

Summary of legislation and policy requirements for exercise of discretions

(such as exemptions and approvals)

CO-OPERATIVES ACT 1997



Government of South Australia

Office of Consumer and
Business Affairs

4 January 2006

CO-OPERATIVES ACT 1997

SUMMARY OF LEGISLATION AND POLICY REQUIREMENTS FOR EXERCISE OF DISCRETIONS (SUCH AS EXEMPTIONS OR APPROVALS)

This document contains a summary of the requirements of the legislation where OCBA has power to exercise discretion, and a summary of the policy that OCBA applies when considering the matter.

A number of applications to OCBA must be made using an Approved Form as referred to in this document. The prescribed fee must accompany the application.

Where there is no Approved Form, generally in relation to seeking an exemption from strict compliance with a provision of the Act, an application to OCBA should:

- be made in writing accompanied by any prescribed fee; and
- fully address the legislation and policy requirements set out in this document, to the extent that it is applicable to the co-operative.

Please note:

The Office of Consumer and Business Affairs (OCBA) undertakes the administration of the Act on behalf of the Corporate Affairs Commission (CAC). OCBA's website address is www.ocba.sa.gov.au.

Fees

The fees payable under the Act to OCBA are set out in Schedule 5 to the Co-operatives Regulations, and are published on OCBA's website.

Disclaimer

OCBA is not providing legal advice and disclaims any liability arising from the use of this document. Where users of this information seek to apply it to particular facts or situations, they should consider seeking their own advice.

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S 17 APPROVAL OF DISCLOSURE STATEMENT OF A PROPOSED TRADING CO-OPERATIVE

Legislation

Approval of disclosure statement

Section 16 provides that before a proposed trading co-operative can be registered, a disclosure statement approved by OCBA under s 17 must be presented to the formation meeting.

Content of disclosure statement

The requirements of s 17 include that the disclosure statement must contain the information necessary to ensure that prospective members are adequately informed of the nature and extent of a person's financial involvement or liability as a member of the co-operative including so far as applicable:

1. the estimated costs of formation;
2. the nature of the proposed membership of the co-operative;
3. the rights and liabilities attaching to shares in the proposed co-operative (including the capital required for the co-operative);
4. the projected income and expenditure of the co-operative for its first year of operation;
5. information about any contracts required to be entered into by the co-operative; and
6. any other information that OCBA directs.

A draft disclosure statement must be submitted to OCBA at least 28 days before the formation meeting (or shorter period as OCBA may allow), and requires consent to any expert's report included.

The manner in which OCBA may give approval is contained in subsection (4).

Section 444 (False and misleading statements) applies to the contents of the disclosure statement.

Relevant materials

Form 1: Submission for approval of draft disclosure statement for proposed trading co-operative;

Circular 5: Disclosure statement.

Policy

Approval of a disclosure statement

Relevant considerations to be addressed include whether the statement:

1. contains matters that are illegal or errors (including accounting errors) or alterations;
2. contains potentially misleading or deceptive statements;
3. gives details of all amounts payable in respect of shares;
4. states that a copy of the statement has been lodged with OCBA and OCBA takes no responsibility for the contents of the statement; and
5. includes any other relevant information concerning the prospects of the proposed co-operative.

Abridgement of time to submit draft:

Relevant considerations to be addressed include:

1. any unique reasons or special circumstances that apply;
2. any commercial necessity for the abridgement;
3. whether and how full compliance with the act would result in an unreasonable burden; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable; and
4. the extent of any impact on the proposed members attending the formation meeting and how determined.

An abridgement of the 28 days cannot be granted after Form 1 has been submitted to OCBA.

S 18 APPROVAL OF RULES OF PROPOSED CO-OPERATIVE

Legislation

Approval

Section 16 provides that before a proposed co-operative can be registered, the proposed rules of the co-operative approved under section 18 must be passed by two-thirds of the proposed members of the proposed co-operative attending the formation meeting.

The rules

The requirements of s 17 include that the proposed rules must:

1. be in accordance with section 102: Content of rules;
2. be in a form that may reasonably be approved; and
3. if the rules contain any alterations of the model rules, be accompanied by a statement setting out the alterations and the reasons for the alterations.

Model Rules

If the rules do not make provision for any matter included in the model rules, OCBA may approve the relevant provisions of the model rules as rules of the co-operative.

Submission to OCBA

A draft of the proposed rules must be submitted to the Commission at least 28 days (or such shorter period as the Commission may allow in a particular case) before the formation meeting.

Active Membership

The proposed rules must include active membership provisions in accordance with Part 6 of the Act.

Factors for consideration

Section 119 provides that the relevant factors and considerations are taken into account in determining:

1. which of the activities of a co-operative are its primary activities; and
2. how and to what extent a member is required to support an activity of, or maintain a relationship with, a co-operative, in connection with a primary activity of the co-operative, to maintain active membership of the co-operative. This should be reasonable when considered in relation to the activities of the co-operative as a whole.

The active membership provisions of a trading co-operative must include provisions requiring a member to utilise an activity relating to a primary activity of the co-operative: s 120(b).

Relevant materials

Form 2: Approval of proposed rules,

Model rules checklist, and

Model rules of a co-operative (by type of co-operative).

Policy

Approval of proposed rules:

Relevant considerations to be addressed include whether the rules:

1. are in accordance with section 102: Content of rules;
2. are in a form that may reasonably be approved; and
3. other than model rules, comply with the Act.

Active membership provisions

Relevant considerations to be addressed include:

1. how it has determined that the proposed active membership provisions:
 - a) are reasonable when considered in relation to the activities of the proposed co-operative as a whole; and
 - b) satisfy the requirements that a member of a proposed trading co-operative must utilise an activity relating to a primary activity of the co-operative; and
2. whether the provisions are:
 - a) measurable;
 - b) relatively succinct; and
 - c) precise enough

to enable an objective determination to be made as to whether a particular member is active or inactive.

Abridgement of time to submit draft:

Relevant considerations to be addressed include:

1. any unique reasons or special circumstances that apply;
2. any commercial necessity for the abridgement;
3. whether and how full compliance with the act would result in an unreasonable burden; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable; and
4. the extent of any impact on the proposed members attending the formation meeting and how determined.

An abridgement of the 28 days cannot be granted after Form 2 has been submitted to OCBA.

S 19,20 APPLICATION FOR, AND REGISTRATION OF, CO-OPERATIVE AND ITS RULES

Legislation

Application for registration

The requirements include that:

1. an application for registration of a proposed co-operative must be lodged with OCBA within 2 months after closure of the formation meeting or within such extended period as OCBA may allow;
2. the proposed rules must be the rules approved under s 18;
3. the name of the proposed co-operative must:
 - a. comply with the requirements of the Act; and
 - b. conform with the Ministerial directions;
4. the other requirements of the Act and the regulations must have been complied with and compliance must be likely to continue; and
5. the proposed co-operative must be designed to function in accordance with the co-operative principles or, if not entirely, OCBA must be satisfied that there are special reasons why the co-operative should be registered under the Act;
6. there must be no reasonable cause for refusing registration.

