

The Senate

Select Committee on
Charity Fundraising in the 21st Century

Report

February 2019

© Commonwealth of Australia 2019

ISBN 978-1-76010-885-4

Secretariat

Ms Bonnie Allan (Committee Secretary)

Mr CJ Sautelle (Principal Research Officer)

Dr Rosalind Hewett (Senior Research Officer)

Ms Leonie Lam (Research Officer)

Ms Kate Morris (Administrative Officer)

Ms Michelle Macarthur-King (Administrative Officer)

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3585

Fax: 02 6277 5794

E-mail: charityfundraising.sen@aph.gov.au

Internet: www.aph.gov.au/senate_charityfundraising

This document was produced by the Select Committee on Charity Fundraising in the 21st Century Secretariat and printed by the Senate Printing Unit, Parliament House, Canberra.

This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivs 3.0 Australia License.



The details of this licence are available on the Creative Commons website:

<http://creativecommons.org/licenses/by-nc-nd/3.0/au/>

Committee membership

Members

Senator Catryna Bilyk, Chair	Tasmania, ALP
Senator Rachel Siewert, Deputy Chair	Western Australia, AG
Senator the Hon Eric Abetz	Tasmania, LP
Senator Brian Burston	New South Wales, UAP
Senator David Smith	ACT, ALP
Senator Amanda Stoker	Queensland, LP

Table of contents

Committee membership	iii
Recommendations	vii
Chapter 1.....	1
Key government and regulatory bodies.....	2
Note	2
Acknowledgements	2
Structure of this report.....	2
Chapter 2.....	5
Background and previous inquiries.....	5
Chapter 3.....	15
Current legislative and regulatory frameworks governing charitable fundraising	15
Introduction	15
Commonwealth legislation.....	15
Commonwealth regulatory bodies.....	19
States and territories	24
Local council requirements	35
Industry codes of practice.....	35
Conclusion.....	36
Chapter 4.....	37
Issues raised in evidence	37
Introduction	37
Complexity	37
Cost of compliance	43

Inefficient allocation of resources	50
Lost opportunities	50
Lack of regulation of online platforms	52
Lack of accountability and transparency	55
Enforcement	57
Limited role of the Australian Competition and Consumer Commission.....	58
Chapter 5.....	61
Options for reform	61
Amendment to the ACL and repeal of state and territory legislation	63
Harmonisation of states and territory legislation	75
Committee view.....	82
Appendix 1	85
Submissions, tabled documents and answers to questions on notice.....	85
Appendix 2.....	89
Public hearings and witnesses	89

Recommendations

Recommendation 1

5.83 The committee recommends that the Australian government urgently provide a public response to the recommendations made in the review panel's report, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review*.

Recommendation 2

5.87 The committee recommends that the Australian Government commit to working with state and territory governments and the not-for-profit sector to develop a consistent national model for regulating not-for-profit and charitable fundraising activities within a time limit of two years.

Chapter 1

1.1 On 19 June 2018, the Senate resolved to establish the Select Committee on Charity Fundraising in the 21st Century. The committee was established to inquire into and report on the current framework of fundraising regulation for charities and options for reform, with particular reference to:

- a. whether the current framework of fundraising regulation creates unnecessary problems for charities and organisations who rely on donations from Australian supporters;
- b. whether current fundraising laws meet the objectives that guided the decision to regulate donations;
- c. whether current fundraising compliance regimes allow charities to cultivate donor activity and make optimal use of resources donors provide;
- d. the loss in productivity for the thousands of charities who try to meet the requirements of the seven different fundraising regimes;
- e. whether the current frameworks for investigation and enforcement are the best model for the contemporary fundraising environment;
- f. how Federal, State and Territory Governments could work together to provide charities with a nationally-consistent, contemporary and fit-for-purpose fundraising regime;
- g. the appropriate donor-focused expectations and requirements that should govern fundraising regulation in the 21st century;
- h. how the Australian consumer law should apply to not-for-profit fundraising activities;
- i. what are the best mechanisms to regulate third party fundraisers and to ensure the culture of third party fundraisers matches community perceptions of the clients they work with;
- j. whether a harmonised, contemporary fundraising regime could help in addressing concerns about the potential influence of foreign money on civil society and political debate in Australia;
- k. the cost to the charity and not-for-profit sector, and the communities they serve, of postponing fundraising reform; and
- l. any other related matters.¹

1.2 The committee was to report on or before 18 October 2018. On 22 August 2018, the Senate granted an extension of time to report until the second sitting Tuesday in February 2019.² The committee resolved to table its report by 13 February 2019.

1.3 In accordance with its usual practice, the Committee advertised the inquiry on its website and wrote to relevant individuals and organisations inviting submissions by

1 *Journals of the Senate*, No. 99, 19 June 2018, p. 3180.

2 *Journals of the Senate*, No. 112, 22 August 2018, p. 3590.

6 August 2018. The Committee received 104 submissions, which are listed at Appendix 1, and held four public hearings:

- Melbourne on 29 October 2018
- Sydney on 30 October 2018
- Canberra on 7 November 2018
- Brisbane on 31 January 2019

1.4 Submissions and the transcripts of evidence are available on the committee's website.³

Key government and regulatory bodies

1.5 The following government and regulatory bodies with oversight of charitable fundraising are referred to throughout this report:

- Australian Charities and Not-for-Profits Commission (ACNC)
- Australian Competition and Consumer Commission (ACCC), which is responsible for administering the Australian Consumer Law (ACL)
- Australian Securities and Investments Commission (ASIC)
- Consumer Affairs Australia New Zealand (CAANZ), comprising Commonwealth, State and Territory officials responsible for consumer affairs
- Australian Taxation Office (ATO)

Note

1.6 References to the Hansard transcript throughout the report refer to the official transcript, unless otherwise stated. Page numbers may vary between the proof and official transcript.

Acknowledgements

1.7 The Committee thanks all submitters and witnesses who provided evidence to the inquiry.

Structure of this report

1.8 The report is divided into five chapters:

- Chapter 1 (this chapter) provides an overview of the conduct of the inquiry;
- Chapter 2 details previous inquiries and recent developments relevant to the inquiry's terms of reference;
- Chapter 3 outlines the current legislative and regulatory frameworks governing charity fundraising and not-for-profits at the state, territory and

3 Senate Select Committee on Charity Fundraising in the 21st Century,
www.aph.gov.au/Parliamentary_Business/Committees/Senate/Charity_Fundraising.

federal levels, as well as the bodies responsible for their oversight and enforcement;

- Chapter 4 highlights the issues identified in evidence in the absence of a consistent nation-wide regulatory framework for charity fundraising; and
- Chapter 5 outlines the options for reform to the current framework of fundraising regulation for charities and not-for-profits, and sets out the committee's views and recommendations arising from the inquiry.

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.¹

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.²

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

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.³

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.⁴

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.⁵

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:

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.

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.⁶

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.⁷

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.⁸ 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

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.⁹

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.¹⁰

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.¹¹

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.¹² 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.¹³

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:

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.¹⁴

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.¹⁵

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.¹⁶

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 2011.¹⁷ In June 2015, consumer affairs ministers, through the Legislative and Governance Forum on Consumer Affairs (CAF),¹⁸ asked Consumer Affairs Australia and New Zealand (CAANZ)¹⁹ 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

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).²⁰ 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.²¹

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 2019–20.²² This proposal contained in CAANZ's final report on the ACL review was noted by ministers at a CAF meeting in August 2017.²³

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'.²⁴

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.²⁵

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

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.²⁶

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.²⁷

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.²⁸

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,²⁹ 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

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.³⁰

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.³¹

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.³²

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

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.

will consider any potential regulatory gap for their local charitable fundraising statutory regimes.³³

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

Chapter 3

Current legislative and regulatory frameworks governing charitable fundraising

Introduction

3.1 This chapter describes the current legislative and regulatory frameworks governing charity fundraising at the Commonwealth, state and territory levels. The chapter also outlines the definition of a 'charity' in the Commonwealth *Charities Act 2013*, and briefly discusses industry self-regulatory codes.

Commonwealth legislation

3.2 Fundraising activities for charities are primarily subject to state and territory government regulation, although Commonwealth and local government regulations are also relevant.¹ Fundraising regulation, at both the Commonwealth and state and territory levels, is concerned with accountability, governance and transparency, and includes requirements for registration and reporting.²

3.3 As outlined by the Australian Centre for Philanthropy and Nonprofit Studies (ACPNS, QUT), a charity's purpose must align with the law on charities:

Charities are already required by the common law to pursue activities only in pursuit of their purposes. Those purposes must be consistent with Australian charity law. Their purposes must also be for the public benefit and not against public policy, as judged in the Australian environment.³

3.4 At the Commonwealth level, there are two key pieces of legislation that govern charitable fundraising: the *Charities Act 2013* (Charities Act) and the Australian Consumer Law.

The Charities Act

3.5 The Charities Act aims to 'provide clarity and certainty as to the meaning' of 'charity' and 'charitable purpose'.⁴ At present, its definitions only apply to where the terms 'charity' and 'charitable' are used in federal legislation, although there was some hope that the definitions it outlined could be used uniformly across Australia.⁵

3.6 The Charities Act defines a charity as follows:

-
- 1 Mr Nicholas Berger-Thomson, Senior Adviser, Individuals and Indirect Tax Division, Revenue Group, Department of the Treasury, *Committee Hansard*, 7 November 2018, p. 47.
 - 2 Ms Alice Macdougall, Deputy Chair, Charities and Not For Profits Committee, Law Council of Australia, *Committee Hansard*, 29 October 2018, p. 9.
 - 3 Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 16.
 - 4 *Charities Act 2013* (Cth), Preamble.
 - 5 G.E. Dal Pont, *Law of Charity*, 2nd edition, LexisNexis Butterworths, Chatswood, New South Wales, 2017, p. 33.

'Charity' means an entity:

- (a) that is a not-for-profit entity; and
- (b) all of the purposes of which are:
 - (i) charitable purposes that are for the public benefit; or
 - (ii) purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i); and...
- (c) that is not an individual, a political party or a government entity.⁶

3.7 'Charitable purposes' as outlined in paragraph (b)(i) means any of the following:

- (a) the purpose of advancing health
- (b) the purpose of advancing education;
- (c) the purpose of advancing social or public welfare;
- (d) the purpose of advancing religion;
- (e) the purpose of advancing culture;
- (f) the purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
- (g) the purpose of promoting or protecting human rights;
- (h) the purpose of advancing the security or safety of Australia or the Australian public;
- (i) the purpose of preventing or relieving the suffering of animals;
- (j) the purpose of advancing the natural environment;
- (k) any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j);
- (l) the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if:
 - (i) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or
 - (ii) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.⁷

3.8 The Commissioner of the Australian Charities and Not-for-profits Commission (ACNC), Dr Gary Johns, emphasised that despite the definition outlined in the Charities Act, there is no 'single definition' of what a charity is across the

6 *Charities Act 2013* (Cth), s 5.

7 *Charities Act 2013* (Cth), s 12.

various jurisdictions in Australia 'and we'll be a long time waiting for that, I suspect'.⁸ This was echoed by Mr Alex Milner from the Law Institute of Victoria, who noted that the states and territories are not bound to the definition of a charity contained in the Charities Act.⁹

Australian Consumer Law (ACL)

3.9 The Australian Consumer Law (ACL) is the national law for fair trading and consumer protection.¹⁰ Its provisions prohibit misleading conduct, false representation and unconscionable conduct. Enforcement responsibilities for the ACL are shared between the Australian Competition and Consumer Commission (ACCC) and state and territory fair trading agencies.¹¹ The Public Fundraising Regulatory Association explained that the 'ACL effectively creates a macro-structure for the regulation of fundraising, whilst not removing ultimate state control over how the ACL is enforced in their respective jurisdiction[s]'.¹²

3.10 Mr Scott Gregson from the ACCC described the functions of the ACL:

The consumer law contains general provisions prohibiting misleading conduct, false representations and unconscionable conduct. It also contains more specific prohibitions, such as those dealing with debt collection, unsolicited consumer agreements and unfair contract terms.¹³

3.11 Dr Lisa O'Brien from The Smith Family explained that the ACL's provisions apply 'to certain activities of charities, notably, fundraising in specific circumstances'. She also noted that the ACL is 'a regulatory framework enforced jointly by all Australian governments', and therefore applicable across jurisdictions.¹⁴ Responsibility for administering the details beneath the framework outlined in the ACL rests with state and territory governments.¹⁵

8 Dr Gary Johns, Commissioner, Australian Charities and Not-for-profits Commission, *Committee Hansard*, 30 October 2018, p. 18.

9 Mr Alex Milner, Member, Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 43.

10 The ACL is located in schedule 2 of the *Competition and Consumer Act 2010*. See also Commonwealth of Australia, *A Guide to the Australian Consumer Law for Fundraising and Other Activities of Charities, Not-for-profits and Fundraisers*, December 2017, p. 2.

11 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 23.

12 Public Fundraising Regulatory Association, *Submission 25*, p. 6.

13 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 23.

14 Dr Lisa O'Brien, Chief Executive Officer, The Smith Family, *Committee Hansard*, 30 October 2018, p. 28.

15 Dr Gary Johns, Commissioner, Australian Charities and Not-for-profits Commission, *Committee Hansard*, 30 October 2018, p. 15.

3.12 In December 2017, the ACCC published *The guide to the Australian Consumer Law for fundraising and other activities of charities, not-for-profits and fundraisers* (the Guide), which was developed with the state and territory offices of fair trading and consumer protection and the Australian Securities and Investments Commission.¹⁶ The Guide is intended to help the charities, not-for-profit and fundraising sectors to 'better understand their obligations under the ACL, particularly in relation to fundraising'.¹⁷

3.13 The Guide specified the circumstances in which fundraising is subject to the provisions of the ACL:

Whether the ACL applies to a particular fundraising activity generally depends on whether that activity occurs in 'trade or commerce'. If it does, then you should expect the ACL to apply to that activity...

[F]undraising activities are also likely to be captured by other State, Territory and Commonwealth laws that govern charities, not-for-profit entities and fundraisers, including laws tailored to those sectors.¹⁸

3.14 The Guide explained that in general, fundraising activities are classed as being in trade or commerce, and therefore are required to meet certain obligations under the ACL, if they:

- involve the supply of goods or services;
- involve fundraising in an organised, continuous and repetitive way; or
- if the body for which the activities are carried out is a for-profit professional fundraiser.¹⁹

3.15 Ms Kate Lynch from the Department of the Treasury outlined what this means for charitable fundraising activities that are classed as being in trade or commerce:

This means that you cannot mislead, deceive or engage in unconscionable conduct, whether it's in relation to a pure donation of money or in selling a good where the purchase provides funds for the charity to use.²⁰

3.16 Ms Lynch stated that the ACL does not 'provide for sector-specific regulation, such as requiring a person to be licensed before they can conduct fundraising activities

16 Ms Kate Lynch, Principal Adviser, Consumer and Corporations Policy Division, Markets Group, Department of the Treasury, *Committee Hansard*, 7 November 2018, p. 47.

17 Commonwealth of Australia, *A Guide to the Australian Consumer Law for Fundraising and Other Activities of Charities, Not-for-Profits and Fundraisers*, December 2017, p. 2.

18 Commonwealth of Australia, *A Guide to the Australian Consumer Law for Fundraising and Other Activities of Charities, Not-for-Profits and Fundraisers*, December 2017, p. 3.

19 Commonwealth of Australia, *A Guide to the Australian Consumer Law for Fundraising and Other Activities of Charities, Not-for-Profits and Fundraisers*, December 2017, p. 3.

20 Ms Kate Lynch, Principal Adviser, Consumer and Corporations Policy Division, Markets Group, Department of the Treasury, *Committee Hansard*, 7 November 2018, p. 48.

...²¹ Fundraising licensing requirements and specific conduct obligations are covered in the laws of the states and Australian Capital Territory, with the Northern Territory having no laws specifically regulating the charitable sector (see below).

3.17 Mr Gregson from the ACCC explained some of the limitations of the ACL in relation to the regulation of charities. For example, because of the ACL's focus on trade and commerce, its application may not cover certain aspects of charitable activities and fundraising that do not occur in these areas. Further, the ACL's penalty provisions do not apply to many situations that do not involve the supply of a good or service, including, potentially, some donations.²²

3.18 While the ACL is a single law, it has multiple regulators, including the ACCC and state and territory fair-trading organisations.²³ These are discussed below.

Commonwealth regulatory bodies

3.19 The three major Commonwealth bodies responsible for regulating charitable fundraising are the ACNC, the Australian Taxation Office (ATO) and the ACCC. The ATO administers the main tax benefit for charitable donations, Deductible Gift Recipients status, while the ACCC administers the Australian Consumer Law, and the ACNC is responsible for administering charity registration, including the requirement that registered charities submit audited accounts and annual reports to the ACNC and adhere to a set of principles on good governance.²⁴

Australian Charities and Not-for-profits Commission (ACNC)

3.20 The ACNC was established in December 2012 by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). The ACNC:

- registers organisations as charities;
- helps charities understand and meet their obligations through information, guidance, advice and other support;
- helps the public understand the work of the not-for profit sector through information, guidance, advice and other support;
- maintains a free and searchable public register so that anyone can look up information about registered charities;

21 Ms Kate Lynch, Principal Adviser, Consumer and Corporations Policy Division, Markets Group, Department of the Treasury, *Committee Hansard*, 7 November 2018, p. 48.

