GILBERT TOBIN

LAWYERS

Gilbert + Tobin Submissions to the Productivity Commission's Draft Research Report on the Contribution of the Not-For-Profit Sector

1 Introduction

Thank you for the opportunity to provide written submissions on the Productivity Commission's Draft Research Report on the Contribution of the Not-For-Profit Sector released on October 2009 (**Report**). We have limited our response to commenting under the two broad headings of "Governance and Accountability — Streamlining the Regulatory Framework" and "Strengthening Relationships — Government, Business and Community" with the majority dedicated to the former. We make our comments as the provider of extensive pro bono legal assistance to not-for-profit organisations (**NFPs**) (representing marginalised and disadvantaged people) in relation to these matters. We agree that there is an urgent need to bring together the multiplicity of governance, taxation and fundraising regulatory arrangements, especially at the Commonwealth level and that relationships between NFPs and government needs to be strengthened and modernised.

The proposed reforms will reduce the compliance burdens upon NFPs, increase compliance by NFPs with their various obligations and afford the public greater protections and certainty particularly with respect to charitable fundraising. They will also result in a very real likelihood that NFPs will be less reliant upon pro bono legal assistance to help understand and navigate what can be rather complex areas of law and regulation.

2 About Gilbert + Tobin

Gilbert + Tobin is a top tier law firm with a strong commitment to the provision of pro bono legal services. It was established in 1988 and currently employs approximately 200 lawyers, 50 of which are partners. We have a dedicated pro bono practice established in 1996 and now consisting of a pro bono partner and 2 full time pro bono lawyers. All of our staff, legal (including partners) and non-legal are encouraged to conduct pro bono work with approximately 80% of our legally qualified employees participating in some form of pro bono legal work each year.

We provide pro bono legal services and assistance to individuals who are disadvantaged and marginalised and organisations that assist people who are disadvantaged and marginalised. Approximately half of our client base is individuals and half is organisations. With respect to our organisation work, our focus is on Indigenous communities and issues.

Of the approximately 500 requests we receive each year for pro bono legal assistance and advice, about 50 relate to deductible gift recipient (**DGR**) status and/or tax concession charity (**TCC**) status, about 50 relate to the establishment and structure of NFPs and approximately 50 relate to charitable fundraising authorities and activities. Of the 150 requests of the nature described above we estimate that we are able to accept around 50 each per year.

Our commitment to the provision of pro bono assistance to NFPs over the last 21 years has given us good visibility of and experience in many of the issues raised in the Report. It is with this in mind that we gladly contribute by way of these submissions.

3 Governance and accountability — streamlining the regulatory framework

3.1 Legal structures

We support draft recommendation 6.1 that the Australian Government should establish a Commonwealth incorporated associations legal structure for NFPs. As suggested in the Report, the new legal structure would assist NFPs, in particular those operating across state and territory boundaries, that do not wish to be companies limited by guarantee but wish to be incorporated at the Commonwealth level. We also agree that together with this reform, Australian governments should ensure that incorporation legislation is amended to allow NFPs to migrate from one form of legal entity to another and to migrate between jurisdictions with relative ease and low transaction costs. The ability to transfer jurisdiction and structure type is not unprecedented. For example see Section 82 of the *Associations Incorporations Act 1991* (ACT) which specifically provides for voluntary transfer of an incorporated association to a company limited by guarantee.

We have many clients which are incorporated as an association in one particular jurisdiction or another which have grown and wish to broaden the geographic scope of their work and their membership. This may take the form of establishing new branches or offices in another state or territory but also arises when an NFP wishes to explore the use of the internet to expand its services while physically remaining in their home jurisdiction. In seeking to do this the issues the NFP needs to address are fairly complex and extensive. They are required to conduct an analysis of what they are doing and form a view on whether their activities could be considered "carrying on business". If the NFP is carrying on business in another state or territory outside its jurisdiction of incorporation, or if there is any doubt of such, then the 3 main options are:

- not to expand geographically;
- become an Australian Registered Body; or
- change structure type altogether to become a public company limited by guarantee (**CLBG**).

