



BUSINESS COUNCIL
OF CO-OPERATIVES AND MUTUALS

Submission to the House of Representatives Standing
Committee on Economics inquiry into impediments to business
investment

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About the BCCM

Formed in 2013 following the United Nations International Year of Co-operatives, the Business Council of Co-operatives and Mutuals (BCCM) is the peak body for Australian co-operatives, mutuals and member-owned enterprises. The BCCM represents a diverse range of enterprises operating across many primary, secondary and tertiary sectors.

The BCCM advocates for recognition of the sector and for measures that create a level playing field between co-operatives and other businesses, including implementation of the recommendations of the Senate Economics References Committee report into Cooperative, mutual and member-owned firms, and the Hammond Review into Access to Capital for CMEs.

1 Introduction

This submission addresses the first of the Committee's terms of reference, which asks it to inquire into and report on:

- **the interaction between regulatory frameworks across all levels of Government and how the cumulative regulatory burden can be reduced to support greater business investment.**

The co-operative and mutual sector is regulated by a mix of state and federal laws. Most co-operatives are incorporated under State and Territory laws, while mutuals are regulated under the Commonwealth *Corporations Act*.

It is important to recognise the competition and accountability benefits of a diverse business ecosystem, where a number of different types of business structures compete against each other on a range of attributes. Research by the [Australia Institute](#) demonstrates that a healthy co-operative sector has significant competition and accountability benefits for economic efficiency and community resilience.

Regulatory frameworks that support a diversity of business models rather than promote one business model over another should be outcomes from the Committee's inquiry.

This submission focusses on the regulatory framework for co-operatives.

2 Co-operatives in Australia

Co-operative and mutual enterprises are formed to pursue different purposes from investor-owned companies, but compete in the same markets.

They share wealth, control and ownership. Communities identify needs and combine to develop organisations that bring diversity, competition and consumer choice to markets, and enable smaller market participants, enterprises or individuals, to enter and compete in markets that favour larger firms.

Co-operatives aim to meet both financial and social goals within the framework of internationally settled principles of co-operation that focus on members and their communities. Democratic control by members provides accountability and secures their commitment to a co-operative's purpose.

They have the potential to provide employment across all industries through the creation of shared enterprises that hedge against risk.

Co-operative and mutual enterprises are in a diverse range of sectors, including agriculture, finance and banking, insurance, motoring services, health services, aged care, disability employment, education, indigenous services, social housing, professional services and retailing. Small businesses join co-operatives to access services that they are not able to acquire as individuals. Motor repairers, plumbers, architects and farmers use co-operatives to access core business services at affordable rates.

The National Mutual Economy Report published annually by the BCCM shows that

For the 2017 financial year, the total value added of the CME sector was \$140 billion, or 8.3% of GDP. CME assets have grown by 10.5% over a five-year period, with turnover growing at 6.6%.

There is growing interest in the co-operative model as a means of dealing with market imbalance and addressing the discontent with investor-owned companies that focus on profit to shareholders, rather than customer interests.

Mutual recognition for co-operatives between States and Territories and the introduction of new capital raising instruments under the Co-operatives National Law have assisted the growth of the sector and the ability of co-operatives to connect people and small businesses across borders. However, this increased momentum has served to highlight the regulatory dissonance and costs faced by the sector.

3 A problematic regulatory framework for co-operatives

The regulatory framework should be as simple as possible to minimise compliance costs, and processes should be transparent to provide clarity and deliver accountability. Where the co-operative regulatory process has been made more user-friendly it has led to increased activity. The Co-op Builder tool, developed by the BCCM for the Farming Together Program, is one example. It assists users to prepare the documents needed to form a co-operative and has led to an increase in registrations.

Regulatory requirements should address the relevant risks to protect members of co-operatives and the community. Regulation should be consistent across jurisdictions to allow growth to occur where there is an economic benefit, and not distort choices.

Most importantly, there should be a level regulatory playing field between co-operatives and other business forms. In March 2017, the Senate Economics References Committee Inquiry into Cooperative, mutual and member-owned firms recommended that

the Commonwealth Government liaise with its state and territory counterparts to ensure that the regulatory burden for small and medium sized co-operative and mutual enterprise aligns with the needs of these organisations and ensures they are not disadvantaged relative to companies of a similar size.

The current framework for regulating co-operatives hinders and distorts their growth and development in the following ways.

