

From the field : a sector in need of specialist support, not superficial scrutiny

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1. INTRODUCTION

In March this year, Choice published an article about the variable and inconsistent way that some Australian charities disclose information to the public (Choice 2008). The article was based on a survey of 11 large domestic and overseas aid charities. Despite its narrow focus, the article attracted significant attention from both the media and government.

In June 2008, the Choice article was referred to in Federal Parliament by the Australian Democrats (Commonwealth Hansard, 18 June 2008) who initiated a Senate Inquiry into the reporting and disclosure regimes in the not-for-profit sector (Senate Economics Committee 2008). By July, one journalist had proclaimed that “In an era of corporate regulation, most parts of the non-profit sector are unregulated” (Ferguson, 21 July 2008).

Unfortunately, the focus of the government and the media is often on the various regulatory exemptions available to charities and churches, particularly those that operate significant business arms. While these issues are worthy of debate, they often distract from the extent of regulation in the not-for-profit sector. Most people who volunteer or work in one of the 700,000 not-for-profit community organisations (**NFPs**) across Australia will confirm that, far from being unregulated, the sector is heavily regulated by a complex regime of overlapping federal, state and local laws.

PilchConnect is a specialist legal service for NFPs based in Victoria. In this ‘from the field’ piece we present case studies from our work in providing legal assistance to those involved in running NFP organisations. The case studies highlight the broad range of legal and regulatory issues NFPs face. The experience of many of our clients, often people involved in governing small, volunteer-based NFPs, is that navigating this myriad of regulation consumes too much of the time and limited resources of NFPs, and diverts focus from their core objectives.

2. ABOUT PILCHCONNECT

The Public Interest Law Clearing House Vic. Inc (**PILCH**) is an independent, not-for-profit organisation which is committed to improving access to justice and protecting human rights.

PILCH has long recognised that much of the work of NFPs is in the public interest. In particular, many provide support for people who are disadvantaged. Yet most NFPs are small, rely heavily on volunteers and have a limited capacity to access legal help (Woodward 2007). While legal aid and community legal sector funding is available for disadvantaged individuals (primarily in the areas of criminal and family law), there is currently no equivalent funding for NFPs to access legal advice. This is despite the positive role many NFPs play in preventing social exclusion and family breakdown (and thus the need for legal aid funding at the ‘crisis’ point).

For over a decade, PILCH has been helping NFPs who provide services in the public interest, gain access to *pro bono* (free) legal help. NFPs regularly approach PILCH for assistance with legal issues including incorporation, tax concessions, governance, fundraising, intellectual property, insurance, legal issues in managing volunteers and employment law, among many others.

By providing legal assistance to NFPs - in effect, 'helping the helpers' - PILCH assists NFPs to set up effective, well-governed and financially viable community organisations. In turn, these NFPs provide crucial support and assistance to the local communities in which they work.

In 2008, as a result of the growing demand from NFPs for free legal assistance, PILCH set up PilchConnect, a specialist legal service for community organisations. The PilchConnect service is to be officially launched on 19 November 2008. The service will include a legal information website, seminars on NFP legal issues, a telephone advice line in 2009 and referrals for eligible NFPs to PILCH member law firms for *pro bono* legal assistance.

3. CASE STUDIES

In Australia, it is not a simple task to set up an effective NFP organisation. The following case studies set out some of the major legal hurdles that many NFP organisations face.

Which legal structure?

One of the first legal decisions that many newly-formed NFP groups face is: should we incorporate? Those involved in governing a NFP organisation will be aware of the benefits of incorporation. These include the creation of a separate legal entity that can own property in its own name, and the protection that limited liability brings members. However, while the decision to incorporate may be an easy one for many organisations, the more difficult task is choosing the most appropriate incorporated legal structure for the organisation.

There are currently more than 20 different ways to incorporate a NFP organisation in Australia (National Roundtable of Nonprofit Organisations, 2004). Common options include an incorporated association, company limited by guarantee, proprietary company, trust, co-operative or aboriginal corporation. Some large, well-established NFPs are formed by Royal Charter and separate Acts of Parliament. There are also a variety of specialist forms of incorporation (e.g. trade unions and parent associations).

