5. CORPORATE GOVERNANCE IN NEW ZEALAND: A PRINCIPLES-BASED APPROACH IN A SMALL MARKET-LED ECONOMY

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5.1. Introduction

The repeated crises of corporate governance whether initiated by corporate failure in New Zealand or those large-scale catastrophes abroad highlight the importance of developing and adopting effective policies and regulation, especially at the corporate level. Free market developed economies remain highly dependent on confidence, especially confidence to invest, to which New Zealand is no exception. Confidence is upheld by a combination of government, regulators, policy makers, institutions and the combined efforts of the directors themselves.

The aim of this chapter is to analyse the corporate ownership and governance environment in New Zealand. Corporate ownership and corporate governance are explored through the conventional lenses of regulatory frameworks and legal structures. Select cases are used to demonstrate desired outcomes being achieved or otherwise. The broad changes to and impacts on corporate governance are discussed in the context of New Zealand, with a focus on the larger firms across publicly listed (PLC); cooperative (COOP); state-owned enterprise (SOE); and, quasi-public and closely held businesses.

It is, however, important to recognise that the composition of business and business activity in New Zealand is significantly different to that of other OECD countries. Three significant attributes of business in New Zealand are unique. First, New Zealand is the only first-world economy to remain dependent on land-based industries (pastoral farming, forestry and horticulture). There is simply no other economy like it amongst top tier nations where that nation's standard of living is largely upheld by the production and sale of agricultural produce, most of which is subsequently exported. Next, with the exception of three specific industrial sites (Marsden Point oil refinery; Waiuku steel mill; and, Tiwai Point aluminium smelter) there is no heavy industry in New Zealand. Even the largest manufacturing sites, such as Ravensdown's Hornby; Ballance Agri-Nutrients' Kapuni; and, Oji Fibre Solution's Kinleith are, by global standards small. Lastly, the interdependency between listed companies, state-owned enterprises, the large cooperative sector, and closely held medium-sized companies creates a cohort of generalist decision makers (i.e., TMTs, CEOs and directors) with a very broad understanding, although perhaps not always deep, of the consequence of their actions. The result is a veritable blend of businesses across multiple sectors, deeply engaged with one another, not bound by common ownership structures (i.e., plcs). In New Zealand cooperatives sit amongst listed companies, competing against quasi-publics and closely held companies, often serviced by the remaining state-owned enterprises. The sheer scale of agriculture dominates the business environment while the legacy of deregulation following a century of essential government investment in the nation's infrastructure, largely due to our tiny population

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and isolation remains.

With these influences in mind the chapter proceeds as follows. The chapter presents a brief discussion of the two approaches to corporate governance open to regulators, and that which has been adopted in New Zealand. Secondly, a succinct review of ownership structures and the value of company law in New Zealand follows providing an overview of the parsimonious legal framework in New Zealand, to which recent health and safety legislation has contributed. Next, a broad description of the critical characteristics of ownership, and control of New Zealand business beginning with the need for (or otherwise) of corporate governance is provided. Lastly, the chapter analyses the influences on the structural attributes and composition of boards.

5.2. The Selection of Regulatory Approach

Much has been written about the motivation behind and increased importance of corporate governance in the 21st Century (see Mueller & Wells, 2012). That much of that contribution is focused on the structural attributes of boards, rather than board processes (Leblanc & Gillies, 2003) should remain a concern to both academics and practitioners. On the other hand, contributors to the regulatory environment and by implication enforcement in most jurisdictions, New Zealand included, continue to produce a plethora of recommendations and rules that supposedly enhance corporate governance with the explicit intention of improving the performance of the enterprises themselves. That these rules are drawn from *a priori*, largely implicit and at times unproven understanding of various relationships as opposed to empirical evidence has not impeded the rate of their introduction.

Recommendations for effective corporate governance can be categorised into one of two broad approaches, namely, rules-based approaches and principles-based approaches (Macnamara, 2012). But regardless of the approach being adopted, the aim as opposed to the means is a much needed attempt to restore trust and confidence in the governance community. Especially much needed trust from investors that in New Zealand is now at risk of morphing into various interpretations of supposedly more appropriate and effective social representation. While the best solution may be for organisations to develop their own mix of approaches (Arjoon, 2006) it is highly unlikely that any jurisdiction would devolve this responsibility to directors themselves. It appears that they are currently considered to be untrustworthy.

While New Zealand was largely spared the indignities of the global financial crisis significant failures amongst our ‘B-Tier’ finance companies at the time resulted in further regulatory reform and the creation of a new regulatory structure. Further, the entirely expected but undesirable failure of businesses, especially where third-party investor capital is at risk (PLCs in particular) has provoked a predictable clamour for yet greater regulation, now including board composition itself.

