

## **Appendix One: PROPOSED COOPERATIVES NATIONAL LAW**

### **Overview**

The proposed *Cooperatives National Law* would be enacted by the Parliament of New South Wales. Each jurisdiction would enact legislation applying the national law in their jurisdiction. This application legislation specifies local administration details such as the appointment of a Registrar of Cooperatives, which courts deal with various matters, and where official notices are published. National regulations supporting the *Cooperatives National Law* would be made by the Governor of New South Wales and would apply in all jurisdictions, unless the Parliament in a particular jurisdiction disallowed all or part of the national regulations. (A State or Territory would also have the option of enacting and maintaining legislation which is consistent with the *Cooperatives National Law*.)

Existing cooperatives legislation in all States and Territories is based on Core Consistent Provisions developed in the mid 1990s by the Standing Committee of Attorneys -General. The proposed *Co-operatives National Law* continues the major features of the existing legislation, while also removing variations between jurisdictions and updating some provisions – particularly provisions which apply parts of the *Corporations Act 2001*.

The proposed *Co-operatives National Law* is divided into eight chapters which are briefly summarised below.

### **Chapter One: Preliminary**

This chapter sets out the principles used by a cooperative organisation. The principles are those agreed by the International Cooperative Alliance and incorporated into Recommendation 193 of the International Labour Organisation. Chapter One contains interpretation provisions and also sets out the relationship between the *Co-operatives National Law* and the *Corporations Act 2001*. The provisions of the *Corporations Act 2001* that are applied throughout the *Cooperatives National Law* are collected and cross – referenced in tabular form along with relevant modifications for ease of reference in this Chapter.

### **Chapter Two: Formation, powers and constitution of cooperatives**

This chapter provides the mechanism for incorporating a cooperative and specifies the legal powers of the incorporated body as well as the legal assumptions that underpin a co-operative's dealings with third parties. It identifies the matters that must be included in the rules of a cooperative and authorises the Registrar of Cooperatives to publish model rules which a cooperative can adopt.

This chapter also sets out the nature of share capital of a co-operative and establishes the legal notion of membership and active membership. Member rights and obligations as well as the circumstances in which membership is cancelled and any rights accompanying cancellation are dealt with in this Chapter.

### **Chapter Three: Management and operation of cooperatives**

This chapter deals with corporate governance of a co-operative. Matters such as the board as managing organ, directors and their duties and meetings. Matters relating to financial reporting and audit are contained in this chapter along with provisions governing fundraising from members and the public.

### **Chapter Four: Structural and other events for cooperatives**

This chapter deals with corporate structural events such as external administration, mergers, schemes of arrangement and transfers of incorporation. Relevant provisions of the *Corporation Act 2001* are applied and modified to achieve consistency of treatment in most external administration processes. Special provisions for caretaker-type administration and administrative powers of the Registrar of Co-operatives leading to a winding up are also located here.

### **Chapter Five: Participating cooperatives**

This chapter replaces the existing system of multiple registration to enable cross-border trade by co-operatives with a mutual recognition scheme for co-operatives from jurisdictions that participate in the *Co-operatives National Law* scheme.

### **Chapter Six: Supervision and protection of cooperatives**

This chapter establishes the powers of the Registrar of Cooperatives, inspectors and special investigators and the procedures that must be used when conducting an investigation. The proposed national law will introduce consistent powers and procedures across jurisdictions. If necessary, however, a particular jurisdiction will be able to modify provisions in this chapter to account for local circumstances.

### **Chapter Seven: Legal proceedings and other matters**

This chapter establishes nationally consistent provisions for offences, civil penalty provisions and appeals against administrative decisions and the use of evidence in proceedings.

### **Chapter Eight: General**

This chapter deals with miscellaneous administrative matters such as the establishment of an office of Registrar of co-operatives, service and filing of documents and the making of national regulations.

### **Schedules**

The schedules support particular provisions in the national law.

Schedule One sets out the matters which must be addressed in the rules of a cooperative.

Schedule Two defines terms used in provisions which regulate interests and control in shares of a co-operative.

Schedule Three contains savings and transitional provisions

Schedule Four sets out interpretation provisions which are nationally consistent and are used in place of the Act Interpretation legislation in each jurisdiction.

Schedule Five contains interim provisions dealing with the registration of charges as security over the property of a co-operative.

Schedule Six contains amending provisions that will omit the interim provisions in Schedule Five upon the commencement of the Personal Property Securities Act 2009 C'th which will centralise the registration of all personal property securities including charges over property of a co-operative.

## **Summary of Provisions and key changes**

The structure of the proposed *Cooperatives National Law* is outlined in the following sections. The content of each chapter in the proposed legislation is briefly summarised and any key changes from existing cooperatives legislation are identified.

### **Chapter One: Preliminary**

Chapter One consists of machinery provisions which assist in the consistent interpretation and application of provisions in the *Co-operatives National Law*. It also specifies the principles which define a cooperative and the extent to which the *Corporations Act 2001* applies as a law of the Commonwealth in relation to cooperatives, and it also identifies in tabular form those provisions of the *Corporations Act 2001* that are applied and modified and thereby become a part of the *Co-operatives National Law* and operate as a law of the relevant State or Territory jurisdiction.

Part 1.1 contains the citation and commencement provisions. Commencement is determined by the application legislation in each jurisdiction. The purpose of the *Co-operatives National Law* is also set out here.