Some of these structures are governed by Commonwealth laws and can operate nationally; others are state-based legal entities. Each structure has its own (often lengthy) statutory requirements, compliance obligations and limitations which have implications for crucial aspects of the NFP's operations, such as:

- where the organisation can operate or 'carry on business' ;
- what activities the organisation can undertake (i.e. trading activities);
- what reporting and audit requirements the organisation will be required to comply with;
- what kind of fees the organisation will be required to pay (both initial registration fees and ongoing costs such as audit costs, filing fees and late penalties);
- what kind of governance structure and voting rights the organisation wishes to have.

Understanding the differences between each structure, and choosing the most appropriate structure for an organisation's intended activities, is no easy task. Choosing the wrong legal structure can be costly, both in terms of money and administrative resources. This was the experience of the members of the committee of management of one NFP that was recently set up in Victoria :

Legal structure : case study 1

“When we incorporated, there seemed to be many different options before us, most of them we did not fully understand, but the three most practical seemed to be:

- (1) attempt to get auspiced by another organisation;
- (2) incorporate as a company limited by guarantee under the *Corporations Act 2001* (Cth); and
- (3) incorporate as an incorporated association under the *Associations Incorporation Act 1981* (Vic).

Option (1) was initially the most attractive as it could have given us easy access to deductible gift recipient (DGR) status under taxation law, thereby giving us eligibility for certain grants. We did not follow this path because of the uncertainty regarding the jeopardising of any host organisation’s DGR status (assuming we could find a host willing to take us on), and because it could have hampered our independence.

Option (2) was attractive to us as it meant that we would be able to operate in all jurisdictions in Australia, as we ultimately intended for our not-for-profit to operate interstate. However, upon further research we decided against incorporating as a company limited by guarantee as the process was expensive (over \$1000) and extremely burdensome (in terms of the financial, administrative and reporting obligations). As a completely volunteer-run organisation we didn’t feel confident that we would have the resources to be able to fulfill all of these obligations. However, as we grow rapidly, it seems more and more likely that we will eventually have to change our current structure. But if we do decide to do this it means that we would have to re-apply for DGR status, ABN and other tax exemptions which is time consuming, burdensome and provides us with organisational uncertainty. It also means it will be a lot more expensive for us to operate.

Option (3) was the most feasible in terms of cost and reporting obligations and was ultimately the structure that we opted for. The process was relatively simple and cheap enough (approx \$150).

However, when the opportunities arose to operate in Sydney and Perth last year, we received legal advice informing us that this may constitute “trading and conducting business” interstate which, absent registration with ASIC, would run contrary to law. As such, the group running the Sydney were advised to incorporate as a separate incorporated association, under NSW law. Due to lack of time and resources, the Perth group remained unincorporated.

However, at the end of the year, due to the confusion, risk and difficulties we faced by having different state-based organisations, we advised the NSW incorporated association to wind up operation and begin to operate through the Victorian incorporated association only. In order to operate in more than one state, we have had to register with ASIC as an Australian Registrable Body under the *Corporations Act 2001* (Cth), which has imposed additional compliance and reporting obligations on the organisation.

This combination of being an incorporated association [requiring us to comply with our own constitution and the *Associations Incorporations Act 1981* (Vic)] but also reporting to ASIC [requiring us to comply with certain provisions of the *Corporations Act 2001* (Cth)] is very unsatisfactory in terms of being subject to different multiple regulatory regimes.

While we are a small organisation, we still would like to operate nationally. However, there is currently no structure available to us that will enable us to do this affordably and efficiently. This will be an ongoing issue for us as we try to fit our organisation into one of these ill-fitting structures.”

The experience of the NFP organisation in Case Study 1 (above) is not uncommon. Many NFPs get caught up in the overlapping federal and state regulatory requirements of different legal structures:

Legal structure : case study 2

"We are a very small environmental non-profit organisation, supporting a national network of community-based incorporated associations. However, due to our national reach, we were set up as a company limited by guarantee. This brings with it the burden of governance requirements associated with large corporations. Our Company Secretary is required to understand and be across the many ASIC reporting requirements to ensure we are compliant and don't incur costs for late or missed filings; an expense we can least afford.

But in addition to this, to support our members, we are required to understand the basics of 8 sets of Incorporated Association laws in each state and territory, which is burdensome for a small resourced organisation such as ours."

