



New South Wales  
Supreme Court

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**CITATION:** DAIRY FARMERS MILK CO-OPERATIVE v  
CO-OPERATIVES COUNCIL [2009] NSWSC 862

**HEARING DATE(S):** 5 August 2009

**JUDGMENT DATE:** 27 August 2009

**JUDGMENT OF:** Bryson AJ at 1

**DECISION:** Proceedings dismissed with costs.

**CATCHWORDS:** CO-OPERATION - Membership - rights of active members  
inactive members and former members - Dairy Farmers  
received large capital payment on takeover of ACFL in which  
Dairy Farmers held shares - Applicants, former members  
whose shares had recently been cancelled applied to  
Co-operative Council which after a hearing decided by  
majority to include Applicants in distribution - Dairy Farmers  
appealed to Court - consideration of powers of Council under  
Co-operatives Act s129 - powers extended to altering rights  
otherwise existing under legislation and constitution of a  
co-operative - HELD - Appeal dismissed.

**CASES CITED:** Dairy Farmers Milk Co-operative Ltd v Australian  
Co-operative Foods Ltd [2008] NSWCA 126; [2007] NSWSC  
1311  
Associated Provincial Picture Houses Ltd v Wednesbury  
Corporation [1948] 1 KB 223  
Water Conservation and Irrigation Commission v Browning  
(1947) 74 CLR 492  
Macedonian Orthodox Community Church St Petka Inc v His  
Eminence Petar The Diocesan Bishop of Macedonian  
Orthodox Diocese of Australia and New Zealand (2008) 237  
CLR 66 at 90

Klein v Domus Pty Ltd (1963) 109 CLR 467 at 473  
Minister for Immigration and Multicultural Affairs v Eshetu  
(1999) 197 CLR 611  
House v The King (1936) 55 CLR499 at 504  
Buck v Bavone (1976) 135 CLR 110

**PARTIES:** Dairy Farmers Milk Co-operative Ltd - Plaintiff  
Co-operatives Council of New South Wales First Defendant  
(submitting)  
Scott Barnett and Thirty others - Second Defendants

**FILE NUMBER(S):** SC 11129/09

**COUNSEL:** Mr I Jackman SC with Mr RM Foreman - Plaintiff  
Mr J Stoljar SC with Mr G Lucarelli - Second Defendants

**SOLICITORS:** Addisons  
Australlegal

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IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COMMON LAW DIVISION  
Corporations List

2009/11129

BRYSON AJ

Thursday, 27 August 2009

DAIRY FARMERS MILK CO-OPERATIVE LTD v CO-OPERATIVES  
COUNCIL AND ORS

JUDGMENT

- 1 BRYSON AJ: The dairy industry is productive of lawsuits. A long continuing co-operative or series of co-operatives of milk producers with the trade name 'Dairy Farmers' marshalled the product of many dairy farmers into milk supply distribution and manufacture. The events now relevant begin with restructuring arrangements in June 2004 for Australian Co-operative Foods Ltd ("ACFL"). The plaintiff Dairy Farmers Milk Co-operative Ltd ("DFMC"), was formed as a co-operative of dairy farmers to which its members would supply milk, in turn to be supplied to ACFL for processing and marketing. DFMC made contractual arrangements up and down, that is, with ACFL and with its own members, which left DFMC without any field operations; ACFL collected milk products from dairy farmers. Dairy farmers were not obliged by law to participate in the supply chain in this way; the relationships were contractual, including contractual obligations imposed by the rules of DFMC.
  
- 2 Members of DFMC typically held shares in ACFL as a result of the restructure in 2004. DFMC had a large shareholding in ACFL. As ACFL remained a co-operative after the restructure in June 2004, DFMC's holding in the share capital of ACFL was limited by law to 20%; see Co-

operatives Act 1992 (NSW) s 289(1). Movements in the membership of ACFL made DFMC's holding exceed this restriction, and led to litigation in which it was established that DFMC was limited to 20% of the shareholding. See *Dairy Farmers Milk Co-operative Ltd v Australian Co-operative Foods Ltd* [2008] NSWCA 126; [2007] NSWSC 1311 (Hammerschlag J). In 2008 there was another large turn of events and restructure in the affairs of ACFL, and the present appeal arises out of it. ACFL was taken over and all shares in it were transferred to National Foods Ltd. When this takeover came under consideration in 2008 it could be expected that when DFMC was paid for its 20% shareholding in ACFL the proceeds or a large part of them would be distributed to its members, as DFMC's dealings with ACFL were in practical terms the whole of DFMC's activities.

