

**FUNDRAISING INSTITUTE AUSTRALIA**  
**SUBMISSION IN RESPONSE TO**  
**NSW REVIEW OF CHARITABLE FUNDRAISING ACT 2015**  
**SUBMISSION COVER SHEET**

**Recipient Email:** policy@finance.nsw.gov.au

**Organisation:** Fundraising Institute Australia (FIA)

**Street address:** Level 2, 60 Archer Street

**Suburb/City:** CHATSWOOD

**State:** NSW

**Code:** 2067

**Postal address:** PO Box 642

**Suburb/City:** CHATSWOOD

**State:** NSW

**Postcode:** 2067

**Principal contact:** Mr Rob Edwards

**Position:** Chief Executive Officer

**Phone:** 02 9411 6644

**Fax:** 02 9411 6655

**Email address:** redwards@fia.org.au

NSW Fair Trading  
PO Box 972  
PARRAMATTA NSW 2124

Email: [policy@finance.nsw.gov.au](mailto:policy@finance.nsw.gov.au)

## CHARITABLE FUNDRAISING REVIEW

The Fundraising Institute of Australia (FIA) thanks NSW Fair Trading for its inclusion as a Key Stakeholder in this review process and for seeking our views on retaining or repealing the Charitable Fundraising Act 1991.

FIA is the peak body for Fundraising in Australia representing the interests of over 1500 fundraisers and Organisations in developing best practice standards, providing professional education programs and advocating for the sector with Government and Regulators

FIA has developed the Principles & Standards of Fundraising Practice as the professional fundraiser's guide to ethical, accountable and transparent fundraising. The Principles & Standards are critical to how the fundraising profession is viewed by donors, government, the community and fundraisers. They have been adopted in Korea, Poland and New Zealand.

This submission addresses the high level issues raised in the Discussion Paper and is supported by a more detailed commentary on the substantive issues in the attached **Appendix**.

## OPTIONS

**FIA unequivocally endorses the Repeal option agreeing with the reasons outlined in the Discussion Paper and adding the following in further support.**

*Red tape burden on the NFP sector.* The Discussion Paper quoted the ACNC-commissioned Deloitte Access Economics report which found that the annual regulatory burden associated with fundraising regulations is estimated at approximately \$13.3 million. As NSW is the largest State both in terms of population and charitable donations repeal of the NSW Charitable Fundraising Act, regulations and mandatory rules would result in a considerable reduction in red tape compliance costs.

*Donors would be protected by general law.* As shown by academic research notably that of Professor Myles McGregor-Lowndes of Queensland University of Technology general law rather than fundraising specific legislation is already preferred for such donor protection compliance activity that is required in all jurisdictions.

*Donors would be able to use the various existing sources of information.* Since its establishment in 2012 the ACNC has developed and publicised its extensive database covering charities Australia-wide including those from interstate which may raise funds in NSW. As recommended below, the proposed repeal legislation should allow a period before introduction or an implementation period after introduction to ensure coverage and complementarity between the ACNC and NSW registers.

*Self regulation and reputational incentives in the sector would assist donors to make their choices.* FIA is currently conducting a Fundraising Sustainability and Code Review to prepare for future challenges including regulatory reform. The process is on schedule to be finalised by the end of 2016 and FIA will undertake to work with NSW Fair Trading to assist with the implementation of the repeal legislation, should that occur.

## **OTHER ISSUES**

### **1. Implementation**

FIA notes it is the NSW Government's intention to include Charitable Fundraising Act repeal in a 2016 Spring Clean Bill should a determination be made to repeal it. While in no way wishing to impede the process or progress of possible repeal, this legislation has been in existence for a very long time and NSW would be the first Australian jurisdiction to embark on repeal.

For charities and other fundraising organisations the proposed repeal is a major development representing an important step towards alignment of fundraising regulation nationally.

NSW would be in the forefront of this long-overdue alignment and FIA submits it will be important, if repeal is determined upon, to prepare carefully for implementation to ensure that the community is well-prepared for the change and comfortable that donors will remain protected.

FIA recommends that a period of six months be allowed for sector and public awareness and education either immediately before or after the repeal comes into effect.

### **2. Australian Consumer Law**

The application of ACL to fundraising is raised in the Discussion Paper but will not relate to the NSW situation if repeal takes place this year as the current ACL evaluation process will not be completed until March 2017.

Although the legal, governance and accounting organisations quoted in the Discussion Paper support fundraising being covered by the ACL, at a practical level actual fundraisers particularly members of FIA have considerable reservations.

