Co-operatives National Law – A Tasmanian Perspective

1. Background

A Co-operative is a legal entity owned and run by and for its members. Whether the members are the customers, residents or employees, they have an equal say in what the business does and a share in the profits or benefits. The 28 co-operatives (co-ops) currently registered in Tasmania operate in a range of different areas including housing, taxi services, livestock marketing and the sale of wholefoods.

Currently, co-ops are incorporated and regulated by state legislation. In Tasmania, this is the Co-operatives Act 1999. Presently, there are varying regulatory frameworks in place in each State and this lack of consistency has created barriers and disincentives to operating as a co-op.

In February 2012, the States and Territories signed the Australian Uniform Co-operatives Laws Agreement (AUCLA). This agreement is a commitment by the States and Territories to develop and implement a nationally consistent regulatory regime for co-operatives.

The new legislative regime, called the Co-operatives National Law (CNL), has been developed by the Legislative and Governance Forum on Consumer Affairs (previously known as the Ministerial Council of Consumer Affairs, which consists of Ministers from each State and Territory as well as the Commonwealth and New Zealand, who have responsibilities for fair trading and, consumer protection laws). All States and Territories are working towards passing the relevant legislation by May 2014.

The new CNL will not make any conceptual changes to the nature of a co-operative. In fact, section 10 of the CNL specifically states that the CNL should be interpreted so as to be consistent with the co-operative principles of the International Co-operative Alliance. The new regime will, however, ensure co-operatives are treated comparatively to other forms of incorporated entity such as companies or incorporated associations.

The new legislation and regulations are in the form of “template legislation”. This means that one State or Territory passes the legislation in their jurisdiction with other States and Territories passing a statute that adopts this legislation as the law for their state. Therefore any future amendments only need to be made to the legislation in the original jurisdiction. (The AUCLA also provides for states to opt to pass their own legislation consistent with the template legislation if that state does not want to utilise the template legislation for whatever reason.)

Tasmania intends to use the template legislation and regulations developed under the AUCLA. This will prevent unnecessary delay in drafting our local legislation and will ensure our legislation
remains consistent with other States into the future. The template legislation was passed by NSW in 2012 so any other state can now pass legislation pointing to this template Act. The draft template regulations were released for comment in late 2012 with feedback due by January 7, 2013.

This document refers to the guidelines as they were made available during this consultation period. Please note, there may be changes made to the final version before it is released, in response to feedback received.

To assist Tasmanian based co-operatives to understand how the changes will affect them, a summary of the key elements of the national legislation is provided below.

2. Nationwide Registration
Currently, co-operatives are registered in their State or Territory of origin and are limited to operating in that jurisdiction unless they separately apply for registration in another jurisdiction/s. This requirement for separate registration in each State is time consuming and costly and could deter a group from electing to incorporate as a co-operative.

Under the CNL, a co-operative legally registered in one jurisdiction could operate on a national basis without the need for any further application or registration. This is in line with the rights and obligations of companies under the Corporations Act 2001.

3. A two tiered system – “Small co-ops” and “large co-ops”
The current co-op legislation in Tasmania does not differentiate between co-ops based on their size, membership or assets. Under the new CNL, a two-tiered system will be created, dividing co-operatives into “small co-ops” and “large co-ops”.

Small Co-ops
The definition of ”small co-ops” will be contained in the national regulations. The definition will look at the asset base, revenue, number of memberships/shares issued and staffing numbers when determining whether a co-op is a “small co-op” for the purposes of the legislation. The current draft of the regulations defines a small co-op as;

… a co-operative that did not, during the previous financial year, raise funds from the public issue of securities, and it satisfies at least 2 of the following paragraphs:

(i) the consolidated revenue of the co-operative and the entities it controls (if any) is less than $8 million for the previous financial year;
(ii) the value of the consolidated gross assets and the entities it controls (if any) is less than $4 million at the end of the previous financial year;
(iii) the co-operative and the entities it controls (if any) had fewer than 30 employees at the end of the previous financial year;
- **Reports to members**
A small co-operative will be required to report to its members, however this report will not need to be audited or reviewed. The report will be fairly straightforward and include basic financial information such as income and expenditure and a statement of changes in equity (see ch 3.10 of the draft regulations for more specific details).

Members can demand an audit or review if they control at least 5% of the votes. (section 271 of the Act outlines the process for this)

The Registrar (a similar role to the current Commissioner for Corporate Affairs, see page 4 for further details) can also require that an audit or review be undertaken. (section 272 outlines the powers of the Registrar in this area.)

Small co-ops can still however choose to include additional financial reporting above and beyond those required by the CNL (as identified above) as part of their rules.

- **Annual returns**
Small co-ops will need to provide a brief annual return to the Registrar rather than having to provide full audited annual financial and director’s reports. The contents of this annual return will be set out in the Regulations (see regulation 3.12 in the current draft for more specific details) and will need to include basic information such as confirmation of the details of the co-op, a statement that the co-op is still solvent, the number of members and a statement indicating whether there has been a direction by members requiring any additional financial reports.

Under the new system small co-ops will have greater financial reporting requirements than a small proprietary company under the Corporations Act 2001. Public feedback on the CNL strongly indicated support from the sector to retain this higher level of reporting in order to uphold the co-operative principles of member participation and democracy.

**Large Co-ops**
A large co-op is defined under the CNL simply as any co-op that does not fit into the definition of a small co-op.

- **Financial reporting and audit**
Large co-operatives are required to prepare annual financial and directors’ reports in line with part 3.3 Division 3 of the CNL. This reporting is comparable to the financial reporting requirements of companies under Part 2M.3 of the Corporations Act 2001.

