

Response to the Discussion Paper

# Charitable Fundraising Regulation Reform

The Treasury

Prepared by

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## **Introduction**

Rather than simply responding to consultation questions, we have provided comments on each paragraph in the Discussion Paper. This allows a better insight into our responses, as our views on some issues canvassed differ from those expressed in the text; and we would challenge many of the assumptions, explicit and implicit, on which the Discussion Paper is based.

Further information about research produced by ACPNS on fundraising regulation, recorded conferences and links to related material can be located at <https://wiki.qut.edu.au/display/nmlp/The+Nonprofit+Model+Law+Project>.

The papers from the conference 'Reforming Fundraising Regulation' (Brisbane, 19-20 April 2011) held by ACPNS will be available in a special issue of the international journal *Voluntas*, in September 2012 at <http://www.springer.com/social+sciences/journal/11266>.

## Foreword

	Text	Comment
i(1)	<p>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.</p>	<p>We agree that the various pieces of legislation are not compatible and further there is no Australian jurisdiction that could be recommended as a 'model'.</p> <p>Note that there is an assumption that such acts regulate the conduct of fundraising by charities. First, the definition of charity differs between jurisdictions and secondly, other organisations which are not legally charities are also regulated. For example in Victoria, any person who conducts or participates in a <b>fundraising appeal</b> comes under the Act unless they are exempt (s.6); and the Act is not restricted to fundraising for charitable purposes.</p> <p>As we argue below, there are possibly serious consequences for competitive neutrality in only regulating one segment of fundraising by charities or for charitable purposes.</p>
i(2)	<p>The review of fundraising regulation is consistent with the vision of the <i>National Compact: working together</i> (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.</p>	<p>Noted.</p>

i(3)	The Productivity Commission's February 2010 research report, <i>Contribution of the Not for Profit Sector</i> , <sup>1</sup> 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.	Agreed.
i(4)	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).	Agreed and it is important for the development of seamless regulation that all are carefully integrated.
i(5)	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 <i>Report of the Inquiry into the Definition of Charities and Related Organisations</i> , the definition in the Charities Bill 2003 and would take into account the findings of recent judicial decisions such as <i>Aid/Watch Incorporated v Commissioner of Taxation</i> . 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.	We disagree that the failed Charities Bill 2003 should be a starting point for a definition of charity; other than to heed the warnings of the Board of Taxation Report on the Bill.

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

i(6)	Further information about the proposed statutory definition of charity, including a factsheet and the consultation paper, is available at: <a href="http://www.treasury.gov.au">www.treasury.gov.au</a> .	Noted.
i(7)	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.	Noted. We are concerned that the proposals to date only extend to charitable organisations and other nonprofit entities being included at an unspecified future date. Competitive neutrality between charities and other nonprofit organisations will be affected and give rise to adverse and inappropriate consequences.
i(8)	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 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.	<p>This assumes a number of matters. First, that it will be technically possible to make valid financial comparisons without consistent financial definitions which are nationally agreed and adopted by parties. Second, that the public will expend the time and resources to actually investigate the financial affairs of charities. Third, that such information is the significant motivation for donation or support. Fourth, that the popular media or other intermediaries can accurately report material from the register.</p> <p>Further, the evidence from other jurisdictions does not unconditionally support these contentions. Some recent articles are:</p> <p>Ram A Cnaan, Kathleen Jones, Allison Dickin, Michele Salomo (2011) Nonprofit Watchdogs: Do They Serve the Average Donor? <i>Nonprofit Management &amp; Leadership</i>, vol. 21(4).</p> <p>Rebecca Szper &amp; Aseem Prakash (2011) Charity Watchdogs and the Limits of Information-based Regulation, <i>Voluntas</i> vol. 22 pp.112-141.</p>

		Having said this, the establishment of the ACNC does provide the basis for taking over many of the functions of fundraising regulators, such as registration, establishment of a public register and education for fundraising consumers or donors.
i(9)	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: <a href="http://acnctaskforce.treasury.gov.au">http://acnctaskforce.treasury.gov.au</a>	Noted.
i(10)	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.	There is a considerable risk of unintended policy consequences if such regulation is restricted to charities. It would be appropriate for such provisions to be included in the ACNC Bill. See comments above.
i(11)	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.	This assumes that the same style of regulation that might apply to charities would be suitable for other nonprofit organisations, and this may not be the case. Again, we submit that all types of nonprofit organisations at least (if not all those who seek to fundraise) should be considered in relation to the proposed regulation for the reasons stated above.

## Chapter One – Introduction

	Text	Comment
1	Fundraising refers to the process of soliciting and gathering contributions as money or other property, usually by requesting donations from individuals or businesses.	This definition does not appear to include seeking donations from government. It is not clear whether ‘contributions’ includes sponsorship or gifts. It does not capture the wide range of activities that can be regarded as fundraising such as nonprofit gaming, events such as dinners and balls, physical challenge activities (marathon walking, running, cycling, swimming etc), soliciting bequests, auctions, clothing bins or cause related marketing. The definition should be wide so as to prevent possible abusive behaviours and encourage competitive neutrality.
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. <sup>2</sup> 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.	Agreed.  Note that the Northern Territory does not have specific fundraising legislation and, on anecdotal evidence, it appears none the worse for this lack of regulation.
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	Agreed. Reference should also be made to the ACFID code of conduct in relation to fundraising <a href="http://www.acfid.asn.au/code-of-conduct">http://www.acfid.asn.au/code-of-conduct</a> and also marketing codes such as those for telephone marketing <a href="http://www.adma.com.au/consumer-help/faq/telemarketing">http://www.adma.com.au/consumer-help/faq/telemarketing</a> .

<sup>2</sup> Appendix A outlines the current State and Territory fundraising laws.

