

[Act 2001 No 76]



New South Wales

Co-operatives Legislation Amendment Bill 2001

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Co-operatives Act 1992* so as:

- (a) to repeal a provision allowing anti-competitive conduct by co-operatives, and
 - (b) to provide that a member under 18 years of age is not entitled to the vote attached to membership of a co-operative, and
 - (c) to enact core consistent provisions to give effect to a national scheme for the regulation of co-operatives with respect to:
 - (i) the procedure for the approval of disclosure statements, and
 - (ii) the provision of information to members, and
 - (iii) the setting of member subscriptions, and
 - (iv) the repayment of money paid up on share capital and amounts due in respect of cancelled membership, and
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- (v) the adoption of certain provisions of the *Corporations Act 2001* of the Commonwealth, and
 - (vi) annual general meetings and other meetings of co-operatives, and
 - (vii) annual reports of co-operatives, and
 - (viii) the qualifications of directors of co-operatives, and
- (d) to make it clear that a co-operative authorised by its rules to accept money before the commencement of a 1997 amendment to the *Co-operatives Act 1992* is not prohibited from accepting the money on deposit by that amendment.

The Bill also amends the *Co-operative Housing and Starr-Bowkett Societies Act 1998* in relation to the lodgment of certain statements and accounts and repeals certain redundant uncommenced amendments to the *Co-operatives Act 1992*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision giving effect to the amendments to the *Co-operatives Act 1992* set out in Schedule 1.

Clause 4 is a formal provision giving effect to the amendments to the *Co-operative Housing and Starr-Bowkett Societies Act 1998* set out in Schedule 2.

Clause 5 repeals most of a 1997 Act that contains amendments that are either commenced and incorporated in the *Co-operatives Act 1992* or that are uncommenced and have become redundant.

Schedule 1 Amendment of Co-operatives Act 1992

Approval of disclosure statements

The *Co-operatives Act 1992* (*the Act*) requires a disclosure statement to be prepared in relation to a proposed trading co-operative containing the information necessary to ensure that prospective members are adequately informed of the nature

and extent of a person's financial involvement and liability as a member of a co-operative. Section 17 of the Act requires a draft disclosure statement for a co-operative to be submitted to the Registrar who may approve the draft statement as submitted, approve a different statement to that submitted or refuse to approve the statement.

Schedule 1 [2] gives the Registrar more flexibility in dealing with and approving disclosure statements. The Registrar can amend or require amendments to a statement or require additional information. The Registrar can also demand further information before approving a disclosure statement.

Schedule 1 [3] makes a consequential amendment.

Exclusive dealing

Schedule 1 [4] omits a provision authorising co-operatives to engage in exclusive dealing, which would otherwise be prohibited under the *Trade Practices Act 1974* of the Commonwealth.

Entitlement to vote

Section 65 of the Act deals with members of a co-operative who are under 18 years of age.

Schedule 1 [5] provides that such a member is not entitled to the vote attached to membership.

Information to persons intending to become members

Section 76A of the Act requires the board of a co-operative to provide each person intending to become a member of the co-operative with certain documents. In the case of a non-trading co-operative, or of a trading co-operative that has the Registrar's consent, it is sufficient that prospective members be given a chance to inspect the information at the registered office of the co-operative.

Schedule 1 [7] requires documents to be made available not only at the registered office of the co-operative but at each other office (if any) of the co-operative, whether in or outside New South Wales or Australia.

Schedule 1 [8] provides for the Registrar's consent to a trading co-operative under section 76A (to allow information to be inspected at the registered office of the co-operative) to be given subject to conditions.

Regular subscriptions payable by members

Section 77 of the Act provides that the rules of a co-operative may require the payment by members of entry fees and regular subscriptions.

Schedule 1 [9] empowers a co-operative to set a member's regular subscriptions based on the business that the member does with the co-operative, or otherwise in accordance with the rules of the co-operative.

Repayment of shares on expulsion

Section 81 of the Act provides for the repayment of the amount paid up on shares held by a member on expulsion of the member. At present, the section requires any amount due to a member in those circumstances to be paid no later than 12 months after the date of expulsion.

Schedule 1 [10] will enable the board of a co-operative to defer a repayment of money paid up on share capital where the board is of the view that repayment would adversely affect the financial position of the co-operative or where the former member agrees to the deferment. The amendment also provides for the application of the relevant money.

Schedule 1 [12] and **[13]** make consequential amendments.

Repayment of amounts due in respect of cancelled membership

Section 134 of the Act requires a co-operative to pay to a former member whose membership has been cancelled the amount due to the member in respect of that cancellation or to apply that amount in a specified way.

Schedule 1 [11] provides that money up to a certain amount may be retained by the co-operative if, after diligent enquiry, the member cannot be found.

Disclosure of information relating to share issues

Section 146A of the Act requires the board of a trading co-operative to provide a member of the co-operative with a disclosure statement before shares are issued to the member.

