

LEGAL FRAMEWORK ANALYSIS

OCEANIA & PACIFIC
SUB-REGIONAL REPORT

ICA-EU PARTNERSHIP

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ICA-EU PARTNERSHIP



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LEGAL FRAMEWORK ANALYSIS

within the ICA-EU Partnership

Sub-Regional Report: OCEANIA & PACIFIC

I. INTRODUCTION

This report covers the sub-region Oceania, and includes the countries New Zealand, Australia, Fiji, Vanuatu, Kiribati and PNG and draws upon the national reports for each of these countries. This report has been prepared by Ms. Ann Apps, sub-regional expert for Asia-Pacific and national expert for Australia, New Zealand (NZ), Fiji and Papua New Guinea (PNG). It also draws upon the work of national experts Ms Jane Gereva (Vanuatu) and Mr. Waimauri Nawaia (Kiribati). Ms Apps also acknowledges the contributions of Mrs. Kammari Betiota (Cooperative Business Regulatory Centre, Kiribati); Mr Faizal Khan (Director and Registrar of Cooperatives of Fiji), Ms Roz Kelly (Coop Business NZ), Anthony Taylor and Robyn Donnelly (BCCM Australia) and Mr Ricky Manus (Assistant Registrar, Co-operative Societies Unit, PNG). Ms Apps also wishes to acknowledge the support of research assistant, Ms Lyb Makin, ICA-AP Program Manager Mr. Mohit Dave, and Regional Director ICA-AP, Mr Balu Iyer and ICA Legislation Coordinator Mr. P. Santosh Kumar.

The national reports were prepared with feedback and commentary from national peak/apex bodies and co-operative registries including Australia's Business Council of Co-operatives and Mutuals (BCCM), New Zealand's Cooperative Business NZ; Vanuatu's Office of the Registrar of Cooperative & Business Development Services, (ORCBDS), Fiji's Department of Co-operative Business, Kiribati's Co-operative Registry and Papua New Guinea's Co-operative Societies Unit.

Co-operatives benefit from regulations that acknowledge their specificities in a way that genuinely ensures a level playing field with other types of business organisations. The research falls within the scope of the knowledge-building activities undertaken within the partnership for international development signed in 2016 between the European Commission and the International Cooperative Alliance (ICA), which aims to strengthen the cooperative movement and its capacity to promote international development worldwide. It demonstrates that the absence of a supportive legal framework for co-operatives, or the presence of a weak or inadequate legal framework, can negatively impact co-operatives and their evolution. In contrast, the existence of supportive regulations can foster co-operatives' creation and strengthening, acting as a driver of sustainable development. For this reason, further knowledge and evaluation of co-operative legislation will become a tool for ICA members, co-operators worldwide, and other key stakeholders such as policymakers and cooperative legal scholars. With greater knowledge and access to a global, country-based legal framework analysis, ICA members can advance their advocacy and recommendations on the creation or improvement of legal frameworks, document the implementation of co-operative legislation and policies, and monitor their evolution.

II. OVERVIEW OF COUNTRIES COVERED: OCEANIA

There is no regional framework law for Oceania. Both Kiribati and Vanuatu still have the legacy legislation from their period as British colonies or protectorates. This legislation was left in place at

independence and is largely unchanged. It is based on the British Indian Pattern for Co-operation (BIPC), a template law that was recommended by the British Colonial Office to the governments of all British dependencies including Fiji and was later adopted in Vanuatu and Kiribati.¹ Both countries are keen to update their legislation, and this report provides an opportunity to consider the co-operative laws that are in place in the other Oceania countries and their strengths and weaknesses.

Australia's law is the most recently revised – with the introduction of a national template law, the *Co-operative National Law* (CNL) in the lead state, NSW in 2014. Although called a 'national' law, co-operatives are regulated at the level of states and the lack of a federal jurisdiction for co-operatives is a regulatory issue. New Zealand's dominant co-operative law is the *Co-operative Companies Act* (CCA), which is a hybrid legal model that has served New Zealand's strong agricultural co-operative sector well since its introduction in 1996, but the 'new generation co-operative' approach is in some respects peculiar to the geographical, cultural, political and agricultural economics landscape in NZ. Replication of this model in other areas in Oceania, would require a political willingness to provide suitable regulatory and policy support to agricultural co-operatives. More information about the New Zealand's co-operative law can be found in the NZ National Report.²

Fiji also introduced its *Co-operative Act* in 1996, and while Fiji is getting ready to review this legislation, it has many features that were guided by ILO recommendations e.g. Section 4 sets out the objects of a co-operative and it is a useful model because of its plain English and logical structure. The Fiji National Report sets out the key features of this Act which stand out as 'best practice'.³ PNG's *Co-operative Society Act* was introduced in 1982, but the law was dormant, lacking the appropriate administrative machinery to implement and administer the law until 2003. PNG is also ready to review and update this existing law. The fact that the Pacific Island countries are all keen to update their co-operative laws, but are lacking the resources and support needed to undertake this task – supports the case for a regional instrument that can provide consistent guidance and support without interfering with the need for each country to tailor the laws to meet their own cultural, social and legal context. (See final recommendations to this report).

Each legal framework has strengths and weaknesses that must also be considered in the context of each country's economic, political, demographical, technological and ecological environment. This report will focus on a comparison and analysis of the dominant co-operative law in the countries under review. The analysis does not extend to specific legislation for financial co-operatives as it would make the report too lengthy and complex. However, some National Reports include references to relevant laws for credit unions and savings and loan societies where those laws also come under the umbrella of the Co-operative Registry.⁴

The laws that are discussed and compared in this regional report are:

- New Zealand: *Co-operative Companies Act* 1996 (NZ) (**CCANZ**) and where it is relevant the *Industrial and Provident Societies Act* 1908 (NZ) (**IPSANZ**)

¹Model Co-operative Societies Ordinance, Enclosure 2 to Circular Despatch dated 20th March, 1946, from the Secretary of State for the Colonies to the Colonial Governments, Col. No. 199, London 1946,

²National Report New Zealand see pages 2, 14-15.

³National Report, Fiji, see pages 12 – 13.

⁴Kiribati's National Report refers to the Credit Unions Act; Vanuatu's National Report refers to the Special By-Laws for Savings and Loan Societies.

- Australia: *Co-operatives (Adoption of National Law) Act 2012* (NSW) This Act includes the template law (CNL) as a schedule to the main Act. (**CNLAUS**)
- Fiji: *Co-operative Act 1996* (Fiji) (**CAFJ**)
- Vanuatu: *Co-operative Societies Act [CAP 152]* (**COSAVU**) *Co-operative Societies Rules* (**COSRVU**)
- Kiribati: *Co-operative Societies [CAP 14]* (**CSOKI**) *Co-operative Societies Regulations* (**CSRKI**)
- PNG – *Co-operative Societies Act [CAP 389]* (**CSAPNG**), *Co-operative Societies Regulation 2003* (**CSRPNG**)

III. REGIONAL COOPERATIVE LAW: OCEANIA

I. Regional Context

Oceania is a geographical region comprising sub-regions Australasia, Melanesia, Micronesia and Polynesia. These sub-regions may overlap depending on whether the lens is geopolitical or geographical. As a region, it is the world's smallest in terms of both land mass and population. The countries that comprise this region are mainly located in the Pacific Ocean, the largest and deepest of the world's oceanic divisions and the most significant in terms of its influence on global climate and food supplies. The region has a diverse mix of economies from sophisticated financial markets in Australia and New Zealand to a mainly subsistence economy in Kiribati.⁵

All countries covered in this report were colonised by the British during the 19th and early 20th Centuries, with Australia taking over from Britain in the administration of the Territory of PNG from 1906. PNG and the Pacific island countries did not gain independence until the mid-20th Century.⁶ British colonisation strongly influenced the development of legal systems in each country and British law is the basis of co-operative law in each country.⁷ All countries are members of the Commonwealth of Nations.⁸

While there is no regional law for Oceania relating to co-operatives, it should be noted that all of the countries included in this regional report belong to the Pacific Islands Forum (PIF).⁹ The PIF is an inter-governmental organisation that aims to bring “peace, harmony, security, social inclusion and prosperity” to the region “by fostering cooperation between governments, collaboration with international agencies, and by representing the interests of its members.”¹⁰ The PIF regional priorities include climate change and disaster risk management; ocean management and conservation; access

⁵Over eighty percent of the population in Kiribati participates in either farming or fishing. Around 10% of the population are members of co-operatives. See Kiribati National Report p 2.

⁶Australia and New Zealand were self-governing dominions by the early 1900's. Fiji gained independence in 1970, Vanuatu in 1980, Kiribati in 1979 and PNG in 1975. .

⁷Vanuatu formerly known as New Hebrides was a British French Condominium, this resulted in a complex duplication of colonial laws, but the British ordinance on co-operatives was the basis of the current Co-operatives Societies Act 1982 [Cap 152]. Australia colonised PNG from 1906, but the Australian legal system was still heavily influenced by the British legal system up until the 1980's.

⁸The current Commonwealth of Nations was formally constituted by the The current Commonwealth of Nations was formally constituted by the [London Declaration](#) in 1949.
[London Declaration](#) in 1949.

⁹The Pacific Islands Forum is the region's premier political and economic policy organisation. Founded in 1971, it comprises 18 members: Australia, Cook Islands, Federated States of Micronesia, Fiji, French Polynesia, Kiribati, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, and VanuatuThe Pacific Islands Forum Secretariat, accessed on 27/04/2020 at <https://www.forumsec.org/who-we-arepacific-islands-forum/>

¹⁰See the description and overview of the PIF at <https://www.forumsec.org/who-we-arepacific-islands-forum/>

to information and communication technologies; and the sustainable management of fisheries.¹¹ These priorities and the links between co-operatives and the sustainable development goals (SDG's) offer new opportunities for regional co-operative development in Oceania.

The review of regional legal frameworks for co-operatives should also consider the globalised context of business regulation and compliance. All countries, but particularly the smaller developing countries are vulnerable to exploitation by global business networks seeking to avoid the consequences of stricter regulatory regimes in developed countries. Areas that may impact on the development of new and revised legal frameworks for co-operatives include risk management and compliance frameworks that deal with bribery, corruption, money-laundering, fraud, human rights violations, slavery and trafficking.¹²

II. Overview of National Contexts

The first table considers the attention (if any) that is given in the relevant legislation to observance or adherence to the co-operative principles generally.

Table 1

Application of Co-operative Principles (General)	Law or Regulation	Relevant section
Subject to this Act any society for carrying on any industry, business or trade <i>in accordance with co-operative principles</i> may be registered under this Act	COSAVU	S 3
Requirement for registration that business is designed to <i>promote the economic interests of its members, in accordance with co-operative principles</i>	CSOKI	S 4
Requirement that those seeking to register a co-operative desire to promote common economic and social interest in accordance with <i>co-operative principles</i>	CSAPNG	S 21
In the interpretation of a provision of this Law, <i>a construction that would promote the co-operative principles</i> is to be preferred to a construction that would not promote the co-operative principles.	CNLAUS	S 11

¹¹The work of the Forum is guided by the [Framework for Pacific Regionalism](#), which was endorsed by Forum Leaders in July 2014. Regionalism priorities can be accessed on the PIF Secretariat website e.g. <https://www.forumsec.org/climate-change-and-disaster-risk-management/>

¹²An example was the introduction of the *Co-operative Societies (Amendment) Act No. 34 of 2017* in Vanuatu that introduced some changes to the COSA to protect co-operative societies being used for money laundering or other fraudulent or corrupt purposes.

