The Institute for Governance and Policy Studies, School of Government at Victoria University of Wellington

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SPECIAL ISSUE
Vested Interests

The Institute for Governance and Policy Studies, School of Government at Victoria University of Wellington

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Policy Quarterly (PQ) is targeted at readers in the public sector, including politicians and their staff, public servants and a wide variety of professions, together with others interested in public issues. Its length and style are intended to make the journal accessible to busy readers.

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Editorial Note

Under the Institute for Governance and Policy Studies (IGPS) charter, vested interests and the role of political party funding in providing undue leverage for vested interests are an important focus for IGPS research and public engagement. The IGPS, building on the work of its predecessor, the Institute for Policy Studies, has undertaken or supported considerable research and public engagement on these issues. *Policy Quarterly* work in this area includes articles by Colin James on vested interests, Michael Macaulay and James Gluck on trading in influence, and Tom Anderson and Simon Chapple on the market for lobbying in New Zealand, as well as Geoff Bertram's impressive piece on competition policy. Also vital is the considerable ongoing research and engagement on freshwater of our colleague Mike Joy, which directly addresses one of the biggest and most influential vested interests in New Zealand, the dairy industry and its vertically integrated fertiliser and marketing arms. Lastly, there have been many other articles in this journal over the past decade on regulatory stewardship and public service reform, many of which address minimising regulatory and policy capture.

To build on this work, a special issue was planned for May 2020, under the editorship of Grant Duncan of Massey University. Work was well advanced when the Covid-19 pandemic struck and, in line with the IGPS charter's recognition that our work programme needs to be responsive to the evolving policy context, we deferred the vested interests issue to focus on the policy challenges presented by the pandemic. We thank Grant for deftly changing horses mid-stream and overseeing a very different special issue from that planned through to successful publication. We also thank Grant for generously allowing us as editors of the deferred issue to draw on the work he had done on the special issue before its postponement.

The articles in this issue cover a wide range of interrelated topics on the overall theme. Grant Duncan and Simon Chapple begin by examining the meanings of the term 'vested interests'. While we can all have legitimate vested interests, the focus in all the articles in this issue is where a person, group, organisation or firm wields sufficient economic or political influence to shift decision-making processes in directions that would favour themselves at the expense of the public interest. The next three articles all concern issues of political donations as a form of party funding, which have been a weeping sore for many years. Andrew Geddis explores the problems posed by the role of private, and often secret, donations for election campaign funding; Tom Anderson and Simon Chapple examine the available Electoral Commission data on party donations from 1996 to 2019 to investigate what it reveals about overall patterns; and Tim Kuhner discusses the risks to democracy posed by the intersection of economic inequality and political donations. Together, these articles constitute a strong case for radical reform of New Zealand's donations regulation.

Bridgette Toy-Cronin considers how power in the form of unequal access to money and resources can undermine justice in civil litigation. She proposes possible ways to minimise its influence. Hers is followed by five articles which serve to demonstrate how widespread self-serving actions by vested interests are in different sectors of New Zealand's society and economy, and the ways in which the public interest can be ignored or subverted. Geoff Bertram's article sets the scene, documenting how the ideological changes of the 1980s and 1990s, presented to the public as intended to address regulatory capture and rent-seeking behaviour, paradoxically reinvented New Zealand as a case study of those pathologies. Employment law expert Dawn Duncan examines how lobbying by big film industry players affected employment law governing the film industry, with damaging impacts on the workforce, and highlights how lobbying can influence policymakers. Mike Joy's personal experiences of the agriculture industry are drawn on to examine its power and influence, which have worked to the detriment of New Zealand's water quality. Yadira Martínez Pantoja's article looks at gene editing and the various stakeholders' complex global and national networks of interests seeking to influence New Zealand's regulation of the technologies. The introduction of product stewardship regulations for some products under the Waste Minimisation Act 2008 is examined by Hannah Blumhardt, the IGPS's waste specialist, who argues that light-handed regulation and a focus on industry self-regulation and voluntary measures are insufficient to curb New Zealand's current high levels of waste because they allocate power to those with a vested interest in the status quo.

Individuals and organisations with connections to the Chinese Communist Party have been high-profile contributors to public controversy surrounding political donations for several years, locally and internationally. China specialist Anne-Marie Brady details the Chinese government's overt and covert influence in New Zealand and the evolving responses of the New Zealand government and the Security Intelligence Service. In the final article, Kate Prickett and Simon Chapple examine gun ownership and the gun lobby, showing low trust in the gun lobby generally, and even among the group they purport to represent, gun owners.

As with every issue of *Policy Quarterly* there are many to thank, especially the peer reviewers, including Jonathan Barrett, Geoff Bertram, Grant Duncan, Paul Harris, Bev Hong, Colin James, Mike Joy, Max Rashbrooke, Marie Russell and Julia Talbot-Jones. Lastly, we are grateful to the regular *Policy Quarterly* production team – copy editor Rachel Barrowman, proofreader Vic Lipski and designer Aleck Yee; and the journal's editor, Jonathan Boston.

Michael Fletcher and Simon Chapple

Grant Duncan and Simon Chapple

What is a vested interest?

Abstract

The term 'vested interest' is often used with a negative connotation, with regard to powerful and wealthy firms or groups who exploit their insider position or block policy changes that others believe would benefit the social interest, the latter potentially including future generations. But the term vested interests also covers members of the public who have rights to participate in public debate. So, how should we understand 'vested interests' for the purpose of improving and democratising policymaking processes?

Keywords vested interest, social interest, collective action, Cabinet Manual, stakeholders

Individuals, groups and organisations have many valid interests. A home owner has a genuine interest in maintaining the utility and market value of the property. A student has an interest in clear guidance from a teacher before an exam. A grocery and its customers have a common interest in food safety standards. Bringing about or maintaining certain states of affairs that favour our own interests is frequently necessary, reasonable or legitimate. And pursuit of self-interest is acceptable in a free and democratic society if it causes no unfair disadvantage or injury to others. Self-interested actions may even contribute (albeit unwittingly) to the social interest. As Adam Smith put it metaphorically, economic actors may be 'led by an invisible hand' to contribute to ends that go well beyond what they intended. A merchant may do more for the nation's economic productivity by buying from abroad when prices there are lower than by favouring local suppliers, and hence 'By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it' (Smith, 1999 [1776], p.32). 'Frequently' does not mean 'necessarily', however. And Keynes showed us the other side of the coin: 'It is not a correct deduction from the Principles of Economics that enlightened self-interest always operates in the public interest' (Keynes, 1963, p.312). Self-interested actions can adversely affect the social interest. This situation is often where the term 'vested interest' comes in, used with a negative connotation. Vested interests may also be lawful, valid and rational interests, however, while people who hold vested interests are members of the public with an equal right to be heard. We should identify the kinds of circumstances in which vested interests may be harmful to the social interest, and seek to prevent their undue influence over policymakers.

To vest originally meant to clothe (James, 2014). Metaphorically, it also means to put someone in lawful possession

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of a property or power (for example, 'by the powers vested in me'). A *vested* interest implies possession of private economic assets, social status or political power, which may be lawful, but may also prefer policy decisions that promote the holder's own ends at the expense of others, or block change that may be beneficial to others. While a vested interest generates private gain, it is often implied that others suffer as a consequence of its political influence or market power.

Uses of 'vested interest' with negative connotations are found in a recent column by Sir Michael Cullen, writing as the chair of a taxation policy working group, after the government's decision not to adopt its recommendation for 'extended capital income taxation' (a capital gains tax). The term 'vested interests' appears five times, including in the title. According to Sir Michael, 'the vested interests opposed to any change were well organised, funded, not too careful with the truth at times and, of course, fully supported by a tribe of right-wing shock jocks on private radio'; they purportedly stood in the way of 'the pursuit of a fairer society' (Cullen, 2019). We take no stand here on the merits of a capital gains tax. But critical concerns about the ability of vested interests to block policy change which may be socially beneficial lead us to ask how to best manage them in a democratic society.

The New Public Management reforms assumed that 'public interest' is a smokescreen behind which vested interests were advanced.

It is worthwhile to consider two contrasting examples of the use of 'vested interest' found in New Zealand policy discourse. The 1967 royal commission of inquiry report into accident compensation in New Zealand is known as the Woodhouse Report, after the commission's chair, Sir Owen Woodhouse. In justifying a guiding principle of 'community responsibility', Woodhouse wrote:

> If the well-being of the work force is neglected, the economy must suffer. For this reason the nation has not merely a clear duty but also a vested interest in urging forward the physical and economic rehabilitation of every adult citizen whose activities bear upon the general welfare. (Royal Commission of Inquiry, 1967, p.20)

In this case, a collective social duty and a vested interest coincide around the general welfare; the public interest and vested economic interests are not opponents in a zero-sum game. The Woodhouse Report persuaded us that the goals of social wellbeing and of economic prosperity may be compatible. That was one of the premises that formed the universal no-fault accident compensation scheme (ACC).

In public economics, if a change in circumstances could lead to a net gain to society, winners can potentially compensate losers and society may be considered better off overall (this is the familiar Kaldor-Hicks-Scitovsky test for a public policy gain: see Scitovsky, 1951). Action to create or prevent change, leading to a net loss on the Kaldor-Hicks-Scitovsky test, may be taken by a vested interest to promote their interests, at odds with the social interest.

In English common law, 'public policy' is sometimes invoked when judges set aside contracts causing mischief or harm to the common good. Otherwise lawful actions by private citizens may be deemed 'to violate a rudimentary public interest' (Ghodoosi, 2016, p.690). An example might be a restraint of trade clause in a contract that has the effect of creating a monopoly. Though it be willingly agreed by the parties, a court may deem it unenforceable on grounds of public policy. For present purposes, and for university studies in 'public policy', however, we normally nowadays define public policy much more broadly as (to quote a textbook example) 'the sum total of government action, from signals of intent to the final outcomes' (Cairney, 2012, p.5).

In economics and in law there are well-established principles by which the public interest trumps private interests. In a democratic society, ideally governments are thought to act as promoters of the social interest. We might see it as contrary to public policy for a private person, group or firm to take advantage of their market power, their influence over policymaking processes, their personal contacts or their high profile in the media to pursue self-interested goals in ways that are not in the social interest.

The social interest

At the height of the New Public Management reforms of the period 1984–96 it was argued, especially by public choice theorists, that the public interest promoted by government action was an illusion. It was claimed that only individuals can meaningfully have interests and that these are best converted into the social interest via private market interactions, as if led by a Smithian invisible hand.

The New Public Management reforms assumed that 'public interest' is a smokescreen behind which vested interests were advanced. Public service professionals would supposedly be disinclined to put into effect the policies of their democratically elected masters, and they would act in their own interests, unless incentivised by quasi-market rewards and sanctions. On the other hand, rational utility maximisation within a market leads firms and entrepreneurs to seek efficiencies and to be responsive to consumers due to the incentives inherent in competition, the price mechanism and the threat of bankruptcy. Creating incentive structures within the public sector mimicking the market was an overarching goal (for an explanation of such theory, see Boston, 1991).

Moreover, it was long recognised by economists that people with common interests will, under certain circumstances,

associate together as industries, professions or pressure groups to advance their collective but private interests, including efforts to influence governments in favour of their members. Such groups are likely to be successful in advancing their vested interest where the gaining group is relatively small and easy to coordinate and each individual entity gains a lot from private collective action, and where the losing group is large and costly to coordinate and each individual of its many members loses only a little (see the first three chapters of Olson, 1971 on the logic of collective action).

With the decline of New Public Management, the notion of 'public interest' has returned. It is now accepted that people may act pro-socially and willingly 'to make a difference' in the interests of the community, as a professional and ethical commitment, or as required under their employment agreements and the law. Under the new Public Service Act 2020, 'the fundamental characteristic of the public service is acting with a spirit of service to the community' (s13). To claim, then, that there is a 'public interest' is not merely a rhetorical ruse to maximise budgets; rather, it is to recognise common values and aims that are openly expressible in law or administrative policy.

In contrast to public interest, then, the term 'vested interest' is often used in the Cullen sense of a negative connotation. It is the potential for harm to the social interest caused by the influence of vested interests that most concerns us here. So, here 'vested interest' refers to a person, group or firm that wields sufficient economic or political influence to shift decision-making processes in directions that would favour themselves and do injury to the social interest. Here a vested interest is a type of political or economic interest, or related interest group, which has a stake in maintaining or producing a state of affairs that may not coincide with, or may even harm, the public interest, and which enjoys an advantage over others in achieving its objectives. It becomes a problem for public policy when it blocks social or economic improvements, or pushes through policy changes that benefit the group with the vested interest at the expense of others' legitimate needs or interests. A vested interest needn't necessarily be a formally organised firm or association. It may include a class of persons with similar interests who coordinate tacitly or informally. There are, on the other hand, identifiable firms, associations and pressure groups that combine resources to influence policymaking in deliberate ways that benefit themselves rather than the wider society. Collective actions by large agricultural interests to frustrate efforts to reverse freshwater degradation are an example. But this doesn't necessarily mean that all of their members' interests are being well served, or that all members support the actions being taken on their behalf. Organisations and groups have their internal divisions and dissent, as well as experiencing free-riders. While people with common interests may indeed combine their efforts to advance their interests, when examining vested interests we need to be wary of over-simplifying or exaggerating their purposes.

Vested interests are often defending advantages that have been acquired over a long time, to which they have become accustomed and that are factored into their business investment plans. Hence, swaying policymaking in particular directions may reflect the vested interests' aversion to a reduced value of those assets or to new costs of doing business, as compared with the potential for innovation and new sources of investment returns that may come with embracing change. The estimated value of losses contingent upon policy reforms may appear to outweigh the harder-to-calculate value of gains that could potentially or actually occur in the future. In cases where vested interests seek to preserve the status quo, it is normally easier to give an account of what they stand to lose due to regulatory changes than of the future losses that would allegedly be inflicted on a vaguely defined public interest if many others are involved, and especially if future generations are affected. In cases such as privatisation of public assets, vested interests may well be lobbying for change, rather than preventing it, or giving advice to government on sales, even as they seek to profit by purchasing a share of those assets and selling later at a healthy profit.

> ... economically powerful vested interests who generate rents from their advantages have greater means to pay for researchers, lawyers and lobbyists to put forward more convincing cases to policymakers.

As elected representatives and public servants are expected to act in the public interest, they should be aware of and carefully manage or mitigate their relationships with vested interests. A vested interest nonetheless participates legitimately in a policymaking process if it publicly declares its interests, is prevented from taking advantage of its market power or political influence, and respects other participants in public debate and policy formulation. A vested interest is, however, not an enlightened interest. But, provided the rules of the public policy game are fair, transparent and enforceable, vested interests can play a valid role in public deliberative processes and elections.

Collective action problems

Not all firms in an industry will see it as in their interests to spend time and money on lobbying government for assistance or creating or preventing changes in regulations for their own advantage. This is in spite of the fact that lobbyists may be at work promoting the interests of that

industry. In the case of the state, however, citizenship comes with compulsory taxation, rather than voluntary membership fees, on the grounds that services provided to one citizen must be available to all as a public good (Olson, 1971). If we think of policy-related consultation with affected persons, groups and industries as a kind of public service in any democracy, then an opportunity to be consulted should be available to all those affected by a decision, as a public good. It is in the interests of good policymaking for all interest groups to be heard in order that positive and negative consequences of policy change (or of no change), some of which may otherwise be unknown to policymakers, can be anticipated and balanced. But economically powerful vested interests who generate rents from their advantages have greater means to pay for researchers, lawyers and lobbyists to put forward more convincing cases to policymakers.

Moreover, vested interests may be strongly invested in the status quo, as an assumed background against which they have made their business plans. Loss aversion bias means that people tend to experience greater pain from a loss than pleasure experienced from a gain of equal economic value. Producers and consumers may hold a bias towards the status quo, especially when a prior investment or sunk cost is at stake (Kahneman and Tversky, 1979; Samuelson and Zeckhauser, 1988). If we seek radical changes in behaviour in order to address the obesity epidemic or climate change, we are up against not only rationally calculable economic barriers (that is, some people suffer losses, for instance through new taxes or reduced demand), but likely also hard-to-shift psychological biases against change, especially when the consequences and potential benefits of change are uncertain and/or well into the future. Powerful economic actors may prefer gratification in the next quarter over wellbeing for all in the long term. They may be motivated rationally by results for themselves or shareholders, but, especially when outcomes are uncertain, they may be as prone as anyone else to irrational biases when considering the common good, future generations and other species. And their louder voices can drown out the less powerful.

We should ask how vested interests operate in particular circumstances, and how policymaking processes can be improved so as to contain their influence; or, better still, how to align vested interests with the public interest ...

For example, a couple who own their home freehold may reasonably calculate that it is in their economic interests to buy an investment property to rent. Once sufficiently large numbers of investors follow suit, however, their collective voice may act as a vested interest that resists taxes on capital gains and the removal of tax incentives that have favoured them in the past. Lobbyists may loudly object to such policies, ignoring the social consequences of renting to people who would like also to be home owners but can't afford to buy, and ignoring the risk of a market correction or even a credit crisis. They thus resist policy changes that reduce the incentives for investors to purchase another property.

Probably the biggest single collective action problem that humanity faces is climate change. There are local and global vested interests in fossil fuels, manufacturing, transport and agriculture that stand in the way of change, and that, for psychological and material reasons, resist the adoption of a long-term strategic outlook. The fear of losses in asset values, a commercial preference for certainty over uncertainty, and biases that favour the status quo discount the potential benefits of embracing climate-related innovations and behavioural changes, even if one has accepted rationally that anthropogenic climate change is occurring. One may claim that it is someone else's responsibility to make the first moves, for example. In this case, 'the public good' pertains to a global public, and the collective action problem involves independent sovereign nations, each with its own vested economic and political interests.

The present question, then, is not just 'who benefits?', but 'who evades short-term costs and/or pushes for short-term gains at the expense of long-term common interests?' We should ask how vested interests operate in particular circumstances, and how policymaking processes can be improved so as to contain their influence; or, better still, how to align vested interests with the public interest, as Woodhouse did.

The *Cabinet Manual* and the Public Service Commission's code of conduct

In public governance, there may be a conflict of interest when an elected or career public official is (or is perceived to be) involved with or influenced by a vested interest. Politicians and officials are people with interests like every other citizen, but ideally they set personal interests and their relationships with vested interests aside and act impartially in the public interest while doing their day jobs. Hence, there are rules and ethical guidelines laid down for ministers in the *Cabinet Manual* and for public servants in Te Kawa Mataaho/the Public Services Commission's code of conduct.

The *Cabinet Manual* sets out expectations for ministerial conduct. No one gets prosecuted for ignoring its 'guidance'; although, in *Field v R* the former minister ought to have been aware of its contents and hence ought to have known that what he was doing was wrong. The *Cabinet Manual* is not, and does not need to be, authorised by Parliament. As adopted

and updated by successive governments, it has simply evolved. It records, but does not formally codify, constitutional conventions. It 'provides guidance' on Cabinet collective responsibility and on conflicts of interest. It purports not to prescribe rules, and yet describes itself as 'authoritative'. It is often cited in the media, however, as a 'rule book' – even as 'the all-important ministerial book of rules' (Walls, 2020). Writing down conventions and guidelines is likely to have an unintended effect, therefore, as people look to the written 'guidance' for exactly that, guidance. In the court of public opinion, the *Cabinet Manual* is likely to be treated as a set of rules for ministerial conduct, and it may acquire a prescriptive political (if not legal) force over time (Duncan, 2015).

The *Cabinet Manual*'s 'guidance' is admirably practical and clear. On the topic of interactions with organisations that we might describe as 'vested interests', paragraph 2.83 says:

> It is a valid and appropriate aspect of a Minister's role to engage with representatives of non-government and commercial organisations. Care should be taken, however, to avoid creating a perception that representatives or lobbyists from any one organisation or group enjoy an unfair advantage with the government. (Cabinet Office, 2017, p.32)

This is a new clause included in the 2017 edition, and the phrase 'enjoy an unfair advantage' is well chosen.

However, a significant inside track for vested interests in the policy process is granted via the use of 'stakeholder' consultation. Stakeholders are subsets or groups of citizens to be consulted by policymakers on a given policy issue. On what basis are stakeholders selected? And to which stakeholders do decision makers pay most attention? (De Bussy and Kelly, 2010, p.290). Stakeholders are given a semi-official role in the *Cabinet Manual*: 'A key consideration in developing workable and effective policy is assessing the need for, and the timing of, consultation with Māori (including relevant iwi, hapū, and whānau), the public, and *relevant stakeholder groups*' (Cabinet Office, 2017, p.76, emphasis added). Cabinet guidelines mandate a 'process for consultation with interest groups' and indicate that departments preparing Cabinet policy papers are responsible for ensuring that 'appropriate … stakeholder consultation is undertaken' (Department of the Prime Minister and Cabinet, 2017). Given resource constraints, there is a risk that big players will be agencies' primary stakeholders. Those who lack resources for research and lobbying and who are not a part of relevant networks risk being overlooked as 'stakeholders' in matters that affect their interests.

The purposes of the Public Service Act 2020 include a statement of core public service values and a requirement for minimum standards of integrity and conduct to be set by the public service commissioner. The commission's *Standards of Integrity and Conduct* set 'standards of behaviour expected of State servants' (Public Service Commission, 2010, p.3). On trustworthiness, they require state servants to 'ensure our actions are not affected by our personal interests or relationships'; 'never misuse our position for personal gain'; 'decline gifts or benefits that place us under any obligation or perceived influence' (Public Service Commission, 2007). While it is necessary to maintain links with outside organisations, state servants are alerted to the risk of 'capture by interest groups and the possible perception of undue influence' (Public Service Commission, 2010, p.7).

The *Standards of Integrity and Conduct* emphasise the need to ensure that disadvantaged members of the community have fair and equitable access to services. They have less to say directly about the mitigation of vested interests, who are, by definition, among society's most privileged. And one has to stretch the meaning of 'services' to include access to policymaking processes. The code warns against taking advantage of, or seeking to gain from, one's position as a state servant, for example in relation to private investments or businesses, in order that job performance is not affected by personal interests and that inside knowledge is not used for personal gain. Gifts, hospitality and offers of secondary employment are particularly sensitive. They could imply or create a mutual obligation with a vested interest, and hence their undue influence or unfair advantage. But the code of conduct does not directly address the management of vested interests.

> Ministers and public servants involved may act perfectly appropriately as individuals, but wealthy and well-connected vested interests, acting as identified stakeholders via non-transparent processes, may still be exploiting their advantages.

The New Zealand state sector does take steps to manage and to mitigate the influence of vested interests over ministers and state servants. The Office of the Auditor-General provides a comprehensive guide to managing conflicts of interest (Controller and Auditor-General, 2020). That corrupt practices are generally well constrained in New Zealand, and wrongdoing can result in prosecution, helps to account for this country's top ranking on Transparency International's Corruption Perceptions Index. But the undue influence of vested interests is not necessarily a matter of clear-cut malfeasance, such as bribery.

Moreover, the various guidelines mentioned above tend to focus on individuals' avoidance or management of conflicts of interest, and only implicitly on

powerful corporate interest groups or lobbyists and their potentially undue influence over policymaking processes at the expense of less well-resourced and less advantaged groups. Ministers and public servants involved may act perfectly appropriately as individuals, but wealthy and well-connected vested interests, acting as identified stakeholders via non-transparent processes, may still be exploiting their advantages. Powerful private stakeholders and their hired lobbyists are not required to deliver clarity regarding their involvement in policymaking processes, nor are they required to declare publicly their interests in policy change or the status quo, and yet it is generally accepted that they have greater rights via the *Cabinet Manual*.

The insulation of policymaking and policymakers from undue economic and political pressures of vested interests does not necessarily assure us of good government, in the senses of efficient, effective, equitable and responsive government. Even without endorsing his push for smaller government, we should pay at least some heed to Niskanen's scepticism about believing 'that honest government is good government' (Niskansen, 1971, p.193). This article addresses not only honest government, however, but also supports governmental processes that are fair, inclusive and democratic, and that prevent undue influence from powerful vested interests. But the codes and guidelines for public governance reviewed above tend to focus more on the honest conduct of individual ministers and state servants. They could be read as guidance on 'butt-covering' rather than guidance for democratic governmental process. There is little that is explicitly aimed at the management and mitigation of vested interests. The term 'stakeholder' is only loosely specified.

Conclusion

As we recover from the impacts of Covid-19, we still face significant problems, such as social and economic inequality, the obesity epidemic, dirty water, online extremism and climate change. None of these challenges can be met without collective action and effective policy and law. And among the barriers to this collective action, there will always stand those vested interests that intervene to protect an advantage they currently enjoy over others, even if changes to policy and law would lead to long-term social and economic benefits. The challenge is that these vested interests, as members of our communities, are also legitimate interests who deserve a fair hearing in democratic policymaking processes. Their participation should be transparent, however, and should not predetermine decision making. It is important for decision-making guides such as the *Cabinet Manual* to move on beyond simply a focus on honest conduct and more strongly focus on management and mitigation of vested interests.

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Andrew Geddis

Funding New Zealand's Election Campaigns
recent stress points and potential responses

Abstract

The nexus between money and politics creates particular problems for liberal democracies like New Zealand. Events during the last parliamentary term put our present system of regulating this issue under some stress. With two cases relating to political fundraising now before the courts and other matters still under investigation by the Serious Fraud Office, this is the right time to consider whether reform of the law is needed and what such reform ought to look like.

Keywords political funding, electoral finance, corruption, electoral law

As soon as human societies began to accord exchange value to cattle, cowrie shells and shiny pieces of metal, money and politics became linked. Each represents a form of power. The possession of money, and the desire of others to obtain that money, bestows both economic sovereignty and dominance upon its holder. At the core of politics lies the struggle for and deployment of social influence and authority. The repeated use of one form of power to obtain and buttress the other can then be seen across time and place. Spending to gain elected office in the Roman Republic became so rampant that it contributed to the end of that system of rule; a fate that some suggest conceivably may befall the United States (Watts, 2018). Meanwhile, examples of political leaders using their governing authority to enrich themselves and their families unfortunately are legion.

The link between these two kinds of power becomes particularly problematic in places governed according to liberal-democratic principles, where freely elected representatives are expected to act in the interests of those they govern. Money's ubiquity means it is required for virtually any sort of election-related activity. Although there may be the odd candidate able to win a local council seat without spending anything on advertising, they still need to pay for petrol to travel to meetings, phone plans to talk to voters and supporters, any deposit required for their candidacy, and the like. Scale up to nationwide elections – where, in New Zealand's case,

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you need to communicate a political party's message to some three million potential voters in a way that will convince them of its merits – and an adequate supply of money becomes critical. It is noteworthy, for example, that three of the most recent 'big splash' attempts to enter our national political scene – Kim Dotcom's Internet Party, Colin Craig's Conservative Party and Gareth Morgan's The Opportunities Party – all shared something in common. All three organisations largely emerged fully formed from the deep pockets of their leader/benefactor.

Of course, these examples also prove that while having some money may be a necessary ingredient for political success, having a lot of it is far from a sufficient one. Even spending millions of dollars cannot compensate for a fundamentally flawed electoral product. Equally, a strong political kaupapa may overcome a relative lack of funds, as the Māori Party's comparative success on the smell of an oily rag showed at the 2008 election (and, to a lesser extent, again in 2020). So, a simple cause-and-effect claim along the lines of 'more money buys more political success' is clearly false.

Which is not to say that an opposite claim – 'money is irrelevant to political success' – is true. Any candidate or party who tries to argue that this is the case should be asked a very simple question: why do you accept donations from supporters, and are you perpetrating a fraud on them when you do so? Because it is a pretty safe bet that, all other things being equal, a candidate or party given the choice of facing either an opponent possessing twice their funds, or one with less funds than them, will plump for the latter option. After all, if money *might* make a difference in the electoral contest you are involved in, then you would be pretty silly to go into it at a significant disadvantage. That perception then creates problems in and of itself. It generates something of an arms race situation for candidates and parties, where having 'enough' money depends upon how much your competitors have available to spend (among other factors). And the logic of seeking to avoid comparative disadvantage while also obtaining a possible comparative advantage can drive behaviours that are harmful to the operation of representative democracy.

While the aim of creating a measure of political equality can justify some limits on election spending, tightening those limits too much can become unjustifiable.

Trying to manage the arms race

New Zealand traditionally endeavours to limit the threat of this political spending arms race effect by placing caps on how much parties, candidates, and third party 'promoters' acting independently of these primary contestants can incur in 'election expenses'. Individual candidates have been subject to such limits since the late 19th century, political parties since 1996 and third party promoters since 2008. At the 2020 election, individual electorate candidates were permitted to incur up to $28,200 in election expenses for their campaign to win a seat. Political parties could incur election expenses of $1,199,000 plus $28,200 for each seat in which they ran a candidate (allowing for a maximum of $3,229,400 for parties that contested all 72 electorates). Third party promoters who register with the Electoral Commission were entitled to incur up to $330,000 in election expenses. In theory, these caps on spending not only allow for a measure of some political equality between electoral participants, but also limit their need to raise funds. If you can only spend a certain amount on your own campaign, and can be sure your opponents will be similarly constrained in their spending, then the requirement to get money to compete is consequently reduced.

Such caps on election expenses, however, only apply to a relatively narrow range of electoral practices: in essence, advertising undertaken during the three-month 'regulated period' preceding polling day. Activities such as opinion polling, running focus groups, candidate travel, hiring campaign advisors, renting campaign offices and the like are not included. Nor does the cap on election expenses include advertising that is carried out before the three-month pre-election regulated period begins. In this era of the 'permanent campaign', such continuous political messaging is regarded as very important. Recall why then National Party leader Simon Bridges was so happy to hear from Jami-Lee Ross that a group of businessmen had made a $100,000 donation to his party:

> Um, look, I just think we want it for, uh, the advertisements and the like, you know? We want it for the things that we're gonna need to do over the next year or so, sort of outside of the – not outside of the party but um, uh, you know, like I say we want to do some more attack ads – say we want to do another regional fuel one, say we want to do another industrial relations one. We just want to keep doing those things, right? (Spinoff, 2018)

Consequently, the regulated election expenses incurred for each campaign represent but a fraction of the total that will actually be spent on seeking election. The full extent of such expenditure is shrouded in mystery as candidates, parties and promoters are required to publicly report only on their election expenses following each contest, not their full campaign accounts.

However, extending the existing controls on election expenditure carries potential risks. Such political spending is actually a democratic good, insofar as it enables candidates and parties to reach and attempt to persuade voters. Limit that spending too much, or for too long, and you may create a less well-informed electorate. This effect may be particularly keenly felt by smaller or newer political actors who find it more difficult to gain coverage from the 'free media'. Such

consequences may then create problems in relation to the right to freedom of expression, as guaranteed by the New Zealand Bill of Rights Act 1990, section 14. While the aim of creating a measure of political equality can justify some limits on election spending,[1] tightening those limits too much can become unjustifiable.[2] Equally, stricter controls on political spending by candidates or parties may have the effect of displacing such expenditure in ways that actually are less accountable. For example, rather than a party or candidate directly spending money on campaigning, they may coordinate with a third party individual or group to do so on their behalf.

Where does all this money come from?

Even with the just discussed, and somewhat rudimentary, cap on election expenses in place, obtaining enough money to fund campaigns to a level that is competitive with (or, even better, greater than) your opponents is considered to be very important. If you cannot self-fund – see Kim Dotcom, Colin Craig, Gareth Morgan – you have to go out to supporters and solicit donations from them. Which creates a potential problem for a representative democracy like New Zealand. Recall that elected representatives are expected to act in the interests of those they govern. This is the basic deal society makes when we vote in elections: we accept that those who win at the polls obtain authority to exercise power over us collectively, as long as they remain committed to using this governing authority in our best interests.

Of course, determining what are the interests of the governed and how power should be exercised in order to serve these interests is not exactly a straightforward matter. The entire basis for human politics is that different people will have different views as to how much different interests matter and how these can best be met. There is a good reason why we have an ACT party and a Green Party and a Māori Party (and a whole host of other parties) all advocating their different policies each election. But one thing that definitely has to be off the table in a properly functioning system of representative democracy is any idea that elected representatives will make decisions based largely on who is paying their bills. Engaging in these sorts of explicit transactions – 'in exchange for this personal gain, I'll use political power thus' – is considered to be a serious crime, as Philip Field discovered in 2009 upon being convicted of and jailed for bribery and corruption.

... the criminal charges brought by the Serious Fraud Office (SFO) against former National MP Jami-Lee Ross and three businessmen suggest a problem with the current threshold for public disclosure of donations.

While such direct quid pro quo deals thankfully remain extremely rare in New Zealand's political culture, reliance on private funding of our national politics still poses a problem. Because, as is unavoidable in a country with a market-capitalist economy, the money that candidates and parties seek to fund their activities is not evenly distributed. You only have to look over the list of disclosed donors to National, Labour, ACT or the Greens (as well as undisclosed donors to the New Zealand First Foundation) to witness that disparity. Only a very small segment of New Zealand's society could even contemplate making a $15,000 (let alone $150,000, or even greater) donation to the political party of their choice.

Yet recall that our governing compact – representatives have our consent to exercise power over us, provided they then use it in our interests – is premised on an assumption that we all should have an equal say in who gets to govern. We have long since rejected John Stuart Mill's proposal that some groups of people deserve to cast more votes because they will have better ideas about how to run our society (Mill, 1977, p.475). Why, then, do we allow for unlimited private funding of those who are competing for public power? Isn't that a form of potential political influence that is just as important, or maybe even more important, than actually casting a vote? Put it this way: if someone were to say to a candidate or party, 'I'll either give you $15,000, or my vote on election day', which option do you think would be chosen?

Of course, by law all significant donations have to be disclosed first to the Electoral Commission and then to the public, which is intended to disincentivise exchanging money for policy influence. The Electoral Act 1993 requires the reporting of the names and addresses of those making donations of over $1,500 to individual candidates, or $15,000 to political parties in a calendar year. The theory is that such reports will expose large gifts to the disinfecting sunlight of public scrutiny. Any policy decisions that favour donors can be queried and their justification held up for close inspection. In turn, the prospect of such questioning will dissuade donors and political actors from even trying to exchange financial support for public policy outcomes. However, events in the last parliamentary term suggest that this disclosure regime has serious flaws in both its design and its implementation.

First, the criminal charges brought by the Serious Fraud Office (SFO) against former National MP Jami-Lee Ross and three businessmen suggest a problem with the current threshold for public disclosure of donations. In short, these individuals are accused of disguising the true source of two donations of $100,000 to the National Party by dividing them among several 'straw' donors, each of whom then appeared to donate less than the $15,000 amount requiring disclosure. If proven, this stratagem is illegal and the attempt to use it a crime. However, New Zealand's

comparatively high disclosure threshold still makes it a viable way of disguising the true source of a large donation. While breaking a donation up and passing it on through several individuals is not entirely risk-free, it still is far less likely to be detected than having to do so among (say) 20 or more individuals.

Second, the details of donations made between 2017 and 2019 to the New Zealand First Foundation show that other, apparently legal, ways may be used to disguise the source of comparatively large donations. In particular, records of donations to the foundation show several related entities under one individual's control making a number of donations just under the disclosure threshold within a few days of each other (Espiner and Newton, 2020). The Electoral Act 1993, section 207LA(1) makes it a 'corrupt practice' to direct or procure '2 or more bodies corporate to split between the bodies corporate a party donation in order to conceal the total amount of the donation and avoid the donation's inclusion by the party secretary in the return of party donations'. However, none of the subsequent charges filed by the SFO against two individuals connected with the foundation were brought under this section. Rather, the charges relate to a general failure to transmit any of the party donations received by the foundation to the New Zealand First party's secretary, as required by law. Nor have any donors to the foundation been charged by the SFO. As such, it appears that the SFO has concluded that this pattern of donating cannot support criminal charges, despite its net effect being that the source of donations amounting to some tens of thousands of dollars would have remained hidden from the public even if the gifts to the foundation had properly been disclosed.