Relevant materials

Circulars 4, 6: Registration of a co-operative,

Form 3: Application for registration,

Form 3A: Statement of directors.

Policy

Relevant considerations to be addressed include whether the:

1. disclosure statement has been approved by OCBA under s17;
2. rules have been approved by OCBA under s 18;
3. proposed co-operative is not designed to function entirely in accordance with the co-operative principles: ss 6,7, and if so, the special reasons why the co-operative should be registered;
4. co-operative has been formed for an illegal purpose;
5. name:
 - a. is misleading as to the true nature of the co-operative;
 - b. is likely to be confused with the name of a body corporate or registered business name;
 - c. is sufficiently dissimilar to the name of another co-operative or registered foreign co-operative and, where relevant, by inclusion of distinguishing words such as "SA" or other necessary geographical description;
 - d. is undesirable as a name for a co-operative;
 - e. conforms with Ministerial directions; and
 - f. complies with s 247: Name to include certain matter.

S 28 CONVERSION OF CO-OPERATIVE

Legislation

Type of co-operative

A co-operative may, by alteration of its rules, convert from:

1. a co-operative with a share capital to a co-operative without share capital or vice versa; or
2. a trading co-operative to a non-trading co-operative or vice versa.

The rules

An alteration of the rules for the conversion of a co-operative must be approved by special resolution passed by means of a special postal ballot: s 195.

Relevant materials

Circulars: Conversion trading to non-trading with shares - procedures;

Conversion trading to non-trading no shares - procedures.

Policy

Relevant considerations to be addressed include:

1. in the case of a conversion from a co-operative with shares to one without, the manner in which the rules provide for how the share capital of the co-operative is to be accounted for on conversion, eg converted to reserves.

S 107 APPROVAL OF PROPOSED ALTERATION OF RULES

Legislation

Changes to the rules

The requirements of the section to be satisfied include that a proposed alteration must be:

1. submitted and approved by OCBA before it is passed;
2. in accordance with s 102: Content of rules;
3. in a form that may reasonably be approved; and
4. accompanied by a statement setting out the reasons for the alteration.

Special resolution

Section 108 specifies that an alteration must, unless otherwise specified in the Act, be made by special resolution. This includes s 28: Conversion of co-operative, which also requires that the special resolution must be passed by means of a special postal ballot.

Time

OCBA may abridge the time of 28 days in which the draft proposed alteration must be submitted to OCBA for approval: s 107(2).

Active membership

Rule alterations that contain active membership provisions must comply with Part 6 (Active Membership) - s 118.

Factors for consideration

Section 119 provides that the board of a co-operative must ensure that the relevant factors and considerations are taken into account in determining:

1. which of the activities of a co-operative are its primary activities; and
2. how and to what extent a member is required to support an activity of, or maintain a relationship with, a co-operative, in connection with a primary activity of the co-operative, to maintain active membership of the co-operative. This should be reasonable when considered in relation to the activities of the co-operative as a whole.

Active membership of a trading co-operative

The active membership provisions of a trading co-operative must include provisions requiring a member to utilise an activity relating to a primary activity of the co-operative: s 120(b).

Relevant materials

Form 5: Application for approval of proposed alteration of rules;

Circular 9: Procedure for alteration of rules;

Circular 3: Procedure for alteration of rules of transferred co-operative.

Policy

Approval of proposed alteration:

Relevant considerations to be addressed include whether the rules:

1. are in accordance with section 102: Content of rules;
2. are in a form that may reasonably be approved; and
3. other than model rules, comply with the Act.

Active membership provisions

Relevant considerations to be addressed include:

1. how the board of the co-operative has determined that the proposed active membership provisions:
 - a) are reasonable when considered in relation to the activities of the co-operative as a whole; and
 - b) satisfy the requirements that a member of a trading co-operative must utilise an activity relating to a primary activity of the co-operative;
2. whether the provisions are:
 - a) measurable;
 - b) relatively succinct; and
 - c) precise enough

to enable an objective determination to be made as to whether a particular member is active or inactive; and
3. how the provisions, that a member of a trading co-operative must utilise an activity relating to a primary activity, relate to past transactions of the co-operative as reported in the last audited accounts.

Abridgement of time to submit draft

Relevant considerations to be addressed include:

1. any unique reasons or special circumstances that apply;
2. whether and how full compliance with the act would place an unreasonable burden on the co-operative; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
3. the extent of the impact on the interests of members and creditors of the co-operative and how determined;
4. the size, activities and structure of the co-operative; and
5. the number and location of the co-operative's members.

An abridgement of the 28 days cannot be granted after Form 5 has been submitted to OCBA.

S 110 REGISTRATION OF ALTERATION OF RULES

Legislation

Registration

The requirements of the section to be satisfied include that:

1. an application for registration of an alteration must be made within 28 days after the alteration is made. The alteration may be made by a special resolution passed at a meeting of members or passed by means of a postal ballot if requisitioned by members: s 197, or if the rules so permit: s 187(2);
2. the alteration does not take effect until registered by OCBA; and
3. OCBA must register the alteration unless:
 - a) OCBA is satisfied that the alteration is contrary to this Act or the regulations; or
 - b) OCBA has other reasonable cause to refuse to register the alteration.

Relevant materials

Form 6: Application for registration of proposed alteration to rules;

Circular 9: Procedure for alteration of rules.

Policy

Relevant considerations to be addressed include:

1. if the special resolution has been passed by means of a postal ballot: s 187(2), how the rules of the co-operative specifically permit this to occur (not by default); and

2. whether the alterations have been approved by OCBA under s 107.

S 120(B) ACTIVE MEMBERSHIP PROVISIONS - TRADING CO-OPERATIVES

Legislation

Active membership

The only active membership provisions that may be contained in the rules of a trading co-operative are:

1. provisions requiring a member to utilise an activity that is a primary activity of the co-operative; and
2. any other active membership provisions that OCBA may approve.

Policy

Relevant considerations to be addressed include:

1. the exception (to be specified in the rules) to utilising a primary activity of the co-operative is only to apply in the event of:
 - a. a natural disaster;
 - b. some other event beyond the member's control; or
 - c. special circumstances apply, eg. cyclic replanting.
2. the payment of a regular subscription by the member on a similar basis to that permitted for a non-trading co-operative pursuant to s 121(a) and (b). The subscription should be not less than \$200 per annum; if it is proposed to be less, the co-operative must provide some meaningful basis on which it is to be calculated.

3. the exception is to apply in respect of a member for a limited period, eg. no more than 3 years, after which the member would be required to utilise a primary activity of the co-operative.

