

Chapter 3

The barriers to growth, innovation and competition

3.1 There were a number of issues raised by submitters and witnesses throughout the inquiry. The majority of the issues raised were by relatively large co-operatives, or national mutual organisations and the concerns generally reflected the interests of organisations of that scale.

3.2 The issues raised by submitters relate to the perceived barriers the sector believes are preventing co-operatives and mutuals from forming and realising their full potential.

3.3 This chapter discusses the following barriers in turn: the lack of recognition of co-operatives and mutuals and their contribution to the economy; a lack of information and advice for new and existing co-operatives; concerns around the requirements of establishing a co-operative; and finally, issues unique to Indigenous co-operatives.

Recognition of the contribution and potential of co-operatives and mutuals

3.4 Despite the huge numbers of people that belong to a co-operative or a mutual in Australia, submitters argued that there is still limited awareness and recognition of the sector, and the benefits it can bring. According to submitters, co-operatives and mutual enterprises (CMEs) should be given equal footing amongst other business structures, a competitively neutral environment created, and recognition of this scale and the potential benefits of the sector needs to be enhanced.

3.5 The Co-op Book Shop cited a lack of recognition as one of the broad restricting factors that was inhibiting the growth of the sector:

That is the main restriction that we have. As far as the broader issues go, to help cooperatives flourish and grow in the future, it is about having the recognition of what you are bringing to our industry and shining a light on our industry. That is one of the reasons that we formed the Business Council of Co-operatives and Mutuals [BCCM]. Eighty per cent of Australians belong to one; they just do not know it, in the main.¹

3.6 The International Co-operative Alliance emphasised that globally co-operatives were increasingly being recognised as being a key element in a pluralistic and diverse economy that can contribute in a broader economic sense, as well as delivering for communities and their members:

I think what we are seeing is a global recognition developing about the cooperative difference and the need to ensure that countries have more pluralistic and diversified national economies. There is clear evidence that

¹ Mr Peter Knock, the Co-op Book Shop, *Committee Hansard*, 29 October 2015, p. 38.

those who did rode through the financial crisis and the recession much better than anyone else.²

3.7 The idea that the co-operative model can assist enterprises to be globally competitive was supported by the example of a grain growers co-operative in Western Australia who found that their co-operative model allows them to remain competitive in a global market place by sharing costs and continually re-investing in their supply chain process:

In WA our supply chain is 90 per cent focused on export, and our grain growers are facing international competition in supplying grain into our close Asian markets, so we go to great lengths to keep our growers' supply chain costs to a minimum and reinvest in storage, handling and infrastructure, as well as generating rebates for our growers. So we think our cooperative business model is good for the Australian economy and deserving of recognition and support.³

3.8 The Australian Scholarship Group were of the view that despite the contribution that co-operatives and mutuals provided to the economy, they received little support relative to other business sectors:

Cooperatives and mutuals are a key and essential part of the Australian economy, yet they are not accorded the recognition and support that can allow them to play an even bigger role in societal development... there is little or no support of the sector in comparison to the corporate or other business sectors.⁴

3.9 Some submitters argued that the lack of inclusion in high level policy discussions is illustrated by the lack of consideration of co-operatives as one of the bodies that could develop in the modern economy. It was suggested that the government's current legislation around crowd-sourced funding and equity⁵ was a policy area where co-operatives, many of which are social enterprises, should have been key to the discussions:

We are seeking recognition of that when the government looks at things like changes to the rules around crowd sourced equity funding. There is a really important discussion taking place in Australia about innovation and adapting to the new world economy that is rising up. That is a brilliant conversation, but I fear that what is potentially missing out of that is the second half of the story, which is social enterprise and social innovation.⁶

2 Dame Pauline Green, International Co-operative Alliance, *Committee Hansard*, 30 October 2015, p. 10.

3 Dr Andrew Crane, Business Council of Co-operatives and Mutuals, *Committee Hansard*, 30 October 2015, p. 16.

4 Mr John Velegrinis, Australian Scholarships Group, *Committee Hansard*, 30 October 2015, p. 52.

5 Corporations Amendment (Crowd-sourced Funding) Bill 2015.

6 Mr Tom Nockolds, Community Power Agency Co-operative Ltd, *Committee Hansard*, 29 October 2015, p. 44.

3.10 The Capricorn Society, the fifth largest CME in Australia with a turnover of \$1.33 billion, contended that government recognition is crucial in developing the sector, and utilising the contribution it can have to the economy:

Co-operatives are the product of addressing the needs of members that market forces currently do not provide for or offer.

Government recognition and support of this core pillar within the Australian economy and landscape through promotion, provision of a developmental framework and an environment of growth are key for CMEs continued and increased contribution to the economy.⁷

Recent Government Reviews that recognised CMEs

3.11 BCCM acknowledged that recognition of the sector is increasing. They cited a number of recent government reviews and high policy processes that have recognised the contribution the sector can make. These included the Competition Policy Review where the Review Panel noted the potential of CMEs to 'increase diversity in public sector markets, increase consumer choice and control and stimulate public service innovation.'⁸

3.12 The competitiveness of growers' or producers' cooperatives was recognised by the Commonwealth Government in the 2015 Agricultural Competitiveness White Paper. The Paper commits the Commonwealth Government to offering training courses on 'cooperatives and other business structures to help farmers to better engage through the supply chain and attract investment.'⁹ In strongly endorsing the advantages of the Co-operative model for farmers, the government also realises that information about the sector needs to be improved:

