

FUNDRAISING INSTITUTE AUSTRALIA**SUBMISSION IN RESPONSE TO CONSULTATION PAPER
SCOPING STUDY FOR A NATIONAL NOT-FOR-PROFIT REGULATOR
(January 2011)****SUBMISSION COVER SHEET**

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FUNDRAISING INSTITUTE AUSTRALIA

SUBMISSION IN RESPONSE TO CONSULTATION PAPER - SCOPING STUDY FOR A NATIONAL NOT-FOR-PROFIT REGULATOR (January 2011)

Fundraising Institute Australia (FIA) endorses the concept of a national Not-for-Profit (NFP) regulator.

FIA comments on the issues in which the Consultation Paper has specifically invited comment as follows.

Clauses 37 - 41

The goals of NFP Regulation

Q1 Are these goals appropriate and adequate for national regulation? Which of these are most important?

FIA supports the goals of good governance, transparency and accountability to underpin strong philanthropic engagement in the community. The recommendations for regulation in clause 38 are sensible measures which should avoid replication of reporting among the various entities.

The Productivity Commission made the following recommendations:

To promote confidence in the not-for-profit sector and reduce regulatory burden, Australian governments, initially through the COAG Business Regulation and Competition Working Group, should:

- Agree to and implement harmonised fundraising regulation and mutual recognition across Australia;
- Support the development of a fundraising register for cross jurisdictional fundraising organisations, to be administered by the proposed national Registrar;
- Endorse the adoption by all governments of the Standard Chart of Accounts for reporting by not-for-profits in receipt of government grants or service contracts;
- Ensure that the Standard Business Reporting initiative be expanded to include reporting requirements by not-for-profits.

FIA has long advocated these measures, in particular harmonisation of fundraising legislation and adoption of standardised accounting practices. There is an urgent need to reduce the regulatory burden for fundraisers, which suffer from the present lack of harmonisation, making national campaigns more expensive and less efficient.

FIA believes that an important first step in meeting the challenge of drafting harmonising legislation is engaging with State and Commonwealth

governments and other relevant stakeholders. Public sector support is a critical factor in the growth of the not-for-profit sector, particularly where governments provide funds for private charities to administer and distribute funding (Salamon and Anheir, 1999, *The emerging sector revisited*, Baltimore, Centre for Civil Society Studies, Institute for Policy Studies, Johns Hopkins University).

While current State government regulation manages financial risk (although not for the significant number of organisations exempt from State regulation), there is no overarching national compliance to protect reputational risk among NFPs.

Industry regulation establishes reporting standards and monitors accountability and transparency of fundraising practices, enhancing ethical practice and professional standards alongside a legislative framework. FIA has taken the lead on a national level in developing standards of fundraising practice which cover both ethical and practical requirements in all areas of modern fundraising practice. FIA members must comply with the FIA Principles and Standards of Fundraising Practice as a condition of their membership of FIA. Compliance is monitored and when required, enforced, by FIA's Ethics Committee, which is drawn from senior members of FIA, and reports to FIA's Board.

FIA's own ethical principles, as stated in FIA's Code of Ethics and Professional Conduct are:

Honesty	FIA members should act honestly and truthfully so that public trust is protected and donors and beneficiaries are not misled.
Respect	FIA members should act with respect for the dignity of their profession and their organisation and with respect for the dignity of donors and beneficiaries.
Integrity	FIA members should act openly and with regard to their responsibility for public trust. They shall disclose all actual or potential conflicts of interest and avoid any appearance of ethical, personal or professional misconduct.
Empathy	FIA members should work in a way that promotes their purpose and encourages others to use the same professional standards and engagement. They shall value individual privacy, freedom of choice, and diversity in all its forms.
Transparency	FIA members should stimulate clear reports, about the work they do, the way donations are managed and disbursed, and cost and expenses, in an accurate and clear manner.

Q2 Are there any other goals for national regulation?

It is important to distinguish between charities and other types of NFPs. Charities aim at accruing a surplus for distribution according to their missions, which must include a public benefit. NFPs of other types include licensed clubs which do not share the interests of charities as they are responsible only to their members and do not distribute the surplus for the public benefit but apply it only for the benefit of their members. Education and health NFPs have other kinds of regulation to comply with which do not apply to charities. The majority of NFPs are small grass roots organisations which do not have sufficient incomes to pay tax or employ staff. Therefore, a “one size fits all” regulation is inappropriate because of the different needs of charities and other types of NFP.

Research has shown that the regulatory environment governing the establishment and operation of NFPs plays a critical role in sustaining and encouraging them (Salamon, 1997, *The International Guide to Nonprofit Law*, John Wiley and Sons; Lyons, M, 2003, “The legal and regulatory environment of the third sector” *The Asian Journal of Public Administration*, 25(1), pp 87-107) The regulatory environment and specific laws can either support the development of a healthy NFP sector or stunt its growth.