Becoming a CLBG, and to a lesser extent an Australian Registered Body, is not a simple exercise and can take a significant amount of time and effort. In addition, once transformed the obligations, particularly those imposed upon a CLBG, can be much greater than those imposed upon the NFP as an incorporated association. Without assistance, paid or otherwise, becoming an Australian Registered Body or a CLBG is often too daunting and too much of a shift from what the NFP knows and is comfortable with. This is with respect to both the transformation process and the compliance obligations moving forward. With this in mind and because many NFPs do not have the financial resources to engage professional advisors to assist, such NFPs wanting to expand their geographical reach will, unless they can secure pro bono assistance, choose not to expand and therefore limit their services to what they are currently doing within their current structure. However, in our experience some NFPs who approach us have chosen to expand their work into other jurisdictions while remaining as an incorporated association either in ignorance of the consequences or with a willingness to accept the risk that they may, on an alternative interpretation of what is "carrying on business", be found to be in breach of another jurisdiction's laws.

3.2 Commonwealth incorporated associations

While we support the concept of a new Commonwealth incorporated associations legal structure for NFPs and understand the need to ensure that there are still appropriate legal structures available for small community-based NFPs, we are concerned that a new Commonwealth incorporated association will add one more option to an already crowded street. When establishing most for profit commercial businesses the most common path is to establish a proprietary limited company or, in a small number of cases, a public company. While some proprietary limited companies will transform to a public company, the vast majority do not. When establishing an NFP however, there are currently 3 main options – an incorporated association, a CLBG or an Aboriginal and Torres Strait Islander corporation. A fourth option is an incorporated association that becomes an Australian Registered Body. A Commonwealth incorporated association will provide a fifth alternative.

State and territory based associations incorporation laws and regulations have, over time, been amended to more closely resemble some of the provisions within the Corporations Act 2001 (Cth) (**Corporations Act**) and have, for the most part, increased the onus of compliance upon incorporated associations.

With the above in mind it is important that:

- as many of the available structures as possible become regulated by, or at least overseen by, the one government body. We comment further on the issue of a National Registrar of Community and Charitable Purpose Organisations (**Registrar**) at section 3.5; and

- that State and Territory based incorporated associations laws and regulations be amended to provide a real, low-onus alternative for small NFPs which do not wish to incorporate at the Commonwealth level.

3.3 Charitable Fundraising

We support the recommendation that unnecessary compliance burdens, in particular those relating to charitable fundraising, be reduced and to this end the Australian governments should:

- agree to and implement modern harmonised fundraising regulation and mutual recognition across Australia; and

- support the development of a fundraising register for cross jurisdictional fundraising organisations, to be administered by the proposed Registrar.

NFPs are currently required to apply for an authority to conduct charitable fundraising activities in each Australian jurisdiction they wish to fundraise in. The application process and the on-going fundraising authority terms and conditions vary quite significantly from jurisdiction to jurisdiction. For example compare the relatively straight forward application requirements of the NSW Office of Liquor Gaming and Racing which administers the *Charitable Fundraising Act 1991* (NSW) and the *Charitable Fundraising Regulation (2008)* (NSW) with the somewhat more onerous application requirements of the Queensland Department of Fair Trading which administers the *Collections Act (1966)* (Qld) and the *Collections Regulation (2009)* (Qld).

It is not only the application processes which vary from jurisdiction to jurisdiction. The types of fundraising activities requiring an authority, the period of time for which a fundraising authority is granted and the terms and conditions of the fundraising authority also differ.

While applying for and complying with an authority to fundraise in an NFP's home jurisdiction may be readily achievable, albeit more difficult in some jurisdictions than others, it becomes exponentially more difficult the more jurisdictions it wishes to fundraise in. This requires NFPs which hold multiple fundraising authorities to create and actively maintain a register of fundraising authorities to ensure that the authority does not unknowingly expire and to help ensure that they continue to comply with the relevant terms and conditions. Inevitably, at some time or another an NFP will find that they have unwittingly allowed a particular authority to lapse. As it is often easier to renew an authority than reapply once it has expired, letting an authority lapse is likely to be a time consuming exercise for both the NFP and the responsible government body.

Uniform laws and regulations together with a harmonised application process and implementation of uniform policies will significantly reduce the administrative burden upon NFPs fundraising in multiple jurisdictions and should, presuming that the State and Territory bodies remain responsible for the regulation of charitable fundraising, increase efficiencies among the responsible government bodies.

