Modernising Australian co-operatives regulation

Interim Findings and Recommendations Report

August 2024

BCCM | THIS IS SOCIAL BUSINESS

Business Council of Co-operatives and Mutuals

Traditional acknowledgement

The Business Council of Co-operatives and Mutuals (BCCM) recognises the Traditional Owners of the land on which we work and meet. We wish to pay our respects to First Nations peoples and their elders, past and present. We recognise that the values of Indigenous cultures and co-operative values are deeply connected through the business model of community owned, people centred enterprise that cares for community and environment.

Statement of Co-operative Identity

A co-operative is an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.

Co-operative values

Co-operatives are based on the values of **self-help**, **self-responsibility**, **democracy**, **equality**, **equity**, and **solidarity**. In the tradition of their founders, co-operative members believe in the ethical values of honesty, openness, social responsibility and caring for others.

Co-operative Principles

The co-operative principles are guidelines by which co-operatives put their values into practice.

1. Voluntary and Open Membership

2. Democratic Member Control

3. Member Economic Participation

4. Autonomy and Independence

5. Education, Training, and Information

6. Cooperation among Cooperatives

7. Concern for Community[1]

[1] Cooperative identity, values & principles | ICA

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1. Introduction

Since the start of this consultation process with the release of a Discussion Paper, momentum among policymakers locally and internationally to support reform for co-ops has grown. The United Nations has declared 2025 an International Year of Co-operatives and has called on Member States to review their co-ops legislation. The Standing Committee on Economics recommended the Competition Taskforce review co-op regulation in its Better Competition, Better Prices Report. It is a good time for the movement to put forward its ideas about how co-op legislation and regulation can be modernised to make it easier for existing co-ops to operate and grow and to encourage more co-op formations.

Questions in the Discussion Paper were developed to reflect issues or difficulties raised with the BCCM in the 12 years since the commencement of the Co-operatives National Law. They focused on legislative provisions that affect the formation and operation of co-operatives as well as the administrative/regulatory experience for co-operatives arising from there being eight Registrars across a national scheme.

There was a noticeable difference in emphasis in responses from larger and smaller co-operatives. Smaller co-operatives reported issues with formation processes and general regulatory guidance, whilst large co-operatives identified broader fundraising and cross-border issues. Despite the differences between large and small co-operatives, there were also many common themes in responses.

Chapter 3 of this report collates the responses thematically and provides draft recommendations. Additional information is provided in Chapter 3 or in appendices where feedback suggested this would be helpful (on topics such as legacy asset protection, public search processes and Director Identification Numbers). The recommendations are also collated as Appendix 5.

At a glance, the findings and recommendations of this report can be summed up as follows:

Modernising the legislation	**Modernising the regulatory environment**
Update the Model Rules	National guidance on rules and disclosure documents
Reduce legislated approval times	National combination of public register/search function
Consider application of recent changes to business regulation to co-ops (e.g. insolvency, online meetings)	Formal co-ordination between states and territories and with Commonwealth to ensure a modern regulatory environment
Consider introducing an opt-in legacy asset protection framework	

We welcome any feedback from co-operators on the interim findings and the draft recommendations to inform our final report and recommendations **by 27 September 2024.**

Melina Morrison
CEO

2. Method

The Discussion Paper was published on 28 August 2023. BCCM members were also briefed in August 2023 on the Discussion Paper at a Public Affairs Committee meeting.

The Discussion Paper was sent to all BCCM members and approximately 500 individual co-operatives. It was sent to The Co-op Federation representing approximately 185 co-operatives, Co-ops WA, representing approximately 48 co-operatives, and the Australian Co-operative Housing Alliance representing approximately 150 housing co-operatives. It was also sent to legal firms and other co-operative advisers.

Responses to the questions posed were requested by 17 November 2023 and could be made via an online survey, email or video conference with BCCM. Respondents were invited to provide comments other than simple Yes/No answers. Feedback was received from 20 respondents:

- Thirteen co-operatives and advisors provided responses to the online survey.
- Four co-operatives and Co-ops WA made written submissions.
- Online discussions were held with representatives of Union Co-operative Society (22 November 2023), Co-ops WA (7 December 2023), The Co-op Federation (21 December 2023) and Independent Liquor Group Co-operative (24 January 2024).

An appendix to this report provides a list of respondents.

Note: *The Co-operatives National Law (CNL) is a national scheme comprising eight separate state co-operatives Acts. All jurisdictions except Western Australia adopted the Co-operatives National Law and Co-operatives National Regulation (CNR) as a template. Western Australia passed its own consistent law, the Co-operatives Act 2009 and accompanying regulation. Differences between the Co-operatives Act 2009 (WA) and the CNL that impact the results are identified.*

3. Responses

The responses have been collated across several themes:

- Approval processes for rules and disclosure
- Regulatory agility
- Public registers
- Publication of regulatory guides
- Other regulatory matters

Across each theme we provide some background information where necessary before summarising the responses to relevant discussion questions. A concluding section sums up and provides recommendations.

