



Charitable fundraising regulation reform

DISCUSSION PAPER AND DRAFT REGULATION IMPACT STATEMENT

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Request for comments

The Australian Government has committed to review fundraising regulation applying to the charitable sector. Consequently, the Treasury has developed this paper to provide information and seek public and stakeholder comments on a proposed framework for a nationally consistent approach to charitable fundraising regulation. This paper has been assessed as meeting COAG's best practice regulation requirements by the Office of Best Practice Regulation.

Responses to this paper are requested by 5.00 pm on **Thursday, 5 April 2012** and can be submitted to:

NFPReform@treasury.gov.au

or

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The Treasury is also interested in meeting with stakeholders to discuss the proposed framework and views presented in this paper. Requests for meetings can be made via the above contact details.

Confidentiality

It will be assumed that submissions are not confidential and may be made publicly available on the Treasury website (www.treasury.gov.au). If you would like your submission, or any part of it, to be treated as 'confidential', please indicate this clearly. A request made under the *Freedom of Information Act 1982* (Cth) for a submission marked confidential to be made available will be determined in accordance with that Act.

FOREWORD

The purpose of this discussion paper is to seek comments on a proposed framework for a new nationally consistent approach to regulation of charitable fundraising. At present, every State and Territory of Australia, with the exception of the Northern Territory, regulates fundraising by charities. Given the significant differences that exist between current State and Territory fundraising laws, this discussion paper does not consider the current regulatory frameworks or use these laws as a basis for a national approach.

The review of fundraising regulation is consistent with the vision of the *National Compact: working together* (the Compact), as it seeks to reduce red tape and streamline reporting. The Compact sets out how Government and the not-for-profit sector will work together to achieve common goals.

The Productivity Commission's February 2010 research report, *Contribution of the Not for Profit Sector*,¹ recognised that compliance burdens could be reduced by reform of fundraising regulation. The Productivity Commission also stated that if the inconsistency in fundraising regulation goes unaddressed this could potentially erode public confidence and trust in fundraising. Furthermore, different State and Territory fundraising legislation has been identified as a significant cost for the sector, particularly for charities operating at a national level, who have to comply with multiple legislative and administrative requirements.

Reforms to regulation of charitable fundraising relate to other reforms being progressed by the Australian Government. These reforms include the development of a statutory definition of charity and the establishment of the Australian Charities and Not-for-profits Commission (ACNC).

The proposed definition of charity would be applied to all Commonwealth laws, including laws regulating charitable fundraising. The proposed definition would be based on the 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations*, the definition in the Charities Bill 2003 and would take into account the findings of recent judicial decisions such as *Aid/Watch Incorporated v Commissioner of Taxation*. Submissions on a consultation paper on the definition of charity closed on 9 December 2011. Consultation on exposure draft legislation is expected to occur in the first half of 2012.

Further information about the proposed statutory definition of charity, including a factsheet and the consultation paper, is available at: www.treasury.gov.au.

In the 2011-12 Budget, the Australian Government announced the establishment of the Australian Charities and Not-for-profits Commission (ACNC). The ACNC will provide a one-stop shop with a view to reducing the regulatory burden on the charity and not-for-profit sectors, as well as providing a public information portal by July 2013.

The establishment of a public information portal will improve transparency within the sector as the public would have more readily accessible information about the activities of

1 <http://www.pc.gov.au/projects/study/not-for-profit/report>.

charities. Improved transparency is likely to reduce the need for more prescriptive regulation of fundraising activities, as the public will be in a position to monitor fundraising activities of charities, reducing the need for Government intervention.

Further information about the establishment of the ACNC, including media releases, factsheets, a YouTube Channel and links to other information about the reforms is available at: <http://acnctaskforce.treasury.gov.au>.

The submissions received from this consultation process will assist in the development of a model for fundraising regulation to be undertaken by the ACNC. Initially it is proposed that fundraising regulation would apply to those entities registered as a charity by the ACNC that engage in fundraising activities for a charitable purpose. The rationale for applying national fundraising regulation only to charities at this stage is to align it with the initial role of the ACNC, which will be on the determination of charity status.

If and when the Government decides that regulation by the ACNC extends to not-for-profit entities other than charities, consideration would be given to extending fundraising regulation in the same way.