These two cases also point to inadequacies with the current means of enforcing the legal rules on disclosing political donations. Each alleged infraction came to the authorities' attention only because of quite unusual actions by individual whistle-blowers. In the case of the donation to the National Party, it was Jami-Lee Ross himself who reported the matter to the police in an effort to implicate his then party leader in the alleged offending. The source of information about donations to the New Zealand First Foundation is not certain, but it appears that some person or persons previously involved in the administration of New Zealand First passed documents over to members of the media. In both cases, audited annual party financial returns had been filed with the Electoral Commission that did not disclose any issues relating to the donations in question. The National Party apparently satisfied itself that the donations now before the court had come from the various individuals identified as giving the money, and so did not need to report the apparent donors' identity to the commission as their gifts were below the disclosure threshold. The New Zealand First party secretary apparently was not told about any donations to the foundation over a three-year period and so could not report them as required by the Electoral Act 1993.

> … the $4,145,750 'broadcasting allocation' distributed between parties prior to each election is a hopelessly outdated means of supporting their electoral campaigns.

This state of affairs underscores the Electoral Commission's very limited role in receiving and publishing political party (and candidate) financial returns. It carries out no independent auditing function to check that they are correct. It has no power to compel information from a party or candidate in relation to a return. At most, it has a statutory obligation in situations where it 'believes that any person has committed an offence …, [to] report the facts on which that belief is based to the New Zealand Police'. In practice, rather than report suspected offending, the commission has in past cases of apparently erroneous financial returns instead preferred to seek the cooperation of parties and candidates to have a corrected version filed.

As a result, it may be that the existing law on donations and their disclosure became regarded as something of a paper tiger. If those involved in election campaigns, whether as candidates, party officials or donors, conclude that a failure to follow the rules around party funding is unlikely to be detected and not punished even if it is, then those rules come to lose their efficacy. Donations that raise no particular concerns may still be reported as is required by the law. However, donations that are considered politically embarrassing or worse may be hidden from the public through legal means or otherwise. If that indeed is the case, then the entire premise of the disclosure regime is defeated.

Of course, the SFO's actions in charging individuals in relation to the National Party donation and the New Zealand First Foundation's activities, as well as its ongoing investigation into donations to the Labour Party and the mayoral campaign in Auckland, may cause those involved in politics to reconsider the risk–reward calculus around disclosing donations. However, we should take this opportunity to consider whether the existing law requiring disclosure of political donations is fit for purpose, as well as whether the Electoral Commission's role in overseeing that law is sufficient.

Beyond private funding of election activities

Even a perfectly working disclosure system in which every donation above a particular threshold becomes publicly known does not really address the basic inequities involved in private political funding. There still will be a very small group in our society whose wealth alone gives them greater capacity to influence who will govern us all. And the parties and

candidates that they choose to support (or not support) may thereby get an advantage in the political contest (even recognising, as I said at the beginning of this article, that having access to money is no guarantee of electoral success).

What, though, is the alternative? Because we cannot hope to take all money out of politics, trying to starve such activities of resources is an invitation for even greater rule bending and outright illegal practices. Furthermore, we really should not try to do so. Having different parties and candidates (and other groups as well) advocating for their best views of society and its future is both a necessary and a desirable part of public political life. Prevent that from happening and you destroy the entire basis of democracy.

One response is to cap the amount that each individual or entity may give and replace that funding with grants of public money, as Canada has done in recent years. Such 'cleaner' forms of political funding are argued to reduce the potential for overtly corrupt relationships, limit the influence that private funding may have over public policy, and also create a more diverse and equitable electoral playing field (Marziani and Skaggs, 2011).

Certainly, there is room in New Zealand to rethink public support for political parties, and perhaps even individual candidates. In particular, the $4,145,750 'broadcasting allocation' distributed between parties prior to each election is a hopelessly outdated means of supporting their electoral campaigns. There is no longer any good reason to apply a different form of regulation to broadcast advertising, particularly in light of the Court of Appeal's radical reworking of the legislative framework in the case of *Electoral Commission v Watson & Jones* [2016] NZCA 512. That decision effectively removed all broadcasting-specific constraints on political advertising from everyone except individual candidates and political parties. Consequently, interest groups or wealthy individuals can use broadcast advertising for political purposes subject only to the spending limits in the Electoral Act, while political parties cannot use this form of communication at all apart from the money given to them through the broadcasting allocation. Furthermore, the allocation criteria that the Electoral Commission is required to follow when distributing these funds are incoherent. They require both that larger and more successful parties be given a greater share of the resource, while also that the commission consider 'the need to provide a fair opportunity for each party … to convey its policies to the public by the broadcasting of election programmes on television'.

As such, these funds should be repurposed as general support for parties' electoral activities, rather than being tied to paying only for advertising via the broadcast media or internet. The criteria for distributing them also should be revisited to prioritise support for a diverse and competitive electoral environment. This can be achieved by, for instance, following the German allocation criteria, where the amount of funds granted for the first four million votes received by parties, which is 0.85 euro per valid vote, is higher than the amount granted for votes received beyond that, which is 0.70 euro per valid vote. And whether the amount of money that the state provides to aid political parties' election campaigns should be augmented to compensate for increased controls on forms of private funding is a conversation that we as a country really need to have.

Conclusion: the root of all evil is deeply rooted

Coming up with a satisfactory solution for all the issues raised by the intersection of money and politics is not easy. As Dan Lowenstein notes in a seminal law review article on campaign finance reform, 'the root of all evil is deeply rooted' (Lowenstein, 1989). But they are matters that we really do have to think about, for at their base lies the fundamental question of whether we can have trust in the process that determines how we all will have to live together. Once that trust is lost, then we no longer have a basis for making such decisions. And without that, well, we really don't have anything to go on at all.

1 Electoral Commission v Watson and Jones [2016] NZCA 512 at [23].

2 Libman v Quebec (Attorney General) [1997] 3 S.C.R. 569.

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Simon Chapple and Thomas Anderson

Who's donating? To whom? Why?

Patterns of party political donations in New Zealand under MMP

Abstract

This article considers the data on donations to New Zealand political parties collected by the Electoral Commission. The purpose is to address who gets what, and why. Relatively small amounts are donated. A little may buy considerable influence. There is limited evidence of strong upward trends in political donations, suggesting a systemic equilibrium. The plurality of donations is received by unsuccessful parties, suggesting that money is insufficient for political success. Most donations come from individuals (mostly men) or families. Cross-political spectrum donations are mostly from businesses and to the two dominant parties, suggesting that businesses are trying to buy the ear of the major power in government.

Keywords public trust, political party funding, party donations, influence, vested interests

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Surveys of the public by the Institute for Governance and Policy Studies for the years 2016, 2018, 2019 and 2020 show that only about one in four New Zealanders have a 'reasonable amount' or a 'great deal' of trust in the ways that political parties are funded, a very low trust level (Nguyen, Prickett and Chapple 2020). Despite this high level of public distrust in funding overall, and the potential importance of political donations specifically as a conduit for pursuit of private interests at the expense of what is socially desirable, no systematic data work has been done on political donations in the mixed member proportional (MMP) electoral system period.

Since the first MMP election there have been four regulatory regimes for donations and hence for data collection. This article focuses on party donations, under these regimes, not candidate donations because of the centrality of parties to MMP. The Electoral Amendment Act 1995 required political parties to annually disclose the value of party donations exceeding $1,000 from a person or organisation. The

resulting information was published by the Electoral Commission on its website. The names and addresses of donors were declared, unless the donation was made anonymously, in which case anonymity was noted. The second donations regime was introduced by the Electoral Amendment Act 1996. The new act raised the annual donation disclosure threshold from $1,000 to $10,000. The third donations regime, commencing in 2008, was introduced by the Electoral Finance Act 2007. The Electoral Finance Act imposed stricter controls on anonymous donations. If any party donation exceeded $1,000, the name and address of the contributor had to be disclosed to the party. If the donation exceeded $10,000, the donor's name had to be disclosed to the public (i.e. there was no anonymity option). Additionally, controls capping the maximum size of overseas donations at $1,000 were introduced.

The 2007 Act was repealed in 2009. However, an amendment to the Electoral Act 1993 was concomitantly introduced which meant that public disclosure requirements for donations over $10,000 and the overseas donation cap of $1,000 remained in force. Further changes were made in the Electoral (Finance Reform and Advance Voting) Amendment Act 2010, which came into force in 2011, creating the rules until 2019. The threshold for public disclosure of the identity of party donors was raised to $15,000 per year and the maximum donation by an overseas person or entity was raised to $1,500. The amendment also introduced a new requirement that party secretaries report any donation received above $30,000 to the Electoral Commission within ten days of receipt. Lastly, the most significant improvement in information from the introduction of the fourth regime was the requirement that parties disclose the number and total value of anonymous donations made between $0 and $1,500, between $1,500 and $5,000, and between $5,000 and $15,000. Hence, the only donations missing from an aggregate count of party donations are named donations (to the party) under $1,500. The omission of the aggregate of these named donations in the reporting regime seems a lacuna which can readily and should be eliminated.

... there are suggestions of donors splitting larger donations and using proxy donors to stay under reporting thresholds ...

This article considers both donations above the public anonymity threshold (1996–2019) and aggregate disclosed donations below the threshold (2011–19). The aim is to use the available data variation to squeeze out as much information as possible to address the questions of who donates to whom and why. The data is not designed for the purposes of answering these questions, and thus imposes a considerable constraint on any conclusions. Nevertheless, some interesting interim conclusions are possible.

Data analysis of party donations

Data on nominal current value party donors was taken from the Electoral Commission website (https://www.elections.org.nz/) for 1996–2019. Data was coded by year, political party (six groups: National, Labour, New Zealand First, Green, ACT, and small parties not elsewhere classified), and by nine types of donors (as private individuals or families, businesses, MPs/party presidents, party branches, community organisations, trusts, unions, millionaire party founders (Colin Craig, Gareth Morgan and Kim Dotcom: these three are also private donors, but because of their size are considered separately here) and anonymous (large donors could be anonymous until the 2008 regime). Data on private individuals or families was coded as male donors, female donors (gender assigned on the basis of name; Google was used where gender was not evident, and a small number of donors were coded unknown) and couple (family) donors. Data was also coded on whether the donations came from a single donor or a donor who made multiple donations at any point over the 1996–2019 period. Aggregate data on donations below the threshold (available from 2011) was also considered in conjunction with disclosed donations.

To allow consistent comparisons across time, all donations data was adjusted to constant 2020 dollar values, using June-year data from the Reserve Bank inflation calculator (https://www.rbnz.govt.nz/monetary-policy/inflation-calculator).

Is the data complete? Under-reporting in any administrative data set is always possible. Equally, there are suggestions of donors splitting larger donations and using proxy donors to stay under reporting thresholds (e.g. *New Zealand Herald*, 2008).

There were 927 individual donations above disclosure thresholds between 1996 and 2019, or just under 39 donors each year on average. The total amount donated and recorded in the system above the varying individual anonymity thresholds amounts to just under $45 million in total and averages a little under $2 million per year. These are not vast sums. They may be large in relation to what it costs to run a political party, however, and they are large relative to the resources of most ordinary people, who most often cannot afford to give sums of thousands of dollars to a political party. In terms of temporal variation, Figures 1, 2 and 3 show a general tendency for a higher number, value and average of above-threshold donations in the eight election years covered, compared to adjacent non-election years.

Two anomalies where donations do not stand out in relation to adjacent non-election years occur in 1996 and 2008. Both almost certainly reflect anticipated regulatory regime changes. Additionally, the 1996 data covers only part of 1996, as regulations on donation reporting came into force on 1 April 1996. Less than half a million dollars is recorded as donated in 1996, compared to over $700,000 the following, non-election year. Equally, in the 2008 election year, donations were $1.2 million compared to $3.3 million in 2007.

Figure 1: Number of donations in excess of anonymity thresholds, 1996-2019

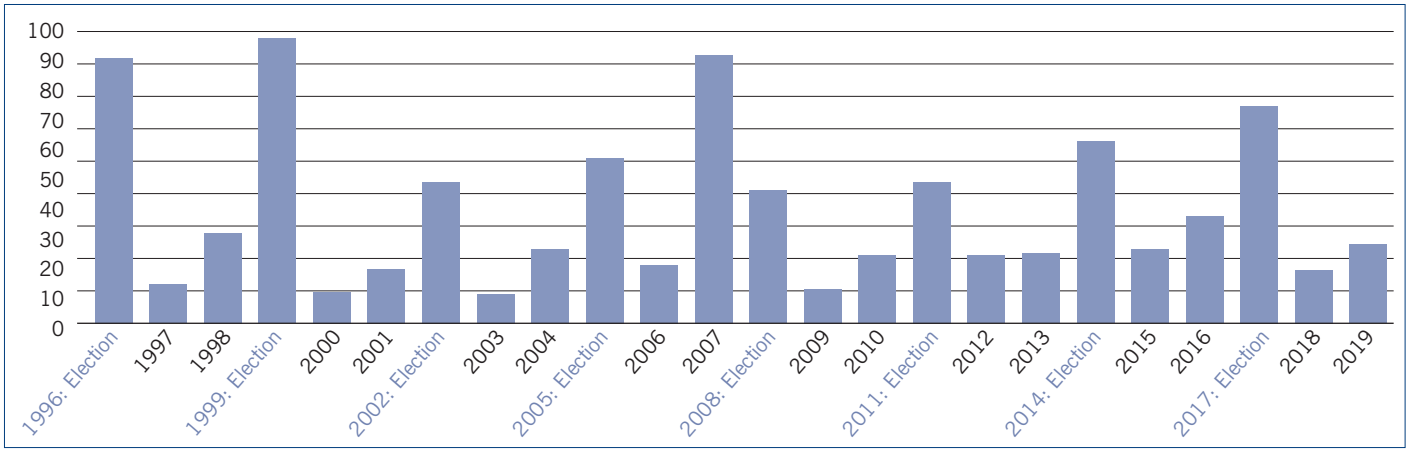


Figure 2: Total value of donations in excess of the anonymity thresholds, 1996-2019

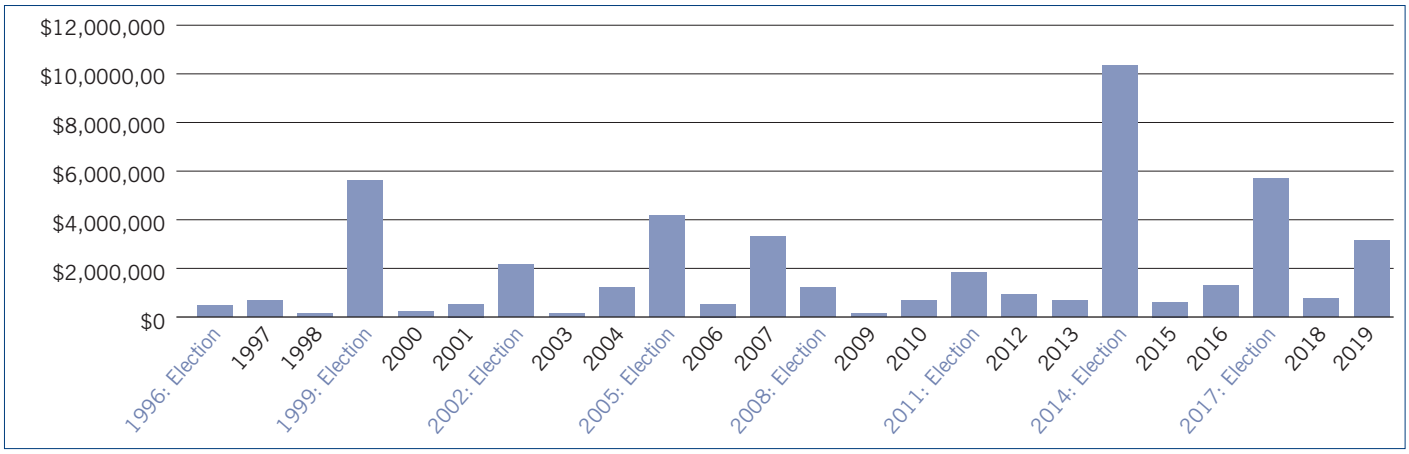


Figure 3: Average value of donations over the anonymity thresholds, 1996-2019

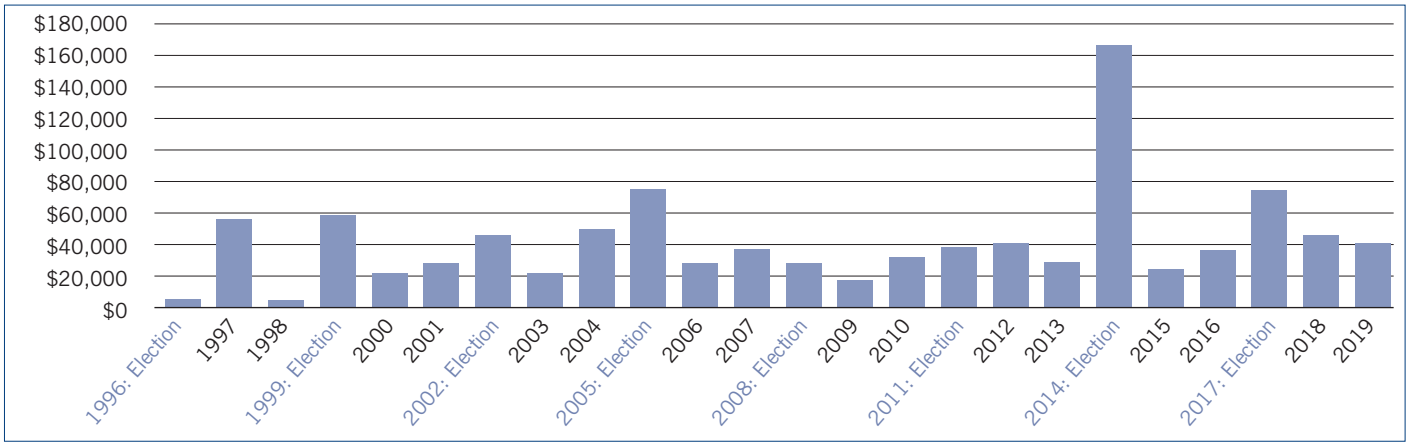
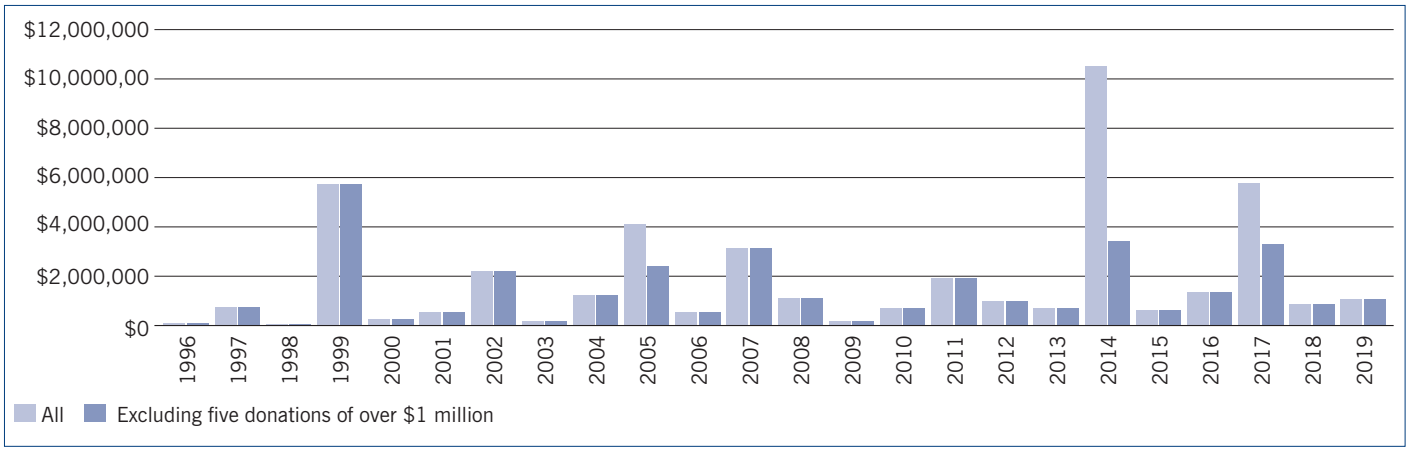


Figure 4: Value of donations over $15,000, 2020 dollars



It seems likely that the 2007 bulge involved anticipation of the Electoral Finance Act, which became law in December 2007. This suggests that regulation does change donors' or parties' behaviour, at least in the short term. While Figure 3 shows that the average measured donation is volatile due to the influence of a small number of large donations (most obviously, in the 2014 election year), the median or middle donation (not charted) is stable over time.

The considerable spike in the total and average value of donations in 2014 (Figures 2 and 3) was due to the large donations from Colin Craig and Kim Dotcom.

A further question is the time trend of donations. Recorded donations represent the tip of an iceberg of unknown size, since named donations of under $1,500 are unrecorded. Additionally, the threshold for recording individual donations changes from $1,000 (1996) to $10,000 (1997), and to $15,0000 (2011) in nominal terms, which may suggest a trend where none actually exists. To address the second issue, only the 747 individual donations over $15,000 (in 2020 dollars) in all years were included. This method allows consistent estimates, with an identical real cut-off over time. Inspection (see Figure 4) showed little evidence of a time trend between 1996 and 2019, confirmed by a regression of individual donation value against time. The correlation with time was weak (r=0.21) and not statistically significant. Dropping the five largest donations as outliers, which is the population of donations exceeding $1 million which drove the aggregate spike in donations in 2014, turned the weak relationship from positive to negative (r=0.09).

Which parties get donations? Who donates? Table 1 shows the plurality of donations were received by parties outside the five typically represented in Parliament over the majority of the MMP period. These have been ineffective in getting people into Parliament. National received somewhat more money in big donations than Labour, and those donations are somewhat larger on average. The Greens are not too far behind National and Labour in terms of donor numbers but have an average donation of about half. ACT have far fewer donations than the Greens, but their average value, double that of the Greens, pushes their total value up.

Table 1: Big donors, big donations: descriptive statistics of party donations in excess of the anonymity disclosure thresholds, 1996–2019, in real 2020 dollars

	N	Value of above-threshold donations	Average donation
BY PARTY			
National	231	$12,874,196	$55,732
Labour	250	$10,179,265	$40,717
Greens	197	$4,683,571	$23,774
Small parties NEC	140	$13,515,921	$96,542
ACT	75	$3,459,939	$46,133
NZ First	34	$388,918	$11,439
BY DONOR TYPE			
Total private	222	$11,424,975	$49,955
Man	144	$6,868,631	$47,699
Woman	51	$2,596,366	$50,909
Couple	22	$1,722,610	$80,573
Unclassified	17	$187,368	$11,022
Millionaire	6	$8,286,362	$1,381,06
Business	181	$6,052,921	$33,442
Anon	111	$5,682,837	$52,843
Trust	37	$5,727,806	$154,806
MPs/president	258	$4,706,425	$19,195
Party branches	64	$1,561,660	$24,401
Trade union	35	$1,362,184	$38,920
Community	13	$196,727	$15,610
BY NUMBER			
Multiple donations	516	$23,959,317	$46,433
Single donations	300	$15,276,937	$50,923
Anon	111	$5,865,556	$52,843

Most donations come from private donors, with men being much more likely to donate than women. All recorded millionaire donors are male. Businesses are an important rather than overwhelming source of donations, although it should be noted that the vast amount of money from private donors and from the millionaires has been made in business, rather than from wage and salary employment. Money from trusts has been of a similar magnitude to business donations.

The plurality of donors by donor type are either MPs or the party president. But the total amount from this source is relatively low, since the average donation is small. Donations from party branches, trade unions and community organisations have been minor sources of funding. Finally, the majority of large donations come from repeat donors – those who have made a large donation in two or more years.

For the period from 2011 to 2019, aggregated donations data below the threshold is available (see Table 2). There is little evidence that New Zealand politics is groaning under the weight of growing amounts of big money. However, this data suggests that individually anonymous donations may be on the increase, as they have risen in successive elections. They have also flowed disproportionately to National over this shorter period ($14 million compared to $4 million for Labour, for example). Such anonymous aggregate donations account for two thirds of National's donations. The large amount of reported donations beneath the disclosure threshold received by the National Party has also been rising over time. Either there is growth in the number of people willing to donate to National under the threshold or they are increasingly avoiding the disclosure threshold. Between 1996 and 2011 National received in excess of $5 million from trusts, a vehicle designed to preserve large donor anonymity. National largely abandoned the use of trusts

Table 2: Reported donations of the five main parties above and below anonymity thresholds, 2011–19

Year	Donations below threshold but reported in aggregate	Donations above threshold	Total of previous two columns
Total	**$23,907,919**	**$12,076,384**	**$35,984,303**
	BY YEAR		
2011 election	$3,875,903	$1,790,321	$5,666,224
2012	$1,077,318	$905,732	$1,983,050
2013	$1,514,340	$492,036	$2,006,376
2014 election	$4,731,710	$2,348,150	$7,079,860
2015	$1,948,487	$567,585	$2,516,072
2016	$2,563,647	$1,167,476	$3,731,123
2017 election	$5,617,014	$2,911,358	$8,528,372
2018	$943,734	$835,714	$1,779,448
2019	$1,635,766	$1,058,012	$2,693,778
	BY PARTY		
National	$14,896,256	$4,425,835	$19,322,092
Labour	$4,108,852	$2,566,280	$6,675,132
ACT	$2,081,581	$1,831,983	$3,913,564
Greens	$1,944,703	$3,187,508	$5,132,211
NZ First	$876,528	$64,778	$941,305

following the 2011 election. It may be that donations previously funnelled to National through trusts above the threshold are now coming in under the anonymity threshold. Another data feature is the very small amounts of money donated to New Zealand First.

Table 3 shows distinct patterns of big funders by party. The class origins of both National and Labour remain in their donor patterns. National gets most reported business donations. Labour absorbs virtually the entirety of trade union donations, which, however, are not large in an environment where trade union coverage of the workforce is low and falling. Labour receives significant business funding. In fact, Labour has got more in donations from businesses – about half a million dollars more – than from trade unions. None of the three smaller parties, including ACT, sometimes perceived as a business-based party, have been able to generate business donations to any serious degree. Equally, traditional trade union support for Labour has not flowed to the Greens on the left.

The other significant feature of National and Labour donations is anonymity, either directly under the early regimes (Labour) or via various trusts set up to funnel money to the party (National). Labour has also concealed donor identity via the use of art auctions (see Wright, Flahive and Pasley, 2017).

Green donations are dominated by MPs, because of their tithing policy. These donations flow from Green electoral success, rather than vice versa. Labour's MP contributions are nearly $1 million – a significant amount reflecting a mass donation in 2007 when the party was in financial strife. MP donations to other parties are minor.

Donors to multiple parties can be divided into donors to multiple parties across the centre-right of the political spectrum (National, Act, the Māori Party, New Zealand First), donors to the centre-left (Labour, Greens, Alliance), and donors to at least one party on both sides of this political spectrum. This data is shown in Table 4.

Six donors donate to parties of the centre-right; for the centre-left the figure is seven. Most multi-party donors on the centre-left are trade unions. There is a mix without strong pattern on the centre-right. The number of cross-spectrum donors is much larger: 20. The cross-spectrum donors are dominated by businesses, comprising 17 of the total number. The purpose of cross-spectrum donors is unlikely to be ideological. Rather, they more likely seek to gain access to politicians to protect some form of vested interest. All such donors are identifiable large businesses, operating with a degree of monopoly in an environment where either government purchasing or regulation is an important consideration. Interestingly, of Labour's total of $1.8 million in business donations, $1.1 million (64%) comes from these cross-

Table 3: What sorts of donors donate to different parties? Donors, parties and reported donations above the anonymity threshold, 1996–2019

	National	Labour	Greens	ACT	NZ First	Small parties NEC	Total
Individual or family	$3,071,426	$2,680,206	$1,166,017	$1,563,304	$71,579	$2,537,490	$11,090,023
Millionaire founder	$0	$0	$0	$0	$0	$8,286,362	$8,286,362
Business	$3,325,408	$1,758,313	$74,559	$227,985	$223,260	$443,395	$6,052,921
Anonymous	$1,236,109	$2,988,990	$57,400	$1,377,750	$9,954	$195,354	$5,865,556
Trust	$5,133,431	$382,934	$0	$95,029	$12,640	$103,772	$5,727,806
MPs/party president	$58,387	$1,056,742	$3,296,134	$147,045	$71,485	$322,580	$4,952,374
Party branches	$0	$104,201	$0	$48,826	$0	$1,408,633	$1,561,660
Trade union	$0	$1,199,584	$73,620	$0	$0	$88,980	$1,362,184
Community	$49,435	$8,295	$15,840	$0	$0	$129,355	$202,925
Grand total	**$12,874,196**	**$10,179,265**	**$4,683,571**	**$3,459,939**	**$388,918**	**$13,515,921**	**$45,101,810**

Table 4: Multi-party donors and the political spectrum, 1996–2019

Donor	Category	Parties	Number of donations	Total value
		CROSS-SPECTRUM		
AMP	Business	National, Labour	2	$46,500
Brierley Investments	Business	National, Labour	3	$124,000
Clear Communications	Business	National, Labour, NZ First	2	$46,500
Contact Energy	Business	National, Labour	8	$264,440
Ericsson Communication	Business	National, Labour, Greens, ACT	2	$58,400
Fletcher Building	Business	National, Labour	10	$237,600
Go Bloodstock NZ	Business	National, Labour	2	$105,000
Heartland Bank	Business	National, Labour	2	$78,908
Lion Nathan	Business	National, Labour	3	$148,500
Natural Gas Corp Management	Private	National, Labour	4	$170,900
Owen Glenn	Trust	National, Labour	3	$692,946
Road Transport Trust	Business	National, Labour	4	$116,500
Saturn Communications	Business	National, Labour, Greens, ACT	2	$62,000
Sky City	Private	National, Labour	7	$319,520
Susan Zhou	Business	National, Labour	2	$73,030
Todd Corporation Ltd	Business	National, Labour	2	$112,000
Toll	Business	National, Labour	4	$128,500
Tower	Business	National, Labour	4	$76,700
Transalta NZ	Business	National, Labour	2	$69,750
Westpac	Business	National, Labour	19	$506,480
Total cross-spectrum			**87**	**$3,438,174**
		CENTRE-LEFT		
E Tü	Union	Labour, Greens	2	$157,590
Nation Distribution Union	Union	Labour, Greens, Alliance	3	$68,186
Engineers Union	Union	Labour, Alliance	4	$202,910
Philip Mills	Private	Labour, Greens	4	$214,871
Rail & Maritime Transport Union	Union	Labour, Greens	4	$88,662
Jim Anderton	MP	Alliance, Progressives	7	$132,510
D and G Becroft	Private	Labour, Progressives	3	$74,950
Total centre-left			**27**	**$939,679**
		CENTRE-RIGHT		
Bruce Plested	Private	National, Māori	4	$298,643
Christopher & Banks Equity	Business	National, ACT	3	$226,156
Earl Hagaman	Private	National, ACT	2	$128,528
Gallagher Group	Business	National, ACT	5	$259,226
John Banks MP	MP	National, ACT	2	$33,289
Paul Adams	Private	National, Family Party	2	$73,479
Total centre-right			**18**	**$ 1,019,321**

spectrum business donors. So corporate donors to Labour do not appear to be endorsing centre-left ideology. Rather they're having a buck both ways. For National, a lower amount and smaller percentage of business donations (about $1 million, or 29% of their total business donations) came from cross-spectrum donations.

Discussion

This article is unable, since there is no physical transaction observed, to resolve the issue of what, if anything, observed donations actually buy in New Zealand politics. But some conclusions are possible. Overall, relatively small amounts in terms of GDP are involved in party donations. The consequence, perhaps, is that comparatively small sums in the right place may buy considerable influence. For a recent example, the transcript of the conversation between National Party leader Simon Bridges and his colleague Jami-Lee Ross could be interpreted as suggesting that a donation of $100,000 could ensure two ethnic Chinese on the National Party candidate list (Stuff, 2018).

If marginal donations gave super-normal returns to donors, donations should be rapidly increasing in value and number to take advantage of this effective private influence vector. However, there is little or no evidence of strong upward trends in political donations, at least as measured by Electoral Commission returns. This suggests that the system is, at least currently, in some sort of rough-and-ready equilibrium.

Party donations usually peak in election years, which suggests that if money is to be used for influencing politics, it is best applied in proximity to an election. It is unclear whether this temporal arrangement is dictated by the donors, or the recipients.

There is little evidence that amounts of party donations have been systematically growing over the MMP period. For over-threshold donations, the plurality is received by small parties, largely reflecting the $8 million donated by the three rich founders of ultimately failed political parties. When the broader amount of donations over a shorter period is considered, National receives the plurality of donations, due to a strong performance on recorded but aggregated and hence anonymous donations. We do not know how many of these donations are rendered anonymous by splitting a larger donation up to come in under the disclosure threshold, as has been suggested in the Bridges/Ross affair, but there has been some suggestion that the practice was not a unicorn (Newshub, 2019).

The plurality of above-threshold donations come from private individuals or families. Where the gender of donations from private individuals can be identified, men are much more likely to be donors than women, even when three millionaire male donors are excluded from the count.

Labour receives significant business funding. But it receives far less than National. In addition, business funding to Labour involves a significant majority from businesses who donate across the political spectrum. These businesses are likely pursuing influence rather than promoting an ideology. However, the amounts involved are not large absolutely, or in relation to donations which seem more ideologically driven.

Also as regards Labour's donations, old class-based patterns still matter in terms of union donations. However, to a large extent due to the very limited power of organised labour in New Zealand, these donations are very small.

Cross-political spectrum donations, a particularly interesting form, are mostly from businesses and go almost entirely to the two dominant parties. Those businesses donating across the spectrum operate in areas of the economy which are subject to significant government influence. This pattern suggests that businesses are trying to buy the ear of one of the two parties which is likely to be the dominant power in the government of the day.

The 2014 and 2017 failures of the big spenders Colin Craig, Kim Dotcom and Gareth Morgan show that parties cannot simply buy their way into power. Money is not a sufficient condition for political success. Nevertheless, Craig, Dotcom and Morgan received significant numbers of votes. While those votes did not get those millionaires into Parliament, simply by funnelling votes away from others they influenced the shape of Parliament and thus had, arguably, an unequal political influence. However, the large amounts of funding going to ACT, a party which for long periods of time has polled very poorly, suggests that money may be a necessary means of keeping a minority party viable through the inevitable lean times.

Lastly, claims sometimes made that regulating donations is ineffective, so we shouldn't bother, is a red herring. No mode of regulation involves zero avoidance and evasion. The examination of data on donations is a case in point. Political parties have found creative ways to avoid (legally) and potentially evade (illegally) regulation on donations reporting, including through use of trusts, anonymous donations, auctions, donation splitting and inter-temporal transfer of donations. Evidence of avoidance and evasion merely establishes imperfection, the inevitable fate of all human creations.