3.1 Approval processes for rules and disclosure

3.1.1 Rule approvals – formation rules

Formation of a co-operative under the CNL first requires the presentation of a set of rules for approval by the Registrar. Promoters may use Model Rules or devise their own rules that comply with CNL.

The Registrar has 28 days to make a decision to either approve or reject a set of rules under the CNL. If the Registrar rejects any or all of the rules, the proposed co-operators must submit amended rules giving the Registrar a further 28 days for approval. There is no provision in the CNL for a co-operative to request that the Registrar approve the rules within a shorter time.

The position in Western Australia is different. Section 17 *Co-operatives Act 2009 (WA)* requires the draft rules to be submitted 35 days – *or a shorter time allowed by the Registrar*.

The following questions were asked about approving rules for formation:

> *Q6. Should the Model Rules be updated? Or should they be discarded and the rules simply be required to comply with a list of topics?*
>
> *Q7. Should the time permitted for the Registrar to approve rules be reduced?*

There were 14 responses to these questions. Eleven responses strongly indicated that the Model Rules should be retained but that they should be updated to reflect modern governance practices and they should be better explained or clarified. It was suggested that the Model Rules were not flexible enough to apply to co-operatives in different sectors. Two respondents indicated that the Model Rules should be discarded.

There were 15 responses to Question 7. Ten responses were that the 28 days allowed under the CNL was too long and created problems particularly when the proposed co-operative was working with financiers during start up. One response suggested that 28 days was too long for approval where the Model Rules were used. Regrettably, two respondents reported that Registrars extended time for approval due to lack of staff. The Co-op Federation noted that unless a proposed co-operative had assistance from the Federation, it was likely that they would experience long times for rule approvals.

Co-ops WA advised that there were no delays for rule approvals in Western Australia because co-operatives could ask for the approval process to be expedited. They reported this was done by the co-operators paying an additional fee. There does not appear to be a legislative basis for the Registrar to charge an additional fee under the *Co-operatives Act 2009 (WA)*.

3.1.2 Approving rule changes

A further question was asked about time frames to amend rules. Under the CNL, prior approval is required to amend certain rules.[2] The process for approval allows the Registrar 28 days to consider the proposed amendment and a further 28 days if it has to be resubmitted.

> *Q15. Should the time permitted for the Registrar to approve a change to a rule be reduced?*

Respondents indicated that 28 days was unnecessary and held potential business risks. One respondent expressed dissatisfaction that the Registrar responded to a proposed rule change within 28 days only to say that the Registrar required more time thereby giving the Registrar a further 28 days to respond.

3.1.3 Consistency for rule approvals

A hallmark of the CNL scheme is that both the legislation and its administration are to be consistent. Consistent administration requires regular collaboration between Registrars to ensure that the law is applied consistently in each jurisdiction and that as regulators, there is consistent information published about how the legislation will be applied.

The Discussion Paper asked the following question:

> *Q16. Should a co-operative be able to expect that if a specific rule is approved in one jurisdiction it will be approved in any other jurisdiction?*

Twelve respondents strongly supported this proposition. The Co-op Federation and Community Power Agency Co-operative both remarked that as advisers to new co-operatives and co-operatives needing to change their rules, consistency is important. BAL Lawyers responded:

> *"Yes – consistency and equality for all entities is key"*

Two respondents indicated that there may be differences in local or state requirements that should be factored in.

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[2] Section 60 CNL (*s103 Co-operatives Act 2009 (WA))* requires pre-approval by the Registrar in two circumstances: a. if the co-operative is proposing to change all of its rules to achieve a change of co-operative type, and b. *for specified provisions*. The specified provisions for rules requiring pre-approval are published in the local Government Gazette and not always published on the Registrar's website.

3.1.4 Formation Disclosure statements

Distributing co-operatives are required to present a formation disclosure statement for approval by the Registrar.

Section 25(2) CNL and s17(2) *Co-operatives Act 2009 (WA)*, specify the content of the formation disclosure statement as:

- *the estimated costs of formation; and*
- *the active membership provisions of the proposed co-operative; and*
- *the rights and liabilities attaching to shares in the proposed co-operative; and*
- *the capital required for the co-operative at the time of formation; and*
- *the projected income and expenditure of the co-operative for its first year of operation; and*
- *information about any contracts required to be entered into by the co-operative; and*
- *any other information that the Registrar directs to be included.*

There is no general regulatory guide for drafting a formation disclosure statement. Registrars publish an example or template for a disclosure statement for a distributing co-operative. In New South Wales and Queensland there is a comprehensive template and it makes clear that once approved it is valid only for 6 months. Victoria, South Australia, Western Australia and Tasmania each publish a short list of inclusions, many of which are already required as part of proposed co-operative's rules.