Chapter 1 - Introduction

1. Fundraising refers to the process of soliciting and gathering contributions as money or other property, usually by requesting donations from individuals or businesses.
2. The principal legislative responses to charitable fundraising have largely been limited to fundraising through solicitation of donations and all States and Territories except the Northern Territory have specific laws regulating charitable fundraising or collections.² These State and Territory laws cover a wide range of issues and have different requirements in relation to registration, information disclosure and reporting, and differ in relation to the scope of regulated activities and entities.
3. Industry self-regulation in the form of principles, standards and codes of conduct also exists alongside government regulation. It plays a role in establishing standards for fundraising in order to improve public trust and confidence in accountability for, and transparency in, the use of publicly donated funds. The Fundraising Institute of Australia (FIA), for example, requires its members to comply with its Principles and Standards. The Principles are overarching codes that apply to all fundraisers, while the Standards address specific discipline of fundraising practice. At least one State also refers to a Code of Practice in its legislation – established in consultation with the charitable sector – to provide reassurance to the donating public concerning charitable collections.
4. Over the last 15 years there have been five significant federal inquiries into regulation of the not-for-profit sector. Three of these inquiries considered fundraising in detail and made specific recommendations for reform in this area. Further information about these inquiries can be found in Appendix B.
5. In addition to these inquiries, the October 2005 report *Giving Australia: Research on Philanthropy in Australia* (Giving Australia report)³ provided insight into the giving activities of Australians. The Giving Australia report found that for most donors, the reputation of, and trust in, a not-for-profit entity was an important factor in determining whether or not to donate and to whom a donation would be made. The report found that other significant motivations for giving included:
 - altruism – desire to make the world/community a ‘better place’;
 - affirmation of identity for givers – identifying with the cause and the people whose assistance is the object of the cause; and
 - reciprocation – giving influenced by a sense of reciprocation for services already provided or in anticipation that help may be needed in the future.

2 Appendix A outlines the current State and Territory fundraising laws.

3 http://www.cafaustralia.org.au/uploads/files/Giving_Australia_Summary_Oct05.pdf.

Chapter 2 – Defining the scope of regulated activities

6. Fundraising can take many forms, from donations by members of a group for a common cause, to more complex arrangements such as a national lottery. Defining the types of fundraising activities that are to be regulated at a national level, as well as determining the nature of the entities that should be regulated, has an important influence on the sector's costs and community trust in the sector.

Is regulation necessary?

7. An important first question is whether fundraising regulation is necessary. Generic laws that apply to fundraising include criminal laws, corporations and associations incorporation law for already incorporated entities, laws dealing with unincorporated associations and the common law.

8. It is generally accepted that the aim of charitable fundraising regulation is to ensure public confidence and trust in fundraising and, in doing so, increase the public's willingness to participate in fundraising activities. Accordingly, most jurisdictions worldwide have laws that regulate fundraising. These laws operate to protect the charitable sector and the public against persons or entities falsely identifying themselves as charities or as acting on behalf of charities, or misrepresenting the purpose of their entity or fundraising activities.

9. Regulation also operates to prevent fundraising activities resulting in public nuisance or inappropriate invasion of privacy. Regulatory requirements for record-keeping and public reporting of details regarding fundraising activities are designed to support trust and confidence in fundraising by increasing transparency and accountability regarding the outcome of fundraising campaigns and the use of publicly donated funds. This is particularly important in the face of growing public demand for greater transparency in the fundraising activities of the charitable sector.

10. Generally speaking, regulation to improve transparency and accountability seeks to address information asymmetry, which occurs when one party to a transaction has more or better information than the other. This creates an imbalance of power in transactions which can result in an inefficient allocation of resources: a market failure.

11. Applied to charities it is usually the charity, rather than donors, that has better information about the uses to which donated funds will be put. Donors may also be unaware of the identity of the charity recipient when making a donation. If unaddressed, information asymmetry can lead to donated funds being used for purposes other than those intended by the donor. In these circumstances, donors place significant faith in the governance and accountability mechanisms regulating the recipient entity to ensure that donated funds are applied to the intended cause.

12. Governance and monitoring arrangements are often used to address information asymmetry. The establishment of the ACNC, a reform closely related to work on charitable fundraising, has the potential to enhance governance and monitoring of the sector via a public information portal that will include financial and other information provided by registered charities. This public information portal has the potential to reduce the need for

more prescriptive fundraising regulation, as enhanced transparency and public monitoring would help to ensure that registered charities are accountable for donated funds.

13. Existing State and Territory regulatory mechanisms are therefore intended to:

- protect the public against fraud, deception and nuisance;
- avoid inefficiency – to maximise the proportion of fundraising proceeds applied to the charitable purpose; and
- empower donors – to ensure that information is available to donors about the use of their donated money in order to make an informed choice amongst the various causes.

14. In seeking to achieve these objectives, State and Territory fundraising laws impose requirements on charities that conduct fundraising activities. Such requirements add to the regulatory burden of the sector, particularly for charities operating across State borders, and need to be considered as part of any regulatory reform to the sector. Existing fundraising laws also have an effect on public confidence and participation by the community in fundraising activities through mechanisms designed to improve transparency and accountability, such as governance and monitoring arrangements.

Consultation question:

2.1 Is it necessary to have specific regulation that deals with charitable fundraising? Please outline your views.

2.2 Is there evidence about the financial or other impact of existing fundraising regulation on the costs faced by charities, particularly charities that operate in more than one State or Territory? Please provide examples.

2.3 What evidence, if any, is available to demonstrate the impact of existing fundraising regulation on public confidence and participation by the community in fundraising activities?

Defining fundraising activities that are to be regulated

15. One of the ACNC's functions will be to register charities. The definition of 'charity' is the subject of a separate discussion paper and is being considered through that process.