The benefit of a cooperative structure is it offers family farmers the ability to retain their property ownership but delivers them the scale to better influence what happens beyond the farm gate, and diversify their income. Farmer-owned cooperatives can also add competition in the market place if they add to the number of participants, and allow farmers to engage in additional parts of the value chain where profitable to do so. The recent success of some cooperatives has increased interest in them. But information on how to form a cooperative and the pros and cons of doing so is not readily available. The Government will provide information to help support better decision making on alternative business structures.¹⁰

3.13 As a consequence of the Agricultural Competitiveness White Paper, the government committed \$13.8 million over two years from 2015-16 for:

7 The Capricorn Society Limited, *Submission 8*, p. 4.

8 Business Council of Co-operatives and Mutuals, *Submission 3*, p. 14.

9 Australian Government, *Agricultural Competitiveness White Paper, Stronger Farmers Stronger Economy*, 2015, p. 7.

10 Australian Government, *Agricultural Competitiveness White Paper, Stronger Farmers Stronger Economy*, 2015, p. 28.

...a pilot program to improve access for farmers to training and information about co-operatives, collective bargaining and innovative business models. Rural Research and Development Corporations will be funded to develop and deliver the training packages and related materials.¹¹

3.14 In terms of social policy the capacity for the co-operative and mutual sector to deliver better social outcomes was also recognised by the McClure Review who recommended that government 'Work with the Business Council of Co-operatives and Mutuals to ensure an enabling regulatory, economic and social environment to support mutuals and co-operatives'.¹²

3.15 However, despite these reviews recognising the valuable role of CMEs, the recent summit in September 2015 of business, community groups and unions called by Prime Minister Turnbull excluded representatives from the CME sector, which BCCM argue represents a backwards step:

Recently, there were national economic reform summits held, and the businesses that represent eight in 10 Australians were not at that table, which would seem to be counterintuitive.¹³

Support to realise the potential of the sector

3.16 While initial recognition was purported to be a barrier for co-operatives, BCCM explained that even after recognition of the co-operative model is achieved, the next step should be to follow that up with actions that actively assist the sector. Dr Crane argued that the sector deserved not only recognition, but impetus and stimulation equivalent to other sectors in the economy:

A government quite often will embrace the small business sector because it is seen as part of how you energise an economy. It is moving from, 'Okay, we recognise you,' through to, 'Actually, you're something we want to stimulate,' and us being chased with offers of support, 'because the government says this is part of a strong, diverse economy and we want to support it.' So it is moving from recognition into actual proactivity...it is then a sector to be driven and supported.¹⁴

3.17 The Mercury Centre also submitted that central to the development of co-operatives was the recognition that the model should be included in the definition of social enterprise and represent an ideal governance model for the creation of sustainable businesses. Mercury proposed a number of areas where assistance from government would help realise the potential of co-operatives as social enterprises:

[R]ecognition that the cooperative models for governance of social enterprise may offer greater incentives to sustainable business community

11 Australian Government, *Mid-Year Economic and Fiscal Outlook 2015-16*, Appendix A, p. 142.

12 Reference Group on Welfare Reform, *A New System for Better Employment and Social Outcomes*, p. 183.

13 BCCM, *Committee Hansard*, 30 October 2015, p. 17.

14 Dr Andrew Crane, Business Council of Co-operatives and Mutuals, *Committee Hansard*, 30 October 2015, p. 16.

trading; an identified need for government assistance for cooperative business services; in measurement, identified need for research on social and economic impact of cooperatives and mutuals; community and public ownership; acknowledgement of cooperatives as a governance model for community participation in government investment and community shares; distributing cooperative model provides a platform to build community investment through community shares or non-transferable withdrawable share capital.¹⁵

3.18 The introduction and rollout of the National Disability Insurance Scheme (NDIS) was cited as a prime opportunity to showcase CMEs as the type of enterprises that have both a commercial and social element to provide customer focussed and responsive services at community level. However to move into this space, as well as other markets, research and data collection to inform decision makers and promote the sector, are crucial steps:

In the context of the NDIS, there is great opportunity...The submissions attest to the flexibility and innovation of co-ops in a whole range of different market settings. At a policy level, I think people have been blind to this. That is why data, research and making visible what these organisations are doing is so important—not only to themselves but also to policy makers in the first instance, and to advisers and others who can shepherd and help them through this formation phase.¹⁶

3.19 Like the NDIS, the recent Trans-Pacific Partnership (TPP) trade agreement offers prospects for grower/producer co-operatives to take advantage of the increased opportunities that may become available under the TPP. However according to the Norco dairy co-operative, Australia is not yet taking full advantage of the model due to a lack of education and awareness:

The Free Trade Agreement with China has been a welcome announcement by the Federal Government and will potentially allow Australian processors to compete equally with other dairy exporting countries. However, it seems that many of Australia's trading partners know the value of cooperatives better than Australia...[T]he sector is not well understood in Australia, resulting in little or no educational content at secondary or tertiary levels. It is essential that we educate our young people regarding the benefits and opportunities that the co-operative, mutual and member-owned business model can achieve in Australia.¹⁷

Benefits of the co-operative model to the agricultural sector

3.20 The committee received evidence from a number of agribusinesses that promoted the value of the co-operative model to their sector. Professor Cotter made

15 Mr Peter Tregilgas, Mercury Centre Co-operative Ltd., *Committee Hansard*, 29 October 2015, p. 57.

16 Mr Garry Cronan, Mercury Centre Co-operative Ltd., *Committee Hansard*, 29 October 2015, p. 59.

17 Norco, *Submission 9*, p. 3.

the general point that the disparate and fragmented nature of the sector lent itself to collaborative business models:

Australia's farming and agribusiness systems are fragmented, with few agribusinesses having sufficient capacity to supply high value, high growth export market opportunities on a year-round basis. Collaborative business models are needed to achieve sufficient scale, implement quality assurance processes and co-ordinate activities including product development, marketing and distribution.¹⁸

3.21 The 'supply and purchasing co-operative' as described by Professor Altman, Dean of Newcastle Business School, is a model which is of particular assistance to small farmers who can replicate the benefits afforded to larger producers by combining their purchasing power:

This type of cooperative is quite important in agriculture where farmers establish a cooperative to obtain goods and services required for their business or for personal use at lower prices than would be possible if they go it alone. Thus farmers can take advantage of economies of scale and scope that are afforded to larger corporate farms.¹⁹

3.22 Professor Altman also explained the features of a 'marketing co-operative', which is similarly utilised by smaller agribusinesses:

This type of cooperative aligns the interests of producers with regards to marketing output to retailers or wholesalers. A marketing cooperative can also store, process, and package output prior sale. This allows farmers, for example, to take advantage of economies of scale and scope in storage and production, increasing their net income over what it might otherwise be. It also serves to increase the bargaining and marketing power of farmers. In addition, a marketing cooperative can help stabilize farmers' income through its inventory capacity, providing farmers with a relatively stable income as marketing prices fluctuate.²⁰

3.23 Co-operative Bulk Handling in Western Australia provided the committee with an example of the co-operative model in action, citing its grain export supply chain:

CBH's integrated business model (storage, handling, transportation, marketing and port operations) seeks to ensure grain growers have greater influence and control throughout each element of the chain, as well as providing the vital interface between growers and their customers.²¹

3.24 Kingfisher Law also emphasised the suitability of the supply and purchasing cooperative model with agribusiness, particularly the irrigation and dairy industries:

18 Professor Julie Cotter, University of Southern Queensland, Answer to question on notice, p. 4, received on 1 March 2016.

19 Professor Morris Altman, Dean and Head, Newcastle Business School, *Submission 12*, p. 4.

20 Professor Morris Altman, Dean and Head, Newcastle Business School, *Submission 12*, p. 4.

21 Co-operative Bulk Handling, *Submission 30*, p. 9.

Importantly, in agriculture or other industries with assets such as land, the active membership requirement promotes a community of interest, centring on an activity or type of business, typically within a region or locality, which is practised in similar form as between members. Dairy and irrigation farming are two simple and accurate examples of farming activity well-served by the co-operative model. A dairy farmer, for example must own land within a defined region and must carry on dairy farming at the location, in order to remain an active member. This reduces the risk associated with speculation, takeovers and asset-stripping and the emergence of oligopolies and monopolisation.²²

Committee view

3.25 The committee notes the sector's potential contribution to the economy while still delivering for the community and continuing to provide its traditional sense of ownership for its membership. Nevertheless, the committee heard a consistent message from contributors that a cultural change is required in the financial trading and regulatory sectors in order to take full advantage of the co-operative model.

3.26 Globally the co-operative model is being utilised to tackle many of the issues facing the international community, from poverty to climate change. It is a model which is highly flexible and adaptable to local conditions and circumstances. The same is true in Australia. Sectors such as community health care or regional agriculture, where the mainstream market may not be able to service a community or provide the economy of scale required to compete nationally and internationally, are well suited to the model whereby community investment drives social enterprise to create sustainable business models.

3.27 The committee is also of the view that the sector should be included and supported to take full advantage of significant economic changes like the NDIS and the TPP. That said, the committee notes the aspirations of many co-operatives to develop and grow and this is always an admirable endeavour. However, the committee is cognisant that these developments offer an opportunity for communities to be at the centre of developments which affect them, which is the primary benefit of the co-operative model.

Recommendation 2

3.28 The committee recommends that co-operative and mutuals sector be better represented in government policy discussions, and is actively promoted as a possible option for service delivery particularly where community based initiatives are being considered.

Recommendation 3

3.29 The committee recommends the Commonwealth Government work with states and territories to develop a program of supports to encourage the establishment of new co-operatives and mutual enterprises.

22 Kingfisher Law, *Submission 51*, p. 7.

Recognition of mutuals

3.30 The recognition of mutuals is a different case than that for co-operatives. Whereas many co-operatives are smaller organisations that may require assistance from various levels of government in their establishment and governance; mutuals in Australia tend to be larger established enterprises that are looking for opportunities to expand and to ensure a level competitive playing field between themselves and traditional commercial companies.