- 3 ACFL made a scheme of arrangement with its members, approved by this Court on 18 November 2008 [2008] NSWSC 1221, ceased to be a co-operative and became a corporation under the Corporations Act. The shareholders in ACFL were paid for their shares and DFMC received about \$91,589,000. At the annual general meeting on DFMC on 10 December 2008 its members declared a special dividend of \$1.6897 per share. This is a dividend out of capital, not out of annual trading profits. The special dividend was not, of course, available to former members of DFMC. Continued membership of DFMC depends in part on continued activity in dairying and continued participation in DFMC's trading activities. From time to time active members ceased to supply product to DFMC (or to ACFL under contractual arrangements with DFMC) and passed, under detailed provisions of DFMC's Rules, to the status of inactive members; then after a time, their membership ended, their shares were cancelled and their capital was returned to them. Under the Act and the Rules DFMC was obliged to return their share capital but had up to 12 months after cancellation to do so and was not obliged to pay interest in

the meantime. In accordance with its commercial interest DFMC had never since it became active in 2004 repaid capital until about the time when the 12 months expired and it was obliged to repay.

4 Thirty-one persons who formerly were members of DFMC and whose membership had been cancelled at various dates between 31 March 2008 and 31 October 2008 are the second defendants, respondents to this appeal. They are some (but not all) of the former members who, before or when prospects of restructure of ACFL and receipt by DFMC of a large payment for its shares came into prospect, had ceased to be members and were waiting for DFMC to repay the capital on their shares. Retaining share capital after cancellation did not keep the shares in existence in any sense. In the cases of these 31 former members, when the prospect of the restructure came under consideration their shares had been cancelled and they were waiting out the arrival of various dates when DFMC would become obliged to pay and could reasonably be expected to pay their share capital. These thirty-one persons were no longer members of DFMC by 18 November 2008 when the scheme of arrangement was approved and had no entitlement to participate in any dividend declared then or later. Their only legal entitlement in DFMC was repayment of their share capital. DFMC in a complete departure from its earlier practice since 2004 repaid all their capital early, on or about 28 November 2008, and did so without paying them any interest. When the dividend was declared on 10 December 2008 they were not members and were not entitled to any payment.

5 These thirty-one persons applied to the Co-operatives Council on 9 December 2008 for reinstatement of their membership pursuant to s 129 of the Act so that they could receive the special dividend which was then proposed and was declared the following day. I will speak of them as the applicants. The Council, in a decision which dealt only with the rights of

those who applied to it, made an order on 5 February 2009 reinstating the membership of the applicants effective from the dates of forfeiture of their shares, so as to entitle them to participate in the special dividend as inactive members, and also ordered that their membership should be cancelled 24 hours after payment of the special dividend. The proceedings before me are an appeal by DFMC against that decision. The Co-operatives Council itself is the first respondent, and it filed a submitting appearance and took no part in the hearing. The applicants opposed the appeal, in which they too were respondents.

- 6 The Co-operatives Council is an administrative body. It was created under Part 15, Division 2, s 414 of the Act and has the functions conferred by s 417. Members are appointed by the Minister (s 414(2)) and in the exercise of its functions the Council is to have regard to policies determined by the Minister and to act consistently with them; see s 4(3). The provisions of Schedule 5 of the Act relating to the Council's procedure are appropriate for an administrative body and do not provide for proceedings in any way characteristic of a tribunal or judicial body. Section 417 is:

**417 Functions of the Council**

The Council has the following functions:

- (a) to encourage the development and integration of the co-operative sector,
- (b) to advise and make recommendations to the Minister on the following matters:
  - any action to be taken for promoting co-operative principles and for encouraging and assisting in the formation of co-operatives
  - policies for the administration of this Act and the regulations
  - the regulations to be made under this Act
  - such other matters as may be referred to the Council by the Minister or as may be prescribed,
- (c) such other functions as may be conferred or imposed on the Council by or under this Act.

7 Among the functions imposed under the Act are functions under s 129:

**129 Order of Council against cancellation**

- (1) The Council may, if satisfied in a particular case that the cancellation of a member's membership under section 127 was or would be unreasonable, direct by order in writing that the membership should not have been cancelled or should not be cancelled.
- (2) While such an order is in force:
  - (a) the membership concerned is not required to be cancelled and any shareholding of the member is not required to be forfeited, and
  - (b) the person whose membership was cancelled is entitled to be reinstated as a member of the co-operative with all the rights and entitlements (including any shareholding) attaching to or arising from the former membership.
- (3) Reinstatement of a member under this section is to be effected in accordance with the directions of the Council.

8 Exercise of powers in s 129 may, as they did in this case, come under the Council's consideration when a person whose membership has been cancelled applies to the Council for consideration, but that is not the only circumstance and the Council could set itself in motion to consider whether to exercise the power in s 129(1) or act on information from some other source. The Council is obliged by the general law to observe fair proceedings or natural justice in making a decision affecting the rights of persons, but the Act does not deal with these procedural obligations. It is not part of the case of any party to claim that there was any failure to accord a fair hearing. The Council held a hearing on 9 December 2008, received information and heard submissions on behalf of DFMC and of the applicants, and made a statement in writing showing what had happened in the inquiry and the conclusions reached. When it made its order on 5 February 2009 (AB1/17-19) the supporting reasons were articulated in short form, little more than an outline, in a way which I regard as appropriate for an administrative body, and not in a way which would be expected of a judicial body. The reasons given by the Council cannot be regarded as a full articulation of its findings of fact and of the

reasoning processes employed in arriving at them; however this is not a criticism. Five of the (potentially) nine members took part in this consideration; the decision was by a majority of three, while the minority of two stated reasons which also appear in the document.