In rules-based jurisdictions, such as the United States of America the Federal Government introduced requirements for significantly greater and more frequent disclosure through The Sarbanes-Oxley Act of 2002 (Sarbox). Sarbox created a Public Company Accounting Oversight Board; strengthened the independence of audit firms; increased corporate responsibility and usefulness of disclosure; increased penalties for

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wrong doing; protected the objectivity and independence of securities analysts; and, increased the resources available to the Securities and Exchange Commission (SEC). In doing so Sarbox is widely regarded as the most significant change to US securities law since the 1934 Securities Exchange Act (Zameeruddin, 2003). Macnamara (2012) observes that rules, such as, Sarbox "have significantly improved corporate governance and executive staff reporting to the Board" (p. 3). Given the global financial crisis (GFC) that claim may have been undeserved, however, his second observation is more valid, namely, that "collusion between auditors, bankers, and corporate officers… [has been] significantly eliminated".

New Zealand was largely spared the impact of the GFC due to the coincidences of global demand for the country's agribusiness outputs (Gow & Lockhart, 2016); a rapid rise in tourism; and, largely uncontrolled immigration. But the negative consequences of a rapid market response to the global demand for dairy; consequences of visitor numbers exceeding infrastructure capacity; and, the nation's inability to build an entirely new city to accommodate incoming citizens each year are now being felt with an equally certain balance between guiding regulation on the one hand and a principled-based approach on the other.

Rules-based approaches, that to date have been actively avoided in New Zealand increase the cost of doing business; "create a culture of dependency"; and, exacerbate "legal absolutism" (Arjoon, 2006, p. 53). Nevertheless, the costs to business must be considered less than the benefits to the broader stakeholder, and particularly the investor community. Notwithstanding earlier comments with respect to researchers' fixation with the structural attributes of boards rules are observed to evoke change (Cullinan, Rousch, & Zheng, 2012).

In principle-based jurisdictions, such as New Zealand and Australia successive governments have introduced increasingly prescriptive guidelines, for example, through the SCNZ (Securities Commission, 2004), the ASIC (ASIC, 2011), and the Australian Prudential Regulation Authority (APRA, 2013). By adopting a largely principles-based approach these jurisdictions appear to have confidence in their respective governance communities conforming with expectations over time. Macnamara (2012) argues that the lack of conformance with expectations, in this case among the investor community, results in problems with confidence in business. However, much belief appears to be placed on gradual change. While principle-based approaches leave the opportunity for continuous improvement with individual businesses, the *rate* at which anticipated outcomes are achieved is indeterminate.

But despite adopting a principled-based regime New Zealand has repeatedly sought to both strengthen and accelerate the adoption of such principles. The establishment of the Financial Markets Authority (FMA) in 2011 whose role is to lead and inspire improvements in the country's financial markets (Hughes, 2013), suggests that either the rate of adoption; the lack of conformance with expectations; or, both were of concern to central government at the time.

Regrettably, none of these measures stemmed the tide of finance company failures that resulted from the GFC. Corporates in both New Zealand and Australia, especially those in the banking and finance industries, have largely been exonerated from blame for the GFC (Konzelmann & Fovargue-Davies, 2012). But the systemic failures of

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finance companies in New Zealand since the GFC, of which there were some 70 owing investors and debenture holders in excess of NZ$8.5bn, suggests something else was amiss. Therefore, the post-Enron range of efforts in New Zealand to both curb the rate of corporate failure and provide greater protection to shareholders and depositors are yet to achieve the desired impact. More recently, the failure of Fletcher Building Limited (plc) invoked calls for the regulation of board composition, especially quotas for women on boards and various forms of ethnic representation that for the time being while noted are unlikely to be enacted.

One of the gaps between legislation directed at improving corporate governance and the desired outcomes achieved appears to reside in the enforcement regime. The systemic collapse of many second (third & fourth) tier finance companies following the GFC produced only some, and mostly inadequate prosecutions. The range in early losses was considerable with Bridgecorp Holdings, which collapsed in July, 2007 owing 14,500 investors NZ$459m while Five Star Consumer Finance, which failed the following month, owed NZ$54.3m. Some of the finance companies were genuine victims of the GFC while others, such as Blue Chip Group and Bridgecorp failed as a result of corporate fraud.

Bridgecorp provides a useful example to explore. During the late 1990s and early 2000s Bridgecorp repeatedly attempted to list on the NZX but was declined each time. In 2002, its directors subsequently deregistered in New Zealand and reregistered in Australia (Gaynor, 2007). Bridgecorp's directors: Rod Petricevic, Rob Roest, Gary Urwin, Peter Steigrad and Bruce Davidson were charged with making false statements in July 2009, in New Zealand. Urwin and Davidson entered an early plea of guilty and received two year jail terms. Petricevic and Roest received six and a half year jail terms, while Steigrad was sentenced to nine months' home detention, 200 hours community service and ordered to pay NZ$350,000 in reparation (Mace, 2012). PriceWaterhouseCoopers subsequently filed a civil action of NZ$442m against the former directors, being the largest civil action in NZ's history (Manning, 2012). While the scale of the sentences can be debated it would appear if the enforcement system in New Zealand, and Australia as Bridgecorp Holdings was registered there actually works.

