

Making the community dollar go further:
a better regulatory framework for Victoria's not-for-profit sector

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17/461 Bourke St Melbourne VIC 3000
Tel: (03) 8636 4429 | Fax: (03) 8636 4455
www.pilch.org.au



Sue Woodward

Senior Lawyer

PilchConnect

T: 03 8636 4430

E: sue.woodward@pilch.org.au



Liz Morgan

Manager and Principal Lawyer

PilchConnect

T: 03 8636 4429

E: liz.morgan@pilch.org.au

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1. Executive Summary

PilchConnect welcomes the opportunity to make a submission to the Victorian Competition and Efficiency Commission's (VCEC's) inquiry into Victoria's regulatory framework. Our submission relates to the regulatory framework for not-for-profit organisations operating in Victoria.

In this submission we have:

- ▶ made observations about the nature, size and characteristics of the not-for-profit sector, highlighting how the not-for-profit sector is different to the business sector, and the implications of this difference for how to best regulate the sector — see heading 4;
- ▶ outlined problems with the current regulatory regime and highlighted what we think are opportunities for the Victorian Government to make a real and lasting difference — see heading 5;
- ▶ drawn on our significant body of previous submissions to outline high level, interim and more detailed recommendations for reform — see heading 6; and
- ▶ detailed relevant previous PilchConnect submissions as well as Victorian and Federal Government reviews and reports, and some other useful materials — see heading 7.

Despite recent Victorian Government efforts in relation to reform of the incorporated associations' regime, there are significant problems with the overarching regulatory framework for the not-for-profit sector and how it is administered. The State-Federal framework does not support simple, 'one-stop-shop' compliance. Instead the current framework provides multiple barriers to growth, accountability and efficiency. There is a high burden and high cost of regulation and as a result limited community resources (funding and volunteer time) are being wasted. Numerous State and Federal reviews of the not-for-profit sector over the past decade have failed to establish workable solutions.

Against this backdrop, we believe the VCEC Inquiry provides an opportunity — we urge the VCEC to consider the 'big picture' and to recommend Victoria lead the way by working with the Commonwealth Government on establishing a new, 'one-stop shop' regulator for incorporation, fundraising and charitable endorsement. By removing duplicated legislative and regulatory effort, the Victorian government would be able to better focus on sector support and innovation, which will in turn see better outcomes for the delivery of Victorian government funded services by the sector, and the strengthening of all Victorian communities.

We are available to discuss our submission with you.

2. About PILCH and PilchConnect

2.1 PILCH

The Public Interest Law Clearing House (Vic) Inc. (**PILCH**) is a leading Victorian, not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice; and
- ▶ foster a strong pro bono culture in Victoria and increase the pro bono capacity of the legal profession.

2.2 PilchConnect

PilchConnect is PILCH's specialist legal service for Victorian not-for-profit community organisations (**NFPs**).

In particular, PilchConnect's focus is on providing legal help to NFPs that work with marginalised or disadvantaged Victorians. Our legal services for NFPs include:

- ▶ low cost legal training in Melbourne and regional Victoria;
- ▶ free legal information via a user-friendly webportal (www.pilchconnect.org.au);
- ▶ legal advice via a freecall telephone advice line;
- ▶ the referral of eligible NFPs to PILCH member law firms for pro bono assistance; and
- ▶ law reform and advocacy work on systemic issues about the regulation of the NFP sector.

2.3 PilchConnect's work on regulatory reform in Victoria

PilchConnect has contributed to the debate about regulatory reform for Victoria's (and Australia's) NFP sector since its inception in 2008. Prior to this time, PILCH also made some submissions relevant to this area (see heading 7). Our submission work draws on empirical evidence and practical examples from our legal inquiry, advice and case work — from the hundreds of inquiries we get every year, particularly from small-medium, grassroots community groups.

PilchConnect also contributes as a member of the Office for the Community Sector Regulatory Reform Reference Group (Department of Planning & Community Development). Most recently PilchConnect has assisted with focus group testing of an updated draft of model rules for Victorian incorporated associations.

3. Scope of this submission

3.1 The regulatory framework for NFP organisations

PilchConnect's expertise and experience is in helping NFP organisations with their legal and regulatory compliance issues. In light of this, our submission is limited to VCEC's inquiry as it affects the Victorian NFP sector — streamlining and reducing the regulatory burden on NFP organisations, while enhancing the effectiveness of regulation, to benefit the community.

3.2 Previous PilchConnect submissions

Our previous submissions relevant to the regulatory framework for NFPs are listed under heading 7 and are referenced in support of our recommendations in this submission. As our detailed views (supported by case studies) are already publicly available via these submissions, and we have limited resources, we have not repeated our views in detail. We would, however, urge the VCEC to consider in full:

- ▶ PilchConnect submission titled 'Time for underpinning: a national regulatory approach for the not-for-profit sector' (<http://www.pilch.org.au/pastsubmissions/#4>) made in response to the 2008 Senate Economics Committee *'Inquiry into disclosure regimes for charities and not-for-profit organisations'*;
- ▶ PilchConnect submissions to the Productivity Commission Research Report on the *'Contribution of the Not-for-Profit Sector'* - initial submission, June 2009 and follow-up submission on the draft report, November 2009 (both at (<http://www.pilch.org.au/submissions/#4>)); and
- ▶ PilchConnect submission on the draft *Associations Incorporation Amendment Bill 2010* (Vic) (<http://www.pilch.org.au/submissions/#2>).

3.3 PilchConnect visitor - Mr David Locke, Charity Commission of England & Wales

In June 2010, PilchConnect hosted a visit to Australia by Mr David Locke, Executive Director Charity Services, Charity Commission for England and Wales. Mr Locke's visit successfully promoted constructive dialogue on future regulatory models for charities and other NFP organisations in Australia. During his visit, Mr Locke presented keynote speeches in Sydney and Brisbane and Melbourne. The Melbourne event was a breakfast forum attended by approximately 150 representatives from the NFP sector, with comments provided by Mr Robert Fitzgerald AM, Productivity Commissioner.

When addressing the various forums Mr Locke offered observations on the regulatory challenges faced by Australian NFPs, in particular inconsistencies between State and Commonwealth models. He noted that these difficulties are exacerbated by the lack of a centralised regulator for the sector. Interestingly, he also commented that devolution to new regulators in Scotland and Ireland has re-ignited problems about inconsistencies for many charities that operate across those borders. Mr Locke also highlighted the importance of transparency in the sector, and the fundamental role this has on the promotion of public confidence in charities in England and Wales.

The VCEC may find the presentation by Mr Locke insightful in relation to this Inquiry. For Mr Locke's powerpoint slides and recordings of his presentations, see <http://www.pilch.org.au/Page.aspx?ID=457> (podcast with Robert Fitzgerald in Melbourne and videocast of Brisbane event).

4. Nature, size and characteristics of NFP sector

4.1 Need to understand the NFP sector

Before it is possible to consider:

- ▶ what regulation is necessary;
- ▶ how well the existing regulatory framework is working or not working;
- ▶ how to reduce the regulatory cost; or
- ▶ how to reduce the regulatory burden,

it is necessary to understand something about the size and nature role of Victoria's NFP sector.

It is also important to appreciate what is different about the NFP sector compared with other sectors that the VCEC may be more familiar with, such as government and business.

4.2 What statistical and other information is available for Victoria?

There is a paucity of up-to-date and even vaguely comprehensive information on the Victorian NFP sector.

Most significantly, there is no single, publicly searchable register of all Victorian NFPs — the vast majority of NFPs are not separately incorporated so are not on registers maintained by either Consumer Affairs Victoria (CAV) or the Australian Securities & Investments Commission (ASIC). Most recent Victorian Government estimates are that there are between 120,000 - 150,000 NFPs in Victoria, with two thirds being informal and unincorporated groups.

The sources of information (see heading 7) are:

- ▶ *Giving Australia* Report, (2005);
- ▶ Allens Consulting, *Improving NFP Law & Regulation* (Aug 2005);
- ▶ CAV (annual reports and 2004 survey)
- ▶ State Services Authority *Review of NFP Regulation Final Report*, Sept 2007 (released April 2008);
and
- ▶ *Strengthening Community Organisations Project Final Report*, Oct 2007 (released April 2008).

