



**Submission to Consumer Affairs Victoria on the
Associations Incorporation Amendment Bill 2010**

30 March 2010

Submission to Consumer Affairs Victoria on the Associations Incorporation Amendment Bill 2010

Sue Woodward, Senior Policy Officer, PilchConnect

Liz Morgan, Principal Lawyer, PilchConnect

PilchConnect: a specialist legal service for community organisations

Public Interest Law Clearing House (PILCH) Inc

Level 17, 461 Bourke Street

Melbourne VIC 3000

T: (03) 8636 4400

F: (03) 8636 4455

E: sue.woodward@pilch.org.au

liz.morgan@pilch.org.au

TABLE OF CONTENTS

A.	Executive Summary	2
B.	About PILCH	2
C.	About PilchConnect	3
D.	Scope and Structure of Submission	4
E.	Overview	4
E.1	Support for policy rationale behind many of the proposed amendments	4
E.2	Oppose current drafting approach in Bill - particularly the purported application of Parts of the Corporations Act	4
E.3	The Act should be consolidated and restructured	6
E.4	Drafting of new model rules	7
E.5	Support for tiered reporting but aiming for national consistency	7
E.6	Community legal education about changes to associations' regime	7
F.	Committee of Management Duties	7
F.1	General comments on the new Committee of Management duties	7
F.2	Duty not to misuse position and duty not to misuse information - new section 29A	9
F.3	Duty of care and diligence - new section 29AB	10
F.4	Duty of good faith and proper purpose - new section 29AC	10
F.5	Duty to pursue objects of the association - new section 29AD	11
F.6	Duty to avoid insolvent trading - new sections 29AE - 29AF	11
G.	Tiered reporting thresholds	12
H.	Specific comments on other provisions	14
H.1	Statement of purposes and model rules	14
H.2	Model Rules	14
H.3	Definition of office holder - new provision in section 3(1)	14
H.4	Use of technology at CoM and general meetings - new section 29AA (CoM) and section 30AA (general meetings)	15
H.5	Rights and liabilities of members - new section 15(3)-(5)	15
H.6	Distributions to members during the 'life' of incorporated association	15
H.7	Grievance procedure- new section 14B(3)	16
H.8	Disciplinary procedure - new section 14AB	16

I. List of abbreviations used 16

A. Executive Summary

1. PilchConnect, a service of the Public Interest Law Clearing House (Vic) Inc. (**PILCH**), welcomes the opportunity to make a submission to Consumer Affairs Victoria (**CAV**) in relation to the Associations Incorporation Amendment Bill 2010 (**the Bill**).
2. The Bill proposes comprehensive changes to Victoria's *Association Incorporation Act 1981* (Vic) (**the Act**). The Bill will have a significant impact on Victoria's not-for-profit (**NFP**) sector, which includes over 35,000 incorporated associations. Accordingly, we commend CAV on the release of an Exposure Draft of the Bill to enable us to provide detailed comments on the possible impact and affect of the provisions as drafted.
3. We further congratulate CAV on the parts of this Bill which introduce some long-awaited reforms to the Act, particularly the removal of the complicated trading prohibition sections.
4. While we support the policy rationale underlying many of the reforms proposed in the Bill, throughout this submission we have documented our concerns with the current drafting approach - particularly in relation to applied civil penalty provisions of the *Corporations Act 2001* (Cth) (**the Corporations Act**). We suggest that the current complicated and legalistic approach is not in line with the original (and ongoing) intention that the Act be a simple and inexpensive means by which unincorporated non-profit associations may obtain corporate status.
5. As indicated by CAV, the model rules for incorporated associations contained in the *Association Incorporation Regulations 2009* (Vic) will need to be re-drafted as a result of the proposed changes to the Act. PilchConnect is concerned to ensure the new model rules are drafted in clear, logical and plain-language style so they are accessible to associations of all sizes.
6. We are also concerned that when the Bill is passed by the Victorian Parliament, and the new model rules are released, there will need to be an extensive community legal education campaign about the effect of the reforms for the 35,000 plus incorporated associations spread across Victoria. This should occur well before the commencement of the new provisions, to ensure that Victoria's NFP sector understands and is resourced to comply with the proposed changes (to the Act and the new requirements about rules).
7. Given the importance of Victoria's NFP sector to Victorian communities and Victoria's economy, we urge the State Government to carefully consider the submissions commenting on the Exposure Draft of the Bill, and to continue to work closely with the sector about the introduction of the proposed reforms.

