

Proposed *Charitable Fundraising Regulation 2008*

Better Regulation Statement

Regulatory Impact Statement

August 2008

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1 About this report

- 1.1 This report has two purposes. Both arise from the Department's proposal to introduce a new regulation – the *Charitable Fundraising Regulation 2008*.
- 1.2 One purpose is to fulfil obligations the *Subordinate Legislation Act 1989* imposes on a NSW government agency that intends to introduce a new regulation to support an Act of Parliament.
- 1.3 This Act decrees that any new regulation must benefit the community. To demonstrate that, the proponent agency must prepare and publish a regulatory impact statement (RIS).
- 1.4 An RIS must articulate the objectives a proposed regulation aims to achieve. An RIS must consider the economic and social costs of the proposed regulation. An RIS must also consider options. Only the option that produces the greatest net benefit to the community should be chosen.
- 1.5 This report contains the RIS for the *Charitable Fundraising Regulation 2008*.
- 1.6 The second purpose is to meet recently-introduced expectations that – when agencies develop regulation – the regulation is required, reasonable and responsive. These expectations emanate from the Government's commitment to cut red tape as a key component of economic and social policy.¹
- 1.7 These expectations stem from broad policy directions in the State Plan.²
- 1.8 To that end, the Government has identified seven principles that characterise good regulation and red tape minimisation.³ The principles are:
 - 1.8.1 The need for government action should be established
 - 1.8.2 The objective of government action should be clear
 - 1.8.3 The impact of government action should be properly understood by considering the costs and benefits of a range of options, including non-regulatory options
 - 1.8.4 Government action should be effective and proportional
 - 1.8.5 Consultation with business and the community should inform regulatory development
 - 1.8.6 The simplification, repeal, reform or consolidation of existing regulation should be considered
 - 1.8.7 Regulation should be periodically reviewed, and if necessary reformed to ensure its continued efficiency and effectiveness.
- 1.9 To demonstrate adherence to these principles when proposing a new regulation, the proponent agency must prepare a better regulation statement (BRS).
- 1.10 A BRS must identify and justify compliance costs and show the action taken to minimise these costs.

¹ Premier's memorandum 2006-17 and Policy Statement *Final Government Response to IPART's Investigation into the burden of regulation and improving regulatory efficiency: Recommendations 1-16*, http://www.dpc.nsw.gov.au/publications/memos_and_circulars/ministerial_memoranda/2006/m2006-17

² NSW Government, *State Plan: A new direction for NSW*, <http://www.nsw.gov.au/stateplan/index.aspx?id=8f782cbd-0528-4077-9f40-75af9e4cc3e5>

³ Better Regulation Office, Department of Premier and Cabinet, *Guide to Better Regulation*, www.betterregulation.nsw.gov.au, p6

- 1.11 This report contains the BRS for the *Charitable Fundraising Regulation 2008*.
- 1.12 It is advantageous that the RIS and BRS processes be combined.
- 1.13 Stakeholder consultation is facilitated when similar analysis processes are consolidated – and when the resulting proposals are integrated into a single reference point that displays cohesion and consistency.
- 1.14 Also decision-makers, including Ministers, are better able to make an informed decision on the proposals – including whether a proposed new regulation is justifiable.
- 1.15 After undertaking both sets of processes, the Department has adopted the option of introducing a new Regulation – the *Charitable Fundraising Regulation 2008*.
- 1.16 This report discusses the contents of the new Regulation. It canvasses the rationale for the Regulation, the predicted benefits and other identifiable impacts. Also, the report includes the full terms of the Regulation.
- 1.17 The Department invited submissions on any aspect of the proposed *Charitable Fundraising Regulation 2008*. The closing date for submissions was 14 July 2008. The content of these submissions and the Department's response is summarised in Chapter 9.
- 1.18 This report is available from www.olgr.nsw.gov.au, by calling (02) 9995 0666 during business hours, or by emailing charity.inquiries@olgr.nsw.gov.au.

2 The fundraising environment

- 2.1 Fundraising organisations are part of the not-for-profit (NFP) sector. This sector plays a vital role in Australian society.
- 2.2 In economic terms, according to one study: ⁴
 - 2.2.1 Australians give \$2.8 billion annually to NFP organisations
 - 2.2.2 NFPs contribute 4.7% of GDP and account for 6.8% of total employment
 - 2.2.3 In comparative terms, NFPs add more to GDP than the mining industry
- 2.3 More recent research into philanthropic giving estimated that from January 2004 to January 2005 Australians gave \$7.7 billion to NFPs. ⁵
- 2.4 Conditions have changed since both of these studies. The resources boom has projected the mining industry to new heights – its contribution to GDP is vastly greater than in 2004 and is likely to surpass the contribution made by the NFP sector nowadays.
- 2.5 Also, the reported estimate of philanthropic giving in calendar year 2004 captured the abnormal swell of donations that followed the East Asian tsunami in December 2004.
- 2.6 The true level of philanthropic giving is likely to lie somewhere between the estimates reported by these two studies.
- 2.7 By any measure, the economic and social net worth of the NFP sector remains significant.
- 2.8 While not all participants in the sector are fundraising organisations, many are.
- 2.9 The fundraising sub-sector consists of donors and potential donors, either individuals or corporations.
- 2.10 Other key participants in this sub-sector are charities that conduct fundraising activities and deliver charitable services to the community; intermediaries that undertake fundraising activities in aid of a charity but for a commercial benefit; and the beneficiaries of fundraising appeals and other donations. ⁶

⁴ Centre for Corporate Law and Securities Regulation, The University of Melbourne (2004) *A Better Framework: Reforming Not-for-Profit Regulation*, <http://cclsr.law.unimelb.edu.au/index.cfm?objectId=017B1CA1-B0D0-AB80-E29B8B41F029F841>, p1

⁵ Australian Government Department of Family and Community Services (2005) *Giving Australia: Research on Philanthropy in Australia – Summary of Findings*, <http://www.philanthropy.org.au/community/transcripts/Giving%20Australia%20Summary.pdf>,

⁶ NSW Department of Gaming and Racing (2002) *Report of the National Competition Policy review of the Charitable Fundraising Act 1991*, http://www.olgr.nsw.gov.au/pdfs/ncp_report_cfa.pdf

3 Need for government action

- 3.1 Various regulatory frameworks impinge on the NFP sector, including the fundraising sub-sector.
- 3.2 Fundraising organisations in NSW are impacted by the two-tiered regulatory system for entities – either the national corporate law framework or the State-based incorporated associations' framework, although it is not mandatory to be a legal entity.
- 3.3 Organisations that fundraise for charitable purposes in NSW are also impacted by a parallel regulatory system.
- 3.4 This is the regulatory system established by the *Charitable Fundraising Act 1991* and which is the focus of this report.
- 3.5 The central argument for regulating these activities is that governments, for centuries, have accepted a responsibility to supervise the use of money collected from appeals to members of the public.
- 3.6 By long-held tradition the Attorney General is vested with a legal duty to act as the guardian of charity and as the constitutional trustee of money given to charity.⁷
- 3.7 In NSW, in a complementary initiative, the Parliament reformed the legislative environment for charitable fundraising (in 1991) and charitable trusts (in 1993).
- 3.8 For charitable fundraising, Parliament introduced a regulatory scheme, including a licensing requirement for most organisations that fundraise by an appeal to members of the public. The scheme exempts mainstream and many other religious bodies.
- 3.9 Although the fundamental concepts in this scheme have changed little since 1991, a gradual move away from prescriptive rules has emerged in recent years. Some pre-existing regulatory controls and practices were relaxed or waived during this period.
- 3.10 This trend is intended to better align the regulatory environment to contemporary perspectives in best practice regulation.
- 3.11 The approach is also consistent with recommendations made to government in the Independent Pricing and Regulatory Tribunal (IPART) report on regulatory efficiency.⁸

⁷ NSW Department of Gaming and Racing (2002) *Report of the National Competition Policy review of the Charitable Fundraising Act 1991*, http://www.olgr.nsw.gov.au/pdfs/ncp_report_cfa.pdf, p10

⁸ Independent Regulatory and Pricing Tribunal (2006) *Investigation into the Burden of Regulation and Improving Regulatory Efficiency*, <http://www.ipart.nsw.gov.au/files/Final%20Report%20-%20Investigation%20into%20the%20burden%20of%20regulation%20in%20NSW%20and%20improving%20regulatory%20efficiency%20-%205%20October%202006%20-%20Website%20Document.PDF>

- 3.12 It is also consistent with commitments in the State Plan, including Priority P3 – Cutting red tape; and Priority S8 – Increased customer satisfaction with government services. These commitments are allied with improved rigour in regulatory gatekeeping and better alignment with arrangements in other States and Territories.⁹
- 3.13 This report explores options for further gains towards less red tape for fundraisers.

