

LUCILLE REECE

**THE PROMISE OF CODETERMINATION: AN
ATTRACTIVE OPTION FOR NEW ZEALAND
COMPANIES?**

Submitted in support of the LLB(Hons) degree
LAWS 521 | Final Research Essay

Te Kauhanganui Tātai Ture | Faculty of Law
Te Herenga Waka | Victoria University of Wellington

2022.

* I am most grateful to my supervisor, Dr Mark Bennett, for his invaluable guidance, wisdom and encouragement. I also thank my father, for his unwavering support and tutelage throughout the entirety of my degree.

Abstract:

Codetermination is a corporate governance model that gives workers the right to elect board-level employee representatives. The model exists in 19 European jurisdictions, with the German model being the most well-known and densely researched. Unlike general stakeholder-centric objectives that simply encourage directors to consider the interests of stakeholders, codetermination mandates the representation of a critical stakeholder – employees – at the highest level of corporate governance. The model has been associated with various economic and non-economic benefits, including increased firm efficiency, improvements in information sharing between employees and senior management, the enhancement of firm-specific skills and the promotion of employee interests. While codetermination has recently received attention from certain policymakers and academics in the United Kingdom, Canada, Australia and the United States, the model has not yet been closely examined in New Zealand. This paper explores the model's operation in Germany and Sweden, its proven and potential benefits, its compatibility with pre-existing industrial relations structures in New Zealand and its ability to address New Zealand-specific contemporary challenges. Ultimately, it is argued that codetermination's benefits, both theoretical and empirically tested, render it worthy of emulation in the New Zealand context.

Key words: "codetermination", "board-level employee representation", "stakeholder approach" "shareholder primacy"

Table of Contents

I	INTRODUCTION	1
II	THE NATURE OF CODETERMINATION: GERMANY AND SWEDEN	4
A	GERMANY.....	5
1	<i>The historical and theoretical backdrop to German codetermination</i>	<i>5</i>
2	<i>Modern-day German codetermination.....</i>	<i>6</i>
3	<i>The Role of Works Councils, Unions and Collective Bargaining Arrangements.....</i>	<i>8</i>
B	SWEDEN.....	9
1	<i>Swedish codetermination: the legislative architecture</i>	<i>9</i>
2	<i>Broader Swedish industrial relations</i>	<i>10</i>
C	THE NATURE OF EMPLOYEE REPRESENTATIVES IN MAJOR GERMAN AND SWEDISH COMPANIES	10
1	<i>Employee representatives in Germany.....</i>	<i>11</i>
2	<i>Employee representatives in Sweden</i>	<i>11</i>
III	OUTCOMES OF CODETERMINATION.....	12
A	ECONOMIC CONSEQUENCES.....	12
1	<i>Efficiency and profitability: theoretical perspectives</i>	<i>13</i>
2	<i>Efficiency and profitability: the data</i>	<i>15</i>
3	<i>Analysis.....</i>	<i>17</i>
B	NON-ECONOMIC CONSEQUENCES	18
1	<i>Promotion of employee interests.....</i>	<i>18</i>
2	<i>Knowledge of realities of the company.....</i>	<i>19</i>
3	<i>Strengthening of democratic institutions</i>	<i>20</i>
4	<i>Concluding analysis.....</i>	<i>22</i>
IV	CODETERMINATION AMID THE STAKEHOLDER APPROACH.....	22
A	SHAREHOLDER PRIMACY	22
B	THE RISE OF THE STAKEHOLDER APPROACH.....	23
C	CODETERMINATION: A MORE CONCRETE RESPONSE TO SHAREHOLDERISM?.....	23
V	CONSIDERATION OF CODETERMINATION IN ANGLO-AMERICAN JURISDICTIONS.....	26
A	UNITED STATES OF AMERICA.....	26
B	THE UNITED KINGDOM.....	27
C	CANADA	29
D	AUSTRALIA.....	29
VI	A CASE STUDY: AIR NEW ZEALAND'S HIGH PERFORMANCE ENGAGEMENT MODEL...30	
VII	ASCERTAINING COMPATIBILITY: AN OVERVIEW OF NEW ZEALAND INDUSTRIAL RELATIONS.....	32
A	UNIONISATION AND COLLECTIVE BARGAINING IN NEW ZEALAND: A BRIEF HISTORY	33
1	<i>Collective bargaining and unionisation from 1984 – present.....</i>	<i>33</i>
1	<i>The Fair Pay Agreements regime</i>	<i>34</i>
B	ANALYSIS.....	35
1	<i>Union membership and collective bargaining.....</i>	<i>35</i>
2	<i>Absolute compatibility – required?.....</i>	<i>37</i>
VIII	CODETERMINATION AS A RESPONSE TO NEW ZEALAND-SPECIFIC CHALLENGES..38	
A	INFORMATION-SHARING BETWEEN EMPLOYEES AND EMPLOYERS	39
B	HONING OF FIRM-SPECIFIC SKILLS	40
C	STRENGTHENING OF DEMOCRATIC INSTITUTIONS	42
1	<i>Lobbying in New Zealand.....</i>	<i>42</i>
2	<i>The utility of codetermination.....</i>	<i>44</i>
IX	PROPOSAL.....	44
A	NUMBER OF EMPLOYEE REPRESENTATIVES	45
B	THRESHOLD FOR QUALIFYING COMPANIES	46

C	ELECTORAL PROCESS.....	46
D	REMOVAL OF EMPLOYEE REPRESENTATIVES	47
X	CONCLUSION	47
I	BIBLIOGRAPHY	51

I Introduction

For the past four decades, shareholder primacy has dominated corporate governance structures across the Anglo-American world.¹ Despite the prevalence of the shareholder-centric approach, stakeholderism has recently garnered attention in business and academic circles.² Stakeholderism advocates for the promotion of stakeholder interests such as that of employees, customers, suppliers, the environment and the wider community.³ While those in Anglo-American jurisdictions have tended to view the corporation's purpose as one centred around generating value for its stockholders, few would contest that employees are pivotal to a firm's success. Regardless, in New Zealand there remain limited options for employees to obtain meaningful representation in companies, let alone governance rights.

Unlike their Anglo-American counterparts, European states have long embraced codetermination, a legislative model that gives employees control rights through board seats within certain companies.⁴ The most well-known codetermination model is that in Germany, where employee-elected representatives may occupy a significant number of seats on corporate boards.⁵ The German model has proved successful and been emulated in 18 other European jurisdictions.⁶ With its inherent emphasis on the interests of a critical stakeholder, codetermination constitutes a direct challenge to shareholder primacy. As such, certain Anglo-American policymakers and commentators have cited codetermination as a desirable corporate governance model.⁷ Unlike generalist stakeholder-centric

1 When this paper uses the term "Anglo-American", it is in reference to states that feature English as a native language and were, at some stage, colonised by the United Kingdom. Australia, New Zealand and the United States are encompassed by this term.

2 See R Edward Freeman "Stakeholder Theory" in C L Cooper (ed) *Wiley Encyclopedia of Management* (Online ed, 2015) for an overview of stakeholder theory.

3 See H Spitzeck and Erik G Hansen "Stakeholder Governance: How Stakeholders Influence Corporate Decision Making" (2010) *Corp Gov* 378 at 380.

4 See Adrian Wilkinson and Stewart Johnstone *Encyclopedia of Human Resource Management* (online ed, ElgarOnline) at 48, Simon Jäger, Shakked Noy and Benjamin Schoefer "What Does Co-Determination Do?" (2021) 75 *ILR Review* 857 at 859 and Gary Gorton and Frank A Schmid "Capital, Labour and the Firm: A Study of German Codetermination" (2004) 2 *J Eur Econ Assoc* 863 at 868.

5 Wilkinson and Johnstone, above n 4, at 48; Gorton and Schmid, above n 4, at 868.

6 See Appendix.

7 See for example Lenore Palladino "Economic Democracy at Work: Why (and How) Workers Should be Represented on US Corporate Boards" (2021) 1 *J Law Pol Econ* 373 and Grant Hayden and Matthew Bodie "Codetermination in Theory and Practice" (2021) 73 *Fla Law Rev* 321. As will be discussed in Part V, Anglo-American Policymakers such as Elizabeth Warren, Bernie Sanders and Theresa May have expressed support for codetermination.

objectives,⁸ codetermination mandates stakeholder representation at the highest levels of corporate governance.⁹

While not even the most ardent supporters of shareholder primacy would refrain from asserting that workers are key drivers of corporate prosperity, formal enshrinement of worker voice in corporate governance through codetermination remains, to some, a radical suggestion.¹⁰ However, as will be discussed in Part V, the fundamental notion that worker voice should be promoted and corporate power structures reformulated is growing in popularity and has been raised by politicians and academics in the United States, United Kingdom, Canada and Australia.

Codetermination has received little attention in New Zealand scholarship, nor has it been seriously considered by local policymakers. However, given the international business community's recent warming toward a more stakeholder-centric approach, the time may be ripe for evaluating the merits of codetermination and its potential utility in the New Zealand context. Indeed, income inequality and an increasing concentration of economic power are salient issues in contemporary New Zealand,¹¹ and are issues that have prompted contemplation of codetermination elsewhere.¹² While external policy measures are also required to remedy such mammoth challenges, it may be wise for New Zealand to contemplate mechanisms internal to company law, like codetermination, in rethinking the distribution of corporate power.

8 Such "generalist stakeholder-centric objectives" include that within the Business Roundtable's 2019 "Statement on the Purpose of a Corporation", which contains broad commitments to various stakeholder groups, but little guidance on how to balance such interests. See Business Roundtable *Statement on the Purpose of a Corporation* (August 2019).

9 Codetermination as a partial answer to some of the practical difficulties associated with the stakeholder approach will be discussed further in Part IV.

10 See for example Michael C Jensen and William H Meckling "Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination" (1979) 52 J Bus 469 at 504. See Samuel Hammond "Elizabeth Warren's Corporate Catastrophe" (20 August 2018) National Review <www.nationalreview.com> for a conservative news outlet's critique of Senator Elizabeth Warren's Accountable Capitalism Bill that, if enacted, would have imposed codetermination requirements on United States companies.

11 New Zealand's wealth gap remains unchanged as at September 2022. The wealthiest 20 per cent of households hold 69 per cent of total household net worth. See Statistics NZ "Distribution of Wealth Across New Zealand Households Remains Unchanged Between 2015 and 2021" (3 March 2022) <stats.govt.nz>

12 See for example BBC "Theresa May Vows to Put Conservatives 'At Service' of Working People" (11 July 2016) <www.bbc.com> and Elizabeth Warren "Accountable Capitalism Act" <www.warren.senate.gov>

Adopting codetermination would certainly disturb traditional conceptions of corporate governance in New Zealand. However, it is argued that its theoretical and empirically-tested benefits render it worthy of consideration. These include the promotion of employee interests, increased firm efficiency through enhanced information-sharing, the honing of firm-specific skills and the protection of democratic institutions.

While codetermination exists in over a dozen European states, particular attention will be paid to Germany and Sweden's application of the model. As will be detailed in Part II, German codetermination operates within a two-tiered board structure, unlike the one-tier model present in New Zealand and other Anglo-American jurisdictions. Conversely, Swedish codetermination exists within a unitary board system and constitutes a valuable comparison to New Zealand's corporate context. Nevertheless, German codetermination will be discussed at length since it is the most well-known and densely researched example of the model's operation.

Ultimately, it will be argued that codetermination, in some form, is worth adopting in New Zealand. It is proposed that one-third codetermination should be imposed for locally incorporated companies with more than 3,000 employees. That is, one-third of such company boards be composed of worker-elected employee representatives.

This paper's analysis can be split into two halves. The first examines the operation and merits of codetermination, its role within the broader stakeholder versus shareholder primacy debate and its contemplation within Anglo-American jurisdictions. The second analyses whether the model's benefits could successfully materialise in New Zealand through comparison to the German and Swedish models.

Part II canvasses codetermination's historical origins and operation in practice. Part III will review the literature on codetermination's economic and non-economic benefits. Part IV explores considerations of codetermination in Anglo-American states. Part V will examine the suitability of codetermination within New Zealand's corporate landscape with reference to New Zealand's historical and contemporary industrial relations climate. Part VII considers how the described benefits could materialise in the New Zealand context. Particular reference will be made to their propensity to facilitate the avoidance of strike action, increase employee retention and bolster protections against corporate lobbying.

II The Nature of Codetermination: Germany and Sweden

Codetermination can be defined as a corporate structure where workers play an official role in corporate governance.¹³ Within a codetermined company, elected workers' representatives are entitled to vote on major company decisions.¹⁴ Codetermination operates as a soft constraint on corporate behaviour as it does not impose any particular outcome on a company.¹⁵ Instead, it is designed to influence decision-making processes and give greater voice to employee interests.¹⁶

Collective bargaining is distinct from codetermination as it concerns a form of employee representation that does not inherently challenge employers' executive power.¹⁷ Rather than dictate corporate governance structures or shop-floor representational arrangements, as is achieved by codetermination, collective bargaining processes seek to produce industry-wide agreements. Unlike collective bargaining, which takes a more adversarial format, codetermination is intended to facilitate cooperative relations between employees and senior management.¹⁸ Regardless, countries with codetermination laws tend to feature centralised collective bargaining frameworks.¹⁹

Codetermination also exists in the context of "shop-floor representation", where employers consult with establishment-level representatives, often in the form of works councils, on matters such as working hours, working conditions or recruitment, for example.²⁰ While

13 Hayden and Bodie, above n 13, at 324; Erik G Furubotn "Codetermination and the Modern Theory of the Firm: A Property-Rights Analysis" 61 *J Bus* 165 at 166.

14 Jäger, Noy and Schoefer, above n 4, at 860 – 861; Sophie Rosenbohm and Thomas Haipeter "German Board-Level Employee Representation in Multinational Companies: Patterns of Transnational Articulation" (2019) 25 *Eur J Ind Relat* 219 at 219 – 220.

15 For further discussion of codetermination acting as a soft constraint for companies, see Jens Dammann and Horst Eidenmüller "Codetermination and the Democratic State" (2020) ECGI Working Paper Series in Law 536 1 at 63.

16 Dammann and Eidenmüller, above n 15, at 63; Hayden and Bodie, above n 7, at 346.

17 Carola M Frege "A Critical Assessment of the Theoretical and Empirical Research on German Works Councils" (2002) 40 *Br J Ind Relat* 221 at 222; Hermann Kotthoff "Plant-level Codetermination as Reflected in Recent Research" (Doctorate in Sociology, University of Frankfurt, 1981) 1 at 11.

18 Kotthoff, above n 17, at 5; Hayden and Bodie, above n 7, at 354; and Jäger, Noy and Schoefer, above n 14, at 862.

19 Kotthoff, above n 17, at 5.

20 Jäger, Noy and Schoefer, above n 14, at 4; Leo E Strine Jr, Anil Kovvali and Oluwatomi O Williams "Lifting Labour's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance" (Discussion Paper, Harvard University, 2021) 1 at 7 – 10; Katharina Pistor "Employees and Corporate Governance" in Margaret M Blair and Mark J Roe (eds) *Employees and Corporate Governance* (Brookings Institution Press, Washington D, 1999).

the term "codetermination" is also used in reference to worker participation at the shop-floor level,²¹ the term will be used hereafter solely in reference to board-level codetermination.

A Germany

To understand codetermination, it is helpful to consider an example jurisdiction. At its core, German codetermination, *Mitbestimmung*, is based upon the notion of promoting equality between capital and labour.²² The model seeks to support stability and facilitate conflict resolution through constructive dialogue.²³

1 The historical and theoretical backdrop to German codetermination

Germany has long embraced a stakeholder-centric conception of the firm.²⁴ As early as the 19th century, German legal scholars and business leaders referred to the notion of "*unternehem an sich*" (the "enterprise per se"), a view of the company which contemplates the interests of shareholders, employees and creditors.²⁵ This philosophy informed the development of codetermination, with mandatory codetermination first arising in 1905 in the form of shop-floor "employee committees".²⁶ By 1916, all companies with more than 50 employees were required to embrace codetermination at the shop-floor level.²⁷ As surveyed by legal historian Ewan McGaughey, from 1918 until the rise of Germany's fascist state in the early 1930s and from 1946 to 1951, businesses and trade unions entered into collective agreements to establish work councils and solidify the presence of employee representatives on company boards.²⁸

While it could be argued that German codetermination arose due to the nation's unique historical circumstances and cannot be transplanted elsewhere, the model's proliferation

21 Frege, above n 17, at 222.

22 John T Addison *The Economics of Codetermination* (Palgrave Macmillan, New York, 2009) at 5; Pistor, above n 20, at 163 – 164.

23 Addison, above n 22, at 5.

24 From 1949 – 1989, codetermination was present only in West Germany. As such, references to "German" codetermination during this period are only in relation to West Germany.

25 See Markus Roth "Employee Participation, Corporate Governance and the Firm: A Transatlantic View Focused on Occupational Pensions and Co-Determination" (2010) 11 EBOR 51 at 62 and F A Mann "The New German Company Law and Its Background" (1937) 19 J Comp Leg 220 at 223 – 227.

