

## Chapter 2

### Background and previous inquiries

2.1 Issues relating to the regulatory framework governing fundraising activities in Australia have been the subject of discussion and review over a number of years. This chapter provides background on relevant previous parliamentary inquiries and government reviews that have examined these issues over the last decade.

#### *Disclosure regimes for charities and not-for-profit organisations – Senate Economics References Committee December 2008*

2.2 In 2008, the Senate Economics References Committee undertook an inquiry into disclosure regimes for charities and not-for-profit organisations, examining current governance and disclosure models for this sector in Australia and possible improvements to the regulatory framework. The committee examined fundraising legislation in Australia and noted concerns from the sector about the difficulties of complying with multiple state and territory-based regulations.<sup>1</sup>

2.3 The committee recommended that a National Fundraising Act be developed following a referral of powers from states and territories to the Commonwealth. It recommended that such a national act should include the following minimum features:

- it should apply nationally to all organisations;
- it should require accounts or records to be submitted following the fundraising period with the level of reporting commensurate with the size of the organisation or amount raised;
- it should include a provision for the granting of a license; and
- it should clearly regulate contemporary fundraising activities such as internet fundraising.<sup>2</sup>

#### *Contribution of the Not-for-profit Sector – Productivity Commission Research Report January 2010*

2.4 In March 2009, the Productivity Commission was tasked by the Australian Government with assessing the contribution of the not-for-profit sector and impediments to its development in Australia. The Productivity Commission's final report, released in January 2010, advocated for the harmonisation of fundraising legislation in Australia:

Fundraising legislation differs significantly between jurisdictions, adding to costs incurred by the [not-for-profit] sector. Harmonisation of fundraising

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1 Senate Economics References Committee, *Disclosure regimes for charities and not-for-profit organisations*, December 2008, pp. 95–98.

2 Senate Economics References Committee, *Disclosure regimes for charities and not-for-profit organisations*, December 2008, p. 98.

legislation through the adoption of a model act should be an early priority for governments.<sup>3</sup>

2.5 The Productivity Commission suggested this approach due to the difficulties associated with achieving truly national legislation through the referral of powers to the Commonwealth from states and territories:

The Commission is attracted to a national fundraising act, although it is reluctant to recommend this as an immediate change. State and territory governments would be understandably hesitant to cede this power to the Commonwealth without knowing what form such national legislation might take. This reluctance would be lessened if these governments had already agreed to a harmonised set of legislation that would form the basis of a nationally applicable model act. A model act (with limited exceptions) could provide national consistency and yet still allow states and territories to control local, jurisdiction-specific small fundraising activities.<sup>4</sup>

2.6 The Commission suggested that governments proceed to a nationally consistent approach to fundraising in a staged manner:

- First, the states and territories develop harmonised fundraising legislation through the adoption of a model act.
- Second, the states and territories mutually recognise (in conjunction with the Australian Government) the fundraising approval granted in other jurisdictions, supported by a national register of cross-jurisdictional fundraising organisations and/or activities.
- Finally, the states and territories could refer their powers to the Commonwealth to enact national fundraising legislation, based on the harmonised legislation agreed to by the state and territory governments and regulated by a Commonwealth body.<sup>5</sup>

### ***Research reports commissioned by the ACNC***

2.7 In 2013, the Commonwealth charities regulator, the Australian Charities and Not-for-profits Commission (ACNC), embarked on a research program to measure the red tape burden on charities in Australia and identify target areas for red tape reduction. Two research reports conducted as part of this program considered fundraising regulation and its effect on red tape in the sector.

2.8 The first of these, a research report into Commonwealth regulatory and reporting burdens on the charity sector, was undertaken by Ernst & Young on behalf of the ACNC and published in September 2014. The report noted concerns in the charitable sector about fundraising regulatory and reporting requirements, and concluded:

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3 Productivity Commission, *Contribution of the Not-for-profit Sector*, January 2010, p. xxiv.