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Timothy K. Kuhner

Representative Democracy in an Age of Inequality

why legal reforms are needed to protect New Zealand's system of government

Abstract

New Zealand's system of government is vulnerable to undue influence and distortion by private wealth. Our legal framework contains no limits on domestic political donations (including donations from corporations and lobbyists), weak disclosure standards for political financing, no political expenditure limits outside the election period, insufficient regulations on lobbying and the revolving door between public and private employment, and few meaningful regulations on conflicts of interest. Given the nation's high level of wealth concentration, these vulnerabilities pose a critical threat. Comprehensive electoral reforms are required to prevent economic inequality from becoming politically entrenched and representative democracy from being undermined.

Keywords economic inequality, political inequality, political donations, party finance, corruption, representative democracy

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New Zealand is supposed to be a representative democracy. The conditions of service in the House of Representatives require all MPs to 'act in the public interest' as legislators and 'represent the citizenry' in parliamentary business and in general dealings with central and local government (McGee, 2017, p.50). Of course, members of Parliament cannot sit or vote in Parliament without first having sworn to 'be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Her heirs and successors' (see Constitution Act 1986, s11(1) and Oath and Declarations Act 1957, s17). But that oath is considered archaic, while the conditions of service are vital to political legitimacy. Indeed, when a single political party finally gained enough votes to form a majority government under MMP, its leader didn't reaffirm her allegiance to the Queen or even to the 50% of voters who had made it possible for Labour to govern alone. Instead, Prime Minister Jacinda Ardern

said: 'I can promise you, we will be a party that governs for every New Zealander' (Brancatisano, 2020).

That kind of promise is credible in exceptional times – times of war, terrorism and global pandemics – when the entire nation shares the same fundamental interests. Beyond the usual disagreements over the best means to employ and the necessary trade-offs to accept, everybody wants to overcome external threats to peace, security, prosperity, health and human flourishing. But internal threats to these same interests trigger deep divisions.

In polls conducted before and during the Covid-19 global pandemic, New Zealanders ranked systemic economic problems as among most important issues facing the country. These included 'poverty and the gap between rich and poor', 'house prices and housing affordability', 'housing shortages and homelessness', and the cost of living (Roy Morgan, 2017, 2018; IPSOS, 2020).[1] When it comes to such contested issues as inequality, taxation and housing market regulations, no party can govern for every New Zealander. But can we at least trust in government ministers, MPs and political parties to represent the citizenry on the whole and pursue the public interest in good faith?

According to the Institute for Governance and Policy Studies (IGPS) public trust survey, the citizenry has serious doubts about the integrity of its political representatives and political parties. Conducted four times between 2016 and 2020, the survey suggests that an average of just 11.8% of New Zealanders have 'complete trust' or 'lots of trust' in government ministers (Nguyen, Prickett and Chapple, 2020). As for high levels of trust in MPs, the average is lower still at 9.1%. Including political parties for the first time in 2020, the survey found that only 5.9% of respondents have a high degree of trust in these organisations.

On a positive note, the percentage of respondents with at least a 'reasonable amount' of trust in the government to 'do what is right for New Zealand' increased from 46.5% to 60.7% between 2016 and 2020 (in parallel with Labour's rise to power and its positive response to Covid-19). And when it comes to citizens' interests being 'equally and fairly considered', the percentage of respondents having at least a reasonable amount of trust also rose significantly, from 38% to 47.7% (ibid.). Still, even under an unusually popular government, over half the population considers our democracy unequal or unfair, and levels of trust in government ministers, MPs and political parties remain extremely low.

> While approximately 25% of New Zealand voters belonged to a political party during the high point of last century's mass political party era ... party membership is probably less than 5% today ... and quite possibly as low as 1–2% ...

How do these mixed results bode for the health of our representative democracy? To begin with, they indicate that New Zealand isn't exempt from a worrisome trend affecting other advanced democracies. OECD research has found that '[t]he government and the parliament are the least trusted institutions in most countries surveyed', and the comparison includes such frequent objects of distrust as financial institutions, the media, immigrants and people from another religion (OECD, n.d.). Examining popular perceptions more closely, the public exhibits greater trust in government openness, reliability and fairness than in government responsiveness and susceptibility to petty corruption. As for the lowest of all levels of trust, they're reserved for government susceptibility to 'high level corruption'. Affirming the prime importance of this issue, OECD research has also found that perceptions of high-level corruption 'are the strongest determinant of trust' (ibid.).

That might sound like good news. When it comes to levels of perceived public sector corruption, New Zealand has been ranked by Transparency International best in the world 15 times since 1995 and in the global top four every year. And when it comes to issues of government quality, including popular voice and accountability and government effectiveness, the World Bank consistently lists New Zealand in the global top ten (World Bank, 2020). Similarly, the *Economist*'s annual Democracy Index has given New Zealand a nearly perfect rating from 2006 to 2020; just fractions of a point behind Norway, Iceland and Sweden, New Zealand currently ranks fourth in the world, the best of all Commonwealth nations and 21 places above the United States (Economist Intelligence Unit, 2020, pp.8–9).

If perceptions of corruption and government quality are what matter most for public trust, then wouldn't complacency be a reasonable attitude for the citizenry and the government to adopt? Absolutely not. And the reasons should motivate the government to be bold and uncompromising when it fulfils its promise of 'a full review of the electoral act, which will include a review of electoral financing rules' (Giovannetti, 2020; New Zealand Labour Party, 2020, p.21).

First of all, New Zealand's sterling reputation for controlling corruption is based on the perceptions of 'business-people and country experts' (Transparency International, 2021, p.24). Public perceptions, in contrast, feature serious concern about high-level corruption. In the four IGPS surveys conducted between 2016 and 2020, a minimum of 70% of respondents reported 'not much trust' or 'little to no trust' in 'the way in which political parties are funded' (Nguyen, Prickett and Chapple, 2020). IGPS research also suggests that 'over one third of New Zealanders see corruption as widespread in government' (ibid.).

Second, experts' views are rapidly changing in ways that support public perceptions. Take 29 January 2020, as an example. That afternoon, the results of the 2019 Transparency International Corruption Perceptions Index were announced. New Zealand came in first, tied with Denmark. But in the accompanying executive report, Transparency International chairperson Delia Ferreira Rubio implored governments to 'urgently address the corrupting role of big money in political party financing and the undue influence it exerts on our political systems' (Transparency International, 2020, p.7). At approximately the same moment on the 29th, the Serious Fraud Office announced that four people had been charged in relation to large donations made to the New Zealand National Party (Serious Fraud Office, 2020). Before the year was over the Serious Fraud Office had announced charges in relation to donations made to the New Zealand First Foundation as well. It also commenced investigations into the Labour Party's fundraising practices and those surrounding mayoral elections in Auckland and Christchurch. Even bearing in mind the presumption of innocence, these charges and investigations should motivate the government to take a hard look at political donations. When it comes to Transparency International's recommendations of controlling political financing, managing conflicts of interest and regulating lobbying activities (Transparency International, 2020, p.5), New Zealand has serious vulnerabilities and its few existing restraints on political financing may be frequently violated.

Third, unlike the fairy tale of a corruption-free New Zealand, public attitudes, Serious Fraud Office investigations and Transparency International's 2020 warning reflect the reality of modern-day political parties. While approximately 25% of New Zealand voters belonged to a political party during the high point of last century's mass political party era (Marsh and Miller, 2012, p.213), party membership is probably less than 5% today (Nguyen, Prickett and Chapple, 2020), and quite possibly as low as 1–2% (Hehir, 2018).[2] While mass political parties were characterised by meaningful grassroots involvement in the formation of party policy, the selection of candidates, attendance at campaign meetings and voter mobilisation efforts (Marsh and Miller, 2012, p.213), political parties with low membership and high costs are 'easy prey for the rich and powerful for whom the political parties offer opportunities for greater wealth and power' (Ewing and Issacharoff, 2006, p.5).

Even if the Serious Fraud Office ends up exposing corrupt violations of electoral law, the greater scandal will still be the reality that many powerful types of undue influence are entirely lawful in New Zealand.

This dynamic is cushioned somewhat by New Zealand's public subsidies for political party expenses and its political party expenditure limits during the three-month election period. But political parties' financial needs go beyond the election period, and, together with candidates, they raise millions of dollars beyond what the state provides. Those private funds are subject to a low degree of transparency, and there are no limits on donations from domestic corporations, trusts, government contractors, lobbyists or individual citizens. To make matters worse, the lobbying industry is almost entirely unregulated and there are no binding standards for mitigating or refusing public conflicts of interest. Even if the Serious Fraud Office ends up exposing corrupt violations of electoral law, the greater scandal will still be the reality that many powerful types of undue influence are entirely lawful in New Zealand.

When it comes to the corrosive influence of private wealth on representative government, the stable door has been left wide open. That risk wouldn't matter so much if wealth were relatively evenly distributed across society. As things stand, however, the horses are virtually guaranteed to bolt, and once they're out it may be impossible to get them back in.

Economic inequality

If wealth is unevenly distributed and the wealthiest individuals have different interests from average citizens on such essential matters as taxation and economic regulations, then political influence on the basis of wealth would distort representative democracy. Is there a sound basis for this kind of concern in New Zealand?

In New Zealand, inequality in household income and the share of wealth owned by the top 10% are both above the OECD average (OECD, 2020, p.6). The wealthiest 10% of New Zealanders possess 59% of total national wealth. The poorest 50% of New Zealanders own just 2% of that wealth (Rashbrooke, 2020). However, a study of capital income by Treasury found that inequality may actually be steeper than this, with the top 10% owning 70% of total wealth (Coughlan, 2021). The average member of the wealthiest 1% holds $3.6m in trusts, $1.6m in shares and $470,000 in cash. The average citizen, meanwhile, holds assets worth $92,000 and has an annual disposable income of $45,744 (Rashbrooke, 2020).

To find similarities between the wealthiest individuals and the middle and lower classes, one need only scrutinise high worth individuals' tax returns.[3] According to an Inland Revenue report released in 2018 under the Official Information Act, two thirds of those who possess over $50 million in assets declare incomes under $70,000 per year (Leask and Savage, 2013). That's surprisingly similar to the average income of all individuals and households combined. More surprisingly, 42% of high worth individuals pay an effective tax rate similar to the minimum rate of 10.5%, applicable to income of up to $14,000 (Coughlan, 2021). Someone who works a

minimum wage job is actually likely to be subject to a slightly higher tax rate than nearly half of the nation's wealthiest individuals and entities.

To avoid paying much income tax, high worth individuals rely on untaxed capital gains, provide services to their own companies which are compensated by the sale of those businesses, and donate wealth to charities that they control, but which may 'ultimately make little or no charitable donations' (Inland Revenue, 2018, pp.4–5, 22). To shield their wealth from taxation altogether, high worth individuals rely on complex tax-planning devices, including 'companies, trusts and overseas bank accounts' (Leask and Savage, 2013). These strategies work so well that high worth individuals pay no taxes at all on 'a large proportion (upward of 33%) of the core wealth' that they control (Inland Revenue, 2018, p.13).

Recalling the general public's concerns over inequality and housing, it's important to note that HWIs' wealth is primarily tied up with property, including commercial and residential property development and real estate businesses (Inland Revenue, 2018, p.8). Discussing how the total estimated wealth of high worth individuals increased from $32.9 billion to $57.5 billion between 2010 and 2014, Inland Revenue noted that property investment is their 'most popular business activity' (Inland Revenue, 2018, p.12).[4]

The boom in real estate prices has surely brought tremendous wealth to the highly leveraged, but for society as a whole it has brought greater rates of homelessness, a state housing crisis, unsafe living conditions, and nearly insurmountable obstacles for young people wanting to buy their first home. Leilani Farha, the United Nations special rapporteur for the right to housing, described the situation in New Zealand as 'a human rights crisis of significant proportions', which includes 'not only violations of the right to housing, but also of the right to health, security and life' (UN Office of the High Commissioner for Human Rights, 2020). Explaining the roots of this crisis, Farha cited 'a speculative housing market that has been supported by successive governments who have promoted homeownership as an investment, while until recently discontinuing the provision of social housing and providing inadequate tenant protection'. As potential solutions, she referenced 'a capital gains tax on the sale of residential properties [and] rent freezes', among other measures.

> The donors behind the great majority of [the US political] campaign and party funds are over 90% white, mostly male, college educated, middle aged or older, and relatively wealthy.

Farha's suggestions point to the elephant in the room: the housing crisis is partly a political choice. In March 2021, Labour announced new policies that could make some difference, including a large public investment in new builds, a five-year extension on taxes on residential property investments, and wider eligibility for first home grants (Walls, 2021). But these changes didn't come until New Zealand was ranked most unequal out of all OECD countries for housing affordability (OECD, 2020, p.7) and accused of significant human rights violations.

We also ought to wonder about the endurance of the political choices underlying economic inequality in general – including the tax loopholes for corporations and trusts exposed by Treasury and Inland Revenue, the failure to restrain speculation in financial markets and property markets, the absence of a wealth tax, low capital gains taxes, and even tax and benefit cuts carried out in the early 1990s. These conditions help explain why the total wealth of the top 0.02% of New Zealanders increased by 500% between 1996 and 2015 (Hazledine and Rashbrooke, 2018, p.300). Relatedly, New Zealand's break with social democracy in the 1980s–90s coincided with 'the developed world's largest increase in income inequality' (ibid.). The question is, how bad do things have to get before governments are willing to defy those who benefit most from the status quo?

If they wanted to address today's severe inequalities, governments could adopt progressive tax policies, pass corporate governance reforms, regulate property markets, raise the minimum wage, and make larger public investments in education, health, housing, benefits and environmental protection (World Inequality Lab, 2018, pp.15–16). But, given the fact that a small number of citizens and corporations possess the majority of national wealth and are predisposed to opposing such policies, the first logical step would be to distance elections, political parties, and law and policymaking from disproportionate financial influence.

That project isn't bound up inexorably with any specific set of policy preferences, such as an increased minimum wage, or generally partisan goals, such as wealth redistribution. Political finance reform isn't socialism in disguise. Rather, it's the structural requirement for the survival of core democratic values and mechanisms in the age of inequality. Those values and mechanisms include representative democracy and responsive government, free and fair elections, political equality, public trust and engagement, deliberation in good faith on the merits of the issues facing the nation, a rejection of high-level corruption, and an embrace of political legitimacy. That said, the interaction between economic inequality and political inequality helps illustrate the threat to those core values and mechanisms.

Political inequality

The state of the US political economy provides a salutary warning. By 2010 the United States had become the most economically unequal advanced

democracy in the world. The top 10% of the population had captured 72% of total national wealth, leaving just 2% of total wealth for the bottom half (Piketty, 2014, p.257). Why would political parties and democratically elected office holders help create and maintain the conditions for such a massive concentration of wealth?

Surveying nearly 2,000 issue areas at the federal level, Martin Gilens and Benjamin Page found that American democracy had been systematically co-opted by the wealthy: 'Economic elites and organised groups representing business interests have substantial independent impacts on US government policy, while mass-based interest groups and average citizens have little or no independent influence' (Gilens and Page, 2014, p.564). Regarding this article's particular concerns, Gilens' prior work revealed widespread 'representational inequality… with a strong tilt toward high-income Americans on economic issues' (Gilens, 2012, p.234).

Discussing the mechanisms for government capture by the wealthy in the United States, Gilens and Page could have been describing politics in New Zealand:

> It is well established that organized groups regularly lobby and fraternize with public officials, move through revolving doors between public and private employment, provide self-serving information to officials … and spend a great deal of money on election campaigns … [M]ost interest groups and lobbyists represent business firms or professionals. Relatively few represent the poor or even the economic interests of ordinary workers. (Gilens and Page, 2014, p.567)

Let's explore one of those causes, campaign finance. In all national elections between 1990 and 2016, an average of just 0.36% of the adult US population stood behind the great majority of campaign funds (Center for Responsive Politics, n.d.).

Who is part of this elite donor class and what do they want from government? The donors behind the great majority of campaign and party funds are over 90% white, mostly male, college educated, middle aged or older, and relatively wealthy.[5] In fact, nearly half of those who donated $5,000 or more to congressional elections between 2012 and 2016 are millionaires. Within this small cross-section of the population, research on the wealthiest Americans suggests that major campaign donors are much more economically conservative on key distributive issues, such as taxation, economic regulation and welfare entitlements (Page, Bartels and Seawright, 2013).

… in New Zealand there are no limits on domestic political donations, including donations from corporations, lobbyists and government contractors.

There are at least four reasons why it would be wrong to dismiss this cautionary tale as just another example of American exceptionalism.

First, the law on political donations is weaker in New Zealand than in the United States. Whereas disclosure begins at $200 in the United States, it begins here at $15,000.01 for political parties and $1,500.01 for candidate donations, and this information isn't made available in New Zealand until after each election (Electoral Commission, n.d.a, n.d.b). Only party donations over $30,000 need to be reported immediately. Moreover, in New Zealand there are no limits on domestic political donations, including donations from corporations, lobbyists and government contractors. The donor class's near monopoly over US campaign financing was achieved even with individual campaign donation limits of under $3,000 per candidate per election and $36,000 per national party committee annually (Federal Election Committee, n.d.a). And in the United States, corporations, federal government contractors and foreign nationals have been barred from contributing to candidates and political parties (Federal Election Committee, n.d.b).

This comparison suggests a clear and present danger in New Zealand of individuals or companies exercising a high degree of financial influence, if not control, over political party positions on key issues affecting, for example, the dairy industry, the racing industry, the fishing industry and property investors. Plus, the level of transparency is shockingly low.

Second, what little we know about political donations in New Zealand is sufficient to raise concerns about the distortion of representative democracy. Simon Chapple and Thomas Anderson's pathbreaking analysis of donations between 1996 and 2019 begins by noting significant problems of underreporting, splitting donations into smaller chunks to avoid disclosure, and the use of proxies (Chapple and Anderson, 2021). Suggesting that the 'use of trusts, anonymous donations, auctions, donation splitting and inter-temporal transfer of donations' is significant, they consider the universe of recorded donations just 'the tip of an iceberg'. Within that exclusive universe of donations over $15,000, here are the key take-away points:

- Gender matters. Men donate much more than women and millionaire donors are almost entirely male.
- Donations are heavily skewed towards the interests of capital. Businesses and trusts are an important source of party donations directly, and a very important source indirectly as well, given that most private donations come from returns on capital, not wages or salaried employment. Moreover, 'the majority of large donations come from repeat donors', which likely means that business interests are more persistent in attempting to exercise political power through financial means. MPs, party branches, trade unions and community

organisations, on the other hand, are all 'minor sources of funding'.

- Donors to the National Party appear much more likely to seek business-friendly policies, but even Labour's donation pool is more pro-business than pro-trade union. Between 2011 and 2019, National received three and a half times more money from anonymous individual donations than Labour ($14 million compared to $4 million), including over $5 million from trusts. In fact, between 1996 and 2019, National received almost 90% of the total donations made by trusts to all registered parties and nearly twice as much money from businesses as the Labour Party. Although Labour received almost all trade union donations between 1996 and 2019, business donations to Labour amounted to 35% more money. Moreover, almost two thirds of that corporate money came from donors giving to multiple parties, meaning that Labour's corporate donors are 'pursuing influence' and seeking to 'protect profitability', rather than 'endorsing [Labour's] centre-left ideology'.

Third, what we know about the United States and reasonably suspect about New Zealand fits into the international crisis of capitalist democracies. In its global analysis of domestic politics, the 2019 United Nations *Human Development Report* notes that well-funded interest groups 'capture the system, moulding it to fit their preferences', and produce 'systematic exclusions or clientelism' (UN Development Programme, 2019, p.11). This observation coincides with a key insight in the Electoral Integrity Project's 2019 report: 'Elections are necessary for liberal democracies – but they are far from sufficient [for] facilitating genuine accountability and public choice' (Norris and Grömping, 2019, p.8). Its 2016 report claims that 'campaign finance failed to meet international standards in two-thirds of all elections' (Norris et al., 2016).

That conclusion harmonises with the wealth-based means of political leverage described in the UN report: 'lobbying, campaign financing and owning media and information' (UN Development Programme, 2019, p.63). Speaking to the importance of these avenues for influence, the UN report notes that the concentration of economic power is far easier to curb before 'its translation to political dominance' (ibid., p.63). Indeed, the fifth and final 'key message' of that entire 350-page document is that 'We can redress inequalities if we act now, before imbalances in economic power are politically entrenched' (ibid., p.14). These conclusions also sync with Transparency International's 2019 report, which stresses that '[p]ublic policies and resources should not be determined by economic power' and that 'governments must … limit the influence of big money in politics' (Transparency International, 2019, p.4).

> Beyond rules on donations, there ought to be a mandatory lobbying register, a binding code of conduct for lobbyists, and binding provisions to slow the revolving door between public and private employment …

Positive proposals for change

In order to protect the integrity of our representative democracy, the government's upcoming review of electoral law ought to be broad and systematic, covering not only political financing, but lobbying and conflicts of interest as well. A broad review would be consistent with international standards and recommendations (United Nations, 2004, articles 7–8, 18; Transparency International, 2019, p.5).

MP Golriz Ghahraman's Electoral (Strengthening Democracy) Amendment Bill proposes lowering the disclosure threshold for all donations to $1,000 and capping aggregate donations at $35,000 per individual. That new threshold for disclosure would complicate myriad practices employed today which amount to 'donation laundering'. Beyond the scope of Ghahraman's proposed terms, an individual donation limit to parties and political campaigns could be set at around 5% of average yearly individual income to prevent the donor class from becoming outrageously unrepresentative along socio-economic lines. Political parties would then have a greater incentive to seek small donations from a great many supporters.

The $50 limit on foreign donations to parties and candidates established pursuant to the Electoral Amendment Act 2019 (2019/72) would make an excellent beginning for a new wave of reforms. Additional measures and monitoring are required, however, to ensure that foreign donors don't set up a domestic company or trust to evade the limit. Moving forward, parties could be required to declare donations online, weekly or in real time, instead of waiting until after an election has concluded. Political donations from trusts, businesses, lobbyists and government contractors could be banned. Businesspeople, shareholders, consumers and people committed to a particular economic philosophy could appropriately fill that void (subject to reasonable dollar limits). Or if donations from legal persons aren't banned, they should at least be limited in quantity, disclosed immediately, and limited in source to segregated funds (not general treasury funds) that the relevant stakeholders have specifically authorised to be used for political purposes.

To adequately enforce the rules, the Electoral Commission should be endowed with greater power. First, it should have an independent power to investigate breaches of electoral law. By the time the Electoral Commission hears about a potential violation of electoral law and refers the matter to the police (who may then refer it to the Serious Fraud Office), rule-breakers have had ample time to destroy the

evidence and get their stories straight. There is no element of surprise. Second, it should have powers of compulsion. The Electoral Commission should have the power to compel the production of evidence and documents, compel people to attend and, possibly, compel them to testify as well. These powers would increase the certainty and celerity of prosecution for violations of electoral law, and these two factors are well known to be more significant in deterring wrongdoing than large penalties alone. Although such powers are controversial, they have been tried and vetted by other comparable bodies, such as the Independent Broad-based Anti-Corruption Commission in Victoria.

Beyond rules on donations, there ought to be a mandatory lobbying register, a binding code of conduct for lobbyists, and binding provisions to slow the revolving door between public and private employment (Edwards, 2019). While the attorney-general and the Government Administration Committee considered the terms of Holly Walker's Lobbying Disclosure Bill 2012 too strict for their interpretations of privacy and free speech (Government Administration Committee, 2013), Walker proposed an amended bill (Walker, 2014), the likes of which could be taken up again. Without even basic safeguards on lobbying, New Zealand ignores OECD principles and lags far behind other advanced democracies (OECD, 2013; Ferguson, 2018, pp.889–940).

As for MPs' conflicts of interest, the existing register of pecuniary interests and standing orders of the House of Representatives provide a rudimentary degree of disclosure. Unfortunately, they relegate decisions about mitigating, stepping back and refusing conflicts of interest to members' own discretion and internal discipline by political parties (McGee, 2017, p.53; Standing Orders Committee, 1995, p.82).[6] A code of ethical conduct for political representatives, such as the codes adopted by the UK, Canada and Australian state parliaments, would be a major improvement (Ferguson, 2018, pp.853–87) and is incumbent upon New Zealand as a matter of international law (United Nations, 2004, article 8).

While Serious Fraud Office investigations and prosecutions may soon reveal specific acts of corruption in political party financing, the real scandal is what's legal and commonplace. Current patterns of political party financing compromise the integrity of representative government and diminish public trust in democracy. Viewed together with significant vulnerabilities to the undue influence of concentrated wealth in lobbying and public conflicts of interest, the poorly regulated state of political finance may amount, in practice, to a system of political exclusion on the basis of wealth (or socio-economic status). Universal suffrage regardless of race, sex, ethnicity and property ownership represents the beginning of representative democracy; the next step consists of comprehensive reforms to prevent the undue influence of private wealth over elections, law and policy.

1 By May 2020 the fallout from the global pandemic had elevated general concerns over the health of the economy and job loss to the top of the list, but a significant percentage of New Zealanders still ranked poverty/inequality, the supply and affordability of housing and the cost of living as among the most important issues facing the country (IPSOS, 2020).

2 Liam Hehir (Stuff, 2018) estimates that National and Labour have a total membership of approximately 30,000 people. That number amounts to about 1% of the total number of voters in 2020 (3.5 million). Even factoring in the number of members of all other political parties, the number could not be expected to double, and therefore it could not be expected to reach 2%. This assumes, however, that Hehir's baseline estimates for National and Labour are accurate.

3 High worth individuals are 'individuals who, together with their associates, effectively control a net worth of $50 m[illion] or more'. They are composed of individuals, companies, trusts, partnerships and other entities, including consolidated groups (Inland Revenue, 2018, pp.7–8).

4 This is consistent with Hazledine and Rashbrooke, 2018, p.301.

5 This is a synthesis of several studies: see, for example, Wilcox, 2001; McElwee, Schaffner and Rhodes, 2016; Roberts, 2016; Pew Research Center, 2017.

6 'The House has not adopted detailed ethical guidelines for its members, taking the view that advice about appropriate behaviour is primarily a matter for induction training and internal party discipline' (McGee); 'Members who have a financial interest in business before the House are not thereby disqualified from participating in a debate on the matter, serving on a committee inquiring into it, or voting on it. It is for members to judge whether they should participate in any of these ways when they possess a financial interest in the outcome of parliamentary proceedings' (Standing Orders Committee).

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Bridgette Toy-Cronin

Power in Civil Litigation

Abstract

Blindfolded Lady Justice represents the ideal of justice – a system that has no regard for the parties' power and is attentive only to the justice of a case. The reality, however, is that power does influence the course of civil litigation in Aotearoa. This article considers the dynamics of power in civil litigation, including the types of parties involved in disputes. It then surveys and evaluates potential areas for reform, including suppressing lawyers' fees, equalising the legal spend between opponents, removing lawyers from disputes, increasing judicial control, conglomerating claims, and involving the public in procedure reform. It concludes that the most promising areas for reform to be pursued in concert are: regulation of legal fees, increasing judicial control and involving the public in civil justice reform.

Keywords civil litigation, power, access to justice

Blindfolded Lady Justice represents the ideal of justice – a system that has no regard for the parties' power and is attentive only to the justice of a case. The reality, however, is that power does influence the course of civil litigation in Aotearoa, and indeed in all countries. This article first considers how power can influence litigation, and then considers policy proposals that might minimise that influence. These policy proposals include some that are already on the table as possible reforms, and some that are not. It considers how successful they might be in eliminating – or at least reducing – the influence of power in civil disputes. Before looking at solutions, however, it is important to understand the dynamics of disputes and how power can influence their course.

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Dynamics of dispute resolution

When we imagine a dispute, we often envisage two warring individuals. This is a mental model drawn from popular culture – think *Judge Judy*, for example – but the reality of dispute dynamics is much more complex. It is important to first unpack these dynamics as part of the context for consideration of the likely effectiveness of various policy changes.

Parties and their entourage

First, let us consider the types of disputants, called 'parties' in civil litigation. Parties vary in the power they possess. Individuals have differing levels of economic and other forms of capital (e.g. social, cultural), as well as different life experience, vulnerabilities and strengths. Disputes involving an individual versus an individual are, however, a relative rarity:

for example, 15.6% of cases in a study of High Court civil litigation (Toy-Cronin et al., 2017). Parties can include government (local, central), companies (ranging from publicly listed and multinationals, to one-person enterprises), trusts (from small family trusts to large public entities), and a variety of other entities and actors including body corporates, liquidators, receivers, partnerships, charity and religious organisations, executors and guardians. Litigation involves many permutations of parties.

The parties may be represented by lawyers, which can influence the power they exert. Lawyers have varying levels of professional skill, as well as different styles of conduct, resulting in differing reputations with the bench and bar. They may come with or without marks of prestige, such as a large firm name or the rank of Queens' Counsel. Some parties have no representation, proceeding as litigants in person. They are particularly vulnerable as a result of their inexperience and confusion about the complexities of the legal world – both its written and its many unwritten rules – and the fact that our higher courts are not designed with them in mind (Macfarlane, 2013; Toy-Cronin, 2015). Most judges and some lawyers do what they can to even up this stark power imbalance, but the adversarial system does not easily lend itself to such accommodations. While most litigants in person could be described as vulnerable (e.g. Trinder et al., 2014), it should also be noted that some – and indeed some represented litigants – use the court process abusively. For example, a violent former partner may continue patterns of coercive control that featured in their relationship by using the court process (Douglas, 2018; Miller and Smolter, 2011), or litigants may conduct vexatious proceedings.

It also needs to be kept in mind that parties may be responding to various pressures and incentives from others. For example, behind a company or an individual there might be an insurer who is controlling the litigation. That insurer will in turn be subject to pressures, including the concerns of their re-insurer, the need to achieve certainty about exposure to liability, and the need to maintain reserves.

It is important to note that it is not the absolute amount of power that a party has that matters, but its resources relative to the other party ...

This brief survey of some of the dynamics of disputing parties – dynamics that are not always visible – shows the great complexity at play in civil litigation. These dynamics must be taken into account in crafting solutions, otherwise the solutions will fall short in their aims. Before looking at the range of solutions, however, let us look in more detail at how money and power influence the dispute process.

Power

Power is a difficult concept to pin down, but a useful model for this discussion is Lukes' theory that power has several dimensions (Lukes, 2005). Two of those dimensions are relevant here. First is the visible face of power: who can dominate the other party, allowing their interests to prevail? Second, who has the power to make the rules that shape whose interests prevail? I consider each of these dimensions in turn.

First dimension – power to prevail

One aspect of the power to prevail is access to financial resources to fund the fight. We know money is unequally distributed, but how does that influence the dispute process? The influence of money stems from the fact that we have 'a market in legal resources [which] enables rich individuals to control outcomes indirectly by stacking the procedural deck' (Wilmot-Smith, 2019). If a party can pay for a lawyer to use all the procedural mechanisms available, they can potentially outmanoeuvre and/or outlast their opponent. They may also be able to retain expert witnesses, whose evidence may be foundational for the case.

This ability to influence outcomes is also a function of the passive court system, as Galanter explained in his seminal article 'Why the "haves" come out ahead'. The courts are passive in that they 'must be mobilized by the claimant', conferring an advantage on the party with not only the money but also with information and 'skill to navigate restrictive procedural requirements' (Galanter, 1974). The adversarial system treats parties 'as if they were equally endowed with economic resources, investigative opportunities and legal skills'.- As this is not usually the case, the system advantages the 'wealthier, more experienced and better organised party' (ibid.). It also advantages corporate parties: parties who are individuals bear the emotional and organisational costs of being involved in litigation, while corporate entities will not have the same emotional costs and can spread the organisational costs among a number of people.

These more experienced parties are sometimes what Galanter calls the 'repeat players', parties who have multiple engagements with the system and can play a longer-term game than 'one-shot' players, who engage just for the dispute at hand. Insurers and banks typify repeat players, as they have multiple engagements and can play for the rules (choosing which cases to settle to avoid creating adverse precedent and which to fight). One-shot players are more often small businesses or individuals who will only encounter the system once or twice in their lifetime.

It is important to note that it is not the absolute amount of power that a party has that matters, but its resources relative to the other party: 'what counts as enough legal resources depends on the amount others have … we have enough legal resources only if we have roughly the same amount as those with whom we are in dispute' (Wilmot-Smith, 2019). While the price overall is important – if it is too expensive, you cannot even get in the game – it is not enough to just lower the price. A

wealthy company versus a wealthy individual is not going to engender much sympathy, but the likely imbalance between them is still important if we think in terms of relative power. The nature of litigation encourages outspending the other party as the winner takes all (Hadfield, 2000). The corporation is likely to have greater access to wealth (including greater ability to borrow) and a greater ability to attract high-quality lawyers as they are likely to be repeat players, offering ongoing business. Even though both parties can afford to be 'in the game', one still has relatively greater resources and that more powerful party can potentially outmanoeuvre and outlast the other.

Second dimension – the power to make the rules

It is important to understand that it is not just the power to prevail but also the power to set the rules of the game that matters. Those who can influence the substantive and procedural law can use that influence to favour their own interests. The power to change the substantive rules is not equally distributed. Lobbying by interested groups (e.g. industry groups, insurers) can create rules that favour those groups' interests. This type of power is important in the development of civil procedure, the rules that govern the process of dispute resolution. Some of this procedure is governed by legislation and is therefore subject to the political process (e.g. the review of class actions: Law Commission, 2020).

Other procedural rules are governed by the Rules Committee, a group made up almost exclusively of those with legal training, and those who make submissions on procedural reform are largely lawyers. This may not be problematic. After all, lawyers are in the best position to make informed submissions as it is they who have the experience and the training, who work in the system and who have a statutory duty to the administration of justice. It cannot be ignored, however, that they also have a lot of skin in the game when it comes to how litigation is organised.

Given that there is unequal power and money in civil litigation and that it does have an effect on outcomes, what are the options for reform? In this complex environment, how do we work to towards the ideal that all are equal before the law?

> ... [for] real change ... there would need to be a paradigmatic shift from our current concept of 'party control' ... to judicial control and rationing of procedure ....

The solutions?

Suppress lawyers' fees

As the New Zealand Law Society recently noted, many consider lawyers' fees 'the elephant in the room' when it comes to discussions about money and civil justice (New Zealand Law Society, 2020, p.7.2). The short point is that they are so high that most – especially individuals – cannot pay to begin the fight. This is sometimes called the 'missing middle' or, due to the size of this group, 'the missing majority' (Szczepanska and Blomkamp, 2020). This group includes middle- and even high-income earners who can begin the fight but quickly run out of funds as the costs mount and therefore either have to become a litigant in person, or have to walk away, accepting a settlement that might not reflect the legal merits. At the same time that most struggle to access legal assistance, surplus income before income tax has steadily grown, from $1,071,000 in 2010 to $1,211,000 in 2017 (Adlam, 2019, reporting data from the Statistics New Zealand Annual Enterprise Survey).

This raises questions about whether the market – which has some features that negatively affect competition, such as information asymmetry and restrictions on entry – needs further or different regulation. Reforms of this nature go beyond the regular calls for more pro bono or more legal aid, both of which fall short in addressing the problem (Stewart and Toy-Cronin, 2018, 2020). There does seem to be some, if limited, appetite for pursuing reform in this area, but it is by no means straightforward and is a topic that warrants a separate discussion (Toy-Cronin, 2019). It is no doubt a key component for reform, and other jurisdictions have begun to introduce regulatory 'sandboxes' to experiment with reforms (Utah being the most sophisticated example). This could be a useful initial step for Aotearoa.

