



New South Wales

Co-operatives Amendment Act 1995 No 41

Contents

	Page
1 Name of Act	2
2 Commencement	2
3 Amendment of Co-operatives Act 1992 No 18	2
 Schedule 1 Amendments	 3



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Co-operatives Amendment Act 1995 No 41

Act No 41, 1995

An Act to amend the *Co-operatives Act 1992* to make further provision with respect to the application of provisions of the *Corporations Law* to co-operatives, the obtaining of financial accommodation by co-operatives, the management and administration of co-operatives and the functions of the Registrar; and for other purposes. [Assented to 26 October 1995]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Co-operatives Amendment Act 1995*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Amendment of Co-operatives Act 1992 No 18

The *Co-operatives Act 1992* is amended as set out in Schedule 1.

Schedule 1 Amendments

(Section 3)

[1] Section 5 Definitions

Section 5 (1)

Insert in alphabetical order:

deed of arrangement means a deed of arrangement executed under Part 5.3A of the *Corporations Law* as applying under this Act or such a deed as varied and in force from time to time.

[2] Section 5 (1)

Omit paragraphs (c)–(f) from the definition of *officer*.

Insert instead:

- (c) a receiver and manager, appointed under a power contained in an instrument, of property of the co-operative, or
- (d) an administrator of a deed of arrangement executed by the co-operative, or
- (e) a liquidator or provisional liquidator appointed in a voluntary winding up of the co-operative, or
- (f) an administrator of the co-operative appointed under Part 5.3A of the *Corporations Law* as applying under this Act or under Division 6 of Part 12 of this Act, or

[3] Section 5 (1)

Omit the definition of *subsidiary*. Insert instead:

subsidiary has the same meaning as in the *Corporations Law*.

[4] Section 5 (4)

Insert after section 5 (3):

- (4) Notes included in this Act do not form part of this Act.

[5] Section 7 Subsidiaries

Omit the section.

[6] Section 12

Omit the section. Insert instead:

12 Registration

- (1) When an application is made for registration of a co-operative, the Registrar must register the co-operative if satisfied that the basic requirements for registration of the co-operative have been met.
- (2) The following are the basic requirements for registration of a co-operative:
 - (a) the co-operative must be designed and intended to operate in accordance with co-operative principles,
 - (b) the co-operative must be designed and intended to operate on the basis of the equality of its members and self help, and for the purpose of promoting the socio-economic well being of its members in a democratic manner,
 - (c) the proposed rules of the co-operative must not be inconsistent with this Act and must be such as may reasonably be approved,
 - (d) the requirements of this Act and the regulations must have been complied with in respect of the proposed co-operative and compliance must be likely to continue,
 - (e) there must be no reasonable cause for refusing registration of the co-operative.

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- (3) If the Registrar is not satisfied that the basic requirements for registration of the co-operative have been met, the Registrar is to:
- (a) refuse registration of the co-operative, or
 - (b) refer the application to the Council for its recommendation.
- (4) If the Registrar refuses registration of the co-operative, the applicants for registration may request the Registrar to refer the application to the Council and the Registrar must comply with such a request. A request made by or on behalf of a majority of the persons elected as referred to in section 8 (2) (c) (the persons to be proposed as the first directors of the co-operative) is taken to have been made by the applicants for registration.
- (5) If the application is referred to the Council, the Council must either recommend registration or recommend refusal of registration but may only recommend refusal if of the opinion that:
- (a) the basic requirements for registration of the co-operative have not been met, or
 - (b) the proposed co-operative would not be a genuine co-operative, or
 - (c) the proposed co-operative is not designed or intended to serve fairly the interests of its members and prospective members.
- (6) The Registrar is required to comply with the Council's recommendation.

[7] Section 33 Legal capacity

Insert "and the regulations" after "this Act" in section 33 (2) (a).

[8] Section 44 Application of Corporations Law

Section 44 (2) (a)

Omit the paragraph. Insert instead:

- (a) relate to any matter that the regulations provide is not to be excluded from the operation of the *Corporations Law*, or

[9] Section 44 (2) (g)

Insert after section 44 (2) (f):

, or

- (g) relate to securities of a co-operative (other than shares in, debentures of, deposits with, or CCU's issued by a co-operative).

[10] Section 44 (3)–(6)

Omit the subsections. Insert instead:

- (3) To remove doubt it is declared that subsection (1) does not operate to exclude the operation of Parts 7.11 (Conduct in relation to securities) and 7.12 (Offering securities for subscription or purchase) of the *Corporations Law* (except in relation to shares in, debentures of, deposits with, or CCU's issued by a co-operative).
- (4) This section does not operate to give rise to any operation of that Law, and does not confer any function under that Law, which that Law would not otherwise have or confer of its own force.
- (5) The regulations may apply a provision of the *Corporations Law* to co-operatives, with or without specified modifications, and a provision so applied has effect as part of this Act and is to be read as forming part of this Act.
- (6) Other provisions of this Act (for example section 266) which apply provisions of the *Corporations Law* to co-operatives operate to apply those provisions as part of this Act and the applied provisions are to be read as forming part of this Act.

Note. This section limits the operation that the *Corporations Law* would otherwise have had in relation to co-operatives.

[11] Section 131 Cancellation of membership prohibited in certain circumstances

Omit section 131 (a). Insert instead:

- (a) if the co-operative is under administration under Part 5.3A of the *Corporations Law* as applying under this Act, or

[12] Section 131 (d)

Insert “(whether or not a receiver and manager)” after “receiver”.

[13] Section 202 Convening of general meeting on requisition

Omit “5%” from section 202 (1) (b). Insert instead “20%”.

[14] Section 208 Disqualification from being a director

Insert at the end of section 208 (1) (c):

, or

- (d) the person is prohibited from managing a co-operative by an order under section 1317EA (Court may make civil penalty orders) of the *Corporations Law*, as applying under this Act.

[15] Section 218 Removal from and vacation of office

Insert “or herself” after “himself” in section 218 (2) (b).