9 As the terms of the Council's order plainly show, the order did not simply give effect to the rights of the applicants as determined in accordance with the Act, the rules of DFMC and the facts and events which had happened. It was not to my understanding disputed on appeal, nor was it disputable, that all the facts and events necessary to bring about cancellation of membership had happened. In my opinion the key issue in this appeal is whether the Council is authorised by s 129(1) to go beyond the legal rights of a co-operative and a member with respect to whether membership should have been cancelled and to make an order directing a result which would not arise in the application of the Act and the Rules; to produce a result different to the result the Co-operative and its Board should have arrived at. If the power in s 129(1) limits the Council to deciding whether the cancellation of membership was lawful and regular, there is no doubt that DFMC and its Board proceeded correctly and that the memberships had been cancelled. If (on the other hand) s 129(1) empowers the Council to make a decision altering rights with respect to cancellation of membership which would exist otherwise, I regard the Council's order as within its power.

10 The power conferred on the Council by s 129 to make a direction about cancelling membership is a discretionary power; this is indicated by the word "may". The discretion is a wide one but it is limited by the context of the statute by which it is conferred, and must be exercised in good faith for a purpose relevant to the administration of the Act and the objects of the Act. The restraint is that indicated by the *Wednesbury* principle; if reasonable persons in the position of the Council could take the view that

the discretion should be exercised in the way they exercised it, having regard to those objects and purposes, its exercise is lawful and valid. The Council's good faith is not challenged, and the relation between the order and the available relevant considerations is not challenged, except that it is said that the power in s 129(1) is limited to determining rights.

- 11 The grounds on which a decision made in exercise of a statutory power by an administrative officer should, when reviewed by a Court, be upheld and the limits of exercise are a frequently recurring subject of judicial decision and are referred to in many places. Judicial formulations are not completely uniform. Those now authoritative should be traced to two approximately contemporary decisions, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 and *Water Conservation and Irrigation Commission v Browning* (1947) 74 CLR 492. In *Browning* Dixon J said at 505, dealing with the statute there under consideration and the power to grant or refuse consent for the transfer of a lease:

"But there is no positive indication of the considerations upon which it is intended that the grant or refusal of consent shall depend. The discretion is, therefore, unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view."

- 12 "...The discretion is confined only by the subject matter, scope and purpose of the legislation" - *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 90 (Gummow ACJ Kirby Hayne and Heydon JJ). The authorities at note (78) include *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 where Dixon CJ said:

"This Court has in many and diverse connexions dealt with discretions which are given by legislation to bodies, sometimes judicial, sometimes administrative, without defining the grounds on which the discretion is to be exercised and in a sense this is one

such case. We have invariably said that wherever the legislature has given a discretion of that kind you must look at the scope and purpose of the provision and at what is its real object. If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion. But within that very general statement of the purpose of the enactment, the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case."

- 13 The limitations of *Wednesbury* unreasonableness were referred to in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611. The discussion of *Wednesbury* unreasonableness by Gleeson CJ and McHugh J at 628 again illustrates what is involved, with the advantage of reference to authorities including authority in the House of Lords and the High Court. There are many other authorities and references and it would be almost impossible, and it is not necessary, to state them exhaustively.
  
- 14 The exercise of the discretionary power indicated by the word "may" is contingent on the Council being satisfied as stated in s 129(1) - "if satisfied **in a particular case** that the cancellation of a member's membership under s 127 was or would be **unreasonable**". (I have emphasised some words) It was conceded by DFMC's senior counsel, in my opinion correctly, that the question of the Council's satisfaction is a discretionary question open to challenge only within the restrictions articulated in *House v The King* (1936) 55 CLR499 at 504 - 555 (Dixon Evatt and McTiernan JJ). Counsel's contention was to the effect that the Council took a wrong view of what it was to be satisfied of, and considered matters which were not available and came to a conclusion which was not available on a correct understanding of s 129(1) and its reference to the matter on which the Council was to be satisfied, and the reference to what was or would be unreasonable.

- 15 In *Buck v Bavone* (1976) 135 CLR 110 Gibbs J made observations which bear on provisions such as s 129(1) and the question of satisfaction of a stated matter for which it provides. Gibbs J was addressing Constitution s 92 and its operation as then understood, in which control of interstate trade by an excessively wide discretionary power might infringe s 92; it was not his Honour's concern to state the authorities which underlay this then-recurring consideration in s 92 cases. Gibbs J said at 118-119:

"It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts. *Hughes and Vale Pty. Ltd. v. New South Wales* [No. 2] itself was a case of that kind. Where the authority is required to be satisfied of the existence of particular matters of objective fact, the position may be very different. It may then be possible to show clearly not only that the material facts existed but that an authority acting in accordance with its duty could have reached no other conclusion than that they existed."

