

Co-operatives Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

Clause 1 sets out the purposes of the Act.

Clause 2 makes the Act operative on a day to be proclaimed.

Clause 3 sets out definitions of words and phrases used in the Act.

Clause 4 sets out the objects of the Act.

Clause 5 sets out the co-operative principles which have been adopted by the International Co-operative Alliance and these are—

Principle of voluntary association and open membership

Principle of democratic control

Principle of limited interest on share capital

Principle of equitable distribution of surplus

Principle of co-operative education

Principle of co-operation between co-operatives.

Clause 6 provides for the application of this Act to societies (other than credit societies, associations of credit societies, federations of credit societies) and to rental housing co-operatives formed under Part VI of the *Housing Act 1983*, gives existing co-operatives 2 years to bring their rules into conformity and allows the Registrar to give co-operative companies 5 years to comply with the Act if they transfer within 1 year of commencement of the Act.

Clause 7 provides for the *Co-operation Act 1981* to apply only to credit societies, associations of credit societies and federations of credit societies.

Clause 8 provides for the application of the *Companies (Victoria) Code* in certain circumstances.

Clause 9 provides for the repeal of Part VI of the *Housing Act 1983*.

PART 2—FORMATION OF CO-OPERATIVES

Types of Co-operatives

Clause 10 provides for the type of co-operatives that may be formed.

Clause 11 provides that a co-operative may be formed for any lawful object specified in the rules.

Clause 12 sets out the number of people required to form a co-operative, a co-operative association and a co-operative federation.

Clause 13 provides for a formation meeting to be held, before a co-operative can be registered.

Clause 14 provides that money must not be accepted for share allotment until a co-operative is registered.

Clause 15 provides that a co-operative has limited liability.

Clause 16 sets out the types of persons eligible to be members of a co-operative.

Clause 17 sets out the circumstances in which a person ceases to be a member of a co-operative.

Clause 18 limits the liability of members.

Clause 19 sets out the rights of members under 18 years of age.

Clause 20 provides rules for bodies corporate that are members of co-operatives.

Clause 21 restricts the right to vote at general meetings to those persons who control less than a specific proportion of the voting rights of the co-operative. The purpose is to prevent factions from gaining control. This clause has a counter-part in Clause 38, which places similar limits on shareholding. Central to both clauses is the concept of 'relevant interests', the clauses are separated to emphasise that in co-operatives voting is not tied to shares, voting attaches to membership. 'Relevant interest' encompasses every possible mode and degree of influence by any person over the way members exercise their right to vote.

PART 3—REGISTRATION OF CO-OPERATIVES

Clause 22 provides that an application for registration must be made in the prescribed manner.

Clause 23 obliges the Registrar to register the co-operative once the Registrar is satisfied with the listed criteria.

Clause 24 obliges the Registrar to issue a certificate of incorporation. The clause provides that registration confers corporate status.

Clause 25 prescribes the procedure for the registration of an existing body corporate.

Clause 26 sets out the prescribed records, registers and documents required to be kept by a co-operative.

Clause 27 proscribes co-operatives from registering certain names.

Clause 28 sets out how and where a co-operative must display its name.

Clause 29 stipulates that a co-operative must have a registered office.

Clause 30 stipulates that a co-operative must have rules including the matters specified in Schedule 1.

Clause 31 provides procedures for changes to rules.

Clause 32 sets out the powers of a co-operative. The making of loans under sub-clause (5) of this clause must be ancillary to other business of the co-operative, hence it may not be a primary object under clause 69 (2).

Clause 33 deals with rental housing co-operatives and their powers.

Clause 34 provides that a co-operative has a charge on debts due from members.

Clause 35 provides for the application of the *Companies (Victoria) Code* to registration of charges.

PART 4—CAPITAL AND FUNDS

Clause 36 provides that capital must be divided into shares of a fixed amount.

Clause 37 provides the procedure for the allotment of shares.

Clause 38 limits the percentage of relevant interest to be held in the right to dispose of shares or to withdraw share capital. Where there are five or more members of a co-operative a person must not hold a relevant interest in more than twenty per cent, or if less than five not more than forty per cent, of the shares.