3.31 A number of organisations made the point mutuals are ideally placed to complement government priorities as they both have interests and obligations beyond the economy. Australian Unity, a large mutual organisation urged the government to take advantage of what the sector has to offer both government and the broader community:

[M]y sense is that organisations such as ours can enter very useful dialogues with governments state and federal, because we have a more coincident set of interests...Our interests are aligned with communities, variously defined—communities of members. Often there is a coincidence of interests between government policy interests and the interests of our community. So I think there is an opportunity for natural alignment.²³

3.32 Regis Mutual Management emphasised that the mutual model is well suited to address areas of potential market failure. They suggest that in those circumstances, when state assistance is requested or required, the mutual model should be promoted by government to facilitate communities working together to address those failings:

When markets fail, those affected often turn to State and Federal Governments for help. Governments can play an effective role in encouraging a sector or group of people to explore the mutual model as a means of overcoming a market failure. In other words, Governments can provide advice and support to affected groups so that they can help themselves...Government can assist by adopting policies that provide greater recognition and support to the roles of mutuals in society and the economy.²⁴

Defining the mutual corporate form

3.33 A central issue that was raised by a number of contributors was the lack of a legal definition of mutuals within the *Corporations Act 2001*. Australian Unity commented that :

...there is a barrier in terms of our corporate form not being sufficiently understood. I think that is one of the issues attaching to our original submission about a recognition in the federal Corporations Act in relation to this corporate form.²⁵

23 Mr Rohan Mead, Australian Unity, *Committee Hansard*, 30 October 2015, pp 6–7.

24 Regis Mutual Management, *Submission 33*, p. 2.

25 Mr Rohan Mead, Australian Unity, *Committee Hansard*, 30 October 2015, pp 6–7.

3.34 MAFIP Ltd. argued that the lack of a legal definition for a mutual has been a 'contributing factor to the low profile and their importance...'.²⁶

3.35 Mutuals are regulated under the Corporations Act, however the mutual form is not defined in law. According to BCCM the mutual form requires better support in the Corporations Act to allow for more clarity for organisations operating under this legal model, including more clarity about the duties of directors.

3.36 Australian Unity placed the issue of defining mutuals within the Corporations Act at the top of their list of recommendations to develop the sector. According to their evidence the Corporations Act is currently tailored to govern for-profit companies where service is not a principal consideration:

The mutual form included in the Corporations Act seems to be almost there as an afterthought. The act is itself designed to govern companies limited by shares and organised for profit maximisation, rather than service maximisation. We argue that there is some inequity caused by this attempt to fit a square peg in a round hole, including the question of how to handle commercially valuable customer lists, which are different from shareholder lists as customers are often members.²⁷

3.37 Bankmecu concurred with the call for recognition within the Corporations Act, suggesting that a definition is developed based on economic and governance tests. According to their submission this would bring a welcome coherency to the regulatory environment:

That the inquiry recommend that recognition of CMEs be given under the Corporations Act – defining mutuality with economic and governance tests. For example, not just regulatory guide (147) for transferring mutual financial institutions. This will give CMEs certainty and enable disparate state based regulations to be replaced with federal law.²⁸

3.38 While accepting that the Corporations Act does not provide a legal definition for mutual enterprises, ASIC did explain that there is some guidance provided relating to de-mutualisation, and in that sense they have a fairly developed regulatory idea of what constitutes a mutual:

No; there is no legislative definition of mutuals, or a mutual. There is not one. For what are called 'transferring financial institutions'—so credit unions and societies that came from the state legislation or state supervision through to federal in the late nineties...there are enhanced disclosure provisions that relate to matters that might be called demutualisation; so just for those ones, not for mutuals generally. And we have given guidance around concepts of mutuality in relation to that part of the law, so we have a

26 MAFIP Ltd., *Submission 46*, para 34.

27 Mr Rohan Mead, Australian Unity, *Committee Hansard*, 30 October 2015, p. 2.

28 Bankmecu, *Submission 18*, p. 2.

regulatory guide that sets out what we consider to be signs of being a mutual.²⁹

3.39 To remove the current competitive barriers facing CMEs, Dr Gary Lewis, a co-operatives historian, recommended that specific federal legislation be developed for co-operatives, mutual and member-owned organizations (CMMOO) to take account of their 'democratic complexion':

I believe the formulation of simple, 'user friendly' federal legislation for CMMOO, perhaps as a section of the *Corporations Act* enshrining their democratic complexion, would be very helpful in removing barriers to innovation, growth and free competition for the sector in Australia.³⁰

3.40 Australian Unity provided the committee with a proposed definition of mutuals that would 'help level the playing field when it comes to commercial governance':

Australian Unity believes "mutual" should be specifically defined in the Corporations Act as an entity:

(a) being a body corporate where member liability is limited by the guarantee of its members (usually a nominal amount), rather than by share capital;

(b) that operates an enterprise; and

(c) in which membership (including any voting rights) is obtained as result of a person receiving a product or service or having another strong personal connection with the company such as an employment relationship, rather than by way of a formal application for membership (as distinct from think-tanks or charities) or an application for shares (as distinct from a body corporate limited by shares).³¹

Mutuals - the role of directors

3.41 In the event of the government amending the Corporations Act, many submitters recommended that the role of directors in mutual organisations be clarified. According to Australian Unity directors have very different obligations in a mutual structure and these need to be catered for in legislation:

[D]irectors of mutuals have different obligations to their constituents than those of shareholding companies. We argue that the service interests—providing the services and maximising those obligations for members—are an equally important consideration for directors of mutual organisations compared with economic interests for those who have ventured capital in

29 Australian Securities and Investment Commission, *Committee Hansard*, 26 February 2016, pp 22–23.

30 Dr Gary Lewis, *Submission 36*, p. 3.

31 Australian Unity, *Submission 45*, p. 6.

shareholding forms. We have proposed a new definition of directors' duties to acknowledge this circumstance.³²

3.42 Mr Matthew Koce, from hirmaa, shared the concerns of others in the sector that 'there needs to be recognition that the director's role is sometimes different in a mutual not-for-profit. That unique role needs to be recognised.'³³

3.43 In addition to their proposed amendments to the Corporations Act to expressly define mutuals, Australian Unity provided the committee with proposed amendments to allow for all of a director's obligations in a mutual to be taken into account:

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.³⁴

3.44 While acknowledging that the role of directors in a mutual structure is broader in a mutual enterprise, ASIC considered that the current provisions in the Corporations Act would not necessarily exclude consideration of these broader duties when determining whether a director had acted in the best interest of the corporation:

[T]he directors' duties provisions in the Corporations Act are cast broadly. So directors need to act in good faith, in the best interests of the particular corporation, and it only obviously applies to cooperatives that are in corporate reform. So it is cast in a principled way, and it picks up a lot of the case law about the way judges have interpreted how directors need to act in particular circumstances. [A] judge in interpreting those provisions could look to: what is the purpose of this corporation? So if a corporation is in its constitution described as having particular goals, which may include cooperative or mutual goals, I think that would be a relevant consideration for a judge in applying that principle-based test...my observation would be that the way that the provisions are currently cast does have a degree of flexibility for judges in assessing whether or not someone is acting in the best interests of the corporation.³⁵

32 Mr Rohan Mead, Australian Unity, *Committee Hansard*, 30 October 2015, p. 2.

33 hirmaa, *Proof Committee Hansard*, 30 October 2016, p. 34.

34 Australian Unity, *Submission 45*, p. 10.

35 Australian Securities and Investment Commission, *Proof Committee Hansard*, 26 February 2016, p. 23.

3.45 Ms Ann Apps from Newcastle Law School accepted that the legislation does allow for a CME's co-operative principles to be considered in delivering a judgement, except in cases where there is a conflict between these principles and a director's financial obligations to the organisation:

The Act also provides that in interpreting any of its provisions, an interpretation which would promote the co-operative principles is preferred. However this does not address the problem that directors and managers face if required to defend a business decision which preferences social output (e.g. ethically sourced raw materials or better employment conditions for workers) at the expense of financial output.³⁶

Committee view

3.46 BCCM submitted a 'Mutuals Charter' which is a set of broad principles that, if followed by government, would provide a competitively neutral environment. The principles are:

- Co-operatives, mutuals and member owned businesses should be able to compete freely and on fair terms with all types of business
- Government should champion these business forms alongside other types of corporate ownership
- Government policy should recognise the value of these businesses and provide appropriate incentives for their creation and development
- Fiscal measures should promote co-operatives, mutuals and member owned businesses as much as share ownership of publically listed companies
- Legislation and regulation for these firms should match the best standards for any business
- It should be as cost effective and straight forward to set up and run a co-operative, mutual or member based businesses as any other type of business³⁷

3.47 The committee concurs with the principles that support competitive neutrality. The committee heard repeatedly that the lack of a legal definition of mutuals was hampering its recognition and development. The mutual model is different but currently the Corporations Act, and its consequent regulatory framework does not take account of the features that differentiate the sector from other companies.

3.48 The committee is of the view that for the sector to be recognised and actively developed, it requires a concomitant regulatory structure. Being defined in law is a crucial step on the path to the sector being recognised more broadly.

36 Ms Ann Apps, *Submission 28*, p. 5.

37 BCCM, *Submission 3*, p. 6.

Recommendation 4

3.49 The committee recommends that a mutual enterprise is explicitly defined in the Corporations Act 2001, and its associated regulations.

3.50 A change to the Corporations Act's definition of duties for directors of mutuals would support a strengthening of governance in mutual organisations. By defining the corporate form, and by properly aligning directors' duties in that corporate form with the interests of members, outcomes for stakeholders would be improved.

Recommendation 5

3.51 The committee recommends that the role of directors in mutual enterprises be defined in the Corporations Regulations to align with the proposed definition of a mutual enterprise in the Corporations Act.

Establishing a co-operative

Cost and complexity of forming a co-operative

3.52 The lack of recognition of CMEs as a viable model for people wanting to set up co-operatives has far-reaching implications for the sector. The committee received evidence that suggested this is an issue at local, state and federal administrative levels.

3.53 The number of members required to form a co-operative in Australia under the Co-operative National Law (CNL) is at least five at start-up. The basis of this requirement is not justified or explained in the bill's explanatory notes. A co-operative group (a co-operative of co-operatives) can be formed by two members, and the Registrar may give permission to enable a co-operative to start up with fewer than five members. The criteria for extending permission for fewer members is not published. Co-operatives can be formed under UK legislation with three members as a minimum.³⁸ A company can be formed with only one member. The section regulating membership is drafted in the NSW Act as follows:

(119)(3)The minimum number of members allowed is:

- (a) in the case of a co-operative group—2 co-operatives; or
- (b) in the case of any other co-operative:
 - (i) if a lesser number than 5 is approved by the Registrar—that number of active members; or
 - (ii) otherwise—5 active members.³⁹

38 In 1996 the Deregulation (Industrial and Provident Societies) Order 1996 SI 1996/1738 used the powers available to government under the Deregulation and Contracting Out Act 1994 to amend primary legislation by the use of regulations to reduce the minimum number of members needed to register a society from 7 to 3, the minimum number of members needed to register a society from 7 to 3. Co-operative News, *UK Co-op Law in 2010: A Summary*, available at: <http://www.thenews.coop/32865/news/banking-and-insurance/uk-co-op-law-2010-summary/>. (accessed 7 March 2016).

39 *Co-operatives (Adoption of National Law) Act 2012* (NSW), ss. 119(3).

