

LEGAL FRAMEWORK ANALYSIS

within the ICA-EU Partnership

National Report of Fiji

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 Fiji.

Introduction

This report has been prepared by Ms. Ann Apps, a sub-regional expert for Oceania with input from Mr. Faizal Khan, Director and Registrar of Co-operatives, Department of Co-operative Business, Fiji.

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The legal framework analysis of cooperative legislation in Fiji aims to:

- Provide a general overview of the Co-operative Act, 1996 (Fiji) and Co-operatives Regulation 1999.
- Evaluate if and how the cooperative law in Fiji supports or hampers the development of cooperatives and, to the extent that it is not “cooperative friendly”, make recommendations for reform.

Cooperative law – Fiji

General Context

Fiji is the largest of the South Pacific Island nations and comprises 330 tropical islands of which 110 are permanently inhabited. The biggest islands Viti Levu and Vanua Levu account for most of the total landmass and 87% of the total population of 883,483. It has one of the most developed economies in the South Pacific and its main industry areas are sugar; agriculture (non-sugar); tourism; audio-visual; forestry; fisheries; mineral water; mineral resources; and textile, clothing & footwear.¹

Fiji became a British Colony in 1874 and gained independence in 1970. Fijian Cooperative law was introduced by the British Ordinance in 1947, however, cooperatives already existed in the agricultural and dairy sectors. Since independence, the focus of the movement has changed from predominantly agricultural cooperatives to an increasing number of consumer cooperatives that are located mostly in rural and maritime areas.²

Following independence the British ordinance was adopted as law,³ until it was replaced by the Co-operatives Act 1996 (Fiji) (CA) in an attempt to encourage greater cooperative autonomy. This Act remains the current law in Fiji although it is currently under review.⁴

The Fijian government has introduced policies to encourage the development of new cooperatives and to strengthen existing cooperatives by building institutional capacity to make them sustainable in fields such as agriculture, renewable energy

¹ Faizal Khan, Speaking Notes, Presentation to ICA-AP Committee meeting at University of Newcastle,

² ICA-AP, Fiji Country Snapshot, 2019.

³ The Co-operative Societies Act CAP 250 1947 (Fiji)

⁴ Khan, Speaking Notes, n1.

and, women empowerment. The government has also encouraged the re-establishment of a national apex body, National Co-operative Federation (NCF) in 2018 by amending the legislation to provide the apex body with an advisory and audit role.⁵ Recent amendments also introduced the Co-operative Advisory Board with advisory powers.⁶

Today there are 372 operational cooperatives in Fiji with assets worth more than FJD \$90 million and earnings over FJD \$10million. The largest cooperative industry sector is the sugarcane harvesting industry (15%) and consumer cooperatives are the most popular type of registered cooperative (33%).

The Co-operative College of Fiji (formerly the Co-operative Training Centre) has been developing, promoting and providing training to cooperatives in Fiji since 1960. The regulator is the Director and Registrar of Cooperatives, Department of Co-operative Business whose portfolio is located within the National Co-operative Federation. The National Co-operative Federation is the apex federation, and it was recently established in 2018 with assistance from the Fijian Government.

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)
General reference to cooperative principles	CA	S 5
Apex organisations to operate in accordance with cooperative principles		S 7(d)
Apex organisations to provide information, education, training, and advisory services on cooperative principles		S 46 (2) (b)

⁵ Co-operative Act 1996 s47

⁶ Co-operative Act 1996 ss48, 49



The NCF is to promote knowledge of the cooperative principles		S 47(2) (d)
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Table 2

Application of Cooperative Principles (Specific)	Law or Regulation	Relevant section (link)
<p>Voluntary and open membership Membership is open to persons over the age of 18 (school cooperatives 14) who are citizens or residents of Fiji who otherwise satisfy the conditions of membership set out in the cooperative by-laws and are conditional upon 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>No person can be a member in more than one cooperative having the same or similar objects except with the consent of the Registrar.</p>	CA	<p>S 37(1)</p> <p>S 37(4)(c)</p> <p>S38(i)(j)</p> <p>S 41</p>
<p>Democratic member governance Each member of a primary cooperative shall have only one vote regardless of shareholding and the vote must be exercised in person and not by proxy.</p> <p>In case of an equality of votes at a GM, the Chairperson of the meeting shall have a casting vote</p> <p>In secondary or apex cooperatives or NCF, votes shall be allocated in the by-laws</p> <p>Also, by limiting the shareholding of any one member to no more than 20% (1/5th) of a cooperative's total share</p>	CA	<p>S 59(1)</p> <p>S 60(1)</p> <p>S 59(2)</p> <p>S 93</p>