The Johns Hopkins Comparative Nonprofit Sector project examined the relationship between the regulatory environment and the NFP sector. The data showed that a country’s laws and legal framework favouring the NFP sector is a positive factor in developing the NFP sector in that country; the countries with the largest NFP sectors had the most supportive regulation (Salamon and Toepler 2000, “*The influence of the legal environment on the development of the nonprofit sector*” Working Paper 17, Centre for Civil Society Studies, The Johns Hopkins University Institute for Policy Studies).

Clauses 45 – 50
Legal Forms

Q3 What should the scope of a national regulator be? What types of entities should be regulated by a national NFP regulator?

There is an urgent need to reduce the regulatory burden for fundraising by NFPs. At present, regulation of NFPs shows scant attention to being proportional to risk. Realistically, the compliance and administrative burden should be reduced for SMEs, the majority of NFPs being small and their fundraising posing little risk to public confidence in accountability for their gifts. While there are over 700,000 NFPs, only 59,000 employ staff and pay tax. The vast majority are small, volunteer-run, community-based organisations for sporting, cultural or community activities.

A new national framework should regulate fundraising of medium to large NFPs in their fundraising activities.

Q4 Should some legal forms be treated differently? If so, why?

FIA is of the view that small unincorporated associations do not need to be formalised, as their form is sufficiently covered by common law and existing laws of association. Small unincorporated associations generally do not handle large sums of money or carry out extensive activities and their members tend to prefer informal organisation for these reasons. The vast majority of NFPs are small and their activities, including fundraising, pose little risk to public confidence in accountability. The need is for streamlined regulation of medium to large NFPs to facilitate their fundraising activities while maintaining public confidence in their accountability.

The Productivity Commission suggested a limit of \$150,000 for State-only registration. This is appropriate, as it concurs with the GST reporting limit for not-for-profit associations.

FIA notes that the Australian Business Name registration via Australian Business Registry is for the primary purpose of managing the GST scheme, rather than identifying businesses, and does not provide legal rights. Therefore, it is not an appropriate means for identification of small unincorporated associations.

Clauses 51 – 58 **Charitable trusts**

Q5 Should the supervision of charitable trusts be moved from the State Attorney-Generals to a national regulator?

Charitable trusts operate differently to NFPs, as they are more correctly regarded as an entity for holding assets such as money and property, rather than an organisation or corporation. The trustee of a charitable trust may be a corporation, but usually their sole or major role is to manage the business of the trust.

Charitable trusts may distribute funds in the form of grants to applicants, but they do not carry out any charitable work directly as they are not permitted to do so by reason of their nature as a trust. Because charitable trusts acquire and distribute funds, and do not carry out charitable services, there is no advantage in nationalising their management or regulation, which can be left to the States or Territories to administer.

Clauses 59-61 **Incorporated associations**

Q6 Should regulation of incorporated associations (including reporting and governance) be moved to a national regulator? Should there be a residual role of the states in regulating incorporated associations?

At State/Territory level, there is little for an organisation to gain from forum shopping, nor is it usually possible to do, for the reason that if an organisation is based in a particular State/Territory, it must be registered in that State/Territory.

With State/Territory registration, this means NFPs must register in each State/Territory in which they operate as a separate entity, which means increased costs in administration, reporting and registration fees. The only way at present in which an organisation can register on a national basis is as a public company limited by guarantee, which involves complex and costly reporting requirements, such as the need for an independent audit to be conducted annually, regardless of the income generated. Any surplus is distributed to members on winding up, which may not be in the best interests of the organisation. The usual entity of a private company is not suitable for not-for-profit organisations, as it requires the company to be responsible only to its shareholders, which conflicts with the mission of a not-for-profit organisation to carry out some purpose for the benefit of the wider community.

A Commonwealth legal structure for not-for-profit organisations would enable organisations to operate nationally without the need to replicate reporting and administration.

Clauses 62 – 65

Access to taxation concessions

Q7 What impacts would simplifying and streamlining mechanisms for the assessment, granting and monitoring of concessional tax treatment have on the NFP sector? In particular, what impacts would this have on small and new NFP entities?

FIA supports the work of Queensland University of Technology in relation to developing a Standard Chart of Accounts for NFPs. This work has been endorsed by the Queensland Treasury. It is primarily designed for small to medium NFPs that may not have an accounting department or a sophisticated accounting system. For consistency purposes, larger NFPs may comply with the Standard Chart of Accounts requirements by adopting the data dictionary component.

