces (or declares) votes of confidence. The significance of these votes is that the Government stands or falls on the outcome.

Significantly, the statement distinguished between 'some event or series of events' and 'votes of confidence' but accepts that both are capable of challenging a government's retention of confidence – a highly organic understanding. He later emphasised this point by writing:¹⁰⁰

during any period of political uncertainty, it is helpful for political leaders to state publicly their positions in respect of support for the Government. Their comments are constitutionally significant, because they may in some situations need to be relied upon.

⁹⁷ At [13].

⁹⁸ At [14].

⁹⁹ At [20].

¹⁰⁰ At [38].

In other words, the 'sentinel of confidence' explicitly recognised that statements beyond a formal confidence vote are capable of affirming that a government does or does not possess the confidence of the house. It is worth noting that he subsequently emphasised that formal confidence votes are "of critical importance" and "the ultimate test of a Government's mandate to continue in power".¹⁰¹ Nevertheless, his statements unquestionably demonstrated that Hardie Boys possessed an organic conception of confidence. Subsequent Governors General – while maintaining their own independence – have recognised the influence of Hardie Boys' general views on their constitutional role.¹⁰²

Having demonstrated that the organic conception is preferred by previous Governors General' statements regarding the principles governing confidence, we can also use their statements to examine how the organic conception would function in practice – a lingering question from my earlier normative examination of which conception of confidence we should prefer.

I argue that we can draw on the principles Governors General established for determining confidence during the government formation process to guide their determination of confidence more generally – especially in the context of a mid-term government collapse (where the consequences of the dispute between organic and formal conceptions are most tangible).

Perhaps the most authoritative modern statement of the principles which guide the behaviour of Governors-General during the process of government formation came in Sir Jerry Mataparae's 2013 speech to the parliamentary Press Gallery. Mataparae identified two key principles: quantity and clarity.¹⁰³ 'Quantity', according to Mataparae, means "one or more parties being able to show they will have a majority in the House of Representatives."¹⁰⁴ More simply, "The prospective government needs to be able to show it will have the numbers."¹⁰⁵ This requirement is intuitive. More difficult is what he meant by 'clarity'. Mataparae wrote that he would expect: "clear and public statements by the party leaders concerned, showing that the prospective government will have the confidence of the House."¹⁰⁶ He went on to define 'clear and public statements' as "unambiguous explanations of their intentions on matters of confidence, so it is obvious to everyone where party allegiances in the House will lie."¹⁰⁷

¹⁰¹ At [39].

¹⁰² Cartwright, above n 1, at 17; Sir Anand Satyanand "Work in Progress in a Country That Works" (2010) 16 CLR 212 at 213.

¹⁰³ Mataparae, above n 64, at [14].

¹⁰⁴ At [15].

¹⁰⁵ At [15].

¹⁰⁶ At [20].

¹⁰⁷ At [20].

In particular, he endorsed the growing trend of formal written agreements between governing parties, because of their “certainty” and “transparency”.¹⁰⁸ In sum, Mataparae requires public statements which unambiguously and durably set out their positions on confidence. This certainly includes formal written agreements but may include other actions, such as clear and public speeches. It almost certainly would not include a ‘maverick’ MP who holds the parliamentary balance of power and occasionally votes against their party, so long as they do not indicate they will vote against their party on issues of confidence (for example, Marilyn Waring). If there are clear, public and unambiguous statements indicating a majority for or against a course of action, the Governor-General may act on matters of confidence.

One could argue that it is inappropriate to draw a connection between the principles guiding how we assess confidence during government formation, and the principles guiding how we assess confidence during government collapse, because the two situations are fundamentally different. Specifically, one might note that following an election it is impossible for a formal confidence vote to take place to unequivocally demonstrate confidence to a Governor-General, since the parliamentary session has not yet begun. Accordingly, a Governor-General is forced in that scenario to rely on the public statements made by, and their private conversations with, politicians to guide their assessment of where confidence lies.

However Governors General have been explicit that the principles of clarity and quantity guide their assessment of confidence during *any* government formation process, not just those following an election. That includes government formation following a mid-term government collapse, when it is possible for a formal confidence vote to be called to unequivocally demonstrate confidence. Although such a vote usually takes place, it typically comes *after* the Governor-General has determined which party or parties can command confidence and recognised their leader as Prime Minister – during which process they apply the same principles of clarity and quantity. In other words, the principles established by Governors General to guide their assessment of confidence during government formation apply whether or not there is a possibility of communicating confidence via formal confidence vote.

Mataparae implied as much in his speech. While he noted that his specific focus was “not on the steps leading up to elections, but rather what happens directly afterwards,” he nevertheless followed that by saying he would consider generally, “what do our constitutional arrangements require of political parties before a prospective government can be sworn in by the Governor-General?”¹⁰⁹

¹⁰⁸ At [21].

¹⁰⁹ Mataparae, above n 64.

The principles guiding government formation apply regardless of whether formal means of demonstrating confidence are available. More important than the presence or absence of situational differences, there is also nothing apparent from the principles themselves which limits their application to the process of government formation. Accordingly, it is not unreasonable to draw a connection between the principles guiding the formation of governments and the principles guiding their collapse.

