

CO-OPERATIVES AMENDMENT BILL 2015

EXPLANATORY MEMORANDUM

The Co-operatives Amendment Bill 2015 (the Bill) amends the *Co-operatives Act 2009* (the Act).

Its purpose is to amend the Act to establish consistency with the Co-operatives National Law (CNL) and allow Western Australian Co-operatives to participate in the national regulatory scheme for co-operatives.

Clause 1: Short title

Clause 1 provides for the short title of the *Co-operatives Amendment Act 2015*.

Clause 2: Commencement

This clause provides for commencement as follows:

- sections 1 and 2 on the day on which the Bill receives Royal Assent; and
- the remaining provisions on a day fixed by proclamation, and different days may be fixed for different provisions.

Clause 3: Act amended

This clause identifies the Act amended by the Bill.

Clause 4: Section 4 amended

Clause 4 deletes the definitions of 'co-operative capital unit', 'foreign co-operative', 'officer' and 'records' and replaces them with terms and definitions consistent with those in the CNL.

In order to align with the terminology used in the CNL, provide definitions for terms used in new provisions and correct references to the name of the Department of Commerce, the following definitions are added:

- 'carry on business';
- 'corresponding co-operatives law';
- 'department';
- 'director';
- 'financial year';
- 'half-year';
- 'involved';
- 'jurisdiction';
- 'participating jurisdiction';
- 'participating Registrar';
- 'quoted security'; and
- 'small co-operative'.

Amendments to replace 'co-operative capital unit(s)' with 'CCU(s)' and 'foreign co-operative(s)' with 'participating co-operative(s)' are made for individual sections where other amendments are also made to those sections. Clauses 198 and 199 of this Bill also make additional amendments to replace these phrases throughout the Act.

Clause 5: Sections 5A and 5B inserted

Clause 5 inserts two new sections. Section 5A provides a mechanism via the regulations for the recognition of a co-operatives law of another jurisdiction as corresponding for the purposes of mutual recognition. It replaces section 367 of the Act which is proposed to be deleted.

Section 5B defines the circumstances in which a person would be regarded to have been involved in a contravention of the Act. In some circumstances, persons involved in an offence by a co-operative will also be subject to a penalty.

Clause 6: Section 10 amended

Clause 10 amends section 10 to extend the operation of the Act to co-operatives authorised to conduct business in the State as participating co-operatives, thereby allowing regulations to be made applying provisions of the *Corporations Act 2001* not only to locally registered co-operatives, but also participating co-operatives.

Clause 7: Section 11 amended

Section 11 lists modifications to the Corporations Law that are necessary for the provisions to operate effectively when applied to co-operatives. Clause 7 amends section 11 by adding a number of additional modifications that are included in the equivalent provision in the CNL.

Some of these modifications will replace provisions deleted from other parts of the Act to improve consistency with the CNL, while some are required as a result of the addition of further applied provisions or to improve the operation of applied provisions.

Clause 8: Part 2 Division 1 heading replaced

This clause amends the heading of the division to Division 1 – Introductory, to reflect the addition of a new section 15A which increases the range of matters dealt with in the division.

Clause 9: Section 13 amended

Clause 9 amends section 13 to change the way in which approval may be given for a distributing co-operative to have less than five members. Previously, a lesser number could be prescribed by the regulations. Subclause (1) amends section 13(3) to provide that the Registrar may approve a lesser number.

Subclause (2) adds an additional subsection (4) allowing approval to be given in relation to a particular co-operative or a class of co-operatives.

Clause 10: Section 14 amended

Clause 10 amends section 14 to change the way in which approval may be given for a non-distributing co-operative to have less than five members. Previously, a lesser number could be prescribed by the regulations. Subclause (1) amends section 14(3) to provide that the Registrar may approve a lesser number.

Subclause (2) adds an additional subsection (4) allowing approval to be given in relation to a particular co-operative or a class of co-operatives.

Clause 11: Section 15A Inserted

Clause 11 inserts a new section 15A dealing with the Registrar's approvals about numbers. It permits the Registrar to give a composite approval with regard to the number of active members required by a co-operative, the number of persons required to hold a formation meeting, the number of members required to sign an application for registration, and the number of members required to carry on business, where a co-operative or class of co-operatives seeks approval for a lesser number than the sections of the Act prescribe in respect of more than one section.

Clause 12: Section 15 amended

Subclause (1) amends section 15(2)(b) of the Act to provide that a non-distributing co-operative must provide an approved disclosure statement to prospective members at the formation meeting of the proposed co-operative if the co-operative has been directed by the Registrar to prepare a disclosure statement. The Act currently requires only a distributing co-operative to prepare (and provided to members) a disclosure statement.

Subclause (2) amends section 15(3) to reflect the fact that the Registrar may have varied the number of persons required to attend a formation meeting.

Clause 13: Section 16 amended

Section 16 of the Act provides that a proposed distributing co-operative must prepare, and submit to the Registrar for approval, a disclosure statement informing prospective members of the nature and extent of a person's financial liability as a member of the proposed co-operative.

Clause 13 amends section 16 to insert new subsections 2A and 2B. These subsections provide that a proposed non-distributing co-operative may also be directed by the Registrar to prepare, and submit for approval by a time specified by the Registrar before a formation meeting is held, a disclosure statement. If the statement is approved by the Registrar, it must be presented at the formation meeting.

Subclauses (2) and (3) amend sections 16(2) and (3) to reflect the inclusion of sections 16(2A) and (2B).

Subclause (4) inserts section 4A which provides that the draft disclosure statement must contain the information that the Registrar directs is to be included.

Subclauses (5) to (8) amend sections 16(4) to (8) to reflect that as a result of the amendments to the section a disclosure statement may be required under sections 16(1) or section 16(2A).

Subclause (9) adds an additional subsection that requires the Registrar to provide reasons where a disclosure statement is not approved, or where it is approved with alterations.

Clause 14: Section 17 amended

Section 17 of the Act requires a proposed co-operative to submit proposed rules to the Registrar for approval. Subclause (1) of clause 14 amends the section by providing that the Registrar may require a person submitting draft rules for approval to give the Registrar any additional information reasonably required by the Registrar to make a determination in line with provisions of section 17(4).

Subclause (2) of clause 14 adds an additional subsection that requires the Registrar to provide reasons where rules are not approved, or are approved with alterations.

Clause 15: Section 18 amended

Subclause (1) amends section 18(1)(c)(ii) to reflect the amendments to sections 13 and 14. Approval for the co-operative to have less than 5 members will now be given by the Registrar rather than prescribed by the Regulations.

Subclause (2) amends section 18(d)(ii) to provide that both a proposed distributing co-operative, and a proposed non-distributing co-operative that has been directed to prepare a disclosure statement, must include a copy of the approved disclosure statement with an application for registration of the co-operative.

Clause 16: Section 22 amended

Clause 16 removes the requirement for an existing corporation to pass a special resolution approving its registration as a co-operative, and replaces it with a requirement for a resolution to be passed in accordance with its constitution and also by a two-thirds majority. This removes the risk that the requirement in an existing corporation's constitution with regard to a special resolution may be different to that in the Act.

Subclause (2) deletes subsections (2) to (4) which are not consistent with the CNL and are no longer required as they were transitional provisions which no longer have effect. It replaces these subsections with two new subsections which provide that an approved disclosure statement must be presented at the formation meeting by a proposed distributing co-operative or a proposed non-distributing co-operative that is subject to a direction by the Registrar under section 16(2B), and that a resolution must be passed by a two-thirds majority of members present.

The heading of the section is amended to 'Formation meeting' to reflect the removal of the transitional provisions.

Clause 17: Section 23 amended

Subclause (1) amends section 23(1) to provide that both a proposed distributing co-operative and a proposed non-distributing co-operative that has been directed to prepare a disclosure statement must include a copy of the approved disclosure statement with an application for registration of the existing corporation as a co-operative.

It also adds requirements for a corporation applying for registration under this section to provide information about its connection with the State, the address of its registered office and any other particulars that the Registrar may require.

Subclause (2) deletes a transitional provision that is not compatible with the provisions of the CNL and is no longer required.

Clause 18: Section 24 amended

This clause amends section 24 to require that an existing corporation applying for registration as a co-operative must have a sufficient connection with this State.

This will ensure that any co-operative registering in Western Australia, and securing an entitlement to trade in any participating jurisdiction by virtue of that registration, has a connection with the jurisdiction. This connection may be members or directors resident in the State or business operations conducted in Western Australia.

Clause 19: Section 28 amended

This clause amends section 28 to include a requirement for an alteration of the rules for conversion of a non-distributing co-operative to a distributing co-operative to have the prior approval of the Registrar. The Act currently requires all amendments to the rules to be pre-approved by the Registrar – that requirement is to be removed by other parts of the amendment Bill.

Subclause (2) adds additional subsections allowing the Registrar to exempt a co-operative or class of co-operatives from the requirements of this section, either on conditions or unconditionally.

Clause 20: Section 33 amended

Section 33 provides that a person who accepts money on behalf of a proposed co-operative must hold the money in trust, and return it if the co-operative is not registered within 3 months of the payment of the money.

A fine of \$6 000 currently applies to a breach of either subsection.

As a result of recent changes to drafting policy in WA, fines will apply to a specific subsection. In order to ensure that a fine applies to each subsection, clause 20 amends section 33 to add an additional fine provision to subsection (1).

Clause 21: Section 65 amended

Clause 21 changes the way in which approval may be given for a non-distributing co-operative to carry on business with fewer than 5 members. Previously, a lesser number could be prescribed by the regulations. This clause amends section 65(3) to provide that the Registrar may approve a lesser number.

Clause 22: Section 68 amended

Section 68 requires a co-operative to provide prospective members of the co-operative with a copy of the rules, recent special resolutions and the most recent financial report. Clause 22 amends section 68 by aligning the process applying to the provision of that information, and the options available to the co-operative for supplying the information with those of the CNL.

A co-operative will continue to be required to provide such information to a prospective member, but may comply with this obligation by notifying the person of the option to inspect such documents at the co-operative's office, on its website or being sent the documents by electronic means. The co-operative must comply with a request for access to the documents at its office or a request to be sent an electronic copy.

Clause 23: Section 69A inserted

Clause 23 inserts a new section 69A which provides that it is an offence for a person to provide a copy of documents or make documents available for inspection, in purported compliance with section 68, when the person knows, or ought to know, that the documents are not a true copy and does not indicate to the person being provided with the documents that they are not a true copy.

The penalty for breach of the section is a fine of \$1 000.

Clause 24: Section 75 amended

Section 75 provides for the transfer of a share or interest in a co-operative on the death of a member to the personal representative of the member, or to another person in accordance with the direction of the personal representative.

Section 75 is subject to the requirements of section 76 (which provides additional options for the transfer of small shareholdings) and section 159 (which allows the shares to be transferred to another person with the consent of the Board where the transferee is eligible for membership).

Clause 24 amends section 75 to also make its operation subject to section 158(2), which provides that the transfer must be authorised by the rules of the co-operative.

Clause 25: Section 76 amended

Section 76 provides that where the total value of the share or interest of a deceased person is less than \$10 000 the co-operative may transfer the shares to the person who appears to be entitled to the shares under the will of the deceased, or where the former member has died intestate, to a person who appears to be entitled to obtain a grant of administration.

Section 76 is subject to the requirements of section 159 (which allows the shares to be transferred to another person with the consent of the Board where the transferee is eligible for membership).

Clause 25 amends section 76 to also make its operation subject to section 158(2), which provides that the transfer must be authorised by the rules of the co-operative.

Clause 26: Section 84 amended

Section 83 of the Act provides that a person may apply to the Supreme Court for an order under the Division where the affairs of a co-operative are being conducted in a way that is oppressive, unfairly prejudicial or discriminatory to a member or contrary to the interests of members as a whole. Section 84 provides a list of orders that the Supreme Court may make in the event of such conduct by a co-operative.

Clause 26 amends section 84 to add a power for the Court to be able to make an order making alterations to the rules of the co-operative.

Clause 27: Section 86 amended

Section 86 provides that the Supreme Court need not make an order for the winding-up of a co-operative in the case of oppressive conduct if the Court considers that the winding-up would unfairly prejudice an oppressed member. Clause 27 amends section 86 so that it also applies where the Court is of the view that the order would unfairly prejudice the members as a whole.

Clause 28: Division 6A inserted

Clause 28 inserts the following sections which provide for access to inspect the books of a co-operative.

- Section 90A provides that, on application by a member, the Supreme Court may make an order authorising the member or another person on behalf of the member, to inspect the books of the co-operative. An order may also be made for inspection by another person if that person has been granted leave to bring, or intervene in, proceedings in relation to the co-operative under section 91. Section 90A(4) provides that the Supreme Court may make an order for inspection by another person only if it is satisfied that the applicant is acting in good faith and the application is made for the purposes of proceedings under section 91. Unless the Supreme Court orders otherwise, the person authorised to inspect the books under this section may make copies of the books.
- Section 90B provides that the Supreme Court may make ancillary orders limiting the use a person may make of information obtained through the inspection or limiting the right of a person inspecting the books to make copies.
- Section 90C provides that a person who inspects documents on behalf of an applicant must not disclose information obtained in the course of the inspection except to the applicant or the Registrar. Unauthorised disclosure is an offence, with a fine of \$500. Section 90C(3) provides that intent is not an element of the offence.
- Section 90D provides that the board, or the co-operative by resolution at a general meeting, may authorise a member to inspect the books of the co-operative, apart from the minutes of board meetings. Minutes of board meetings, or minutes of the meetings of board committees may only be inspected in accordance with the rules of the co-operative.

Clause 29: Section 98 amended

Section 98 specifies the requirements for the rules of a co-operative. The Act provides, at section 98(4) that the rules of a co-operative may incorporate any provision of the model rules.

Clause 29 deletes that subsection and replaces it with a provision that allows a co-operative to incorporate all or any of the provisions of the model rules in force at a particular time. This amendment eliminates the need for a co-operative to physically reproduce incorporated portions of the model rules in its rules, allowing the rules to be adopted by reference.

Clause 30: Section 103 amended

Section 103 provides that a proposed alteration of the rules of a co-operative must be approved by the Registrar before the resolution to alter the rules is passed by members. Subclause 1 amends that section by adding sections 1A and 1B, which provide that only alterations which relate to the conversion of a non-distributing co-operative to a distributing co-operative, or which are of a class of alterations specified by the Registrar by order published in the Gazette, require prior approval.

Subclause (3) amends section 103(5) by adding a power for the Registrar to require the co-operative to provide any additional information that the Registrar reasonably requires in order to determine whether a proposed alteration of the rules should be approved as submitted; whether a different alteration to that which was submitted should be approved; or if the proposed alteration should be refused.

Subclause (4) inserts subsection (8) to require the Registrar to provide written notice of the reasons where alterations are not approved, or a different alteration to that which was submitted is approved.

The heading of section 103 is amended to reflect the fact that the section affects only certain alterations of rules.

Clause 31: Section 126 amended

Section 126 provides a mechanism for appeal to the Supreme Court where the decision of a co-operative to cancel a membership is unreasonable. Clause 31 amends section 126 by providing that an application can only be made by the member or former member concerned, and must be made within 6 months after cancellation (or receipt of notice of cancellation if such notice is required).

Clause 32: Section 131 amended

Part 6 Division 5 of the Act provides for the entitlements of former members of a co-operative to continue for two years after cancellation of membership where certain specified events affecting the assets or liabilities of a co-operative happen within that period. This recognises the contribution made by those members.

