



THIRTY-NINTH PARLIAMENT

REPORT 96

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

CO-OPERATIVES AMENDMENT BILL 2015

Presented by Hon Kate Doust MLC (Chair)

February 2016

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“6. Uniform Legislation and Statutes Review Committee

- 6.1 *A Uniform Legislation and Statutes Review Committee* is established.
- 6.2 The Committee consists of 4 Members.
- 6.3 The functions of the Committee are –
 - (a) to consider and report on Bills referred under Standing Order 126;
 - (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
 - (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
 - (d) to review the form and content of the statute book; and
 - (e) to consider and report on any matter referred by the Council.
- 6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.”

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Hon Brian Ellis MLC (Deputy Chairman)

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**EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS FOR THE
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

CO-OPERATIVES AMENDMENT BILL 2015

EXECUTIVE SUMMARY

- 1 The Co-operatives Amendment Bill 2015 (Bill) arises from Western Australia having signed the Australian Uniform Co-operative Laws Agreement, which provides for a national uniform scheme of legislation governing the registration and regulation of co-operatives. A co-operative is an autonomous association of persons who voluntarily join together to meet common needs through a jointly owned and democratically controlled enterprise.¹

- 2 The Bill amends the *Co-operatives Act 2009* (Act) to achieve consistency with the Co-operatives National Law and allow Western Australian co-operatives to participate in the national uniform scheme. Principal changes introduced by the Bill include:
 - aligning the duties of directors of co-operatives and accounting, auditing and financial reporting to the requirements that apply to proprietary companies under the *Corporations Act 2001* (Cth)
 - a simplified process for the mutual recognition of participating co-operatives registered in other jurisdictions which also operate in Western Australia
 - a mechanism for the adoption by reference of any or all of the provisions of model rules prescribed by the regulations.

- 3 The Committee has inquired into the Bill and considered issues of parliamentary sovereignty and law-making powers. The Committee notes the following clauses in the Bill which may impact upon the sovereignty of the Parliament of Western Australia and its law-making powers:
 - clause 62 (see paragraph 4.9)
 - clause 85 (see paragraph 4.15)
 - clause 134 (see paragraph 4.31).

¹ Department of Commerce, *What is a co-operative?* Available at: <<https://www.commerce.wa.gov.au/consumer-protection/what-co-operative-0>>. Viewed 8 December 2015.

- 4 The Committee finds that the Bill makes amendments to the Act which, despite the extensive nature of the changes, do not impact upon the sovereignty and law-making powers of the Parliament to a significant extent.
- 5 The Committee does, however, draw the attention of the Legislative Council to recurring themes that it has previously identified and made comment on with regard to uniform legislation and its impact on the Parliament of Western Australia.
- 6 As noted in previous reports, the Committee is concerned at the increasing inclusion of Henry VIII clauses in acts, the use of subsidiary legislation to elaborate on obligations set out in principal legislation (often not drafted at the time of the principal legislation being considered) and the lack of review clauses in uniform legislation.

FINDINGS AND RECOMMENDATIONS

- 7 Recommendations are grouped as they appear in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the Government prioritise the consideration of the Co-operatives Amendment Bill 2015 in the Legislative Council.

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Finding 1: The Committee finds that, whilst the intergovernmental agreement impacts upon the sovereignty and law-making powers of the Parliament of Western Australia, the continued erosion of these powers is mitigated through effective scrutiny of uniform legislation by the Committee and the Legislative Council.

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Finding 2: The Committee finds that clause 62 of the Co-operatives Amendment Bill 2015 may have an impact on the sovereignty and law-making powers of the Parliament.

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Recommendation 2: The Committee recommends that the Minister for Commerce explain to the Legislative Council the reasoning for the Henry VIII clauses in clause 85 (proposed new sections 244ZZB(1)(b) and (c)) of the Co-operatives Amendment Bill 2015.

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Finding 3: The Committee finds that incorporating a review clause into the Bill is an effective mechanism to preserve the sovereignty and law-making powers of the Parliament of Western Australia.

Recommendation 3: The Committee recommends that the Co-operatives Amendment Bill 2015 be amended to provide for a review of the legislation after five years.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

CO-OPERATIVES AMENDMENT BILL 2015

1 INTRODUCTION

- 1.1 On 18 November 2015, the Legislative Council referred the Co-operatives Amendment Bill 2015 (Bill) to the Standing Committee on Uniform Legislation and Statutes Review (Committee), according to Standing Order 126 of the Legislative Council's Standing Orders.
- 1.2 Standing Order 126(7) requires the Committee to report within 45 days of referral. Due to the Parliament being in recess at the conclusion of this period, the Committee was required to report to the Legislative Council by 16 February 2016, being the first sitting day following the expiry of 45 days.
- 1.3 On 3 December 2015, the Legislative Council extended the Committee's time in which to report to 25 February 2016.

Inquiry procedure

- 1.4 The Committee called for submissions by contacting 55 stakeholders directly and by advertising in *The West Australian* on Saturday 28 November 2015. The Committee received three submissions. A list of stakeholders invited to make a submission and submissions received are listed at **Appendix 1**.
- 1.5 The Committee held a hearing with the Department of Commerce (Department) on 9 December 2015.²
- 1.6 The Committee thanks all submitters and witnesses for their assistance with the inquiry.

Supporting documents

- 1.7 Hon Michael Mischin MLC, Minister for Commerce, provided the Committee with the following documentation and information pursuant to Ministerial Office Memorandum MM2007/01:
- Australian Uniform Co-operative Laws Agreement (the IGA)
 - Explanatory Memorandum to the Bill

² Submissions and the transcript of the hearing on 9 December 2015 are available on the Committee's website at www.parliament.wa.gov.au/uni.

