

# LEGAL FRAMEWORK ANALYSIS

within the ICA-EU Partnership

## National Report of Vanuatu

ICA - Asia and Pacific (ICA-AP) is the voice of cooperative enterprises in the Asia Pacific region. ICA-AP, as a regional office of the ICA, is also a co-signatory of a Framework Partnership Agreement signed between the International Cooperative Alliance and the European Commission in March 2016, which aims at strengthening the cooperative movement and its capacity to promote international development. This agreement underpins the ‘Cooperatives in Development’ program and includes knowledge building activities at the global (harmonized) and regional (decentralized) level.

The activities planned within the framework of the program include diverse research activities conducted at the global and regional level. The primary activities undertaken at the global level include a Legal Framework Analysis (A2.2), which is led in a coordinated way by all ICA offices. Within this framework, ICA-AP oversees implementing the research in the Asia and Pacific region.

The study on legal frameworks under the Legal Framework Analysis (A2.2) will evaluate jurisdictions and policy regulations according to their enablement of cooperative development. The document will present recommendations for the next steps in renewing the legal frameworks and helping to shape the policy agendas in a targeted way in the different regions and countries. It will evaluate the cooperative legal framework in place with common indicators, delivering on a scale of how ‘cooperative-friendly’ the legislation in a country is. In the same context, this report deals with the Legal Framework Analysis of Vanuatu.

## Introduction

This report was initially prepared by Jane Gereva, the national expert appointed by the International Cooperative Alliance Asia and Pacific (ICA-AP). The process began

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with the completion of questionnaire for the legal framework analysis with input from Santosh Kumar of the ICA-AP and Ridley Joseph, Director of the Cooperative Department of Vanuatu. The report has been reviewed and revised with some additional commentary added by Ann Apps, the sub-regional expert for Oceania.

The legal framework analysis on cooperative legislation in Vanuatu aims to:

- Provide a general overview of the Co-operative Societies Act COSA, as amended, and its main features including how the legal framework secures the cooperative identity and distinguishes it from other types of business organizations, notably the public company.
- Evaluate if cooperative law in Vanuatu supports or hampers the development of cooperatives, and to the extent that it is not “cooperative friendly”, make recommendations for reform.

## Cooperative law - Vanuatu

### General Context

Vanuatu is a small island state with culturally and linguistically diverse communities scattered over 83 islands.<sup>1</sup> It has a developing economy and a plural legal system.<sup>2</sup> Vanuatu (as New Hebrides) was jointly ruled by the British and French from 1906 to 1980.<sup>3</sup> The cooperative model was introduced by the British and French colonisers during this period, primarily as a development tool. Cooperatives were developed under government direction as a two-way producer and consumer model, providing a mechanism for trading agricultural products with consumer goods on the islands.<sup>4</sup> Following independence in 1980, a lack of administrative expertise and resourcing of cooperative regulators,<sup>5</sup> and a shift in development aid policies in the west towards free-market neoliberal policies saw a reduction in support for the cooperative

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<sup>1</sup> Wesley Morgan, 'Overlapping Authorities: Governance, Leadership and Accountability in Contemporary Vanuatu' (2013) *Journal of South Pacific Law*, A-8.

<sup>2</sup> Geoffrey White, 'Indigenous Governance in Melanesia' (AusAID, 2006) <[http://ips.cap.anu.edu.au/sites/default/files/SSGM\\_IndigenousCustomaryGovernance\\_ResearchPaper\\_06.pdf](http://ips.cap.anu.edu.au/sites/default/files/SSGM_IndigenousCustomaryGovernance_ResearchPaper_06.pdf)>, 5.

<sup>3</sup> Corrin and Paterson, *Introduction to South Pacific Law*, (2017, Cambridge) 30.

<sup>4</sup> 2019 Vanuatu Country Snapshot, ICA-AP.

<sup>5</sup> Ibid.

business model and neglect of cooperative law.<sup>6</sup> However, in the past decade, there has been a resurgence of interest in the cooperative business model in Vanuatu. Initiatives such as the ‘Traditional Money Banks project’ and the ‘Year of the Traditional Economy, 2007 – 2008’ have increased the government’s recognition of the significance of the cooperative model in assisting communities to achieve improved living standards, with a particular emphasis on savings clubs and credit unions.<sup>7</sup> The Office of Registrar of Cooperatives and Business Development Services (ORCBDS) became a member of the ICA in 2015.