	<p>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.</p>	
4	<p>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.</p>	<p>Agreed. However unfortunately the opportunity to examine the many State reports about the reform of fundraising regulation was missed. This could have greatly informed the discussion paper. Extensive reform agendas in New South Wales, Victoria and South Australia should not be overlooked.</p>
5	<p>In addition to these inquiries, the October 2005 report <i>Giving Australia: Research on Philanthropy in Australia</i> (Giving Australia report)<sup>3</sup> 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:</p> <ul style="list-style-type: none"> <li>• altruism – desire to make the world/community a ‘better place’;</li> <li>• affirmation of identity for givers – identifying with the cause and the people whose assistance is the object of the cause; and</li> <li>• Reciprocation – giving influenced by a sense of reciprocation for services already provided or in anticipation that help may be needed in the future.</li> </ul>	<p>It is worth going back to the original report and data to examine this interpretation of the statement that “for most donors, the reputation of, and trust in, a not-for-profit entity [were] important factor[s] in determining whether or not to donate and to whom a donation would be made.”</p> <p>Our understanding of the report is that affirmation of identity accounts for almost half the donors while respect or trust, accounts for just over one-quarter.</p> <p>From <i>Giving Australia</i> (pp 30–31)</p> <p>“The strongest set of reasons, in terms of frequency with which they were invoked, were:</p> <ul style="list-style-type: none"> <li>– Affirmation of identity. This included identifying with the cause and the people whose assistance is the object of the cause .... These are the reasons given by almost half the donors.</li> <li>– A sense of reciprocation. Almost one-third say they give because of a sense of reciprocation for services already provided, or anticipation that help might be needed in future (reasons 4, 5 and 7).</li> </ul>

<sup>3</sup> [http://www.cafaustralia.org.au/uploads/files/Giving\\_Australia\\_Summary\\_Oct05.pdf](http://www.cafaustralia.org.au/uploads/files/Giving_Australia_Summary_Oct05.pdf).



	<ul style="list-style-type: none"> <li>– Respect for a nonprofit organisation. Just over one-quarter nominate respect for, or trust in a nonprofit organisation (reasons 2 and 8).</li> <li>– Desire to strengthen the community/make the world a better place. This was nominated by just less than one in eight respondents (reasons 6 and 12).”</li> </ul> <p>A more useful analysis appears in the Productivity Commission’s Research Report on the Contribution of Not-for-profit Organisations (2010, p 172) , “An extensive survey of over 500 articles in the international literature on giving by Bekkers and Wiepking (2009) identified eight primary drivers of giving — awareness of need, solicitation, costs and benefits (including tax incentives), altruism, reputation, psychological benefits, values and efficacy (box G.3). Importantly for NFPs trying to attract funds, donors are particularly sensitive to organisations that demonstrate their impact in the community and create strong personal connections with donors.”</p>
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## Chapter 2 – Defining the scope of regulated activities

	Text	Comment
6	<p>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.</p>	<p>We agree that defining fundraising is a critical part of any legislation or regulation. It is not entirely clear how community trust would be influenced directly by a definition, but if the issue is that unregulated areas harbour abusive behaviour, then our comments about containing the regulation to charities only, are relevant.</p>

<b>Is regulation necessary?</b>		
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.	<p>Agreed.</p> <p>It is also instructive to note at this point that relatively few prosecutions are brought under the fundraising legislation, but it appears that more are brought by the police and other authorities under general statutes. This appears to be particularly so in relation to dishonest behaviour in relation to collections connected to natural tragedies such as floods and bushfires. The question that needs to be asked and answered is why is there are apparent low level of fundraising prosecutions and why are general statutes used in preference to the fundraising acts?</p>
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.	<p>We maintain that the actual formal objects of the present Australian regulation are mixed and confused. The legislation has most been in response to a single fraud or interest group concern as a response by politicians to ‘fix a situation’. The following legislative objects illustrate the mixed purposes:</p> <p><b>Stated Objects of Fundraising Legislation</b></p> <p><b>New South Wales <i>Charitable Fundraising Act 1991</i> s 3</b></p> <p>To ensure <b>proper and efficient management</b> and <b>administration</b> of fundraising for charity; to <b>prevent deception</b> of the public</p> <p><b>Victoria <i>Fundraising Act 1998</i> s 2</b></p> <p>To facilitate–</p> <p>(a) transparency and public confidence in the fundraising industry and in not-for-profit organisations that conduct fundraising; and</p> <p>(b) The protection of members of the public from whom money or benevolent purposes in the course of fundraising; and</p>

(c) The protection of the public interest in relation to fundraising.

**ACT** *Charitable Collections Act 2003 s 6*

“(a) To promote proper management and administration of collections; and  
(b) To ensure proper record-keeping and auditing of accounts for collections; and  
(c) To ensure that the public has access to information about collections.”

**Tasmania** Second reading speech introducing Collections for Charities Bill 2000

“to provide greater integrity and certainty to the activities of fundraising in Tasmania”

**South Australia** *Collections for Charitable Purposes Act 1939*

“An Act to provide for the **control** of persons soliciting money or property for certain charitable purposes.”

*Collections for Charitable Purposes Improving Regulation Issues Paper (2010)*

“To improve transparency to donors of charitable collections, without creating any unreasonable administrative burden on the licensed charity sector.”

**Queensland** Second reading speech introducing the Collections Bill 1966

“The making of better provision for the regulation of appeals to the public for the support of genuine objects, and for the prohibition of appeals for spurious purposes.

The achievement of those objects by a simplification of the present means of regulation and control.

The division of objects that are worthy of public support between charitable purposes and community purposes.

The making of provision for ensuring a greater measure of regulation and control over appeals to, and collections from, the public where a commercial undertaking, or some

private gain, is involved.

The giving of lawful authority in cities and towns, where needed, for the controlling of door-to-door appeals and the assistance of street collections.

The elimination of the need for duplication of authorities needed in relation to appeals for support.

The making of more satisfactory provisions in relation to the investigating of appeals for support, the records to be kept, the audit of accounts and the lodgment of returns.

The ensuring for the benefit of the community of the use of moneys collected or assets obtained from appeals to the public for charities and community purposes upon the organisation or association in question ceasing to operate or upon failure of the purpose for which the money or assets were obtained.”

