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2016



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LIST OF ABBREVIATIONS

BenCom	Community Benefit Society
CA	Companies Act
CCBSA	Co-operative and Community Benefit Society Act
CIC	Community Interest Company
CIO	Charitable Incorporated Company
DHB	Dover Harbour Board
DPPTL	Dover People's Port Trust
FETF	Folkestone Estate Trust Foundation
ICA	International Co-operative Alliance
IPS	Industrial and Provident Societies
PLC	Public Limited Company
PoD	Port of Dover
SE	Social Enterprise
TFLLCIC	The Folkestone Leas Lift Community Interest Company

***An investigation into the development of legal forms for the delivery of community benefit
and community interest***

Abstract

In considering sociologically that emancipatory alternatives to dominant business institutions and social structures are evolving as a whole, as suggested by Wright,¹ this thesis argues that the available legal form frameworks, which are evolving during the same period, have blurred historical business registers, due to a lack of clear differentiation and branding. It also argues that the legal frameworks fail to provide guidance on how to structure a community enterprise in order to garner and demarcate participation through representation. The essential interconnections between business institutions, communities and community-perceived assets are weak. The necessity to formally allow access to power-sharing and decision-making through organisational structures, and the ability to extend accountabilities on profit and surplus distribution in a way in which the community/stakeholders can participate and be represented, are essential; this can address social disconnections and benefit community outcomes. The work argues for additional guidance and branding to clearly define the legal forms open for use by business institutions, mainly social enterprises. It recommends additional regulatory governance and tests to the pre-existing frameworks, which will rectify the blurring of the registers.

¹ Erik Olin Wright, 'Transforming Capitalism through Real Utopias' [2012] American Sociological Review 1. Alternative business structures include, for example, cooperatives, mutuals and not-for-profit organisations

Thesis statement

This thesis is concerned with the lack of differentiation between legal forms used by social enterprises: community interest companies, community benefit societies and charities. It questions two particular legal tests: the community interest test and the community benefit test. 'These incorporated legal business structures, brought into force in recent years, are aimed at raising social capital'¹ and have 'light touch regulatory governance'.² These structures are considered to be more accessible, as opposed to charity law, which has been seen as unnecessarily complex.³ This work argues that the variety of hybrid company structures now open for use by social enterprises has led to a blurring of three historical business registers.⁴ This blurring has meant that community interest and community benefit tests are subjective and lack clear differentiation between themselves and, vitally, tests of public benefit.⁵ The lack of differentiation detracts social capital and vital funding from charities, which have to comply with stringent governance. Furthermore, there is a danger that social entrepreneurs (those with a strong economic profile) will use these models to their advantage, thereby exposing and risking community assets, community interest/benefit, public benefit and, therefore, social reform. The thesis presented here therefore suggests a layered approach; this would see additional options for all business institutions. The additions to pre-existing frameworks would differentiate them as inclusive or advance opposed to modest or standard. It suggests applying key codes for a) guidance on the permitted rules related to constitutions that cover measuring the outcomes against the test, for both community benefit societies and community interest companies; and b) optional additional guidance in relation to community participation through representation, and ways in which to structurally organise a community enterprise. This work believes this to be essential and that it must be at the heart of all communities, rather than social enterprise. In addition, the work highlights essential interconnections related to community assets, in terms of both material value and social value; it suggests that the current asset lock facility found in community interest companies fails to achieve its legal intention.

¹ Franz Huber, 'Social Capital Of Economic Clusters: Towards A Network-Based Conception Of Social Resources' (2009) 100 (2) Tijdschrift voor economische en sociale geografie – Journal of Economic and Social Geography 160.

Social capital is a form of economic and cultural capital in which social networks are central. Transactions are marked by reciprocity, trust, and cooperation, and market agents produce goods and services not mainly for themselves, but for a common good.

² Ian Snaith, *Handbook of Co-operative and Community Benefit Society Law* (2nd edn, Co-operatives UK; Jordans 2014). Regulator of Community Interest Companies annual report 2015/2016 p.9

³ Sarah Williams, 'Legal Blog: Law Commission Proposals Could Simplify Charity Law' (*Charitytimes*, 14 September 2016) <www.charitytimes.com/ct/blog-law-commission-proposals-would-simplify-charit-law.php> accessed 18 October 2016.

⁴ These refer to: i) a company for the benefit of the company and shareholders; ii) charities for public benefit; and iii) cooperatives, mutuals and societies for the benefit of their members.

⁵ 'Public benefit: rules for charities' (*UK Government*, 14 February 2014) <www.gov.uk/guidance/public-benefit-rules-for-charities> accessed 20 October 2016.

The legal test for charities.

Through case studies, this critically, descriptively and comparatively reviews legal devices both open to and adopted by communities who had endeavoured to secure community assets for community interest/benefit. It asks the following questions: How is community benefit and/or community interest achieved? How is it measured, managed and ultimately regulated?

This work seeks to examine through case studies the use of legal forms⁶ by social enterprises, set against the backdrop of successive governments' commitments to a Third Way – or Big Society – and, later, localism agendas during the period of 2010 to 2015, and set within the context of growth in businesses classed as social enterprises. This work challenges the existing legal forms adopted by institutions, as well as those that were brought into force in late 2014. These institutions have pledged community interest and/or community benefit as their primary purpose, and their underlying objective is to improve social welfare.

The case studies were examined during a period under the term of the Conservative–Liberal Democrats coalition government, where supportive enabling legislative amendments and consolidations were introduced to foster the vision of a Big Society. The introduction of the Co-operative and Community Benefit Societies Act 2014 in August 2014 aimed to see a total overhaul and consolidation of society law, cooperative law and community benefit law. The modernisation of the early Societies Acts of 1852, 1862, 1876 and 1893 and the Credit Unions Acts of 1965 and 1979, to the early twenty-first century reforms facilitated by Private Members' Bills and secondary legislation 2012–2014, saw the regulatory body evolve, from the Financial Services Authority (FSA) to the Financial Conduct Authority and the Prudential Regulation Authority. These are consolidations, rather than newly designed devices created for a deliberate purpose. Numerous reforms found in previous law were consolidated into one single Act in August 2014: the Co-operative and Community Benefit Societies Act 2014. There is emerging evidence within the findings in this paper that the legal forms do collectively garner social capital, but they need to go further to ensure wider democratic community participation and to address the blurring of historical registers.

This thesis reviews the government's political agendas and the legal frameworks it has put in place to pursue community interests and community benefit in the UK, with a particular emphasis on empowerment and access to power. The standpoint from which this assessment is carried out is that power is required by community groups to influence and shape effective outcomes for and within their communities. The wider policy objectives pursued by this agenda can be viewed as attempting to address inequalities with an aim of creating a business environment where individuals and communities can flourish without entirely relying on state provision, charitable donations and/or capitalist commercial provisions.

⁶ Legal forms/devices relate to business structures through which institutions are legally governed, held under both Company Law and Industrial Provident Societies Law.

Within the fields of social humanities, law and anthropology, the terms used to describe the concepts of 'community groups' and 'citizen power' are unclear.⁷ These concepts are loosely defined and therefore not embedded within the institutional powerhouses⁸ that seek to address social welfare and social inequalities. This impacts on the ability of institutions to place and embed community groups within their organisational structures, therefore creating a significant barrier preventing communities from having the required opportunities – and thus power – to influence decision-making.

Arnstein⁹ states that there is overall confusion in this area, noting that there is much rhetoric and many over-used euphemisms, both politically and academically, all of which contribute to this area being somewhat confounding and incoherent.¹⁰

This work therefore examines the particular political agenda that has called for social empowerment through the following slogan:

You can call it liberalism. You can call it empowerment. You can call it freedom. You can call it responsibility. I call it the Big Society.¹¹

David Cameron adopted the 'Big Society' theme and agenda during his campaign leading up to the election that placed him in office in May 2010, in a Conservative/Liberal Democrat coalition government. Empowerment and responsibility became key codes for the development of a number of initiatives designed to place a focus on empowering local communities. This was undertaken to drive communities to take responsibility for the stewardship of community assets and the delivery of community services, to and for the benefit of the local community. The programme pursued by the coalition under the initial rubric of the 'Big Society' (a term that later fell out of favour and was replaced by 'localism' as the key thematic),¹² focuses on the potential in local communities to:

⁷ Robert Gunn and Chris Durkin, *Social Entrepreneurship: A Skills Approach* (The Policy Press 2010).

⁸ The term 'powerhouse' is used to describe institutions who hold power over the 'have nots', run commercially and as statutory bodies. These are institutions where decision-making and management operate in isolation from those they seek to serve.

⁹ Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) *Journal of the American Institute of Planners* 216.

¹⁰ *ibid.*

¹¹ Transcript of a speech by the Prime Minister on the Big Society on 19 July 2010: 'Big Society Speech' (*UK Government*, 19 July 2010) <www.number10.gov.uk/news/big-society-speech/> accessed 26 April 2012.

The rationale behind the idea and programme is most comprehensively laid out in Jesse Norman's book: Jesse Norman, *The Big Society: The Anatomy of the New Politics* (University of Buckingham Press 2010).

Also see Glasman M and Norman J, *The Big Society in Question* (2011) 82 *Political Quarterly* 9.

¹² Department for Communities and Local Government, 'A plain English guide to the Localism Act' (November 2011) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/5959/1896534.pdf> accessed November 2016.

A) Take responsibility for the maintenance of local assets and the delivery of local services that would once have been maintained or delivered as part of the local and national state infrastructure (a modified form of privatisation).

B) Become actively involved in strategies designed to reboot local economic decline and stagnation (partnerships with private enterprises).

c) Develop social capital in communities through the recognition of which assets are of value to communities, and enhancing their willingness to protect such assets themselves.

This strategy was intended to promote social regeneration through the recognition of the value of social capital,¹³ by providing the means through which communities could become actors empowered in equalising their own welfare.

In order to achieve the above objectives, it is argued that a challenge needs to be brought to incumbent institutions, including capitalistic corporations, charities and statutory bodies (national state infrastructures), in particular those institutions that operate to benefit communities. The challenge is to introduce structural representation in order to achieve democratic power-sharing and integrated participation of community groups. Structural representation needs to be drafted into organisational structures, constitutions and articles of association. Anything other than being structurally placed on the boards of companies, charities or trusts is simply ineffective tokenism. Therefore, the requirement for legal forms that are identifiable as conducive to the promotion of community interest and/or benefit is necessary; these forms may be classed as alternatives to existing models. As Wright¹⁴ notes, alternatives are already in existence. However, this work reveals that there is a lack of clear branding¹⁵ in the alternatives and in their key characteristics and differences. This work therefore considers how we can bring together these alternative legal forms with scholarly evidence that demonstrates the need to represent community stakeholders. This representation can occur by structurally placing community members or groups within institutions in order to address

¹³ Tristan Claridge, 'Definitions of Social Capital' (*Social Capital Research*, 7 January 2004) <www.socialcapitalresearch.com/literature/definition.html accessed January 2015>

The commonalities of most definitions of social capital are that they focus on social relations that have productive benefits.

¹⁴ Erik Olin Wright, 'Transforming Capitalism through Real Utopias' [2012] *American Sociological Review* 1. Alternative business structures include, for example, cooperatives, mutuals and not-for-profit organisations.

¹⁵ American Marketing Association Dictionary. Retrieved 29 June 2011. The Marketing Accountability Standards Board (MASB) endorses this definition as part of its ongoing Common Language in Marketing Project: 'Branding gives identification of a business product or service; name, term, design, symbol, or other feature that distinguishes one business/product from those of others, marketing and communication methods help to distinguish a company from competitors in order to establish said business with its customers.'

inequalities, achieve democracy and encourage power-sharing, thereby achieving social responsibility and endeavouring to address 'imbalances between rich and poor [which] is the oldest and most fatal ailment of all republics'.¹⁶

This dissertation adopts the view that capitalist economies are the primary producers of devastating global and local inequalities.¹⁷ The events witnessed in the 2008 global financial crisis and in the UK riots of 2011¹⁸ are evidence of a system in radical need of reform. Bresser-Pereira notes that '30 Neoliberal Years of Capitalism collapsed in the 2008 global financial crisis'.¹⁹ He draws a direct association between the ills of capitalist models in the events that unfolded and the need to understand the effects of poverty in order to achieve democratisation. This paper argues that the 'poor' need to be placed within institutional structures in order to be democratically represented. According to Wright,²⁰ previous feudalist structures allowed capitalist corporations a space to thrive; as a consequence, a capitalist social order has developed, which has been built inside the historical relations and institutions forged under the social context of feudalism. What is now required is legislation that accepts alternatives, by offering a framework that sees clearly branded legal models, rather than models that have emerged and evolved by coincidence. These models need to be deliberately created so that they are capable of embedding the needs of the poor and of deprived communities within the business form. Lord O'Neill, Commercial Secretary to the Treasury, launched the Commission on Inclusive Growth in 2016, a major new inquiry into creating more inclusive economies – where more people are able 'to participate fully in, and benefit from, the growth of their local area'.²¹ This is direct recognition of the importance to include and have full representation of local

¹⁶ Plutarch, ancient Greek biographer (c. 46–120 CE).

¹⁷ Luiz Carlos Bresser-Pereira, 'Democratization and Equality' (paper prepared for the Festschrift for José María Maravall, John March Institute, Madrid, 14–15 June 2010).

'Democratization – the improvement of the quality of democracy – is taking place in so far as democratic societies irregularly progress towards the political objectives of modern societies: security, freedom, material well-being, social justice and protection of the environment. Democratization is the outcome of the increase of two equalities: substantive political equality and economic equality. During the 30 Golden Years of Capitalism (1949–78) progress was sizeable and reflected in social theory in the struggle between modernization theory and Marxism, and on the rise of pluralist school of democracy. Yet, after a relative crisis in the 1970s democracy fell back as a reactionary ideology – neoliberalism – turned dominant and mounted an attack to the Social State and to equality. In the intellectual realm, social theory lost relevance, while liberal political theory turned dominant, and an utopian concept of democracy – deliberative democracy – dominated the debate on democracy. On the other hand, the rise of rational expectations based on a pessimistic view of mankind reflected the dismal times. The 30 Neoliberal Years of Capitalism collapsed in the 2008 global financial crisis. Meanwhile, the poor and a minority of republican citizens proved to be the real agents of democratization. We need to acknowledge their existence to understand why political progress eventually happens.'

¹⁸ See Section 2.4.

¹⁹ Bresser-Pereira (n 17).

²⁰ Wright (n 14).

²¹ 'RSA Insights: Inclusive Growth Commission' (RSA, 25 May 2016) <www.thersa.org/discover/videos/rsa-insights/rsa-insights-inclusive-growth-commission> accessed May 2016.

stakeholders; as O'Neill states, 'it is they who have the most to gain and lose from any business economics'.²²

In challenging incumbent institutions, Wright²³ states that the dominant capitalistic models are legally placed (within company law) and are therefore successful at maximising and delivering economic returns for the stakeholders. Furthermore, the people running capitalist legal models (a type of business category) are fiducially required by law to follow strategies that largely pursue economic returns and growth, with no moral obligations to wider stakeholders, particularly the local community who might be reliant on the business economy.

A major problem with the capitalist model is that directors must pursue business objectives for the company's benefit; they are not required legally to be influenced by moral concerns, nor are they bound – legally or morally – to abide with the views of their shareholders or wider stakeholders. As a direct result, it can be argued that the capitalist corporation model in its current form operates in a culture of business growth strategies based on pure economic returns. It is therefore legally structured not to address any other objectives, such as social benefit, community interest or environmental issues. The capitalist business model could therefore be argued as not being a democratic model, as noted by Wright, as it does not take into account the positions/views of all those involved in its operations democratically.²⁴ Wright points to the objective of endless growth as being incompatible with a sustainable environment, drawing reference to the austerity measures since the financial crash of 2008 and the rhetoric that insists on spending more to revive economies on the assumption that growth is critical. A lack of imagination is evident here; the global financial crash saw repeated governments pursue policies of spending in line with strategies aimed at business growth.

Wright states that 'developing a theory of alternatives to capitalism at the beginning of the twenty-first century is a pressing task, as for most people capitalism now seems the natural order of things'.²⁵ He argues that what is required is a move away from the enshrined business structures and dominant institutions that are widely recognisable in Western societies – institutions that operate in a space endorsed by governments. States have allowed alternatives to government provisions;²⁶ in free market economies, businesses deliver in place of government provisions. These are distinct business models. The state provides social welfare structures through a number of intersects or frameworks that the emerging business must work

²² *ibid.*

²³ Wright (n 14).

²⁴ *ibid.*

²⁵ *ibid.* 2.

²⁶ *ibid.*

to; this inert strategy has resulted in huge imbalances of wealth and welfare on a global scale, as the welfare structures are primarily based on capitalistic ethos and not social welfare agendas.

Capitalism has dealt with maximising material value agendas, and a corporation's primary responsibility has been identified as the delivery of profit for its stakeholders. The Western world is highly dependent and measured on its ability to consume, and therefore material welfare is key. Colander states that whilst 'material needs are limited, material wants are essentially infinite [and] this gives for-profit corporations an unlimited role in an increasingly materialistic society'.²⁷

Material wealth is obtained by consumers and fulfilled by companies in a highly lucrative and competitive market place. Marketing strategies are sophisticated in design, and consumers are demanding and, at times, disloyal; taking this on board, we can have some empathy with the task presented to governments, as meeting the demands of social needs is equally complex.

What was witnessed during the period of this research was an awakening in government and in society with regard to its own interdependency on material welfare; to a small extent, society's insatiable materialistic appetite has been questioned. The focus on achieving merely material welfare may be the cause of major imbalances in our societies, as will be argued in Section 1.4. By acknowledging that security in communities is essential in order to enjoy material welfare, a sense of responsibility in balancing material and social welfare is identified. It is at this juncture that one should recognise tensions and consequently pose the following question: whose responsibility is it to ensure social welfare and how should it be funded?²⁸ This work assumes a general consensus that it is a shared responsibility. The task is to devise a strategy with identifiable legal business forms that the state governs, in order to address welfare imbalances and to 'reduce human suffering and expand the possibilities of human flourishing'.²⁹

In posing the question of whose responsibility it is to improve social welfare, this work argues that the beneficiaries of such ambitions require vital access to power; that they are embedded within the management of institutions tasked with delivering community benefit or community interest aspirations; that they are capable of influencing the outcomes in order to improve their welfare and address inequalities; and that the beneficiaries participate and are represented on the decision-making boards.

²⁷ David Colander, 'Solving Society's Problems from the Bottom Up: For-Benefit Enterprises' (2012) 55(1) *Challenge* 69.

²⁸ Funding requires a surplus by way of profits or by raised taxes and effective distribution.

²⁹ Wright (n 14) (Second proposition, as noted in his abstract).

Successive government policies have seen a multitude of initiatives, along with significant investments in schemes aimed at assisting the poorest and most vulnerable within societies. Programmes aimed at improving social inequalities have been delivered by a number of institutions, charitable bodies, companies and the state, either directly or indirectly. It should be noted that many programmes have achieved life-changing outcomes for a whole host of people. However, significant welfare inequalities still exist. A problematic by-product of governmental welfare strategies has seen the creation of generational welfare interdependency.³⁰ The austerity measures brought into force since the financial crash have been presented as necessary in order to restrict this trend and address welfare dependency, by placing emphasis on work and contribution to society. To many, this strategy has been harsh, and further isolates the most vulnerable in our society. In contrast, consider the true community benefits of focusing on structural social inclusion.

However, one problem with government strategies relates to the ways in which welfare is measured: inequality measures are based on material wealth (and, in particular, the extent to which people own assets or access to material goods and services).³¹ One example of such measures is the following:

People in poverty are those who are considerably worse-off than the majority of the population. Their level of deprivation means they are unable to access goods and services that most people consider necessary to an acceptable standard of living.³²

The above measure focuses on consumer inequality and excludes other important dimensions of welfare, such as access to education, health and decision-making. This one-dimensional measure should be challenged and replaced by alternative measures that take social welfare values into account.

Colander,³³ for instance, argues that current governmental frameworks are not effective in providing social welfare, as they do not take into account the ways in which social welfare and

³⁰ Veronique de Rugy, 'Is Welfare Dependency Perpetuated from One Generation to the Next? Maybe' (*National Review*, 6 November 2013) www.nationalreview.com/corner/363284/welfare-dependency-perpetuated-one-generation-next-maybe-veronique-de-rugy July 2016

³¹ 'How is Economic Inequality Defined? The Equality Trust's Focus on Economic Inequality' (*The Equality Trust*) <www.equalitytrust.org.uk/how-economic-inequality-defined> accessed 27 July 2016.

'Economic inequalities are most obviously shown by people's different positions within the economic distribution – income, pay, wealth. However, people's economic positions are also related to other characteristics, such as whether or not they have a disability, their ethnic background, or whether they are a man or a woman. While The Equality Trust recognises the importance of these measures, the focus of our work is specifically the gap between the well-off and the less well-off in the overall economic distribution. This is reflected in the choice of terms and statistics in this section.'

³²Centre for Research in Social Policy, 'A Minimum Income Standard for the UK' (*Loughborough University*) <www.lboro.ac.uk/research/crsp/mis/> accessed 27 July 2016.

³³ Colander (n 27).

material welfare are deeply interrelated. Both the economy and society are complex systems, and Colander suggests that governments should consider them together as a broad ecosystem and avoid their compartmentalisation. One way of achieving this aim that Colander points to, and which is relevant for the purpose of this dissertation, is by avoiding the separation between 'those donating and those actually carr[ying] out the spending of the funds [on the one hand], and the beneficiaries of the funds [on the other]'.³⁴

The ability to share power between the 'haves' and the 'have-nots' is essential, and what is required is structural participation. This appears to be evident in the case studies that this dissertation focuses on; they show the importance of association and participation whilst also pointing to the limits posed on them by the compartmentalisation of material assets and ownership. They are structurally separated and, at times, totally removed when the asset lock facility³⁵ (specifically the legal asset lock facility) is in place.

The inequalities within communities between the 'haves' and 'have-nots' are partially due to imbalances in ownership of assets, wealth, property and power, as described by Sherry Arnstein.³⁶ For example, property is held as private ownership, and controlled by those seen to have power – this can be over land resources or funds held by companies or the state. This can be viewed as the 'haves' giving access to those with the means – who also happen to be the 'haves'. Community assets are often owned and controlled by quasi-public spheres – again, the 'haves'. The introduction of social ownership can provide a discourse when contrasted with private ownership because, in practice, it generally collapses into state ownership.³⁷ A leading theoretician in this field, Professor Jaroslav Vaněk,³⁸ makes this distinction in relation to worker cooperatives – those controlled by worker bases or those controlled by ownership bases. Having a connection to an asset, due to being an owner, part-owner or custodian, creates an obligation to support, manage and care for the asset, as well as a sense of responsibility. The asset lock feature removes this and creates separation and compartmentalisation, which, in turn, jeopardise its social and material value.

³⁴ Colander (n 27).

³⁵ The asset lock is a legal requirement of a community interest company, as per Chapter 6. It is designed to ensure that the assets of the CIC (including any profits or other surpluses generated by its activities) are used for the benefit of the community.

³⁶ Arnstein (n 9).

³⁷ Wright (n 14).

³⁸ Jaroslav Vaněk, *The General Theory of Labour-Managed Market Economies* (Cornell University Press 1970). This is a seminal work on self-management. Vaněk's works on the economics of participation have included *The Participatory Economy: An Evolutionary Hypothesis and a Strategy for Development*, which reviewed the behaviour of labour-managed firms in more social spheres, beyond their interests in net revenue per worker.

This thesis argues that community asset ownership is essential. The ability to asset lock community assets for a community group that is democratic and sustainable is key. If we are to consider communities as ecosystems, which are evolving and capable of constant change, we need to recognise the need for sustainable welfare policies that are managed by those who are intrinsically affected – those donating time or funds and those spending the funds and managing the community assets, along with those who are receiving the community benefits or community interest. Achieving this objective requires supporting governance and accountability mechanisms that prevent non-separation and encourage effective participation. The Cooperative and Community Benefit Society Law Act 2014 is light touch;³⁹ it is flexible and vague, with a non-requirement of named beneficiaries. What is required is further legal guidance in order to achieve the necessary interconnections within communities; a community interest company or community benefit society must be recognisable and different to the incumbent institutions, which centralise power and money in a materialistically driven economy. The question is: how can the alternative models to non-capitalist models enter the economy and counterbalance the current inequalities within institutions? This work suggests that stakeholder participation through representation at board level is essential; this is something that can simply be introduced as an evolving strategy.

We need to be open-minded when considering changes; as Wright⁴⁰ suggests, some caution is required here, as the institutions that purport to improve social inequalities and welfare are often the cause of human suffering, due to the consolidated ways in which they operate. This note of caution suggests that a steady transformation is required. Integral to this process is the ability to diagnose the problematic aspects of the existing models and institutions in order to transform them. It is important to keep in mind, as Wright points out, that the processes of transformation are likely to produce unintended consequences and, as Hayek has argued, some may even cause more harm than the original inadequate institutions did.⁴¹ However, in light of the argument articulated above, this acknowledgement does not invalidate the pressing need for alternatives that can improve welfare.

What is required is emancipatory social contribution. Wright⁴² suggests that, if an environment is considered as an ecosystem, the role of the government becomes one of loosely allowing a coupling of business forms, with the dominant species currently being a capitalistic model, and

³⁹ Snaith (n 2).

Light touch regulation refers to being less stringent than charitable models, as discussed by Iain Snaith and the Cooperative International Alliance. Also referred in the Regulator of Community Interest Companies Annual Report 2015/16 p.9

⁴⁰ Colander (n 27).

⁴¹ Frederick A Hayek, *The Fatal Conceit: The Errors of Socialism* (University of Chicago Press 1991).

⁴² Wright (n 14).

with a wide range of non-capitalist forms that could co-exist as evolving economic organisms. These might be able to challenge and shift the dominance of the capitalist corporate models.

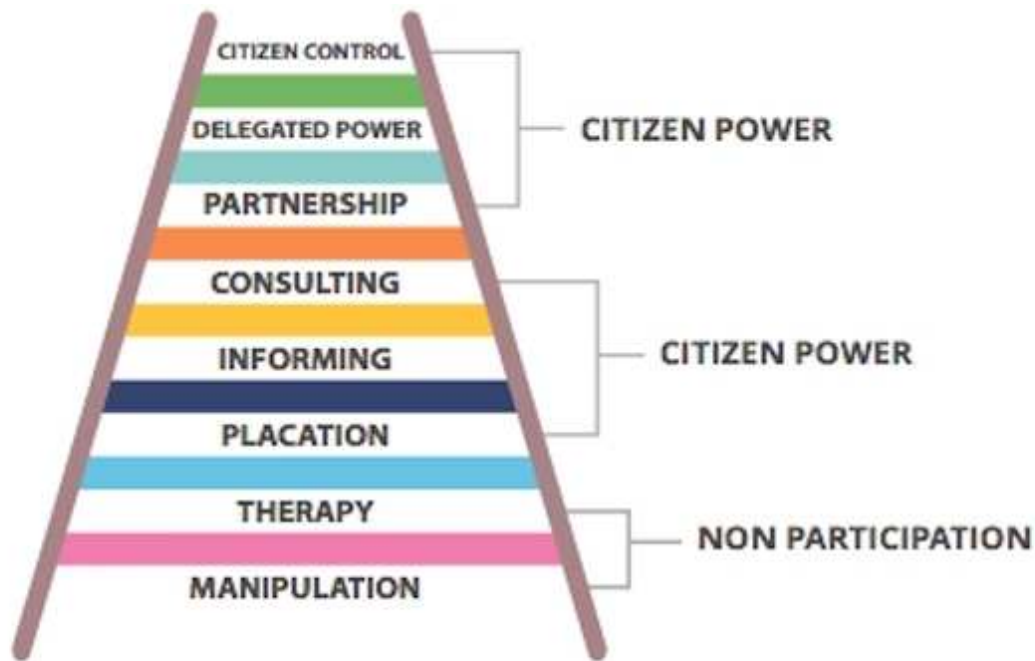
Essential in this transformation process is effective participation. Embryonic economic organisms require more than mere tokenism; instead, they need true democratic participation to feed and thrive on. There is much work on community participation, self-help and citizen involvement, some evidence of which is drawn out in the main body of this research. However, participation is not always welcome and enabled; there is evidence of instances in which public participation has been opposed, as argued by Sheldrick in *Blocking Public Participation*,⁴³ which details several strategic lawsuits brought to curtail political activism and public expression. Moffit⁴⁴ challenges the view that governments seek secrecy and that there are tensions in bureaucratic administration, suggesting that democratic accountability can be achieved by all when engaged effectively, bringing together groups with diverse expertise who can produce better public policy outcomes.