26 Roth, above n 25, at 62.

27 At 62.

28 Ewan McGaughey "The Codetermination Bargains: The History of German Corporate and Labour Law" LSE Law Society and Economy Working Papers 10/2015 1 at 1.

across Europe in the second half of the 20th century is evidence to the contrary.²⁹ Nineteen of the European Union's 27 post-Brexit members now have embraced some form of codetermination, notably Sweden, Denmark, the Netherlands and Austria.³⁰ The model's expansion indicates that a specific historical context is not a prerequisite for its success. Furthermore, historical stability has remained a key characteristic of European codetermination laws as the models have remained steadfast despite changes in political leadership.³¹

Codetermination has, thus far, been confined to the European continent. However, it is argued that a lack of experimentation elsewhere cannot allow one to discount the model's potential applicability in Anglo-American states. As will be canvassed in Part V, codetermination has been looked at with interest by various academics, politicians and representative bodies in the United States, Canada, Australia and the United Kingdom.

2 *Modern-day German codetermination*

Unlike the unitary board structure present in Anglo-American states, German companies typically adopt a two-tier board system comprising a management board and a supervisory board - a model prevalent across continental Europe.³² The management board actively

29 Klaus J Hopt "Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe" (1994) 14 IRLE 203 at 203; Simon Jäger, Shakked Noy and Benjamin Schoefer "Codetermination and Power in the Workplace" (23 March 2022) Economic Policy Institute <www.epi.org> at II.B

30 See appendix 1 for a list of the European states that have adopted the model and the percentage of board seats reserved for employees. Norway is a notable non-European Union state that has also embraced codetermination.

31 Only Hungary and the Czech Republic partly abolished mandatory codetermination. However, Hungary has retained mandatory codetermination for firms with two-tier boards (which constitute the vast majority), and the Czech republic reintroduced mandatory codetermination in 2017 for companies with at least 5000 employees after its abolition in 2014. See Worker Participation EU "Hungary – Board-Level Representation" <www.worker-participation.eu> and Worker Participation EU "Czech Republic – Board-Level Representation" <www.worker-participation.eu>

32 The two-tier board structure is mandated by the German Stock Corporation Act 1965. Gorton and Schmid, above n 4, at 868; Christoffer Saidac, Mattias Friberg and Khaled Talaghan "The Corporate Governance Review: Sweden" (17 March 2022) The Law Reviews <www.thelawreviews.co.uk>

manages the company,³³ whereas the supervisory board oversees its actions.³⁴ Employee-occupied seats are restricted to the supervisory board.³⁵

German supervisory boards operate to shape long-term strategy, review executive performance, appoint and dismiss management board members and set compensation.³⁶ In this sense, supervisory boards occupy a role similar to that of New Zealand boards of directors.³⁷ As such, while New Zealand's board system is unitary, the practical activities of local boards are not dissimilar to that of German supervisory boards.

The foundations of German codetermination are located in two key pieces of legislation: the Codetermination Act 1976 and the One-Third Participation Act 2004. The 1976 Act is the central piece of legislation. It applies to companies with over 2,000 employees, requiring that they have equal shareholders and employees on their supervisory board, thereby imposing full parity codetermination.³⁸ Depending on the supervisory board's size, around 70 per cent of the seats are occupied by company employees and 30 per cent by trade union representatives.³⁹ Under the 2004 Act, companies with at least 500 employees must give employees the right to elect one-third of their supervisory boards.⁴⁰

Under both systems, employees elect a labour director, and shareholders elect the supervisory board's chairman.⁴¹ Both individuals are – supposedly – neutral and entitled

33 In this sense, management boards occupy a similar role to that of "managers" within Anglo-American companies. Management boards are responsible for the company's day-to-day operations. See for example Klaus J Hopt and Patrick C Leyens "The Structure of the Board of Directors" in *Comparative Corporate Governance* (Edward Elgar Publishing, Cheltenham, 2021) and Walther Müller-Jentsch "Formation, Development and Current State of Industrial Democracy in Germany" (2016) 22 *Eur Rev Labour and Research* 45 at 50.

34 Hayden and Bodie, above n 7, at 331 – 332; Klaus J Hopt "The German Law of and Experience with the Supervisory Board (Working Paper, Max Planck Institute for Comparative and International Private Law and ECGI, 2016) at 2.

35 Codetermination Act 1976 (DE), s 7.

36 Hopt, above n 29, at 204; Pistor, above n 20, at 184; Gorton and Schmid, above n 4, at 868. See L Fauver and M E Fuerst "Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards" (2006) 82 *J Financ Econ* 673 at 675 for a discussion of the nature of German supervisory boards in comparison to those in the United Kingdom and the United States, which have the same unitary board system as is present in New Zealand.

37 See Institute of Directors New Zealand "Starting a Board" <www.iod.org.nz> for an overview of key board functions in New Zealand.

38 Codetermination Act 1976, s 7; Pistor, above n 20, at 174.

39 Codetermination Act 1976, s 7(2).

40 One Third Participation Act 2004 (DE).

41 Codetermination Act 1976, s 27(2).

to a tie-breaking vote.⁴² As such, neither bloc of directors can outvote the other. At least one employee representative must be a managerial employee.⁴³

Only company employees may vote for supervisory board representatives.⁴⁴ The employees of foreign branches and subsidiaries of German companies may not vote or be voted onto their supervisory boards.⁴⁵ To safeguard against arbitrary dismissals and excessive shareholder control, shareholders cannot remove employee representatives without 75 per cent of the company's employees having voted in favour of removal.⁴⁶

3 *The Role of Works Councils, Unions and Collective Bargaining Arrangements*

German codetermination does not exist in a vacuum. Instead, it is part of a broader industrial relations landscape also comprised of unions and works councils. Works councils aggregate information about the employees they represent and work with management to construct mutually beneficial outcomes.⁴⁷ These representative bodies are mandatory in Germany's private sector, operate at the firm level and have a company-specific electorate - unlike unions, which operate at the industry level.⁴⁸ In the decades following the Second World War, works councils became the most prominent form of industrial relations across European states.⁴⁹ Works councils, rather than unions, are the primary vehicle through which employees are represented in Germany.⁵⁰

Collective bargaining is prominent in Germany. In 2015, collective agreements covered 50.2 per cent of private-sector employees.⁵¹

42 Gorton and Schmid, above n 4, at 869.

43 Jens Dammann and Horst Eidenmüller "Codetermination: A Poor Fit for US Corporations" (2020) 3 CBLR 1 870 at 884.

44 Codetermination Act 1976, s 3(1); Mathias Habersack "Corporate Codetermination: German-Style as a Model for the UK?" (July 18 2016) University of Oxford <www.ox.ac.uk> Employees of subsidiary companies based in Germany may vote for supervisory board representatives. See Codetermination Act 1976, s 3(1).

45 Codetermination Act 1976, s 3(1); Above n 44.

46 Codetermination Act 1976 (DE), s 23.

47 Joel Rogers and Wolfgang Streeck *Works Councils: Consultation, Representation and Co-operation in Industrial Relations* (2nd ed, University of Chicago Press, Chicago, 2009) at 6.

48 At 55.

49 Frege, above n 17, at 221.

50 See generally Rogers and Streeck, above n 47 for further discussion of works councils and their relation to unions.

51 Jelle Visser *Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts Database - Version 6.1* (Amsterdam Institute for Advanced Labour Studies, University of Amsterdam, November 2019).

B Sweden

Known for its car manufacturers and home furnishing giants such as Volvo and Ikea, the Nordic state boasts the world's 22nd largest economy and the tenth largest in Europe.⁵² Swedish companies operate under a one-tier board structure.⁵³

1 Swedish codetermination: the legislative architecture

Worker involvement in Swedish corporate decision-making occurs through board-level representation and collective bargaining.⁵⁴ Board-level codetermination was first introduced in 1972.⁵⁵ amid a swathe of labour reforms intended to give private-sector workers greater say in company management.⁵⁶ The Board Representation (Private Sector Employees) Act 1987 requires all companies with more than 25 employees to have two board members elected by the employee body.⁵⁷ Companies with over 1000 employees and more than one branch must have three employee representatives.⁵⁸ Employee representatives can never be in the majority.⁵⁹

Swedish employee representatives are elected via a different process to that in Germany. The default approach is that unions bound by a collective agreement with the company select the employee representatives, so long as 80 per cent of the company's workers belong to the union(s).⁶⁰ This approach can be varied by agreement between the company and the relevant unions.⁶¹

52 WorldData "Biggest Economies in 2021 By Gross Domestic Product" <www.worlddata.info> ; Statista "Gross Domestic Product at Current Market Prices of Selected European Countries in 2021" (27 July 2022) <www.statista.com>

53 Saidac, Friberg and Talayhan, above n 32.

54 Jeff Wheeler "Employee Involvement in Action: Reviewing Swedish Codetermination" (2002) 26 Labor Stud J 71 at 75.

55 At 76.

56 Klas Levinson "Codetermination in Sweden: Myth and Reality" (2000) Econ Ind Democr 457 at 457.

57 Board Representation (Private Sector Employees) Act 1987 (SE), s 4.

58 Levinson, above n 56, at 459.

59 Gregory Jackson "Employee Representation in the Board Compared: A Fuzzy Sets Analysis of Corporate Governance, Unionism and Political Institutions"(2005) 12 Ger J Ind Rel 252 at 256.

60 Board Representation (Private Sector Employees) Act, s 8.

61 Section 8. The appointing party fixes the length of an employee representative's term which will often be the relevant union. However, this term cannot exceed four financial years. See section 10 of the Act.

2 *Broader Swedish industrial relations*

Like Germany, Sweden has a long history of labour-management cooperation.⁶² The nation's industrial relations system is characterised as a "social partnership" between employers and employees through their representative bodies, the unions.⁶³ Unsurprisingly, Sweden's workforce is highly unionised, with 68 per cent of workers belonging to a union in 2019.⁶⁴ Collective bargaining coverage for Swedish employees is also high, sitting at 88 per cent in 2020.⁶⁵

Works councils were present in Sweden from 1946,⁶⁶ but in the 1970s were gradually replaced by a codetermination system that places heavy emphasis on collective bargaining.⁶⁷ Since Swedish unions have historically been sceptical of council-like institutions, such an outcome is unsurprising.⁶⁸

C The Nature of Employee Representatives In Major German and Swedish Companies

A possible criticism of codetermination is that employees lack the expertise and experience necessary to occupy board-level positions. Unfortunately, data on the attributes of employee representatives on European boards is sparse. However, anecdotal examples suggest such representatives on the boards of prominent German and Swedish companies are often seasoned employees with experience in union leadership.

62 Wheeler, above n 54, at 72.

63 The social partnership model places emphasis on partner dialogue and collective bargaining, rather than regulation. The social partners themselves include the Swedish Trade Union Confederation, the Confederation of Swedish Enterprise and the Swedish Confederation of Professional Associations. See The Swedish Trade Union Confederation *The Swedish Model – The Importance of Collective Agreements in Sweden* (online looseleaf ed) at 3; Dominique Anxo "Shaping the Future of Work in Sweden: The Crucial Role of Social Partnership" in Daniel Vaughan-Whitehead (ed) *Reducing Inequalities in Europe* (online ed, Edward Elgar Publishing Limited, Cheltenham, 2018) 519 at 519 – 520; and Wheeler, above n 54, at 72.

64 Anders Kjellberg "The Swedish Model in an Uncertain Time: Unions, Employers and Collective Agreements in a Changing Labour Market" (7 June 2020) Lund University <www.portal.research.u.se>

65 Above n 64.

66 Above n 64.

67 Instead of relying on works councils, centralised union organisations and codetermination arrangements work to ensure compliance with collective agreements. See Göran Brulin "Sweden: Joint Councils under Strong Unionism" in Joel Rogers and Wolfgang Streeck (eds) *Works Councils: Consultation, Representation and Cooperation in Industrial Relations* (2nd ed, University of Chicago Press, Chicago, 2009) 189 at 189 – 190.

68 At 189.

1 Employee representatives in Germany

Audi's supervisory board is one that boasts long-time employees with backgrounds in employee advocacy. The board comprises ten shareholders and ten employee representatives, all with a long history at the company and previous leadership experience. For example, Alexander Reinhart, appointed to the supervisory board as an employee representative in January 2022, began working as a mechatronics technician at AUDI AG in 2004 and commenced union involvement that same year.⁶⁹ From 2004 to 2021, Reinhart held various titles in union leadership, including as an elected union representative, a youth representative, a member of Audi's General Works Council, a member of the board of union representatives and the chair of that board for one year.⁷⁰ Another recent appointee, Karola Frank, was a longstanding member of the Audi Works council at Ingolstadt and had worked at Audi since 1997.⁷¹ In addition to working as a master craftswoman and mediator, Frank was the vice-chair of Germany's largest union, IG Metall, from 2015 – 2021.⁷²

Another large automaker, Mercedes Benz, features long-serving employees and union representatives on its supervisory board.⁷³ Ergun Lümali, for example, had decades of experience as a re-fitting worker and deputy foreman, while also acting as a union representative for IG Metall and various works councils, before he was appointed vice-chairman of the company's supervisory board.⁷⁴

2 Employee representatives in Sweden

Employee representatives on the boards of two major Swedish companies are similarly experienced. The SKF Group operates SKF, one of the world's largest manufacturers of bearings.⁷⁵ The company's board features two employee representatives, Jonny Hilbert and Zarko Djurovic.⁷⁶ Hilbert was employed by the SKF Group since 2005 before being appointed to the board in 2015. He is also Chairman of SKF's Gothenburg union.⁷⁷ Djurovic has been employed by the company since 2006, was appointed to the board in 2015, and previously held the position of Charmain for the Metalworker's Union.⁷⁸

69 Audi MediaCenter "Audi Supervisory Board: Changes to Members Representing Employees" (14 January 2022) <www.audi-mediacycenter.com>

70 Above n 69.

71 Above n 69.

72 Above n 69.

73 Mercedes-Benz Group "The Supervisory Board" <www.group.mercedes-benz.com>

74 Mercedes-Benz Group "Ergun Lümali" <www.group.mercedes-benz.com>

75 Thomas "Top Global and USA Bearings Suppliers" <www.thomasnet.com>

76 SKF "SKF Board of Directors" <www.investors.skf.com>

77 Above n 76.

78 Above n 76.

Ericsson, a multinational information and communications technology company headquartered in Stockholm, also features long-time employees on its board. For example, Torbjörn Nyman was appointed to the board by LO, the Swedish Trade Union Confederation, in 2017 after having worked at the company since 1996.⁷⁹ Anders Ripa, also appointed to the board in 2017 by a leading Swedish union, was employed at Ericsson since 1998 and currently works as the company's security advisor.⁸⁰

All employees on the boards of the discussed Swedish and German companies were similarly experienced.⁸¹ Ultimately, empirical research is necessary to definitively ascertain the nature of employee representatives within codetermined companies across Europe. Regardless, these examples, while anecdotal, indicate that such board appointees in large companies possess a wealth of company experience and a background in union leadership.

III Outcomes of Codetermination

Any discussion of codetermination necessitates a review of its consequences. While there is a body of scholarship on the model, it remains divided. Law and economics scholars are generally sceptical of codetermination and its potential benefits, while others are more optimistic. Moreover, empirical studies have historically contradicted one another.

A Economic Consequences

In 2006, Fauver and Fuerst asserted that the theoretical literature on codetermination was in its infancy.⁸² Despite a recent surge in the publication of codetermination-related articles,⁸³ this statement arguably still rings true. Indeed, the scholarly consensus on codetermination's economic outcomes has ebbed and flowed since the 1980s.⁸⁴ The earliest, and most methodologically dubious,⁸⁵ empirical studies concluded that

79 Ericsson "Board members" <www.ericsson.com>

80 Ericsson, above n 79.

81 See Ericsson, above n 79; SKF, above n 76; Audi MediaCenter, above n 69; and Mercedes-Benz Group, above n 73.

82 Fauver and Fuerst, above n 36, at 678 – 679.

83 This surge in publication on codetermination can, at least in the United States, largely be attributed to the proposals released by Senators Warren and Sanders in 2018 that included codetermination requirements.

84 Hayden and Bodie, above n 7, at 351.

85 These studies have been criticised on various bases, including sample size, data frequency and lack of controls. See Hayden and Bodie, above n 7, at 351 (footnote 180).

codetermination had minimal effects on firm profits.⁸⁶ More recent studies have concluded the opposite.⁸⁷ Nevertheless, the following subpart will explore the competing theoretical perspectives on the model's economic utility.

1 Efficiency and profitability: theoretical perspectives

A potential positive economic consequence concerns increased firm efficiency through the avoidance of strikes. Despite being a notable proponent of shareholder primacy, Hansmann has argued codetermination can work effectively when paired with collective bargaining.⁸⁸ He contended that since worker representatives on boards can streamline communication channels between workers and employers, codetermination can enhance company-union relations.⁸⁹ Such relations may facilitate the avoidance of strikes, thereby increasing overall firm efficiency.⁹⁰

Other scholars have used the contractarian argument to dismiss codetermination on the basis that the model acts as a legislative constraint on corporate activity. Bainbridge and Jensen and Meckling have argued codetermination is an inefficient approach since it operates as a binding constraint and is infrequently voluntarily adopted by firms.⁹¹ However, Hayden and Bodie and Renaud have noted that various factors may deter individual companies from embracing codetermination in the absence of legislation.⁹² For example, firms may be reluctant to independently introduce shared governance structures due to concerns that doing so would generate a negative perception of the company's labour relations and potentially impede its ability to raise funds.⁹³ Similarly, unilateral adoption may lead to wage compression, competitive disadvantages, and the transaction costs associated with altering an individual company's embedded hierarchies.⁹⁴

86 See Jan Svjnar "Relative Wage Effects of Unions, Dictatorship and Codetermination: Econometric Evidence from Germany" (1981) 63 Rev Econ & Stat 188 at 195.