B. About PILCH

8. PILCH is a Victorian, not-for-profit organisation that is committed to furthering the public interest, improving access to justice and protecting human rights. It coordinates the delivery of pro bono legal services through four pro bono referral schemes (Public Interest

Law Scheme, Victorian Bar Scheme, Law Institute of Victoria Scheme and PilchConnect) and two pro bono outreach legal clinics (Homeless Persons' Legal Clinic and Seniors Rights Legal Clinic).

9. PILCH's objectives are to:
 - improve access to justice and the legal system for those who are disadvantaged or marginalised;
 - identify and seek to redress matters of public interest requiring legal assistance for those who are disadvantaged or marginalised;
 - refer individuals, community groups, and NFP organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
 - support community organisations to pursue the interests of the communities they seek to represent; and,
 - encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.
10. PILCH meets these objectives by facilitating the provision of pro bono legal services, and by undertaking law reform, policy work and legal education.

C. About PilchConnect

11. PilchConnect is a specialist legal service for NFPs based in Victoria and is one of the six services operating under the PILCH umbrella.
12. We provide legal services to Victorian-based NFPs, the vast majority of which are small-medium incorporated associations. Many are micro, entirely volunteer-run community groups. Our services include free and low cost legal information, training, and legal advice (via phone). We also have a service matching eligible, public interest NFPs with PILCH member law firms to receive free legal assistance. Our service is unique within Australia.
13. PilchConnect works to 'help the helpers' by supporting the establishment and the effective running of well-governed community organisations. In turn, these NFPs provide crucial support and assistance to the local communities in which they operate, including services to clients and members, promoting volunteering and community well being.
14. PilchConnect works to achieve excellent standards of governance and regulatory compliance by NFP community organisations so their economic and social contribution to Victoria and Australia is maximised.
15. Our law reform submissions are based on empirical evidence and practical examples drawn from our legal inquiry data, training, advice work and case work that we provide to Victorian NFPs every day.

D. Scope and Structure of Submission

16. This submission looks in detail at the amendments contained in the Bill. In some cases we fully support the amendments, both in terms of the policy rationale behind them as well as the drafting of relevant clauses. In some cases, we support the policy rationale behind the amendment, but do not think that the drafting is appropriate for reasons which we have explained. In some cases we do not support the policy rationale behind the amendment.
17. We begin with overview comments in Section E. These comments are relevant to many or all of the amendments proposed by the Bill.
18. In Section F we set out our specific comments in relation to the Committee of Management (**CoM**) duties which are introduced by the Bill.
19. In Section G we set out our specific comments in relation to the new tiered reporting scheme introduced by the Bill.
20. We have grouped our comments on all other provisions of the Bill in Section H.
21. As you will note, we have limited our comments to the parts of the Bill that we thought were most important, and we have not commented on all of the amendments made by the Bill (which extends to more than 50 pages). Please do not hesitate to contact us for further information about other provisions in the Bill.
22. For a full list of the abbreviations used throughout this submission, please see Part I.

E. Overview

E.1 Support for policy rationale behind many of the proposed amendments

23. PilchConnect agrees with the policy rationale of many of the amendments to be introduced by the Bill including: the removal of the current trading prohibition, the express codification of CoM member duties (which were widely regarded to have applied to incorporated associations via common law), the introduction of new tiered reporting levels, the use of technology for meetings, the indemnity provisions and the improvement of the amalgamation sections. We have indicated this support throughout Sections F, G and H below, when discussing specific amendments in more detail.

E.2 Oppose current drafting approach in Bill - particularly the purported application of Parts of the Corporations Act

24. While PilchConnect support the principle of many of the amendments, in many cases we do not support the current drafting approach adopted for the new provisions. In particular, we oppose the drafting of provisions which purport to apply sections (and even whole Parts of) the Corporations Act. We think this approach is inappropriate and will be confusing for people involved in the NFP sector (and for lawyers).
25. The incorporated associations' regime is one that was intended to be '*a simple and inexpensive means of incorporation for non-profit associations of widely varying kinds*'

(Chief Justice's Law Reform Committee Report 1980). This was confirmed when the original Associations Incorporation Bill was introduced into Parliament in 1981. The Second Reading Speech for the Bill made it clear that the purpose of the legislation was to *'provide a simple and inexpensive means by which unincorporated non profit associations may obtain corporate status.'* (Hansard, 4 December 1981 p.4285).

