

Hon Lianne Dalziel
Chairperson
Commerce Select Committee
Committee Secretariat Commerce
Parliament Buildings
Wellington 6160

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Level 3
75 Ghuznee Street
Te Aro
Wellington 6011
New Zealand
T +64 4 384 4595
F +64 4 801 6966
E nzca@nz.coop
Skype nz.coop
W www.nz.coop

Dear Madam Chairperson,

Submission on the Financial Service Providers (Pre Implementation Adjustments) Bill

Introduction

1. Thank you for the opportunity to make a submission to the Commerce Select Committee (“**the Committee**”) on the Financial Service Providers (Pre-Implementation Adjustments) Bill (“**the Bill**”). We welcome the opportunity to be involved in ensuring this important legislation is right for New Zealand businesses.
2. We wish to appear before the Committee to speak to our submission. Our contact is:

Ramsey Margolis
Executive Director
Telephone: 04 384 4595
Mobile: 021 97 3531
Email: ramsey@nz.coop

About the New Zealand Cooperatives Association

3. The New Zealand Cooperatives Association is an incorporated society which was first registered as the New Zealand Agricultural Cooperatives Association on 29 March 1984. On 26 May 1997, we became the New Zealand Cooperatives Association.
4. The constitution of the Association details the following objects:
 - to encourage, promote and advance New Zealand cooperatives;
 - to act as a representative association for those engaged as cooperatives;

- to promote discussion and cooperation with the decision-makers at all levels of Government designed to further the interests of the cooperative movement;
 - to collect, verify, and publish information relating to the cooperative movement;
 - to provide services and expertise to those engaged in the cooperative industry and to carry out research into all aspects of the movement.
5. We represent approximately 50 member businesses, with half being agricultural cooperatives. The range of members in other sectors of the economy is widening. Members are primarily cooperative companies or industrial and provident societies.
 6. Together, cooperative and mutually owned businesses in New Zealand have a turnover or revenue in the region of \$32 billion, or just under one-quarter of New Zealand's gross domestic product.¹ Cooperatives directly employ thousands of New Zealanders, with indirect employment for many more.
 7. A list of Cooperatives Association members is contained in the Appendix to this submission.

Summary of submissions

8. In summary, we consider that it is inappropriate for cooperatives to be subject to the requirements of the Financial Advisers Act 2008 (“**FAA**”) and Financial Service Providers (Registration and Dispute Resolution) Act 2008 (“**FSPA**”), as:
 - (a) cooperatives cannot cause the sorts of “mischief” the FAA and FSPA are designed to address;
 - (b) cooperatives are disproportionately affected compared to similar businesses; and
 - (c) the requirements of the FAA and FSPA will result in significant compliance costs to cooperatives and as no benefits will flow from the requirements, the compliance costs are unjustified.
9. We therefore submit that the Committee should consider:
 - (a) first, excluding issuing cooperative shares from the scope of the FAA and FSPA;

¹ IMF World Economic Outlook Database, New Zealand 2007 GDP, NZD 129.671 billion.

- (b) if our primary submission is not accepted, second, deferring the requirements for cooperatives to comply with the requirements of the FAA and FSPA pending the outcome of the Ministry of Economic Development's review of the Securities Act; and
 - (c) if our primary and secondary submissions are not accepted, third, including cooperative shares in the list of category 2 products.
10. This submission only relates to the issuing of cooperative shares (i.e. the membership arrangements between cooperatives and their members). Cooperatives may also deal in other financial products and services (for example, some financial institutions are cooperatives and mutuals). This submission does not propose any change to the application of legislation to other financial products or financial services in which cooperatives may deal, only cooperative shares.

Background

11. Cooperatives carry on business with their members by providing them with goods and services. Cooperatives issue shares to their members ("**cooperative shares**")² Such shares are issued under the provisions of the Cooperative Companies Act 1996 or the Industrial and Provident Societies Act 1908. Some cooperatives issue other types of securities to their members (e.g. under the Companies Act 1993 – called "Companies Act shares" or "investor shares" – as well as cooperative shares). Members will often operate trading or current accounts with their cooperative.
12. Cooperative shares usually have the following features:
- (a) they are required in order either to transact with the cooperative (i.e. it is necessary to hold cooperative shares prior to purchasing goods or services from the cooperative), or to obtain member benefits from transacting with the cooperative (i.e. member discounts or rebates);
 - (b) when a member ceases to transact with the cooperative, they have the right to surrender their cooperative shares and be refunded the value of those shares. Members can require the cooperative to return their money, they do not have to find a secondary market buyer for their cooperative shares;
 - (c) there are controls on the number of cooperative shares (or the voting rights attached to cooperative shares) that a member may have. This limit is usually either fixed and relatively low, or determined by a