16. The approach that has traditionally been taken to the regulation of fundraising activities is to first define the regulated activity and the regulated entities broadly. Activities and entities are then exempted to limit regulation to those activities and entities that should be regulated (and to exclude others to avoid imposing unnecessary cost on them). It is proposed to continue this approach.

17. Accordingly, it is proposed that 'fundraising activities' should be regulated, where a fundraising activity is defined as any activity that involved the soliciting or receipt of money (whether or not in return for a good or service) or other property primarily for a charitable purpose. 'Charitable purpose' will be defined in accordance with the related work on the definition of charity.

Activities that might be exempt from fundraising regulation

18. A number of activities are unlikely to raise significant concerns. Accordingly, the following activities might be exempt from fundraising regulation:

- Soliciting for government grants – on the basis that governments can require information and regular reporting on the outcomes from funding provided to charities.
- Corporate donations or donations from public and private ancillary funds – on the basis that these entities are likely to be better placed than an individual member of the public to conduct due diligence before donating to a potential recipient.⁴
- Workplace appeals for assistance for colleagues and their families – on the basis that the recipients of such funds are usually personally known to at least a significant proportion of the donors.
- Donations to religious organisations from their own members – also on the basis that the recipients of such funds are usually personally known to at least a significant proportion of the donors.

19. To the extent that certain fundraising activities are comprehensively regulated under other regulation, duplication of regulation should be avoided. For example, lotteries and raffles that are regulated under a State or Territory law could be exempt from fundraising regulation.

Consultation questions

2.4 Should the activities mentioned above be exempted from fundraising regulation?

2.5 Are there additional fundraising activities that should be exempt from fundraising regulation?

If so, please provide an explanation of why the relevant activities should be exempt.

Implementing a national approach to fundraising regulation

20. A key objective of the reforms is to reduce the costs for the sector.

21. Smaller scale fundraising is likely to present less risk to the community in terms of loss or fraud. Smaller-scale fundraising activities that use volunteer labour are also less likely to raise concerns. This is particularly the case since volunteers have an incentive to ensure that organisations that they volunteer their time to use resources wisely. The smaller scale of such activities could also make them uneconomic if they are subject to fundraising regulation.

22. It is proposed that annual fundraising of up to \$50,000 by a single entity, or a group of closely related organisations, should be exempt from the proposed national fundraising regulation in order to avoid imposing disproportionate costs on smaller entities. However, entities would be able to voluntarily register and comply with the relevant Commonwealth laws if their fundraising activities are otherwise exempt.

23. Fundraising regulation in Australia is currently undertaken by State and Territory Governments. Accordingly, States and Territories have considerable experience and expertise in administering fundraising laws. Any reforms would seek to ensure that charities, particularly those that only operate in one State or Territory, are able to benefit from this considerable experience and expertise.

4 Corporate donations are discussed further in Chapter 7 under the heading 'Private participators'.

24. A number of options exist for implementing a nationally consistent approach to fundraising regulation for charities that register with the ACNC. Potential approaches to implementing a national approach to fundraising regulation include:

- the States and Territories applying a national fundraising law as a law of each jurisdiction (the application of laws approach) – examples of an application of laws approach currently in use include the Australian Consumer Law (ACL)⁵ and the Australian Energy Regulator; or
- the States and Territories enacting ‘mirror’ legislation, that is, legislation in the same or similar terms as that enacted in a host jurisdiction.

25. To reduce the compliance burden on charities, a national approach to fundraising regulation should not duplicate existing State and Territory fundraising regulation. As outlined above, national fundraising laws are proposed to apply only to charities that raise funds of an amount that exceeds the proposed \$50,000 threshold, but not to other not-for-profit entities or to entities that do not meet the definition of ‘charity’. Accordingly, State and Territory governments may decide to exempt those charities covered by the national law from State and Territory fundraising laws.

26. As a general rule, Commonwealth Government agencies have the ability to administer Commonwealth laws and State and Territory agencies can administer the laws of the relevant State or Territory. Accordingly, for State and Territory Governments to continue to play a role in administering fundraising laws, any new law will need to exist as both a law of the Commonwealth and a law of each participating jurisdiction.

Consultation questions:

2.6 Is the financial or other effect of existing fundraising regulation on smaller charities disproportionate? Please provide quantitative evidence of this if it is readily available.

2.7 Should national fundraising regulation be limited to fundraising of large amounts? If so, what is an appropriate threshold level and why?

2.8 Should existing State or Territory fundraising legislation continue to apply to smaller entities that engage in fundraising activities that are below the proposed monetary threshold?

2.9 Should a transition period apply to give charities that will be covered by a nationally consistent approach time to transition to a new national law? If so, for how long should the transition period apply?

Registering for fundraising activities

27. All forms of fundraising involve a risk that money collected may be misappropriated. Due to these risks, fundraising activities are ordinarily subject to some form of pre-authorisation or notification to a regulator. As charities will generally register with the ACNC, there is potential for authorisation for fundraising to be streamlined with the process of registering as a charity.