26. In fact, the reason that the Act was initially introduced in the early 1980s was because the Victorian Government thought that the Corporations Act (as it is now known) was too complex, and was inappropriate legislation to regulate many NFP organisations. This was view was noted in the Second Reading Speech:
- 'In order to overcome the difficulties [of operating as an unincorporated association], some non-profit associations have sought incorporation under the Companies Act or the Co-operation Act. However, both of these Acts have been framed primarily to deal with profit-making bodies. As a result, they include very detailed and extensive provisions relating to the management and control of bodies registered under them...The difficulties experienced in Victoria have been overcome in some other States and Territories of Australia by enacting special legislation providing for the incorporation of non-profit associations.'*
27. PilchConnect's position, in line with the rationale underpinning the intention of the original Act, is that all of the provisions of the Act need to be easily understood by non-lawyers (ie. by members of the public involved in incorporated associations) - without requiring the assistance of a lawyer. This is because most community organisations cannot afford to pay for legal advice. Further, the size and scope of activities of many community organisations means that they should not need this level of assistance to operate.
28. The need for clarity (and the ability for a non-legal person to understand their obligations set out in the Act) is particularly important for the provisions about CoM member duties and the rights of members. We have provided a detailed explanation of this point - particularly in relation to the applied civil penalty provisions for breach of CoM duties - below at paras. 52 and 53]. We think if the current drafting is introduced into Parliament, it is likely to be met with a significant backlash from the Victoria community sector and to be seen as imposing unnecessary red tape and complexity.
29. In support of the above, we note that the Explanatory Memorandum does not set out any evidence of complaints or widespread trends of poor governance of incorporated associations, nor does it provide information on any high level of risk regarding the activities of incorporated associations. Thus no evidence is given to justify the application of the stringent Corporations Act penalty regime for breach of directors duties (which were drafted for the regulation of large public companies). The legislative response needs to be proportionate to the issues that the Bill proposes to address. A regime which gives greater clarity about CoM member duties will support the efforts of people who volunteer to govern incorporated association. However, the current drafting approach has the potential to have the opposite effect - and may scare potential CoM members away from volunteering their time.
30. Further, we note the Victorian State Government's stated goal of reducing the regulatory burden for NFPs. In its 2007 document *Reducing the Regulatory Burden* the Victorian

Government committed to reducing the administrative burden of regulation by 15 per cent over three years and 25 per cent over the next five years. The intention to ensure this kind of reduction would be pursued in relation to the NFP sector was acknowledged in the State Government's 2008 *Action Plan: Strengthening Community Organisations* which states:

'In the 2006-07 Victorian Budget, the Government committed to a specific and ambitious target for reducing the administrative burden of State regulation, and to a program of reviews aimed at identifying where there is scope for simplifying and streamlining regulation. Within this framework, the Government recognises the undue administrative burden impacting on the NFP sector...We will therefore undertake a series of actions designed to simplify and update legislation and relieve the burdens of regulatory compliance and reporting to reflect a contemporary distribution of risk, rather than a range of historical definitions. This will further reduce the administrative burden on NFPs and release resources for more efficient performance of core activities' (page 10)

31. We submit that the drafting of the Bill in its current form has not achieved a reduction in regulatory burden for incorporated associations. However, we note that many of these issues could be resolved quickly by adopting simpler drafting methods.

E.3 The Act should be consolidated and restructured

32. Given the extent and significance of the current amendments, we recommend consolidation and restructuring of the legislation.
33. The Bill contains significant amendments that will make the amended *Associations Incorporation Act 1981* (Vic) (**the Amended Act**) exceedingly difficult to navigate. A consolidation and restructure would help make the changes easier to understand because there would be a more logical sequence. For example, we note that the various requirements for the 'things an incorporated association must have' are currently scattered throughout the Act (eg. a set of rules, a statement of purpose, a secretary, a register of members, a register of assets etc.). Instead there should be one Part in the Act where these things are collected together. Another example is given below at paragraph 95 below.
34. We have previously made submissions to CAV on the issue of re-structuring the Act. We note that the current amendments are the result of a 'review' process that commenced in 2004. We are disappointed that, within this timeframe, the Victorian Government has not taken the opportunity to re-write this 30 year old Act.
35. As noted above, many of the reforms in the current Bill are welcome. If restructuring would delay the passing of the Bill, we suggest that it would be better to proceed with the introduction of the Bill in its present form – but coupled with an undertaking that, prior to the amendments becoming operational, a further Bill be introduced to restructure and consolidate the legislation. This course of action would see the Victorian Government meet its commitment to simplify and update the legislation (see above para. 30).

