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Final Report

National Competition Review of the *Hawkers Act* and the *Collections Act*

A Regulatory Review

The Allen Consulting Group

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Preface

The Allen Consulting Group wishes to thank all those who took the time to participate in the review, and Oxford University Press for the provision of a pre-release copy of Dal Pont's *Charity Law in Australia and New Zealand*.[1]

[1] Dal Pont, *Charity Law in Australia and New Zealand*, Oxford University Press, Melbourne, 2000 (forthcoming).

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Abbreviations

ACCC	Australian Competition and Consumer Commission
ACT	Australian Capital Territory
ACTCOSS	ACT Council of Social Service
ADMA	Australian Direct Marketing Association
AFP	Australian Federal Police
BARRT	Business Advisory and Regulatory Review Team
CoAG	Council of Australian Governments
CPA	*Competition Principles Agreement*
CSO	community service obligation
FIA	Fundraising Institute - Australia
IC	Industry Commission
NA	not available
NCC	National Competition Council
NCP	National Competition Policy
NSW	New South Wales
NZ	New Zealand
WA	Western Australia

Part A

Summary and Background

Chapter One

Executive Summary

1.1 Background to the Review

As part of its commitments under National Competition Policy (NCP), the Government of the Australian Capital Territory (ACT) has undertaken to review the

- *Collections Act 1959*; and
- *Hawkers Act 1936*;

against the guiding principle that legislation:

> "... should not restrict competition unless it can be demonstrated that:
>
> a) the benefits of the restriction to the community as a whole outweigh the costs; and
>
> b) the objectives of the legislation can only be achieved by restricting competition."
>
> *Competition Principles Agreement*, Sub-clause 5(1).

The review has been broad-ranging and has considered the ongoing appropriateness of the existing regulatory regimes, paying particular attention to elements of the legislation that might restrict competition.

1.2 Key Observations and Suggested Approaches

1.2.1 The Hawkers Act

The *Hawkers Act* regulates: "Any person who carries any goods on his person or on any animal or in or on any vehicle for the purpose of selling or offering for sale those goods".[2]

The *Act* appears to address both consumer protection concerns and concerns regarding the use of public space for commercial purposes, and as a result lacks a clear regulatory focus.

The Group considers that the existing consumer protection objective:

- is duplicative of other ACT and Commonwealth consumer protection and other laws;
- ignores the fact that the nature of the goods sold by hawkers are of a relatively low value and are not enduring — hence the costs of fraud are low because of the low value and the non-durable nature of the goods means that there is less of a need for post-sale follow-up; and

[2] Section 5 *Hawkers Act 1936*.

- ignores that consumers are naturally wary of buying anything of value from a hawker and hence are likely to be particularly vigilant.

Given these observations, the Group suggests that the *Hawkers Act* should not specifically seek to address consumer protection related matters.

Rather, the focus of the legislation should be on regulating how public space is allocated for commercial purposes. Instead of the relatively vague language of the existing *Act*, the legislation should incorporate clear guides as to the factors which will be considered relevant when considering whether a hawker should be allowed to use public spaces.

In this light, the *Hawkers Act* should be streamlined in the following manner:

- there should be a simple 'negative licensing' scheme for those hawkers wishing to sell goods where the hawker is essentially mobile (ie, moves location within each half an hour). The licence can be obtained simply by providing contact details and the payment of the requisite licence fee. Such parties will be bound by the provisions of the *Act* that regulate their conduct;
- if a hawker wishes to sell goods or services at a single location for a period of time (greater than a half hour at a time) then they should be required to obtain a full licence specifying the location at which they can operate. Such a licence should be based upon a range of criteria including:
  - the maintenance of public safety (eg, to minimise risks associated with cars pulling over to the side of the road to stop at a hawker's van);
  - the maintenance of a sufficiently free flow of human and vehicular traffic (eg, a hawker's trolley should not impede the flow of passengers alighting from a bus at a bus interchange); and
  - the availability of sufficient public amenities (eg, toilets and rubbish bins).

  This single licence would do away with the existing need to obtain a hawkers licence and a separate 'Permit to Stand';
- rather than the existing 180 metre exclusion zone around shops, hawkers should be allowed to set up anywhere on public land except where moveable signs are prohibited from being located. This approach seeks to ensure that vehicular and pedestrian activity is not impeded and that shop owners should have the ability to be easily seen and accessed by passing customers. While these restrictions are relatively prescriptive, they have been determined following a comprehensive public consultation program and have the advantage of being administratively simple to enforce (because the prohibitions are clear and distances can be easily measured). While the locational flexibility and lower overheads of a hawker may be perceived as an unfair advantage by many shop owners, shops have the advantage of greater consumer acceptance and trust. If this reform provides such a great advantage to hawkers it would not be unreasonable to see shop owners give up their premises and convert to hawkers on the expiry of their leases — something that the Group doubts will happen;
- conditions (ie, enforceable undertakings) should be able to be placed upon licence holders to ensure public safety, public amenity, etc; and

- there should be no restrictions on the operational structures of a hawker (eg, limits on the number of vehicles, ownership structures, etc). As a result, corporations should be able to obtain a hawkers licence.

The scope of the *Act* could be expanded to regulate the delivery of services by hawkers, although the Group does not support this extension at present. Consideration of the inclusion of services was made in response to safety concerns arising from window cleaners operating at traffic lights. The regulation of such activity is the responsibility of the Police,[3] but if under-enforcement is perceived as a current problem then the *Act* could be extended to services and brought within the Government's control. Rather than the inclusion of services generally, the Group suggests that any such extension should address the delivery of services in particular locations (eg, in the vicinity of traffic lights).

The Group does not suggest separating out those land use provisions from the business licensing provisions of the *Act* given that, particularly with regard to the full licence, the licence is tailored to meet a particular land use outcome.

Given this proposed refocussing of the *Hawkers Act* on land use, consideration should be given to merging the *Hawkers Act* with other legislation that regulates the use of public spaces (eg, the *Roads and Public Places Act 1937*).[4]

1.2.2 The Collections Act

As its name implies, the *Collections Act* focuses on public collections/fundraising. It provides a system for the Minister to issue a licence to collect money or goods either in a public place or by canvassing residents door-to-door. The *Act* gives the Minister discretion to refuse to issue a licence on various public interest grounds and outlines the obligations of licensees in relation to authorising and identifying collectors and accounting for the proceeds of the collection. It further gives the Minister the power to control the duration and frequency of collections and to regulate the number of collections occurring at the same time.

The regulation of charities and charitable fundraising in Australia has been piecemeal and inconsistent in its response to increased reliance by charities upon fundraising:

> "... the twentieth century (and in particular the late twentieth century) has seen a marked growth in number of collecting charities, which rely not on private endowment but, *inter alia*, on *fundraising* activities for the promotion of their purposes. These activities include, in addition to the simple solicitation of donations, fees for services, membership fees, sale of expertise, retailing, collection of clothing or goods, business ventures, corporate sponsorship, hiring of the organisation's facilities, an interest or rent from investments or property. However, the legislative response to this phenomenon has largely been limited to fundraising through solicitation of donations. Even then, three

[3] See section 5 of the *Traffic Act 1937*: "A person shall not walk upon a public street ... without due care and attention or without reasonable consideration for other persons using the street."

[4] The *Roads and Public Places Act* is being separately reviewed under the ACT's NCP legislative review program.

> jurisdictions, the Northern Territory, Tasmania, and New Zealand, have not enacted legislation directed specifically to fundraising or collections (although law reform bodies in the two latter jurisdictions have made recommendations to this effect). In the Northern Territory, Tasmania and New Zealand, it is the general law of contract (and perhaps trusts), coupled with legislative fair trading initiatives, that serves to govern the conduct of charitable fundraising."
>
> Dal Pont, *Charity Law in Australia and New Zealand*, Oxford University Press, Melbourne, 2000 (fortheoming), p.387.

It is important to stress that while there appears to be a common belief that the *Collections Act* regulates all charitable giving it only regulates a small subset of giving (ie, not over the phone, not on private property, etc). As a result only a small percentage of all donations is regulated by the *Act*; over the period 1997-1999 only $3.72 per ACT resident per year was raised under collections licensed under the *Act*, or an estimated three percent of all charitable donations in the ACT.

A fundamental tension in the analysis of the appropriateness of the *Collections Act* occurs because of the disparate nature of the fundraising organisations involved. In particular, the fundraisers in the ACT can be classified into three broad categories:

- those with a national approach. The tendency for these organisations is to operate in a manner that meets the highest regulatory standards of all the states and territories. As these organisations tend to be large and have national profiles they will tend to operate a particular way irrespective of any lower standards in the ACT;
- those with a regional approach. These include fundraisers that are structured to cover NSW and the ACT, or those that focus on the greater ACT region (ie, the Eden Monaro region). These organisations currently comply with the higher standard NSW legislation and hence will tend to operate in compliance with the NSW system even in the ACT; and
- those solely operating in the ACT. These organisations have become accustomed to the current system and some may resent approaches that operate in other jurisdictions (ie, allowing cross-border competitors, higher reporting standards, etc).

Even within each of these categories:

- there are a range of legal structures (eg, unincorporated bodies, corporations, trusts, etc);
- they have varying collection strategies (eg, some only collect once a year of a particular day or week, and others collect on a more regular basis);
- they vary greatly in size; and
- there are diffcrent mixes of reliance upon staff, volunteers and paid contractors.

Given these observations, the Group suggests that the *Collections Act* should amended with an emphasis on:

- streamlining the licensing process —

  - rather than being licensed for fundraising on particular days, the licence would be for a significantly longer period;[5]
  - the regulations should allow for mutual recognition of fundraisers that are licensed in jurisdictions with equivalent licensing regimes;
- streamlining the provision of information to the regulator — rather than reporting on the funds raised and the expenses incurred for each and every collection, fundraisers would be required to present audited accounts to the regulator every year. If an organisation is considered to be too small to have audited accounts an appropriate person (eg, an accountant, a retired accountant, a bank manager, etc) should verify that the organisation's record-keeping provides an accurate account and those records should be provided to the Registrar. While this appears to be a softening of the existing reporting requirements, current arrangements are piecemeal, the information that is provided is unverified and there is no public dissemination of the information;
- increasing disclosure to the community —
  - collectors will need to display a range of information to potential donors. This information will include the name of the fundraising organisation, contact details for the fundraiser, the purpose to which the funds will be spent, and the nature of the collector (ie, volunteer, staff member or paid collector);
  - a list of licensed fundraisers should be made publicly available (ie, placed on an accessible web page) with their contact details;
- allowing consumers to choose to whom they wish to donate funds — the current *Act* restricts both who can undertake collections and when. The approach in the manner in which current *Act* is applied has a number of biases:
  - towards larger national organisations/campaigns which have annual fundraising campaigns on particular days;
  - against interstate/national fundraisers who may be prohibited from fundraising in the ACT because they would be competing against similar local organisations;
  - against those organisations which would like to fundraise on an ongoing or frequent basis.

  The Group suggests that donors' choice should not be restricted by government intervention and regulation. Rather, the emphasis should be on allowing a broad array of choices, which when coupled with increased information disclosure to potential donors, provides donors with the ability to choose who they would like to support. While there may be some apprehension that this will cause a significant and uncontrolled increase in collections there is no evidence from interstate jurisdictions that this is likely.

This approach has been suggested on the basis that the *Act* should regulate the activity of fundraising, and that the regulation of public space is unnecessary and should be removed from the *Act*.

It is important that the Department of Urban services be made aware of national moves to harmonise the regulation of charitable fundraising. In this regard, it appears that there should be some consolidation of government

[5] As an example, a similar licensing system in NSW provides for an initial two year licence which is subsequently renewable every five years.

responsibility for charities, and that this is probably best achieved in a department other than Urban Services (even though enforcement is through the Department of Urban Service's rangers).

1.3 Recommendations

1.3.1 The Hawkers Act

RECOMMENDATION B1 — *The Hawkers Act should have as its objective the appropriate allocation of public space for hawking taking into account impacts on third parties.*

RECOMMENDATION B2 — *There should be continued positive licensing for hawkers who wish to operate from a single location (ie, certain criteria must be met and a fee paid before a hawker is allowed to operate). Mobile hawkers should operate under a negative licensing scheme (ie, they will only be required to provide contact information and pay a fee before being allowed to operate — there are no 'positive' licensing requirements).*

RECOMMENDATION B3 — *The Act should be amended to remove the 180 metre exclusion zone provided for traditional shop owners. In place of this restriction, hawkers should not be allowed to operate in locations at which moveable signs are prohibited.*

RECOMMENDATION B4 — *The licence for stationary hawkers should include the right to stand at a single location (ie, the existing hawkers licence and the Permit to Stand should be merged).*

RECOMMENDATION B5 — *There should be no character requirements that need to be met to obtain a hawkers licence.*

RECOMMENDATION B6 — *There should be no minimum age requirement in order to obtain a hawkers licence.*

RECOMMENDATION B7 — *A business should be able to obtain a hawkers licence.*

RECOMMENDATION B8 — *There should be no requirement for a hawkers van to state that it is operated by a licensed hawker.*

RECOMMENDATION B9 — *There should be no restrictions as to the number of vehicles that a mobile hawker can operate, but a licence fee should be payed for each vehicle.*

RECOMMENDATION B10 — *A separate licence is required for every vehicle operating from a single location from which goods are sold.*

RECOMMENDATION B11 — *There is no need for the Hawkers Act to regulate the number of people employed by a hawker or their minimum age.*

RECOMMENDATION B12 — *The section 22 restriction on licence transfers should be retained.*

RECOMMENDATION B13 — *The Act should be amended to remove the requirement that two sureties be provided.*

RECOMMENDATION B14

Regulation of health, liquor and contraband goods should be undertaken in generally applicable legislation and should not be referred to in the Hawkers Act.

1.3.2 The Collections Act

RECOMMENDATION C1

To aid understanding of the legislation the Collections Act should be amended to state that the objectives of the Act are:

- *to protect the public against fraud, misappropriation of funds and misleading conduct;*
- *to ensure that donors and the public have access to information; and*
- *to ensure that organisations use acceptable fundraising practices.*

RECOMMENDATION C2

The Act should not place limits on the level of fundraising costs or remuneration per se.

RECOMMENDATION C3

The regulatory emphasis should be on disclosure of fundraising details to potential donors.

RECOMMENDATION C4

There should be no power to refuse a license based upon where the funds are to be spent.

RECOMMENDATION C5

The legislation should continue to provide the Minister with the ability to refuse to licence a fundraiser on broad public interest grounds. The Minister should be required to provide reasons for any such decision.

RECOMMENDATION C6

The Collections Act should not limit the locations where collections can be undertaken or the number of organisations collecting at any particular time.

