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ARTICLE

Legal Persons and the Influence Market: The Prohibition of Political Donations from Companies and Trusts

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Although companies and trusts are ineligible voters, they may nevertheless acquire access and influence as political donors. The Independent Electoral Review Panel therefore recommended prohibiting political donations from legal persons. This article supports this recommendation, analysing political donations by entities through the lens of Michael Johnston's influence market syndrome of corruption. Johnston theorises that systemic corruption manifests in societies with electoral law regimes that sanction the exchange of private wealth for political influence. Applying an egalitarian approach to political donations, this article suggests that the prohibition of company and trust donors is necessary to constrain the influence market's operation and preserve the capacity for New Zealanders to act as political equals. However, ultimately, the question of whether entities should enjoy unlimited participation in the influence market due to their "expressive rights" remains a constitutional question, which New Zealand must confront.

I Introduction

New Zealand's electoral law aids the exchange of wealth for political access and influence by providing companies and trusts with participation rights in democracy as eligible political donors. In that capacity, legal persons join other donors, public officeholders and political parties in an influence market. This article analyses political donations by legal

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persons through the lens of Michael Johnston's "influence market syndrome".[1] Johnston theorises that electoral law regimes that sanction the interplay between wealth and political influence degrade democracy's representative nature, as political parties "rent out" access and influence in exchange for financial contributions.[2] The Independent Electoral Review Panel (IERP) has recently recommended that the government prohibit non-individuals from donating to political parties and candidates, preventing entities from gaining "access and undue influence through donations".[3]

This article argues that the IERP's recommendation is justified as prohibiting entity donors, specifically companies and trusts, will help preserve the political equality of individuals. Companies and trusts are viewed as illegitimate political citizens because, unlike individuals, entities cannot participate in electing representatives as voters. This article applies an egalitarian approach, drawing on Johnston's influence market theory alongside John Rawls's work and Canadian Supreme Court jurisprudence.[4] Influence markets allow economic inequality to transfer into the political sphere, as economic elites may trade political donations for undue influence.[5] This represents an egalitarian concern with ensuring equal political influence opportunities for citizens, by preventing citizens with companies and trusts at their disposal from dominating the influence market due to the unequal advantages the corporate form possesses over individual citizens.

Legal persons possess unfair advantages over natural persons as they are granted separate legal personhood, beneficial ownership, preferential tax treatment and the ability to arrange themselves in opaque corporate networks to enhance profit-making potential. When permitted to employ these advantages in the political realm, entity donors allow inequalities in democratic influence between entities and individuals by two means: diminishing the equal political participatory rights of individuals and harming democratic transparency. Aligning with a Rawlsian egalitarian approach, this article adopts the principle of political equality to analyse political financing, requiring equal opportunities for political influence amongst electors. First, as legal persons amass greater wealth than most natural persons, they may wield greater potential influence, diminishing the rights of natural persons to equal political access.[6] Secondly, entity donors may exploit loopholes in the Electoral Act 1993's donor disclosure obligations in ways that individuals cannot. This allows potential undue influence to operate without meaningful transparency and hinders the ability of individuals to ensure that they are exercising equal political rights.[7]

New Zealand's law has legitimated the influence exerted by companies and trusts by maintaining that political expenditure represents an act of "expression", protected under the New Zealand Bill of Rights Act 1990 (NZBORA). Engaging with American and Canadian jurisprudence on corporate political speech, I argue that political financing reform is

1 Michael Johnston *Syndromes of Corruption: Wealth, Power and Democracy* (Cambridge University Press, Cambridge (UK), 2005).
2 At 43.
3 Independent Electoral Review *Final Report: Our recommendations for a fairer, clearer, and more accessible electoral system* (November 2023) at [13.55].
4 John Rawls *A Theory of Justice* (Harvard University Press, Cambridge (Mass), 1971); *Harper v Canada (Attorney-General)* [2004] 1 SCR 827 at [62]–[63]; *Libman v Quebec (Attorney-General)* [1997] 3 SCR 569 at [41]; and see Part VI of this article.
5 Johnston, above n 1, at 43.
6 See Part IV of this article.
7 See Part V of this article.

needed to ensure that "expression" competes on an equal playing field.[8] Non-individual donations must be prohibited as their "influential" qualities are greater than their "expressive" ones.

My analysis proceeds as follows: Part II discusses Johnston's influence market theory. Part III examines New Zealand's electoral law. Part IV considers how entity donations diminish the equal political rights of natural persons. Part V analyses how entity donations introduce political financing loopholes to the Electoral Act's transparency obligations. Part VI links the recommendation to prohibit entity donations to egalitarian theory. Finally, Part VII assesses the greatest barrier to reform—the contention that political donations by legal persons represent "expression" under NZBORA.

II The Influence Market Syndrome of Corruption

A *Influence market theory*

Johnston theorises that in societies with strong democratic institutions, corruption manifests through the legitimated private exchange of wealth for political access and influence, rather than outright illegality.[9] Influence markets are characterised by "the use of wealth to seek influence within strong political and administrative institutions", whilst scoring favourably on corruption indices that emphasise traditional corruption, like bribery.[10] New Zealand has strong regulatory and corruption watchdogs, including the Electoral Commission (the Commission) and Serious Fraud Office (SFO). In 2023, New Zealand ranked third on the Corruption Perception Index (CPI), having previously placed first equal.[11]

This commendable CPI ranking does not account for influence processes that manifest throughout New Zealand's political landscape. Individuals and corporations can "pay to play" as unregulated lobbyists.[12] Politicians have offered exclusive private dinners for thousand-dollar attendance fees.[13] However, this article focuses on political party financing, the most widely debated influence market concern.[14] As political parties "rent out" access to obtain donations, a form of systemic corruption evolves to accommodate political and economic elites.[15]

In recent years, major parties have been entangled in SFO prosecutions of donation practices. The New Zealand First (NZF) scandal involved the use of a company and trust to segregate party donations, evading statutory disclosure obligations.[16] The National Party was similarly embroiled in scandal after donors circumvented disclosure requirements to hide the source of two $100,000 donations.[17] James Gluck labels these scandals as

8 See Part VII of this article.
9 Johnston, above n 1, at 38 and 86.
10 At 60.
11 Transparency International "Corruption Perceptions Index" (2023) <www.transparency.org>.
12 James Gluck "Trading in Influence in New Zealand" (PhD Thesis, Victoria University of Wellington, 2022) at 34.
13 Max Rashbrooke and Lisa Marriott *Money for Something: A report on political party funding in Aotearoa New Zealand* (Victoria University of Wellington, Wellington, 2022) at 30.
14 Johnston, above n 1, at 43.
15 At 33, 42 and 61.
16 See generally *R v EF* [2022] NZHC 1755.
17 See generally *R v Zhang* [2022] NZHC 2541.

influence market manifestations, where private wealth was traded to acquire political influence.[18]

B *Assumptions in influence market theory*

(1) Large donations are accompanied by expectations of access and influence

Johnston contends that wealth purchases influence, ranging from increased access to politicians to the acquisition of advantageous policy outcomes. Access is a precondition for legislative influence, affording donors the opportunity to make a case on policy as "[a]ccess is limited and does not guarantee favourable outcomes, but little can be accomplished without it".[19] Indeed, Max Rashbrooke has documented admissions by donors that "many expected to have access to politicians" following donations.[20] In the National Party scandal, $100,000 donations secured dinners with then-leader Simon Bridges.[21] In the NZF scandal, donors received direct access to decision-makers overseeing the Provincial Growth Fund.[22] Establishing causal links between donations and legislation is typically impossible and indeed unnecessary—the mere *perception* of undue influence is sufficient to harm democracy.[23]

(2) Access and influence as corruption

Employing Johnston's theory, this article adopts a "systemic" corruption perspective, where corruption extends to the exchange of political influence for private wealth. In the alternative "individualistic" conception, corruption is reduced to individual illegal quid pro quo conduct, meaning legislators may permissibly provide pathways for political influence. Hence, in *Citizens United v Federal Election Commission*, the United States Supreme Court considered that the fact that corporate donors may have:[24]

> … influence over or access to elected officials does not mean that these officials are corrupt … . It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies … . Democracy is premised on responsiveness.

Whilst catering to donor concerns is democratically desirable in the individualistic conception, Johnston's systemic corruption approach requires that legislators act independently of private financial influence to prioritise broader public interests. This approach highlights the "systematic ways wealth and power degrade the ability for institutions to do their work and for citizens to participate".[25] Systemic corruption is, therefore, diagnosed as a "deformation of judgment" where:[26]

18 Gluck, above n 12, at 26, 60 and 110.
19 Johnston, above n 1, at 42 and 71.
20 Max Rashbrooke and Lisa Marriott "A Reform Architecture for Political Party Funding in Aotearoa New Zealand" (2023) 19(1) PQ 73 at 74.
21 Gluck, above n 12, at 79–80.
22 At 108.
23 Johnston, above n 1, at 60.
24 *Citizens United v Federal Election Commission* 558 US 310 (2010) at 359, quoting *McConnell v Federal Election Commission* 540 US 93 (2003) at 297.
25 Gluck, above n 12, at 24.
26 *McConnell*, above n 24, at 153.

> … officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.

Private interests overtake the public good, corroding the institutions of representative democracy.[27]

III Electoral Law in New Zealand

A *Minimal public subsidies, high-cost electioneering and ineffective expenditure caps*

Systemic corruption implicates political financing regimes, as electoral law may foster dependence between politicians and wealthy financiers.[28] New Zealand's political financing regime, outlined in the Electoral Act, must be assessed.

State funding does not cover most electioneering and daily party expenses, rendering political parties largely reliant on private finances.[29] There are two primary sources of state funding for parties: the broadcasting allocation covers advertising costs in election years;[30] and MP support and parliamentary work is state-funded following an election.[31] The absence of subsidies for campaigning, general party expenses and policy-making therefore perpetuates reliance on private political donations.[32]

The influence of wealth is then strengthened when combined with high-cost electioneering trends. Election expenditure increased by 63 per cent between 1999 and 2020.[33] Correspondingly, the 2023 election was characterised by unprecedentedly large donations. National received more donations in a single year than Labour raised in a decade and scored the largest-ever individual donation in New Zealand's history—$500,000 from businessman Warren Lewis.[34] Whilst donations of $100,000 were once rarities, 2023 saw multiple parties receive $100,000 to $500,000 donations.[35]

Expenditure limits ostensibly prevent political parties from needing to amass substantial financial resources for electioneering. Currently, expenditure limits are set at $1,388,000 for each party and $32,600 per electorate, resulting in a $3,735,200 expenditure cap for parties competing in all 72 electorates.[36]

However, expenditure limits only apply to election advertising in the three-month "regulated period" before voting.[37] In the 2023 election, expenditure limits applied to party advertisements between 4 July to 13 October 2023.[38] As Professor Andrew Geddis identifies, in the "era of the 'permanent campaign'", regulated expenditure limits

27 Camila Vergara *Systemic Corruption: Constitutional Ideas for an Anti-Oligarchic Republic* (Princeton University Press, Princeton, 2020) at 36.
28 At 36.
29 Rashbrooke and Marriott, above n 13, at 9.
30 At 9.
31 At 9.
32 At 9.
33 Pete McKenzie "New Zealand's campaign finance laws are broken. That can have enormous consequences" *The Guardian* (online ed, London, 12 June 2021).
34 Thomas Coughlan "National raises 'unprecedented' $2.3m war chest from richlist donors before election year" *The New Zealand Herald* (online ed, Auckland, 18 January 2023).
35 Coughlan, above n 34.
36 Electoral Act 1993, s 206C.
37 Andrew Geddis *Electoral Law in Aotearoa New Zealand* (3rd ed, LexisNexis, Wellington, 2023) at 151.
38 Electoral Act, s 3B(2)(a)(ii).

represent a mere "fraction" of election expenses; money is required for virtually every election-related activity, including campaign consultants, office and travel expenses, opinion polling and policy development.[39] High-cost electioneering, combined with minimal public subsidies and ineffective expenditure limits, encourages parties to rent out political access to wealthy interests.