From the foregoing analysis, we can see that the understanding of confidence held by previous Governors General is consistent with the organic. We can also draw on their statements to derive principles governing how Governors General will approach matters of confidence. I have shown that these principles can and should be applied under the organic conception to minimise political uncertainty and the risk of compromising their political neutrality. This demonstrates that there are few practical or normative obstacles to adopting the organic conception of confidence.

B Previous Practice

It is worth examining the most recent confidence crisis in Aotearoa to understand how confidence has previously been understood and applied in practice. This came in 1998, when a dispute over the privatisation of state assets fractured the National-New Zealand First coalition led by Prime Minister Jenny Shipley and Deputy Prime Minister Winston Peters.¹¹⁰ From this dispute we can observe behaviour by Shipley which matches an organic conception of confidence.

Due to economic pressures, in 1998 Shipley's government sought to sell its stake in Wellington Airport.¹¹¹ For a variety of reasons, Peters was opposed to this move.¹¹² The dispute came to a head on 12 August, when Peters led a number of his New Zealand First colleagues in a walk-out from a Cabinet meeting.¹¹³ Shipley responded by requesting that the Governor-General withdraw Peters' ministerial warrant; prompting the collapse of the coalition.¹¹⁴ Some – according to Philip Joseph – suggested at the time that if Shipley had not been able to maintain a parliamentary majority, she could have used the Standing Orders of the House to block a formal confidence vote and remain in power until the following year.¹¹⁵ Such an approach would have relied on constitutional actors adopting a formal conception of confidence and ignoring the antidemocratic

¹¹⁰ Tim Watkin and Guyon Espiner *The 9th Floor* (Bridget Williams Books, Wellington, 2017) at 161.

¹¹¹ At 161.

¹¹² At 162.

¹¹³ At 161.

¹¹⁴ At 162.

¹¹⁵ Joseph, above n 3, at 725.

implications of a Prime Minister retaining power after a majority of parliament had expressed their opposition. Not only would Shipley have lost her government's democratic mandate, but also any incentive to subject her government to the scrutiny of Parliament: her government would have already lost confidence, removing Parliament's key tool for encouraging compliance with its scrutiny and exercise of accountability.

In the event, Shipley was able to cobble together a parliamentary majority through the support of ACT and some former New Zealand First ministers lent support to the government.¹¹⁶ But in the moment of crisis, according to Shipley, "I thought I was going to the country as I triggered the arrangements, because I couldn't see how I would necessarily get through [with a parliamentary majority]."¹¹⁷ Shipley's comments indicate an organic conception of confidence. In her mind, what seems to have mattered was the actual level of support she commanded in Parliament – not whether she could command majority support at, or entirely avoid, a formal confidence vote. This is a useful indicator that the organic conception may have at least once guided actual constitutional practice.

B Influential Constitutional Materials

One might think the question of whether we should take an organic or formal conception is largely resolved, given that a key constitutional actor in the assessment of confidence (Hardie Boys as Governor-General) and a key historical case study (the Shipley-Peters dispute) indicate that we should take an organic conception. This is not the case, as can be seen from some of the key materials which make up our constitution.

On the one hand, the Cabinet Manual strongly supports an organic conception of confidence. The Manual is maintained under the supervision of the Cabinet Secretary (who also serves as the Clerk of the Executive Council and therefore as the primary advisor to Governors General) and as such is the key piece of soft law governing the practice of Governors General and executive actors. It is therefore a crucial constitutional text. As former Prime Minister Helen Clark put it in her foreword to the Manual, it is "a primary source of information on New Zealand's constitutional arrangements, as seen through the lens of the executive branch of government".¹¹⁸

On the other hand, David McGee's text *Parliamentary Law and Practice* takes a more formal conception. Written by a former long-serving Clerk of the House, *Parliamentary Law and Practice*

¹¹⁶ Watkin and Espiner, above n 110, at 163.

¹¹⁷ At 163.

¹¹⁸ Cabinet Office, above n 24, foreword by Helen Clark at xv.

is accepted as the authoritative explanation of the rules and procedures of Parliament. Given that Parliament is the actor able to give or withdraw confidence, *Parliamentary Law and Practice* is therefore essential to our understanding of confidence.

1 Cabinet Manual

With regards to the constitutional framework guiding executive behaviour, the Cabinet Manual is our most influential text. The Manual strongly supports the organic conception of confidence.

In establishing when the caretaker convention will apply, the Manual specifies that the caretaker convention comes into force either after an election or, “If the government has clearly lost the confidence of the House”.¹¹⁹ In discussing whether the Governor-General is bound to follow the advice of a Prime Minister, the Manual declared, “In accordance with convention, the Governor-General will act on the advice as long as the government appears to have the confidence of the House”.¹²⁰ The use of the words ‘clearly’ and ‘appears’ is important – if confidence could only be lost through formal votes (which can only give an affirmative or negative result), then the addition of ‘clearly’ or ‘appear’ would be unnecessary. These imply that there are alternatives to formal votes, and thus that confidence is an organic concept.

