

Chapter 7

Legal Structures

7.1 This Chapter describes the most common legal structures under which Not-For-Profit Organisations can be constituted currently and weighs the advantages and disadvantages of each form with regards to the suitability of its application for all Not-For-Profit Organisations.

7.2 In a background paper made available to all submitters (Appendix 3), the committee questioned whether a specialist legal structure for all Not-For-Profit Organisations might benefit the sector. This Chapter investigates the suitability of a specialist legal structure for the entire Sector and the potential forms of such a structure. The involvement of states and territories in any legal structure reform is explored.

Existing legal structures

7.3 There are a range of legal structures available to anyone wishing to establish a not-for-profit organisation. The most numerically common legal structure is the unincorporated association governed by common law principles. The most common corporate status is Company Limited by Guarantee or Incorporated Associations under relevant state or territory acts. There are numerous other structures under which not-for-profit organisations can be formed, including, but not limited to: trusts; cooperatives; Aboriginal corporations; unincorporated associations; religious organisations that may or may not be statutory corporations; Royal Charter; and special Act of Parliament. These legal structures impose a statutory obligation on the not-for-profit organisation with the exception of the unincorporated association, discussed below. Woodward and Marshall commented that:

...the current myriad of legal structures leads to confusion and inefficiencies in regulation. Consideration should be given to combining the best aspects of corporations law and the incorporated associations regimes.¹

7.4 The following discussion will be limited to the most common forms of legal structures for Not-For-Profit Organisations due to the number of different ways in which an organisation can operate. However, the current legislative environment is described by the Alliance (Community and Residential Care Providers) as being 'complex, inconsistent and confusing across Australia'.² Professor Mark Lyons elaborates:

1 Woodward, S. and Marshall, S., *A Better Framework: Reforming Not-For-Profit Regulation*, University of Melbourne, 2004, Chapter 3.

2 The Alliance, *Submission 28*, p. 4.

One way of illustrating this is to look at the decisions faced by persons wishing to start or incorporate a previously unincorporated nonprofit association. In any state or territory they are faced with at least three possible ways of proceeding: as a company limited by guarantee (a form of public company), as an association or as a cooperative. If they were an aboriginal group they could look at incorporating as an aboriginal corporation. But in some states, if they were an association of government school parents they would be required to incorporate under the education act. If it was a trade union they formed, another different route to incorporation would be required. Alternatively, if they were faith-based they might avoid incorporation while apparently obtaining its advantages through their standing with their sponsoring denomination, itself incorporated by a special act of parliament.³

Unincorporated Associations

7.5 Unincorporated not-for-profit associations are generally not required to be registered. They are not legal entities and therefore impose few legal obligations on members; however, unincorporated associations are considered to be both an entity and a company for income tax purposes.⁴ Large political parties and their branches, and large religious organisations are often combinations of unincorporated associations of members and corporate property trusts subject to the direction of the unincorporated association members. These organisations have the resources to choose other legal forms but have decided that this arrangement best suits their purposes.

7.6 In effect, an unincorporated association is a group of members that have come together for a common purpose. By number, unincorporated associations are the most common legal structure used by Not-For-Profit Organisations and are generally presumed to be small operators. The committee heard that, while it is the preferred legal structure of many organisations, 'an unincorporated association is a very dangerous creature. There are lots of cases that I could take you to that would fully illustrate that'.⁵

7.7 There are no reporting requirements for unincorporated associations, although these organisations are required to comply with any relevant legislation (ie. an unincorporated association that undertakes a fundraising appeal is required to follow the directives laid out in the relevant state fundraising act.

7.8 The committee heard that stakeholders were concerned that small organisations not be subject to burdensome reporting and disclosure regimes under any reform to the Third Sector. (Chapter 10 discusses this issue further.)

3 Professor Mark Lyons, *Submission 67*, p. 5.

4 *Income Tax Assessment Act 1997*, Division 995-1.

5 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 43.

