

Co-ops/2012 – Opinion 4

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

19 September 2012

OPINION 4

CO-OPERATIVES AMENDMENT BILL [B17 – 2012]

COMMENTS ON CERTAIN ASPECTS OF THE CURRENT WORKING DRAFT OF THE CONSOLIDATED CO-OPERATIVES AMENDMENT BILL (040612nb)

Further to my memorandum of earlier today (marked 'Opinion 3'), my advices on clauses 41-60 of the above Bill are as follows:

1. Clause 41 (s 53 of the principal Act)

1.1 Sub-paragraph (a)

This clause and clause 37 of the Bill (and the corresponding sections 53 and 49 of the principal Act) are the only provisions that refer to 'subsidiaries' of a co-operative.

Can (all) co-operatives have subsidiaries? If they can, the term 'subsidiary' needs to be defined.

1.2 Sub-paragraph (b)

This sub-paragraph contains the first reference to an 'officer' of a co-operative. There are also further references to 'officers' in the Bill's clauses 62 (investigations by the registrar) and 66 (powers of the Tribunal and proposed compromises with creditors). The principal Act however contains no references to 'officers' of a co-operative.

If co-operatives can / do in fact have 'officers', they should be subject to the same requirements, duties and other provisions as directors of the co-operative (in the same way that the Companies Act's provisions relating to directors generally also apply to prescribed officers). This would require the insertion of a reference to 'officers' in all of the provisions that refer to 'directors' of a co-operative.

1.3 Sub-paragraph (b) contd.

It is possible that a person other than a director (or officer) may be in possession of the accounting records, books or documents that the auditor or reviewer requires.

As such, it might be advisable to change the draft subsections 53(3) and (5) to also include reference to the full list of current and former directors, members, employees, mandatories and agents (who are in the other provisions of section 53).

Similarly, the proposed new subsections 53(6)(a) and (b) should perhaps also refer to agents and mandatories since the proposed new subsection 53(2) requires the directors to approach them to supply any information required by the auditor or reviewer.

2. Clause 42 (s 54 of the principal Act)

No comment.

3. Clause 43 (s 55 of the principal Act)

No comment.

4. Clause 44 (s 56 of the principal Act)

This is simply a consequential change necessitated by a definitional amendment – no further comment.

5. Clause 45 (s 60 of the principal Act)

No comment.

6. Clause 46 (s 62 of the principal Act)

6.1 Sub-paragraph (b)

Why has the reference to 'the board of directors' been changed here (to 'the directors') and not also in subsection 62(2) of the Act?

Also, 'the Board' would be better than 'the directors', unless the intention is that every individual director must submit a proposal under subsection 62(2) and a declaration under subsection 62(4).

6.2 Sub-paragraph (d)

Would (and does) the registrar have jurisdiction over all other possible types of legal entities that a co-operative may convert into?

6.3 Sub-paragraph (e)

Consider replacing 'braning' with 'any of its documents, marketing and other materials'.

7. Clause 47 (s 63 of the principal Act)

I would recommend that 'satisfied' in line 2 be replaced with 'reasonably satisfied'. There is a general administrative law obligation on officials to exercise their powers and discretion reasonably but its express inclusion reduces the scope for confusion or doubt.

(The Committee may recall that we inserted the same express 'reasonableness' requirement in amendments to the Companies Act's provisions relating to, for example, the Commission's power under s 22(2) to take action against companies suspected of fraudulent or reckless trading.)

8. Clause 48 (s 64 of the principal Act)

The penalty for the sub-paragraph (b) offence should be specified, either here or in the general offence s92 of the Act.

9. Clause 49 (s 66 of the principal Act)

9.1 Sub-paragraph (a)

Consider replacing 'bringing the newly converted co-operative into line with the provisions of this Act' with:

'that ensures that the newly converted co-operative fulfils all the provisions of this Act.'

9.2 Sub-paragraph (b)

The rest of s 66 makes it clear that a company has to make an application to the registrar in order to convert into a co-operative. The reference in this sub-paragraph to 'the date of notification being submitted' should therefore be replaced with 'the date on which the application was submitted'.

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10. Clause 50 (s 67 of the principal Act)

No comment.

11. Clause 51 (s 68 of the principal Act)

I would recommend that the constitution be made binding on not only the co-operative itself and its members but also on its directors.

One of the significant changes that the Companies Act 2008 made was to render a company's MOI expressly binding on the company's directors, prescribed officers and board committee members in addition to the company itself and its members. That resolved a number of longstanding common law issues and debates regarding the enforcement and enforceability of company constitutional provisions. Making the same amendment in this context would be similarly beneficial.

12. Clause 52 (s 69 of the principal Act)

I suggest the following re-wording for this clause:

'A co-operative which, whilst it was a company, gave the registrar an undertaking under section 66(3) must, within 90 days of its date of its incorporation as a co-operative, submit a constitution that complies with the requirements of this Act to the registrar.'

13. Clause 53 (new insertion as s 70A of the principal Act)

No comment.

14. Clauses 54-60

I would like to spend a little more time considering these winding-up and judicial management provisions with reference to corresponding winding-up, judicial management and business rescue provisions in both the former Companies Act 1973 and the Companies Act 2008 before commenting on these clauses.

I shall be at the Committee's meeting tomorrow, Thursday 20 September 2012, to discuss these comments and those set out in my earlier Opinions 2 & 3.

Yours sincerely

Kathy Idensohn