Our Ref: SMA
Your Ref:

17 October 2018

Financial Innovation & Payment Unit
The Treasury

By email: mutualreform@treasury.gov.au

Dear Sir/Madam

Response to consultation on exposure draft of the Treasury Laws Amendment (Mutual Entities) Bill 2018

1. We are active advisers in the customer-owned banking sector. The writer has advised in the sector for over 30 years.

2. Many of our clients are mutual authorised deposit-taking institutions and also 'transferring financial institutions' for the purposes of Schedule 4 to the *Corporations Act 2001*.

3. We submit that many existing mutual financial institutions would not satisfy the definition of 'mutual entity' as set forth in the exposure draft of the Bill (i.e. the proposed section 51M definition).

4. As the proposed definition stands, a company would not be a mutual entity if, pursuant to its Constitution, a person who is a member in more than one capacity has more than one vote at a general meeting of the company.

5. Currently the constitutions of many mutual financial institutions provide for members who hold memberships in more than one capacity to have more than one vote at an annual general meeting.

6. Many provide for the possibility of joint memberships and provide to the effect that the joint member is taken to be a person separate to the persons constituting the joint member. Hence two or more persons can be admitted as a member, and hold a member share, jointly, and each can also be admitted as a member, and hold a member share, individually.

7. Furthermore, many provide for the possibility of a person holding member shares (and hence being members) in their own right and (separately) as the trustee for an unincorporated association.

8. The constitutions of many of these institutions expressly provide that a member who holds member shares (and hence memberships) in more than one capacity has one vote for each such membership.

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9. We note that the treatment of joint memberships as memberships separate from and additional to memberships held by the individuals constituting the joint member reflects section 169(8) of the *Corporations Act*.

10. We also note that in RG 147 ('*Mutuality – Financial Institutions*') at RG 147.69 ASIC acknowledged the fact that members of mutual financial institutions may hold memberships in different capacities and expressed the view that this did not mean that the person effectively had more than one vote (ie that the institution was not a mutual).

11. We therefore submit that adopting the definition as it stands would have the unintended consequence that many existing mutual financial institutions would cease to be regarded as mutuals for the purposes of the *Corporations Act* upon the amendments taking effect. We note that the Hammond report warned that making any change to the *Corporations Act* to include such a definition needed to be carefully considered to minimise unintended consequences.

12. While affected institutions could potentially amend their constitutions so as to satisfy the definition:

    12.1 any such amendments would need to be approved by members by special resolution and there could be no guarantee of such resolutions being passed;

    12.2 in our opinion the necessary modifications would themselves trigger Clause 29 of Schedule 4 to the Corporations Act (see clause 29(1)(c)); and

    12.3 it is likely that in some cases the necessary modifications would trigger provisions which many mutual financial institutions have in their constitutions which are intended to operate if a demutualisation are proposed.

13. For completeness, we suggest that any definition should begin 'A company is a mutual entity if' rather than 'A mutual entity is a company if'.

Yours faithfully
Piper Alderman

Per: 

Shannon Adams
Partner