In April 2010, the Council of Australian Governments (COAG) agreed that all jurisdictions would adopt the Standard Chart of Accounts, where possible, by 1 July 2010. Government Department use of standardised terminology for account codes (and costs to be included in those codes) in their application/acquittals processes will significantly streamline current reporting requirements and reduce the administrative burden for NFP service providers, particularly those receiving grants from a number of Departments.

<http://www.treasury.qld.gov.au/office/knowledge/docs/nonprofit-organisations/index.shtml>

FIA also notes that CPA Australia also endorses a standardised method of accounting for not-for-profit organisations, as set out in its report, *Financial Reporting by not-for-profit entities*, 2000.

Notwithstanding the work already done, the cross-industry support and the support of COAG, no standard of accounting for not-for-profit organisations has been adopted. FIA is of the view that without national government support, adoption of a standard will be unlikely because of the difficulty in achieving compliance, given the multiplicity of State/Territory compliance regimes.

Q8 What are the likely compliance cost savings from improvements to taxation arrangements?

Research by The Allen Consulting Group concluded that savings in Victoria alone would exceed \$24 million per years, leading to a total savings over 10 years of more than \$200 million (The Allen Consulting Group, *Review of NFP Regulation*, 2007). If applied to the whole of Australia, savings to charities over a 10 year period would easily exceed \$1 billion.

The Allen Consulting Group reviewed the costs of compliance for the State Services Authority in Victoria in 2007. It concluded that considerable savings could be made by the following measures:

- Removing requirements for annual returns;
- Improving governance arrangements;
- Removing prohibitions on trading;
- Improving the consistency and reducing the duplication in data and reports required by government departments;
- Increasing access to quality standards across government departments and programs;
- Improve the consistency in financial and accounting terms for grant reporting as well as the measures and approaches used by government departments to account for grants;
- Improve information for NFPs to reduce costs to associations in searching and submitting information.

FIA also refers to the following research:

McGregor-Lowndes, Myles & Ryan, Christine M. (2009) [Reducing the compliance burden of nonprofit organisations : cutting red tape](#). *Australian Journal of Public Administration*, 68(1), pp. 1-18.

Ryan, Christine M., Newton, Cameron J., & McGregor-Lowndes, Myles (2008) [How Long Is A Piece of Red Tape? The Paperwork Reporting Cost of Government Grants](#), CPNS Working Paper No. 39.

Q9 Does the current complexity of the taxation framework discourage entities from applying to access tax concessions?

Australian charities follow a fee dominant model of fundraising. 63% of funds are privately raised. Surprisingly, private funds are not raised from private philanthropy, but from fees and payments for goods and services, rather than reliance on government funding (Salamon and Anheir, 1999, *The emerging sector revisited*, Baltimore, Centre for Civil Society Studies, Institute for Policy Studies, Johns Hopkins University).

While the market in Australia for not-for-profit services is large, further growth is limited because of the dependence on private fundraising. As only about 30% of funding in Australia comes from government, with the remainder raised privately, further support by government will increase the NFP sector's efficiency and effectiveness.

One way of doing this is by increasing the available range of Deductible Gift Recipients (DGRs). Gifts to charities have been deductible in Australia since the introduction of Commonwealth income tax legislation in 1915 (O'Connell, *The tax position of charities in Australia – why does it have to be so complicated* (2008) AT Rev 17 at 21.) Treasury has estimated that the cost of providing gift deductibility was \$710 million in 2007-2008 (O'Connell, 2008, citing Treasury, *Tax Expenditure Statement 2006*, item A64). By contrast, the general level of giving in Australia is around \$11 billion (Giving Australia, *Research on Philanthropy in Australia*, Summary of Findings, 2005). Given the value of revenue from charities in Australia, this is a very modest level of subsidy, being much less than 1 per cent of all giving.

Given the small cost of gift deductibility compared to the productivity of the not-for-profit sector, there is no good economic reason to reduce this level of subsidy; or waive tax deductibility; or reduce the number of DGRs. Rather, there is a solid argument for government support to be increased for a sector which is so valuable to the Australian community, both economically and socially.

Clauses 66 - 70 Regulation and Supervision

Q10 What value would educational and compliance initiatives managed by a new national NFP regulator provide to NFP entities?

Education and compliance are very different roles, although a national regulator if properly resourced should be able to do both. The role of education is to inform NFPs about their obligations and promote the role of the NFP regulator. The role of compliance is to ensure that NFPs do in fact meet their obligations and exercise their responsibilities in a way which is publically accountable.

FIA is involved in both education and compliance for its members.

FIA offers two professionally recognised qualifications open to Australian and international students by distance education. These are the Fundraising Management Diploma (FMD) and the Fundraising Practice Certificate (FPC).

In 2009 FIA introduced its national Skills 123 curriculum, which is delivered Australia-wide by FIA's most experienced accredited fundraisers. Each Skills module builds on the knowledge gained in the previous workshop, offering valuable theoretical concepts and practical applications for all levels and types of fundraising.