⁹ NSW Government, *State Plan: A new direction for NSW* (2007)
<http://www.nsw.gov.au/stateplan/index.aspx?id=8f782cbd-0528-4077-9f40-75af9e4cc3e5>, p98

4 Objective of government action

- 4.1 Parliament, when enacting the *Charitable Fundraising Act 1991*, adopted three public policy objectives for the new legislation:
- 4.1.1 promotion of proper and efficient management and administration of fundraising appeals for charitable purposes
 - 4.1.2 ensuring the proper keeping and auditing of accounts in connection with such appeals and
 - 4.1.3 prevention of deception of members of the public who desire to support worthy causes
- 4.2 These objectives were seen as a public policy response to problems encountered by consumers or other community members. They reflected the convention that governments are in some way responsible for regulating money collected from appeals to members of the public.¹⁰
- 4.3 In part they addressed actual or potential market failure in the charitable fundraising sector. Market failure occurs if fundraisers do not operate in the best interests of consumers (donors, potential donors, beneficiaries and potential beneficiaries) because of economic inefficiency or other detriment.
- 4.4 They also addressed potential loss of reputation or confidence in a charity as occurs when the community loses faith in how charitable fundraising proceeds are managed and applied.
- 4.5 Observation suggests that these high-level objectives remain relevant. This was the conclusion of the National Competition Policy review conducted in 2002. It found that if the legislation did not exist:¹¹
- 4.5.1 donors and potential donors would not be protected from unscrupulous fundraisers, thereby threatening revenue for legitimate charities
 - 4.5.2 community or charitable organisations would not be able to offer a 'competitive product' against commercial operators, thereby losing much needed revenue.
- 4.6 To fulfil the objectives, Parliament determined that the legislative scheme should control:
- 4.6.1 who can conduct fundraising activities – *ie* who can operate in the market
 - 4.6.2 how fundraising appeals must be undertaken – *ie* what conduct is expected in the market
 - 4.6.3 how fundraising income must be accounted for and applied – *ie* what additional conduct is expected in the market.
- 4.7 Parliament introduced a licensing scheme as the preferred means of achieving the intended objectives.
- 4.8 A person or organisation wishing to fundraise for charity must obtain a licence known as a fundraising authority. By May 2008 there were 5,100 organisations licensed to conduct charitable fundraising activity in NSW.

¹⁰ See paragraphs 3.5 and 3.6

¹¹ NSW Department of Gaming and Racing (2002) *Report of the National Competition Policy review of the Charitable Fundraising Act 1991*, http://www.olgr.nsw.gov.au/pdfs/ncp_report_cfa.pdf, p5

- 4.9 This number has been relatively stable for around a decade. In a typical year, about 400 new licences are granted. A corresponding number of licence holders either surrender their licence or do not renew their 2-year or 5-year licence, often because the charity ceases to operate. On average, about 1,200 licence renewal options are processed each year. Of these, about 800 renewals are approved.
- 4.10 Regulatory experience with this scheme suggests that the high-level objectives are valid and remain appropriate.
- 4.11 The Department has a well-established regulatory relationship with holders of these licences through its licensing role, and its compliance role. This relationship has not brought forward evidence that the high-level objectives are questionable today.
- 4.12 Beneath the high-level objectives in the Act are objectives at the level of the Charitable Fundraising Regulation. A Regulation has existed since 1993 when the Act commenced operation, as regulations were seen as necessary to support the operation of the Act.
- 4.13 The current Regulation, which dates from 2003, will expire on 1 September 2008. The Department proposed that the soon-to-expire Regulation be replaced by a slimmer Regulation that will operate for the 5-year period from 1 September 2008.
- 4.14 The underlying, implied objectives of the new Regulation are to:
- 4.14.1 release the 'grip' of the Act where this is feasible, by creating exemptions from requirements that would otherwise apply
 - 4.14.2 clarify the interpretation and operation of the Act where there is room for uncertainty or confusion among licensees and consumers
 - 4.14.3 promote flexible approaches to ensuring regulatory compliance where practicable
 - 4.14.4 maintain a fallback position for licence conditions in the unlikely event that the Department cannot process a licence or renewal application within the 60 day service guarantee period
 - 4.14.5 implement government policy to reduce the overall level of market regulation and associated red tape.
- 4.15 Chapter 8, which discusses the assessed impacts of the *Charitable Fundraising Regulation 2008* in some detail, describes the objectives of Government action envisaged by each part of the Regulation.

5 **Alternative regulatory options**

5.1 Before concluding that the best regulatory option is to introduce the *Charitable Fundraising Regulation 2008*, the Department explored and considered other regulatory options.

5.2 Six options were considered:

- Option 1 Take no action
- Option 2 Industry self-regulation or co-regulation
- Option 3 Address matters in the Act rather than by Regulation
- Option 4 Address matters by administrative provisions
- Option 5 Make a regulation with the same or more controls than at present
- Option 6 Make a regulation with fewer controls than at present

Option 1 Take no action

5.3 Under this option, the 2003 Regulation would lapse on 1 September 2008 and not be replaced.

5.4 In reality though, this option is not feasible. The *Charitable Fundraising Act 1991* was written in a form that expects some regulatory obligations to be dealt with by regulation.

5.5 The Act, for example, allows for exemptions to be created – but only via a regulation – that exclude religious bodies or organisations from the reach of the Act.

5.6 To not take advantage of these deregulatory opportunities would prejudice the intended operation of the Act and hinder achievement of its high-level objectives.

5.7 This option was not supported for this reason.

5.8 It was also discarded because the option would result in a loss of control over integrity, standards and financial accountability that, if not specified in a regulation, would expose the fundraising sector to vulnerability.

5.9 On balance, it was concluded that there is a real, beneficial purpose for regulation – which is to protect and inform donors to charitable organisations through disclosure requirements and to generally promote public confidence in the charitable fundraising sector.

5.10 Importantly though, any proposed regulation would need to be well-targeted.

Option 2 Industry self-regulation or co-regulation

- 5.11 This option would place the responsibility for the development and policing of a regulatory framework for the charitable fundraising sector on an organised industry.
- 5.12 While industry self-regulation is generally encouraged, such a system does not have the force of law. A self-regulatory system could also require that a non-governmental penalty system be developed, such as exclusion from an industry body for non-compliance with the regulatory framework.
- 5.13 Under a co-regulatory framework such penalties could have the force of law, but a system of self-regulation would have to rely fully on the censure of, or dismissal from, an industry body. Unless membership of that industry body could be made obligatory for participation in the industry, this penalty may have little real impact.
- 5.14 In either case, if the role of government was some distance removed from full participation in the regulatory framework, the extent to which any self-regulatory or co-regulatory framework and penalties would ensure compliance is unclear.
- 5.15 This situation could lead to public uncertainty regarding the maintenance of industry standards and associated loss of public confidence in the conduct of charitable fundraising appeals.
- 5.16 Hence this option was not recommended because it does not provide a guarantee that an acceptable level of standards within the industry would be maintained. This option was also discarded because it would not adequately assist in the implementation of practices, particularly in the area of financial accountability, sufficient to sustain an appropriate level of public confidence in the charitable fundraising sector.

