

## **Co-operatives National Law Approval of Alternative Consistent Legislation**

**Paper for the Consumer Affairs Forum (CAF)  
submitted by the CNL Inter-jurisdictional Working Party of Officials**

### **Introduction**

- A. The Australian Uniform Co-operatives Law Agreement (AUCLA) signed by all States and Territories provides for a uniform scheme of legislation by relying upon the legislative powers of each jurisdiction to pass laws that are either uniform or consistent with a template legislative code.
- B. In particular, the AUCLA provides for New South Wales to pass "Initial Legislation" and other jurisdictions to then either pass legislation that applies the Initial Legislation as a law in their jurisdiction or pass alternative consistent legislation to the Initial Legislation.
- C. The drafting of the Initial Legislation in the form of the Co-operatives National Law (CNL) was achieved through the co-operation and agreement of each jurisdiction.
- D. A principal aim of the AUCLA and its terms is to enable co-operatives to carry on business outside their home jurisdiction of incorporation without any regulatory barriers, and to reduce compliance costs by ensuring that as far as possible the law in each jurisdiction in which a co-operative carries on business is uniform.
- E. It is acknowledged by jurisdictions that achieving completely uniform legislation is not practicable, and this is reflected in the variances set out in the AUCLA. Clause 9(5) of the Agreement recognises that there may be non-uniform matters (as referred to in Clause 12) and clause 9(3) provides for the enacting of alternative consistent legislation.
- F. Notwithstanding the flexibility for the uniform scheme to contain differences, jurisdictions have made best endeavours to achieve substantial uniformity and thereby achieve the principle aim of enabling co-operatives to carry on business across jurisdictional borders without regulatory barriers.

### **Alternative consistent legislation**

- 1. Most jurisdictions have indicated an intention to apply the Initial legislation, however, South Australia and Western Australia will broadly rely on the terms of sub-clause 9(3) of the AUCLA to pass alternative consistent legislation utilising the process set out in subsection 7(3) of the CNL for the CAF approval of that legislation.
- 2. Sub-clause 9(3) of the AUCLA provides alternative mechanisms by which jurisdictions can either enact alternative consistent legislation or have such legislation approved by the Ministerial Council on Consumer Affairs (MCCA) (hereinafter referred to as the Consumer Affairs Forum or CAF). Assessment of the AUCLA reveals that while the provisions of sub-clause 9(3) contain alternative mechanisms, the practical process by which a

jurisdiction's legislation might be accepted as being "alternative consistent legislation" is unclear. It is therefore proposed that the provisions in subsection 7(3) of the CNL be used, in preference to sub-clause 9(3) of the AUCLA, for the purpose of developing a clear process by which CAF can approve a jurisdiction's legislation as being alternative consistent legislation within the broad intention of the AUCLA.

3. Section 7 of the CNL sets out the basis upon which the legislative scheme operates as a set of *corresponding co-operatives laws* where the legislation of other jurisdictions either apply the CNL as a law of that jurisdiction, or as subsection 7(3) provides:

*(3) If this Law does not apply as a law of the other jurisdiction, a law of the other jurisdiction is a corresponding co-operatives law for the purposes of this Law if the National Regulations declare that the law substantially corresponds to the provisions of this Law.*

4. Given that the CNL and National Regulations together comprise the template legislation underpinning the national scheme, it is appropriate that the process for assessing alternative consistent legislation should involve applying the test in subsection 7(3) of "**substantially corresponds**" as this, like the AUCLA include CAF approval of a proposed declaration as a necessary element of the approval process for the National Regulations under section 612 of the CNL (paragraph 9 below discusses this in further detail).
5. The process of applying the test "substantially corresponds" already exists in current legislation in NSW (see s369B in the NSW Co-operatives Act) and in other jurisdictions' co-operatives legislation where it is used to determine whether the legislation of another jurisdiction corresponds for the purposes of recognising foreign co-operatives.
6. The practical process under which those provisions operated involved a departmental assessment that a law from another jurisdiction substantially corresponded to the local co-operatives law, and then advice to the Governor to make a declaration in the Gazette.
7. For example, in 1998 this process was used to enable the NSW Governor to make declarations in respect of co-operative laws in the Northern Territory, Queensland, South Australia and Victoria. At that time, Western Australia's co-operatives laws still required significant amendment and could not be declared as being "substantially corresponding" legislation. Western Australia has since enacted co-operatives laws that significantly align with legislation in the other Australian jurisdictions (2009 and 2010).
8. A declaration in the National Regulations that a co-operatives law corresponds to the CNL will enable co-operatives to carry on business outside their jurisdiction of incorporation as provided for in Chapter 5 (participating co-operatives) of the CNL.

9. The National Regulations are made pursuant to section 612 of the CNL by the New South Wales Governor on the advice of the Executive Council and the **recommendation of the Ministerial Council**. This recommendation requires the unanimous approval of CAF of the National Regulations (AUCLA cl.9(2)), including any declarations therein regarding a corresponding co-operatives law. Similarly subsequent amendments of the CNL and National Regulations once made, are to be approved by a majority resolution of CAF (AUCLA cl.10(2)).
10. It remains to determine what is meant by **substantially corresponds** within the ambit of the CNL and the AUCLA.
11. Jurisdictions that propose enacting alternative consistent legislation or amending existing legislation so that it can be recognised as alternative consistent legislation require certainty as to the criteria that will be used to assess whether their legislation substantially corresponds to the CNL before commencing any legislative process.
12. Accordingly, it is proposed to settle criteria to establish whether the alternative consistent legislation “substantially corresponds” to the CNL.