² Sometimes also known as "nominal value shares".

formula based on the level of transactions with the cooperative. It would be very unlikely for a single member to have a large shareholding in a cooperative unless the cooperative is very small indeed; and

- (d) cooperative shares issued under the Cooperative Companies Act or the Industrial and Provident Societies Act have a nominal or “par” value (i.e. the price of a share is set by the cooperative and the value a member receives on surrender is fixed by the cooperative, rather than by trading on a secondary market).
13. Cooperative shares are technically subject to the provisions of the Securities Act 1978. However in many ways they are not a true “investment”. In particular, members purchase cooperative shares for the benefits of membership, and not because the cooperative shares may go up in value or provide dividend returns. The price of cooperative shares is usually a fraction of the value transactions the member will have with the cooperative. While some cooperatives pay dividends on shares, most pay rebates, or a percentage of the amount spent with cooperatives. That is, members receive money based on the value of the spend with the cooperative, rather than the number of cooperative shares held.
 14. The non-investment basis of cooperative shares has been acknowledged by the Securities Commission. The Commission has granted very wide-ranging exemptions from the provisions of the Securities Act under the Securities Act (Cooperative Companies) Exemption Notice 2002 and the Securities Act (Industrial and Provident Societies) Exemption Notice 2002 (“**the Exemption Notices**”). While cooperatives remain technically subject to the Securities Act, they are exempted from many matters including most of the substantive disclosure matters required in a prospectus, and renewing prospectuses periodically.

Application of FAA and FSPA to cooperatives

15. The FAA and FSPA potentially apply to cooperatives in various ways. However, the focus of this submission is the potential application of the legislation to issuing cooperative shares.
16. Most cooperatives have “sales representatives” who sell the benefits of membership to potential members. Cooperatives communicate with members and potential members using all forms of written, electronic and oral communication. Typically employees or representatives of a cooperative will meet with members and potential members to discuss how the cooperative works. This will include an explanation of financial and

shareholding arrangements. Such discussions will normally involve handing over the relevant investment statement and describing the procedure for buying shares and other securities, and operating accounts.

17. The difficulty for cooperatives arises if a cooperative representative makes comments along the lines of “I think that ...” or “the advantages of membership are ...”. As discussed above, cooperative shares are a pre-requisite to cooperative membership. Such comments relate to a financial product and may therefore amount to a recommendation, an opinion or guidance in relation to those cooperative shares. Therefore cooperatives and their representatives would in this situation become subject to the FAA and FSPA in relation to issuing cooperative shares.
18. Cooperatives may also be affected by the legislation if they provide other “financial products” in terms of the FAA (for example consumer credit contracts) or other “financial services” in terms of the FSPA (for example issuing and managing means of payment such as credit and debit cards). However, in this case, the legislation would apply to cooperatives in the same way as non-cooperatives.
19. This submission proposes that the FAA and FSPA not apply to issuing cooperative shares. However, it does not propose any change to the application of legislation to other financial products or financial services.

No mischief

20. We do not believe that communications, including recommendations, about cooperative shares by cooperatives and their representatives can cause the sort of “mischief” the FAA and FSPA are designed to address, as:
 - (a) no conflict of interest issues arise, as cooperative members know that the representative is remunerated by the cooperative;
 - (b) members decide whether or not to join a cooperative on the basis of the goods and services provided by the cooperative. They do not approach cooperative representatives in order to obtain financial advice about financial products which best meet their need and risk profile;
 - (c) members are buying the benefits of membership, they are not buying cooperative shares for the purposes of investment returns;
 - (d) members of cooperatives have an absolute right to redeem any money “invested” in cooperative shares once they cease transacting with the cooperative. This is the ultimate resolution to any dispute.

There is no need for more sophisticated alternative dispute resolution mechanisms; and

- (e) there is no issue about competence of cooperative representatives which requires new legislation, as the cooperative itself is liable and accountable for the actions of its representatives in the course of business.
21. Further, there is no suggestion or evidence that cooperative representatives are regarded as “financial advisers” by the public. We do not believe there is any need to require:
- (a) disclosure of such persons’ conflicts of interests, fees and competency, because they are not used by the public as financial advisers;
 - (b) competency of such persons as financial advisers, because they do not match members of the public with financial products which meet the needs and risk profile of the public; and
 - (c) accountability for financial advice, or to impose new rules to manage conflict of interests, over and above the accountability which already resides in the cooperative itself.