Option 3 Address matters in the Act rather than by regulation

- 5.17 Parliament has decided that substantive matters of Government regulation should be dealt with by principal legislation (an Act) and that lesser, more routine matters be provided for in subordinate legislation (a regulation) as its general approach to law-making.
- 5.18 It is clear from the wording of the *Charitable Fundraising Act 1991* that regulations were envisaged to give effect to the Act. There is no expressed intention that the matters which are covered by existing regulations were to be specified in the Act at some point later in time.
- 5.19 Maintaining these provisions in a regulation instead of the Act allows for a degree of flexibility in the regulatory framework. Should additional changes or enhancements to the framework be required, effecting such changes by regulation is a simpler and more efficient process than that involved in changing an Act.
- 5.20 Dealing with changes by regulation means that amendments can be made quickly and more cheaply than is the case for principal legislation. Also, scrutiny of subordinate legislation by the Minister for Regulatory Reform acting on the advice of the Better Regulation Office in the Department of Premier and Cabinet, the Legislation Review Committee of the NSW Parliament and the ability of Parliament itself to disallow regulations, recognise that there were appropriate review procedures.
- 5.21 Accordingly, this option was not recommended.

Option 4 Address matters by administrative provisions

- 5.22 There are limits to the matters that can be dealt with appropriately by administrative means. This is because the Act specifically requires that regulations be made. In light of this, administrative action would not provide the necessary legal certainty, or deliver legal sanctions where non-compliance is found.
- 5.23 Accordingly, this option was not recommended.

Option 5 Make a regulation with the same or more controls than at present

- 5.24 If the current Regulation was to be re-introduced unchanged or impose greater obligations than at present, opportunities to relax the regulatory effect and consequently reduce red tape would be lost.
- 5.25 An example is the proposed relaxation of the existing requirement that participants in a fundraising appeal wear ID badges at fundraising events and functions where it is clear to attendees that the fundraising appeal is conducted by or on behalf of a particular organisation.
- 5.26 This option was not recommended. It is incompatible with the Government's policy agenda to reform regulation and reduce red tape.

Option 6 Make a regulation with fewer controls than at present

- 5.27 This is the preferred option. The *Charitable Fundraising Regulation 2008* will provide for the administrative and machinery matters contemplated by the *Charitable Fundraising Act 1991* and the fulfilment of other objectives in Chapter 4.
- 5.28 The Regulation includes only those requirements necessary to give effect to sensible control and proper administration of the Act. The Regulation will amend or remove existing requirements that create over-burden. The overall result supports government policy to minimise the number and complexity of regulations and reduce red tape.
- 5.29 This approach is also consistent with the intention of Parliament as reflected in the terms of the Act. In some instances, regulations are the only means of achieving the efficient operation of substantive provisions of the Act. In other instances, the proposed regulations would complement the contents of the Act.

Conclusion

- 5.30 It is considered that the best way of achieving the stated objective of effective control over the conduct of charitable fundraising is to proceed with option 6.. It is also considered that this option provides the most net benefit to the community.

6 Impact of government action

- 6.1 When contemplating new regulation, it is important to consider the impact of the proposed action.
- 6.2 This Chapter explains the opportunity now taken to diminish the impact of the 2003 Regulation, as against the proposed 2008 Regulation.
- 6.3 The 2008 Regulation is divided into three Parts and one Schedule. This is slightly more contained than the existing 2003 Regulation, which is divided into three Parts and two Schedules.
- 6.4 The two existing Schedules will be combined, for simplicity and ease of understanding. In this process, eleven components of the existing Schedule 1 will be dropped:

Provision	Requirement removed	Reason for removal; impact
Sch 1, clause 1(1)	Deemed licence holders permitted to conduct appeals for period specified in the application for the authority	Redundant provision as the current application form does not ask applicant to specify a period.
Sch 1, clause 7 (2)(c)(ii)	Notes to the accounts include a statement that distinguishes between certain costs	This information has no apparent value. A regulatory burden is lifted and red tape is reduced.
Sch 1, clause 7(2)(e)	Notes to the accounts include a list of all forms of fundraising appeal	As above
Sch 1, clause 7(2)(f)(i)	Notes to the accounts include a comparison, expressed as a ratio, of the total costs of fundraising to the gross income obtained from fundraising	As above
Sch 1, clause 7(2)(f)(ii)	Notes to the accounts include a comparison, expressed as a ratio, of the net surplus from fundraising to the gross income from fundraising	As above
Sch 1, clause 7(2)(f)(iii)	Notes to the accounts include a comparison, expressed as a ratio, of the total costs of services provided by the licensee to the total expenditure	As above
Sch 1, clause 7(2)(f)(iv)	Notes to the accounts include a comparison, expressed as a ratio, of the total cost of services provided by the licensee to the total income received	As above
Sch 1, clause 7(3)	The income statement to show aggregate gross income received, the total expenditure associated with all fundraising appeals and the net operating surplus or deficit	This removes a duplicate requirement in clause 7(1)

Sch 1, clause 7(7)	Information already supplied in financial reports be separately itemised	This information has no apparent value. A regulatory burden is lifted and red tape is reduced.
Sch 1, clause 7(8)	This clause operate subject to the particular conditions of a licence	An express statement is not considered necessary
Clause 19	Licence holders comply with the requirements of the <i>Lotteries and Art Unions Act 1901</i> and any regulations under that Act	This is removed as the express statement is not considered necessary

6.5

6.6 In another step toward regulatory reform, the proposed 2008 Regulation will introduce a wider range of reductions from regulatory obligations, when compared with the Regulation operating since in 2003. The new exemptions or windbacks are:

Provision	Requirement reduced	Impact; reason for change
Clause 11(2)	To allow identification badges not to be worn at a fundraising event or function where it is clear to attendees that the fundraising appeal is conducted by or on behalf of a particular organisation	Regulatory effect is eased and red tape reduced as there is no need to issue and recover badges or a requirement to maintain a register
Clause 14(1)(b)	To only require an unincorporated association to notify of an amendment to its constitution where the change affects its charitable objects, non-profit nature and/or disposition of funds on wind-up	Regulatory effect is eased and red tape reduced as unincorporated associations are no longer required to notify of changes to their constitution that are not relevant to their charitable status
Sch 1, clause 5	To raise the level of gross income obtained from fundraising appeals – from \$20,000 to \$100,000 – at which the requirement that an unincorporated association lodge a periodic return to the Minister is triggered	Regulatory effect is eased and red tape reduced for unincorporated associations with income up to \$100,000 as time taken to prepare and lodge return is saved
Sch 1, clause 6(3)	To allow disbursements from a fundraising account above \$260 by electronic funds transfer as well as by cheque	Regulatory effect is eased and red tape reduced. There may also be minor financial transaction cost savings
Sch 1, clause 6(4)	To provide exceptions to the requirement under section 20(6) that the proceeds of a fundraising appeal be kept in an account containing only the proceeds of that or other fundraising appeals conducted by the same persons	Regulatory effect is eased and red tape reduced as the time taken to set up and administer extra bank account is saved
Sch 1, clause 7(2)	To raise the level of gross income obtained from appeals – from \$20,000 to \$100,000 – at which the requirement to provide certain information as notes to the income statement and balance	Regulatory effect is eased and red tape reduced as notes to the financial accounts no longer required for a larger cohort of licensed fundraisers