- 16 There is no privative provision in the Act restricting judicial review of decisions of the Council, and acts of the Council in excess of its statutory powers may be controlled by judicial review. There is also the right of appeal conferred by s 419, under which DFMS brings this appeal:

#### 419 Appeal to Court from decision of Council

A person aggrieved by a decision of the Council under this Act may appeal against the decision to the Court in accordance with rules of court.

- 17 In relation to such an appeal UCPR 50.16 provides (and in the terminology of Part 50 the Council is a court: see UCPR 50.2):

**50.16 Conduct of appeal**

- (1) If the decision under appeal has been given after a hearing, the appeal is to be by way of rehearing.
- (2) The higher court has the powers and duties of the court, body or other person from whom the appeal is brought, including powers and duties concerning:
  - (a) amendment, and
  - (b) the drawing of inferences and the making of findings of fact, and
  - (c) the assessment of damages and other money sums.
- (3) The higher court may receive further evidence.
- (4) Despite subrule (3), where the appeal is from a judgment after a trial or hearing on the merits, the higher court may not receive further evidence except on special grounds.
- (5) Subrule (4) does not apply to evidence concerning matters occurring after the trial or hearing.
- (6) The higher court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been given or made.

- 18 Section 419 is an altogether general enactment relating to decisions of the Council under the Act, including decisions in which there had not been a hearing, and to which provisions of UCPR 50.16 would not apply; for those the field for debate would be much narrower.

- 19 In my understanding of my duty on appeal by way of rehearing, it is only if the decision under appeal is first shown to be erroneous, which in this context means in excess of the power, that I am to address in detail the facts of the matter and come to my own conclusion about whether I am satisfied of the matter referred to, and on how the discretion should be exercised. Only if, by express provision or necessary implication, the legislation conferring appellate power required entire reconsideration *de novo* should I embark on such consideration without passing this stage.

Section 419 does not require reconsideration *de novo*. If the Council has acted within the limits of its powers the Court does not choose what the Council ought to do.

20 UCPR 50.16 applies because the Council's decision was given after a hearing. I received evidence of what took place at the hearing, not a complete transcript of the events, and I also received a volume of evidence on some incidental matters. The debate in the appeal related principally to the nature of the power in s 129(1), and to the conclusions of fact which I should reach and act on if the power is limited as the appellant contends. There is no real doubt about those facts and there was nothing in the nature of a debate about credibility. Notwithstanding UCPR 50.16, the rehearing is not a rehearing of all matters under consideration *de novo* and the ordinary restrictions or gateways of appellant power with respect to discretionary decisions apply. It was not contended otherwise.

21 The objects of the Act are stated in wide terms and include in s 3(b):

“ to promote co-operative philosophy, principles, practices and objectives...”

22 Section 6 contains a statement of co-operative principles which, under s 7, have a part in the interpretation of the Act. Co-operative principles in s 6 include:

**“Member economic participation**

Members contribute equitably to, and democratically control, the capital of their co-operative. At least part of that capital is usually the common property of the co-operative. They usually receive limited compensation, if any, on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes: developing the co-operative, possibly by setting up reserves, part of which at least would be indivisible; benefiting members in proportion to their transactions with the co-operative; and supporting other activities approved by the membership.”

Section 7 is:

**“Interpretation to promote co-operative principles**

(1) In the interpretation of a provision of this Act or the regulations, a construction that would promote co-operative principles is to be preferred to a construction that would not promote co-operative principles.”

23 I particularly notice “benefiting members in proportion to their transactions with the co-operative”. The broader view of the power in s 129 is an interpretation supported by reference to s7; but s 129 yields the same interpretation even if there is no recourse to s 7.

24 Co-operatives are profoundly different from joint stock companies. Membership is for people who participate in the co-operative activities. The Act provides, in s 116 and following, a scheme in which members who are not active become inactive members and then, if they remain inactive for a period, cease to be members; their membership is cancelled and (under s. 134) their capital is returned. In DFMC the period is 12 months: Rule 109. Their shares are forfeited: s 128. Effect is given to these provisions by rule 13 of DFMC’s rules, which includes:

**13.2 Active Membership Rules**

A member of the Co-operative will be an \* active member of the Co-operative on a particular day (the “test day”):

13.2.2 in connection with the carrying of Primary Activity A, if the member complies with at least one of the following paragraphs:

**(a) The Direct Supply Rule**

the member has supplied at least 200 litres of \*milk (not acquired from a third party) to the Co-operative in any 7 day

period during the \*relevant period;

25 Part 6 of the Act deals with active membership requirements: see s 64(1). The rules of DFMC prescribe active membership requirements; they are expressed in a way which I find obscure, but centrally active membership requires delivery of 200 litres of milk in the course of a week within a whole period of eight weeks. Each of the applicants went out of supply and ceased to be an active member within these provisions. This happened for various reasons; some retired or left the industry, some decided to supply milk to a different purchaser not involved in the arrangements between DFMC and ACFL, while continuing to produce milk, in some cases on a large scale. Some gave up dairying when they found it no longer economic, for various reasons, prominently drought. However that may be, they all passed out of the category of active members and became inactive members and later there were declarations by the Board under s 127(1) cancelling membership in the circumstances stated in s 127(1)(b).

