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Law Institute Victoria
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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 on line upload

Dear Senate Select Committee

Charity Fundraising in the 21st Century: submission

Thank you for inviting public submissions to the Charity Fundraising in the 21st Century inquiry. We present our submission.

Our brief submission will address Terms of Reference "f" namely:

> *how Federal, State and Territory Governments could work together to provide charities with a nationally-consistent, contemporary and fit-for-purpose fundraising regime.*

Our submission's central point is that:

1. *The Senate Select Committee should consider a state based Uniform Fundraising Law to overhaul and modernise current state based fundraising legislation; and*
2. *If consensus amongst state based regulators for point 1 proves impractical to achieve, then the Commonwealth assist the charitable fundraising industry to develop an industry fundraising code under the Competition and Consumer Act 2010 ("CCA") and secure a concomitant agreement by state based fundrasing regulators to abolish their respective fundraising legislation.*

Our recommendation to the Senate Select Committee is a profoundly practical one – take the path that will work for federal and state based regulators. The issues around fundraising regulation have gone on far too long.

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Who we are

Prior to establishing our boutique practice in charity and not for profit law, the author was engaged on contract around 2006 by the Fundraising Institute of Australia ("FIA"). Reporting to the CEO, the author's year long position at FIA required researching, consulting and drafting the FIA Code of Practice and Fundraising Complaint Process.

Part of that FIA work involved liaising with state based fundraising regulators. Guidance on development of the FIA Codes also came from an ACCC publication on voluntary codes of practice.

For those reasons the author believes he is uniquely qualified to make a submission to the Senate Select Committee.

Subsequent to the release of the finalised FIA Codes, and as part of its inquiry into disclosure regimes for charities and non-profit organisations in 2008, the Senate Economics Committee recognised the role of FIA's Codes of Practice in helping to maintain Australian charities' high reputation with the public.

For abundant disclosure, the author founded and currently chairs the Law Institute Victoria *Charities and Not for profit Law Committee*. This submission however is made by our firm.

If it is necessary for the Senate Select Committee's consideration, the author can attend a face to face meeting in Melbourne to discuss our submission.

Yours faithfully
DF MORTIMER & ASSOCIATES

Derek Mortimer
Principal

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Charity Fundraising in the 21st Century

Submission

A. Summary

1. In this submission we address the Senate Select Committee's Terms of Reference:

> *(f) how Federal, State and Territory Governments could work together to provide charities with a nationally-consistent, contemporary and fit-for-purpose fundraising regime.*

2. We suggest 2 models of how Federal, State and Territory Governments could work together to provide a nationally-consistent, contemporary and fit-for-purpose fundraising regime:

   (a) A Uniform Fundraising National Law; or

   (b) An industry Code of Fundraising.

3. Our recommendation to the Senate Select Committee is a profoundly practical one – we recommend that the Senate Select Committee take the path that will work for regulators.

B. Background in brief

4. State based fundraising legislation is well recognized as being inconsistent *inter se,* and particular sections of legislation are out of date with modern fundraising techniques.[1]

5. These inconsistencies and anachronisms needlessly cost time and money for not for profit organisations.[2] Indeed, these "red tape" issues should be beyond controversy.

[1] To avoid labouring this point we have not included specific supporting references but can do so on request.

[2] see "Charitable Fundraising Regulation Reform" (2012 QUT: https://static.treasury.gov.au/uploads/sites/1/2017/06/ProfessorMylesMcGregorLowndes.pdf at 20 July.

6. However it does not follow (and contrary to high profile advocacy by the charity Justice Connect), that state based fundraising legislation should be abolished altogether and replaced with an amended *Australian Consumer Law*[3] or a *Competition and Consumer Act 2010* ("CCA") supported industry code.[4]

7. Argument regarding lack of consistency and anachronisms in state fundraising legislation could (as a matter of due consideration) be addressed by actually updating and harmonizing that state based fundraising legislation.

C. Suggestion 1: A Uniform Fundraising National Law

8. State based fundraising legislation has recently been successfully engaged to support regulator investigations into the financial affairs of charities.[5]

9. Repeal of state based fundraising legislation accordingly may have the effect of "throwing the baby out with the bath water" ie aspects of the legislation that can and does work to support regulator investigations will be lost.

10. That federal and state governments can work together to create state based legislation that is modern and nationally consistent is not without precedent. For example, harmonization of state laws has recently been achieved with respect to co-operatives legislation and legal profession regulation.[6]

11. Accordingly we respectfully suggest, it is prudent for the Senate Select Committee to consider if Federal, State and Territory Governments could work together to create and regulate a Uniform Fundraising Law.