Provision	Requirement reduced	Impact; reason for change
	sheet is triggered	
Sch 1, clause 8(1)	To increase from 40% to 50% the percentage of expenses in relation to donation appeals that licensed fundraisers are required to take reasonable steps not to exceed	Regulatory effect eased but neutral effect on red tape as provision only sets benchmark
Sch 1, clause 12	To remove the requirement to comply with the Australian Direct Marketing Association Code of Practice – and replace it with five basic requirements relating to all forms of direct marketing and a requirement when direct marketing by telephone to comply with the Commonwealth <i>Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007</i>	Regulatory effect is eased and red tape overall is reduced as no longer required to comply with a specific industry code. Licensed fundraisers are in any event required under Commonwealth law to comply with the Standard. Finally an opportunity to harmonise with Victorian and NSW Fair Trading legislation was identified. Accordingly, there is a new requirement for a five day cooling off period when goods or services over \$100 are supplied. It should be noted that this is a rare event in the charitable sector eg the vast majority of art union tickets sell for less than \$100
Sch 1, clause 20	To allow licensed fundraisers to keep records at any location, other than the registered office, as long as the Department is advised of the location in writing	Regulatory effect is eased and red tape reduced by allowing records to be kept at a location most convenient for licensed fundraisers
Sch 1, clause 24	To reduce the time non-accounting related records must be kept from five years, to three years	Regulatory effect is eased and red tape reduced in lessening the period that affected records must be kept for

7 Impact assessment matrix

- 7.1 There is significant diversity in the size and composition of the 5,100 licensed fundraising organisations in NSW.
- 7.2 Income raised from the conduct of fundraising appeals in a financial year may range from a few hundred dollars to millions of dollars. Some organisations may be staffed by a handful of volunteers; other much larger organisations use commercial best practice and may employ large numbers of staff.
- 7.3 Record keeping practices also vary widely according to the nature of the organisation. Smaller organisations may use simple manual systems, while larger organisations may use sophisticated computerised systems.
- 7.4 In exploring the cost impact of the proposed regulations, it was not considered possible or appropriate to calculate and assign a numerical value to the indirect and direct costs and benefits of each of the six options to stakeholders.
- 7.5 Accordingly, this report utilises a multi criteria analysis method – sometimes called the ‘balanced scorecard’ approach – to assess the costs and benefits of each option.¹²
- 7.6 As criteria, the report invokes the three objects in the Act¹³ and establishes two other objectives.
- 7.7 One of the added criteria aims to strike the appropriate balance between the level of regulation of fundraising appeals on the one hand, with the public’s right to be adequately informed of the costs of those appeals and the percentage of funds raised applied to the advertised charitable purpose. This is expressed as ‘Appropriate balance between fundraising and disclosure’.
- 7.8 The second criterion addresses the policy objective of reduced red tape, and is expressed as ‘Reduces red tape’.
- 7.9 Each criterion is rated as negative 1, zero, or positive 1. A total score is then derived for each option.

Option 1 Take no action

Criterion	Score	Summary
Proper and efficient management of appeals	-1	Regulation lapses and lessens general regulatory effect of Act where Act contemplates the making of regulations
Keeping and auditing of accounts	-1	Regulation lapses and ability to detail the particulars in records of income and expenditure by regulation as anticipated in section 22 of the Act is lost. Also deemed licence holders not required to comply with record and account keeping requirements contained in Schedule 1
Prevention of public deception	-1	Regulation lapses and significant risk that probability of public being deceived will rise
Appropriate balance between fundraising and disclosure	-1	Regulation lapses and disclosure requirements in the current Regulation are removed. Also deemed licence holders not required to comply with disclosure requirements contained in Schedule 1

¹² Better Regulation Office, Department of Premier and Cabinet, *Guide to Better Regulation*, www.betterregulation.nsw.gov.au, p50

¹³ See paragraph 4.1

Criterion	Score	Summary
Reduces red tape	0	Licence holders would still be subject to the regulatory requirements of the Act. If the Regulation lapsed it is likely there would be a relaxation of the regulatory regime which could result in an overall small reduction in red tape. It is probable that this would be offset by an inability by regulation to exempt religious bodies, councils and related bodies and public universities from holding licences and to exempt certain activities from being considered fundraising appeals, which in turn would result in an increase in red tape
	-4	Not recommended as the preferred option

Option 2 Industry self-regulation or co-regulation

Criterion	Score	Summary
Proper and efficient management of appeals	-1	Government some distanced removed from regulatory process. Although co-regulation could have force of law, self-regulation would rely on censure or dismissal from industry body. This would have little impact if membership of industry body not compulsory. Ultimately no guarantee that acceptable levels of industry standards leading to proper and efficient management of appeals would be in place
Keeping and auditing of accounts	-1	It is likely that a large number of organisations would keep appropriate accounts and have them audited under a co-regulatory or self-regulatory system. However it is probable that an indeterminate number would not do so without government involvement in the regulatory process
Prevention of public deception	-1	No guarantee appropriate standards in place to avoid risk of an increase in public deception
Appropriate balance between fundraising and disclosure	-1	No guarantee appropriate levels of disclosure in place to ensure public informed adequately of costs of fundraising and percentage of funds raised applied to charitable purpose
Reduces red tape	0	It is likely there would be a relaxation of the regulatory regime which could result in an overall small reduction in red tape. It is probable however that this would be balanced by an inability by regulation to exempt religious bodies, councils and related bodies and public universities from holding licences and to exempt certain activities from being considered fundraising appeals, which in turn would result in an increase in red tape
	-4	Not recommended as the preferred option

Option 3 Address matters in the Act rather than by regulation

Criterion	Score	Summary
Proper and efficient management of appeals	-1	Lessening of regulatory flexibility and effect where the Act specifically envisages the making of regulations

Criterion	Score	Summary
Keeping and auditing of accounts	-1	Ability to detail the particulars in records of income and expenditure by regulation as anticipated in section 22 of the Act is lost. Also deemed licence holders not required to comply with record and account keeping requirements contained in Schedule 1
Prevention of public deception	-1	Significant risk that probability of public being deceived will rise
Appropriate balance between fundraising and disclosure	-1	Loss of disclosure requirements in the current Regulation. Also deemed licence holders not required to comply with disclosure requirements contained in Schedule 1
Reduces red tape	0	It is likely there would be a relaxation of the regulatory regime which could result in an overall small reduction in red tape. It is probable however that this would be balanced by an inability to exempt religious bodies, councils and related bodies and public universities from holding licences and to exempt certain activities from being considered fundraising appeals, which in turn would result in an increase in red tape
	-4	Not recommended as the preferred option

Option 4 Address matters by administrative provisions

Criterion	Score	Summary
Proper and efficient management of appeals	-1	There are limitations on matters that can be addressed by administrative means as the Act specifically contemplates the making of regulations in certain circumstances. Likely lessening of regulatory flexibility and effect
Keeping and auditing of accounts	-1	Ability to detail the particulars in records of income and expenditure by regulation as anticipated in section 22 of the Act is lost. Also deemed licence holders not required to comply with record and account keeping requirements contained in Schedule 1
Prevention of public deception	-1	Significant risk that probability of public being deceived will rise
Appropriate balance between fundraising and disclosure	-1	Loss of disclosure requirements in the current Regulation. Also deemed licence holders not required to comply with disclosure requirements contained in Schedule 1
Reduces red tape	0	It is likely there would be a relaxation of the regulatory regime which could result in an overall small reduction in red tape. It is probable however that this would be balanced by an inability by regulation to exempt religious bodies, councils and related bodies and public universities from holding licences and to exempt certain activities from being considered fundraising appeals, which in turn would result in an increase in red tape
	-4	Not recommended as the preferred option

