



MUTUAL CAPITAL LEADERSHIP PROJECT



Newsletter

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Mutual Reforms Act – Constitutional and legal implications

Leading mutual sector lawyers, Jo Dodd and Tim McEwen, help firms to understand the implications of the Mutual Reforms Act. They outline the impact the law will have on individual constitutions, and how firms may wish to take advantage of new opportunities.

Are you ready to capitalise?

Jo Dodd
King & Wood Mallesons



This article outlines the key steps to issuing mutual capital instruments (MCIs) following the commencement of the Treasury Laws Amendment (Mutual Reforms) Act 2019.

Step 1: Are you a “mutual entity and an “MCI mutual entity”?

To issue MCIs you must be a “mutual entity” and you must be an “MCI mutual entity” which means:

- you’re a public company registered under the Corporations Act 2001 (Cth);
- your constitution provides that no person has more than one vote at a general meeting (for each capacity in which the person is a member);
- you do not have voting shares (other than MCIs) quoted on a prescribed financial market;
- you’re not an entity registered under the Australian Charities and Not-for-profits Commission Act 2012 (Cth); and
- your constitution has been updated to include a statement that you intend to be an “MCI mutual entity” for the purposes of the Corporations Act.

Step 2: Special procedure to amend your constitution – you’ve got less than 3 years

You will need to amend your constitution to provide for the issuance of MCIs. The MCIs regime provides for a special procedure for mutual entities to amend their constitutions

to issue MCIs without demutualising.

Mutual entities have until 6 April 2022

(and no more than three attempts)

to amend their constitutions using the special procedure.

Step 3: Retail or wholesale investors?

Once you start considering an issuance of MCIs, the first step will usually be to decide who your prospective investors will be, including whether you will issue MCIs to “wholesale” or “retail” investors, which will impact the documentation and issuance process (as shown in the high-level diagram below). A retail issuance will usually involve a prospectus and due diligence and verification processes, whereas an issuance to wholesale investors, while limiting your investor base, is a simpler and cheaper process.

Step 4: Obtain regulatory approvals, if required

Depending on your circumstances, you may need to obtain regulatory approvals, waivers or rulings, including from APRA, ASIC, ASX or the ATO. For example, many mutual entities which are regulated by APRA will need to obtain APRA’s prior approval ahead of issuance, which usually involves APRA reviewing the proposed terms and is likely to require draft legal, tax and accounting opinions and the offer documentation to ensure they comply with APRA’s prudential standards. It is best to start the approval process as early as possible to allow time for this review.

Amend your constitution to provide for issuance of MCIs

Retail investors

Wholesale investors

Prepare terms and prospectus or offer information statement

Prepare terms and information memorandum

Obtain any regulatory approvals, waivers or rulings required in your specific circumstances

Prepare marketing materials and investor presentations

Conduct due diligence and verification processes

Obtain any final internal approvals or authorisations required

Prepare underwriting and agency arrangements

Prepare subscription and agency arrangements

Prepare any ASX announcements, disclosures or listing arrangements

Obtain final legal opinions, tax opinions and accounting advice

Issue MCIs

Jo Dodd is a market-leading capital markets lawyer at the forefront of developments for mutuals, with nearly 20 years' experience in domestic and international markets. Jo's unique set of skills allow her to work across both hybrid and debt capital markets (retail and wholesale) and she is well-known in the market as a responsive, pragmatic and commercial adviser.

Jo has regularly advised mutual entities on capital instruments, constitutional amendments and banking regulation, including industry firsts such as Warwick Credit Union's issuance of Additional Tier 1 Capital notes convertible into mutual equity interests. She was closely involved in preparing submissions on the amendments to the Corporations Act relating to mutual entities and mutual capital instruments.

What type of MCI do you want?

Tim McEwen
Herbert Smith Freehills



As you consider the amendments to be made to your constitution to allow for the issue of mutual capital instruments (MCIs) you should also be considering what features you want your MCIs to have. In particular with respect to:

voting – bearing in mind that the constitution must provide that no person has more than one vote at a general meeting for each capacity in which the person is a member:

- will MCIs vote on all the same issues as non-shareholder members or ordinary shareholders if your mutual entity already has ordinary shares on issue?
- will MCI holders have a vote in their capacity as a MCI holder and as a non-shareholder member or ordinary shareholder, if applicable?
- will MCI holders be able to vote on a demutualisation or winding up of the mutual entity?

distributions – will MCIs have a fixed rate of return, a floating rate of return or a variable return based on profit or some other measure?

surplus assets – will MCIs be entitled to share in surplus assets of the mutual entity on winding up?

In deciding whether to issue MCIs, the Board will need to balance the rights of MCI holders and the rights of the mutual entity's traditional non-shareholder members or ordinary shareholders.

Part of this consideration will be whether the terms of the MCIs will be sufficient to attract investors while at the same time being acceptable to traditional members and the mutual ethos of the mutual entity.

The Board will also need to consider whether the constitution will provide broad parameters within which the Board will make the decision about the terms of MCIs or whether the constitution will be more prescriptive.

Tim is a partner in the Corporate group of Herbert Smith Freehills with particular expertise in equity capital markets, mergers and acquisitions, complex transactions and managed funds matters.

Tim has been involved in the development of the MCI legislation with the Business Council of Co-operatives and Mutuals and Treasury since February 2018 through to the enactment of the legislation.

This is not legal advice – because of the potential complexity involved, you should seek specialist advice on the amendments and the special procedure in relation to your own situation. We recommend that you discuss the new legislation with your legal advisors.

Mutuo/BCCM consultancy services on new capital in mutuals

Mutual capital leadership symposium

The Business Council of Co-operatives and Mutuals (BCCM) presented the first educational event on mutual capital, which was designed to help mutual sector firms to understand the impact of the new law and the opportunities it presents for individual firms.

The Symposium was attended by 100 delegates, mostly from mutual businesses, with some suppliers and potential sector investors.

This event focussed on a range of linked issues firms will need to consider:

- Constitutional impact for mutual entities
- Legal status and features of the new capital instrument
- Market investment opportunities (wholesale and retail)
- The potential for groups of firms to issue together
- Ratings, tax and listing implications
- APRA regulations for mutual ADIs
- ASIC regulation of retail issuance

The speakers were selected as the most relevant experts in their field, and the opportunity to hear from them in one place is not available elsewhere.

BCCM will share the learning from this event and by working with experts from the sector, we will provide regular newsletters focussing on specific aspects of this changed agenda.

Mutuo/BCCM consultancy services on new capital in mutuals

The peak cross-sector body for co-operatives and mutuals, BCCM, has teamed up with Mutuo, to provide private consultancy to individual mutuals. We can help firms to understand the implications for the new legislation and what it means for their strategic planning.

This includes:

- Confidential board briefings
- Senior executive briefings
- Strategic planning implementation
- Member communication consulting

About Mutuo

Mutuo is the leading global consultancy for mutuals, promoting all types of co-operative & mutual business through:

- Public affairs and political advocacy
- Policy development
- Management consultancy for mutuals

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