VIJAY CHAND

Recasting the Co-operative as a Stakeholder Theory Solution:
Does New Zealand Law Preserve the Co-operative Concept?

LAWS521 Research Paper

Te Kauhanganui Tātai Ture | Faculty of Law

Te Herenga Waka | Victoria University of Wellington

2022

Table of Contents

I Introduction

Despite their prevalence in the New Zealand economy and their dominance in key, mainly agricultural, industries, co-operative companies remain an under discussed area in New Zealand's legal literature.[1] Globally, however, discussion on the return of the co-operative form and its importance in a diverse organisational landscape is rising.[2]

Similarly, stakeholder theory is rising in relevance as an argument against the entrenched shareholder primacy view in company law.[3] Whilst companies have been an integral part of the growth and prosperity over recent history, companies are now being seen as the driver behind many of our problems.[4] Or at the very least, the status quo structure of companies and company law is not adequately using the substantial power of the company to address the problems.

In response to the issues, debate is raised over how companies can be better directed towards using their substantial power to drive change for a sustainable future. This debate

---

[1] Cooperative Business New Zealand "MEDIA RELEASE: New Zealand Co-operatives make up 18% of NZ's GDP, paving the way on long-term sustainability" <www.nz.coop>.

[2] See Dante Cracogna, Antonio Fici and Hagen Henrÿ *International Handbook of Cooperative Law* (Springer Berlin Heidelberg, Berlin, 2013); Willy Tadjudje and Ifigeneia Douvitsa *Perspectives on Cooperative Law* (Springer Nature Singapore, Singapore, 2022) at v; Hagen Henrÿ *Guidelines for Cooperative Legislation* (3rd ed, International Labour Office, Geneva, 2012) at 31–32; Antonio Fici "The Essential Role of Cooperative Law" (2014) 2 DQ 147.

[3] See Robert Freeman "A Stakeholder Theory of the Modern Corporation" in Max Clarkson (ed) *The Corporation and Its Stakeholders* (University of Toronto Press, Toronto, 1998) 125; Robert Freeman and others *Stakeholder Theory* (Cambridge University Press, Cambridge, 2010); Thomas Donaldson and Lee Preston "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications" (1995) 20 The Academy of Management Review 65; Andrew Keay "Stakeholder Theory in Corporate Law: Has It Got What It Takes?" (2010) 9 Rich J Global L & Bus 249; Susan Watson "Moving beyond Virtue Signalling: Corporate Sustainability for New Zealand" in Beate Sjåfjell and Christopher Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press, Cambridge, 2019) 176.

[4] Lucian Bebchuk and Roberto Tallarita "The Illusory Promise of Stakeholder Governance" (2020) 106 Cornell L Rev 91 at 99; Kent Greenfield "The Third Way" (2014) 37 Seattle ULRev 749 at 750.

has condensed into a shareholder primacy versus stakeholder theory debate over whom a company should be managed for.[5] Whilst the company is the dominant for-profit organisational form, this debate has overlooked the importance of other organisational forms.

At first glance, co-operative companies appear to be an ideal stakeholder theory policy. This is because co-operative companies align the shareholder role with a stakeholder group.[6] They centre an organisation's focus around a stakeholder group's economic and social needs. The link between stakeholder theory and co-operative companies, however, also remains an under-explored area in the literature.

This paper suggests that co-operative companies address the current shortcomings in the stakeholder theory policies focused on the company in a way that still accords with the principles behind stakeholder theory. It seeks to recast the longstanding co-operative form within the stakeholder theory. In doing so, it explores the concept of co-operative companies, in comparison and in contrast to the company form, and analyses whether New Zealand's co-operative legislation preserves the co-operative identity.

This paper does not seek to solve the shareholder primacy versus stakeholder theory debate, nor to fix the stakeholder theory critiques. This paper draws upon the debate to set the stage for the co-operative company, and it draws upon the shortcomings of the current stakeholder theory policies to justify recasting the co-operative company as a stakeholder theory policy.

Nor does this paper seek to replace the company form with the co-operative company form entirely. There is an undoubted place for the company form within any modern economy. This paper instead, asserts that co-operative companies can be recast within the realm of

---

[5] Institute of Directors and MinterEllisonRuddWatts *Stakeholder governance: A call to review directors' duties* (July 2021) at 3.

[6] Caroline Gijselinckx *Co-operative Stakeholders Who Counts in Co-operatives, and How?* (Working Paper on Social and Co-operative Entrepreneurship 0905, 2009) at 1.

stakeholder theory policies and on this justification, they could perhaps be promoted through the broader organisational law to play an even greater role in New Zealand's

A Structure

Part two of this paper introduces the shareholder primacy versus stakeholder theory debate. It discusses the theoretical conception of the competing corporate governance systems and their place within current New Zealand law. the role co-operatives companies could play within it. Given co-operatives are proposed as a new stakeholder theory policy, the criticisms of stakeholder theory are also discussed.

Part three defines the co-operative company identity in theory, with reference to the International Labour Organisation's co-operative principles, and rejects the argument that companies are merely a type of co-operative. Part four argues that the co-operative can be recast as a stakeholder theory policy. In doing so, it assesses how applicable the critiques of stakeholder theory are to co-operatives. The part ends by canvassing the critiques to a stakeholder theory understanding of co-operatives.

Part five introduces the historical background to the New Zealand's co-operative laws and the current position of co-operative law in New Zealand. Part six continues with an analysis of five distinguishing elements of our co-operative law and assesses how well they preserve the co-operative identity. Part seven concludes that our co-operative companies' law does not adequately preserve the co-operative identity.

Part eight draws upon the co-operative laws of other jurisdictions to suggest improvements to our co-operative laws with the goal of strengthening the co-operative identity. Part nine concludes by linking back to the stakeholder theory justifications of co-operative companies.

B Key Terms

This paper discusses both companies and co-operative companies. Given the overlap between the two organisational forms, there are similarities between the terms used to describe functions and roles within each. This paper focuses on co-operative companies

that are incorporated under the Companies Act and will refer to them as simply "co-operatives".

Company and co-operative shareholders will be distinguished by calling the former "shareholders" and the latter "members". Co-operative members also need to be further separated between transacting-shareholders, referred to as "user-members", and non-transacting shareholders, referred to as "investor-members", where necessary.

Company law refers to the legal structure of the company form under the Companies Act 1993. But the extent of law that affects the company organisation goes beyond just the structure. The term broader company law includes, for example, tax, competition, labour, resource management, and health and safety laws. Each affects the exercise of the company form and forms a part of the broader conception of company law. This paper will use the term broader co-operative law to refer to the similar extent of laws that affect the co-operative as an organisation, beyond its legal structure.

II The Shareholder Primacy and Stakeholder Theory Debate

In response to growing societal and ecological pressures, there are debates in organisational and company law about whether the current accountability and incentive structures on companies are sufficient for us to develop into a better future.[7] The debate is distilled into the argument between the shareholder primacy and stakeholder theory conceptions of corporate governance.

This paper seeks to recast the co-operative company organisational form as a stakeholder theory solution. To do so, it is necessary to engage with the debate in the literature around whose interests a company should focus on. A discussion of the shortcomings and critiques of current stakeholder theory policies is necessary to understand why it is important to recast the co-operative company form as a stakeholder theory. This discussion will focus on the theoretical conceptions of shareholder primacy and stakeholder theory, although it will draw upon the specific New Zealand law to demonstrate the ideas.

---

[7] *Madsen-Ries v Cooper* [2020] NZSC 100, [2021] 1 NZLR 43 at [31].

A Shareholder Primacy

The shareholder primacy norm considers that a company's board should have the overriding focus of managing a company for the benefit of and in the interests of a company's shareholders.[8] The norm "[equates] the corporate purpose with the maximisation of monetary interests of shareholders".[9]

Watts states that: "Shareholder primacy has been and remains intrinsic to the Commonwealth model of company law, and … still underlies New Zealand company law."[10] The Law Commission agrees with Watts that the reformed Companies Act 1993 still reflects shareholder primacy. In its 1989 report on company law reform, the Law Commission "rejected the notion that directors should have a legally enforceable duty to embrace stakeholder interests as part of their general decision making".[11] Instead, the Law Commission adopted the shareholder primacy position that company law should continue to be focused on shareholder interests and any protection for stakeholders can be done in the broader company law.[12]

Shareholder primacy, however, is not explicitly legislated in New Zealand company law. For example, s 131 of the Companies Act 1993 requires directors to act in the best interests of *the company,* not the shareholders. As an abstract legal construct however, the company itself cannot be said to have any particular best interest: "A company can be *treated* as having interests, but only by attributing the interests of other persons to it."[13] And, in general, the most relevant and most natural stakeholder group to have their interests

---

[8] Aneil Kovvali "Countercyclical Corporate Governance" (2022) North Carolina Law Review (forthcoming) at 8.

[9] Beate Sjåfjell and Jukka T Mähönen *Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy* (No 2022-43 University of Oslo Faculty of Law Legal Studies Research Paper Series 2022) at 5.

[10] Peter Watts, Neil Campbell and Christopher Hare *Company law in New Zealand* (LexisNexis NZ, Wellington, 2016) at 230.

[11] Watts, Campbell and Hare, above n 10, at 382.

[12] Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989) at 47.

[13] Watts, Campbell and Hare, above n 10, at 35.

attributed to the company is the shareholders, given their residual rights, control and oversight.[14] This is the process by which it can be said that shareholder primacy is the dominant position in New Zealand despite directors' duties being owed to the company.

Furthermore, the norm is also "implicit in the general structure of incorporation"[15] through company law features like shareholder control of company constitutions[16], the ability to pass special resolutions on company management[17], and the appointment and removal of directors.[18]

1 Justifications for Shareholder Primacy

The norm is justified on two conceptions. The first is rooted in property rights. As the owners of the shares, the company is thus the shareholder's property, and the board is the shareholder's agents who must manage the company for the shareholders' benefit.[19]

The second justification considers shareholders to be the residual claimants of a company's surplus value after accounting for all other fixed claimants, drawing upon the nexus of contracts theory of the firm.[20] Therefore, the board manages the company for the shareholders benefit as the shareholders "have the correct incentives to maximize economic value".[21]

---

[14] Watts, Campbell and Hare, above n 10, at 35.

[15] Peter Watts "To whom should directors owe legal duties in exercising their discretion? — a response to Mr Rob Everett" [2019] CSLB 49 at 51.

[16] Companies Act 1993, s 32.

[17] Companies Act 1993, ss 106 and 109.

[18] Companies Act 1993, ss 153-156; Watts, above n 15, at 51; Freeman, above n 3, at 125.

[19] Lenore Palladino and Kristina Karlsson *Towards 'Accountable Capitalism': Remaking Corporate Law Through Stakeholder Governance* (Roosevelt Institute, 2018) at 3.

[20] At 3.

[21] Kovvali, above n 8, at 8.