The Office for Community Sector (**OCS**) was established in 2008 and part of its mandate is to improve 'the scope and quality of information about NFPs — their number, nature, activities, economic and social contribution and broad trends affecting them'. Therefore the OCS may have further information about the NFP sector that would assist the VCEC with this inquiry.

The following is a summary of some of the key points drawn from sources listed on the previous page:

Key statistics on the Victorian NFP sector

It is estimated that there were 120,000 - 150,000 NFPs in Victoria - of these approximately 39,000 are incorporated as associations under the *Associations Incorporation Act 1981 (Vic)*, with over two-thirds of groups remaining unincorporated.

In 2005/06:

- ▶ the Victorian Government directed \$2 billion to the NFP sector via funding (grants, service payments); and
- ▶ 87% of all adult Victorians gave a donation and over 40% volunteered for a NFP.

Victorians contribute approximately \$3 - \$4 billion per annum to NFP fundraising.

The vast majority of groups rely on volunteers — about 90% with 76% having no paid staff.

Mostly NFPs are small groups of people coming together around a common cause or activity. Less than 10% percent are 'prescribed associations', that is incorporated organisations with revenues of at least \$200,000 and/or assets of \$500,000.

However, some are very large with enormous membership and / or volunteer bases — for example, Bicycle Victoria with 40,000+ members and about \$12M in revenue (2008-2009 <http://www.bv.com.au/>).

In terms of the types of activities undertaken by these groups, CAV data on Victorian incorporated associations suggests that the majority are sporting groups (16,000), small arts groups (7,800), landcare groups (1,600), and adult community / further education (450) groups.

VicSport (a Victorian sporting and recreation peak body) suggests that there are about 80,000 (unincorporated) 'clubs' with 2 million participants, workers and volunteers. Most of these groups are small in terms of annual income — the majority with less than \$25,000.

Of the minority of groups that are separately incorporated, the most common legal structure is an incorporated association under the *Associations Incorporation Act 1981 (Vic)*. CAV report that the number of incorporated associations is growing by about 1,450 per annum, but it is worth noting that there is very little pro active culling of non-active bodies on the register. The following table sets out the types of legal structures for Victorian NFPs (note, this does not include most churches or any trusts as they are not separate legal entities).

Victorian NFP legal structures	
Incorporated association	35,915
Company limited by guarantee	1,645
Co-operative	748

Aboriginal corporation	64
Own Act of Parliament	20
<i>Total number of separately incorporated Victorian NFPs</i>	<i>38,282</i>

4.3 Australian NFP sector

We refer the VCEC to the 2010 Productivity Commission Report, *Contribution of the Not-for-Profit Sector* for the most up-to-date information and description of the broader Australian NFP sector. In particular, we note that Victoria's NFP sector is an important part of Australia's significant and growing NFP sector. Key points to note from the Productivity Commission Report are that:

- ▶ the Australian NFP sector's contribution to GDP grew from \$21 billion in 1999-2000 to \$43 billion in 2006-07 (7.7% pa in real terms) and this made up 4.1% of GDP in 2006-07, up from 3.3% in 1999-2000, even without imputed volunteer contributions (see below);
- ▶ there are about 600,000 NFPs across Australia, up from 520,000 in 1995-96;
- ▶ only 59,000 NFPs are deemed 'economically significant' (employ paid staff and/ or have an active tax role) by the Australian Bureau of Statistics;
- ▶ volunteers contributed \$14.6 billion in unpaid work in 2006-07, up from \$8.9 billion in 1999-2000;
- ▶ in terms of legal structures, the Victorian experience is mirrored across Australia with the majority of NFPs being unincorporated (estimated number 440,000), and of those that are incorporated, the most common legal structure are State or Territory based incorporated associations (136,000) followed by companies limited by guarantee (11,700); and
- ▶ the sector attracts 4.6 million volunteers in 2006-07 and is also a significant employer (890,000 people in 2006-07, up from 604,000 in 1999-2000).

4.4 What is different about the NFP sector?

In order to streamline and reduce the regulatory burden on NFP organisations while enhancing the effectiveness of regulation, we recommend that the VCEC bear in mind the following factors which distinguish the NFP sector from the business sector.

Importance of public trust and confidence in the NFP sector

Nearly all NFP groups rely on public trust and confidence in some way, even if they do not rely significantly on monetary donations from the general public. For example, people will not become members or volunteer their time if they do not believe a community group is well run and 'trustworthy'. In the business sector people buy what they need or want without being overly interested in the governance arrangements or administrative costs of a company. In contrast, donating money (or time) to an NFP is discretionary — a decision that can be quickly reversed if there is any perception that the benefit is not going directly for the purpose for which it was given, or too much is being wasted on 'administration'.

There is much written on this issue by the Charity Commission of England and Wales, and annual surveys of public trust and confidence are used as a key performance indicator for the Charity Commission itself (see http://www.charitycommission.gov.uk/About_us/About_charities/Our_research_index.aspx).

Different and greater number of stakeholders

The number and type of stakeholders that are interested in NFPs, and to which NFPs report, are different to the business sector. There is often a multiplicity of stakeholders for NFPs: for example, funders can include all levels of government (Federal, State and local) and multiple departments within government, plus other sources such as philanthropic and corporate. NFPs have stakeholders that business do not have — volunteers, members as well as others such as carers of clients (who may or may not be the same as their members). For business, it is largely about shareholders, consumers and financial institutions.

Mission driven nature of NFPs


Linked to the previous point is the fact that NFPs are mission driven organisations rather than profit driven. This means the type of information that is relevant to NFP stakeholders is not the same as for business. For example, people who donate to a support service for disadvantaged youth want to know what services have been provided, how many young people have been helped, how many volunteers and members are involved, where does the organisation get its funding from (etc.), as well as basic information about the organisation's financial position. In short, descriptive information about activities and outcomes needs to be considered when regulating NFPs, not just financial information.

In our law reform submissions, we have consistently emphasised the need for appropriate reporting — that is, the provision of information that is relevant to NFP stakeholders. Importantly, however, we only recommend descriptive reporting in the context of a tiered, proportionate reporting scale, based on organisational size. As mentioned at the outset, it must be *better* regulation rather than simply imposing *more* obligations on the sector.

Limited resources, but willingness to comply

Our legal service receives hundreds of enquiries every year from people involved in running NFPs. With very few exceptions, these callers are willing (even keen) to comply with regulation and be accountable and transparent in their activities. However, because of the complexity of the current State and Federal regulatory regime, they often have difficulty understanding how to comply. For example, does opening up a charity auction at an annual dinner to bids via the internet (say from a few members and contacts who are interstate), mean the group must register under the each of the State and Territory based fundraising regimes? The heavy reliance on volunteers and limited financial resources exacerbate the difficulties faced by NFPs — they cannot readily access professional accounting, legal or other advice.

This willingness to comply has been noted by regulators:

	<p><i>“Non-profit organisations show a strong desire to get it right, but often have a low level of knowledge about how the tax and superannuation systems work. Where compliance issues arise, they are mainly due to mistakes or a lack of knowledge.</i></p>
<p>2008/2009 Compliance Program, Not-for-Profit organisations</p> <p>http://www.ato.gov.au/corporate/content.asp?doc=/content/00155156.htm&page=63&H63</p>	<p><i>Many non-profit organisations have limited resources for managing their tax and superannuation affairs and rely heavily on volunteers (who traditionally have a high turnover rate). Only around half of non-profit organisations have their income tax returns prepared by tax agents, which is low compared with other taxpayer segments.”</i></p>

5. A better regulatory framework for Victorian NFPs

5.1 What is wrong with the current regulatory framework?

NFPs grapple with a level of red tape that eclipses their corporate counterparts. Existing NFP legal structures are confusing and none of them are entirely satisfactory. In 2010 there is less uniformity for NFP incorporation and fundraising regimes than there was for business in 1961 when the (harmonised) uniform companies' law regime was introduced. Although that attempt at on-going harmonisation between the States failed, the business sector (because of a referral of powers by the States) has enjoyed a truly national incorporation and public fundraising regime with an independent regulator since 2001. At the very least, the NFP sector deserves parity.