RECOMMENDATION C7

Rather than focusing on funds raised and costs incurred for particular collections:

- *all organisations that produce audited accounts should be required to lodge those accounts with the Registrar on an annual basis; and*
- *organisations which do not have audited accounts should be required to keep appropriate records and have those records signed off by an 'appropriate person' as being in order.*

RECOMMENDATION C8

Collectors should required to wear a badge (or prominently display information) that states:

- *the name of the fundraising organisation;*
- *the purpose for which funds are being raised, and how and where the funds will be spent;*
- *whether the particular collector is:*
  - *a volunteer;*
  - *a paid employee of the fundraising organisation; or*
  - *a contracted professional fundraiser and the term on which they (or their organisation) are contracted;*
- *a contact name and phone number for the fundraiser.*

RECOMMENDATION C9	*When seeking a fundraising licence the applicant should be required to provide an example of the information to be provided to the community. The Registrar should ensure that the example adequately conveys the required information.*
RECOMMENDATION C10	*Systematic failure to display the required information at the point of collection should result in the suspension or revocation of a fundraiser's licence.*
RECOMMENDATION C11	*The Collections Act should explicitly provide the Minister with the power to delegate to the Registrar the issuance of licences.*
RECOMMENDATION C12	*There should be a publicly accessible list of licensed fundraisers and their contact details.*
RECOMMENDATION C13	*The Act should be drafted to apply to any direct or indirect appeal for support. A direct appeal would include a personal request for a donation in any form, and an indirect appeal would include those circumstances where the appeal involves the sale of a good or service where the price does not truly reflect the good or service's value.*
RECOMMENDATION C14	*Under the principle of mutual recognition the ACT should accept fundraising licences from jurisdictions with fundraising regimes that are similar to that in the ACT.*

Chapter Two

Principles Underlying This National Competition Policy Review

This chapter explains the NCP principles and framework that underlies the remainder of this report.

In April 1995, the Commonwealth, State and Territory Governments signed the inter-governmental *Competition Principles Agreement* (*CPA*), committing themselves to ensuring that new and existing legislation does not impose undue competitive restrictions:

> "The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:
>
> a) the benefits of the restriction to the community as a whole outweigh the costs; and
>
> b) the objectives of the legislation can only be achieved by restricting competition."
>
> Sub-cl. 5(1) *Competition Principles Agreement*

This test — the 'competition test' — is intended to establish whether particular restrictions on competition remain necessary, through an assessment of the costs and benefits of current and alternative means of achieving policy objectives.

Legislation may be said to restrict competition if it:

- establishes an outright prohibition of business activity;
- establishes or protects a monopoly;
- provides for the licensing or registration of participants in a business activity;
- allocates quotas/franchises;
- requires specific quality/technical standards for specific equipment;
- establishes price controls (including direct and indirect controls);
- nominates preferred customers or suppliers;
- confers differential benefits on particular persons/entities;
- provides for natural resource access licensing;
- establishes participation limits (on overseas/interstate participants);
- establishes barriers to entry or exit (often througb licensing/registration);
- imposes restrictions on business structure, form or ownership;
- imposes restrictions on business conduct;
- imposes potential impediments to innovation (eg, through quality standards);
- promotes inefficient cross–subsidies between classes of goods and services; and

- promotes efficiency losses through excessive regulation.

As the competition test is built on the presumption that restrictions to competitive economic bebaviour impose costs on the community, the burden of proof is on governments, and those who benefit from competitive restrictions, to establish the public interest case for the retention or enactment of legislation which restricts competition.[6]

To this end, NCP acknowledges that competition is not an end in itself; that while, in general, the introduction of competition will deliver benefits to the consumer, there are situations where community welfare will be better served by not effecting particular competition reforms. That is, competition is to be implemented to the extent that the benefits that will be realised from competition outweigh the costs.

Sub-clause 1(3) of the *CPA* provides for considerations other than strictly economic criteria in assessing public benefit in circumstances where, on balance, there is a net benefit for the community. It sets out the circumstances in which the weighing up process is called for, and also some of the factors which need to be taken into account in making the decision:

> "Without limiting the matters that may be taken into account, where this Agreement ealls:
>
> (a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of aetion; or
>
> (b) for the merits or appropriateness of a particular policy or eourse of aetion to be determined; or
>
> (c) for an assessment of the most effective means of aehieving a policy objective;
>
> the following matters shall, where relevant, be taken into account:
>
> (a) government legislation and policies relating to ecologically sustainable development;
>
> (b) social welfare and equity considerations, including community service obligations;
>
> (c) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
>
> (d) economic and regional development, including employment and investment growth;
>
> (e) the interests of consumers generally or of a class of consumers;
>
> (f) the competitiveness of Australian businesses; and
>
> (g) the efficient allocation of resources."

This is called the 'public interest' test. The National Competition Council (NCC) emphasises that the public interest test is not exclusive or prescriptive. Rather, it provides a list of indicative factors a government could look at in considering the benefits and costs of particular actions,

[6] See Independent Committee of Inquiry, *National Competition Policy*, AGPS, Canberra, 1993, p.206.

while not excluding consideration of any other matters in assessing the public interest.

If, on balance, the costs of restrictions on competition in the legislation outweigh the benefits then the restrictive legislative provisions should not be retained. Even if, on balance, there are net benefits arising from restrictions, the legislation should only be retained in its current form if its objectives cannot be achieved more efficiently through other means, including non-legislative approaches.

Box 2.1

Application of National Competition Policy to the *Collections Act*

The review terms of reference (see Appendix One) asks that this review:

> "confirm the results of a preliminary audit that the Act does not contain any barriers to competition in relation to business activities or activities in trade or commerce, i.e. the activities regulated are not within the intended ambit of the National Competition Policy"

The Group disagrees with the preliminary findings and suggests that the *Collections Act* does fall within the ambit of the NCP legislative review process.

The *Collections Act* sets up a scheme of licensing for the collection of monies or goods:

> "The *Collections Act* provides a system for the Minister to issue a licence to a person, society, association or body for collection of money or goods, either in a public place or by canvassing residents door-to-door. The *Act* gives the Minister discretion to refuse to issue a licence on various public interest grounds and outlines the obligations of licensees in relation to authorising and identifying collectors and accounting for the proceeds of the collection. It gives the Minister the power to control the duration and frequency of collections and to regulate the number of collections occurring at the same time."

The preliminary audit shows a clear lack of understanding of the ambit of NCP:

- the *Act* sets up a scheme of licensing for the collection of monies or goods. As licensing regimes create entry barriers that restrict who can and cannot compete in the market the legislation is of the nature that is generally included for review within the NCP legislative review program;
- there is clearly competition between fundraisers. This was demonstrated by a number of industry participants who speak with a passion about outperforming other fundraisers who are raising funds for similar purposes; and
- fundraising is increasingly being undertaken by professional fundraisers and so easily can be categorised as a business activity. In any event, the legal structure of the organisations should not matter given that the NCP process (particularly as shown through the *Competition Policy Reform Act 1995*) has focused on the extension of competition policy to all sectors of the community including the unincorporated sector and governments. The preliminary audit's failure to appreciate this extension of competition to all sectors is damning.

Even if this review is not considered under the NCP framework, given the ACT's commitment to apply the sub-clause 5(1) of the *CPA* test to new (or amended) legislation, any amendment to the *Act* would need to consider alternatives to current arrangements under the NCP legislative review framework.

Source: Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995, pp.221-222; and The Allen Consulting Group.

B

Part B

The *Hawkers Act*

Chapter Three

An Introduction to the *Hawkers Act*

3.1 An Overview of the *Hawkers Act* and Hawking in the ACT

The *Hawkers Act* establishes a licensing regime for hawkers. Hawkers are people:

- who carry food or goods;
- on their person, on an animal or in/on a vehicle;

with the intention of selling the food or goods. The regime only applies to the operations of such people on public (ie, not private) property.[7]

There are about 40 licensed hawkers at a given time in the ACT, with the majority selling take-away food or a mix of flowers and fruit. Most of these hawkers use hawking as an ongoing form of employment, although a small minority are hawkers on weekends for a salary top-up.

Most hawkers have permits to stand along sides of major roads — see Figure 3.1 as an example.

Figure 3.1

A Typical Flower Hawker

Source: The Allen Consulting Group

Others set up near building sites or in carparks at the fringes of commercial areas — see Figure 3.2 for an example. Indeed, it was suggested during the review that hawkers play an important role in those areas where suburbs are still developing and where shops are not yet fully established.

[7] Therefore, the *Hawkers Act* does not apply to vans located on, for example, petrol station sites.

Figure 3.2

A Food Hawker Located at a Truck Stop

Source: The Allen Consulting Group

In a limited number of cases (eg, Mr Whippy Ice Cream vans) hawkers do not have permits to stand, but instead move from location to location at least every half hour.

Most hawkers use a vehicle which is only on the site while trading. Exceptions are Dolly's Food Van at Acton, food vans at the Belconnen Bus Interchange, Kooyong Street Civic and Woden near the 'markets'.

3.2 The Objectives of the *Hawkers Act*

3.2.1 The Historical Objectives of Hawking Regulation

Licensing of bawkers is common around the world and has a long history.

The origins of legislation addressing the hawking of goods suggest it was formed to protect the public from unscrupulous sellers:

> "Whilst the crown was concerned at a early date to regulate markets and fairs the concept of hawking seemed to evolve in the 16th century from the activities of "itinerant traders and vagrants". Hawkers were said to be "a sort of deceitful fellows that go from place to place buying and selling brass, pewter, and other merchandise, that ought to be uttered in open market" ...
>
> At the same time, the first Statute to deal with itinerant traders was made. 5 Edw 6 C 21 (1552) provided:
>
> > No Tinker, Pedlar, or Petty Chapman, shall wander about from the Town where he dwelleth, or exercise the Trade of Tinker, but such as shall be licensed by two Justices of Peace or more, under their Hands and Seals, upon Pain of fourteen Days Imprisonment"
>
> Available at http://www.dpa.act.gov.au/ag/Reports/Essays/e27.html.

In Australia this concern was overlaid with turn of the century concerns regarding the desire to regulate public spaces to ensure public safety and visual amenity:

> "How can we explain these moves to reform urban street life in the late

> nineteenth and early twentieth centuries? There is no one explanation which covers the situation in all colonies, but certain common processes are identifiable. And these relate to transformations in the management of urban space common to cities in other English-speaking countries at about the same time. The growth of an urban middle class which accompanied the industrial expansion of the nineteenth century created a class of leisured wives and daughters who sought to use urban space in new ways, most notably by shopping and promenading in the central business districts. ... With more 'respectable' women using the streets, the presence of what they regarded as 'nuisances' had to be minimised and preferably eliminated. Hawkers, beggars and drunks were all targets of this campaign ..."
>
> Frances, "The History of Female Prostitution in Australia" in Perkins, Prestage, Sharp, & Lovejoy (eds), *Sex Work and Sex Workers in Australia*, University of New South Wales Press, Sydney, 1994, pp.27-52 available at http://www.infoxchange.net.au/wise/HEALTH/Pros3.htm.

Furthermore, at least initially, the regulation of hawkers in the ACT was proposed to remove the perceived competitive advantage provided to hawkers by being able to avoid shop trading hours restrictions. Evidence of this is provided by the following extract from the memo (16 July 1926) which initiated drafting of the *Hawkers Ordinance 1926* (the first Ordinance made for regulation of Hawkers in the ACT):

> "Difficulty has been experienced owing to the absence of proper control of hawkers and other itinerant purveyors of merchandise in the Federal Territory, and shop-keepers who have established themselves in Canberra have made strong complaints in regard to their unfavourable position as compared with these un-licensed persons who keep no regular hours and ply their trade even on Sundays.
>
> At the present time there is no law under which hawkers and similar persons may be licensed, as the law of New South Wales in respect of such activities applies only in certain prescribed places. It is not feasible for the State to proclaim the Federal Capital Territory as a prescribed area for this purpose, and independent provision must therefore be made.
>
> The [Federal Capital] Commission has approved of the introduction of a system for licensing hawkers and similar persons with provision for controlling the hours during which they may operate."

However, in the course of drafting it was decided:

> "that it is not now proposed to deal with the matter of hawkers' hours of trading in the Hawkers' Ordinance. A draft Early-closing Ordinance, which covers hawkers, has been prepared and it is considered that that Ordinance will sufficiently cover the case."

While this objective was dropped, it is clear that an underlying objective of the regulation of hawkers was to constrain their natural competitive advantages in comparison to traditional shops.

3.2.2 The Current Objectives

As the historical origins of hawkers legislation implies, the objectives of the legislation are somewhat mixed.

The current *Hawkers Act* does not include an explicit statement of its underlying objectives, but could be said to contain provisions related to the regulation of:

- the proper conduct of 'business' (ie, to protect consumers from fraudulent commercial behaviour);
  - this is evident in the need for hawkers to be of good character and submit to a police check;
- activity in public places (ie, to ensure that business is conducted in a safe and orderly fashion in public places);
  - this is evident in the regulation of where and when hawkers can operate.

An unwritten objective, but one that was verbally stated by one member of the bureaucracy, is that the current *Hawkers Act* is drafted specifically to retard the sector's migration from a family-based system of operation to a more commercial focus.[8]

3.2.3 The Appropriateness of Current Objectives

The Council of Australian Governments (CoAG) has publicly stated that government interventions in markets should generally be restricted to situations of market failure and that each regulatory regime should be targeted on the relevant market failure or failures.[9]

Market failures may arise under a number of conditions including:

- *public goods* — these goods will tend to be under–produced because they are non–excludable (ie, people who have purchased the good cannot stop others using it up) and non–rivalrous (ie, the good is not used up with use). Common examples include aspects of the natural environment and national defence;
- *externalities* — these are positive or negative impacts of market transactions which are not reflected in prices, and so lead to non-optimal levels of production and consumption. In effect, externalities are impacts on unrelated third parties. Pollution is commonly cited as a negative externality (because third parties suffer from its production) and education is often cited as an example of a positive externality (because third parties can benefit from another person's increased knowledge);
- *natural monopolies* — where the costs of establishment, resources or infrastructure mean that setting up competition is socially wasteful. Because a natural monopoly is socially optimal but not necessarily in the interests of all players in the market, governments may decide to regulate in the public interest; and
- *information asymmetries* — where information is not evenly distributed throughout the community. Traditionally this has meant that firms have had complete (or high) information and consumers have correspondingly very little.

It is plausible to suggest that there may be externalities associated with hawking. For example, there may be traffic congestion as people slow down to stop at a hawkers van, there may be perceived 'visual pollution' created

[8] For example, because licences are personal and the number of assistant hawkers are limited, it would be difficult for McDonalds (or any other corporation) to establish a mobile McDonalds outlet.

[9] Council of Australian Governments, *Report of Task Force on Other Issues in the Reform of Government Trading Enterprises*, released as part of the first CoAG communique, 1991, p.22.

by the operation of a hawker's business, and there may be increased litter around a hawker's van.

While there will be some information asymmetries associated with the purchase of goods from a hawker, this is probably no more so than a purchase from a traditional shop.

In addition to explicit market failures, other reasons why governments have tended to regulate or intervene in markets include:

- *the desire for universal goods and/or services* — community service obligation (CSO) services such as concessions to essential services for low income households is an example where governments have deemed it necessary to 'interfere' with the market;
- *allocation of public resources* — some industries base their operations on a public resource of limited capacity, so that a public agency must intervene to ration out that resource; and
- *protection of consumers, employees and the environment* — this is intended to overcome problems of externalities and imperfect information in the market place.[10]

The regulation of hawkers could be rationalised on two of these grounds:

- by allocating public spaces that can be used by hawkers the legislation serves to allocate a scare resource (ie, public land); and
- while the *Hawkers Act* includes a number of elements that seem to suggest that the act has a consumer protection objective, as noted above, the Group is sceptical that there is any special characteristics associated with hawkers that justify special consumer protection legislation.

Given these observations, the Group suggests that the appropriate objective for the *Hawkers Act* is to allocate public space for the use of hawking in such a manner that minimises impacts on third parties. Such impacts could include regulating to:

- ensure public safety (eg, with cars pulling over to the side of the road);
- ensure a sufficiently free flow of human and vehicular traffic; and
- maintain the availability of sufficient public amenities (eg, toilets and rubbish bins).

The ACT Council of Social Service (ACTCOSS) also suggested that an objective of the *Act* is to provide rights for hawkers (ie, the *Act* provides the right to hawk). The Group does not support this view; regulation provides a framework for hawkers to operate but does not provide any particular 'rights' over their operation on public or private land.

