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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CO-OPERATIVES NATIONAL LAW (ACT) BILL 2017

REVISED EXPLANATORY STATEMENT

Presented by
Shane Rattenbury MLA
Minister for Justice, Consumer Affairs and Road Safety

CO-OPERATIVES NATIONAL LAW (ACT) BILL 2017

Introduction

This explanatory statement relates to the *Co-operatives National Law (ACT) Bill 2017* (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

Outline

Purpose of the Bill

The ACT is a party to the *Australian Uniform Co-operative Laws Agreement* (AUCLA).¹ The AUCLA provides that all Australian states and territories should enact model co-operative laws based on the Co-operatives National Law (CNL), which is contained in an appendix to the NSW *Co-operatives (Adoption of National Law) Act 2012*.²

The purpose of the CNL is to modernise the law for co-operatives by creating a consistent regulatory framework for co-operatives operating throughout Australia. The CNL allows co-operatives registered in one state or territory to operate in other jurisdictions without obtaining separate registrations. These mutual recognition provisions, as well as clarified governance provisions (which are consistent with the requirements for other corporate entities) and reduced reporting provisions for smaller co-operatives, will simplify the regulation of co-operatives in the ACT.

The Bill repeals the *Cooperatives Act 2002* (the old Act) and adopts the CNL.

¹ The Australian Uniform Co-operative Laws Agreement is available at: http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/About_cooperatives/Cooperatives_national_law.page#Australian_Uniform_Co-operative_Laws_Agreement

² *Co-operatives (Adoption of National Law) Act 2012* available at <http://www.legislation.nsw.gov.au/#/view/act/2012/29/app2>

Four pieces of legislation are required to adopt the national law:

- the enabling Act which adopts the CNL in the ACT and contains local application provisions to modify the CNL to it to enable its operation in the ACT;
- the CNL – which is set out in an appendix in the NSW adopting legislation;
- the Co-operatives National Regulations made by NSW that set out model co-operatives rules; and
- the local regulations that provide for the continued recognition of ACT co-operatives and sets fees payable in the ACT for services related to the regulation of ACT co-operatives under the CNL.

The Bill is the enabling Act for the ACT. The local regulations are a separate subordinate law made under the enabling Act.

The Bill aligns with the objectives of the CNL set out in section 3 of the CNL (and the existing core principles and objects of the Cooperatives Act) which are to:

- a) enable the formation, registration and operation of co-operatives; and
- b) promote co-operative philosophy, principles, practices and objectives; and
- c) protect the interests of co-operatives, their members and the public in the operations and activities of co-operatives; and
- d) ensure directors of co-operatives are accountable for their actions and decisions to the members of co-operatives; and
- e) encourage and facilitate self-management by co-operatives at all levels; and
- f) encourage the development, integration and strengthening of co-operatives at local, regional, national and international levels by supporting and fostering state, territory and national peak organisations and co-operative instrumentalities.

Key Changes

Key changes that have been introduced by the CNL include:

- provision for mutual recognition of co-operatives operating in participating jurisdictions without requiring them to register in other jurisdictions;
- introduction of new core model rules for co-operatives;
- re-classification of co-operatives as distributing or non-distributing co-operatives (with or without share capital) in place of the previous terms of ‘trading and non-trading’;
- simplification of financial reporting requirements to members depending on the size of the co-operative;
 - small co-operatives are not required to lodge publicly available accounts with the Registrar; however, they will have to lodge an annual return. Small co-operatives will not have to appoint an auditor or have their accounts audited or reviewed, unless they are directed to prepare audited or reviewed financial statements by the Registrar or by its members.
- brings director and secretary duties and liabilities in line with those under the *Corporations Act 2001* (Cwlth).

Registration and Rules under the CNL

Existing ACT co-operatives registered under the old Act will continue to be registered under the CNL.

The Commissioner for Fair Trading within Access Canberra will perform the functions of the Registrar of Co-operatives.

In terms of rules, co-operatives will be able to continue to operate under their existing rules (old rules), but will be encouraged to adopt the new model rules or update their rules. In the event of any inconsistency between a provision of the old rules and the CNL, the CNL will prevail. After prior approval by the Registrar the rule change may be submitted to the members for approval.

The Bill contains transitional and savings provisions which means that existing ACT co-operatives will not have to re-register or change their rules.

The Bill will significantly reduce red tape for smaller co-operatives and for co-operatives seeking to operate across multiple jurisdictions.

Chapter Summary of the Co-operatives National Law (ACT)

Extract from the Explanatory Note to the *Co-operatives (Adoption of National Law) Bill 2012 (NSW)*³

A chapter summary of the National Law is set out below. It is divided into chapters and schedules, which are briefly summarised below.

Chapter 1 Preliminary

This chapter sets out the principles used by a co-operative organisation. The principles are those agreed by the International Co-operative Alliance and incorporated into Recommendation 193 of the International Labour Organisation. The Chapter contains interpretation provisions and also sets out the relationship between the Co-operatives National Law and the *Corporations Act 2001*. The provisions of the Corporations Act that are applied throughout the Co-operatives National Law are collected in a note and cross-referenced in tabular form along with relevant modifications for ease of reference.

