WHY AUSTRALIA'S CO-OPERATIVE NATIONAL LAW IS NOT REALLY A 'NATIONAL' LAW

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Recently the Queensland Parliament passed the *Co-operatives National Law* Act 2020 (Qld). This was a quiet but significant moment in the history of co-operative law in Australia. When this Act commences,[2] the Australian states and territories will, for the first time, have consistent laws for co-operatives. The advantage for co-operatives includes consistent terminology for two co-operative types (co-operatives will be either 'distributing' and 'non-distributing'); a consistent reporting regime which is less onerous for 'small' co-operatives; mutual recognition of co-operatives registered in other states; and the ability to issue co-operative capital units (CCU's) to members or non-members. However, the 'Co-operative National Law' is not a 'national' law in the sense that most would understand. It is not a law that has been passed by the Australian federal legislative body, the Commonwealth Parliament, rather, it is a template law that was introduced in 2012 by the State of NSW as the lead jurisdiction, as *the Co-operative (Adoption of National Law) Act*, 2012.

The idea of a using template law to achieve uniform laws between the states and territories in Australia is not new. A lack of uniformity of laws passed by the states has long been regarded by the Australian business community as an unnecessary transaction cost and a problem in need of a solution. The source of the problem is a federal system that divides law making powers between the Commonwealth Parliament and the six state and two territory parliaments.

When the Australian federation was created by the *Commonwealth of Australia Constitution Act* 1900 (Imp), the state and territory governments were responsible for the administration of co-operative law in Australia. At the time this was not surprising, as most business law regimes including company law, employment law and taxation law were all administered at the level of state government. The original impetus to federate the six self-governing colonies was the unification of defence, currency and immigration policies. In the early part of the 20th century Australia's economy was said to 'ride on a sheep's back'[3]. The business sector was reliant on agriculture and rural and regional economies and it made sense for business laws to remain a state priority.[4]

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[2] The *Co-operatives National Law* Act 2020 (Qld) was passed by Queensland Parliament on 17th June but is commencement date has yet to be proclaimed.
[3] An idiomatic phrase referring to Australia's dependence on wool as the source of export income and national prosperity.
[4] During this period, we saw a rise in agricultural co-operatives in Australia, particularly in grain and dairy industries

The need for harmonised business law was not a pressing issue until the period of rapid economic growth following World War II. In the second half of the 20th century, the Australian states have gradually handed over their legislative powers on most aspects of business law to the federal system. This began with income taxation,[5] followed by a uniform scheme for competition and consumer law,[6] company law,[7] and finally employment law.[8].

When the states agreed to refer their law-making power with respect to corporations, co-operatives (as corporate bodies) opted to be removed from the express referral of legislative power and remain as corporate bodies under state control.[9] This was an understandable and rational decision in 2001. Co-operatives are locally based organisations; historically they had strong support from state governments of all political persuasions. As member-based organisations, they were less likely to require the supervision and oversight of the national corporate watchdog, Australian and Securities Investment Commission (ASIC).[10] But forty years on, the regulatory and legal landscape looks very different and the co-operative sector tends to be marginalised and forgotten, particularly when it comes to policy decisions affecting businesses – and where federal politics is dominant.

One of the main reasons that most aspects of business law were transferred to the federal sphere was the problem of maintaining uniform legislative schemes. Unlike the United States, where their brand of 'competitive federalism' means that the states are in competition for business registrations as a source of revenue,[11] Australia has a long history of 'co-operative federalism' where the states have worked together to try and achieve harmonised laws.[12] Unfortunately, most attempts have eventually proven to be unsuccessful. The schemes work for a while, but over time the political priorities in each state diverge, resulting in inconsistencies and complexity.

[5] The Australian federal government first began to levy income tax in 1915 to help fund Australia's war effort. Between wars, income taxes were levied at both the state and federal level. Since World War II the states' have not imposed income tax.
[6] A scheme for consistent consumer laws was introduced in the 1980s using a template legislation scheme based on Part V of the *Trade Practices Act* 1974 (Cth). A single federal law replacing the mirror schemes in each state and territory was introduced under the *Competition and Consumer Act* 2010(Cth).
[7] The state Attorney Generals agreed to refer their law-making power with respect to companies and financial services in August 2000, later formalised in the *Corporations Agreement* 2002. This followed a series of unsuccessful attempts to create uniform company law schemes between the states and territories between 1961 and 2001. This referral of power created the constitutional basis for the *Corporations Act* 2001.
[8] The validity of the controversial *Workplace Relations Amendment (Work Choices) Act* 2005 was based on state's referral of the corporation's power, enabling the federal government to take over most of the field of employment law in Australia. The Act was later replaced with the *Fair Work Act* 2009 (Cth), but the centralised regulatory system remained intact.
[9] Corporations Agreement 2002, s503(1) see https://www.coag.gov.au/sites/default/files/agreements/Revised-Corporations-Agreement-2002.pdf
[10] ASIC was set up as a response to a number of significant corporate collapses in the 1960's and 1970's.
[11] L Bebchuk, "Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law" (1992) 105 *Harvard Law Review* 1435
[12] Robert S French, "The Referral of State Powers – Cooperative Federalism Lives?" (2003) 31 *UWALR* 19

Forty years after choosing to remain as state-based businesses, co-operatives in Australia are united by consistent legislation for the first time. But there is no guarantee that uniformity between the states will be successfully maintained over time. The *Co-operative National Law ('CNL')* may prove to be a temporary fix given the difficulties faced in implementing the scheme so far:

- The states had tried to achieve uniformity by agreeing to adopt 'Core Consistent Provisions' in co-operative laws 1996.The scheme unravelled when the states failed to maintain consistent legislation and neglected updating their co-operative laws.
- The process of intergovernmental negotiations to introduce a harmonised scheme began in 2007. It took another five years before the states and territories entered the Australian Uniform Co-operative Law Agreement ('AUCLA) in 2012 with NSW as lead jurisdiction.
- Western Australia made it clear from the outset that it was not interested in replacing the *Co-operatives Act 2009* (WA) with the CNL. Western Australia has agreed to continue to update its laws to ensure consistency with the CNL.[13].
- Queensland withdrew from the AUCLA in 2015. It continued to negotiate with the intergovernmental working party, and eventually agreed to adopt the CNL with the passing of the *Co-operatives National Law* Act 2020 (Qld).
- Any jurisdiction may withdraw from the AUCLA at any time.

In the meantime, there are some arguments in favour of shifting co-operatives to the federal sector. Most importantly co-operatives suffer from the lack of representation in a federal ministerial portfolio. Company law dominates in Australia – because a unified single-entry system has made it quick and easy to incorporate as a company. The process of registering a new co-operative may take weeks or even months. If legal advice is required, it is likely to be very expensive.

The *Corporations Act* is a broad legislative scheme and it has the potential to accommodate diverse legal models including co-operatives within its framework. But any such accommodation would need to recognise that co-operatives have a governance model that is distinct and different to 'for profit' businesses. If co-operatives were included as a distinct type of corporation in the *Corporations Act*, a legal requirement for directors of co-operatives registered under the Act to report annually to members on steps taken to operationalise or embed the co-operative principles and values in the co-operative entity would serve multiple purposes. Not only would it crystallise the co-operative identity at the national level, it would incentivise directors, lawyers and accountants to learn about the co-operative model and encourage educational institutions to include co-operatives in their curriculum.

[13] http://services.enews.fairtrading.nsw.gov.au/online/18268207-7.html