Part 1.2 specifies definitions that are used in the *Co-operatives National Law*. These definitions are based on definitions in the *Co-operatives Act 1997* of Queensland with some adjustments to ensure consistency with equivalent definitions in the *Corporations Act 2001*. For example, the definition for “officer of a cooperative” has been adjusted to be the same as that used for an officer of a company. The use of standard definitions does not involve any substantive changes from existing legislation for any State or Territory and will facilitate consistent application across jurisdictions. This Part also defines corresponding co-operatives laws to enable the operation of participating co-operatives across borders within Australia.

Part 1.3 sets out seven principles for cooperative organisations developed by the International Cooperatives Alliance. It also states that there should be a preference for interpreting the *Co-operatives National Law* in a way that promotes those principles. These seven co-operative principles are also referred to in various other provisions – such as those

dealing with the rules of a cooperative. Part 1.3 remakes provisions which currently exist in the cooperatives legislation in all jurisdictions.

Part 1.4 declares that the *Corporations Act 2001* does not apply to co-operatives except in certain limited circumstances. This declaration is a continuation of an equivalent declaration that is made in the existing co-operatives legislation in each jurisdiction. The extent of any exclusion from the Corporations legislation is governed by the terms of the Corporations Agreement 2002 and subject to approval by the Ministerial Council on Corporations. Approval was granted in January 2011.

Part 1.4 also contains a table that identifies provisions of the *Corporations Act 2001* that are applied and modified as part of the Co-operatives National Law. There is no equivalent information provision in existing cooperatives legislation for any jurisdiction and it can be difficult for a reader to be certain that they have identified all relevant provisions applied from the *Corporations Act 2001*. The Table in Part 1.4 provides an accessible cross-reference to locate the applied provisions. General modifications for applied provisions are also set out in this Part.

## **Chapter Two: Formation, powers and constitution of cooperatives**

Chapter Two deals with the incorporation of a cooperative, the legal capacity and powers that a cooperative has as an incorporated body and the rights and responsibilities of the members. It also sets out the legal effect of a co-operative's rules, the nature of shares and membership.

### **Incorporation and registration**

Part 2.1 describes the different types of co-operatives and replaces the terminology of *federation* and *association* to refer to aggregations of co-operatives with the simple term *co-operative group*. This Part establishes the mechanism and requirements for incorporating a new co-operative. It also provides a mechanism to enable existing corporations, such as companies or incorporated associations, to transfer and form a co-operative. Part 2.1 continues existing provisions for all jurisdictions with minor adjustments. These adjustments include providing a time limit of 28 days for the Registrar to approve documents necessary for the initial formation meeting to be held. It also removes the requirement for a disclosure statement in the case of a non-distributing co-operative unless there is a requirement in a specified case by the Registrar. These adjustments are made to simplify and shorten the time taken to form a new co-operative.

Part 2.2 sets out the legal capacity and powers of a cooperative as an incorporated body based upon equivalent provisions for companies. This Part makes minor modifications to provisions in existing cooperatives legislation by removing the ability for a co-operative's internal rules to affect its legal capacity. A co-operative's rules continue to be able to limit a co-operative's activities, but this will not affect its dealings with third parties and the abolition of the doctrine of *ultra vires* for co-operatives. Provisions dealing with matters such as the execution and authentication of documents. These changes are made to remove redundant references to official seals and common seals and to improve consistency with equivalent provisions in sections 125 to 127 of the *Corporations Act 2001*. Provisions

dealing with ratification of pre-registration contracts are continued in the same form as existing co-operatives legislation.

### **Rules of a cooperative**

Part 2.3 continues existing provisions dealing with the rules of a co-operative. Some minor modifications have been made to simplify the administration of rules and changes to rules. These modifications will not disadvantage any existing cooperative. In summary the modifications are:

- the Registrar of Co-operatives is authorised to make model rules which can be adopted by a co-operative - currently in some jurisdictions model rules must be prescribed by Regulation;
- a co-operative will be able to choose whether to adopt some model rules “as in force from time to time” and automatically accept any changes made to these model rules - or choose to adopt model rules as in force at a specified date;
- the Registrar of Co-operatives will be able to specify categories of rules which a co-operative can change without requesting prior approval – for these rules, the co-operative will simply notify the Registrar that the rule has been changed.

### **Shares**

All distributing cooperatives have a share capital. Non-distributing cooperatives are not required to have a share capital, those that do issue shares will choose to have a share capital if it supports their activities. Part 2.4 determines the legal nature of a share in a co-operative. There is no change from existing legislation in this regard.

Part 2.4 also makes provisions for disclosure requirements for the issue of shares to a person who proposes to become a member of a distributing co-operative. Disclosure requirements for the issue of shares are continued from existing legislation which applied and modified similar provisions under the *Corporations Act 2001* in an inconsistent manner. Part 2.4 Divisions 2 and 3 now spell out disclosure requirements and clearly establish civil rights for compensation for defective disclosure thus removing the inconsistent application of provisions from the *Corporations Act 2001*. These adjustments will not create any appreciable disadvantage to distributing co-operatives which are already required to provide disclosure statements, and they will clarify rights for potential members who take up shares in circumstances where the disclosure is defective.

provides for matters such as the type of shares that can be issued, the information that must be disclosed for share issues, the consequences of disclosing misleading or deceptive information, the registration of shareholdings and interests in shares, restrictions on total shareholding applying to individual members and restrictions on the transfer of shares, the arrangements that apply when a shareholder dies and requirements for the purchase or repayment of shares by the cooperative.