### General criteria

13. As mentioned above, Co-operatives legislation in each jurisdiction, including Western Australia, currently includes a mechanism, similar to that in section 7(3) of the CNL, by which another jurisdiction’s legislation can be recognised as “substantially corresponding” with legislation in the home jurisdiction. None of the current legislation, however, defines “substantially corresponds”. It is therefore appropriate to interpret the phrase according to its ordinary meaning.
14. Case law<sup>1</sup> on the meaning of “substantially” or “substantial” suggests that while the WA Act or SA Act and CNL do not have to be identical, their provisions must be more than merely similar. *Stroud’s Judicial Dictionary of Words and Phrases* (7<sup>th</sup> ed. 2006) cites *Sackville-West v Holmesdale* 39 L.J. Ch 520 supports this view in its analysis of the words “to correspond”. The analysis indicates that “to correspond” does not mean “to be identical with” but rather means “to harmonise with” or “be suitable to”.
15. In light of the above, it is proposed that any assessment of whether alternative consistent legislation substantially corresponds within the meaning of section 7(3) of the CNL should involve a two-step process:
  - *First*, identify the key matters in the CNL and alternative consistent legislation for which harmonisation is important because these matters are essential to distinguishing a co-operative from other types of bodies corporate and therefore are essential to any national legislative scheme.

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<sup>1</sup> *Kotulski v Attard* [1981] 1 NSWLR 115 per Slattery J at 117-118. *Tillmans Butcheries Pty Ltd v Australiasian Meat Industry Employees Union* (1979) 27 ALR 367 per Dean HJ at 382. *Dainford Ltd v Lam* (1985) 3 NSWLR 255 per Powell J at 268. *Guthrie v Spence* [2009] NSWCA 369.

- *Second*, identify any substantive points of difference between the CNL and the proposed alternative consistent legislation to determine whether these derogate from the key matters<sup>2</sup>.

### **Specific criteria**

16. The following key matters are proposed:

- the co-operative principles;
- the democratic nature of the co-operative arising from membership which includes:
  - voting rights attaching to membership not shares;
  - the primary activity and active member provisions;
  - the inclusion of members in any decisions that would impact on the:
    - active membership requirements of the co-operative;
    - purpose for which the co-operative was established; or
    - the financial well-being of the co-operative;
- corporate governance rules including clear duties for directors and officers and financial accountability through appropriate reporting;
- disclosure requirements relating to fundraising including the issuing of shares to new members, debentures and Cooperative Capital Unit's; and
- national regulatory requirements including:
  - applied Corporations Act provisions; and
  - provisions applying to participating co-operatives so that they can conduct business in other jurisdictions in competition with other corporate entities such as companies.

17. Legislation that makes corresponding provision for these key matters would be considered as substantially corresponding provided that there were no other substantive points of difference that derogate from these key matters.

### ***Identifying and obtaining agreement on the treatment of points of difference in alternative consistent legislation***

18. A jurisdiction that enacts alternative consistent legislation to reproduce or incorporate the CNL in total will submit for CAF's approval the legislation, with a statement that the law substantially corresponds to the provisions of the CNL. CAF's approval would also be sought to the Co-operatives National Regulations being amended to declare that the

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<sup>2</sup> Note that non-substantive points of difference in a jurisdiction's alternative consistent legislation would not be identified as part of this process because the provisions already substantially correspond to provisions in the CNL. For example where provisions uses slightly different words but have the same effect this would not be considered a substantive point of difference.

jurisdiction's legislation substantially corresponds to the provisions of the CNL.

19. If CAF approves the Co-operatives National Regulations being amended under paragraph 18, an amendment would be drafted and submitted to the Governor in New South Wales for making upon recommendation of the relevant Minister.
20. A jurisdiction that proposes enacting alternative consistent legislation by amending existing legislation so that its provisions substantially correspond to the CNL will submit for CAF's approval:
  - (i) the substantive points of difference between the alternative consistent legislation and the CNL for which amendments are proposed; and
  - (ii) the substantive points of difference for which amendments are not proposed because they do not derogate from the way in which the alternative consistent legislation as a whole addresses the key matters; and
  - (iii) a statement to the effect that there are no other points of difference, substantive or otherwise, that would give rise to an inconsistency between the alternative consistent legislation and the CNL that require CAF approval under the AUCLA.
21. In advising CAF, each jurisdiction will consider the points of difference in (i) and (ii) and decide whether the proposed amendments are sufficient for the purpose of ensuring that the jurisdiction's legislation will, as a whole, be a corresponding co-operatives law.
22. If CAF notes and approves the proposed amendments the jurisdiction could proceed to have the proposed amendments enacted and advise CAF on the outcome. Once a Jurisdiction's Amendment Bill has been enacted, the jurisdiction would undertake a similar process in relation to identifying amendments to its regulations for CAF's approval.
23. Ultimately an amendment to the Co-operatives National Regulations declaring the jurisdictions legislation to be a corresponding co-operatives law will be the intended outcome of this whole process.