

Vested Interests

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A way of thinking about vested interests

Colin James, assisted by Ellie Argyle

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1. We all have vested interests, so what's the fuss?

In 2010-11 three government policy initiatives aroused controversy and accusations of special treatment for "vested interests": a change in workplace relations law to meet the demand of a film company; special treatment for a company in the ultra-fast broadband roll-out; and a gambling-licences-for-convention-centre deal (details *section 5b*). Were the accusations justified? And what is a "vested interest" and where does it fit in a democracy?

Everyone has interests and expresses and pursues those interests in various ways, individually and with others who are like-minded and directly or by seeking favourable rules or the backing of those in authority. In a sense all interests are "vested" since they are attached to and, in a sense, "clothe" the person or entity holding or pursuing them. And in an open, democratic society, their pursuit logically is an unexceptionable, natural, human interaction.

But the term "vested interests" has acquired negative overtones of unfair, nefarious or anti-social behaviour – that is, their successful pursuit, and sometimes just their pursuit, is in some way damaging. This note suggests a framework for distinguishing appropriate, natural, human pursuit of interests from a pursuit of interests which is *injurious* to the general public interest (defined in *section 4*) and some ways in which such injurious pursuit of interests can be countered.

The premise for the framework is that in a well-functioning modern democracy all citizens are equal members, which does not imply equality of outcomes but does imply that there is a general public interest in interests not being pursued in such a way as to advantage some and disadvantage others by creating substantial new inequalities or maintaining or exacerbating pre-existing substantial inequalities, as defined in *sections 3 and 4*.

This note is specifically set in, and speaks only for New Zealand, though some parallels are drawn with other modern democracies and there is some reference to practices in other modern democracies.

Also, while the term "vested interests", as used in the media and common parlance, often implies unethical or immoral behaviour, this note *does not treat the topic as matter of ethics*.

Nor is it definitive. The topic merits wider debate and the application of finer minds and stronger intellects.

2. The dictionary definition and an alternative

"Vested" originally meant being clothed, then possession of property, then personal interest. In the Shorter Oxford Dictionary [Shorter Oxford] "vested" means, in addition to "clothed", particularly in religious vestments, "secured or settled in the possession of or assigned to a person, as opposed to rights that he or she may acquire in the future" and, derived from that, "a personal interest in a state of affairs, usually with an expectation of gain" and "a person or group having such an interest". Collins [Collins] gives, first, "an existing and disposable right to the immediate or future possession and enjoyment of property", second, "a strong personal concern in a state of affairs, system, etc, usually resulting in private gain" and, third, "a person or group that has such an interest". Macmillan [Macmillan] gives "a special reason for wanting things to happen in a particular way, because you will benefit from this".

From these definitions this note will assume the meanings relevant to this discussion are the latter meanings involving "gain" and "benefit". It will also take a "vested interest" not just to define the interest but also to refer to the person or group which holds the interest.

As an aside, some academic literature does not clearly distinguish the pursuit of interests from the generalised interest a voter has in the outcome of an election and from mere voting behaviour. An exception close to home is Jack Vowles [Vowles 1993] who said vested interests are the interests of a few with political influence that do not benefit society.

But, because the term "vested interest" in common parlance usually implies, assumes or imputes ill-intent or ill-gotten gain, this note will avoid the term and instead talk of *special interests* or just *interests*. (However, when someone quoted uses the term in the quote it obviously will be kept as spoken/written. The same goes for the term as it appears in the references.)

3. The framework: citizenship, equality and the general public interest

The framework for consideration of the pursuit of interests in this note is a well-functioning modern democracy, the essence of which is taken to be equal citizenship: each citizen an equal member.

[In this note "citizen" is used generically to refer to the people of a place, by birth or by choice-and-acceptance. The place is the nation-state, specifically New Zealand, though also, where the context makes clear, to a city or region within New Zealand. In the New Zealand context the generic "citizen" is assumed to include those with the status of "permanent resident".]

Citizens in a modern, well-functioning democracy have claims in common on the resources, products and services of the place. They have a common interest in peace, order and security and in impartially-administered laws upholding that common interest and regulating their pursuit of their claims and interests. In a modern, well-functioning democracy citizens choose from amongst themselves those who make, and arrange for the administration of, those laws and all citizens are eligible to be chosen. Thus, the state is subject to the citizens, not the other way round.

A citizen in a modern well-functioning democracy is formally equal with other citizens before the law and has individual and civil rights to certain freedoms, to vote and to own land and other property free from arbitrary confiscation by the state. In this note, this is called *formal citizenship*.

In the twentieth century citizens collectively awarded themselves (through those they chose to make the laws) additional rights, including to access education, health care, housing and income maintenance. In 1972 the Royal Commission on Social Security declared that the state should ensure that "everyone is able to enjoy a standard of living much like that of the rest of the community and thus is able to feel a sense of participation and belonging to the community" [Royal Commission 1972]. In this note this is called *full citizenship*.

In practice citizens are not equal, even in the formal sense.

First, they have *inherent inequalities*, some inherited and some acquired in the very early years of life. These include heritage and whakapapa, distinctive and distinguishing characteristics and disabilities and abilities, physique, hair, skin and eye colour, looks, aptitudes and inclinations, type and quality of intelligence and energy, degree of creativity or method, the way of seeing things, humour and introversion or extroversion. (Make your own list.) Citizens also differ by age and gender.

Second, there are *attitudinal inequalities*. Citizens have an unequal inherent or acquired interest in, enthusiasm for and commitment to fully exercising their formal citizenship through such actions as voting, joining with others in a common cause, making a full contribution (for example, by paying due taxes) and upholding the rights of all citizens to the benefits of citizenship. There are leaders and followers, those who instigate and innovate and those who acquiesce or settle for the quiet life, those who feel fully part of the society and nation, for whatever reason, and those who do not.

Third, there are *manufactured inequalities*, different from the first two types because they are made, not inherent: created – by action or omission – in the law and by the state's practices, by custom or social structures and traditions and by economic interaction. Not all citizens have genuine, practical equality before the law (for example, because of cost or ethnicity). Some benefit more than commensurately from resources, products and services because the system advantages and privileges them. Systemic limitations or policies, service failures and failures to correct for inherited disabilities or characteristics or very-early-life experience deny some citizens genuine equality of access to education, health care, housing and income maintenance – that is, deny them genuine equality of opportunity to fully participate in the nation, its society and society's major subset, the economy. As the cross-party parliamentary health committee "Hutchison report" in November 2013 [Parliamentary health committee 2013] made clear, drawing on extensive research, inequalities in pre-birth and early-childhood experiences have long-lasting effects on child health, capacity to be educated, teenage conduct and capacity as an adult to become a full member of the workforce, with an income that enables full citizenship. Many are by age 3 to excluded from *full citizenship* unless they have exceptional help and/or develop exceptional willpower later in life.

Manufactured inequalities thus, in effect, deny true justice, that is, the capacity for each citizen, as far as inherent differences allow, to meet all needs and take as full a part in their society and nation as they might wish.

