



Defining Mutuality

What are co-operatives
and mutuals: A guide to legal
and governance models

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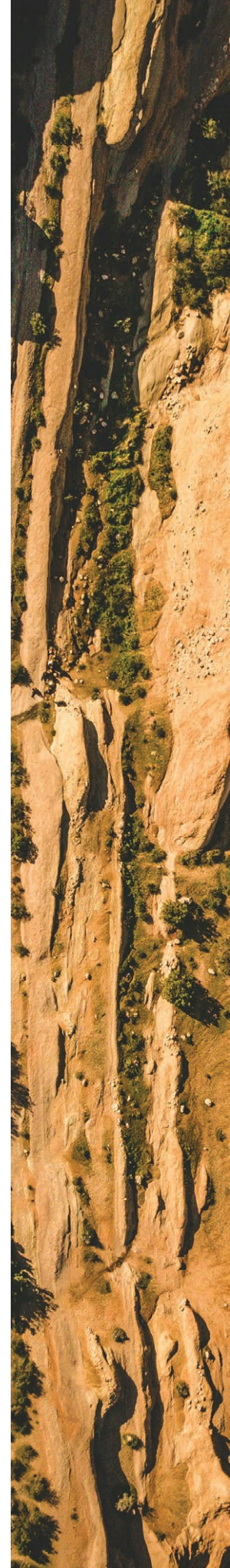
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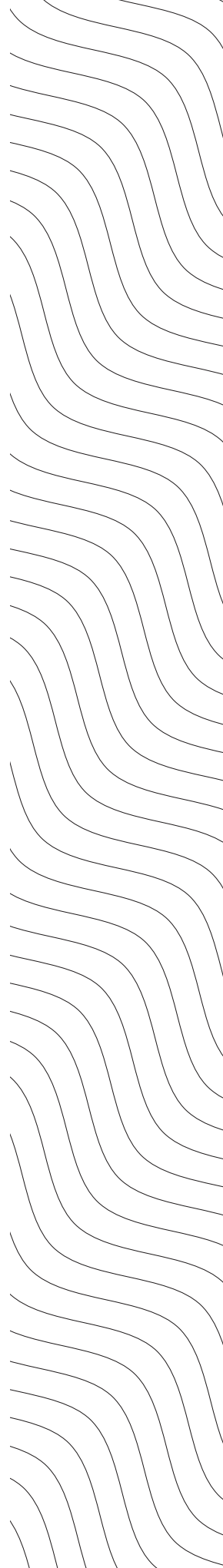
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Defining Mutuality

What are co-operatives and
mutuals: A guide to legal and
governance models



Overview

This document seeks to provide guidance on how different co-operatives and mutuals are defined in Australia, how they fit into the corporate landscape, the different legal structures used and the governance systems operated.

It does so under the following headings >





Comparing corporate business purpose

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- › The purpose of a shareholder-owned company is to reward owners, who make risk investments, through profits and capital gain.
 - › The purpose of a co-operative or mutual is to provide goods and services to its members, on an equitable basis.
 - › The purpose of a charity and not-for-profit is to deliver public benefits to a defined community.
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Defining co-operatives and mutuals

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- › Every co-operative or mutual has a business purpose that seeks to achieve equitable outcomes for its members.
 - › A basic principle of co-operatives and mutuals is that members' benefits must be fair – this means benefits are either universal or tied proportionately to business transactions.
 - › Co-operatives and mutuals constitute themselves in ways that ensure this outcome.
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Legal structures

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- › In some parts of the world, particular co-operatives and mutuals have bespoke legal structures that only they can use. In Australia, this only applies to co-operatives registered in their home state or territory under Co-operatives National Law or the Co-operatives Act 2009 (WA).
 - › There is no single legal structure for a co-operative or mutual, though federally registered mutuals are now able to identify as a 'Mutual Entity' under the Corporations Act.
 - › Australian co-operatives and mutuals utilise a range of incorporated (co-operative, company, incorporated association or Indigenous Corporation) and unincorporated (trust) structures, but always with a mutual-style constitution.
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Mutual governance

D

- › In order to maintain equity, all co-operatives and mutuals choose a constitution that operates on the basis of one member, one vote governance, or a system close to it.
 - › Governance can either be direct, with all economic participants qualifying as members, or indirect, with proxy representation of stakeholder interests.
 - › The level of active engagement by members will depend on the type of co-operative or mutual and the level of engagement required.
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Appendices

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- › Identifying a co-operative or mutual enterprise.
 - › A comparison of co-operatives and mutuals: producer-owned, mutual and customer-owned.
 - › The spectrum of mutual governance.
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Comparing corporate business purpose

The purpose of a shareholder-owned company is to reward owners, who make risk investments, through profits and capital gain

Private purpose relies on creating shareholder value and is effective at delivering it. It dominates the commercial world today. It creates jobs, provides goods and services and generates tax revenue. It encourages constant innovation, improvement and progress and has driven many great advances.