FIA's submission to the ACL pointed out that giving a donation and paying for a good or a service are entirely different. A charitable donation is a gift for which the donor does not expect anything in return whereas the purchase of a good or service is a transaction in 'trade or commerce'. This means that provisions in the ACL such as statutory cooling off periods are a problem for fundraising.

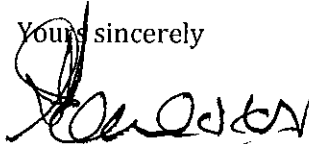
In addition FIA is concerned that coverage under the ACL would result in the imposition of another regulator, the Australian Competition and Consumer Commission, when there is already a recently-established charities regulator at the national level, the ACNC.

Despite FIA's reservation about the expansion of the ACL to cover fundraising, it is recognized that alignment of regulation and reduction of red tape can only occur if there is national legislation covering fundraising with the agreement of the states and territories.

The COAG NFP Reform Council discussion paper on Charitable Fundraising in 2011 proposed that national coverage could be achieved by amendment of either the ACL or the ACNC Act. FIA believes that the ACNC would be a better fit than the ACCC because it already regulates charities and it would avoid duplication of regulators.

If further information is required, please contact the undersigned.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rob Edwards', written over a horizontal line.

Rob Edwards  
Chief Executive Officer  
15<sup>th</sup> July 2016

## APPENDIX

FIA takes this opportunity to comment on certain areas of fundraising practice where government support can facilitate best practice while making compliance easier for charities, in particular small to medium charities.

### 1. Fundraising ratios

FIA is of the view that prescribed fundraising ratios, such as the 50% requirement in NSW, are not relevant to modern fundraising and accounting practices, as they do not adequately reflect the true value of return on investment to charities.

### 2. Self regulation.

FIA supports self regulation as a valuable adjunct to government regulation and is a leader in self regulation with its development of its Principles and Standards of Fundraising Practice.

### 3. Government reporting including public register

FIA supports streamlining and harmonisation of State and Commonwealth legislation, in particular adoption by NSW of ACNC reporting requirements to ease the cost of compliance for small to medium charities.

The ACNC portal is comprehensive, with an effective register of charities and ease of searching. It is national so it captures complete information about charities in Australia. There is no need for a NSW register.

### 4. Applicable legislation

FIA is of the view that it is not necessary to extend the provisions of the Australian Consumer Law to charities. In particular sections 18, 20 and 50 are aimed at regulating corporations. In the absence of any evidence that misleading or deceptive conduct, unconscionability and harassment and coercion are significant problems with Australian charities, the Australian Charities and Not for Profit Commission Act and the Charities Act provide enough safeguards specifically for charities.

## 1. FUNDRAISING RATIOS

The ACNC has stated that it believes that administration costs alone are an unreliable indicator of the extent to which donations make a difference. Some charities which make a real difference may have relatively high administration costs, whereas others are less effective and have low administration costs. Misconceptions about administration costs can lead to unfair assessments of a charity's effectiveness. It is important that charities are measured on their impact and effectiveness, not simply on their administration costs. (ACNC Commissioner's Column 24 June 2015).

ACNC has prepared with QUT a factsheet on the costs of administration of charities, to which we draw your attention. [http://www.acnc.gov.au/ACNC/FTS/Fact\\_administration.aspx](http://www.acnc.gov.au/ACNC/FTS/Fact_administration.aspx)

Some of the points made in this factsheet are:

- In Australia, there are no standards or clear definitions to guide which of the charity's costs should be classified as 'service related' and which should be classified as 'administration'. In the absence of any such standards or guidelines, information about administrative costs is not comparable and often misleading.
- In the absence of any such standards or guidelines, charities commonly implement 'cost centre accounting' procedures to provide internal management information, but these arrangements vary greatly between charities. For example, a charity may employ a



receptionist who answers calls from donors and will therefore need to decide how to classify such wage costs. Information about administrative costs generated by such procedures may not be comparable

- It is better to pay attention to other factors of nonprofit performance: transparency, governance, leadership, and impact as well as costs.

In 2010, the Coalition of Australian Governments agreed to adopt the Charter of Accounts for Not for Profits developed by Queensland University of Technology as the government standard, a measure supported by FIA and CPA. While this measure means that there is now a recognised standard for accounting for not for profits, it does not deal with harmonising State government requirements concerning the cost of fundraising. NSW legislation limits the cost of fundraising for a charitable event to 50% of the gross proceeds of the event. In contrast, Victorian legislation refers only to “reasonable” costs without specifying any measurable amount. Most other states do not address the cost of fundraising in legislation.

