

# The Promise of Codetermination: An Attractive Option for New Zealand Companies?

LUCILLE REECE\*

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

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\* LLB(Hons), BA *Wgtn.* Lawyer, Bell Gully. Recipient of the New Zealand Law Students' Association Prize for Legal Writing. I am most grateful to my supervisor, Dr Mark Bennett, for his invaluable guidance, wisdom and encouragement. I also thank my father, for his unwavering support and tutelage throughout the entirety of my degree.

## I INTRODUCTION

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

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

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1 When this article uses the term “Anglo-American”, it is in reference to states that feature English as an official language and were, at some stage, colonised by the United Kingdom. The term encompasses Australia, New Zealand and the United States.

2 See R Edward Freeman “stakeholder theory” in Cary L Cooper (ed) *Wiley Encyclopedia of Management* (online ed, John Wiley & Sons, Chichester, 2015) vol 2 for an overview of stakeholder theory.

3 See Heiko Spitzack and Erik G Hansen “Stakeholder governance: How stakeholders influence corporate decision making” (2010) 10 *Corp Gov* 378 at 379–380.

4 See Miguel Martínez Lucio “Co-determination” in Adrian Wilkinson and Stewart Johnstone (eds) *Encyclopedia of Human Resource Management* (Edward Elgar Publishing, Cheltenham, 2016) 48 at 48; Simon Jäger, Shakked Noy and Benjamin Schoefer “What Does Codetermination Do?” (2022) 75 *ILR Rev* 857 at 859; and Gary Gorton and Frank A Schmid “Capital, Labor and the Firm: A Study of German Codetermination” (2004) 2 *J Eur Econ Assoc* 863 at 868–869.

5 Lucio, above n 4, at 48; and Gorton and Schmid, above n 4, at 868–869.

6 Jens Dammann and Horst Eidenmüller “Codetermination: A Poor Fit for US Corporations” (2020) 3 *Colum Bus L Rev* 870 at 880.

7 See for example Lenore Palladino “Economic Democracy at Work: Why (and How) Workers Should be Represented on US Corporate Boards” (2021) 1 *J Law Pol Econ* 373; and Grant M Hayden and Matthew T Bodie “Codetermination in Theory and Practice” (2021) 73 *Fla L Rev*

generalist stakeholder-centric objectives,<sup>8</sup> codetermination mandates stakeholder representation at the highest levels of corporate governance.<sup>9</sup>

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

Codetermination has received little attention in New Zealand scholarship and has not been seriously considered by local policymakers. However, given the international business community's recent warming toward a more stakeholder-centric approach, the time may be ripe for evaluating the merits of codetermination and its potential utility in the New Zealand context. Indeed, income inequality and an increasing concentration of economic power are salient issues in contemporary New Zealand,<sup>11</sup> and are issues that have prompted contemplation of codetermination elsewhere.<sup>12</sup> While external policy measures are also required to remedy such mammoth challenges, it may be wise for New Zealand to contemplate mechanisms internal to company law, like codetermination, in rethinking the distribution of corporate power.

Adopting codetermination would certainly disturb traditional conceptions of corporate governance in New Zealand. However, it is argued that its

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321. As will be discussed in Part V, Anglo-American policymakers such as Elizabeth Warren, Bernie Sanders and Theresa May have expressed support for codetermination.

8 See for example Business Roundtable *Statement on the Purpose of a Corporation* (August 2019), which contains broad commitments to various stakeholder groups but little guidance on how to balance such interests.

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

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

11 The wealthiest 20 per cent of households hold 69 per cent of total household net worth: see Statistics New Zealand "Distribution of wealth across New Zealand households remains unchanged between 2015 and 2021" (3 March 2022) Stats NZ <[www.stats.govt.nz](http://www.stats.govt.nz)>.

12 See for example "Theresa May vows to put Conservatives 'at service' of working people" (11 July 2016) BBC <[www.bbc.com](http://www.bbc.com)>; and Elizabeth Warren "Accountable Capitalism Act" <[www.warren.senate.gov](http://www.warren.senate.gov)>.

theoretical and empirically tested benefits render it worthy of consideration. These benefits include the promotion of employee interests, increased firm efficiency through enhanced information-sharing, and the honing of firm-specific skills.

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

This article's analysis will unfold as follows. Part II canvasses codetermination's historical origins and operation in practice. Part III reviews the literature on codetermination's economic and non-economic benefits. Part IV explores considerations of codetermination in Anglo-American states. Part V examines the suitability of codetermination within New Zealand's corporate landscape with reference to New Zealand's historical and contemporary industrial relations climate. Finally, Part VII considers how the described benefits could materialise in the New Zealand context. Particular reference will be made to the propensity for these benefits to facilitate the avoidance of strike action and increase employee retention.

## II THE NATURE OF CODETERMINATION: GERMANY AND SWEDEN

Codetermination can be defined as a corporate structure within which workers play a formalised role in corporate governance.<sup>13</sup> Within a codetermined company, elected workers' representatives are entitled to vote on major company decisions.<sup>14</sup> Codetermination operates as a soft constraint on corporate behaviour,<sup>15</sup> designed to influence decision-making processes and give greater voice to employee interests without imposing any particular outcome on the company.<sup>16</sup>

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13 Hayden and Bodie, above n 7, at 324; and Eirik G Furubotn "Codetermination and the Modern Theory of the Firm: A Property-Rights Analysis" (1988) 61 J Bus 165 at 166.

14 Jäger, Noy and Schoefer, above n 4, at 860–861; and Sophie Rosenbohm and Thomas Haipeter "German board-level employee representation in multinational companies: Patterns of transnational articulation" (2019) 25 Eur J Ind Relat 219 at 219–220.

15 See Jens Dammann and Horst Eidenmüller "Corporate Law and the Democratic State" [2022] U Ill L Rev 963 at 1010 for further discussion of codetermination acting as a soft constraint for companies.

16 Dammann and Eidenmüller, above n 15, at 1010; and Hayden and Bodie, above n 7, at 346.

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

Codetermination also exists in the context of shop-floor representation, where employers consult with representatives of organised workers, often in the form of works councils, on matters such as working hours, working conditions or recruitment.<sup>20</sup> While the term "codetermination" is also used in reference to worker participation at the shop-floor level,<sup>21</sup> all following uses of the term in this article refer solely to board-level codetermination.

To understand codetermination, it is helpful to consider example jurisdictions. While codetermination exists in over a dozen European states, this Part will focus on Germany and Sweden's application of the model. German codetermination operates within a two-tiered board structure, unlike the one-tier board model present in New Zealand and other Anglo-American jurisdictions. Conversely, Swedish codetermination exists within a unitary board system and offers a valuable comparison to New Zealand's corporate context. Nevertheless,

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

18 Kotthoff, above n 17, at 5; Hayden and Bodie, above n 7, at 354; and Jäger, Noy and Schoefer, above n 4, at 862.

19 Kotthoff, above n 17, at 5. For example, German works councils can initiate negotiations around and advocate for the establishment of a mandatory time recording system for working hours. See this mechanism detailed in L&E Global "Germany: Recording of working hours – works council can initiate negotiations regarding the configuration of the recording system" (27 July 2023) L&E Global: Alliance of Employers' Counsel Worldwide <leglobal.law>.

20 Simon Jäger, Shakked Noy and Benjamin Schoefer "Codetermination and Power in the Workplace" (2022) 3 J Law Pol Econ 198 at 200; Leo E Strine Jr, Anil Kovvali and Oluwatomi O Williams "Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance" (2022) 106 Minn L Rev 1325 at 1331; and see generally Katharina Pistor "Codetermination in Germany: A Socio-Political Model with Governance Externalities" in Margaret M Blair and Mark J Roe (eds) *Employees and Corporate Governance* (Brookings Institution Press, Washington DC, 1999) 163.

21 Frege, above n 17, at 222.

German codetermination will be discussed at length since it is the most well-known and assiduously researched example of codetermination's operation.

## A Germany

At its core, German codetermination (*Mitbestimmung*) is based upon the notion of promoting equality between capital and labour.<sup>22</sup> The model seeks to support stability and facilitate conflict resolution through constructive dialogue.<sup>23</sup> Germany has long embraced a stakeholder-centric conception of the firm.<sup>24</sup> As early as the 19th century, German legal scholars and business leaders referred to the notion of the “*unternehmen an sich*” (“enterprise per se”)—a view of the company which contemplates the interests of shareholders, employees and creditors.<sup>25</sup> This philosophy informed the development of codetermination, with mandatory codetermination first arising in 1905 in the form of shop-floor “employee committees”.<sup>26</sup> By 1916, all German companies with more than 50 employees were required to adopt codetermination at the shop-floor level.<sup>27</sup> As surveyed by legal historian Ewan McGaughey, from 1918 until the rise of the fascist Third Reich in the early 1930s, and again from 1946 to 1951, German businesses and trade unions entered into collective agreements to establish work councils and solidify the presence of employee representatives on company boards.<sup>28</sup>

While it could be argued that German codetermination arose due to the nation's unique historical circumstances and cannot be transplanted elsewhere, the model's proliferation across Europe in the second half of the 20th century is evidence to the contrary.<sup>29</sup> To date, 19 of the European Union's 27 post-Brexit members have embraced some form of codetermination, most notably Sweden,

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

23 Addison, above n 22, at 5.

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

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

26 Roth, above n 25, at 62.

27 At 62.

28 Ewan McGaughey “The Codetermination Bargains: The History of German Corporate and Labor Law” (2016) 23 Colum J Eur L 135 at 135.

29 Klaus J Hopt “Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe” (1994) 14 IRLE 203 at 203; and Jäger, Noy and Schoefer, above n 20, at 204–205.

Denmark, the Netherlands and Austria.<sup>30</sup> The model's expansion indicates that a specific historical context is not a prerequisite for its success. Furthermore, historical stability has remained a key characteristic of European codetermination laws as the models have remained steadfast despite changes in political leadership.<sup>31</sup>

While codetermination has thus far only been implemented in continental Europe, this geographic confinement should not discount codetermination's potential applicability to Anglo-American states. As will be canvassed in Part V, codetermination has attracted interest from academics, politicians and representative bodies in the United States, Canada, Australia and the United Kingdom.

Unlike the unitary board structure present in Anglo-American states, German companies typically adopt a two-tier board system comprising a management board and a supervisory board—the prevailing model across continental Europe.<sup>32</sup> The management board actively manages the company,<sup>33</sup> while the supervisory board oversees the management board's actions.<sup>34</sup> Employee-occupied seats are reserved for the supervisory board only.<sup>35</sup>

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30 See Dammann and Eidenmüller, above n 6, at 880, Table 1 for a list of the European states that have adopted the model and the percentage of board seats reserved for employees. Norway is a notable non-European Union state that has also embraced codetermination.