capital the influence of any one member is limited.		
<p>Member economic participation. Where the registered society is a producer cooperative (i.e. the cooperative disposes of agricultural commodities or handicrafts produced by members), the cooperative may through its by-laws or by contract, require that its members dispose of all or a specified proportion of their produce through the cooperative.</p> <p>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.</p> <p>The cooperative may transact with non-members, according to the volume if any prescribed by its by-laws but must keep separate accounts.</p>	<p>CA</p> <p>CA</p> <p>CA</p>	<p>S 25(1)</p> <p>S 40</p> <p>S 53(g) S 80(b)</p>
<p>Autonomy and independence A registered cooperative is independent and autonomous, to the extent that it has the power to hold property, enter into contracts, institute and defend suits, and do all necessary for the purpose of its by-laws.</p> <p>The Registrar may impose provisional registration on a proposed cooperative seeking registration and impose further conditions.</p>	<p>CA</p> <p>CA</p>	<p>S 14</p> <p>S 13(1)</p>
<p>Cooperation among cooperatives Cooperatives may form secondary cooperatives and apex organisations, which may be registered to facilitate the operations of their members or to</p>	<p>CA</p>	<p>S 44</p>

provide such other services as may be necessary for their members as laid down in their by-laws.		
Concern for community. After statutory contribution to the reserve fund, a cooperative may apply its surplus towards donations and grants for charitable or social purposes provided that this sum shall not exceed ten percent of the net surplus.	CA	S 102(1)(e)

A ‘cooperative’ is defined in Section 2 Interpretation to mean: ‘an association of persons who have voluntarily joined together to achieve a common end through the formation of a democratically controlled organisation, 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, which is provisionally or fully registered under this Act as a primary or secondary cooperative, apex organisation or the National Co-operative Federation.’

Section 5 provides that a cooperative shall observe the cooperative principles in its operations, and goes on to set out the cooperative principles as set out in the 1995 Statement of Cooperative Identity.

The promotion of members as an objective of the CA

The CA sets out the objectives of cooperatives in section 4(1)(2) providing that “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 “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.”

This is also strengthened by a requirement that a service cooperative shall conduct at least 51% of its trade with its members, and a workers cooperative shall have at least 80% of employees as members and that all members shall be employees, CCA s 2.

The promotion of members is also prioritised in other ways. Members are unable to exercise their rights unless they have made payment to the cooperative or have acquired shares or interest as prescribed under the Act or by-laws of the cooperative, CA s40. Members have the right to participate in general meetings and to use the

services and facilities of the cooperative, CA s 38. If the cooperative is a producer cooperative it may require its members to only disposing of its produce or a proportion of their produce through the cooperative, CA s25(1). The cooperative has the power to distribute its surplus as a bonus or rebate to members based on their volume of transactions with the cooperative, CA s102(1)(a).

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 CA (see generally Part III). In the case of a primary cooperative, a minimum of 10 persons or persons and associations is required. (A secondary cooperative requires at least 2 primary cooperatives and an apex cooperative requires at least two primary or secondary cooperatives), CA s 7.

A group of persons who wish to establish a cooperative must set up a Formation Committee, CA s 8. The Formation Committee must consist of at least seven persons, and they must meet to elect a Chairperson, a Treasurer, and also a Secretary who will keep a record of the Formation Committee's proceedings, CA s 8(2). The Formation Committee can call upon the assistance of an apex cooperative where available or may call upon the registrar or other person to assist them.

The Committee has quite an onerous set of tasks to perform before applying for registration including engaging in educational meetings with proposed members, scope the expected membership and volume of business for the first year, draw up a budget and cash flow forecast, compile a list of prospective members, and draft the by-laws for the cooperative, CA s 9. Once they have completed these tasks, the Formation Committee must hold a Founder's Meeting, declaring that they intend to register a cooperative and approving the by-laws, CA s 10. Within 2 months of the Founder Meeting and application to register the cooperative must be lodged, CA, s 11.