Division 4 of Part 2.4 continues provisions in existing cooperatives legislation which deal with the issue of shares and bonus shares. This Division also continues the existing power of a co-operative to require members to take up additional share capital with one significant modification. Under existing co-operatives legislation a compulsory share issue proposal by a co-operative was permitted upon the passing of a special resolution which only requires a two third majority. Members who did not wish to be bound by this requirement only have the option of resigning from the co-operative. A resolution of this nature must now be passed by special postal ballot which requires a three quarter majority and provides a clear mechanism to facilitate voting by all members regardless of whether they were able to attend the relevant meeting. In practice, co-operatives will not be disadvantaged by this change. The risk of losing members (and share capital) through resignation and the desire to achieve additional capital raising on a democratic basis is reflected in the existing practice of co-operatives to not propose a compulsory share issue programme unless there is likely to be a significant majority voting in favour of such a proposal.

Division 5 of Part 2.4 establishes uniform requirements for the management of money paid in respect of shares to be issued to new shareholders so that these funds are held on trust. These safeguards reflect sections 722 to 724 of the *Corporations Act 2001* and they currently apply in all jurisdictions except the Australian Capital Territory, the Northern Territory and Victoria. Sections 2.4.22 to 2.4.24 incorporate these provisions directly into the *Co-operatives National Law* and apply them uniformly in all jurisdictions.

Existing provisions dealing with the notification of non-beneficial interests in shares have been updated to be consistent with sections 672A and 672B of the *Corporations Act 2001* – the updated provisions are at sections 2.4.25 and 2.4.26 of the *Co-operatives National Law* – and ensure that equivalent processes and standards for disclosure of relevant interests in shares apply in cooperatives as those that operate in respect of companies.

Part 2.4 also continues existing provisions which specify circumstances in which shares may be sold or transferred, in particular transfers that arise due to the death of a member.

Finally, Division 9 of Part 2.4 deals with voluntary repurchases of shares by the co-operative. Existing co-operatives legislation permits a co-operative to repurchase some or all of a member's shares subject to the discretion of the board which, in turn is guided by the requirement to protect the co-operative's future viability and solvency. Repurchases of capital requirements and limits are continued in Division 9 along with provision to assist a co-operative to manage any obligation to repay share capital by the issue of debt securities. Minor adjustments to these provisions achieve uniformity across jurisdictions to deal obligations to repay share capital that will arise as a result of other events such as cancellation, expulsion or resignation of a member.

Overall, the modifications in Part 2.4 of the *Co-operatives National Law* do not alter the unique nature of shares in a co-operative and do not modify core consistent provisions in existing legislation.

### **Membership**

Part 2.5 contains provisions dealing with membership of a cooperative, including the rights and liabilities of members and requirements for dispute resolution and provisions enabling

members to seek legal redress for oppressive conduct by the co-operative. This Part continues provisions in existing cooperatives legislation with minor adjustments in language for some jurisdictions. It also introduces the following changes:

- a cooperative will now be able to satisfy requirements to give information to prospective members by making the information available for inspection – this includes making information available via a website.
- cooperatives in all jurisdictions will now be required to repay a member's shares within twelve months if the member is expelled – provisions in New South Wales legislation enabling an extension of time in some circumstances have been discontinued.
- provisions which deal with the inspection of books by members have been set out in full at sections 2.5.31 to 2.5.34 – previously these provisions were applied by reference to the sections 247A to 247D of the *Corporations Act 2001* but application was not always readily apparent in some jurisdictions because of the style of reference used.

Part 2.6 continues existing provisions regarding active membership including requirements for a cooperative to have active membership rules, to cancel the membership of inactive members and procedures that must be used to change active membership rules. Some minor adjustments have been made consequent upon the more general change referred to in Part 2.3 relating to the need for prior approval of rule changes. Under existing legislation, prior approval by the Registrar of Co-operatives is required before a resolution to change the active membership rule can be put to members. As a result in the change to section 2.3.6 the Registrar of Co-operatives may specify by designated instrument which rules require approval before they may be altered. A resolution to alter the active membership rule is likely to be so specified in each jurisdiction.

Under existing cooperatives legislation, a cooperative can use a simplified process to cancel membership if a member's whereabouts are not known and any amount to be repaid to the member is less than \$50.00. This amount has not been updated for many years and is being increased to \$100.00.

At present, former members of a distributing cooperative whose membership was cancelled because they became inactive may be entitled to certain payments or share allocations if the co-operative is wound up, transfers incorporation to the *Corporations Act 2001* or merges with another co-operative. Under current legislation, these entitlements extend for a minimum period of five years after membership is cancelled. Division 5 of Part 2.6 of the *Co-operatives National Law* reduces the minimum period of entitlement to two years and removes entitlements to distributions from reserves to former members.

This change will only apply if membership is cancelled after the *C-operatives National Law* commences operation. Transitional provisions will preserve existing entitlements and a co-operative will still be able to provide for a longer period of entitlement for former members in its rules. These changes represent an advantage to co-operatives who wish to carry on business with the support of their active members. Former member entitlements are a means

to permit members to access capital stored in a co-operative by rewarding loyalty. However, the period of five years imposed upon co-operatives represented a costly impost in both administration and the development of the co-operative's business for the benefit of its active members. Existing members of co-operatives will not be disadvantaged as their rights are preserved under transitional provisions.