The provisions are not compatible with the provisions included in the rules of a number of WA co-operatives – which provide for a shorter period, and, in some cases, for all rights and liabilities to be terminated immediately on cessation of membership. Section 131 allows a co-operative to make provisions in its rules that are incompatible with the requirements of the Division.

This clause amends section 131 to provide that only co-operatives with inconsistent arrangements prior to the commencement of the amendment Bill will be able to maintain inconsistent arrangements.

Clause 33 Section 132 amended

Clause 33 amends section 132(1)(a) by deleting the reference to section '289(a)' in that clause and inserting section '289(1)(a)'.

Clause 33 also amends section 132(2)(a) by deleting the reference to section '289(a)' and inserting '289(1)(a)'.

Clause 34: Section 133 amended

Clause 34 amends section 133 to remove subsection (1)(a) which deals with a situation where a co-operative becomes a subsidiary of another co-operative. The provision has no application as it is not possible for a co-operative to be a subsidiary.

Clause 35: Heading for Part 7 Division 2 replaced

Clause 35 adds the additional information 'requirements for distributing co-operatives' to the heading to align with the CNL and better reflect the amended contents of the Division.

Clause 36: Sections 137A and 137B inserted

Clause 36 adds two new sections dealing with disclosure requirements for distributing co-operatives. These are additional requirements that will be imposed on co-operatives as a result of the amendment Bill.

- Section 137A requires a distributing co-operative to take all reasonable steps to ensure that it has a current disclosure statement registered. The disclosure statement must contain sufficient information to ensure that prospective members are adequately informed of the nature and extent of the financial liabilities attached to membership, and stops being current when there is a change in the rights and liabilities of shareholders, or a substantial change in the financial position or prospects of the co-operative. Subsection (5) provides that a new disclosure statement must be registered within 14 days (or a longer period approved by the Registrar) when the registered disclosure statement is no longer current. The penalty for non-compliance is a fine of \$1 000.
- Section 137B provides that a person must not advertise, or otherwise publish a statement referring to, an offer or intended offer of shares to persons who are not members of the co-operative unless a current disclosure statement has been lodged with the Registrar. The penalty for non-compliance is a fine of \$1 000. Subsection (3) provides that it is not an offence if a person publishes the statement in the course of conducting the business of publishing or broadcasting. Subsection (4) provides that intent is not an element of the offence.

Clause 37: Sections 137 and 138 replaced

Section 137 enables a person who intends to apply for shares in a distributing co-operative to obtain a current disclosure statement. Section 138 specifies the information which must be contained in a disclosure statement. Clause 37 deletes sections 137 and 138 and replaces them with a new section 137 which requires the co-operative to provide its current disclosure statement to a person who intends to acquire shares and is not currently a shareholder.

Section 137(1) and (2) provide that the board of a distributing co-operative must give a prospective shareholder a current disclosure statement and any other information the Registrar directs before the person becomes bound to acquire shares. Subsection (3) provides that the information may be given by a notice that the person may inspect the information at an office of the co-operative or on a website, or may request to be sent an electronic copy. Subsection (4) requires the co-operative to comply with a request under subsection (3).

Clause 38: Section 139 amended

Section 139 permits the Registrar to exempt a co-operative from the requirements of section 137 and 138 (provision of a disclosure statement to prospective members). Clause 38 amends section 139 to empower the Registrar to provide an exemption from the broader range of disclosure provisions now included in Division 2.

Subclause (2) inserts a new subsection 3 which provides that an exemption may be granted unconditionally or subject to conditions.

Clause 39: Part 7 Division 3A inserted

This clause inserts Division 3A to the Act which contains four new sections which provide for compensation for defective disclosure by a co-operative.

- Section 140A describes the circumstances in which a failure to provide disclosure will give rise to a right to recover damages. It provides that it is a contravention for a co-operative to provide a disclosure statement that is misleading or deceptive, or omits required information in circumstances where this results in material adversity for the person to whom the information is given. It is also a contravention if the co-operative provides a disclosure statement that is not current.
- Section 140B provides that the co-operative, each director, any person named in the disclosure statement with their consent, and any involved person may be liable for loss or damage caused by a contravention of section 140(A)(1) or (2). Such an action is required to be commenced within 6 years after the day the reason for the action arose. The provisions of new Division 3A do not affect any liability that a person has under any other written law.

- Section 140C provides that a person who has made all reasonable inquiries and after doing so believes that the statement complies with the requirements of section 140A can rely on a defence of due diligence.
- Section 140D provides general defences where the person has placed reasonable reliance on information supplied by a third party, or is not aware of the circumstances that have caused the disclosure statement to cease to be current.

Clause 40: Section 141 deleted

This clause deletes section 141 as new sections 150A to 150E will replace similar provisions previously applied by this section.

Clause 41: Section 146 amended

Clause 41 amends section 146 by including the requirement for a proposal approved by special resolution to require members to take up or subscribe for additional shares, to be passed by a special postal ballot. As this proposal would have a significant impact on the liability of members, the requirement for a special postal ballot ensures that members who are unable to attend a meeting can participate in the decision, and that they are provided with all relevant information and sufficient time to respond.

Subclause (2) replaces subsection (7) and provides that the requirement under section 146(3) for the proposal to include a disclosure statement and other information about the effect on shareholdings and the entitlement to resign rather than participate does not apply in any instance where the co-operative issues bonus shares to members.

Clause 42 Part 7 Division 4A inserted

This clause adds five sections which replace the provisions of the Corporations Law previously applied by section 141.

- Section 150A defines the term 'disclosure statement' used in this division.
- Section 150B limits the operation of Division 4A to the offer of shares to persons who are not already shareholders in the co-operative.
- Section 150C provides that application money and all other money that is paid by a person applying for shares under a disclosure statement, is to be held in trust until such time as the shares are issued or transferred, and returned as soon as practicable if the transfer does not proceed. . A fine of \$2 500 or imprisonment for 6 months or both applies for a breach of the section. Subsection (3) provides that intent is not an element of the offence.

- Section 150D provides that if the share issue is conditional on the receipt of a minimum number of applications from members or other eligible persons, or by raising of a minimum amount, then none of the shares are to be issued or transferred until the condition has been satisfied.
- Section 150E provides that if a share issue does not proceed because of the failure of a condition set out in the disclosure statement with regard to receipt of a minimum number of applications from eligible persons or the raising of a minimum amount then any application monies paid to the co-operative must be repaid.

Subsection (1)(c) provides that the condition must be satisfied within 4 months after the date of the disclosure statement. Subsection (2) provides that, for the purposes of working out whether a condition has been satisfied a person who has agreed to take shares as an underwriter is taken to have applied for those shares. A fine of \$2 500 or imprisonment for 6 months or both applies for a breach of subsection (1). Subsection (3) provides that intent is not an element of the offence.

Clause 43: Part 7 Division 4 heading replaced

This clause replaces the heading of Division 4 to align with the CNL and reflect the contents of the division.

Clause 44: Section 151 amended

Subclause (1) amends the penalty at 151(1)(c) from a fine of \$3 000 to \$1 000 consistent with the CNL.

Subclause (2) inserts a new subsection 3A which provides that proof of intention is not a required element for an offence under subsection (1) of section 151.

Subclause (3) inserts a new section 6A providing that if a person proves that the giving of a disclosure direction is vexatious they do not need to comply with the direction.

Clause 45: Section 163 amended

Section 163 provides that the rules of a co-operative may authorise the co-operative to purchase the shares of members and repay to the member all or any part of the amount paid up to nominal value of shares held. Clause 45(1) amends section 163(4)(a) to replace the term 'records' with 'books' for consistency with other provisions in the Act.

Clause 45(2) inserts a new subsection 5A which, consistent with an equivalent provision in the CNL, provides that a co-operative must not purchase shares or repay any amount paid up on shares if it is insolvent, or likely to become insolvent as a result of the purchase or repayment.

Clause 46: Section 169 amended

Clause 46 replaces the penalty in section 169(1) with a fine of \$6 000, or imprisonment for 6 months, or both.

Clause 47: Section 171 amended

Clause 47 amends section 171 by providing that the section, which prevents a member from voting if another person has a relevant interest in the share held by the member, is subject to subsection 3 (which empowers the Registrar to order otherwise) and section 167(5) (which allows for joint membership).

Clause 48: Section 180 amended

Section 180 deals with the effect of a special resolution. Section 181 requires a co-operative to lodge two copies of each special resolution with the Registrar. Section 182 requires a special resolution which is required to be passed by special postal ballot to be approved for registration by the Registrar. Clause 47 inserts a new subsection 180(3) which provides that the requirements of sections 181 and 182 do not apply to special resolutions altering the rules of a co-operative. The equivalent provision has been deleted from section 181.

Clause 49: Section 181 amended

Clause 49(1) inserts a new penalty of a fine of \$2 000 for failure to lodge copies of a special resolution with the Registrar for registration.

Clause 49(2) replaces subsection (4) with a new subsection which provides that proof of intention is not a required element for an offence under subsection (1).

Clause 50: Section 185 amended

This clause deletes section 185(1) and replaces it with a new subsection requiring a special postal ballot to be held in the way prescribed in the regulations. This amendment maintains consistency with the CNL approach with regard to postal ballots. The regulations will prescribe the requirements which are likely to be consistent with those included in the model rules.

Clause 51: Section 187 amended

Section 187 provides that a co-operative must hold a special postal ballot in relation to the matters listed in the section. Clause 51 amends section 187 by adding two additional matters for which a co-operative must hold a special postal ballot. These being: where the co-operative requires members to take up or subscribe for additional shares; or where the co-operative requires members to lend money to the co-operative.

Clause 52: Section 190 amended

Clause 52 amends section 190 by the addition of three new subsections:

- subsection 190(4) to provide that an annual general meeting must be held in addition to any other meetings held during the year;
- subsection 190(5) to provide that failure to hold an annual general meeting is an offence punishable by a fine of \$1 000; and
- subsection 190(6) to provide that intention is not a required element of an offence under section 190(5).

Clause 53: Section 194 amended

Clause 53 amends section 194 to provide that the rules of a co-operative may restrict the number of votes that a proxy may exercise on a question determined at a meeting by a poll.

Clause 54: Section 196 amended

Clause 54 amends section 196 by replacing the requirement for minutes to be confirmed at, and signed by the chairman of, the next meeting with a requirement that the minutes are signed within a reasonable time of the meeting by the chairman of the meeting or the chairman of the next meeting.

Clause 55: Sections 197A to 197D inserted

This clause inserts four new sections into the Act which are consistent with provisions in the CNL in respect of the rights and entitlements of a co-operative's auditor at meetings and the management of meetings.

- Section 197A provides that a co-operative must give its auditor the same notice of a general meeting and communications that it provides to members. Section 197B provides that an auditor is entitled to attend and be heard at a general meeting, or to authorise another person to attend and speak at the meeting, in respect of any part of the business that concerns the auditor. Subsection (3) provides that an auditor is entitled to be heard even if the auditor retires at the meeting or a resolution is passed at the meeting removing the auditor from office. Subsection (4) provides that an auditor may authorise a representative to attend and speak on the auditor's behalf.
- Section 197C provides that the chairman must allow reasonable opportunity for members to ask question about, or comment on, management of the co-operative at an annual general meeting. Section 197D provides that if the auditor or a representative of the auditor is present at the annual general meeting the chairman must allow reasonable opportunity for members to ask questions of the auditor in respect of the conduct of the audit.

- Subsection (3) provides that written answers from the auditor may be tabled by the chairman if they have been submitted by the auditor in response to written questions submitted prior to the meeting. Subsection (4) provides that the co-operative must make written answers tabled under subsection (3) reasonably available to members as soon as practicable after the annual general meeting.

Clause 54 provides for a fine of \$500 for a breach of sections 197A, 197C and 197D and also provides that, in respect of those offences (with the exception of the offence created by section 197D(4)), intention is not a required element of an offence.

Clause 56: Section 197 amended

Clause 56 amends section 197 by adding a new subsection (2A) which provides that the board of a co-operative must consist of at least three directors, at least two of whom must be ordinarily resident in Australia. This amendment is required for consistency with the CNL and is also consistent with the current model rules and the practice of currently registered co-operatives.

Clause 57: Section 198 amended

Clause 57 amends section 198 to provide that if the rules of the co-operative authorise, the board may appoint an independent director to the board, subject to ratification by the members at the next annual general meeting. This amendment addresses concerns that section 198(3)(a) may only permit the board to fill a vacancy where a director has resigned or been removed, and not where the board has identified a need for an additional independent director to deal with an immediate deficiency in skills or experience on the board.

Clause 58: Section 200 deleted

Clause 58 deletes section 200 in respect of disqualification of directors. The section is replaced by new provisions at Part 9 Division 2A.

Clause 59: Section 205 amended

Clause 59 amends section 205 by correcting references to the sections of the Act dealing with disqualification and appointment of an administrator.

Clause 60: Section 206A inserted

This clause inserts a new section 206A which provides that a director may be removed by ordinary resolution of the co-operative despite anything in the rules of the co-operative and any agreement between a director and the co-operative, or any or all members of the co-operative.

Subsections (2), (3) and (4) provide that notice of the resolution must be provided to members at least 2 months before the meeting is scheduled to be held.

However, if a meeting is subsequently called, the resolution may be passed at the meeting even though less than 2 months notice has been given, provided that at least 21 days notice has been provided to members of the meeting at which a resolution will be passed to remove a director or appoint another director in place of a director removed from office.

Subsections (5), (6), (7) and (8) provide that the co-operative must give the director a copy of the notice. The director is entitled to have a written statement circulated to members (provided that it is less than 1 000 words long and is not defamatory) and to speak at the meeting.

Subsection (9) provides that a replacement director will serve the remainder of the term for which the removed director was elected.

A fine of \$500 applies to a contravention of subsection (5) or (7) and subsection (10) provides that for the purposes of those subsections intent is not an element of an offence.

Clause 61: Part 9 Division 2A inserted

This clause inserts 9 new sections dealing with disqualification of persons from managing co-operatives.

- Section 206B defines 'disqualified persons' for the purposes of the division and provides that it is an offence, with a fine of \$24 0000 or imprisonment for 2 years or both, for a disqualified person to act as a director or otherwise take part in the management of a co-operative.
- Section 206C provides that a person who has been convicted of an offence under the Act, or a corresponding co-operatives law, or a previous co-operatives law of any jurisdiction is disqualified from managing co-operatives for five years after the conviction (or five years after release from prison if a custodial sentence is imposed). Subsections (3) and (4) provide that for the purposes of proceedings under the Division a certificate by an authority prescribed by the regulations is evidence of a relevant conviction, and of the particulars of a person's release from prison.
- Section 206D provides that on application of the Registrar the Supreme Court may extend the period of disqualification by up to an additional 15 years. The Registrar must apply before the period of automatic disqualification begins or before the first year of disqualification has expired, and may only apply once in relation to a disqualification. The Supreme Court may have regard to any matters that the court considers appropriate in determining if an extension is justified.
- Section 206E provides that on application of the Registrar the Supreme Court may disqualify a person from managing co-operatives for a period that the court considers appropriate if there has been a declaration that the person has contravened a civil penalty provision and the court is satisfied that the disqualification is justified.