This can be understood as power involvement and power distribution by citizen participation, structurally placed to personally represent their citizens' position; anything less is merely therapy or tokenism, as per Arnstein's assertion.⁴⁵

⁴³ Byron M Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (Wilfred Laurier University Press 2013).

⁴⁴ Susan L Moffit, *Making Policy Public: Participatory Bureaucracy in American Democracy* (Cambridge University Press 2014).

⁴⁵ Arnstein (n 9).



Source: Arnstein, Sherry R. "A Ladder of Citizen Participation," *Journal of the American Institute of Planners*, Vol. 35, No. 4, July 1969, pp. 216-224.

Figure 1.1a: Arnstein's Ladder of Citizen Participation⁴⁶

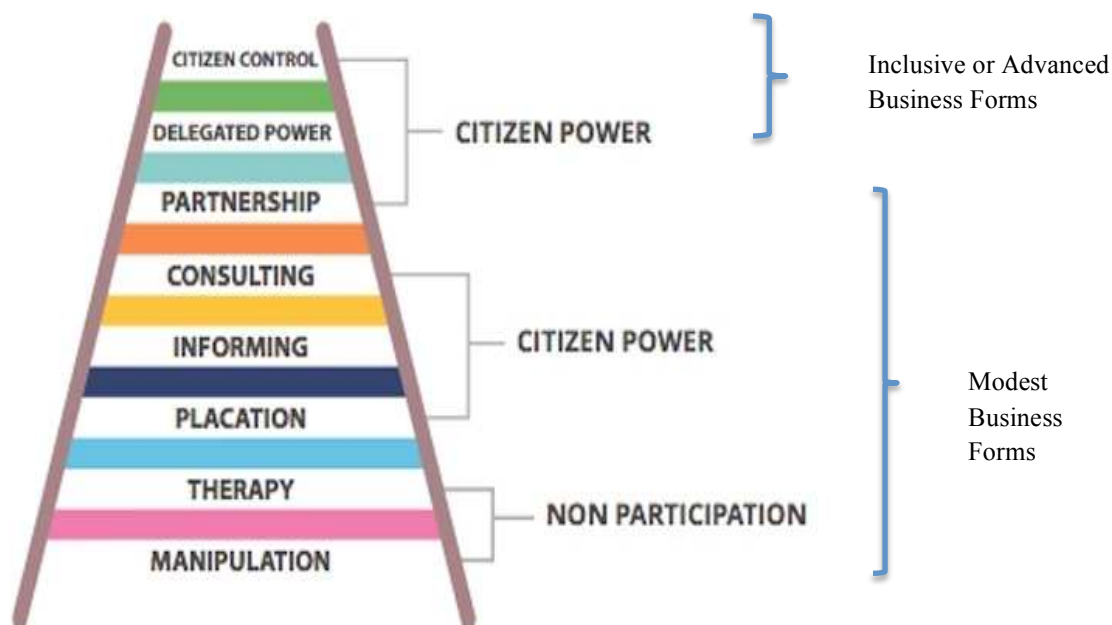
Arnstein⁴⁷ developed a ladder that offers essential steps to achieving effective citizen participation, noting that roadblocks are present and power is often heavily protected. Arnstein noted that the manipulation and therapy rungs on the ladder serve merely as cures or a process of education, while informing, consultation and placation are mere tokenism and do not allow for participation. It is only when there is delegated power and citizen control that any degree of citizen power can be achieved. The case studies within this research offer further evidence of this argument and point to the ability of institutions to evolve. In the second case study, that of Dover, we see in the early days that there appeared to be little on offer – merely placation – yet, in the end, we see a structural opening for a Community Director being firmly placed on the board of directors.⁴⁸

With regard to the structural development of the available legal models, this work argues for social enterprises using community interest companies and or community benefit societies to have the option of further structural guidance that secures participation and representation, accompanied differentiation which is identifiable.

⁴⁶ Arnstein (n 9).

⁴⁷ *ibid.*

⁴⁸ This post requires further guidance on how community views can be expressed, voting on all matters, exclusions for confidential matters, etc.



Source: Arnstein, Sherry R. "A Ladder of Citizen Participation," *Journal of the American Institute of Planners*, Vol. 35, No. 4, July 1969, pp. 216-224.

Figure 1.1b: Arnstein's Ladder of Citizen Participation supported by legal differentiation for institutions whom operate a structurally inclusive incorporated business model.

With regard to the moral development of the available legal models, Wright⁴⁹ provides an efficient guide to aid social enterprises in understanding the different voyages that can be embarked upon according to the varying principles open to them on formation. He lists three moral principles: equality, democracy and sustainability. A social enterprise might therefore consider delivering against moral obligations as part of its accountability. These principles are the key differentiators to the code of conduct found in a capitalistic company.

Equality:

In a socially just society, all people would have broadly equal access to the social and material conditions necessary for living a flourishing life.

Democracy:

In a fully democratic society, all people would have broadly equal access to the necessary means to participate meaningfully in decisions about things that affect their lives.

Sustainability:

⁴⁹ Wright (n 14).

*Future generations should have access to the social and material conditions necessary to live flourishing lives in the same way that present generations do.*⁵⁰

When compared with current material equality measures, these principles are more holistic and enable a more interconnected approach to the welfare of communities, one secured through effective participation. Participation is essential and must not be overlooked: 'Citizen participation is a categorical term for citizen power... participation without a redistribution of power is an empty and frustrating process for the powerless, it allows the power holders to claim that all sides were considered.'⁵¹ It is therefore essential that supportive guidance on organisational structures is introduced, guidance that places citizens on the boards of organisations that purport community interest and/or community benefit.

There are, however, concerns over some aspects of asset- and power-sharing: can assets and power really be shared? Robert Oakeshott⁵² poses the following question: 'Can an enterprise be democratically owned? If the essence of a democratic enterprise, or community, is that all its members should be on the same footing...' This is an extremely difficult question to address, and this dissertation does not provide a comprehensive answer. However, it argues that unclear branding of the business type leads to roadblocks and disparities when there is no common work, no pooling of resources, no ownership and no identifiable beneficiaries or community participation/representation.

This work undertakes empirical research as a method of investigation, through two local case studies. The case studies are drawn from Kent, in order firstly to investigate the available legal forms designed to deliver community benefit or community interest, both as opposed to and compared with the existing company structures used by social enterprises; and secondly to investigate how participation and profit distribution is governed. The case studies unfolded during the same time frame as the Big Society rhetoric and the introduction of the Cooperative and Community Benefit Society Act. The first two case studies developed out of a move to privatise a significant local asset, the Port of Dover, when two opposing business models were offered. The third case study is a small-scale social enterprise in Folkestone, which arose as a consequence of local authority cuts: the Folkestone Leas Lift community asset.

1.1 ISSUES UNDER INVESTIGATION

⁵⁰ *ibid.*

⁵¹ Arnstein (n 9).

⁵² Robert Oakeshott, *The Case for the Worker Coop: A Typology for Industrial Democracy* (2nd edn, Palgrave Macmillan 1990).

Given the coalition's concerns with recognising, developing and enhancing social capital, what legal forms are available to carry out this function? How successful are these forms and the evolving modifications made to them in delivering the objective?

One of the major themes developed has been that of community benefit as a key focus between the delivery of policy and the development of legal forms. How are we to understand, identify and measure – as well as enhance and protect – community benefit and community interest?

If we can agree that the governance within capitalist business models fails to answer to the communities they serve, surely an alternative business model must have sufficiently resilient governance that is fit for purpose? Furthermore, its business activities need to be both measurable and manageable, as well as open to regulation.

1.2 MAPPING AND CONTEXTUALISING THE 'LEGAL FORMS'

The deployment of legal forms for 'social enterprise' aimed at garnering social capital needs to be understood as being developed through a number of intersected sites, and through a number of rather different registers. Mapping these sites and registers has been a major concern in this study, particularly as a large number of crucial legislative developments unfolded during the time frame of the research. To date, there has been no simple or single resource for providing a map of the legal forms and devices, and therefore this thesis has become, in part, a design for such a mapping. To understand the distinctive characteristics carried in each legal form, reference has to be made to the origins of the forms; therefore, an understanding of the context within which the form originally developed is required.

Diagrams have been designed to provide one means through which to extrapolate the major design features of these legal forms now in play. Full descriptions can be found in Chapter 3. This details the purposes and the functions available in the current and emerging legal models to carry business ventures in supporting the coalition's aspirations.

When navigating a course through the legal material, it is useful to initially recognise a number of different registers through which the forms emerged and are recognised and differentiated. The registers are briefly introduced below, namely the company register, as held at Companies House; a charities register, as held by the Charity Commission; and membership-based organisations (which are not registered separately).

Historically, the company – as a legal structure, whether commercial, charitable or a state institution (the statutory body) – could have been divided into four primary registers, possibly five: 1) the unincorporated association; 2) the corporation company; 3) the cooperative society;

4) the charitable organisation; and 5) the public sector, as in statutory bodies (operating on behalf of the state). Each legal form has to comply with governance rules that determine its objectives, how surplus (profits) can be distributed and who can be held to account – and how – by stakeholders and/or community groups with an interest in the business activity. Along with the law-enforcing regulator, these are just some of the structural requirements. This work sets out a mapping exercise, both textually and graphically, and a graphical matrix can be found in Appendix 1, providing full details on governance. What has come about in recent times is the ability to hold a number of legal forms under one company, in order to work around some of the perceived barriers – for example, conditions that affect methods of fundraising – and on pre-agreed charitable objectives, as opposed to more vague, relaxed terms. The historical registers have been blurred, and the term ‘social enterprise’ covers a multitude of legal forms.

The growth⁵³ in business activities operating under the guise of a social enterprise, as opposed to a commercial or charitable benefit institution, is observed within this work. It reveals that the term is a wraparound concept and not a legally identifiable business form. It is here that the work suggests that there is a problem in the identification and branding of the available legal forms open for adoption. It pursues the need for clear identities in order to garner vital community participation and social reform. One could note that the basic historical starting point for philanthropic gifts, collecting funds, and donations to support ‘community benefit’ or ‘community interest’ would have been given or awarded to charitable organisations, which operate in the ‘public interest’. The test and governance for ‘public interest’ and its governing body have been present and largely fit for purpose.

The term ‘social enterprise’ (SE) has recently become very popular in policy documents. It is a term that has been defined loosely in a number of ways, but always held together by a perceived concern over producing profit for social purposes rather than profit for distribution between solely economic investors.⁵⁴ For many, this sector is a commercial activity; it is seen as developing out of and in parallel with the financial activities of charities, as well as being a useful model for considering and delivering services that were once delivered by either state provision or the private market economy. A version of a company that often marries business skills that are paid for with altruistic commitment, through unpaid labour, has emerged in this sector.

⁵³ Social Enterprise UK, *The People's Business: State of Social Survey 2013* (Westminster, APPG on Social Enterprise 2013).

⁵⁴ BIS Department for Business, Innovation & Skills, ‘A Guide To Legal Forms for Social Enterprises’ (November 2011 URN 11/400).

It could be argued that the term 'social enterprise' encompasses two rather different tropes of initiative:

1. The well-organised, larger-scale economic enterprise, whose motive is to meet 'social need' or to provide 'social benefit', and who requires a legal form that recognises and supports this aim;
2. The smaller and less well-organised local initiative, which needs to be able to find and use with ease a legal form that suits its needs.

Public benefit and charitable purposes are forms related to the classical models used by charities when receiving donations and gifts. Acquiring charitable status (by meeting the public benefit test) allows for a number of fiscal benefits⁵⁵ in recognition of the organisation's charitable purposes status. Both sectors are now dominated by entrepreneurial skills, which have transformed them into professional and commercial institutions. What we see now is the emergence of a new legal form: a company designed specifically for charitable enterprises.⁵⁶

Cooperatives and mutuals often sit in a sector that is referred to as 'not-for-profit' but this is not really correct, as these enterprises simply distribute profits between members of the organisation. Since the nineteenth century, such schemes have been recognised as a form of industrial and provident society (IPS hereafter); this allowed them to be incorporated and to be regulated with reference to their aims.⁵⁷ More recently, another strand of IPSs has developed: organisations that are for the benefit not of members but for the community. Here, the problem of branding begins, especially in the public mind, as they are two very different models and are difficult to distinguish between. This work places an importance on this distinction, as it posits that all social enterprises who benefit from voluntary labour and/or fundraising must be recognisable and accountable in the public's minds; where/to whom is the money going? One of the major concerns in the coalition government's tranche of legislation for social enterprises (SEs hereafter) has been to clearly distinguish between the two; this has been implemented with the introduction of the legal form 'community benefit societies', as opposed to societies benefiting members (cooperatives and mutuals).

⁵⁵ 'Charities and Tax' (*UK Government*, 25 October 2016) <www.gov.uk/charities-and-tax/overview>

'As a charity you can get certain tax reliefs. To benefit you must be recognised by HM Revenue and Customs (HMRC). Charities don't pay tax on most types of income as long as they use the money for charitable purposes.' July 2015

⁵⁶ 'Set up a Charity' (*UK Government*, 14 July 2016) <www.gov.uk/setting-up-charity/structures>

'Charitable company: You must register a charitable company with Companies House. Trustees have limited or no liability for a charitable company's debts or liabilities. Charitable incorporated organisation (CIO): A CIO is an incorporated structure designed for charities. You create a CIO by registering with the Charity Commission. You don't need to register with Companies House.' July 2015

⁵⁷ Industrial and Provident Societies Act 1965 (c 12).

We have seen IPS legal forms established for both member-based business structures and non-member-based business structures, used in the context and theme of 'social enterprises to garner social capital'. This can be thought of in two ways: firstly, the ability to draw the energy, skills and commitment from within a community to build an SE, and secondly, in building social capital from community energy.

However, how is an SE, as a legal form, connected to building social capital? This can be achieved by focusing on the given aim, the SE's aspirations, as required in their governance documents – that of community benefit or community interest. This is the requirement that becomes the thematic focus for the investigation into the matrix of legal forms: what is the aim, how is it measured and by what means of governance, and are the said tests fit for purpose?

1.3 RESEARCH QUESTIONS, METHODOLOGY AND ARGUMENT

The research questions of this thesis are twofold:

Firstly, it investigates whether the governance available in the legal forms open to social enterprises is fit for purpose, in both structural and operational terms. It asks whether the legal forms used by social enterprises and aimed at community benefit or community interest are identifiable and economically viable, or whether they are merely confusing and competing with those legal forms that pre-existed.

Secondly, it investigates whether the communities and societies whose welfare and interests are meant to be the purpose of said enterprises receive any social benefit, and considers which mechanisms form the basis on which this assessment is made.

In short, the research question is: How are the business activities of community benefit and community interest companies measured, managed and regulated?

This question is, in turn, investigated by studying the following two sub-questions:

What are the differences in the structures, governance and accountability between the legal forms emerging from the different registers, as outlined above, which are designed to carry community benefit or community interest as a legal criterion, with particular emphasis on accountability?

What seems to be significant in building the processes designed to deliver community benefit or community interests, and should these processes become key codes and the means to improved regulation?

After mapping the major legal forms, this thesis explores three case studies drawn from Kent in Chapters 4–6. The first two relate to two potential options that developed out of a move to privatise the Port of Dover, and the third is a study of a small-scale social enterprise in Folkestone, which arose as a consequence of local authority cuts and, therefore, could be thought of as a species of privatisation.

The case studies involved fieldwork⁵⁸ in the form of local orientation on the ground, interviews and one small survey, as well as participation in local activities in order to gather material. Because of the nature of the emergence of the material, in that much of it was either ongoing or very recent, extensive use was made of local newspaper coverage as well as other forms of media, such as social media, in order to track events as well as gauge how they were being profiled and received.

In the first two case studies (Dover), a great deal of government material or communications with government needed to be tracked. Further, changes in legislation and government directives during the period had to be followed in order to understand how they related to the Dover scenario. These case studies were used to investigate the research questions.

⁵⁸ Fieldwork was undertaken from 2012 to 2014, and also draws on fieldwork undertaken in Dover from 2010 to 2011.

1.4 INTRODUCTION SUPPOSITION

Inequalities are always present, and initiatives to address inequalities and provide an environment in which mankind can excel have long been sought by social scientists, governments and communities seeking to improve on the historical institutions that sit under the bedrock of mankind's existence.⁵⁹ This work challenges the inexistence of legally constructed institutions⁶⁰ and the processes of engaging social participation and representation in order to achieve social democracies and improve equalities. The research undertaken in the main body of this thesis looks at the evolving legal institutions and how community participation ought to be recognised as a key factor when pursuing policies that wish to garner social capital and social entrepreneurship. Richard Wilkinson and Kate Pickett's *The Spirit Level: Why More Equal Societies Almost Always Do Better* was published in 2009.⁶¹ Those sitting to the left of social reform have seen their argument as supportive of social democracy, while some opponents agree in part to the claims, just not to the solution offered. Likewise, according to *The Economist*,⁶² Britons agree with the causal issues and the presence of inequality but do not hold the view that it is for the state to fix them.

Inequalities do exist, and the state control frameworks are unable to keep up with diverse and complex societies; their role is to protect and govern the operators of business activities – the 'haves' – ensuring that they are honest in their activities and that the 'have-nots' are not taken advantage of. If this can be agreed, then the role of the state – as in the government – can be defined, and therefore what is required from them can be established.

This dissertation argues, firstly, that the government should pursue a coherent strategy that delivers enabling legal structures to ensure that the legal forms open to business operators are identifiable, transparent and governed in a manner that demonstrates true accountability; and secondly, that business objectives, especially where aimed at community interest and/or community benefit, are effectively regulated.

British policymakers are in a bind. What they have come up with in recent decades is a social model somewhere between American stratification and European egalitarianism. As a fudged solution for an equivocal country, it isn't bad.⁶³

⁵⁹ Richard Wilkinson and Kate Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (Bloomsbury Press 2009).

⁶⁰ These institutions refer to companies, mutuals and cooperatives business structures.

⁶¹ Wilkinson and Pickett (n 59).

⁶² Bagehot, 'On Equality: The Lessons of the Spirit Level Debate for the Left, the Right and the British Public' *The Economist* (19 August 2010).

⁶³ Wilkinson and Pickett (n 59).

The following Chapter 2 investigates the events that have influenced policymakers, particularly the global financial crises and the riots of 2012. It considers the growth of SEs, with a focus on the legal forms of governance and their rules. It begins by defining the term 'social enterprise' and what it entails. It concludes by reviewing the cost of an excluded social order, and endeavours to link the need for inclusion, by way of participation and representation of communities within business enterprises, as an essential factor and intersect, for it is the communities who have the most to both lose and gain.

2.1 2008: A GLOBAL FINANCIAL CRISIS

In 2008, a global financial crisis rocked economies across the globe when a number of large, long-established banks collapsed, and the perceived lack of management visibility and control left investors and creditors – as well as society at large – devastated.⁶⁴ As a result of this economic crisis, the UK government decided to make sweeping cuts across the public sector. Cuts could be seen in vital services to communities – for example, hospital services, transportation, schools and reductions in the police and armed services – all of which threatened the public sector, in terms of both provisions of services and as sources of employment.

However, in certain sections of the political spectrum, such reductions in publicly provided services were not seen as problematic. They resonated with the argument that the state should not be over-extended into ‘public service’, and that the alternative of a ‘third sector’ to deliver social services, rather than the state, was to be welcomed.⁶⁵ Further, in areas in which the financial crisis had led to a reduction in private enterprises (for example, consumer services and retail), there was a perceived need for a ‘third way’, in which communities would not be dependent on the traditional private sector or on the state to keep their local economies afloat.

This was the background against which ‘social enterprise’, as a specific form of socio-economic organisation, was to emerge and be promoted as the ‘Third Way’ (by Labour),⁶⁶ and as the ‘Big Society’ (by the Conservatives and, latterly, by the coalition government).⁶⁷

In terms of the economic crisis, one concern has been that, in the corporate sector, both shareholders and other stakeholders have been let down by a lack of visibility and accountability, and through key failures in corporate governance. Traditional forms for company governance were severely criticised and it became recognised that the opportunities for holding a board to account were limited.⁶⁸ This was one crucial factor in the increased

⁶⁴ Philip Haynes, *Public Policy beyond the Financial Crisis: An International Comparative Study* (Routledge 2012).

⁶⁵ Norman (n 11).

Prime Minister’s speech on Big Society (n 11).

⁶⁶ Stephen Yeo, ‘The New Mutualism and Labour’s Third Way’ in Johnston Birchall (ed), *The New Mutualism and Public Policy* (Routledge 2001).

Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Polity 1998).

⁶⁷ See, for example, Norman (n 11).

⁶⁸ See e.g. Hutton (1995) *Report of the Ownership Commission* (2012), which can be accessed on <www.mutuo.co.uk>.

concern towards developing legal forms for a more 'socially responsible capitalism',⁶⁹ forms in which building systems of accountability was crucial.

'Socially responsible capitalism' was concerned not only with accountability to those who were obviously stakeholders in any particular business enterprise, but also with the economic and social well-being of society as a whole. Thus not only were strategies to be developed for holding company directors more rigorously to account, on behalf of both investors and related stakeholders, but other forms of incorporation were also to be encouraged, especially those that emphasised the interests of workers or stakeholders as 'investors' in the enterprise, as well as legal forms that encouraged enterprises set up in the interests of, or for, the benefit of the community. 'Socially responsible capitalism' was a mixed model of many different corporate forms, operating together to build a more sustainable economy and a healthier social order.⁷⁰

Thus, for the first time, conservative thinkers became actively interested in the legal and business forms more traditionally associated with socialism and liberalism – in particular, mutuals and cooperatives. Rather than simply standing for free-market economics, they sat under the rubric of the 'Big Society', which would be committed to a socially responsible market concerned with socio-economic regeneration and social renewal.

2.2 SOCIAL RENEWAL: 'SOCIAL ENTERPRISE' FOR 'SOCIAL CAPITAL'

Social enterprise is defined in government literature as:

... a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners.⁷¹

The use of the word 'primarily' suggests that some but not all of the SE's objectives are social and that profits are 'principally' – but not necessarily entirely – reinvested into either the enterprise or the community. This indicates a level of flexibility in the SE as a term of reference. And, indeed, the term SE is a business heading only; it merely describes the purpose of the business and not the legal form or its taxable status. It describes a sector rather than defining a particular form of commercial activity.

On the history of capitalism, companies and law, see Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854–1920* (Ashgate 2009).

⁶⁹ Hutton (n 68).

⁷⁰ *ibid.* Also see Norman (n 11).

⁷¹ Department for Business, Energy and Industrial Strategy, 'A Guide to Legal Forms for Social Enterprise' (*UK Government*, 21 November 2011) <www.gov.uk/government/publications/legal-forms-for-social-enterprise-a-guide> accessed November 2014.

Although seemingly a well-established working term within the SE sector, and a term regularly employed by government and policy-makers, the lack of a clear definition has created an environment in which the general public may not be able to differentiate between different organisations working for the public benefit. For instance, a charity – in which all surplus of profits must be returned to the charitable purpose – and a social enterprise – which holds discretion as to the distribution of profits, which can be drawn down as directors' dividends or invested outside of the social purpose – may be seen as similar or the same, despite their fundamental differences. These differences are significant yet not evident at first glance within the sector – or, more widely, in the public sphere. However, Gunn et al. (2010) argue that:

... what is common across all definitions of social entrepreneurship is the stipulation that the major underlying drive for social entrepreneurship is the creation of a social value that is produced in collaboration with people and organisations from the civil society who are engaged in social innovation that usually implies an economic activity.⁷²

The research from the case studies examined during the course of this work suggests leaning towards understanding a definition of SE as both an ideal process and, importantly, as a legal form, in that those committed to delivering local social renewal utilise the appropriate legal forms and business models to support their aims. We can think of this as building on and delivering 'social capital'.⁷³ And, if any term can hold the sector together more cogently, then a search for a definition of SE is required with a focus on 'community benefit returns'. A 'community benefit returns' test, which focuses on outcomes, might offer a measure for judging the SE. It is no surprise that it is 'community benefit' that runs as a thread – the crucial criterion – through all legal and business forms dedicated to the growth and delivery of social capital. However, it is further required that levels of collaboration and participation are indicated as measures to be judged, in addition to community benefit.

In June 2013, the Cabinet Office claimed there to be some 180,000 social enterprises in the UK, generating £55 billion for the economy.⁷⁴ However, it can be noted that the issues of meaning and confidence in the sector among the general public still constitute an obstacle for the

⁷² R Gunn, C Durkin, G Singh and J Brown, 'Social Entrepreneurship in the Social Policy Curriculum' (2008) 4(1) Social Enterprise Journal 74.

⁷³ Tristan Claridge, 'Social Capital Literature Summary' (*Social Capital Research*, 7 January 2004) <www.socialcapitalresearch.com/literature/summary.html> accessed June 2013.

'Social capital does not have a clear, undisputed meaning, for substantive and ideological reasons (Dolfsma and Dannreuther 2003; Foley and Edwards 1997). For this reason there is no set and commonly agreed upon definition of social capital and the particular definition adopted by a study will depend on the discipline and level of investigation (Robison et al. 2002). Not surprisingly considering the different frameworks for looking at social capital there is considerable disagreement and even contradiction in the definitions of social capital (Adler and Kwon 2002).'

⁷⁴ Cabinet Office, 'Social Enterprise: Market Trends' (May 2013)

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/205291/Social_Enterprises_Market_Trends_-_report_v1.pdf> May 2015

development of social enterprises. The Social Enterprise Mark and membership to Social Enterprise UK (now Fair Business)⁷⁵ have attempted to provide processes through which SEs can be recorded as meeting key standards. However, only 450 social enterprises have applied for certification, which stands in strong contrast to the Cabinet figures. Given the size and importance of this sector, its regulation and governance must be more clearly defined, rather than being held together loosely and carried in a number of legal forms. In 2013, a Cabinet Office report noted that 56% of social enterprises with a 'very good fit definition, found regulation an obstacle for them as a social enterprise'.⁷⁶ It seems that the sector is subject to tension between, on the one hand, a lack of clarity in the definition available from the different forms operating within the sector and, on the other hand, a wish to keep things flexible and open to interpretation as inclusively as possible.

2.3 THE RANGE OF LEGAL FORMS FOR SOCIAL ENTERPRISES

The coalition's period of office (2010–2014) was marked by legislative activity aimed at providing a range of legal forms for social enterprises. This legislative profile was part of a raft of statutory reforms concerned with advancing and supporting many aspects of the 'Big Society' agenda and the development of a focus on localism. Much of this in relation to SE built on initiatives begun by previous governments, but often with a sharper focus and a very immediate imperative, given the financial crisis.