Multiple statements in the Manual regarding how the existence of confidence might be affirmed are even more explicit that confidence is an organic concept. First, the Manual declares that in some circumstances whether a government has confidence may be unclear.¹²¹ Again, if it was only possible for a government to lose confidence through defeat in a formal confidence vote (per the negative conception of confidence), it would never be unclear whether it had confidence or not. In order for it to be possible for confidence to be unclear, confidence must be organic. The Manual goes on to note that:¹²²

Where loss of confidence is clear (for example, where the government has lost a vote of confidence in the House), the Prime Minister will, in accordance with convention, advise that the administration will resign.

The language the Manual used regarding formal votes of confidence is non-exclusive (“for example”). Accordingly, there must be other ways for a loss of confidence to be demonstrated.

¹¹⁹ At [6.22].

¹²⁰ At [6.63].

¹²¹ At [6.59].

¹²² At [6.60].

This is a strong indication that confidence is an organic concept. Collectively, such language demonstrates a preference for the organic conception.

2 Parliamentary Law and Practice

With regards the constitutional framework guiding parliamentary actions, *Parliamentary Practice in New Zealand* – by David McGee, the long serving former Clerk of the House – has become highly influential. The most compelling evidence in *Parliamentary Practice in New Zealand* that confidence is an organic concept is McGee's statement that:¹²³

... it is a matter for the Governor-General in the exercise of the reserve powers of the office to judge whether a Government possesses the confidence of the House. This can involve making fine judgements on the legitimacy or effect of the actions of politicians ...

Independent judgment would not be necessary if the presence of confidence could only be proved or disproved through formal votes of confidence. McGee is explicit that a Governor-General may make reference to political behaviour external to formal votes of confidence in exercising their independent judgment regarding whether confidence exists.

Despite this strong statement in favour of an organic conception of confidence, however, McGee makes stronger statements in favour of a formal conception of confidence. In his detailed discussion of confidence votes, he explicitly wrote that:¹²⁴

Strictly speaking, confidence is a negative (and somewhat circular) concept. A Government retains the confidence of the House for so long as it can avoid defeat on important parliamentary votes—those that involve a question of confidence.

Similarly, McGee later emphasises that, “The means by which the retention of confidence in the Government is tested is a vote in the House itself—a confidence vote.”¹²⁵ These statements directly address the question of whether confidence is organic or formal – and side with the latter. That said, in an important passage McGee conceded that:¹²⁶

In practice, if a Government is facing inevitable defeat in a confidence vote it is unlikely to wait for the vote to occur (as the Government did in 1928) before taking action to effect

¹²³ At 128.

¹²⁴ At 127.

¹²⁵ At 128.

¹²⁶ At 128.

a new political settlement. So even if a Government has not been formally defeated in a confidence vote, it may be forced to recognise that defeat is inevitable [and] to act on the basis that it has occurred...

McGee indicated here that while confidence is a formal concept, in practice governments may understand it as an organic one. However, he is explicit that this is optional. In 1928, the government chose to treat confidence as a negative concept prior to losing a formal vote of confidence; McGee's use of words like "unlikely to" and "may" indicate that a government today could in practice also treat confidence as a negative concept.¹²⁷ Overall, McGee makes strong statements both ways – leaving doubt about which conception of confidence is appropriate. His statements lean slightly in favour of the formal conception.

C Scholarly Opinion

This split view on whether confidence is organic or formal – despite the indications from Hardie Boys and Shipley – can also be seen in the observations of our leading constitutional scholars. Joseph's *Constitutional and Administrative Law in New Zealand* tends towards the formal conception, Knight and Palmer's *The Constitution of New Zealand* adopt the organic conception, and (from a political theory perspective) some of the authors in Janine Hayward, Claire Timperley and Lara Greaves' edited text *Government and Politics in Aotearoa New Zealand* seem to tend towards the formal conception.

1 Philip Joseph

Aotearoa's most influential constitutional text is Philip Joseph's *Constitutional and Administrative Law in New Zealand*. Joseph takes a formal conception of confidence. In any instance where he directly engaged with a government's mandate to govern, he indicated that it is revoked once a government loses a formal vote. In his detailed explanation of the caretaker convention, for example, he explicitly stated that it arises either following an election or "where a government suffers defeat on a confidence vote in the House" – leaving no space for an organic conception of confidence.¹²⁸ Similar statements occur throughout the text.¹²⁹

A closer reading of the text may provide some support for an organic conception. For example, Joseph at one point suggested a broader set of circumstances where the caretaker convention might apply than that provided above, when he wrote that, "The caretaker convention applies during

¹²⁷ At 128.

¹²⁸ At 239.

¹²⁹ See, for example, at 14 and 208.

periods of political uncertainty, when it may not be clear which party or group of parties in the House has a mandate to govern.”¹³⁰ Political uncertainty is inclusive of, but does not seem limited to, instances where a government loses a formal vote. This implies a more organic conception of confidence.