Application of Co-operative Principles (General)	Law or Regulation	Relevant section
The proposed co-operative must be designed to function under the co-operative principles or, if it is not designed to function entirely under the co-operative principles, the Registrar must be satisfied there are special reasons why the co-operative should be registered under this Law;	CNLAUS	S27(C)
A co-operative shall in its operations observe the <i>principles</i> that (section goes on to list the co-operative principles as per the ICA Co-operative Identity Statement)	CSAFJ	S 5
No general or specific reference to co-operative principles	CCANZ IPSANZ	n/a

The incorporation of co-operative principles (generally) into a legal framework for co-operatives is desirable but tricky. The ILO *Guidelines to Cooperative Legislation* suggests that the co-operative principles should be referenced in the definition of a co-operative and ideally in a preamble to the legislation, setting out the role and functions of co-operatives in that country.¹³ He notes that the co-operative principles should not be treated as legal norms, because to do so will limit the legislator's ability to tailor the legislation to suit the country's unique circumstances.¹⁴ To take this advice on board, it is suggested that the wording used in Kiribati's s 4: “ business is designed to promote the economic interests of its members, in accordance with co-operative principles.” is the closest option, but this should be part of the definition of a co-operative rather than suggesting that compliance is a prerequisite for registration. The problem is that if strict adherence to co-operative principles appears in the law as a requirement for registration the Registry requires adequate resources to monitor their implementation. Australia's CNL also lists the co-operative principles (s10) and then suggests that when interpreting the CNL, an interpretation that promotes the co-operative principles is to be preferred. It goes considerably further in s27(c) requiring the Registrar to determine that the co-operative is likely to function entirely under the co-op principles and if not, must be satisfied that there are special reasons why the co-op should be registered. NZ's IPSA provides that only 'bone fide' co-operative societies can be registered but does not define a 'bone fide' co-operative society.

Each country may choose to embed some of the co-operative principles into the legal framework as legal norms and the following table provides a comparative guide to how this has been done in relation to specific co-operative principles in the compared legislation:

¹³Hagen Henry, *Guidelines to Cooperative Legislation*, 3rd Edition ILO 2012, 67.

¹⁴Ibid.

Table 2

Co-operative Principle (Specific)	Application in national law
<p><i>Voluntary and open membership (minimum no of <u>individual</u> members of a primary co-op)</i></p>	<p>The minimum number of members to register a co-op varies from country to country:</p> <ul style="list-style-type: none"> • COSAVU requires 7 members, s 4 (1). • CSOKI requires 10 members, s 5. • CAFJ requires 10 members, s 7. • CNLAUS requires 5 members, ss 18, 19. • CSAPNG requires 7 'eligible persons', s21. • CCANZ does not set a minimum number of members, more than one is implied. • IPSANZ requires 7 members, s5.
<p><i>Voluntary and open membership (membership of primary co-operative open to artificial persons ie corporate bodies or associations)</i></p>	<ul style="list-style-type: none"> • CAFJ allows membership to associations (does not include companies), s 7 • COSAVU allows membership to registered societies, s4(1) • CSOKI allows membership to registered societies, s5. • CNLAUS allows membership to corporate bodies, s 18,19,22. • The CSAPNG requires the Registrar to approve a corporate body that is not a registered society for membership (see definition of 'person' in s 2. • CCANZ by implication allows membership to corporate bodies • IPSANZ allows membership to corporate bodies as 'persons', s5
<p><i>Voluntary and open membership (age restrictions)</i></p>	<p>Most laws require members to be over 18 years.</p> <ul style="list-style-type: none"> • CSOKI allows members over 16 years, s 23 • COSAVU and CAFJ make an exception for school co-ops, CAFJ says 14 years s 37 (1) (a) COSAVU does not specify age minimum for school co-ops. • CNLAUS allows minors to be members if allowed by by-laws, S 110(3) • CSAPNG requires that foundation members must be 'eligible persons' i.e. over 18 years and an automatic citizen of PNG. Membership is otherwise allowed on terms and conditions for eligibility set out in accordance with the society's rules, so could presumably include minors, S 20.

<p><i>Voluntary and open membership</i> (freedom to withdraw and redeem capital)</p>	<p>Most laws allow members to withdraw upon notice and be reimbursed the nominal value of their member shares:</p> <ul style="list-style-type: none"> · COSRVU R 8 (2)(5) · CSRKI RR 13, 16 · CAFJS 38 (i)(j) · The CNL provides that the co-ops rules <i>may</i> authorise the co-op to repurchase member shares at nominal value at the request of the member, but place limits on the amount of shares that can be voluntarily redeemed to no more than 5% of the co-ops nominal capital in any year, and prohibits repayment where it would place the co-op at risk of insolvency CNLAUS s107 · A co-operative company <i>may</i> issue shares at a nominal value and accept surrender of those shares at that nominal value CCANZ ss 15, 18 · CSAPNG is an exception. It provides that a member is not entitled to be refunded the nominal value of their shareholding if they withdraw from the co-op, unless the buyback is approved by the Registrar and creditors of the Society. If the shareholder is deceased the society may repay those shares to the estate, Ss 58(2), 59, 62.
<p><i>Voluntary and open membership</i> (prohibition on belonging to more than one co-op of the same or similar type)</p>	<ul style="list-style-type: none"> · Vanuatu and Kiribati prohibit a person from membership of more than one registered society whose principal object is to grant loans to its members, unless with sanction of the Registrar COSAVU s 25; CSOKI s 25. · Fiji provides that no person can be a member in more than one co-operative having the same or similar objects except with the consent of the Registrar CAFJ s 41. · Australia, NZ and PNG do not restrict membership.
<p><i>Voluntary and open membership</i> (prohibition on fixing an upper limit on number of members)</p>	<p>Only Vanuatu and Kiribati expressly prohibit a co-op from fixing an upper limit to the number of its members:</p> <ul style="list-style-type: none"> · COSRVU R 8(6) · CSRKI R 12(1)
<p><i>Democratic member governance</i> (one member – one vote)</p>	<p>Most laws provide for one member/one vote with exceptions for federations and secondary co-ops:</p> <ul style="list-style-type: none"> · COSAVU s 26 (but in the case of societies of which a registered society is a member that society may have such voting powers as are provided in the by-laws of the society of which it is a member (s 26 (b))

	<ul style="list-style-type: none"> · CSOKI s 26 (also provides an exception where registered society is a member, as per by-laws) · CAFJ s59(1) and requires vote to be exercised in person and not be proxy. · CNLAUS s 228 If its rules so provide, a member of a co-operative group may have the number of · votes (up to 5) at a general meeting that is stated in the rules (s228(3)) · CCANZ one member-one vote is not prescribed and votes may attach to shares not membership. · IPSANZ one member one vote is not prescribed but likely to be set out in by-laws and requirements for special resolution assume one member - one vote, s14. · CSAPNG – one member – one vote is not prescribed, but likely to be set out in the rules, s 51, also requirements for special resolution assumes one member – one vote, s82.
<p><i>Democratic member governance (limits on shareholding)</i></p>	<p>Democratic member governance can also be protected in other ways. One way is to limit a member's shareholding as a % of total share capital and in this way limiting their influence over the co-operative's affairs. The following laws limit that percentage to 1/5th or 20% of total share capital:</p> <ul style="list-style-type: none"> · COSAVU s 28 · CSAKI s 29 · CAFJ s 93 · CNLAUS s 363(1) · CSAPNG s 60 <p>In New Zealand CCANZ protects members control rights by providing that no less than 60% of voting rights must be exercised by transacting shareholders, s2 IPSANZ restricts individual members influence by capping individual shareholding at \$4000 or such amount as prescribed by Minister, s4(2)</p>
<p><i>Member economic participation (producer co-ops disposal of produce).</i></p>	<p>Where the co-op is a producer co-operative it may require its supplier members to only transact with the co-op in relation to all or a specified proportion of their produce:</p> <ul style="list-style-type: none"> · COSAVU s 13 · CSOKI s 13 · CAFJ s25(1) <p>IN CSAPNG the Act allows certain contracts in restraint of trade, so that a co-operative member may be required to sell products or have specified dealings with the co-op for a period not exceeding 3 years, s 44.</p>

	<p>In CNLAUS this requirement is expressed more broadly by requiring the co-op to specify its primary activities in its rules and the minimum requirements for a member to be an 'active member' by supporting that activity Ss 145(a)150, 151. In CCANZ member economic participation is inherent in the definition of 'co-operative activities' CCA s3 when coupled with the meaning given to 'transacting shareholder' in CCA s 4(1). Not all members need to be transacting shareholders but must be more than 60% to qualify as a co-operative company.</p>
<p><i>Member economic participation (capital contribution).</i></p>	<p>Most laws provide that membership rights can only be exercised once the member has contributed the required amount of capital, either by paying a fee or purchasing member shares:</p> <ul style="list-style-type: none"> COSAVU s 24 CSOKI s 24 CAFJ s 40 CNLAUS s 120(1) <p>CSAPNG the payment to be made or the share or interest to be acquired before the exercise of the rights of membership is left to the society's rules, s 51(l)</p> <p>For CNLAUS where the co-op is a non-distributing co-op, the payment of a subscription or membership fee may be a requirement of active membership, s 151.</p>
<p><i>Member economic participation (transacting with non-members).</i></p>	<p>While the primary objective of a co-operative is to transact with its members, it is not unusual for a co-operative to contract with non-members for a range of reasons. In Vanuatu and Kiribati, the Registrar may prohibit or limit a cooperatives transaction with non-members:</p> <ul style="list-style-type: none"> · COSAVU s32 COSRVU R 47 · CSOKI s34 <p>CCAFJ does not prohibit a co-op from transacting with non-members if allowed in its by-laws but requires it to keep separate accounts s 80(b)</p> <p>CCANZ requires that no less than 60% of the co-operative be 'transacting members' so conversely up to 40% can be non-transacting members, but this will depend on by-laws, Ss 2, 3, 4.</p> <p>CNLAUS and CSAPNG do not prohibit transacting with non-members (however in both Australia and PNG there are tax advantages if more than 90% of the co-ops transactions are with its members.</p>