7.9 The committee is aware of the risk that the establishment of any formal disclosure regime for unincorporated associations may be seen to be onerous, and, in the worse case scenario, may provide a disincentive for the continuation of these (often) small organisations. However, it is the role of the committee to balance this possibility with what it believes is a public expectation that even small organisations are answerable to the government and the community in the event of fraud, mismanagement, or concerns for public safety.

Companies Limited by Guarantee

7.10 A company limited by guarantee 'means a company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up'.⁶ According to the Treasury:

There are approximately 11,000 companies limited by guarantee registered under the Corporations Act 2001. This figure has been growing at 6 per cent per annum in recent years.⁷

7.11 Not all companies limited by guarantee are not-for-profit although the reporting requirements are the same for all. Companies limited by guarantee are subject to the *Corporations Act 2001*, which is administered by the Australian Securities and Investments Commission (ASIC). It is a requirement that these companies:

- Have at least 3 directors and 1 secretary;
- Have at least 1 member;
- Have a registered office address and principal place of business located in Australia;
- Have its registered office open and accessible to the public;
- Be internally managed by a Constitution or Replaceable rules;
- Maintain a register of its members;
- Keep a record of all directors' and members' meeting minutes and resolutions;
- Appoint a registered company auditor within 1 month of its registration;
- Keep proper financial records;
- Prepare, have audited and lodge financial statements and reports at the end of every financial year;

6 *Corporations Act 2001*, s. 9.

7 Australian Treasury, *Submission 169*, p. 18.

- Send to its members a copy of its financial statements and reports, unless the member has a standing arrangement with the company not to receive them;
- Hold an Annual General Meeting once every calendar year within 5 months of the end of its financial year;
- Receive and review an annual company statement and pay an annual review fee; and
- Lodge notices whenever changes to its officeholders, office addresses, constitution and its name occur within specified timeframes as determined by the Corporations Act 2001.⁸

7.12 In their 2004 survey of Not-For-Profit companies, Woodward and Marshall found that:

[M]ore than half (52%) of respondents indicated ‘public perception and status’ was an important factor in the decision to use a company structure rather than an incorporated association. This supported anecdotal evidence that ‘serious’ or ‘more sophisticated’ NFP organisations use the Corporations Act 2001 (Cth) rather than incorporated associations’ legislation.⁹

7.13 In compiling their final report, the authors also found that a significant percentage of organisations chose a company limited by guarantee to be their structure because it was a requirement of grant makers. Woodward and Marshall go on to hypothesise that:

Whilst we are unaware of any government funding agreements that require the company limited by guarantee structure, many funding agreements specify that an organisation must be ‘incorporated’ before receiving funds. This general requirement, combined with the results for ‘public perception and status’, may mean that government funding agreements are being interpreted as requiring a company limited by guarantee structure.¹⁰

7.14 The committee heard a range of different views about the suitability of the company limited by guarantee structure for Not-For-Profit Organisations. Mr David Sharpe, of the Australia Council for the Arts informed the committee that as a grant-making body, they ‘ask for a particular standard of financial reporting and that standard is in line with the *Corporations Act*’.¹¹

8 Australian Securities and Investments Commission, *Registering not-for-profit or charitable organisations*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations?openDocument> (accessed 3 November 2008).

9 Woodward, S. and Marshall, S., *A Better Framework: Reforming Not-For-Profit Regulation*, University of Melbourne, 2004, p. 58.

10 Woodward, S. and Marshall, S., *A Better Framework: Reforming Not-For-Profit Regulation*, University of Melbourne, 2004, p. 59.

11 Mr David Sharpe, Program Manager, Business Capacity Building, Australia Council for the

7.15 The committee notes that support for a specialist legal structure for Not-For-Profit Organisations was not absolute. Ms Catherine Brown, a lawyer, consultant and director, told the committee that, while she supported a single legal structure, 'we would suggest that this should be a company limited by guarantee with public reporting obligations'¹².