Conversely, in the case of Blue Chip Group, which collapsed in February, 2008 owing 1200 investors some NZ$120m, the liquidators were simply unable to get adequate funds to sue. In this case former cabinet ministers Wyatt Creech and John Luxton, and founder Mark Bryers alongside the other directors were to be sued on the basis of reckless trading (Slade, 2013). The liquidators attempted to pursue the directors for between NZ$15 – 40m in reparation. What is also intriguing in this case is that after the company was placed in receivership Blue Chip *investors* were found to be committed to the purchase of real estate by both the High Court and Court of Appeal (NZN, 2012). Only on appeal at the Supreme Court was this finding overturned. This outcome, arguably, marks the other extreme of enforcement in New Zealand where until the Supreme Court's over-ruling the investors themselves were found responsible for the completion of transactions commited to by the directors of a company in liquidation.

Following the establishment of the FMA more charges have been laid and brought before the courts. These include successful prosecutions against Five Star Consumer Finance and Five Star Finance (FMA, 2013) for which the directors received either two

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year jail terms, home detention and five year management bans; Nathans Finance where similar punishments were handed down; and, Lombard Finance & Investments, which also included a former cabinet minister and Knight of the Realm for which the defendants appealed their sentences in the Supreme Court, only to be denied. With respect to South Canterbury Finance (SCF), the last finance company to collapse in New Zealand in the bear market following the GFC, the Serious Fraud Office lead the prosecution with the FMA's support. SCF was placed into voluntary receivership in August, 2010 owing depositors NZ$1.bn while owning assets of NZ$1.9bn (Reuters, 2010). Under the Government's Retail Deposit Guarantee Scheme some 35,000 investors were paid out NZ$1.6bn. Criminal charges were laid against the former directors, the former CEO, and the company accountants for theft and false statements which carry maximum penalties of seven years and false accounting carrying a maximum of ten years imprisonment. Therefore, company directors can be held personally liable for the losses of their companies in New Zealand.

In summary, New Zealand has adopted a principled-based approach to corporate governance and despite what amounted to severe provocation following the GFC has endeavored to retain this approach. The market mechanisms were enhanced with the introduction of the FMA in 2011, absorbing and extending the functionality previously held by the Securities Commission (SCNZ). The trials of the failed finance company executives, directors and shareholders produced intriguing precedents. What has emerged is that limited liability only applies to shareholders, not shareholders who may also be current directors, nor those officers historically involved in the firm's governance who owned shares. The reach of the law was extended, and the corporate veil pierced.

The characteristics of business ownership in New Zealand will be discussed next. Particular attention is paid to the absence of any more than one large internationally competitive multinational, and the domination of cooperatives amongst large businesses in New Zealand. While much fascination lies amongst business researchers with small to medium sized enterprises (SMEs), le petit bourgeoisie (Harrison & Rose, 2006) their unitary nature (commonality of shareholder, director & manager, with or without a trailing spouse) offers little from which to learn perhaps other than the desire for autonomy and other lifestyle goals. The myriad of these micro-enterprises is not the subject of the following discussion.

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5.3. Ownership Structures and Company Law

There are four forms of ownership structure available to business in New Zealand. While other structures exist, such as incorporated societies (a legal entity) and partnerships (i.e., between spouses, siblings, or parent & sibling which are taxed & treated as sole traders) these four account for all of the nation's business entities. They are first, the sole trader (an individual in business); second, the company (across all its various forms from one shareholder/director/employee to global plcs); third, trusts (including the somewhat special case of Maori trusts with tribal members as iwi, hapu and on occasions marae being identified as beneficiaries); and fourth, limited partnerships (an entity to enable the repatriation of tax losses across boarders with the disestablishment of loss attributing qualifying companies (LAQC) on April 1, 2011). The

essential attributes of each are now discussed in order of their importance, from least to most.

The Limited Partnership was introduced in 2008 under the Limited Partnership Act with the following key features. They are a separate legal personality and have an indefinite lifespan if desired. They have the unique characteristic of defined activities that the limited partners can be involved in while not participating in the management of the limited partnership (safe harbour activities, such as agriculture). And, they have a somewhat unique tax treatment. Limited partnerships are a form of 'partnership' that involves a manager, known as the general partner, who is liable for all the debts and liabilities of the business, and investors known as limited partners who are liable to the extent of their capital contribution to the partnership (e.g., as would be shareholders), and can also capture the repatriation of tax losses incurred by the entity, as would a sole-trader (unlike shareholders). The register of limited partnerships is administered by the New Zealand Companies Office, while registration, maintenance and annual return filing for limited partnerships is conducted manually rather than online.

Limited Partnerships have emerged as a preferred entity in agricultural businesses where multiple sources of investor income (from both New Zealand citizens and those offshore) are used to fund the purchase and/or development of a large scale dairy farm, sheep and beef farm, orchard, vineyard and now hop garden (e.g., MyFarm Investments, 2018). They are also used in sport, of which the best known is the Crusaders Limited Partnership (Evans, 2018). The Crusaders are one of New Zealand's five professional regional rugby franchises in which each of the local unions (from Tasman to South Canterbury) are limited partners and the entity itself is managed by the Crusaders (headquartered in Christchurch, Canterbury). The Crusaders compete in the Southern Hemisphere's professional rugby competition that includes teams from New Zealand, Australia, South Africa, Argentina and Japan. Started in 1996, and now run for twenty-three consecutive years, the Crusaders are easily the most successful franchise having played in the final thirteen times, and won nine. While cause and effect is not being attributed here, the business's performance has never been questioned either on or off the field.