Even up the amount spent on lawyers

While the ability to pay legal fees is important, as discussed above, so is that ability to pay relative to the opposing party. This suggests that a solution lies in ensuring both parties have roughly equal access to money to fund their fight. This idea was one of the animating concerns of *Biggs v Biggs* [2020] NZCA 231, a relationship property dispute involving high-value property. In that case, the court allowed an interim distribution of relationship property to the wife so she could pay her advisers (lawyers, accountants and experts) in a situation where the wife had access to less of the assets than the husband, pending a final distribution of the property. The wife's lawyer argued that 'The interests of justice require that they be put on an equal footing' (*Biggs* at [29]). Releasing funds does create some equality between the parties, but it is no solution where there are not such funds available. Furthermore, the nature of the adversarial contest encourages outspending the opponent, creating a race to the top (Hadfield, 2000). Indeed, the wife's outstanding accounts at the time of the hearing were just over $1m, not including the further costs as they moved towards trial or the trial costs that were avoided by settlement.

A possibility is a cap on litigation spending (equivalent to a salary cap in sport), ensuring that all the 'teams' are on roughly equal footing. This is not a concept that is currently part of civil justice reform. There are a number of probable reasons for this. One is a sense that personal autonomy demands that there should be no restraint

on legal spending, a claim Wilmot-Smith (2019) disputes. Another is that such a cap would likely further fuel the flight from the public courts to privatised forms of dispute resolution. Many contracts already have an arbitration clause, which requires the contracting parties to use arbitration rather than the public justice system to settle disputes. This trend towards privatised justice is problematic for various reasons (for discussion see Farrow, 2014), and it seems highly likely that if the courts were to cap what could be spent on litigation, this would encourage more parties to avoid the public justice system and 'go private' instead. There are practical problems with monitoring as well. Solutions must therefore be found elsewhere.

Take lawyers out of the picture

A popular solution is to remove lawyers. If the biggest cost in litigation is lawyers, ban lawyers; then wealth does not matter. This is the thinking behind calls for an increase in the jurisdiction of the Disputes Tribunal (a lawyerless tribunal) (Rules Committee, 2020, p.16). There are constitutional problems with this proposal (the Disputes Tribunal's independence is not well protected: for example, referees are appointed for a limited term), but for the purposes of this discussion about money and power, there are also problems.

Removing lawyers attends only to the question of money, not other forms of power: for example, the interpersonal power between a tenant and landlord or between a divorcing couple. Furthermore, this proposal attends to the problem of unequal money only in appearance, because parties can still retain assistance behind the scenes. Recall the complexities of different types of parties: for example, insured defendants whose cases will still be run by the insurer, with their experience and in-house and external legal advisers; or a party who is a company, which must instruct a real person (likely a lawyer) to represent its interests.

The proposal is also flawed at a more fundamental level: it does not address the key problem of high legal fees. Rather than questioning what is reasonable to spend on any form of dispute resolution, it simply takes the current market in legal advice and makes the system lawyerless where it is uneconomic to instruct a lawyer. In other words, where the amount a party will pay in legal fees is likely to outstrip the amount they can recover, then the jurisdiction is set at that level. That is currently estimated to be around $100,000: i.e. it will cost close to $100,000 in legal fees to recover $100,000. This uses the legal market as the determining factor in the procedure available, rather than any more principled determination of how resources should be allocated. Nor does it address the question of why a party might be spending $1m to recover $3m. While litigation spending of that magnitude is 'economic', in a strict cost–benefit analysis, it is not a principled basis. A party who is owed $3m should be able to recover it without spending a third of it in lawyer fees, but the incentives in the system dictate otherwise.

> The complexity of the legal market and the disputants that use the system means that there is no silver bullet for addressing the distortion that power can create in our civil litigation system.

The idea of taking lawyers out of the picture also falls into the trap of one of the myths around the role of lawyers. While popular culture tends to present lawyers as fomenters of trouble who encourage litigiousness (Galanter, 2005), there is plenty of empirical research to show that this is not the role most lawyers take (e.g. Mather, McEwen and Maiman, 2001). While there are always some exceptions, lawyers play an important role in reality checking and working towards settlement, a skill which is difficult for litigants in person (Toy-Cronin, 2015; Wangmann, Booth and Kaye, 2020).

Judicial control and rationing procedure

An area of reform with significant potential is having judges take greater control of how proceedings are managed. Such reforms allow judges to make decisions about which issues are heard, and to control length of trial and scope of evidence, including the need for expert evidence. These types of measures address unequal power because the judge can limit the steps that can be taken, meaning one party has less power to try and outlast another party.

The Rules Committee is actively considering various models that, if implemented, would increase judicial control (Rules Committee, 2019; see also Kós, 2016) and the response to the consultation suggests broad support (Rules Committee, 2020). To effect real change, however, there would need to be a paradigmatic shift from our current concept of 'party control' (where the parties are responsible for the course of litigation and judges are largely passive) to judicial control and rationing of procedure (where judges determine how much procedure each case is given).

Not all will be in favour of what will be perceived as radical reform; they will point out that judges do not have an omniscient view of what is happening within litigation and that control should therefore continue to lie with the parties. However, of all the actors in litigation, judges are best placed to make decisions about what is necessary and reasonable in a case. Rationing procedure means tolerating a higher degree of inaccuracy in decisions, but this should be tolerable for the benefits it brings to the disputing parties (to control the litigation spend and ensure quick resolution) and for other parties waiting to access the system (protecting scarce court resources for the use of others). Reforms that increase judicial control are therefore a very important element of measures to reduce

the influence of money and power in litigation.

Conglomerate the claims of many people

A solution that is currently the subject of a review by the Law Commission is whether and to what extent the law should allow class actions and litigation funding (Law Commission, 2020). The idea behind class actions (from a litigant perspective) is that if many claims can be conglomerated, this reduces the financial and emotional barriers to individuals bringing cases themselves. Class actions increase the plaintiffs' power; they are no longer a lone David battling Goliath, but a whole team of Davids. The difficulty with class actions is that they are, by their nature, very complex. They therefore require expert legal assistance to run, which of course comes at a price. This in turn gives rise to the need for litigation funding. Litigation funding is, however, a profit-driven enterprise which creates incentives that may be at odds with the aims of a justice system. It can also deliver significant profits to investors and lawyers, but may not deliver a great deal into the hands of the plaintiffs.

Representative actions (a close cousin of class actions) and litigation funding are already operating in Aotearoa. It is, therefore, useful to create stronger regulation around them. In particular, creating a regime with strong judicial control over certifying class actions and funding arrangements, and also the legal fees charged, will protect the aims of class actions. However, it is far from clear that there are large numbers of cases that might be suitable to be brought as class actions, so this solution will be a tool in the tool box rather than a complete toolkit in itself.

Another form of conglomeration is charging public watchdogs with the responsibility for bringing claims on behalf of wronged parties. Watchdogs enable the power of the state to be harnessed against repeat wrongdoers or a wrongdoer who has harmed many individuals, rather than relying on individuals or profit-driven enterprises bringing classes of plaintiffs together. To be effective they need to be funded to perform the function, shifting litigation costs from parties to the state. It would be worth considering more use of this form of addressing civil wrongs.

Involve the disputants in creating the rules and procedures

One of the types of power discussed above was the power to set the rules under which disputes are conducted. Rebalancing this type of power – currently held disproportionately by lawyers and powerful interest groups – requires the involvement of a broader group of people in the process by which the rules are set.

One aspect of this is creating a structure for greater public involvement in rules consultations. Other jurisdictions (including the United States, Canada and Hong Kong) have developed court users committees that bring together people with experience of the justice system to provide feedback on proposals. This would be a worthwhile development in Aotearoa.

Another promising trend in rebalancing this second form of power is the use of 'legal design' or 'human-centred design' in reforming court procedures. Human-centred design takes the user experience as the starting point and then creates and tests solutions with users (Hagan, 2018). This method has been used in the creation of the much-lauded Civil Resolution Tribunal in British Columbia, which is an online, self-service platform for disputes of small quantum. Deploying this method in Aotearoa can help to rebalance this less obvious but important form of power in our civil dispute system (Pirini, 2020).

Conclusion

The complexity of the legal market and the disputants that use the system means that there is no silver bullet for addressing the distortion that power can create in our civil litigation system. The Rules Committee is showing some appetite for introducing what is the most promising type of reform, greater judicial control of proceedings. The regulators now need to engage with difficult questions around how to make legal services more affordable. Together with reforms to introduce greater public involvement in court procedure reform, there is real potential to at least minimise the effect of power in litigation, working towards the aim of equal justice before the law.

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Geoff Bertram

Regulatory Capture in Product Markets and the Power of Business Interests

Abstract

This article explains pervasive regulatory failure, lagging productivity, and the corporate capture of policy and policymakers as possibly unintended, but not unpredictable, outcomes of the New Zealand Treasury's radical adoption during the 1980s of public choice and Chicago school doctrines. With deregulation and a limited role of government written into statutes and embodied in regulatory practice, the pathologies identified and described by Buchanan, Tullock, Stigler and their collaborators became more, rather than less, prevalent in the New Zealand regulatory landscape. Privatisation opened the way for looting; the Commerce Act and new regulatory guidelines enabled rather than blocked anti-competitive practices and monopolistic rent-taking; relaxed oversight meant that foreign direct investment became more extractive and less productive. From relatively inclusive politics and strong regulatory enforcement, New Zealand shifted towards more extractive institutions and weaker regulation. As a result, market power is exercised by the current business and financial elite in ways that have worsened wealth and income distributions, imposed deadweight burdens (both static and dynamic) on the economy, and now confront policymakers with roadblocks to achieving more inclusive institutions and pursuing a 'wellbeing' agenda.

Keywords regulation, market power, public choice theory, capture, looting, institutions

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> We shouldn't put people in charge of government who don't believe in government. They fail us every time.
> (quoted in Caputo, 2021)

In a recent article in this journal (Bertram, 2020b) I commented on the inadequacy of the Commerce Act 1986 as a check on abuses of market power – both monopolistic pricing and anti-competitive conduct. The problem of regulatory failure in New Zealand since 1984 is, however, much wider than just that one Act of Parliament. As one *Spinoff* commentary put it in relation to heavy vehicle tow bar certification and damage from forestry slash during floods, 'if I read one more story about regulatory failure my head is going to explode' (Stevenson, 2018). From Pike River to electricity prices, from the ineffective emissions trading scheme to agriculture industry-driven subversion of efforts at fresh water regulation, from fishing industry refusal to install cameras on vessels to failure to ensure workplace health and safety (while wrapping small businesses up in red tape, much of it misdirected), there is widespread public unease at the apparent inability of successive New Zealand governments to regulate effectively. Successive Parliaments have been unwilling to fix the legislative provisions that empower deep-pocketed corporate lobbies.

Many of those provisions had their origins overseas. Writing in the 1960s, Buchanan and Tullock (1962) and Olson (1965) emphasised the divergence between an idealised conception of 'the public interest' on the one hand and, on the other, the special interests of small groups within society pursuing their self-interested ends through the political processes of lobbying and capture of institutions. Subsequently, Krueger (1974) and Buchanan, Tollison and Tullock (1980) consolidated the notion of a 'rent-seeking society' as one in which the capture of special privileges and favours by particular groups created a massive waste of resources. Post-1984 in New Zealand, this rent-seeking model was enthusiastically adopted by senior public officials, and underpinned the radically transformative policies of the fourth Labour government. The neo-liberal case for those changes was spelled out in detail by the New Zealand Treasury (Treasury, 1984, 1987) in documents that not only set the course for radical policies in the short run, but continue to resonate in mainstream political discourse three decades on.

> Over the decades since the neo-liberal experiment kicked off, its downsides have become apparent through a series of well-documented failures, which have had surprisingly little effect in shifting the general orientation of policy.

In the case of the state, the central changes were a rolling back of regulatory interventions of all sorts, a culture of deference to the supposedly superior qualities of the market, and a new public management model that separated 'policy advice' from operational delivery of services with the aim of reducing or eliminating the 'capture' of government resources by self-interested groups enriching themselves at the expense of the general public. Removal of 'burdensome' regulation was predicted to unleash private initiative and productivity, while the forces of competition would look after the public interest by curbing predatory exercise of market power and aligning business incentives with the interests of consumers.

In the case of the business environment, policy innovations included the elimination of direct regulation of prices and anti-competitive conduct, the privatisation of a swathe of public entities, many of which were monopolies in their respective markets, the suppression of the traditional role of the courts in providing common-law protection for the weak against the strong, a loosening of checks on foreign direct investment, a frontal assault on unions and wage awards in the name of 'labour market flexibility', and a radical shift to a less generous welfare state motivated largely by the argument that welfare benefits were a disincentive to work.

Over the decades since the neo-liberal experiment kicked off, its downsides have become apparent through a series of well-documented failures, which have had surprisingly little effect in shifting the general orientation of policy. The imperviousness of this country's policy elite both to evidence of policy failures, and to suggestions for a reorientation, is one of the issues to which the present article is addressed. Even in 2021 the neo-liberal mindset continues to hold sway over policy discourse within the state apparatus, while the corporate and financial business elite maintains a strong, and largely successful, lobbying effort in defence of its gains secured under deregulation. For old-fashioned Marxists who view the state as the committee of a predatory bourgeoisie – for whom, in other words, regulatory and policy capture is the norm – this is no surprise. For social democrats committed

to a more positive vision of the nature and role of the state, it is both challenge and puzzle.

One possible answer to the puzzle is the familiar neo-liberal slogan 'there is no alternative'. A second possibility is that New Zealand now occupies the best of all possible world: that all alternatives are inferior to the status quo and that the ascendancy of neo-liberalism has been justified in retrospect by its performance in practice. A third, and I shall argue the most persuasive, is that the political and economic arenas have been 'captured' along the lines described by the (mostly right-wing) authors of public choice theory and the Chicago-school critique of regulation – precisely the doctrines on which the New Zealand Treasury built and implemented its transformational agenda.

Public choice and Chicago

Two pillars of that literature were the 'Virginia public choice' school epitomised by Olson (1965), Buchanan and Tullock (1962), Buchanan et al. (1980), Coase (1960) and Tullock (1967, 1975), and the 'Chicago school' of antitrust thinking derived from writers such as Stigler (1971), Bork (1978) and Posner (1978). (For a critique of the Chicago school by legal scholars see Hovenkamp and Morton, 2020 and Khan, 2018. For a strong economics critique see Glick and Lozada, 2021). Those writers were sceptical of collective conceptions of society, and of moral sentiments as motivators of human conduct. Their perspective was individualistic, and the human agents in their models were motivated by economic incentives. Adam Smith's bleak observation that 'people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices' pretty much sums up the perspective.

This, too, was a central message of *Government Management* (Treasury, 1987, vol.1): since the institutions of government have the power to confer benefits upon particular groups, and those groups are comprised of self-interested individuals interested purely in self-enrichment, it follows that those groups have an incentive to 'capture' government-granted privileges for themselves, and that such 'rent-seeking behaviour' can be prevented only by closing down channels of 'capture' and forcing all parties to engage in competitive, productive activity in a free market setting.

Stigler claimed that 'as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit' (Stigler, 1971, p.3). He viewed regulation as a marketable commodity to be purchased by the highest bidder through the capture of political parties. And his conclusion offered the Treasury officials of 1984 and 1987 a clear legitimating mandate: 'economists should quickly establish the license to practice on the rational theory of political behavior' (ibid., p.18).

That suggestion – that economists (at least, ones with free market inclinations) were somehow the only people who possessed a clear vision of the public good – runs through the public choice and Chicago school literature, and provided the platform from which the New Zealand Treasury preached in 1984 and 1987. But why economists, alone among professional groupings, should somehow be immune to the self-aggrandising tactics of which all other professions stood accused, was never clear.

Regulatory capture is defined as follows:

> a corruption of authority that occurs when a political entity, policymaker, or regulatory agency is co-opted to serve the commercial, ideological, or political interests of a minor constituency, such as a particular geographic area, industry, profession, or ideological group. When regulatory capture occurs, a special interest is prioritized over the general interests of the public, leading to a net loss for society. (Wikipedia, 2021a)

It can be argued that Treasury's role in the neo-liberal policy upheaval was perhaps the clearest example in New Zealand history of precisely such a capture process. Treasury's frontal assault on the integrity of other professional groups – teachers, health professionals, engineers, lawyers, and bureaucrats in other agencies – not only coarsened the tone of political discourse but led to a stripping-out of professional expertise from key parts of the public sector, all in the name of protecting the public from predation. In addition, the separation of policy from operational responsibilities – the 'funder–provider split' – which was designed to block capture, became in practice a block to good professional practice by providers of publicly funded services, and the source of an active process of capture of state resources by opportunistic agents alert to loopholes in public–private contracting (on which cf Hart, 2017).

> The neo-liberal revolution staked everything on the proposition that the reforms would raise economic efficiency and that the severe social pain inflicted would be short-lived.

Two other key elements of the public choice canon catch the eye when reviewing New Zealand's recent experience. First is the argument in Tullock (1967) that predatory transfers of wealth within society, whether achieved by rent-seekers through tariffs and regulations, or by straightforward theft, have consequences for the general welfare that go far beyond the comparative static welfare losses. Tullock focused on the dynamic welfare losses caused both by the attempts of citizens to protect themselves against predation, and by the disincentive effects of being threatened with predation (or actually predated).

The second public choice proposition, from Tullock (1975), is that once capture has occurred and the first generation of predators have taken their ill-gotten gains and moved on, their successors will be left

holding assets for which they have paid the capitalised value of the rents gained by capture or predation. The result is that predation is locked in and difficult to reverse, because of losses that would have to be borne by the successor group, who bear no responsibility for the capture but have committed their wealth to the post-capture industry.

The record of neo-liberalism in action

The neo-liberal revolution staked everything on the proposition that the reforms would raise economic efficiency and that the severe social pain inflicted would be short-lived. The outcomes after three decades, measured by productivity and distribution, point in the opposite direction (StatsNZ, 2021; Nolan, Pomeroy and Zhengh, 2019; Rashbrooke, 2018; Rosenberg, 2017; Easton, 2020, ch.50). Productivity has lagged and the sharp, policy-driven increases in income inequality of the early 1990s have become entrenched rather than alleviated with passing decades. The New Zealand Productivity Commission – a body originally set up in 2012 to defend and advance the deregulatory agenda (Kelsey, 2015, pp.148–9) – for a long time attempted to portray as a 'paradox' or 'puzzle' the failure of the reforms to spark more rapid productivity growth. More recently, in trying to move beyond that position, the commission produced a list of potential explanations for poor productivity (Nolan, Fraser and Conway, 2018, p.8; Nolan, Pomeroy and Zhengh, 2019, Table 1, p.5) that conspicuously omitted the possibility that the policy revolution of the 1980s and 1990s might have been actively damaging to economic performance at the same time as it shredded large parts of the social fabric.

There is space here only for a quick review of a few of the most glaring problems that have emerged in New Zealand since 1984. There is, however, an extensive literature meticulously documenting the detail – notably Easton (1997, part VI, 2020, part V), Kelsey (1995, 1999, 2015), Jesson (1987, 1999, 2005), along with the regular listing of Overseas Investment Office decisions in the journal *CAFCA Foreign Control Watchdog*, an enormous amount of investigative journalism and commentary in the daily press (most recently, at the time of writing, the series of *Stuff* investigations into Ministry of Business, Innovation and Employment regulatory oversight of migrant worker exploitation), several reports of independent inquiries into workplace safety issues (notably Royal Commission on the Pike River Coal Mine Tragedy, 2012 and Independent Taskforce on Workplace Health and Safety, 2013), and comments from the legal fraternity in court decisions and commentary (for references to some of which see Bertram, 2020b). In relation to specific sector histories the literature includes Macfie (2013) on Pike River, Lee (2019) on finance company collapse, Dyer (2019) on leaky homes, Armstrong (2014) on workplace safety and Bertram (2006, 2013) on the electricity industry. Four issues that emerged will be summarised here in roughly chronological order.

> A striking feature of the New Zealand privatisations of 1987–96 was precisely the domination of value extraction over value creation ...

Privatisation of public assets

Privatisation of public assets starting in 1987 was justified by a supposed need to pay down government debt, but was driven mainly by Treasury's generalised preference for private over public ownership (Treasury, 1984, pp.293–4; 1987, pp.37–9, 96–100, 112–17). The outcome was to enrich a small group of insiders – a mix of local business people and opportunistic overseas investors – with close connections to key players in the state apparatus.

Kelsey describes the process:

> All state operations and assets were sold as soon as commercially possible, irrespective of the economic return … [Over the decade 1987–96] some 39 assets were sold for about $19 billion. There was never any independent audit of the economic (let alone the social) costs and benefits of the privatisation programme. Privatisation saw a massive transfer of wealth from government and taxpayers to a few companies and individuals. The project was steered through by a few government officials, politicians, corporate lobbyists, and private sector advisers. Key players among the latter were a select group of merchant bankers and consultants for whom privatisation was especially lucrative … Sometimes they blurred the boundaries by advising the government and also acting as buyers. (Kelsey, 1999 pp.178–9)

The privatisation process down to 1996 provides a clear example of rent-seeking and regulatory capture in action – processes initiated and overseen by the New Zealand Treasury's self-declared disciples of the public choice and Chicago writers for whom rent-seeking and regulatory capture were supposedly anathema, a contradiction identified at the time by Bruce Jesson (1999, pp.13–16).

In the overseas literature at about the same time, Akerlof and Romer were publishing their classic analysis of the savings-and-loan scandals of the 1980s in the United States, using the term 'looting' to characterise the self-interested conduct of opportunistic private agents taking advantage of profit opportunities opened up by ill-advised and poorly designed deregulation:

> [T]he normal economics of maximizing economic value is replaced by the topsy-turvy economics of maximizing

> current extractable value, which tends to drive the firm's economic net worth deeply negative. Once owners have decided that they can extract more from a firm by maximizing their present take, any action that allows them to extract more currently will be attractive – even if it causes a large reduction in the true economic net worth of the firm. (Akerlof and Romer, 1993, p.2)

A striking feature of the New Zealand privatisations of 1987–96 was precisely the domination of value extraction over value creation (on these concepts see Lazonick and O'Sullivan, 2000). Typically, the private 'insider' purchasers used leveraged buy-out tactics to secure control, then extracted cash gains and exited, in several cases leaving the enterprises they had sold in a parlous state requiring taxpayer-funded bail-outs. Such was the case in the sale of New Zealand Steel to Equiticorp in 1987 (Wiklund, 1996), the sale of the railways to Tranz Rail (Gaynor, 1997, 2000, 2002, 2004, 2008, 2011; Hyman et al., 2003), and the privatisation of the Bank of New Zealand (Kelsey, 1999, p.180; Gaynor, 2004), the Post Office's telecommunications branch (Jesson, 1999, pp.172–3; Gaynor, 1997; Kelsey, 1999, pp.181–2), the Government Printing Office (Kelsey, 1999, p.180) and the electricity system assets formerly held by central and local government (Kelsey, 1999, pp.181–6; Rosenberg and Kelsey, 1999).

Foreign investment

The inroads of foreign investors into New Zealand markets under deregulation went far beyond participation in that early rush to buy up privatised state assets. Controls on foreign investment were loosened substantially from the late 1980s on, resulting in a switch away from the previous tendency for foreign direct investment to be directed to financing new productive ventures, towards takeovers of existing operations from which profits could be extracted by exploiting New Zealand's very lax regulatory and tax arrangements. In 2002 a report commented that

> although the nation has at times attracted significant quantities of FDI, the quality has been poor. Almost all FDI in New Zealand has involved privatisation or merger and acquisition activity with little flow-on benefit. Export-oriented greenfield investment has been sparse, and is generally concentrated in low-growth, low-return sectors. (Boston Consulting Group, 2001, quoted in Rosenberg, 2004)

In 2020 the Productivity Commission was still lamenting essentially the same problem (Productivity Commission, 2020, pp.23, 71) .

> Investment Office, part of Land Information New Zealand) has been asked to investigate evidence of the bad character of an investor no action has been taken … Even for companies with established records elsewhere of large scale price fixing (such as former Canterbury Malting Company owner Archer Daniels Midland), or bad environmental behaviour (such as Waste Management's former and original owner Waste Management International or WMX) no action was taken ... (Rosenberg, 2010, p.19)

… the 'benefit to New Zealand' test, any impression from the name of the test that it involves a weighing-up of costs and benefits would be quite wrong.

The neo-liberal regime of extraordinarily weak regulation of foreign direct investment is embedded both in the legislation and in the culture of the regulatory agency, the Overseas Investment Office (OIO). Following more than a decade of experience of overseas investors mounting looting expeditions (in the Akerlof and Romer sense) into New Zealand, the Overseas Investment Act 2005 loosened rather than tightened the controls (Rosenberg, 2004, 2010). Two tests are applied by the OIO: the investor must be 'of good character', and the investment must involve some identifiable 'benefit to New Zealand'.

The good character test is pretty much a dead letter (Ayers, 2012; Horton, 2004, 2017); it has virtually never been used by the OIO to reject an applicant. Rosenberg commented that

> The good character requirement is routinely satisfied by the individuals providing statutory declarations that they are of good character. On occasions when the regulator (formerly the Overseas Investment Commission, and since the 2005 Act the Overseas

Turning to the 'benefit to New Zealand' test, any impression from the name of the test that it involves a weighing-up of costs and benefits would be quite wrong. The 'test', applied to overseas purchases of 'sensitive land', requires only the counting of benefits and rules out most consideration of costs (Bertram, 2020d, 2020e). In 2018 this became apparent when the then minister of conservation, Eugenie Sage, was forced against her judgement to sign off approval for a Chinese company to buy up a mineral water resource near Whakatāne for bottling and export, against strong local opposition. The law, she was advised, did not allow her to take environmental or Treaty of Waitangi downsides into account. The following year Sage had to decide whether to approve OceanaGold's application to buy a productive Waihī dairy farm for conversion to a toxic waste dump. This time she refused, triggering what appears to have been a credible threat by the transnational mining company to litigate under the Act. The government backed down, replacing Sage with another minister, who signed the approval. The failure of a subsequent judicial review sought by a local environmental group (which not only lost

the case but was hit with punitive costs for taking it) confirmed that the law does not allow cost-benefit assessment of foreign purchases of sensitive land – at least as 'cost-benefit' is understood in economics. The spectacle of a large transnational corporation first facing down government ministers, and then crushing its local citizen opponents in the High Court, could have been taken directly from Stigler's model of capture.

Assessment of public benefit

The assessment of public benefit in the regulation of mergers and takeovers has been another area in which the New Zealand regulatory system has deliberately set aside questions of the distribution of wealth, for the benefit of possessors of market power. Tullock's (1967) emphasis on the negative dynamic welfare effects of predatory wealth transfers, mentioned earlier, was set aside (or perhaps just forgotten) by Treasury officials asked to recommend how policy should deal with monopoly profits. As Pickford (1993) describes, the Commerce Commission shifted in the early 1990s from an 'income-weighted' to an 'efficiency' criterion, which meant allowing mergers even when the efficiency gains (along with any monopoly rents) were all captured by the merged firm. In 1992 an officials' committee comprising representatives of Treasury, the Department of Justice, the Department of the Prime Minister and Cabinet and the Ministry of Commerce, resolved (over the laudable objection of Justice) that in any cost–benefit evaluation of mergers and takeovers under section 3 of the Commerce Act 1986 there should be no weightings applied to the costs and benefits applying to different groups. Thus (for example), a dollar lost to consumers due to monopoly pricing was to be treated as completely offset by the dollar gained by the monopolist, provided only that both parties were New Zealanders. Monopoly per se had no welfare implications (Bertram, 2004, p.268). This proposition that bare wealth transfers are fine unless they go to foreigners remains embedded in the Commerce Commission's procedures.

> Since 1990 the electricity sector ... early buyers of network and generation assets ... extracted cash as profits soared, then realised their (untaxed) capital gains by selling out to successors whose rate of return on the purchase price would be closer to normal profits ...

Regulation of monopolies

Regulation of monopolies – both 'natural' and otherwise – has been the area where the neo-liberal programme most dramatically ran aground on its own public choice rocks. Treasury's faith in markets to solve problems was qualified by token acknowledgement that monopolies could be a problem, followed quickly by rejection of well-established regulatory responses:

> The approach which traditionally has been used is to deal with symptoms of market dominance directly through price controls or rate of return regulations. However substantial costs are incurred in regulatory intervention. These are incurred directly through the operations of the regulatory authority and interest group lobbying, and indirectly through the distraction of management effort, the blunting of competition between firms and the slowing down of innovation. (Treasury, 1987, vol.1, p.106)

Even where competition in the usual sense was not feasible, contestability theory offered an alibi for non-regulation:

> If through exploitation or unfair trading an individual or firm can earn a return in a particular activity that is above that earned elsewhere then there will exist incentives for others to enter the market and compete, thereby undermining the longer term survival prospects of such practices. Thus economic rents and privileges tend to be transient in the context of competitive processes … (ibid., p.16)

The general attitude was summed up by the single sentence on regulation in the chapter on 'role and limits of government': 'Ignorance about the perverse effects of regulation may create a tendency for its overuse in the same way that smoking was widely tolerated before people knew about its costs' (ibid., p.37).

The Commerce Act 1986 reflected this philosophy. Whereas its predecessor, the Commerce Act 1975, had as its explicit purpose 'the regulation, where desirable in the public interest, of trade practices, of monopolies, mergers, and takeovers, and of the prices of goods and services', the new law promised only 'to promote competition in markets for the long-term benefit of consumers within New Zealand'. Alas, the crucial section 36 that was supposed to prevent anti-competitive practices was ineffective (Bertram, 2020b, p.84), while the provision in part 4 for regulation of monopoly profits was not activated until after 2000. In the interim, under a largely pointless (but very costly) regime of information disclosure, the newly created corporate monopolies in ports, airports, telecommunications, gas and electricity hastened to use their market power to the full, driving up prices, margins and profits and then revaluing their fixed assets up to capitalise (lock in) their licensed predatory status. Of these, the only sector whose

monopoly position was eventually broken was telecommunications – significantly, the sector where powerful new deep-pocketed entrants were eager to compete 'for the market', and where the monopolistic overreach of Telecom during the 1990s was sufficient to induce Parliament finally in 2000 to pass a law breaking up the firm's vertically integrated status.

In the early 2000s, *after* the natural-monopoly firms in gas, electricity networks, ports and airports had raised prices to the profit-maximising level and banked their expected ongoing monopoly profits in the shape of massively increased book value of their assets, part 4 of the Commerce Act finally cranked into action, at precisely the moment when the monopolies needed protection against consumer hostility to their profiteering. The subsequent events in the electricity distribution sector are documented in Bertram (2006, 2013, 2014) and Bertram and Twaddle (2005). Furious and effective lobbying by the big network operators cornered the Commerce Commission into locking in, as the basis for future regulation, the companies' asset values as at 2002, bloated with capital gains secured from a decade of unrestrained monopoly conduct. An intricate, highly prescriptive set of regulatory procedures designed to preserve those was written into the Commerce Act in 2008, and the Commerce Commission from then on was merely a legitimating rubber stamp on monopoly pricing – precisely the situation described by Stigler in his seminal (1971) attack on regulation in the US. By taking an expensive and wasteful High Court case[1] against the commission in 2012 a group of monopolies in airports, gas and electricity secured also the court's imprimatur on their sky-high asset value, again a move directly out of the Stigler playbook.

Since 1990 the electricity sector has been a classic example of Tullock's (1975) model of transitional gains: early buyers of network and generation assets (in many cases foreign investors) extracted cash as profits soared, then realised their (untaxed) capital gains by selling out to successors whose rate of return on the purchase price would be closer to normal profits, and who would consequently fight any rolling back of asset values to true historic cost.

Among documented case studies of the outcome of this failed implementation of what used to be (before 1986) a serviceable regulatory model under the 1975 Commerce Act and the common law are those of Wellington Electricity (Werry and Turner, 2014; Bertram, 2018) and Aurora Energy Ltd (Bertram, 2020c). In the case of Aurora – a company which systematically milked its asset base while holding up its regulatory asset valuation – the commission has declared itself powerless under the Commerce Act to impose any write-down, with the result that urgently needed new investment must be funded from yet another price increase imposed on customers (Commerce Commission, 2020).

> … deregulation and privatisation opened the way for a new generation of opportunistic rent-seekers and looters, and arguably shifted New Zealand down the institutionalists' development rankings.

Public choice and institutional models of development failure

To keep a sense of perspective on the discussion to this point, it is important to recall that New Zealand remains among the world's rich economies, and consistently scores highly on global indices of transparency and 'freedom from corruption' (at least the overt sort) and in global survey responses about 'ease of doing business' (however much it might be suggested that this represents executives from large transnationals celebrating the ease with which they can crush or buy out their smaller competitors in a deregulated setting).

One of the strangest features of the public choice and Chicago schools was their emergence in what was then the world's most successful economy, the United States. The apocalyptic tone ('there is no alternative') adopted by proponents of neo-liberal policy in the 1980s across much of the OECD sits oddly within the wider development discourse in institutional economics, which often attributes the success of today's rich countries to their relative freedom from rent-seeking and capture, reflecting their superior 'social infrastructure' (Hall and Jones, 1999; Landes, 1998; North, 1989, 1991, 1994; Acemoglu, 2003; Acemoglu and Robinson, 2012). These authors draw directly on public choice models; as Acemoglu and Robinson note:

> Our work follows the seminal work of Tullock (1967) who proposed the notion of 'rent seeking' to argue that the welfare costs of a distortionary economic institution like monopoly were actually much higher than the static deadweight losses would suggest … [A] key building block of our work is that inefficient economic institutions are chosen not just to create rents, but to solidify the political power of elites. It is this feature that makes it difficult to find efficient solutions to the problems of economic rents, and potentially generates much greater inefficiencies. (Acemoglu and Robinson, 2019, pp.676–7)

Concentrations of power, and/or a weak and ineffective state, they suggest, lead to regulatory capture and rent-seeking, and this explains how today's poor countries became poor. But this does not make the public good identical with the neo-liberal advocacy of deregulation and minimisation of government intervention. As Myrdal (1968) argued long ago, whether regulations and other interventions have good or bad outcomes depends more on

the quality of the state – 'soft' or 'hard' – than on the content of the policies.

The officials who drove the New Zealand reforms clearly believed themselves to have a neutral, unblinkered view of where the 'public interest' lay, coupled with a firm belief that deregulation and privatisation would remove the opportunities for rent-seeking that they perceived to be rampant in pre-1984 New Zealand. In practice, deregulation and privatisation opened the way for a new generation of opportunistic rent-seekers and looters, and arguably shifted New Zealand down the institutionalists' development rankings. But the characterisation of pre-1984 New Zealand as some sort of failed state was always a weak link in the neo-liberal case.

Conclusion

In this article I have argued that the sweeping institutional changes imposed by successive New Zealand governments between 1984 and 1999, and consolidated thereafter, have left in their wake a paradoxical situation. The changes were motivated and justified by ideas drawn from the economic theories of public choice, rent-seeking and regulatory capture advanced by the Virginia and Chicago schools of economics and law, and were ostensibly designed to free New Zealand from the ills diagnosed by those schools of thought in the US. Yet the effect of the changes was not so much to eliminate pre-existing problems of capture and rent-seeking as to reinvent New Zealand as a case study of those pathologies in action, only under different management.