87 Kornelius Kraft and others "Codetermination and Innovation" (2011) 35 Cambridge J Econ 145 at 167.

88 Henry Hansmann "When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination and Economic Democracy" (1990) 99 Yale L J 1749 at 1803.

89 At 1803.

90 At 1766.

91 Stephen M Bainbridge "Privately Ordered Participatory Management: An Organisational Failures Analysis" (1998) 23 Del J Corp L 979 at 1054 – 55; Jensen and Meckling, above n 10, at 473.

92 Hayden and Bodie, above n 7, at 344; Simon Renaud "Dynamic Efficiency of Supervisory Board Codetermination in Germany" (2007) 21 Labour 689 at 691.

93 Hayden and Bodie, above n 7, at 344;

94 Hayden and Bodie, above n 7, at 344 – 345; Renaud, above n 92, at 691 – 692.

Additionally, as discussed in Part II, legal historian Ewan McGaughey has noted that German codetermination originally sprang from collective agreements voluntarily entered into by business and labour representatives.⁹⁵ Therefore, codetermination defied such contentions at its inception and did not solely exist due to the presence of economically unsound legislation.⁹⁶ In fact, when the market conditions are right, employees appear to "bargain for codetermination".⁹⁷

In 1979, Jensen and Meckling famously predicted codetermination would lead to economic collapse in Germany.⁹⁸ They argued codetermination would result in workers "eating up" the firm by "transforming the assets of the firm into consumption or personal assets", resulting in "a significant reduction in the country's capital stock, increased unemployment, reduced labour outcome and an overall reduction in output and welfare."⁹⁹ Of course, such a profound collapse did not eventuate. Codetermination remains a critical part of the German economy, which has remained competitive for decades and now ranks as the world's fourth-largest by Gross Domestic Product.¹⁰⁰ Similarly, despite suffering a financial crisis in the 1990s, the Swedish economy is highly diverse and competitive, placing fourth in the IMD World Competitiveness Rankings 2022 and, over the past 15 – 20 years, has sustained a rate of economic growth surpassing that of the United States and the EU-15.¹⁰¹

In 1991, Smith developed a positive economic case for codetermination based on its ability to correct labour, capital market and organisational failures.¹⁰² Smith explains that corporate managers possess incentives to distort organisational structures, which can generate inefficiencies.¹⁰³ By providing guaranteed joint decision-making at the board level, codetermination can correct such distortions by providing internal quality controls

95 McGaughey, above n 28, at 1.

96 At 2.

97 Hayden and Bodie, above n 7, at 344.

98 Jensen and Meckling, above n 10, at 504.

99 At 504.

100 Research FDI "The Top 20 Largest Economies in the World by GDP" (8 February 2021) <researchfdi.com>

101 The EU-15 refers to the European Union's fifteen member states as of December 2003, before enlargement of the Union. IMD "World Competitiveness Ranking 2022" <www.imd.org> ; McKinsey Sweden *Growth and Renewal in the Swedish Economy: Development, Current Situation and Priorities for the Future* (McKinsey Global Institute, May 2012) at 9; Sweden "The Swedish Economy" <www.sweden.se>

102 See Stephen C Smith "On the Economic Rationale for Codetermination Law" (1991) 16 J Econ Behav Organ 261 at 261.

103 At 263 – 273.

over internal management decisions and thwart management opportunism.¹⁰⁴ Smith concludes that codetermination can improve firm efficiency on account of this corrective function.¹⁰⁵

Scholars have also contended that codetermination acts as a reward for employees who have honed their firm-specific skills, thereby improving firm efficiency.¹⁰⁶ Codetermination arrangements may incentivise staying at a firm long-term due to the possibility of occupying a representative role and encourage enhancing skills relating exclusively to that workplace.¹⁰⁷ In particular, Smith's economic case notes that codetermination has been shown to generate efficiency-related benefits through increases in technical efficiency and knowledge generation through firm-specific skill development.¹⁰⁸

Dammann and Eidenmüller have contended that codetermination discourages risk-taking and is, therefore, unfavourable since corporate boards must be headed by those willing to tread into uncharted territory.¹⁰⁹ Conversely, Hayden and Bodie have argued that such a stance assumes the existence of some "optimal level of risk-taking" and dubiously purports that shareholders are the only ones placed to assess "all downsides of risky corporate behaviour".¹¹⁰

2 *Efficiency and profitability: the data*

The empirical evidence tends to support the theoretical position that codetermination can enhance firm value. While older empirical studies routinely contradicted one another, recent research has more consistently indicated that codetermination positively correlates with high profitability and increased capital market valuation.¹¹¹

Fauver and Fuerst's 2006 study of 250 publicly traded German companies with varying degrees of codetermination found that "prudent levels" of employee representation "significantly improved firm value" due to enhanced information-sharing between

104 Smith, above n 102, at 267.

105 At 277.

106 Furubotn, above n 13, at 170-174; Smith, above n 102, at 276 and 277;

107 Dammann and Eidenmüller, above n 15, at 31.

108 Smith, above n 102, at 191.

109 Dammann and Eidenmüller, above n 43, at 932 – 934.

110 Hayden and Bodie, above n 7, at 348.

111 Kraft, above n 39, at 167; Fauver and Fuerst, above n 36, at 677; and Jörg Heining, Simon Jäger and Benjamin Schoefer "Labour in the Boardroom: The Effects of Codetermination on Firm Performance and Wages" (2020) 136 Q J Econ 669.

employees and employers, which thereby improved board-decision making.¹¹² The authors noted that industries requiring more intense coordination of activities and information-sharing, such as manufacturing, benefit more from codetermination.¹¹³ Affirming Hansmann's theoretical position, the authors found that board-level employee representation could facilitate the avoidance of strikes by providing workers and unions with helpful information about firm strategy and profits.¹¹⁴ The authors tentatively concluded that for such positive benefits to materialise, the optimal level of employee representation on supervisory boards was likely less than 50 per cent, and an excessive number of labour representatives could reduce firm value.¹¹⁵

A 2020 study of a 1994 German reform that abolished codetermination for some firms but retained it in others found that codetermined firms saw increased capital and output per worker.¹¹⁶ These findings are consistent with the views of corporate directors in states with codetermination laws. A 2012 survey found 71 per cent of German executives opposed the abolition of the state's codetermination laws, and a 2000 study of Swedish directors found that 76 per cent regarded codetermination in a "positive" or "very positive" light.¹¹⁷ As noted by Harju, Jäger and Schoefer, if codetermination were objectively bad for firm performance, directors would surely harbour animosity toward it.¹¹⁸

No empirical evidence supports the assertion that codetermination negatively impacts other stakeholder groups, such as shareholders, creditors and the environment.¹¹⁹ In fact, codetermined firms have often provided more robust long-term protections for such stakeholders.¹²⁰ Hayden and Bodie, Lin, Schmid and Xuan's 2018 study found that "employee representatives who aim to protect the interests of the firm's employees can (unintentionally) also help to protect the interests of banks as both stakeholders are interested in the long-term stability and survival of the company."¹²¹ Regarding the model's

112 Fauver and Fuerst, above n 36, at 677.

113 At 703.

114 At 703.

115 Fauver and Fuerst, above n 36, at 703.

116 Heining, Jäger and Schoefer, above n 111, at 672.

117 Jäger, Noy and Schoefer, above n 4, at 10.

118 At 10.

119 Grant Hayden and Matthew Bodie "Codetermination: The Missing Alternative in Corporate Governance" (13 January 2022) Law & Political Economy Project <www.lpeproject.org>

120 Hayden and Bodie, above n 102; Hayden and Bodie, above n 7, at 356.

121 Hayden and Bodie, above n 7, at 356; Chen Lin, Thomas Schmid and Yuhai Xuan "Employee Representation and Financial Leverage" (2018) 127 *J Fin Econ* 303 at 32.

impact on the environment, Scholz and Vitols' 2019 study found that codetermined firms tended to have substantive Corporate Social Responsibility policies that set concrete emissions-reduction goals.¹²²

Despite such benefits, recent studies have indicated that codetermination has either no or minimal positive effects on wages for workers themselves. For example, upon surveying changes in board-level employee representation in Finnish and German companies, Harju, Jäger and Schoefer found that wage increases of 1.0 per cent and 1.6 per cent occurred, rendering such benefits statistically insignificant.¹²³

3 Analysis

The recent empirical evidence tends to form a consensus that codetermination positively affects firm performance.¹²⁴ These findings are consistent with the German response to recent crises. Germany recovered from the 2008 Global Financial Crisis more swiftly than its Anglo-American counterparts, with some describing the phenomenon as an "economic miracle".¹²⁵ During this period, positive relations between management and employees enabled many German companies to retain their core workforce since worker consent was obtained before salaries and working hours were reduced.¹²⁶

More recently, in early 2020, amidst the economic disruptions caused by the COVID-19 pandemic, certain German firms cooperated with employees to mitigate fallout and criticism. Over half of German firms adopted *Kurzarbeit* – a strategy whereby worker hours were shortened to preserve human capital.¹²⁷ The social insurance strategy enabled companies to retain firm-specific human capital and avoid costly re-hiring, re-training and severance processes, thus comparatively boosting firm efficiency during a period of unprecedented crisis.¹²⁸ For example, the supervisory board of automaker Daimler-Benz agreed to reduce work hours to avoid mass layoffs with the unanimous support of its

122 Robert Scholz and Sigurt Vitols "Board-level Codetermination: A Driving Force for Corporate Social Responsibility in German Companies?" (2019) 25 Eur J Indus Rels 233 at 243 – 244.

123 Jäger, Noy and Schoefer, above n 4, at 6.

124 Hayden and Bodie, above n 7, at 354.

125 See Hayden and Bodie, n 7, at 353; Michael C Burda and Jennifer Hunt "What Explains the German Labour Market Miracle in the Great Recession?" (2011) 649 SFB Discussion Papers at 273 – 275; and Ulf Rinne and Klaus F Zimmermann "Another Economic Miracle? The German Labor Market and the Great Recession" (2012) 1 IZA J Labor Policy 1 at 1.

126 Hayden and Bodie, above n 7, at 353.

127 See International Monetary Fund "Kurzarbeit: Germany's Short-Time Work Benefit" (15 June 2020) <www.imf.org> and Reuters "Half of German Firms Using Shortened Working Hours Due to Coronavirus" (23 April 2020) Reuters <www.reuters.com>

128 International Monetary Fund, above n 127.

employee representatives.¹²⁹ In contrast, United States firm Tesla faced widespread criticism from employees due to an alleged lack of consultation¹³⁰, ultimately resulting in bitter relations between employees and management.¹³¹ These contrasting examples indicate codetermination may be able to facilitate harmonious relations between workers and senior management during times of unprecedented crisis.

As noted above, the data does not indicate that codetermination results in employee wage increases. However, such an economic consequence is arguably not the most critical metric by which to measure the model's success. The fundamental rationale behind codetermination is not monetary; it is to afford employees the right to board-level representation, rather than see wage increases approved.

B Non-economic consequences

1 Promotion of employee interests

A critical non-economic benefit associated with codetermination, and indeed the model's overarching goal, is the promotion of employee interests. In theory, when workers are represented at the board level, their interests will be advocated for and catered to.¹³² Since the model can improve communication pathways between shareholder-appointed directors and the employee body,¹³³ and see the voice of a key stakeholder can be entrenched at the board level, such an outcome is, arguably, to be expected.

Swedish directors have positively received the promotion of employee interests through codetermination. Klas Levinson's extensive surveys of both management and labour in

129 Stuttgart Zeitung "Daimler extends Short-Time Work Until the End of April (8 April 2020) <www.stuttgarter-zeitung.de>

130 In May 2020, Tesla employees were given permission to work from home. However, some received termination notices alleging a "failure to return to work". Additionally, later that year it was alleged that workers were forced to return to work during quarantine, leading to protests from employees. See Faiz Siddiqui "Tesla Gave Workers Permission To Stay Home Rather Than Risk Getting COVID-19. Then it Sent Termination Notices" (25 June 2020) The Washington Post <www.washingtonpost.com> and Rupert Neate "Tesla Shareholders Urged to Oust Elon Musk over \$55bn Pay Deal: Adviser Pirc Says Musk's Pay and Twitter Outbursts Pose 'Serious Risk of Reputation Harm to the Company'" (30 June 2020) The Guardian <www.theguardian.com>

131 Siddiqui, above n 130; Dammann and Eidenmüller, above n 15, at 54.

132 Hayden and Bodie, above n 7, at 346; See Carola Frege and John Godard "Varieties of Capitalism and Job Quality: The Attainment of Civic Principles at Work in the United States and Germany" (2014) 79 *Am Sociol Rev* 942; Elizabeth Anderson *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)* (Princeton University Press, Princeton, 2017).

133 Fauver and Fuerst, above n 36, at 677.

hundreds of Swedish companies in 1984, 1996 and 1998 found, overall, that codetermination worked well for the majority of companies, with most corporate leaders believing that the model "contributes new ideas, strengthens people's willingness to cooperate and confers legitimacy for such difficult decisions as production or worker cut-backs."¹³⁴ Similarly, Levinson found that most Swedish directors perceived board-level codetermination positively as it could promote collaboration, trust and effect change within companies.¹³⁵

The empirical data on precisely how employee representatives uplift the general employee in board meetings is limited.¹³⁶ However, Levinson's survey of Swedish directors regarding the position and influence of board-level employee representatives sheds some light on the matter. The data showed that while such individuals tended to have low activity levels during board discussions, this significantly increased when discussing personnel matters, work environmental concerns and reorganisation, among other areas.¹³⁷ While confined to codetermined Swedish companies, this data indicates that employee representatives become most involved in board meetings when matters directly affecting employee well-being arise.

Employee interest-promotion through codetermination may also lead to improved feelings of job satisfaction amongst workers. While empirical studies on the correlation between job satisfaction and codetermination are sparse at best,¹³⁸ a 2021 study by Harju, Jäger and Schoefer found subjective job satisfaction moderately increased within codetermined Finnish firms.¹³⁹ Indeed, if employees are afforded meaningful avenues for grievances to be raised and their broader interests represented at the board level, it is perhaps unsurprising that they would experience greater work satisfaction.

2 *Knowledge of realities of the company*

Information-sharing between employee representatives and other board members has already been identified as a distinct positive economic outcome of codetermination.

134 Levinson, above n 56, at 463.

135 At 460. In a 1998 study, 60 per cent of Swedish directors responded positively to the question "What are your experiences of employee board representation and its advantages and disadvantages for the company?".

136 Naturally, extensive information on the actual dynamics of such meetings is unavailable for commercial confidentiality reasons.

137 At 464 – 466.

138 Jäger, Noy and Schoefer, above n 17, at 5.

139 At 8.

However, non-economic benefits may also arise from board members understanding the firm's daily operations. This paper posits that if employee representatives with such in-depth knowledge and experience are present at the board level, their input could valuably influence decision-making by ensuring that shareholder-appointed directors are aware of the firm's day-to-day realities. For example, issues relating to working conditions could be effectively communicated where an employee representative has direct experience working at the shop-floor level.¹⁴⁰ Indeed, there is a dense literature propounding the value of diverse boards,¹⁴¹ and commercial expertise can be valuably supplemented by practical knowledge of a company's day-to-day operations.

Conversely, Dammann and Eidenmüller have suggested that the benefits of board diversity through codetermination would be inherently limited due to shareholder-appointed directors and employee representatives having "fundamentally different goals".¹⁴² However, this position assumes, without robust substantiation, such parties would consistently disagree on matters of corporate importance. A 1996 study found that 86 per cent of Swedish managing directors did not believe union participation contributed to conflict and the slowing down of company operations.¹⁴³ While it may be true that shareholder-appointed directors and employee representatives have different mandates, no available evidence suggests that codetermined boards regularly suffer from stalemate.

3 *Strengthening of democratic institutions*

A potential non-economic benefit of codetermination is its ability to strengthen democratic institutions by restraining corporate power. Indeed, there is a vast literature citing the corporation's role as an influential political actor and its propensity to wield excessive influence in state affairs.¹⁴⁴

140 Smith has stated that "codetermination provides employees with a regular grievance channel to either higher level managers or to owners". See Smith, above n 102, at 266.

141 See for example Seletha R Butler "All on Board! Strategies for Constructing Diverse Boards of Directors" (2012) 7 VA L & Bus Rev 61 at 76 and Mijntje Lückerath-Rovers "Women on boards and Firm Performance" (2013) 17 J Manag Gov 491.

142 Dammann and Eidenmüller, above n 43, at 910.

143 Levinson, above n 56, at 462.

144 See for example Stephen Wilks *The Political Power of the Business Corporation* (Edward Elgar Publishing, Cheltenham, 2013); Luigi Zingales "Towards a Political Theory of the Firm" (2017) 3 JEP 113; David Vogel *Fluctuating Fortunes: The Political Power of Business in America* (2nd ed, BeardBooks, Washington DC, 2003); and Peter A Gourevitch and James Shin *Political Power and Corporate Control* (Princeton University Press, Princeton, 2007).