4 Productivity Commission, *Contribution of the Not-for-profit Sector*, January 2010, pp. 141–142.

5 Productivity Commission, *Contribution of the Not-for-profit Sector*, January 2010, p. 142.

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Our research revealed that a number of key inter-jurisdictional regulatory issues (such as fundraising regulation) remain a concern for charities. Progress on resolving these issues, however, appears stalled. There would thus appear scope for the charity regulator to adopt an 'honest-broker' role, and revive and drive reform on such issues as fundraising regulation. This could be achieved by commissioning research on the costs of the current fundraising regulatory framework, and/or holding national workshops with charities to build the case and options for reform.<sup>6</sup>

2.9 A second research report was conducted by Deloitte Access Economics on behalf of the ACNC, with the final report published in February 2016. This report examined options to align the regulatory obligations of the ACNC and states and territories. Fundraising was one of the three key areas of focus for this report, which found:

Overwhelmingly, fundraising is the source of the greatest amount of regulatory burden for charitable organisations. Fundraising legislation differs significantly between jurisdictions, which very quickly escalates the administrative costs a charity incurs. Consequently, the annual regulatory burden associated with fundraising regulations is estimated at approximately \$13.3 million per year across the sector.

Fundraising regulation has not kept pace with new forms of fundraising, particularly as online campaigns for funds have grown through the use of third party websites. The current arrangements treat fundraising as an activity isolated to one state or territory, when, in reality, even small organisations may attract interest nationally *and* internationally through online channels such as crowdsourcing websites.<sup>7</sup>

2.10 The report identified three options for aligning the regulatory obligations of the ACNC and states and territories.

*Option 1 – ACNC obligations fulfil state and territory regulatory requirements*

2.11 This option would seek to make use of existing Commonwealth regulatory processes and obligations by allowing charities to achieve compliance with individual state and territory regimes through meeting ACNC obligations.<sup>8</sup> In relation to fundraising regulation, this option is explained as follows:

Option 1 will seek to implement an agreement with states and territories where reporting obligations will be satisfied by meeting the equivalent ACNC requirements. In practice, this would mean charitable organisations could use ACNC reporting requirements to satisfy state and territory

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6 Ernst & Young, *Research into Commonwealth Regulatory and Reporting Burdens on the Charity Sector: A Report Prepared for the Australian Charities and Not-for-profits Commission*, 30 September 2014, p. 65.

7 Deloitte Access Economics, *Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, 23 February 2016, p. 2.

8 Deloitte Access Economics, *Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, 23 February 2016, p. 33.

reporting obligations, with state and territory variations embedded in the ACNC's reporting template. Applications to fundraise would continue to be managed at the state and territory level according to the relevant legislation; however status as a charitable organisation would be met through registration as a charity with the ACNC.<sup>9</sup>

2.12 Implementation of this option would lead to an estimated annual saving of \$5.04 million for the sector in regulatory compliance costs, through the elimination of duplicative reporting requirements.<sup>10</sup>

### *Option 2 – Alignment of state, territory and ACNC regulatory obligations*

2.13 This option would aim to align current processes at each jurisdictional level with best practice, while retaining the structure of state and territory oversight. Under this option, states, territories, and the ACNC would agree on a common approach to regulation across the three areas (including fundraising), which would address issues of duplication and inconsistency across different jurisdictions.<sup>11</sup>

2.14 If implemented, processes that determine how fundraising activities are undertaken in each jurisdiction would be aligned between state and territory regulators, and these processes would be aligned with ACNC reporting requirements to reduce the amount of administration involved.<sup>12</sup> Full implementation of this option would lead to an estimated annual saving of \$8.5 million for the sector in reduced regulatory compliance costs. The report noted, however, that:

While this [option] reduces regulatory burden by approximately \$8.5 million a year, it requires consensus from each state and territory to achieve this reduction. At present, there is no conceptual underpinning between jurisdictions on the common goal of regulation, and what the scope of the regulated activity should be. Should one state be hesitant about moving towards a common regulatory approach, the benefits associated with the change would be significantly reduced.<sup>13</sup>

### *Option 3 – ACNC as a central regulatory body*

2.15 Under this option, oversight of various aspects of charities regulation would be transferred to the ACNC from state and territory management. In relation to fundraising regulation, this proposal is explained as follows:

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9 Deloitte Access Economics, *Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, 23 February 2016, p. 34.