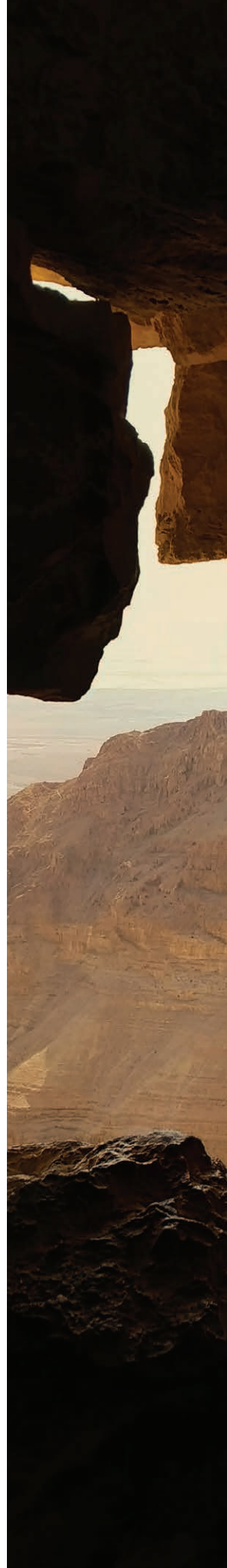
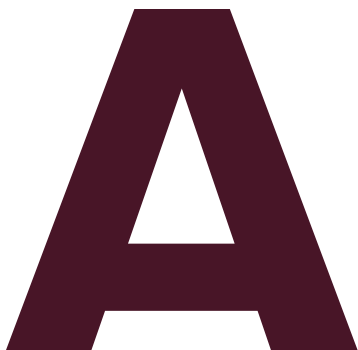
Rewards for this success belong to the owner–shareholders, for the whom the company exists. Directors have a legal duty to serve the interests of shareholders above all other stakeholders.

The purpose of a co-operative or mutual is to provide goods and services to its members, on an equitable basis

A mutual venture is one where people come together to achieve something for themselves and for each other. They have a shared need that none of them can meet on their own, but by pooling that shared need through a willingness to do something collaboratively, they provide a mechanism to meet the needs of all.

Co-operatives and mutuals can operate at lower cost to customers or members, all else being equal, because they are not required to reward investors. They can choose to share this advantage with members through higher service levels, lower pricing or rebates.

Co-operatives and mutuals are equitable because they reward membership in relation to its engagement with the co-operative or mutual, rather than in proportion to investor shareholding.



The purpose of a charity and not-for-profit is to deliver public benefits to a defined community

Charities are a form of custodian ownership where individuals are precluded from obtaining any private benefit, and where the organisation exists for one or more public benefit charitable purposes. They are established by private individuals or organisations and generally procure their funding from private individuals, businesses and other benefactors.

Often those who benefit from charities will be limited to a specified group of people living with a particular disadvantage. In many jurisdictions, charities are treated favourably for fiscal purposes, to reflect their public purpose.

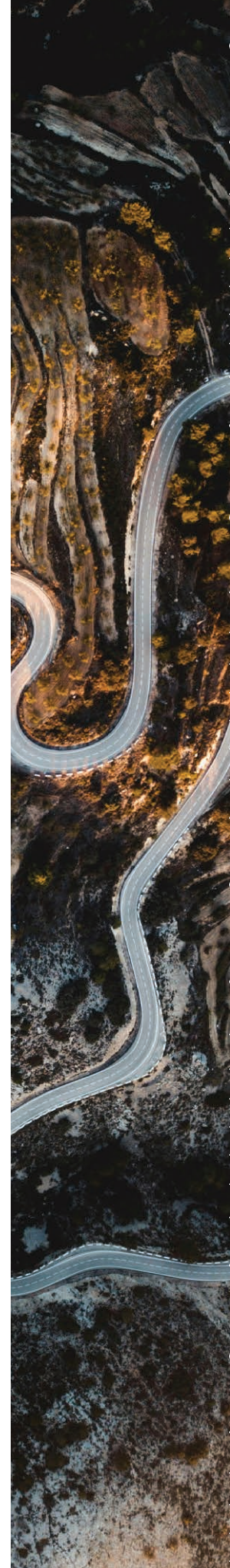


Defining a co-operative or mutual enterprise

Every co-operative or mutual has a business purpose that seeks to achieve equitable outcomes for its members

Co-operatives and mutuals emerge where there is a market failure, where traditional forms of business do not meet people's needs. Mutuality consists of people making a commitment to each other through the mutual organisation they have established.