3.54 The time required to register a co-operative was also raised by submitters. Prior to formation proposers must get approval for its rules/constitution by the Registrar. The Registrar may take up to 28 days to approve or reject or require amendment.⁴⁰ If the draft is rejected or amendment is required, then a further period of 28 days may be taken by the Registrar to approve. There are model rules provided under the legislation, however, guidance on matters such as the drafting of active member requirements is poor. The result is that it can take many months to gain approval or great cost to obtain professional legal advice to draft rules.

3.55 Evidence of the length of time it can take was provided by the Voluntary Parents Association who recounted their experience at the committee's hearing in Sydney, as well as in their submission:

Our co-operative took five months to register and cost over \$20,000 to establish, including \$17,000 of legal fees and several thousand dollars for various insurances. This is an enormous investment of time and money for a small not-for-profit.⁴¹

3.56 In their view the cost and regulatory burden is disproportionate for small non-profit and non-distributive co-operatives, and acts as a disincentive for people to establish co-operatives:

We understand and expect that Federal and State governments have a duty to protect consumers. However, we suggest a balance between protections and setting the bar so high that volunteers are discouraged from forming self-help organisations. From our perspective, half of the compliance work we did provided no meaningful protection to members. The problem is that government regulations are one size to fit all, from small worker co-operatives to large financial institutions, when the reality is that the needs and purposes of co-operatives within that spectrum vary widely.⁴²

3.57 While there has been an improvement in the information and support available in those states that have adopted the Co-operatives National Law (CNL), there seems to be a persistent perception that there is lack of assistance in setting up a co-operative or seed funding a co-operative business available at a state or federal level.

3.58 The current advice on 'how to set up a small business' from governments at both a state and federal level only gives four types of business structure at most to choose from: sole trader, partnership, company and trust.

3.59 As mentioned above, there has been an improvement in information about co-operatives following the enactment of the CNL, but this is only available on the

40 NSW Fair Trading, *Registering a Co-operative*, available at: http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Registering_a_cooperative.page (accessed 7 March).

41 Voluntary Parents Association, *Submission 37*, p. 7; *Committee Hansard*, 29 October 2015, pp 1–2.

42 Voluntary Parents Association, *Submission 37*, p. 7.

co-operative section of the government's website, not in the small business section. The system therefore assumes some form of pre-existing knowledge when someone wants to set up a co-operative, or that a co-operative may be the most appropriate option for their enterprise.

3.60 BCCM provided an example whereby government firstly does not consider co-operatives in the development of policy, and then government officials do not have knowledge of whether co-operatives are eligible for the subsequent program:

It seems to pop up in lots of different places[...]we received an inquiry about a current tax exemption program that was being offered to R&D organisations. This was to encourage the flourishing of entrepreneurship and start-ups. [T]his group had been turned down for the program for the exemption based on the fact that they were not a corporate entity that was recognised within the program. When we tested it, we went through three layers of people—officers of the department—and were rejected. When we finally pushed it—eventually we received a ruling that, in fact, cooperatives were eligible. So this really is endemic throughout the system...⁴³

3.61 However, as discussed above and in Chapter 2, the committee found that those states and territories which have adopted the CNL have significantly improved the information available on establishing co-operatives. The Australian Tax Office also provided the committee with information showing the relatively straightforward steps someone would have to take to apply for an ABN as a co-operative.⁴⁴

Improving education, knowledge and expertise

3.62 Other submitters contend that a lack of education about CMEs in tertiary institutions, compounds the problem for co-operatives in getting appropriate advice since there is a lack of professional business advisors with requisite knowledge of the business models. The Co-operative Bookshop also raised the lack of understanding in the professions generally tasked with advising organisations on aspects of governance:

Co-operatives and mutual enterprises (CMEs) are poorly understood due to the paucity of education provision; leading to under-recognition of the business model by key professions including accounting and legal practitioners.⁴⁵

3.63 Ernst and Young (EY) were of a similar view that the lack of expertise in the relevant professions as well as government agencies was hindering the development of the sector:

The CME sector does not have access to the same level of government and professional support for the model because of lack of specialised expertise. There is therefore a need to develop this expertise across relevant

43 Ms Melina Morrison, Business Council of Co-operatives and Mutuals, *Committee Hansard*, 30 October 2015, p. 22.

44 Australian Tax Office, answer to question on notice, received 8 March 2016.

45 The Co-operative Bookshop, *Submission 38*, Attachment 1, p. 1.

government agencies and professional advisors in order to facilitate the establishment and growth of CMEs.⁴⁶

3.64 While agreeing there is a serious deficiency in the expertise available to CMEs, Professor Greg Patmore did suggest that renewed focus as a result of the UN International Year of Co-operatives has made a difference in bringing forth improvements in the training of those professionals tasked with advising the sector:

The co-operative sector is largely ignored in both secondary and tertiary education which limits knowledge about the co-operative business model. In the wake of the Cooperative, mutual and member-owned firms UN International Year of Co-operatives there has been some interest in including cooperatives in the tertiary curriculum of business students.⁴⁷

3.65 The sector itself is attempting to address the lack of understanding and expertise across the professions by establishing links with the tertiary education sector to ensure that more is being done to improve the understanding and awareness of the cooperative model. The Co-op Bookshop highlighted the progress being made so far, with a number of universities introducing and developing courses for law, accountancy and other relevant students on the model:

A number of Universities have embarked on development and actual introduction of courses including, Newcastle University, University of Western Australia, Charles Sturt University and Sydney University. While these steps are positive, more needs to be done to ensure an understanding of the CME model by legal practitioners, accountants, and other service providers. Inclusion of the CME business model in business-related courses at all levels of education would significantly assist in raising awareness of the sector in the Australian economy.⁴⁸