26 DFMC has not traded in milk, or operated in the field to collect, transport or store milk. Its operations have depended, throughout, entirely on its contractual relationship with ACFL for collection and storage of milk. Active members have contractual relationships with DFMC under which they are contractually obliged to deliver to ACFL much larger volumes of milk than the active membership requirements. In the Council's words "the individual supply contracts required members to supply a continuous regular and economical quantity of milk." A milk purchasing policy established by ACFL and agreed to by DFMC required minimum levels of collection at 400 litres per pick-up and collection on a daily or alternate day basis. To fit into the practicalities, there would have to be deliveries at the rate of 400 litres at the least, and every day, or alternate day, not within a two week period. The amount required increased and from July 2008

became 600 litres and from 1 January 2009 it was 800 litres per pick-up. It would not have been easy for an inactive member to return to compliance because delivery of 200 litres of milk would be outside the range of what the contractual obligations would require and what ACFL could be expected to do with respect to collecting milk from suppliers; small volumes would have been economically useless. Nominal or token compliances with Rule 13 involving proffer of 200 litres once in a seven-day period could not have happened in practicality.

27 These considerations would have impacted on different applicants in different ways. Some were still in high volume production but delivering elsewhere and could, if they had been so minded, have resumed large volume delivery to ACFL. For others large volume delivery was not practical; but in concept they probably included some who could have reorganised their affairs and embarrassed DFMC with proffers of delivery of 200 litres of milk. Someone with an acute awareness of the active membership rule, adept at manoeuvre and highly motivated to re-qualify so as to share in the expected advantages might have pursued these possibilities; for all I know, some did. But the applicants did not and the acute pursuit of advantage in such ways is not characteristic of the co-operative movement or of dairy farmers. Although some expressed a view, usually in very general terms, that they would or could have returned to milk supply if they had seen the opportunity, none of them in my understanding established in a clear way the loss of a real opportunity to return to active membership which they would have exercised if the co-operative had pointed out the advantages of doing so.

28 In a number of circumstances cancellation of membership is prohibited; these circumstances are stated in s 131. Section 132 requires the Board of a co-operative to ensure that not less than one month's notice of intention to declare membership cancelled is given to a member. The applicants'

counsel contended that on a close reading of the provisions relating to losing active membership the applicants, or some of them, had not lost active membership until a later point than the Board regarded them as having done so and contended that for that reason the notices under s 132 had been delivered prematurely. I do not accept the argument presented about calculation of times, but it is not necessary to state my reasons because compliance with s 132 and delivery of timely notice are not made a condition of the effectiveness of a cancellation. The circumstances mentioned in s 131 are circumstances in which the Board is prohibited from declaring membership cancelled; there is no provision making cancellation interdependent with compliance with the notice requirement in s 132.

- 29 What the Board of a co-operative must do to declare an inactive membership cancelled is prescribed in detail by Part 6 Division 4, particularly s 127, and s 133 creates an offence for directors who fail to cancel membership as required by Part 6. These provisions serve the policy of limiting membership to persons who are participants in the primary activity and excluding people who have become no more than investors. Section 133 and the imperative language of s 127 give the Board no room for choice for the course they are to take if a member has not been an active member for the required period, in this case 12 months. Circumstances in which a Board may not cancel are also prescribed; circumstances stated in s 130 are the only circumstances in which deferral of forfeiture or deferral of cancellation of membership is authorised. The grounds stated in s 130 were not acted on here; the principal ground is (s 130(1)(a)).

“(a) if the board has reasonable grounds to believe that a member has ceased to be an active member due to unusual circumstances which prevent the member fulfilling his or her active membership obligations...”

- 30 So if the facts exist and the member has been inactive during a period of 12 months a co-operative's Board really has no choice. In my opinion ss 127 and 129 work together to provide a mitigation of s 127 by allowing another authority, not the Board but the Council, to depart from the imperative requirements of s 127.
- 31 On the terms of s 129(1) it is necessary, if there is to be a power of the Council to act, that there should be been a cancellation, or that there should be a prospective cancellation; meaning an effective cancellation
- 32 The view that the power conferred by s 129(1) is a broad one and extends to, as it were, remaking what would otherwise be the rights and obligations of the co-operative, its Board and its member is supported in my opinion by the terms of the satisfaction test in s 129. The satisfaction test enables the Court to address "a particular case" and come to view about that, and to address whether cancellation "was or would be unreasonable". There is no test of reasonableness and no element of s 127 turns on whether the member's losing membership is reasonable or not. Everything about the Board's decision to cancel is mandated by the Act: it is none of their business whether or not cancellation is unreasonable. There is a reasonableness test for deferral in s 130, but I do not think that it can be correct that the reference to reasonableness in s 129 appears there so as to pick up instances where the question of deferral under s 130(1)(a) had been considered and refused. That is only a small part of the subject.
- 33 If the concerns of the Council under s 129(1) are limited to the legality of a cancellation decision, and the Council has no room for action apart from deciding the facts and applying the law, action under s 129 would be limited to resolving disputes which could be resolved by the Court. It would not follow that s 129 would be superfluous; access to the Council is simpler than access to the Court and the Council can set itself in motion

under s 129. However if the language of s 129 is understood to confer power on the Council as an administrative body to mitigate what are otherwise imperative requirements, it is far easier to understand why s 129 has a place in the act. If the power given to the Council was intended to be the simple power of adjudication, that power could in my opinion have been clearly expressed in a much simpler way than in the words of s 129(1).