³ The Explanatory Note to the *Co-operatives (Adoption of National Law) Bill 2012 (NSW)* and Co-Operatives National Law is available at <http://www.legislation.nsw.gov.au/#/view/bill/840896a9-59f5-e181-b705-de78b74def2a>

Chapter 2 Formation, powers and constitution of co-operatives

This Chapter provides the mechanism for incorporating a co-operative and specifies the legal powers of the incorporated body as well as the legal assumptions that underpin a co-operative's dealings with third parties. It identifies the matters that must be included in the rules of a co-operative and authorises the Registrar of Co-operatives to publish model rules that a co-operative can adopt. The Chapter also sets out the nature of share capital of a co-operative and establishes the legal notions of membership and active membership. Member rights and obligations as well as the circumstances in which membership is cancelled and any rights accompanying cancellation are dealt with in the Chapter.

Chapter 3 Management and operation of co-operatives

This Chapter deals with corporate governance of a co-operative. Matters such as the board as the managing organ, directors and their duties and meetings are included. Matters relating to financial reporting and auditing are contained in the Chapter along with provisions governing fundraising from members and the public.

Chapter 4 Structural and other events for co-operatives

This Chapter deals with corporate structural events such as external administration, mergers, schemes of arrangement and transfers of incorporation. Relevant provisions of the *Corporations Act 2001* are applied and modified to achieve consistency of treatment in most external administration processes. Special provisions for caretaker-type administration and administrative powers of the Registrar of Co-operatives leading to a winding up are also located here.

Chapter 5 Participating co-operatives

This Chapter replaces the existing system of multiple registration to enable cross-border trade by co-operatives with a mutual recognition scheme for co-operatives from jurisdictions that participate in the Co-operatives National Law scheme.

Chapter 6 Supervision and protection of co-operatives

This Chapter establishes the powers of the Registrar of Co-operatives, inspectors and special investigators and the procedures that must be used when conducting an investigation. The Co-operatives National Law will introduce consistent powers and procedures across jurisdictions. If necessary, however, a particular jurisdiction will be able to modify provisions in this Chapter to account for local circumstances.

Chapter 7 Legal proceedings and other matters

This Chapter establishes nationally consistent provisions for offences, civil penalty provisions, appeals against administrative decisions, and the use of evidence in proceedings.

Chapter 8 General

This Chapter deals with administrative and other miscellaneous matters such as those relating to the office of Registrar of Co-operatives, the service and filing of documents, and the making of National Regulations.

Schedules

Schedule 1

Sets out the matters that must be addressed in the rules of a co-operative.

Schedule 2

Defines terms used in provisions that regulate interests and control in shares of a co-operative.

Schedule 3

Contains savings and transitional provisions.

Schedule 4

Sets out interpretation provisions that are nationally consistent and are used in place of the interpretation legislation in each jurisdiction.

Offences in the Co-operatives National Law

Penalties are imposed for a range of offences under the CNL. These include penalties in relation to disclosure requirements for distributing co-operatives, provisions applying to particular share subscriptions, rights and liabilities of members, disqualification from managing co-operatives, duties and liabilities of directors, officers and employees, good faith civil obligations and significant penalties for criminal offences pertaining to good faith, use of position and use of information.

Penalties are also imposed in relation to the declaration of interests, co-operative's registers, books and returns, name and registered office, meetings, financial records, lodging reports and returns with the Registrar, appointment of auditors, acquisition and disposal of assets, restrictions on share and voting interests, participating co-operatives carrying on business in the jurisdiction, prevention of fraud and other activities, false or misleading statements and secrecy.

Penalties under the CNL range from \$500 to \$200,000. Penalties comprise a monetary penalty or a term of imprisonment, or both. By national agreement, the actual amount of a penalty contained under the CNL is not altered. For consistency in the implementation of the CNL, the monetary penalty amounts have been expressed in fixed dollar terms as opposed to the usual practice of expressing monetary penalties in penalty units that are indexed under the section 133 of the *Legislation Act 2001*.

Where penalties are expressed as strict liability offences and include terms of imprisonment, the Bill modifies the penalties to impose only the monetary penalty, consistent with the *Human Rights Act 2004* and the Justice and Community Safety Guide to Framing Offences which provides that imprisonment should only be a penalty applying to strict liability offences in exceptional circumstances.

The modifications to these provisions are in schedule 1 of the Bill.

Application of the Co-operatives National Law and Regulations

The CNL and Co-operatives National Regulations, as in force from time to time, apply as Territory laws, subject to modifications made by the Bill or in the local regulations.

The Bill provides that any amendments to both the CNL and the Co-operatives National Regulations must be tabled in the ACT Legislative Assembly within six sitting days and can be disallowed by the Assembly under the Legislation Act. This maintains the parliamentary sovereignty of the Assembly to the greatest degree practicable consistent with the adoption of the national law and regulations as in force from time to time.

The Executive may make regulations (the local regulations) for the local application provisions of the CNL (ACT). A regulation may make provision in relation to administration, procedural matters relating to the operation of the CNL and the supervision and inspection of co-operatives. A local regulation may create offences and fix maximum penalties for the offences of not more than the amount mentioned in section 612(5) of the CNL (ACT) (Power to make Co-operatives National Regulations).

The Executive may also make local regulations to deal with transitional issues that may arise from implementation of the national law.

Applied matters and local application provisions

Provisions under the CNL declare certain matters to be applied Corporations legislation matters for the purposes of the Corporations application legislation of this jurisdiction in relation to provisions of the Corporations Act specified in those provisions.

The Co-operatives National Regulations may declare any matter relating to co-operatives or participating co-operatives to be an applied Corporations legislation matter for the purposes of the Corporations application legislation of this jurisdiction in relation to any provision of the Corporations legislation that does not apply of its own force to co-operatives or participating co-operatives.