RECOMMENDATION B1

The Hawkers Act should have its objective the appropriate allocation of public space for hawking taking into account impacts on third parties.

[10] These three objectives may or may not be related to a market failure.

Chapter Four

Is a Licensing Regime Appropriate?

Sub-section 6(1) of the *Hawkers Act* prohibits a person from hawking unless he or she holds a licence issued under the *Act*. The need to have a licence does not apply to the sale of goods:

- in a market or fair established in the ACT;[11]
- in a shop occupied by the person selling; or
- in any premises approved by the Minister.[12]

However, section 12 of the *Act* gives the Registrar the power to grant a licence subject to the payment of a fee (s.13).

The combined effect of these provisions is to establish a licensing regime for hawkers.

This chapter briefly considers whether there are any practical alternatives to licensing and some of the particular features of alternative licensing approaches.

4.1 The Scope for Self-Regulation

4.1.1 An Overview of Self-Regulation

Under NCP it is necessary to ask whether it is necessary for government to regulate hawkers at all (ie, to rely on self-regulation).

Industry self–regulation describes the type of actions or procedures that the industry determines to be appropriate conduct — ranging from simple statements of intent, to rules of conduct, and on to industry developed norms.

Amongst a number of benefits associated with self-regulation (see Table 4.1), two benefits stand out — self–regulation:

- maximises industry flexibility — it allows for easy adjustment by industry participants to changes in the nature of the industry (eg, changing technologies and/or consumer preferences); and
- reduces the need for and the cost of government resources spent administering a regulatory framework.[13]

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[11] The relationship between the *Hawkers Act* and markets and fairs is explored in *Attorney General of the Australian Capital Territory on the Relation of Olaseat Pty Limited v The Australian Capital Territory Minister for Land and Planning, The Australian Capital Territory and the Rotary Club of Canberra Belconnen Incorporated* (1992) 109 FLR 389.

[12] The first two classes provided exemptions are regulated under other legislation, and can be justifiably regulated on different grounds because of the differential character of the dealings: shops are permanent and immobile, and fairs/markets are temporary but bring together a range of buyers and sellers of a range of goods and services. The third exemption is in the nature of a public interest exemption.

[13] However, at least some of the costs will be transferred to the industry.

However, for self–regulation to be effective:

- there must be sufficient power and commonality of interest within an industry to deter non–compliance; and
- the cost of non–compliance must be small.

Table 4.1

Potential Advantages and Disadvantages of Self–Regulation

Advantages of Industry Made and Enforced Rules/Norms	Disadvantages of Industry Made and Enforced Rules/Norms
• They are more likely to be observed because they are made by those to whom they apply. • They utilise the insiders' expertise and experience in the formulation of codes or agreements. • They can be more responsive and flexible than regulation with changes and updating occurring more often. • They can allow for more innovative behaviour of industry participants. • They have the agreement of major industry participants and therefore awareness and compliance is likely to be higher. • They provide a market solution for the regulation of ethical behaviour. • They are cheaper for governments to develop and monitor as those being regulated bear the cost of regulating. • They may provide a dispute resolution mechanism, via independent arbitrators, the ombudsman, or industry councils.	• There are no legal remedies for breaches of industry developed codes/norms. • They could be used to promote anti–competitive behaviour. • They impose monitoring costs which are incurred by the industry or a professional association. • Compliance may be low if a sense of commonality amongst those affected is not present. • They may implicitly create barriers to entry.

Source: The Allen Consulting Group

4.1.2 Self-Regulation by Hawkers

In a number of other jurisdictions state and territory governments have seriously considered the scope for self-regulation of hawkers. For example, as part of each jurisdiction's NCP review processes:

- the hawkers legislation in New South Wales (NSW) was repealed;
- a recommendation to repeal the legislation has been made in the Northern Territory (NT), and
- the Queensland review is considering the repeal of its legislation.

This self-regulatory trend has arisen because of the view that there are sufficient safeguards in other legislation such that there is no need for a state

or territory government to regulate hawkers, and that such matters are more appropriately dealt with at a local level.

Indeed, there is an array of existing generally applicable Commonwealth and ACT legislation which already regulates the activities of hawkers — see Table 4.2.

Table 4.2

ACT and Commonwealth Legislation Which Already Regulates the Conduct of Hawkers

Legislation	Description
Trade Practices Act 1974 (Cth)	Regulates commercial conduct to protect consumers
Fair Trading Act 1992	Regulates commercial conduct to protect consumers
Liquor Act 1975	Regulates the sale of liquor
Crimes Act 1900	Regulates the sale of contraband goods
Roads and Public Places Act 1937	Regulates the use of roads and public places
Sale of Goods Act 1954	Regulates the sale of goods
Traffic Act 1937	Regulates the use of motor vehicles and horse-drawn vehicles
Food Act 1992	Regulates facilities, equipment, products and activities associated with the preparation of food

Source: The Allen Consulting Group

To some degree this position has been supported by the ACT Law Review Program which, in reference to the *Hawkers Act*, noted that: "It has a number of provisions (mainly offences dealing with liquor and contraband goods) which are properly dealt with in the Liquor and Crimes Acts respectively."[14]

Despite the existence of these other laws, there are two reasons to support the ongoing regulation of hawkers:

- the repeal (or suggested repeal) of bawkers legislation in other jurisdictions has only been possible because regulatory responsibility has been shifted to local councils. Given that the ACT has only a single level of government there is no scope to pass the responsibility for regulating hawkers to another level of government; and
- the disparate nature of the industry means that it is unlikely that an acceptable code of commercial behaviour or industry norms will be developed that will allow self-regulation to be relied upon to any degree to ensure that hawkers will minimise externalities.

Given these observations the Group suggests that there will be a need for some form of government regulation of hawkers.

[14] Attorney-General's Department, *Legislation Review Principles*, available at http://www.dpa.act.gov.au/ag/Reports/Review/Report2/review2.htm.

4.2 Particular Forms of Licensing

4.2.1 Traditional Licensing

Traditional licensing schemes impose a range of costs and benefits. These are discussed in turn.

Costs associated with a hawkers licensing regime may broadly be classified as:

- *administrative and compliance costs*, both for industry and for those who enforce the regulation:
  - hawkers currently incur direct financial costs in complying with licensing requirements imposed by the *Hawkers Act*. Licensing fees are shown in Table 4.3, but there will be other costs such as having to go an lodge licensing forms (these are not posted out to hawkers, but must be collected in person); and
  - the ACT Government also incurs direct financial costs in administering the licensing regimes. This includes at least part of one officer's salary, but does not appear overly onerous in the current circumstances (particularly when offset against the licence fees obtained); and
- *costs to economic efficiency* which arise from any restriction on competition. Licensing regimes have, at least in theory, an impact on economic efficiency because they raise/create entry barriers and distort underlying supply decisions.[13] That is, by raising the cost of market entry some potential hawkers will be discouraged and hence would not enter when they otherwise would have. At least in the first instance (ie, before taking into account potential quality concerns), the potential losers from such licensing requirements are:
  - consumers — who would expect to pay lower prices and have wider choices if a licensing regime did not exist; and
  - potential hawkers — who would find it harder (ie, more costly in time, effort and expense) to enter the ACT market.

  While these costs are real, they are unlikely to be overly significant in the current circumstances.

[13] The impact of licensing regimes is shown diagrammatically in Logan, Milne and Officer, "Competition Policy in Regulated Markets" in James (ed), *Regulating for Competition? Trade Practices Policy in a Changing Economy*, Centre for Independent Studies, Sydney, 1989, pp.115-139 at p.127.

Table 4.3

Fees under the *Hawkers Act*

Fee Clauses	Fee
Licence Application	
Initial approval — charge by the Australian Federal Police (AFP) for a police check	$34
Licence renewal	nil
General Licence	
No vehicle being used	$8.20 monthly/$98.40 yearly
Vehicle 0-2 tonne	$13.40 monthly/$160.80 yearly
Vehicle over 2 tonne	$20.60 monthly/$247.20 yearly
Permit to Stand	
No vehicle being used	$13.40 monthly/$80.40 half yearly
Vehicle 0-2 tonne	$52.00 monthly/$312 half yearly
Vehicle over 2 tonne	$77.40 monthly/$464.40 half yearly

Note: Weight appears to be used as a proxy for space occupied by a hawkers vehicle.
Source: Department of Urban Services

Against these costs, licensing of hawkers may have a number of benefits:

- clear entry criteria can be established. However, such benefits will be limited because it is not clear that the control of inputs will necessarily affect the outputs (ie, will the satisfaction of entry criteria mean that hawking will actually be conducted in particular manner?);
- licensing provides a means by which the number of hawkers can be monitored and their identity ascertained (ie, to send information regarding legislative changes or in case that there has been a problem with respect to the operation of a hawker);[16]
- conditions can be attached to a licence regarding the operation of a particular hawker; and
- the threat of license revocation can be used as an enforcement tool in ensuring the maintenance of hawking standards.

The Group considers licensing to be an appropriate regulatory mechanism for the regulation of hawkers.

4.2.2 Negative Licensing

A negative licensing scheme is one whicb removes the restrictive nature of licensing altogether, and permits a person to operate as a hawker without any formal test of competence or character. However, under negative licensing the Government still retains the authority to withdraw permission to hawk if that person subsequently fails to meet the minimum standards of work and conduct set out in the *Act*.

[16] As an example, the NSW Department of racing and gaming sends a bulletin to all licensed fundraisers every six months advising the organisations of actual and proposed legislative changes and wider industry developments.

Negative licensing can take two forms — where there are:

- no entry requirements necessary to get a licence (ie, just sign up by providing contact information); or
- restrictions on entry based on certain negative characteristics (eg, serious criminal convictions) rather than specification of any positive requirements for licensing (eg, good character or particular educational requirements).

In either case fees may have to be paid.

Advantages of negative licensing may include:

- lower compliance costs — negative licensing imposes fewer costs on potential hawkers (eg, there is no need to have a police check), which should result in lower prices for consumers;
- lower administrative costs — whilst the Government would still incur some continuing administrative costs under a system of negative licensing, compared to costs required to maintain a system of 'positive licensing' there would probably be a small net saving to the Government; and
- the ability to 'punish' contravention of licence conditions — while registration alone may not ensure high quality, the threat of licence revocation may be enougb to provide gambling providers with the incentive to provide honest and high quality services. In essence, this would amount to a system of free entry and enforced exit.

In comparison, the potential disadvantages of negative licensing of hawkers include:

- as no positive screening occurs the number of 'inappropriate' hawkers initially entering an industry may be higher than under a traditional licensing process. The Group considers this to be a minimal risk with respect to hawkers;
- some hawkers may be able to operate undetected or act inappropriately before they are detected. That is, licence removal will only occur after the detection of a breach. Given the generally trivial nature of the goods sold by hawkers any such costs are likely to be minor; and
- enforcement activities may need to be increased, thereby increasing monitoring costs. Again, however, the Group considers this cost to be minimal.

The Group considers negative licensing to be an appropriate regulatory mechanism for the regulation of hawkers.

4.2.3 Co-Regulation

Co–regulation is a system of government regulation in which the government establishes a regulatory framework (including conduct rules) but administrative responsibility is handed over, to a greater or lesser degree, to the industry itself.

The principal benefit of co-regulation is that it harnesses the industry's desire to be regulated and puts the onus on the industry to take on more responsibility. A co-regulatory approach need not lessen standards — the

Government's ongoing needs can be met by establishing the ground-rules for hawking.

A problem with co-regulation in the ACT is that there is no body that represents the interests of hawkers. This alone makes co–regulation unsuitable for the regulation of hawkers.

4.2.4 Certification

One of the most common alternatives to licensing is certification. Under a certification regime anyone would be allowed to hawk, but formal certificates of competency are provided to those hawkers who desire to be certified and can meet the necessary minimum standards.

Certification standards tend to be similar to those in place under a licensing regime. Under a licensing arrangement, however, only those individuals who meet the requirements are allowed to practice; certification does not preclude practice by non-certified professionals.

Certification has a number of advantages over licensing. One of the most important benefits of certification, as opposed to licensing, is that it allows consumers greater freedom of choice. An individual could choose either a non-certified hawker, or a (presumably 'better') certified hawker. Friedman strongly supports the freedom to chose under a certification regime:

> "If the argument is that we are too ignorant to judge good practitioners, all that is needed is to make the relevant information available. If, in full knowledge, we still want to go to someone who is not certified, that is our business."
>
> Friedman, "Occupational Licensure", in *Capitalism and Freedom*, Chicago, 1962, pp.137–160 at p.149.

A system of certification, however, is not necessarily a desirable alternative to licensing:

- like licensing, mandatory entry requirements for a certificate may not increase service quality if they focus on inputs;
- certification may not lessen quality problems associated with externalities.[17] A consumer who chooses a non-certified provider, for example, may not take into account the possible effect of his or her decision on others (eg, the risk that the provider will cause problems for third parties); and
- certification may be undesirable when the costs of an inaccurate assessment of quality is high. However, this is not a problem with respect to hawkers given the low value and consumable nature of the goods sold.

In the current case, the inability of certification to address externalities rules out co–regulation as a viable regulatory option.

[17] Wolfson, Trebilcock & Tuohy, "Regulating the Professions: A Theoretical Framework", in Rottenberg (ed), *Occupational Licensure and Regulation*, Washington DC, AEI, 1980, p.205.

4.2.5 Monitoring the Operations of Hawkers

To avoid the ambiguous quality effects that stem from mandatory entry requirements it may be appropriate to implement a system of ongoing monitoring. Sucb a system would set standards of competence, monitor to insure compliance with standards, and penalise those who fail to comply. The aim of such a regime would be to lessen hawkers' incentives to engage in undesirable activities. Operational monitoring may also be used in conjunction with licensing, certification, or registration.

The effectiveness of operational monitoring, however, is dependent on the degree to which regulators:

- can (and do) monitor outputs; and
- apply appropriate penalties for non-compliance.

Operational monitoring can be costly to administer in comparison to certification and licensing. At present the monitoring of hawkers is principally done by rangers.

Monitoring can be used in conjunction with a number of different options. Its advantage is that it directs government oversight at the actual service being provided (ie, hawking) rather than factors that have only a (possibly weak) link with the manner in which a hawker operates.

Ongoing monitoring is an important element of the existing hawker's regime. However, it is necessary to acknowledge that existing and future monitoring by rangers will be less than complete and monitoring is hence only a complement to other licensing approaches.

4.3 Conclusion

While the Group views it as necessary that there be some Government role in licensing hawkers, it is important to focus tbat licensing in a manner that addresses the legislative objectives.

Given that the regulatory focus should be on the allocation and use of public space, the Group suggests that:

- the major focus of the legislation should be upon hawkers who operate from a single location, and there should be a hawkers licence for such operators. This will allow particular conditions to be attached to individual licences prior to the commencement of the hawker; and
- there is less regulatory concern for mobile hawkers and hence it may only be necessary for a negative licence. While it could be argued that there is no need to license such operators at all, it is useful to operate a minimalist licensing regime in order to know who is operating and as a means of providing information to operators.

RECOMMENDATION B2

There should be continued positive licensing for hawkers who wish to operate from a single location (ie, certain criteria must be met and a fee paid before a hawker is allowed to operate). Mobile hawkers should operate under a negative licensing scheme (ie, they will only be required to provide

contact information and pay a fee before being allowed to operate — there are no 'positive' licensing requirements).

Chapter Five

Operational and Structural Restrictions Placed on Hawkers

5.1 Geographical and Time Restrictions

Sections 6A and 6B of the *Act* impose various geographical and time restrictions on hawkers, which limit where and when they can operate.