As Case Study 1 (above) illustrates, many NFPs outgrow their initial structure. We are regularly contacted by NFPs that start life as one legal structure, but an expansion of their operations, or a change of mission, means the initial structure is no longer viable. For example, a group that starts as a small, volunteer-based co-operative with every volunteer signed up as a shareholder, may run into considerable administrative difficulty when its volunteer base expands into the hundreds. To remain viable, a NFP may need to migrate to a different legal structure, however this can be a complex legal task and the transition may often require expert legal help.

Notably, the problem of choosing the 'right' legal structure is not an issue the for-profit (business) sector faces. The national regime for companies came about after over 50 years of experimenting with various state and federal co-operative and mutual recognition schemes. National reform was finally achieved largely because business found the situation unworkable. The situation in the NFP sector is no different.

Financial reporting obligations and costs

The impetus for the Senate Inquiry on reporting regimes in the NFP sector, appears to have been influenced by a view that the sector wastes money on 'high' and 'hidden' administrative costs. The implication is that the public is not getting value for their donated dollar. The reality is that small organisations are often required to spend a significant percentage of their resources on reporting and audit costs:

Reporting and Audit costs : case study 1

"We are a small non-profit organisation, with 1.4 staff with a budget of just over \$200,000. We were set up as a company limited by guarantee because we needed to operate nationally. This brings with it the burden of governance requirements associated with large corporations. We are subjected to an annual financial audit, consuming approximately 2 weeks of precious staff resources and costing just under \$2,500."

Reporting and Audit costs : case study 2

"We would argue that there are high costs to doing things properly and limits to the extent to which pro bono services can be used. The costs of our external audit with a negotiated discount currently stand at 0.4% of turnover. This is in stark contrast to my experience of the costs of the external auditor of a statutory body with turnover 30 times the turnover of our

organisation, where the external audit costs are 0.014% of turnover.”

Audit costs are not only confined to companies limited by guarantee. A similar requirement to have audited accounts is imposed on Victorian incorporated associations, where their annual turnover or assets exceed a nominated amount. This requirement can see asset-rich but cash-poor NFP organisations spending nearly 20% of their turnover entirely on audit fees, an expense that can cripple a small organisation.

Audit costs are just one example of compulsory administrative costs. There are many others that accumulate as small organisations seek to comply with various regulatory requirements (see, for example, the case studies on tax and fundraising below). Smaller NFP organisations have less resources and these costs simply take up a greater percentage of total budget. Further, a lack of resources can sometimes compound the problem, as late penalties for reporting delays can add up quickly for many organisations (at over \$200 per month in the for companies limited by guarantee under the *Corporations Act*).

Tax concessions

In Australia, federal and state tax concession laws lack any discernible public policy rationale. It is widely agreed that the existing provisions for concessional taxation treatment of charities are confusing. As the National Roundtable for Nonprofit Organisations has stated:

“But it is in tax law that the greatest confusion is to be found. There are a great variety of concessions given by different levels of government, each to a variety of nonprofit organisations. It is impossible to find any set of principles underpinning the legislation that designates these concessions. There are no clear links between the concessions provided and public disclosure requirements. Not surprisingly, in such an environment regulation is confusing, contradictory and often unfair.” (NRNO 2004)

At PilchConnect, about 40% of the requests we receive for assistance from NFPs relate to tax concessions – in particular, deductible gift recipient (**DGR**) status. Nearly all applicants are confused about the terminology and the categories that exist. Even more confounding is the archaic constitution wording that organisations have to adopt to apply for concessions (requiring the use of words such as ‘destitution’ and ‘distress’).

The confusion is exacerbated because considerable anomalies have emerged over time. Some organisations within the same umbrella ‘group’ have experienced different outcomes regarding applications for DGR or tax concession charity status, depending on which local Australian Tax Office (**ATO**) office they applied to.

We are also contacted by NFPs which have DGR status, but have not realised that seemingly unrelated actions, such as changing the wording of their constitution, or entering into contract (such as an auspice agreement with another organisation), may jeopardise their tax concession status. However, it may not always be the voluntary actions of the NFP that causes the problem. The inconsistencies between overlapping federal and state legislation can cause small NFP organisations large legal problems:

Tax : case study 1

"We are a not-for-profit community organisation (company limited by guarantee), providing services in Victoria.