We do not believe that, in Australia at least, such laws ‘operate’ effectively to protect charities or the public. The legislation in most Australian jurisdictions is a symbolic gesture by parliament, often in response to a single scandal, and enforcement at any level is at very low levels: merely 10 prosecutions and 204 complaints to regulators in 2011. (See table in appendix.)

The idea that public confidence and trust through accountability is a consideration for donors is contested by some researchers: see G Berman & S Davidson (2003) ‘Do donors care? Some Australian evidence’, *International Journal of Voluntary and Nonprofit Organisations*, vol 14, pp 421–429:

“It is commonly believed that individuals would donate more to charity if they were assured that the funds would not be “wasted”. This is a common answer to survey type investigations into charitable giving. In this paper we adopt a law and finance approach to investigate the validity of this contention in the Australian context. We develop an Accountability Rights variable and relate that variable to charitable donations.”(p 421)  
“This paper has adopted a law and finance approach to evaluate the question of whether donors “care” about increased accountability for charitable organizations. Following La Porta et al (1997) we have formulated an accountability index and evaluated its impact on

		<p>donations. It appears that the accountability index has a weak impact on charities [sic] ability to raise funds from the public. In short, it would appear that donors do not care about the usage of funds.” (p 429)</p> <p>Again, note that the majority of false representation complaints are not brought under the fundraising legislation but the general fundraising laws. The penalties are also higher and more severe under the general acts as well.</p>
9	<p>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.</p>	<p>We note that:</p> <ul style="list-style-type: none"> <li>• The link between increased accountability and increased giving has not been demonstrated empirically; in fact the evidence shows the contrary.</li> <li>• Those who want access and transparency do not pay the cost of access; nor in most cases can it be recovered from purchasers/users (as a for-profit business can). We maintain that if stakeholders wish to have access to such information there should be a price placed on it, to prevent waste or mischief.</li> <li>• The public is in most instances relying on the ‘good badge of housekeeping’ provided by registration under the various acts. However, the credibility of such registration is falling away as the various government authorities do not have the resources to check adequately the veracity of the reported fundraising (if they ever did). We dispute the idea that shifting this responsibility to the public to ‘self-check’ will be a successful strategy unless the information provided is vastly improved by developing appropriate accounting standards and other measurement tools ‘fit for purpose’, combined with a public and intermediary education campaign.</li> </ul>
10	<p>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</p>	<p>Inefficient allocations can also occur when those who demand information do not pay the cost of it, or the cost of providing access cannot be passed on to others such as purchasers/users. This is particularly so if the information is not used, or only used by a small minority (who may have the ability to pay the full price of access to such information). Disclosures mandated by government which are not ‘fit for purpose’ also cause waste of resources; that is, it does not</p>

	<p>other. This creates an imbalance of power in transactions which can result in an inefficient allocation of resources: a market failure.</p>	<p>establish efficiency or effectiveness.</p> <p>Refer G Berman &amp; S Davidson (2003) 'Do donors care? Some Australian evidence', <i>International Journal of Voluntary and Nonprofit Organisations</i>, vol 14, pp 421–429;  Ram A. Cnaan, Kathleen Jones, Allison Dickin, Michele Salomo (2011) 'Nonprofit Watchdogs: Do They Serve the Average Donor?', <i>Nonprofit Management &amp; Leadership</i>, vol. 21(4);  Rebecca Szper &amp; Aseem Prakash (2011) 'Charity Watchdogs and the Limits of Information-based Regulation', <i>Voluntas</i> vol. 22, pp 112–141</p> <p>Further, government or some other body must supply widely accepted measures of fundraising honesty, effectiveness and efficiency in order for such a strategy to be more than moving the problems onto the general public. That would not benefit any stakeholder, apart from governments which will not have to expend resources on monitoring or taking political responsibility for scandals.</p>
11	<p>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.</p>	<p>On the issue of information asymmetry in nonprofit organisations, Henry Hansmann theorises that primarily the donor notes the signal of trust created by the non-distribution constraint and the constrained purposes of the organisation: H Hansmann (1980) 'The role of non-profit enterprise', <i>Yale Law Journal</i>, vol. 89, pp 835–901.</p> <p>It is through the legal structuring of the nonprofit organisation (purposes, non-distribution constraint, strict fiduciary duties of governors etc) that these matters are addressed, not only through fundraising regulation.</p> <p>We suggest that the governing body (board, trustee, committee etc) of the organisation is the key focal point, after the inherent mechanisms of legal structure, to ensure donations are used for the purposes of the organisation.</p> <p>Thus any regulation should focus on making the board responsible for the organisation's</p>

		fundraising activities and for accounting for their actions in a meaningful way to stakeholders.
12	<p>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.</p>	<p>This paragraph misses the important role of governance of the organisation itself and goes directly to command and control regulation by the state. Governing bodies play a critical role and any regulation should recognise this. To ignore it is to put the state in the place of the governing body. This has serious deficiencies such as inability of the state to replicate the governance role without excessive costs and impact upon civil rights. It is better on every level for governing bodies in the first instance to attend to asymmetry issues, rather than the state.</p> <p>Instead, nonprofit governing bodies should be encouraged to accept responsibility for good stewardship of resources and foster a suitable relationship with those who provide those resources. Such a relationship will always have an eye to the costs of the accountability exchange and what is appropriate in the circumstances.</p> <p>Governments can enhance this process by the encouragement of peer-based codes and best practice, rather than inflexible ‘command and control’ regulation.</p>
3	<p>Existing State and Territory regulatory mechanisms are therefore intended to:</p> <ul style="list-style-type: none"> <li>• protect the public against fraud, deception and nuisance;</li> <li>• avoid inefficiency – to maximise the proportion of fundraising proceeds applied to the charitable purpose; and</li> </ul>	<p>We agree that the state is best placed to deal with fraud and deception using criminal sanctions. But it needs to harness strategies to encourage those controlling organisations not to act in socially unacceptable (and illegal) ways. On the evidence available to us there is either little fundraising fraud or little state enforcement of such fraud.</p> <p>We contend that it is primarily a responsibility of the governing body of an organisation to make judgments about fundraising efficiency and resource allocation. They should be called to account for their decisions, rather than have financial ratios or measures, which are not evidence-based, imposed upon them by edict without regard to context or circumstance.</p> <p>The evidence does not bear out the claim that donors mainly seek to make an informed choice,</p>