If satisfied with the group's compliance with the Act and the viability of the cooperative, the Registrar shall register the cooperative, CA s 12. If not, the Registrar may impose additional conditions while allowing a provisional registration, CA, s12.

The cooperative may determine the extent of liability of its members under its by-laws, provided that liability shall not be less than any amount owing on the member's shares, CA s 95(1).

A Supervisory Committee must be established where a cooperative has more than 50 members, CA s 76. The Committee consists of 3 members elected by the General Meeting who cannot be board members or employees of the cooperative, CA s 77. It is responsible for ensuring that the affairs of the cooperative are conducted in accordance with the by-laws and the resolutions adopted at the general meetings, CA s78. It has special powers to conduct an inquiry into the affairs of the cooperative at the request of 10% of the members or on its initiative when it suspects that mistakes are being made or laws breached in the running of the cooperative, CA s 85.

The CR provides for the keeping of a register of cooperatives by the Registrar, CR r 18(1). The Registrar must also keep a record of the current officers of each cooperative, CA s 23.

The Registrar has broad powers to conduct an inquiry into the affairs of a cooperative, where there are reported suspicions that the cooperative is violating the Act or its by-laws, CA, s 86. These powers are separate and in addition to the powers of a Supervisory Committee to inquire and report on the internal affairs of the cooperative, CA s 85.

The Registrar has the power to cancel the registration of a cooperative that fails to hand in audited accounts for 3 years, CA s84(2).

Admission of new members

New members must meet the threshold requirements for membership set out in the CA including: being over the age of 18 years (or 14 years for school cooperatives) and being a citizen or resident of Fiji, CA s37(1) and is conditional upon agreeing to comply with any requirements in the by-laws including paying any subscription fee or purchasing the required member shares, ss 37(4), 40. Note that the model by-laws set out in Schedule 1 also provide that every member shall be of good character and a sound mind (Rule 6(d)).

The requirement that members actively participate in the business of the cooperative will usually be set out in the by-laws, but the CA also states that it is a duty of every member: to use the services and facilities of the cooperative for all or part of the transactions that may be carried out through it if specified in the admission form at

the time of his or her joining the cooperative, or in a contract made in accordance with section 25 of the Act; CA s39(b).

Members' voting rights

The CA provides that each member of a primary cooperative shall have only one vote regardless of shareholding and the vote must be exercised in person and not by proxy, CA s 59(1), however, in the case of an equality of votes at a GM, the Chairperson of the meeting shall have a casting vote, CA s60(1). In secondary or apex cooperatives or NCF, votes shall be allocated in the by-laws, CA s 59(2). Members voting rights are exercised in annual, special, general and branch meetings, CA Pt VIII, ss 52 – 62. The Act does not make any provision for joint membership.

Governance structure

The supreme governing organ of the cooperative is the General Meeting, s 52(1). The cooperative must hold an Annual General Meeting within 6 months of the end of its financial year, CA s 54. The GM has extensive powers including approving the annual accounts; electing the members of the Board and Supervisory Committee; giving directives to the Board and general manager to ensure the smooth operation of the business of the cooperative; approve the maximum amount the cooperative can borrow; approve budget and cash flow forecasts for the following year; decide in the volume of business that can be carried out with non-members and determine how the surplus will be distributed, CA s 54(3).

A cooperative is administered and managed by a Board, which exercises the powers set out in the Act or delegated to it by the General Meeting, CA s 63(1). The CA requires that the board shall have a minimum of 3 members or be a multiple of 3, CA s 64(1). The board members are elected for a 3-year term and can serve a maximum of two terms before they must retire for at least one term, CA s 64(3). Only cooperative members who meet the qualification requirements in CA s 65 are eligible for election by the members in GM, CA s 64. Voting for Board members is by secret ballot, CA s 60(2).

A board appointment is an honorary position and Board members are only entitled to reimbursement of reasonable expenses, plus any honorarium or allowance approved by the GM, CA s 66. A board member is automatically removed from office if they are absent from two consecutive Board meetings without leave from the Chairperson CA s 68(1)(d). A board member may be removed before the expiry of

their term by a resolution of the GM provided notice of the resolution is given, CA s 68(2).