(i) *Regulatory administration is paternalistic*

The registration process for new co-operatives requires approval by the Registrar of the constitution and disclosure documents for formation. Company registration has no equivalent approval process and formation is quick and indifferent to purpose or viability. While it is important that a co-operative's constitution reflects the characteristics of the co-operative model, the approval process is dogged by unnecessary requirements for the drafting of constituent documents at the formation stage, resulting in delay and additional costs for registration.

Registrars bear no legal responsibility for the success or failure of a co-operative. The entity should stand or fall on its own merit, as is the case with any corporation. However, there are examples where regulators in one jurisdiction have rejected formation documents based on a view that the entity may not be financially viable.

There is no policy justification for the adoption of paternalism in the process for registering co-operatives.

(ii) Regulatory administration is not transparent

Registrars do not produce regulatory guides for co-operatives and their advisers to explain how the decisions or discretions that the registrar makes will be administered. Regulatory guides would provide a degree of certainty for entities and their advisers, where the entity requires the regulator to make a decision or where it is likely that the regulator will exercise its powers under the legislation.

State and Territory Registrars have produced simple fact sheets about the legal requirements under the law, but there is no guide that assists co-operatives to better understand what policies or interpretations of the law the Registrar will apply. While there are numerous instances under the Co-operatives National Law requiring Registrar approval, decision or exemption, there are no regulatory guides indicating how these powers will be exercised.

By way of comparison, the Australian Securities and Investments Commission produces Regulatory Guides

- explaining when and how ASIC will exercise specific powers under legislation
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach.

The absence of regulatory guides for co-operatives contributes to administrative inconsistency between jurisdictions.

(iii) Regulatory administration exhibits a closed culture

There is no standing consultative group for co-operative law and administration. The inter-government agreement, underpinning the Co-operatives National Law scheme, charges State and Territory Ministers with responsibility for reviewing the legislation and administrative processes. Since commencement of the legislative scheme, there has been no review the law or issues of administrative uniformity at Ministerial level. Efforts by the BCCM to raise and resolve regulatory and administrative issues through government agencies have either been ignored or met with piecemeal responses.

By way of example,

- A. the BCCM has requested Registrars, both individually and through an interstate operational committee, to provide comment or consult over a range of administrative matters since early 2016 and has not received any response.
- B. As part of a project to provide a free online resource (called the Co-op Builder) to assist new co-operatives to draft formation documents, the BCCM has asked Registrars to consider pro forma documents as acceptable for registration. Responses were received from only three

of the eight jurisdictions, each of which was different. Continued requests on this matter by the BCCM have been largely unanswered.

(iv) Inconsistent regulatory administration between jurisdictions

Applications for registration requiring approvals of constituent documents are subject to differing administrative policies and standards. In other words, a proposed draft constitution will be approved in one jurisdiction, but not approved in another.

Different Registry staffing expertise means that more complex approval processes, such as the approval of terms of issue and disclosure for securities where investor protection is paramount, are not carried out consistently.

(v) The Co-operatives National Law has still not been adopted by Queensland

The uniform scheme of legislation, called the Co-operatives National Law (CNL), was commenced by New South Wales and Victoria in 2014. Adoption by other jurisdictions has taken place over the following three years, with the exception of Queensland.

Queensland has withdrawn from the inter-government agreement and there is presently no commitment by the state to adopt the CNL.

Lack of uniformity creates costs and barriers for interstate trade and commerce between Queensland and other jurisdictions. Co-operatives registered under the CNL must register as a foreign co-operative to carry on business in Queensland, and co-operatives registered in Queensland do not have mutual recognition to carry on business in other States and Territories.

The regulatory framework in Queensland has different requirements for matters such as director elections and voting. Smaller co-operatives are required to produce annual audited financial statements, representing a significant cost to operations without any matching benefit. Further, co-operatives registered in Queensland are not permitted to offer hybrid securities to boost investment, whereas co-operatives in all other jurisdictions can.

(vi) Regulatory overlap between state and federal jurisdictions

Co-operatives wishing to engage in capital raising through share offers and offers of debentures or Co-operative Capital Units must either risk action by ASIC or make separate disclosures under both regulatory regimes. This cannot be justified on any policy grounds.

This problem arises because of the complex relationship between the *Corporations Act 2001* (Cth) and the CNL.

While legislation for co-operatives is within the power of State and Territory Parliaments, the Commonwealth *Corporations Act 2001* affects some activities by co-operatives. The jurisdictional limits of the *Corporations Act 2001* are defined in the CNL in terms that are complex and therefore open to interpretation.