Rent-seeking and capture were not absent before 1984, but since that date the newly ascendant groups have had less productive orientation and more clearly extractive character (Bertram, 2003; Jesson, 1999; Kelsey, 2015). From relatively inclusive politics and strong regulatory enforcement, New Zealand shifted towards more extractive institutions and weaker regulation. As a result, market power is now exercised by the current business and financial elite in ways that have worsened wealth and income distribution, imposed substantial deadweight burdens (both static and dynamic) on the economy, and now confront policymakers with roadblocks to achieving more inclusive institutions. Among those roadblocks is the entrenchment of legislative and regulatory provisions that trap policymakers in what I have called an 'iron cage' of restraints on government (Bertram, 2020a, 2021). Hobbes' Leviathan has been tamed, shackled and demoralised, leaving a 'self-hating state' (Feffer, 2007; Monbiot, 2013; Bertram, 2014, p.51) presiding over a 'rentier capitalism' (Christophers, 2020).

In this, the neo-liberal revolutionaries of post-1984 New Zealand have run into the problem encountered by Leninist revolutionaries of the early twentieth century: having overturned the ancien regime, they have installed in its place a new order that is profoundly vulnerable to precisely the criticisms they had mounted against the old.

1 *Wellington International Airport and Ors* v *Commerce Commission* [2013] NZHC 3289.

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HOBBIT LAWS
Human Rights and the Making of a Bad Sequel

Abstract

In 2010 the National Party-led government did a deal to keep the filming of *The Hobbit* in New Zealand. The deal involved amending the Employment Relations Act 2000 to exclude film workers from the definition of 'employee', and thus also from the protections of employment law. The amendment was rushed through under urgency, and protests and international criticism ensued. Ten years later, the Labour government is considering the Screen Industry Workers Bill. Rather than restoring employment rights to the workers in the film industry, it introduces a dangerous new precedent and continues to trade off human rights against commercial convenience.

Keywords independent contractors, freedom of association, film industry, strikes

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Much like the *Lord of the Rings* movies, the legal status of workers in the New Zealand film industry is something of a long and drawn-out saga. This article re-examines the making of the 'Hobbit law' in the light of its problematic sequel, the Screen Industry Workers Bill currently before Parliament. The 'Hobbit dispute', as it came to be known, provides a case study of political deal making, in which workers were excluded from the minimum standards of employment and human rights traded away for the sake of the commercial profitability of favoured industries. The Hobbit dispute helps to explain the peculiar Screen Industry Workers Bill currently being considered and provides timely warnings for future law reform efforts.

The legal background

The origins of the Hobbit dispute begin in 2001, when a Mr Bryson, engaged as a model technician working on the *Lord*

of the Rings movies, sought to challenge his termination, requiring him first to be declared an employee by the courts. His case was appealed all the way to the Supreme Court, which eventually decided that Mr Bryson was an employee (*Bryson v Three Foot Six*).[1] The *Bryson* case was significant for New Zealand law, becoming the leading authority on employment status determinations. It also had a particular impact on the film industry, which had taken advantage of the previous Employment Contracts Act 1991, engaging a large proportion of its workforce as independent contractors. The difference between an employee and an independent contractor is an important one, as employee status opens the door to the rights and protections of employment law. For example, an employee must be provided with the minimum employment standards, such as being paid at least the minimum wage and provided with paid annual or sick leave. Employees can access the personal grievances regime and can bring a legal case to challenge unfair treatment or dismissal, using the Employment Relations Mediation Service, the Employment Relations Authority or the Employment Court to resolve their disputes. Importantly also, an employee can join a union, and exercise legally protected rights to collective bargaining and industrial action (see Anderson, Hughes and Duncan, 2017, ch.5).

An independent contractor, 'being in business for themselves', is not covered by employment protections and is left largely to determine their own legal affairs. Employers sometimes engage in a practice called 'sham contracting', which involves misclassifying their workers as independent contractors in order to avoid having to comply with these minimum employment rights. The employment relationship is treated as a special legal relationship, with additional rules and protections due to the inequality of bargaining power that exists between the parties and the risk of exploitation. An explicit aim of the Employment Relations Act is to acknowledge and address 'the inherent inequality of power in employment relationships' (s3). The legal test for determining the status of a worker reflects this aim, requiring the courts to determine 'the real nature of the relationship' (s6(2)). The courts look at all the circumstances and decide whether the worker being described as an independent contractor is genuinely in business for themselves, or is in reality an employee and entitled to the rights and protections of employment law.

> … the Employment Relations (Film Production Work) Amendment Act 2010, commonly referred to as the 'Hobbit law', [was] passed under urgency, meaning it was not subject to normal public consultation and submission processes …

The Hobbit dispute

The 2010 Hobbit dispute received a lot of attention at the time, and more detailed accounts are provided elsewhere (Tyson, 2011; Kelly, 2011a, 2011b; Nuttall, 2011; Wilson, 2011; Haworth, 2011; Handel and Bulbeck, 2013). To summarise briefly, the movie director Peter Jackson sought to film *The Hobbit* in New Zealand, as he had the *Lord of the Rings trilogy*. The actors' union, New Zealand Actors Equity (now Equity New Zealand), supported by international unions, sought to enter into bargaining for a collective agreement. This was refused, with the production company claiming, among other things, that to do so would breach part 2 the Commerce Act 1986, as their workers were genuinely independent contractors (despite the decision in *Bryson* discussed above). This is because the legal line between employee and independent contractor also operates as the line between legally protected collective bargaining and running a cartel. Genuine independent contractors seeking to act collectively to improve their working conditions run the risk of being accused of price fixing or entering into other cartel arrangements. While the New Zealand Commerce Commission has not typically pursued legal actions against such workers in this grey area, the Commerce Act does allow for other parties to bring cases. A disgruntled film production company seeking to prevent union action could commence such proceedings, with the attendant delays and legal costs of defending the case. This has been a tactic used overseas to prevent workers such as Uber drivers from trying to act collectively to improve their working conditions (Brown, 2020; Paul, 2017).

At the time of the Hobbit dispute, the film and television industry had seen a rise in large-scale strike action internationally (Handel, 2011; Littleton, 2013). The dispute between the New Zealand actors' union and the film production company escalated and Jackson threatened to take production to another country, with the associated loss of jobs and reputation for New Zealand as a filming destination. New Zealand politicians and industry representatives had spent considerable time and effort developing a local film industry and the loss of *The Hobbit* would have been a significant setback (Shelton, 2005). Jackson also criticised New Zealand's employment laws as being too uncertain and inflexible for the film industry, specifically citing the decision in *Bryson* (Tyson, 2011; Kelly, 2011a). The National-led government of the time intervened in the escalating dispute, negotiating directly with the Warner Brothers production company to keep the film in New Zealand. A deal was reached by which the law would be changed for the film industry and subsidies to the company to make the film would be increased in return for tourism promotion benefits, such as advertising New Zealand tourism on distributed DVDs and launching a tourism campaign in association with the New Zealand film premiere. There was considerable backlash

from unions and workers over the doing of this deal, with protests and widespread international condemnation. The deal resulted in the Employment Relations (Film Production Work) Amendment Act 2010, commonly referred to as the 'Hobbit law', being passed under urgency, meaning it was not subject to normal public consultation and submission processes (Wilson, 2011).

The Hobbit law and its effects

The Hobbit law changed the definition of employee in section 6 of the Employment Relations Act to specifically exclude workers 'engaged in film production work as an actor, voice-over actor, stand-in, body double, stunt performer, extra, singer, musician, dancer, or entertainer' and workers 'engaged in film production work in any other capacity' (s6(1)(d)). A long list of possible film industry jobs were covered by the amendments, meaning that unless a contract specified that a worker was an employee, they were deemed to be an independent contractor, regardless of what the courts considered to be the 'real nature of the relationship'. The film industry is the only industry that has been given such a special exemption, with the definition of 'employee' and the resulting employment obligations otherwise near universally applicable. As few film workers have sufficient individual bargaining power to demand that they be engaged as an employee, the effect of the amendment is to allow film production companies to dictate how their workers are engaged, depriving them of both their individual and collective employment rights. Declaring the film workers to be independent contractors, and thus outside the Commerce Act exemptions for employees, meant that film industry workers and their organisations could not engage in collective bargaining activities. The interaction of the law in this area has been set out in more depth elsewhere (McCrystal, 2014).

Reclassifying the film workers as independent contractors had obvious effects on individual bargaining power, as there were no applicable minimum legal standards and no associated inspection and enforcement machinery to support workers, as well as no protection from dismissal. The reclassification also damaged the collective bargaining power of workers in the industry, with workers unable to negotiate collectively for improvements to their working conditions or take industrial action. One of the explicit goals of the Employment Relations Act is 'to promote observance in New Zealand of the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively' (s3(b)). Freedom of association is a fundamental human right contained in article 20 of the Universal Declaration of Human Rights (1948), which New Zealand was – and still is – a signatory to, and is also protected under section 17 of the New Zealand Bill of Rights Act as well as the Employment Relations Act. While film industry workers still had the 'freedom' to join an organisation, those organisations lacked the legal rights of unions and were prevented from taking action to improve the terms and conditions of those workers. It is difficult for union power to survive under such conditions. Quite simply, there is little value in belonging to a union that cannot engage in collective bargaining or take industrial action to improve wages.

> There was no evidence presented that the film industry could not operate under the normal laws of employment, as it had done before the Hobbit law and as every other industry in New Zealand does.

Further, the absence of employment status effectively also prevents a union from enforcing minimum conditions or representing workers with individual claims. In such circumstances freedom of association rights are rendered effectively useless. As seen in the 1990s, unions are profoundly affected by the statutory conditions they operate within; Anderson concludes:

> it is almost axiomatic in industrial relations and labour law that effective collective representation requires substantial legislative support … History and practice make it clear that, in the absence of support and in the face of employer hostility to collective representation, union membership and the coverage of collective bargaining are likely to plummet. (Anderson, 2011, p.77)

The Film Industry Working Group

It is against this background that one can perhaps begin to make sense of the peculiar 2018 report of the Film Industry Working Group. When the Hobbit law was passed in 2010 the Labour Party stood in firm opposition to it, promising repeal. When the Labour-led coalition government was elected in 2017, rather than simply repeal the Hobbit law amendments it set up the Film Industry Working Group and charged it to make recommendations 'on a way to restore the rights of workers in the industry to collectively bargain, without necessarily changing the status of those who wish to continue working as individual contractors' (Film Industry Working Group, 2018a). It is unclear why the Labour-led coalition government chose to do this, and whether it was the result of industry lobbying, internal coalition dynamics or simply a desire to avoid a repeat of the publicity and political controversy that occurred in 2010.

The Film Industry Working Group involved representatives of a number of film industry bodies and guilds, and also the New Zealand Council of Trade Unions (Film Industry Working Group, 2018b, p.20). While it is difficult to know exactly what happened in its meetings, or to get a sense of the negotiation dynamics at play, when the group provided its report to the government it recommended not a repeal

of the Hobbit law amendments but an extension. The report proposed to include workers in the wider 'screen industry' within the exceptions, including those involved in television, web-based productions, online games and 'formats not yet known to the film industry' (ibid., p.4). The Film Industry Working Group considered the screen industry to be so unique as to warrant its own legal regime, with watered-down minimum standards that could be opted out of 'by agreement', in which workers are 'free to request' that they be engaged as employees and continue to have no meaningful protection from termination and no right to engage in industrial action to support collective claims.

To justify such special treatment, the reasons advanced were that the market was global and competitive; there are different types of film productions ranging in size; producers require certainty of cost and flexibility of conditions; and the nature of filming (e.g. location, light, outdoor sets, etc.) requires late changes to schedules (ibid., p.6). There are few industries in New Zealand that are not subject to global competition, do not have market participants of varying sizes, would not prefer certainty in cost and flexibility of conditions, and do not have to change working patterns and schedules due to factors such as weather or access to locations and resources. There was no evidence presented that the film industry could not operate under the normal laws of employment, as it had done before the Hobbit law and as every other industry in New Zealand does. None of the factors listed were especially unique, and none were so compelling as to justify continuing to deprive workers of their fundamental human rights.

The Screen Industry Workers Bill

Based on the recommendations in the Film Industry Working Group report, the Screen Industry Workers Bill was introduced into Parliament in February 2020. Although the recommendations of the working group are peculiar, and the Screen Industry Workers Bill is a highly problematic piece of legislation as a result, it was likely thought politically easier to simply give the industry what it had apparently agreed to than to propose something different that was more consistent with New Zealand's employment laws or international obligations. Continuing the Hobbit law legacy, the Screen Industry Workers Bill, if it is passed, will create an even larger group of workers who are declared independent contractors, with no regard to the reality of their working situation and leaving them without the full protections of employment law. While workers may 'choose' to request to be employees, the production companies may also 'choose' to refuse to engage them as such (the same position as presently the case). The bill does restore some collective bargaining rights, granting an exemption from the Commerce Act. It creates a watered-down good faith regime, with no right to strike, that falls far short of what is anticipated in ILO conventions 87 and 98. This point is articulated well by Gordon Anderson in his submissions to the parliamentary select committee on the bill:

> The Bill, as with the 'Hobbit' legislation, provides a signal that New Zealand law is amenable to reform on the demand of overseas investors and that New Zealand is willing to tailor its laws to conform to the employment prejudices of such investors … The right to strike, other than in very limited circumstances, is an internationally recognised fundamental right of all workers. The convenience of one, non-essential, industry [does] not justify such an exception. Apart from depriving workers in the screen industry of a fundamental right, the removal of the right to strike sets an unwelcome precedent. (Anderson, 2020)

While the right to strike is often unpopular with employers and governments … it is a fundamentally important human right, core to the ILO decent work agenda and the 2030 United Nations Sustainable Development Goals …

The decisions of the ILO Committee on Freedom of Association clearly set out that 'the right to strike is a fundamental right of workers and their organisations', 'an intrinsic corollary to the right to organise protected by Convention No. 87' and an 'essential means through which workers may promote and defend their economic and social interests' (ILO Committee on Freedom of Association, 2018). Further, it is clear that 'all workers must be able to enjoy the right to freedom of association regardless of the type of contract', that 'the status under which workers are engaged by the employer should not have any effect on their right to join workers organisations and participate in their activities', and, further, that 'the criterion for determining the person covered by the right to organise is not based on the existence of an employment relationship' (ibid.). A right to bargain without a right to strike is referred to as 'collective begging' and has far less practical value (Novitz, 2020). While the right to strike is often unpopular with employers and governments (the government itself being a very large employer), it is a fundamentally important human right, core to the ILO decent work agenda and the 2030 United Nations Sustainable Development Goals, operating as a civil and political right at the heart of a democratic society and a social and economic right to counter the abusive

exercises of economic power (ILO, 2021; Novitz, 2019). The Screen Industry Workers Bill has been reported back from select committee, and there have been some changes made, but the core issues, especially in relation to the right to freedom of association, remain. At May 2021, the bill appears to have stalled, with the government announcing it has done a deal with Amazon to film the Lord of the Rings television series in New Zealand. The deal involves substantial increases in the subsidies payable to Amazon. It has not been confirmed that the stalling of the bill forms part of this deal, but the timing suggests this may be the case.

Regardless of the deal done with Amazon, the creation of the Screen Industry Workers Bill sets a dangerous precedent. It indicates a political willingness to slice out segments of the workforce to exclude from the protections of employment law on the basis that it may be more convenient for certain industries. The risk of setting a precedent is a very real one at the moment. The government has signalled its intention to change the law relating to independent contractors, but not what it is proposing to do (Ministry of Business, Innovation and Employment, 2019). It is also Labour Party policy to introduce fair pay agreements, which, although still light on detail, seem likely to entail bargaining for industry minimum conditions applicable to all workers, but that involves either a partial or total loss of the right to strike (New Zealand Labour Party, 2021).

There are other industries that may be looking to the special treatment of the film industry as a template for their own lobbying, and could just as easily argue that they were 'unique' in being subject to global competition and the risk of international capital flight and would prefer certainty of cost and increased flexibility. For example, in 2020 there were three legal cases on the employment status of drivers (*Leota v Parcel Express, Southern Taxis v A Labour Inspector* and *Archchige v Raiser*).[2] The courier and taxi drivers in *Leota* and *Southern Taxis* were held to be employees, but the Uber drivers in *Archchige* were held to be independent contractors. The previous legal status of drivers had been an area of ongoing ambiguity (due to the peculiarities of how the Supreme Court in the *Bryson* decision dealt with the previous leading case). Transport sector companies unhappy with the 'uncertainty' of these recent decisions may well be looking for the government to do a similar deal to that done for the film industry. The clarification of the status of Uber drivers as independent contractors also opens the door to actions for breaching the Commerce Act should Uber drivers seek to act collectively to improve their working conditions.

While [working groups] potentially offer[s] a government the ability to avoid responsibility and controversy over the law that results, establishing a working group does not guarantee that better law will be made.

A lesson for future reforms

The Hobbit dispute and the Screen Industry Workers Bill are symptomatic of wider problems and provide important warnings for policymakers trying to solve them. In late 2019 the government started consulting on reforms to the law relating to independent contractors, with a number of options open for consideration (Ministry of Business, Innovation and Employment, 2019). It is widely recognised that the centuries-old distinctions between employee and independent contractor are out of step with the hiring practices of the contemporary labour market and that some type of reform is needed. There is no consensus, however, about what that reform should look like. The Screen Industry Workers Bill is one model of response. While this response may be a dream come true for industries that would like to be free of their employment obligations and given a chance to write their own special laws, it also creates segments of the workforce with fewer legal rights than others, with less access to justice and particularly vulnerable to exploitation. For example, while some workers in the newly expanded category of 'screen production workers' will have greater rights than they had under the Hobbit law, they will not have equal rights to other workers in the labour market, and they will not have the full rights they are entitled to in the human rights instruments that New Zealand has adopted.

Additionally, if the Screen Industry Workers Bill passes, many workers not previously covered by the Hobbit law will then be able to be deprived of their employment status and the legal protections afforded by it. While these workers can notionally ask to be engaged as employees, the reality is that very few will have the bargaining power to do so. This lack of individual bargaining power is the underlying reason for having universally applicable minimum employment protections in the first place, and is also the reason that the right to freedom of association is a fundamental human right.

The Hobbit dispute and the Screen Industry Workers Bill provide a number of warnings to policymakers and legislators. The first warning relates to the role of working groups in law making, and the need to carefully consider whether a working group is appropriate, its terms of reference, its membership and negotiation dynamics and the risk of capture. While potentially offering a government the ability to avoid responsibility and controversy over the law that results, establishing a working group does not guarantee that better law will be made. The second warning relates to attempts to tinker with bad law, rather than repealing and properly fixing the underlying

problems. A key thing to remember is that, if not for the Hobbit law, many of these workers would be employees. The Hobbit law removed these workers' legal rights without consultation or due democratic process. Were it not for the Hobbit law there would have been no reason to establish a Film Industry Working Group, and had a Film Industry Working Group not been established, the Screen Industry Workers Bill would likely never have been drafted in such a form, opening up a raft of new problems. If, for example, the government considers there is a problem with the law relating to independent contractors, it should repeal the Hobbit law and properly reform that area of law in a way that gives certainty to all businesses and workers.

The third warning is about the role of the law in protecting workers from exploitation and intervening in unequal bargaining relationships. There are very good reasons why universal minimum employment standards and international conventions on fundamental workers' rights exist, and trading off those minimum standards and human rights for the convenience of powerful international corporations should not be an acceptable compromise in New Zealand employment law.

1 *Bryson v Three Foot Six* [2003] 1 ERNZ 581 (EC); *Bryson v Three Foot Six* [2005] NZSC 34.

2 *Leota v Parcel Express* [2020] NZEmpC 61; *Southern Taxis Ltd v A Labour Inspector* [2020] NZEmpC 63; *Arachchige v Raiser New Zealand Ltd* [2020] NZEmpC 230.

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Mike Joy

Vested Interests in Big Agriculture
a freshwater scientist's personal experience

Abstract

Almost three decades of studying freshwaters in New Zealand has revealed to me that our lowland freshwater ecosystems are in dire straits and that there is no hint of improvement, or even a slowing of degradation. The leading cause of their demise is land-use change, specifically the rampant and extreme intensification of farming. The response of government, both central and local, has been an abject failure to limit this intensification and its resultant harm. Key to these regulatory failures by authorities charged with protecting freshwaters has been the influence at all levels of powerful agricultural industry lobby groups.

Keywords freshwater, science, agriculture lobby, vested interests, personal experience

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As I started researching freshwater as an undergraduate, and through my postgraduate master's and PhD research, it became increasingly clear that the biggest harmful impacts on freshwater ecosystems and drinking water in New Zealand were from intensive agriculture. The narrative is simple: the more intensive the agriculture/horticulture, the more nutrients, pathogens, herbicides, pesticides and hormones escape into the environment. The first port of call for most of these contaminants is freshwater, though there is also loss into the atmosphere of greenhouse gases such as nitrous oxide and methane.

Intensive agriculture is not the only issue for freshwater in New Zealand, but the scale of harm from agriculture is orders of magnitude higher than from any other land use, including urban, horticultural and industrial use. On a much smaller and local scale, intensive horticulture and municipal and industrial out-of-pipe pollution is most definitely a problem. But

to quantify the proportions: around 40% of the total length of waterways in New Zealand is in pastoral catchments and a similar amount in the conservation estate, versus a few percent in horticulture and urban catchments. For most large rivers, only a minor proportion of the nutrient load comes out of pipes from humans and industry; the majority is diffuse: that is, the leaching through and across the land from intensive agriculture and horticulture to waterways.

The more research I did – for teaching, for my own studies on New Zealand's freshwaters and via my overseas experience working in southern Ireland, Eastern Europe and French Polynesia – the more I realised just how extreme our freshwater crisis is by global standards: effectively we export freshwater in the form of food, and have dirty water as a waste product. And I was increasingly aware that our freshwater quality was worsening at an accelerating pace. International comparisons (Bradshaw, Giam and Sodhi, 2010) show that we are among the worst in the world for lowland river and lake quality, and for greenhouse gas emissions. The science is clear. Hundreds of reports from Crown research institutes – and even from the OECD – have detailed the freshwater declines in New Zealand and its causes. Yet it becomes clearer every day that, despite our comprehensive Resource Management Act (RMA), water quality continues to decline.

Given the legislation and the strong evidence of public demand for improved freshwater outcomes, the obvious question is, why is water quality worsening? The most glaring reason is that there has been almost no intervention by the regulators – the regional councils – to rein in the biggest cause, agricultural intensification. So why did central and local government not limit the biggest driver of a problem they were supposedly committed to solving?

In the first two decades after the passing of the RMA the absence of any national freshwater policy meant that the 16 regional authorities charged with environmental regulation were easy targets for the well-resourced big players in industry, especially agriculture. The regional authorities could be picked off individually as they worked through developing their regional plans. At each hearing a team of high-paid lawyers and consultants was deployed by industry. Council staff were no match for these well-funded experts, often deferring to them at every point and many times becoming captured by them. The resources and time budgets of the environmental NGOs, and the mostly unpaid local environmental care group members appearing in their own time, were stretched beyond their limits. These out-gunned individuals and NGOs dropped out along the way as their budgets were drained and their people burnt out. The Department of Conservation appeared at hearings in the early years, but less and less over time. By the time the fifth National government came to power in 2008, the department had virtually ceased to advocate for the environment – a statutory role, no less – and was absent from the table at planning and major resource consent hearings.

... I realised just how extreme our freshwater crisis is by global standards: effectively we export freshwater in the form of food, and have dirty water as a waste product.

Local government

Early in my academic career I had my first experience of the capture of local government by vested interests. I became aware of the pollution of the Oroua River, a tributary of the Manawatū River, near Awahuri where I was then living. My local swimming hole on the Oroua River on State Highway 3 happened to be a regional council monitoring site and I discovered that it was listed as one of the most polluted in the region. The pathogens and nutrients causing the river health problems came partly from intensive farming in the catchment, but especially from the discharge of the municipal waste water from the nearby township of Feilding, plus waste water from a large meat works and a large vegetable washing plant.

After discovering the shocking water quality data, I investigated the resource consent monitoring data for the out-of-pipe discharges into the river. I was amazed to find that for a decade the resource consent requirements were very rarely met. I took this failing up at a meeting with the regional council chief executive and his compliance manager, and I was told that council policy was not to take legal or punitive action on breaches of consent conditions. They informed me that to save ratepayers money on expensive and time-consuming legal action the council preferred to 'work with' the big dischargers to try and reduce their impacts on the river. The meat works and vegetable processing plant had at different times threatened to pack up their operations and move away if too much pressure was put on them over their resource consents. Council officers felt it was their role to ensure that this didn't happen, as many jobs would be lost. They also pointed out that the Manawatū District Council owned and operated the municipal waste water treatment plant, so if they were penalised they would be penalising their own ratepayers.

Around 2009, the Manawatu–Wanganui Regional Council (later renamed Horizons Regional Council) embarked on some relatively ambitious legislation that included the potential to limit farming intensity in some catchments as part of its proposed 'One-plan'. The agriculture industry, including Federated Farmers, vehemently attacked the proposed plan. As usual, at the hearings for the proposed One-plan the agricultural industry appeared with teams of paid consultant experts and lawyers. As a submitter, this situation was one I became used to: giving evidence in a hearing and seeing a team of extremely well-heeled, expensive lawyers and consultants with stacks of files and evidence on one side representing a small number of people with a considerable financial stake in proceedings, a handful of

overworked and harassed-looking council officers in the middle, and a few mostly unpaid individuals doing their best to represent a very large number of current and future users of the environment on the other side.

The decline of water quality in the Manawatū River was increasingly in the news and this culminated in a front-page story in the *Dominion Post*, calling the river 'among [the] worst in the West' (Morgan and Burns, 2009). The headline was based on research done by Roger Young from the respected Cawthron Institute, using an internationally applied comprehensive measure of freshwater ecosystem metabolism to reveal that rates of gross primary productivity and ecosystem respiration in the Manawatū River were among the most extreme ever reported internationally (Young, 2009).

The response from agricultural interests to the report was aggressive. Young was attacked by the agricultural industry to the point where lawyers acting for the Horizons Regional Council were forced to seek an order from the hearing's commissioners to protect him from harassment (RNZ, 2010). Of course, such experiences kill several birds with a single stone, serving also *pour encourager les autres*, dissuading other scientists from sticking their heads above the parapet.

At the next regional council election following the plan change hearings, a pair of local leaders of the Federated Farmers organisation stood as candidates. Their campaigns were unusually loud and well advertised, as they were supported by Federated Farmers. Both men were elected and almost immediately the emphasis on freshwater impacts moved away from agricultural impacts and instead highlighted urban issues. I was at a meeting at Horizons a few days after the new councillors had started, and the council freshwater science manager, clearly upset, stood up and made a statement to a room full of people that sadly now politics would override science at this council.

In 2006 Fonterra applied to the Manawatū–Wanganui Regional Council to renew its consent to discharge waste water from its Longburn processing plant into the Manawatū River. I gave evidence at this consent hearing, which was my first experience as an expert witness. I pointed out that it was difficult if not impossible to quantify the impact of the Fonterra factory discharge, because the river was already so polluted by the time it reached Longburn that the macroinvertebrate community index (MCI) scale had bottomed out. During the subsequent cross-examination, one of the lawyers representing Fonterra passed a note to one of the commissioners, who then asked me if I was philosophically opposed to this discharge. I thought about it and said that yes, I was philosophically opposed to the discharge of any contaminants into rivers. I subsequently found out through a friend of one of the commissioners that this meant my evidence was ignored. If in a murder case the expert pathologist was asked the same question – are you philosophically opposed to murder? – and they said yes, would their expert evidence be ignored?

> The influence of vested interests in the media is seen in many ways, from the subtle power of advertising money to more blatant funding of public relations campaigns.

The examples I have given reveal the politicisation of environmental regulation at local government level in New Zealand. This is referred to, in a recent comprehensive report evaluating the environmental outcomes of the RMA, as 'agency capture': the capture of regional councils by vested interests, revealed, for example, by a 'lack of enthusiasm for setting strong limits for freshwater due to a preponderance of agricultural interests in the council' (Brown, Peart and Wright, 2016, p.20). The Environmental Defence Society noted in its report assessing the environmental outcomes of the RMA that: 'Agency capture of (particularly local) government by vested interests has reduced the power of the RMA to appropriately manage effects on the environment' (ibid., p.6). It is not just in New Zealand: international studies have highlighted regulatory capture as a form of corruption in government water agencies (Moggridge, Carmody and O'Donnell, 2020).

Central government

The influence of vested interests on central government has been discussed in general (Edwards, 2020), but in relation to the environment a recent speech by Simon Upton, the current parliamentary commissioner for the environment and a former minister of the Crown in a National government, summed it up well when commenting on the recent Randerson report, a review of the RMA (Ministry for the Environment, 2020). Upton remarked:

> In taking up the debate the Review Panel has initiated, Parliamentarians need to fashion law that is fit for purpose not just in times of benign governance sympathetic to environmental goals, but in times of conflict and upheaval when leaders are tempted – either by vested interests or unwelcome facts – to let the environment go for short-term gain. (Upton, 2020, p.20)

A recent example of powerful influence on central government that I was directly involved in stands out for me. The Ministry for the Environment set up three advisory groups for its Essential Freshwater programme. I was a member of the Freshwater Science and Technical Advisory Group, and the two other groups were the Kāhui Wai Māori group and the Freshwater Leaders Group. We were tasked with advising the minister for the environment on changes to the National Policy Statement for Freshwater Management to halt the decline of water quality in New Zealand. The issue had become a very big political football. I knew people on each of the other groups, and about midway through the two-year process a group of us discovered via a leaked email that there was a secret

'primary sector group' that the ministry was working with behind the backs of the three publicly acknowledged groups. The email, accidently leaked, claimed that freshwater policy was being written by this group representing the agricultural industry. The email was marked 'confidential and not to be shared' and it was doing the rounds of anyone involved in agriculture, and seemed to have originated within Federated Farmers.

Some graphs were included in this email purporting to show that a measure called 'nitrogen surplus' could be used as a measure of pollution. This measure does not relate to harm done environmentally. I immediately recognised the graph, as I had seen it on the website of DairyNZ, a lobby group for Fonterra. The graph showed a very strong relationship between nitrogen loss at the root zone in dairy pasture and a 'nitrogen surplus'. This data seemed to me to be selected for fitting the line rather than reflecting reality. So, I gathered data for all the Landcorp dairy farms on the same measures and I plotted them in the same way that DairyNZ had, and I found that there was no relationship at all. It was clear that DairyNZ had selected some farms to fit their claims so they could push for a measure that suited their pecuniary interests.

Subsequent questioning by me of the Ministry for the Environment senior staff revealed that there had indeed been a dozen secret meetings with the industry group. Ministry officials then invited us to a meeting in the environment minister's office, where the chief executive of the ministry gave us an apology and *mea culpa*. I had gone into this process holding nothing back, believing we were working with the Ministry for the Environment for a good outcome for all New Zealanders. The discovery that industry lobbyists were being given secret backdoor access to the decision process shook me badly. Looking back, it seems clear that ministry staff at the highest levels had been captured by vested interests.

In 2009, after more and yet more publicity about declining water quality in New Zealand, the newly elected fifth National government set up the Land and Water Forum. I was invited to join. I attended the first few meetings, but soon gave up as I realised that the balance of participants was heavily stacked in favour of environmental exploiters. There was an overwhelming dominance of what the forum called 'stakeholders', by which they clearly meant those with vested interests in commercial use of water. The public of New Zealand, who to my mind are the most important and numerous 'freshwater stakeholders', were represented by a handful of poorly resourced NGO representatives, individuals and Fish & Game New Zealand. As an example of the imbalance, every power company was represented, and every industry in any way involved in exploiting water and the agricultural industry was represented, by large and very well-resourced teams (Land and Water Forum, n.d.). Every individual in the room representing industry extractors was well paid and had ready access to lawyers, administrative support and carefully curated research. On the other side, the NGOs, iwi and environmental defenders were overworked, had little if any support, and had limited access to research.

> The failure at all levels of government to protect our freshwater environment stems from political expediency and a failure to acknowledge, analyse and address the influence of vested interests.

In a 2016 article for the *New Zealand Journal of Ecology* looking back on the Land and Water Forum, Anne Brower highlighted these power imbalances and noted 'that the outlook for environmental quality in New Zealand under collaborative environmental governance is bleak, but perhaps not dismal' (Brower, 2016). Brower also said that:

> No matter how well intentioned the government officials, well trained the scientists, and altruistic the collaborative constituents, the logic of collective action predicts that the vested resource development interest will usually emerge as the winner who took the most. (ibid.)

The chief executive of Fish & Game at the time, Bryce Johnson, described the Land and Water Forum process in their magazine, stating that the 'the process is great for vested interests seeking private commercial use of some public natural resource such as water. But it is a losing game for anyone wanting to retain that resource in its existing natural state for use as fish and wildlife habitat' (Johnson, 2016).

Vested interests in the media

The influence of vested interests in the media is seen in many ways, from the subtle power of advertising money to more blatant funding of public relations campaigns. In 2018 DairyNZ launched a campaign it called 'The vision is clear', describing it as a 'movement ... to encourage and inspire every New Zealander to think about their personal impact on our country's water quality'. As if the predominant polluting problem was with every New Zealander. This campaign is one product of an agreement with Auckland-based New Zealand Media and Entertainment company (NZME.), publisher of the *New Zealand Herald* and owner of several radio stations, which hosts content produced by DairyNZ on its platforms. The campaign's main presence has been a series of articles and advertisements published in the *New Zealand Herald* which are all optimistic, suggest that the freshwater problems are urban and down to the actions of individuals, and make little mention of dairy's overwhelming dominance in the freshwater harm. A stark, preposterous example of shifting the blame was published in the print version of the *Herald* – a prominent 'the vision is clear' advertisement claiming that one way to improve water quality was for urban home

owners to regularly sweep their paths and driveways.

This industry-funded public relations campaign is one of many concerted attempts to divert public awareness away from the harm intensive agriculture is doing. These campaigns have been described as 'cooling discourses' by Sarah Monod de Froideville. She defines cooling discourses as communications that are 'employed to settle concerns about harmful activity that are gathering momentum through acknowledging the harm and appearing to address the activity in some manner'. They are, she notes, 'temporary stupefying discourses that facilitate a state of ignorance, or *agnosis* so that harmful activity can continue or resume unopposed' (Monod de Froideville, 2020). Whether or not these campaigns are successful is hard to judge, but multiple polls have revealed that freshwater is New Zealanders' number one environmental concern and freshwater management has been an important election issue (Fish & Game New Zealand, 2019).

The malign and antisocial hand of vested interests is also felt in universities. For example, at Massey where I previously worked, the agriculture industry had a strong presence, with offices on the campus and students wearing branded clothing. Many student research projects and the research done by academics were directly funded by industry, and industry put on or supported student social events.

For much of the time I was a freshwater scientist and senior lecturer at Massey University, Steve Maharey was vice chancellor. After he left the university, he told me that the head of a large and powerful agricultural lobby group very regularly called him directly by telephone to complain about me and what he called my 'advocacy', demanding that I be dismissed. Maharey said to me he told this lobbyist that his academics have a role under the Education Act as critic and conscience of society, and that unless he had a specific complaint of some false or inaccurate science, he would not be sacking me. No such evidence was ever supplied.

Conclusion

In conclusion, it is clear that a big reason for the failure of environmental protection in New Zealand has been and continues to be the usurpation of the ideals of environmental legislation by relatively small numbers of well-resourced and well-paid people, funded by industries harming the environment with the explicit aim of enabling this harm to continue so private gain can be continued. The failure at all levels of government to protect our freshwater environment stems from political expediency and a failure to acknowledge, analyse and address the influence of vested interests. Part of the problem is that government, both local and central, frequently operates in a simplistic economic growth paradigm, and this inevitably clashes with the uncompromising and non-linear reality of biophysical limits to growth (Borsellino and Torre, 1974; Meadows, Randers and Meadows, n.d.; Schmelzer, 2015). These are real and inescapable limits, and they cannot be fiscally ameliorated (Meadows, Randers and Meadows, n.d.; Browning, 2012).