Option 5 Make a regulation with no amendments - the status quo

Criterion	Score	Summary
Proper and efficient management of appeals	1	The Regulation remains and allows appropriate provisions to continue where the Act contemplates the making of regulations e.g. the exemption of certain activities from being considered fundraising appeals
Keeping and auditing of accounts	1	Ability to detail particulars in records of income and expenditure by regulation as anticipated in section 22 of the Act remains. Also deemed licence holders still required to comply with record and account keeping requirements contained in Schedule 1
Prevention of public deception	1	Provisions assisting in the prevention of public deception remain. Significant risk that probability of public being deceived will rise is avoided
Appropriate balance between fundraising and disclosure	1	Disclosure requirements in current Regulation remain. Also deemed licence holders required to comply with disclosure requirements contained in Schedule 1
Reduces red tape	-1	Identified opportunities for relaxation of the regulatory regime by amendment of the Regulation with consequent reductions in red tape cannot be acted upon
	+4	Not recommended as the preferred option

Option 6 Make a regulation with amendments

Criterion	Score	Summary
Proper and efficient management of appeals	1	The Regulation remains with some minor amendments which overall contribute to a relaxation to the regulatory regime. Allows appropriate provisions to continue where the Act contemplates the making of regulations e.g. the exemption of certain activities from being considered fundraising appeals
Keeping and auditing of accounts	1	Ability to detail the particulars in records of income and expenditure by regulation as anticipated in section 22 of the Act remains. Also deemed licence holders still required to comply with record and account keeping requirements contained in Schedule 1
Prevention of public deception	1	Provisions assisting in the prevention of public deception remain. Significant risk that probability of public being deceived will rise is avoided
Appropriate balance between fundraising and disclosure	1	Disclosure requirements in the current Regulation remain. Also deemed licence holders required to comply with disclosure requirements contained in Schedule 1
Reduces red tape	1	Identified opportunities for relaxation of the regulatory regime by amendment of the Regulation with consequent reductions in red tape can be acted upon
	+5	Preferred option

8 Clause-by-clause assessment

8.1 It is now convenient to examine the impact on a clause-by-clause basis, adopting the logical order in the *Charitable Fundraising Regulation 2008*.

Part 1 – Preliminary

8.2 Part 1 contains 3 clauses which are essentially machinery or procedural matters.

8.3 Clause 1 states how this regulation is to be cited. It is to be named the *Charitable Fundraising Regulation 2008*.

8.4 Clause 2 states the Regulation will commence on 1 September 2008.

8.5 Clause 3 contains definitions of various terms used throughout the Regulation.

Costs and Benefits

8.6 There are no economic and social costs or benefits associated with Part 1 of the Regulation. These provisions are interpretation tools which promote a proper understanding and functioning of the Regulation.

Part 2 – Fundraising appeals

Clauses 4 and 5

8.7 Section 5 of the Act states that the soliciting or receiving by a person of any money, property or other benefit constitutes a fundraising appeal if, before or in the course of any such soliciting or receiving, the person represents that it is for, or includes, a charitable purpose.

8.8 The section also lists circumstances that do not constitute a fundraising appeal. These circumstances involve: a request or receipt of an amount required in good faith as a fee for renewal of membership of an organisation; an appeal by an organisation to members of the organisation; a request that any property be devised or bequeathed; an appeal conducted exclusively or predominantly among persons sharing a common employer or place of work in connection with another of those persons; and an appeal to any government authority.

8.9 Section 5(3)(f) allows a regulation to prescribe additional circumstances as not constituting a fundraising appeal. This is the explicit purpose of clauses 4 and 5. They are deregulatory in that they deliver more exceptions from the blanket rule imposed by section 5.¹⁴

8.10 Clause 4 prescribes a request for, or the receipt of, money from a person if the money payable is a genuine fee or charge for the provision of educational facilities or services, child-minding services, goods or services supplied through a supported employment service for people with disabilities, nursing or medical services or other care or welfare services.

8.11 Clause 5 prescribes an appeal where there is a request or receipt of specified benefits from a registered club where that request or receipt relates to the Community Development Support and Expenditure Scheme administered under the *Gaming Machine Tax Act 2001*.

¹⁴ See paragraph 4.14.1

Costs and Benefits

- 8.12 The public would not generally view fees or charges for the use of facilities or services as specified in clause 5 as charitable fundraising activities. They would be more likely to recognise them simply as a fee or charge that must be paid in order to receive the service. Likewise they would not generally view a request for funding from a registered club under the Community Development and Support Expenditure Scheme as a fundraising appeal.
- 8.13 These exclusions provide a benefit to fundraising organisations, and consequently to the community at large. If these types of fundraising activities were considered fundraising appeals there would be minor cost increases for licensed fundraisers and more significant cost increases for non-licensed fundraisers, who conducted them.
- 8.14 There would also be an increase in red tape for affected organisations. In this case, affected organisations, not exempt under the Act from the requirement to hold a licence, would have to apply for one and therefore come under the umbrella of the regulatory regime, with consequent compliance costs.
- 8.15 There is also a benefit to government in that these types of activities are not subject to scrutiny under the charitable fundraising regulatory regime, with consequent cost savings.

Clause 6

- 8.16 Section 7(1)(b) allows the prescription of religious bodies or religious organisations as exempt from the Act, apart from section 48. This provides a means of exempting bodies or organisations of a religious character that are not listed as a recognised denomination for the purposes of section 26 of the *Marriage Act 1961 (Cth)*.
- 8.17 The Regulation lists 29 exempt religious bodies. An organisation or body is regarded as religious if its objects and activities suggest the promotion of some religious object and if the beliefs and practices of members constitute a religion. The criteria assessed to determine whether a set of beliefs and practices include belief in a supernatural being and acceptance of canons of conduct that give effect to that belief and do not offend ordinary laws. The effect of this exemption is to permit the 29 bodies or organisations to conduct fundraising appeals without regulatory control over the manner in which an appeal is conducted.

Costs and Benefits

- 8.18 There should be no direct economic and social costs associated with this clause. If any difficulty arises with regard to any religious body or organisation improperly accounting for or applying monies collected from the public, the Minister may exercise a legislative discretion to issue a notice declaring the exemption no longer applies in a particular case.
- 8.19 There should be a direct benefit to these bodies or organisations because of the exemption. To not prescribe these organisations as religious bodies and organisations may result in cost increases for affected organisations, due to increased compliance costs, without any significant benefit the community. Affected organisations would also be subject to an increase in red tape.

Clauses 7 and 8

- 8.20 Section 9(3)(a) permits an organisation or person or one of class of organisations or persons to conduct fundraising appeals without being the holder of a licence to fundraise, if authorised by the regulations.
- 8.21 Clause 7 states that the following classes of organisations or persons may be authorised to conduct appeals without holding a licence to fundraise:
- 8.21.1 Local councils
 - 8.21.2 Council committees
 - 8.21.3 Trustees of trusts where a local council is a trustee
 - 8.21.4 Trustees of trusts where the holders of various council offices are trustees by virtue of holding that office
 - 8.21.5 Trustees of trusts where a person nominated by a local council is a trustee by virtue of being nominated by the council
- 8.22 Clause 8 provides that 11 public universities are authorised to conduct appeals without holding a licence to fundraise.

Costs and Benefits

- 8.23 There should be no direct economic and social costs associated with this clause. There should be a direct benefit to local councils and committees and trustees associated with councils along with the 11 listed public universities.
- 8.24 If this exemption was not in place it is likely that these organisations and trustees would incur higher compliance costs associated with being under the umbrella of the charitable fundraising regulatory regime, without any significant benefit to the community. Consequently there should be minor cost savings for these bodies. Affected bodies and trustees would also be subject to more red tape.
- 8.25 It is considered that local councils and related entities, as third tier government bodies, with consequent governance and reporting obligations, can be relied upon to have in place appropriate systems and internal controls to ensure financial accountability for funds raised for a charitable purpose, without the need for a licence.
- 8.26 It is also considered that the same reliance can be placed upon public universities on the basis that they are generally regarded as well-run institutions and their financial accountability is reviewed annually by the NSW Auditor General.
- 8.27 There is also a minor benefit to government in that these organisations and persons are subject to less scrutiny under the charitable fundraising regulatory regime, with consequent minor cost savings.

