

**SUBMISSION TO**: Manager – Banking, Insurance and Capital Markets Unit,

 Financial Systems Division,

 The Treasury,

 CANBERRA, ACT (submitted by email)

**RE:** Removing barriers to new entrants to the banking sector, & use of the

 the word ‘bank’;

 and related Mutual ADIs’ governance issues.

**FROM**: SAKS Consulting Pty Ltd (www.saksconsulting.com)

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SUBMISSION OBJECTIVES

1. The principal objective of this Submission is to present comments considered specifically relevant to the proposition that Mutual ADIs with capital under the current $50m constraint be permitted, by legislative change and APRA policy decisions, to use the word “bank” in their name(s).
2. The secondary objective, given Government’s stated intent to effect banking legislative and policy change aimed at creating a ‘more level playing field’, is to present the contention that whilst changes such as noted above are commendable and appropriate, there is a pressing need as part of the change / review process to concurrently correct a variety of mutual ADI governance faults.

BACKGROUND INFORMATION

1. This Submission is (materially) formed against the backdrop of two (2) earlier relevant Submissions, and a Review of a below noted Mutual ADI’s merger - and being:-
2. Discussion Paper on governance issues relevant to Mutual ADIs - “*Micro-banks governance standards*” - submitted to Minister Kelly O’Dwyer on 6 September 2016 and displayed at [www.voice4members.com](http://www.voice4members.com). For ease of reference in considering material herein, portions of that submission - part (B) - *Issues and Proposals, Detail -* andfrompart (D)- *Research Notes on Issues and Proposals*, are contained in the attached Annexure (1).
3. Confidential Submission of 18 May 2017 to Mr Greg Hammond OAM – Facilitator, Consultation Process, Reforms for Co-operatives, Mutuals and Member-Owned Firms (the Process being aimed at assisting Government to further develop its response to the Senate Economic References Committee Report ‘*Co-operative, Mutual and Member-owned Firms’).*
4. A 31 July 2017 dated Review/Critique of the April 2017 merger of Bankstown City Credit Union (BCCU) and Unity Bank, put by Bankstown CU Members & Community Action Association Inc., also posted at [www.voice4members.com](http://www.voice4members.com) This item records history to the merger with particular focus on perceived governance and process faults causing substantial equity loss for BCCU members. Certain key aspects within that Review are attached as Appendix 2.

1. Response from Minister O’Dwyer’s office to the above item (3,a) was to facilitate a meeting with Treasury officials held on 4 November 2016, resulting in agreement SAKS Consulting effect (limited) supplementary research aimed at testing certain of the contentions raised in the Discussion Paper. Outcomes of such research was reported confidentially to Treasury on 9 December 2016.

USE OF THE WORD “BANK” by MUTUAL ADIs

1. SAKS supports the proposition that all mutual ADIs be afforded the opportunity to use the word ‘bank’ in their name; but with one observation, viz - that minimal use by ‘converting’ mutual ADIs of the word ‘mutual’ (to date) to describe the type of bank does not optimise differentiation and hence diminishes the possibility of enhanced customer engagement, and hence of greater market competition (as seemingly sought by Government).
2. It’s understood that evolution of the “bank” name change proposition stemmed from earlier Government/regulatory support for use of the phrase ‘mutual banking’ by APRA regulated mutual ADIs, driven by persistent (customer owned banking) industry advocacy for various changes aimed at overcoming perceived constraints when compared with advantages said to be enjoyed by non-mutual (and often much larger) banking competitors.
3. However, of the (approx.) 20 mutual ADIs that have been able to & have chosen to introduce “bank” into their name only (approx.) 4 have added the prefix “mutual”. SAKS is of the opinion this stands as an unwise decision by the 16 (approx.) bodies in question. This view stems from the fact that traditional equity based (& many of such much larger) enterprises have badly tarnished their reputations in recent times [[1]](#footnote-1) and that mutual ADIs who choose, without differentiation, to appear to join such group will not optimise the name change benefit sought to be achieved. Indeed, without clear differentiation, the opposite may well prove to be the case.
4. SAKS contends that the customer owned banking entities industry, policy makers, and regulators should carefully consider this matter and, perhaps, regulation should make use of “mutual” with “bank” a mandatory feature to change. What banks do what, and how, and why some are different from others, is a confusing scene for most consumers. Simply claiming that small banks are ‘better’ than big banks and/or that some smaller bodies are in the ‘better’ group because they are customer owned will not, in SAKS opinion, create the clear differentiation required.