The following questions were asked about formation disclosure statements:

> *Q10. Should all distributing co-operatives be required to prepare a disclosure statement as part of the formation process?*
>
> *Q11. Should the requirement for a disclosure statement be dependent on risk associated with the purchase of shares? If so, what dollar amount do you consider to represent a risk that would require disclosure by a co-operative?*

The responses to these questions were mixed.

Ten responses included a simple yes, while five respondents proposed that a disclosure statement should be required only when there is an element of risk. The suggested risk was either the amount of funds to be raised at formation reflecting the potential amount of risk of loss to individual members. Two responses referred to the need to match requirements for companies, so that a disclosure statement may not be needed at formation unless there was to be a significant fundraising event to occur at that time. These respondents proposed that instead of a formation disclosure statement, appropriate disclosure could be required when the co-operative does embark on a significant round of fundraising. One respondent suggested that a formation disclosure statement should be required when the amount of share capital required for membership is $5,000 or more.

3.1.5 Formation disclosure statements for non-distributing co-operatives

Non-distributing co-operatives are not required to lodge a disclosure statement unless the Registrar directs. There is no template for a disclosure statement for a non-distributing co-operative and no guidance about when it will be required other than a statement on the New South Wales Registrar's website:

> A disclosure statement will be required where the operations of the proposed co-operative may result in a significant financial risk to members or where other circumstances exist that warrant the preparation of a disclosure statement.[3]

The Co-op Federation and Co-operative Bonds did not respond to Question 10 directly but both remarked on the need for clearer information about when the Registrar would require a non-distributing co-operative to prepare a formation disclosure statement.

It was also noted that the NSW Registrar required all non-distributing co-operatives to provide projected financial statements as part of their application for approval of rules and this information is used to determine whether to require a disclosure statement.

3.1.6 Ongoing disclosure requirements for distributing co-operatives

Distributing co-operatives must maintain a current registered disclosure statement (s68 CNL and s137A *Co-operatives Act 2009 (WA)*). 'Current' is defined as when there is a change in the rights or liabilities attaching to shares or a significant change occurs in the co-operative's financial position or prospects.

The following questions were asked in relation to s68CNL:

> *Q8. Is it necessary to require all distributing co-operatives to update their disclosure statement at least annually?*
>
> *Q9. Should the requirement be altered to reflect the risk of loss to new persons who seek membership so that the disclosure necessary to those persons includes current financial information and any other significant matters the contribute to risk for the new member?*

Responses to this question were mixed, with some respondents saying that there should only be an obligation to lodge an updated disclosure statement if there was a significant change to the risks.

Comments on this aspect of the CNL focussed on the lack of guidance regarding the meaning of when a disclosure statement should be updated and lodged with the Registrar, including whether a disclosure document with a hyperlink to the latest financial reports of a co-op will remain current in most circumstances. Other respondents revealed that some Registrars had no process for receiving an updated disclosure statement and have in fact rejected them when they are lodged.

Co-operative Bonds stated that lodging an updated disclosure statement:

> "…should be based on certain thresholds regarding member obligations and terms, changes to capital raising and other matters that pertain to change in risk profile. In addition, there should be two standard national templates for disclosure - one for formation and one for updating as different information is required…"

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[3] See Fair Trading NSW

Co-ops WA stated that the obligation to lodge a current disclosure statement did not mean there was a need to lodge a new disclosure statement annually to reflect changes in the co-operative's financial position.

The NSW Registrar made a class order in respect of s68 CNL to exempt co-operatives from lodgement of an updated disclosure statement where the initial share capital requirement is $200 or less. Information about this exemption is difficult to find and no other jurisdiction has a similar exemption in place.

3.1.7 Summary and Recommendations

The primary objective of the CNL at the time of its introduction was to

> *"…ensure that there are no competitive advantages or disadvantages for co-operatives as compared to corporations…"*[4]

However, current processes for formation of a co-operative may frustrate the growth of the sector because it can too long and there is no purposeful national guidance for preparing the formation documents.

While pre-approval of rules is a good regulatory measure to ensure that only true co-operatives are formed, delays can operate as an unacceptable barrier for co-operatives. Model Rules may provide a quick pathway to approval, however, the feedback from respondents suggests Model Rules do not reflect modern governance practices or allow for tailoring of rules to suit various sub-sectors.