7.16 In a document submitted to the committee (Tabled documents, Appendix 1), Mr A.D. Lang, a barrister, summarises the advantages he perceives with the company limited by guarantee structure, including:

- No restrictions on trading.
- Can carry on business in every state and territory with a single registration.
- Can have only 1 member, ie. be a subsidiary.
- ASIC doesn't scrutinise constitutions or amendments to constitutions.¹³

7.17 Similarly, he notes the perceived disadvantages of the structure for Not-For-Profit Organisations:

- The Corporations Act was never intended to regulate not-for-profit organisations:

Its purpose is to regulate profit-making companies.

It is so long and convoluted as to be virtually incomprehensible, even to lawyers.

The provisions that apply to companies limited by guarantee are scattered, almost at random, throughout the Act.

In practical terms it will be difficult for a company limited by guarantee to comply with all the requirements of the Corporations Act without a qualified company secretary.

- All companies limited by guarantee are necessarily public companies:

As such, they must allow proxies.

They cannot prevent non-members from being appointed proxies, and thereby participating in its general meetings.

A small number of disgruntled members (5% or 100, whichever is fewer) can requisition a general meeting whenever and as often as they like.

Arts, *Proof Committee Hansard*, 31 October 2008, p. 70.

12 Ms Catherine Brown of Catherine Brown and Associates, *Proof Committee Hansard*, 30 October 2008, p. 2.

13 Mr A.D. Lang, *Pros and Cons of Companies Limited by Guarantee versus Incorporated Associations*, Appendix 1, p. 1.

Directors can be sacked by a simple majority at a general meeting even without cause.

- The statutory duties and potential liability of board members are more onerous (although the common law duties and liability are probably the same).
- The administrative overheads are much more significant:

The annual fee is \$1,000, rather than \$39.70 (unless the company limited by guarantee is a charity).

All changes of directors and company secretaries and their personal details must be notified to ASIC within 28 days.

There are hefty penalties for late filing.

- There is no provision for amalgamation. Mergers will require at least 1 entity to be wound up, with consequent potential termination of employment.
- An incorporated association cannot become a company limited by guarantee unless every member agrees.¹⁴

7.18 The committee notes the transparency of reporting that is required under the company limited by guarantee structure. It is aware that a public company structure has served Australian enterprises well. However, it is aware that companies limited by guarantee must report to ASIC, a body that the committee has heard 'has not the slightest interest in regulating the activities of not-for-profit organisations'.¹⁵ The committee also finds the list of disadvantages in the document tabled by Mr A.D. Lang to be compelling, particularly when consideration is given to the administrative overheads of the structure and the more onerous statutory duties of board members on the operation of micro and small Not-For-Profit Organisations.

Incorporated Associations

7.19 Associations are incorporated under State and Territory Associations Incorporation legislation which is administered by the various state authorities. An incorporated association is a legal entity which protects its members from the debts and liabilities of the association. Unlike a company limited by guarantee, all incorporated associations should be Not-For-Profit Organisations.

7.20 Incorporated associations may only undertake business in their state jurisdiction. Due to different legislation in each state and territory, the reporting

14 Mr A.D. Lang, *Pros and Cons of Companies Limited by Guarantee versus Incorporated Associations*, Appendix 1, p. 1. Note: The final point is in relation to an Incorporated Association incorporated in Victoria and may not be true of those incorporated in other states or territories.

15 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 37.

requirements of incorporated associations are not aligned.¹⁶ ASIC states that an incorporated association may need to:

- Have a committee, responsible for managing the association;
- Have a public officer and notify any changes in that position;
- Have a registered office in its state of incorporation;
- Act in accordance with its objects and rules;
- Hold an Annual General Meeting once every calendar year;
- Lodge an Annual Statement every year;
- Keep proper accounting records and, in some states prepare, have audited and lodge financial statements;
- Keep minutes of all committee and general meetings.
- Keep registers of members and all committee members
- Have a common seal¹⁷

7.21 Mr Lang summarises the perceived advantages and disadvantages of incorporated associations in Victoria, where he is based:

Advantages of Incorporated Associations

- The Associations Incorporation Act is specifically designed to provide a simple and inexpensive means of incorporating not-for-profit organisations.
- The Associations Incorporation Act is more flexible than the Corporations Act, and does not contain any of the limitations that the Corporations Act places on public companies (which includes all companies limited by guarantee).
- The statutory duties and potential liability of board members are less onerous (although the common law duties and liability are probably the same).
- The annual fee is \$37.60 rather than \$1,000. It is not necessary to lodge the names of committee members, changes in committee members or their personal details. There are no late fees.
- Two or more incorporated associations can amalgamate “seamlessly”, so that all their assets, liabilities and staff are automatically transferred across to the amalgamated association, without any need for winding up or termination of employment.