[16] Section 218 (c)

Omit the paragraph. Insert instead:

- (c) if the director resigns the office of director by notice in writing given by the director to the co-operative,

[17] Section 220 Meaning of officer

Omit paragraphs (c)–(f) from the definition of *officer* in section 220.
Insert instead:

- (c) a receiver, or receiver and manager, of property of the co-operative, or any other authorised person who enters into possession or assumes control of property of the co-operative for the purpose of enforcing any charge, or
- (d) an administrator of a deed of arrangement executed by the co-operative, or
- (e) a liquidator or provisional liquidator appointed in a voluntary winding up of the co-operative, or
- (f) an administrator of the co-operative appointed under Part 5.3A of the *Corporations Law* as applying under this Act,

[18] Section 222 Standard of care and diligence required

Omit section 222 (1). Insert instead:

- (1) In the exercise of his or her powers and the discharge of his or her duties, an officer of a co-operative must exercise the degree of care and diligence that a reasonable person in a like position in a co-operative would exercise in the co-operative's circumstances.

Maximum penalty: 10 penalty units.

[19] Section 229 Adoption of Corporations Law provisions concerning officers of co-operatives

Insert at the end of section 229 (2):

, and

- (d) the reference in section 592 to the commencement of Part 5.7B were a reference to the commencement of section 343B of this Act.

[20] Section 252 Returns

Omit “at least 14 days before each annual general meeting of the co-operative is held”.

Insert instead “within 4 months after the close of the financial year of the co-operative”.

[21] Section 263 Fund raising to be in accordance with Act and regulations

Omit section 263 (1) and (2). Insert instead:

- (1) The regulations may impose requirements and restrictions on the obtaining of financial accommodation and the giving of security in connection with the obtaining of financial accommodation by a co-operative.

[22] Section 263 (3)

Omit “the provisions of this or any other section of this Act”.

Insert instead “any provision of this Act or the regulations”.

[23] Section 266 Application of Corporations Law to issues of debentures

Omit section 266 (1) and (2). Insert instead:

- (1) The provisions of Parts 7.11 (Conduct in relation to securities) and 7.12 (Offering securities for subscription or purchase) of the *Corporations Law* apply to and in respect of debentures of a co-operative, subject to the following:
 - (a) for the purposes of the application of those provisions, a co-operative is taken to be a company and the term *corporation* is taken to include a co-operative,
 - (b) references in those provisions to the Commission are to be read as references to the Registrar,
 - (c) the provisions apply with such modifications as may be prescribed.

- (2) The provisions of the *Corporations Law* applied by this section do not apply to a loan to which section 268 (Compulsory loan by member to co-operative) applies.

[24] Section 266 (4)

Insert “which are not defined in this Act” after “section”.

[25] Section 268 Compulsory loan by member to co-operative

Omit section 268 (1). Insert instead:

- (1) A co-operative may require its members to lend money, with or without security, to the co-operative, but only if the rules of the co-operative authorise the co-operative to do so and only in accordance with a proposal approved by a special resolution of the co-operative.

[26] Section 268

Omit section 268 (5). Insert instead:

- (5) The proposal must:
- (a) be accompanied by a disclosure statement, approved by the Registrar, that explains the purpose for which the money raised by the co-operative pursuant to the proposal is to be used, and
 - (b) clearly show the total amount of the loan to be raised by the co-operative and the basis on which the money required to be lent by each member is to be calculated.

[27] Section 269 General nature of CCU

Insert at the end of the section:

- (5) Despite any rule of law or equity to the contrary, a condition subject to which a CCU is issued, whether the CCU is issued before or after the commencement of this subsection, is not invalid merely because the CCU is, by the condition, made irredeemable or redeemable only on the happening of a contingency however remote or at the end of a period however long.

[28] Section 269A

Insert after section 269:

269A Priority of CCU's on winding up

- (1) On a winding up of a co-operative, a debt owed to a person as the holder or former holder of a CCU issued by the co-operative is to rank for priority of payment in accordance with the terms of issue of the CCU.
- (2) Such a debt may rank as a secured debt if it is secured but if it is unsecured may not rank in priority to other unsecured debts. It may rank equally with or behind unsecured debts and (if the debt ranks behind unsecured debts) may rank in priority to, equally with or behind debts due to contributories.

[29] Section 273 CCU's not to be issued unless terms of issue approved by Registrar

Omit section 273 (2). Insert instead:

- (2) The terms of issue must specify the following (but this subsection does not limit the contents of the terms of issue):
 - (a) details of entitlement to repayment of capital,
 - (b) details of entitlement to participate in surplus assets and profits,
 - (c) details of entitlement to interest on capital (whether cumulative or non-cumulative interest),
 - (d) details of how capital and interest on capital are to rank for priority of payment on a winding up.

[30] Section 325 Application of Corporations Law to winding up

Omit "together with the amount of the contingent liability, if any, attached thereto, and" from section 325 (3) (c).

[31] Section 325 (3) (f)

Insert after section 325 (3) (e):

- (f) a reference in any of those provisions to section 260 (Remedy in cases of oppression or injustice) of the *Corporations Law* is to be read as a reference to Division 5 (Oppressive conduct of affairs) of Part 4 of this Act.

[32] Section 325 (4)

Insert after section 325 (3):

- (4) The provisions of the *Corporations Law* applied by this section are to be read subject to sections 76 (Liability of members to co-operative) and 331 (Liability of member to contribute in a winding up where shares forfeited etc) for the purposes of determining the liability of members and past members to contribute on a winding up of a co-operative.

[33] Part 12, Division 5

Omit the Division. Insert instead:

Division 5 Administration of co-operative—application of Corporations Law

332 Adoption of Part 5.3A of Corporations Law

- (1) The provisions of Part 5.3A (Administration of a company's affairs with a view to executing a deed of company arrangement) and Division 3 (Provisions applying to various kinds of external administration) of Part 5.9 of the *Corporations Law* apply to and in respect of a co-operative as if it were a company.
- (2) Those provisions so apply with the following modifications:
 - (a) those provisions are to be read as including the provisions of section 332A of this Act,
 - (b) references in those provisions to sections 164 and 166 of the *Corporations Law* are to be read as references to sections 36–39 and 41 of this Act,

- (c) references in those provisions to an administrator appointed under a provision of Part 5.3A are to be read as including a reference to an administrator appointed by the Registrar under the provision included by paragraph (a),
- (d) references in those provisions to the Commission are to be read as references to the Registrar,
- (e) such other modifications as may be prescribed by the regulations.

