BUSINESS COUNCIL
OF CO-OPERATIVES AND MUTUALS

Co-operatives (New South Wales) Local Regulation 2020

Submission to the Department of Customer Service

10 July 2020

The Business Council of Co-operatives and Mutuals (BCCM) welcomes the opportunity to make a submission to the Department of Customer Service in relation to the proposed Co-operatives (New South Wales) Regulation 2020 ('the proposed Regulation').

As the national peak body representing co-operative and mutual enterprises, BCCM supports a modern legislative, regulatory and administrative environment that encourages the formation and growth of co-operatives.

We have provided feedback on the proposed Regulation under each of the key areas of proposed change outlined in the consultation email of 26 June 2020. We have provided additional feedback and under an 'other feedback' heading.

The BCCM would welcome the opportunity to meet with the Department of Customer Service to discuss the matters raised in this submission.

1. **Removing outdated provisions, including those that do not exist in other jurisdictions' local regulations. By doing this, the number of clauses in the Regulation have been reduced from 18 to 12.**

Clause 8 in the current Regulation is made under the authority of s522(4) CNL. Section 522(4) refers to a person being able to claim expenses in attending at or producing documents to an inquiry. The expenses allowable may be provided either in the CNR or the local regulations. The CNR makes no provision for expenses, however, the current 2014 Regulation, cl8, provides that such persons are entitled to be paid conduct money and other expenses as if giving evidence in a court proceeding. The omission of this regulation raises a problem in that such persons who would otherwise have a legitimate claim for expenses now do not have the ability to be compensated for their time.

Recommendation
Reinstate clause 8 of the 2014 Regulation.

Clause 17 of the current Regulation is omitted. It is a saving provision that preserves delegations of authority under the old regulation/legislation.

Recommendation
That the Department of Customer Service advise whether omission of this clause is caught by the general savings provision in the proposed Regulation.

2. **Aligning the language with other jurisdictions' local regulations to achieve regulatory uniformity**

No comment.

3. Streamlining and removing unnecessary fees to reduce the total number of fees payable from 76 to 24

The BCCM considers that there is no substantive reduction in the number of fees and if anything, there is an increase in the number of fees from 76 to 89.

By our count the number of fees listed in the Schedule, the current Regulation specifies 76 separate fees, not including a few late fees. The proposed Regulation specifies fees in respect of 89 separate legislative provisions.

We also note that each fee has been increased by more than the amount that normally occurs through the impact of CPI adjustments.

> *For example, the fee for pre-approval of a rule change (mostly for active membership) under the current Regulation is 0.73 fee units or $77. Under the proposed Regulation it is 0.8 fee units or $84.*

We are concerned that there is a change in the manner of applying registration fees.

Under the current Regulation there is no separate fee for approval of a draft set of rules or a draft disclosure statement in preparation for registration. Rather a composite fee when the approved rules and disclosure statement is lodged along with the application for registration. The requirement for pre-approval of rules and disclosure statement is an additional requirement for co-operative registrations compared to company registrations that ensures only well-designed co-operatives are registered. However, the proposed Regulation adds an additional, avoidable, disincentive to co-operative formation in New South Wales by requiring payment of a separate fee for pre-approval of rules and disclosure statement.

All co-operative regulators should seek to reduce barriers to formation of co-operatives.

Recommendation

a. Review fee increases and reinstate existing fee unit amounts.
b. Reinstate the existing fee structure for registration of new or transferring co-operatives so that the fees attributable to approving rules and disclosure statements are combined and payable at the time of lodging an application for registration.

4. Expanding the power of the Registrar to waive, reduce, postpone or refund fees in cases of financial hardship or special circumstances (e.g. natural disaster)

There is no change to the Registrar's power to waive, reduce, postpone or refund fees under the proposed Regulation.

5. Other feedback

(i) Naming processes and the exemptions: s220(4) and (7) CNL and Cl2.5

Section 220 CNL prescribes requirements for including the word co-operative[1] in a registered co-operative's name.