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

32 The two-tier board structure is mandated by the Stock Corporation Act 1965 (Germany). See Gorton and Schmid, above n 4, at 868; and Christoffer Saidac, Mattias Friberg and Khaled Talayhan “Sweden” in Willem J L Calkoen (ed) *The Corporate Governance Review* (11th ed, Law Business Research, London, 2021) 304.

33 In this sense, management boards occupy a similar role to that of “managers” within Anglo-American companies. Management boards are responsible for the company's day-to-day operations. See for example Klaus J Hopt and Patrick C Leyens “The structure of the board of directors: Boards and governance strategies in the US, the UK and Germany” in Afra Afsharipour and Martin Gelter (eds) *Research Handbook on Comparative Corporate Governance* (Edward Elgar Publishing, Cheltenham, 2021) 116 at 116; and Walther Müller-Jentsch “Formation, development and current state of industrial democracy in Germany” (2016) 22 *Transfer* 45 at 50.

34 Hayden and Bodie, above n 7, at 331–332; and Klaus J Hopt *The German Law of and Experience with the Supervisory Board* (ECGI, Law Working Paper No 305/2016, January 2016) at 2.

35 Codetermination Act 1976 (Germany), s 7.

German supervisory boards appoint and dismiss management board members, set compensation, shape long-term strategy and review executive performance.<sup>36</sup> In this sense, supervisory boards occupy a similar role to New Zealand boards of directors.<sup>37</sup> As such, while New Zealand companies are governed by unitary boards, those boards perform similar functions to the supervisory boards of German companies.

The foundations of German codetermination are located in two key pieces of legislation: the Codetermination Act 1976 and the One-Third Participation Act 2004. The 1976 Act is the central piece of legislation. It applies to companies with over 2,000 employees, requiring their supervisory boards to have an equal number of shareholder and employee representatives, thereby imposing full parity codetermination.<sup>38</sup> Approximately 70 per cent of board seats reserved for workers must be occupied by company employees and 30 per cent by trade union representatives.<sup>39</sup> Under the 2004 Act, companies with at least 500 employees must give employees the right to elect one-third of supervisory board members.<sup>40</sup>

Under both systems, employees elect a labour director, and shareholders elect the supervisory board's chairperson.<sup>41</sup> Both individuals are—supposedly—neutral and entitled to a tie-breaking vote.<sup>42</sup> Consequently, neither bloc of directors can outvote the other. At least one employee representative must be a managerial employee.<sup>43</sup>

Only company employees may vote for supervisory board representatives.<sup>44</sup> The employees of foreign branches and subsidiaries of German companies may not vote or be voted onto their supervisory boards.<sup>45</sup> To safeguard against arbitrary dismissals and excessive shareholder control, shareholders

36 Hopt, above n 29, at 204; Pistor, above n 20, at 184; and Gorton and Schmid, above n 4, at 868. See Larry Fauver and ME Fuerst "Does good corporate governance include employee representation? Evidence from German corporate boards" (2006) 82 J Financ Econ 673 at 675 for a discussion of the nature of German supervisory boards in comparison to those in the United Kingdom and the United States, which have the same unitary board system as is present in New Zealand.

37 See Institute of Directors New Zealand "Starting a Board" <[www.iod.org.nz](http://www.iod.org.nz)> for an overview of key board functions in New Zealand.

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

39 Codetermination Act, s 7(2).

40 One-Third Participation Act 2004 (Germany).

41 Codetermination Act, s 27(2).

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

43 Dammann and Eidenmüller, above n 6, at 884.

44 Codetermination Act, s 3(1); and Mathias Habersack "Corporate Codetermination German-Style as a Model for the UK?" (18 July 2016) University of Oxford <[www.ox.ac.uk](http://www.ox.ac.uk)>.

45 Codetermination Act, s 3(1).



cannot remove employee representatives without 75 per cent of the company's employees having voted in favour of removal.<sup>46</sup>

German codetermination does not exist in a vacuum. It is part of a broader industrial relations landscape also comprising trade unions, works councils and wide collective agreement coverage. Works councils aggregate information about the employees they represent and work with management to reach mutually beneficial outcomes.<sup>47</sup> These representative bodies are mandatory in Germany's private sector, operating at the firm level with a company-specific electorate—unlike unions, which operate at the industry level.<sup>48</sup> In the decades following the Second World War, works councils became the most prominent vehicles for advancing industrial relations across European states.<sup>49</sup> They remain the primary bodies through which employees are represented in Germany.<sup>50</sup> Collective bargaining is also prominent in Germany, with collective agreements covering 50.2 per cent of private-sector employees in 2015.<sup>51</sup>

## **B Sweden**

Known for its car manufacturers and home furnishing giants such as Volvo and Ikea, Sweden boasts the world's 22nd largest economy and the 10th largest in Europe.<sup>52</sup> Swedish companies operate under a single-tier board structure.<sup>53</sup> Worker involvement in Swedish corporate decision-making occurs through board-level representation and collective bargaining.<sup>54</sup> Board-level

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46 Section 23.

47 Joel Rogers and Wolfgang Streeck "The Study of Works Councils: Concepts and Problems" in Joel Rogers and Wolfgang Streeck (eds) *Works Councils: Consultation, Representation, and Co-operation in Industrial Relations* (2nd ed, University of Chicago Press, Chicago, 2009) 3 at 6.

48 At 55.

49 Frege, above n 17, at 221.

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

51 See the OECD/AIAS database on Institutional Characteristics of Trade Unions, Wage Setting, State Intervention and Social Pacts, version 1.1 (September 2023): OECD "OECD/AIAS ICTWSS database" <[www.oecd.org](http://www.oecd.org)>. This database was originally developed by Professor Jelle Visser at the University of Amsterdam's Advanced Labour Studies-Hugo Sinzheimer Institute (AIAS-HSI), but is now produced jointly by the OECD and AIAS-HSI.

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

53 Saidac, Friberg and Talayhan, above n 32, at 304.

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

codetermination was first introduced in 1972,<sup>55</sup> amid a swathe of labour reforms intended to give private-sector workers greater say in company management.<sup>56</sup> The Board Representation (Private Sector Employees) Act 1987 requires all companies with more than 25 employees to have two board members elected by the employee body.<sup>57</sup> Companies with over 1,000 employees and more than one branch must have three employee representatives,<sup>58</sup> and employee representatives can never be in the majority.<sup>59</sup>

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

Like Germany, Sweden has a long history of labour-management cooperation.<sup>62</sup> The nation's industrial relations system is characterised as a "social partnership" between employers and employees through their representative bodies, the unions.<sup>63</sup> Accordingly, Sweden's workforce is highly unionised, with 68 per cent of workers belonging to a union in 2019.<sup>64</sup> Collective

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55 At 76.

56 Klas Levinson "Codetermination in Sweden: Myth and Reality" (2000) 21 *Econ Ind Democr* 457 at 457.

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

58 Levinson, above n 56, at 459.

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

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

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

62 Wheeler, above n 54, at 72.

63 The social partnership model places emphasis on partner dialogue and collective bargaining, rather than regulation. The social partners themselves include the Swedish Trade Union Confederation, the Confederation of Swedish Enterprise, and the Swedish Confederation of Professional Associations: see The Swedish Trade Union Confederation *The Swedish Model – The Importance of Collective Agreements in Sweden* (2011) at 3; Dominique Anxo "Shaping the future of work in Sweden: The crucial role of social partnership" in Daniel Vaughan-Whitehead (ed) *Reducing Inequalities in Europe* (online ed, Edward Elgar Publishing, Cheltenham, 2018) 519 at 519–520; and Wheeler, above n 54, at 72.

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

bargaining coverage for Swedish employees is also high, sitting at 88 per cent in 2020.<sup>65</sup>

Works councils were present in Sweden from 1946,<sup>66</sup> but in the 1970s were gradually replaced by a codetermination system that placed heavy emphasis on collective bargaining.<sup>67</sup> This development is unsurprising, given that Swedish unions have historically been sceptical of works council-like institutions.<sup>68</sup>

### ***C The nature of employee representatives in major German and Swedish companies***

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

For instance, Audi's supervisory board includes long-time employees with backgrounds in employee advocacy. The board comprises 10 shareholders and 10 employee representatives, all with a long history at the company and previous leadership experience. For example, Alexander Reinhart, appointed to the supervisory board as an employee representative in January 2022, began working as a mechatronics technician at AUDI AG in 2004 and commenced union involvement that same year.<sup>69</sup> From 2004–2021, Reinhart held various union leadership positions, including as an elected union representative, a youth representative, a member of Audi's General Works Council, and a member of the board of union representatives, including a one-year assignment as chair of that board.<sup>70</sup> Another recent appointee, Karola Frank, is a longstanding member of the Audi Works council at Ingolstadt and has worked at Audi since 1997.<sup>71</sup> In

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65 Kjellberg, above n 64.

66 Kjellberg, above n 64.

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

68 At 189.

69 Audi MediaCenter "Audi Supervisory Board: Changes to members representing employees" (14 January 2022) <[www.audi-mediacyenter.com](http://www.audi-mediacyenter.com)>.

70 Audi MediaCenter, above n 69.

71 Audi MediaCenter, above n 69.

addition to working as a master craftswoman and mediator, Frank was the vice-chair of Germany's largest union, IG Metall, from 2015–2021.<sup>72</sup>

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

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

Ericsson, a multinational information and communications technology company headquartered in Stockholm, also features long-time employees on its board. For example, Torbjörn Nyman was appointed to the board by LO, the Swedish Trade Union Confederation, in 2017 after having worked at the company since 1996.<sup>79</sup> Anders Ripa, also appointed to the board in 2017 by a leading Swedish union, was employed at Ericsson since 1998 and currently works as the company's security advisor.<sup>80</sup>

All employees on the boards of the abovementioned Swedish and German companies were similarly experienced.<sup>81</sup> Ultimately, empirical research is necessary to ascertain the characteristics and experience of employee representatives within codetermined companies across Europe. However, these examples—while anecdotal—indicate that such board appointees in large

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72 Audi MediaCenter, above n 69.

73 Mercedes-Benz Group "The Supervisory Board" <[www.group.mercedes-benz.com](http://www.group.mercedes-benz.com)>.

74 Mercedes-Benz Group "Ergun Lümalı" <[www.group.mercedes-benz.com](http://www.group.mercedes-benz.com)>.

75 Thomas "Top Global and USA Bearings Suppliers" <[www.thomasnet.com](http://www.thomasnet.com)>.

76 SKF "SKF Board of Directors" <[www.investors.skf.com](http://www.investors.skf.com)>.

77 SKF, above n 76.

78 SKF, above n 76.

79 Ericsson "Board members" <[www.ericsson.com](http://www.ericsson.com)>.

80 Ericsson, above n 79.

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

companies tend to have a wealth of company experience and a background in union leadership.

