

Co-ops/2012 – Opinion 3

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

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OPINION 3**CO-OPERATIVES AMENDMENT BILL [B17 – 2012]****COMMENTS ON CERTAIN ASPECTS OF THE CURRENT WORKING DRAFT OF THE
CONSOLIDATED CO-OPERATIVES AMENDMENT BILL (040612nb)**

I refer to my memorandum of yesterday's date (your numbered 'Opinion 2).

My advices and comments on the most recent changes to the Act's s 1 definitions are set out below.

I have also set out my comments on clauses 30- 40 of the draft Bill. I am still working on clauses 41-60 and will let you have as my comments on as many of them as possible before tomorrow's meeting. I hope that the committee will excuse this 'staggering' of my opinions but there is a substantial amount of material to work through since receipt of my instructions on Monday, 17 September and I have a number of comments.

THE AMENDMENTS TO THE ACT'S S 1 DEFINITIONS

I have checked the amendments that were made to the s 1 definitions pursuant to the Committee meeting on 12 September 2012.

I confirm that these changes properly incorporate my previous comments and suggestions and the other changes agreed to by the Committee.

COMMENTS ON CLAUSES 30-60 OF THE DRAFT BILL**1. Clause 30 (s 39 of the principal Act)**

What information is being referred to here? Is it the information that is currently required by s 39 of the Act or some new or other information?

S 39 does not require any information relating to the 'Board' as a whole. If there is no intention to add to the information already required by s 39, the sub-paragraph (a) reference to 'the Board' should be deleted, there is no need to refer to individual directors and the provision should read:

'(4) The Minister must, by notice in the *Gazette*, determine the form, manner and time period for submission of the information required in terms of subsections (1) and (2).'

If the intention is to require some other information relating to the Board as a whole or to individual directors, the nature of that information should be described.

2. Clause 31 (s 41 of the principal Act)

Subsection (4) refers to the need for equal 'ranking' of all membership shares. Ranking for what purposes?

Sections 3(a) and 14(e) of the Act already require equal ranking for voting purposes so presumably this provision is referring to equal ranking for interest payments, members' liability under s23 and all other purposes. If so, it should perhaps spell that out.

3. Clause 32 (s 44 of the principal Act)

3.1 I would advise that, in addition to the amendments already contained in this clause, that the existing s 44(1) of the Act also be re-worded. As it stands, it allows co-operatives to pay amounts out of any surplus to their members after they have put at least 5% into a reserve fund in terms of s 3(1)(e).

Presumably this is the same mandatory 5% that is referred to in terms of s 46(1). If so, that should be made clear. With both sections 3(1)(e) and 46 referring to 5% reserves it might create confusion as to whether they are separate or different reserve requirements.

Furthermore, the potential sectoral legislation contemplated in the new draft definition of 'surplus' and the co-operative's own constitution may require it to use its surplus in some other way(s) before being able to pay it out to members as patronage proportions. The fact that there may be such additional requirements on the use of a surplus should be made clear in subsection (1).

- 3.2 Sub- paragraph (b) – The word 'reinvested' in subsection 5(c) is correct but might be confusing to laypersons. Consider changing it to read:

'not used in the purchase of membership shares in terms of section (44)(3)'

- 3.3 The last clause to sub-paragraph (b) is a little 'jumbled' and could perhaps be simplified. Also, if the fund concerned is provided for in the constitution, it will be taken to have been agreed to by the members so is further agreement from them necessary?

Consider re-wording the last clause to read:

'may be placed in such fund or funds and used for such purposes as are authorised by the co-operative's constitution.'

4. Clause 33 (s 46 of the principal Act)

- 4.1 The word 'indivisible' is not incorrect but it is a little 'technical'. Consider replacing it with 'not payable' or 'non-distributable'.

- 4.2 Subsection (2) is not clear. Does it mean that there is only an obligation to put 5% of the surplus into the reserve each year if the co-operative does not *already* have a reserve equal to at least 5% of its net assets? If so, the clause should be re-worded to make that clear.

Also, how is the net asset value determined? With reference to the latest audited report, independent reviewed report or annual report?

- 4.3 Delete 'any of' in subsection 3(b).