- Co-operatives National Law (CNL)
- a statement as to any timetable for the implementation of the legislation
- the Government's policy on the Bill
- advantages and disadvantages to the State as a participant in the relevant scheme or agreement
- relevant constitutional issues
- an explanation as to whether and by what mechanism the State can opt out of the scheme
- the mechanisms by which the Bill, once enacted, can be amended.³

1.8 The Committee received the Second Reading Speech, the Explanatory Memorandum and the Bill when the Bill was introduced into the Legislative Council on 11 November 2015.

Structure of the legislation

1.9 The Bill adopts Structure 2 for uniform legislation: 'Model Legislation.'⁴ This approach, also known as mirror legislation, involves the enactment of uniform legislation in Western Australia with local variations as necessary to achieve the agreed uniform national policy. This structure is referred in the IGA as 'Alternative Consistent Legislation' and defined in clause 9(3) of the IGA as being:

legislation which is either uniform with the Initial Legislation or is such that an act or thing which would be lawful under the Initial Legislation would also be lawful under the legislation of that State or Territory.

1.10 The Bill makes amendments to the *Co-operatives Act 2009* (Act) to ensure its consistency with the CNL.

1.11 The Legislative and Governance Forum on Consumer Affairs (CAF)⁵ endorsed Western Australia's proposed amendments to its legislation at a meeting on

³ Hon Michael Mischin MLC, Minister for Commerce, Letter, 11 November 2015.

⁴ See Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 64, *Information Report on Uniform Scheme Structures*, 31 August 2011, p 17.

⁵ Previously known as the Ministerial Council on Consumer Affairs. Any reference in this report to MCCA should be read as referring to the entity now known as CAF.

12 June 2015, ensuring that the current amendments to the Act are consistent with the IGA.⁶

1.12 The Business Council of Co-operatives and Mutuals notes that:

*[by] enacting alternate consistent legislation, the Western Australian Parliament retains complete authority over the enactment and any subsequent amendment to its legislation.*⁷

2 BACKGROUND TO THE BILL

Introduction

2.1 A co-operative is generally defined as:

*an autonomous association of persons who voluntarily join together to meet common business, social and cultural needs through a jointly owned and democratically controlled enterprise.*⁸

2.2 The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements considered a national uniform scheme for co-operatives in its 1998 report on co-operatives law.⁹

2.3 The report noted the following reasons for implementing a national uniform legislative scheme for co-operatives:

Co-operatives have for some time been agitating for modern co-operatives legislation. They had argued that existing legislation was antiquated and did not provide a suitable framework in the current commercial and social environment. The co-operatives submitted that their activities were hamstrung by the inadequacies of the legislation. They recommended the establishment of uniform co-operative legislation. They proposed that the legislation be less regulatory and interventionist and that standards of financial accountability be included.

⁶ Hon Michael Mischin MLC, Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 November 2015, p 8461. See also Australian Consumer Law, *Meeting of Ministers for Consumer Affairs Joint Communiqué Final*, 12 June 2015, p 2. Available at: <<http://consumerlaw.gov.au/files/2015/09/007.pdf>>. Viewed 14 January 2016.

⁷ Submission 3 from Business Council of Co-operatives and Mutuals, 18 December 2015, p 3.

⁸ Department of Commerce, *What is a co-operative?* Available at: <<https://www.commerce.wa.gov.au/consumer-protection/what-co-operative-0>>. Viewed 8 December 2015. See **Appendix 2** for general information regarding co-operatives from the Department of Commerce website.

⁹ Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report 22, *Co-operatives Law*, 21 May 1998.

*Another major problem with the existing co-operatives legislation was that co-operatives were subject to the Corporations Law if they wished to have members or issue securities across State/Territory borders. This was recognised as an impediment to co-operatives trading interstate.*¹⁰

Co-operatives Act 2009

- 2.4 The Co-operatives Bill 2007 (2007 Bill), which became the Act upon commencement in 2009, was the subject of a report tabled by this Committee following referral by the Legislative Council in April 2008.¹¹
- 2.5 The 2007 Bill was intended to replace the two statutes that previously regulated co-operatives in the State: the *Companies (Co-operative) Act 1943* and the *Co-operative and Provident Societies Act 1903*. At the time of the Committee's report, the IGA had not yet been signed by Western Australia (see paragraph 3.5), but the Minister for Consumer Protection at the time, Hon Sheila McHale MLA, indicated that Western Australia would implement alternate consistent legislation '*in order to accommodate local requirements.*'¹²
- 2.6 The Committee found that the Co-operatives Bill 2007 was consistent with the agreement of the Ministerial Council on Consumer Affairs and the national agreement. The *Co-operatives Act 2009* commenced operation on 22 October 2009.

3 THE INTERGOVERNMENTAL AGREEMENT

- 3.1 The IGA has been signed by all States and Territories and came into effect in February 2012. The recitals to the IGA are reproduced at **Appendix 3**.
- 3.2 New South Wales was approved by unanimous resolution of the Ministerial Council on Consumer Affairs as the host jurisdiction for the uniform legislation. The *Co-operatives (Adoption of National Law) Act 2012* (NSW) commenced operation in that State in March 2014. The IGA expressly provides in its recitals that '*without fettering the powers of future Parliaments*' States and Territory parties to the agreement would either adopt New South Wales' initial legislation or enact alternative consistent legislation.

¹⁰ *ibid*, p 5.

¹¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review Committee, Report 30, *Co-operatives Bill 2007*, 27 May 2008.

¹² *ibid*, p 8.

- 3.3 By the end of 2015, New South Wales, Victoria, South Australia, Northern Territory and Tasmania had all enacted legislation to implement the CNL.¹³ Western Australia and the Australian Capital Territory are the only remaining parties to the IGA yet to implement the CNL in legislation. The Department has noted that ‘*most core features of the national legislation are already incorporated into the WA act.*’¹⁴
- 3.4 The selected clauses within the IGA noted below may impact upon the sovereignty of the Parliament of Western Australia.