34 The reading of s 129 in which the powers conferred are ample is not a difficult one. The power to mitigate a cancellation is withheld from the Board; it is conferred on the administrative body which is to encourage the development and integration of the co-operative sector (s 417(a)). That body is under ministerial control, as to membership and policy; it is a branch of the administration. It is a suitable body on which to confer the power of considering, in the course of the administration of the Act, what would be reasonable or unreasonable in a particular case and exercising administrative discretion whether or not to intervene. The question whether or not cancellation by the Board would be unreasonable although the Board must under penalty make the cancellation is difficult to understand; the introduction of the concept of reasonableness indicates that a different test is to be applied by the Council to that applied by the Boards of co-operatives.

35 My conclusion is in favour of the broader view of the power. If the narrower view were correct the appeal could not fail. Everything which the Board did about cancellation was in accordance with the prescribed provisions of the Act and the rules. What the Board did in the later events, including the Board's decision to return the capital earlier than it was its ordinary practice to return capital, was lawful.

- 36 I turn to consider whether the Council's order should have been made on the broad view of s 129(1).
- 37 Under section 134 a co-operative must within 12 months after the date of cancellation repay the amount due to the former member (or apply it in some other ways as provided) and the amount due includes any amount paid up in respect of shares forfeited. A former member may be readmitted, or may be regarded as shareholder in some circumstances; but these do not apply in the present case.
- 38 In respect of each of the applicants DFMC followed a routine when they became inactive in that they had not supplied milk for eight weeks. The first letter, for which there was no statutory requirement, was in this form.

Dear Member

**Membership - Change of Status - DFMC**

It is now more than eight (8) weeks since you supplied milk to Dairy Farmers which means under the rules of Dairy Farmers Milk Co-operative Limited (DFMC) your status is required to be changed from active membership of DFMC to inactive membership, effective from the date you ceased supply i.e. 31 July 2007.

During the period whilst you are an inactive member your shares will qualify for any dividend declared. As an inactive member, the NSW Co-operatives Act stipulates that you will not be entitled to vote. At the end of 12 months of inactive membership, you will be notified that your membership has been cancelled and your 26,716 shares in DFMC have been forfeited.

No later than 12 months following the forfeiture of your shares you will be repaid the paid up capital on your shares less any monies (if any) owed by you to Dairy farmers.

In addition, the Board has decided, although it is not required by the NSW Co-operatives Act to do so, that for the period of not more than 12 months during which your share capital is held by the Co-operative after forfeiture of your shares ("the post forfeiture period"), you will be entitled to interest on your share capital equivalent to the rate of any dividend declared on shares during the post forfeiture period.

#### **FIVE YEAR PROVISIONS AFTER FORFEITURE OF SHARES**

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.

If this happens, we will write to you and give you the opportunity to buy back the shares (at \$1.00 each) you previously held prior to forfeiture. Therefore, if you change your address during the 5 year period, please advise this office of your new address.

Thank you for your support during the period of your milk supply to the Co-operative.

Yours faithfully

[Name omitted]

**Share Registry Manager**

**On behalf of the Board of Directors**

39 Then later when there had been no supply for at least 11 months DFMC wrote to the inactive member a letter with notice as required in s 132, in this form:

Dear Member,

**One months notice before cancellation of membership**

Our records show you have not supplied to either Australian Co-operative Foods Limited (ACF) or to Dairy Farmers Milk Co-operative Limited (DFMC) for a period of at least 11 months. Under section 132 of the Co-operatives Act this Co-operative is obliged to give you one months notice of its intention to declare your membership of DFMC cancelled.

It is the intention of the Co-operative to declare your membership cancelled (and your shares forfeited) one month after the date of service of this notice on you.

No later than 12 months following the forfeiture of your 26,716 shares you will be repaid the paid up capital on your shares less any monies owed by you to the co-operative.

In addition, the Board has decided, although it is not required by the NSW Co-operatives Act to do so, that for the period of not more than 12 months during which your share capital is held by the Co-operative after forfeiture of your shares ("the post forfeiture period"), you will be entitled to interest on your share capital equivalent to the rate of any dividend declared on shares during the post forfeiture period.

## FIVE YEAR PROVISIONS AFTER FORFEITURE OF SHARES

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If this happens, we will write to you and give you the opportunity to buy back the shares (at \$1.00 each) you previously held prior to forfeiture. Therefore, if you change your address during the 5 year period, please advise this office of your new address.

