Submission to the Commonwealth Treasury

on the Charitable Fundraising Regulation Reform Discussion Paper and Draft Regulation Impact Statement

Victorian Government

May 2012

Introduction

The Victorian Government welcomes the opportunity to provide comments on the Commonwealth Treasury's proposed charitable fundraising regulation applicable to charities registered with the proposed Australian Charities and Not-for-profits Commission (ACNC) as discussed in the *Charitable Fundraising Regulation Reform Discussion Paper and Draft Regulation Impact Statement* (Fundraising Discussion Paper).

The views in this paper are consistent with the Victorian Government's previous submissions to the Assistant Treasurer. It is intended that this submission be read in conjunction with Victoria's submission on the Governance Arrangements Consultation Paper and the exposure draft of legislation to establish the proposed ACNC.

In April 2010, the Council of Australian Governments (COAG) agreed to progress a nationally-consistent approach to fundraising regulation as part of continuing reforms in the regulation of the not-for-profit (NFP) sector that would result in a reduction in red tape and streamlined reporting.

In July 2010, COAG formally requested that the then Ministerial Council on Consumer Affairs (MCCA)[1] progress this work. Victoria led the national Fundraising Working Party to produce a detailed discussion paper that identified key issues and options requiring consideration by jurisdictions to achieve a nationally consistent approach to fundraising regulation. In June 2011, MCCA agreed to the Commonwealth Treasury assuming the lead coordination role.

Victoria shares the goal of a national framework for fundraising regulation and Victoria welcomes the Commonwealth in its facilitative role in working with state and territory governments to achieve this outcome.

It is recognised that there is inconsistent fundraising regulation across jurisdictions in Australia. A driver for harmonisation efforts therefore is to address such inconsistencies and simplify regulation to reduce compliance burdens, especially for NFP entities that operate nationally.

However, simplifying or reducing burden should not come at the cost of the quality of protection and support for the sector and the public. Reform measures therefore should seek to simplify and improve the regulatory framework. The Productivity Commission noted in its *Contribution of the Not-for-Profit Sector* report that it "expects any move to harmonise state and territory fundraising legislation would result in a body of updated and streamlined regulation".[2] The Commission discussed various approaches of mutual recognition, harmonisation of legislation based on best practice and clear principles, or national legislation.[3]

For the purposes of this response, Victoria therefore proposes that the tasks ahead for jurisdictions are to:

1. agree on a national framework; and
2. agree on the contents of fundraising legislation.

At this stage, Victoria is focused on establishing a clear basis for a national framework with the Commonwealth. As to the content of the law, Victoria has shared its work with the Commonwealth and will continue to do so in the spirit of working constructively to deliver best practice laws.

[1] Now COAG Legislative and Governance Forum on Consumer Affairs.

[2] *Contribution of the Not-for-Profit Sector – Productivity Commission Research Report,* January 2010, at page 143 (hereafter Productivity Commission NFP Report).

[3] Productivity Commission NFP Report at page 139-142.

1 A multiple regulator national framework

The development of a framework for cooperation between state and territory governments and the Commonwealth is the most significant step to achieve a nationally-consistent approach to fundraising regulation. This is not simply a matter of jurisdictions agreeing to introduce similar pieces of legislation or to move to one piece of legislation to apply nationally.

This framework would need to clearly articulate the relationship between state and territory regulators and the proposed ACNC and their respective jurisdictions. Matters for jurisdictions to agree on are:

a. Approach to implementing nationally consistent fundraising legislation;
b. Approach to administering fundraising legislation including national coordination of education, monitoring, compliance and enforcement activities;
c. The inter-governmental agreement (IGA) including governance arrangements such as voting, and the process for agreeing to and implementing future legislative amendments and the making of regulations and codes. This IGA should also set out the jurisdiction's agreement to the level of harmonisation and coordination efforts;
d. Integration or coordination of systems and processes required for the 'report-once-use-often' general reporting framework (such as information exchange or a central database), and any proposed national register of cross-jurisdictional fundraising organisations or activities;
e. Process for developing and agreeing to the contents of nationally consistent fundraising legislation (see Section 2 below);
f. Timeframes for implementation; and
g. Transitional arrangements.

Victoria notes the discussion by the Commonwealth Treasury on pages 7 and 8 of the Fundraising Paper of some of the issues and options for implementing a nationally consistent approach to fundraising regulation for charities that register with the proposed ACNC.