- Section 206F provides that on application of the Registrar the Supreme Court may disqualify a person from managing co-operatives for up to 20 years if, within the last 7 years, the person has been an officer of two or more failed entities. The section defines 'failure' to cover a range of events where the entity has solvency issues that have not been able to be resolved in a way that satisfies entitlements of creditors. Subsection (3) provides that in determining whether a disqualification is justified the Supreme Court can have regard to the person's conduct in the management of the entity and its property and any other matters that the Court considers appropriate.
- Section 206G provides that on application of the Registrar the Supreme Court may disqualify a person from managing co-operatives for a period that the court considers appropriate if the person has been an officer of a co-operative that has twice contravened co-operatives legislation (or equivalent legislation).
- Section 206H provides that the Registrar may disqualify a person from managing co-operatives for up to 5 years if, within the previous 7 years, the person has been an officer of two or more co-operatives that have been wound up and unable to pay their debts. The persons must be given a notice allowing them opportunity to demonstrate why they should not be disqualified prior to any final notice of disqualification being issued. Subsection (2) provides that if the Registrar determines that the person is to be disqualified, a notice must be served advising them of the disqualification. The disqualification takes effect from the time that the notice is served.
- Section 206I provides that a person disqualified by the Registrar may be given written permission by the Registrar to manage a particular co-operative or co-operatives. Permission may be subject to conditions. Failure to comply with conditions carries a penalty of a fine of \$24 0000 or imprisonment for two years or both.
- Section 206J provides that a disqualified person may apply to the Supreme Court for leave to manage co-operatives generally or specific co-operatives except where disqualified by the Registrar under section 206H. Notice of the application must be provided to the Registrar in the approved form. Notice of an order granting leave must be lodged with the Registrar within 14 days. An order granting leave may be revoked by the court on application by the Registrar. Leave may be subject to conditions. Failure to comply with conditions carries a penalty of a fine of \$24 0000 or imprisonment for two years or both. Section 206J does not apply to a person disqualified under section 206B(1)(d) because of a business connection with the auditor of the co-operative.

Clause 62: Section 207A inserted

Clause 62 inserts section 207A which provides that the secretary of a co-operative must take all reasonable steps to ensure that the co-operative does not contravene a prescribed provision of the Act. Provisions prescribed in the CNL National Regulations are those covering responsibilities such as lodgement of annual reports and other notifications with the Registrar and maintenance of registers.

The penalty for non-compliance is a fine of \$500.

Clause 63: Sections 207 to 212 replaced

Sections 207 to 212 deal with duties and liabilities of officers. They have been replaced with new provisions which are equivalent to those in the CNL and based on the duties that apply to the directors of companies under the *Corporations Act 2001*.

Clause 63 replaces sections 207 to 212 with 6 new sections:

- Section 207 is a civil obligation that provides a director or officer must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise in the same circumstances and holding the same office. A business judgement is defined as any decision to take or not take action in respect of a matter relevant to the business operations of the co-operative. An officer who makes a business judgement in good faith for a proper purpose taking into account the co-operative principles, has no material personal interest, is reasonably informed and rationally believes the judgement to be in the interests of the co-operative is taken to meet the requirement. The belief in the judgement is considered to be rational for the purposes of the section unless the belief is one that no reasonable person in that position would hold.
- Section 208 is a civil obligation and provides that a director or other officer must exercise their powers and discharge their duties in good faith in the best interests of the co-operative and for a proper purpose. A third party who is involved in the contravention also contravenes the section. Section 5B describes what constitutes involvement in a breach of the legislation. Involvement in a contravention will mean that the third party is potentially liable for a civil penalty.
- Section 209 places a civil obligation on a director, secretary, an officer or employee of a co-operative to not improperly use their position to gain advantage for themselves or some other person or cause detriment to the co-operative. A third party who is involved in the contravention also contravenes the section. Section 5B describes what constitutes involvement in a contravention.

- Section 210 is a civil obligation which provides that an officer or employee of a co-operative, or a person who has been an officer or employee, must not use information obtained in the course of their duties improperly to gain advantage for themselves or someone else or cause detriment to the co-operative. A third party who is involved in the contravention also contravenes the section. Section 5B describes what constitutes involvement in a contravention.
- Section 211 is an offence provision. Subsection (1) provides that a director or officer of a co-operative commits an offence if they recklessly or dishonestly fail to exercise their duties and powers in good faith in the best interests of the co-operative and for a proper purpose. Subsection (2) provides that a director, officer or employee of a co-operative commits an offence if they dishonestly use their position with the intention of gaining an advantage for themselves or someone else or causing detriment to the co-operative, or recklessly as to whether such advantage or detriment might result. Subsection (3) provides that a person who obtains information as an officer or employee of a co-operative commits an offence (or has obtained the information when occupying that role previously) and uses that information dishonestly with the intention of gaining an advantage for themselves or someone else or causing detriment to the co-operative, or recklessly as to whether such advantage or detriment might result commits an offence. A penalty of a fine of \$200 000 or imprisonment for 5 years or both applies to a contravention of section 211.
- Section 212 provides that, with the exception of those subsections in 207 (subsections 207(1),(3) and(4)) which codify an equivalent common law obligation, sections 207 to 211 have effect in addition to any rule of law relating to the duty or liability of a person because of their office or employment and do not prevent the commencement of civil proceedings for a breach thereof.

Clause 64: Section 213 amended

Clause 64 amends section 213 by updating the modifications to the Corporations Law provisions applied by the section in order to reflect changes made elsewhere in the Act.

Clause 65: Section 214 amended

Clause 65 amends section 214 by updating the modifications to the Corporations Law provisions applied by the section in order to reflect changes made elsewhere in the Act. The date in section 592(1)(a) is amended to 1 September 2010 to reflect the commencement date of the *Co-operatives Act 2009*.

Clause 66: Section 215 amended

Clause 66 replaces the penalty in section 215 with a fine of \$24 000, or imprisonment for 2 years, or both for consistency with the CNL and to improve alignment with the *Corporations Act 2001*.

Clause 67: Section 216 amended

Clause 67 replaces the penalty in section 216(1) with a fine of \$24 000, or imprisonment for 2 years, or both for consistency with the CNL and to improve alignment with the *Corporations Act 2001*.

Clause 68: Section 217 amended

Clause 68 replaces the penalty in section 217(5) with a fine of \$24 000, or imprisonment for 2 years, or both for consistency with the CNL and to improve alignment with the *Corporations Act 2001*.

Clause 69: Section 218 amended

Clause 69 replaces the penalty in section 218 with a fine of \$24 000, or imprisonment for 2 years, or both for consistency with the CNL and to improve alignment with the *Corporations Act 2001*.

Clause 70: Section 220 amended

Clause 70 replaces the penalties in sections 220(1) and (5) with a fine of \$24 000, or imprisonment for 2 years, or both in each subclause for consistency with the CNL and to improve alignment with the *Corporations Act 2001*.

Clause 71: Part 9 Division 6 deleted

Clause 71 deletes Part 9 Division 6 which deals with financial reports and audit and is replaced by new Part 10A.

Clause 72: Part 9 Division 7 heading replaced

Clause 72 replaces the term 'records' in the heading to Part 9 Division 7 with 'books' to reflect amended terminology in the Act.

Clause 73: Section 230 amended

Section 230 requires a co-operative to keep the required registers. Clause 73 subclause (1) amends subsection (1) to replace the term 'co-operative capital units' with CCUs to reflect amended terminology in the Act. It also deletes subsection (1)(i) as there will no longer be a requirement for co-operatives to maintain a register of undertakings.

Subclause (2) inserts a new subsection that provides that for the purposes of subsection (1), intent is not an element of an offence of failure to maintain registers as required by section 230.

Clause 74: Section 232 amended

Section 232 deals with inspection of the registers of a co-operative by members and the information that must be available to members. Clause 74 amends the section by deleting subsection (1)(d) and inserting new subsections (1)(d) and (ea) to reflect changes made in Part 10A of the Act. The new subsection will require a co-operative to keep available for inspection a copy of the most recent annual return under section 244ZB and the most recent financial information reported to members under Part 10A. Reference to 'co-operative capital units' in paragraph (f) is replaced with 'CCUs' to reflect amended terminology.

Subclause (2) inserts two new subsections which clarify that minutes of board meetings and board committee meetings will only be available for inspection of members if the rules of the co-operative so provide. In the event that the rules provide that the minutes are available, they will be available on the terms and conditions described in the rules.

Clause 75: Section 233 amended

Clause 75 amends section 233 by replacing the term 'co-operative capital units' with 'CCUs' to reflect a change in terminology in the Act. It also inserts a new subsection 233(5) which, consistent with the CNL, provides that disclosure of information obtained from the registers of a co-operative for the purposes described in the section is authorised by the Act. This provision is required to ensure that permitted use of the information will accord with National Privacy Principles.

Clause 76: Section 234 amended

Clause 76 amends section 234(1) to remove the requirement for co-operatives to notify the Registrar of changes to the officers of its subsidiaries as this information is publicly available from the relevant agency (in most cases the Australian Securities and Investment Commission).

Clause 76(2) introduces a fine of \$2 000 for a breach of subsection 234(1).

Clause 76(3) deletes the penalty in subsection 234(2), as this has now been moved to section 234(1).

Clause 76(4) inserts new subsection 234(3) that provides that for the purposes of subsection (1), the offence of failure to notify the Registrar of the appointment or cessation of officers of the co-operative, intent is not an element of an offence.

Clause 77: Section 235 deleted

Clause 77 deletes section 235 which provides for lodgement of an annual report with the Registrar, as this has been replaced by a new reporting requirement in new Part 10A.

Clause 78: Section 236 amended

Clause 78 amends section 236 by inserting a new subsection that provides that for the purposes of subsection (1) of section 236, the offence of failure to provide information about members at the request of the Registrar, intent is not an element of an offence.

Clause 79: Section 237 amended

Clause 79 amends section 237 by inserting a new subsection that provides that for the purposes of subsection (2) of section 237, the offence of failure to provide a special return at the direction of the Registrar, intent is not an element of an offence.

Clause 80: Section 238 amended

Section 238 deals with the name of a co-operative. Subsection (7) prohibits an entity formed or incorporated under another Act from registering a name that includes the word 'co-operative' or an abbreviation thereof. Clause 80 deletes subsection (9), which is no longer required as all co-operatives legislation will be included in the national scheme, and inserts a new subsection which allows the regulations to exempt entities or kinds of entities. This recognises that there may be occasions where use of the word is appropriate and is not likely to mislead those dealing with the entity for example, entities established using a different corporate form to promote and support co-operative enterprises.

Clause 81: Section 240 replaced

Section 240 deals with the requirement for the name of a co-operative to appear on its business documents. Clause 81 replaces section 240 with a new section that aligns the definition of 'business documents' and the requirements with regard to the information that must appear on documents, with the requirements of the CNL.

Subclause (2) provides that a co-operative must ensure that its name is legible and appears on its seal and all business documents. Subclause (3) provides that an officer must not use a seal or sign a document on which co-operative's name does not appear.

Subclause (4) provides that a director must not knowingly authorise or permit a contravention of the section.

A fine of \$2 000 applies to a breach of subsections (1), (2) or (3).

Subclause (5) inserts a new subsection (5) that provides that for the purposes of subsection (2), intent is not an element of an offence.

Clause 82: Section 241 amended

Section 241 deals with the process by which a co-operative changes its name. Clause 82 amends section 241 by inserting two new subsections.

Subsection (8) provides that a co-operative must comply with a direction by the Registrar to change its name. A fine of \$500 applies for a failure to comply.

Subsection (9) provides that intent is not an element of an offence for the purposes of subsection (8).

Clause 83: Section 242 amended

Section 242 deals with the name used by a co-operative, subsection (1) prohibits an entity formed or incorporated under another Act from carrying on business using a name that includes the word 'co-operative' or an abbreviation thereof.

Clause 83 amends section 242 by deleting subsection (2), as the section to which it refers (238(9)) has been deleted, and inserts a new subsection (2) which allows the regulations to exempt entities or kinds of entities. This recognises that there may be occasions where use of the name is appropriate and is not likely to mislead those dealing with the entity for example, entities established using a different corporate form to promote and support co-operative enterprises.

Clause 84 Section 243 amended

Section 243 deals with the requirements for a co-operative to maintain a registered office.

Clause 84 amends the section by inserting three new subsections. Subsections (4) and (5) provide for the Registrar, by order published in the *Gazette*, to exempt a small co-operative, or a class of small co-operatives from the requirements of subsection (2), which requires the display of the name of the co-operative at its registered office. The exemption may be subject to conditions. This recognises that very small co-operatives may operate from residential rather than commercial premises and may have limited dealings with the public.

Subsection (6) provides that for the purposes of the section intent is not an element of an offence.

Clause 85: Part 10A inserted

Division 1 - Preliminary

Part 10A comprises 65 new sections which replace the financial reporting and audit provisions currently applied from the Corporations Act by section 225. They are based on the provisions of Chapter 2M of the Corporations Act, but have been amended to apply to co-operatives.

Given the extent of amendments required, most sections have been reproduced in full rather than applied.

- Section 244A defines terms used in the Part.
- Section 244B describes modifications to those parts of the Corporations Law that are applied.

Division 2 – Financial records

- Section 244C relates to a co-operative's obligation to retain financial records and provides that a co-operative must keep written financial records which document and explain the co-operative's transactions, financial position and performance and which would enable true and fair financial reports to be prepared and audited. The section further provides that the records must be retained for 7 years and failure to comply with this section is an offence which attracts a fine of \$2 500. The section also stipulates that intent is not an element of the offence.
- Section 244D relates to the language of the financial records and provides that financial records may be kept in any language, but an English translation must be made available, upon request, within a reasonable time. The section further provides that failure to comply with this section is an offence with attracts a fine of \$2 500. The section also stipulates that intent is not an element of the offence.
- Section 244E relates to the format of the financial records and provides that a co-operative must ensure that if financial records are kept in electronic form, they are convertible into hard copy and that hard copy is provided to any person entitled to inspect the records within a reasonable time. The section further provides that failure to comply with this section is an offence which attracts a fine of \$2 500. The section also stipulates that intent is not an element of the offence.
- Section 244F relates to where financial records can be kept and provides that, a co-operative can decide where to keep their financial records but if they are kept outside the State, sufficient information must be kept in the State to enable financial statements to be prepared. The section further provides that the Registrar must be provided with written notice as to where the records are kept, and may direct the co-operative to produce the records. Penalties in the section range from fines of \$2 000 to \$2 500. Intent is not an element of the offences.
- Section 244G relates to a director's right of access to financial records and provides that a director has a right of access to financial records at all reasonable times. The section further provides the Supreme Court with the power to authorise another person to inspect financial records on a director's behalf and make other ancillary order that it considers appropriate. The section also empowers authorised person to make copies of the records unless the Supreme Court orders otherwise.

Division 3 – Annual financial reports and directors’ reports generally

- Section 244H relates to which types of co-operatives are required to prepare annual financial reports and directors reports. The section provides that a large co-operative must prepare full financial reports and directors’ reports. The section further provides that a small co-operative is not required to produce those reports outlined in the regulations unless required by members under section 244I or the Registrar under section 244J, to provide full financial reports. The regulations will prescribe a basic report detailing the financial position of the co-operative including the balance sheet and cash flow statement.
- Section 244I relates to the right of members of small co-operatives to direct the co-operative to prepare full financial and director reports and outlines the requirements of any member direction. Specifically, the section provides that members holding at least 5 percent of the votes in a small co-operative may direct the co-operative to produce full financial reports and provide those reports to members. The section further provides that failure to comply with the members’ direction attracts a penalty of a fine of \$1 000.
- Section 244J relates to the right of the Registrar to direct a small co-operative to prepare full financial and director reports and outlines the requirements of any direction. The section provides that the Registrar may direct a co-operative to produce full financial reports and lodge them or provide them to members. The section states that the direction may require compliance with particular requirements of Part 10A, and is to specify the date for lodgement or service on members.