The Board's functions include preparing for and convening General Meetings; keeping accurate accounts and records; approving loans, assisting auditors, implementing decisions taken by the GM and taking all necessary steps to safeguard the assets and funds of the cooperative, CA, s 63(2). The Board may also hire and fire a General Manager, who may or may not be a member of the cooperative, CA ss 63(1), 67(2). A Chairperson and Vice-Chairperson may either be elected by the General Meeting or appointed by the Board is set out in the by-laws, CA s 67(1). The cooperative's by-laws may authorise the GM or Board to set up sub-committees to assist the Board in carrying out its functions, CA s 71.

The CA does provide for the election of a Supervisory Committee, which is mandatory when the cooperative has more than 50 members, CA s 76. The Supervisory Committee has 3 members who are elected by and responsible to the GM, s 77(2). The role of the Supervisory Committee is to provide independent oversight of the Board, management, and employees of the cooperative. This role includes: checking that expenditure is authorised and valid and approving expenditure over a certain amount if required by the by-laws, inspecting accounts, reporting serious anomalies to the Board or to the Registrar, approving any loans to Board members and presenting an independent report at the AGM, CA s 78(2). The Supervisory Committee has the power to conduct an inquiry into the affairs of the cooperative where a request is made by the GM or 10% of members or on the initiative of the Supervisory Committee, CA s 85(1). The Supervisory Committee may request the Registrar to conduct an inquiry or appoint an independent Commission of Inquiry at the expense of the cooperative, CA s 85(3). The report of the inquiry may go to a Special General Meeting who may decide to discharge and replace the current Board, CA s 85(4).

A cooperative must have its accounts audited annually by an independent auditor appointed by the Registrar, CA s 81. The auditor is required to prepare a report and must report any irregularities to the cooperative and the Registrar, CA s 82(1). The cooperative must submit a report of its activities together with the audited financial statements and a copy of the auditor's report to the Registrar, once these reports have been approved at the AGM and within 6 months of the end of the financial year, CA s 84(1). Where a cooperative fails to submit its annual reports to the Registrar for

three consecutive years, the Registrar will investigate and where there are grounds, may cancel the registration of the cooperative, CA s 84(2).

Cooperative financial structure and taxation

Capital contributions

Part X of the CA deals with the property and funds of a cooperative. Section 90 provides that the capital of a cooperative may be comprised of any of the following: non-refundable member entrance fees; member share capital (which may be withdrawable upon the termination of membership, or transferable subject to a cooperative's by-laws); reserves generated from the surplus in previous financial years; grants or donations; public or private borrowings (e.g. from members, credit institutions or other cooperatives); other member contributions provided for in a cooperative's by-laws.

Each cooperative must set out the nominal value of each share and minimum share subscription requirements for membership, CA s 91(1). Payment of shares by new members may be staggered, provided at least 10% of the minimum subscription is paid upon admission to the cooperative, CA s 91(2). Fijian cooperative law also provides for multi-stakeholder cooperatives and allows differential share contributions in accordance with criteria set out in a cooperative's by-laws, CA s 91(3). Importantly, however, no member may hold more than 1/5th of a cooperative's share capital – a provision that is aligned with similar provisions in many other Oceanian jurisdictions.

Other sources of finance

Cooperatives are empowered by law to seek finance from a range of sources including:

- grants, donations and other contributions in cash or in-kind from public or private donor organisations; CA s 90 (d).
- the capital borrowed from members in the form of voluntary savings, deposits from other cooperatives or banks and public or private credit institutions, or from any other technical or financial assistance organisation subject to any conditions and restrictions as are provided for in this Act and the by-laws, CA s90(e).

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- Transactions with non-members (100% of any surplus must go into the reserve fund), CA s 100(2).

CA s 100 also requires the establishment of a general reserve fund by each cooperative to be used in accordance with each cooperative's by-laws, along with a statutory reserve fund (the National Reserve Investment Trust Fund) to be administered by the National Co-operative Federation – however, details regarding the administration of this fund have not yet been formalised by regulation.

A cooperative 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, CA s 97.