5.1.1 Restrictions on Proximity to Shops

Sub-sections 6A(1) and (2) prohibit a person, without Ministerial consent, carrying on a business as a licensed hawker within 180 metres from a shop unless he or she is a *bona fide* resident or occupier of any premises at those premises or has a Ministerial exemption.[18]

This is a clearly anti-competitive provision.

This restriction is defended on the grounds of equality, with the precise argument having a number of different flavours:

- that shops deserve protection because they have a higher up front cost and pay ongoing rates;
- that shops are at a disadvantage in comparison to hawkers because they are unable to move around to pick new locations at will.

These arguments are correct as far as they go. It is certainly true that shop owners do have different cost structures and do not have the locational flexibility of hawkers. This, however, is a choice that shop owners have made, preferring to adopt a form of retailing that has a greater air of stability and operational certainty in comparison to hawkers.

Options

There are a range of alternative options:

- only restrict the sale of equivalent goods — the current prohibition includes those circumstances whereby a hawker cannot operate within 180 metres of a shop even though the goods sold have nothing in common with those sold in the shop;
- reduce the distance to something less than 180 metres — given that no-one can confirm precisely why the exclusion zone extends to 180 metres it is reasonable to query whether a shorter distance would be appropriate. The difficulty would be in determining what alternative distance should be stipulated. After considering a range of options,[19] the preferred method of ensuring that vehicular and pedestrian activity is not impeded and that shop owners should have the ability to be easily seen and

[18] 'About half a dozen' Ministerial permits have been issued to trade within 180 metres of a shop.

[19] For example, one option considered too administratively difficult to interpret was to prohibit hawkers from setting up directly in front of a shop (on the pavement or on the road).

accessed by passing customers is to regulate the location of hawkers in the same manner that moveable signs are regulated. The restrictions on the location of moveable signs are set out in Appendix Two. While these restrictions are relatively prescriptive, they have been determined following a comprehensive public consultation program and have the advantage of being administratively simple to enforce (because the prohibitions are clear and distances can be easily measured);

- only allow the sale when shops are not open — this approach would maintain a competitive advantage for shop owners but would allow consumer access to goods to be maximised; and
- scrap the exclusion zone entirely — this would allow hawkers to set up anywhere as long as it is consistent with a range of other laws.

Conclusion

The Group considers that the inflexible[20] exclusion rule, as it is currently provided, serves no justifiable purpose that is consistent with the legislative objectives and NCP. As a result, the Group recommends that the set exclusion provision be removed from the legislation.

However, the Group suggests that there is some merit in the argument that hawkers should not be able to intrude into normal pedestrian, vehicular and commercial space in a manner that may disrupt the traditional flow of customers past a shop. As a result, the Group suggests that the *Act* should provide that hawkers are not allowed to operate in locations where a moveable sign would not be allowed to be located. This approach, consistent with the proposed legislative objectives, seeks to ensure that public space is used by hawkers in a manner that is consistent with the use of public spaces by other parties (ie, by shop-owners which wish to put signs in public spaces).

RECOMMENDATION B3

The Act should be amended to remove the 180 metre exclusion zone provided for traditional shop owners. In place of this restriction, hawkers should not be allowed to operate in locations at which moveable signs are prohibited.

5.1.2 Permits to Stand

Given that the objective of the *Act* is to regulate the provision of public land the Group considers that the Permit to Stand is at the core of the *Hawkers Act*.

Generally, under sub–section 6A(3), it is an offence for hawkers to leave a vehicle being used to carry goods in the course of the hawking business standing at a particular place for more than certain lengths of time. The Minister may, however, under sub–sections 6B(1) and (2), publish a notice specifying a place at which licensed hawkers may permit their vehicles to stand without a time limit. The Minister may also issue a permit to a hawker authorising the hawker to carry on business at a place at particular times.

[20] There is a provision for a Ministerial exemption, but as one review participant noted, it is a difficult and less than transparent process to obtain such a waiver.

In effect, the current *Act* requires that a hawker who wishes to operate from a single location must obtain two licences:

- a hawker's licence may be issued for a minimum of one month and a maximum of twelve months; most hawkers licences are taken out for 12 months. As a matter of policy, in practice the minimum period for which a licence is issued is two months; and
- Permits to Stand may be issued for minimum of one month and a maximum of six months. As a matter of policy, in practice the minimum period for which a Permit to Stand is issued is two months.

This arrangement creates a number of problems in the eyes of hawkers. In particular — as noted by Gloria and Gavin Thomas — the time periods for the hawkers licence and the Permit to Stand are not aligned and hence there are increased paperwork costs associated with multiple trips to pay licence fees.[21]

RECOMMENDATION B4

The licence for stationary hawkers should include the right to stand at a single location (ie, the existing hawkers licence and the Permit to Stand should be merged).

5.2 Restrictions on a Hawker's Business Structure

5.2.1 Personal Licensing

The *Act* currently provides a hawkers licence to an individual, and requires that

> "An applicant for a hawker's licence shall be required to produce to the Registrar a certificate signed by the Commissioner of Police or a member of the Police Force of the Territory thereto authorized in writing by the Commissioner of Police that the applicant-
>
> (a) is above the age of eighteen years;
>
> (b) is a person of good character; and
>
> (c) is a fit and proper person to be licensed to trade as a hawker."
>
> Sub-section 8(3) *Hawkers Act 1936*

The Group struggles to see why hawkers should be thought of as potentially corrupt or incompetent while there is no such *prima facie* concern with normal shop proprietors. While there may be a perception that the mobility of hawkers will aid the dissemination of stolen or illegal goods there is no evidence that this is the case or is higher than with respect to shops or unlicensed hawkers.

RECOMMENDATION B5

There should be no character requirements that need to be met to obtain a hawkers licence.

[21] The Department of Urban Services does not send out licence renewals as a matter of course, and a number of hawkers have complained that this is unhelpful and adds to the stress of operating in an impermanent industry (ie, their licence may not be renewed and they may not be able to operate).

Furthermore, the Group suggests that the age requirement is unnecessary as there should be no age barrier to, for example, a 17 year old person deciding to establish their own hawking business. In effect, the possible age of a hawker is pre-determined by restrictions in other legislation (eg, other legislation regulates the age at which money can be handled, tobacco sold, etc).

RECOMMENDATION B6

There should be no minimum age requirement in order to obtain a hawkers licence.

The Group further suggests that a licence should be able to be provided to companies. This reflects the view that hawkers operate as businesses and should be free to structure their business in a manner that reflects modern best practice (if they so wish). If a business seeks a licence then contact details should be provided for all directors of that business and the person responsible for the day-to-day operations of the hawking business.

RECOMMENDATION B7

A business should be able to obtain a hawkers licence.

5.2.2 Hawker's Vehicle

Section 15 of the *Act* requires a holder of a hawker's licence to have the words "Licensed Hawker" clearly visible on the vehicle. This both identifies the hawker to both rangers and consumers.

This requirement appears to have two objectives:

- to provide some comfort to consumers that they are dealing with a licensed — as opposed to an unlicensed — hawker. The implication is that a licensed hawker is more trustworthy because they are more permanent that unlicensed hawkers and that there is some recourse to the government in the event that there is a problem with the goods and/or the service; and
- to assist rangers in distinguishing between licensed and unlicensed hawkers.

The Group is not convinced that either of these rationales provide any significant benefits:

- the nature of goods sold by hawkers (typically low value and impermanent) means that the consumer risks associated with purchasing a defective product are small (but possibly more significant if there are health-related implications); and
- the signs are often obscured by awnings, product displays and signs. As a result any benefit associated with signalling to consumers and rangers is dramatically reduced.

RECOMMENDATION B8

There should be no requirement for a hawkers van to state that it is operated by a licensed hawker.

Of course, as with normal shops, a hawker may still be required to display a number of signs in order to comply with other legislation. For example, signs may relate to the registered business name, health approvals, tobacco licences, and so on.

5.2.3 Vehicle Use

Section 6(1A) of the *Act* requires a licensed hawker:

- not to use more than one vehicle at any one time; and
- not to use a vehicle that is not included in the class of vehicles specified in his or her licence.

These provisions may limit a hawker's operational flexibility and their ability to 'grow the business'.

Indeed, a government officer suggested during the course of this review that there is an underlying intention to limit the ability of hawkers to develop beyond 'one man shows' to develop larger single or franchised operations.

The Group sees no NCP compliant rationale for arbitrarily limiting the growth of a hawker's business. Removal of this restriction may allow some new or existing hawkers to expand their business, but given the family nature of the sector the Group considers it unlikely that this will 'open the flood gates' to a significant expansion of the industry.

RECOMMENDATION B9

There should be no restrictions as to the number of vehicles that a mobile hawker can operate, but a licence fee should be payed for each vehicle.

The exception to this approach is when hawkers are operating from permanent locations. In such circumstances it is necessary for a each vehicle to have a separate licence as it is in these circumstances that land is being allocated on a permanent basis and there may be particular conditions attached to each vehicle's location.

RECOMMENDATION B10

A separate licence is required for every vehicle operating from a single location from which goods are sold.

Clearly, the type of vehicle is relevant to the nature of use of public space. As such, hawkers licensed to stand at a particular location will have to specify the type of vehicle that they intend to operate.

5.2.4 Assistant Hawkers' Licences

An applicant for an assistant hawker's lieence must satisfy certain criteria including that:

- the applicant must be above the age of sixteen years if they are a child of the hawker and 18 if tbey are otherwise an employee; and
- the applicant must be a child or employee of a person carrying on the business of a hawker.[22]

Section 9A of the *Act* provides that the Registrar cannot grant more than two assistant hawker's licences to be in force at any one time in respect of the business of any licensed hawker. Again, this appears to be an attempt to limit the size of a hawker's business.

[22] Section 9 *Hawkers Act 1936.*

The Group sees no rationale for regulating employment terms specifically for hawkers; this should be governed by general industrial relations laws.

By regulating a hawker as an unincorporated or incorporated business there will be no need to licence individual staff. However, the licence holder will continue to have legal responsibility for employees under existing legal doctrine.

RECOMMENDATION B11 *There is no need for the Hawkers Act to regulate the number of people employed by a hawker or their minimum age.*

5.2.5 Licence Transfer

Section 22 of the *Act* prohibits a holder of a licence from letting or lending out his or her licence.

This restriction has been justified on the basis that the licences have been personal (ie, attaching to an individual) and hence cannot reasonably be transferred to another person.

The Group considers this a reasonable ongoing restriction, even when the licence pertains to a business rather than an individual, because the licence creates only an entitlement and not a property right.

RECOMMENDATION B12 *The section 22 restriction on licence transfers should be retained.*

Chapter Six

Other Matters

6.1 The Provision of Security

Section 10 of the *Act* requires an applicant to enter into a security with two sureties approved by the Registrar each in the sum of forty dollars.

The level of surety in the current *Act* is the same quantum as that set in the original *Hawkers Ordinance* made in 1926 (which was two sureties of twenty pounds). The rationale at that time is not known hut the figure may derive from the equivalent NSW legislation.

There is some logic to the requirement for a surety. In an industry which is mobile there is a risk that parties who contravene the *Act* may flee to avoid any further punishment.

However, given the minimal penalties that attach to the *Act*, and the low level of the required surety, the Group is not convinced that the provision of the existing surety is a significant factor in ensuring compliance with the *Act*.

Indeed, the requirement of surety may encourage parties to avoid becoming licensed in order to avoid the surety requirement.

The Group considers that the surety does not reflect any real world risks and should either:

- be scrapped; or
- be scrapped and replaced with a bond to be provided by the hawker, and possibly adjusted to reflect real flight risks.

Given that the surety serves no purpose at present, the Group sees little point in its maintenance, or the requirement that a bond be provided.

RECOMMENDATION B13

The Act should be amended to remove the requirement that two sureties be provided.

6.2 Duplicative Licence Provisions

In order to minimise the duplication of regulation the Group suggests that ACT Law Review Program's observations be acted upon,[23] and provisions relating to liquor[24] and contraband goods[25] should be dealt with under the *Liquor* and *Crimes Acts* rather than the *Hawkers Act*.

[23] Attorney-General's Department, *Legislatian Review Principles*, available at http://www.dpa.act.gov.au/ag/Reports/Review/Report2/review2.htm.

[24] Sections 18-20 *Hawkers Act 1936*.

[25] Section 21 *Hawkers Act 1936*.

Another potentially duplicative provision is section 8A:

> "An application for a hawker's licence authorizing the use of a vehicle for the sale of food or food and other goods shall be deemed not to have been duly made unless it is accompanied by a certificate issued by the Chief Health Officer, or a person authorised in writing by the Chief Health Officer to issue certificates for the purposes of this section, certifying that the vehicle has been inspected and that the Chief Health Officer is satisfied that the vehiele is suitable for the carriage of food."
>
> Section 8A *Hawkers Act*

While the Group acknowledges that section 8A is included to ensure that appropriate health licences are obtained (ie, placing an emphasis upon public health), the Group nevertheless considers this provision unnecessary in the *Hawkers Act*. Public health can be maintained without the need for legislating in the *Hawkers Act*:

- the application form should alert potential applicants to the fact that they will need a health certificate if selling food; and
- the Department of health and Community Care could be provided with a list of licenced hawkers on a regular basis or when such a list is requested — all this requires is a simple fax.

RECOMMENDATION B14

Regulation of health, liquor and contraband goods should be undertaken in generally applicable legislation and should not be referred to in the Hawkers Act.

The Group understands that the Department of Health and Community Care has no objection the repeal of s.8A of the *Hawkers Act*, so long as proper administrative agreements are formulated and put in place to ensure that information sharing takes place. That is, Recommendation B14 is supported by the Department of Health and Community Care on the condition that the two suggested non-legislative tools are acted upon.

6.3 Regulation of the Supply of Services by Hawkers

The current *Act* only regulates the supply of goods. There appears to be some community concern — both from consumer protection and public space perspectives — regarding the provision of services on public land.

The most visible such service is the cleaning of windscreens at traffic lights:

> "There was no legislation covering the window-washers and a spokesman for Urban Services Minister Brendan Smyth said last night that it was a police matter."
>
> MacDonald, "Ban on Bucket-Collection 'Threatening AIDS Relief'" *Canberra Times*, 1999.

The major concern appears to be that such services are provided in a dangerous environment for both the service provider and motorists. That is, there is a creation of negative externalities.

Given the disparate nature of the car window cleaning industry, it is unlikely that self-regulation or co-regulation are feasible.

The regulation of such activity is currently the responsibility of the Police,[26] but if under-enforcement is perceived as a problem then the *Act* could be extended to services and brought within the ACT's control.

Such an extension could be achieved by regulating services either:

- explicitly — regulating the provision of particular services on a case by case basis. In the first instance the *Act* could require the licensing of persons delivering services to vehicles temporarily parked at traffic lights and other intersections. This would include window-washers and people who sell papers. A set of common conditions should be developed to apply to these particular classes of people. Such conditions could include, for example, the wearing of bright/reflective clothing to aid visibility; or
- generally — regulate the provision of all services and then exempt particular services where they are not appropriate.

The second approach suffers from the problem that it may catch a broad range of activities that pose no particular social or economic costs. Such an approach would increase administrative costs, would rely on under-enforcement to be efficient and would create community uncertainty.

The Group is not convinced that there is a real problem with the provision of services to the community by hawkers, but if there is, suggests that the Hawkers Act should be extended on a case-by-case approaeh rather than the general inelusion of services.

[26] See section 5 of the *Traffic Act 1937*: "A person shall not walk upon a public street ... without due care and attention or without reasonable consideration for other persons using the street."

