

8 June 2005

The Honourable Marsha Thomson,
Minister for Consumer Affairs,
Associations Incorporation Act Review,
Consumer Affairs,
GPO Box 123A
Melbourne Vic 3001

Dear Minister,

Review of the Associations Incorporation Act – Interim Report

Bicycle Victoria (BV) is one of Victoria's largest membership-based, self-funding incorporated associations. We were founded in 1975 and have since grown to a membership based of over 40,000. Our mission is to get *More People Cycling More Often* and we are well known for key events such as our Great Rides (see www.bv.com.au). As a 'prescribed association' under the *Incorporated Associations Act* 1981 that currently has an annual income in excess of \$1 million, we have a keen interest in the interim report that has been published by CAV.

We urge you to consider the serious ramifications of this report as outlined below.

1. Not-for-profit sector

As CAV's March 2004 Review Paper acknowledges, the not-for-profit sector makes a significant contribution to the economy both in terms of Gross Domestic Product (4.7% when the value of volunteer labour is added in) and employment (6.8% of total employment, over 4 million volunteers). In comparative terms, not-for-profit organisations add more to GDP than the mining industry (ABS 2002). But of even greater significance is the contribution that the sector, both nationally and in Victoria, makes to our social well-being:

The charitable sector underscores many basic values in Australian democracy. It exemplifies the principles of pluralism, free choice and the rights of citizens to participate in and take responsibility for their community

(1995 Industry Commission Report)

In Victoria, not-for-profit organisations provide an important range of social services, education and research, culture, sport and recreation, health services, professional bodies and a wide range of other activities. These activities serve to link members of the community to each other which in turns improves social cohesion. It is evident from the work being undertaken by the Victorian Government (e.g. by the Department for Victorian Communities), that the importance of supporting and promoting the activities of the not-for-profit sector as a means of strengthening communities is well recognised.

We are concerned, however, that some of the proposals outlined in the Interim Report are retrograde steps for the sector.

The following is an outline of what we regard as the preferred regulatory model and then our particular concerns about the proposals in the Interim Report.

2. Our preferred model

In order to ensure that we spend maximum time and resources on achieving our mission (including the provision of the high quality services for our Members), we need a regulatory regime that is clear, fair and consistent.

We need this regime to be enforced by an adequately resourced regulator that understands the specific needs of the full range of not-for-profit organisations (in our case, one with a large membership base). We need a fee scale that is graduated according to size but is also modest. We want accountability that is appropriate to the needs of not-for-profit stakeholders (such as members, donors, grant makers and the general public). Not-for-profit organisations need the flexibility of being able to operate and/or fundraise in other states without separate or additional regulation.

In short, we support a strong national regulatory framework that is based on these criteria because it will provide a foundation for stakeholder confidence in the sector and, in particular, a foundation for member confidence. Without this confidence it will not be possible for us to secure the funding (via membership fees) that we need to pursue our mission, which in turn benefits the entire Victorian community. Other not-for-profits rely on public donations; these are also underpinned by confidence that there are regulatory checks and balances in place to ensure that funds are used for the purpose for which they have been given. The right framework will benefit the entire sector.

In terms of a preferred model, we endorse the key findings of the report by Woodward & Marshall ‘A Better Framework: reforming not-for-profit regulation’ 2004, which is referred to in the Interim Report. In particular, we support the Woodward & Marshall recommendations that:

- a. a single Commonwealth statutory regime for all corporate bodies (both for-profit and not-for-profit, including incorporated associations) should be introduced – we note from the Interim report that the Victorian government wishes to continue to provide a legal structure for “small, local, voluntary non-trading membership based organisations”. We believe that this approach will exacerbate the existing multiplicity of legal structures in the not-for-profit sector and add new difficulties (e.g. the need to change regimes if success/community need means an organisation grows so it is no longer ‘small’);
- b. if ASIC is to be the regulator under this single Commonwealth regime (at least until a new national not-for-profit specific regulator is created), then it needs to take steps to make itself more friendly to not-for-profit users (e.g. a specialist division);
- c. a range of modifications need to be made to existing Corporations Act requirements; in particular we would highlight the need for a plain language guide summarising the provisions/obligations relevant to not-for-profits;

- d. a new not-for-profit specific legal structure needs to be developed drawing on the best aspects of the corporations law and the incorporated associations regimes, with consideration of the recent UK developments (community interest companies etc).

In our opinion these recommendations need to be implemented as a package; we do not favour coming under a single Commonwealth regime based on the existing Corporations Act as administered by ASIC. If the combined changes were introduced then we would see it as a preferable system to the current two-tiered State (associations) and Commonwealth (companies) regimes.