Under the existing fragmented NFP regime there are a myriad of legal structures (at least 20 types), multiple regulators (over 11), multiple and inconsistent legislative definitions of 'charity', and at least eight different approvals required for conducting national fundraising.

A lot of the time and resources of NFPs is wasted on deciding between these structures, or having to change structures as an organisation grows or merges.

Case studies

For examples of the practical difficulties faced by Victorian NFPs, see the case studies in the PilchConnect Submission to 2008 Senate Inquiry (headings 5.18, 5.19 and 8.10 <http://www.pilch.org.au/pastsubmissions/#5>).

We also note the compelling example given in the submission to the 2008 Senate Inquiry by Human Rights Film Festival Inc. http://www.aph.gov.au/senate/committee/economics_ctte/charities_08/submissions/sub133_pub.pdf.

The current NFP regulatory regime provides multiple barriers to accountability and efficiency. There is both a high burden and high cost of regulation and, as these case studies show, limited community resources (funding and volunteer time) are being wasted.

Despite numerous State and Federal reviews of the NFP sector saying the same thing on many key issues (such as, the framework is complex and inconsistent, there needs to be an independent national regulator and nationally consistent fundraising laws), there has been years of governmental inaction. In recent times, we note that it has taken more than a year for COAG to even 'scope' the need for harmonisation of the fundraising laws.

5.2 Previous Victorian government proposals

In Victoria there have been a number of reform proposals that have not been implemented, and which we have not (and would not) support. We mention them as background, and to further illustrate our general views on what, and to whom, NFPs should be required to report.

First there have been moves (via reforms to the incorporated associations regime and as a recommendation in the 2007 Victorian State Services Authority *'Review of Not-for-Profit Regulation'* (Final Report) to require large incorporated associations to migrate to the companies' regime in the belief that they will face greater scrutiny there. This approach has been successfully resisted by these groups and, until such time as the

companies' regime has a 'part' more specifically suited to NFPs (ideally administered by a specialist NFP regulator), we do not believe this is an appropriate response.

The 2007 Victorian State Services Authority Report also recommended cost savings be achieved by not requiring incorporated associations to submit an Annual Statement form to CAV. It recommended that only associations in receipt of Victorian government funding, or who are registered fundraisers be required to disclose their financial accounts on their own website (rather than to CAV). In order to promote accountability and transparency, we are of the view that:

- ▶ all incorporated NFP organisations should be required to maintain proper financial records and accounts (proportionate to their organisation's size);
- ▶ all NFP organisations should be required to report to an external regulator — NFPs 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 searchable, public register
- ▶ there should be a basic level of disclosure by all incorporated NFPs and what is reported should be relevant to NFP stakeholders (see heading 4.4) — for example, annual income and expenditure, sources of income, number of volunteers and members, activities undertaken; and
- ▶ additional reporting requirements should be tiered according to organisational size.


See further PilchConnect submissions to: 2007 Commonwealth Treasury 'Review of companies limited by guarantee'; 2008 Commonwealth Parliament Senate (Economics Committee) 'Inquiry into disclosure regimes for charities and not-for-profit organisations'; 2009 Productivity Commission 'Contribution of the NFP Sector'; and 2010 Commonwealth Treasury 'Review of companies limited by guarantee'. These are all available at <http://www.pilch.org.au/submissions/>.

5.3 Research, submissions, reviews and reports so far

Over the last 15 years, the NFP sector has spent vast resources providing submissions to government to explain these problems (Prof Myles McGregor-Lowndes calculates 12,900 pages of submissions, a calculation he made before the 319 submissions made by the sector to the 2010 Productivity Commission Inquiry and 26 to the 2010 Senate Public Benefit Inquiry).

Despite these efforts, there has been a frustrating lack of progress. We have 'review overload' — six major Federal government inquiries (1995 Industry Commission Report, 2001 Charity Definition Inquiry, 2008 Senate Economics Committee, 2010 Australian Productivity Commission, 2010 Henry Tax Review, 2010 Senate Economics Legislation Committee) and multiple Victorian government inquiries (2005 Allens Consulting, 2007 SCOP, 2008 SSA plus reviews of the fundraising and incorporated associations' regimes).

The most recent Senate Inquiry Report states:

	<p><i>"The Committee agrees with the view expressed to it that there comes a time when a government has to make a decision either to do something or to stop saying that it is going to do something, because the matter has been on the agenda for many years. It is now time for action."</i></p>
<p>Senate inquiry into the 'Tax Laws Amendment (Public Benefit Test) Bill: http://www.aph.gov.au/senate/committee/economics_ctte/public_benefit_test_10/index.htm</p>	

We agree. The weight of evidence from these submissions and inquiries means we are at a tipping point. We need State and Federal Government co-operation, not further reviews. From the States' perspective, the Victorian Government is well placed, particularly with appropriate recommendations from this VCEC Inquiry, to lead the way. These reforms are likely to (or at least should) attract bi-partisan and independent support.

5.4 How can the Victorian Government make a difference?

We recommend bold action. Continued, uncoordinated piecemeal reforms to State-based fundraising and incorporated associations regimes may make some improvements but, overall, they tend to exacerbate the problem. Given the significant economic and social contribution made by the NFP sector to Victorian community, the sector is worthy of better, 'fit for purpose' regulation. As the corporations law (business sector) experience shows, regulatory reform of this nature will most quickly and comprehensively be achieved by a referral of powers. In the case of NFPs, a State referral of powers to the Commonwealth in relation to the incorporation and fundraising by NFPs would allow a separate NFP Act (or at least a separate part of the Corporations Act) to be passed without fear of constitutional challenge (see PilchConnect follow-up submission to the Productivity Commission Draft Report for more detailed discussion of this issue: headings 3.4 - 3.23, pages 6 -10 <http://www.pilch.org.au/submissions/#4>).

While we appreciate that a referral of powers requires high level cooperation (ideally from all States), corporate law development shows that the States can quickly be harnessed into action when necessary. The NFP sector is worthy of similar, prompt co-operation and there is likely to be considerable sector disquiet if, yet again, no progress is achieved.

Even if not all States are prepared at this stage to refer powers, it would still be significant if a 'lead' State did so, with others to follow over time. We note that, to date, the Victorian government has shown considerable interest in this area, further demonstrated by including NFPs in its referral to the VCEC.

While the current COAG agenda may lead to greater harmonisation of fundraising laws, recent experience with co-operatives (in addition to the corporations' law experience) demonstrates that harmonisation and mutual recognition is, at best, an incredibly lengthy process. It is particularly difficult in the fundraising context because, compared with co-operatives, existing laws are considerably more divergent, technology is raising new challenges, and the number and diversity of the groups to be regulated is much greater.

Broadly speaking, we agree with the Productivity Commission's observations (2010, see for example page 117) that State government efforts and resources are better directed to sector development, rather than duplicating regulators and legislative frameworks for legal structures and fundraising.

5.5 Mirco NFPs — an opportunity

We suggest that the Victorian Government (or possibly the VCEC as part of this Inquiry) should consider the development of a simple registration scheme that would provide some (but not all) of the benefits of being a separate legal entity, but without the compliance obligations and formality of legal structures such as an incorporated association or company.

This scheme could both reduce the regulatory burden for a significant number of existing very small (or mirco) NFPs currently incorporated as associations, as well as assisting some of the 120,000 or so unincorporated community groups which could benefit from this legal protection.

Our experience of dealing with hundreds of inquiries about incorporation, legal structures, insurance (etc.) is that many groups are effectively being rushed into separately incorporating solely for the purpose of obtaining public liability and volunteer insurance and / or to be eligible to apply for very small government

and philanthropic grants. Many groups have an annual income of less than \$5,000. All these groups really need is some recognition of legal status (separate from their members) and some limitation around the extent to which members can be personally liable for the debts of the group.

These groups pose a very low regulatory risk. From a public policy point of view, in exchange for the small 'burden' of registering, mirco groups would obtain significant practical advantages and the government would benefit from capturing basic information about their existence. This data, on the size and nature of a part of the NFP sector that we currently only have "guesstimates" about, would support improved public policy decisions on how best to regulate and support the sector.

We believe this issue is becoming more pressing for mirco NFPs as the convergence between the requirements of incorporated associations and public companies limited by guarantee continues to increase. (For example, the *Associations Incorporation Amendment Act 2010* (Vic) introduces an obligation to prevent insolvent trading as applies under the *Corporations Act 2001*.)