As a matter of normative law making, the justification for shareholder primacy is that shareholder value maximisation is a good proxy for maximising overall societal wealth.[22] Shareholders instruct their agents to generate shareholder wealth through efficiency gains, generating overall societal value.[23] The best means to pursue aggregate social welfare is to "make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests".[24]

Shareholder primacy as a normative matter, however, is not settled. It is relevant to note that the Supreme Court in *Madsen-Ries v Cooper* discussed three competing models of corporate governance, being shareholder primacy, stakeholder theory and a concentration on the company itself.[25] After briefly mentioning the three competing models, the Court expressly stated that it did not "for the purposes of this appeal need to decide which of the competing models of corporate governance is correct".[26]

2 Enlightened shareholder value

It is also necessary to appreciate that whilst shareholder primacy tends to dominate New Zealand company law, directors are not fundamentally precluded from voluntarily taking account of stakeholder interests. It appears that directors do voluntarily at least consider stakeholder interests in their management. A 2020 survey of New Zealand directors found that 87 per cent agreed that stakeholder interests are very important to their business.[27]

Indeed, it can be said that being responsive and understanding of an organisation's impact on its stakeholders is essential for the long-term success of an organisation.[28] Certainly, it

---

[22] Andrew Keay "Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model" (2008) 71 MLR 663 at 669.

[23] Henry Hansmann and Reinier Kraakman "The End of History for Corporate Law" (2001) 89 Geo LJ 439 at 441.

[24] At 441.

[25] *Madsen-Ries v Cooper*, above n 7; Institute of Directors and MinterEllisonRuddWatts, above n 5, at 13.

[26] *Madsen-Ries v Cooper*, above n 7, at [31].

[27] Institute of Directors and MinterEllisonRuddWatts, above n 5, at 16.

[28] Watts, Campbell and Hare, above n 10, at 382.

cannot be in the best interests of the shareholders if an organisations poor workplace environment restricts its capacity to hire staff or if its negative environmental impact destroys its sources of raw materials. This reflects the enlightened shareholder value conception, where stakeholder interests are considered to the extent and for the purpose of understanding how to generate greater and long-term shareholder value.[29] Indeed, ignoring stakeholder interests that are material to the company, and hence the shareholders' value, would possibly be in breach of the duty to act in good faith and with the skill of a reasonable director.[30]

This idea is reflected in Duncan Webb MP's Companies (Directors Duties) Amendment Bill.[31] That Bill seeks to clarify, "to avoid doubt", that consideration of non-shareholder interests is permissible under the current s 131 duty.[32] The Bill does not intend to change the law under s 131, instead it acts to explicitly confirm the position many directors currently take.[33]

B Stakeholder Theory

Stakeholder theory emerged as a pushback against the, relatively recent, centring of shareholders and their interests in company law.[34] Stakeholder theory is a realm of policies that restructure the internal organisation of the company so that it is more responsive and accountable to its stakeholders.[35] Stakeholders are generally accepted to mean groups who affect and are affected by the company, for example its employees, its suppliers, the local

---

[29] Bebchuk and Tallarita, above n 4, at 108.

[30] Institute of Directors and MinterEllisonRuddWatts, above n 5, at 14.

[31] Companies (Directors Duties) Amendment Bill 2021 (75-1).

[32] Companies (Directors Duties) Amendment Bill 2021 (75-1), cl 4.

[33] Companies (Directors Duties) Amendment Bill 2021 (75-1) (explanatory note) at 1.

[34] Keay, above n 22, at 673.

[35] Margaret Lund and Lynn Stout "A Team Production Theory of Corporate Law" (1999) 85 Virginia Law Review 247 at 320; Greenfield, above n 4, at 763; Len Sealy "Directors' 'wider' responsibilities—problems conceptual, practical and procedural" (1987) 13 Mon LR 164 at 170; Bebchuk and Tallarita, above n 4, at 114–115.

community, and the environment.[36] The theory considers that for company law to truly serve and improve society, stakeholders must be included in its focus.[37] It argues that companies should be "responsible to a variety of groups or 'stakeholders' in society – other than just the organization's owners".[38] Rather than using external regulation, stakeholder theory looks to change the companies' internal structures.[39] Unsurprisingly, given their dominance in the economic realm, stakeholder theories' focus has been on companies.

Stakeholder theory does not have a singular policy platform to implement.[40] Instead, stakeholder theory is a broad tent of ideas and changes that reshape corporate law towards stakeholders. It seeks to rebalance the power within companies to make them a more positive social force.[41] The theory recognises that "corporations are collective enterprises, drawing on investments from various stakeholders who contribute to the firm's success"[42] and argues that greater emphasis on the interests of stakeholders needs to be legally recognised.[43] The theory goes beyond taking into account stakeholder interests because of their effect on shareholder value, asserting that the "welfare of each group of stakeholders is relevant and valuable independently of its effect on the welfare of shareholders".[44]

A stakeholder is traditionally identified by their interest in the affairs of an organisation.[45] Stakeholders are defined either narrowly as those whom a company relies upon for survival, or broadly as those who affect and are affected by the company and its actions.[46] Donaldson and Preston qualify the broad definitions use of the term affected by,

---

[36] Freeman and others, above n 3, at 24; Sealy, above n 35, at 170; Keay, above n 3, at 257.

[37] Keay, above n 22, at 674; Freeman, above n 3, at 133–134; Keay, above n 3, at 298–300.

[38] Gijselinckx, above n 6, at 1.

[39] Greenfield, above n 4, at 761; Keay, above n 3, at 254–255.

[40] Freeman and others, above n 3, at 133.

[41] Greenfield, above n 4, at 761; Keay, above n 3, at 254–255.

[42] At 761.

[43] Keay, above n 22, at 674; *Madsen-Ries v Cooper*, above n 7, at [29].

[44] Bebchuk and Tallarita, above n 4, at 114.

[45] Donaldson and Preston, above n 3, at 81; Gijselinckx, above n 6, at 2 –7.

[46] Freeman, above n 3, at 129; Elaine Sternberg "The Defects of Stakeholder Theory" (1997) 5 CG 3 at 3.

considering stakeholders to be "identified through the actual or potential harms and benefits that they experience or anticipate experiencing as a result of the firm's actions or inactions".[47] This includes employees, customers, suppliers, competitors, the communities in which the company operates, the environment, and governments.[48] For example, a company's employees are relied upon by the company for its operations and success, and in turn the company affects the employees welfare through working conditions and remuneration, therefore employees are a stakeholder group.[49] As another example, a company has an environmental footprint and impacts the environment it operates in, thus the environment is a stakeholder group.[50]

Bringing the above together, consider that a board decision to dispose of production waste by dumping may increase shareholder welfare through a lower cost of production, but the board has externalised that cost and harm onto the environment and local communities. The company's action has causes harm to those groups, they are affected by the company's actions, and they are part of the company's stakeholders. Stakeholder theory would thus argue, as a matter of corporate governance and aside from any environmental protection regulations, that boards should consider that harm and not benefit shareholders through detriment to stakeholders.[51]

1 Rejection of Shareholder Primacy

Firstly, the stakeholder theory rejects the shareholder primacy argument that shareholder value maximisation is a good proxy for overall societal wealth.[52] Efficiency gains are not the only method to increase shareholder value. Shareholder wealth can be increased by

---

[47] Donaldson and Preston, above n 3, at 85.

[48] Freeman, above n 3, at 130–132.

[49] At 130.

[50] At 131.

[51] At 132–133.

[52] Keay, above n 22, at 671.

extracting value from other stakeholders, such as through negative externalities, market power in the labour market, or at the expense of consumer surplus.[53]

There is the argument that stakeholder theory or concern for stakeholder interests is already possible under existing company law and thus no reform is required. But the stakeholder theory argues that the structure of company law will always tends towards prioritising and protecting shareholder interests, especially when times are tough.[54] It is good and commendable that companies do voluntarily take into account stakeholder interests, reflecting the position that directors are not prohibited from taking stakeholder interests into account, but if they are not legal protected then they are at risk to the extent they conflict with shareholder interests.[55]

Larry Fink, CEO of the global investment firm BlackRock, in his 2022 Annual Letter, described great companies as ones that show "a clear sense of purpose; consistent values; and, crucially, they recognize the importance of engaging with and delivering for their key stakeholders", describing this as "stakeholder capitalism".[56] This concern for stakeholder interests is still, however, presented through the lens of promoting shareholders long-term interests and value, as Fink goes on to describe that stakeholder capitalism is "all about long-term, durable returns for shareholders".[57] Stakeholder interests are not being seen as an end, but as a means to an end. Therefore, stakeholder theory argues for going beyond stakeholder interests being considered only for their material effect on shareholder value. Instead, stakeholder interests should be viewed as having "intrinsic value" independent of their ability to benefit shareholders.[58] And thus, we should reshape company law to mandate greater consideration of stakeholder interests.

---

[53] Keay, above n 22, at 671.

[54] Lynn Stout "The Toxic Side Effects Of Shareholder Primacy" (2013) 161 University of Pennsylvania Law Review 2003 at 2016–2019.

[55] Bebchuk and Tallarita, above n 4, at 176.

[56] Larry Fink "Annual 2022 Letter to CEOs" BlackRock <www.blackrock.com>.

[57] Fink, above n 56.

[58] Donaldson and Preston, above n 3, at 81.

C Shareholder Primacy Criticisms of Stakeholder Theory

The stakeholder theory presents an attractive proposal; to address the issues we currently face, companies should be reshaped to have greater concern and emphasis on stakeholders and their interests.[59] Notably, prominent shareholder primacy advocates do not necessarily disagree that stakeholders should be given greater protection.[60] Shareholder primacy advocates, however, disagree with the proposed stakeholder theory policies. Not only do they claim the promise of stakeholder theory is illusory, but they also argue that the practical policies are overall harmful.[61] This is because stakeholder theory policies reduce the efficiency of companies.[62] Accounting for stakeholders within the structure of the company is at the expense of the efficiency enhancing features of the company structure.

1 The balancing problem[63]

Firstly, the range of stakeholders in a company are vast and diverse, with varied and competing interests.[64] Stakeholder theory proposals allowing boards to take into account stakeholders' interests equally with shareholders' interests in the management of a company means the board no longer has a clear focus.[65] This is a risk as the "past success of corporations has been based on the presence of effective incentives for corporate decision makers".[66] Stakeholder theory policies risk inputting the "institutionalisation of inherent conflict among a range of interests of stakeholders", involving the judiciary "in non-justiciable tasks".[67]

---

[59] Bebchuk and Tallarita, above n 4, at 94.

[60] At 1; Hansmann and Kraakman, above n 23, at 442.

[61] Bebchuk and Tallarita, above n 4, at 164.

[62] At 95–96.

[63] Keay, above n 3, at 277.

[64] Palladino and Karlsson, above n 19, at 14.

[65] At 7.

[66] Bebchuk and Tallarita, above n 4, at 100.

[67] Watts, Campbell and Hare, above n 10, at 388.

Leviten-Reid and Fairbairn, drawing upon Hansmann, argue that attempting to balance multiple groups' interests increases the costs of decision making in an organisation.[68] This is for two main reasons. Firstly, different stakeholders may have fundamentally different interests and "may be apt to resolve issues and pursue strategic directions in a manner that advances their own well-being versus the well-being of the larger group".[69] Secondly, it is costly to accurately understand and consider the different interests of different stakeholders.[70]

For example, employees are a stakeholder group and a policy of offshoring part of the production chain, suppressing wages and job opportunities locally, would harm the interests of the employees. A company's customers are another stakeholder however, and under the stakeholder theory would be equally deserving in having their interests considered. It would be in the customers interests for the offshoring to occur if, all else equal, it resulted in decreased prices and increased consumer surplus.