Clause 9

- 8.28 Section 20(3) states that the regulations may specify what constitutes a lawful and proper expense in connection with fundraising appeals. Clause 9 details what these are.
- 8.29 The Minister must consider certain criteria in determining what constitutes lawful and proper expenses, such as the type and amounts claimed being of a reasonable nature. The control of expenditure ensures a fair return and is consistent with the objects of the Act to prevent deception of the public and to promote proper and efficient management and administration of fundraising appeals.

Costs and Benefits

- 8.30 This clause allows economic benefits to flow generally to licensed fundraisers and members of the public. The creation of these parameters facilitates better planning and control over appeals, which leads to better returns for fundraisers. The public is able to receive better value for its donated dollar as more funds flow to the stated objectives of the charity.
- 8.31 Clause 9(7) requires that any expense incurred as part of an appeal jointly conducted with a trader must be provided for in a written contract with the authorised fundraiser. This is of economic benefit to the fundraiser as without such a requirement there could be uncertainty as to which party was responsible for a particular expense. This could result in increased costs for the fundraiser. Although the majority of traders act responsibly, a small number may exploit their relationship with licensed fundraisers.
- 8.32 Although these requirements could involve some economic costs to appeals conducted jointly with traders, they are unlikely to place any added economic burden on licensed fundraisers. The requirement that the ratio of expenses to gross proceeds from an appeal is reasonable in the circumstances is a general benchmark that is expected to be within the means of most authorised fundraisers and traders.
- 8.33 This clause provides important social benefits to the community that would outweigh any possible social costs. Members of the public should not only obtain better value for their donations, but also should be secure in the knowledge it affords better accountability and control over the conduct of appeals. The clause also reflects community expectations and standards.
- 8.34 There appears no justification to increase or decrease the percentage commission payable to collectors. Increasing the percentage would result in less return to the benefiting charity. Decreasing the amount payable may mean that persons will not participate in fundraising appeals, which may in turn result in less funds for charities.
- 8.35 Disallowing commissions would potentially be disastrous for charities, because they are unable to rely totally on volunteer collectors. Some charities can more easily source volunteer collectors but may still use paid collectors; other charities rely heavily or even totally on paid collectors. Capping commissions at one third of gross appeal proceeds means that members of the public obtain better value for their donation.

Clause 10

- 8.36 Section 22 provides that a person or organisation that conducts or has conducted a fundraising appeal must keep records of income and expenditure in relation to each appeal. The records must be in writing, include any particulars required by the regulations, be kept at the registered office of the person conducting the appeal and be retained for 7 years.
- 8.37 Clause 10 details the particulars that are to be shown in records as provided for in section 22(2)(b) of the Act. The particulars required are all items of gross income received or receivable, all items of expenditure incurred and the application or disposition of any proceeds obtained from the appeal.
- 8.38 These particulars include all invoices, vouchers and other documents of prime entry relating to each fundraising appeal, and such working papers and other documents necessary to explain the methods and calculations by which appeal accounts are made up.

Costs and Benefits

- 8.39 Although there are economic costs associated with the maintenance of records, all responsible licensed fundraisers would prudently maintain records in the normal course of their business. The costs are necessary to ensure there is proper accountability for fundraising appeals and to prevent or minimise deception of members of the public who desire to support worthy causes. This clause protects the authorised fundraiser, the authorised fundraiser's governing body and the community by ensuring there is proper accountability.

Clause 11

- 8.40 Clause 11(1) establishes a requirement whereby persons participating in a fundraising appeal by means of 'face-to-face' solicitations must prominently display an identification card or badge issued to the person for the purposes of the appeal. A penalty can be imposed where this is not complied with (*ie* maximum penalty is 5 penalty units, or \$550).
- 8.41 Clause 11(2) provides an exemption from this requirement where it is clear to a person attending a fundraising event or function that the event or function is being conducted by or on behalf of a licensed fundraiser.

Costs and Benefits

- 8.42 There is no identifiable cost to the face-to-face collector wearing this identification – any cost is borne by the authorised fundraiser. Although there will be costs to licensed fundraisers in complying with the requirement, these should be offset by a general economic benefit, as potential donors may be more inclined to support a cause if they are aware of the identity of the person doing the soliciting, and the cause that they represent.
- 8.43 The community also benefits from face-to-face collectors being obliged to display the card or badge. Where it is displayed, it enables members of the public to be more confident as to the bona fides of the appeal. It provides important community protection.
- 8.44 Without the proposed requirement no offence would exist if a participant in a fundraising appeal failed to wear the identification issued to that person by the authorised fundraiser.
- 8.45 Clause 11(2) provides a benefit to affected organisations via a reduction in costs associated with preparing cards or badges, issuing and recovering them and keeping a register. The benefit will vary according to the type and size of the event and the nature of the organisation. There will also be a consequent reduction in red tape for affected organisations in not having to prepare badges, issue and recover them and keep registers.

Clause 12

- 8.46 Clause 12 requires that persons conducting or participating in fundraising appeals must meet certain obligations relating to disclosure. Particularly where conductors or participants in appeals, other than face-to-face collectors, are paid in any form, they must disclose that they are employed and the name of their employer for the purpose of the appeal.
- 8.47 These particular requirements should be viewed in conjunction with clause 11 of the Regulation and clause 11 of Schedule 1 to the Regulation.

Costs and Benefits

- 8.48 This clause does not add any costs to the person conducting or participating in the appeal. However, there may be an economic cost to licensed fundraisers, as the community may not wish to donate after being informed that not all of a donation goes to the appeal.

8.49 Any economic costs would appear to be outweighed by the need to prevent deception of the public. Without this information, the public could mistakenly assume that the full proceeds of the donation will go towards the charitable purpose for which it is provided. At the same time, any reduction in support for charitable organisations dependent upon donations may result in a real social cost to the community.

Clause 13

8.50 Section 47 provides for documentation and particulars as prescribed to be supplied to the public. It also enables fees to be specified, by regulation, for furnishing certain information. This information may be obtainable from the authorised fundraiser or from the Minister.

8.51 The clause gives effect to section 47.

8.52 Clause 13 states that the authorised fundraiser is required to furnish copies of annual audited accounts (also known as financial reports) prepared in relation to fundraising appeals conducted during the seven years prior to the request.

8.53 This clause also proposes that, if the authorised fundraiser is an organisation, the prescribed information must be a copy of, or an extract from, the organisation's objects and constitution (including any amendments) and the names, qualifications and occupation of members of the governing body of the organisation.

8.54 In addition, clause 13 provides that the maximum fee for furnishing copies of documentation either by the authorised fundraiser or the Minister is \$13.00 for the first page and \$1.00 for each subsequent page. These rates have not changed from the rates set out in the 2003 Regulation.

8.55 The public should benefit from these provisions by receiving the information at reasonable cost. The facility to obtain this information may result in better management, increased financial responsibility and improved integrity.

Clause 14

8.56 This clause requires that authorised fundraisers furnish the Minister (as the licensing authority) with changes to certain basic particulars, such as the name and address, the constitution, details of branches and traders. The changed particulars must be notified within 28 days, or within such further time as the Minister may allow. The clause no longer requires unincorporated associations to notify of every change to their constitution. This class of organisation is only required to notify of a change to their constitution where it affects their charitable purpose, non-profit nature and/or disposition of funds on wind-up.

Costs and Benefits

8.57 It is common practice for organisations to be expected to advise of changes of particulars to government agencies and to other bodies or organisations. Any economic cost incurred by the organisation is outweighed by the need to maintain the integrity of the Department's records. This facilitates the provision of information and advice to licensed fundraisers and the public.