22 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 24. See also Mr Alex Milner, Member, Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 44.

23 Ms Kate Lynch, Principal Adviser, Consumer and Corporations Policy Division, Markets Group, Department of the Treasury, *Committee Hansard*, 7 November 2018, p. 51.

24 Public Fundraising Regulatory Association, *Submission 25*, p. 3; Mr Nicholas Berger-Thomson, Senior Adviser, Individuals and Indirect Tax Division, Revenue Group, Department of the Treasury, *Committee Hansard*, 7 November 2018, p. 49.

- maintains the Charity Passport online system (which charities can update through the Charity Portal) that government agencies can use to access information about charities;²⁵ and
- works with state and territory governments (as well as federal, state and territory government agencies) to develop a 'report-once, use-often' reporting framework for charities.²⁶

3.21 The ACNC only regulates charities that have chosen to register with it—around 56 190 registered charities as at 3 July 2018.²⁷ It noted in its submission that 'many organisations undertaking fundraising in the community are not registered charities'.²⁸ While it is able to revoke a charity's registration, an action which, the ACNC Commissioner noted, is very rare, the ACNC is unable to retrieve money that the charity raised 'because that's a matter for state attorneys-general'.²⁹

3.22 Mr Nicholas Berger-Thomson from the Department of the Treasury explained the regulatory functions of the ACNC in more detail:

At the Commonwealth level, the ACNC does not regulate the fundraising activities of charities; rather, registered charities have reporting obligations to the ACNC and must comply with a set of principles-based governance standards. There may be cases where a charity's fundraising practices raise questions about the adequacy of its broader governance arrangements, in which case the ACNC may decide to commence a compliance investigation. It's important to note that the ACNC has no jurisdiction to investigate or take action against not-for-profits that are not registered charities, and many organisations undertaking fundraising in the community are not registered charities.³⁰

3.23 The ACNC also stated that it 'does not have a general jurisdiction to investigate concerns about fundraising activities and practices', and would usually refer concerns about fundraising practices to state and territory consumer affairs agencies.³¹ However,

25 Australian Charities and Not-for-profits Commission, *Report Once, Use Often: Charity Passport Guide for Government Agencies*, V1.3, September 2017, pp. 7 and 9.

26 Australian Charities and Not-for-profits Commission, *About us*, <https://www.acnc.gov.au/about> (accessed 7 December 2018); Justice Connect, *Submission 49*, p. 13.

27 Dr Gary Johns, Commissioner, Australian Charities and Not-for-profits Commission, *Committee Hansard*, 30 October 2018, p. 13; Australian Charities and Not-for-profits Commission, *Submission 8*, p. 2.

28 Australian Charities and Not-for-profits Commission, *Submission 8*, p. 3.

29 Dr Gary Johns, Commissioner, Australian Charities and Not-for-profits Commission, *Committee Hansard*, 30 October 2018, p. 18.

30 Mr Nicholas Berger-Thomson, Senior Adviser, Individuals and Indirect Tax Division, Revenue Group, Department of the Treasury, *Committee Hansard*, 7 November 2018, p. 47.

31 Australian Charities and Not-for-profits Commission, *Submission 8*, p. 3.

...there may be cases where a charity's fundraising practices raises questions about the adequacy of its broader governance arrangements, in which case the ACNC may decide to commence a compliance investigation.³²

3.24 The ACNC described other areas raised with the ACNC that are usually outside of its jurisdiction, including:

- concerns about aggressive fundraising;
- improper sharing of donor details;
- perceptions that charity fundraising practices are taking advantage of vulnerable donors;
- charities using false advertising; and
- complaints that charities are wasting money or using donated funds inefficiently.³³

3.25 Witnesses expressed broad support for the ACNC. For example, Dr Lisa O'Brien, the Chief Executive Officer of The Smith Family, argued that the 'ACNC has been an effective regulator since its establishment'.³⁴ Ms Tania Burstin from mycause stated that:

Having the ACNC has really helped us a lot. Having a single source of truth, a single place to refer and a single point of trust has been really good for us.³⁵

3.26 This sentiment was echoed by Ms Lavanya Kala from Volunteering Australia, who stated:

The establishment of the ACNC, and the ACNC legislation, has been fantastic. It has been a really useful body as a charity regulator. In terms of reporting, it has been really great as well because you can access the ACNC website and all your information is there—all the reporting is in one place...³⁶

3.27 However, Ms Vera Visevic, a Partner at Mills Oakley, noted the limitations of the ACNC's regulatory role, as the ACNC only regulates around 56 000 charities while there are about 600 000 not-for-profits in Australia.³⁷

32 Australian Charities and Not-for-profits Commission, *Submission 8*, p. 2.

33 Australian Charities and Not-for-profits Commission, *Submission 8*, p. 3.

34 Dr Lisa O'Brien, Chief Executive Officer, The Smith Family, *Committee Hansard*, 30 October 2018, p. 28.

35 Ms Tania Burstin, Managing Director, mycause, *Committee Hansard*, 29 October 2018, p. 30. See also mycause.com.au website.

36 Ms Lavanya Kala, Policy Manager, Volunteering Australia, *Committee Hansard*, 7 November 2018, p. 9.

37 Ms Vera Visevic, Partner, Mills Oakley, *Committee Hansard*, 30 October 2018, p. 33.

3.28 Dr Gary Johns, the Commissioner of the ACNC, explained to the committee that registering charities with the ACNC is not compulsory:

It's voluntary to register as a charity in Australia, but it's the only way you can get to the tax office. So it's a nice incentive there. We know we are the key people here. People register with us. It's a very powerful standing you have as a registered charity, but really it's to get the tax benefits. If a charity wants to stand outside the system then it can.³⁸

3.29 Mr David Crosby, the Chief Executive Officer of the Community Council for Australia, explained that the organisation no longer accepted members that were not registered with the ACNC:

We've reached the position within our organisation where if you're not registered with the ACNC you cannot be a member of our organisation. Unless you are a registered charity with the Australian Charities and Not-for-profits Commission, you cannot be a member of the Community Council for Australia. Increasingly, I think that is the standard that some philanthropic funders and others are adopting.³⁹

3.30 Mr Crosby outlined the differences in the regulatory functions of the ACNC and the ACCC, which is the main regulator for the ACL (see below), suggesting that if people had concerns about who was on the board of a charity or where the money was going, they should complain to the ACNC because these are governance issues.⁴⁰

Australian Taxation Office (ATO)

3.31 Charitable giving in Australia, according to the Fundraising Institute of Australia (FIA), 'is underpinned by tax deductibility'.⁴¹ To this extent, the ATO is involved in a regulatory role in managing the tax deductibility status of charities. Mr Michael Hardy, the Assistant Commissioner of Aggressive Tax Planning from the ATO, explained that:

...the Australian Taxation Office has no particular role in regulating fundraising for charities. We do have a role, of course, in the tax administration interface of charities with the tax system.⁴²

3.32 Most not-for-profits with deductible gift recipient (DGR) status must be registered with the ACNC. However, Mr Hardy noted that not all charities have gift deductible status:

38 Dr Gary Johns, Commissioner, Australian Charities and Not-for-profits Commission, *Committee Hansard*, 30 October 2018, p. 18.

39 Mr David Crosby, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, p. 41.

40 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, pp. 44–45.

41 Fundraising Institute Australia, *Submission 28.1: Supplementary to submission 28*, p. 6.

42 Mr Michael Hardy, Assistant Commissioner, Aggressive Tax Planning, Australian Taxation Office, *Committee Hansard*, 7 November 2018, p. 48.

One of the things that we observe with the public generally, and which perhaps is good to have on the record for the committee, is that many people conflate things—they assume that all charities are deductible gift recipients. Or, conversely, they assume that all deductible gift recipients are charities. Neither is true!⁴³

3.33 Mr Nicholas Berger-Thomson from the Department of the Treasury stated that government reforms announced in December 2017 require non-government DGRs:

...to be registered as charities with the ACNC, which will mean that, in effect, you will need to be a registered charity with the ACNC to be eligible for DGR status...⁴⁴

3.34 However, Mr Hardy outlined that some categories of DGR do not require an entity listed as a DGR to be a charity, which are:

...typically public funds for particular good purposes—for funding of hospitals or other such things. In that situation you could have an organisation that is not a charity endorsed by the ACNC but does have DGR status... But for those types of organisations that have DGR status because of, I guess, a precursor obligation to be a charity, if they were to lose charity status it would be unlikely they could retain DGR status.⁴⁵

Australian Competition and Consumer Commission (ACCC)

3.35 The ACCC is responsible for enforcing the ACL at a federal level, while state and territory fair trading agencies are responsible for enforcing the ACL in their own jurisdictions (see below).⁴⁶ A list of state and territory fair trading agencies is outlined in Table 3.1.

3.36 Mr Scott Gregson from the ACCC outlined the differences between the ACCC and state and territory fair trading agencies:

The ACCC is more likely to pursue matters that are national, involving large companies, a greater number of consumers, interstate trade et cetera. We rarely get involved in resolving individual disputes but, rather, have a different enforcement model. States and territories obviously are more likely to pursue matters within their own states or territories and get involved in dispute resolution.⁴⁷

43 Mr Michael Hardy, Assistant Commissioner, Aggressive Tax Planning, Australian Taxation Office, *Committee Hansard*, 7 November 2018, p. 48.

44 Mr Nicholas Berger-Thomson, Senior Adviser, Individuals and Indirect Tax Division, Revenue Group, Department of the Treasury, *Committee Hansard*, 7 November 2018, p. 51.

45 Mr Michael Hardy, Assistant Commissioner, Aggressive Tax Planning, Australian Taxation Office, *Committee Hansard*, 7 November 2018, p. 51.

46 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 23.

47 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 23.

3.37 Charities do not operate in the same way that other industries involved in selling goods or services do, which then impacts the role that the ACCC can play in regulating activities under the ACL. However, Mr Gregson stated that many charities 'have developed sophisticated, organised and repetitive fundraising activity that we consider will often place their conduct within trade or commerce and therefore within reach of the Australian Consumer Law'.⁴⁸

3.38 Mr Gregson told the committee that the ACCC does not 'receive a large number of contacts in relation to charities', though it is unclear whether this is because of a small number of issues raised, or because consumers report issues with charitable fundraising to other agencies.⁴⁹

States and territories

3.39 Each state and territory has its own agency that performs similar functions to the ACCC at the state or territory level. All jurisdictions except the Northern Territory have laws regulating charitable fundraising. This section outlines some of the key features of the regulatory frameworks governing charitable fundraising in the states and territories.

State and territory consumer protection agencies

3.40 Each state and territory has its own consumer protection agency that is responsible for enforcing the ACL, in instances where a matter does not fall within the remit of the ACCC because it concerns the individual state or territory. These agencies are listed in Table 3.1.

Table 3.1: List of state and territory consumer protection agencies⁵⁰

Australian Capital Territory	Access Canberra
New South Wales	NSW Fair Trading
Northern Territory	NT Consumer Affairs
Queensland	Office of Fair Trading Queensland
South Australia	SA Office of Consumer and Business Services
Tasmania	Tasmanian Consumer Affairs and Fair Trading

48 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 23.

49 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, pp. 23–24.

50 Australian Competition & Consumer Commission, *Consumer protection agencies*, <https://www.accc.gov.au/contact-us/other-helpful-agencies/consumer-protection-agencies> (accessed 7 December 2018).

Victoria	Consumer Affairs Victoria
Western Australia	WA Consumer Protection

State and territory legislation

3.41 The states and the Australian Capital Territory have their own laws regulating charitable fundraising activities, while the Northern Territory currently has no legislation on charities. Table 3.2 outlines some of the key pieces of legislation in each jurisdiction.

Table 3.2: State and territory legislation regulating charitable fundraising⁵¹

Australian Capital Territory	<i>Charitable Collections Act 2003</i>
New South Wales	<i>Charitable Fundraising Act 1991</i>
Northern Territory	N/A
Queensland	<i>Collections Act 1966</i>
South Australia	<i>Collections for Charitable Purposes Act 1939</i>
Tasmania	<i>Collections for Charities Act 2001</i>
Victoria	<i>Fundraising Act 1998</i>
Western Australia	<i>Charitable Collections Act 1946</i>

3.42 Mr David Thomas, a member of Chartered Accountants Australia and New Zealand, explained that licensing arrangements are 'not consistent from state to state. New South Wales will have different requirements to Queensland or Western Australia, and so on'.⁵²

3.43 Further, terminology and definitions used in state and territory legislation vary.⁵³ Some legislation addresses particular types of fundraising activities not addressed in the legislation of other states; exemptions for particular types of charitable organisations that apply in one jurisdiction do not necessarily apply in another; and there is inconsistency in requirements for audits and reports, and how fundraising appeals must be conducted.⁵⁴

51 Public Fundraising Regulatory Association, *Submission 25*, p. 2; Justice Connect, *Submission 49*, p. 8.

52 Mr David Thomas, Member, Chartered Accountants Australia and New Zealand, *Committee Hansard*, 30 October 2018, p. 10.

53 Mills Oakley, *Submission 64*, pp. 6–15; Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 5.

54 See Justice Connect, *Submission 49*, p. 8; Mills Oakley, *Submission 64*, pp. 10–13, 17–18.

3.44 Only South Australia and Tasmania specifically refer to the internet in legislation as a possible mode of appeal for support.⁵⁵

3.45 The different regulatory frameworks mean that charities receiving donations or fundraising across state and territory borders may have to submit different applications for licenses and meet different requirements. The time periods for registration of fundraising activity range from 28 days to 60 days to no specified time frame.⁵⁶ Some of these varying requirements are outlined in Table 3.3, as provided by the Community Council for Australia, which described 'what one charity had to do to comply with Australian fundraising regulations for a largely web based fundraising campaign'.⁵⁷

3.46 As outlined below, the New South Wales Parliament has recently passed changes to its regulatory regime for its licensing requirements, while South Australia and the Australian Capital Territory now no longer require a charity to obtain a licence if it is already registered with the ACNC.

Table 3.3: Varying registration requirements of charities by state and territory⁵⁸

Advertising requirements for a public notice	Qld
Amount intended to raise in the jurisdiction	ACT, WA
Appeal manager details	VIC
Auditor's details	ACT, NSW, SA, Qld, WA
Bank account details	NSW, VIC, Qld, WA
All directors' details (name, position, address)	SA, VIC, Qld
All directors' signatures	VIC
Certified copies of supporting documents	Qld, WA
Copies of supporting documents (not certified)	ACT, NSW, VIC
Covering letter	WA
Dates required for the licence	TAS

55 Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 10, fn 38; Federation of Parents and Citizens Associations of New South Wales, *Submission 94*, p. 3; Justice Connect, *Submission 49*, p. 16, fn 4.

56 Justice Connect, *Submission 49*, p. 8.

57 Community Council for Australia, *Submission 43*, p. 6.

58 Community Council for Australia, *Submission 43*, p. 6. See also UN Women National Committee Australia, *Submission 26*, p. 2.

Fundraising activities to be undertaken	ACT, SA, WA
Third party fundraising provider details	SA, VIC
Police check	VIC, WA
State address if intending to fundraise in that state	NSW, VIC
Statement of purpose	SA, TAS, VIC, Qld, WA

3.47 Further, reporting requirements once an entity has obtained a licence also vary considerably between jurisdictions, in terms of both to whom organisations are required to report and what material should be provided in those reports.

3.48 However, recent reforms have moved towards harmonising the various regulatory differences across the jurisdictions. As noted above, South Australia and the Australian Capital Territory no longer require organisations registered as charities with the ACNC to obtain a licence or permission to fundraise.⁵⁹ New South Wales, Victoria and South Australia have recently initiated reforms that will, according to the FIA, 'substantially reduce red tape for fundraising [and]... resolve the lion's share of issues relating to misalignment of fundraising licensing and application processes...'⁶⁰

3.49 The ACNC explained that it has streamlined reporting arrangements with incorporated associations in Tasmania, South Australia, the ACT and Victoria, and with charitable fundraisers in South Australia and the ACT. This means it shares information with other government agencies, enabling registered charities to be exempt from usual reporting obligations to those agencies.⁶¹

3.50 Mr Scott McClellan, the Executive Manager of Code and Regulatory Affairs at the FIA, noted that recent reforms at the state level were encouraging:

We're actually very encouraged with the momentum that seems to be occurring at the state level to achieve regulatory reform and red tape reduction... In many cases, the red tape has arisen not because of any bureaucratic failings of governments at either the state or the Commonwealth level but because of changes in technology that have made it possible for fundraisers to operate across state borders.⁶²

3.51 The following section outlines some of the specific features of each jurisdiction, including recent changes to regulatory requirements. The committee only received evidence directly from the governments of the Australian Capital Territory and New South Wales.

59 Justice Connect, *Submission 49*, p. 8.

60 Fundraising Institute Australia, *Submission 28.1: Supplementary to submission 28*, p. 2.

61 Australian Charities and Not-for-profits Commission, *Submission 8*, p. 5.

62 Mr Scott McClellan, Executive Manager, Code and Regulatory Affairs, Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 2.