To the extent that the pursuit of interests, including success in that pursuit, reflects *inherent* and *attitudinal inequalities*, the effects are unremarkable and are consistent with democratic practice and thus are in the general public interest. To the extent that that pursuit *manufactures substantial new inequalities* or maintains or exacerbates existing *manufactured inequalities* and those inequalities are *substantial*, the effects will arguably be incompatible with true democratic practice and in that sense not in the general public interest.

This general public interest is not the same as the public's interests, which are many and varied. Also, there are many publics within the general public, each with specific interests (*section 5*).

Democracy is a *contest of beliefs and ambitions*. This contest is decided by majorities, either directly, as in a referendum, or indirectly by the elected legislature (in New Zealand, Parliament), mostly through its delegated ministers and their delegates, officials and other executive or advisory bodies.

Referendums and Parliament are imperfect mechanisms for producing majorities. Not all citizens are equally informed about an issue decided by referendum and not all citizens have an equal interest in the outcome, which may serve a minority interest or ambition. Many decisions by Parliament are decided by that majority of members of Parliament which constitutes or supports the cabinet/ministry and Parliament delegates a great deal of executive discretionary decision-making to the cabinet and officials. Decisions made in this way may serve the interests of particular interest groups rather than the interests of a national majority.

Elections are one corrective mechanism. But elections are infrequent. Particular policies, laws or actions cannot readily be changed just by voting in such a way that a different set of

parties constitutes the governing majority in Parliament. Moreover, while a majority of the public (as measured by opinion polling) may oppose a particular executive action, as with partial sales of state-owned enterprises in 2013-14, the constitution of the parliamentary majority and so the cabinet/ministry may not substantially change at the subsequent election if (as is usual) a majority of voters accords more importance to other factors. So Parliament and elections are blunt mechanisms for distilling the general public interest (as defined above) from the contest of beliefs and ambitions. And, while most parties, especially the big ones, pay close attention to opinion polls, focus groups and informal feedback from citizens which to some extent guide their positioning in the contest of beliefs and ambitions, and while there is growing interest in alternative mechanisms (*section 10*), particularly at local level, ministers and officials have wide latitude to favour some interests over others.

In fact, most beliefs and ambitions are those of minorities: organised interest groups, pressure groups, non-government organisations, associations (including churches and unions); or ad hoc campaigns; or the unorganised expression or reflection of citizens' generation, stage of life (including, for example, parenthood), gender, ethnicity, socioeconomic status and other shared characteristics. Majorities are the result of the contest among, or coalitions or coincidences of, those minorities. While some organised minorities seek to act in the public interest, or believe they do, the pursuit of most minority beliefs and ambitions is only incidentally demonstrably in the general public interest, as defined above. Nevertheless, if they do not unduly deny the needs and claims of some citizens and do not unduly deliver on pursuers' claims and needs their successful pursuit does not undermine that general public interest.

4. When is pursuit of an interest injurious?

Each citizen has a vital *individual interest* in eating, staying alive and being free from harm and has a compelling individual interest in having all necessities met, in being able to live with dignity and self-worth and provide well for one's children and in living under clear legal rules by which the authorities and other citizens abide (a *rules-based system*, *section 5b1*). These are legitimate interests which no democracy officially denies though no democracy ensures they are met for all citizens all the time.

Citizens join together formally and informally in *interest groups* to collectively pursue individual interests when they decide joint action by many is more likely to secure their interests than acting individually. Unions and business associations are obvious examples. Political parties may also represent such group interests and have their own interests in winning and maintaining power and having favoured policies enacted.

Firms are a hybrid: a firm has an individual interest but is also a collective in the sense that all those engaged or employed in it have an interest in the firm being profitable.

Citizens also form associations such as *charities* and *not-for-profit organisations* to protect or advance the individual interests of others less likely to be able to pursue their interests without help. While those who organise, fund and take part in those organisations derive personal psychological or spiritual benefit and the managers and employees (if any) have an obvious pecuniary interest in their success and in that sense may be argued to be pursuing their individual interests, such organisations mostly enhance general welfare. This can also usually – but not always – be said of associations which promote animal welfare or protection of the physical environment or seek to enhance a suburban or urban landscape or push for policy change they believe will make society or the economy more equitable.

There is nothing inherently injurious to the general public interest, as defined in *section 3*, in

these activities. If the competition is equal, the pursuit of any one interest will not reduce the realisation of any other interest more than the realisation of that interest is reduced by the realisation of others' interests. Of course, in practice some secure more of their interests than others: equal citizenship does not imply equal outcomes because people have inherent and attitudinal inequalities (*section 3*). Moreover, human society is a complex adaptive system and such systems are dynamic and so not in continuous equilibrium. So some inequalities of outcome from the competitive pursuit of special interests is compatible with a just society in a well-functioning democracy.

It can also be argued, (loosely) following John Rawls [Rawls 1972], that if some secure an advantage (gain or benefit) through successfully pursuing their interests, that is compatible with a just society if others are not disadvantaged. [There might also be a general acceptance of long-established differences – a "culture" – as noted in *section 5a*.]

But large and persistent inequalities of outcomes are not compatible with a just society because then the citizens are no longer equal members.

Also, full equal citizenship implies that differences in outcomes should not result from *manufactured* inequalities, as distinct from *inherent* or *attitudinal* inequalities. If the pursuit of a special interest of a particular person, firm, organisation or association is realised and results in substantial gain or benefit at the expense of a substantial disbenefit to others, that manufactures a substantial inequality and so is against the general public interest.

This is the way this note will treat the pursuit of special interests. To reprise *section 3*:

Pursuit of a special interest is injurious to the general public interest if its successful pursuit manufactures substantial new inequalities or substantially exacerbates existing manufactured inequalities or maintains existing substantial manufactured inequalities.

5. The interaction of interest groups and the executive

There are two principal ways in a democracy in which special interests can be pursued and advantages gained. One is through economic markets: establishing a monopoly, duopoly or oligopoly (or monopsony, duopsony or oligopsony) or a closed guild, as in some professions or trades, confers advantage, which may come at cost to the far more numerous buyers (or sellers) unless regulated. The other way is through government (central or local) policy and action that confers an advantage to an individual, group, sector or class. The second route is the main focus of this note and in fact the two are often intertwined.

Richard Mulgan [Mulgan 2004] identified three types of interaction between interest groups and governments. This note will take his matrix as a convenient way of looking at the pursuit of interests.

Mulgan's first type is an open or laissez-faire pluralist model in which the political system operates like an open market where private individuals who want to pursue interests organise with like-minded people into interest groups to gain benefits from the government but do not control decision-makers. [This is essentially similar to the notion in *section 3* that democracy is a contest of beliefs and ambitions.]

Mulgan's second type of interaction between interest groups and governments is corporatism. Interest groups are formally incorporated into the system of government, which recognises them as the sole representatives of their economic or social sectors. Sweden and Austria, for example, used to negotiate overall economic direction with representatives of industries and trade unions. There have in the past been elements of this in New Zealand, notably when wage bargaining was formally regulated by the Arbitration Court and when in the 1950s and

1960s governments informally arbitrated among interest groups, often behind closed doors. There have also been economic planning conferences (for example, 1968-69) and economic "summits" (for example, 1984 and 2009). Mulgan argued these models are legitimate and contribute positively to the operation of a democracy.