### **Chapter Three: Management and operation of cooperatives**

Chapter Three of the *Cooperatives National Law* deals with the management and operation of a cooperative. It addresses matters such as requirements applying to the board and the duties and liabilities of directors, officers and employees. It sets out requirements for holding meetings of members and conducting votes. It also covers financial records and reporting, auditing requirements, the acquisition and disposal of assets, granting charges against cooperative assets and issuing securities such as debentures.

A key feature of Chapter Three is that it includes a number of provisions in full which were previously applied by reference to the *Corporations Act 2001*. This is particularly so for provisions dealing with the disqualification of directors and for financial reporting and auditing. It also contains significant changes to the financial reporting obligations of small co-operatives.

#### **Management of a cooperative**

Part 3.1 continues provisions in exiting cooperatives legislation which deal with the management of a cooperative. It establishes a requirement for a board, and also specifies a minimum number of three directors for a co-operative along with the requirement that at least two directors must reside in Australia. Provisions in New South Wales legislation dealing with employee directors and directors appointed as a condition of a loan by the Crown has been omitted, because they are more appropriately addressed through the rules of a co-operative or the terms of any loan or grant that may be made by the Crown to a co-operative.

All jurisdictions currently apply disqualification provisions in Part 2D.6 of the *Corporations Act 2001* – but this is not done in a consistent or comprehensive manner. Part 3.1 sets out disqualification provisions in full at sections 3.1.10 to 3.1.18. The provisions are drafted to ensure full integration with Part 2D.6 of the *Corporations Act 2001* and have the effect that:

- any person who is disqualified from managing a corporation of any kind under the *Corporations Act 2001* is also automatically disqualified from managing a co-operative for five years;
- any person who is convicted of an offence against the *Co-operatives National Law* in any jurisdiction is automatically disqualified from managing a cooperative in all jurisdictions for five years;
- the Supreme Court has the power to extend the period of automatic disqualification and to impose disqualifications on people who have been involved in the management of failed corporations – these powers are equivalent to powers available under Part 2D.6 of the *Corporations Act 2001*;



- the Registrar of Co-operatives has the power to disqualify a person who has been involved in the management of two or more insolvent cooperatives within the last seven years – this is equivalent to a power that Australian Securities and Investments Commission has in relation to other forms of corporation under section 206F of the *Corporations Act 2001*.

Part 3.1 also updates provisions in existing cooperatives legislation which invalidate arrangements or purported arrangements to indemnify officers and auditors against any negligence, default, breach of duty or breach of trust. Existing provisions are replaced by sections 3.1.27 to 3.1.28 which are directly based on sections 199A to 199C of the *Corporations Act 2001*.

Part 3.1 continues the existing requirements for the appointment of a secretary but additionally now imposes specific liability on the secretary for failure to ensure the performance of specified obligations. These specified obligations will be listed in the National Regulations and will reflect obligations identified as being the responsibility of the Secretary of a company in s188 of the Corporations Act such as failures to ensure the lodgement of documents and reports.

Director and officer duties are set out in Part 3.1 Division 4. Public consultation identified a need to redraft these duties to more closely reflect the duties imposed upon directors of companies. Apart from redrafting to reflect modern terminology, significant other changes include the introduction of a regime imposing civil penalties similar to the civil penalty provisions under the *Corporations Act 2001* and the introduction of a business judgment rule that includes specific reference to co-operative principles.

Other matters within this Part include applied *Corporations Act 2001* provisions to protect employee entitlements and continued provisions dealing with directors' remuneration and compensation for expenses as well as specific conflict of interest provisions and the procedure for declaring conflicts of interest.

Provisions relating to the keeping of registers, inspection and production of registers and other documents by members and the Registrar of Co-operatives, registered office and name requirements are continued in this Part with minor language adjustments.

### **Voting and meetings**

Part 3.2 makes provision for meetings of a cooperative and votes by members. Part 3.2 continues the provisions in existing cooperatives legislation with inconsequential adjustments to wording for some jurisdictions. Part 3.2 also makes the following minor modifications:

- the Registrar of Co-operatives currently has the power to disallow a special resolution before it is put to members and in effect prevent members voting on the proposal – this power is discontinued in the *Co-operatives National Law*.
- requirements about when a cooperative must hold its annual general meeting have been standardised across jurisdictions and a penalty for failing to hold an annual

general meeting has been included – this penalty is consistent with the equivalent penalty under the *Corporations Act 2001*.

- The right of an auditor to be notified about general meetings of a cooperative and to be heard at those meetings will apply in all jurisdictions – currently this right is not stated for some jurisdictions.

### **Financial reports and audit**

Existing co-operatives legislation in all jurisdictions applies part 2F.3, sections 249K and 249V and Chapter 2M of the *Corporations Act 2001* in a modified form. These provisions establish requirements for financial records, financial reporting and audits which are key responsibilities for directors and other responsible officers. However, the manner of referring to the applied provisions and modifications in each jurisdiction can make it difficult to understand the full extent of these responsibilities. Part 3.3 of the *C-operatives National Law* sets out the provisions for financial records, financial reporting and audits in full. This makes the requirements more accessible and more apparent.