E.4 Drafting of new model rules

36. The content of the new model rules will be important. PilchConnect recommends that development of these new model rules (or constitution) should include testing them with a diverse range of incorporated associations (e.g. small and large organisations, wholly voluntary run and those with paid employees, organisations in different sub sectors, like welfare, sport, etc).

E.5 Support for tiered reporting but aiming for national consistency

37. Overall, the proposed reforms make incorporated associations more like companies limited by guarantee (CLG) which *may* assist moves to national harmonisation. PilchConnect has, in multiple forums and in all its submissions (see www.pilch.org.au/submissions/), supported national consistency for NFP legal structures and fundraising laws so that even small organisations can operate easily across States without additional registration. However, national consistency should not come at the cost of an inappropriate burden on small organisations, or governing legislation that is difficult to understand and unnecessarily lengthy.

E.6 Community legal education about changes to associations' regime

38. The reforms to be introduced by the Bill are significant and will affect more than 35,000 incorporated associations across Victoria.
39. From our experience, we submit it is vitally important that the introduction of these reforms (especially those on CoM member duties) be accompanied by properly funded, free, accessible, face-to-face training, as well as on-line and hard copy plain language resources. This training needs to be conducted on on-going and State-wide basis and also consider CALD and low literacy groups. The training needs to be designed and targeted in a way that people understand their new legal rights and obligations, and ensures that there is no decline in the rate of CoM member participation.

F. Committee of Management Duties

F.1 General comments on the new Committee of Management duties

40. PilchConnect supports the introduction of a duty to pursue the purpose of the incorporated association, and the inclusion of duties of care and diligence, good faith and proper purpose, and the duty to prevent insolvent trading. It is generally accepted that these duties already apply to CoM members of incorporated associations by virtue of the common law. PilchConnect provide governance training to incorporated associations based on this approach. However, the codification of the duties in the Act will remove all doubt.
41. While greater clarity about CoM member duties will support the efforts of people who volunteer to govern community organisations, the current drafting approach with regard to penalties has the potential to confuse volunteers and possibly scare them away.

42. We note that the wording adopted in the Bill adopts much of the wording of the Corporations Act. We acknowledge that this drafting approach has the advantage of creating consistency between legal structures used by NFPs, and will encourage courts to more readily draw on company law cases to assist with interpretation of these incorporated association provisions.
43. However, where there is a conflict between the advantages of a body of case law and the provisions being more easily by understood by CoM members, we believe the latter approach should prevail. This is in keeping with the original spirit of the Act, *'to meet a real need by providing a simple and inexpensive means of incorporation for non-profit associations of widely varying kinds'* (see above para. 25). The duties being imposed need to be easily understood by an 'average' person acting as a volunteer CoM member.
44. We recommend the preferred approach should be to use the same key words should be used as those in the Corporations Act (words such as 'care and diligence', 'good faith in the best interests'), but that there should not be wholesale incorporation of the 'civil penalty' provisions of the Corporations Act.
45. We suggest that a volunteer CoM member, having read and understood their duty to use care and diligence in the discharge of their duties, would be confounded by the proposition following the duty that :
- 'Subsection (1) is a civil penalty provision for the purposes of section 37AB and, as such, is declared to be applied Corporations matter in relation to the provisions of Part 9.4B (Civil consequences of contravening civil penalty provisions) of the Corporations Act.'*
46. We have commented further on how difficult it is to 'trace' this line of reasoning (at paras. 52 and 53 below), and suggest that only lawyers would be able to do so.
47. Instead we recommend that, to enable a CoM member to read the CoM provisions without also having to look to other parts of the Act and the Corporations Act:
- at the start of the part on CoM duties, there be a summary table with all the CoM duties, defences and penalties plus sign-posts to relevant sections (tables have been used successfully in this way in the Corporations Act, eg. section 285),
 - each duty, corresponding penalty and any specific defences (such as the 'business judgment' defence) be contained together in one section per duty;
 - after these specific duty sections, the general provisions that apply to all the CoM duties be outlined, namely:
 - the indemnity for CoM members from the incorporated association (PilchConnect supports the inclusion of new section 29E);
 - the general defences such as that outlined in section 1318(1) of the Corporations Act; and
 - the general (civil) penalties: ie, if there is a breach, the CoM member may also be liable to compensate the incorporated association for up to \$20,000.

- details of who has standing to right to bring an action for breach of a duty and / or seek a penalty / compensation; and
 - after this, include any necessary technical provisions such as sections 29AB(4) and 29AC(2) (see comments below at para 60).
48. If the CoM duties look too onerous initially – even if defences are provided further on in the Act or in the Corporations Act – then potential CoM members may be deterred from serving on CoMs (see further below at paras. 52 and 53).
49. Even if these CoM duties have always have applied to incorporated associations, they are significant new inclusions in the Act. We recommend free, accessible, face-to-face training and on-line and hard copy plain language resources accompany with these reforms.