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Yadira Ixchel Martínez Pantoja

Vested Interests and Business Diplomacy biotechnology companies and gene editing in New Zealand

Abstract

New Zealand is known worldwide for its green image and environmentally friendly products, including a GMO-free status. However, recent advances in biotechnology suggest that new technologies, such as gene editing, may help to combat climate change and contribute to sustainability. Debate about whether to allow the use of gene editing in the dairy, farming and livestock industries in New Zealand has begun because of vested interests in new technologies from multinational corporations, the dairy industry and the government. In New Zealand, companies utilise business diplomacy strategies in order to promote their corporate interests and participate in multi-level networks of influence and information. This article identifies the main stakeholders in gene editing, their roles in a multi-level network of vested interests, and their uses of business diplomacy in New Zealand.

Keywords business diplomacy, gene editing, biotechnology, GMOs, vested interests

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There is worldwide concern about protecting the environment while feeding a growing global population. The United Nations projects the world population to be around 9.8 billion by 2050 (UN DESA, 2017), which poses challenges to food supply and nutrition. New Zealand, a top producer of livestock and dairy, may contribute to solving the problem of feeding the world's population in 2050. To increase productivity while reducing CO_2 emissions produced by farming, agricultural biotechnology, genetically modified organisms (GMOs) and gene editing may be promising tools.

Gene editing is a type of genetic engineering in which part of the genome is cut to alter, remove or change a specific expression of a gene (Royal Society Te Apārangi, 2019b). One of the main tools of gene editing is CRISPR (clustered regularly interspaced short palindromic repeats). Gene editing is closely related to genetic modification because of the alterations done in genomics. However,

scientifically gene editing differs from genetic modification, in which a gene from another species, generally a bacterium, is introduced into a genetically modified organism to generate a specific expression, such as resistance to herbicides. Hence, biotechnology companies and some scientists and institutions claim that gene-editing technology is not genetic modification. Other groups and organisations consider that gene editing is still a form of genetic modification and are concerned about possible effects to the environment and human health. They consider gene-edited products to be GMOs. These differences in opinion have started a worldwide debate around gene editing (Harmon, 2015; Montenegro, 2016; Plumer et al., 2018).

Countries that favour GMOs, such as the United States, Canada, Australia and Brazil, have adopted the 'substantial equivalence' principle, which considers GMOs equal to their counterparts. In contrast, the European Union, Norway and Switzerland have adopted the 'precautionary principle', with a stricter traceability system and mandatory labelling. Similar approaches have been taken towards gene editing. In 2018, the US Department of Agriculture stated that it would not regulate gene-edited plants. Similarly, in April 2019, Australia's Office of the Gene Technology Regulator ruled that the use of gene editing to produce plants, animals and human cells that does not introduce new genetic material will not be regulated (Mallapaty, 2019). In contrast, in July 2018 the Court of Justice of the European Union ruled that crops produced with gene editing should be regulated as GMOs.

In New Zealand the regulation of GMOs has not changed since 1996. The Hazardous Substances and New Organisms Act 1996 prevents the cultivation of GMOs other than for laboratory experiments. However, science has evolved, and some local groups favour gene-editing technology. Crown research institutes such as Plant and Food Research, BioHeritage, the Royal Society Te Apārangi and AgResearch have suggested that New Zealand should update its legislation to accommodate CRISPR developments (AgResearch NZ, 2018; Royal Society Te Apārangi, 2019a). The University of Canterbury has suggested that New Zealand is missing economic and sustainability opportunities by not utilising this technology. Fonterra supports research on alternative protein meat made of gene-edited material to curb CO_2 emissions from livestock production overseas. All these groups have vested interests in gene editing and a common goal of advancing New Zealand's economic growth. But do they also utilise their economic strength and political influence to shape public policy and regulations in ways that meet their own particular interests?

The different levels of networks of influence and information for gene editing consist of multinational corporations, national companies and other public participants.

In order to change regulations and advance common goals, powerful groups have vested interests, and with the help of various strategies, such as business diplomacy, they may advance their own interests. Business diplomacy refers to firms managing and influencing stakeholders in a host country to achieve higher reputation and profit goals, alliances, and a positive political environment, employing instruments such as media releases, educational material, conferences and seminars, awards and research centres (Martínez Pantoja, 2018a). Hence, business diplomacy creates international and local alliances between stakeholders, built on shared interests, that augment the influence of the corporation in a positive way (Kesteleyn, Riordan and Ruël, 2014). Some of the tasks that are managed by business diplomacy are negotiation, renegotiation, compromises and adaptations with local authorities (Saner, Yiu and Sondergaard, 2000). Consequently, the use of business diplomacy assists in the management of local alliances and the creation of multi-level networks that are key to advancing vested interests.

The different levels of networks of influence and information for gene editing consist of multinational corporations, national companies and other public participants. All these stakeholders share a concern about climate change and an interest in the use of gene editing to fight it. They promote a better environment and giving New Zealand better chances to compete in the global arena. In this article I will first analyse biotechnology companies and some of their instruments of business diplomacy implemented in New Zealand. Second, I will examine the interests of national companies in gene editing. Then, I will explain the levels of networks, including industry associations, the government, and public organisations that also have shared interests in gene editing for the prosperity of New Zealand.

Biotechnology companies in New Zealand

Biotechnology companies have passed through a series of mergers and acquisitions. By 2017 this business sector was concentrated into four participants: DowChemical and DuPont, ChemChina and Syngenta, Bayer and Monsanto, and BASF. All of them operate in New Zealand, but BASF does not have gene editing or GMO products in this market.

Syngenta

Syngenta engages globally in research and development and its programme of corporate social responsibility includes climate change. This company has been active in genome editing for more than ten years, and by 2017 it had licenced CRISPR Cas9 and Cpf1 gene-editing technology for agriculture. The commercialisation of its gene-editing technology depends on regulations, so it is concerned about the

European Court of Justice subjecting gene editing to GMO regulations, implying more costs (Syngenta, 2018b).

As a form of business diplomacy, the Syngenta Connections programme in the Asia–Pacific supports students to visit countries in the Asia–Pacific region in order to learn about different farming practices and challenges. The 2017 programme included two students from New Zealand (Syngenta, 2017). Syngenta also has the Syngenta Growth Awards, in which sustainability researchers are recognised. Jim Walker of Plant and Food Research in Hawke's Bay received an award for the use of pesticides in 2018 (Syngenta, 2018a). Syngenta also has a partnership with Plant and Food Research as part of its Operation Pollinator. These instruments help to build long-term relationships and multi-level networks of influence and information.

Biotechnology companies share interests in the promotion of agricultural biotechnology and the removal of regulations inhibiting innovation ...

Bayer

At a global level, Bayer supports research and development in plant breeding through gene editing. Bayer believes that this technology may promote plant diversity and genetic diversity, and that the product should be regulated, not the technique (Preuss, 2018). It argues that plant breeding can be a solution for climate protection and affordable food for an increasing population. Bayer has implemented a biennial Youth Ag Summit, with two participants from New Zealand attending in 2017 and one in 2019 (Bayer Crop Science New Zealand, 2017). This is part of Bayer's Agriculture Education Program to encourage young people to learn about sustainable agriculture. Bayer has also participated in the New Zealand Innovation Awards, in which the Spring Sheep Milk Company was nominated for innovation in 2017. These activities are implemented by Bayer to build networks, promote its products, and disseminate ideas on sustainability which align with its corporate interests.

Corteva Agriscience

DuPont Pioneer, DuPont Crop Protection and Dow AgroSciences evolved over the 2010s into what is now Corteva Agriscience. This company is a leader in the development of gene-edited products. It is considered a pioneer in the use of CRISPR for the development of agricultural products, including soybeans, sorghum, corn and canola (Corteva Agriscience, 2019). Gene editing in agriculture aims to feed a growing population and provide healthier food. In New Zealand, Corteva Agriscience supports the Taranaki Science Fair for students from 30 intermediate and secondary schools around the country, which helps it project a better image and a sense of corporate social responsibility.

Dairy industry

At a domestic level, the dairy industry has shared interests in gene editing in order to be more productive and sustainable. The dairy industry is interested not only in surviving and growing economically, but also in leading innovation.

Fonterra

Fonterra supports genetic modification, given the value this technology may offer for the environment, biosecurity and animal welfare (Fonterra Co-operative Group, 2018). However, this company acknowledges New Zealand's GM-free status under current regulations, and the company emphasises that its products do not contain GMOs. Nonetheless, Fonterra is interested in the development of healthier and more sustainable products through genetic engineering. For example, in early 2019 it invested in Motif Ingredients, a biotech start-up located in Boston which develops laboratory-grown meat with gene-editing technology (Flaws, 2019).

Other international stakeholders share an interest in the development of alternatives to meat protein, including Gingko Bioworks, the Louis Dreyfus Company, Viking Global Investors and Breakthrough Energy Ventures. These firms are investors in Motif Ingredients along with Fonterra. Breakthrough Energy Ventures is a fund supported by billionaires such as Bill Gates and Jeff Bezos (Gibson, 2019). Bill Gates, through the Bill and Melinda Gates Foundation, supports genetic engineering and innovation. Moreover, the Bill and Melinda Gates Foundation and the Rockefeller Foundation are promoters of the green revolution and support GMOs. For example, in Mexico these foundations support the International Centre for the Improvement of Maize and Wheat, which has promoted the introduction of GMOs into Mexico (Martínez Pantoja, 2018b). Consequently, the Bill and Melinda Gates Foundation has become influential in the areas of genetic engineering, health and poverty alleviation, having access to politicians and scientific and business elites. This philanthropic influence on global agricultural policy aims to promote certain ideas and pursue corporate diplomacy (Martens and Seitz, 2015).

Industry associations

Another way to build networks and extend influence is to belong to industry associations. Firms group together with like-minded organisations in specialised trade associations to advance shared goals (Rowlands, 2001). Biotechnology companies share interests in the promotion of agricultural biotechnology and the removal of regulations inhibiting innovation (Falkner, 2009). In addition to having public relations representatives, they join industry associations to better represent themselves in front of governmental agencies and society. Industry associations have the advantage of disseminating technical knowledge and promoting scientific events without the stigma of the company's name.

BIO and its subsidiaries

BIOTech New Zealand, previously known as NZBIO, is a subsidiary of BIO International, which is an industry association that promotes biotechnology and represents biotechnology organisations and research centres, with a global network in 30 countries. BIOTech New Zealand's aim is to maximise capabilities in science and technology and create a stronger economy by embracing opportunities offered by biotechnology (BIOTechNZ, 2019a). BIOTech New Zealand supports agricultural biotechnology and has urged New Zealand to adopt a new biotechnology strategy because the global biotechnology market is expected to be worth US$727 billion by 2025 (BIOTechNZ, 2019b). On gene editing, its executive director, Zahra Champion, has expressed her disappointment to the minister of conservation over the government forbidding the use of this technology to fight predators in New Zealand.

NGOs

Non-governmental organisations (NGOs) are relevant because they give legitimacy to governmental activities. Additionally, some NGOs enjoy popularity and their activities concentrate on practical matters or specific causes, in contrast to political parties (Castells, 2008). NGOs also perform proactive consultation to ensure the legitimacy of policy decisions (Saner and Yiu, 2008). Hence, NGOs are a source of credibility and they may foster cooperation towards common interests, along with building a broader network of influence.

Pure Advantage

Pure Advantage, a research charity in New Zealand which promotes green growth, supports gene editing, biotechnology and new food technologies. Rosie Bosworth, a future foods specialist with Pure Advantage, claims that the agricultural industry is already being disrupted by start-ups that develop lab meat, and that the future of food technology is in non-meat lab-based protein. Hence, the public and private sectors need to invest in this area to create a more sustainable industry and to be more competitive in food production and agriculture (Bosworth, 2016). She also endorsed Fonterra's sponsorship of Motif Ingredients, despite the criticism the firm received for supporting gene editing.

> … genetically modified foods and gene-edited products are not accepted in some premium markets and may not solve all the environmental problems that we face today.

Government departments and Crown research entities

Businesses' agendas advance further when companies share vested interests with the government by collaborating and creating partnerships. In the case of gene editing, there are government agencies interested in biotechnology.

Ministry of Business, Innovation and Employment

The Ministry of Business, Innovation and Employment has not presented an official statement on gene editing. However, it has funding for science and development in biotechnology. The 2019 Endeavour Round included a project to modify brushtail possum fertility using gene editing. A report titled 'Current land-based farming systems research and future challenges' analyses the possible applications and potential of gene editing and how this technology is regulated.

Plant and Food Research

This institute has a clear policy regarding genetic modification. This technology is used only for confined experiments with the purpose of enhancing the existing horticultural, arable, seafood and food and beverage industries in New Zealand, and to contribute to economic growth and the environmental and social prosperity of the country (Plant and Food Research, 2018). The Operation Pollinator partnership combines the expertise of Plant and Food Research in identifying associations between plant species and insects, and the know-how of Syngenta in enhancing biodiversity, increasing the effectiveness of pollinators, and improving crop yields, sustainable farming and environmental stewardship (Plant and Food Research, 2019). This partnership allows a more extended network of cooperation towards biotechnology applications.

BioHeritage Challenge

This agency oversees protecting New Zealand's biodiversity through partnerships and research innovations. Its director, Andrea Byrom, has stated that a possible solution for pest control could be gene editing or gene silencing, as long as it is cheaper than traditional pest control per hectare. But any new genetic technology must be subject to public consultation (Biological Heritage, 2017). Hence, this agency is interested in gene editing if it is accepted by the public.

AgResearch

This agency has not implemented gene editing directly. However, it employs genomics-based research tools in order to improve growth rate, health, meat and milk production, and fecundity, and to reduce the use of chemicals in livestock (AgResearch NZ, n.d.). Tony Conner, Forage Science Group Leader and a supporter of forage genetics, considers that a public discussion about gene editing applications in food production in New Zealand is necessary (AgResearch NZ, 2018).

The Royal Society Te Apārangi

In October 2018 the Royal Society released a document discussing the benefits of gene-editing technology, its differences from GMOs, its potential for important industries in New Zealand, such as honey,

dairy, agriculture and livestock, and the effects on the environment. The Royal Society's panel calls for the revision of gene-editing technology regulations and for there to be a wide public discussion to explore and assess gene editing to maintain biodiversity, the environment and primary industry, including kaupapa Māori (Royal Society Te Apārangi, 2019a). This agency is the most important one promoting gene editing and inviting stakeholders to start a discussion on how gene editing may benefit New Zealand.

University of Canterbury

Emerita professor and plant biologist Paula Jameson from the University of Canterbury considers that New Zealand should re-evaluate gene editing for the improvement of crop production and the possible benefits for sustainability in agriculture and the environment. Countries such as the United States, Australia, Canada, Argentina, Japan and Brazil are already accepting gene editing with no major regulatory oversight (University of Canterbury, 2019). There is a concern that New Zealand is left being behind in science and research, so she recommends reconsidering gene editing.

Conclusion

Gene-editing applications for specific purposes, such as cow's milk free of allergens, can be beneficial for the economic growth of the country. This would boost the dairy industry to make farmers more competitive. However, genetically modified foods and gene-edited products are not accepted in some premium markets and may not solve all the environmental problems that we face today. Regulations still need to incorporate kaupapa Māori, consumer perceptions, the possible effects on the environment, and New Zealand's image abroad: as clean, green and GMO-free, or as a gene-editing proponent and innovator. A lot more public consultation is required before this new technology is adopted.

Biotechnology companies have influenced the regulation of GMOs internationally, inserted representatives in international bodies to influence decisions, and persuaded governments to relax regulations. A similar scenario may be predicted for gene-editing regulations, in which some of the same stakeholders interact with and exercise their diplomatic skills to influence regulators. More importantly, with all these vested interests in gene editing, it is worth asking the following questions: to what extent will this gene-editing technology be developed by public research institutions for the use and profitability of the private sector? To what extent should the private sector receive support from the government, at public expense, to advance its corporate interests? What will be the direct benefits for farmers, the environment, and overall for New Zealand? We live in an era of rapid technological change. Sooner or later this issue will become a political controversy, and some vested interests will promote gene editing as a tool to address the climate crisis and to help New Zealand thrive.

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Hannah Blumhardt

Foxes Guarding the Hen House?

Industry-led design of product stewardship schemes

Abstract

For the first time since the enactment of the Waste Minimisation Act 2008, New Zealand is applying regulated (or mandatory) product stewardship to several priority products. By making those who manufacture, sell and use products responsible for minimising the waste those products cause, well-designed product stewardship schemes can act as a critical tool in the transition to a circular economy. However, the New Zealand government has put its faith in industry to lead scheme design. Such an approach threatens to vitiate robust, ambitious schemes and foreground industry interests over those of wider society and the natural environment. This article juxtaposes the radical potential of product stewardship against the probable outcome of industry-led schemes, and recommends reforms that the minister for the environment should pursue in order to shift the dial towards more inclusive design of product stewardship schemes.

Keywords product stewardship, zero waste, circular economy, industry capture

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In 2020 New Zealand began developing its first regulated product stewardship schemes in a drive to reverse our status as one of the world's most wasteful countries. Schemes will cover tyres, electronics, agrichemicals, farm plastics, refrigerants and plastic packaging. Whether this foray into regulated product stewardship triggers meaningful waste prevention or simply results in the proliferation of end-of-pipe recycling programmes will depend on robust, ambitious schemes reinforced by regulations. Success hinges on scheme design, especially who gets to set the product stewardship agenda, and government's role in the process. Unfortunately, New Zealand lacks a precedent for effective scheme design. The minimalism of the Waste Minimisation Act 2008 – home to New Zealand's product stewardship provisions – permits an outdated reliance on industry self-regulation, with only light-touch government intervention, and no guarantee of oversight in the public interest. The minister for the environment must ensure that the upcoming review of

the Waste Minimisation Act addresses these issues. Otherwise, New Zealand risks leaving the fox in charge of the hen house, and validating weak schemes that hinder true circularisation of our economy.

What is product stewardship and what is its purpose?

Product stewardship is about making those who manufacture, sell and use a product responsible for reducing that product's environmental impact across its life cycle. Traditionally, product stewardship includes:

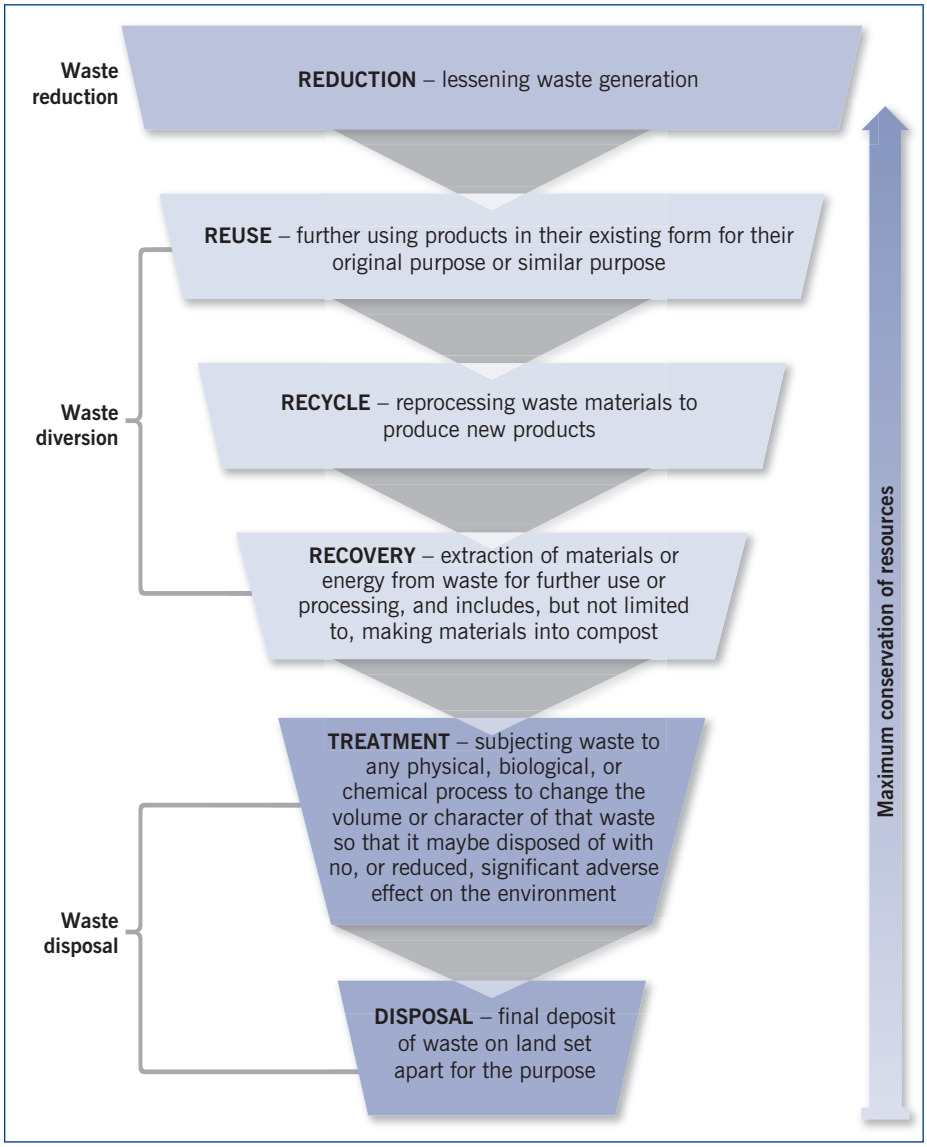
- product take-back services for reuse or recycling;
- market-based measures to lift recovery rates (e.g. advanced disposal fees or deposit/return systems); and
- modulating fees to cover costs of processing hard-to-recycle products.

Product stewardship aims to internalise a product's social and environmental costs, which is assumed to incentivise producers to redesign products to be more environmentally friendly (Michaelis, 1995; Andrews, 1998, p.188). This assumption has solidified product stewardship as integral to the circular economy aspiration to 'design out waste' (Jensen and Remmen, 2017; Crawford, 2021).

However, to date, excessive focus on managing 'end-of-life' products has shoehorned product stewardship schemes towards recycling, rather than upstream activities. Zero waste and circular economy experts continually remind policymakers that product stewardship should consider products' full life cycles, and adopt interventions that disincentivise over-production and over-consumption and incentivise product redesign, reuse, maintenance and sharing, not only recycling (Hannon, 2020, p.4; Sanz et al., 2015; Lane and Watson, 2012, pp.1256, 1260; National Recycling Coalition, 2020). Examples include:

- landfill bans;
- binding reduction targets and import levies for certain products, materials and chemical additives;
- reuse quotas; and
- design specifications and/or eco-modulating fees to increase product durability, reusability and repairability and decrease product toxicity.

Figure 1: The waste hierarchy, based on the approach in the Waste Minimisation Act



Source: Ministry for the Environment (2009), p.19

These types of interventions focus on changing how we design and use products to decelerate global demand for raw materials and the pace of manufacture, a concept described as dematerialising consumption (Cogoy, 2004; Petrides et al., 2018). Success in this endeavour will mean society generates less waste, but this is not necessarily the end goal. Rather, waste reduction signifies our progress towards mitigating climate change, respecting planetary boundaries, and replacing the current 'take–make–throw' linear economy with a regenerative circular economy.

In the current era of ecological breakdown, environmental policies like product stewardship must serve these critical bigger-picture goals. Fortunately, product stewardship is capable of doing so because it takes an expansive view, identifying roles and responsibilities for actors across the product life cycle (as opposed to 'extended producer responsibility', which places responsibility on producers solely).[1] Accordingly, product stewardship carries the 'radical potential' to highlight the multiple opportunities for waste prevention across supply chains and a product's life. This vista considers post-consumption/end-of-life products, but also how stuff circulates at the household or community meso-scale, and the macro-scale processes that drive raw material extraction and manufacturing decisions (Lane and Watson, 2012; Hannon, 2020, p.4). Some commentators argue that this diffused outlook creates confusion, allowing producers to deflect regulatory accountability, continue externalising scheme costs, and implement ineffectual recycling initiatives (Nichol and Thompson, 2007; Lewis, 2009, p.21; Lane and Watson,

2012, p.1258). However, good scheme design can mitigate these problems, and ensure that product stewardship schemes are ambitious and incorporate robust regulatory measures that help to reduce emissions, material consumption, pollution and waste.

Product stewardship in New Zealand: lofty vision, shaky foundations

Product stewardship is enshrined in the Waste Minimisation Act 2008. Section 8 defines product stewardship as a system to:

> encourage (and, in certain circumstances, require) the people and organisations involved in the life of a product to share responsibility for – (a) ensuring there is effective reduction, reuse, recycling, or recovery of the product; and (b) managing any environmental harm arising from the product when it becomes waste.

Subsection 8(a) guides product stewardship schemes to follow the waste hierarchy, which prioritises preventing and reducing waste, and fostering systems of reuse, before recycling, composting, energy recovery or disposal.[2] The provision's wording encompasses a product's end-of-life, but also upstream, activity, including product redesign geared towards achieving reduction outcomes (e.g. selling liquid products as solid concentrates to eliminate plastic packaging) or improving a product's reusability (e.g. designing durable, repairable electronics). Accordingly, subsection 8(a) envisages ambitious forms of product stewardship that engage interventions across product life cycles.

Section 8 also foreshadows both voluntary and mandatory product stewardship. Under the voluntary approach, anyone (usually an industry group) can design a scheme, then apply for its accreditation, provided certain basic criteria in section 14 of the Act are met. Until recently, successive New Zealand governments preferred the voluntary approach to product stewardship, despite mounting evidence that it was not delivering comprehensive waste reduction, nor cost redistribution outcomes (Blumhardt, 2018).

The pathway for mandatory schemes involves the relevant minister declaring a product a 'priority product', which triggers the requirement that a product stewardship scheme be developed and accredited. Under section 12 the minister can also issue guidelines regarding the expected 'contents and effects' of priority product schemes, with which schemes should be 'consistent' to receive accreditation. Following accreditation, the minister can make scheme participation compulsory under section 22(1)(a), a discretionary power only available for priority product schemes. Any additional regulatory measures to trigger activities up the waste hierarchy, such as fees, deposit/return systems, binding targets or design specifications, are not guaranteed, and likely depend on whether scheme designers recommend them. This makes the scheme design process critical. However, the Act is silent regarding who should design schemes and how.

In July 2020 the then associate minister for the environment, Eugenie Sage, triggered the mandatory product stewardship process for the first time, declaring the following 'priority products':

- tyres;
- electrical and electronic products;
- agrichemicals and their containers;
- refrigerants and other synthetic greenhouse gases;
- farm plastics; and
- plastic packaging.

The minister also exercised her discretion to issue section 12 guidelines.[3] Schemes are now in development for all listed products, with applications for accreditation due over the coming years.

The move towards mandatory product stewardship represents a turning point in New Zealand waste policy, prompting optimistic assessments about its potential to transform the economy and address various environmental ills (Crawford, 2021). For example, the Climate Change Commission has recommended that the government expand product stewardship to more products to help reduce greenhouse gas emissions (Climate Change Commission, 2021, p.125). This optimism reflects the growing influence of zero waste, circular economy strategies, which perceive product stewardship's potential to tackle climate change and resource depletion through upstream reductions in waste, toxicity and material consumption (Haigh et al., 2021; National Recycling Coalition, 2020). However, while the Waste Minimisation Act's expansive definition of product stewardship is fit for purpose, its silence regarding the scheme design process is not. As will be discussed, this silence risks undermining truly ambitious schemes by surrendering product stewardship to vested interest capture.

> Industry-led co-design allocates power to those with a vested interest in the status quo linear economy, while effectively marginalising other interest groups and experts.

Scheme design: who's in charge and why does it matter?

Realising the radical potential of product stewardship to stimulate circular business models hinges on the presence and influence of bold, disruptive ideas during scheme design. Under the Waste Minimisation Act, scheme design loosely follows a 'framework' approach whereby government sets general expectations for scheme outcomes and leaves industry to design schemes within these parameters (Hickle, 2014; Lane and Watson, 2012, p.1257). The minister's section 12

guidelines set the overarching 'contents and expected effects' of schemes. However, when it comes to scheme design, the passive voice in key provisions – 'a product stewardship scheme for the product must be developed' (s10(a)) and 'accreditation of the scheme must be obtained' (s10(b)) – elucidates neither a process nor who should take charge.

New Zealand policymakers have long assumed that industry would fill this gap. Soon after the Waste Minimisation Act's enactment, the Ministry for the Environment released *A Guide to Product Stewardship*, stating that 'it is expected that any business involved in the product life cycle will take the lead in designing and implementing schemes' (Ministry for the Environment, 2009, p.2). The document explained that industry 'know the most about the product' and 'are best placed to efficiently incorporate initiatives to manage end-of-life impacts into the design, production and distribution of the product' (p.2). A decade later the ministry called this approach 'co-design', adopting it for New Zealand's first regulated product stewardship schemes with similar justifications: 'government intervention can be slow', whereas business is 'far more agile in leading innovation in areas of expertise' (Ministry for the Environment, 2019, p.17). Furthermore, '[u]nlike the Government, business can bring to the design process a deep understanding of supply chains, cost-effective logistics, product design, and stakeholder and customer expectations' (ibid.).

Industry-led co-design allocates power to those with a vested interest in the status quo linear economy, while effectively marginalising other interest groups and experts. The ministry does state that co-design would 'benefit from including wider stakeholders', including collectors, recyclers, territorial authorities, and advocates for consumers and environmental and community health, and that Māori must be part of co-design as partners with the Crown (ibid., p.18). However, the Waste Minimisation Act creates no framework to ensure wider stakeholder participation (Mia, 2011, p.103). Although the ministry commits to 'promote and monitor' scheme design processes (Ministry for the Environment, 2019, p.18), an active facilitation and oversight role is warranted, given that 'groups have unequal access to government policy-making processes' (Lewis, 2009, p.82) and 'the environment cannot sign a contract and has no way to represent its interests' (Rashbrooke, 2018, p.130). Furthermore, inclusive processes are needed to ensure fairness and scheme durability:

> If everyone is in the room when regulations are being drawn up – including the firms affected, but also their sharpest civil-society critics – and the issues are fully canvassed, the openness of the process raises the chance of producing rules that are well-informed, necessary and likely to be obeyed. (ibid., p.77)

Undoubtedly, industry stakeholders are essential. However, product stewardship accords responsibility to many actors who share a stake in scheme outcomes and a right to influence them. Sometimes these interests will conflict with industry, given that many social and environmental costs of production are currently externalised. A neutral arbiter with policymaking competency is needed to oversee inclusive scheme design, balance competing interests and power discrepancies between stakeholders, and act decisively for the public good. In a democracy, these are roles government can fulfil that 'no other body can' (ibid., p.3).

The government's decision to derogate these roles likely stems from resourcing constraints that prohibit the ministry from leading scheme design when the Waste Minimisation Act does not require this. This predicament reveals the legacy of neo-liberalism, which views government as clunky, bureaucratic, or even oppressive when upholding social and environmental goals vis-à-vis the efficiency of industry self-regulation (ibid.) – views that have led New Zealand to excel at 'privatizing its environmental regulatory system' (Haufler, 2001, p.41). However, industry self-regulation 'is not … a viable substitute for effective governance regimes for environmental protection' (Andrews, 1998, p.193). One example of the consequences of this approach are the industry projects that have lumped the New Zealand government with tracts of contaminated land and toxic waste to manage at public expense: for example, the hazardous waste stockpiled at the Tīwai Point aluminium smelter, and in Northland by Sustainable Solvents Group (Pennington, 2021; Hancock, 2021).

> Research indicates that 'companies tend to apply strategies that do not challenge the concept of business as usual, which in the long run does not change companies' relationship with nature' …

Producers may indeed know best how to redesign their products to reduce waste most efficiently. However, this does not mean they can be relied upon to propose necessary solutions that go against their vested interests. Ultimately, product stewardship exists to redress problems industry has been unable (or unwilling) to solve independently. While producers may wish to control the rules that bind them, government should not aspire to deliver this. And yet, those selected to lead New Zealand's first priority product schemes are largely industry-led groupings and/or non-profit membership organisations comprised of industry representatives. Warning signs are already emerging that this approach could vitiate robust, ambitious product stewardship schemes.

Warning signs: the pitfalls of industry-led scheme design

Small horizons – 'If recycling is the answer, we're asking the wrong question'

Allowing the regulated community to design the rules facilitates neutralisation of robust, ambitious regulatory proposals. Research indicates that 'companies tend to apply strategies that do not challenge the concept of business as usual, which in the long run does not change companies' relationship with nature' (Jensen and Remmen, 2017, pp.377–8). Industry-led product stewardship schemes rarely rise above recycling, as recycling fits more comfortably within current linear business models than activities up the waste hierarchy (Lane and Watson, 2012, p.1256). Can we really expect the plastic packaging industry to impose binding reduction targets on their own product? Or the electronics industry, which profits from product upgrades and obsolescence, to recommend regulations that require longer-lasting, repairable products or increased sharing or service-based business models?

A pro-recycling approach permeates New Zealand's proposed product stewardship schemes. For example, AgRecovery – the existing voluntary product stewardship scheme for agrichemicals – has been selected to lead co-design of the agrichemical and farm plastics mandatory schemes. AgRecovery has pioneered efforts to reduce on-farm burying and burning of waste plastics, which is laudable. However, the scheme has relied on open-loop recycling of collected plastics.[4] When the priority products were declared, AgRecovery's early communications called product stewardship a 'recycling scheme', only occasionally referenced reuse and redesign, and made no mention of reduction (AgRecovery, 2020). A more inclusive scheme redesign process to introduce fresh, external perspectives might help broaden horizons.

Similarly, in designing the proposed product stewardship scheme for tyres, the industry-led Tyrewise group comprehensively weighed various options for managing rubber from end-of-life tyres (ELTs) against the waste hierarchy, yet excluded 'reduce' outcomes:

> Whilst reducing the waste generated has the highest weighting within the Waste Hierarchy it is unable to be applied … This report identifies the alternative uses for ELTs and to do that it must be assumed that the waste has already been created. (3R Group Ltd, 2012, p.25)

While pragmatic, framing analysis around 'alternative uses for ELTs' does not uphold the spirit of section 8(a) of the Waste Minimisation Act. Of course, end-of-life tyres will always exist. Nevertheless, product stewardship presents an opportunity to reduce their total numbers, an opportunity that is missed when removed from the equation.

Tyrewise also gives reuse pathways like retreading short shrift, and averts any ability to influence tyre design to address durability, toxicity or microplastic pollution (3R Group Ltd, 2020, p.22). The scheme proposes that end-of-life tyre processors receive modulated payments to encourage preferred uses according to the waste hierarchy (ibid., p.132). However, the end-of-life focus restricts scheme incentives to energy recovery (tyre-derived fuel and pyrolysis) and various open-loop recycling options. Some of the proposed uses have potential ecological and human health hazards that Tyrewise underexplores, reinforcing the need for independent, suitably qualified oversight of industry-led scheme proposals to assess environmental and social outcomes (Llompart et al., 2013).

Regulatory capture

At times, the legitimacy the product stewardship process grants to industry-designed schemes can be exploited to decelerate advances towards effective and ambitious regulation. Overseas commentators have noted that as regulators consider product stewardship, industries begin 'co-opting public regulation' to lock in 'comfortable rather than demanding standards' (Andrews, 1998, p.186). This can include 'getting out in front of state legislatures' by designing industry schemes for adoption, or mandatory EPR (extended producer responsibility) laws being 'absorbed by a pre-existing, voluntary industry consortium' (Sarno and Hopkins, 2015, pp.13, 12). Industries may create or platform such consortia – typically non-profit associations with a veneer of separation and beneficence – that then act as blocking coalitions either within or outside the product stewardship system. Sometimes, the very agencies established to manage product stewardship schemes (producer responsibility organisations or PROs) become lobbyists against progressive legislation (Tangpuori et al., 2020, p.150).