B *The absence of donor restrictions*

New Zealand's weak regulatory regime permits companies, trusts and unions to donate. As there are no donation caps, donors may contribute unlimited sums. Donations trigger varying disclosure obligations and "overseas persons" restrictions, as considered in Part V. The eligibility of companies and trusts as donors, coupled with the absence of donation caps, aids the exchange of wealth for influence by dissolving the barrier between the economic and political spheres.[40]

C *International comparison*

For perspective on how weak New Zealand's political financing arrangements are, overseas comparison is necessary. Of the 32 surveyed countries, New Zealand is included in the one-third that permit unlimited donations.[41] Many OECD countries implement limits for political donations from natural and legal persons.[42] According to the International Institute for Democracy and Electoral Assistance, at least 49 countries ban corporate donations.[43] Out of the 27 member states of the European Union, 13 have banned donations from legal entities.[44]

Canada serves as a useful comparison. Political contributions from corporations and unions have been banned since January 2007 under the Canada Elections Act.[45] Canada has a strict donations cap, set at $1,725 in 2024.[46] To compensate for expenditure restrictions, the State reimburses donors with tax credits through Canada's state-funded tax credit system. These are available at differing rates: 75 per cent for donations reaching $500; 50 per cent for those between $500 and $950; and 33 per cent for those over $950, with a maximum credit of $830. Parties that achieve over two per cent of the party vote in an election are reimbursed for half their election expenses.[47]

These settings have prevented political contributions from being concentrated in the hands of wealthy individuals and entities. In 2021, the Conservatives received over 95,000

39 Andrew Geddis "Funding New Zealand's Election Campaigns: recent stress points and potential responses" (2021) 17(2) PQ 9 at 10.

40 Timothy K Kuhner *Capitalism v Democracy: Money in Politics and the Free Market Constitution* (Stanford University Press, Stanford, 2014) at 63.

41 Rashbrooke and Marriott, above n 13, at 60.

42 Organisation for Economic Cooperation and Development *Regulating Corporate Political Engagement: Trends, challenges and the role for investors* (OECD Public Governance Policy Papers No 13, 2022) at 20.

43 Magnus Ohman *Political Finance Regulations Around the World*: *An Overview of the International IDEA Database* (International Institute for Democracy and Electoral Assistance, February 2012).

44 Quentin Reed and others *Financing of Political Structures in EU Member States: How funding is provided to national political parties, their foundations and parliamentary political groups, and how the use of funds is controlled* (Policy Department for Budgetary Affairs, June 2021) at 17–18.

45 Canada Elections Act SC 2000 c 9, s 363(1).

46 "Limits on Contributions – 2024" Elections Canada <www.elections.ca>.

47 Rashbrooke and Marriott, above n 13, at 61.

donations, each averaging $278.[48] As party finances are sourced from a range of voters, this reduces potential for large political contributions from select individuals to purchase undue influence.[49]

D *The Independent Electoral Review Panel*

Due to political financing weaknesses, the Labour Government established the IERP in 2021 to recommend electoral law reform.[50] In November 2023, the IERP issued its final report, with over 140 recommendations.[51] This article focuses on the recommendation that "only individuals who are enrolled to vote be allowed to donate".[52] Although this also prevents unions and iwi groups from donating, this article focuses on companies and trusts as the dominant non-individual donors in New Zealand's political landscape.[53] Given their comparatively limited financial resources, other entities, such as unions, may "actually welcome the removal of any possibility of donating".[54]

The IERP's recommendation to prohibit non-individual donors seeks to prevent entities from acquiring access and undue influence through donations and thereby degrading public trust in democratic integrity.[55] Building on the IERP's rationale, the subsequent discussion assesses the impact of entity donations on democratic trust and the equal political participation rights of individuals.

IV Legal Persons and the Equal Political Participation Rights of Natural Persons

A *Inequality between legal persons and natural persons*

Legal persons accumulate vast financial resources compared to most natural persons and may therefore wield substantial influence as eligible political donors. This section considers how legal persons' donations harm the rights of natural persons to equal political participation, as donors may exert influence by donating in both their personal capacity and via associated entities with concentrated financial resources.

An appreciation of socio-economic inequality provides important context. From 1985 to 2005, inequality in New Zealand increased more rapidly than in any other developed country.[56] Wealth disparities have since become entrenched. Since 2021, the wealthiest one per cent of individuals hold a net worth 68 times greater than the median New Zealander.[57] When economic power is unequally distributed, political influence will, if permitted by electoral law, "tend to trace the outlines of economic inequality".[58]

48 At 62.
49 At 62.
50 Kris Faafoi "Government to review electoral law" (5 October 2021) Beehive <www.beehive.govt.nz>.
51 Independent Electoral Review, above n 3.
52 At [13.8].
53 Electoral Commission "Donations exceeding $20,000" <https://elections.nz>.
54 Rashbrooke and Marriott, above n 13, at 69.
55 Independent Electoral Review, above n 3, at [13.55].
56 Max Rashbrooke *Too Much Money: How Wealth Disparities are Unbalancing Aotearoa New Zealand* (Bridget Williams Books, Wellington, 2021) at 49.
57 At 2.
58 Kuhner, above n 40, at 42.

When pitted against the concentrated wealth of entities, New Zealanders cannot engage in the influence market on an equitable footing.

(1) Concentrated wealth in entities

Ownership of companies and trusts is primarily the domain of wealthy individuals. In 2015, the Inland Revenue Department estimated that 212 high-net-worth individuals owned approximately 7,100 entities, comprising 5,000 companies and 1,200 trusts.[59] The wealthiest tenth of New Zealanders hold ownership of the "productive economy" in the form of business ownership or company shares.[60] The average individual in the top one per cent of the net worth distribution holds approximately half their assets in trust equity.[61] For the 2020 to 2021 income year, a surveyed 149,500 trusts reported a total of $469 billion in assets, averaging $3.1 million per trust.[62]

Legal persons possess financial advantages allowing them to "amass and deploy financial resources on a scale few natural persons can match".[63] Entities receive preferential tax treatment, as 80 per cent of the income of high-wealth individuals comes from capital gains, primarily earned through trusts or companies.[64] Entities protect wealth from high-risk business activities (and creditors and spouses) through separate legal personhood, to maximise economic returns.[65] As Rehnquist J identified in *First National Bank of Boston v Bellotti*, the State grants "the blessings of potentially perpetual life and limited liability to enhance … efficiency as an economic entity", yet "those properties, so beneficial in the economic sphere, pose special dangers in the political sphere".[66] This recognises that through state-conferred economic advantages, companies and trusts may amplify their policy-making preferences at the expense of the individual. The wealth of entities is granted an "organizationally superior, legally privileged framework", and by employing these economic privileges in the political sphere, entities harm the democratic rights of individuals.[67]

(2) The 2023 election

Corporate donations were prevalent in the 2023 election, demonstrating that non-individual donors command significant political influence. The table below reflects that right-leaning parties ACT New Zealand and National received significant donations from companies and trusts, with at least 20 entities donating sums ranging from $20,000 to $200,000. This table only includes party (rather than candidate) donations and does not account for donations under $20,000, declared in April 2024.[68]

59 Rashbrooke, above n 56, at 151.
60 At 80–81.
61 At 152.
62 Thomas Coughlan "Greens promise wealth tax as research reveals rich stash $470b in trusts" (10 June 2023) *The New Zealand Herald* (online ed, Auckland, 10 June 2023).
63 *Citizens United*, above n 24, at 469, per Stevens J.
64 Policy and Regulatory Stewardship *High-wealth Individuals Research Project* (Inland Revenue Department, April 2023) at i.
65 Companies Act 1993, s 15; and *First National Bank of Boston v Bellotti* 435 US 765 (2003) at 809.
66 *Bellotti*, above n 65, at 825–826.
67 Kuhner, above n 40, at 98.
68 Electoral Commission, above n 53.

Party donations from companies and trusts exceeding $20,000 in the 2023 general election (1 January 2023 to 11 October 2023)		
Donating entity	**Quantity**	**Recipient**
Companies		
ADN Commercial Ltd	$24,500.00	National Party
Christopher & Banks Ltd	$100,000.00	
Buen Holdings Ltd	$200,000.00	
Hud Studio Ltd	$35,000.00	
IEF Ltd	$23,000.00	
Midlands Seed Ltd	$40,000.00	
Oregon Group Ltd	$62,000.00	
Rank Group Ltd	$150,000.00	
Velocity Freight Ltd	$100,000.00	
VDB Management Services Ltd	$50,000.00	
National Party total: $784,500.00		
Ateco Group NZ Ltd	$25,000.00	ACT New Zealand
Atlas Concrete Ltd	$50,000.00	
Rank Group Ltd	$104,000.00	
Christopher & Banks Ltd	$100,000.00	
Align Farm Investments Ltd	$100,000.00	
Owens Properties Ltd	$50,160.00	
ACT New Zealand total: $429,160.00		
Rank Group Ltd	$100,000.00	New Zealand First
AJR Finance Ltd	$50,000.00	
New Zealand First total: $150,000.00		
Weft Knitting Company	$100,000.00	Green Party
Green Party total: $100,000.00		
Vision New Zealand	$19,250.22	Freedoms New Zealand
Vision New Zealand	$47,052.53	
Aotearoa Media Ltd	$21,959.25	
Freedoms New Zealand total: $88,262.00		
Company total: $1,551,922.00		
Trusts		
Merani Trust	$54,755.67	ACT New Zealand
Beethoven Trust	$50,000.00	
Cambrian Trust	$50,000.00	
West Reeve Family Trust	$25,000.00	
Ototoa Trust	$25,000.00	NewZeal
Trust total: $204,755.67		

(a) Companies

In the 2020 to 2023 election cycle overall, National received the most reported corporate donations, valued at $1,544,405.67—almost a quarter of Labour's total donation value.[69] ACT received at least $429,160 in company donations.[70] Interestingly, corporate donors tend to be repeat donors, as "business interests are more persistent in attempting to exercise political power through financial means".[71] Rank Group Ltd donated $354,000 between National, ACT and NZF, whilst Christopher & Banks Ltd donated multiple times to National and ACT.[72]

Notably, corporate donors favoured right-leaning parties over cross-spectrum donations. Cross-spectrum donations occur when corporations donate to both dominant parties as a "quid pro quo attempt to gain access" and acquire influence with either party.[73] This previously accounted for a significant proportion of Labour's corporate funding.[74] However, Labour did not receive any company donations in the 2023 electoral cycle. It has been suggested that corporate donors have increasingly disfavoured Labour, due to policies perceived to be adverse to business interests.[75]

(b) Trusts

In 2023, trust donations above $20,000 amounted to $204,755.67. In the past, trust donations were of similar magnitude to corporate donations and comprised dependable funding for National, which received 90 per cent of trust donations from 1996 to 2019.[76] Recently, National appears to have reduced reliance on trusts as vehicles for donor anonymity, instead relying on anonymous donations falling under disclosure thresholds.[77]

(c) Wealthy donors exert influence personally and via associated entities

A further trend in the 2023 election cycle was the prevalence of substantial donations made in both an individual's personal capacity and via associated entities, as the table below demonstrates.[78]

69 Electoral Commission "Party donations and loans by year" <https://elections.nz>.
70 See above table at 13.
71 Timothy K Kuhner "Representative Democracy in an Age of Inequality: why legal reforms are needed to protect New Zealand' system of government" (2021) 17(2) PQ 21 at 25.
72 See above table at 13.
73 Thomas Anderson and Simon Chapple *Patterns of political donations in New Zealand under MMP: 1996–2019* (Institute for Governance and Policy Studies, Working Paper 20/05, November 2020) at 14 and 21.
74 Simon Chapple and Thomas Anderson "Who's donating? To whom? Why? Patterns of party political donations in New Zealand under MMP" (2021) 17(2) PQ 14 at 18.
75 Farah Hancock "No significant donations to the Labour Party from businesses in over two years" (14 September 2023) RNZ <www.rnz.co.nz>.
76 Chapple and Anderson, above n 74, at 15 and 18.
77 At 17.
78 Electoral Commission, above n 53.