The SE programme drew from three existent tropes of legal and business models to build a profile for the sector, as follows:

1. A model derived from company law: the community interest company;
2. A model derived from cooperatives and mutuals (industrial and provident societies): the community benefit society;
3. A model derived from charities law: the charitable incorporated organisation.

Together, these three models provided a spectrum of potential for SE, each developed specifically to address the concerns of building social capital and delivering community benefit. And yet each is rather different in form, sometimes subtly and sometimes quite overtly, with many of these disparities arising because of the forms' differences in origin. The central questions in this research are aimed at addressing and understanding these differences as well as their similarities.

⁷⁵ These are two separate organisations that major in the field of social enterprises.

⁷⁶ Cabinet Office (n 74).

It is possible to interpret the emergence and adoption of this range of legal forms for SE as a positive renewal for those sectors that have not been part of mainstream capitalism and the private free market.⁷⁷ It is also possible to interpret the new emphasis on community empowerment as a chance for communities to reassert themselves as active political agents. However, it is also true that these profiles have emerged as part of an economic crisis, in which both cuts and job losses are an everyday reality. This is both the tension and the challenge; how can these new forms be used to actually help deliver some community benefit and contribute to some social renewal?

Community interests are also being recognised in the twenty-first century in legal reforms within the area of property law, which have in small part recognised 'property' rights that go beyond purely private ownership to encompass the recognition of community interests and benefits. The Commons Act 2006, the Localism Act 2011 and the Growth and Infrastructure Act 2013 were all designed, in different ways, to empower and engage communities, thereby 'becoming a powerful political, legal and social tool raising questions regarding identity, community and sociality', according to Holder and Flessas.⁷⁸ They further argue that 'in a world in which global warming, identity politics, religious conflict and political differences all contribute to the increasing atomization of the individuals and communities, the trope of commonality has immense power'.⁷⁹

It can at this stage be acknowledged that, indeed, a 'trope of commonality has immense power', and that this may take form within a number of political agendas. The witnessing of the global crisis in 2008 opened up the opportunity for a re-evaluation of socio-economic priorities. This re-evaluation was given further impetus after the events that unfolded in August 2011. The riots across the UK gave rise to the urgent need to address the imbalances, inequality and exclusion within society as a national priority.

⁷⁷ Geoffrey Ingham, *Capitalism: With a New Postscript on the Financial Crisis and its Aftermath* (Polity 2008).

⁷⁸ Jane B Holder and Tatiana Flessas, *Emerging Commons* (Sage Publishing 2008).

⁷⁹ *ibid.*

disenfranchisement.⁸³ Overall, what the events evidenced was a need to build social as well as economic capital, and to find ways of reintegrating as well as regenerating 'communities'. The complexities in building socio-economic capital for renewal are all too obvious, but so too is the need to find ways of doing so.

The events of summer 2011 underscored the need for change but also rendered visible some evidence of potential: ordinary people came out to help those who had suffered, and to clean up their localities without waiting for government intervention (or support). Ordinary people showed a remarkable commitment to community and the building of it.



Figure 2.2: The clean-up operation⁸⁴

The politics driving alternative legal forms for SEs continued to hold purchase. The SE agenda saw David Cameron elevating it onto the global stage, resulting in the social entrepreneurship agenda moving across local and international agendas. This resulted in unprecedented pledges of funding to support SEs, as witnessed at the Social Capital Markets Conference in September 2013.⁸⁵

Capital fundraising and/or grant funding may only be open to certain types of legal forms; evidence suggests that the majority of CIC's dissolve consequently as noted in the Regulator of Community Interest Companies annual report 2015/2016. SEs may face restrictions in terms of eligibility when applying for funds. The particular terms of a grant or fund may insist on the organisation being a registered charity, for instance; further restrictions may apply when endeavouring to raise capital funds – for example, from equity. Sometimes funding is also

⁸³ MPs Debate English Riots (n 81).

⁸⁴ The Guardian.com.

⁸⁵ David Cameron (Social Capital Markets Conference, September 2013). For further details on the political agendas associated with social capital markets, see <http://socialcapitalmarkets.net>

limited because of the lack of property or assets against which to secure loans, but sometimes it is simply related to a fear of innovation and an unwillingness to engage with new forms of enterprise.⁸⁶ In recognition of these difficulties, David Cameron announced at the Social Capital Markets Conference (SOCAP), held in September 2013, that significant funding for SEs had been and was to be made available.

SOCAP is now an annual event, which connects together global investors, foundations, institutions and social entrepreneurs. The 2013 event confirmed that levels of funding for SEs were at an all-time high and still growing, and that the returns and success rates of investment were exceeding expectations.⁸⁷

2.5 CONCLUSION

With accessible funding to hand, it surely remains crucial that we are able to identify the key elements that are important to any SE in terms of its legal form, as well as being able to differentiate them from investor-owned capitalistic corporations, which are the different legal forms on offer.

The four critical areas in considering differences in the structure of governance and regulation are as follows:

1. The permitted rules (articles) and constitution, and amendments thereof;
2. Governance on surplus (profit) distribution, and asset-locking facilities;
3. Governance of transformation and dissolution of enterprise, either solvent or insolvent;
4. Rules on voting by either membership or shareholders.

This work argues for additional legal guidance for rules 1 and 4 above. Rule 1 requires precise measures associated with achieving the stated and regulated community interest test and community benefit society statements. Rule 4 requires guidance on community participation and representation measures, thereby giving a means by which accountability can be pursued.

Chapter 3 offers an insight into the theoretical considerations of securing social capital and the growth in alternative business models. This is supported by acknowledging the challenges faced

⁸⁶ Interview with Eamonn Rooney and Terry Begent, Directors of the Leas Lift Community Interest Company (Folkestone, 10 July 2012).

⁸⁷ Social Capital Markets Conference (n 85).

in developing or introducing an alternative type of business. The work draws from both David Colander and Erik Olin Wright, who consider the governmental, social and commercial considerations in this field.

Chapter 3 then compares the fundamental similarities and differences between the available legal forms (business structures) open to social enterprises whose emphasis is on community benefit or community interest. It details them from a legal and technical viewpoint, endeavouring to discover what aspects within the given legal form make it suitable and fit for purpose for social enterprises. To accompany this textual, descriptive chapter, a matrix of the available legal forms and their distinctions can be found in Appendix 1.

The chapter concludes with an introduction to the case studies that have been used to further investigate the available legal forms in actual use. These case studies consider businesses who are pursuing community benefit and/or community interest objectives.

This chapter discusses the comparisons between the available legal forms open to social enterprises whose emphasis is on objectives for 'community benefit' or 'community interest'. It sets out their general purpose and functions, both descriptively and diagrammatically, including the emerging legal forms for social enterprises, such as community interest companies (CICs hereafter) and community benefit societies (CBSs hereafter). It compares them to the pre-existing investor-owned capitalist corporation models (whether privately, publicly or quasi-publicly owned).

The work draws reference from David Colander, an iconoclastic economist, and Erik Olin Wright, a sociologist in social stratification, in order to gain a wider understanding of the demand for alternative legal forms in terms of both their use and their standing in the economy, while also tracking their momentum in terms of legal amendments during the time period of this research.

The term 'alternative' is used to introduce another option aside from the investor-owned capitalistic corporation model, which pursues shareholder profits. Such models see a high percentage of the shareholders owning shares, and these shareholders do not contribute to the business activity, either directly or indirectly; they merely receive profits by way of dividends on their shares.

Historically, the term 'alternative' would have been associated with cooperative societies. Cooperatives originally derived from the term 'cooperate', and saw those who contributed in some way to a given business and/or those listed on a membership base benefiting from the profits or surplus of the given business. Examples of cooperation in cooperatives can be observed through those who pool resources, as seen in farmers' cooperatives or worker cooperatives. However, what has now emerged is a company legal form, run for the benefit of others – communities who do not contribute or who are not registered as members or identifiable as beneficiaries.

A traditional, investor-owned capitalistic corporation is held accountable by its shareholders, through established rules that are mainly executed in annual general meetings. Shareholders have some rights; however, their control over the company is somewhat limited, as it is run and managed by the board of directors.

Arguably, there is a very similar process for membership-based cooperatives and mutual societies, achieved through meetings.⁸⁸ However, greater emphasis is placed on ensuring that the concept of democratic control is acted upon; this is a fundamental defining principle and a differentiator to that of the legal structures found in investor-owned capitalistic corporations. The new, emerging legal structures offered in CBS models do not require such democratic control. This therefore opens up a very pertinent question, and one that sits at the heart of this paper: who holds the business operators to account?

The two primary legal forms aimed at SEs – CICs and CBSs – are discussed in detail in Sections 3.3 and 3.4, respectively. An incorporated company holds its own legal personality, and its surplus is distributed according to the company's constitution; this area of governance is extremely similar in SEs, and is explored in this chapter. This chapter seeks to identify and understand the second critical question discussed in Chapter 1: how is community benefit measured, managed and ultimately regulated? This chapter looks specifically for clarification on governance and accountability and how profit/surplus is distributed.

The demand for alternatives has come from stakeholders, consumer groups, worker forces, entrepreneurs and governments, driven to address the effects of social exclusion and the imbalances of power in societies, as evidenced in Section 2.4. Much imagination has been required from both the communities on the ground – a 'bottom-up' emergence – and from incentives from the state, a 'top-down' process. This imagination was needed to organise and create alternative business models with supporting legal structures. However, what has been brought into force through the Cooperative and Community Benefit Societies Act 2014 is the modernisation and amendment of pre-existing legal models. Here we see a missed opportunity and a lack of imagination, which fails to include the essential elements for which this thesis argues: the vital community interconnections of participation, through representation and measurable outcomes. This is supported by Wright, who notes that 'developing a theory of alternatives to capitalism at the beginning of the twenty-first century is a pressing task, as for most people capitalism now seems the natural order of things'.⁸⁹ Like many natural orders, there lays an ability to evolve, and in the present day there appears to be an appetite due to what is at stake.

⁸⁸ Snaith (n 2).

Co-operative and Community Benefit Societies Act 2014, general provisions.

⁸⁹ Wright (n 14), p2

3.1 LEGAL MODELS: WHAT IS AT STAKE?

It is at this juncture that one should recognise tensions; whose responsibility is it to address social welfare needs and to fund addressing them? Funding requires, firstly, surplus by way of profits or by raised taxes and, secondly, effective distribution of this surplus. Further tension exists as to how the state should influence and address welfare imbalances in order to ‘reduce human suffering and expand the possibilities of human flourishing’.⁹⁰ Each requires a coherent strategy and enabling legal structures, in addition to consideration with reference to materialistic values and inequalities. We return briefly to issues with measuring material values as an indicator of well-being, as this is also the primary measure within the incumbent business forms in operation – namely the capitalistic corporation model.

The capitalistic corporation model deals with delivering material value; a corporation’s primary responsibility is to deliver profit for its stakeholders. The Western world can be observed as being highly dependent on its ability to consume, and therefore material welfare is key. Colander states that ‘material needs are limited, material wants are essentially infinite, so this change gave for-profit corporations an extended, almost unlimited, role in an increasingly materialistic society’.⁹¹

What was witnessed during the period of this research was an awakening in our society of its own interdependency on material welfare; its insatiable materialistic appetite was questioned. The recognition that a focus on achieving social material welfare may be the cause of major imbalances in our societies was witnessed in Section 2.4. And in recognising that, in order to enjoy material welfare, we need security in communities, a sense of responsibility to balance material and social welfare in conjunction with each other is therefore identified and required. This leads again to the same question: whose responsibility is it and how can surplus be achieved and distributed to improve social welfare?

Colander⁹² states that governmental frameworks are not efficient at providing social welfare. The problem with the government providing social welfare is the same as that of the government providing material welfare: the economy is too complex to deal with a control framework, and our social system is also too complex. Colander suggests that governments create a border ecosystem – one of material and social preferences, which can be articulated and acted upon. He notes the importance of there ‘not being a substantial separation of people, those donating and those that actually carry out the spending of the funds, and the beneficiaries

⁹⁰ *ibid* 2, 1.

⁹¹ Colander (n 27) 72.

⁹² *ibid*.

of the funds'.⁹³ Any form of separation is unhealthy. Colander⁹⁴ notes that separation of welfare and material goals allows people to compartmentalise their lives.

This appears to be evident in the case studies within this paper; the importance of association and participation are evidenced as being significant. However, we can see the introduction of the compartmentalisation of material assets and ownership when the asset lock facility is put in place, as they are structurally separated and, at times, totally removed. The imbalances within communities between the 'haves' and the 'have-nots' may be partially due to imbalances over ownership of assets (wealth and property) and power. As described by Sherry Arnstein,⁹⁵ there is a discourse with 'social ownership' when contrasted with 'private ownership'; in practice, it generally collapses into state ownership.⁹⁶

If we consider our communities as ecosystems, which are evolving due to constant changes, we can see the need for a sustainable welfare policy that is managed by those who are intrinsically affected: those donating time or funds, those spending the funds and managing the community assets, and those who are receiving the community benefit or community interest. Achieving this requires supporting governance and accountability that prevents non-separation and encourages effective participation through representation, via rules 1 and 4 as noted in Chapter 2. The CBS model that has emerged is both flexible and vague. For instance, the non-requirement for named beneficiaries does little to encourage participation; arguably, it promotes the very opposite. Therefore, it can surely be argued that additional legal guidance is required in order to promote the necessary interconnections between different actors within communities and wider stakeholders.

When comparing legal forms for social enterprises, accountability needs to be a key feature. Social enterprises who purport community benefit aspirations, and those who are assigned to community interest tests, need to be clear in the 'statements' that sit at the core of their existence.

The nature of social enterprises suggests that their purpose is social and for benefit or interest – but how is this social nature tested? A charity must conform to public benefit tests; all surpluses are returned to their charitable objectives and the charity is accountable to the Charity Commission. While a corporation's duties are to pursue profit, they are still accountable to their shareholders. Accountability for CICs and CBSs is discussed in detail in the following sections

⁹³ *ibid* 74.

⁹⁴ *ibid*.

⁹⁵ Arnstein (n 9).

⁹⁶ Wright (n 14).

3.3 and 3.4. When reviewing the options, we learn that there is very little in the way of guidance as to the tests that are sought to be met in order to ascertain approval of a CIC or CBS, and no guidance on how to frame and draft the essential constitutions and charters. All require some form of mechanism to measure accountability, hence this work's recommendations.

The need for identifiable alternatives to the current structures is important in the twenty-first century; the need for the state to provide a greater ecosystem, through well-drafted legislation and guidance, is paramount.

Legislative changes throughout the period of the coalition government have consolidated and expanded the range of legal forms available to carry the policies that drive social enterprise.

The remainder of this chapter will do the following:

- 1) Examine the range of legal forms, their characteristics and their differences in terms of governance and accountability.
- 2) Pose the question of whether all, any or some in particular are well designed in terms of combining economic viability with the delivery of 'community benefit'.
- 3) Establish the crucial criteria for making such a judgment.

3.2 TO BE OR NOT TO BE INCORPORATED?

Social enterprises are free to adopt one or multiple/hybrid legal forms and can choose a variety of options, from legal structures originating from forms constructed as companies through to legal mechanisms, such as trusts and charities, as well as friendly societies, all of which are intended to achieve similar outcomes.⁹⁷

Subject to the form adopted, essential factors require consideration. Examples include who owns or holds the assets – such as property in land – and whether these can be locked away in order to protect them; the decision-making processes; how funds are raised, either through grants or loans; rules on profit and surplus distribution; and rules on winding up or liquidation, extending to the ability to demutualise the organisational legal form in order to convert into an investor-owned company. These characteristics will be discussed, and a comparative matrix is attached in Appendix 1.

⁹⁷ Snaith (n 2).

Many community groups and clubs tend to stay unincorporated. For many amateurs, the regulations associated with forms of incorporation are too cumbersome and restrictive. However, the possibility of being sued, due to a lack of limited liability and the difficulties in entering into contracts and accessing certain streams of funding, has driven the search for forms to incorporate SEs.

Social Enterprise London (a regional agency) looked at the obstacles related to the development of social enterprises and discovered that regulation in particular was a barrier, with 56% stating that it was a barrier to the success of their business, and a further 47% stating that it affected them in terms of obtaining funding.⁹⁸

It is useful to understand why regulation is important and what it sets out to differentiate. Primarily, regulation is the ability to correctly identify the appropriate legal form when creating an enterprise, and it aims to deal – or not – with obstacles, as evidenced in the case studies that follow in Chapters 4–6. The research for this thesis demonstrates the importance of adopting the correct legal form for an SE in terms of raising the necessary funds, acquiring and protecting property and, importantly, time and branding.

The introduction of amended and consolidated legislation in 2014, which stretches back the initiatives begun by the previous government, aimed to address these regulatory barriers, therefore making the construction of legal forms for SEs more accessible. The legislation is aimed at being efficient and effective at raising social and economic capital, ultimately positioning SEs as being economically viable. Introducing further regulatory regimes, however light-touch they are, is always likely to improve public confidence in those emerging commercial sectors concerned with social factors as the core purpose of their business activity.

Traditional business enterprises can operate through a range of structures, from unincorporated businesses, sole traders and partners to incorporations, which include incorporated limited partnerships, private or public companies. To begin with, it is useful to remember the most significant reason for incorporation.

In an unincorporated business structure, it is the actual individual(s) who holds legal personality; those who conduct the business activities carry the rewards and the risks – the ownership of the assets and the ability to sue or be sued. They are not governed by a constitution or registration that determines either their form or their rules of engagement with

⁹⁸ Social Enterprise UK, 'The People's Business: State of Social Survey 2013' (APPG on Social Enterprise, Westminster, 2013).

other businesses; therefore, there is no test regarding their business purpose or core-trading objectives. They are subject to the usual regulations and restrictions concerning the Inland Revenue, along with the relevant safety regulations and licensing requirements, but otherwise they are free to trade. The key characteristic is that they are personally liable for any losses incurred through their business activities.

However, in incorporated associations, a separate legal personality is established for the purpose of running the business. This separation can be used to effectively build a wall between the wealth of the business and the private wealth of the individuals running it, in their capacity as operators of the business. This is known as 'limited liability', because it protects the private individual from being personally financially accountable for business failure. It was first developed in the nineteenth century to protect directors of industrial and provident societies.⁹⁹

Subsequently, limited liability has become a central feature of capitalism, the market and economic enterprise, usually to be found in the form of a limited company. However, in 2000, the Limited Liability Partnerships Act 2000 extended it to also include partnerships, as long as they comply with the Companies Act 2006 in terms of governance, filing reports and accounts.¹⁰⁰

Thus the main benefit of incorporation is the limitation of the risks associated with the business to the incorporated enterprise, rather than them being carried by the individuals behind the organisation. This can be particularly beneficial when leasing property, taking out loans or employing staff, and, of course, tax is deducted from the incorporated entity and not from the individual's personal income.

We can therefore say that there are two further considerations in deciding whether a business should remain unincorporated or register for incorporation:

1. Issues of tax: an unincorporated sole trader is subject to profits being taxed against the income of the individuals involved, usually through the individuals being classed as self-employed. In incorporated organisations, it is the business entity that is taxed; business thresholds for tax exemptions are often attractive and it is easy to see why it is often financially beneficial for individuals to adopt an incorporated form, as this avoids personal income tax liability.
2. Issues of privacy and administration: one effect of incorporation is that all company reports and accounts are held by the government and are open to the public.

⁹⁹ See further McQueen (n 68) and Snaith (n 2).

¹⁰⁰ For full rules on limited liability, see Companies Act 2006 (regulations 2009, SI 2009/1804).

Of course, there is evidence of limited liability structures being used in circumstances that seem to allow individuals to trade with risk and loss without taking personal financial responsibility themselves for the consequences. As with trusts, the company form can be used to hide actual control over an enterprise, as well as real ownership of profit and assets.

Global capitalism and the effects of using companies as little more than investment opportunities have led to major concerns in many communities and localities over issues such as who is running the business, who is profiting from it and whether the profiteers care about the local impact or the future of the communities that are 'hosts' to the businesses.¹⁰¹ Dani Rodrick's work discusses community disconnect as a consequence of globalisation and how, contrary to this, inclusive communities and global business can prosper.¹⁰²

A solution and a trend that began developing in 2016 is a call for key stakeholders in global businesses to have improved local representation and workers on boards. This thesis heavily supports the suggestion that both workers and community members are placed on boards, as it is they who hold the greatest level of interest and benefit in the future and success of the companies or enterprises.¹⁰³

We can see that the traditional route for small community groups and clubs, in terms of remaining unincorporated, is obviously problematic in a number of ways, from leaving officers unprotected against debts and losses through to difficulties in entering into contracts, holding assets or raising credit. However, the issue is now whether the introduction of the new forms has removed the concern over the cumbersome regulations and the sense that there was not a suitable business model for social enterprises. It is the aim of the consolidated legislation to address the factors that had restricted the development of some small-scale local enterprises, which are designed to meet community benefit or community interest.

The introduction of the amended and consolidated legislation, completed in 2014, was aimed at making the legal forms available for use by SEs more accessible, efficient and effective, in terms of using, growing and sustaining both social and economic capital. It is therefore reasonable to review the legislation and ensure that SEs have the required guidance and regulation in order to deliver the objective of 'social benefit'.

¹⁰¹ See further McQueen (n 68) and Hutton (1995, 2010, 2015).

¹⁰² Dani Rodrick, *The Globalization Paradox* (Oxford University Press 2011).

¹⁰³ See further Janet Williamson, 'Workers on Board: The Case for Workers' Voice in Corporate Government' (*Trades Union Congress*, September 2013) <www.tuc.org.uk/sites/default/files/Workers_on_board_0.pdf>

Three legal forms have been designed specifically for the use of SEs. This does not mean that other forms cannot be used, but these forms have been specifically designed to meet the following criteria:

1. A means through which to recognise the reasons why the enterprise has been established and through which to test efficacy in the delivery of that aim, in order to deliver key benefits to support the running of the enterprise and, thereby, the overall concern of 'benefit to the community'. (This is similar to the operation of provisions concerning the benefits of charitable status.)
2. A registration and regulatory mechanism that is not too cumbersome (for smaller-scale enterprises) and yet is still sufficiently robust (for larger-scale enterprises).

The first two legal forms designed for use by SEs are the community interest company (CIC hereafter), derived from company law, and the community benefit society (CBS hereafter), derived from industrial and provident society law. A third has recently been developed, the charitable incorporated organisation (CIO hereafter), derived from charities law. Charitable status can be an addition to other legal forms, available, for instance, to a company whose objectives match the charitable criterion of 'public interest';¹⁰⁴ however, this results in regulation by two agencies: the CIC regulator and the Charity Commission. The introduction of CIOs has removed this duality and placed the third legal form under the regulation of the Charity Commission. Not only is this third form rather new and untested, compared to the other two, but it is also rather different in that the key criterion is 'public' rather than 'community' benefit. We shall examine what difference this may mean in practice after looking at each of the three forms.

We should note at this point that these legal forms may be used in association or in combination with other legal forms, such as trusts or CIOs. It is also possible for an SE to be carried by a legal form not designed specifically for its purpose. This is especially true in the use of legal forms traditionally associated with charities, in which the charitable concern is the primary issue and the legal form is designed to carry out that purpose, yet a trust or company is the mechanism used for the operation. Charities are concerned with 'public benefit' and are clearly closely associated with SE.

¹⁰⁴ Charitable status can also be achieved by a trust.

The two more orthodox legal forms are CICs and CBSs, which will be examined in more detail before moving on to a consideration of charities. Examining charities is important because of the closeness and similarity between charitable aims and SEs.

3.3 COMMUNITY INTEREST COMPANIES

3.3.1 GOVERNANCE AND ACCOUNTABILITY

A CIC can be held by guarantee or shares, and its governance can be found in the Companies (Audit, Investigations and Community Enterprise) Act 2004.

Their permitted rules are in their governance documents, their articles and constitutions are found in their Memorandum and Articles of Association and must essentially include:

6.1.6. The community interest test and the asset lock;

There is a clear relationship between the asset lock and the community interest test in that the test may not be seen to be met if a reasonable person might consider that the activities of the CIC are being carried on for the benefit of the company's directors, employees or service providers rather than for the benefit of the community.¹⁰⁵

A CIC that is limited by shares operates its voting based on one vote per share, and the owners can be classed as being the shareholders while the managing body is the board of directors. A CIC limited by guarantee operates its voting based on one member, one vote, and the owners can be classed as being the members while the managing body makes up the trustees.¹⁰⁶

The end of 2014 saw the CIC regulator approving 9,871 CICs¹⁰⁷ under the Companies Act 2006.¹⁰⁸ CICs are particular legal forms that proved to be an important asset in the coalition's strategy for supporting and developing social enterprises – perhaps, in part, because this form is derived from one already familiar to entrepreneurs and businessmen, that of the company.

The annual report by the CIC regulator for the second quarter of 2014–15 reads as both a celebration of success and a product branding exercise. It includes data on events to promote CICs but no data on any 'negative' action taken by the regulator against a CIC. It does note the

¹⁰⁵ Companies (Audit, Investigations and Community Enterprise) Act 2004 (Commencement No 18) Order 2004 Regulations 2009, SI 2009/180.

¹⁰⁶ In this respect, it mirrors the forms available for cooperative enterprises, as incorporated through industrial and provident society legislation before the major reforms distinguishing between member societies and community benefit societies.

¹⁰⁷ Companies (Audit, Investigations and Community Enterprise) Act 2004 and Companies Act 1989 (Commencement No 18) Orders still govern CICs.

¹⁰⁸ Annual report by the CIC regulator for the second quarter of 2014–15.

number of dissolved CICs; for example, in 2013/2014 and 2015/2016¹⁰⁹; 1, the regulator approved 2,494 new CICs, while 976 were dissolved in the same period and 11 were converted to the newly available charitable status.

As CICs are designed for social enterprises who wish to use assets and profits for the public good, their legal form is intended to be easy to set up (a sample copy of an application is attached in Appendix 2). With the benefits of corporate legal personality, they carry distinctive features that differentiate them from the usual investor company in order to ensure that they work for the community rather than for shareholder benefit. These distinctive features are primarily:

- i) the use of the 'community interest' test;
- ii) the asset lock;
- iii) dividend and interest capping restrictions;
- iv) the introduction of the CIC regulator, who has extensive powers to approve, supervise and investigate CICs, with the power to change directors, manage CIC property, bring civil proceedings and petition for the winding up of a CIC;
- v) the condition that a CIC must register with, and satisfy the requirements of, the CIC regulator.

The first two features will now be examined in more detail.

- i) The 'community interest' test:

The community interest test requires that 'a reasonable person might consider that its activities are being carried on for the benefit of the community' and 'excludes activities that a reasonable person might consider to promote or oppose changes to the law or to the public policy, support a political party or political campaigning organisation or influence voters community'.¹¹⁰

The CIC community interest test is an annual test, and CICs are being reviewed annually by the regulator in order to check that the CIC still meets the criterion.

¹⁰⁹ See appendix 3 and 6.

¹¹⁰ 'Office of the Regulator of Community Interest Companies: Information and guidance notes – Chapter 4: Creating a Community Interest Company (CIC)' (*Department for Business, Innovation and Skills*, May 2016) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/407433/13-781-community-interest-companies-chapter_-4-creating-a-CIC.pdf> accessed July 2012.

ii) The asset lock:

There is a clear relationship between the asset lock and the community interest test, in that the test may not be seen to be met if ‘a reasonable person might consider that the activities of the CIC are being carried on for the benefit of the company’s directors, employees or service providers rather than for the benefit of the community’.¹¹¹ Therefore, placing an element of regulatory control over the assets is seen as a protective device, and all CICs must employ asset locks.

