

31 October 2018

Ms Julie Greenall-Ota  
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The Treasury  
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SYDNEY NSW 2000

Email: [mutualreform@treasury.gov.au](mailto:mutualreform@treasury.gov.au)

Dear Ms Greenall-Ota

### **Treasury Laws Amendment (Mutual entities) Bill 2018**

Thank you for the opportunity to provide comment on this draft legislation. COBA welcomes the open and collaborative approach that Treasury is taking to this consultation process.

COBA is the industry association for Australia's mutual banks, credit unions and building societies. The customer-owned banking sector represents most of the transferring financial institutions that are subject to the Part 5 Schedule 4 provisions.

Our member institutions are all authorised-deposit taking institutions (ADIs) and under APRA's regulations require equity capital to underpin their activities. Greater and more certain access to this capital will allow mutual ADIs to both create and take advantage of strategic opportunities.

#### **Support for objectives of the draft bill**

COBA believes that the draft Bill will remove the uncertainty for transferring financial institutions in respect of the demutualisation provisions in Part 5 of Schedule 4 of the Corporations Act. The definition will make it simpler to determine whether a proposal is or is not a demutualisation. This will greatly increase our ability to raise equity capital. The definition also addresses the lack of legislative recognition of the mutual corporate model.

#### **Revising the current definition**

COBA and BCCM have jointly agreed on a revised 'mutual entity' definition (**proposed definition**) based on Treasury's initial proposal (**current definition**).

#### **51M Mutual entities**

- (1) A company is a *mutual entity* if:
  - (a) the company is registered under this Act; and
  - (b) the company's constitution provides that each member of the company has no more than one vote at a general meeting of the company; and
- (2) For the purposes of paragraph (1)(b): the requirement in that paragraph is satisfied notwithstanding that the company's constitution provides to the effect that a person who is a member in more than one capacity has one vote at a general meeting of the company in respect of each membership.

The proposed definition addresses the issues raised below where a member could have more than one vote at a general meeting. It aligns with the existing RG147 as it allows members to have a vote in more than one capacity but only one vote for each membership (RG147.70).

COBA does not foresee any issues for mutual ADI governance with our proposed definition as this is in line with the existing RG147.

COBA notes that the Explanatory Memorandum (EM) could provide examples of what is considered different capacities, particularly around individual memberships vs. trustees and joint memberships.

Similarly, the EM could also reflect that the proposed changes are the first of a broader set of legislative changes to the Corporations Act.

### **Issue - voting in more than one capacity**

A significant number of COBA members have constitutions that allow a person to have more than one vote at a general meeting due to the person having more than one capacity. This is inconsistent with Treasury's proposed 51M(2)(a).

RG 147.40(c)<sup>1</sup> allows for a person to have more than one vote if they are a member in more than one capacity. As noted, this is inconsistent with Treasury's proposed 51M(2)(a).

We are concerned that the current definition raises doubts about an entity's mutual status based on the constitutional entitlement of a person who is an individual member to also vote in the following situations:

- as the vote-holder in a joint membership, and
- as the vote-holder as a trustee.

COBA requests that Treasury adopt the COBA and BCCM proposed definition to ensure that mutual ADIs can retain this status under the 'mutual entities' legislative framework.

The alternative of changing constitutions is undesirable because such changes:

- may require a special resolution at a special general meeting,
- could trigger Clause 29 of Schedule 4 to the Corporations Act (see clause 29(1)(c)), and
- could trigger provisions which many mutual financial institutions have in their constitutions which are intended to operate if a demutualisation is proposed.

## **Background & Policy Rationale**

### Voting in more than one capacity - joint memberships

COBA believes that our proposed definition allows the use of joint memberships based upon the definition of member under the Corporations Act, or at minimum, the recognition that a joint membership is a different capacity.

Many COBA member constitutions contain the concept of a joint membership. This allows two or more persons to have a joint account. The general characteristics of joint memberships are:

- two or more persons jointly admitted as a member,
- with a primary joint member as the member listed first in the register, and
- only the primary joint member can vote on behalf of the joint member.