Victoria supports a national framework based on a model of multiple regulators administering consistent fundraising legislation and delivering support services to NFP entities. The role of state regulators in the NFP sector is significant as the majority of NFP entities are small and local organisations.[4] As to the matters above:

a. Victoria suggests that state and territory jurisdictions should aim towards implementing consistent legislation rather than uniform legislation based on the Commonwealth proposed model. The approaches of consistent and uniform legislation were discussed in the discussion paper prepared by Victoria in 2011 for MCCA and shared with all jurisdictions through the Fundraising Working Party. For completeness, the distinctions between the approaches are set out in Appendix A.

b. Victoria intends to maintain existing levels of protection and assurance for the Victorian community. Therefore, if the Commonwealth intends to introduce specific fundraising legislation, this would sit alongside Victoria's fundraising legislation. Victoria notes that Victoria cannot be expected to pass complementary reforms to any Commonwealth initiative that is introduced unilaterally or without upfront agreement. Victoria notes that under the current constitutional arrangements the power to regulate incorporated associations and co-operatives resides with state governments. The Corporations Agreement 2002 explicitly excludes Commonwealth regulation of incorporated associations and co-operatives. Victoria is thus concerned about how the Commonwealth proposes to address constitutional issues related to any dual coverage. Victoria requests greater clarity from the Commonwealth about how it proposes its new legislation and the proposed ACNC would interact with existing state and territory legislation and regulators.

[4] Over two-thirds of NFP entities are small unincorporated organisations.

c. An IGA underpins a harmonisation model based on a cooperative federalism framework. As to the extent of cooperation, Victoria believes that jurisdictions should seek to harmonise only matters appropriate for cross-jurisdictional application: approval mechanisms (such as registration), conduct requirements, record keeping, disclosure and reporting provisions.[5] Compliance and enforcement provisions (such as inspections and infringements) are highly specific to jurisdictions' legal systems and thus should not be harmonised. However, coordinating compliance and enforcement efforts would be highly desirable for regulating cross-border or multiple jurisdiction fundraising activity.

   Victoria therefore proposes that the Commonwealth facilitate the drafting of the IGA and agreement by all jurisdictions to the IGA before introducing any new Commonwealth fundraising legislation. The IGA can identify policy outcomes that can be achieved through legislation, and policy outcomes that can be achieved through administrative and logistical coordination between regulators. Victoria notes that, for the Australian Consumer Law (ACL) reforms, the IGA was signed before the contents of ACL could be agreed to and legislation introduced nationally by all jurisdictions.

d. Victoria supports the 'report-once-use-often' concept. However, Victoria notes that implementing this idea requires significant resources to align IT and administrative systems and processes within each jurisdiction and between jurisdictions. Victoria seeks the Commonwealth's confirmation of its intent and commitment to invest in coordinating systems.

e. The process for developing the contents of the national fundraising legislation should be informed by best practice regulatory performance by existing state and territory regulators. There is an opportunity to assess the efficacy of aspects of existing fundraising regulation. This is further discussed in Section 2 below. Also, Victoria supports excising gaming activities from the scope of the Commonwealth's proposed fundraising national legislation as duplication of regulation should be avoided.

f. Victoria is committed to the delivery of coordinated fundraising reforms in a timely manner for the benefit of the NFP sector. Victoria notes that the timeframes for implementing these reforms remain unclear. Victoria recognises that these fundraising reforms would be contingent on the establishment of the proposed ACNC and the proposed statutory definition of "charity" and "charitable purposes". The Commonwealth proposes a phased approach suggesting actions to be taken by state and territory governments. In the interest of coordinated efforts and clarity and certainty for the NFP sector, Victoria seeks the Commonwealth's clarification about its proposed timeframes for such actions so that Victoria can respond in detail about their feasibility and desirability.

Victoria proposes that the appropriate forum to work through the above matters would be the Fundraising Working Party under the auspices of the COAG Legislative and Governance Forum on Consumer Affairs and reporting to COAG through the Standing Council on Federal Financial Relations and the COAG NFP Working Group. As the first step, Victoria requests further details from the Commonwealth in the form of a detailed implementation agenda that addresses the above aspects of national cooperation and how it will consult and seek the agreement of state and territory governments as partners in delivering a nationally consistent fundraising framework.

[5] See the Not-for-profit sub-group final report to the Business Regulation and Competition Working Group on regulation of fundraising, September 2009.

2 Delivering simplified and improved fundraising legislation

It is Victoria's understanding that the Commonwealth's proposed legislation initially would only apply to fundraising activities of "charities" that raise funds for "charitable purposes" (both terms yet to be defined) of an amount that exceeds $50,000 per annum. The proposed law therefore would *not* apply to:

a. entities that do not meet the definition of a "charity";
b. fundraising activities not for "charitable purposes"; or
c. fundraising activities that may generate less than $50,000 per annum.