332A Appointment of administrator by Registrar

- (1) The Registrar may, after an inquiry into the affairs of a co-operative under Division 2 or 4 of Part 14, appoint a person as an administrator for the purposes of the provisions of Part 5.3A of the *Corporations Law* as applying under section 332 if the Registrar is of the opinion that the co-operative is insolvent or likely to become insolvent at some future time.
- (2) The person appointed by the Registrar need not be a registered liquidator.

[34] Sections 343A, 343B

Insert after section 343:

343A Adoption of Corporations Law concerning reciprocity with other jurisdictions

- (1) The provisions of Part 5.7A (Reciprocity with other jurisdictions) of the *Corporations Law* apply to and in respect of a co-operative in the same way as they apply to and in respect of a company.
- (2) Those provisions so apply with such modifications as may be prescribed by the regulations and as if:
 - (a) a reference in those provisions to a recognised company were a reference to a foreign co-operative, and

- (b) a reference to a provision of the *Corporations Law* of another jurisdiction were a reference to that provision as applying to a foreign co-operative under a law of another jurisdiction under which that foreign co-operative is incorporated.

343B Adoption of Corporations Law concerning insolvent co-operatives

- (1) The provisions of Part 5.7B (Recovering property or compensation for the benefit of creditors of insolvent company) of the *Corporations Law* apply to and in respect of a co-operative in the same way as they apply to and in respect of a company.
- (2) Those provisions so apply with such modifications as may be prescribed by the regulations and as if a reference in those provisions to any provision of section 289 of the *Corporations Law* were a reference to the equivalent provisions of the regulations under section 243 of this Act.

[35] Section 383 Privilege

Omit section 383 (3). Insert instead:

- (3) The legal practitioner is also not entitled to refuse to comply with the requirement if the person by or on behalf of whom the communication was made or (if the person is under administration under Part 5.3A of the *Corporations Law*, as applying under this Act, or in the course of being wound up) the administrator or the liquidator agrees to the legal practitioner complying with the requirement.

[36] Section 389 Privilege

Omit section 389 (2). Insert instead:

- (2) The legal practitioner is not entitled to refuse to produce the document if the person by or on behalf of whom the communication was made or (if the person is under administration under Part 5.3A of the *Corporations Law*, as applying under this Act, or in the course of being wound up) the administrator or the liquidator agrees to the legal practitioner producing the document.

[37] Section 408A

Insert after section 408:

408A Power of Registrar to intervene in proceedings

- (1) The Registrar may intervene in any proceedings relating to a matter arising under this Act or the regulations.
- (2) When the Registrar intervenes in proceedings, the Registrar is taken to be a party to the proceedings and, subject to this Act, has all the rights, duties and liabilities of such a party.
- (3) The Registrar may appear and be represented in any proceedings in which the Registrar wishes to intervene pursuant to this section:
 - (a) by a person to whom the Registrar has delegated the Registrar's functions under this Act or such of those functions as relate to a matter to which the proceedings relate, or
 - (b) by an officer or temporary employee of the Public Service who is engaged in the administration of this Act, or
 - (c) by solicitor or barrister.

[38] Section 421 Certificate evidence

Insert after section 421 (1):

- (1A) The Registrar may issue a certificate stating that a requirement of this Act specified in the certificate:
 - (a) had, or had not, been complied with at a date or within a period specified in the certificate, or
 - (b) had been complied with at a date specified in the certificate but not before that date.

[39] Section 436 Interpretation of applied provisions of Corporations Law

Insert after section. 436 (3):

- (3A) Provisions of the *Corporations Law* applied by or under this Act apply and are to be interpreted as if the definitions of words and expressions and other interpretative provisions contained in the *Corporations Law* formed part of this Act.

[40] Sections 436A, 436B

Insert after section 436:

436A Implied application of regulations and other provisions of Corporations Law

- (1) When a provision of this Act or the regulations applies a provision (*the applied provision*) of the *Corporations Law* to co-operatives, the following provisions are also applied by force of this section and are to be read as forming part of this Act:
- (a) the provisions of any regulation (an *applied regulation*) for the time being in force under the applied provision,
 - (b) any provision of the *Corporations Law* that creates an offence in relation to a contravention of the applied provision,
 - (c) the provisions of Part 9.4B (Civil and criminal consequences of contravening civil penalty provisions) of the *Corporations Law* for the purposes of any provision of the *Corporations Law* applied by this Act that is a civil penalty provision within the meaning of that Part.
- (2) The regulations under this Act may prescribe modifications to any of the provisions applied by subsection (1) for the purposes of their application under this section, and those provisions apply subject to any such prescribed modifications.

- (3) If a provision of the *Corporations Law* or the regulations under that Law applying under this Act (including under this section) creates an offence and the penalty for that offence is specified in another provision (*the penalty provision*) of the *Corporations Law* or those regulations, the penalty provision is to be read as forming part of this Act for the purpose of determining the maximum penalty applicable to that offence.

436B Effect of amendments to applied provisions of Corporations Law

- (1) A provision of the *Corporations Law* that is applied by or under a provision of this Act so applies as in force from time to time.
- (2) If a group of provisions of the *Corporations Law* is applied by or under a provision of this Act (whether by application of a Part or other division of the *Corporations Law* or otherwise), and the *Corporations Law* is amended so as to insert new provisions in that group of provisions, the new provisions form part of the group of provisions so applied.

[41] Section 443 Injunctions

Insert “or a person whose interests have been, are or would be affected by the conduct” after “Registrar” in section 443 (1).

[42] Schedule 1 Matters for which rules must make provision

Omit the fifth dot point in clause 1.