The second structure to consider are trusts. Trusts in New Zealand, being quite different to either companies or sole traders require a settlor, trustees and beneficiaries creating a three way fiduciary relationship. And, unlike companies, they have a fixed life expectancy as defined in the trust deed, now typically a period of 80 years. Trusts are remarkably commonplace in NZ agriculture. Many date to the time when beneficiary income was treated at personal tax rates. Income could be distributed to children as beneficiaries and then taxed at lower marginal tax rates. Note that this provision was removed in 2004 (Inland Revenue Department, 2004). With some exceptions beneficiary income is now largely taxed at 33%. Trusts were also regarded as a means of protecting family assets against the consequences of failed marriages in particular, consequently 'the farm' was owned by the family trust. In some instances the trust then traded, being governed by trustees (often including the family accountant or lawyer). The capital limitation of trusts is seldom acknowledged: introducing new capital, assigning capital, shifting capital and providing liquidity all being problematic. The awareness of these limitations, especially to the legal profession, has recently been

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the subject of the New Zealand Law Society's ongoing professional development (Lockhart, 2015).

Amongst corporates trusts often feature as a vehicle through which philanthropic intentions can be pursued, especially the provision of scholarships for education, such as the Ravensdown Hugh Williams Memorial Scholarship that provides NZ$5,000 per year to a student to undertake an agricultural or horticultural degree, for a maximum of three years.

The third entity to consider is the once ubiquitous sole-trader. The number of sole-traders (& partnerships) in New Zealand is declining, now accounting for 28% of all enterprises, with the drop from 38% in 2008 being accounted for by growth in the number of limited liability companies (Statistics New Zealand, 2018). The decline is expected to continue in the future as the country's compliance regime mounts, especially in workplace health and safety and little if any asset protection is afforded.

The preferred and fourth business entity in New Zealand is now the registered limited-liability company (company) accounting for 56% of the 528,170 enterprises as at February, 2017 (Statistics New Zealand). Sole-traders, or individual proprietorships (16.8%) and partnerships (legally the same, 11.1%), therefore, remain numerically important (say, 150,000) for the time being, but are fast becoming an obsolete form of business enterprise.

There are some 300,000 companies registered in New Zealand, that account for the employment of 71 percent of the workforce (Statistics New Zealand, 2017). Of these 2,460 (Statistics New Zealand, 2018) employ more than 100 people, with these particular enterprises being responsible for nearly half (47%) of the nation's entire workforce, which include governmental organisations. All New Zealand companies, regardless of the number of shareholders from as few as one to thousands; the number of directors, again from one to many; and, the liquidity of shareholding from being closely held to listed on the New Zealand Stock Exchange are subject to the sole Companies Act (1993). The Act provides the core of the corporate regulatory system in New Zealand including company registration; rules for directors and officers, shareholders or members; disclosure and reporting requirements; insolvency rules; investigation and enforcement of the law; and, the removal of companies from the register (MBIE, 2018). The Act excludes personal insolvency and the personal properties securities regime for individuals, and financial reporting by financial market participants which is covered by the financial markets regulatory system (i.e., the FMA & NZX, introduced earlier).

The FMA is responsible for enforcing securities, financial reporting and company law as applied to financial services and the securities markets. New Zealand's Companies Office then works closely with the FMA in assisting businesses and capital market participants meet their compliance requirements.

New Zealand company law (Watson, 2017) has a 'fundamentally similar set of legal characteristics… and the same problems… occur across all jurisdictions". Two exceptions being that the New Zealand company may have only one director (Section 127), and that the duty of directors is to act in good faith and in what the director believes to be the best interests of *the company* (Section 131), not shareholders which differs from British law. Of note is that one person companies, while not unique to New

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Zealand are extraordinarily common here. Smith (2013) observes that one person companies are open to abuse due to the lack of separation of ownership from control, Berle and Means' (1932, p. 5) 'alter ego' observation. Limited liability being successful but the consequences of hiding behind limited liability, the proverbial 'corporate veil' being problematic to which statutory and equitable remedies are increasingly being applied.

In summary, New Zealand has an abundance of enterprises, one for every nine (9) citizens of which the majority are now held in the company/corporate form. However, the term corporate is not to imply corporate structure but a registered limited liability company. Of these only a small proportion have a scale, and even fewer (174) are listed on the New Zealand stock exchange, of which some lack scale. Registered companies are, therefore, the legal entity of enterprise choice which embraces the full gambit from one-person companies to publicly listed entities. Amidst the group of companies with scale are a number of large cooperatives (COOP), 12 with annual revenues greater than NZ$174m; publicly listed companies on the New Zealand stock exchange, including Fonterra[21] (2018) (New Zealand's largest company, with an annual turnover of NZ$22bn) of which 58 are dual listed on the Australian Stock Exchange (ASX)[22]; twelve state-owned enterprises (SOE), such as Airways Corporation of New Zealand Ltd and KiwiRail Ltd; listed hybrid forms whereby private ownership sits alongside that of the state at Air New Zealand (NZ govt 52%), Genesis Energy Limited (NZ govt 51%), Mercury NZ Limited (NZ govt 51%) and Meridian Energy Limited (NZ govt 51%); several quasi-public (QP) companies where multiple shareholders exist (say 20-30), for example Canterbury Grasslands Ltd with limited asset liquidity; and, many closely held companies, such as AFFCO Holdings, Dairy Holdings Ltd, Datacom, Greenlea, Open Country Dairies, Progressive Meats, Rank Group, and Todd Corporation all with scale and all of whose ownership is (very) closely held. However, there remains only one true multinational, namely Fonterra, the world's fourth largest dairy company (behind Nestle, Lactalis & Danone). Therefore, it is the absence of say another four or five multinationals that induces the view that New Zealand is a nation of small business. Attention now shifts to the critical characteristics of ownership, and control of these large New Zealand businesses, the nation's corporate entities, with a focus on PLCs, COOPs and SOEs.