<p>Co-operation among co-operatives (secondary and tertiary societies)</p>	<p>Most of the laws accommodate secondary or tertiary societies by allowing co-operative (societies) to be members of another co-operative:</p> <p>COSAVU Ss 4, 5; CSOKI SS 4, 5 CNLAUS s111 (referring to the formation of co-operative groups) CSAPNG s106 (referring to the formation of associations, federations or composite groups) CCAFJ s 44 not only sets out the power to federate but also sets out the functions of secondary, tertiary and apex organisation, and expressly refers to a national peak body, the National Co-operative Federation, SS 46, 47.</p>
<p>Co-operation among co-operatives (Co-operative development fund)</p>	<p>The idea of all co-operatives contributing a proportion of their surplus into a fund for the development of the co-op sector is good in theory but dependent on a strong secondary and tertiary sector. In the case of the Vanuatu and Fijian legislation the power to require contributions to and administer the central fund is in the hands of the Registrar.</p> <ul style="list-style-type: none"> · COSRVU R40 Co-operative Development Fund · CAFJ s101 Central Co-operative Fund and a National Reserve Investment Trust Fund s100(3).
<p>Concern for Community</p>	<p>Co-operatives contribute to their communities by providing income, employment and otherwise meeting the needs of members. They may also make additional financial contributions to their communities and most co-operative laws make provision for co-ops to contribute a proportion of their surplus to a charity or for community benefit. The amount is limited to 10% in the following laws:</p> <ul style="list-style-type: none"> · COSAVU s 34 · CSOKI s 36 (2) · CAFJ s102 (1)(e) <p>The CNLAUS s 356 says the limit must be prescribed in the co-op's rules. CSAPNG leaves this to the co-op's rules (by-laws), s51 The IPSANZ also leaves this to the co-ops rules, s 10(f). CSAPNG does not mention any distribution of surplus to charity or community – but does provide that any distribution of any kind must be approved by the Registrar, s95(2).</p>

III. Specific Elements of the Co-operative Law

a) Definition and objectives of cooperatives

Definition of a co-operative

There is no regional trend regarding how (or if) a co-operative is defined in the legislation. In the older style BIPC legislation, adopted in Kiribati and Vanuatu, the legislation does not define what a co-operative is – other than by default, by requiring that only societies who are carrying on an industry, business or trade in *accordance with co-operative principles* may be registered under the Act. PNG is similar as the Act provides that only eligible persons who desire to promote common economic and social interest in accordance with cooperative principles may apply for registration as a society. However in these Acts the 'co-operative principles' are not set out, nor is there any reference to the ICA Identity Statement, nor ILO R127 or 193.

Fiji's Co-operative Act includes a detailed definition of a co-operative in its interpretation clause, CAFJ s 2. The definition was in line with ILO r 127 (later replaced by ILO r 193). The definition goes on to prescribe minimum membership requirements for service co-operatives and worker co-operatives. The Co-operative Act also sets out the objectives of co-operatives in section 4: *A co-operative aims at promoting the economic and social interests of its members by providing effective services which the members need and can make use of and further that the main purpose of a co-operative is not maximisation of profits but service to members and a co-operative shall operate according to sound business principles.*

The CNLAUS and New Zealand legislation (CCANZ and IPSANZ) do not include a definition of a co-operative. Nor do these Acts have a preamble, setting out 'the role and the function of cooperatives in society in general and in the economy of the country in particular'.¹⁵ However the IPSANZ links To be registered a society must be either “a *bona fide cooperative society*” or a society where its activity “will improve the conditions of living or the social wellbeing of members of the working classes”, or be for “community benefit”. [S33\(2\) Statutes Amendment Act 1939](#). The CCANZ states that one of the objectives of the Act is to *reaffirm the value of the co-operative company as a means of facilitating its shareholders carrying on business on a mutual basis.*

Role and function of co-operatives in society

The inclusion in the co-operative legislation of a 'preamble' setting out the role and functions of co-operatives in society (and their autonomy and independence from government intervention) is important, particularly where the co-operatives sector is not strong. A preamble can help to guide the interpretation of the law and can be used when necessary to defend the co-operative identity, by either defining coops with reference to the ICA identity statement or by reference ILO r193, This is important where a lack of diversity of organisational forms is an issue.¹⁶

The inclusion of a clear definition of a co-operative is another way that the co-operative sector can help to strengthen and defend the co-operative identity. The definitions in the co-operative statement of

¹⁵Hagen Henry, Guidelines for Cooperative Legislation (International Labour Office, 2012) 64.

¹⁶Ibid, 63, 64.

identity and ILO r 193 and the earlier r 127 are useful starting points. The advantage of the definition according with ILO ar127 as used in Fiji's *Co-operative Act* is that it also includes the following words: *'making equitable contributions to the capital required and accepting a fair share of the risks and benefits of the undertaking in which the members actively participate'* making it clear to potential members that the co-operative is a vehicle which requires member commitment and patronage. While a definition is recommended, it must also be tailored to the national context.

Promotion of member benefit

The promotion of member benefit requires the legal model to incorporate mechanisms that allow and encourage co-operatives to prioritise improving the position of members (both individually and as a whole) over maximising returns on investment (or the channelling of funds away from members). In the case of the legislation in Vanuatu, Kiribati and PNG the Registrar plays a significant role in ensuring the promotion of member benefit. Examples include: the power to prohibit a co-operative from transacting with non-members (COSAVU s 32; CSOKI s 34); the power to restrict a co-op lending money to other societies or taking on too much debt (COSAVU s 30 and COSRVU Rr 11, 46; CSRKI r20(2); CSAPNG s 39).

Most co-operative laws in the region recognise the notion of patronage refunds or rebates but leave it to individual co-operatives to tailor their own rules relating to the distribution of surplus to members (COSAVU s34(3); CSOKI s36 (1); CAFJ s 102 (1) (a); CCANZ ss 30(2); IPSANZ s 10(f) and CNLAUS s357(1) (But only in the case of distributing co-operatives). CSAPNG provides that the Registrar must approve any distributions (in any manner) of the net surplus of a society to its members, CSA s 95.

Other ways that the law can ensure the promotion of member benefit is by limiting returns on capital. COSRVU and CSAPNG limits dividends on paid up share capital to 6% and CSRKI to 5%. Fiji says interest on share capital shall not exceed 20%! Because of movement in interest rates over time there is a danger in setting a fixed maximum amount in the legislation. The CNLAUS provides that a distributing co-op may only pay a 'limited dividend' on shares when distributing surplus or reserves, s357(1)(c). A 'limited dividend' is a dividend that is not more than the amount prescribed by the National Regulations. Reg 3.19 provides a formula for calculating the amount based on amount that is linked to interest on a 5-year term deposit with a major savings bank. In New Zealand, Co-operative Companies may make provision for limited dividends in their constitution. They also have power under the Companies Act to make provision for the payment of differential dividends for different classes of shareholders (*Companies Act NZ s53, 54*)

Co-operative law in most countries also ensures that a co-operative promotes member benefit (as a whole) by mandating that a proportion of any surplus funds is paid into a reserve fund. The fund may or may not be divisible following a liquidation of the co-op. In Vanuatu and Kiribati, the law provides that not less than one fourth of any net profit shall be transferred to a reserve fund (unless the Registrar approves a lesser amount), COSAVU s34(1); CSOKI s36. The fund is not divisible, COSRVU r 39(2), CSRKI r 54(3). In PNG one fifth of net profit must be transferred to a statutory reserve fund but the Act also provides that if the statutory reserve fund stands at an amount equal to not less than 50% of the sum of the aggregate amount of paid up capital and moneys raised on loan or deposit, the transfer need not be made, ss92(1); 95. The fund is only divisible to members upon a winding up, s93. In Fiji, the CAFJ provides more detail about the setting up of a reserve fund. The co-operative must allocate a minimum

of 30% of any surplus resulting from transactions with members, and all the profits resulting from transactions with non-members, CAFJ s 100 (2).

In Australia the CNLAUS distinguishes between distributing and non-distributing co-operatives. A non-distributing co-operative is prohibited from giving returns or distributions on surplus or share capital to members, other than the nominal value of shares (if any) at winding up. However, members may be entitled to a rebate based on transactions with the co-op. It must make provision in its constitution for the allocation of any surplus on a winding up to a similar co-operative or charity, s 448 (1)(2). In the case of a distributing co-operative, the allocation of any proportion of the surplus to a reserve fund is left to the discretion of the board, see CNLAUS, s 355.

Neither the CCANZ or IPSANZ mandates the requirement for a proportion of profits or reserves to be paid into a reserve fund. This requirement may be included in the co-operative's constitution or by-laws. A co-operative society may make provision for the distribution of any surplus in the instrument of dissolution or leave this to the award of the Registrar, IPSANZ s 15(1) (c). To accord with the definition of a 'co-operative society' in s33 *Statutes Amendment Act 1939*, it can be argued that any such distribution should not be to its members, but to a similar organisation or charity.

b) Establishment, cooperative membership and governance

Use of the word 'co-operative in a business name

All co-operative laws of the reviewed countries protect the co-operative identity by prohibiting the use of the word 'co-operative' in a business name unless the business is registered under the relevant co-operative law and impose financial penalties for breach, COSAVU s 63; CSOKI s 59; CAFJ s118; CSAPNG s158, CNLAUS s220(4); CCANZ s14 and IPSANZ (s33(4) *Statutes Amendment Act 1939*).

All the co-operative laws in the reviewed countries grant a registered co-operative the privilege of corporate status. The co-operative is a legal entity and as such it has the powers of a legal person, including perpetual succession, the power to sue and be sued, to hold property and to use that property as security etc. COSAVU s 8; CSOKI s8; CAFJ s 14; CSAPNG s 30, CNLAUS s 38; CCANZ, - a co-operative company obtains its corporate status as a company that is also registered under the Companies Act 1993 (NZ), CANZ s 15; IPSANZ s9.

Requirements for registration.

A quandary for any co-operative law is the ease or complexity of formation (and registration). On the one hand, to enable co-operative development, the requirements for formation and registration should not be too onerous, expensive or resource intensive especially when compared to other types of business models. On the other hand, the co-operative model must accommodate the requirements of democratic governance, member economic participation and the prioritisation of member benefit over capital. The co-operative registry must assume the role of gatekeeper to ensure that only authentic co-operatives are registered. A more difficult question is the extent that the registry should assume responsibility for ensuring that the proposed business is viable and likely to succeed. A preferable alternative is that peak bodies are well resourced enough to nurture new co-operatives and can complement the state in this role.