Legislated time limits under the CNL and the *Co-operatives Act 2009 (WA)* do not necessarily present a clear time limit for approvals when provision for extending the time appears to be used frequently and without good cause.

Disclosure statements are generally required to ensure adequate information about risk to a potential member. It is reasonable to question whether a formation disclosure statement is necessary unless there is significant risk for members at the point of formation.

Ongoing disclosure under s68CNL reflects the fact that co-operatives seek to encourage new members to join continuously. Disclosure to new members should reflect the current risks rather than the risks disclosed at formation. It is important that Registrars produce regulatory guidance about these requirements so that co-operatives are able to comply with them.

Recommendations:

1. The Model Rules should be reviewed and should contain instructions about their meaning and impact. The review should be carried out by an expert panel to ensure that they meet modern governance standards.
2. The time allowed for approval of the formation rules by the Registrar should be limited to 14 days and s24(6)(b) CNL and s17(6)(b) *Co-operatives Act 2009 (WA)* should be repealed.

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[4] Co-operatives National Law Regulatory Impact Statement, 2012 page 6

3. The requirement for the preparation of a formation disclosure statement by distributing co-operatives should be reviewed and more closely linked to risks associated with joining the co-operative.
4. Registrars should develop consistent regulatory guidelines for the preparation of formation disclosure statements for both distributing and non-distributing co-operatives.
5. Requirements for the lodgement of current disclosure statements by distributing co-operatives should be published by all Registrars.

3.2 Regulatory agility

3.2.1 Regulatory agility

The CNL is a national scheme supported by an agreement between all Australian states and territories[5]. Amendments to the CNL template law and the Co-operatives National Regulation (CNR) can only be made with the agreement of two thirds of the states and territories. Amendments to the *Co-operatives Act 2009 (WA)* can be made by the Western Australian Parliament provided such amendments are consistent with the CNL template.

Some aspects of the CNL legislative scheme dealing with financial reporting, insolvency and fundraising disclosure mirror provisions in the *Corporations Act 2001* through application and modification. In some cases changes to the *Corporations Act* flow through to the CNL, but not all of them. Developments to laws governing equity crowdfunding, changes to insolvency laws, and most recently, proposed new climate-related financial disclosure requirements, do not or will not flow through to the CNL.

As a crisis, COVID demonstrated some of the challenges of the national scheme to deliver on its goals of uniform legislation and administration for co-operatives.

During COVID, the BCCM advocated to each Registrar to make temporary orders modifying the insolvency provisions as applied from the *Corporations Act* to CNL and *Co-operatives Act 2009 (WA)* (as had been put into effect for companies). The responses were not uniform and took months to effect across the eight jurisdictions.

COVID restrictions also impacted the ability of co-operatives to hold general meetings. Unlike the *Corporations Act,* the manner of holding a general meeting is governed by the co-operative's rules. Unfortunately, the Model Rules that were adopted by many co-operatives at formation do not provide for virtual general meetings. Some co-operatives sought to change their rules, but this was not successful as they could not hold the meeting to pass the special resolution required.

The advice and any relief provided by each Registrar was inconsistent and in most cases merely provided a fee free extension of time to hold the AGM. There continues to be inconsistent positions from Registrars about the use of technology for member meetings.

The Discussion Paper asked the following questions:

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[5] Australian Uniform Co-operative Laws Agreement (AUCLA)

Q1. Do you think the system for legislative change is responsive to the evolving needs of the co-operative movement?

Q2. Should co-operatives legislation be technology neutral?

Q3. Should recent changes to insolvency law be applied to co-operatives?

Q18. Where the regulator has power to make adjustments to regulatory impact and the power to produce guidance for co-operatives do you think the regulators should act quickly and uniformly in response to these problems?

Of the 13 responses to Q1. eleven respondents said that it was slow and inconsistent. While agreeing that the CNL scheme brought positive change to the co-operative sector, it was noted by CBH Group that co-operative regulators need to continue to evolve the governance / regulatory landscape to deal with changes in the operating environment (both past and anticipated) and to co-ordinate between them for consistent responses. Notably the ability to use technology for meetings is of particular importance where members are geographically distant and presented AGM difficulties during COVID. One Registrar (NSW) advised that members could use online meeting technology for their AGM, but later retracted this advice. Another Registrar (WA) has taken the view that online meetings cannot be accommodated under the Co-operatives Act and proposes an amendment to the legislation to enable this.