Disproportionate effect

22. We consider that cooperatives are disproportionately affected by the FAA and FSPA compared to other New Zealand businesses. Cooperatives are almost unique in New Zealand in that:
- (a) cooperatives continually issue new cooperative shares (in the sense that new members may join at any time);
 - (b) employees are involved in the selling cooperative shares; and
 - (c) substantively similar businesses to cooperatives will not be subject to the FAA and FSPA.
23. In contrast, other businesses that continually issue new shares and securities are typically financial institutions (for example, banks and fund managers). A key role for such businesses’ employees is selling those products. Such shares and securities make up their core business, whereas cooperative shares are merely ancillary to the underlying business of the cooperative.

24. We also note that such financial institutions are able to take advantage of the Qualifying Financial Entity (“**QFE**”) framework. This will substantially reduce the compliance costs of such financial institutions. Most cooperatives will not have the scale to justify applying for approval as a QFE (we discuss this point further below).
25. In further contrast, other businesses that are not financial institutions are very unlikely to be continually issuing new shares and securities. For example, a manufacturing business may have an initial public offering of securities (an “**IPO**”). However, that business is likely to employ professional brokers and advisers outside the business to assist in that IPO. Its employees will have at most a limited role; most employees will not be providing financial services at all. Further, that IPO will be over in a relatively short period of time, perhaps three months. To the extent such businesses are subject to the FAA and FSPA, the obligations will only be for a short period and often able to be discharged by others.
26. Finally, other businesses operate almost identically to cooperatives. For example, a cooperative retailer may sell product X. The cooperative’s sales representatives will meet with customers in an effort to get them to buy product X from the cooperative. Other retailers (not cooperatives) selling product X will also have sales representatives meeting with customers in an effort to sell their product X. Customers will presumably make their decision on the basis of a number of factors, including price and convenience. However, the cooperative retailer will have cooperative shares as a part of its overall package. Because of this, its sales representatives will be subject to the FAA and FSPA. The other retailers’ sales representatives will not be subject to the FAA and FSPA, despite being responsible for exactly the same thing, i.e. selling product X.

Compliance costs

27. The regulatory requirements of the FAA and FSPA will subject cooperatives to substantial compliance costs. In light of the above, we consider that such costs are unjustified, as:
 - (a) there is no mischief that justifies incurring such costs;
 - (b) the regulatory requirements will have no benefit to members of cooperatives; and
 - (c) cooperatives will be disproportionately affected by the requirements.
28. Based on figures released by the Minister of Commerce, we believe the compliance costs to cooperatives will be at least **\$2 million** initially, plus a

further **\$1.2 million** per annum. We set out our figures below. We note this will not include the fees payable for membership of a dispute resolution scheme, the training costs, nor the intended Securities Commission levy on financial advisers. Such costs have not yet been provided to the public.

Initial costs

Cost item	Cost	Estimated number affected	TOTAL
FSP registration (business)	\$350	90	\$31,500
Director and manager criminal check	\$35 per person	550	\$19,250
Dispute resolution contribution	\$30	90	\$2,700
FSP registration (individual)	\$350	1,350	\$472,500
Individual criminal check	\$35	1,350	\$47,250
Dispute resolution contribution	\$30	1,350	\$40,500
FAA authorisation	\$750	1,350	\$1,012,500
Supervision fee (minimum)	\$250	1,350	\$337,500
TOTAL			\$1,963,700

Ongoing costs

Cost item	Cost	Estimated number affected	TOTAL
FSP registration confirmation (business)	\$60	90	\$5,400
Director and manager criminal check (where necessary)	\$35 per person	100	\$3,500
Dispute resolution contribution	\$30	90	\$2,700
FSP registration (individual)	\$60	1,350	\$81,000
Individual criminal check (where necessary)	\$35	1,350	\$47,250
Dispute resolution contribution	\$30	1,350	\$40,500
FAA authorisation renewal	\$500	1,350	\$675,000
Supervision fee (minimum)	\$250	1,350	\$337,500
TOTAL			\$1,192,850

29. We also note that cooperatives will not have the scale to justify applying for approval as a QFE. The QFE model is designed for financial institutions with many staff, different financial products and detailed internal compliance systems. This is likely to be excessive for cooperatives with staff only selling the benefits of membership in that cooperative.
30. We further note that some cooperatives have advised us that they plan on changing their business practices: some are now considering prohibiting

staff from advocating the benefits of membership for fear of falling within the regime of the FAA and FSPA.