Most laws require that certain pre-formation requirements are met, including a meeting of founding members to resolve to form a co-operative and approve the by-laws. A brief overview of pre-formation requirements in different jurisdictions is provided in the following table:

Table 3

Requirement	COSAVU	CSOKI	CSAPNG	CAFJ	CNLAUS	CCANZ or IPSANZ
Minimum number of 'natural' persons	7	10	7	10	5	2 CCANZ 7 IPSANZ
Includes minors (under 18)	School co-ops only	Yes	If allowed in rules but not for formation	School co-ops only	Yes, if allowed in by-laws	IPSANZ Yes subject to bylaws s9(j)
Pre-formation meeting requirements	Members must sign application form	Members must sign application form	Yes, s22	Yes, s10	Yes s26	No, IPSANZ s 5 Yes, CCANZ s 6(1)
Approved application form	Yes s5(1)	Yes, COSR R6	Yes, CSR r 2.	Yes, s11	Yes, s 26	Yes, CCA s 6 No IPSANZ
Application fee	Yes Vt400	Yes KI \$4	Yes, K\$25	Yes FJ\$110	Yes AU \$110 or \$383 (with disclosure statement)	No IPSANZ s 20 No CCANZ (but fee paid for registering as a company under CA)
Model rules or by-laws	Yes, prescribed by-laws for Savings and Loan Co-ops and Consumer Co-ops	Yes, CSRKI r 57.	Yes, s57. but unable to locate on website,	Yes, Schedule 1, also see website for consumer co-ops	Yes, CNRAU Schedules 5, 6,7	No CCANZ Yes IPSANZ Schedule 2

Requirement	COSAVU	CSOKI	CSAPNG	CAFJ	CNLAUS	CCANZ or IPSANZ
Probationary societies	Yes	Yes	No	Yes	No	No
Financial projections required	No (although the Registrar may require such information s5(3))	No (although the Registrar may require such information s6(3))	No, however the Registrar may require the applicant to provide further information s 10.	Yes, Ss9, 11(2)	Yes, if distributing co-operative – disclosure document required.	No

There is no simple solution to this quandary. Australia and Fiji have the most onerous requirements for pre-formation activities. The sub-regional expert is aware that in Australia there is a lack of resources to assist new co-operatives to meet the formation requirements. There is a need to suitable templates to help co-operative tailor their constitution without incurring significant legal costs. This has been an issue in both Australia and New Zealand. In Australia, the BCCM has developed an online tool to assist new co-operatives to build their own by-laws (constitution), see <https://www.getmutual.coop/builder/>. In Vanuatu and Fiji, the Co-op Registry has provided standard model rules or by-laws for certain types of co-operatives. The use of 'model' or 'standard' rules is positive in the sense that it reduces the cost for new co-operatives. On the other hand, it reduces the opportunity for democratic participation, as the process of designing and implementing a constitution is empowering for members. One creative initiative that could be replicated is the use of pictures and diagrams to make the by-laws accessible to all members. The [Sustainable Economies Law Centre](#) in Oakland California helped the East Bay Permanent Real Estate Cooperative to do this for its members so they could more easily understand its [bylaws](#).

Membership qualifications

Co-operatives are all about their members, so the framing of any qualification on the right to access membership is important and requires careful consideration in the context of co-operative principles but also must be adapted to variations in national contexts.

All the co-operative laws in the reviewed countries either allow or presume that corporate bodies (e.g. other registered co-operatives or companies) can be a member of a primary co-operative: COSAVU s 5; CSOKI s5; CAFJ s7; CSAPNG s 64 (refer back to definition of 'person' in s2) CNLAUS s110; CCANZ s4(1); IPSANZ s4(2). Whether or not it is desirable will depend on the type of primary co-operative that is being considered. Corporate members are common in producer and service co-operatives where the suppliers are often made up of individual businesses but may not be so common in consumer or savings and loan societies. As the legal frameworks under review are intended to be able to accommodate a variety of types of co-operative, any restriction on corporate membership should be a

matter for the co-operative's by-laws. The CSAPNG requires the Registrar to approve a corporate body that is not a registered society for membership (see definition of 'person' in s 2.)

Both COSAVU and CAFJ restrict natural membership to adults (over 18 years) but make an exception for school co-operatives, CSOKI allows members over the age of 16 years and CNLAUS allows minors if the rules allow, but the minor is not allowed to hold office or to vote, CNLAUS s 114. IPSANZ allows minors over the age of 16 to be members and subject to any exceptions in its by-laws to exercise all rights of membership, except they cannot hold office, s 9(j). CSAPNG requires that the founding members must be 'eligible persons' meaning automatic citizens of PNG and over 18 years but seems to otherwise leave the question age of members to the society's rules.

In countries where youth make-up a significant proportion of the population, there may be good reasons for allowing younger members, at least in producer co-operatives. However, there are also legal risks where transactions may not be enforceable against minors. There is an argument that this should be a matter left to be determined by co-operatives in their rules or by-laws, but perhaps with some attention to the issue at a policy level CSOKI s 23 also requires members to be resident or occupy land within the co-operatives area of operation and this is also a requirement that may not always be relevant to all co-operative types, so again is an issues that is better left to the co-operative to determine in its by-laws.

There is a considerable variation in the minimum number of members needed to form a co-operative in each country. CAFJ and CSOKI require 10 members, COSAVU, CSAPNG and IPSANZ require 7 members, CNLAUS requires 5 members and CCANZ has no minimum, but at least 2 members and no one member can have more than 60% of the voting shares. There is no 'right' number and the balance must be struck between making it too difficult to find the numbers and having too few members to be economically viable. This may vary depending on the type of co-operative, so that it might be higher for a consumer or savings and loan society and lower for a worker co-operative or producer co-operative.

Both COSRVU r8(6) and CSRKI R 12(1) prohibit co-operatives from fixing a maximum number of members. The 'open door' principle may threaten the economic viability of a producer co-operative but may be appropriate for consumer co-operatives. This is also a question best left to the members when designing their co-operative's by-laws.

In Vanuatu The *Co-operative Societies (Amendment) Act 2017* was passed to protect co-operative societies being used for money laundering or fraudulent or corrupt purposes. One significant amendment was to COSAVU s7 which requires the Registrar to be satisfied, that key persons of the society are 'fit and proper' persons. To determine if a key person is 'fit and proper' the Registrar must take into consideration if the person has been convicted of any criminal offence or is the subject of criminal proceedings or appears on the UN Financial Sanctions list (or any other criteria prescribed by the rules), COSA s 7(2). There are two concerns regarding these recent amendments. Firstly, whether the Registrar has the resources and information it needs to make the assessment of character, and secondly whether it might exclude some people from membership in a co-operative who might benefit from the opportunity to be reintegrated into society.¹⁷

¹⁷See for example the views of Henry, on this issue, op cit, 74.

Withdrawal of capital

The principle of voluntary and open membership requires that members should be free to withdraw from membership when the co-operative for any reason is no longer serving their needs or when they are no longer able to contribute as required. The ability to withdraw also means that the co-operative must refund the member any capital that has been invested. Traditionally a member of a co-operative is only entitled to the nominal value of their shares. In some circumstances this may be less than the amount initially invested.

Under the COSAVU, a member who withdraws from membership may be entitled to repayment of monies paid for shares, but this will be subject to any conditions for repayment set out in the by-laws, COSRVU r 8 (5). The co-operative is also entitled to set-off against the capital to be refunded, any debts due by the member to the co-op. COSRKI requires that co-operatives establish a *share transfer fund* to cover the cost of reimbursement of member capital. Repayment may also be subject to conditions including committee consent and approval by the Registrar, CSRKI r 16. The co-operative is also entitled to set-off against this capital for any amounts owed to the co-operative. CAFJ provides a withdrawing member is entitled to repayment of their share capital, CAFJ s 38(j), however the co-operative's by-laws may set out any conditions for withdrawal of members including prescribing a period of notice, but such notice period shall not be longer than one year, CASFJ s 42. CSAPNG is an exception as it prohibits a co-operative from refunding share capital to members unless it has the written consent of both the Registrar and all its creditors, s59. However, it does allow the refunding of share capital to the estate of a deceased member (with the Registrar's consent) s62. It should be noted that the PNG *Companies Act 1997* does allow a company to issue shares that are redeemable at the option of the shareholder. It is important that any refund of share capital to members does not pose a risk to the solvency of the society, but this can be dealt with in a number of ways that are less onerous than requiring all creditors to consent.

The CNLAUS allows a member who resigns (or is expelled) to be repaid the amount that is paid up on shares, less any amount owing to the co-operative *within one year*, CNLAUS s128(1) The board may delay repayment of shares to former members if doing so would adversely affect the co-operative's financial position, or if the co-op and former member otherwise agree, CNL s128(1). If a co-op repurchases shares, it may issue or allot debentures or co-operative capital units (“CCUs”) to the former member in satisfaction of the amount owed or (for deposit-taking co-ops only) apply the amount as an interest-bearing deposit, CNL s128.

The CCANZ allows a co-operative company to choose whether it will issue shares to members as nominal shares or ordinary shares, CCANZ s 15. A shareholder of a company registered under the CCANZ who has ceased to be a transacting shareholder may surrender shares with a nominal value and the company may accept the surrender of the shares (and refund the nominal capital). The Board cannot accept the surrender of shares if to do so would cause it to become insolvent, CCANZ s18. The IPSANZ leaves it to the by-laws of the co-operative society to determine if member shares shall be withdrawable and making provision for repayment of any monies due.

Member obligations and liability

The reciprocal nature of the relationship between members and their co-operative is often forgotten.

In the reviewed countries, different legal frameworks deal with the issue of member economic participation quite differently.

COSAVU and CSOKI both prohibit members from belonging to more than one society where the main purpose of the society is to grant loans to its members, without the sanction of the Registrar COSAVU s 25; CSOKI s25. CAFJ imposes a broader prohibition on belonging to more than one society with the same objects, CAFJ s 41.

Most of the reviewed laws require members to make the minimum required financial contribution, whether a subscription fee or acquisition of the minimum number of member shares in accordance with the requirements in the by-laws, before they can exercise the rights of membership. COSAVU and CSOKI s 24; CAFJ s40; CNLAUS s120. CSAPNG and IPSANZ both leave the terms of admission to membership to their rules or by-laws. The CCANZ attaches rights to shares rather than membership but provides that only transacting shareholders may vote on resolutions unless the by-laws provide otherwise, s 33.

The liability of members to contribute to the payment of the debts of the co-operative varies and may be left to the rules or by-laws of the co-operative. Most of the reviewed laws provide that the liability of members on dissolution is limited to any amount unpaid on their share capital, plus any charges or fines, COSAVU s 47; CSAPNG s 31, CNLAUS s 121, IPSANZ s 9(1). In CSOKI and CAFJ the by-laws will set out the liability of members, which may be limited to the amount that is unpaid on shares, or greater than that amount or unlimited; CSRKI, 57(1)(f), CAFJ s 95. A co-operative company is also registered under the *Companies Act 1993* and the liability of its shareholders is limited unless its constitution provides otherwise, CANZ s 97.

A co-operative that is in financial difficulty may need to raise capital from its members. It may be able to do this by requiring members to purchase additional shares, CNLAUS s 82 requires the co-operative to approve a board's decision to require members to purchase additional shares by a special postal ballot. A special postal ballot is also required to approve a compulsory loan by members to the co-op and provides that the term of the loan must be 7 years or less, s 343. In both instances the board's proposal for additional capital may provide that the member purchase the shares or make the loan by way of deduction from money payable to the member for his or her dealings with the co-op.

In Vanuatu the co-operative has power to raise funds from its members, but not to compel them to contribute, COSRVU r 46. There is provision in the CCANZ – applying only to co-operative dairy companies which enables a co-operative dairy company to amend its constitution to require its members to take up more shares, CCANZ s40. There are restrictions on the application of this provision including a requirement that more than 90% of members vote in favour of the resolution, CCANZ s 41.

