

FUNDRAISING INSTITUTE AUSTRALIA

SENATE SELECT COMMITTEE ON FUNDRAISING IN THE 21ST CENTURY

30 NOVEMBER 2018

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INTRODUCTION

This supplementary submission, provided at the request of the Committee during FIA's appearance before it on 30 October 2018, takes account of important regulatory and other developments that have occurred since Fundraising Institute Australia (FIA) made its initial submission to the Enquiry in July. It also responds to questions taken on notice during the hearing.

FIA speaks for the largest fundraisers in Australia by revenue. The latest data from the ACNC shows that there are about 23,000 charities with DGR status, but many are very small and do not engage in public fundraising. The largest five percent of charities receive 80 percent of the sector's income. There are only 1929 registered charities with fundraising income of over \$.5 million. FIA members account for 1480 or nearly 80 percent of them.

SUMMARY

1. Since the Senate Committee began its work, significant regulatory developments have occurred at the state level, which fundamentally alter the landscape for fundraising reform.
2. In particular, NSW, Vic, SA and ACT have initiated reforms that, once finalised, promise to substantially reduce red tape for fundraising. These measures, if adopted in substantially the same form by all states, would resolve the lion's share of issues relating to misalignment of fundraising licensing and application processes, the largest source of red tape.
3. Greater cooperation and sharing of technology platforms between state fair trading departments and the ACNC is also moving us closer towards a one-stop solution for nation-wide campaign registration and reporting.
4. Through their own reforms, the states are demonstrating their determination to retain their jurisdiction in respect of charitable fundraising regulation. Instead of withdrawing from the space, the states are asserting their powers.
5. The prospect of amending the Consumer and Competition Act to create a 'code' to regulate charitable fundraising is fraught with regulatory risk and imposes yet another layer of (federal) government regulation, the constitutional implications of which are uncertain given that fundraising has traditionally been the jurisdiction of the states. While such an outcome would be a fillip to certain elements of the legal community, the cost burden would fall overwhelmingly upon charities and professional fundraisers.
6. The impact of a mandatory code administered by the ACCC would be largely felt, in terms of compliance risk and red tape, by FIA members who are responsible for over 80 percent of public fundraising in Australia.
7. FIA urges the Committee to propose a firm timetable for all levels of government to achieve consistency in fundraising regulation and, as

recommended by the ACNC Review Report, for the Commonwealth to play a stronger role in encouraging the states and territories towards harmonisation.

1. RECENT REGULATORY DEVELOPMENTS AT STATE LEVEL

Since the Senate Committee began its work, significant regulatory developments have occurred at the state level, which fundamentally alter the landscape for fundraising reform.

NSW is moving ahead with amendments to its *Charitable Fundraising Act 1991* in response to recommendations from the Bergin Inquiry. The amendments, passed by both Houses in October, strengthen Fair Trading's compliance and enforcement regime. FIA understands officials have now commenced drafting the regulations to support the new provisions in the Act.

A second round of amendments, anticipated early in 2019, is expected to provide for renewable five-year licenses, which would be a significant red tape reduction for fundraisers. The initiative will reduce red tape by building the 'standard conditions' for fundraising into the Act, thereby eliminating the need to fill out these forms for each campaign.

Other new measures are aimed at aligning financial and reporting requirements with the ACNC. FIA appreciates the effort that appears to be going into alignment with other states (in particular Victoria) in regard to licensing conditions and enforcement provisions.

FIA also welcomes the initiative to align the Act with the Australian Consumer Law in respect of false, misleading or deceptive conduct.

The NSW Charitable Fundraising reforms represent the most important red tape reduction program to date, from FIA's perspective, because they are actually being implemented. They will result in major reductions in terms of both costs and administration and could act as a template and a catalyst for other jurisdictions, thus creating momentum for harmonisation.

The state government in Victoria is now expected to push ahead with its own fundraising reform program which had been paused for the recent elections.

The ACT has already been a pace-setter. Its reforms of last year reduced both fundraising-specific red tape and financial reporting requirements for ACNC registered entities.

South Australia has led the way in terms of working with the ACNC on a seamless reporting regime.

2. AMENDING THE CONSUMER AND COMPETITION ACT TO CREATE A 'CODE' TO REGULATE FUNDRAISING

As was clearly demonstrated during its review of 2017, the Australian Consumer Law already applies to most fundraising activities. The ACCC has subsequently provided regulatory guidance on this which continues to be under review.

The proposal for a national mandatory code is problematic because it is contemplated to replace existing state regulation, but that will not happen if the states do not repeal.