Skills 123 training consists of three separate workshops:

Skills 1 – The Foundations of Fundraising

Skills 2 – Building on the Foundations of Fundraising

Skills 3 – Professional Skills – Senior Level Fundraising

The Foundations of Fundraising is an ideal introduction to the fundraising sector. It provides a solid foundation for all aspects of fundraising. Students then progress to Skills 2. This workshop explores in depth the tools and concepts introduced in Skills 1. Skills 3 is a Senior Level Fundraising workshop, designed to build on each participant's practical experience with a management focus.

Skills 123 training is an excellent learning and networking opportunity. Completion of all three modules provides accreditation towards the Fundraising Management Diploma.

FIA is the only peak organisation in Australia which has developed an extensive body of Standards covering all aspects of fundraising practice. They were developed with the assistance of FIA senior members with current expertise in the area of each Standard.

Separate Standards are necessary as the fundraising practices in these areas are completely different to each other. These Standards are mandatory for FIA members. The Standards cover both ethical considerations of fundraising practice and guidelines as to how to conduct particular fundraising practices. FIA considers that it is crucial for fundraisers to not only know how to use a particular fundraising technique, but also to understand the ethical basis underlying the technique.

FIA's Standards include:

- Standard of Charitable Gaming Fundraising Practice
- Standard of Charitable Telemarketing Fundraising Practice
- Standard of Direct Mail Fundraising Practice
- Standard of Electronic Fundraising Practice
- Standard of Events Fundraising Practice
- Standard of Face to Face Fundraising Practice
- Standard of Grants Fundraising Practice
- Standard of Overseas Aid Fundraising Practice

- Standard of School Fundraising Practice

Clauses 71-101 Reporting

Q 11 What benefits would a 'report once, use often' model of reporting offer?

A streamlined model of reporting would reduce compliance costs to NFPs.

Q12 What information do NFP entities currently provide to government agencies? Do these include general purpose financial reports and fundraising reports? What other reports are currently required? What do the reporting requirements involve? What information is required for the purposes of grant acquittals?

For incorporated associations, information required by government agencies is different in every State/Territory.

Public companies limited by guarantee report to ASIC and have the same reporting and auditing requirements as other public companies.

Q13 How significant is the compliance burden imposed by requirements for acquittal of grants? Where could these be simplified?

As an example of the types of requirements recommended for acquittal of grants, FIA refers to its Standard of Grant Fundraising Practice, which sets out best practice for application for grants. The basic requirements for application and acquittal in the Standard are set out below:

5.1 A Fundraiser should comply with the key steps to make a Grant application which are:

When applying for a Grant,

- a) establish a proposal consistent with the Objects of the Grant seeking Organisation, including the objectives, the rationale and the expected results; and
- b) prepare a budget in accordance with section 6;

After the award of a Grant,

- c) write a report for the Grant making Organisation or Fund about the Grant, evaluating the outcomes set for the Grant and including any information required by the Grant making Organisation or Fund for the acquittal of the Grant.

5.2 A Fundraiser should not make Grant applications that:

- a) do not meet the guidelines for the Grant application; or
- b) are made to a Fund or Organisation whose Objects are not consistent with the Objects of the Organisation represented by the Fundraiser, to avoid making Grant applications which will not be considered.

5.3 If the Grant making Organisation or Fund requires the Fundraiser to enter into an agreement, the Fundraiser must comply with the requirements of the agreement, subject to section 6 of this Standard, which prevails in the event of a conflict.

Q14 What benefits would the establishment of a NFP sector information portal have for the public, the sector and the government? What information should be available on the portal?

Establishment of an information portal would enhance public confidence in NFPs by enabling members of the public to access consistent and accurate information about NFPs.

The type of information to be included in the portal is also important. Studies have shown that donors use very different, personal measures of trust in a charity compare to the economic, financial or legal measures which tend to be used by regulators. Donors prefer to assess charities by intangible, social measures such as familiarity, word of mouth, or the prominence of the charity in their community. Regulators, on the other hand, tend to require charities to disclose information on fund use (eg ratios between overheads and funds available for the charity's purpose). Therefore, regulators should concentrate on distributing information to donors which informs donors about the effectiveness of the charity, rather than its fund allocation. (Szper, R and Prakash, A: *Charity Watchdogs* and the Limits of Information- based Regulation *Voluntas* (2011) 22: 112 – 141)

Q15 What information might need to be provided to a national regulator but not made public through a NFP information portal?

The NFP information portal could contain the following information:

- identify the names, addresses and registration details of NFPs;
- forms to facilitate compliance;
- information about the establishment and operation of NFPs.