Despite their general scepticism toward codetermination's economic benefits, Dammann and Eidenmüller have contended that codetermination can protect democratic institutions by mitigating the dangers associated with using extreme corporate wealth for political lobbying.¹⁴⁵ The authors note that codetermination legislation must be designed with this particular goal in mind to be successful in this regard.¹⁴⁶

Dammann and Eidenmüller argue that since codetermination decentralises corporate power by affording employees a concrete role in corporate governance, it will be more difficult for other board members to garner support for a lobbying strategy.¹⁴⁷ They contend employee representatives are more likely to oppose corporate strategies that, through lobbying, support policies benefitting the wealthy few at the expense of everyday workers.¹⁴⁸

Dammann and Eidenmüller posit that codetermination could protect democratic institutions as follows: in a company with full parity codetermination, employee representatives would be unable to remove shareholder representatives on their own.¹⁴⁹ However, should they acquire the support of a single shareholder representative, they could vote to remove a CEO who plans to use corporate funds to lobby the legislative branch, and rational CEOs will be disincentivised from pursuing such strategies.¹⁵⁰ Where such strategies are abandoned, democratic processes will, in theory, be free to run their course devoid of excessive corporate influence.

Dammann and Eidenmüller's thesis is an attractive one. However, to be realised, a sufficient percentage of employee-occupied board seats would be needed to ensure the generation of adequate disincentives. Full parity or one-third codetermination would likely be required.¹⁵¹

The authors primarily refer to instances of excessive corporate influence in the United States. However, the underlying rationale is likely applicable to other Western

145 Dammann and Eidenmüller, above n 43, at 910; Dammann and Edenmueller, above n 15, at 12 – 13.

146 Dammann and Edenmueller, above n 15, at 7.

147 At 41.

148 At 43.

149 At 43.

150 At 43.

151 At 66 – 67.

democracies. Part VIII will assess the potential utility of this theoretical benefit in the New Zealand context.

4 *Concluding analysis*

There are some valuable non-economic benefits associated with codetermination. The literature is still developing, and would benefit from further empirical studies. However, there is a sound basis from which to conclude that the model can generate attractive results for companies, both economic and non-economic. As such, it is argued that those intent on stakeholder-centric corporate governance reform should give codetermination ample consideration.

IV Codetermination Amid the Stakeholder Approach

Turning from codetermination's consequences to its position within broader company law scholarship, this Part will explore the model's utility in the context of stakeholder theory. While many European countries have long emphasised the importance of stakeholders in corporate governance, Anglo-American states have favoured the shareholder-primacy approach, at least in the past four decades. However, over the past decade, various challenges have been made to the shareholder-centric orthodoxy, primarily in the form of the "stakeholder approach". While the stakeholder approach has garnered at least symbolic support from prominent actors, it arguably lacks teeth and requires more concrete mandates to be successful.

With reference to the origins of shareholder primacy, this Part will briefly canvas the rise of stakeholderism and suggest how codetermination could resolve the flaws associated with the stakeholder approach.

A Shareholder Primacy

The orthodox law and economics theory of shareholder primacy dictates that maximising shareholder value is the corporation's central purpose.¹⁵² The directors derive their powers from the shareholders, are their agents and must act in their interests when making corporate decisions.¹⁵³

152 See generally Milton Friedman *Capitalism and Freedom* (40th ed, University of Chicago Press, Chicago, 1962); and Jensen and Meckling, above n 10.

153 See Michael C Jensen and William H Meckling "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure" (1976) 3 J Fin Econ 305 and Stephen M Bainbridge "Director Versus Shareholder Primacy in New Zealand Company Law as Compared to USA Corporate Law" (2014) 14 UCLA School of Law, Law and Economics Series 1 at 1.

Despite its current prominence, shareholder primacy has not always dominated corporate governance structures in Anglo-American states. In the mid-20th century, US companies were controlled by professional managers, boards served as public representatives and shareholders were relegated to the background.¹⁵⁴ More broadly, one-third of employees in the United States were represented by unions, their growth having been fuelled by the New Deal reforms of the 1930s.¹⁵⁵ Management was largely unconstrained by board members and afforded a significant degree of agency.¹⁵⁶ However, such norms were inconsistent with statutory underpinnings of company structure in the United States and soon gave way to the shareholder primacy model pioneered by law and economics scholars.¹⁵⁷ By 1997, the shareholder primacy approach was firmly the default, with the Business Roundtable then declaring that the "paramount duty of management and boards of directors is to the corporation's stockholders".¹⁵⁸

B The Rise of the Stakeholder Approach

In recent years, powerful actors have seemingly embraced a more stakeholder-orientated corporate philosophy. For example, in its 2019 "Statement on the Purpose of a Corporation", the Business Roundtable appeared to wholeheartedly adopt a stakeholder-centric approach, stating that companies must "deliver value" to their stakeholders to foster future success.¹⁵⁹

With its inherent emphasis on worker voice, codetermination constitutes a direct challenge to shareholder primacy norms. However, there is a distinct difference between symbolic statements intended to signal a philosophical shift toward a stakeholder approach and models, like codetermination, that mandate stakeholder participation at the highest levels of corporate governance. As such, this paper suggests that codetermination may serve as a partial answer to the issue of empty stakeholderism.

C Codetermination: A More Concrete Response to Shareholderism?

The stakeholder approach emphasises the corporation's responsibility to wider stakeholders, including employees, creditors, suppliers, customers, the environment and

154 Bainbridge, above n 153, at 3.

155 Hayden and Bodie, above n 7, at 322.

156 Bainbridge, above n 153, at 2.

157 At 3.

158 Business Roundtable *Statement on Corporate Governance* (September 1997). For a summary of the rise of shareholder primacy see Lynn Stout "New Thinking on 'Shareholder Primacy'"(2012) 2 *Account Econ Law* 1 at 2 – 3.

159 See Business Roundtable, above n 8.

the local community.¹⁶⁰ However, the effectiveness of the stakeholder model can be inherently limited where directors are forced to make trade-offs between the interests of various stakeholders when making decisions.¹⁶¹

Section 172 of the United Kingdom's 2006 Companies Act encapsulates the stakeholder approach. The section¹⁶² requires directors, when promoting the success of the company, to have regard to "the interests of the company's employees... the need to foster the company's business relationships with suppliers, customers and others, the impact of the company's operations on the community and the environment" and more.¹⁶³ In New Zealand, the Companies (Directors' Duties) Amendment Bill merely states that directors "may (emphasis added) take into account recognised environmental, social and governance factors" when determining the best interests of the company.¹⁶⁴ The New Zealand Bill is even less prescriptive than the United Kingdom equivalent as it stops short of imposing positive duties to consider stakeholder interests.

Despite their underlying intent, such provisions are unlikely to meaningfully elevate stakeholder interests in practice. Indeed, many a scholar has criticised the United Kingdom's provision on this basis, since it mandates the consideration of stakeholder interests insofar as shareholder interests are not impinged upon.¹⁶⁵ Indeed, Andrew Keay and Taskin Iqbal's empirical research on s 172's effects on the reporting of large listed companies affirmed that the provision had little impact – operationally and in company

160 Silvia Ayuso and others "Maximising Stakeholders' Interests: An Empirical Analysis of the Stakeholder Approach to Corporate Governance" (2019) 53 *Bus Soc* 414 at 414; Jean Tirole "Corporate Governance" 69 *Econometrica* 1 at 24; Stephen M Bainbridge "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 *Northwest Univ Law Rev* 547 at 549.

161 See Lucian A Bebchuk and Roberto Tallarita "The Illusory Promise of Stakeholder Governance" (2020) 106 *Cornell L Rev* 91 at 121. and Matteo Gatti and Chrystin Ondersma "Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera" (2020) 46 *J Corp L* 1 at 68.

162 Section 172 of the Companies Act 2006 is, for all intents and purposes, the equivalent of New Zealand's s 131 of the Companies Act 1993.

163 See Companies Act 2006, s 172(1)(b) – (f) (UK).

164 Companies (Directors Duties) Amendment Bill 2021 (75-1), cl 4(5).

165 See for example Charlotte Villiers "Narrative Reporting and Enlightened Shareholder Value Under the Companies Act 2006" in John Loughrey (ed) *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar Publishing, Cheltenham, 2012) 97 at 102 – 108; Richard Williams "Enlightened Shareholder Value in UK Company Law" (2012) 35 *UNSWLJ* 360 at 376; and Andrew Keay "Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach" (2007) 29 *Sydney L Rev* 577 at 611.

reporting.¹⁶⁶ Outside of the United Kingdom, Bebchuk, Kastiel and Tallarita's empirical study of past choices made by directors under new stakeholderism rules in the United States found that directors did not tend to exercise their discretion in favour of stakeholders.¹⁶⁷

Fatally, the directorial discretion approach simply requires directors to "consider" various factors, thereby leaving weighing up of relevant interests solely reliant on the directorial discretion of corporate leaders who may choose to adhere to shareholder interests regardless.¹⁶⁸ As canvassed by Bebchuk and Tallarita, even with a seemingly renewed sense of corporate purpose under the stakeholder approach, there still exist overwhelming incentives for directors to only support stakeholder objectives so long as doing so supports shareholders.¹⁶⁹ Similarly, Gatti and Ondersma argue that even where a stakeholder approach is legislatively mandated, directors alone cannot be trusted to consistently and meaningfully consider all stakeholders' interests.¹⁷⁰ Indeed, they assert that relying on directors to do so is a "perilous bet".¹⁷¹ Accordingly, it has been argued that the stakeholder approach is no more than a symbolic façade that could thwart more beneficial external reform.¹⁷²

Conversely, codetermination establishes a concrete model whereby a key stakeholder, the company's employees, are afforded a voice in decision-making. As asserted by Gotti and

166 Andrew Keay and Taskin Iqbal "The Impact of Enlightened Shareholder Value" (2019) 4 J Bus Law 304 at 327 – 328.

167 Consistency statutes adopted by over 30 US states give directors the ability to consider stakeholder interests when making decisions. Bebchuk, Kastiel and Tallarita found that directors often gave little weight to stakeholder interests. See Lucian A Bebchuk, Kobi Kastiel and Roberto Tallarita "For Whom the Corporate Leaders Bargain" (2021) 94 South Calif Law Rev 1467 at 1536 for an overview of the authors' findings.

168 Bebchuk and Tallarita, above n 161, at 122 – 123. Bebchuk and Tallarita's empirical study of past choices made by directors under stakeholderism rules show that directors will not tend to exercise their discretion in favour of stakeholders. See Bebchuk and Tallarita, above n 161, at 156 for the authors' discussion of their findings.

169 Such incentives include executive compensation and career prospects, both of which are enhanced through adherence to shareholder-value maximisation strategies. See Bebchuk and Tallarita, above n 161, at 148 – 155; and Stephen N Kaplan and Bernadette A Minton "How Has CEO Turnover Changed?" (2012) 12 Intl Rev Fin 57 at 58.

170 Gatti and Ondersma, above n 161, at 73.

171 At 73.

172 Gatti and Ondersma, above n 161, at 73; Bebchuk and Tallarita, above n 161, at 171. Specifically, Bebchuk and Tallarita contend that relying on shareholder-appointed corporate leaders alone could divert attention away from more effective reforms that "preclude or discourage" the imposition of negative externalities on stakeholders. See Bebchuk and Tallarita, above n 161, at 171 – 172.

Ondersma, any proposal purporting to reshape corporate governance norms and shift power to weaker constituents must include mandates and enforcement mechanisms.¹⁷³ Under codetermination, even where employee representatives are outvoted, they are at least afforded a defined role in corporate governance, one which would unlikely materialise consistently in the absence of legislatively mandated control rights. Where employee representatives are present, boards may be disincentivised from pursuing corporate strategies detrimental to employees.¹⁷⁴ Crucially, codetermination can uplift worker interests and, as was found to be the case within codetermined Swedish firms, promote constructive collaboration between executives and a key stakeholder – employees.¹⁷⁵

Codetermination does not resolve all the impediments associated with the stakeholder approach. Even with employee-elected directors present on boards, trade-offs between the interests of various stakeholders can occur. Nevertheless, it is argued that since codetermination ensures the presence of crucial stakeholder representatives in the decision-making process, it could empower employees more robustly than under the directorial discretion approach.

V Consideration of Codetermination in Anglo-American Jurisdictions

Despite codetermination being so far confined to the European continent, it has not escaped those in Anglo-American states. Academics and policymakers in the United States, United Kingdom, Canada and Australia have recently considered the model's attractive features, indicating a growing interest in the model as an alternative corporate governance measure.

A United States of America

The United States legislative landscape recently saw murmurings of codetermination in the form of ambitious proposals brought by Democratic Senators Elizabeth Warren and Bernie Sanders.¹⁷⁶ While neither Warren's Bill nor Sanders' proposal gained significant traction, they constitute valuable examples of policymakers contemplating codetermination outside Europe.

173 Matteo Gatti and Chrystin Ondersma, above n 161, at 70. While Gatti and Ondersma do not explicitly endorse or reject codetermination as a means to uplift such constituencies, they do note that codetermination could hold the most promise for employees. See Gatti and Ondersma, above n 161, at 71.

174 See Dammann and Eidenmüller, above n 15, at 43 where the authors discuss how such disincentives arise in the context of lobbying-related decisions.

175 Levinson, above n 56, at 460.

176 See Elizabeth Warren "Accountable Capitalism Act" <www.warren.senate.gov> and Bernie Sanders "Corporate Accountability and Democracy" <www.berniesanders.com>

In August 2018, Senator Warren introduced the Accountable Capitalism Bill. The Bill would have required companies engaging in interstate commerce and valued at over 1 billion to have 40 per cent of their boards elected by employees.¹⁷⁷ The Bill would have also established a mandatory federal corporate charter for all companies above the aforementioned valuation threshold. Senator Sanders proposed that publicly traded corporations and those with assets or revenues of \$100 million must ensure that employees elect 45 per cent of corporate directors.¹⁷⁸

Although these proposals align closely with Germany's 1976 Act, they are not identical. Senator Warren's approach would see a comparably limited number of companies become subject to codetermination rules, and these companies comprise a slightly smaller combined market capitalisation compared to that in Germany.¹⁷⁹ While Sanders' approach gave slightly less voter power to employees than that in Germany, it was more far-reaching than Germany's 1976 Act, as all public corporations in the United States would have come within its scope.¹⁸⁰ Additionally, if realised, the proposal would have provided for employee ownership of at least 20 per cent of companies worth over \$100 million, thereby establishing a more expansive worker empowerment regime than in Germany.¹⁸¹

Unsurprisingly, many commentators were resistant to these reforms, with one academic stating that Warren's Bill would "destroy capitalism" and "channel Karl Marx".¹⁸² However, others lauded Warren's and Sanders' calls for significant corporate reform amid record income inequality and palpable corporate influence in US policymaking.¹⁸³ Ultimately, neither candidate succeeded in their bid for the Democratic nomination in 2020's presidential election, and the political fervour for such reform quickly dissipated.

B The United Kingdom

Support for codetermination has occasionally arisen in the United Kingdom. One can find the earliest examples of codetermination in the Oxford University Act 1884 and the Cambridge University Act 1856, which required that their university councils be partly

177 See Accountable Capitalism Act (115th Congress, 2017-2018) (US).

178 Sanders, above n 176.

179 Dammann and Eidenmüller, above n 43, at 886.

180 Sanders, above n 176.

181 Sanders, above n 176.

182 See Interview with Jeffrey Miron, Harvard Professor (CNBC, Mad Money, 16 August 2018) and Interview with BET founder Bob Johnsen and former Medtronic CEO Bill George (CNBC, Mad Money, 16 August 2018).

183 See for example Robert Hockett "Bernie Sanders on Corporate Democracy" (14 October 2019) Forbes <www.forbes.com>

comprised of persons representative of and elected by students and staff.¹⁸⁴ In private enterprise, the Port of London Act 1908 mandated labour representation on the Port Authority's board until its repeal in 1968.¹⁸⁵

Codetermination did not receive considerable attention in the United Kingdom until the European Commission released its Draft Fifth Company Law Directive in 1975 and Germany enacted its 1976 Codetermination Act. This Draft Directive sought to harmonise corporate governance law across the European Union and mandate board-level codetermination for large companies.¹⁸⁶ In response to ongoing industrial disputes and the Draft Directive's release, Harold Wilson's Labour government commissioned the Committee of Inquiry on Industrial Democracy to investigate labour representation, culminating in the 1977 Bullock Report.¹⁸⁷ The Majority of the Committee considered the presence of worker directors on the boards of large companies was a natural response to post-war economic changes and unrealised worker potential.¹⁸⁸ The Report's terms of reference expounded the "the need for a radical extension of industrial democracy in the control of companies by means of representation on boards of directors."¹⁸⁹ However, such reform was never realised, with the United Kingdom slipping into the 1978 – 1979 winter of discontent soon after the Report's release and Thatcherism solidifying its hold on domestic policy thereafter.¹⁹⁰

Surprisingly, it was the United Kingdom's Conservative then-Prime Ministerial candidate Theresa May who most recently called for a re-examination of company board structures. At a 2016 conference, May advocated for adopting European-style board-level codetermination requirements for large companies.¹⁹¹ In criticising the general lack of scrutiny exercised by non-executive directors, May stated, "we're going to change that system – and we're going to have not just consumers represented on company boards, but

184 See Oxford University Act 1854 (UK), s 6 ; Cambridge University Act 1856 (UK), s 6, 12.

185 Port of London Act 1908 (UK), s 1(7).

186 See Commission of the European Communities *Employee Participation and Company Structure in the European Community* (11 December 1975).