### III OUTCOMES OF CODETERMINATION

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

#### *A Economic consequences*

In 2006, Fauver and Fuerst observed that the theoretical literature on codetermination was in its infancy.<sup>82</sup> Despite a recent surge in the publication of codetermination-related articles,<sup>83</sup> this assessment arguably still rings true. Indeed, the scholarly consensus on codetermination's economic outcomes has ebbed and flowed since the 1980s.<sup>84</sup> The earliest—and most methodologically dubious<sup>85</sup>—empirical studies concluded that codetermination had minimal effects on firm profits.<sup>86</sup> More recent studies have concluded the opposite.<sup>87</sup> Against this backdrop of divided opinions, the following subpart will explore the competing theoretical perspectives on the model's economic utility.

##### *1 Efficiency and profitability: theoretical perspectives*

Increased firm efficiency—achieved through the avoidance of strikes—is a potential positive economic consequence of codetermination. Despite being a notable proponent of shareholder primacy, Hansmann has argued that codetermination can promote efficiency when paired with collective bargaining.<sup>88</sup> He contended that codetermination can enhance company–union

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

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

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

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

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

87 Kornelius Kraft, Jörg Stank and Ralf Dewenter “Co-determination and innovation” (2011) 35 *Camb J Econ* 145 at 167.

88 Henry Hansmann “When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy” (1990) 99 *Yale LJ* 1749 at 1803.

relations, since worker representatives on boards can streamline communication channels between workers and employers.<sup>89</sup> Such relations may facilitate the avoidance of strikes, thereby increasing overall firm efficiency.<sup>90</sup>

Other scholars have used the contractarian argument to dismiss codetermination on the basis that the model acts as a legislative constraint on corporate activity. Bainbridge and Jensen and Meckling, as proponents of contractarianism, have argued that codetermination is an inefficient approach, as it operates as a binding constraint which is rarely adopted by firms voluntarily.<sup>91</sup> However, Hayden and Bodie and Renaud have noted that there are various practical reasons why individual firms may not voluntarily embrace codetermination in the absence of legislation.<sup>92</sup> For example, firms may be reluctant to independently introduce shared governance structures due to concerns that doing so would generate a negative perception of the company's labour relations and potentially impede its ability to raise funds.<sup>93</sup> Similarly, unilateral adoption may lead to wage compression, competitive disadvantages, and the transaction costs associated with altering an individual company's embedded hierarchies.<sup>94</sup> Accordingly, it is unsurprising that when given a choice, individual companies do not readily leap at the prospect of imposing such internal structural changes.

Additionally, as discussed in Part II, legal historian Ewan McGaughey has noted that German codetermination originally sprang from collective agreements voluntarily entered into by business and labour representatives.<sup>95</sup> Codetermination did not, therefore, arise solely as a result of economically unsound legislation.<sup>96</sup> Rather, it came about organically, suggesting that when the market conditions are right, employees appear to "bargain for codetermination".<sup>97</sup>

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89 At 1803.

90 At 1766.

91 Stephen M Bainbridge "Privately Ordered Participatory Management: An Organisational Failures Analysis" (1998) 23 Del J Corp L 979 at 1054–1055; and Jensen and Meckling, above n 10, at 473.

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

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

94 At 344–345; and Renaud, above n 92, at 691–692.

95 McGaughey, above n 28, at 1.

96 At 2.

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

In 1979, Jensen and Meckling famously predicted codetermination would lead to economic collapse in Germany.<sup>98</sup> They argued codetermination would result in workers “eating ... up” the firm’s assets, resulting in “a significant reduction in the country’s capital stock, increased unemployment, reduced labour income, and an overall reduction in output and welfare”.<sup>99</sup> Of course, such a profound collapse did not eventuate. Codetermination endures as a critical feature of the German economy, which has remained competitive for decades and now ranks as the world’s fourth largest by gross domestic product.<sup>100</sup> Similarly, the Swedish economy is highly diverse and competitive; despite suffering a financial crisis in the 1990s, it has sustained a rate of economic growth surpassing that of the United States and the EU-15 over the last 15–20 years.<sup>101</sup>

In 1991, Smith developed a positive economic case for codetermination based on its ability to correct labour, capital markets and organisational failures.<sup>102</sup> Smith explained that corporate managers possess incentives to distort organisational structures by acting opportunistically, which can generate inefficiencies.<sup>103</sup> By providing guaranteed joint decision-making at the board level, codetermination can correct such distortions by providing internal quality controls over management decisions and thwarting management opportunism.<sup>104</sup> Smith concluded that codetermination could improve firm efficiency through this corrective function.<sup>105</sup>

Scholars have also contended that codetermination acts as a reward for employees who have honed their firm-specific skills, thereby improving firm efficiency.<sup>106</sup> Codetermination arrangements may encourage employees to stay at a firm long-term due to the possibility of occupying a representative role, and enhance the development of skills relating exclusively to that workplace.<sup>107</sup> In

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

99 At 504.

100 ResearchFDI “The Top 20 Largest Economies in the World by GDP” (8 February 2021) <[www.researchfdi.com](http://www.researchfdi.com)>.

101 The EU-15 refers to the European Union’s 15 member states as of December 2003, before enlargement of the Union. IMD “World Competitiveness Ranking 2022” <[www.imd.org](http://www.imd.org)>; McKinsey & Company *Growth and renewal in the Swedish economy: Development, current situation and priorities for the future* (McKinsey Global Institute, May 2012) at 9; and Swedish Institute “The Swedish economy” <[www.sweden.se](http://www.sweden.se)>.

102 See Stephen C Smith “On the economic rationale for codetermination law” (1991) 16 *J Econ Behav Organ* 261 at 261.

103 At 263–273.

104 At 267.

105 At 277.

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

107 Dammann and Eidenmüller, above n 15, at 986.

particular, Smith's economic case notes that codetermination has been shown to generate efficiency-related benefits through increases in technical efficiency and knowledge generation through firm-specific skill development.<sup>108</sup>

Dammann and Eidenmüller have contended that codetermination's emphasis on worker upliftment discourages corporate risk-taking and is therefore unfavourable as boards must be willing to tread into uncharted territory.<sup>109</sup> However, Hayden and Bodie have argued that such a stance both assumes the existence of some "optimal level of risk-taking" and dubiously purports that shareholders are the only individuals well-placed to assess all "downsides of risky corporate behavior".<sup>110</sup>

## 2 *Efficiency and profitability: the data*

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

Fauver and Fuerst's 2006 study of 250 publicly traded German companies with varying degrees of codetermination found that "prudent levels" of employee representation "significantly improve[d] firm value" due to enhanced information-sharing between employees and employers, which thereby improved board-decision making.<sup>112</sup> The authors noted that industries requiring more intense coordination of activities and information-sharing, such as manufacturing, benefit more from codetermination.<sup>113</sup> Affirming Hansmann's theoretical position, the authors found that board-level employee representation could facilitate the avoidance of strikes by providing workers and unions with helpful information about firm strategy and profits.<sup>114</sup> The authors tentatively concluded that for such positive benefits to materialise, the optimal level of employee representation on supervisory boards was likely less than 50 per cent,

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108 Smith, above n 102, at 279.

109 Dammann and Eidenmüller, above n 6, at 932–934.

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

111 Kraft, Stank and Dewenter, above n 87, at 167; Fauver and Fuerst, above n 36, at 677; and Jörg Heining, Simon Jäger and Benjamin Schoefer "Labor in the boardroom" (2021) 136 Q J Econ 669.

112 Fauver and Fuerst, above n 36, at 674 and 677.

113 At 703.

114 At 703.



cautioning that an excessive number of labour representatives could reduce firm value.<sup>115</sup>

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

There is no empirical evidence supporting the assertion that codetermination negatively impacts other stakeholders, such as shareholders, creditors and the environment.<sup>119</sup> In fact, codetermined firms have generally provided more robust long-term protections for such stakeholders.<sup>120</sup> Lin, Schmid and Xuan's 2018 study found that:<sup>121</sup>

Employee representatives who aim to protect the interests of the firm's employees can (unintentionally) also help to protect the interests of banks as both stakeholders are interested in the long-term survival and stability of the firm.

Regarding the model's impact on the environment, Scholz and Vitols' 2019 study found that codetermined firms tended to have substantive corporate social responsibility policies that set concrete emissions-reduction goals.<sup>122</sup>

Despite such benefits, recent studies have indicated that codetermination has no or minimal positive effects on wages for workers themselves. For example, upon surveying changes in board-level employee representation in Finnish and German companies, Harju, Jäger and Schoefer found that the wage

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115 At 703.

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

117 Jäger, Noy and Schoefer, above n 4, at 868.

118 At 868.

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

120 Bodie and Hayden, above n 119; and Hayden and Bodie, above n 7, at 356.

121 Chen Lin, Thomas Schmid and Yuhai Xuan "Employee representation and financial leverage" (2018) 127 JFE 303 at 321.

122 Robert Scholz and Sigurt Vitols "Board-level codetermination: A driving force for corporate social responsibility in German companies?" (2019) 25 Eur J Ind Relat 233 at 243–244.

increases observed in those companies—1.0 per cent and 1.6 per cent, respectively—were statistically insignificant.<sup>123</sup>

### 3 Analysis

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

More recently, in early 2020, amidst the economic disruptions caused by the COVID-19 pandemic, certain German firms cooperated with employees to mitigate fallout and criticism. Over half of German firms adopted *Kurzarbeit*: a strategy whereby worker hours were shortened to preserve firm-specific human capital.<sup>127</sup> The social insurance strategy enabled companies to avoid costly re-hiring, re-training and severance processes, thus comparatively boosting firm efficiency during a period of unprecedented crisis.<sup>128</sup> For example, the supervisory board of automaker Daimler AG (now Mercedes-Benz Group) agreed to reduce work hours to avoid mass layoffs with the unanimous support of its employee representatives.<sup>129</sup> In contrast, United States firm Tesla faced widespread criticism from employees due to an alleged lack of consultation,<sup>130</sup>

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

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

125 See Hayden and Bodie, above n 7, at 353; Michael C Burda and Jennifer Hunt “What Explains the German Labor Market Miracle in the Great Recession?” (2011) BPEA 273 at 273–275; and Ulf Rinne and Klaus F Zimmermann “Another economic miracle? The German labor market and the Great Recession” (2012) 1 IZA J Labor Policy 1 at 1.

