



BUSINESS COUNCIL  
OF CO-OPERATIVES AND MUTUALS

Ms Hannah Dunn  
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Senate Economics References Committee Secretariat  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear

RE: QUESTIONS ON NOTICE – SENATE ECONOMIC REFERENCES COMMITTEE  
INQUIRY INTO COOPERATIVE, MUTUAL AND MEMBER-OWNED FIRMS IN THE  
AUSTRALIAN ECONOMY

Thank you for your email following the Committee's hearing in Melbourne on 30 October.

The Business Council of Co-operatives and Mutuals is pleased to provide the following material in response to the Committee's "Questions on Notice" to the BCCM.

I trust that the following information is of assistance. Should the Committee require any further information, I invite you to contact me directly by phone: or email:

Yours sincerely

Melina Morrison  
CEO

07 December 2015



## Answers to Questions on Notice

### First Question on Notice (Transcript page 17):

Senator XENOPHON: You are going to get pushback in terms of the reforms you are seeking. I cannot speak for my colleagues, **but I think that it would be useful from my point of view to get templates of the sorts of specific changes that are required—we do not have the resources to do that—but also to look at the consequences of those changes.**

Answer:

The Business Council of Co-operatives and Mutuals provides the following material pertinent to the specific changes recommended.

### **1. New Capital Instruments.**

The BCCM recommends active consideration by government and regulators to changes in the relevant legislation to enable the raising of different forms of capital.

Relevant to this recommendation is material and templates from other jurisdictions including the UK:

#### 1.1 Mutuals' Deferred Shares Act 2015 (UK)<sup>1</sup>

#### 1.2 "Raising New Capital in Mutuals – Taking Action in the UK" Report - Background and explanation of The Mutuals' Redeemable Shares Bill (UK)<sup>2</sup>

#### 1.3 The All-Party Parliamentary Group for Mutuals (UK):

<http://www.mutuo.co.uk/category/appg/>

The Purpose of the Group is to discuss and support mutuals. The Group has members from both Houses of Parliament.

The Group has challenged the way that government and financial regulators work with mutuals and has called for a series of reforms that will enable mutuals to compete on a fair basis with companies.

The Group produced a report on issues related to capital raising in mutuals including how mutuals can raise capital without destroying the mutual principle:

<http://www.mutuo.co.uk/wp-content/uploads/2014/09/Capital-Report-Final.pdf>

The report recommends that:

#### 1. New capital instruments for mutuals should be created:

##### a. Individual mutual society members should be enabled to invest in their mutuals through new types of shares

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<sup>1</sup> Attachment A.

<sup>2</sup> Attachment B.



- b. Government and regulators should take action by supporting Lord Naseby's Mutuals' Redeemable and Deferred Shares Bill
- c. The Financial Conduct Authority should abandon its existing definition of 'sophisticated' and 'unsophisticated' investors which is simplistic and ill-conceived.
- 2. Regulators should have a legal duty to promote corporate diversity:
  - a. The law governing regulators should be changed to introduce this new responsibility
  - b. The UK regulatory and policy environment is less in tune with mutual business than in other EU countries
- 3. There is a real need for policy makers, regulators and legislators to better understand how customer owned mutuals operate:
  - a. Regulators should better understand how mutuals are owned and operate, both here, and in competitor economies
  - b. Regulators should employ people with direct experience of mutual business

#### 1.4 Materials and templates relevant to protecting mutuality:

1.4.1 The protection for mutuality in the Mutuals' Deferred Shares Act 2015 (UK) is extracted from the Act as follows:

##### *"2. Restriction on voting rights:*

*(1) Regulations under section 1(1) must make provision to ensure that no friendly society or mutual insurer will confer—*

*(a) more than one vote per person as a member on holders of deferred shares who are members of the society or insurer by virtue only of being such a holder; (b) additional voting rights on a member of the society or insurer by virtue of being a holder of a deferred share where the member is a member other than by virtue of being such a holder.*

*(2) Regulations under section 1(1) must make provision prohibiting the holder of a deferred share who is a member of a friendly society or mutual insurer by virtue only of being such a holder from proposing or voting in respect of any of the following—*

*(a) a resolution under section 85, 86 or 91 of the Friendly Societies Act 1992 (amalgamation, transfer of engagements or conversions);*

*(b) a resolution to similar effect in the case of a mutual insurer, including a compromise or arrangement proposed at a meeting called under section 896 of the Companies Act 2006 (court order for holding of meeting);*

*(c) an arrangement made in pursuance of section 110 of the Insolvency Act 1986 (acceptance of shares etc as consideration for sale of company property) or Article 96 of the Insolvency (Northern Ireland) Order 1989 (S.I. 1989 / 2405 (N.I. 19));*

*(d) such other matters as the regulations may specify."*

In summary, any holder of shares will have only one vote, regardless of the number of shares they purchase. Secondly, the holder of shares cannot participate in votes to



demutualise or merge or transfer the business elsewhere. The holders of shares have fewer rights than ordinary members who remain in control.

#### 1.4.2 Changing the Corporations Act definition of directors' duties for directors of mutuals as protection against demutualisation.

The BCCM recommends amendment of the Corporations Act to provide that directors of mutuals should consider the interests of members as recipients of products and services provided by the company in the discharge of their directors' duties.

A proposed amendment to the Corporations Act to clarify that directors are allowed to recognise the full service interests of their existing set of stakeholders (members/customers) could be formed as follows:

*"Insert new part 12.3 in the Corporations Regulations applying to the mutual form:*

##### 12.3.01

*This Part modifies the application of subsections 180(2)(a), 180(2)(d), 181(1)(a), 181(b), 184(1)(c), 184(1)(d), 187(a) and 187(b) of the Act in relation to the directors and officers of a company.*

##### 12.3.02

*A director or other officer of a corporation, in exercising their powers or discharging their duties, to act:*

*(a) in good faith in the best interests of the corporation; and*

*(b) for a proper purpose,*

*should take into account the interests of members of the corporation as recipients of services provided by the company."<sup>3</sup>*

#### 1.4.3 Express recognition of mutuals in the Corporations Act to strengthen governance in mutual corporate forms.

Submissions have been made to this Inquiry that include recommendations for express recognition of mutuals in the Corporations Act. It is argued that defining the mutual form in the law would have the effect of enabling the Corporations Act, related regulatory regimes, regulators and courts to reflect and develop practices that attend to the circumstances of companies formed for service maximisation (mutuals) as distinct from profit maximization.