10 Deloitte Access Economics, *Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, 23 February 2016, p. 39.

11 Deloitte Access Economics, *Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, 23 February 2016, p. 35.

12 Deloitte Access Economics, *Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, 23 February 2016, p. 35.

13 Deloitte Access Economics, *Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, 23 February 2016, p. 40.

Fundraising regulation would be unified by transferring oversight capacity from all states and territories to the ACNC through a referral of powers. Under this scenario, it is envisaged that, as the national regulatory body, all charities registered by the ACNC could apply for a [licence] to fundraise in every state and territory via the ACNC registration process. In doing so, they would be required to comply with an agreed set of requirements in undertaking and reporting on the fundraising activity.<sup>14</sup>

2.16 This option would require the development of a single set of rules covering the definition of fundraising activities, the way in which such activities must be undertaken, and financial reporting requirements. It would make a charitable organisation's ability to undertake fundraising dependent on registration with the ACNC.<sup>15</sup>

2.17 Implementation of this option would lead to the greatest reduction in regulatory compliance burden, with estimated annual savings of \$10.8 million for the charitable sector.<sup>16</sup>

### ***Australian Consumer Law Review – March 2017***

2.18 The Australian Consumer Law (ACL) is Australia's first nation-wide consumer protection law, which commenced operation in January 2011.<sup>17</sup> In June 2015, consumer affairs ministers, through the Legislative and Governance Forum on Consumer Affairs (CAF),<sup>18</sup> asked Consumer Affairs Australia and New Zealand (CAANZ)<sup>19</sup> to initiate a broad-reaching review of the ACL. The review's final report was delivered in March 2017, and commented on several issues relating to the application of the ACL to fundraising activities.

2.19 CAANZ explained in the review's final report that the ACL generally applies to conduct undertaken 'in trade or commerce'; and that in many cases, the activities of fundraisers in seeking donations are captured by general provisions of the ACL that do not require a supply of goods or services (including provisions prohibiting

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14 Deloitte Access Economics, *Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, 23 February 2016, p. 37.

15 Deloitte Access Economics, *Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, 23 February 2016, p. 37.

16 Deloitte Access Economics, *Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, 23 February 2016, p. 40.

17 The ACL is Schedule 2 of the *Competition and Consumer Act 2010* (Cth) and is applied in each state or territory via each jurisdiction's application laws.

18 CAF consists of all Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading and consumer protection laws. Its objective is to provide the best and most consistent protection for Australian and New Zealand consumers through its consideration of consumer affairs and fair trading issues of national significance and, where possible, development of consistent approaches to those issues.

19 CAANZ is a CAF sub-committee comprising the most relevant senior officer from consumer affairs or fair trading agencies in each CAF jurisdiction.

unconscionable conduct, and misleading or deceptive conduct).<sup>20</sup> It noted, however, that there are legal complexities in this area particular to charitable and not-for-profit fundraising, and that the charitable sector faces widespread uncertainty in determining how the ACL applies in practice.<sup>21</sup>

2.20 CAANZ noted the 'immediate need for regulatory guidance' on the extent to which the ACL covers the activities of the charitable, not-for-profit and fundraising sector, and how regulators will approach compliance and enforcement. CAANZ proposed to develop this regulatory guidance as a priority project for 2017, with a view to subsequently assessing the effectiveness of this guidance and whether any amendment to the ACL is necessary in 2019–20.<sup>22</sup> This proposal contained in CAANZ's final report on the ACL review was noted by ministers at a CAF meeting in August 2017.<sup>23</sup>

2.21 This regulatory guidance was developed by CAANZ members and subsequently released in December 2017. The *Guide to the Australian Consumer Law for fundraising and other activities of charities, not-for-profits and fundraisers* sets out 'general principles and examples to assist the charity and fundraising sector in understanding its obligations under the ACL'.<sup>24</sup>

2.22 The guidance states that in general, an organisation's fundraising activities are likely to meet the legislative definition of 'trade or commerce' and hence attract certain obligations under the ACL if the organisation: engages in a fundraising activity involving a supply of goods or services; is a for-profit professional fundraiser; or is fundraising in an organised, continuous and repetitive way.<sup>25</sup>

2.23 The obligations required by the ACL in such circumstances include that organisations:

- must not engage in misleading or deceptive conduct or unconscionable conduct; and

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20 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Final Report*, March 2017, p. 75.

21 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Final Report*, March 2017, pp. 75–76.

22 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review: Final Report*, March 2017, p. 76.

23 Legislative and Governance Forum on Consumer Affairs, *Joint Communique: Meeting of Ministers for Consumer Affairs*, 31 August 2017, p. 6. Noting of a proposal means that 'Regulators will issue guidance or explore further options for these items' (p. 6).