Therefore, the interests of these two stakeholder groups are in tension and any attempt to weigh up their respective claims or find balance creates uncertainty for a board.[71] An attempt to balance all stakeholder interests "risks quickly becoming a utopia … [or the] strongest, most strategic or most vocal of stakeholders may get to set business strategies and make decisions for private benefits".[72]

2 Stakeholder accountability mechanisms[73]

Secondly, merely allowing directors to *consider* the interests of stakeholders may not go far enough. If directors are ultimately still appointed and subject to removal by

---

[68] Catherine Leviten-Reid and Brett Fairbairn "Multi-stakeholder Governance in Cooperative Organizations: Toward a New Framework for Research?" (2011) 2 Canadian Journal of Nonprofit and Social Economy Research at 29.

[69] At 29.

[70] At 29.

[71] Watts, above n 15, at 50.

[72] Sjåfjell and Mähönen, above n 9, at 14.

[73] Keay, above n 3, at 293.

shareholders, then directors interested in self-preservation will still promote the shareholders' interests.[74] Therefore, what would be required to protect stakeholder interests is not only allowing boards to consider stakeholder interests, but to hold them accountable to stakeholders as well.[75] However, as the range of stakeholders are vast, diverse and subject to competing interests, how is a board meant to act?[76] The board cannot protect all stakeholders at all times, however, if the board is accountable to all stakeholders then it will be trapped.[77] Or, inversely, the board could take any course of action and justify it by reference to the interests of one or more stakeholder groups.[78] If the board is accountable to everyone, then it is accountable to no one.[79] And with the lack of a streamlined accountability mechanism, boards may be less disciplined in their performance.[80]

In summary, this paper, given the goals of stakeholder theory and in light of the strong criticisms of stakeholder theory, suggests that recasting co-operatives as a stakeholder theory policy could be an ideal response. To argue that co-operatives fit within the realm of stakeholder theory, the next part will define the core, theoretical identity of co-operatives. The following part will then recast the theoretical co-operative identity as a stakeholder theory policy.

III Defining Co-operatives

This part attempts to draw out the core identity of the co-operative organisational form. It seeks to differentiate the form from others by reference to the core identity of co-operatives. To contextualise this approach, consider the company form whose identity can be understood by its essential elements. Armour and others have outlined the five core

---

[74] Bebchuk and Tallarita, above n 4, at 100.

[75] At 158.

[76] Keay, above n 22, at 677.

[77] At 676.

[78] Kovvali, above n 8, at 11.

[79] Keay, above n 22, at 677; Sternberg, above n 46, at 5.

[80] Bebchuk and Tallarita, above n 4, at 164.

elements of company law; the features that must be present for an organisational form to meet the conception of the company.[81] These include: "legal personality, limited liability, transferable shares, delegated management under a board structure, and investor ownership".[82] This part will undertake a similar inquiry to distil the co-operative to its essential character.

A The Co-operative Concept

Parnell insightfully defines a co-operative as:[83]

> An enterprise, freely established, that is owned and controlled by a group of legal persons for the purpose of equitably providing themselves with mutual benefits arising from the activities of the enterprise and not primarily from investment in it.

From this definition we can see the underlying principle of a co-operative is that they are user-centric organisations, created with the purpose of fulfilling its members social and economic needs.[84] This contrasts with capital-centric or owner-focused organisations like companies.

Others in the literature have defined co-operatives by reference to its key features. Münkner states the following features as key to a co-operative: "capital deprived of its insignia of power" (that is, power attaches to members individually and not to their financial interest), voting rights and profit-sharing not proportional to contributed capital, democratic governance through one member one vote, and the principal object of promoting its

---

[81] John Armour and others "What is Corporate Law?" in Reinier Kraakman and others (eds) *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed, Oxford University Press, Oxford, 2017) 1 at 1.

[82] At 1.

[83] Edgar Parnell *Reinventing Co-operation – The Challenge for the 21st Century* (Plunkett Foundation, Oxford, 1999) as cited in Lynne Taylor "Governance Issues for Co-operative Companies under the Co-operative Companies Act 1996" (2009) 15 NZBLQ 23 at 293.

[84] Fici, above n 2, at 150.

members.[85] Similarly, Woodford points out six typical rules or features that are present in traditional co-operatives, including: open membership, low entry fees, no or limited return on capital, no capital gains for members, capital not proportionate to patronage, and one member one vote.[86]

Both Münker and Woodford's features help define the co-operative as a user-centric organisation. Combining both gives a functional definition of a co-operative, that is, organisations with most of those features could be considered a traditional co-operative.

1 Evolution in co-operatives

Similar to company law, co-operative law has evolved over time, with incorporators pushing the boundaries of what is possible with more unique structures.[87] As a part of this evolution, new organisations have arisen that are nominally co-operatives but do not have all of the features identified above. Woodford discussed the developments in co-operative law that have brought in "new generation co-operatives"[88] and "hybrid co-operatives".[89]

New generation co-operatives address the problems, most often around capital access, facing traditional co-operatives.[90] They have six key features, including: members supply capital in proportion to patronage, potential for capital gains, no substantial unallocated reserves, membership and production may be limited, new members pay for a fair share of existing capital, and voting rights proportional to patronage.[91] Hybrid co-operatives "involve a combination of co-operative structure plus investor shareholdings".[92]

---

[85] Hans Münkner "Ensuring Supportive Legal Frameworks for Co-operative Growth" (paper presented to the ICA 11th Regional Assembly, Nairobi, November 2014) at 18.

[86] Keith Woodford "New Generation Co-operatives and Related Business Structures" (paper presented to Co-operative Directors' Seminar, Wellington, September 2003) at 1–2.

[87] Woodford, above n 86.

[88] At 3.

[89] At 6.

[90] At 3.

[91] At 3.

[92] At 6.

2 Dual nature of members

Yet there is no suggestion that new generation co-operatives do not fit within the definition of co-operatives, as they are still user-centric organisations. A common feature across all permutations of co-operatives is the dual nature to the role of shareholder.[93] Co-operative members (the transacting shareholders) are both owners of the organisation and (one of) its users. This reflects the user-centric principle behind co-operatives. This paper suggests that perhaps the most fundamental and distinguishing element of co-operatives is the required dual nature of members.[94]

Traditional co-operatives, by definition, uphold the dual nature essential feature. New generation co-operatives focus on changing the relationship between a member's capital interest and user interest in the co-operative, but they still retain the dual natured shareholders.[95] Hybrid co-operatives, however, bring in an element of investor shareholders who do not uphold this essential element. Therefore, it is necessary that, at the bare minimum, the co-operative members in the hybrid co-operative have more control over the organisation (for example, members hold the majority of voting shares) than the investor shareholders to still be a co-operative.[96]

B Co-operative Identity

A key driver of the distinct co-operative identity is the International Labour Organization's Promotion of Cooperatives Recommendation 2002 (the Recommendation), which sets out a statement of co-operative principles.[97] Henrÿ considers the Recommendation to be fundamental for deriving global co-operative principles and argues that the

---

[93] Woodford, above n 86, at 9.

[94] Roger Herman and Jorge Sousa "Converting Organizational Form: An Introductory Discussion" in *A Co-operative Dilemma: Converting Organizational Form* (Centre for the Study of Co-operatives, University of Saskatchewan, Saskatoon, 2012) 1 at 4.

[95] Woodford, above n 86, at 3.

[96] At 6–7; Co-operative Companies Act 1996, s 2.

[97] International Labour Organization *Promotion of Cooperatives Recommendation* R193 (2002).

Recommendation "constitutes binding public international cooperative law".[98] Most of the literature incorporates the principles in the Recommendation into their discussion of co-operative identity.[99] Some co-operative laws also expressly or implicitly adopt the principles.[100]

The Recommendation defines a co-operative to be "an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise".[101] The Recommendation also adopts the co-operative principles, as formed by the General Assembly of the International Co-operative Alliance in 1995, which include: "voluntary and open membership; democratic member control; member economic participation; autonomy and independence; education, training and information; cooperation among cooperatives; and concern for community".[102] These principles form the basis of the co-operative identity and they should guide co-operative policy.[103]

To support and uphold the co-operative identity and principles, the Recommendation calls upon governments to implement legal frameworks which would:[104]

---

[98] Henrÿ, above n 2, at 47.

[99] Henrÿ, above n 2, at 47–55; Ann Apps *National Report of New Zealand* (International Cooperative Alliance, Legal Framework Analysis within the ICA-EU Partnership) at 4–6; Lewis Evans and Richard Meade *The Role and Significance of Cooperatives in New Zealand Agriculture: A Comparative Institutional Analysis* (Ministry of Agriculture and Forestry, February 2006) at 9; Antonio Fici "Cooperative Identity and the Law" (2013) 24 EBLR 37 at 43–51; Sonja Novkovic "Defining the co-operative difference" (2008) 37 The Journal of Socio-Economics 2168 at 2169.

[100] Co-operatives National Law 2012 (NSW), s 10; Canada Cooperatives Act SC 1998 c 1, s 7; Ifigeneia Douvitsa *National Report of France* (International Cooperative Alliance, Legal Framework Analysis within the ICA-EU Partnership, August 2021) at 5.

[101] International Labour Organization, above n 97, cl 2.

[102] At cl 3(b).

[103] At annex.

[104] At cl 6.

> … (a) establish an institutional framework with the purpose of allowing for the registration of cooperatives in as rapid, simple, affordable and efficient a manner as possible;
> (b) promote policies aimed at allowing the creation of appropriate reserves, part of which at least could be indivisible, and solidarity funds within cooperatives;
> (c) provide for the adoption of measures for the oversight of cooperatives, on terms appropriate to their nature and functions, which respect their autonomy, and are in accordance with national law and practice, and which are no less favourable than those applicable to other forms of enterprise and social organization;
> (d) facilitate the membership of cooperatives in cooperative structures responding to the needs of cooperative members; and
> (e) encourage the development of cooperatives as autonomous and self-managed enterprises.

These principles go beyond the necessary legal structures of co-operatives. That is, the principles aimed at development and education of co-operatives would be unusual to be reflected in the legal co-operative structure.[105] Those principles are aimed at wider government policies. The other principles, however, do call for specific co-operative structures to be protected in co-operative law. Co-operative surpluses forming indivisible reserves, for example, is a feature of co-operatives that should be reflected in any co-operative law.

C Companies are Just a Type of Co-operative?

In his "outstanding book"[106], *The Ownership of Enterprise*, Hansmann provides an interesting discussion by conceptualising companies as merely a particular type of co-operative, describing "the conventional investor-owned firm [as] nothing more than a

---

[105] Peter Somerville "Co-operative identity" (2007) 40 Journal of Co-operative Studies 5 at 6.

[106] Fici, above n 2, at 152.

special type of producer cooperative-a lenders' cooperative, or capital cooperative".[107] Hansmann considered a co-operative to be: [108]

> … a firm in which ownership is assigned to a group of the firm's patrons, and the persons who lend capital to a firm are just one among various classes of patrons with whom the firm deals.

Hansmann's conception is an attractive argument, but ultimately it overlooks the essential element that distinguishes the co-operative and the company, the dual nature of co-operatives members.[109]

The dual nature of members denies Hansmann's conception that companies are merely a special type of capital co-operative. The dual nature of co-operative members reflects how the owners of the co-operative company are more than just owners, because they must be users as well. All shareholders have the potential to contribute capital to the organisation and have equity in it. To be considered a user of the co-operative, however, a person would need to also interact with the business activity of the co-operative. A member of a co-operative is both a shareholder, doing the shareholder role of contributing capital and overseeing the board, and a user when they also, for example, sell their raw material for the co-operative to process. Therefore, in Hansmann's so-called capital co-operatives the shareholders are not also users, and they lack the dual nature.