The BCCM is undertaking further work with the sector to provide examples, templates and materials regarding express recognition of mutuals in law.

## 2. Regulatory Impact Test

In order for co-operatives and mutuals to compete on fair terms with all other types of business, it is proposed that government should introduce a policy fitness test that can be applied to specific proposals.

An appropriate place for this is at question four of the Australian Government Guide to Regulation, which sets out requirements for regulatory impact statements (RISs).

Question four of the RIS requires policy makers to:

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<sup>3</sup> Submission 45 (Australian Unity): Co-operative, mutual and member-owned Firms Senate Inquiry



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*“Identify who is likely to be affected by each regulatory option and assess the economic, social and environmental costs and benefits as well as how those costs and benefits are likely to be distributed.”<sup>4</sup>*

We note that RISs currently require consideration of:

- businesses with a specific requirement to consider small businesses;
- individuals; and
- community organisations.

We recommend that categories of businesses should be clearly expressed to include co-operatives and mutuals because they are subject to different regulation and the impact of any proposed regulatory change may be different for these business types.

This would not be a lengthy or complex addition to the Government Guide to Regulation. It could take the form of one paragraph, along the following lines, consistent with the small business requirement:

*“Give co-operative, mutuals and member owned firms special consideration. Are the regulatory costs disproportionately burdensome on co-operatives and mutuals due to their business structure or customer base? Does the analysis adequately take into account the different impacts on such businesses of different sizes, types and locations?”<sup>5</sup>*

### **3. Co-operatives National Law**

#### **3.1 COAG and the AUCLA.**

There is a nationally consistent operating environment for those who choose to collaborate under a company structure. There is no nationally consistent operating environment for those who seek to form a co-operative.

Notwithstanding co-operatives law and administration is a matter for states and territories, it is important that this Inquiry should strive to achieve nationally consistent co-operatives law and administration.

The Australian Uniform Co-operative Laws Agreement (AUCLA)<sup>6</sup> that saw the passage of the Co-operatives National Law (CNL) as part of a scheme of uniform laws is based on such a policy objective.

Unfortunately, there is still no national adoption of the CNL and moreover, Queensland has withdrawn from the Agreement. Without national adoption of the CNL, co-operatives cannot carry on business across state or territory borders without requirements for dual registration. There is a need for a focused effort to ensure adoption by all states and territories of a national regulatory regime supported by uniform administration and systematic review of the legislative regime to ensure that it meets its policy objectives.

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[http://cuttingredtape.gov.au/sites/default/files/documents/australian\\_government\\_guide\\_regulation.pdf](http://cuttingredtape.gov.au/sites/default/files/documents/australian_government_guide_regulation.pdf)

<sup>5</sup> Submission 39 (COBA), Co-operative, mutual and member-owned Firms Senate Inquiry

<sup>6</sup> Attachment C.



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The AUCLA and the development of the CNL was overseen by the Legislative and Governance Forum on Consumer Affairs under COAG and this forum provides an opportunity for all governments to develop and enact policy in a uniform manner.

The Commonwealth was not a party to the AUCLA, however, the Agreement is a key to achieving a nationally consistent operating environment for co-operatives that could reflect international best regulatory practice for co-operatives.

Clause 9(6) of the AUCLA requires the parties to the Agreement to keep the CNL under review and to ensure that its policy objectives remain valid and that its terms are appropriate for securing those objectives.

Clause 19(1) requires the Ministerial Council to meet once each year to consider co-operative law matters.

It would seem appropriate with respect to this Inquiry, for the Committee to ask questions on notice of each relevant State or Territory Minister or Registrar whether any meetings have been held under the terms of the agreement.

Queensland has withdrawn from the CNL process, however it is appropriate for the Committee to ask the relevant Minister what actions, if any, they are taking to adopt uniform or consistent legislation for co-operatives that meet the policy objectives of the CNL.

It is suggested that the Commonwealth could through the Legislative and Governance Forum on Consumer Affairs initiate consultations with all state and territory governments to progress a nationally consistent operating environment for co-operatives and to consider whether there is scope to review the CNL and its administration to meet the needs of people wishing to form co-operatives.

Such consultation may also include consideration of a **single national regulator for co-operatives**.

The failure of the states to achieve genuine uniformity in co-operative laws together with the hidden cost of administrative duplication and bureaucracy are good reasons to contemplate a referral of co-operative law making powers to the federal jurisdiction.

### 3.2 Sector supported Registration Service.

Evidence provided to the Inquiry shows the cost, time and complexity of registering co-operatives in Australia acts as an inhibitor on the growth of the sector. In other jurisdictions the Regulator works with the sector to facilitate co-operative formations.

As the UK's network for co-operatives and peak body, Co-operatives UK works with the FCA – the UK Registrar - to help new-starts get off the ground, provide specialist advice for growing businesses and lead major programmes to develop the UK co-operative sector: <http://www.uk.coop/developing-co-ops/model-governing-documents>

In most cases, a co-operative's constitution can be simple and closely follow the existing Model Rules (national regulations). Co-operatives UK has drafted their templates based on the Model Rules and the FCA has approved them.





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Proposed incorporators in the UK can use templates and model governing documents provided by Co-operatives UK. Co-operatives UK assists incorporators to fill in the documents and lodge these with the Registrar.

The process of registration using these model templates is efficient (14 day or less) and costs around £40. In Australia, bespoke constitutions take longer and are vastly more costly to produce.

The equivalent process exists regarding company constitutions when incorporators use a company registration specialist. They have model constitutions and they lodge for the incorporator. The process is fast and inexpensive.