	<ul style="list-style-type: none"> <li>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.</li> </ul>	<p>but if they do, the cost of doing so should be borne by donors (users) so that it is not passed on to beneficiaries (third parties). It is users not beneficiaries who are best placed to bear this cost.</p> <p>Further, some fundraising Acts give exemptions to many of Australia’s largest fundraising bodies. This begs the question: why have these nonprofit organisations done so well for so long, in relation to both fundraising and public trust, without the support of regulation by the state? The level of exemptions in some jurisdictions is quite extensive as indicated in the ACPNS factsheet:  <a href="#">‘Exclusions and Exemptions from Fundraising Regulation’</a>,  available at <a href="https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers">https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers</a>.</p>
14	<p>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.</p>	<p>Again, the evidence that ‘Existing fundraising laws also have an effect on public confidence and participation by the community in fundraising activities’ is weak and contested. For example, the Northern Territory does not have fundraising legislation and there appears to be no significant demand for it by anyone in that jurisdiction.</p> <p>Charities and nonprofits generally do seek ‘badges of good housekeeping’ to offer a less expensive alternative to information acquisition by donors. Again, there is a cost in monitoring such badges if they are worth anything; this cost is not insignificant and ought to be borne by the users or the taxpayers through the state. We do not consider broadly mandated dissemination of flawed measures for further interpretation by the public as satisfactory.</p>



<i>Consultation Questions</i>		
2.1	Is it necessary to have specific regulation that deals with charitable fundraising? Please outline your views.	<p>It is not necessary and probably preferable in Australia. Instead, other laws in relation to public nuisance, advertising, nonprofit corporations and business regulation could be crafted to apply appropriately as necessary. Further, if the ACNC is to become a national regulator, it may assume higher level regulatory tasks in relation to fundraising education and criminal intelligence. Local government is best suited to regulating fundraising public nuisance (e.g. doorknocks and face to face solicitations) in local communities in accord with a national model code developed co-operatively with the ACNC and the profession.</p> <p>While politicians may believe that they need to demonstrate to the public that they have responded to a 'scandal', in reality the regulation is rarely used and inappropriate, based on efficiency and effectiveness measures.</p>
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.	<p>Yes; for example see the evidence compiled in ACPNS factsheets:  <a href="#">‘Time and Cost of Gaining Approval to Fundraise in Australian Jurisdictions’</a>  <a href="#">‘Annual returns 2011’</a>  <a href="#">‘Fundraising Records and Annual Returns—Information Requirements’</a></p> <p>All are available at <a href="https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers">https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers</a></p>
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?	<p>Refer to the study by Berman and Davis (2003) and other articles noted above. The thesis of Dr Ted Flack (2007) is worth reading by any policy analyst seeking to do work in the area and we draw your attention specifically to his findings about registration signalling:  <a href="http://eprints.qut.edu.au/16362/">http://eprints.qut.edu.au/16362/</a></p>

## Defining fundraising activities that are to be regulated

	Text	Comment
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.	Noted; see comments above in relation to the definition.
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.	Agreed, but note our comments above in relation to the current width of exemptions which are not only wide but also very inconsistent between jurisdictions.
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	<p>This departs from the definition given in paragraph1.</p> <p>As discussed above this does not allow competitive neutrality in the market for donations and contributions (however defined) as it only relates to charities.</p> <p>The work on the definition of charity proceeds from a flawed basis, the discarded draft Charities Bill; instead, it should be referenced back to the Charities Definition Inquiry.</p>

	definition of charity.	
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### Activities that might be exempt from fundraising regulation

	Text	Comment
18	<p>A number of activities are unlikely to raise significant concerns. Accordingly, the following activities might be exempt from fundraising regulation:</p> <ul style="list-style-type: none"> <li>Soliciting for government grants – on the basis that governments can require information and regular reporting on the outcomes from funding provided to charities.</li> <li>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.<sup>4</sup></li> <li>Workplace appeals for assistance for colleagues and their families – on the basis</li> </ul>	<p>Refer to the following ACPNS factsheet in relation to the current chaotic exemptions: <a href="https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers">‘Exclusions and Exemptions from Fundraising Regulation’</a> (also available from <a href="https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers">https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers</a>)</p> <p>Government – agreed.</p> <p>Corporate – this depends on the size of the corporation, and small business may not be in such a position.</p> <p>Workplace appeals – this depends on the size of the workplace</p> <p>Religious organisations – this depends on the definition of ‘religious organisations’. The current legislation does not cover this definition well and needs to be aligned.</p>

<sup>4</sup> Corporate donations are discussed further in Chapter 7 under the heading ‘Private participators’.

	<p>that the recipients of such funds are usually personally known to at least a significant proportion of the donors.</p> <ul style="list-style-type: none"> <li>• 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.</li> </ul>	
	<p>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.</p>	<p>Agreed and this argument should also be applied more widely to various general statutes as well as mentioned above at paragraph 7.</p>
<p><b>Consultation Questions</b></p>		
2.4	<p>Should the activities mentioned above be exempted from fundraising regulation?</p>	<p>Refer to comments above at paragraph 18.</p>
2.5	<p>Are there additional fundraising activities that should be exempt from fundraising regulation?</p>	<p>Public nuisance fundraising should be left to local governments to regulate. They are closer to local communities which are subject to such behaviour and will have better regulatory traction. The ACNC should co ordinate co operative development of a national model of regulation of such matters in relation to local government.</p>

## Implementing a national approach to fundraising regulation

	Text	Comment
20	A key objective of the reforms is to reduce the costs for the sector.	Noted, but every indication is that costs will not be reduced in the short to medium term. Better value would be achieved for the regulatory dollar and nonprofit compliance dollar if smart regulatory practices supported by evidence based research are implemented. For further discussion of such strategies refer to material presented by Prof Myles McGregor-Lowndes and Prof Phillips at the ACPNS Fundraising Regulation Conference <a href="https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers">https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers</a>
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.	While the loss may be less in fundraising by small organisations, the likelihood of fraud and dishonesty in small organisations may in fact be greater. Fraud ought not to be tolerated no matter what the scale.  A mechanism to approve small one-off charitable fundraising appeals where there is no constitutional document would also be handy. For example, to sanction a group of concerned people wish to help someone who desperately needs a wheelchair or in response to a local tragedy. The appeal is usually only be for a short duration (less than 6 months) and the funds would all be dispersed during or at the end of the appeal.
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	The definition of 'an entity' or 'group of closely related organisations' must be stated, so that this can be examined for unintended consequences.