Those who favour Mulgan's third, "market liberal" model disapprove of the first two models. This model is associated with "market liberal" or "new right" theories which seek to limit the role of the state and rely more on unregulated choices by individuals and private firms in a free market. In this construct, interest groups are self-interested, seeking special advantages or privileges contrary to the national interest.

Mulgan's three models leave six gaps.

The first is that in his "open market" model the "invisible hand" of that market may be manipulated by some interest groups which have more influence than others and that influence may not be in the overall public interest of the majority. That is, there are well-connected interest groups.

The second is that a powerful or well-connected individual or firm may secure special gains or advantages.

The third is that "market liberal" arguments against special interests can be – arguably are – themselves a special-interest argument. Moreover, those arguing against interest groups may – often do – form interest groups to argue that case. The question then is: who benefits from such limits on the state?

The fourth is that the coincidence of many individual special interests may constitute a powerful minority that prevails against the interests of the majority. In other words, "concentrated interests" of the few with much to gain individually prevail over the "dispersed interests" of the many who have little to lose individually.

The fifth is that a "legacy" minority may be able to pass on privileges to its children in much the way the landed aristocracy could in the pre-democratic era or industrial capitalists could in early modern democracy. The educational meritocracy could be said to be a modern version of such a minority.

The sixth is that of the member of Parliament or councillor who argues his/her own special interest or the special interest of a group of which he/she is a member.

5a. The visible invisible hand of the market

Mulgan's "open market" implies an ideal market, that is, one in which those who take part have equal knowledge and equal bargaining power: the "primitive higglers" of introductory economic textbooks. But there are few such markets. In almost all markets both information and power are asymmetrical, usually in favour of larger or more concentrated participants (for example, a large supermarket chain versus its many suppliers and its many customers).

Examples of attempts to rectify this imbalance are the establishment of the Dairy Board in 1923 to bargain with the London buyers of butter and the Industrial Conciliation and Arbitration Act of 1894 followed by compulsory unionism in 1935 which addressed the imbalance between employers and employees.

The "influence market" in which interest groups are engaged is similarly skewed. The presumption in a market is that of a "level playing field" in which no player or team has the advantage of running downhill. (To which it might be added, as Sir Kenneth Douglas used to say [Douglas, early 1990s] that there must also not be a strong wind blowing down the field.)

In an ideal political system governments' arbitration of competing bids for policy, legislation

and other action by firms and not-for-profits, commercial and social associations, employers and unions, pro-economic-output and pro-environment lobbies, lower-tax and higher-redistribution pressure groups, private and public institutions (schools, hospitals) and so on would be guided strictly by the general public interest (as defined in *sections 3 and 4*), distilled from free and widespread public discourse.

In practice, governments of different parties favour different interests and therefore advantage some interests and disadvantage others.

This is in a crude sense self-correcting in a democracy, by way of elections and public action: protests, organised campaigns, petitions and so on. However, because to some limited extent elections are influenced by parties' marketing capacity, which depends on donations and because some individuals and organisations are capable of bigger donations than others, elections themselves are not necessarily a corrective mechanism.

Moreover, once a policy or legislation is put in place it becomes a new status quo and the longer it is in place, the more likely it is to become accepted by the public as the norm. (Examples: national superannuation, GST, Kiwibank and KiwiSaver.) So, while a government made up of different parties from the ones that instigated the policy or legislation might oppose something when it is introduced, if it takes office some time after the change it may be less likely to repeal it and the longer the delay the less likely the repeal. Something widely regarded as contrary to the general public interest (as defined in *sections 3 and 4*) at its inception may thus over time come to be accepted as in that general public interest through a sort of democratic osmosis.

In this sense, the status quo may become part of the "*culture*". An example might be the acceptance of large income and wealth inequalities in twentieth-century United States as compatible with opportunity to make something of oneself. Has a culture of acceptance of large manufactured inequalities developed in New Zealand since the 1980s? Or is there a point at which such a "culture" (if it exists) breaks down, perhaps by way of a political populist response to stress?

5b. Powerful, well-connected interests can finesse the "market"

There is another way for the executive to deal with sectoral and individual interests, which was applied by the new Labour government in 1984. It stopped listening to arguments by individual firms and sectors (or individuals) for their special benefit. The criterion for successful arguments put to the government was that a change would deliver national benefit.

This did not mean sector groups or large firms stopped pressing cases that were beneficial to the sector, firm or individual. But it did mean that to gain that benefit a case had to be presented that the benefit to the sector/firm/individual was also a benefit to the economy as a whole and the case had to argue for generic, not special action. (Though it should be added that the criteria themselves as to what constituted national benefit favoured some arguments over others – *section 6, the self-reinforcing loop*.)

Broadly speaking, this national benefit "rule" still applies but there are exceptions. Notably, in recent years well-connected individuals or firms have persuaded ministers to respond to specific cases they have made which benefit them directly. They have in effect finessed Mulgan's interest group market.

- In September 2010 the Australian Media Entertainment and Arts Alliance union, backed by several international actors unions, ramped up a bid by New Zealand Actors Equity for minimum conditions for filming the *Hobbit* film series. Sir Peter Jackson, the director, said these claims put at risk Warner Brothers' commitment to the film and specifically to the film being filmed in New Zealand: Warner Brothers did not want to deal with a

unionised workforce. After lawyers representing Warner Brothers met the Minister of Economic Development, Gerry Brownlee, and the Prime Minister and Tourism Minister, John Key, the government agreed on 27 October to promote special legislation in Parliament specifying that film workers were contractors and could not demand a collective agreement or take strike action. The legislation passed Parliament. The deal also gave Warners up to \$34 million in tax concessions.

The deal did have a large national interest component in work, business opportunities and promotional benefits. It included a commitment that all DVDs of the films would include a tourism promotional video.

Nevertheless, it prompted criticism that the law had been changed to meet the demands of an individual company — a response at odds with the post-1984 principle. Professor Paul Roth of Otago University, an academic specialising in employment law, said the deal was a case of New Zealand "teetering into third world status". [Roth 2010.] And it clearly disadvantaged the particular employees affected and, if replicated elsewhere, would disadvantage employees generally.

This was a case of specific concessions to a firm in return for it spending money here.

- In legislation promulgated in late 2010 successful bidders for contracts to build fibre networks for the ultra-fast broadband project were granted a period of eight and a-half years in which the Commerce Commission (the regulator of the telecommunications sector) could not inquire into, or order changes to, the terms under which retailers of broadband services could access the fibre. Since Telecom's network arm, Chorus, was expected to, and eventually did, win most of the network building contracts, this was seen by competitors, retailers, consumers and all political parties other than National as potentially giving Chorus near-monopoly rents and this unusual alliance successfully campaigned through March-April-May 2011 to have the "regulatory holiday" removed — though the government did still guarantee that fibre builders would not be out of pocket if the Commerce Commission did order cuts in access terms.