In summary, it is counter productive for micro NFP groups to incorporate before they have sufficient funds or capacity to manage the on-going compliance obligations required by existing NFP legal structures. It is also frustrating for regulators seeking improved compliance rates to try to regulate these groups. An alternative form of 'registration' for these groups is required. On this issue, we suggest the VCEC consider the excellent article recently published by Prof. Myles McGregor-Lowndes and Frances Hannah entitled '*Unincorporated associations as entities: a matter of balance between regulation and facilitation?*' (*Company and Securities Law Journal*, 2010, 28(3), pp. 197-221). The article canvasses the problem in more detail and examines possible options, in particular a form of registration used in the USA. There have also comments made in the public hearings and submissions to the 2008 Senate Economics Committee Inquiry that we could direct the VCEC to. We would be happy to elaborate on this issue further.

6. Recommendations

We refer the VCEC to our recommendations in the four main submissions we have made on NFP regulatory reform, namely:

- ▶ PilchConnect submission titled 'Time for underpinning: a national regulatory approach for the not-for-profit sector' (<http://www.pilch.org.au/pastsubmissions/#4>) made in response to the 2008 Senate Economics Committee 'Inquiry into disclosure regimes for charities and not-for-profit organisations',
- ▶ two PilchConnect submissions to the Productivity Commission Report on the '*Contribution of the Not-for-Profit Sector*' - initial submission, June 2009 and follow-up submission on the draft report, November 2009 (both at (<http://www.pilch.org.au/submissions/#4>), and
- ▶ PilchConnect submission on the draft *Associations Incorporation Amendment Bill 2010* (<http://www.pilch.org.au/submissions/#2>).

In these submissions we have tried to set out an overall road map for regulatory reform, and we urge the VCEC to consider the recommendations it makes in the light of this 'big picture'.

In terms of those recommendations most relevant to the Victorian Government, we highlight the following from our previous submissions and urge the VCEC to recommend that:

Recommendation 1

The Victorian Government should work with the Commonwealth Government to establish a 'one-stop shop' independent, national NFP regulator which would register and oversee NFP incorporation, fundraising and determination of charitable status.

Recommendation 2

The Victorian Government should work with the Commonwealth Government to create an improved national NFP legal structure (drawing on the best aspects of the incorporated associations' law and the companies limited by guarantee structure).

The improved NFP legal structure (which may simply be further reform of the existing companies limited by guarantee structure) must include a sliding scale of reporting obligations, fees and penalties based on the size of the organisation, and allow an organisation to operate across all States without dual registration (that is, without requiring registration under the Victorian associations' regime and as a registrable body under the corporations law). The core provisions should be capable of being understood by a non-lawyer and the legislation should include a 'Guide for Small Non-Profits' (similar to the 'Guide for Small Business' in the *Corporations Act 2001*).

Recommendation 3

The Victorian Government should proceed to discuss a referral of its (State) powers over incorporation and fundraising by NFPs to the Commonwealth Government in order to most quickly and effectively implemented recommendations 1 and 2.

Recommendation 4

The Victorian Government should make core, recurrent funding available for sector-based support services that assist NFPs understand and implement sound governance and

accountability practices, thereby allowing NFPs to more efficiently meet their compliance obligations and have greater time to focus on core objectives.

Recommendation 5

The Victorian Government should work with all other Australian governments to ensure appropriate and consistent contractual accountability and reporting requirements in relation to publicly funded service delivery. In particular, there is a need to scale the contracts to the size of the funding and the size of the NFP receiving it.

Recommendation 6

Once an organisation is endorsed as a 'charity' for Commonwealth taxation purposes, the Victorian Government should accept that determination for all State taxation purposes unless there is a very strong policy reason to add extra requirements.

Recommendation 7

The Victorian government should consult with the NFP sector about the desirability of new form of separate legal status and limited liability for mirco NFP groups.

As an interim step, we recommend that:

Recommendation 8

The Victorian Government should work via the Council of Australian Governments toward mutual recognition of NFP licensing standards by mid 2011 — including fundraising regulation, charitable status and charitable gaming (excluding poker machines). Once a new, national regulator for NFPs is established (recommendation 1), we recommend that the Victorian Government refers its powers over these matters to the Commonwealth Government, so that a proper national regime can be achieved (see recommendation 3).

At a more detailed level, we recommend that:

Recommendation 9

The Victorian Government should consolidate, re-order and simplify the drafting of the *Associations Incorporation Act 1981 (Vic)* before the changes made by the *Associations Incorporation Amendment Act 2010 (Vic)* commence.

Recommendation 10

The model rules for incorporated associations contained in the *Association Incorporation Regulations 2009 (Vic)* should be re-drafted in clear, logical and plain-language style so they are accessible to associations of all sizes.

Recommendation 11

Well before the *Associations Incorporation Amendment Act 2010 (Vic)* comes into force and the new model rules are released, an extensive community legal education campaign about the effect of the reforms should be undertaken across Victoria. In particular, it must be clear what steps associations are required to take (if any) to ensure their rules comply with the new provisions, and no fees should be payable for making changes necessary to comply with the new requirements.

Recommendation 12

The Victorian Government should reconsider the current ‘cost recovery’ policy rationale behind the imposition of fees on incorporated associations by Consumer Affairs Victoria. The aim of the review should be to reduce the fees (online lodgement and publications could significantly reduce any administrative costs) and make fees proportionate to the size of the organisation. This is in line with stated Victorian Government regulatory policy. It also makes sense given the contribution of the NFP sector to Victoria’s economy, the limited resources of many NFPs, the lack of use of data collected with fees and the lack of enforcement action by the collection agency. For more information on this, please see Part 3 ‘Imposition of Fees’ in our submission to the Regulatory Impact Statement on the *Associations Incorporation Amendment (Fees and Other Matters) Regulations 2009* (copy enclosed as Attachment 1 to this submission).

[We note that the UK and NZ charity commissions do not charge a fee to register a charity.]

Recommendation 13

The Victorian Government consider making the information it collects about NFP organisations freely available to the public via an on-line, searchable database. Models are available from charities commissions in other jurisdictions, in particular:

- the UK Charities Commission

<http://www.charitycommission.gov.uk/showcharity/registerofcharities/RegisterHomePage.aspx>

- the NZ Charities Commission.

www.charities.govt.nz/TheRegister/PurposeoftheRegister/tabid/94/Default.aspx

7. Previous submissions, reports and inquiries

7.1 Relevant PilchConnect submissions

Along with many other NFPs, PilchConnect has contributed a significant amount of its limited resources (currently only 3 lawyers) to preparing submissions on NFP regulatory reform. In the last two and a half years we have made 14 public submissions and 3 confidential submissions to government inquiries. We have done this because we believe regulatory reforms will help prevent many of the common issues that NFPs currently bring to us.

Recent PilchConnect submissions	
2010: Submission to the Commonwealth Treasury — reforms to company limited by guarantee reporting requirements	http://www.pilch.org.au/submissions/#3
2010: Submission to Senate Economics Legislation Committee — Tax Laws Amendment (Public Benefit Test) Bill 2010	http://www.pilch.org.au/submissions/#1
2010: Submission to CAV — Exposure Draft Associations Incorporation Amendment Bill	http://www.pilch.org.au/submissions/#2
2009: Submission to CAV - Regulatory impact Statement on the Associations Incorporation Amendment (Fees and Other Matters) Regulations 2009	RIS available via Consumer Affairs Victoria website under 'Public Consultations and Reviews' and copy of our submission attached to this submission at Attachment 1
2009: Further Submission to Productivity Commission, — Draft Research report, 'Contribution of the Not-for-profit-Sector'	http://www.pilch.org.au/submissions/#4
2009: Initial submission to Productivity Commission — Issues paper, 'Contribution of the Not-for-profit-Sector'	http://www.pilch.org.au/submissions/#4
2009: Submission to Victorian Government — Reducing Red Tape Project, Early Childhood Development Sector Consultation	http://www.pilch.org.au/pastsubmissions/#2
2008: Submission to Henry Tax Review — 'Removing complexity, adding coherence: A proper framework for concessional tax treatment of charities and not-for-profit entities'	http://www.pilch.org.au/pastsubmissions/#4
2008: Submission to Senate Economics Committee — 'Time for underpinning: a national regulatory approach for the not-for-profit sector', Inquiry into Disclosure regimes of Charities and Not-for-profit Organisations	http://www.pilch.org.au/pastsubmissions/#5