The Bill also includes provisions which tailor the CNL to the Territory's legislative environment. These include fee determinations, definition and instrument provisions, ACT specific authorisations for certain provisions of the CNL, and modifications such as those necessary to facilitate the Territory's registration scheme to continue to operate with minimum impact on the existing co-operatives scheme in the ACT.

Consistently with the approach taken in the Cooperatives Act, and in other state adopting legislation, the Bill contains a division in relation to the application of the Corporations Act generally. It provides that a provision of the Corporations Act applied by the CNL (ACT) in relation to co-operatives is taken to be part of the Act. It also provides for the manner of interpretation of the applied provisions of the Corporations Act.

Regulatory impact assessment

The CNL makes minor adjustments across a range of areas to resolve variations that currently exist between some States and Territories. As previously discussed, the Bill will provide mutual recognition of co-operatives operating in participating jurisdictions without requiring them to register in other jurisdictions.

The CNL introduces new core model rules for co-operatives. However, co-operatives will be able to continue to operate under existing rules. In the event of any inconsistency between a provision of the old rules and the new legislation, the new legislation prevails. After prior approval by the Registrar the rule change may be submitted to the members for approval.

Adoption of the CNL will simplify financial reporting and auditing requirements for small co-operatives and remove the obligation to lodge publicly available accounts. Co-operatives registered under previous co-operative legislation are taken to be registered under the CNL.

Provisions of the Corporations Act will apply in a modified form across jurisdictions. The provisions will apply consistently to all States and Territories. These provisions include the duties of directors and other officers of the co-operative, and provisions relevant to professionals who provide services to a co-operative, for example, auditors, receivers and liquidators.

As previously discussed, the Bill will significantly reduce red tape for smaller co-operatives, which will be of particular benefit to the current co-operatives registered in the ACT, and for co-operatives seeking to operate across multiple jurisdictions.

Human Rights Considerations

The bill engages the following rights under the Human Rights Act:

- the right to freedom of peaceful assembly and freedom of association;
- the right to equality before the law;
- the right to privacy and reputation;
- the right to be presumed innocent until proven guilty; and
- the right not to be tried or punished more than once.

The right to peaceful assembly and freedom of association

The right to peaceful assembly and freedom of association is provided for in section 15 of the Human Rights Act. It states that:

- 1) Everyone has the right of peaceful assembly;
- 2) Everyone has the right to freedom of association.

The right to freedom of peaceful assembly and freedom of association is recognised internationally under articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR).

In promoting co-operatives, the International Labour Organisation (ILO) states a ‘co-operative is an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.’⁴ Co-operative principles include ‘voluntary and open membership, democratic member control, member economic participation, autonomy and independence, education, training and information, cooperation among cooperatives, and concern for community’.⁵

The Bill supports the right to peaceful assembly and freedom of association by providing the legislative framework for the co-operative principles, in particular the principles of voluntary and open membership, democratic member control and member economic participation.

The right to recognition and equality before the law

Under section 8 of the Human Rights Act, the right to recognition and equality before the law provides that:

- 1) Everyone has the right to recognition as a person before the law;
- 2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind;

⁴ International Labour Organisation, ‘Promotion of Cooperatives Recommendation 2002 (No.193), Recommendation concerning Promotion of Cooperatives’, Geneva, 90th ILC session (20 June 2002) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R193> at 7 September 2016.

⁵ Ibid. See also Antonio Fici, ‘An Introduction to Cooperative Law’ (2013) *International Handbook of Cooperative Law*, 4.

- 3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

The right is recognised at international law by article 26 of the ICCPR which provides ‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.

The ILO states in its recommendation that ‘cooperatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination’,⁶ and has recommended measures should be adopted ‘to promote the potential of cooperatives in all countries, irrespective of their level of development, in order to assist them and their membership to, amongst other measures, improve social and economic well-being, taking into account the need to eliminate all forms of discrimination’.⁷

The Bill supports this right through adoption of the CNL core model rules which provides for the fundamental matters for which rules of co-operatives must make provision. The Bill promotes the co-operative principle of democratic member control and member economic participation by virtue of its members possessing democratic control and contributing equitably to the capital of their cooperative. In primary co-operatives members have equal voting rights (one member, one vote) and co-operatives at other levels are also recognised in a democratic manner.

In addition, the Bill will bring director duties and the duties of other officers and employees in line with those contained in the Corporations Act, including provisions in relation to use of position, use of information and criminal offences pertaining to good faith, use of position and information.⁸

The right to privacy and reputation

Section 12 of the Human Rights Act provides that everyone has the right:

- a) Not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- b) Not to have his or her reputation unlawfully attacked

Part 6.4 of the CNL (Supervision and inspection) sets out the functions and powers of an inspector to monitor and enforce compliance with the law. These include the power to enter a place where the occupier provides consent, the entry is authorised by a warrant or the place is where the affairs or activities of a co-operative are managed or conducted.

⁶ ILO, above n 1, Annex.

⁷ International Labour Organisation, above n 1, para 4(f).

⁸ CNL, Division 4.

In the absence of the occupier's consent or a warrant, an inspector may enter the land around the premises to ask its occupier for consent to enter the premises. The requirement to obtain consent, an authorised warrant or entry of a place where the activities of a co-operative are managed or conducted, provide safeguards to ensure the exercise of these powers does not unreasonably limit or restrict the right to privacy.