D Conclusion

In conclusion, it is suggested that the essential element of a co-operative is the dual nature to members' roles. Underlying the co-operative concept is the idea that it is a user-centric organisational form. It is also suggested that the United States Department of Agriculture succinctly sums up the core of a co-operative the best; the co-operative concept is founded

---

[107] Henry Hansmann *The Ownership of Enterprise* (Harvard University Press, Cambridge (Mass), 1996) at 12.

[108] At 15.

[109] Sandeep Vaheesan and Nathan Schneider "Cooperative Enterprise as an Antimonopoly Strategy" (2019) 124 Penn St L Rev 1 at 17.

upon the following three essential elements: user-owned, user-controlled, and user-benefited.[110] Co-operative laws should embrace features that promote these elements in order to preserve the co-operative identity.

IV Re-casting the Co-operative as a Stakeholder Theory Policy

This paper submits that co-operatives can be recast as a stakeholder theory policy. Gijselinckx argues that co-operatives "by virtue of their essential properties have a more natural inclination towards stakeholder theory".[111] Co-operatives embody the stakeholder theory idea that stakeholders are "inherently valuable to the corporation and should be treated as such in the management of the affairs of the corporation".[112] The co-operative values and principles that uphold their identity make them more likely to have concern for community and focus on goals beyond their members' needs.[113]

Co-operatives remove the investor-shareholder pressures by severing the link between control and capital. Instead, co-operative owners must also be the users of the firm; ownership and control are concentrated in a single group.[114] The users chosen to be centred in a co-operative can be one of a variety, such as consumers, suppliers, or workers, each of whom are a stakeholder group.[115]

Co-operatives are structured around the concept that a stakeholder group is embraced in the company structure as shareholders. The co-operative is set up for and made up of one of its stakeholder groups. Co-operative companies, unlike regular companies, have a purpose; they are "established to serve their members' interests and hence profitability is a

---

[110] USDA Rural Development *How To Start a Cooperative, Cooperative Information Report 7* (1996) at 1; Thomas Beckett *National Report for the United States of America* (International Cooperative Alliance, Legal Framework Analysis within the ICA-EU Partnership, November 2020) at 5.

[111] Gijselinckx, above n 6, at 1.

[112] Keay, above n 3, at 254.

[113] Gijselinckx, above n 6, at 1.

[114] Somerville, above n 105, at 5.

[115] Gijselinckx, above n 6, at 1.

means to an end rather than an end in itself".[116] Whilst the co-operative is still structured to create value for its shareholders, restricting who can be shareholders results in value being created for a stakeholder group.

Co-operative members have a dual nature as both shareholders and stakeholders.[117] Instead of shareholder primacy resulting in maximised shareholder value, with the shareholders possibly being institutional or disconnected investors, the co-operative generates value by transacting with its shareholders and any surplus value can either be retained for their benefit or distributed to the shareholders.[118] As the shareholders are intimately connected to the co-operative activity and represent a stakeholder group this structure generates a more sustainable business model.[119]

This is because members have different incentives than shareholders despite both nominally holding shares in the organisation. Shares in a co-operative have a different quality to shares in a company. The Rt Hon Douglas Graham PC, the Minister of Justice at the time of the Co-operative Companies Act 1996, considered that:[120]

> … a share in a co-operative company does not function in the same way as an ordinary share - that is, as an investment. Rather, it functions as an entry ticket to gain admission to the co-operative company to obtain rebates on transactions with the company or to enter into transactions at more competitive prices.

Given the co-operatives positioning of stakeholders as central to the company, it is possibly an ideal stakeholder theory model for the next era of corporate structure. In theory, the co-operative model can promote stakeholders and their interests more readily than regular companies, whilst also retaining the essential company features to promote efficiency.[121]

---

[116] Chris Cornforth "The Governance of cooperatives and mutual associations: a paradox perspective" (2004) 75 Annals of Public and Cooperative Economics 11 at 15.

[117] Gijselinckx, above n 6, at 8.

[118] Fici, above n 2, at 156.

[119] Henrÿ, above n 2, at 20.

[120] (26 July 1995) 549 NZPD (Co-operative Companies Bill - First Reading, Douglas Graham) as cited in Taylor, above n 83, at 297.

[121] Gijselinckx, above n 6, at 19.

They are a more natural vehicle for a socially responsible corporation. Just as the shareholder primacy norm is re-enforced through the company structure, the social responsibility of co-operative companies is re-enforced through the co-operative structure.[122]

A Co-operatives Uphold the Efficiency Enhancing Company Principles

Other stakeholder theory policies generally remove the necessary accountability, as one feature of company law, for companies to be maximally efficient. Co-operatives, in theory, retain a similar structure to companies. The board is still accountable to the shareholders and directors are required to act in the best interests of the co-operative, that is, in interests of the shareholders. The difference is that a co-operative's shareholders are more immediate to the business of the co-operative; by definition co-operative members are involved with the business of the co-operative[123], whereas company shareholders can be distant and solely interested in their financial interest in the company.[124] The structure is the same, it is who makes up the roles within the structure that are different in co-operative companies.

As mentioned above and explored below, the co-operative better upholds its principles and identity if there is an indivisible reserve, or asset lock, with disinterested dissolution of assets.[125] The members should not receive the assets upon dissolution, instead they should be reinvested into the co-operative economy.[126] This is to avoid the cumulative co-operative value being reflected in the members wealth, because that changes the members incentives by essentially aligning it with the mechanics of an investor-owned company.[127] A co-operative share is not an investment and should not operate to give members value beyond that which is returned by reference rebates on their transactions with the co-

---

[122] Henrÿ, above n 2, at 22.

[123] Co-operative Companies Act 1996, ss 2–4.

[124] Stout, above n 54, at 2016.

[125] Henrÿ, above n 2, at 35 and 92.

[126] Fici, above n 99, at 59.

[127] Evans and Meade, above n 99, at 20.

operative.[128] This affects the oversight and efficiency of co-operative members as shareholders. This efficiency loss, however, is offset due to members still having an interest in generating surpluses that can be paid back to members as rebates based on their transacting volumes.

Company shareholders promote long-term efficiency due to their interest in the residual assets of the firm and short-term efficiency through their potential to receive dividends.[129] Co-operative members have a short-term interest in receiving rebates on their transactions with the co-operative, but, even without the interest in the residual rights of the co-operative, members will demand a long-term sustainable co-operative so that they can ensure a consistent trading relationship. Because the members' involvement in the co-operative goes beyond the monetary and is generally essential to their own business (for producer co-operatives), they have a strong interest in the long-term viability of the co-operative.[130] Shareholders, on the other hand, have only a fungible capital investment in the company and there are generally close substitutes they can switch to if needed.[131]

Therefore, whilst co-operative members without an interest in the residual assets of the co-operative have less of an efficiency incentive, this is offset by the dual nature of their role and the survival of the co-operative being intrinsically linked to their primary business. This is especially so for a producer co-operative where the members solely sell their entire product to the co-operative.

B Critique of the Co-operative Centred Stakeholder Theory

The argument is that the recast co-operative model of stakeholder theory has a greater emphasis and protection of stakeholder interests than the regular company whilst retaining the efficient structure. The co-operative model does, however, have some drawbacks.

---

[128] Henrÿ, above n 2, at 35.

[129] Kovvali, above n 8, at 8.

[130] Evans and Meade, above n 99, at 20.

[131] Gijselinckx, above n 6, at 2.

Only one stakeholder group is centred in a co-operative. Companies have vast and varied groups of stakeholders, with potentially conflicting interests. The co-operative model only prioritises one stakeholder group. The purpose of the co-operative is directed to internal members, like a regular company, and not to external stakeholders.[132] There is no legal structure within the co-operative law that would guarantee other stakeholder groups are treated any better than a regular company.[133]

As evident in the argument that co-operatives are a more efficient stakeholder theory policy, the shareholder primacy embodied in the current company law structure would remain. Boards would manage the co-operative company in the best interests of the particular stakeholder shareholders. Value could still be generated not only through efficiency gains, but by extracting surplus from other stakeholder groups not given shareholder protection in the co-operative.

The co-operative board would be faced with the same incentives to promote and create shareholder value as a regular company board. There may be benefit in centring at least one stakeholder group as the shareholders of the co-operative, but it is not likely to be the panacea for all stakeholder interests. Development of new forms of multi-stakeholder co-operatives is required, although this risks the same lack loss of accountability criticism as the stakeholder theory.[134]

C Conclusion

In conclusion, recasting the co-operative organisational form is not without its challenges. Features of the co-operative make it tend toward the same outcomes and structure as promoted by shareholder primacy. The fact remains that, despite aligning the role of shareholder within the organisation with a stakeholder group, the board still manages the co-operative for the benefit of the shareholders. It could even be arguably more justifiable for a co-operatives board to focus on the welfare its members than a company's board.

---

[132] Fici, above n 2, at 156.

[133] Gijselinckx, above n 6, at 19.

[134] Cornforth, above n 116, at 18.

Unlike the majority of stakeholder theory policies, a co-operative has no formal protection or inclusion of a variety of stakeholder interests within its decision-making; stakeholders are just as vulnerable as under the shareholder primacy company model.

Despite these challenges, this paper would suggest that co-operatives are more stakeholder theory friendly than not. Whilst the stakeholder group does take on the role of shareholder, they bring a different perspective and do not have the same investment-only relationship with the organisation. This distinguishes their demands on the co-operative. The shareholder short-term value desire pressures are removed. The risk that shareholders generate their own value at the inefficient expense of stakeholders is alleviated somewhat as the co-operative's members are more closely connected and embedded with the organisation and its other stakeholders.

V New Zealand's Co-operative Law

The first half of this paper analysed whether, in theory, the co-operative could be a recast as a stakeholder theory policy. It concluded that the co-operative is a relatively better vehicle for promoting stakeholder theory policies and should be promoted as such. This is not the end of the story, however. It is entirely possible that a jurisdiction's co-operative laws are not well-crafted and do not adequately create an organisational form within that jurisdiction that accords with the co-operative identity. As considered above, the co-operative identity can be described in the abstract, without reference to the black-letter law of one specific jurisdiction. Consider, for example, the theoretical conception of the company with its essential elements[135], compared to the reality of how that is implemented in a specific jurisdiction.[136] It may be that in theory the co-operative is able to be recast as a stakeholder theory policy, but it is necessary to analyse whether the specific co-operative laws of a jurisdiction uphold the theoretical co-operative identity. If it does, then it is possible to argue based on stakeholder theory justifications for different treatment of the co-operative.

---

[135] Armour and others, above n 81.

[136] Companies Act 1993.

To that end, this second half of the paper analyses whether New Zealand's co-operative laws uphold the theoretical co-operative identity. To do so, this paper will trace the development of co-operative acts in New Zealand, and then analyse whether key features of the Co-operative Companies Act 1996 uphold the co-operative identity.