The *Co-operatives National Law* also proposes a significant reform to the financial reporting regime. Under existing legislation all co-operatives regardless of size or risk are required to prepare and lodge financial reports equivalent to those prepared by public companies. Some jurisdictions grant relief to individual co-operatives or classes of co-operatives in an unco-coordinated manner. Part 3.3 introduces the following changes:

- a small cooperative will not be required to lodge annual financial or directors' reports to the Registrar of Co-operatives. Instead they will be required to lodge an annual return to confirm such matters as continuity of operation, any change of officers or registered office details and that it has passed resolution that it is solvent. The contents of the annual return will be determined by the National Regulations.
- a small co-operative will still be required to report to its members annually but at a basic level which will be determined by the National Regulations. The National Regulations will also prescribe whether such reports should be audited or reviewed. A co-operative will be at liberty to prescribe additional reporting under its rules to that specified in the National Regulations.
- members controlling 5% of a small co-operative may require additional financial reporting or an audit.
- The Registrar of Co-operatives may require the lodgement of financial or directors' reports and that they be audited.
- the power of the Registrar of Cooperatives to issue an exemption for requirements under Part 3.3 has been stated in more detail - consistent with the equivalent exemption power available to the Australian Securities and Investment Commission under the *Corporations Act 2001*.

- Thresholds to determine whether a co-operative is considered to be a small co-operative will be settled by the National Regulations after the necessary consultation.

The new financial reporting requirements for small co-operatives in the *Co-operatives National Law* are expected to deliver significant cost savings to small co-operatives without introducing any significant risks to the viability of co-operatives. Small co-operatives will not enjoy complete freedom from financial reporting as is the case for small proprietary companies under the *Corporations Act 2001*. This is because public consultation strongly indicated the need for basic level reporting to members to ensure that the co-operative principles of member participation and democracy were entrenched in legislation.

As a result of the requirement to review legislative provisions imposing liability for corporate fault on directors and officers by COAG, Part 3.3 (3.3.66) no longer imposes blanket liability upon directors for failure to comply with financial reporting requirements. Instead, director liability is imposed in respect of financial reporting requirements over which a director has control or influence.

### **Funds and property**

Part 3.4 deals with how a cooperative can raise funds through the issue of debt securities to members and the public. It also sets out the various means by which a co-operative can make distributions to members and it contains restrictions on the acquisition and disposal of assets.

Part 3.4 continues fund raising provisions without change from the existing legislation for debentures issued to people who are members of the public. This is done by applying Chapter 6D of the *Corporations Act 2001* dealing with disclosure to investors along with Part 1.2A, Chapters 2L, 6CA and Part 7.10 of that Act.

Issues of debentures to members or employees of the co-operative are governed by specific disclosure requirements set out in section 3.4.8.

Sections 3.4.9 and 3.4.10 of the *Co-operatives National Law* apply restrictions on advertising and publicity where no disclosure statement has been prepared and set requirements for the subscription money to be held on trust. These provisions are based on sections 722 and 734 in Chapter 6D of the *Corporations Act 2001*. At present these provisions apply in Queensland, Tasmania and South Australia only, but are being extended to all jurisdictions.

Cooperatives legislation in Victoria and New South Wales currently authorises a cooperative to issue a form of security known as a Cooperative Capital Unit. Division 2 of Part 3.4 extends these existing provisions to all jurisdictions. Cooperative Capital Units are similar to debentures but with additional flexibility to align them more closely to redeemable preference shares. All of the provisions governing disclosure and terms of issue that apply to debentures also apply to Cooperative Capital Units. As the name implies, a Cooperative Capital Unit is a capital based security. It is not a share, as shares may only be

issued to members, but it may be redeemed by an issue of shares, if the security holder is already a member.

The terms of issue of Cooperative Capital Units enable a high degree of flexibility for return to investors. The return may be in the form of a dividend type distribution similar to an equity security or it may be a percentage return similar to a debt instrument. The restrictions on redemption of Cooperative Capital Units are similar to the redemption options available in respect of redeemable preference shares for a company. This flexibility will have financial accounting significance for a cooperative's debt and equity ratios and its tax position if the terms of issue are structured so that the instrument has significant equity characteristics.

### **Restrictions on the acquisition of interests**

Part 3.5 sets out restrictions on the acquisition of interests in a co-operative. In particular, Division 1 of Part 3.5 places restrictions upon relevant interest in shares and voting, substantial share interests and it limits the total percentage share interest that can be held by a member to 20%. Part 3.5 is linked with Schedule 2 which provides the necessary definitions to support the operative restrictions. Division 1 of Part 3.5 is designed to support the co-operative principle of democratic control by members. Part 3.5 and Schedule 2 continue the provisions in existing legislation for all jurisdictions with two changes.

- restrictions on the acquisition of interests apply to all co-operatives that issue shares, including non-distributing co-operatives. Provisions in existing legislation only apply to distributing cooperatives. This change recognises that a non-distributing co-operative may be formed to carry on a business enterprise for the benefit of members without making distributions. Share interests and voting control in a non-distributing co-operative are capable of affecting a member's economic interests and it is appropriate to apply restrictions consistently across co-operative types. Transitional provisions will preserve existing rights for members who hold shares in excess of the specified percentage of issued share capital at the time that the legislation commences and will prevent automatic forfeiture of those shares.
- notification requirements for corporate members of a co-operative have been altered. Under existing legislation in all jurisdictions, an unlisted corporation (as defined in the *Corporations Act 2001*) that is a member of a co-operative must give information about the identity and relevant interests of its shareholders on an annual basis. As each member of a cooperative (including an unlisted corporation) has only one vote irrespective of the level of shares held, the risk that a controlling interest in a cooperative could be hidden through multiple unlisted corporations is low. The annual requirement is replaced with a power for either the board or the Registrar of Co-operatives to require an unlisted corporation to provide the required information within 28 days.