As a charitable organisation, we applied to the Australian Tax Office (ATO) pursuant to the *Income Tax Assessment Act 1997* (ITAA) and received endorsement as a public benevolent institution (PBI) (with access to GST concession, FBT exemptions and income tax exemptions) and in 2000 we received endorsement as a deductible gift recipient (DGR).

The Victorian Parliament then passed amendments to state legislation that required designated agencies to adopt specific wording in their constitution (objects and powers) if they wanted to be registered.

We sought legal assistance to make the necessary amendments to our constitution and a law firm re-drafted our constitution to comply with the state legislation, and we submitted the draft constitution to the ATO. We got a shock when the ATO advised that the amended constitution would not meet the ITAA requirements and threatened to revoke our status as a PBI, as well as our endorsement as a DGR! This news was extremely alarming to us as we were not sure if our organisation would be viable if we lost our tax concessional status.

Luckily, we were then able to work with the law firm to navigate the complex path of drafting constitution clauses that would comply with both state and federal laws. After many hours of legal work, we were ultimately successful in drafting clauses acceptable to both jurisdictions, and kept our DGR status."

Once again, organisations with tax concessions are subject to significant reporting requirements to maintain their concessional status:

Tax : case study 2

"We have been relatively successful in proving our charitable status. However, this has not been without extensive pro bono legal advice and assistance. We achieved endorsement to operate a DGR fund in November 2007. Our endorsement is based on its status as an eligible cultural organisation listed on the Register of Cultural Organisations (ROCO) administered by the Department of the Environment, Heritage and the Arts.

Key compliance requirements regarding DGR status include reporting donation-related activity to ROCO for every 6 month period and notification of any change to the address of the organisation, membership of the Committee, membership of the sub-committee administering the DGR fund etc. It is normal practice for the DGR status of an organisation to be reviewed every 2-3 years.

We have also succeeded in our application for Tax Concession Charity (TCC) status which enables us to receive exemption from income tax and fringe benefits tax obligations and eligibility for GST charity concessions. However, without specialised legal assistance, we would not have been able to access the tax benefits that exist for NFPs. It is difficult to understand the difference between all the tax concessions available for NFPs and why we need to make different applications for different statuses. Different statuses also require different compliance obligations, which further complicates the matter."

Perhaps the most worrying inquiries we receive are from community organisations that have, for years, assumed they were exempt from various taxes, only to receive a letter from the ATO advising them they are not. The outstanding amounts demanded can jeopardise the viability of the organisation.

Fundraising

The difficulty posed by separate, state-based regulation of the NFP sector is perhaps nowhere more evident than in the area of fundraising. As soon as an NFP seeks to raise funds from the public, it will encounter this murky area of the law. Should the NFP wish to raise money across Australia, it will have to grapple with eight markedly different state and territory-based fundraising laws.

There have already been a number of inquiries into fundraising laws in Australia. They have all concluded the variation between State-based fundraising laws results in duplication, significant expense, and enormous frustration for NFPs. The current laws prevent NFPs from raising much needed funding in an efficient way:

Fundraising : case study 1

As a small not-for-profit organisation which operates in other states, we are amazed at the multiple and inconsistent regulation of fundraising in different states, which has hampered our work. [Having different regimes in different states] seems like a completely inefficient way to regulate fundraising across the country. It also remains unclear whether we are able to use our DGR status nationally absent such licenses in each jurisdiction and, on this basis, whether we are able to apply for grants based in other States. Each State has unique requirements without there appearing to be any rational reason for such difference. For a small not-for-profit organisation such as ours, such a regulatory regime is difficult to understand.

In Victoria, even to hold a simple fundraiser event we have to apply for a license pursuant to the *Fundraising Appeals Act 1998* (Vic). In Victoria, organisations that only use unpaid volunteers and derive less than \$10,000 of gross income in any (tax) year are exempt from having to register as a fundraising entity. As such, our organisations' fundraising is not yet to the point where we have to register, but we may have to do so in future. However, this kind of exemption for small not-for-profits does not exist each piece of equivalent interstate legislation, which have their own registration and licensing systems.