The BCCM recommends that the Regulator/s work with to develop a Registration Service. The BCCM would develop template constitutions for the various types of co-operatives (consumer, producer, energy etc.) based on the CNL Model Rules, with (Registry) "acceptable" active membership rules and share provisions.

As the peak body for co-operatives and mutuals, the BCCM could play a role similar to Co-operatives UK and be a sponsoring body for forming co-operatives at minimal cost.

The BCCM has started to develop these template resources to assist new-starts and existing co-operatives to overcome the existing information asymmetry and higher costs of registration. These resources are found on the public access start-up website [www.getmutual.coop](http://www.getmutual.coop).

Development of resources similar to the UK's Community Shares resources (<http://communityshares.org.uk>) and co-operative crowdfunding platform, Microgenius (<http://www.microgenius.org.uk>) would assist Australian co-operatives with their capital raising.

#### 4. Accounting Standards

Evidence provided to the Inquiry shows that Accounting Standards (AASB132) requires co-operatives to record their shares as liabilities on their balance sheet.

This makes the balance sheet look weak which can affect a co-operative's ability to raise capital as loans from banks and other lenders (co-operatives have to explain that their share capital is a liability because it is subject to requirements to be repaid).

A company records its shares as equity. If a co-operative issues securities, like debentures, then potential investors would look at a balance sheet with more liabilities than assets.<sup>7</sup>

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<sup>7</sup> Please note in some cases share capital may be recorded as equity where a co-operative's rules make the cost of a share non-repayable, such as the case where members have paid a low-cost membership fee. If the rules of a co-operative do not permit a member to request a repurchase then they may take the view that the shares are equity but this is far from a consistent situation.

This is the case for Hepburn Wind. Their Annual Report records their \$9 million in share capital as equity and the note pertaining to this is as follows: "Issued capital may be required to be treated as a liability if there is a right for members to request redemption, or if a member's funds must be repaid, for example as a result of the member not meeting the active member test. The rules of the Co-operative do not provide for members to request redemption, however, repayment of issued capital may be required within twelve months after a member has been inactive or uncontactable for three



How to amend the CNL to fix the accounting anomaly:

The inter government agreement (AUCLA) in Clause 10 provides for NSW to introduce amendment to the CNL because it is a NSW Act. The Ministerial Council under COAG (now called the Consumer Affairs Forum) must consider the amendment and it can only be made if 2/3 of the States and Territories agree.

It would be useful, on the question of accounting standards, to propose to each State Registrar that they consider the problem for co-operatives that is created by AASB132 and in particular that they consider whether the CNL could be amended to impose limits on repayment of capital in a similar manner to the limits placed on companies.

AASB132 requires that for a security to be classed as capital (capital being the 'permanent' equity in a company, it should either not be repayable during the life of the company or the board has an ability to refuse repayment.

Co-operatives may have to repay capital in two instances:

- a. If a member requests a repurchase, and
- b. If a member leaves the co-operative (through inactivity and cancellation, expulsion or resignation).

In respect of a, the rules may actually not permit repurchase, or if they do, then there is a statutory limit on repaying any more than 5% of the issued capital in a 12 month period.

In respect of b, the co-operative must repay the capital to the member, but may be able to delay repayment if it would compromise the financial stability of the co-operative (but it cannot be delayed more than 10 years).

Overall, no member can hold more than 20% of the issued capital of a co-operative, so the risk of repayment under 'b' is limited to 20% of the issued capital. This could be drastic if there are a small number of members and one or two members leaving the co-operative.

Notwithstanding the conservative nature of co-operatives on matters of repayment of capital - it does not meet the definition of capital under AASB132 because it is exposed to more repayment options than share capital for a company.

Contrast this with the company position - share capital is not repayable generally. However, there is scope under reduction of capital provisions in the Corporations Act for share buy backs on either a pro rata basis or on selective (individual) basis provided they follow a procedure and provided that they do not breach the statutory limit of 10% of issued capital in a 12 month period.

Draft proposal to amend the CNL:

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years. No issued capital is currently repayable and, accordingly, issued capital has been treated as equity."





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*“That the CNL be amended to provide that no more than 10% of the issued capital be repaid in any 12 month period, whether this is through repurchase arrangements, resignations, cancellations or expulsions”.*

This is similar to companies.

This proposal might impact on individual members' ability to recover their share capital if they are cancelled and they hold more than 10% of the share capital, but may have some other positive consequences. Obligations to repay capital are an internal management issue for co-operatives because they must estimate how many members may leave the co-operative and plan to be in a position to repay.

If they know that it can never exceed 10% per year, then this will assist that planning. For members, the process for repayment after cancellation can be protracted with the board being able to delay repayment for a period of 10 years and through the substituted offer of debt securities.

It would be useful for the Senate Committee to call the accounting professional bodies to ask whether this kind of solution would bring co-operative shares into the definition of capital under AASB132.

The amendment to CNL would permit co-operatives to refuse repayment of member share capital where the repayment would exceed 10% of the issued share capital. This is the permitted limit for share buy backs for companies.

## **5. Public Service Mutuals**

The BCCM recommends active consideration by government of the greater involvement of mutuals in the provision of community services as a viable alternative to traditional privatisation and outsourcing models

The BCCM makes four recommendations in relation to government supporting Public Service Mutuals:

1. Establish an independent Mutuals Taskforce
2. Convene and coordinate a network of Mutuals Ambassadors
3. Fund a Mutuals Support Programme
4. Enact enabling legislation.

### **5. 1 Mutuals Information Service**

The Mutuals Information Service is managed by the UK Cabinet Office's mutuals team, which encourages and supports the establishment of public service mutuals. It is a dedicated website for anyone interested in setting up or finding out more about public service mutuals: <https://www.gov.uk/government/groups/mutuals-information-service>

The Public Service Mutuals (UK Cabinet Office) website offers:

- a. Detailed guides
- b. Business case templates
- c. Enabling legislation



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- d. Case studies
- e. Links

<https://www.gov.uk/government/collections/public-service-mutuals>

The Mutuals Support Programme offers a range of support packages to public sector staff and commissioners.