S 144, 144A AND 145A DISCLOSURE STATEMENT FOR INTENDING SHAREHOLDERS OF TRADING CO-OPERATIVE

Legislation

Filing of disclosure statement

A person who intends to acquire shares in a trading co-operative and is not already a shareholder must be given a current disclosure statement.

A disclosure statement approved by OCBA under section 17 may be used for this purpose providing it is current as described in section 144(4).

A disclosure statement is no longer current if there has been a change in the rights or liabilities of any class of shares, there has been a significant change in the financial position, or the financial or other reports under section 233(1) have become available.

Otherwise, a disclosure statement must comply with section 144A, and be filed with OCBA before it is to be given to an intending shareholder.

If a disclosure statement stops being current because of a change mentioned in s 144(4), a new disclosure statement must be filed, or OCBA must be advised in writing that it is no longer current (in which event, it may no longer be used).

Content of disclosure statement

The disclosure statement filed with OCBA must include: -

1. a statement of the rights and liabilities attaching to shares;
2. a copy of the last annual report under section 244 (unless the report has already been given to the person, or made available to the person under section 72);

3. any other relevant information about the financial position and prospects of the co-operative if there has been a significant change since the date of the last annual report; and
4. any other information OCBA directs.

Section 444 (False and misleading statements) applies to the contents of a disclosure statement.

Corporations Act

Some provisions of the Corporations Act apply to shares referred to in a disclosure statement, as follows.

Consents to inclusion of statements by experts and others in a disclosure statement: s 716(2)

A disclosure statement may only include a statement by a person, or a statement said in the document to be based on a statement by a person, if:

- (a) the person has consented to the statement being included in the document;
- (b) the document states that the person has given this consent; and
- (c) the person has not withdrawn this consent before the document is lodged with OCBA.

Application money to be held on trust: s 722

The application money received for the shares offered under the disclosure statement must be held on trust until the shares are issued or the money returned. The money must not be accessed by the co-operative until after the shares are allotted.

Minimum subscription condition must be fulfilled before issue, and circumstances of condition not being met: s 723(2), and s 724(1)(a) and (2)(a)

If the disclosure statement states that the shares will not be issued unless:

- (a) applications for a minimum number of shares are received; or
- (b) a minimum amount is raised;

the shares must not be issued until that condition is satisfied.

If that condition is not satisfied within 4 months after the date of the disclosure statement, the co-operative must repay the money received that has not resulted in an issue of the shares.

Restrictions on advertising and publicity: s 734

This controls advertising and promotion in order to encourage subscribers to rely on information provided in a disclosure statement, rather than information supplied through any advertisements or other promotion.

A person must not:

- a. advertise an offer or intended offer of shares; or
- b. publish a statement that:
 - i. directly or indirectly refers to the offer or intended offer; or
 - ii. is reasonably likely to induce people to apply for the shares,

unless the advertisement or publication is authorised by subsections (4), (5), (6) or (7).

Relevant materials

Form 57: Disclosure statement for intending shareholders of a trading co-operative.

Policy

Relevant considerations to be addressed include whether the statement:

1. states the rights and liabilities attaching to the shares;
2. includes, if required, a copy of the last annual report under s 244;
3. includes, if relevant, any other information about the financial position and prospects of the co-operative;
4. includes, if relevant, a statement that a person has given, and has not withdrawn, the person's written consent to the inclusion in the document of any statement purporting to be made by the person or based on any statement made by the person (a copy of the consent should accompany the draft disclosure statement) [s 716(2) of Corporations Act];
5. contains any matters that are illegal or errors or alterations;
6. contains potentially misleading or deceptive statements;

7. states that no shares will be issued on the basis of the statement, if it stops being a current disclosure statement as described in s 144(4); and
8. states that a copy of the statement has been filed with OCBA, and OCBA takes no responsibility for the contents of the statement.

S. 144B EXEMPTIONS FOR DISCLOSURE STATEMENTS (UNDER S 144 OR 144A)

Legislation

Exemptions

OCBA may exempt the board or boards of a trading co-operative or class of trading co-operative from a requirement of s 144 or 144A.

Section 144 requires a current disclosure statement to be filed with OCBA before it is required to be given to an intending shareholder. Section 144A deals with content requirements of a disclosure statement under s 144.

An exemption may only be granted if OCBA is satisfied that compliance would be inappropriate in the circumstances or would impose an unreasonable burden.

An exemption may be granted subject to conditions.

Policy

Relevant considerations to be addressed include:

1. the relevant requirement for which exemption is sought;
2. any unique reasons or special circumstances that apply;
3. whether and how compliance would be inappropriate in the circumstances;
4. whether and how compliance would place an unreasonable burden on the co-operative (the applicant must demonstrate not only that there is a burden, but that the burden is unreasonable);
5. the size, activities and structure of the co-operative;
6. the minimum share amount required to be subscribed by a member;

7. the extent of any impact on the interests of members of the co-operative and how determined; and
8. any alternative disclosure method proposed.

S 150 APPROVAL OF DISCLOSURE STATEMENT IN RELATION TO ADDITIONAL SHARES

Legislation

The requirements of the section include that any proposal (to be approved by special resolution of the co-operative) to require a member to subscribe for additional shares must:

1. be accompanied by a disclosure statement, approved by OCBA, that explains the purpose for which the funds raised by the issue of the additional shares are to be used; and
2. clearly show the total number of additional shares to be issued and the basis on which the shares are to be apportioned amongst members; and
3. be accompanied by a statement informing the member that they may inform the board by notice by the date specified in the statement (being a date before the passing of the special resolution) that the member resigns on the passing of the special resolution.

Section 17(1), (3) and (7) (Approval of disclosure statement) applies to the disclosure statement. In part, it requires that a draft disclosure statement must be submitted to OCBA at least 28 days before giving notice of the special resolution, and requires consent to any expert's report included.

Section 444 (False and misleading statements) applies to the contents of the disclosure statement.

Policy

Relevant considerations to be addressed include whether the disclosure statement:

1. contains matters that are illegal or errors or alterations;
2. contains potentially misleading or deceptive statements;
3. gives details of all amounts payable in respect of the shares;
4. states that a copy of the statement has been lodged with OCBA and OCBA takes no responsibility for the contents of the statement;
5. includes the financial position of the co-operative by reference to the previously provided audited accounts for the previous financial year; and
6. includes any other relevant information concerning the financial position and prospects of the co-operative if there has been a significant change since the date of the last annual report.

S 189 DISALLOWANCE BY OCBA OF PROPOSED SPECIAL RESOLUTION

Legislation

Notice of special resolution

Section 187(4) requires a co-operative to give at least 28 days notice to OCBA of a proposed special resolution before giving notice to members of the proposed special resolution.