Division 4 – Annual financial reports

- Section 244K describes the components of an annual financial report. These include financial statements, notes and a directors’ declaration. While these are now included in the Act rather than in applied provisions, the requirements for the annual report have not changed.
- Section 244L outlines when a co-operative’s financial reports must comply with accounting standards and provides that the financial report of a large co-operative must comply with accounting standards and that a small co-operative is only required to comply with accounting standards if the direction provided by its members or the Registrar requires it. Section 244M requires the financial statements and notes to give a true and fair view of the financial position and performance of the co-operative or (if applicable) consolidated entity.

- Section 244N relates to the auditing of financial reports and requires a large co-operative to have its financial report audited in accordance with the requirements of Part 2M.3 Division 3 of the Corporations Act. The section further provides that the financial report of a small co-operative is only required to be audited if it is prepared pursuant to a direction by its members or the Registrar and the terms of the direction require it to be audited.
- Section 244O applies section 295A of the Corporations Act to co-operatives with quoted securities only. This section imposes additional reporting requirements on those co-operatives.

Division 5 – Annual directors’ reports

- Section 244P requires a large co-operative to prepare a directors’ report as part of its annual financial report. The section outlines what information the report must contain including the general information described in section 244Q and the specific information described in section 244R. The Section also provides that the directors’ report must be made in accordance with the resolution of the directors, specify the date on which the report is made and be signed by a director. Section 244Q outlines the general information that a directors’ report for a financial year must contain including: a review of the results of operations during the year; any significant changes in the co-operative’s state of affairs; the principle activities during the year and changes to those activities and any matter that has significantly affected the co-operative. The section also requires the directors’ report to refer to likely future developments in the co-operative’s operations, unless reporting on those developments would result in unreasonable prejudice to the co-operative.
- Section 244R outlines the specific information that must be included in the directors’ report including details of:
 - dividends/distributions paid to or recommended to be paid to members;
 - the name of each person who is or has been a director, officer or partner in the co-operative’s audit firm;
 - any options that are granted over unissued shares or interests granted as remuneration to any of the directors or 5 of the most highly remunerated officers of the co-operative;
 - unissued shares or interests under option at the date the report is made;
 - shares or interests issued during or since the end of the year;
 - any indemnity that is given to a current or former officer or auditor against a liability and any premium that is paid for insurance against a current or former officer or auditor;

- the directors' qualifications, experience and special responsibilities and the number of director and board committee meetings held during the year; and
 - any proceedings that a person brought or intervened in on behalf of the co-operative; and
 - any application for leave under Part 4 Division 6 made in respect of the co-operative.
- Section 244S applies sections 299A, 300(11) to 11(E) and 300A of the Corporations Act to co-operatives with quoted securities only. These sections require the provision of additional information in the directors' report.

Division 6 – Half year financial report and directors' report

- Section 244T applies Part 2M.3 Division 2 of the Corporations Act to co-operatives that are disclosing entities. These provisions require a disclosing entity to produce half-year financial reports and directors' reports.

Division 7 – Audit and auditor's report

- Section 244U applies Part 2M.3 Division 3 of the Corporations Act to co-operatives. These provisions relate to the audit process and the audit report. The application of these provisions to co-operatives is not changed as a result of the amendment Bill.

Division 8 – Annual financial reporting to members

- Section 244V relates to the reporting of annual financial reports to members. The section requires a large co-operative to report to members by providing a copy of its annual financial reports to each member prior to the AGM. The section further provides that a concise report can be provided, with notification to members that they can request a full report. The regulations will require a small co-operative to provide basic financial information to allow members to assess the financial position of the co-operative. The section also provides that the report can be provided to members in a number of ways, but a member can elect to receive a hard copy or an electronic copy. The amendment Bill does not alter the requirements for provisions of reports to members, but incorporates the provision in full rather than applying corresponding provisions in the Corporations Act. The penalty for contravention of the section is a fine of \$1 000. Intent is not an element of the offence.
- Section 244W provides that a large co-operative (other than a disclosing entity) must report to members under section 244V within 5 months of the end of the financial year. A large co-operative that is a disclosing entity must report within 5 months of the end of the financial year or 21 days before the AGM, whichever is earlier. A small co-operative must report 14 days before the AGM. The penalty for contravention of the section is a fine of \$1 000. Intent is not an element of the offence.

- Section 244X sets out options for members in receiving financial material. The section provides that a member may request a full financial report, or may request that the co-operative not send financial information. This may be a standing request or may apply for a particular financial year. A co-operative must comply with a request within 7 days or by the date that the financial report is due under section 244V, whichever is later. The reports must be provided free of charge, unless a copy has already been provided. The penalty for contravention of the section is a fine of \$1 000. Intent is not an element of the offence.
- Section 244Y sets out the requirements relating to consideration of reports at annual general meetings. The section provides that for a large co-operative the directors must lay before the annual general meeting the financial report, directors' report and auditor's report. For a small co-operative the directors must lay before the annual general meeting any reports required to be provided to members under sections 244V, 244I or 244J. The penalty for contravention of the section is a fine of \$1 000. Intent is not an element of the offence.
- Section 244ZA applies section 318 of the Corporations Act to a co-operative that has issued debentures. The provision requires a co-operative to provide a copy of the annual financial report, directors' report and auditor's report to debenture holders who are not members of the co-operative.

Division 9 – Lodging reports and returns with Registrar

- Section 244ZB requires a co-operative to lodge an annual return with the Registrar for each financial year. The contents of the annual return will be prescribed by the regulations. The report is to be lodged 28 days after the AGM is held, or is due to be held. The penalty for contravention of the section is a fine of \$1 000. Intent is not an element of the offence.
- Section 244ZC provides that a large co-operative must lodge its financial reports with the annual return. The reports are to be lodged 28 days after the AGM is held, or is due to be held. The penalty for contravention of the section is a fine of \$2 500. Intent is not an element of the offence.
- Section 244ZD provides that a co-operative that is required to prepare a half-year report must lodge the report with the Registrar within 75 days of the end of half-year. The penalty for contravention of the section is a fine of \$2 500. Intent is not an element of the offence.

- Section 244ZE empowers the Registrar to direct a co-operative to lodge a copy of any report prepared or obtained under the Part. The direction must be in writing, specify the period concerned, be made no more than 6 years after the period concerned and specify a date for lodgement (at least 14 days after the date of the direction). The penalty for contravention of the section is a fine of \$1 000. Intent is not an element of the offence.
- Section 244ZF provides that, if a financial report or directors' report is amended after lodgement with the Registrar, the co-operative must lodge the amended report within 14 days. A copy must be provided to any member who requests one. If the amendment is material, members must be notified of the nature of the amendment and of their right to request a copy of the amended report. The penalty for contravention of the section is a fine of \$1 000. Intent is not an element of the offence.

Division 10 Special provisions about consolidated financial statements

- Section 244ZG provides that Part 2M.3 Division 6 of the Corporations Act applies to co-operatives producing consolidated reports. That Division provides that directors and officers must provide all necessary information for preparation of financial statements and that an auditor must have to the co-operative's books and information or assistance from officers and directors.

Division 11 – Financial years and half years

- Section 244ZH provides that the financial year of a co-operative is as provided in its rules. The initial financial year of a newly formed entity must be not more than 18 months after formation, while a transferring entity has 18 months from the date of its last AGM. When the date of end of financial year is changed by an alteration to the rules of a co-operative, the current financial year may be extended for 6 months, or the next financial year may be up to 18 months. The regulations may require each entity controlled by the co-operative to have the same end of financial year.
- Section 244ZI provides that a half-year for a co-operative is the first six months of a financial year (but may be longer or shorter by up to 7 days).

Division 12 - Auditors

- Section 244ZJ provides that Part 2M.4 Divisions 1 to 4 of the Corporations Act apply to co-operatives, subject to several modifications. These sections relate to the registration of auditors with ASIC. Part 2M.4 Division 5 (relating to rotation of auditors) applies to a co-operative with quoted securities only.

- Section 244ZK provides that if a small co-operative has not appointed an auditor at a general meeting, an auditor may be appointed by the directors to hold office until the next annual general meeting.
- Section 244ZL provides that if a large co-operative has not appointed an auditor at a general meeting, an auditor must be appointed by the directors within one month after registration of the co-operative. The auditor must be a registered company auditor, a firm with one member who is a registered company auditor or an authorised audit company and holds office until the next annual general meeting. A co-operative registered prior to the commencement of the *Co-operatives Act 2009* may continue to use an auditor approved by the Registrar prior to the commencement of that Act until that auditor is replaced. A fine of \$2 500 has been introduced for a failure to comply with this section.
- Section 244ZM provides that a large co-operative must appoint an auditor at its first annual general meeting, and must appoint an auditor to fill any vacancy at subsequent annual general meetings. An auditor holds office until the auditor dies, is removed or resigns in accordance with the process prescribed by the Act, ceases to qualify for registration as an auditor under the Corporations Act or is disqualified in accordance with the circumstances prescribed by the Act (including a conflict of interest). In the case of disqualification, an opportunity exists to address the circumstances of the disqualification during a 'remedial period'. A fine of \$2 500, or imprisonment for 6 months or both, has been introduced for a failure to comply with this section.
- Section 244ZN provides that if a casual vacancy occurs in the office of auditor of a large co-operative, and a new auditor has not been appointed at a general meeting, the directors must appoint an auditor to fill the vacancy within one month. The auditor will hold office until the next annual general meeting. A fine of \$2 500, or imprisonment for 6 months or both, has been introduced for a failure to comply with this section.
- Section 244ZO provides that, where an auditor is removed from office at a general meeting and a notice has been provided to the intended replacement, the co-operative may appoint a new auditor by special resolution at the same meeting. If the resolution is not passed, or no notice has been provided, the meeting may be adjourned and a replacement appointed by ordinary resolution when the adjourned meeting resumes. At least 14 days notice of a nomination must be given and the adjourned meeting must be held between 20 to 30 days after the date of the initial meeting. The auditor will hold office until the next annual general meeting.
- Section 244ZP introduces a new requirement for a large co-operative to notify the Registrar of the appointment of an auditor within 28 days of the appointment. A fine of \$2 000 applies for a failure to comply.

- Section 244ZQ provides that, where a large co-operative fails to replace an auditor, written notice must be provided to the Registrar within 7 days. The Registrar must appoint an auditor as soon as practicable after receipt of the notice. If notice is not provided, or is provided after the expiry of the notification period, the Registrar may appoint an auditor at any time, and must do so as soon as practicable after receipt of the late notice. An auditor appointed by the Registrar under this section holds office until the next annual general meeting of the co-operative.
- Section 244ZR provides that the Registrar has a general power to appoint an auditor of a large co-operative on application by a member of the co-operative when the co-operative has not appointed an auditor as required by the Act. An auditor appointed by the Registrar under this section holds office until the next annual general meeting of the co-operative.
- Section 244ZS provides that the Registrar can appoint an auditor only with the consent of the auditor. The Registrar must not appoint an auditor where there is another auditor continuing to act. The Registrar must not appoint an auditor on receipt of a notice of auditor replacement failure if the Registrar has already appointed an auditor to fill the vacancy.
- Section 244ZT provides that when a vacancy occurs in the office of auditor of a co-operative, a remaining auditor, or auditors (if any) may continue to act.
- Section 244ZU provides that notice of nomination of an auditor must be provided to the co-operative prior to the meeting at which the appointment will be made. Where notice is not provided, a purported appointment is of no effect, and the co-operative is guilty of an offence. A fine of \$2 500 applies. A copy of the notice must also be sent to the nominee not less than 7 days before the meeting or at the time the notice of meeting is given.
- Section 244ZV provides that an auditor must consent to the appointment by notice in writing to the directors. Where consent is not provided, a purported appointment is of no effect, and the co-operative is guilty of an offence. A fine of \$2 500 applies.
- Section 244ZW provides that an auditor may be removed by resolution at a general meeting. Notice of intention must be given prior to the meeting, and copies of the notice must be provided to the auditor and lodged with the Registrar. Within 7 days of receipt of the notice the auditor may make written representations in response and may request that a copy of the representations be sent to members. The auditor may also have the representations read out, or otherwise be heard, at the meeting.

An auditor may resign by notice in writing. The auditor of a large co-operative must have the consent of the Registrar to the resignation.

A statement made to the Registrar seeking consent is not admissible in any civil or criminal proceedings against the auditor. The resignation of an auditor takes effect on the day specified in the notice of resignation, the day on which the Registrar gives consent or the day fixed by the Registrar.

If on the retirement or withdrawal from a firm of a member, the firm is no longer capable of acting as auditor of a co-operative (because the firm cannot meet the registration requirements under the Corporations Act), the individual member shall be taken to be the auditor until he or she obtains the consent of the Registrar to his or her retirement or withdrawal.

Notice of the removal or resignation of an auditor must be lodged with the Registrar within 14 days and also given to any trustee for the holders of debentures or CCUs.

- Section 244ZX provides that an auditor will cease to hold office if a special resolution is passed for voluntary wind up, a certificate of winding up is given by the Registrar, or an order is made by the Supreme Court for the winding up of the co-operative.
- Section 244ZY provides that the reasonable fees and expenses of an auditor are payable by the co-operative.
- Section 244ZZA provides that the auditor of a co-operative has qualified privilege in relation to a statement made in the course of duties as auditor or the provision of a notice or financial report to the Registrar and that any person has qualified privilege in relation to publication of a document prepared by the auditor and required to be lodged with the Registrar or a statement made by the auditor in the course of his or her duties.

Division 13 - Accounting and auditing standards

- Section 244ZZB provides that a reference to accounting or auditing standards is a reference to standards made for the purposes of the Corporations Act as modified by the regulations.
- Section 244ZZC provides that, when interpreting the accounting and auditing standards, expressions have the same meanings as in this Part or in Chapter 2M of the Corporations Act and the interpretation provisions in this Act and the Corporations Act also apply as required.

Division 14 - Exemptions and modifications

- Section 244ZZD provides that the Registrar may by order published in the *Gazette* exempt the directors, the co-operative, or the auditor of a specific co-operative from the requirements of Divisions 2 to 12 of this Part (but not including the applied Corporations Act provisions of Part 2M.4 Division 4 which relate to deliberate disqualification of an auditor).

An exemption may be subject to conditions and may be limited to a specified period of time. An application for an exemption must be authorised by a resolution of the directors, in writing and signed by a director and lodged with the Registrar. The Registrar must give written notice of the granting, revocation or suspension of an exemption.

