

Productivity Commissions’ key recommendations with PilchConnect’s comment

On 11 February 2010, after a year of research, the Productivity Commission released its final report *Contribution of the Not-for-Profit Sector*. Links to PilchConnect’s initial and follow-up submissions to the Productivity Commission, our press releases and related documents are can be viewed on our Submissions webpage, see www.pilch.org.au/submissions. Below we have summarised and commented on some of the key findings and recommendations that the Productivity Commission made about legal and regulatory issues affecting Australia’s NFP sector.

Productivity Commission’s Recommendations		Pilch Connect’s comments
Overview of findings and recommendations		
Overview finding “The current regulatory framework for NFPs [not-for-profit organisations] is characterised by uncoordinated regimes at the Commonwealth and state/territory levels. Disparate reporting and other requirements add complexity and cost, especially for organisations operating in more than one jurisdiction.”		This finding affirms Pilchconnect’s submissions and several other Victorian and Federal government inquiries and academic research.
Overview finding In its report, the Productivity Commission makes a number of recommendations for improved regulation for the NFP sector (discussed in more detail below), including: ▶ the establishment of a national ‘Registrar for Community and Charitable Purpose Organisations’ to regulate national not-for-profit entities; ▶ development of nationally harmonised fundraising laws and a national fundraising register; ▶ adoption of a statutory definition of ‘charitable purposes’; ▶ providing a ‘one stop shop’ for tax endorsement of not-for-profits; ▶ implementation of a single reporting portal for not-for-profits with the view to ‘report once, use often’; ▶ establishment of an ‘Office for Not-For-Profit Sector Engagement’ to drive the Commission’s recommendations.		Overall, this represents a comprehensive road map for reform which, if promptly and properly implemented, will vastly improved the regulatory underpinning for Australia’s not-for-profit sector. As a package, these reforms would help reduce red tape and complexity for all not-for-profit organisations – large and small, national and locally based groups. However, for the recommendations to be implemented effectively they require the co-operation of all levels of government, in particular, State and Federal. Given other findings by the Productivity Commission about the size and importance of the sector to Australia, we urge governments to cooperate in this way and for the implementation work to begin immediately.

Productivity Commission's Recommendations	Pilch Connect's comments
Legal and regulatory reforms	
Recommendation 6.1 "The Australian Government should amend the <i>Corporations Act</i> to establish a separate chapter relating to not-for-profit companies limited by guarantee. This should: ▶ embody the principles of proportionality in relation to reporting, fees and charges ▶ provide clear rules on the disposal of assets in the event of the company being dissolved or restructured, in addition to the proposed prohibition on the payment of dividends ▶ include a plain English guide (as currently exists for small and medium scale enterprises) As part of this process, the Australian Government should, in consultation with stakeholders, examine whether there are additional requirements that are inappropriate or unduly restrictive for not-for-profit organisations that should also be addressed."	The company limited by guarantee legal structure is currently used by about 11,700 not-for-profit organisations and is administered by the Australian Securities and Investments Commission (ASIC). We are supportive of improvements to the company limited by guarantee legal structure. In particular, the first and third points in Recommendation 6.1 were ones suggested in PilchConnect's submission. If significant improvements such as these are combined with a 'one-stop shop' under a new Registrar (see below), it will make the company limited by guarantee structure a much more attractive option for not-for-profits, regardless of their size. Specifically, being a company limited by guarantee is likely to be more attractive than being an incorporated association governed by State or Territory legislation, particularly if the new Registrar can endorse for tax and fundraising purposes. But if these improvements are not introduced in conjunction with a specialist new regulator (one that is not merely a division within ASIC), the amended company limited by guarantee structure is unlikely to be significantly more popular with the sector. See also our submission to the 2010 Commonwealth Treasury - Companies limited by guarantee at www.pilch.org.au/submissions which discussed the proposed tiered reporting regime for companies limited by guarantee.

Productivity Commission's Recommendations	Pilch Connect's comments
Recommendation 6.5 “The Australian Government should establish a one-stop-shop for Commonwealth regulation by consolidating various regulatory functions into a new national Registrar for Community and Charitable Purpose Organisations. While ultimately the Registrar could be an independent statutory body, initially it should be established as a statutory body corporate or organ in the Australian Securities and Investment Commission. The Registrar will undertake the following key functions: ▶ register and regulate not-for-profit companies limited by guarantee and Indigenous corporations, with a stakeholder team dedicated to Indigenous corporations ▶ assess the eligibility of not-for-profit organisations for Commonwealth tax concession status endorsement and maintain a register of endorsed organisations ▶ register cross-jurisdictional fundraising organisations and/or activities by not-for-profit organisations ▶ provide a single reporting portal for public record corporate and financial information. ▶ provide appropriate guidance in relation to governance matters ▶ investigate compliance with regulatory requirements ▶ provide complaints handling in respect of the above functions.”	A ‘one-stop shop’ is a welcome recommendation that PilchConnect (and many, many others) have been seeking in our submission to the Productivity Commission and other inquiries before it (such as the 2008 Senate Economics Committee <i>Inquiry into Disclosure Regimes for the Not-for-Profit Sector</i>). Exactly how this important reform would be achieved and over what period of time is unclear (for example, registration of cross-jurisdictional fundraising organisations is unlikely to occur before the States and Territories have implemented mutual recognition and harmonised fundraising laws - see further below for comments on how long this may take). However, once implemented, a one-stop shop for all regulatory issues would be a major reduction in red tape for the sector. Organisations that wish to fundraise in more than one jurisdiction (for example, by using the internet) would have a significant incentive to migrate to the company limited by guarantee structure as administered by the new Registrar. By doing so they would only have to deal with one, specialist not-for-profit regulator that would also determine their concessional taxation status. In terms of ‘who’ should provide this ‘one-stop shop’, the difference between “a statutory body corporate or organ in ASIC” is not explained in the Report. We note that the Productivity Commission suggests “a dedicated [ASIC] Commissioner would need to be appointed to oversight this body. In addition, an advisory panel, drawn from the sector, should be established to provide input on sector specific issues and support culture change within ASIC as required” (page 150, Chapter 6). PilchConnect is strongly of the view that the new Registrar must be a specialist regulator that is independent of government and adequately resourced, not simply a division of ASIC (see our media release on this issue). ASIC are clearly identified as a business regulator and are not the appropriate regulator for determining charitable (concessional tax) status. Other countries like the England, New Zealand and Singapore have long recognised the importance of the not-for-profit sector and have established specialist regulators or charity commissions. Australia’s not-for-profit sector, worth \$43 billion and a major player in delivery of government services, should be given this support.

Productivity Commission's Recommendations	Pilch Connect's comments
Recommendation 6.4 “Responsibility for endorsement for Commonwealth tax concessional status for not-for-profit organisations and maintaining a register of endorsed organisations should sit with the Registrar for Community and Charitable Purpose Organisations. To retain endorsement for Commonwealth tax concessions, endorsed organisations should be required to submit an annual community purpose statement to the Registrar which would be accessible to the public. The Australian Commissioner for Taxation should have the right to seek a review of decisions of the Registrar in relation to the endorsement of not-for-profit organisations for tax concessional status. The Commissioner should also have the power to issue a directive to the Registrar for the dis-endorsement of an organisation where there has been a breach of taxation compliance requirements.”	PilchConnect has called for an independent regulator to determine endorsement of charitable (concessional tax) status rather than the Australian Commissioner for Taxation (ATO). We are, therefore, supportive of this recommendation. Note our comments above about what body should ‘house’ the Registrar. More information is needed about which body would hear ‘review’ applications by the ATO. We do not believe dis-endorsement should be an automatic right of the ATO. Rather the Registrar should be satisfied that there is clear evidence of serious and /or continuing breach of taxation compliance requirements before dis-endorsing an organisation.
Recommendation 6.2 “Australian governments should, through the Council of Australian Governments Business Regulation and Competition Working Group, pursue harmonisation of state and territory based incorporated associations legislation, with an initial focus on: ▶ aligning not-for-profit organisations’ public corporate and financial reporting requirements ▶ rules on the distribution of assets on the dissolution or restructuring of a not-for-profit organisation ▶ allowing not-for-profit organisations to migrate from one legal form to another and to move to the Commonwealth jurisdiction without onerous transaction costs.”	We strongly support a nationally consistent approach to corporate and financial reporting, and distribution of assets on dissolution and restructuring by incorporated associations. This consistency is highly desirable and long over due. Allowing easy and no-cost migration between legal forms is essential if the migration of existing organisations to the new Registrar is to be successful.

Productivity Commission's Recommendations	Pilch Connect's comments
Recommendation 6.3 "To promote confidence in and reduce the compliance costs associated with fundraising regulation, Australian governments, through the Council of Australian Governments Business Regulation and Competition Working Group, should: ▶ agree to and implement mutual recognition and harmonised fundraising regulation across Australia, through the establishment of model fundraising legislation ▶ support the development of a fundraising register for cross-jurisdictional fundraising organisations and/or activities, to be administered by the proposed national Registrar for Community and Charitable Purpose Organisations ▶ clarify the responsibility for regulation of fundraising undertaken through electronic media such as the internet, and move to ensure appropriate regulation of such mediums including through Commonwealth legislation."	We strongly support a nationally consistent approach to the regulation of public fundraising by not-for-profit organisations. However, we do not agree with the Productivity Commission's proposed implementation method for achieving national consistency. The experience of Australian governments over the last few years in relation to attempts to harmonise cooperatives laws highlights that this approach can take "years to implement across all jurisdictions" (see Box 6.1, page 118). The corporations' law experience (namely, the decades it took to get nationally consistent laws for companies) also demonstrates that harmonisation and mutual recognition is a long, ultimately unsuccessful approach. Mutual recognition and harmonisation is even more difficult in the fundraising context because, compared with cooperatives, the existing State and Territory based laws are considerably more divergent. Our follow up submission to the Productivity Commission recommended that rules on fundraising by Commonwealth incorporated NFP bodies (that is, companies limited by guarantee) should be included in the <i>Corporations Act</i> 2001, in the same way that this legislation has provisions regulating fundraising activities of 'for-profit' companies. This approach would also attract existing and new organisations to the Commonwealth regime, supporting the goal of a 'one-stop shop'.

Productivity Commission's Recommendations	Pilch Connect's comments
Recommendation 6.6 "The Registrar should implement the principle of 'report once, use often' by providing a single reporting portal and form for annual reporting on community purpose, governance arrangements, financial accounts and fundraising activity. Australian governments, through the Council of Australian Governments, can support this principle and substantially reduce compliance costs for not-for-profit organisations by: ▶ adopting and developing an implementation strategy for the Standard Chart of Accounts for reporting by not-for-profits in receipt of government grants or service contracts ▶ expanding the Standard Business Reporting initiative to include reporting requirements by not-for-profits ▶ encouraging their agencies to utilise the governance and financial account information (that will be lodged with the Registrar) to meet their organisation level 'health check' requirements for contracting purposes."	In line with our submission to the Productivity Commission and 2008 Senate Inquiry, we support this recommendation. At the moment there is multiple reporting to multiple regulators and the information is not collated or feedback to the sector. We believe <u>all</u> incorporated organisations should have some basic reporting obligation. If this obligation is tailored to size, seeks information relevant to not-for-profit stakeholders, can be lodged free and on-line, and is used for multiple purposes (including gathering data on the contribution of the sector and its various sub-sectors), we believe there will not be any great resistance to compliance even by small organisations. See also our submission to the 2010 Commonwealth Treasury - Companies limited by guarantee which discussed the proposed tiered reporting regime for companies limited by guarantee.
Taxation	
Recommendation 7.1 "The Australian Government should adopt a statutory definition of charitable purposes in accordance with the recommendations of the 2001 <i>Inquiry into the Definition of Charities and Related Organisations</i>."	In line with our submission to the Productivity Commission and 2008 Senate Inquiry, we strongly support this recommendation. In terms of implementation, we believe this recommendation should be implemented after the establishment of a specialist independent regulator.

Productivity Commission's Recommendations	Pilch Connect's comments
Recommendation 7.2 “State and territory governments should recognise the tax concession status endorsement of not-for-profit organisations at the Commonwealth level. Given the disparities between eligibility for tax concessions across jurisdictions, state and territory governments should utilise such Commonwealth endorsements in determining eligibility for their jurisdictional concessions, and seek to harmonise tax concessional status definitions or classifications with the Commonwealth over time.”	In line with our submission to the Productivity Commission and 2008 Senate Inquiry, we support this recommendation. In order for the reforms to have the maximum impact, there needs to be consistency between eligibility for State, Federal and local government tax concessions.
Sector support	
Recommendation 9.2 “State and territory governments should review their full range of support for sector development to reduce duplication, improve the effectiveness of such measures, and strengthen strategic focus, including on: ▶ developing the sustainable use of intermediaries providing support services to the sector, including in information technology ▶ improving knowledge of, and the capacity to meet, the governance requirements for not-for-profit organisations’ boards and management ▶ building skills in evaluation and risk management, with a priority for those not-for-profit organisations engaged in delivery of government funded services.	PilchConnect is pleased that the Productivity Commission has recognised the role and importance of sector based support services such as PilchConnect. <i>“Better advice is emerging from initiatives within the sector, from NFP peak bodies and purpose specific entities. For example, PilchConnect (sub. 131) offers assistance to those involved in community organisations that want to establish a legal entity, be it an incorporated association, a company limited by guarantee, cooperative, or other form.”</i> (see Productivity Commission’s Report page 122)