Clause 39 provides for a register to be kept of all persons who hold a relevant interest in ten or more per cent of shares in a co-operative.

Clause 40 provides that where there is an offer to purchase shares in a co-operative which is made as part of a proposal for, or is conditional upon, either the sale of the undertaking or any part of the undertaking of the co-operative as a going concern; or the registration of the co-operative as a body corporate under any other State or Commonwealth Act; or the winding-up of the co-operative; or where a contravention of *Clause 38* would result were the offeror to be registered immediately after the offer is made as the holder of the shares; then the offer must not discriminate between active and inactive members, and must be made with the approval of the members.

Clause 41 prohibits offers to purchase shares which would result in the purchaser becoming a substantial shareholder within the meaning of *Clause 39*, if the offers discriminate between active and inactive members.

Clause 42 provides that an offer made in contravention of *Clauses 40* or *41* does not entitle the offeror to registration as shareholder, and if the transfer is registered the shareholder is not entitled to vote at meetings. Any vote cast in contravention of this clause is to be disregarded.

Clause 43 provides that shares may only be transferred or repaid in the circumstances specified, that is, with consent of directors or where rules provide, approval of members, when a member dies, or to an administrator appointed under the *Guardianship and Administration Board Act* (1986).

Consent or approval must not be given if the nominal value of the shares would exceed the specified percentage of the nominal value of the shares as at the beginning of the financial year in question.

A person must give notice in writing to the co-operative within 14 days of transfer or agreement to transfer a share.

A person must give notice in writing to the co-operative within 14 days of commencing to hold shares whether on their own behalf or someone else's.

This clause prohibits shares in a co-operative from being quoted on a stock exchange.

Clause 44 provides for cancellation of shares.

Clause 45 provides for repayment of share capital within specified periods of time, depending on the reason why repayment is required, that is, in the event of expulsion, resignation or forfeiture.

Clause 46 provides that where a member cannot be found for 2 years the shares of the member are to be cancelled and the amount paid up on the shares paid to the Treasurer who must deal with it as if it was received under the *Unclaimed Moneys Act* 1962.

Clause 47 provides that the register of members and shares must state when persons are joint shareholders.

Clause 48 indicates the circumstances that the provisions of the *Companies (Victoria) Code* would apply in relation to the issue of a prospectus.

Clause 49 limits the extent of distribution of surplus, where the rules of the co-operative so provide.

Clause 50 enables the making of rules relating to the investment of surplus funds.

PART 5—MANAGEMENT

Division 1—General provisions

Clause 51 provides that the operations of the co-operative are to be managed by a board of directors.

Clause 52 states that there must not be less than 3 directors and stipulates who may be a director.

Clause 53 sets out the manner of electing directors.

Clause 54 sets out that a person above the age of 72 years must not be elected as a director except in specified circumstances.

Clause 55 sets out the circumstances in which the office of a director is terminated.

Clause 56 provides for the election of a chairperson of the board of directors.

Clause 57 provides that the director's remuneration must be approved at a general meeting of the co-operative, and where the director is acting in an executive capacity it may be approved by the board of directors.

Clause 58 requires a co-operative to appoint a secretary.

Clause 59 provides that a co-operative must notify the Registrar within 14 days of any change of secretary or directors.

Clause 60 provides for one vote only per member and sets out other rules in relation to voting.

Clause 61 provides that decisions at a meeting must be determined by a majority in circumstances where a special resolution is not required.

Clause 62 sets out the requirements for passing a special resolution at a meeting of a co-operative.

Clause 63 sets out when general meetings are to be held and requires a quorum.

Clause 64 requires 21 days notice of general meetings to be given to members and the manner of giving notice.

Clause 65 requires meetings of the board of directors to be held at least every three months. Notice must be given in accordance with the rules. A quorum is 50 per cent of the number of directors unless the rules provide for a higher percentage.

Clause 66 requires minutes of general meetings to be recorded and made available for inspection of members. Minutes must be kept of board and sub-committee meetings but need not be made available to members unless the rules provide.