Another indication that Joseph takes a more organic conception of confidence comes from his statement that “the Governor-General’s recourse [to dissolution] is not automatic where some other party leader claims the confidence of the House.”¹³¹ Notably, he does not condition that statement on the failure of the government to win a formal confidence vote; a mere credible claim that a government has lost confidence could be sufficient.

To resolve the tension between Joseph’s specific statements that defeat on a formal confidence vote is required and the implications of some of his language and statements in some other areas, we can look to his extended discussion of the Shipley-Peters crisis. During it, he addressed the suggestion, inspired by the formal conception, that Shipley could have used the House’s Standing Orders to block an express or declared confidence vote and remained in office until the following February – the next time an implied vote of confidence would have arisen.¹³² It is worth quoting at length:¹³³

... a Prime Minister who took this action would renounce his or her political responsibility to resolve the uncertainty and demonstrate where the confidence of the House lay. A decision to govern into the New Year would have invited the Governor-General’s intervention under the reserve powers. The caretaker convention does not envisage a caretaker Prime Minister remaining in office for a period of five months, until supply runs out.

There are two ways of interpreting this explanation. The first is that confidence is a formal concept. Joseph indicates that by avoiding a formal vote, a government would be able to avoid “demonstrat[ing] where the confidence of the House lay” (though he also implies it would be acting improperly).¹³⁴ This indicates that the presence or absence of confidence can only be shown through a formal vote. However, Joseph also indicated that a Prime Minister which took such a step would be a “caretaker”.¹³⁵ The caretaker convention only applies when a government has lost

¹³⁰ At 239.

¹³¹ At 736.

¹³² At 725.

¹³³ At 725.

¹³⁴ At 725.

¹³⁵ At 725.

confidence. Accordingly, Joseph's assumption that a government in this position would be subject to the caretaker convention indicates that confidence is an organic concept.

In sum, Joseph's explicit statements indicate that confidence is a formal concept. But some of his explanations and implications indicate that he understands it in a much broader, organic way in some circumstances. His writing, therefore, tends towards the formal conception but often does little except demonstrate the existence of doubt in the scholarly community over whether confidence is formal or organic.

2 Dean Knight and Matthew Palmer

Dr Dean Knight and Justice Matthew Palmer's *The Constitution of New Zealand* provides a more modern examination of the constitutional issues addressed by Joseph.¹³⁶ Usefully, they directly address the organic/formal dispute in their text and conclude that the organic conception is preferable. Specifically, in the context of the Governor-General's role, Palmer and Knight note that:¹³⁷

... loss of confidence may be manifested through other means, absent a formal loss of a vote of confidence in the House. For example, actions or statements which indicate that one of the parties of government has repudiated the coalition, confidence-and-supply or support agreements on which the government grouping was predicated may indicate a loss of confidence.

Having recognised that "clear cases of changes to an underlying political settlement could trigger the consequences of loss of confidence" – in keeping with the organic conception – they specify that: "In such circumstances it would be prudent for the Governor-General to invite public clarification of confidence, if the position is uncertain."¹³⁸ This is an explicit adoption of the organic conception. This is useful in clarifying the constitutional position, especially since their text is the most recent legal examination of this issue and thus best positioned to demonstrate the modern approach. Implicit in their examination is their desire that our legal understanding of confidence accurately reflects political realities. However despite explicitly adopting the organic conception of confidence, they do not explicitly examine the normative arguments underpinning it. Accordingly, their view – while highly influential – cannot be conclusive.

¹³⁶ Knight and Palmer, above n 52; I am grateful to Dr Knight and Justice Palmer for allowing me to read their book prior to publication.

¹³⁷ At 74.

¹³⁸ At 74-75.

3 Janet McLean and Alison Quentin-Baxter

Whereas Knight and Palmer take an explicitly organic conception of confidence, Janet McLean and Alison Quentin-Baxter in *This Realm of New Zealand* are similarly forthright in their adoption of the formal conception. Having explained the importance of confidence to the reserve powers, McLean and Quentin-Baxter examine when confidence is lost. In doing so, they write that in New Zealand, “governments are seen as having the confidence of Parliament as long as they have not been defeated in what is recognised as being a confidence vote”.¹³⁹ Interestingly, they take that position even though they concede that “in the New Zealand Parliament the opportunities for a vote of confidence are relatively rare.”¹⁴⁰

As previously noted, McLean and Quentin-Baxter’s rationale for this position – which they concede is arguably “anti-democratic” – is that Aotearoa’s parliamentary term is so short that the constitution ought to be weighted towards “the continuity, during that short period, of both the government and Parliament.”¹⁴¹ Their scholarship indicates that our normative preference for the organic conception may not be consistent with actual practice.

4 Anne Twomey

In *The Veiled Sceptre*, Professor Anne Twomey suggests a modulated form of the organic conception may apply to Westminster jurisdictions.¹⁴² Using the example of a letter signed by a majority of a lower House, which expresses a lack of confidence in a government, Twomey has written that “such a letter may not (without a vote on the floor of the House) amount to proof of loss of confidence”.¹⁴³ In other words, a political statement is not enough for confidence to be lost. However, she went on to write that “it may be sufficient to trigger the application of caretaker conventions, pending a vote of the House on confidence.”¹⁴⁴

Put differently, Twomey distinguishes between actual and potential loss of confidence (the former requiring the loss of a formal confidence vote, the latter requiring serious doubt as to whether a government could win such a vote). But despite distinguishing between their nature, she suggests both could have the same constitutional effect. While different from the form of the organic conception I have set out in this paper – under which confidence can be actually lost either through

¹³⁹ McLean and Quentin-Baxter, above n 54, at 188.