	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.	We submit that regulatory efficiency and effectiveness vary greatly between jurisdictions. Those that only operate in a single jurisdiction should have the benefit of model 'fit for purpose' legislation and regulation. Much of current state regulation is not 'fit for purpose'.
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: <ul style="list-style-type: none"> <li>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</li> </ul>	There are other approaches available, using general legislative provisions and co-regulation codes and other tools.

	<p>use include the Australian Consumer Law (ACL)<sup>5</sup> and the Australian Energy Regulator; or</p> <ul style="list-style-type: none"> <li>the States and Territories enacting ‘mirror’ legislation, that is, legislation in the same or similar terms as that enacted in a host jurisdiction.</li> </ul>	
25	<p>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.</p>	<p>Noted, but we point out that competitive neutrality should be maintained in relation to all entities, particularly those which do not fall within the definition of charity.</p>

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

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.	Noted; this means all jurisdictions must agree if the proposal is to proceed.
<i>Consultation Questions</i>		
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.	Regulation – and paperwork in particular – is regressive on small nonprofit organisations, as it is for small businesses. Refer to Myles McGregor-Lowndes & Christine Ryan (2009) ‘Reducing the compliance burden of nonprofit organisations: cutting red tape’, <i>Australian Journal of Public Administration</i> , 68(1), pp 1-18, available at <a href="http://eprints.qut.edu.au/18252/">http://eprints.qut.edu.au/18252/</a>
2.7	Should national fundraising regulation be limited to fundraising of large amounts? If so, what is an appropriate threshold level and why?	There should be no limit in relation to matters of fraud, criminal law or consumer protection issues. Other regulation might be proportionate to the risks and costs involved.
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?	While a single regime is to be preferred, if state and territory jurisdictions continue separate regulation, they should all adopt similar provisions to avoid duplication and confusion.



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?	This depends on the final form of the legislation (if any) and the education resources available to government to implement the reforms.
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### Registering for fundraising activities

	Text	Comment
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.	<p>There is significant potential for streamlining as indicated by the following ACPNS fundraising fact sheets, which outline across applicable Australian jurisdictions: information on fundraising annual returns; legislative requirements for record keeping and annual returns; and the time and cost of gaining approval to conduct fundraising:</p> <p><a href="#">Annual returns 2011</a></p> <p><a href="#">Fundraising Records and Annual Returns–Information Requirements</a></p> <p><a href="#">Time and Cost of Gaining Approval to Fundraise in Australian Jurisdictions</a></p> <p>These are available at  <a href="https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers">https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers</a></p>
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,	This approach has much to recommend it.

	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.	<p>There are no 'bad organisations' only bad controllers of organisations. We suggest that controls should be directed at individuals not organisations.</p> <p>ACNC should have appropriate powers which are properly supervised to redress instances where property of an organisation has not been applied for its stated purposes.</p>
<b>Consultation Questions</b>		
2.10	What should be the role of the ACNC in relation to fundraising?	<p>Our preference is for the general law to deal with the bulk of fundraising issues. In this instance the ACNC may have an intelligence function, alerting appropriate authorities to alleged misconduct and co-ordinating co-regulatory codes and schemes.</p> <p>The ACNC's supervision of organisations' governance will apply to fundraising, as it would to other activities of the organisation where the board must be accountable for default in relation to its legal duties and obligations. Part of the calling to account could be a properly devised information portal with appropriate accounting and benchmarking standards.</p>
2.11	Should charities registered on the ACNC be	Yes.

	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?	This will depend on the final form of the legislation, but might include some co-regulatory devices such as codes and schemes.
2.13	What types of conduct should result in a charity being banned from fundraising? How long should any bans last?	The focus should not be on some notion of a 'bad charity' or 'bad nonprofit organisation' only 'bad' individuals who control, work for, or volunteer for organisations. Any actions should focus on individual actors who are responsible for defaults. In many cases this will be board members, trustees, governors or managers of the organisation.

### Chapter 3 – Regulating the conduct of fundraising

	Text	Comment
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.	Noted.
31	Fundraising necessarily involves contact between a donor and a charity,	While the opening statement is generally true, many bequests are given without any contact between the donor and the charity and deceased

	<p>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.</p>	<p>donors can have little effective interest in being provided with evidence of their donation.</p>
32	<p>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.</p>	<p>Noted, and much of the current legislation and regulatory activity could be so characterised.</p>
33	<p>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.</p>	<p>An issue with principles based regulation is that it often comes to an issue of how principles are applied in relation to a specific context. If they can be applied by a regulator without due process or any fetter on their interpretation and application, then nonprofit organisations can be justifiably aggrieved and suspicious of their promotion.</p> <p>The safeguards for application of principles need to be established and cost effectively accessible by nonprofit organisations.</p>

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.	Agreed, subject to the reservations above.
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### Application of consumer protection laws to charitable fundraising

	Text	Comment
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: <ul style="list-style-type: none"> <li>• there is a supply or acquisition of goods or services;<sup>6</sup></li> <li>• the supply or acquisition occurs in the course of trade or commerce;<sup>7</sup> and</li> <li>• the goods or services were supplied to, or acquired by, a consumer.</li> </ul>	Noted.
36	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.	Agreed.
37	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	Agreed.

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

<sup>7</sup> 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)”.

	therefore involve a very minor or no compliance burden.	
<i>Consultation Question</i>		
3.1	Should the aforementioned provisions of the ACL apply to the fundraising activities of charities?	They could be applied, provided that adequate consultation with the sector in relation to unique circumstances regarding fundraising was held and then heeded.