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5.4. Ownership and Control of New Zealand Corporate Business

One of the fundamental tenets of what has become corporate governance is the separation of ownership from control. This separation can be brought about by either the introduction of 'new' capital or the introduction of 'new' directors. New or third-party equity capital can be introduced by way of either a close or initial public offering (IPO)

[21] Fonterra's own capital is not publicly listed. The listed securities (Fonterra Shareholders Fund, FSF) are actually units issued by a separate entity reflecting the underlying value of Fonterra shares. While they receive dividends they do not have the legal rights assigned to shares.

[22] A company listed on the main board of the NZX can dual list on ASX as an ASX Foreign Exempt Listing without meeting the very high financial thresholds that apply to other ASX Foreign Exempt Listings. Instead, it must meet the same financial thresholds as an ASX Listing. As an ASX Foreign Exempt Listing, the company will be required to comply with the rules of the main board of the New Zealand exchange, and only a small number of ASX's Listing Rules (ASX, 2018).

(Ritter & Welch, 2002) or is attracted by the firm as venture capital (Hellmann & Puri, 2002). On both occasions that capital may be unaccompanied by either employment in the company or a position of control through governance on the board. It is through either of these circumstances that the requisite construct of separation between ownership and control, as made by Berle and Means (1932) emerges. A further observation from Berle and Means of real significance to New Zealand enterprise is that "it has long been possible for an individual to incorporate his business even though it still represents his own investment, his own activities, and his own business transactions; he has in fact merely created a legal alter ego by setting up a corporation as the nominal vehicle" (p. 5). In such circumstances a state of unification exists, separation has not occurred and in New Zealand not only is a separate legal entity created (in the form of a company) but the preferred 'structure' mirrors that of a sole-trader/proprietorship, but with the advantage of limited liability, and as noted by Smith (2013) while open to abuse it is not necessarily openly abused.

Governance can also be seen to emerge from the second source of separation, now being actively promoted in New Zealand, through that of the non-executive director (NED) (Tricker, 1984). This later catalyst for governance is observed to post-date Berle and Mean's work by more than half a century and is seen as one solution to the repeated crises of governance and unsatisfactory business performance. The best practice movement has responded through increasingly prescriptive structural recommendations to these crises which have now spilled into the context of unification (above). These recommendations for governance appear to be aligned with resource-based views, such as that by Siebels and Zu Knyphausen-Aufseß (2012) who support the structural separation of ownership from control, albeit implicitly. The promotion of the value of non-executive directors is exemplified in New Zealand by the state-owned sector, and state-owned enterprises (SOE) in particular, where for nearly three decades what were government ministries have been companies complete with boards solely comprising NEDs.

Arguably our twelve remaining SOEs are a legacy of stalled public sector reform from the mid-1980s, leaving these businesses in a transitory state between government ownership and asset sale to the public. The most recent round of government asset sales in 2013 produced the current mixed model of ownership, whereby the New Zealand government retained a majority ownership of three electricity companies, with the balance of their shares being listed on the NZX. Therefore, both SOEs and these mixed ownership companies emerge for inclusion in this discussion. However, the promotion of NEDs has not been confined to the state sector and numerous organisations (e.g., banks, financial institutions, New Zealand Institute of Directors, consultants & industry-good organisations, such as DairyNZ) have all promoted the value of NEDs on the boards of what are closely held companies: capital being held by one shareholder, a married couple, or a few family members) where there has otherwise been no separation of ownership from control up until that point, but from which governance arguably emerges. In these circumstances governance is promoted as a panacea for multiple ills (poor performance, gross indebtedness & environmental negligence), and creates separation to some degree. This attribute of business in New Zealand is increasingly common, however, these too remain beyond the scope of the discussion that follows.