F.2 Duty not to misuse position and duty not to misuse information - new section 29A

50. PilchConnect supports the re-drafting of these clauses, which are long-winded and convoluted and contain difficult terms. However, the new provision proposed by the Bill is even more difficult to understand than the current provision.
51. We recommend that the wording of new section 29A more closely follow sections 182 and 183 of the Corporations Act. The language of the Corporations Act provisions is shorter and easier to understand (eg. there is no reference to 'pecuniary'). This is one instance where it is possible to both align with the Corporations Act wording of the duty and have more easily understood provisions.
52. We note that making civil breaches (ie. those incorporated association breaches that occur without 'knowing or reckless' behaviour) applied Corporations Act matters will create enormous confusion for CoM members. The practical outcome of this approach is that, in order for a CoM member to work out what is meant by 'a civil penalty' and what the actual penalty for a civil breach is, it will be necessary to:
- grapple with the concept of 'applied Corporations legislation' (we understand even CAV / parliamentary drafters are still trying to resolve how these provisions will work in light of specialist legal advice they have received);
 - consider what the Corporations Act 'civil penalty provisions' say and how these provisions are modified; and
 - realise that (new) section 37AB(2)(c) of the Amended Act (which will be tucked away much further along in the Amended Act than the provision imposing the duty) means that the maximum 'pecuniary penalty' for contravening a civil penalty provision as an association 'office holder' is \$20,000 (rather than \$200,000, which is the maximum penalty imposed on 'directors and officers' under the Corporations Act).
53. Also (again because of the 'applied Corporations Act' drafting approach) a CoM member is unlikely to realise:
- that the court has the general power to grant relief in civil proceedings - where a person may be found to have contravened a civil penalty provision but 'has acted honestly, and having regard to all the circumstances of the case, the person ought

fairly to be excused': see section 1317S(2), Part 9.4B Corporations Act as applied by section 37AB(2) of the Amended Act; and

- that, if the breach of this duty is committed 'knowingly or recklessly', they can be liable under both the criminal provisions (new sections 29A(3) and (4)) and the civil penalty provisions (ie. liable for 60 penalty units and up to \$20,000 in civil penalty orders).

54. From our experience working with small-to-medium volunteer run NFPs, these provisions are already very difficult to explain to CoM members (particularly CALD and low literacy groups and also groups that are 'self-help' groups where members do 'benefit' or 'gain an advantage' from their membership of the group). The proposed changes will only make this explanation even more difficult.
55. We suggest that practical examples (eg. case studies) of improper use of position or information will be important and we recommend they be included in readily accessible and free education materials and training.

F.3 Duty of care and diligence - new section 29AB

56. PilchConnect supports this duty being included in the Act, although we have some concerns about the drafting.
57. We note that the wording of the 'business judgment' defence follows the Corporations Act. However, as incorporated associations are NFPs, this term does not resonant with them. New section 29AB(3)(a) provides that '*a business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the incorporated association*'. This definition is unhelpful and circular. The vast majority of CoMs would not describe their organisations as having 'business' operations, especially if they do not employ staff, rent premises or provide client services.
58. While the term 'business judgment rule' may be used to ensure that existing case law can be used to understand this defence, we recommend that in the definition itself, the word 'business' be deleted (ie. so it reads '*...take or not take action in respect of a matter relevant to the operations of the incorporated association*').
59. We recommend that the provision setting out the duty should also make it clear what penalty applies to a contravention, rather than requiring the reader to follow the convoluted path outlined above (see paras. 52 and 53).
60. We note that section 29AB(4) is largely repeated in section 29AC(2) which is in turn modelled closely on section 185 of the Corporations Act. Some parts seem unnecessary and we recommend that they be reconsidered. Any parts that are necessary should be combined in one section at the end of all the duties so that they do not confuse or unduly lengthen the substantive wording.

F.4 Duty of good faith and proper purpose - new section 29AC

61. PilchConnect supports this duty being included in the Act.

62. We recommend that the provision setting out the duty should also make it clear what penalty applies to its contravention, rather than requiring the reader to follow the convoluted path (see paras. 52 and 53).
63. Also, similar to our comments above at para. 60, section 29AC(2) repeats section 29AB(4) which is in turn modelled closely on section 185 of the Corporations Act. Some parts seem unnecessary and we recommend that they be reconsidered. Any parts that are necessary should be combined in one section at the end of all the duties so that they do not confuse or unduly lengthen the substantive wording.