Yours faithfully

[Name omitted]

Share Registry Manager

- 40 When membership was cancelled, DFMC wrote to the former member notifying this fact. None of the letters dealt with the prospective reconstruction of ACFL which was under consideration for some months in 2008, or dealt with the prospect that DFMC would receive a large amount of money for its 20% shareholding and that there would be a distribution to members. A large change of affairs such as a takeover or float of ACFL was in prospect and was public knowledge for most of 2008. Some of the affidavits referred to this in information they gave to the Council. Just what form the change would take was not known, but the prospect of advantage to members of DFMC was visible and was seen.

Inactive members and former members could well have learnt something about the proposed reconstruction and takeover of ACFL from public sources, or from DFMC, and in a few cases statements which applicants made to the Council appear to show that they did know that there was some such prospect. I suppose an inactive member or former member with an acute sense of self-interest and investment opportunities might have seen the opportunity to retrieve active membership and participate in whatever benefits came out of the reconstruction. For all I know some former members did take up this opportunity, although dairy farmers are not characteristically acute or adept about manoeuvres in corporate affairs. The letters I have referred to did not in any way whatever refer to the pending reconstruction, or to any opportunities connected with it. References in some of the statements made to the Council suggest that some of the applicants understood that in some way (certainly not on a literal reading of them) the letters held out that participation in whatever benefits came into existence would be extended to the former members; or understood that if this was not so the letters would have explained that fact. The majority of the Council appears to have made some such interpretation of the situation created by the letters, although not of the terms of the letters.

- 41 DFMC did not depart in any way from its obligations toward former members under the Act, or in any significant way from the procedure required, and did not say anything in the letters which was misleading; nor did it depart from anything said in the letters, in any way which defeated any persons' rights. The indication that interest would be paid was gratuitous and was not binding, and it remained open to the co-operative to withdraw it, as the co-operative did. The reference to paying interest at the same rate as a dividend referred only to a dividend declared before repayment; the reader had available the insight, on full and informed consideration, that DFMC could choose to repay earlier than it

had done in earlier cancellations, and before any dividend had been declared. The change of policy and withdrawal of the decision to pay interest did not in fact have any adverse impact because no dividend was declared before repayment, hence if the policy had not been withdrawn, no interest would have been paid.

42 A recurring theme in the statements made to the Council by a number of the applicants is that DFMC did not point out to them in detail what they would have to do to revive their active membership, and this was complained of. I can see no ground on which it was the duty of DFMC to tell members or former members what they could do. The significance of not telling members what opportunities they could pursue is something for the Council to weigh up, in the context of co-operative principles, not in the context of commerce and investment in a corporation.

43 Any recipient of these letters with a lawyerlike cast of mind and a strict understanding of language would understand and could have foreseen the entire defensibility of the cancellation and repayment, tested by the provisions of the Act and without any impact of a decision under s 129. No estoppel or alteration of position could reasonably be based on receiving and clearly understanding the letters. This is the strength of DFMC's position if s 129 extends only to adjudication on rights.

44 If it were before the Court to decide whether the applicants had legitimate expectations, or a reasonable expectation, created by DFMC by its letters or in any other way, that they would be treated as participants in any advantage flowing from the reconstruction, they could not succeed. The actual terms of the letters, taken with the knowledge that should be imputed to members of the rules of the co-operative, would show that there was no legitimate or reasonable basis for such an expectation.

45 The reasons stated by the majority for their view that the cancellations of membership were unreasonable should not be picked over, and should not be treated, by the standards applied to judicial decisions, as if they were required to be a satisfactory exposition of the reasons for the decision. The Council's decision is to be tested by deciding whether it was within their power, not by considering how well they explained it. The exercise of a power and the process of explaining the exercise are different things. If the reasons, and also the exercise of the power on the whole of the facts which appeared at the hearing, should rightly be tested by legality, they are inadequate; but they do not show that the decision of the Board was wrong in any sense, or that it ought to be changed or corrected.

46 In their reasons the majority stated their conclusions thus:

**"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 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."

The minority reasons were also stated:

- "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."

47 Turning to the majority's ground one, the reference in the two letters to an entitlement to interest refers only to interest on shares; the letters do not refer to an entitlement to a share, dividend or whatever the prospective advantage might be called of a prospective sale of the shares in ACFL. Further the letters refer only to interest at a rate equivalent to the rate of dividend declared during the post-forfeiture period; on a reasonable understanding, they do not refer to a dividend which might be declared after the capital had been repaid and anything which could have been thought of as the post-forfeiture period had ended. The reference to an entitlement did not expand what this passage in the letters talked about into a reference to an entitlement in a case where no dividend was declared while the share capital still had not been repaid, although one was declared later. The practice of not repaying the share capital until a period of 12 months had expired was not referred to, and where repayment was referred to the words used on a fair reading indicate that

repayment might be made at any time within 12 months following forfeiture of shares. Turning to ground two, the passage referred to has no relation to the events which have happened, in which DFMC has not been converted into a company or wound up, and this passage and the use of the word "entitlement" in it gave no assurance of any entitlement in the relevant circumstances which later did happen. Ground three shows, to my reading, the Council's view that as at the time of the letters it was appropriate, if the letters were being written, to tell recipients what their rights and obligations were under the active membership rule, and to point out that there were courses available through which they could revive or attempt to revive their active membership. This consideration impacts differently on different classes of the applicants, according to the time at which their inactive membership ended and their shares were cancelled. The reference to full disclosure in ground three has no force in a discussion of legal entitlements because there was no duty or obligation of DFMC to disclose rights and obligations under the active membership rule, at the times of the two letters. The lawyer-like response is that the recipients of the letters were or had been members and were in as good a position to know what rights they had under the Act and the rules as the sender of the letter.