### British Indian Pattern of Cooperation (BIPC)

The main cooperative law in Vanuatu is the Co-operative Societies Act COSA. It was passed in Parliament in 1982 and came into force in July 1987. It is an example of the British Indian Pattern of Co-operatives (BIPC). The BIPC model was a ‘purpose-built’ rural economic development tool for colonial British-India.<sup>8</sup> After the second world war, the state-assisted BIPC model was recommended by the British Colonial Office to the governments of all British dependencies including the Fiji and Solomon Islands,<sup>9</sup> and was later adopted in Vanuatu.<sup>10</sup>

The BIPC model assumes a highly centralised and well-resourced registry system. The absence of adequate enforcement mechanisms in the post-independence period meant that the cooperative model fell into disrepute with foreign donors, who prioritised assistance with legislative reforms and technical expertise to strengthen the company model. This has resulted in a neglect of cooperative law and until recently there had not been any substantial revision of the model.

The following legislation makes up the legal framework for cooperatives in Vanuatu:

- Co-operative Societies Act [CAP 152] COSA
- Co-operative Societies (Amendment) Act No. 10 of 2011

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<sup>6</sup> Hans -H Munkner, 'Ensuring Supportive Legal Frameworks for Co-operative Growth' (Paper presented at the ICA 11th Regional Assembly, Nairobi, 2014), 4.

<sup>7</sup> Ralph Regenvanu and Haidy Geismar, 'Re-imagining the Economy in Vanuatu - An interview with Ralph Regenvanu and Haidy Geismar' in Edvard Hviding and Knut M.Rio (ed), *Made in Oceania - Social movements, cultural heritage and the state in the Pacific* (Sean Kingston Publishing, 2011) , 37.

<sup>8</sup> It involved providing financial incentives to registered cooperative societies in the form of tax breaks and government funding. The designers of the legal model presumed that the recipients of these benefits required careful supervision and monitoring, so at the centre of the model was a highly bureaucratic and interventionist cooperatives registry.

<sup>9</sup> Model 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, Munkner, above n , 11 and Munkner, above n , 24.

<sup>10</sup> The *Co-operative Societies Act*, CAP 152 Vanuatu, commenced in July 1987.

- Cooperative Societies (Amendment) Act No. 34 of 2017
- Co-operative Societies Rules Order No. 37 of 1987
- Co-operative Societies (Co-operative Development Fund) Rules Order No. 1 of 2000
- Co-operative Societies Rules (Amendment) Order No. 23 of 2001
- Cooperative Societies (Cooperative Development Fund Rules) (Amendment) Order No. 11 of 2006
- Co-operative Societies Rules (Amendment) Order No. 106 of 2018
- By-laws for Co-operative Consumers and Marketing Society Limited
- By-laws for Co-operative Savings and Loans Society Limited

The Co-operative Societies Act (“COSA”) regulates all types and forms of cooperative societies in Vanuatu and provides that “any society carrying on any industry, business or trade, in accordance with co-operative principles may be registered under the Act”. (COSA s 2)

The Act does not make any reference to social cooperatives or worker cooperatives, but it does provide especially for the establishment of school cooperatives which can be established with the written consent of the Minister, (COSA s 57). There are required by-laws for consumer and marketing societies and also for savings and loan societies.

The Act does not make provision for ‘not for profit’ or charitable associations which can only be incorporated under the Charitable Associations Incorporation Act [CAP 140].

### Specific elements of the cooperative law

#### Definition and objectives of cooperatives

#### Cooperative Principles

Table 1

Application of Cooperative Principles (General)	Law or Regulation	Relevant section (link)
Requirement for registration that business is designed to function in	COSA	Ss 3, 7

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accordance with cooperative principles; (or if not, Minister may by special order exempt society from any requirement of this Act as to registration.)		S54
Defines a ‘school cooperative society’ as a cooperative trading in accordance with cooperative principles established within a school for general education or similar educational purposes		S57(2)
The (compulsory) by-laws for savings and loan cooperatives set out the objects of the cooperative including: <ul style="list-style-type: none"> <li>- encouraging regular savings among members, and</li> <li>- providing an organization that receives and invests savings and/or lend them to members under a safe system of lending and promoting education in cooperative principles and practices.</li> </ul>	By-Laws for Cooperative Savings and Loans Societies	Clause 6 (1)

