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Senate Select Committee on Charity Fundraising
c/- Committee Secretary
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

by email: charityfundraising.sen@aph.gov.au

Dear Senate Select Committee

Charity Fundraising in the 21st Century: supplementary submission

Thank you for inviting a supplementary submission to the inquiry. I present our 4 page supplementary submission which makes 2 points:

1. *Specific fundraising legislation can provide remedies to charities and donors when things do go wrong; and*
2. *Claims that there is a "high level" of non-compliance by charities with respect to state and territory fundraising legislation should be treated with caution.*

In the submission I provide a de-identified example of a commercial fundraising appeal that did go wrong. It clarifies my concern about "regulatory gaps" if fundraising regulation was to rely only on the *Australian Consumer Law* and the ACNC.

Yours faithfully
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Charity Fundraising in the 21st Century
Supplementary Submission

A. Fundraising specific laws offer remedies when fundraising goes wrong

1. I respectfully suggest that whilst state and territory fundraising legislation is in need of reform, great care is needed with reform to ensure appropriate rights and powers are in place when fundraising does go wrong.¹
2. The ACCC says that it is not likely to investigate individual cases of fundraising conduct² even though the *Australian Consumer Law* at least in some cases will apply. The ACNC has a regulatory role concerning charity governance that could indirectly regulate fundraising, but it does not have specific jurisdiction with regard to commercial fundraisers.
3. Specific fundraising legislation on the otherhand does offer a range of remedies. For example, Victorian fundraising legislation³ requires "commercial fundraisers" to be registered with the fundraisers' names and addresses publicly disclosed. The Victorian regulator has power to require a distribution of part or all of the proceeds of a fundraising appeal, and powers to demand production and audit of fundraising appeal financial records, amongst other powers.
4. Below is an example of when a commercial fundraising appeal did go wrong.

B. An example – the flawed fundraiser⁴

5. A tragedy occurred in a Victorian rural community involving unexpected loss of life. Certain people ("the survivors") were unable to achieve a modest standard of living as a consequence of the tragedy.

¹ I used the colloquial "throw the baby out with the bathwater" to describe the concern in our original submission; a more appropriate phrase is "regulatory gap".

² Evidence to Senate Select Committee on Charity Fundraising in the 21st Century, Parliament of Australia, Canberra 7 November 2018, 27 (Mr Gregson).

³ *Fundraising Act 1998* (Vic) and *Fundraising Registration Guidelines* 16 July 2009.

⁴ The example is based on a matter involving the author's law firm. Some details are obscured to protect confidentiality.

6. Immediately after the tragedy a commercial entity ("fundraiser") set up a series of "pay to enter" fundraising events with representations to the public that the proceeds would go to a trust to assist the survivors. The events were well supported by the rural community with gross proceeds easily exceeding \$100,000.
7. The fundraiser then learned it had a substantial tax liability because the Tax Commissioner considered the "pay to enter fee" to be "income" and GST was also collected. The fundraiser had assumed, without advising the survivors of the need, that the trust would be a "DGR endorsed" charity. DGR endorsement would allow the fundraiser to make a tax deductible donation to the trust, thereby reducing the fundraiser's taxable income arising from the fundraising events.
8. The fundraiser refused to distribute any of the fundraising events proceeds until the extent of the fundraiser's tax liability was settled.
9. Correspondence ensued between the survivors' lawyers and the fundraiser, and later, between the survivors' lawyers and the fundraiser's lawyers. The fundraising events gross proceeds were placed in a lawyer's trust account, under a settlement deed.
10. Under the settlement deed, the fundraiser agreed to make a distribution to the survivors under either of 2 alternatives:
 - (a) The survivors establish a charity and obtain DGR endorsement to then receive a tax deductible donation from the fundraiser (the survivors had advice that such a charity could be established as a "necessitous circumstances fund"); or
 - (b) The survivors accept an "after tax" sum directly from the lawyers' trust account, with the balance being returned to the fundraiser to pay for its settled tax liability.
11. The "after tax" option was substantially less than the survivors had expected and arguably, was less than what was expected by members of the public who had paid to enter the fundraising events.
12. To be clear, there was no basis to say that the fundraiser acted fraudulently; "inept and ill advised" may be an apt description for its conduct.
13. There was a basis under the *Fundraising Act 1998* (Vic) however to allege to the Victorian fundraising regulator that the fundraiser:
 - (a) was required to be registered as a "commercial fundraiser" as it in fact was not so registered;

- (b) made misleading statements to survivors and members of the public who attended the fundraising events regarding the quantum of proceeds to be distributed to the trust;
 - (c) had (initially) provided the survivors and its lawyers with financial statements relating to the fundraising events that were demonstrably inaccurate;
 - (d) may have improperly applied fundraising proceeds towards its own legal expenses; and
 - (e) refused to distribute that part of the proceeds which irrespective of the fundraiser's potential tax liability, the survivors were presently entitled.
14. The survivors did not make a complaint to the Victorian regulator, although:
- (a) a complaint remained the better alternative to litigation if the matter could not be settled by negotiation; and
 - (b) it was likely (based on experience) that the Victorian regulator would follow up on such a complaint.
15. The survivors (who were in financial difficulty) confidentially settled the matter about 14 months after the tragedy by accepting the lesser "after tax" sum of about 23% of the gross proceeds from the fundraising events.

C. Charities' alleged non-compliance with fundraising laws

16. I respectfully suggest that without better evidence, claims regarding charities' alleged high level of non-compliance with fundraising legislation be treated with caution.
17. The ACNC claims⁵ that there is "a high level of noncompliance" by charities with regard to obligations under state and territory fundraising legislation. The claim is based on data that shows there are about 10,500 registered charities in Queensland of which about 2,500 hold fundraising licenses.

⁵ Evidence to Senate Economics Legislation Committee (Estimates), Parliament of Australia, Canberra 1 March 2017, 112 (Mr Locke). Mr Locke is recorded as stating:

We do not know precisely, but we do believe that there is a high level of noncompliance. ... So we have approximately 10½ thousand charities that say they are operating in Queensland: 2½ thousand, we understand, have fundraising licences. One would assume from that there are a number of those 8,000 that actually are operating without a licence. I think that would be a fair assumption.

18. For the sake of clarity, it is not mandatory for a charity registered at the ACNC to also hold a fundraising license. Generally, a charity only needs a fundraising license if its fundraising involves solicitations from the public. Accordingly, charities that do not solicit funds from the public are exempt from the need to be licensed.
19. Below is a summary of situations where a charity does not need a fundraising license in Victoria.

D. An example of fundraising law exemptions

20. In Victoria a fundraising license is not required under the *Fundraising Act 1998* (Vic) if solicitations for funds are only made to:
 - (a) charity members (eg members of a faith community by way of offertory bowl or similar, or by solicitations amongst family members associated with a private ancillary fund);
 - (b) persons who share a common workplace and the solicitation is made on behalf of a charity by one of those persons (ie workplace giving);
 - (c) state and federal government agencies (ie charities that apply for government grants);
 - (d) for profit companies, trusts and partnerships where the entity is empowered to do so (eg family trading trusts often have a "charitable distribution" clause in the trust deed);
 - (e) persons attending a funeral where in lieu of flowers, the solicitation is for an organisation such as a charity; or
 - (f) raise less than \$10,000 from the public and where only volunteers are engaged in the fundraising.

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