Many NFPs have become more sophisticated and innovative in their fundraising initiatives and have embraced internet-based fundraising as part of their overall fundraising strategy. This, coupled with web 2.0 applications such as Facebook and Twitter, is making it increasingly difficult to ascertain from and in which jurisdiction fundraising activities are being conducted. It is therefore becoming increasingly artificial to restrict fundraising authorities to physical boundaries. NFPs should be able to rely on the fact that holding a fundraising authority in one jurisdiction is sufficient for all other

Australian jurisdictions. For instance, questions such as should an NFP incorporated as an association in and holding a valid fundraising authority in NSW which receives funds from a giver in the ACT through a website hosted on a server located in Victoria be required to also hold a Victorian fundraising authority would not need to be asked if being authorised to fundraise in one Australian jurisdiction was sufficient for all other Australian jurisdictions.

Certainty and simplicity in the area of charitable fundraising will increase the comfort and compliance of NFPs, will reduce the administrative burden both with respect to the application and ongoing compliance with an authority's terms and conditions, should afford greater protections and certainty to the broader public giving to NFPs and should lead to a reduction in the need for legal assistance which is simply not available to all NFPs.

3.4 Commonwealth register

We support the concept of a Commonwealth register for cross-jurisdictional fundraising organisations to be administered by the proposed Registrar. Such a register should be made available to the public to enable prospective givers to ascertain whether a particular NFP has an authority to fundraise at the Commonwealth level. Of course, absence from the Commonwealth register would not necessarily mean that the NFP in question does not have an authority to fundraise in its home jurisdiction. With this in mind, and to save confusion and false assertions as to the NFP's authority to fundraise, the Registrar should also be a repository for information relating to state and territory based fundraising authorities. It would also be beneficial to include this information in the business.gov.au ABN look up site that already contains certain information relating to an NFP's deductible gift recipient status and other company related details.

Uniform laws and regulations together with a harmonised application process and implementation of uniform policies would, in theory, also enable the Registrar to fulfil most, if not all, of the responsibilities currently performed by the relevant state and territory based government bodies such as the receipt and assessment of applications for fundraising authorities and the investigation of complaints and could even go so far as to include fulfilling such responsibilities with respect to NFPs that only wish to fundraise in their home jurisdiction. While this would foreseeably relieve the relevant State and Territory based government bodies from these responsibilities, and thereby enable them to either divert resources to other core areas of business or create cost savings, the States and Territories would need to be in favour of such a shift and the Registrar would need to be appropriately funded to fulfil this role properly.

Unless the Registrar takes full responsibility for administering the granting and enforcement of charitable fundraising authorities for all States and Territories as well as at the Commonwealth level, we do not see the Registrar's role being anything beyond that of confirming that the NFP holds the relevant State or Territory based fundraising authority and entering the NFP's information on the Commonwealth fundraising register. If the States and Territories maintain their current roles in relation to these issues then giving a similar role to the Registrar would only create a second level of bureaucracy for NFPs and would detract from the effectiveness of the reforms aimed at reducing the administrative burdens on NFPs.

3.5 National Registrar of Community and Charitable Purpose Organisations

We support draft recommendation 6.4 that the Australian Government should establish a 'one-stop shop' for Commonwealth regulation by consolidating various regulatory functions into a new National Registrar of Community and Charitable Purpose Organisations (**Registrar**) with the following functions:

- to register and regulate a new Commonwealth Incorporated Associations regime, Companies Limited by Guarantee, and Indigenous Corporations;
- to register and endorse NFPs for all Commonwealth tax concessions;
- to register NFPs for cross-jurisdictional fundraising;

- to establish a single portal for the lodgement, maintenance and access to public record corporate and financial information, proportionate to size and risk-based on the principle of 'report once use often';

- to investigate complaints; and

- to provide education and guidance on governance issues.

A one-stop-shop as contemplated by the Registrar has the very real potential to help tie together Australia's not-for-profit sector which is currently quite disjointed. In our experience there is a very real need for a centralised and expert provider of free, or very low cost, governance education and training including specific initiatives for organisations run by Indigenous Australians. We note that the Office of the Registrar of Indigenous Organisations (**ORIC**) has, as part of its role, the ability to provide governance and other training to Aboriginal and Torres Strait Islander Corporations. Our experience is that many Indigenous NFPs are hesitant to incorporate as an Aboriginal and Torres Strait Islander Corporation due to a perception of over regulation and interference by ORIC so instead choose to become a CLBG or an incorporated association and do not engage the services of ORIC. We submit that a Registrar which could provide more specific and hands on assistance and advice to all NFPs and not just those NFPs incorporated as an Aboriginal and Torres Strait Islander Corporation, if provided with a genuine commitment to build capacity and knowledge within the NFP, would be extremely valuable in assisting in the long term viability and success of many NFPs.