Start a public service mutual: the process

<https://www.gov.uk/guidance/start-a-public-service-mutual-the-process>

Start a public service mutual: training and support

<https://www.gov.uk/guidance/start-a-public-service-mutual-training-and-support>

Start a public service mutual: guidance for commissioners

<https://www.gov.uk/guidance/start-a-public-service-mutual-guidance-for-commissioners>

Suppliers: information and contract opportunities

<https://www.gov.uk/guidance/suppliers-information-and-contract-opportunities>

Employee Ownership In Our Public Services - Making It Happen

<http://employeeownership.co.uk/wp-content/uploads/Employee-Ownership-in-Our-Public-Services-for-print.pdf>

## 5.2 Enabling legislation

The 'right to provide' (R2P), announced in March 2011 builds on the UK Government's commitment to give public sector workers new rights to provide services as staff-led enterprises and bid to take over the services they deliver.

Staff-led enterprises encompass staff-led mutuals, co-operatives, co-owned businesses and social enterprises, joint ventures and partnerships.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/330615/Right To Provide - EOI Guidance Template.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330615/Right_To_Provide_-_EOI_Guidance_Template.pdf)

## 5.3 Mutuals Ambassadors

The Mutuals Taskforce recommended, in their 2012 report, "Public Service Mutuals: Next Steps", that the Government should convene and coordinate a network of Mutuals Ambassadors to drive forward the creation and growth of mutuals on the ground":

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61776/Public-Service-Mutuals-next-steps.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61776/Public-Service-Mutuals-next-steps.pdf)

The government supported public servants who want to form mutuals with a £10 million Mutuals Support Programme and Mutuals Information Service.

Second Question on Notice (Transcript page 19)



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Senator XENOPHON: You can understand the CPSU's concerns about what has occurred in the UK—they saw that as privatisation by stealth. Maybe they did not put it quite in those words, but you understand their concerns?

Dr Crane: Yes, particularly if their concerns are ultimately rooted back in the amount of employment and the quality of employment. If that is where it is coming from then I would say that properly mutualised public services—with mutual ownership by those receiving the services or indeed, in some cases, the employees—are far better and more stable employers than other forms. So I can understand the generic concern around privatisation, but if it is going to happen or it is going to go into some other form then co-ops and mutuals are very good custodians and employers and indeed tend to be very focused on their employees.

Senator XENOPHON: Could you, on notice, provide information on the technical aspects of this and what you say are appropriate amendments based on what the UK has done. Also, I just want to clarify this. With the CNL there are two schools of thought: to rip it up and start afresh or to try to build on what we have. I take it that you are of the latter view.

Answer:

## 1. Guidelines

The BCCM recommends active consideration by government of the greater involvement of mutuals in the provision of community services as a viable alternative to traditional privatisation and outsourcing models.<sup>8</sup>

However, the BCCM recommends appropriate amendments to the approach which was taken in the UK over the past five years, which has given rise to concerns, especially from unions, about the impacts on public sector employment and public sector employees, based on:

- a. A narrow definition of Public Service Mutuals (PSMs) as employee 'spin outs' (organisations that have left the public sector but continue delivering public services where employee control plays a significant role in their operation: <https://www.gov.uk/government/get-involved/take-part/start-a-public-service-mutual>) and;
- b. The formation of organisations, called 'mutuals', that do not meet the democratic and open criteria of genuine co-operatives i.e. privatised services under the cover of 'mutuals'.

Whilst there have been some examples of good staff engagement, the two umbrella groups representing co-operatives and unions in the UK - the TUC and Co-operatives UK - were concerned that not enough public sector mutuals offered employees a genuine voice in the formation or the running of the new business.<sup>9</sup>

<sup>8</sup> This recommendation is supported in the Harper Competition Policy Review (<http://bccm.coop/major-opportunities-for-mutuals-to-enter-service-markets/#.VmQmxITG7Uo>) and the McClure Review of the Welfare System (<http://bccm.coop/welfare-report-back-co-operative-solution/#.VmQnT4TG7Uo>).

<sup>9</sup> The civil service pension scheme manager MyCSP, for example, was formed as a private business without a ballot for staff on the transfer and operates without the genuine accountability that would make it a true mutual.



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Accordingly the peak bodies for unions and co-operatives in the UK jointly produced guidance on public sector spin-outs: [http://www.uk.coop/sites/default/files/uploads/legacy-files/downloads/tuc\\_co-operatives\\_uk\\_guidance\\_0.pdf](http://www.uk.coop/sites/default/files/uploads/legacy-files/downloads/tuc_co-operatives_uk_guidance_0.pdf)

The TUC and Co-operatives UK have signed up to this historic joint set of best practice guidelines setting out the conditions that should be in place to ensure that public service mutuals are based on employee support and offer genuine employee ownership and representation.

The guidance calls for the government to establish quality standards in its programme of public service mutualisation and outlines a set of principles agreed between trade unions and representatives of the co-operative and mutual sector.

The guidance addresses concerns in five key areas where the two organisations identified best practice for successful mutualisation:

- a. workforce engagement and consultation in the process
- b. governance and democracy in the mutual
- c. commissioning of services
- d. safeguarding of public assets
- e. employment standards

The TUC and Co-operatives UK will work with the Cabinet Office, which is responsible for the mutualisation programme in government, on the implementation of these principles.

The BCCM supports the mutual option for public services as a way to empower staff and engage service users but agrees with the TUC and Co-operatives UK that it must be done well. There are international principles, which safeguard the co-operative model, as a form of mutual. This guidance draws on these principles, and pioneering work with co-operative schools, to set out how to protect and promote the interests of employees and others who have a direct stake in the quality of public services.<sup>10</sup>

## 2. Broader definition

The BCCM has adopted a broader definition of Public Service Mutuals, which includes mutuals formed by service users (consumer co-operatives), providers of services (enterprise co-operatives) as well as by employees (worker co-operatives). This broader definition has the effect of promoting a plural business economy, with many types of firm.