¹⁴⁰ At 188.

¹⁴¹ At 189.

¹⁴² Twomey, above n 28, at 503.

¹⁴³ At 503.

¹⁴⁴ At 503.

formal confidence votes or through political statements indicating it has been lost – Twomey’s statement nonetheless supports our overall preference for the organic conception.

5 Pita Roycroft, Janine Hayward, Lara Greaves and Claire Timperley

It is useful to examine which conception of confidence is adopted by disciplines other than law. Hayward, Greaves and Timperley have recently published the seventh edition of *Government and Politics in Aotearoa New Zealand*, traditionally one of the most authoritative texts in Aotearoa-specific political theory. Pita Roycroft contributed the chapter on Parliament. In his definition of confidence, he wrote, “If the House withdraws its confidence in the government by majority vote, the principle of responsible government demands that the government resigns or regroups to form a new government”.¹⁴⁵ He uses active verbs like “retain[ing]” confidence, but in his discussion of how that works in practice he only examines formal confidence votes. Collectively, this indicates an understanding of confidence focused on formal confidence votes. The text’s other references to confidence are vague on the topic. Accordingly, *Government and Politics in Aotearoa New Zealand* tends towards a more formal conception of confidence. However due to its lack of depth on the issue, it does little to clarify the issue either way.

D Comparative Experience

Aotearoa’s constitutional structure draws heavily from other jurisdictions. It is based on the Westminster model (inspired by Britain and shared with Commonwealth countries like Canada) and has integrated the Mixed-Member Proportional electoral system modelled by Germany. Accordingly, having examined domestic authorities and case studies, influential constitutional material and the opinion of domestic scholars, it is important to consider case studies and approaches from these other jurisdictions. This section will examine the British, Canadian and German approaches to confidence. It finds that the Canadian experience pushes towards the organic conception, the British experience towards the formal conception, and that the German experience is of little use either way.

1 Britain: Fixed-Term Parliaments Act

It is first important to examine the British experience, given its status as the original Westminster constitutional system. Prior to 2011, Britain was analogous to Aotearoa in that questions of confidence were governed solely by convention. That changed with the passage of the Fixed-Term

¹⁴⁵ Pita Roycroft “Parliament” in Janine Hayward, Lara Greaves and Claire Timperley (eds) *Government and Politics in Aotearoa New Zealand* (Oxford University Press, Wellington, 2021) at 137.

Parliaments Act 2011, which introduced an approach to confidence strongly coloured by the formal conception of confidence.

Section 1 of the Fixed-Term Parliaments Act specifies the date on which each British parliamentary election should fall (a change from previous practice, when the date was determined by the Prime Minister).¹⁴⁶ Section 2 specifies that an early election may take place in two situations: if a two-thirds parliamentary majority vote for a motion requesting an early election, or if a bare majority vote for a motion expressing a lack of confidence in the government (without subsequently voting for a motion expressing confidence).¹⁴⁷ This introduced a highly formal conception of confidence to Britain's constitutional arrangements – confidence was maintained until it was lost through a formal confidence vote. Britain's choice to codify that conception makes it markedly different to Aotearoa's constitutional arrangements and thus of little use in clarifying what the current conception of confidence in Aotearoa is.

However, subsequent discussion regarding the Act (which has become highly controversial) may reveal what the status quo ante was. A recent report by the parliamentary Joint Committee on the Fixed-Term Parliaments Act, published prior to the Act's introduction, referred to express, implied and declared confidence votes.¹⁴⁸ No reference was made to political statements or actions external to formal votes of confidence, indicating that representatives of the British Parliament believe that prior to the Fixed-Term Parliaments Act, Britain operated under a formal conception of confidence. Given the similarities between pre-2011 Britain and Aotearoa in terms of constitutional arrangements, this strongly signals that Aotearoa also operates under a formal conception.

This sentiment is echoed by many British constitutional scholars. For example, Robert Craig (Lecturer in Law at the University of Bristol) is explicit that prior to 2011: "The executive and the legislature used to be able to precipitate a general election: MPs through a vote of no confidence and the Prime Minister through seeking a dissolution."¹⁴⁹ This is a clearly formal conception of confidence. In reading the submissions of multiple constitutional academics to the Joint Committee on the Fixed-Term Parliaments Act 2011, it is difficult to find any who challenge the focus on formal confidence votes in assessing confidence.¹⁵⁰

¹⁴⁶ Fixed-Term Parliaments Act 2011, s 1.

¹⁴⁷ Section 2.

¹⁴⁸ Joint Committee on the Fixed-Term Parliaments Act "Report on the Fixed-Term Parliaments Act" (18 March 2021) at [63].

