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for community organisations

Associations Incorporation Reform Bill 2011 – PilchConnect's key issues

PilchConnect is a specialist legal service for not-for-profit community organisations (**NFPs**). We provide free and low-cost assistance to Victorian NFPs on a wide range of legal and legally-related issues, and undertake law reform and policy work aimed at improving the legal framework and reducing red tape for the NFP sector.

PilchConnect supports a rewrite of the *Associations Incorporation Act 1981* (Vic) and considers there is a need for the Act to be made simpler and easier to navigate for the people involved in incorporated associations, who are often volunteers with no access to legal advice. Unfortunately, we have a range of concerns about the drafting of the Associations Incorporation Reform Bill 2011 (the Bill). We have expressed these concerns in previous submissions and consultations.[1] In our view, there are **three key unresolved issues** with the Bill, as follows.

Office holder duties are drafted in a complex and inconsistent way

While we support the inclusion of legislative provisions that outline all duties owed by office holders, **we oppose a drafting approach which would apply sections (and even whole Parts of) the *Corporations Act 2001* (Cth) by reference.** This approach is inappropriate and will be confusing for people involved in associations (and for lawyers). Under the Bill, a Committee member of an incorporated association will be worse off than a director of a company because they have to read two pieces of legislation and apply modifications to the wording in the Corporations Act to make it relevant to the associations context.

Example: A volunteer committee member, who wants to know about their duty to prevent insolvent trading (applied by cl 152 of the Bill), will need to:

- identify the relevant duty and insolvency provisions in the associations legislation and understand that certain provisions of the Corporations Act are 'applied';
- locate and read the relevant provisions of the Corporations Act;
- make the necessary modifications to the text of the Corporations Act;
- read other provisions of the Corporations Act to understand the defences etc; and
- cross-refer back to the Schedule to the legislation in order to identify the applicable penalty.

It must be possible to draft provisions that clearly articulate each duty and any specific defences, and outline the general defences and penalties, other than by burying these in complex applied provisions of the Corporations Act.

We are concerned that the mixture of criminal and (applied) civil penalty provisions results in a 'jumble' of penalty units and dollar figures, which are difficult to understand. The amounts of the penalties also appear inconsistent with the seriousness of the contravention – an officer who 'knowingly or recklessly' commits a breach of the duty not to misuse information can be liable under criminal penalty provisions for up to 60 penalty units (about $7,300), whereas an officer who negligently or inadvertently breaches a duty could be liable for up to $20,000 for a civil penalty under the Corporations Act applied provisions.

We recommend the Bill be rewritten to set out the specific duties, defences and penalties more clearly.

[1] See eg PilchConnect's submission on the exposure draft of the Associations Incorporation Amendment Bill 2010 at www.pilch.org.au/submissions/#11.

Transitional provisions are confusing – incorporated associations will need support & guidance

While we have sympathy for the policy intent behind some of the transitional provisions, we are concerned that these arrangements will create confusion in practice – particularly for organisations that use the model rules. On commencement of the legislation, for example, associations will continue to use their existing rules (and those with the model rules may continue to use the old model rules for up to 12 months) – however:

- under clause 48(4) of the Bill, any rule that is inconsistent with a provision of the new legislation will be invalid (and presumably the new model rule provision will automatically apply);
- under clause 48(3) of the Bill, if an association's rules are silent on a matter which is provided for in the new model rules, then that provision of the new model rules will automatically apply; and
- Schedule 1 of the Bill lists 23 matters that must be provided for in an association's rules, several of which are not dealt with in the existing model rules (nor in many associations' own rules).

This means that, in effect, for a time there will be 2 'sets' of model rules in operation (or a mixture of two sets) – and many associations will be in the confusing position of having to work out if/where their existing rules are deficient, locate the relevant provision(s) of the new model rules, and apply these, in addition to their own rules.

Example: Organisation X uses the model rules. The Bill is enacted but Organisation X continues to operate using their existing rules (old model rules), as they are allowed to do for up to 12 months (see Sch 4, cl 7(3)). However, the new Act requires the association to have rules about members' access to minutes of meetings - the new model rules differ from the old model rules on this point (the old model rules allows for the inspect of relevant documents, but do not specifically talk about minutes).

Organisation X figures they are able to continue operating under the old model rules for 12 months, so they don't have to worry about any changes yet. However, when they learn all associations' rules now have to include a provision on access to minutes, they are unsure if their rules are sufficient.

Free, accessible and clear guidance, education and plain language resources about the changes (and transitional arrangements) will be absolutely essential. Many organisations will be confused about what their rules are following the commencement of this Bill (if passed), and will need help to understand what they have to do to be compliant (including amending their own rules).

The transitional provisions must also include a **waiver of fees to amend associations' rules** as a result of the reforms.

Model rules 'deeming provision' is ambiguous and clumsy

The model rules deeming provision (cl 48(3) of the Bill) is drafted in a clumsy, ambiguous way. The existing section already causes confusion, so clarity and plain language for the new provision is particularly important.

The scope of this clause in the Bill (particularly the phrase 'In relation to any matter in relation to which…') is confusing, and the provision sits uneasily with the requirement that an association's rules must provide for certain matters listed in Schedule 1 (some of which are optional).

Example: Schedule 1 of the Bill requires "qualifications (if any) for membership" to be included in an association's rules. Organisation Y has opted not to include any qualifications for membership in its rules. Because their rules are silent on the issue, the model rules provision in relation to qualification for membership is deemed to apply to Organisation Y, despite this being an optional provision (ie. "if any") under Schedule 1.

Organisation Y did not realise that in order to avoid the application of the model rules provision, it should have expressly stated in its rules that "there are no qualifications for membership."

We contend that cl 48(3) of the Bill should be amended to read:

> **'If Schedule 1 requires a matter to be included in the rules of an association, but the rules of an association do not make provision for that matter, the provision in the model rules on that matter is taken to be included in the rules of that association'.**

More information

We would be happy to discuss our views on the Bill in more detail. Please contact us:

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