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

127 See International Monetary Fund “Kurzarbeit: Germany’s Short-Time Work Benefit” (15 June 2020) <[www.imf.org](http://www.imf.org)>; and Joseph Nasr “Half of German firms using shortened working hours due to coronavirus: Ifo” (23 April 2020) Reuters <[www.reuters.com](http://www.reuters.com)>.

128 International Monetary Fund, above n 127.

129 Stuttgart Zeitung “Daimler extends Short-Time Work Until the End of April” (8 April 2020) <[www.stuttgarter-zeitung.de](http://www.stuttgarter-zeitung.de)> as cited in Dammann and Eidenmüller, above n 15, at 1003, n 280.

130 In May 2020, Tesla employees were given permission to work from home. However, some received termination notices alleging a “failure to return to work”. Additionally, later that year it was alleged that workers were forced to return to work during quarantine, leading to protests from employees. See Faiz Siddiqui “Tesla gave workers permission to stay home rather than risk getting covid-19. Then it sent termination notices” *The Washington Post* (online ed, 25

ultimately resulting in bitter relations between employees and management.<sup>131</sup> These contrasting examples indicate that codetermination may facilitate harmonious relations between workers and senior management during times of unprecedented crisis.

As noted above, the data does not indicate that codetermination results in employee wage increases; however, this is arguably not the most critical metric by which to measure the model's success. The fundamental purpose of codetermination is to afford employees the right to board-level representation, rather than to directly improve their wages.

## ***B Non-economic consequences***

### *1 Promotion of employee interests*

A critical non-economic benefit associated with codetermination—and indeed the model's overarching goal—is the promotion of employee interests. In theory, when workers are represented at the board level, their interests will be advocated for and catered to.<sup>132</sup> This can be expected to play out in practice, as the model improves communication pathways between shareholder-appointed directors and the employee body,<sup>133</sup> entrenching the voice of a key stakeholder at the board level.

Swedish directors have responded positively to the increased promotion of employee interests through codetermination. Klas Levinson's extensive surveys of both management and labour in hundreds of Swedish companies in 1984, 1996 and 1998 found that codetermination worked well overall for the majority of companies, with most corporate leaders believing that the model “contributes new ideas, strengthens people's willingness to cooperate and confers legitimacy for such difficult decisions as production or worker cut-backs”.<sup>134</sup> Similarly, Levinson found that most Swedish directors perceived board-level

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June 2020) as cited in Dammann and Eidenmüller, above n 15, at 1003, n 279; and Rupert Neate “Tesla shareholders urged to oust Elon Musk over \$55bn pay deal” *The Guardian* (online ed, 30 June 2020) as cited in Dammann and Eidenmüller, above n 15, at 1003, n 278.

131 Siddiqui, above n 130; and Dammann and Eidenmüller, above n 15, at 1003.

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

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

134 Levinson, above n 56, at 463.

codetermination positively as it could effect change and promote collaboration and trust within companies.<sup>135</sup>

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

Promoting employee interests through codetermination may also lead to improved feelings of job satisfaction amongst workers. While empirical studies on the correlation between job satisfaction and codetermination are sparse,<sup>138</sup> a 2021 study by Harju, Jäger and Schoefer found subjective job satisfaction moderately increased within codetermined Finnish firms.<sup>139</sup> Indeed, it is perhaps unsurprising that employees experience greater work satisfaction when they are provided meaningful avenues to raise grievances and have their broader interests represented at the board level.

## 2 *Knowledge of realities of the company*

Information-sharing between employee representatives and other board members has already been identified as a distinct positive economic outcome of codetermination. However, non-economic benefits may also arise from board members' understanding the firm's daily operations. This article posits that if employee representatives with such in-depth knowledge and experience are present at the board level, their input could valuably influence decision-making by ensuring that shareholder-appointed directors are aware of the firm's day-to-day realities. For example, issues relating to working conditions could be effectively communicated where an employee representative has direct

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

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

137 Levinson, above n 56, at 464–466.

138 Jäger, Noy and Schoefer, above n 4, at 5.

139 At 8.

experience working at the shop-floor level.<sup>140</sup> Indeed, there is extensive literature propounding the value of diverse boards,<sup>141</sup> reflecting that commercial expertise can be valuably supplemented by practical knowledge and lived experience, including of a company's day-to-day operations.

Conversely, Dammann and Eidenmüller have suggested that the benefits of board diversity through codetermination would be inherently limited due to shareholder-appointed directors and employee representatives having “fundamentally different goals”.<sup>142</sup> However, this position assumes, without robust substantiation, that such parties would consistently disagree on important matters. This does not seem to be the case in practice; for example, a 1996 study found that 86 per cent of Swedish managing directors did not believe union participation contributed to conflict and the slowing down of company operations.<sup>143</sup> While it may be true that shareholder-appointed directors and employee representatives have different mandates, no available evidence suggests that codetermined boards regularly suffer from stalemate.

### *3 Concluding analysis*

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

## **IV CODETERMINATION AMID THE STAKEHOLDER APPROACH**

Turning from codetermination's consequences to its position within broader company law scholarship, this Part explores the model's utility in the context of stakeholder theory. While many European countries have long emphasised the importance of stakeholders in corporate governance, Anglo-American states have favoured the shareholder primacy approach, at least in the past four decades. However, over the past decade, various challenges have been made to the shareholder-centric orthodoxy, primarily in the form of the “stakeholder

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

141 See for example Seletha R Butler “All on Board! Strategies for Constructing Diverse Boards of Directors” (2012) 7 Va L & Bus Rev 61 at 76; and see generally Mijntje Lückers-Rovers “Women on boards and firm performance” (2013) 17 J Manag Gov 491.

142 Dammann and Eidenmüller, above n 6, at 910.

143 Levinson, above n 56, at 462.

approach”. While the stakeholder approach has garnered at least symbolic support from prominent actors, it arguably lacks teeth and requires more concrete mandates to be successful.

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

### ***A Shareholder primacy***

The orthodox law and economics theory of shareholder primacy dictates that maximising shareholder value is the corporation’s central purpose.<sup>144</sup> The directors derive their authority from the shareholders, serve as their agents, and must act in their interests when making corporate decisions.<sup>145</sup>

Despite its current prominence, shareholder primacy has not always dominated corporate governance structures in Anglo-American states. In the mid-20th century, United States companies were controlled by professional managers; boards served as public representatives and shareholders were relegated to the background.<sup>146</sup> More broadly, one-third of employees in the United States were represented by unions, their growth having been fuelled by the New Deal reforms of the 1930s.<sup>147</sup> Management was largely unconstrained by board members and afforded a significant degree of agency.<sup>148</sup> However, such norms were inconsistent with the statutory underpinnings of company structure in the United States and soon gave way to the shareholder primacy model pioneered by law and economics scholars.<sup>149</sup> By 1997, the shareholder primacy approach was firmly the default, with the Business Roundtable then declaring that the “paramount duty of management and of boards of directors is to the corporation’s stockholders”.<sup>150</sup>

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144 See generally Milton Friedman *Capitalism and Freedom* (40th ed, University of Chicago Press, Chicago, 2002); and Jensen and Meckling, above n 10.

145 See Michael C Jensen and William H Meckling “Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure” (1976) 3 JFE 305; and Stephen M Bainbridge “Director Versus Shareholder Primacy: New Zealand and USA Compared” [2014] NZ L Rev 551 at 552.

146 Bainbridge, above n 145, at 552.

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

148 Bainbridge, above n 145, at 552.

149 At 553.

150 Business Roundtable *Statement on Corporate Governance* (September 1997) at 3. See Lynn Stout “New Thinking on ‘Shareholder Primacy’” (2012) 2 Account Econ Law 1 at 2–3 for a summary of the rise of shareholder primacy.

## ***B The rise of the stakeholder approach***

In recent years, powerful actors have seemingly embraced a more stakeholder-orientated corporate philosophy. For example, in its 2019 “Statement on the Purpose of a Corporation”, the Business Roundtable appeared to wholeheartedly adopt a stakeholder-centric approach, stating that companies must “deliver value” to their stakeholders to foster future success.<sup>151</sup>

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

## ***C Codetermination: a more concrete response to shareholderism?***

The stakeholder approach emphasises the corporation’s responsibility to wider stakeholders, including employees, creditors, suppliers, customers, the environment and the local community.<sup>152</sup> However, the effectiveness of the stakeholder model can be limited where directors are forced to make trade-offs between the interests of various stakeholders when making decisions.<sup>153</sup>

Section 172 of the United Kingdom’s Companies Act 2006 encapsulates the stakeholder approach. The section<sup>154</sup> requires directors, when promoting the success of the company, to have regard to factors including:<sup>155</sup>

... the interests of the company’s employees ... the need to foster the company’s business relationships with suppliers, customers and others,

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151 See Business Roundtable, above n 8.

152 Silvia Ayuso and others “Maximising Stakeholders’ Interests: An Empirical Analysis of the Stakeholder Approach to Corporate Governance” (2014) 53 *Bus Soc* 414 at 414; Jean Tirole “Corporate Governance” (2001) 69 *Econometrica* 1 at 24; and Stephen M Bainbridge “Director Primacy: The Means and Ends of Corporate Governance” (2003) 97 *NW U L Rev* 547 at 549.

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

154 Section 172 of the Companies Act 2006 (UK) is, for all intents and purposes, the equivalent of s 131 of New Zealand’s Companies Act 1993.

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

the impact of the company's operations on the community and the environment ...

In New Zealand, the Companies Act 1993 merely states that directors “*may ... take into account recognised environmental, social and governance factors*” when determining the best interests of the company.<sup>156</sup> The New Zealand Act is thus even less prescriptive than the United Kingdom equivalent, falling short of imposing positive duties to consider stakeholder interests.

Despite their underlying intent, such provisions are unlikely to meaningfully elevate stakeholder interests in practice. Many scholars have criticised the United Kingdom's provision on this basis, since it mandates the consideration of stakeholder interests insofar as shareholder interests are not impinged upon.<sup>157</sup> Andrew Keay and Taskin Iqbal's empirical research into the effects of s 172 on the reporting of large publicly listed companies affirmed that the provision had little impact, both operationally and in company reporting.<sup>158</sup> Outside of the United Kingdom, Bebchuk, Kastiel and Tallarita's empirical study of past choices made by directors under new stakeholderism rules in the United States found that directors did not tend to exercise their discretion in favour of stakeholders.<sup>159</sup>

Fatally, the directorial discretion approach simply requires directors to consider various factors, thereby leaving the weighing-up of relevant interests to the discretion of corporate leaders who may—and often do—choose to prioritise shareholder interests notwithstanding statutory directives.<sup>160</sup> As observed by Bebchuk and Tallarita, there still exist overwhelming incentives for directors to

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156 Companies Act (NZ), s 131(5) (emphasis added).