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The governance structure, common to all the nation's corporates, whether they be listed, quasi-public, cooperatives or SOEs is the single-tier model whereby the business is governed by one corporate body, the board of directors that has the sole function of corporate governance, activated while the board is in session. As noted in the introduction the composition of New Zealand business creates a complexity of business stuctures amongst the large firms, as opposed to being dominated by plcs. Amidst the top 50 largest firms (Deloitte, 2018) by revenue are 20 listed companies (e.g., Fonterra, Fletcher Building & Air New Zealand), 16 foreign owned subsidiaries (e.g., Woolworths, Fulton Hogan & BP); eight cooperatives (e.g., Foodstuffs – North Island, Foodstuffs – South Island & Zespri); two privately held companies (e.g., Datacom & Open Country Dairy); two state-owned enterprises (e.g., Transpower & New Zealand Post); and, two trusts (Vector & TrustPower). However, the complexity of business is such that even this list appears to suffer inaccuracies, for example, AFFCO arguably New Zealand's fourth largest meat processor has been omitted as has been the Todd Corporation, neither of whom are obligated to make their financial performance public by virtue of being closely held in family ownership.

Further, the classification between cooperatives and listed companies, and listed and SOEs is also problematic in New Zealand. As noted earlier there are partially listed former SOEs in the energy sector, notably hydroelectric power generation, while the nation's flag carrier airline, Air New Zealand has also emerged with a similar ownership structure: publicly listed but majority government owned. The distinction between cooperatives and listed companies is also challenging as Fonterra, formerly a cooperative is now partially listed providing much needed liquidity (no pun intended) to supplier farmers. Conversely, Silver Fern Farms a former cooperative is half-owned by Shanghai Maling Aquarius, a listed Chinese company. The twenty largest listed companies in New Zealand by annual revenue (NZ$m) are listed in Table 5.1.

Table 5.1. Largest 20 publicly listed NZ companies by annual revenue (FYE 2017)

Rank	*Publicly listed company*	*Revenue (millions)*	*Industry*
1	Fonterra	18,845	Dairy processing & export
2	Fletcher Building	9,499	Construction
3	Ebos Group	7,625	Healthcare
4	Air New Zealand	5,109	Airline
5	Z-Energy	3,871	Fuel retailing
6	Spark	3,614	Telecommunications
7	The Warehouse Group	2,981	Retail
8	Mainfreight	2,333	Freight & transport
9	Meridian	2,319	Energy
10	Contact	2,080	Energy
11	Genesis	1,951	Energy
12	Infratil	1,823	Infrastructure
13	Mercury	1,597	Energy
14	Downer	1,517	Construction
15	PGG Wrightson	1,132	Farm input & services
16	Chorus	1,040	Comms infrastructure
17	Skycity Entertainment	927	Casino & accommodation
18	Sky Network Television	893	Subscription television
19	T&G Global	869	Fresh produce
20	Fisher & Paykel Healthcare	869	Healthcare technologies

Source: author's elaboration of Deloitte (2018). NZ's top 200 companies (FYE 2017)

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By global standards the ownership and governance arrangements of most listed companies in New Zealand follow conventional best practice: A single tier, often unitary board with a majority of independent directors, and separation of the roles of chair and CEO. Listed companies must report against, in a comply or explain fashion the NZX Corporate Governance Code (NZX, 2017), which is based on the following eight principles:

1. Code of ethical behaviour – directors should set high standards of ethical behavior, model this behavior and hold management accountable for these standards being followed throughout the organisation.
2. Board composition and performance – to ensure an effective board, there should be a balance of independence, skills, knowledge, experience and perspectives.
3. Board committees – the Board should use committees where this will enhance its effectiveness in key areas, while still retaining board responsibility.
4. Reporting and disclosure – the Board should demand integrity in financial and non-financial reporting and in the timeliness and balance of corporate disclosures.
5. Remuneration – the remuneration of directors and executives should be transparent, fair and reasonable.
6. Risk management – directors should have a sound understanding of the material risks faced by the issuer and how to manage them. The Board should regularly verify that the issuer has appropriate processes that identify and manage potential and material risks.
7. Auditors – the Board should ensure the quality and independence of the external audit process.
8. Shareholder rights and relations – the Board should respect the rights of shareholders and foster relationships with shareholders that encourage them to engage with the issuer.

Those same conventions are demonstrated amongst the cooperatives, of which the largest 20 (again by annual revenue) are listed in Table 5.2 below. A not unexpected difference between the PLCs and the COOPs, however, is that the COOPs all have a majority of owner directors, and entirely non-executive board structures to which the CEO reports.

Table 5.2. Largest 20 NZ cooperatives by annual revenue (FYE 2016)

Rank	*Co-operative*	*Revenue (millions)*	*Industry*
1	Foodstuffs – North Island	6,238	Domestic food retail
2	Foodstuffs – South Island	2,721	Domestic food retail
3	Sliver Fern Farms	2,434	Meat processing & export
4	Farmlands	2,210	Farm input supply
5	Alliance Group	1,501	Meat processing & export
6	Zespri	1,458	Kiwifruit export
7	Ballance Agri-Nutrients	892	Farm fertiliser
8	Southern Cross Medical Care Soc.	817	Medical insurance & hospitals
9	Ravensdown Fertiliser	711	Farm fertiliser
10	Mitre 10 (New Zealand)	708	Home hardware
11	Westland Co-op Dairy Co	639	Dairy processing & export
12	Independent Timber Merchants	398	Construction supplies
13	Market Gardeners	328	Fresh produce marketing
14	CDC Pharmaceuticals	293	Pharmaceutical wholesaler
15	Tatua Co-op	286	Dairy foods & export
16	Capricorn Society	261	Auto industry finance
17	Livestock Improvement Corp.	228	Dairy farm genetics
18	FMG Insurance Ltd.	209	Farm & general insurance
19	Southland Building Society	183	Savings bank
20	NZPM Group	175	Plumbing & gas fittings

Source: author's elaboration of NZ Coop (2018). NZ's top 30 co-operatives base on revenue (FYE 2016)

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The remaining dozen SOEs follow the same board structure, namely all independent directors appointed by the shareholding minister, to which the CEO reports. The board chair then reports performance to the shareholding minister against an agreed upon statement of intent. The SOEs are listed on the basis of annual revenue in Table 5.3 below.