D. Suggestion 2: An industry Code of Fundraising

12. The Senate Select Committee will be aware of Industry code principles set out in Treasury's paper *Industry Codes of Conduct Policy Framework* (2017). Amongst the preliminary questions the paper asks is whether the identified problems can be addressed by existing legislation. [7]

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[3] Justice Connect advocated amending the Australian Consumer Law to apply to "trade and commerce" and "fundraising".
[4] Justice Connect promotional youtube clip: https://www.youtube.com/watch?v=NtcSbdTr_rk at 20 July.
[5] Consumer Affairs Victoria with regard to the Shane Warne Foundation and Office of Fair Trading NSW with regard to certain RSL entities: https://www.consumer.vic.gov.au/library/publications/news-and-events/news-alerts/the-shane-warne-foundation-public-statement-26-february-2016.pdf: and https://www.finance.nsw.gov.au/inquiry-under-charitable-fundraising-act-1991 both at 20 July.
[6] *Co-operatives National Law* and *Uniform Legal Profession Law* respectively.
[7] *Industry Codes of Conduct Policy Framework* (2017) [11-13] *https://static.treasury.gov.au/uploads/sites/1/2017/11/p2017-t184652-5.pdf* at 20 July.

13. Only the Australian Competition and Consumer Commission (and not state based *Australian Consumer Law* regulators) has jurisdiction with regards to industry codes.[8]

14. Justice Connect's supplementary submission to the ACNC 5 year review provides a useful summary of how an industry code would work. [9]

15. Inevitably there will be a need to create legislation to support an Industry Code of Fundraising. Without the concomitant support of state fundraising regulators to abolish state based fundraising legislation, charities will find themselves needing to comply with state *as well as* federal fundraising laws – an absurd and counterproductive prospect.

16. Accordingly we respectfully suggest, it is prudent for the Senate Select Committee to consider if Federal, State and Territory Governments could work together to create an Industry Code of Fundraising and abolish state fundraising legislation.[10]

E. Our recommendation

17. Our recommendation to the Senate Select Committee with respect to its Terms of Reference "f" is a profoundly practical one – take the path that is achievable for regulators. This issue of inconsistent and anachronistic state fundraising laws is at least 10 years old and is understood by some regulators.[11]

18. This is not the place to discuss the text of either suggested model. It might be useful for the Senate Select Committee (if it is not already doing so) to clarify the goals of any reform by asking:

    (a) Will there be a "net public benefit"(which we take to mean a benefit to the *donating public*);[12]

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[8] Per ACCC website statement: https://www.accc.gov.au/business/industry-codes at 20 July.

[9] *Justice Connect supplementary submission 20 April* [pp 4-5] : http://www.nfplaw.org.au/sites/default/files/media/JusticeConnectNFP_LawsupplementarySubmissionACNC_Review20April2018.pdf

[10] The ACCC has taken a view in its ACNC 5 Year review submission dated 27 February 2018 that state based fundraising regulation is preferred: https://www.accc.gov.au/system/files/DORIS%20-%20D18-27502%20EO%20-%20Correspondence%20-%20SIMS%20-%20Mr%20Crowe%20-%20Review%20of%20Aust.. .pdf at 21 July.

[11] Fundraising reform was certainly in the minds of some state regulators when the author was advising and drafting the FIA Code of Practice in 2006. Regulators' concerns then were due in part to controversy involving an undisclosed speaker's fee being paid at fundraising events: see "Cherie Blair implicated in charity scandal" (27 October 2005) Radio National: http://www.abc.net.au/am/content/2005/s1491741.htm at 20 July.

[12] See above *Industry Codes of Conduct Policy Framework* (2017) pp 11-13.

(b) Will the reform provide fundraising regulation proportionate to the risks, or will it simply "deregulate" charitable fundraising?;[13] and

(c) Will the reform reduce unnecessary administration for charities or will it actually increase uncertainty with an increase in risk adverse paper work?[14]

Derek Mortimer

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[13] See transcript headline "Charities launch campaign to deregulate the sector" (30 August 2017) Radio National http://www.abc.net.au/radionational/programs/breakfast/charities-launch-campaign-to-deregulate-the-sector/8855106 at 20 July.

[14] A recent example of regulatory uncertainty is ACNC Governance Standard 5. The ACNC legislation repeals the statutory duty of directors of charitable companies limited by guarantee in the *Corporations Act 2001*. The legislation now places compliance responsibility on charities (and not directors). Charities must take "reasonable steps" to ensure directors comply with their duties. However what "reasonable steps" are is not easy to determine: see Ian Ramsay and Miranda Webster "Registered Charities and Governance Standard 5: An Evaluation" (2017) 45 ABLR 127, at 128 and 129.