Clauses which may impact upon the sovereignty and law-making powers of the Parliament

Clause 7 of the IGA

- 3.5 Clause 7 of the IGA provides that a State or Territory (except New South Wales, which enacted the template legislation) shall cease to be a party to the IGA if it fails, within 12 months or such further time as agreed by CAF, to secure the passing and proclamation of the relevant legislation. The forum has extended this timeframe to 18 May 2016.¹⁵
- 3.6 The Committee is concerned that this externally-imposed timeframe will create significant difficulties for both the Parliament and the Executive to comply with the requirements of the IGA. Whilst the 18 May 2016 deadline may appear reasonable in isolation, the Committee notes that the reality of the Parliamentary sitting calendar and the Business Program of both Houses will significantly limit the time available to consider the Bill and make any amendments.
- 3.7 In the Committee’s view, this Bill therefore requires urgent consideration by the Parliament and should be prioritised to ensure that Western Australia complies with clause 7 of the IGA.
- 3.8 The Committee also observes that, in general, this type of clause in an intergovernmental agreement impacts upon Parliamentary sovereignty by requiring the Parliament to enact legislation which has been agreed to by the Executive in a

¹³ New South Wales Government, Department of Fair Trading, *National Co-operatives Law Update Issue #14*, December 2015. Available at: <<http://services.eneews.fairtrading.nsw.gov.au/online/18262372-4.html>>. Viewed 22 January 2016. Queensland withdrew from the IGA on 30 January 2015 and continues to rely on its State legislation for co-operatives.

¹⁴ Anne Driscoll, Acting Director General, Department of Commerce, *Transcript of Evidence*, 9 December 2015, p 2.

¹⁵ Hon Michael Mischin MLC, Minister for Commerce, Letter, 11 November 2015, Attachment A.

(sometimes limited) timeframe not set by the Parliament itself.¹⁶ In practical terms, once the Executive enters into an intergovernmental agreement, the pressure to pass uniform legislation may limit effective scrutiny of the legislation by the Parliament.

- 3.9 In this case, however, the Committee concedes that clause 7 is a key aspect of the IGA and the impact upon Parliamentary sovereignty will be mitigated through the Committee's scrutiny in this report.
- 3.10 The Committee draws the attention of the Legislative Council again to the urgency surrounding the need for timely consideration of the Bill, given the very short timeframe available for Parliamentary scrutiny and the operation of clause 7 of the IGA.

Recommendation 1: The Committee recommends that the Government prioritise the consideration of the Co-operatives Amendment Bill 2015 in the Legislative Council.

Clauses 10(2) and 11

- 3.11 Clause 10(2) states that a State or Territory must not introduce amending legislation:

unless there has been a resolution of the MCCA, passed by a majority comprising at least two thirds of the members who are present and vote, approving the Amending Legislation in the form in which it is introduced or made.

- 3.12 The operation of clause 10 has the potential to impact upon the sovereignty of Parliament by requiring the approval of CAF prior to making amendments to the legislation once enacted.
- 3.13 Clause 11 provides that a State or Territory which has passed Alternative Consistent Legislation (see paragraph 1.9) is not required to obtain the approval of CAF to amend its legislation. The Committee has confirmed with the Department that clause 11 applies to Western Australia, which acts as an important safeguard against such an impact:

[It] is our understanding that clauses 10(2) and 10(3) do not apply to Western Australia's legislation, which comes squarely within the scope of clause 11 ... The proposed amendments have been

¹⁶ Other Committees have previously noted their concern that the role of the legislature is increasingly threatened by the use of uniform legislation and national agreements: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 19, *Uniform Legislation and Supporting Documentation*, 27 August 2004; Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 63, *Information Report: Scrutiny of Uniform Legislation*, 30 June 2011.

*considered by CAF in July 2013 and approved in accordance with the provisions set out in the AUCLA [the IGA] ... amendments going forward will not come within the requirements of clause 10.*¹⁷

Clause 13 of the IGA

- 3.14 Clause 13(1) of the IGA restricts a State or Territory from introducing legislation into Parliament which conflicts with the CNL unless ‘*there is an important reason why this should be introduced.*’ The Committee explored the issue of who decides when a reason is sufficiently important to deviate from the CNL at a hearing with the Department:

The CHAIR: *Regarding part 7, clause 13(1)(a): What is the department’s understanding of “unless there is an important reason”? Is this according to the relevant State or Territory or the Legislative and Governance Forum on Consumer Affairs?*

Ms Peterson: *Clause 13(b) refers to the MCCA, which is now the CAF, as being notified as soon as possible of the submission of legislation. There is no suggestion in there that there is a requirement of consultation with CAF. It is our understanding that the department of the relevant State or Territory would be responsible for making a determination as to whether there is an important reason for departure.*¹⁸

- 3.15 The Committee notes, therefore, that the power to determine whether to notify CAF in relation to amending legislation lies with the Executive (through the Department), despite the fact that it is the Parliament of Western Australia that has the power to make the laws in question (which may conflict with the IGA). The Committee observes that the operation of clause 13 is a further example of the continuing devolution of the Parliament’s law-making powers to the Executive.
- 3.16 Whilst this clause therefore impacts upon Parliament’s sovereignty in making legislation, the Committee notes that there is no penalty outlined in the IGA for a member State or Territory who breaches this clause. The Committee therefore questions the utility of clause 13 if there will be no consequences for non-compliance.

¹⁷ Robyn Peterson, Senior Policy Officer, Department of Commerce, *Transcript of Evidence*, 9 December 2015, p 11.

