



Irish Co-operative Organisation Society Limited

Opening Statement

Pre-legislative scrutiny of the Co-operative Societies Bill 2022
Joint Oireachtas Committee on Enterprise Trade and Employment,

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Chairman, Members of the Oireachtas,

1. Introduction

I would like to thank you for the opportunity this morning to participate in the pre legislative scrutiny of the General Scheme of the Co-operative Societies Bill 2022 (the “General Scheme”).

By way of introduction, ICOS serves and promotes co-operative businesses and enterprises, across multiple sections of the Irish economy, making ICOS the leading organisation for registering new co-operatives in Ireland and reliable, experienced advisors on co-operative rules and governance in Ireland.

Our core business is to provide leadership to the co-operative movement in Ireland. We use our collective voice to put the needs of the co-operative movement and our member co-ops to the forefront of what we do. We draw upon the pioneering and innovative spirit of our founding members to help strengthen our co-operatives operating in today’s ever changing and competitive world.

Starting from the agricultural co-operative path set by our founding President, Sir Horace Plunkett in 1894, ICOS today has evolved to serve the co-operative sector in seven core categories, namely:

- i. Multipurpose dairy co-ops [Lee Strand, Drombane, Mullinahone etc.]
- ii. Livestock sector co-ops [Dingle Mart, Kenmare Mart, Central Auctions, Elphin]
- iii. Store, trade and wholesale co-ops [Inishowen, Oldcastle]
- iv. Service-related co-ops [National Co-operative Farm Relief Services, IFAC]
- v. Community-oriented, culture and leisure co-ops [Group Water Schemes, Cafes, Dublin Food Co-operative]
- vi. Food, fishing, forestry and beverage co-ops [Western Forestry, Foyle Fisherman’s Co-operative]
- vii. Advisory and education-related co-ops [Milk Quality Ireland, FRS Training Ltd, The Plunkett Institute]

I want to impress upon you, members of the Committee, the degree of experience and expertise which ICOS has developed over the past almost 130 years. The vast majority of the 1000 or so Co-operatives

registered under the IPS Acts have ICOS Rulebooks. We have the marks on our backs from working with communities and groups to form co-ops, amend Rules, merge and consolidate co-ops, and sometimes wind them up. We believe we are unique in this respect, our experience is hard earned, and our views need to be considered.

2. Co-operatives - Overview

The co-operatives in the ICOS affiliate network represent and serve the interests of 175,000 individual members and feature a workforce of more than 11,000 people.

The Co-operative sector is comprised of a range of Societies, from the large business co-operatives operating in the agri food space to the smaller community service focused co-operatives. All are vital to their members and play significant social and economic roles in their stakeholder environments.

The large co-operative societies are mainly positioned in the Dairy Industry and now produce, process and market produce on a global level. Four of these co-operatives generate turnover in the billion-euro territory, with three others reporting turnover of €500 million plus. There are several dozen Societies generating a turnover of at least €10 m or more and these co-operatives serve their members and the local economy exceptionally well.

Then there are the several hundred small Societies which are just as important as the larger Societies to their members and to the local communities they serve. These Societies are typically community based and provide central services to their local community.

In terms of economic contribution our network of co-operatives generate an estimated total of €9.7 Billion in annual turnover. A significant proportion of this turnover is circulated in the Irish economy through:

- i. employee wages;
- ii. payments to suppliers such as farmers and other small rural businesses; and
- iii. payments/dividends paid to the 175,000 co-operative members.

In addition to delivering economic and social benefits, co-operatives place great emphasis on enhancing the skills of co-operative staff and management. They do this via the ICOS Skillnet training programmes. This allows co-operatives of all sizes avail of a wide variety of training resources in order to develop the skills of personnel. Furthermore, this demonstrates real application of the ICA co-operative principle of learning, education and training.

3. The General Scheme

ICOS notes that in recent months the Department of Enterprise, Trade and Employment published a general scheme of a bill to modernise and consolidate the statutory framework governing co-operative societies in Ireland.

For the record ICOS wishes to commend this development given the somewhat archaic and piecemeal nature of the existing Industrial and Provident Societies legislation. ICOS has commenced, but not entirely completed its analysis of the Scheme document. On the Committee's request we submitted our initial comments on the Scheme for your consideration by letter dated the 13th of January.