[43] Schedule 3 Registration etc of charges

Schedule 3, clause 7 (1) (b) and (3) (b)

Omit clause 7 (1) (b) and (3) (b). Insert instead:

- (b) an administrator of a co-operative is appointed under Part 5.3A of the *Corporations Law* as applying under this Act, or
- (ba) a co-operative executes a deed of arrangement,

[44] Schedule 3, clause 7 (1)

Omit “or official manager”.

Insert instead “, the administrator of the co-operative, or the deed’s administrator”.

[45] Schedule 3, clause 7 (1) (c) (ii) and (3) (c) (ii)

Omit “commencement of the winding up or the appointment of the official manager, as the case may be” wherever occurring.

Insert instead “critical day”.

[46] Schedule 3, clause 7 (1) (d) and (e)

Omit “commencement of the winding up or at the time of the appointment referred to in paragraph (b)” wherever occurring.

Insert instead “start of the critical day”.

[47] Schedule 3, clause 7 (3) (d)

Omit “commencement of the winding up or at the time of the appointment of the official manager”.

Insert instead “start of the critical day”.

[48] Schedule 3, clause 7 (5)

Omit “official manager of the co-operative, notwithstanding that”.

Insert instead “administrator of the co-operative, or an administrator of a deed of arrangement executed by the co-operative, even if”.

[49] Schedule 3, clause 7 (6) (c) and (d)

Omit subclause 7 (6) (c). Insert instead:

- (c) an administrator of the co-operative being appointed under Part 5.3A of the *Corporations Law* as applying under this Act, or
- (d) the co-operative executing a deed of arrangement.

[50] Schedule 3, clause 7 (7)

Omit “and (c)”. Insert instead “, (c) and (d)”.

[51] Schedule 3, clause 7 (8)

Insert after clause 7 (7):

(8) In this clause:

critical day, in relation to a co-operative, means:

- (a) if the co-operative is being wound up—the day when the winding up began, or
- (b) if the co-operative is under administration—the relevant day in relation to the administration, or
- (c) if the co-operative has executed a deed of arrangement—the relevant day in relation to the administration that ended when the deed was executed.

relevant day, in relation to the administration of a co-operative, means:

- (a) if, when the administration began, a winding up of the co-operative was in progress—the day on which the winding up is taken because of Division 1A of Part 5.6 of the *Corporations Law* (as applying under this Act) to have begun, or
- (b) otherwise—the day on which the administration began.

[52] Schedule 4 Receivers and managers

Omit the heading to the Schedule.

Insert instead “**Schedule 4 Receivers, and other controllers, of property of co-operatives**”.

[53] Schedule 4, clause 1

Insert in alphabetical order:

administrator, in relation to a deed of arrangement, means an administrator of the deed appointed under Part 5.3A of the *Corporations Law*, as applying under this Act.

control day, in relation to a controller of property of a co-operative, means:

(a) unless paragraph (b) applies:

- (i) in the case of a receiver, or receiver and manager, of that property — the day when the receiver, or receiver and manager, was appointed, or
- (ii) in the case of any other person who is in possession, or has control, of that property for the purpose of enforcing a charge,

the day when the person entered into possession, or took control, of property of the co-operative for the purpose of enforcing that charge, or

(b) if the controller became a controller of property of the co-operative:

- (i) to act with an existing controller of such property, or
- (ii) in place of a controller of such property who has died or ceased to be a controller of such property,

the day that is, because of any other application or applications of this definition, the control day in relation to the controller referred to in subparagraph (i) or (ii).

controller, in relation to property of a co-operative, means:

- (a) a receiver, or receiver and manager, of that property, or

- (b) anyone else who (whether or not as agent for the co-operative) is in possession, or has control, of that property for the purpose of enforcing a charge.

daily newspaper means a newspaper that is ordinarily published on each day that is a business day in the place where the newspaper is published, whether or not the newspaper is ordinarily published on other days.

managing controller, in relation to property of a co-operative, means:

- (a) a receiver and manager of that property, or
(b) any other controller of that property who has functions or powers in connection with managing the co-operative.

national newspaper means a daily newspaper that circulates generally in each State, the Capital Territory and the Northern Territory.

[54] Schedule 4, clause 3A

Insert after clause 3:

3A Court may declare whether controller is validly acting

- (1) Where there is doubt, on a specific ground, about:
- (a) whether a purported appointment of a person, after the commencement of this clause, as receiver of property of a co-operative is valid, or
(b) whether a person who has entered into possession, or assumed control, of property of a co-operative after the commencement of this clause did so validly under the terms of a charge on that property,

the person, the co-operative or any of the co-operative's creditors may apply to the Court for an order under subclause (2).

- (2) On an application, the Court may make an order declaring whether or not:
- (a) the purported appointment was valid, or
 - (b) the person entered into possession, or assumed control, validly under the terms of the charge,
- as the case may be, on the ground specified in the application or on some other ground.

[55] Schedule 4, clause 4

Omit the heading to clause 4.
Insert instead “**Liability of controller**”.

[56] Schedule 4, clause 4A

Insert after clause 4:

4A Liability of controller under pre-existing agreement about property used by co-operative

- (1) This clause applies if:
- (a) under an agreement made before the control day in relation to a controller of property of a co-operative, the co-operative continues after that day to use or occupy, or to be in possession of, property (*the third party property*) of which someone else is the owner or lessor, and
 - (b) the controller is controller of the third party property.
- (2) Subject to subclauses (4) and (7), the controller is liable for so much of the rent or other amounts payable by the co-operative under the agreement as is attributable to a period:
- (a) that begins more than 7 days after the control day, and

- (b) throughout which:
 - (i) the co-operative continues to use or occupy, or to be in possession of, the third party property, and
 - (ii) the controller is controller of the third party property.
- (3) Within 7 days after the control day, the controller may give to the owner or lessor a notice that specifies the third party property and states that the controller does not propose to exercise rights in relation to that property as controller of the property, whether on behalf of the co-operative or anyone else.
- (4) Despite subclause (2), the controller is not liable for so much of the rent or other amounts payable by the co-operative under the agreement as is attributable to a period during which a notice under subclause (3) is in force, but such a notice does not affect a liability of the co-operative.
- (5) A notice under subclause (3) ceases to have effect if:
 - (a) the controller revokes it by writing given to the owner or lessor, or
 - (b) the controller exercises, or purports to exercise, a right in relation to the third party property as controller of the property, whether on behalf of the co-operative or anyone else.
- (6) For the purposes of subclause (5), the controller does not exercise, or purport to exercise, a right as mentioned in subclause (5) (b) merely because the controller continues to be in possession, or to have control, of the third party property, unless the controller:
 - (a) also uses the property, or
 - (b) asserts a right, as against the owner or lessor, so to continue.