The quyasi-public (QP) and closely held sectors have no reporting or public disclosure requirements, however, the businesses of scale (certainly the ones identified earlier) typically employ external auditors and report formally to shareholders. The primary difference in the structural attributes of their boards are shareholder(s) directors, often in a majority to which a non-founding CEO reports.

Table 5.3. NZ state-owned enterprises by annual revenue (FYE 2016 or 2017)

Rank	*State-Owned Enterprise*	*Revenue (millions)*	*Industry*
1	New Zealand Post	1,485	Postal & courier, banking
2	Transpower	1,061	National transmission grid
3	Solid Energy	639	Coal mining & export
4	KiwiRail Holdings	595	Railway freight & passenger services
5	Landcorp Farming	233	Pastoral farming
6	Kordia Group	217	Telecommunication network
7	Airways Corporation	205	Air navigation
8	AsureQuality Limited	189	Food & primary industry compliance
4	Electricity Corporation	n.d.	Residual entity
5	KiwiRail Holdings	595	Railway freight & passenger services
6	Kordia Group	217	Telecommunication network
7	Landcorp Farming	233	Pastoral farming
8	Meteorological Service	60	Weather forecasting
9	Quotable Value	41	Property valuation
10	Animal Control Products	n.d.	Pest control products
11	Electricity Corporation	n.d.	Residual entity
12	New Zealand Railways		Railway land

Source: New Zealand Treasury (2018). Commercial portfolio.

The last sector of businesses in New Zealand, as mentioned earlier, are Maori owned organisations. Increasingly the focus of academics identifying the supposed 'Maori economy' (from Merrill, 1954) as being both distinct and separate, these latter organisations largely emerged from state funded settlements to Maori for historical breaches of property rights and land confiscation in the mid to late 19th Century. As a result the tribes (iwi) were, and still are being paid compensation by the state. The five largest Maori owned organisations, on the basis of asset valuations are listed in Table 5.4 below. As with the previous discussions these businesses, notably the holding or parent companies have adopted a near identical board structure as to those elsewhere, with non-executive boards and some independent (non-beneficial) directors to which the CEO of their commercial operations report.

Table 5.4. Maori owned organisations by asset value (FYE 2017)

Rank	*Maori Owned Organisation*	*Assets (millions)*	*Industry*
1	Ngai Tahu	1,676	Property, fishing, farming & tourism
2	Waikato-Tainui	1,246	Tourism, property, fishing & forestry
3	Ngati Whatua Orakei	939	Property
4	Moana New Zealand Ltd[23]	540	Fishing & exporting
5	Tauhora North No.2 Trust	329	Energy & farming

Source: Author's elaboration

[23] Moana New Zealand (formerly Aotearoa Fisheries Limited, AFL), *ranked 194th nationally with annual revenues of NZ$176m.*

5.5. The Structure and Composition of New Zealand's Corporate Boards

As early as 1997, Bob Garratt observed that the non-executive board, "is also common in New Zealand, where the non-executive role is treated positively and has become a career in itself" (p. 40). Therefore, the pursuit of what may be recognised as being best practice, regardless of whether or not it has been empirically demonstrated to produce superior performance, has been everyday parlance in New Zealand for decades. The separation of chair and CEO has been so long standing amongst corporates that no recollection was encountered as to when the last NZX company may have demonstrated such attributes, perhaps Michael International Ltd two decades ago. The closest a lack of separation (approaching duality) may have occurred was when Sir Roderick Deane was appointed the chair of Telecom in 1999, having served the previous seven years as its CEO. Deane subsequently appointed his own General Manager Group Services, Theresa Gattung, as his successor. But the modern conventions of board structure are generally well adhered to in New Zealand, not just amongst listed companies but across the business sector, and public sector alike near regardless of ownership structure. It is simply how business is conducted in New Zealand.

Exceptions do exist amongst foreign owned subsidiaries where local CEOs are on boards, and often chair those boards reporting to the parent company in the home location or their Australian branches. However, even amongst this group various forms of adherence to norms of structure occur, whereby local independents often sit alongside the executives producing a conventional mixed board.

Increasingly other dimensions of board 'structure' have emerged as subjects worthy of promotion, and again regardless of the lack of empirical evidence establishing causality between boards and subsequent corporate performance. So in addition to the conventions of a majority of independent directors defined by either employment and/or ownership, and separation of board chair and CEO, there is now an expectation for women on boards; and, an emerging expectation of racial diversity. No doubt additional dimensions will follow. The common assumption here being that diversity of directors, measurable by way of their appearance will enhance business performance.