2020 to 2023 election cycle: party donations made in an individual's personal capacity and through associated entities			
Donor	**Date**	**Recipient**	**Total**
$50,000.00 John Bayley	5 May 2023	National and NZF	**$214,600**
$60,000.00 Bayley Corporation Ltd	25 November 2022		
$104,600.00 Bayley Corporation Ltd	26 May 2022		
$104,000.00 Rank Group Ltd	26 September 2023	ACT, National and NZF	**$804,000**
$150,000.00 Rank Group Ltd	15 September 2023		
$100,000.00 Rank Group Ltd	15 September 2023		
$100,000.00 Graeme Hart	24 March 2023		
$250,000.00 Graeme Hart	13 April 2022		
$100,000.00 Graeme Hart	14 March 2022		
$25,000.00 Christopher Reeve	24 March 2023	ACT, National	**$295,000**
$100,000.00 Tawata Farms	25 August 2021		
$100,000.00 Christopher Reeve	5 July 2021		
$35,000.00 Matariki Trust	16 September 2020		
$35,000.00 Matariki Trust	24 February 2020		
$103,260.00 Christopher and Michaela Meehan	23 August 2023	National, ACT	**$205,254.70**
$50,000.00 Christopher Meehan	24 March 2023		
$51,994.70 Speargrass Holding Ltd	17 May 2022		

* This table does not include all donations made by the specified individuals and entities in the election cycle.

Representing a mere sample of such donations, this table reflects that donors may claim a greater stake in the influence market by drawing on both their extensive personal wealth and that of their companies and trusts. Individuals who own entities may amplify potential influence, which, when pitted against the comparatively limited resources of the average individual, has dire implications for the democratic rights of natural persons.

B *Rights of political participation*

Although legal persons may wield considerable political influence through donations, rights of political participation are only afforded to natural persons. Section 12 of NZBORA confines the right to vote to citizens over 18 years old.[79] This reality fuelled the IERP's recognition of the need to "remove the perception that *those who are unable to vote* are able to unduly access and disproportionately influence political parties".[80] Prohibiting legal person donors recognises that political expenditure may exert immense and unequal democratic influence, whilst entities themselves are not political citizens.

Political participation rights are fundamental to democracy, as they dictate how individuals consent to Parliament's exercise of public power. The Universal Declaration of Human Rights (UDHR) sets a standard of democratic practice for states to aspire towards, providing that:[81]

79 New Zealand Bill of Rights Act 1990 [NZBORA], s 12(a); and Electoral Act, s 74 extends voting rights to permanent residents.

80 Independent Electoral Review, above n 3, at [13.34] (emphasis added).

81 *Universal Declaration of Human Rights* GA Res 217A, art 21(3).

> The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage.

Drawing on the UDHR, art 25(b) of the International Covenant on Civil and Political Rights (ICCPR) preserves the right and opportunity, without unreasonable restriction:[82]

> To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

Section 12 of NZBORA affirms art 25(b), mirroring the ICCPR's commitment to "the right to vote in genuine periodic elections" by "equal suffrage".[83] These rights of political participation have been recognised as the very embodiment of democracy, securing popular sovereignty through the consent of the people.[84]

(1) Equal participatory rights and the influence market

Inherent in the ICCPR and the NZBORA is the recognition that equality of political participation is a precondition of representative democracy. First, the commitment to "genuine" elections in the NZBORA and the ICCPR recognises that elections "must accurately reflect the will of the people".[85] "Genuine" elections require that "voters have a certain minimum amount of political influence".[86] This interpretation is supported by the United Nations Commission on Human Rights, which emphasised "the importance of the equitable participation of all" and that "popular participation" and "equity" are "essential foundations of democracy".[87] Secondly, the NZBORA and the ICCPR both require that elections occur through "equal suffrage".[88] This has been interpreted to mean that "each vote carries equal weight" and has identical influence on election results, applying to "inequalities in the *effect* of votes".[89]

Whilst donations do not impact the technical weight of each vote, they do permit an additional market of political influence to operate alongside the electoral system. Mere rights of access to the influence market effectively mean nothing to individuals who lack the financial resources to participate. Select electors and their associated entities, with the requisite financial resources, can acquire an additional and perhaps even more potent means of participation in the political process than voting. Indeed, Professor Geddis considers that parties value an elector's political donation more than their vote, reflecting that the influence market affords greater rights of political participation to wealthy interests.[90] By incorporating a company or settling a trust to protect and further personal

82 International Covenant on Civil and Political Rights 999 UNTS 171 (signed 16 December 1966, entered into force 23 March 1976) [ICCPR], art 25(b).

83 NZBORA, s 12(a).

84 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 475.

85 At 491.

86 Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kehl am Rhein, 2005) at 444.

87 *Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy* UN Doc E/CN.4/L.47 (14 April 2003) at 2–4.

88 NZBORA, s 12; and ICCPR, art 25.

89 Nowak, above n 86, at 447–448 (emphasis added).

90 Geddis, above n 39, at 10.

wealth, individuals who donate via entities may acquire a considerable stake in the influence market. Concentrated wealth, channelled through trusts and companies, distorts the principle of "one person, one vote" by impairing the capacity for New Zealanders to act as political equals. Yet, the promise of democracy is that citizens equally participate in determining who governs.

New Zealand has sanctioned the unequal political influence of citizens by maintaining a political financing regime that permits legal persons to participate in the influence market through unlimited political donations. Johnston identifies that the price of undue influence over political representatives is distrust in democratic processes and institutions.[91] Private wealth degrades democratic participation rights by fostering dependence between political representatives and wealthy financiers, at the expense of the public good.[92] By permitting unlimited donations from entities, the political process is perceived to be responsive to market influence, rather than broader societal interests. In a 2021 survey, only 8.8 per cent of New Zealanders expressed "complete" or "a lot" of trust in political parties, and three-quarters of respondents distrusted the current political financing system.[93] This reflects that in a market of access and influence, citizens lose faith in the representativeness and responsiveness of their democratic institutions, as a popular sense prevails that participation through the voting ballot is ineffective.[94] Electors cannot respect political processes premised on offering the affluent greater opportunities for political influence.

V Legal Persons and Influence Market Transparency

A potential remedy for the democratic disease of influence market syndrome is transparency. Predicated on the "sunlight is the best disinfectant" principle, the object of the Electoral Act's statutory disclosure regime is to provide transparency over party financing.[95] Disclosure allows for public scrutiny and political accountability, dissuading parties and donors from trading political contributions for access and influence.[96] Disclosure prevents perception issues, maintaining public confidence in democratic integrity. As the Court of Appeal recently recognised:[97]

> Disclosing the identities of those who fund political parties' activities … ensures some peace of mind for New Zealanders that their Government is not unduly and secretly influenced by money.

This section considers how legal persons, as eligible donors, introduce immense complexities into the Electoral Act's disclosure obligations regime. Entities can obscure donor identity through beneficial ownership, shell and shelf companies, and opaque corporate networks. Entities thwart transparency by facilitating donation-splitting to

91 Johnston, above n 1, at 73.
92 Gluck, above n 12, at 24.
93 Simon Chapple, Cristhian Prieto Duran and Kate Prickett *Political donations, party funding and trust in New Zealand: 2016 to 2021* (Institute for Governance and Policy Studies, Working Paper 21/14, November 2021) at 5; and Rashbrooke and Marriott, above n 13, at 5.
94 Johnston, above n 1, at 73.
95 *R v H* [2024] NZCA 77 at [1].
96 Geddis, above n 39, at 11.
97 *R v H*, above n 95, at [32].

undercut disclosure thresholds and by permitting easy subversion of the foreign donor ban. This fuels perceptions that undue influence operates without transparency.

A *Electoral Act 1993 disclosure requirements*

Donations over specified thresholds trigger differing disclosure obligations. In 2022, the Electoral Amendment Bill (EAB) reduced the disclosure threshold from $15,000 to $5,000 from 1 January 2023.[98] For donations exceeding $5,000, specified donor details, including names and addresses, must be provided in annual financial returns and are then publicly disclosed by the Commission.[99]

Anonymous donations below $1,500 are permitted.[100] Parties must also report the number and total value of anonymous donations and donations between $1,500 to $5,000.[101] Anonymous donations above $1,500 are possible through the protected donations regime; donor identity is only disclosed to the Commission, preserving anonymity for sums up to $52,563.[102]

For larger donations that may rapidly influence politics, disclosure obligations intensify, providing greater opportunity for public scrutiny. The EAB modified the ongoing obligation to disclose donations exceeding $30,000 within 10 working days, lowering the threshold to $20,000, but requiring expedited disclosure within 10 working days only in general election years.[103] This amendment overlooks the reality that timely disclosure of large donations is necessary even in non-election years. Disclosed details include the donor's name, address, donation amount and date.[104] The Commission publishes these details, notifying voters of when parties receive large quantities of funding.[105] Additionally, the EAB required parties to release annual financial statements detailing assets, liability, expenditure and income.[106]

B *Entity transparency: opaque corporate networks, shell and shelf companies and beneficial ownership*

As the Ministry of Justice observed in 2021, the disclosure regime is weakened by entity donations due to minimal public oversight regarding corporate ownership, directors and the beneficial ownership of trusts.[107] By employing an entity, donors can ensure greater privacy over their personal identity, inhibiting transparency regarding "the nature of non-individual donors, and the amounts they donate to candidates and parties".[108]

Although director and shareholder details are publicly available on the New Zealand Companies Register, opaque corporate structures can obscure donor identity. The typical formula for a high-net-worth individual's corporate group comprises "a holding trust with the [individual] as a trustee or beneficiary, and several group companies with the shares

98 Electoral Act, s 210.
99 Geddis, above n 37, at 168; and Electoral Act, ss 210(1) and 210F.
100 Electoral Act, s 207G.
101 Sections 210(1)(f) and 210(6A); and Geddis, above n 37, at 171.
102 Geddis, above n 37, at 167; and Electoral Act, ss 208A–208G.
103 Section 210C.
104 Section 210C.
105 Geddis, above n 37, at 168; and Electoral Act, s 210F.
106 Section 210G.
107 Kris Faafoi *Package of potential changes to political donation settings prior to 2023 General Election* (Ministry of Justice, ELP-15-02, August 2021) at [4].
108 At [47].

held by the respective trusts".[109] For example, one prominent donating entity in the 2023 election cycle was Bayley Corporation Ltd, the parent company of a major realty and property group.[110] This entity has 17 different shareholder allocations, including Bayley Share Custodian Ltd, Lonskye Trustees Ltd and TT Trustee Company Ltd.[111] The complexities in determining corporate ownership prevent identification of which individuals in a corporate group may benefit from making donations. Such complexities are non-existent for individual donors. As Max Rashbrooke and Lisa Marriott identify, "attempts to trace donations [become] … greatly hampered by webs of interrelated entities. The simplest way to deal with this situation is to limit donations to natural persons".[112]

Furthermore, trusts preserve donor anonymity. Despite the Financial Action Task Force's recommendation, there is no public register for trusts.[113] Donations from unincorporated bodies must include the name of the person at whose direction the donation was paid and the name of the trust. However, Professor Geddis notes that if a trust donates $100,000 in an election year, the party secretary is only required to disclose within 10 working days that the trust provided the donation.[114] Information on the named individual contributing to the trust's donation will only be revealed when the party's annual financial return is filed.[115] At this later date, the Commission will publish the trust name and service address, along with the name of the associated individual who transmitted the donation.[116] Beyond this, there is no visibility regarding the trust's settlor, trustees or beneficial owners.