- (7) Subclause (2) does not apply in so far as the Court, by order, excuses the controller from liability, but an order does not affect a liability of the co-operative.
- (8) The controller is not taken because of subclause (2):
 - (a) to have adopted the agreement, or
 - (b) to be liable under the agreement otherwise than as mentioned in subclause (2).

[57] Schedule 4, clauses 5A–5C

Insert after clause 5:

5A Controller’s duty of care in exercising power of sale

- (1) In exercising a power of sale in respect of property of a co-operative, a controller must take all reasonable care to sell the property for:
 - (a) if, when it is sold, it has a market value—not less than that market value, or
 - (b) otherwise—the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.
- (2) Nothing in subclause (1) limits the generality of anything in Division 2 (Duties and liabilities of directors, officers and employees) of Part 9.

5B Court may authorise managing controller to dispose of property despite prior charge

- (1) On the application of a managing controller of property of a co-operative, the Court may by order authorise the controller to sell, or to dispose of in some other specified way, specified property of the co-operative, even though it is subject to a charge (in this clause called the “prior charge”) that has priority over a charge (in this clause called the “controller’s charge”) on that property that the controller is enforcing.

- (2) However, the Court may only make an order if satisfied that:
- (a) apart from the existence of the prior charge, the controller would have power to sell, or to so dispose of, the property, and
 - (b) the controller has taken all reasonable steps to obtain the consent of the holder of the prior charge to the sale or disposal, but has not obtained that consent, and
 - (c) sale or disposal of the property under the order is in the best interests of the co-operative's creditors and of the co-operative, and
 - (d) sale or disposal of the property under the order will not unreasonably prejudice the rights or interests of the holder of the prior charge.
- (3) The Court is to have regard to the need to protect adequately the rights and interests of the holder of the prior charge.
- (4) If the property would be sold or disposed of together with other property that is subject to the controller's charge, the Court may have regard to:
- (a) the amount (if any) by which it is reasonable to expect that the net proceeds of selling or disposing of that other property otherwise than together with the first-mentioned property would be less than so much of the net proceeds of selling or disposing of all the property together as would be attributable to that other property, and
 - (b) the amount (if any) by which it is reasonable to expect that the net proceeds of selling or disposing of the first-mentioned property otherwise than together with the other property would be greater than so much of the net proceeds of selling or disposing of all the property together as would be attributable to the first-mentioned property.

- (5) Nothing in subclause (3) or (4) limits the matters to which the Court may have regard for the purposes of subclause (2).
- (6) An order may be made subject to conditions, for example (but without limitation):
 - (a) a condition that:
 - (i) the net proceeds of the sale or disposal, and
 - (ii) the net proceeds of the sale or disposal of such other property (if any) as is specified in the condition and is subject to the controller's charge,

or a specified part of those net proceeds, be applied in payment of specified amounts secured by the prior charge, or
 - (b) a condition that the controller apply a specified amount in payment of specified amounts secured by the prior charge.

5C Receiver's power to carry on co-operative's business during winding up

- (1) A receiver of property of a co-operative that is being wound up may:
 - (a) with the written approval of the co-operative's liquidator or with the approval of the Court, carry on the co-operative's business either generally or as otherwise specified in the approval, and
 - (b) do whatever is necessarily incidental to carrying on that business under paragraph (a).
- (2) Subclause (1) does not:
 - (a) affect a power that the receiver has otherwise than under that subclause, or
 - (b) empower the receiver to do an act that he or she would not have power to do if the co-operative were not being wound up.

- (3) A receiver of property of a co-operative who carries on the co-operative's business under subclause (1) does so:
 - (a) as agent for the co-operative, and
 - (b) in his or her capacity as receiver of property of the co-operative.
- (4) The consequences of subclause (3) include, but are not limited to, the following:
 - (a) for the purposes of clause 4 (1), a debt that the receiver incurs in carrying on the business as mentioned in subclause (3) of this clause is incurred in the course of the receivership,
 - (b) a debt or liability that the receiver incurs in so carrying on the business is not a cost, charge or expense of the winding up.

[58] Schedule 4, clauses 6, 6A

Omit clause 6. Insert instead:

6 Controller's duties in relation to bank accounts and accounting records

- (1) A controller of property of a co-operative must:
 - (a) open and maintain an account, with an Australian bank, bearing:
 - (i) the controller's own name, and
 - (ii) in the case of a receiver of the property—the title "receiver", and
 - (iii) otherwise—the title "controller", and
 - (iv) the co-operative's name,or 2 or more such accounts, and
 - (b) within 3 business days after money of the co-operative comes under the control of the controller, pay that money into such an account that the controller maintains, and

- (c) ensure that no such account that the controller maintains contains money other than money of the co-operative that comes under the control of the controller, and
 - (d) keep such accounting records as correctly record and explain all transactions that the controller enters into as the controller.
- (2) Any director, creditor or member of a co-operative may, unless the Court otherwise orders, personally or by an agent, inspect records kept by a controller of property of the co-operative for the purposes of subclause (1) (d).

6A Managing controller to report within 2 months about co-operative's affairs

- (1) A managing controller of property of a co-operative must prepare a report about the co-operative's affairs that is in the prescribed form and is made up to a day not later than 30 days before the day when it is prepared.
- (2) The managing controller must prepare and lodge the report within 2 months after the control day.
- (3) As soon as practicable, and in any event within 14 days, after lodging the report, the managing controller must cause to be published in a national newspaper, or in each State and Territory in a daily newspaper that circulates generally in that State or Territory, a notice stating:
 - (a) that the report has been prepared, and
 - (b) that a person can, on paying the prescribed fee, inspect the report at specified offices of the Registrar.
- (4) If, in the managing controller's opinion, it would seriously prejudice:
 - (a) the co-operative's interests, or
 - (b) the achievement of the objectives for which the controller was appointed, or entered into possession or assumed control of property of the co-operative, as the case requires,

if particular information that the controller would otherwise include in the report were made available to the public, the controller need not include the information in the report.