Two respondents stated that the inconsistency and tardiness of regulatory adaptation tended to relegate the status of co-operative enterprise. For example, Eyre Peninsula Co-operative Bulk Handling commented that:

> *"Co-operatives are still viewed as a country bumpkin tool and not taken as seriously as they should be. The urgency is not there."*

Technology neutrality means that a piece of legislation allows regulated persons to achieve the objectives or requirements set out in the legislation using any technology, such as digital technologies. In relation to co-operatives, there are three main areas where technology neutrality is important: the ability of co-ops to conduct their day-to-day operations and commercial transactions digitally, the ability of co-ops to hold meetings and ballots digitally, and the ability to meet any regulatory requirements such as sending in an annual return to the Registrar digitally. While Electronic Transactions legislation in each jurisdiction facilitates commercial transactions between parties, it does not impact on regulatory requirements for co-operatives or companies to lodge, execute or deliver all documents required under the Corporations Act or the CNL. COVID prompted changes to the *Corporations Act* to expressly allow companies to hold fully online meetings and to use digital signatures for a variety of documentary requirements.[6]

[6] *Corporations Amendment (Meetings and Documents) Act 2022.* The amendments enable wholly virtual meetings where permitted by the constitution of the company and other changes to facilitate wholly digital conduct of business by companies (including digital affixing of a company seal).

Fifteen of the 17 respondents to Question 2 supported the ability of co-ops to operate in a technology neutral environment, with some referring specifically to the problems encountered with online meetings during COVID.

Question 18 addressed the topic of regulatory change responsiveness by referring to instances under the CNL that allowed Registrars flexibility to exempt entities from or modify the impact of some regulatory requirements. Ten respondents agreed that it was necessary for Registrars to act promptly and consistently and that this function could be done by a centralised office.

On the specific question about the application of recent changes to insolvency laws for small companies to allow them to restructure with the guidance of a small business professional, twelve respondents were in favour of this. Some respondents pointed out that the co-operative directors were more likely to focus on the co-operative's survival (Union Co-op Society) while others stated that, in principle, co-operatives should have access to the same insolvency relief processes as companies. Co-ops WA disagreed with this proposal as it tended to leave the directors in control of the co-operative.

3.2.2 Summary and recommendations

By applying some parts of the *Corporations Act*, the CNL is automatically updated to reflect some regulatory developments for companies. However, not all developments that apply to companies automatically apply to co-operatives. There appears to be no regular communication between ASIC or the Federal Treasury and co-operative Registrars on administrative matters or trends and priorities in business regulatory policy. This leaves Registrars responsible for checking whether it is appropriate to apply changes in the *Corporations Act* to co-operatives with or without modifications. Currently, this is not happening.

Recommendations:

6. That consideration be given to whether provisions equivalent to the *Corporations Amendment (Meetings and Documents) Act 2022* should be applied to co-operatives.
7. That consideration be given to whether small business insolvency provisions introduced for companies should be applied to co-operatives.
8. Registrars should establish a regular communication with the Australian Securities and Investments Commission and Federal Treasury to ensure that changes to the Co*rporations Act* that would benefit co-operatives are recognised and appropriately and promptly incorporated into the CNL.
9. Registrars should establish regular meetings to consider administrative and regulatory matters under the CNL with a view to ensuring consistent administration.

3.3 Public registers

3.3.1 Public registers

Public register information for co-operatives is maintained in eight separate registers with varying methods and fees for access determined by local regulations and practice. **Appendix 3** contains information about the relevant agency, public register access and fees for each jurisdiction.

The Discussion Paper posed the following questions:

Q4. Should the public register information for co-operatives be located on a single register? If you think it should be in a single register, should it be the same register as all other business models, or should it be a separate national co-operatives register?

Q14. Do you think there should be such differences in the fees charged for the same functions between each state and territory? Do you think that functions such as a common public register or centralising the approval functions for registering co-operatives would help achieve more uniform administration of the legislation?

Eighteen respondents expressed support for a single national register that clearly identified co-operatives. Most respondents also took the view that the register should reinforce the distinct identity of co-operatives and therefore be kept separate from public register data for other types of corporation. A small number of respondents indicated support for the register to be combined with other entities, although it was still suggested that the Australian Business Register was not adequate.

CBH Group noted that:

> *"A common public register or greater co-operation between regulators may assist in ensuring that an increased level of efficiency can be obtained."*

Speaking to the arrangements for searching public documents of co-operatives, Independent Liquor Group Co-operative commented that:

> *"The current system is slow. Stakeholders such as banks that need this corporate information are used to dealing with ASIC's automated processes and can find it confusing to navigate."*

Ten respondents agreed that the fees for the performance of functions should be uniform and that a single public register would facilitate this. Co-ops WA suggested combining functions in this way was *ultra vires*.