The venture is only sustainable if people commit to bringing their trade to the organisation, and if their needs change, then by changing what the organisation does to meet those shifting needs. People can do this in a co-operative or mutual because as members, they own and control the organisation.



A basic principle of co-operatives and mutuals is that members' benefits must be fair – this means benefits are either universal or tied proportionately to business transactions

Co-operatives and mutuals are a form of ownership which will only work and retain people's commitment if they are fair to everyone, and equitable.

This is achieved through members sharing equal power in the organisation, rebates from surpluses being distributed in proportion to economic contribution, underlying assets not being used to reward anyone and no-one gaining more than anyone else, except through the trade they have contributed to the co-operative and mutual.

Co-operatives and mutuals constitute themselves in ways that ensure this outcome

Mutuality is a form of collective or shared ownership between individual members on the basis of a mutual commitment.

Like a shareholder-owned company, co-operatives and mutuals are legal entities distinct from their member-owners, but they have a different business purpose that is reflected in the way they are constituted.

There are many different legal forms used by co-operatives and mutuals – rather than a particular legal form, they instead share a common approach in their constitutions.

Legal structures



In some parts of the world, particular co-operatives and mutuals have bespoke legal structures that only they can use. In Australia, this only applies to co-operatives registered in their home state or territory under Co-operatives National Law or the Co-operatives Act 2009 (WA)


Before the Corporations Act 2001, separate legislation only existed in Australia for credit unions, building societies and friendly societies. Other types of co-operatives and mutuals were already registered as companies.

Today, most federally registered co-operatives and mutuals are now under the Corporations Act as companies, with the sector's other main corporate structure being state-registered co-operatives. A smaller number of co-operatives and mutuals are structured as incorporated associations, Indigenous corporations or trusts.

Overseas, other bespoke corporate structures remain, with specific co-operative and mutual forms maintained in a number of jurisdictions. Indeed, in the European Union, for example, new and additional structures for co-operatives and mutuals have been developed in recent years.

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There is no single legal structure for co-operatives and mutuals, though federally registered mutuals are now able to identify as a ‘Mutual Entity’ under the Corporations Act

②

Australian co-operatives and mutuals utilise a range of incorporated and unincorporated structures, but always with a mutual-style constitution

③

Mutuality is a way of doing business, with a different business purpose from shareholder-owned firms. As indicated, it is the constitutional arrangements that define co-operatives and mutuals, rather than any single legal structure.

The Treasury Laws Amendment (Mutual Reforms) Act 2019 permits federally registered companies with a mutual constitution to use the definition of a “mutual entity”. A company is a mutual entity if: (a) the company is registered under the Corporations Act; and (b) the company’s constitution provides that a person has no more than one vote at a general meeting of the company for each capacity in which the person is a member of the company.

Federally registered co-operatives and mutuals all adopt one of the types of company structure and add a mutual-style constitution that reflects their needs as best can be established under the Corporations Act.

Australian co-operatives and mutuals may be companies limited by shares, by guarantee, or by shares and guarantee. The additional qualification of “mutual entity” was introduced in 2019, although as explained previously, this is an assertion of mutuality that is parallel to the existing legal and taxation corporate status of a co-operative or mutual.

Although a major step forward, this remains sub-optimal, as the Corporations Act fails to cater for the necessary character of mutual business. Additional reforms are needed to remedy this.