¹⁴⁹ Robert Craig "Written evidence submitted by Robert Craig (University of Bristol) to the Joint Committee on the Fixed-Term Parliaments Act 2011" at [19].

¹⁵⁰ This collection includes, among others, Sir David Natzler (former Clerk of the House of Commons), Craig Prescott (Lecturer in Law, Bangor University), Petra Schleiter (Professor of Comparative Politics, University of

2 Canada: prorogation and the Byng-King affair

Canada has experienced two constitutional crises which involved matters of confidence: the first being the 2008 prorogation request by Prime Minister Stephen Harper, and the second being the Byng-King affair of 1926. It is important to examine them, given their significance in the academic discourse about confidence (both are still taught as primary case studies in many foundational public law courses) and the similar constitutional rules regarding confidence in Canada and Aotearoa.¹⁵¹ The Harper affair indicates that Westminster jurisdictions operate under a modulated form of the organic conception of confidence, while the Byng-King affair gently pushes towards the organic conception.

First, the Harper prorogation. In an election in 2008, Harper's minority government (which had been in office since 2006) increased its number of seats but failed to win a majority.¹⁵² Harper's government won a confidence vote in Parliament on November 27.¹⁵³ Days later, however, the leaders of the Canadian opposition parties – which held a majority of seats in Parliament – announced they had lost confidence in the Harper government and said they would pass a formal vote of no confidence as soon as they could (the earliest opportunity to do so being an 'opposition day' on December 8).¹⁵⁴ In the interim, they intended to ask the Governor-General to commission Liberal Party leader Stéphane Dion as Prime Minister of a Liberal-NDP government.¹⁵⁵ Harper responded by going to the Governor-General and advising her to prorogue Parliament (which had only been sitting for sixteen days) – on the pretext that the government needed to consult with the public on its policy programme, but with the effect of preventing the opposition parties from moving a confidence vote.¹⁵⁶ The Governor-General accepted Harper's request.¹⁵⁷

In other words, a majority of parliamentarians clearly stated they had lost confidence in a government. However they had not had a chance to demonstrate that by a vote in Parliament. Accordingly, the Governor-General treated the government as still having confidence and acted on its advice. This would suggest that Canada operates under the formal conception of confidence – where formal votes are required for confidence to be withdrawn. As Peter Hogg, who was the

York) and Thomas Fleming (Lecturer in Politics, University of York), Robert Hazell (Professor of Government, University College London) and Meg Russell (Director of the Constitution Unit, University College London).

¹⁵¹ Peter Hogg *Constitutional Law of Canada* (5th ed, Thomson Reuters Canada, Ontario, 2007) at § 9.13.

¹⁵² Peter Hogg "Prorogation and the Power of the Governor-General" (2009) 27 *National Journal of Constitutional Law* 193 at 194.

¹⁵³ At 195.

¹⁵⁴ At 195.

¹⁵⁵ At 195.

¹⁵⁶ At 195.

¹⁵⁷ At 195.

Governor-General's legal advisor at the time, has written: "having secured approval of the speech from the throne, the Prime Minister still possessed the confidence of the House of Commons."¹⁵⁸

However, a conclusion in favour of the formal conception is weakened by the fact that the Governor-General did not immediately accept Harper's request: she deliberated for two and a half hours before accepting that it was the best course of action given the political circumstances.¹⁵⁹ In doing so, she was exercising personal and independent judgment – which she could only do if she considered she was not bound by the government's advice. How do we reconcile the suggestion that the government had not actually lost confidence with the Governor-General's exercise of independent judgment? Hogg explained it in the following terms:¹⁶⁰

Since an actual loss of confidence in the government would open up the Governor General's personal discretion, it should also be the case that an imminent loss of confidence opens up the same personal discretion.

This is a modulated form of the organic conception, similar to that put forward by Twomey.¹⁶¹ It distinguishes between actual and imminent loss of confidence (the former being loss of a formal confidence vote; the latter being statements clearly demonstrating that such a vote will be lost) but accepts that they have the same constitutional effect. It does so in recognition of the anti-democratic consequences of a more formal conception. If that were not the case, as Hogg wrote, "a Prime Minister could always avoid (or at least postpone) a pending vote of no confidence simply by advising the prorogation (or dissolution) of the pesky Parliament."¹⁶² Accordingly, while the version of the organic conception put forward by Twomey and Hogg is different from that which I have suggested, they both push in the same direction and should be considered supportive of each other.

Second, the Byng-King affair of 1926. At the core of this episode was a dispute between Canadian Prime Minister Mackenzie King and Canadian Governor-General Lord Byng. King's Liberal Party had suffered major losses in a general election in 1925 and King had lost his own parliamentary seat.¹⁶³ However no clear parliamentary majority emerged.¹⁶⁴ By June 1926, King was leading a minority government which was about to face a censure motion that was likely to pass.¹⁶⁵ He chose

¹⁵⁸ At 196.

¹⁵⁹ At 198.

¹⁶⁰ At 198.

¹⁶¹ Twomey, above n 28, at 20 and 503: Twomey in fact cites Hogg's analysis as support for her argument.