In particular, s220(4) prevents non-co-operative entities registered under other New South Wales state laws from using "co-operative" in their name. The local regulations can provide an exemption and an exemption is available for obvious entities such as co-operative housing societies and certain older societies formed before 1923.

The exemption power is set out in s220(7) CNL as an exemption power specifically for the types of entities referred to in s220(4) – namely state-registered entities. A local regulation made under s220(7) cannot exempt entities that are formed or incorporated under federal laws or laws from other jurisdictions.

The proposed cl5 cites that it is made pursuant to s220(7) extends the exemption to building societies, credit unions, friendly societies and *entities who are permitted under a law of the Commonwealth*. To the extent that the proposed cl5 exempts entities formed under federal laws, namely paragraphs (c), (d) and (e), the clause is beyond the authority of s220(7).

The inclusion of federally registered entities in cl5 may potentially lead to a conflict between the federal Minister with authority under the *Business Names Registration (Availability of Names) Act* to give permission to use the word "co-operative" in the name of a company without any referral to the Registrar.

Recommendation

Clause 5.1 should read:

5 Restrictions on registered names and trading names—exemptions

(1) For the purposes of section 220(7) of CNL, an entity is exempt from section 220(4) of CNL if the entity is—

(a) a co-operative housing society within the meaning of the Co-operative Housing and Starr-Bowkett Societies Act 1998, or

(b) a company or society formed or incorporated under an Act before the commencement of the Co-operation Act 1923.

(ii) Unsuitable names

Section 220 also prevents the Registrar from allowing a co-operative to use an unsuitable name. Unsuitable names are defined in the National Regulations, in particular Cl7 CNR. Clause 7 directly references a name as unsuitable if it is 'unavailable to the co-operative under the *Business Names Registration Act*' or if it is otherwise unsuitable under local regulations.

The proposed cl4 provides a discretion to the Registrar to determine unsuitability because a name is likely to mislead.

[1] And its variants such as "co-op", "coop", "cooperative".

The *Business Names Registration Act* authorises the processes for name availability for entities covering whether a name is misleading by eliminating identical or nearly identical names, undesirable names and restricted words and expressions.

The choice of a name for a co-operative, unlike for companies, will therefore be subject to a double process whereby one regulator may determine the name to be acceptable and the other may determine that it is misleading. There is no justification for two processes and the imposition of a second process means that co-operatives must wait until the Registrar makes their determination and may lose the available name to another person or entity in the meantime.

There is no need for the proposed cl4 because the name availability processes under the *Business Names Registration Act* as prescribed in the CNR is sufficient.

Recommendation

Clause 4 of the proposed Regulation should be omitted.

(iii) Name exemptions for other entities: s225(2) CNL and Cl. 2.5.2-4

Section 225 CNL prevents entities other than those registered under the CNL from using the word "co-operative" in their name unless the local regulations exempt the entity, or the local regulation provide for the exemption of specified entities.

Clause 5 paragraphs 2 to 4 make provision for the Registrar to exempt individual entities. Whilst the power is given to the Registrar, there is no guidance or basis upon which the Registrar might make the decision. In other words, the discretion is unfettered.

It is not good regulatory practice to provide an unfettered discretion to make administrative decisions.

It is suggested that the Registrar should exercise their discretion in granting an exemption to an entity to use the word "co-operative" if the Registrar is satisfied that the entity is designed to operate in accordance with co-operative principles.

Recommendation

Clause 5(2) –(4) should read:

(2) The Registrar may, by written notice to an entity, exempt that entity from section 220(4) or 225(1) of CNL provided that the Registrar is satisfied that the entity carries on its business or activities in accordance with co-operative principles.

(3) The written notice—

(a) must specify whether the exemption relates to section 220(4) or 225(1) of CNL, or both, and

(b) may specify conditions (including limitations as to time) to which the exemption is subject.

(4) The Registrar may, by further written notice to an entity exempted under subclause (2)—

(a) vary the conditions of the exemption, or

(b) revoke the exemption.

(5) For the purposes of this clause, written notice is given

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