GOVERNANCE OF MUTUAL ADIs

1. SAKS contends that governance standards and practices are not evident amongst various of mutual ADIs consistent with contemporary expectations for Government supported banking enterprises. Accordingly, in the event that mutual ADIs might more easily gain capacity to introduce “bank” into their names (and perhaps access to ‘better’ or greater forms of capital as being considered from the ‘Hammond Review’), then SAKS submits such should be accompanied by enhanced contemporary governance changes – in the public interest. An update to governance practices is even more appropriate as the industry consolidates into larger entities (usually with a greater number of members spread across bigger areas) which diminishes capacity for the ‘small man’ to be heard in one member/one vote bodies.
2. Core rationale is the fact that governance falls short (in many cases) given the real lack of practical capacity of shareholder members to have any impact on Board policy decisions and outcomes, and by the lack of information which should be made available to aid such processes. Some examples are :-
* Except for rare Special meetings, shareholder participation is limited to potential attendance at once-a-year AGM’s where the agenda & debate is totally subject to the decisions of the Chair, & often, capacity to participate is greatly restrained by cost and time travel issues impacting one vote shareholder members located across (commonly) vast areas. Contentious issues that shareholders may wish to raise are commonly received with platitudes and/or not even allowed to be raised.
* Material subjects put for consideration (at any meetings) are often submitted by Boards with minimal detail and explanation, often with no real analysis of options, and with some only on a ‘take it or leave it basis’. Also, in some cases, proposals carry less in the way of facts and impact analysis than would be acceptable where non mutual public shareholder bodies are concerned (eg the BCCU/Unity Bank merger noted in Appendix 2 which featured no independent opinion as to value for BCCU members – versus that required for the 2016 Your Credit Union/Auswide Bank merger transaction).
* Voting by member shareholders is commonly limited to a paper based old fashioned mail in process – with no option for electronic participation – and which usually means very low (and often Board controllable) involvement. Such can be evident by as low as 2 members voting per thousand, & with 50%+ of same often made up of staff members (who must usually also be shareholder members), Directors, family members, & close associates. In some cases, Board capacity to influence core groups of shareholders with some (other) group interest can further influence results consistent with Board preferred objectives.
* Director nomination/voting processes featuring the need for excessive member &/or nominee membership (eg- 2 or 3 years membership to be able to participate); as many as 5 members needed to nominate another as a proposed Board member (which is a number of ‘friends’ hard to identify in today’s mutual enterprises); and where physical attendance at the AGM is necessary to be able to vote by ballot – only at the meeting (such attendance being impracticable for many one vote shareholders living up to hundreds if not thousands of kilometres from the AGM venue) [[2]](#footnote-2). Such ‘status quo’ constraints / Board preferred outcome practices result in little ‘common member’ real participation and (in some cases) Board members remaining un-challenged & in office for 20+ (& even 40+) years.
1. Such faults mean that real shareholder engagement in governance is a fallacy compounded by limited APRA oversight as to shareholder rights given primary focus by that body on depositor protection and financial system stability. ASIC oversight appears often subservient to APRA directives. Further compounding the lack of influences on mutual ADI Boards is the lack of widespread commercial ‘public interest’ constraint / oversight mechanisms. Mutual ADIs have no ASX type focus, no Shareholder Association(s) or governance issues focus entities [[3]](#footnote-3), no block shareholder groups to answer to as to financial performance, and very limited financial press and similar exposure of a critique nature.
2. Contrary to displaying the best of governance, transparency and accountability practices, a number of Mutual ADIs today focus excessively – without constraint - on sustaining incumbency of Directors and Management. Perpetuation of the status quo is further evident by sometimes nothing but ‘lip service’ given to the concept of shareholder members having any useful practical capacity to question Board performance or proposals or to impact outcomes. An example of a detrimental outcome for shareholders arising from such faults is that occurring from the herein referenced Bankstown City Credit Union / Unity Bank merger (Appendix 2).
3. COBA (the mutual ADIs industry body)– states in a recent media release [[4]](#footnote-4) that the “--- *enduring solution to concerns about the banking sector is action to promote sustainable competition so that poor conduct is swiftly punished –“.* SAKS agrees with this principle – however ‘poor conduct’ does extend to the maintenance (in many cases) of governance practices detrimental to the interests of customers in their dual capacity as shareholders. It is also clear that Government sees the need for improved banks’ governance, and consequences - should such fall short [[5]](#footnote-5).

RECOMMENDATIONS

1. SAKS Consulting proposes that outcome to the subject ‘bank name change’ review (and to the “Hammond Review”) include the following governance legislative or regulatory changes (listed below according to SAKS opinion on priority, with cross-references to detail on the Proposals as listed in the Sept. 2016 Paper to Government & repeated – with some variations - as Annexure 1):-
2. That members be given the express option, by electronic means, to vote on all matters without the need to attend meetings or to appoint proxies (ref Proposal 6).
3. That 20 members have the right to call for a meeting of members for proper purpose (ref Proposal 2).
4. That 20 members may put a motion for consideration by any meeting of members called by the Board or by members (ref Proposal 4).
5. That a minimum notice period of 35 days be mandated for all general and special meetings – and including practices whereby Annual Reports are issued to members at least 7 days in advance of any director voting process (ref Proposal 3).
6. That the legal and regulatory process by which members can obtain access to a copy of the Register of Members for proper purpose be reviewed and clarified so as to give effect to a practical, believable, consistent, and transparent mechanism – and, where a merger is proposed – such be accompanied by an appropriate independent report (ref Annexure 2).
7. That there be no time qualification in respect to members standing for office as a director, or in respect to members nominating same (ref Proposal 9).
8. That time in office (of a director) be limited to a maximum of 9 years, and re-nomination not be permitted within 3 years from such termination (ref Proposal 8).
9. That the number of Directors not be more than 8 persons at any one time (ref Proposal 7).
10. That the right of members to seek to remove a director from office by ordinary resolution be clearly displayed in Rules (ref Proposal 12).
11. That the definition by which a director might be deemed as not independent be expanded to better focus on issues of both perceivable and factual influence (ref Proposal 11).
12. That every Mutual ADI have a directors nomination committee comprised of one current director (excluding the Chair) and two other persons totally independent of the board or of management, and not having occupied any such position for the preceding 3 years (ref Proposal 10).
13. That all mutual ADIs, at a part of their website, publish up to date copies of their Rules/Constitution, of minutes of all members’ meetings (including material considered at same, and of criteria applicable to nominations for a director role (ref Proposal 1).
14. That the Rules/Constitution of mutual ADIs be accompanied – at their websites, by a “plain English” statement in respect to member rights as shareholders (ref Proposal 13).
15. That all mutual ADIs establish, promote, and manage a members’ internet forum (ref Proposal 5).