¹⁶² Hogg, above n 151, at 198.

¹⁶³ Esbrey, above n 76, at 46.

¹⁶⁴ At 47.

¹⁶⁵ Hogg, above n 151, at 198.

to seek a dissolution of Parliament from the Governor-General.¹⁶⁶ Byng refused to accept King's advice, prompting King's resignation.¹⁶⁷ Byng asked the leader of the opposition to form a government.¹⁶⁸ That government was defeated on an express vote of confidence.¹⁶⁹ Byng was then advised to dissolve parliament and call an election, which he did.¹⁷⁰ King won the election.¹⁷¹

It could be argued the Byng-King affair pushes towards the organic conception. Prior to the censure vote against King – which was in essence a formal confidence vote – King's government had lost successive attempts to amend the vote or adjourn.¹⁷² This could be construed as an indication that King would lose the censure vote and therefore that he had lost confidence. It is on that basis that Byng may have refused King's request – indicating an organic conception of confidence. However because this arguable loss of confidence was not clearly expressed through extra-parliamentary statements, it is difficult to conclude one way or the other whether the organic or formal conception of confidence is preferred.

3 Germany: constructive votes of no confidence

Helpfully, Germany's Basic Law is explicit about the nature of confidence in the German system: it has codified a confidence mechanism coloured by the formal conception. Article 67(1) of the Basic Law requires that "The Bundestag may express its lack of confidence in the Federal Chancellor only by electing a successor by the vote of a majority of its Members and requesting the Federal President to dismiss the Federal Chancellor."¹⁷³ Should the German Chancellor request a vote of confidence and lose it, the Bundestag must dissolve (unless confidence can be regained).¹⁷⁴ This approach is termed a 'constructive vote of no-confidence' and is intended to ensure stability – by requiring lack of confidence to be expressed through formal votes (and requiring a successor to be specified), Germany avoids repeated government collapse.

Germany is of constitutional interest to Aotearoa, given its similarity in electoral systems. Accordingly, its reasons for codifying a formal approach to assessing confidence will be examined later in this paper in the context of what our approach to confidence should be. However, its requirement of 'constructive votes of no-confidence' is clearly different to the constitutional reality

¹⁶⁶ Esbrey, above n 76, at 49.

¹⁶⁷ At 49.

¹⁶⁸ At 50.

¹⁶⁹ At 50.

¹⁷⁰ At 50.

¹⁷¹ At 50.

¹⁷² Hogg, above n 151, at 198.

¹⁷³ Basic Law for the Federal Republic of Germany 1949, art 67(1).

¹⁷⁴ Art 68(1).

in Aotearoa, where the form of formal confidence votes is much more expansive. Accordingly, Germany's approach is not useful for determining what the constitutional status quo in Aotearoa is.

E Conclusion

One conclusion which can be drawn from the foregoing summary of domestic and foreign case studies, constitutional texts and influential scholarly opinion is that whether confidence is an organic or formal concept remains contested. Hardie Boys' statements, the Shipley-Peters dispute, the Cabinet Manual, Knight and Palmer and comparative Canadian experience all indicate that it is an organic concept (in one form or another). But *Government and Politics in Aotearoa New Zealand, Parliamentary Law and Practice* and comparative British experience indicate that we ought to understand it as a formal concept. Joseph, meanwhile, is in two minds on the issue. However, the sources in favour of the organic conception (the statements and practice of Hardie Boys and Shipley, influential constitutional materials like the Cabinet Manual and recent scholarly opinion by Knight and Palmer) are more explicit, numerous and relevant to the experience of Aotearoa than those favouring the formal conception. Accordingly, the organic conception is not only normatively preferable but is also a better representation of current constitutional thinking.

V Conclusion

Despite the constitutional consensus about when a government is 'born' (gains confidence), it has remained largely unclear until now what the circumstances are in which a government may 'die' (lose confidence). That is the overarching question I have tried to answer in this paper.

To do so, I examined the normative arguments for different understandings of confidence. I found that there are strong normative arguments for the organic conception of confidence – namely, that it better channels the fundamental principle of democracy and constrains the illegitimate exercise of power. By contrast, the concerns some might have about political uncertainty and compromised independence apply to any exercise of independent judgement regarding where confidence lies. Consequently, they only require the construction of a clear framework which can guide that exercise of independent judgement. Moreover, the concern that the organic conception would lead to inappropriate renegotiation of our political settlements fails to properly weigh the democratic imperatives at stake.

Having concluded that the organic conception is normatively preferable, I examined the state of Aotearoa's constitutional materials and scholarly thinking. I found that there is significant

uncertainty regarding whether we should adopt the organic or formal conception of confidence. Historical statements and practice (particularly that of Sir Michael Hardie Boys and Dame Jenny Shipley) indicated an organic conception. So did the Cabinet Manual, Knight and Palmer's *Constitution of New Zealand*, Anne Twomey's *Veiled Sceptre* and Canadian constitutional experience. However, David McGee's *Parliamentary Law and Practice*, Janet McLean and Alison Quentin-Baxter's *This Realm of New Zealand*, Janine Hayward, Claire Timperley and Lara Greaves' *Government and Politics in Aotearoa New Zealand* and British constitutional experience all tend towards the formal conception. Philip Joseph's *Constitutional and Administrative Law in New Zealand*, meanwhile, tends towards both conceptions at different points. Nonetheless, the materials in the whole tend towards the organic conception. Accordingly, the organic conception is both normatively preferable and largely compatible with current constitutional thinking.