16 Appendix 1 lists the legislation and regulation that states and territories must comply with according to the state in which they are registered.

17 Australian Securities and Investments Commission, *Registering not-for-profit or charitable organisations*, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Registering+not-for-profit+or+charitable+organisations?openDocument> (accessed 3 November 2008).

Disadvantages of Incorporated Associations

- Trading prohibited. However, not if trading is only ancillary to the principal purpose, the transactions are with members, or the association is a charity.
- If the association carries on business outside Victoria, it will need to register as a “registrable Australian body” under the Corporations Act, obtain and use an ARBN, and notify ASIC of changes in its committee members and their personal details.
- Must have at least 5 members.
- Consumer Affairs Victoria nitpicks all constitutions and amendments to constitutions that contain provisions different from the model rules.¹⁸

7.22 While the committee heard that there was support for the incorporated associations legal structure among Not-For-Profit Organisations, the Law Council of Australia believes that the current Associations Acts are out of date:

[A]t present, each of the state Associations Incorporation Acts contains restriction in various forms on trading by incorporated associations. These provisions are generally poorly expressed and difficult to understand. The trading restrictions appear out of step with the increasingly entrepreneurial role expected of the NFP sector by both state and federal governments.¹⁹

7.23 The Country Women's Association's concerns lay in the comparability of the Acts across states and territories and they believe that it would be much better if the rules of incorporation were the same Australia-wide for everybody'.²⁰

7.24 The committee notes that advantages of an incorporated associations structure, particularly with regard to smaller organisations. However, to adopt this structure nationally, all states and territories would need to agree to refer their powers in this respect to the Commonwealth, or agree to harmonise the legislation at the state level. Mr Lindsay Doig of the CPA Third Age Network Committee warned the committee that:

In the event that there was some level of harmonisation rather than a national body, we would probably argue that there should be some mechanisms which would enable us to retain harmonisation. Too often we find that two years down the track we have got an unharmonised

18 Mr A.D. Lang, *Pros and Cons of Companies Limited by Guarantee versus Incorporated Associations*, Appendix 1, p. 1

19 Law Council of Australia, *Submission 128*, p. 10.

20 Ms Noela MacLeod, Immediate Past President, Country Women's Association, *Proof Committee Hansard*, 30 October 2008, p. 67.

harmonised regime. We would argue that whatever regime is applied it should be uniform and remain uniform across Australia.²¹

Statutory corporations

7.25 A statutory corporation is an organisation established by an Act of state or commonwealth parliament. The most common statutory corporations in the Third Sector are religious bodies, whose regulatory conditions may differ from that of other Not-For-Profit Organisations.

7.26 Reporting requirements of statutory corporations vary, but the committee notes that an Act of Parliament outlining the disclosure regimes for Not-For-Profit Organisations may be an effective method of aligning requirements across the sector.

Co-operatives

7.27 A co-operatives model could technically be applied to any activity, however traditionally co-operatives exist in economic sectors such as agriculture and irrigation, fisheries, consumer and financial services, housing, and production (workers' co-operatives). Co-operatives are also popular models for promoting arts and culture. Co-operatives form a legal entity, and, in Australia, the co-operative model is most common in Victoria. The International Co-operative Alliance (ICA) defines a co-operative as:

...an autonomous association of persons united voluntarily to meet their common economic, social, and cultural needs and aspirations through a jointly-owned and democratically-controlled enterprise.²²

7.28 The Ministerial Council of Consumer Affairs (MCCA) has been working for almost a decade on harmonising cooperative legislation across Australia. At its 2 September 2005 meeting, MCCA gave its approval for the drafting of template legislation to be underpinned by a Ministerial Agreement between the states and territories, which will accelerate adoption of amendments to the cooperatives legislation in all jurisdictions.