The co-operative laws make special provision to enable the co-operative to require its members to transact solely with the co-operative. This can be a tricky area, as it can potentially violate local competition law, and it can allow a co-operative to 'rest on its laurels' rather than striving to keep a loyal membership by focussing on member benefit. COSAVU, CSOKI and CAFJ all make special provision for disposal of produce for producer co-ops including agriculture, forestry, fisheries and handicraft and require members to dispose of all or a specified percentage through the co-operative, where a failure to do so constitutes a breach of contract, CSOVU s 13; CSRKI s 13, CAFJ 25. All provide that this requirement shall not be treated as a restraint of trade.

CSAPNG allows certain contracts in restraint of trade, so that a co-operative member may be required to sell products or have specified dealings with the co-op for a period not exceeding 3 years, s 44. The CNLAUS provides that the rules of a co-operative may require a member to deal with the co-operative for a fixed period and enter into a contract for that purpose, s125. The rules may require a member to sell products through the co-operative or obtain supplies or services from the co-op. Both CSAPNG and CNLAUS allow the co-operative to stipulate an amount as liquidated damages for breach of contract for a failure to comply.

The CNLAUS also ensures member economic participation (and financial viability) by requiring that all members comply with an active membership rule, CNLAUS s 146. This requires a co-operative in its rules to specify its primary activities and the active membership rule set out the way in which its members must contribute (at a minimum) to enable the co-operative to carry out its primary activities. A co-operative can have more than one primary activity, CNLAUS s 147. A non-distributing co-operative may provide in its rules that the payment of a regular subscription is sufficient to comply with the active membership rule, s 151. The co-operative has power to cancel the membership of an inactive member after 3 years or a shorter period if set out in its rules, CNLAUS s 156.

The CCANZ is a law that only applies to companies that carry out co-operative activities with transacting shareholders, s 3 and 4. The transacting shareholders may be required to hold shares in proportion to the volume of their transaction with the co-operative company in accordance with its constitution.

Division of governance between the general meeting (assembly) and board of directors

Co-operatives are democratic organisations and depend for their success on the active participation of members in the affairs of the co-operative. Henry explains that a co-operative has a dual function – it is both an association of members and an enterprise. The governance structure must reflect this dual character.¹⁸ As a rule – association matters (elections, amendments to rules, significant decisions that impact on the nature and objects of the association e.g. sale of major assets) should be made by the general assembly or general meeting. Decisions that relate to day to day operations of the business are enterprise matters and should properly be dealt with by a board of directors and their employed staff.

A point of difference between co-operatives and profit maximising companies is that the members of a co-operative in general assembly must exercise the right amount of control over the board and management of the company to ensure that it does not take actions which dilute its co-operative identity, but this needs to be carefully balanced against the risk of too much interference, so that the enterprise cannot run efficiently. It is a finely tuned balance that requires constant attention. It will not work unless the membership is well informed and interested in the affairs of the co-op (which will only happen if the co-op is working to maximise member benefits) and the board is skilled and committed to safeguarding the organisation's co-operative identity.

In Vanuatu and Kiribati, the legislation does not mention the division of governance between the general assembly and the board (or management committee), except for the Registrar's power to dissolve the committee, COSAVU s 58 and CSOKI s 40. The role and function of the two organs, the

¹⁸Hagen Henry, Guidelines for Co-operative Legislation (ILO 2012).

General Meeting and Committee, are set out in the regulations (rules) and arguably include too much detail regarding the roles of the officers treasurer and secretary, when this is something that should be left to the by-laws of the co-operative. Fiji's co-operative law includes a division of power between the General Meeting and the Board in CAFJ, ss 52- 75 and states that the General Meeting is the supreme decision-making body, s 52.

The CAFJ provides that the powers of the Board of Directors shall be as delegated to it in accordance with the Act and by the General Meeting (rather than in the by-laws of the co-operative). The functions of the Board include to implement all decisions taken by the general meeting, CAFJ s 63(2)(k). In the sub-regional expert's opinion, this tips the balance of power too far in favour of the General Meeting and this may lead to problems if the Board cannot make day to day (enterprise) decisions without needing to seek the approval of the General Meeting. While this might be appropriate for some co-operatives, the default should be a clear division of power- with the power to make 'enterprise' decisions left solely to the Board, except where those decisions impact on the members' ability to participate in the co-operative (e.g. sale of major assets). These default rules should be able to be modified by the by-laws or rules of individual co-operative.

The CNLAUS provides a suitable model for the division of governance between the two organs and sets out where special ballots of members are required for decisions that impact on member participation. CNLAUS Chapter 3, Part 3.1 for Management and Part 3.2 for Meetings.

Board of directors – skills and remuneration

Fiji's Registrar identified the problem of 'weak boards'¹⁹, to the extent that the issue can be addressed by legislative design, the following suggestions based on CNLAUS might be useful, but should always be considered within the local context and to ensure that co-operatives have maximum flexibility to adapt to their own individual circumstances and type:

- By allowing a board to have non-member directors (provided that member directors always outnumber non-member directors when any decision is made), see e.g. CNLAUS s 174.
- By allowing board members to receive director's fees, concessions or other benefits provided that these are approved by the general meeting, see e.g. CNLAUS s 203. There may need to be some additional guidance here, so that honariums are appropriate for smaller co-operative's, but director's fees might be appropriate for larger or complex co-operative businesses needing to attract and retain the right skill mix on its board.
- A suggested requirement (that does not exist in CNLAUS but is a modified version of the requirements of directors under the CCANZ requiring the Board to make an an annual resolutions that in the Board's opinion the company is a 'co-operative company') is: to require director's to report annually on the co-operative's performance in relation to the promotion of its members and its attention to promoting co-operative philosophy, principles, practices and objectives . This report may provide a mechanism for developing the skills and knowledge of board members in a manner that is focused on understanding the co-operative identity and co-operative advantage of the enterprise, rather than measuring the Board's performance using only financial indicators.

¹⁹This issue was raised by the Fijian Registrar in a presentation to ICA-AP members at the 14th ICA-AP Co-operative Research Conference in Newcastle Australia, 12 December 2019.

Decision making

Most of the reviewed laws provide for democratic governance of the co-operative based on one-member one vote: COSAVU s 26; CSOKI s 26; CAFJ s 59; CNLAUS s 228. Under the CCANZ voting rights are as per the *Companies Act* and attach to shareholding unless otherwise provided for in a co-operative company's constitution and the terms of issue for shares, CANZ s36. However, the CCANZ does state that only transacting shareholders will be entitled to vote on a resolution unless the constitution expressly provides otherwise, supporting a culture of control by the transacting members of a co-operative company, CCANZ s33. This is further supported by the requirement that no less than 60% of voting rights must be exercised by transacting shareholders, thus requiring some degree of transacting member control, CCANZ s2. The IPSANZ and CSAPNG do not expressly deal with member voting rights, but leave this to the co-operative society's rules, although in both laws, the requirements for special resolutions assume a one member one vote rule, IPSANZ s14, CSAPNG s 82.

Most laws allow voting by proxy, CSOKI, s 27; COSAVU s 27; CNLAUS s 229 and CSAPNG s81 allow voting by proxy if the rules allow. In addition, CNLAUS provides that the proxy must be an active member and the rules may limit the number of votes a proxy may hold, s229. In contrast, CAFJ s59 provides that votes must be exercised in person and not by proxy. There is a danger that voting by proxy may be used by some to manipulate control in a co-operative. Whether it should be mandated or left to the rules, is a decision to be made by legislators based on local context.

The setting of a quorum for the General Meeting is also important to ensure that democratic decision making is prioritised. COSRVU r 16 sets the quorum at 1/3 of members and provides that if the quorum is not met, the meeting is adjourned for one week. If, at the second meeting, the quorum is not met after one hour, the members present shall constitute a quorum. CSRKI leaves the setting of a quorum to the by-laws of the co-operative CSRKI r 26, but also provides for a one week adjournment and a quorum of present members after one hour. CAFJ s58 has more prescriptive details regarding the quorum. Where the co-op has forty or less members the quorum is half the members or 10, whichever is the lesser number. In the case of a primary co-operative having more than 40 members it is one fourth or one hundred members, whichever is less. If the quorum is not reached there is 15 days to convene a new meeting and at the second meeting the quorum shall be the members present. The CNLAUS leaves the setting of a quorum at General Meetings to the by-laws, s 255. IPSANZ does not mention quorums at meetings, but leaves this as a matter to be dealt with in the by-laws. CSAPNG leaves the setting of a quorum to the rules of the society, s51(r), s75. CCANZ leaves this to the *Companies Act* which provides that unless otherwise provided in the by-laws or rules, a quorum is present if more than 50% of votes held in the company can be cast (remembering that votes attach to shares and not members), CANZ Schedule 1, s4.

Content of by-laws

All the reviewed legislation makes provision for the matters that must be set out in the by-laws, except CCANZ, noting that technically a company registered under the *Companies Act* NZ is not required to have a constitution, and that a co-operative company is only required to have a constitution that defines the co-operative activity to be undertaken. In practice most co-operative companies will have comprehensive by-laws or constitution.

The matters that are required to be set out in the co-operative's by-laws (constitution or rules) varies considerably from law to law. See COSAVU Schedule (s 5(3)), CSOKI s57; CSAPNG s 51, CNLAUS Schedule 1 and IPSANZ Schedule 2. The CAFJ sets out a model by-law in Schedule 1 rather than only a list of the matters to be included. The *Guide to Co-operative Legislation* sets out a checklist of the matters that should be included in by-laws.²⁰ The main concern in the design of co-operative legislation is to get the right balance between those matters that should be mandated in the Act or Regulations and those that should be left to the co-operatives to determine in their own by-laws. If the law empowers the Registrar to make decisions on enterprise matters e.g. fixing the maximum liability a society may incur in loans, the autonomy of the co-operative is reduced and its ability to function effectively may be hampered, especially where the Registrar lacks the resources needed to micro- manage the decision making of every co-operative.

c) Co-operative financial structure and taxation

The issue of access to capital or lack of access to capital is often put forward as a matter of high concern for the co-operative sector and described by some as a weakness of the business model. But the issue should not be given disproportionate attention and should always be considered in the context of the co-operative identity. Co-operative capital should primarily be sourced from members as both investors and users of the co-operative. If the members are not prepared to invest enough capital to initiate the enterprise or enough patronage to make the business viable – arguably, the co-operative should not exist. If a co-operative relies too heavily on external capital – the principles of 'self-help' and 'autonomy' are compromised.

It should also be acknowledged that all new businesses regardless of type or legal form will struggle in the early stages due to a lack of capital, and many will fail because of this. It is the nature of new businesses and the inherent risk in any new venture that cause many to fail. It is not due to a flaw in the co-operative model. If a business struggles and then succeeds it has already learnt how to develop resilience and face the down turns in its business cycles.

However, a good legal framework for co-operatives needs to be flexible enough to accommodate the different financing needs of different types of co-operative enterprise without compromising the co-operative identity. For a range of reasons, the co-operative company model in New Zealand is well suited to its export oriented agricultural sector and has proven to be a resilient and successful model. The sub-regional expert is not suggesting that hybrid co-operative companies should replace traditional co-operatives, but that diverse enterprise models that cater for the existing and emerging business types sometimes require separate legal frameworks (assuming that the country is also able to support a separate regulatory framework for any new model).