Disallowance of special resolution

Section 189 provides that OCBA may disallow a proposed special resolution before it is passed if OCBA is of the opinion that the effect of the special resolution (if passed) would be in contravention of the Act or the regulations or any other law.

Policy

Relevant considerations to be addressed include whether the effect of the special resolution (if passed) would be in contravention of the Act or the regulations or any other law.

S 193 REGISTRATION OF SPECIAL RESOLUTION.

Legislation

Register special resolution with OCBA

If OCBA is satisfied that the co-operative has complied with the provisions of the Act and the regulations, and that the resolution is not contrary to the Act or the regulations, or does not have reasonable cause to refuse to register the special resolution, OCBA must register the resolution.

Policy

Relevant considerations to be addressed include:

1. if the special resolution has been passed by means of a postal ballot: s 187(2)), how the rules of the co-operative specifically permit this to occur (not by default); and

2. the special resolution has not been disallowed by OCBA under s 189.

S 195 APPROVAL OF DISCLOSURE STATEMENT IN RELATION TO SPECIAL POSTAL BALLOT.

Legislation

Disclosure statement

The requirements of the section to be satisfied include that the co-operative must send to each member (along with any other material required to be sent in connection with the postal ballot) a disclosure statement approved by OCBA and containing information concerning:

1. the financial position of the co-operative;
2. the interests of the directors of the co-operative in the proposal with which the ballot is concerned, including any interests of the directors in another organisation concerned in the proposal;
3. any compensation or consideration to be paid to officers or members of the co-operative in connection with the proposal;
4. such other matters as OCBA directs.

Section 17(1), and (3) to (7) (Approval of disclosure statement) applies. It requires that a draft disclosure statement must be submitted to OCBA at least 28 days before the notice of the special postal ballot is given to members, and requires consent to any expert's report included.

Section 444 (False and misleading statements) applies to the contents of the disclosure statement.

Special postal ballot

Section 196 provides that a special postal ballot is to be conducted for passing a special resolution in relation to the following:

1. conversion of:
 - a. a share capital co-operative to a non-share capital co- operative or vice versa; or
 - b. a trading co-operative to a non-trading co-operative or vice versa: s 28;
2. transfer of incorporation: s 301;
3. an acquisition or disposal of assets referred to in s 270;
4. the maximum permissible level of share interest in the co-operative: s 275;
5. takeover: s 285;
6. merger: s 294;
7. transfer of engagements: s 294; or
8. members' voluntary winding up: s 312.

Schedule 2 to the Regulations specifies the manner in which a postal ballot must be conducted.

Relevant materials

Circulars: Conversion trading to non-trading co-operative with shares - disclosure statement;

Transfer trading co-operative to association - disclosure statement;

Transfer trading co-operative to company - disclosure statement;

Members' voluntary winding up - disclosure statement; and

Form 16: Application for approval of draft disclosure statement.

Policy

Relevant considerations to be addressed include whether the disclosure statement:

1. contains matters that are illegal or errors or alterations;
2. contains potentially misleading or deceptive statements;
3. states that a copy of the statement has been lodged with OCBA and OCBA takes no responsibility for the contents of the statement;
4. includes the financial position of the co-operative by reference to the previously provided audited accounts for the previous financial year;
5. includes any other relevant information concerning the financial position and prospects of the co-operative if there has been a significant change since the date of the last annual report;
6. provides an explanation of the steps and procedures necessary to achieve the implementation of the proposal;
7. includes the proposed special resolution(s) together with the reasons for, and effects of, same;
8. includes, if relevant, a statement that an expert has given, and has not withdrawn, the expert's written consent to the inclusion in the disclosure statement of any statement purporting to be made by the expert or based on any statement made by the expert (a copy of the consent should accompany the draft disclosure statement) [s 17(3)]; and
9. in the case of a conversion from a co-operative with share capital to one without, how the rules provide for share capital to be converted to reserves.

S 199 ANNUAL GENERAL MEETING

Legislation

OCBA Exemption

A co-operative must hold its AGM within 5 months after the close of its financial year. OCBA may extend this period. Any application must be made before the obligation has become due.

Relevant materials

Corporations Act Chapter 2M - Financial Reports and Audit.¹

Policy

Relevant considerations to be addressed include:

1. any unique reasons or special circumstances that apply;
2. whether the matter relates to events that could not be reasonably foreseen;
3. whether and how full compliance with the act would place an unreasonable burden on the co-operative; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
4. the extent of the impact on the interests of members and creditors of the co-operative and how determined;
5. the size, activities and structure of the co-operative;
6. the number and location of the co-operative's members;
7. if relevant, what alternative financial reporting methods are proposed; and
8. the effect of the proposed extension on other regulatory requirements.

¹ Parts 2F.3, 2M.2, 2M.3, 2M.4 and 2M.7 and sections 198F, 249K, 249V and 250T of the Corporations Act apply with suitable modifications. (S 233 and Reg 13)

S 234 POWER OF OCBA TO GRANT EXEMPTIONS IN RELATION TO FINANCIAL REPORTS AND AUDIT

Legislation

Exemptions

OCBA has the power to exempt a co-operative or any class of co-operative or a director or an auditor of a co-operative from compliance with all or specified provisions of the regulations made for the purposes of the Act: s 233(2) and reg 13. An exemption may be subject to conditions or limited as to time.

Policy

Relevant considerations to be addressed include:

1. extent of relief sought;
2. any unique reasons or special circumstances that apply;
3. whether and how full compliance with the act would place an unreasonable burden on the co-operative; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
4. the extent of the impact on the interests of members and creditors of the co-operative and how determined;
5. the size, activities and structure of the co-operative;
6. the number and location of the co-operative's members;
7. the extent of any public interest;
8. what alternative financial reporting methods are proposed;
9. if relevant, reasons why the co-operative should be given a preference in relation to other co-operatives that include purposes that are similar to the co-operative;
10. whether compliance would be inappropriate to the circumstances because an external administrator has taken over all, or a significant part of, the day to day operations of the co-operative; and

11. if relief is sought in respect of particular activities, the nature and size of the activities and their relationship to the co-operative as a whole, and the extent of any government grants utilised in respect of those activities.

S 250 APPROVAL OF CHANGE OF NAME

Legislation

Names

The requirements of the section to be satisfied include that OCBA may refuse to approve a change of name if:

1. OCBA is of the opinion that the new name is undesirable; or
2. OCBA is of the opinion that the name is such as is likely to be confused with the name of a body corporate or a registered business name; or
3. the new name does not conform to the Ministerial directions (as published in the Gazette of 5 March 1998).

Advertising

The co-operative must advertise the change of name in at least one newspaper circulating in the locality or localities in which the co-operative carries on business (The Advertiser will suffice) within 28 days after the change of name has taken effect: reg 18. (OCBA is not involved in this process.)