5 The ACL is set out in Schedule 2 of the *Competition and Consumer Act 2010 (CCA)*.

28. One approach would be to allow all charities registered with the ACNC to also be authorised to engage in fundraising activities across Australia. This approach would have the benefit of reducing complexity for participants in the sector and also improve transparency for donors, as all charities registered with the ACNC would be authorised to raise funds from the public.

29. Assuming that charities that are registered with the ACNC are also authorised for the purposes of fundraising activities, there is likely to be a need to have legislative power to ban a charity from fundraising activities in certain circumstances, such as insolvency or if there is evidence that there has been significant wrongdoing in the course of fundraising. It is proposed that the ACNC would have the power to ban a charity from fundraising activities. However, any decision by the ACNC would be reviewable by the Courts.

Consultation questions:

2.10 What should be the role of the ACNC in relation to fundraising?

2.11 Should charities registered on the ACNC be automatically authorised for fundraising activities under the proposed national legislation?

2.12 Are there any additional conditions that should be satisfied before a charity registered with the ACNC is also authorised for fundraising activities?

2.13 What types of conduct should result in a charity being banned from fundraising? How long should any bans last?

Chapter 3 – Regulating the conduct of fundraising

30. The vast majority of charities engage in fundraising activities in an honest way, seek to avoid undue harassment or coercion of donors and aim to maintain public goodwill. All charities will likely suffer a reduced ability to raise funds from the public if undesirable conduct of a small minority of charities leads to a reduction in community confidence in the sector. Well targeted regulation benefits the sector by enhancing community confidence in charities.

31. Fundraising necessarily involves contact between a donor and a charity, either directly, or through an intermediary. The role of third parties in fundraising is discussed later in this paper. Several aspects of this contact may be the subject of regulation. For example, donors should not be lied to, misled or deceived into giving a donation; and fundraising activities should not create a public nuisance. Donors also have an interest in being provided with evidence of their donation, for both taxation reasons and as a means of holding charities accountable for donations.

32. One way to regulate conduct of fundraising could involve laws that deal with various aspects of fundraising conduct in a detailed way. Prescriptive laws have the potential to create unwarranted distortions in the way that charities engage in fundraising conduct. Prescriptive laws are also less flexible in their application, leading to the possibility that undesirable conduct may continue to occur but fall outside of narrowly proscribed activities.

33. Principles-based regulation, on the other hand, relies more on principles and outcome-focused, generic laws to achieve regulatory objectives. Generic laws provide charities with flexibility to adapt their activities to changes in technology or changes in society without the need for legislative change. Generic laws also allow regulators and courts to intervene when conduct falls outside the standards set in the generic laws. A focus on the outcomes of fundraising regulation and more reliance on principles and outcome-focused rules will result in more effective and efficient regulation for the sector.

34. For example, the application of generic laws to business conduct has proved to be a successful approach in the ACL and State and Territory Fair Trading Acts that preceded the ACL. Extending some of the generic conduct provisions in the ACL to fundraising activities may be an effective and efficient way to regulate fundraising.

Application of consumer protection laws to charitable fundraising

35. The ACL includes generic consumer protection provisions. The application of these provisions to charitable fundraising is not automatic as the provisions apply only if:

- there is a supply or acquisition of goods or services;⁶
- the supply or acquisition occurs in the course of trade or commerce;⁷ and
- the goods or services were supplied to, or acquired by, a consumer.

6 **services** are defined broadly in section 2 of the ACL and include rights, benefits and privileges.

7 The definition of **trade or commerce** in section 2 of the ACL includes “any business or professional activity (whether or not carried on for profit)”.

36. Provisions of the ACL that could be applied to fundraising activities include:

- Misleading or deceptive conduct (section 18);
- Unconscionable conduct (sections 20-22);
- False or misleading representations (section 29); and
- Harassment and coercion (section 50).

37. The application of the aforementioned conduct provisions to charities regulated by the ACNC could be achieved by either including relevant provisions in legislation that establishes the ACNC or by amendment of the ACL.

38. Application of these conduct provisions to charities is unlikely to impose significant additional costs on the sector. Misleading or deceptive conduct, unconscionable conduct, false or misleading representations and harassment and coercion provisions do not require any positive action by regulated entities, instead involving the avoidance of certain behaviours and therefore involve a very minor or no compliance burden.

Consultation question:

3.1 Should the aforementioned provisions of the ACL apply to the fundraising activities of charities?

Charitable fundraising and calling hours

39. Section 73 of the ACL regulates permitted calling hours for dealers approaching a person face-to-face to make an unsolicited offer to supply goods and services. The permitted calling hours, which are default calling hours only and may be varied by State and Territory legislation,⁸ are:

- Monday to Friday – from 9am to 6pm; and
- Saturday – from 9am to 5pm.
- Dealers are prohibited from approaching a person at any time on a Sunday or a public holiday.