Division 2 of Part 3.5 continues existing co-operatives legislation which provides a process in the event of a takeover offer in respect of a co-operative. Changes to these provisions reflect the discontinuance of the administrative role of the Co-operatives Council in New South Wales. Any formal approval requirements will be performed by the Registrar of Co-operatives as is the case in all other jurisdictions.

## **Chapter Four: Structural and other events for cooperatives**

Chapter Four deals with circumstances where a co-operative is restructured or ceases to exist as a corporate body. Provisions in this chapter are designed to be consistent with equivalent provisions in the *Corporations Act 2001* and to a large degree apply provisions from that Act. Chapter Four continues existing co-operatives legislation with a small number of changes for some jurisdictions.

### **Administration, receivers and controllers**

Part 4.1 of the *Co-operatives National Law* continues existing cooperatives legislation and provides for the appointment of an administrator to control a cooperative.

An administrator can be appointed in the same circumstances that an administrator can be appointed to a company under Part 5.3A of the *Corporations Act 2001*. The board of a cooperative can appoint an administrator if the directors are of a view that the cooperative is insolvent or is likely to become insolvent. The liquidator of a cooperative (appointed as part of a voluntary winding up) and certain other controllers can also appoint an administrator in those circumstances.

Part 4.1 makes one change to these appointment provisions for all jurisdictions apart from New South Wales. In New South Wales, the Registrar of Co-operatives can also appoint an administrator for the purposes of Part 5.3A of the *Corporations Act 2001*. This administrator must be a registered liquidator unless the likely costs of administration will be excessive in the light of the assets and liabilities on the co-operative. In such a case the Registrar of Co-operatives is able to appoint a person who is not a registered liquidator. Section 4.1.3 of the *Co-operatives National Law* extends this arrangement to all jurisdictions

Co-operatives legislation in all jurisdictions currently provides an alternative to appointment of an administrator under Part 5.3A of the *Corporations Act 2001*. These provisions enable a co-operative to be placed in caretaker type of administration while it is still solvent, but other prescribed circumstances exist – such as the cooperative has less than five members or the board is not able to form a quorum at its meetings, the cooperative has not been conducting business for at least six months, or the cooperative's affairs are being managed in such a way that the interests of members and creditors require protection by the appointment of an administrator. The *Co-operatives National Law* continues these provisions in Division 2 of Part 4.1 .

Part 4.2 of the *Co-operatives National Law* deals with the appointment, powers and liabilities of a receiver or controller under a security by applying Part 5.2 of the *Corporations Act 2001*. This represents no appreciable change to existing legislation which essentially replicates Part 5.2 of the *Corporations Act 2001* in a schedule. This drafting method was adopted to take advantage of changes that will be made to the *Corporations Act 2001* consequent upon the commencement of the *Personal Properties Securities Act 2009* C'th.

### **Mergers and transfers**

Part 4.3 regulates mergers of cooperatives and the consolidation of more than one co-operative by transfer of engagements. Part 4.3 also provides a procedure to facilitate a transfer of incorporation by co-operatives to another corporate form. The provisions in Part 4.3 are the same as under existing cooperatives legislation, with no significant changes.

### **Compromises and arrangements**

Part 4.4 deals with compromises and arrangements with creditors. These provisions continue existing legislation for all jurisdictions – with no significant changes.

### **Winding up and insolvency**

Parts 4.5 and 4.6 of the *Co-operatives National Law* regulate the winding up of a cooperative and the recovery of property for creditors of an insolvent cooperative. This is done by applying Parts 5.4 to 5.6 and Part 5.7B of the *Corporations Act 2001* and including additional provisions which enable the Registrar of Cooperatives to wind up a cooperative by administrative action in other prescribed circumstances. These prescribed circumstances are specified in section 4.8.1 and are the same as those circumstances in which the Registrar can appoint a caretaker type administrator under Division 2 of Part 4.1.

Parts 4.5 and 4.6 continue existing cooperatives legislation in all jurisdictions with the following changes:

- Part 5.7 of the *Corporations Act 2001* was applied in some jurisdictions. Part 5.7 deals with winding up bodies which are Australian Registrable Bodies and other non-companies. Its application is not relevant and it is no longer applied.
- Minor adjustments have been made to the application of a range of administrative and machinery provisions within the applied *Corporations Act 2001* provisions to ensure that they are appropriate to co-operatives. These modifications are specified in section 4.5.3.
- Section 588G of the *Corporations Act 2001* has been applied consistently across all jurisdictions. This provision establishes a director's duty to prevent insolvent trading by a co-operative by imposing personal liability upon the director for debts incurred whilst the co-operative is insolvent. At present this provision is not applied in the Australian Capital Territory, the Northern Territory, Tasmania or Victoria.

### **Deregistration**

Part 4.7 regulates deregistration of a cooperative by applying Part 5A.1 of the *Corporations Act 2001*. This Part continues provisions in existing cooperatives legislation for all jurisdictions.

## **Chapter Five: Participating Cooperatives**

Cooperatives legislation in each State and Territory apart from Victoria currently prohibits a foreign cooperative from conducting business in that State or Territory unless it is registered by the local Registrar of Cooperatives. In Victoria, a foreign cooperative incorporated in Australia simply has to notify the Victorian Registrar of Cooperatives that it intends to conduct business in Victoria and provide certain information.

The current legislation has the effect that a cooperative which is incorporated, for example, in South Australia is prohibited from conducting business in any other State and Territory apart from Victoria unless it has applied for and received registration in a particular State or Territory.