Australian Capital Territory

3.52 The Chief Executive Officer of the FIA described the ACT as a 'pacesetter' because of its recent reforms to the regulatory requirements for registered charities.⁶³ The FIA submitted that the ACT's 'reforms of last year reduced both fundraising-specific red tape and financial reporting requirements for ACNC registered entities'.⁶⁴

3.53 The Australian Capital Territory requires collectors to wear identifying tags while soliciting or receiving money or benefits.⁶⁵

3.54 The ACT does not require organisations that are ACNC registered charities to maintain a licence or meet annual return and accounting requirements from the ACT regulatory authorities.⁶⁶ The ACT is one of only two jurisdictions that expressly mentions online fundraising in its legislation.⁶⁷

New South Wales

3.55 Mr Alex Milner, a member of the Not for Profit and Charities Law Committee of the Law Institute of Victoria, told the committee that New South Wales has 'one of the most detailed fundraising regimes' in Australia. He described the regime as being quite 'particular', involving legislation and regulatory authorities.⁶⁸

3.56 Mr Milner outlined how the New South Wales legislation deals with the definition of a fundraising appeal:

It applies to any receipt of moneys for any activity or purpose which includes a charitable purpose. So, when you flow that through, it doesn't just apply to donations—in fact the legislation is specific that it doesn't just apply to donations—it also applies to fee-for-service arrangements where the charity is raising money, maybe through an op shop or some other activity, to generate revenue.⁶⁹

3.57 In October 2018, the New South Wales Parliament passed a bill to make changes to the state's charitable fundraising regime. The bill was introduced in order to implement recommendations arising from a public inquiry into the conduct of the

63 Ms Katherine Raskob, Chief Executive Officer, Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 1.

64 Fundraising Institute Australia, *Submission 28.1: Supplementary to submission 28*, p. 3.

65 Mills Oakley, *Submission 64*, p. 18; *Charitable Collections Act 2003 (ACT)*, s 16(1).

66 Justice Connect, *Submission 49*, p. 8; UN Women National Committee Australia, *Submission 26*, p. 3; Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 8 and p. 10, fn 37.

67 Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 10, fn 38; Federation of Parents and Citizens Associations of New South Wales, *Submission 94*, p. 3; Justice Connect, *Submission 49*, p. 16, fn 4.

68 Mr Alex Milner, Member, Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 42.

69 Mr Alex Milner, Member, Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 42.

Returned and Services League (RSL) NSW Branch and related entities.⁷⁰ This legislation includes measures seeking to:

- streamline the registration process for charities in NSW by allowing them to use proof of registration with the ACNC to apply for a fundraising authority in NSW; and
- increase the compliance and enforcement powers of the NSW regulator to conduct random inspections of charities and investigate possible breaches of the Act.⁷¹

3.58 In the second reading debates on the bill, concerns were raised by some about the regulation of online donations, and harmonisation efforts in relation to reporting and administration requirements across the states and territories.⁷²

3.59 Ms Rose Webb, the New South Wales Fair Trading Commissioner and the Deputy Secretary of the Better Regulation Division in the New South Wales Department of Finance, Services and Innovation, told the committee that the changes:

- are an important step in harmonising regulatory requirements with Commonwealth requirements, especially regarding registration and reporting;
- provide that proof of current registration with the ACNC can be used to apply for a fundraising authority in New South Wales; and
- align financial reporting and self-disclosure reporting requirements with the ACNC requirements.⁷³

3.60 In September 2018, the ACNC entered into a new agreement with NSW Fair Trading to reduce the administrative burden on registered charities. NSW incorporated associations will now only be required to submit their annual financial reports to the ACNC. The ACNC will then share the data with NSW Fair Trading.⁷⁴

3.61 The FIA stated its support for the reforms:

70 Mr Scot MacDonald, *Second Reading Speech, New South Wales Legislative Council Hansard, Fair Trading Legislation Amendment (Reform) Bill 2018 and Charitable Fundraising Amendment Bill 2018*, 17 October 2018, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-77678/HANSARD-1820781676-77678> (accessed 30 November 2018).

71 Ms Yasmin Catley, *Fair Trading Legislation Amendment (Reform) Bill 2018 and Charitable Fundraising Amendment Bill 2018, Second Reading Speech, New South Wales Legislative Assembly Hansard*, 24 October 2018, <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-104321> (accessed 12 February 2019).

72 *Fair Trading Legislation Amendment (Reform) Bill 2018 and Charitable Fundraising Amendment Bill 2018, Second Reading Debate*, 24 October 2018.

73 Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Finance, Services and Innovation, *Committee Hansard*, 7 November 2018, p. 33.

74 *ACNC Annual Report 2017–18*, October 2018, pp. 58–59.

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.⁷⁵

3.62 Some aspects of New South Wales charitable fundraising legislation, Ms Webb noted, are similar to the ACL, in terms of requiring people not to mislead or deceive. She argued, however, that New South Wales legislation covers other, more specific areas, such as prudential regulation – or where funds must be kept and how they must be stored and accounted for – as well as how charities should conduct themselves.⁷⁶

3.63 New South Wales does not require registration for fundraising for individuals.⁷⁷

Queensland

3.64 The committee heard that the Queensland legislative requirements are 'cumbersome and expensive' and 'the most stringent... of all the states'.⁷⁸ Mr Alex Milner from the Law Institute of Victoria stated that the Queensland Office of Fair Trading must approve any public materials distributed as part of a campaign that involves a commercial fundraiser. As a result, Mr Milner said,

I've certainly been aware of situations where national campaigns, which often have their own deadlines and pressures, will specifically exclude Queensland from fundraising exactly for that reason: that there is just no way of being compliant in the time available.⁷⁹

3.65 Examples of regulations outlined in evidence include, for example, the requirement that an individual cannot carry out a fundraising appeal wearing a mask and carrying a toy firearm.⁸⁰ Another regulation requires entities to provide collectors involved in door-to-door fundraising or street collection to wear an identifying armlet or badge.⁸¹ Dr Ted Flack told the committee that in Queensland, 'if you want to set up your own fund to send your granddaughter to China for a particular operation or

75 Fundraising Institute Australia, *Submission 28.1: Supplementary to submission 28*, p. 3.

76 Ms Rose Webb, Deputy Secretary, Better Regulation Division, Department of Finance, Services and Innovation, *Committee Hansard*, 7 November 2018, p. 37.

77 Ms Tania Burstin, Managing Director, mycause, *Committee Hansard*, 29 October 2018, p. 25.

78 ME/CFS Australia, *Submission 55*, p. 1; Mr Peter Hills-Jones, Chief Executive Officer, Public Fundraising Regulatory Association, *Proof Committee Hansard*, 31 January 2019, p. 33.

79 Mr Alex Milner, Member, Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 42.

80 Mr Alex Milner, Member, Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 43; *Collections Regulation 2008* (Qld), reg. 16.

81 Public Fundraising Regulatory Association, *Submission 25*, p. 9; *Collections Regulation 2008* (Qld), reg. 18(1).

whatever it happens to be, you have to get a licence now', although he reported that the legislation on this issue 'is not enforced properly'.⁸²

3.66 Professor Myles McGregor Lowndes from the Australian Centre for Philanthropy and Nonprofit Studies at Queensland University of Technology highlighted that, as in Western Australia, it was illegal in Queensland 'to collect money on the end of a long pole outside the reach of the collector', although this provision has been repealed. He stated that the provision originated in a 1903 law in London 'to prevent collections from the tops of stagecoaches as they passed London streets, slowing the traffic'.⁸³

3.67 Within seven days of filing an application to become a charity in Queensland, an association must give notice of the application in a newspaper published in Brisbane with state-wide circulation, and in another newspaper published at least 5 days a week that circulates 'throughout the locality in which the association's registered address is situated'. The notice must state that a person may object to the registration.⁸⁴

3.68 Ms Tania Burstin from mycause stated that Queensland charities are required to have approval for one-off charitable appeals, whether fundraising for individuals or entities.⁸⁵

3.69 As in Victoria, Queensland's fundraising laws also regulate fundraising for non-profit purposes that are not charitable at law, including appeals for sports clubs and for individuals.⁸⁶

3.70 The FIA argued that instead of decreasing regulatory requirements for fundraising in recent reforms, instead the Queensland system had 'ended up increasing... fundraising red tape by tightening licensing requirements around face to face donor appeals and requiring the sector to undertake new disclosure and other transparency measures'.⁸⁷

3.71 Mr Peter-Hills Jones from the Public Fundraising Regulatory Association was of the opinion that Queensland's regulatory requirements may mean 'that the speed at which charities can respond to, say, flooding or bushfires in Queensland is slower'. Due to the length of time needed to obtain a licence to fundraise in Queensland,

82 Dr Edmund (Ted) Flack, Private capacity, *Proof Committee Hansard*, 31 January 2019, p. 28.

83 Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Proof Committee Hansard*, 31 January 2019, p. 11.

84 Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 12; *Collections Regulation 2008* (Qld), regs. 4(3)–(4).

85 Ms Tania Burstin, Managing Director, mycause, *Committee Hansard*, 29 October 2018, p. 25.

86 Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 10.

87 Fundraising Institute Australia, *Submission 28*, p. 3.

charities may fundraise in other states for communities affected by disasters in Queensland.⁸⁸

3.72 Mr Paul Tavatgis from Whiplbird Consulting noted the complexities of Queensland's legislative requirements, and gave the following example:

...in Queensland, you may find that part of the regulation is that it's possible for a charity to book out the entire state for a week or for two weeks, and that may mean that you are no longer able to carry out your fundraising in Queensland and you have to pack all your fundraisers off to another jurisdiction or you've got to stand them down for a week. So it's incredibly complex.⁸⁹

3.73 However, other evidence emphasised positive aspects of Queensland's regulatory system. For example, Ms Tracy Adams from yourtown stated that 'We've always vouched that Queensland has been quite progressive, particularly for us in the context of charitable art unions and the like'.⁹⁰

3.74 The committee surmised that opinions on the positive or negative aspects of Queensland regulation depend, in part, on the types of fundraising activities undertaken by charities.

South Australia

3.75 A number of submitters and witnesses described the South Australian system as simple and streamlined.⁹¹ For example, Ms Lavanya Kala from Volunteering Australia highlighted that the South Australian model was 'pretty good' and 'pretty streamlined' compared to other models.⁹² The FIA argued that 'South Australia has led the way in terms of working with the ACNC on a seamless reporting regime'.⁹³

3.76 South Australia does not require organisations that are ACNC registered charities to obtain permission to fundraise from state regulatory authorities, so long as they provide the state regulator with notice of their ACNC registration and intention to

88 Mr Peter Hills-Jones, Chief Executive Officer, Public Fundraising Regulatory Association, *Proof Committee Hansard*, 31 January 2019, p. 34.

89 Mr Paul Tavatgis, Director, Whiplbird Consulting, *Proof Committee Hansard*, 31 January 2019, p. 4.

90 Ms Tracy Adams, Chief Executive Officer, yourtown, *Proof Committee Hansard*, 31 January 2019, p. 10.

91 ME/CFS Australia, *Submission 55*, p. 1. See also World Education Australia Limited, *Submission 92*, p. 1.

92 Ms Nicole Stanmore, Director, Business Development, Engagement and Operations, Australian Council of Social Services, *Committee Hansard*, 7 November 2018, p. 12.

93 Fundraising Institute Australia, *Submission 28.1: Supplementary to submission 28*, p. 4; see also The Smith Family, *Submission 54*, p. 4.

fundraise.⁹⁴ Since December 2017, South Australia has no longer required charities already reporting to the ACNC to also report to state regulatory authorities.⁹⁵

3.77 South Australia has a mandatory code of conduct for charities that operates in effect as legislation.⁹⁶ This code requires charities to ensure that collectors participating in unsolicited collections wear an identifying badge.⁹⁷ Mr Bruce Moore, General Counsel for the Australian Red Cross Society, argued that the South Australian code is:

...an example of how a code can be written in relatively simple terms which are easy for the fundraising entity to understand and apply as well as those engaged by the fundraising entity to support it—third party fundraisers.⁹⁸

Tasmania

3.78 The inquiry received very little evidence outlining the regulatory framework governing charity fundraising in Tasmania. However, that evidence that did mention Tasmania highlighted that the state has made recent efforts to align its regulatory requirements with the ACNC.⁹⁹ Tasmania is one of only two jurisdictions to expressly mention online fundraising in its legislation.¹⁰⁰

Victoria

3.79 The committee received little evidence outlining particular aspects of the regulatory framework governing charitable fundraising in Victoria. However, witnesses and submitters explained that Victoria only requires registration if the fundraising is more than \$10 000 and only volunteers are used to fundraise.¹⁰¹

94 Justice Connect, *Submission 49*, p. 8; Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 10, fn 37 and p. 12.

95 Fundraising Institute Australia, *Submission 28*, p. 10; Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 8.

96 Mr Scott McClellan, Executive Manager, Code and Regulatory Affairs, Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 8; South Australian Attorney-General's Department, *Code of Practice: Collections for Charitable Purposes Act 1939*, <https://www.cbs.sa.gov.au/sites/default/files/charities-code-of-practice.pdf> (accessed 7 December 2018).

97 South Australian Attorney-General's Department, *Code of Practice: Collections for Charitable Purposes Act 1939*, <https://www.cbs.sa.gov.au/sites/default/files/charities-code-of-practice.pdf> (accessed 7 December 2018), s 7(1).

98 Mr Bruce Moore, General Counsel, Australian Red Cross Society, *Committee Hansard*, 29 October 2018, p. 34.

99 Oceania Province, *Submission 11*, p. 1; Fundraising Institute Australia, *Submission 28*, pp. 3, 10.

100 Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 10, fn 38; Federation of Parents and Citizens Associations of New South Wales, *Submission 94*, p. 3; Justice Connect, *Submission 49*, p. 16, fn 4.

101 Ms Tania Burstin, Managing Director, mycause, *Committee Hansard*, 29 October 2018, p. 25; mycause, *Submission 11*, p. 19.

Commercial fundraisers must obtain their own fundraising licence, even if they are operating under the authority of a licensed charity, unlike in other jurisdictions.¹⁰² Victorian fundraising laws also apply to non-charitable entities, such as not-for-profits that are held to account by their members.¹⁰³

3.80 Submitters outlined that Victoria has recently taken steps to ensure that charities only report to the ACNC.¹⁰⁴ The ACNC stated in its annual report for 2017–18 that from 1 July 2018, 'charities incorporated in Victoria... report to the ACNC... Charities taking part in this arrangement will no longer need to report to Consumer Affairs Victoria, or pay an annual fee'.¹⁰⁵

3.81 Consumer Affairs Victoria is currently in the process of consulting with industry stakeholders on changes to its *Fundraising Regulations 2009*, due to expire in June 2019. The regulations in their current form prescribe requirements for fundraising appeals.¹⁰⁶

Western Australia

3.82 Ms Delaine Smith, the Chief Executive Officer of the Australasian Leukemia and Lymphoma Group, stated that 'Western Australia actually has quite a detailed process, far more detailed than any other state'.¹⁰⁷ Evidence highlighted a number of features of the fundraising regulatory regime in Western Australia. For example, Western Australia requires an audit of all income, no matter the amount.¹⁰⁸ Balance sheets and notes to accounts, income and expenditure statements and independent auditor reports must be submitted six months after the end of the financial year.¹⁰⁹ Further, fundraising through street collections requires a separate licence, and street collections in Perth must take place on a Friday unless otherwise approved.¹¹⁰

3.83 The committee heard that funds raised through an online organisation for a charity not registered in Western Australia would not be transferred to the charity until

102 Mills Oakley, *Submission 64*, p. 15; *Fundraising Act 1998* (Vic), ss 16B and 17A.

103 Justice Connect, *Submission 49*, p. 15, fn 3.

104 Four Paws Australia, *Submission 95*, p. 7; Fundraising Institute Australia, *Submission 28*, pp. 3, 10; Fundraising Institute Australia, *Submission 28.1: Supplementary to submission 28*, p. 3.

105 *ACNC Annual Report 2017–18*, October 2018, p. 58.

106 Consumer Affairs Victoria, *Fundraising Regulations 2009 remake*, <https://www.consumer.vic.gov.au/resources-and-tools/legislation/public-consultations-and-reviews/fundraising-regulations-2009-remake> (accessed 17 December 2018).

107 Ms Delaine Smith, Chief Executive Officer, Australasian Leukemia and Lymphoma Group, *Committee Hansard*, 29 October 2018, p. 36.

108 Administry Inc, *Submission 14*, p. 2.

109 Ms Nicole Stanmore, Director, Business Development, Engagement and Operations, Australian Council of Social Services, *Committee Hansard*, 7 November 2018, p. 2.

110 Mills Oakley, *Submission 64*, p. 17; *Street collections*, <https://www.commerce.wa.gov.au/consumer-protection/street-collections> (accessed 7 December 2018).

it was able to prove that it had a licence in Western Australia.¹¹¹ The Australian Centre for Philanthropy and Nonprofit Studies at Queensland University of Technology drew attention to the fact that the legislation governing charitable fundraising in Western Australia, the *Charitable Collections Act 1946*, refers to World War II as the 'present war'.¹¹²

Local council requirements

3.84 The Public Fundraising Regulatory Association submitted that there are additional regulatory requirements for face-to-face fundraising at the level of local government. Many local councils, they stated, require fundraisers to obtain additional permissions to use public spaces for street fundraising and, in some instances, for door-to-door fundraising, with up to 80 per cent of local councils issuing permits for face-to-face fundraisers.¹¹³ For example, Western Australia's street fundraising legislation only regulates the Perth metropolitan area, with responsibility for preventing nuisance in areas outside Perth resting with local authorities.¹¹⁴

3.85 Professor Myles McGregor-Lowndes from the Australian Centre for Philanthropy and Nonprofit Studies at Queensland University of Technology suggested that local authorities are best-placed to deal with issues like street fundraising.¹¹⁵

Industry codes of practice

3.86 The committee heard that a number of organisations, such as the FIA, the Public Fundraising Regulatory Association and the Australian Council for International Development, have voluntary industry codes.¹¹⁶ The Public Fundraising Regulatory Association noted that many charities 'choose to submit to self-regulation... to demonstrate their commitment to best practice and ethical

111 Ms Delaine Smith, Chief Executive Officer, Australasian Leukemia and Lymphoma Group, *Committee Hansard*, 29 October 2018, p. 37.