2008: Submission to Economic Development and Infrastructure Joint Investigatory Committee of the Victorian Parliament — Inquiry into Improving Access to Victorian Public Sector Information and Data	http://www.pilch.org.au/pastsubmissions/#6
2007: Submission to State Services Authority — Review of Not-for-Profit Regulation	http://www.pilch.org.au/pastsubmissions/#10
2007: Submission to Victorian Government — Stronger Community Organisations Project (SCOP)	http://www.pilch.org.au/pastsubmissions/#10
2007: Submission to Commonwealth Treasury — Review of Companies limited by guarantee	http://www.pilch.org.au/pastsubmissions/#8

7.2 Recent Victorian reports on reducing the regulatory burden

2005

Victorian Government Review of Fundraising Appeals Act — available from CAV website

Victorian Government Associations Incorporation Act Review Report — available from CAV website

Victorian Government (then Department of Victorian Communities) commissions Allens Consulting Group to undertake research: Improving NFP Law and Regulation (74 page report)

2007

Victorian State Services Authority (SSA) commissions Allen Consulting Group to produce report Review NFP Regulation (30 page report) — available on SSA website

Victorian SSA Final Report Review of NFP Regulation (116 page report) — available on SSA website

Department of Victorian Communities commissions the Stronger Community Organisations Project (185 pages) — available on DPCD website

2008

Victorian SSA produces report 'Regulating the NFP Sector' (30 page paper) — available on SSA website

Victorian Government produces the State Government Action Plan: Strengthening Community Organisations (an Action plan that includes setting up the Office for the Community Sector within the Department of Planning and Community Development) — available on DPCD website

Office of the Community Sector (OCS) commissions Deloitte to produce a report 'Enhancing regulatory awareness and engagement in NFP Community Organisations' (57 pages) — available on DPCD website

OCS commission Melbourne University to produce a report 'Reducing the Burden - Increasing the Impact - Better integrated Standards and Quality Assurance Systems' (83 pages) — available on DPCD website

Other

There have also been two reports into fundraising legislation and a full government review of the associations legislation (2004)

7.3 Historical Victorian reports

Victoria, Royal Commission on Charity, 1890, Final Report dated 22 December 1891, Parliamentary Papers, 1891, Vol.6.

Victoria, Chief Justice's Law Reform Committee, Report on Charitable Trusts, Melbourne, 1965.

Victoria, Victorian Chief Justice's Law Reform Committee, Unincorporated Associations, Melbourne, 1980.

Victoria, State Government Interdepartmental Working Party, Administration of Charities (First Report), Melbourne, 1980.

Victoria, Administration of Charities, Victorian State Government Interdepartmental Working Party, (Second Report) Report, Victorian Government Printer, Melbourne, 31 March 1982.

Victoria, Regulation of Health Care Agencies and Charities, Health Department, (Discussion Paper No. 8), Melbourne, 1987.

Victoria, 'Report on the Law Relating to Charitable Trusts, Legal and Constitutional Committee', 34th report to Victorian Legislative Council, May 1989.

Victoria, 'A Report to Parliament on the Law Relating to Charitable Trusts', No.54, Government Printer, Melbourne, 1989 at p.3.

Victoria, A Report to Parliament on the Public Liability of Voluntary Organisations, Legal and Constitutional Committee of the Victorian Parliament, No.50, Victorian Government Printer, Melbourne, 1989.

7.4 Federal Reports

1995: Industry Commission, Charitable Organisations in Australia, Report No. 45, AGPS, 1995

2001: Treasury Report Charities Definition Inquiry: www.cdi.gov.au

2007: Treasury Discussion paper on Financial Reporting by Unlisted Public Companies: <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1269>

2008: Senate Economics Committee Report Inquiry into Disclosure Regimes for NFPs : http://www.aph.gov.au/senate/committee/economics_ctte/charities_08/index.htm

2009 - 2010: Productivity Commission, 'Contribution for the Not-for-profit Sector' (particularly Chapter 6 on legal and regulatory barriers) <http://www.pc.gov.au/projects/study/not-for-profit/submissions#initial>

2010: Henry Review Australia's Future Tax System: <http://taxreview.treasury.gov.au/>

2010: Senate inquiry into the 'Tax Laws Amendment (Public Benefit Test) Bill': http://www.aph.gov.au/senate/committee/economics_ctte/public_benefit_test_10/index.htm

7.5 Other useful references

- ▶ Giving Australia Report, a major research report commissioned by the (then) Department of Family and Community Services, on behalf of the Prime Minister's Community Business Partnership, released 10 October 2005: see <http://www.bus.qut.edu.au/research/cpns/publications/documents/Giving-Australia-Full-Report.pdf>
- ▶ For a more detailed discussion of the issues discussed under heading 4.4 see Woodward & Marshall, 'A Better Framework: reforming not-for-profit regulation' University of Melbourne (2004) <http://ccslr.law.unimelb.edu.au/go/centre-activities/research/reforming-not-for-profit-regulation->

[project/index.cfm](#) , in particular see Chapter 7 'Stakeholders' and Chapter 8 'Disclosure'. Also, Woodward & Marshall, 'The more the merrier? Stakeholders in not-for-profit companies' Third Sector Review (Volume 10, No.1 2004).

- ▶ National Roundtable of Nonprofit Organisations, Nonprofit Regulation Reform Program: An initial statement by the National Roundtable of Nonprofit Organisations, released 21 May 2004. Available at <http://www.nonprofitroundtable.org.au/>

ATTACHMENT 1

11 December, 2009

Associations Incorporation RIS
Consumer Policy and Programs Branch
Consumer Affairs Victoria
GPO Box 123
Melbourne VIC 3001

By email: risconsultations@justice.vic.gov.au

Dear Sir / Madam

Regulatory Impact Statement: Associations Incorporation Regulations

We refer to your letter dated 13 November 2009 inviting public comment on a Regulatory Impact Statement (**RIS**) for the proposed *Associations Incorporation Amendments (Fees and Other Matters) Regulations 2009 (Vic)* (**the Regulations**) prepared by Consumer Affairs Victoria (**CAV**).

We enclose a submission on the RIS. PilchConnect provides free and low cost legal services to many small Victorian incorporated associations and have used inquiry data, and knowledge gained from our training, advice work and case work to inform this submission.

In the submission we have asked CAV to confirm when the proposed Regulations will expire and when they intend to undertake a thorough review of them, as indicated in the RIS. We would be grateful if CAV could advise us on these issues.

If you have any questions, please do not hesitate to contact us on the details below.

Sincerely



Liz Morgan
Manager and Principal Lawyer
PilchConnect: legal assistance for community organisations
Public Interest Law Clearing House (PILCH)

Enc.

PILCHCONNECT COMMENT ON CONSUMER AFFAIRS VICTORIA'S REGULATORY IMPACT STATEMENT FOR THE PROPOSED ASSOCIATIONS INCORPORATION AMENDMENTS (FEES AND OTHER MATTERS) REGULATIONS 2009 (VIC).

1 ABOUT PILCHCONNECT

- 1.1 PilchConnect is a specialist legal service for not-for-profit community organisations (**NFPs**) based in Victoria and is one of the six services operating under the umbrella of the Public Interest Law Clearing House (Vic) Inc (**PILCH**).¹
- 1.2 PilchConnect provides legal services to Victorian NFPs, including many Victorian incorporated associations, particularly micro and small-medium organisations. Our services include free and low cost legal information, training, and legal advice (via phone) to the Victorian NFP sector. We also have a service matching eligible, public interest NFPs, who have complex legal issues with PILCH member law firms to receive free legal assistance. Our service is unique within Australia.
- 1.3 By developing as a sector-based hub of NFP legal expertise, PilchConnect is working 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.
- 1.4 In effect, we are 'helping 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.
- 1.5 PilchConnect works in formal partnership with the Australian Centre for Philanthropy and NonProfit Studies at Queensland University of Technology and with peak bodies such as Volunteering Victoria, Volunteering Australia and VCROSS. The service currently receives no government funding and relies on pilot funding from The William Buckland Foundation and the Legal Services Board of Victoria.
- 1.6 PILCH is itself a Victorian incorporated association, and like many not-for-profit organisations, we operate on very limited resources. PilchConnect is a service of PILCH and operates with 3.0 equivalent full time lawyers.
- 1.7 In addition to the services we provide to NFPs (see para. 1.2) in the last year alone we have responded to requests by government to comment on, or provide submissions to:
 - Proposed amendments to the *Association Incorporation Act 1981* (Vic) on a cabinet-in-confidence basis (July 2009);²
 - proposals to amend the *Equal Opportunity Act* to cover volunteers (November 2009);

¹ See www.pilch.org.au/about/

² PilchConnect also provided a comprehensive submission on the 'phase 1' changes to the *Association Incorporation Act* that were introduced earlier in 2009.