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**ANNEXURE (1) to 11 August 2017 Submission to Treasury.**

**About this Annexure.**

This Annexure is, substantially, part (B) to the Discussion Paper put to Minister Kelly O’Dwyer on 6 September 2016 - being detail and reasoning to the Proposals then submitted which are repeated in this Submission in summary form at paragraph (14), with one principal addition, being item (iv) to para (14) and commented upon herein in Annexure 2. The full 6 September 2016 Paper is at [www.voice4members.com](http://www.voice4members.com) - and some of the Proposals detailed herein have been slightly expanded upon/varied in the light of developments since September 2016.

Mutual ADIs are described in such Discussion Paper (& variously herein) as ‘mutual micro-banks’ to avoid confusion that might arise by multiple descriptives such as – credit union / building society / mutual bank.

The 2016 Discussion Paper arose from a review (on behalf of the Communities Action Group – “CAG”, effected by SAKS in association with Integrity Governance) of the Rules (Constitutions) and/or 2014/15 Annual Reports of about 20% of mutual micro-banks, carried out in the May/July period of 2016.

Relevant research findings, including as to parties examined, is at part (D) to the Discussion Paper at the above-noted website.

Following issue of the 6 September 2016 Paper, a meeting occurred with Treasury officials on 4 November resulting in agreement that SAKS conclude 2 processes then in hand (and report further to Treasury):-

1. Refer the full Paper to each of the 18 mutual ADIs examined for comment or corrections – before adding Part (D) to that at the ‘’voice4members” website. (There were no responses of any substance, nor any material identified by any of such parties as requiring correction.)
2. Complete attendance at various upcoming 2015/16 end of year AGM’s – preceded by various questions in writing, in order to test outcomes in respect to key aspects to the contentions raised.

Such outcomes were reported confidentially (as agreed) to Treasury on 9 December. Various of such Supplementary advices, and some of the research findings from the above noted Part (D) of the original Paper, are added to the following material.

All efforts described above, and in this Submission, have been provided pro-bono.

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**DETAIL and REASONING in respect to PROPOSALS submitted**

**Proposal (1), Disclosures** – *All mutual micro banks must publish on a section of their websites accessible to members, and to the public at large, up to date copies of their Rules/Constitutions, and minutes of member meetings (including material considered), and criteria relevant to nominations for a director role. Commentary-*

* Rules - A number of mutual micro-banks reviewed do not provide easy access to the Rules that govern their affairs, and about one half indicate no website access at all. Such is inconsistent with the best of transparency principles.
* One entity suggested the Rules did not warrant publication because they were complex and needed management explanation. Another said that not publishing the Rules, and only releasing to members upon request, was specifically designed to stop/frustrate ‘outsiders’ from obtaining same and embarking upon some action considered potentially detrimental to member interests.
* Many Rules are written in a style difficult for the average consumer member, or potential member/customer, to interpret; and that is also inconsistent with the best in transparency principles (and hence leads to Proposal 13).
* Minutes of member meetings are usually only generally available at subsequent meetings (often after long periods of time). The outcomes of these meetings (and material considered) should be more readily and more quickly available to members, displayed within 21 days of a meeting being held, and retained on websites for at least 3 years.
* One entity correctly pointed out that S251 of the Corporations Act dealt with a shareholder’s rights to obtain a (promptly prepared) copy of minutes, and they might consider publishing same to the Member section of their website, after Board approval.
* Another said (incorrectly) there is no requirement to supply such information and that the significant cost of distributing same is unlikely to warrant such action.
* Early and certain disclosure of minutes would assist in effective members’ consideration – probably also requiring regulatory intervention where accuracy of proceeding is considered to be questionable.[[6]](#footnote-6)
* Director nominations criteria*.* It appears common in many cases that Mutual ADIs only distribute (often lengthy) material relating to the Director nomination / voting process at the date nominations open and only to those who specifically seek this material. This procedure limits the capacity of interested persons to review and consider the often long and complex material well in advance of choosing to be considered for nomination.
* These practices do not give shareholder/consumer members such basic of structural and historical information relating to the entity owned, or where a member of the public is contemplating becoming a customer member shareholder, and/or wishing to have a say in the affairs of the Mutual ADI.
* The Customer Owned Banking Association (COBA) argues for disclosure – as per its August 2015 submission to the Financial Services Inquiry, p8, “--- *consumers are entitled to simple and clear information that allows them to make informed decisions---“.* Disclosures, as detailed, are necessary.

**Proposal (2), Calling meetings of members, by members** – *In addition to the powers of the Board to do so, Rules of Mutual ADIs/(Mutual mini-banks, or MMBs) should explicitly state the right of 20 members to ask for a meeting for proper purpose, and the MMB shall distribute documentation relevant thereto at cost to the MMB. Commentary –*

* The Corporations Act (s 249D) specifies the Board of a public company (e.g. a mutual micro-bank) may be asked by shareholder members, holding at least 5% of the votes that may be cast, to call a general meeting. This member right is either displayed in Rules in a complex manner, or is not displayed at all.
* Achieving a proposition by the assembly of 5% of shareholders is virtually impossible in a diverse one member one vote mutual structure. Members of most such bodies never come into contact with one another, and such regularly only ever evidence less than 2 per 1000 members voting (i.e. under .2%)
* A prior aspect to the Act where 100 members might be the optional threshold is understood to no longer apply. In any event, it is proposed that 20 members of a mutual micro-bank is a fair and reasonable number to be able to ask for a meeting as a means to really participate in the affairs of their enterprise.
* To avoid potentially frivolous requests, it is further proposed that the Board of a mutual micro-bank should be able to reasonably determine, within 10 business days of a members’ request, that a proposed meeting is not for a proper purpose. The relevant group of members should then have a further 10 business days to present a case to APRA (or to ASIC) arguing otherwise.
* APRA / ASIC should have 10 business days to decide if they determine that the request is for a proper purpose, and the relevant notice should issue within 10 business days of such determination (together with any reasonable relevant documentation submitted) calling a meeting not earlier than within 35 days of the notice.
* If the board determines the meeting is for proper purpose then the same 35 day notice period, and distribution of any relevant material, should occur.
* To avoid significant administrative costs possibly attached to the calling of meetings, electronic communications should be mandated, where feasible. And, it is fair and reasonable that the mutual micro-bank bear all costs for a proper purpose members’ initiated meeting.

