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Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
Parkes ACT 2600

By email: nfpreform@treasury.gov.au

Dear Sir/Madam

Submissions - Review of not-for-profit governance arrangements

Co-operative Bulk Handling Limited ("CBH") refers to the Treasury's Consultation Paper December 2011 entitled *Review of not-for-profit governance arrangements (Consultation Paper)* and the Treasury's request for submissions from stakeholders.

CBH welcomes the opportunity to participate in the Treasury's consultation process and to provide submissions in response to its Consultation Paper.

While CBH's submissions are described in more detail below, the key points can be summarised as follows:

1. Each State and Territory has similar legislation in place governing co-operatives.¹ West Australian co-operatives are governed by the *Co-operatives Act 2009 (WA)*, a recently enacted legislative act which has been specifically designed to promote co-operative philosophy, principles, practices and objectives in the operations and activities of co-operatives in Western Australia.
2. Co-operatives play an important role in the Australian community and economy, operating in industries such as fishing, dairy production, water distribution and agriculture. The Government of Western Australia is best placed to administer and impose governance requirements on Western Australian based co-operatives.
3. The *Co-operatives Act 2009 (WA)* obliges co-operatives to comply with stringent and thorough governance requirements to protect the interests of their West Australian members and the West Australian public and to ensure directors and officers of co-operatives are accountable to members for their actions and decisions. The legislation in the other States and Territories have similar governance obligations.

¹ See *Co-operatives Act 2002 (ACT)*, *Co-operatives Act 1992 (NSW)*, *Co-operatives Act (NT)*, *Co-operatives Act 1997 (QLD)*, *Co-operatives Act 1997 (SA)*, *Co-operatives Act 1999 (TAS)*, *Co-operatives Act 1996 (VIC)*.

4. The governance issues and concerns raised in the Consultation Paper are explicitly addressed and dealt with by the *Co-operatives Act 2009 (WA)*.
5. The introduction of Commonwealth governance requirements applicable to not-for-profit co-operatives will result in an unnecessary duplication of effort and costs.
6. Where additional Commonwealth governance obligations are imposed, there is a real risk that inconsistent or conflicting requirements or procedures may arise, causing uncertainty and additional costs.
7. There are significant risks with the Commonwealth mandating risk or investment strategies of not-for-profit co-operatives. Management and the board of directors are best placed to formulate their entity's internal risk and investment programs and sufficient protections already exist to ensure that management and directors are held to account.
8. There is a great deal of ambiguity surrounding the State and Commonwealth negotiation process which is aimed at aligning governance requirements. No time frame is in place and there is no guarantee that a successful resolution will be achieved.
9. If the Commonwealth were to introduce duplicative governance arrangements, it would be preferable for not-for-profit co-operatives in each State and Territory to be granted an exemption from complying with such obligations on the basis that they are in compliance with the governance requirements of their respective co-operative legislation.

Background

CBH is a co-operative with 4,700 grower members. CBH was established to promote the West Australian agricultural industry through the development and conduct of bulk grain storage and handling operations for the Western Australian grains industry. As a co-operative, CBH is unique in that it is committed to activities which are predominantly for the benefit of the industry as a whole. For a more detailed summary of the history of CBH, please refer to our website: www.cbh.com.au.

CBH is registered as a co-operative under the *Co-operatives Act 2009 (WA)* (the **Act**). The Act sets out a list of principles which co-operatives are bound to follow. They include:

- (a) voluntary and open membership;
- (b) democratic member control;
- (c) member economic participation;
- (d) autonomy and independence;
- (e) education, training and information;
- (f) co-operation among co-operatives; and
- (g) concern for the community.

Further to these co-operative principles, the Act places stringent 'best practice' governance obligations on West Australian co-operatives (such as CBH) with oversight and compliance administered by the Registrar of Co-operatives.

As discussed in more detail below, the governance issues/questions raised in the Consultation Paper are already addressed by the Act. For example, the Act:

- (a) imposes statutory duties and obligations on directors and officers of co-operatives;
- (b) requires the preparation and filing of audited financial reports and accounts;
- (c) sets out member rights; and
- (d) prescribes voting and meeting requirements.

These obligations and principles are similar to, and in many cases, equivalent to, the best practice governance requirements provided under the *Corporations Act 2001*.

In promoting the above-mentioned co-operative principles, it is important for not-for-profit co-operatives not to be unnecessarily burdened with duplicative or inconsistent governance procedures which will lead to increased compliance and administration costs. In addition, with the government of each State and Territory already having a prescriptive and thorough governance regime in place for co-operatives, there is little value to be gained by the Commonwealth introducing a separate governance arrangement and incurring the additional costs of ensuring compliance.

Consultation Paper Issues and Questions

When considering co-operatives in all States and Territories and the governance issues and questions raised in the Consultation Paper, CBH is of the view that the requirements of the Act (or its equivalent in the other States and Territories) impose best practice requirements which already address such issues and questions.

To support CBH's view, identified below are those parts of the Act which specifically deal with the matters and questions discussed in the Consultation Paper.²

Responsible individuals' duties - Questions 1 to 10 (pages 15 to 19)

Please refer to Part 9, Division 3 – Duties and liabilities of directors, officers and employees of the Act which covers those matters and questions raised in the Consultation Paper regarding responsible individuals' duties.