112 Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 6; *Charitable Collections Act 1946* (WA), s 6.

113 Public Fundraising Regulatory Association, *Submission 25*, p. 1; Mr Peter Hills-Jones, Chief Executive Officer, Public Fundraising Regulatory Association, *Proof Committee Hansard*, 31 January 2019, p. 33.

114 Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. 6, fn 11; Western Australian Department of Mines, Industry Regulation and Safety, *Street collections*, <https://www.commerce.wa.gov.au/consumer-protection/street-collections> (accessed 7 December 2018).

115 Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Proof Committee Hansard*, 31 January 2019, p. 12.

116 Mr Scott McClellan, Executive Manager, Code and Regulatory Affairs, Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 8.

fundraising'.¹¹⁷ It argued that most investigative and enforcement 'work currently being undertaken is by self-regulatory bodies...'¹¹⁸

3.87 Mr Scott McClellan, the Executive Manager of Code and Regulatory Affairs at the FIA, outlined the purpose of industry codes and how these differ from legislation:

Remember that these codes deal with ethical conduct that should become almost second nature... Those codes play a very particular role. They are about trying to raise the bar. Organisations, charities and suppliers that have signed up to these industry bodies are interested in being part of a fraternity that's trying to do the right thing, trying to lift standards.

Legislation, by contrast, is concerned with setting a minimum bar below which you must not stray or you could find yourself in trouble with the law. It's quite a different proposition. Very serious financial penalties accrue to the breach, for example, of an ACCC-registered code under the ACL... [T]hose mandated codes have been imposed on the sectors because there has been evidence of systemic failure in those sectors.¹¹⁹

3.88 Ms Kate Lynch from the Department of the Treasury noted that at present the ACL does not include any codes regulating fundraising, but the inclusion of such a code would 'obligate all jurisdictions, including the Northern Territory, which currently doesn't regulate fundraising, to adopt the regulation'.¹²⁰ She further clarified that no industry codes sit with the ACL; rather, industry codes for specific sectors exist under the *Competition and Consumer Act 2010*, which is concerned with industry and markets.¹²¹

Conclusion

3.89 This chapter has outlined the major pieces of Commonwealth legislation, the national bodies responsible for regulation of charitable fundraising, differences between state and territory requirements, and industry codes of practice. The following chapter examines in further detail issues raised in evidence concerning current regulatory requirements.

117 Public Fundraising Regulatory Association, *Submission 25*, p. 1.

118 Public Fundraising Regulatory Association, *Submission 25*, p. 5.

119 Mr Scott McClellan, Executive Manager, Code and Regulatory Affairs, Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 8.

120 Ms Kate Lynch, Principal Adviser, Consumer and Corporations Policy Division, Markets Group, Department of the Treasury, *Committee Hansard*, 7 November 2018, p. 48.

121 Ms Kate Lynch, Principal Adviser, Consumer and Corporations Policy Division, Markets Group, Department of the Treasury, *Committee Hansard*, 7 November 2018, p. 53.

Chapter 4

Issues raised in evidence

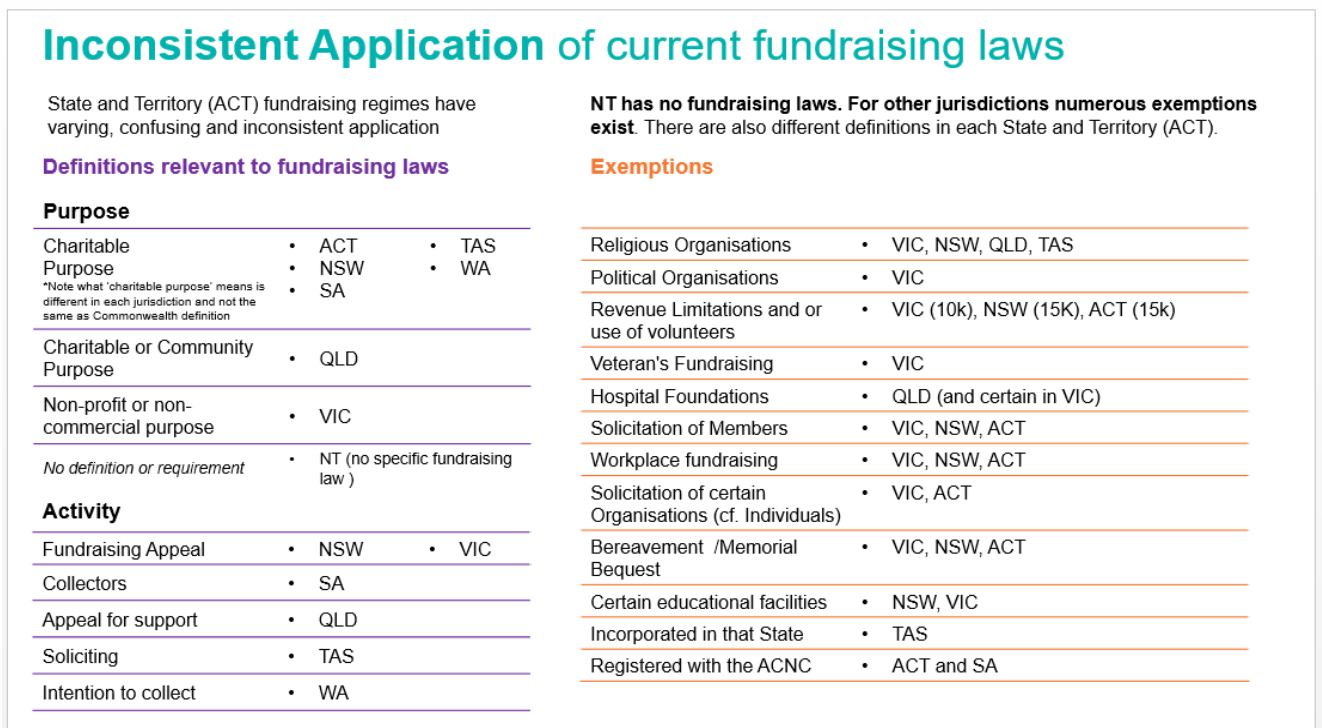
Introduction

4.1 This chapter examines the issues raised in evidence urging reform of Australia's fragmented regulatory regimes for charity fundraising. Evidence before the committee examined long-standing issues encountered by stakeholders engaged in fundraising.

Complexity

4.2 A significant number of submitters and witnesses commented on the complex and fragmented regulatory environment within which charities and not-for-profits have to operate. The complexity was attributed to the inconsistent application of current fundraising laws arising from duplication, different definitions for common terms, and laws not being fit-for-purpose or failing to meet current needs (see Figure 4.1).

Figure 4.1: Inconsistent application of current fundraising laws¹



Source: Justice Connect, Submission 49, p. 8.

4.3 The committee was informed that the law on charities has become increasingly complex. For example, Ms Vera Visevic, Partner at Mills Oakley, stated that the 'law is confusing and complex' even for experienced lawyers with specialist

1 Justice Connect, Submission 49, p. 8.

knowledge in the charity and not-for-profit sector. She reported that in recent times the advice she has encountered has increased in complexity because 'people are trying different ways and different methods to fundraise'.²

4.4 Many witnesses and submitters expressed confusion about the law. For example, Ms Alice Macdougall, Deputy Chair of Charities and Not for Profits Committee, Law Council of Australia, viewed the current regulatory regime as creating unnecessary confusion. She called for urgent reform to 'reduce the confusion and the regulatory burden on charities arising from the current situation of detailed, inconsistent, out of date and onerous fundraising laws'.³

4.5 Ms Visevic explained that, apart from information that is available in acts and regulations, the lack of publicly available information or guidance from various departments and regulators regarding their expectations makes it difficult for lawyers to advise clients. There is also limited judicial interpretation available for reference in this area of law.⁴

Different definitions

4.6 As previously outlined in Chapter 3, the committee heard from witnesses and submitters the challenges caused by various definitions for common terms in different jurisdictions.⁵

4.7 Mr Alex Milner from the Law Institute of Victoria stated that much of the complexity and inconsistencies in fundraising laws can be traced to the inconsistent definition of charity across Australian jurisdictions.⁶ Mr Milner highlighted NSW as one of the most detailed fundraising regimes with a very broad definition of fundraising appeal, as discussed in Chapter 3.⁷

4.8 Ms Katherine Raskob, Chief Executive Officer for Fundraising Institute Australia, told the committee that:

2 Ms Vera Visevic, Partner at Mills Oakley, *Committee Hansard*, 30 October 2018, p. 33.

3 Ms Alice Macdougall, Deputy Chair of Charities and Not for Profits Committee, Law Council of Australia, *Committee Hansard*, 29 October 2018, p. 9.

4 Ms Vera Visevic, Partner at Mills Oakley, *Committee Hansard*, 30 October 2018, p. 33; Mills Oakley, *Submission 64*, p. 4.

5 See, for example, the table in Mills Oakley's submission outlining the different treatment between states and territories of like-elements such as ACNC licensing, charitable purpose definition, conducting an appeal, and exemptions. One basic 'mismatch' between the Commonwealth and state and territory legislation is the various interpretations for charity, with the result that an organisation could be considered a charity by the Australian Charities and Not-for-profits Commission but still require state and territory licences. Mills Oakley, *Submission 64*, pp. 6–13, 16–17.

6 Mr Alex Milner, Member, Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 43. For example, the states are not bound by the definition in the Commonwealth's *Charities Act 2013*.

7 Mr Alex Milner, Member, Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 42.

The current laws are very inconsistent, even as to what is regulated and what is exempted. Even the definition of charitable fundraising, for example, differs across various state and territory legislation. So they will increasingly have to staff and pay for the additional costs of the various compliance regimes across the country.⁸

4.9 Professor Myles McGregor-Lowndes from the Australian Centre for Philanthropy and Nonprofit Studies (ACPNS), Queensland University of Technology (QUT), and Dr Ted Flack made similar observations in relation to the lack of an agreed definition for fundraising.⁹

Donations across jurisdictions

4.10 The committee also heard differing opinions on whether a breach has occurred if a donation was received interstate without authority from the donor's state. For example, while there was one opinion that a local charity receiving a one-off donation in another state was unlikely to attract the regulatory interest of that state unless the charity was seeking donations from said state or was engaged in a fundraising appeal, this was not a widely shared view.¹⁰ However, Mr David Thomas, a Member of Chartered Accountants Australia and New Zealand, thought in a similar situation he would be breaking the law if someone donated from Queensland and the Sydney based Lifeline Australia in NSW did not have a fundraising licence in Queensland.¹¹

Duplication

4.11 Ms Macdougall from the Law Council of Australia argued that since the establishment of the Australian Charities and Not-for-profits Commission (ACNC), there has been no need for separate state and territory regulations, which duplicate ACNC requirements and provisions already covered in the Australian Consumer Law (ACL).¹²

4.12 Ms Raskob agreed with this view, foreseeing a more challenging environment for her members to comply with the various state and Commonwealth regulations that govern their online fundraising activities.¹³

8 Ms Katherine Raskob, Chief Executive Officer for Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 2.

9 Dr Edmund (Ted) Flack, Private capacity, *Proof Committee Hansard*, 31 January 2019, pp. 12 and 26. Dr Ted Flack referred to fundraising as a 'cultural term' without a definition.

10 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Committee Hansard*, 29 October 2018, p. 24.

11 Mr David Thomas, Member, Chartered Accountants Australia and New Zealand, *Committee Hansard*, 30 October 2018, p. 9. Mr Thomas, who is also the CEO of Lifeline Northern Beaches, explained that his locally-based organisation is a separate entity to Lifeline Australia.

12 Ms Alice Macdougall, Deputy Chair, Charities and Not for Profits Committee, Law Council of Australia, *Committee Hansard*, 29 October 2018, p. 9.

13 Ms Katherine Raskob, Chief Executive Officer, Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 2.

Fragmentation and inconsistencies across jurisdictions

4.13 Mr Milner from the Law Institute of Victoria provided an example of a national fundraising campaign that encountered blockage in Queensland, due to the requirement for commercial fundraising agreements. Mr Milner explained that:

These are, essentially, any agreements with a party who is participating in the appeal and who is receiving commissions or reward as part of that appeal. That agreement needs to be approved by the Queensland minister, and, more than that, any public materials that are distributed as part of a campaign that involves a commercial fundraiser need to be approved by the Queensland Office of Fair Trading. So, I've certainly been aware of situations where national campaigns, which often have their own deadlines and pressures, will specifically exclude Queensland from fundraising exactly for that reason: that there is just no way of being compliant in the time available.¹⁴

4.14 This fragmentation of fundraising laws at the State and Commonwealth levels is also replicated at the local government level. Mr Paul Tavatgis, Director for Whipbird Consulting, noted the 'many different forms of rules' that applied to face-to-face fundraising. The lack of consistency across local authorities:

...means that charities or third-party fundraising businesses need to maintain significant teams of people, to essentially, liaise with local authorities on a week-to-week basis to ensure that their fundraisers have the correct permits in order to fundraise in each local authority area.¹⁵

4.15 Mr Milner argued that these fragmented laws are not based on good policy and do not have a sound commercial basis:

The thing I always say when I'm talking to lawyers about fundraising regulation is: you have to read it and suspend disbelief, because you can't read it and assume that it has a good policy or commercial underpinning. Often it doesn't, and often you have to read it on its own terms and then try and apply it... The level of ridiculousness in some of these pieces of legislation is just incredible.¹⁶

4.16 The committee heard that another source of confusion is the lack of centralisation of the portfolio under one responsible minister. The committee was informed responsibilities governing the relevant Commonwealth portfolio are

14 Mr Alex Milner, Member, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 42.

15 Mr Paul Tavatgis, Director, Whipbird Consulting, *Committee Hansard*, 31 January 2019, p. 2.

16 Mr Alex Milner, Member, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 43.

distributed across four departments under the remit of several ministers.¹⁷ The current division of responsibilities are as follows:

- Three Treasury ministers:
 1. Assistant Minister for Treasury and Finance, the Hon Zed Seselja—ACNC
 2. Treasurer, the Hon Josh Frydenberg—Australian Competition and Consumer Commission (ACCC), Australian Taxation Office (ATO)
 3. Assistant Treasurer, the Hon Stuart Robert MP—competition and consumer policy, taxation legislation and administration.
- Minister for Social Services—since 2013 responsibility for charity/not-for-profit (NFP) issues has been split between Treasury and the Department of Social Services (DSS) with the former responsible for the ACNC Act and DSS for the Charities Act.
- Minister for Communications—Australian Communications and Media Authority (telephone and online solicitation for donations), Do Not Call Register (charity exemption).
- Attorney General—under the *Privacy Act 1988* (charities and NFPs are specifically covered as 'entities' under the Australian Privacy Principles).¹⁸

Outdated for current needs

4.17 Evidence before the committee commonly touched on the rapid adoption of new technologies in the sector and how current fundraising legislation has not reflected the changed landscape. Some witnesses pointed out the anachronistic laws that still exist.¹⁹ For example, Mr Derek Mortimer, Principal, DF Mortimer & Associates, and Professor Myles McGregor-Lowndes, ACPNS, QUT, referred to the *Street Collections (Regulation) Act 1940* in Western Australia which makes it illegal to collect money on the end of a long pole inherited from London's 1903 Metropolitan Streets Act.²⁰

17 Fundraising Institute Australia, Answer to question on notice, 30 October 2018. See also *Committee Hansard*, 30 October 2018, pp. 5–6.

18 Assistant Minister Seselja took over responsibility for charities from the former Minister, the Hon Michael Sukkar, Fundraising Institute Australia, answer to question on notice, 30 October 2018. See also Department of the Prime Minister and Cabinet, *Ministry List*, 25 January 2019, available at <https://www.pmc.gov.au/resource-centre/government/ministry-list> (accessed 6 February 2019).

19 Mills Oakley, *Submission 64*, p. 4; Chartered Accountants Australia and New Zealand, *Submission 40*, p. 1; Mr Norman O'Bryan, AM SC, Private capacity, *Proof Committee Hansard*, 31 January 2019, p. 19.

20 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Committee Hansard*, 29 October 2018, p. 21; Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Proof Committee Hansard*, 31 January 2019, p. 11.

4.18 The committee heard that despite the shift towards online fundraising, only two fundraising laws 'explicitly address email or the internet and none of them address online giving or the matter of jurisdiction'.²¹ This issue is addressed further later in this chapter.

Non-compliance

4.19 The committee heard that many charities failed to comply with the relevant regulations and that non-compliance with the various Commonwealth and state regulations could be attributed to both accidental and deliberate conduct.