The ultra-fast broadband project is in effect a public-private partnership (PPP) between the government-owned Crown Fibre Holdings and companies building the fibre network building companies. PPPs typically involve a tradeoff between the government and the private company to give the contracting company reasonable assurance it will be able to operate profitably.

- On 13 June 2011 Prime Minister and Tourism Minister John Key, Economic Development Minister David Carter and Auckland Mayor Len Brown announced a deal with Sky City Entertainment under which Sky City would build a \$350 million, 3500-seat convention centre in Auckland by 2015, in return for which the government would favourably consider additional gambling licences and/or an extension of its gambling licences beyond 2021 termination date. Sky City said the regulatory changes were needed to assure it of revenue in return for the risk it was taking. The government said it would get a convention centre, much needed for tourism, without having to stump up money itself.

This prompted criticism that gambling licences were for sale to a favoured company. Mr Key said the additional licences would not worsen problem gambling because it would be foreigners who did the gambling and the changes would be subject to "full public submissions" because additional licences needed a change to the Gambling Act which imposed a moratorium on casinos.

A subsequent Audit Office report faulted officials in the Ministry of Economic Development for not following strict tendering rules. (Other critics said it added to the risk

of more gambling addiction or just more gambling and more individual and societal cost.)

5b1. The equalising importance of a rules-based system

The message from these examples was that rules can be bent if the deal is attractive enough and if you can get the ear of the Prime Minister or other senior ministers.

In each case it could be, and was, argued that there was national economic benefit:

- Jobs and associated spending and promotional benefits flowed from the *Hobbit* deal.
- The country's businesses and consumers will benefit from the broadband rollout; though it is still not clear how great the net economic benefit will be, there are two previous examples where such investment in infrastructure has eventually yielded national economic benefit, railways and the telegraph; and
- The country gets a convention centre which will bring high-spending international conferences to Auckland, benefiting transport, accommodation and other businesses and potentially generating more.

To which might be added the particular circumstances of a small country, where some projects can be achieved only by joint action by the government and a private firm.

But the economic benefit was at the cost of favouring powerful interests – "concentrated interests" (*section 6b*) – which could get the ear of politicians. This is injurious to the general public interest (as defined in *sections 3 and 4*) because a **rules-based system** is an **important, arguably critical, equalising protection of the individual interests of those who do not have power** – that is, "dispersed interests" (*section 6b*). It also risks setting up a "loop" (*section 6*).

[There is an obvious parallel in New Zealand's often-expressed interest in, and need of, a rules-based international order, since New Zealand is a very small nation-state with negligible military and economic strength.]

5c. Buying well-connectedness

One way of becoming well-connected to more effectively pursue an interest is to employ a well-connected lobbyist on staff (if a firm) or contract a lobbyist in a specialist lobbying firm.

The connectedness a lobbyist in New Zealand can offer ranges *from* (1) introductions to (a) those in the cabinet/ministry who have the relevant portfolio and/or those who have most weight in the cabinet, (b) those in governing and opposition parties who have that portfolio and/or influence within the parties and (c) relevant officials in the relevant government agencies *to* (2) actual influence because of the lobbyist's influence.

This has led to calls for registration of lobbyists and publication of their meetings with politicians and officials. A bill by Green MP Sue Kedgley, taken over by Holly Walker, was rejected by the Government Administration select committee of Parliament as impracticable in its original form and discharged on 22 August 2013 despite proposals by Walker to make it more practical.

A number of countries do register lobbyists, without noticeable effect on the capacity for special-interest activity.

A New Zealand qualifier: New Zealand is a small country: the heads of significant firms and interest groups meet the Prime Minister, ministers and senior officials formally and/or bump into them informally far more often and far more readily and frequently than in larger countries and so have no need to hire intermediaries for access (though they might hire them to influence general public opinion). A deal might develop out of such an informal meeting or casual encounter.

5d. Buying the law to drive a special interest

A wealthy person or large firm can resort to legal action to defend or advance an interest. This can be expensive and so deter or defeat a person or firm with limited means from opposing or competing. A gagging writ or a defamation threat can silence a journalist who is not backed by a media firm with sufficient means and resolve. A Resource Management Act objection can block a small residential development or a small firm's expansion.

This amounts to an inequality before the law, which is a cardinal principal of *formal citizenship* in a well-functioning democracy as in *section 3*.

It is not new. But New Zealand appears to be becoming more litigious, that is, to be following the United States from the rule of law to the "rule of lawyers".

Alternative means of dispute resolution such as small claims tribunals and mediation and arbitration services have been developed to improve access to inexpensive or less expensive dispute resolution. But are those arrangements sufficient to counter determined pursuit of a special interest?

5e. Another example – or not?

Excessive consumption of alcohol damages the health of persistently excessive drinkers, with flow-on damage to families and costs to the health and justice systems and other opportunity costs to the economy. Excessive consumption of fatty foods and sugary drinks by children is linked to obesity and diabetes in later life, again with flow-on damage to families and costs to the health system and economic opportunity costs. Campaigners, including academic researchers, backed often by local politicians and the police, have tried to restrict sales of alcohol by limiting sales hours and setting minimum prices or imposing higher taxes. Other campaigners have tried to restrict advertising of damaging food and drink to children, banning their sales in schools and imposing taxes.

Such campaigners' success during the term of this government has been limited in the case of alcohol and close to zero on damaging food and drink. Campaigners sometimes blame "vested interests" for blocking or delaying corrective action by influencing politicians. [Stuff 2014, Medical Journal 2007, Open Access 2011] It could be argued that if children do develop health problems as a result of too much fatty and sugary food and drink, that limits their capacity to participate fully in the workforce and society and thus denies them *full citizenship*, as in *section 3*, which is unfair on the children, who cannot have the knowledge and long-term perspective to limit their consumption.

The campaigners assert the manufacturers' and retailers' pursuit of their interests – to sell more of their product – is against the public interest though it is at the least debatable whether their interpretation of public interest fits this note's criterion for the general public interest of creating, exacerbating or maintaining substantial inequalities (*section 4*). Against this, the manufacturers and retailers can legitimately claim that the great majority of the public wants to buy the products and that to block the sales or artificially raise the price would interfere with personal liberty, a core right of *formal citizenship* in *section 3*. They can legitimately argue that only a small minority consumes alcohol to the point of self-harm or damage to others. They argue that it is for parents to decide what children eat, not the state. They can point to industry contributions to social media campaigns and other socially responsible actions to offset the damage to the minority.

Similar arguments are made in the case of gambling.

It is a matter of debate whether in these cases the producers' and retailers' pursuit of their interests are injurious to the general public interest in the sense that they manufacture

substantial new inequalities or maintain or exacerbate existing substantial ones. On one side of that debate a parallel is drawn with smoking, for which the health consequences were convincingly proved by researchers and there has been government action to limit smoking through taxes, social advertising and health warnings, with, probably, plain packaging to come. That parallel is rejected by the other side, in part by citing other research.