157 See for example Charlotte Villiers “Narrative reporting and enlightened shareholder value under the Companies Act 2006” in John Loughrey (ed) *Directors' Duties and Shareholder Litigation in the Wake of the Financial Crisis* (Edward Elgar Publishing, Cheltenham, 2012) 97 at 102–108; Richard Williams “Enlightened Shareholder Value in UK Company Law” (2012) 35 UNSWLJ 360 at 376; and Andrew Keay “Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's ‘Enlightened Shareholder Value Approach’” (2007) 29 Syd LR 577 at 611.

158 Andrew Keay and Taskin Iqbal “The impact of enlightened shareholder value” (2019) 4 JBL 304 at 327.

159 Consistency statutes adopted by over 30 US states give directors the ability to consider stakeholder interests when making decisions. Bebchuk, Kastiel and Tallarita found that directors often gave little weight to stakeholder interests: see Lucian A Bebchuk, Kobi Kastiel and Roberto Tallarita “For Whom the Corporate Leaders Bargain” (2021) 94 S Cal L Rev 1467 at 1536 for an overview of the authors' findings.

160 Bebchuk and Tallarita, above n 153, at 122–123. Bebchuk and Tallarita's empirical study of past choices made by directors under stakeholderism rules show that directors will not tend to exercise their discretion in favour of stakeholders. See Bebchuk and Tallarita, above n 153, at 156 for the authors' discussion of their findings.



support stakeholder objectives only to the extent that doing so advances shareholder interests, even with a seemingly renewed sense of corporate purpose under the stakeholder approach.<sup>161</sup> Similarly, Gatti and Ondersma argue that even where a stakeholder approach is mandated in legislation, directors alone cannot be trusted to consistently and meaningfully consider all stakeholders' interests.<sup>162</sup> They describe the adoption of such an approach as a "perilous bet".<sup>163</sup> Against this backdrop, it has been argued that the stakeholder approach is no more than a symbolic façade that could thwart more beneficial external reform.<sup>164</sup>

Conversely, codetermination establishes a concrete model whereby a key stakeholder, the company's employees, are afforded a voice in decision-making. As asserted by Gatti and Ondersma, any proposal purporting to reshape corporate governance norms and shift power to weaker constituents must include mandates and enforcement mechanisms.<sup>165</sup> Under codetermination, even where employee representatives are outvoted, they are at least afforded a defined role in corporate governance—one which would unlikely materialise in the absence of legislatively mandated control rights. Where employee representatives are present, boards may be disincentivised from pursuing corporate strategies detrimental to employees.<sup>166</sup> Crucially, codetermination can uplift worker interests, and, as was found to be the case within codetermined Swedish firms, promote constructive collaboration between executives and a key stakeholder—employees.<sup>167</sup>

Codetermination does not resolve all the impediments associated with the stakeholder approach. Even with employee-elected directors present on boards, trade-offs between the interests of various stakeholders can occur. Nevertheless,

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161 Such incentives include executive compensation and career prospects, both of which are enhanced through adherence to shareholder-value maximisation strategies: see Bebhuk and Tallarita, above n 153, at 148–155; and Stephen N Kaplan and Bernadette A Minton "How Has CEO Turnover Changed?" (2012) 12 *Int Rev Fin* 57 at 58.

162 Gatti and Ondersma, above n 153, at 73.

163 At 73.

164 At 73; and Bebhuk and Tallarita, above n 153, at 171. Specifically, Bebhuk and Tallarita contend that relying on shareholder-appointed corporate leaders alone could divert attention away from more effective reforms that "preclude or discourage" the imposition of negative externalities on stakeholders: see Bebhuk and Tallarita, above n 153, at 171–172.

165 Gatti and Ondersma, above n 153, at 70. While Gatti and Ondersma do not explicitly endorse or reject codetermination as a means to uplift such constituencies, they do note that codetermination could hold the most promise for employees: see Gatti and Ondersma, above n 153, at 71.

166 See Dammann and Eidenmüller, above n 15, at 994–995 where the authors discuss how such disincentives arise in the context of lobbying-related decisions.

167 Levinson, above n 56, at 460.

it is argued that since codetermination ensures the presence of crucial stakeholder representatives in the decision-making process, it could empower employees more robustly than under the directorial discretion approach.

## V CONSIDERATION OF CODETERMINATION IN ANGLO-AMERICAN JURISDICTIONS

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

### A *United States of America*

The United States' legislative landscape recently saw murmurings of codetermination in the form of ambitious proposals brought by Democratic Senators Elizabeth Warren and Bernie Sanders.<sup>168</sup> While neither Warren's Bill nor Sanders' proposal gained significant traction, they constitute valuable examples of policymakers contemplating codetermination outside Europe.

In August 2018, Senator Warren introduced the Accountable Capitalism Act: a proposed federal Bill which would have required companies engaging in interstate commerce and receiving more than USD 1 billion in annual gross receipts to reserve 40 per cent of their board seats for employee-elected representatives.<sup>169</sup> The Bill would have also established a mandatory federal corporate charter for all companies above the aforementioned valuation threshold. Senator Sanders proposed that publicly traded corporations and those with assets or revenues of USD 100 million be required to ensure that employees elect 45 per cent of corporate directors.<sup>170</sup>

Although these proposals align closely with Germany's 1976 Act, they are not identical. Senator Warren's approach would see a comparably limited number of companies become subject to codetermination rules, and these companies comprise a slightly smaller combined market capitalisation compared to that in Germany.<sup>171</sup> While Sanders' approach would give slightly less board power to employees than the German model, it was more far-reaching than Germany's

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168 See Elizabeth Warren "Accountable Capitalism Act" <[www.warren.senate.gov](http://www.warren.senate.gov)>; and Bernie Sanders "Corporate Accountability and Democracy" <[www.berniesanders.com](http://www.berniesanders.com)>.

169 See Accountable Capitalism Act 2018, S 3348, 115th Cong § 2(2)(A) and 6(b)(1).

170 Sanders, above n 168.

171 Dammann and Eidenmüller, above n 6, at 886.

1976 Act, as all public corporations in the United States would have come within its scope.<sup>172</sup> Additionally, if realised, the proposal would have provided for employee ownership of at least 20 per cent of companies worth over USD 100 million, thereby establishing a more expansive worker empowerment regime than exists in Germany.<sup>173</sup>

Unsurprisingly, many commentators resisted these reforms, with one academic stating that Warren's Bill would "destroy capitalism" and "channel Karl Marx".<sup>174</sup> However, others lauded Warren's and Sanders' calls for significant corporate reform amid record income inequality and palpable corporate influence in United States policymaking.<sup>175</sup> Ultimately, neither candidate succeeded in their bid for the Democratic nomination in the 2020 presidential election, and any political fervour for such reforms quickly dissipated.

## ***B United Kingdom***

Support for codetermination has occasionally arisen in the United Kingdom. One can find the earliest examples of codetermination in the Oxford University Act 1854 and the Cambridge University Act 1856, which required that their university councils partly comprise persons representative of and elected by students and staff.<sup>176</sup> In private enterprise, the Port of London Act 1908 mandated labour representation on the Port Authority's board until its repeal in 1968.<sup>177</sup>

Codetermination did not receive considerable attention in the United Kingdom until the European Commission released its Draft Fifth Company Law Directive in 1975 and Germany enacted its 1976 Codetermination Act. The Draft Directive sought to harmonise corporate governance law across the European Union and mandate board-level codetermination for large companies.<sup>178</sup> In response to ongoing industrial disputes and the Draft Directive's release, Harold Wilson's Labour government commissioned the Committee of Inquiry on

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172 Sanders, above n 168.

173 Sanders, above n 168.

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

175 See for example Robert Hockett "Bernie Sanders on Corporate Democracy" (14 October 2019) Forbes <[www.forbes.com](http://www.forbes.com)>.

176 See Oxford University Act 1854 (UK) 17 & 18 Vict c 81, s 6; and Cambridge University Act 1856 (UK) 19 & 20 Vict c 88, ss 6 and 12.

177 Port of London Act 1908 (UK) 8 Edw 7 c 68, s 1(7).

178 See Commission of the European Communities *Employee participation and company structure in the European Community* (Supplement 8/75, 12 November 1975).

Industrial Democracy to investigate labour representation, culminating in the 1977 Bullock Report.<sup>179</sup> The Majority of the Committee considered the presence of worker directors on the boards of large companies was a natural response to post-war economic changes and unrealised worker potential.<sup>180</sup> The Report's terms of reference expounded the "need for a radical extension of industrial democracy in the control of companies by means of representation on boards of directors".<sup>181</sup> However, such reform was never realised, with the United Kingdom slipping into the 1978–1979 Winter of Discontent soon after the Report's release and Thatcherism solidifying its hold on domestic policy thereafter.<sup>182</sup>

Surprisingly, it was the United Kingdom's Conservative then-prime ministerial candidate Theresa May who most recently called for a re-examination of company board structures. At a 2016 conference, May advocated for adopting European-style board-level codetermination requirements for large companies.<sup>183</sup> In criticising the general lack of scrutiny exercised by non-executive directors, May stated, "we're going to change that system—and we're going to have not just consumers represented on company boards, but workers as well".<sup>184</sup> However, such proposals did not materialise during May's tenure as Prime Minister, and successive Prime Ministers have been silent on the matter.

## C Canada

Codetermination has rarely come to the fore in Canadian politics. However, Canada's 1971 Robert Dickerson Committee, which produced the Canada Business Corporations Act and strongly advocated for the enshrinement of the stakeholder approach in legislation, examined the viability of non-shareholder empowerment through the appointment of representative directors.<sup>185</sup> Ultimately, the Committee dismissed the viability of codetermination on the basis that

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

180 Committee of Inquiry into Industrial Democracy *Report of the Committee of Inquiry on Industrial Democracy* (Cmd 6706, January 1977) at [9]–[12].

181 At [9].

182 See generally Williamson, above n 179, at 127 and 135–136 for an overview of the Conservative backlash to Bullock.

183 Habersack, above n 44.

184 "Theresa May vows to put Conservatives 'at service' of working people" (11 July 2016) BBC <[www.bbc.com](http://www.bbc.com)>.

185 PM Vasudev "Corporate Stakeholders in New Zealand – The Present, and Possibilities for the Future" (2012) 18 *NZBLQ* 167 at 184.

ascertaining the eligible electorate would be too cumbersome a task.<sup>186</sup> However, this contention appears not to have impeded the jurisdictions with codetermination laws, as restricting the electorate to the company's employees remains the default approach.