¹⁸ Hon Kate Doust MLC, Chair, Standing Committee on Uniform Legislation and Statutes Review and Robyn Peterson, Senior Policy Officer, Department of Commerce, *Transcript of Evidence*, 9 December 2015, p 11.

Finding 1: The Committee finds that, whilst the intergovernmental agreement impacts upon the sovereignty and law-making powers of the Parliament of Western Australia, the continued erosion of these powers is mitigated through effective scrutiny of uniform legislation by the Committee and the Legislative Council.

4 THE BILL

Overview

4.1 The purpose of the Bill is to amend the Act to establish consistency with the CNL and to allow Western Australian co-operatives to participate in the national regulatory scheme for co-operatives.¹⁹

4.2 The Second Reading Speech for the Bill states that:

The Co-operatives Amendment Bill 2015 (the Bill) amends the Co-operatives Act 2009 ... to achieve consistency with the Co-operatives National Law (CNL) and to allow Western Australian (WA) co-operatives to participate in a national regulatory scheme for the registration and regulation of co-operatives.

Participation in the scheme will remove barriers to the development and expansion of co-operative enterprises and offer investment opportunities by allowing those WA registered co-operatives wishing to expand their operations to carry on business nationally, without any requirement to register in other jurisdictions.²⁰

4.3 The Department has advised that:

the intention ... was to replicate the CNL in relation to the identified key matters. In other respects, the amended WA legislation would be consistent with the CNL, except when the specific conditions prevailing in the sector in WA required a different legislative approach ... or legislative provisions or drafting conventions applying in Western Australia required a provision to be drafted differently ... a number of the proposed changes will impact only on administrative and procedural matters.²¹

4.4 The Committee notes that there are four key areas where the Bill will affect the rights and obligations of co-operatives and their members:

¹⁹ *Co-operatives Act 2009, Explanatory Memorandum*, Legislative Council, p 2.

²⁰ Hon Michael Mischin MLC, Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 18 November 2015, p 8461.

²¹ Sarah Hazell, Legal Policy Officer, Department of Commerce, *Transcript of Evidence*, 9 December 2015, p 5.

- registered co-operatives will now be permitted to conduct business in any participating jurisdiction, subject to compliance with the applicable legislation in that jurisdiction
- duties that apply to directors of co-operatives and defences available to allegations of breaches of these duties will be aligned with the duties of directors of proprietary companies
- accounting, auditing and financial reporting obligations for co-operatives will be more closely aligned with those that apply to proprietary companies
- co-operatives will be able to adopt all or any of the provisions of model rules for co-operatives as prescribed by regulation.

Consultation

- 4.5 Consultation on a national level occurred during 2010 and 2011 while the CNL was being developed. The Department advised that Co-operatives WA was a party to that process and provided a submission at the time regarding the CNL on behalf of its members.²²
- 4.6 Following the finalisation of the CNL, the Department reviewed the legislation and published a discussion paper on proposed amendments to the Act to remain consistent with the national law.
- 4.7 The Department released its ‘Proposals to align the Co-operatives Act 2009 with the Co-operatives National Law 2012’ in November 2012 and received four written submissions from Western Australian co-operatives. The Department also convened an industry reference group to address concerns from the industry regarding the contents of the proposed amendments to the Act.²³

Clauses which may impact upon the sovereignty and law-making powers of the Parliament

- 4.8 The Committee notes the following specific provisions in the Bill which may impact upon the sovereignty and law-making powers of the Western Australian Parliament.

Clause 62 – proposed new section 207A

- 4.9 This clause provides that:

The secretary of a co-operative must take all reasonable steps to ensure that the co-operative does not contravene a provision of this

²² *ibid*, p 3.

²³ *ibid*, p 4.

Act that is prescribed by the regulations for the purposes of this section.

Penalty: a fine of \$500.

- 4.10 The Committee notes that this clause leaves it to subsidiary legislation to outline the offences under the Act which a co-operative's secretary must monitor and for which the secretary is liable. This clause raises the issue of Fundamental Legislative Scrutiny Principle 12, which requires a consideration of whether a delegation of legislative power is appropriate in the circumstances:

*Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?*²⁴

- 4.11 The Department has advised that clause 62 is based on section 188 of the *Corporations Act 2001* (Cth), which provides that the secretary of a corporation is responsible for ensuring that a company complies with a range of statutory requirements.²⁵ The provisions in question will relate to the co-operative's record keeping obligations and the maintenance of registers.²⁶ The Committee notes that in the Commonwealth legislation the provisions are set out in the Act, rather than being left to regulations.

- 4.12 The Department has advised that:

the inclusion of these provisions in the regulations allows additional flexibility for jurisdictions to amend the provisions to meet any change in circumstances. As the provisions set out in the national regulations relate to administrative and compliance functions of the secretary, inclusion of these provisions in the regulations will allow flexibility to adjust the regulations to meet compliance goals ...

*including the provisions in the regulations rather than the Bill provides for prompt amendment of the requirements to maintain consistency with the Corporations Act ... should the Commonwealth decide to amend section 188 of the Corporations Act.*²⁷

- 4.13 Whilst the Department is of the view that including these provisions in the Act rather than in regulation 'would not make the legislation inconsistent for the purposes of the

²⁴ See Western Australia, Legislative Council, Standing Committee on Legislation, Report 30, *Bell Group Companies (Finalisation of Matters and Distribution of Proceeds) Bill 2015*, 10 November 2015, p 48 for the most recent discussion of this Fundamental Legislative Scrutiny Principle.

²⁵ Section 188 of the *Corporations Act 2001* (Cth) contains a list of 12 offences for which a company secretary is responsible if the company commits an offence.