- (5) If the managing controller omits information from the report as permitted by subclause (4), the controller must include instead a notice:
- (a) stating that certain information has been omitted from the report, and
 - (b) summarising what the information is about, but without disclosing the information itself.

[59] Schedule 4, clauses 8–17

Omit clauses 8–17. Insert instead:

8 Supervision of controller

- (1) If:
- (a) it appears to the Court or to the Registrar that a controller of property of a co-operative has not faithfully performed, or is not faithfully performing, the controller's functions or has not observed, or is not observing, a requirement of
 - (i) in the case of a receiver—the order by which, or the instrument under which, the receiver was appointed, or
 - (ii) otherwise—an instrument under which the controller entered into possession, or took control, of that property, or
 - (iii) in any case—the Court, or
 - (iv) in any case—this Act, the regulations or rules of court, or
 - (b) a person complains to the Court or to the Registrar about an act or omission of a controller of property of a co-operative in connection with performing or exercising any of the controller's functions and powers,

the Court or the Registrar, as the case may be, may inquire into the matter and, where the Court or Registrar so inquires, the Court may take such action as it thinks fit.

- (2) The Registrar may report to the Court any matter that in the Registrar's opinion is a misfeasance, neglect or omission on the part of a controller of property of a co-operative and the Court may order the controller to make good any loss that the estate of the co-operative has sustained thereby and may make such other order or orders as it thinks fit.
- (3) The Court may at any time:
 - (a) require a controller of property of a co-operative to answer questions about the performance or exercise of any of the controller's functions and powers as controller, or
 - (b) examine a person about the performance or exercise by such a controller of any of the controller's functions and powers as controller, or
 - (c) direct an investigation to be made of such a controller's books.

9 Controller may apply to Court

- (1) A controller of property of a co-operative may apply to the Court for directions in relation to any matter arising in connection with the performance or exercise of any of the controller's functions and powers as controller.
- (2) In the case of a receiver of property of a co-operative, subclause (1) applies only if the receiver was appointed under a power contained in an instrument.

10 Power of Court to fix receiver's remuneration

- (1) The Court may by order fix the amount to be paid by way of remuneration to any person who, under a power contained in an instrument, has been appointed as receiver of property of a co-operative.

- (2) The power of the Court to make an order under this clause:
- (a) extends to fixing the remuneration for any period before the making of the order or the application for the order, and
 - (b) is exercisable even if the receiver has died, or ceased to act, before the making of the order or the application for the order, and
 - (c) if the receiver has been paid or has retained for the receiver's remuneration for any period before the making of the order any amount in excess of that fixed for that period—extends to requiring the receiver or the receiver's personal representatives to account for the excess or such part of the excess as is specified in the order.
- (3) The power conferred by subclause (2) (c) must not be exercised in respect of any period before the making of the application for the order unless, in the opinion of the Court, there are special circumstances making it proper for the power to be so exercised.
- (4) The Court may from time to time vary or amend an order under this clause.
- (5) An order under this clause may be made, varied or amended on the application of:
- (a) a liquidator of the co-operative, or
 - (b) an administrator of the co-operative, or
 - (c) an administrator of a deed of arrangement executed by the co-operative, or
 - (d) the Registrar.
- (6) An order under this clause may be varied or amended on the application of the receiver concerned.
- (7) An order under this clause may be made, varied or amended only as provided in subclauses (5) and (6).

11 Controller has qualified privilege in certain cases

A controller of property of a co-operative has qualified privilege in respect of:

- (a) a matter contained in a report that the controller lodges under clause 6A or 7, or
- (b) a comment that the controller makes under clause 14 (2) (c).

12 Notification of matters relating to controller

- (1) A person who obtains an order for the appointment of a receiver of property of a co-operative, or who appoints such a receiver under a power contained in an instrument, must:
 - (a) within 7 days after obtaining the order or making the appointment, lodge notice that the order has been obtained, or that the appointment has been made, as the case may be, and
 - (b) within 21 days after obtaining the order or making the appointment, cause notice that the order has been obtained, or that the appointment has been made, as the case may be, to be published in the Gazette.
- (2) A person who appoints another person to enter into possession, or take control, of property of a co-operative (whether or not as agent for the co-operative) for the purpose of enforcing a charge otherwise than as receiver of that property must:
 - (a) within 7 days after making the appointment, lodge notice of the appointment, and
 - (b) within 21 days after making the appointment, cause notice of the appointment to be published in the Gazette.

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- (3) A person who enters into possession, or takes control, as mentioned in subclause (2) must:
- (a) within 7 days after so entering into possession or taking control, lodge notice that the person has done so, and
 - (b) within 21 days after so entering into possession or taking control, cause to be published in the Gazette notice that the person has done so,
- unless another person:
- (c) appointed the first-mentioned person so to enter into possession or take control, and
 - (d) complies with subclause (2) in relation to the appointment.
- (4) Within 14 days after becoming a controller of property of a co-operative, a person must lodge notice in the prescribed form of the address of the person's office.
- (5) A controller of property of a co-operative must, within 14 days after a change in the situation of the controller's office, lodge notice in the prescribed form of the change.
- (6) A person who ceases to be a controller of property of a co-operative must:
- (a) within 7 days after so ceasing, lodge notice that the person has so ceased, and
 - (b) within 21 days after so ceasing, cause notice that the person has so ceased to be published in the Gazette.

13 Statement that receiver appointed or other controller acting

- (1) Where a receiver of property (whether within or outside this State or within or outside Australia) of a co-operative has been appointed, the co-operative must set out, in every public document, and in every eligible

negotiable instrument, of the co-operative, after the name of the co-operative where it first appears, a statement that a receiver, or a receiver and manager, as the case requires, has been appointed.