3.6 Commonwealth tax concessions, exemptions and rebates

We support draft recommendation 7.1 that all Australian governments should recognise the tax concession status endorsement of NFPs at the Commonwealth level, and explore the scope for a single national application process for organisations for tax status endorsement, or mutual recognition of endorsement, across all jurisdictions.

Similar to the jurisdiction-based issues raised in the discussion of charitable fundraising regulation at section 3.3, there is scope for mutual recognition of an NFP's status for tax purposes across multiple State and Territory jurisdictions with respect to taxes such as payroll tax, land tax and stamp duty. We acknowledge that when tax is involved, unlike with fundraising regulation, there is a potential loss of tax revenue to the state and that there is therefore an extra sensitivity, and perhaps reluctance, to embrace a mutual recognition regime. This should not be an impediment however as mutual tax recognition arrangements are not unprecedented. It is also logical for example that a NSW-based NFP which has successfully obtained one charity related tax benefit or another in NSW which wishes to commence operations in Tasmania, should also be eligible to receive that same benefit, presuming an equivalent benefit is in fact available, without having the burden of having to apply separately to the Tasmanian Office of State Revenue.

There is also the potential for some cross over between the various tax related endorsement processes and requirements and charitable fundraising regulation. By way of example, in our experience many NFPs are of the understanding that once endorsement as a TCC and/or a DGR has been granted then fundraising activities may be lawfully conducted. We commonly experience disbelief when we inform NFPs that they are still required to apply for a fundraising authority in each State and Territory in which they wish to conduct fundraising activities. We submit that the successful application to be endorsed as a TCC and a DGR should, by virtue of the rigorous application process for TCC and DGR, be sufficient to warrant the automatic granting of a fundraising authority in the NFP's home jurisdiction and to be automatically placed on the proposed Commonwealth fundraising register. Any gap which may exist between what a State or Territory may ordinarily require in order to grant a fundraising authority and the requirements to be endorsed as a TCC and/or and DGR should be identified and removed as part of any reform.

We also agree with draft recommendation 7.2 that the Australian Government should widen the scope for gift deductibility to include all charitable institutions and charitable funds as endorsed by the proposed National Registrar.

Further, the entire DGR and TCC regimes should be modernised to properly capture what is now understood as charitable and simplified to make the application process and on-going compliance more comprehensive.

There are approximately 40 different categories of DGR status. We have come across a number of examples where organisations are placed in the somewhat absurd situation, that because they fulfil the criteria for 2 or more DGR categories, they are precluded from being endorsed for any. For example an organisation that has an equal focus on environment and culture, such as an indigenous organisation, can not, without incorporating 2 separate legal entities or applying to be specially listed, be endorsed as a DGR as the rules associated with both the Register of Cultural Organisations and the Register of Environmental Organisations require an organisation to have a "primary purpose" of culture or environment (as the case may be). Incorporating two separate legal entities, one to fulfil the cultural aspect of the NFP's objects and one to fulfil the environmental aspects of the NFP's objects does not reduce the administration and compliance burdens, rather it increases them. Similarly the process of applying to be endorsed as a DGR by way of being specially listed in the *Income Tax Assessment Act (1997)* (Cth) is a difficult and burdensome task.

The information relating to eligibility and ongoing compliance requirements also needs to be simplified. Such simplification will remove confusion, allow for more certain compliance and remove some of the current imbalance whereby the difference between a successful and an unsuccessful application can depend on the ability of the NFP to express its application in appropriate terms.

We agree that gift deductibility should continue to be available to other categories of services and assistance provided by NFPs, which currently fall outside the scope of what is currently understood to be "charitable" such as some cultural and environmental organisations. Categories of DGR which are currently administered by government bodies other than the Australian Tax Office such as cultural and environmental organisations (administered by the Department of the Environment, Water, Heritage and the Arts), organisations established for harm prevention (administered by the Department for Families, Housing, Community Services and Indigenous Affairs) and organisations providing overseas aid (administered by AusAid) together with entities which are specifically named in the Income Tax Assessment Act 1997 or its Regulations should, in order to create uniformity, consistency and simplicity, also be brought under the responsibility of the Registrar.