Distribution of surplus to members

Once the requisite contribution is made to the general reserve fund, a cooperative may distribute its remaining surplus (from the current financial year and carried over from preceding years) in any of the following ways:

- as a bonus paid to members, proportionate to their transactions with the cooperative (i.e. a patronage rebate);
- as interest paid on share capital (no more than 20%);
- as an incentive bonus paid to employees/workers;
- as an allocation to any special fund/s provided for in the cooperative's by-laws (provided that 10% of the net surplus is allocated to an education fund);
- as donations and grants for charitable/social purposes (no more than 10% of net surplus);
- as payment of honorarium to members of the Board if provided for in the by-laws; and
- any other purpose provided for in the by-laws.

Distribution of net surplus to members may also take the form of bonus shares that may also be withdrawable or transferrable, however only after five years from the date of issue, CA s 103.

Distribution of surplus upon dissolution

Part XII of the CA provides for the dissolution and liquidation of cooperatives. A cooperative may only be wound up by order of the Registrar, a process that will generally be managed by a Registrar approved liquidator, CA s 108. Upon winding-up of a cooperative, s 113 of the CA provides for dissolution of the cooperatives assets

(including the reserve fund) in the following order: first, to the costs of liquidation; then to the payment of all deposit liabilities to debtors; then to the discharge of all other liabilities of the cooperative; then to the payment of share capital held by members; and then, provided that the by-laws of the cooperative permit, to the payment of a dividend or bonus at a rate not exceeding that laid down in the by-laws of the cooperative for any period during which no dividend or bonus was paid.

Taxation of cooperatives

Income Tax (Exempt Income) Regulations 2016- Part 2 Exempt Entities, provides that Fijian cooperatives registered under the Co-operatives Act 1996 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.⁷ Savings and loan cooperative societies are entitled to claim as exempt income, any income derived by the society and carried to a reserve fund or capitalised. A cooperative 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.⁸

Income Tax (Exempt Income) Regulations 2016- Part 9 Economic Development Exemptions also provides a specific exemption for cooperative dairy companies:

“The income of a co-operative dairy company incorporated in Fiji and registered under the provisions of the Co-operative Dairy Companies Act 1974 is exempt income in so far only as it is derived from the collection, treatment or manufacture and distribution of dairy products from milk or cream supplied by shareholders, or from the investment of any surplus funds from such activities not distributed to shareholders.”⁹

The sub-regional expert also assumes that cooperative might also be entitled to special Tax treatment under Fiji’s Revenue and Customs Service’s tax and Custom Incentive Scheme. In the 2018 – 2019 Scheme, there are special incentives for Small and Micro Enterprises (SME’s) where there is a tax exemption for SMEs in selected sectors where they have a maximum turnover threshold of \$500,000. The selected sectors include:

- Agriculture and Fishing

⁷ Income Tax (Exempt Income) Regulations 2016 Part 2 Exempt Entities, Income Tax Act 2015 (Revised up to 31st October 2019), <https://www.frcs.org.fj/wp-content/uploads/2019/10/Income-Tax-Act.pdf>

⁸ Income Tax (Exempt Income) Regulations 2016, Part 2 Exempt Entities.

⁹ Income Tax (Exempt Income) Regulations 2016, Part 9 (2) Economic Development Exemptions.

- Tourism (Sea Cruise and River Tour Operators).
- Community and Social Services (Amusement, recreation services; traditional handicraft producers (not “middleman” or agents).
- Supportive projects to the tourism industry (flora, fauna and other natural characteristics of Fiji; and history, traditions, cultures, and ways of life of its peoples).¹⁰

There is also a waiver of stamp duty for all SME’s on all instruments. These incentives will presumably apply to a significant proportion of cooperative enterprises in Fiji.

Other specific features

The Fijian Co-operative Act has several special features that are not found in the other frameworks under review in Oceania and some will be discussed in more detail below. These include:

Provision for the establishment of a supervisory committee, CA s 76- 79. In the CA the establishment of a supervisory committee is mandatory for a cooperative that has more than 50 members and is optional for other cooperatives. A supervisory committee has the power to act on behalf of all the members to ensure that the members exercise control over the Board of Directors. It is in addition to other mechanisms of control including the requirement for an external audit to be carried out, CA s80.