During Aotearoa's relatively short time as a Westminster democracy, we have had several constitutional close calls – moments where confusion and lack of forethought have left us adrift in the regulation of executive power. It is not difficult to imagine a similar situation arising in the future, with a renegade Prime Minister exploiting confusion regarding the appropriate conception of confidence in order to carry on exercising power at the head of an undead government.

My conclusion in this paper that we ought to prefer the organic conception of confidence helps us avoid that outcome. By clearly adopting the organic conception – because it is normatively preferable and constitutionally consistent – we could establish the kind of principled constitutional framework necessary to deter such an abuse of power from occurring.

VI Bibliography

A Books

Anne Twomey *The Veiled Sceptre* (Cambridge University Press, Cambridge, 2018).

Dean Knight and Matthew Palmer *The Constitution of New Zealand: A Contextual Analysis* (1st ed, Hart, Wellington, 2021).

Marilyn Waring *Marilyn Waring: The Political Years* (Bridget Williams Books, Wellington, 2019).

Paul Kelly *November 1975* (Allen & Unwin, Sydney, 1995).

Peter Hogg *Constitutional Law of Canada* (5th ed, Thomson Reuters Canada, Ontario, 2007).

Philip Joseph *Constitutional and Administrative Law of New Zealand* (4th ed, Thomson Reuters New Zealand, 2015).

Tim Watkin and Guyon Espiner *The 9th Floor* (Bridget Williams Books, Wellington, 2017).

B Chapters in Edited Books

Pita Roycroft "Parliament" in Janine Hayward, Lara Greaves and Claire Timperley (eds) *Government and Politics in Aotearoa New Zealand* (Oxford University Press, Wellington, 2021).

Stephen Church "Government Formation" in Janine Hayward, Lara Greaves and Claire Timperley (eds) *Government and Politics in Aotearoa New Zealand* (Oxford University Press, Wellington, 2021).

C Journal Articles

Anand Satyanand "Work in Progress in a Country That Works" (2010) 16 CLR 212.

J.E Esbrey 'Personality and Politics: A New Look at the Byng-King Dispute' (1973) 6 Canadian Journal of Political Science 1.

Mark Bovens *Assessing and Analysing Accountability: A Conceptual Framework* (2007) 13 ELJ 4.

Matthew Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565.

Peter Hogg “Prorogation and the Power of the Governor-General” (2009) 27 National Journal of Constitutional Law 193.

Silvia Cartwright “The Role of the Governor-General” (2001) NZCPL Occasional Paper 15.

D Government Publications

Cabinet Office *Cabinet Manual 2017*.

David McGee *Parliamentary Practice in New Zealand* (4th ed, Oratia, 2017).

Joint Committee on the Fixed-Term Parliaments Act “Report on the Fixed-Term Parliaments Act” (18 March 2021).

Royal Commission on the Electoral System “Report of the Royal Commission on the Electoral System: Towards a Better Democracy” (December 1986).

E Legislation

Basic Law for the Federal Republic of Germany 1949.

Fixed-Term Parliaments Act 2011.

F Cases

Crawford v Securities Commission [2003] 3 NZLR 160 (HC).

G Newspaper Articles

Thomas Coughlan “Election 2020: Jacinda Ardern claims largest Labour victory in 50 years” *Stuff* (18 October 2020) <<https://www.stuff.co.nz/national/politics/300135131/election-2020-jacinda-ardern-claims-biggest-labour-victory-in-50-years>>.

“Prime Minister Jacinda Ardern Changes Election Date to 17 October” *RNZ* (17 August 2020) <<https://www.rnz.co.nz/news/political/423698/prime-minister-jacinda-ardern-changes-election-date-to-17-october>>.

“Sir John Kerr: Overturned Government of Australia” *Los Angeles Times* (Los Angeles, March 30 1991).

H Speeches

Sir Jerry Mataparae “Speech to the Press Gallery Dinner” (Government House, Wellington, 9 November 2013).

Sir Michael Hardie Boys “The Constitutional Challenges of MMP: A Magical Demystification Tour” (Institute of Policy Studies Seminar on Government under MMP: The Constitutional and Policy Challenges, Wellington, 3 December 1998).

Sir Michael Hardie-Boys “The Role of the Governor General Under MMP” (Speech to the Institute of International Affairs, Wellington, 24 May 1996).

Robert Godley ‘Speech to the Constitutional Association’ (Wellington, 15 November 1850).

I Submissions to Select Committees

Gavin Phillipson “Written evidence submitted by Professor Gavin Phillipson (University of Bristol) to the Joint Committee on the Fixed-Term Parliaments Act 2011”.