3.66 The Mercury Centre said that they were often approached by prospective cooperatives who say they are often counselled not to go down the cooperative path by accountants and lawyers who do not have the requisite knowledge of the model to properly advise them:

The Mercury Centre is responding to regular requests flowing from workshops that the ability and expertise to set up Cooperatives is not available. Consequently communities are regularly dissuaded from the cooperative path by accountants and lawyers who do not have the knowledge to set up cooperatives and recommend alternatives such as shelf Pty Ltd or Incorporated Associations.⁴⁹

46 Ernst and Young, *Submission 44*, p. 2.

47 Professor Greg Patmore, *Submission 4*, p. 17.

48 The Co-operative Bookshop, *Submission 38*, p. 10.

49 Mercury Centre, *Submission 43*, p. 7.

3.67 This view was backed up by the Cohousing Cooperative who claimed that they have 'ongoing difficulty working with both these professions [accountancy and lawyers], as there is a lack of knowledge of co-operatives as a legal structure.'⁵⁰

3.68 Furthermore, the Centre argued that this lack of expertise among the professions of law and accountancy added to both the burden of governing a co-operative, and to the cost:

It is a commonly held view that establishing and maintaining a Cooperative is a more expensive and onerous task than the compliance for a Propriety Limited (Pty Ltd) or Incorporated Association. This position is exacerbated by the lack of inclusion and professional training at tertiary level in Law and Accountancy.⁵¹

3.69 Kingfisher Law were also of the view that the current provision in tertiary courses and professional development for those who are expected to provide advice and expertise to the sector is limiting its progress and hindering the concomitant benefits to the broader economy:

Australian entrepreneurs and managers, financial advisers, regulators, lawyers, accountants and elected representatives need increased access to better, more accurate information on, and expertise for, co-operatives and mutuals. Without this, Australia risks foregoing optimal development, which would otherwise be achievable.⁵²

3.70 In contrast, a response to a question on notice from the committee, the Head of Education at Chartered Accountants Australia New Zealand said that in his experience the exact opposite was the case:

I have spent most my career working for, or being a director of co-operatives or mutuals (CAANZ is one). I can say that my general background in accounting made it quite easy to take on those duties and I had no difficulties in acting as a director and coping with the particular structure of a co-operative. I think that would be true of accounting professionals generally. The co-operative structure is not difficult to understand and the conduct of the business of at least most co-operatives is not very different from those of other businesses... I have seen no evidence of an issue with advisors with the requisite knowledge, indeed my experience is the reverse and that the market responds to needs for advice very efficiently.⁵³

3.71 According to the BCCM, the ramifications of this lack of expertise do not just impact the establishment or development of a CME, they can also result in regulations or tax law being misapplied, and have serious consequences for the CME:

50 Cohousing Cooperative, *Submission 7*, p. 2

51 Mercury Centre, *Submission 43*, p. 5.

52 Kingfisher Law, *Submission 51*, p. 3

53 Chartered Accountants Australia and New Zealand, answer to question on notice, received 11 March 2015.

Co-operative and mutual business forms are not well understood by policy makers, lawyers and accountants or other business advisors. As a result, business advice for those wishing to set up a co-operative or mutual is inconsistent and ad-hoc at state level, and too often, the different business purpose that mutuals have is ignored, leading to inappropriate regulation and treatment from authorities.⁵⁴

Committee view

3.72 The introduction of the Co-operatives National Law in most states and territories has resulted in improvements to the advice, guidance and information available to those wanting to set up and govern co-operatives. The committee welcomes these improvements and with the rollout of the CNL, or equivalent legislation across the whole country, expects similar improvements in all jurisdictions.

3.73 The committee notes the role of regulatory bodies in ensuring that co-operatives are not being ill-advised is central to the role of government at all levels. The evidence received by the committee about co-operatives incurring additional costs because of inappropriate advice is something those responsible for registering and regulating co-operatives should be aware of, and seek to mitigate where possible.

Recommendation 6

3.74 The committee recommends the Commonwealth Government work with states and territories to ensure the continual improvement to advice, guidance and information provided at all stages in the establishment, governance and regulation of co-operatives.

3.75 The committee is particularly interested in strengthening the educational curriculum to underpin the development of the sector. Without access to expertise to guide co-operatives through establishment, governance, regulation and compliance, the potential of the sector is always going to be limited.

3.76 The committee is cognisant of the advances in this field, with several universities offering units within their law and accountancy courses. Recent examples, such as the commitment in the Agriculture White Paper to offer training courses on 'cooperatives and other business structures to help farmers to better engage through the supply chain and attract investment', are proof that government can have a role in developing the sector at this level.

3.77 Nevertheless, there is still significant capacity in the secondary and tertiary education field to increase awareness of the CME model. Moreover, there is also capacity for increased professional recognition in courses from relevant professional bodies such as accountancy bodies, the Institute of Company Directors to teach students about diverse business ownership models.

3.78 While the committee understands that it is not the government's role to set curriculum in tertiary institutions, or private industries bodies, it urges the government to facilitate in whatever way it can to improve the situation. The committee would

54 Business Council of Co-operatives and Mutuals, *Submission 3*, p. 19.

also encourage greater liaison between the CME sector and the tertiary institutions and peak bodies to promote the value of improving recognition of the sector within tertiary institutions.