- Section 244ZZE provides that the Registrar may exempt the directors, the co-operatives, or the auditors of a class of co-operatives from the requirements of Divisions 2 to 12 of this Part (but not including the applied Corporations Act provisions Part 2M.4 Division 4 which relate to the deliberate disqualification of an auditor). An exemption may be subject to conditions and may be limited to a specified period of time.
- Section 244ZZF provides that, in order to grant an exemption, the Registrar must be satisfied that compliance with the provisions would make the financial reports misleading, would be inappropriate or impose unreasonable burdens. To determine whether compliance would be an unreasonable burden, the Registrar must have regard to the costs and benefits of compliance, any practical difficulties or unusual financial circumstances and any other relevant matters. The impact on creditors must also be considered.
- Section 244ZZG provides that the Registrar may by order published in the *Gazette* exempt specific non-auditor members of an audit firm from the provisions of Part 2M.4 Division 3 of the Corporations Act which relate to auditor independence (as applying under Division 12). An exemption may be subject to conditions and may be limited to a specified period of time. The Registrar must give written notice of the granting, revocation or suspension of an exemption.
- Section 244ZZH provides that the Registrar may by order published in the *Gazette* exempt classes of audit firms or non-auditor members of audit firms from the provisions of Part 2M.4 Division 3 of the Corporations Act which relate to auditor independence (as applying under Division 12). An exemption may be subject to conditions and may be limited to a specified period of time.
- Section 224ZZI provides that, in order to grant an exemption under section 244ZZG or 244ZZH, the Registrar must be satisfied that compliance with the provisions would make the financial reports misleading, would be inappropriate or impose unreasonable burdens.
- Section 244ZZJ provides that the Registrar may by order published in the *Gazette* exempt a specified co-operative, person or firm proposed to be appointed as auditor, a specified director or auditor or a class of any of those persons from compliance with a provision of the regulations made for the purposes of Part 10A. An exemption may be subject to conditions and may be limited to a specified period of time.

- Section 244ZZK provides that, where section 324DA of the Corporations Act applies to a co-operative with quoted securities as a result of Section 244ZJ(2) the time in which an auditor must be replaced can be extended by declaration of the Registrar from five consecutive years to six or seven years and from five out of seven years to six out of seven years. To make a declaration, the Registrar must be satisfied that without the modification the requirement would impose an unreasonable burden on the auditor or the audited body.
- Section 244ZZL provides that, if an auditor plays a significant role in the audit of a co-operative in reliance on a declaration under section 244ZZK the auditor must give the co-operative written notice of the declaration. The penalty for failure to comply with this requirement is a fine of \$500.
- Section 244ZZM provides that the Registrar may amend, suspend or revoke an exemption granted under Part 10A Division 14. This power can be exercised if the Registrar is satisfied that the criteria for the grant of the exemption are no longer satisfied.

Division 15 - Miscellaneous

- Section 244ZZN provides that the directors must make the disclosures required by the regulations about the affairs of the co-operative and any entity controlled by the co-operative. The penalty for failure to comply with this requirement is a fine of \$2000.
- Section 244ZZO provides that a director must take all reasonable steps to comply with, or secure compliance with sections 244I, 244J, 244V (1) or (2), 244W(2), 244ZB, 244ZC, 244ZD, 244ZE, 244ZF and section 318 of the Corporations Act (as applied). If a person contravenes the section, and the contravention is dishonest, a fine of \$200 000 or imprisonment for 5 years or both applies.

Clause 86: Section 250 amended

Section 250 applies parts of the *Corporations Act 2001* to the issue of debentures by co-operatives. Clause 86 amends section 250 by updating the modifications to the *Corporations Act 2001* provisions applied by the section in order to reflect changes made elsewhere in the Act.

Subclause (2) inserts a new subsection 3A which identifies those applied provisions that are civil penalty provisions for the purposes of the new civil penalty provisions at Part 17 Division 2 of the Act. These are consistent with the provisions that have been identified as civil penalty provisions in the CNL.

Clause 87: Section 251 deleted

Section 251 applies parts of the *Corporations Act 2001* to the issue of debentures to members and employees of the co-operative. Clause 87 deletes section 251 as the disclosure requirements in these circumstances are now prescribed in new provisions in Part 10 Division 1.

Clause 88: Section 252 amended

Section 252 outlines disclosure requirements where debentures are issued to members and employees. Clause 88 amends subsection (2) by providing that the section does not apply where debentures are issued as payment for purchase of shares owned by the member under section 164(1). The reference to section 127(1) is replaced with a reference to section 127(2) to reflect an amendment of that section.

Subclause (2) amends the disclosure requirement by inserting a new subsection (3A) specifying that the co-operative must inform a person applying for debentures of the entitlement to request a disclosure statement and give the person a disclosure statement if the person requests it.

Subclause (3) amends subsection (3) and defines a 'disclosure statement' for the purposes of the Division, and describes the components that must be included in a disclosure statement in this instance as:

- the purpose for which money raised by the issue of debentures is to be used;
- the rights and liabilities attaching to debentures;
- the financial position of the co-operative;
- any interests of the directors in the issue;
- any compensation to be paid to officers in connection with the issue; and
- any other matter the Registrar directs.

Subclause (4) adds two additional subsections which empower the Registrar, by order published in the *Gazette*, to exempt a co-operative from the obligation to comply with the section, either unconditionally or subject to conditions. This recognises that there may be instances where the debentures are issued to individuals who have sufficient information about the financial affairs of the co-operative that further disclosure is not required.

Clause 89: Sections 253A and 253B inserted

Clause 89 adds two new sections to the Act with regard to issue of debentures.

Section 253A provides that a person must not advertise an offer of debentures unless a disclosure statement relating to the issue of the debentures has been approved by the Registrar. A fine of \$1 000 applies in the case of a contravention.

An exception is provided for a person who publishes a notice in the course of their publishing or broadcasting business and has no reason to suspect a contravention. Subclause (3) provides that intent is not an element of an offence for the purposes of subsection (1).

Section 253B(1) provides that all application money received from people applying for debentures and all other money paid by them on account of the debentures must be held on trust until the debentures are issued or the money is returned to the applicants.

Section 253B(2) provides that if the application money needs to be returned to an applicant, the person must return the money as soon as practicable.

A fine of \$2 500 or imprisonment for 6 months or both applies in the case of a contravention of sections 253B(1) and 253B(2).

Section 253B(3) provides that intent is not an element of an offence for the purposes of subsections 253B(1) and 253B(2).

Clause 90: Section 254 amended

Section 254 applies parts of the *Corporations Act 2001* to reissue of redeemed debentures. Clause 90 removes reference to section 124(1)(b) of the Corporations Act. The section will no longer apply as specific provisions have been included in this division with regard to disclosure requirements.

Clause 91: Section 255 amended

Section 255 deals with a requirement for members to lend money to the co-operative. Clause 91 inserts a requirement for a special postal ballot to be held in those circumstances. As the loaning of money would have a significant impact on the liability of members, the requirement for a special postal ballot ensures that members who are unable to attend a meeting can participate in the decision, and that they are provided with all relevant information and sufficient time to respond.

Clause 92: Section 257 amended

Clause 92 amends section 257 by deleting the reference to 'CCU' and replacing with 'co-operative capital unit' consistent with the terminology used elsewhere in the Act.

Clause 93: Section 261 amended

Clause 93 amends section 261(a) by replacing the requirement for the rules of the co-operative to provide that holders of CCUs will be entitled to one vote per CCU held at a meeting of CCU holders with a requirement to provide for an entitlement to *either* one vote per CCU held or one vote only. This is consistent with the CNL and allows the co-operative to determine in its rules which approach is preferred for managing meetings of holders of CCUs.

Clause 94: Section 271 amended

Section 271(3) provides that a rebate or dividend payable to a member may be applied with the consent of the member as a payment for the issue of bonus shares or as a loan to the co-operative. Clause 94 replaces section 271(3) with three new subsections which provide that the dividend or rebate may be applied as a payment for the issue of bonus shares (with the consent of the member), or as a loan to the co-operative either with the consent of the member, or if the rules of the co-operative so authorise.

Subsection (5) provides that where a loan to the co-operative is authorised by the rules the loan is repayable to a member at call and interest is to be paid for the term of the loan as prescribed by the regulations.

This is consistent with the CNL and allows maximum flexibility for the members of the co-operative to make rules that suit the needs of their co-operative, while protecting members by ensuring that loans without prior consent of members are repayable on demand.

Clause 95: Section 273 amended

Section 273 deals with acquisition and disposal of assets where the transaction has potential to significantly affect the activities or undertaking of the co-operative. An undertaking meaning all the assets of the co-operative. The section provides that a special postal ballot is required to authorise the transaction if the value of the assets exceeds a prescribed proportion of the assets of the co-operative. This clause amends the existing section by removing the capacity for a co-operative to override this obligation in its rules. The clause also adds a requirement for a special postal ballot to be held where the disposal of an asset impacts on the ability of the co-operative to carry out its primary activities if the primary activities in question form a basis for active membership.

Subclause (3) amends the offence provision at subsection (3) by providing that a board member who is in a position to influence the conduct of the co-operative in respect of the transaction, and does not use all due diligence to prevent the commission of the offence, contravenes the provision and a fine of \$6 000 applies.

Section 273(4) empowers the Registrar to exempt a co-operative from compliance. Subclause (5) inserts a new provision allowing the exemption to be granted unconditionally or subject to conditions.

Clause 96: Section 284 amended

Section 284 provides that a co-operative must keep a register of notifiable interests (substantial shareholdings). Clause 96 amends the section by providing that the register will be available for inspection by members only.

Clause 97: Section 288 amended

Section 288 provides that the Registrar may exempt a person from the obligations of the Division (which deals with substantial shareholdings in a co-operative). Clause 97 amends the section by inserting a provision that provides that an exemption may be granted unconditionally or subject to conditions.

Clause 98: Section 289 amended

Part 11 Division 2 imposes restrictions on certain share offers. Section 289 describes the types of offers to which the division applies. Clause 98 amends section 289(1) by adding an additional category of offers being an offer that would result in the offeror having a substantial share interest, or a substantial change taking place in the substantial share interest that the offeror already has once the offeror is registered as the holder of those shares. Subclause (2) adds an additional subsection that defines what constitutes a substantial share interest or a substantial change in share interest by reference to the definitions in section 276.

Clause 99: Section 290 replaced

Section 290 provides that an offer to which the division applies must be approved by special resolution by special postal ballot. Clause 99 replaces section 290 with a new provision requiring that the offer must be approved by special resolution passed by a special postal ballot as well as by the Registrar.

Subsection (2) provides that an offer referred to in section 289(2)(e) may be made without approval under subsection (1) if it is made in accordance with the regulations.

Clause 100: Section 291 amended

Clause 100 amends section 291 to reflect the addition of section 289(2)(e) by clause 97.

Clause 101: Section 293 amended

Clause 101 replaces the penalty in section 293(2) with a fine of \$20 000 or imprisonment for 5 years, or both and the penalty in section 293(3) with a penalty of a fine of \$10 000, or imprisonment for 2 years, or both. In each case the previous penalty was either a fine or imprisonment.

Clause 102: Section 296 amended

Section 296 empowers the Registrar to exempt a co-operative from the requirements of the division, which restricts the acquisition of certain share interests. Clause 102 inserts a new subsection providing that the Registrar may grant an exemption unconditionally or subject to conditions.

Clause 103: Section 300 amended

Section 300 empowers the Registrar to exempt a co-operative from the requirements of the section, which requires a co-operative to provide a disclosure statement in connection with a proposal for merger or wind up.

Clause 103 deletes section 300(5) which permits the Registrar to grant an approval or exemption subject to conditions and replaces it with a provision consistent with the CNL which provides that the Registrar may grant an exemption unconditionally or subject to conditions.

Clause 104: Section 306 amended

Clause 104 amends section 306 dealing with applications for transfer of incorporation by inserting a new provision at subsection (2A) requiring a co-operative without share capital, that makes an application to transfer its incorporation, to advertise its intention to transfer by public notice in a newspaper at least two weeks before a resolution is put to members. The new provision also requires that in the case where the new body will have a share capital, all members have equal shareholding in the new body or the Registrar approves in writing, the making of the application.

Subclause (2) adds two additional subsections (section 306(3) and (4)) which empower the Registrar to exempt a co-operative from the obligation to comply with the section, either unconditionally or subject to conditions. These replace a deleted provision which provides that the regulations may exempt a co-operative from the requirement to comply.

Clause 105: Section 309 amended

Section 309 restricts the changes that can be made to the rights and liabilities of existing members when a co-operative transfers to another form of incorporation. Section 309(2) extends the protection to former members whose shares have been forfeited less than two years before the transfer.

Clause 105 inserts a new subsection (5) which reflects the fact that, as a result of amendments to other sections, the rules of some co-operatives will provide for rights and obligations of former members to subsist for less than two years provided for by the Act. Subsection (5) provides that the shorter period specified in the rules of the co-operative will also apply to rights and obligations of former members under this section.

Clause 106: Section 315 amended

Clause 106 replaces section 315 with a new provision which describes the ways in which a co-operative may be deregistered as a result of other amendments to the Act.

In particular, Clause 106 provides that a co-operative may be deregistered under the sections of the *Corporations Act 2001* as applying under section 316. When those provisions are applied deregistration is provided for on completion of the wind up process. Clause 106 also provides that a co-operative may be deregistered by an administrative act of the Registrar as provided for under section 482.

Clause 107: Section 316 replaced

Clause 107 replaces section 316 with a new provision that applies parts of the *Corporations Act 2001* to the winding up or deregistration of a co-operative. The new provision:

- does not apply to winding up on certificate of the Registrar under section 314;
- does not apply Part 5.7 of the Corporations Act;
- moves the modifications to the applied provisions to a new Schedule 6 Division 1;
- provides for a copy of the special resolution for the voluntary winding up to be filed with the Registrar within the period prescribed by the *Corporations Act 2001* or a longer period approved by the Registrar;
- provides for the form of the notice to be filed to be the form required by the *Corporations Act 2001* with any necessary modifications;
- specifies that a quorum for the meeting at which the resolution is passed is to be determined in accordance with the requirements of the *Corporations Act 2001*;
- specifies that the time when a voluntary winding up is taken to commence is determined in accordance with the requirements of the *Corporations Act 2001* Law provisions; and
- provides that applied *Corporations Act 2001* provisions have effect subject to any other sections of Part 12 of the Act.

Clause 108: Section 317 amended

Section 317 provides that a special resolution by means of special postal ballot is required to authorise a voluntary winding up by members. Clause 108 deletes section 317(2) which provides that a regulation may exempt a co-operative from compliance with the requirements of the section, and replaces it with new subsections (3) and (4) which provide that the Registrar may exempt a co-operative or class of co-operatives from a requirement under the section and that an exemption may be granted unconditionally or subject to conditions.

Clause 109: Section 322 amended

Section 322 deals with the liability of members on winding up and extends liability to former members whose membership has been cancelled less than two years before the transfer.

Clause 109 inserts a new subsection (5) which reflects the fact that, as a result of amendments to other sections, the rules of some co-operatives will provide for rights and obligations of former members to subsist for less than two years provided for by the Act. Subsection (5) provides that the shorter period specified in the rules of the co-operative will also apply to rights and obligations of former members under this section.

Clause 110: Part 12 Division 4 heading replaced

Clause 110 amends the heading of Part 12 Division 4 to 'Administration' to reflect the fact that in addition to administration under the applied provisions of the *Corporations Act 2001* an additional option for appointment of an administrator is available as a result of amendments.

Clause 111: Part 12 Division 4 Subdivision 1 inserted

Clause 111 amends Division 4 by inserting a new section 323A which provides that there are two methods for the administration of a co-operative, being, administration under the Corporations Act as applying under subdivision (2) and administration under subdivision (3) (administrator appointed by the Registrar).