- 48 However on the broad view of the power of the Council under s 129 the reasons stated by the majority are, in my opinion, a reasonable basis, indeed quite a strong basis for the order that the Council made. The passages in the letters referred to in grounds one and two could well convey to a recipient that the recipient had established entitlements which the Board would respect and that these related to the current prospect of a large reorganisation of the co-operative's affairs. There was the context of current events, and there is also the absence of any reference whatever, on a lawyer-like reading, to the prospective reorganisation. Whatever particular members or former members made of the letter, people in the

position of members generally, unless they were unusually acute and understanding in dealing with correspondence from their co-operative, would understand that they were being given a general assurance about their rights in the current situation. In any event the reasons stated by the majority indicate that they took some view of this kind of the effect of the letters.

49 The reasons stated by the majority indicate, in my understanding, a view that people who had been active members of a co-operative until relatively recently, and were still participating in its affairs as former members if only in the very limited way of waiting until the co-operative found it suitable to return their capital, should be included in the distribution of the advantages flowing in a reorganisation which came under consideration before their final severance. A decision that the Council was satisfied that their exclusion by cancellation was unreasonable, and that the Council should make some other disposition, was in my opinion well within the bounds of the power, as reasonable people charged with exercising the power could decide to exercise it.

50 I do not regard the events and circumstances which happened later than the date of cancellation as irrelevant or outside the range of matters which should be considered when the Council decides whether it is satisfied that the cancellation was unreasonable; the terms of s 129(1) show that the Council might exercise its power before but also after a cancellation had taken effect, and I see no reason why, in the breadth of the concept of what is unreasonable, circumstances after the cancellation took effect should be excluded from consideration.

51 The power conferred on the Council is very wide, and the range of matters on which the Council could act is also very wide. The objects stated in the Act and the co-operative principles in s 7 show that it is appropriate when

exercising administrative powers to take views and approach the entitlements of persons in a different way to the ways of commerce and of corporations legislation. Everything revolves around participation in the co-operative activity, and benefiting members in proportion with their transactions with the co-operative is part of the co-operative principles. What is reasonable or unreasonable about cancellation of membership should be understood in a very ample way. It is not correct, in my opinion, that, as DFMC's counsel submitted, if the cancellation was lawful it could not be unreasonable. If the proposition is inverted, I accept that if a cancellation is not lawful it is unreasonable; but these are not corollaries.

- 52 In my opinion the view on which the Council must be taken to have acted that it was satisfied on the question of unreasonableness was a view available to them, was not based on any wrong view of the facts or any wrong principle, and should not be set aside and reopened for my consideration. I take the same view of the Council's discretionary decision to go on and make the order which the Council decided to make. It was contended that reinstatement merely to receive a special dividend was beyond the proper scope of s129, and that the detailed directions relating to return to membership, which was to cease after payment of the dividend, were beyond the power in s129. In my view the terms of the order, which were highly adapted to the instant case, were within the power to make directions in s129(3) and were appropriate directions to give effect to the Council's decision on the principal matter. Notwithstanding that the appeal is by way of rehearing, it is not for me to come to a conclusion on my own about unreasonableness or the appropriate form of order. Part of the consideration of reasonableness is consideration of what the Council as an administrative body concerned with what should be done in accordance with the provisions of the Act and with good policy, could regard as reasonable. My decision does not involve any criticism of DFMC or its Board; they appear to have acted

correctly within the Act and the rules, but the Council has lawfully made a different disposition.

53 It should be seen that the exercise of the Council's power did not involve any decision that the Board had acted wrongly or made an error; the Council had powers that the Board did not have, and the Board was constrained to act as it did. As far as I can see, the Board made no error but complied with its duty. However the Act did not give the Board the last word.

54 The reasons stated by the minority would, if they had been the basis of decision, be sufficient grounds for refusal on either view of s 129. If the question for the Council had been whether cancellation by the Board had been lawful and correct, the reasons stated by the minority would sufficiently express correct grounds for not intervening. Then too on the broader view, the reasons stated by the minority could not be impugned because they are grounds upon which reasonable people could decide that they were not satisfied that the cancellation was unreasonable. If the Council had acted on the grounds stated by the minority their decision would be correct and would be affirmed. The only thing wrong with the minority view is that they were a minority; they did not prevail.

55 My order has the effect of dismissing the appeal.

ORDER: Proceedings dismissed with costs.

I certify that this and the preceding 28 pages are a true record of His Honour's Reasons for Judgment.

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*T Armstrong*  
Associate  
27/8/09