

Co-operatives Council

Application by Forbes, et al. for reinstatement under s129 of the Co-operatives Act, 1992 as members of Dairy Farmers Milk Co-operative Ltd

The Co-operatives Council was constituted by Ms Marie Winter, Ms Helen McCall, Ms Suzanne Henderson, Mr Ron Haile and Mr Paul Hart

Order:

Preamble

The Co-operatives Council is established under Section 414 of the Co-operatives Act 1992. Section 129 gives the Council a discretion to determine that the cancellation of a person's membership was unreasonable in the circumstances of a particular case.

The Council has a general policy role under the Act, and it has a particular role in the determination and operation of active membership requirements as between members and the co-operative.

The Matter before the Council

The Council received Applications from a number of former members of Dairy Farmers Milk Co-operative (the Co-operative) requesting consideration under Section 129 of the Act. In this matter, the active membership requirement contained in the rules of the Co-operative is that members must supply 200 litres of milk over a seven day period. In the day to day operation of the Co-operative, and for commercial reasons, members were required to sign milk supply contracts, as authorised by s78 of the Act as well as the Co-operative's rules. The individual milk supply contracts required members to supply a continuous, regular and commercial quantity of milk. The actual amount varied as between members, however, in every case it was an amount that was in excess of the active membership requirement under the rules.

The effect of sections 127 and 133 as well as the Co-operative's rules is that the board of the Co-operative was mandated to cancel the membership of a person if the member became inactive and the member remained inactive for a period of 12 months.

The board was also required to send out a notice to the inactive member which had the effect of giving the member one month's notice of impending cancellation.

The Co-operative was the holder of a 20% parcel of shares in Australian Co-operative Foods Limited (ACF). As a result of a Scheme of arrangement and then a subsequent sale of the shares in ACF (also known as Dairy Farmers) to another entity, the Co-operative received a large sum of money. It was proposed that this gain would be distributed to members by way of a special dividend of \$1.68 per share.

Cancellation of membership entails the automatic forfeiture of shares. Each of the Applicants were members whose membership was cancelled and shares forfeited prior to the 1st December 2008. The Co-operative declared the special dividend on 9th

December, 2008 with the result that none of the applicants received the special dividend.

Each of the Applicants became inactive during 2007 and they each received two letters setting out their membership status. The first letter is referred to as the 'Change of Status letter' and the second letter is referred to as the 'One month notice letter'. A third letter was received which was the final cancellation letter. Subsequently, each member was repaid an amount representing the amount of paid up share capital that they held in the Co-operative on or about 28th November, 2008.

Conclusion:

In determining the question before the Council under s129 the Council has concluded, by majority, that in the circumstances the cancellation of each of the Applicants' membership was unreasonable for the following reasons:

1. The two letters, being the Change of Status letter and the One month notice letter, contained the following words:
"... you will be entitled to interest on your share capital equivalent to the rate of dividend declared on shares during the post forfeiture period."

In the Council's view, the use of the word "entitlement" means something that is a given right and that no further action is required in order to claim it.

2. The same two letters also contained the following words:

"Under the NSW Co-operatives Act, for a period of five years from when your shares are forfeited, you are entitled to be regarded as a shareholder on the happening of certain specific events involving either a takeover of the Co-operative, the conversion of the Co-operative into a company or the winding up of the Co-operative."

This further statement using the same word, "entitled" led the Applicants to conclude that they did not have to do anything more to receive their 'entitlements'.

3. The Applicants, as at the date of the first two letters, were not given full disclosure by the Co-operative of their rights and obligations under the Active Membership Rule.

Order:

The council therefore orders that each Applicant is to be reinstated on the following basis:

1. The membership of each Applicant be reinstated effective from the date of forfeiture of their shares;
2. The membership of each Applicant is such that it entitles each Applicant to participate in the Special Dividend that was declared on 9 December 2008;
3. The entitlement of each Applicant, to the Special dividend, will be on the basis

of their shareholding at the date of their change of status to that of Inactive Member;

4. The membership of each Applicant shall be cancelled twenty four (24) hours after payment of the Special dividend to the member.

Date: 5 February 2009

**Alana Eslick
Secretary to the Co-operatives Council**

Mr Hart and Mr Haile dissented for the following reasons:

1. Each of the Applicants left the Co-operative of their own free will,
2. They either chose to supply another co-operative or to retire,
3. The Council's role is not to determine whether the Co-operative made any promise to any of the Applicants nor what the content of that promise was,
4. Members were provided with appropriate and proper procedure,
5. There are no grounds to support that the cancellation was unreasonable.