Scope of the FSPA, FAA and the Bill

31. We have previously made submissions relating to the scope of the FAA and FSPA. In summary, we previously expressed the view that the FAA and FSPA should not apply to businesses where the financial service or product is merely ancillary to the underlying business. This would include most cooperatives.

32. This view was supported by the then-Minister of Commerce in her First Reading speech on the Bill:

“...it is not the intention of this Bill to capture every person who discusses a financial matter with a client or offers a product or service that might have a financial implication; rather, it aims to ensure that people providing financial advice in the course of their business or as their full-time occupation are competent to do so.”

33. Our initial submission was also supported by the Finance and Expenditure Select Committee in its report on the initial Financial Advisers Bill. However the Financial Advisers Bill was substantially amended and this submission appears to have been lost.

34. This view has been raised again recently in the report of the Capital Markets Development Committee (“**CMDT**”). The CMDT report recommends:

“Exclud[ing] from the Financial Advisers Act people advising investors who are outside the scope of the Securities Act.”

35. By virtue of the Exemption Notices, cooperatives are exempted from many matters required by the Securities Act. In substance therefore, this recommendation would apply to issuing cooperative shares.

36. In light of this background and the disproportionate compliance costs and limited benefits of requiring cooperatives to comply with the FAA and FSPA in relation to issuing cooperative shares, our primary submission is that the Committee should exclude issuing cooperative shares from the scope of the FAA and FSPA.

37. We believe this could be achieved by providing that:

- (a) cooperative shares issued under the Cooperative Companies Act or Industrial and Provident Societies Act are not “financial products” for the purposes of the FAA; and
 - (b) participating in an offer of cooperative shares to the public is not a “financial service” under section 5(i) of the FSPA.
38. We note that under our suggested approach, cooperatives would still be required to register as financial service providers under the FSPA to the extent that they carried out other “financial services”. However, only the cooperative itself, and its directors and senior managers would be required to register, not all the individual sales representatives. Even assuming all cooperatives did perform other financial services, the compliance costs for cooperatives would only be approximately **\$50,000** initially and **\$9,000** annually, plus the fees for membership of dispute resolution schemes.

Deferral of requirements

39. We note that officials from the Ministry of Economic Development are currently formulating policy proposals for the review of the Securities Act. We have spoken to officials and understand that a key part of this review will consider the scope of the Securities Act and when it should and should not apply.
40. The status quo under the Securities Act and the Exemption Notices is that cooperative shares are virtually exempt from the prospectus and statutory supervisor requirements of the Securities Act.
41. Our view is that the status quo should at least be maintained. However, depending on how the review of the Securities Act progresses, we intend to submit that cooperative shares are fundamentally not an “investment”. Cooperative shares should therefore not be regulated as a “financial product” under the Securities Act, and therefore would also be excluded from the FAA and FSPA.
42. If our primary submission is not accepted, our second submission is that the Committee should consider deferring the requirements for cooperatives to comply with the requirements of the FAA and FSPA in relation issuing cooperative shares, pending the outcome of the Ministry of Economic Development’s review of the Securities Act. Cooperatives face substantial compliance costs under the FAA and FSPA. Such costs will clearly be unjustifiable if the requirement to comply with the FAA and FSPA were to be reversed within 18 months to two years anyway.

43. As above, we believe this could be best effected by providing that cooperative shares issued under the Cooperative Companies Act or Industrial and Provident Societies Act are not “financial products” for the purposes of the FAA and are excluded from the “financial services” definition in the FSPA, for a specific period.

Category 2 products

44. If our primary and secondary submissions are not accepted, our third submission is that the Committee should consider including cooperative shares issued under the Cooperative Companies Act or Industrial and Provident Societies Act in the list of category 2 products (**clause 6** of the Bill refers).
45. We believe this would be appropriate as:
- (a) as for certain other proposed category 2 products, shareholders can surrender their cooperative shares and get a refund of their “investment” when they cease to transact;
 - (b) as for building society shares, cooperative shares relate primarily to membership of the relevant business, rather than an “investment”;
 - (c) cooperative shares are not “complex” financial products, as evidenced by the wide-ranging exemptions from the provisions of the Securities Act; and
 - (d) for the reasons outlined above, there is no potential “mischief” associated with cooperative shares that would require them to be a category 1 product.
46. Including cooperative shares as a category 2 product would mean that cooperatives and their representatives would only have to be registered under the FSPA, not authorised under the FAA. This would not eliminate all compliance costs on cooperatives, but it would significantly reduce them. The shaded costs at paragraph 28 would no longer be payable by cooperatives. This would provide an estimated compliance cost saving of at least **\$1 million** initially and a further **\$1 million** per year. We estimate there would be further substantial savings by not requiring representatives to undertake additional education or qualifications.