Legal persons may also be employed to transmit political donations through entities that serve as facades for commercial activity, to hide donor identities. Although never since addressed by the government, the Justice Select Committee has recognised the harmful potential for shell companies to transmit political donations.[117] "Shell" companies are corporations with no "independent operations, significant assets, ongoing business activities, or employees".[118] "Shelf" companies are dormant corporations with inactive shareholders and directors that may spontaneously leap into action for a single donation transaction.[119] Shell and shelf companies obscure corporate ownership and serve as mere intermediaries for donations, creating substantial difficulties in tracing the identities of the true individuals behind a donation.

109 Rashbrooke, above n 56, at 151.
110 See table in Part IV(A)(2)(c) of this article.
111 New Zealand Companies Office <www.companiesoffice.govt.nz>.
112 Rashbrooke and Marriott, above n 13, at 69.
113 Financial Action Task Force *Concealment of Beneficial Ownership* (Egmont Group, Paris, 2018).
114 Geddis, above n 37, at 169.
115 Electoral Act, s 210C.
116 Electoral Commission, above n 53.
117 Meka Whaitiri *Inquiry into the 2017 General Election and 2016 Local Elections: Report of the Justice Committee* (December 2019) at 9.
118 Financial Action Task Force, above n 113, at 5.
119 At 5.

(1) Ineffective regulation

(a) Section 207C "contributions"

Section 207C of the Electoral Act deals with a single donation comprising smaller donations from multiple sources.[120] The provision seeks to prevent donors from funnelling smaller donations into an intermediary entity, prohibiting donors from "setting up a trust or other conduit to launder donations that otherwise would have to be declared, thus disguising the true source" of donations transferred to political parties.[121]

Donors must disclose when donations are funded from "contributions" exceeding $1,500.[122] "Contributions" are money or equivalent services provided to a donor, with the expectation of funding a donation.[123] Donors are required to disclose the contributor's name, address and the contribution amount.[124] Candidates or party secretaries must return the donation if there are reasonable grounds to believe donors have failed to declare contributions.[125] This obligation is relatively meaningless, as there is no offence provision for failing to return donations if "reasonable grounds" do exist. The $40,000 fine applies only to donors who fail to disclose contributions with the intention of concealing a contributor's identity.[126]

(b) Section 207E "transmitters"

Section 207E of the Electoral Act attempts to target the use of intermediaries to transmit donations. It is an offence if a "transmitter" transmits a donation on behalf of a donor without disclosure.[127] Ostensibly, this could capture donors who employ entities as mere intermediaries to conceal their identity, by incorporating a shelf company to transmit donations or utilising another company to which they have no discernible shareholding or directorial links. A "transmitter" is defined as "a person to whom a donor gives or sends a donation for transmittal to a candidate or party".[128] The reference to a "person" includes legal persons.[129]

However, s 207E has no "anti-collusion" offence. This means that only the transmitter (the entity) will be subjected to the penalty, whilst the individual employing the entity for their personal benefit would face no such sanction. Without an anti-collusion offence prohibiting collusion through an "agreement, arrangement, or understanding with any other person" to implicate individuals involved in illicit strategies to transmit donations, s 207E is not a potent defence against individuals who employ entities as privacy-maintaining vehicles for donations.[130]

120 Geddis, above n 37, at 185.
121 At 186.
122 Electoral Act, s 207C(2).
123 Section 207(2).
124 Sections 207C(3)(a)–(d).
125 Sections 207C(4)–(5).
126 Section 207D.
127 Section 207E.
128 Section 207.
129 Legislation Act 2019, s 13.
130 See s 207(L)(1) of the Electoral Act, which has an anti-collusion offence.

(c) Evaluation

Neither s 207C nor s 207E is likely to deter individuals from pooling multiple donations into entities or transmitting donations through intermediary entities. First, entities are viewed as legitimate donors due to the fiction of separate legal personhood. In the absence of obvious evidence of an illicit strategy, it may be almost impossible to prove offences. Detection of such practices is rife with complexities and exacerbated by features of legal personhood, such as beneficial ownership and complex corporate structures. Secondly, despite the $40,000 fine attached to both offences, such a penalty will be futile if imposed against, for instance, shell or shelf companies with no assets.[131] Most significantly, neither provision prevents donation-splitting, where large political donations are divided into tranches and transferred via legal vehicles to avoid disclosure obligations.

C *Legal persons and the spectre of donation-splitting*

There is significant evidence that donors are reluctant to donate above disclosure thresholds.[132] In 2022, anonymous donors described the $15,000 threshold as a threshold "a lot of people don't want to cross, as they do not want their name in public".[133] The High Court judgment in *R v EF* and the subsequent Court of Appeal judgment in *R v H* (the NZF proceedings) exposed that entities facilitated rife donation-splitting to circumvent disclosure thresholds and undermine party financing transparency.[134]

(1) The New Zealand First proceedings: background

R v EF concerned two defendants who channelled donations to NZF through entities. Party donations must be transmitted to party secretaries within 10 working days and filed as publicly available donation returns.[135] In 2019, EF and FG were charged with obtaining by deception nearly $750,000 of alleged donations for NZF, which were not transmitted to the party secretary, but held by entities to circumvent disclosure obligations.[136] Sixteen payments totalling $69,000 were deposited into the bank account of the company (GH) and 154 payments totalling $678,000 were deposited into a trust (the Foundation) established by NZF's board.[137] EF was the director and shareholder of GH and the Foundation was settled by EF with himself and FG as trustees.[138] Although not disclosed to the Commission or declared as donations, the money indisputably contributed towards NZF's 2017 election expenses.[139]

At the High Court, both defendants were acquitted.[140] The statutory definition of "party donation" concerned money given to persons "*involved in the administration of the affairs* of the party".[141] The defendants were not involved in the party's administrative affairs due

131 Sections 207F and 207D.
132 Faafoi, above n 107, at [32].
133 Rashbrooke and Marriott, above n 13, at 46.
134 *R v EF*, above n 16; and *R v H*, above n 95.
135 Electoral Act, ss 207B(2) and 210.
136 Crimes Act 1961, s 240; and *R v EF*, above n 16, at [39]–[40].
137 At [2] and [26].
138 At [2].
139 At [29]–[30].
140 At [77].
141 This definition has been amended: Electoral Act, s 208F(1)(a) (emphasis added).

to the separate legal personalities of the two entities. Jagose J held that the "payments determinedly were not made to EF or FG" in their positions in NZF, but were made to the defendants solely in their capacity as Foundation trustees.[142] The fiction of separate legal personhood allowed NZF to maintain that the trust and company were separate from the party itself, as Jagose J emphasised GH's and the Foundation's "determinedly separate status".[143]

Notably, the Court of Appeal rejected this determination, considering that the defendants' positions as trustees did not preclude them from involvement in NZF's administrative affairs.[144] Depositing funds into a nominally separate entity did not prevent the funds from being "party donations".[145]

(2) Evasion of the disclosure threshold: donation-splitting via legal entities

Regardless of whether the Foundation and company had transmitted the party donations directly to NZF, the donations were legally free from the Electoral Act's disclosure obligations. This was owed to the strategy of "donation-splitting"—the concerted use of sums under $15,000, to avoid the disclosure threshold. The Foundation's records showed 12 payments one cent below the $15,000 threshold were received between April 2017 and May 2019.[146]

Lowering the disclosure threshold to $5,000 attempts to prevent donation-splitting. As approximately $4,999.99, rather than $14,999.99, may now be donated without disclosure, donation-splitting requires more transactions to transfer similarly large sums, theoretically enhancing the likelihood of detection. Yet, as few individuals possess the resources to donate any sums at all, smaller donations may nevertheless purchase considerable influence.[147] Furthermore, exposure of such practices remains virtually impossible and the SFO and Commission likely do not detect most donation-splitting instances.[148] Wrongdoing is generally exposed only through internal whistleblowers and investigative journalists.[149]

(a) Donation-splitting by individuals: *R v Zhang* and *Zheng v R*

Donation-splitting individuals can face criminal prosecution. In *R v Zhang*, the defendants were convicted of obtaining a benefit by deception under s 240(1)(a) of the Crimes Act 1961, through a fraudulent stratagem where large donations were split into sub-$15,000 tranches to evade the disclosure threshold.[150] In two separate incidents, approximately $100,000 was split into $14,000 sums, transferred to the bank accounts of seven sham individual donors and then transmitted to the National Party.[151]

142 *R v EF*, above n 16, at [55]–[56].
143 At [56].
144 Electoral Act, s 207; and *R v H*, above n 95, at [42] and [52].
145 At [43].
146 Guyon Espiner and Kate Newton "NZ First Foundation: Rich-listers donate $100k in a week" (27 February 2020) RNZ <www.rnz.co.nz>.
147 Anderson and Chapple, above n 73, at 26.
148 Rashbrooke and Marriott, above n 13, at 39.
149 At 39; Tim Murphy "The monied class who funded Winston Peters" (9 June 2022) *Newsroom* <https://newsroom.co.nz>; and Espiner and Newton, above n 146.
150 *Zhang*, above n 17, at [1].
151 At [191] and [248].

The Court of Appeal in *Zheng v R* overturned the convictions, as s 240(1)(a) hinged on the defendants obtaining a "benefit" for themselves.[152] The Court considered that the appellants "divest[ed] themselves of any benefit" by transferring the donations to National.[153] The Court rejected that "freedom from public scrutiny" was a benefit under s 240(1)(a), which could be valued, as the SFO had submitted, by deducting $15,000 from the donation amount.[154] Furthermore, the third-party benefit the National Party allegedly received from the donations did not satisfy the requirement that the *defendants* obtain a benefit from their fraud.[155] These findings highlighted the inadequacy of the available offence provisions to prosecute donation-splitting defendants.

However, the Court noted that the appellants could have been charged under s 240(1)(d) for "causing loss by deception", if the SFO demonstrated that National incurred costs by investigating the illicit donations.[156] As s 240(1)(a) had been relied upon, there was insufficient evidence for s 240(1)(d) to succeed.[157] Although it may constitute a crime under s 240(1)(d) to donation-split amongst individuals, the law on donation-splitting amongst entities is inconclusive.

(b) Donation-splitting by entities

Employing entities to facilitate donation-splitting is not fundamentally different from the identified wrongdoing in *Zhang,* where the defendants were prosecuted for splitting $100,000 into sub-$15,000 tranches transmitted to sham donor individuals.[158] Yet, as legal persons are eligible donors, individuals may legitimately donate smaller tranches of money through multiple trusts and companies, undercutting the disclosure threshold. Both circumstances allow political parties to receive a substantial sum from a single donor, albeit in smaller tranches, without facing public scrutiny.

Data on the frequency of donation-splitting is largely unavailable, due to the obvious reality that such donations are not disclosed. Investigations by journalists have, nevertheless, unearthed examples. In the 2017 election, corporate tycoon Ian Ross donated $10,000 to NZF through five different corporate entities.[159] Investment company director Andrew Bagnall donated $10,000 to NZF personally, as well as $12,000 from one trust, $14,500 from another and $13,500 from a third.[160] Businessman Tony Van den Brink donated $50,000 personally and through associated entities, broken into four separate payments.[161] Other individuals have undertaken donation-splitting practices:[162]

- Brendan and Jo Lindsay and associated entities: $75,000;
- Conrad Properties and related entities: $55,000;
- Kent Baigent and associated entities: $30,000;
- Graeme Hart and associated entities: $29,990;
- Sir Peter Talley and associated entity: $26,950; and

152 *Zheng v R* [2023] NZCA 551 at [84].
153 At [106].
154 At [114]–[115].
155 At [97] and [105].
156 At [116].
157 At [117].
158 *Zhang*, above n 17, at [191].
159 Murphy, above n 149.
160 Murphy, above n 149.
161 Murphy, above n 149.
162 Espiner and Newton, above n 146.