More recently, the 2021 Canadian federal election saw then-Conservative Party leader Erin O'Toole promise to ensure federally regulated companies had elected worker representatives on their boards should he be elected Prime Minister.<sup>187</sup> However, O'Toole lost the election to Justin Trudeau and the proposal never materialised.<sup>188</sup>

## **D Australia**

Codetermination has recently received some attention in Australia. In 2018, the Australian Council of Trade Unions passed a motion at its national Congress advocating for a federal policy to install employees on company and government-managed boards.<sup>189</sup> Ahead of the 2019 election, the Australian Labor Party indicated a willingness to consider international codetermination models and the viability of their emulation in the Australian corporate context; however, this proposal failed to gain any meaningful traction.<sup>190</sup>

In sum, while codetermination has momentarily captured attention in a handful of non-European jurisdictions, it is yet to be seriously considered in most Anglo-American states. This is likely due to a range of factors, including a lack of political will, the persistence of the shareholder primacy model in these jurisdictions, and potential pushback from business leaders. Additionally, given the urgency of recent public health crises, climate change-related concerns and geopolitical tensions,<sup>191</sup> codetermination reform is likely not viewed as a particularly pressing item on the political agenda. In the absence of widespread enthusiasm for such reform, it is unsurprising that these proposals have tended to recede into the political backwaters following some initial attention.

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

187 "Conservative Leader Erin O'Toole to ensure Canadian workers have their voices heard" (23 August 2021) Conservative <[www.conservative.ca](http://www.conservative.ca)>.

188 "Canada election 2021: Full results" *The Guardian* (online ed, 21 September 2021).

189 Australian Council of Trade Unions "Worker Representation on Boards (Our Economic Future)" (Motion at National Congress, 18 July 2018) at 2.

190 Australian Labor Party "Our Plan" (2018) <[www.alp.org.au](http://www.alp.org.au)>.

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

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

## VI A CASE STUDY: AIR NEW ZEALAND'S HIGH PERFORMANCE ENGAGEMENT MODEL

Despite having received limited political attention in New Zealand, codetermination's philosophical intent is not entirely absent from local corporate governance. The fallout from the Global Financial Crisis prompted some local industry leaders to reconsider their corporate structures, with companies such as KiwiRail and Air New Zealand pursuing the "high-performance high engagement" (HPHE) model:<sup>192</sup> a non-board policy that seeks to boost worker participation through engagement with workers and unions.<sup>193</sup> While the HPHE model cannot be directly equated to codetermination as it does not allocate board seats to employees, the two models share the same fundamental emphasis on worker empowerment in support of firm growth.

In 2015, Air New Zealand adopted its High Performance Engagement model to facilitate greater worker involvement in company decision-making. The model features a charter designed by the company and the relevant unions, stating that the parties are to facilitate the "direct and substantive involvement" of workers in decision-making processes and foster collaborative relationships.<sup>194</sup> High Performance Engagement was afforded a somewhat aspirational definition, with the charter stating that the model prescribes "a way of working... [involving] employees, management and unions working ... to

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

193 See "High performance depends on high engagement" *The New Zealand Herald* (online ed, Auckland, 6 April 2011); Fiona Rotherham "Air NZ and unions collaborate on high performance engagement" *The National Business Review* (online ed, 23 July 2015); and KiwiRail *Building a Sustainable Future* (Statement of Corporate Intent 2022–2024) at 19. See also Employment Relations Centre "What is High Performance through Engagement?" <[www.employmentrelations.co.nz](http://www.employmentrelations.co.nz)>.

194 Annie Newman and Irina Freilekhman "A case for regulated industrial democracy post-Covid-19" (2020) 45(2) NZJER 70 at 71.

achieve mutually beneficial outcomes”.<sup>195</sup> However, the charter stops short of allocating board seats for employee or union representatives or dictating formal processes by which employees are to be involved in decision-making.

Despite its lofty intentions, a 2019 review conducted by the union found workers did not believe the partnership was giving effect to its promises.<sup>196</sup> While the company has not released specifics regarding the model's implementation, union members Newman and Freilekhman have asserted that the charter's lack of specificity and enforceability resulted in a lack of consultation between Air New Zealand and E Tū, the nation's largest aviation union, during the height of the COVID-19 pandemic, which ultimately left employees without a voice during the crisis period.<sup>197</sup> Additionally, Newman and Freilekhman have suggested that High Performance Engagement was adopted to reduce costs by avoiding adversarial relations with unions, rather than to genuinely empower workers.<sup>198</sup>

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

The general lack of codetermination structures in New Zealand to date arguably suggests that the model is unlikely to be a useful fit domestically, given that companies have not embraced codetermination organically. However, as discussed in Part III, Hayden and Bodie and Renaud have noted that companies may be deterred from embracing codetermination in the absence of legislative mandates for a range of reasons, making it difficult to draw such simplistic conclusions.<sup>199</sup>

While codetermination-like arrangements have not been voluntarily adopted by New Zealand's most prominent companies, the Air New Zealand example illustrates that a leading domestic company has been independently willing to implement a model that at least in theory uplifts workers and involves

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195 Air New Zealand *Air New Zealand High Performance Engagement Charter* (2015) as cited in Newman and Freilekhman, above n 194, at 71.

196 Newman and Freilekhman, above n 194, at 71.

197 At 71.

198 At 72.

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

them in decision-making. The next question is whether the model could co-exist with current industrial relations arrangements in New Zealand.

## VII ASCERTAINING COMPATIBILITY: AN OVERVIEW OF NEW ZEALAND INDUSTRIAL RELATIONS

Codetermination has been shown to work effectively in various European states. However, whether the model could be successfully transplanted elsewhere remains to be seen. As discussed in Part II, in Germany and Sweden, codetermination forms part of a broader industrial relations system that emphasises worker empowerment. Indeed, codetermination is said to be most effective when implemented in states already supportive of employee representation, such as those with a strong union presence and collective bargaining frameworks.<sup>200</sup> Nevertheless, it is unlikely a country would need to directly emulate the extent of unionisation and collective agreement coverage present in Germany and Sweden for the model's benefits to materialise.

Despite an absence of works councils, New Zealand has a broader legislative architecture that empowers workers, albeit to a lesser extent than in Germany. Unionisation and collective bargaining are on the rise, and Fair Pay Agreements have recently received statutory backing.

A complete analysis of the potential impediments and harmonious preconditions associated with the introduction of codetermination in New Zealand is outside the scope of this article. However, this Part will explore the similarities—or lack thereof—between New Zealand's unique industrial relations context and the German and Swedish examples. It then critically analyses the limited utility of these similarities in realising the benefits of codetermination.

### *A Unionisation and collective bargaining in New Zealand: a brief history*

From 1894 until the 1990s, New Zealand's industrial relations landscape featured high union membership rates, highly centralised bargaining and a compulsory arbitration system.<sup>201</sup> However, the 1990s saw the decline of unions in many

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200 Josh Child "Organizational participation in post-covid society – its contributions and enabling conditions" (2021) 35 Int Rev Appl Econ 117 at 134; and Newman and Freilekhman, above n 194, at 75.

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



industrialised societies, and New Zealand was no exception.<sup>202</sup> Furthermore, the enactment of the Employment Contracts Act in 1991 radically altered New Zealand's collective bargaining framework. The Act decentralised New Zealand's industrial relations system, emphasising individual employment contracts over pattern bargaining at the firm and industry level.<sup>203</sup> Union membership was rendered voluntary, and the benefits associated with compulsory arbitration diminished.<sup>204</sup> A mere four years after the Act's introduction, workers covered by collective agreements plummeted from three-fifths of the workforce to three-tenths.<sup>205</sup> In the years following, the collective agreement coverage of private sector workers reduced dramatically compared to those in the public sector.<sup>206</sup>

While the Employment Relations Act 2000 purported to support the negotiation of collective agreements, it had limited practical effect. The share of the workforce covered by collective agreements has continued to fall, with only 10.2 per cent of private sector workers covered by such arrangements in 2015.<sup>207</sup> In contrast, collective agreements covered 50.2 per cent of German workers in 2015, and 88 per cent of Swedish workers in 2020.<sup>208</sup>

Despite the decline in union membership rates over the past three decades, New Zealand's union statistics are relatively high compared to other OECD countries.<sup>209</sup> For example, New Zealand has higher union membership than France, Switzerland, Spain and Portugal.<sup>210</sup> As of 2021, unionised workers comprise 17 per cent of New Zealand's workforce,<sup>211</sup> compared to 13.7 per cent of Australia's and 10.3 per cent of the United States'.<sup>212</sup> New Zealand coverage

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202 At 4; and Andy Charlwood and Peter Haynes "Union Membership Decline in New Zealand, 1990–2002" (2008) 50 *J Ind Relat* 87 at 90–92.

203 See Stephen Blumenfeld and Noelle Donnelly "Collective Bargaining Across Four Decades: Lessons from CLEW's Collective Agreement Database" in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976–2016* (Victoria University Press, Wellington, 2018) 107.

204 Charlwood and Haynes, above n 202, at 92.

205 Blumenfeld and Donnelly, above n 203, at 201.

206 At 202.

207 At 202.

208 International Labour Organisation *Collective bargaining in Germany and Ukraine: Lessons learned and recommendations for Ukraine* (2021) at 16.

209 For example, New Zealand has higher union coverage rates than France, Switzerland, and Spain: see OECD Statistics "Trade Union Dataset" <[www.stats.oecd.org](http://www.stats.oecd.org)>.

210 OECD Statistics, above n 209.

211 PricewaterhouseCoopers *Fair Pay Agreements: What will they mean for New Zealand businesses?* (August 2021) at 5.

212 OECD Statistics, above n 209.

is slightly higher than Germany's, which sat at 16.3 per cent in 2019.<sup>213</sup> However, New Zealand's figures predominantly comprise public sector workers: 60 per cent of unionised workers were employed in the public sector in 2019.<sup>214</sup> Only 10.3 per cent of New Zealand's private sector workers were unionised in 2017, a figure only slightly higher than in Australia and the United States.<sup>215</sup>

In May 2021, the Labour-led government announced its plans to introduce the Fair Pay Agreements regime, and in doing so catalysed the most significant structural shift in New Zealand industrial relations since the 1990s.<sup>216</sup> The Fair Pay Agreements Act 2022 allows for the creation of Fair Pay Agreements (FPAs), which are “sector-level collective agreement[s] that [set] minimum terms and conditions for all employees within an industry or occupation”.<sup>217</sup> FPAs are intended to complement existing collective agreements at the enterprise level and individual employment agreements while making it easier to instigate sector-wide negotiations.<sup>218</sup>

As the Fair Pay Agreements Act only came into force on 1 December 2022, and only a handful of industries have commenced negotiations, one's ability to assess its impact is limited. However, with its robust support for industry-wide agreements, the regime is poised to boost collective bargaining across various sectors, at least in comparison to current levels.<sup>219</sup> If this occurs, New Zealand's industrial relations landscape will be aligned more closely with those of

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213 Despite having high collective bargaining coverage rates, union membership is comparably low in Germany due to its voluntary nature and the greater emphasis placed on works councils: see Rogers and Streeck, above n 47, at 55; and Bernd Fitzenberger, Karsten Kohn and Qingwei Wang *The Erosion of Union Membership in Germany: Determinants, Densities, Decompositions* (IZA Discussion Paper No 2193, July 2006).