Schedule 1 [16] removes the obligation to make full disclosure to current shareholders who are provided with annual reports and other information under the Act. The new provision also requires a co-operative to notify the Registrar of significant changes occurring after release of the disclosure statement and to file a new document that reflects the current situation. A provision is also inserted to

allow the Registrar to exempt a co-operative or class of co-operatives from the disclosure requirements where they would impose an unreasonable burden or be inappropriate for other reasons.

Adoption of certain Corporations Act provisions about shares

Schedule 1 [17] applies provisions of the *Corporations Act 2001* of the Commonwealth in relation to offers of shares in a trading co-operative to persons who are not already shareholders. The provisions relate to advertising securities, misleading statements, experts' consents, holding money on trust and the return of money where minimum subscriptions are not fulfilled.

Members not required to take up additional bonus shares

Section 155 of the Act provides that, if authorised by its rules, the board of a trading co-operative may require a member to take up or subscribe for additional shares. The section makes provision for a disclosure statement in relation to the share issue.

Schedule 1 [18] makes it clear that the section does not operate so as to require the normal disclosures relating to a bonus share issue under section 151 (4) (a), 156 or 282 (1) (b) of the Act.

Meetings

At present, the first annual general meeting of a co-operative must be held within 19 months after incorporation of the co-operative.

Schedule 1 [19] provides that the first annual general meeting of a co-operative must be held within 18 months after incorporation.

Section 203 of the Act requires the minutes of each general meeting, board meeting and sub-committee to be recorded, confirmed and signed and to be made available for inspection.

Schedule 1 [20] imposes an obligation that the minutes be recorded within 28 days of the meeting to which they relate.

Qualification of directors

At present, section 206 (3) of the Act provides that for each director of a co-operative who is an independent director of the co-operative there must be at least 3 directors who are active member directors.

Schedule 1 [21] removes that requirement and instead requires that there must be a simple majority of active member directors, or such greater majority as the rules may provide.

At present, section 206A of the Act empowers the Minister to exempt co-operatives from the requirements of section 206 (3), which is proposed to be amended by Schedule 1 [21]. **Schedule 1 [22]** omits section 206A as a consequence of that amendment.

Schedule 1 [48] provides for the continued operation, on a temporary basis, of orders made under the repealed section.

Meetings of board

Section 209 (4) of the Act provides that at any meeting of the board of directors of a co-operative a quorum is achieved when 50% of the total number of directors are present, or such greater number of directors as is specified in the rules are present.

Schedule 1 [23] imposes the additional quorum requirement that active member directors must outnumber independent directors by at least one, or by such greater number as is specified in the rules.

Section 210 of the Act provides for the transaction of business of the board of a co-operative outside of meetings and requires any resolution approved in writing by a majority of the directors of the board to be taken as being a decision of the board. The section requires such a resolution to be recorded in the minutes of the meetings of the board.

Schedule 1 [24] requires such a resolution to be recorded within 28 days after the last director required for the majority signs the resolution.

Secretary of the board

Schedule 1 [25] creates a requirement for a co-operative to have a secretary appointed by the board who is an adult ordinarily resident in Australia.

Power of Registrar to grant exemptions

Section 244 of the Act permits the Registrar to grant exemptions to co-operatives from compliance with any or all of the requirements of regulations made under Part 9 of the Act relating to accounts and the auditing of co-operatives.

Schedule 1 [26] allows for exemptions to be granted to any person or firm proposed to be appointed as an auditor or to any other person (such as a director or proposed director).

Schedule 1 [27] makes a consequential amendment.

Annual report

Section 252 of the Act requires a co-operative to send a copy of its annual report to the Registrar within the required period in each year. That report is required to include a copy of the accounts of the co-operative.

Schedule 1 [28] amends the list of matters required to be included in an annual report and provides that financial reports of subsidiaries do not need to be included unless the legislation under which the subsidiary is incorporated requires an annual report.

Limits on deposit taking

Section 263A of the Act imposes limits on the ability of a co-operative to accept money on deposit. A co-operative may accept money on deposit if it was authorised by its rules to do so immediately before the commencement of the *Co-operatives Act 1992*. Section 263A was inserted in the Act on 1 December 1997.

Schedule 1 [29] provides that a co-operative may accept money on deposit if it was authorised by its rules to do so immediately before the commencement of the amendment made by the *Co-operatives Amendment Act 1997* to insert section 263A, that is, immediately before 1 December 1997.

Schedule 1 [48] validates any such acceptance of money on deposit.

Distribution of surplus or reserves to members

Section 282 provides for a co-operative to apply a part of the surplus arising in any year from the business of the co-operative, or a part of the reserves of the co-operative by distribution to members as a rebate (on the basis of business done with the co-operative, the issue of bonus shares to members or the issue of a limited dividend to members).

Schedule 1 [31] and **[32]** provide for share holding to be taken into account on the issue of bonus shares or dividends.

Maximum permissible level of share interest

Section 289 of the Act provides that the maximum permissible level of share interest in a co-operative is 20% of the nominal value of the issued share capital of the co-operative. That maximum may be varied by an order of the Co-operatives Council. In the case of a particular person, the maximum can also be increased by a special resolution of the co-operative, approved by the Council.