- the Victorian Government Early Childhood Development Sector Regulatory Review (June 2009);
 - the Productivity Commission's study on the *Contribution of the NFP Sector*, Initial Call for submissions (June 2009);
 - the Productivity Commission's Draft Report on the *Contribution of the NFP Sector*, Call for Further Submissions (November 2009);
 - 2009 Safe Work Australia - National Harmonisation of OHS Laws (October 2009);
 - Commonwealth Senate *Inquiry into Access to Justice* (30 April 2009); and
 - Commonwealth *Henry Tax Review* (November 2008).
- 1.8 All of our submissions are based on the comprehensive inquiry data, training, advice work and case work that we provide to small-medium NFPs, assisting government to make decisions that are based on empirical evidence and practical examples.
- 1.9 In this regard, we note comments on page 12 of the RIS documentation that:
- The Regulations will require revision as a result of the second round of amendments to the Act. A thorough review of the Regulations is proposed once the second round of reforms to the Act have been implemented. To minimise transition costs for CAV and the industry, it is considered preferable to defer any substantial changes to the Regulations to when the thorough review of the Regulations is carried out. Consequently, the proposed Regulations substantially remake the remaining provisions of the 1998 Regulations.*
- 1.10 As a pilot service with limited funding, PilchConnect does not have resources to commit to providing substantial input into a 'temporary measure' RIS. In this response we have, however, made some overall comments that we hope will inform the final RIS for the Regulations.
- 1.11 We understand that these proposed Regulations are an interim measure only. We submit that the proposed Regulations should be timed to sunset as soon as the proposed changes to the *Associations Incorporation Act 1981 (Vic) (the Act)*, have been made.
- 1.12 We request that CAV commit to undertaking an in-depth review into the policy rationale underlying the Regulations, and a comprehensive review of their effectiveness in meeting this policy rationale, as soon as the changes to the Act, flagged for 2010, are introduced.³
- 1.13 We hope that, when CAV review the Regulations again, it would include a more comprehensive response to:
- the State Services Authority's Final Report on the *Review of Not-for-profit Regulation (2007)*;⁴
 - the report of the Senate Standing Economics Committee's report *Disclosure Regimes for Charities and Not-for-Profit Organisations (2008)* which made reference to evidence that incorporated associations are 'poorly regulated';⁵

³ Unfortunately, the timing (ie date for review) of these new Regulations is unclear from the RIS documentation.

⁴ State Services Authority *Review of Not For Profit Regulation Final Report (2007)*

- commitments made in the State Government's *Strengthening Community Organisation Action Plan* (2008) to reduce the regulatory burden for NFPs; and
- data and empirical information gathered and presented by the Productivity Commission in relation to the *Contribution of the NFP Sector* including the Commission's analysis of barriers to the sector's effectiveness.

1.14 In the meantime, we have made some general comments about the proposed interim amendments to the Regulations below.

2 PRELIMINARY COMMENTS ON BACKGROUND MATERIAL IN THE RIS

Comments throughout the report about 'simple' regulation

2.1 The RIS sets out the history of the Act, including a reference to the second reading speech where it is noted that the original 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].

2.2 Throughout the RIS there are statements to the effect that the Act continues to provide organisations with a 'simple form of incorporation'. For example:

Particular benefits of incorporating as an incorporated association under the Act (compared to incorporation as a company limited by guarantee under the corporations law) include:

- *It is simpler and less expensive; and*
- *It provides less onerous ongoing regulatory obligations and office-holder duties.*⁶

2.3 While when the Act was introduced it may well have met its stated purpose (to provide a simple form of incorporation), in the 25 plus years since its introduction it has been amended by 28 different amending Acts (i.e. more than once a year) and 7 of these have been significant amendments. The amendments have introduced more sections into the Act, often in an ad hoc, band aid manner. The Act has become difficult to follow and the language used in the legislation, regulations and the Model Rules are difficult for non-legally trained people to understand. A noticeable trend has been to increasingly incorporate, by reference, large sections of the *Corporations Act* (Commonwealth legislation that primarily regulates the for-profit sector and public companies).⁷ The recent amendments to the Act proposed by CAV indicate that this trend appears to be continuing – a matter which we also refer to below at paras. 4.1 to 4.7.

2.4 This situation has been compounded by a lack of public legal education on the changes to the Act, so that people involved in incorporated associations are not confident in interpreting the legislation or being able to amend their own rules (despite the intention of the original drafters that the regime would be one that would not require people to have to engage a lawyer).

⁵ Senate Standing Committee on Economics *Disclosure regimes for charities and Not-for-Profit Organisations*, 14 December 2008 at p. 70

⁶ RIS p. 2

⁷ For example, see section 31M on Voluntary Administration; section 36D Winding up and Cancellation.

- 2.5 Increasingly, PilchConnect is being approached by Victorian incorporated associations seeking legal advice to interpret clauses of the Model Rules or provisions in the Act. There is confusion around basic matters such as how an organisation can change its rules, when grievance procedures are to be invoked, and the content of the legal duties committee of management members.
- 2.6 While the regulatory regime for incorporated associations may have been intended to be simple, PilchConnect submits that the RIS provides no evidence that it is so today. We have separately submitted to CAV⁸ that the Act needs an entire re-write, including a simplification of the language and a new, logical order to the provisions (eg. collecting all sections about rights of members in one part, all duties of committee members in another part etc). This is also required for the Model Rules. Coming up to 30 years since its original enactment, it is unacceptable that the Act continues to be 'patched-up', and that people involved in Victorian incorporated associations continue to have to deal with a sub-standard regulatory regime.

Reasons for incorporation misconceived

- 2.7 On page 10 of the RIS it is stated that:

*The capacity for associations to incorporate appears to have had a positive impact on the community and is viewed as a positive option for incorporation by community groups. This is borne out by ongoing high rates of new incorporations (currently in excess of 1,400 per annum) with especially high rates of association formation among culturally and linguistically diverse groups and migrant groups. The Act ensures that the rights of members of incorporated associations are protected by means of an appropriately comprehensive set of rules. The Act also contains requirements aimed at ensuring the efficient and accountable management of the association's activities.*⁹

- 2.8 We note that no evidence is provided to support these assertions. Our experience working directly with many small NFP groups is that the main reason they give for incorporating is because local government authorities and philanthropic funders are increasingly refusing to provide even minor funding to groups that are not incorporated. Another reason for incorporation is to obtain insurance.
- 2.9 In particular, many of the CALD and migrant groups we have worked with via migrant resource centres and via our regional training have indicated that they have minimal understanding (if any) of their considerable compliance obligations under the Act. Many have told us they only incorporated because they were 'told to' by a funder and they did not understand what this actually meant for their organisation. In particular, they did not know about the existence of the Model Rules and had never read them, despite probably adopting them on incorporation. This anecdotal evidence may help to explain why over 25% of incorporated associations do not currently file their annual return.¹⁰

⁸ See PilchConnect's August 2009 confidential submission to CAV on proposed changes to the *Associations Incorporation Act*

⁹ RIS page 10

¹⁰ RIS page 30

- 2.10 We urge CAV to review this situation and conduct research into the motivations for incorporation and the level of comprehension small groups have about the Victorian regulatory regime. The results of this research would assist CAV to ensure that the regulation of incorporated associations in Victoria is simple, tailored and proportionate.

