

# Co-ops/2012 – Opinion 1

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**TO: THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY  
PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA**

11 September 2012

**CO-OPERATIVES AMENDMENT BILL [B17 – 2012]**

**MEMORANDUM OF COMMENTS ON THE DRAFT DEFINITIONS IN S1 OF THE WORKING  
DRAFT CONSOLIDATED CO-OPERATIVES AMENDMENT BILL (040612nb)**

I refer to the e-mail correspondence I received from Andre Hermans on 10 September 2012 requesting my comments on the proposed amendments to the definitions contained in s1 of the Co-Operatives Act 14 / 2005 ('the Act') contained in the above working draft of the Consolidated Co-operatives Amendment Bill ('the Bill').

As requested, I have considered the draft amendments with particular reference to the Bill's aims of enhancing the developmental character of the Act, reducing the regulatory burden for co-operatives, and enhancing compliance, co-ordination, administration and sustainability of co-operatives.

I have also checked that they are in conformity with the Companies Act 71 / 2008 where appropriate.

I have also considered both the stakeholder comments and the DTI's responses which motivated the proposed definitional amendments and I am in general agreement with all of the DTI's responses.

I am also satisfied that the proposed amendments are in accordance with the Bill's aims and will facilitate the achievement of those aims.

I do however have some comments regarding the wording of certain of the draft definitions. A few of these raise substantive issues of law. Many, however, are simply suggested changes of style or language that may be of use in making the provisions more accessible to the co-operatives, their members and other laypersons. I appreciate that some of them may appear unnecessary over-simplifications to those with legal and technical expertise but I think it is particularly important to remain mindful of the Bill's over-riding aim of clarifying the law and reducing the compliance-related difficulties on the part of co-operatives and their members, many of whom lack legal training.

**1. The para (b) definition of 'agricultural co-operative'**

This definition appears twice in the draft. The first one (tagged on to the definition of 'Agency') must be deleted.

**2. The para (b) definition of 'audit'**

The draft definition refers to compliance with a reporting framework 'if any'.

The DTI's comments indicate that a reporting framework is currently being considered by a task team and will be in place. If this is definitely the case, delete the words 'if any' in the second last line of the definition.

Reference can also be made to where the framework will be published (for example 'as published by the Minister by regulation under section X').

This would make it clear that there is in fact a framework, indicate where it can be found and draw attention to the need to comply with it.

**3. The para (f) definition of 'community development'**

Just a change to grammar and punctuation.

I would suggest the wording be changed to read:

**'community development'** means a set of values and practices which aim to combat poverty, assist the historically disadvantaged and unite communities by developing individual and collective skills, knowledge and

experience and, thus, empower communities to undertake initiatives to combat social, economic, political and/or environmental problems;

**4. The para (h) definition of 'constitution'**

Section 13 of the Act requires all co-operatives to adopt a constitution. It does not indicate exactly how that is to take place but in practice it would be adopted by all of the founding or prospective members of a new co-operative (and those who do not agree to it would not become members).

That is the only case where the content of the constitution would require the approval of all the members. Subsequent changes to the content of an existing constitution are governed by section 18, which allows for changes to be made by special resolution (i.e. by a 2/3rds majority vote of its members).

To avoid any possible confusion as to which document is covered by the definition (whether it only applies to the originally adopted version of the constitution or to the original version as properly amended), it might be useful to add the words 'including any amendments to it in terms of section 18' to the end of the definition.

**5. The para (i) definition of 'co-operative principles'**

Sub-para (a) – Voluntary and Open Membership

The draft only refers to an absence of discrimination on the grounds of gender, social, racial, political or religious grounds.

The Bill of Rights' Equality clause is much wider and prohibits discrimination on the grounds of:

'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

The definition should, as a matter of both principle and policy, include reference to at least all of those grounds.

(I note also that consideration is being given to requiring all worker co-operatives to comply with all labour legislation. If so, that would include the Employment Equity Act 55 / 1998 which goes even further by also prohibiting discrimination on various other grounds such as family responsibility and HIV status.)

Sub-para (b) - Democratic Member Control

Replace the word 'including' at the end of the first sentence with 'through'.