- Nelson and Sue Schick and associated entities: $20,000.

In 2008, businessman Sir Owen Glenn donated multiple sums to NZF through various companies and a nominally separate trust.[163] Further investigation revealed "many individuals had donated … through several corporations they owned in amounts less than the $15,000 limit for anonymous donations".[164]

When donors, like the defendants in *Zhang*, split donations amongst individuals, they may be subject to (albeit so far unsuccessful) prosecutions.[165] Yet, individuals who donate behind the legal fiction of a company or trust have avoided prosecution. Large donations, whether lump sums or split into tranches, can purchase access and influence. If such donations were properly accounted for, donor details would be provided to the Commission to ensure transparency.

Additionally, donation-splitting amongst individuals is generally traceable, but when entities are employed, beneficial ownership and complex entity networks render detecting illicit activity virtually impossible.[166] By prohibiting entity donors, parties would be unable to accept donations from entities, forcing individuals seeking to circumvent disclosure requirements to transfer money to other individuals. This practice would be significantly easier to detect and, following *Zheng*, is overtly illegal.[167]

(c) Ineffective regulation

One largely redundant Electoral Act provision attempts to prevent entity donation-splitting. Under s 207LA(1), it is 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 … .

This provision aims to prevent a corporation from using multiple subsidiaries to make party donations that are "split" to avoid disclosure thresholds.[168] The provision will not address circumstances where an *individual* transmits a donation through various entities. Rather, the provision prohibits *bodies corporate* from using multiple subsidiaries to donate to an individual candidate.[169]

As s 207LA will not cover individuals who donate via multiple associated entities, it is largely ineffectual and has never been employed. Professor Geddis considers the provision "cannot support criminal charges" despite the "net effect" of donation-splitting being that "tens of thousands of dollars … remained hidden from the public".[170] Rashbrooke considers that donation-splitting by trusts and companies to the NZF Foundation at least "breach[es] the intent" of s 207LA as an "attempt to illegitimately reduce the public's knowledge of who is funding political parties".[171] Although inadequate

163 Gluck, above n 12, at 97.
164 At 97.
165 *Zheng*, above n 153, at [116].
166 Rashbrooke and Marriot, above n 13, at 69.
167 See *Zheng*, above n 153, at [116], where despite unsuccessful prosecutions, the Court acknowledged that s 240(1)(d) of the Electoral Act could be used in the future.
168 Geddis, above n 37, at 168.
169 *Zhang*, above n 17, at [55].
170 Geddis, above n 39, at 12.
171 Rashbrooke and Marriott, above n 13, at 37.

to deal with the practice itself, the fact that s 207LA exists in the first place suggests legislative awareness that entities facilitate subversive donation-splitting practices.

Significantly, s 207LA only applies to party donations, rather than candidate donations.[172] Entity donors may legally employ a stratagem where smaller donations are made to individual political candidates from separate subsidiaries, without being unlawful.[173] If these donations fall below the $5,000 threshold, public disclosure via the Commission will not be required.

D *Foreign donor influence*

Entity donations also create potential for indiscernible foreign influences to operate through circumvention of the foreign donation ban. The Electoral Amendment Act 2019 prohibited foreign donations to protect New Zealanders from foreign election interference.[174] In 2023, the New Zealand Security Intelligence Service disclosed that foreign states "persistently" interfere in New Zealand with "potential for significant harm".[175]

"Overseas persons" may only donate $50 maximum to a political party annually.[176] Parties are given 20 days to return donations exceeding $50.[177] Party secretaries must "take all reasonable steps" to determine whether donations exceeding $50 originate from overseas entities.[178] This obligation is arguably meaningless, as no corresponding offence provision exists for failure to do so.[179]

Additionally, the law leaves significant gaps for foreign donors to infiltrate the influence market without oversight. The definition of "overseas persons" includes entities with bodies corporate incorporated outside New Zealand.[180] This fails to capture New Zealand incorporated entities owned by overseas individuals or entities. Foreign individuals may therefore freely make political donations. In the 2023 election, $87,000 was donated by 100 per cent foreign-owned companies.[181] In 2017, Chinese billionaire Lin Lang funnelled a $150,000 donation to the National Party through a New Zealand-incorporated company.[182] Entity donations therefore prevent the foreign donation prohibition from operating effectively, harming transparency around foreign influence.

E *Implications*

By allowing legal persons to donate to political parties, New Zealand has opened itself up to easy routes circumventing the Electoral Act's disclosure obligations, compromising the influence market's transparency. Possible solutions include reforming the Act's provisions

172 Geddis, above n 37, at 186.
173 At 186.
174 Andrew Little "Government to ban foreign donations" (3 December 2019) Beehive <www.beehive.govt.nz>.
175 *New Zealand's Security Threat Environment 2023: An assessment by the New Zealand Security Intelligence Service* (2023) at 14 and 27.
176 Electoral Act, s 207K.
177 Sections 207K(3).
178 Sections 207JA(1) and 207L(2).
179 Geddis, above n 37, at 163.
180 Electoral Act, s 207(2).
181 Kelsey Haub "Corporate Political Finance in New Zealand: What Does it Look Like, Should it be Allowed, Could it be Democratised?" (2024) 30 Auckland U L Rev 166 at 168.
182 Rashbrooke and Marriott, above n 13, at 37.

to effectively combat donors who employ entities to obscure their identity and facilitate donation-splitting. For instance, s 207E could be improved through an anti-collusion offence and by imposing penalties against individuals employing the entity, rather than merely the entity itself. Section 207LA could be expanded to apply to donation-splitting individuals, rather than merely bodies corporate.

Yet, these reforms only go so far; entities introduce enforcement complexities that greater transparency obligations alone cannot address. As Professor Michael Macauley argues, "we used to think that sunlight was the best disinfectant, but now we see that it only creates more shadows in which to hide".[183] Whilst disclosure is undeniably valuable, disclosure only allows public scrutiny, without any means of legal recourse. The IERP recognised that:[184]

> … simply knowing that an individual, or organisation, has made a donation does not reduce the potential for that donor to have access to, or influence over, a political party or candidate.

Disclosure must therefore be coupled with legal mechanisms to prevent undue influence, which requires the prohibition of political donations by legal entities.

VI Reform: Prohibiting Non-Individual Donors

A *Egalitarian theory*

Perspectives on political financing reform are inextricably entangled with contested constitutional theories of how democracy should function. The recommendation to prohibit non-individual donors is motivated by egalitarian theory, which validates the government's role in limiting the influence of money in politics, to enhance the capacity for individuals to participate equally in political processes. The contrasting libertarian theory prioritises the operation of the political "free-market", which positions political financing regulation as a potential threat to laissez-faire ideals.[185] Libertarians are "content to allow differences in wealth, whether earned or unearned, to translate into greater acquisitive power".[186]

Egalitarian theorist John Rawls insists, however, that "[t]he constitution must take steps to enhance the value of equal rights of participation for all members of society … irrespective of their economic and social class."[187] This represents a constitutional judgement that the State may permissibly intervene to preserve political equality amongst individuals. The Rawlsian approach requires an elector's economic position to be excluded from determining their capacity to acquire political influence.[188] Electoral law reforms therefore attempt to separate the economic sphere from the political sphere.

183 Michael Macauley and Gary Hickey *National Integrity System Assessment United Kingdom — Corruption in the UK: Part 3* (Transparency International UK, United Kingdom, 2011) at 97 as cited in James Gluck and Michael Macaulay "Trading in Influence: a research agenda for New Zealand?" (2017) 13(2) PQ 49 at 51.

184 Independent Electoral Review, above n 3, at [13.49].

185 See also Part VII(A) of this article; and Susan Rose-Ackerman "Corruption: Greed, Culture, and the State" (2010) 120 Yale LJ 125 at 125.

186 Kuhner, above n 40, at 60.

187 Rawls, above n 4, at 224–225.

188 At 224.

The Canadian Supreme Court in *Harper v Canada* recognised the value in imposing expenditure restrictions to preserve political equality amongst individuals by creating a "level playing field" for electors to engage in the political process.[189] *Libman v Quebec* similarly condoned the pursuit of political equality, to "ensure a right of equal participation in democratic government".[190]

As egalitarian theory recognises the need to separate political influence from income, it shares an ideological foundation with Johnston's systemic corruption perspective, seeking to equalise opportunities for political influence. Influence market societies allow economic inequality to transfer to the political sphere, as economic elites may acquire undue influence in exchange for political donations, resulting in the unequal distribution of political power. For Rawls, political financing must ensure "fair opportunity to take part in and to influence the political process" to prevent inequalities from enabling "those better situated to exercise a larger influence over the development of legislation".[191] Likewise, Johnston's "undue influence" concept describes the "unfair advantages" that certain individuals and entities possess in the political sphere, embodying a fundamental concern with inequality.[192]

Prohibiting entity donors limits how wealthy citizens can use the financial resources amassed by, and held in, companies and trusts, to acquire access and influence. This prevents economic inequalities from manifesting in the political process. The ability of legal persons to make unlimited political donations exacerbates the vulnerability of New Zealand's democracy to distortion by vested interests and private wealth.[193]

B *Prohibiting entity donors*

The recommendation to prohibit non-individual donors has two egalitarian rationales. First, as Part IV considered, the eligibility of corporations and trusts as political donors permits inequalities in political influence, due to the "difference in economic power and organizational capabilities" between natural and legal persons.[194] As entities have extensive wealth to mobilise in the influence market, prohibition is necessary to distance the political and economic spheres. This would protect the democratic rights of New Zealanders to equal political participation and alleviate the potential for undue influence.

Secondly, as Part V discussed, prohibition will achieve greater transparency of New Zealand's influence market by removing loopholes to the Electoral Act's disclosure obligations, preventing the surreptitious operation of undue influence. Greater transparency preserves the capacity for individuals to ensure that they are competing on equal terms in the political process.

C *Systemic reform*

Although this article focuses on prohibiting entity donors, systemic reform is necessary to truly constrain the operation of the influence market and preserve the capacity for New Zealanders to act as political equals. Prohibiting entity donations but not capping

189 *Harper,* above n 4, at 828.
190 *Libman,* above n 4, at [46]–[47].
191 Rawls, above n 4, at 224–225.
192 Kuhner above n 40, at 102.
193 Kuhner, above n 71, at 21.
194 Kuhner, above n 40, at 86.

donations will "entrench the influence of wealthy individuals" who may nevertheless contribute unlimited political donations in their personal capacity.[195]

Additionally, by prohibiting non-individual donations, donors may be encouraged to fund third-party promoters, funnelling political money into invisible influence processes to circumvent restrictions.[196] New Zealand's entirely unregulated lobbying industry is also an outlet for corporate money, where entities may attempt to exert policy-making influence.[197]

Nevertheless, prohibiting entity donors is the first logical step towards influence market reform. Entities amass extensive wealth, which they may mobilise in exchange for political influence. This dilutes the equal participatory rights of natural persons and facilitates evasion of the Electoral Act's transparency obligations in ways that natural persons cannot. Prohibition can also be distinguished from other reform measures, as it implicates the rights of legal fictions, rather than human individuals.

VII Barriers to Reform: Political Donations as "Expression" Rather Than "Influence"

Given the harms inflicted on political equality, it can be difficult to understand why entities are permitted participation rights in the influence market as eligible donors.

The primary barrier to the prohibition of donations by legal persons is the right to freedom of expression, as it is contended that when legal persons donate to political parties, this represents an act of political expression, rather than an investment in influence. Section 14 of NZBORA protects the right to expression: "[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." Under s 5, freedom of expression can be limited if "demonstrably justified in a free and democratic society".