- (2) Where there is a controller (other than a receiver) of property (whether within Australia or elsewhere) of a co-operative, the co-operative must set out, in every public document, and in every eligible negotiable instrument, of the co-operative, after the co-operative's name where it first appears, a statement that a controller is acting.

14 Officers to report to controller about co-operative's affairs

- (1) In this clause:

reporting officer, in relation to a co-operative in respect of property of which a person is controller, means a person who was:

- (a) in the case of a co-operative other than a foreign co-operative—a director or secretary of the co-operative, or
- (b) in the case of a foreign co-operative—a local agent of the foreign co-operative,

on the control day.

- (2) Where a person becomes a controller of property of a co-operative:
- (a) the person must serve on the co-operative as soon as practicable notice that the person is a controller of property of the co-operative, and
- (b) within 14 days after the co-operative receives the notice, the reporting officers must make out and submit to the person a report in the prescribed form about the affairs of the co-operative as at the control day, and

- (c) the person must, within one month after receipt of the report:
 - (i) lodge a copy of the report and a notice setting out any comments the person sees fit to make relating to the report or, if the person does not see fit to make any comment, a notice stating that the receiver does not see fit to make any comment, and
 - (ii) send to the co-operative a copy of the notice lodged in accordance with subparagraph (i), and
 - (iii) if the person became a controller of the property:
 - (A) because of an appointment as receiver of the property that was made by or on behalf of the holder of debentures of the co-operative, or
 - (B) by entering into possession, or taking control, of the property for the purpose of enforcing a charge securing such debentures,and there are trustees for the holders of those debentures—send to those trustees a copy of the report and a copy of the notice lodged under subparagraph (i).
- (3) Where notice has been served on a co-operative under subclause (2) (a), the reporting officers may apply to the controller or to the Court to extend the period within which the report is to be submitted and:
- (a) if application is made to the controller—if the receiver believes that there are special reasons for so doing, the controller may, by notice in writing given to the reporting officers, extend that period until a specified day, and

- (b) if application is made to the Court—if the Court believes that there are special reasons for so doing, the Court may, by order, extend that period until a specified day.
- (4) As soon as practicable after granting an extension under subclause (3) (a), the controller must lodge a copy of the notice.
- (5) As soon as practicable after the Court grants an extension under subclause (3) (b), the reporting officers must lodge a copy of the order.
- (6) Subclauses (2), (3) and (4) do not apply in a case where a person becomes a controller of property of a co-operative:
 - (a) to act with an existing controller of property of the co-operative, or
 - (b) in place of a controller of such property who has died or ceased to be a controller of such property.
- (7) However, if subclause (2) applies in a case where a controller of property of a co-operative dies, or ceases to be a controller of property of the co-operative, before subclause (2) is fully complied with, then:
 - (a) the references in subclauses (2) (b) and (c) to the person, and
 - (b) the references in subclauses (3) and (4) to the controller,include references to the controller's successor and to any continuing controller.
- (8) Where a co-operative is being wound up, this clause (including subclause (7)) and clause 15 apply even if the controller and the liquidator are the same person, but with any necessary modifications arising from that fact.

15 Controller may require reports

- (1) A controller of property of a co-operative may, by notice given to the person or persons, require one or more persons included in one or more of the following classes of persons to make out as required by the notice, verify by a statement in writing in the prescribed form, and submit to the controller, a report, containing such information as is specified in the notice as to the affairs of the co-operative or as to such of those affairs as are specified in the notice, as at a date specified in the notice:
 - (a) persons who are or have been officers of the co-operative,
 - (b) where the co-operative was incorporated within one year before the control day—persons who have taken part in the formation of the co-operative,
 - (c) persons who are employed by the co-operative or have been so employed within one year before the control day and are, in the opinion of the controller, capable of giving the information required,
 - (d) persons who are, or have been within one year before the control day, officers of, or employed by, a co-operative that is, or within that year was, an officer of the co-operative.
- (2) Without limiting the generality of subclause (1), a notice under that subclause may specify the information that the controller requires as to affairs of the co-operative by reference to information that this Act requires to be included in any other report, statement or notice under this Act.
- (3) A person making a report and verifying it as required by subclause (1) must, subject to the regulations, be allowed, and must be paid by the receiver (or the controller's successor) out of the controller's receipts,

such costs and expenses incurred in and about the preparation and making of the report and the verification of the report as the controller (or the controller's successor) considers reasonable.

- (4) A person must comply with a requirement made under subclause(1).
- (5) A reference in this clause to the controller's successor includes a reference to a continuing controller.

16 Controller may inspect books

A controller of property of a co-operative is entitled to inspect at any reasonable time any books of the co-operative that relate to that property and a person must not fail to allow the controller to inspect such books at such a time.

17 Lodging controller's accounts

- (1) A controller of property of a co-operative must lodge an account:
 - (a) within one month after the end of:
 - (i) 6 months, or such shorter period as the controller determines, after the day when the controller became a controller of property of the co-operative, and
 - (ii) each subsequent period of 6 months throughout which the controller is a controller of property of the co-operative, and
 - (b) within one month after the controller ceases to be a controller of property of the co-operative.
- (2) An account must be in the prescribed form and show:
 - (a) the controller's receipts and payments during:
 - (i) in the case of an account under subclause (1) (a)—the 6 months or shorter period, as the case requires, or

- (ii) in the case of an account under subclause (1) (b)—the period beginning at the end of the period to which the last account related, or on the control day, as the case requires, and ending on the day when the controller so ceased, and
 - (b) except in the case of an account lodged under subclause (1) (a) (i)—the respective aggregates of the controller’s receipts and payments since the control day, and
 - (c) in the case of:
 - (i) a receiver appointed under a power contained in an instrument, or
 - (ii) anyone else who is in possession, or has control, of property of the co-operative for the purpose of enforcing a charge,the following:
 - (iii) the amount (if any) owing under that instrument or charge:
 - (A) in the case of an account lodged under subclause (1) (a) (i)—at the end of the control day and at the end of the period to which the account relates, or
 - (B) otherwise—at the end of the period to which the account relates,
 - (iv) the controller’s estimate of the total value, at the end of the period to which the account relates, of the property of the co-operative that is subject to the instrument or charge.
- (3) The Registrar may, of the Registrar’s own motion or on the application of the co-operative or a creditor of the co-operative, cause the accounts lodged in accordance with subclause (1) to be audited by a registered company auditor appointed by the Registrar and, for the purpose of the audit, the controller must furnish the auditor with such books and information as the auditor requires.