The Commonwealth is thus introducing legislation in an area where it did not previously legislate. The Commonwealth notes that "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."[6]

The Commonwealth proposes that this new legislation be agreed as a "model Act" that state and territory governments apply or mirror as state laws. The Commonwealth also proposes legislative workarounds and exemptions to state and territory laws to fit around the proposed Act.

Victoria notes that the Commonwealth has indicated that in the longer term the scope of the proposed Act *may* be extended to apply to charitable fundraising by NFP entities (not just charities registered with the ACNC).

Victoria has significant concerns about this approach, principally the lack of clarity and certainty for state and territory regulators, as well as the NFP sector, in both the short and the long term. Moreover, Victoria considers state and territory governments play an important role in the regulation of fundraising, particularly with respect to incorporated associations and co-operatives that are regulated by state governments.

For the purposes of Victoria's responses below, the Commonwealth's proposed fundraising legislation applicable to charities will be referred to as the "interim Commonwealth legislation".

The scope of the proposed interim Commonwealth legislation is to be contrasted with Victoria's broader approach to regulating fundraising activity. The *Fundraising Act 1998* (Vic) covers fundraising activities:

a. generally by a person or organisation (ie not just charities or NFP entities);
b. for purposes other than for commercial purposes (ie both charitable and non-charitable purposes); and
c. for any amount (a threshold of $10,000 applies where volunteer labour is used).

The interim Commonwealth legislation therefore would be inconsistent with Victoria's approach to regulating fundraising activities.

As the interim Commonwealth legislation would operate in parallel with existing state and territory fundraising legislation, the proposal would lead to increased regulatory burden, uncertainty and complexity for NFP entities which would have to:

- determine if they are a charity under the Commonwealth regulatory scheme (and required to register as charity with the ACNC under a separate Commonwealth legislation);
- assess in advance whether their fundraising activities will raise more than $50,000 per annum for charitable purposes (and thus required to register as a fundraiser with the ACNC); and
- comply with new Commonwealth requirements as well as any existing state requirements.

[6] See Fundraising Discussion Paper, page 2.

Current evidence suggests that the level of cross-border and multi-jurisdiction fundraising activity[7] is limited to 450 to 900 organisations and this small cluster would be captured by the Commonwealth legislation. A report by the NFP Sub-Group established by the Business Regulation and Competition Working Group[8] estimated that 450 fundraisers are registered in multiple jurisdictions.[9] The Australian Centre for Philanthropy and Nonprofit Studies notes there are about 900 organisations registered with Australian Securities and Investments Commission (ASIC) with an Australian Registered Body Number (ARBN) that carry on activities across Australian jurisdictional borders.[10] As a draft regulatory impact statement, the Fundraising Discussion Paper has not demonstrated sufficient evidence of quantifiable benefits for the introduction of the interim Commonwealth legislation.

Victoria notes that, while the Commonwealth may need to introduce specific charitable fundraising legislation to grant the proposed ACNC with appropriate regulatory authority, Victoria does not believe that legislation of limited application should be regarded as a model fundraising Act. Further, it appears the Commonwealth assumes a natural progression to cover the field of fundraising activity by all types of NFP entities in the future. However it is not a simple matter to change the scope of the interim Commonwealth legislation so that it applies generally across the board to 600,000 NFP entities in Australia, and in the case of Victoria, other bodies engaged in fundraising activities. Any proposed extension of scope would need to take into account the diversity of fundraisers and fundraising activities.

Further, it appears that the Commonwealth's approach involves multiple coordinated rounds of legislation between federal, state and territory jurisdictions. The Commonwealth's proposal would involve four rounds of enactment of:

1. the interim Commonwealth legislation;
2. state and territory legislation to work around the interim Commonwealth legislation;
3. Commonwealth legislation extending the scope of the interim Commonwealth legislation to apply to NFP entities generally; and
4. a second round of state and territory legislative repeals or amendments.

Victoria believes that this drawn out approach would add to pressures on the sector as it adapts to current reforms and is not in the spirit of simplifying and reducing regulatory burden.

Victoria suggests a comprehensive approach to developing the contents of a national law that considers a fundraising regulatory framework that applies to NFP entities generally, without the need for the introduction of interim Commonwealth legislation. State and territory regulators should be seen as partners in settling the design, policy intent and content of fundraising law that is to be nationally consistent.