**Proposal (3), Notices of meetings –** *A minimum notice period of 35 days should be mandated for general and special meetings; and appropriate practices should ensure the issue of Annual Reports in advance of any voting for directors process.* Commentary –

* Often, members do not have reasonable time to consider and (if appropriate) to re-act to complex issues raised in notices of meeting. 21 days is too short, and hence a minimum notice period of 35 days should be mandated for all general and special meetings.
* And, to best ensure members can consider the merits of retiring / re-standing directors’ performance, when re-election might be challenged by others, practices should ensure that the Annual Report is issued at least 7 days before any voting for director process starts (which could mean issuance of such Report before formal issue of a Notice of AGM) [[7]](#footnote-7).
* As a matter of consistency in process, all notices should be issued to members (where relevant detail is held) by email and/or electronic text mechanisms – and otherwise by mail.

**Proposal (4), Member capacity to put motions** - *That* *20 members may put a resolution for consideration by any meeting of members, called by the Board or by members, providing it is lodged with the MMB not less than 21 days before the meeting, and the MMB is obliged, at its cost, to distribute same (and any reasonable supporting documentation) to all members at least 14 days before the meeting; and* *motions put at a meeting by a member, and seconded, and properly relevant to the business of the meeting, must be submitted to the meeting for a vote - and need not be in writing*. *Commentary –*

* Various parts of the Corporations Act (eg s249) provide a mechanism for 100 members, or those holding 5% of votes, to put resolutions to a general meeting.
* There are a number of issues that mean such provisions are not relevant, today, for MMBs with their often diverse one member one vote structure, and which accordingly do not provide for adequate MMB member representation. Firstly, as with the issue of members calling a meeting (Proposal 2), the Act’s specification as to number of members is too high. 20 members would be a better, fairer, number for MMBs.
* Secondly, the Act appears to allow members to put a motion and to have it circulated at cost to the company (MMB) - if it is presented to allow distribution when the notice of meeting is distributed. Otherwise, cost appears to fall (potentially) on the members who put the motion. This provision is in-appropriate for MMB members.
* Most MMBs issue the notice of the annual general meeting at about 21 days before - and with their Annual Report [[8]](#footnote-8). This means MMB members have a very short time to react (and hence Proposal 3, calling for a 35 day minimum period). MMB members would rarely if ever conclude a resolution should be put before the notice is issued containing matters to be considered. Further, unlike ASX listed companies, the only time a matter of real performance is divulged (which may warrant member action) is once only each year when the Annual Report is issued (hence, also note footnote 8 below, re Proposal 3).
* Accordingly, the proposed 20 members should be able to put a resolution for any meeting of members, called by the Board or by members, both before and after a notice is issued - providing it is lodged at least 21 days before the meeting – and the MMB should be obliged to distribute same at its cost to all members at least 14 days before the meeting date. The 35 day minimum period to Proposal 3 should accommodate this mechanism, and Proposal 6 calling for optional electronic voting on all matters, would better allow for real member engagement.
* The third aspect to member motions is those which might be put at a meeting (called by the Board or by members). Commonly such must be in writing (presumably somehow in hand when a meeting starts) and the Chair can decline to accept same. Accordingly, the miniscule number of members ever voting at a meeting, being personally present or by proxy, rarely (if ever) take this step. The Chair should be obliged to put any resolution presented by a member (and seconded) at any meeting of members, and without same needing to be in writing.
* The 9 December supplementary advices to Treasury noted various end of year unique events applying in respect to one MMB - which was argued against by certain members via a Statement to Members. The proposed Statement was put to the Board for discussion, however there was no response. It was also proposed the Board distribute the document to members before the AGM / voting – which was refused.
* Whilst such response was no doubt legally permissible it did support the contention that a handful of members in a very diverse one vote/one member body is materially constrained when it comes to seeking a substantive response from a Board of an entity disinclined to engage.

**Proposal (5), Practical incapacity for shareholder members to consult and engage -** MMBs *should establish, promote, and manage a members internet forum to allow members a modern day mechanism to exchange views on matters relevant to the affairs of the mutual enterprise. Commentary*

* Engagement with members, and practical means for the exchange of views, was once a feature of mutual micro-banks. This is not the case today, and has seen the vesting of power in the hands of many Boards with little public / member accountability. Mutual micro-banks should embrace modern technology and establish mechanisms for practical member (owner) inter-action on matters of common interest.
* Decades ago credit unions and building societies commonly formed around a mutual feature such as a workplace or a tight community. This ‘common bond’ was the core feature to entities like credit unions and readily allowed for face-to-face exchanges of views (often as people met over time), and for action. Members knew one another, and knew the directors and management.
* Today, most mutual micro-banks have moved well way from the common bond concept and, except in a few rare ‘pockets’, the opposite applies and mutual micro-bank members and owners usually only know a very small number of fellow members, there are no practical mechanisms for inter- action, and certainly almost zero public accountability. By contrast, ASX listed bodies are subject to an array of external oversight mechanisms.