4.20 Ms Lavanya Kala, Policy Manager, Volunteering Australia, told the committee that given the complexity of the regulatory regime, it would not be surprising if some non-compliance was deliberate, even if it was not committed out of any 'ill intent'.²²

4.21 At the Senate Economics Legislation Committee's 2017 additional estimates, Mr David Locke, then Assistant Commissioner, Charity Services at the ACNC, suggested that there was a high level of noncompliance among charities operating in Australia. This suggestion was based on a comparison of data from Queensland with data from the ACNC, which showed only 2500 charities from a total of 10 500 registered charities in Queensland held a fundraising licence. Mr Locke assumed the discrepancy was due to 'a number of those 8,000 [charities]... operating without a licence'.²³

4.22 This assumption, however, was questioned by Mr Mortimer, who cautioned against assuming that all charities should hold a fundraising licence by noting that it was not mandatory for all ACNC-registered charities to have a fundraising licence if their fundraising did not involve soliciting funds from the public.²⁴

4.23 A large majority of witnesses and submitters believed that most charities wanted to do the right thing and comply with the laws, and breaches of fundraising laws occurred not because charities intend to circumvent them but due to ignorance arising from the laws' complexity.²⁵

21 Ms Geraldine Magarey, Leader Research and Thought Leadership, Chartered Accountants Australia and New Zealand, *Committee Hansard*, 30 October 2018, p. 9.

22 Ms Lavanya Kala, Policy Manager, Volunteering Australia, *Committee Hansard*, 7 November 2018, pp. 7 and 9.

23 Mr David Locke, then Assistant Commissioner, Charity Services, Australian Charities and Not-for-profits Commission, Senate Economics Legislation Committee (Additional Estimates 2016–17), *Committee Hansard*, 1 March 2017, p. 112.

24 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Submission 6.1: Supplementary to submission to 6*, p. 4.

25 Justice Connect, *Submission 49*, pp. 19–20; Ms Alice Macdougall, Deputy Chair, Charities and Not for Profits Committee, Law Council of Australia, and Mr Alex Milner, Member of Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, pp. 11 and 42; Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard*, 31 January 2019, p. 13.

4.24 Submitters commented on considerable confusion caused by the 'legal intricacy' of the current legal framework, particularly for small organisations. Consequently, reported non-compliance can often be attributed to 'genuine misunderstanding'.²⁶ The practical impact means that small organisations may risk breaking the law by turning a 'blind eye' to non-compliance.²⁷

4.25 Ms Visevic suggested that based on her firm's experience, 'most organisations that are fundraising are probably in breach of some law somewhere in the country'.²⁸ This belief was based on Mills Oakley's experiences with clients. According to Ms Visevic, clients seek the firm's advice twice in their lifetimes. The first is when they first set up to fundraise and the second is when they only have one licence but continue to fundraise in another jurisdiction until they are found to be non-compliant. Ms Visevic suggested this would indicate many more organisations that engage in fundraising are likely to inadvertently breach fundraising laws.²⁹

Cost of compliance

4.26 Overwhelmingly, the evidence presented before the committee was that the costs of compliance with each state and territory's fundraising laws place a significant burden on charities, both large and small. Differences between jurisdictions mainly exist across three key areas:

- applying for fundraising registration or a licence, and retaining eligibility to fundraise;
- maintaining ongoing compliance; and
- reporting.³⁰

Applying and retaining fundraising registration or a licence

4.27 As discussed in Chapter 3, the application of fundraising registration and licensing is inconsistent across state, territory and Commonwealth jurisdictions. As each state and territory has its own requirements for fundraising licences, the regulatory burden associated with fundraising is estimated to cost the charity sector \$15.1 million each year³¹, and millions more when other not-for-profits are included.³²

26 Mills Oakley, *Submission 64*, p. 4; Justice Connect, *Submission 49*, pp. 19–20.

27 Mr David Thomas, Member of Chartered Accountants Australia and New Zealand, *Committee Hansard*, 30 October 2018, p. 10.

28 Ms Vera Visevic, Partner, Mills Oakley, *Committee Hansard*, 30 October 2018, p. 36.

29 Ms Vera Visevic, Partner, Mills Oakley, *Committee Hansard*, 30 October 2018, p. 36.

30 Deloitte Access Economics, *Australian Charities and Not-for-profits Commission, Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, Final Report, 23 February 2016, p. 17.

31 Deloitte Access Economics, *Australian Charities and Not-for-profits Commission, Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, Final Report, 23 February 2016, p. 39.

32 Ms Sue Woodward, Head of Not-for-profit Law, Justice Connect, *Committee Hansard*, 29 October 2018, pp. 2 and 5, Justice Connect, *Submission 49*, p. 7.

The Smith Family observed that the 'requirement to register in each state and territory plus the different definitions and compliance regimes which apply across them create an undue administrative burden for all charities'.³³

4.28 Mr Norman O'Bryan, SC, stated that he considers the \$15 million figure estimated by Deloitte Access Economics to be 'a gross underestimate' and does not account for the time and effort expended by people who would otherwise be engaged in charitable activities. Mr Peter Hills-Jones, Chief Executive Officer, Public Fundraising Regulatory Association, also noted that Deloitte's estimated figure left out the costs associated with complying with local council regulations.³⁴

4.29 For example, Mr John Scott, Company Secretary and Accountant for the Brandenburg Orchestra, reported that the organisation had spent between \$5,000 and \$10,000 on legal advice to ensure the organisation complied with its fundraising obligations.³⁵

4.30 Mycause reported it had a compliance regime for four licences and three entities and spent in excess of eight hours each month on compliance.³⁶ In addition to the 14 sets of regulation covering its two charities, the My Cause Gift Fund (a Public Ancillary Fund) and Helping a Friend in Need (a Public Benevolent Institution), the platform complies with the ACNC as well as with the regulatory regime the company established with Consumer Affairs Victoria for its personal cause fundraising activities.³⁷

4.31 Ms Tania Burstin from mycause told the committee:

We advise our charity partners... that they must be registered in the state in which they are fundraising. We define fundraising as a solicitation of donations both online and offline. We do not regard a 'donate now' button as solicitation. If Tania Burstin of Victoria wants to fundraise for Bruny Island art society in Tasmania, that organisation must be registered in Victoria. As a charity, you may not know where your fundraisers are located, so therefore you must be registered in each state.³⁸

33 Dr Lisa O'Brien, Chief Executive Officer, The Smith Family, *Committee Hansard*, 30 October 2018, p. 28.

34 Mr Norman O'Bryan, AM SC, Private capacity, *Proof Committee Hansard*, 31 January 2019, p. 19; Mr Peter Hills-Jones, CEO, Public Fundraising Regulatory Association, *Proof Committee Hansard*, 31 January 2019, p. 34. See also Justice Connect, *Submission 49*, p. 19.

35 Mr John Scott, Company Secretary and Accountant for the Brandenburg Orchestra, *Committee Hansard*, 30 October 2018, p. 24. See also Ms Tracy Adams, CEO, yourtown, *Proof Committee Hansard*, 31 January 2019, p. 9 and yourtown, *Submission 79*, pp. 7 and 11.

36 mycause, *Submission 11*, p. [4].

37 Ms Tania Burstin, Managing Director, mycause, *Committee Hansard*, 29 October 2018, pp. 27–28; mycause, *Submission 11*, p. [4].

38 Ms Tania Burstin, Managing Director, mycause, *Committee Hansard*, 29 October 2018, p. 25.

Maintaining ongoing compliance

4.32 Deloitte Access Economics' report outlined the different types of requirements with which charitable organisations are expected to comply on a continuous basis to retain their fundraising registration or licence. These can vary according to the type and method of fundraising, including:

- the authority for street collectors to act on a charity's behalf;³⁹
- receipting requirements; and
- the requirement to have a physical address in the state in which the relevant organisation fundraises.⁴⁰

4.33 The committee heard that for Musica Viva, which operates in all eight states and territories, the impost of maintaining current fundraising authorities across the entire country is significant in terms of administrative, financial and reporting burdens. Mrs Sarah Falzarano, Director of Finance, Sydney Symphony Orchestra, highlighted this burden with an example of a national campaign:

[W]e would run a competition in our subscription campaign incentivising people to subscribe. Because we run subscriptions nationally, then we have to take out those competition authorities in all eight jurisdictions, so the flow-on impact of that is it diverts already-scarce resources away from the purpose of the organisation. Similarly, the regulatory framework around fundraising activities is often complex and sometimes open to misinterpretation. A national approach with simple guidelines in plain English would greatly reduce time lost in ensuring that compliance is all in place on a national scale.⁴¹

4.34 To underscore the amount of regulation the company mycause has had to comply with, Ms Burstin, Managing Director of the online fundraising platform, reported the company is 'really up to our eyeballs in compliance'.⁴² Ms Burstin explained that to comply with the 14 sets of regulations, one part-time staff member is employed to keep up to date with the organisation's compliance obligations. In addition to the regular regulatory compliance work, there are other requirements:

Not only does each state have a different burden of registration—for example in Queensland having to advertise in the newspaper, or in New South Wales having to have a postal address in New South Wales—but each state has a different burden of compliance. For example, Victoria

39 For example, Western Australia's *Street Collections (Regulation) Act 1940* (WA) regulates fundraising via street collections differently by requiring a separate licence from that granted by the main fundraising legislation. See Mills Oakley, *Submission 64*, p. 17.

40 Deloitte Access Economics, *Australian Charities and Not-for-profits Commission, Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, Final Report, 23 February 2016, p. 22. For a list of location requirements refer to the Deloitte report.

41 Mrs Sarah Falzarano, Director of Finance, Sydney Symphony Orchestra, *Committee Hansard*, 30 October 2018, p. 23.

42 Ms Tania Burstin, Managing Director, mycause, *Committee Hansard*, 29 October 2018, p. 28.

wants our data in May, just before the end of the financial year, rather than waiting for our books to be complete at the end of June. The New South Wales regulator recently knocked back our audit as it did not reference their act; it only referenced the ACNC. This causes us additional cost and burden with our expensive auditors.⁴³

4.35 Mr John Scott from the Brandenburg Orchestra recounted a similar example of regulatory burden experienced by the Australian Brandenburg Orchestra:

[W]e opened up in Melbourne when the Melbourne Recital Centre came on board 10 years ago, and we decided that we wanted to fundraise there. Even though we were registered for fundraising in New South Wales, and it's a requirement for that to be reported in our annual report, we had to go and register in Victoria as well. The issue we had there was that our office is based in Sydney and is very small. They required an office in Melbourne in order for us to register.⁴⁴

4.36 In addition to ensuring each of the compliance requirements for each state and territory is covered, Mr Bruce Moore, General Counsel, Australian Red Cross Society, noted that compliance dealings with individual state and territory regulators can delay fundraising campaigns:

It's more the detailed dealings with the individual regulators that gives rise to specific obligations—for example, provision of copies of contracts to the Queensland regulator for fundraising with the entities who we are contracting with in order to raise funds. [...] So it's that kind of detail that means sometimes there may be a time interval between wanting to run a campaign and being able to commence it.⁴⁵

4.37 Other issues identified included the difficulty of obtaining criminal record checks for all board members who may be scattered across the country and the requirement for an audit report if the ticket price for an event is over a certain threshold. This was despite accounts already being audited by one of the major accounting firms.⁴⁶

4.38 Adding to the complication of fulfilling a 'significant number of operational compliance requirements', Deloitte's research found that compliance information can be difficult to access. Deloitte stated in its report:

As fundraising registration is typically an ancillary component of the state or territory's responsibilities, some jurisdictions do not have this information readily available on their website to use as a quick reference guide. Consequently, time is spent searching for the different requirements

43 Ms Tania Burstin, Managing Director, mycause, *Committee Hansard*, 29 October 2018, p. 25.

44 Mr John Scott, Company Secretary and Accountant for the Brandenburg Orchestra, *Committee Hansard*, 30 October 2018, p. 23.

45 Mr Bruce Moore, General Counsel, Australian Red Cross Society, *Committee Hansard*, 29 October 2018, p. 35.

46 Mr John Scott, Company Secretary and Accountant for the Australian Brandenburg Orchestra, *Committee Hansard*, 30 October 2018, p. 23.

in each of the jurisdictions to ensure that requirements are being maintained.⁴⁷

4.39 Mr Moore from Australian Red Cross Society outlined that even for a large organisation with a dedicated team to oversee fundraising, the work required to comply with the range of regulatory requirements remains substantial and is a continuous process. He outlined some of the internal processes undertaken before his charity could fundraise nationally:

Maintaining fundraising licences—they need to be renewed every so often. There are certificates around what is permitted fundraising activity and for what types of purposes. That can vary. So, in our case, that has to be expressed, and is expressed, in general terms because of the diversity of charitable activities the organisation undertakes. It is making sure all those things are in place on a continuous basis that provides some of the challenges.⁴⁸

Reporting

4.40 The committee received evidence that in addition to compliance with federal reporting requirements, charities which fundraise also have reporting obligations to the relevant state and territory regulators on amounts they collect. As noted by Deloitte, these reporting obligations can vary between jurisdictions, as do the timeframes for submission and the need for audited accounts.⁴⁹

4.41 Mills Oakley's submission echoed Deloitte's findings, reporting that the effort and work involved to meet the different, and sometimes conflicting, audit and reporting requirements puts pressure on an organisation's resources (both financial and human capital).⁵⁰

4.42 For example, Mrs Falzarano from Sydney Symphony Orchestra drew attention to the large number of regulatory authorities that Australian Major Performing Arts Group (AMPAG) members reported to over the course of a 12 month period. She noted:

[t]hose multilayered reporting requirements provide a high administrative burden and can lead to complexity, and we find that many of them are often asking for similar data, perhaps in slightly different presentation formats.⁵¹

47 Deloitte Access Economics, *Australian Charities and Not-for-profits Commission, Cutting Red Tape: Options to Align State, Territory and Commonwealth charity Regulation*, Final Report, 23 February 2016, pp. 22–23.

48 Mr Bruce Moore, General Counsel, Australian Red Cross Society, *Committee Hansard*, 29 October 2018, pp. 35–36.

49 Deloitte Access Economics, *Australian Charities and Not-for-Profits Commission, Cutting Red Tape: Options to Align State, Territory and Commonwealth Charity Regulation*, Final Report, 23 February 2016, p. 23.

50 Mills Oakley, *Submission 64*, p. 17.

51 Mrs Sarah Falzarano, Director of Finance, Sydney Symphony Orchestra, *Committee Hansard*, 30 October 2018, p. 23.

Disadvantages small and medium charities

4.43 The committee heard that the regulatory burden was particularly difficult for smaller charities to manage. Mr Moore from Australian Red Cross indicated his sympathy for the regulatory burden experienced by smaller charities operating on limited resources.⁵² Ms Lavanya Kala from Volunteering Australia added that the vast majority of charities were small organisations heavily dependent on giving and philanthropy and work under severe funding constraints.⁵³

4.44 Mills Oakley's submission supported this view, and pointed out that the limited budgets and resources of smaller organisations made it especially difficult for charities to obtain 'exhaustive legal advice on issues requiring extensive research to account for jurisdictional inconsistencies'.⁵⁴

4.45 Small charity organisations like the Australasian Leukaemia and Lymphoma Group (ALLG), which recently moved into the fundraising space as a way to diversify its revenue, advised the committee that when they looked at setting up a fundraising plan they were surprised to learn there was not a nationally consistent approach to fundraising regulations. Ms Delaine Smith, Chief Executive Officer for ALLG, was also surprised that the standards and codes were not set by the ACNC but by organisations that require additional annual memberships, such as the Fundraising Institute Australia and the Public Fundraising Regulatory Association.⁵⁵ Ms Smith reported that of the \$41,000 ALLG received in donations, about a quarter (less than \$10,000) was spent on compliance. This did not include the human resource time. She explained that once the initial application process with the states was taken, the ongoing reporting was less onerous to maintain.⁵⁶

4.46 Mr David Thomas, Member of Chartered Accountants Australia and New Zealand, described his workload as a member and Chief Executive Officer of a small local not-for-profit branch of Lifeline Australia and observed that '[t]o make this a lot simpler would free us up so much'.⁵⁷

Volunteer-based organisations

4.47 The impact of regulatory compliance was emphasised by Ms Kala for Volunteering Australia in her evidence before the committee. The committee heard

52 Mr Bruce Moore, General Counsel, Australian Red Cross Society, *Committee Hansard*, 29 October 2018, pp. 35–36.

53 Ms Lavanya Kala, Policy Manager, Volunteering Australia, *Committee Hansard*, 7 November 2018, pp. 7–8.

54 Mills Oakley, *Submission 64*, p. 4. See also Dr Lisa O'Brien, Chief Executive Officer, The Smith Family, *Committee Hansard*, 30 October 2018, p. 29.

55 Ms Delaine Smith, CEO, Australasian Leukaemia and Lymphoma Group (ALLG), *Committee Hansard*, 29 October 2018, pp. 33 and 35.