Policy

Relevant considerations to be addressed include whether the name:

1. is misleading as to the true nature of the co-operative;
2. is likely to be confused with the name of a body corporate or registered business name;

3. is sufficiently dissimilar to the name of another co-operative or registered foreign co-operative and, where relevant, by inclusion of distinguishing words such as "SA" or other necessary geographical description;
4. is undesirable as a name for a co-operative;
5. conforms with Ministerial directions; and
6. complies with s 247: Name to include certain matter.

S 253 AND REG 19 REGISTRATION OF DISCLOSURE STATEMENT IN RELATION TO DEPOSIT-TAKING

Legislation

Disclosure statement

Regulation 19 provides that a deposit taking co-operative must provide a depositor with a copy of a current disclosure statement prior to the first deposit made by the depositor after the commencement of the regulation and, thereafter, at least once in each period of 12 months.

Currency of disclosure statement

A current disclosure statement is a disclosure statement that:

1. has been submitted to and registered by OCBA;
2. has not, within 23 days after the date on which it was submitted to OCBA, been the subject of a direction by OCBA under s 256 of the Act;
3. complies with any such direction given by OCBA;
4. complies with any conditions imposed by OCBA; and
5. is not more than 12 months old.

Contents of disclosure statement

A disclosure statement that is submitted to OCBA must contain:

1. a statement of the assets and liabilities of the co-operative;
2. a statement of the financial position of the co-operative;
3. a profit and loss statement for the co-operative; and
4. such other information as OCBA directs.

Section 444 (False and misleading statements) applies to the contents of the disclosure statement.

Policy

Relevant considerations to be addressed include whether the disclosure statement:

1. contains matters that are illegal or errors or alterations;
2. contains potentially misleading or deceptive statements;
3. describes what the funds raised by the offer are to be used for
4. gives particulars of:
 - a. the security (if any) to be given in respect of the deposits;
 - b. the rate of interest (if any) payable on the deposits; and
 - c. the terms of repayment of the deposits;
5. states that a copy of the statement has been lodged with OCBA and OCBA takes no responsibility for the contents of the statement;
6. states that no deposits will be accepted on the basis of the statement after the expiry date specified in the statement, which must not be later than 12 months after the date of the statement;
7. includes the financial position of the co-operative by reference to the previously provided audited accounts for the previous financial year;

10. includes any other relevant information concerning the financial position and prospects of the co-operative if there has been a significant change since the date of the last annual report; and
11. includes a statement purporting to be made by an expert or to be based on an expert's statement and:
 - (a) the expert has given written consent to the submission of the disclosure statement including the expert's statement; and
 - (b) there appears in the disclosure statement consent from the expert.

S 258 APPLICATION OF CORPORATIONS ACT TO ISSUE OF DEBENTURES

Legislation

Corporations Act provisions

The following provisions of Corporations Act apply to and in respect of debentures:

1. Part 1.2A (Disclosing entities);
2. Part 7.11²:
 - a. Division 2 (Prohibited conduct);
 - b. Division 2A (Insider trading);
 - c. Division 4 (Civil liability);
 - i. Subdivision A (General)
 - ii. Subdivision C (Liability in respect of unlawful market activity);
3. Chapter 2L (Debentures); and
4. Chapter 6D (Fundraising)

² There is no Pt 7.11 Div 1, Div 3, Div 4, Subdiv B in the Corporations Act.

The provisions do not apply to:

- (a) a loan to which section 262 applies;
- (b) an issue of debentures that is made:
 - (i) solely to members; or
 - (ii) solely to members and employees of the co-operative; or
 - (iii) to a person who on becoming an inactive member of the co-operative has had his or her share capital converted to debt.

The offer documents are to be lodged with OCBA and OCBA has the power to issue a stop order in relation to misleading or deceptive documents (s728 - Misstatement in, or omission from, disclosure document): s739.

Policy

ASIC's prevailing policy will be considered for appropriateness, e.g. ASIC policy statement 152 (Lodgement of Disclosure Documents). It is suggested intending issuers contact OCBA before a disclosure document is lodged.

S 259 APPROVAL OF DISCLOSURE STATEMENT IN RELATION TO DEBENTURES ISSUED SOLELY TO MEMBERS OR SOLELY TO MEMBERS AND EMPLOYEES

Legislation

Disclosure statement

The requirements of the section to be satisfied include that before issuing to the person debentures to which this section applies, a co-operative must provide a person with a disclosure statement, approved by OCBA, and containing such

information as is reasonably necessary to enable a person to make an informed assessment of the financial prospects of the co-operative, including:

1. the purpose for which the money raised by the co-operative by the issue of debentures is to be used;
2. the rights and liabilities attaching to the debentures;
3. the financial position of the co-operative;
4. the interests of the directors of the co-operative in the issue of the debentures;
5. any compensation or consideration to be paid to officers or members of the co-operative in connection with the issue of debentures; and
6. such other matters as OCBA directs.

Section 17(1), (3) and (7) (Approval of disclosure statement) applies. It requires that a draft disclosure statement must be submitted to OCBA at least 28 days before the issue of the debentures, and requires consent to any expert's report included.

Section 444 (False and misleading statements) applies to the contents of the disclosure statement.

Policy

Relevant considerations to be addressed include whether the disclosure statement:

1. contains matters that are illegal or errors or alterations;
2. contains potentially misleading or deceptive statements;
3. gives details of all amounts payable in respect of the debentures;
4. states that a copy of the statement has been lodged with OCBA and OCBA takes no responsibility for the contents of the statement;
5. states that no securities will be issued on the basis of the statement after the expiry date specified in the statement, which must not be later than 12 months after the date of the statement;
6. includes the financial position of the co-operative by reference to the previously provided audited accounts for the previous financial year; and

7. includes any other relevant information concerning the financial position and prospects of the co-operative if there has been a significant change since the date of the last annual report.

S 262(3) APPROVAL OF DISCLOSURE STATEMENT IN RELATION TO COMPULSORY LOAN

Legislation

Disclosure statement

The requirements of the section to be satisfied include that the proposal must:

1. be accompanied by a disclosure statement, approved by OCBA, that explains the purpose for which the money raised by the co-operative pursuant to the proposal is to be used and includes any other information that OCBA directs;
2. clearly show the total amount of the loan to be raised by the co-operative and the basis on which the money required to be lent by each member is to be calculated; and
3. be accompanied by a statement informing the member that the member may inform the board by notice on or before the date specified in the statement (being a date before the passing of the special resolution) that the member resigns on the passing of the special resolution.

Section 17(1), (3) and (7) (Approval of disclosure statement) applies. It requires that a draft disclosure statement must be submitted to OCBA at least 28 days before the special resolution, and requires consent to any expert's report included.

Section 444 (False and misleading statements) applies to the contents of the disclosure statement.