24 ACCC, *Guide to the ACL for charities, not-for-profits & fundraisers*, <https://www.accc.gov.au/publications/guide-to-the-acl-for-charities-not-for-profits-fundraisers> (accessed 11 December 2018).

25 CAANZ, *Guide to the Australian Consumer Law for Fundraising and Other Activities of Charities, Not-for-profits and Fundraisers*, December 2017, p. 3.

- if the organisation's fundraising activities also involve supplying goods or services, it must not make false or misleading representations or engage in unconscionable conduct in relation to the supply of those goods or services.<sup>26</sup>

***Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review 2018***

2.24 In December 2017, the Australian Government announced an independent review of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) and the *Australian Charities and Not-for-profits Commission (Consequential and Transitional) Act 2012* (Cth) (together, the ACNC Acts). The Panel undertaking the review were tasked with examining the objects of the ACNC Acts, the regulatory framework established by the ACNC Act to achieve those objects, the powers of the ACNC, and whether any legislative changes were required to address issues raised by the review.<sup>27</sup>

2.25 On 22 August 2018, the Australian Government tabled the report and recommendations of the review panel. The panel noted that the ACNC does not regulate fundraising activities of charities. Nevertheless, the panel considered fundraising in its review because of:

...the direct impact that the current framework has on the sector, object 3 of the ACNC Act ('to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector') and the overwhelming stakeholder concerns raised.<sup>28</sup>

2.26 The panel considered that the most appropriate mechanism for reform is through the Australian Consumer Law (ACL) framework. The panel refuted the ACCC's arguments against this approach,<sup>29</sup> and concluded:

The Commonwealth Government has an opportunity to reduce red tape for the sector by taking a leadership role in working with State and Territory governments to harmonise fundraising laws. By amending the ACL to ensure application to fundraising activities, working with the States and Territories to repeal or amend existing fundraising laws, and developing a mandatory Code of Conduct, the Commonwealth can significantly reduce the administrative burden on the sector.

A mandatory Code of Conduct on fundraising should be developed as a priority. Whether the Code sits under State and Territory fundraising legislation as a Uniform Code, or the Competition and Consumer Act, the Panel would expect that it would reflect best practice, and be flexible

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26 CAANZ, *Guide to the Australian Consumer Law for Fundraising and Other Activities of Charities, Not-for-profits and Fundraisers*, December 2017, p. 6.

27 Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018*, August 2018, p. 2.

28 Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018*, p. 100.

29 Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018*, p. 100–102.

enough to set ethical standards in relation to new and emerging technologies and practices, such as crowd funding, commission-based face-to-face fundraising, telephone fundraising and third party commercial fundraising. Local councils should be involved in the development of the Code to ensure that public nuisance issues of fundraising in public spaces are addressed. The Panel considers that the responsibility for enforcement remains with State and Territory regulators.

Both Victoria and New South Wales have indicated support for national reform of fundraising legislation and the ACNC has made some progress with South Australia, Tasmania and the ACT. Leadership from the Commonwealth will build on this progress and see the move toward a national scheme come to fruition.<sup>30</sup>

2.27 The review panel made 30 recommendations in its report. Relevantly, the panel recommended:

Recommendation 25

The Australian Consumer Law be amended to clarify its application to charitable and not-for-profit fundraising and a mandatory Code of Conduct be developed.

Recommendation 26

The use of the Charity Passport by Commonwealth departments and agencies be mandated.<sup>31</sup>

Recommendation 27

Responsibility for the incorporation and all aspects of the regulation of companies which are registered entities be transferred from the Australian Securities and Investments Commission (ASIC) to the ACNC, except for criminal offences.

Recommendation 28

A single national scheme for charities and not-for-profits be developed.<sup>32</sup>

2.28 The Commonwealth Government has not yet provided a formal response to the ACNC Legislation Review.

2.29 CAF ministers noted the review at a meeting on 26 October 2018, and stated:

The Commonwealth Government has not formally responded to the ACNC Act review panel report. While awaiting that response, CAANZ members

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30 Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018*, pp. 102–103.

31 See Chapter 3 for more information on the Charity Passport.

32 Commonwealth of Australia, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislative Review 2018*, p. 13.

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will consider any potential regulatory gap for their local charitable fundraising statutory regimes.<sup>33</sup>

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33 Legislative and Governance Forum on Consumer Affairs, *Joint Communique: Meeting of Ministers for Consumer Affairs*, 26 October 2018, p. 6.