**Proposal (6), In-adequate members voting mechanism** – *Members be given the express option, by electronic means, to vote on all matters without the need to attend meetings or to appoint proxies. Commentary –*

* The majority of matters requiring a member vote are commonly carried by an extremely small number of votes with no real mechanisms for practical member participation, or for the exchange of views, or to raise alternates, and hence outcomes are usually as the Board may propose.
* Along with the common restraint currently imposed by the need for physical attendance at a meeting (or appointment of a proxy) in order to vote [[9]](#footnote-9), other participation restraints are covered elsewhere herein in respect to member ability to call meetings (Proposal 2) and limited capacity to put motions (Proposal 4).
* Most mutual micro-banks today feature a shareholder/member base living and working, in many cases, over large areas way beyond the location where a members meeting might be held and, in many cases, well outside the common bond network of the past. Members (often) cannot physically attend meetings and are thus dis-enfranchised when it comes to attaining a real and practical say as shareholders in the affairs of their enterprise. Appointing a proxy, by itself, does not allow for real participation.
* The Federal Government is considering proposals to reform elements of the traditional company AGM system – in relation to public companies – which are widely supported [[10]](#footnote-10). Mutual micro-banks, as part of the key banking industry, should promptly move in the same direction and expressly provide for an electronic voting option in respect to all matters put to members.
* Response from one MMB to a query at the AGM suggested “-*quite a few members participate in voting when the matter is more than just procedural* ----“ and went on to note well over 2000 members used the paper based mechanism for voting on a recent merger. CAG suggests that 2000+ of about 50,000+ members (of the relevant body) is a very modest level to participation. This entity also said the board “—*may consider electronic voting in terms of efficiency and effectiveness” –* with however no apparent change over 2017 to date.
* Another’s response was about various processes having advantages & dis-advantages, and then claimed the “—*recent census melt down (as) a reasonable example of the deficiencies of electronic voting” !*
* CAG (SAKS) remains very firmly of the view that in order to achieve an optimum fair and democratic result affording all members the best opportunity to participate, Mutual ADIs should apply their unique & secure capacity to electronically consult with/contact the majority of members (as banking clients) and give members the option to vote on all matters by electronic means. Failing to do so ‘opens the door’ to the fact, or perception, that using currently permissible mechanisms adds to outcomes where ‘the few control the many’.

**Proposal (7), Number of directors**– *Mutual micro-banks should not have more than 8 Directors at any one time. Commentary –*

* Many mutual micro-banks allow an unlimited numbers of directors. This is not a good practice, can create a cumbersome structure disproportionate to the size of the business, potentially at higher than necessary cost to member shareholders, and hence a reasonable maximum should be specified.
* An open-ended capacity to have an unlimited number of directors can create a less than vigorous process by which a board’s size might best be contained.
* Possibly, with APRA approval, there could be a power to exceed the maximum by say 2 persons for up to one year so as to allow flexibility of transition when mergers occur.

**Proposal (8), Directors’ time in office** – *The time a MMB Director may be in office be limited to a maximum of nine years, and re-nomination not be permitted within 3 years from such termination. Commentary –*

* Research discloses situations where there are some Directors who have been in office for 20+ years, and even for 40+ years. Such long periods are excessive and inconsistent with good corporate renewal practices by which turnover is facilitated to best introduce new skills and thinking.
* Long periods in office is also inconsistent with views attributed to APRA in respect to Superannuation Funds [[11]](#footnote-11). Such thinking should extend to mutual micro-banks.
* One MMB, at its 2016 AGM – who had 2 persons serving for more than 40 years, advised one of same was to retire. Another entity reported verbally that a very long serving director was simply an anomaly. Another declined to answer a members’ question about policy in this regard and if any director might today be in office contrary to same & without members being aware of any such exception. A similar question was put to other mutual ADIs (with no responses given).

**Proposal (9), Directors’ nomination process - time qualifications - voting** - *That there be no membership time qualification in respect to persons standing for office as a director, or in respect to members nominating same; and voting (as for all matters) give members an optional electronic option. Commentary –*

* Nominations Some mutual micro-banks specify that a person being nominated to be a director, and the person (or persons) nominating, must have been a member for one or more years. This is inconsistent with co-operative principles in a one member / one vote / all are equal structure in that it discriminates simply around the date a party becomes a member.
* As noted in the Research part D to the September ’16 Discussion Paper a ‘standout’ of Board control over the nominations process is Peoples Choice CU (previously Australian Central CU) which says an applicant for director must be a member for 2 years, with Rule10.5(3) adding there needs to be an unusually high number 5 nominees who each must also have been a member for 2 years & have known the applicant for 12 months; and later in this section requires an applicant’s age to be advised - which seems to add a discriminatory element.
* Another ‘standout’ is Select Encompass CU which stated its Rules specify a 3 year period as a member in order to be nominated and subsequently advised this provision was adopted on Industry advice some years ago to deter “carpetbaggers’’. Another Credit Union commented in generalities about such constraints “-- *being designed to preserve members’ best interests –“.*
* Voting – Community Mutual (‘CM’- now Regional Australia Bank), appears to require members physically attend a meeting to cast a vote by hand on the day (or appoint a proxy to do so); & then requiring ballots to be counted at the AGM. Logistically, given geographic spread of CM’s membership, this provision acts as a very material constraint on member participation & produces a near guaranteed process by which carriage of Board preferences is assured.
* When it comes to member voting by secret ballot in respect to parties nominated to be a director (and in respect to other matters) then a postal system (by itself) is antiquated and costly and, where members are, and are known to be, generally apathetic on governance issues, tends to produce a process open to the fact or perception of non-democratic influences able to ensure Board desired outcomes
* Accordingly, an electronic voting mechanism option should be put in place for election of directors (and as proposed in respect to voting by shareholder members - on all matters).