Policy

Relevant considerations to be addressed include whether the disclosure statement:

1. contains matters that are illegal or errors or alterations;
2. contains potentially misleading or deceptive statements;
3. states that a copy of the statement has been lodged with OCBA and OCBA takes no responsibility for the contents of the statement;
4. includes the financial position of the co-operative by reference to the previously provided audited accounts for the previous financial year; and
5. includes any other relevant information concerning the financial position and prospects of the co-operative if there has been a significant change since the date of the last annual report.

S 270(2) EXEMPTION IN RELATION TO ACQUISITION AND DISPOSAL OF ASSETS

Legislation

Special resolution

A co-operative must not do any of the following things except as approved by special resolution by means of a special postal ballot:

1. sell or lease as a going concern, the undertaking of the co-operative or a part of the undertaking that relates to its primary activities the value of which represents 5 per cent or more of the total value of the undertaking;
2. acquire from or dispose to a director or employee of the co-operative, or a relative (within the meaning of the Corporations Act) of such a director or employee or of the spouse of such a director or employee, of any property the value of which represents 5 per cent or more of the total value of all the assets of the co-operative that relate to its primary activities;

3. acquire an asset the value of which exceeds 5 per cent or more of the assets of the co-operative if the acquisition would result in the co-operative commencing to carry on an activity that is not one of its primary activities; or
4. dispose of an asset if the disposal would result in the co-operative ceasing to carry on any primary activity of the co-operative, or in the ability of the co-operative to carry on any primary activity of the co-operative being substantially impaired either generally or in a particular geographical region.

Special postal ballots

Section 195 governs special postal ballots including approval of a disclosure statement by OCBA.

Exemption

OCBA may exempt a co-operative from compliance with all or specified provisions of s 270 and s 195 (Special postal ballots) in relation to any matter to which s 270 applies and may grant that exemption unconditionally or subject to conditions.

Policy

Relevant considerations to be addressed include:

1. extent of relief sought;
2. any unique reasons or special circumstances that apply;
3. whether and how full compliance with the act would place an unreasonable burden on the co-operative; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
4. any commercial necessity for the exemption, and the extent of same;
5. whether timing is an issue and why;
6. the extent of the impact on the interests of members of the co-operative and how determined including:
 - a. whether members will be disadvantaged if not consulted, and why; and
 - b. the degree to which members have already been consulted about the sale, and any comments from members;
7. what alternative methods of members' decision making are proposed;
8. the size, activities and structure of the co-operative;

9. the number and location of the co-operative's members; and
10. whether compliance would be inappropriate to the circumstances because a voluntary administrator has taken over all, or a significant part of, the day to day operations of the co-operative including what effect, if any, has the voluntary administrator already had on the ability of the co-operative to carry on its primary activity or in substantially impairing its ability to carry on its primary activity.

S 275(2) APPROVAL TO EXCEED MAXIMUM LEVEL OF SHARE INTEREST

Legislation

Maximum shareholding

Section 275(1) provides that a person must not have a relevant interest in shares of a co-operative the nominal value of which exceeds 20 percent of the nominal value of the issued share capital of the co-operative.

Increasing the limit

Subsection (2) provides that OCBA, by Gazettal, may specify a maximum greater than 20 percent in respect of a particular co-operative, a particular class of co-operatives or co-operative generally.

Policy

In respect of a particular co-operative:

Relevant considerations to be addressed include:

1. the unique reasons or special circumstances why the 20% limit should be exceeded;

2. whether the board of directors is (or will be) comprised of a majority of persons who are not associates of the person in question (as defined in schedule 2 to the act);
3. whether the proposal results in any loss of mutuality;
4. any consequences to the co-operative if the proposal is not agreed to; and
5. the reasons why the co-operative should be given preference in relation to other co-operatives.

S 275(5) APPROVAL TO EXCEED MAXIMUM LEVEL OF SHARE INTEREST

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Legislation

Maximum shareholding

Section 275(1) provides that a person must not have a relevant interest in shares of a co-operative more than 20 percent of the nominal value of the issued share capital of the co-operative.

Increasing the limit

Pursuant to subsection (4), the 20 percent maximum may be increased in respect of a particular person by special resolution of the co-operative passed by means of a special postal ballot.

Subsection (5) provides that such a resolution does not have effect unless it is approved by OCBA or the person concerned is another co-operative.

An approval may be granted subject to conditions.

Policy

Relevant considerations to be addressed include:

1. the unique reasons or special circumstances why the 20% limit should be exceeded;
2. whether the board of directors is (or will be) comprised of a majority of persons who are not associates of the person in question (as defined in schedule 2 to the act);
3. whether the proposal results in any loss of mutuality; and
4. any consequences to the co-operative if the proposal is not agreed to.

An interest that would exceed 50% would not normally be approved. Any exemption granted will be subject to review in 5 years.

S 301, 302 APPLICATION FOR TRANSFER OF INCORPORATION AND EXEMPTION FROM REQUIREMENTS BEFORE APPLICATION CAN BE MADE

Legislation

Incorporation

Section 301 provides that a co-operative, if approved under Division 2 of Part 12 of the Act, may apply to become incorporated as a company under the *Corporations Act*; or a body corporate that is incorporated, registered or otherwise established under a law that is prescribed for the purposes of the section (Associations Incorporation Act: reg 26).

Special resolution

Before an application is made under s 301, the co-operative must by special resolution passed by means of a special postal ballot:

1. approve the proposed application;
2. determine what name the co-operative is to apply to be incorporated; and
3. adopt any memorandum or articles of association or rules that may be necessary or considered desirable.

Section 195 requires a special postal ballot to be conducted in accordance with the section for passing a special resolution in relation to a transfer of incorporation.

Section 302(3) and (4) allows OCBA to exempt a co-operative (subject to any conditions) from compliance with all or specified provisions of the section or s 195 [special postal ballots] in relation to any matter to which s 302 applies.

Relevant materials

Circular: Transfer non-trading co-operative no shares to association;

Circular: Transfer trading to non-trading co-operative to association;

Circular: Transfer trading co-operative to company.

Policy

Relevant considerations include:

1. extent of relief sought;
2. any unique reasons or special circumstances that apply;
3. whether and how full compliance with the act would place an unreasonable burden on the co-operative; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
4. any commercial necessity for the exemption, and the extent of same;
5. whether timing is an issue and why;
6. the size, activities and structure of the co-operative;
7. the number and location of the co-operative's members;
8. the financial position of the co-operative;
9. the extent of the impact on the interests of members of the co-operative and how determined including:
 - a. whether members will be disadvantaged if not consulted, and why; and
 - b. the degree to which members have already been consulted, and any comments of members; and
10. what alternative methods of members' decision making are proposed, including resolution by special resolution (as defined in the act) which must be registered by OCBA under s 193 to create an effective date for commencement of the winding up).