The Committee requested and the BCCM is preparing a Supplementary Submission in response to the evidence of the CPSU given at the hearing on 30 October 2015. This supplementary material will provide more detail about the BCCM's recommended approach to Public Service Mutuals.

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<sup>10</sup> Measuring the impact of Public Service Mutuals  
[http://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/politics/projects/mme/Group\\_Project\\_Electronic\\_Copy.pdf](http://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/politics/projects/mme/Group_Project_Electronic_Copy.pdf)



Third Question on Notice (Transcript page 19)

Senator XENOPHON: In the state of New South Wales, yes. I have heard some horror stories that it is incredibly difficult to get registered. Is that a fair criticism—that registration poses many obstacles?

Ms Morrison: I am not going to sheet blame back to that particular registry for everything.

Senator XENOPHON: No, but there have been complaints in New South Wales.

Ms Morrison: I have a litany of complaints. I am happy to table those with the inquiry.

Senator XENOPHON: That might be useful.

Answer:

The BCCM receives inquiries for assistance pertaining to a wide range of issues encountered with forming co-operatives including:

- a. Delays and overall slowness of the registration process
- b. Cost and complexity of registering a co-operative
- c. Problems encountered with other agencies ATO, ASIC etc not recognising co-operatives
- d. Frontline staff of said agencies not knowing about co-operatives
- e. Lack of information about co-operatives on government portals and in guidance notes

Evidence provided to the inquiry has substantiated some of the regulatory issues with co-operatives forming.

Examples are found in the submissions to this inquiry of the Voluntary Parents Services Co-operatives (cost, complexity, time and regulators) and the Community Power Agency (time, complexity, inconsistencies in registry advice).

The BCCM has received a majority of complaint information from co-operatives trying to register in the State of NSW. Complaints relating to lack of available information and resources have also been received from other States (Victoria, South Australia).

Forming a co-operative is difficult for several reasons, which exist in all States and Territories:

1. Very few government sponsored business advisory services (like the small business commissioners in each State and Territory) provide any information or assistance on co-operatives as an option for starting a business. These services generally deal with sole trader, partnership, trust and company structures only. The exception is Victoria, however the small business website suggests that people not use this form as it is complex.

Generally, the Registries in all States and Territories lack experience or expertise in managing the registration or supervision process even though they have always had the function.



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This is because they do not employ corporate law or regulatory personnel. They are government departments focussed upon consumer protection.

Expertise was lost when the federal government took control of regulating companies and State and Territory Corporate Affairs Commission staff were transferred to ASIC in 2000.

2. The requirement for five members for form a co-operative: In most jurisdictions, the UK being the most relevant, only three members is required to start a co-operative. Getting five people or entities to agree to form a co-operative is more difficult than getting three to agree. However, once the co-operative is formed it is easier to join more members because the entity exists and has a purpose and may be an “up and running business”.

The requirement for five members was in the old law and there was no policy discussion or consultation surrounding the CNL about whether this number was appropriate.

3. There are no regulatory guides that indicate how the Registrar will apply the law in each State and Territory: There are fact sheets that set out the procedures, for example there is a modest fact sheet that sets out how to draft an active membership rule in NSW. It is written as though it is simple to draft this rule, but in practice the active membership test was the rule rejected most often by the NSW Registry.

## **2. Illustrative examples of complaints received by the BCCM in the previous quarter.**

### **2.1 Problems encountered with other agencies (ATO).**

The BCCM was contacted by an individual looking to form a co-operative for clarification about whether his business would be eligible for a research and development grant regardless of company structure. The individual looking to form a co-operative had been advised by representatives from business.gov.au that co-operatives were not eligible, despite seeming to fit within the required criteria.

The BCCM's General Manager, Alexandra Hordern, called business.gov.au representatives to confirm this position. File notes as follows:

Wednesday 30 September 2015:

- AH – T/O to Jay, Business.gov.au @ 2:21 pm – asked whether a co-operative or mutual is included in the definition of R&D entity (<http://www.business.gov.au/grants-and-assistance/innovation-rd/RD-TaxIncentive/Eligibility/Pages/Eligible-Entities.aspx>)? Jay advised that I would need to speak to someone at the ATO – call on 132866.
- AH – T/O to ATO @ 2:27pm. Spoke to Morgana. AH asked whether a co-operative or mutual is included in the definition of R&D entity (<http://www.business.gov.au/grants-and-assistance/innovation-rd/RD-TaxIncentive/Eligibility/Pages/Eligible-Entities.aspx>)? Morgana said that she was unsure, but that the entity would need to be registered with ASIC. I explained that Co-operatives are registered under a state-specific law, and registered with the State Registrar, rather than ASIC. However, they are registered under “an Australian Law”. Morgana said that she would check and put me on hold. Morgana came back on the line and advised that she can't provide an answer as she believes the company





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needs to be registered with ASIC. Morgana took my details and will have a specialist call me back within the next 48 hours.

Thursday 1 October 2015:

- AH – T/I - spoke to Paul from ATO at 9:48am – Paul noted that ‘registered under Australian Law’ usually refers to Corporations Law and being registered with ASIC. The only way you can claim for an R&D grant is to lodge a tax return, but would need to be registered with ASIC. Public trading trusts are eligible, but Paul thought that co-operatives are not eligible. I explained that co-operatives are registered under ‘an’ Australian Law as they are state-regulated corporations. Under the explanatory regs – “3.20 Corporate limited partnerships are not eligible for an R & D tax offset because they can have a partner other than a corporation. [Schedule 3, item 45, section 94J of the ITAA 1936]”. Paul explained that this would disqualify co-operatives. I asked for further explanation as to the rationale behind excluding co-operatives. Paul said that he had a vague recollection that maybe co-operatives are eligible, so he’ll need to check with someone and come back to me later today.
- AH – T/I Paul from ATO @ 11:25am – Paul said he has looked further and has found that a co-operative is considered a corporate entity and therefore definitely qualify. Paul explained that the words ‘Australian Law’ can apply to State, Territory, or Federal legislation. S117 of the Income Tax Assessment Act talks about co-operatives as corporate entities, so they definitely are eligible.