FIA’s long held view is that it accepts that the Cost of Fundraising Ratio is one of several indicators that not-for-profit organisations may wish to use for reasons relating to managing their internal systems and costs or for sector specific benchmarking exercises that may be conducted occasionally by fundraising practitioners. FIA remains opposed to any specific percentage or cost of fundraising ratio being included in legislation that applies across all organisations, as it is inequitable and even misleading to do so.

Any regulation on the cost of fundraising should be limited to requiring that a range of information that may be useful and relevant to donors and other stakeholders (e.g. mission and goals, governance structures, fundraising activities, programs and program evaluations) be available and provided by not-for-profit organisations upon request. This model has also received support from the UK Charities Commission inquiry, and expert not-for-profit scholars in Australia (e.g. Woodward and Marshall 2004). It has now been accepted under *the Australian Charities and Not for Profit Commission Act as satisfactory reporting to the ACNC*.

***Recommendation:***

*FIA is of the view that the ACNC reporting model should be satisfactory for NSW reporting requirements.*

## **2. SELF REGULATION, RISK MANAGEMENT AND BEST PRACTICE**

To facilitate risk management and best practice by charities, FIA has long advocated self-regulation, in particular:

- harmonisation of fundraising legislation,
- adoption of standardised accounting practices, and
- development and adoption of professional self regulation.

There is an urgent need to reduce the regulatory burden for fundraisers, who suffer from the present lack of harmonisation, making national campaigns more expensive and less efficient, as there are different reporting and legislative requirements in every State and Territory. In NSW, regulation is not proportional to risk. Charities are over regulated compared to the very low-risk of non compliance.

There have been few reported examples of charitable fraud in NSW, and in the rare cases where they occur, they are the result of non compliance and poor Board supervision; for example, where a

Board does not enforce the requirement that bank accounts be operated at all times by two signatories, which dramatically reduces the risk of fraud or embezzlement. Furthermore, the risk is being reduced by the ACNC, which is actively enforcing compliance by deregistering thousands of charities for non compliance. At present, it has 1,400 charities targeted for revocation.

The Standard of Risk Management AU NZ ISO 31000:2009 provides authoritative guidance on risk management practice for organisations. In 2010, FIA and National Roundtable of Nonprofit Organisations sponsored the PPB Not for Profit Risk Survey 2010 (Standards Australia, HB 266:2010 *Guide for managing risk in not-for-profit organizations*). PPB surveyed the risk management practices of not for profit organisations and compared them to the key components of the recently introduced standard, as there were several significant differences between the 2009 standard and its predecessor. The survey is the most recent survey of risk management practice available. The outcome was encouraging; over 70% of respondents indicated they placed a high level of importance on risk management practices and understood the link between risk management and the organisation's ability to achieve its outcomes.

FIA is the only peak organisation in Australia which has developed an extensive body of Standards covering all aspects of fundraising practice. The ACFID Code of Conduct applies only to charities operating overseas. FIA's Principles and Standards of Fundraising Practice apply to all FIA members within Australia.

Under FIA's Complaint Process, members of the public may complain to FIA about the conduct of FIA members, including any financial complaints. FIA is not aware of any complaints from the public or its members about the financial management of charities.

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 by developing the FIA Principles and 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.

While FIA understands that self regulation cannot supersede government legislation, FIA is of the view that the profession can work more closely with government, both through consultation and by government showing support for FIA's drive for professionalism among fundraisers. One way this could be done is by drawing the public's attention to FIA's Principles and Standards of Fundraising Practice on its website, not necessarily as a formal endorsement, but as an information service.

***Recommendation:***

*FIA submits that an educational focus is more appropriate than an enforcement focus, as the most recent research shows that smaller NFPs pay less attention to formal risk management policy and practices because of budgetary constraints, rather than ignorance of compliance issues.*

FIA welcomes the opportunity to discuss self regulation, in particular ways to enhance public recognition of the Principles and Standards of Fundraising Practice, in more detail if invited to do so.

### **3. GOVERNMENT REPORTING**

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).

Realistically, the compliance and administrative burden should be reduced for small to medium charities. The majority of charities and not-for-profit organisations operating in NSW are small and their fundraising posing little risk to public confidence in accountability for their gifts. The ACNC has recognised this and provided for less complex reporting requirements for small to medium charities.

***Recommendation:***

*FIA submits that it is appropriate for NSW to follow the lead of the ACNC on reporting requirements and accept that reports submitted to ACNC will also satisfy NSW reporting requirements.*

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

- streamlining regulation,
- facilitating compliance and reducing compliance costs,
- unifying the reporting and disclosure obligations for not for profit organisations across jurisdictions, and
- encouraging compliance with fundraising industry standards of fundraising practice.