We continue to review the Scheme and to consult with our members on its implications and we look forward to communicating with law and policy makers on the development of this important legislative initiative.

The following are our initial observations:

3.1 Companies Acts concepts and cross application of provisions

The Scheme cross applies several procedures (e.g. liquidation and audit exemption) from the Companies Acts with necessary modifications. Co-operatives and their members deserve specific and accessible legislation. These procedures should be installed with modification inside the Bill.

In addition, the Scheme removes several co-operative concepts (e.g. Special General Meeting) with new terms synonymous with companies (e.g. Extraordinary General Meeting). Member familiarity and co-operative culture should be enhanced not undermined especially where the gains of this proposed homogenisation are not apparent. ICOS calls for retention of these terms per the current law and practice.

3.2 Amendment of rules of society by special resolution

The Scheme proposes that for a co-operative to amend or alter its rules the support of 75% of members present, entitled and voting would be required.

Currently co-operative societies determine their rule amendment thresholds in their rules. ICOS experience is that the widely practised two-thirds threshold strikes the correct balance between sufficiency of mandate and realising effective reform.

In Appendix A to this Statement we have detailed cases where this balance has proven itself in the context of actual co-op member issues that have been proposed for adoption in the general meeting.

ICOS calls for a retention of co-operative autonomy to determine the threshold or alternatively an installation of the 'two thirds' threshold under statute.

3.3 Legal reserve

The Scheme proposes compulsory reservation of funds of the Society. The purpose, necessity and scope for confusion of this measure are of serious concern. We wonder what the basis is for such a high level of financial regulation when it does not apply to companies doing similar business.

Due regard has not been afforded to the prevailing and successful means by which members determine that funds are to be reserved – These are detailed at Appendix B.

The actual limitations to be imposed on funds that would be reserved has not been addressed in the Scheme and this gives rise to grave concerns that co-operative autonomy could be fettered.

Furthermore, the Scheme requirement that a society would determine the 'adequacy' of the reserves is open to interpretation. It would generate confusion in terms of compliance and could discourage producers/service users from choosing the co-operative model.

Finally, ICOS notes the shift to a compulsory reserve from an optional mechanism in the 2022 public consultation.

3.4 Approval thresholds for amalgamations and transfers of engagement

The Scheme proposes a worrying overhaul of the current procedures on how societies may consolidate. These actions would now require two Special General Meetings with support levels of 75% and above 50% respectively.

The current law does not require a second meeting where 75% is secured. For proven reasons of securing a sizeable mandate and moving with efficiency to deliver on the will of members ICOS submits that the current standard works.

The proposed change could have serious unintended consequences in the context of service users and their livelihoods.

The current legislation also allows for two or more co-operatives to consolidate where they each attain simple majority support, on the caveat that in those circumstances a second 'confirmatory' meeting approves the proposal (at above 50%). This has secured continued service provision in rare cases. It's removal from the statute book (as proposed by the Scheme) would be a retrograde step.

ICOS members have grave concerns on this development and we call for the retention of the current mechanisms to be retained in the new framework.

3.5 Minimum number of individuals who may establish a co-op

The Scheme proposes a reduction in the minimum number of natural persons who may form a co-operative from 7 to 3. Co-operatives establish and sustain where scale and service needs combine. The co-operative principles are supportive of the scale theme as are the challenges of economic and service delivery.

ICOS acknowledges there may be sectoral exceptions justifying a lower threshold but respectively submits that the 7-member minimum has served as a reasonable starting point for collective endeavour and should prevail on the statute.

3.6 Audit Exemption

The Scheme introduces audit exemption for small co-operatives. ICOS has long called for this initiative and there we support this positive development. The cost of the financial audit can be burdensome in relative terms for small community focused co-operatives.

However, the Scheme proposal (Head 169) falls short in devising a solution that safeguards the unique member stakeholder imperatives in a co-operative.

Prior ICOS submissions to public consultations demonstrate the member control proposals we have considered, designed and offered.

ICOS has grave concerns on the unintended consequences of introducing what is otherwise a very positive concept for co-operative application. I would be happy to take the Committee through our concerns in more detail and I refer to Appendix C.