## 2.2 PaRA Co-operative

Parent Assisted Residential Accommodation Co-operative, which was registered on 15 September 2015, first contacted the BCCM at the beginning of July 2015 seeking advice to expedite their registration.

The BCCM referred the co-operative to a lawyer by 3 July. The following is a timeline of the registration process.

13 July - Draft rules settled.

16 July - The rules were sent to the Registry for approval.

5 August - Registry reply that they want a disclosure statement (*Note that a disclosure statement is not normally required for a non-distributing co-operative. The Registrar has a discretion to require it. There are no guidelines for when it will be required - they have lost 21 days in time at this point*). Further, a requirement for a disclosure statement under s23 CNL requires the Registrar to provide a written notice including the time by which the disclosure statement is to be provided. No such notice has been given to them.

5 August – Co-operative representative responds to the Registry and asks what information is required to be in the disclosure statement.

7 August - Ask specifically what is required for the disclosure statement (*Note that there is only information about the contents for a disclosure statement for a distributing co-operative on the website*).



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7 August - Response from Registry regarding the co-op's rules is received (*Note that some comments require amendment of the rules that are inconsistent with the Model Rules set out in the National Regulations, other comments are of a gratuitous nature*).

11 August - Response by co-operative to Registry comments on rules and updated rules submitted for approval.

13 August - Disclosure statement lodged with Registry along with letter that they would like a prompt response because delay would incur cost for PaRA House.

As at 24 August there is was no response from the Registry regarding the second set of rules or the disclosure statement.

The co-operative was eventually registered on 15 September. This shows a period of 10 weeks to register the co-operative.

The case also illustrates inconsistent administration. In a similar case assisted by the BCCM, a registering co-operative was not required to lodge a disclosure statement but like PaRA, it had its rules rejected by the NSW Registry when the rules were in fact the Model Rules enshrined in the National Regulations.

This again showed a paternalistic attitude and gratuitous advice. These co-operatives sought assistance from legal advisors adding a considerable cost and time impost to the registration process.

The case illustrates how the history of paternalistic interference by the state co-operative registries is a barrier to attract a new generation of potential co-operators.

PaRA described the process of registration as 'tedious' and suggest other families wishing to emulate their structure may choose to operate as companies because it is much easier to set up.

The ATO's on-line system for setting up an ABN would not accept the word Limited in the name and this presented a new set of issues for the co-operative. The following is a transcript of the protracted communication with the ATO. (Names deleted from email trail).

Email transcript:

Subject: Re: Ministerial consent required for proposed business name - PaRA Co-operative Limited (Treat as In Confidence)

On 03/09/2015, at 5:21 PM, wrote:

Hi

This is where things stand

a) Registration of Business Name

See the attached document. As mentioned you cannot register a business name with Co-operative or Limited in the name unless you have ministerial consent. To get ministerial consent we need to write to them indicating that we are using the name under as required by Div.7 s.220 of CNL. I can do this, and attach your Certificate of Registration from NSW Fair



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Trade. Or if that is going to take too long and can write the letter without the certificate. Let me know what you think.

#### b) ABN Application

ABN applications are made to the ATO by online forms or by ordering a form and posting it back to the ATO. I filled in the online form and ticked the entity type as "Co-operative". Once I had made this selection I had no options to select "incorporated" and I was not allowed to use the word "Limited" in the name. I wonder if this problem could have been avoided by doing a paper form and posting it. Maybe it is a glitch in their online system. Anyway I called the ATO, was put through to a specialist consultant and she didn't know whether Co-operatives were "Limited" and "incorporated". I told her they were, however, she was not prepared to make a change over the phone and requested it in writing. I will try and phone one more time and hope I get someone else and request they make the change to "Limited" as required by div.7 s.220 of the CNL. If this doesn't work I will write the letter.

On 04/09/2015, at 1:45 PM, wrote:

Hi

I called the ATO again and got further clarity.

I gave the person I spoke to several ABNs including Life Start Co-operative Limited and asked her to research the processes they used to register their name with "Limited" and as an "other incorporated entity".

She recognised the glitch in the online system and said the process across the different ABNs I asked her to check was as follows:

- 1) Register online for an ABN and use "Co-operative" as your selected entity.
- 2) Write a letter to ATO and attach a CERTIFIED copy of your Registration Certificate issued by Fair Trading NSW and request for the name to be changed to have "Limited" on the end as per the Registration Certificate.
- 3) Fill in a Change of Registration form NAT2793 (which I have ordered and is being posted to me). On this form change entity type to "other incorporated entity"

This will mean that ParA Co-operative Limited will have the correct name and be listed as incorporated under State Legislated Act. This is what we want.

This whole process does not need to take place if the ATO amend their online ABN registration process.

Email Transcript Ends.

## 2.3 Community Transport and Care Co-operative

The BCCM has assisted the Community Transport and Care Co-operative to form. The process of registering the co-operative was protracted and complex. The following email transcript and attachment (letter from Registry) illustrates some of this process. (Names deleted from email trail).

Email transcript:



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From:  
Thu 3/09/2015 2:50 PM  
2 attachments let- Ms     ~.pdf ATT00001.txt

Hi

Letter regarding approval of rules etc from the registry is attached. I will formally advise Gillian and the CTOs shortly.

The matters they raise are easily fixed, but I thought you may wish to see the kind of detail and absurdity in the Registry's processes!