Consultation question:

3.2 Should the fundraising activities of charities be regulated in relation to calling hours? If so, what calling hours should be permitted?

Charitable fundraising and unsolicited selling provisions of the ACL

40. Division 2 of Part 3-2 of the ACL deals with supply of goods or services to consumers, in trade or commerce, outside of the business or trade premises of the supplier or over the telephone.

⁸ See subsection 131C(2) of the CCA. For example, in its legislation applying the ACL Western Australia varied its permitted calling hours from 9am to 6pm on Monday to Friday, to 9am to 8pm.

41. The unsolicited selling provisions of the ACL apply to supplies of goods or services only where the price paid or payable is more than \$100. Furthermore, the unsolicited selling provisions only apply if the relevant activities are 'in trade or commerce' and there is a 'supply of goods or services'. It is therefore clear that the unsolicited selling provisions do not apply to donations of cash to a charity.

42. Some activities engaged in by charities may involve both a supply of goods and services and may satisfy the 'in trade or commerce' criterion. The unsolicited selling provisions would therefore apply to those activities if the value of a single transaction exceeds \$100. This application of the unsolicited selling provisions treats charitable entities in the same way as businesses when they engage in activities that are in trade or commerce.

43. There are arguments for either explicitly applying the unsolicited selling provisions to charities or for exempting charities from these provisions. The current position is a balance between these approaches.

44. Explicit application of the unsolicited selling provisions to charitable entities would enhance consumer protection by extending the same rights to consumers for transactions with charitable entities as apply for transactions with businesses. On the other hand, an exemption would address uncertainty for the sector about application of these provisions.

Consultation question:

3.3 Should unsolicited selling provisions of the ACL be explicitly applied to charitable entities? Alternatively, should charitable entities be exempt from the unsolicited selling provisions of the ACL?

Chapter 4 – Information disclosure at the time of giving

45. Requiring charities to meet minimum information disclosure requirements at the time of giving allows donors to make better informed decisions. The information should suit donors' needs; however, there are practical limits as to what information can be provided at the time of giving. Providing consumers with excessive amounts of information can also have a tendency to overwhelm or confuse consumers.

46. Donors are likely to be interested in a range of information when giving, such as the charity or purpose for which the fundraiser is collecting funds. Minimum information disclosure requirements could also include information about the charity, such as their name and Australian Business Number (ABN).

47. If every charity has a unique registration number (that is, their ABN) and relatively detailed information is available via a publicly accessible register, the need for information to be provided at the time of giving is likely to be reduced. If public documents used by a charity in the course of fundraising activities are required to include a charity's ABN, any interested person will be able to access details about the charity, including contact details, responsible persons and financial information (depending on the final design of the ACNC's general reporting framework and public information portal) by reference to the ABN, using the public register to be maintained by the ACNC.

48. It is common practice for consumer regulators to maintain webpages that alert consumers and the media to common scams. The ACNC might also consider maintaining a scams page. Charities could be required to provide consumers with contact details for the ACNC on their public documents.

49. It is recognised that some members of the public may not have either the means or the motivation to access a register to find out more information about a charity. For these individuals, the provision of some basic information about a charity at the time of giving is likely to be beneficial. Additional information disclosure may include the following:

- Information about whether the collector is paid and basic details about the charity
 - Some donors may prefer to donate to charities that use voluntary, rather than paid collectors and all donors are likely to require at least the name of the charity to which a donation is being made.
- Name badges and contact information
 - This would facilitate responsible practices through greater accountability. Name badges would allow any prohibited practices to be traced back to a particular person and contact information is needed to allow donors to raise any concerns about fundraising practices with the relevant charity.
- Disclosure requirements for advertising or print materials soliciting donations.
 - Requiring advertisements and print materials soliciting donations to include contact information, such as an ABN, would provide greater accountability.

- Information about whether the gift is tax deductible
 - It is proposed that a charity would be required to disclose whether it has been endorsed by the Australian Taxation Office as a Deductible Gift Recipient (DGR) and whether the gift is tax deductible. Even if the charity has DGR status the gift may not be tax deductible (for example, where the donor receives something in return for the gift).
 - As not all charities have DGR status, this is an area where community understanding may be limited and there is potential for charities to misrepresent themselves.

Consultation questions:

4.1 Should all charities be required to state their ABN on all public documents? Are there any exceptions that should apply?

4.2 Should persons engaged in charitable fundraising activities be required to provide information about whether the collector is paid and the name of the charity?

4.3 Should persons engaged in charitable fundraising activities be required to wear name badges and provide contact details for the relevant charity?

4.4 Should specific requirements apply to unattended collection points, advertisements or print materials? What should these requirements be?

4.5 Should a charity be required to disclose whether the charity is a Deductible Gift Recipient and whether the gift is tax deductible?

4.6 Are there other information disclosure requirements that should apply at the time of giving? Please provide examples.

4.7 Should charities be required to provide contact details of the ACNC and a link to the ACNC website, on their public documents?