However, the term ‘asset lock’ is a little misleading, since it suggests a ‘lock in’ of all the assets into the CIC. This fails to draw the distinction between current or cash assets and fixed assets; it is the latter that comes under the ‘lock’. Further, it must be understood that the assets are being locked away from either being alienated by the directors (for instance, used as if current assets and spent¹¹²) or being exploited by them. In the Leas Lift case study, the asset lock is used in two ways. Firstly, it’s used to separate the CIC business enterprise from the land and the property – that being the lift, which is safeguarded to the property owners. Secondly, it is a way of holding all the property owned by the CIC, such as the shop stock, ticket machine, and so on. Should the CIC cease to trade, the assets – the shop stock and the ticket machine – could be sold or given to another CIC registered company. We witness here the legislative endeavour to secure the assets as a core around which – perhaps even *for* which – the enterprise is organised. The assets remain after the enterprise is wound up. Therefore, on registration, CICs are required to detail the assets that are subject to the lock and the body (organisation) that will, in the event of the company ceasing to trade, have the assets transferred to them.¹¹³ The body receiving the assets must also be a CIC or equivalent; they will then continue to manage and use the assets for community benefit, albeit through a different organisation.¹¹⁴ If necessary, a transfer may be made to another body utilising the asset lock that was not specified in the CIC articles, with the consent of the regulator. Further, assets subject to the lock may, in certain circumstances, be traded for full market value, as long as the CIC retains the value of the transferred assets.

The asset lock facility is progressive, yet it fails to secure a community’s material value in a local asset and allows for separation of local assets.

3.3.2 SURPLUS AND PROFIT DISTRIBUTION

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ This provision is very similar to orthodox cooperative law, in which the assets of a cooperative must, on any cooperative being wound up, be transferred to another cooperative. It also resonates with the provisions for transferring assets from a charity that is being brought to an end – traditionally under mode, but now more often under a scheme either designed or approved by the Charity Commissioners.

¹¹⁴ Creating a Community Interest Company (n 109).

The dividend cap encourages people to invest in CICs by allowing dividend payments to be returned; however, in line with the principle that the assets and profits of a CIC are for the benefit of the community, the dividend cap provision prevents dividend distribution becoming disproportionate to the amounts invested and the amount returned to the core purposes of the enterprise – this can range up to a cap of 25%.¹¹⁵

CIC directors can be paid a salary and may draw dividends, and the founders of the CIC can take a seat on the board as a paid director, therefore being able to influence strategic business decisions.

A CIC is not a charity, yet it may have charitable objectives and thus be granted charitable status if it meets the ‘public benefit’ test. In these circumstances, the CIC becomes subject to two regulatory regimes. If the CIC is not registered with the Charity Commission, it will not receive tax relief benefits.

With regard to the distinction between ‘public benefit’ and ‘community interest’, the latter has a lower threshold – one of ‘reasonable person’ – and is somewhat subjective. And although they have different legal regimes, one that is experienced and the other a relative newcomer, it falls to the effectiveness of the CIC regulator to investigate and ensure that ‘reasonable’ people are reviewing the activities of others in their community. Accountability is ‘in-house’ in a CIC, due to the close proximity of those who construct the enterprise, manage the enterprise and draw funds and distribute dividends.

3.4 COMMUNITY BENEFIT SOCIETIES

3.4.1 GOVERNANCE AND ACCOUNTABILITY

Following amendments and the consolidating legislative reform, ‘community benefit societies’ were finally brought into full fruition in the Co-operative and Community Benefit Societies Act 2014. The Act introduced a split between member group ventures and non-member group ventures, deciding on those that were cooperative societies and those that were community benefit societies. The history that forms the background to their development can be traced back to early nineteenth-century legislation concerned with establishing IPSs.¹¹⁶ This legislation was focused on enabling and regulating the establishment of membership groups into recognised cooperative and mutual enterprises. These were enterprise ventures, in which

¹¹⁵ Office of the Regulator of Community Interest Companies, ‘Leaflets: Information Pack’ (*Department for Business, Innovation and Skills*, May 2016)

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/524217/13-783-community-interest-companies-information-pack.pdf>

¹¹⁶ See further McQueen (2009), Snaith (n 2) and Bottomley and Moore (2013).

assets were held and enterprises pursued for the benefit of the membership. Further, under the cooperative model:

Members have democratic control of the business and share in its profits... It is owned by, and run for, the benefit of its members, who are actively and directly involved in the business.¹¹⁷

The owners of a CBS, under the 2014 Act, can be classed as being the members, with the managing body being the directors. The members vote using Model Rules 12th Edition,¹¹⁸ and all governance documents are permitted articles and constitutions. For a cooperative society, there are no social purpose tests; they follow the cooperative principles.¹¹⁹ However, a community benefit society must conduct business that is primarily run for the benefit of people who are not members, and it must be in the interest of the community at large.

The basis of the cooperative society element from the nineteenth century legislation onwards is that any membership group seeking to register as a cooperative must meet the criteria first set down in the 'Rochdale Principles', and subsequently amended by the International Co-operative Alliance. However, the legislation also provided for 'community benefit societies' that were not member-based cooperatives. For instance, the Prevention of Fraud (Investment) Act 1939 restricted the types of organisations that could register under the IPS formula to 'bona fide co-operatives and community benefit societies'.¹²⁰ It recognised and allowed for the existence of 'societies for improving the conditions and social well-being of members of the working classes and societies for the benefit of the community generally',¹²¹ rather than for the benefit of members.

The Co-operative and Community Benefit Societies Act 2003 first introduced the form of the BenCom, now associated with the CBS, along with the Companies (Audit, Investigations and Community Enterprise) Act 2004. The Community Benefit Societies Regulations 2006 introduced the facility of an asset lock, which could be used by CBSs. However, member-based societies and community-based societies remain rather too closely entwined together to make it easy for outsiders to understand their differences, despite significant reforms, consolidating

¹¹⁷ Co-operatives UK <www.uk.coop/simplygovernance> accessed July 2014.

¹¹⁸ Office of the Regulator of Community Interest Companies, 'Community Interest Companies: Model Constitutions' (*UK Government*, 1 August 2013) <www.gov.uk/government/publications/community-interest-companies-constitutions> accessed May 2016.

¹¹⁹ International Co-operative Alliance, 'Co-operative Identity, Values & Principles' <<http://ica.coop/en/whats-co-op/co-operative-identity-values-principles>> accessed May 2016.

¹²⁰ http://www.legislation.gov.uk/ukpga/1958/45/pdfs/ukpga_19580045_en.pdf accessed July 2015

¹²¹ *ibid.*

legislation and the new framings; this work argues that these legal forms are not clearly distinguishable.

Reform has also been enacted in relation to financial services and credit unions, which impacted on changes to the regulatory bodies for both types of society. The Financial Services Act 2012 abolished the Financial Services Authority and divided its functions between the Financial Conduct Authority (FCA hereafter), which would carry the responsibilities for the registration of mutual societies and the regulation of markets, and the Prudential Regulation Authority (PRA hereafter), which would henceforth regulate organisations engaged in banking and insurance (for example, credit unions, building societies and friendly societies). What developed was a clear separation between businesses in the financial sector and others. Further, substantive legislative amendments and statutory instruments across the sector were seen in the Co-operative and Community Benefit Society Act 2014 (CCBSA hereafter), which consolidated and amended all of the earlier IPS Acts. The existing legislation on IPSs is still applicable to any legacy organisations; however, new societies must now register under the CCBSA 2014, which constructs two very different legal forms for two very different circumstances. The first is the membership-based 'bona fide co-operative society' and the second refers to those societies that operate 'for the benefit of the community'.

3.4.2 SURPLUS AND PROFIT DISTRIBUTION

A cooperative society must follow the Co-operative Principles, which strictly limit returns, capital and share capital; the rules state that these are limited and should be low. Their regulator, the FCA, insists on this appearing in their rules on registration.

A CBS must not permit either profits or any of the society's assets to be distributed to its members. This is enforced by the FCA, who insist on it appearing on the mutual societies application form when the company is set up.

As with a CIC, a CBS might well achieve charitable status and be subject to regulation by the Charity Commissioners.

3.5 COMPARISON BETWEEN THE TWO FORMS

From a distance (as observed from the field research conducted in the case studies within this thesis), those who have backgrounds and experience in cooperatives and mutuals may lean towards a model of CBS, whereas those who have a background and experience in business may choose a company-form model – a CIC model. This has much to do with familiarity, but it might

also underscore some fundamental differences between the two forms. Most obviously, CICs have an automatic asset lock, whereas CBSs can choose whether to use one or not – on reflection, this might suggest that there is more need for protection in CICs than in CBSs. CICs require a ‘community interest’ test to be met in order to be registered, whereas a CBS’s test is that of ‘community benefit’. This would place them in exactly the same terrain in terms of objectives – but, in terms of processes and regulation, the subtle differences between them may actually point to very different cultures.

Neither model requires membership groups and both have tests that are subjective, as they are statements of ambition with no measures and rely heavily on the effectiveness of their different regulatory bodies.

Two of the major features that mark the differences between the two forms are, firstly, the ability to pay and to distribute profits among directors, which is seen as a motivator to directly encourage social entrepreneurship – despite restrictions applying to the overall percentage of profits distributed¹²² – and, secondly, the use of the asset lock. It is therefore possible to establish a social enterprise that can pay the creator a wage and dividends of the profits, without the consent or approval of the community it claims to serve under community interest and community benefit.

What is lacking is a clear distinction in the branding and, essentially, in terms of the distinctions between ‘public interest’ test, ‘community interest’ test and ‘community benefit’ test. The branding of the legal forms used by social enterprises must be identifiable by all stakeholders and classify key distinctions, such as surplus arrangements and decision-making, in order to achieve sustainable business forms. The current blurring of the registers may, in fact, harm the historical legal models designed to aid charitable intentions. This distinction needs to state the percentage of surplus returned to cause – or not, as the case may be (an example is offered in Section 7.5: Recommendations). Presently, there is a lack of accountability.

This work suggests further research to find out whether:

- 1) there is a difference in regulatory bodies and, if so, in what way(s);
- 2) there is a higher level of concern from regulators over one form than another;
- 3) there are any traceable differences between the two in terms of economic viability or social culture;
- 4) there are any significant differences in the operation of the criterion of ‘community benefit’ versus ‘community interest’;

¹²² C (AICE) Act 2004 s.30 and SI 2005/1778, reg 26 to 29 amended.

- 5) one or the other makes a more significant contribution to the development of social capital.

3.6 CHARITABLE STATUS

Under section 2 of the Charities Act 2006 (and subsequently the Charities Act 2011), a charity is defined as an organisation that falls under a specific list of purposes and meets the criteria of being for 'the benefit of the public'. Achieving the status of a charity carries considerable fiscal advantages, but it also subjects the organisation to the regulation of the Charity Commissioners, who monitor not only the accounts of the charity but also whether the organisation continues to meet the criterion of public benefit.

Statistics for the period leading up to June 2014 show a total of 163,709 registered charities, with a gross income of £63.4 billion.¹²³

It is possible to be registered as a charity using a number of legal forms: unincorporated associations, trusts, companies limited by shares or guarantee, CICs, CBSs or bodies established by Royal Charter or as a statutory corporation. However, many of these forms of incorporation require that the SE is subject to the relevant regulatory body. Therefore, when applying for charitable status, they become subject to two regulatory bodies.

The Charities Act 2011 (ChA 2011, hereafter) introduced a new form for SEs: a charity can now be structured as a 'charitable incorporated organisation' (CIO). The CIO is the first legal structure created solely for charitable organisations, and is aimed at delivering a combination of a corporate framework with charitable objectives.¹²⁴ On incorporation as a CIO, the charity will have limited liability. However, there was initially a structural problem with CIOs: the elements of additional compliance resulted in the possibility of it becoming a dual registration system, thereby reproducing the existing problem. As John Low, Chief Executive of the Charities Aid Foundation put it, somewhat bluntly: 'We've got ourselves into a terrible muddle. Charities with dual registration are regulated by charity law and company law. The two are not compatible.'¹²⁵ However, this hurdle has now been overcome, with the result that CIOs are only subject to charities regulation. They were finally introduced in late 2013, and it is currently too soon to say whether they will prove to be either popular or successful.

¹²³ Charity Commission, 'Charity Register Statistics for Previous Years: Charity Commission' (*UK Government*, 30 September 2014) <www.gov.uk/government/publications/charity-register-statistics/charity-register-statistics-for-previous-years-charity-commission> accessed December 2014.

¹²⁴ 'On a Structural Level' (*Charity Times*) <www.charitytimes.com/pages/ct_features/feb08/articles/ct_february08_feature1_on_a_structural_level.htm> accessed October 2014.

¹²⁵ Charity Commission (n 122.)

3.7 COMBINING LEGAL FORMS AND STATUTES

The emergence of legislation related to legal forms has led to combinations of forms being adopted – for instance, combinations of a number of legal forms within one enterprise, or a registration of a particular legal form within a particular ‘status’. As an example, many SEs will also carry charitable status. This may involve the entire enterprise being registered with the status of a charity, and thereby becoming subject to the charitable regime; or it may involve one section being set aside for charitable status whilst the rest of the organisation remains outside of the regime.

It is unclear how far being subject to the ‘public benefit’ test may or may not hinder the more flexible approach of SEs using the ‘community benefit’ test. Over the years, a jurisprudence has become established that has considered and developed the notion of ‘public benefit’, and the Charity Commission has been concerned with making sure that charitable status (and benefits) are not abused. We have yet to see whether the same kind of approach is likely to be developed for ‘community benefit’.

Other than charitable status, the other frequent combination employed by SEs is the use of trusts within a combined SE model – for instance, along with CBS. This has been used, generally, to protect assets through a form analogous to an asset lock. However, with the recent introduction of the compulsory use of asset locks for CICs and the potential to use them for CBSs, the use of the trust for these purposes may cease to be relevant.

What lies behind the legislative amendments is the desire to encourage social enterprise and build social capital. Three key legal forms have been innovated in order to encourage the growth of SEs, addressing (directly or indirectly, primarily or as part of a broader package) the delivery of ‘benefit to the community’ through enterprise. The UK Consumer Research, Focus Groups & Sensory Profiling noted that there are four key profiles for social entrepreneurs: activists, change agents, market pioneers and market influencers.¹²⁶ What is becoming evident is that the legal forms that are being established have recorded failure rates lower in comparison to less socially motivated organisations.¹²⁷

The next three chapters will examine the case studies in detail, while a brief overview is given below.

¹²⁶ John O Cooper, *Applied Behavior Analysis* (2nd edn, Pearson Education 2014).

¹²⁷ Pam Seanor, ‘Narratives of Transition from Social to Enterprise: You Can’t Get There from Here!’ (2013) 19(3) *International Journal of Entrepreneurial Behaviour & Research* 324

3.8 A BRIEF INTRODUCTION TO THE CASE STUDIES

The case studies are all drawn from Kent and are used to explore the use of legal forms to deliver community benefit. In all cases, fieldwork was undertaken in order to gain a better understanding of the situations involved. This encompassed interviews with the social entrepreneurs who were engaged with the enterprises.

The Port of Dover (Case Studies One and Two)

Events at the Port of Dover form a powerful study of legal processes and democratic consensus when a community asset is perceived as being at risk. Here, the community endeavoured to protect the most significant local economic asset for community benefit. Dover Port is a ‘Trust Port’, and was likely to become privatised. The local community – or rather, local social entrepreneurs – resisted privatisation into the free market in favour of an alternative plan for ‘local ownership’, through a mechanism developed by the People’s Port.

The first case study will track the events that called for the protection of community interests and examine the design of a complex legal device (a combination of forms) for holding and managing the port for local benefit. The outcome was the defeat of the plans for privatisation, but it was not a simple victory for the People’s Port either.

The second case study focuses on the role assigned to the Dover Harbour Board in becoming more proactively concerned with delivering ‘community benefit’.

The people of Dover were only partially victorious, due to there not being a formal legal structure or practical guidelines on how to ensure ‘enduring community participation’; what emerged was the ability to have community participation through representation, by way of a community director on the mainly company-represented operating board. Full victory now needs to evolve through provisions that measure community participation.

Leas Lift, Folkestone (Case Study Three)

The Leas Lift in Folkestone is not a direct economic contributor to the town; however, it has offered an indirect benefit to the local economy by contributing to tourism. Designed as a transport link between the upper town and the lower, it offers the experience of being carried up and down the cliffs with good views of the coast. It has therefore become a locally valued ‘site’ in its own right. This heirloom has failed to be commercially viable, and the operation has been forced to close on a number of occasions. In 2012, the Folkestone Leas Lift Community Interest Company was established to take over the running and maintenance of the lift. In this

case study, we examine social capital, initially in the form of social entrepreneurs acting for the community in endeavouring to secure the future of an asset as social capital for the community.

However, much of the achievements within the enterprise can be isolated to the endeavours of two key social gems; further guidance and wider community participation and representation are required to secure its long-term sustainability.

The starting points for the case studies are different, but what they have in common is the energy found from within their communities to protect and utilise assets that have been identified as vital, and therefore recognised as community interests that provide community benefit. In both Dover and Folkestone, these assets were understood as essential in driving social renewal. Both are examples of social enterprises that use social capital to secure local interests. However, both case studies also highlight the numerous difficulties incurred in attempting to build sustainable social capital and deliver 'community benefit' to protect community interests.

Firstly, the lack of differentiation detracts social capital and vital funding from enterprise. The Leas Lift requires ongoing maintenance to comply with health and safety regulations, and its current legal form prevents securing funding, as will be discussed. It also fails to attract wider community interest and participation, to bear the burden of the funding required to secure the long-term security of the enterprise.

Furthermore, there is a danger that social entrepreneurs (those with a strong economic profile) may use these models to their advantage, thereby exposing and risking community assets, community interest/benefit, public benefit and, therefore, social reform. Therefore, the need for additional guidance to both rules 1 and 4 (as discussed previously) would provide the much-required essential expertise.

What becomes evident is the need for community participation through representation, structurally placed within a legal form. Legal forms that aspire to delivering community interest and/or community benefit can address the disconnections within communities – disconnections between the 'haves' and the 'have-nots'. There is further value to be achieved if this is accompanied with an effective use of community asset lock facilities. This can deal with the remoteness of 'asset ownership'; a lack of ownership can often be a barrier but, when achieved, a real sense of community ownership and responsibility creates real community empowerment.

The heart of good ownership is engagement with stewardship expressed through as many ownership forms as possible. Britain will have a better performing economy and a more resilient economy the more seriously it can develop better ownership.¹²⁸

Chapter 4 is the first case study, presenting the primary option open to the Port of Dover. This is followed by Chapter 5, which sees a radically different option evolve. The events that unfolded give us an excellent opportunity to see exactly how communities can be considered in large-scale enterprises. The port was due to follow the same route that many other UK ports had followed, from being a statutory body to full privatisation. However, due to a number of factors, which will be discussed in the following chapters, an essential element that prevented privatisation was a clause in the originating trust document. However, the practical application needed modernisation in order to secure the port and, thereby, community interest and community benefit.

¹²⁸ Will Hutton, launching the Report of the Ownership Commission (2012), quoted on website <www.muteo.co.uk> accessed January 2015. See Bottomley and Moore (2014).

4.1 ORIGINS OF THE PORT AUTHORITY

Dover is one of the Cinque Ports. The precise origin of the Confederation of Cinque Ports has been the subject of contention. Some have claimed that the organisation was originally established by a long-lost royal charter dating from before the Norman Conquest in 1066; however, opposing views suggest that it did not come into existence until a royal charter in 1260.¹²⁹

The formation of Dover Harbour Board, as it is known today, can be traced back to a royal charter granted by James I in 1606 for the establishment of a port authority separate from the authority of the town. The structure put in place was one similar to the structure used for all Cinque Ports: a Lord Warden and a 'board', who then held responsibility for the administration, maintenance and improvement of the harbour.

Two factors are noticeable from this very brief history of the process through which the port authority was established:

- i) An early jurisdictional division between port and town is evident, despite the close, symbiotic economic and social relationships between the two.¹³⁰
- ii) The construction of the port authority through royal charter was a form of incorporation into a 'public' asset. In later years, such forms of incorporation became known and thought of as 'statutory public corporations' and were placed, albeit as independent bodies, under the protection and guidance of the government under whose authority they had been established. Thus any form of accountability by the corporation was focused on national rather than local government.¹³¹

What is witnessed here is the early onset of separating the port, as an asset, from the community – a separation from local control to national control. Yet it is a quasi-public corporation with no local representation.

¹²⁹ For more detail on the history of the Cinque Ports, see www.cinqueports.org/theoriginsoftheconfederation/ accessed December 2013.

¹³⁰ The Dover town history website, in proudly recording its own charters, makes this point and underlines the consequent tensions between town and port. <http://www.whitecliffscountry.org.uk> accessed December 2013

¹³¹ *ibid.*

The particular genealogy for ports incorporated under royal charter was that they eventually became known and regulated as 'trust ports'. Trust ports are administered nationally by the relevant Secretary of State and locally by a Harbour Board.

The use of the term 'trust' does not mean that the ports are held in trust in the 'normal' legal sense – nor are board members trustees. However, no one has offered a sensible replacement for the term 'trust port', and it is a concept that is understood within the sector as conveying the idea that the assets of the ports and the enterprise of the port are being held and run for 'public benefit' rather than for 'private profit'.

The running of trust ports is now framed by two pieces of legislation, the first of which is detailed below:¹³²

An Act to establish a National Ports Council to provide for the control of harbour development and for giving financial assistance for the improvement of harbours; to make other provision respecting the construction, improvement, maintenance and management of harbours; to make provision with respect to charges of certain harbour authorities and lighthouse authorities; and for purposes connected with the matters aforesaid.

Subsequently, the National Ports Council has since been disbanded, and the duties of the Council have been transferred to the Department for Transport.

Under Chapter 40 of this Act, applications may be made by the Harbour Board to the Secretary of State for orders enabling them to make various changes, such as rearranging borrowings, requesting funding for specific projects or making constitutional changes to their administrative structure. For instance, in 2006, leading to the Dover Harbour Revision Order No. 2167 Part 6, the Board requested the power to enable and extend financial borrowing and guarantees, and to revise their constitutional and general powers in order to allow them to establish committees and subsidiaries to aid in the running of the port. This request and the subsequent revision order demonstrate some of the problems with the trust port model, not so much in everyday operations but more in terms of planning for modernisation projects and expansion. Although the revision order extended the previous constraints on borrowing, it did so cautiously and did not meet the Board's full request for the powers to raise financial investment to fund an

¹³² Harbours Act 1964.

extensive modernisation programme, which the Board considered essential for the future of the port.¹³³

There are three main problems with the port's current legal form, all of which directly link and affect the management of harbours. These are:

- i) the limitations that are placed on them to raise capital and, therefore, to be able to plan for modernisation and expansion; this requires them to seek funds only from central government as opposed to open financial markets.
- ii) the need to follow the Harbours Act protocols every time they wish to go beyond and change their remit – this incurs expenses and time delays and creates uncertainty, as they have to rely on governmental agendas and priorities.
- iii) the tendency for central government to be cautious, thereby leaving harbour boards with no alternatives – this may affect ongoing development and maintenance, due to an inability to raise the monies required or to pursue the operationally planned programmes. Again, the government of the day has the final say, and this is seen as restrictive in a competitive business environment.

These constraints are experienced by harbour boards as limitations on their potential as businesses, and inevitably, in the opinion of the Dover Harboard, this has led to a decline in the financial viability of the ports. The government may, on the other hand, see it as their duty not to take risks with the public asset of ports, or consider themselves unable to either provide or sanction the levels of funding requested.

It is perhaps no surprise that, in the 1980s, as part of an expansive programme for the privatisation of publically held assets, ports should come to be considered as examples of assets and businesses that would benefit from privatisation. Certainly, many harbour boards welcomed the potential of privatisation. The possibility of privatising a port, especially through the schemes for privatisation put forward by individual harbour boards, was framed by the second piece of crucial legislation, the Ports Act 1991. This sets out the present framework for the organisation and governance of 'trust ports', under which the relevant Secretary of State appoints the Chairman and four board members. There are then two ex officio members and an eighth board member, who is appointed by the other seven members.

Crucially, the Act allows for the privatisation of trust ports, and details the procedures to be undertaken for the development of a scheme for privatisation by the harbour board.

¹³³ For the DHB's full request, see Dover Harbour Revision Order No. 2167 Part 6.

4.2 REVIEWING THE FUTURE OF THE TRUST PORTS

Government policy since the 1980s has moved between actively encouraging the privatisation of the trust ports and simply not inhibiting it. This has been seen as a means through which to both raise capital for improvements to the ports and release capital assets for the Exchequer.

A review was undertaken by the Department of the Environment, Transport and the Regions (DETR) Ports Division in 1998, entitled 'Modernising Trust Ports' (MTP hereafter), followed by the government's White Paper on the future of transport, 'A New Deal for Transport: Better for Everyone' (1999), both of which provided a clear statement of support for a privatisation policy for the ports. A second edition of the Modernisation of Trust Ports document (hereafter MTP2), published in 2000, outlined both policy and process in greater detail. As particulars for the process of privatisation were fleshed out, and some concerns were expressed over the impact of privatisation during the process, government documents began to address the process not merely as one of economic consideration, with regard to the economic viability of the business, but also as one of social concerns, in terms of both labour and the socio-economic considerations for local communities. In other words, what became a part of the process of review, albeit not in the centre of the process, was the recognition of concerns clustered around issues that we could term as being of 'community benefit'.

Thus, in MTP1, the importance of this link between port and community was explored through the relationship between the port authority and the local government authority:

Both local authorities and the trust sector have a broad community focus. Both have interests in the regeneration and growth of the local economy, integrated transport, sustainable distribution and the environment. Given Government's views on the role and responsibilities of trust ports and the fact that both they and local authorities are statutory bodies whose powers overlap, especially in the planning field, there is scope for a new, productive partnership to be forged between the trusts and their local authorities.¹³⁴

This, understandably, presumes the local authority to be acting for the community interest and to the community's benefit. It recognises that, in this role, local authorities would potentially be aware of five important aspects in which a port is crucial – or has become crucial – to and for a local economy:

¹³⁴ Modernising Trust Ports, 1998, s 121.

1. Employment: this is the most obvious source of income for the local economy, in terms of the employment of local people (along with their ability to then put money into local circulation). However, it is not only immediate employment that benefits; it is also the training of local people in skilled employment (through apprenticeships), as well as the secondary jobs that the port attracts into the area (for example, in relation to customs and immigration).
2. Secondary and periphery commerce: this both arises in relation to and serves port activities, and develops into a crucial local economic infrastructure.
3. Material infrastructure: this mainly refers to roads, which serve the port as well as building and benefiting the local economy. Some of this infrastructure is paid for or subsidised by the port.
4. Tax revenue: this includes both local and the more formal revenue streams that the port must pay, both locally and centrally.
5. Profit: under public ownership, this is accrued by the Exchequer, but it can be, in part, distributed locally.

Therefore, on the one hand, we have a clear impetus towards privatisation:

This Government has stated that it does not wish to use its powers under the Ports Act 1991 to force through the privatisation of a port. Nevertheless the Department strongly encourages Trust Ports to analyse their corporate structure and keep it under review, with a view to identifying opportunities to enhance their efficiency and get value from their assets, seeking to create the prospect of greater efficiency, driven by the disciplines and incentives of private investors.¹³⁵

And yet, on the other hand, there is an attempt to place this within the context of 'encourag[ing] the continued development of an open and accountable relationship between all ports, their users and local communities'.¹³⁶

¹³⁵ DETR, 'Trust Port Review: Modernising Trust Ports – A Guide to Good Governance (1 March 2000) <www.gov.scot/Resource/Doc/158184/0042810.pdf>

¹³⁶ Department for Transport, 'Modernising Trust Ports' (*UK Government*, 10 August 2009) <www.gov.uk/government/publications/modernising-trust-ports>

Balancing commercial interests with the aspiration of fostering an ‘open and accountable relationship’ between ports and their local communities lies at the heart of the Dover case study.