187 Adrian Williamson "The Bullock Report on Industrial Democracy and the Post-War Consensus" (2016) 30 *Contemp Br Hist* 119 at 120.

188 Committee of Inquiry into Industrial Democracy *Report of the Committee of Inquiry on Industrial Democracy* (Cmnd 6706, January 1977) at [9] - [12].

189 At [9].

190 See generally Williamson, above n 189, at 127 and 135 – 136 for an overview of the Conservative backlash to Bullock.

191 Habersack, above n 44.

workers as well."¹⁹² However, such proposals did not materialise during May's tenure as Prime Minister, and Boris Johnson has been silent on the matter.

C Canada

Codetermination has rarely come to the fore in Canadian politics. However, Canada's 1971 Robert Dickerson Committee, which produced the Canada Business Corporations Act and strongly advocated for the enshrinement of the stakeholder approach in legislation, examined the viability of non-shareholder empowerment through the appointment of representative directors.¹⁹³ Ultimately, the Committee dismissed the viability of codetermination on the basis that establishing the electorate would be too cumbersome a task.¹⁹⁴ However, this contention appears not to have impeded any of the jurisdictions with codetermination laws, as restricting the electorate to the company's employees remains the default approach.

More recently, the 2021 Canadian federal election saw then-Conservative Party leader Erin O'Toole promise to ensure federally regulated companies had elected worker representatives on their boards should he be voted Prime Minister.¹⁹⁵ However, O'Toole lost to Justin Trudeau in the 2021 federal election, and the proposal never materialised.¹⁹⁶

D Australia

Codetermination has recently received some attention in Australia. In 2018, the Australian Council of Trade Unions passed a motion at its national congress advocating for a federal policy to install employees on company and government-managed boards.¹⁹⁷ Australia's Labor party has also indicated a willingness to consider international codetermination models and the viability of their emulation in the Australian corporate context ahead of the 2019 election.¹⁹⁸

192 BBC "Theresa May Vows to Put Conservatives 'At Service' of Working People" (11 July 2016) <www.bbc.com>

193 P M Vasudev "Corporate Stakeholders in New Zealand – The Present, and Possibilities for the Future" (2012) 18 NZBLQ 1 at 14.

194 Robert Dickerson, John Howard and Leon Getz (Dickerson Committee) *Proposals for a New Business Corporations Law for Canada* (Information Canada, Ottawa, 1971) at 9.

195 Conservative "Conservative Leader Erin O'Toole To Ensure Canadian Workers Have Their Voices Heard" (23 August 2021) <www.conservative.ca>

196 The Guardian "Canada Election 2021: Full Results" (21 September 2021) <www.theguardian.com>

197 Australian Council of Trade Unions "Worker Representation on Boards (Our Economic Future)" (Motion at National Congress, 18 July 2018).

198 Australian Labour Party "Our Plan" (2018) <www.alp.org.au>

In sum, while codetermination has momentarily captured attention in a handful of non-European jurisdictions, it is yet to be seriously considered in most Anglo-American states. This is likely due to a range of factors, including a lack of political will, the persistence of the shareholder primacy model in these jurisdictions and potential pushback from business leaders. Additionally, given the urgency of recent public health crises, climate-change-related concerns and geopolitical tensions,¹⁹⁹ codetermination reform is unlikely viewed as particularly pressing an item on the political agenda. In the absence of widespread enthusiasm for such reform, it is perhaps unsurprising that these proposals eventually receded into the political backwaters.

Nevertheless, this part has attempted to convey that while unusual to some, codetermination is not a new concept in the Anglo-American world, and those intent on exploring alternative forms of corporate governance have pushed for its consideration. It is apparent that if codetermination is to be successfully introduced in New Zealand or other Anglo-American states, there must be sufficient political impetus to bring the reform to fruition.

VI A Case Study: Air New Zealand's High Performance Engagement Model

Despite having received limited political attention in New Zealand, codetermination's philosophical intent is not entirely absent from local corporate governance. The fallout from the Global Financial Crisis prompted some local industry leaders to reconsider their corporate structures, with companies such as KiwiRail and Air New Zealand pursuing the "high-performance high engagement" (HPHE) model,²⁰⁰ a non-board policy that seeks to boost worker participation through engagement with workers and unions.²⁰¹ While the model cannot be directly equated to codetermination as it does not allocate board seats to employees, they both feature the same fundamental emphasis on worker empowerment in support of firm growth.

199 Here, this paper refers to recent crises such as the COVID-19 pandemic, climate-change-related weather events and the war in Ukraine.

200 The High-Performance High-Engagement model is not explicitly associated with the stakeholder movement, and has primarily been deployed in the New Zealand context only. The model has also been embraced by the Ministry of Health (see Ministry of Health "High Performance High Engagement" <www.health.govt.nz>).

201 See New Zealand Herald "High Performance Depends on High Engagement" (6 April 2011) <www.nzherald.co.nz>; Fiona Rotherham "Air NZ and Unions Collaborate on High Performance Engagement" (23 July 2015) National Business Review <www.nbr.co.nz> ; KiwiRail *Building a Sustainable Future* (Statement of Corporate Intent 2022 – 2024) at 19. See also Employment Relations Centre "What is High Performance through Engagement?" <www.employmentrelations.co.nz>

In 2015, Air New Zealand adopted its High-Performance Engagement model to facilitate greater worker involvement in company decision-making. The model features a charter designed by the company and the relevant unions, stating that the parties are to facilitate the "direct and substantive involvement" of workers in decision-making processes and foster collaborative relationships.²⁰² High Performance Engagement was afforded a somewhat aspirational definition, with the charter stating that the model prescribes "a way of working...[involving] employees, management and unions working ... to achieve mutually beneficial outcomes." However, the charter stops short of allocating board seats for employee or union representatives, nor does it dictate formal processes by which employees are to be involved in decision-making.²⁰³

Despite such intentions, a 2019 review conducted by the union found workers did not believe the partnership was giving effect to its promises.²⁰⁴ While the company has not released specifics regarding the model's implementation, union members Newman and Freilekhman have asserted that the charter's lack of specificity and enforceability resulted in a lack of consultation between Air New Zealand and E Tū, the nation's largest aviation union, during the height of the COVID-19 pandemic, which ultimately rendered employees without a voice during the crisis period.²⁰⁵ Additionally, Newman and Freilekhman have suggested that High Performance Engagement was adopted to reduce costs by avoiding adversarial relations with unions, rather than to genuinely empower workers.²⁰⁶

Regardless of the precise intentions behind the model's introduction, the Air New Zealand example illustrates that employee representation partnerships can have lacklustre effects if unsupported by concrete mechanisms to ensure participation in decision-making. As such, if employees are to be given a meaningful voice in the governance of companies like Air New Zealand, it likely must be mandated rather than encouraged.

It could be argued the general lack of pre-existing codetermination structures in New Zealand suggests that since companies have not embraced codetermination organically, the model is unlikely to be a useful fit. However, as discussed in Part III, Hayden and Bodie

202 Annie Newman and Irina Freilekhman "A Case for Regulated Industrial Democracy post COVID-19" (2020) 45 NZJER 70 at 71.

203 Air New Zealand *Air New Zealand High Performance Engagement Charter* (2015).

204 Newman and Freilekhman, above n 202, at 71.

205 At 71.

206 At 72.

and Renaud have noted individual companies may be deterred from embracing codetermination in the absence of legislation for a range of reasons.²⁰⁷

While codetermination-esque arrangements have not been voluntarily adopted by scores of prominent New Zealand companies, the Air New Zealand example illustrates that a leading domestic company has been independently willing to implement a model that – in theory – uplifts workers and involves them in decision-making. The next query is whether the model could co-exist amid current industrial relations arrangements in New Zealand.

VII Ascertaining Compatibility: An Overview of New Zealand Industrial Relations

Codetermination has been shown to work effectively in various European states. However, whether the model could be successfully transplanted elsewhere remains to be seen. As discussed in Part II, German and Swedish codetermination form part of a broader industrial relations system that emphasises worker empowerment. Indeed, codetermination is said to be most effective when implemented in states already supportive of employee representation, such as those with strong union presence and collective bargaining frameworks.²⁰⁸ Nevertheless, it is unlikely a country would need to directly emulate the extent of unionisation and collective agreement coverage present in Germany and Sweden, for example, for the model's benefits to materialise.

Despite an absence of works councils, New Zealand has a broader legislative architecture that empowers workers, although to a lesser extent than in Germany - unionisation and collective bargaining are on the rise, and the Fair Pay Agreement reform is underway.

A complete analysis of the potential impediments and harmonious preconditions associated with the introduction of codetermination in New Zealand is outside this paper's scope. However, this Part will explore the similarities, or lack thereof, to the German and Swedish examples with reference to New Zealand's unique industrial relations context. The limited utility of such similarities in realising the benefits of codetermination will also be critically analysed.

207 Hayden and Bodie, above n 7, at 344; Renaud, above n 92, at 691.

208 Josh Child "Organisation Participation in Post-COVID Society – Its Contributing and Enabling Conditions" (2021) 36 Int Rev Appl Econ 117 at 134; Annie Newman and Irina Freilekhman "A Case for Regulated Industrial Democracy post COVID-19" (2020) 45 NZJER 70 at 75.

A Unionisation and Collective Bargaining in New Zealand: A Brief History

1 Collective bargaining and unionisation from 1984 – present

From 1894 till the 1990s, New Zealand industrial relations featured high union membership rates, highly centralised bargaining and a compulsory arbitration system.²⁰⁹ However, the 1990s saw the decline of unions in many industrialised societies, and New Zealand was no exception.²¹⁰ Furthermore, the enactment of the Employment Contracts Act in 1991 radically altered New Zealand's collective bargaining framework. The Act decentralised New Zealand's industrial relations system, emphasising individual employment contracts rather than pattern bargaining at the industry level.²¹¹ Union membership was rendered voluntary, and the benefits associated with compulsory arbitration diminished.²¹² A mere four years after the Act's passing, workers covered by collective agreements dropped from three-fifths of the workforce to three-tenths.²¹³ In the years following, the collective agreement coverage of private sector workers reduced dramatically compared to those in the public sector.²¹⁴

While the Employment Relations Act 2000 purported to support the negotiation of collective agreements, it did not achieve this goal. The share of the workforce covered by collective agreements has continued to fall, with only 10.2 per cent of private sector workers covered by such arrangements in 2015.²¹⁵ In contrast, collective agreements covered 50.2 per cent of German workers in 2015, and 88 per cent of Swedish workers in 2020.²¹⁶

209 Erling Rasmussen *Employment Relationships: Workers, Unions and Employers in New Zealand* (eBook edition, Auckland University Press, Auckland, 2010) at "4".

210 See Rasmussen, above n 209, at "4" and Andy Charlwood and Peter Haynes "Union Membership Decline in New Zealand 1990 – 2002" (2008) 50 *J Ind Relat* 87 at 90 – 92.

211 See Stephen Blumenfeld and Noelle Donnelly "Collective Bargaining Across Three Decades: Lessons from CLEW's Collective Agreement Database" in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976 – 2016* (Victoria University Press, Wellington, 2018) at 201.

212 Charlwood and Haynes, above n 51, at 92.

213 Blumenfeld and Donnelly, above n 82, at 201.

214 At 202.

215 At 202.

216 International Labour Organisation *Collective Bargaining in Germany and Ukraine: Lessons Learned and Recommendations for Ukraine* (2021) At 16.

Despite the decline in union membership rates over the past three decades, New Zealand's union statistics are relatively high compared to other OECD countries.²¹⁷ For example, New Zealand has higher union coverage rates than France, Switzerland, Spain and Portugal.²¹⁸ As of 2021, unions represent 17 per cent of New Zealand's workforce,²¹⁹ compared to 13.7 per cent of Australia's and 10.3 per cent of the United States'.²²⁰ New Zealand coverage is slightly higher than Germany's, which sat at 16.3 per cent in 2019.²²¹ However, New Zealand's figures are predominantly comprised of public sector workers - 60 per cent of unionised workers were employed in the public sector in 2019.²²² Only 10.3 per cent of New Zealand private sector workers were unionised in 2017, a figure slightly higher than that in Australia and the United States.²²³

1 The Fair Pay Agreements regime

In May 2021, the Labour-led Government announced its plans to introduce the Fair Pay Agreements regime, which, when enacted,²²⁴ will constitute the most significant structural shift in New Zealand industrial relations since the 1990s.²²⁵ Fair Pay Agreements (FPAs) are "sector-wide collective agreements that impose minimum conditions for all employees within an industry or occupation."²²⁶ FPAs are intended to complement existing collective

217 For example, New Zealand has higher union coverage rates than France, Switzerland, and Spain See OECD Statistics "Trade Union Dataset" <www.stats.oecd.org>

218 Above n 217.

219 PricewaterhouseCoopers *Fair Pay Agreements: What Will They Mean For New Zealand Businesses?* (August 2021) at 5.

220 OECD Statistics, above n 217.

221 Despite having high collective bargaining coverage rates, union membership is comparably low in Germany due to its voluntary nature and the greater emphasis placed on works councils. See Rogers and Streeck, above n 27, at 55 and Bernd Fitzenberger, Karsten Kohn and Qingwei Wang *The Erosion of Union Membership in Germany: Determinants, Densities, Decompositions* (Institute of Labour Economics, IZA Discussion Paper No. 2193, July 2006).

222 Centre for Labour, Employment and Work "Union Membership in New Zealand Shows Further Growth" Victoria University of Wellington <www.wgtn.ac.nz>

223 Sue Ryall and Dr Stephen Blumenfeld *Unions and Union Membership in New Zealand – Report on 2017 Survey* (Centre for Labour, Employment and Work - Victoria University of Wellington, 2017) at 8.

224 This paper uses the word "when" rather than "if" since the Bill will likely be passed by party vote and Labour holds a clear majority in the House.

225 PricewaterhouseCoopers, above n 88, at 2.

226 At 3.

agreements at the enterprise level and individual employment agreements while making it easier to instigate sectoral negotiations.²²⁷

While it is difficult to predict the precise impact of FPAs following the Bill's enactment, collective bargaining will likely become more prevalent across various sectors, at least in comparison to current levels.²²⁸ If this occurs, New Zealand's industrial relations landscape will be aligned more closely with that present in Germany, Austria and the codetermined Nordic countries, all of which have strong industry-level collective bargaining regimes.²²⁹

B Analysis

While there are some key differences between New Zealand's industrial relations system and that in Sweden and Germany, there arguably exists a sufficient framework to support the imposition of codetermination. Unions are prevalent in some facets of the private sector, and collective bargaining will soon receive stronger legislative backing. Additionally, a lack of union coverage in some sectors may generate a greater need for codetermination.

1 Union membership and collective bargaining

(a) Union membership

New Zealand's union coverage statistics are relatively low compared to that in certain European jurisdictions, such as the codetermined states of Sweden, Denmark, Finland and Norway,²³⁰ and membership remains a predominantly public sector phenomenon. While New Zealand's statistics are relatively similar to that in Germany and higher than that in

227 See New Zealand Parliament "Bill to Enable Fair Pay Agreements" (4 May 2022) <www.parliament.nz> ; Fair Pay Agreement Working Group 2018 *Fair Pay Agreements: Supporting Workers and Firms to Drive Productivity Growth and Share the Benefits* (December 2018).

228 It is noted that should the National party win the 2023 election, the survival of the Fair Pay Agreement regime could be jeopardised. See Anneke Smith "Fair Pay Agreements Bill Flies Through First Reading" (5 April 2022) Radio New Zealand <www.rnz.co.nz> where Paul Goldsmith, National's workplace relations, stated that the party would repeal the legislation. However, since, at the time of writing, the 2023 election results cannot be reliably predicted at the time of writing, nor whether National would follow through with repealing the legislation, this paper will assume that the regime will persist.

229 Jäger, Noy and Schoefer, above n 23, at 5.

230 OECD Statistics, above n 217.

France and Hungary²³¹ – two other codetermined states – these figures may be explained or mitigated by the prominence of works councils in these jurisdictions.²³²

Noting the dominant role of German unions in organising codetermination arrangements, Jäger, Noy and Schoefer have cited low union influence in the United States as one reason why codetermination may be ineffective in that jurisdiction.²³³ While New Zealand has a higher percentage of unionised private-sector workers than the United States, if one were to measure codetermination's likely success solely based on a jurisdiction's union membership rates, it would seem New Zealand does not fare exceedingly well.

Despite differences in coverage to that in Europe, there arguably exists a sufficient union infrastructure to support any imposition of codetermination in New Zealand. Union membership rates have increased since 2018, reversing a decades-long period of decline.²³⁴ In March 2021, there were 136 registered unions in New Zealand, an increase of 5 per cent from the year prior.²³⁵ Certain industries, such as aviation, manufacturing (encompassing the food and beverage subsector) and postal and warehousing services, are, comparatively, highly unionised.²³⁶ Accordingly, prominent companies in such industries, such as Air New Zealand, AFFCO Holdings and Mainfreight, could benefit from the involvement of union leaders in developing codetermination arrangements.

In any event, high union coverage may not be a prerequisite to the success of codetermination, as a lack of extensive unionisation across New Zealand's private sector might actually enhance the model's beneficial effects. Even in industries with low union coverage, such as mining, agriculture and construction,²³⁷ the presence of employee representatives on the boards of large corporates could mitigate the lack of union-related

231 Above n 217.

232 See Rogers and Streeck, above n 27, at 55. For an overview of the nature of works councils in France and Hungary Worker Participation EU, above n 31, at "France" and "Hungary".

233 Jäger, Noy and Schoefer, above n 4, at 21.

234 Centre for Labour, Employment and Work, above n 199, at 6.

235 New Zealand Companies Office "Union Membership Return Report 2021" <www.companiesoffice.govt.nz>

236 Centre for Labour, Employment and Work, above n 199, at 6. Prominent unions in these sectors include E Tū (encompassing manufacturing, food, aviation, infrastructure workers, among others), the New Zealand Air Line Pilots' Association and FIRST Union (logistics and warehousing). See generally NZCTU "Find Your Union" <www.union.org.nz>, which contains an interactive tool that matches work areas to relevant New Zealand unions.

237 For data on union membership across industry sectors, see Ryall and Blumenfeld, above n 200, at 6.

representation in that industry. Codetermination requirements for companies in such sectors could serve as a valuable internal mechanism to prevent adversarial relations between employers and employees. Additionally, company employees who previously did not have recourse to an influential union body could relay concerns or suggestions to their elected employee representatives, thereby generating previously non-existent communication channels. As such, a lack of high union coverage may not spell defeat for any codetermination proposal in New Zealand – in fact, it could further highlight the need for board-level worker representation.

(b) Collective bargaining

As discussed in Part II, board-level employee representation can theoretically streamline communications during the collective bargaining process, thereby preventing strikes and increasing firm efficiency.²³⁸ However, as noted by Dammann and Eidenmüller, the likelihood of this benefit materialising depends on the prominence of collective bargaining in a country's economy.²³⁹

New Zealand's collective bargaining rates pale compared to that of Germany and Sweden. This may change following the enactment of the Fair Pay Agreements Bill, which will facilitate sector-wide bargaining and likely increase collective agreement coverage. However, it is unlikely that even under the FPA regime, rates of collective bargaining in New Zealand would grow to rival that of Germany and Sweden, at least in the short term. FPAs would need to become widespread across New Zealand's private sector to emulate the coverage rates seen in those jurisdictions. Instead, it is more likely FPAs will first be sought within specified low-paying sectors encompassing a minority of private sector workers.²⁴⁰ However, given collective agreement coverage will almost certainly increase under the new regime, it is more likely that codetermination's efficiency-related benefits could materialise should the model be introduced.

2 *Absolute compatibility – required?*

Despite the existence of a general industrial relations infrastructure, New Zealand's unionisation rates and collective agreement coverage are substantially lower than that of Germany and Sweden. Does this spell the end of any realistic consideration of codetermination in New Zealand? Not necessarily.

238 Hansmann, above n 88, at 1766.

239 Dammann and Eidenmüller, above n 43, at 902.

240 New Zealand unions have prioritised seeking Fair Pay Agreements for cleaners, security guards and supermarket workers. See Henry Cooke "Cleaners, Security and Supermarkets Priority for Unions for Sector-wide Fair Pay Agreements" (25 June 2019) Stuff <www.stuff.co.nz>

While European states tend to place more emphasis on worker empowerment than their Anglo-American counterparts, the general contours of New Zealand's industrial relations are not that dissimilar to that in codetermined European countries. Union membership is rising, and the FPA regime is poised to boost collective bargaining coverage. Additionally, Sweden largely phased out works councils after introducing codetermination legislation in 1973, indicating that works councils are not a prerequisite for a country to benefit from codetermination. Works councils are also absent or have minimal influence in Finland, Denmark and Norway, three other codetermined Nordic states.²⁴¹

Indeed, codetermination has proliferated across many European countries, all of which have diverse industrial relations landscapes with varying emphasis placed on unions, collective bargaining arrangements and general employee upliftment.²⁴² It would certainly be useful if New Zealand's industrial affairs mirrored that of Sweden and Germany. However, it is unlikely industrial relations structures identical to that in Sweden, Germany or indeed any codetermined state are a non-negotiable precondition to the model's success, and no empirical evidence has yet indicated as such. Additionally, some of the aforementioned benefits, such as the development of firm-specific skills and promotion of employee interests, could materialise in a company without external unions and collective agreements. This is because such benefits are inherently internal to a company and do not rely on the presence of outside bodies. Moreover, as suggested above, industries with low unionisation rates may further highlight the need for codetermination, and see the model succeed independently of unions.

VIII Codetermination as a Response to New Zealand-Specific Challenges

As canvassed in Part III, various economic and non-economic benefits, both theoretical and empirical, have been associated with codetermination. This Part will consider the extent to which certain benefits could address, improve or mitigate contemporary challenges in New Zealand. Particular attention will be paid to the ability of codetermination to encourage employee retention through the honing of firm-specific

241 See country-specific worker participation information at Workplace Participation EU "National Industrial Relations" <www.worker-participation.eu>

242 Industrial relations systems are by no means uniform across European states. For example, France, a country with mandatory codetermination requirements for certain companies (See Udo Rehfeldt *Board-Level Representation in France: Recent Developments and Debates* (Institute for Codetermination and Corporate Governance, Mitbestimmungsreport no 53, 2019) at 3), had union density rates of only 8.8 per cent in 2018. Hungary and the Czech Republic also have low coverage rates. See OECD Statistics, above n 217.

skills, increase firm efficiency through the avoidance of strike action and strengthen democratic institutions through curbing corporate lobbying practices.

A Information-sharing Between Employees and Employers

Hanssman and Fauver and Fuerst have contended that codetermination can result in the avoidance of strike action by improving communication channels between employees, union representatives and company executives.²⁴³ Assuming the viability of this benefit, this subpart will consider the extent to which it could assist industrial relations in contemporary New Zealand.

Under the Employment Relations Act 2000, workers can lawfully strike when their union is actively negotiating a collective agreement or there is a serious health and safety issue.²⁴⁴ New Zealand has a long history of strike action²⁴⁵, and strikes remain somewhat ubiquitous in the 21st century.²⁴⁶

While strike action has ebbed and flowed since the early 2000s, the years spanning 2018 – 2020 saw a sharp spike in work stoppages.²⁴⁷ 2018 saw 143 stoppages involving 11,109 employees and 192 lost work days, while 2019 saw 158 stoppages involving 53,752 employees, 142,651 lost work hours and an estimated \$9.78 million in lost wages and salaries.²⁴⁸

From 2018 – 2020, the Ministry of Business, Innovation and Employment did not release precise data on the proportion of strikes carried out by private sector workers compared to public. Helpfully, Business New Zealand's comprehensive list of all private sector strikes from 2017 – 2020 illustrates that at least 40 companies were threatened with or affected by strikes during this period.²⁴⁹ In 2018, for example, employees of Event Cinemas, Farmers

243 See Fauver and Fuerst, above n 36, at 703; Hansmann, above n 88, at 1803.

244 Employment Relations Act 2000, ss 83 – 84.

245 See John E Martin "Labour History in New Zealand" (1996) 49 ILWCH 166 for an overview of New Zealand industrial relations including instances of strike action and John M Howells "Causes and Frequency of Strikes in New Zealand" (1972) 25 ILR Rev 524 for a synopsis of strike action in New Zealand from 1952 – 1970.

246 See data on work stoppages at Ministry of Business, Innovation and Employment "Work Stoppages" <www.employment.govt.nz>

247 The term "work stoppages" encompasses both strikes and lockouts.

248 It is noted that the data for these years encompasses partial strikes where, for example, employees perform their role but refuse to wear their uniform or only carry out select duties. See Ministry of Business, Innovation and Employment, above n 246.

249 Business New Zealand "Businesses Threatened with or Affected by Strikes Since 2017 Election" <www.businessnz.org.nz>

and Wendy's New Zealand engaged in strikes in response to pay cuts.²⁵⁰ A recent private sector strike involved egg producer Zeagold, whose employees went on strike for three days in early August 2022.²⁵¹ On 30 August 2022, fuel tanker truck drivers employed by SouthFuels Limited announced they would commence a two-month-long strike from 12 September till 12 November 2022.²⁵²

While publicised instances of strike action in 2021 and 2022 mainly involved public sector workers, such as nurses and bus drivers,²⁵³ private companies face strikes more frequently than one might suspect. While strikes are a valid and important form of industrial action, any instance of strike action reduces firm efficiency through lost hours and additional time and resources spent engaging in negotiations - a loss that could have been mitigated by effective dialogue between firms and employees. As such, New Zealand companies could benefit from the existence of any internal mechanism that facilitates the constructive resolution of labour issues – like codetermination.

B Honing of Firm-specific Skills

Codetermination is said to encourage the enhancement of firm-specific skills, as employees may be motivated to stay at a company long term due to the prospect of attaining a board-level position.²⁵⁴ While empirical research is necessary to thoroughly scrutinise the ubiquity of this benefit, Smith and Furubotn have convincingly argued that employees will be incentivised to remain at a firm where representative governance opportunities are available.²⁵⁵

Dammann and Eidenmüller have argued that retention-related benefits might be confined to countries with stronger termination laws and are unlikely to materialise in states which allow employees to be fired "at will", such as the United States, unlike in Germany, where

250 Michael Hayward and Oliver Lewis "Wendy's Workers Strike After Negotiations Break Down" (26 May 2018) Stuff <www.stuff.co.nz> ; Susan Edmunds "Event Cinemas Pay-Cut Threat "Legal" (28 May 2018) Stuff <www.stuff.co.nz> ; Jessica Tyson "Farmers Retail Workers Strike" (5 July 2018) Te Ao Māori News <www.teaomaori.news>

251 Rebecca Macfie "Big Wage Rises: 'It's Our Turn Now'" (4 August 2022) Newsroom <www.newsroom.co.nz>

252 Scoop Business "FIRST Union, Fuel Tanker Truck Drivers at SouthFuels Limited Have Issued a Strike Notice" (30 August 2022) <www.scoop.co.nz>

253 Leith Huffadine "New Zealand has a Long History of Going on Strike. Now, It's a Complex Issue" (30 May 2018) Stuff <www.stuff.co.nz>

254 Furubotn, above n 13, at 170 – 174; Smith, above n 102, at 276 and 277.

255 Furubotn, above n 13, at 170 – 174; Smith, above n 102, at 276 and 277.

employers must give a specific reason before termination.²⁵⁶ New Zealand law is closer to that present in Germany, since dismissals are deemed unlawful unless their basis is "fair and reasonable".²⁵⁷

Given recent trends, this retention-related benefit may be of particular relevance in contemporary New Zealand. The COVID-19 pandemic has induced, or accelerated, what has come to be known as the "Great Resignation", an ongoing international trend that has seen voluntary resignations by millions of employees across various Western democracies.²⁵⁸ In the United States alone, over 24 million people resigned between April and September 2021.²⁵⁹ New Zealand has not been immune to this international trend, and a 2021 Employee Sentiment Research survey indicated that around 40 per cent of New Zealanders intended to search for a new job in 2022.²⁶⁰ With the reopening of New Zealand's borders in 2022, the matter has been compounded by a growing "brain drain" as employees look to overseas opportunities.²⁶¹ From May 2021 to May 2022, over 58,200 New Zealanders migrated overseas, constituting a net migration loss of 10,700.²⁶² While "overseas experiences" have long been a rite of passage for young New Zealanders,²⁶³ the COVID-19 pandemic has resulted in a greater concentration of young people choosing to relocate overseas at the same time and, consequently, exacerbating pre-existing staffing shortages.²⁶⁴

It is not suggested that codetermination presents a catch-all solution to current challenges in New Zealand's job market. However, further incentives to enhance firm-specific skills and prevent talent from relocating offshore can only be welcomed. Similarly, since

256 Dammann and Eidenmüller, above n 15, at 32.

257 See Employment Relations Act 2000, s 103A(2) – (4).

258 See for example Gabriela Ksinan Jiskrova "Impact of COVID-19 Pandemic on the Workforce: From Psychological Distress to the Great Resignation" (2022) 76 J Epidemiol Community Health 525 at 525.

259 US Bureau of Labor Statistics "Job Openings and Labor Turnover Survey" <www.bls.gov>

260 *ELMO Employee Sentiment Index* (ELMO, October – December 2021) at 2.

261 See Susan Edmunds "'Brain Drain is Underway': Workforce Shrinks as Young People Leave" (16 May 2022) Stuff <www.stuff.co.nz> ; Jean Bell "Stemming the Brain Drain" (25 July 2022) Radio New Zealand <www.rnz.co.nz>

262 Statistics New Zealand "International Migration: May 2022" (12 July 2022) <www.stats.govt.nz>

263 For example, in 2021 Prime Minister Jacinda Arden described overseas experiences as a "rite of passage". See Dan Lake "What the Free Travel Agreement Means for travel Between New Zealand and the United Kingdom (21 October 2021) Newshub <www.newshub.co.nz>

264 Ireland Hendry-Tennent "Explainer: Are the Impacts of Brain Drain Being Overhyped and How Worried Should the Average Kiwi Be" (15 August 2022) Newshub <www.newshub.co.nz>

codetermination has been associated with increases in worker satisfaction,²⁶⁵ resignations could be rendered less likely and local talent kept onshore.²⁶⁶

C Strengthening of Democratic Institutions

In their article "Codetermination and the Democratic State", Dammann and Eidenmüller posit that by decentralising corporate governance structures and generating disincentives around lobbying, codetermination could act as a valuable "check" on corporate power in the United States.²⁶⁷ Indeed, corporate interference in democratic processes has long been a feature of United States politics - since the 1970s, corporate lobbying has become increasingly prevalent and influential.²⁶⁸ In fact, a 2014 study concluded ordinary citizens in the United States wield "little to no independent influence" on government policy, whereas economic elites and organised groups have "substantial independent impacts".²⁶⁹

While there is not yet an indication corporate lobbying has reached such heights in New Zealand, the industry is currently unregulated, and its true size is unknown. As such, Dammann and Eidenmüller's key contentions could be applicable in the New Zealand context.

1 Lobbying in New Zealand

Lobbying can be defined as "any effort by individuals or collectives to directly influence decisions of legislators and public officials outside elections."²⁷⁰ Lobbying, a fairly common practice within most Western democracies²⁷¹, is not necessarily inherently "bad" for democracy, depending on who you ask. On one view, lobbying allows large corporates to have their vested interests represented at the policy level, thereby thwarting the natural

265 Jäger, Noy and Schoefer, above n 4, at 8.

266 Many studies indicate that there is a positive relationship between worker satisfaction and employee retention. See for example Christy Josephine Prabha "Employee Retention: A Review of Literature" (2013) 14 JBM 8 at 13 and Ricardo Biason "The Effect of Job Satisfaction on Employee Retention" (2020) 3 IJECM 405 at 413.

267 Dammann and Eidenmüller, above n 15, at 5.

268 See generally Benjamin C Waterhouse *Lobbying America: The Politics of Business from Nixon to NAFTA* (Princeton University Press, Princeton, 2013) and Patrick J Ackard "Corporate Mobilization and Political Power: The Transformation of US Economic Policy in the 1970s" (1992) 57 Am Sociol Rev 597.

269 Martin Gilens and Benjamin I Page "Testing Theories of American Politics: Elites, Interest Groups and Average Citizens" (2014) 12 Perspect Politics 564 at 576.

270 Thomas Anderson and Simon Chapple "Grease or Sand in the Wheels of Democracy? The Market for Lobbying in New Zealand" (2018) 14 Policy Quarterly 10 at 10.

271 See generally Justin Greenwood and Clive S Thomas "Introduction: Regulating Lobbying in the Western World" (1998) 51 Parliam Aff 487.

democratic process.²⁷² Others contend lobbying positively supports policymaking by facilitating the fulfilment of shared objectives.²⁷³ This paper takes the position that *excessive* corporate lobbying can disrupt legitimate democratic processes. In many instances, the interests and objectives of powerful companies will run counter to that of the citizens lawmakers are elected to represent.²⁷⁴

Statistics New Zealand does not collect data on political lobbying intermediaries due to the industry's small size.²⁷⁵ Accordingly, it is difficult to precisely measure the industry's breadth and possible influence.²⁷⁶ Regardless, New Zealand's lobbying industry is likely very small compared to that of Australia and the United States.²⁷⁷ Despite the Green Party's introduction of the Lobbying Disclosure Bill in 2012,²⁷⁸ which did not make it past its second reading, lobbying remains entirely unregulated.²⁷⁹

Despite a lack of overarching lobbying statistics, data on Parliamentary swipe card holders²⁸⁰ provides some insight into the industry's size and recent growth.²⁸¹ Chapple and Anderson's data on lobbyist swipe card access from 2012 – 2017 indicates lobbying is on the rise, as the number of lobbyists with access grew from 12 to 41 from 2012 - 2017.²⁸² In 2017, 32 per cent of the holders were corporations and 32 per cent were intermediary lobbyists.²⁸³ Of course, the available swipe card access data does not consider lobbying firms without such access, law firms that provide lobbying services and Members of Parliament lobbied outside of Parliament.²⁸⁴ As such, Chapple and Anderson have

272 See generally Mancur Olson *The Logic of Collective Action* (Harvard University Press, Cambridge, 1965) and Robert D Tollison "The Economic Theory of Rent Seeking" (2012) 152 *Public Choice* 73 at 73 – 82.