- To these examples of successful pursuit of special interests might be added the influence of Federated Farmers, which persuaded the government to postpone indefinitely agriculture's inclusion in the greenhouse gas emissions trading scheme and whose farmer-members are the beneficiaries of a decision to use some of the proceeds of the partial sales of state-owned enterprises to seed investment in water storage dams to provide more water for irrigation (though it can also be argued that it can enable more efficient use of river water and thus, if there is no additional allocation, limit the take from aquifers). In both cases, those special interests would be rejected by a government made up of Labour and the Greens.

5f. A "moral" dimension

Is there a moral dimension? Can the pursuit of apparently altruistic interests result in injury to the general public interest in the sense of manufacturing a substantial new inequality or maintaining or exacerbating a substantial existing inequality?

It is at least arguable that there are cases where a charitable group believing itself to be acting in the best interests of disadvantaged people creates a new disadvantage (inequality) through its actions towards and impositions on those it is helping by limiting their freedom of action or thought and thereby in some cases affecting their capacity to learn freely and/or take part in the workforce at an earning level consistent with their capacity. This argument could apply particularly to strict religious sects or groups.

It is also at least arguable that an environmental interest group can, by stopping investment and the creation of jobs through that investment, manufacture a new income/wealth inequality or maintain an existing one by denying people opportunity to realise an opportunity to earn a higher income.

Also, in some cases some of the group's funding comes from interest groups or firms which have a direct interest in selling alcohol or gambling.

This merits more inquiry than has been possible in this note.

5g. Government agencies and special interests

Government departments and other agencies routinely deal with special interests in the form of "stakeholders" to ensure policies and programmes are workable and take into account those whom policies and programmes most affect. This is unexceptional if any adjustments to policy or programmes are made in line with national interest criteria. But there is a risk of capture. A full analysis of the relationship of agencies with stakeholders would be appropriate but is beyond the scope of this note.

6. The self-reinforcing loop

Mulgan's third model is the "market liberal" model. The special interest pursued is theoretical or principled or ideological and usually argued on the ground that the resultant policies are in the national interest. Nevertheless, if successful, it can result in a privileged class or caste emerging which has a special interest in upholding the theory/principle/ideology. A loop can develop in which those whom a set of policies advantages can ensure the policies are not overturned or instead reinforced.

This is common in autocratic states. A twentieth century example is the implementation of Marxist communism in Russia/Soviet Union which privileged an oligarchy that was able to pass on its privileges to progeny because of its hold on power, many members of which were able to remain privileged and some to become even more privileged when the system disintegrated in 1989-90 and then morphed into a new autocracy. The ruling Communist party in China is another example, maintaining power despite deep changes in the ideological orthodoxy.

Some argue that a modified version developed under Mulgan's "market liberal" model in Anglo-American countries over the past 30 years. A set of theories arguing for "more market" or a new "market liberalism" ascribing primacy to market mechanisms over government regulation and action gained enough adherents to influence and/or command cabinets and legislatures in Britain, the United States, Canada, Australia and New Zealand (and over time to varying degrees in other countries). In its crude form the argument was that if the state did less, businesses would have more breathing space, investors would increase their investment in them, output would rise and, over time, incomes generally would rise with output – and this would serve the national interest.

The difference between this ideological success and the seesaw of policy change with changes of elected government is that in this case the beneficiaries of the policies – firms, their managers and their investors and particularly banks and their various offshoots, whose incomes rose while those of the "middle class" or "working class" stagnated – had the connectedness and wherewithal to lobby successfully to keep the policies in place, despite changes of the party composition of governments. This created a self-reinforcing loop which largely survived even the global financial crisis precipitated by the crash of the lightly regulated United States banking system in 2008.

Even governments of the centre-left, which had before the 1980s favoured the Keynesian "mixed economy", adapted to market-liberalism, to which they made only relatively minor adjustments. Market liberalism over time became the orthodoxy, in part through promotion and in part through the process of adaptation and acquiescence referred to in *section 5a*.

This kept the influence loop in place.

That loop appears to have been tightest in the United States, where, to quote the Buttonwood column in the *Economist* magazine [Economist 2014], reviewing a paper by Martin Gilens and Benjamin Page [Gilens 2014]:

"The danger [of the system in the United States that requires candidates to raise a great deal of money to compete effectively] is of a vicious cycle in which politicians adopt policies that favour the better-off; this gives the wealthy more money with which to lobby politicians, which leads to more favourable legislation and so on. The surge in inequality over the last 30 years could perhaps be attributed, in part, to this process."

The Buttonwood columnist wrote that the Gilens research showed that...

"...if a proposed policy change had low support among the wealthy (one in five in favour) the policy was adopted about 18% of the time. When four in five wealthy people supported a plan, the prospects for adoption rose to 45%. In contrast, it did not matter whether a policy change was backed by the vast majority, or only a tiny minority, of those on average incomes; its chances of adoption were 30% either way. Business interest groups, however, were much more successful in getting their way (a similar success rate to the wealthy."

Relating this to the global financial crisis and its aftermath, the article noted that "many people believe that Wall Street has done rather better than Main Street out of the crisis, even

though it was the source of the problem".

It is noteworthy that this appeared in a magazine strongly committed to market-liberalism.

Nor was the *Economist* alone. Alan Kohler, a conservative commentator in the *Australian Business Spectator* said this in a column on 2 December 2013:

"In recent weeks I have been developing an idea – that is, trying it out in speeches – that inequality results when elite vested interests succeed in distorting society to their own ends, and the two great vested interests of the modern world are American bankers and the Chinese Communist Party." [Kohler 2013]

The Gilens and Page paper was interpreted in the media as concluding that the United States is an oligarchy. The *Daily Telegraph* [Telegraph 2014] report said the study found from a study of 1800 United States policies enacted between 1981 and 2002 that "economic elites and organised groups representing business interests have substantial independent impacts on United States government policy, while mass-based interest groups and average citizens have little or no independent influence. When a majority of citizens disagrees with economic elites and/or with organised interests, they generally lose. Moreover, because of the strong status quo bias built in the United States political system, even when fairly large majorities of Americans favour policy change, they generally do not get it." When the interests overlap, this is "coincidence".

In effect, the creation of an oligarchic loop amounts to capture of the policymaking process and in that process the creation of "*rents*", that is, returns from investments or labour in excess of what a market free of policy and other distortions would deliver. This clearly amounts to the manufacture of an inequality which can be substantial.

6a. The loop in New Zealand

It might be argued that a milder version of this has applied in New Zealand. Political parties depend on donations for their operational and campaign funding. Businesses are the biggest donors to the National and Labour parties. And in this election cycle the Greens have been shown to have similarly benefited from a "green" business donor. All three parties insist they do not make policy adjustments in response to specific donations. The National party's practice is that all such donations are made to the party organisation and MPs are not notified. Some businesses have a policy of making donations to all significant political parties. But businesses do pick and choose. The National party's general policy line favouring business coincides with higher donations from business than other parties. Some of the Labour party's bigger business donors are those who would benefit from Labour's industry policies. Labour also receives significant funding from unions which reflects both the party's origins in the labour movement and consequent special constitutional rights for unions and its pro-union labour relations policy. The Conservative party was formed by a wealthy businessman.