Division 2—Duties and Responsibilities of Directors

Clause 67 sets out in general terms the most important duties of a director. These may be summarised as follows—

(1) The director must act honestly in good faith and in what he or she believes to be the best interests of the co-operative and its members as a whole but not so as to materially prejudice the interests of creditors.

(2) There is a duty imposed on directors to exercise a reasonable degree of care and diligence in the exercise of his or her duties. The duty of care requires prudence based on objective standards whereas the duty of skill requires prudence based on experience. the duty of diligence requires a director to keep him or herself informed of the policies, business and affairs of the co-operative, the functions and acts of its officers and to be aware of the manner in which the business is conducted.

(3) A director must ensure that the powers of a director are exercised for the primary and substantial purpose for which they were conferred. This includes ensuring that the director does not make improper use of information he or she has acquired by virtue of the office of director to gain an advantage for him or herself or the detriment of another.

(4) A director must not, except as expressly permitted by clause 67, act or exercise any power as a director where his or her own interests would conflict with those of the co-operative.

This provision is only a summary of the most important duties of directors. It is not meant to exclude the general law. Breach is punishable by criminal proceedings and is also subject to civil actions pursuant to clause 68.

Clause 68 requires a director to declare any possible conflict between his or her interest and those of the co-operative. Failure to do so is punishable with criminal proceedings.

This clause is intended as a safeguard against the derestricting of investment powers and for that reason ‘business opportunity’ and ‘pecuniary interest’ are to be given the broadest possible interpretation.

Dealings entered into by a director in good faith in the ordinary course of business of the co-operative and on terms that are usual and proper in similar dealings between the co-operative and its members are to be exempted from this provision.

Clause 69 provides that in addition to any criminal proceedings, the Registrar or any other person affected by a director’s breach of duty may take civil proceedings.

PART 6—ACTIVE MEMBERSHIP

Clause 70 provides that primary objects are the main purposes of a co-operative. It prohibits co-operatives from having the making of loans or the taking of deposits as their main purposes.

Clause 71 provides when a member of a co-operative is an active member of the co-operative.

Clause 72 provides that the board of directors must ensure that the rules contain active membership provisions. These provisions specify which of the objects are the primary objects of the co-operative and the manner in which a member of the co-operative is required to support these objects. The rules may provide that payment of a regular subscription is sufficient to establish active membership. The board of directors is given 2 years from the commencement of this Part to comply.

Clause 73 provides that active membership resolutions must be made in accordance with this clause.

Clause 74 provides for the giving of reasons for refusal by the Registrar to approve a proposed active membership resolution and review of that decision.

Clause 75 sets out the manner form or giving notice to members of a meeting at which an active membership resolution is to be proposed.

Clause 76 sets out who is eligible to vote on active membership resolutions.

Clause 77 sets out the eligibility of directors to vote at board meetings on a proposal to submit an active membership resolution.

Clause 78 provides that where a member of a co-operative is not eligible to vote on a resolution that this does not affect any other right entitlement obligation or duty of the member as a member.

Clause 79 sets out the circumstances in which shares must be forfeited.

Clause 80 allows the board of directors to defer forfeiture of a member's shares for up to one year in certain circumstances.

Clause 81 sets out procedure for dealing with amounts paid up on forfeited shares.

Clause 82 creates an offence if the board of directors fails to declare to be forfeited the shares of a member required to be forfeited.

Clause 83 provides that where the rules of a co-operative contain active membership provisions a member of the co-operative is not entitled to vote unless he or she is an active member.

Clause 84 restricts registration under other Acts.

Clause 85 provides that the Registrar may grant an exemption from application of this Part of the Act.

PART 7—ACCOUNTS AND AUDIT

Clause 86 provides that subject to exemption by the Registrar, Part VI of the *Companies (Victoria) Code* applies with such modifications as are prescribed.

Clause 87 provides qualified privilege for an auditor.

Clause 88 provides that a least 14 days before the day on which the Annual General Meeting of the co-operative is held that the co-operative must lodge a copy of certain accounts and documents with the Registrar.

PART 8—MERGERS

Clause 89 provides the procedure by which co-operatives may make an application for merger.