Contribution of the NFP sector

- 2.11 It is disappointing that the RIS does not reference or use evidence of the significant contribution of the NFP sector¹¹ to Australia's and Victoria's civil society and social capital, as well as to the economy. The final RIS could draw on the Productivity Commission's draft (or possibly final) research report on the *Contribution of the NFP Sector*, especially with regard to 'spillover effects'.¹² In this regard, the RIS fails to highlight the way in which the NFP sector is increasingly being engaged by government agencies to deliver crucial community services, and the need to support organisations that deliver these services on behalf of government.

- 2.12 Statistics released by the Australian Bureau of Statistics including the September 2009, *Australian National Accounts: Non-Profit Institutions Satellite Account, 2006-07*,¹³ show that in the 2006/2007 year:

- NFPs contributed around \$43 billion to Australia's economy – equivalent to 4.1% of the country's economy;¹⁴
- NFPs employed close to 890,000 people and generated approximately \$76.6 billion of income throughout the sector;¹⁵
- the contribution of volunteers in the NFP sector across Australia is valued at approximately \$14.6 billion;¹⁶
- approximately 5.2 million (34%) of Australian adults volunteered in the community sector¹⁷ and volunteering in the NFP sector contributed a total of 623 million hours of work, the same as 317,200 full time jobs; and¹⁸
- over 50 per cent of expenditure on community services in Australia, such as aged care and children's services, is delivered through NFP community organisations.¹⁹

- 2.13 In Victoria :

- in 2006, an estimated 33% of adult Victorians volunteered their time²⁰, 79% of adult Victorians gave money²¹ to NFP community organisations; and

¹¹ We note in passing that, when discussing NFPs collectively, the term 'sector' is more appropriate than 'industry'.

¹² In particular, see Chapter 3 of that Report, including table at [3.13], available at www.pc.gov.au/projects/study/not-for-profit/draft

¹³ See www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbyCatalogue/A9567441208D43B3CA257634001BFA54

¹⁴ See above n.13

¹⁵ See above n.13

¹⁶ See above n.13

¹⁷ ABS, *Not-for-profit Organisations 2006-2007* (CAT 8106.0), at www.abs.gov.au/AUSSTATS/abs@.nsf/mf/8106.0

¹⁸ See above n.13

¹⁹ ABS, *Community Services, 1999-2000* (CAT.8696.0), at www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8696.01999-2000

²⁰ ABS *Voluntary Work 2006* (CAT 4441.0), at www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4441.02006

²¹ See 2005 *Giving Australia Report* at www.fahcsia.gov.au/SA/COMMUNITIES/PUBS/COMMUNITY/Pages/default.aspx

- NFP community organisations receive over **\$2.2 billion** of Victorian Government funding in service agreements (to deliver services, often to marginalised and disadvantaged Victorians) and in grants every year.²²

2.14 It is disappointing that the RIS does not make use of the significant data that has been released about the NFP sector in the last year. We refer to the significant contribution of the NFP sector below (see paras 3.5 - 3.8) in relation to the imposition of fees.

3 IMPOSITION OF FEES

Non-compliance with commitment to reduce regulatory burden for NFPs

3.1 The RIS indicates there has not been a comprehensive reconsideration of the imposition of fees or the fee structure, and that the regulations about fees have been remade, virtually without change. The stated reason is to minimise change while the Act is being amended in 2010.

3.2 We are particularly concerned that CAV has not given due consideration to 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.²³ 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* :

*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.*²⁴

3.3 We submit that the remaking of the *Associations Incorporation Regulations*, largely in their current form, has not achieved a reduction in regulatory burden for incorporated associations.

3.4 We refer to our request above (see paras. 1.11 - 1.13 above) that CAV confirm that it will undertake a comprehensive review of the fee structure as soon as the changes to the Act are made in 2010. We hope that the reduction of the regulatory burden for NFPs will be a key focus in the full review of the Regulations following amendment of the Act.

²² Fels, A et al. *Stronger Community Organisations Project - Report of the Steering Committee* (SCOP report), 2007 available at www.dpcd.vic.gov.au, page 50

²³ Victorian State Government *Reducing the Regulatory Burden* 2007

²⁴ *Victorian Government's Action Plan : Strengthening Community Organisations* (2008), p 10

Rationale for cost recovery

3.5 Victorian Government policy acknowledges that full cost recovery may not always be the most appropriate basis for setting fees.²⁵

3.6 In the RIS, CAV have noted that Victorian government policy contemplates that there may be circumstances in which fees should be set at levels entailing subsidies and that 'less than full' cost recovery may be appropriate.²⁶ There then appears to be an unexplained decision that 70% cost recovery is appropriate, without any further analysis:

The fees under proposed regulation 19 will require the industry to fund a major portion of the costs of administration of the Act and Regulations. This will cost industry \$1,376,039 per annum.

Maintaining the current level of fees will result in an under-recovery of costs of \$596,931. This is inconsistent with the Government's general cost recovery policy. However, it is consistent with the recognition by government of the voluntary and not for-profit nature of incorporated associations and of the benefit to the wider community of a vibrant, sustainable, incorporated associations sector...

Approximately 70% of CAV's costs in administering the Act and proposed Regulations will be recovered, providing revenue of \$1,376,039 per annum. Requiring this level of costs of administration of the Act and Regulations to be recovered from the industry ensures taxpayers are not subsidising the entire scheme. Instead, the people who derive the benefits from the regulatory scheme contribute to the costs of administering the scheme.²⁷

3.7 We submit that CAV have failed to note the full Victorian government policy in regard to fee setting and cost recovery. In the Department of Finance and Treasury *Cost Recovery Guidelines*²⁸ it is noted that (emphasis added):

While general policy is for costs to be recovered on a full cost basis, there are nevertheless situations where it may be desirable to recover at less than full cost, or not to recover costs at all. Examples of such situations are discussed in more detail in Chapter 4, and include circumstances where:

- *practical implementation issues make cost recovery infeasible;*
- *there are benefits to unrelated third parties (sometimes referred to as 'positive externalities');*
- *social policy or vertical equity considerations are considered to outweigh the efficiency objectives associated with full cost recovery; and/or*
- *full cost-recovery might adversely affect the achievement of other government policy objectives (underlining added).*

3.8 We have noted above the significant contribution of the NFP sector to Australia's and Victoria's society and economy, as well as its significant 'spillover' social benefits (see para. 2.11). The

²⁵ See page 39 *Victorian Guide to Regulation*

²⁶ RIS pages 24 and 27

²⁷ RIS page 27

²⁸ Available from www.vcec.vic.gov.au

sector involves significant numbers of volunteers, assists in community engagement, delivers a large portion of social and community services on behalf of the State Government (assuming many of the risks of these), and works to reduce disadvantage and social exclusion, in line with Victorian government policy.

- 3.9 We submit that the benefits that the NFP sector brings to Victorian society as a whole, and the social policy objectives (such as the Victorian Government's commitment to community engagement and social inclusion) necessitate a more comprehensive analysis of the cost recovery rationale in these Regulations. It may well be that this is an area where no cost recovery is appropriate. This should be considered after the amendments to the Act.

Fees are not proportional to size of NFP organisation

- 3.10 The series of fees imposed by the Regulations are the same no matter the size of the incorporated association. We note that there appears to have been no research into the disproportionate burden the current fee structure places on micro and small incorporated associations. For example, Mercy Private Hospital Inc. and Berry Street Inc. - organisations with an annual turnover of well over \$1 million made up of significant fee-for-service, government funding and fundraising activities - pay the same amount to CAV as a small newly arrived African group that has an annual turnover of \$550 derived from member fees.

- 3.11 The State Government's own *Victorian Guide to Regulation* (2007) states :

*In general, businesses (sic) of different sizes should not be burdened disproportionately by the imposition of regulatory requirements ...However, there may be instances where the benefits of the regulations clearly override concerns of discrimination or unfair treatment. Therefore, whenever disproportionate sectional impacts are identified, they need to be considered on a case-by-case basis.*²⁹

- 3.12 We note that the reference to 'business' in this document appears to indicate a for-profit entity, but we assume that the Victorian Government would apply the same considerations to the NFP sector. There does not appear to have been any 'case-by-case' analysis of the disproportional nature of the fees in this RIS.