Whether this form of funding of political parties reflects the influence of injurious special interests is a matter for debate. Donor Sky City (*section 5b*) did benefit from ministerial adjustment of a tender process but there is no evidence that that was the result of its donation, as distinct from its proposition just happening to fit well with ministers' aims to expand tourism.

6b. Concentrated v dispersed interests

One way in which an oligarchic loop can develop is through the advantage a relatively small, well-organised, well-connected, well-financed and tightly focused ("concentrated") interest group with much to gain from a policy or set of policies (a special tariff or lower top marginal or company tax, for example) has over "dispersed" interests, that is the large

numbers of unorganised people who individually have less to lose (or to gain from alternative policies) and for whom the transaction costs of mobilisation are greater.

This, of course, applies more generally than to oligarchic loops. Where a concentrated limited number or small group of individuals or firms stand to gain or lose individually from a policy and the wider, dispersed, public stands to lose or gain less individually, governments and legislators often find it easier to respond to the concentrated case. [Wilson 1984] [Lowi 1984] An example is the refusal to impose a capital gains tax, which would come at substantial individual cost to some who derive substantial income from capital gain but distribute only a small individual gain to the great majority who do not gain income from capital gain.

This can take place near-invisibly to the general public or at least largely below the radar.

6c. A less obvious version of class privilege

A less obvious version of a caste or stratum which has gained a privileged position and then bequeathed that privilege to its children and grandchildren is what some have called the "educational meritocracy": those who benefited from the greatly expanded access to universities in the 1960s and 1970s to get high-paying professional and managerial jobs. Research in New Zealand reflects findings in other countries that a child of those people was more likely to go to university than a child whose parents did not and that this has continued into a second generation. [Callister various, Treasury 2012] Ironically, many of the educational meritocrats argued and continue to argue for policies that would reduce the very inequality of incomes they individually ensure their children are on the upside of through education. And, irony within irony, many were among those who argued for, introduced and managed the market-liberal policies that accentuated income and wealth differentials.

Bankers, business owners and investors had a special interest in economic policies which rewarded them and their firms financially. Educational meritocrats had a special interest in an educational system which disproportionately rewarded them with good livings. Both pursued their special interests effectively. The educational meritocrats of the Labour party, for example, made students loans interest-free in 2006, thus benefiting all educational meritocrats' children. This may be a case of maintaining a substantial manufactured inequality.

6d. The place of nepotism

Another version of caste or stratum is nepotism. Some argue that nepotism is an ingrained element in tribal organisation and consequently in iwi. It is also ingrained in family businesses, such as the Todd Group. Nepotism generates an inequality but it is one within a group, not (or not necessarily) an inequality in wider society. Nevertheless, is there possibly a wider issue in the routes of influence iwi have through the separate seats in Parliament and on one local authority, statutory advisory boards (as in Auckland) and statutory requirements for consultation and formal recognition in the likes of partnerships with the Department of Conservation? Might that possibly give iwi business special interests an advantage and, if so, generate the potential for successful pursuit of an injurious special interest? Addressing that question – if, indeed, it is a valid question – is beyond the scope of this note at this time.

7. The well-connected councillor or MP

An alternative to, or supplementary way of, pursuing a special interest is for the person whose interest it is or for a representative of a group special interest to win office to press the case. This might be said of a unionist or a business or farming leader.

The issue then is whether that enables the interest group to secure a gain or benefit it would not have secured. This may be the case at local level. An example some cite is the Canterbury Regional Council's impasse over water allocation and control: some councillors wanted more control to combat contamination of waterways and draining of aquifers, which was affecting city water; others representing farmers opposed that. In the opinion of one who was involved, farmers became concerned they would be outvoted after the 2010 elections and the government replaced the councillors with commissioners. It is beyond the scope of this note at this time to do a detailed analysis of this event.

There does not appear to be any evidence of payment of members of Parliament to represent or speak on behalf of interest groups, as was uncovered in Britain or as is a matter of fact in the United States Congress. Many MPs in New Zealand do come into Parliament from high-level membership of an interest group and do argue that group's interest but there is no evidence in the public domain that they continue to be paid by the interest group once in office and no evidence that the party is thereby captured by the interest group as a result of their presence, as distinct from as a result of the sorts of interactions described in *sections 4 and 5*.

8. The public is a target, too

So far, this note has focused on the interaction of individuals, firms, sector groups and associations with the executive and political parties. Firms (and political candidates) also try to influence the general public. They mostly do this by way of public relations, advertising and other mechanisms in Mulgan's "open market". But some use other means.

One largely unseen mechanism is the mining of data collected about individuals through their shopping, online and telecommunications activities. This has rapidly developed in the 2010s into a major activity which enables firms (and political candidates) to individualise marketing. [It has also become a serious worry about government surveillance.] While this pursuit of interests raises issues of individual privacy and the data-miners are advantaged, in some cases hugely, it is unclear whether it is injurious to the general public interest as defined in *sections 3 and 4*.

Another activity largely invisible to the public (though recently partly exposed by United States media) is the payment of retainers by pharmaceutical companies in the United States to eminent academics who publish positive evidence about their products and/or endorse their products to doctors and the general public, including in academic journals, without the academics making clear their relationship with the companies. Pharmaceutical companies' gifts or other arrangements with doctors can lead to their drugs being more likely than competitors to be prescribed or to be prescribed when not actually necessary or even potentially with harmful side-effects. [Harris and Carey, 2008]

Some climate change sceptics are similarly funded by fossil fuel companies directly or through think tanks. [Goldenberg, 2013]

That some academics have in the past been co-opted and in some cases, in effect, "bought" by firms may reduce trust in scientists and science. To the extent that academic institutions and/or their staff and students are funded from general taxation, it may also be an issue of public policy.

This should be distinguished from promoting some scientists' findings to contest the findings of other scientists where there is no payment or collusion. Science is never certain. But if thereby they secure policy favourable to their special interests against strong and widely supported scientific evidence (*section 5e*), that may manufacture an inequality which, if

substantial, would be injurious to the general public interest.

An interesting sidelight is in this extract from "How Putin is Reinventing War" by Peter Pomerantsev, which refers to different constituencies in the west (anti-European Union "right-nationalist" parties, anti-United States far-leftists, anti-homosexuality United States religious conservatives) which are persuaded or enticed by a range of different messages from Moscow to, in effect or in fact, lobby the Russian case, in this case on the Ukraine standoff:

"Influencers often appear in western media and policy circles without reference to their Kremlin connections: PR company Ketchum placing pro-Kremlin op-eds in the *Huffington Post*; anti-Maidan articles by British historian John Laughland in the *Spectator* that make no mention of how the think tank he was director of was set up in association with Kremlin-allied figures; or media appearances by influential German political consultant Alexander Rahr that fail to note his paid position as an adviser for the German energy company Wintershall, a partner of Gazprom, Moscow's massive natural gas company (Rahr denies a conflict of interest)." [Pomerantsev 2014]

9. The risk is not just to the losers

There is an irony in an excessive pursuit of special interests to the point that they are injurious: it can lead to damaging political or other reaction which negates the gains won by pressing those interests and in doing that may lower general welfare.