3.3.2 Summary and Recommendations

Public Register information not only provides data about the co-operative sector for policymaking and business purposes, it is also an indicator of the legitimacy of the sector that it records. Financial transactions, capital movement and regulatory compliance can all be identified in a well maintained and accessible public register. The existence of a reliable public register can inform government agencies considering regulatory change and how to improve efficiency of regulatory operations.

Sections 597 and 598 CNL provide an administrative solution for the establishment of a single Public Register by allowing a Registrar to confer a function on another Registrar from a corresponding jurisdiction and for those functions to be delegated to another person.

Recommendations:

10. That the current separate public registers for co-operatives be combined under a single entity that is able to provide efficient, timely and consistent digital access to data for all co-operatives.
11. That Registrars consider publishing annual data about co-operative registrations, insolvencies and dissolutions.

3.4 Publication of Regulatory Guides

3.4.1 Regulatory guides

The Discussion Paper noted that a key change under the CNL scheme was to provide greater access to capital for co-operatives through the offer of new capital instruments, Co-operative Capital Units (CCUs).

Offers of CCUs are governed by a mix of disclosure requirements depending on whether the offer is made to members only or to the public. The BCCM has independently reviewed the legislative requirements for CCU offers and noted a number of drafting errors in both the CNL and the *Co-operatives Act 2009 (WA)*. These matters have been communicated to Registrars but no action has been taken to remedy the errors. **Appendix 4** identifies the drafting errors.

Since implementation there has been limited use of CCUs. A search of state and territory Registrar websites reveals no information about the nature of a CCU nor the process for making an offer of CCUs.

The Discussion Paper asked the following:

> *Q17. Should regulators publish material about fundraising by offering securities and provide guidance material for co-operatives to prepare offer and disclosure documents? Should there be a centralised process for the lodgement and publication of offer documents for co-operative securities to ensure uniformity?*

Ten respondents said that Registrars should publish guidance material on fundraising and disclosure, and that Registrars should provide a portal for the lodgement of offer documents. Community Power Agency Co-operative supported improved guidance about offer processes noting that:

> *"The experience of getting CCUs approved for the Haystacks Co-op was very slow and painful. NSW Fair Trading had limited understanding of how to approve or use CCUs, with the approval process taking over 9 months and needing several external advisors."*

BAL Lawyers were strongly in favour of the publication of regulatory guides and information by Registrars:

> *"There are volumes of information published on companies through the ASIC website, yet the information on co-operatives on each Registrar's website is inconsistent and varies greatly in depth of information. It makes it difficult for people to make informed decisions to incorporate a co-operative or become a member of the co-operative."*

The Co-op Federation noted in discussion with the BCCM that:

> *"Registrars are strongly focussed on enforcement of regulation in respect of formations. Once the co-op is formed regulatory oversight is minimal."*

And that:

> *"There is a fundamental lack of regulatory guidance for matters other than rule approval."*

Two respondents disagreed with the Registrar publishing guidance material for fundraising. Co-ops WA suggested that the publication of guidance material on fundraising could make the Registrar a market participant.

4.4.2 Summary and Recommendations

Regulatory information and guidance is important for potential co-operators, existing co-operatives and advisers to co-operatives. A failure to provide basic information about fundraising, and CCUs in particular, is likely to reduce the uptake of these instruments.

It is also important that drafting errors noted in the legislation are remedied promptly so that there can be clarity around the processes for fundraising by co-operatives.

Recommendations:

12. The provisions in the CNL relating to the offer of debentures and CCUs should be reviewed and errors removed.
13. Registrars should publish clear and consistent guidelines for the offer of securities.

3.5 Other regulatory matters

3.5.1 Director Identification Numbers (DINs)

Director Identification Numbers (DINs) only apply to directors of companies, Aboriginal Corporations and registered Australian bodies. The main policy driver for the introduction of the DIN scheme is to deter fraudulent behaviour such as "phoenixing"[7]. It will also serve to protect director personal information.

> *Q5. Should co-operative directors be required to obtain a DIN? Alternatively, should member directors be excused from the DIN requirements, but independent directors required to have a DIN?*

Responses to this question were generally in favour of DINs applying to co-operative directors. Some respondents such as Folk Art Co-operative Society drew a distinction between small community co-operatives and large business co-operatives. One respondent suggested that not taking advantage of the DIN system made co-operatives look unprofessional. Co-ops WA did not support the application of DINs to co-operatives because phoenixing does not usually occur in the co-operative sector.

The Co-op Federation had not considered that DINs were necessary for co-operative directors because of the low incidence of phoenixing in the sector. However, it was acknowledged that DINs may help deal with instances of persons disqualified from managing companies who seek to incorporate a co-operative under the state based co-operative regime.