3.7 Requisition of meeting by 10% of members with voting rights

The Scheme proposes a statutory right of 10% of those members enjoying voting rights to call for a special general meeting to be held. Member control and participation are solid co-operative reasons why this mechanism already resides in the rule books of ICOS affiliated co-operatives. In that regard, ICOS supports the statutory development.

However, in many co-operatives there may be good reason for inserting, for example, a maximum on the number of members from one district who can compose the 10% requisition – I refer to Appendix D.

ICOS calls for a retention of this nuance.

3.8 Removal and replacement of directors

The Scheme proposes that members could remove a director, outside of scheduled rotational retirement, by a simple majority in a general meeting. As economic democracies co-op rule books should demonstrate both a basis and means for director removal.

However, the interests of balancing successful management of the co-operative must be balanced with the democratic will of the membership. I am happy to elaborate on this and I refer you to Appendix E in that regard.

The ICOS model rules set a two-thirds threshold on this course of action and we contend that this should be facilitated in the Bill.

Separately, the Scheme proposes that members could then replace a director at the same meeting where their predecessor is removed. ICOS has informed concerns on this proposal and these are elaborated upon at Appendix C.

3.9 Directors' fiduciary duties

We welcome the Scheme's codification of fiduciary (and other) duties for co-operative directors. However, the functioning of co-operative model depends on a degree of what otherwise appears as a 'conflict'. For example; the board is composed of individuals having a trade or service relationship with the co-operative.

With this in mind and as set out in Appendix F, ICOS welcomes that the Scheme makes some acknowledgement to this feature.

However, we feel there may be scope to go further. The Bill needs to respect and cater, to the greatest extent feasible, for that important co-operative nuance and it is critical to note that vanilla application of the Companies Acts will not, in ICOS opinion, address the needs of co-operatives, their members and directors.

3.10 Personal representatives right to attend and vote at general meetings

We note the Scheme proposes that the personal representatives of deceased members would have the right to attend and vote at general meetings. We have concerns about this.

Co-operatives are designed with service to the fore and as a result; society rule books typically restrict some key decisions to active members. Such rule books also stipulate that on death the successor to the title of the shares (i.e. under the will or rules of intestacy) will receive the monetary equivalent of the shares but has no right to become a member unless s/he meets the conditions for, and have been admitted to, membership.

This important architecture would be compromised were persons being neither members nor holding a service use interest in the co-operative permitted to attend and participate in meeting decisions.

3.11 Registration of rules by new co-operative society

The Scheme would require (Head 13) existing societies to adopt and register new rules under the new legislation. ICOS recognises that reformed governing legislation necessitates reform of co-op constitutions. That said, how a co-op is structured in terms of rights, roles and responsibilities is important. Co-operatives are, after all, economic democracies.

ICOS submits that for many (particularly modestly resourced) co-operatives the task of developing rules that satisfy both the members and the law will be onerous.

The legislation should be framed in a way that minimises that burden to making the most vital legislative changes.

3.12 Devolved decision implementation

The proposals to allow the appointment of a designated person to “bind the society” (Head 31) and to “empower a person” to “execute deeds or do any other matter” on behalf of the society (Head 33) are presumably designed to facilitate efficient decision taking.

In a co-operative member control is paramount. How control and decision making is delegated and discharged is for each co-op to determine in its rules and policies. ICOS has concerns that the current wording of these two proposals undermines member control and risks unintended negative consequences.

3.13 Special right shares

The Scheme would recognise that shares with different (“special”) rights could be issued (Head 46). Conceptually, this is helpful as there are cases where the members of a co-op may have reason to allocate different rights typically on the basis of service use. That said ICOS does have concerns with the proposal in current form. It would permit the creation of a new share category on a simple majority of members.

ICOS submits that member rights are integral to the co-operative model and that the initial step on that path should be the approval of members by a majority of two thirds present, entitled and voting.

In summary, the powers provided for under Head 46 should come with the caveat that prior to use they should be adopted into the society’s rules.

3.14 Alternate directors

The idea of alternate directors may have foundation under other corporate models, but we would submit that its inclusion in co-operative legislation would be ill advised.

The Scheme (Head 86) would permit a director to appoint another director to attend and vote at board meetings. In the alternative it would allow a director, with the consent of the Board, to appoint “any other person” to exercise those rights.