### Charitable fundraising and calling hours

	Text	Comment
39	<p>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,<sup>8</sup> are:</p> <ul style="list-style-type: none"> <li>• Monday to Friday – from 9am to 6pm; and</li> <li>• Saturday – from 9am to 5pm.</li> <li>• Dealers are prohibited from approaching a person at any time on a Sunday or a public holiday.</li> </ul>	Noted.
<i>Consultation Question</i>		
3.2	Should the fundraising activities of charities be regulated in relation	There is little reason to allow a nuisance by a nonprofit organisation where it would not be tolerated by a commercial business. Such matters might be more

<sup>8</sup> 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.

	to calling hours? If so, what calling hours should be permitted?	appropriately regulated by local government which is closer to communities in relation to such matters, provided a national model was developed in consultation with all stakeholders.
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### Application of consumer protection laws to charitable fundraising

	Text	Comment
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.	Noted.
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.	Noted.
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.	Noted.
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.	Noted.

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.	Noted.
<b>Consultation Question</b>		
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?	Yes, provided the unique nature of some nonprofit transactions is taken into consideration. It may be that a section of the ACL could be given over to NFP issues.

## Chapter 4 – Information disclosure at the time of giving

	Text	Comment
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.	Noted, but the vast majority of donors merely seek the assurance of a ‘good housekeeping seal’, if anything. We have already indicated a sample of evidence based research that donors are not necessarily ‘rational’ in seeking to inform themselves of the minute detail about a cause or organisation. In fact, they seek to ‘free ride’ on others, to reduce their information transaction costs to the lowest cost possible.  The information provided needs to be ‘fit for purpose’ and what this is in the Australian context is yet to be determined.
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	Given the above, they may not be interested in this information, particularly if there is a cost attached.  An ABN disclosure might be enhanced by a specific mark or number



	information about the charity, such as their name and Australian Business Number (ABN).	that identifies the organisation as a charity or nonprofit organisation. Few donors would go to the expense of a pre-solicitation inquiry through an ABN search. A specific mark or number alerts the donor that it is an approved charity or nonprofit organisation, not a for-profit entity.
47	<p>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.</p> <p>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.</p>	Agreed, but note the points made above, and the enhancement that a special number or mark could bring to the regulatory environment.
48	<p>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:</p> <ul style="list-style-type: none"> <li>• Information about whether the collector is paid and basic details about</li> </ul>	<p>It is mainly a matter of economic cost in proportion to a small donation and risks to the donor.</p> <p>Information and disclosure requirements such as those proposed are too prescriptive; instead, the organisation and its agents should be subject to the obligation to answer donors' questions and not engage in</p>

<p>the charity</p> <ul style="list-style-type: none"> <li>– 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.</li> <li>• Name badges and contact information <ul style="list-style-type: none"> <li>– 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.</li> </ul> </li> <li>• Disclosure requirements for advertising or print materials soliciting donations. <ul style="list-style-type: none"> <li>– Requiring advertisements and print materials soliciting donations to include contact information, such as an ABN, would provide greater accountability.</li> </ul> </li> <li>• Information about whether the gift is tax deductible <ul style="list-style-type: none"> <li>– 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).</li> <li>– 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.</li> </ul> </li> </ul>	<p>misleading or deceptive conduct.</p> <p>Regarding the points on gifts and tax deductibility:</p> <p>We note the relevance of information about tax deductibility but see our comments above about a specific number or mark.</p> <p>It is inappropriate for an organisation to advise on specific tax deductibility issues which, in most instances, will only be known by the taxpayers.</p> <p>The matter of DGR status, limited community understanding and the potential for charities to misrepresent themselves could be redressed under existing provisions.</p>
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<i>Consultation Questions</i>		
4.1	Should all charities be required to state their ABN on all public documents? Are there any exceptions that should apply?	Requiring ABN to be stated on public documents is possibly useful, but as discussed above a unique charity or nonprofit number or mark would be of greater use to donors.
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?	They should be required to provide an accurate answer if asked.
4.3	Should persons engaged in charitable fundraising activities be required to wear name badges and provide contact details for the relevant charity?	No, but they should be required to provide an accurate answer if asked.
4.4	Should specific requirements apply to unattended collection points, advertisements or print materials? What should these requirements be?	Yes, clear identification of the organisation and contact details should be required.
4.5	Should a charity be required to disclose whether the charity is a Deductible Gift Recipient and whether the gift is tax deductible?	No. A charity cannot be expected to advise on gift deductibility which is only in the knowledge of the donor taxpayer.
4.6	Are there other information disclosure requirements that should apply at the time of giving? Please provide examples.	The details for contacting the national regulator's complaints hotline.
4.7	Should charities be required to provide contact details of the ACNC and a link to the ACNC website, on their public documents?	Yes.

## Chapter 5 – Information disclosure after the time of giving

	Text	Comment
50	<p>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.</p>	<p>Our comments on this paragraph are:</p> <ol style="list-style-type: none"> <li>1. A critical first step in the reform process (not the last!) is that government provide or facilitate appropriate accounting and auditing infrastructure in terms of standards which are 'fit for purpose'. The current standards fall far short of what is required.</li> <li>2. Most donors are only interested in information disclosure if it costs them nothing.</li> <li>3. If costs are imposed on nonprofit organisations, they usually cannot pass them on to users/beneficiaries as most for-profit organisations do.</li> <li>4. The temptation for governments and donors to ask for more information than they would feel a need for if they had to bear the cost of its provision, should be resisted.</li> <li>5. Government in conjunction with other stakeholders have an important role to play in educating donors about the appropriate measures of 'worthiness' of non-profit organisations. This is dependent on agreed standards being developed from an evidence base.</li> </ol>
51	<p>At present, there are a number of record-keeping and reporting requirements applied to charities by government. These include that:</p> <ul style="list-style-type: none"> <li>• the records provide a true and fair view of income and expenditure for the collection to be worked out at any given time;</li> </ul>	<p>Noted.</p> <p>In relation to the problems of banking funds to a separate bank account refer</p> <p>Ted Flack &amp; Christine M Ryan (2005) 'Financial reporting by Australian nonprofit organisations: dilemmas posed by government funders', <i>Australian Journal of Public Administration</i>, 64(3), pp. 69-77, available at <a href="http://eprints.qut.edu.au/3593/">http://eprints.qut.edu.au/3593/</a></p>