A The History

Much of the co-operative company legislation literature starts from a position that globally, company law and co-operative company law are converging.[137] Many push back against this trend, arguing from a normative point of view that retaining a range of diverse organisational types is necessary for a healthy economic environment,[138] recognising "that there is no universally ideal organisational form".[139]

Historically, co-operatives were often "formed to provide countervailing power" to small scale producers.[140] Faced with monopsony power in the supply chain, small producers with relatively weak bargaining power would feel squeezed by their marketing or supplying partners. Co-operatives were often formed for economic reasons, returning the profits from along the supply chain to the producer, and not for overly altruistic or social reasons.[141]

A common theme of the early New Zealand co-operative companies Acts was that they severely limited the type of co-operative that could be registered under them. The Co-operative Companies Act 1956, for example, limited the types of co-operatives to egg

---

[137] Hagen Henrÿ "Trends and Prospects of Cooperative Law" in Dante Cracogna, Antonio Fici and Hagen Henrÿ (eds) *International Handbook of Cooperative Law* (Springer Berlin Heidelberg, Berlin, 2013) 803 at 805.

[138] Antonio Fici "An Introduction to Cooperative Law" in Dante Cracogna, Antonio Fici and Hagen Henrÿ (eds) *International Handbook of Cooperative Law* (Springer Berlin Heidelberg, Berlin, 2013) 3 at 6; Henrÿ, above n 2, at 2.

[139] Evans and Meade, above n 99, at 31.

[140] Woodford, above n 86, at 2.

[141] Taylor, above n 83, at 292.

marketing, fertiliser manufacturing, fish marketing, milk marketing or pig marketing co-operatives.[142]

Another theme of early New Zealand co-operative companies legislation was the lack of incorporation under them. They have always been structured as an appendage to company law.[143] Co-operatives always had to be registered and incorporated as companies, as well as being deemed co-operatives by meeting the structural requirements in the co-operative companies acts.[144]

Notably, since the inception of co-operative companies legislation in New Zealand, there has always been a place for investor-members. The definition sections were usually structured to require that shares "not less than three-fifths in nominal value are held by persons engaged in supplying" the co-operative.[145] Therefore, we have never stringently restricted our co-operatives to the pure user-member form.

B Co-operative Companies Act 1996

The Law Commission, in its 1989 company law reform report that led to the Companies Act 1993, discussed the legal framework for co-operatives.[146] The Commission considered that no separate co-operative company legislation was required, as incorporators could mould the company form through constitutions to reflect the co-operative structure.[147] The Law Commission considered that the "repeal of the special co-operative company statutes is desirable as the proposed [Companies] Act would render them unnecessary".[148]

---

[142] Co-operative Companies Act 1956, s 2.

[143] Alexander Malherbe "Member voice and influence: A study of cooperative governance in the Australasian dairy industry" (Doctor of Philosophy (Phd) Thesis, The University of Waikato, 2020) at 91.

[144] Malherbe, above n 24, At 44.

[145] Co-operative Companies Act 1956, s 2.

[146] Law Commission, above n 12, at 63–64.

[147] At 63.

[148] At 64.

Therefore, a new co-operative companies statute was not introduced alongside the new Companies Act 1993. Co-operatives continued to be regulated under the Co-operative Companies Act 1956. Ultimately, however, after pressure from co-operatives, notably in the agricultural industries, separate co-operative legislation was passed in the modernised Co-operative Companies Act 1996 (the Act).[149]

The current position of co-operatives in New Zealand under the Act is relatively similar to that of co-operatives under the historical co-operative statutes.[150] Co-operatives must be registered as companies as well as also being structured to meet the Act's definitional requirements and thus be able to call themselves a co-operative.[151] Taylor describes the position as the Act "merely [modifying] the application of … the Companies Act 1993 in order to facilitate the use of the corporate form as a means of carrying on a co-operative enterprise".[152]

A major change in the Act, is the broadening of permitted industries and types of co-operatives. The Act no longer prescribes allowed industries and types of co-operatives. So long as the shareholders structure the company to meet the co-operative structure, then they can become a co-operative. This is only a relatively recent liberalising of the co-operative regime but one which strongly upholds the co-operative principles in the Recommendation.[153]

Given the historical overlap between co-operative law and company law, the continued overlap is understandable.[154] Co-operative law is still an appendage to company law, and the co-operatives' roots are within company law.[155] The following part explores five key features of the Act and their effect on the co-operative identity.

---

[149] Woodford, above n 86, at 4.

[150] Taylor, above n 83, at 297.

[151] Co-operative Companies Act 1996, pt 2.

[152] Taylor, above n 83, at 297.

[153] Henrÿ, above n 2, at 53.

[154] Taylor, above n 83, at 297.

[155] Malherbe, above n 143, at 58.

VI Preservation of the Co-operative Identity in New Zealand Law

Relevant to note in this discussion of the Acts key features is the role of the co-operative's constitution. The Companies Act explicitly states that there is no requirement for a company to have a constitution.[156] The company takes the default constitutional arrangements under the Companies Act.

Similarly, the Co-operative Companies Act also does not expressly require a co-operative to have a constitution.[157] Despite this, it is implied that a co-operative must have a constitution.[158] This is because the definition of a co-operative in s 2 of the Act a co-operative to state in their constitution what their principal co-operative activity is.[159] A co-operative must have a constitution that, if covering nothing else, states the co-operative principal activity.

The proceeding discussions of co-operatives' features relate to the default positions under the Act. These defaults, however, would be largely modifiable by a co-operative's constitution to reflect what is best for that co-operative.[160] This affects any analysis of the law relating to co-operatives. Co-operative incorporators, whom it is fair to expect, are likely to be co-operative friendly, have a large degree of discretion to structure their co-operative how they see fit. Aspects of the following analysis may not apply if incorporators have structured their co-operative in a different manner. A detailed survey of co-operative's constitutions and how they differ from the default position under the Act is beyond the scope of this paper. This paper's analysis, however, is still important as the default position under the Act is a key indicator of how a co-operative should be structured and reflects the neutral position of the law.

---

[156] Companies Act 1993, s 26.

[157] Apps, above n 99, at 8.

[158] At 8.

[159] Co-operative Companies Act 1996, s 2.

[160] Apps, above n 99, at 14.

A Co-operative Purpose

1 Principal activity

A key distinguishing feature of the Act is the requirement that co-operatives have a co-operative purpose.[161] Without the co-operative purpose, a company could not be registered as a co-operative. This aligns with the co-operative identity by requiring the co-operative to have a "sense of what it is, where it came from, what it does, and where it is going – a sense of identity".[162]

When registering a co-operative, directors must declare that the organisation is a co-operative company.[163] The first limb of the definition of a co-operative company requires the principal activity of the company to be a co-operative activity. Co-operative activity is defined in s 3 as:[164]

> … (a) supplying or providing the shareholders of the company with goods or services, or both: …
> (c) processing or marketing goods or services, or both, supplied or provided by its shareholders: …
> (e) entering into any other commercial transaction with the shareholders of the company

This means the principal activity must be one that involves the members of the company. This does not mean, however, that co-operatives are limited to solely the co-operative activities of transacting with their shareholders. Indeed, this would make for a poor co-operative, for it would not meet the economic needs of its members.

For example, a dairy co-operative has the co-operative activity of purchasing raw dairy products off its producer members. But this is only half the story. The necessary corollary

---

[161] Fici, above n 99, at 44; Co-operative Companies Act 1996, s 2.

[162] Brett Fairbairn *Three Strategic Concepts for the Guidance of Co-operatives Linkage, Transparency, and Cognition* (Centre for the Study of Co-operatives University of Saskatchewan, 2003) at 20.

[163] Co-operative Companies Act 1996, s 6(1)(c).

[164] Co-operative Companies Act 1996, s 3.

of transacting with its members, is the co-operative taking advantage of economies of scale to process and market the members' supply. They sell it to a wider audience and generate greater surplus than the member acting as an individual could.[165] Therefore, the co-operative must have the principal activity of transacting with its members, but it is permitted to enter into other business activities ancillary or beneficial to those member transactions.

In contrast, company law places no purpose requirement on companies; the law is neutral as to the activity pursued.[166] Nor does company law require companies to have the purpose of making profit and maximising shareholder wealth.[167] Shareholders, however, may elect directors who steer the company in the pursuit of profit to derive a return on the shareholder's capital, but that is not a legal requirement.[168]

2 Co-operative directors' duties

Under the current law, given the co-operative purpose must be stated in the co-operative's constitution as its principal object, a director not managing the co-operative in this manner could be at risk of breaching s 134, the duty to comply with the co-operative's constitution.[169]

Further, co-operative directors might be in breach of s 131 of the Companies Act (the requirement to act in good faith and in the best interests of the company) if they failed to uphold the co-operative activity in their management of the co-operative, but that is not explicit.

---

[165] Fici, above n 2, at 151.

[166] Fici, above n 2, at 149.

[167] At 149.

[168] Watts, Campbell and Hare, above n 10, at 376.

[169] Taylor, above n 83, at 303.

The Canada Co-operatives Act provides an interesting way of holding co-operative directors to account.[170] Canadian co-operatives must operate on a co-operative basis and if they do not, members and other interested parties can challenge the co-operative for failing to live up to this identity.[171]

In summary, the Act requires co-operatives to pursue a co-operative activity, which is defined as transactions with its members. Co-operative directors also have, albeit not explicit, duties to uphold their co-operative purpose through ss 131 and 134. These features distinguish co-operatives from companies and serves to uphold the user-centred co-operative identity.

B The Dual Nature of Members

Hansmann conceptualised the company as a type of supplier co-operative, namely the capital co-operative, because investors are collaboratively joining their capital together for their collective benefit.[172] What Hansmann's conceptualisation overlooks, however, is the fundamental dual nature requirement of co-operative user-members.[173] In the so-called capital co-operative, investors would not have the requisite user nature to their role.[174]

In contrast, a true co-operative's transacting members are expected to provide capital through buying shares, and be an owner of the co-operative, but they are also required to use the firm.[175] The nature of the use varies depending on the type of co-operative.[176]

This is demonstrated and upheld in the definition of the required co-operative activity, as the activity must be done with the co-operatives' members.[177] Further, the second limb of

---

[170] Frank Lowery *National Report of Canada* (International Cooperative Alliance, Legal Framework Analysis within the ICA-EU Partnership, March 2020) at 5.

[171] Canada Cooperatives Act SC 1998 c 1, s 329.

[172] Hansmann, above n 107, at 12–15.

[173] Fici, above n 99, at 44.

[174] Fici, above n 2, at 153.

[175] Somerville, above n 105, at 8.

[176] At 8–9.

[177] Co-operative Companies Act 1996, s 3.

the definition of a co-operative company requires at least 60 per cent of voting rights to be held by transacting shareholders.[178] Transacting shareholders are ones who supply, provide, purchase, or acquire goods or services from the company.[179] That is, they are the members who transact with the company for it to be considered undertaking a co-operative activity.

1 Incentive structure is changed

Aligning the owners as users of the co-operative creates a different incentive structure to that of companies. The company, with the fractured use and ownership through investors, creates an incentive to manage the company with the ultimate focus of generating return on investment.[180]In contrast, within a user-owner system like the co-operative the incentive structure is changed. Members have a broader focus than sole return on their investment,[181] indeed the co-operative is usually, but not required to be, structured to avoid capital gains being possible for members.[182] Thus the focus will be on deriving benefit from the user relationship.

In summary, the definitional requirements of co-operative companies preserve the dual nature of the members. The co-operative must have the principal activity of transacting with its members and must have voting control of the co-operative being held by the transacting members. This upholds the user-benefited identity of co-operatives.

---

[178] Co-operative Companies Act 1996, s 2.

[179] Co-operative Companies Act 1996, s 4.

[180] Watts, above n 15, at 51.

[181] Margaret Lund *Cooperative Equity and Ownership: An Introduction* (University of Wisconsin Center for Cooperatives, April 2013) at 39–44.

[182] Fici, above n 2, at 155.

C Democratic Member Control

1 Democratic voting

The co-operative is a more democratic organisational form.[183] Most of the literature considers the purest form of co-operative to have a one member one vote system;[184] Fici describes one member one vote as "the core of the [co-operative] identity"[185] and "perhaps the most important and traditional element of the cooperative identity".[186] Priority within decision making is given to people over capital. For example, the Australian Co-operatives National Law states "the right to vote attaches to membership and not shareholding … each member has only one vote".[187]

The Act, however, allows for a more flexible control regime. One member one vote has never been a requirement within New Zealand co-operatives. The law allows for a highly flexible and adaptable share structure framework for co-operatives.[188] It is up to each co-operatives' members to decide how to structure their co-operative.

On one hand, this flexibility is to be desired as it enhances the freedom of the co-operative members to structure their co-operative how they see fit. Many co-operatives instead use a system that reflects the value or volume of transactions a member does with the co-operative, reflecting the co-operative principle of proportionality.[189] This can be justified on fairness grounds, as "those who make a greater contribution (of labour, money or assets) should be allowed to receive correspondingly greater benefit".[190] On the other hand, this follows the thinking of the company structure, with control dependent on extent of one's financial interest in the co-operative. Allowing non-one member one vote structures

---

[183] International Labour Organization, above n 97.

[184] Somerville, above n 105, at 5.

[185] Fici, above n 99, at 48.

[186] Fici, above n 31, At 61.

[187] Co-operatives National Law 2012 (NSW), s 227.

[188] Evans and Meade, above n 99, at 13.

[189] Somerville, above n 105, at 6.

[190] At 6.

promotes members' freedoms but risks the core democratic nature of co-operatives. Proportional voting systems, however, still uphold the user-controlled identity of the co-operative.

2 Admission of new members

ICA principle one calls for co-operatives to have open membership, where "all people wishing to join the cooperative may, in theory, take advantage of the benefits the cooperative is able to provide".[191] The Act does not explicitly provide for open membership, instead allowing each co-operative to take their own approach. Many large co-operatives tend to restrict the admission of new members, for example Foodstuffs only allows their supermarket franchise owners to obtain shares and access the co-operative's benefits.[192]

There is one area of our co-operative law, however, that strongly upholds the co-operative identity by mandating open access. Section 73 of the Dairy Industry Restructuring Act 2001 requires the Fonterra Co-operative Group to maintain open admission for all relevant sharemilkers.[193] The idea of open membership is present in our co-operative law, but it is not applied as the default for all our co-operatives.

D Members Rights and Entitlements

A key legal requirement restricting the makeup of a co-operatives' shareholding comes from the requirement that at least 60 per cent of voting shares are held by transacting shareholders.[194] A company cannot be a co-operative if more than 40 per cent of the company's voting rights are held by investors, or non-transacting shareholders, that is ones who do not have the dual nature in their relationship with the company.

---

[191] Fici, above n 99, at 62.

[192] Woodford, above n 86, at 5.

[193] At 4.

[194] Co-operative Companies Act 1996, s 2.

1 Share transfer

A key distinguishing element between co-operative members and company shareholders comes from the rights attached to each position. Shareholders have ownership rights in the residual surplus of a firm, and generally receive parts of the surplus on an on-going basis through dividends, although they have no right to dividends as they are fully subject to the board's discretion.[195]

Some notable co-operatives do have a secondary market for the free transfer of its shares,[196] Henrÿ, however, describes non-transferable shares as the default to be best practice but does consider individual co-operatives could allow transferable shares.[197]

Co-operative shares can have nominal values, unlike companies' shares.[198] This means co-operatives can buy back shares issued to members at or members can surrender their shares for the nominal sum. The ability of co-operatives to have a nominal price for their shares is crucial for the effective operation of issuance and surrender of co-operative shares.[199] This operation is what allows for the different nature and incentives of co-operative shareholding.

Generally, members can only get out by surrendering their shares to the company for the nominal price, therefore not receiving capital gains. This is not a legal restriction on the co-operative form, however. The Act does not restrict the transfer of shares, instead adopting the free transfer provisions of the Companies Act.[200] It is up to individual co-operatives to decide what, if any, restrictions they place on the transfer of their shares. It is highly likely a co-operative would restrict the free transfer of its shares, however, as it

---

[195] Companies Act 1993, s 53.

[196] See Fonterra Co-operative Group Limited; Woodford, above n 86, at 4.

[197] Henrÿ, above n 2, at 91.

[198] Co-operative Companies Act 1996, s 15; Companies Act 1993, s 38; Evans and Meade, above n 99, at 13.

[199] Evans and Meade, above n 99, at 13.

[200] Co-operative Companies Act 1996, s 27.

needs to ensure it retains the required 60 per cent of voting shares held by transacting shareholders.[201]

2 Financial interest in the co-operative

Co-operative members should not have any interest in the capital growth and limited interest in the profits generated by the co-operative.[202] This is to sever the link between rights to the distributions of the company and control over it.[203] Generally, members receive benefits through rebates paid out of any surplus for the year, based on the volume or value of transactions they did with the co-operative.[204] This incentivises members to increase their transactions with the co-operative, rather than merely increasing their capital holdings, emphasising the user-focused nature of co-operatives.[205]

Furthermore, a pure conception of the co-operative contemplates restricting members access to any reserves that are built up.[206] Reserves are the surpluses that are not distributed to members and are instead retained by the co-operative. To fully uphold the co-operative identity, members should not have any rights to the reserves, even at liquidation.

Instead, the literature suggests the retained surpluses should form an indivisible reserve.[207] The reserve can and should be used to finance and expand the co-operatives operations. However, in the event of the co-operative being wound up, any excess assets once liabilities have been paid should be vested into the co-operative economy, rather than back to the members. Even upon liquidation, the preferred position would be for remaining reserves to be used to further other co-operative aims, rather than paid back to the current members.[208] This indivisible reserve or "locked-in capital serves also as an inter-generational link, an

---

[201] Taylor, above n 83, at 298.

[202] Fici, above n 99, at 47.

[203] Evans and Meade, above n 99, at 20.

[204] Henrÿ, above n 2, at 94.

[205] Fici, above n 99, at 56.

[206] Henrÿ, above n 2, at 92.

[207] Fici, above n 99, at 48.

[208] Henrÿ, above n 2, at 99.

element of sustainability".[209] The Act, however, makes no provision for indivisible reserves, with the default being that co-operatives can distribute returns to members.[210]

3 Duties on members

Directors owe shareholders and their companies' duties, however, there are no similar duties placed on shareholders when exercising their control and ownership of the company. This aligns with the shareholder primacy conception that the company is owned by and is managed for the benefit of the shareholders themselves, and that it is up to shareholders to know what their best interests are.

Similarly, the Act does not place any duties upon co-operative members. They may have, however, moral obligations as a member of a collectivist organisation to act as good co-operative members by participating in governance decisions, holding management to account, and directing their best efforts to transact as much as possible with the co-operative.[211]

It is arguably more justifiable to introduce duties on shareholders owed to the company; Henrÿ symbolically places members' obligations above that of members' rights in his model co-operative law.[212] This is because of the dual nature role the co-operative member plays compared to the shareholder of a company.

E Role of Investor-members

Co-operative investor-members take the form of the familiar investor shareholder of a company. The only required involvement for their role is the contribution of capital. They can also be users of the company, but their position as shareholder is not predicated upon them being a user. They lack the dual nature to their role. Investor-members have generally always been allowed in New Zealand co-operatives.

---

[209] Henrÿ, above n 2, at 92.

[210] Co-operative Companies Act 1996, s 30; Malherbe, above n 143, at 47.

[211] Henrÿ, above n 2, at 75.

[212] At 76.

For example, the Co-operative Companies Act 1956 only required a co-operative to have three-thirds of their voting rights be held by transacting shareholders to meet the requirements of a co-operative, reflecting the current position.[213]

1 Justifications for investor-members

There are strong economic grounds for justifying the inclusion of investor members into co-operatives. One major challenge co-operatives face is access to capital.[214] Capital is required for growth, with equity generally provided at a lower cost than debt financing. Companies are open to capital investors whose contribution allows the company to finance its operations and grow. Co-operatives' focus on user-members restricts its potential capital base.[215] Co-operatives face well canvassed challenges in accessing the necessary capital for growth and expansion and allowing investor-members is an easy solution.[216]

Therefore, New Zealand co-operative law has always allowed space for voting non-transacting shareholders, allowing for easier access to capital raising. However, these investor-members have a different incentive structure and focus to that of user-members.[217] Investor-members care about profit and receiving a return on their investment, which may be to the detriment of the interests of the user-members.

As an example, in a dairy co-operative, farmers who supply milk to the company want to receive the highest farmgate milk price as is sustainable for the co-operative to pay out.[218] The co-operative then uses economies of scale to process and sell dairy products to generate surplus, some of which is distributed to its farmer members through rebates based on the value or volume of milk supplied.[219] The producer is incentivised to "support a [co-

---

[213] Co-operative Companies Act 1956, s 2.

[214] Münkner, above n 85, at 8.

[215] Evans and Meade, above n 99, at 85.

[216] Woodford, above n 149, at 9.

[217] Somerville, above n 105, at 11.

[218] Malherbe, above n 143, at 5.

[219] At 84.

operative] when it provides benefits [the producer] would not obtain by acting independently".[220]

User-members derive their benefits directly from their supply transactions with the co-operative, with no expectation of capital growth. Their concern is not with growing the co-operative so that their share value in the co-operative grows, instead their concern about growth comes from wanting a secure and profitable co-operative they can sell their product to at market prices.[221] Investor-members on the other hand, have an interest in the company itself generating profit, with one clear expense to supress being the cost of inputs, that is, the benefits to the user-members.[222]

2 Tension between investor-members and user-members

The Act's allowance of investor-members is justified by the efficiency gains derived from having access to cheaper sources of funding.[223] The co-operative identity is attempted to be protected by limiting the extent of control investor-members can hold; the user-members must always hold the balance of voting power.[224] Whilst it is justified on efficiency grounds, the inclusion of investor-members, and to such a degree, strongly denigrates the co-operative identity, which is typified by the absence of investors.[225] Henrÿ argues it must be "emphasized that voting by [investor members] constitutes a severe deviation from [co-operative] principles".[226] Including investor-members naturally changes the incentive structure for a co-operative's management. Whilst they cannot hold the balance of power, investor members can have a large voice and predicate increased capital funding on a

---

[220] Bruce J Reynolds *Decision-making in cooperatives with diverse member interests* (United States Department of Agriculture, RBS Research Report 155, April 1997) at 1.

[221] Woodford, above n 86, at 7.

[222] Woodford, above n 86, at 7.

[223] Hagen Henrÿ "Cooperatives in a world in crisis" (paper presented to the Expert Group Meeting organized by the Department of Economic and Social Affairs, New York, April 2009) at 11.

[224] Co-operative Companies Act 1996, s 2.

[225] Henrÿ, above n 2, at 93.