If is FIA's view that the best way to achieve this is to harmonise NSW compliance requirements, in particular for incorporated associations, with ACNC reporting requirements, to avoid the need for an additional layer of reporting. This would be of particular assistance to small to medium charities, for whom the cost of compliance is often a burden. Larger charities are usually structured as companies limited by guarantee to facilitate national operation. These companies are already regulated by ASIC and ATO as well as ACNC.

FIA's view is that the existing reporting requirements for such companies are sufficient and reports given by such companies to ACNC, ASIC and ATO should satisfy NSW reporting requirements.

#### **4. APPLICABLE LEGISLATION**

FIA does not agree with the proposition that donors are consumers under the Australian Consumer Law (ACL). A consumer is defined under the ACL as a person who receives goods or services from a supplier in exchange for payment. A donor who makes a donation to a charity does not receive anything from a charity except goodwill. A donation made by a donor is a gift to the charity, which is the reason why gifts are tax deductible. A gift is a one way transaction, from the donor to the charity, unlike goods or services, which are provided in a two way exchange between consumer and supplier. This is a fundamental difference long recognised in the common law and to depart from this is a radical idea, which may even adversely affect the tax deductible status of the gift.

The "cooling off" period provision of the ACL is also problematic for charities, as they would be unable to use funds raised during the cooling off period. This would particularly affect smaller charities with limited cash flows.

The Charities Act 2013 defines a charity as a not-for-profit entity created for a charitable purpose for the public benefit (or ancillary to same). This distinguishes charities from companies, which are created for the purpose of distributing profit to shareholders. The public benefit test is contrary to the purpose of the ACL which is to protect consumers from certain practices of profit making entities, when those practices give the profit making entity an unfair advantage over the consumer. Because the charity is for a public benefit, it cannot have an unfair advantage over members of the public, or it would fail its purpose and be dealt with by the ACNC. If a charity acted unconscionably or with duress to a particular donor, it would not only be subject to sanctions by the ACNC but also



to remedies under the general law, in particular the equitable remedies of unconscionability and undue influence, which are well established.

The Australian Charities and Not-for-Profit Commission Act 2012 (ACNC Act<sup>1</sup>) contains extensive and high level reporting, monitoring and enforcement provisions, particularly in relation to financial reporting. These powers ensure that the ACNC can monitor charities effectively.

The Australian Charities and Not-for-Profit Commission Regulation 2013 (ACNC Regulations<sup>2</sup>) sets out basic governance standards that apply to all charities ie:

1. Purpose and not-for-profit nature of a registered entity
2. Accountability to members
3. Compliance with Australian laws
4. Suitability of responsible entities
5. Duties of responsible entities

The ACNC Regulations also contain protections under governance standard 5. A responsible entity will be protected if they take reasonable steps to ensure compliance with their duties. These include:

- Compliance with expert advice
- Making decisions in good faith for a proper purpose
- Incurring a debt while reasonably believing the charity was solvent (or taking reasonable steps to prevent the debt being incurred)
- Unable to manage through illness

These are common sense provisions that comply with existing governance standards and the laws of trust. There is no reason why NSW should make compliance of a higher or different standard than that required by the ACNC.

**Recommendation:**

*FIA is of the view that it is not necessary to extend the provisions of the Australian Consumer Law to charities. In particular sections 18, 20 and 50 are aimed at regulating corporations. In the absence of any evidence that misleading or deceptive conduct, unconscionability and harassment and coercion are significant problems with Australian charities, the Australian Charities and Not for Profit Commission Act and the Charities Act provide enough safeguards specifically for charities.*

## **Bibliography**

- ACNC: Commissioner's Column 24 June 2015  
[http://www.acnc.gov.au/ACNC/Comms/Com\\_Col/CC\\_20150624.aspx](http://www.acnc.gov.au/ACNC/Comms/Com_Col/CC_20150624.aspx)
- ACNC and QUT factsheet on costs of fundraising  
[http://www.acnc.gov.au/ACNC/FTS/Fact\\_administration.aspx](http://www.acnc.gov.au/ACNC/FTS/Fact_administration.aspx)
- FIA Research Paper on Cost of Fundraising  
<http://www.fia.org.au//AM/Template.cfm?Section=Home&WebsiteKey=474ae2cd-28ab-4912-a438-7db70a862d6a>
- PPB Not for Profit Risk Survey 2010
- Salamon and Anheir, 1999, The emerging sector revisited, Baltimore, Centre for Civil Society Studies, Institute for Policy Studies, Johns Hopkins University)
- Standards Australia, HB 266:2010 Guide for managing risk in not-for-profit organizations
- Woodward and Marshall, A better framework – reforming not-for-profit regulation, University of Melbourne, Centre for Corporate Law and Securities Regulation, 2004