The Act also sets out the role and functions of secondary and tertiary cooperatives and specifically the apex organisation, the National Co-operative Federation, CA ss 46-47. The sub-regional expert notes that the NCF was only recently been formed in 2018 and that the Fijian Government provided the necessary budget to “assist the formalisation and operationalisation of the Apex body.”¹¹

The Act also makes provision for a Co-operative Advisory Board, CA s 48 – 50. The function of this Board is to advise the Minister about matters of policy relating to cooperative development, amendments to the legislation and other laws that impact on cooperatives. The CA does not specify that the members of the Co-operative Advisory Board shall be members of a cooperative or a secondary or peak body, but the appointment of 5 members is made on the recommendation of the Registrar.

¹⁰ Information on tax incentives is available at <https://www.fracs.org.fj/our-services/customs/doing-business-in-fiji/tax-and-customs-incentives/>

¹¹ Mariai Vula Suva, “Target 100 aimed at Co-operatives.” Fiji Sun 28 January 2018 accessed at <https://fijisun.com.fj/2018/01/28/target-100-aimed-at-cooperatives/>

The CA provides that the General Meeting is the supreme decision-making organ for the cooperative, CA s 52. The CA also 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 the by-laws of the cooperative). The functions of the Board include implementing all decisions taken by the general meeting, CA s 63(2)(k).

Degree of “cooperative friendliness” of cooperative law in Fiji

The Co-operative Act 1996 (Fiji) is limitedly ‘cooperative friendly’. The main issue with the framework is that it relies heavily on a well-resourced cooperative registry to ensure that cooperatives comply with the law e.g. auditing and reporting, and in this sense, it does not support the fourth cooperative principle independence and autonomy’ In most respects, it is a good example of a well-drafted and easy to read legislative framework for cooperatives. It has many of the features which are recommended as best practice in cooperative law.¹² It is currently under review, and any revision of the law must ensure that it is suited to its national context, taking into account local laws and customs and the likely impacts of any law reform on existing cooperatives. The cooperative friendliness of the legislation will always be impacted by the broader regulatory framework and the interaction between cooperative law and other laws including consumer, tax and labour laws. Some issues relating to obstacles to cooperative development in Fiji are outlined below.

Legal obstacles or barriers

The Registrar advised that the Co-operative Act 1996 is currently under review and requires updating. Regardless of how well a legal framework is operating in practice, regular review and updating or revision where necessary is an important indicator that cooperatives have an ongoing “seat at the policy table”. It also means that it is more likely that the differences between cooperatives and other types of business models will be taken into account when other laws are introduced or amended. In other words, the regular revision of cooperative legislation is an important mechanism for educating and training government ministers and their advisors on cooperatives and cooperative law and policy.

¹² Hagen Henry, Guidelines to Cooperative Legislation, 3rd Edition ILO 2012.

The Registrar noted that the regulation of cooperatives in Fiji faced the following challenges:

- Governance issues – weak Board, honorarium services, lack of active participation, etc.
- Compliance issues - especially auditing
- Lack of data from cooperatives

Not all these issues can be addressed by making changes to the legislative framework, but some possible recommendations will be made below.

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

The Co-operative Act 1996 has several features that align with the best practice recommendations set out in the ILO’s 2012 Guidelines to Cooperative Legislation, including the following features which are not common to all the other legal frameworks considered Oceania:

- It sets out the general role and objective of cooperatives in society, CA s 4
- It has an interpretation section which provides a glossary of key legal terms used in the Act, CA s 2.
- It includes a definition of a cooperative (that reflects the definition in ILO r 127), although it is recommended that the definition should be customised where appropriate to accord with its local context.
- It refers to the cooperative principles (though arguably it mandates compliance with the words ‘shall observe’), CA s5.
- It makes provision for a supervisory committee or council to exercise continuous control over the board of directors, (this is mandated where the cooperative has more than 50 members), CA s 76.

The CA defines the legal form of different levels of cooperatives (primary, secondary, tertiary and apex) and specifies the activities which each level should exercise, CA s 44 – 47.

Features from other jurisdictions that might encourage cooperative development in Fiji.

