pilchconnect

a specialist legal service
for community organisations

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To whom it may concern

Charitable Fundraising Regulation Reform Discussion Paper

PilchConnect welcomes the opportunity to respond to the 'Charitable Fundraising Regulation Reform Discussion Paper' (**Discussion Paper**).

About PilchConnect

PilchConnect is an independent, specialist community legal service that provides not-for-profit (**NFP**) organisations with access to free or low cost legal help (information, advice and training). We support small-medium NFP community organisations to be better run. We do this because when organisations are well run, they are more likely to achieve their mission, and trust and confidence in the NFP sector is likely to be improved. By supporting NFPs in this way, we aim to contribute to a better civil society with more connected communities.

We fill a niche role; sitting between regulators and the private legal profession. As an independent, sector-based intermediary we understand the practical constraints that small community organisations operate under, and are trusted by them to provide practical, NFP-relevant legal help or direct them to other assistance. We often help organisations work out if they really do have a legal problem, how serious it is and what possible next steps are. We prioritise NFPs that assist marginalised and disadvantaged people and in rural and regional areas.

Our submission work is based on empirical evidence and practical examples drawn from our legal inquiry, advice and case work.

Overall Comments

PilchConnect supports national reform of fundraising regulation. We offer the following overall comments on the issues addressed in the Discussion Paper:

- It is clear that current regulatory regimes at state and territory level create inconsistencies, complexity and inefficiencies that fail to achieve the desired policy outcomes of transparency, accountability and increased public trust and confidence in fundraising activities. We question whether specific fundraising regulation is necessary to achieve these policy objectives, given the proposed role of the ACNC as the 'one-stop-shop' for registration

and reporting of charities (and ultimately other NFPs), and the potential for the Australian Consumer Law (**ACL**) to regulate behavioural aspects of fundraising and provide consumer-based protections to the donating public.

- Given the current 'patchwork' of state and territory regulation, it is imperative that reforms to achieve national consistency are integrated with (and ideally, replace) existing state and territory regimes. Without this, national reform of charitable fundraising may simply add an extra layer of regulation, particularly for charities registered with the Australian Charities and Not-for-Profits Commission (**ACNC**). This result is undesirable and contrary to the Government's commitment to reducing red tape and streamlining reporting requirements for charities and NFPs.
- We support the following approach to national reform:
  - Charities that are registered with and report to the ACNC should be automatically authorised to fundraise nationally, and should be exempt from all state and territory fundraising regulation. In our view it is unnecessary to impose additional registration or reporting requirements on registered charities that conduct fundraising activities – the proposed ACNC legislative framework is sufficient to achieve the policy objectives of accountability, transparency and public trust and confidence in charities' activities, including fundraising.
  - The ultimate goal should be for other not-for-profit organisations to be able to register with and report to the ACNC, in line with the concept of the ACNC as a 'one-stop-shop' national regulator for charities *and* not-for-profits. Once registered with the ACNC, NFPs should be authorised to fundraise nationally and exempt from state/territory fundraising regulation.
  - We appreciate that there may be an interim period where the ACNC will only be able to register, and regulate the activities of, charities (as opposed to NFP organisations more broadly). In this transition period, it may be appropriate for some state-based regulation of fundraising activities to continue (for non-ACNC registered organisations). However we submit that federal and state/territory governments should work to 'fast-track' NFPs that are registered fundraisers under state and territory regimes into the ACNC national regulatory framework.
- Where existing laws apply (or could easily be amended to apply) to the fundraising context, this is preferable to specific regulation. Such an approach will avoid duplication and inconsistencies among regimes. Notably, the ACL and other consumer-focused laws could regulate 'on the ground' aspects of fundraising activities (eg, misleading and deceptive conduct, information disclosure, privacy and nuisance).
- Charitable fundraising via the internet should not be limited to ACNC-registered charities. It is not clear in the Discussion Paper why the 'higher risks' posed by internet and electronic fundraising cannot be adequately dealt with by existing legislative regimes, in particular laws addressing spam, electronic transactions, misleading and deceptive conduct, and fraud.

Our key issues

The priorities for fundraising reform

PilchConnect welcomes the Treasury's interest in reforming the regulatory approach to fundraising activities in Australia. The need for a consistent, coherent fundraising regime is well documented, most explicitly by the 2008 Senate Report on the Disclosure Regimes for Charities and Not-for-Profit Organisations which recommended the implementation of a National Fundraising Act through the referral of State powers.[1] More recently, the Productivity Commission's 2010 Research Report into the Contribution of the Not-for-Profit Sector (**Productivity Commission Report**) recommended that mutual recognition and harmonised fundraising regulation be implemented across Australia, through the establishment of model fundraising legislation, as well as the creation of a fundraising register for cross-jurisdictional fundraising organisations.[2]

There is much confusion around the application of current regulatory approach to fundraising (particularly in relation to cross-border activities) and there are noticeably low numbers of registered fundraisers across jurisdictions. The current regime is ineffective, outdated, and creates an undue administrative burden on a sector that is often time and resource poor. While we agree that the regulation of fundraising activities ought to have its policy basis in protecting public confidence and trust in fundraising, we are particularly concerned with the extent to which regulation creates excessive administrative burdens that adversely impact on a NFP's ability to further its mission. Achieving the correct balance between these priorities ought to be a key goal for any reform to fundraising policy.

In 2010, there were 13,106 registered fundraisers amongst 27,028 Deductible Gift Recipients (**DGRs**) and 53,773 Tax Concession Charities (**TCCs**).[3] On these figures it is fair to assume that most of those unregistered DGRs, and many of the TCCs, should have some form of fundraising accreditation, and that these entities have either opted not to go through this process, or are unaware of their obligation to register. This is consistent with our experience in providing legal advice and information on fundraising to Victorian community organisations – many NFPs are either confused as to what they have to do to comply, or unaware that they are required to comply, or often both.

We also note there are relatively few complaints and prosecutions under existing fundraising regulation[4] and it appears that state regulators are not currently prioritising the enforcement of existing fundraising laws and regulations.

The national reform of fundraising regulation in Australia must have regard to existing legislative approaches in order to understand what has (and has not) worked to date. In this respect, we refer the Treasury to the extensive work of the Queensland University of Technology's Australian Centre for Philanthropy and Nonprofit Studies (**ACPNS**). In particular, we highlight the work of the ACPNS in analysing the regulatory approaches to fundraising in each jurisdiction, and producing statistics on

[1] See recommendation 9
[2] See recommendation 6.3
[3] See '*Registered Fundraising Organisations*, published by the Australian Centre for Philanthropy and Nonprofit Studies, (https://wiki.qut.edu.au/download/attachments/118897665/Fundraising+issues+sheet_registered+fundrais_2012.pdf?version=1&modificationDate=1330556729000)
[4] The Australian Centre for Philanthropy and Nonprofit Studies has identified 47 prosecutions across Australia in the four years to 2011 (https://wiki.qut.edu.au/download/attachments/118897665/Fundraising+issues+sheet_registered+fundrais_2012.pdf?version=1&modificationDate=1330556729000)

complaints, enforcement and prosecutions under these laws[5]. Clearly, there is a need to improve the regulatory framework – perhaps most urgently by addressing inconsistencies between state/territory regimes and removing cumbersome red tape for organisations seeking to fundraise in multiple jurisdictions.

In recognising that fundraising 'scandals' are relatively rare in Australia, we caution against any regulatory approach that creates additional registration and reporting obligations on the NFP sector. We believe that many of the perceived concerns around damage to public trust and confidence can be just as easily dealt with through existing legal frameworks (with some minor amendments) designed to protect consumer interests, and prevent fraudulent, misleading and unfair practices.

The focus on 'charitable' fundraising

We note that in the Discussion Paper, the proposed national approach to fundraising regulation only appears to consider 'charitable' fundraising - that is, fundraising for primarily a charitable purpose. Currently, charities only form approximately 58,000 of the 600,000 odd NFPs in Australia, and many of those falling outside the definition of charity will undertake some form of fundraising, a significant level of which would not be considered to be 'charitable' (eg, fundraisers for member-serving clubs, sporting groups etc). In this respect, we note the ACPNS' comments in relation to competitive neutrality issues raised by applying national regulation to only a section of fundraisers, and refer the Treasury to the ACPNS submissions on this point.

We also note that the proposals in the Discussion Paper are contingent on distinguishing 'charitable' organisations from other groups. In light of the current work on a statutory definition of charity, there is a strong argument that any new regulatory measures for national fundraising should be considered after the ACNC has begun operations, and discussions on the statutory definition of charity have progressed.

The need to avoid inconsistency and duplication

In our view, state and territory fundraising laws should ultimately be unnecessary, and regulation should be shifted to a single, national fundraising regulatory scheme. Duplication should not be regarded as 'inevitable' and we would oppose any implementation that simply adds an additional layer of regulation for registered charities.

In our submission, there should be a national regulatory approach to fundraising for all NFPs, charitable or not. In recognition of the parallels in policy goals between the ACNC and fundraising regulation, we submit that the ACNC is best placed to administer a national registration and reporting framework, as outlined in our responses to Consultation Questions 2.10-2.13.

We appreciate that the ACNC will not be equipped (or funded) to be the national regulator of all fundraising activities when it opens its doors in October 2012. If national fundraising reform is to be limited to charities registered with the ACNC (at least for an initial period), it is imperative that the states and territories recognise the national endorsement of charities for fundraising purposes to avoid an exacerbation of the current inefficiencies of multiple registration and reporting requirements. We submit that national regulation of charitable fundraising via the ACNC should not be introduced if existing state and territory fundraising regimes continue to apply in their current scope. If necessary, national reform should be deferred until the states and territories can (at least)

[5] See www.cpns.bus.qut.edu.au

agree to recognise ACNC-registered charities as approved fundraisers for the purposes of state-based laws (which would mean registered charities could fundraise nationally) – or, preferably, that registered charities should be exempted from state-based regulation entirely.

We recognise that because the ACNC's role will be initially limited to charities, the states and territories may still have a role in regulating fundraising activities of the large group of fundraisers not considered 'charitable' – for example, member-serving clubs. However we submit that NFPs wishing to fundraise nationally should be 'fast tracked' into the ACNC regulatory framework as soon as practicable.

Ultimately our preference is for removal of state-based fundraising regulation in favour of registration and reporting via the ACNC, and reliance on the ACL and other consumer-focussed laws to regulate fundraisers' conduct in soliciting funds. However if this approach is not accepted and state-based fundraising regulation remains, there must be harmonisation and mutual recognition of fundraising registration, as recommended by the Productivity Commission in 2010.[6]

These submissions are set out in further detail in response to the specific questions contained within the Discussion Paper.

Is regulation necessary?

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

PilchConnect submits that separate regulation of charitable fundraising is not necessary, in light of the establishment of the ACNC and the existence of other laws that already deal with conduct which fundraising laws also seek to regulate.

As submitted below, the policy goals of both the ACNC and fundraising regulation are highly compatible (ie, maintaining public trust and confidence) and it is appropriate that charities endorsed and monitored by the ACNC are able to conduct fundraising activities without the need for additional registration. This approach will clearly require further consideration of the ACNC's powers and enabling legislation to ensure it is equipped to receive and respond to fundraising-related matters. This approach is also contingent on obtaining the recognition of all states and territories that ACNC registration is sufficient to fundraise in each jurisdiction (ie, to avoid the need for separate state-based registration and reporting).

However, we note there are a large number of fundraisers that will not be registered charities. We submit that until these organisations can be brought within the ambit of the ACNC, there may still be some scope for regulation of fundraisers at the state and territory level. If specific regulation were to remain, proper consideration must be given to the role and extent of the regulatory approach and care must be taken to avoid the current inconsistencies and incompatibilities across jurisdictions. Any specific regulation must offer a registration process that is not unduly onerous on community organisations, and provide fundraisers with Australia-wide recognition through a 'register once' option. While in our view the ideal approach would be to have a national body responsible for this function in its entirety, given the ACNC is not yet operational and will only have responsibility, at least

[6] See rec. 6.5 of Productivity Commission Report.

in the early stages, for a small section of the fundraising sector (ie registered charities), it is critical that any state-based regulatory approaches to fundraising are consistent and mutually recognised.

The Discussion Paper's narrow focus on charities suggests that inconsistencies in fundraising regulation at state and territory level will continue for those organisations not registered as charities with the ACNC. We submit that this review ought to also consider the regulatory approach to fundraising by non-charitable organisations (such as member-serving associations), to ensure that the existing inconsistencies and lack of mutual recognition are addressed. We have concerns that a failure to do this will exacerbate the current regulatory complexity and confusion arising from incompatible legislation.

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.

The burden of compliance with existing fundraising regulation is well known in the sector. PilchConnect receives a significant number of inquiries from small, volunteer-reliant NFPs seeking advice on the application of fundraising law – in particular the effects of cross-jurisdictional fundraising. The ease at which organisations can raise funds across borders via new technologies has meant that it is often necessary that organisations register in multiple jurisdictions or risk non-compliance and potentially significant penalties. This is a time-consuming process, and in our view more often than not creates an unnecessary layer of red tape that can only be remedied by mutual recognition between jurisdictions and harmonisation of state and territory laws, or ideally a single national fundraising regulatory regime.

Example – the impact of fundraising regulation on small organisations

Wombat Care is a Victorian charitable organisation that provides short-term care for wombats that have been injured in road accidents. The organisation has been caring for a baby wombat that needs a life-saving operation. Wombat Care decides to seek donations from local community members to raise funds for the operation. A local journalist hears of the fundraising campaign, and runs the story in the newspaper – with a very cute photo of the wombat.

The newspaper also publishes the story in its website edition. The news story 'goes viral' and as a result, significant funds are donated to Wombat Care. When the volunteers at Wombat Care find the time to take stock of the money coming in, they realise the organisation has exceeded the small-scale threshold under Victorian fundraising laws and should be registered as a fundraiser in Victoria. To make matters more complicated, the donations have come in from people all over the country – and even some from overseas! Wombat Care is worried that they might not only be non-compliant with fundraising laws in Victoria, but in other states and territories as well.

For many of PilchConnect's clients (most of which are small to medium NFPs), the time and effort of registration and annual reporting in each fundraising jurisdiction is often beyond the resources of the organisation. As a community legal centre, PilchConnect is obliged to inform fundraisers of their legal obligations to register in multiple states, even where the organisation may even struggle to dedicate the time to register in their home jurisdiction. In our experience, there is little in the way of incentive for organisations to register as a fundraiser as the administrative burden of registering and reporting outweighs the benefits of being registered (very few donors require evidence of registration), and the risk of compliance or enforcement action is remote.

While we do not have exact figures of the financial impact of fundraising registration, we refer the Treasury to the Productivity Commission Report which notes the 'substantial' cost of compliance with inconsistent fundraising legislation when operating across jurisdictions (see p.138). In particular, we highlight the Fundraising Institute of Australia's submission to that Inquiry which highlighted World Vision Australia's estimate costs of over $1 million to comply with fundraising reporting obligations across jurisdictions.

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?

In addition to confusion amongst fundraisers as to how fundraising regulation applies, we submit that there is substantial uncertainty within the donating public about fundraising laws. In order to achieve the end goal of public confidence and trust, fundraising regulation must firstly offer a regime that encourages registration amongst fundraisers, and secondly is recognised by the donating public. We submit that the complexity and inconsistency in the current approach offers neither of these principles, and the majority of donors do not factor fundraising registration into their decision to donate.

We submit that the types of matters that have the ability to pose a significant threat to public confidence and participation by the community (ie, fundraising 'scandals') may be more appropriately dealt with through a mixture of improved accountability via the ACNC and consumer-focussed laws, and in extreme cases criminal actions dealing with fraudulent behaviour. We discuss our views on the interplay between fundraising regulation and existing laws further in our responses to Part 6 of the Discussion Paper.

Defining fundraising activities to be regulated

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

2.5 Are there additional fundraising activities that should be exempt from fundraising regulation? If so, please provide an explanation of why the relevant activities should be exempt.

Our view is that charities registered with the ACNC ought not to be required to undergo a further registration process to undertake fundraising activities, and therefore there is no need for specific exemptions for charities under this model.

We agree with the Discussion Paper's position that where an activity is comprehensively regulated under other legal frameworks, duplication should be avoided.

In the event that additional registration (beyond ACNC registration) is required before fundraising can occur, we believe that the activities mentioned at Paragraph 18 of the Discussion Paper are appropriate for exemption, and submit that further exemptions may also be appropriate to ensure that smaller, low-risk fundraising activities are not over-regulated. There may also be scope to consider additional exemptions based on:

(i) fundraising that is considered minor activity through the use of annual threshold amounts;
(ii) fundraising that is of a private nature;
(iii) fundraising taking the form of sponsorships; and

(iv) fundraising within specified community subsectors already subject to a myriad of licensing and governance obligations (eg, child care centres, kindergartens and health facilities).

We note that currently, there is very little in common by way of exemptions between fundraising jurisdictions – which creates a high degree of uncertainty, especially given the ease at which cross-jurisdictional fundraising can take place via new technologies. In our experience, while exemptions themselves can cause confusion amongst small to medium not-for-profit organisations, it is the *inconsistency amongst exemptions across jurisdictions* that is the source of most frustration within the sector.

Implementing a national approach to fundraising regulation

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

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

As discussed in our response to Consultation Question 2.11, we form the view that charities registered with the ACNC should automatically be authorised to conduct fundraising activities without the need for a further registration process. Given this position, a threshold amount is irrelevant at the national level as all registered charities will be able to conduct fundraising activities.

For those organisations not registered as charities with the ACNC, and if separate regulation remains, we submit that a threshold amount is appropriate, and those thresholds should be consistent across all jurisdictions, clearly stated, and easy to apply in practice. Without a threshold amount providing exemption for smaller low risk fundraising activities, the administration burden on smaller charities seeking to fundraise can easily be disproportionate. At PilchConnect, we receive a number of inquiries from smaller Victorian community organisations on fundraising licensing matters. In many cases, we are able to advise that the exemption for fundraising under $10,000 per annum (using solely volunteers) will apply, much to the relief of volunteer committee members that are often fatigued at the administrative burdens from other aspects of the group's work.

Our experience is that there is often confusion about how thresholds apply in practice. Specifically, PilchConnect is aware of a level of confusion amongst community organisations on what is included when calculating the annual total, and when the fundraisers are considered 'volunteers'. The following example demonstrates these issues.

Example – the need for clarity with small-scale fundraising thresholds

A small Victorian charitable organisation hosts an annual fundraising dinner which includes a silent auction - this is the only fundraising event each year. The sole employee of the organisation is responsible for ticket sales, facilitating donations and running the auction on the night. She receives her regular salary while organising this event. Between ticket sales and the auction, the organisation raises $12,000 from the dinner, however after expenses have been paid (venue hire etc), they are left with $8,000. Victoria has an exemption from fundraising registration where under $10,000 has been raised, and only volunteers have been used in the appeal. The organisation is confused as to whether it should have registered, or if it is entitled to rely on this exemption.

Smaller organisations lack the time and resources to interpret and apply unduly complex exemptions, and to do so will divert energy from the organisation's core purposes, often resulting in a decision to either not register or cancel the fundraising activities. This is a situation any new regulatory framework should strive to avoid, and reforms ought to give priority to ensuring small-to-medium NFPs are able to fundraise without the need for external assistance or legal advice.

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

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

As submitted above, our preferred policy approach is for a single, national approach to regulating fundraising activities by community organisations as a function of the ACNC. Given this is unlikely to occur in the short term, we appreciate that the states and territories may still have a role to play in the regulation of fundraising activities by those organisations not registered with the ACNC (ie, non-charities).

With this in mind, if separate regulation remains, we reiterate the importance of consistency across state and territory frameworks and submit that any proposed monetary threshold must be equally applied between jurisdictions. As discussed above, our view is that an exemption for minor, low-risk fundraising activities is preferable, and that exemption should be easily understood and applied.

Ideally there would be no transition period as all fundraisers (whether conducted by a registered charity or not) could register with the ACNC and be exempted from state-based regulation. However if there is to be a transition period then we submit that organisations wishing to fundraise nationally should be 'fast tracked' into the ACNC national framework. In relation to a transition period for those organisations moving to a national approach to fundraising, we submit that the ACNC will be best placed to provide registered charities with education and information on the transition between fundraising controls.

Registering for fundraising activities

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

The core principles behind both the ACNC and fundraising regulation are aligned (ie, public trust, transparency and confidence in the sector) and the ACNC will play a key role in developing and maintaining a national register of charities. The ACNC information portal provides opportunities to provide transparent and centralised information to the donating public on fundraisers.

In our view, as the independent national regulator, the ACNC has the ability to promote the accountability and transparency that government and the general public seek, as well as the ability to educate and support the sector on fundraising matters. It remains a separate question as to whether the ACNC has the resources to undertake this process, however bringing fundraising within the ambit of the ACNC is consistent with the initial goals of it becoming a 'one-stop-shop' regulator for charitable and NFP organisations.

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

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

We agree that charities registered with the ACNC should have streamlined access to fundraising authorisation. The ACNC's focus on supporting and promoting good governance amongst those organisations it registers provides a level of endorsement that can easily be extended to a fundraising licence.

This approach is consistent with the 'one-stop-shop' model that the ACNC was developed on, and given the strong parallels between the goals of the ACNC and goals of fundraising regulation, we submit that fundraising authorisation go hand-in-hand with ACNC endorsement as a charitable entity.

Of critical importance will be the recognition of this authorisation by all states and territories. As such, this proposal demands negotiation between the ACNC and states and territories to ensure that all jurisdictions are satisfied that ACNC registration provides sufficient safeguards and removes the need for additional fundraising registration.

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

We note that the proposed powers to be vested in the ACNC appear to provide an adequate range of enforcement options, ranging from warnings to severe disciplinary action including removal from the register of charities. A specific power to ban or suspend fundraising activities may need to be included in this set of enforcement powers.

There ought to be a sliding scale of offences and penalties, recognising that a ban on fundraising could have significant consequences for many community organisations reliant on public donations. A ban ought to be reserved for serious and/or repeated violations, and in particular, circumstances where conduct has the potential to damage the community sector's reputation amongst the donating public.

Application of consumer protection laws to charitable fundraising

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

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

In our view, the ACL (and other consumer-focussed laws) are an appropriate mechanism for addressing concerns about the conduct and practice of fundraising activities. In this respect, we urge the Treasury to give attention to how fundraising regulation can be complemented by existing consumer protection laws and industry codes of practice, so as not to duplicate regulation.

Currently, the ACL imposes obligations on both individuals and companies or organisations who engage in trade or commerce or supply goods or services to consumers to act fairly and honestly and

to ensure that the goods and services they supply are safe. It is our understanding that the ACL already applies to NFP community organisations when they engage in trade or commerce or supply goods and services to consumers, and we submit that the ACL should be amended to specifically cover fundraising activities of community organisations. Similarly, consumer protection legislation such as the *Competition and Consumer Act 2010* (Cth) and the *Spam Act 2003* (Cth) could also be amended to appropriately address consumer-based concerns about the conduct of fundraising appeals. Existing regulators such as ASIC, ACCC and Australian Communications and Media Authority (**ACMA**) each could have a role in responding to consumer complaints against conduct of fundraising activities.

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?

We further submit that many charities may already be subject to the ACL's regulation of unsolicited selling practices.[7] In our view, it is appropriate that the unsolicited selling provisions contained in the ACL apply to fundraising by charities and NFPs, and submit the ACL should be amended to clarify its application to such activities.

Information disclosure at the time of giving

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

We support the principle of requiring fundraisers to include their ABN on public documents in the interests of transparency. Requiring charities to disclose their ABN will provide consumers and donors with the opportunity to access further information about the charity, particularly through the ACNC's publicly available register. Transparency is at the heart of public trust and confidence, and requirements to disclose basic identifiers (such as an ABN) further this objective.

However, we note there are already legal requirements for companies limited by guarantee to include their name and ACN (or ABN)[8] on all public documents, and for incorporated associations to include their name and registration number on all business documents.[9] Therefore, we do not consider there is any need for an additional requirement requiring charities to include their ABN on all public documents *in relation to fundraising specifically*. Instead, consideration could be given to clarifying the definition of public documents in relation to fundraising activities. At the very least, additional disclosure obligations should have regard to existing requirements to ensure consistency in terminology and minimise incompatibility.

Given the constant evolution of fundraising initiatives, overly prescriptive regulation of disclosure requirements can often become dated and difficult to apply. Consideration should be given to the

[7] See PilchConnect fact sheet at www.pilch.org.au/services/#6

[8] Section 153 of the Corporations Act requires a company to display its name and ACN on all its public documents and negotiable instruments. The Act also allows for a company's ABN to be used in place of its ACN, where the last 9 digits of the ABN are the same as, and appear in the same order as, the 9 digits of the company's ACN.

[9] For example, Section 12 of the *Associations Incorporation Act 1981* (Vic) requires the name and registration number of an association to appear in all notices, advertisements and other official publications and business documents. A business document includes a business letter, statement of account or invoice, negotiable instrument, cheque, receipt etc.

use of industry standards or codes of practice when addressing mandatory disclosure requirements, particularly as they relate to the use of technology when disseminating information.

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

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

We acknowledge the need for some form of regulation to support the principles of transparency and accountability in fundraising activities, and to promote public trust and confidence in the sector. However in our view, it is inappropriate to seek to achieve these objectives via the imposition of unduly burdensome 'micro level' administrative obligations. Regulation should not discourage fundraising (including innovations) and we submit that high level 'principles based' regulation and reporting via the ACNC, coupled with provisions in the ACL to address unfair or misleading practices (eg deceptive conduct in soliciting funds, causing distress or nuisance) is preferable to a highly prescriptive regulatory approach which potentially stifles innovation and creates unnecessary burden.

There are practical limits as to what information can be provided at the time of soliciting funds, and we believe the majority of donors are savvy enough to ask questions or conduct their own research if they have concerns over the accountability or legitimacy of a fundraising activity – especially when the ACNC's public information portal allows for (financial and narrative) information about registered entities to be accessible to the public.

Consistent with our response to Consultation Question 4.1, we submit that basic identifying information of a fundraiser should be disclosed to donors. We query whether disclosure of information beyond these basic identifiers should form a legislative requirement, noting that it will be in the interests of the charity to disclose information about their causes in order to garner support.

While we appreciate the public's concern about the use of paid fundraisers, it is unduly prescriptive to require disclosure about whether or not a collector is paid. This is not only difficult to apply in practice, it is not directly relevant to the fundamental goals of maintaining public trust and confidence in fundraising. As much as the public may not like the idea of expenses being used in the administration of fundraising, it is a model that often generates larger funds, in turn allowing an organisation to deliver greater altruistic benefits.

Consistent with our views above, we form the view that it is overly prescriptive to require fundraisers to wear name badges and provision of contact details for the charity. Often this will be supplied as it is in the fundraiser's interests, however it is our view that it would be more important for the fundraiser to be required to carry an official authority or authorised pledge form from the charity, to verify that they are in fact representing that charity and some information about that charity. We also support information about the charity or purpose for which the fundraiser is collecting funds be available and given to donors or potential donors by the fundraiser when requested.

We support non-legislative requirements being placed on regulated fundraising in line with those required of signatories to the FIA's code of practice. All members of the FIA are signatories to their charity code of practice, the Principles and Standards of Fundraising Practice, which includes a Code of Ethics and a Standard of Face-to-Face Fundraising (**Standard**). Under this Standard, charity fundraisers must clearly display to a donor an authorised pledge form, name tag identifying the fund-raiser by name and the organisation's identity, and any mandatory requirements for a fundraising

activity required by state or territory legislation. A similar approach could be applied by the ACNC, where a standard or code is made available to fundraisers in a co-regulatory model of carrying out fundraising activities.

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

We can only comment on the Victorian regulations which require the collection box to be constructed securely, sealed properly and numbered consecutively.[10] The box must also be labelled with the name of the appeal and the name of the person conducting the appeal and the people or causes or things on whose benefit the collection is being conducted. Although in our experience these requirements have not created difficulties for NFPs, we have serious doubts over whether these rules are complied with by fundraising entities and enforced by state regulators. This could be effectively dealt with by fundraising codes of practice, supported by consumer laws.

In relation to print materials and advertisements, the obvious requirements such as including the name and information about the organisation are likely to be included in the materials regardless of a legislative requirement. Further, on certain advertising materials, such as billboards, it is impractical to require information to be included about the causes and the charity conducting the fundraising. Regulation must be high level, principles based, and flexible enough to allow for an wide range of (innovative) fundraising situations.

We again note the ACL (and other consumer-focussed laws) in playing a significant role in regulating fundraising activities, and also highlight the role of the Advertising Standards Bureau in regulating the conduct and content of advertisements. We again submit that these regimes can potentially apply to advertisements for fundraising activities, and we caution against any duplication in regulation of this nature in fundraising legislation.

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

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

We see no need for DGRs to disclose their DGR status to potential donors. Given that the offer of a deductible donation will often act as an incentive to donors, it is in the interests of DGR endorsed institutions and funds to disclose their status, and most will do so in the absence of a legislative requirement to do so. Further, if the ABN is provided to donors at the point of fundraising, a free search on the Australian Business Register (and the ACNC in future) allows donors to obtain an organisation's DGR and tax concession status.

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

This proposal seems overly prescriptive and burdensome and in our view would add very little to donor trust and confidence. In our view, ensuring the public is aware of, and able to locate and contact the fundraising regulator is a job for the regulator in its capacity as an educator of the sector, it is not job for the fundraising organisation.

[10] See s.10 of the *Fundraising Act 1998* (Vic)

Information disclosure after the time of giving

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

5.2 Should charities be required to report on the outcomes of any fundraising activities, including specific details relating to the amount of funds raised, any costs associated with raising those funds, and their remittance to the intended charity? Are there any exceptions that should apply?

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

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

Most recently, a significant part of 'public confidence and trust' relates to rising scepticism about the percentage of raised funds that are directly passed on to the end cause as opposed to being 'used up' in administration. However we believe it is difficult and open to interpretation if charities were asked to cite percentages of raised funds used in administration. We submit that with the increased availability of information about charities – particularly with the establishment of the ACNC's public information portal – donors will become increasingly savvy and as a result, industry self-regulation could provide an effective safeguard.

These concerns over efficiency are leading to a greater focus on reporting by charities, which can be a useful form of accountability and transparency, but is not always the most accurate measurement. In this respect, we submit that fundraising ratios are not an accurate measure of performance, and do not endorse this as a specific reporting requirement. We further endorse the views of the FIA that until there is a uniform accounting standard for not-for-profits, 'it is meaningless trying to compare charity's financial statements. It's like trying to compare apples and oranges.'[11] Moreover, in some years charities need to spend more on acquiring more supporters, therefore a 'moving average' would be a better measure.[12]

It is important to remember that extensive fundraising appeals cost money, and the essential work that many charities do cannot occur without fundraising. The reporting requirements, while necessary, also need to recognise this fact, and not contribute to the growing perception that charities should have no administrative costs, and in fact that some such costs (are necessary to increase donor support, and ultimately an organisation's furtherance of its mission.

The amount of funds collected, and optional narrative descriptions of how those funds were spent, are useful reporting requirements for charities to provide to the ACNC. Disclosure of such information would promote transparency and accountability, however as stated above, it is important to ensure reporting requirements are proportionate to the amount of funds involved in the fundraising. The costs involved in administering and complying with the reporting requirements also need to be considered to ensure charities, particularly smaller ones, are not discouraged from fundraising by overly burdensome and complex reporting requirements. The ACNC's recognition of tiered reporting is likely to address these concerns.

[11] 'Peak body defends fundraising costs', media release, FIA, 27 October 2011.
[12] Ibid.

Internet and electronic fundraising

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

Internet and electronic fundraising should be an acceptable means for fundraising for all fundraising organisations. Limiting internet and electronic fundraising to charities registered with the ACNC would have a significant adverse impact on organisations that may not be considered charitable, yet may rely on fundraising as a source of income (eg, political parties and sporting clubs), as well as the for-profit sector.

It is not clear in the Discussion Paper why the 'higher risks' posed by internet and electronic fundraising cannot be adequately dealt with by existing legislative regimes, in particular laws addressing spam, electronic transactions, misleading and deceptive conduct, and fraud.

For example, the *Spam Act 2003* prohibits the sending of 'unsolicited commercial electronic messages' with an 'Australian link'. We submit that safeguards similar to those that currently exist in the Spam Act could be used to achieve the policy goals of fundraising regulation, without the need for duplication through specific regulation for electronic charitable fundraising.

We further note that the use of codes of practice can have a role to play in this regulatory framework, and draw the Treasury's attention to existing industry-based codes of practice registered with regulators including as ACMA, the regulator with oversight of communications, broadcasting and online matters.

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

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

We refer to our response to Consultation Question 4.1, and submit that this matter could be adequately addressed by a clear definition of 'public documents'. While we would not endorse an approach requiring fundraisers to state their registration number of 'all communications', there may be certain online fundraising activities or correspondence that should be grouped under the disclosure requirements for 'public documents'.

We are not in a position to provide further comment on technology specific restrictions that could be placed on electronic or online fundraising. This is a question for the information technology sector who understands the needs, risks and sensitivities of online fundraising and fundraisers.

Fundraising by third parties on behalf of charities

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

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

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

PilchConnect assist small-to-medium NFPs, mainly those organisations that are either entirely or substantially reliant on volunteers. The limited size and resources of our client base means that the vast majority of our clients do not use, or are not involved in third party fundraising therefore we do not have extensive experience or examples to draw on in this area.

If anything we would suggest that the charity which the third party is fundraising for be required to notify the ACNC of all third parties fundraising on their behalf. This information could then be added to a publicly available register so that donors and potential donors can confirm that their money or goods or service is going to the nominated charity. This would assist in increasing accountability within the sector, particularly in relation to third parties fundraising.

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

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

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

The requirement to disclose the name and registration number of a charity when fundraising would be in line with the minimum standards for information disclosure discussed in Part 4. Disclosure of the name and ABN should be required, even where collecting is being carried out by a third party, in order for donors to be able to access information about the relevant charities, this information should be available.

We would caution against a requirement that third party fundraisers must disclose the nature of their relationship with the recipient organisation for two reasons. Firstly, as noted above, the use of third party fundraisers may in fact enhance an organisation's ability to further its mission. While many donors may feel uneasy about fundraising administration expenses, third party fundraising continues to be an effective way to generate funds and forced disclosure can only serve to damage this. Secondly, 'paid labour for fundraising activities' is a very broad notion. The fact that an organisation employs a marketing manager that may be involved in setting up a fundraising event, would mean that paid labour is being used for fundraising activities.

We submit that further clarification of this issue is necessary. Careful consideration should be given to this issue so as not to provide a knee-jerk reaction to a perceived transparency problem amongst charitable fundraisers in Australia.

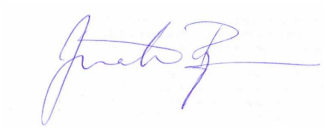
7.7 Is regulation required for private participators involved in charitable fundraising? If so, what should regulation require?

Again, there is a range of ways private participators can be involved in charitable fundraising, for example through sponsorship, staff charitable activities, collecting donations etc. In our view, it is not appropriate for specific regulation to apply to all private participators. We submit these activities are better addressed through existing consumer-focussed laws as discussed previously in this submission.

Conclusion

We would be happy to elaborate on any of the issues raised in this letter. Our details are below.

Yours sincerely,



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Endorsements

This submission is endorsed by the Public Interest Law Clearing House NSW.