7.29 As with incorporated associations, co-operatives are administered under state and territory legislation. They differ from incorporated associations primarily because they can be formed to establish a business that makes a profit for its members. Not-For-Profit co-operatives are generally referred to as 'non-trading' where its rules prohibit it from giving returns or distributions on surplus or share capital to members.

21 Mr Lindsay Doig, Member, Voluntary and Honorary Work Subcommittee, CPA Australia Third Age Network, CPA Third Age Network Committee, *Proof Committee Hansard*, 30 October 2008, p. 81.

22 International Co-operative Alliance, *What is a co-operative?*, <http://www.ica.coop/coop/index.html> (accessed 5 November 2008).

7.30 Audit and financial reporting requirements vary from state to state, but may include a requirement to:

- Appoint an auditor.
- Send audited accounts and required reports to members prior to AGM.
- Lodge audited accounts and required reports with the registering body.
- Notify changes in directors, registered office, co-operative name, rules, auditor, charges, and debentures.
- Provide a declaration of interest by directors.

7.31 Some different rules may apply to non-trading entities depending on whether the co-operative was started with or without share capital, and in some states small co-operatives may be exempt from certain reporting.

7.32 The committee heard limited evidence from witnesses regarding the viability or suitability of the co-operative legal structure for Not-For-Profit Organisations. The committee notes that co-operatives may be for- or not-for-profit organisations. While the co-operative reporting requirement may be suitable for Not-For-Profit Organisations generally, the definition of 'co-operative' would not apply to many organisations operating within Australia.

Committee View

7.33 The committee agrees that it is impossible to find one existing legal structure currently used by Not-For-Profit Organisations that would be suitable for all. The variability between Not-For-Profits means that complying with the requirements of the *Corporations Act*, for example, would be extremely burdensome to micro organisations. The perception that those organisations regulated by ASIC have a greater status than association incorporations could discourage companies limited by guarantee from wanting to change structure. Similarly, the Association Acts are considered to be poorly regulated and differ from state to state, raising difficulties for national organisations if they were forced to migrate to a state or territory Associations Act.

A specialist legal structure

7.34 The previous section examined the current legal structures available for use by Not-For-Profit Organisations where it was found that one of these structures as they stand is suitable for use across the entire sector:

It is important to note that the legal and regulatory framework currently in place is devised for 'for-profit' companies and does not assist the information needs of stakeholders in the NFP sector. The members of NFPs (and their stakeholders) want to know the financial position of the organisation, that the organisation is being managed prudently, and that the

allocation of resources is aligned with the values and objectives of the organisation as set out in its constitution. The current legal and regulatory framework is designed to facilitate shareholder management and to assist investors to examine the accounts to ascertain the deployment of and return on their investment.²³

7.35 Professor Mark Lyons argues that a new system must be purpose-built for Not-For-Profit Organisations:

Existing legal and regulatory arrangements are so complex and muddled that only a completely new, purpose built system will achieve the goal of a simple and appropriately designed system. Tacking nonprofits onto corporations and requiring ASIC to regulate them is certainly not appropriate. Because nonprofit organisations differ in some fundamental ways from business, the new act and regulator must be purpose built, based on a clear understanding of the behavioural dynamics of nonprofit organisations and recognise that most nonprofits are very small and rely entirely on volunteer labour.²⁴

7.36 The committee found that a high level of support exists among contributors to the Inquiry for such a legal structure. Mackillop Family Services believes that:

The goals of such purpose-built legislation would be:

- To create a regulatory environment that encourages nonprofit organizing and the nonprofit contribution to the nation's social, economic and cultural life.
- ...
- To propose regulation commensurate with the level of risk (for example organisations with employees, government contracts, a certain level of capital and income should have more rigorous compliance and reporting requirements; others below such benchmarks may not be required to report.)²⁵

7.37 A purpose-built specialist legal structure need not be entirely original. Long-established wording from the *Corporations Act* directly relevant to Not-For-Profit Organisations could be retained should it be deemed not to interfere with the objectives laid out in the development of a specialist structure.