Board meetings are the forum in which oversight and control of the co-operatives business is taken. In a co-operative service using members select the people they believe to be fit to discharge that key legal function.

It is not for the director or his fellow directors to determine who may exercise his powers in his absence. ICOS calls for mature reflection on the consequences of this proposal.

3.15 Members’ register

Head 95 of the Scheme stipulates that the members’ register could be closed a maximum of 30 days per annum. The implication, we understand, being that co-operative boards and their administrative supports would be compelled to keep the register open for membership applications for 11 months of the year.

In ICOS experience there can be legitimate reasons why a co-operative might decide to restrict the time in which the members’ register is “open”. One example being the fair convening of elections.

More fundamentally, the administrative burden of keeping the register open and processing requests whenever they may arise should not be underestimated where modestly (and often voluntarily) resourced co-operatives are concerned.

3.16 Proxy voting

As mentioned throughout our statement, initiatives designed to inject flexibility and efficiency, though commendable in theory, can jeopardise the member control and participation features on which the co-op’s health will hinge. The introduction of member proxy votes is one such example (Head 104).

ICOS contends that member engagement with co-operative decision making should stay in the hands of those service-using members. The Covid 19 pandemic required co-operative members to discharge their decision-making rights through the online alternative to the customary physical meeting.

Crucially, the key tenet of members scrutinising resolutions, debating financial performance and ultimately voting on decisions was preserved. A proxy mechanism breaks that tenet and erodes member control.

ICOS acknowledges that the proposal would leave it to the co-operative to decide whether to install the proxy mechanism in its rules. That said, we submit that a worrying precedent is being set by this proposal.

3.17 Member oppression

We note what appear to be very broad grounds and range of remedies for a member seeking relief from alleged oppression under Head 115.

ICOS has concerns that such a mechanism could be misused by either 1) a co-operative member who is simply not in agreement with the legitimate actions of that co-operative's board or 2) a member trying to block a legitimate democratic decision made by the members of that co-op. Such litigation, or even the threat thereof, could have a significant chilling effect on the exercise of economic democracy that is at the heart of the Department's vision for co-operative societies.

With this in mind, we note it is critical that the bar for granting relief is set at an appropriate level and that the legislation equips the courts with an appropriate and sufficiently nuanced test to apply when balancing the needs of all members of a co-operative in such an action.

3.18 Director to have regard to employees interests

We note that Head 127 and Head 131 provide that a co-operative shall have regard to the interests of employees as well as to the interests of members. We note that this may suggest an equality or even a supremacy of employees interests.

It is important that co-operative directors are given clarity by the legislation regarding the hierarchy of these duties and we would suggest that it would be appropriate that a co-operative board would have regard to members interests before those of employees.

3.19 Disclosable interests.

The proposal (Heads 154 to 157) to require Directors to disclose an "interest of any kind in the shares/debentures of a body corporate" to a statutory register is presumably aimed at ensuring greater transparency and avoidance of conflicts of interest.

While such an aim is welcome, ICOS has concerns regarding the appropriateness of this Head for co-operative directors, the vast majority of which are volunteers. This Head requires a director to notify the cooperative of such a disclosable interest and it is critical to consider the burden this places on directors and the possible barrier to volunteering such a burden may unintentionally create.

3.20 Register of interests

The Irish co-operative sector has a track record of prudent management and good governance. While ICOS constantly reminds our affiliate co-operatives, regardless of size, of the importance of their compliance and governance obligations, we note our concern arising from some of the deadlines for notification of changes.

Head 164 - notification of change of officer gives a 3 day deadline for notification of such a change. We believe that this gives volunteer and part time secretaries a very tight turnaround time to comply after a change has taken place and a slightly more appropriate timeline of one or two weeks should be implemented instead.

3.21 Strike off and restoration

The Scheme provides that where a co-op would be struck off by the Registrar there would be statutory routes available to have it restored. Heads 216 to 221 are of particular interest. ICOS has several queries which we would appreciate clarification on.

We note that for certain applications it would be a condition that “all outstanding annual returns” would be delivered to the Registrar. ICOS seeks clarity in the final text on whether that would include returns for the period prior to strike off (when the Society would typically be in default) or solely the period of the strike off.