- 3.13 The failure to analyse the disproportional affect of the imposition of the fees also appears to disregard Action 3 of the *Victorian Government's Action Plan : Strengthening Community Organisations* in which the Victorian State Government committed to:

*..work with community organisations and the Commonwealth Government to develop a regulatory framework which is appropriate for both large and small NFPs. We will ensure that our regulatory approach manages risk and provides accountability, transparency and adequate protections for NFPs of all sizes.*³⁰

²⁹ DTF *Victorian Guide to Regulation* Second Edition April 2007, page 37.

³⁰ *Victorian Government's Action Plan : Strengthening Community Organisations* (2008), p 11.

- 3.14 We also note that no adequate explanation has been given for ignoring recommendations about fees made by the State Services Authority's comprehensive *Review of NFP Regulation*.³¹
- 3.15 We hope CAV will look carefully at this when the Act is remade and the Regulations are re-visited.

Failure to consider cumulative impacts of Regulation

- 3.16 We note that the Victorian Government's *Guide to Regulation* document states:

*Because regulated parties are likely to be affected by various different types of regulation, it is important to consider the cumulative impacts of regulation, rather than the impact of individual regulations in isolation.*³²

- 3.17 We submit that CAV has not taken into account the cumulative, complex regulatory environment that Victorian incorporated associations face. In addition to CAV's association incorporation requirements, an incorporated association is also likely to be trying to comply with (and pay fees in relation to) :

- regulatory obligations under Victoria's fundraising laws;
- obligations under Victoria's gambling regulation laws (raffles and other minor gaming);
- obligations under Victoria's tax laws;
- obligations under Commonwealth taxation laws;
- obligations under licensing and accreditation systems for various sub-sectors (eg. housing, childcare etc);
- obligations for its staff or volunteers under professional registration schemes (eg. teacher, medical practitioner etc);
- obligations to maintain appropriate insurance as required by various legislative instruments (occupational health and safety, volunteers insurance etc); and
- obligations to maintain licenses / checks (eg. working with children), amongst many others.

- 3.18 We hope CAV will look carefully at this issue when the Act is remade and the Regulations are re-visited.

Failure to enforce of Regulations

- 3.19 We note that the Victorian Guide to Regulation states:

A regulation is neither efficient nor effective if it is not complied with or cannot be effectively enforced. Thus, compliance considerations should be a significant element in the choice between

³¹ State Services Authority report, see n. 4

³² Department of Treasury and Finance *Victorian Guide to Regulation* Second Edition, April 2007, page 40.

*different regulatory approaches. ... Compliance strategies should ensure the greatest degree of compliance at the lowest possible cost to affected parties...*³³

- 3.20 In this regard, the information in the RIS indicates a trend towards non-compliance with the Regulations and little enforcement action. For example, over a quarter (27%) of incorporated associations failed to submit their annual return in 2008/2009 (rising from 24% in 2006/2007 and 26% in 2007/2008). The RIS presents no analysis of this trend and little analysis of whether the regulatory approach adopted in the Regulations is suitable.
- 3.21 PilchConnect submit that a more comprehensive review of the Regulations, and levels of compliance with them, should be undertaken when the Act is amended.

4 PREPARATION OF FINANCIAL STATEMENTS - AASB STANDARDS

- 4.1 We note the proposal to require prescribed association to provide audited financial statements in compliance with the relevant accounting standards, which are effectively the standards set by the AASB as relevant from time to time.
- 4.2 While we support the requirement that prescribed associations provide audited financial statements in accordance with relevant AASB standards, we do not support the complicated way that this has been drafted in the proposed Regulations.
- 4.3 In particular, proposed new regulation 13A(2) will state that:
- in this regulation, the accounting standard has the same meaning as the Corporations Act.*¹
- 4.4 While it may be that professional auditors will know that the AASB standards apply (as part of their professional requirements), the Act and Regulations are supposed to be understandable to a member of the public (without them having to seek legal advice). A committee member from a non-accounting background should be able to read the regulation and understand which accounting standard will apply in order to be able to look this standard up and arrange their accounts in a suitable way. This is particularly important for incorporated associations that may be approaching the financial reporting threshold for the first time.
- 4.5 In the way that the proposed regulations are currently drafted, a committee member would be required to find and access the *Corporations Act*, then look up the section 9 definitions of 'accounting standard' and 'AASB' which then refer to section 334 of the Corporations Act, which makes provision for the AASB to issue standards.
- 4.6 We submit that proposed new regulation 13A(1) should simply state that a prescribed association must submit audited financial statements in accordance with relevant AASB standards for that financial year.

³³ Department of Treasury and Finance *Victorian Guide to Regulation* Second Edition, April 2007, page 37.

- 4.7 The reference to (and therefore) incorporation of the *Corporations Act* in this paragraph is appears unnecessary and is not justified in the RIS. It is also appears contrary to the *Victorian Guide to Regulation* which indicates that the practice of incorporation by reference should be approached with caution,³⁴ so that incorporation by reference via Commonwealth legislation appears particularly problematic.
- 4.8 We submit that the Victorian Government should be supporting the development of an AASB NFP-specific accounting standard as soon as possible. A requirement by regulators and grant-makers (Government and other) for reports based on such a standard would provide much-needed consistency to the reporting process and, assuming the standard was scaled accordingly to organisational size, it would also reduce the compliance burden for prescribed associations.

5 SECURITY TO BE GIVEN BY LIQUIDATOR

- 5.1 We have no comments on this change.

6 IMPOSITION OF FINES BY INCORPORATED ASSOCIATIONS

- 6.1 We note that the RIS provides little practical guidance on the imposition of fines by a committee of an incorporated association. We submit that further information is required in regard to this provision, including when it will be appropriate to impose fines and the process for doing so.
- 6.2 While we understand that this power will be appropriate for certain organisations as a deterrent from misconduct, there should be greater consultation with peak bodies to ensure that financial penalties against members are carried out in a manner that is fair and justifiable.
- 6.3 As a minimum, we submit that any provision which allows for fines to be imposed on members should be amended to only apply where there has been a serious breach of rules. The current wording would allow a committee to fine a member for the smallest of breaches of the organisation's rules.
- 6.4 We believe greater clarity and guidance is required for organisations wishing to rely on this provision as a means of disciplining one of its members.

7 OTHER MATTERS

Understanding of regulations / education

- 7.1 The *Victorian Guide to Regulation* states :

One common source of non-compliance is the failure of affected groups to understand the law. This may result from poorly drafted or too complex regulations or from inconsistent interpretations of regulations from enforcement officials. Thus, measures to encourage compliance may be as

³⁴ Department of Treasury and Finance *Victorian Guide to Regulation* Second Edition, April 2007, page 39.

*simple as ensuring regulatory clarity and brevity, pursuing a public education campaign, or consultation with affected parties.*³⁵

- 7.2 We note refer CAV to the 27% non-compliance rate with filing of annual statements and the case many associations we have met who have very little understanding of their obligations under the Act and Regulations (for example, see paras. 2.7 to 2.10 above).
- 7.3 To better address the level of awareness of compliance obligations, an education campaign should be implemented along with the proposed changes. PilchConnect is, with funding, well placed to assist the Victorian government and CAV with training and development of plain language guides for NFPs, as demonstrated by our recent publication of the *Guide for Public Officers and Secretaries of Victorian Incorporated Associations*³⁶, and our current role of updating Victorian NFPs on law reform through our monthly e-bulletin which currently has over 1,000 subscribers.³⁷
- 7.4 As noted by the Productivity Commission in its recent draft report into the *Contribution of the NFP Sector*, it is often the case that NFP service providers are more trusted by users than government or business providers.³⁸ From our experience this is particularly so in relation to compliance and regulatory issues, as NFPs will often not wish to discuss possible breaches or general concerns with these bodies, but will be willing to seek advice from peak bodies and sector-based services such as PilchConnect.

³⁵ Department of Treasury and Finance *Victorian Guide to Regulation* Second Edition, April 2007, page 37.

³⁶ See www.pilch.org.au/incguide

³⁷ See www.pilch.org.au/Page.aspx?ID=272

³⁸ See, for example, General Social Survey for 2006 (ABS), at Box 4.6, of the Productivity Commission's Draft Report