People who are part of joint memberships are also able to join as individual members. Some constitutions explicitly state that these members can vote twice at a general meeting – once as an individual member and then once as the primary joint member. This is consistent with

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<sup>1</sup> 147.40(c): A membership must only allow the person who holds it to have one vote. This does not prevent a person who holds a membership in more than one capacity from having one vote for each membership (for example, an individual membership and a joint membership with another person).

the principle of 'one membership one vote', but not that of 'one person one vote' (51M(2)(a)).

As noted above, this voting entitlement is explicitly allowed under RG147.40(c),

Some constitutions explicitly prevent this practice by noting that 'no persons can have more than one vote'. While others do this more implicitly by noting that 'holders of member shares' have one vote. However, some constitutions would require amendment to meet 51M(2)(a) under the current definition. This amendment is not necessary under our proposed definition.

#### *Future of joint memberships*

COBA members have noted that joint memberships are a legacy concept. Most COBA members do not appear to issue new joint memberships, despite the entitlement remaining in the constitution.

In the past, membership numbers and account numbers were the same, which meant new joint accounts required a new joint membership. This is no longer the case as new joint members are now on-boarded as 'linked' individual memberships and the joint account is then derived from this relationship.

While the practice of new joint memberships has stopped, COBA members note that there are still legacy joint memberships on their member registers.

#### *Multiple joint memberships*

COBA notes that members can have multiple joint memberships where there are different combinations of persons. For example, Person A could have a joint membership with Person B and a separate joint membership with Person C (so memberships AB and AC). However, they could not have multiple joint memberships with the same persons. For example, membership AB and BA is the same membership. The joint memberships with different persons should also be considered different capacities.

#### Voting in more than one capacity – trustee on behalf of an unincorporated association

Most COBA members allow trustees to vote in their capacity as an individual member and as a trustee. This is not the member voting twice, but for themselves and then on behalf of the association. Given our proposed definition allows voting in different capacities, this resolves this issue.

Unincorporated associations need a trustee to hold the member share or be liable for the member guarantee. If a trustee is also a member in a personal capacity, then this could lead to this person having more than one vote at a general meeting and explicitly in more than one capacity. This violates the current definition.

An example of situation is a sports club president who banks with a credit union and is also the trustee for an account on behalf of the sports club with the same credit union. The sports club president in this instance is clearly a member in two different capacities. If this president was also the trustee for a social club, COBA would also consider this a different capacity to the trustee of the sports club.

#### Voting on behalf of other members

COBA believes that our proposed definition allows for an individual member to have an individual vote and also vote in the following situations:

- on behalf of another as a proxy (including as a Chair)
- as a representative of a body corporate member, and
- on behalf of a deceased, bankrupt or incapacitated member.

This is based on idea that this individual member is 'exercising' another member's entitlements under the constitution at the general meeting rather than 'having' another vote.<sup>2</sup>

RG 147.69 provides an interpretation of this concept and the current view on this.<sup>3</sup>

COBA and its advisers are comfortable that these three situations are covered by our proposed definition, in combination with the general operations of the Corporations Act, and explicit clarification in the Bill is not required. Any further clarification should be provided in the EM.

Thank you once again for the opportunity to provide comment on this draft legislation.

Please contact Luke Lawler, Director – Policy on 02 8035 8448 or at [llawler@coba.asn.au](mailto:llawler@coba.asn.au) if you have any further questions.

Yours sincerely



**MICHAEL LAWRENCE**  
**Chief Executive Officer**

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<sup>2</sup> Noting that the definition is based on the constitution providing that a member **has** no more than one vote

<sup>3</sup> RG 147.69: There will be members who are members in their own right, but who also hold a joint membership, or are a representative of or proxy holder for another member. In these circumstances, the member can vote their own membership, and also be the means by which the joint membership votes or the other members vote. In our view, this would not mean that the person effectively has more than one vote.