Member shares

COSAVU and CSOKI both deal indirectly with member shares, by providing that member shares are not attachable, and no member shall hold more than one fifth of the share capital of the co-operatives. The COSRVU and CSRKI provide that shares are only transferable to other members (or incoming members) with the sanction of the committee, COSRVU r 37 and CSRKI r 43. While both laws leave it to

²⁰Henry, *Guide to Cooperative Legislation*, op cit, 82.

the co-operative's by-laws to determine if shares are refundable if a member withdraws, the CSRKI requires the co-operative to set up a share transfer fund to repurchase these shares, CSRKI r 16.

Under the CAFJ, a co-operative must set out the nominal value of each share and minimum share subscription requirements for membership in its by-laws, CAFJ s 91(1). Payments for the purchase of shares by new members may be staggered, provided at least 10% of the minimum subscription is paid upon admission to the co-operative, CAFJ s 91(2). CAFJ also provides for multi-stakeholder co-operatives and allows differential share contributions in accordance with criteria set out in a co-operative's by-laws, CAFJ s 91(3). The Act also provides that no member may hold more than one-fifth of a co-operative's share capital, CAFJ s 93.

The CNLAUS also requires that shares have a nominal value as specified in the rules of the co-operative, CNLAUS s 76. The CNLAUS provides that a distributing co-operative must have share capital, a non-distributing co-operative may or may not have share capital depending upon the rules of the co-operative, CNLAUS s 19(2). Shares are transferable as provided in the co-operative's by-laws, CNLAUS s 67. A member must subscribe for the minimum amount of shares, and must pay at least 10% of the nominal value and subject to the rules of the co-operative, so in a similar way to Fiji, the by-laws may allow a member to pay off their member share subscription over time, CNLAUS ss 77, 78. The CNLAUS also allows a co-operative to issue member shares at a premium. This provision can be used by co-operatives to address the free rider issue Where earlier members have contributed to the growth in value of the co-operative over time, later members may be asked to pay a premium for any new member shares, see CNLAUS s 80. The CNLAUS also makes provision for the issue of bonus shares in limited circumstances, CNLAUS s 83. Member shares can be transferred in accordance with the by-laws, to other active members or incoming members with the consent of the Board, CNLAUS s 99. The maximum shareholding for any member is 20% of the nominal value of the issued share capital, CNLAUS s 363.

CSAPNG leaves it to the rules of the society to determine the nominal value of shares, the minimum share subscription requirements for membership and the way the shares or interests of members may be transferred, s51. The CSAPNG provides that no member shall hold more than one fifth of the share capital of the co-operatives (without permission of the Registrar), s60.

Under the CCANZ a co-operative company *may* issue shares at a nominal value and accept surrender of those shares at that nominal value and different classes of shares may have different nominal values, CCANZ s 15. There is no limit in the CCANZ on the size of the shareholding of a single transacting shareholder, so long as no less than 60% of voting rights are in the hands of transacting shareholders as a whole. However, there may be a limit set out in the constitution. This limit may be determined based on transactions with the company during a defined period. CCANZ s 21 authorises the co-operative company to require a shareholder to surrender excess shares where the shareholder holds more shares of nominal value than is required under its constitution.

IPSANZ limits member share capital in co-operative societies to \$4,000 (the Minister may authorise a higher value in respect of any society by notice in the New Zealand Gazette), IPSANZ s 4(2).

Access to external capital

There are several ways a co-operative may access external capital and it is well accepted that some levels of external capital may be an essential requirement for the proper and efficient operation of the business. The most common way for a co-operative to access external capital is through debt, including unsecured loans, secured loans and the issue of debentures. The advantage of using debt capital is that it does not directly compromise the democratic control of the enterprise by members, but if debt levels become too high, it may impact on the co-operative's autonomy.

In many countries co-operatives are at a disadvantage when it comes to accessing debt (or quasi-equity) capital from traditional sources (e.g. banks) because international accounting standards may require that withdrawable member shares are shown on the balance sheet as debt rather than equity. This may make the books of the co-operative look less attractive than a similar business whose books show member shares as equity. There are also concerns that as co-operatives do not seek to maximise profits, the lenders capital is at a greater risk. Both are often misconceptions that are based on a lack of understanding of the co-operative business model in mainstream financial circles. Both issues need may need to be addressed at the policy level. One option is to allow co-operatives to adopt accounting standards that are tailored to the core features of the model.²¹ If a co-operative has built in protections to ensure that the amount of share capital that can be redeemed within a fix period is limited, and that no redemption can be made when there is a risk of insolvency, there is no reason to treat the co-operative differently than a company where similar rules apply.²²

Co-operative laws in Vanuatu, Kiribati and PNG require the Registrar to approve decisions that involve access to external capital. In PNG a society has the power to raise money on loan including by charging its property or issuing bonds (unsecured notes or debentures) or receive money on deposit (where authorised by its rules). However, the Registrar has the power to fix the maximum amount of undischarged liability that the co-operative may incur including both aggregate and specific classes of liability, CSA s 39. In Vanuatu and Kiribati, the co-operative must fix at a general meeting the maximum liability it may incur in loans or deposits whether from members or non-members, COSRVU r 11(1), CSRKI r 20 (1). This maximum is also subject to the approval of the Registrar, COSRVU r 11 (2), CSRKI r 20(2).

In Vanuatu, a co-operative's power to issue debentures or to encumber any of the assets of the society by mortgage or otherwise also requires the prior written approval of the Registrar, COSRVU r 46. The 2017 amendments to the COSAVU requiring a co-operative to notify the Registrar of any changes to the by-laws or policies relating to the source of funds used to pay the capital of the registered society, COSAVU s 11A. In Fiji, a co-op may receive deposits and loans from members and non-members, subject to limits set out in its by-laws and any amendment to those limits must be approved by the Registrar, CAFJ s 97.

The CAFJ provides that co-operatives may seek finance from a range of sources including grants, donations and contributions from public or private donor organisations; CAFJs 90 (d). Also, capital

²¹See Duncan Wallace, Accounting Standards and Co-operatives: Proposed Solutions to the Problem of AASB 132 (2016, BCCM) available at <https://bccm.coop/wp/wp-content/uploads/2018/09/AASB-submission.pdf>.

²²In Australia the Corporations Act 2001 (Cth) allows companies to buy back member shares in certain circumstances provided that the buy-back does not exceed 10% of the company's issued capital in a 12 month period, s257B Corporations Act, 2001 (Cth).

borrowed from members in the form of voluntary savings, deposits from other co-operatives or banks and public or private credit institutions, or from any other technical or financial assistance organisation, subject to restrictions in the Act or by-laws, CAFJ s90(e).

COSAVU and CSOKI both allow the Registrar to prohibit or restrict the co-operative's ability to transact with non-members, COSAVU s32; CSOKI s 34. The CAFJ provides that in relation to any capital raised from transactions with non-members, 100% of any surplus must go into the reserve fund, CAFJ s 100(2). The CNLAUS does not impose any restriction on co-operatives transacting with non-members nor does it require that the proceeds of those transactions be transferred to any reserve fund. The CCANZ provides that in the case of dairy co-operatives (except in limited circumstances) that all transactions must be with members, CCANZ s 39.

The CNLAUS provides that co-operatives may issue debentures and / or Co-operative Capital Units ('CCUs'), both of which may be issued to members and non-members. CCUs are hybrid forms of instrument which can be structured as either debt or equity, subject to their terms of issue, see CNLAUS Part 3.4 Division 2. The rights attached to CCUs do not affect democratic member governance of the co-operative and confer an interest in only the capital (but not the share capital) of a co-operative: CNLAUS ss345(1) and 349. CCUs provide Australian co-operatives with additional flexibility in raising capital and allow for more diverse contributions to a co-operative's capital structure. However, they are not widely known or used outside the co-operative sector, so external investment tends to be limited to former members of the co-operative.²³

CCANZ allows co-operative companies to raise capital by issuing transferable shares to non-transacting members in accordance with the relevant provisions in the *Companies Act* and subject to its own constitution and the requirement that 60% of shares are to be held by transacting shareholders. Co-operative companies may also raise capital by issuing debentures and obtaining loans in the same way as other companies. Co-operative societies registered under IPSANZ also have the power to raise capital from other sources by borrowing and issuing debentures, s10(e). In New Zealand, the offer of securities of either co-operative companies or co-operative societies must be properly disclosed in accordance with the requirements of the *Financial Markets Conduct Act 2013* (NZ).

Taxation

There are two issues relating to taxation and they should be treated separately. The first relates to how 'income' is assessed in a tax system that relies mainly on income taxation. A fair taxation system should acknowledge the difference between 'surplus' and 'profit'. A co-operative may make a surplus on transactions with members. As the co-operative aims to provide its services to members at the lowest possible price, a surplus is an overcharge, which should not be taxed in the hands of the co-operative if they return it to their members as a rebate or dividend. It will be treated as income in the hands of members and taxed accordingly. This should not be treated as a special privilege afforded co-operatives, but instead flows from the definition of assessable income and prevents a double taxation comparable to dividend imputation schemes (except that in the latter the company pays the tax).

²³A former co-operative, Namoi Cotton (which has since demutualised) listed CCUs on the ASX, however these were mainly held by 'dry' or non-active former members of the co-op.

The second issue is where co-operatives are given tax incentives or special treatment because the government wishes to incentivise or support co-operative businesses. This may be justifiable, but it needs to be acknowledged that it will increase the risk of bogus co-operatives being formed to take advantage of any special benefit.

In the reviewed countries, the National expert for Kiribati advised that co-operatives do not receive any special treatment, and that all businesses are taxed at a flat rate of 20% of assessable income. In Vanuatu co-operatives do not receive any special treatment, but notably, the taxation regime does not include income taxation. Instead the government relies mainly on VAT and Land Tax for revenue together with other taxes including excise tax, rent tax, business licensing fees and customs duties. The sub-regional expert is not aware of co-operatives receiving any special treatment in connection with these taxes.

Fiji has a system of tax incentives designed to encourage small and new businesses. The *Income Tax (Exempt Income) Regulations 2016- Part 2 Exempt Entities* provides Fijian co-operatives with the following incentives:

- New co-operatives may be entitled to an exemption from income taxation for a period of up to 8 years from the date of registration if the Minister so orders.²⁴
- Savings and loan co-operative societies are entitled to claim as exempt income, any income derived by the society and carried to a reserve fund or capitalised.
- A co-operative society registered under the *Co-operatives Act* that is receiving government assistance for a project may be exempt for the duration of the project for a period of up to 5 years

In Australia and PNG the treatment of surplus as non-assessable income in the hands of the co-operative only applies to 'co-operative companies' (this may include some producer or service co-operatives as in both countries the definition of 'companies' in the tax legislation includes co-operatives) where not less than 90% of its business is with its members. It also provides a tax incentive for co-operative companies, who may be eligible to deduct the repayment of both interest and principal payments on certain government loans. This provision does provide a significant tax advantage and has been used by co-operatives in Australia to invest in infrastructure and expand facilities for the benefit of local communities. However, they must first be able to get their hands on a government loan, and these are not available in all states. The sub-regional expert is not aware if co-operatives in PNG have been able to take advantage of these provisions.