For example, ASIC's view is that co-operatives are subject to dual regulatory disclosure

requirements when offering securities to raise capital across borders and that co-operatives must also be registered as Australian Registrable Bodies under the *Corporations Act*. This interpretation is at odds with the CNL, because the CNL excludes the *Corporations Act* provisions in respect of co-operative securities (s12 CNL).

(vii) Lack of coordination between State and Federal corporate regulators

There is no consultative process between Federal Treasury and State and Territory corporate regulators to identify or manage the regulatory impact of changes to the *Corporations Act*.

The CNL applies parts of the *Corporations Act* as a law of the relevant State or Territory by reference. Recent changes to Chapter 6D of that Act to permit crowdfunding are likely to form part of the applied provisions under the CNL for disclosure statement content and processes. The impact of these provisions on co-operatives has not been considered in any regulatory impact statement. Requests for information from State and Territory regulators about how co-operatives may utilise these provisions have not had a response.

(viii) Process for registering a name for a co-operative

Since the transfer of responsibility for Business Names to ASIC, there is an uncertain process for selecting a name for a new co-operative. Prospective co-operators are required first to check the availability of a name on the ASIC Register, but cannot reserve a name on that system. Rather, they must propose the name to the Registrar for approval. If the Registrar approves the selected name, this approval does not reserve the name, and the promoters must wait until the co-operative is registered before they know whether they have secured the name. Registration may take up to one month from approval, during which time the name may no longer be available.

The consequence of these deficiencies in the current state and territory based regulatory framework is to create barriers to entry for new co-operatives, hamper access to capital, distort choices about investment and growth, and deny the unexplored potential of this business form.

4 Lack of data uniformity, accessibility and digital capacity

The development of good policy and regulatory frameworks relies on reliable, consistent and accessible data.

At present, each State and Territory maintains a separate public register of co-operatives. Unless the place of registration is known, a person wishing to know about the status of a co-operative needs to search all State or Territory registers until they find the co-operative.

Information about the size and composition of the co-operative sector in Australia can only be obtained by separate requests to the eight jurisdictions. Each jurisdiction collates statistics differently. For example, some jurisdictions do not differentiate between the type of co-operative – distributing or non-distributing (with or without share capital). Some jurisdictions do not provide statistical data, stating that it is too time consuming and difficult to provide.

The lack of a single national, searchable public register for co-operatives is a serious deficiency in the present regulatory framework.

The difficulties in undertaking research to inform regulatory policy for co-operatives were examined during the Senate Economics Research Committee Inquiry into Cooperative, mutual and member owned firms.

The Committee recommended that

the Commonwealth Government ensures that a national collection of statistics and data is undertaken to provide an accurate picture of the scale and extent of the co-operative and mutual sector.

For its part, the co-operative and mutual sector has initiated research programs to assist better understanding of the size, value and potential of the co-operative model.

In particular,

- The BCCM has published the National Mutual Economy Report each year since 2014,
- The University of Western Australia has developed the Australian Co-operative and Mutual Enterprise Index,
- In a joint research project, the University of Sydney and Macquarie University have produced a Visual Atlas of Australian Co-operatives,
- A Mutual Value Measurement research project is being undertaken by Monash University in partnership with a number of BCCM members, and
- Eliza's Project: Gender diversity and inclusion in CMEs report produced by Per Capita and the BCCM.

Finally, illustrating the archaic processes that beset the sector, co-operatives are not able to lodge documents through an online portal. Indeed, in some jurisdictions documents can only be lodged by ordinary mail.

5 Recommendation

To address the regulatory and data issues identified in this submission, it is recommended that:

There be a single national regulator for co-operatives under Commonwealth responsibility.

The Australian Securities and Investments Commission has the expertise and processes for administering and monitoring corporate entities. The Co-operatives National Law incorporates the principles that ensure the unique characteristics of co-operatives are protected and fostered.

Referral of the power to make and administer the regulatory framework for co-operatives to the Commonwealth Parliament would provide uniformity for regulation and administration and resolve any dual regulatory issues. It would also provide a single national and searchable public register to support policy and research into the size and value of the sector.

As a key regulator in Australian financial markets, ASIC is best placed to administer disclosure requirements for new hybrid securities (Co-operative Capital Units) offered by co-operatives to boost business investment.

Jurisdictions, such as the United Kingdom and New Zealand, regulate co-operatives through specialist units within their respective corporate regulators.