In 2021, the Ministry of Justice considered that prohibiting entity donations would not be viable before the 2023 election due to the "significant impact on freedom of expression".[198] This statement is underpinned by two value-based assumptions that require deeper interrogation. First, it assumes that political donations comprise "expression", which accepts the contention that "money is speech". Secondly, it assumes that legal persons are owed rights to political expression in the same way that natural persons are.

A *United States jurisprudence: money as speech and corporations as speakers*

American jurisprudence demonstrates that whether entities enjoy expressive rights is fundamentally a question of constitutional interpretation. This engages differing valuations of political expenditure as either "influence" or "expression" motivated by libertarian and egalitarian ideologies.

The United States has adopted a libertarian approach, emphasising the expressive liberties of individuals and corporations to engage in political expenditure. In 1976, the Supreme Court in *Buckley v Valeo* portrayed political expenditure restrictions as efforts to "restrict the speech of some elements of our society in order to enhance the relative voice

195 Rashbrooke and Marriott, above n 13, at 66.
196 Independent Electoral Review, above n 3, at [13.55].
197 Gluck, above n 12, at 34.
198 Faafoi, above n 107, at [46].

of others".[199] This rhetorical sleight of hand substituted "speech" for the exchange of "money", affording constitutional protection to political spending.[200] In this libertarian conception, the State cannot regulate spending as "speech" unless restrictions survive a strict scrutiny threshold, furthering a "compelling interest".[201] *Buckley* struck down most political expenditure restrictions in the Federal Election Campaign Act 1974 amendment (FECA) as being unjustifiable limits on political expression.[202]

Two years later, in *Bellotti*, the Supreme Court addressed whether corporations held constitutionally protected rights to engage in political spending.[203] The appellants challenged a Massachusetts statute which imposed criminal sanctions upon national banking associations and business corporations, prohibiting expenditures that may influence referenda voters. The Court asserted that the value of speech did not "depend upon the identity of its source", extending *Buckley*'s constitutional speech protections to corporations.[204]

White J's dissent adopted a contrasting egalitarian rationale, endorsing the State's role in redistributing speech rights, to reduce the disproportionate influence of corporate speakers. White J recognised that political financing restrictions prevented corporations that had amassed wealth "as a result of special advantages extended by the State for certain economic purposes", from using that wealth to "acquire an unfair advantage in the political process".[205]

At the core of this dissent lies a concern with systemic corruption, and an account of the need to preserve representative democracy from outsized economic influences. The egalitarian ideological interest represents a "classic governmental interest in protecting against improper influences on officeholders that debilitate the democratic process".[206] In contrast, *Buckley* adopted an individualistic corruption conception, upholding FECA's $1,000 restriction on direct independent candidate contributions due to a "sufficiently important" governmental interest only in preventing corruption through large contributions that serve as "political quid pro quo".[207]

However, in *Austin v Michigan Chamber of Commerce*, corruption was not solely linked to quid pro quo potential but could manifest in the immense power of corporate donors to overwhelm the political preferences of citizens, as undue influence. The Court upheld a Michigan Campaign Finance Act provision preventing corporations from using treasury funds to finance election candidates.[208] *Austin* highlighted the "corrosive and distorting effects of immense aggregations of wealth" accumulated through the corporate form.[209] Aligning with Johnston's systemic corruption account, *Austin* recognised a need to separate political influence from wealth, preventing affluent corporate donors from dominating the political process.[210] Whilst *Bellotti*'s majority highlighted corporate expenditure's expressive value as "speech", *Austin* highlighted the "influential" qualities of corporate

199 *Buckley v Valeo* 424 US 1 (1976) at 48–49.
200 Deborah Hellman "Money Talks but It Isn't Speech" (2011) 95(3) Minn L Rev 953 at 1002.
201 *Buckley*, above n 199, at 39 and 94.
202 At 58–59.
203 *Bellotti*, above n 65, at 822.
204 At 777.
205 At 809.
206 *Citizens United*, above n 24, at 464, per Stevens J.
207 *Buckley*, above n 199, at 25–26 and 29.
208 *Austin v Michigan Chamber of Commerce* 494 US 652 (1990) at 652.
209 At 660.
210 At 660.

donations, as extensive wealth "accumulated with the help of the corporate form" may be used to "influence unfairly the outcome of elections".[211]

More recently, *Citizens United* endorsed *Buckley* and *Bellotti*, portraying corporate donations as "expression" and thereby discounting their potential for undue influence. The Supreme Court invalidated a section of the Bipartisan Campaign Reform Act, which prohibited corporations and unions from making independent election expenditures from general treasury funds for electioneering communications, allowing corporations to spend immense sums on political advocacy as constitutionally protected "expression".[212] Entities with vast financial resources were therefore permitted to dominate American democracy due to their status as "speech producers".[213]

(1) Implications

American jurisprudence demonstrates that defining expression and granting expressive rights to entities ultimately engages constitutional concerns, requiring a normative determination as to whether political expenditure constitutes expression or influence. In contrast to the extensive line of American case law debating the political expression of legal persons, New Zealand has avoided in-depth discussion of the subject.

The next section seeks to address gaps in New Zealand's jurisprudence by assessing the political expression of legal persons. It is argued that the interest in protecting democracy from undue influence is greater than the interest in protecting the expression of legal persons. This requires engagement with *Buckley*'s contention that "money is speech", and *Bellotti*'s portrayal of corporations as "speakers", worthy of expressive rights.

B *Money as speech: political donations as "expression"*

It is first necessary to consider whether political donations constitute "expression" under s 14 of the NZBORA. In *Buckley,* the United States Supreme Court found that political expenditure limits "necessarily reduce the quantity of expression", as "virtually every means of communicating ideas in today's mass society requires the expenditure of money".[214] *Buckley* conceived of money as so integral to political advocacy that restrictions on money effectively restricted expression.[215] This finding remained undisturbed by the *Citizens United*'s majority, who labelled political financing regulations an "outright ban on speech".[216]

Although justification is absent, New Zealand has adopted a similar position. The Electoral Finance Act 2007 was "vilified" as an attack on freedom of expression.[217] The Attorney-General's report on the (since rejected) Electoral (Strengthening Democracy) Amendment Bill observed that donation-capping and disclosure obligations were inconsistent with freedom of expression, as donations convey "expressive [messages] of

211 At 660 and 669.
212 Loren M Findlay "Artificial Entities with Natural Rights: Pursuing Profits at the Expense of Human Capital" (2020) 26(2) JCRSJ Just 743 at 752.
213 Kuhner, above n 40, at 76.
214 *Buckley*, above n 199, at 19.
215 At 21.
216 *Citizens United*, above n 24, at 312.
217 Jonathan Boston and Alec Mladenovic "Political Equality and the Regulation of Election Spending by Parallel Campaigners" (2010) 45(4) AusJPS 623 at 627.

support or alignment between donor and donee".[218] The Ministry of Justice similarly accepted that donation restrictions engage expression under s 14 of the NZBORA.[219] Regulation of election advertisements as "political speech" impinged free expression in *Greenpeace of New Zealand Inc v Electoral Commission.*[220] This "money as speech" approach permits the incursion of the economic realm into political terrain.

(1) *Buckley*'s approach

Despite New Zealand's unquestioning acceptance of *Buckley*'s "money as speech" metaphor, the equivalence is not an inevitable one. After all, "speech" is defined as "the faculty or act of speaking; the act of expressing or describing thoughts, feelings, or perceptions by the articulation of words".[221] As money is not speech in any literal sense, connections drawn between the two concepts are ideological.

In equating money with speech, *Buckley* overlooked glaring differences between the concepts. Money, as a form of property, is a finite commodity, unequally distributed across society.[222] Speech is infinite and freely available to all.[223] Whilst speech is naturally endowed to all individuals, the distribution of money stems from policy decisions. The "money as speech" metaphor eschews all such distinctions, overlooking the crucial reality that whilst speech is available to all, money is not. Positioning speech as "naturally and freely available to all makes it a very appealing marker of democracy". [224] Yet, the reality is that "[t]hose with money speak, those without it are silenced, and those with little are drowned out."[225]

When democracies protect financial outputs as "expression", the expression of legal persons will drown out the individual voice. The Attorney-General's report on the Electoral (Strengthening Democracy) Amendment Bill considered that "[g]iving a large sum of money … is likely to indicate a greater level of support or alignment than giving a small sum".[226] Yet, when financial resources determine expressive impact, donations obscure the intensity of support for political positions. Whilst a wealthy company may routinely contribute $5,000 to a favoured political party, a financially desperate student may string together a $100 contribution for a party they passionately believe in: "[i]ntensity is all with the student", but dollar totals obscure this reality entirely.[227] Political expenditure therefore "bears no relation to the conviction with which the ideas expressed",[228] yet the "money as speech" metaphor allows financial resources to dictate speech access.

218 David Parker *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Strengthening Democracy) Amendment Bill* (House of Representatives, 2021) at 1–2.
219 Faafoi, above n 107, at [46].
220 *Greenpeace of New Zealand Inc v Electoral Commission* [2014] NZHC 2135, [2014] 3 NZLR 802 [*Greenpeace*] at [18].
221 Maneesh Sharma "Money as Property: The Effects of Doctrinal Misallocation on Campaign Finance Reform" (2008) 41(3) MJLR 715 at 737.
222 At 737.
223 At 737.
224 Spencer A Overton "Mistaken Identity: Unveiling the Property Characteristics of Political Money" (2000) 53 Vand L Rev 1235 at 1261.
225 Sharma, above n 221, at 727.
226 Parker, above n 218, at 2.
227 J Skelly Wright "Politics and the Constitution: Is Money Speech?" (1976) 85(8) Yale LJ 1001 at 1014.
228 *Bellotti*, above n 65, at 810.

(2) The "speech-act" approach

The "speech-act" approach offers an alternative conception of the relationship between money and speech. This posits that expending a political donation constitutes "conduct", which can be restrained through regulation, as distinguished from constitutionally protected "expression".[229] For instance, the Supreme Court in *Morse v Police* accepted that non-verbal conduct of burning the national flag in condemnation of New Zealand's military involvement in Afghanistan constituted expression.[230] *Morse*'s "expression" was the anti-war message. The "conduct" was the physical destruction of the flag. This distinction can be extrapolated to consider the "speech-act" dynamics underpinning political donations—the conduct is the exchange of money, which can be regulated, whilst the expressive message relates to the donor's political preference. *Buckley* has therefore been criticised for fixating on "what the money can buy, and not on the money itself", overemphasising that political expenditure can purchase expression, whilst neglecting to question whether the exchange of money can itself be regulated.[231]

Most valuably, the "speech-act" conception reveals that exchanging political money has limited expressive value. As money is a fungible commodity exchanged for endless goods and services, giving money has minimal expressive significance.[232] *Morse* is again illustrative. Flag-burning engaged the right to freedom of expression as "[t]he message and the manner of it" were "intertwined, the message cannot be conveyed precisely the same way other than by burning the flag".[233] *Morse*'s flag-burning carried expressive significance as a potent means of protesting New Zealand's presence in Afghanistan, constituting a form of expression where "the 'medium is the message'".[234] In contrast, as money is the universal medium of exchange, giving money does not communicate any message.[235] Money is a mere manner of facilitating expression, rather than a message in itself.[236]

(3) Implications

Questioning the nature of "expression" is perhaps an unhelpful starting point. Expression, after all, may just be "the name we give to verbal behavior that serves the substantive agendas we wish to advance".[237] *Buckley*'s money as speech equivalence has been labelled a "rhetorical device", used to entrench the expenditure of wealthy people and corporations, by immunising political donations from restriction as constitutionally protected expression.[238]

229 Wright, above n 227, at 1019; Hellman, above n 200, at 956; and Tamara Piety *Brandishing the First Amendment: Commercial Expression in America* (University of Michigan Press, Ann Arbor, 2012) at 54.
230 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [80], [82] and [121].
231 Sharma, above n 221, at 723.
232 Hellman, above n 200, at 969.
233 *Morse*, above n 230, at 3–4.
234 Hellman, above n 200, at 970.
235 At 970.
236 At 969.
237 Stanley Fish *There's No Such Thing as Free Speech, and It's a Good Thing, Too* (Oxford University Press, New York, 1994) at 102.
238 David Kairys "The Contradictory Messages of Rehnquist-Roberts Era Speech Law: Liberty and Justice For Some" (2013) U Ill L Rev 195 at 205.