The *Cooperatives National Law* introduces a mutual recognition system for co-operatives that are incorporated in any jurisdiction that participates in the scheme for uniform co-operative laws. Participation in the scheme is determined by whether a jurisdiction has a corresponding co-operatives law. A corresponding co-operatives law is either the *Co-operatives National Law* applied in a particular jurisdiction or a consistent law of a jurisdiction. A law of a jurisdiction will be consistent if it is declared to be so under the National Regulations.

Co-operatives or other bodies that are incorporated in jurisdictions outside the scheme for uniform co-operative laws would need to register in a particular jurisdiction as a co-operative to gain mutual recognition in all other participating jurisdictions.

Part 5.2 of the *Co-operatives National Law* prohibits a co-operative from carrying on business outside its jurisdiction of registration without authority. Section 5.2.2 provides automatic authorisation to carry on business in a jurisdiction. The authorisation will cease if the co-operative is deregistered in its original jurisdiction or if its authority is withdrawn under a process set out in s5.2.5. A participating co-operative's authority may be withdrawn if it breaches provisions of the *Co-operatives National Law* that apply to it in the participating jurisdiction. Section 5.2.5 also permits the Registrar to reinstate a participating co-operative's authority to carry on business.

A participating co-operative will be subject to any provisions of the *Co-operatives National Law* as specified in the National Regulations and Part 5.3 specifies particular requirements affecting participating co-operatives by providing offences for giving prospective members false copies of rules or other documents and advertising shares or other securities such as debentures and CCUs in the participating co-operative without having lodged a disclosure statement for that purpose with the Registrar in its jurisdiction of origin. Part 5.3 also authorises a Registrar to give specific direction to a participating co-operative regarding the manner in which it obtains financial accommodation, including ceasing obtaining such financial accommodation in a jurisdiction. Participating co-operatives will be required to include their name and place of origin on all seals and business documents.

Part 5.4 of the *Co-operatives National Law* also includes new provisions which enable a Registrar of Cooperatives to wind up the activities of a participating cooperative carrying on

business in their State or Territory regardless of whether the cooperative has been deregistered or wound up in the jurisdiction where it was incorporated.

The power to wind up under Part 5.4 is confined to the affairs of the participating co-operative that are in a jurisdiction outside its place of origin. Provisions regarding surplus property of a participating co-operative deliver that surplus to persons entitled to it under the law of the participating co-operative's place of incorporation. An order to wind up a participating co-operative's affairs is only available upon application to the Supreme Court by the Registrar of Co-operatives if the co-operative's authority to carry on business is withdrawn or it has been deregistered in its place of origin.

Currently less than one percent of cooperatives utilise the existing provisions for registration as a foreign co-operative. It is possible that existing restrictions are creating a barrier to conducting business and that the number of cooperatives conducting business in more than one jurisdiction will increase when the *Co-operatives National Law* comes into operation.

The *Co-operatives National Law* eliminates the costly requirements for cooperatives which wish to operate across borders, whilst providing adequate control for Registrars in each jurisdiction to control activities of a participating co-operative.

### **Chapter Six: Supervision and protection of cooperatives**

Chapter Six establishes a framework for administration and enforcement of the *Co-operatives National Law*. This chapter deals with the appointment and powers of inspectors and investigators. It also specifies miscellaneous powers of the Registrar of Cooperatives not stated elsewhere in the legislation. Provisions in Chapter Six are drawn from the *Cooperatives Act 1995* of Queensland and in most instances are the same as currently apply in other jurisdictions. If necessary, the application legislation for a particular jurisdiction can replace provisions in Chapter Six. For example provisions relating to the issue of search warrants may need to be modified to be consistent with local legislation.

Chapter Six also establishes some general offence provisions for matters such as falsification of records, making false statements, fraud and offering or accepting commissions. These provisions continue offences which currently apply in all jurisdictions.

### **Chapter Seven: Legal proceedings and other matters**

Chapter Seven addresses legal proceedings and other associated matters. Part 7.1 continues existing provisions for a range of offences, but also introduces new provisions for enforceable undertakings and extends the period of time permitted to initiate proceedings for an offence from 3 years to 5 years, consistent with time the limit in the *Corporations Act 2001*.

Sections 7.1.8 to 7.1.13 establish a framework where the Registrar of Co-operatives can accept a written undertaking by a person in relation to a contravention or suspected contravention of the *Co-operatives National Law*. This undertaking can be to refrain from conduct that constitutes the contravention or to take action to prevent or remedy a contravention. The Registrar of Co-operatives must record any undertaking that is given in the Register of Co-operatives, but is able to withhold information from public disclosure if



that information is commercial-in-confidence, consists of personal details or if disclosure would be against the public interest.

Once a written undertaking has been accepted by the Registrar of Co-operatives, it is an offence for the person to contravene that undertaking. The person can, however, withdraw from the undertaking with the permission of the Registrar of Co-operatives.

The Registrar of Cooperatives can apply to a court or tribunal (specified separately for each jurisdiction) for a finding that there has been a contravention of an undertaking. If this finding is made, the court or tribunal can make a range of orders which include requiring the person to comply with the order, directing the person to pay any financial benefits that have been obtained to the Registrar of Co-operatives or paying compensation to a person who has suffered loss, injury or damage.