Clause 112: Part 12 Division 4 Subdivision 2 heading inserted

Clause 112 inserts a new heading 'Administration under Corporations Act' for those sections dealing with administration under the applied *Corporations Act 2001* provisions.

Clause 113: Section 323 amended

Section 323 applies Part 5.3A and Part 5.9 Division 3 to the administration of a co-operative. Clause 113 deletes modifications in relation to references to 'company' and 'ASIC' as these are now provided for in section 11. The clause inserts several modifications consistent with those in the CNL to the applied provisions to enable them to be applied effectively to a co-operative rather than a proprietary company.

Clause 114: Section 324A inserted

Clause 114 inserts section 324A which provides that the Registrar may appoint an administrator under applied Part 5.3A of the Corporations Act if satisfied that the co-operative is insolvent or likely to become insolvent.

Section 324A(2) provides that the person appointed by the Registrar must be a registered liquidator unless the Registrar is of the view that the cost will be excessive taking into account the known assets of the co-operative and the expected extent of its debt.

Clause 115: Part 12 Division 5 heading replaced

Clause 115 amends the heading of Part 12 Division 5 to 'Administration: alternative procedure' to reflect the fact that an additional option for appointment of an administrator is available as a result of amendments. Division 5 is renumbered as Subdivision 3. The sections in this Subdivision provide an alternative process for administration.

Clause 116: Section 324B inserted

Clause 116 inserts section 324B which deals with the operation of the Division and provides that the *Corporations Act 2001* provisions applied under Subdivision 2 do not apply to administration under Subdivision 3, and the provisions of Subdivision 3 do not apply to the appointment of an administrator under section 324A.

Clause 117: Section 325 amended

Clause 117 amends section 325(3) by replacing the reference 'Division' with 'Subdivision' to reflect the altered numbering in the Part 12.

Clause 118: Section 326 amended

Clause 118 amends section 326(4) by replacing the term 'records' with 'books' to reflect this amended terminology in the Act.

Clause 119: Section 336 amended

Clause 119 amends section 336(1)(b) by replacing the reference to appointment of an administrator under 'Division 5' with reference to appointment of an administrator 'by the Registrar under Division 4 Subdivision 3' to reflect a change in terminology and numbering in that section.

Clause 120: Section 337 amended

Section 337 applies Part 5.7B of the *Corporations Act 2001* in the case of insolvency of a co-operative. Clause 120 deletes the modification in relation to references to 'company' at section 337(1)(a) as this is now included in section 11. The clause inserts several additional modifications consistent with those in the CNL to the applied provisions to enable them to be applied effectively to a co-operative rather than a proprietary company. The modifications deal with differences in terminology and references in the applied provisions and differences in the nature of co-operative shareholding.

Clause 121: Section 344 amended

Section 344 provides that section 536 of the Corporations Act applies to a person appointed to administer a compromise or arrangement as if that person was appointed as a liquidator of a co-operative. Clause 121 removes the modification to the applied provision which provides that a reference to 'ASIC' is to be read as a reference to the 'Registrar', as this modification is now made in section 11 of the Act.

Clause 122: Section 346 amended

Clause 122 amends section 346 by inserting a new subsection (3) that provides that, for the purposes of an offence under subsection (2) (failure by a director to arrange reports), intent is not an element of an offence.

Clause 123: Section 359 amended

Section 359(3) applies Part 9.7 of the Corporations Act to amounts transferred to the Registrar in accordance with the requirements of the section. This clause deletes two modifications to the applied provisions as these modifications are now made elsewhere in the Act.

Clause 124: Part 14 heading replaced

Clause 124 replaces the current heading 'Mutual recognition' with a new heading 'Participating co-operatives' reflecting new provisions in the Part that allow co-operatives registered in participating jurisdictions to carry on business nationally as participating co-operatives in place of current provisions in relation to mutual recognition.

Clause 125: Section 365 deleted

Section 365 defines terms used in Part 14. Clause 125 deletes the section. Definitions of 'authorisation notice' and 'non-participating co-operative' are no longer required as these terms are no longer used. The remaining terms are now used more frequently throughout the Act, and the definitions have been amended for consistency with the CNL and moved to section 4.

Clause 126: Section 366 amended

Section 366 defines the term 'carry on business' for the purposes of this Part. Clause 126 replaces the definition with a definition that is aligned with the CNL. The definition is consistent with the definition used in the *Corporations Act 2001* but amended to include soliciting for members and the seeking of share capital or offer of securities in the State to reflect the member based nature of co-operative enterprise.

Clause 127: Section 367 deleted

Section 367 describes when a law will be regarded as a corresponding co-operatives law for the purposes of mutual recognition. Clause 127 deletes the section which has been replaced with a definition of 'corresponding co-operatives laws' at section 5A.

Clause 128: Section 368 amended

Clause 128 amends section 368 by replacing the term 'foreign co-operative/s' with 'participating co-operative/s' and the term 'co-operative capital units' with 'CCUs' to reflect changes in terminology in the Act.

Clause 129: Part 14 Division 2 heading replaced

Clause 129 replaces the current heading 'Mutual recognition of foreign co-operatives' with 'Participating co-operatives carrying on business in this State' reflecting replacement of the provisions recognising foreign co-operatives with new provisions in the Division that allow co-operatives registered in participating jurisdictions to carry on business nationally as participating co-operatives.

Clause 130: Section 370 amended

Clause 130 amends section 370 by removing the requirement for a participating co-operative to notify the Registrar of intention to carry on business in the State. Subclause (3) deletes section 370(3) as co-operatives that are not participating co-operatives will not be able to seek approval to carry on business in the State.

Clause 131: Sections 372 to 374 replaced

Clause 131 deletes sections 372 to 374 which deal with the process by which co-operatives registered in other jurisdictions can be authorised to carry on business in Western Australia. This process has been replaced by an automatic entitlement for a co-operative registered in a participating jurisdiction to carry on business in that State. As such, these provisions are no longer required.

A new provision is inserted at section 372 which preserves the entitlement of existing co-operatives which are currently carrying on business in the State as foreign co-operatives with the authorisation of the Registrar to continue to do so, even if they are not participating co-operatives for the purposes of the new definition.

Clause 132: Section 376 amended

Section 376 describes the circumstances in which a foreign co-operative ceases to be authorised to carry on business in the State. This clause amends section 376 by deleting subsections (c) and (d) which relate to failure by the Registrar to grant authorisation. As there will no longer be a requirement for the Registrar to grant authorisation (or respond to a notice of intention to carry on business in the State) these provisions are no longer required.

Clause 133: Section 377 amended

Section 377 provides for the withdrawal of authority for a participating co-operative to carry on business in the State in some circumstances. Clause 133 deletes sections 377(b) and (c), which relate to the original application or notice. As there will no longer be a requirement for the Registrar to grant authorisation (or respond to a notice of intention to carry on business in the State) these provisions are no longer required.

The clause also deletes section 377(d) and replaces it with a new provision at section 377(b) which expands the reference to failure to comply with a co-operatives law to include corresponding co-operatives laws and inserts a new provision at section 377(d) to allow authority to be withdrawn where a co-operative has contravened a direction of the Registrar under section 380E (which permits the Registrar to make directions about financial accommodation).

Subclauses (2) and (3) replace the term 'foreign co-operative' in the section with 'participating co-operative' reflecting the change in terminology in the Act.

Subclause (4) inserts new sections 377(7) and (8). Subsection (7) provides that where the Registrar has given written notice to a co-operative withdrawing its authority to carry on business in the State that decision may subsequently be revoked by notice to the co-operative. Subsection (8) provides that where such notice is given, the co-operative is authorised to carry on business from the date of the notice or a later date specified in the notice.

Clause 134: Sections 378 and 379 replaced

Clause 134 deletes sections 378 (appeal to the Supreme Court against a decision by the Registrar to not authorise a co-operative to carry on business in the State) and 379 (application of specified provisions of the Act to co-operatives registered outside the State) and replaces them with new provisions.

The clause removes the ability of a co-operative to appeal a decision not to issue an authorisation notice under section 378, as such notices are no longer issued. A new section 378 is inserted that empowers a co-operative to appeal to the Supreme Court against a decision of the Registrar to give notice to the co-operative withdrawing its authority to carry on business in the State.

A new provision is inserted at section 379 which removes the reference to Schedule 5, as provisions applying to participating co-operatives are now included as specific provisions in the Act or in the regulations rather than in a schedule.

Clause 135: Section 380 replaced

Clause 135 deletes section 380 (dealing with requirements for the name of a foreign co-operative to appear on its documents and seal) and replaces it with six new provisions relating to requirements for participating co-operatives:

- Section 380A provides that it is an offence to give a person intending to become a member a copy of the rules of a participating co-operative, representing them as binding, unless they are an unaltered copy of the registered rules. It is also an offence for a person to alter the rules of a participating co-operative and circulate a copy representing the copy as a copy of the registered rules. A fine of \$1 000 applies for a breach of either subsection.
- Section 380B provides that it is an offence to give a person intending to become a member of a participating co-operative a copy of a special resolution of a co-operative or of the last reported financial information of the co-operative knowing that it is not, in a material respect, a true copy and without indicating to the person that it is not a true copy. It is also an offence to make such a document available for inspection in those circumstances. A fine of \$1 000 applies for a breach of either subsection.
- Section 380C provides that a person must not advertise a share offer to non-members unless a current disclosure statement is registered and any other requirements of the regulations are complied with. A fine of \$1 000 applies for a breach of this section. Subsection (3) provides that the section does not apply to a person publishing an advertisement or notice in the course of their business as a publisher if the person did not know or have reason to suspect that publication would contravene the provision. Subsection (4) provides that intent is not an element of an offence.
- Section 380D provides that a person must not advertise a CCU offer to non-members unless a current disclosure statement is registered and any other requirements of the regulations are complied with. A fine of \$1000 applies for a breach of this section. Subsection (2) provides that the section does not apply to a person publishing an advertisement or notice in the course of their business as a publisher if the person did not know or have reason to suspect that publication would contravene the provisions. Subsection (4) provides that intent is not an element of an offence.

- Section 380E provides that the Registrar may give directions to a participating co-operative with regard to the way in which it is to obtain financial accommodation in this State. A direction may require the co-operative to stop obtaining financial accommodation or stop obtaining it in a particular way; require repayment of financial accommodation obtained; require refinancing of repaid financial accommodation in a specified way; and specify the way in which the co-operative is permitted to invest the proceeds of financial accommodation. Subsection (3) provides that the Registrar must give the co-operative written notice of the reasons for the direction and subsection 4 permits the co-operative to apply to the Supreme Court for review of the decision within 28 days of receipt.
- Section 380 replaces the deleted section 380 and deals with the requirement for the name of a participating co-operative to appear on its business documents. Subsection (1) aligns the definition of 'business documents' and the requirements with regard to the information that must appear on documents, with the requirements of the CNL.

Subsection (2) provides that a participating co-operative must ensure that its name appears on its seal, all notices advertisements and official publications and all business documents.

Subsection (3) provides that an officer must not use a seal, authorise a notice of or sign a document on which co-operative's name does not appear.

Subsection (4) provides that a director must not knowingly authorise or permit a contravention of the section. A fine of \$2 000 applies to a breach of subsections (1), (2) or (3). Subsection (5) provides that for the purposes of subsection (2), intent is not an element of an offence.

Clause 136: Section 381 amended

Clause 136 amends section 381 authorising the supply of information to participating Registrars by replacing the reference to 'foreign co-operative' with 'participating co-operative' reflecting a change in terminology in the Act and expanding the operation of the provision to include all documents rather than public documents only reflecting the enhanced role of participating Registrars in regulation under the national scheme. Subclause (2) inserts a new subsection providing that the section applies regardless of whether a reciprocal arrangement exists between the jurisdictions, making it clear that the authority for the supply of information under this section is in addition to any formal arrangement under section 485.

Clause 137: Sections 382 and 383 deleted

Clause 137 deletes sections 382 and 383 which require a foreign co-operative to notify the Registrar of changes which might impact on its authorisation and notify the Registrar of cessation of business are no longer required as a result of the removal of the requirement for a participating co-operative to give notice to the Registrar of intent to carry on business in the jurisdiction or obtain authorisation.

Clause 138: Section 384 amended

Clause 138 amends section 384 to include a reference to functions of the Registrar under a corresponding co-operatives law. This reflects the additional functions that the Registrar will exercise by virtue of participation in the national scheme and the changes in terminology in the Act. The heading of the section is also changed to 'Functions conferred on Registrar under corresponding co-operatives law' to reflect the new content of the section.

Clause 139: Section 385A inserted

Clause 139 inserts a new provision which empowers the Registrar to exempt a participating co-operative from a requirement of the Act that would otherwise apply. The provision provides a mechanism for dealing with situations where an inconsistency between the requirements of the Act and the requirements of the co-operatives law in the jurisdiction of registration may prevent a co-operative from complying with both co-operatives laws.

Subsection (2) provides that an exemption may only be given if the Registrar considers it appropriate having regard to the contents of the corresponding co-operatives law in the jurisdiction in which the co-operative is registered.

Subsection (3) provides that an exemption may be granted unconditionally or subject to conditions.

Clause 140: Section 386 amended

Clause 140 amends section 386 by deleting subsection (a) which refers to an investigation by the Registrar under Part 15 Division 2 or 4 as new more comprehensive provisions have been inserted into the Act dealing with investigations and wind up in relation to participating co-operatives. References to 'foreign co-operative' have been replaced with 'participating co-operative' reflecting changes in terminology in the Act.

Clause 141: Section 387 amended

Section 387 applies parts of the Corporations Act to the wind up of a participating co-operative. Clause 141 amends the section by changing the reference to 'Schedule 6' to 'Schedule 6 Division 2' to reflect the restructure of the Schedule into two Divisions. References to 'foreign co-operative' have been replaced with 'participating co-operative' reflecting changes in terminology in the Act.

Clause 142: Section 388 amended

Clause 142 amends section 388 by replacing references to 'co-operative' and 'foreign co-operative' in the heading and the section with 'participating co-operative' reflecting changes in terminology in the Act.

Clause 143: Part 14 Division 5 heading replaced

Clause 143 amends the heading of Division 5 from 'Mergers and transfers of engagements' to 'Mergers and transfers of engagements affecting participating co-operatives' clarifying the fact that it applies only to mergers and transfers of engagements of participating co-operatives.

Clause 144: Section 389 amended

Clause 144 amends section 389 by inserting definitions of 'assets' and 'liabilities' and 'State co-operative' for the purposes of this Division (these have been moved from section 396) and aligning the terminology used in the existing definition of 'appropriate Registrar' with that used elsewhere in the Act.

Clause 145: Section 390 amended

Clause 145 deletes section 390(2). This section is no longer required as the Act will not make any provision for 'non-participating co-operatives'.

Clause 146: Section 391 amended

Clause 146 amends section 391 by deleting section 391(2). The section is no longer required as the Act will not make provision for 'non-participating co-operatives'. Section 391(3)(b) is also amended by removing the qualification limiting the operation of the section to participating co-operatives, as all mergers or transfers of engagements dealt with under this section will now affect participating co-operatives only.

Clause 147: Section 392 amended

Clause 147 amends section 392 by replacing references to 'foreign co-operative' in the section with 'participating co-operative' reflecting changes in terminology in the Act. Subclause (2) also replaces a reference in section 392(3)(f) to 'co-operatives law of the participating State' with 'corresponding co-operatives law of the participating jurisdiction' to reflect changes in terminology.