Financial information, even in summary form, should not be publicly available, as this would disadvantage NFPs compared to the private sector. Private for-profit companies do not have their financial information publically available and are able to keep their dealings confidential.

Q16 What benefits would be provided by the application of SBR to the NFP sector, following the implementation of the SCOA so as to minimise any compliance costs?

SCOA has not yet been implemented, and therefore, it is not possible to assess the benefits of SBR for NFPs. FIA submits that as NFPs are not businesses, SBR would have to be modified to meet their needs.

Q 17 Given its voluntary nature, are many NFP entities likely to use SBR? What barriers, such as preferences for providing reports in paper form or reluctance to upgrade accounting software, might reduce usage of SDR by NFP entities?

NFPs will only use SBR if it meets their needs including recognition that NFPs report differently to for-profit businesses.

Clauses 102- 112 Governance, disclosure and compliance

Q 18 Are the suggested core rules and regulatory framework adequate?

Given the short deadline, it is not possible within the scope of these submissions to answer that question as FIA needs adequate time to canvass the opinions of its members.

FIA requests a further round of submissions in order to respond with the appropriate level of detail.

Q19 What powers does the regulator require to improve governance and regulatory oversight?

FIA submits that the Australian government should facilitate all forms of fundraising practice by:

- streamlining regulation,
- facilitating compliance and reducing compliance costs, and
- encouraging compliance with fundraising industry standards of fundraising practice.

Clauses 113- 116 Fundraising

Q20 What role should a national regulator play with respect to fundraising?

There are many current forms of modern fundraising practice which are both cost-effective and productive. The fundraising industry is innovative and new forms of fundraising are continually being developed throughout the world and

when developed, are readily taken up in Australia. The NFP regulator should tread lightly so that innovation in fundraising technique is not fettered

Clauses 117 – 127

Review and appeal procedures

Q21 What problems arise from the complex interrelationship between Commonwealth, State and Territory responsibilities for this area?

While current State government regulation manages financial risk (although not for the significant number of organisations that are exempt from State regulation), there is no overarching national compliance regime to protect reputational risk among not-for-profit organisations. Industry regulation establishes reporting standards and monitors accountability and transparency of fundraising practices, enhancing ethical practice and professional standards alongside a legislative framework.

Regulatory risk should be managed nationally through the support and promotion of industry self regulation and the adoption of codes of best practice in order to promote public trust and confidence in professional fundraising.

FIA believes that moving toward national harmonisation and national regulation of fundraising laws is positive and deserves encouragement. The national harmonisation of fundraising legislation will be more successful and effective if it takes place together with wider reform of the regulatory environment of the not-for-profit sector, such as the development of national accounting standards for the sector. This is supported by:

- Woodward and Marshall, *A better framework – reforming not-for-profit regulation*, University of Melbourne, Centre for Corporate Law and Securities Regulation, 2004;
- The Commonwealth Government commissioned *Inquiry into Charitable and Related Organisations*, 2001;
- The Industry Commission's report on *Charitable Organisations in Australia*, 1995;
- CPA Australia, *Financial Reporting by not-for-profit entities*, 2000.

FIA supports the general thrust of these reports' recommendations on national harmonisation of regulation. In particular, FIA suggest that consideration be given to the following evidence-based recommendations in Woodward and Marshall (2004):

- Introducing a single specialist not-for-profit legal structure;
- Developing and implementing specific national accounting standards;
- Unifying the reporting and disclosure obligations for not-for-profit organisations across jurisdictions;
- Developing a simple Standard Information Return similar to those used in the USA, UK and New Zealand as a means for not-for-profit

organisations to provide relevant information on their purposes and activities.

Q 22 What might be the implications of the different approaches of referral of powers or harmonisation of legislation?

FIA has long advocated these measures, in particular harmonisation of fundraising legislation and adoption of standardised accounting practices. There is an urgent need to reduce the regulatory burden for fundraisers, which suffer from the present lack of harmonisation, making national campaigns more expensive and less efficient. Regulation shows scant attention to being proportional to risk. Realistically, the compliance and administrative burden should be reduced for SMEs, the majority of not-for-profit organisations being small and their fundraising posing little risk to public confidence in accountability for their gifts. A new national framework could regulate fundraising of medium to large not-for-profit organisations in their fundraising activities.

While current state government regulation manages financial risk (although not for the significant number of organisations exempt from state regulation), there is no overarching national compliance to protect reputational risk among the not-for-profit organisations.

Industry regulation establishes reporting standards and monitors accountability and transparency of fundraising practices, enhancing ethical practice and professional standards alongside a legislative framework. FIA has taken the lead on a national level in developing standards of fundraising practice which cover both ethical and practical requirements in all areas of modern fundraising practice. FIA members must comply with the FIA Principles and Standards of Fundraising Practice as a condition of their membership of FIA. Compliance is monitored and when required, enforced, by FIA's Ethics Committee, which is drawn from senior members of FIA, and reports to FIA's Board.