Part 6.4 also provides powers of seizure including where a place has been entered without a warrant. However the power can only be exercised where the inspector reasonably believes the thing is evidence of an offence against the CNL (ACT).

There are safeguards in place to ensure that the power to seize does not unreasonably limit or restrict the right to privacy. For example, an inspector has the power to seize anything else only where the inspector reasonably believes that the thing is evidence of an offence against the CNL (ACT) and the seizure is necessary to prevent the thing being hidden, lost or destroyed or used to continue or repeat the offence. The inspector is also required to give a receipt to the person from whom the thing was seized, or if this is not practical, leave the receipt at the place of seizure, in a reasonably secure way and in a conspicuous position. The inspector is also required to return a seized thing to its owner.

The limits placed on the right to privacy and reputation are reasonable and necessary to facilitate investigation and enforcement of the CNL (ACT).

Right to be presumed innocent until proven guilty

Section 22(1) of the Human Rights Act provides that 'everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'.

The Bill contains several strict liability offences. These include offences relating to particular share subscriptions, disclosure and registration of interests in shares, management and operation of co-operatives, co-operative's registers, books and returns, meetings and financial records. In offences of strict liability the onus of proof is reversed and the defendant therefore must satisfy the threshold of an evidentiary burden.

In line with *R v Johnstone*,⁹ the onus of proof should only be placed on the defendant in exceptional circumstances, such as where a particular element of an offence is within particular knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove the element than for the defendant to establish it.

Section 550 of the CNL (ACT) provides if a provision of the CNL provides that an offence is strict liability, the defence of mistake of fact is available.

Section 22(2)(i) of the Human Rights Act also provides that a person is not to be compelled to testify against himself or herself or to confess guilt.

⁹ *R v Johnstone* [2003] 1 W.L.R 1736

Section 503 of the CNL (ACT) provides a limited privilege against self incrimination when making statements to inspectors exercising functions under the CNL of compelling production of documents and requiring answers to questions.

The privilege against self incrimination is limited as it only applies if it is claimed in advance by the individual, before answering any questions.

This limitation is justifiable given that it is necessary that inspectors have sufficient regulatory powers to obtain information about the operations of co-operatives to determine whether the law has been breached. These are standard powers in a regulatory context, and are reasonable in the sense that people participating in the operation of a co-operative are on notice about their obligations.

It is reasonable to limit the privilege in the regulatory context to situations where it is claimed, as only the person claiming the privilege will know whether the evidence might tend to incriminate them.

Notice must be given in an approved form before a person can be asked to provide answers to questions, meaning they will be in a position to assess the likely implications of questions and seek legal advice, before answering them.

Under section 500(1)(c)(ii) questions can only be asked in relation to the ‘promotion, formation, membership, control, transactions, dealings, business or property of the co-operative’, rather than about the individual or their private conduct.

Where an inspector enters a place in undertaking their functions (e.g. with consent or under a warrant) there is a general privilege so that answering a question or producing a document other than one required to be kept under the Co-operatives National Law which would incriminate the person is a reasonable excuse for not complying with a direction to assist an inspector (s 507(4)).

Arguably in determining the scope of the privilege the application of the interpretation principles in s 30 of the Human Rights Act will apply to clarify that, where claimed, the privilege is a privilege against both direct and derivative use consistent with Victorian case law (*Re application under the Major Crime (investigative Powers) Act 2004* [2009] VSC 381 at 167). In addition the law does not remove existing powers to refuse to admit evidence under the *Evidence Act 2011*.

Right not to be tried or punished more than once

Section 24 of the Human Rights Act provides that ‘no-one may be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law.

Section 549 of the CNL promotes the right not to be tried or punished more than once. That section provides an offender is not liable to be punished for the offence under the CNL and the co-operatives law of the participating jurisdiction.

Clause Notes

Co-operatives National Law (ACT) Bill 2017

Part 1 Preliminary

Clause 1 Name of Act

This clause provides that the title of this Act is the *Co-operatives National Law (ACT) Act 2017* (the ‘CNL Act’).

Clause 2 Commencement

This clause provides that the CNL Act will come into operation on 1 May 2017. The note included in the clause clarifies that the naming and commencement provisions automatically commence on the notification day as provided by section 75(1) of the Legislation Act.

Clause 3 Dictionary

This clause clarifies that the dictionary at the end of the CNL Act is part of the CNL Act and that definitions in the dictionary apply to the local application provisions of the Act.

Note 1 of the clause clarifies that the dictionary at the end of the CNL Act defines certain terms used in the CNL Act and includes references (‘signpost definition’) to other terms defines elsewhere in the CNL Act.

Note 2 of the clause clarifies that a definition in the dictionary (including a signpost definition) applies to the entire CNL Act unless the definition, or another provision of the CNL Act, provides otherwise or the contrary intention otherwise appears as provided by sections 155 and 156(1) of the Legislation Act.

Clause 4 Terms used in Co-operatives National Law (ACT)

This clause clarifies that terms used in the local application provisions have the same meanings in those provisions as they have in the Co-operatives National Law contained in the appendix to the *Co-operatives (Adoption of National Law) Act 2012* (NSW) as applied in the ACT (the ‘CNL (ACT)’).

The note contained in the clause clarifies that a definition in an Act applies except so far as the contrary intention appears as provided by section 155 of the Legislation Act.

Clause 5 Notes

This clause clarifies that a note included in the provisions of the CNL Act is explanatory and is not part of those provisions.