To be clear, such a 'code' would be black letter law by another name. In sectors where a mandatory code has been imposed (examples include franchising, food & grocery, oil, unit pricing) a breach of the code is a breach of the Competition and Consumer Act and can be enforced by the ACCC. If the ACCC takes court action and the court finds that the Code has been breached, the court can order a range of remedies, including injunctions and damages. Financial penalties for breach of these mandatory codes can be severe. In the case of the Grocery Code imposed on Coles, Woolworths and other grocery retailers and suppliers, start-up costs alone for each participant were estimated at over \$61,000.¹

Generally speaking, these mandated codes have been imposed on sectors where there has been serious and systemic market failure. In some cases it has been the suppliers of large corporations that have been the victims of market power asymmetries. In other cases it is consumers who have needed protection. Is charitable fundraising so broken as to be in need of this kind of regulatory 'solution'?

Despite its reservations about a mandated code, FIA does not have a problem with amending the ACL to provide greater clarity as to its application to the sector as long as the tax deductible status of charities and their donors is not affected. The entire structure of charitable giving in this country is underpinned by tax deductibility, so any threat to that is of concern to FIA.

¹

https://www.legislation.gov.au/Details/F2015L00242/Explanatory%20Statement/Text#_Toc404332460 p. 24

Nevertheless, FIA is confident that, provided any proposed amendments to the ACL were vetted by the Australian Tax Office in advance as part of the drafting process, the tax deductibility of donations will be protected.

3. GREATER COOPERATION AND SHARING OF TECHNOLOGY PLATFORMS

During consultations around proposed fundraising reforms in NSW, FIA was pleased to learn of the increased levels of collaboration occurring with other states and the ACNC.

As previously mentioned, in NSW new measures are aimed at aligning financial and reporting requirements with the ACNC, and efforts are being made to align with other states (in particular Victoria) in regard to licensing conditions and enforcement provisions.

The states have a legitimate interest in knowing who is fundraising in their jurisdiction and this is why registers exist. Yet technology has enabled fundraising to cross state borders. This has created red tape for charities who have to register their fundraising activity in multiple jurisdictions. Logically, if the 'blockage' in the path towards harmonisation and alignment among the states is a technological one, then technology should be used to solve it.

Surely the solution is to create a platform in which all states can ensure that all organisations and individuals fundraising in their jurisdictions have registered in one place so that, if they receive donations from people in other states or other countries, the money can be properly accounted for, and the risk of any fraudulent activity reduced. Such a platform already exists: the ACNC charity portal.

4. THE STATES ARE DETERMINED TO RETAIN JURISDICTION

The states and territories are integral to fundraising reform but FIA does not detect any intention, particularly on the part of the largest states, to repeal their fundraising laws. Such repeal would be an absolutely essential precursor to the introduction any single, national regime if any real reduction in red tape were to be achieved.

5. RISK OF ANOTHER LAYER OF GOVERNMENT REGULATION

FIA finds it perplexing that the model being promoted to reduce red tape for charitable fundraising is yet more regulation, this time by a federal agency, the ACCC.

If the Commonwealth acted unilaterally to set up this model, it would take conservatively two years or more to achieve. Meanwhile:

- FIA knows from direct contact with the states that they have no intention of repealing their laws;
- The model depends on the ACCC becoming the national regulator, but both it and Treasury have made submissions in opposition to its taking on that role;
- The required amendment to the Consumer and Competition Act could probably not be approved and passed by Parliament until at least 2020, and framing the proposed mandatory national code would take even longer, pushing real reform further off into the future; and
- The current momentum for reform from states led by NSW, Victoria, South Australia and the ACT, in cooperation with the ACNC, could be lost.

7. ACHIEVING FUNDRAISING REFORM VIA HARMONISATION

FIA believes past failures of COAG to effectively address duplicative fundraising regulation are not a reason to abandon this avenue of reform. While imperfect, the COAG process remains the most likely to achieve cooperation among state and federal players.

As was pointed out by officials from the ACCC during the 7 November hearing, there have also been several COAG successes such as the Australian Consumer Law itself, health regulation and food standards. What is needed (and what FIA now sees evidence of) is the political will to find solutions.

Past experience tells us that introducing a new regulator to this sector, without the cooperation of the states, is a recipe for failure. When the ACNC was established in 2012 there was no agreement with the states about financial reporting. As a result, six years later there are still states that have not aligned their annual financial reporting requirements with the ACNC annual information statement.

FIA fully recognises the importance of the ACL and played an active role in the consultations with the ACCC in developing the regulatory guide for fundraisers. As was demonstrated by the Victorian Government in the Gibson

case and as submitted to the Committee by the ACCC, the ACL should be applied in conjunction with state and territory laws, not instead of them.