FIA believes that an important first step in meeting the challenge of drafting harmonising legislation is engaging with State and Commonwealth governments and other relevant stakeholders. Public sector support is a critical factor in the growth of the not-for-profit sector, particularly where governments provide funds for private charities to administer and distribute funding (Salamon and Anheir, 1999, *The emerging sector revisited*, Baltimore, Centre for Civil Society Studies, Institute for Policy Studies, Johns Hopkins University)

FIA supports the work of Queensland University of Technology in relation to developing a Standard Chart of Accounts for not-for-profit organisations. FIA notes that CPA Australia also endorses a standardised method of accounting for not-for-profit organisations, as set out in its report, *Financial Reporting by not-for-profit entities*, 2000. Notwithstanding the work already done, the cross-industry support, and support from COAG, no standard of accounting for not-

for-profit organisations has been adopted. FIA is of the view that without national government support, adoption of a standard will be unlikely because of the difficulty in achieving compliance, given the multiplicity of State/Territory compliance regimes.

Clauses 128 – 145

The form of the national regulator

Q23 What form of the national regulator best meets the objectives of simple, effective and efficient regulation of the NFP sector?

FIA supports the recommendations in the Senate Economics Committee Inquiry - *Disclosure regimes for charities and not-for-profit organisations* (September 2008). The Senate Inquiry raised the need for regulatory reform of the sector. Organisations exhaust valuable resources complying with the onerous and conflicting legislation governing not-for-profit organisations in each State and Territory. As there have been a number of inquiries into regulation of charities at both State and Commonwealth level, it is crucial that if a regulator is established, it provides overarching regulation as a single regulator, rather than the replication of numerous, repetitive and often onerous regulation regimes as is presently the case.

The key issues raised by the Senate Inquiry are:

- Multiple reporting requirements and disclosure regimes (Commonwealth, State, Territory, local);
- Significant regulatory burden;
- Exemptions which mean that not-for-profit organisations are differently regulated;
- Lack of recognition for diversity across the sector (regulation is not proportional to risk);
- Current disclosure regimes attempts to measure efficiency (despite the lack of a national accounting standard) rather than effectiveness of charitable and not-for-profit activities.

FIA members support the establishment of a regulator which addresses these issues, with an aim to achieving the following goals:

- enabling the work of the fundraising industry by means of light-touch regulation; and
- closing the gap between statutory and self-regulation.

At present, with State/Territory registration, incorporated associations must register in each State/Territory in which they operate as a separate entity, which means increased costs in administration, reporting and registration fees.

The only way at present in which an organisation can register on a national basis is as a public company limited by guarantee, which involves complex

and costly reporting requirements, such as the need for an independent audit to be conducted annually, regardless of the income generated. Any surplus is distributed to members on winding up, which may not be in the best interests of the organisation.

The usual entity of a private company is not suitable for not-for-profit organisations, as it requires the company to be responsible only to its shareholders, which conflicts with the mission of a not-for-profit organisation to carry out some purpose for the benefit of the wider community.

A Commonwealth legal structure for NFPs would enable organisations to operate nationally without the need to replicate reporting and administration.

A separate independent regulator for charities and not-for-profit organisations, similar to the Charities Commissions of UK and New Zealand, would be a more appropriate regulatory and compliance fit, as it would be dedicated to the needs of NFPs.

Australian regulation does not differentiate between social enterprises and charities, and does not address the differences in their operations. FIA recommends the consideration of a model of regulation that recognises this difference, similar (but not identical) to the UK model, which regulates social enterprises as Community Interest Companies by the Regulator of Community Interest Companies.

However, FIA notes that the UK system of Community Interest Companies would not exactly fit a Commonwealth model, for several reasons. These are:

- The UK model is based on the needs of a particular community and therefore the CIC can be highly localised. There is no need in Australia for such a model, as the State/Territory system for incorporated associations meets the needs of small, local not-for-profit organisations.
- The emphasis on attracting investment is also not appropriate to Australian not-for-profit organisations, as this would conflict with State/Territory fundraising and charity legislation.

While there would be economy and convenience to the Commonwealth in utilising the structure of an existing department as a regulator, FIA submits that neither the ATO nor ASIC would be an appropriate regulator, as the needs of charities and not-for-profit organisations are not aligned with the needs of for-profit corporations serviced by these bodies. FIA supports the creation of an independent national NFP regulator.

The ATO's role is to administer and enforce the Australian taxation laws. Apart from issuing ABNs through the Australian Business Register, the ATO does not have any registration or supervisory duties over corporations or incorporated or unincorporated associations. The role of the ATO is not compatible with or adaptable to the regulation of NFPs.