Clause 90 provides that where the Registrar is satisfied that the co-operatives have complied with the previous clause and that the new proposed rules are adequate the Registrar must register as one co-operative, co-operatives which have merged.

Clause 91 provides that a merger takes effect upon the issue of a certificate under clause 90 and sets out the provisions that apply on and from the issue of a certificate.

Clause 92 provides that the Registrar may with the approval of the Minister direct a co-operative to merge with another co-operative in certain circumstances.

PART 9—GENERAL

Clause 93 provides that Part VIII of the *Companies (Victoria) Code* applies in relation to arrangements and reconstructions.

Clause 94 provides that Part X of the *Companies (Victoria) Code* applies in relation to the appointment of receivers and managers.

Clause 95 provides that Part XI of the *Companies (Victoria) Code* applies in relation to official management.

Clause 96 empowers the Registrar to appoint administrators in certain circumstances. It sets out the effect on the co-operative of such appointment and the powers and duties of administrators. It sets out the procedure to be followed upon revocation of appointment of an administrator and provides for remuneration of administrators. The clause limits the liability of administrators and the Registrar during periods of administration.

Clause 97 sets out additional powers of the Registrar which follow the exercise of power to appoint directors under sub-clause 96 (10). These powers are exercisable with the approval of the Minister.

Clause 98 provides that during periods of administration under clause 96 no action or proceedings in any court are to be commenced or proceeded with unless the Court gives leave, and only on the terms and conditions imposed by the Court. In addition, the Registrar must be notified if any intention to apply for leave of the Court and the Registrar may oppose the granting of the application.

Clause 99 provides the procedure by which the Minister may direct the Registrar to revoke the appointment of an administrator.

Clause 100 provides that Division 2 Part II and Part XII of the *Companies (Victoria) Code* apply in relation to winding-up and the appointment of liquidators.

Clause 101 sets out the procedure for registration of a co-operative under another Act.

Clause 102 provides the procedure by which co-operatives may make an application for a certificate authorising the co-operative to apply for registration as a public company under the *Companies (Victoria) Code*.

Clause 103 provides the procedure by which co-operatives may apply for registration as a public company under the *Companies (Victoria) Code*.

Clause 104 provides that the National Companies and Securities Commission must register the co-operative as a public company once clause 103 is complied with.

Clause 105 sets out the procedure to be followed when a co-operative proposes to apply for registration under any other Act following a takeover offer. The clause seeks to prevent hostile takeovers.

Clause 106 sets out the procedure for sale of substantial assets.

PART 10—GOVERNMENT GUARANTEES

Clause 107 provides the prerequisites to registration as a co-operative formed for the purpose of obtaining a loan with a government guarantee.

Clause 108 sets out the provisions relating to government guarantees.

PART 11—FOREIGN CO-OPERATIVES

Clause 109 stipulates that a foreign co-operative must not carry on business in Victoria unless it is registered. It lists a number of matters which a foreign co-operative may do in Victoria without being regarded as carrying on business.

Clause 110 sets out the procedure for registration of a foreign co-operative.

Clause 111 stipulates that a foreign co-operative must establish a principal office in Victoria and notify the Registrar of the address of the principal office and the address of its agent.

Clause 112 sets out the duties and obligations of an agent of a foreign co-operative.

Clause 113 requires that a foreign co-operative must cause its name to be printed on any document used in the course of business and affixed in a conspicuous position on the outside of its principal office.

Clause 114 stipulates that within a month of any changes in certain particulars a foreign co-operative must notify the Registrar and lodge any documents required to be lodged by the regulations.

Clause 115 stipulates the balance sheets and profit and loss statements of a foreign co-operative are to be lodged with the Registrar. The Registrar may require a foreign co-operative to provide any other information that he considers necessary in relation to a foreign co-operative's financial position.

Clause 116 sets out the procedure for serving notices on a foreign co-operative.

Clause 117 restricts the use of certain names by a foreign co-operative.

Clause 118 sets out the procedure for cessation of business in Victoria by a foreign co-operative.