214 Centre for Labour, Employment and Work “Union Membership in New Zealand shows further growth” Victoria University of Wellington <[www.wgtn.ac.nz](http://www.wgtn.ac.nz)>.

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

216 PricewaterhouseCoopers, above n 211, at 2.

217 At 3; and Fair Pay Agreements Act 2022, s 3.

218 See New Zealand Parliament “Bill to enable Fair Pay Agreements” (4 May 2022) <[www.parliament.nz](http://www.parliament.nz)>; and Fair Pay Agreement Working Group 2018 *Fair Pay Agreements: Supporting workers and firms to drive productivity growth and share the benefits* (December 2018).

219 It is noted that should the National Party win the 2023 general election, the survival of the Fair Pay Agreement regime could be jeopardised: see Anneke Smith “Fair Pay Agreements Bill Flies Through First Reading” (5 April 2022) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)> where Paul Goldsmith, National's workplace relations spokesperson, stated that the party would repeal the legislation. However, since neither the 2023 election results, nor whether National would follow through with repealing the legislation, can be reliably predicted at the time of writing, this article will assume that the regime will persist.

Germany, Austria and the codetermined Nordic countries, all of which have strong industry-level collective bargaining regimes.<sup>220</sup>

## ***B The viability of codetermination in New Zealand: an analysis***

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

### ***1 Union membership and collective bargaining***

New Zealand's union coverage statistics are relatively low compared to certain European jurisdictions, such as the codetermined Nordic states,<sup>221</sup> and union membership remains a predominantly public sector phenomenon. While New Zealand's statistics are relatively similar to Germany's and higher than, for example, France's and Hungary's<sup>222</sup>—two other codetermined states—these figures may be explained or tempered by the prominence of works councils in these jurisdictions.<sup>223</sup>

Noting the dominant role of German unions in organising codetermination arrangements, Jäger, Noy and Schoefer have cited low union influence in the United States as one reason why codetermination may be ineffective in that jurisdiction.<sup>224</sup> While New Zealand has a higher percentage of unionised private-sector workers than the United States, if one were to measure codetermination's likely success solely based on a jurisdiction's union membership rates, it would seem New Zealand does not fare exceedingly well.

Despite differences in coverage to that in Europe, there is arguably sufficient union infrastructure in New Zealand to support a mandatory codetermination regime. Union membership rates have increased since 2018, reversing a decades-long decline.<sup>225</sup> In March 2021, there were 136 registered

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220 Jäger, Noy and Schoefer, above n 4, at 5.

221 OECD Statistics, above n 209.

222 OECD Statistics, above n 209.

223 See Rogers and Streeck, above n 47, at 55. See Worker Participation EU, above n 31, at "France" and "Hungary" for an overview of the nature of works councils in France and Hungary.

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

225 Centre for Labour, Employment and Work, above n 214, at 6.

unions in New Zealand—an increase of 5 per cent from the year prior.<sup>226</sup> Certain industries, such as aviation, manufacturing (including the food and beverage subsector) and postal and warehousing services, are comparatively highly unionised.<sup>227</sup> Accordingly, prominent companies in such industries, such as Air New Zealand, AFFCO Holdings and Mainfreight, could benefit from the involvement of union leaders in developing codetermination arrangements.

In any event, high union coverage may not be a prerequisite to the success of codetermination, as a lack of extensive unionisation across New Zealand's private sector might actually enhance the model's beneficial effects. Even in industries with low union coverage, such as mining, agriculture and construction,<sup>228</sup> the presence of employee representatives on the boards of large corporates could mitigate the lack of union representation. Codetermination requirements for companies in such sectors could serve as a valuable internal mechanism to prevent adversarial relations between employers and employees. Additionally, company employees who previously did not have recourse to an influential union body could relay concerns or suggestions to their elected employee representatives, thereby opening previously non-existent communication channels. As such, a lack of high union coverage may not necessarily undercut any codetermination proposal in New Zealand; in fact, it could further highlight the need for board-level worker representation.

As discussed in Part II, board-level employee representation can theoretically streamline communications during the collective bargaining process, thereby preventing strikes and increasing firm efficiency.<sup>229</sup> However, as noted by Dammann and Eidenmüller, the likelihood of this benefit materialising depends on the prominence of collective bargaining in a country's economy.<sup>230</sup>

New Zealand's collective bargaining rates pale in comparison to Germany's and Sweden's. This may change with the new statutory FPA regime, which aims to facilitate sector-wide bargaining, likely increasing collective

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226 New Zealand Companies Office "Union membership return report 2021" <[www.companiesoffice.govt.nz](http://www.companiesoffice.govt.nz)>.

227 Centre for Labour, Employment and Work, above n 214, at 6. Prominent unions in these sectors include E Tū (encompassing manufacturing, food, aviation, infrastructure workers, among others), the New Zealand Air Line Pilots' Association and FIRST Union (logistics and warehousing). See generally NZCTU "Find Your Union" <[www.union.org.nz](http://www.union.org.nz)> which contains an interactive tool that matches work areas to relevant New Zealand unions.

228 See Ryall and Blumenfeld, above n 215, at 6 for data on union membership across industry sectors.

229 Hansmann, above n 88, at 1766.

230 Dammann and Eidenmüller, above n 6, at 902.

agreement coverage. However, even under the FPA regime, it is unlikely that rates of collective bargaining in New Zealand will grow to rival the likes of Germany and Sweden, at least in the short term. FPAs would need to become widespread across New Zealand's private sector to emulate the coverage rates seen in those jurisdictions. Instead, it is more likely FPAs will first be sought within specified low-paying sectors representing a minority of private sector workers.<sup>231</sup> However, given that collective agreement coverage will almost certainly increase under the new regime, it is more likely that codetermination's efficiency-related benefits could materialise should the model be introduced.

## *2 Is absolute compatibility between jurisdictions required?*

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

While European states tend to place more emphasis on worker empowerment than their Anglo-American counterparts, the general contours of New Zealand's industrial relations are not so dissimilar to codetermined European countries. Union membership is rising and the FPA regime is poised to boost collective bargaining coverage. Additionally, Sweden largely phased out works councils after introducing codetermination legislation in 1973, indicating that works councils are not essential for a country to benefit from codetermination. Works councils are also absent or minimally relevant in Finland, Denmark and Norway—three other codetermined Nordic states.<sup>232</sup>

Indeed, codetermination has proliferated across many European countries, all of which have diverse industrial relations landscapes with varying emphasis placed on unions, collective bargaining arrangements and general employee upliftment.<sup>233</sup> There is no empirical evidence that any particular structure or condition is a necessary prerequisite for the successful introduction of

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231 New Zealand unions have prioritised seeking Fair Pay Agreements for cleaners, security guards and supermarket workers: see Henry Cooke "Cleaners, security and supermarkets priority for unions for sector-wide Fair Pay Agreements" (25 June 2019) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

232 See country-specific worker participation information at Workplace Participation EU "National Industrial Relations" <[www.worker-participation.eu](http://www.worker-participation.eu)>.

233 Industrial relations systems are by no means uniform across European states. For example, France, a country with mandatory codetermination requirements for certain companies, had union density rates of only 8.8 per cent in 2018: see Udo Rehfeldt *Board-Level Representation in France: Recent Developments and Debates* (Institute for Codetermination and Corporate Governance, Mitbestimmungs report no 53, 2019) at 3. Hungary and the Czech Republic also have low coverage rates: see OECD Statistics, above n 209.

codetermination, so New Zealand need not concern itself with emulating the various other aspects of European industrial policy canvassed in this article. Additionally, some of the aforementioned benefits, such as the development of firm-specific skills and promotion of employee interests, could materialise in a company without external unions and collective agreements. This is because such benefits are inherently internal to a company and do not rely on the presence of outside bodies. Moreover, as suggested above, industries with low unionisation rates may further highlight the need for codetermination, and see the model succeed independently of unions.

## VIII CODETERMINATION AS A RESPONSE TO NEW ZEALAND-SPECIFIC CHALLENGES

As canvassed in Part III, various economic and non-economic benefits, both theoretical and empirical, have been associated with codetermination. This Part considers the extent to which certain benefits could address, improve, or mitigate contemporary challenges in New Zealand. Specifically, it will consider the ability of codetermination to encourage employee retention through honing firm-specific skills and increasing firm efficiency through the avoidance of strike action.

### *A Information-sharing between employees and employers*

Hansmann and Fauver and Fuerst have contended that codetermination can result in the avoidance of strike action by improving communication channels between employees, union representatives and company executives.<sup>234</sup> Assuming the efficacy of this benefit, this subpart will consider the extent to which it could assist industrial relations in contemporary New Zealand.

Under the Employment Relations Act, workers can lawfully strike when their union is actively negotiating a collective agreement or if there is a serious health and safety issue.<sup>235</sup> New Zealand has a long history of strike action,<sup>236</sup> and strikes remain common in the 21st century.<sup>237</sup>

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

235 Employment Relations Act 2000, ss 83–84.

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

237 See data on work stoppages at Ministry of Business, Innovation and Employment “Work stoppages” <[www.employment.govt.nz](http://www.employment.govt.nz)>.

While strike action has ebbed and flowed since the early 2000s, the years spanning 2018–2020 saw a sharp spike in work stoppages.<sup>238</sup> In 2018, there were 143 stoppages involving 11,109 employees and 192 lost work days, while 2019 saw 158 stoppages involving 53,752 employees, 142,651 lost work hours and an estimated \$9.78 million in lost wages and salaries.<sup>239</sup>

From 2018–2020, the Ministry of Business, Innovation and Employment did not release precise data on the proportion of strikes carried out by private sector workers compared to the public sector. Nonetheless, Business New Zealand's comprehensive list of all private sector strikes from 2017–2020 helpfully illustrates that at least 40 companies were threatened with or affected by strikes during this period.<sup>240</sup> In 2018, for example, employees of Event Cinemas, Farmers and Wendy's New Zealand went on strike in response to pay cuts.<sup>241</sup> A recent private sector strike involved egg producer Zeagold, whose employees went on strike for three days in early August 2022.<sup>242</sup> On 30 August 2022, fuel tanker truck drivers employed by SouthFuels announced they would commence a two-month-long strike from 12 September to 12 November 2022.<sup>243</sup>

While publicised instances of strike action in 2021 and 2022 mainly involved public sector workers, such as nurses and bus drivers,<sup>244</sup> private companies face strikes more frequently than one might suspect. While strikes are a valid and important form of industrial action, any instance of strike action reduces firm efficiency through lost hours and additional time and resources spent engaging in negotiations—a loss that could have been mitigated by effective dialogue between firms and employees. With the intensification of the

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238 The term “work stoppages” encompasses both strikes and lockouts.