C

Part C

The *Collections Act*

Chapter Seven

An Introduction to the *Collections Act*

7.1 Overview of the *Collections Act*

Section 2 of the Collections *Act* creates a general prohibition on unlicensed persons collecting moneys or goods — this includes the sale of discs, badges, tokens, flowers or other devices — from members of the public in public streets or their residences.

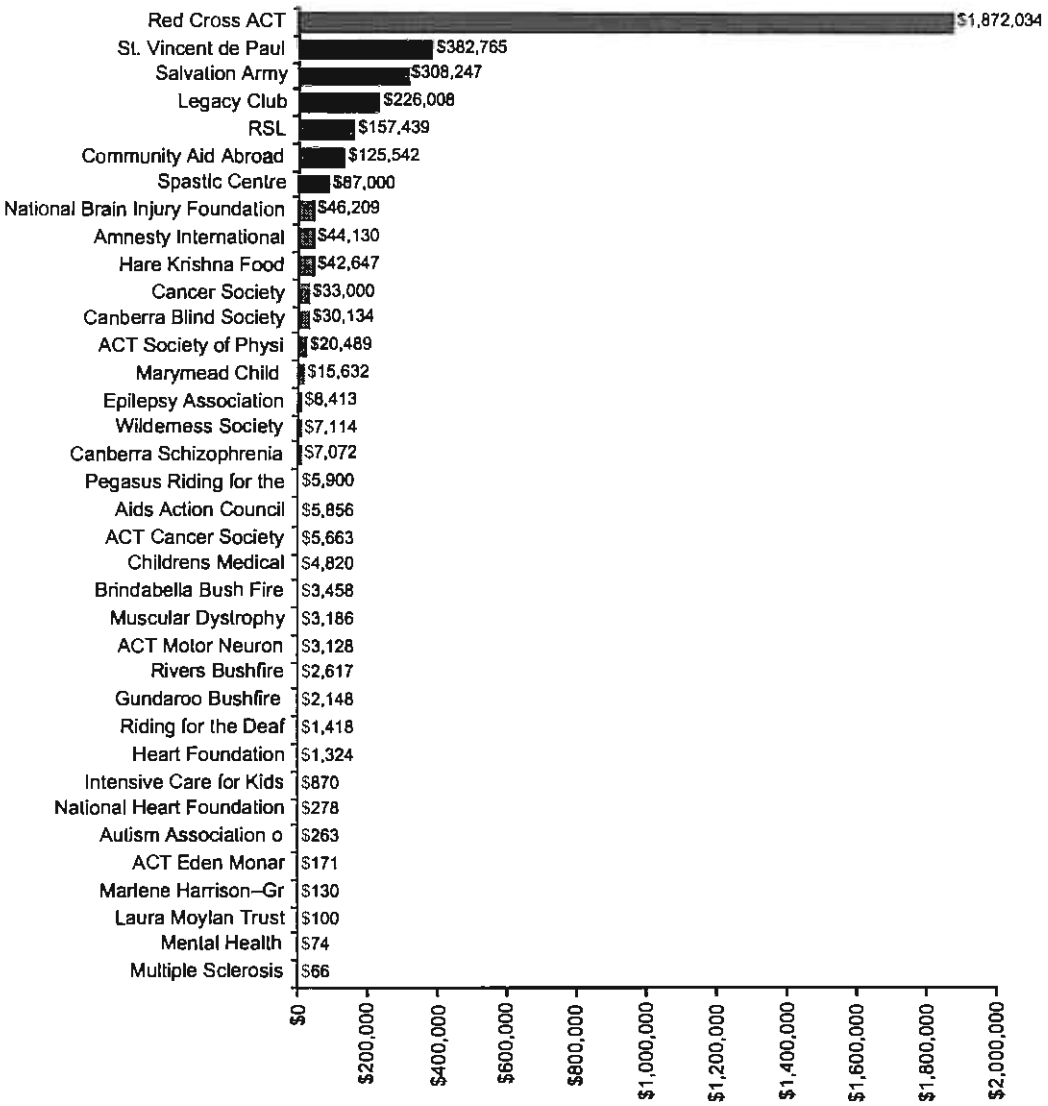
In turn, the *Act* provides a system for the Minister to issue a licence to overcome the general prohibition. The *Act* gives the Minister discretion to refuse to issue a licence on various public interest grounds and outlines the obligations of licensees in relation to authorising and identifying collectors and accounting for the proceeds of the collection. It further gives the Minister the power to control the duration and frequency of collections and to regulate the number of collections occurring at the same time.

While the *Collections Act* would appear to be a significant regulatory regime for charitable fundraising in the ACT, in reality its role is somewhat more constrained. For example, over the years 1997 to 1999 inclusive there was only $3,455,345 collected though licensed fundraising — see Figure 7.1. In effect, only $3.72 per ACT resident per year was raised under collections licensed under the *Act*.[27] Indeed, this figure is inflated by a single Red Cross campaign which alone raised $1,679,960 (ie, all but one collection raised $1,775,385 over three years).

[27] Assumes 1997 population levels in the ACT — Department of Urban Services, *Population Forecasts for Canberra and Districts 1998-2008*, September 1998, p.24.

Figure 7.1

Funds Raised Under the Collections Act (1997-1999)



Source: Analysis of Department of Urban Services records by The Allen Consulting Group.

In the ACT fundraising is not regulated on private premises (eg, within shopping malls or individual shops), over the telephone, via print advertisements and magazine inserts, and by means such as quiz nights. As a result, giving under the *Collections Act* is only a very small percentage of total giving in the ACT. For example, averaging the now somewhat old levels of charitable giving identified by the Industry Commission (IC) in 1995 (see Table 7.1), and assuming an Australian population of 17 million, the average charitable donation per person per year is approximately $75. Thus, very roughly, the *Collections Act* regulates just under three percent of all donations in the ACT.

Table 7.1

Estimates of National Giving — All Philanthropic Organisations ($ million)

	Australian Association of Philanthropy (1988–89)	Australian Bureau of Statistics (1988–89)	O'Keefe (1992–93)
Individuals	$839	$1042	$1107
Businesses	$471	NA	NA
Bequests	$256	NA	NA
Trusts	$122	NA	NA

Note: Business donations include only those employing 10 to 19 people or over 1000 people.

Source: Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995, p.226.

7.2 The Objectives of the *Collections Act*

The *Collections Act* does not include an explicit statement of its underlying objectives.

The IC has suggested that:

> "The objectives of fundraising legislation are:
>
> - to protect the public against fraud, misappropriation of funds and misleading conduct;
> - to ensure that donors and the public have access to information; and
> - to ensure that organisations use acceptable fundraising practices."
>
> Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995, p.231.

The objectives, in the language of the discussion contained in Chapter Three, seek to address information asymmetries. That is, as potential donors are not buying any goods or services which value can easily be assessed at the point of donation, they have to rely on information provided to them by the collector. However, it is only the collector that truly knows why the money is being collected and hence the information imbalance between the collector and the potential donor creates the potential for fraud.

Review participants were generally supportive of the objectives suggested by the IC.

However, ACTCOSS suggested that these consumer oriented objectives should be balanced by acknowledging that the legislation creates a right for fundraisers to undertake collections. While acknowledging that this was probably implicit in the whole legislation, ACTCOSS suggested that this should be made explicit.

While agreeing with ACTCOSS that the legislation creates an entitlement to undertake fundraising (ie, not a 'right' as in a property right), the Group does not support the view that this is an objective of the *Act*.

RECOMMENDATION C1

To aid understanding of the legislation the Collections Act should be amended to state that the objectives of the Act are:

- *to protect the public against fraud, misappropriation of funds and misleading conduct;*
- *to ensure that donors and the public have access to information; and*
- *to ensure that organisations use acceptable fundraising practices.*

Chapter Eight

Is a Licensing Regime Necessary?

8.1 Is Self–Regulation Practical?

An alternative to licensing is self–regulation, for example through voluntary accreditation by a professional association.

On the surface there is good reason to believe that self-regulation is a possible regulatory alternative. For example, there are two peak private sector organisations that provide voluntary accreditation:

- the Australian Direct Marketing Association (ADMA) — provides certification for organisations; and
- the Fundraising Institute – Australia (FIA) — provides certification for individuals.

The roles of these self-regulatory organisations are explained in Box 8.1.

Box 8.1

Self-Regulatory Bodies in the Collections Field

Fundraising Institute — Australia

The Fundraising Institute — Australia (FIA) is a professional association whose members work as fundraisers. The FIA has over 1,000 members, with an estimated 80 percent of charities using the fundraising services of FIA members.

One of the functions of the FIA is to define, foster and review adequate ethical standards and practices in fundraising. This is done through a *Code of Ethics* and a *Code of Professional Conduct.*

The FIA accredits fundraisers on a voluntary basis. Accreditation is available to candidates with five years or more of professional experience in fundraising and is based on an assessment of education, experience and performance in fundraising and service to the profession.

The FIA also provides its members with a range of services, including the organisation of conferences, seminars and meetings; the release of publications; education and training; acknowledgment of high performers and best practice through awards; and representation of the members' interest in consultation with governments.

Australian Direct Marketing Association

The Australian Direct Marketing Association (ADMA) is a national non-profit organisation which, from its roots as an advocate for catalogue and mail-order traders in the 1960s, has evolved into the nation's largest association of information-based marketers with over 4,000 members.

ADMA represents a vast array of organisations who market their products and services directly to consumers and businesses via the telephone, direct-response television and radio, print media such as catalogues, magazines, newspapers and addressed mail, the Internet and other new interactive media.

As the self-regulatory body for the industry, ADMA works to enhance consumer confidence in direct marketing. Members abide by a *Code of Practice* that requires honesty and fairness in customer dealings. The ADMA *Code of Practice* was developed in consultation with industry, government and consumer groups under the guidance of the Ministerial Council on Consumer Affairs and is authorised by the Australian Consumer and Competition Commission (ACCC).

On behalf of it members, ADMA administers a consumer satisfaction program. This includes a complaints-handling service administered by an independent Code Authority and a Do Not Mail/Do Not Call service whereby individuals can have their names removed from marketing lists.

Source: Fundraising Institute — Australia; and Australian Direct Marketing Association

Voluntary accreditation with either of these organisations is likely to give the general community greater confidence that accredited fundraisers have the necessary skills, reputation and experience to conduct fundraising appropriately.

However, self–regulation has the inherent and inescapable weakness of being voluntary in nature. While a significant number of fundraisers that operate in the ACT are members of the ADMA or have staff who are members of the FIA, there are also a significant number of (largely voluntary) organisations who undertake collections who have no such affiliations. As a result, the Group suggests that it is not possible to completely rely upon self-regulation of collections.

Although it is difficult to quantify the benefits of fundraising regulation, review participants generally accept that some level of regulation is necessary in order to ensure that the public interest is served. The Group agrees with these views.

8.2 Possible Forms of Licensing

Drawing upon the discussion in Chapter Four, the Group observes that:

- under a 'positive' licensing regime there will be costs for both the regulator and the fundraiser. Broadly, such costs will arise because of the requirements that a collector:
  - obtain an authorisation to conduct a collection;
  - keep records of finances, and report to an appropriate public official;
  - become subject to inquiry and inspection by a public official;
  - ensure public disclosure of or access to relevant information; and
  - conduct fundraising using acceptable practices;
- while negative licensing and certification will likely have lower up front costs, the costs associated with a failure to comply with the practicing standards could be so significant on donor confidence that there should be some form of initial screening; and
- while monitoring is an effective compliment, the diversified nature of collections (eg, with possibly hundreds of individual collectors) makes it impossible to rely on ongoing monitoring.

The Group suggests that a positive licensing regime is required.

8.3 Licensing of Organisations or Individuals?

A concern identified during the IC review was that many collectors do not have the necessary training, skills and experience to conduct fundraising.

One of the options considered to resolve this shortcoming included the licensing of individual fundraisers. Government licensing would restrict the ability of non–licensed practitioners to provide fundraising services. Such licences could be subject to conditions such as:

- minimum education and training requirements;
- character and work performance references; and
- details of any conviction relating to offences involving fraud or misleading conduct.

Advantages of government licensing individual fundraisers might be:

- to give fundraisers and the public greater confidence that people conducting fundraising have the appropriate skills; and
- to reduce the likelihood of misuse and waste of resources.

However, the benefits of licensing individual fundraisers may be reduced by:

- the difficulty in determining the type and level of training necessary to ensure that a fundraiser is able to conduct fundraising effectively;
- licensing does not guarantee that fundraisers will not misuse funds or waste resources or that their advice is sound; and
- restrictions on competition from non–licensed practitioners may also reduce the incentive for innovation in fundraising and increase the cost of conducting fundraising.

As a result of these limitations the Group does not support the licensing of individuals in addition to, or in preference to, the licensing of fundraising organisations. This conclusion was supported by all review participants.

Chapter Nine

Initial Grounds for Refusing to Issue a Licence

Section 5 of the *Act* provides that the Minister may refuse to issue a licence if, for example, he or she is of the opinion that:

- the purposes for which the moneys or goods collected will be devoted are not in the public interest;
- the expenses incurred in connection with the relevant collection(s) are likely to be unreasonably high in relation to the amount of moneys, or the value of goods, that will be collected;
- that excessive remuneration is likely to be retained or paid out of the proceeds of the collection(s);
- where the applicant does not propose to apply the whole (or substantially the whole) of the money or goods collected for the benefit of residents of the ACT, that there is a soeiety, association or body in the ACT which applies the whole of the greater part of its resources for the benefit of ACT residents for purposes that include purposes similar to those for which the moneys or goods are proposed to be collected;
- the applicant is not a fit or proper person to hold a licence; or
- for any other reason, it would be contrary to the public interest to issue the licence.

These six grounds can be rationalised into three general categories, which are discussed in the following sections.

9.1 Collection Costs/Remuneration

9.1.1 Current ACT Arrangements

Two of the grounds for refusal relate to excessive costs/remuneration:

- the expenses incurred in connection with the relevant collection(s) are likely to be unreasonably high in relation to the amount of moneys, or the value of goods, that will be collected;
- that excessive remuneration is likely to be retained or paid out of the proceeds of the collection(s);

These provisions appear to address concerns — often expressed in the media[28] — that the public are often not aware of the relative percentage of funds being spent on the fundraising itself, and that excessive costs/remuneration is likely to give fundraising a bad name and discourage future giving.

[28] See, for example, Farront, "Bogus Collectors Face Crackdown", *The Age*, 1 April 1999, p.4.

A problem with these grounds is that the language provides for significant discretion. In order to assist the licensing process some general guidelines have been developed by the Department of Urban Services:

> "A major criterion for approval is the proportion of money (or goods) not reaching the nominated cause eg collectors' wages, material costs and other costs incurred in the collection. This assessment has become more difficult in recent times as many charities are choosing to use sponsorship arrangements with professional sales groups where the charity receives only a percentage of the proceeds. Generally collections are done with volunteers and there are small costs for things like printing, advertising, etc running to less than one percent. In some cases expenses may run to ten percent, but above this the proportion becomes of major concern. The obligatory Financial Statement from the licensee should be examined carefully where the percentage of costs goes beyond ten percent. A maximum of thirty percent has been struck as an acceptable level of expenses where wages for collectors or managers are itemised. beyond this point serious consideration should be given as to the legitimacy of the collection and further discussion with the licensee contemplated."
>
> Department of Urban Services, *Public Place Management: Procedures Manual*, Section C.

It is not clear as to why the ten and thirty percent thresholds have been chosen.