	<ul style="list-style-type: none"> <li>• the records be kept in a way that allows them to be conveniently and properly audited;</li> <li>• 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;</li> <li>• a register of assets be maintained;</li> <li>• a petty cash book be maintained;</li> <li>• reports include information about proceedings of fundraising activities, expenditure amounts and amounts distributed to beneficiaries; and</li> <li>• funds raised by fundraising be banked in a separate identifiable account.</li> </ul>	<p>In particular:</p> <p>“Moreover, all 22 departments required nonprofit organisations to apply any <i>donations received</i> in support of the funded project or activity to the fund set up to administer the government funding. While it may be argued that this is required because the government department wishes to gain some understanding of the extent of their funding to the total funding for the project, this requirement poses problems for nonprofit organisations. In the first instance, accounting treatment would normally have all donations in one account rather than being apportioned to certain projects. In the second instance, the ubiquitous requirement for donations to be applied to funded projects is likely to cause difficulties for those nonprofit organisations that are endorsed by the [ATO] (Australian Taxation Office, 2000) as ‘Deductible Gift Recipients’ (DGRs). These organisations are required by the Income Tax Assessment Act 1997 to establish one separate ‘gift fund’ into which all tax deductible donations are to be placed (Australian Taxation Office, 2003); this rules out accounting for donations for different projects in different ‘funds’.</p> <p>Again, the inconsistency in treatment between the Queensland government funding conditions, the [ATO] and accepted accounting treatment places nonprofit organisations in a dilemma when dealing with these transactions – it places them in jeopardy of breaching either their funding agreements with government funding agencies or breaching tax law. This particular issue again illustrates how difficult it is for nonprofits to deal with their accountability obligations on a day-to-day basis, without any thought of higher levels and objectives of accountability.”</p> <p>This is on top of fundraising regulation requirements that fundraising income (gift or trading income) must also be placed in a separate bank account!</p>
52	Reporting requirements for fundraising will be considered in the context of broader ACNC reporting	Noted.

	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.	Noted.
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	Noted.

	adequate scope for charities to describe the positive outcomes achieved through the use of donated funds.	
55	<p>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 Comment might include the following:</p> <ul style="list-style-type: none"> <li>• Requirements to report information relating to funds collected. <ul style="list-style-type: none"> <li>– 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.</li> </ul> </li> <li>• Accounting and record keeping requirements. <ul style="list-style-type: none"> <li>– 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</li> </ul> </li> </ul>	<p>Noted, but ‘fit for purpose’ accounting and auditing standards, developed in consultation with all stakeholders, are required.</p> <p>Extensive research and consultation are needed on the issue of fundraising ratios and administrative costs. This is a difficult area and some of the debate can be appreciated by reading material on the ACPNS website at <a href="https://wiki.qut.edu.au/display/nmlp/Ratio+and+Administration+Cost+Debate">https://wiki.qut.edu.au/display/nmlp/Ratio+and+Administration+Cost+Debate</a></p> <p>It is folly to proceed to mandate transparency under misleading accounting standards, in relation to such issues, as the mischief that could result would damage the nonprofit sector and ultimately impact unfairly on beneficiaries.</p>

	<p>requirements.</p> <ul style="list-style-type: none"> <li>• Auditing of reported fundraiser information. <ul style="list-style-type: none"> <li>– 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.</li> </ul> </li> </ul>	
56	<p>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.</p>	<p>Some States have relatively ‘light touch’ regulation of fundraising. Therefore to make a ‘one-stop shop’ national approach could become incompatible with the aspiration of the National Compact to ‘reduce red tape and streamline reporting’ (p 9).</p>



<b>Consultation Questions</b>		
5.1	Should reporting requirements contain qualitative elements, such as a description of the beneficiaries and outcomes achieved?	Yes.
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?	Only after appropriate evidence based research and external accounting standards have been agreed as 'fit for purpose'. We believe the best outcome would be to require boards to give account in meaningful terms of their fundraising strategies and results.
5.3	Should any such requirements be complemented with fundraising-specific legislated accounting, record keeping, and auditing requirements?	Yes, refer above.
5.4	What other fundraising-specific record keeping or reporting requirements should apply to charities?	The reporting requirements proposed by the ACNC should be sufficient.

## Chapter 6 – Internet and electronic fundraising

	<b>Text</b>	<b>Comment</b>
57	Traditional forms of fundraising activities usually involve interaction between two people, either face-to-face or over the telephone. New technologies create new	Refer to previous comments about bequests in relation to direct contact.

	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.	Noted.
59	<p>These new regulatory challenges include:</p> <ul style="list-style-type: none"> <li>• The public may not be able to assess the trustworthiness of the information that is disseminated.</li> <li>• 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.</li> <li>• 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.</li> <li>• The public may find it difficult to verify the identity of fundraisers operating on the internet. <ul style="list-style-type: none"> <li>– 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,</li> </ul> </li> </ul>	<p>Noted, but these challenges should not be overstated as they also occur with more traditional fundraising activities.</p> <p>The laws relating to spam also include provisions in relation to nuisance by nonprofit fundraisers.</p>

	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.	This does not achieve competitive neutrality. Non-charitable nonprofits will still be able to operate through the Internet.  ABNs are also issued to for-profit firms, so an ABN does not serve as a 'mark' of a charity – which lessens the value of displaying an ABN. As suggested above, a special number or mark may be warranted to indicate charity status.
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.	Note concerns stated above.
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.	Noted.
<b>Consultation Questions</b>		
6.1	Should internet and electronic fundraising be prohibited unless conducted by a charity registered with the ACNC?	It is unwarranted to curb fundraising conducted via these media by other nonprofit organisations and is a breach of competitive neutrality principles.