Table 2

Application of Cooperative Principles (Specific)	Law or Regulation	Relevant section (link)
<p>Voluntary and open membership</p> <p>Restriction on age (over 18) and membership of more than one savings and loan society.</p> <p>Membership conditional upon subscription or purchasing member shares</p> <p>A member is free to withdraw from society and receive reimbursement of the amount paid for member shares</p>	<p>COSA</p> <p>Co-operative Societies Rules (COSR)</p> <p>COSR</p>	<p>SS 23, 25</p> <p>S24</p> <p>R 8(2)(5)</p> <p>R 8(6)</p> <p>S 25</p>

<p>No registered society shall fix any limit to the number of its members. Except with the sanction of the registrar, no person shall be a member of more than one registered society whose principal object is to grant loans to its members</p>	<p>COSA</p>	
<p>Democratic member governance No member shall have more than one vote in the affairs of the society (chairman has casting vote where votes are equal). Also, by limiting the shareholding of any one member to no more than 20% (1/5th) of a cooperative's total share capital the influence of any one member is limited.</p>	<p>COSA</p>	<p>S 26 S 28</p>
<p>Member economic participation. Where the registered cooperative is a producer cooperative (i.e. the cooperative disposes of agricultural commodities or handicrafts produced by members), the cooperative may require that its members dispose of all or a specified proportion of their produce through the cooperative. Otherwise, members can only exercise rights of membership if they have paid the membership fee or acquired member shares as required by rules or by-laws. Transactions with non-members may be prohibited or restricted</p>	<p>COSA  COSA COSR COSA and COSR</p>	<p>S 13  S 24 S32 and R 47</p>
<p>Cooperation among cooperatives The CSR provides for the establishment of a Cooperative</p>	<p>COSR</p>	<p>R 40</p>

<p>Development Fund to provide financial and other assistance to registered societies, particularly in the agriculture, fishery, livestock, forestry, manufacture, retail, trade, infrastructure, and transportation sectors.</p> <p>The Registrar may require societies to contribute to the fund.</p>		
<p>Concern for community.</p> <p>A registered society may, with approval of the registrar (after the transfer of net profits to statutory reserve fund) contribute an amount not exceeding 10% of the remainder to any charitable purpose or a fund for ‘common-good’.</p>	<p>COSA</p>	<p>S 34</p>

Cooperatives are not defined in the COSA, other than the requirement that only those societies carrying on an industry, business or trade, in accordance with cooperative principles may be registered under the Act, (COSA s 3). Tables 1 and 2 above show how some of the cooperative principles are given effect in the legislation. However, the Act does not set out the ICA Cooperative Principles or reference the ICA Statement of Cooperative Identity or another instrument which refers to those principles, e.g. ILO R 193.

The promotion of members as an objective of the COSA

The COSA does not specifically address the objectives of a cooperative, i.e. it does not 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’.<sup>11</sup>

The promotion of members is prioritised by the power for the Registrar to restrict the cooperative’s transactions with non-members, COSA s 32. Members are unable to exercise their rights unless they have made payment to the society or acquired an interest as required by the rules or by-laws, COSA s 24. If the cooperative is a

<sup>11</sup> Hagen Henry, Guidelines for Cooperative Legislation (International Labour Office, 2012) 64.



producer cooperative it may require its members to only dispose of its produce or a proportion of their produce through the cooperative, COSA s13. However, the COSA does not oblige the cooperative to distribute its surplus based on patronage. It may do so in accordance with its rules, COSA s34(3), COSR r 10 (3).

## **Establishment, cooperative membership and governance**

### Legal requirements for the establishment and continuation of a cooperative.

Registration is necessary for the establishment of a cooperative under the COSA, COSA s 7. An application for registration must include copies of by-laws setting out the matters listed in the Schedule, COSA s 5(3) and COSR r 2.

The Registrar has the power to defer the registration of a new society subject to the society's compliance with conditions set by the Registrar. The society shall be permitted to operate in the meantime as a probationary society, COSA s 6.

To be eligible for registration, a society must have no less than 7 members, COSA 4 (1) who are over 18 years of age, COSA s 23, unless they are members of a school cooperative, COSA, s 57 or two members where one of the members is a cooperative society, COSA s 4(1)(b). The Registrar has the power to cancel the registration of a society that no longer has the required number of members, COSA s 39(1).

The Co-operative Societies (Amendment) Act No. 34 of 2017 introduced some changes to the COSA to protect cooperative societies being used for money laundering or other fraudulent or corrupt purposes. One significant amendment was to COSA s7 requiring the Registrar to be satisfied, not only about the new society complying with the Act and other laws but also about the source of funds used to pay the capital of the society and 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 offense 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).