**Proposal (10), Director Nominations Committee** – *That every mutual micro-bank have a Director Nominations Committee comprised of one current Director, excluding the Chair, and two other persons totally independent of the board or of management,**and not having occupied any such position for the preceding three years****.*** *Commentary –*

* The existence of, and form to, such a body is not consistent amongst mutual micro-banks and, in some cases, specifies the Committee can be one person only.
* Such situation should be corrected to ensure the existence of a fully transparent, mainly independent (parties) and balanced process.

**Proposal (11), Directors’ independence** – *A director be deemed not independent if the director is currently, or has in the preceding 3 years, been an employee or director, or in any position carrying material responsibility, of any body that has funds on deposit, directly or indirectly, that exceed 5% of the mutual micro-bank’s liabilities, and/or where any external body of any nature can reasonably be judged as being in a position, directly or indirectly, to exercise material influence by fact or by perception on the operations, conduct, membership of, or public status of the relevant mutual micro-bank. Commentary –*

* APRA’s CPS 510 at January 2015 (Prudential Standards-Governance) states that the majority of Directors must be independent, including the Chair. The question of independence should be totally transparent, clear of any doubt, and should extend to deal with perceptions as well as with facts.
* Undoubted independence can be questioned in two example circumstances. The first is the potential impact of single large deposits from corporate bodies on liquidity management. If such a depositor has a relevant person (ie – director or employee or similar) as a director of the mutual micro-bank, there is potential conflict of interest. Such person should not be regarded as independent.
* The second circumstance is where a mutual micro-bank director might be materially involved with another relevant entity (as a director or employee or contractor etc) that can reasonably be judged as having the potential, by fact or by perception, to exercise material influence or control. Such ‘other’ entity might, for example, be any party that has factual, potential, or perceptible influence over a common group of members of a mutual micro-bank.
* Such gives rise to the possibility for ‘block’ voting by a common interest group of members (readily influenced as a group) which might exist with any of (for example) a material socially active religious order, trade union, or community group, or with common shareholders of a corporate body (and including any common focus melding of interests between one or more of such parties). This type of outcome cuts right across the core mutual principles of one member / one vote.
* Mutual micro-banks are subject to various complex provisions should de-mutualisation be contemplated and where there might be material change envisaged such as defined re-structure or modification to rules or the issue of certain classes of shares, and which could impinge on the principles of mutuality. These provisions usually contain a definition as to what constitutes ‘control’ [[12]](#footnote-12) and such could be adopted as a reference point in respect to ‘testing’ any director’s association with such entities to assess independence.
* Persons who have relationships of the nature noted herein should be free to be directors of a mutual micro-bank, but should be classified as not independent.

**Proposal (12), Removal of director –***Mutual micro-banks should clearly display in their Rules the right, by ordinary resolution of its members, to remove a director from office.*

*Commentary –*

* Most mutual micro-banks do not display this important right of members in their Rules. Such deficiency needs to be corrected in order that members can consider an action relevant to accountability.

**Proposal (13), Shareholder members, plain English, rights statement-** *MMBs must publish, at their websites, a ‘plain English’ summary of the key provisions by which member shareholder may participate in conduct of the affairs of their mutual. Commentary –*

* A common virtue claimed by most mutual micro-banks is that shareholder members “– *can have a say in the running of their enterprise, and a member can even become a director* – “. Another relevant view of the industry via COBA is about consumers (shareholder members) having simple and clear information 6.
* As noted generally herein the attainment of such an outcome is fraught with many obstacles. Not the least of these is, in some cases, the lack of easy access to Rules and, when such can be studied, they commonly extend over many pages, have provisions that are a mix of too much or too little information and ‘legal mumbo jumbo’, and are thus very hard for the average shareholder member to understand.
* Whilst in theory shareholder members might be able to “– *have a say / participate etc. –*“ the practical reality is that having a right, and not having a plain English summary of how to gain knowledge about and apply such a right, is useless.

**ANNEXURE (2) to 11 August 2017 Submission to Treasury**

Register of Members (Access), and Merger Independent Opinion

SAKS submits that the process by which a member can gain access to a Mutual ADI’s Register – as seemingly contemplated by the law and ASIC advices [[13]](#footnote-13)- is totally in-effective. It appears the case that deficiencies in the law &/or in regulations &/or in Regulator administration warrants comprehensive review on the assumption that it’s desirable the fact to the law be consistent with the principles.

Currently, the right to gain access and the process is riddled with inconsistencies that appear easily manipulative by those who seek to deny such access, and thus frustrate real member participation in the affairs of the entity they own.

Two (2) practical examples arose over the period since the 6 September Discussion Paper submitted to Minister O’Dwyer, and the date of this Submission. Detail pertaining to a 2016 AGM experience was reported to Treasury in the SAKS 9 December supplementary report. The other example is that attached to the 2017 Bankstown City Credit Union / Unity Bank merger, and summarised below

As noted earlier in this Submission, at paragraph (3), various persons formed the view in early 2017 that the planned merger would be dis-advantageous to members’ interests.