The "speech-act" approach is similarly underpinned by political imperatives and has been labelled a judicial device used to "manipulate distinctions".[239] Indeed, *Buckley* rejected that spending money limited conduct rather than expression, insisting "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element".[240] If it is therefore impossible to eliminate political considerations when delineating "expression", we should carefully justify the decision to equate political donations with expression.

New Zealand has accepted *Buckley*'s "money as speech" approach as seemingly pre-ordained, avoiding difficult normative questions. Sanctified as free expression, substantial wealth can become a prerequisite for participation in the influence market in the form of "speech". This enables a dynamic where the affluent can powerfully express their views at the expense of ordinary citizens, entrenching the participatory advantages of the wealthy in the influence market. By "[t]ranslating money into political activity", political donations are positioned as a "source of information for the electorate", rather than a "source of corruption".[241] The potential for political donations to operate as a form of undue influence is disavowed, whilst the expressive qualities of donations are emphasised.

C *Legal persons as speakers: expressive rights of entities*

(1) Theories of legal personhood: the rights entitlement of entities

Even if political donations are accepted as "expression", the question of whether legal persons should bear the right to freedom of expression in the same way as natural persons must be examined. This requires consideration of the three dominant theories on the rights-bearing capacity of entities.[242]

The "individualistic approach" holds that entities cannot attract rights, as only individuals deserve rights protections.[243] Human rights instruments like the ICCPR only grant rights to individuals, recognising that legal persons may accumulate immense financial power, whilst human rights typically protect the vulnerable against powerful interests.[244]

In certain respects, New Zealand adopts a "real entity" approach. This conceives of entities as embodying a real existence upon incorporation, with the full capacity and legal personhood to bear rights.[245] New Zealand law does not distinguish between entities and individuals as rights-bearers, as NZBORA protections apply to both natural and legal persons. Section 29 provides:

> **29 Application to legal persons**
>
> Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

239 Fish, above n 237, at 105.
240 *Buckley*, above n 199, at 16.
241 Kuhner, above n 40, at 41.
242 Andreas Kulick "Corporate Human Rights?" (2021) 32(2) EJIL 537 at 541.
243 At 539.
244 At 538; and ICCPR, art 2(1).
245 Kulick, above n 242, at 542.

Alternatively, the "fictional theory" adopted in this article posits that entities are wholly artificial legal vehicles reliant on human actors for their functions and human law for their existence.[246] The rights of legal persons are theorised to arise by virtue of the law, rather than any innate moral entitlement, as entities are ultimately a nexus of contracts and legal rules, granted existence by the trust deed or corporate constitution and regulated by the Trusts Act 2019 and Companies Act 1993.

Traces of "fictional theory" remain present in NZBORA. Under s 5, there is potential for NZBORA's benefit to be justifiably limited, to grant lesser protections to legal persons than natural persons.[247] Furthermore, s 29 applies "[e]xcept where … otherwise provide[d]". Although no provisions explicitly deny rights, legal persons are implicitly excluded from electoral rights, which are only applicable to citizens over 18 years.[248] Withdrawing electoral rights recognises that the political participation rights of entities are not equivalent to natural persons. As Rehnquist J identified in *Bellotti*, "the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons".[249] As legal personhood is ultimately a fiction, the rights-bearing capacity of entities can be limited for greater democratic imperatives.

(2) Entities and "expressive" rights

Whilst the rights entitlement of entities alone is contentious, even greater difficulties arise when determining whether entities are owed rights to expression. New Zealand has accepted that entities possess expressive rights, as s 14 of the NZBORA has been consistently invoked by legal persons in court proceedings.[250] In considering that legal persons enjoyed rights to expression, the High Court in *Greenpeace* cited *Citizens United* to support the proposition that the "political speech of corporations or other associations should not be treated differently simply because they are not natural persons".[251] Blind acceptance of such a proposition overlooks the ideological nature of the decision to afford expressive rights to legal persons, as demonstrated by the conflicting majority and dissenting opinions in *Citizens United* and *Bellotti.*

Citizens United's majority adopted a "real entity" approach to corporations, insisting that entities were the valid recipients of expressive rights.[252] Drawing on *Bellotti,* the majority contended that "Government cannot restrict political speech" due to corporate identity.[253] In *Bellotti,* Powell J, writing for the majority, equated corporations with individuals, validating entities as political citizens by considering that "[t]he inherent worth of the speech" did not depend "upon the identity of its source, whether corporation … or individual".[254]

Libertarian concerns with the protection of a free market for political speech were central to *Bellotti*'s insistence upon the irrelevance of corporate identity. The majority insisted that a speaker's corporate status did not disqualify them from free speech protection, as "if the government were to pick and choose who could participate in the

246 At 542.
247 Butler and Butler, above n 84, at 110.
248 Section 12.
249 *Bellotti*, above n 65, at 824.
250 See *Greenpeace*, above n 220.
251 At [98].
252 Reuven Avi-Yonah "Citizens United and the Corporate Form" (2010) 4 Wis L Rev 999 at 1043.
253 Kuhner, above n 40, at 28.
254 At 70; and *Bellotti*, above n 65, at 777.

market, then the market would cease to be free",[255] allowing the government to dictate "which persons may speak, favouring certain viewpoints".[256] Similarly, *Citizens United* disavowed attempts to "muzzle" corporate speech, claiming that "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content."[257] However, prohibiting corporate political donors is ultimately content-neutral regulation, simply restricting an entire class of donors. Much like the foreign donor prohibition, such regulations neutrally restrict the source of expression, companies and trusts, without favouring or censoring viewpoints based on content.[258]

Despite the disavowal of identity-based distinctions in *Bellotti* and *Citizens United*, a speaker's identity must be relevant. Electoral law in both the United States and New Zealand restricts the ability of foreign governments and nationals to make political donations, imposing speech restrictions based on foreign identity.[259] A truly "free market for political speech would include each and every viewpoint on matters of public concern, regardless of whether those viewpoints were instrumental for corporate or foreign domination", reflecting that the "worth of speech" must, in some ways, depend upon the "identity of its source".[260]

This recognition underpins Rehnquist J's dissent in *Bellotti,* which adopted the "fictional" theory, emphasising the corporation as "invisible, intangible, and existing only in contemplation of law".[261] Due to the artificial nature of entities, Rehnquist J recognised that rights to freedom of expression may not be "necessary to carry out the function of a corporation organized for commercial purposes".[262] Similarly, Stevens J's dissent in *Citizens United* identified that "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires"; rather, legal personhood is an economically convenient fiction conferred by legal rules.[263] Restrictions on political expression based on corporate identity were rendered "less worrisome" as entities were not members of the political community.[264]

Additionally, the fictional identity of legal persons holds immense relevance, as speech protections aim to protect the speaker's expressive interests.[265] Jacob Rowbottom locates three main justifications for protecting free expression. First, expression is instrumentally valuable for the pursuit of the truth, to enable the interchange of ideas.[266] Secondly, expression is intrinsically valuable for self-fulfilment, as a "component of individual autonomy".[267] Finally, expression is essential for democratic self-governance.[268] As legal persons are fictions, it cannot be accepted at face value that the justifications for protecting free expression apply also to companies and trusts.

255 Kuhner, above n 40, at 68
256 *Bellotti*, above n 65, at 784–785.
257 *Citizens United*, above n 24, at 340.
258 Electoral Act, s 207K.
259 Section 207K; and Kuhner, above n 40, at 69.
260 At 69; and *Bellotti*, above n 65, at 777.
261 At 823.
262 At 825.
263 *Citizens United*, above n 24, at 466, per Stevens J.
264 At 424.
265 At 466.
266 Jacob Rowbottom "Political Donations and the Democratic Process: Rationales for Reform" (2002) 2 PL 758 at 772.
267 At 772.
268 At 772.

Hence, the next section examines the purpose of the right to free expression, to determine whether that purpose is accomplished when expressive rights are extended to legal persons.[269] It considers that the rationales for protecting "political expression" are inapplicable to legal persons and cannot justify their participation in the political market. Hence, one reason to prohibit legal person donations is that their "influential" qualities are greater than their "expressive" ones.

(a) Entities and the interchange of ideas

Derived from John Stuart Mill's theory that free speech requires protection as "truth is discovered in the collision of varying opinions", expressive rights protect the interchange of ideas.[270] Free speech is theorised to enable the discovery of political truth, as "the best test of truth is the power of the thought to get itself accepted in the competition of the market".[271] However, the dominance of wealthy corporations does not enhance the "truth-producing capacity" of the political market, as the defining characteristic of most entities is profit-maximisation.[272] Mill's defence of free speech may be inapplicable for entities motivated by "the pursuit of profit rather than the pursuit of truth".[273]

This may initially appear to be a comparatively unconvincing reason to withdraw expressive rights from entities. After all, not all entities are solely profit-driven. For instance, recent law reform, s 131(5) of the Companies Act, clarifies that directors may consider environmental and social matters, beyond profit-maximisation, when pursuing the company's best interests.[274] Furthermore, if expressive rights are withdrawn from entities due to their profit-seeking nature, what about individuals pursuing self-interested economic goals when engaging in political expression?

The real value in this argument therefore lies in recognising that corporate expression may harm the interchange of ideas, as the political expression of legal persons can silence the expression of natural persons. Granting freedom of expression to entities permits private wealth to "control the course of public debate", rendering the political expression of individuals inaccessible.[275] Individuals who own companies and trusts can amplify their opinion by exercising expressive rights in their own personal capacity and through their associated entities, overwhelming the expression of others.

(b) Entities and self-fulfilment

Furthermore, as legal fictions, entities are arguably incapable of deriving intrinsic value from expression as a form of self-fulfilment and autonomy.[276] This second justification of free speech stems from Thomas Emerson's thinking that the "proper end of man is the realization of his character and potentialities as a human being".[277] *Bellotti* rejected that the "inherent worth" of speech was dependent on the source's corporate identity,

269 Findlay, above n 212, at 773.
270 Mary Stoll "Corporate Rights to Free Speech?" (2005) 58 Journal of Business Ethics 261 at 264.
271 *Abrams v United States* 250 US 616 (1919) at 630.
272 Stoll, above n 270, at 265.
273 At 265.
274 Companies Act, s 131(5).
275 Rawls, above n 4, at 225.
276 Marilyn Friedman and Larry May "Corporate Rights to Free Speech" (1986) 5 Bus & Prof Ethics J at 6.
277 Piety, above n 229, at 77.

overlooking the reality that speech derives worth "as a component of individual autonomy" through the intrinsically valuable goal of self-actualisation.[278] This is a distinctly human function; after all, legal persons "do not have a 'self' to be actualized".[279]

The expression of legal persons arises by virtue of legal rules, rather than autonomous actions. As entities are comprised of a plurality of human actors, company actions like contract signing or asset divestment are attributed to legal persons through the rules of attribution, established by Lord Hoffman in *Meridian Global Funds Management Asia Ltd v Securities Commission.*[280] Attribution rules reveal that entities possess no autonomy interests, as an entity's conduct is mediated by human actors and ascribed by legal rules. As Lord Hoffmann recognised, "[t]here is in fact no such thing as the company as such, no ding an sich, only the applicable rules."[281] "Corporate speech" similarly serves as shorthand for the legal rules that dictate when the company has spoken.