8.58 Prescribing a shorter period in which to provide the changed particulars would arguably place additional pressure on licensed fundraisers. Prescribing a longer period could mean that an additional period of time would pass before the Department's records are updated. Nevertheless, under clause 14, the Minister or the Minister's delegate can allow a further time to lodge the required particulars. There is a reduction of red tape for unincorporated associations with possible minor financial transaction cost savings.

Part 3 – Miscellaneous

Clause 15

- 8.59 Section 16(6) provides that where an application for an authority to fundraise is not dealt with within 60 days after the date of the receipt notice for the application (or if further information was sought within 60 days of the receipt notice for that information) the authority is taken to have been granted subject only to such conditions as may be prescribed by regulation.
- 8.60 Clause 15 requires that persons or organisations that are deemed to hold an authority under section 16(6) of the Act comply with the conditions set out in Schedule 1. These conditions are the same as those imposed on fundraisers who are granted an authority in the normal course of events under the *Licensing and Registration (Uniform Procedures) Act 2002*; however the power to impose conditions in this circumstance rests solely in section 19 of the Act.

Costs and Benefits

- 8.61 Attaching conditions to a licence to fundraise for a charitable purpose is a key manner in which the objectives of the Act are pursued. Failure to attach conditions would hamper the achievement of these objectives.
- 8.62 Clause 15 ensures that licences that are deemed under section 16(6) and licences granted in the normal course of events under the *Licensing and Registration (Uniform Procedures) Act 2002* are treated equally in the imposition of the same standard conditions attached to the licence. This ensures competition principles are not offended.

Clause 16

- 8.63 Section 49(3) of the Act enables the Minister to authorise police officers to exercise the functions of an authorised inspector. Clause 16 proposes that any police officer of or above the rank of sergeant may exercise the functions of an authorised inspector.

Costs and Benefits

- 8.64 No economic burden is placed on licensed fundraisers from these appointments. There is no additional cost to NSW Police Force as police would normally investigate persons and organisations conducting charitable fundraising appeals, particularly where fraud is alleged. It is considered appropriate that police of appropriate rank be given this authority to assist their investigations.

Clause 17

- 8.65 As a savings provision, this clause provides that any act, matter or thing that, immediately before the repeal of the 2003 Regulation, had effect under that Regulation continues to have effect under the 2008 Regulation.

Costs and Benefits

- 8.66 This is a machinery matter with no associated direct or indirect costs or benefits.

Schedule 1 – Part 1: General conditions

- 8.67 This Part contains a number of clauses which together form a standard set of conditions attached to a licence to conduct charitable fundraising appeals deemed under section 16(6) of the Act. These conditions are directed mainly at financial reporting, disclosure, record-keeping and internal control requirements.
- 8.68 Their global aim is to ensure as much as possible that all funds raised are accounted for and are applied to the advertised charitable purpose.

- 8.69 Chapter 6 describes the intention to remove or reduce regulatory obligations in Schedule 1 of the existing 2003 Regulation, as a result of the BRS and RIS processes for the proposed 2008 Regulation.¹⁵
- 8.70 There is one departure from this approach. It is proposed to introduce into Schedule 1 an extended disclosure obligation in circumstances where participants in fundraising appeals provide services directly related to the conduct of the appeals, as well as when appeals are conducted jointly with a for-profit entity (which the legislation calls a ‘trader’).
- 8.71 The extension, in clause 15(3), is limited to where the level of involvement in the conduct of the fundraising appeal falls short of the level required for them to be considered as jointly conducting, thus avoiding the important disclosure requirements. There may be a slight increase in red tape for some licensed fundraisers in complying with this additional disclosure requirement.

Costs and Benefits

- 8.72 There are compliance costs to licensed fundraisers associated with meeting the requirements of the standard set of conditions, along with costs to government associated with monitoring that compliance.
- 8.73 However, these costs are outweighed by the benefit to both the charitable fundraising industry and the public in promoting transparency and donor confidence in the sector.

Schedule 1 – Part 2: Participation of children in fundraising appeals

- 8.74 This Part contains a number of clauses which protect the interests of children who participate in fundraising appeals, whether as volunteers or paid workers.

Costs and Benefits

- 8.75 There are compliance costs to licensed fundraisers associated with meeting these requirements, along with costs to Government associated with monitoring that compliance. However, these costs are outweighed by the benefit to children participating in appeals and the sector generally, due to higher confidence in parents in permitting children to participate in appeals.

¹⁵ See paragraphs 6.4 and 6.5

9 Consulting on this Regulation

- 9.1 A key element of regulatory development is consultation with business and the community. For a regulatory measure such as the *Charitable Fundraising Regulation 2008*, 'business' is taken to mean the not-for-profit sector.
- 9.2 This BRS and RIS are part of the consultative process for this regulation.
- 9.3 In advance of releasing this RIS and BRS, the Department convened the first of a series of meetings with the Fundraising Institute Australia. More meetings in this series are planned.
- 9.4 Peak industry bodies such as the Fundraising Institute Australia, the Australian Council of Social Service and the National Roundtable of Non-Profit Organisations have been advised of this report and invited to make submissions.
- 9.5 The following organisations have also been informed of the release of this report and how to locate it:
- Attorney General's Department
 - Australian Council of Social Service
 - ClubsNSW
 - Community Relations Commission
 - Department of Ageing, Disability and Home Care
 - Department of Commerce - Office of Fair Trading
 - Department of Community Services
 - Department of Education and Training
 - Department of Local Government
 - Department of Premier and Cabinet – Better Regulation Office
 - Ethnic Communities' Council of NSW
 - Fundraising Institute Australia
 - Legislation Review Committee
 - Local Government & Shires Associations of NSW
 - National Roundtable of Non-Profit Organisations
 - NSW Department of Health
 - NSW Police Force
 - Office for Children – Children's Guardian
 - Privacy NSW – Office of the Privacy Commissioner
 - The Audit Office of NSW

- 9.6 This report is available to any person on request.
- 9.7 Its existence has been advertised to members of the public through notices published in the *NSW Government Gazette*, *The Sydney Morning Herald* and *The Daily Telegraph*, and by a notice on our website www.olgr.nsw.gov.au.
- 9.8 The report is published on this website.
- 9.9 Persons and organisations were invited to make a submission on the proposed Regulation by Monday 14 July 2008.
- 9.10 In addition the Department conducts a regular seminar program for licensed fundraisers and peak bodies in the charitable fundraising sector. This is used as an opportunity for stakeholders to provide feedback on the regulatory scheme, including on obligations imposed by regulation.
- 9.11 In the 2006-07 financial year, 25 seminars were delivered.
- 9.12 In the 2007-08 financial year to date, 32 seminars have been delivered.
- 9.13 These ranged from general seminars delivered to all licensed fundraisers in a geographical area to small seminars tailored for individual licensed fundraisers.
- 9.14 Direct customer feedback obtained through the delivery of these seminars has been taken into account when identifying and acting on opportunities to relax the regulatory regime with a consequent reduction in red tape.
- 9.15 The Department received submissions from privacynsw in the Attorney-General's Department, the NSW Office of Fair Trading in the Department of Commerce and the Fundraising Institute Australia (FIA). On 18 July 2008 Departmental officers met with representatives of the FIA and discussed their submission and the Department's intended response.
- 9.16 The submissions and intended Departmental responses are summarised as follows:

Submitter	Submission	Departmental response
Privacynsw Attorney-General's Department	<p>Point 1 – Schedule 1 - clause 12</p> <p>Considered clause 12 an essential regulatory element of collection activities as it protects the public from unreasonable actions by fundraisers. Understood desire to reduce red tape in removing requirement to comply with ADMA Code of Practice, but not certain that added provisions will compensate for removal of requirement to comply with Code.</p> <p>Point 2 – Schedule 1 – clause 20</p> <p>Noted this proposed clause allows fundraisers to keep records at any location other than a registered office. Felt that the requirement that the location be suitably secure be emphasised, particularly if the fundraising records contain personal</p>	<p>Point 1</p> <p>The Department believes that it would be onerous and over-regulating to require all holders of licenses to fundraise to comply with the current 2006 version of the Code. The Department considers that placement of the salient features of the Code into the clause and requiring compliance with the Commonwealth Telecommunications Standard will provide sufficient protection to members of the public.</p> <p>Point 2</p> <p>The Department's Best Practice Guidelines for Charitable Organisations requires that 'proper security be exercised over the storage of books of account and records.'</p>