273 Thomas Groll and Maggie McKinley *Modern Lobbying: A Relationship Market* (CESifo, DICE Report 3/2015, September 2015) at 16; Richard L Hall and Alan V Deardorff "Lobbying as Legislative Subsidy" (2006) 100 *APSR* 69 at 81.

274 For example, companies with an interest in expanding operations may run counter to that of local communities who may be adversely affected by such developments.

275 Anderson and Chapple, above n 270, at 11.

276 At 11.

277 At 13.

278 New Zealand Parliament "Lobbying Disclosure Bill" <www.parliament.nz>

279 Anderson and Chapple, above n 270, at 11. See also Dr Bryce Edwards "Opinion: More Light on Revolving Door Lobbyists" (23 February 2018) *Newsroom* <www.newsroom.co.nz>

280 This data does not take into account swipe cards held by Members of Parliament and parliamentary staff. See Anderson and Chapple, above n 270, at 11.

281 At 12.

282 At 12.

283 At 12.

284 At 13.

contended the true size of New Zealand's lobbying market is likely larger than is commonly believed and may even resemble that of Australia.²⁸⁵

2 The utility of codetermination

The New Zealand lobbying industry's unknown size and lack of regulation generates a raft of transparency concerns. Little public knowledge of lobbying activities can generate a lack of understanding around ministerial decision-making and undermine trust in the democratic process.²⁸⁶ Moreover, the gradual decline in union membership since the 1990s has reduced the lobbying power of trade unions relative to corporate lobbyists, potentially limiting the ability of such groups to represent worker interests in the policymaking process.²⁸⁷

This lack of clarity may enhance democracy-preservation-related benefits of codetermination in the New Zealand context. As suggested by Dammann and Eidenmüller, where sufficient disincentives are generated through codetermination, rational CEOs could be dissuaded from pursuing lobbying strategies unfavourable to employee representatives.²⁸⁸ Through the possible mitigation of decisions to undertake lobbying by companies subject to codetermination, the model could strengthen and reinforce the legitimacy of democratic institutions from within the boardroom.

IX Proposal

This paper has attempted to highlight codetermination's economic and non-economic merits and how the model could serve as a useful, albeit partial, response to contemporary issues, including strike action, employee relocation and corporate lobbying.

This paper's primary intent has been to prompt contemplation of codetermination in the New Zealand context. However, in the interests of clarity and completeness, this paper proposes that if New Zealand were to legislate for codetermination, codetermination requirements should be imposed on the nation's largest companies. On balance, it is argued that the model's theoretical and empirically tested benefits render it worthy of emulation. While New Zealand's overarching industrial relations system may differ from that of the discussed European states, it has been contended that any dissimilarities are insufficient to

285 Anderson and Chapple, above n 270, at 13.

286 Anderson and Chapple, above n 270, at 15; Craig Holman and William Luneburg "Lobbying and Transparency: A Comparative Analysis of Regulatory Reform" (2012) 1 Int Groups Adv 75; and Scott Davidson "Public Affairs Practice and Lobbying Inequality: Regulation of the Influence Game" (online looseleaf ed, Wiley) at 3.

287 Anderson and Chapple, above n 270, at 15.

288 Dammann and Eidenmüller, above n 15, at 43.

wholly discount the model's potential utility. New Zealand has moderately high union coverage compared to other OECD countries, impending legislation is set to strengthen industry-level collective bargaining and even the sectors without a strong union presence could distinctly benefit from mandated board-level employee representation.

This proposal does not purport to contain an exhaustive description of a New Zealand codetermination model. Instead, it sets out its possible key tenets and aspects of European models that could be directly emulated or built upon.

A Number of Employee Representatives

The most contentious part of any codetermination proposal is likely to be the quantum of employee representatives. Too few and the representatives are rendered tokenistic, too many and there risks the emergence of exceedingly high levels of codetermination in a one-tier board system, as is present in New Zealand.

This paper has drawn comparisons between New Zealand and Sweden because both states possess a unitary board structure. However, it is argued that for the benefits of codetermination to be fully realised, more than two or three employee representatives, the number present on the boards of Sweden's largest companies, are required. This is especially so in the context of the democracy-preservation benefit, which depends on the presence of a sizeable enough proportion of employee representatives to generate sufficient disincentives. Instead, the quantum of representatives should be set at a static proportion of the board, i.e. one-third, rather than requiring that two or three representatives be present regardless of the board's size.

Acknowledging that fully parity codetermination requirements may be excessive in the context of a one-tier board, this paper proposes that one-third codetermination would constitute a reasonable mid-point. Such a proposal is consistent with Fauver and Faust's suggestion that the optimal level of codetermination is likely below 50 per cent to see efficiency-related benefits come to fruition.²⁸⁹

While one-third codetermination would mean worker representatives can be outvoted, this paper contends their presence on the board would still see the described economic and non-economic benefits materialise, namely: increases in firm efficiency, improved information-sharing and collaboration, increases in worker empowerment and enhancement of firm-specific skills. The presence of even a minority of employee representatives in the

289 Fauver and Fuerst, above n 36, at 703.

boardroom could positively influence corporate decision-making and operate as a positive soft constraint on company activity.

While lobbying-related decisions could see employee representatives outvoted under the one-third approach, disincentives could still be generated. If such board members attained the support of even a few shareholder-appointed directors, lobbying strategies could be thwarted. Even if such a majority was not obtained, employee representatives could render other directors alive to the potential implications of lobbying activity for certain constituents and possibly deter them from expressing support in future.

B Threshold for Qualifying Companies

Employee empowerment is the central rationale behind the codetermination model. As such, it is contended that the threshold at which companies ought to become subject to codetermination requirements be personnel-based rather than revenue or market-capitalisation-based. After all, the larger the employee body, the greater the need for representation. Similarly, the greater a company's size, the greater the societal precedent it sets through its treatment of employees. Accordingly, it is proposed that locally incorporated companies with 3,000 or more employees should become subject to codetermination requirements. Such a threshold would ensure that codetermination requirements are only imposed where the company's activities affect a relatively large number of employees. If implemented, such a codetermination model would be more conservative than that in Germany and Sweden.

The consequences of such a requirement could materialise as follows. The proposed threshold would mean many listed companies would become subject to codetermination requirements. For example, the boards of most listed companies tend to have around 8 – 12 directors.²⁹⁰ If one-third codetermination were imposed, 2 – 4 board members would be employee representatives.

C Electoral Process

This paper supports the adoption of the German-style electoral process. That is, employee representatives are elected by company employees rather than selected by the unions, as is the electoral process in Sweden. This position is taken for two reasons. First, unions are less dominant in New Zealand than in Sweden. Second, election from the employee body rather than union selection would constitute a more democratic process.

290 See for example the boards of Fonterra (Fonterra "Board of Directors" <www.fonterra.com>), Spark New Zealand (Spark "Board of Directors" <www.sparknz.co.nz>) and Mercury NZ Limited (Mercury "Our Board of Directors" <www.mercury.co.nz>).

D Removal of Employee Representatives

As is the process in Germany,²⁹¹ it is proposed that shareholders can only remove employee representatives if at least 75 per cent of employees vote in favour of removal. This requirement would safeguard the democratic process underpinning employee board appointments by ensuring shareholders cannot unilaterally disrupt codetermination arrangements.

X Conclusion

Stakeholder-focused reform has been toyed with by many an academic in recent years. Despite having received limited recognition across Anglo-America, codetermination is associated with economic and non-economic benefits that render it deserving of further academic and political attention. This paper has highlighted the model's propensity for boosting firm performance, increasing worker empowerment, strengthening democratic institutions, honing firm-specific skills and improving communication channels between employees and senior executives. The model is time-tested, has garnered the lasting support of many European directors and could present a concrete resolution to the practical problems associated with generalist stakeholder-centric objectives.

Further empirical research is necessary to fully ascertain some of the model's effects. Regardless, this paper has attempted to prompt serious contemplation of codetermination in a local academic environment that has been largely silent on the matter. Accordingly, this paper explored codetermination's workings in practice, outlined how those in Anglo-American jurisdictions have looked to the model with interest and examined the nature of New Zealand industrial relations. By reference to the Air New Zealand example, this paper has suggested that to see meaningful outcomes in the worker-empowerment space, avenues for worker participation must be mandated by legislation. An analysis of codetermination's ability to respond to local challenges was then conducted, and the conclusion reached that codetermination could usefully mitigate strike action, assist employee retention and internally constrain lobbying activity amid a substantially unregulated local market. Finally, a tentative proposal as to the nature of a New Zealand codetermination model was laid out, encompassing only the largest locally incorporated companies.

It would be naive to assert that the introduction of even one-third codetermination legislation in New Zealand would be readily accepted by all across the political spectrum. Ideological disagreements will always render employee-related corporate governance reform controversial. However, if the promotion of stakeholder interests is to be

291 Codetermination Act 1976 (DE), s 23.

meaningfully pursued, concrete forms of stakeholder governance, like codetermination, deserve a place on the agenda.

Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 12,089 words.

*XI Appendix**A Board-Level Codetermination and Board Structure in European Countries*²⁹²**Table 1: Board-Level Codetermination and Board Structure in European Countries**

Country	Percentage	Board	Country	Percentage	Board
Austria	1/3	2-tier	Hungary	1/3	Either
Croatia	1 rep.	Either	Luxembourg	1/3	1-tier
Czech Rep.	1/3	2-tier	Norway	1/3	1-tier
Denmark	1/3	2-tier	Slovakia	1/3	2-tier
Finland*	¼	Either	Slovenia	1/2	Either
France**	1 rep.	Either	Sweden	3 rep.***	1-tier
Germany	½	2-tier			

²⁹² Retrieved from Dammann and Eidenmüller, above n 43, at 880.

I Bibliography

A Legislation

1 New Zealand

Employment Relations Act 2000.

2 Germany

Codetermination Act 1976.

One Third Participation Act 2004.

Coal, Iron and Steel Codetermination Act 1951.

3 Sweden

Board Representation (Private Sector Employees) Act 1987.

4 United Kingdom

Companies Act 2006.

Cambridge University Act 1856.

Oxford University Act 1854.

Port of London Act 1908.

B Books and Chapters in Books

John T Addison *The Economics of Codetermination* (Palgrave Macmillan, New York, 2009).

Elizabeth Anderson *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)* (Princeton University Press, Princeton, 2017).

Dominique Anxo "Shaping the Future of Work in Sweden: The Crucial Role of Social Partnership" in Daniel Vaughan-Whitehead (ed) *Reducing Inequalities in Europe* (online ed, Edward Elgar Publishing Limited, Cheltenham, 2018) 519.

Stephen Blumenfeld and Noelle Donnelly "Collective Bargaining Across Three Decades: Lessons from CLEW's Collective Agreement Database" in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976 – 2016* (Victoria University Press, Wellington, 2018).

Göran Brulin "Sweden: Joint Councils under Strong Unionism" in Joel Rogers and Wolfgang Streeck (eds) *Works Councils: Consultation, Representation and Cooperation in Industrial Relations* (2nd ed, University of Chicago Press, Chicago, 2009) 189.

Milton Friedman *Capitalism and Freedom* (40th ed, University of Chicago Press, Chicago, 1962).

Peter A Gourevitch and James Shin *Political Power and Corporate Control* (Princeton University Press, Princeton, 2007).

Klaus J Hopt and Patrick C Leyens "The Structure of the Board of Directors" in *Comparative Corporate Governance* (Edward Elgar Publishing, Cheltenham, 2021).

Simon Larmount *Corporate Governance: What Can Be Learned from Japan?* (Oxford Academic, Oxford, 2004).

Mancur Olson *The Logic of Collective Action* (Harvard University Press. Cambridge, 1965).

Katharina Pistor "Employees and Corporate Governance" in Margaret M Blair and Mark J Roe (eds) *Employees and Corporate Governance* (Brookings Institution Press, Washington D, 1999).

Erling Rasmussen *Employment Relationships: Workers, Unions and Employers in New Zealand* (eBook edition, Auckland University Press, Auckland, 2010).

Joel Rogers and Wolfgang Streeck *Works Councils: Consultation, Representation and Co-operation in Industrial Relations* (2nd ed, University of Chicago Press, Chicago, 2009).

Charlotte Villiers "Narrative Reporting and Enlightened Shareholder Value Under the Companies Act 2006" in John Loughrey (ed) *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar Publishing, Cheltenham, 2012) 97.

David Vogel *Fluctuating Fortunes: The Political Power of Business in America* (2nd ed, BeardBooks, Washington DC, 2003).

Benjamin C Waterhouse *Lobbying America: The Politics of Business from Nixon to NAFTA* (Princeton University Press, Princeton, 2013).

Stephen Wilks *The Political Power of the Business Corporation* (Edward Elgar Publishing, Cheltenham, 2013).

D Journal Articles

Patrick J Ackard "Corporate Mobilization and Political Power: The Transformation of US Economic Policy in the 1970s" (1992) 57 Am Sociol Rev 597.

Thomas Anderson and Simon Chapple "Grease or Sand in the Wheels of Democracy? The Market for Lobbying in New Zealand" (2018) 14 Policy Quarterly 10.

Takashi Araki "Corporate Governance Reforms, Labour Law Developments and The Future of Japan's Practice-Dependent Stakeholder Model"(2005) 2 Japan Labour Rev 26.

Silvia Ayuso and others "Maximising Stakeholders' Interests: An Empirical Analysis of the Stakeholder Approach to Corporate Governance" (2019) 53 Bus Soc 414.

Stephen M Bainbridge "Director Primacy: The Means and Ends of Corporate Governance" (2003) 97 Northwest Univ Law Rev 547.

Stephen M Bainbridge "Director Versus Shareholder Primacy in New Zealand Company Law as Compared to USA Corporate Law" (2014) 14 UCLA School of Law, Law and Economics Series 1.

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

Ricardo BIASON "The Effect of Job Satisfaction on Employee Retention" (2020) 3 IJECM 405.

Michael C Burda and Jennifer Hunt "What Explains the German Labour Market Miracle in the Great Recession?" (2011) 649 SFB Discussion Papers.

Seletha R Butler "All on Board! Strategies for Constructing Diverse Boards of Directors" (2012) 7 VA L & Bus Rev 61.

Andy Charlwood and Peter Haynes "Union Membership Decline in New Zealand 1990 – 2002" (2008) 50 J Ind Relat 87.

Josh Child "Organisation Participation in Post-COVID Society – Its Contributing and Enabling Conditions" (2021) 36 Int Rev Appl Econ 117.

Jens Dammann and Horst Eidenmüller "Codetermination: A Poor Fit for US Corporations" (2020) 3 CBLR 1 870.

Jens Dammann and Horst Eidenmüller "Codetermination and the Democratic State" (2020) ECGI Working Paper Series in Law 536 1.

Horst Eidenmüller, Andreas Engert and Lars Hornuf "Incorporating Under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage" (2009) 10 EBOR 1.

L Fauver and M E Fuerst "Does Good Corporate Governance Include Employee Representation? Evidence From German Corporate Boards" (2006) 82 J Financ Econ 673.

Carola M Frege "A Critical Assessment of the Theoretical and Empirical Research on German Works Councils" (2002) 40 Br J Ind Relat 221.

Carola Frege and John Godard "Varieties of Capitalism and Job Quality: The Attainment of Civic Principles at Work in the United States and Germany" (2014) 79 Am Sociol Rev 942.

Erik G Furubotn "Codetermination and the Modern Theory of the Firm: A Property-Rights Analysis" 61 J Bus 165.

Gary Gorton and Frank A Schmid "Capital, Labour and the Firm: A Study of German Codetermination" (2004) 2 J Eur Econ Assoc 863.

Matteo Gatti and Chrystin Ondersma "Can a Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera" (2020) 46 J Corp L 1.

Martin Gilens and Benjamin I Page "Testing Theories of American Politics: Elites, Interest Groups and Average Citizens" (2014) 12 Perspect Politics 564

Justin Greenwood and Clive S Thomas "Introduction: Regulating Lobbying in the Western World" (1998) 51 Parliam Aff 487.

Richard L Hall and Alan V Deardorff "Lobbying as Legislative Subsidy" (2006) 100 APSR 69.

Grant Hayden and Matthew Bodie "Codetermination in Theory and Practice" (2021) 73 Fla Law Rev 321.

Henry Hansmann "When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination and Economic Democracy" (1990) 99 Yale L J 1749.

Jörg Heining, Simon Jäger and Benjamin Schoefer "Labour in the Boardroom: The Effects of Codetermination on Firm Performance and Wages" (2020) 136 Q J Econ 669.

Craig Holman and William Luneburg "Lobbying and Transparency: A Comparative Analysis of Regulatory Reform" (2012) 1 Int Groups Adv 75.

Klaus J Hopt "Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe" (1994) 14 IRLE 203.

John M Howells "Causes and Frequency of Strikes in New Zealand" (1972) 25 ILR Rev 524.

Simon Jäger, Shakked Noy and Benjamin Schoefer "What Does Co-Determination Do?" (2021) ILR Review 1.