9.1.2 Concerns About Establishing Caps on Expenses

A problem with a cap on expenses is determining the appropriate level.

Indeed, it is difficult to judge levels of collection efficiency on the basis of fundraising cost ratios and by placing legislative controls on the costs of fundraising because:

- there is a lack of any objective criteria for determining an appropriate limit. There may be legitimate reasons for higher costs in some appeals than in others;
- it is difficult to determine the costs which should be allocated to fundraising. Problems include apportionment of overheads and campaign costs over the period of fundraising benefit and a lack of standardised accounting methods; and
- legislative controls encourage organisations to underestimate their expenses.

That there is no single 'right' cap is evident from the range of caps/thresholds/tests used or suggested by a range of jurisdictions and reviews:

- the FIA *Code of Professional Conduct* suggests that:

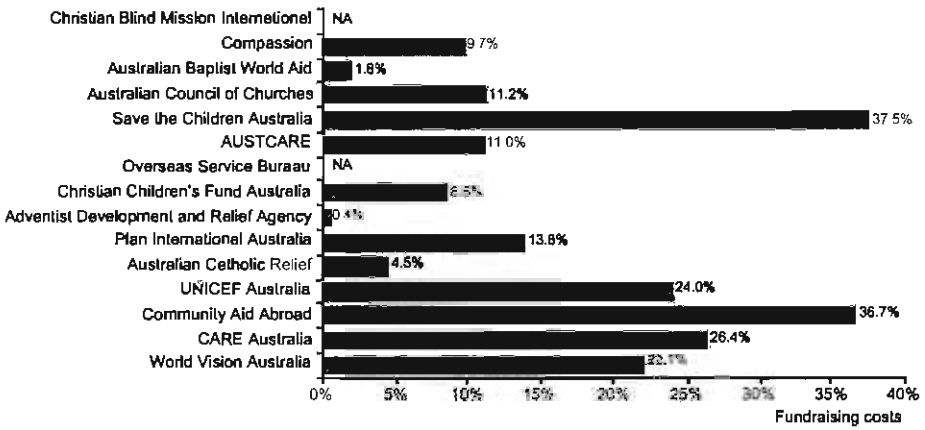
  > "All fundraising organisations ... should ... aim for levels of cost which are generally acceptable ... In capital fundraising appeals, as distinct from ongoing budget fundraising activities, costs in the area of 15 to 20 percent would be regarded as 'borderline' around 10 to 15 percent as aeceptable and 5 percent would be unusually low."

- NSW is the only jurisdiction in Australia which regulates the percentage of fundraising expenses. The *Charitable Collection Act 1991* states that charitable organisations "must take all reasonable steps" to ensure that fundraising expenses do not exceed 40 percent of the proceeds of fundraising for donation only appeals. The requirement does not have strict application — if the 40 percent benchmark is not met, then the Department of Racing and Gaming will decide whether, "all reasonable steps were taken";
- in South Australia and Western Australia (WA) a licence may be revoked on the grounds that expenses are likely to be unreasonably high or remuneration excessive. Furthermore, in a recent review of the WA system a recommendation was made that administration costs of fundraising not exceed forty percent of proceeds of fundraising activity;[29] and
- in some American states legislative controls have also been placed on the allowable percentage of fundraising expenses for charities to address problems of fraud and misappropriation of funds. Furthermore, charities are rated by the National Charities Information Bureau and the Philanthropic Advisory Service of the Council of Better Business Bureaus. These organisations suggest that fundraising costs should not exceed between 30 to 35 per cent of the money raised.

It is quite clear that there is a fair bit of variability in fundraising costs amongst Australia's largest fundraisers (see Figure 9.1).

Figure 9.1

Fundraising Ratios for the 15 Largest Non-Government Development Organisations



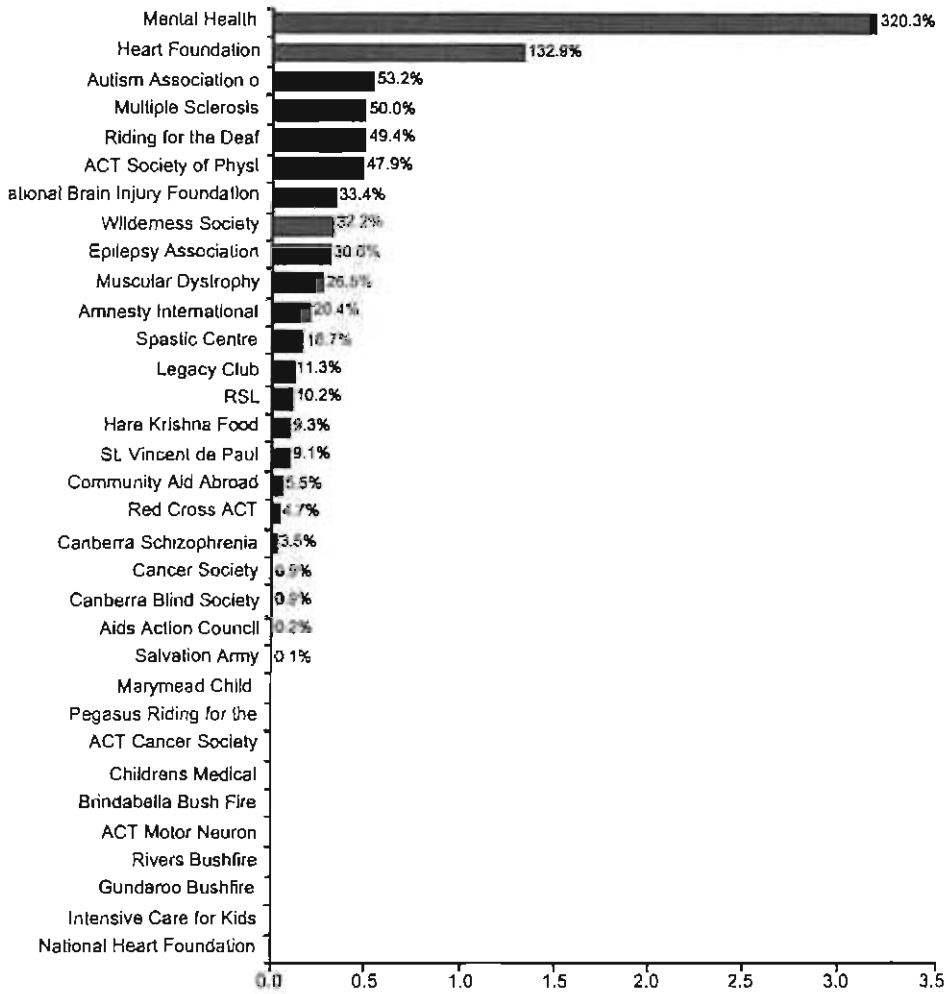
Source: Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995. p.166.

Equally, while the average ratio for fundraising under the *Collections Act* is estimated to be 6.8 percent, there are significant disparities between the costs for different organisations — see Figure 9.2.

[29] Parliament of Western Australia — Legislative Council, *Report of the Select Committee on Charitable Collections*, 1988 (chaired by B.L. Jones), p.16.

Figure 9.2

Collection Costs as a Percentage of Funds Raised Under the *Collections Act* (1997-1999)



Note: The Group suggests that in the majority of cases these ratios understate the percentage of collection costs because the estimates generally fail to account for a charities overheads (including staff salaries) that have been directed towards a collection.

Source: Analysis of Department of Urban Services records by The Allen Consulting Group.

There are a number of legitimate reasons as to why the fundraising costs of one organisation may be high relative to others. For example:

- the organisation may be trying to develop a reputation and support base and will be willing to spend more money on a high profile collection in order to do this;
- there may be significant start–up costs with fundraising programs;
- a fundraising campaign may be expensive, but it may attract funds that may never have otherwise gone to a charitable purpose;
- an organisation's cause or programs may not immediately (or ever) invoke widespread public sympathy or emotion;
- fundraising programs may not just aim to raise money from donors but also to educate and inform the public about issues; and

- fundraising may be aimed at attracting more than just money — it may also aim to attract volunteers or goods in kind.

During the review a number of these points were made by organisations such as the Epilepsy Association. It argued, for example, that expenditure on professional fundraisers, even if they breached the 30 percent threshold, could raise significantly more funds than their purely voluntary organisation could. In effect, the cap discriminates in favour of larger fundraisers which have a significant profile and against those organisations that do not.

As a result of these observations — and consistent with recommendations by the IC[30] and Flack[31] — the Group suggests that legislative controls on the acceptable ratio of costs to fundraising should not be included in the *Act* or in guidelines used to administer the *Act*.

RECOMMENDATION C2

The Act should not place limits on the level of fundraising costs or remuneration per se.

9.1.3 Alternative Options

There are three main options for dealing with the issue of fundraising costs — they are:

- *self-regulation* — there are a number of reasons as to why this would not be a dramatic change:
  - the onus would be on those who have low (or lower) costs to advertise this fact; and
  - if a general 'public interest' grounds for refusal is maintained (see section 9.3) then there would still be the power to restrict a collector if it were felt necessary.[32]
- *disclosure* — this can be done in a number of ways:
  - the establishment of a *public registry* of relevant information on costs of fundraising (and other relevant matters), which casts on donors the onus of accessing information to assist informed giving (*'caveat donor'* approach);[33]
  - disclosure by collectors to potential donors of the percentage of the donation to be applied for the purposes of the appeal and/or the payments made to professional fundraising for their services. This option can be justified on two theoretical grounds: 'donor regulation theory' suggests that regulation or monitoring of the expenses incurred in charity fundraising is best undertaken by the contributors themselves, and 'donor protection theory' suggests that disclosure of information will correct information asymmetries and reduces untoward moral pressure on a potential donor;[34]

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30 Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995, p.237.

31 Flack, "Reviewing the Collections Act", Working Paper 54, Queensland University of Technology, 1995, p.8.

32 See Farrant "Bogus Collectors Face Crackdown", *The Age*, 1 April 1999, p.4.

33 Luxton, *Charity Fund-Raising and the Public Interest*, Avebury, Aldershot, 1990, pp.197–198.

34 Luxton, *Charity Fund-Raising and the Public Interest*, Avebury, Aldershot, 1990, pp.199–200.

- *control of the number of organisations engaging in fundraising* — the logic of this approach is that competition increases public nuisance and possibly total costs. However, proof of net benefit from limiting participation or entry to certain fundraising activities is difficult to substantiate.

The Group suggests that a disclosure approach is the most appropriate approach given problems with the other approaches:

- while self-regulation may be effective in that it will assist potential donors to find low cost fundraisers, it will not assist in the identification of high cost fundraisers; and
- control of the number of organisations may or may not reduce overheads. If there is less competition for funds (ie, if the number of fundraisers is limited) they may adopt the 'easy life' and let cost ratios increase. Concerns about limits on the number of fundraisers is discussed more fully in Chapter Ten.

Disclosure-based approaches are not foolproof however. In addition to potential difficulties in enforcing disclosure, the principal drawbacks of the disclosure option relate to the quality of the information disclosed. In particular:

- the information disclosed can be misleading as a result of creative (though legal) accounting; and
- potential donors may suffer interpretational problems (eg, a simple statement of a percentage figure itself is not guide of administrative efficiency).[35] This suggests that information disclosure should focus on the broad principles rather than overly precise and potentially confusing ratios or dollar amounts.

Despite these potential problems, the Group suggests that the emphasis of the *Act* should be to encourage appropriate disclosure to enable potential donors to make informed choices.

RECOMMENDATION C3

The regulatory emphasis should be on disclosure of fundraising details to potential donors.

The detail of this disclosure is discussed in Chapter Eleven.

9.2 Expenditure in the ACT

The most sensitive grounds for refusal relates to the requirement where the applicant fundraiser does not propose to apply the whole (or substantially the whole) of the money or goods collected for the benefit of residents of the ACT, that there is a society, association or body in the ACT which applies the whole of the greater part of its resources for the benefit of ACT residents for purposes that include purposes similar to those for which the moneys or goods are proposed to be collected.

In effect, this ground for licence refusal protects domestic collectors from interstate competition. At least in spirit, if not in practice, this offends the Constitutional focus on free and fair trade across borders. Indeed, in

[35] See Luxton, *Charity Fund-Raising and the Public Interest*. Avebury, Aldershot. 1990, pp.198–199.

discussing such local preference provisions Flack has stated: "It is submitted that these provisions are anachronisms in the Australia of the 1990s and should be abandoned.[36]

The concern is that people are being misled as NSW organisations undertake collections in the ACT and residents are not made fully aware that they are donating to an interstate organisation and/or that an equivalent local organisation even exists. Supporters of the limitation on interstate collectors argue that the ACT's public interest is maximised by ensuring that donations are spent in the ACT and not elsewhere.

9.2.1 Alternative Options

There are two alternative options that could be explored in any reform:

- remove the ban entirely — this approach would allow any organisation to fundraise in the ACT (subject to other regulatory controls) irrespective of where the funds will be spent. Under this option the onus would be on local organisations to positively advertise the fact that funds raised will be spent in the ACT, and hope that consumers will identify that non-ACT organisations are likely to spend their funds outside the ACT; or
- require the display of information — this approach would require fundraisers to clearly state their name (as the name often has a regional link), provide contact details and state how and where the funds will be spent.

9.2.2 Discussion

This restriction on interstate competition shows clearly the different emphasis of different fundraisers. Those who raise and spend funds locally argue passionately for retention of this provision, while those with regional (eg, ACT-Eden Monaro) or wider (eg, national or overseas) emphasises tend to view the current restriction as a potential (if not actual) threat.

While there is undoubtedly a public benefit in fundraising being spent in the ACT, it is difficult to suggest that donors should be denied the ability to choose precisely who receives their largess. Unless there is the provision of information to consumers as to where funds will be spent there is the potential for deception, and hence the Group suggests that there should be mandatory disclosure as to where funds will be spent.

RECOMMENDATION C4

There should be no power to refuse a license based upon where the funds are to be spent.

The regulatory emphasis should be upon ensuring that consumers have access to information about where and how collected funds will be spent — see Chapter Ten.

[36] Flack, "Reviewing the Collections Act", Working Paper 54, Program on Non-profit Corporations, Queensland University of Technology, 1995, p.8.

9.3 General 'Public Interest' Rationales

Given the apparent community concerns regarding unscrupulous collections there is a justifiable reason for maintaining a failsafe mechanism. To ensure that this is used in 'appropriate' circumstances any refusal on public interest grounds should be accompanied by reasons which are provided to the party.

RECOMMENDATION C5

The legislation should continue to provide the Minister with the ability to refuse to licence a fundraiser on broad public interest grounds. The Minister should be required to provide reasons for any such decision.

Chapter Ten

Restrictions on the Use of Public Space for Fundraising

Sub-section 5(3) provides that the Minister also has the power to refuse to issue a licence if this would result in:

- two or more licences being issued for the same period of time and in relation to the same place(s); or
- where the licence is for door–to–door collections, more than six such licenses being issues in a year to a particular party or two or more parties being authorised to conduct such collections in relation to the same place or places during a particular week.

10.1 Claimed Benefits of Restricting Access to Public Spaces

This section describes the three main benefits claimed to flow from restricting when and where collections can take place.

10.1.1 Fights Over Public Space/Minimising Public Nuisance

The major reasons for this power seems to be the desire to ensure that:

- there are not unseemly squabbles between collectors for prime collection locations — the main concern is to regulate collections just outside shopping centres;
- householders are not disturbed by (the same) collectors on too regular a basis; and
- to ensure that collectors are made aware of where they can and cannot collect.

These three reasons can be rationalised on the basis that public nuisance resulting from too many fundraising appeals or public squabbles between collectors may reduce donor contributions.