A recent New Zealand example may have been the hard line by Federated Farmers against inclusion in the greenhouse gas emissions trading scheme and against proposals for firm measures to reduce fertiliser runoff pollution of waterways. Fish and Game, the pressure group for recreational fishers and hunters, labelled this "dirty dairying", a phrase that caught on and may have contributed to firming public opinion against dairy farmers and for firmer measures.

More broadly, the embedding of high income and wealth inequalities by the success of the "oligarchic loop" in *section 6* may in time provoke a response which rolls back the "loop's" influence and gains.

One response is populism. To quote the Buttonwood *Economist* article again: "The risk in the long run is that the excessive influence of the better-off may prompt an overreaction. If resentment grows strong enough to propel populists to power, they may push through policies that are a disbenefit not just for the financial sector but for the economy as a whole." The article notes that the Tea Party was at first fuelled by resentment at the bank bailouts of 2008. In Europe populist parties pushing grab-bag policies promising relief that range from the far or racist or nationalist "right" to the hard or romantic "left" have surged since 2008 and won big votes in the European Union elections on 25 May 2014.

It was on a surge of populism in a time of hardship in Germany in the early 1930s that the Nazis piggybacked to power.

Populism is seldom rational and coherent or, if so, is likely to be selective in its targets and "solutions" which, perversely, may compound the initial problem. It can in turn generate its own interests and embed policies and systems which disadvantage all but those in power.

In other words, if interest groups push too hard and are too successful, they risk a popular response which strips them of their gains. In the case of the ascendancy of the financial sector which led to the global financial crisis it could be said its self-interested (and greedy) behaviour has generated a big risk to business of populist anti-business policies if the

resultant wave of populism is not contained and reversed.

Alan Kohler again: "Inequality, I would argue, is not caused by capitalism but by its lapses – that is, by vested interests that distort the system for their own purposes and capture more than their share. Inequality is thus caused by a failure of regulation and competition, not by the existence of competition." [Kohler 2013]

Yet those whose interests prevail are often reluctant to criticise colleagues' excesses. In New Zealand there was very little criticism from business leaders of the conduct of finance companies even after they began collapsing in May 2006.

Of course, the potential response to injurious special interests need not lower general welfare. Political mobilisation for a rational programme of action may raise general welfare. There is a glimmer of such a mobilisation in recent re-thinking of social democracy in Europe [Policy Network 2014] and in the re-examination of economic theory by the likes of Thomas Piketty [Piketty 2014] focused on addressing high inequality in democracies as a result of the ascendancy of the "oligarchy" referred to in *section 6*. This is not confined to the "left". As indicated above, there is also some rethinking of first principles on the "right".

10. Protections, antidotes and alternatives

To recap (*section 4a*), we all have vital individual interests in having necessities met and we have individual interests in an ordered society, under the rule of law, that is, in peace and security and in the opportunity for genuine participation in our society and its major subset, the economy. That is a function of our citizenship in a modern democracy. We not only have an equal claim to *formal* citizenship but an equal claim to *full* citizenship (*section 3*).

While the successful pursuit of one's own interests affects others' individual interests, some inequality in the realisation of individual interests is compatible with *full* citizenship. Equality of outcomes is impossible and probably undesirable and in any case inconsistent with the inherent and attitudinal inequalities that make each human unique and gives society constructive diversity. In the democratic contest of beliefs and ambitions some will benefit more than others. But substantial inequality of outcomes and substantial maldistribution of benefits – the creation, maintenance and extension of manufactured inequalities – is not compatible with full citizenship.

Moreover, substantial maldistribution of benefits will over time undermine peace, security and order and the resultant disorder may undo the gains made by injurious special interests (*section 9*).

So it is in the general public interest (as defined in *sections 3 and 4*) that the successful pursuit of injurious interests is prevented or exposed and reversed. Prevention requires a strong rules-based system that takes account of the interests of the least and less powerful and does not advantage powerful individuals and groups (*section 5b1*). Exposure and reversal require strong institutions, a rules-based system and rigour in policymaking and political decision-making and in the operations of government departments and agencies to prevent capture and resultant rents.

One institutional dimension is transparency: sunlight is the best disinfectant. This focuses on roles of the media, the parliamentary process and the three parliamentary officers, the Auditor-General, the Ombudsman and the Parliamentary Commissioner for the Environment which can speak on behalf of "dispersed interests". To these might be added the Office of the Children's Commissioner.

The role of the media essentially comes down to the degree to which they influence public

attitudes. This ranges from not at all, if the media take no interest in an issue, through neutral presentation of both sides of an issue, to actively enlisting the public on one side of an issue through a campaign, as in the campaign against the legal sale of synthetic cannabis and "party" drugs (which may have had the perverse result of driving the market underground and possibly more difficult to police and possibly more socially and individually damaging). A detailed analysis is beyond the scope of this note.

Also beyond the scope of this note is a detailed study of Parliament's role in shining sunlight on potentially or actually injurious pursuit of special interests, through questions, debates and select committee hearings though it might be noted that Parliament's oversight is uneven and depends partly on particular and/or special interests of political parties and MPs. Certainly, it merits analysis. Another issue meriting analysis but beyond the scope of this note is whether the fact that there are many parties in Parliament may have increased the potential for those pushing special interests to influence policy. The same goes for whether reversing the decline in voter turnout might be a factor underpinning a "culture" (*section 5a*) of acceptance of manufactured inequalities and of the "loop" described in *section 6 and 6a*. And remember that political parties themselves have special interests (*section 4 and 6a*).

At an Institute for Governance and Policy Studies workshop on Holly Walker's failed Lobbying Disclosure bill (*section 5c*) lobbyists argued that the Official Information Act, the Auditor-General and the media's obsessive interest in politicians' and officials' spending records, gifts to them and donations to political parties make improper secretive influence unlikely (though others argue that the "club" functions which the Prime Minister goes to and which people pay to attend by donating to the party may verge on being a case in point). The lobbyists at the workshop pointed to New Zealand's consistent No 1 or No 2 global rating by Transparency International for the least corruption, to media criticism of the Sky City and Sir Peter Jackson deals (*section 5b*) and recent media controversies involving interventions by cabinet ministers Judith Collins and Maurice Williamson that some said could conceivably be read as returning favours to donors. To that might be added the success of a coalition of business and consumer lobbyists in having the Chorus deal altered and the Auditor-General's critical report of officials' handling (at ministers' behest) of the Sky City deal (*section 5b*).