Recommendation 7

3.79 The committee recommends that the Commonwealth Government work with all relevant stakeholders to undertake a program of education and training to inform all stakeholders about the role of co-operatives and mutuals.

Recommendation 8

3.80 The committee recommends that the Commonwealth Government examine ways in which it can improve the recognition and understanding of the co-operative and mutual sector in the national secondary school curriculum, and that tertiary institutions consider the inclusion of co-operatives and mutuals in accounting, business, commerce, economics and law degrees.

Recommendation 9

3.81 The committee recommends that professional accreditation bodies, such as the Law Society and Institute of Chartered Accountants, require a demonstrated knowledge of the co-operative and mutual structure before they will licence its members to practice accounting or law.

Issues affecting Indigenous co-operatives

3.82 The committee received evidence from Indigenous co-operatives which share similar concerns to other CMEs, but which also have specific issues relating to Indigenous organisations' eligibility to access government funding as a co-operative.

3.83 Academic research submitted to the inquiry on the experience of Indigenous communities in establishing co-operatives, shows a lack of recognition of the contribution of co-operatives in Indigenous communities, and that many of them did not receive any support while setting up the enterprise.⁵⁵

3.84 The committee heard evidence citing Tranby College in Sydney as an example of a long running co-operative that had received excellent results for its members and broader community since its establishment in the late 1950s:

Tranby Aboriginal College in Sydney, the training and educational arm of Cooperative for Aborigines Ltd, which has been operating successfully since 1958, is an excellent model demonstrating what can be achieved with a diverse group of students from all around Australia, including remote regions, studying in a supportive and cooperative environment while emphasizing indigenous ownership and control.⁵⁶

55 Associate Professor Branka Krivokapic-Skoko, Charles Sturt University, *Submission 13*, p. 2.

56 Dr Gary Lewis, *Submission 36*, p. 3.

3.85 Evidence suggests the co-operative model is ideal in delivering services in remote areas, such as Indigenous communities, where issues can be complex and service provision through the private sector is often not suitable or available:

Awareness of multi-stakeholder CME structures may open up opportunities for developing effective governance structures for managing complex problems including those experienced by organisations delivering public services and those operating in Indigenous communities.

The owner member characteristic especially when a multi-stakeholder structure is utilised may be particularly effective governance model when addressing complex problems and where CMEs facilitate community empowerment. There may be opportunities to use multi-stakeholder structures in Indigenous communities or as the basis for collective impact initiatives which seek to harness diverse resources to achieve a common goal.⁵⁷

3.86 Despite their apparent suitability to deliver services through community ownership in communities, the committee heard that many co-operatives are being pressured to convert to corporations in order to access government funding. Councillor Kanak gave evidence to the committee in Melbourne and explained his statement in his submission that:

A current barrier to innovation, growth, and free competition in the Aboriginal Torres Strait Islander Community is the funnelling of Aboriginal Torres Strait Communities away from co-operative models towards Aboriginal corporations, albeit in an atmosphere of purported freedom of choice.⁵⁸

3.87 Mr Wy Kanak from Tranby College informed the committee that, under the Indigenous Advancement Strategy, Commonwealth Government grant funding above \$500 000 was only available to Indigenous organisations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.⁵⁹ According to Mr Kanak this is causing deep distress in co-operatives such as Tranby College and may cause them to 'abandon their cooperative structure and reincorporate under the Aboriginal Councils Act'.⁶⁰

3.88 A similar issue was raised in the inquiry that wasn't specific to Indigenous organisations. The Master Butchers Co-operative Ltd informed the committee that the Next Generation Manufacturing Investment Programme stipulates that eligible applicants must be 'an entity incorporated under the Corporations Act 2001'.⁶¹

57 Ernst and Young, *Submission 44*, p. 3.

58 Councillor Kanak, *Committee Hansard*, 29 October 2016, p. 64.

59 Australian Government, *Indigenous Advancement Strategy Guidelines, Part 2.8.2*, July 2014, p. 8.

60 Mr Wy Kanak, *Committee Hansard*, 29 October 2015, p. 64.

61 Master Butchers Co-operative Ltd, *Submission 60*, pp 1–2.

Committee view

3.89 The committee was concerned to hear that funding streams to previously successful Indigenous co-operatives were placed in jeopardy by the obligation for grant recipients above a certain level to be corporations. Not only does this restriction cause angst in the organisations and communities they support, it also sends the wrong signal to the co-operative sector more generally. Amending the Indigenous Advancement Strategy to allow co-operatives registered under the CNL would alleviate funding concerns, and demonstrate recognition of the value the sector brings to Indigenous communities.

3.90 The application of these restrictions across government grants and funding mechanisms further concerns the committee. This is a tangible example of co-operatives being disadvantaged against other types of business structures and the committee is keen to understand why these restrictive practices are in place. While the committee understands that governments must ensure appropriate risk management strategies are in place when expending public funds, there appears to the committee to be no compelling reason why co-operative and mutual enterprises present any more risk than incorporated organisations. In the absence of any justification the committee is of the view the restrictions should be removed.

Recommendation 10

3.91 **The committee recommends that the Commonwealth Government amend the Indigenous Advancement Strategy to allow registered co-operatives the same access to allow levels of grant funding as other entities.**

Recommendation 11

3.92 **The committee recommends that the Commonwealth Government review, and where necessary amend the eligibility criteria for grants and funds across all government grants and program guidelines to ensure that co-operatives and mutual enterprises are not excluded on the basis of their business structure.**