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[7] See Concerns about illegal phoenix activity | ASIC

There was interest in more information about instances of disqualifed persons attempting to form co-operatives. **Appendix 2** provides examples of co-operative formations involving persons who were disqualified from managing companies and similar issues.

3.5.2 Summary and Recommendation

Applying Director Identification Numbers to directors of co-operatives can protect the integrity of the co-operative model with limited red-tape impact on directors or co-operatives.

Recommendation:

14. That consideration be given to requiring co-operative directors to have a Director Identification Number as part of their eligibility to be a director.

3.5.3 Protecting legacy assets

The Discussion Paper note recent changes to co-operatives law in the United Kingdom to allow for permanent protection of legacy assets for co-ops that opt-in through a member vote. The Discussion Paper asked the following question:

> *Q12. Should the law be amended to allow for permanent protection of legacy assets by co-operatives?*

Nine respondents supported this proposition of co-ops having the ability to opt-in to a statutory legacy asset protection framework. Some respondents, including The Co-op Federation and Union Co-operative Society, wanted further information about how these provisions work in other jurisdictions such as the United Kingdom. Co-ops WA did not support it indicating that the members of distributing co-operatives were likely to want a distribution of assets in the event of a demutualisation or winding up of the co-operative. Further information about legacy asset protection legislation can be viewed at:

- BCCM, Legacy assets
- Mutuo, Demutualisation and how to stop it
- Cliff Mills, *Ius Cooperativum*, A study of indivisible reserves in cooperatives in EU member states

3.5.4 Summary and Recommendation

Statutory protection for legacy assets is an option for established co-operatives, whether distributing or non-distributing, to reduce the threat of demutualisation and focus on their purpose of service delivery to current and future members.

Recommendation:

15. That consideration be given to whether legacy asset protection provisions similar to the *Co-operatives, Mutuals and Friendly Societies Act 2023 (UK)* should be introduced into the CNL and *Co-operatives Act 2009 (WA)*.

4. How to provide feedback and next steps

BCCM seeks feedback **by 27 September 2024.**

Feedback can be provided via email to anthony.taylor@bccm.coop

BCCM will prepare a final report and recommendations taking into consideration any feedback.

Appendix 1 – List of respondents to Discussion Paper

Name	Type	State or territory
BAL Lawyers	Advisor	ACT
Broomehill Village Co-op	Non-distributing	WA
CBH Group	Non-distributing	WA
Cohousing Co-operative	Non-distributing	TAS
Community Power Agency Co-op	Non-distributing and advisor	NSW
Co-operative Bonds	Distributing and advsior	VIC
Co-ops WA	Federation	WA
Eyre Peninsula Co-operative Bulk Handling	Distributing	SA
Folk Art Co-operative Society	Non-distributing	QLD
Independent Liquor Group Co-operative	Distributing	NSW
Moorleigh Ceramic Co-op	Non-distributing	VIC
Norco Co-operative	Distributing	NSW
The Co-op Federation	Federation	NSW
The Trashy Artisan Co-operative	Non-distributing	QLD
Union Co-op Society	Distributing	QLD
Warrandyte Retirement Village Co-op	Non-distributing	VIC
Anonymous		
Anonymous		
Anonymous		
Anonymous		

Appendix 2 – Case studies of recent co-operative formations involving disqualified persons and related issues

Co-op Name	Jurisdiction	Year of registration	Potential issues
Pilbara Liveable Villages Co-op	WA	2019	The co-op was registered with eligible directors, but it turned out the main promoter behind the business was a disqualified person. The co-op was subsequently deregistered in 2020. See: Veronica Macpherson, mastermind of suspected WA Ponzi scheme, returns with new property business - ABC News
Lotus Energy Co-operative	VIC	2019	The co-op promoters include persons who have previously been (not currently) disqualified from managing companies. It is unclear if funds raised in the co-op with a relevant disclosure statement or through a subsidiary. See: Cricket superstars and mum & dad investors caught out | 7 News Australia (youtube.com)
C.H.A Co-operative	NT	2022	The co-op was registered in the Northern Territory with an undischarged bankrupt as a founding director. The promoters were from Victoria with limited evidence of a connection to the Northern Territory. See this article about one of the promoters of the co-op: Ex-Victorian agent pays price for $100k trust account withdrawal - Real Estate Business