²⁶ Department of Commerce, *Explanatory Memorandum – Co-operatives Amendment Bill 2015*, p 20.

²⁷ Anne Driscoll, Acting Director General, Department of Commerce, Letter, 22 December 2015, p 3.

AUCLA in the short term, it has expressed concern that Western Australia's involvement in the national law requires consistency in relation to identified key areas, including corporate governance rules. If the provisions in question were included in the Act, *'co-operatives would incur additional compliance costs ... while WA undertook the process of amending its principal Act.'*²⁸

- 4.14 The Committee is concerned at the increasing frequency with which subsidiary legislation is used to give substance to and elaborate on obligations outlined in principal legislation, including behaviour which may give rise to penalties. The Committee notes, again, the erosion of the Parliament's sovereignty through this delegation to the Executive to make laws for the people of Western Australia.

Finding 2: The Committee finds that clause 62 of the Co-operatives Amendment Bill 2015 may have an impact on the sovereignty and law-making powers of the Parliament.

Clause 85 – proposed new section 244ZZB

- 4.15 This proposed new section contains references to accounting or auditing standards which are made for the purposes of the *Corporations Act 2001* (Cth):

(1) *A reference in this Part (including provisions of the Corporations Act applying under this Part) to accounting or auditing standards is a reference to –*

(a) *the accounting or auditing standards made for the purposes of the Corporations Act, except as provided by paragraphs (b) and (c); or*

(b) *the accounting or auditing standards referred to in paragraph (a) but as modified by the regulations; or*

(c) *the accounting or auditing standards **prescribed by or determined under the regulations** in substitution for all or any accounting or auditing standards referred to in paragraph (a)...*

(3) ***The regulations may provide** that an accounting or auditing standard referred to in subsection (1)(a) does not apply for the purposes of –*

(a) *this Act; or*

²⁸ *ibid*, p 3.

(b) a particular provision of this Act; or

(c) a particular aspect or application of this Act,

and may do so without substituting another accounting or auditing standard.

[Committee emphasis added]

- 4.16 Proposed new section 244ZZB(1)(b) provides that the accounting or auditing standards referred to in section 244ZZB(1)(a) can be modified by regulation and section 244ZZB(3) enables regulations made under the Act to override specific sections in the Act (sections 244ZZB(3)(a)-(c) above). These are Henry VIII clauses, as they enable primary legislation to be amended by subsidiary legislation rather than by an Act of Parliament. Henry VIII clauses are repugnant because of this shift of power from the Legislative to the Executive arm of government.
- 4.17 The Committee notes that, whilst courts have traditionally disliked this type of clause in principal legislation, there is a growing acceptance that subsidiary legislation made under Henry VIII clauses are valid so long as there is ‘*direct and unambiguous authority*’ in the principal legislation.²⁹ More recently, the Committee observes that the courts have not declared Henry VIII clauses to be invalid, or found them to be objectionable, where a process exists for proper scrutiny of the subsidiary legislation, as is found in section 42 of the *Interpretation Act 1984* (see paragraph 4.26):

*The underlying legislative purpose is evidently to provide a flexible means of making adjustments to the savings and transitional provisions otherwise contained in Pt 19H [of the Workers Compensation Act 1987 (NSW)] which does not require those adjustments to be embodied in further amendments to the Act. The flexible means provided is ... **subject to disallowance of any provision of a regulation so made by resolution of either House of Parliament under s 41 of the Interpretation Act [NSW] ... That parliamentary oversight ... diminishes the utility of the pejorative labelling of the empowering provisions as “Henry VIII clauses.”** The empowering provisions reflect not a return to the executive autocracy of a Tudor monarch, but the striking of a legislated balance between flexibility and accountability in the working out of the detail of replacing one modern complex statutory scheme with another.³⁰*

[Committee emphasis added]

²⁹ *Combined State Unions v State Service Coordinating Committee* [1982] 1 NZLR 742, 745 (Woodhouse P).

³⁰ *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18, 61 (Gageler J).

- 4.18 The Committee is concerned that the Explanatory Memorandum for the Bill did not identify any clauses in the Bill as Henry VIII clauses, which reveals a lack of appreciation of their impact upon the sovereignty of the Parliament.
- 4.19 Henry VIII clauses undermine the sovereignty of the Parliament and erode the institution's law-making power. The Committee's concerns regarding the increasing use of Henry VIII clauses have been well-documented in previous reports, as recently as March 2015.³¹
- 4.20 The Committee has also previously recommended that, where uniform legislation introduced in the Legislative Council proposes a Henry VIII clause, this be identified in the Explanatory Memorandum to the bill.³² During the Legislative Council's consideration of Report 55, the Government strongly supported the Committee's recommendation to these clauses in the Explanatory Memorandum:

I do not know what it is about parliamentary counsel and some government agencies, but they just do not seem to recognise what Henry VIII clause are, and it is not unusual for us to discover them in this chamber. Indeed, I have discovered a few since I have been in cabinet. I have a general view that we should not have them.

*I do not think we should be able to change an act by regulation. I think there is a fundamental problem with that. However, there have been occasions in the past where Henry VIII clauses have been unavoidable ... But, as a general rule, we should not have them, and I agree entirely with the view that if there is going to be one, a justification needs to be provided to the committee and to the Parliament ... having read the Henry VIII clauses that the committee has identified, the government is happy to accept the recommendations for amendments that are advocated by the committee ...*³³

- 4.21 The Committee notes that, since 2010, the identification of Henry VIII clauses in supporting documentation for uniform legislation bills has continued to be an issue, despite the Government's statements above.

³¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 91, *Rail Safety National Law (WA) Bill 2014*, 24 March 2015, p 19. See also the following Committee reports: Report 59, *Personal Properties Securities (Commonwealth Laws) Bill 2007 and Personal Properties Securities (Consequential Repeals and Amendments) Bill 2007*, 22 March 2011; Report 55, *Trade Measurement Legislation (Amendment and Expiry) Bill 2010*, 11 November 2010.