1. The letter first tells us that the name is approved, but they can't guarantee that it will be available. I take it that this means that there has been no process set up with ASIC over names!
2. The rules can't be approved unless we insert the approved name. First, my letter to the Registry indicates that the name will be changed once we know whether the name will be approved. Second, I guess that if I change the references to the name in the rules, I have to hope that the approved name is still available at the time of registration. Is this too weird?
3. The rules cannot be approved because the paragraphs are not consecutively numbered. This is really absurd! I omitted two rules that were not relevant to this coop and retained the numbering so that it was easy for the Registry to compare our rules with the Model rules. If I changed the rule numbers they would not have been so easily compared.
4. In my discussion with the Registry by phone, they asserted an objection to rule 16(4), but said they needed to get legal advice about it. After discussion they agreed that if their advice was such that it permitted the inclusion of this rule, then it could be later inserted by the board. Accordingly I left the rule in the draft, marked it in red and reiterated this agreement in my covering letter. It seems that they now will not allow this, relying on a provision in the CNL which is not really pertinent to this issue. Of course I do not have any idea how long their legal advice will take.

So there you have it. It makes a nice example of the Registry processes: they can't approve draft rules without an approved name that they can't guarantee will be available and they can't approve rules where the numbering is wrong.

By the way, what will be the quickest way to raise a cheque for \$254 payable to the Registry for approval regarding the share capital limit?

From:  
Subject: Community Transport co-operative project  
Date: 31 July 2015 9:38:46 pm AEST  
To:

Dear

I refer to our telephone conversation earlier today.



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As discussed, it is unfortunate that you will not agree to meet to discuss the issues that you raise with the draft rules.

My purpose in meeting with you and \_\_\_\_\_ in the first instance was to provide as much information about the project as early as possible and to ensure that issues with draft documents could be resolved quickly and efficiently. I had hoped that we could have continued in this manner in order to deal with issues efficiently.

I understand that you have demands on your time and certainly there are cost and time constraints for the proponents of the community transport co-operative project. I am of the view that many of the issues that you raise could be resolved very quickly in a short meeting and save us both the time of emails and lengthy written responses to comments.

Nonetheless I have attempted to address the issues that you have raised in the attached document and look forward to your reply, or perhaps a time to discuss the issues either by phone or in person.

I would be grateful if you would advise whether the Registrar requires the lodgement of a disclosure statement for approval for this co-operative, so that I can prepare this for lodgement with the draft rules.

Regards

Email transcript ends.

#### **2.4 Suggesting questions on notice comparing UK/Australian registration process:**

What is the average time taken to register a co-operative in the UK?

What matters does the UK Registrar examine in the rules in order to determine that the entity is designed to operate on a co-operative basis?

How often does the UK Registrar reject rules or require amendment?



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#### Fourth Question on Notice (Transcript page 21)

Ms Morrison: I do not have it hear (sic) to table but I could certainly forward the chapter that has been written for the ANZSOG cross-sector policy conference which details the lessons learned from the UK and how we could, with some foresight, avoid those consequences and unintended outcomes of what should, essentially, be an opportunity for communities.

ACTING CHAIR: Absolutely.

Answer:

As requested the article is attached.<sup>11</sup>

*“Expanding the role of co-operative and mutual enterprises in delivering public services - Mutuality: disrupting the status quo”* was written for the Australia and New Zealand School of Government (ANZSOG) Workshop on “Cross Sector Working for Complex Problems”, held 13 August 2015 at the Crawford School of Public Policy.

The paper is a draft of the article that will be published in 2016.

The paper includes lessons learned from the UK experience in mutualising public services over the past five years and the appropriate amendments based on what the UK has done.

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<sup>11</sup> Attachment D.





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Fifth Question on Notice (Transcript page 22)

Senator XENOPHON: What happened in Queensland? Was that a thought bubble from Campbell Newman?

Mr (sic) Morrison: I would like to take that question on notice because we have not—

Mr (sic) Morrison: We have not had a chance to discuss CNL with the new government, so we are not sure whether that was because cooperatives were given such a low priority and there were other things that Mr Newman—

Mr (sic) Morrison: former Premier Newman needed to get on with. No states have a cooperative minister, so it is not going to be a priority in any portfolio.

Answer:

National Co-operatives Law updates are produced by NSW Fair Trading on behalf of the Co-operatives National Law (CNL) working party to keep co-operatives stakeholders informed about the progress of the introduction of the CNL in each State and Territory:  
<http://services.eneews.fairtrading.nsw.gov.au/online/18248380-63.html>

The September 2014 issue had the following update with regard to Queensland's adoption of CNL: "Queensland and AUCLA

*Queensland commends the Legislative & Governance Forum on Consumer Affairs (CAF) on the progress of the Co-operatives National Law and congratulates New South Wales, together with the participating jurisdictions, on the immense body of work committed to these reforms, over recent years.*

*So that Queensland can implement legislation in accordance with its own reform agenda, Queensland has provided the CAF with notice of its withdrawal from the Australian Uniform Co-operative Laws Agreement, effective from 30 January 2015.*

*Although Queensland is withdrawing from the Agreement, it intends to implement substantially consistent legislation in Queensland that will facilitate mutual recognition with relevant jurisdictions.*

*For more information please refer to the Queensland Government Office of Fair Trading web-site: <http://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/fair-trading-services-programs-and-resources/consultation-regulatory-reform/national-cooperatives-law/> "*

From Queensland Government Office of Fair Trading website:

*"National cooperatives law*

*New South Wales has developed and commenced a template national law. Each State and Territory Government has or is considering whether it will either: adopt the template law from NSW, or pass its own law, to be consistent with the national law. Queensland is currently considering whether the existing law in Queensland should change. More details will be made available if any changes are going to occur. In the meantime, the Queensland Cooperatives Act 1997 still applies.*



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*For further information on the national cooperatives law, please go to the NSW Cooperatives legislation webpage.”*

Sixth Question on Notice (Transcript page 23)

ACTING CHAIR: We are looking at it in the beef industry as well. Regarding Senator Xenophon's question—and I completely agree—about providing us with draft examples. When you are talking about consistent definitions of cooperatives and mutuals, we would like to see what that might look like, otherwise it gets sent off to a committee and we could be there for years. So having something from you as the representative body would actually be of great assistance. Could you expand on the mutuals charter recommendation?

Answer:

Co-operatives and mutuals are the main types of member-owned businesses in Australia.

