



BUSINESS COUNCIL
OF CO-OPERATIVES AND MUTUALS

Submission in respect of draft legislation: - Commonwealth Registers Bill 2018; Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2018.

October 2018

1 Introduction

The Business Council of Co-operatives and Mutuals (BCCM) is pleased to provide a submission in response to the Exposure draft Bills dealing with modernising business registers and Director Identification Numbers (DINs). This submission focusses on the impact of the draft legislation on the Australian co-operatives sector.

2 National Business Simplification Initiative (NBSI)

Modernisation of registers and the introduction of the Director Identification Number system are important steps in this national initiative.

In general, the BCCM supports the modernising Business Registries project and the introduction of DINs.

The NBSI is an agreement between the Commonwealth, States and Territories to remove red tape and facilitate business growth, and the BCCM applauds efforts to simplify and reduce the number and complexity of instances where businesses must interact with different government agencies. However, the BCCM is of the view that the scheme as proposed by the draft legislation excludes State and Territory registered co-operatives, thereby compromising any level playing field for business models.

Co-operatives are limited liability corporations registered under State and Territory legislation such as the *Co-operatives National Law (CNL)*. They have the same powers as companies registered under the *Corporations Act*, including the power to issue financial securities to the public. The CNL authorises all co-operative to carry on business nationally and co-operative directors are held to the same standards as company directors.

Co-operatives are significant contributors to the Australian economy. Approximately 2,000 registered co-operatives, provide diversity necessary for a resilient economy and deliver vital services to tens of thousands of small and medium enterprises who are their members.

Interest in the co-operative model of enterprise is growing, evidenced by increase in the number of new incorporations over the last 2 years. As the preferred choice of model in agriculture over many years, they provide support and market power to farming businesses. Longstanding agricultural co-operatives such as Norco Co-operative Ltd (registered in New South Wales), Geraldton Fishermen's Co-operative Ltd and Co-operative Bulk Handling Ltd (both registered in Western Australia) continue to export billions of dollars of Australian produce while supporting local farming communities.

Co-operatives carry on business in the same competitive markets as companies and should be treated even-handedly. The legislative policy to facilitate the policy goal for a simplified national business regulatory environment, as agreed with States and Territories demands inclusion of all business, yet the draft legislation excludes registered co-operatives.

The BCCM questions why this part of the Australian business sector is not included in this compact between the Commonwealth and States and Territories to simplify business registration.

3 Specific comments on the draft legislation

3.1 Commonwealth Registrar

Clause 7(a) of the draft Commonwealth Registers Bill 2018 provides that functions and powers can be conferred on the Registrar by “this Act or any other law of the Commonwealth (other than an **excluded law**)”.

Excluded law is defined in clause 5 as “the corporations legislation (within the meaning of the *Corporations Act 2001*)”.

The meaning of excluded law is not clear. The *Corporations Act* does not define **excluded law per se**, it does refer to **excluded matter**, being State or Territory legislation declared to be excluded from the *Corporations Act* under s5F of that Act. Relevantly, excluded matters under section 5F include the CNL and co-operatives legislation in Western Australia and Queensland.

The terms of clause 7(a) effectively close off any referral of functions under a law of a State or Territory.

Clause 7 of the Commonwealth Registrar Bill 2018 also governs the allocation of DINs.

The BCCM is aware of the limit of legislative power in the Commonwealth to make laws with respect to State and Territory entities, however, neither the legislation as currently drafted nor the Explanatory Memorandum, contemplates the possibility of any future referral of functions by States and Territories.

Noting that the legislative framework can be amended later, the BCCM argues that it is shortsighted and inconsistent with a national compact between jurisdictions to simplify business red tape, to not include potential for a future referral in the current framework.

3.2 Director Identification Numbers

Co-operatives are entitled to the benefits of the Director Identification Number (DIN) system.

DINs will support compliance activity by regulators to ensure directors do not provide

false information in relation to their position. False information hampers investigative and compliance action.

Co-operative directors are in the same fiduciary position in respect of the enterprise they manage as company directors and are subject to similar compliance obligations. DINs not only assist regulators but potentially provide greater comfort to members and third parties dealing with co-operatives.

Given that Clause 7 of the Commonwealth Registers Bill 2018 does not include any referral of functions under co-operatives legislation to the Registrar, it appears that directors of co-operatives will not be required to apply for a DIN.

It is noted however that the required for a DIN would apply to directors of a State or Territory incorporated entity that was also registered under Part 5B.2 of the Corporations Act, dealing with Australian Registered Bodies (ARBs).

Co-operatives are not required to register as ARBs as they are authorised to carry on business in other States and Territories by virtue of their governing legislation. For example, s12 of the CNL excludes Chapter 5B other than when a co-operative seeks to transfer registration and become a company under Part 5B.1.

The BCCM is aware of some larger co-operatives registered as ARBs under previous legislation. It will result in some co-operatives being subject to the DIN requirement by historical accident, while directors of other co-operatives are not.

It is the view of the BCCM that all directors of co-operatives should be treated in the same way as the directors of companies in relation to requirements for a DIN.

3.3 Regulatory vs registry functions

The BCCM notes that the proposed legislative scheme is drafted to transfer only registry functions and not regulatory functions. However, proposed substitutions in the Treasury Laws Amendment (Registries Modernisation and Other Matters) Bill 2018 may transfer a regulatory function to the Commonwealth Registrar.

In particular, the terms of s601CC necessarily involve a regulatory discretion to cancel the permission of an ARB to carry on business interstate.

The BCCM submits that the exercise of power under s601CC should remain within the scope of ASIC's power and not that of the Registrar.

4 Recommendation

The BCCM recommends:

1. That cl 7 of the draft Commonwealth Registers Bill 2018 be amended as follows, to allow States and Territories to refer registry functions under co-operatives legislation to the Commonwealth Registrar

Cl 7 Functions

The Registrar's functions are:

(a) such functions as are conferred on the Registrar by or under this Act or any other law of the Commonwealth (other than an excluded law) or any other law of a State or Territory; and

(b) such functions as are prescribed by rules made for the purposes of this paragraph; and

(c) such functions as are incidental to the functions mentioned in paragraph (a) or (b).

2. That the provisions of s601CC of the Corporations Act are not amended to transfer power in respect of this function to the Registrar

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