Chapter 5 – Information disclosure after the time of giving

50. Given that fundraising activities can lead to the accumulation of substantial funds, maintaining best practice accounting, record keeping, reporting and auditing standards is likely to improve public confidence in the charity sector. Donors as well as the general public, have an interest in the outcome of fundraising campaigns. In particular, donors may be interested to know about the distribution of funds raised and to receive some assurance that funds raised reached the intended beneficiaries. While measures to increasing transparency and accountability regarding the outcome of fundraising campaigns may not necessarily inform donors' decisions at the time of giving, they can provide a general level of confidence in the sector.

51. At present, there are a number of record-keeping and reporting requirements applied to charities by government. These include that:

- the records provide a true and fair view of income and expenditure for the collection to be worked out at any given time;
- the records be kept in a way that allows them to be conveniently and properly audited;
- the records be kept by the authorised fundraiser for a prescribed period after the receipt of the income or the incurring of the expenditure to which they relate;
- a register of assets be maintained;
- a petty cash book be maintained;
- reports include information about proceedings of fundraising activities, expenditure amounts and amounts distributed to beneficiaries; and
- funds raised by fundraising be banked in a separate identifiable account.

52. Reporting requirements for fundraising will be considered in the context of broader ACNC reporting requirements and need to be proportionate to the risks and the amount of funds involved. Reporting requirements also need to consider any additional costs they impose on charities.

53. The establishment of the ACNC and the associated requirement for charities to be registered and for certain financial information to be made public creates an opportunity for charities to increase the community's confidence in charities and for the ACNC to work with other regulators to develop a 'report-once-use-often' general reporting framework. The requirement to register and to make information about a charity's finances publicly available is similar to the requirement for companies to register with the Australian Securities and Investments Commission and to make information available to the public via a publicly accessible register. This approach provides for robust public accountability and minimises or reduces additional costs.

54. As part of its broader reporting framework, the ACNC also is expected to provide opportunities for charities to disclose non-financial information about their entity and fundraising activities. This may provide adequate scope for charities to describe the positive outcomes achieved through the use of donated funds.

55. Given the objectives of transparency and accountability, information provided by charities to the ACNC could include the amount of funds collected and how these funds were spent. Some broad dimensions of a policy response might include the following:

- Requirements to report information relating to funds collected.
 - This information could include high level information about the amount of funds collected and distributed to beneficiaries. Other information such as an account of fundraising costs may also be considered.
- Accounting and record keeping requirements.
 - These requirements could be implemented to ensure the consistency and accuracy of any reported fundraising information. These requirements could be relaxed for smaller entities and would complement requirements imposed as part of the ACNC’s wider reporting requirements.
- Auditing of reported fundraiser information.
 - Auditing requirements would complement legislated accounting, record keeping and auditing requirements in ensuring that information is accurate. It would further provide incentives against any misuse of funds. It is not proposed that auditing would be required of smaller entities, where auditing is not currently required under other laws. This approach is similar to that applied by the New Zealand Charities Commission (NZCC), which requires lodgement of audited financial statements only if an entity is required to audit their financial statements irrespective of NZCC requirements.

56. Reflecting the proposed ‘one-stop shop’ nature of the ACNC, it is proposed that reporting requirements under the national approach for registered charities would replace existing reporting requirements in State fundraising regulation.

Consultation questions:

5.1 Should reporting requirements contain qualitative elements, such as a description of the beneficiaries and outcomes achieved?

5.2 Should charities be required to report on the outcomes of any fundraising activities, including specific details relating to the amount of funds raised, any costs associated with

raising those funds, and their remittance to the intended charity? Are there any exceptions that should apply?

5.3 Should any such requirements be complemented with fundraising-specific legislated accounting, record keeping, and auditing requirements?

5.4 What other fundraising-specific record keeping or reporting requirements should apply to charities?

Chapter 6 – Internet and electronic fundraising

57. Traditional forms of fundraising activities usually involve interaction between two people, either face-to-face or over the telephone. New technologies create new challenges for fundraising regulation. Modern fundraising may take many forms that increasingly do not involve direct communication between two people.

58. For example, an increasingly popular form of fundraising involves receipt of an email from a friend or colleague seeking donations related to an activity that they are participating in with a request to visit a website where names of donors are made public. The increasing popularity of internet and electronic fundraising does create new challenges for the regulation of fundraising.

59. These new regulatory challenges include:

- The public may not be able to assess the trustworthiness of the information that is disseminated.
- The public may have limited access to information about the cause being supported as there is less opportunity to ask questions than for face-to-face or telephone fundraising.
- The potential for nuisance to be created if these technologies are over used. For example, mass emails can easily amount to spam if sent to an excessively large number of addresses. Text messages can also be sent out in large numbers to the point of creating a nuisance.
- The public may find it difficult to verify the identity of fundraisers operating on the internet.
 - In a different sphere of activity, sale of tickets for major sporting events like the Olympics and Soccer World Cup have often been the subject of frauds involving websites that appear authentic, but simply collect money with no prospect of supplying any tickets. This risk could be even greater for internet fundraising, as donors often have no expectation of receiving anything in return when they make a donation.