### Admission of new members

There is no mandated requirement that cooperative members actively participate in the business of the cooperative once they have qualified for membership. However,

the cooperative may set out minimum member participation requirements in its rules, COSA s 13. The prescribed by-laws for Co-operative Consumer and Marketing Societies requires that members shall be resident or in the occupation of land in the area of the cooperative and have paid up the value of at least one share at the time of application for membership (Clause 9).

The 2017 amendments do require the cooperative once registered to notify the Registrar of any changes about key persons and sources of funds, COSA s 11A. Otherwise, the cooperative society is prohibited from setting an upper limit on the number of members it will admit, CSR r 8(6)

### Member's voting rights

COSA s 26 sets out the one member/one-vote principle. The exceptions are that in the case of an equality of votes, the chairperson has the casting vote, and a cooperative society may have more than one vote as set out in the by-laws of the cooperative, COSA s 26. The law does not make any provision for joint membership.

### Governance structure

Requirements for governance are not set out in the COSA but the by-laws must make provision for the appointment and removal of a committee, managers and other officers in accordance with requirements as set out in COSR R 20. Committee members must also be members of the cooperative, COSR R 20. There is no minimum number of committee members prescribed.

The function, powers, and duties of the committee are also set out in COSR r 21. The committee elected at the annual general meeting is the executive authority of the society and is responsible for the management of the affairs of the society. The Committee may enter into contracts, borrow money and may institute, defend and settle any legal proceedings on behalf of the society, COSR r 21. The CRS also sets minimum attendance requirements so that in case of a failure to attend 3 consecutive meetings without leave, members will be deemed to have vacated the office, COSR r 20 (5). The committee shall appoint a secretary whose duties are set out in the COSR r 24 and may appoint a treasurer (if the by-laws require) who may take over some of the duties listed for the secretary, COSR r 25.

There is no general provision under the law for supervisory boards however where the cooperative is a national society or secondary society that receives government financial assistance, or where the Minister believes it is in the interest of the National

Economy, the Minister may appoint special members of the committee (up to one-third of committee members may be special appointments), COSA s 59.

While the cooperative law does not set out the fiduciary obligations and liabilities of the committee members these will inhere in common law, equity and statute. COSA s 61 provides that every offense committed by the society shall also be deemed to have been committed by every officer who has an obligation under the by-laws to fulfill the duty which has been breached. If there is no such individual officer – it shall be deemed to have been committed by every member of the committee (who was not ignorant or aimed to prevent the commission of the offense.)

The Registrar has the power to discharge any officer who is because of his conduct or otherwise, unfit to hold his office, COSR r 26. The Registrar also has extended powers to investigate the affairs of any society under the 2017 amendments to the COSA, see SS 37, 37A, 37B.

Cooperative committees are accountable to their members through the members' rights to receive a copy of the cooperative's annual return, balance sheet and profit and loss statement, COSA s 35. The cooperative is also required to hold an annual general meeting within one month after the Registrar has audited the cooperative's accounts. COSR r 14. As per the requirements of democratic member governance, members will generally elect the committee at general meetings (as per a cooperative's by-laws and COSR r 14) and, in this way, have some degree of control over the governance of their cooperative.

Additional member protections include a requirement that certain matters may only be decided by special resolution, needing three-fourths of members to be in favour of the proposal. These decisions include a decision to split a cooperative society into two societies, COSA s 22; the removal of a committee member, COSR r 20(3); or amendment of the by-laws of the cooperative, COSR r 41(2). Expulsion of a member requires a two-thirds majority. COSR r 8(3).

## Cooperative financial structure and taxation

### Capital contributions

A member is not entitled to exercise the rights of membership until they have made any payment to the cooperative required for membership or acquired the minimum

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number of shares as required by the cooperative's by-laws, COSA s24. Fundraising by issuing shares is also subject to the requirement that a member may not hold more than 20% of a cooperative's share capital, COSA s28.

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, COSR r 8 (5). The cooperative is also entitled to set-off against any monies owing to a member, any debts due by the member to the cooperative.

### Other sources of finance

The cooperative's power to raise funds is set out in COSR r 46 including the power to issue shares to members; obtain loans and receive deposits from members and non-members subject to rule 11 and by other lawful means (also see COSA s 30). Rule 11 requires the cooperative to fix at a general meeting the maximum liability it may incur in loans or deposits whether from members or non-members. This maximum is also subject to the approval of the Registrar.

Fundraising is also subject to the 2017 amendments to the COSA requiring the cooperative 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, COSA s 11A.