Features from Australia’s CNL that might help encourage cooperative development in Fiji include:

- The streamlining of categorisation into ‘distributing’ and ‘non-distributing’ cooperatives is useful and allows for a simplified governance regime for non-

- distributing cooperatives (particularly those that do not issue shares). This model is particularly useful for small scale community organisations and clubs; however, it can also be used by larger infrastructure and service cooperatives.
- The requirement for member economic participation through the requirement of ‘active membership’ is a legal design feature that can help the model stay true to the cooperative principles.
 - The classification of cooperatives as ‘large’ or ‘small’ (based on a combination of features including revenue, assets, and number of employees) is a practical feature that simplifies and reduces the cost of financial reporting and auditing requirements for smaller cooperatives. (see CNR 1.4)
 - The introduction of civil penalty provisions for some breaches of the law including breach of director’s duties makes it easier for the regulator to prosecute and penalise directors who may have acted negligently or dishonestly. (see Part 7.2 CNL).
 - A feature from New Zealand’s Co-operative Companies Act (CCA) that might be worth considering is: The CCA requires the board as part of its annual reporting process to pass a resolution stating whether, in the board’s opinion, the company has, throughout the accounting period to which the report relates, been a cooperative company. The resolution must set out the full reasons for the directors’ opinion, CCA s 10. In the author’s opinion, any requirement for the directors of a cooperative organisation to take their mind to the cooperative identity of the business – and report on this publicly is an example of best practice that should be replicated in other laws. In this instance, the requirements are technical (i.e. attention to what is a ‘cooperative activity’? and who are its ‘transacting shareholders’?) but the reporting requirement could easily be adapted to cooperatives and extended to include reporting on the cooperative’s attention to promoting cooperative philosophy, principles, practices, and objectives.
 - The cooperative audit is an important mechanism in German cooperative law, and it does not have an equivalent in Fiji’s Co-operative Act. The cooperative audit looks at a wider set of indicators beyond financial performance and verifies the organisations compliance with cooperative values and principles.

Recommendations for the improvement of the national legal framework

The following are recommendations for improvement of the Co-operative Act 1996 (Fiji) that are tailored to address the weaknesses identified by the Director and Registrar of Cooperatives of Fiji:

- The problem of compliance with audit requirements can be addressed by introducing simplified compliance requirements for ‘small’ cooperatives. In Australia and NZ, the members of ‘small’ cooperatives can elect to opt-out of the obligation to have their financial records audited annually. The cooperative’s by-laws may still require that the cooperative’s financials be externally reviewed (to check that the financial statements have not been modified).
- The problem of audit compliance and data collection can also be addressed by introducing simplified compliance requirements for small cooperatives, so that they do not need to lodge their financial statements with the Registry (they must still prepare and present financial statements to their members) but instead have to complete and lodge an ‘annual return’ which allows the Registry to capture data in a streamlined way. The directors of the ‘small’ cooperatives must include a solvency resolution, and may be liable to a civil or criminal penalty if the cooperative is trading or about to trade while insolvent. See e.g. CNL s 293.

The governance issue, ‘weak boards’ might be addressed in a number of ways, including:

- 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. CNL s 174.

By allowing board member’s to receive the director’s fees, concessions or other benefits provided that these are approved by the general meeting, see e.g. CNL s 203. There may need to be some additional guidance here so that honorariums are appropriate for smaller cooperative’s but director’s fees might be appropriate for larger or complex cooperative businesses needing to attract and retain the right skill mix on its board.

An added requirement for the director’s to report annually on the cooperative’s performance in relation to the promotion of its members and the cooperative’s attention to promoting cooperative 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 cooperative identity and cooperative advantage of the enterprise, rather than only its financial performance.

Conclusions

Fiji has a vibrant cooperative sector and that is supported by friendly cooperative legislation and a government that is interested in improving its policy and legislative environment to help the sector thrive and grow. Examples of government initiatives include:

- a National Co-operative Policy introduced in 2011;
- the ‘Target 100’ initiative in January 2018 to guide 100 cooperatives across Fiji to be compliant with the Co-operative Act; and
- the budgetary and operational assistance to establish the National Co-operative Federation

The Co-operative Act 1996 (Fiji) is currently under review, and as mentioned above this provides a good opportunity to ensure that government Ministers are made aware of the importance of the sector and the need for diverse organizational forms. A review and update of the existing law should happen periodically, but the existing legislation has many positive features and an evaluation of the implementation of existing laws (and the reasons for any of its non-implementation) need to be considered in any review of the legal framework.

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