Large co-ops are also required to satisfy audit requirements as contained in the Corporations Act.

- **Reports to members**
Large co-ops have a choice as to how they report to their members. They can either;
  - provide a copy of each of the financial, director’s and audit report to their members, or
- provide a concise report (as defined in Section 284 of the Act). If a concise report is provided, it needs to also state that a member can still request a copy of the full reports if they wish. These reports must be provided to the member free of charge.

4. Other provisions regarding management of the co-operative

The CNL includes a variety of other provisions relating to the eligibility of an individual to be a director (ch 3 div 2) and the duties of directors, the secretary and other officers (ch 3, div 4 and 5). These provisions are largely aimed at bringing the obligations of officers of co-operatives in line with those of officers of companies under the Corporations Act 2001.

5. National Regulations and Model Rules

The National Regulations are currently in draft form and provide a range of details to support the CNL. The public consultation period for the draft regulations ended on 7 January however as of 25 February 2013 there has not been any information provided to regulators as to if and how the regulations may change in response to stakeholder feedback.

The regulations define “small co-operatives”, detail the required content of financial reports and outline the responsibilities of the secretary of a co-operative. There are also requirements regarding fundraising which bring co-operatives in line with corporations law.

The majority of the regulations are dedicated to setting out model rules. There are different model rules for:

- distributing co-ops with share capital,
- distributing co-ops without share capital, and
- non-distributing co-ops.

The model rules have been included to provide an example of what a suitable set of rules might look like. A co-operative may wish to avoid a lengthy process in drafting its own rules and simply fill in the details and adopt the appropriate model rules.

On the other hand, a different co-operative may wish to add further safeguards, reporting or requirements to the Model Rules to ensure members’ expectations are met. Either approach is fine, provided the final rules include all the requirements of Schedule 1 of the CNL. The Registrar then assesses and approves a co-op’s rules as part of the registration process.

The regulations also provide (sections 65 and 66) that a co-op can adopt the model rules–

- as they stand at the time of the co-op’s decision, or
- as “in force from time to time” –ie if the model rules are changed by amendment to the regulations, the co-op’s model rules are automatically changed.
It should be remembered that co-ops will retain the ability to include requirements in their rules that are greater or more stringent than those in the model rules. The model rules have been drafted simply to demonstrate how the minimum requirements applying to a co-operative can be met.

6. Registrar of Co-ops

The new CNL provides for the creation of the role of Registrar of Co-operatives in each State.

This role would be undertaken by the Commissioner for Corporate Affairs in Tasmania (a position currently held by the Director of Consumer Affairs and Fair Trading) and is similar to the role the Commissioner currently plays under the Cooperatives Act 1999.

The Registrar has a range of administrative responsibilities under the Act including the assessment and approval of the rules of the co-op and the subsequent registration and ongoing regulation of the co-op.

7. Co-operative Capital Units

Cooperative Capital Units (CCUs) were first introduced in New South Wales in the 1990s as a more flexible means for co-operatives to raise funds from external sources. The concept has since also been adopted by Victoria and Western Australia. CCUs can be issued to non-members and the terms of issue can be tailored to best suit the financial circumstances of the co-operatives.

For many co-operatives, CCUs will be of little interest however for a small number this may create a valuable tool in managing their business. To date in NSW, only 1 or 2% of registered co-ops are utilising CCUs.

Some more detailed information about how CCUs have been used in NSW is provided in the following paper, published by the NSW Office of Fair Trading.


8. Regulations for Local Matters

As part of the transition to the CNL, some minor additional regulations will have to be made to provide for Tasmania-specific matters such as fees and court procedures.

Consumer Affairs and Fair Trading is taking the opportunity to review the fees currently charged to co-operatives for various transactions to ensure they are no higher than is required to cover costs borne by the office and are comparable to those in place for incorporated associations.
9. What will a co-op need to do when the new law is passed?

Co-ops that are currently registered in Tasmania will be deemed to be registered under the new system. They will not need to re-register.

However, existing co-ops will need to assess whether their current reporting is in line with the new reporting requirements. If an existing co-op is a small co-op for the purposes of the new law, it may be able to reduce its annual reporting (unless its own rules state otherwise).

Existing co-ops will also need to ensure that their rules include all prescribed matters included in Schedule 1 of the CNL. However, the new Schedule 1 is very similar to the existing provisions in the Tasmanian Co-operatives Act 1999, so co-ops that are compliant with this Act should have little, if anything to change. Co-ops with limited resources may consider adopting the appropriate new model rules as a way of ensuring ongoing compliance.

Further information on co-operatives under the new CNL will be available on the Consumer Affairs website closer to the date of commencement.

Any group seeking to be registered as a co-op will need to comply with the new requirements. The process itself will still involve an application through Consumer Affairs and Fair Trading. Information about the new process and the required forms will be available on the website following commencement of the CNL.

10. Further Information

The Office of Consumer Affairs and Fair Trading is managing the transition to the CNL in Tasmania.

As part of this process we would welcome feedback from co-operatives registered in Tasmania as to your views on the CNL and in particular any costs or benefits that co-ops might incur as a result of the change.

Feedback can be provided by post, email or fax to:

- Post: GPO Box 1244, Hobart 7001
- Email: Felicity.Poulter@justice.tas.gov.au
- Fax: 6233 4882

The consultation period will end on 13 March 2013.

Alternatively, if you would like to discuss the proposed changes, clarify how they may affect your co-op, or meet with CAFT to provide your feedback, please contact Felicity Poulter on 6233 8051.

Further information about the CNL and the draft regulations is available on the NSW government website at: