pilchconnect

a specialist legal service
for community organisations

19 October 2012

Submission to Consumer Affairs Victoria:

Regulatory Impact Statement –
Associations Incorporation Reform Regulations 2012

PilchConnect welcomes the opportunity to respond to the Regulatory Impact Statement (***RIS***) for the proposed *Associations Incorporation Reform Regulations 2012* (the ***proposed regulations***).

PilchConnect is a specialist legal service for not-for-profit community organisations (***NFPs***). A summary of our service is included at Appendix A. We represent and assist small and medium not-for-profit organisations that have public interest purposes, so our comments and recommendations in this submission are framed for their benefit.

PilchConnect's approach to this submission

PilchConnect does not intend to comprehensively address all aspects of the RIS or answer all of the consultation questions in this submission. Broadly, we are supportive of the Government's decision to update the legislation and the regulations, however we have some concerns in relation to particular proposals based on their potential to impact on our key client base.

The first part of our submission focuses on what we see as the key issues arising from the RIS and proposed regulations, namely:

1. The new fee structure - particularly the increased fees for groups incorporating with their own rules and for groups altering their rules
2. The need for clarity and fairness safeguards regarding the imposition of fines on members
3. Our primary concerns arising from the proposed model rules:
    a. Provision for members to have access to relevant documents
    b. Additional duties on the committee and individual office holders, and
    c. The need for plain language drafting.

The second part of our submission comments on the 'big picture' of regulation of incorporated associations, particularly in light of developments in the regulation of charities at the national level. We urge the Victorian Government to work with the Commonwealth and other governments to streamline regulatory and reporting requirements for charitable incorporated associations in light of the proposed regulatory framework of the Australian Charities & Not-for-Profits Commission (**ACNC**)).

The third part of our submission is a table that highlights specific concerns we have with the drafting of the proposed model rules and our suggested amendments.

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PART 1: PILCHCONNECT KEY ISSUES

1. Proposed fee structure

Increased fees

PilchConnect does not support the ultimate outcome of the proposed fee structure, which is an overall increase in the fees payable by associations for CAV's administrative services.

The RIS proposes that the regulations should enable CAV to recover 80% of the costs of administering the *Associations Incorporation Reform Act 2012* (Vic) (***Reform Act***), up from the current 60% cost recovery. There is no clear case presented in the RIS as to why recovery of costs by CAV should increase from the stated 60% to 80%, and the 80% figure appears to have been arbitrarily selected. We believe there are compelling social policy grounds to not increase fees payable by incorporated associations, particularly those fees that impact directly on tier 1 associations which make up 90% of associations incorporated in Victoria.[1]

More broadly we submit that there should be a review of the 'cost recovery' policy rationale behind the imposition of fees on incorporated associations. The aim of the review should be to reduce the fees (including by reconsidering CAV's current administrative systems and process - eg. online lodgement of forms could significantly reduce CAV's administrative costs) and ensure that fees are equitable, proportionate and appropriate. This is in line with stated Victorian Government regulatory policy.[2]

Reducing fees for incorporated associations 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 minimal enforcement action by the collection agency. For our more detailed arguments on these points we refer to Part 3 'Imposition of Fees' and Part 4 'Rationale for cost recovery' of 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).

Cross-subsidisation for small associations

We applaud the Government for taking steps to support small associations through cross-subsidisation in the proposed fee structure. However, even with the benefit of the proposed cross-subsidisation a tier 1 association is still faced with a 14% increase in the annual fee to lodge its financial statement, and a 25% increase in the fees to seek an extension of time to hold its annual general meeting or lodge its financial statement. While the RIS highlights that some fees are to be reduced, we submit that those particular fees are for uncommon procedures (e.g. to change the name of the association) and will be seldom used. In effect, in most circumstances, the fees payable by associations will increase overall in comparison to the fee regime under the Associations Incorporation Regulations 2009 (the ***current regulations***).

[1] *Regulatory Impact Statement*, Table 5, part 1.2, page 14.

[2] See, for example, *Victorian Guide to Regulation*, Edition 2.1, August 2011, Department of Treasury and Finance, esp at 3.2.2 (re consideration of objectives of the legislation) and 3.2.13 (re appropriate setting of fees, which states that cost recovery may not be appropriate where, for example, 'the benefits of the activity are not fully restricted to the entity being charged the fee'). See *Victorian Guide to Regulation* at www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/VGR-incl/$File/VGR%20-%20incl.%20SLA%20guidelines%20from%201%20July%202011.pdf.

We are especially concerned about increases in fees for common administrative procedures which support the good governance and management of associations. Particularly, we do not support the proposed fee for an association to incorporate with own rules (45% fee increase) and for altering rules (108% fee increase). These increased fees will actively discourage associations from updating their rules (or incorporating with their own rules), leading to situations where small volunteer-run associations may retain inappropriate rules, rather than pay a significant amount to change them. We consider that these fees will also discourage voluntary organisations from incorporating (or remaining incorporated) under the Reform Act. We note that there is no fee payable to ASIC for altering the constitution of a company limited by guarantee under the *Corporations Act 2001* (Cth).[3] We also note there is proposed to be no fee for registering a charity with the ACNC.

The RIS acknowledges that a 'fundamental objective' of the incorporated associations scheme is to make it accessible to small voluntary organisations.[4] Under the proposed fee structure, while that may arguably be the case for small organisations that are prepared to adopt the model rules, it is not the case, in our view, for organisations wishing to incorporate with its own rules. They would be required to pay significantly higher fees to incorporate and additional high fees to change their rules on an ongoing basis.

Recommendations:

1. ***That the Government consider a fee structure below the current 60% cost recovery model, or at the very least, maintain the current 60% cost recovery model.***

2. ***That if Recommendation 1 above is not adopted and an increased cost recovery fee structure is adopted:***
    a. ***the proposed cross-subsidisations for small charities should be implemented***
    b. ***the fee 'differential' between incorporating with own rules and with the model rules should be reduced, or at the very least, maintained at its current level, and***
    c. ***the fee for altering an association's rules should reduced to not more than the fee under the current regulations.***

Waiver of fees

Because most associations will need to (or desire to) alter their rules in light of the Reform Act (for reasons of prudence and certainty and/or to avoid the confusion of 'reading in' model rules), it is our strong submission that the fee for altering the rules of an association should be **waived for the first 12 months** from commencement of the Reform Act. In particular, associations with their own rules should not bear an additional financial burden imposed upon them by a change in law.

We submit that the waiver should not be restricted to associations changing their rules just to comply with the Reform Act. The waiver within this limited period should extend to **all** rule alterations, as this will encourage associations to re-visit their rules and more actively take ownership of the governance of their associations after commencement of this long-anticipated reform.

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[3] See ASIC Information Sheet 30: *Fees for commonly lodged documents,* 27 August 2012, available at www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/Fees_for_commonly_lodged_documents.pdf/$file/Fees_for_commonly_lodged_documents.pdf

[4] *RIS*, part 6, page 35.

Recommendation:

3. ***That the Registrar exercise discretion under section 207 of the Reform Act to waive the fee payable for altering the rules of an association, for all associations, for a 12 month period from commencement of the Reform Act.***

Associations required (by other regulators) to include certain provisions in rules

The proposed fee structure (i.e. higher fees for *not* using the model rules) operates to the financial detriment of charities and other sub-sector specific organisations that are required by regulators to include certain provisions in their rules. We submit it is contrary to the public policy of affording concessions to such organisations to subject them to higher fees, simply because they are required to include certain standard clauses in their rules.

We submit there are several tactics required to address this problem. First, the model rules must contain rules that are suitable for associations intending to seek endorsement as a tax concession charity (***TCC***) and/or a deductible gift recipient (***DGR***).[5] We suggest that consultation with the Australian Taxation Office (**ATO**) should occur before the proposed regulations are finalised to ensure the model rules include relevant clauses in a suitable form. Second, associations should be allowed to choose from a relevant 'clause bank' of additional standard clauses (that will satisfy ATO requirements) without having to pay a higher fee for incorporation. Third, if an association needs to change its rules *after* incorporation in order to access TCC or DGR concessions, then a lower or no fee should be payable for making those changes.

We also note the potential impact of ACNC governance and/or external conduct standards (proposed to be made in 2013). Should these standards require a registered charity to include certain provisions in its rules, then any such requirements should be likewise accommodated within the fee structure and/or the model rules as required in due course.

Recommendations:

4. ***That the model rules contain clauses that are suitable for organisations intending to apply for charitable tax concessions.***

5. ***That the Registrar exercise discretion under section 207 of the Reform Act to waive (or at least reduce) the fees payable for:***
    a. ***incorporation of an association with its own rules, and***
    b. ***alteration of an association's rules,***

    where this is required for the purposes of the association accessing tax concessions.

[5] We acknowledge it may not be possible draft the model rules in a way that is both simple and meets the requirements for *all* DGR categories (as some DGR categories require specific provisions - eg. a public fund - that would be unnecessarily complex for most small associations). However in our view the model rules should include clauses that will be suitable for at least some of the most common NFP tax concessions sought. Please note that it is due to this complexity that we also suggest there is a need for a 'clause bank' of additional clauses (eg a DGR 'public fund' clause) that attract a reduced (or no additional) fees: see further discussion below.

2. The power to fine members for breach of the rules

Proposed regulation 19 empowers the committee to 'determine' to impose a fine of up to $500 on a member of the association for breaching the association's rules. Although this power currently exists in regulation 18A of the current regulations, in our experience very few associations utilise this mechanism and we query whether it is appropriate or necessary. We are particularly concerned that the regime, as currently proposed, affords little protection to members accused of having breached the rules and does not require associations to have a clear and fair process for imposing fines on members.

Recommendation:

6. ***That the committee's ability to impose fines on members for breaching an association's rules be removed.***

The drafting of proposed regulation 19

If the above recommendation is not accepted and the Reform Act retains the right to fine members for breaches of the rules, we make the following comments on proposed regulation 19:

- The committee's power to fine members appears as a 'free floating' right under proposed regulation 19 - there is no requirement for an association to specify a procedure for fining members in its rules. The result is that arguably, the committee has power to 'determine to impose' any fine it likes (up to $500) on a member who breaches the rules without being required to adhere to any decision-making/process framework in the rules (or in the Reform Act) in doing so.[6] This has the potential for significant abuse and arbitrary application. We recommend that, if the power to fine members is retained, an association should be required to expressly provide a regime for fining members in its rules (and if an association's rules are silent on the matter, confirm that the committee does not have power to fine). Requiring an association to provide for fining members in its rules would have the added benefit that any disputes about fines would trigger the grievance procedure in the association's rules.

- Even if a requirement to provide for fining members in an association's rules is imposed, additional protections are needed to ensure that the committee exercises its power in a proportionate and reasonable way. While there may be circumstances where imposing a fine of $500 may be considered justifiable, there will certainly be circumstances where fining a member that amount would be an unreasonable and disproportionate response (for example, in the case of a trivial or inadvertent breach). If the power to fine members is retained, there should to be a requirement that the committee act reasonably and proportionately in imposing fines on members.

- Proposed regulation 19 should also clarify that natural justice and procedural fairness

6 It is possible that imposing fines on members would be regarded as a 'disciplinary action' under the Reform Act (triggering certain procedural fairness protections for the member involved) although this is not clear on the face of the proposed regulation and not clearly compatible with the language of section 54 of the Reform Act. It is also unclear whether an association would be required to address fining members as part of the disciplinary procedure in its rules (if it has one). These issues should be clarified.

protections must be given to a member who is accused of having committed a breach and fined. Consideration should be given to requiring an association to address imposing fines on members as part of its disciplinary procedure (if any), to ensure consistency in disciplinary actions and make clear that a member who has been fined can object to the committee's decision in any particular case. (We note this is the approach taken in the current model rules, where the ability to fine a member is addressed as part of the disciplinary procedure in rule 7.)

- Draft regulation 19 empowers the committee to 'determine' to impose a fine on a member. It is not clear what level of consensus is required of a committee to make this decision (eg, by resolution). This should be clarified.

- While we support the prescription of a maximum amount of a fine, we are concerned that a 'blanket' amount of $500 fails to take into account the diversity of incorporated associations' memberships and circumstances. In our view, a $500 limit may be considered an appropriate maximum amount for larger associations (and for a serious breach), however it is likely to be entirely inappropriate for many small associations whose members are marginalised or disadvantaged. Consideration should be given to implementing a structure whereby maximum fines are tailored to the association's circumstances – for example by prescribing different maximum amount for the 'tiers' of associations (e.g. tier 1 associations can impose the maximum fine of $100, tier 2 associations $200, and tier 3 associations $500).

Recommendation:

7. ***That if Recommendation 6 is not adopted and the Committee's ability to impose fines on members is retained:***

    a. ***proposed regulation 19 should be amended to require an association to expressly provide for fining members in its rules***

    b. ***the Committee should be required to exercise its power to fine members in a proportionate and reasonable way, and to provide proper avenues for a member to challenge a decision of the Committee (e.g., via grievance and/or disciplinary procedures under the rules)***

    c. ***the decision-making process required of a Committee in 'determining' to impose fines should be clarified, and***

    d. ***consideration should be given to introducing maximum fine amounts in a way that recognises the diversity of Victorian incorporated associations, for example by prescribing lower maximum amounts for tier 1 and 2 associations.***

Fining members under the proposed model rules

The proposed model rules are silent on the issue of imposing fines on members. If Recommendations 6 and/or 7(a) above are not accepted, then an express provision should be inserted into the model rules to ensure the default position for incorporated associations is that the committee does not have power to fine members for committing a breach of the rules.

Recommendation:

8. ***That if Recommendations 6 and/or 7(b) above are not adopted, the proposed model rules include an express provision clarifying that the Committee does not have power to impose fines on members for committing a breach of the rules.***

3. Issues arising from the proposed model rules

(a) Access by members to relevant documents of an association

In our experience, access to association information is one of the most vexing issues faced by committees of small to medium community organisations.

Item 13 of Schedule 1 of the Reform Act requires associations to make provision in their rules for members to have access to, and to obtain copies of its records, securities and other 'relevant documents'. 'Relevant documents' is defined extremely broadly in the Reform Act and in proposed model rule 74(4) as:

> 'the records and other documents, however compiled, recorded or stored, that relate to the incorporation and management of the Association and includes the following –
> (a) its membership records;
> (b) its financial statements;
> (c) its financial records;
> (d) records and documents relating to transactions, dealings, business or property of the association.

The issues which arise from item 13 of Schedule 1 and the drafting of rule 74 are addressed below.

No policy basis

Mandating that members must have access to relevant documents of an organisation is unusual in corporate law and in our view does not sit comfortably with principles of governance. Separation of the management of an association by the committee from the general membership is a key element of the Reform Act. Unlike office holders, members are under no fiduciary or statutory duties or other restrictions (such as increased liability), other than what is contained in the rules. There is no policy purpose stated in the explanatory material to the Reform Act (or elsewhere to our knowledge) to explain the broad access right.

Inconsistent with Reform Act and implications unintended

The drafting of item 13 of Schedule 1 and proposed model rule 74 are inconsistent with other provisions in the Reform Act regarding members' access to other (sub-types of relevant) documents and, we submit, the implications are unintended. The Reform Act specifically provides for members' rights in relation to inspection of the rules and the minutes of a general meeting, and the register of members (section 53 and sections 57 and 58, respectively) and the restriction of access to personal information recorded in the register (section 59). The legislature would surely have addressed the right to inspect all the internal management documents of the association in the body of the Reform Act, if it had intended for item 13 of Schedule 1 to result in the provision of an extremely broad level of access to all 'relevant documents' to all members of all incorporated associations.

We also note that while minutes of committee meetings would be within the definition of 'relevant documents', Schedule 1 of the Reform Act separately provides that access to committee meeting minutes is *optional* - it also allows terms and conditions to be imposed on access. This provides further support for the view that the legislature did not intend item 13 of Schedule 1 to be an unfettered right of members' access to all classes of relevant documents.

The Reform Act also provides for remedies to the members if they have a concern with the conduct of the committee, a committee member or the management of the association as a whole. These remedies include instigating a grievance procedure, removal of a committee member by special resolution, or seeking relief from oppressive conduct. They are complimented by a member having access to regulators such as CAV, the ATO or (soon) the ACNC, where there is a breach of the relevant legislation. Granting an additional, far-reaching right that has no sound policy justification will disproportionately empower members to the detriment of the association.

Inconsistent with rights and protections in other laws

The lack of restrictions on use of information by a member both undermines and fails to contemplate application of other laws such as privacy law and the law of confidential information. There is also no duty or requirement for a member to avoid any conflict of interest in relation to the *purpose* of inspection and the *use* of any of these documents.

We are concerned that members could abuse this entitlement and drain a committee's already stretched time and resources, including by undertaking "fishing" exercises, re-distributing accessed sensitive information (including to regulators) and generally hindering the management and good governance of the association, and the association's compliance with laws in respect of the information sought for inspection.

We strongly recommend that item 13 of Schedule 1 of the Reform Act be amended to mirror the drafting in item 16, which requires an association's rules to address the 'right of access (if any)' by members to committee meeting minutes**.**

Recommendation:

9. ***That item 13 of Schedule 1 of the Reform Act be amended so that an association's rules must address a 'right of access (if any) by members to the association's records, securities and other relevant documents.'***

Drafting of proposed model rule 74

Further to the above, proposed model rule 74(2) and (3) give far reaching and significant powers to the members as follows:

> '(2) All financial records, books, securities and any other relevant documentation [as defined in the Reform Act and sub-rule (4)] of the Association must be made available for inspection free of charge to any member upon request.
>
> (3) A member may make a copy of any accounts, books, securities and any other relevant documents of the Association.'

We submit this scope of access is inappropriate and inhibits the ability of a committee and staff to confidently and properly manage the activities of the association.[7] Until item 13 of Schedule 1 of the Reform Act is amended as recommended above, proposed rule 74(2) and (3) should be more narrowly framed and clarified so that:

- access to relevant documents is subject to applicable laws (eg. privacy, legal professional privilege, laws of confidentiality)
- committees have discretion to withhold documents that are confidential, commercially or otherwise sensitive, contain personal information, or are otherwise deemed by the committee to be documents that are not appropriate for members' inspection/copying
- members must state a proper purpose when they apply for access to relevant documents
- restrictions may be imposed on the member's use or distribution of information and/or documents accessed
- the association can charge an administrative fee for providing access to relevant documents, and
- an association's right to choose whether to allow access to committee meeting minutes is preserved, in accordance with item 16 of Schedule 1 of the Reform Act.

Recommendation:

10. ***That until Recommendation 9 is adopted, proposed model rule 74 must be qualified to ensure appropriate 'carve outs' and committee discretion regarding members' access to and copying of relevant documents.***

(b) Additional duties on committees and committee members

PilchConnect is concerned by the introduction in the proposed model rules of additional 'duties' on committees and certain office holders.

General Duties under proposed model rule 44 (and 'directions' under 41(4))

Proposed model rule 44 imposes specific duties on committees and committee members, seemingly in addition to the statutory duties imposed by the Reform Act. These additional duties require a committee member to familiarise themselves with the rules and the Reform Act (sub-rule (1)), ensure that the association and individual members of the committee comply with the rules (sub-rule (2)) and comply with any additional duties imposed upon them by resolution at a general meeting.

In our view, proposed model rule 44 should be entirely removed. We consider that there are a number of problems with its provisions as drafted:

- The responsibilities outlined in proposed model rule 44 (1) and (2) overlap with (and are in fact incidents of) the duties imposed on the committee by the Reform Act. For example, the duty in sub-rule (1) to become familiar with the rules of the association would be required of a committee member by the duty in section 84 of the Reform Act to exercise powers and discharge duties with reasonable care and diligence. The introduction of additional duties under the model rules, which overlap with existing legislative duties, will confuse existing and potential committee members, and potentially risk them misinterpreting the full extent

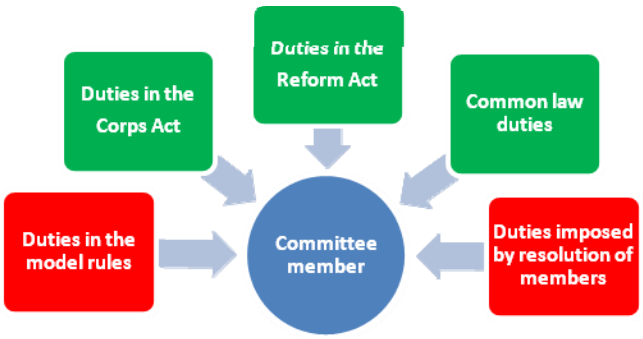
[7] We have found the access right in the rule 36 of the current model rules to be problematic and frustrating for committees.

of their obligations. It may also lead to a reduction in the number of people willing to volunteer on an association's committee.

- In our view, if any committee duties are to be specified in the model rules (which we support), then they should be a simple description of each of the duties imposed by the Reform Act. Indeed this is an ideal opportunity to consolidate the committee duties in the Reform Act in a plain language, helpful way. The duties should include the duty to prevent insolvent trading (which is not expressly stated in Division 3 of Part 6 of the Reform Act but is rather an 'applied' provision of the *Corporations Act* under the Reform Act).[8]

- Sub-rule (3) is inappropriate and should be removed. Committee members are under statutory and common law duties in relation to how they carry out their role, including a duty to act in the best interests of the organisation as a whole. A general and unfettered right of members to impose additional duties on the committee could lead to a situation where members impose unreasonable and/or unworkable additional duties on the committee. We note there are no restrictions on the types of duties that members can impose – it is quite foreseeable that the committee could therefore be under a duty (imposed by resolution of members) to act in a way that conflicts with their overriding fiduciary duties to the association. Alternatively the membership could impose duties on the committee which are unfair, discriminatory or contrary to proper governance principles.

- In a survey of incorporated associations conducted by PilchConnect earlier in 2012, almost 80% of respondents said that legal duties of committee members were extremely challenging or challenging. Comprehension of and adherence to these legal obligations will be made even more challenging by the proposed model rules, which unnecessarily introduce extra sources of general duties under rule 44(1) and (2) and permit yet more duties to be imposed 'from time to time' by members' resolution under proposed rule 44(3):



Related to the imposition of the above general duties is the members' 'direction' power in proposed model rule 41(4). In our view, it should also be removed. A general power of members to 'direct' the committee on any matter within the committee's power would effectively empower the membership to dictate any aspect of the committee's functions. There are no restrictions in the proposed rule on the types of directions that members can impose, and it is feasible that a members' direction may be inconsistent with the committee's overriding duties to the association. Also, nowhere in this rule

8 We note that the Note to sub-rule (2) of proposed model rule 44 refers to the general duties in Div 3 of Part 6 of the Reform Act. However the duties are not specified in the Note, nor is there an explanation of their relationship to the (seemingly additional) duties imposed by proposed rule 44.

does it state that the committee must follow a direction made by the members under proposed sub-rule (4). In fact, if the committee was required to follow such directions, it may, in certain circumstances, put individual members in breach of their obligations under sub-rule (1) to manage the association and/or their broader duties under the Reform Act.

Recommendations:

11. ***That proposed model rule 44 be deleted, and that in its place there be a plain language description of each of the duties on committee members in the Reform Act.***

12. ***That proposed model rule 41(4) be deleted.***

Additional obligations on secretary and treasurer

Proposed model rules 46 and 47 impose specific obligations the secretary and treasurer respectively. These proposed rules are in some cases inappropriate, as the relevant obligation properly falls on the committee as a whole (e.g. proposed rule 47(2)), and in other cases, duplicate other provisions of the model rules (sometimes with slightly different language – e.g. proposed rule 47(1)(d) cf. 68(4)).

While we appreciate that the obligations imposed on the secretary and treasurer under these proposed rules may be regarded as 'best practice' within a traditionally governed association, we are concerned that the imposition of specific obligations on these particular individual office holders will promote a culture of 'abdicating responsibility' on the part of the rest of the committee (e.g, "The financial stuff is the Treasurer's job, so I don't have to worry" or "I don't have to make sure we're keeping proper records because that's the Secretary's role"). The additional duties may also discourage individuals from taking on these roles, for fear of being subject to higher standards and increased personal liability.

With regard to proposed rule 46 (re, secretary), we do see merit in sub-rule (1) which points out that the secretary has duties under the Reform Act (although the Note which follows it could be improved by setting out specific key obligations) and sub-rule (4) which re-states the Reform Act requirement to notify CAV of a change of secretary. We also consider that it may be useful to include a note/cross-reference in this part of the model rules to other provisions of the rules that relate to the secretary and treasurer's roles (e.g. rule 74(1) for the secretary, and rules 67-70 for the treasurer).

Recommendation:

13. ***That proposed model rules 46 and 47 be deleted. However consideration should be given to re-stating in the model rules the secretary's key obligations under the Reform Act, and cross-referring to provisions of the model rules which relate to the specific roles of secretary and treasurer.***

(c) The need for plain language drafting in the model rules

It is imperative that the proposed model rules are drafted in simple, plain language, to maximise their accessibility to incorporated associations. In our recent survey of Victorian community organisations,

74% of respondents said dealing with their rules was either extremely challenging or challenging.[9]

We note that according to the RIS:

- over 27,000 (or, 72% of) incorporated associations have annual revenue below $50,000,[10] and
- there are especially high rates of associations forming among culturally and linguistically diverse (***CALD***) groups and migrant groups.[11]

These are the organisations most likely to be reading and using the model rules, because they are the groups least likely to have the resources and/or know-how to draft their own rules. With this in mind, we urge the Government to ensure the drafting of the model rules is accessible to these target audiences. The flow-on effect from a set of more accessible and usable model rules that impose the minimum necessary administrative obligations is that associations will feel confident consulting and applying them. Increased familiarly with the model rules will lead to greater compliance with the Reform Act.

In the table in Part 3 below, we set out a number of suggested amendments to simplify the drafting of the proposed model rules (although these are not comprehensive). Unfortunately the 28 day timeframe to provide comments on the RIS has not allowed us time to consult specifically with small associations on the drafting of this version of the proposed model rules.[12] However PilchConnect has previously worked with focus groups comprised of associations on the 'usability' of the current model rules, and the feedback we consistently receive is that the language used is overly legalistic and unclear. It is vital that the model rules are drafted in language that is as simple and easy for small volunteer -run groups to understand and use as possible.

Recommendation:

14. That the proposed model rules be drafted in 'best practice' plain language style to maximise accessibility by small, volunteer-run groups, including CALD and migrant groups.

We believe that the accessibility of the model rules can be further enhanced by consistent cross-referencing to the Reform Act. The great majority of associations that we deal with use their rules as the primary source of their obligations and responsibilities under the Reform Act. For this reason the model rules should consistently state (or, at the very least, cross-refer to) the obligations imposed on associations and its office holders in the Reform Act. The proposed model rules presented in the RIS do this selectively. For example, the note following proposed model rule 44(2) simply states that 'general duties' exist in Division 3 of Part 6 of the Reform Act. A more helpful approach would be to list the details of all the 'general duties' in the Reform Act. There are examples of where the proposed model rules re-state the Reform Act, such as rules 34, 61 (use of technology) and 69 (financial records) and 46(3) (requirement to notify CAV of appointment of new secretary).

Recommendation:

15. That the proposed model rules reference key obligations in the Reform Act consistently and effectively.

[9] *PilchConnect NFP Compliance Survey – 2012*. 186 responses were received, of which 83% were from incorporated associations.
[10] *RIS*, Table 5, part 1.2, page 14.
[11] *RIS*, Part 1.3, page 16.
[12] The RIS correctly identifies that PilchConnect was involved in consultations and focus testing on a previous draft of the model rules (which appears to be a justification for the truncated consultation period for this RIS), however we note that the consultation took place in 2010 before the Reform Act was enacted, and was on a significantly different draft of model rules.

Regardless of the final text of the model rules, we submit that user-friendly improvements can be made by way of the layout and formatting of the model rules. We suggest that the version of the model rules available on CAV's website should contain aids to navigation (such as an index and table of contents), "more help" bubbles (eg, definitions of terms, or more practical info), and hyperlinks to relevant sections in the Reform Act (especially where a relevant requirement or duty is not fully stated in the model rules).

Recommendation:

16. ***That CAV produce a version of the model rules that contains navigational aids (e.g., an index), 'more help' boxes and explanations of terms for volunteers, and hyperlinks to relevant sections of the Reform Act.***

PART 2: THE 'BIGGER PICTURE' - STREAMLINING REGULATION FOR VICTORIAN CHARITABLE ASSOCAITIONS

PilchConnect has supported of the Victorian Government's decision to re-write and update the *Associations Incorporation Act 1981* (Vic) and current regulations, and considers that on the whole the new regime will improve the regulation of Victoria's incorporated associations.

However we wish to take this opportunity to point out that, despite recent Victorian reform efforts, the overarching regulatory framework for the not-for-profit sector and its administration remain problematic. The State-Federal framework undermines a simple 'one-stop-shop' compliance approach for NFPs. The current framework inhibits growth, accountability and efficiency in the NFP sector. The time and financial cost of compliance under the current framework results in significant wastage of the limited resources of community organisations.

Against this backdrop, we urge the Victorian Government to take a leading role in working with the Commonwealth Government to establish streamlined reporting and regulatory arrangements for charities registered with the new national regulator. By removing legislative and regulatory duplication, the Victorian Government would be able to better focus on sector support and innovation, which will in turn generate better outcomes for the delivery of Victorian Government funded services by the sector, and the strengthening of all Victorian communities.

We note that South Australia has recently committed to amending its incorporated associations and fundraising laws once the ACNC is established with a view to harmonising reporting requirements and authorising charities to collect charitable donations in South Australia once they have formally registered with the ACNC. We recommend Victoria to adopt a similar approach - or as an interim step at least, commit to reviewing the regulatory framework for Victorian incorporated associations once the ACNC is established.

Recommendation:

17. ***That the Victorian Government take a 'lead role' in working with the Commonwealth Government and other States and Territories to harmonise reporting requirements (and fundraising laws) for charitable incorporated associations with the regulatory framework of the proposed Australian Charities and Not-for-Profits Commission.***

PART 3: DETAILED COMMENTS ON PROPOSED MODEL RULES

Following is a table that addresses our key concerns with specific drafting in the model rules. It should be read in conjunction with and in light of the comments we have made above.

Proposed model rule	PilchConnect comments
General	The model rules should contain a table of contents and/or an index.
General	Many headings in the proposed model rules are not plain language. For example: • 'Eligibility for membership' should be rephrased as '**Who can be a member**' (proposed rule 8) • 'Cessation of membership' should be rephrased as '**Ending membership**' (proposed model rules 16) • 'Resignation' should be rephrased as '**Resigning as a member**' (proposed model rule 17) • 'Eligibility' should be rephrased as '**Who can be a committee member**' (proposed model rule 48)
General	As discussed in Part 1 of this submission, the imposition of fines on members for breach of the rules (see proposed regulation 19) should be expressly disallowed in the model rules.
4	• In the definition of ***committee member***, 'Division 3 of Part 5' should be replaced with 'rules 48 to 56'. • In the definition of ***general meeting***, 'Part 4' should be replaced with 'rules 28 to 31'. • The definition of ***special resolution*** should be clarified to read: '***special resolution*** means a resolution that requires at least three-quarters of the members' eligible to vote and present (including by proxy) at the meeting, to vote in favour of passing the resolution'. It would also be helpful to note here that there are other requirements for passing a special resolution (i.e., notice requirements under the Reform Act).
5	Sub-rule (1) is not plain language. It should read: 'Subject to the Act, the Association has the power to do all things related to achieving its purposes.'
6	Further to our discussion in Part 1 above, we recommend that

	advice be sought from the ATO to ensure this provision will be suitable for associations seeking tax concessions.
12	Strong feedback from our clients is that having both a subscription fee and a joining fee is confusing. This rule should be re-drafted with reference to one fee only.
13	• In sub-rule (1)(a), the notice that a member is entitled to receive should be of a *proposed* special resolution. • We query whether sub-rule (3)(b) is necessary. It seems confusing, and the policy rationale is unclear. If the rule is designed to prevent new members joining up 'en masse' before a general meeting (i.e. meeting 'stacking') then we are not convinced it will achieve this aim, as the application process for membership is in the hands of the committee which can determine an application for membership 'as soon as practicable'. • If however sub-rule (3)(b) is retained, '10 working days' should be changed to '10 business days' for consistency. • In sub-rule (3)(c), the language should be changed to the present tense, i.e., 'the member's membership is not suspended for any reason'.
14	The concept of 'associate members' will be confusing and, in our view, is unnecessary for small organisations. We suggest this rule should be deleted in the interests of simplicity and plain language.
15	This rule is not plain language. It should read: 'The rights of a member are not transferable and end when membership ends.'
16	'Without delay' should be replaced with 'as soon as practicable' for consistency with other proposed model rules.
17	In sub-rule (1), the method by which a member may give notice of resignation is unnecessarily complex, and in any case is covered by proposed rule 73(3). The sub-rule should read: 'A member may resign by writing to the Association.'
18	• In sub-rule (1)(a)(iv) the word 'notation' should be changed to 'note' • In sub-rule (1)(b) for clarity, it may be useful to clarify that no other information should be kept about a former member of the association, other than the date of their ceasing to be a member.
19	The current model rule (r 7(1)) enables a disciplinary action to be taken if a member has 'neglected' to comply. This does not appear in proposed rule 19. In our view this ground should be reinstated,

	otherwise members cannot be sanctioned unless there is proof that a member *intended* not to comply (eg, active *refusal* to comply, after a warning).
21	• In sub-rule (2), the term 'reprimand' should be replaced with 'warn'. • In sub-rule (3), we are concerned that the requirement for an absolute majority may be difficult to achieve (especially as the committee cannot vote by proxy) and we query whether absolute majority is necessary given an aggrieved member has appeal rights if a decision is made by the committee to suspend or expel. Consideration should be given to whether a resolution is sufficient at this stage of the disciplinary process, as is the case under the current model rules.
25	A time limit for attempts to resolve the dispute should be added, e.g. 14 days as appears in the current model rules.
26	Sub-rule (1) should include a time within which the mediation to take place, e.g. 10 days as appears in the current model rules.
30	Sub-rule (4) is not plain language. A potential alternative is: • 'Despite sub-rule (3), general business may be considered at the meeting if it is an item for consideration in the notice under rule 32, and the majority of members at the meeting agree.'
33	• We find that proxies cause concern for many of our clients during AGM season. As a result, we would prefer to see a mention of the difference between general and specific proxies in this rule (or in a 'help box' or Note). • We also recommend a simple, suggested (but not mandatory) proxy form be appended to the rules or otherwise made available to associations (eg on CAV's website).
34	Sub-rule (2) does not address the situation where a member participating through the use of technology is required to vote by secret ballot.
35	In sub-rule (2), 'presence' for the purpose of quorum should include by proxy.
41	• In sub-rule (1), reference should be to the 'Committee' and not to the 'Management Committee' for consistency. • Sub-rule (3) should include a power for the committee to make by-laws by absolute majority. • As discussed in Part 1 of our our submission, sub-rule (4) should be deleted.

42	• Sub-rule (1)(b) provides that the committee cannot delegate a duty imposed under the Reform Act or any other law. This provision highlights the confusion that will arise from multiple sources of committee duties as discussed in Part 1 of this submission above. • Consideration should be given to giving the committee a specific power to delegate functions to particular committee members (in addition to staff and subcommittees).
44	As discussed in Part 1 of our submission, this rule should be deleted entirely, and replaced with a provision which simply describes the four duties of committee members under the Reform Act. This rule should include the duty to prevent trading while insolvent (which applies by reference to the Corporations Act and is not specified in Division 3 of Part 6 of the Reform Act). See also our comment on proposed model rule 64 below.
General	It would be useful to include a reference in the model rules to the (new) requirement to indemnify committee members (section 87 of the Reform Act). As discussed in Part 1 of our submission , most associations use the rules as their primary source of obligations and it is unhelpful if some, but not all, the key obligations in the Reform Act are referenced in the model rules. See also our comment on proposed model rule 64 below.
45	Sub-rule (3) is unnecessary and should be deleted. This rule is also inconsistent with proposed rule 29(3)(b)(i) which requires the committee to undertake this task (not necessarily the President).
46	• As discussed earlier in our submission, sub-rules (2) and (3) should be deleted. • We consider sub-rule (1) may be useful for secretaries, especially the Note which follows it, which could be improved by setting out the key obligations of the secretary under the Reform Act. No *additional* functions should be imposed on the secretary by this rule. • It may be useful to include a cross-reference to other provisions that refer to the secretary in the rules – i.e. proposed model rules 71 and 74.
47	• As discussed in part 1 of our submission, this rule should be deleted entirely. However it may be useful to include a cross-reference to other provisions that refer to the treasurer in the rules – i.e. proposed model rule 68.
48	The model rules should expressly state that membership of the association is a requirement for eligibility for election to the committee, if this is the intention (this appears the case by

	implication in proposed rule 55(2)(a)). Otherwise, the model rules should clearly state that committee membership is open to members and non-members.
49	The timing of vacation of the offices of committee members is likely to cause confusion and should be reconsidered. Proposed model rule 49 currently provides that the Chairperson declares positions vacant at the AGM, after the annual report and financial statements have been received (but presumably before elections are held: see order of general business in proposed model rule 29(3)). This would seem to result in the Chairperson's position being vacated before elections are held, creating uncertainty about who is to preside over the election process. (The proposed model rules appear to assume the Chairperson's role will continue during elections.) We submit that for simplicity and clarity, the committee's term should end at the *conclusion* of the AGM.
53	• In our experience a 'returning officer' is not commonly used by small associations, and we consider a requirement to use one may impose unnecessary burden. Sub-rule (1) should be amended so that the Chairperson can appoint a member in the case of a ballot. • 'Informal' vote in sub-rule (8) is a concept not commonly used or likely to be understood. It should be changed to 'should not be counted'. • 'Decide by lot' in sub-rule (11) is a concept not commonly used or likely to be understood. We suggest changing this to 'decide by a random process' and/or give specific examples in a Note (e.g. 'flip a coin' or 'draw straws').
54	• The term of office of committee members should be amended in light of our comments on proposed model rule 49 (above). • Sub-rule (3) should contain an affected committee member's rights to make representations to the secretary or president of the association and to be permitted to give such representations to members before their removal, as contained in rule 30(2) and (3) of the current model rules.
55	The term 'ceases to be' could be rephrased as 'stops being'.
57	Sub-rule (2) is unnecessary and should be deleted. In our view, this is properly a matter for the elected committee to determine.
58	An additional sub-rule should be included as follows: "The only business that may be conducted is the business for which the meeting is convened."

59	An additional sub-rule should be included as follows: "The only business that may be conducted is the business for which the meeting is convened."
60	We do not see the need for sub-rules (1) and (2) (as they are procedural matters that should be determined by the committee as it sees fit) and consider sub-rule (3) is more appropriately dealt with under rules 58 and 59 respectively (see above). We recommend deletion of this rule.
64	We note that proposed model rule 64 replicates (in simple language) the duty to disclose and manage material personal interests contained in sections 80 and 81 of the Reform Act. Given this approach is acceptable in this rule, the other key duties of the committee (e.g. in sections 83 – 85 of the Reform Act) should be similarly replicated in simple terms in the model rules.
66	• Sub-rule (1) should be amended to provide that the committee should not grant leave of absence for more than 3 months 'unless there are special circumstances'. This affords the committee the ability to grant a period of longer leave if, for example, there are valid circumstances preventing a member from returning within a 3 month period (e.g. young family commitments, study trip for 6 months etc). Alternatively this sub-rule could state that consecutive leave periods can be granted if there are special circumstances. • Sub-rule (2) should be deleted as it is unnecessarily prescriptive. In our view, the committee should be able to determine whether retrospective leave of absence is granted on a case-by-case basis.
68	• Sub-rule (3) should confirm the treasurer can delegate responsibility for these functions. • Sub-rule (3) should include reference to a process for authorisation of electronic funds transactions (EFT).
69	Delete 'would' as the first word of sub-rule (6).
73	Given the prevalence of email communication, we suggest deleting the words 'if the member has requested that the notice be given in that manner'. In our experience, email communication is very common among associations and it is burdensome (on members and on the association) to require members to actively 'request' correspondence by email.
74	As noted in Part 1 of our submission, sub-rules (2) and (3) are too broad. The following qualifications should be placed on access to and copying of an association's relevant documents:

	• access to relevant documents is subject to applicable laws (eg. privacy, legal professional privilege etc) • members must state a proper purpose when they apply for access to relevant documents • committees have discretion to withhold documents that are confidential, commercially or otherwise sensitive, contain personal information, or are otherwise deemed by the committee to be documents that are not appropriate for members' inspection/copying • restrictions may be imposed on the member's use or distribution of information and/or documents accessed • the association can charge an administrative fee for providing access to relevant documents, and • an association's right to choose whether to allow access to committee meeting minutes must be preserved.
75	As discussed in Part 1 of our submission, we recommend that advice be sought from the ATO to ensure that this provision, as drafted, will meet requirements for associations seeking endorsement as a tax concession charity.

We would be happy to discuss the contents of this submission with you at any time. Please find our contact details below.

Yours sincerely

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Endorsements

Association of Neighbourhood Houses and Learning Centres
Volunteering Victoria

APPENDIX A

About PilchConnect

PilchConnect is an independent, specialist community legal service that provides not-for-profit (**NFP**) organisations with access to free or low cost legal help (information, advice and training). We support small-medium NFP community organisations to be better run. We do this because when organisations are well run, they are more likely to achieve their mission, and trust and confidence in the NFP sector is likely to be improved.

By supporting NFPs in this way, we aim to contribute to a better civil society with more connected communities.

We fill a niche role; sitting between regulators and the private legal profession. As an independent, sector-based intermediary we understand the practical constraints that small community organisations operate under, and are trusted by them to provide practical, NFP-relevant legal help or direct them to other assistance. We often help organisations work out if they really do have a legal problem, how serious it is and what possible next steps are. We prioritise NFPs that assist marginalised and disadvantaged people and people in rural and regional areas.

Our submission work is based on empirical evidence and practical examples drawn from our legal inquiry, advice and case work.