7.38 The committee acknowledges that some organisations hold reservations about the introduction of a specialist structure which may create an additional burden for organisations. Mr Dan Romanis of the Royal District Nursing Service indicated that:

Whilst we want a standardised approach to disclosure regimes for charities and not-for-profits, we are also cautious about potential new administrative

23 Chartered Secretaries Australia, *Submission 17*, p. 2.

24 Professor Mark Lyons, *Submission 67*, p. 3.

25 Mackillop Family Services, *Submission 43*, p. 5.

burdens. Our submission refers to the risks and the costs that we see in the current complex environment, including diversion of resources from our core charitable functions.²⁶

7.39 Similarly, the Skyline Education Foundation Australia stated that, while they support the need for standardisation:

...any changes must deliver a simpler, easier and more accessible regime. Changes which create additional red tape, bureaucracy or a complex reporting regime are prohibitive for small not-for-profits and will cause fatal damage to the sector, leading to the closure of many grass roots programs which deliver significant benefits to both individuals and communities.²⁷

Compulsory or voluntary?

7.40 Professor Myles McGregor-Lowndes expressed the view that a specialist legal structure should attract Not-For-Profit Organisations rather than 'forcing them in because you have closed down the other legal vehicles' and argued for an appropriate transition period. He added that:

It is short-sighted to close off other legal forms and the ability of people to exploit those forms for productive purposes rather than to fit them into a constricted legal form that they must take or not be nonprofit. I would prefer that, yes, we have a national regime of incorporated associations, but that it attract people and organisations by being efficient, effective and attractive to them.²⁸

7.41 Father Brian Lucas of the Australian Catholic Bishops Conference went further and stated that small Not-For Profit Organisations should not be required to sign up to any new legal structure:

I am prepared to say quite unequivocally that the micro-organisations do not belong in a regulatory framework, nor should they be required to incorporate. They are of minimal risk. We have lived for many years with unincorporated associations. Incorporation is late on the scene. There were fears and anxieties about litigation, and we handle that in a different way. We should be encouraging and enthusiastic about groups of people, be it a dart club or any other group, coming together to do good things for themselves and for the community. Unless there is risk, they ought not be in the regulatory framework. We need to assess the risk...You have a proportionality between regulation and risk.²⁹

26 Mr Dan Romanis, Chief Executive Officer, Royal District Nursing Service, *Proof Committee Hansard*, 28 October 2008, p. 3.

27 Skyline Education Foundation Australia, *Submission 32*, p. 2.

28 Professor Myles McGregor-Lowndes, *Proof Committee Hansard*, 29 October 2008, p. 44.

29 Father Brian Lucas, General Secretary, Australian Catholic Bishops Conference, *Proof Committee Hansard*, 29 October 2008, p. 42.

7.42 In contrast to Professor McGregor-Lowndes, the committee heard from Mr Lang of the Law Council of Australia that Not-For-Profit Organisations should not be given a choice – that once a specialist legal structure is legislated, all existing Not-For-Profit Organisations should be automatically migrated to the new structure. He added that:

...it will be possible to transfer across all of the existing incorporated associations and companies limited by guarantee without those organisations needing to change their constituent documents at all and with no practical change to the way in which those organisations operate.³⁰

7.43 Ms Susan Woodward of PilchConnect agreed with Mr Lang on the issue of migration, suggesting that a 'deeming provision' could be included in the new legislation. She noted that this had occurred successfully in the past during a changeover in the Indigenous corporations area, and similarly in 2001 when the Corporations Act changed memoranda and articles of association.³¹

7.44 The committee heard suggestions that if all Not-For-Profit Organisations moved to a single legal structure, there will be increased liabilities in the future for 'directors' (or equivalent) of organisations that are currently unincorporated. However, the committee is aware that the 'directors' of unincorporated associations are currently faced with potentially *more* liability than directors whose organisation is incorporated or limited by guarantee:

If you're the honorary treasurer of an unregistered [unincorporated] non-profit organisation called Better Community, for example, and you're renting premises for your organisation, you will have to make the lease in your own name (acting as a trustee for Better Community)....