56 Ms Delaine Smith, CEO, ALLG, *Committee Hansard*, 29 October 2018, p. 35.

57 Mr David Thomas, Member, Chartered Accountants Australia and New Zealand, *Committee Hansard*, 30 October 2018, p. 10. See fn 10.

the volunteering sector, which contributes \$290 billion annually to Australia socially and economically, plays a critical role in the delivery of government priorities and support for the charity sector. For organisations which rely heavily on the efforts of volunteers, the regulatory burden places them under enormous pressures. Ms Kala suggested that the formal decline in volunteering numbers could be due to people being deterred by red-tape.⁵⁸ She told the committee:

...the reporting requirements are complex and confusing and result in onerous administrative requirements for charities that don't have the resources or human capital [such as in-house counsel] to navigate them.⁵⁹

4.48 To underscore the vital role of volunteers in the charity sector, Ms Kala told the committee that volunteers make up 2.97 million members of the sector's workforce compared to one million paid staff members.⁶⁰ The 2015 Giving Australia report on non-profits and volunteering found that 62.3 per cent of organisations in the not-for-profit sector recruited volunteers.⁶¹

4.49 The committee heard there are additional costs involved for volunteer-involving organisations in the charity sector compared to charities run by paid staff. This is due to the high costs associated with the management of volunteers, who might be considered 'free labour' but require resources for training, equipment, management and compliance.⁶²

4.50 Mr John Mikelsons, Senior Policy and Advocacy Officer for the Australian Council of Social Service (ACOSS), highlighted the impost placed upon small charities that rely heavily on volunteers. He told the committee that a national charity involved in fundraising for HIV prevention that relies solely on volunteers to run, of which he is a board member, has had to relinquish its fundraising licence in several states because it did not have the resources to 'keep it up'.⁶³

4.51 Ms Nicole Stanmore, Director of Business Development, Engagement and Operations for Australian Council of Social Service, stated that, in relation to reporting and registration, in a voluntary organisation:

...if there's no administrative support, it would be absolutely impossible to coordinate different board directors to do police checks, to sign different

58 Ms Lavanya Kala, Policy Manager, Volunteering Australia, *Committee Hansard*, 7 November 2018, p. 7.

59 Ms Lavanya Kala, Policy Manager, Volunteering Australia, *Committee Hansard*, 7 November 2018, p. 7.

60 Ms Lavanya Kala, Policy Manager, Volunteering Australia, *Committee Hansard*, 7 November 2018, p. 7.

61 Ms Lavanya Kala, Policy Manager, Volunteering Australia, *Committee Hansard*, 7 November 2018, p. 7.

62 Ms Lavanya Kala, Policy Manager, Volunteering Australia, *Committee Hansard*, 7 November 2018, p. 8.

63 Mr John Mikelsons, Senior Policy and Advocacy Officer, Australian Council of Social Service, *Committee Hansard*, 7 November 2018, p. 3.

forms and to have everything done on time. That process can actually take weeks.⁶⁴

Inefficient allocation of resources

4.52 The committee heard from witnesses that charity resources have often been diverted from core business in order to comply with current regulatory obligations.

4.53 For example, the committee heard that in addition to the costs involved, the time ALLG staff spent on compliance was not productive and could be better directed towards ALLG's primary research objectives, with its Chief Executive Officer saying that 'This is due to the repetition, the inconsistencies, the various fees and the additional costs that one has to acquire, such as print media, in various states'.⁶⁵

4.54 Similarly, Ms Katherine Raskob, the Chief Executive Officer of the Fundraising Institute Australia, described the resources member organisations have had to divert towards regulatory compliance that could have been more productively employed on their charitable cause:

[O]ur members [are] all across Australia, and many of them say that they have additional resources that cost them quite significant funds to be able to adhere to the various legislation and regulatory regimes. Those funds could more effectively be used for the ultimate cause of their fundraising activity rather than for red tape. One of our members is an NGO and works to eradicate poverty worldwide, and it has one full-time equivalent just doing the work of red tape, working within the red tape burden. For example, if that were a salary of over \$100,000, you can imagine how far that would go in a fundraising environment.⁶⁶

4.55 Several witnesses concurred and drew attention to the inefficient use of their (member or client) organisations' resources.⁶⁷ Dr Lisa O'Brien, Chief Executive Officer for The Smith Family, told the committee that a 'lack of harmonisation currently limits efficiency in The Smith Family's efforts to fundraise, expand services and increase its positive impact for Australian communities'.⁶⁸

Lost opportunities

4.56 For small organisations, the regulatory burden of compliance with fundraising requirements often means they have had to make a cost-benefit analysis of whether a

64 Ms Nicole Stanmore, Director of Business Development, Engagement and Operations, Australian Council of Social Service, *Committee Hansard*, 7 November 2018, p. 4.

65 Ms Delaine Smith, Chief Executive Officer, Australasian Leukemia and Lymphoma Group, *Committee Hansard*, 29 October 2018, p. 33.

66 Ms Katherine Raskob, the Chief Executive Officer, Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 3.

67 Lifeline, The Smith Family, Volunteering Australia, and Whipbird Consulting, see *Committee Hansard*, 30 October 2018, pp. 11 and 28; *Committee Hansard*, 7 November 2018, p. 7; and *Proof Committee Hansard*, 31 January 2019, p. 2.

68 Dr Lisa O'Brien, Chief Executive Officer, The Smith Family, *Committee Hansard*, 30 October 2018, p. 28.

fundraising activity should be pursued or restricted in its scope. For example, Mr Peter Kempen, Chairman of ALLG, explained that despite receiving DGR status in 2009 and being able to receive donations, ALLG decided against going national with its fundraising activities because it found the process daunting. Mr Kempen added:

Whilst that didn't stop us from receiving some donations, particularly in Victoria, we didn't rush to go national even though we are a national organisation conducting trials across the country. We didn't seek to go down that path for some years...and we're still questioning the value of doing it.⁶⁹

4.57 Mr Kempen informed the committee that if the process had been less complex, ALLG's decision to engage in fundraising would have been made much easier. As it is, Ms Smith advised that after over 12 months of working through the registration process with Western Australia, ALLG decided to suspend the process following a cost-benefit analysis.⁷⁰

4.58 Dr Peter Thomas, Director of Policy and Operations, Association of Australian Medical Research Institutes (AAMRI), provided an example of lost opportunity attributed to regulatory burden. It involved a Victoria-based member being told by the NSW Fair Trading that a NSW postal address was a required part of their application if they wanted to undertake a national fundraising campaign. Dr Thomas told the committee that:

...after much arguing and discussion they [NSW Fair Trading] said, 'We'll ignore that and put your Victorian address down.' That is all well and good but the directors have to sign a declaration saying that they are compliant with the law—and they're unwilling to sign a declaration that they're complying with the law when they're knowingly disregarding it. It's taken one person in that office probably about three weeks of arguing over the last six months to get to that stage.⁷¹

4.59 Ms Alice Macdougall, the Deputy Chair of the Charities and Not for Profits Committee at the Law Council of Australia, shared a similar observation where regulatory burden has deterred the participation of otherwise interested fundraising partners:

Where I probably see the most restriction occurring is actually where corporates want to support some charitable cause. When they find out that there's this fundraising regime and that it's very detailed in what they can and can't do, they withdraw, particularly if it's something where they want to sell a good and say some of the money is going to a charitable purpose.

69 Mr Peter Kempen, Chairman, Australasian Leukemia and Lymphoma Group, *Committee Hansard*, 29 October 2018, p. 36. See also Mr Peter Tavatgis, Director, Whipbird Consulting, *Proof Committee Hansard*, 31 January 2019, p. 2.

70 Ms Delaine Smith, Chief Executive Officer, Australasian Leukemia and Lymphoma Group, *Committee Hansard*, 29 October 2018, p. 36.

71 Dr Peter Thomas, Director, Policy and Operations, Association of Australian Medical Research Institutes, *Committee Hansard*, 29 October 2018, p. 37.

With the varying provisions around labelling and advertising and all sorts of requirements, they just go, 'No, we're not going to do that.'... It's too hard.⁷²

4.60 The committee heard evidence from a number of witnesses about the stifling effect current fundraising laws have on innovation in the sector. This impacts the ability of charities of all sizes to engage in new and novel ways to fundraise beyond their own jurisdiction.⁷³

4.61 One such example of constraint placed on a potential fundraising campaign involved a client wanting to fundraise using a mobile phone app. Mr John Vaughan-Williams, Lawyer for Mills Oakley, explained that due to a delay in obtaining licences in every state for a national campaign, the commencement of the fundraising operation was delayed by six to 12 months.⁷⁴ Mills Oakley concluded that the risk of non-compliance and the current regime's complexity discourages charities from expanding their fundraising programs.⁷⁵

Lack of regulation of online platforms

4.62 A recurring issue identified by witnesses and submitters concerned the lack of regulation for online fundraising. The committee heard there was no consistent approach to online fundraising between the states and territories. The committee heard that online giving has become 'a very cost-effective way of engaging with people and a very contemporary way of giving and receiving information'.⁷⁶ Ms Geraldine Magarey, Leader Research and Thought Leadership, Chartered Accountants Australia and New Zealand, reported that 96 per cent of large organisations use websites to fundraise, 80 per cent use social media and almost 70 per cent use third party fundraising platforms and crowdfunding campaigns.⁷⁷

4.63 The lack of a national approach to regulation in the online fundraising space means that despite the digital transformation of fundraising activities, current fundraising laws have failed to deal with this new form of fundraising, resulting in a

72 Ms Alice Macdougall, Deputy Chair, Charities and Not for Profits Committee, Law Council of Australia, *Committee Hansard*, 29 October 2018, p. 10. See also Mr Norman O'Bryan's evidence regarding lost opportunities, *Proof Committee Hansard*, 31 January 2019, p. 20.

73 For examples, see Ms Sue Woodward, Head, Not-for-profit Law, Justice Connect, *Committee Hansard*, 29 October 2018, pp. 2–3, 8; Ms Alice Macdougall, Deputy Chair, Charities and Not for Profits Committee, Law Council of Australia, *Committee Hansard*, 29 October 2018, pp. 10, 13; Ms Sarah Wickham, Policy and Research Manager, Philanthropy Australia, *Committee Hansard*, 29 October 2018, pp. 14, 16–17.

74 Mr John Vaughan-Williams, Lawyer, Mills Oakley, *Committee Hansard*, 30 October 2018, pp. 34–35.

75 Mills Oakley, *Submission 64*, p. 4. See also Ms Alice Macdougall's observation (Law Council of Australia), *Committee Hansard*, 29 October 2018, p. 13.

76 Ms Tracy Adams, CEO, yourtown, *Proof Committee Hansard*, 31 January 2019, p. 7.

77 Ms Geraldine Magarey, Leader Research and Thought Leadership, Chartered Accountants Australia and New Zealand, *Committee Hansard*, 30 October 2018, p. 9.

regulatory gap as well as inconsistent treatment of different groups engaging in the same fundraising activities. The states and territories' different approaches often result in 'inconsistent, ambiguous and not clearly codified [guidelines] and require specific investigation'.⁷⁸

4.64 However, Mr Alex Milner, Member of Not for Profit and Charities Law Committee, Law Institute of Victoria, stated current legislation has been slow to reflect the diverse nature of fundraising in Australia:

There is not just online fundraising; there is also fundraising to do with donations of cryptocurrency and all sorts of weird and wonderful things that come through. It's apparent that the current legislation has a whole lot of gaps in terms of how it addresses that. It also has, in many cases, a questionable policy basis. It may have been the case that some of the legislation did have a good policy basis, but it no longer has that.⁷⁹

4.65 Mr Moore echoed this view and stated:

[a] national approach would need to recognise that fundraising these days is via a great variety of different channels, some face to face, some online, some through mail and so on. In particular, digital fundraising through online activities doesn't have any state or territory boundaries.⁸⁰

4.66 Ms Burstin likened online fundraising to the traditional method of people asking family and friends for money to help each other for a range of causes, the only difference now being the borderless nature of such online fundraising activities.⁸¹

4.67 The committee heard alongside the shift towards online fundraising there is also a trend in the direction of third-party fundraising.⁸² Generally, third-party fundraising refers to any non-charity groups, commercial businesses or private individuals who wish to fundraise on behalf of charities or a personal cause. The online platform used to host the fundraising event is considered a commercial entity.

4.68 Ms Sarah Wickham, Philanthropy Australia, observed the high profile Belle Gibson fraud case highlighted the need to 'really modernise, streamline and update fundraising laws in Australia':

[B]ecause online digital fundraising platforms are not regulated in Australia there were no rules around the ability of individuals to create fake

78 Mills Oakley, *Submission 64*, p. 13. Mills Oakley provided a real-life example where the legal advice it provided a client involved each state and territory jurisdiction adopting conflicting interpretations of whether an additional licence was required outside of the host jurisdiction.

79 Mr Alex Milner, Member of Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 42.

80 Mr Bruce Moore, General Counsel, Australian Red Cross Society, *Committee Hansard*, 29 October 2018, p. 32.

81 Senate Select Committee on Charity Fundraising in the 21st Century, *Committee Hansard*, 29 October 2018, pp. 25–26.

82 Senate Select Committee on Charity Fundraising in the 21st Century, *Committee Hansard*, 30 October 2018, p. 9.

campaigns and go to the public with a compelling story to raise funds. When you find a situation where a sector or an industry is significantly developing through the pace of technological development, but regulation isn't keeping up the pace with these issues, you see situations like this happen.⁸³

4.69 The committee notes that the state regulator was successful in obtaining an order against Ms Gibson for contravention of the ACL.

Local online platforms disadvantaged

4.70 The committee heard that the current regulatory environment can result in disadvantages for local online platforms. For example, in the absence of consistent regulations governing the online fundraising space, particularly as they relate to personal cause fundraising, Ms Burstin reported that her company has had to create its own regulatory regime with Consumer Affairs Victoria (CAV) in order to operate from Victoria. This includes complying with all company regulations and notifying the regulator each month of every fundraising page that is created.⁸⁴ However, by complying with these regulations, Ms Burstin argued that her locally-based third party fundraising company is operating at a disadvantage compared to her unregulated competitors based overseas.⁸⁵

4.71 Ms Burstin attributed the lack of consistent regulation across the different jurisdictions to a confused approach to personal cause fundraising regulation. Apart from mycause's regulatory solution with CAV, New South Wales is the only state that regulates mycause's online fundraising platform as a trader. Also, while some states treat personal cause fundraising as a charitable purpose and therefore regulate it, some do not, or are confused about how to regulate it. Ms Burstin suggested that the confusion arises when regulators try to define online personal cause fundraising within the narrow legislative frameworks that cover charity and charitable purpose. When regulators fail to find a satisfactory solution, this leaves a regulatory gap that may place an unfair burden on local fundraisers and fundraising platforms, and leaves donors vulnerable to fraud.⁸⁶

83 Ms Sarah Wickham, Policy and Research Manager, Philanthropy Australia, *Committee Hansard*, 29 October 2018, p. 18.

84 Ms Tania Burstin, Managing Director of mycause, *Committee Hansard*, 29 October 2018, p. 27.

85 Ms Tania Burstin, Managing Director of mycause, *Committee Hansard*, 29 October 2018, pp. 26–28.

86 Ms Tania Burstin, Managing Director of mycause, *Committee Hansard*, 29 October 2018, p. 27.

4.72 The inconsistent treatment between locally-based and overseas-based fundraising platforms is underscored by the numerous regulations Ms Burstin's company⁸⁷ has had to comply with compared to her unregulated competitors:

When I speak to the regulators, I might say to them—in fact, I have said to them in Victoria—'Person A is fundraising on an overseas platform, and they're located in Victoria. They've raised over \$10,000, and they haven't got a licence with you, which is your requirement.' They will say to me, 'Oh, but that platform's overseas.' I will say to them, 'But the fundraiser is located in Victoria.' It probably shouldn't matter where the platform is located. It doesn't really matter anymore...⁸⁸

4.73 Ms Burstin highlighted some of the transparency and accountability measures local companies like hers undertake that overseas platforms do not:

There is no level playing field with the overseas platforms, who are non-compliant with any regulations. [...] We expose the bank account name and the name of the beneficiary, so the donor can make an informed choice. [...] Should that trust be broken, you have a remedy in consumer and fraud law.⁸⁹

Lack of accountability and transparency

4.74 Evidence before the committee emphasised the importance of trust underpinning the relationship between donors and the beneficiaries of donations in the charity and not-for-profit sector. The committee heard transparency and accountability activities, which are critical to building trust, should be streamlined and made more accessible to both charities and members of the public than is presently the case.

Third party and online fundraising platforms

4.75 In relation to online third party platforms, the committee heard that the lack of interaction with donors on these platforms was incompatible with transparency and accountability.⁹⁰

4.76 Several witnesses raised the issue of accountability and transparency concerning third party online fundraising platforms that require regulation.⁹¹

87 As third-party fundraisers are generally, if not all, for-profit entities, they would be covered by the Australian Consumer Law as they engage in trade and commerce. See *Committee Hansard*, 29 October 2018, pp. 11–12.

88 Ms Tania Burstin, Managing Director of mycause, *Committee Hansard*, 29 October 2018, p. 26.

89 Ms Tania Burstin, Managing Director of mycause, *Committee Hansard*, 29 October 2018, p. 26.

90 Ms Delaine Smith, CEO, ALLG, *Committee Hansard*, 29 October 2018, p. 39.

91 See, for example evidence from mycause, Mills Oakley, Dr Ted Flack, ACPNS, QUT, and Neumann and Turnour Lawyers, *Committee Hansard*, 29 October 2018, 30 October 2018 and 31 January 2019.