The ATO does not have the legal jurisdiction or administrative capacity to coordinate the roles of State/Territory agencies or exercise other supervisory functions. FIA notes that the Australian Business Name registration via Australian Business Registry is for the primary purpose of managing the GST scheme, rather than identifying businesses, and does not provide legal rights. Therefore, it is not an appropriate means for identification of small unincorporated associations.

The ATO's counterparts in the USA and Canada have been unable to develop the necessary flexibility or openness to meet the needs of NFP regulation. This has resulted in regular demands from the US and Canadian NFP sectors for an independent regulator.

ASIC's duty is to ensure compliance with the Corporations Act 2001, an act which does not apply to NFPs. As an example of the difficulties that can be caused by trying to fit not-for-profit organisations into a corporate regime, the reporting and compliance regime imposed by ASIC on companies limited by guarantee is exceptionally onerous given the reporting requirements for incorporated associations at State/Territory level. Companies limited by guarantee comprise only 1% of all corporations, and are established by their members as not-for-profit organisations, but are treated as if they were profit making ventures for the purpose of governance.

FIA is of the view that small unincorporated associations do not need to be formalised, as their form is sufficiently covered by common law and existing laws of association. Small unincorporated associations generally do not handle large sums of money or carry out extensive activities and their members tend to prefer informal organisation for these reasons. The majority of not-for-profit organisations are small and their activities, including fundraising, pose little risk to public confidence in accountability. The need is for streamlined regulation of medium to large organisations to facilitate their fundraising activities while maintaining public confidence in their accountability.

Q25 Are there benefits from establishing an interim regulator through an existing Commonwealth regulator, to undertake immediate reform?

An interim regulator would not be appropriate as it would not be sufficiently developed to manage the interrelationships between the Commonwealth and State or Territory authorities. Because of this, it would increase the administrative and regulatory burdens on NFPs as duplication or increased reporting requirements would inevitably follow.

FIA submits that the proposed regulator be properly developed and funded before implementation to streamline the transition process from State or Territory to Commonwealth administration.

Clauses 146 – 158
Sector specific regulation of the NFP sector

Q26 What would be the advantages and disadvantages of incorporating the functions of ORIC and the proposed housing regulator into a national regulator? What alternative approaches are available to avoid duplication?

NFPs cover a wide range of areas for community welfare, medical research, education, environment, sporting, cultural and many other pursuits for the public benefit. Most NFPs have nothing to do with housing or ORIC and therefore it is not appropriate for a national NFP regulator to combine these roles, as different skills and administrative responsibility are required.

Q27 What benefit could flow from a national regulator maintaining a dedicated subsection focusing on indigenous corporations and/or housing?

This is not within FIA's mission and therefore, FIA declines to comment.

Clauses 159 – 164
Funding Implications

Q28 What level of contribution should NFP entities make to the cost of the national NFP regulator?

Costs should be modest, given the huge difference in incomes among NFPs. State and Territory costs of administration are kept at a modest level to ensure NFPs are able to afford compliance requirements. Registration and lodgement fees should be levied at a rate that is affordable for all NFPs

Q29 Should there be a differential cost for smaller NFP entities?

It is appropriate for costs to be differentiated between smaller and larger NFPs, given the huge range of incomes among NFPs. FIA recommends that the limit for paying GST ie under \$150,000 for NFPs be applied to identify which NFPs should pay lower fees.

Clauses 165 – 168
Definitional issues

Q30 Would a statutory definition of charity achieve the goals of greater certainty and administrative efficiency in relation to the determination of charitable purpose, particularly in relation to determining access to taxation concessions and across different jurisdictions and laws?

Traditionally, political lobbying or advocacy has not been considered to be a charitable purpose and therefore, an organisation engaging in such activity

has not qualified for DGR status, so that donations are not tax deductible. But this has changed in Australia with the High Court's progressive decision in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42. (*"the Aid/Watch case"*)

In 2006, the ATO revoked the charitable status of Aid/Watch after it criticised Federal Government foreign aid policy. The reasoning was that political advocacy was not a traditional charitable purpose, which since 1891, covered relief of poverty; advancement of education; advancement of religion; and other purposes beneficial to the community. Under English common law, which is influential in Australia, the rationale was that political purposes could not be charitable because a Court could not ascertain whether a particular political purpose such as a change in the law would be for the public benefit. This has generally been upheld in both the UK and Australia.

The High Court agreed that there is an implied right in the Australian Constitution for all Australian voters to engage in political debate. The Australian Constitution, which is the basis of the Australian political system, allows voters to communicate directly with legislators through referendums, in order to bring about changes in the Constitution. This means that the Constitution itself allows advocacy for legislative and political change and for this reason, the traditional common law must be adapted to be consistent with the requirements of the Constitution. The outcome for charities in Australia is that there is no general doctrine which excludes political objects from charitable purposes. The decision overturns over 100 years of accepted Australian law on the role and purpose of charities, bringing the law up to date with how modern charities work.