10.1.2 Increased Return for Some Charities

The ability to control where a party can operate and how frequently has clear anti-competitive implications. However, a possible reason may be to maintain a 'reasonable' return for a limited number of charities rather than a potentially lower return for more charities. For example:

> "Cause days, or badge days have saturated the marketplace — limiting their public impact and revenue-raising capacity. (Witness *Red Nose Day* — which in previous years, was a high profile event. Today, while still high in public acceptance, it is merely one of an increasingly crowded-crowd!). Consumers have become 'cause-day-weary' and many NPOs are reporting a decline in short term support."
>
> O'Keefe & Partners, *11th Annual Giving Trends in Australia Report*, 1999, available at http://www.auscharity.org/giving.html.

10.1.3 Reduced Overheads

As briefly discussed in section 9.1, a third rationale is that by limiting the number of organisations undertaking collections there is also a limit on fundraising overheads.

10.2 The Costs Associated with Supply Restrictions

The problems with the current approach are well described by the IC:

> "Fundraising legislation in the Australian Capital Territory provides that the Minister may refuse to issues a collection licence where it may result in more than six licences for door–to–door collections being issued in the same year to the same person or organisation; or two or more different persons or organisations conducting separate collections in the same place during a particular week.
>
> The Commission considers limiting the number of fundraisers inappropriate in the absence of an approach that will result in clearly demonstrable net benefits. There are a number of problems with current approaches to limiting participation or entry to fundraising. For instance, there are no objective criteria for determining the optimal number of participants. Allowing too many fundraisers may result in higher costs, whereas insufficient numbers may reduce donations by lowering the incentive for innovative fundraising techniques. Limiting the number of fundraisers may also discriminate against smaller organisations. Finally, there is no evidence that current approaches will either increase total donations or lower the costs of a given level of fundraising."
>
> Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995, pp.238-239.

The Group is concerned that the *Act*, or at least the way that it is applied, explicitly discriminates in favour of some fundraisers and against others. In particular, while there is a 'first come, first served' presumption there are a number of important departures from this rule:

- there appears to be a preference/priority given to national campaigns and organisations that have campaigns run at about the same time each year;[37] and
- there is discrimination against organisations who would like to operate on a very regular basis. For example, even though the *Act* does not indicate that this is the intended approach, the Hare Krishna's are not allowed to apply for all days in a month, instead having to wait until infrequent fundraisers have nominated their preferred dates and then being allowed to apply for the remainder.

These distinctions appear to have been determined by the bureaucracy rather than any direction from the Minister or the Legislative Assembly.

As long as the *Act* restricts the potential for fundraising there can be no transparent and equitable approach for allocating fundraising times and locations.

During consultations the Group floated the idea of doing away with Government control or where and when a fundraiser can collect (ie, allowing

[37] See Department of Urban Services, *Policy and Procedures (a Guide to New Applicants) Collections Act 1959*, 4 August 1999, p.2.

open competition).[38] While some organisations opposed this approach outright, the majority were at least neutral to the idea or positive (eg, the RSL). While there was some concern regarding the potential for clashes, this can be overcome by the Department maintaining publicly accessible lists of dates when, and locations where, organisations are proposing to conduct major fundraising events. The provision of this information will be of interest to the community and to those who are planning fundraising events.

RECOMMENDATION C6

The Collections Act should not limit the locations where collections can be undertaken or the number of organisations collecting at any particular time.

[38] This is the approach employed in other Australian jurisdictions that regulate fundraising.

Chapter Eleven

Information Provision and Reporting Requirements

11.1 Information to Be Provided to the Regulator

Persons who collect money or goods pursuant to a licence or an authority issued under the *Act* are required to provide the Minister with a statement after the collection period to which the licence relates which sets out the money or goods collected, details of the expenses incurred and the manner in which the net proceeds are dealt with — s.8.

In its review the IC argued that:

> "Information on the finances and operations ... can best assist donors (and the community generally) if it is consistent, comprehensive, accessible, up-to-date, and relevant. Much of the information currently collected under State-based fundraising legislation does not meet these criteria."
>
> Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995, p.244.

This comment is particularly applicable to the ACT's regime. There are a number of practical problems with the ACT's reporting requirements:

- there is no apparent consistency as to how different organisations determine their costs. While some provide a relatively detailed assessment of their costs, others are vague or simply state that they had zero costs. The greatest problem is the understatement of costs because overheads are not included in cost estimates;
- while parties sign a statutory declaration as to the quantum of funds raised and costs expended, as there is no auditing of these figures it is impossible to track whether the statements are correct;
- while there is a running tally of funds collected, there is no aggregation of the costs data; and
- the information gathered is not made publicly available, and does not even appear to guide the issuance of future licences.

Given the lack of analysis of information currently provided to the regulator it is appropriate to consider whether the collection of such information is really necessary.

Rather than the provision of a report covering just a few days or weeks, the Group suggests that a better approach would be to adopt the NSW's broad methodology. This would require:

- all organisations that produce audited accounts to lodge those audited accounts with the Registrar on an annual basis; and

- organisations which do not have audited accounts would need to keep appropriate records and have those records signed off by an 'appropriate person' (eg, an accountant, a bank manager, a retired accountant, etc) as being in order.

This is a much more holistic approach that focuses on an organisation's overall *bona fides* rather than a micro focus on fundraising on particular days.

This change would lower some of the costs faced by organisations in meeting their fundraising and other financial reporting requirements. For example, an incorporated fundraiser may currently need to produce one set of reports to satisfy the requirements of the ACT's fundraising legislation, and another set to satisfy the requirements of their particular form of incorporation. With this reform the fundraiser would need only one set of reports.

While the IC was critical of this approach because fundraisers will have different audit standards depending upon their form of incorporation (ie, leading to inconsistency), the Group nevertheless sees this approach as an improvement on the existing system.

Organisations to which this approach was suggested were generally supportive because:

- in the most part they already have audited accounts (because of obligations under their incorporating laws or the NSW fundraising legislation); or
- the process is acknowledged as being streamlined.

RECOMMENDATION C7

Rather than focusing on funds raised and costs incurred for particular collections:

- *all organisations that produce audited accounts should be required to lodge those accounts with the Registrar on an annual basis; and*
- *organisations which do not have audited accounts should be required to keep appropriate records and have those records signed off by an 'appropriate person' as being in order.*

11.2 Information to be Provided at the Collection Point

One of the issues identified by the IC in its review of charities was the need to provide adequate information to enable consumers to make informed judgements as to whom they should donate money.

As discussed earlier, it is clear that without some form of mandatory disclosure consumers will lack the information to make such an informed judgement.

In the review *Issues Paper* it was suggested that such mandatory disclosure could include information such as:

- the purpose to which the fundraising will be put;
- the percentage of funds raised that will go explicitly to the identified purpose;

- the percentage of funds raised that will be paid to the collecting person/organisation; or
- the name, address and so on of the person undertaking the collecting.

During the review there was significant support expressed for the requirement that fundraisers should wear a badge (or prominently display information) that states:

- the name of the fundraising organisation;
- the purpose for which funds are being raised, and how and where the funds will be spent;
- whether the fundraiser is:
  - a volunteer;
  - a paid employee of the fundraising organisation; or
  - a contracted fundraiser and the terms on which they (or their organisation) are contracted;
- a contact name and phone number for the fundraiser.

One large national fundraiser suggested that all collectors should be required to have photo badges, although this approach was condemned by others as excessively expensive given the often large number of once a year collectors.

RECOMMENDATION C8

Collectors should required to wear a badge (or prominently display information) that states:

- *the name of the fundraising organisation;*
- *the purpose for which funds are being raised, and how and where the funds will be spent;*
- *whether the particular collector is:*
  - *a volunteer;*
  - *a paid employee of the fundraising organisation; or*
  - *a contracted professional fundraiser and the term on which they (or their organisation) are contracted;*
- *a contact name and phone number for the fundraiser.*

To ensure that information is provided a fundraiser should provide a dummy format for badges/signs at the time of registration. Any significant deviation from this dummy format should be shown to the Registrar. This approach seeks to ensure that the information will be prominently displayed and is not likely to mislead or deceive the public.

RECOMMENDATION C9

When seeking a fundraising licence the applicant should be required to provide an example of the information to be provided to the community. The Registrar should ensure that the example adequately conveys the required information.

Given that the regime relies significantly upon effective disclosure to the public, the Group suggests that the penalty for blatant or systematic failure

to adhere to the required disclosure standard should result in suspension or revocation of a fundraiser's licence.

RECOMMENDATION C10

Systematic failure to display the required information at the point of collection should result in the suspension or revocation of a fundraiser's licence.

Chapter Twelve
Other Matters

12.1 Institutional Arrangements

This section considers a range of changes to existing administrative/institutional arrangements regarding the *Collections Act*.

12.1.1 A Charities Commission

On option for the ACT is the establishment of a specialist charities supervisory body along the lines of the English Charities Commission. An overview of the Commission is role is provided in Box 12.1.

Box 12.1

The English Charities Commission

The Charities Commission (the Commission) is an independent statutory body responsible directly to the Home Secretary for the oversight of charities in England and Wales, aiming to assist public confidence in the sector by providing supervision and support for charities and by imposing accounting and reporting standards. The Charity Commission dates back to the nineteenth century when there was public concern over mismanagement and abuse of funds by some charities. It replaced a series of *ad hoc* commissions established from the seventeenth century to look into charities.

The Commission is administered by Charity Commissioners — a Chief Charity Commissioner and at least three Commissioners, all of whom must be qualified legal practitioners — and a staff of approximately 650 people whose role is to promote, "the effective use of charitable resources by encouraging the development of better methods of administration, by giving charity trustees information or advice on any matter affecting the charity and by investigating and checking abuses".

This role carries with it four main functions:

- the Commission *registers* organisations that it determines are charitable pursuant to applications by those organisations. Registration does not confer charitable status, but it provides conclusive evidence, subject only to correction by the court, that an organisation is charitable by law. The register of charities so maintained is open for public inspection at all reasonable times. A person who is or may be affected by the registration of an organisation may, on the ground that the organisation is not a charity, object to it being registered or apply for its removal. An appeal against the Commissioners' decision not to register, or to register, can be made to the court. In conducting the process of registration, the Commission has the task of developing the concept of charity and ensuring that it remains relevant to contemporary society;
- the Commission drafts regulations prescribing the content of accounting records, statements of account, and annual returns and reports, which registered charities must prepare. The *Charities Act 1993* also imposes upon registered charities duties relating to the audit of their accounts, and to providing a copy of their most recent accounts upon request and the payment of a reasonable fee;
- the Commission provides support and guidance to charities via a general newsletter, giving individual advice in response to requests or following up monitoring, and to intervene to protect resources of charities by, for example, suspending or removing trustees or appointing a receiver. It may also take such legal proceedings against charities as are exercisable by the Attorney–General, or compromise claims with a view to avoiding or ending such proceedings. A person 'interested in the charity' may, with the consent of the Commission, bring an action in relation to the administration of that charity; and
- the Commission has the power to investigate complaints from the general public or as a result of its own monitoring, and to intervene to protect resources of charities by, for example, suspending or removing trustees or appointing a receiver. It may also take such legal proceedings against charities as are exercisable by the Attorney–General, or compromise claims with a view to avoiding or ending such proceedings. A person 'interested in the charity' may, with the consent of the Commission, bring an action in relation to the administration of that charity.

Sources: Dal Pont, *Charity Law in Australia and New Zealand*, Oxford University Press, Melbourne, 2000 (forthcoming), pp.439-440.

The main advantages of creating a charities supervisory body, of a kind similar to the Charities Commission include:

- consistency and efficiency in monitoring and enforcement of charities;
- a formal process for complaint, investigation and donor protection;
- the development of uniform regulatory and reporting standards;
- the collection and coordination of statistics; and
- the development of comprehensive and consistent policy advice in relation to charities.[39]

This model has gained some support in Australia and New Zealand:

- a WA Parliamentary Committee recommended that a charities supervisory body (known as the Public Collections Board) be established in WA;[40] and
- the New Zealand Working Party on Charities and Sporting Bodies has recommended that a charity commission be established in New Zealand.[41] The Working Party identified the main roles of such a commission as being to register charities,[42] to monitor a charity's use of funds to ensure that they are used for its objectives, to provide advice and support to charities, to assist charities to be accountable to the public, to promote coordination of information within the charitable sector, and to give advice to government on the sector. Aside from an establishment grant and phased–out continuing funding, the commission would be self–funded through registration fees and fees for services.

There have also been, however, a number of reviews that have been critical (or at least not supportive) of the English model:

- in 1979 the New Zealand Property Law and Equity Reform Committee was critical of a commission model, largely based on the lack of evidence of any significant amount of misappropriation or misapplication of funds. The Committee noted that, "the benefit of the establishment of organised supervision would be dis–proportionate to the resources and manpower involved";[43]
- the IC rejected the option on the grounds that it would increase the level of bureaucracy and cost involved in regulating charities, duplicate many functions already efficiently being carried out by other government agencies, and ignore important regulatory issues particular to each jurisdiction (such as fundraising policies). The IC was also unconvinced that to establish such a body would guarantee any greater success than the present system in controlling illegal conduct by rogue organisations.[44] To this end, it concluded that many of the benefits of such a body could be achieved more simply and cheaply by greater inter–governmental cooperation and more specific regulatory mechanisms; and

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[39] Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995, p.208.

[40] Parliament of Western Australia — Legislative Council, *Report of the Select Committee on Charitable Collections*, 1988, pp.8–10.

[41] Working Party on Charities and Sporting Bodies, *Report to the Minister of Finance and the Minister of Social Welfare*, November 1989, pp.60–62.

[42] Although the Working Party recommended that registration be on a voluntary basis, it suggested that registration be a prerequisite for tax privileges.

[43] Property of Law and Equity Reform Committee, *Report on the Charitable Trusts Act 1957*, Wellington, 1979, para.10.

[44] Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995, p.210.

- the 1998 Report from the House of Commons Committee of Public Accounts relating to the administration and operation of the English Charities Commission provides signifieant support for those opposed to a commission model. It criticised the Commission for
  - failing to meet performance targets;
  - the inaccuracy of the register;
  - failing to enforce requests for information to charities;
  - failing to obtain eighty percent of charity accounts (in 1996 one–quarter of charities failed to deliver annual returns, and one–third produced no annual report);
  - lacking rigour during testing of new monitoring arrangements; and
  - failing to remove charities from the register on the grounds prescribed by the *Charities Act 1993* (UK).[45]

While a body such as the Charities Commission has the advantage of bringing together a range of regulatory responsibilities directed at charities, it has the downside of creating a significant bureaucratic institution, and will leave unresolved a range of cross-jurisdictional issues.

The Group suggests that a Commission is not appropriate for the ACT given the ACT's small size and because it will leave a range of unresolved cross-jurisdictional issues.

12.1.2 The Role of the Registrar

A significant concern with the current legislative framework is the issue as to whether licences have been appropriately made by the Registrar:

> "The Act appears to provide powers only to the Minister. It does not provide any delegation to others to act on his behalf. We appear to have a very loose arrangement for effective administration. The legal implications of the signature block at the base of the licence have not been established."
>
> Department of Urban Services, *Public Place Management: Procedures Manual*, Section C.

This 'looseness' should be removed as soon as possible, with the power to issue licences properly delegated to the Registrar.

RECOMMENDATION C11

The Collections Act should explicitly provide the Minister with the power to delegate to the Registrar the issuance of licences.

12.1.3 Register of Charities

The review terms of reference specifically ask that the Reviewer: "review the relevance and appropriateness of the regulatory regime as it relates to street activity, including but not restricted to ... whether there should be a register of charities for purposes of the Act".