4.3 CONFLICTING INTERESTS

The concerns for the Dover Harbour Board (DHB hereafter) over the past 20 years have been focused on finding the economic resources to develop the material infrastructure of the port. Changes in the ways in which the harbour has been used have resulted in the need for major structural changes to the docks. For example, in 2012, a request was made to the Secretary of State (under the Harbour Act 1964, Chapter 40) for an Order (No. 146) allowing a revision order to support a scheme for the sourcing of finance for the redevelopment of the Western Docks (Terminal 2). The crucial need, from the point of view of the DHB, has been to enable it to raise capital for such work, and a principal concern has been their inability to raise sufficient capital through these routes.

Within this context, it is not surprising that the DHB would be actively considering taking the route to privatisation in order to be able to access funding for crucial (in their view) work, as well as having the freedom to determine their business plans without having to keep returning to apply for orders to allow them to pursue their business strategies. By 2009, the DHB had made it clear to all concerned that their intention was to make an application for the privatisation of the Port under the Ports Act 1991.

An alternative method of attempting to raise monies has been through revenue from the use of the harbour. However, attempts to increase harbour fees have resulted in bringing together stakeholders who are otherwise fierce competitors. In 2011, P&O Ferries, SeaFrance and DFDS Seaways joined forces to ask the Transport Secretary (under S.31 of the Harbours Act 1964) to rule that the increased fees imposed by the DHB were unreasonable. Lloyd Rodgers, the inspector holding the subsequent inquiry, was told that the charges amounted to more than a 30% increase, possibly as high as 35%.¹³⁷ The DHB acknowledged that the increases would create a cash reserve of £60 million, increasing to £90 million by 2015. They also made it clear that some of this surplus would be used to fund the privatisation, as the process would require funding. The ferry companies challenged whether the Board was entitled to use revenue raised from tariffs for such a purpose. Further, Fergus Randolph, QC, representing the ferry companies, argued:

¹³⁷ Graham Tutthill, ‘Storm Brewing at Port of Dover Public Enquiry’ *East Kent Mercury* (21 September 2011).

... that the Trust Ports could be compared to having an heirloom – a valuable asset to be safeguarded and handed on to succeeding generations. Far from passing on that heirloom, the board will be selling the family silver.¹³⁸

Clearly, some of the stakeholders (namely the ferry companies using the port) were not necessarily happy with proposals for privatisation. What about the local community?

There is no doubt that the local community did feel dependent upon the DHB for the local economy, and they also felt isolated from the DHB. No local representation had any impact at board level (expect, perhaps, via local trade unions), and there had been a significant sense in the locality that the DHB was not making sufficient local investment into, for instance, the training of a pool of apprentices for future skilled employment. To illustrate, in 2009–2010, DHB had only one apprentice post, and the average age of their employees was 48 years.¹³⁹

However, concerns over the limitations of the DHB's relationship with the local community did not reduce local concerns over the DHB's plans for privatisation. Local evidence provided a more than sufficient reason for such concerns.

Less than an hour away from Dover are the Medway Ports. A management buyout bought the ports for £120 million and created a 'legal entity company', which held all the ports' assets. This was then sold for £400 million three years later. Not only had the Treasury failed to obtain the true market value for the ports, it had also failed to ensure that some monies would be invested into the regeneration of a community that was already devastated by severe local economic decline and was sorely in need of investment.¹⁴⁰

This lack of concern for the interests of the community and the failure to work with the community, along with ongoing frustrations with the current management at the DHB, were the grounds upon which the local community expressed their concerns over the announcement of a planned management buyout of the port by the DHB, the usual route to privatisation for trust ports under the Ports Act 1991.¹⁴¹

4.4 PLANS FOR PRIVATISATION

In 2009, the DHB submitted a bid for a buyout scheme to the Secretary of State. In a written ministerial statement on 25 January 2010, the Secretary of State indicated that the scheme

¹³⁸ *ibid.*

¹³⁹ Interview with Neil Wiggins, Chair of the Peoples Port (Dover, 2012).

¹⁴⁰ Patricia J Arnold and Christine Cooper, 'A Tale of Two Classes: The Privatisation of Medway Ports' (1999) 10(2) *Critical Perspectives on Accounting* 127.

¹⁴¹ Ports Act 1991, s 9.

would be approved by the government and Dover would become privatised. Shortly after this statement, an election was called and the Labour government was not re-elected. However, the new coalition government might have been expected, in general circumstances, to support the privatisation plan – or at least not to hinder it. The circumstances, however, were not ‘general’, and a new political agenda changed the game plan.

The local community did not take the announcement of privatisation as one that they would simply accept. The trade unions would have been expected to be concerned about any plan to privatise, given the likely loss of jobs. What might have been less expected, however, was the concern expressed by prominent local people over both the possible effect of privatisation on the local economy and the reasons given for privatisation, which were proposed in the business plans by the DHB. Whilst the trade unions organised their opposition to privatisation through a defence of the status quo, others began to consider alternative patterns for a change in trust status.

What was unique to the Dover situation – although, as we shall see, it ‘fitted with the times’ – was the development of a plan for an alternative bid, one based on the idea of a ‘People’s Port Trust’. For the initiators of this approach, this alternative offered two aspects that were important in speaking both to and for local concerns. Firstly, it addressed the needs and interests of the local community by putting them at the centre of the future of the port. Secondly, it recognised the particular ‘place’ that Dover holds as the gateway to the nation, and argued that the local community were to be thought of as the custodians of this place in its full symbolic and real significance. If the nation, through trust port status, was no longer to be the custodians, then the people of Dover would and should take over that role. The slogan that the People’s Port Trust devised in support of their campaign was ‘Keeping the Nation’s Gateway forever England’.¹⁴²

Combining national pride with local concerns was a strong formula, and the campaign received support, particularly for the local interest aspect, through a key political development – the adoption, by the Conservative party and then the coalition government, of the ‘Big Society’ agenda.¹⁴³

Timing is always critical, and never more so than here. Party political campaigning leading up to the general election in 2010 delivered the ‘Big Society’ theme, which became music for the People’s Port aspirations. Local campaigners found that they had the support of a young local

¹⁴² <www.peoplesport.org.uk/home/>accessed July 2011.

¹⁴³ See further Norman (n 11).

candidate for Parliament, who also understood the potential of what was at stake. If the Big Society political fanfare could really empower and change local politics, then the community felt strengthened by the election of Charlie Elphicke as Conservative Member of Parliament for Dover and Deal. He had been able to link together the People's Port campaign with the Big Society initiative and, upon being elected, he managed to position the People's Port bid as an example of the Big Society in operation, thereby garnering support for it at national government level.

On 15 June 2010, the newly elected MP, Charlie Elphicke, wrote to the Secretary of State, stating that:

... the current transfer scheme promoted by the previous Government and the Dover Harbour Board is strongly opposed by the community of Dover and Deal. It is also strongly opposed by the ferry companies and other operators of the Port. For this and the other reasons... I submit that the current transfer scheme should be rejected. Instead I submit that an alternative scheme should be advanced. The Port should be acquired by and for the community under the new Government's 'Big Society' policy...¹⁴⁴

Elphicke argued that he had pledged to the people of Dover and had been given a mandate by them to make representations in opposition to the DHB scheme and to set out an alternative. He therefore requested that, as a matter of urgency, the DHB proposal, which had been supported by the previous government in January of the same year, be reviewed by the newly elected government officials. He went further in arguing that not allowing 'this representation would be to fail to take all relevant views into account and thereby do harm'.¹⁴⁵

Essentially, he was calling for a review of the decision made by the previous government, providing reasons for why the decision should be reopened and readdressed. He gave reasons for challenging the scheme, based on a close reading of the DHB business plan, which he described as being a good economic plan. Crucially, he then added reasons for why the issue needed to be addressed by the newly elected government, based on criteria that were drawn from the Big Society approach. These included the need to take into account the strength of opposition to the DHB plan locally,¹⁴⁶ including the local community's concerns that the Medway Ports scenario should not be repeated, and that little provision had been made under

¹⁴⁴ Letter from Charlie Elphicke to the Rt Hon Philip Hammond MP (15 June 2010).

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.* He included the local concern over national security: 'People in Dover and across the UK do not want to see the Port come under the ownership of a foreign people or emanation therefore; this potential situation is unacceptable to the people of Dover.'

the DHB plan for community benefit – distributing any profits for local community use, for example.

Elphicke then used Appendix B attached to the letter to argue in more detail that, following the Big Society initiative, the Port could be owned by a ‘community trust’, established for ‘public benefit’. He outlined the options for establishing and financing such a venture, alongside other options, and then argued that it was not right to be too prescriptive at this stage as to the form that should be recommended. Elphicke was not arguing against moving the Port from trust port status, but against the traditional model of privatisation, into the free-market economy, instead developing an alternative approach based on a model of community ownership not vested in local authority control. In this, he was drawing from the outline developed by the People’s Port group.¹⁴⁷ There were just two problems with this, and they are evident in the letter that Elphicke sent to the Secretary of State on 12 June 2010:¹⁴⁸

- i) The model was ill defined and lacking in detail – the community representatives were building on a mutual and cooperative structure, which none of them were familiar with, and which had not been used in such circumstances before.
- ii) Elphicke knew that any legal structure – in particular, an unusual (non-standard) one – would have to be able to deliver an economically viable model, especially in terms of being able to raise sufficient capital through investment or loans.

The People’s Port group had begun to realise that a mutual model would not be sufficient to protect the Port’s assets for the people of Dover; it would not really deliver community ownership and, further, it would be unlikely to attract sufficient economic support. However, the basic concern to protect the Port for the people remained. On legal advice, they had begun to build a rather different approach, devising a scheme that drew not from the history of mutuals but from that of charities. Elphicke’s letter may speak of mutuality at one level but, on another level, what he is proposing (but not committing himself to) is rather different, as it suggests a community ownership model.¹⁴⁹

Therefore, a trust model scheme appeared, devised by the People’s Port as a ‘community trust’ into which all the assets of the port could be transferred. These assets were then to be held for ‘public benefit’. The term used is the correct one: the public are now referred to, rather than the community, as the trust would have to be registered as a charity. Given the changes in the public

¹⁴⁷ See further details on mutual models and the approach taken by the People’s Port in Anne Bottomley and Nathan Moore, ‘Matters of Ownership: A People’s Port for Dover’ (2013) 64 (3) Northern Ireland Legal Quarterly 365.

¹⁴⁸ See appendix 5.

¹⁴⁹ Interview with Wiggins (n 138).

benefit test through charities law since 2006, this would not be impossible, and would carry the benefit of revenue advantages – this legal form is well understood in the financial sector and would therefore allow for finances to be raised against the port. It would place the trust under the regulation of the Charity Commission, but this might enhance confidence in the trust, its governance and the role of its trustees. The trust would, of course, need to keep the Commissioners apprised as to how it was meeting the criteria of public benefit (actually local community interests). Additionally, it would provide a form of asset lock for all the Port's potential assets in land and property. In this sense, public 'benefit' would be secured, and more successfully than under a mutual model.

The trust would then invest the assets into a port company; the directors would then compose a management tier, which would include both business and community representatives, with no single interest holding a majority, thereby building a wider consensus in the making of decisions. Further, all board meetings would be held in public. Elphicke recognised that such a structure would have to command the support of the business community in order to be economically viable and to improve the chances for the necessary levels of long-term investment needed. Further, the likelihood of available funding to implement such a development had to be found within a reasonable period of time. In other words, Elphicke was making it clear that both reopening the decision made by the previous government and building an alternative proposal could not wait – this was imperative.¹⁵⁰

Situating Elphicke's intervention politically is to recognise the context of the newly formed coalition government. The government had pledged to implement the Big Society initiatives that had been at the heart of the election campaign of the major players. Thus the events in Dover could be positioned as exemplifying what the new government stood for. However, Elphicke's intervention also demonstrates how difficult it was to actually translate some of these aspirations into material forms for use. The Dover case clearly appealed to Elphicke politically, in that it consolidated his local reputation, as well as giving a newly elected member of government a national and government profile very quickly, but it was also a very difficult case to mount in terms of developing a legal form that would deliver the twin imperatives of economic and social sustainability.

Elphicke faced exactly the same problem as the campaigners running the 'People's Port' initiative: how to get beyond the obvious appeal of the case and develop a plan that could be implemented. There is no doubt that the government took Elphicke's intervention very

¹⁵⁰ Elphicke (n 43).

seriously, and there is evidence that he received a great deal of support from the Cabinet Office in building an alternative legal and financial model.¹⁵¹

It is useful to remind ourselves of the published aims and concerns of the People's Port. Here we can see signs of endeavouring to move beyond traditional agendas and binaries, and to begin to tease out what was at stake and how that might be addressed through the development and adoption of 'new' legal forms or combinations. These aims are detailed below:

1. 'Dover must remain the 'Nation's Gateway' – does this require ownership of the Port by the people of Dover if the nation no longer holds it as a 'public asset'?
2. The possibility of moving community assets from 'state run' to local 'community run', with the community therefore taking over responsibility for such assets.¹⁵²
3. The recognition of the need to secure funding to invest in the Port, thereby enabling the regeneration of the Port area for the (long-term) interests of the people and community of Dover.
4. The empowerment of all stakeholders, including the users of the Port.¹⁵³

The first two objectives given suggest that this is crucially an issue of 'ownership'. However, we need to think of this not so much in terms of 'who owns the property' but rather in terms of 'for whom the property is held'; this way of thinking aligns with a trust model, particularly a charitable trust model. This then needs to be balanced against the economic requirements to make the business viable (the next two objectives).

At this point, we can compare the design of the DHB bid for 'full' privatisation with the alternative design for 'community ownership' developed by the People's Port, as a scheme called the 'Dover People's Port Trust Ltd' (DPPTL hereafter).

4.5 CRITICAL DIFFERENCES BETWEEN THE TWO DESIGNS

Very simply, under the DHB bid, the Port assets would be transferred, in their entirety, to a new operating company (OpCo), operating on behalf of investors (shareholders). However, in the DPPTL scheme, the assets would be transferred into a trust, which would hold them for the benefit of the community and in terms that would recognise and empower all stakeholders.

¹⁵¹ Interview with Wiggins, (n 138).

¹⁵² This resonates with the theme of the protection of 'community assets' under the Localism Act 2011, with provisions for the transfer of assets from local authority control to 'community control'.

¹⁵³ Taken from the People's Port website.

The DHB scheme would operate as a company under the Companies Act 2006. It would, as described in earlier chapters, operate in the interest of the company with the freedom to establish a constitution and articles that would focus on the development of the enterprise in economic terms. The structure and aims of the company might well refer to – and make provision for – community participation and representation, with aspirations of intended community benefit and interest, but these would not be central features of the enterprise/company. Further, any economic concerns would argue that nothing must be done that might restrict the Port's economic viability, including its attractiveness to potential investors (i.e., profit), and the ability to sell assets or use them as security would be unrestricted.

In contrast, to achieve community benefit for such an enterprise, the model needs to protect assets and ensure levels of community benefit, but also allow for the economic viability of the enterprise. The DPPTL chose a combined model, layering together a trust and an operating company, in order to deliver the custodian model sought by the People's Port initiative. In particular, the model addresses:

1. the ability to create an asset lock in relation to the material property (land and buildings) through a trust form;
2. the establishment of an operating company to run the business;
3. defined intentions/purposes of the business;
4. a mission statement and articles of constitution, accountable to their 'owners' (the trust).

This is grounded in and carried by a combined model in which the assets are held in 'trust' for 'public benefit', with trustees representing and protecting the community interest, combined with a company model that allows for financial profiling and investment. At its foundations, the trust could protect the community interest whilst allowing the company to deliver the economic imperative through a sustainable business plan. Of course, this would necessarily result in having to be subject to two statutory and regulatory regimes – charitable trusts law and company law. It would also have to work on the basis that the trust model was acceptable to commercial interests.

We can demonstrate the fundamental difference between the designs through a diagram:

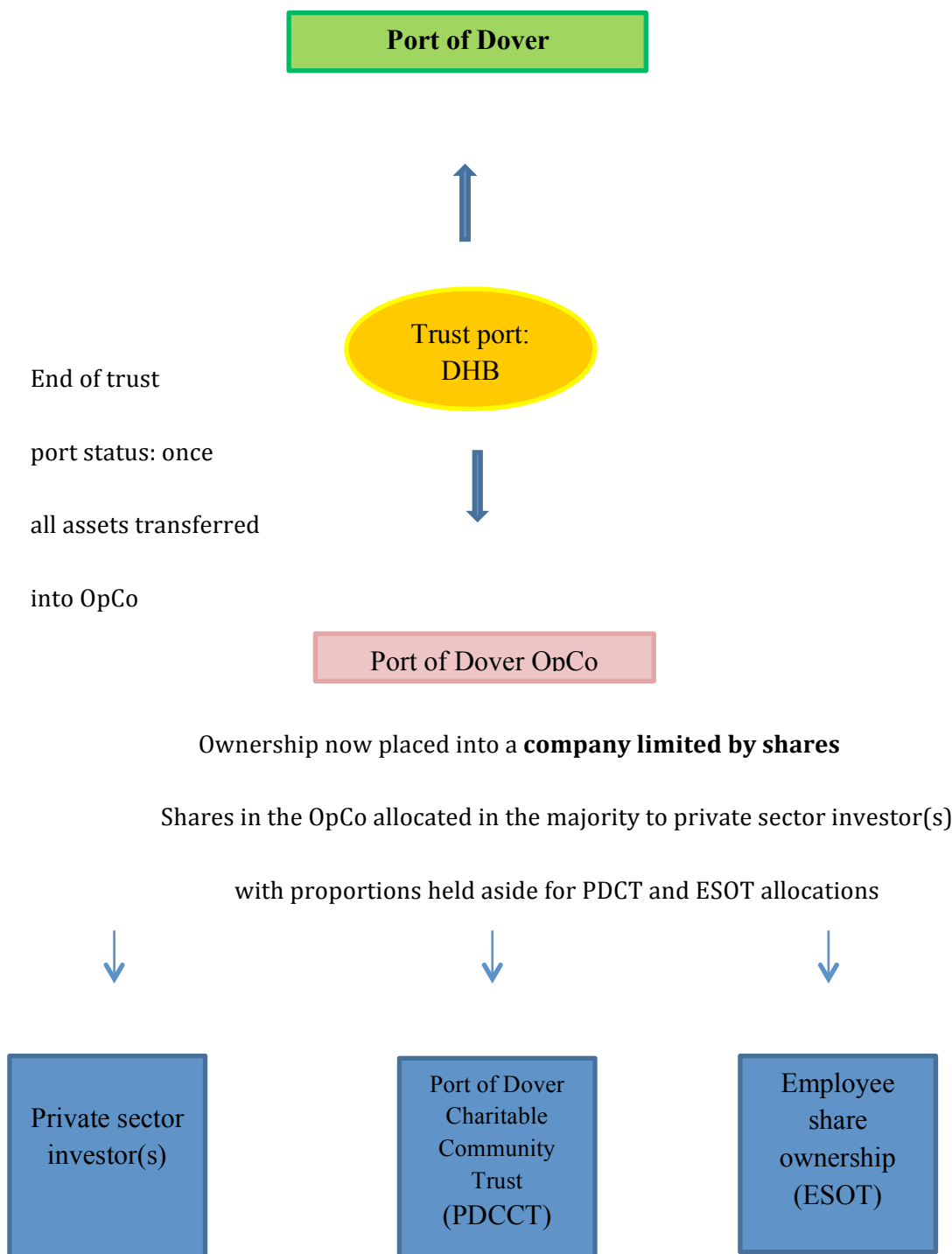


Figure 4.1: Dover Harbour Board's plan for change in trust port status

You will notice that:

1. The company design is based on shareholding, where the majority of shares would be made available to private investors.

2. However, in recognition of other stakeholders, the design allows for:
 - I. a small proportion of shares to be transferred to employees (this is usual in all privatisation programmes under the Ports Act 1991; they are allocated to individuals and come with no restrictions on the sale of them to private investors);
 - II. another small proportion to be held in a charitable trust, allowing for monies (from profits) to be distributed locally for charitable causes as a 'public benefit'. The proportion of monies made available for these purposes will be dependent on decisions taken by the board of directors.

Under this scheme, the voice of the community would be minimal. The direct consequence of this model is that it transports the asset into the company, which then controls the agenda and business objectives. Any community interest is limited to receipts from the charity. However, the structure renders any income from the charitable fund as vulnerable, and has no requirement to address the ongoing socio-economic concerns of the community. The trustees will have some access to company meetings, as shareholders, but the connection between being allocated a share and having some control within the company framework must be distinguished. There is little control, other than the use of a vote at annual meetings – and that is greatly dependent not only on who holds the votes but also on how much information is made available to shareholders and how far they are invited to participate in decision-making with regard to company matters. There is nothing in such a structure to guarantee the development of a more ethical, open and accountable system.¹⁵⁴

The trustees of the PDCCT would have no real influence over the board of the OpCo, except for the minor option to remove a director under the Companies Act 2006 S.168. This is not a positive or purposive option, but mainly a retrospective tactic; the reality is a purely 'passive ownership via shares'.¹⁵⁵ The ESOT may have a slightly increased moral and political entitlement to 'rights', as they are also employees and would have the support of trade unions. But this is simply a pressure to be considered rather than a legally binding 'right' to be heard and listened to (unless such provisions are made in the articles and constitution – which is unlikely).

It seems, then, that the Port of Dover OpCo would have the 'freedom' to conduct its business without any legal obligation to listen to its shareholders, let alone to the people of Dover, as they

¹⁵⁴ See further Williams (1983) and Hutton (2012).

¹⁵⁵ Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Transaction Publishers 1932) 355.

are not formally represented. The Dover community would have some control over the DPCCT, through the appointment of trustees and by reference to the Charity Commission. However, they would not be able to influence the amount available for distribution or the economic success of the Port, upon which the fund would be reliant.

Port of Dover: a statutory body



Trust Port of Dover



Port of Dover OpCo created by DHB



The DPPTL charitable trust would then invest in a share capital company

The Trust' would own the assets and share capital and, thereby, the OpCo: Board Trustees

The DPPTL combined model trustees:

Dover District Council

Kent County Council

Member of Parliament

Lord Warden Cinque Ports

Framework agreement embedded in the constitution of the OpCo



Financed by: joint venture concession model, finance infrastructure fund or finance party and bond holders



A regeneration fund – a separate entity with a separate board of trustees
s.17 & s.18 Ports Act 1991

Figure 4.2: Dover People's Port Trust Ltd: proposed organisational structure

The model proposed by the People's Port is one in which, on incorporation, the DPPTL would receive the Port's assets into a trust, securing the 'Nation's Port' *by* the people of Dover, *for* the people of Dover, on behalf of the nation. This places the Port in the custodianship of the trustees. The share capital model for the company, on the other hand, is one designed to secure the equity and the assets within the core of the company. Investors (members) would invest in shares at a nominal value – their face value in return for a bond. The bond could then be traded on a secondary market and be subject to fluctuating interest rates. If interest rates are higher than the bond's coupon rate, then the bond is sold at a discount (below par). Conversely, if interest rates are lower than the bond's coupon rate, then the bond is sold at a premium (above par). This process of capital investment through loans from investors – via issuing shares at par value, in which bonds can be retained and the full amount of the loan repaid, returned on the maturity of the bond certificate or traded within the period – allows for investment without losing control over the ownership of the Port. It draws from share capital models developed by cooperatives and similar not-for-profit organisations (IPSSs), and is registered and regulated (now) by the Financial Services Regulator.

The model above allows for both investment and trading, and it might be appealing to investors. The DHB model requires majority share ownership for full control and, even then, it could be subject to a hostile takeover by, for example, venture capitalists. The DPPTL model does not require this. Therefore, long-term loan returns could be seen as a low risk, and this, coupled with profitability to date, could make it an attractive investment.

The bid also delivers accountability and control on a community level. It provides the 'values and principles' of tried and tested corporate 'legal forms', developed through classic cooperative models, which would be enshrined in the constitution of the company. All underpinned by the 'one member, one vote' principle, this would secure community control and participation at an accessible entry level of £10.00. It is at the entry level that an individual within the community of Dover would become an actual member of the Port. This model, of course, like all business models, would require efficient resourcing and management in order to ensure that wider industry strategies are developed successfully to guarantee ongoing port profitability.

The income from profits that was not required for port development would then be democratically processed through the regeneration fund, securing monies for the development of the town and community. The membership structure offers more than simply membership; it has the potential of extending to the grass roots community and encouraging social enterprise in individuals working to support and deliver the community aims, through active participation

on the regeneration fund board or in the projects supported by them. This builds social capital in a number of forms.

Further, this model is more likely than any other to retain the operation of the Port not only as a local asset but also as a national asset. The patrimony of the Port could be secured for generations to come; the tangible assets (the physical infrastructure) of the land and the intangible assets of the enterprise could become – and provide for – a locally sustainable economy, addressed towards community benefit. Indeed, in 2011, the People’s Port held a local referendum to see whether their proposal was truly attractive to the local community and whether the community would then give their support to the proposal. The results can still be found on the DPPTL website,¹⁵⁶ detailed below:

The question asked was ‘Do you oppose the private sale of the Port of Dover as proposed by the Dover Harbour Board and support its transfer to the community of Dover instead?’

The responses were as shown:

Yes = 5,244

No = 113

Therefore, of the respondents, 97.5% were in favour of the People’s Port approach rather than that proposed by the DHB.

During 2011–12, two quite different schemes for the future of the DHB were on the ministerial desk. A great deal was going on behind the scenes, mainly because the DPPTL not only looked as if it could be feasible but also looked as if it was, as Elphicke had argued, a testing ground for the Big Society agenda. The very presence of the People’s Port scheme had meant that it was politically impossible to simply allow the DHB bid to go ahead. Dover waited – what would the government do? It was, in fact, a time of intense government activity, as the government developed the legal structures to carry the Big Society agenda forward. The two major legal forms for SEs – CICs and CBSs (see Chapter 3) – were finally being brought into fruition, as well as the charitable form (CIO). Specifically, in relation to the privatisation of ports, the government came to recognise that no scheme should be allowed to go ahead based on economic criteria alone and without serious reference to local community interests – this process of re-evaluation forms the basis of the next case study, in which the focus returns to the

156 www.peoplesport.org.uk/referendum accessed September 2012 & March 2012

DHB. Before turning to this, the case study focusing on the People's Port plan is evaluated for mutuality.

4.6 EVALUATION OF THE CASE STUDY

It is clear that the model devised by the People's Port was radical – particularly for the running of such a large enterprise as the Port of Dover. However, it was not seen as impossible. Combining a trusts model and a mutual model with a commercial business model was achieved in theory; how it would have survived in practice is moot. This may, in part, be due to the light touch application of the law that is presently available in the legal models, such as community interest companies, and further guidance, as argued for in this thesis, could go some way to addressing the structural formalities required to achieve community benefit and/or interest.

Most worrying would have been the ability of the DPPTL in reality to raise capital on the open financial market. This case study and the case study in Chapter 6 suggest that one of the biggest challenges to community social enterprises is the ability to hold assets and/or property in order to raise the required funds, as opposed to traditionally owned company assets held by an enterprise. One cannot help thinking that it was, indeed, a step too far for the government and too risky an enterprise with which to profile the Big Society. It did achieve one very important purpose – it put community benefit firmly onto the agenda. However, the question of how far a newly established agenda can go and the consideration of the effectiveness of legal forms concerned with delivering community benefit are for the next case study in Chapter 5, where we see these held as not just important, but essential.