The note contained in the clause refers to section 127(1), (4) and (5) of the Legislation Act for clarification for the legal status of notes.

Clause 6 Offences against Act – application of Criminal Code etc

This clause clarifies that the *Criminal Code 2002* and other legislation apply in relation to offences against this Act.

Note 1 of this clause provides that chapter 2 of the Criminal Code applies to all offences against this Act and sets out the general principles of criminal responsibility (including burdens of proof and general defences) and defines terms used for offences to which the Code applies eg ‘conduct’, ‘intention’, ‘recklessness’ and ‘strict liability’.

Note 2 of this clause provides that section 133 of the Legislation Act deals with the meaning of offence penalties that are expressed in penalty units.

Part 2 Application of Co-operatives National Law and Co-operatives National Regulations

Clause 7 Application of Co-operatives National Law and Co-operatives National Regulations

This clause clarifies that the Co-operatives National Law applies as a territory law, as modified by schedule 1, and is referred to as the *Co-operatives National Law (ACT)* and applies as if it were part of the *Co-operatives National Law (ACT) Act 2017*.

Similarly, the clause clarifies that the Co-operatives National Regulations apply as National Regulations in force under the CNL (ACT), as modified by local regulations, and may be referred to as the CNL (ACT).

For the purposes of the section, the clause provides definitions for ‘Co-operatives National Law’, ‘Co-operatives National Regulations’ and ‘National Regulations’.

Clause 8 Exclusion of Legislation Act

This clause clarifies that the Legislation Act does not apply to the CNL (ACT), except for chapter 7.

Chapter 7 (Presentation, amendment and disallowance of subordinate laws and disallowable instruments) of the Legislation Act applies to the CNL (ACT) as if a reference to a subordinate law were a reference to the National Regulations and a reference to ‘notification day’ under section 64 of the Legislation Act were a reference to ‘published’ as mentioned in section 614(1) of the CNL (ACT) (Publication and commencement of National Regulations) and other necessary changes were made. This will mean that changes to the national regulations must be tabled in the ACT Legislative Assembly as a subordinate instrument which can be disallowed by resolution of the Assembly, providing an avenue for ongoing scrutiny of changes to the national regulations.

This clause clarifies that the section does not limit the application of the Legislation Act to the local application provisions of the Act.

Part 3 Some matters referred to in Co-operatives National Law (ACT)

Clause 9 Meaning of certain terms in Co-operatives National Law (ACT)

This clause clarifies the meaning of ‘police officer’, ‘public sector official’, ‘Registrar’ and ‘this jurisdiction’ for the purposes of the CNL (ACT). In particular, the Registrar for the ACT will be the Registrar of Co-operatives, designated under s 19 of the CNL (ACT) as the Commissioner for Fair Trading sitting within Access Canberra.

Clause 10 Corporations application legislation – the Law, s 4

This clause provides that part 4 of the CNL (ACT) is the corporations application legislation for the ACT. This effectively replicates the applied corporations provisions of the *Cooperatives Act 2002*. Corporations application provisions allow for the parts of the *Corporations Act 2001* (Cwlth) to apply to co-operatives in particular circumstances, and require co-operatives to act as if they were corporations. This provides for consistency in the rules around director’s duties, issuing of debentures, and the winding up and deregistration of the co-operative with those applying to corporations.

Clause 11 Designated authority – the Law, s 4

This clause provides that the Registrar is the designated authority for the following provisions of the CNL (ACT); section 15 (modifications to applied provisions), section 492 (appointment of inspectors), section 494 (Inspector’s identity card), section 520 (Appointment of investigators), section 601 (Inspection of register of co-operatives) and section 622 (Approval of forms). This is a minor change in scope for the role of the Registrar as it shifts roles of appointment of inspectors and investigators, which was previously a ministerial function, in order to make this appointment process faster.

Subsection (2) provides that a magistrate is the designated authority for sections 504 (Warrants) and 505 (Warrants – applications made otherwise than in person). This protects rights by establishing independent scrutiny of applications for search warrants.

Clause 12 Designated instrument – the Law, s 4

This clause provides the definition of a ‘notifiable instrument’, ‘written notice’ and ‘written order’ and provides a table specifying the relevant designated instrument required to validly execute the provision of the CNL, in column 2 of the table. The table distinguishes between the designated instrument required for individual co-operatives and a class of co-operatives. This gives the Registrar the ability to exempt particular classes of co-operatives from CNL requirements by making a notifiable instrument, or a single co-operative by a written order.

Clause 13 Designated tribunal – the Law, s 4

This clause provides that the designated tribunal is the ACT Civil and Administrative Tribunal (ACAT), for merits review of decisions made by the Registrar under part 7.3, and the ACT Magistrates Court for resolution of disputes about any other provisions. The ACT Magistrates Court will have the power to refer complex questions or matters of general importance, or questions of law to the ACT Supreme Court for determination.

Clause 14 Shares compulsorily acquired – the Law, s 436

This clause provides that section 1341(1) & (2) of the Corporations Act dealing with unclaimed property is taken to be read as requiring unclaimed property of a co-operative to be paid to the public trustee and guardian by the registrar. Where unclaimed property of a co-operative has been sold or disposed of, the proceeds must be paid to the public trustee and guardian.