The enforceable undertakings framework incorporates various provisions from the *Fair Trading Act 1987* of South Australia, the *Fair Trading Act 1999* of Victoria and the *Fair Trading Act 1987* of New South Wales. The framework provides an alternative strategy for enforcement which is flexible and can be used to rapidly respond to contraventions which are causing damage to members of a co-operative or to the community. The introduction of provisions for enforceable undertakings reflects current practice in consumer protection and does not affect existing provisions for the prosecution of offences.

Part 7.1 also deals with procedural matters such who may initiate proceedings for offences, double jeopardy and the meaning of strict liability when it is specified in relation to an offence.

Part 7.2 provides for a new civil penalty regime to deal with contraventions of the Co-operatives National Law. The civil penalty regime is modelled on Part 9.4B of the *Corporations Act 2001*. The introduction of this method of dealing with contraventions recognises that some contraventions of the Co-operatives National Law do not warrant criminal sanction. Specific provisions are identified as being civil penalty provisions and the Registrar of Co-operatives is enabled to seek a declaration of a contravention by the Court in respect of persons.

Examples of provisions that are classed as civil penalty provisions are breaches of directors' duties under sections 3.1.21 to 3.1.24, certain contraventions of the financial reporting obligations under Part 3.3, breaches of applied disclosure provisions in relation to issues of securities and other securities market based contraventions. The applied *Corporations Act 2001* provisions dealing with the breach of the duty to prevent insolvent trading by a co-operative is also a civil penalty provision. Criminal breaches of directors' duties are set out in sections 3.1.25 and specify a particular criminal intention component; they cannot be dealt with under the civil penalty regime.

Evidentiary rules and the burden of proof in these proceedings is the same as for civil proceedings and a declaration will lead to the Court being able to make a pecuniary penalty order up to a maximum of \$200,000 and a compensation order. Only the Registrar of Co-operatives may initiate proceedings for a declaration of contravention, a pecuniary penalty order and compensation orders. The co-operative has power to apply for a compensation

order only and to intervene and be heard in relation to other proceedings brought by the Registrar of Co-operatives in relation to the contravention. The Court also has power under section 3.1.13 to make an order disqualifying a director from managing a co-operative if there has been a contravention of a civil penalty provision.

Compensation orders arising from civil penalty provisions under Part 7.2 are in addition to any other rights the co-operative would have to compensation. The time limit for bringing proceedings for a civil penalty contravention is 6 years.

Procedural provisions manage the conduct of criminal proceedings that arise out of the same conduct that is the subject of civil penalty proceedings so as to avoid multiple proceedings over the same conduct and to avoid double jeopardy-type issues.

The introduction of a civil penalty regime serves the interest of the administration of the *Co-operatives National Law* by providing a more simple method of achieving compliance. Of itself, the provisions for civil penalties do not impose any greater liability upon co-operatives or their officers than otherwise exist, however, there is a greater likelihood that Registrars will exercise these powers to achieve compliance because of the lower standard of proof required. The outcome for co-operatives will likely result in more active pursuit of contraventions by officers and corresponding orders for compensation for loss along with disqualifying persons from further involvement in the management of co-operatives.

Part 7.3 provides for appeals against the variety of administrative decisions that may be made by the Registrar of Co-operatives. Examples of decisions by the Registrar include decisions to approve rules, disclosure statements, to register a co-operative and other similar matters. Appeals will be to a tribunal, such as an administrative decisions tribunal or a court designated by each jurisdiction in its application legislation.

Part 7.4 continues existing provisions for derivative proceedings by members and others on behalf of a co-operative, the Court's powers including its power to order costs and other procedural matters.

Part 7.5 also continues existing provisions dealing with the evidentiary nature of various registers and records. Some redundant provisions have been removed for Queensland and New South Wales.

## **Chapter Eight: General**

Chapter Eight deals with miscellaneous administrative and machinery matters. These provisions continue existing cooperatives legislation with minor adjustments to facilitate uniform administration across jurisdictions. In particular Part 8.1 provides for the establishment of the office of Registrar of Co-operatives, including the ability for a Registrar in one jurisdiction to carry out functions conferred by corresponding co-operatives law in another jurisdiction.

Part 8.2 continues provisions for the service of documents on co-operatives and members of co-operatives with minor changes to achieve uniformity. These provision do not derogate from any other provisions permitting the service of notices such as procedural rules of court or other provisions which facilitate electronic communication.

Part 8.3 introduces new provisions for making National Regulations. These provisions simplify the regulation making process by:

- authorising the Governor of New South Wales to make National Cooperatives Regulations which then apply in all jurisdictions applying the *Cooperatives National Law*.
- authorising the relevant Ministerial Council to specify the arrangements for publishing the National Cooperatives Regulations. These arrangements can potentially remove the necessity to publish the Cooperatives National Regulations in the Gazette of every jurisdiction.
- enabling Parliament in each jurisdiction to disallow all or part of the Cooperatives National Regulations in the same way that other Regulations can be disallowed in that jurisdiction.
- ensuring that disallowance of the Cooperatives National Regulations in one jurisdiction does not affect their application in other jurisdictions.

New South Wales will only recommend the initial Cooperatives National Regulations to the Governor of New South Wales after they have been unanimously approved by the Ministerial Council on Consumer Affairs - and will only recommend subsequent amendments that have been approved by a two thirds majority of members of the Ministerial Council voting on the proposal.

Part 8.3 combines miscellaneous matters of administration including arrangements for the sharing of information between jurisdictions, forms, translation of documents and procedures for exemptions and delegations. These are reflective of existing legislative provisions.