Meanwhile, it should be noted that the social capital raised in this case study was limited to a small number of local activists. There was very little local evidence of active support for the People's Port or their plan, despite the positive referendum. The experience does not seem to have built up much social capital for Dover in terms of building community integration with the harbour – it is rather as if things have been done on the community's behalf, rather than the community having experienced doing anything for itself.

It is clear that few understood the DPPTL scheme or were willing to become active members of it. It could be argued that local social capital survived, as the community continued to support Elphicke in the next election, in part on the grounds of the campaign he led for the future of the Port.

Finally, the campaign can be thanked for a focused development of policy in relation to port privatisation, which must now take community interests into account.

Chapter 5 sees a new turn of events for the communities within Dover with regard to the life of the Port of Dover, which sees the development of the principal argument pursued by the People's Port – that of community participation – favourably unfold.

5.1 A GOVERNMENT DECISION

Following the activities of Dover People’s Port, as discussed in Chapter 4, and Dover Harbour Board’s counter-bid towards privatisation, a final decision on the Port’s future was made by the Department of Trade, on behalf of the government, on 20 December 2012.

The Conservative–Liberal Democrat coalition government turned down the Dover Harbour Board transfer scheme for the privatisation of the Port of Dover (hereafter PoD). The Secretary of State, in reaching his conclusion, considered that the purpose of the transfer scheme:

... would not ensure a sufficient level of enduring community participation in the port. He also concluded that in so far as the Board made the application in order to be able to obtain the additional finance necessary to undertake the proposed redevelopment of the Western Docks, there were other options available to secure that redevelopment.¹⁵⁷

Leaving aside, for the present, the reference to second grounds for refusal (financial reasons), the importance at this point is to focus on the first grounds: ‘a sufficient level of enduring community participation’.

MTP¹⁵⁸ (1989) sections 18–20 recognised that the trust port authorities have a responsibility to ‘strike a balance that fully respects the interests of all the stakeholders, not just one group, in the light of the objectives of the [port] trust and what constitutes the “common good” for all stakeholders (current and future) and the [port] trust itself’. The second edition of this document was supplemented by a specific reference to the relationship between trust ports and local authorities. Section 121 states:

Both local authorities and the trust sector have a broad community focus. Both have interests in the regeneration and growth of the local economy, integrated transport, sustainable distribution and the environment. Given Government’s views on the role

¹⁵⁷ Letter from Mostaque Ahmed, Department for Transport, to Roger Mountford, Chairman of Dover Harbour Board (20 December 2012) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/49017/dover-harbour-board-transfer-20121220.pdf> 2 para 3.

¹⁵⁸ ‘Modernising Trust Ports – Second Edition’ (August 2008) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/9222/mtp-good-guide-to-governance.pdf> 10 para 19.

and responsibilities of trust ports and the fact that both they and local authorities are statutory bodies whose powers overlap, especially in the planning field, there is scope for a new, productive partnership to be forged between the trusts and their local authorities.¹⁵⁹

However, these references would not, of themselves, provide a sufficient reason for focusing on any aspect of community interest or benefit as part of the evaluation of a scheme for privatisation. It was this that had been at the root of Charlie Elphick's¹⁶⁰ complaint to the government – not only was there no effective provision for community interests, but there also did not need to be. This was unacceptable to him and to his constituency, and it was this point that would have to be addressed by the government. Thus, in August 2011, the government made a preliminary move by announcing that evidence of 'community participation' must be addressed as part of any bid submission.¹⁶¹ Then, in January 2012, revised criteria for the sale of trust ports (under the Ports Act 1991, s.9, s.11 and s.12¹⁶²) were published, which expanded the criteria of 'community participation' as follows:

The Secretary of State will not approve an application for the sale of a trust port under the 1991 Act unless the sale is considered to deliver an enduring and significant level of community participation in the port.¹⁶³

However, the statement also made it clear that this 'does not necessarily require a community role in the operation of the port',¹⁶⁴ and that it did not offer any specific parameters or guidance towards working this aspiration into a legal structure. Despite these limitations, the introduction of the terms 'enduring' and 'significant' were welcomed by concerned parties.

During the period of the development of this policy, the DHB did not ignore the emerging politics and the need to demonstrate community involvement. They themselves revised their plans, giving a greater profile to 'community participation' through extending, in particular, the proposed charitable fund. Further, they began to consider how, even as a trust port, they could act with more reference to the interests of the local community. It seems that they thought that these actions, along with a much sharper publicity campaign, might be sufficient in persuading the government that they did and could meet the criteria of 'community participation'. Hence,

¹⁵⁹ *ibid.*

¹⁶⁰ Charlie Elphicke, as Conservative Member of Parliament for Dover and Deal

¹⁶¹ Amendments to government criteria for consideration of the appropriateness of sale of a major trust port in England and Wales under the Ports Act 1991, 16 May 2011, col 4WS.

¹⁶² Ports Act 1991 c 52 part 1: Transfer of Port Undertakings (*legislation.gov.uk*)

<www.legislation.gov.uk/ukpga/1991/52/part/1/crossheading/transfer-of-port-undertakings>

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

when the decision was announced, we should take at face value the report in which Bob Goldfield, DHB's chief executive, said that he was 'surprised and disappointed' by what he called a 'curious decision'.¹⁶⁵

Did this decision mean that the way was then open for the DPPTL model to be accepted? It does not seem so. In fact it seems clear, in retrospect, that a deal – a compromise – had been hammered out behind the Westminster scenes. DHB would not, even with their compromises, get a simple go-ahead – but neither would the alternative be allowed. Instead, what has transpired is the continuation, at least for the time being, of the DHB, albeit now much more proactive in terms of community participation.

A certain level of expectation is encoded very clearly in items explaining the government's more detailed reasons for not accepting the DHB scheme. For instance, under paragraph 62, note is taken of the PoD cash reserves:

In recent years DHB has increased harbour dues to allow it to build up a reserve to help finance redevelopment within the port, especially of the Western Docks (Terminal 2 – T2). This has now reached approximately £60m on an annual turnover of £58.5m in 2009. A number of representations, ferry operators and a few employees were concerned that this cash reserve could be siphoned out of the business and not used for port infrastructure.¹⁶⁶

Reservations about senior management were detailed in paragraph 63:

Senior management: Several representations were concerned that senior management for the port of Dover were motivated by the potential personal benefit that they might receive on completion of a sale, rather than the needs of the business, the businesses using the port or the local community. In particular, it was perceived that the ESOT [employee share ownership trust] would benefit Board members and senior executives and so they were not impartial about the proposed sale.¹⁶⁷

Concerns had been recognised and lines drawn. In effect, the government was making it clear just how much the DHB would have to do in order to establish confidence in both the local community and, thereby, the support of the government.

¹⁶⁵ Tutthill (n 136).

¹⁶⁶ Amendments to government criteria under Ports Act 1991 (n 160) para 62.

¹⁶⁷ *ibid* para 63.

We can see here the challenge of producing a provision for an enterprise structured as a corporation that is legally required to consider the local community significantly. It is here that the structural guidance needs to be placed in order to demonstrate actual community participation that has access to power, as per Arnstein's ladder.¹⁶⁸

5.2 ADDRESSING 'COMMUNITY'

Since the decision to refuse the DHB scheme, the DHB instituted a number of structural changes, as well as becoming much more visibly active as a local source of 'charitable' bequests.

The latter builds on a crucial section in the government statement, under paragraph 34:

... the proposal focussed on the role of the PoD Community Trust [hereafter PDCT]. Through its shareholding in PoD Ltd, and through the proposed endowment, the [PDCT] would share in the profitability of the port, and in any increase in the port's value. PDCT would also have an ability to influence the management of the port both through its shareholding¹⁶⁹ and through the two Partnership Directors...¹⁷⁰

Thus not only is reference made to the need to make sure that the local community would 'share in the profitability of the port' and in 'any increase in the port's value', but also to the fact that the community should have 'an ability to influence the management of the port' through 'two partnership directors'. Despite a rejection of this scheme (and consider how far the DHB had moved in trying to persuade the government that they had addressed the revised criteria), what was left as a kind of 'promise' was the issue not simply of what the DHB might have done, but rather of what they were (and are) willing to do now.

In a speech delivered at the Dover Marine Harbour Hotel (April 2014), entitled 'The Future of the Port of Dover',¹⁷¹ the Undersecretary of State for Transport, Stephen Hammond, finally began to provide some details on how the Port's structure would be expected to achieve the ultimate goal of 'enduring and significant community participation'. He set out three steps that needed to be taken: 1) community involvement; 2) commercial development; and 3)

¹⁶⁸ Arnstein (n 9).

¹⁶⁹ This would have been secured through introducing two classes of shares: one ordinary (which could be used to raise funds in the private capital markets) and a second, separate class for being held by the PDCT (which could not be traded or used/exposed to potential takeover or merger, but would be static and fixed). This is unusual and would have required the UK listing Authority to approve such a scheme.

¹⁷⁰ Dover Harbour Board, 'CSR: Investing in the Community' (*Port of Dover*) <www.doverport.co.uk/csr/investing-in-the-community/ July 2014>

¹⁷¹ Dover Harbour Board, 'Port Welcomes Minister to Dover' (*Port of Dover*, 9 April 2014) <www.doverport.co.uk/about/news/port-welcomes-minister-to-dover/12853/ April 2014>

regeneration. He then referred to other major trust ports that had successfully adopted 'community forums' as part of their involvement with local communities:

The port and community forum and port user groups require legal commitment and seats on the board, therefore additional community non-executive directors should be appointed.¹⁷²

Subsequently, an announcement was indeed made that the DHB would consist of the chairman, the existing non-executive specialist directors, the executive directors and two new seats opened for community non-executive directors. The process of recruiting the community directors made it clear that the positions would be held by persons either living in Dover or operating a business in the town. Further, a greater focus was to be placed on local economic interests, by not merely operating under the rubric of providing monies for local charities, but rather by also becoming engaged with local regeneration.

The first community director took office in January 2015 on a salary of £27,000 per annum for two to three days' work a week – some locals have found this excessive, particularly a number of dock workers. However, the board defended the amount as the going rate for a person experienced in executive matters and having decision-making abilities.

Such structural changes foster closer workings with key stakeholders, some members and others users. The creation of community directors on the board is key, but also important is greater union participation, as is the construction of the Port of Dover and Unite (shop stewards). Furthermore, all moves towards a PDCT lay an important foundation for any future developments.

The board may not look that different in many respects, but the personalities and the presence of community directors will hopefully ensure that the old problems with relationships between the community and the DHB are improved in a major way.

¹⁷² Department for Transport and Stephen Hammond, 'The Future of the Port of Dover' (*UK Government*, 9 April 2014) <www.gov.uk/government/speeches/the-future-of-the-port-of-dover> accessed September 2014.



Figure 5.1: Dover Harbour Board – Board of Directors in 2014¹⁷³

Certainly, DHB seems to have been revitalised by these events. In September 2014, having safeguarded the cash reserves – which were by then in excess of £60 million – and secured them for investment into the development of the port, and with approval granted from the Harbour Revision Order 2012¹⁷⁴ by the Secretary of State, DHB announced the commencement of the first substantial phase of works to transform the Port, to the tune of £120 million.¹⁷⁵

Tim Waggott, Chief Executive of the Port of Dover, was quoted as saying:

The studies have been done and the conversations have been had with our customers, with our community and with our staff. Now it is time for action. Now it is time to deliver for Dover.¹⁷⁶

¹⁷³ Dover Harbour Board, 'About: The Board' (*Port of Dover*) <www.doverport.co.uk/about/the-board/> accessed 1 October 2014.

¹⁷⁴ The Dover Harbour Revision Order 2012 No. 416 Whole Instrument Without Schedules (*legislation.gov.uk*) <www.legislation.gov.uk/uksi/2012/416/body/made>

¹⁷⁵ Dover Harbour Board, 'Dover Harbour Board's Biggest Ever Investment in Dover Starts Now' (*Port of Dover*, 30 September 2014) <www.doverport.co.uk/about/news/dover-harbour-boards-biggest-ever-investment-in/12904/> accessed 1 October 2014.

¹⁷⁶ *ibid.*

5.3 EVALUATION OF THE CASE STUDY

To what extent can it be thought that the DHB are not acting as stewards of local community assets held for community benefit? Are they simply indulging in rhetoric when they emphasise their commitment to the locality in speeches? Is it at a relatively low economic cost that they have so much expanded their local charities fund? And will they take the appointment and presence of local board members seriously? Do they still harbour privatisation plans and are now playing a long game, during which they build a portfolio of evidence of ‘enduring and significant community participation’?

It is quite possible that what we have is little more than an example of astute business practice meeting the reality of politics, and working out a strategy not merely for survival but for long-term benefit.

Because of the lack of clarity in terms of what is expected under the criterion of ‘community participation’ and the extent to which this carries an acknowledgment of ‘community benefit’, it is difficult to know how DHB will be held to account. There is no regulatory body to answer to in terms of the criterion, unless or until they move to make a second application for privatisation.

The only potential for holding DHB to account is found in the direct pressure that can be brought to bear by the newly elected directors; but will they really provide a point of contact and a chain of accountability between DHB and the local community? The local community is not electing them; they are not formally accountable to the people of Dover.

Finally, not only is there a lack of clarity in the use of the criterion but there is also little to suggest that DHB can be held to account in meeting it. However, there remains the issue of how far the people of Dover are willing to go to become active members of their community, in terms of protecting the asset of the Port for their benefit. The People’s Port group have become rather quiet, as if the fight is now over – or, at least, over for the time being. How will energy and concern be maintained?

The legal form that is in place does little to offer support to garner full or partial community participation. However, there is nothing stopping the PoD from adopting structures from organisations whose entire operating models are based on wider stakeholder representation, such as that of the John Lewis partnership model.¹⁷⁷ The PoD would not need to change its legal form, as it is free to structure as it feels fit. It could adopt the ethos of the John Lewis committee council; here, you could see schools, highways, health, tourism, local chambers of business, the

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yacht club and others all represented as council members, with agendas and voting rights equally distributed.

From this case study, it could be suggested that not only are legal forms for the delivery of community benefit essential, but so is assessing the level of commitment in a community, as to whether there is enough of a concern and a benefit, and whether there is a will to act. This is a crucial aspect of social capital – the building of a community willing and able to act. Perhaps one of the problems with social entrepreneurs is that they too often rely on themselves not only to set the agenda but to sustain it.

Having provided an overall evaluation of the case study, it is interesting to undertake a review of the evidence framed through the research questions as a form of summary of this chapter.

In either seeking mutuality or acting as stewards of community benefit, the considered governance available fails to provide terms of reference for both structural and operational practices. Further details on organisational structures that truly empower community representation are absent.

The terms of reference for delivering the aim of ‘enduring and significant community participation’ ‘for social benefit’ need expanding and should be clearly drafted in constitutional references. These could be placed within the permitted rules and company constitution, which would then be both measurable and enforceable. It is also here that further reference needs to incorporate the measuring of ‘community benefit’, and evidence of social renewal, participation levels, empowerment and responsibility must become key codes for initiatives designed to place a focus on ‘community benefit’; this could be achieved within the rules on voting, which are currently only open to either shareholders or members. It will only then be possible to answer the latter part of the research question – whether the communities and societies whose welfare and interests are meant to be the purpose of said enterprise receive the (or any) social benefit. The mechanisms to assess this must be present; they are currently absent. The evidence that emerges from these two case studies points to the need for open accountabilities. It suggests that democratic participation is essential, as is the ability to influence outcomes. This must be more than merely the media broadcasting of events supported by the DHB – representatives of the community need to be part of the planning and execution of programmes in order to demonstrate the significant and enduring level of participation and to determine the outcomes and reflect on the benefits that will follow.

The following case study can be found just around the coast in Folkestone. We find a small-scale community interest company endeavouring to deal with the challenges and engineering feats

faced by the Victorians – an enterprise that has been plagued by an inability to make the venture financially viable. What becomes evident in this case study is the commonality with the DHB case study, in terms of the level of social capital to be found and the high level of local passion and commitment towards an asset that is identified as an integral part of the community.

6.1 BACKGROUND TO THE DEVELOPMENT OF THE LIFT

Folkestone is characterised by a division of the town into two geographically distinctive sections, the lower and upper areas, separated by a sharp cliff face, created as a consequence of a severe cliff fall in 1784. Until the nineteenth century, Folkestone was a small fishing community with a seafront subject to bad storms and encroaching shingle, and on which it was hard to land boats. In 1807, a private Act of Parliament allowed for the building of a pier and harbour, which were designed and built by Thomas Telford in 1809.¹⁷⁸ By 1820, a harbour area of 14 acres had been enclosed for further development. However, Folkestone's economy and population grew slowly, as development was still hampered by sand and chalk. The Folkestone Harbour Company invested heavily in removing silt from the harbour, but with little success. By 1842, the company had become bankrupt, and the government put the derelict harbour up for sale. It was bought by the South Eastern Railway Company (SER), which was then building the London to Dover railway line. This company invested heavily in the harbour, dredging the area and building a new pier. A railway was constructed right down to the pier, and the town soon became the SER's principal packet station for the continental traffic to Boulogne.¹⁷⁹

Thus in 1843, the railway brought economic wealth to the town, both in terms of carrying goods and passengers to the port and in terms of bringing visitors to Folkestone itself. Folkestone began to develop as a holiday destination. The upper section (on top of the cliffs) is the site of residential Folkestone, including a substantial area planned and developed by the Radnor Estate in the nineteenth century, formed by villas, hotels and substantial open spaces ('the Leas'), as well as a promenade utilising the sea views. The lower section comprises the port, the pier and the sea shore. Victorian engineering solved the logistical challenges that had divided these two sections, not only through the building of a series of pathways and a road, but also through the development of a water lift. The building of this lift was to the benefit not only of visitors and tourists, in allowing much easier (and very pleasant) access between the two sections of the town, but also of the economic stakeholders in both sections of the town – the Radnor Estate on the upper land and the owners of the harbour at the bottom of the cliff.

¹⁷⁸ For full details of Thomas Telford's commission of the East Pier see 'East Pier, Folkestone Harbour' (*Historic England*) <<https://historicengland.org.uk/listing/the-list/list-entry/1392378> July 2014>

¹⁷⁹ *ibid.*

In 1877, a pleasure pier was built, followed by the water lift to connect the beach and sea with the upper promenade. Whilst Folkestone remained a fashionable seaside resort, the lift was integral to the visitor experience and was financially viable. However, as fashions changed in the late twentieth century, the lift ceased to play an important role in moving people between town and beach and in serving large numbers of visitors. This Victorian lift was no longer financially viable as fashions changed, and there was no incentive to invest in the maintenance of the structure, let alone the running of it. Today, the lift holds a Grade II listing and is one of the oldest operational water lifts in the UK.¹⁸⁰

In many ways, the story of the development of Folkestone remains a story of division into two sections, and of attempts made at different times not only to facilitate movement between the two but also to bring them together in order to create a more unified Folkestone. Such a 'bringing together' could be understood as carrying economic as well as social benefits to both sections of the town, in support of each other. However, the origins of two of the major players in the development of Folkestone, both as a port and as a resort, can be traced: on the one hand, a commercial company controlling the railway and harbour and, on the other hand, a family controlling the land upon which the upper town was built. The two sections were controlled by two different interest groups, albeit with a considerable rationale for working together.

6.2 THE RADNOR FAMILY HOLDINGS

We can track the political and economic influence of one family in the development of Folkestone from 1697, when there was an initial parcelling of land in the town; this family is the Radnors, whose family name and titles still mark much of the topography of the town. Today, the head of the family is William Pleydell-Bouverie, the 9th Earl of Radnor, heir to the Radnor Estates. The Earl's forefathers, the de Bouverie family, were Huguenots from Flanders who, having made substantial wealth in trade, had purchased land in Wiltshire (still held by the family today). By 1771, the Radnors had acquired substantial landholdings in the area of Folkestone, and added the title of that location to their portfolio of titles for the use of the family. However, the Folkestone landholding proved to be problematic. The chalk cliffs were (and are) unstable, and a number of landslides and cliff falls made development of the land a problem. From the late eighteenth century, particularly following the 1784 fall, designs for sea defences and a new harbour greatly stabilised the site and allowed for the possibility of developing the town as a resort to be considered. The second Viscount Folkestone, Member of Parliament for Salisbury, Wiltshire, introduced a private Act of Parliament in 1818, which allowed for further parcels of land in Folkestone to be purchased and developed for what would

¹⁸⁰ Rooney and Begent (n 86).

become the development known as the 'The Leas'. It was this Act, and the subsequent design and building of The Leas, that allowed for the development of Folkestone into a leading seaside resort for fashionable and wealthy people by the late nineteenth century.¹⁸¹ The Leas still functions as a central point to the town, giving it an air of graceful – if now faded – gentility. However, such an extensive and expensive development was only made feasible by the steps taken by the owners and operators of the harbour to secure their own economic interests.

Once the sea defences were secured, the development of all the Folkestone land was also secured. The arrival of the South Eastern Railway Company in 1843 had improved transportation, offering vastly reduced travel times from London to the south coast and transforming the town into the principal station and port for the continent, as well as helping to develop the town as a popular and fashionable seaside destination. In 1877, the Pier Company, having built the pleasure pier, developed and began building the original Leas Lift in order to ensure the comfort of the wealthy Victorian pleasure seekers, who would benefit from improved access to the seaside from The Leas. To do so, they leased land from the Radnor family, who owned the site.¹⁸²

The lift, of a funicular design, offered a 46-second solution to transportation up and down the cliff, delivering a ride connecting the seafront to the upper promenade and thus avoiding a long, steep climb up the hill. The lift, which continues to exist today, was installed in 1885. Now a Grade II listed building, the Leas Lift is one of the oldest remaining water lifts in the UK.

¹⁸¹ *ibid.*

¹⁸² *ibid.*



Figure 6.1: The Leas Lift viewed from the pier¹⁸³

Although the lift was exceptionally popular in its day, and has carried more than 50 million people since it opened, as the town declined as a popular seaside destination in the middle-to-late twentieth century, the Lift Company failed and went out of business. The lease returned to the Radnor family, along with the lift.

In 1967, the Radnor Estate leased the lift to the local authority, Shepway District Council. The local authority kept the lift going, at a loss, until 2009, when the lease expired. Once again, the lift had failed to be economically viable, and the council decided not to apply for a further lease. The lift was closed. Furthermore, although the council had held a lease that placed upon them the obligation to 'fully refurbish' the lift, they had failed to service and maintain it. On returning the lift to the Radnor Estate, the council was charged, under the terms of the lease, for the full cost of restoring the lift and meeting the listed building requirements. Although the Estate billed the council for the cost of the work, the whole amount was not met, and a figure as low as 50% is believed to have been recouped.¹⁸⁴

The Radnor family's property interests remain central to Folkestone. Some of these interests are still held in the Radnor Estate, whilst others are held (for revenue purposes) in the Folkestone Estate Trust Foundation. The Leas Lift and the land upon which it is sited are now held by the

¹⁸³ Picture from the Folkestone and District Historical Local Society

¹⁸⁴ Rooney and Begent (n 86).

Folkestone Estate Trust Foundation (FETF hereafter). Indeed, the FETF owns not only the freehold of the lift but also the whole of the cliff face, as well as The Leas – subject to a 999-year lease in favour of the council – the Marine site car park to the east of the lower lift station and the car park between Marine Crescent and Marine Parade.¹⁸⁵ The FETF also holds the benefit of restrictive covenants over some of the surrounding land, which was formerly part of the Radnor Estate. In other words, their interests in maintaining and developing the economy of the town are extensive and critical, and the Estate has suffered, along with the general decline of Folkestone as a fashionable (and wealthy) resort.

However, the FETF do not hold much property on the lower site, down by the seaside, harbour and beach (other than that detailed above). The land and assets once owned by the South Eastern Railway Company, most importantly the port area, are now owned by the other principal player in Folkestone: Roger de Haan. Through holding companies, as well as his charitable trust, he now owns the freehold of part of the council car park, the former funfair site and, most importantly, the harbour. Therefore, de Haan's interests now govern a great deal of the lower section of Folkestone,¹⁸⁶ whereas the Radnor family's interests still hold sway in the upper section.

6.3 THE ACTIVATION OF SOCIAL CAPITAL TO SECURE THE ASSET OF THE LEAS LIFT

After the closure of the lift in 2009, the FETF sought a new tenant in order to reopen the lift. Without the council or a significant business investor being interested in taking over the lift, the Estate had to think of something rather different. In 2010, the Estate's agent thought of the possibility of combining local 'social capital' with the interests of the Estate, and suggested a plan to open, manage and maintain the lift as a 'social enterprise'. It seemed obvious that a CIC was the form that such a social enterprise would take.¹⁸⁷

A CIC is a company limited by guarantee, the essential components of which are as follows:

- i. It is registered as a 'not-for-profit' enterprise

This is a descriptive term used by the social enterprise community, meaning simply and only that the CIC does not produce profit for investors, but rather for reinvestment into the enterprise and thereby into the community. Registration must confirm that it meets these objectives, and it is then regulated to ensure continual adherence to them.

¹⁸⁵ *ibid.*

¹⁸⁶ He is now engaged in a major development of the seafront, detailed at the end of this chapter.

¹⁸⁷ Refer back to Chapter 2; this is a reprise of the basic material in relation to CICs for the purposes of this chapter.

- ii. It (the CIC) must state 'community benefit' aims/objectives in its foundation documents

It is therefore clear that this is not only central to the construction of any CIC, but also remains its only rationale for its existence. It is essential that, under section 36, the applicant for CIC status makes clear how a 'community benefit' will be delivered in order to be registered as having CIC status. This process is also known as the 'social purpose' test, and has to be met yearly.

- iii. The legal format is as a company 'limited by guarantee'

This is a company form, based on a legal form originally developed by and for cooperative societies, and is therefore blended with a trust-form approach, as it has the intentions of the enterprise stated as its primary purpose within its community interest test. For instance, 'directors' are called and act as 'trustees', who may not draw salaries but only expenses. Further, there are no shareholders and therefore no dividends to be paid from profits.

- iv. An asset lock facility

This is best understood as protecting the value of the assets for altruistic purposes, rather than the material asset itself actually being locked away – for instance, a particular item of property held/locked for a particular community group. If the CIC folds, then the assets (those being actual items) are either transferred to a similar organisation or sold at market value and the monetary value is transferred; thus neither the assets nor their value can accrue to individuals for personal gain.

The design of a CIC can obviously be applied to a lift to be run for and as a community asset. But it should be remembered that the lift in question had not been run at a profit for some time, and that the land upon which the lift is built is owned by the local landowning family. Therefore, other than thinking of it simply as an issue of 'community interest', we might also think of the choice of a CIC by the Radnor Trust as being one that suited their interests too – as a means by which to keep the lift in operation, but without either expense or the loss of a potential future asset.¹⁸⁸ What would be required would be social entrepreneurs willing to invest their time and skills for little more than the reward of 'feeling good' about it. Thus the only issue was the need to find social entrepreneurs who would be willing to undertake the running of it. From this

¹⁸⁸ See Section 6.5 Evaluation.

initiative, 'The Folkestone Leas Lift Community Interest Company' (TFLLCIC hereafter) was established in 2010 by the Radnor Estate's agent.¹⁸⁹

The required CIC section 36 declarations on the formation of a CIC are recorded in the company file.¹⁹⁰ Particularly important in stating who the beneficiaries are is Section A: Community Interest Statement – beneficiaries:

We/I the undersigned, declare that the company will carry on its activities for the benefit of the community, or a section of the community.