Clause 15 Deregistration – the Law, s 453

This clause provides that for the purposes of section 453(d) of the CNL (ACT) (Application of Corporations Act – deregistration) a reference to the Commonwealth in sections 601AD (Effect of deregistration), 601AE (What the Commonwealth or ASIC does with the property) and 601AF (The Commonwealth’s and ASIC’s power to fulfil outstanding obligations of deregistered company) is taken to be a reference to the Territory.

This clause allows the deregistration provisions in the Corporations Act to apply to co-operatives in the ACT.

Subsection (2) of the clause clarifies that for the purposes of section 453(e) of the CNL (ACT) a reference to section 601AE of the Corporations Act to crediting an amount to a Special Account (within the meaning of the *Public Governance, Performance and Accountability Act 2013* (Cwlth)) is taken to be a reference to crediting the amount to the public money of the Territory in the consolidated revenue fund. This means that any money not disbursed under the deregistration provisions in the CNL (ACT) can be paid into Territory funds.

Clause 16 Costs of inquiry – the Law, s 530

This clause clarifies that for the purpose of section 530(3)(b) of the CNL (ACT) (Costs of inquiry) the Registrar may, by written notice given to a co-operative, direct the co-operative to pay to the Territory any costs of an inquiry.

Clause 17 Secrecy – the Law, s 537

This clause provides that for the purposes of s 537(4)(c) of the CNL (ACT), a person who is, or at any time was, engaged in the administration of the CNL (ACT) or a former Act must not, other than as provided by section 537, record, make use of or divulge information obtained in the course of the administration. Information may be divulged to, amongst others, the Treasurer, the commissioner for revenue, the auditor-general, the ombudsman or a person nominated by one of these people.

Subsection (2) of this clause clarifies that for the purposes of section 537(6) of the CNL (ACT), the definition of ‘former Act’ is the *Cooperatives Act 2002*.

Clause 18 Pecuniary penalty orders – the Law, s 556

This clause clarifies that for the purposes of section 556(2) of the CNL (ACT) (Pecuniary penalty orders), a pecuniary penalty ordered to be paid in the ACT is to be paid and treated as a civil debt owed to the Territory.

The note contained in the clause clarifies that the amount owing under a law may be recovered as a debt in a court of competent jurisdiction or the ACAT as provided by section 177 of the Legislation Act.

Clause 19 Registrar of Co-operatives – the Law, s 595

This clause clarifies that the Commissioner for Fair Trading is designated as the Registrar of Co-operatives and may exercise the functions of the Registrar of Co-operatives under the local application provisions of this Act, the local regulations, the CNL (ACT) and the Co-operatives National Regulation (ACT).

Clause 20 Protection of officials from liability – the Law, s 595

This clause provides a standard immunity for public officials exercising functions under the CNL (ACT). The clause provides that an official is not civilly liable for conduct engaged in honestly and without recklessness in the exercise of a function or in the reasonable belief that the conduct was in the exercise of a function. The clause clarifies that any civil liability that would, apart from this clause, attach to the official attaches instead to the Territory.

For the purpose of this clause, subsection (3) provides the definitions for ‘conduct’, ‘function’ and ‘official’.

The note contained in this clause clarifies that a reference to an Act includes a reference to the statutory instruments made or in force under the Act, including any regulation as provided by section 104 of the Legislation Act.

Clause 21 Stamp duty on transfer – the Law, s 620

This clause provides that if a co-operative that transfers its incorporation under part 4.3 (Mergers and transfers of engagements), division 2 (Transfer of incorporation) of the CNL (ACT) was a company under the Corporations Act before its registration, and stamp duty had been paid on its incorporation as a company in relation to the amount of the nominal capital of the company (or, if the nominal capital was subsequently increased, on the amount of its nominal capital as increased), then any stamp duty paid must be taken into account and included in assessing the stamp duty payable on its incorporation or registration in accordance with the transfer.

Clause 22 Registration fees – the Law, s 620

This clause clarifies that no fee is chargeable under any Act for registration of an instrument executed or registered in relation to a transfer of any property to give effect to the CNL (ACT), section 413 (Effect of merger or transfer on assets and liabilities) or section 481 (Effect of merger or transfer of engagements) in relation to a merger of co-operatives, a transfer of engagements or a transfer of incorporation.

Part 4 Application of Corporations Act

Clause 23 Definitions - pt 4

This clause provides definitions for the purposes of the applied corporations provisions of the CNL (ACT).

Clause 24 Provisions to which this part applies

This clause provides that certain provisions in the CNL (ACT) may be declared to be an applied corporations matter and may apply the whole of the corporations legislation, particular parts, or specific provisions to co-operatives operating in the ACT, subject to any modifications made by the CNL (ACT).

This application has no effect if the co-operative is already bound by the provision by force of a law of the Commonwealth.

Clause 25 Effect of declaratory provisions

This clause provides that provisions of the Corporations Act declared to be applied corporations matters apply as if they were in force as part of the CNL (ACT) from time to time with the effect of a territory law.

Clause 26 Modifications to applied Corporations law

This clause makes general modifications to the Corporations legislation to allow it to be read and operate in the Territory.

Clause 27 Conferral of functions on ASIC

This clause provides that the applied corporations law only operates to confer functions on the Australian Securities and Investments Commission if ASIC is authorised to perform that function. In most cases where the ASIC has a function under an applied corporations provision, that function will be exercised by the Registrar under the CNL (ACT).

Clause 28 Conferral of functions on ACT Courts

This clause provides that the applied corporations law that operates to confer a function on a court, is taken to confer the function on the Supreme Court, or another court specified for that provision.