A proposal that would not include any decision-making by members would not usually be agreed to.

S 310 APPOINTMENT OF LIQUIDATOR FOR WINDING UP ON COMMISSION'S CERTIFICATE

Legislation

Appointment of liquidator

A co-operative may be wound up on a certificate of OCBA if necessary grounds exist as described in s 331.

On giving a certificate, OCBA may appoint a liquidator, on such conditions as it thinks fit, who need not be a registered company liquidator under the Corporations Act.

OCBA must decide on what fees the liquidator is entitled to.

OCBA may direct if any security is to be given by the liquidator for the exercise of functions.

OCBA must appoint a person to fill any vacancy in office.

Policy

Relevant considerations to be addressed include:

Appointment

1. Size, activities and structure of the co-operative;
2. Consent of person to appointment;
3. Proposed fees to be charged, including basis, e.g. consistent with guidelines issued by the Insolvency Practitioners Association of Australia;
4. Acknowledgement that fees are to be paid from the co-operative's funds (unless the co-operative has insufficient funds and other arrangements are made with OCBA);
5. Provision of copy of policy for professional indemnity insurance, commensurate with performance of duties as liquidator. For a registered liquidator, insurance cover would be expected to be similar to requirements in ASIC's Policy Statement 33, paragraph 9A;
6. If the person is not a registered liquidator, relevant considerations also include:
 - (a) qualifications, experience and independence of the person in relation to the task to be undertaken;
 - (b) any convictions or disqualifications; and

(c) experience in relation to similar entities.

Security

Where professional indemnity insurance is not adequate, any proposed alternative or additional monetary or other security, commensurate with performance of duties as liquidator, in the form of e.g.:

- (a) bank cheque; or
- (b) debenture or security guaranteed by a Government of Australia.

S 312 MEMBERS' VOLUNTARY WINDING UP

Legislation

Special resolution by means of special postal ballot

Section 312(1)(b) provides that a co-operative may be wound up voluntarily if a special resolution is passed by means of a special postal ballot in favour of a voluntary winding up.

Pursuant to subsection (2), OCBA may by order exempt a co-operative from compliance all or specified provisions of the section or s 195 (Special postal ballots).

Relevant materials

Circular: Members' voluntary winding up - procedure.

Policy

Relevant considerations to be addressed include:

1. extent of relief sought;
2. any unique reasons or special circumstances that apply;
3. whether and how full compliance with the act would place an unreasonable burden on the co-operative; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
4. any commercial necessity for the exemption, and the extent of same;
5. whether timing is an issue and why;
6. the size, activities and structure of the co-operative;
7. the number and location of the co-operative's members;
8. the financial position of the co-operative;
9. the extent of the impact on the interests of members of the co-operative and how determined including:
 - a. whether members will be disadvantaged if not consulted, and why; and
 - b. the degree to which members have already been consulted, and any comments of members; and
10. what alternative methods of members' decision making are proposed, including resolution by special resolution (as defined in the act), which must be registered by OCBA under s 193 to create an effective date for commencement of the winding up.

A proposal that would not include any decision-making by members would not usually be agreed to.

S 368 REGISTRATION OF FOREIGN CO-OPERATIVE

Legislation

A participating co-operative

Section 364(2) requires an application for registration of a participating co-operative to be accompanied by documents that include:

1. a certificate, not more than 2 months old, from the Registrar of the participating State, in which the participating co-operative is registered, incorporated or formed stating that the co-operative is complying with the provisions of the co-operatives law of that State prescribed for the purpose of the section of that law that corresponds with s 373; and
2. a copy of the current rules of the co-operative.

A non-participating co-operative

Section 365(2) requires an application for registration of a non-participating co-operative to be accompanied by documents that include a copy of the current rules of the co-operative.

Section 366 provides that a non-participating co-operative is not eligible for registration unless OCBA is satisfied that the rules of the co-operative:

1. comply with co-operative principles;
2. include acceptable active membership provisions;
3. provide procedures acceptable to OCBA for disclosure of information;
4. provide that a member has one vote only;
5. make adequate provision for the duties of directors; and
6. provide for acceptable accounting standards for the co-operative.

Foreign co-operative

Section 367 provides that a foreign co-operative is eligible for registration under Part 14 of the Act if the name under which it proposes to carry on business in South Australia is not such as is likely to be confused with the name of a body corporate or a registered business name.

Relevant materials

Forms 30, 31: Application for registration of a participating/non-participating co-operative as a foreign co-operative.

Policy

Participating foreign co-operative

Relevant considerations to be addressed include whether the name is:

1. likely to be confused with the name of a body corporate or registered business name; and
2. sufficiently dissimilar to the name of another co-operative or registered foreign co-operative and, where relevant, by inclusion of distinguishing words such as "SA" or other necessary geographical description and, where relevant, by inclusion of distinguishing words such as "name of participating State" or other necessary geographical description.

Non-participating foreign co-operative

Relevant considerations to be addressed include whether the rules contain provisions consistent, or in the case of s 366 (a) that comply, with the following sections of the Act:

1. S 366 (a): ss 6, 7 - Co-operative principles
2. S 366 (b): ss 114 to 136 (Part 6) - Active membership
3. S 366 (c):
 - ✚ s 72 - Co-operative to provide information to person intending to become a member
 - ✚ s 144 - Disclosures to members before issuing shares
 - ✚ s 150 - Members may be required to take up additional shares
 - ✚ s 195 - Special postal ballots
 - ✚ s 236 - Disclosure by directors
 - ✚ s 258 - Prospectus required under adopted Corporations Act in relation to an offer or invitation of debentures to non-members
 - ✚ s 259 - Disclosure statement required where debentures are issued to members
 - ✚ s 262 - Compulsory loan by member to co-operative
 - ✚ s 290 - Additional disclosure requirements for offers involving conversion to company

✚ s 344 - Explanatory statement required to accompany notice of meeting

✚ s 345 - Requirements for explanatory statement

4. S 366 (d):

✚ s 175 - Voting

✚ s 177 - Restriction on voting entitlement under power of attorney

✚ s 178 - Restriction on voting by representatives of body corporate

✚ s 179 - Inactive members not entitled to vote

✚ s 180 - Control of the right to vote

✚ s 181 - Effect of relevant share and voting interests on voting rights

5. S 366 (e):

✚ s 204 - Convening of general meeting on requisition

✚ s 216 - Officers must act honestly

✚ s 217 - Standard of care and diligence required

✚ s 218 - Improper use of information or position

✚ s 223 - Adoption of Corporations Act provisions concerning officers of co-operatives (ss 589 to 598 and 1307)

✚ s 229 to 232 (Part 9 Division 4) - Declaration of interests

✚ s 233(2)(f) - Preparation, auditing and laying before members of accounts and reports (as provided for in reg 13)

✚ s 341 - Directors to arrange for reports (in relation to a compromise or arrangement or in connection with a scheme for the reconstruction of a co-operative)

6. S 366 (f): s 233 - Requirements for accounts and accounting records (as provided for in reg 13)

S 421 EXTENSION OR ABRIDGMENT OF TIME

Legislation

Time

OCBA may grant an extension of, or may abridge, any time for doing anything required to be done by the co-operative by the Act, the regulations or the rules of a co-operative on such terms (if any) as OCBA determines.