Replace 'membership' in (ii) with 'members'.

Consider including a reference to decision-making by majority vote, possibly at the end of (i)?

Sub-para (c) – Member Economic Participation

The reference to the need for members to contribute 'equitably' is ambiguous. Consider replacing it with 'equally' or 'in amounts proportionate to their membership share' or some similar explanation.

Replace 'including' at the end of the first sentence with 'by'.

Reword (iii) along the following lines:

'allocating surpluses to the reserves required in terms of section 46 and any additional reserves required by the co-operative's constitution or considered necessary or desirable by the members; benefitting members in equal proportion to their transactions with the co-operative; and supporting other activities approved by the members.'

Sub-para (e) - Education, Training and Information

This sounds a little onerous and might read more easily with a couple of grammatical changes.

Perhaps qualify and re-word the definition to require the provision of 'reasonable education and training for their members, elected representatives,

managers and employees so that they can contribute effectively to the development of their co-operatives and are able to inform the general public ....'

Sub-para (f) – Co-operation among Co-operatives

Again, this sounds a little onerous. Perhaps re-word as:

*'Co-operation among Co-operatives* requiring co-operatives to serve their members as effectively as possible and strengthen the co-operative movement by working together through local, national, regional and international structures where possible'.

**6. The para (k) definition of 'financial statements'**

All of the sub-paragraphs end with 'for the period', except sub-paragraph (b). To be consistent, add 'for the period' after 'an income statement'.

Also consider referring, in all sub-paragraphs, to 'for the period to which they relate'.

**7. The para (l) definition of 'independent review'**

It might be useful for the definition to mention who conducts the review (by, for example, saying 'an assessment by an independent reviewer ....')

The reference to the 'practitioner' should perhaps be replaced with 'independent reviewer', if that who is required to conduct the review.

**8. The para (l) definition of 'juristic person'**

This definition is a little legally confusing.

Our law recognises two types of legal persons – natural legal persons (human beings) and juristic persons (non-human / artificial legal persons which may be either incorporated or unincorporated).

It is not clear whether the intention is to only include, as 'juristic persons' for the Act's purposes, those entities and other bodies of persons that are recognised as legal persons or whether the intention is to also include other structures such as trusts that are not technically juristic legal persons. This needs to be clarified.

If the intention is to include trusts and other associations or structures that are not legal persons, they should be expressly referred to in the definition. (The Companies Act for example expressly includes trusts in its definition of a 'juristic person'. Although this does not convert trusts into juristic legal persons it does make them subject to the Act's provisions that apply 'juristic persons' as *if* they were also juristic legal persons).

**9. The para (m) definition of 'management decision report'**

I would suggest the following revised wording:

**'management decision report'** means an assessment report drafted by the Board that accompanies the financial statements and that assesses the co-operative's compliance with applicable legal requirements and the requirements contained in its own constitution.'

**10. The para (p) definition of 'primary co-operative'**

I don't understand why sub-paragraph (b) of this definition refers to two juristic persons being able to form a co-operative.

As the DTI points out, all co-operatives operate on democratic principles and the participation of juristic persons as members is as desirable as that of natural legal persons. As such, surely a minimum of 5 persons (of any kind and in any combination) should be the standard requirement (except for secondary and apex co-operatives)?

**11. The para (s) definition of 'social report'**

Add 'as set out in its constitution' at the end of the definition.

**12. The para (u) definition of 'surplus'**

This definition is a little difficult to understand.

Is the intention that any economic surplus (rather than 'result') that remains in the form of 'profit' in any financial year is to be allocated first in complying with the section 46 reserve fund requirements and then, subject to any requirements in any applicable sectoral legislation, re-invested in the co-operative or distributed to its members in accordance with any requirements contained in its constitution or, in the absence of any such constitutional requirements, as determined by its members (by special resolution)?

Perhaps this (or the actual intention) can be clarified.

**13. The para (w) definition of 'worker co- operative'**

Should this definition include primary and secondary co-operatives?

I trust that these comments will be of some assistance to the Committee and look forward to meeting with you tomorrow,

Yours sincerely

Kathy Idensohn