Gabriela Ksinan Jiskrova "Impact of COVID-19 Pandemic on the Workforce: From Psychological Distress to the Great Resignation" (2022) 76 J Epidemiol Community Health 525.

Stephen N Kaplan and Bernadette A Minton "How Has CEO Turnover Changed?" (2012) 12 Intl Rev Fin 57.

Andrew Keay "Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach" (2007) 29 Sydney L Rev 577.

Kornelius Kraft and others "Codetermination and Innovation" (2011) 35 Cambridge J Econ 145.

Klas Levinson "Codetermination in Sweden: Myth and Reality" (2000) Econ Ind Democr 457.

Mijntje Lückerath-Rovers "Women on boards and Firm Performance" (2013) 17 J Manag Gov 491.

Gregory Jackson "Employee Representation in the Board Compared: A Fuzzy Sets Analysis of Corporate Governance, Unionism and Political Institutions"(2005) 12 Ger J Ind Rel 252.

Michael C Jensen and William H Meckling "Rights and Production Functions: An Application to Labor-Managed Firms and Codetermination" (1979) 52 J Bus 469.

- Michael C Jensen and William H Meckling "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure" (1976) 3 J Fin Econ 305.
- Chen Lin, Thomas Schmid and Yuhai Xuan "Employee Representation and Financial Leverage" (2018) 127 J Fin Econ 303.
- F A Mann "The New German Company Law and Its Background" (1937) 19 J Comp Leg 220.
- John E Martin "Labour History in New Zealand" (1996) 49 ILWCH 166.
- Ewan McGaughey "The Codetermination Bargains: The History of German Corporate and Labour Law" LSE Law Society and Economy Working Papers 10/2015 1.
- Walther Müller-Jentsch "Formation, Development and Current State of Industrial Democracy in Germany" (2016) 22 Eur Rev Labour and Research 45.
- Annie Newman and Irina Freilekhman "A Case for Regulated Industrial Democracy post COVID-19" (2020) 45 NZJER 70.
- Lenore Palladino "Economic Democracy at Work: Why (and How) Workers Should be Represented on US Corporate Boards" (2021) 1 J Law Pol Econ 373.
- Christy Josephine Prabha "Employee Retention: A Review of Literature" (2013) 14 JBM 8.
- Simon Renaud "Dynamic Efficiency of Supervisory Board Codetermination in Germany" (2007) 21 Labour 689.
- Ulf Rinne and Klaus F Zimmermann "Another Economic Miracle? The German Labor Market and the Great Recession" (2012) 1 IZA J Labor Policy 1.
- Sophie Rosenbohm and Thomas Haipeter "German Board-Level Employee Representation in Multinational Companies: Patterns of Transnational Articulation" (2019) 25 Eur J Ind Relat 219.
- Markus Roth "Employee Participation, Corporate Governance and the Firm: A Transatlantic View Focused on Occupational Pensions and Co-Determination" (2010) 11 EBOR 51.
- Robert Scholz and Sigurt Vitols "Board-level Codetermination: A Driving Force for Corporate Social Responsibility in German Companies?" (2019) 25 Eur J Indus Rels 233.
- Stephen C Smith "On the Economic Rationale for Codetermination Law" (1991) 16 J Econ Behav Organ 261.
- H Spitzeck and Erik G Hansen "Stakeholder Governance: How Stakeholders Influence Corporate Decision Making" (2010) Corp Gov 378.
- Lynn Stout "New Thinking on 'Shareholder Primacy'" (2012) 2 Account Econ Law 1.
- Jan Svjnar "Relative Wage Effects of Unions, Dictatorship and Codetermination: Econometric Evidence from Germany" (1981) 63 Rev Econ & Stat 188.

Eiji Takashahi and Oliver Kirchwehm "Development of Corporate Governance in Japan and Germany: Is the Two-Tiers System Obsolete?" (2006) 17 *J Interdiscip Econ* 1.

Jean Tirole "Corporate Governance" 69 *Econometrica* 1.

Robert D Tollison "The Economic Theory of Rent Seeking" (2012) 152 *Public Choice* 73.

P M Vasudev "Corporate Stakeholders in New Zealand – The Present, and Possibilities for the Future" (2012) 18 *NZBLQ* 1.

Jelle Visser *Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts Database - Version 6.1* (Amsterdam Institute for Advanced Labour Studies, University of Amsterdam, November 2019).

Jeff Wheeler "Employee Involvement in Action: Reviewing Swedish Codetermination" (2002) 26 *Labor Stud J* 71.

Richard Williams "Enlightened Shareholder Value in UK Company Law" (2012) 35 *UNSWLJ* 360.

Adrian Williamson "The Bullock Report on Industrial Democracy and the Post-War Consensus" (2016) 30 *Contemp Br Hist* 119.

Luigi Zingales "Towards a Political Theory of the Firm" (2017) 3 *JEP* 112.

E Reports

Sue Ryall and Dr Stephen Blumenfeld *Unions and Union Membership in New Zealand – Report on 2017 Survey* (Centre for Labour, Employment and Work - Victoria University of Wellington, 2017).

Commission of the European Communities *Employee Participation and Company Structure in the European Community* (11 December 1975).

Committee of Inquiry into Industrial Democracy *Report of the Committee of Inquiry on Industrial Democracy* (Cmnd 6706, January 1977).

ELMO Employee Sentiment Index (ELMO, October – December 2021)

Fair Pay Agreement Working Group 2018 *Fair Pay Agreements: Supporting Workers and Firms to Drive Productivity Growth and Share the Benefits* (December 2018).

Robert Dickerson, John Howard and Leon Getz (Dickerson Committee) *Proposals for a New Business Corporations Law for Canada* (Information Canada, Ottawa, 1971).

Fair Pay Agreement Working Group 2018 *Fair Pay Agreements: Supporting Workers and Firms to Drive Productivity Growth and Share the Benefits* (December 2018).

Bernd Fitzenberger, Karsten Kohn and Qingwei Wang *The Erosion of Union Membership in Germany: Determinants, Densities, Decompositions* (Institute of Labour Economics, IZA Discussion Paper No. 2193, July 2006).

International Labour Organisation *Collective Bargaining in Germany and Ukraine: Lessons Learned and Recommendations for Ukraine* (2021).

KiwiRail *Building a Sustainable Future* (Statement of Corporate Intent 2022 – 2024)
 McKinsey Sweden *Growth and Renewal in the Swedish Economy: Development, Current Situation and Priorities for the Future* (McKinsey Global Institute, May 2012).
 PricewaterhouseCoopers *Fair Pay Agreements: What Will They Mean For New Zealand Businesses?* (August 2021).

F *Dissertations*

Hermann Kotthoff "Plant-level Codetermination as Reflected in Recent Research" (Doctorate in Sociology, University of Frankfurt, 1981) 1.

G *Internet Resources*

Audi MediaCenter "Audi Supervisory Board: Changes to Members Representing Employees" (14 January 2022) <www.audi-mediacenter.com>
 Australian Labour Party "Our Plan" (2018) <www.alp.org.au>
 Jean Bell "Stemming the Brain Drain" (25 July 2022) Radio New Zealand <www.rnz.co.nz>
 Matthew Bodie and Grant Hayden "Codetermination: The Missing Alternative in Corporate Governance" (13 January 2022) Law & Political Economy Project <www.lpeproject.org>
 Business New Zealand "Businesses Threatened with or Affected by Strikes Since 2017 Election" <www.businessnz.org.nz>
 Business Roundtable *Statement on the Purpose of a Corporation* (August 2019).
 BBC "Theresa May Vows to Put Conservatives "At Service" of Working People" (11 July 2016) <www.bbc.com>
 Centre for Labour, Employment and Work "Union Membership in New Zealand Shows Further Growth" Victoria University of Wellington <www.wgtn.ac.nz>
 Conservative "Conservative Leader Erin O'Toole To Ensure Canadian Workers Have Their Voices Heard" (23 August 2021) <www.conservative.ca>
 Henry Cooke "Cleaners, Security and Supermarkets Priority for Unions for Sector-wide Fair Pay Agreements" (25 June 2019) Stuff <www.stuff.co.nz>
 Susan Edmunds "'Brain Drain is Underway': Workforce Shrinks as Young People Leave" (16 May 2022) Stuff <www.stuff.co.nz>
 Susan Edmunds "Event Cinemas Pay-Cut Threat "Legal" (28 May 2018) Stuff <www.stuff.co.nz>
 Dr Bryce Edwards "Opinion: More Light on Revolving Door Lobbyists" (23 February 2018) Newsroom <www.newsroom.co.nz>
 Ericsson "Board members" <www.ericsson.com>
 Fonterra "Board of Directors" <www.fonterra.com>

The Guardian "Canada Election 2021: Full Results" (21 September 2021)
<www.theguardian.com>

Mathias Habersack "Corporate Codetermination: German-Style as a Model for the UK?"
(18 July 2016) University of Oxford <www.ox.ac.uk>

Michael Hayward and Oliver Lewis "Wendy's Workers Strike After Negotiations Break
Down" (26 May 2018) Stuff <www.stuff.co.nz>

Samuel Hammond "Elizabeth Warren's Corporate Catastrophe" (20 August 2018) National
Review <www.nationalreview.com>

Ireland Hendry-Tennent "Explainer: Are the Impacts of Brain Drain Being Overhyped and
How Worried Should the Average Kiwi Be" (15 August 2022) Newshub
<www.newshub.co.nz>

Robert Hockett "Bernie Sanders on Corporate Democracy" (14 October 2019) Forbes
<www.forbes.com>

Leith Huffadine "New Zealand has a Long History of Going on Strike. Now, It's a Complex
Issue" (30 May 2018) Stuff <www.stuff.co.nz>

Institute of Directors New Zealand "Starting a Board" <www.iod.org.nz>

International Labour Organisation "Statistics on Collective Bargaining"
<www.ilo.org>

IMD "World Competitiveness Ranking 2022" <www.imd.org>

International Monetary Fund "Kurzarbeit: Germany's Short-Time Work Benefit" (15 June
2020) <www.imf.org>

Simon Jäger, Shakked Noy and Benjamin Schoefer "Codetermination and Power in the
Workplace" (23 March 2022) Economic Policy Institute <www.epi.org>

Anders Kjellberg "The Swedish Model in an Uncertain Time: Unions, Employers and
Collective Agreements in a Changing Labour Market" (7 June 2020) Lund University
<www.portal.research.u.se>

Dan Lake "What the Free Travel Agreement Means for travel Between New Zealand and
the United Kingdom (21 October 2021) Newshub <www.newshub.co.nz>

Rebecca Macfie "Big Wage Rises: 'It's Our Turn Now'" (4 August 2022) Newsroom
<www.newsroom.co.nz>

Mercedes-Benz Group "Ergun Lümali" <www.group.mercedes-benz.com>

Mercedes-Benz Group "The Supervisory Board" <www.group.mercedes-benz.com>

Mercury "Our Board of Directors" <www.mercury.co.nz>

Ministry of Business, Innovation and Employment "Work Stoppages"
<www.employment.govt.nz>

Ministry of Health "High Performance High Engagement" <www.health.govt.nz>

Rupert Neate "Tesla Shareholders Urged to Oust Elon Musk over \$55bn Pay Deal: Adviser Pirc Says Musk's Pay and Twitter Outbursts Pose 'Serious Risk of Reputation Harm to the Company'" (30 June 2020) The Guardian <www.theguardian.com>

New Zealand Parliament "Bill to Enable Fair Pay Agreements" (4 May 2022) <www.parliament.nz>

New Zealand Herald "High Performance Depends on High Engagement" (6 April 2011) <www.nzherald.co.nz>

New Zealand Companies Office "Union Membership Return Report 2021" <www.companiesoffice.govt.nz>

New Zealand Parliament "Lobbying Disclosure Bill" <www.parliament.nz>

NZCTU "Find Your Union" <www.union.org.nz>

Russell Palmer "Political Donations Law Changes: Clock Ticking Ahead of Election" (29 July 2022) Radio New Zealand <www.rnz.co.nz>

OECD Statistics "Trade Union Dataset" <www.stats.oecd.org>

Research FDI "The Top 20 Largest Economies in the World by GDP" (8 February 2021) <researchfdi.com>

Reuters "Half of German Firms Using Shortened Working Hours Due to Coronavirus" (23 April 2020) Reuters <www.reuters.com>

Fiona Rotherham "Air NZ and Unions Collaborate on High Performance Engagement" (23 July 2015) National Business Review <www.nbr.co.nz>

Christoffer Saidac, Mattias Friberg and Khaled Talaghan "The Corporate Governance Review: Sweden" (17 March 2022) The Law Reviews <www.thelawreviews.co.uk>

SKF "SKF Board of Directors" <www.investors.skf.com>

Statistics New Zealand "Distribution of Wealth Across New Zealand Households Remains Unchanged Between 2015 and 2021" (3 March 2022) <stats.govt.nz>

Statistics New Zealand "International Migration: May 2022" (12 July 2022) <www.stats.govt.nz>

Bernie Sanders "Corporate Accountability and Democracy" <www.berniesanders.com>

Scoop Business "FIRST Union, Fuel Tanker Truck Drivers at SouthFuels Limited Have Issued a Strike Notice" (30 August 2022) <www.scoop.co.nz>

Faiz Siddiqui "Tesla Gave Workers Permission To Stay Home Rather Than Risk Getting COVID-19. Then it Sent Termination Notices." (25 June 2020) The Washington Post <www.washingtonpost.com>

Anneke Smith "Fair Pay Agreements Bill Flies Through First Reading" (5 April 2022) Radio New Zealand <www.rnz.co.nz>

Spark "Board of Directors" <www.sparknz.co.nz>

Statista "Gross Domestic Product at Current Market Prices of Selected European Countries in 2021" (27 July 2022) <www.statistica.com>

Statistics NZ "Distribution of Wealth Across New Zealand Households Remains Unchanged Between 2015 and 2021" (3 March 2022) <stats.govt.nz>

Stuttgarter Zeitung "Daimler extends Short-Time Work Until the End of April (8 April 2020) <www.stuttgarter-zeitung.de>

Sweden "The Swedish Economy" <www.sweden.se>

Thomas "Top Global and USA Bearings Suppliers" <www.thomasnet.com>

Jessica Tyson "Farmers Retail Workers Strike" (5 July 2018) Te Ao Māori News <www.teaomaori.news>

US Bureau of Labor Statistics "Job Openings and Labor Turnover Survey" <www.bls.gov>

Elizabeth Warren "Accountable Capitalism Act" <www.warren.senate.gov>

Worker Participation EU "Czech Republic – Board-Level Representation" <www.worker-participation.eu>

Worker Participation EU "Hungary – Board-Level Representation" <www.worker-participation.eu>

Workplace Participation EU "National Industrial Relations" <www.worker-participation.eu>

WorldData "Biggest Economies in 2021 By Gross Domestic Product" <www.worlddata.info>

H Other Resources

1 Bills

Electoral Amendment Bill 2022 (152 – 1) (NZ).

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

Accountable Capitalism Act (115th Congress, 2017-2018) (US).

2 Corporate charters

Air New Zealand *Air New Zealand High Performance Engagement Charter* (2015).

3 European Council directives

Council Regulation 2157/2001 on the Statute for a European Company (SE) [2001] OJ L 294.

Council Directive 2001/86 Supplementing the Statute for a European Company with Regard to the Involvement of Employees [2001] OJ L 294.

4 Hansard

(28 July 2022) NZPD (Electoral Amendment Bill – First Reading, Kiritapu Allan).

5 Interviews

Interview with BET founder Bob Johnsen and former Medtronic CEO Bill George (CNBC, Mad Money, 16 August 2018).

Interview with Jeffrey Miron, Harvard Professor (CNBC, Mad Money, 16 August 2018).

6 Online commentaries and looseleaf texts

Scott Davidson "Public Affairs Practice and Lobbying Inequality: Regulation of the Influence Game" (online looseleaf ed, Wiley).

R Edward Freeman "Stakeholder Theory" in C L Cooper (ed) *Wiley Encyclopedia of Management* (Online ed, 2015).

Thomas Groll and Maggie McKinley *Modern Lobbying: A Relationship Market* (CESifo, DICE Report 3/2015, September 2015).

Klaus J Hopt "The German Law of and Experience with the Supervisory Board (Working Paper, Max Planck Institute for Comparative and International Private Law and ECGI, 2016).

Andrew R Keay *Shareholder Primacy In Corporate Law: Can it Survive? Should it Survive?* (online looseleaf ed, SSRN).

Constantin Lagos and others *Predictors and Consequences of Work Alienation in Times of Crisis: Evidence from Two Longitudinal Studies During the COVID-19 Pandemic* (online looseleaf ed, Springer).

Udo Rehfeldt *Board-Level Representation in France: Recent Developments and Debates* (Institute for Codetermination and Corporate Governance, Mitbestimmungsreport no 53, 2019).

Leo E Strine Jr, Aneil Kovvali and Oluwatomi O Williams "Lifting Labour's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance" (Discussion Paper, Harvard University, 2021) 1.

Swedish Trade Union Confederation *The Swedish Model – The Importance of Collective Agreements in Sweden* (online looseleaf ed).

Adrian Wilkinson and Stewart Johnstone *Encyclopedia of Human Resource Management* (online ed, ElgarOnline).

7 Press releases

Australian Council of Trade Unions "Worker Representation on Boards (Our Economic Future)" (Motion at National Congress, 18 July 2018).