In New Zealand, under section DIV 19 of the *Income Tax Act 2007* any "mutual association" is allowed a deduction, for a distribution to its members of net taxable profits (termed "an association rebate"). As mentioned above, in the sub-regional expert's view, this treatment of surplus arising from transactions with members should be regarded as fair tax treatment of assessable income, rather than a special privilege.

²⁴Income Tax (Exempt Income) Regulations 2016 Part 2 Exempt Entities, Income Tax Act 2015 (Revised up to 31st October 2019), <https://www.frsc.org.fj/wp-content/uploads/2019/10/Income-Tax-Act.pdf>

Audit

All co-operative laws under review provide for external auditing of the co-operative's financial accounts. COSAVU and CSOKI requires that the Registrar carry out the audit or authorise the auditing of the accounts of every registered co-operative society every year COSAVU s 36 (1); CSOKI s 37(1) and prepare an audit report COSRVU r 14(1), r 38; CSRKI r 55. The CSRKI suggests that co-operatives may be required to support this process by making contributions to the Audit and Supervision Fund, CSRKI rr 55 and 56. The national expert's report suggests that the Registrar has assumed responsibility for auditing and that this is a burden on the Registry's resources. It is not clear if an Audit and Supervision Fund is still in existence in Kiribati. CAFJ makes similar provision for auditors to be approved by the Registrar, CAFJ s 81, although the recently established National Co-operative Federation is empowered to conduct audits, CAFJ s 47 (2)(g), it is not clear if these are to be in the nature of 'co-operative audits' and in addition to the financial audits required under CAFK ss 80, 81. In PNG the Registrar is also responsible for auditing the accounts of a society (or appointing an auditor), and the legislation requires that all societies have their accounts audited annually. The law provides that an external auditor must be appointed where the gross turnover of a society exceeds a prescribed amount, CSA s 99. The sub-regional expert was unable to locate a regulation or other order that sets this prescribed amount.

The CNLAUS provides that 'small' co-operatives may be exempt from the requirement to have their financial accounts audited annually and do not need to submit accounts to the Registry, but they do need to submit an annual return confirming that all directors have made a 'solvency' resolution. The members of large co-operatives are responsible for appointing (or confirming the appointment) of the auditor for the following year at the annual general meeting. Both CCANZ and IPSANZ are subject to the *Financial Reporting Act 2013* and are required to have their financial accounts audited but may opt out if they are not 'large'. Co-operative societies may also opt out of the annual audit if a resolution passed by more than 95% of its members, IPSANZ ss 8K, 8L. Co-operative companies may also opt out of preparing annual reports, depending on the size of the company, the number of shareholders and whether members are willing to opt in or out of compliance with requirements for reporting and auditing. CANZ ss207I, 207J, 207K.

None of the co-operative laws in the countries under review required the co-operative to undergo any internal or external auditing of its non-financial performance i.e. there is no reference in any of the reviewed laws to a 'co-operative audit'. (But note the sub-regional expert's earlier recommendation regarding the Board to make an annual resolution and report on the attention given to promoting co-operative philosophy, principles, practices and objectives).²⁶

d) Other specific features

The role and function of apex bodies

Most co-operative laws in the region accommodate the formation of federated societies, COSAVU s3, CSOKI s4, CSAPNG s106, CNLAUS s 111(2). However, CAFJ is the only law that specifically mentions the role and function of secondary, tertiary and apex bodies. Most laws acknowledge Both Vanuatu and

²⁵Income Tax Assessment Act 1936 (Cth) ss117-120. Income Tax Act (PNG) ss 150 – 53

²⁶See the final dot point under the section heading, 'Board of directors – skills and remuneration'.

Fiji have recently re-established apex bodies, the Vanuatu Co-operative Business Network (VCBN) and the National Co-operative Federation (NCF) in Fiji. In PNG the Federation on Savings and Loans Societies (FESALOS) was formed in 1966 and is still functioning today. Most of PNG's secondary societies were converted into companies when the co-operative legislation was repealed in the 1970's. In Australia, the Business Council of Co-operatives and Mutuals (BCCM) is a relative newcomer, established in 2013. It still has two surviving state co-operative federations in NSW and WA. In New Zealand, Co-operative Business NZ (CBNZ) has a longer history, established in 1984 with its roots in the NZ Agricultural Co-operative Association. Both the NZ and Australian peak bodies represent mutuals as well as co-operatives, and it is doubtful that the co-operative sector alone would have the numbers and resources needed to support a peak body. The principle of 'co-operation among co-operatives' is a difficult one to implement, and Oceania lacks the strong sectoral and national federations that support the co-operative sectors in UK, Europe and US.

The sub-regional expert is of the view that a broadly described power to federate and an inclusive (rather than exhaustive) description of the role and function of secondary and tertiary co-operatives is a positive inclusion, if only because it is an indicator of the importance of federations to the promotion of a healthy co-operative sector. It may also draw the attention of policy makers to the need to consider the impacts of competition law on co-operative structures. However, federations and peak bodies should not be created and financed by the state, as this goes against the principles of voluntariness and autonomy. Federations should emerge spontaneously in industry sectors where co-operative development is occurring and where the co-operatives themselves recognise the value of integrating horizontally to deliver value to members.

IV. DEGREE OF “COOPERATIVE FRIENDLINESS” OF THE LEGISLATION IN THE REGION

This section should address the overall responses in national reports to Q19-22. In particular, the author should consider responses from ICA members, if present. The answers should note whether ICA member responses to these questions are in line or diverge with those of the legal expert.

The sub-regional expert's attempt to measure a national legal framework's 'co-operative friendliness' in terms of how well the law supports co-operative development and growth is problematic and largely subjective. At the crux of the problem is a lack of data that proves that there is a direct correlation between a robust co-operative legal framework and the size of the co-operative sector. In most countries there are many factors that come into play including economic, political, geographic and historical. Co-operative sectors in each country have cycled through periods of growth and contraction over time related to a combination of one or more of these factors. However, when co-operative law is regularly reviewed, amended and updated, it is more likely that there is a political commitment to co-operative development, and when this is done in conjunction with changes to other policy areas, so that there is an accommodating policy environment, it is more likely to lead to a rise in co-operative numbers. There is some statistical evidence that this did occur in Australia (NSW) after the introduction of the CNL. The assessment of the friendliness of the co-operative legislation in this review also takes into account the legislation's ability to support the 'co-operative identity', which may not itself lead to co-operative growth – but if the legal framework does not defend a distinct co-operative identity, it will eventually become redundant.

The CNL is quite significantly 'co-operative friendly' in the sense that the legislation is designed so that it is conducive to registered co-operatives operating in accordance with the first four of the co-operative

principles. These features include requirements for active membership rules, primary activities and embedding of co-operative principles in several areas including directors' duties. But co-operative development in Australia is stymied by the absence of co-operative law-making powers at the federal level. The CNLAUS is a template law that brings Australia closer to uniformity between state jurisdictions. However, co-operatives do not have a seat at the federal policy making table, and the state registrars lack the resources to act as strong promoters or regulators. It is also difficult to form a co-op under the CNLAUS. The requirements might protect the co-operative identity, but they deter new entrants who have other faster, cheaper and less demanding options when it comes to a choice of legal form.

New Zealand has been described as the world's most co-operative economy.²⁷ On a Likert scale of co-operative friendliness as an indicator of co-operative development, the CCANZ score is *more co-operative friendly than not*. This is because the legislation has been tailored (together with the *Dairy Industry Restructuring Act 2001* (DIRA) to meet the specific requirements of the dairy industry, which is the largest industry in the co-operative sector and one of the largest exporters in New Zealand. By adjusting the legal framework to ensure it meets the capital and financing needs of its largest sector, the CCANZ has contributed to the resilience of the co-operative model in NZ and ensured that it is recognised in policy circles as a business model that is worth defending. In comparison, IPSANZ is an outdated law, based on the earlier *UK Industrial and Provident Societies* legislation. The *Statutes Amendment Act 1939* requires that only 'bone fide' co-operatives be registered under the Act. But the Act itself provides no guidance, and matters relating to co-operative identity are left the co-operative's own by-laws. According to the NZ Companies Registry, co-ops registered under this Act are mainly service or marketing co-operatives, consisting of small businesses who combine resources to improve their market competitiveness or purchasing power (eg taxi co-operatives). The sub-regional expert does not have access to any data that shows whether this sector is growing or stable. But there is a case for reviewing and updating the IPSANZ, even if it is to 'refresh' the memories of legislators about the role of co-operatives in the business community and the need to keep the legal framework up to date to ensure that it offers a viable alternative business model for contemporary businesses.

Co-operative laws in Kiribati and Vanuatu are almost identical and based on a template colonial law known as the British Indian Pattern of Co-operation (BIPC). On the Likert scale of 'co-operative friendliness' both frameworks are rated as *more cooperative unfriendly than friendly*. This is because both laws have not been reviewed or updated since adopted by these countries following independence. COSAVU and CSOKI both assume well-resourced and funded co-operative registries to support co-operative development. The Registrars' extensive powers to intervene in the affairs of co-operatives undermine the fourth co-operative principle of independence and autonomy, and assumes that the Registries will have the time, resources, skills and support required to carry out this role effectively. In the absence of adequate resources and support, current laws do not serve the sector well in practice and require revision and updating.

Co-operative law in PNG is also considered to be *'more cooperative unfriendly than friendly'*. Co-operative law and policies were dismantled in PNG following independence. Many existing co-operatives and federations were liquidated, and some were registered as 'co-operative companies' under the *Companies Act* or *Business Groups Incorporation Act*. Co-operative law was reintroduced in

²⁷In a 2014 global survey commissioned by UNDESA, using the indices of membership as a % of population, employment as a % of population and gross revenue as a % of GDP, NZ was ranked number 1 in the world, <https://nz.coop/research-reports/top-40/>.

the early 1980's but it remained dormant and lacked any administrative machinery until 2003, when the Co-operative Societies Unit was established within the Department of Commerce and Industry. The Registrar's extensive powers to intervene in the affairs of co-operatives are underpinned by an assumption that the CSU will have the funding and resources needed to carry out its role effectively. In 2008, a Cooperative Society Development Policy (CSDP) was introduced with the objective of promoting co-operative development in rural PNG. Initial government funding resulted in some resurgence in the co-operative sector. However, PNG continues to struggle with high levels of government debt and a resource dependent economy that is vulnerable to dips in commodity prices. The CSU is keen to revise its legislation, but any review should take into account the likelihood that government and external funding is likely to be limited.

Co-operative law in Fiji is *limitedly 'co-operative friendly'*. Similarly, to PNG, Vanuatu and Kiribati it assumes a well-resourced co-operative registry to carry out auditing and other supervisory tasks. On the other hand, the CAFJ is a good example of a well drafted and easy to read legislative framework for co-operatives. It has many of the features which are recommended as best practice in co-operative law.²⁸ It is currently under review, and it is important that any revision of the law ensures that it is suited to its national context and takes into account its interaction with local laws and customs and the likely impacts of any law reform on existing co-operatives.