[226] At 86.

greater emphasis on their capital returns than on user-member benefits. There is an inherent tension between investor-members and user-members.[227]

VII Conclusion on Whether New Zealand Law Preserves the Co-operative Form

The overarching theme of the Act is one of flexibility in the co-operative form.[228] In many respects the Act merely tweaks the Companies Act, leaving it up to the constitutions of co-operatives to further narrow down and uphold the co-operative identity.[229] Despite co-operatives prevalence and importance in New Zealand's economy, co-operative law appears as an appendage to and finds its roots in company law.[230] It is entirely possible to register as a co-operative whilst being structured virtually indistinguishably from a company. Inversely, it is entirely possible for a company to structure itself functionally indistinguishably from a co-operative, given the freedom of New Zealand's liberalised company law.[231] The only, albeit important and sizeable, distinguishable features are the restrictions on the extent of voting non-transacting shareholders and the co-operative purpose requirement.[232]

Therefore, New Zealand has a highly permissive co-operative law landscape. Co-operative incorporators can register and structure their co-operative in a multitude of ways and, some motivated co-operatives can and do strongly uphold the co-operative identity. On the one hand, this is a highly commendable legal framework. It maximises the options and freedoms of incorporators. It has done away with the historical approach of restricting which industries could have co-operatives.

---

[227] Evans and Meade, above n 99, at 27.

[228] Malherbe, above n 143, at 58.

[229] Apps, above n 99, at 14.

[230] Apps, above n 99, at 15.

[231] Law Commission, above n 12, at 63.

[232] Apps, above n 99, at 4.

On the other hand, however, this reflects a poor preservation of the co-operative identity. It is important to preserve the co-operative identity because, as Herman and Sousa describe: "Organizations with a weak co-operative identity fail to differentiate themselves from alternative business forms and thus compete on the terms dictated by the capitalist model."[233] Under New Zealand law, the bare minimum of the co-operative identity is preserved, but the additional features are left up to individual co-operatives to implement rather than provided as the default option.[234] Freedom is promoted, but at the expense of the co-operative identity.

In conclusion, New Zealand does have distinct a co-operative law that upholds the minimum co-operative identity. Beyond the minimum, however, New Zealand suffers from too much flexibility in its co-operative structure. The co-operative structure risks being too similar to the company structure, and not enough its own distinct form. This is a failing of our co-operative law, the role of which, as Münker describes, "is to shape and protect the co-operative model of organisation, … co-operatives should be obliged to remain within the type-specific organizational model and should be discouraged to deviate from this model".[235]

VIII Improving New Zealand's Co-operative Law

With the goal of better preserving the theoretical co-operative identity within New Zealand law, this part canvasses other relevant jurisdictions' approaches to co-operative law. It attempts to point to features, elements and structures of other jurisdictions' co-operative laws that could be adopted in New Zealand. These suggestions are focused on the co-operative identity enhancing potential of them. These suggestions tend to focus on removing the flexibility in New Zealand's co-operative law, creating a more distinct and onerous co-operative structure with more mandatory rules.[236] Restricting the flexibility of co-operative law, which can be seen as a positive of New Zealand's co-operative law, can

---

[233] Herman and Sousa, above n 94, at 8.

[234] See above part VI; Apps, above n 99, at 14.

[235] Münkner, above n 85, at 3.

[236] Henrÿ, above n 2, at 13–14.

be justified by the suggestions potential to strengthen the co-operative identity and further their stakeholder theory bona fides.[237]

A Adoption of the Co-operative Principles in Law

A notable absence in the Act is the lack of reference to the co-operative principles as set out by the International Co-operative Alliance and adopted by the International Labour Organisation.[238] Other jurisdictions explicitly adopt these principles within their co-operative laws.

For example, s 10 of Australian Co-operative National Model Law reproduces the seven principles, giving them express inclusion within Australian co-operative law.[239] Further, section 11 also requires that the co-operative law is to be interpreted in such a way as to promote the co-operative principles.[240] Section 7 of the Canadian Co-operative Act 1998 also expressly includes the international co-operative principles.[241]

This clear incorporation of the principles draws upon the international identity of the co-operative and adopts it in the local law. This can affect how the law is interpreted and applied. In interpreting the Companies Act, for example, the courts tend to favour the business judgement rule as alluded to in the preamble of the act.[242] A similar inclusion of the co-operative principles would clearly demonstrate the intent of upholding those principles, which enhance the co-operative identity, within our law.

B A Single Co-operative Companies Act

The Act is "specifically directed at adapting the corporate form as a legal structure for co-operative enterprises".[243] As part of this, the Act is rooted in and draws upon the

---

[237] Apps, above n 99, at 14.

[238] See part III(b); International Labour Organization, above n 97, annex.

[239] Co-operatives National Law 2012 (NSW), s 10.

[240] Section 11.

[241] Canada Cooperatives Act SC 1998 c 1, s 7.

[242] Watts, Campbell and Hare, above n 10, at 489.

[243] Taylor, above n 83, at 311.

Companies Act as the foundation for the co-operative structure. For example, co-operatives under the Act must also be registered companies.[244] and to the extent the Act does not alter it, the requirements and obligations of the Companies Act applies to co-operatives.[245]

On the other hand, other jurisdictions structure their co-operative legislation as a single, all-encompassing statute. This provides for all the elements of the co-operative structure without reliance on company law. For example, the Canada Cooperatives Act 1998 is not predicated on its company law, co-operatives are solely regulated and established under the co-operative law.[246]

This approach shows the co-operative as its own organisational form, distinct from the company. It would, however, create unnecessary duplication in the law if the structure retains the similar underlying company structure, as the Act currently does.

C Asset Lock or an Indivisible Reserve

In an ideal traditional co-operative, members would only receive part of the surplus returned to them by reference to their extent of transactions with the co-operative, patronage rebates or bonuses.[247] Their ownership in the co-operative is not an investment.[248] Members incentives should relate to transacting with the co-operative, and receiving proportional rebates on those transactions, rather than investing with an expectation of capital growth.[249] The nature of a member's financial interest in a co-operative must be distinguished from that of an investor in a company, else the co-operative would face the same incentives and pressures from its owners as a company.

---

[244] Co-operative Companies Act 1996, s 2.

[245] Co-operative Companies Act 1996, s 29.

[246] Canada Cooperatives Act SC 1998 c 1; Lowery, above n 165.

[247] Fici, above n 99, at 59.

[248] (26 July 1995) 549 NZPD (Co-operative Companies Bill - First Reading, Douglas Graham) as cited in Taylor, above n 83, at 297.

[249] Somerville, above n 105, at 14.

The rest of the surplus would be retained by the co-operative, asset locked so it could only be used to be reinvested in the co-operative and bequeathed to other co-operative causes upon the organisation's dissolution, along the principle of disinterested dissolution.[250] If the reserves were distributed to members at dissolution, then the current members would receive an unfair windfall.[251] Members who redeem their shares in the co-operative (that is, cease to be members) only receive the prescribed nominal value for the shares.[252] In contrast, investors in a company cease to be owners by selling their shares at value that, in theory, reflects the present value of the company's future earnings and assets. If members at dissolution received the value of the co-operative's assets, then members redeeming earlier should expect to also receive their share of this value, which would undermine the co-operative identity by changing the incentive structure for members.[253]

Retained surpluses should also not be distributed as dividends to members. That is, no earnings should be paid out according to a member's shareholding, instead only against the volume of transactions they undertake with the co-operative within the last defined period.[254]

The Act does not provide for an indivisible reserve, leaving it to individual co-operatives to embrace it for themselves. Henrÿ considered indivisible reserves a necessary element of model co-operative legislation and other jurisdictions do mandate them.[255] For example, French co-operative law requires co-operatives to create certain indivisible reserves, including a reserve for any profits generated from transactions with non-members.[256]

---

[250] Fici, above n 99, at 60.

[251] Evans and Meade, above n 99, at 20; Somerville, above n 105, at 14.

[252] Co-operative Companies Act 1996, ss 15–18.

[253] Fici, above n 99, at 48.

[254] Somerville, above n 105, at 12.

[255] Henrÿ, above n 2, at 35–38.

[256] Douvitsa, above n 100, at 19.

These reserves are indivisible during the life of the co-operative and its dissolution.[257] Such a policy is in accordance with the co-operative principles and upholds their identity.[258]

D Multi-stakeholder Co-operatives

Finally, as noted above in part III(A)(1), the co-operative form continues to evolve. This final sub-part tentatively suggests another improvement to the co-operative law that reflects the potential next evolution in co-operatives.[259]

Mirroring the rise in stakeholder theory discussions, there has been a rise in a new form of the co-operative.[260] The multi-stakeholder co-operative goes beyond aligning a single stakeholder group as the members of the co-operative. Instead, multi-stakeholder co-operatives allow for different types of members based on their role in the co-operative. For example, a typical producer co-operative could also have a second type of share that is allocated to workers, creating a producer and worker owned multi-stakeholder co-operative.

In Quebec, the Co-operatives Act provides for multi-stakeholder co-operatives called solidarity co-operatives.[261] Section 226 sets out that co-operatives may choose to structure themselves as a solidarity co-operative, with members falling into different stakeholder categories. The principle of one member one vote is modified to reflect that the different member groups may have differing numbers and extents of interest in the organisation.[262]

Multi-stakeholder co-operatives address some of the problems in recasting the co-operative as a stakeholder theory policy. Such co-operatives are no longer dominated with a single stakeholder group being given the shareholder role. Having a second stakeholder

---

[257] Douvitsa, above n 100, at 19.

[258] Fici, above n 99, at 59.

[259] Gijselinckx, above n 6, at 1.

[260] Leviten-Reid and Fairbairn, above n 68.

[261] Leviten-Reid and Fairbairn, above n 68, at 27.

[262] Somerville, above n 105, at 6.

ownership group better protects the additional stakeholder group's interests in the management of the co-operative.

Multi-stakeholder co-operatives also further the stakeholder theory bona fides of co-operatives. They "broaden the scope of objectives of the co-operative, strengthening the public character of the services they deliver".[263] They are not without criticism, however. A key criticism is the same as that levelled by shareholder primacy advocates, the two masters problem.

It is hard for a board to effectively balance the interests of two groups when their interests may conflict or diverge.[264] Having multiple groups' interests being taken into account is said to increase the costs associated with decision-making in an organisation.[265] As Hansmann described it in 1996, one of the "strongest indications of the high costs of collective decision making is the … absence of large firms in which ownership is shared among two or more different types of patrons", that is, multi-stakeholder co-operatives.[266] Further, a possible result may be domination by one stakeholder member grouping within the co-operative, "[reverting] to what amounts to single-stakeholder dominance".[267]

IX Conclusion

Despite the co-operative presence in New Zealand's economy, and their seemingly ideal stakeholder theory bona fides, co-operatives have been an overlooked area of organisational law.

This paper explored the shareholder primacy versus stakeholder theory debate and argued in favour of recasting the co-operative as a stakeholder theory policy. It sought to recast the co-operative as a stakeholder theory policy to further justify strengthening co-operatives within New Zealand. In doing so, the co-operative identity was distilled into its

---

[263] Gijselinckx, above n 6, at 1.

[264] Leviten-Reid and Fairbairn, above n 68, at 29.

[265] At 29.

[266] Hansmann, above n 107, at 44.