4.77 Ms Macdougall from the Law Council of Australia recommended that charity regulations should be based on transparency and public accountability for all activities. The conduct of activities should not be misleading, coercive or unconscionable, and funds raised should be applied in a manner consistent with charitable purposes.⁹²

4.78 Ms Smith from ALLG commented that it can be confusing to understand the administrative costs of organisations using third party online platforms. She explained that while the online platform might claim there is a small percentage that would be taken for administrative costs, the donor might interpret this to mean the cost to be the charity's administrative fee when this is not the case. Rather, the percentage cost refers to the amount retained by the online platform. Ms Smith was of the opinion that such fees and charges should be clarified so people are informed exactly what proportion of their donations goes toward the charitable cause of their choice.⁹³

4.79 Ms Smith also identified insufficient clarity about who has access to a donor's credit card details, the fees associated with using third party services, and any additional costs. She also raised the issue of when an online third party fundraiser withholds funds from a beneficiary because the beneficiary did not have a licence for fundraising interstate.⁹⁴

Administration and non-charity related expenses

4.80 A common complaint heard by the committee was the lack of transparency and information concerning administration and non-charity related fees and expenses. The committee heard that while donors may not like to learn their funds go towards administration costs, administration costs are necessary in order to undertake the work of charities or charitable causes. Mr Moore, General Counsel for Australian Red Cross Society, suggested that it was a matter of educating the public so they understand that some administration costs are necessary in order to direct funds towards a charity's core purpose.⁹⁵

4.81 Dr Thomas concurred and added that costs can differ depending on a particular stage of a fundraising campaign. He explained that often most of the expenses for a fundraising campaign can be in the set and up-front costs involving the

92 Ms Alice Macdougall, Deputy Chair, Charities and Not for Profits Committee, Law Council of Australia, *Committee Hansard*, 29 October 2018, p. 9.

93 Ms Delaine Smith, CEO, Australasian Leukemia and Lymphoma Group, *Committee Hansard*, 29 October 2018, p. 40.

94 Ms Delaine Smith, CEO, Australasian Leukemia and Lymphoma Group, *Committee Hansard*, 29 October 2018, p. 37.

95 Mr Moore, General Counsel, Australian Red Cross Society, *Committee Hansard*, 29 October 2018, pp. 39–40. See also Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Proof Committee Hansard*, 31 January 2019, pp. 15–16.

staffing of a campaign. This immediate establishment cost will decline over time as donations increase and the charity receives a steady stream of funds from donors.⁹⁶

4.82 Ms Macdougall shared a similar view, contending that it is impossible to regulate what percentage of money raised should be spent on administration:

I think there's been quite a lot of research done out of QUT where they look at this issue of fundraising ratios. Basically, they conclude every time that it's impossible to regulate, because you can account so differently for different aspects of it. [...] There are arguments that when you're just starting out you might be spending a lot more money on administration than you are in producing whatever your charitable purpose is. It could depend on the timeline. It could be very misleading in itself, the actual ratio.⁹⁷

4.83 The issue of fees was particularly relevant to online third party fundraisers. Mr Kempen was of the view that there is a transparency deficit regarding online fundraising and believed strongly that donors should be informed how much of their donations go to the charity of choice and how much is charged by third party fundraisers for their service.⁹⁸

Enforcement

4.84 The committee heard from witnesses that enforcement of fundraising regulations was a recurring issue, particularly in the context of under-resourced regulators. For example, Mr David Crosbie from the Community Council for Australia stated that:

Unfortunately this is an area of government activity that has not been well resourced. Even if the legislation was good, I think there are fewer than 20 people around Australia employed in this area, across all the jurisdictions, so they just haven't resourced it.⁹⁹

4.85 The issue of under-resourced fundraising regulators was highlighted by ACPNS, QUT's submission, which reported that the number of staff employed in fundraising regulation administration across Australia was particularly inadequate, with 16.95 full-time equivalent (FTE) staff responsible for the whole country.¹⁰⁰

96 Dr Peter Thomas, Director of Policy and Operations, Association of Australian Medical Research Institutes, *Committee Hansard*, 29 October 2018, p. 40.

97 Ms Alice Macdougall, Deputy Chair, Charities and Not for Profits Committee, Law Council of Australia, *Committee Hansard*, 29 October 2018, p. 11.

98 Mr Peter Kempen, Chairman, Australasian Leukemia and Lymphoma Group, *Committee Hansard*, 29 October 2018, p. 39. Ms Smith submitted a similar view about the substantial fees charged by some online fundraising organisations as a middleman. See *Committee Hansard*, 29 October 2018, p. 33.

99 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, p. 41.

100 Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Submission 56*, p. [13]. See also Professor Myles McGregor-Lowndes and Mr Norman O'Bryan, AM SC, Private capacity, *Proof Committee Hansard*, 31 January 2019, pp. 17, 21–22.

4.86 Mr Vaughan-Williams, Lawyer for Mills Oakley, expressed a similar sentiment. He partly attributed the regulator's reluctance to pursue breaches of the law through the courts to the authority being 'a little bit under-resourced'.¹⁰¹ He noted that the regulators may want to 'pursue things' but they may be restricted by limited resources.¹⁰² Ms Visevic was of the view that regulators were '[not] proactive in terms of trying to ferret out that sort of behaviour [breaches of the law] or trying to review licensed organisations'.¹⁰³ Ms Visevic stated that her firm usually don't get involved until something was reported to them or they may be pressured to get involved because a case may have garnered a lot of media attention. They may act 'bolshie' at the start but would generally arrive at a solution that did not include going to court.¹⁰⁴

4.87 Ms Burstin stated that even where there is regulation requiring a license in a jurisdiction, not all states may enforce this requirement. She provided an example where in Queensland, although a person is required to have permission for a one-off charitable appeal, the regulator may not follow up due to lack of resources, especially when they believe no fraud has been committed.¹⁰⁵

4.88 Evidence received from the Public Fundraising Regulatory Association (PFRA) and the Fundraising Institute Australia indicated that these two self-regulatory groups devoted significant resources to compliance activities with members. For instance, Mr Peter Hills-Jones, Chief Executive Officer, from PFRA, informed the committee his organisation undertook checks of 400 to 500 of its members each year.¹⁰⁶

Limited role of the Australian Competition and Consumer Commission

4.89 Some evidence outlined concerns about the limited role of the ACCC in regulating the charities sector under the ACL. In particular, this evidence emphasised that because the ACL is confined to trade or commercial activities, the ACCC may overlook other types of charitable fundraising activities that do not fall within this remit, unless they involve fundraising in an organised, continuous and repetitive way.¹⁰⁷ Many witnesses and submitters supported expanding the ACL and the

101 Mr John Vaughan-Williams, Lawyer, Mills Oakley, *Committee Hansard*, 30 October 2018, p. 36.

102 Mr John Vaughan-Williams, Lawyer, Mills Oakley, *Committee Hansard*, 30 October 2018, p. 36.

103 Ms Vera Visevic, Partner, Mills Oakley, *Committee Hansard*, 30 October 2018, p. 35.

104 Ms Vera Visevic, Partner, Mills Oakley, *Committee Hansard*, 29 October 2018, pp. 35–36.

105 Ms Tania Burstin, Managing Director of mycause, *Committee Hansard*, 29 October 2018, pp. 25 and 27.

106 Fundraising Institute Australia, *Submission 28*, p. 7; Mr Peter Hills-Jones, CEO, Public Fundraising Regulatory Association, *Proof Committee Hansard*, 31 January 2019, pp. 31 and 34. The committee heard both self-regulatory bodies used mystery shopping firms to undertake these checks.

107 For example, Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, pp. 39 and 46; Dr Ted Flack, *Submission 91*, p. 9.

regulatory role of the ACCC, whether as a single or co-regulator with the ACNC or another body.

4.90 The following chapter outlines some of these proposals, as well as other options for reform that were suggested by witnesses and submitters as a means of resolving many of the issues raised about the current regulatory frameworks for fundraising.

Chapter 5

Options for reform

5.1 This chapter outlines options for reform to the current framework of fundraising regulation for charities and not-for-profits that have been raised by submitters and witnesses.

5.2 Those who gave evidence to the inquiry were of the near-universal opinion that the status quo was not an acceptable outcome for the fundraising sector. The frustration at a lack of reform in this area was summarised by Mr David Crosbie, Chief Executive Officer of the Community Council for Australia:

It's one of those areas where you just find yourself banging your head against the wall and thinking, 'What is happening here?' There is a long history of regulatory failure. Twenty-three years ago, this was identified as an issue that needed to be fixed. It's been identified time and time again...

[W]e are beyond frustrated with the inability of regulatory authorities in this country to provide charities with a capacity to operate their fundraising regimes in the 21st century. Time and again we raise concerns, we put out media releases, we get it on agendas, we get it on various kinds of reform agendas, red-tape reduction agendas, but it just doesn't happen. It's kind of a slap in the face for the charities sector, because you wonder, if we were a business sector that employed 1.3 million, would we still be asked to go through these really ridiculous regimes of regulation?¹

5.3 Dr Matthew Turnour, a lawyer who was also a member of the Australian Charities and Not-for-profit Commission (ACNC) Legislative Review Panel, echoed these sentiments, reporting to the committee that all stakeholders believed national reform was necessary; however, there was disagreement only in relation to how to achieve this. Dr Turnour told the committee:

...if there's one theme that comes through the ACNC review, and we heard this everywhere we went from state regulators as much as from anybody else in a sense, it's that everybody thinks that fundraising should be regulated at a national level. Everyone thinks that it's impossible to do it in any other fashion. The only difference is how it's done—whether it's done under the ACCC [Australian Competition and Consumer Commission] or whether it's done by its own national scheme.²

5.4 Dr Turnour was optimistic about change for the sector, observing that:

It's true that it's been on the agenda for 23 years, but I don't think it's had this much heat in it, this much excitement and this much anticipation in all of these years, and the time does seem to be right. To be very, very frank,

1 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, p. 39.

2 Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard*, 31 January 2019, p. 18.

the failure is political—nowhere else. Politicians have got to get this done. It's as simple as that. My view is they've got to do it at a national level, emanating from, with the greatest of respect, the federal parliament to start with, and do the deals that have to be done to create a national scheme just as we did for the Corporations Act nearly 40 years ago now.³

5.5 Throughout the inquiry no fundraising regulatory models from overseas were put forward as appropriate for the Australian context. Professor Myles McGregor-Lowndes, an expert on fundraising regulation, told the committee that despite his determined efforts he has been unable to find a suitable legislative fundraising model elsewhere, saying 'I've searched the world and I don't think that there's a model that I'd take bits out of to try to construct a national scheme here...'⁴

5.6 The committee heard that any reform should *lessen* the regulation that the charities and not-for-profit sector deals with. For example, Mr Paul Tavatgis, Director, Whipbird Consulting, told the committee:

I think it would be better to keep the existing regime rather than have a lengthy process or a partial change to the system, which actually adds additional requirements before old ones are removed. I think that would be counterproductive and would add to the inefficiencies of the system.⁵

5.7 Any model for reform must be suitable for all types of charity fundraisers, not just large organisations. Ms Tracy Adams, Chief Executive Officer, yourtown, urged the committee to be mindful of the capacity constraints that small organisations operate within when considering models of reform:

I think, whatever we end up going with, we cannot just build a model that suits one element of those who are working in the space of fundraising. We need to try and develop a way that creates genuine return and confidence for the charities and for the community, while being mindful that this is very diverse and can be complex. We've got organisations that might be totally volunteer based, right through to highly sophisticated charities.⁶

5.8 Proposals for reform raised with the committee throughout the inquiry included:

- amending the Australian Consumer Law (ACL) to ensure that all charitable fundraising activities are captured under the ACL;

3 Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard*, 31 January 2019, p. 18.

4 Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Proof Committee Hansard*, 31 January 2019, p. 15. See also p. 11.

5 Mr Paul Tavatgis, Director, Whipbird Consulting, *Proof Committee Hansard*, 31 January 2019, p. 2.

6 Ms Tracy Adams, Chief Executive Officer, yourtown, *Proof Committee Hansard*, 31 January 2019, p. 10.

-
- repealing existing state and territory fundraising legislation and relying primarily on the ACL;
 - introducing a national, mandatory code of practice for charitable fundraising activities; or
 - seeking harmonisation of state and territory fundraising laws, possibly through the development of template legislation.

Amendment to the ACL and repeal of state and territory legislation

5.9 A significant number of submitters and witnesses advocated for a solution to create a nationally consistent, contemporary and fit-for-purpose fundraising regulatory regime involving three elements:

- amendments to the ACL to ensure that all fundraising activities undertaken by charities and not-for-profits are included within the scope of the ACL;
- repeal of existing state and territory fundraising laws; and
- the introduction of a mandatory national code of conduct governing fundraising activities.

5.10 Justice Connect was the primary advocate of this proposed model, supported by a large number of other organisations as part of the #fixfundraising campaign.⁷

5.11 Each of the elements in this proposed model were discussed at length during the inquiry, and are considered here in turn.

Amending the ACL to ensure all fundraising activities are covered

5.12 As noted in Chapter 3, the ACL currently applies to fundraising activities that are undertaken 'in trade or commerce', which is likely to occur where these activities:

- involve the supply of goods or services;
- involve fundraising in an organised, continuous and repetitive way; or
- are undertaken by a for-profit professional fundraiser.

5.13 The obligations triggered by the ACL in such circumstances include that bodies fundraising in trade or commerce:

- must not engage in misleading or deceptive conduct or unconscionable conduct; and
- if the body's fundraising activities 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.

5.14 Justice Connect stated that minor amendments could be made to the ACL 'to ensure its application to fundraising activities for and on behalf of charities (and

7 Justice Connect, *Submission 49*, p. 3. According to Justice Connect, the #fixfundraising campaign has been supported by 'more than 235 organisations and individuals representing more than 570 charities'.

other not-for-profit organisations) is clear and broad'. It argued that this measure, when combined with the repeal of state-based fundraising regulations, would create a nationally-consistent, contemporary and fit-for-purpose fundraising model that is:

- **Stronger:** It would use the ACL supported by a mandatory code of conduct to put better protection of all donors at the heart of fundraising regulation across the nation, regardless of the method used to fundraise (or the location of the fundraiser);
- **Simpler:** It would use the ACL, which is principles-based regulation (backed by a process for nationally consistent reform) which would help capture innovation and changes to methods of fundraising without territorial limitations; and
- **Smarter:** It would create a truly modern, national system of regulation by removing duplicative and burdensome requirements for registration and reporting, allowing for ethical conduct to be central to all fundraisers and fundraising activity.⁸

5.15 Justice Connect provided a number of reasons why it considers the ACL to be a suitable platform for reform of fundraising, including:

- the core policy objectives of the ACL are congruent with the policy objectives of fundraising regulation (including: preventing practices that are unfair or contrary to good faith, are unconscionable or deceptive; helping people make informed decisions and protect them when they have been treated unfairly; and penalising those who have acted unfairly);
- the ACL represents a modern, principles-based approach to regulation of people and organisations, which would ensure that individuals and fundraisers are aware of their obligations without overly onerous registration and reporting requirements;
- through jurisdictional cooperation, the ACL can apply to any person (natural or corporate or resident overseas) who operates in Australia;
- the ACL is a well-understood piece of law, which means it is easier to explain to fundraisers and donors, and is likely to more quickly improve fundraiser behaviour;
- the ACL does not impose any additional regulatory burden on fundraisers and has been shown to be an effective method for both private enforcement and redress (not available under state-based laws) as well as regulatory pursuit of misconduct where it does occur;
- the amendments proposed to the ACL would be cost effective to implement and serve to broaden the remedies available to all ACL regulators;

8 Justice Connect, *Submission 49*, pp. 21–22.

-
- the ACL contemplates the development and enforcement of voluntary and mandatory industry codes, which would be appropriate and helpful in the fundraising context;
 - the regulators with oversight of consumer law are the same regulators concerned with fundraising laws; and
 - the current regulatory approach of the ACCC and state-based regulators of the ACL is a risk-based, proportionate approach.⁹

Specific amendments to the ACL

5.16 In terms of what specific amendments to the ACL would be required under this scenario, Ms Alice Macdougall of the Law Council of Australia stated:

[T]he provisions [of the ACL] that apply only to the supply of goods and services should be expanded to cover fundraising activities as well. That's the main area in relation to the ACL that would require tweaking.¹⁰

5.17 Justice Connect submitted that the ACL should be amended to achieve the following:

- without amending the definition of 'trade or commerce', ensure the following provisions apply to the fundraising activities of not-for-profits: section 18, (misleading or deceptive conduct), section 20 (unconscionable conduct) and section 29 (false or misleading representations); and
- in the context of fundraising activities, breaches of section 21 (unconscionable conduct), section 29 (false or misleading representations) and section 50 (harassment and coercion) should not be required to be in connection with the supply of goods and services in the context of fundraising activities of not-for-profits.¹¹

5.18 Justice Connect stated that the proposed changes would 'provide regulators with increased remedies to address serious fundraising misconduct'.¹² It suggested that its proposed amendments could be achieved by: creating a separate 'fundraising activities' provision in the ACL; adding a carve out for 'fundraising activities' to the relevant provisions; and inserting a definition of 'fundraising activities'.¹³

9 Justice Connect, *Submission 49*, pp. 24–26.

10 Ms Alice Macdougall, Deputy Chair, Charities and Not For Profits Committee, Law Council of Australia, *Committee Hansard*, 29 October 2018, p. 12. See also Mr Norman O'Bryan, AM SC, Private capacity, *Proof Committee Hansard*, 31 January 2019, pp. 22–23.