6 Conclusion

Co-operatives have been part of Australian life for generations. They have demonstrated a great capacity to adapt and evolve and thereby make a continuing contribution to our economic and social wellbeing. They add value and resilience to communities, represent a means for people to create worthwhile employment through enterprise and are a way of mitigating economic distress during economic downturns.

They have been underrepresented in policy discussions and must work hard to explain their value to the economy, because financial reporting systems tend to measure the performance of investor-owned firms.

Australia's economy is becoming more fluid, competitive and open as a result of the digital economy and changing global trade arrangements. In this context, our needs for employment, environmental and food security are growing challenges. A healthy co-operative sector, as part of a diverse and competitive business ecosystem, will have significant benefits in economic and community resilience.

Current regulatory burdens are constraining the growth of the sector and limiting the contribution co-operatives could make.

The potential for co-operatives and mutuals should be recognised and fostered by addressing the deficiencies identified in this submission through the transfer of regulation of co-operatives from State and Territory registries to a single Commonwealth regulator.

7 Appendix : Recommendations of the Senate Economics References Committee inquiry into cooperative, mutual and member-owned firms

Recommendation 1

The committee recommends that the Commonwealth Government ensures that a national collection of statistics and data is undertaken to provide an accurate picture of the scale and extent of the co-operative and mutual sector.

Recommendation 2

The committee recommends that co-operative and mutuals sector be better represented in government policy discussions, and is actively promoted as a possible option for service delivery particularly where community based initiatives are being considered.

Recommendation 3

The committee recommends the Commonwealth Government work with states and territories to develop a program of supports to encourage the establishment of new co-operatives and mutual enterprises.

Recommendation 4

The committee recommends that a mutual enterprise is explicitly defined in the Corporations Act 2001, and its associated regulations.

Recommendation 5

The committee recommends that the role of directors in mutual enterprises is defined in the Corporations Regulations to align with the proposed definition of a mutual enterprise in the Corporations Act.

Recommendation 6

The committee recommends the Commonwealth Government work with states and territories to ensure the continual improvement to advice, guidance and information provided at all stages in the establishment, governance and regulation of co-operatives.

Recommendation 7

The committee recommends that the Commonwealth Government to work with all relevant stakeholders to undertake a program of education and training to inform them about the role of co-operatives and mutuals.

Recommendation 8

The committee recommends that the Commonwealth Government examine ways in which it can improve the recognition and understanding of the co-operative and mutual sector in the national secondary school curriculum and that tertiary institutions consider the inclusion of co-operative and mutuals in accounting, business, commerce, economics and law degrees.

Recommendation 9

The Committee recommends that professional accreditation bodies, such as the Law Society and Institute of Chartered Accountants, require a demonstrated knowledge of the co-operatives and mutual structure before it will licence its members to practice accounting or law.

Recommendation 10

The committee recommends that the Commonwealth Government amend the Indigenous Advancement Strategy to allow registered co-operatives the same access to allow levels of grant funding as other entities.

Recommendation 11

The committee recommends that the Commonwealth Government review, and where necessary amend the eligibility criteria for grants and funds across all of government grants and program guidelines to ensure that co-operatives and mutual enterprises are not excluded on the basis of their business structure.

Recommendation 12

The committee recommends that the co-operative and mutual sector be considered when the government is preparing a Regulatory Impact Statement that accompanies new regulatory policies.

Recommendation 13

The committee recommends that the Commonwealth Government liaise with its state and territory counterparts to ensure that the regulatory burden for small and medium sized co-operative and mutual enterprise aligns with the needs of these organisations and ensures they are not disadvantaged relative to companies of a similar size.

Recommendation 14

The committee recommends that the Commonwealth Government closely monitor the progress of the International Accounting Standards Board in developing solutions to bring co-operative shares under the definition of capital under AASB 132, and, where possible, facilitate equivalent amendments as expeditiously as possible.

Recommendation 15

The committee recommends that Commonwealth and State Governments support the formalisation of some of innovative market-based approaches to raising capital for small and medium sized co-operative and mutual enterprises, in the form of advice and information, as they become available.

Recommendation 16

The committee recommends that APRA set a target date for the outcome of discussions with the co-operative and mutuals sector on issues of capital raising and bring those discussions to a timely conclusion.

Recommendation 17

The committee recommends that the Commonwealth Government examine proposals to amend the Corporations Act 2001 to provide co-operative and mutual enterprises with a mechanism to enable them access to a broader range of capital raising and investment opportunities.