The company's activities will provide benefit to:

The residents of Folkestone, Kent and, in particular those of limited mobility, Visitors to Folkestone, Kent and, Students from educational establishments. Those having an interest in historical machinery.¹⁹¹

Section B describes the activities and related benefits in further detail; the aim was to maintain the service of the lift 'for the community', whilst also securing the lift's unique position in the heritage of the town as a living museum. TFLLCIC now maintains and operates the lift 'on behalf of the community' as a non-profit-making organisation and, as a necessary part of their incorporation as a CIC, they have met the 'community interest' test. The lift has reopened as a 'living museum', providing schools and locals with educational facilities and offering an insight into Victorian engineering, along with the provision of a transportation link providing quick and easy access between the town and the seaside. However, the CIC must be able to show that it continues to meet the community benefit test in annual reviews.

In 2010, The Folkestone Estate had the lift in full working order, and the primary challenge for the CIC has been to keep the lift moving in order to maintain the Victorian engineering. The worst thing that can happen is for the lift to stand idle, as water and metal do not stand well together. Furthermore, both the lift and the adjoining buildings carry the obligations of a Grade II listing. It is clearly within the interests of the Radnor Estate to ensure that they, as the registered title holders, comply with these requirements, as failure to do so will expose them to fines. However, for the Estate, finding someone with the knowledge and skills to operate,

¹⁸⁹ See coverage of the opening of the lift as a CIC, with the keys being handed over by the Radnor Estate's agent – and note the help provided towards the restoration fund by the Roger de Haan charity. 'Coastal Water Lift on Folkestone Cliffs Reopened' (*BBC*, 26 July 2010) <www.bbc.co.uk/news/uk-england-kent-10758519 July 2014>

¹⁹⁰ CIC36: Application to Form a Community Interest Company' No 7266662 (6 August 2013) <www.gov.uk/government/publications/form-cic36-application-to-form-a-community-interest-company>

¹⁹¹ See appendix 2 for the Folkestone Leas Lift CIC community benefit statement.

maintain and drive the lift in order to keep the engineering running – and at the lowest cost possible – was crucial. How did they manage it?

The Estate's agent had tracked down Eamonn Rooney, the last-known lift worker, who had been a ticket inspector on the lift for a number of years when employed by the Council, and was now in retirement. Much to his bemusement, the Estate approached him with their proposal.¹⁹² By good fortune, Eamonn Rooney is also a local historian, with a great understanding of the history of the town, its creation, fortunes and decline. He became instrumental to the future of the lift and the CIC proposal, extending his passion for and commitment to the town into a specific focus on the resurrection and survival of the lift.

During the lift's closure, tension had developed in the town, and the community had reacted by marching through the town calling for the lift to be reopened. Locally, there were real concerns that the lift would be decommissioned and the land sold for development – thus ending both the Victorian legacy and the availability of low-cost access to and from town and beach. Within this context, he agreed to set up and run the company and the lift for 'a social purpose', as he recognised and valued the materiality of the asset, as well as the motivation of local concerns. He came out of retirement, and approached old friend and fellow Folkestonian activist Begent to assist him in the project. Rooney knew that Begent had worked with community groups and local businesses to provide solutions that had enabled community projects to be formed. For example, Begent had been crucial in establishing the Pomade Local Market (local farmers' markets), Step Sure,¹⁹³ The Shed (a secure area for youths to meet with skateboards, provision for ramps, etc.), Pavement Pounders (a walking group) and the Film Factory.¹⁹⁴ He is an obvious example of a local 'social entrepreneur' and, with his background and Eamonn's commitment, the potential of a CIC was realised.

Relevant to their willingness to carry forward the Leas Lift project as a CIC is that the establishment of the farmers' market was amongst the first of the community lead projects that Begent had been involved with, as well as meeting the need to provide additional tourist information in the harbour, which could be carried in a small store and information point located close to the market, on harbour land.¹⁹⁵ After a number of community consultations, the legal form adopted for this enterprise was a CIC. An essential driver for choosing this form was

¹⁹² Rooney and Begent (n 86).

¹⁹³ <www.stepshort.co.uk>

¹⁹⁴ <www.thefilmfactory.org>

¹⁹⁵ Rooney and Begent (n 86).

that it offered the security and clarity of a 'lock' on any 'assets'.¹⁹⁶ The CIC model was adopted by the interested parties as one suitable to their needs, and, subsequently, it seemed to the two friends the obvious choice for the Leas Lift as well.¹⁹⁷ The Leas Lift Community Interest Company was formed and registered in May 2010 – as a result of an initiative taken by the Radnor Estate's agent but made possible and carried through by local social entrepreneurs.

6.4 PRESENT CONDITIONS

The lift originally had two tracks, with two lifts operating; however, at present, there is only one track in operation. The second track is in a disastrous state, and poses a high threat to general health and safety. This presents a significant issue, which affects the immediate needs and long-term plans of and for the CIC. There has been a failure to find a mutually agreeable way forward between the various stakeholders (primarily the local authority, the CIC and the statutory body that oversees the listed status, but also the Radnor Trust), and therefore further maintenance and restoration work on the second lift have been prevented, other than necessary 'safety' work. Perhaps ironically, compliance with health and safety regulations is at present the single biggest threat to the future of the lift. Second to this, and closely related, is the public liability insurance premium. Therefore, in practice, the two entrepreneurs running the CIC have had much to contend with, and little access to the resources necessary to try to deal with the issues. Constant battles with other institutions have debilitated their energies, and they spent the first year of operation feeling that they had very little control over the future of the lift because of the need to try to recover the second lift and put it back into operation. The fate of the second track for access from the upper level is hugely significant, and central in the bargaining negotiations between the stakeholders and planning officials. A fundamental objective to a multimillion-pound development plan on the lower level of land and beach is one of access and congestion. A lift system is still a favoured solution to the challenge of access from the upper and lower levels of Folkestone.¹⁹⁸

TFLLCIC holds a licence to operate the lift rather than a lease; the arrangement between the Radnor Estate and TFLLCIC is that the CIC holds a licence to operate the lift and not a lease on

¹⁹⁶ Department for Business, Innovation and Skills, 'Office of the Regulator of Community Interest Companies: Information and Guidance Notes – Chapter 6: The Asset Lock' (May 2016)

<www.gov.uk/government/uploads/system/uploads/attachment_data/file/524154/14-1089-community-interest-companies-chapter-6-the-asset-lock.pdf>

'The Asset Lock is designed to ensure that the assets of the CIC (including any profits or other surpluses generated by its activities) are used for the benefit of the community.'

¹⁹⁷ Interestingly, another reason for choosing a CIC is the relevant ease in forming and constructing the legal form. It is felt that the process is manageable and problem-free, compared to forming a charity, for example. Evidenced in interviews with Eamonn Rooney and Terry Begent (n 86).

¹⁹⁸ Rooney and Begent (n 86).

the land. There are no fixed rent charges for the lift from the Estate, but the rent is subject to future profits once all costs are taken into account. This element is essential in addressing the financial viability of the lift as a commercial business, one that must offset costs against profit to survive.

The CIC has to raise funds in order to meet the running costs of the lift, as well as any maintenance or development costs. The wage costs are approximately £60,000 pa,¹⁹⁹ in addition to ongoing maintenance and running costs, which amount to an approximate figure of £77,000 per annum.²⁰⁰

In terms of everyday income, the charge for the ride has to reflect the experience, which is only 46 seconds, as well as the value of not having to walk between the lower and upper town. The cost for an adult is 50p, while it is 30p for children, and a family ticket (2 adults and 2 children) costs £1.40.

It is highly unlikely that the lift would be able to be economically viable, especially given the pressures placed on the CIC in relation to the second lift, which were outlined above. To try to run the lift in simple commercial terms seems unsustainable. It has therefore been essential that the creativity, skills and commitment that social entrepreneurs can bring to such a project have been present here. Even more fortunately, Rooney and Begent have had the creativity to develop various initiatives to bridge the economic gap, most successfully through the launching of the annual Folkestone Leas Lift Beer Festival, which commenced in 2011.

In 2015, the lift opened for another season. Now well recognised, not only locally but also further afield, through such sites as TripAdvisor,²⁰¹ the lift has become something of a moderate success, bringing pleasure to locals and visitors on memory-lane trips, to engineering enthusiasts and to children enjoying the ride. However, this has only been possible due to the investment of labour and social capital, and to the commitment and efforts of two key players, both men in their late 60s – Rooney and Begent.

If the social enterprise is a success for the community – the community that applied direct pressure on Rooney to ensure the longevity of the lift – have they further supported him and his efforts? The wider business community offers discounts for printing and advertising, leveraged by Rooney in his pitch that the lift brings economic value and is good for the wider business

¹⁹⁹ Lift operators are employed.

²⁰⁰ 'Operating Costs Vastly Reduced', TFLLCIC Abbreviated Accounts (31 March 2014) (see Appendix 2).

²⁰¹ www.tripadvisor.co.uk

As of March 2015, 239 TripAdvisor reviews had reported a 4.5 recommendation rate, with many reports commenting on both the ease of using the lift as a point of access to the beach and harbour, as well as the friendliness of the people running the enterprise.

community. Further evidence of community interest is apparent, and events have been held around the lift and are well represented.²⁰² But how much support is forthcoming from other stakeholders – particularly the council? The limitations in the use of the site (there are no toilets; the car parking is chargeable; the council have refused to allow a permanent tea room on the site; and they have declined to assist in changes to the small road directly outside the lower level, which could serve light refreshments and ice-creams) suggest that key stakeholders are not exactly proactive in offering support. Although the area to the side of the bottom of the lift has been developed into formal gardens, leading to a play area and tea room, the immediate area around the base of the lift is largely redundant wasteland, with only remnant signs of previous uses, which is not very inviting.²⁰³ The economic capital required to support the input of social capital in this enterprise is not visible, and the two entrepreneurs, despite their enthusiasm and commitment, were often found to be rather dispirited and not sure of how long they would be able to keep going.

There is little evidence of practical support from the wider community; representatives from local social groups, teenagers, young families, arts and engineering students, and so on, are not visible. It seems that the ‘social purpose’ statements and related activities can be difficult to activate, even by well-meaning and imaginative men such as these. Developing potential with and within the local community is another aspect to the running of the CIC – and yet one that both takes more time and perhaps needs different sets of communication skills. There is scope to activate several ‘interpretive communities’ within this project, expanding its social purpose and widening its reach. It could be argued that this is the responsibility of the trustees, but it could also be argued that the current test for ‘social purpose’ not only encourages vagueness but may also place too much responsibility on a small group of people who struggle to keep a difficult enterprise up and running.

The two directors kindly shared their ‘corporate plan’ for the next five years during the course of this case study, joking that it is a question of whether they could even survive that long. They have certainly come to see the current business as requiring a new structure, one that will need to develop other lines of economic and social support. They had decided that options to replace the CIC could include:²⁰⁴

- i) the local authority taking the lift back and operating it as a public asset – but they know that this is most unlikely, given the cuts;

²⁰² Field visit, summer 2015.

²⁰³ Field visit, 17 November 2014.

²⁰⁴ Rooney and Begent (n 86).

ii) the lift being given to a body like the National Trust – but the Radnor Estate is unlikely to agree to this, as it would entail loss of their freehold;

iii) the lift being adopted by the body of stakeholders working on the extensive development of the harbour and seafront – this has potential, given that planning permission has been obtained for this major development, led by local businessman Roger de Haan, and the lift would enhance the use of the seafront. However, it would depend on the Radnor Estate interests being met.

If all else fails, another option is for the lift to be taken over by another community trust (a BenCom) or another CIC – but no one has come forward.

At present, the lift continues to provide a community benefit at a steady pace, and has the advantage of being slightly protected as a community asset for future generations. In the autumn months, the services are reduced to just weekends, with notices put up weekly to confirm operating times. In winter, it is closed. It may not be until the wider development of the lower land that the lift will be sufficiently economically viable, and then fully repaired and totally refurbished, with both tracks working.

The Leas Lift is a limited liability company CIC; this prevents it from accessing funds from charitable organisations. When thinking about the material value of the lift as a community (or public) asset, the ‘living museum’ approach fits well, and if recast as a charitable body, this would open up the enterprise to the ability to apply for grant funding from other sources, such as the National Lottery Funding, English Heritage, and so on, as well as conveying revenue advantages. In the early days, the group did look at becoming a charity, but they felt that this was too complex in its construction and regulation. However, one can’t help but feel that this enterprise will always need the type of financial support akin to a charity. However, given the likely opposition of the Radnor Estate, due to the requirement of both the land and the lift being placed in a charity, thereby relinquishing their influence, and the fact that the SE is already incorporated as a CIC, it is unlikely that either Began or Rooney will have the time, energy or commitment to rethink their previous stand against being a charity.

6.5 EVALUATION OF THE CASE STUDY

The most obvious point is that this CIC survives on a combination of little financial support but a considerable investment in time and enthusiasm by just two people. In many ways, it is a classic example of privatisation being ‘covered’ by community and individual voluntary labour. Other than the local community, three major stakeholders are benefiting from this – the local

authority, the Radnor Trust and the developers of the seafront (de Hann). The Radnor Trust has the ability to protect its long-term ownership of the land, as well as its obligations to maintain the lift as a listed building.

The CIC is set up to operate the lift and therefore can be considered as an operator not an owner of the asset (the lift itself). The only assets controlled by the CIC are peripheral items related to the operation; these are locked away. In the event of the CIC ceasing to trade, these would need to be sold at market value or offered to another CIC. Therefore, one might need to question what is of real monetary value as opposed to community material value? What is protected here is the land and the lift – they are assets of the Radnor Trust – and not the social enterprise, which is bound to the social purpose for which the CIC has been established.

The 9th Earl of Salisbury has shown a personal interest in the Leas Lift; he frequently visits and supports the community events. Both Rooney and Begent report that the Earl holds a great affection for the lift, and sees it as an heirloom, which he wants to maintain for the benefit of the community, as well as a potential resource for the business community. He seems impressed by the ‘social enterprise’ movement and how it has been so resourceful in protecting the lift. However, one cannot help thinking that it has been as much for his family’s benefit as for the local community’s.

Is this a good marriage between social and economic capital, or is this little more than a holding mechanism, while the private property stakeholders continue to develop their property assets in Folkestone? In other words, is this an example of SE bringing together private interests with community benefit, rather than SE simply serving community interests? The SE enterprise model (see Chapter One) allows for either, and once we place ‘social benefit’ at the centre of the equation, we can see more clearly that SE is not always focused solely on benefit to the community.

What we see here is the sharing of assets and the control and management to operate them with the ‘have-nots’. It could be argued that, in the community, the ‘have-nots’ are well placed and hold true citizen power;²⁰⁵ this thesis suggests not. The CIC model restricts them from using the asset – the lift – to raise funds; therefore, it could be suggested that the CIC merely holds the liability. What this tells us is that, even on securing the top rungs of Arnstein’s ladder, those of delegated power and citizen control, without the ability to either hold actual property or assets or to leverage finance against them, the degree of power may have fatal limitations.

²⁰⁵ Arnstein (n 9).

Another aspect to this case study is, again, just how reliant many SEs are on local social capital in the form of social entrepreneurs – especially unpaid ones. What is evident in this example is just how much Rooney and Begent have had to do and against what odds. For example, the constant need to pursue potential lines of funding and the complexities of potentially renegotiating and/or changing the legal form surely constitute more than the everyday business of simply keeping the lift operational. Further, they seem to have limited support locally. Again, to actually build social capital rather than draw from it seems more problematic. Having said that, the fact that Begent had been involved in other activities of and for community benefit was crucial in delivering the skills, experience and confidence that encouraged both men to take up this project. But they are only two people, and not in the first flush of youth. Folkestone was willing to march in concern when the lift was closed, yet participation and representation of the wider community is not present within the enterprise; how can Folkestone be activated to now support the CIC? The question of support for community-orientated SEs and the building of social capital for regeneration and renewal remain critical. How is a social enterprise to be embedded at a community level? Without addressing this question, SEs will too often remain limited to social activists or the subject of altruistic behaviour by benefactors if they fail to garner wider participation. It is all too likely that, in Folkestone, either the Radnor family or the de Hanns will turn out to be critical to the long-term survival of this local asset, the Leas Lift.

Social and private economic capital is often driven by different motivations, with very different agendas. Social capital tends to lean towards the protection of the materiality of an asset in order to secure the social value of use (or cultural heritage), which may be difficult to measure, whilst economic capital requires the mechanism of economic growth in order to secure a return on financial investment. Alternatively, models that use a combination of both social and economic value require something in return for both forms of investment, whether it is in time or in money. Failure of one or the other in receiving a return may jeopardise the necessarily tense relationship; difficulties in balancing the two models could result in one side or the other withdrawing from the enterprise. On the one side, a return on investment for the economic capital and, on the other, a return of social value for the social capital invested are, therefore, essential in managing these very different expectations, and this requires some careful negotiation and balancing.

In relation to TFLCIC, a peppercorn rental has been essential; not only is the enterprise under financial pressure to raise funds to pay for the cost of running the lift, but its financial viability may have been drastically affected if there had been a commercial charge for the lease. Equally, the existence of the lease protects the long-term interests of the FETF, and therefore the peppercorn rent provides support for – and recognition of – the labour and social capital that

has made that project viable, as a future benefit to the FETF. The importance of timescales is significant here and may require some consideration; are the parties working towards the development of a mutually convenient temporal scale?

Did the FETF favour the CIC as a legal form because they could then protect their asset by locking it into a trust, whilst maintaining their asset and leaving the door open for future development? The lift fails to provide a return for them. They could have gifted it to a charity, who would have been able to enhance the delivery of public benefit, as charities can access greater funding and grants. Instead, the FETF retained the legal title and thereby the final ownership and control of both the lift and the land, which they can now use as leverage in future development plans, especially for access to the lower area land.

Therefore, it could be argued that not only have the local community benefited from the CIC, but so has the FETF, in that:

- They have appeased the community in allowing a 'community interest' to be recognised and developed.
- The lift remains in use, therefore minimising the risk of it falling into deterioration and resulting in fines for the Estate.
- The asset remains available to the Estate and easily accessible should they wish to reassert ownership control.
- The lift therefore remains a valuable economic commodity, which could be traded in the negotiations during development and planning whilst, at the same time, being portrayed locally as a community asset, secured through an innovative social enterprise.

In 2015, the developers shared the same challenges as those that faced developers at the turn of the eighteenth century: the lower level still requires access to the upper level; the existing roads and pathways are still very limited; and the nineteenth-century lift remains a popular mode of transport between the two levels. Who can, at this point, say that the CIC is for 'community benefit' alone?



Figure 6.2: Folkestone, 2014²⁰⁶



Figure 6.3: Plan for the proposed development of Folkestone Seafront and Harbour²⁰⁷

²⁰⁶ See <www.rdhct.org.uk/> (accessed November 2012) and <www.folkestoneseafront.com/the-masterplan/> (accessed March 2015) for the full masterplan for Folkestone Sea Front. In January 2015, the Folkestone Seafront development project received outline planning permission from Shepway District Council.

²⁰⁷ *ibid*

6.6 A TECHNICAL REVIEW OF THE OPERATION OF THE CIC

Having provided an overall evaluation of the case study, it is interesting to undertake a more technical review of the evidence of how the CIC is running, framed through the research question.

The first question considers whether the governance of the CIC is fit for purpose, in both structural and operational terms, and whether the said legal forms can deliver an aim of ‘for social benefit’, both as a legal device and as a measure of ‘social capital’ for social renewal aspirations.

The overall governance in this case appears to be operating effectively; the directors are continuing to provide evidence that they are delivering against the filed CIC 36 community interest statement. However, the inability to raise capital and make decisions that affect the infrastructure is impacting negatively on their ambitions. The lift’s primary role is that of public transportation; it must therefore comply with health and safety, and the lack of capital will cause issues and will restrict the natural development and growth of the enterprise. The current model also fails to include the structural involvement of the community; wider community participation could bring an injection of social capital and solutions to the problems that this CIC is faced with.

However, the main challenge is that this legal form is reliant on limited fundraising, but is possibly excluded from the formal fundraising (in terms of local fundraising and national pledges) that might foster grants to repair, develop and maintain this historical heirloom. The CIC in this form may also be preventing donors from supporting the enterprise; the amounts in the annual reports filed on 31 March 2014²⁰⁸ are insignificant. Therefore, further public awareness of the definition is required if both social capital and economic capital are to be realised. Once again, potentially recasting this enterprise as a charitable incorporated organisation may attract donors, as they recognise the public benefit and understand this legal forms regulator.

The second research question asked whether the communities and societies whose welfare and interests are meant to be the purpose of said enterprise receive the (or any) social benefit, and through what mechanisms this will be judged. Evidence can be drawn directly from field research, where three surveys were undertaken over the duration of the case study. On each occasion, 12 random members of the public were asked a number of simple questions. The results can be seen below:

²⁰⁸ See Appendix 2.

	July 2012	July 2013	July 2014
Do they use the lift?	11	12	10
Do they use the lift weekly?	2	5	4
Do they understand the organisational structure? ²⁰⁹	1	3	5
Do they volunteer?	0	0	1
Is it worth investing in?	12	12	12

Table 6.1: Results of field survey

What is interesting is some evidence of growth in the understanding of the organisational structure – although this is still relatively low – and the fact that there is consistency in the answer that the lift should be invested in. The use of the lift by locals and visitors shows that it is delivering a social benefit. It is being used for weekly ‘exercise’ by some, whilst for others it continues to serve as their primary access route connecting the upper land and town to the lower shingle beach and parking area. Could further community participation and a more comprehensive and extensive local survey be used to gather information on support, which could then be used to further demonstrate community benefit and in negotiations for further funding? This survey does suggest a small but significant level of support – how could it be built upon? How can the local community be drawn into building social capital and valuing ‘community benefit’? The ability to harness the community is key; the risk to the lift of failing to energise the community and raise funding could be fatal.

This thesis sought to examine through case studies the use of emerging legal forms by social enterprises from a number of different historical registers, designed to carry community benefit or community interest as a legal criterion, with particular emphasis on accountability. But the work has importantly learned that what seem to be significant in building the processes

²⁰⁹ Question: Do you know what type of company, enterprise or charity it could be?

designed to deliver community benefit or community interest are, firstly, the identification of the legal form – as in public and commercial awareness – and, secondly, the importance of community participation.

This case study can be interpreted as evidence of the legal forms through the four historical registers being blurred, due to a lack of clear branding; therefore, the essential interconnections with regard to accountability for profit and surplus distribution are unclear at best and unhelpful at worst. Additionally, the simplicity of the CIC also fails to garner and demarcate participation through representation.

The following and final chapter will further position the findings from the case studies in conjunction with wider academic work, it will offer both an evaluation and recommendations.

We have seen growth in the social enterprise economy, as discussed earlier, but what is yet to be considered is why. Is the growth due to the ease in which a social enterprise's business activities can be conducted – unmeasured, unmanaged and loosely regulated?

The legislation brought into force during the period of this research sought to overcome the restrictions in the pre-existing legal devices (i.e., membership models and charitable models), with the provisions of less stringent and more accessible legal devices adoptable by social enterprises, which encourage business activities that pledge an aim of benefiting others. The governance and branding for CICs and CBSs can be widely interpreted; in both models, the beneficiaries are not named or classified. A community benefit society is a society without a need for members – there is no formal representation of the community that benefits from the purpose of the society. Thus there is no requirement for the beneficiaries within the said community to be measured with regard to the benefits offered or declared by a CIC or CBS. This work suggests that this light-touch approach could be identified as a modest legal form.

Without the legal form of governance requiring measures of community benefit, community interest or community participation, how can the business form be managed and ultimately regulated by the governing body/ies? Furthermore, without structural requirements or measures of community representation, how can community participation be achieved? CIC and CBS business models did not intend to address inequalities directly; however, if social capital is required to address exclusion, then participation is absolutely critical, as demonstrated in the cases studies offered by both Arnstein²¹⁰ and, as illustrations, Wright.²¹¹

We can directly connect the work from Arnstein's *Ladder of Citizen Participation*,²¹² which discussed offering steps 1–8. The ladder offers steps to achieving effective citizen participation, noting that roadblocks are present and power is often heavily protected. Arnstein notes that the manipulation and therapy rungs on the ladder serve merely as cures or a process of education, while informing, consultation and placation are mere tokenism and do not allow for participation. It is only when there is delegated power and citizen control that any degree of citizen power can be achieved. The steps on the ladder are offered as enticements to citizens,

²¹⁰ Arnstein (n 9).

²¹¹ Wright (n 14)15. Configurations of socialist empowerment: Elements for building a socialist hybrid.

²¹² *ibid.*

and are potentially significant and accessible; however, it is only the top rung that will allow true citizens' access to real 'power-sharing'.

We have seen that participation and representation is essential, hence the concerns that this work has when projects or community benefit/interest are purported with limited community participation and with no formal means to demonstrate community participation. It does, however, appreciate that this is not always possible; yet the work wishes to challenge the barriers that might prevent achieving community participation and structural representation.

The case studies within Arnstein's article refer to these barriers and suggest that real structural community participation and power-sharing are rarely achieved; the lower steps are mere gestures, facades, leaving the community or citizens with no real say in reality. Those holding the power maintain control. Here, it could be argued that there is a retention of power by the upper classes – the 'haves' versus the lower classes, the 'have-nots' – despite the therapy, informing and consultation processes.

This typology might therefore be interpreted as power being very much protected by the 'haves'; they protect it fiercely and can obstruct access to it, while giving back nothing more than supportive sound bites, which operate as mere symbolic efforts. Arnstein provides a number of examples of power protection in the Community Action Agencies case study.²¹³ We see power as being firmly held by the 'haves'; it is argued that power is and can be used to suppress and relegate citizens, forcing them into merely advisory roles. This could be the case again for the Folkestone Leas Lift.

It could be argued that the 'have-nots' are further manipulated into false senses of involvement with really little power or no power. It is only in reaching and achieving the upper steps that true delegated power can be obtained, and then the 'have-nots' can be structurally placed and given accountability and power-sharing. The Dover case study in Chapter 5 goes some way to doing this, in the creation and recruiting of two Community Directors onto the main Dover Harbour Board. This could be seen as true power-sharing. This work argues for further structural guidance to ensure the diverse communities within Dover are given a voice and access to the power. There is no information or guidance as to exactly how the power²¹⁴ accessible to the Community Directors will be distributed downwards, to the community; how will the Community Directors liaise with the community they are representing?

²¹³ Arnstein (n 9).

²¹⁴ Power here refers to the ability of the Community Director to have equal access to all DHB data, along with the ability to put forward community views/consideration; this would require the timetabling of community matters on DHB agendas for all board meetings.

This thesis promotes the achievements in Dover as an excellent starting point for community representation, placed structurally, organisationally and constitutionally on the board of a company that is significant to the community of Dover. The work also recognises Dover's mixed legal form approach towards community benefit, as a legal model potentially identifiable as being advanced or inclusive. The publication of how further inclusive, democratic layers of community representation can be brought about is required.

This achievement can be put forward as a template to address the limitations in CICs and CBSs, as well as other combinations of legal model that purport to serve community interest and/or community benefit. The redistribution of power can only be achieved with inclusive communities, therefore avoiding the separation of ownership. If used correctly, they can be the essential interconnection; this will promote social responsibilities and, thereby, a better chance of delivering social renewal.

There is nothing necessarily new here. Wright²¹⁵ accepts that there are active alternatives currently in operation and that these alternative models have evolved through a number of intersects. Many do not directly compete against the existing capitalist models, and they can sit comfortably side by side, operating in small markets, hence the primary argument of this work. All that is required is differentiation – for example, between business models that are modest and business models that are advanced or inclusive.

It is essential that any alternative to capitalism is identifiable as being an alternative and has the ability to be categorised with the varying options, ensuring that the grounds by which it is created and operates are different in a fundamental way. Wright argues that this, in turn, creates a process for which different power configurations can be determined. Additionally, much like Arnstein's work, Wright notes the ability and importance of power distribution and, importantly, redistribution; it must be central in the foundational structures. This work suggests that branding and identification, noting modest legal forms in comparison to those that are advanced/inclusive, could provide clear foundational structures.