[267] Leviten-Reid and Fairbairn, above n 68, at 29.

essential elements. The identity of co-operatives adopted by the paper was based on the three principles of user-owned, user-controlled, and user-benefited. The first half of the paper concluded that co-operatives can be understood as a stakeholder theory policy given the alignment of a stakeholder group as the shareholders of the co-operative which changes the incentives of the organisations owners.

The theoretical co-operative identity was then assessed against the practical reality of co-operative law in New Zealand. This paper analysed whether key features of our co-operative law adequately preserved the co-operative identity. This paper concluded that the co-operative identity is preserved in New Zealand law to a minimum extent but that the inherent flexibility in the law makes it difficult to have a strong co-operative identity as the default form.

The final part of this paper broadened the assessment of co-operative identity enhancing features to consider comparable jurisdictions co-operative laws. It discussed particular aspects of overseas co-operative law that could be adopted within New Zealand law to strengthen the co-operative identity. This paper has argued that co-operatives can be recast as a stakeholder theory policy. Features such as indivisible reserves, comprehensive co-operative legislation and the adoption of the co-operative principles in law would strengthen the co-operative identity, albeit at the expense of organisational flexibility for incorporators. This strengthening would make New Zealand’s co-operative law a stronger stakeholder theory policy.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 11,990 words.

X Bibliography

A Cases

Madsen-Ries v Cooper [2020] NZSC 100, [2021] 1 NZLR 43.

B Legislation

1 New Zealand

Co-operative Companies Act 1956

Co-operative Companies Act 1996.

Companies Act 1993.

Companies (Directors Duties) Amendment Bill 2021 (75-1).

Dairy Industry Restructuring Act 2001.

2 Australia

Co-operatives National Law 2012 (NSW).

3 Canada

Canada Cooperatives Act SC 1998 c 1.

C Books and Chapters in Books

John Armour and others "What is Corporate Law?" in Reinier Kraakman and others (eds) *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd ed, Oxford University Press, Oxford, 2017) 1.

Margaret Blair "Whose Interests Should Corporations Serve?" in Max Clarkson (ed) *The Corporation and Its Stakeholders* (University of Toronto Press, 1998) 47.

Antonio Fici "An Introduction to Cooperative Law" in Dante Cracogna, Antonio Fici and Hagen Henrÿ (eds) *International Handbook of Cooperative Law* (Springer Berlin Heidelberg, Berlin, 2013) 3.

Robert Freeman "A Stakeholder Theory of the Modern Corporation" in Max Clarkson (ed) *The Corporation and Its Stakeholders* (University of Toronto Press, Toronto, 1998) 125.

Robert Freeman and others *Stakeholder Theory* (Cambridge University Press, Cambridge, 2010).

Henry Hansmann *The Ownership of Enterprise* (Harvard University Press, Cambridge (Mass), 1996).

Hagen Henrÿ *Guidelines for Cooperative Legislation* (3rd ed, International Labour Office, Geneva, 2012).

Hagen Henrÿ "Trends and Prospects of Cooperative Law" in Dante Cracogna, Antonio Fici and Hagen Henrÿ (eds) *International Handbook of Cooperative Law* (Springer Berlin Heidelberg, Berlin, Heidelberg, 2013) 803.

Roger Herman and Jorge Sousa "Converting Organizational Form: An Introductory Discussion" in *A Co-operative Dilemma: Converting Organizational Form* (Centre for the Study of Co-operatives, University of Saskatchewan, Saskatoon, 2012) 1.

Reinier Kraakman and others *The Anatomy of Corporate Law* (3rd ed, Oxford University Press, Oxford, 2017).

Brett McDonnell "Three Legislative Paths to Social Enterprise: L3Cs, Benefit Corporations, and Second-Generation Cooperatives" in Benjamin Means and Joseph Yockey (eds) *The Cambridge Handbook of Social Enterprise Law* (1st ed, Cambridge University Press, Cambridge, 2019) 67.

Bronwen Morgan "Transcending the Corporation: social enterprise, cooperatives, and commons-based governance" in Thomas Clarke, Justin O'Brien and Charles O'Kelley (eds) *The Oxford Handbook of the Corporation* (Oxford University Press, Oxford, 2019) 666.

Ville Pönkä "The Cooperative as a Platform for Sustainable Business Operations" in Beate Sjåfjell and Christopher Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (1st ed, Cambridge University Press, Cambridge, 2019) 682.

Willy Tadjudje and Ifigeneia Douvitsa (eds) *Perspectives on Cooperative Law* (Springer Nature Singapore, Singapore, 2022).

Susan Watson "Moving beyond Virtue Signalling: Corporate Sustainability for New Zealand" in Beate Sjåfjell and Christopher M Bruner (eds) *The Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (Cambridge University Press, Cambridge, 2019) 176.

Peter Watts, Neil Campbell and Christopher Hare *Company law in New Zealand* (LexisNexis NZ, Wellington, 2016).

D Journal Articles

Stephen Bainbridge "Director Versus Shareholder Primacy in New Zealand Company Law as Compared to USA Corporate Law" (2014) 4 NZLR 551.

Lucian Bebchuk and Roberto Tallarita "The Illusory Promise of Stakeholder Governance" (2020) 106 Cornell L Rev 91.

Svein Ole Borgen "Rethinking incentive problems in cooperative organizations" (2004) 33 The Journal of Socio-Economics 383.

Chris Cornforth "The Governance of cooperatives and mutual associations: a paradox perspective" (2004) 75 Annals of Public and Cooperative Economics 11.

Thomas Donaldson and Lee Preston "The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications" (1995) 20 The Academy of Management Review 65.

Antonio Fici "Cooperative Identity and the Law" (2013) 24 EBLR 37.

Antonio Fici "The Essential Role of Cooperative Law" (2014) 2 DQ 147.

Kent Greenfield "The Third Way" (2014) 37 Seattle ULRev 749.

Darrell Hammond and John Luiz "The co-operative model as a means of stakeholder management: An exploratory qualitative analysis" (2016) 19 South African Journal of Economic and Management Sciences 630.

Henry Hansmann and Reinier Kraakman "The Essential Role of Organizational Law" (2000) 110 The Yale Law Journal 54.

Henry Hansmann and Reinier Kraakman "The End of History for Corporate Law" (2001) 89 Geo LJ 439.

Julius Hogben "Co-operatives and the Law" (1947) 23 NZLJ 120.

Andrew Keay "Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model" (2008) 71 MLR 663.

Andrew Keay "Stakeholder Theory in Corporate Law: Has It Got What It Takes?" (2010) 9 Rich J Global L & Bus 249.

Aneil Kovvali "Countercyclical Corporate Governance" [2022] North Carolina Law Review (forthcoming).

Catherine Leviten-Reid and Brett Fairbairn "Multi-stakeholder Governance in Cooperative Organizations: Toward a New Framework for Research?" (2011) 2 Canadian Journal of Nonprofit and Social Economy Research.

Margaret Lund and Lynn Stout "A Team Production Theory of Corporate Law" (1999) 85 Virginia Law Review 247.

Sonja Novkovic "Defining the co-operative difference" (2008) 37 The Journal of Socio-Economics 2168.

Krishna Reddy and Stuart Locke "The relationship between ownership structure, capital structure and corporate governance practices: A case study of co-operatives and mutuals in New Zealand" (2014) 10 International Journal of Managerial Finance 511.

Len Sealy "Directors' 'wider' responsibilities—problems conceptual, practical and procedural" (1987) 13 Mon LR 164.

Peter Somerville "Co-operative identity" (2007) 40 Journal of Co-operative Studies 5.

Elaine Sternberg "The Defects of Stakeholder Theory" (1997) 5 CG 3.

Lynn Stout "The Toxic Side Effects Of Shareholder Primacy" (2013) 161 University of Pennsylvania Law Review 2003.

Lynne Taylor "Governance Issues for Co-operative Companies under the Co-operative Companies Act 1996" (2009) 15 11.

Sandeep Vaheesan and Nathan Schneider "Cooperative Enterprise as an Antimonopoly Strategy" (2019) 124 Penn St L Rev 1.

Peter Watts "To whom should directors owe legal duties in exercising their discretion? — a response to Mr Rob Everett" [2019] CSLB 49.

Keith Woodford "The Diversity of Co-operative Structures in New Zealand Agribusiness" (2008) 41 Journal of Co-operative Studies 4.

E Reports

Ann Apps *National Report of Australia* (International Cooperative Alliance, Legal Framework Analysis within the ICA-EU Partnership, April 2020).

Ann Apps *National Report of New Zealand* (International Cooperative Alliance, Legal Framework Analysis within the ICA-EU Partnership, April 2020).

Thomas Beckett *National Report for the United States of America* (International Cooperative Alliance, Legal Framework Analysis within the ICA-EU Partnership, November 2020).

Ifigeneia Douvitsa *National Report of France* (International Cooperative Alliance, Legal Framework Analysis within the ICA-EU Partnership, August 2021).

Lewis Evans and Richard Meade *The Role and Significance of Cooperatives in New Zealand Agriculture: A Comparative Institutional Analysis* (Ministry of Agriculture and Forestry, February 2006).

Caroline Gijselinckx *Co-operative Stakeholders Who Counts in Co-operatives, and How?* (Working Paper on Social and Co-operative Entrepreneurship 09.05, 2009).

Institute of Directors and MinterEllisonRuddWatts *Stakeholder governance: A call to review directors' duties* (July 2021).

Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989).

Frank Lowery *National Report of Canada* (International Cooperative Alliance, Legal Framework Analysis within the ICA-EU Partnership, March 2020).

Margaret Lund *Cooperative Equity and Ownership: An Introduction* (University of Wisconsin Center for Cooperatives, April 2013).

Cliff Mills *National Report of United Kingdom* (International Cooperative Alliance, Legal Framework Analysis within the ICA-EU Partnership, December 2020).

Bruce J Reynolds *Decision-making in cooperatives with diverse member interests* (United States Department of Agriculture, RBS Research Report 155, April 1997).

Beate Sjåfjell and Jukka T Mähönen *Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy* (No. 2022-43 University of Oslo Faculty of Law Legal Studies Research Paper Series 2022).

USDA Rural Development *How To Start a Cooperative, Cooperative Information Report 7* (1996).

F Dissertations

Alexander Malherbe "Member voice and influence: A study of cooperative governance in the Australasian dairy industry" (Doctor of Philosophy (Phd) Thesis, The University of Waikato, 2020).

G Internet Resources

Cooperative Business New Zealand "MEDIA RELEASE: New Zealand Co-operatives make up 18% of NZ's GDP, paving the way on long-term sustainability" <www.nz.coop>.

Larry Fink "Annual 2022 Letter to CEOs" BlackRock <www.blackrock.com>.

H Other Resources

Hagen Henrÿ "Cooperatives in a world in crisis" (paper presented to the Expert Group Meeting organized by the Department of Economic and Social Affairs, New York, April 2009).

International Labour Organization "Promotion of Cooperatives Recommendation" (R193, 2002).

Hans Münkner "Ensuring Supportive Legal Frameworks for Co-operative Growth" (paper presented to the ICA 11th Regional Assembly, Nairobi, November 2014).

Lenore Palladino and Kristina Karlsson Towards "'Accountable Capitalism': Remaking Corporate Law Through Stakeholder Governance" (Roosevelt Institute, 2018).

Keith Woodford "New Generation Co-operatives and Related Business Structures" (paper presented to Co-operative Directors' Seminar, Wellington, September 2003).