The extra disadvantage is that if anything goes wrong -- if the Better Community office burns down, or if people fall over the mat and injure themselves and sue - it's possible that as the lessee and as a committee member you may be held personally liable. In that case, if there isn't enough money in the Better Community cashbox to cover the payout you may have to pay for it yourself.

There can also be difficulties with opening bank accounts, problems with insurance, and confusions about who owns what property. If you stop being a member of Better Community but your name is still on the contracts there may be difficulties transferring your responsibilities to the new Treasurer.³²

30 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 84.

31 Ms Susan Woodward, Manager, PilchConnect, *Proof Committee Hansard*, 11 November 2008, pp 5-6.

32 Australian Institute of Community Practice and Governance, *Help Sheet*, http://www.ourcommunity.com.au/management/view_help_sheet.do?articleid=733 (accessed 27 November 2008).

Harmonisation or referral of powers?

7.45 Contributors to the inquiry were divided as to how a single structure should be achieved. The committee heard support for the harmonisation process, by which states and territories would retain their power of legislation, but would amend their current legislation so that it was the same as in other states.

In making this recommendation [to harmonise legislation], the Institute acknowledges that there would be significant implementation and transitional issues to be resolved if a single harmonised regime were to be adopted. This is inevitable given the current plethora of arrangements. However, our experience and expertise tell us that this would be the most effective and sustainable solution.³³

7.46 Others took the opposing view, advocating that states and territories refer their power to the Commonwealth in order to achieve a single piece of legislation. Professor Lyons stated definitively that 'we should have a national incorporated associations statute. That certainly would be a marvellous benefit to the sector, the economy and Australia generally.'³⁴ The Alliance (Community and Residential Care Providers) agreed that 'it may be preferable for states and territories to refer their powers to the Commonwealth, so that a single national legislative regime can be established, managed by a single national regulator'.³⁵

7.47 The committee heard that a specialist legal structure, defined in an Incorporated Associations Act would not necessarily require a great deal of practical change for the Sector:

What would happen is simply very much what happened with the corporate affairs offices that the states used to run prior to the Commonwealth companies scheme coming into operation. Those offices simply became regional offices of ASIC. Nothing changed at a practical level. The staff, in fact, remained the same. No-one sent documents to Canberra. They sent the documents to their regional office and there was no practical change for the companies concerned. What we would see happening with the Incorporated Associations Act is the same thing. There would be no practical change for those organisations at all. The documents would be lodged as they currently are in the relevant capital city and there would be a devolution of authority to regional offices of the regulator.³⁶

33 Institute of Chartered Accountants, *Submission 108*, p. 7.

34 Professor Mark Lyons, *Proof Committee Hansard*, 29 October 2008, p. 88.

35 The Alliance, *Submission 28*, p. 7.

36 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 84.

Disclosure regimes

7.48 One of the main tasks of the committee has been to examine the transparency inherent in the disclosure regimes of charities and other Not-For-Profit Organisations. What a Not-For-Profit Organisation is required to disclose is largely a result of their legal structure – companies limited by guarantee, for example, are required to comply with the reporting requirements of the *Corporations Act 2001*.

7.49 However, the committee recognises that a legal structure and what it requires in terms of disclosure cannot be developed in isolation from each other. This Chapter will discuss disclosure in broad terms. A more detailed discussion of elements of disclosure will be addressed in Chapter 10.

7.50 Submitters provided the committee with suggestions as to what features a specialist legal structure should contain. More than any other issue, the committee heard concerns that any specialist legal structure for the Sector should avoid a one-size-fit-all approach. The CPA Third Age Network Committee requested that a distinction be made according to whether organisations are charities or not.