60. Due to the higher risks posed by internet and electronic fundraising, it is proposed that fundraising over the internet for charitable purposes be prohibited unless an entity is registered with the ACNC. This is proposed mainly due to the authenticity issues associated with internet and electronic fundraising, and the potential for these technologies to be utilised for large scale scams. It is also proposed that all charities engaging in electronic fundraising must state their ABN in all communications with members of the public.

61. These two requirements will have a number of benefits. Any communication without an ABN will immediately indicate to the recipient that there has been a breach of the law. This will allow the ACNC to quickly take action to warn the public that unauthorised fundraising activity is taking place. The quotation of an ABN will also allow donors to readily access information about the body requesting a donation on the register maintained by the ACNC.

62. To the extent that they are applicable, all other legislative requirements applicable to other forms of fundraising will also apply to internet or electronic fundraising.

Consultation questions:

6.1 Should internet and electronic fundraising be prohibited unless conducted by a charity registered with the ACNC?

6.2 Should charities conducting internet or electronic fundraising be required to state their ABN on all communications? Could this requirement be impractical in some circumstances?

6.3 Are there any technology-specific restrictions that should be placed on internet or electronic fundraising?

Chapter 7 – Fundraising by third parties on behalf of charities

63. Charities engage third parties to assist them with fundraising activities. Third party fundraisers can take at least three forms:

- Individuals or businesses that specialise in assisting charities to raise money. These entities are usually paid for their services either through fees unrelated to the amounts of money to be raised, or by retaining a percentage of funds raised;
- entities, for example, clubs, that raise fund for charity but generally do not receive any earnings for their services to charities; and
- ‘for profit’ entities that dedicate a portion of their profit from the sale of goods and services to a particular charitable purpose and also do not receive any financial benefit from charities.

64. As mentioned in Chapter 2, corporate donors are likely to be in a good position to conduct due diligence on the charities to which they donate funds. Similarly, clubs are likely to be in a position to conduct due diligence on the charities to which they donate.

65. These types of donors are likely to have a closer relationship with the charities to which they donate and, given the often larger size of their donations, are also likely to have more incentive to monitor the activities of charities, than is the case for individual donors. Corporate donors are also likely to have more bargaining power to request information from charities about their activities and more resources to devote to monitoring activities. Accordingly, the information asymmetry that otherwise requires or is otherwise associated with regulation is likely to be addressed, at least to some extent, by the monitoring performed by corporate donors or clubs when they support charities.

66. However, paid third parties are more likely to be motivated by the potential to earn an income from fundraising activities and may be less likely to devote resources to monitoring the activities of the charities for which they collect. Whilst paid third parties may have less incentive to monitor the activities of charities, specialisation may provide efficiencies in terms of those businesses raising funds for charities at a lower cost than for in-house fundraising by charities. Third party fundraisers may also provide a funding mechanism for charities that do not otherwise have the expertise or resources to engage in fundraising activities.

67. Third party fundraising activities have also been linked to public nuisance issues. For example, fundraising activities can create a nuisance if competition between fundraisers leads to a large number of fundraisers operating in a particular area.

68. To ensure that charities are able to receive prompt feedback on the conduct of third party fundraisers that they engage, it is proposed that third party fundraisers be required to clearly state the name and the ABN of the relevant charity on all documents or collection vessels used in fundraising activities. There would also be a requirement to state the name and ABN of the relevant charity when conducting fundraising activities using electronic means.

69. It is also proposed that third party fundraisers be required to identify themselves as third parties who are collecting donations on behalf of a charity, as well as to disclose the

amount of the donations that will ultimately be received by the charity for which they are collecting. As there is potential for third party fundraisers to misrepresent themselves in this area, the purpose of this approach is to make it clear to the public that not all of their money is going to the charity in question.

70. It is proposed that third parties that raise funds on behalf of a charity in return for a direct financial or other benefit would be subject to these requirements. Applying fundraising laws to corporate donors or clubs, when they do not receive a financial benefit from collecting on behalf of charities, would likely impose costs without a sufficiently large offsetting benefit. Accordingly, a definition of third party fundraiser is proposed, which would be limited to an entity that raises funds on behalf of a charity in return for a direct financial or other direct benefit.

71. As noted earlier in this paper, the ACNC will introduce a general reporting framework that will likely require charities to make certain information about their activities public. As part of fundraising reforms, information about their fundraising activities would be included within the general reporting framework. This requirement will ensure that charities are more accountable for fundraising activities, including those performed for them by third parties. This will help to ensure that charities impose defensible conditions on third party fundraisers.

72. Another regulatory option could be to require third party fundraisers registering separately with the ACNC. This would provide information and allow the ACNC to take action directly against a third party fundraiser that breaches fundraising laws. The views of stakeholders are specifically sought on this possibility.