³² Recommendation 2 in Committee Report 55, *Trade Measurement Legislation (Amendment and Expiry) Bill 2010*, 11 November 2010, p 12.

³³ Hon Norman Moore MLC, Minister for Mines and Petroleum, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 23 November 2010, p 9249.

- 4.22 The Committee explored the reasoning behind clause 85 with the Department at a hearing:

The CHAIR: Please explain the rationale for providing, in proposed new section 244ZZB(1)(b), for the regulations to modify accounting or auditing standards referred to in proposed new clause 244ZZB(1)(a)?

Ms Peterson: The standards are developed by the AASB [Australian Accounting Standards Board] and the AUASB [Australian Accounting Standards Board] and they are subject to regular review and amendment by those bodies. As they are made to address the needs of a wide variety of entities, it is possible that changes will be made to the standards that will make them unsuitable for application to cooperatives ...

*We are not aware of any issues in relation to the application of current standards to cooperatives, but it was considered necessary to build into the Western Australian legislation a capacity to deal with that situation if it arises.*³⁴

- 4.23 The Committee is of the view that the Department has not provided a sufficiently compelling reason for the inclusion of Henry VIII clauses in proposed sections 244ZZB(1)(b) and (3), other than flexibility for the Executive.
- 4.24 The Committee therefore reiterates its view that the use of Henry VIII clauses in principal legislation continues to undermine the sovereignty of the Parliament and should be used only where strictly necessary.

Recommendation 2: The Committee recommends that the Minister for Commerce explain to the Legislative Council the reasoning for the Henry VIII clauses in clause 85 (proposed new sections 244ZZB(1)(b) and (c)) of the Co-operatives Amendment Bill 2015.

Clause 85 – proposed new section 244ZZK

- 4.25 Proposed section 244ZZK also contains a Henry VIII clause, as highlighted in this extract from clause 85:

244ZZK. Registrar’s power to modify the operation of section 324DA of Corporations Act

³⁴ Hon Kate Doust MLC, Chair, Standing Committee on Uniform Legislation and Statutes Review and Robyn Peterson, Senior Policy Officer, Department of Commerce, *Transcript of Evidence*, 9 December 2015, pp 13-14.

(1) *On an application made in accordance with this section, the Registrar may –*

(a) *declare that the Corporations Act section 324DA(1) (as applying under Division 12 of this Part) applies to a registered company auditor*

...

(8) *The Registrar must give the applicant written notice of the making, revocation or suspension of the declaration.*

4.26 The impact of this Henry VIII clause is significant for two reasons:

- the Registrar of Co-operatives is given the power to modify the operation of a statute by declaration (section 324DA of the *Corporations Act 2001* (Cth))
- such a declaration by the Registrar is not a regulation for the purposes of the *Interpretation Act 1984* and therefore not subject to Parliamentary scrutiny through the disallowance process.³⁵

4.27 The Committee notes that the Parliamentary disallowance process and the power of the Joint Standing Committee on Delegated Legislation to scrutinise subsidiary legislation are important aspects of the Parliament's sovereignty and should be protected where possible.

4.28 The Department has advised that:

*Any declaration made in relation to that section [section 244ZZK] will be of an administrative rather than a legislative nature. It will be about dealing with the needs of a particular cooperative at a particular time. A decision is unlikely to be contentious and it would be subject to challenge by any affected party in the Supreme Court.*³⁶

4.29 Whilst the Committee notes that the ability for affected parties to seek redress through the courts is an important aspect of the proposed new section, it is not relevant to the potential impact that it may have upon the sovereignty of Parliament.

³⁵ Section 42 of the *Interpretation Act 1984* provides that all regulations must be laid before each House of Parliament and either House may disallow regulations. The Joint Standing Committee on Delegated Legislation has the power to scrutinise all subsidiary legislation on behalf of the Legislative Council that is referred to it within its Terms of Reference. For further information, refer to the Joint Standing Committee on Delegated Legislation's Terms of Reference: Schedule 1, clause 10 of the Standing Orders of the Legislative Council.

³⁶ Robyn Peterson, Senior Policy Officer, Department of Commerce, *Transcript of Evidence*, 9 December 2015, p 14.

4.30 The Committee is, however, satisfied that the relatively minor, administrative nature of the Registrar's declaration in proposed new section 244ZZB(1) will not have an impact upon Parliamentary sovereignty and legislative scrutiny.

Clause 134 – proposed new section 379

4.31 This proposed new section provides that the Act may be amended by subsidiary legislation (a Henry VIII clause) as follows:

(1) A participating co-operative that is authorised under this Part to carry on business in this State must comply with the provisions of this Act that are prescribed by the regulations.

(2) The provisions prescribed for the purposes of subsection (1) –

(a) apply with all necessary modifications and any modifications prescribed by the regulations; and

(b) are in addition to the provisions of this Part and any other provisions of this Act that are expressed to apply to participating co-operatives.

4.32 In this case, the Henry VIII clause existed in the Act prior to the amendment proposed by clause 134. Section 379 of the Act currently provides that:

The provisions of this Act specified in –

(a) Schedule 5; and

(b) the regulations,

apply, with all necessary modifications and any modifications prescribed by the regulations, to a foreign co-operative that is authorised to carry on business in this State under this Part.