Also, the cooperative's power to issue debentures or to encumber any of the assets of the society by a mortgage or otherwise requires the prior written approval of the registrar, COSR 46.

### Distribution of surplus to members

The cooperative may only distribute its surplus to members after it has transferred not less than one-fourth of its net profits to a statutory reserve fund., COSA s 34. The remainder of profits may be divided among members by way of dividend or bonus in accordance with the rules and the by-laws of the cooperatives, COSA s 34. Cooperatives may also be required to contribute an amount not less than 1,000VT to the Cooperative Development Fund annually (COSR r 40).

The COSA does not oblige the cooperative to distribute its surplus based on patronage although it may do so in accordance with its rules, COSA s34(3), COSR r 10 (3). The payment of any dividend on paid-up share capital is limited to 6%, COSR r 10 (2).

### Distribution of surplus upon dissolution

The COSA s46 provides for the disinterested distribution of any surplus upon dissolution after the satisfaction of all debts and liabilities, and the costs associated with winding up and the return to members of the nominal value of their shares. Any remaining surplus must be devoted to any object described in the by-laws of the society whose registration has been canceled. If where no object is described the surplus will be transferred to the reserve fund of a cooperative operating with a similar purpose in the same area, COSA s 46 (3).

### Taxation of cooperatives

The taxation regime in Vanuatu does not include income taxation. Instead, the government relies mainly on VAT and Land Tax for revenue, other taxes include Excise Tax, Rent Tax, Business Licensing, and Customs Legislation. In January 2020 new legislation, the Tax Administration Act comes into effect. The key features are aimed to modernise the revenue collection system and improve taxpayer compliance. These changes will impact on cooperative businesses and include:

- Requiring businesses to have and use a Tax Identification Number (TIN)
- New or clearer record-keeping obligations for business taxpayers
- Electronic filing and paying is facilitated

Tax law in Vanuatu does not provide for the special treatment of cooperatives. However, the COSA provides the Minister with power to exempt an individual cooperative or class of cooperative society from the payment of stamp duty or registration fees, COSA s 56.

### Other specific features

Apart from having the standard features of a BIPC law described below, the specific features of Vanuatu's cooperative law include the specific recognition of 'school cooperatives', the mandated contribution to a statutory reserve fund and the establishment of a Cooperative Development Fund.

The cooperative law in Vanuatu is still largely based on the model ordinance that is referred to as the British Indian Pattern of Co-operation (BIPC). The most significant feature of BIPC regulation is that it requires the Registrar to take an active role in monitoring and supporting the activities of cooperatives to ensure sound decision-making. The Registrar's powers have recently been extended under amendments to

the COSA to implement FATF recommendations.<sup>12</sup> Examples of instances in the COSA and COSR where the Registrar has discretion and power to intervene in the affairs of cooperatives include:

- Determining whether any member is suitably qualified to be a member, COSA s 4 (5) and also following the 2017 amendments, to determine whether the key persons of the cooperative are ‘fit and proper persons’ and also that the source of funds used to pay the capital of the registered society is legitimate, COSA s 7 and s 11A.
- Power to carry out on-site inspections during normal business hours, to inspect premises, books of account and documents, COSA s 37
- Determining whether registration of a new society should be deferred on conditions and setting those conditions for a probationary society, COSA s 6(1)
- Approve any amendments to by-laws (with a right of appeal to the Minister), COSA s 10 (3)
- Approve an application for an individual to be a member of more than one cooperative savings and loan society, COSA s 25
- Approve a loan by one registered society to another, COSA s 30(1)
- Approve the maximum liability a society may incur in loans or deposits whether from members or non-members, COSR r 11 (2)
- Grant permission to a cooperative to lend money on the security of movable property which is other than the produce or goods in which the society is authorised to deal, COSAs 30 (2)
- Prohibit or restrict the lending of money on mortgage of immovable property by any registered society COSA s 30(2) also the prior written approval of the Registrar is required for any issue of debentures or the encumbering of the assets of the society by a mortgage or otherwise, COSR r 46
- Approve where a society may invest or deposit its funds, COSA s 33 including to direct where the secretary of a cooperative may deposit the cooperative’s cash, COSR r 24(d)
- Determining the proportion of funds (if less than  $\frac{1}{4}$ ) that shall go into the statutory reserve fund, COSA s 34(1)

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<sup>12</sup> The Co-operative Societies (Amendment) Act No 34 of 2017 was introduced to strengthen regulatory controls to protect the financial sector from abuse by criminals. The amendments were required to give effect to the Financial Action Task Force (FATF) - an intergovernmental body working to develop policies to protect the global financial system against money laundering, terrorist financing and weapons financing.