Policy

Relevant considerations to be addressed include:

1. any unique reasons or special circumstances that apply;
2. whether the matter relates to events that could not be reasonably foreseen.
3. whether and how full compliance with the act would place an unreasonable burden on the co-operative; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
4. the extent of the impact on the interests of members and creditors of the co-operative and how determined;
5. the size, activities and structure of the co-operative;
6. the number and location of the co-operative's members;
7. if relevant, what alternative financial reporting methods are proposed; and
8. the effect of the proposed extension on other regulatory requirements

28 days notice

In respect of a notification of special resolution: s 187(4), which is required to be lodged at least 28 days before notices are given to members, any application for abridgement of the 28 days must be lodged with OCBA before the 28 days has commenced.

S 451 APPROVAL IN RELATION TO SERVICE ON MEMBER OF CO-OPERATIVE

Legislation

A notice required under this Act to be given to a member of a co-operative may be given by publishing the notice in a newspaper circulating generally in South Australia or in the area served by the co-operative (The Advertiser will suffice), if the:

1. co-operative is a non-trading co-operative; or
2. member's whereabouts are unknown to the co-operative; or
3. OCBA grants the co-operative permission to give the notice to its members in that manner.

The permission may relate to a particular notice or a class of notice and may be conditional.

Policy

Relevant considerations to be addressed include:

1. the provision of the Act requiring the notice;
2. the extent of relief sought;
3. any unique reasons or special circumstances that apply;
4. whether and how full compliance with the act would place an unreasonable burden on the co-operative; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable;
5. the extent of the impact on the interests of members and creditors of the co-operative and how determined;
6. the size, activities and structure of the co-operative;
7. the number and location of the co-operative's members;
8. what additional notice methods (to newspaper notice) are proposed (as conditions); and
9. the effect of the proposed permission on other regulatory requirements.

APPLIED CORPORATIONS ACT PROVISIONS³

S 324BD APPROVAL OF AUDITOR

Legislation

Qualification

Subject to the provisions, an individual, or a firm, may be appointed as auditor for a co-operative if the individual, or at least one partner in the firm, is a registered company auditor. In addition, an authorised audit company may be appointed as auditor. (Corporations Act S 324AA, 324BA, 324BB, 324BC)

Approval to be an auditor

An individual who is not a registered company auditor may be appointed as auditor of a co-operative if OCBA:

- a) is satisfied that the individual is suitably qualified or experienced; and
- b) approves the individual for the purposes of the provisions of the CA adopted by or under the Act in relation to the audit of the co-operative's financial reports.

An individual so approved by OCBA is taken to be a registered company auditor, and the provisions of the Act (including provisions of the CA adopted by or under the Act) apply to the person with the necessary modifications.

Relevant materials

Form: Auditor approval questionnaire.

³ Refer to regulation 13

Policy

Relevant considerations to be addressed include:

1. qualifications and independence of the person;
2. the auditing experience of the person in relation to similar entities;
3. any convictions or disqualifications;
4. the size, activities and structure of the co-operative;
5. the proposed audit practices and methodologies; and
6. whether the person is a member of a professional accounting body.

S 329(5) CONSENT TO RESIGNATION OF AUDITOR

Legislation

An auditor of a co-operative may, by notice in writing given to the co-operative, resign as auditor of the co-operative if:

- a) the auditor has, by notice in writing given to OCBA, applied for consent to the resignation and stated the reasons for the application and, at or about the same time as the notice was given to OCBA, notified the co-operative in writing of the application to OCBA; and
- b) the consent of OCBA has been given.

OCBA must, as soon as practicable after receiving a notice from an auditor under subsection (5), notify the auditor and the co-operative whether it consents to the resignation of the auditor (s 329 (6)).

Relevant materials

Form 25: Application for consent to resign as auditor.

Policy

In considering an application for consent to resign, OCBA's main concern is to ensure that the independence of the audit function is preserved.

Relevant considerations to be addressed include whether:

1. the auditor has been induced to resign because of any suggestions made by, or actions of, the co-operative's management, indicating that the auditor will be replaced if the auditor deals with certain matters or items other than in accordance with a manner suggested by the co-operative;
2. adequate assurance has been given by the auditor that the application does not follow as a consequence of a limitation on the scope of the auditors work or the existence of a significant uncertainty affecting the financial statements; and
3. the auditor provides any other assurances and information on any other matters that the auditor believes OCBA should be made aware of, that may impinge on the independence of the audit function as it relates to the co-operative.

Resignations that do not take effect at the AGM

Relevant considerations to be addressed include whether:

1. there are exceptional circumstances, e.g.:
 - a. the failing health of the auditor;
 - b. loss of independence of the auditor;
 - c. a relocation of the co-operative's or auditor's principal place of business resulting in circumstances where it would be impractical for the auditor to perform the audit;
2. a day other than the next AGM is appropriate; and
3. subject to OCBA's approval of the resignation, the application includes a copy of a directors' resolution appointing a replacement auditor and a confirmation from the proposed replacement auditor stating preparedness to accept the appointment.

CO-OPERATIVES REGULATIONS REG 46 WAIVER OF FEES

Regulation

Waiver

Regulation 45 provides that the fees set out in Schedule 5 to the regulations are prescribed for the purposes of the Act.

Regulation 46 provides that OCBA may waive, reduce or refund any fee payable under the Act or the regulations by:

1. a co-operative that, in the opinion of OCBA, is constituted primarily for a charitable purpose; or
2. a co-operative that, in the opinion of OCBA, is constituted primarily for the purpose of advancing the welfare of a class of disadvantaged persons,

if, in the opinion of OCBA, there are special circumstances that justify payment being waived, reduced or refunded.

Policy

Relevant considerations to be addressed include:

1. whether the co-operative is constituted primarily for a charitable purpose; or
2. whether the co-operative is constituted primarily for the purpose of advancing the welfare of a class of disadvantaged persons;
3. the matter that attracts the fee and the amount payable;
4. the function to be performed by OCBA in respect of the matter;
5. the extent of fee relief sought;

6. the special circumstances that justify payment being waived, reduced or refunded;
7. whether and how full compliance with the requirements would place an unreasonable burden on the co-operative; the applicant must demonstrate not only that there is a burden, but also that the burden is unreasonable; and
8. the size, activities and structure of the co-operative;

Applicants have a high standard of proof to overcome in respect of points 6 and 7.