F.5 Duty to pursue objects of the association - new section 29AD

64. PilchConnect supports the inclusion of a duty to pursue the objects of an association (as expressed in the rules of the incorporated association). We support the inclusion of the duty because it expressly draws the focus of the CoM to the mission-driven nature of incorporated associations (rather than profit-driven motive of business).
65. While section 14A of the Act currently provides that an incorporated association must not act outside the scope of its purposes, it is helpful for this to be an express duty on CoM members so they better understand their responsibilities.
66. Again, we recommend that the provision setting out the duty should also make it clear what penalty applies to its contravention, rather than requiring the reader to follow the convoluted path (see paras. 52 and 53).

F.6 Duty to avoid insolvent trading - new sections 29AE - 29AF

67. PilchConnect supports this duty being included in the Act. However, we are concerned that, in contrast to the drafting in the Bill, plain language should be used to describe the duties even if it means varying the wording of the Corporations Act. In the following paragraphs we set out some of our particular concerns.
68. The heading for section 29AE refers to 'duty to avoid...' but the wording of the section and the Corporations Act refers to 'preventing' debts being incurred. We suggest the heading be changed to 'prevent' insolvent trading.
69. The wording of section 29AE(1) is very awkward: 'must not fail to prevent...'. It needs to be expressed as a positive duty. For example, '*an office holder must not allow the incorporated association to continue to operate once there are reasonable grounds for suspecting that it is insolvent*'. This still picks up key terminology from the Corporations Act.
70. The provisions describing this duty and its defences run for 5 pages, even without the applied Corporations Act provisions. PilchConnect suggest there must be a way of shortening and simplifying this duty.
71. Also, because of the 'applied Corporations Act' drafting approach, a CoM member is unlikely to realise:
- the court has the general power to grant relief in civil proceedings. Namely, where a person may be found to have contravened a civil penalty provision but 'has acted honestly, and having regard to all the circumstances of the case, the person ought

fairly to be excused'): see section 1317S(2), Part 9.4B Corporations Act as applied by section 37AB(2) of the Amended Act, or

- that the civil penalty provisions apply in addition to the penalty stated in section 29AE(3) (ie, can be liable for 60 penalty units and up to \$20,000 in civil penalty orders).

G. Tiered reporting thresholds

72. PilchConnect supports the introduction of a 3-tiered reporting regime. However, we are concerned at the variations that will exist between the requirements on Victorian incorporated associations and those imposed on companies limited by guarantee (**CLGs**) if the amendments to the Corporations Act proposed by the *Corporations Amendment (Corporate reporting Reform) Bill 2010* (Exposure Draft) proceed.
73. To highlight the problem the following is a summary of the Bill compared with the proposed new reporting requirements for CLGs (which are likely to be in force from 1 July 2010).

<i>Incorporated associations under the Bill</i>	<i>Companies limited by guarantee (CLG)</i>
Tiers established by reference to current assets & total (annual) revenue.	Tiers established by reference to annual revenue.
<u>Tier 1</u> = 0 to \$200,000 - complete same information currently required.	<u>Tier 1</u> = 0 to \$250,000 - no financial or directors report required and no audit or review required.
<u>Tier 2</u> = \$200,000 to \$500,000 - written statement by independent accountant (member of CPA, ICCA or NIA) that accounts have been kept in accordance with good accounting practice (known as 'negative assurance'). Registrar can exempt.	<u>Tier 2</u> = Deductible Gift Recipient (DGR) organisations with less than \$250,000 and all organisations over \$250,000 but less than \$1,000,000. - financial statement required which can be reviewed instead of audited plus streamlined director's report and members to be notified of annual reports (rather than automatic distribution).
<u>Their 3</u> = \$500,000 plus - audited accounts in accordance with AASB accounting standards. Must submit audit report with financial statements with certification that it is a true and fair view of financial situation of incorporated association.	<u>Tier 3</u> = \$1,000,000 plus (with or without DGR) - audited financial required plus streamlined director's report. Members to be notified of annual reports (rather than automatic distribution).
25% of members at AGM right to request 'negative statement' or audit of accounts of Tier 1 and 2 incorporated association. Minutes of AGM to include copy of financial statement.	5% of members or ASIC right to request review or audit of accounts of Tier 1 and 2 CLG.