	<p>information.</p> <p>Note:</p> <p>Submission indicated that privacy NSW was only able to comment on privacy aspects of the proposed regulation and that subject to the above comments, agreed that the best way of achieving the objective of effective control over the conduct of charitable fundraising appeared to be by way of making the proposed regulation.</p>	<p>Also, if covered by Commonwealth privacy legislation, a licence holder will be required to abide by National Privacy Principle 4, which relates to data security. This principle states that an organisation must take reasonable steps to:</p> <ol style="list-style-type: none"> 1. protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure and 2. destroy or permanently de-identify personal information if it is no longer needed for any purpose for which the information may be used or disclosed under National Privacy Principle 2. <p>The Department regards the above as sufficient to ensure an appropriate level of protection of personal information.</p>
<p>The NSW Office of Fair Trading Department of Commerce</p>	<p>Point 1 – Industry Standard</p> <p>Fair Trading supported the proposal for fundraisers to comply with the Commonwealth Telecommunications Standard.</p> <p>Point 2 – Harmonisation</p> <p>Fair Trading noted the reference to harmonisation with Vic and NSW fair trading legislation with the new requirement for a five day cooling off period where goods and services supplied by direct marketing over \$100, and welcomed the proposals. However it noted that inconsistencies remain e.g. five day period in NSW as opposed to ten day in Vic. The period in NSW under fair trading legislation also only applies to door-to-door selling and telemarketing whereas the proposed clause applies also to solicitation by direct marketing via electronic device e.g. fax and direct mail.</p> <p>It noted that the development of a national generic consumer law will address these inconsistencies, but detailed work on the new law commenced recently and the date for implementation for the national</p>	<p>Point 1</p> <p>Noted</p> <p>Point 2</p> <p>The Department has taken the opportunity to harmonise as much as possible. A choice needed to be made between the 10 and 5 day cooling off period and 5 was chosen so as to remain consistent with NSW fair trading legislation. The Department also aimed for consistency in applying the requirement to all forms of fundraising, rather than excluding electronic device and direct mail. This approach also is consistent with National Competition Policy principles. The Department will continue to identify and act upon appropriate opportunities to harmonise in the future.</p>

	<p>consumer policy framework has yet to be determined</p>	
<p>FIA</p>	<p>Point 1- Part 2 - clauses 7a and 7b</p> <p>Point made that exemptions to regulation cause confusion in the regulatory environment – no level playing field for charities that must comply with the regulation and the public assumes all charities are regulated. Exemptions mean only a proportion of charitable organisations are captured by the Regulation. Organisations that must comply are disadvantaged, usually smaller organisations and the public which expects the regulation to cover all charitable activity.</p> <p>Compliance adds to administrative costs and is not proportional to risk of fraud or malpractice, evidence of which is scant. Regulation should be flexible and proportionate so that over-regulation is avoided. The ‘lowest common denominator’ approach does not hold if regulation created with a view to being proportional to risk.</p> <p>FIA estimates in Vic that exemptions mean only 20% of fundraising is captured and that it is likely to be the same in NSW. This results in discrimination against these organisations, mainly in the disability, arts, culture and overseas aid areas. This is unsatisfactory when the public has an interest in the costs of fundraising and regulators have the same interest, but to a greater degree.</p> <p>Corporate law allows for some differences in how small and medium businesses operate and suggest this should be considered in non-profit sector. Allowances should be made for smaller and newer organisations. These are likely to have higher costs of fundraising than established organisations.</p>	<p>Point 1</p> <p>The Act specifically exempts religious organisations and associated bodies. Traditionally the religious activities of recognised religious bodies were exempt from charity laws. The <i>Charitable Collections Act 1934</i> exempted religious activities but not other charitable activities. The 1991 Act recognised the difficulty of distinguishing between the two, on the basis that religious bodies generally saw ‘other’ charitable activities as a natural extension of their religious activities. Accordingly, religious bodies generally were made exempt in the current Act.</p> <p>The rationale for having exemptions from holding an authority are generally based on a recognition that appropriate oversight of fundraising and internal controls are already in place. Government agencies report to a Minister, local councils are third tier government bodies with appropriate corporate governance in place and public universities are audited by the Auditor-General.</p> <p>Allowances have been made for smaller organisations e.g. raising the trigger amount to \$100,000 for s23 reports for unincorporated associations and for notes to the financial accounts. This reduces red tape and the regulatory burden for smaller fundraisers.</p>

	<p>Point 4 – Schedule 1 - Clause 1 Traders</p> <p>FIA proposes that traders be registered either in a separate or existing register. FIA believes that traders who fundraise have responsibility to comply with regulation, as do charities. It is impractical and often impossible for charities to enforce compliance with regulation for traders who fundraise on their behalf. Notes VIC government requires traders to register before fundraising. The register notes the benefiting charities and the trader's role as a commercial operator.</p> <p>Point 5 – Schedule 1 Conditions relating to children</p> <p>FIA members have some concerns re use of children in fundraising appeals. FIA recommends the inclusion of a clause requiring fundraisers who use children to undergo a 'working with children' check similar to the NSW Dept of Education and Training.</p>	<p>Point 4</p> <p>The Department can see some benefits flowing from this proposal. However this could only be achieved by amending the Act rather than the Regulation. A compelling argument would need to be advanced to Government that the benefits of adopting a form of licensing regime for traders outweighed the resulting increase in red tape. The FIA has the option of raising this issue in any submission it may make as part of the proposed review of the Act, in 2009.</p> <p>Point 5</p> <p>NSW child protection legislation provides that an employer must conduct certain enquiries where a person is working with children, whether as a volunteer or on a paid basis.</p> <p>The <i>Commission for Children and Young People Act 1998</i> imposes an obligation to inquire as to whether an employee is a 'prohibited person' and to not employ that person –ss33B-E. This applies to employers where the employment is child-related (child is under 18). It also applies to both paid and volunteer employees.</p> <p>Where there is primary children-related employment i.e. paid, foster-care and religious officials, there is a statutory obligation to conduct a mandatory background check – Division 3 -section 37. This only applies to paid employees.</p> <p>The Department considers that the above requirements impose a sufficient obligation on charitable organisations that use child participants in fundraising appeals, to make appropriate inquiries of both volunteer and paid employees.</p>
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9.17 After consideration of these submissions and a final internal review, four changes were made to the public consultation draft of the Regulation at clause 14 and clauses 1, 6 and 7 of the Schedule. These changes had an overall effect of further reducing red tape. Chapter 6 contains more information about these changes.

10 Regulation review

- 10.1 It is expected that regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficacy.¹⁶
- 10.2 This report itself is prompted by a process of regular review, driven by the *Subordinate Legislation Act 1989*.
- 10.3 This Act dictates a complete review of a regulation every 5 years.
- 10.4 Where feasible, the Department will review the content of the proposed Regulation inside the 5-year span.
- 10.5 To that end, feedback will continue to be obtained from stakeholders in the charitable sector via the delivery of seminars and meetings with peak bodies.
- 10.6 Developments in legislation and government policy in NSW and other Australian jurisdictions will be monitored for possible improvements to the regulation of the charitable sector in NSW.

¹⁶ See paragraph 1.8.7

11 ***Charitable Fundraising Regulation 2008***

11.1 The Regulation is available at www.legislation.nsw.gov.au.