V. RECOMMENDATIONS FOR THE IMPROVEMENT OF THE LEGAL FRAMEWORK IN THE REGION

This section should address the responses to Q23-26. In particular, the author should consider responses from ICA members, if present. The answers should note whether ICA member responses to these questions are in line or diverge with those of the legal expert. This section may contain an analysis of the comparable national legal frameworks within the region.

A comparison of legal frameworks for co-operatives in the Oceania region is a worthwhile exercise. It provides an opportunity to conduct a detailed analysis of the strengths and weaknesses in each legal framework. More importantly, it helps to deepen our understanding of the history of co-operatives in the region, and to better understand the connections and similarities between these legal frameworks. The analysis reveals the potential for regional co-operation between the Pacific neighbours, so that together as a whole – the co-operative sector might be able to achieve more than the sum of its Pacific Island nation parts.

A common thread is the influence of British colonisation. The experience in the former British Dominions, Australia and New Zealand differed from the Pacific Island nations. In the Dominions, the British legal and social systems were transposed, and the white settlers dominated the first nations peoples by taking land into private ownership, and introducing cattle, sheep and broad acre farming. While those British and European migrants who settled in urban areas experimented with consumer co-operatives based on the British Rochdale model, it was agricultural producer co-operatives that were most effective in meeting the needs of members.

The Pacific Island nations had a very different experience of British colonialism. The British may have claimed some islands in the region as colonies or protectorates, but the contemporary island nations

²⁸Hagen Henry, *Guidelines to Cooperative Legislation*, 3rd Edition ILO 2012.

of Vanuatu, Fiji, Kiribati and parts of PNG are all island archipelagos, each including many smaller islands consisting of many distinct tribes with diverse ethnic and linguistic systems. The influence of British colonialists was often confined to one or two islands and their capital cities. Beyond those white settlement areas, the outer islands were rarely or never visited except by missionaries. This means that in countries that continue to have plural legal systems, the transplanted co-operative law only resides in the adopted western legal system and is not necessarily well integrated into other legal systems that continue to operate as customary law or 'kastom'.

While co-operative development in Australia and New Zealand was mostly due to voluntary and self-help initiatives, the governments in each country provided policy and funding support, at least up until the mid-1980's. The neo-liberal shift to open Australia and NZ to global trade resulted in deregulation of agricultural industries, including grain, livestock and dairy. In Australia, deregulation, competition law and policy and the centralisation of business regulation left co-operatives out in the cold, and the sector has struggled to survive in most states. A recent demutualisation of a large dairy co-operative means that only a couple of significant agricultural co-operatives are left standing.²⁹ Recently there are signs that the federal government is interested in supporting a revival in the sector,³⁰ and there are emerging co-operatives in new areas including health, care and worker co-operatives.³¹

In New Zealand, following deregulation, the government supported the formation of a mega-co-operative to replace the government marketing agency in the dairy industry. New Zealand's pragmatic approach to co-operatives, sees them as an effective tool to enable a small country to compete effectively in global agri commodity markets. This has meant that it has maintained a supportive regulatory and policy environment and has been willing to innovate with its regulatory framework for co-operatives to accommodate their need for capital. Despite its success, the co-operative sector has struggled more recently, with the demutualisation and privatisation of one of its larger dairy³² co-operatives, and governance issues in Fonterra as it experienced the sort of hubris and overconfidence of executive management, that led to the demise of agricultural co-operatives in Western Canada.³³

Kiribati, Vanuatu, PNG and Fiji all become independent nation states in the 1970's or early 1980's. They were left with legacy legislation from their colonial period, and most of it was adopted without review, as they transitioned into independence. The co-operative law in Kiribati, Vanuatu and Fiji was all based on the *British Co-operative Societies Ordinance*, a template law modelled on co-operative law in British India and known as the 'British Indian Pattern of Co-operation' or 'BIPC'.³⁴ The co-operative law in PNG

²⁹Mazzarol, T. 'Murray Goulburn Saga has its Roots in Deregulation.' *The Conversation*, 25/05/2016, accessed at <https://theconversation.com/murray-goulburn-saga-has-roots-in-deregulation-59607>

³⁰BCCM, 'Co-operative Farming, Future Proofing Aussie Farmers', <https://bccm.coop/what-we-do/co-operative-farming-program/about/>

³¹BCCM, National Mutual Economy Report, 2019, accessed at <https://bccm.coop/wp/wp-content/uploads/2019/11/BCCM-2019-NME-Report.pdf>

³²Voinea, A. 'New Zealand's Westland Dairy Co-op approves Demutualisation Plans', *The News*, 12/07/2019, accessed at <https://www.thenews.coop/140802/sector/agriculture/new-zealands-westland-dairy-co-op-approves-demutualisation-plans/>

³³Gerard Hutching, 'Fonterra heads reject ex-CEO Spierings' policies of 'global domination', *Stuff*, 7/11/2019 accessed at <https://www.stuff.co.nz/business/farming/117234408/fonterra-heads-reject-exceo-spierings-policies>. Fulton, M & Larson, K, 'Overconfidence and Hubris: The Demise of Agricultural Co-operatives in Western Canada.' (2009) 37(2) *Journal of Rural Cooperation* 166.

³⁴Model Co-operative Societies Ordinance, Enclosure 2 to Circular Despatch dated 20th March, 1946, from the Secretary of State for the Colonies to the Colonial Governments, Col. No. 199, London 1946, cited in Munkner H, Hans -H Munkner, 'Ensuring Supportive Legal Frameworks for Co-operative Growth' (Paper presented at the ICA 11th Regional Assembly, Nairobi, 2014), 4.

from the 1950s to 1970s period under the Australian colonial administration was also based on the BIPC model, but it was repealed following independence, and the co-operative sector was dismantled. PNG passed the *Co-operative Societies Act 1982*, but the law remained dormant until the administrative machinery – the Co-operative Societies unit was set up in 2003. Fiji reviewed and updated their BIPC legislation in 1996. The CAFJ is a well drafted law that implements many of the ILO *Guidelines to Cooperative Legislation*, but the Registrar notes that the law has shortcomings especially in the area of co-operative governance, reporting and auditing. All the South Pacific countries included in this analysis are currently reviewing their laws. However, the Registries all indicate the need for guidance and support in undertaking a legislative review.³⁵

The sub-regional expert recommends that the South Pacific Island nations may benefit from a regional framework template law for the region. Adoption of the template law would be optional and voluntary for these countries but would provide them with a point of reference to guide any reviews of existing laws. A key benefit would be that the template law would provide a focal point for co-operation between the co-operative Registries in the region. The template law would be a 'living document', so that feedback could be obtained from member Registries through a Regional Council. The feedback on any issues relating to the implementation of each country's revised laws would be added to annotated commentary to the Framework and recommended solutions to administrative and practical issues could be considered by the Regional Council, and the template law amended and updated as agreed. The Australian and New Zealand Registries along with their peak bodies BCCM and Co-op Business NZ may be invited as associate or guest members. Another key benefit that a regional template law might offer is as a reference point for co-operative education in the region. Fiji is well placed to be the lead jurisdiction for any regional framework law. The current *Co-operatives Act 1996* (Fiji), although under review provides a good foundation model for a proposed regional template law. Fiji also has a Co-operative College as a functioning educational training centre for co-operatives.

The National reports for the reviewed countries in Oceania, each highlight the strengths and weaknesses of existing laws and make recommendations for improvements. A summary of key recommendations that are common to many of the countries are noted here and provide a starting point for a review of the CAFJ as a model for a regional template law:

- The law should provide a definition of co-operative which has standard features but is tailored to each country's national and cultural context so that it provides a clear identity for co-ops generally, but also in each country.
- The law should refer to the co-operative principles as a guideline for both internal governance and external regulations. (Any listing of co-operative principles in the legislation should be inclusive rather than exhaustive, as co-operative principles are not fixed and may change over time, a reference to the Co-operative Identity Statement is also desirable). Co-operative principles should not be confused with legal principles and so compliance should not be mandatory. However, a regional template law may incorporate one or more of those principles into the legal identity of the co-operative.
- A review of the functions of the Registrar to relieve them of some of the regulatory burden that falls on their shoulders under existing laws and has more realistic expectations of the role of the co-operative registry based on available resources.

³⁵The sub-regional expert met with Registrars from Fiji, PNG and Kiribati at the UNDESA Workshop on “The Role of Cooperatives in Sustainable Development in Asia-Pacific Countries” in Fiji, 3-5th March 2020. Vanuatu contracted with an external consultant and currently has a draft bill that is to be tabled in Parliament in 2020, see Office of Register of Co-operatives and Business Development Services, 2019 Annual Report, accessed at https://cooperative.gov.vu/images/Annual_Reports/ORCBDS_Annual_Report_2019.pdf

- The law should include appropriate (and achievable) reporting mechanisms for co-operatives based on their size and type to encourage self-regulation of co-operatives with support (rather than direct intervention in co-op decision making processes as noted above).
- A template law might consider the inclusion of special provisions for school co-operatives with a possible reduction in minimum age (e.g.13 years).
- A template law should include the requirements for a Board including membership, requirements, disqualification, quorum, duration of term and election and removal from the Board.
- A distinction between large and small co-operatives and simplify the reporting and compliance obligations of small co-operatives (this reduction in external supervision and administration might be given in exchange for members assuming unlimited liability, or restrictions on raising external capital).
- Consider incorporating a simplified alternative legal structure with a low administrative burden for small common interest groups.
- Include a power to federate and set out the role and function of secondary and tertiary co-operatives and any apex organisation, including auditing and reporting obligations.

VI. CONCLUSIONS

If the national expert has additional comments that were not included in the above sections, they can be made in the conclusions. This section should also address any specific challenges in collecting the information or integrating the ICA member comments. Specific challenges or opportunities related to the national context should be addressed here.

Any criticism of national legal frameworks for co-operatives in this sub-regional report should not be regarded as a criticism of any of the Co-operative Registries who are left with the difficult task of administering the law, often with too few resources. The review is about the 'law on the books' rather than the 'law in action'. The National Reports, ICA-AP country snapshots and feedback and reports from Co-operative Registries indicate that the South Pacific nations are committed to co-operative development in the region and have recently introduced strategic plans and policies to reinvigorate their co-operative sectors. Fiji, Vanuatu and Kiribati co-operative registries have all indicated a desire to update their co-operative legislation. The proposed regional template law may provide them with a useful guideline and also enable the sharing of resources for education and training.

However, the law 'by and of itself does not change anything.'³⁶ To be effective, the law must be applied and to be applied it must be understood. The willingness of the actors (government, co-operative managers and co-operative members) to better understand the co-operative identity, and to apply that knowledge to practice, will be heavily dependent upon each actor's commitment to gaining a better understanding of the co-operative model by participating in education and training. To make a significant difference, this must occur, not just at the grass roots level of members, but at all levels including engaging the policy makers at the top.³⁷

³⁶Hagen Henry Guidelines to Co-operative Legislation 3rd Edition, 2012, 104.

³⁷Hans Munkner, "The Supportive Environment for Cooperatives" (2002) Expert Group Meeting, Mongolia

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