Finally, we note in Head 217 that persons who “had an entitlement... to be registered as a member” at the time of dissolution by virtue of the death, as we interpret the text, of a former member would have the right to make such an application. The wording here is a cause for concern as, left unchecked, it would unintentionally erode the long respected, and rule book supported, principle that it is for a co-operative board to determine who qualifies for membership.

Appendices

Appendix 'A'

Amendment of rules of society by special resolution

(Head 22 and 111)

The General Scheme proposal is for the amendment of the rules of a Society to require a resolution of “not less than 75 per cent of the votes cast by such members of the co-operative society concerned as, being entitled to do so, vote” in a general meeting (refer to Head 22 & 111(3)).

This contrasts with the legislation under which societies currently operate. It states that the society's rules must provide the appropriate threshold. The current legislation recognises two key co-operative principles: member control and autonomy. The members of a society determine the appropriate minimum support to amend the constitution of the society.

Among the many important matters to be settled by service users setting up a society is the procedure by which the rules will be reformed in future. Over the lifetime of a co-operative it will be the members, acting through their elected board representatives, who drive the substance and process of reviewing and amending the society's rules.

That substance can range from matters of a clerical nature (such as how members receive notice of meetings) to those of a more substantive nature (such as changing electoral districts or the voting rights of non-active members).

The ICOS model rules prescribe that for a rule amendment proposal to succeed, it must secure the support of two thirds of members present, entitled and voting. This threshold strikes, we believe, a workable balance between more temporary (simple majority) decisions such as whether to allocate dividends and more structural permanent (higher threshold) decisions such as conversion or amalgamation.

In recent months, ICOS has witnessed a selection of results in co-op special general meetings which illustrate that balance. In one society, a proposal to change the conduct of elections and to introduce other modernisations to the rule book was approved by circa 70% of the circa 50 members attending the general meeting.

In another co-operative, a proposal to re-allocate board seats among geographic districts received over 60% of the vote but fell short of the 66.67% minimum. In both cases, a rule amendment was at stake, and in both cases members engaged in extensive debate on the issues both at representative level and, most crucially, in general meeting.

These anecdotes illustrate the point that decisions on changing rules do attract member engagement. These decisions are important and their impact will continue until the members next decide to review (and potentially reverse) the rules as amended. Accordingly, these decisions should, in ICOS experience, require a higher minimum approval than 50%. However, these changes are not on the scale of the special resolution matters (e.g. conversion to company) and nor are they irreversible.

For those reasons, ICOS submits that any new legislation should either devolve to the co-operative the power to set its own majority threshold for rule amendments or alternatively, prescribe a threshold of two-thirds of members, present and entitled and voting.

Appendix 'B'

Legal reserve

(Head 50)

ICOS has concerns on the proposal for co-operative societies to adopt a mandatory legal reserve (Head 50). Subject to receipt of further elaboration on the purpose and the workings of the proposal, ICOS questions whether a compulsory legal reserve is necessary and holds the view that its application may lead to confusion. The proposal should be reconsidered to ensure there is no undue restriction on the autonomous democratic control of Irish co-operative societies.

We appreciate what is presumably a desire to provide a legal basis in statute for the protection of co-operative property within the society rulebook and we note that Head 50 would leave it to the rules of the Society to determine distribution of that reserved property. That said, the proposal does not stipulate or suggest what purpose is to be served by that protection. Accordingly, the question arises what downsides might arise for the co-operative and/or its members on foot of that reservation.

In particular, ICOS notes that the members of co-operative societies operating under the existing legislation have deployed various measures to ensure that property is retained to sustain the co-operative. The ambition and nature of those measures can be independently and democratically determined by co-operative members under the current law.

In Irish co-operatives, and in particular those operating from the ICOS model rules, these control measures include:

- a nominal share value (applicable on redemption)
- board determination on admission of members
- limits on the number of shares that each member may hold
- share redemption ultimately a board decision (often expressing the duty to consider financial health of the co-operative) and not a member's
- Board and AGM control on decisions to distribute surplus (dividends, bonuses)

These controls act to secure continued service delivery (i.e., sustaining the co-operative) as the dominant co-operative purpose. In doing so, they (being periodically reviewed and maintained by service-using members) render individual wealth accumulation a subordinate concern while not unduly burdening member autonomy or democratic control within that co-operative society. The proposal for a compulsory reserve (as currently presented in the General Scheme) fails to recognise the successful deployment of these proven control measures.