Victoria shares the views of the Productivity Commission that streamlining and updating fundraising legislation is achievable despite existing jurisdictional differences. It is Victoria's view that differences between state and territory fundraising regimes should not be seen as an obstacle to harmonisation efforts. Differences between the existing regimes are often a result of policy innovations in response to local circumstances. This is an opportunity to assess their relative merits and develop simplified and improved laws. It is important to conduct due diligence in analysing the policy intent, the detriment addressed, evidence of effectiveness (or failure) and the context underpinning the existing legislative approaches.

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[7] Related to this is the perceived legislative gap in internet and telephone fundraising. However, a gap does not exist, as internet fundraising activity is regulated under some state fundraising laws that apply to any mode of fundraising (as they are drafted for general application). See further discussion by the Australian Centre for Philanthropy and Nonprofit Studies at https://wiki.qut.edu.au/display/nmlp/The+Nonprofit+Model+Law+Project.

[8] September 2009.

[9] Based on analysis of the state and territory registers of fundraisers. The report notes that this may be considered as a lower estimate.

[10] https://wiki.qut.edu.au/display/nmlp/The+Nonprofit+Model+Law+Project

Detailed comparative analysis of the different regimes and proposals for best practice was completed by the Fundraising Working Party in February 2011. Victoria recommends that this process continue, to reach agreement on nationally consistent fundraising legislation. Upon such agreement, only two stages of legislative enactments would be required: enactment by a host jurisdiction (which can be a state or territory government or the Commonwealth), and enactment by remaining jurisdictions. A precedent model is the Co-operatives National Law currently being implemented by state and territory governments. This model involves a host jurisdiction, in this case NSW, passing the Co-operatives National Law (CNL) that was agreed to by state and territory regulators. Other jurisdictions will either adopt the CNL or pass consistent legislation.

Finally, Victoria notes that one area of concern in fundraising regulation is the issue of disclosure of the costs of fundraising and use of funds. There is an opportunity to initiate important policy reforms in this area. Victoria suggests that certainty and clarity provided by an accounting standard would assist the sector. Victoria notes that efficiency in resource allocation is not (and nor should it be) a definitive measure of the impact or outcomes of NFP activities funded by donations. However, allocative efficiency is nonetheless a useful tool for assessing the management of funds.

Victoria is willing to take this opportunity with the Commonwealth and other jurisdictions to further reduce regulatory burden without compromising the quality of protection and support for fundraisers and the donating public. Victoria will continue to work cooperatively and constructively with Commonwealth Treasury, and state and territory regulators. Victoria welcomes further discussions on the regulatory framework and contents of the law with relevant parties and stakeholders.

Appendix A – Options for a national legislative framework

Past inquiries have called on the Commonwealth, state and territory governments to work towards consistency, uniformity or harmonisation using one or more of these options as a means to reduce compliance costs.

Victoria sets out its understanding of these distinct options as follows:

1. **Uniform legislation**

The options for implementation are:

a. Development of a national template or application of laws legislation. One jurisdiction (the 'host' jurisdiction) would enact legislation containing all of the agreed substantive provisions that would then be adopted and enacted by all jurisdictions that are party to the agreed scheme; or

b. The Commonwealth can assume sole regulatory responsibility for fundraising activity. This would require a referral of power to the Commonwealth by state and territory governments.

2. **Consistent legislation**

The options for implementation are:

a. *A complementary legislative scheme*
   This scheme would require all jurisdictions to work together to develop and pass separate but consistent pieces of legislation. Broad consistency can be achieved without requiring that all legislation be identical. Core components of the legislation could be standardised across jurisdictions but with some flexibility over details (which may include exemptions from regulation).

b. *An alternative consistent legislative scheme*
   This scheme can be considered to be a variation upon a national template or application of laws approach. This approach would require jurisdictions to agree on the essential elements to be included in fundraising legislation. Participating jurisdictions can pass their own legislation that contains these essential provisions but could also be more or less extensive than the initiating or host legislation.

c. *A reciprocal legislative scheme*
   This scheme would entail participating jurisdictions recognising, on a reciprocal basis, the status conferred under legislation enacted by the other jurisdictions (ie recognising the registration or licensing of a fundraiser by another state or territory regulator for the purposes of authorised fundraising activity within their own jurisdiction). This approach may also, for example, allow a fundraiser operating nationally or in a number of states to be registered and to report to one jurisdiction only, provided that there was also an agreed approach for the exchange of regulatory information between jurisdictions.