A consistent definition of a co-operative or mutual is a business owned by, or on behalf of, its customers, its employees, a group of like-minded producers or a combination of these.

There are regulatory differences: Co-operatives are usually registered as co-operative societies under state-based legislation. Co-operatives may also register as companies under the Corporations Act. Mutuals are regulated under the federal Corporations Act.

Despite regulatory differences, co-operative and mutual enterprises (CMEs) share important characteristics that distinguish them from companies. They are a self-help response to the mutually identified needs of individuals or organisations. They are driven to meet both financial and social goals. They reinvest their profits and surpluses to benefit their members and communities.

Co-operative and mutual enterprises (CMEs) take many forms and operate in a wide range of business and social environments. Most people recognise CMEs through one or more of the long established credit unions, building societies, motorist mutuals, co-operatives, friendly societies and mutual insurers. But the sector encompasses more types of organisations – from employee owned businesses to specialist bodies such as football supporter trusts.

What all of these membership based organisations share is a common heritage and ethos – to serve their members and work in the wider interests of society.

The purpose of these firms is different from other businesses: they exist to serve their members rather than to reward capital investors.



Seventh Question on Notice (Transcript page 23)

**Senator McALLISTER:** We are almost out of time, so perhaps on notice could you provide a couple of examples of sexy—as we are now describing them—cooperatives. I would be quite interested in the extent to which the model is being adapted by new forms of business, in the context of, as Senator McKenzie properly describes, this enthusiasm about collaborative and sharing styles of business. I would be interested to know whether we are seeing that in the Australian context.

**Dr Crane:** I can give you some examples of cooperatives that have started in the last few years that are going very well. We can add those.

Answer:

Co-operatives are active in traditional industry sectors like banking, agriculture and insurance as well as flourishing in new areas of innovative business and start-ups. Co-operatives are a democratic, independent business model for groups to use to organize their self-help, community owned ventures. According to the 2015 state of the sector report on the co-operative business sector (2015 National Mutual Economy Report)<sup>12</sup> the highest concentration of co-operatives is found in sports and recreation pursuits. Housing (mainly comprised of tenant managed housing co-operatives) is the next largest sector by number, followed by financial services (e.g. customer owned banks and friendly societies) and community services (e.g. aged care, disability and child care). Retail, agriculture, arts and education are important sectors of the mutual economy. Half of the co-operatives formed in NSW in 2014 were arts co-operatives.

Many Aboriginal communities organise community services, arts and cultural activities and medical services through their community owned co-operatives.

We are seeing groups use the co-operative model to start businesses designed to meet urgent social and economic needs, to pursue environmental or social justice goals or to respond to changes in government policy like the National Disability Insurance Scheme.

Here follows examples of new co-operatives that show the diversity and opportunity to scale this business model to help communities meet their varied needs.

Long form case studies of co-operatives operating in Healthcare, Aged Care, Disability Employment and Affordable Housing are found on the BCCM's self-help co-operative start-up website: [www.getmutual.coop](http://www.getmutual.coop)

National Health Co-op (NHC)

Based in the ACT, National Health Co-op (NHC) was formed as a consumer owned co-operative in 2006 to provide affordable and accessible health care services to the West Belconnen community on the northern fringe of Canberra. Since opening its first clinic in 2010, it has grown to over 30,000 registered patients who receive 100,000 consultations annually. This represents approximately 8 per cent of the ACTs population.

NHC is supported by 60 medical and administrative staff across five full-time medical centres located in Charnwood, Belconnen, Kippax, Evatt and Chisholm.

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<sup>12</sup> [http://bccm.coop/wp/wp-content/uploads/2015/11/NME-Report-2015\\_web1.pdf](http://bccm.coop/wp/wp-content/uploads/2015/11/NME-Report-2015_web1.pdf) (page 18).



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### Co-operative Home Care

CHC is a financially sustainable, not-for-profit employee owned co-operative which opened its doors in 2013 and today has 18 employees and eight worker members, providing 500 hours of homecare weekly in metropolitan Sydney.

The idea for CHC arose from founder, Robyn Kaczmarek's experience working in the homecare sector and seeing the challenges of low wages, poor working conditions, isolation and training affecting staff morale and the quality and continuity of care provided to older people and people with disability. As a not-for-profit employee owned co-operative, CHC returns all profits directly back into funding operations.

### Boomalli Aboriginal Artists Co-operative

Boomalli Aboriginal Artists Co-operative is one of Australia's longest running Aboriginal owned and operated art galleries. Established in Chippendale Sydney in 1987, Boomalli was established as a co-operative to provide a platform for all Aboriginal and Torres Strait Islander artists to exhibit and promote urban Indigenous art on their own terms.

One of the primary aims of Boomalli has been to redress some of the social inequities experienced historically by indigenous artists and provide an authentically strong cultural voice within a contemporary Australian context.

### Bathurst Wholefood Co-operative

This co-operative is dedicated to supporting local farmers, and bringing locally grown, farm fresh produce to the people of Bathurst.

With a retail store in Bathurst, stocking locally sourced fruit, vegetables and other fresh produce purchased from local farmers, the people of Bathurst access the freshest organic and locally grown produce all year round. Wholefoods are generally unprocessed and contain no artificial additives or preservatives.

### Pingala

Pingala is a renewable energy co-operative who build community owned solar farms in Sydney. Pingala and the local community help choose, build and operate the solar farm on the roof of a local host site such as a hotel, a school, a car park or wherever makes sense.

The community develops skills and knowledge, helps implement a low carbon solution and enjoys a satisfying social, financial and environmental return on investment. The host site develops a stronger connection with the community, enjoys positive publicity and benefits from solar without having to invest significant time or money in the project.

### Voluntary Parents Services

Parents are struggling with volunteer fatigue and have told the state government they need more people to help out at schools and with childrens' sport.

In a bid to arrest the decline in volunteers, and stave off volunteer fatigue, Voluntary Parents Services is a co-operative that aims to help parents negotiate tax, superannuation, insurance and workplace health and safety issues.