The global packaging industry has repeatedly demonstrated this behaviour, creating multifarious industry-led non-profit groupings and consistently pre-empting legislation by promoting voluntary pacts that create the semblance of activity while delaying real progress (ibid., pp.13–17). In Europe, established packaging PROs have opposed regulatory efforts to lift packaging recovery rates and introduce design specifications and binding plastic reduction targets (ibid., p.150; Wermter and Vanhoutte, 2021). New Zealand's Glass Packaging Forum, an accredited voluntary product stewardship scheme, actively opposes a beverage

… as regulators consider product stewardship, industries begin 'co-opting public regulation' to lock in 'comfortable rather than demanding standards'

deposit/return scheme applying to glass, much like the glass industry overseas (Tangpuori et al., 2020, p.109).

In New Zealand, industry groupings are moving (or have already moved) to absorb or pre-empt mandatory product stewardship. For example, since plastic packaging's 'priority product' declaration, several packaging organisations have begun positioning to influence scheme design, including the Australian Packaging Covenant Organisation (APCO), currently promulgating its ANZPAC initiative across Oceania. APCO already leads the industry component of Australia's co-regulatory packaging product stewardship scheme. Despite this scheme's failure to meet its targets, APCO continues to push for voluntary industry–government collaboration, claiming that further regulatory intervention would be 'heavy-handed' (Readfearn, 2021). Allowing APCO to lead co-design of New Zealand's scheme would likely produce similar outcomes.

Meanwhile, the Australia and New Zealand Recycling Platform (ANZRP) has been selected to lead co-design of the scheme for electrical and electronic products through its flagship programme, TechCollect. ANZRP is a self-proclaimed 'industry-for-industry' organisation whose membership includes over 50 global electronics brands. It is transparent that its members are 'our focus and our motivation' and that members' 'needs are second to none' (ANZRP, 2019, p.18). In 2019, before the priority product declaration, ANZRP described 'actively lobbying the New Zealand Government for a regulated product stewardship scheme' at its members' request, and funding a pilot e-waste collection programme. The organisation noted that '[o]ur efforts have not gone unnoticed as we now find ourselves in the ideal position to deliver such a scheme when the Government launches its program' (ibid., p. 9).

ANZRP/TechCollect already run Australia's largest co-regulatory scheme for e-waste, which faces allegations of excessive competitiveness and ineffectual cost redistribution. When managing product stewardship schemes, industry groups are motivated to reduce the scheme fees producers pay. This can drive improved scheme efficiency, but also continued cost externalisation. For example, within Australia's e-waste scheme, producer fees have dropped so far that some local governments say they are 'financially underpinning the logistics of the Scheme' (Western Australia Local Government Association, 2018, p.14). Furthermore, the cost-driven approach has so depressed the price for e-waste recycling that some recyclers struggle to meet social and environmental standards while maintaining contracts. These recyclers have urged the Australian government to provide more oversight and 'to stop considering that the producer organisations are the best ones to run these schemes' (Stephens, 2020).

Industry dominance in product stewardship scheme design casts a shadow over the allocation of public funds to these processes. The Ministry for the Environment administers the Waste Minimisation Fund, through which it has allocated grants for industry-led co-design, but also to industry-led associations *before* the priority product declarations (presumably to ensure existing capacity to design and run schemes). Since 2018, over $1 million has been allocated to these ends (Ministry for the Environment, n.d.b). Additionally, in 2019, Plastics NZ was awarded $1 million to investigate the circular economy for plastics (Plastics NZ, 2020). One can reasonably assume that this study will inform the future plastic packaging scheme, for which co-design is still pending. This funding was awarded despite Plastics NZ existing to advocate for 'plastics growth and the development of the plastics industry', including working 'to encourage and at times prevent change that we think will adversely affect our member companies' (Plastics NZ, n.d.). The Waste Minimisation Fund is public money and should uphold inclusive design processes, and transparent feasibility investigations that lay the groundwork for robust schemes. Current use of funds risks industry groups being paid to control product stewardship policymaking and bolster future lobbying.

Going forward

As interest in product stewardship grows, New Zealand's approach needs updating to ensure that schemes achieve meaningful waste reduction rather than simply rubber-stamping a plethora of glorified recycling schemes. The minister must prioritise this in the government's waste work programme. The review of the Waste Minimisation Act (occurring throughout 2021) is a good opportunity; several reforms should be considered.

> ... New Zealand's approach needs updating to ensure that schemes achieve meaningful waste reduction rather than simply rubber-stamping a plethora of glorified recycling schemes.

Establish an independent product stewardship agency and comprehensive compliance regime

The updated Waste Minimisation Act should establish an independent central government agency to oversee product stewardship, with a legislated compliance regime to ensure that scheme outcomes and targets are set, delivered and consistently improved upon. Given growing interest in product stewardship and the circular economy, this agency must be properly resourced to work proactively across ministries and manage a growing work programme. The Act should establish the agency's mandate and key responsibilities, including:

- advancing products for priority product status;
- leading and overseeing inclusive scheme design processes;
- setting ambitious, measurable reduction targets with regular, transparent reporting requirements, and monitoring and reviewing accredited schemes for compliance;
- advocating for the waste hierarchy and public interest in all schemes; and
- recommending new regulatory powers to achieve more ambitious waste reduction outcomes.

Tighten requirements for expected contents, effects, scheme design and accreditation

The status of the minister's section 12 guidelines regarding the expected content and effects of priority product schemes is too precarious. The guidelines are issued in the *New Zealand Gazette* and could be revoked as ministers change. They are not binding; they do not consider scheme design; and issuing them at all is discretionary. The new Waste Minimisation Act should build scheme expectations into its provisions, including adherence to the waste hierarchy and a focus on full product life cycles rather than 'end-of-life' products and 'end-of-life' costs.

The Act must also establish the basic elements of a robust priority product scheme design process, including articulating a leadership role for government. The design process for the proposed beverage container return scheme in 2020 provides a useful blueprint regarding government oversight (Ministry for the Environment, n.d.a). The Act should also adopt a more stringent accreditation process for priority products that better enables the government to evaluate proposed schemes, rather than being obliged to accredit the first proposed scheme that meets the guidelines.

Extend and utilise section 23 of the Waste Minimisation Act

Discussion about regulated product stewardship has focused on the priority product process. However, all of part 2 of the Waste Minimisation Act relates to product stewardship , including the oft-overlooked section 23. This section enables various regulations for both non-priority and priority products, including:

- landfill bans;
- bans of products containing specified materials;
- mandatory product take-back services for reuse, recycling, recovery, treatment or safe disposal;
- fees to cover product management costs (e.g. advanced recycling fees or clean-up costs);
- deposit/return systems; and
- compulsory labelling requirements.

Arguably, section 23 is the Act's most promising product stewardship provision because it enables regulation without the entire priority product process. Furthermore, its use is initiated by central government and must be preceded by public consultation, which equalises stakeholder input, with government stewarding the process and final decision. However, successive governments have underutilised this provision. Only subsection 23(1)(b) – the provision permitting product bans – has been used (twice), to ban single-use plastic bags and plastic microbeads in janitorial products.

Governments should use section 23 more. Furthermore, the Waste Minimisation Act review should expand the regulatory powers in this provision to enable binding reduction targets for particular products, chemical additives and materials; reuse quotas; product design specifications, including mandatory recycled content; eco-modulating fees; and tools to incentivise the service/sharing economy. The provision should also be amended to permit bans on single-use applications of specified products, regardless of material composition.

Allocate waste levy revenue according to the waste hierarchy

As product stewardship scheme proposals emerge, it is increasingly clear that New Zealand lacks not only recycling capacity, but also infrastructure, systems and expertise to deliver outcomes higher up the waste hierarchy – from reusable packaging systems and repair and refurbishing apprenticeships, to research into product redesign to reduce waste and toxicity. Waste levy revenue should be allocated towards building such capacity to enable scheme designers to recommend ambitious product pathways.

Conclusion

New Zealand is one of the world's most wasteful countries per capita (OECD, n.d.; Hoornweg and Bhada-Tata, 2012, p.82). In the global economy's current 'take–make–throw' setting, an outsized waste footprint signifies entrenched overconsumption of Earth's material resources, and the associated greenhouse gas emissions, pollution, resource depletion and biodiversity loss. High-income countries like New Zealand must reduce waste by reducing material consumption (Haigh et al., 2021). This cannot be achieved by sporadically inventing new recycling programmes, but through transforming how we design and use products. Product stewardship is critical to this transformation, but requires far more activity at the 'reduce' and 'reuse' levels of the waste hierarchy, at every stage of a product's life cycle. This ambitiousness resides in the Waste Minimisation Act's definition of product stewardship, but not in industry-led interpretations. Revamping how we understand, utilise and design product stewardship, and government's role in this process, will better equip us with the tools necessary to move towards a zero waste, circular society and reverse the dramatic degradation of this one planet we call home.

1 However, product stewardship still recognises that producers hold greatest influence in reducing products' adverse impacts, and should carry most responsibility within product stewardship schemes (Hickle, 2014, p.266; Lewis, 2009, p.22; Mia, 2011, pp.82, 124).
2 The waste hierarchy is ordered the way it is because activities near the top are most effective at reducing waste and emissions, so this is where we should invest most time and resources.
3 The guidelines cover expectations such as circular resource use, fully internalised end-of-life costs borne by producers, public accountability, and open and transparent appointment of representative directors or governance boards.
4 Open-loop (as opposed to closed-loop) recycling occurs when a product is not recycled back into the same type of product with the same function. Consequently, there is material 'leakage' in the original product's life cycle, meaning raw materials are required to continue manufacturing the product.

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Anne-Marie Brady

Magic Weapons and Foreign Interference in New Zealand

how it started, how it's going

Abstract

In March 2021, the New Zealand Security Intelligence Service (SIS) launched a remarkable campaign to inform the New Zealand public on the risk of foreign interference. In New Zealand, reference to 'foreign interference' almost always relates to the foreign interference activities of the Chinese Communist Party (CCP) government. New Zealand has been severely affected by CCP foreign interference. For the Ardern government it was never a matter of 'whether' New Zealand would address this issue, but 'how'. The SIS's unprecedented public information campaign is part of a significant readjustment in New Zealand–China relations since 2018. This article documents some of those changes.

Keywords New Zealand–China relations, foreign interference, united front work

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In March 2021, New Zealand's most secret of agencies, the New Zealand Security and Intelligence Service (SIS), launched a remarkable campaign to inform the New Zealand public on the risk of foreign interference (Protective Security Requirements, n.d.). The SIS released a deluge of documents for the campaign. Buried among them was the startling revelation that it had discovered a New Zealander 'working on behalf of a foreign state intelligence service', collecting information for that foreign government against New Zealand-based dissidents, and that another individual 'closely connected to a foreign state's interference apparatus' was trying to co-opt New Zealand political and economic elites on behalf of a foreign government (New Zealand Security Intelligence Service, 2021).

The SIS's unprecedented public information campaign is part of a significant readjustment in New Zealand's policy towards its major trading partner, the People's Republic of China (PRC). The readjustment did not happen overnight; it is a result of a series of changes made in the last four years. This article documents some of those changes. New Zealand has been the canary in the coal mine for many

other small states that are also trying to defend themselves against China's political interference activities without being punished economically for doing so.

How it started

The PRC's political interference activities in New Zealand first hit the headlines in September 2017, when *Newsroom* and the *Financial Times* broke the news that a New Zealand government MP, Yang Jian, had worked in Chinese military intelligence for 15 years (Jennings and Reid, 2017; Anderlini, 2017). Soon after, I released my research paper 'Magic weapons: China's political influence activities under Xi Jinping' (Brady, 2017). Until the 'Magic weapons' paper came out, Chinese Communist Party (CCP) political interference activities had not been a priority for the SIS, which for much of the previous decade had focused on counter-terrorism, and they had not been publicly discussed in New Zealand. The 'Magic weapons' paper broke new ground by tracing the connection of what the CCP refers to as 'united front work' to espionage and political subversion. It outlined how, under Xi Jinping, united front work had become a core activity – a magic weapon – of the CCP. The paper used New Zealand as a case study to explain a wider global phenomenon.

The revelations of the 'Magic weapons' paper had an immediate impact, both in New Zealand and internationally (Congressional-Executive Commission on China, 2017). Commentators described it as 'devastating', a 'bombshell', 'essential reading', 'a weighty academic report', 'an exemplar study', a 'sputnik moment' (Field, 2017; Walker, 2017a; Barmé, 2017; Fisher, 2017; Gitter, 2017; Diamond, 2017). It was cited as a factor in the 2017 New Zealand general election and in the post-election coalition talks (Walker, 2017b). In 2017, the US National Endowment for Democracy drew on the paper to create their concept of 'sharp power' (Cardenal et al., 2017).

The 'Magic weapons' paper outlines the corrupting influence of CCP political interference activities on the New Zealand political system through the blurring of personal, political and economic interests, and how they have curtailed freedom of speech, religion and association for the New Zealand ethnic Chinese community.

In New Zealand, reference to 'foreign interference' almost always relates to the foreign interference activities of the CCP government.

The March 2021 SIS public statements matched this assessment, though avoiding attribution (New Zealand Security Intelligence Service, 2021). Part of the response of the New Zealand government to CCP political interference has been to follow strict discipline on public discussion of the issue.

The 'Magic weapons' paper began as a draft chapter for a book edited by Canadian academic J. Michael Cole, and presented at an authors' workshop in Arlington, Virginia in September 2017. I had been asked by Cole to look at New Zealand's experience of CCP interference operations and assess their impact on democratic institutions, but I found a lot more than either he or I had expected. New Zealand appears to have been a test zone for many of the CCP's foreign interference efforts.

Under Xi Jinping, foreign interference activities – the CCP's 'united front work' – have gone on the offensive. United front work is a task of all party and state agencies, as well as of every CCP member. Three quarters of the chief executives of China's major corporations are now CCP members; all large Chinese companies and foreign companies working in China have a CCP cell. In my paper I wrote of the party–state–military–market nexus which was amplifying CCP political interference activities.

In late August 2017, when I had a final draft of my paper and was sure of its conclusions, I reached out to the SIS, as well as to senior staff at the Ministry of Foreign Affairs and Trade, to alert them to my findings. I got no response. I was very disconcerted by this. I then sent my paper to academic peers overseas and university colleagues to get their thoughts on it and ask what I should do next. The day before the authors' workshop began, I decided I had to go public. I knew it would be years before the edited book would be published,[1] and in the meantime the situation in New Zealand could have worsened. On 18 September I released my paper on the website of the Woodrow Wilson International Center for Scholars in Washington, DC, where I am a global fellow. The information in my paper was of public interest and New Zealanders had a right to know about the seriousness of the situation. Foreign interference activities only thrive if public opinion in the affected nation tolerates or condones it.

On 23 September 2017 New Zealand held national elections. After six weeks of negotiation, a coalition Labour–New Zealand First–Green Party government was formed. The new government showed an early awareness of the challenges New Zealand was facing in its foreign policy. Foreign Minister Winston Peters stated that under the new government, 'New Zealand is no longer for sale' (1 News, 2017). Prime Minister Jacinda Ardern indicated a concern that New Zealand maintain its reputation as corruption-free. She stated that New Zealand would remain outward-facing, while still looking after its own interests (Scoop, 2017). The new government's national security briefings were released to the public, with the section on espionage featuring discussion about hacking attacks and 'attempts to unduly influence expatriate communities'. The SIS recommended that the prime minister 'openly provide information about public security issues to the public' (New Zealand Security Intelligence Service, 2017, p.10; Department of the Prime Minister and Cabinet, 2017, p.7).

In New Zealand, reference to 'foreign interference' almost always relates to the foreign interference activities of the CCP government. 'China is New Zealand's

Russia' is one way to put it. However, going public about the issue of CCP foreign interference was problematic for the Ardern government. New Zealand needed to resist CCP political interference activities, yet do so in a way that did not invite economic retaliation. In order to deal with the problem the Ardern government could not just attack the policies of the previous government; it also had to clean its own house and address the participation of its own politicians in CCP united front activities (CGTN, 2017). Working out how to do this was one of its top priorities.

In January 2018 the findings in the 'Magic weapons' paper were incorporated into the US government's Indo–Pacific strategy (Allen-Ebrahimian and Dorfman, 2021). New Zealand's closest strategic partners were very concerned about the revelations of the paper, not just for New Zealand, but because of what it told them about the extent of CCP political interference in their own societies.

From late 2017 to mid-2018, New Zealand government agencies debated how to deal with CCP political interference. A core question of the analysis was the cost of confronting China. The basic question the agencies had to answer was: should New Zealand protect its national security, or economic security? China is New Zealand's largest overall trading partner; 27% of exports go there. New Zealand is strategically dependent on China for imports of 513 categories of goods, and 144 of them have applications in critical national infrastructures (Rogers et al., 2020). New Zealand is also a 'strategic partner' of China, having signed a comprehensive cooperative relationship agreement in 2003, and in 2014 a comprehensive strategic partnership agreement. New Zealand by then had expanded relations with China beyond trade to finance, telecommunications, forestry, food safety and security, education, science and technology, tourism, climate change and Antarctic cooperation, and even to military cooperation.

The internal debate concluded in favour of national security. Without national security, New Zealand has no economic security. In the end, it was not a matter of whether New Zealand dealt with the issue, but how. Beginning in 2018, the Ardern government managed a cautious, case-by-case recalibration of the New Zealand–China relationship, passing new legislation and making quiet policy adjustments, all the while stating that any changes are 'country agnostic' (Harrison, 2019a), or else avoiding mentioning that a change has occurred at all. The problem with the Ardern government following such a quiet strategy on dealing with CCP foreign interference is that it has been perhaps a bit too subtle, and the actions the government has taken tend to be overlooked or underreported.

> … in December 2018, the GCSB blocked PRC telecommunications company Huawei from being involved in the 5G set-up for New Zealand's biggest telecommunications company, Spark, citing national security concerns.

Unfolding a resilience strategy, 2018–21

Unlike the Australian government, the Ardern government has made no statements specifically acknowledging China's political interference activities. However, in February 2018 Prime Minister Ardern acknowledged that New Zealand 'must not be naïve' and that New Zealand was indeed experiencing 'foreign interference activities' (RNZ, 2018). In March 2018 the SIS released its 2017 annual report, which, for the first time, mentioned the word 'foreign interference' in a New Zealand public document. In May 2018 the minister of foreign affairs, Winston Peters, announced a major new foreign policy direction, the 'Pacific reset', focused on regaining New Zealand's influence in the South West Pacific, which was being undermined in part by the PRC's growing activities in the region (Peters, 2018b). Ardern's foreign policy speeches highlighted New Zealand's 'independent foreign policy' (Small, 2018; 1 News, 2019), a phrase invoked whenever New Zealand plans to disagree with a great power. Coalition government foreign policy statements repetitively emphasised the importance of the international rules-based order and supporting regional architecture, and stressed the need for trade diversification – code for rebalancing the China relationship (Peters, 2018a).

In June 2018 the New Zealand government released the *Strategic Defence Policy Statement 2018*, outlining challenges in the security environment, including the return of 'spheres of influence' and 'might is right' (Ministry of Defence, 2018). In August New Zealand joined other Five Eyes partners in a communiqué on sharing information to combat foreign interference (Department of Home Affairs, 2018). In September 2018 New Zealand joined with Pacific Island Forum nations in signing the Boe Declaration on regional security, which highlighted signatories' determination to be 'free of external interference and coercion' (Pacific Islands Forum Secretariat, 2018).

In October 2018, the then minister of justice and minister responsible for the SIS and GCSB (Government Communications Security Bureau), Andrew Little, sent a letter to the justice select committee requesting that it add an inquiry into foreign interference in New Zealand into its just-concluded evaluation of the administration of the 2017 general election and 2016 local body elections. Initially the inquiry was not open to the public, but after much behind the scenes discussion, as well as some controversy, it was opened to public submissions. In December 2018, Cabinet signed off on New Zealand's new national security and intelligence priorities. Foreign interference appeared for the first time ever as a priority. From that date, addressing foreign interference activities in New Zealand became the SIS's top task – although

the public would not be informed of this until March 2021 (New Zealand Security Intelligence Service, 2019).

Also in December 2018, the GCSB blocked PRC telecommunications company Huawei from being involved in the 5G set-up for New Zealand's biggest telecommunications company, Spark, citing national security concerns. Huawei has close links to the People's Liberation Army (PLA) and the Chinese Ministry of State Security. Its ownership structure links it into the CCP United Front Work Department (Henry Jackson Society, 2019; Balding and Clarke, 2019). Jacinda Ardern strenuously emphasised that the decision on 5G was the GCSB's to make, working within the Telecommunications (Interception Capability and Security) Act 2013. In 2011 Huawei had established a major stake in the New Zealand telecommunications market as the main financial backer of start-up company 2degrees (Pullar-Strecker, 2013). Huawei also pitched to build New Zealand's 3G and 4G networks for the country's other main telecommunications providers. But in 2013, the National–Māori Party coalition government passed the Telecommunications (Interception Capability and Security) Act to remove security risks from public telecommunications. Under the Act, Huawei was restricted to peripheral activities and excluded from the core of New Zealand's 3G and 4G set-up. Since the December 2018 ruling, only 2degrees has been permitted to use Huawei for 5G.

Huawei has been very active in trying to shape public opinion in New Zealand. It is a major sponsor and advertiser in the New Zealand media and offers significant funding to New Zealand universities and think tanks (Harrison, 2019b). However, in 2019 Huawei's sponsorship of New Zealand's annual television awards ended; the awards' main sponsor is now New Zealand government agency NZ On Air. Huawei sponsored economics think tank Motu to do telecommunications research from 2017 to 2020, but this grant appears not to have been renewed (Motu, 2020).

In January 2019 the SIS website listed foreign interference as one of New Zealand's top national security concerns (New Zealand Security Intelligence Service, n.d.). The service's 2018 annual report, released in early 2019, provided a useful definition of the difference between foreign influence and foreign interference. In July 2019 Andrew Little attended a Five Country ministerial in London which defined foreign interference as:

> coercive, deceptive, and clandestine activities of foreign governments, actors, and their proxies, to sow discord, manipulate public discourse, bias the development of policy, or disrupt markets for the purpose of undermining our nation and our allies. (Little, 2019, p.9)

From February to December 2019, the New Zealand Parliament held its first inquiry into foreign interference in New Zealand. It was obvious that the inquiry's focus was the covert actions of the CCP government, although politicians and officials strenuously avoided naming China (Kitteridge, 2019b). In an extraordinary move, security agencies gave several detailed public as well as closed-door briefings to the inquiry (Kitteridge, 2019a, 2019d). The SIS discussed various vectors for foreign interference: cyber-enabled threats to the New Zealand general election; the use of social and traditional media to spread disinformation; building covert influence and leverage over politicians and political parties, including through electoral financing; and foreign control of diaspora communities (Kitteridge, 2019b). SIS director-general Rebecca Kitteridge highlighted foreign interference through 'relationship building and donation activity by state actors and their proxies. This activity spans the political spectrum and occurs at a central and local government level.' Without directly commenting on any political party, Kitteridge said that in future the SIS would be willing to help parties vet their candidates for national security concerns (Kitteridge, 2019c).

Non-action – the lack of further questionable activities – has been a noticeable trend in New Zealand-China relations during the term of the Ardern government.

Also in 2019, the Ardern government updated the Overseas Investment Act to prevent foreign buying of residential property in New Zealand, over concerns this was being used for politically related money laundering (among other issues). In 2016 the Panama Papers had described New Zealand as the 'heart of global money laundering'. The Ardern government updated anti-money laundering legislation (the Anti-Money Laundering and Countering Financing of Terrorism Act 2009) to strengthen oversight of transfer of funds in and out of New Zealand. The SIS's 2019 annual report stated that the SIS continued to be concerned about the global rise in the scale and aggression of foreign interference and espionage, and noted that it was briefing a range of sectors on foreign interference and its impact on New Zealand's economy, democracy and international reputation.

In November 2019, New Zealand diplomats had their last-ever official discussion with China about Xi Jinping's signature project, the Belt and Road Initiative (Sachdeva, 2020b). The Belt and Road Initiative is a China-centred political and economic bloc aimed at reshaping the global order (Rolland, 2015; Pang, 2015). In 2015 New Zealand was the first Western country to set up a body to promote the Belt and Road Initiative locally, the New Zealand One Belt One Road (OBOR) Council. In March 2017 it was the first Western country to sign an agreement on the Belt and Road Initiative, though it was only a memorandum of arrangement – an agreement to discuss the issue for the next five years (Ministry of Foreign Affairs and Trade, 2017a). At the same time, the Oceania Silk Road Network,

the New Zealand OBOR Foundation and the New Zealand OBOR Think Tank were launched, all led by present and former New Zealand political leaders (Harman, 2016; Ge, 2017). However, the last public mention of the New Zealand OBOR Council was in November 2017 (Maude, 2017), and none of the other above organisations appear to exist anymore either. The New Zealand government's involvement in the Belt and Road Initiative had never developed beyond diplomatic talks and conferences; by 2019 even these had ceased (Ministry of Foreign Affairs and Trade, 2017b).

Non-action – the lack of further questionable activities – has been a noticeable trend in New Zealand-China relations during the term of the Ardern government. From 2015 the Chinese People's Association for Friendship with Foreign Countries (CPAFFC), one of China's leading united front organisations, had facilitated an annual China–New Zealand mayoral forum, but there were no further such forums after 2017 (Invercargill City Council, 2017). In 2012 a Chinese property developer with close connections to the CCP government donated 1 million yuan (NZ$211,000) to the New Zealand China Friendship Society to enable it to expand its activities (Hutching, 2015; New Zealand China Friendship Society, n.d.); in the same year, the CPAFFC donated a further 1 million yuan (New Zealand China Friendship Society, 2012). The society used the donations to subsidise activities that promote a non-critical view of China in New Zealand. The funds ran out in 2017 and have not been renewed.

The 'Magic weapons' paper documented how many former senior National Party politicians had taken up well-paid directorships in Chinese companies and banks. All appear to still be in those roles in 2021. However, neither former prime ministers Bill English nor John Key have taken on any Chinese company directorships since retiring from politics. In 2020 the associate minister for ethnic affairs, Aupito William Sio, was the only MP to attend the Chinese Embassy's annual Lunar New Year event held at Te Papa, which featured a propaganda exhibition on Xinjiang. In the past, scores of politicians had attended such events organised by the embassy. In an apparent symbolic gesture of solidarity, Jacinda Ardern and many other MPs attended the 2020 Lunar New Year event organised by the New Zealand Chinese Association, a New Zealand-focused cultural organisation founded in the 1930s.

In September [2020] New Zealand signed an anti-trust investigations cooperation agreement with Five Eyes partners, to facilitate sharing of confidential information and cross-border evidence ...

In December 2019, the New Zealand Parliament passed under urgency new legislation to restrict foreign political donations, by a vote of 119 to 1 (New Zealand Parliament, 2019), a rare act of cross-party unity; the only dissenting voice said the legislation did not go far enough. The need for this legislation was documented in the 'Magic weapons' paper. Between 2007 and 2017 the New Zealand National Party received NZ$1.36 million of its publicly declared donations from proxies of the CCP, either Chinese entrepreneurs with close political connections to the CCP, or CCP united front organisations. The New Zealand Labour Party received NZ$83,000 from such sources, but only in 2017 when it was in government. Since the 'Magic weapons' paper was released, neither the National Party nor the Labour Party have recorded any further large donations from CCP-connected individuals (Electoral Commission, 2019, 2020b). However, in the same time period, both parties reported that they had received hundreds of thousands of dollars in amounts which do not require the donor's name to be publicly disclosed (Electoral Commission, 2020a). In 2020 the Serious Fraud Office began investigating a case of $100,000 in donations in amounts under $15,000 received by the National Party from the Chaoshan Association, one of the CCP's leading proxy groups. Charging documents allege that a 'fraudulent device, trick, or stratagem' was used to divide the donations into sums of less than $15,000 to hide the donor's identity (Hurley, 2020). In 2019 the Serious Fraud Office also investigated CCP united front-connected anonymous donations received by Labour leaders Phil Goff and Lianne Dalziel in the Auckland and Christchurch mayoral elections. In 2017 New Zealand media conglomerate *Stuff* called for transparency in political funding, with a requirement that the identity of all donors be disclosed to the Electoral Commission (Owen, 2017), but political will is lacking to achieve this.

In 2020 Parliament conducted a further inquiry into foreign interference, focused on local government. The inquiry lasted for eight months, but was unable to make any legislative recommendations before the 2020 election. Andrew Little promised that his government, if re-elected, would pass further legislation to deal with foreign interference. In July 2020 New Zealand introduced national security considerations into overseas investment assessments. In September New Zealand signed an anti-trust investigations cooperation agreement with Five Eyes partners, to facilitate sharing of confidential information and cross-border evidence (Shukla, 2020).

In October 2020 the New Zealand government tightened the Strategic Goods List to include catch-all restrictions on the export of items or know-how not on the list but that could be used by a police force, militia or armed forces in weaponry (Ministry of Foreign Affairs and Trade, 2019). As documented in the 'Magic weapons' paper, and detailed in my 2020 submission to the parliamentary inquiry into foreign interference in local government (Brady, 2020), the CCP government has attempted to access military technology and know-how from

New Zealand companies and university researchers, via mergers and acquisitions, research funding and student exchanges. This potentially breaches New Zealand's legal obligations around strategic goods under the Wassenaar Arrangement (a multilateral export control regime). From 2019 the government was in discussion with Universities New Zealand on how to deal with this issue. In March 2021, the SIS and Universities New Zealand issued advice for academics and researchers on how to protect themselves against foreign interference activities, including efforts to access military and police-related technologies (Protective Security Requirements, n.d.).

The outbreak of the Covid-19 pandemic hastened New Zealand's gradual, case-by-case readjustment of the China relationship into a more fundamental shift. The Chinese ambassador to New Zealand threatened that New Zealand's Covid border closures would affect New Zealand–China trade, tourism and 'people's sentiments' (1 News, 2020). In March 2020 China restricted New Zealand's purchase of personal protective equipment (PPE), when a few 'weeks' worth' of supply was available locally (Strang, 2020; Clark, 2020). The PRC government and Huawei pointedly sent bulk supplies of PPE to countries that had not made a final decision on Huawei in their 5G system (Free America Network, 2020).

In June 2020, the trade minister, David Parker, announced a long-term trade recovery strategy highlighting non-China market opportunities (Parker, 2020). New Zealand joined an informal group of countries that have succeeded in suppressing Covid-19 to swap notes on re-opening. China was not included (Gerrard and Chiaroni-Clarke, 2020). New Zealand partnered with Australia to offer practical assistance to help Pacific small island nations deal effectively with Covid-19, in part to counter China's efforts to use access to Covid vaccines and PPE as a means to influence Pacific politics (RNZ, 2020).

In July 2020, Ardern broke diplomatic protocol by using her speech at the New Zealand–China Business Forum to express criticism of China's policies towards the Uyghurs, Hong Kong and Taiwan. Predictably, her words provoked pushback from the Chinese ambassador (Burrows, 2020). The government has continued to speak up against the CCP government's repression in Xinjiang and Hong Kong. While it has been insufficient for some, it is the most outspoken any New Zealand government has been on human rights issues in the PRC since the events of 4 June 1989. Ardern's and her ministers' public comments on the CCP government's human rights abuses sent the signal that New Zealand is not afraid to speak up publicly on matters of concern in the relationship, and that New Zealand–China relations were about more than trade.

The CCP adopts a carrot-and-stick approach to the Chinese diaspora: financial opportunities and honours for those who cooperate; harassment, denial of passport or visa rights and detention for family members living in China for those who do not.

Magic weapons, but no magic fix

Passing new legislation can only go so far in dealing with foreign interference; what is needed is broad public awareness of the risk. Moreover, some foreign interference activities are not currently illegal, yet public opinion agrees that they are, as Ardern put it, 'outside the spirit of the law' (O'Brien, 2020). Some aspects of CCP foreign interference activities are proving difficult to fix.

The leading Auckland Chinese-language paper, the *Chinese Herald*, reputedly has close personnel inks to the PRC consulate[2] and works with the All-China Federation of Returned Overseas Chinese (Chinese Herald, 2017). The online version of the *Chinese Herald* was a joint venture with NZME., parent company of the *New Zealand Herald*. In 2019 this business relationship was ended after concerns were raised about the *Chinese Herald*'s apparent censorship of politically sensitive stories on China (Walters, 2019). In 2016, the CCP English-language paper, *China Daily*, signed a deal with Fairfax Media to have six pages of paid content published in Fairfax newspapers in Australia and New Zealand (Rose, 2016). The *Dominion Post* and the *Press* both published this content. This business relationship ended in 2020, following international criticism of free media republishing CCP propaganda. However, the *New Zealand Herald* continues to have a business relationship with CCP paper the *People's Daily* (Kinetz, 2021).

In the hardest-to-fix basket is CCP united front work against the New Zealand Chinese community. In 2021 a leading New Zealand Chinese activist said that CCP activity against this community is 'rampant', at levels much greater than in Australia or the United States (Yu, 2021). New Zealand has a population of around 247,000 citizens and permanent residents who identify as Han Chinese, as well as smaller numbers of other ethnic groups within China, such as Tibetans and Uyghurs. The CCP adopts a carrot-and-stick approach to the Chinese diaspora: financial opportunities and honours for those who cooperate; harassment, denial of passport or visa rights and detention for family members living in China for those who do not. New Zealand Chinese activists spoke up at the two parliamentary inquiries into foreign interference about feeling unsafe in New Zealand due to harassment from CCP authorities. They have repeatedly raised concerns about New Zealand's biased Chinese-language media and CCP censorship in New Zealand's Chinese-language WeChat social media. Yet so far nothing has been done to change this. New Zealand's media laws are strong on issues of economic monopoly, but weak on matters to do with political monopoly.

CCP supervision of the New Zealand Chinese community through proxies also continues unchanged. However, in 2018 the New Zealand Values Alliance, a pro-democracy grouping of New Zealand Chinese opposed to CCP political interference in New Zealand, was launched. Since 2018, several New Zealand Uyghurs have spoken to the media about the CCP government's repressive policies and about how unsafe they feel in New Zealand. New Zealand Hongkongers have also been very politically active in the last two years, demonstrating in support of democracy activists in Hong Kong and lobbying the New Zealand government to speak up about what is happening there. In 2020 NZ On Air announced a programme to better express the diversity in New Zealand's Asian communities (NZ On Air, 2021). In 2020 the Asia New Zealand Foundation launched a similar effort to support Asian artists and creatives. In 2021 the New Zealand government launched an ethnic graduate programme to attract a more diverse workforce into the public sector (Office of Ethnic Communities, 2021). All of these initiatives are connected to New Zealand's new overall social cohesion and resilience strategy to enhance national security (Royal Commission of Inquiry, 2020).