- 4.4 Consider changing subsection 3(c) to:

'the manner in which a co-operative must report on its use of its reserve fund and reserves.'

5. Clause 34 (heading to Chapter 7 of the principal Act)

In accordance with the new definition, the heading should be AUDITED REPORTS.

6. Clause 35 (s 47 of the principal Act)

There are a number of references to 'Registrar' with the capital 'R' throughout the Bill. They all need to be changed to 'registrar' to accord with the Act's existing definition of that term.

6.1 Change 'Registrar' to 'registrar' in subsections (2) and (3).

6.2 Should subsection (4) perhaps specify the kinds of things that make up a 'reporting system framework' (such as accounting methods, procedures, timeframes etc.)?

7. Clause 36 (s 48 of the principal Act)

7.1 All other provisions in the Act and (the Bill) use days rather than weeks to describe time periods (except for long periods which are described in terms of months).

In the interests of consistency, the two weeks referred to in subsection (1) should be changed to 14 days.

7.2 Consider clarifying subsection (5) to read:

'The audited report for at least 21 days after the meeting at which it was considered.'

This would make it clear what 'consideration' of the report is being referred to, and by whom.

7.3 I suggest a change of subsection (6)(a) to:

'must submit ... and the outcome of the general meeting's discussion and consideration thereof to the registrar within 15 days of the resolution of the annual general meeting; or'

7.4 I recommend the following re-wording for subsection 6(b):

'if the general meeting resolves to delay submitting the audited report or the independent reviewed report or the annual report to the registrar, the chairperson of the board or the person who acted as chairperson at the meeting must notify the registrar in writing within 15 days of the reasons for such delay and the action the co-operative intends taking in order to address the situation'.

7.5 The subsection (7) reference to the registrar taking 'appropriate steps' is a little vague and open-ended. What kinds of 'steps' are contemplated?

8. Clause 37 (s 49 of the principal Act)

Who determines whether a person has not acted in accordance with the relevant professional code of conduct as contemplated in subsection 49(a)(iii)?

Similarly, who decides whether a person has a conflict of interests as contemplated in subsection 49(b)?

Do these subsections require some sort of official certification of misconduct or conflict of interest from SAICA or any other professional governing body?

9. Clause 38 (s 50 of the principal Act)

9.1 Consider re-wording sub-paragraph (c) to read:

'(2) Despite subsection (1), if an auditor or an independent reviewer is not appointed at any meeting, the previously appointed auditor or independent reviewer shall continue in office until a successor is appointed.'

9.2 Sub-paragraph (d)

Where will the registrar prescribe the method of notification referred to in this section?

Change 'Registrar' to 'registrar'.

9.3 Sub-paragraph (e) - consider replacing 'and such fine must not exceed' with 'which fine may not exceed'.

9.4 Sub-paragraph (f) – Why is subsection 50(4) of the Act being deleted? Its provisions might assist in ensuring that co-operatives are not exploited by unscrupulous professionals who attempt to charge exorbitant fees.

9.5 Sub-paragraph (g) – Consider changing the last phrase 'or is prohibited from registration with an accredited professional body' to 'who is legally prohibited from registering or re-registering with an accredited professional body'.

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The new subsection (7)

Consider replacing 'the remainder of the relevant period' in line 2 with 'the remainder of the period of office of the resigning auditor or independent reviewer'.

Also, replace 'prescripts' with 'requirements' (line 4) and correct the spelling of 'co-operative' in the last line.

The new subsection (8)

Consider changing 'for whatsoever reason' to 'for any reason'.

10. Clause 39 (s 51 of the principal Act)

Sub-paragraph (e) – change 'holds office' (line 2) to 'shall hold office'

11. Clause 40 (s 52 of the principal Act)

Sub-paragraph (e) – Consider re-wording as:

'A director or a member of a co-operative may require the auditor, former auditor, independent reviewer or former independent reviewer to attend a general meeting at the expense of the co-operative and answer questions relating to their duties as auditor or independent reviewer. Provided that the auditor, former auditor, independent reviewer or former independent reviewer is given at least 10 days prior written notice of such meeting'

My advices and comments on clauses 41 -60 of the Bill will follow shortly.

Yours sincerely

Kathy Idensohn