In Victoria, raffles are regulated by another piece of legislation [the *Gambling Regulation Act 2003* (Vic)]. This Act requires that regardless of the level, or size, or type of a raffle, charitable organisations who wish to hold a raffle need to be declared as 'community or charitable organisation' by the Victorian Commission for Gambling Regulation (VCGR) before they may hold a raffle. We have been informed that we need to apply to the VCGR every 12 months, as this is the maximum length of time that such a declaration is operative for. All in all, this complicated and confusing system only encourages non-compliance.

Many NFPs struggle not only to comply with the various laws that regulate fundraising, but also the practical reality that it costs money to raise money:

Fundraising : case study 2

As a mid size community organisation, receiving very little government funding due to the limited attention being paid by State and Commonwealth governments to our particular segment of the health sector, we are forced to go to the public to raise nearly 100% of our funds. To disclose to the public that it costs around 60 cents to raise a dollar through one of our fundraising programs would, in the current environment, mean the demise of the program and the loss of half of our staff. We wouldn't be able to continue our work or provide services to people who suffer from [this health condition] who rely on us.

Given the difficulties posed by fundraising laws, some NFPs seek funding from government or philanthropic organisations. However, this may merely compound the legal issues faced by NFPs.

For example, some philanthropic funding is available only to NFPs that are incorporated and/or have a particular tax status. We are often approached by small unincorporated groups seeking legal assistance to incorporate and get DGR taxation status, primarily so they can apply to a philanthropic body for funding for their activities. After the incorporation and tax laws are explained, along with the requirements to maintain these, some conclude that it is 'just not worth it' for the funding they may receive. It is when we try to explain these laws to groups using interpreters that we are reminded just how anachronistic and illogical they are.

Volunteer management

Many NFP organisations rely heavily on the efforts and commitment of volunteers. However, the legal issues that surround the engagement of volunteers by NFPs are numerous. There is a lot of legal information about employee rights and entitlements, and the differences between an employee and an independent contractor. However, there are few resources that explain how the law applies to volunteers.

In a legal sense, volunteers differ significantly from employees. Employees have rights to workers' compensation, superannuation, leave (and other employee entitlements), which volunteers do not have. However, NFPs have to be careful about how they appoint and 'treat' their volunteers. In the event of an accident or the end of the volunteer arrangement, a lack of documentation about a person's 'status' as a volunteer, combined with how reimbursements, ex-gratia payments or other non-pecuniary benefits may have been paid, may leave an NFP open to an argument that the person was effectively an 'employee' despite being called a 'volunteer'. This may result in the NFP being liable for claims for unpaid salary, termination payments and other employee entitlements.

Another example relates to the ownership of intellectual property in NFP organisations. While there is an implied term in an employment contract that any intellectual property belongs to the employer, no such term exists when a NFP engages a new volunteer. Unless an organisation has requested volunteers to assign any intellectual property they create to the organisation, issues can arise as to the ownership of the intellectual property in training materials, publications and computer applications, among other creations.

Occupational health and safety (**OHS**) laws are another confusing area and there is a lot of uncertainty in the sector as to whether, and to what extent, the Victorian OHS legislation applies to NFP organisations that have no employees (that is, NFPs run entirely by volunteers).

Client feedback to PilchConnect reveals a number of ongoing legal issues in volunteer management:

Volunteer : case study 1

"The legal aspect of volunteer engagement is an emerging field, and one which is increasingly confusing. To give the most basic example, managers of volunteers are confused when it comes to dismissing volunteers - are volunteers subject to the same laws in relation to dismissal as employees? Can we or our NFPs be sued for unfair dismissal of a volunteer? Do discrimination laws apply?"

Volunteer insurance has also been highlighted in the media in the last decade, with a significant rise in the cost of public liability insurance pushing many smaller NFPs and sporting clubs to the edge. For many, it was simply not financially viable to continue. Personal accident insurance coverage for volunteers is still a confusing area for many, mainly due to variations in the definition of a volunteer

and who is covered by insurance. One charity I was involved with identified that it had 'volunteers', 'supporters' and 'event participants', depending on the level of risk and the control that the charity could exert over the risk.