Private participators

73. Apart from third party entities that specialise in assisting charities to raise money, there is another group of third party fundraisers: private participators. This group of fundraisers are private entities that trade in goods or services and dedicate a portion of their profit from the sale of goods or services to a particular charitable purpose.

74. Examples of corporate social responsibility events and private participators' alignment with charity partners include:

- Woolworths recent campaign to match their customer's donations to the Salvation Army for flood relief across Australia;
- McDonalds' annual McHappy Day, which raises funds for Ronald McDonald House Charities;
- Coles' support of the Cancer Council's annual Daffodil Day; and
- entities having an unattended collection tin/box seeking donations for a charitable purpose.

75. For profit entities that participate in fundraising activities are generally subject to current State and Territory fundraising regulation, although the registration, reporting, disclosure and conduct requirements that are triggered differ between jurisdictions. In addition, 'trading agreements' are often used between charities and private participators that govern the relationship and outlining the parties' responsibilities.

76. As with third party fundraisers who assist charities, but are not paid for their services, the regulatory arrangements for private participators could have a significant impact on fundraising activities. Excessive compliance obligations could deter fundraising activities such as corporate social responsibility events. Alternatively, a lack of appropriate regulation could potentially deter donations by the public who may perceive that the contribution of private participators is not being used to support the stated purpose or charity. However, since the involvement of many private participators in charitable fundraising is to promote their public profile as socially responsible entities, such involvement is likely to present less chance of undesirable conduct given the potential reputational harm to the entity if they engage in fraudulent or deceptive conduct.

Consultation questions:

7.1 Is regulation required for third party fundraising? If so, what should regulation require?

7.2 It is appropriate to limit requirements on third party fundraising to those entities that earn a financial benefit?

7.3 Should third party fundraisers be required to register with the ACNC for fundraising purposes only? If so, what are the implications of requiring the registration of third party fundraisers?

7.4 Should third party fundraisers be required to state the name and ABN of charities for which they are collecting?

7.5 Should third party fundraisers be required to disclose that they are collecting donations on behalf of a charity and the fees that they are paid for their services?

7.6 Should third party fundraisers (or charities) be required to inform potential donors that paid labour is being used for fundraising activities?

7.7 Is regulation required for private participators involved in charitable fundraising? If so, what should regulation require?

Appendix A – Current State and Territory fundraising legislation

NSW: *Charitable Fundraising Act 1991*
Charitable Fundraising Regulation 2008

ACT: *Charitable Collections Act 2003*
Charitable Collections Regulation 2003

VIC: *Fundraising Act 1998*
Fundraising Regulation 2009
Veterans Act 2005

WA: *Charitable Collections Act 1946*
Street Collections (Regulation) Act 1940
Charitable Collections Regulations 1947
Street Collections Regulations 1999

TAS: *Collections for Charities Regulations 2001*

QLD: *Collections Act 1966*
Collections Regulation 2008

SA: *Collections for Charitable Purposes Act 1939*

Appendix B – Previous inquiries into charitable fundraising

June 1995 Industry Commission report *Charitable Organisations in Australia*⁹

This report recommended that the Council of Australian Governments should consider approaches to achieving greater efficiency and effectiveness of fundraising regulation among States/Territories. The report also recommended that specific consideration should be given to addressing issues of (Recommendation 18):

- public disclosure and the role of contract fundraisers;
- public nuisance and donor privacy; and
- the types of entities to which regulation applies.

December 2008 Senate Standing Committee on Economics report *Disclosure regimes for charities and not-for-profit organisations*¹⁰

The committee recommended that a National Fundraising Act be developed following a referral of powers from States and Territories to the Commonwealth. The committee considered that the Act should (Recommendation 9):

- apply nationally;
- apply to all entities;
- require accounts or records to be submitted following the fundraising period with the level of reporting commensurate with the size of the entity or amount raised;
- include a provision for the granting of a licence; and
- clearly regulate contemporary fundraising activities such as internet fundraising.

January 2010 Productivity Commission report *Contribution of the Not-for-Profit Sector*¹¹

This report made a number of recommendations relating to fundraising broadly, including detailed recommendations on a national regulator which would also seek to register those entities fundraising across State jurisdictions. In relation to fundraising, the report recommended that, to promote confidence in and reduce the compliance costs associated with fundraising regulation, Australian governments should (Recommendation 6.3):

- agree to and implement mutual recognition and harmonised fundraising regulation across Australia, through the establishment of model fundraising legislation;
- support the development of a fundraising register for cross-jurisdictional fundraising entities and/or activities; and

9 http://www.pc.gov.au/__data/assets/pdf_file/0007/6991/45charit.pdf.

10 http://www.aph.gov.au/Senate/committee/economics_ctte/charities_08/report/report.pdf.

11 http://www.pc.gov.au/__data/assets/pdf_file/0003/94548/not-for-profit-report.pdf.

- clarify the responsibility for regulation of fundraising undertaken through electronic media such as the internet, and move to ensure appropriate regulation of such mediums including through Commonwealth legislation.