239 It is noted that the data for these years encompasses partial strikes where, for example, employees perform their role but refuse to wear their uniform or only carry out select duties: see Ministry of Business, Innovation and Employment, above n 237.

240 Business New Zealand “Businesses threatened with or affected by strikes since 2017 Election” <[www.businessnz.org.nz](http://www.businessnz.org.nz)>.

241 Michael Hayward and Oliver Lewis “Wendy’s workers strike after negotiations break down” (26 May 2018) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>; Susan Edmunds “Event cinemas pay-cut threat ‘legal’” (28 May 2018) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>; and Jessica Tyson “Farmers retail workers strike” (5 July 2018) Te Ao Māori News <[www.teaomaori.news](http://www.teaomaori.news)>.

242 Rebecca Macfie “Big wage rises: ‘It’s our turn now’” (4 August 2022) Newsroom <[www.newsroom.co.nz](http://www.newsroom.co.nz)>.

243 Scoop Business “FIRST Union, Fuel Tanker Truck Drivers at SouthFuels Limited Have Issued a Strike Notice” (30 August 2022) Scoop <[www.scoop.co.nz](http://www.scoop.co.nz)>.

244 Leith Huffadine “New Zealand has a long history of going on strike. Now, it’s a complex issue” (30 May 2018) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>.

cost of living crisis and the arrival of a recession,<sup>245</sup> it might not be unduly pessimistic to expect an increase in strike action in the coming months. As such, New Zealand companies could benefit from the existence of any internal mechanism that facilitates the constructive resolution of labour issues—like codetermination.

## **B Honing of firm-specific skills**

Codetermination is said to encourage the enhancement of firm-specific skills, as employees may be motivated to stay at a company long term due to the prospect of attaining a board-level position.<sup>246</sup> While empirical research is necessary to thoroughly scrutinise this benefit's efficacy, Smith and Furubotn have convincingly argued that employees will be incentivised to remain at a firm where representative governance opportunities are available.<sup>247</sup>

Dammann and Eidenmüller have argued that retention-related benefits might be confined to countries with stronger termination laws—like Germany, where employers must give a specific reason before terminating an employee—and are unlikely to materialise in “fire at will” jurisdictions like the United States.<sup>248</sup> New Zealand law is closer to Germany's, as dismissals are deemed unlawful unless procedurally and substantively “fair and reasonable”.<sup>249</sup>

Given recent trends, this retention-related benefit may be of particular relevance in contemporary New Zealand. The COVID-19 pandemic has arguably induced or at least accelerated what has come to be known as the “Great Resignation”: an international trend that has seen voluntary resignations by millions of employees across various Western democracies.<sup>250</sup> In the United States alone, over 24 million people resigned between April and September 2021.<sup>251</sup> New Zealand has not been immune to this trend, and a 2021 Employee Sentiment Research survey indicated that around 40 per cent of New Zealanders intended to search for a new job in 2022.<sup>252</sup> With the reopening of New Zealand's

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245 See for example William Hewitt “Concerns cost of living crisis could lead to malnutrition and health issues” (25 May 2023) Newshub <[www.newshub.co.nz](http://www.newshub.co.nz)>; and Anan Zaki “New Zealand in recession as GDP falls for a second quarter” (15 June 2023) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

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

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

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

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

250 See for example Gabriela Ksinan Jiskrova “Impact of COVID-19 pandemic on the workforce: From psychological distress to the Great Resignation” (2022) 76 JECH 525 at 525.

251 US Bureau of Labor Statistics “Job Openings and Labor Turnover Survey” <[www.bls.gov](http://www.bls.gov)>.

252 ELMO *Employee Sentiment Index – New Zealand* (February 2022) at 2.



borders in 2022, the issue has been compounded by a growing “brain drain” as employees look to overseas opportunities.<sup>253</sup> From January 2022 to January 2023, over 97,000 New Zealanders emigrated overseas, constituting a net migration loss of 17,500.<sup>254</sup> While “overseas experiences” have long been a rite of passage for young New Zealanders,<sup>255</sup> the COVID-19 pandemic has resulted in a greater concentration of young people choosing to relocate overseas at the same time, exacerbating pre-existing staffing shortages.<sup>256</sup>

It is not suggested that codetermination presents a catch-all solution to current challenges in New Zealand’s job market. However, viable incentives to enhance firm-specific skills and prevent talent from relocating offshore can only be welcomed. Similarly, since codetermination has been associated with increases in worker satisfaction,<sup>257</sup> resignations could be rendered less likely and local talent kept onshore.<sup>258</sup>

## IX PROPOSAL

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

The primary intent has been to prompt contemplation of codetermination in the New Zealand context. In the interests of clarity and completeness, this article proposes that if New Zealand were to legislate for codetermination, mandatory requirements should be imposed only on the nation’s largest companies. On balance, it is argued that the model’s theoretical and empirically tested benefits render it worthy of emulation. While New Zealand’s overarching industrial relations system may differ from those found in the discussed

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253 See Susan Edmunds ““Brain drain is underway”: Workforce shrinks as young people leave” (16 May 2022) Stuff <[www.stuff.co.nz](http://www.stuff.co.nz)>; and Jean Bell “Stemming the brain drain” (25 July 2022) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

254 Statistics New Zealand “International migration: January 2023” (14 March 2023) StatsNZ <[www.stats.govt.nz](http://www.stats.govt.nz)>.

255 For example, in 2021 Prime Minister Jacinda Ardern described overseas experiences as a “rite of passage”: see Dan Lake “What the Free Trade Agreement means for travel between New Zealand and the United Kingdom” (21 October 2021) Newshub <[www.newshub.co.nz](http://www.newshub.co.nz)>.

256 Ireland Hendry-Tennent “Explainer: Are the impacts of brain drain being overhyped and how worried should the average Kiwi be” (15 August 2022) Newshub <[www.newshub.co.nz](http://www.newshub.co.nz)>.

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

258 Many studies indicate that there is a positive relationship between worker satisfaction and employee retention: see for example Bidisha Lahkar Das and Mukulesh Baruah “Employee Retention: A Review of Literature” (2013) 14(2) IOSR-JBM 8 at 13; and Ricardo Biason “The Effect of Job Satisfaction on Employee Retention” (2020) 8 IJECM 405 at 413.

European states, it is suggested that these dissimilarities are insufficient to wholly discount the model's potential utility in this country. New Zealand has moderately high union coverage compared to other OECD countries; impending legislation is set to strengthen industry-level collective bargaining; and even the sectors without a strong union presence could distinctly benefit from mandated board-level employee representation.

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

### *A Number of employee representatives*

The most contentious aspect of any codetermination proposal is likely to be the number or proportion of employee representatives on corporate boards. Too few, and the representatives are rendered tokenistic; too many, and we risk the emergence of untenably high levels of representation for a one-tier board system (as is the norm in New Zealand).

This article has drawn comparisons between New Zealand and Sweden because both states utilise a unitary board structure. However, it is argued that for the benefits of codetermination to be fully realised in New Zealand, more than two or three employee representatives—the number present on the boards of Sweden's largest companies, regardless of the overall size of said boards—will be required. This is especially so in the context of the democracy-preservation benefit, which depends on the presence of a large enough proportion of employee representatives to generate sufficient disincentives. The quantum of representatives should therefore be set at a static proportion of the board, rather than requiring a fixed number of representatives regardless of the board's size.

Acknowledging that full parity codetermination requirements may be excessive in the context of a one-tier board, this article proposes that one-third codetermination would constitute a reasonable mid-point. Such a proposal is consistent with Fauver and Faust's suggestion that the optimal level of codetermination to see efficiency-related benefits come to fruition is likely below 50 per cent.<sup>259</sup>

While one-third codetermination would mean worker representatives could be outvoted, this article contends that their presence on the board would still see the described economic and non-economic benefits materialise. These benefits

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

include increases in firm efficiency and worker empowerment, improved information-sharing and collaboration, and enhancement of firm-specific skills. The presence of even a minority of employee representatives in the boardroom could positively influence corporate decision-making and operate as a positive soft constraint on company activity.

### ***B Threshold for qualifying companies***

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

The consequences of such a requirement could materialise as follows. The proposed threshold would mean many listed companies would become subject to codetermination requirements. For example, the boards of most listed companies tend to have around 8–12 directors.<sup>260</sup> If one-third codetermination were imposed, 2–4 board members would be employee representatives.

### ***C Electoral process***

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

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260 See for example the boards of Fonterra (Fonterra "Board of Directors" <[www.fonterra.com](http://www.fonterra.com)>); Spark New Zealand (Spark "Board of Directors" <[www.sparknz.co.nz](http://www.sparknz.co.nz)>); and Mercury NZ Limited (Mercury "Our Board of Directors" <[www.mercury.co.nz](http://www.mercury.co.nz)>).

### ***D Removal of employee representatives by shareholders***

As is the process in Germany,<sup>261</sup> it is proposed that shareholders could only remove employee representatives if at least 75 per cent of employees were to vote in favour of removal. This requirement would safeguard the democratic process underpinning employee board appointments by ensuring shareholders cannot unilaterally disrupt codetermination arrangements.

## **X CONCLUSION**

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

Further empirical research is necessary to fully ascertain some of the model's effects. That proviso notwithstanding, this article has attempted to prompt serious contemplation of codetermination in a local academic environment that has been largely silent on the matter. Accordingly, this article has explored codetermination's workings in practice, outlined how those in Anglo-American jurisdictions have looked to the model with interest and examined the nature of New Zealand industrial relations. By reference to the Air New Zealand example, this article has suggested that to see meaningful outcomes in the worker empowerment space, avenues for worker participation must be mandated by legislation. This article then analysed codetermination's ability to respond to local challenges, concluding that codetermination could reduce strike action and assist employee retention. Finally, a tentative proposal as to the nature of a New Zealand codetermination model was laid out, encompassing only the largest locally incorporated companies.

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

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261 Codetermination Act, s 23.

promotion of stakeholder interests is to be meaningfully pursued, concrete forms of stakeholder governance—like codetermination—deserve a place on the agenda.