Clause 148: Section 393 amended

Clause 148 amends the terminology in the section required as a result of the inclusion of a definition of 'participating Registrar' in section 4. Section 393(2)(b) is deleted, as it is not required as the Act will no longer make provision for 'non-participating co-operatives'.

Clause 149: Section 394 amended

Clause 149 amends section 394 by deleting subsections 1(d) and (e) and inserting a new subsection 1(d) reflecting the fact that the Act will no longer make provision for non-participating co-operatives. Terminology in sections 394(2) and 394(4) has also been altered to reflect changes in terminology in relation to corresponding co-operatives legislation.

Clause 150: Section 395 amended

Clause 150 amends section 395 by deleting subsections 1(d) and (e) reflecting the fact that the Act will no longer make provision for non-participating co-operatives. Terminology in section 395(2) has also been altered to reflect changes in terminology in relation to corresponding co-operatives legislation.

Clause 151: Section 396 amended

Clause 151 deletes definitions of 'assets' and 'liabilities' which have been moved to section 389.

Clause 152: Part 15 Division 1A inserted

Clause 152 inserts Division 1A with the heading 'Examining a person about a co-operative'.

Section 398A is also inserted relating to 'Application of Corporations Act: court-directed examinations'. This section applies Part 5.9 Division 1 of the Corporations Act to the court directed examination of a co-operative, and enables the court to obtain information about the examinable affairs of a co-operative.

Clause 153: Part 15 Division 1 heading replaced

Clause 153 replaces the heading of the Division 'Supervision and protection' with a new heading 'Supervision and inspection' to reflect the fact that parts of the Division deal with powers to conduct inspections.

Clause 154: Section 398 amended

Clause 154 deletes the definition of 'chief executive officer (DOCEP)' as references to DOCEP have been removed and replaced by 'the department'. A definition of 'department' is now in section 4. The definition of 'relevant document' is amended to reflect the replacement of the term 'records' with 'books' in the Act.

Clause 155: Section 399 amended

Clause 155 replaces references to 'co-operative' and 'foreign co-operative' in the heading and the section with 'participating co-operative' to reflect changes in terminology in the Act. Reference to this 'Part' has been changed to 'Division' as a result of the revision of the structure of this Part.

Clause 156: Section 400 amended

Clause 156 replaces references in the section to 'DOCEP' with 'of the department' to reflect the renaming of the Department of Commerce and a change in drafting convention.

Clause 157: Section 412 amended

Section 412 deals with the grounds and process for the issue of a warrant. Clause 157 deletes subsection (4), which describes the matters which must be established to the satisfaction of the magistrate before they may issue the warrant, and replaces it with a new subsection that is consistent with the equivalent provision in the CNL. This provision allows a magistrate to issue a warrant only if satisfied there are reasonable grounds:

- (a) for suspecting the affairs or activities of a co-operative are being managed or conducted at the place; or
- (b) for suspecting there are relevant documents at the place; or
- (c) for suspecting there is a particular thing or activity that may provide evidence of an offence against the Act or that thing or activity is at the place, or may be at the place, within the next 7 days.

Consistent with the CNL and other legislation administered by the Department of Commerce, section 412(5)(b) will be amended to provide that the warrant must state the suspected offence (if any) for which the warrant was issued, rather than the offence.

Clause 158: Section 415 amended

Clause 158 amends section 415 by replacing the current penalty for failure to give reasonable help in the event of a search of a fine of \$12 000 or imprisonment for one year with a new fine of \$2 000. The change is consistent with the CNL and reflects the broader range of circumstances in which an inspector may conduct a search.

Clause 159: Section 419 amended

Clause 159 amends section 419(5) by replacing the current penalty in the case of a failure to provide a name and address during a search of a fine of \$12 000 or imprisonment for one year with a new fine of \$2 000. This change is consistent with the CNL and reflects the broader range of circumstances in which an inspector may conduct a search.

Clause 160: Section 420 amended

Clause 160 amends section 420(1) by replacing the penalty for providing false or misleading information to an inspector, which is currently a fine of \$12 000 or imprisonment for one year, with a new penalty of a fine of \$12 000, imprisonment for one year, or both. This change is consistent with the penalty that applies under the CNL.

Clause 161: Section 421 amended

Clause 161 amends section 421(2) by replacing the penalty for refusing to provide a document that the person is required by the Act to hold or keep, which is currently a fine of \$12 000 or imprisonment for one year, with a new penalty of a fine of \$12 000, imprisonment for one year, or both. This change is consistent with the penalty that applies under the CNL.

Clause 162: Section 422 amended

Clause 162 amends section 422(1) by replacing the penalty for providing false or misleading documents to an inspector, which is currently a fine of \$12 000 or imprisonment for one year, with a new penalty of a fine of \$12 000, imprisonment for one year, or both. This change is consistent with the penalty that applies under the CNL.

Clause 163: Section 423 amended

Clause 163 amends section 423(2) by replacing the penalty for obstructing an inspector, which is currently a fine of \$12 000 or imprisonment for one year, with a new penalty of a fine of \$12 000, imprisonment for one year, or both. This change is consistent with the penalty that applies under the CNL.

Clause 164: Section 427 amended

Clause 164 replaces references in the section to 'DOCEP' with 'of the department' to reflect the renaming of the Department of Commerce and a change in drafting convention.

Clause 165: Section 431 amended

Clause 165 amends section 431(1) by replacing the penalty for offences by an involved person, which is currently a fine of \$24 000 and imprisonment for two years, with a new penalty of a fine of \$24 000, imprisonment for two years, or both. This change is consistent with the penalty applying under the CNL.

Clause 166: Section 432 amended

Clause 166 amends section 432 by replacing the penalty for offences relating to documents, which is currently a fine of \$12 000 and imprisonment for one year, with a new penalty of a fine of \$12 000, or imprisonment for one year, or both. This change is consistent with the penalty applying under the CNL.

Clause 167: Section 438 replaced

Clause 167 deletes section 438 which deals with falsification of books, and replaces it with a new section which modernises the provision by providing for the situation where documents are stored in electronic form. It also expands the coverage of the section to prohibit destruction or concealment of books in addition to the making of false entries.

Subsection (1) provides that an officer, employee or member (or any former officer, employee or member) who engages in conduct that results in the concealment, destruction, mutilation or falsification of any securities of or belonging to the co-operative; books affecting or relating to the affairs of the co-operative; or any record required to be sent, kept or delivered under the Act is guilty of an offence.

Subsection (2) provides that where a matter used or intended to be used in connection with the keeping of books is stored in an illegible form by means of a mechanical device, an electronic device or any other device, a person who:

- (a) records or stores by means of that device matter that the person knows to be false or misleading in a material particular; or
- (b) engages in conduct that results in the destruction, removal or falsification of matter that is recorded or stored by means of that device, or has been prepared for the purpose of being recorded or stored, or for use in compiling or recovering other matter to be recorded or stored by means of that device; or
- (c) having a duty to record or store matter by means of that device, fails to record or store matter by means of that device-
 - (i) with intent to falsify any entry made or intended to be compiled, wholly or in part, from matter so recorded or stored; or
 - (ii) knowing that the failure so to record or store the matter will render false or misleading in a material particular other matter so recorded or stored,

is guilty of an offence. A fine of \$10 000 or imprisonment for 2 years or both applies.

Subsection (3) provides that it is a defence to a charge arising under subsection (1) or subsection (2)(b) if the defendant proves that the defendant acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

Clause 168: Section 449 amended

Section 449 empowers the Registrar to grant an extension or abridgement of time for doing anything required by the Act. Clause 168 amends section 449 by extending the operation of that section to also apply to participating co-operatives.

Clause 169: Section 452 amended

Clause 169 deletes the definition of 'department' from section 452, as a definition is now included in section 4.

Clause 170: Section 454 amended

Clause 170 removes the requirement for the Registrar to keep a register of foreign co-operatives.

Clause 171: Part 16 Division 4 deleted

Clause 171 deletes Part 16 Division 4 which deals with enforceable undertakings. New provisions in relation to undertakings consistent with those in the CNL have instead been inserted in Part 17.

Clause 172: Part 17 heading replaced

Clause 172 replaces the heading of Part 17 'Offences and proceedings' with the new heading 'Legal proceedings and other matters' to reflect the fact that matters other than proceedings for offences, such as undertakings and civil penalty provisions are now included in this Part. New Part 17 has been divided into three divisions, and this clause also inserts a new heading for Division 1 titled 'Offences, enforcement and remedies' to reflect the contents of that Division.

Clause 173: Section 474 deleted

Section 474 provides that if a co-operative breaches any provision of the Act an officer of the co-operative may also be taken to have contravened the same provision. Clause 173 deletes that provision, as the Act now contains specific provisions covering the duties and responsibilities of officers. As a result, section 474 is no longer required.

Clause 174: Section 476 amended

Section 476 deals with secrecy. Clause 174 amends subsections (4) and (5) by increasing the range of circumstances in which information can be divulged by a person engaged in the administration of the Act. Subsection 476(4) is amended to include for the purposes of any proceedings under the Act or a corresponding co-operatives law, or of an inquiry authorised by legislation of this State or of another jurisdiction, or under a requirement imposed under legislation of this State or of another jurisdiction. Subsection 476(5) is amended to permit informed to be divulged to the Registrar or a participating Registrar. These amendments reflect new reciprocal arrangements for participating co-operatives in the CNL.

Clause 175: Section 478 amended

Section 478 provides for a further offence where there is a continuing failure to do a required act. Clause 174 replaces the current penalty, which is calculated by use of a formula that takes into account the original penalty and the number of days in the further offence period, and replaces it with a penalty worked out by multiplying \$50 by the number of days in the further offence period (being the period for which an offence continues after the person has been convicted of an offence).

Clause 176: Section 480A inserted

Clause 176 inserts section 480A, titled 'Order against person concerned with co-operative', which provides for the Supreme Court to make an order where a person is guilty of fraud, negligence, default, breach of trust or breach of duty in relation to a co-operative which has resulted, or is likely to result, in damage to the co-operative.

Subsection 480A(1) provides that an application may only be made by an 'eligible applicant' in relation to a co-operative. An eligible applicant means the Registrar; or a liquidator or provisional liquidator; or an administrator of a co-operative; or an administrator of a deed executed by the co-operative under the Corporations Act as applying under section 323 ('Application of Corporations Act to administration of co-operative'); or a person authorised in writing by the Registrar to make an application.

Subsection 480A(2) provides that, subject to subsection (3), where the Supreme Court is satisfied that a person is guilty of fraud, negligence, default, breach of trust or breach of duty and the co-operative has suffered, or is likely to suffer, loss or damage as a result, the Supreme Court may make such orders as it thinks appropriate against or in relation to the person (including either or both of the orders specified in subsection (4)).

Subsection 480A(3) provides that the Supreme Court must not make an order against a person under subsection (2) unless the court has given the person the opportunity to give evidence, call witnesses to give evidence, bring other evidence before the court and to employ a legal practitioner to represent the person in the proceedings.

Subsection 480A(4) provides that the orders that may be made under subsection (2) against a person include an order directing the person directing a person to pay money or transfer property to the co-operative; and an order directing the person to pay to the co-operative the amount of the loss or damage.

Subsection 480A(5) provides that nothing in the section prevents any person from instituting any other proceedings in relation to the matters.

Clause 177: Section 481 replaced

Clause 177 deletes section 481 dealing with commencement of proceedings, and inserts section 481A, 481B, 481C, 481D, 481E, 481F, 481G, 481H, 481I and 481. The new provisions dealing with undertakings are consistent with the provisions that apply under the CNL:

- Section 481A, titled 'Undertakings', provides that the Registrar may accept a written undertaking with regard to future behaviour where the Registrar has reasonable grounds to believe that there has been a contravention of the Act.

The Registrar may accept an undertaking that the person will either refrain from conduct that is a contravention of the Act or will take action to prevent or remedy a contravention. Subsection (3) provides that the person may withdraw or vary the undertaking at any time with the consent of the Registrar. Subsection (4) provides that the consent of the Registrar is required even if the terms of the undertaking purport to authorise withdrawal or variation without consent. Subsection (5) provides that where an undertaking is accepted, the Registrar must not proceed against the person in respect of the conduct that is the subject of the undertaking unless it appears to the Registrar that the person has contravened the undertaking. Subsection (6) provides that subsection (5) does not apply to an application by the Registrar for an order under section 481C.

- Section 481B, titled ‘Offence of contravention of undertaking’, provides that it is an offence to contravene an undertaking given to the Registrar. A fine of \$6 000 applies.
- Section 481C, titled ‘Enforcement order on application with consent of person giving undertaking’, provides that the Registrar may, with the consent of the person who gave the undertaking, apply to the Supreme Court for an order directing the person to comply with the undertaking. The Supreme Court may make an order directing the person to comply with the undertaking. This section does not limit the operation of section 481D with regard to other options for enforcement.
- Section 481D, ‘Enforcement orders after contravention of undertaking’, provides that, if the Supreme Court is satisfied, on the application of the Registrar, that a person has contravened an undertaking, the Supreme Court may make any or all of the following orders:
 - (a) an order prohibiting the person from engaging in specified conduct;
 - (b) an order directing the person to take specified action to comply with the undertaking;
 - (c) an order directing the person to pay to the Registrar an amount up to the amount of any financial benefit the person has obtained directly or indirectly and that is reasonably attributable to the contravention of the undertaking;
 - (d) any order that the court considers appropriate directing the person to compensate any other person who has suffered loss, injury or damage as a result of the contravention of the undertaking;
 - (e) any other order the court considers appropriate.

Subsection (2) provides that the Supreme Court may make an interim order under subsection (1)(a) pending final determination of the application.

Subsection (3) provides that the Supreme Court may, on application of the Registrar or person in respect of whom the order was made, vary or discharge an order under subsection (1)(a).

Subsection (4) provides that an order under subsection (1)(a) may be made subject to such conditions as the Supreme Court thinks appropriate.

Subsection (5) provides that the Supreme Court must not make an order under this section (other than an interim order) unless satisfied on the balance of probabilities that proper grounds for the order have been established.

Subsection (6) provides that if a co-operative or other corporation is found to have contravened an undertaking, each officer of the co-operative or other corporation is taken to have so breached the undertaking if the officer knowingly authorised or permitted the breach, and the court may make, against the officer, all or any of the orders specified in subsection (1) that the court thinks appropriate.

- Section 481E, titled 'Copy of undertaking', provides that the Registrar must give a copy of an undertaking under section 481A to the person who gave the undertaking.
- Section 481F, titled 'Registration of undertakings', provides that the Registrar must register each undertaking in the register of co-operatives.

Subsection (2) provides that the register of co-operatives must include the name and address of the person who gave the undertaking; the date of the undertaking; and a copy of the undertaking.

Subsection (3) provides that the Registrar may withhold personal details of an individual not involved in a contravention or possible contravention to which the undertaking relates; or the information is commercial-in-confidence; or disclosure of the information would be against the public interest.

Subsection (4) provides that if information is withheld under this section from inclusion in the register of co-operatives, the register must include a statement reflecting that information has been withheld and the grounds on which it has been withheld.

Subsection (5) provides that, for the purposes of this section, information is 'commercial-in-confidence' if its disclosure would place a person at a substantial commercial disadvantage in relation to present or potential contractual negotiations or arrangements, or it is of a kind prescribed by the regulations as being commercial-in-confidence.