4 Strengthening relationships — government, business and community

4.1 Funding models

While the following section includes references to pro bono legal services, the argument is also true for the provision of other professional services on a pro bono basis. We refer to pro bono legal services because this is where our provided experience lies.

We are in full support of draft recommendation 11.1 that Australian governments should, in the contracting of services or other funding of external organisations, determine and clearly articulate whether they are fully funding particular services or activities undertaken by NFPs, or only making a contribution towards the associated costs and the extent of that contribution. We agree that Australian governments should fully fund those services and activities that they would otherwise provide directly and in applying this criterion, they should have regard to whether the funded activity is considered essential, as part of the social safety net or an entitlement for eligible Australians.

We submit that when developing a funding arrangement with an NFP to deliver a service or fulfil a role the government would deliver or fulfil, the government in question ought to include a component of funding to cover the cost that the NFP may incur to receive sound legal advice. Providers of pro bono services should not be required to meet the shortfall in funding in these circumstances. The reality is that even with the establishment of several large pro bono practices in the last decade and surveys revealing lawyers provide hundreds of thousands of hours on a pro bono basis there is still a huge unmet legal need amongst the marginalised and disadvantaged and the organisations representing or assisting them. As a result only a small proportion of NFPs which request pro bono legal assistance will receive it - giving rise to inequities between those government funded NFPs which do get pro bono assistance and those which do not or have to expend part of their funding to pay for the assistance when this is not part of the funding budget.

We further submit that it is in the interest of Australian governments and in the interest of the recipients of services and activities provided by government funded NFPs, for NFPs to be given funding to cover legal costs. As the administrators of, and practitioners in, a large pro bono legal practice we receive many requests for assistance from NFPs that they arguably ought to have the funding to source on a fee-for-service basis. While we strive to service as many NFPs which fit our intake policy as possible, demand far exceeds our ability to assist and inevitably some NFPs are left to continue providing services or conducting activities funded by government without appropriate, or any, legal advice or assistance. Much of what we are asked to assist with or advise on goes to the heart of the purpose for the funding or relates directly to the effective and lawful running of the NFP. Requests are varied and include:

- amending constitutions to properly reflect an NFP's current make up and mode of operating;
- providing advice on general corporate governance such as directors duties;
- calling and running AGM's, election and removal of directors, auditors and other ASIC compliance matters;
- negotiating leases and managing disputes with respect to leases;
- preparing, negotiating and managing documents relating to collaboration such as Memoranda of Understanding (MOU) and consortium/joint venture agreements;
- preparing documents to engage workers and volunteers such as consultancy agreements and volunteer guidelines; and
- providing advice on employment related queries and conflicts; drafting, reviewing, advising on and negotiating agreements with other organisations or business such as agreements for the supply of goods and/or services; and providing advice on tax related queries.

It is inevitably in the best interests of the government funder and the recipients of the NFP's services that the NFP be able to perform its responsibilities with sound and trusted legal support. Unfavourable contracting arrangements, unresolved legal disputes relating to agreements, board membership, leases or employment failure to comply with the Corporations Act, ASIC or tax laws and regulations, can all be avoided or resolved more quickly and favourably with legal assistance but can be debilitating at best and outright fatal at worst if left unaddressed.

Similarly we support draft recommendation 11.3 that Australian governments should ensure that service agreements and contracts include provision for reasonable compensation for providers for the costs imposed by changes in government policy which affect the delivery of the contracted service, for example, changes to eligibility rules, the scope of the service being provided or reporting requirements.

4.2 Office for not-for-profit sector

We support the development of an Office for Not-For-Profit Sector Engagement to be located within the Prime Minister's portfolio to give focus to improving the sector's engagement with the Government, and a business, and stimulate sector-wide policy development.

4.3 Building governance capabilities

We strongly support draft recommendation 10.4 that Australian governments should provide support to develop and promote training for not-for-profit management and boards in governance and related areas. Our experience is that many difficulties arise for NFP management and directors due to a lack of awareness of their obligations or the lack of experience or skills to adequately meet them. Training in this area would assist enormously. They should explore the options for improving access to and quality of such training in these areas with peak bodies and appropriate training providers. We submit that this recommendation should be implemented regardless of whether or not the proposed new Registrar is established. See section 3.5 for more on the benefits associated with training and education of NFPs.