Analysis of the Information Document issued on about March 6 proved such to be the case in that it proposed BCCU shareholder members forego rights to equity held to a value in excess of $5000 each, compounded as being distinctly in-appropriate by the fact of a number of years of very poor financial performance (ie a 2015/16 expense ratio of 98%), and the proposition the CEO ‘walk away’ with a $250,000+ redundancy payment, 2 directors be ‘elevated’ to the (ridiculously large) 13 person merged entity Board on materially increased fees, & the 5 retiring directors share a ‘reward for service’ bonus of $80,000.

It’s not intended this Submission argue the case for or against the (now approved) merger but rather draw attention to the deficient governance, legal, & Regulator approved processes which drove the outcome; with focus mainly on 2 aspects, viz accessing the Register of Members to permit counter (or other proposal) views being put to members, and, where a planned merger is for consideration, the lack of independent advice

1. **Accessing the Register of Members** –
2. The day after the ID issued, (on March 7) a BCCU member (with support from 4 other members) made a request for copy of the Register (advised upon by leading law firm - Dentons).
3. 7 days thereafter (on March 14) the BCCU Board responded with “ *We refuse your request for a copy of the register”*
4. The following day (March 15), Dentons advised the BCCU Board of intent (in the absence of attention as sought) the relevant member seek ASIC intervention; which subsequently occurred by letter to ASIC on March 17 (also in a form advised upon by Dentons; who suggested, on a high level basis, of a high probability of success).
5. Over subsequent weeks, the Bankstown Members & Community Action Assn (MACA) made a variety of requests and submissions, including to the Board of BCCU (with no responses about suggested deficiencies in the ID) and to APRA and ASIC.
6. ASIC finally agreed to meet MACA, including a representative from Dentons, on March 31. The result was ASIC advising that the merger process (& dealing with MACA concerns about unquestionable adverse impact on members) was totally for APRA’s consideration - with the only exception being possible ASIC attention to the Register of Members issue.
7. On April 10 ASIC advised by email that MACA suggested ID disclosure faults would not give rise to any ASIC actions, and also that access to the Register would not be ordered. The Register decision carried the ASIC view that “—*the matter does not prevent you (MACA etc) from pursuing any civil remedies available – (and suggesting MACA etc) – consult a legal adviser to discuss what other options, if any, may be open – to pursue the matter privately*”. MACA made it clear to ASIC on 13 April that this suggestion was of no value given a month had passed since the request was made and then only 9 days remained to the Special meeting, and
8. A follow up phone conversation with an ASIC officer seeking an explanation as to why the ‘no access’ Register decision, resulted in advices broadly to the effect – “ *it’s really all in APRA’s hands and (for ASIC) a question of priorities ---“.* Such comment was not expanded upon.
9. APRA finally responded by letter on 12 April with (in substance) “—*the XX Act prevent(s) APRA and its officers from disclosing information relating to the supervision of a particular regulated institution --- (I am) unable to discuss with you specific matters in relation to BCCU ---“*
10. MACA (repeated) requests for some explanations put to the respective Chair(s) of both APRA and ASIC, post such outcomes and post the 19 April BCCU Special Members meeting, have to date only resulted in an ASIC response of 4 May “--- *you will receive a response in due course*”

Observations, contentions, conclusions

1. ASIC’s website [[14]](#footnote-14) says “*Anyone has a right to request a copy of a company’s share register. A company must provide a copy of the register to you within seven days* ---“. Nothing is said about any constraints (as evident above).

Interestingly, practical and certain access was understood (by SAKS) to have been thought the case by the Treasury officials met on 4 November 2016.

1. A 2004 proposal by Mackay Permanent Building Society seeking access to the Register for Capricornia Credit Union (resisted by same) duly resulted in ASIC approval in about May 2005, followed by Capricornia’s appeal to the Administrative Appeals Tribunal (supported by CUSCAL), with the ASIC decision subsequently upheld in about December 2005 [[15]](#footnote-15). This decision lead to a 2007 Federal Court action by Capricornia v ASIC – where ASIC’s original decision to permit access is understood to have been substantially upheld.
2. ASIC’s May 2005 Consultation Paper 64 canvassed a variety of points surrounding the question of practical access to Mutuals’ Register(s) of Members and included the point at clause 1.10 “--- *in the context of sending information to members about a proposal for a merger ---- Any proposal that the board of a mutual entity should become the ‘gatekeeper’ for communications with members is not consistent with the kinds of policy objectives that the register provisions are generally designed to achieve –“.*
3. SAKS has no material knowledge of changes to the law / history leading to the 12 August 2006 modification of Regulations to s173 of the Corporations Law – nor relationship of matters in the ‘Capricornia v ASIC 2007’ judgement - however (to the layman) it appears same resulted in outcomes thereafter inconsistent with the preceding posture of ASIC.
4. Accordingly, it currently appears by the BCCU/Unity Bank case (& the earlier noted 2016 experience) a mutual ADI can (improperly, in our opinion) refuse access without any reason, thus forcing the applicant into a protracted complaint mechanism via ASIC, and then to an even more protracted (& costly) legal process; and all aimed at frustrating capacity to contact members to the point where an event like a meeting of members can occur before such a process might lead to access being secured and members given the opportunity to consider reasonable arguments contrary to the wishes of a Board.
5. SAKS submits that such an outcome is totally inconsistent (as above) with ASIC’s past posture, and is also totally in-appropriate today when it comes to transparency and ensuring processes that best ensure accountability of Boards to members. ASIC’s advices to the public, its processes, and (probably) the law needs change to ensure principles about public Register access are transparently applied – in a practical way (and also see footnote [[16]](#footnote-16) regarding disclosure of electronic addresses).