Central to our submission is an appeal to the Senate Committee to resist the introduction of governance and reporting regimes with application, without distinction, to all charities and NFPs. We suggest that a 'one size fits all' approach is against the public interest.³⁷

7.51 The Australian Evangelical Alliance was concerned that a distinction be made between large and small organisations:

We urge your Committee to take account of smaller organisations when making proposals to reform the sector. In particular we are concerned that the end result should include differentiation between the scale and nature of the spectrum of NFPs – ranging from say World Vision to a church parent-run playgroup that has to incorporate solely to be able to get association liability insurance cover.³⁸

7.52 Dr Ted Flack identified another way of differentiating Not-For-Profit Organisations based on their 'publicness':

The extent to which the organisation is a public organisation is also important. It is argued that it is appropriate for charities and other not-for-profit organisations that are publicly funded (either by way of extensive public fundraising or by a significant level of government funding) to be required to produce comprehensive publicly available information about their activities and the financial position. In this case, high standards of narrative and statistical information and full general purpose financial statements might be expected.

37 CPA Third Age Network Committee, *Submission 39*, p. 2.

38 Australian Evangelical Alliance, *Submission 37*, p. 4.

However, charities and other not-for-profit organisations that are essentially the private affair of the participants should not be required to make comprehensive public disclosures of their activities or finances. The regulation of these private associations (including charitable associations) could reasonably be left to the participants.³⁹

7.53 Ms Woodward seconded Dr Flack's differentiation, saying that reporting obligations should be linked to the level of concessional taxation treatment. Ms Woodward warned, however, that 'it would be important to make sure that having that combination does not make it too complex'.⁴⁰

7.54 The majority of contributors were of the belief that annual revenue should determine the disclosure regimes of Not-For-Profit Organisations:

Different regimes or reporting requirements may be based on the annual financial turnover. Turnover or revenue is the most objective and relevant indicator for the not-for-profit sector.⁴¹

7.55 Many felt that small Not-For-Profit Organisations should be exempt from reporting at all, or at least should receive the same exemptions as small proprietary companies.⁴² However, many other contributors felt that a specialist legal structure should require some form of reporting:

CSA does not support an exemption of any NFPs from a minimum level of financial accountability. The majority of NFPs are tax-exempt and therefore not required to lodge a taxation return. Proper financial statements are essential to ensuring good governance and an understanding of risk management, and without any statutory obligation to lodge annual financial reports, the risk of NFPs (particularly those that do not receive external funding) not preparing such statements is high.⁴³

I do not particularly care what form it is in... But if it happens to be the bank balance written by the treasurer on the back of an envelope then I would like to see a scanned copy of that submitted to the regulator. At least it would tell you something about the organisation and how it is running or not running. Without that sort of information you know nothing about the organisation at all.⁴⁴

39 Dr Ted Flack, *Submission 12*, p. 3.

40 Ms Susan Woodward, Manager, PilchConnect, *Proof Committee Hansard*, 11 November 2008, p. 3.

41 CPA Australia, *Submission 98*, p. 4.

42 Pricewaterhouse Coopers, *Submission 61*, p. 2.

43 Chartered Secretaries Australia, *Submission 17*, p. 6.

44 Mr A.D. Lang, Representative, Law Council of Australia, *Proof Committee Hansard*, 29 October 2008, p. 69.

Committee View

7.56 The committee received persuasive evidence in the submissions it received and through the public hearing process. The committee believes that a single specialist legal structure, designed specifically for Not-For-Profit Organisations, will result in the most effective and efficient regulation of the Sector.

7.57 The committee appreciates that judgement will need to be exercised in determining the disclosure regimes of organisations under the legal structure. Of the distinctions drawn by submitters, the committee notes that the annual revenue of an organisation may be the best way of determining what standard an organisation should report to. However, the committee agrees that all organisations should be required to report under the specialist structure to the national regulator, even if that reporting is basic.

7.58 The committee believes that it is preferable that all Not-For-Profit Organisations use the same legal structure, in order to ensure more solid regulation of the Sector. For this reason, the committee recommends requiring all existing organisations to migrate to the new structure when it has been developed.

Recommendation 7

7.59 The committee recommends that a single, mandatory, specialist legal structure be adopted for Not-For-Profit Organisations through a referral of state and territory powers. Given the degree of change such a legal structure would mean for some not-for-profit organisations, the legal structure must be developed in full consultation with these organisations.