PART 12—ADMINISTRATION

Clause 119 establishes the Victorian Co-operatives Council. The functions of this Council are to advise the Minister on the promotion integration and development of the co-operative sector, on the effect of government policies and activities on the development of the co-operative sector and any other matter specified in this Act. The Council is also to make recommendations and submit proposals to the Minister and the Registrar in any matter relating to the operations of co-operatives.

Clause 120 sets out how the Council is to be constituted.

Clause 121 refers to the position of the Registrar of Co-operatives and the Deputy Registrars of Co-operatives and sets out their powers.

Clause 122 sets out the secrecy provision.

Clause 123 provides that the Registrar must make an annual report to the Minister.

Clause 124 applies Division I of Part II of the *Companies (Victoria) Code* in relation to powers of inspection.

Clause 125 applies Part VII of the *Companies (Victoria) Code* in relation to special investigations.

Clause 126 sets out the circumstances in which the Registrar may call a special meeting and hold an investigation into the affair of a co-operative.

Clause 127 empowers the Registrar to suspend the operations of a co-operative where it would be in the best interests of members or creditors of a co-operative.

PART 13—MISCELLANEOUS

Clause 128 refers to evidentiary provisions including certificate of incorporation, seal of the Registrar, certified copies of the rules and minutes of meetings.

Clause 129 refers to the application of provisions relating to certain offences and sets out definitions of words and phrases used in this Part.

Clause 130 makes it an offence if a person being a past or present officer of a co-operative does not disclose or deliver up all property in his possession to the appropriate officer, conceals property, removes property, destroys property or makes any false statements or entries or fraudulently obtains property or credit and lists defences.

Clause 131 refers to liability where proper accounts are not kept.

Clause 132 refers to officers incurring debts knowing that they are not likely to be paid.

Clause 133 gives the court power to declare a person personally responsible for the payment to the co-operative of an amount equal to the whole or part of the debt in respect of which a conviction was made and to repay the co-operative the amount of the debt.

Clause 134 makes it an offence for a person to give consideration to a member or creditor of a co-operative to secure appointment or nomination of the person or another as liquidator or official manager of a co-operative.

Clause 135 makes it an offence to destroy, mutilate, alter or falsify books and records.

Clause 136 makes it an offence to fraudently induce the giving of credit to the co-operative, with intent to defraud creditors to make a gift, transfer or charge or execution against the property of the co-operative or conceal or remove property within 2 months before the date of any unsatisfied judgement or order for payment against the co-operative.

Clause 137 creates the offence of making false or misleading statements in any document required under the Act.

Clause 138 prohibits acceptance of commissions fees or reward from persons in respect of transactions of that person with a co-operative.

Clause 139 sets out the circumstances which must apply before the powers given under section 140 and 141 can be exercised.

Clause 140 empowers the court to examine defaulting officers on the application of the Registrar.

Clause 141 empowers the court to assess damages against delinquent officers on the application of the Registrar.

Clause 142 makes it an offence if a co-operative continues to carry on business when it has an insufficient number of members.

Clause 143 makes it an offence to misuse the seal of the co-operative.

Clause 144 deals with offences of falsely obtaining possession of property and misapplying property.

Clause 145 sets out who may bring proceedings and a time limit for any proceedings.

Clause 146 sets out the circumstances in which the Registrar or an interested person may apply for injunction relief and the powers of the court to grant injunctions.

Clause 147 empowers the Registrar, Deputy Registrar or authorised person to issue penalty notices for certain offences.

Clause 148 sets the general penalty and provides that the general penalty applies to co-operatives which do not comply with the Act and to any other person who commits an offence against the Act for which no penalty is expressly provided or for which the penalty is expressed to be the general penalty.

Clause 149 provides that where a person is convicted of a offence which constitutes failure to do an act, the obligation to do that act continues and failure to do that act is a continuing offence.

Clause 150 sets out the circumstances in which review of decisions of the Registrar may be made. Appeals may ultimately be made to the Administrative Appeals Tribunal.

Clause 151 empowers the making of regulations.

Clause 152 inserts a new section 123 of the *Residential Tenancies Act 1980*.

SCHEDULE

Schedule 1 sets out the matters to be included in the rules of co-operatives.

Schedule 2 sets out the matters which may be included in regulations.