The CCP government manages overseas students via organisations such as the Chinese Students and Scholars Association (CSSA). The English name of the New Zealand branch of this organisation is the New Zealand Chinese Students' Association, but the Chinese version of its name is the same as that of the parent organisation in China, CSSA. This is important, as the organisation has tried to obscure its connection to the CCP in its public profile and statements of its leaders. Chinese sources say the New Zealand Chinese Students' Association is 'under the correct guidance' of PRC representatives in New Zealand (China News, 2012). A former Chinese diplomat who defected to Australia says the CCP uses the CSSA for intelligence purposes (Chen, 2020). In 2017 there were 40,000 students from China studying in New Zealand. Until Covid-19 struck, Chinese students made up almost half the total number of foreign students studying in New Zealand, raising concerns about dependence on one market and fears this could be used as a lever to pressure New Zealand. New Zealand universities have made efforts to diversify. At the same time, the total number of Chinese students studying abroad has fallen. In 2021 there were only 11,000 international students from the PRC studying in New Zealand. The New Zealand Chinese Students' Association has rebranded itself as a 'charitable society', whose main purpose is to promote Chinese culture and 'act as a bridge' between New Zealand Chinese students and the 'New Zealand mainstream community' (New Zealand Chinese Students' Association, n.d.). However, members on some New Zealand campuses have allegedly been involved in harassing and intimidating political dissidents; yet police and the SIS seem unable to do anything about it (RNZ, 2021).

> New Zealand's efforts to signal an independent foreign policy and maintain a positive relationship with China at the same time as quietly readjusting policies has been too subtle for many commentators, and New Zealand's international image has suffered a hit.

The 'Magic weapons' paper looked at the National Party's ethnic Chinese MP Yang Jian and Labour's Raymond Huo, and their involvement with CCP united front activities. Yang Jian worked for PLA military intelligence for 15 years. He admitted concealing this history on his New Zealand permanent residency application and job applications in New Zealand, as well as his public profile in New Zealand (Jones, 2017; Jennings and Reid, 2017; Anderlini, 2017; Sachdeva, 2017; Huanqiu Renwu, 2013). Yang has been central in shaping the National Party's China strategy and leading engagement with the New Zealand Chinese community, as well as in fundraising from it. In 2020 both Yang and Huo retired from Parliament. However, Yang's National Party successor, Nancy Lu, also has united front connections (Sachdeva, 2020a). Lu was not elected in the 2020 election, but continues as the National Party's Chinese diaspora representative. Huo's successor in Parliament, Chen Naisi, also has united front links. In 2016 Chen was president of the New Zealand Chinese Students and Scholars Association and co-president of its Auckland branch. Chen has refused to disavow the association, or acknowledge that it is a CCP government-sponsored organisation. She avoids public commentary on CCP-sensitive matters, such as the Uyghurs, Hong Kong or Taiwan.

How it's going, and where to next?

New Zealand's quiet policy shift on China has undergone significant changes, without New Zealand suffering any economic damage. In 2021, bilateral trade levels are the same or better than in 2018, when the policy shift began. Yet this incremental shift in China policy and the quiet resilience strategy risks policy inertia and resistance from those with vested interests against the changes. As of the time of writing, the NZ Inc China Strategy, published by the John Key government in 2012 before Xi Jinping came to power, is still on the Ministry of Foreign Affairs website, giving the impression that it represents current New Zealand government thinking (Ministry of Foreign Affairs and Trade, 2015). The multiple legislative changes, government statements and policy tweaks show that it does not. The Ardern government needs to issue a new, whole-of-government China strategy, one that reflects current realities

and steers the way for balancing economic versus security risks.

The second-term Ardern government has made a few missteps in signalling its China policy to like-minded partners, including comments of the minister for trade, Damien O'Connor, that Australia should follow New Zealand 'and show some respect' to China (Dziedzic, 2021), and the foreign minister, Nanaia Mahuta, proposing that New Zealand act as an intermediary between Australia and China (Guardian, 2020) (both countries rebuffed this offer). New Zealand has attracted unfavourable notice from like-minded partners by only selectively joining international statements criticising China's aggressive foreign and domestic policy. New Zealand's efforts to signal an independent foreign policy and maintain a positive relationship with China at the same time as quietly readjusting policies has been too subtle for many commentators, and New Zealand's international image has suffered a hit. New Zealand has set the goal of reducing economic dependency on China. However, more efforts need to be made to help exporters familiarise themselves with alternative markets, as the government once did to help exporters get into the China market from the late 1980s.

Under the Ardern government, New Zealand's approach to China has been one of passive defence, of quiet acts to boost resilience and resistance. Nearly four years after the 'Magic weapons' paper was released, significant progress has been made on a resilience strategy, yet still more needs to be done.

1 The book the 'Magic weapons' paper was commissioned for was finally published three years later in 2020: *Insidious Power: how China undermines global democracy* (https://camphorpress.com/books/insidious-power/).

2 A typical meeting in 2015, had the PRC Auckland Consul General advising the head of a New Zealand Chinese newspaper on how she should report on China matters (http://www.chinaconsulate.org.nz/chn/gdxw/t1272585.htm)

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Kate Prickett and Simon Chapple

OVER THE BARREL OF A GUN?

Trust, gun ownership and the pro-gun lobby in New Zealand

Abstract

The Christchurch attack on 15 March 2019, when 51 Muslims were murdered by a right-wing extremist carrying half a dozen semi-automatic rifles and shotguns, brought the nation's relaxed gun laws to light. Prior attempts to pass gun safety legislation have been thwarted by groups purporting to represent New Zealand gun owners. However, the swift and decisive political actions in the immediate wake of the attack signalled greater political appetite for meaningful change. Using unique data collected immediately in the wake of the Christchurch attack, this study examines who gun owners are, New Zealanders' trust in gun owners and the pro-gun lobby, and whether trust differs by gun ownership and political ideology.

Keywords guns, firearms, gun lobby, public trust, gun owners

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The terror attack that killed 51 Muslim New Zealanders on 15 March 2019 was the worst act of violence on New Zealand soil in modern history. The attack was particularly destructive because of the use of semi-automatic firearms, modified to increase lethality, and access to large amounts of ammunition (Royal Commission, 2020a, p.40). In addition, there were systemic failures in the processes for granting a firearms licence (Royal Commission, 2020b, pp.275–81). Thus, in addition to the racism and right-wing extremism underpinning the attack (Battersby and Ball, 2019), a spotlight was shone on gaps in New Zealand's gun laws (Royal Commission 2020a, 2020b).

In the immediate aftermath, changes were made to tighten up gun laws. These changes were contested by pro-gun lobby groups, the most prominent of which is the Council of Licensed Firearms Owners (COLFO), established in 1996. One of its objectives is 'To be recognised as the collective organisation whose views and opinions on firearms legislation and related matters are considered representative,

authoritive [sic] and responsible' (Council of Licensed Firearms Owners, 2021a). COLFO claims several thousand members, representing individual gun owners and nationwide organisations with an interest in guns (the latter including the National Rifle Association of New Zealand, the Sporting Shooters Association of New Zealand, the New Zealand Antique and Historical Arms Association, the New Zealand Black Powder Shooters Federation, New Zealand Deerstalkers Association, Pistol New Zealand, New Zealand Service Rifle Association and the International Military Arms Society (Council of Licensed Firearms Owners, 2021b)).

In October 2018 there were just under a quarter of a million current firearms licences in New Zealand, including standard, dealer and visitor licences (Royal Commission 2020b, p.273), whose holders COLFO aims to represent.[1] In 1997 it was estimated that 20% of households had at least one gun (Thorp, 1997, p.38), with that estimate dropping to around 17% by 2005 (Van Dijk, van Kesteren and Smit, 2007). Gun ownership was estimated as higher than average among rural (37%) and higher-income households (24%), and particularly among those where the main income earner is a farm owner or manager (78%) (Thorp, 1997, pp.258–9). There are few recent studies shedding light on the number of firearm owners in New Zealand and who they are, suggesting a paucity of information about the public's – and gun owners' – view of the pro-gun lobby which purports to represent them.

Immediately after the Christchurch massacre, the libertarian ACT party positioned itself as a protector of gun owners' rights in the face of legislative changes to gun access. This stance, which included placing COLFO spokesperson Nicole McKee at third on the party's list, likely contributed to ACT's best ever election result in 2020.[2] Understanding the extent to which this alignment – between political ideology and gun ownership – exists in New Zealand and whether this influences people's perceptions of the trustworthiness of the government, generally, and of the gun owner community and pro-gun lobby specifically, is consequently of considerable public import.

In October 2018 there were just under a quarter of a million current firearms licences in New Zealand, including standard, dealer and visitor licences … whose holders COLFO aims to represent.

This article has four aims: first, to provide up-to-date information on the proportion of households which have guns and document any changes since the 1997 Thorp report; second, to identify the socio-demographic composition of gun owners and people living in gun-owning households in New Zealand; third, to examine whether individuals' gun ownership status is associated with differences in trust in (1) gun owners as a group and (2) the pro-gun lobby; and finally, to explore whether trust in the government, gun owners and the pro-gun lobby differs across ideological lines.

We address these aims using a unique data set collected in April 2019 in the wake of the 15 March attack. By doing so, this article provides an up-to-date portrait of gun ownership in New Zealand, and points to how differences in trust in the government and pro-gun lobby among gun owners, and the population generally, may shape future firearms-related legislation.

Methods

Data and sample

Data was collected as part of an annual New Zealand population-based survey conducted by the Institute for Governance and Policy Studies at Victoria University of Wellington, focusing on various dimenions of trust (Chapple and Prickett, 2019), and typically conducted annually in February. Given increased interest in public trust immediately after the Christchurch terrorist attack, another survey was conducted in mid-April 2019. Because of heightened concern around gun ownership and the influence of the pro-gun lobby on the passage of new gun legislation (Manch, 2019; Russell and Cook, 2019), questions on gun ownership and gun owner trust were included on the April survey.

The survey was administered by Colmar Brunton, a market and social research firm, with study participants coming from a large and diverse existing online research panel comprising more than 100,000 active participants. A subset of this panel was contacted and screened by age, gender, household income, ethnicity and region to ensure a diverse sample. The final sample consisted of 1,000 New Zealand-based respondents aged 18 years and older.

Variables

Trust

The focal outcomes of interest were levels of trust. Interpersonal trust was an 11-point scale ranging from 0 = not at all to 10 = completely, with respondents asked, 'In general, how much do you trust most people?' For questions regarding trust in government, respondents were asked, 'How much trust do you have in the government to do what is right for New Zealand?', with the response scale ranging from 1 = very little/none to 4 = a great deal. For trust in institutional groups to do the right thing, such as the police, politicians, medicial practitioners and the media, respondents were asked, 'How much trust do you have in the following groups to do the right thing?', with a scale ranging from 1 = I have no trust at all to 5 = I have complete trust. A further set of questions asked about trust in groups of people generally, including gun owners and the pro-gun lobby, with respondents asked, 'How much do you trust the following groups of people in New Zealand?', with the response scale the same as that asked of institutional groups, with 1 = I have no trust at all to 5 = I have complete trust.

Table 1: Sample characteristics by gun ownership (n = 1,000)

	Total	By gun ownership		Percentage within group with guns in the household
		No guns	Guns in the household	
	n	%	%	%	Row %
Gender					
Female	504	50.5	51.5	45.9	13.7
Male	493	49.2	48.2	54.1	16.7
Gender diverse	3	0.3	0.4	0.0	0.0
Age					
18–24 years	88	8.9	9.0	6.8	11.9
25–44 years	352	35.3	36.4	29.5	12.6
45–64 years	329	33.0	31.6	39.8*	18.3
65 years and older	227	22.8	23.1	24.0	15.6
Ethnicity (mutually inclusive)					
NZ European/Pākēha	812	81.1	79.7	92.4*	17.2
Māori	83	8.4	7.4	13.2*	24.2
Pasifika	47	4.7	5.2	1.3*	4.4
Asian	67	6.7	8.1	0.0	0.0
Other	42	4.2	4.2	2.7	10.3
Nativity					
Born in New Zealand	762	76.2	74.8	84.4*	16.8
Not born in New Zealand	238	23.8	25.2	15.6*	10.0
Annual household income					
$30,000 or less	157	15.8	16.8	11.5	10.9
$30,001–$70,000	388	39.0	38.4	39.6	15.5
$70,001–$100,000	189	18.8	18.4	21.0	16.9
More than $100,000	266	26.4	26.4	27.9	15.9
Educational attainment					
Secondary school or less	296	30.2	28.7	37.9*	19.1
Diploma	327	33.3	33.8	30.3	13.9
Undergraduate	203	20.6	21.4	16.5	12.2
Postgraduate degree	156	15.9	16.1	15.3	14.5
Home ownership					
Owns home	687	69.3	67.6	79.0*	17.3
Rents home	304	30.7	32.4	21.0*	10.4
Region					
Auckland	317	31.5	34.5	14.9*	7.2
Wellington	111	11.0	12.1	6.1*	8.3
Canterbury	128	12.8	13.0	13.5	15.6
Waikato	95	9.5	8.4	15.6*	24.8
Tasman/Nelson/West coast	44	4.6	4.1	5.8	20.0
Eastern North Island	47	4.7	3.9	8.7*	28.8
Bay of Plenty	64	6.6	6.1	9.0	20.8
Northland	37	3.7	2.9	7.5*	31.6
Southland	76	7.7	7.1	10.2	20.3
Mid-North Island	79	8.0	7.8	8.9	16.9
Number of household members	1,000	2.7	2.6	2.6	..
		(1.4)	(1.4)	(1.2)	..
Political ideology					
Left	142	14.8	16.3	8.4*	8.5
Centre-left	179	18.6	19.0	16.9	13.8
Centre	273	28.4	28.0	29.6	16.0
Centre-right	233	24.3	22.9	31.7*	20.0
Right	135	14.0	13.8	13.4	14.8
% of sample		100.0	84.8	15.2	15.2
n	1,000	100.0	825	147	147

Unweighted *n*s, weighted percentages. Analyses by gun ownership exclude 28 respondents who refused to answer the question on firearm ownership. Small cell sizes within some groups should be interpreted with caution. * Chi2 and T-tests indicating means statistically different compared to those with no guns in the household at at least $p < .05$.

Gun ownership

Gun ownership was ascertained through a question that asked respondents whether they owned a gun. Respondents could answer: (1) yes; (2) no, but there is a gun in our house; (3) no, there are no guns in our house; or (4) prefer not to say.[3] In line with prior research on gun ownership, we categorise gun owners as those who live in a home with a gun (although we note key differences in the socio-demographic characteristics of those who own the gun and those who live in a home with a gun but do not own a gun).

Political ideology

Respondents were asked on a 0–10 scale, where 0 = left, 5 = centre and 10 = right, how they would place their political views.[4] From this scale, respondents were grouped into five categories: (1) left (0–2 on the scale); (2) centre-left (3–4 on the scale); (3) centre (5 on the scale); (4) centre-right (6–7 on the scale); and (5) right (8–10 on the scale).[5]

Covariates

In addition to gun ownership and questions on trust, respondents were asked for a wide array of socio-demographic information, including on gender, age, income, educational attainment, ethnicity, nativity, home ownership, household composition and geographic region

Analytical plan

Bivariate analyses were conducted to examine the first and second aims of the study to understand the rate and characteristics of gun owners and differences in trust between gun owners and those not living in homes with guns (research questions 1, 2 and 3). Ordinary least squares (OLS) multivariate analyses were employed to examine whether associations between gun ownership and political ideology and trust in gun ownership and the pro-gun lobby were significant, controlling for an array of socio-demographic characteristics that may be endogenous to both gun ownership and trust. Post hoc Wald tests were conducted to test for statistical differences between gun owners and those without guns by political ideology regarding their trust in gun owners and the pro-gun lobby.

All analyses were conducted in Stata (StataCorp, 2017). A survey weight was used to adjust the sample for gender, age, ethnicity, income and region, and infer population-level estimates. For the multivariate analyses, multiple imputation was used to impute on the small amount of item-level missingness in the independent variables (less than 1% of data used in the analyses). This included 28 cases where gun ownership was not ascertained and 41 cases where political ideology could not be ascertained.[6]

Findings

Gun owners in New Zealand

Compared to the 20% of households found to own a gun in 1997 (Thorp, 1997), we found a smaller proportion – 15.2% of the sample – reported either owning a gun or living in a home that contained a gun (Table 1). This finding suggests that gun ownership has been becoming less normative over the last generation. Just over half (51%) of those who reported having a firearm in the household indicated that they were the gun owner. This translates to approximately 7.7% of respondents reporting being firearm owners. Extrapolated out and age-adjusted to the population of New Zealanders aged 18 years or older, this equates to approximately 289,000 firearm owners, a number larger than the approximately 244,425 firearm licence holders (McIlraith, 2019).[7] Some of this discrepancy is likely due to firearm owners whose licences have lapsed and those who were not licensed in the first place. Among those who reported living in homes with guns, men were much more likely to be owners, with men stating they were the owner of the firearm in 88% of gun-owning households.[8]

Compared to those who did not live in a household with a gun, those living with guns were more likely to be aged 45–64 (40% of gun owners vs 32% of those without guns), to identify as New Zealand European (92% vs 80%) or Māori (13% vs 7%), to have been born in New Zealand (84% vs 75%), and to own a home (rather than rent; 79% vs 68%). Gun owners were more likely to have ended their education at secondary school (38% vs 29%). Gun owners were less likely than those without guns in the home to be aged 25–44 (30% vs 36%), to identify as Pasifika (1% vs 5%) or Asian (no respondents who own a firearm reported being Asian, vs 8% of the sample without guns), and less likely to be found in regions with large urban centres such as Auckland (15% vs 36%), Wellington (6% vs 12%) or Waikato (8% vs 16%).

In terms of political ideology (categorised into five groups representing 'left', 'centre-left', 'centre', 'centre-right' and 'right'), gun owners were more likely to report being 'ccntre-right' (32% vs 23%) and less likely to report being 'left' (8% vs 16%). Interestingly, there was not a statistical difference in the proportion of gun owners versus non-gun owners who reported being 'centre-left' (19% vs 17%), 'centre' (30% vs 28%) and 'right' (13% vs 14%).

Figure 1: Gun ownership by political ideology (n = 962)

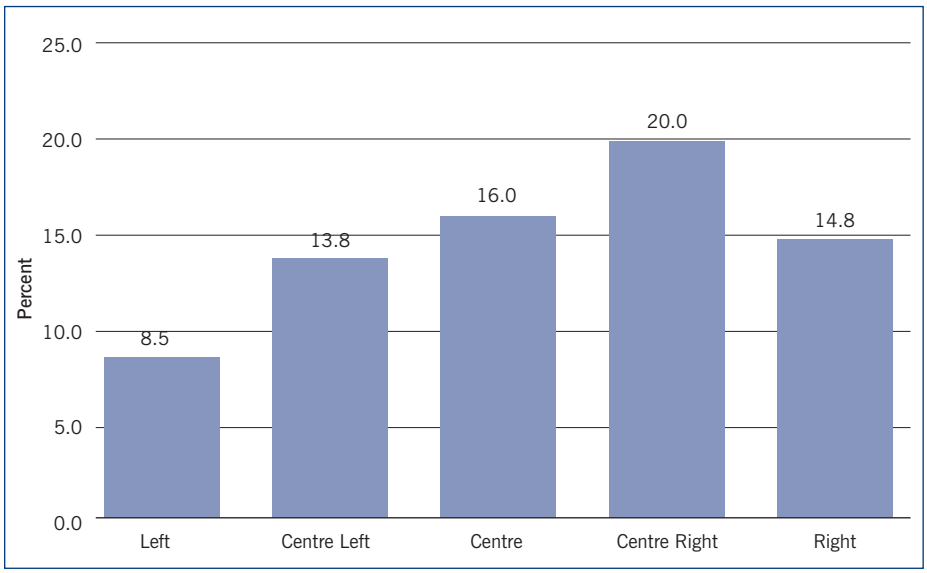


Table 2: Trust by gun ownership (n = 1,000)

	Total			No guns			Guns in household		
	Trust rank	M	(std dev.)	Trust rank	m	(std dev.)	Trust rank	m	(std dev.)
General trust in people (0–10 scale)		6.33	(1.74)		6.34	(1.74)		6.40	(1.66)
Trust government to do what is right (1–4 scale)		2.71	(0.77)		2.75	(0.75)		2.57*	(0.84)
Trust in groups of people (1–5 scale)									
Gun owners		2.80	(0.97)		2.65	(0.92)		3.51*	(0.92)
Pro-gun lobbyists		2.28	(1.01)		2.16	(0.95)		2.82*	(1.08)
Trust to do the right thing (1–5 scale)									
Medical practitioners	1	3.78	(0.85)	1=	3.78	(0.86)	1	3.89	(0.78)
Police	2	3.76	(0.91)	1=	3.78	(0.90)	2	3.78	(0.95)
Judges/courts	3	3.48	(0.95)	3	3.50	(0.94)	4	3.43	(0.95)
Schools and colleges	4	3.39	(0.79)	4	3.41	(0.79)	5	3.39	(0.78)
Universities	5	3.35	(0.84)	5	3.37	(0.81)	6	3.31	(0.90)
Small businesses	6	3.31	(0.75)	6	3.29	(0.74)	3	3.46*	(0.73)
Charities	7	3.19	(0.86)	7	3.20	(0.85)	7	3.16	(0.91)
Churches	8	2.80	(1.09)	8	2.82	(1.07)	8	2.72	(1.18)
Local government	9	2.74	(0.93)	9	2.77	(0.93)	9	2.66	(0.92)
Corporations/large businesses	10	2.67	(0.88)	10	2.68	(0.86)	10	2.62	(0.93)
Government ministers	11	2.62	(0.94)	11	2.65	(0.93)	12	2.52	(0.96)
Members of Parliament	12	2.59	(0.87)	12	2.61	(0.86)	11	2.53	(0.95)
TV/print media	13	2.51	(0.86)	13	2.54	(0.84)	13	2.39	(0.93)
Bloggers/online commentators	14	2.06	(0.86)	14	2.06	(0.83)	14	2.01	(1.01)
N / %		1,000	100.0		825	82.4		147	14.7

Unweighted ns, weighted percentages. * T-tests indicating means statistically different compared to those with no guns in the household at at least p < .05.

Putting this another way, Figure 1 displays the proportion of respondents within each political ideology group who reported being gun owners, highlighting the higher rates of firearm ownership among the centre-right. Twenty per cent of respondents who identified as centre-right reported they had a firearm in their household, but there were lower and similar rates of firearm ownership among those who identified as centre-left (14%), centre (16%) and right (15%). Those who reported being left on the political spectrum had the lowest rates of firearm ownership (9%).

Trust in gun owners and the gun lobby

Overall, there was no statistical difference in interpersonal trust between gun owners and those who did not own guns (Table 2). Moreover, there was little difference between those who owned guns and those who did not in terms of their level of trust in different institutional groups to do the right thing, and their relative ranking of those groups.

Where some trust differences did emerge between gun owners and non-gun owners, however, was (1) their trust in the government to do the right thing, and (2) trust in gun owners and the pro-gun lobby. In terms of trust in the government, gun owners, on average, gave a modestly lower score of 2.57 on a 1–4 scale compared to non-gun owners at 2.75 – a statistically significant but small effect size (23% of a standard deviation).

In regard to trust in gun owners, unsurprisingly, gun owners had high trust in gun owners as a group, on average scoring themselves 3.51 (out of 5), which would relatively rank gun owners as the third most trustworthy group, similar to judges but lower than medical practitioners and the police. Those who did not own guns, however, gave gun owners a low trust score of 2.65, ranking them in the lower third of institutions, similar to politicians and corporations. Overall, the difference in trust score was 88% of a standard deviation – a much larger effect size than any differences in trust in government.

However, *neither* of these two communities had high levels of trust in the gun lobby. Individual gun owners rated trust in the pro-gun lobbyists at 2.82, 0.69 points lower than trust in themselves as an ownership group – a large difference for a group which aims to represent them. Trust in pro-gun lobbyists by individual gun owners was only marginally higher than trust in politicians and local government. Among non-gun-owning households, trust in pro-gun lobbyists (2.16) was rated in line with the least trustworthy group, bloggers and online commentators.

Gun ownership and trust in the government, gun owners and the pro-gun lobby across the political ideological spectrum

Finally, we examined whether trust in the government, gun owners and the pro-gun lobby differed by gun ownership across the political ideological spectrum, controlling for other sociodemographic characteristics. The findings from these multivariate regressions are presented in Table 3.

In terms of trust in government, gun owners were modestly less trusting than non-gun owners ($B = –0.15$; $p < .05$). Unsurprisingly, political ideology was more strongly associated with trust in the government than gun ownership, with those identifying from centre ($B = –0.40$; $p < .001$) through right ($B = –0.82$; $p < .001$) less trusting of the government than those who considered themselves centre-left or left (model 1a). Interestingly, trust in government did not appear to statistically differ across the political spectrum by whether the respondent was also a gun owner (model 2a).

Table 3: OLS regressions predicting trust (n = 997)

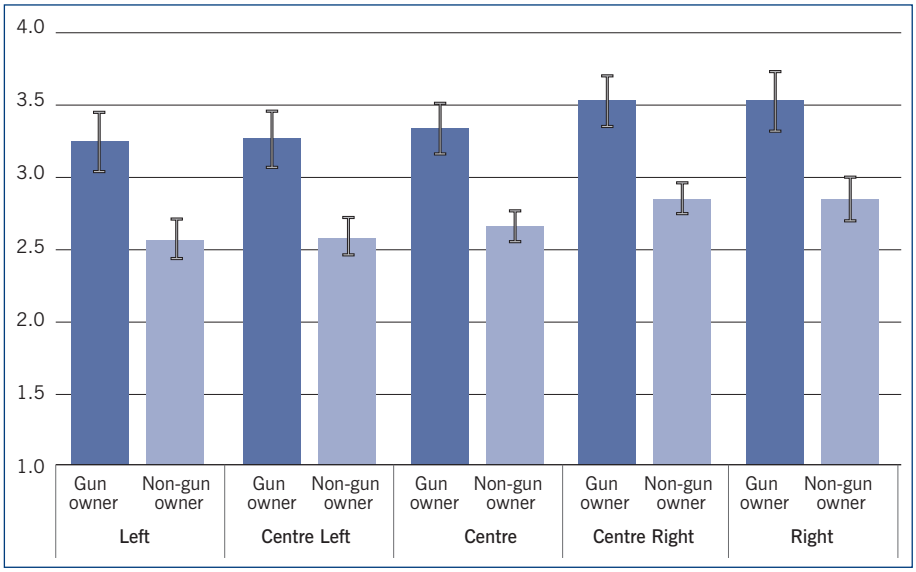
	Trust the govt to do the right thing		Trust in gun owners		Trust in the pro-gun lobby	
	(1a)	(2a)	(1b)	(2b)	(1c)	(2c)
Gun ownership (ref: no guns in household)						
Guns in household	–0.15*	–0.11	0.70***	0.32	0.57***	0.18
	(0.07)	(0.22)	(0.08)	(0.27)	(0.09)	(0.29)
Political ideology (ref: left)						
Centre-left	–0.04	–0.05	0.03	0.01	0.30**	0.27*
	(0.08)	(0.09)	(0.10)	(0.10)	(0.11)	(0.11)
Centre	–0.40***	–0.37***	0.10	0.06	0.43***	0.41***
	(0.08)	(0.08)	(0.09)	(0.10)	(0.10)	(0.11)
Centre-right	–0.47***	–0.49***	0.29**	0.26*	0.65***	0.60***
	(0.08)	(0.09)	(0.10)	(0.10)	(0.10)	(0.11)
Right	–0.82***	–0.81***	0.30**	0.24*	0.72***	0.63***
	(0.09)	(0.10)	(0.11)	(0.12)	(0.12)	(0.12)
Gun ownership x political ideology						
Gun ownership x centre-left		0.08		0.30		0.39
		(0.27)		(0.33)		(0.36)
Gun ownership x centre		–0.22		0.47		0.28
		(0.25)		(0.31)		(0.33)
Gun ownership x centre-right		0.07		0.37		0.46
		(0.25)		(0.30)		(0.33)
Gun ownership x right		-0.09		0.55		0.73+
		(0.28)		(0.35)		(0.39)
Constant	3.13***	3.13***	2.26***	2.28***	2.34***	2.37***
	(0.17)	(0.17)	(0.20)	(0.20)	(0.22)	(0.22)
N	997	997	997	997	997	997
R-squared	0.18	0.18	0.23	0.23	0.16	0.16

Standard errors in parentheses: *** $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, + $p < 0.10$.
Models control for gender, age, educational attainment, annual household income, ethnicity, home ownership, nativity and geographic region.
Three respondents who identified as gender diverse dropped from analysis because of collinearity issues.

In line with the bivariate findings, gun owners were considerably more trusting of other gun owners ($B = 0.70$; $p < 0.001$; model 1b) and the pro-gun lobby ($B = 0.57$; $p < 0.001$; model 1c) than were non-gun owners. Political ideology was also associated with trust in gun owners as a group and the pro-gun lobby, albeit to a lesser extent in regard to gun owners (model 1b) and more so when examining the pro-gun lobby (model 1c). For example, those who identified as centre-right or right reported higher levels of trust in gun owners than did those who identified as centre or left of centre. There was no statistical difference in trust in gun owners among those identifying as centre versus left of centre.

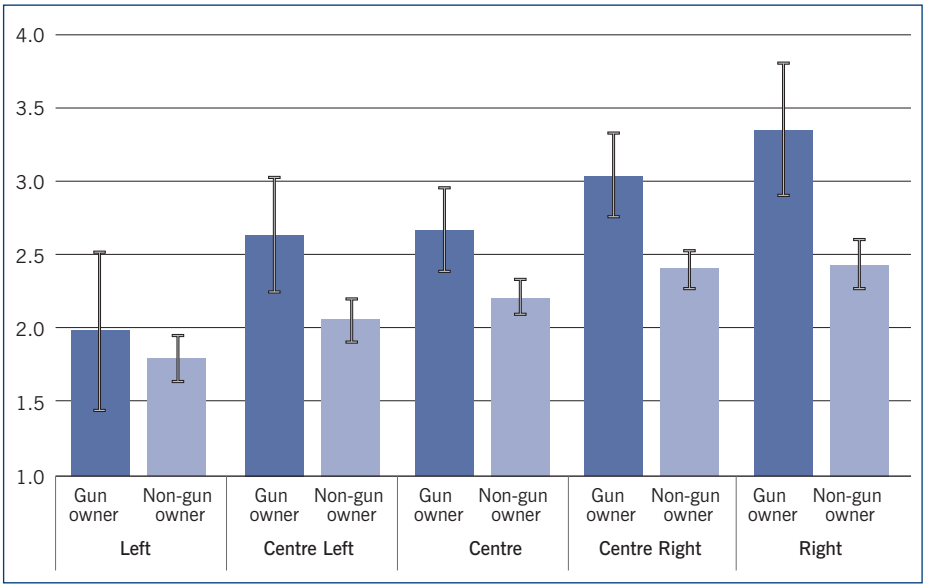
Turning to trust in the pro-gun lobby, a different pattern emerges. Political ideology appears more strongly correlated to trust in the pro-gun lobby compared to trust in gun owners generally, and the effect size of gun ownership on trust in the pro-gun lobby is slightly smaller than for trust in gun owners. For example, there appears to be a clear political spectrum gradient in trust in the pro-gun lobby, whereas for trust in gun

Figure 2: Predicted trust in gun owners (*n* = 997)



Note: Predicted margins estimated from model 1b, Table 3, controlling for: gender, age, educational attainment, household income, ethnicity, home ownership, nativity, and geographic region. Error bars represent 95% confidence intervals.

Figure 3: Predicted trust in the pro-gun lobby (n = 997)



Note: Predicted margins estimated from model 2c, Table 3, controlling for: gender, age, educational attainment, household income, ethnicity, home ownership, nativity and geographic region. Error bars represent 95% confidence intervals.

owners, differences only appeared to emerge between those centre/left of centre and those on the centre right/right.

There was little evidence that trust in collective gun owners differed by individual gun ownership along the political spectrum. The models do suggest, however, that gun ownership may be differently associated with trust in the pro-gun lobby by political ideology. Figures 2 and 3 present the predicted trust estimates from the models 1b and 2c from Table 3. Whereas there was a trust gap between gun owners and non-gun owners in trust in gun owners generally, and those on the political right had slightly higher levels of trust in gun owners than those on the political left, that gap remained fairly consistent across the political spectrum. This pattern, however, was different for trust in the pro-gun lobby. There was no statistical difference between gun owners and non-gun owners on the left in their trust in the pro-gun lobby, and while there was more trust in the pro-gun lobby to the right of the political spectrum, the gap in trust for the pro-gun lobby between gun owners and those without guns also widened and was largest among those on the political right.

Discussion

Four important findings emerged from this study. First, the proportion of households owning guns has fallen in the last generation, with estimates from our study suggesting that approximately 15% of the population live in gun-owning households, compared to around 20% two decades ago (Thorp, 1997) and 17% in 2005 (van Dijk, van Kesteren and Smith, 2007). Gun-owning households, always a minority, are becoming a smaller one. Despite our estimate being in line with the downward trend from estimates in 1997 and 2005, this comparison should be interpreted with caution, given differences in the sampling methods.

Second, individual gun owners trusted gun owners as a collective and the pro-gun lobby more so than those who did not own guns – even after controlling for other factors that differed among those who did and did not own guns. Although both gun owners and non-gun owners trusted the pro-gun lobby much less than they trusted gun owners as a collective, non-gun owners placed the pro-gun lobby among the least trustworthy groups, rating them similar to bloggers and online commentators.

Third, these gaps in trust in gun owners as a group and the pro-gun lobby between individual gun owners and non-gun owners were wider than the gaps in trust in the government to do the right thing. Political ideology was more strongly associated with trust in the government than gun ownership, with those whose political ideology was more closely aligned with the Labour government, unsurprisingly, reporting higher levels of trust in them. This trust, however, did not differ across the political ideology spectrum by gun ownership, indicating some broad support for the government's actions immediately after the Christchurch attack, and a lack of evidence that gun owners are strongly tied to anti-government rhetoric.

Fourth and finally, however, there was some evidence to suggest that the confluence of political ideology and gun ownership may shape how gun owners perceive the trustworthiness of the pro-gun lobby purporting to represent them. Gun owners at the left-wing liberal end of the ideological spectrum reported much lower levels of trust in the pro-gun lobby than gun owners on the right-wing end. This gap in pro-gun lobby trust among gun owners on the left versus the right was more than twice as wide as among those on the left versus the right who did not own guns.

Taken together, along with the finding that New Zealanders have moderate levels of trust in gun owners generally, but low levels of trust in the pro-gun lobby, our results suggest that it is a small group of gun owners who identify on the right who likely share the interests of the pro-gun lobby.

1 Some of these licencees will not own a gun (about 9% according to a 1,000-person sample survey by AGB McNair reported by Thorp, 1997, p.37), or will not currently live in New Zealand. Some may be dead and not removed from the register.
2 McKee is now a list member of Parliament.
3 The small number (n = 28) who refused to say whether there was a firearm in the home were imputed for the multivariate analyses.
4 Respondents were prompted to state where they aligned on the political spectrum with: 'Most political parties in New Zealand lean to the "left" or the "right" with their policies. Parties to the left are liberal and believe governments should support the less fortunate people in society. Parties to the right are more conservative and believe in individual responsibility. Some parties position themselves in the centre. How would you place your political views using the scale below?'
5 The small number reporting 'don't know' (4.1% of the sample) were imputed for the multivariate analyses.
6 There was no substantive difference in the findings whether listwise deletion or multiple imputation was used.
7 Authors' calculations available upon request.
8 Results dichotomising respondents in firearm-owning households into those who owned the firearm versus those who did not are not presented, although available from the lead author upon request. Few socio-demographic differences existed between the two groups, apart from the difference by gender.

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