1. **Independent Advice**
2. It appears common current practice that when a mutual ADI - to similar body - merger is being put by way of an Information Document, for a vote by members (usually by those of the lesser entity), that the Boards of each such entity – with concurrence by APRA and ASIC, are not required to obtain any independent advice as to value to members.
3. The BCCU/Unity merger followed this process – with nothing said about any aspect to members’ equity, including the fact that every BCCU member had an equity in BCCU of in excess of $5000 value – proposed to be transferred to Unity Bank without any (explained) reasonable consideration.
4. By any contemporary measure such an outcome was totally inconsistent with reasonable standards of transparency and accountability, compounded by the whole “take it or leave it” merger proposition, and where the BCCU need to merge appeared a consequence to very poor Board direction and performance by BCCU in recent years (A full Review/Critique of the merger is at [www.voice4members.com](http://www.voice4members.com) ).
5. By way of contrast, when a mutual ADI proposes to its members that change best be effected by de-mutualisation and merger with a compatible non-mutual body, then such process dictates members of the mutual ADI receive a particularly detailed ASIC approved report by a suitably qualified independent party – eg as evident to the 2016 de-mutualisation / merger effected between Queensland Professional Credit Union (trading as Your Credit Union, or YCU) and Auswide Bank Limited [[17]](#footnote-17)
6. Exactly the same obligation should apply where a mutual ADI to mutual ADI merger is proposed. There is no case to the view that members should be deprived of facts and an independent recommendation when it comes to giving up their equity interests in the entity they own.
1. “Nine News” – 27 July 2017 “*Ross Coulthart – Why Australians think our big banks are bastards*”; some extracts being :- “--- *there is one issue (*banks*) that enflames’ vitriolic responses more than any other; --- the level of public passion and bitterness is overwhelming in comparison to what you might expect to be the top issue of the day; --- Treasurer Scott Morrison clearly had his reasons when he told the big banks in the May budget that ‘no one likes you any more’ –“.* [↑](#footnote-ref-1)
2. see added detail on examples in Annexure 1 re Proposal 9 [↑](#footnote-ref-2)
3. eg, the equities market research/advocacy body - “Ownership matters” [↑](#footnote-ref-3)
4. 8 May 2017, titled “*Customer owned banking sector welcomes competition review*” [↑](#footnote-ref-4)
5. ‘’Daily Telegraph” 30/5/17, p1, reporting Treasurer Scott Morrison on the need for banks to meet “--- *standards – in line with what average Australians expected* –“; and that “—*Banks and their executives must be held to account for – actions that hurt customers –“*  [↑](#footnote-ref-5)
6. eg - the Chair at the 2016 AGM of (now named) Unity Bank was asked if the members’ questions would be written into the minutes. The response was “—*we’ll take advice on that matter* –“ (Such request arose because the written questions were responded to verbally in a general sense only, with some matters totally ignored.) Minutes provided in January 2017 did not list the questions put in writing and, in response to a query as to why, the response was such was decided on legal advice – with no further explanation given. [↑](#footnote-ref-6)
7. this point added herein to that presented in the Sept. 2016 Discussion Paper (referenced at para 3,a). [↑](#footnote-ref-7)
8. - SAKS argues time should be advanced, as to availability, when a Director voting process is required – see Proposal 3 [↑](#footnote-ref-8)
9. also see Commentary re Proposal 9, Voting – concerning process for voting for directors at one credit union; not by postal vote or optional attendance, but where physical attendance is seemingly mandatory to cast a vote at the relevant meeting. [↑](#footnote-ref-9)
10. E.g.- Australian Institute of Company Directors media release 20 June 2016 “*Company directors call for AGM overhaul”*  [↑](#footnote-ref-10)
11. The Australian, 20 October 2015, “---*APRA concerned fund directors overstay* ---“

 [↑](#footnote-ref-11)
12. Partial extract from Rules pertaining to a de-mutualisation test – “ **-- *control*** *means the ability or power of an* ***entity:*** *(a)**whether direct or indirect; --- to dominate decision-making, directly or indirectly, in relation to the financial and operating policies of any other entity ------ “* 6 COBA August 2015 submission to the Financial Services Enquiry, at p8 “—*consumers are entitled to simple and clear information that allows them to make informed decisions ---“*  [↑](#footnote-ref-12)
13. ASIC website / May 2005 Discussion Paper per following part (3) - Observations [↑](#footnote-ref-13)
14. ASIC – ‘Running a Company – Accessing company information, Share register’, para 3 [↑](#footnote-ref-14)
15. Source ‘The Morning Bulletin’ –per InfoChoice / Australian Regional Media, Queensland- 5/5/05 and 1/12/05. [↑](#footnote-ref-15)
16. S169 of the Corporations Act details contents to the Register which seemingly limits relevant contact data to names & addresses. This means that any member who had a Register copy is limited to a costly, cumbersome, & ‘time poor’ mail process to establish contact. However, in contrast, a mutual ADI – by virtue of email contact data held relevant to its banking services for virtually all members – is able to access & use that medium to solicit member actions of a corporate nature – & which medium detail would probably be denied to a member. At the least this appears to display a lack of balance when it comes to member rights & hence to our view the Board should advise email contact information as part of the Register disclosure mechanism (or – as put at Proposal 2 - the Board itself should distribute agreed material to members). [↑](#footnote-ref-16)
17. requiring that the commercial/legal Scheme involve an independent experts report pursuant to clause 29(4)(c) of Part 5, Sch 4 of the Corporations Act as the basis to Directors’ recommendation that the Scheme is in the best interests of members; as set forth in the 22 February 2016 report by Lonergan Edwards & Associates Limited re the YCU/Auswide merger. [↑](#footnote-ref-17)