4.33 The Committee has confirmed with the Department that the regulations made in relation to the proposed new section 379(2) will not actually modify the provisions in the Act:

Ms Peterson: *The proposed section replaces current section 379 that contains a similar arrangement in relation to the regulation of what we now call foreign cooperatives. It is intended to allow additional provisions of the Western Australian act currently applying to only local registered cooperatives to be extended to apply to participating cooperatives should that be required ... it is not intended at this stage that any additional provisions will be incorporated by way of regulation. But should it become necessary for additional provisions*

of the Western Australian act to be applied to participating cooperatives in the future, then the capacity will be there to do that ...

Ms Driscoll: When we say 'participating', we mean foreign – so, basically, it is making sure that our cooperatives have an even playing field with those that enter our space.³⁷

- 4.34 Section 379 as currently worded was part of the original Co-operatives Bill 2007, considered by the Legislative Council during the debate on the bill and scrutinised in the Committee's Report 30.³⁸ The Committee concludes that, given that the wording of section 379 has already been considered by the Parliament of Western Australia, the Henry VIII clause in proposed new section 379(2) will not have an additional impact upon the sovereignty of the Parliament.

Review of the Act

- 4.35 The Committee has previously commented on the lack of a review clause in uniform legislation and notes that clauses to provide for periodic review are standard drafting practice. Review clauses are an important mechanism for Parliamentary accountability and oversight of legislation.³⁹
- 4.36 The Committee has explored the possibility of the Bill being amended to include a review of the operation of the amendments introduced by the Bill.
- 4.37 The Department advised that its intention is to '*review the operation of the amendments once a reasonable period of time has passed in order to allow the Western Australian co-operatives to experience working within the new framework.*'⁴⁰
- 4.38 The Department does not support the insertion of a formal review clause into the Act (through an amendment to the Bill) for the following reasons:

The co-operatives legislation has a very limited direct impact on the community outside co-operatives ... the Department is confident that any issues in relation to the operation of the legislation will quickly come to its attention ... The regulation of the co-operatives sector nationally provides for an opportunity for an ongoing review process

³⁷ Robyn Peterson, Senior Policy Officer, Department of Commerce and Anne Driscoll, Acting Director General, Department of Commerce, *Transcript of Evidence*, 9 December 2015, pp 15-16.

³⁸ See paragraphs 2.4 to 2.6. Report 30 was written prior to the current Terms of Reference and thus did not make specific findings in relation to the prevalence of Henry VIII clauses in principal legislation.

³⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 91, *Rail Safety National Law (WA) Bill 2014*, 24 March 2015, p 24. See also Committee Report 92, *Directors' Liability Reform Bill 2015*, 21 April 2015, pp 14-16 and Report 91, *Business Names (Commonwealth Powers) Bill 2011*, 6 March 2012, pp 20-21.

⁴⁰ Robyn Peterson, Senior Policy Officer, Department of Commerce, *Transcript of Evidence*, 9 December 2015, p 17.

and in light of these mechanisms the Department is of the view that a formal review clause is not required in the amendment Bill ...

As part of the process of the development of the amendment Bill a comprehensive review was undertaken in relation to the operation of the Co-operatives Act 2009, which already incorporates most key features of the National Law.⁴¹

- 4.39 The Committee, however, is of the view that incorporating a review clause into the Bill is an effective mechanism to preserve the Parliament's law-making powers with regard to the Bill's operation.

Finding 3: The Committee finds that incorporating a review clause into the Bill is an effective mechanism to preserve the sovereignty and law-making powers of the Parliament of Western Australia.

Recommendation 3: The Committee recommends that the Co-operatives Amendment Bill 2015 be amended to provide for a review of the legislation after five years.

5 CONCLUSION

- 5.1 The Committee finds that the Bill makes amendments to the Act which, despite the extensive nature of the changes, do not impact upon the sovereignty and law-making powers of the Parliament to a significant extent.
- 5.2 The Committee does, however, draw the attention of the Legislative Council to recurring themes that it has repeatedly identified and made comment on with regard to uniform legislation and its impact on the Parliament of Western Australia.

Recurring themes identified by the Committee

- 5.3 As noted in previous reports, the Committee is concerned at the increasing inclusion of Henry VIII clauses in acts, the use of subsidiary legislation to elaborate on obligations set out in principal legislation (often not drafted at the time of the principal legislation being considered) and the lack of review clauses in uniform legislation.
- 5.4 The Committee notes that the ongoing explanation from the Executive that Henry VIII clauses are necessary to provide flexibility must be balanced against the impact on Parliamentary sovereignty.

⁴¹ Anne Driscoll, Acting Director General, Department of Commerce, Letter, 22 December 2015, p 2.

- 5.5 The Committee notes the words of the Standing Committee on Uniform Legislation and General Purposes in its Report 9 and extrapolates that uniform legislation in general has the potential to reduce the role of Parliament as the ultimate law-maker in the State.⁴²
- 5.6 The Committee also notes that external deadlines for the passage of uniform legislation imposed through intergovernmental agreements do not take into account the important role of the Parliament in the legislative process. The Committee appreciates the complex negotiations often involved in setting timeframes for national legislation to be implemented, but urges the Executive to be mindful of imposing unrealistic deadlines upon the Parliament to consider legislation.
- 5.7 The Committee therefore concludes that the Bill does not significantly impact upon the sovereignty and law-making powers of the Parliament, but highlights that it is symptomatic of a continued erosion of power to the Executive through uniform legislation.



Hon Kate Doust MLC
Chair

25 February 2016

⁴² The Standing Committee on Uniform Legislation and General Purposes quoted the former Minister for Consumer and Employment Protection: *'The most common concern with template legislation is that it impacts the sovereignty of participating jurisdictions and a perceived reduction in Parliament's role as the ultimate law-maker'*: Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 9, *Consumer Credit (Western Australia) Amendment Bill 2002*, 6 May 2003, p 18.