- Approve the contribution of net profits to a charitable purpose or common good fund COSA s 34 (4)
- Power to prohibit or restrict the cooperative's power to transact with non-members COSA s 32, COSR r 47
- Where the accounts of a society are not approved by the members at an AGM, to make a decision about the correctness of those accounts, COSR r 14(2)(c)
- Convene a special general meeting of any registered society for any purpose at the Registrar's discretion COSR r 15(4)
- Approve a cooperative committee's decision to write off bad debts, COSR r 21 (2) and require a committee to prepare and submit an estimate of income and expenditure for the following year, COSR r 21(3)(c), r 36(1)
- Approve the use of funds of a registered society for the acquisition of land, buildings, motor vehicles, plant and machinery (this expenditure must firstly be approved by members in a general meeting), COSR r 36(3)
- Determine disputes between members or one cooperative society and another, COSA s 51 COSR r 43(1)
- Dissolve a management committee and appoint an administrator, COSA s 58
- Request a cooperative to discharge a person holding office where the registrar has reason to consider the officer unfit to hold office, COSR r 26(1)
- Power to order the conditional attachment of the property of a debtor of the society where a loan from the society is due and remains unpaid and the matter is referred to the registrar from the committee, COSA s 49, COSR r 33
- Power to direct the cooperative on how it should deal with its statutory reserve fund COSR r 39(1)
- Determine a cooperative's annual contribution to the Cooperative Development Fund, COSR r 40(1)

There are some features relating to the existing cooperative law that are noted on the website of the Office of the Registrar of Co-operatives and Business Development Services (ORCBDS),<sup>13</sup> but the sub-regional expert could not find where these features were reflected in the current Act and Rules. They are worth mentioning:

- The by-laws that govern how the cooperative is run can take into account Ni-Vanuatu customs and traditions
- In some cases, cooperatives may be exempted from providing annual reports

<sup>13</sup> <https://cooperative.gov.vu/index.php/start-coops> accessed on 9/02/2020

## Degree of “cooperative friendliness” of cooperative law in Vanuatu

The COSA is more cooperative unfriendly than friendly. This is because the law has not been adapted in any way to the cultural, economic and social circumstances of Vanuatu and its pluralist legal system. Instead, it is based on a template colonial law known as the British Indian Pattern of Co-operation (BIPC).

As Hans Munkner suggests the BIPC model law was designed to be an effective enabler of cooperative development where the Registrar can play the role of a “philosopher, guide and friend” to cooperatives rather than wielding power as an ‘inspecting officer’.<sup>14</sup> However, this type of legislation and the Registrar’s extensive powers to intervene in the affairs of cooperatives is underpinned by an assumption that the Registrar will have the extensive resources, skills, and support that is needed to carry out the role in this manner.

The BIPC was also underpinned by the assumption that cooperative development would be supported by national governments and international investors and import markets. Globalisation, free trade policies, and multi-national vertical supply chains have challenged cooperative development in most countries since the mid-‘70s, and foreign aid schemes have for some time shifted away from cooperatives as a tool for development, and instead have focussed attention on legal frameworks for the ‘investor-owned’ company. It also means that the assumptions upon which the ‘cooperative friendliness’ of COSA in Vanuatu is based, no longer hold.

In this past decade, there is some evidence of a shift in these trends, towards a renewed interest in the cooperative model. The reasons are different – it is recognised that the cooperative model has inherent features that promote sustainable development and provides members with opportunities to develop resilience and stable employment. In a world faced with increasing uncertainty and instability, the cooperative is gaining ground as a suitable business model that is deserving of attention by policymakers and investors.

### Legal obstacles or barriers

This report is focused on the ‘law on the books’ rather than the law in action in Vanuatu. But it should be noted that Vanuatu ORCBDS has taken steps to update its cooperative law. At the time of writing this report, ORCBDS 2018 Annual Report notes

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<sup>14</sup> Hans-Hermann Münkner, “Worldwide Regulation of Co-operative Societies”an overview

that the current legislation is currently ‘under review’.<sup>15</sup> The sub-regional expert has formed the view that the following issues may be potential barriers to cooperative development in Vanuatu:

- COSA is a ‘transplanted’ law that has not been adapted to suit local conditions and needs. The law has not been substantially revised since it commenced in 1987.
- COSA requires a highly centralised system of supervision and administration. However, COSA compromises the cooperative principle of ‘autonomy and independence’ by requiring the Registrar to approve many of the decisions that would normally be left to the cooperative. See the list of Registrar’s powers above.
- The national expert noted that it was important that the government ‘exercise some control over cooperatives societies to ensure that cooperatives adhere to cooperative principles and to avoid corrupt practices.’ This needs to be balanced against the availability of resources, particularly among the 6 provinces. The 2018 ORCBDS noted vacancies for the business development officer positions in each province. The 2018 report also notes that the Registry was unable to carry out all audits within the 12 months, with audit completions running at around 63% with a target of around 80% completions. This calls into question the requirement that all cooperatives be audited in 12 months. Alternatives are discussed in Part IV below.
- The national expert also mentions that the law does not specifically deal with ‘cooperation among cooperatives’, but she notes that the establishment of the Cooperative Development Fund (CDF) does do this. COSR R 40 notes that “the purpose of the Fund is to promote and facilitate the social and economic development of Vanuatu by providing financial and other assistance to registered societies, particularly in the agriculture, fishery, livestock, forestry, manufacture, retail, trade, infrastructure, and transportation sectors.” The sub-regional expert notes that there is no mention of the fund in the ORCBDS 2016 or 2018 reports, and on that basis assumes that the CDF is not currently operating.

While the Act allows cooperative societies to be members of other cooperative societies, COSA s 3; and recognises the power of the Minister to appoint special members to the committee of secondary and tertiary cooperatives that are receiving

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<sup>15</sup> ORCBDS Annual Report, 2018, p 1, 6.



government assistance, COSA s 59; it does not deal with the role and function of secondary or apex bodies, c/f Co-operative Act 1996 (Fiji) s 44 – 47.

#### Features of the existing law that stand out as ‘best practice’

The COSA is flexible enough to accommodate a variety of cooperative types including consumer, producer, worker, and financial (savings and loan) cooperatives. Although there is an argument in favour of separate regulation of financial cooperatives, any changes would need to ensure that they did not discourage the formation of smaller savings and loan cooperatives, which perform an important function in some communities.

COSA makes provision for cooperatives to contribute to their statutory reserve fund and a sector-wide cooperative development fund. The former fund is an important prudential requirement to encourage cooperatives to save so that they can be resilient during times of financial stress. The latter fund is an initiative that can help to foster cooperation among cooperatives by providing cooperatives with access to a source of ‘patient’ capital within the sector.

Disinterested distribution of surplus on dissolution is not mandated in all cooperative legal frameworks, but there are good arguments in favour of this practice, as it deters predatory behaviour by management when a cooperative has built up a decent capital reserve.

The law makes special provision for school cooperatives, and this is an initiative that can foster cooperative development by introducing the model to young people and can also serve as a practical education and training vehicle.

#### Features from other jurisdictions that might encourage cooperative development in Vanuatu.

Fiji replaced the BIPC model with the introduction of the Co-operative Act 1996 and although it is ready to revise and update that law, the 1996 Act has some features which are good practice, subject to the modifications suggested by Hagen Henry below:<sup>16</sup>

- The Fijian Co-operative Act (CAFJ) includes a definition of a cooperative in CAFJ s 2. Here it is based on ILO recommendation 127 which has been replaced

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<sup>16</sup> H Munkner, “Ensuring Supportive Legal frameworks for Co-operative Growth’ Paper presented at the ICA Regional Assembly, Nairobi, 2014, 7; Hagen Henry, Guidelines for Co-operative Legislation, 3<sup>rd</sup> Edition, ILO 2012, Part 3.

by a briefer definition in ILO r193. Henry recommends that the definition should be tailored to suit the local context.<sup>17</sup>

- It includes a description of the objects of a cooperative, CAFJ s4. Henry suggests a Preamble to the Act which sets out in more detail the legislator's commitment to the cooperative as a distinct type of business organisation and the role that it will play in the economy and society (i.e. in that nation's context).
- The CAFJ Act requires cooperatives to observe the cooperative principles, CA s 5. Henry recommends that while a reference to the cooperative principles is important, the law should be clear in distinguishing between the principle and legal rules. Cooperatives should be asked to respect the cooperative principles and use them to guide their decision making.
- The CAFJ sets out procedures for establishment, and registration of cooperatives, the amendment of by-laws and its dissolution. Importantly, it does this while significantly reducing the Registrar's powers to intervene in the internal decision making of the cooperative (see the extensive nature of those powers in COSA listed above).
- The CAFJ provides for the establishment of a supervisory committee for cooperatives with more than 50 members, CA s 76 – 79. Henry suggests that this can be an effective self-regulatory mechanism.<sup>18</sup> Its effectiveness may depend on the local context, and members' access to skills, time, training and development.
- The CAFJ includes the power to federate and sets out the role and function of secondary and tertiary cooperatives and the apex organisation.
- COSA leaves the requirements for setting up a committee or board to carry out the executive functions of the cooperative to its by-laws, The CAFJ and Australian CNL both provide for the requirements for a Board including membership, requirements, disqualification, quorum, duration of term and election and removal from the Board in the law.