Conclusions

47. In conclusion, our primary submission is that the Committee should consider the scope of the FAA and FSPA. Cooperatives cannot cause the

sorts of “mischief” the FAA and FSPA are designed to address in relation to issuing cooperative shares, but will face significant and disproportionate compliance costs. Cooperative shares should therefore be excluded from the FAA and FSPA.

48. If our primary submission is not accepted, our second submission is that the Committee should consider deferring the requirements for cooperatives to comply with the requirements of the FAA and FSPA in relation to issuing cooperative shares, pending the outcome of the Ministry of Economic Development’s review of the Securities Act. The results of this review may be that cooperative shares are not treated as a “financial product”.
49. If our primary and secondary submissions are not accepted, our third submission is that the Committee should consider including cooperative shares in the list of category 2 products. As for other category 2 products, cooperative shares are simple, must be surrendered by the cooperative when trading ceases and relate to membership of the business rather than an “investment”. This would reduce the compliance costs faced by cooperatives.
50. We trust the Committee will carefully consider our submissions. We look forward to appearing in person to discuss these matters with you further.

Yours sincerely,



Peter Macdougall

Chairperson
E peter@nz.coop
M 027 433 9837



Ramsey Margolis

Executive Director
E ramsey@nz.coop
M 021 97 3531

MEMBERS OF THE ASSOCIATION 2009–2010

CHAIRPERSON

Peter Macdougall
“Minzion”, Millers Flat, RD2 Roxburgh 9572

H 03 446 6822
M 027 433 9837
peter@nz.coop

ARABLE & HORTICULTURE

Councillor : Adrian Gault
Eastpack Ltd
457 Tablelands Rd, RD1 Opotiki 3197

H 07 315 7789
M 027 225 5587
adrianjulie@farmside.co.nz

CC **Allied Grain Cooperative Te Awamutu Ltd**
www.alliedgrain.co.nz

CC **Berryfruit Export NZ Ltd**
www.boysenberry.co.nz

CC **Birchwood Packhouse Ltd**
www.birchwoodpackhouse.co.nz

CC **Eastpack Ltd**
www.eastpack.co.nz

CC **Fruitpackers (HB) Cooperative Ltd**
www.frupack.co.nz

CC **Kerikeri Irrigation Co Ltd**
keri.irrigation@xtra.co.nz

CC **Market Gardeners Ltd trading as MG Marketing**
cosec@mgmarketing.co.nz

CC **New Zealand Honey Producers' Cooperative Ltd**
www.nzhoney.co.nz

CC **NZ Hops Ltd**
www.nzhops.co.nz

CC **Satara Cooperative Group Ltd**
www.satara.co.nz

CC **Seasonal Solutions Ltd**
www.jobscentral.co.nz

CC **The NZ Blackcurrant Cooperative Ltd**
www.nzblackcurrants.com

DAIRY

Councillor : Christine Burr
Fonterra Cooperative Group Ltd
Private Bag 92 032, Auckland 1142

W 09 374 9428
M 021 624 324
christine.burr@fonterra.com

CC **Dairy Goat Cooperative (NZ) Ltd**
www.dgc.co.nz

CC **Fonterra Cooperative Group Ltd**
www.fonterra.co.nz

CC **LIC Ltd**
www.lic.co.nz

CC **NZ Organic Dairy Farmers Cooperative Ltd**
www.organicdairy.net.nz

CC **Tatua Cooperative Dairy Co Ltd**
www.tatua.com

CC **Westland Cooperative Dairy Co Ltd**
www.westland.co.nz

**FERTILISER
& TOP
DRESSING**

Councillor : Tony Reilly
Shell Terrace, Motupipi, RD1, Takaka 7183
(Ravensdown Fertiliser Cooperative Ltd)