As the Interim Report notes, the recommendations in the Woodward & Marshall Report have received wide support. It is also worth noting that its key recommendations are consistent with earlier major reports commissioned by the Commonwealth government (1995 Industry Commission Report and Charities Definition Inquiry Report 2001), as well as the Nonprofit Regulatory Reform Program proposed by the National Roundtable of Nonprofit Organisations (press release, May 2004). Despite this strong evidence base for change and support from within the sector, it is unfortunate that these reforms are not actively under discussion by government. Until they are introduced, we do not believe that the corporations' law regime is appropriate for the needs of the majority of not-for-profit organisations.

3. Problems with a transfer to the Companies regime

We are pleased that you will not be implementing the proposed transition period of 5 years for requiring existing associations with annual revenue of \$1 million or more to transfer to the Corporations Act (proposal 3). Given this, we assume that existing associations such as us will not be required to transfer our incorporation to the Corporations Act. However, this is somewhat unclear in the light of other parts of the Interim Report. In particular, proposal 2 says that criteria for refusing applications 'or directing existing incorporated associations' to transfer 'should be amended to directly relate to the purpose clause' (i.e. proposal 1), but you have also indicated that proposal 1 will not be implemented. We ask that this confusion be clarified in the final report.

Even if our situation is resolved (i.e. existing associations can remain under the Act), refusing new bodies incorporation will not meet what we have outlined as critical policy requirements of consistency and fairness (some 'large' associations will have a choice that others will not).

The following is a list of the major concerns we have about being required to transfer our incorporation to the *existing* Corporations Act:

- a. the Act was never intended to regulate not-for-profit organisations; its purpose is to regulate profit-making companies and this is reflected in the way in which ASIC administers the Act (borne out by the results of the large scale survey of existing not-for-profit companies conducted by Woodward: 70% of respondents thought that the Corporations Act and the way it is implemented by ASIC is more appropriate for those companies that are 'for profit' than those that are not-for-profit);
- b. it is a huge piece of legislation of which only scattered and small bits relate to the structure that not-for-profits use, namely a company limited by guarantee. There is no equivalent to the Small Business Guide for companies limited by guarantee. Only

those not-for-profits that have a qualified company secretary would have any hope of understanding and complying with all the requirements;

- c. we have received legal advice that, as all companies limited by guarantee are necessarily public companies,
 - they must allow proxies and cannot prevent non-Members from being appointed proxies, and thereby participating in its general meetings
 - a small number of vexatious Members can requisition a general meeting whenever and as often as they like (expensive with over 40,000 Members)
 - directors can be sacked by a simple majority at a general meeting;
- d. we are also advised that an incorporated association cannot become a company limited by guarantee unless every Member agrees and there are no easy procedures for amalgamations;
- e. the annual fee would be \$1,000 rather than \$35.80 because we are not a 'charity', late fees are substantial [and there are fees to obtain copies of documents];

As an interesting reflection in terms of accountability and the potential definitional difficulties, we understand that because we have fewer than 50 employees and our revenue is less than \$10 million, we could register as a 'small' proprietary company under the Corporations Act. This would enable us to avoid the general requirement to prepare or lodge audited accounts. For an organisation that has adopted the highest standards of financial disclosure, and a sector that should aspire to this, we are concerned that this option would exist.

4. Conclusions – the way forward

We applaud the leadership shown by the Victorian Government in putting the issue of a national not-for-profit regulatory framework on the agenda in this Review, its review of the fundraising laws and, significantly, in the *Fairer Victoria* Policy (13.3, p 60). Coupled with this is strong support from the sector (in the submissions received and the work of the National Roundtable of Nonprofit Organisations). Earlier government-initiated inquiries (Industry Commission 1995, Charities Definition Inquiry 2001) and recent independent academic research (Woodward & Marshall 2004) build the case for significant reform.

Rather than shifting some 'large' associations from the incorporated associations regime to the manifestly unsuitable companies regime and creating an artificial small vs large dichotomy, we would urge you to focus on the bigger picture of a clear, fair and consistent single, national legislative and regulatory regime for all not-for-profits.

<p>We are deeply concerned that, if implemented, the Interim Report will create greater division and confusion in the Victorian not-for-sector sector. Those organisations deemed to be 'large' by a State legislation will be forced to incorporate under the Corporations Act and therefore be regulated by the Commonwealth. There will be the smaller organisations incorporated under the associations regime and regulated by the State government. Those that, over time, creep to the cusp of 'large' will be forced to change</p>
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their legal status and procedures as a reward for growth. This fragmentation of the not-for-profit sector in Victoria will inevitably slow the impetus towards a single national structure, and distract attention from that important goal.

We would welcome an opportunity to discuss our submission with you.

Yours,

Harry Barber

General Manager