Where there is a divide between customary law and a transplanted law, participatory lawmaking should have a strong role to help bridge the gap. An example is where the cooperative law prescribes that regulations under the law can only be made after hearing the views of the elected representatives of the cooperative movement. The CAFJ provides for the establishment of a Co-operative Advisory Board to advise the

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<sup>17</sup> Henry, n 15, 65

<sup>18</sup> H Henry, n15, 89.

Minister on any amendments to the cooperative law or other laws that might impact on cooperatives, CAFJ s 49.

The introduction of simplified options with less administrative burden – especially for smaller cooperatives with low-profit levels:

- A non-distributing model as recognised in Australia’s CNL is one option, with simplified processes for formation and registration. The CNL also expressly distinguishes between ‘small’ and ‘large’ cooperatives and recognises that ‘small’ cooperatives (distributing or non-distributing) do not have the same reporting obligations as large cooperatives. (see CNL s 271)
- Other options include Common Initiative Groups (CIGs) adopted in Cameroon and described by Munkner as “light legal structures which give their members the choice between models with or without share capital, with or without members’ liability for debts of their organisation, between remaining a local group, joining a cooperative society or transforming itself into a cooperative society, forming unions or federations.”<sup>19</sup>

### **Recommendations for the improvement of the national legal framework**

The following recommendations are based on the analysis above and include many of those put forward by the national expert. The Office of the Registrar of Cooperative & Business Development Services (ORCBDS) has adopted a National Cooperative Policy that includes an overhaul of the existing regulatory framework as a strategic goal.<sup>20</sup> Many of the suggestions may already have been considered in the proposed draft legislation.

- Definition of cooperative to provide a clear identity for cooperatives in Vanuatu.
- Reference to cooperative principles as a guideline for both internal governance and external regulation.
- While the regulation of financial cooperatives (credit unions and larger savings and loan societies) may need separate legislation, smaller savings and

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<sup>19</sup> H Munkner, *Worldwide Regulation of Co-operative Societies - An Overview*, (2013, Euricse, Working Paper, 53) 19.

<sup>20</sup> ORCBDS Annual Report, 2018 – available at <https://cooperative.gov.vu/>

loan societies may need to be treated with less formality to ensure that they continue to be an accessible option where there is a need that will otherwise be unmet.

- A review of the functions of the Registrar (and officers of ORCBDS) under the Act relieve them of some of the regulatory burdens that falls on their shoulders under the COSA and to encourage self-regulation of cooperatives with support (rather than direct intervention in cooperative decision making as noted above).<sup>21</sup>
- Revised legislation might give more attention to the formation and support of school cooperatives with a possible reduction in minimum age (e.g.13 years).
- A distinction between large and small cooperatives and simplify the reporting obligations of small cooperatives.
- Provide a simplified legal structure with a low administrative burden for small common interest groups.

## Conclusions

While Vanuatu's current cooperative law is outdated and undergoing revision, the ORCBDS has been active in renewing and refreshing cooperative policy with the adoption of a 5-year National Competition Policy (2017 – 2022), supported by a 3-year business plan and annual work plan.

Vanuatu can draw upon existing legislative frameworks for inspiration e.g. Fiji, Australia, South Africa and should be guided by Hagen Henry's Guidelines for Co-operative Legislation for best practice recommendations. Most importantly, Vanuatu policymakers and legislators should be guided by their assessment of the strengths and weaknesses of the key elements of their current regulatory systems. For example, COSA requires the Registry to audit all cooperatives annually. The 2018 Report notes that this target has proven impossible to achieve, and this is not surprising. A revision of the law is necessary to ensure that the supervisory role and functions of the Registry (ORCBDS) are achievable and based on a realistic assessment of its resources and staffing.

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<sup>21</sup> The National expert noted that the revision would be in accordance with the National Co-operative Policy 2017- 2022.