Clause 29 Implied application of regulations and other provisions of Corporations legislation

This clause provides that instruments forming part of the Corporations legislative scheme will also apply as if they were laws of the Territory, subject to any modifications made under the CNL ACT or local regulations.

Clause 30 Proceedings for offences

This clause provides that offences under the applied corporations law provisions may be dealt with as an offence against a law of the Territory. Where the penalty is expressed in penalty units the value of one penalty unit will be taken to be \$100, consistent with the value set in other states. Relevant Territory laws relating to the conduct of criminal proceedings will apply to such offences.

Clause 31 Application of Corporations legislation by other means

Despite the location of the applied corporations provisions in part 4 of the CNL ACT, this clause provides that the Territory is not prevented from applying the Corporations Act in other legislation.

Part 5 Miscellaneous

Clause 32 Rules of co-operatives formed to carry on club may restrict voting rights

This clause provides that the rules of a co-operative that has as a primary activity the operation, maintenance or carrying on of a club may provide for different classes of membership, and restrict the voting rights attaching to membership of those different classes, only if the Registrar approves of the provision and the membership of the class or classes entitled to full voting rights constitutes at least 40% of the total membership of the co-operative.

Subsection (3) of this clause clarifies that a rules provision providing for different classes of membership or restricting the voting rights attaching to membership of those different classes may be amended only with the prior approval of the Registrar.

Clause 33 Proceeding for offences

This clause clarifies that a proceeding for an offence is to be disposed of summarily in the Magistrates Court. Subsection (2) clarifies that a proceeding for an offence under the local application provisions of this Act may be commenced no later than five years after the alleged commission of the offence and only by the Registrar or a person authorised in writing by the Registrar to commence proceedings.

For the purpose of this clause, subsection (3) provides that an ‘offence’ means an offence under the local application provisions of this Act or the local regulations, or the CNL (ACT) or the Co-operatives National Regulation (ACT).

Clause 34 Proceeding for recovery of fines or penalties under co-operatives rules

This clause clarifies that a proceeding for the recovery of a fine or penalty imposed by the rules of a co-operative may be commenced in the Magistrates Court and only on application by the co-operative.

Clause 35 Regulation-making power – local regulations

This clause provides that the Executive may make regulations for the local application provisions of the Act and the CNL (ACT). The note contained in this clause clarifies that a regulation must be notified, and presented to the ACT Legislative Assembly, under the Legislation Act.

Subsection (2) provides that a regulation may make provision in relation to the administration of the CNL (ACT); procedural matters relating to the CNL (ACT), and administrative matters relating to the supervision and inspection of co-operatives.

Subsection (3) clarifies that a regulation may create offences and fix maximum penalties for the offences of not more than \$2,000 for an offence, as specified under s 612(5) (Power to make Co-operatives National Regulations).

Part 6 Repeals and consequential amendments

Clause 36 Legislation repealed

This clause repeals the *Cooperatives Act 2002*, and *Cooperatives Regulation 2003*.

Subsections (2) & (3) provide that all relevant other legislative instruments under the Cooperatives Act and Legislation Act are repealed.

Clause 37 Legislation amended – sch 2

This clause provides that the CNL (ACT) amends the legislation in schedule 2.

Part 10 Transitionals

Clause 50 Meaning of *commencement day* – pt 10

This clause provides that for the purpose of part 10, the ‘commencement day’ means the day section 3 (Dictionary) commences.

Clause 51 Exclusion of Legislation Act – Co-operatives National Regulations

This clause provides that if the Co-operatives National Regulations are published before the commencement day, section 8(2) applies as if the National Regulations were published on the commencement day.

Clause 52 Saving of operation of *Cooperatives Act 2002*

This clause provides saving provisions so that rights, privileges or liabilities under the Cooperatives Act will not be affected by its repeal. This clause will also provide that investigations or proceedings under the Cooperatives Act will continue to be handled under the old law. These saving provisions are consistent with the general savings provisions in the Legislation Act.

Clause 53 Registration of co-operatives

This clause clarifies that a registered trading co-operative is taken to be registered under the CNL (ACT) and is taken to be a distributing co-operative under the CNL (ACT). The clause also provides that a non-trading co-operative will be taken to be a non-distributing co-operative under the CNL (ACT). This clause means that co-operatives existing in the ACT will not have to re-register under the new legislation.

Clause 54 Minimum paid up amount of shares – the Law, s 78(4)

This clause clarifies that section 78(4) of the CNL (ACT) (Minimum paid up amount) does not affect shares issued before the commencement day. This means that existing shares in a co-operative will not be affected by the new rules about having a minimum amount of paid-up shares.

Clause 55 Entitlements of former members of trading co-operatives – the Law, sch 3, s 1

This clause clarifies that if a person's membership of a trading co-operative was cancelled before the commencement day, a reference to division 5, part 2.6 of the CNL (ACT) (Entitlements of former members of distributing co-operatives) to a period of two years after the person's shares were forfeited is taken to be a reference to a period of five years after the person's shares were forfeited.

Clause 56 Entitlement to distribution from business or reserves of co-operative

This clause provides that entitlements of members prior to the commencement of the CNL (ACT) will continue to exist until satisfied.

Clause 57 Transitional regulations

This clause allows the Executive to make regulations that deal with transitional matters. Subsection (1) allows the making of a regulation to deal with any transitional matters that arise as a result of the enactment of the Bill. However, the scope of the regulation must be confined to the same sphere of operation as the amended Act, strictly ancillary to the operation of the Act and not widen the Act's purpose.