Contrary evidence includes: Nicola White's detailed analysis of the shortcomings and limitations of the Official Information Act, including many ministerial frustrations of Ombudsman inquiries [White 2007]; continuing ministerial attempts, some carried through, to legislate limitations of the Official Information Act, including in the Environmental Reporting Bill, the Building (Earthquake-prone Buildings) Amendment Bill, the Education Amendment Bill which provided for charter schools, the Mixed Ownership Model Bill (for the partial sale of state-owned enterprises) and several sections of the Statutes Amendment Bill No 4 (2014); the fact that the Sky City and Sir Peter Jackson deals went ahead, a pointer that there will be more such deals; the fact that Collins was admonished by the Prime Minister but then defended; and complaints from the Parliamentary Commissioner for the Environment of encroachments in favour of mining companies on the Conservation Act's protected areas.

Another relevant institution is the Commerce Commission, which has multiple roles, including controlling monopolies and setting pricing parameters for oligopolies, finding and fining cartels and inquiring into and putting a stop to excessive exploitation of market power to disadvantage consumers and suppliers. The Commerce Commission set lower prices for copper-wire supply of broadband than Chorus wanted to charge; initially the Minister of Telecommunications, Amy Adams, proposed a law change to support Chorus but quickly backed off in the face of public, media and lobbyists' criticism. Alongside the commissioner, the Consumer Council represents consumers.

The Chorus incident demonstrates the limitation on the Commerce Commission's capability to counter injurious special interests: the government can, if it disagrees, change the law at the behest of those interests if it has a majority in Parliament.

Even *formal* citizenship, equality before the law, is at risk from injurious special interests. Courts are one (limited) channel for redress. But a special interest with deep pockets can prevail in court by forcing an opponent with fewer resources to retreat from legal redress or opposition. To some extent that is ameliorated through alternative tribunals such as the small claims tribunal or by mechanisms such as mediation and conciliation. Also, "dispersed" interests can band together and raise funds: the Environmental Defence Society and Forest and Bird are examples.

Another counterweight is better application of vetting techniques for new legislation and regulations to ensure they are in the national interest and not in the special interests of a firm, sector or association. New Zealand is one of only a handful of jurisdictions that has established such a process but it is still effectively in the early stages of development and thus so far a weak counter to strong special interests [Productivity Commission, 2014]. Related to this is the requirement that the Attorney-General state if legislation or regulations contravene a provision of the Bill of Rights Act: such statements are routinely ignored by the government, with impunity.

There are other potential antidotes, most of which involve mechanisms to give "dispersed interests" a stronger voice.

One is citizens' campaigns, protests and petitions. A huge petition in 1973 to Parliament to "save Manapouri" dissuaded the National government from pursuing a plan to raise the level of the lake by 6 metres as part of a plan for a new hydro-electricity generating plant which would have done unsightly damage to the native bush surrounding the lake. Many of those who signed the petition were National party members, including some high-ranking ones in the party outside Parliament. A similar sentiment, again including many in the National party, quickly dissuaded a National-led government in 2010 from prospecting for and exploiting minerals in land administered under section 4 of the Conservation Act.

Citizens can petition for a referendum (a citizens-initiated referendum) which must be held if more than 10% of enrolled voters sign a petition (subject to verification of a sample). But the referendums are non-binding and none which has passed since they were legislated for in 1993 has been implemented by the government. A recent example: when a petition with 18,500 more verified signatures than the required 308,753 secured a citizens-initiated referendum opposing partial sales of state-owned electricity companies and the referendum, which was held over three weeks from 22 November to 13 December 2013, passed 67.3%-32.4% (on a turnout of 45.1%), it was dismissed by the government which claimed a mandate for the sales because it had said in its 2011 election manifesto it would do them, a claim, in effect, that the sales were in the national interest and the public had endorsed them.

So far there is no avenue for citizens to force a binding referendum through a citizens initiative, as there is in many states in the United States and in Switzerland. And in any case, there is a risk, which would need to be carefully managed and countered, that injurious special interests could both initiate self-serving referendums and co-opt initiatives to serve their ends, as frequently happens in the United States. That happens less in Switzerland, which suggests Switzerland could usefully be drawn on to guide New Zealand practice.

Another option is a citizens assembly or jury. A randomly selected stratified sample of citizens deliberates over an extended period, with expert input, and makes recommendations which are binding on the legislature. This was used in British Columbia over 11 months in 2004 to determine whether to introduce proportional representation. The assembly

recommended in favour but the resultant referendum failed (by 2.3%) to reach the 60% threshold for change. More recently, a citizens assembly, called a convention, in Ireland in 2013-14 proposed on 31 March 2104 a range of constitutional or civil rights changes which the legislature has undertaken to put to referendums. (Constitutional convention 2014)

An alternative to Mulgan's "open market" of interest groups is collaborative governance, adapted from Scandinavian practice. So far there has been only one in New Zealand, the Land and Water Forum (LaWF), involving 59 interest groups ranging from environmental and recreational advocates to industry, farmers and local government, which deliberated over three and a-half years, producing recommendations broadly supported by the government and main opposition parties. Regional versions are now being set up to deal with detailed catchment matters, including allocation. The LaWF had the backing of the government, which encouraged interest groups to engage, but government backing might not be necessary if interest groups see it as in their overall interest to reach durable compromises rather than take their chances on Mulgan's "market". Some in the health sector are exploring that possibility. One criticism of this mechanism is that it leaves out the "dispersed interests", the general public. But that dimension can be added in at the political stage when the forum's recommendations are translated into law.

Another way of potentially checking undue influence on policy is "working groups" of experts, as the present government has used for capital markets, tax and welfare reform. A criticism of that mechanism is that the working groups themselves may reflect biases in favour of some interests over others.

There is a range of other mechanisms of varying potential, including the use of online mechanisms to encourage citizen feedback and suggestions, particularly by local councils but to some extent by the central government. These might over time gather weight, though it is too early to tell. The important issue is that supplements to representative democracy are evolving and the trend towards this so-called "participatory democracy" or "citizens participation" does seem to be gathering some momentum (though still very unevenly, intermittently and often issue-specific or group-specific). So it might be that over time "oligarchies" are less likely to form and/or be able to dominate policy and individual firm or sector lobbying may be less successful.

11. An inequality checklist

The cornerstone criterion in this note by which pursuit of a special interest is judged to be injurious to the general public interest is whether it manufactures a substantial inequality or maintains or exacerbates an existing substantial manufactured inequality. Given that the level of income and wealth inequalities is high and has risen greatly since the 1980s and so has put full citizenship beyond the reach of large numbers of citizens, that suggests the level of successful pursuit of injurious special interests has also been high, at least in the sense of a loop having developed which generates and protects policies that benefit those already benefited. Within that loop there are examples of specific injurious interests.

That suggests that there is cause for a more informed and comprehensive inquiry than this cursory note and for a programme of action developed from that inquiry. That programme would not constrain the pursuit of special interests, which is a core part of the contest of beliefs and ambitions at the heart of a healthy democracy. But it would strengthen the monitoring and exposure of the pursuit of those interests if that pursuit is injurious to the general public interest, which is the antithesis of a healthy democracy.

The aim would be that each citizen has full equal membership, the essence of a democracy.

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