Our other broad concern with Head 50 is that, as drafted, there is uncertainty on what is envisaged by way of purposes that the funds could not be applied towards (i.e. once 'reserved') and the requirement that the reserves be "adequate having regard to the nature, scale, complexity and risk profile" of the Society's business. We believe that creating an obligation to correctly figure out what is "adequate" would impose an undue burden on existing societies seeking to comply with the new

legislation. Moreover, it may result in a reluctance to use the co-operative society legal structure for the type of ambitious projects, business sectors and communities that we want co-operative societies to have a place in.

As a final point, ICOS notes that in the most recent public consultation wherein the legal reserve was first mooted by the Department, the proposal was for societies to have the option of maintaining a reserve. The General Scheme, however, provides for a mandatory reserve. ICOS is opposed to this development.

Appendix 'C'

Audit Exemption

(Head 169)

First and foremost, ICOS supports the concept of an audit exemption for small co-operatives and has advocated for a co-operative designed solution in response to public consultations over the last decade. Furthermore, ICOS supports the financial thresholds put forward in the Scheme which accord with our recommendations submitted to the most recent public consultation.

A co-operative audit exemption should be designed with the co-operative entity and its stakeholders as the starting point.

In that regard, we note with considerable concern that neither the Department's own proposal to allow 10% of the members to reverse a co-operative society's audit exemption or the ICOS proposal that a 90% majority of members in each year's AGM would need to approve preparing financial statements without an audit for that year, (for both refer to 2022 Public Consultation) have been adopted in the General Scheme.

We also note that our proposal to permit audit exemption for no more than four consecutive years and to then oblige the co-operative society, by statute, to conduct an audit in the fifth year was not adopted in the General Scheme.

These measures have been considered, developed and submitted to the Department with a view to developing an audit exemption mechanism fit for the co-operative model and its stakeholders. To better contextualise the need for these exemption protections it is sensible first to reflect on what the audit itself achieves.

Aside from being a public interest compliance measure, the act of auditing the financial statements provides co-operative members with some assurance on the financial health and compliance status of their co-operative. That safeguard is especially important where livelihoods depend on the continued existence of the co-operative. In a co-operative, the member's interest is not profit but service, and the long term sustainability of that service. This crucial co-operative distinction is especially relevant when illustrating the utility of the audit and the need for care when availing of an audit exemption.

That said, there are cases where the cost of the audit is unduly burdensome relative to the financial means of the co-operative. For that reason, and in those circumstances, ICOS submits that co-operative members should be afforded the option of securing an exemption.

In summary, ICOS firmly believes that the “gold standard” for a co-operative specific audit exemption is one that would feature the protections outlined above. It would put the decision to avail of the exemption in the hands of the members on a periodic basis. It would require proactive decision of the members as an item for consideration in the AGM with the authority of the rule governing the order of the business for the AGM. It would afford members a potent and easy to use means of holding their leadership to account and tightening up oversight of the collective enterprise they each depend on if they feel the need arises, for whatever their reasons might be.

Appendix ‘D’

Requisition of meeting by 10% of members with voting rights

(Head 99)

The Scheme would confer rights on shareholders to requisition general meetings of the Society. Two distinct mechanisms are outlined in the Scheme. ICOS notes that the mechanism whereby 10% of members carrying voting rights can compel the directors to convene a general meeting broadly reflects a default provision of the ICOS model rules.

In ICOS experience of working with co-operatives and their members, the true value of ‘the requisition rule’ is that it acts as a deterrent against board unilateralism and safeguards member control. However, this member control mechanism should be measured and designed according to circumstances.

Many ICOS affiliated co-operatives require that amongst the 10% of members signing the requisition a minimum level of diversity (e.g. by geographic district) must be secured. Where this has been installed in the rules, the members of the society have factored in local or other factors peculiar and (above all) relevant to that co-operative’s membership.

As currently drafted (Head 99) would apply a vanilla threshold of 10% of voting right members for the purposes of calling a special general meeting “notwithstanding anything in the rules”. This would amount to a statutory prohibition on the current legitimate right of co-operative members to determine requisition conditions appropriate to their needs.