Subsection (2) allows the making of a regulation that modifies the Act. A regulation under this section may only modify part 10 of the Act, and only if the Executive is of the opinion that the part does not adequately or appropriately deal with a transitional issue. A provision of this kind is an important mechanism for achieving the proper objectives, managing the effective operation, and eliminating transitional flaws in the application of the Act in unforeseen circumstances by allowing for flexible and responsive (but limited) modification by regulation.

Subsection (3) gives a regulation under subsection (2) full effect according to its terms. A provision of part 10 of the Act modified by regulation will operate in the same way (in relation to another provision of the Act or any other territory law) as if it were amended by an Act, and in accordance with established principles of statutory interpretation. The section is not expressed, and does not intend, to authorise the making of a regulation limiting *future* enactments of the ACT Legislative Assembly. Modification by regulation of part 10 of the Act has no ongoing effect after the expiry of that part.

Clause 58 Expiry – pt 10

This clause provides that part 10 expires five years after the day it commences.

Schedule 1 Modifications – Co-operatives National Law

Clause [1.1] Section 15(2)(f)

This clause provides that where the applied provisions of the CNL (ACT) make reference to notification in the Gazette, those provisions will be taken to require notification under the Legislation Act. This is necessary because the ACT does not use a Gazette process for notifiable instruments.

Clauses [1.2 – 1.4] Sections 88(1); 88(2); 90(1)

These clauses replace the maximum penalty of \$2,500 or imprisonment for 6 months, or both attaching to these strict liability offences with a maximum penalty of \$2,500, consistent with ACT offence framing and human rights practice.

Clauses [1.5 – 1.9] Sections 92(1); 252(1); 252(2); 286(4); 287(1)

These clauses replace the maximum penalty of \$1000 or imprisonment for 3 months, or both attaching to these strict liability offences with a maximum penalty of \$1,000, consistent with ACT offence framing and human rights practice.

Clauses [1.10 – 1.11] Section 340(1); 340(2)

These clauses replace the maximum penalty of \$2,500 or imprisonment for 6 months, or both attaching to these strict liability offences with a maximum penalty of \$2,500, consistent with ACT offence framing and human rights practice.

Clause [1.12] Section 453(e)

This clause updates a reference in the CNL to the Commonwealth old accountability legislation, which has been repealed and replaced by the *Public Governance, Performance and Accountability Act 2013* (Cth).

Clause [1.13] Section 570

This clause makes a modification to clarify that a reference to an appeal against a decision of the Registrar means a review by ACAT of the decision on its merits, in accordance with the process set out in the *ACT Civil and Administrative Tribunal Act 2008*.

Clause [1.14] Section 578(4)

This clause makes a modification to clarify that a reference to the rules of the designated tribunal, for review of decisions made by the Registrar, means the ACT Civil and Administrative Tribunal Act and any instruments, procedures, rules or regulations made under that Act.

Schedule 2 Consequential amendments

Part 2.1 Confiscation of Criminal Assets Act 2003

Clause [2.1] Dictionary, definition of *financial institution*, paragraph (c)

This clause is a consequential amendment to substitute the reference to cooperative to co-operative consistent with terminology used in the CNL.

Part 2.2 Electricity Feed-in (Renewable Energy Premium) Act 2008

Clause [2.1] Section 5F(1), definition of eligible entity, paragraph (a)(ii)

This clause is a consequential amendment to substitute the reference to cooperative to co-operative consistent with terminology used in the CNL.

Clause [2.3] Section 5F (3), definition of co-operative

This is a consequential amendment to substitute the current definition of ‘co-operative’ with the definition provided under section 4 of the CNL (ACT)

Part 2.3 Land Tax Act 2004

Clause [2.4] Section 11(3), definition of *not-for-profit housing corporation*

This is a consequential amendment to omit a reference to the *Cooperatives Act 2002* and substitute with a reference to the CNL (ACT)

Part 2.4 Legislation Act 2001

Clause [2.5] Dictionary, part 1, new definition of *Co-operatives National Law (ACT)*

This is a consequential amendment to insert a new definition of ‘*Co-operatives National Law (ACT)*’ and ‘*Co-operatives National Regulation (ACT)*’ into the dictionary, part 1, of the Legislation Act. ‘*Co-operatives National Law (ACT)*’ means the provisions applying in the ACT because of s 7 of the *Co-operatives National Law (ACT) Act 2017* (Application of Co-operatives National Law and Co-operatives National Regulations).

Part 2.5 Perpetuities and Accumulations Act 1985

Clause [2.6] Section 14(3), definition of *fund*

This clause is a consequential amendment to substitute the reference to cooperative to co-operative consistent with terminology used in the CNL.

Part 2.6 Unclaimed Money Act 1950

Clause [2.7] Section 26, definition of *unclaimed money*, new paragraph (ca)

This is a consequential amendment to insert a new paragraph into the definition of ‘unclaimed money’ under section 26 of the *Unclaimed Money Act 1950*. The paragraph references section 436(3) of the *Co-operatives National Law (ACT)*.

Clause [2.8] Dictionary, definition of *company*, paragraph (a) (ii)

This is a consequential amendment to omit the words *Cooperatives Act 2002* and substitute the words *Co-operatives National Law (ACT)* under the definition of ‘company’ in the *Unclaimed Money Act 1950*.

Dictionary

The dictionary defines various words and phrases used in the local application provisions of the proposed Act.