74. With reference to the above table we note that, while the overall requirements are quite similar, there are variations in:
- dollar cut off points for each tier;
 - how the dollar cut off is calculated - annual revenue and DGR (CLG) versus annual revenue and assets (incorporated association);
 - what is reported at each tier: no reporting for Tier 1 (CLG);
 - type of accounting review and by whom - negative assurance versus review and registered company auditor (CLG, Tier 3) versus auditor (incorporated association, Tier 3);
 - what percentage of members can request review/audit/ statement and if that request must be made at AGM or can be made at other time;
 - ASIC can request additional reporting but the Registrar of Incorporated Associations (**the Registrar**) cannot; and
 - the Registrar can exempt Tier 2 from the requirement, but ASIC has no exemption powers.
75. We think that there should be a basic level of disclosure by all incorporated NFPs. Incorporated associations need to be able to file their statements via a simple, on-line, free filing system so that stakeholders can get basic information via a public register (eg. annual income and expenditure, sources of income, number of volunteers and members, activities undertaken). This information should then be freely searchable by the public. PilchConnect has made strong representations on this issue on a number of occasions (in written submissions on the CLG reforms 2007 and 2010, www.pilch.org.au/submissions and in person at Treasury-run roundtables).
76. For existing organisations that may be thinking of migrating to the CLG structure and newly forming groups, the variation between CLG and incorporated association requirements frustrating and confusing - exacerbating existing problems.
77. In terms of the dollar limits, we recommend that the Bill follow those proposed by the CLG reforms. The proposed range of the second tier (between \$200,000 – 500,000) is too small. When an incorporated association has \$1,000,000 plus in annual revenue, it is of a sufficient size that audited accounts should be mandatory. Of course, good governance or other obligations (eg. to funders) may mean that smaller organisations need audits but this should not be mandated by the Act, particularly given the average cost of an audit. We agree with the approach in the Bill that the tiers for incorporated associations should not be linked to DGR status (see the reasons given in our submission on CLGs 2010, www.pilch.org.au/submissions/).
78. In terms of the criteria for the dollar limits, we recommend that the Bill follow the CLG reforms by using limits based solely on annual revenue. This is the simplest and brightest line.
79. We query whether there is there really much difference between a 'negative assurance' and a 'review' – these variations may make sense to accounting bodies but not to users of information or committees/ boards that have to get obtain them.

80. In terms of the number of members required to request a negative assurance or audit (when not otherwise required because of annual revenue), we recommend that it should be at least 25% and it should not be something that cannot be applied retrospectively (ie, the members should only be able to request the change for the next financial year).

H. Specific comments on other provisions

H.1 Statement of purposes and model rules

81. We agree that the statement of purposes and rules should form one document. However we recommend that this document be called 'the constitution' rather than the rules (which may lead people to think 'purposes' are no longer required). This change will also create consistency with the Corporations Act. The new model rules should correspondingly be called the 'model constitution'. Consequential (additional) amendments will be required throughout the Act.
82. Transitional provisions for the change to one document (whatever it is called) are required. The validity of existing statements of purposes and rules need to be preserved so that existing incorporated associations are not required to take any (positive) action. This was the approach taken when memorandum and articles of association were combined into a constitution under reforms to the Corporations Act.

H.2 Model Rules

83. We note that Stage 2 of the reforms have not included a new version of the Model rules. PilchConnect understands that the drafting of these rules has been put out for tender.
84. We recommend that there be at least two sample (or model) rules in the regulations - one for very small groups and one (or possibly two) for medium to large groups.
85. As well as being plain language, we recommend annotations to explain what clauses mean and alternative provisions for issues such as proxy or no proxy voting.
86. We urge CAV to commission user-testing as part of the tender to draft new model rules. This testing needs to be done with a diverse range of incorporated associations – diverse in size and activities, and including volunteer-run groups. PilchConnect would be happy to work with the successful tender to facilitate this testing.

H.3 Definition of office holder - new provision in section 3(1)

87. We note the new definition of 'officer holder' includes a person who has 'the capacity to affect significantly the financial standing of the incorporated association'. While this is the same wording as is used in the Corporations Act, we recommend it is not be included in its present form.
88. As currently worded, the new section 3(1) definition of 'office holder' could apply CoM duties (eg. duty to prevent insolvent trading) on those bodies that fund an incorporated association to 50% or more. This could include government, philanthropics and 'white knights' (eg. private individual donors). No reason is given in the Explanatory Memorandum to the Bill for expanding the reach of the duties in this way, and the different

revenue and funding sources for incorporated associations (compared with business) should be considered.