For companies, corporate governance rules dictate when entities have "spoken" through political expenditure. Section 128(1) of the Companies Act establishes that, subject to the constitution, a company's business and affairs are managed by the board of directors. This is subject to certain limits.[282] However, current corporate governance mechanisms afford shareholders minimal control over political donations, since these are treated as an ordinary business decision for which shareholder approval is not required.[283] Therefore, a company is deemed to have spoken when the board allocates shareholder investments to a political party or candidate. It is accordingly difficult to justify how entities possess cognizable interests in self-expression when such expression relies on legal rules.

As shareholders typically do not receive input on corporate political spending, corporate donations do not "represent a manifestation of individual freedom or choice", but may conflict with the expressive rights of individuals behind the entity itself.[284] In *Bellotti*, White J recognised that shareholders "do not share a common set of political or social views".[285] Hence, corporate political donations may misuse shareholder investments, threatening the expressive rights of shareholders. To combat these concerns, New Zealand's large NZX listed companies often implement internal policies prohibiting political donations.[286] Nevertheless, White J's "shareholder protection" rationale reflects that there is no deeper fundamental interest in the expression of legal persons in the form of political donations, as such donations are not representative of a uniform human interest. Political expression cannot contribute to the self-fulfilment of corporate speakers, as there is no cohesive "self" to fulfil.

(c) Entities and democracy

The third justification for disregarding the expressive rights of entities in the political sphere recognises that speech protections preserve the capacity of individuals to access

278 *Bellotti*, above n 65, at 777–778; and Rowbottom, above n 266, at 772.
279 Piety, above n 229, at 59.
280 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 12.
281 At 12.
282 See s 129 of the Companies Act, which requires special shareholder resolutions for "major transactions".
283 Haub, above n 181, at 13.
284 *Bellotti*, above n 65, at 805.
285 At 805.
286 Haub, above n 181, at 15.

public deliberations for effective self-government, as a "civil and political right supporting democracy".[287]

From a libertarian perspective, speech protections for the promotion of democratic self-government are predicated on censorship concerns.[288] The majority in *Citizens United* legitimately identified that "[s]peech is an essential mechanism of democracy" as a means to "hold officials accountable to the people".[289] Speech protections combat "attempts to disfavor certain subjects or viewpoints" to prevent the government from evading political accountability by silencing critics.[290] In the political sphere, where the election of public officeholders is at stake, speech protections possess their "fullest and most urgent application".[291] This represents entirely valid recognition of the need to preserve fulsome political debate amongst the public for effective self-government.

Yet, prohibiting non-individual donors does not censor viewpoints. It merely requires individuals to exercise their expressive rights in their personal capacity, rather than amplifying their political preferences via entities. White and Rehnquist JJ in *Bellotti* noted "even complete curtailment of corporate communications" leaves individuals "free to communicate their thoughts".[292] As individuals with ownership of companies and trusts can only exercise expressive rights in their personal capacity, speech must compete with other individuals on a more equal playing field.[293] When entity donations are banned, only domination by outsized financial resources and the corresponding potential for undue influence are lost. Hence, political donations by legal entities are "less a matter of speech as such, and more a matter of making one's speech influential".[294]

Libertarian concerns about censorship also overlook the potential for government intervention, in the form of political financing regulation, to promote robust public debate. This would occur by preventing entities with disproportionate financial resources from monopolising speech access. Concerns with censorship and a free-market for political speech are inextricably bound up in libertarian distrust of government intervention. *Citizens United* noted that speech protections were "[p]remised on mistrust of governmental power", reflecting the belief that speech restrictions will harm democracy, even if imposed for democratic improvement.[295] Political financing regulation is conceived of as harmful state interference in the political free-market, disregarding the potentially valuable role of government in promoting fair and equal political expression.

Rather than positioning the government as a "threat" to political expression, political financing regulation may serve as a "guarantor" of the meaningful expression of all individuals.[296] As the Canadian Supreme Court in *Harper* identified, the "state can provide a voice to those who might otherwise not be heard" and "restrict the voices which dominate the political discourse".[297] *Harper* legitimated the State's role in "preventing the voices of the wealthy from drowning out those of others and preserving confidence in the

287 *Moncrieff-Spittle v Regional Facilities Auckland* [2022] NZSC 138, [2022] 1 NZLR 459 at 465.
288 Kuhner, above n 40, at 129; and *Citizens United*, above n 24, at 340.
289 *Citizens United*, above n 24, at 339.
290 At 340.
291 Kuhner, above n 40, at 36.
292 *Bellotti*, above n 65, at 807.
293 Kuhner, above n 40, at 85.
294 At 37.
295 *Citizens United*, above n 24, at 312; and Ronald Dworkin *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, Cambridge (Mass), 2000) at 353.
296 Kuhner, above n 40, at 69.
297 *Harper*, above n 4, at [62].

electoral system".[298] Similarly, *Libman* recognised a need to "ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others" to "prevent the most affluent from monopolizing election discourse".[299] Canadian jurisprudence therefore identifies that political financing regulation may enhance, rather than inhibit expression, as "uncontrolled spending could favour the messages of wealthier citizens".[300] Whilst courts may denounce political financing regulation as efforts to reduce freedom, it is also possible to validate regulation's potential to increase freedom, through the promotion of political equality.[301]

Like Canada, New Zealand courts have recognised that legislative constraints on expression can promote, rather than hinder, democracy. In *Greenpeace*, the Court acknowledged that election advertisement restrictions were:[302]

> … part of the endeavour to promote fair and balanced political discourse and protect the integrity of the election process. In that context the value of the speech is arguably enhanced and the risk of legitimate expression being overwhelmed or drowned out reduced.

Similarly, *Watson v Electoral Commission* noted that the Electoral Act restricted freedom of expression due to "the interests of the NZBORA right to vote in genuine elections [and] the objects of participant equality and transparency".[303] The Court of Appeal noted that the Electoral Act promoted "participant equality and transparency, so protecting the right to vote by restricting free expression, and that restrictions of this kind can be justified in a free and democratic society".[304] Therefore, in some circumstances, like *Harper* and *Libman*, courts have willingly restricted expression for democratic objectives of participatory equality and transparency. Whilst freedom of expression is uncontroversially valuable in any democratic society, expression is not the only democratic right worthy of protection. As s 5 of the NZBORA recognises, expressive rights can be traded off to provide citizens with "equal opportunities for political influence", and ensure that "pervasive economic inequality" does not provide the affluent with a greater political voice.[305]

Indeed, the Electoral Act restricts the expenditure of political money as "expression" in myriad ways to preserve democratic objectives. Statutory disclosure obligations indirectly discourage political expression from donors who value anonymity, whilst the foreign donor ban directly limits expression from foreign nationals.[306] Underlying these regulations is recognition that free expression must, at times, be curtailed for greater democratic imperatives, representing justified limitations under s 5 of the NZBORA. Yet, companies and trusts can easily circumvent disclosure obligations and the foreign donor prohibition. Hence, whilst the government has imposed limitations on political expression, this power has been exercised "porously", permitting the reliance of political parties on wealthy donor companies and trusts.[307] New Zealand, therefore, desperately needs to confront the apparent weaknesses that entity donations perpetuate in its political

298 At 832.
299 *Libman*, above n 4, at [41] and [47].
300 *Harper*, above n 4, at [21]–[31].
301 Kuhner, above n 40, at 46.
302 *Greenpeace*, above n 220, at [67].
303 *Watson v Electoral Commission* [2015] NZHC 666 at [52].
304 *Electoral Commission v Watson* [2016] NZCA 512, [2017] 2 NZLR 63 at [23].
305 Boston and Mladenovic, above n 217, at 631.
306 See Part V of this article.
307 Haub, above n 181, at 23.

financing regime. Due to the harm inflicted on equal participatory rights and donor transparency, debate on curtailing the political expression of legal persons is long overdue.

(d) Evaluation

If freedom of expression is the greatest barrier to the prohibition of political donations from legal persons, it is certainly not insurmountable. Viewing donations as expression and entities as the valid recipients of rights of expression is a political choice. Once *Buckley*'s "money as speech" metaphor is identified as a political device, rather than an "apolitical abstraction", political donations are deprived of their status as sanctified forms of expression and can be regulated in ways that are beneficial for society.[308] Even if it is accepted that political donations are "expression" under s 14 of the NZBORA, s 5 can be used to limit the expressive rights of legal persons, due to the harm such rights cause to natural persons.[309] The prohibition of non-individual donations recognises that the government's interest in preventing undue influence, in the form of vastly disproportionate expressive contributions from companies and trusts, is greater than the interest in maintaining the unlimited expression of legal entities.

VIII Conclusion

Although companies and trusts are not eligible voters, they may nevertheless acquire access and influence as eligible political donors. This article supports the IERP's recommendation to prohibit entity donors, to prevent "those who are unable to vote" from acquiring "access and undue influence through [political] donations", offering an egalitarian analysis of political financing.[310] Through the lens of Johnston's influence market theory, it is argued that legal person donations may exert immense and unequal democratic influence, whilst entities themselves are not political citizens.

Influence markets permit the exchange of political influence for private wealth, degrading democracy's representative nature. Corruption occurs as private financial influences operate upon public officeholders, fuelling perceptions of a political process that responds to market influence, over voter concerns. This is underpinned by egalitarian considerations, as influence markets allow economic inequality to transfer to the political sphere, where economic elites acquire "undue influence". Undue influence represents a fundamental concern with outsized economic influences on public officeholders.[311] To separate political influence from wealth, wealthy interests should be prevented from acquiring greater rights of political participation by donating wealth amassed via their associated trusts and companies. Prohibiting entity donors would level the playing field between individuals by banning the acquisition of additional political influence via entities.

By providing entities with participation rights in the influence market as political donors, New Zealand's electoral law has sanctioned the unequal political influence of individuals. Drawing on a Rawlsian egalitarian approach to political financing and Canadian judgments *Harper* and *Libman*, it is argued that the economic and political spheres must be distanced to preserve political equality, by withdrawing the rights of legal persons to make political donations.

308 Fish, above n 237, at 115.
309 Butler and Butler, above n 84, at 150.
310 Independent Electoral Review, above n 3, at [13.34] and [13.55].
311 Johnston, above n 1, at 73.

Entity donors acquire influence market advantages in two forms. First, legal persons are granted favourable legal privileges for wealth accumulation and certain donors may draw on both their personal wealth and that of their associated entities. As legal persons amass greater wealth than most natural persons, they may wield greater potential influence, diminishing the rights of natural persons to equal political access. Secondly, entity donors can exploit Electoral Act loopholes, impairing political financing transparency in ways that individuals cannot. Entity donors may funnel political money through opaque corporate networks and obscure identity through beneficial ownership and "shell" and "shelf" companies. Entities facilitate evasion of the disclosure threshold through donation-splitting and circumvention of the foreign donation prohibition. Sections 207C, 207E and 207LA cannot effectively constrain these practices. As a result, entities may acquire undue influence with minimal transparency.

The third component of this article assesses the effect of the entity donor prohibition on freedom of expression. Using United States jurisprudence on corporate political spending, it is argued that the New Zealand government's interest in preventing undue influence is greater than the interest in maintaining unlimited "expression" by companies and trusts. First, *Buckley*'s "money as speech" metaphor is considered. When speech access becomes contingent on financial resources, the voice of corporate speakers will overwhelm individuals, permitting affluent New Zealanders to speak the loudest. Secondly, the rights of entities to expression are assessed by examining the three rationales for protecting free expression and considering the Supreme Court opinions in *Bellotti* and *Citizens United*.

Ultimately, the question of whether entities should continue to enjoy unlimited participation in the influence market due to their "expressive rights" remains a constitutional question which New Zealand must confront. This article suggests that valid reason exists to view the political donations of legal persons as undue influence, rather than expression. Hence, the political expression of legal persons should be curtailed to preserve expressive equality amongst individuals.