The recent failure of Fletcher Building (NZX) provides an example of the expectations of corporate board composition in New Zealand. The failure, disclosed losses of some NZ$660m from the Building and Interiors Division in February, 2018 as opposed to a company collapse, such as Carillion (FTSE) promoted what has become a predictable outpouring of anguish. Many of the comments emerging in both traditional and social media appeared to be nothing more than efforts – political or otherwise – at getting 'column inches', 'sound bites' or 'air time'. However, they also reflect increasing expectations of corporate boards, and intriguingly expectations around board composition, especially the sex and increasingly the ethnicity of directors in New Zealand. The new demands on the composition of corporate boards include a suite of measurable director attributes that must supposedly address diversity across age, sex, ethnicity, religion and various other proxies for diverse thought. No doubt there are issues with respect to asymmetrical opportunities presented by what has historically been a predominantly Euro-centric cum Anglo-Saxon masculine business community in New Zealand. But what emerged in the face of the Fletcher Building failure were public

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statements to the effect that the construction company would never have been in the poor financial state had a woman been at the helm. "If a woman had been chairing Fletchers, that wouldn't have happened," said Gattung (Nadkarni, 2018). Interestingly, Gattung chose to ignore the involvement of former Prime Minister Jenny Shipley on the board of Mainzeal, another significant construction firm that collapsed five years earlier. Ethnic Communities Minister Jenny Salesa subsequently ordered a stocktake of ethnic diversity on public sector boards. Women make up about 45 percent directors on SOE boards, yet no-one had done a count according to ethnicity (Chanwai-Earle, 2018). However, this new stocktake is not just about ethnicity, it is argued to be a chance for the government to monitor how reflective boards are of New Zealand communities including age, the disabled and LGBTI+.

Of importance to these observations is the increasing *belief* that boards in New Zealand ought to represent the community in which the corporate operates, and can only do so by way of directors effectively mirroring that constituency in terms of their age, ethnicity, physical ability and gender. Some two-thirds of NZX companies have a diversity policy, and 20% (140) of the 684 listed company directors on the Main Board are women (NZX, 2018). The percentage/number of male and female directors is the only diversity statistic published by the NZX.

Private sector boards are elected by the company's shareholders (Companies Act, Section 155), those with capital at risk not the community at large. By contrast SOE boards are appointed by the shareholding minister, and while subject to political interference have largely attempted to reflect competency first. The only known study of aspiring and current government board member competency is that by the author (Lockhart, 2010) who wrote that, "were diversity blind what would an effective board look like? For it is diversity of thought that should be being encouraged, as under an effective board chair diverse boards ought to be able to generate and explore a wider range of options before decisions are made. That the physical attributes of directors are being mistaken for the diversity of their intellectual and cognitive contributions is also cause for concern". The real fear to emerge in New Zealand is that if you say something often enough it will be believed, competency the long tenor of directors is at risk of being supplanted by what directors look like. A finding in remarkable contrast to that of Kakabadse and Kakabadse (2008), whose extensive contribution can be reduced to one single attribute of directors, wisdom.

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5.6. Conclusion

Corporate governance and ownership in New Zealand, a small isolated economy has emerged from the nexus between listed companies, the state-owned sector, an abundance of large cooperatives, many QPs and an array of closely held firms of substance. To suggest that there is a system would be misleading, for corporate governance in New Zealand results not only from this nexus but also the adoption of a principled base approach motivated by adherence to a free market: one in which practices and motivation for improvement largely sits with the directors and institutions themselves. At times the rate of improvement has demonstrably frustrated legislators, especially following the collapse of the B-Tier finance companies in the aftermath of the

GFC. The result was the creation of the FMA, producing heightened expectations towards transparency and reporting to reinstill investor confidence, which is the lifeblood of the corporate sector.

Change in the sector has been surprisingly slow, not due to reluctance, but simply because the starting point as noted by Garratt (1997) was closer to the attributes of best practice being promoted today. However, that is not to suggest that either the structure or composition of boards are optimal, or ever likely to be so. The expectation of more women directors in particular is evident across all sectors of the business community. But caution should remain that the increasingly vocal drive for greater diversity, as measured by the physical attributes of directors rather than how they think does not distract from the appointment of directors with requisite competencies – irrespective of what these may be.

The emergence of the so called 'Maori economy' poses both opportunities and perhaps concern, especially should these interests continue to be promoted as being both distinct and separate from the rest of New Zealand business, complete with different tax legislation, differing legal interpretation, access to resources and distinctive property rights.

To date business in New Zealand, including the contribution from the state sector has produced a remarkably intertwined economy. While it remains dependent on agriculture, food, fibre and advanced commodity exports and more recently tourism it is one in which a very high standard of living has been enjoyed for the last century and more. The absence of large-scale heavy industry, and proximity of state and private capital has created an entourage of generalists, that on occasions they appear to suffer from a lack of detailed technical knowledge or analytical ability. Another outcome is the relatively common career pathway in governance that remains unchanged since Garrat's observation two decades ago.

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