This means that charities will now be able to advocate for political change, generate public debate and lobby the government for change on issues that are relevant to the work they do.

By standing up for the right for charities to engage in political debate, the High Court has ensured that Australian charities can now lead the way worldwide in advocating on matters of public benefit.

Q31 Is Parliament a more appropriate body to define charitable status than the courts, given its ability to be more responsive to changing community needs and expectations?

Australia is governed under the Westminster system, which ensures that the three arms of government – Parliament, the Courts and the Executive – are able to exercise checks and balances on each other. While Parliament is the supreme law maker, the courts are able to review both legislation and common law, interpreting these in the light of Parliamentary intention and community expectations. In the *Aid/watch* case, the High Court recognised that 19th century rules for the operation of charities needed review to take into account the social, cultural and technological changes that have occurred to create modern society. The Executive, in the form of the ATO, was applying

outdated concepts to a modern organisation. To date, Parliament has made no response, but it would be a backward step for Parliament to reverse the *Aid/watch* decision by reverting to outmoded 19th century concepts of charitable activities.

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ORGANISATIONS SUPPORTING THE FIA SUBMISSION

- Guide Dogs Victoria
- North Shore Heart Research Foundation
- Global Philanthropic Foundation
- Cerebral Palsy Alliance
- Australian Sports Foundation Ltd
- Eltham College of Education
- Crystal Cathedral Ministries Australia Ltd
- Tony Stacey Management Consulting
- Mondial Fundraising
- Vision Australia
- First Direct Solutions
- Gallipoli Medical Research Foundation
- Cerebral Palsy Alliance
- St Vincent's Brisbane
- Ballarat Grammar Foundation
- Australian Conservation Foundation
- Florey Neuroscience Institution
- Victoria University
- Exodus Foundation
- Bendigo Health Foundation
- Fusion Australia
- What'sOn Consulting
- Indigenous Community Volunteers
- Share Community Appeal
- Henderson Partners
- Focus Fundraising
- Fundraising Management Consultants
- Xponential Philanthropy
- Print National
- Leukaemia Foundation
- Northcott Disability Services
- St Vincent's Hospital (Melbourne)
- Emerson Research
- Very Special Kids
- The Salvation Army
- Alzheimer's Association
- Wheelchair Sports NSW
- Clifford Research Trust
- Cancer Council Tasmania
- Camberwell Grammar School
- Save the Children
- 96 Five Family Radio
- Mater Dei Camden
- ACCESS Ministries
- UNSW
- Guide Dogs SA/NT
- Montrose Access
- University of Melbourne
- Elevate Fundraising
- Baptist World Aid Australia
- Surf Life Saving Foundation
- BAPTCARE
- Mission Australia
- Arthritis NSW
- Royal Children's Hospital Foundation
- Epilepsy Foundation of Victoria
- Children's Hospital Foundations Australia
- The Mailing House
- Social Venture Consulting
- SCOPE

- Very Special Kids
- Epworth Medical Foundation
- The Salvation Army
- Catholic Mission
- Roman Catholic Archaises Brisbane
- Blue Care Qld
- Lawrence Jackson Associates
- Evelyn Mason & Associates
- Cystic Fibrosis NSW
- Rebecca Hazell & Associates
- Let's Talk Marketing
- St John of God Foundation
- Amnesty International
- Mental Illness Fellowship Victoria
- Royal Flying Doctors Service - Tas
- Crystal Cathedral Ministries
- EW Tipping Foundation
- Save the Children
- Melbourne Grammar School
- Cabrini Health
- Social Money Solutions
- Australian Lung Foundation
- Apple Marketing Group
- House With No Steps
- The Trust Company
- CustomCom
- White Lion
- CQ University
- Menzies Inc
- Bluelight
- Home Ground
- Rosemary Wade Consulting
- Cootharinga Northern Qld
- The Chamber Music
- Sir Moses Montefiore Jewish Home
- Variety, the Children's Charity, Victoria
- Mercy Health Foundation
- MS Queensland
- Anglicare Victoria
- Marist Youth Care
- St Vincent de Paul Society
- Parramatta Mission
- Mater Foundation Qld
- St Josephs College
- Medecins Sans Frontiers Aust.
- Cornucopia
- Australia for UNHCR
- Plan International
- Blackbaud Australia
- Greenpeace Australia
- Care Australia
- Steps Disability Qld
- Robe John & Associates
- Cancer Council Victoria
- Interplast Australia
- SPR Australia
- Arts Centre Gold Coast
- Nazareth Care
- Consulate Health Care