- (4) Where the Registrar causes the accounts to be audited on the request of the co-operative or a creditor, the Registrar may require the co-operative or creditor, as the case may be, to give security for the payment of the cost of the audit.
- (5) The costs of an audit under subclause (3) are to be fixed by the Registrar and the Registrar may if the Registrar thinks fit make an order declaring that, for the purposes of clause 4 (1), those costs are taken to be a debt incurred by the controller as mentioned in clause 4 (1) and, where such an order is made, the controller is liable accordingly.
- (6) A person must comply with a requirement made under this clause.

[60] Schedule 4, clauses 19–19C

Omit clause 19. Insert instead:

19 Enforcement of controller's duty to make returns

- (1) If a receiver of property of a co-operative:
 - (a) who has made default in making or lodging any return, account or other document or in giving any notice required by law fails to make good the default within 14 days after the service on the controller, by any member or creditor of the co-operative or trustee for debenture holders, of a notice requiring the controller to do so, or
 - (b) who has become a controller of property of the co-operative otherwise than by being appointed a receiver of such property by a court and who has, after being required at any time by the liquidator of the co-operative so to do, failed to render proper accounts of, and to vouch, the controller's receipts and payments and to pay over to the liquidator the amount properly payable to the liquidator,

the Court may make an order directing the controller to make good the default within such time as is specified in the order.

- (2) An application under subclause (1) may be made:
 - (a) if subclause (1) (a) applies—by a member or creditor of the co-operative or by a trustee for debenture holders, and
 - (b) if subclause (1) (b) applies—by the liquidator of the co-operative.

19A Court may remove controller for misconduct

Where, on the application of a co-operative, the Court is satisfied that a controller of property of the co-operative has been guilty of misconduct in connection with performing or exercising any of the controller's functions and powers, the Court may order that, on and after a specified day, the controller cease to act as receiver or give up possession or control, as the case requires, of property of the co-operative.

19B Court may remove redundant controller

- (1) The Court may order that, on and after a specified day, a controller of property of a co-operative:
 - (a) cease to act as receiver, or give up possession or control, as the case requires, of property of the co-operative, or
 - (b) act as receiver, or continue in possession or control, as the case requires, only of specified property of the co-operative.
- (2) However, the Court may only make an order under subclause (1) if satisfied that the objectives for which the controller was appointed, or entered into possession or took control of property of the co-operative, as the case requires, have been achieved, so far as is reasonably practicable, except in relation to any property specified in the order under subclause (1) (b).

- (3) For the purposes of subclause (2), the Court must have regard to:
 - (a) the co-operative's interests, and
 - (b) the interests of the holder of the charge that the controller is enforcing, and
 - (c) the interests of the co-operative's other creditors, and
 - (d) any other relevant matter.
- (4) The Court may only make an order under subclause (1) on the application of a liquidator appointed for the purposes of winding up the co-operative in insolvency.
- (5) An order under subclause (1) may also prohibit the holder of the charge from doing any or all of the following, except with the leave of the Court:
 - (a) appointing a person as receiver of property of the co-operative under a power contained in an instrument relating to the charge,
 - (b) entering into possession, or taking control, of such property for the purpose of enforcing the charge,
 - (c) appointing a person so to enter into possession or take control (whether as agent for the chargee or for the co-operative).

19C Effect of clauses 19A and 19B

- (1) Except as expressly provided in clause 19A or 19B, an order under that clause does not affect a charge on property of a co-operative.
- (2) Nothing in clause 19A or 19B limits any other power of the Court to remove, or otherwise deal with, a controller of property of a co-operative (for example, the Court's powers under clause 8).

[61] Schedule 6 Savings and transitional provisions

Schedule 6, Part 1

Insert “**Part 1 General**” before clause 1.

[62] Schedule 6, clause 2 (1)

Omit “this Act.”. Insert instead:

the following Acts:

this Act

Co-operatives Amendment Act 1995

[63] Schedule 6, clause 2 (2)

Omit “this Act”. Insert instead “the Act concerned”.

[64] Schedule 6, Part 2

Insert “**Part 2 Provisions relating to the 1923 Act**” before clause 3.

[65] Schedule 6, clause 3A

Insert after clause 3:

3A Societies wound up or dissolved under the 1923 Act

A society wound up, dissolved or struck off the register under the 1923 Act (other than a society exempt from clause 4) is taken to have been wound up, dissolved or struck off the register under this Act.

[66] Schedule 6, Part 3

Insert after clause 13:

Part 3 Provisions consequent on the Co-operatives Amendment Act 1995

14 Convening of general meeting on requisition

The amendment to section 202 made by the *Co-operatives Amendment Act 1995* does not apply in respect of a requisition for a general meeting served on a co-operative before the commencement of that amendment.

15 Vacation in office of director

The amendment to section 218 made by the *Co-operatives Amendment Act 1995* does not apply in respect of a notice in writing of a director's intention to resign office given by the director to the board of the co-operative before the commencement of that amendment.

16 Operation of amendment to Corporations Law

The amendment to section 229 made by the *Co-operatives Amendment Act 1995* is taken to have commenced immediately before the commencement of Part 5.7B of the *Corporations Law*.

17 Official management

- (1) Section 332 of this Act (as in force immediately before its replacement by the *Co-operatives Amendment Act 1995*) continues to apply to and in respect of the official management of a co-operative under Part 5.3 of the *Corporations Law* that commenced before the replacement of that section.

- (2) A reference in this Act to an administrator, or to administration, under Part 5.3A of the *Corporations Law* includes a reference to an official manager or deputy official manager, or to official management, under Part 5.3 of that Law.

[Minister's second reading speech made in—
Legislative Assembly on 31 May 1995
Legislative Council on 17 October 1995]