In summary, Part 9, Division 3 requires directors and officers to act honestly, to exercise care and diligence and not to make improper use of information. The consequence of contravening such duties includes monetary penalties and imprisonment.

Disclosure requirements and managing conflicts of interests – Questions 11 to 15 (pages 19 to 23)

Please refer to Part 9, Division 4 – Restrictions on directors and officers and Division 5 – Declaration of interests of the Act. The relevant sections provide obligations on directors to disclose conflicts of interest and prohibit transactions which may give rise to a conflict. CBH notes that section 215 specifically requires the fees and remuneration of directors to be approved at a general meeting of the co-operative.

Risk management – Questions 16 to 19 (pages 23 to 25)

Of specific concern to CBH are the questions surrounding the possible introduction of controls and mandates regarding a not-for-profits' risk management and investment strategy.

CBH does not support the introduction of any legislation which obliges co-operatives to follow or implement risk or investment strategies mandated by the Commonwealth. There is

² Please note that as a West Australian co-operative, CBH has limited its comments to the Act.

a real danger that the introduction of such measures will impose serious and detrimental constraints on the activities of a co-operative which may hinder its ability to adapt to market conditions and, in relation to CBH, act in the best interests of the West Australian agricultural industry.

It is CBH's view that management and directors are best placed to formulate their entity's internal risk and investment strategies. In relation to West Australian co-operatives, other protections already exist to ensure that management and directors are held to account (i.e. the filing and audit of financial reports, annual general meetings, members' rights, director duties, etc).

In respect to indemnities and insurances for officers and auditors of a co-operative, Part 9, Division 3, section 213 of the Act adopts the standards set by the *Corporations Act 2001*.

Internal and external reviews – Question 20 (pages 25 to 26)

Please refer to Part 9, Division 6 – Financial reports and audit of the Act. The relevant sections adopt the reporting and auditing requirements set by the *Corporations Act 2001*.

Minimum requirements for an entity's governing rules – Questions 21 to 25 (pages 26 to 28)

Part 5 – Rules of the Act provides a thorough and detailed regime which a co-operative must abide by when adopting or amending rules. In relation to CBH, its rules are readily available on its website: www.cbh.com.au.

As a general comment, CBH believes that given the different sizes, structures, activities, principles and purposes of not-for-profit entities, it will be difficult to introduce a set of model rules which can be readily applied to all.

Further, CBH does not support the Australian Charities and Not-for-profit Commission (ACNC) having a role in mandating the requirements of governing rules. To do so would grant the ACNC a greater authority than those prescribed to the Australian Securities and Investments Commission under the *Corporations Act 2001*.

Relationships with members – Questions 26 to 28 (pages 28 to 29)

The governance rules surrounding the relationship of a co-operative and its members are extensively dealt with under the Act. Please refer to Part 4 – Membership, Part 5 – Rules, Part 6 – Active membership, Part 7 – Shares, Part 8 – Voting and meetings and the rules of the co-operative.

Summary – Questions 29 to 33 (page 31)

Rather than introduce specific or additional governance arrangements for Australian not-for-profit co-operatives, it is CBH's view that the Act (and its equivalent in each State and Territory) already provides a best practice standard of governance which is equivalent to the standards imposed on companies under the *Corporations Act 2001*.

As is outlined above, the concerns discussed in the Consultation Paper are more than adequately dealt with by the Act (and its equivalent in each State and Territory) and to introduce additional obligations and have another regulator (in addition to the Registrar of Co-operatives) administer governance requirements is unnecessary, duplicative, costly and inefficient.

Nonetheless, if Commonwealth governance obligations are introduced, CBH suggests that the interests of the public, co-operatives and government will be better served by not

introducing a new set of governance principles for not-for-profit co-operatives but by such Commonwealth legislation:

- (a) acknowledging and recognising that governance standards provided by the Act (or its equivalent in each State and Territory) meet the requirements of the Commonwealth arrangements; and
- (b) exempting not-for-profit co-operatives from the Commonwealth obligations as long as they continue to comply with the requirements of the Act (or its equivalent in each State and Territory, as the case may be).

Other

We note that at page 3 of the Consultation Paper, the Commonwealth government:

“hopes to work with the states and territories to ensure that the ACNC will be a national regulator, and be responsible for monitoring and administering all governance requirements of registered entities, regardless of structure.”

Further:

“While the aim is not to impose additional requirements on top of any existing governance requirements, it should be acknowledged that the process of negotiation with the states and territories in aligning requirements may take time.”

These comments do not specify a time frame in which State and Commonwealth negotiations are to take place, nor does it guarantee that an agreeable governance solution will occur. This uncertainty, coupled with the real possibility of having duplicative and costly governance regimes for an indefinite time, provides not-for-profit co-operatives with an inefficient and costly regulatory and governance environment with fails to deliver any additional governance checks and balances that are not already achieved under the Act.

As suggested above, a solution to this problem would be for any new Commonwealth governance arrangements to take into account the requirements of the Act (or its equivalent in each State and Territory) and provide an exemption to those not-for-profit co-operatives which comply with the Act (or its equivalent in each State and Territory, as the case may be). This is a simple and effective way of dealing with the uncertainty and additional cost burden which is likely to be created with a dual governance regime.

CBH appreciates the opportunity to comment on the Consultation Paper. Please let us know if you require any further information from us or would like us to clarify any of the submissions made in this letter.

Yours sincerely

For: Co-operative Bulk Handling Limited



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