For the reasons outlined above and in testament to the principles of member control and independence, ICOS submits that co-operatives should retain the right to customise the composition of the 10% condition where their members deem it appropriate to do so.

Appendix 'E'

Removal and replacement of directors

(Head 66 and 67)

The General Scheme would introduce a process by which a co-operative director could be removed from office by the membership (Head 67). Under the Scheme, members would have the right to serve notice of such a resolution and the director concerned would have the right to respond with representations. The Scheme also provides that where the resolution is successful, the resulting vacancy “may be filled at the meeting at which he or she is removed”.

In ICOS experience, most co-operative society rule books provide for the removal of directors by the membership (or their elected representatives) outside of scheduled rotation and retirement. Furthermore, where a right of removal exists the rules will provide for fairness with the rules stipulating that the director may make written representations within a specified period.

ICOS supports the proposal to insert on the statute a (1) basis for removal of directors and (2) a procedure that respects the position of the director in question.

However, ICOS does have concerns on two aspects of the proposal.

Concern 1:

The Scheme would enable members to remove a director on an “ordinary resolution”, defined under the Scheme as a simple majority. The relevant provision (Head 67.1) suggests that this right and threshold would apply “notwithstanding anything” in the society’s rules.

The ICOS model rules apply a higher threshold - two thirds of persons present, entitled and voting - to be met before a director can be removed. The logic for this higher bar is to achieve a balance between the representative rights of members - critical in a co-operative - with due regard to the demanding, and at times unforgiving, responsibilities of directing the affairs of an incorporated entity. Within the design of an economic-service democracy members must have the ability to remove a director where there is good reason for doing so. At the same time, effective management by the collective board of directors necessitates a degree of security of tenure once the initial election decision has been made.

ICOS calls for the legislation to either allow societies to set their own voting threshold or alternatively to prescribe a threshold of two-thirds majority of members present, entitled and voting.

Concern 2:

The Scheme proposes (Head 67.9) that where a director is removed under the mechanism, he/she can be replaced immediately in that same meeting. As has been mentioned above, the members’ right to electoral representation on the board drives member control of the co-operative’s services. Mentioned too, is the responsibility of members to make the right election decision.

Outside of standard election cycles the decision to remove (and to replace) a director should, in ICOS experience, be taken with a greater degree of care. Accordingly, where a Director has been removed from office the casual vacancy is filled at a subsequent meeting.

This has two upsides: it focuses members' minds on the removal decision allowing them to consider the resolution on its own specific merits; it then creates time and space for the relevant members to consider the vacancy and the credentials of the candidates seeking to fill it.

ICOS calls for legislation permitting a co-operative to provide in its rules that the resulting vacancy would be filled at a meeting designated for that important purpose.

ICOS acknowledges that under the Scheme a co-operative would be required to maintain a minimum number of directors. We submit that legislation can be drafted to allow for alternative regulations on the filling of vacancies where the legal minimum would be undermined.

Appendix 'F'

Directors' fiduciary duties

(Head 83, 130 and 131)

Member control in a co-operative is, perhaps, best illustrated by the presence of active service using members on the Board of the co-operative society. This phenomenon is not the exception, it is the assumed and it is the necessary.

Accordingly, the introduction of statutory fiduciary duties will require due regard to the vital components of the co-operative model.

ICOS welcomes the inclusion of a provision noting that "No director of a co-operative society or intending such director shall be disqualified by his or her office from contracting with the co-operative society either with regard to his or her tenure of any such other office or place of profit or as vendor, purchaser or otherwise."

We believe there is a justification for further assurance and recognition in the statute of the unique set of conflicting interests and responsibilities that a co-operative director necessarily holds in a properly functioning co-operative society. As with audit exemption this is an area where design of the statute should, in ICOS opinion, properly address the model.

This clarity is important against the backdrop of an increased compliance burden on a sector dependent on voluntary directors. While the voluntary nature of the sector's leadership will never be offered as an excuse to have more lenient governance standards relative to the nature of the activity being undertaken, it is reasonable to expect that a greater level of clarity and certainty regarding these individuals' legal duties would be offered.

-- Ends --