- Section 481G, titled ‘Double jeopardy’, provides that a person is not liable to be punished for an offence under the Act if the conduct in question also constitutes an offence under a corresponding co-operatives law of a participating jurisdiction and the person has been punished for the offence under the corresponding co-operatives law of the participating jurisdiction.
- Section 481H, titled ‘Time limit for starting proceedings for offence’, provides for when proceedings for an offence under the Act can be instituted.

Subsection (1) provides that in this section the term ‘relevant day’ means the day on which the *Co-operatives Amendment Act 2015* section 177 comes into operation.

Subsection (2) provides that proceedings for an offence under this Act that is alleged to have been committed on or after the relevant day can be instituted no later than 5 years after the alleged commission of the offence.

Subsection (3) provides a grandfathering provision to retain a three year limitation period where the offence is committed before the relevant day.

- Section 481I, titled ‘Authorisation to start proceedings for offence’, provides that proceedings for an offence under this Act may be started only by the Registrar or a person authorised in writing by the Registrar.
- Section 481, titled ‘Proceedings for recovery of fine or penalty imposed by rules’, provides that proceedings for the recovery of any fine or penalty imposed by the rules of a co-operative may only be instituted by the co-operative.

Clause 178: Part 17 Divisions 2 and 3 inserted

Division 2

Clause 178 inserts a new Division 2 titled ‘Civil consequences of contravening civil penalty provisions’. The Division includes 13 new provisions dealing with prescribing offences which are civil penalty provisions and outlines the consequences of contravention of those civil penalty provisions.

- Section 482A defines the terms ‘civil penalty provision’, ‘compensation order’ and ‘pecuniary penalty order’ which are used in this Division.
- Section 482B identifies those provisions of the Act and those applied provisions of the Corporations Act that are civil penalty provisions for the purposes of the Division, the provisions relate to:
 - duties of directors and officers – such as care and diligence, good faith, use of position and use of information;

- obligations relating to the management and administration of co-operatives – including the requirement to follow directives of members or the registrar, reporting requirements and lodging of returns and reports with the Registrar;
- provisions relating to debentures – concerning continuous disclosure obligations and prohibitions on insider trading; and
- the duty of directors to prevent insolvent trading.

The section requires the Supreme Court to make a declaration of contravention where the sections identified are contravened by a person. A declaration must specify the court that made the declaration, the civil penalty provision that was contravened, the person who contravened the provision and the conduct that constituted the contravention.

- Section 482C provides that, where a declaration is made, the declaration will be conclusive evidence of the contravention, and the circumstances of the contravention as described in the declaration.
- Section 482D provides that where a declaration has been made and a co-operative has suffered material damage as a result of the contravention or has been materially prejudiced in its ability to pay creditors or the contravention is serious, the Supreme Court may order the person to pay a pecuniary penalty of up to \$200 000. The penalty is a civil debt payable to the Registrar on behalf of the State and the Registrar and the State may enforce the order as if it were a judgment debt.
- Section 482E provides that where a person has contravened a civil penalty provision and a co-operative has suffered damage as a result of the contravention the Supreme Court may order the person to pay damages to the co-operative. There is no requirement for a declaration of contravention to have been made under section 482B or a person to have been convicted of an offence. Subsection (4) provides that, for the purposes of determining damage suffered by the co-operative, any profits made by any person as a result of the contravention are to be included. Subsection (5) provides that a compensation order may be enforced as if it were a judgment of the Supreme Court.
- Section 482F provides that the Registrar may apply for a declaration of contravention, a pecuniary penalty order or a compensation order and a co-operative may apply for a compensation order. In the case of an application for a declaration or pecuniary penalty order by the Registrar, the co-operative may intervene and is entitled to be heard. Subsection (5) provides that no person may apply for a declaration of contravention, a pecuniary penalty order or a compensation order unless permitted by this section. An application for a compensation order may be made whether or not a declaration of contravention has been made.

- Section 482G provides that proceedings for a declaration of contravention, a pecuniary penalty order or a compensation order must be started no later than 6 years after the contravention.
- Section 482H provides that the Supreme Court must apply the rules of evidences and procedure applying to civil matters when hearing proceedings for a declaration or order.
- Section 482I provides that the Supreme Court must not make a declaration of contravention or a pecuniary penalty order if the person has been convicted of an offence in respect of the same conduct.
- Section 482J provides that any proceedings under this Division will be stayed if criminal proceedings are commenced in respect of the same conduct, but may be resumed if the person is not subsequently convicted of the criminal offence. If the person is convicted of the offence, the proceedings for the declaration or order are dismissed.
- Section 482K provides that criminal proceedings may be instituted in respect of the same conduct, regardless of the fact that the conduct has been the basis of a declaration or order under this Division, or of a disqualification from managing co-operatives under Part 9 Division 2A.
- Section 482L provides that evidence or information given in respect of proceedings under this Division is not admissible in criminal proceeding against a person in respect of the same conduct, unless the criminal proceedings are in respect of falsity of the evidence or information in question.
- Section 482M provides for relief from liability in respect of proceedings for a compensation order where the person has acted honestly, and having regard to the circumstances ought fairly to be excused for the contravention.

Subsection (1) defines the range of proceedings for which an application for relief will be available.

Subsection (3) describes the matters to be taken into account in considering whether a person ought fairly to be excused for a contravention of applied section 588G of the Corporations Act (the duty to prevent insolvent trading), these include the action taken by the person with respect to appointment of an administrator, when the action was taken and the results.

A person who believes that proceedings will or may be begun against them may apply to the Supreme Court for relief and the Court may grant relief as if the eligible proceedings had begun in the Court. The relief may be granted whether or not proceedings have begun, and whether or not the matter is being tried by a judge with a jury. Subsection (7) provides that nothing in this section limits the power to grant relief in section 482N.

Division 3

Division 3 is titled 'Miscellaneous' and deals with miscellaneous matters connected with court proceedings.

- Section 482N provides that the Supreme Court may relieve a person from liability in any proceedings for negligence, default, breach of trust or breach of duty where the person has acted honestly and, having regard to the circumstances ought fairly to be excused. The Supreme Court may relieve the person of liability wholly or partly on whatever terms it thinks fit.

Subsection (2) provides that where a person has reason to apprehend that a claim will or might be made against them, the person may apply to the Supreme Court for relief and the Court may grant relief as if the proceedings for negligence, default, breach of trust or breach of duty had been brought in the Court.

Subsection (3) provides that relief may be granted whether or not the matter is being tried by a judge with a jury. If the matter is being heard by a judge with a jury, and the judge is satisfied that the defendant ought to be relieved wholly or partly from liability, the judge may withdraw the case in whole or in part from the jury and direct judgment to be entered for the defendant on such terms as the judge thinks proper.

Section (4) provides that relief may be granted to an officer or employee of a co-operative, an auditor, an expert advisor or a receiver, manager or liquidator.

- Section 482O provides that a procedure required by the Act or the rules of a co-operative is not invalid as a result of procedural irregularity unless the Court is of the opinion that it has caused or may cause substantial injustice that cannot be remedied by any other order, and declares the proceeding to be invalid.

Accidental failure to provide notice, non-receipt of notice or inability of a person to access notice of a meeting will not invalidate the meeting unless the Court makes a declaration to that effect on the application of a person concerned who was entitled to attend the meeting.

Subsection (5) provides that if a member does not have reasonable opportunity to participate in a meeting of members or part of a meeting of members held in two or more venues the meeting will only be invalid if the Supreme Court is of the opinion that a substantial injustice has been caused or may be caused and the injustice cannot be remedied by any other order, and the Supreme Court declares the meeting (or part of it) invalid.

Subsection (6) provides that the Supreme Court may also make orders declaring an act, matter or thing is not invalid, directing rectification of a register, relieving a person of civil liability for an irregularity, or extending the period for doing any act, matter or thing, and may make consequential and ancillary orders.

Subsection (7) provides that an order may be made declaring that an act matter or thing is not invalid or relieving a person from civil liability in respect of that Act notwithstanding that the contravention resulted in the commission of an offence.

Subsection (8) provides that the Supreme Court must not make an order under this section unless it is satisfied that:

- In the case of an order under subsection (6)(a) (an order declaring that an act, matter or thing is not invalid) that the act matter or thing is essentially of a procedural nature, that the person/s involved in the contravention acted honestly and that it is just an equitable that the order be made;
 - In the case of an order under subsection (6)(c) (relieving a person of liability in respect of a contravention) that the person subject to the civil liability concerned acted honestly; and
 - In every case, that no substantial injustice has been or is likely to be caused to any person.
- Section 482P provides that civil proceedings under the Act are not to be stayed merely because the proceeding arises out of, or discloses, the commission of an offence.
 - Section 482Q provides that in proceedings under the Act, apart from proceedings for an offence, the standard of proof to be applied to establish a matter is on the balance of probabilities.

Clause 179: Section 482 amended

Clause 179 amends section 482 by replacing reference to section 315 of the Act with 'the provisions of the Corporations Act as applying under section 316'. This amendment is required as a result of amendments to those sections.

Clause 180: Section 483 amended

Section 483 provides for service of documents on a co-operative. Clause 180 deletes subsections (1), (2) and (3) and inserts new sections 1 and 2 which provide for service on a co-operative or a participating co-operative by:

- posting to the registered office;
- leaving the document at the registered office with a person who appears to have reached the age of 16;
- where a liquidator or administrator has been appointed, posting to the liquidator or administrator or leaving documents at the registered address notified to ASIC or the Registrar;

- where a liquidator or administrator has been appointed by the Registrar, leaving documents at the registered address notified to ASIC,

Subsection (2) provides that, for the purpose of service by post, a document is properly addressed if it is addressed to the registered office of the co-operative or participating co-operative.

Subclause (2) amends subsection (4) by replacing the term ‘foreign co-operative’ with ‘participating co-operative’ reflecting the change in terminology in the Act.

Clause 181: Section 484 amended

Section 484 outlines requirements for service of notices on a member of a co-operative. Clause 181 amends the section by providing that it does not apply to service of annual financial reports on members, as specific requirements apply to service of annual reports under Part 10A (section 244V).

Clause 182: Section 485 amended

Section 485 provides for reciprocal arrangements in relation to exchange of documents or information between jurisdictions. Clause 182 amends terminology in relation to participating jurisdictions to reflect changes in the Act.

Clause 183: Section 487 replaced

Clause 183 deletes section 487, which deals with the ability to place conditions on exemptions given under nominated sections of the Act. This provision is no longer required as the ability to include conditions is dealt with in the relevant sections instead.

It is replaced by a new section 487 which deals with the inclusion of statements by a person in disclosure statements and provides that the statement can only be included with the consent of the person who made it. Consent must be noted in the disclosure statement, and may be withdrawn.

Clause 184: Section 489A inserted

Clause 184 inserts a new section 489A which provides that, unless otherwise provided, an approval by the Registrar under the Act is to be given in writing.

Clause 185: Schedule 3 clause 1 amended

Clause 185 amends the definition of ‘co-operative’ in Schedule 3 clause 1 to reflect the change in arrangements for dealing with foreign co-operatives registered before the commencement of section 130 of the *Co-operatives Amendment Act 2015*.

Clause 186: Schedule 3 clause 32 amended

Clause 186 amends the definition of ‘officer’ in Schedule 3 in respect of a foreign co-operative to reflect the change in arrangements for dealing with foreign co-operatives registered before the commencement of section 130 of the *Co-operatives Amendment Act 2015*.

Clause 187: Schedule 3 clause 39 amended

Clause 187 amends the way that the penalty is described in the clause to refer to ‘penalty for this subclause’ to reflect current drafting convention.

Clause 188: Schedule 3 clause 41 amended

Clause 188 amends the way that the penalty is described in the clause to refer to ‘penalty for this subclause’ to reflect current drafting convention.

Clause 189: Schedule 4 clause 1 amended

This schedule deals with powers and obligations of receivers and controllers of the property of co-operatives. Clause 189 amends several definitions in clause 1.

- The definition of ‘co-operative’ is amended to reflect the change in terminology in the Act from ‘foreign co-operative’ to ‘participating co-operative’.
- The definition of ‘officer’ is amended to reflect the change in terminology in the Act from ‘foreign co-operative’ to ‘participating co-operative’.
- The definition of ‘property’ is amended to reflect the fact that in the case of a foreign co-operative registered outside Australia (and treated as a participating co-operative as a result of the operation of section 372) a receiver or controller appointed under this Act will not have control of property outside of Australia.

Clause 190: Schedule 4 clause 20 amended

Clause 190 amends the definition of ‘reporting officer’ in clause 20 to remove the reference to ‘foreign co-operative’ in subclause 20(1)(a) which is no longer required as a result of the amendments, and to replace references to ‘foreign co-operative’ in subclause 20(1)(b) with ‘participating co-operative’ reflecting the change in terminology in the Act.

Clause 191: Schedule 4 clause 22 amended

Clause 191 replaces references to ‘records’ in the heading and in clause 22 with ‘books’ reflecting the change in terminology in the Act.

Clause 192: Schedule 4 clause 23 amended

Clause 192 replaces the reference to 'records' in clause 23(5) with 'books' reflecting the change in terminology in the Act.

Clause 193: Schedule 5 deleted

Schedule 5 lists the provisions of the Act that apply to foreign co-operatives. The application of provisions of the Act to participating co-operatives is now dealt with in the relevant sections of the Act and schedule 5 is deleted.

Clause 194: Schedule 6 amended

Clause 194 amends the heading of Schedule 6 by inserting a reference to the two sections of the Act to which the schedule applies, sections 316 and 387.

Clause 195: Schedule 6 Division 1 inserted

Schedule 6 describes the modifications to Corporations Act provisions applied to the winding up and deregistration of co-operatives.

The Bill amends Schedule 6 by dividing it into two divisions covering locally registered co-operatives and participating co-operatives, as the processes (and modifications required) will be different.

This clause inserts Division 1(1A), which describes the modifications to winding up and deregistration provisions applied to locally registered co-operatives by section 316.

In order to permit Western Australia to determine whether further modifications should be made in the case of future amendments to the Corporations Act, Division 1(1A)(u) provides for additional modifications to be prescribed by the regulations.

Clause 196: Schedule 6 Division 2 heading inserted

This clause inserts a heading for Division 2 which reflects the fact that the contents relate to the modification of provisions applying to participating co-operatives under section 387.

Clause 197: Schedule 6 clause 1 amended

This clause amends the provisions outlining modifications applying to winding up and deregistration provisions under section 387 so that they are tailored to apply in relation to participating co-operatives.

In order to permit Western Australia to determine whether further modifications should be made in the case of future amendments to the Corporations Act, Division 2(1)(n) provides for additional modifications to be prescribed by the regulations.

Clause 198: Various references to ‘co-operative capital unit’ amended

This clause replaces various references to ‘co-operative capital unit’ or ‘co-operative capital units’ in headings and sections of the Act with ‘CCU’ or ‘CCUs’ reflecting a change in terminology in the Act

Clause 199: Various references to ‘foreign co-operative’ amended

Clause 199 replaces various references to ‘foreign co-operative’ in headings and sections of the Act with ‘participating co-operative’ reflecting a change in terminology in the Act.

Clause 200: Various penalties amended

Clause 200 replaces the term ‘Penalty’ in various sections of the Act with ‘Penalty for this subsection’ reflecting a change in drafting convention which requires a penalty provision to attach to a specific subsection within a provision.