Screening volunteers is a relatively recent development for many NFPs. In Victoria, there is now a confusing set of requirements around police checks and the new 'Working with Children Checks' (WCC). In some cases these checks (one or both) are mandatory; sometimes it is a question of what is best practice given the role the volunteer performs. It can be an expensive exercise for some NFPs, with a standard police check costing about \$14, although WCCs are free for volunteers. There are other differences between the two. WCCs are issued to individuals rather than agencies and 'belong' to the individual involved, so are transferable if the individual volunteers for more than one agency. However, police checks are generally not transferable unless the individual volunteer has applied and paid for his/her own. Normally the NFP applies and pays for police checks, so if an individual is volunteering for more than one agency (which is common), then each agency bears the expense of a police check for that one individual. This confusion and duplication is senseless and costly and could be avoided."

Volunteer : case study 2

'This area of law (employee and volunteer management) is a minefield for our organisation, which is in the transition from being a completely volunteer-run organisation to one that contracts or employs people to fulfill various roles and services.

As a very small, low-resourced organisation who cannot currently afford to pay its staff, it is extremely difficult to understand how we are able to remunerate people for the work that they do in even a limited fashion without exposing ourselves to the complexities of the employment law framework. This area of law is complex and unclear making it difficult to know the correct legal position and how we are meant to comply with the law.

The law related to governing volunteers is confusing and if it were not for the recent NFP seminar on this issue, we would still be not be fully sure of our obligations. In any case, for a small volunteer run organisation, we are constantly faced with a lack of resources, which makes it a challenge to implement best practice standards."

4. CONCLUSIONS

When the Senate Inquiry on reporting and disclosure regimes in the not-for-profit sector was announced in June of this year, many in the NFP sector heaved a collective sigh. There have been over 10 different (State and Federal) inquiries into various aspects of the NFP sector over the last 7 years. One leading academic in the sector, Prof. Myles McGregor Lowndes, has estimated that the sector has spent in the order of \$1 million preparing submissions to two previous federal government inquiries (McGregor-Lowndes, 2008). Despite this, few, if any, of the recommendations of these reports have been implemented.

However, the current Senate Inquiry received over 170 submissions, many from NFPs across Australia. Like many others, PilchConnect put in a submission to remind government that the sector consists, not just of a handful of big churches and major charities, but also 700,000 community organisations, many of which are small, rely heavily on volunteers, and with very limited resources (PilchConnect, 2008).

Our submission pointed out that, far from being 'unregulated', the sector is drowning in a sea of regulation. While we believe regulation of the sector is necessary to ensure good governance,

transparency and accountability, our submission called for national regulation, with a sound policy underpinning, to support the sector. As it was for business, the current complex regulatory regime for NFPs is unworkable and intolerable.

Our submission made many recommendations for law reform, aimed at reducing the complexities of regulation in the NFP sector, as illustrated by the above cases studies. In particular, we urged the Senate to use the opportunity to:

- push for national reform and national regulation of the sector rather than piece-meal, overlapping federal / state regulation;
- establish an independent, national regulator with responsibility for the entire NFP sector (rather than the current regulators, including the Australian Securities and Investments Commission and state-based regulators such as Consumer Affairs Victoria, which have shown little interest in the sector);
- develop an improved, NFP specific, legal structure(s) that allows the benefits of incorporation with minimum expense and flexibility to meet the needs of the diverse range of organisations within the sector; and
- make uniform fundraising laws and disclosure requirements for NFPs, based on a sliding scale, where disclosure obligations are proportionate to NFP size.

A full copy of the submission can be found on PILCH's website (www.pilch.org.au) or on the Senate Inquiry website at: www.aph.gov.au (Committees>Senate>Economics>Current Inquires).

The Inquiry Committee is due to report to the Senate by the end of November this year. The very short timeframe for the Inquiry could either be seen as recognition of the urgent need for reform, or alternatively, a complete under-estimation of the extent and complexity of the issues involved. Unfortunately, although the former is the case, the latter may well be the reality.

In the meantime, PILCH will formally launch its new service, PilchConnect, on the 19 November 2008. We will continue to advocate for change, at both state and federal levels. And we will continue to help the helpers – by providing eligible Victorian NFPs with access to pro bono legal assistance.

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