The benefits of achieving a successful transformation of business structures could likely lead to transformations within social structures. The redistribution of power forms an opportunity for transformation to occur; it is both key and problematic in moving towards an economic and social utopian model to improve the outcomes for community groups and citizens alike.

²¹⁵ Wright (n 14).

Wright suggests a number of factors that can assist in transforming the existing capitalist institutions. He asserts that the economic structural institutions in use commercially are operating in an environment akin to that of an ecosystem. It is here that we can note the natural openness to allow through true democracies – sustainable platforms evolving over time, managed by those intrinsically affected and involved. The state’s role is to create processes and an environment for evolution, which could then see the redistribution of power between the ‘haves’ and ‘have-nots’; the ‘have-nots’ thus need to be identifiable and able to influence outcomes.

The process of transformation has been through historical struggles. Wright²¹⁶ notes three logical strategic steps of struggle: ruptural, interstitial and symbiotic. The first stage is an out-and-out war between capitalism and the alternatives, which would result in a winner and a loser. The second strategy allows for alternatives to exist, somewhat marginal to capitalist models or possibly within the existing capitalist models. The third strategy sees the state and societies working together; this might be at the top of Arnstein’s ladder and Wright’s Utopia.

Ultimately, Wright supports frameworks that establish social empowerment that is committed to institutional diversity. He suggests that this lies in the ability to allow a number of diverse institutions; in this way, we will see challenges to the incumbent dominant capitalist models. Additionally, Wright suggests alternatives that are diverse and capable of opposing the incumbent institutions, which will no doubt create conflicts between the classes – the ‘haves’ and the ‘have-nots’ – also noted by Arnstein.²¹⁷

The challenge is for the state to provide legal business models that address inequalities in an ecosystem that is emancipatory. The argument here is aimed at addressing the historically blurred registers by identifying and differentiating community-centric models, namely a) modest legal forms (currently available) and b) the introduction of advanced/inclusive legal forms, which are an evolution of the current offerings but have structural requirements to demonstrate community representation and power-sharing. An advanced/inclusive model would publish ‘measurables’ on targeted outcomes, and may also, if required, use the trust tools to further lock community assets for communities. These would be expansions of rules 1 and 4, as discussed earlier.

²¹⁶ *ibid.*

²¹⁷ Arnstein (n 9).

7.1 IDENTIFIABLE LEGAL FORMS

The legal definition for a social enterprise designed to deliver community benefit has progressed, and, in some respects, clarity has been achieved. The parameters for the critical test for community benefit or community interest, although present, are not easily recognisable commercially or, importantly, in the eyes of the public. The development of 'for the community benefit' draws directly on the 'public benefit' found in charities law.

A social enterprise is a business description or a headline concept, and it can use any number of legal forms. To be effective, it is of fundamental importance that this definition²¹⁸ is clearly distinguished. Charities return all surpluses to the charitable objective, and the surplus from social enterprises can be distributed to those running the enterprise (albeit with restricted percentages established). It is not simply a matter of political and public education in understanding the devices; social entrepreneurs (including those with a strong economic profile) will grasp the models to their advantage, as they might the ability to hold multiple legal forms. This may expose and risk community assets and community benefit.

The challenge here is in both the time it would take to devise an alternative and the potential burden to businesses; therefore, the opportunity to establish a layered approach to the current legal forms could be almost immediate; either you are modest or you are advanced/inclusive. This could be tied into funding qualifications and taxable benefits (similar to charitable tax benefits).

7.2 ENFORCEMENT OF GOVERNANCE

Of critical importance is whether the communities and societies whose welfare is meant to be the purpose of CIC or CBS enterprises receive the (or any) social benefit, and how effectively the enterprises are regulated. This research demonstrates that there is a lack of understanding in the public's minds as to how a CIC is regulated; this raises concerns over accountability, which extends to profit and surplus distribution. Because the CCBS Act arrived late in 2014, it is still too early to comment.

The Charity Commission is both experienced and recognised within communities and is largely trusted. The CIC Regulator is new; their recent annual reports read as more of a company's

²¹⁸ Department for Business, Energy and Industrial Strategy, 'A Guide to Legal Forms for Social Enterprise' (*UK Government*, 21 November 2011) <www.gov.uk/government/publications/legal-forms-for-social-enterprise-a-guide> accessed November 2014.

'... a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners...'

promotional brochure than that of a regulator, and there was no evidence to demonstrate regulatory non-compliance or enforcement of their powers.²¹⁹ Examples of CICs who have failed to meet their test, as per CIC 36, I had requested this from the CIC Regulator, but the information is yet to be received.

This work considers that a predictable expectation would be the amalgamation of the CIC Regulator and the Charity Commission, as the latter would bring its expertise in effective governance to the fore. It should also aim to address branding in community benefit and public benefit organisations in the future.

The CBS governance draws from models derived from traditional, democratic membership cooperative societies, and is now considered a 'bona fide cooperative'.²²⁰ CBS legislation needs to evolve and pursue governance that drives democratic and participatory involvement for and in community benefit societies. Governance should develop the asset locking facility and the opportunity to asset lock land and property solely for community benefit; in both case studies, property and land were central to the communities' material value in the assets, and were key drivers behind garnering the social capital, as they could be seen as representing the interconnection.

The CBS model draws heavily from the cooperative models. The purpose of a CBS is to serve a community and not just its members; the issues that need clarification are how is a community linked, when might the community be unidentified (disassociated) and by what measures are these controlled? After all, it is the cooperation and mutual benefit of a group that makes them willing as a cooperative society – but first they must accept being a member. How can you have a cooperative-based legal form with no evident way of listing or demonstrating any form of community cooperation? This rings true and is equally confusing of a society with no members.

The Port of Dover regime has initiated the structural integration of the community and has made early operational and financial contributions aimed directly at benefiting the community; this was evidenced in the pledges drafted both in their company objectives and in the overseeing trust declaration. What is evident here is that the clause that required 'community participation' is present, in both operational and structural terms, and should be noted as a powerful legal clause, with further use and entrenchment of the need to have community participation in order to benefit communities when creating and governing a sustainable social enterprise.

²¹⁹ See Appendix 6 for CIC Annual Report.

²²⁰ Snaith (n 2).

The backdrop to this thesis was successive governments' commitments to either a Third Way or the Big Society. Here, we can consider whether their agendas contributed to or empowered local social activists in anyway. The work considers that the 'Big Society' ethos was present in both case studies. It was certainly a factor in raising the social capital for the Port of Dover; this was evidenced very directly. In the case of the Folkestone Leas Lift, this was more indirect but still present, as evidenced in field surveys, and therefore it can be seen as being evident during the period of this early research.

However, what we are left with are some voids; the available governance falls short of enshrining community participation. The Port of Dover drew from an early legal clause that drafted in the requirement to ensure community participation, and witnessed it being achieved by community representation and through a mixture of legal devices. This work sees this as an opportunity to develop these lessons as an additional option within the pre-existing legal models, taking them from light-touch, modest models to – if required and desired – advanced or inclusive legal models.

7.3 ANSWERING THE RESEARCH QUESTIONS

Research question 1: Is the governance fit for purpose, in both structural and operational terms, and can the said legal forms deliver 'for social benefit', both as a legal device and as a measure of 'social capital' leading to renewed social aspirations?

Firstly, the evidence emerging from the case studies points to a number of key elements: participation, identity and capital. Each is required, but priority is on the ability to achieve community participation – this is essential. The work suggests that effective community participation can provide sustainability. However, without community participation, it would be questionable; therefore, social renewal may not follow. This was evident in the Leas Lift case study, and in the Port of Dover. The Dover model went further with a provision for a Community Director structurally placed on the Dover Harbour Board, thereby achieving community participation and representation by local people for the wider community of Dover.

Therefore, the work suggests that the current offerings might well be acceptable and suitable for low-key, modest community ambitions. Further advanced and more inclusive models are required, with guidance on building operational structures that support community participation through representation. This can also consider how to fulfil the delivery of definable measures for community participation and profit/surplus distribution, extending to measures related to outcomes, which can then be used by the appropriate regulator in order to hold a business to account.

Chapter 6 demonstrates some limitations in securing financing models for SEs who hold few or no assets. Here, care must be taken when key assets are locked, as this can directly affect funding opportunities and capital-raising options, as often the only or main asset is used as security against a financial agreement. The ability to access local community assets vested in land or property has been shown through both case studies to be essential; therefore, an option open to both a CIC or a CBS would be the ability to have the community benefit/interest asset considered and classified or registered as a local or community asset,²²¹ as argued by Alison Clarke, who advocates the ‘efficient regulation of land that is communally used’.²²²

Social renewal is possible but it will only be modest; for advanced social renewal, more advanced, inclusive social and business structures are required.

Research question 2: Do the communities and societies whose welfare and interests are meant to be the purpose of said enterprises receive the (or any) social benefit, and through what mechanisms will this be judged?

Some light evidence has been obtained to demonstrate how those intended to benefit are benefiting, as seen with the Leas Lift. Locals do use the lift for basic transportation and consider there to be a benefit from the lift running as part of the local heritage; in many ways, it positively contributes to the local economy. In Dover, there is more solid data available; financial sums have been awarded to local causes and there has been much publicity aimed at promoting DHB community events. So, to this extent, the work could suggest that the communities are receiving benefits.

The CIC Regulator’s operational report for the second quarter 2014–15 is a very positive report, and covers events and activities that raise awareness of CICs and the growth of CICs, but has no mention of the numbers that failed to meet the community interest test or of orders to restrict or cease certification,²²³ which is concerning. The problem here is with the modest, light-touch regulatory requirements within the social purpose test and the community interest statement. Therefore, the work suggests that the mechanisms are too subjective and fail to offer a concrete basis to judge.

²²¹ This concepts draws on materials related to registering local assets and the Localism Act 2011.

²²² Alison Clarke, ‘New Commons: Recognition of Communal Land Rights within a Private Property Framework’ (2006) 59(1) Current Legal Problems 319, 320.

Clarke argues that in ‘England and Wales where successive stages of land reform have concentrated on rules of private ownership... the law struggles to find appropriate legal structures for the recognition and efficient regulation of land that is communally used’.

²²³ The Office of the Regulator of Community Interest Companies, ‘Operational Report: Second Quarter 2014–2015’ <www.gov.uk/government/uploads/system/uploads/attachment_data/file/365907/CIC-14-1163-community-interest-companies-operational-report-second-quarter-2014-15.pdf>

7.4 EVALUATION

The legal frameworks available do assist in broad terms with the aiding of social renewal – they are suitable. Anything more ‘complicated’ might stifle social and economic capital, and jeopardise social renewal and community benefit. The emergence of these light-touch legal forms originally set out to simplify the ability for social entrepreneurs to be incorporated; anything too complex may deter them. However, the succession and substantiality of community groups requires wide community participation, in terms of both use and management. The ability to maintain the interconnections between the purpose of the asset or service and those who require the benefit or have an interest in it is essential. It is in both the ability to identify the interconnections and the ability of a community group to be structurally represented, and able to manage a local asset or resources, that real power-sharing will occur – power-sharing that is capable of affecting the outcomes for local communities, with the end users being the beneficiaries.

This brings us back to the ability to identify those who a) are involved and b) benefit, which in turn brings us to forms of membership models or co-ownership models; both require further investigation. From that platform, the mechanisms to measure and monitor outcomes could be surveyed – after all, who better to ask whether a social purpose or community benefit initiative is delivered than the benefiting community?

This research has shown the desire for social enterprises and the ease at which they can be formed, many of which benefit from social capital. The work has shown that social capital comes in many forms, from local community activities to experienced commercial entrepreneurs and politicians. It also shows a weakness in the general public’s lack of understanding and differentiation between the legal forms used by SEs. The problems exist due to the methods of development of the legal forms and the blurring of the historical registers that once differentiated companies, charities and membership societies and mutuals. The associated tests are equally interchangeable – public benefit, community benefit or community interest, in the eyes of the layperson. Improving on this is tricky – after all, where would we start? There could be a distinction between social enterprise and community enterprise but, in practice, separating social and community becomes problematic; when is something social but not community? What is a community? How can we define a community group?²²⁴ It can be argued that the legal forms discussed in this work state that they are community-centric, as a given due to their titles

²²⁴ See further challenges in identifying and interpreting communities in: Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press 1980)

of community interest company or community benefit society, and that provisions on their community statements explain what makes their business of interest or benefit to a community.

What is required is further operational and structural support and guidance (see Section 7.5), possibly drawing from the cooperative principles of membership²²⁵ and the John Lewis communication councils, and as discussed in Chapter 5 for the Port of Dover. Further organisational structures can be seen in Mondragon,²²⁶ which achieves organisational community participation and co-ownership as a conglomerate of over 100 individual significant worker cooperatives, with its corporation based in the Basque region of Spain; these are what we might like to refer to as advanced and inclusive business models.

The findings within this paper show that, although skills exist and social capital entrepreneurs are available and willing – such as those identified in the case studies: Wiggins, Chair of Dover People’s Port, and Rooney and Begent of the Folkestone Leas Lift CIC – further support is required from the state in terms of structural and operational governance.

In Chapter 4 through to Chapter 5, we saw Wiggins securing support in the wider political communities, who advised and promoted alternative legal models to achieve the Port’s capital funding measures while securing and enshrining an ‘enduring and significant community participation’.²²⁷ While both Rooney and Begent continue to deliver the Leas Lift as a form of transportation for the benefit of Folkestone and its people, with the support of the local landowner, wider participation would be of value. For these models to act as agents for social renewal, further work on operational structures is required.

There are many unresolved questions in relation to the PoD and the recruitment of Community Directors due to join the board that warrant further exploration. Exactly how are these positions going to operate? What voting rights will they have? How will they gather and disseminate information that is representative of the community? What communications council will they have, and will they have deputies able to present to the board? The recruitment of Community Directors is a good start, but further operational structures are required. Most importantly, how will the newly appointed Community Directors engage with the people of Dover? There are many different communities within the wider community that will need to be

²²⁵ It is very rare for member-based cooperatives to be a charity, as it is the members rather than the public who may benefit, except where a condition to membership exists – for example, a class of charitable beneficiaries. The utilisation of the principles and the structures of co-ownership societies is what is meant here.

²²⁶ For more information on Mondragon, refer to their website at: <www.mondragon-corporation.com/eng/about-us/governance/> accessed December 2013.

²²⁷ Dover Harbour Board Transfer Scheme: Letter from Department for Transport to Dover Harbour Board (20 December 2012) para 3.

represented. Might there be an ongoing membership base? What is participation going to look like and how will it be measured?

TFLLCIC, again, might gain from considering the benefits associated with membership structures; this would be in addition to the current legal requirements, but worthy of consideration in order to protect the asset as a community benefit heirloom. As shown in Chapter 6, low usage and failed commercial viability has plagued the lift; the adoption of an enabling legal form and the identification of a clear brand for the Leas Lift enterprise is required in Folkestone in order for it to continue.

7.5 RECOMMENDATIONS

If our starting point is that social enterprises are the same as community enterprises, and we consider sociologically that emancipatory alternatives to dominant institutions and social structures are evolving as a whole, as suggested by Wright,²²⁸ then a natural recommendation is to suggest additional thresholds within the existing legal structures already in place. These can be used by social enterprises to legally address the road blocks identified by Arnstein²²⁹ to secure real community citizen empowerment.

The Third Way, Big Society and localism agendas would be underpinned by a mixture of legal devices open to incorporated businesses, the current community models would remain and an advanced model with additional checks and bounds could be made available. This would see CICs and CBSs as either modest or advanced models.

A modest model is the current light-touch offering, while advanced models would see additional legal requirements: a) structural requirements to demonstrate community representation and participation, and b) a more definable and measurable interest or benefit statement, which includes measurables on outcomes. This could be achieved within the company's constitution and permitted rules. Examples of how to frame and draft rules to achieve this are required, as are examples of organisational structures, and provisions for measurables, participation levels and outcomes.

Furthermore, this work suggests the development of the asset lock facility – the ability to hold assets for 'social purposes' through an asset lock. These facilities need to be robust in ensuring that critical community assets are not lost in the commerce of business or in the event of the business enterprise ceasing to trade. The asset lock restriction aims to protect assets for social benefit purposes. Extending this is required, as it may not lock the actual asset (the item) but

²²⁸ Wright (n 14) 8.

²²⁹ Arnstein (n 9).

only its value for community benefit. The critical division between the monetary value of the asset and the material value held by the communities needs protecting, as it is often the only means of connecting them together; often, it is the material value that connects a community, and when this is lost, the damage is irreparable.

The danger here is in losing or failing to identify the essential social/community interconnections between the asset²³⁰ and the community; separation can occur, resulting in the compartmentalising²³¹ of assets, which can break or restrict social capital. The interconnection between the material value and the monetary value requires local knowledge, experience, voice and power; it is here that the importance of effective participation is, again, aligned with power. It is critical that an eco-economy has supporting legislation that pursues and measures the non-separation of users; those who manage, those who fund and the beneficiaries are all required and should be equally present and able to contribute.

What this research has shown is that there are some critical ingredients to delivering sustainable social enterprises, and that an advanced legal model could address the concerns identified in order to provide resilient, accountable, democratic business structures. We can once again draw from Wright's²³² work in considering guidance on ways in which we could expand CIC and CBS constitutions and their critical community interest statements or community benefit statements.

Wright offers suggestions on the starting points for the terms of reference in constitutional guidance. A social enterprise might therefore consider delivering against moral obligations as part of its accountability. These may well be based on moral principles. As seen in Chapter 1, Wright²³³ lists three moral principles: equality, democracy and sustainability.

Equality:

In a socially just society, all people would have broadly equal access to the social and material conditions necessary for living a flourishing life.

²³⁰ The lift in Folkestone and the port in Dover connected the community and empowered them to protect the assets and ensure that they benefited from them.

²³¹ Wright (n 14).

²³² *ibid.*

²³³ *ibid.*

Democracy:

In a fully democratic society, all people would have broadly equal access to the necessary means to participate meaningfully in decisions about things that affect their lives.

Sustainability:

Future generations should have access to the social and material conditions to live flourishing lives at least at the same time as present generations.²³⁴

The above may aid in developing community interest statements with regard to why and what the business purpose is – what is then required is the ‘how’. How is the business going to achieve its statement? Much of this is already covered within the current legislation. The advanced options put forward in this work would require expressed targets on deliverables and the demonstration of participation, not only through representation on the operating board but also possibly through a form of membership.

Communities are made up of people, as are societies and institutions. Institutions are made up of rules and operated by people; it is people who are required to secure power through effective participation to determine agendas and outcomes. Participation is essential and must not be overlooked. Citizen participation is a categorical term for citizen power; participation without a redistribution of power is an empty and frustrating process for the powerless, and allows the powerholders to claim that all sides were considered.²³⁵ Through organisational structures and supportive guidance, readdressing the power is able to occur .

In the Dover People’s Port Trust Ltd., as described in Chapter 4, the community centred their entire counter-bid on participation and membership, a counter-bid that pledged that the people of Dover could ‘own’ the Port of Dover for a commensurate token of just ten pounds. This was absurd, ludicrous to many, but an attractive invitation for some, and one that could make a difference to the future of the Port of Dover. The community derailed the privatisation of the port; this eventually saw the community seated on the main operating board. This act travelled deep into the asset; it demonstrates the importance of ‘ownership’. Announcements would soon follow, confirming that capital funds were being placed in the community fund to directly

²³⁴ *ibid.*

²³⁵ Arnstein (n 9).

benefit the community.²³⁶ This is direct evidence of delivering social renewal as a direct link to the asset of the PoD. The alternative would have been for the Port and its funds to be privatised.

As seen in Chapter 6, in Folkestone, the CIC is achieving social capital while still challenged with limitations in capital-raising options; the essential community participation and capital are missing elements. This work argues that these are essential for a sustainable social enterprise; the consequences of not having these present might well be fatal for a social enterprise.

Participation across all levels is required, whether top down or bottom up; it is present in worker models, employee-owned models and cooperatives, and is essential for good competition, commercial viability and in securing social and economic capital – strong communication and operating councils working for the benefit of the business and/or the community are required for any sustainable business.

Transparency and democracy are paramount in fostering participation and long-term sustainable business strategies. This can be achieved by having good stakeholder representation, from workers and communities to key business partners structurally placed on the main operating board. The structures for both CICs and CBSs do not offer any legal frameworks that either require or encourage this key element. Recently enacted legislation offered key features aimed at being attractive to entrepreneurs: firstly, it offered a simple means of formation, being easy to operate in meeting regulatory compliance, and, secondly, it increased profit distribution possibilities. It is through having structural governance, incorporating democratic participation, that we can draw in communities. Achieving the participation of cross-community representation will secure involvement, which, in turn, fosters social responsibilities and allows for trust to be nurtured. This replaces the effects of disconnected societies, as witnessed in Chapter 2; it is essential that, within any organisations that purport to help the community, there is a formal place for those whom they purport to exist for to exist within.

Consider the Leas Lift as a modest CIC: the current power-holders are Rooney and Begent (and, arguably, they are the asset-owners, but they are not a legal part of the CIC). Now consider it as an advanced CIC: it would retain both Rooney and Begent and aim to include other groups within the community – for example, educational representatives from schools and colleges, mother and toddler groups, the tourist board, businesses and chambers of commerce, local press and media, to mention just a few community groups. Inclusion is important for those

²³⁶ Dover Harbour Board, 'Community Fund' (*Port of Dover*) www.doverport.co.uk/csr/community-fund/ accessed 19 November 2014.

Dover Harbour Board, 'Community Giving' (*Port of Dover*, 6 November 2014) <www.doverport.co.uk/about/news/community-giving/12911/> accessed 19 November 2014.

whose representation and contribution could positively alter the lift as an asset, as well as having the potential to boost the small but vital sums of money required to keep the lift going.

Previously, the PoD – managed by the Dover Harbour Board – held a damaged identity as, over a number of years, the organisation was driven by personal agendas centred on privatisation plans. The negative connotations associated with the Port left it unable to foster any form of trust with its stakeholders and the local community. The identity of the PoD is now open for rebranding and, to date, positive evidence is being witnessed.

The array of legal forms open to social enterprises allows freedom and flexibility to operate business enterprises; these are not distinguishable from those of charities. The advantages of business structures trading within company law sees multiple business forms coexisting; this has created the complexities associated with holding companies and legal entities. Where business risk can be hidden, there is a possibility of ‘lifting the corporate veil’;²³⁷ this work fears that the present ability to construct multiple legal forms will lead to the lifting of the ‘social enterprise veil’ and/or the lifting of the ‘social purpose community interest and benefit veil’.

The lack of imagination used to deliver legal models fit for purpose leaves this paper to draw the conclusion that the newly emerged forms that have evolved are not vastly different to those that previously existed, and that the CIC model is too close to an investor-owned company, even with the capping on dividends. The CBS model, on the other hand, will rely heavily on its accountability being challenged by its regulator.

The legal devices assuming to be fit for purpose – to deliver the aspirations of social renewal from social capital – are already in place. The classes of business, private, public, charity and community will, in drafting the ‘rules’ within their constitutions, set out their objectives. It will be in the application and enforcement by their regulatory bodies that evidence will be available as to whether they actually benefit communities. It is at this entry point that this work suggests a simple overlaying approach to the differentiation of institutions that are advanced and community-inclusive.

This work has argued that a mix of legal forms is being adopted by enterprises labelled as ‘social enterprises’. The one-type-fits-all approach to ownership in the corporate world has led to large PLCs dominating global business and the spectacular collapse of the banking sector in the Global Crisis 2008 and onwards. What is called for is variety, as ‘variety is the evolutionary fuel in the

²³⁷ *Salomon v Salomon and Co Ltd* [1897] AC 22

economic development'.²³⁸ These varieties must be clearly distinguishable and support an ecosystem of social needs.

This paper has identified concerns related to the blurring of historical registers and the lack of distinctions between 'public interest', 'community interest' and 'community benefit'. If these ambitions are being carried by a mix of legal models and the registers are to remain blurred, then the work suggests that all commercial business models are recognised as offering an alternative – possibly being advanced or community-inclusive. Secondary to this is the development of communal asset registers for community benefit assets – those not socially owned by the state or privately held but locked for democratic community benefits and interests. Having both a structural place for community representation and a method of locking community assets, in order to secure the much-required interconnections, and supported by a mix of legal devices, could see the assembly of both social responsibility and social renewal.

We can return again to Arnstein's²³⁹ ladder of participation to see the barriers that will be present and to endeavour to stop the power-sharing and blocking of the above.

Roadblocks lie on both sides of the simplistic fence. On the power holders' side, they include racism, paternalism, and resistance to power redistribution. On the have-nots side, they included inadequacies of the poor community's political socioeconomic infrastructure and knowledge-base, plus difficulties of organizing representatives and an accountable citizen's groups in the face of futility, alienation, and distrust.²⁴⁰

These barriers need to be recognised and overcome. This work's suggestions are based on overcoming these barriers with advanced legal governance, layered onto all the existing incorporated legal forms. This can be achieved by extending the existing rules to include:

1. community participation by structural representation, with measures on community outcomes (surplus/profit distribution, of what and to whom);
2. asset lock extensions for 'actual' property and land – the locking of community assets.

This overlay recommendation extends not only to SEs but to all business classifications, including state-managed and owned, commercial capitalist corporations and charities. The

²³⁸ The Ownership Commission, 'Plurality, Stewardship and Engagement' (March 2012) 2.2.

²³⁹ Arnstein (n 9).

²⁴⁰ Arnstein (n 9) 3.

introduction of legal frameworks with a layered approach fits neatly with Wright's work on *Transforming Capitalism through Real Utopias*.²⁴¹

This paper draws evidence from the Port of Dover's originating trust, which set out an objective to protect the community's interest in the Port by 'serving the community'. This clause has survived and been expanded on; the drafting clause has stood the test of time and been extended to secure a vital and 'sufficient level of enduring community participation'. Therefore, the work argues for all incorporated legal forms that purport to provide public interest, community interest or community benefit to be operated and represented by those whom they serve, and to be recognised as being so – a socially advanced business model, classified by their social goals.

The precious clause that was drafted into the original agreement, and was expanded by central government during the period of this research, delivered for the people of Dover. This work strongly suggests that such a clause should be present in the running, managing and maintenance of all advanced enterprise business structures that are purporting to deliver community interest, community benefit or public benefit. It also argues that socially held assets, whether national or local, and in land or property, and held in a mix of incorporated legal forms (such as in the NHS, prisons and schools), all adhere to 'sufficient levels of enduring community participation' in time and space, for the people by the people. It also argues that this should be verified through representation and measurable on its outcomes.

²⁴¹ Wright (n 14).

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MATRIX: TABLE 1 DISTINCTIONS BETWEEN LEGAL FORMS

THE FOLKESTONE LEAS LIFT CIC ABBREVIATED ACCOUNTS 31 MARCH 2014:

CERTIFICATE ON INCORPORATION OF A COMMUNITY INTEREST COMPANY

CERTIFICATION THAT CAROLINE ARCHER PRESENTED A PAPER ENTITLED
'DOVER PEOPLES PORT: THE IMPORTANCE OF COMMUNITY ASSETS AND
COMMUNITY INTERESTS' AT INTERNATIONAL INSTITUTE FOR THE
SOCIOLOGY OF LAW, ONATI, APRIL 2014

APPENDIX: 5

LETTER FROM CHARLIE ELPHICKE MP TO THE RT HON PHILIP HAMMOND,
SECRETARY OF STATE FOR THE DEPARTMENT FOR TRANSPORT, 15 JUNE
2010