[45] See Wilkinson, "The Charity Commission: Regulation and Support of Charities" (1998) 148 *New Law Journal* 752 at752–753.

The Department of Urban services has on file a number of letters requesting information about such a register. The queries seem to be driven by two slightly different objectives:

- in some jurisdictions this is a precursor to being allowed to undertake charitable collections; and/or
- some parties are interested in seeing which charities operate in the ACT, possibly to ascertain their *bona fides*.

The *Collections Act* is neutral as to the status of an organisation. For example, a for profit organisation may undertake a collection.

However, the Group suggests that a Web page be created that includes a list of licensed fundraisers (the majority of whom will be charities) and their contact details.

RECOMMENDATION C12

There should be a publicly accessible list of licensed fundraisers and their contact details.

12.2 Extension of the *Act* to Cover Alternative Forms of Fundraising

12.2.1 Extension to Cover Direct Debit Authorisations

The review terms of reference request the reviewer to consider whether the *Collections Act*, "should include forms of collection of money otber than cash collections (eg, soliciting authority for electronic funds transfers)".

In its report into charities the IC noted that a problem with fundraising-related legislation across Australia has not kept pace with newer forms of funds transmission (eg, authorisation to direct debit).

A number of parties to the review agreed that the *Act* should be made as neutral as possible. This can be done in a number of ways:

- specifying the means of value transmittal (eg, by cash, credit, direct debit, etc) and updating this as new technologies/approaches develop; or
- broadening the criteria by regulating a public fundraising appeals however that appeal is made.

The Group prefers the second approach as it is form neutral.[46]

One way to do this is to draft the legislation so that it applies to any direct or indirect appeal for support. A direct appeal would include a personal request for a donation in any form (including through a direct debit), and an indirect appeal would include those circumstances where the price of the good or service does not truly reflect the good or service's value (eg, a badge, token, flower, etc).[47]

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[46] Flack, *Reviewing the Collections Act*, Working Paper 54, Program on Non-Profit Corporations, Queensland University of Technology, 1995, p.8.

[47] This approach has the benefit of not capturing within the regulatory net such things such as sausage sizzles where the funds clearly are earmarked for a worthwhile purpose.

RECOMMENDATION C13

The Act should be drafted to apply to any direct or indirect appeal for support. A direct appeal would include a personal request for a donation in any form, and an indirect appeal would include those circumstances where the appeal involves the sale of a good or service where the price does not truly reflect the good or service's value.

12.2.2 Extension to Collections on Private Property

The *Act* currently does not apply to collections undertaken on private premises (eg, such as a shop).[48] It is assumed that the property owner (generally the large shopping centre chains) will bear responsibility for monitoring the collection practices of fundraisers that they have authorised to be on their property. It tends to be the larger and higher profile fundraisers that are provided the opportunity to undertake collections in shopping centres, and there is a tendency for such organisations to operate according to the operational standards as set out in the NSW and Victorian legislation. As a result, the Group suggests that ongoing self-regulation of collections in private premises (excluding door-to-door collections) remains appropriate.

12.2.3 Other Forms of Canvassing

Significant discussion was held with parties regarding the extension of the *Collections Act* to other then face-to-face collections. The two major areas of extension were considered:

- to telephone canvassing; and
- to canvassing via Internet and traditional mail.

Regulation of telephone canvassing has been undertaken in a number of jurisdictions in order to limit public nuisance.[49] For example, the SA Working Party to Review the *Collections for Charitable Purposes Act* said:

> "Of all issues considered by the Working Party, telemarketing has probably been the subject of most complaints in terms of its intrusiveness and the very proportion of donated moneys which are required to sustain a telemarketing campaign where commercial agents are involved."
>
> Working Party to Review the Collections for *Charitable Purposes Act*, *Report*, South Australian Treasury Department, Adelaide, 1993, p.12.

The majority of organisations which undertake telephone fundraising tend to be associated with the FIA and/or the ADMA and hence there is a degree of self-regulation. For example, the FIA's *Code of Professional Conduct* provides guidelines to members requiring disclosure to donors and specifying correct procedures for telephone solicitation. However, industry associations only have the power to enforce these requirements on their members.

[48] The *Act* does, however, apply to door-to-door collections.

[49] Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995, p.235.

While some jurisdictions regulate telephone fundraising, possibly with the effect of reduced public nuisance and invasion of privacy, it may be that the costs of conducting appeals may increase as a result of greater regulation.[50]

The same concerns may arise with attempts to regulate solicitation via the Internet and traditional post. While a number of jurisdictions do notionally regulate collections via the Internet and the post,[51] it is clear that enforcement is the problem.

This is a different issue because there is no face-to-face pressure to contribute and there are likely to be overwhelming enforcement problems.

While the Group is aware of some concern that the *Collections Act* does not extend to non face-to-face fundraising the Group considers it inappropriate for this review to consider the *Act*'s extension without further demonstrated evidence of a significant and ongoing problem and wider community consultation on this specific issue.

12.3 National Reform

Organisations operating national fundraising campaigns expressed concern over the inconsistency of fundraising regulations in different jurisdictions.

Significant inconsistencies in the regulatory requirements for fundraising across states impose considerable administrative costs on fundraisers, particularly those conducting fundraising on a national basis. For example, during the IC inquiry, Sydney City Mission argued that: "Tbe nightmare of non-uniform legislation is one of those things that costs this country more than enough in administration alone," and World Vision Australia estimated that the inconsistency of fundraising legislation costs their organisation at least $1 million a year.[52]

The IC recommended that the efficiency and effectiveness of organisations conducting fundraising across borders may be improved by either:

- uniformity of fundraising legislation; or
- mutual recognition of fundraising legislation.[53]

The Group recommends that a limited form of mutual recognition be implemented, with the ACT accepting the licences of organisations from jurisdictions which have similarly structured licensing criteria (principally that they provide audited accounts).

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[50] Costs may increase if the regulation, for example, restricts telephone calls at certain times or requires consent to be obtained before donor's names and details are made available to others.

[51] Monaghan, *Charitable Solicitation Over the Internet and State-Law Restrictions*, Yale Law School, 1996, footnote 84, available at http://www.bway.net/~hboerad/monaghan.html.

[52] Industry Commission, *Charitable Organisations in Australia*, AGPS, Melbourne, 1995, p.234.

[53] Mutual recognition would allow organisations complying with the regulations of a particular state or territory to be deemed to comply with the regulations of others.

RECOMMENDATION C14

Under the principle of mutual recognition the ACT should accept fundraising licences from jurisdictions with fundraising regimes that are similar to that in the ACT.

The Group suggests that such recognition should be provided through regulations and that consideration, in the first instance, should be given to recognising licenees from NSW and Vietoria.

It is important to note that the NSW Government has recently written to all states and territories suggesting that negotiations commence to harmonise the regulation of fundraising across Australia. Such moves are not new, but should be welcomed.

These harmonisation discussions may have an impact on how the reforms proposed in this report should be implemented. The Group suggests that while harmonisation may mean that these reforms should be delayed until it is clear whether national harmonisation is indeed possible, ongoing negotiations (which have proved unsuccessful in the past) should not be used to indefinitely delay the reforms proposed in this report.

D

Part D

Appendices

Appendix One

Terms of Reference

A1.1 Scope

The review will be undertaken in accordance with the principle set out in Clause 5(1) of the Competition Principles Agreement 1995 that: *"...legislation (including Acts, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that: (a) the benefits of the restriction to the community as a whole outweigh the costs; and (b) the objectives of the legislation can only be achieved by restricting competition*". In addition, the review will consider other regulatory issues in relation to obsolescence, redundancy and appropriateness in meeting the objectives of the legislation.

A1.2 Hawkers Act

In relation to the Hawkers Act and without limiting the scope of the review, the Reviewer shall:

- In accordance with the Competition Principles Agreement, review barriers to competition in the legislation, including the following potential barriers identified in an initial audit:
  - Section 6(1) regarding the requirement for hawkers to be licensed, and the potential restriction on entry into the market;
  - Section 6(1), in conjunction with Seetion 6(3) regarding exemptions from the requirements for a licence, and the potential restriction by conferring differential benefits;
  - Section 6(1A) regarding not using more than one vehicle per licensed hawker, and the potential restriction on business conduct;
  - Sections 6A and 6B regarding various geographical and time restrictions on hawkers, and the potential restrictions on business form and conduct, and on entry to the market;
  - Sections 8, 8A, 12, 12A and 13 (taken together) regarding establishing a licensing regime for hawkers, and the potential barrier to entry into the market;
  - Section 9A regarding the limit of two assistant hawkers' licences per licensed hawker, and the potential restriction on business conduct and entry into the market;
  - Section 10 regarding provision of sureties, and the potential barrier to entry into the market;
  - Section 15 regarding signage on vehicles, and the potential restriction on business conduct; and
  - Section 22 prohibiting lending or letting out of a licence, and the potential restriction on business conduct and structure.

- Identify those provisions of the Act which relate primarily to business licensing/regulation and those provisions of the Act which relate primarily to regulation of street activity, and assess the proposition that these elements should be in separate Acts;
- Review the Act and the case for its repeal in relation to the continuing relevance and appropriateness of the regulatory regime it establishes. This should include:
  - Identifying the range of legislation currently available in the ACT to regulate commercial activities in public places; and
  - Assessing whether existing legislation relating to commercial use of public places should be supplemented and/or consolidated.

A1.3 Collections Act

In relation to the *Collections Act* and without limiting the scope of the review, the Reviewer shall:

- confirm the results of a preliminary audit that the Act does not contain any barriers to competition in relation to business activities or activities in trade or commerce, i.e. the activities regulated are not within the intended ambit of the National Competition Policy;
- identify those provisions of the Act which relate primarily to regulation of the activity of fundraising *per se* and those provisions of the Act which relate primarily to regulation of the activity in public places, and assess the proposition that these elements should be in separate Acts;
- review the relevance and appropriateness of the regulatory regime as it relates to street activity, including but not restricted to:
  - whether it should include forms of collection of money other than cash collections (e.g. soliciting authority for electronic funds transfers); and
  - whether there should be a register of charities for purposes of the Act.

Appendix Two

Moveable Signs Guidelines

The *Code of Practice for the Placement of Movable Signs in Public Places* (Instrument No.225 of 1999 made pursuant to s.12A of the *Roads and Public Places Act 1937*) sets out requirements regarding the placement and keeping of movable signs in public places. In Chapter Five the Group suggested that restrictions should be placed on hawkers could piggy-back (at least to some degree) restrictions placed on moveable signs. The following extracts are the key restrictions placed on moveable signs:

"7. **Placement of movable signs**

(1) Movable signs may be placed on unleased Territory Land subject to the following restrictions –

(a) Movable signs must not be placed in the following areas:

(i) Designated Areas, ie areas with the special characteristics of the National Capital – exeept with the express approval of the National Capital Authority [see also Clause 8, Designated Areas];

(ii) in the case of business signs – outside the boundaries of the eommercial or industrial centre in which the business is operating. These boundaries are defined by the land use policies shown on the Territory Plan maps;

(iii) roundabouts;

(iv) median strips of roads (schools and charities exempt);

(v) within 20 metres of traffie lights;

(vi) on residential nature strips (real estate signs exempt); or

(vii) within 20 metres of the apex of the kerb lines at an intersection (real estate directional signs exempt). ...

(c) Prohibited Actions:

(i) movable signs must not cause a danger or restriet pedestrian access on walkways or nature strips;

(ii) movable signs must not cause a danger or restricted access for visually or physically impaired pedestrians, or pedestrians pushing a stroller, pram trolley or any other object;

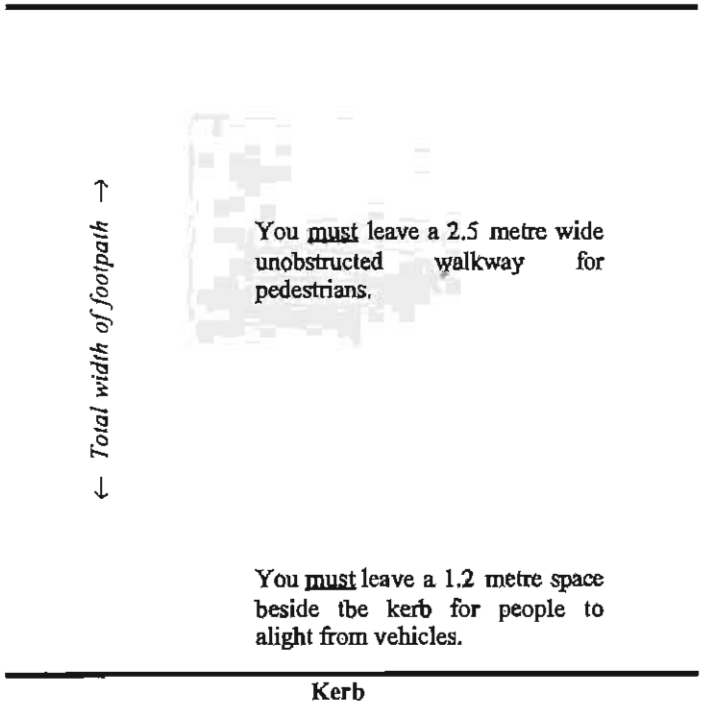
(iii) placement of movable signs must be a minimum of 1.2 metres back from the back of the street kerb to allow persons free access when alighting from a vehicle;

(iv) movable signs must not encroach on to or cause an obstruction on pedestrian or bicycle footpaths;

(iv) in commercial areas pedestrians must have access to a minimum of a 2.5 metres wide walkway free of movable signs or other obstructions, in addition to 1.2 metres back from the top of the street kerb. The walkway should

allow pedestrians to walk either in a straight line or in a line which follows the street contour (see Fig. 1).

Figure 1



(vi) movable signs must not be placed in pedestrian access under awnings which are 2.5 metres or less in width;

(vii) the use of metal pickets, rope, wire, chains, padlocks or any other device must not be used to secure movable signs in the ground or to another object;

(viii) movable signs must not be placed in front of, over the top of, or in a position that will restrict access to fire hydrants, above-ground and in-ground access to services; and

(ix) movable signs must not be placed in emergency vehicle access routes.

(d) The placement of movable signs must not impede maintenance activities (eg the mowing of grass)."

Appendix Three

Public Consultation

This review involved 'targeted public consultation', and was organised in the following manner:

- the Department of Urban Services sent letters to all licensed hawkers and the major charities operating in the ACT, and peak bodies representing the welfare and business sectors. The letter advised these parties of the upcoming review and invited them to contact The Allen Consulting Group if they were interested in receiving a later *Issues Paper*. Four people responded with an interest in the *Hawkers Act*, thirteen with an interest the *Collections Act* and one with an interest in both;
- the Group prepared an *Issues Paper* that was distributed to those parties who indicated an interest in the review, as well as to the Business Advisory and Regulatory Review Team (BARRT);
- an advertisement was placed in a Saturday *Canberra Times* alerting the community to the review and inviting them to contact the Group to receive a copy of the paper (two people contacted the Group) or to download the *Issues Paper* directly from the Group's homepage;
- meetings — either face-to-face or by telephone — were held with a range of parties that requested meetings; and
- parties were invited to provide written submissions.

In addition, the Group spoke with a number of parties in governments in other jurisdictions and with broader industry participants (eg, the FIA).

Three written submissions were made to the review — Rob Odell (proprietor of the Woden Autofair), Gloria and Gavin Thomas (hawkers operating in Hume — see Figure 3.2) and Canberra Legacy — and are available upon request from the Department of Urban Services.