Mutual governance

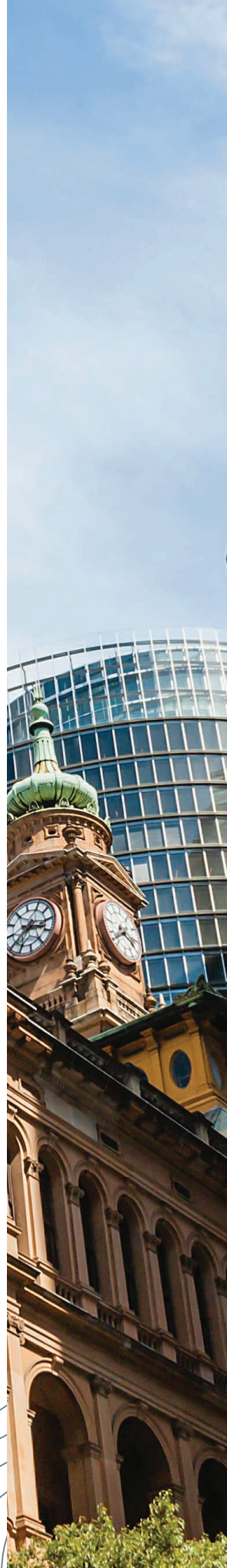
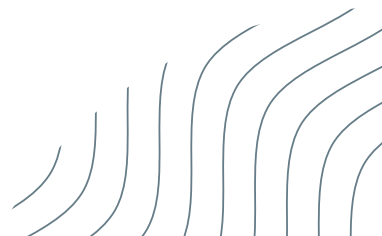
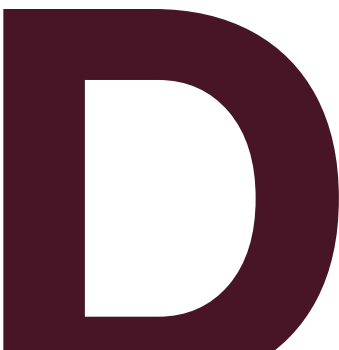
In order to maintain equity, all co-operatives and mutuals choose a constitution that operates on the basis of one member, one vote governance, or a system close to it

①

It is a fundamental principle of co-operatives and mutuals that members share power in the organisation.

Co-operatives and mutuals almost universally adopt constitutions that are based on the foundation of one member, one vote. This contrasts with shareholder-owned companies, where voting is proportional, in relation to investments.

When the Mutual Reforms Act 2019 was drafted, it was this feature that was selected as the essential characteristic for the definition of a "mutual entity".



Governance can either be direct, with all economic participants qualifying as members, or indirect, with proxy representation of stakeholder interests

②

Constitutions in co-operatives and mutuals will reflect the character, history and membership base of the business.

In most co-operatives and mutuals, membership is broad, with membership rights for all customers in consumer mutuals, or all producers in the case of producer-owned types.

Occasionally, member representation is on a proxy or delegate basis, with membership rights held by a smaller representative group on behalf of the wider stakeholders. In either case, one member, one vote is operated.

Sometimes, proportional voting is on the basis of economic contribution or investment. In these cases, an upper limit is placed on the voting power of any individual member.

The level of active engagement by members will depend on the type of co-operative or mutual and the level of engagement required

③

Mutual constitutions vary according to the particular circumstances of a business. The level of engagement between individual members and the governance structure also varies.

As a general rule, the greater the financial relationship between the co-operative or mutual and the member, the higher the level of engagement that is experienced in the governance structure.

Appendices

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Identifying a co-operative or mutual

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A comparison of co-operatives and mutuals:
producer-owned, mutual and customer-owned

③

The spectrum of mutual governance



3 steps to identifying a co-operative or mutual

In most cases¹, it is a simple process.

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Your company is registered under the Corporations Act 2001 (Cth)

What type of company is it?

Company limited by shares

Company limited by guarantee

Company limited by shares and guarantee

Do you have a mutual constitution?

(No person has more than one vote at a general meeting - one member, not more than vote)

Yes

No

You are a mutual entity

You are not a co-operative or mutual



b

You are a state registered co-operative

You are a co-operative or mutual



¹There are some exceptions, for example mutuals that are incorporated associations like RAC WA or producer-owned co-operatives that meet the income tax definition of a co-operative.

A comparison of co-operatives and mutuals: producer-owned, mutual and customer-owned

For the purpose of comparison, we have selected a number of leading Australian co-operatives and mutuals.



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Producer owned, e.g. **Norco, CBH Group**

Features

- > Business purpose is to provide value to its enterprise members
- > Membership consists of individual enterprises
- > There is a strong financial relationship between members and co-operatives and mutuals
- > Members contribute capital
- > Members benefit from rebates and services