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?	As discussed above, a special number or mark should be considered rather than an ABN, which other non-charitable entities can use.
6.3	Are there any technology-specific restrictions that should be placed on internet or electronic fundraising?	No, innovation should be encouraged, and monitored for future intervention if required.

## Chapter 7 – Fundraising by third parties on behalf of charities

	Text	Comment
63	<p>Charities engage third parties to assist them with fundraising activities. Third party fundraisers can take at least three forms:</p> <ul style="list-style-type: none"> <li>• 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;</li> <li>• entities, for example, clubs, that raise fund for charity but generally do not receive any earnings for their services to charities; and</li> <li>• ‘for profit’ entities that dedicate a portion of their profit from the sale of goods and services to a particular</li> </ul>	<p>There are many other variations of the third option apart from receiving a portion of profit from the sale of goods and services. Other mechanisms include various types of sponsorships; marketing; matching gifts from the public or staff; participating in events. If these activities, which are currently included in some States’ regulation, are not to be regulated, this should be stated expressly.</p>

	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.	We dispute this assumption, particularly in relation to small corporate and club donors. The <i>Giving Australia</i> report (p 14) states: “Businesses with fewer than 11 employees account for 89% of all Australian businesses and 66% participated in some form of giving (giving \$1.5 billion or 47% of all business giving).”
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.	Again, there is an assumption about the capacity of all businesses, which may not be applicable to the majority of businesses.
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	Noted.

	<p>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.</p>	
67	<p>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.</p>	<p>It is unfortunate that the discussion paper uses non-specific language and does not address the issue of face to face or street solicitation. As discussed above, this might be best addressed by local government with the assistance of model regulation developed by the ACNC in conjunction with stakeholders.</p>
68	<p>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.</p>	<p>Noted.</p>
69	<p>It is also proposed that third party fundraisers be required</p>	<p>It may be impossible or impracticable to disclose the amount of donations until after</p>

	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.	the appeal has concluded.
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.	The term 'a direct financial or other benefit' must also be explained.
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	Reporting is well after the event given the time lags involved; and the state of accounting standards and measures of such matters are not settled.

	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.	Noted.
<b>Private participators</b>		
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.	There are other involvements apart from a donation of a portion of their profit. For example, donation of goods and collection of donations, matching of contributions and sponsorship arrangements, organisation of staff charitable activities. These other activities should be recognised and evaluated for their risk.
74	Examples of corporate social responsibility events and private participators' alignment with charity partners include: <ul style="list-style-type: none"> <li>Woolworths recent campaign to match their customer's donations to the Salvation Army for flood relief across</li> </ul>	These are all very large corporations. Small business activities should be recognised and may represent greater regulatory risk. For example, in May 2001, the ACCC instituted proceedings against Quality Bakers Australia Limited (Buttercup Bread) relating to its 'Help Buttercup Help our Babies' promotion. Advertisements promised that: ' <i>Buttercup would donate 30 cents to the Canberra Hospital for every additional Buttercup product* purchased</i> '. A footnote stated in fine print, that the donation would only apply to products sold over and above the average sales



	<p>Australia;</p> <ul style="list-style-type: none"> <li>• McDonalds’ annual McHappy Day, which raises funds for Ronald McDonald House Charities;</li> <li>• Coles’ support of the Cancer Council’s annual Daffodil Day; and</li> <li>• entities having an unattended collection tin/box seeking donations for a charitable purpose.</li> </ul>	<p>for a defined period. Following ACCC intervention, Buttercup honoured its promotion by making a donation to the Hospital.</p> <p>See <a href="http://www.accc.gov.au/content/index.phtml/itemId/87969/fromItemId/378012">http://www.accc.gov.au/content/index.phtml/itemId/87969/fromItemId/378012</a></p>
75	<p>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.</p>	<p>In our experience, regulation of, and compliance with such measures are very poor in many jurisdictions.</p>
76	<p>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</p>	<p>This paragraph does not consider the power imbalance between a possible multinational corporation and a charity; one could argue that in some instances charities may need to be protected from inappropriate behaviour, e.g. by large corporations using charity connections to boost their CSR credentials or corporate reputation.</p> <p>This paragraph also seems to assume that big business is the major corporate giver; i.e. it ignores the finding that small business also represents a significant donor group, and small business donations may involve different issues. As noted above, the <i>Giving Australia</i> report states (p 14): “Businesses with fewer than 11 employees</p>

	<p>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.</p>	<p>account for 89% of all Australians businesses and 66% participated in some form of giving (giving \$1.5 billion or 47% of all business giving).”</p>
<p><i>Consultation Questions</i></p>		
7.1	<p>Is regulation required for third party fundraising? If so, what should regulation require?</p>	<p>This should be a matter for the board of a nonprofit and they should be held to account for their decisions in relation to such activities of their agents.</p>
7.2	<p>It is appropriate to limit requirements on third party fundraising to those entities that earn a financial benefit?</p>	<p>No. It is a matter for the board as above.</p>
7.3	<p>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?</p>	<p>No.</p>
7.4	<p>Should third party fundraisers be required to state the name and ABN of charities for which they are collecting?</p>	<p>Yes and consumer protection laws should apply and be enforced.</p>
7.5	<p>Should third party fundraisers be required to disclose that they are collecting donations on behalf of a charity and the</p>	<p>No, and such fees may not be ascertained at the time of the question.</p>

	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?	No.
7.7	Is regulation required for private participators involved in charitable fundraising? If so, what should regulation require?	Yes, no solicitation should occur without the authority of the charity or nonprofit organisation concerned. It may be a space where co-regulatory strategies, such as professional codes of conduct, could be used.

## Fundraising Regulators and Activities 2011

	NSW	VIC	QLD	SA	WA	TAS	ACT	Total
No. of equivalent full-time staff engaged in administering the Act	E - 7	2.5	2.5	2	2.4	0.05	0.5	16.95
No. of prosecutions	0	2	7	0	1	0	0	10
No. of complaints	103	5*	55	39	2	0	0	204

E = estimate

\* = investigations