Schedule 1 [33] removes the ability of the Council to specify a maximum permissible level of share interest for a particular person.

Schedule 1 [34] provides for the approval of the Council to an increase in relation to a particular person to be given on conditions.

Transfer of incorporation

Section 316 of the Act allows a co-operative to apply for a transfer of incorporation and requires the co-operative, before doing so, to adopt any memorandum or articles of association or rules that may be necessary or considered desirable.

Schedule 1 [35] includes in that requirement a requirement to adopt any constitution or replaceable rules that may be necessary or considered desirable.

Schedule 1 [36] makes a consequential amendment.

Winding up on Registrar's certificate

Section 324 of the Act provides for a co-operative to be wound up on a certificate of the Registrar. The liquidator is required to give any security that may be prescribed by the regulations.

Schedule 1 [37] provides that the Registrar may exempt the liquidator from the requirement to provide that security, either unconditionally or subject to conditions.

Registrar to be notified of certain changes relating to foreign co-operatives

Section 369K of the Act requires the Registrar to be notified of certain changes affecting foreign co-operatives.

Schedule 1 [39] provides for a non-participating foreign co-operative to give notice of any change of the registered office or registered name of the co-operative in its State of incorporation or registration. (At present, only foreign co-operatives established under Australian law are required to notify such changes.)

Mergers and transfers of engagements

Section 369Q of the Act sets out the requirements to be met before an application can be made for consolidation of all or any of the assets, liabilities and undertakings of a NSW co-operative and a non-participating co-operative by a merger or transfer of engagements. The section requires the proposed merger or transfer to be approved by a special resolution passed by special postal ballot or, in some circumstances, by a resolution of the board of the co-operative unless the Registrars in both States permit consent to the merger or transfer by board resolution.

Schedule 1 [40] provides for the requisite approval for making an application for approval of a proposed merger or transfer to be given by special resolution passed at an annual general meeting, or by ordinary resolution of the board. The amended section also provides for consent to such an arrangement to be granted with or without conditions, including conditions requiring members to receive a disclosure statement.

Phasing-in of 1997 amendments

Schedule 1 [44] gives co-operatives an additional 2 years to bring their rules into conformity with the Act and the regulations. (When the Act was amended in 1997 a 2-year phasing-in period, or any longer period approved by the Registrar, was provided for.)

Schedule 1 [45] allows the Registrar to approve a longer phasing-in period in relation to a class of co-operatives and not just a particular co-operative.

Schedule 1 [46] validates rules of certain co-operatives for the duration of the longer phasing-in period.

Savings and transitional provisions

Schedule 1 [43] empowers the Governor to make savings and transitional regulations consequent on the enactment of the proposed Act.

Schedule 1 [47] inserts a savings and transitional provision relating to loans made by members under section 268 of the Act before the Act was amended in 1997. Section 268 of the Act empowers a co-operative to require its members to loan money to the co-operative. Prior to the insertion of section 268A in 1997, members determined the rate of interest on those loans when approving the loan proposal. Section 268A provides for the fixing of the rate of interest at the rate of dividend payable in respect of that period on share capital of the co-operative. Rates approved by members under section 268 loan proposals made before the commencement of section 268A (in December 1997) may differ from the rate now fixed by section 268A. The proposed amendment provides for loans made by members to the co-operative before the commencement of section 268A to continue on the terms in which they were made.

Schedule 1 [48] makes savings and transitional provisions consequent on the enactment of the proposed Act.

Other amendments

Schedule 1 [1] clarifies two definitions.

Schedule 1 [6] and [38] update the use of a term.

Schedule 1 [14] removes a requirement for a register relating to particulars of members whose membership has been cancelled to be in an approved form.

Schedule 1 [15] and [30] provide for certain exemptions to be granted unconditionally or subject to conditions.

Schedule 1 [41] updates a reference to a statutory body.

Schedule 1 [42] clarifies the manner in which documents may be served on a foreign co-operative.

Schedule 2 Amendment of Co-operative Housing and Starr-Bowkett Societies Act 1998

Division 4 of Part 4 of the *Co-operative Housing and Starr-Bowkett Societies Act 1998* sets out accounting requirements for co-operative housing societies and Starr-Bowkett societies. In particular, section 128 requires that societies prepare a statement of financial performance and statement of financial position following the end of each financial year and section 129 provides for the preparation of group accounts. Those sections require that the statements and accounts generally be prepared before the time at which notice of the society's annual general meeting is required to be given, that is, before a day that is 14 days before the end of the period of 5 months after the close of the society's financial year and also set out what is to happen if there is no annual general meeting held. Section 148 of the Act requires that societies must lodge returns in accordance with the regulations, which presently require lodgment within 3 months of the close of the society's financial year (see *Co-operative Housing and Starr-Bowkett Societies Regulation 2000*, clause 27).

Schedule 2 [1] and [2] synchronise the lodgment of statements, accounts and returns by providing that the statements and accounts referred to in sections 128 and 129 must be prepared before the date on which returns are required to be lodged with the Registrar under section 148.