APPENDIX 1

STAKEHOLDERS INVITED TO PROVIDE A SUBMISSION AND SUBMISSIONS RECEIVED

Stakeholders invited to provide a submission

1. Department of Commerce
2. Co-operatives WA
3. Small Business Development Corporation
4. The Law Society of Western Australia
5. Albany Organised Primary Producers Co-operative Limited
6. B.K.W Co-operative Limited
7. Badimia Trading Co-operative
8. Bauble Collective Co-operative Limited
9. Boyup Brook Co-operative Company Limited
10. Bunbury Taxis Co-operative Limited
11. Caxton Co-operative Limited
12. Contractors and Self-Represented Workers Co-operative Limited
13. Co-operative Bulk Handling Limited
14. Cunderdin Farmer's Co-operative Company Limited
15. Denmark Co-operative Company Limited
16. Desert Kitchen Co-op Limited
17. Engineering and Manufacturing Industry Co-operative Limited
18. Esperance Organised Primary Producers Co-operative Limited
19. Fremantle Wind Farm Co-operative Limited
20. Fruit West Co-operative Limited
21. Gabiny Plum Harvesters Co-operative Limited
22. Gascoyne Water Asset Mutual Co-operative Limited
23. Gascoyne Water Co-operative Limited
24. Geraldton Fisherman's Co-operative
25. Geraldton Organised Primary Producers Co-operative Limited
26. Kalgoorlie Taxi Car Owners Co-operative Limited
27. Kellerberrin Farmer's Co-operative Limited
28. Kojonup Co-operative Company Limited

29. Kukerin Co-operative Company Limited
30. Liquor Barons Co-operative Limited
31. Midland Forestry Alliance Co-operative Limited
32. Miling Co-operative Company Limited
33. Mount Barker Co-operative Limited
34. Nyungar Trading Co-operative Limited
35. Ord Irrigation Asset Mutual Co-operative Limited
36. Ord Irrigation Co-operative Limited
37. Ord River District Co-operative Limited
38. Organic and Biodynamic Meats Co-operative Limited
39. Phoenix Pond Co-operative Limited
40. Preston Valley Irrigation Co-operative Limited
41. Quairading Farmer's Co-operative Limited
42. South West Irrigation Asset Co-operative Limited
43. South West Irrigation Management Co-operative Limited
44. Sustainable Housing for Artists and Creatives Co-operative Limited
45. Sweeter Banana Co-operative Limited
46. The Wagin District Farmer's Co-operative Company Limited
47. United Crate Co-operative Limited
48. Watheroo Community Co-operative Limited
49. Wesbuilders co-operative Limited
50. Western Australia Meat Marketing Co-operative Limited
51. Westonia Community Co-operative Limited
52. Widi Trading Co-operative Limited
53. York and District Co-operative Limited
54. Cocos Island Co-operative Society Limited
55. Business Council of Co-operatives and Mutuals

Submissions received

1. Business Council of Co-operatives and Mutuals
2. Co-operatives WA
3. Ord Irrigation Co-operative Limited

APPENDIX 2

WHAT IS A CO-OPERATIVE?

A co-operative is an autonomous association of persons who voluntarily join together to meet common business, social and cultural needs through a jointly owned and democratically controlled enterprise.

Co-operatives play an important role in our economy and community. They are diverse organisations and are often regionally based supporting a wide range of industries including retail, agriculture, water distribution, manufacturing, taxi services and arts and crafts.

In Western Australia all co-operatives must be registered with Consumer Protection.

Types of co-operatives

Two types of co-operatives operate in Western Australia:

- distributing co-operatives: This structure allows returns or distributions to members on surplus other than the nominal value of any shares at the time of winding-up. Distributing cooperatives must have share capital
- non-distributing co-operatives: This structure does not allow returns or distributions on surplus other than the nominal value of any shares at the time of winding-up. Non-distributing co-operatives can choose whether to have share capital.

Is becoming a co-operative the right choice?

The following seven guiding principles distinguish a co-operative from other business structures:

- voluntary and open membership to anyone willing to accept the responsibilities of membership
- democratic member control. Members have equal voting rights (one member, one vote)
- economic participation. Members contribute and control the capital of their co-operative in an equitable and democratic way
- autonomy and independence. Co-operatives are autonomous organisations controlled by their members
- education, training and information is often provided to members so that they can contribute effectively to the organisation
- co-operation among co-operatives helps to reinforce co-operative ideals and further the co-operative business structure
- concern for the community. Co-operatives also the sustainable development of their communities through policies accepted by their members.

[Source: Department of Commerce, Consumer Protection Division]

APPENDIX 3
AUSTRALIAN UNIFORM CO-OPERATIVES LAWS AGREEMENT
RECITALS

- (A) *It is generally acknowledged to be in the interests of the public and of persons and authorities concerned with the administration of the laws regulating co-operatives that there should be, as far as possible, uniformity both in those laws and their administration in the States and the Territories of Australia.*
- (B) *The Governments of the States and the Territories of Australia are agreed that as far as possible such uniformity will be achieved by establishing and implementing the Scheme, the objects of which are to ensure that:*
- (a) *the legislation relating to the Scheme is, and continues to be either:*
 - (i) *uniform throughout Australia; or*
 - (ii) *in any State or Territory where it is not uniform, consistent with the uniform laws;*
 - (b) *the legislation is administered, as far as possible, on a uniform basis;*
 - (c) *as appropriate from time to time, changes in the legislation are proposed for consideration and amendments made when the need for reform arises.*
- (C) *Agreement has been reached between the States and the Territories that, without fettering the powers of future Parliaments, the Scheme will provide for the introduction of Initial Legislation into the Parliament of the State of New South Wales and require the other States and Territories to either:*
- (a) *adopt that Initial Legislation; or*
 - (b) *enact and maintain legislation which is consistent with the Initial Legislation.*