89. We also recommend that the reference in the definition to a person '*who makes...decisions that affect...the business of the incorporated association*' in paragraph (c)(i) should be changed to the '*operations of the incorporated association*'. The term 'operations' is more relevant to the NFP sector than 'business'.

H.4 Use of technology at CoM and general meetings - new section 29AA (CoM) and section 30AA (general meetings)

90. PilchConnect supports changes to allow technology to be used for CoM and member meetings. However the new wording (sections 29AA and 30AA) is very lengthy and not well drafted. We recommend simpler and shorter wording that is more aligned with sections 248D (directors' meetings) and 249S (members' meetings) from Corporations Act.
91. In particular, sub-section 29AA(1) is unnecessary and sub-section 29AA(2) implies that a meeting using technology may be valid even when it is not possible for a CoM member to participate.

H.5 Rights and liabilities of members - new section 15(3)-(5)

92. We support the additional provisions which cover the rights of members have to a copy of the rules, the minutes of general meetings and notices of meetings.
93. We also support the new right of members to inspect and have a copy of the register of members. Although many members already have this right under the model rules, this new provision will remove uncertainty about the need for a register of members.
94. However, we recommend that new section 15(3)(b) be amended to include an extra provision giving incorporated associations the right to apply to the Registrar for an exemption of the requirement to keep make the register of members available to the members if there are reasonable grounds for doing so. We are aware of some groups where it is inappropriate for members to have general access to information about others in the group (eg. groups formed to support people where there is a social stigma attached to the people eligible to be in the group).
95. We have suggested the re-writing of the Act to group like provisions (see above Part E.3). However, if this suggestion is not taken up, we recommend that section 15 include a sign-post section to section 28A (and vice versa) so members know that if they misuse information gained from members register they can be liable for a fine.

H.6 Distributions to members during the 'life' of incorporated association

96. We strongly support the removal by the Bill of the 'trading provisions' in the Act (existing sections 3(2) and parts of section 51). We note the parts of section 51 that prohibit distributions to members will be retained and that (existing) section 36CA prevents (with limited exceptions) all incorporated associations from distributing surplus assets to members on winding up. These provisions ensure only NFPs can incorporate as

incorporated associations (the constraint on distributions to members being the hallmark of an NFP).

97. So members clearly understand the NFP nature of incorporated associations, we believe the rules (constitution) of an incorporated association should be required to state that there can be no distribution of profits or assets to members during the life of the association, on winding up or on dissolution. Thus, we recommend that the new list of matters to be included in the rules of an incorporated association (section 43 of the Bill which inserts a new Schedule with a list of matters for inclusion in the Rules) should include:
- a provision under the heading 'Funds' requiring a clause in the rules prohibiting distributions (assets or income) to members except as may be permitted by the Act; and
 - a modified item 23 so the heading reads '*Winding up and dissolution*' and says '*Prohibiting the distribution of any surplus assets on the winding up or dissolution of the incorporated association except as may be permitted by the Act*'.
98. The words 'except as may be permitted by the Act' are necessary to allow distributions to a like organisation as permitted by the Act (and the Australian Taxation Office).

H.7 Grievance procedure- new section 14B(3)

99. The wording in new section 14B(3)(b) needs to be amended because an incorporated association can't 'ensure' that the dispute is resolved. The better wording is that an incorporated association must '*ensure that the outcome of the grievance procedure is determined by an un-biased...*' which is also consistent with the wording in new section 14AB(2)(b).

H.8 Disciplinary procedure - new section 14AB

100. We recommend an additional provision or note that explains the difference and relationship between the grievance and discipline procedures.
101. We also recommend that this additional provision makes it clear that sub-sections 14AB(2) and (3) apply notwithstanding any contrary provision in the rules (constitution) or policies of the incorporated association. There then needs to be sign-post to this section in the Schedule (about what matters must be covered by the rules).

I. List of abbreviations used

the Bill	<i>Associations Incorporation Amendment Bill 2010 (Vic)</i>
the Act	<i>Associations Incorporation Act 1981 (Vic)</i>
the Amended Act	the <i>Associations Incorporation Act 1981 (Vic)</i> as if the reforms in the Bill were included

the Corporations Act	<i>Corporations Act 2001</i> (Cth)
CALD	culturally and linguistically diverse
CAV	Consumer Affairs Victoria
CoM	committee of management
CLG	company limited by guarantee
DGR	Deductible gift recipient
NFPs	not-for-profit (ie. non-distributing) organisations
Registrar	Registrar of Incorporated Associations, Consumer Affairs Victoria