Appendix 3 – Comparison of fees and search processes in each jurisdiction

Jurisdiction	Is there a free list of co-ops available?	How are co-op documents accessed?	Fees for extract	Fees for other (non-certified) public document	Is basic registration information shared with ASIC?
NSW	Yes, Website search function (but no master list function - free)	Fill out form, return by post or email, wait 3-5 business days, pay fee	$36	$36 (<20 pages); $95 (>$20 pages)	Yes
VIC	Yes, Website hosts list in PDF form (free)	Fill out form, return by post, wait for processing.	$35	$25.40 for first page, $2 per page thereafter, up to $124 per document.	Yes
QLD	No, request extract, pay online, $10 for first page, $1.85 for each additional page.	Fill out online form, payment via online gateway	$10 for first page, $1.85 for each additional page	$10 for first page, $1.85 for each additional page	Yes
SA	No, request extract, pay $7.40 for first page and $2.05 per page thereafter.	No published process	$7.40 for first page and $2.05 per page thereafter	$7.40 for first page and $2.05 per page thereafter	No, not in last 5 years
WA	Yes, Website list (free)	Fill out form, return by post or email, pay online by secure gateway	$17 (uncertified); $36 (certified)	$17 for first page, $1.90 for each additional page, up to $86.60 per document.	No
TAS	No, no information on how to access.	No information on how to access.	No fees published.	No fees published.	Yes
ACT	Yes, Website list (free)	Fill out online form	Flat fee of $25	Flat fee of $25	No
NT	No, no information on how to access.	Direction to contact Licensing NT on website re forms and fees.	No fees published.	No fees published.	Yes

Appendix 4 – Legislative drafting errors

CNL	Co-operatives Act 2009 (WA)	Drafting error	Action
s467(1)(c)	s253A	Wrongly refers to a member only offer (s338 CNL) (s252 WA)	Replace s338 with s337
s347	s250	Applies Financial accommodation provisions to CCUs as though they are debentures, thereby requiring appointment of a trustee. Overlooks fact that CCUs are capital	Distinguish between capital and those offers that require an appointment of a trustee
CNR	**Co-ops Regulation 2010 (WA)**		
Reg 5.2(2)	s466	Wrongly requires a cross border offer of shares to lodge disclosure with ASIC or seek exemption from ASIC	Repeal
Reg 5.3(2)	s467	Wrongly requires a cross border offer of CCUs or debentures to lodge disclosure with ASIC or seek exemption from ASIC	Repeal

Appendix 5 – List of recommendations

1. The Model Rules should be reviewed and should contain instructions about their meaning and impact. The review should be carried out by an expert panel to ensure that they meet modern governance standards.
2. The time allowed for approval of the formation rules by the Registrar should be limited to 14 days and s24(6)(b) CNL and s17(6)(b) *Co-operatives Act 2009 (WA)* should be repealed.
3. The requirement for the preparation of a formation disclosure statement by distributing co-operatives should be reviewed and more closely linked to risks associated with joining the co-operative.
4. Registrars should develop consistent regulatory guidelines for the preparation of formation disclosure statements for both distributing and non-distributing co-operatives.
5. Requirements for the lodgement of current disclosure statements by distributing co-operatives should be published by all Registrars.
6. That consideration be given to whether provisions equivalent to the *Corporations Amendment (Meetings and Documents) Act 2022* should be applied to co-operatives.
7. That consideration be given to whether small business insolvency provisions introduced for companies should be applied to co-operatives.
8. Registrars should establish a regular communication with the Australian Securities and Investments Commission and Federal Treasury to ensure that changes to the C*orporations Act* that would benefit co-operatives are recognised and appropriately and promptly incorporated into the CNL.
9. Registrars should establish regular meetings to consider administrative and regulatory matters under the CNL with a view to ensuring consistent administration.
10. That the current separate public registers for co-operatives be combined under a single entity that is able to provide efficient, timely and consistent digital access to data for all co-operatives.
11. That Registrars consider publishing annual data about co-operative registrations, insolvencies and dissolutions.
12. The provisions in the CNL relating to the offer of debentures and CCUs should be reviewed and errors removed.
13. Registrars should publish clear and consistent guidelines for the offer of securities.
14. That consideration be given to requiring co-operative directors to have a Director Identification Number as part of their eligibility to be a director.
15. That consideration be given to whether legacy asset protection provisions similar to the *Co-operatives, Mutuals and Friendly Societies Act 2023 (UK)* should be introduced into the CNL and *Co-operatives Act 2009 (WA)*.

About the BCCM

The Business Council of Co-operatives and Mutuals is the national industry peak body for co-operatives and mutuals, working with governments, regulators and policymakers to ensure the Australian economic landscape is fully able to benefit from a competitive co-op and mutual movement.

Through its member co-ops and mutuals, the BCCM represents more than 11 million people and businesses.

The BCCM is a member of the International Co-operative Alliance (ICA) with access to world-wide networks.

Business Council of Co-operatives and Mutuals (BCCM)

GPO Box 5166, Sydney, NSW 2000

E: info@bccm.coop | P: +61 (02) 8279 6050 | www.bccm.coop