H 03 525 8165
M 027 220 4464
tony.r@xtra.co.nz

CC **Ballance Agri-Nutrients Ltd**
www.ballance.co.nz

CC **Ravensdown Fertiliser Cooperative Ltd**
www.ravensdown.co.nz

CC **Rodney Cooperative Lime Co Ltd**
bryce@nichollsbrown.co.nz

FINANCIAL SERVICES

Councillor : Girol Karacaoglu
PSIS Ltd
PO Box 54, Wellington 6140

W 04 495 7722
M 027 565 0613
girolkaracaoglu@psis.co.nz

FMA

Farmers Mutual Group
www.fmg.co.nz

CC

PSIS Ltd
www.psis.co.nz

GROCERY WHOLESALE

Councillor : Chris Knowles
Foodstuffs (South Island) Ltd
Private Bag 4705, Christchurch 8140

W 03 353 8602
M 021 398 764
chris.knowles@foodstuffs-si.co.nz

CC

Foodstuffs South Island Ltd
www.foodstuffs-si.co.nz

I&P

Foodstuffs (Wellington) Cooperative Society Ltd
www.foodstuffs-wgtn.co.nz

MEAT & FIBRE

Councillor : Herstatt Ulrich
Silver Fern Farms Ltd
PO Box 941, Dunedin 9054

W 03 614 3856
M 027 471 1245
herstattulrich@farmside.co.nz

CC

Alliance Group Ltd
www.alliance.co.nz

CC

Silver Fern Farms Ltd
www.silverfernfarms.co.nz

CC

Primary Wool Cooperative Ltd
www.primarywool.co.nz

CC

Velexco Cooperative Group Ltd
www.velexco.co.nz

TRADES & RETAIL SERVICES

Councillor : Russell Green
Capricorn Society Ltd
PO Box 404 258, Puhoi 0951

W 09 422 0777
M 021 655 461
russell.green@capricorn.coop

CC

AMN Cooperative Ltd
www.amncoop.co.nz

I&P	Canterbury Education Services Society Ltd www.cessl.org.nz
CA	Capricorn Society Ltd www.capricorn.coop
I&P	Composite Retail Society Ltd www.compositeretail.co.nz
CC	Independent Timber Merchants Cooperative Ltd www.itm.co.nz
CC	Interflora Pacific Unit Ltd www.interflora.co.nz
Co	Lighting Network NZ Ltd t/as Lighthouse Lighting Group www.lighthouselighting.co.nz
CC	NZPM Group Ltd www.plumbingworld.co.nz • www.nzpm.co.nz
CC	Orb Communications Ltd www.orb.co.nz
Co	Origin Agroup Ltd www.originagroup.co.nz
CC	Pharmacy Wholesalers (Bay of Plenty) Ltd www.pwl.co.nz
CC	Pharmacy Wholesalers (Central) Ltd www.pwlcentral.co.nz.
<hr/>	
TRADING SOCIETIES	Councillor : Lachie Johnstone PO Box 123, Takanini 1245 (Farmlands Trading Society Ltd)
	W 09 267 9758 M 027 652 8872 lachiej@wff.co.nz
I&P	Ashburton Trading Society Ltd www.ats.co.nz
I&P	Combined Rural Traders Society Ltd www.crt.coop
I&P	Farmlands Trading Society Ltd www.farmlands.coop

Inc Soc **Rural Service Centre**
PO Box 160, Takaka 7283

OTHER MEMBERS

Councillor : John Timoti-Hohaia
Hato Paora Cooperative Co Ltd
PO Box 132 080, Auckland 1644

H 09 276 5232
M 021 665 337
john@hatopaora.coop

Energy CC **Electricity Ashburton Ltd**
www.electricityashburton.co.nz

Community CC **Hato Paora Cooperative Co. Ltd**
www.hatopaora.coop

Community I&P **Ngati Kahu Ki Whangaroa Cooperative Society Ltd**
lgevans@actrix.co.nz

Community I&P **Ngati Pahauwera Section 30 Representatives Cooperative Society Ltd**
www.ngatipahauwera.co.nz

Rural services I&P **Rural Couriers Society Ltd**
www.coural.co.nz

PROVISIONAL MEMBERS

Simply Good Food CSA Ltd
www.simplygoodfood.co.nz

Torere Macadamias Ltd
www.macnz.com/induscoop.asp

Legislation Codes

CA Corporations Act 2001 (Australia)
CC Cooperative Companies Act 1996
I&P Industrial & Provident Societies Act 1908
Co Companies Act 1993
FMA Farmers Mutual Act 2007
Inc Soc Incorporated Societies Act 1908

Councillor contact details

H Home phone
W Work phone
M Mobile phone

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