②

Mutuals, e.g. **HCF, CareSuper, Australian Unity**

Features

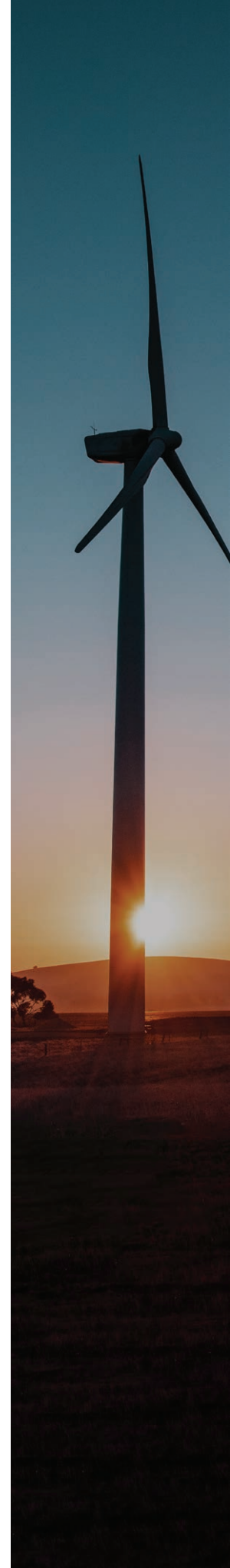
- > Business purpose is to provide value to its customers (or policy holders)
- > Membership consists of individual customers or their proxy representatives
- > Members do not contribute capital
- > Members benefit from price and service

③

Customer-owned, e.g. **Great Southern Bank, RACWA, Bank Australia**

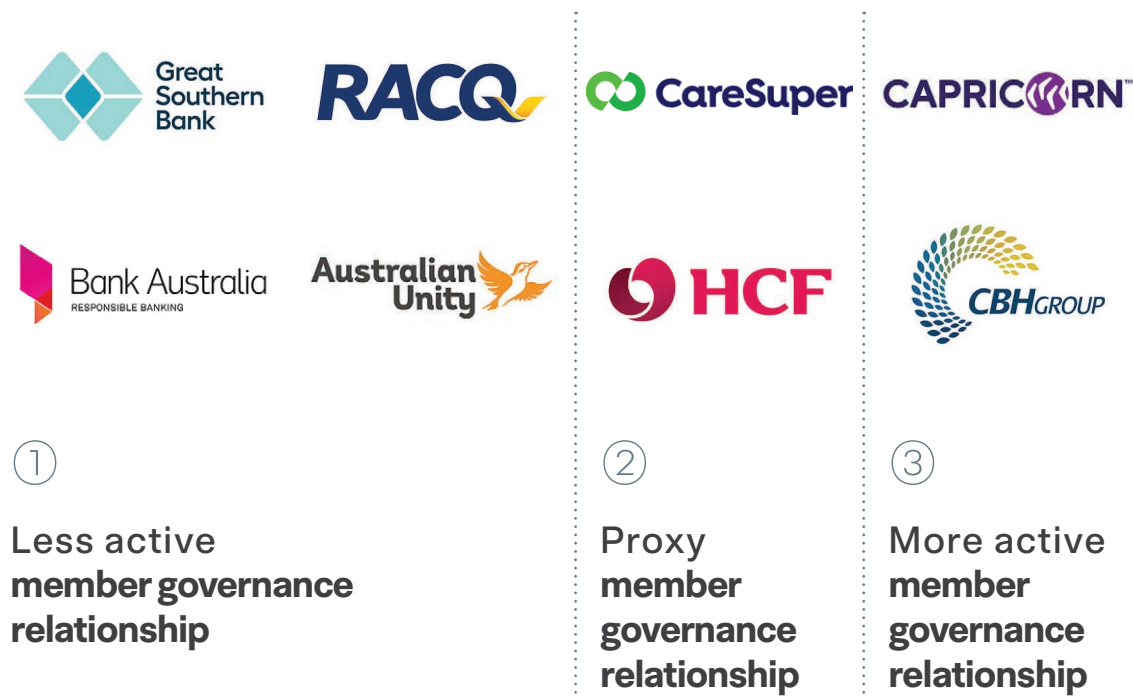
Features

- > Business purpose is to provide value to its customers
- > Membership consists of individual customers
- > Members do not contribute capital
- > Members benefit from price and service



The spectrum of mutual governance

For the purpose of comparison, we have selected a number of leading Australian co-operatives and mutuals.



The varying manner in which co-operatives and mutuals adopt mutual governance structures is a good illustration why legal form and governance alone is not the best indicator of the way a business will operate its mutuality. It is always best to refer first to the business purpose.

As suggested above, the level of engagement that members will have with the governance practices of a co-operative or mutual will tend to increase, the more financial stake they have. Hence members in producer-owned co-operatives and mutuals are usually more engaged in director elections, AGMs and other member activities.

Where the member relationship is more as a customer, this reduces the level of the active engagement, in the normal life of a mutual. An exception to this is in the case of proxy members, usually a small number representing the wider customer base, who will be more engaged up to (and sometimes including) Board level.

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