11 *Submission 49*, p. 24.

12 Justice Connect, answers to written questions on notice, 30 November 2018 (received 20 December 2018), p. 5.

13 *Submission 49*, p. 24.

ACCC view

5.19 The ACCC was not supportive of the proposal to deregulate state and territory fundraising regimes and rely on an amended ACL to regulate charitable fundraising. While acknowledging there is a strong case for reform to fundraising regulation, ACCC representatives cautioned that relying on the ACL as a cover for any poor conduct in the charitable fundraising sector 'would bring about regulatory gaps'.¹⁴ According to the ACCC, the ACL solution would not deliver:

- specific regulation requiring accountability and record keeping on the part of fundraisers; or
- proactive monitoring and surveillance of the fundraising sector to ensure compliance.¹⁵

5.20 The ACCC explained further in its submission:

The ACL and state and territory fund raising legislation cover fundamentally different areas of regulation. Broadly speaking, the ACL prohibits misleading or deceptive conduct and specific forms of unfair practices in dealings between businesses and consumers. It applies consistently to all sectors of the economy.

Unlike state and territory fundraising legislation, the ACL does not mandate that [not-for-profit] sector participants take specific positive courses of action. It does not require [not-for-profit] sector participants adopt accountability or transparency measures.

In response to concerns of governments and the public, some state and territory [not-for-profit] sector legislation contains specific probity and accountability measures designed to promote public trust and confidence in a sector that relies so heavily on voluntary contributions... The ACL is not designed to achieve such specific outcomes. It does not impose the licencing, financial reporting and other accountability requirements to which the [not-for-profit] sector is currently subject and which seek to ensure good governance and accountability.¹⁶

5.21 Mr Scott Gregson, Executive General Manager of the Mergers and Authorisation Review Division at the ACCC, noted that consumer law regulators, and in particular the ACCC, 'must scan and prioritise work across the economy':

[The ACCC is] not in a position to provide the same level of focus or expertise that industry-specific regulators do, and we've seen that in the

14 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 24.

15 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 31.

16 Australian Competition and Consumer Commission, *Submission 50*, pp. 2–3.

areas where there might be an expectation of the ACCC filling a gap, and it stretches our capacity to do that when we're looking across the economy.¹⁷

5.22 Ms Rose Webb, the New South Wales Fair Trading Commissioner, provided similar evidence to the committee that existing provisions of the ACL do not cover all the regulations that are required in relation to charitable fundraising.¹⁸

5.23 The ACCC also argued that removing the 'trade and commerce' filter that is currently applied to the ACL, or explicitly adding 'fundraising activities' to definitions in the ACL, may raise issues of constitutional validity, and more broadly may be expanding the ACL beyond its current scope. Mr Gregson commented:

A fundamental frame of the [ACL] is its application to conduct in trade or commerce. It's not intended to apply, for example, to conduct that might be engaged in in public or political debate. This both has a constitutional point and is a sound policy constraint on the legislation.

...We think the trade or commerce power—or the provisions, the framework—does appropriately delineate conduct that should be regulated by bodies such as the ACCC and conduct that shouldn't. We simply don't think our laws should be catching conduct in... things that have nothing to do with trade or commerce.¹⁹

Other submitter and witness views

5.24 Many submitters and witnesses were supportive of the proposal to extend the coverage of the ACL to fundraising activity and repeal state and territory regulation.²⁰

5.25 Some witnesses argued that amending the ACL to clarify its coverage of charitable fundraising would provide certainty for the sector, without noticeably increasing the operational burden on the ACCC in practice. For example, Mr David Crosbie, Chief Executive Officer of the Community Council for Australia, commented:

No-one is asking the ACCC to be a regulator for the charities sector... We just want to ensure that the small area of interaction around fundraising that

17 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 24.

18 Ms Rose Webb, New South Wales Fair Trading Commissioner, *Committee Hansard*, 7 November 2018, p. 37. See further information in Chapter 3.

19 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, pp. 23 and 25.

20 See, for example: Australian Council of Social Services, *Submission 10*, p. 2; CPA Australia, *Submission 44*, p. 1; Chartered Accountants Australia and New Zealand, *Submission 40*, p. 3; Community Council for Australia, *Submission 43*, p. 5; Law Council of Australia, *Submission 47*, p. 7; Philanthropy Australia, *Submission 77*, p. 5; Ms Lavanya Kala, Policy Manager, Volunteering Australia, *Committee Hansard*, 7 November 2018, pp. 7 and 12.

is not clearly, definitely covered by the Australian Consumer Law is covered, which would require some minor amendments.²¹

5.26 Mr Crosbie argued that all donations should be considered consumer interactions and come under the remit of the ACL:

ACCC are about consumer issues. The point at which they knock on my door and ask, 'Will you donate to this charity?' and I donate to the charity and then it's not a charity, that's ACCC. We know it already is. That's what's being prosecuted. If they take the money and use it completely differently, that's an ACCC issue. It is already. It's misleading and deceptive conduct. I don't think we necessarily need any major beefing of any laws. We just need to make it very clear—and apparently, the lawyers tell me, you can do this with some minor legislative changes—that all donations should be treated as consumer interactions. I think that's fair enough.²²

5.27 It was also pointed out that under the ACL's multi-regulator model, most regulatory action relating to fundraising activities would continue to be undertaken by state and territory regulators, with the ACCC only becoming involved in particularly significant or national cases. Further, it was highlighted that in a recent high-profile case of wrongdoing by a charitable fundraiser, the Victorian regulator had chosen to seek remedy in the courts using penalty provisions available under the ACL, rather than remedies available under state-based fundraising legislation.²³

5.28 Mr Norman O'Bryan, SC, further explained the Justice Connect submission, and expressed doubt that clarification of ACCC jurisdiction in relation to the application of the ACL's coverage of fundraising was 'really necessary'. In relation to ACCC comments about the constitutionality of adding fundraising to the ACL, Mr O'Bryan stated:

If the Commonwealth is going to pass a small amendment to the ACL—and the ACL is state and territory legislation for practical purposes—there is no constitutional impediment whatsoever. The ACL is passed by the Commonwealth, but it is a schedule to the act, it is picked up by the states and it applies in the states. That is absolutely constitutionally bombproof.²⁴

5.29 Dr Matthew Turnour, Lawyer and member of the Review Panel of the ACNC Legislation, suggested that 'shoehorning' charities into the ACL and under the oversight of the ACCC was better than nothing; however, he and others proposed that a national scheme for not for profit and charities law was a better option:

21 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, p. 39.

22 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, p. 46.

23 Ms Sue Woodward, Head, Not-for-profit Law, Justice Connect, *Committee Hansard*, 29 October 2018, pp. 3 and 5.

24 Mr Norman O'Bryan, AM SC, Private capacity, *Proof Committee Hansard*, 31 January 2019, p. 23.

A national scheme focused on the not-for-profit space is the ideal. If we can't do that, then we can force the ACCC to go as far as it can within its constitutional powers.²⁵

5.30 This proposal is discussed in more detail below.

Role of the ACNC under a new regulatory model

5.31 The current role of the ACNC in regulating aspects of charitable fundraising was discussed in detail during the inquiry, as well as questions of how that role could evolve as part of a revised regulatory regime.

5.32 Some submitters and witnesses suggested that the ACNC's current functions, involving registration of charities and overseeing governance and reporting requirements, are sufficient to regulate charitable fundraising when combined with a strengthened ACL.²⁶

5.33 Legal firm Mills Oakley suggested that the ACNC could oversee the assessment of fundraising licences across all states and territories, as well as the reporting and auditing of charitable fundraising, while leaving investigation of poor fundraising conduct to be regulated under the ACL framework. Ms Vera Visevic from Mills Oakley explained:

...an organisation could obtain a licence from the ACNC, subject to them having ticked off meeting certain criteria, and on a yearly basis they would then report, put in audited accounts and so on.

The ACCC would then have the powers to actually determine whether or not an organisation with a licence has breached any of the provisions of the ACL... Then, if the ACCC investigated that organisation and found there had been a breach of the ACL, that could be a ground upon which the ACNC could then revoke that licence.²⁷

5.34 This was echoed by Mr John Mikelsons from the Australian Council of Social Service, as discussed in Chapter 4. Mr Mikelsons argued that the ACCC should regulate conduct via the ACL, while the ACNC should take the role of sector-specific regulator and oversee reporting.²⁸

5.35 The ACCC was in favour of expanding the role of the ACNC to more comprehensively regulate the not-for-profit sector, rather than a solution involving expansion of, or reliance on, the ACL:

25 Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard*, 31 January 2019, p. 14.

26 See, for example, Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, pp. 44–45.

27 Ms Vera Visevic, Partner, Mills Oakley, *Committee Hansard*, 30 October 2018, p. 34. See also Mills Oakley, *Submission 64*, p. 5.

28 Mr John Mikelsons, Senior Policy and Advocacy Officer, Australian Council of Social Service, *Committee Hansard*, 7 November 2018, p. 4.

The ACNC has an existing role in regulating the NFP [not for profit] sector. The ACNC Act could be amended to expand this role. Expanding the role and functions of the ACNC would allow for a nationally consistent approach to probity, financial reporting and accountability measures.

If this approach were adopted, it would be critical to ensure that the ACNC has the appropriate enforcement, compliance and investigative tools and adequate resources to provide meaningful oversight.²⁹

Registration and licensing requirements

5.36 The fact that some jurisdictions (namely South Australia and the ACT) have already streamlined their fundraising licensing requirements to allow for registration to occur through the ACNC was used as supporting evidence that the ACNC could take on this role for all jurisdictions.³⁰

5.37 On the question of the best way to register or licence fundraising operators, the Fundraising Institute of Australia argued that creating a single national register of fundraising entities, ideally through the ACNC charity portal, was the most promising way forward:

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.³¹

5.38 Ms Tania Burstyn, Managing Director of Mycause, argued that licensing or registering requirements for fundraisers are ineffective at preventing bad behaviour in any case:

What is the material difference if I am fundraising for the Cancer Council or I'm fundraising for my friend with cancer if, in fact, I do not pass the funds to the beneficiary as I said I would or, in fact, if I state I have cancer even if I do not? I've committed fraud no matter who the beneficiary is, I've committed fraud no matter which entity or nonentity I represent, and I've committed fraud even if the charity that I purport to represent is registered in seven states and territories.

29 Australian Competition and Consumer Commission, *Submission 50*, pp. 4–5.

30 See, for example, Dr Lisa O'Brien, Chief Executive Officer, The Smith Family, *Committee Hansard*, 30 October 2018, p. 30.

31 Fundraising Institute Australia, *Submission 28.1: Supplementary to submission 28*, p. 5.

The state regulations do not stop this fraud and are, in fact, unworkable in this context... We believe it is up to the donor to take personal responsibility for their donation. It seems nonsensical for a charity to be registered in each state when a fundraiser could, in fact, claim to fundraise for that charity without the charity's knowledge or approval and without any registration anyway.³²

5.39 Dr Ted Flack argued that a basic level of registration or licensing for organisations undertaking not-for-profit fundraising is still required in order to maintain public trust in the sector. Dr Flack stated that licensing requirements for fundraising organisations could be kept to a bare minimum, sufficient only to demonstrate to consumers that the organisation is making a properly constituted request for funds in relation to a recognised philanthropic or not-for-profit purpose.³³ Dr Flack argued that such a licensing system could be enforced through a simple complaint mechanism, involving either the ACNC or state and territory regulators.³⁴

Practicality of repealing state and territory fundraising legislation

5.40 Several witnesses expressed doubt that repealing state and territory fundraising legislation, as part of a solution involving reliance on the ACL, was practically achievable. Mr Derek Mortimer, Principal at DF Mortimer & Associates, while supportive of a repeal of state and territory regulation, did not consider that this was feasible:

I don't oppose Justice Connect's submission. If states were to repeal their legislation, that's fantastic. But, by the same token, the regulators haven't listened to Justice Connect's submissions [in the past]. Nor have the regulators listened to the Productivity Commission about harmonising. So we're in a position where something has to give, and I'm not confident that states and territories are simply going to line up en masse and repeal their legislation in the way that Justice Connect would perhaps like them to.³⁵

5.41 The Fundraising Institute of Australia (FIA) stated similarly:

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 [of] any single, national regime if any real reduction in red tape were to be achieved.³⁶

32 Ms Tania Burstin, Founder and Managing Director, Mycause, *Committee Hansard*, 29 October 2018, pp. 25–26.

33 Dr Ted Flack, Private capacity, *Proof Committee Hansard*, 31 January 2019, p. 29.

34 Dr Ted Flack, Private capacity, *Proof Committee Hansard*, 31 January 2019, p. 29.

35 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Committee Hansard*, 29 October 2018, p. 21.

36 Fundraising Institute Australia, *Submission 28.1: Supplementary to Submission 28*, p. 5.

Mandatory Code of Conduct for fundraising activities

5.42 Some witnesses and submitters expressed support for a fundraising code of conduct, with various suggestions about the type of code and what it would contain.³⁷

5.43 Ms Geraldine Magarey, Leader Research and Thought Leader at Chartered Accountants Australia and New Zealand, informed the committee a national fundraising code of conduct would provide guidance and consistency across the sector in how fundraising activities are to be conducted:

We feel that the code of conduct would be a sort of 'how to' in terms of what needs to be done. Obviously, legislation deals with definitions et cetera and the letter of the law, but in terms of how to enact the law we feel that a code of conduct would be very beneficial. A mandatory one which would then be consistent—a simplified one—is probably the way to go, not to complicate things and turn it in its own right into a massive legal document.³⁸

5.44 Dr Lisa O'Brien, Chief Executive Officer of The Smith Family, suggested that a code of conduct would increase confidence in the sector:

[I]t's in everyone's interest that there is consistent and effective fundraising across the country. I think having a code of conduct that all fundraisers adhere to will better ensure that and that it will enhance the reputation of organisations that fundraise.³⁹

5.45 Dr O'Brien stated that a code of conduct could also be useful insofar as it may give the states and territories the confidence necessary to remove other regulatory requirements in individual jurisdictions:

South Australia has already removed its requirement for local registration as a fundraising organisation. We need more states to follow that lead. But I think it's also about having a framework in place that will address the concerns of the states and jurisdictions around registration. I suspect the code of conduct would assist with that as well, because in essence the states are concerned about conduct. If there's a mandatory code that all fundraisers adhere to, that would give some confidence as well and address some of their concerns about local activity.⁴⁰

37 For example, Mr Alex Milner, Member, Not for Profit and Charities Law Committee, Law Institute of Victoria, *Committee Hansard*, 29 October 2018, p. 43; Justice Connect, *Submission 49*, p. 21; Whipbird Consulting, *Submission 60*, p. 60; Australian Red Cross Society, *Submission 63*, p. 5; DF Mortimer & Associates, *Submission 6*, p. 3.

38 Ms Geraldine Magarey, Leader Research and Thought Leader at Chartered Accountants Australia and New Zealand, *Committee Hansard*, 30 October 2018, p. 11.

39 Dr Lisa O'Brien, Chief Executive Officer for The Smith Family, *Committee Hansard*, 30 October 2018, p. 29.

40 Dr Lisa O'Brien, Chief Executive Officer, The Smith Family, *Committee Hansard*, 30 October 2018, p. 30.

5.46 Ms Alice Macdougall, Deputy Chair for the Charities and Not for Profits Committee at the Law Council of Australia, observed that a code may not in fact be necessary:

On a review of everything that all the governments want covered, the conclusion may be that the current principle-based laws in the ACNC Act and in the ACL are sufficient to cover all areas relating to fundraising activities. The code of conduct may only be necessary if there are particular aspects which the state and territory governments may insist on in order for them to be comfortable in repealing the laws. In my view, it will depend on what is in that code of conduct, if in fact there is one, as to what the issues will be. It's almost too difficult to talk about how you would do it, who would be the regulator and if it can or can't be done until we can actually identify if in fact there is anything that needs to be in the code of conduct.⁴¹

5.47 Ms Macdougall further added:

[I]f a code of conduct is needed in order to make sure that this fundraising legislation is repealed then, yes, we support it, but at this stage it's not clear that it is actually needed. I think that the states and territories will perhaps provide guidance on what they would need to see in order for them to be comfortable repealing the legislation. If the only way to satisfy that requires a code of conduct then we support the code of conduct.⁴²

5.48 Ms Sue Woodward, the Head of Not-for-profit Law at Justice Connect, suggested that a mandatory fundraising code of practice could be introduced under the *Competition and Consumer Act 2010* (CCA) and enforced by the ACCC, as is the case for other industry codes:

We've had specialist legal pro bono advice to say that there's no reason why another code of conduct couldn't be enforced using the multiregulator approach. It's just a matter of the drafting—just because it hasn't been done exactly that way before. There's no legal impediment that we're aware of, and nothing has been pointed out to us to say that that's not possible. The ACNC review panel reached that same conclusion.⁴³

5.49 Similarly, the Public Fundraising Regulatory Association recommended the creation of a unified 'Australian Fundraising Standard' which would 'cover many of the specific requirements found in the state fundraising laws'. They emphasised that this should be contingent on the repeal of state and territory laws.⁴⁴

41 Ms Alice Macdougall, Deputy Chair, Charities and Not for Profits Committee, Law Council of Australia, Senate Select Committee on Charity Fundraising in the 21st Century, *Committee Hansard*, 29 October 2018, p. 10.

42 Ms Alice Macdougall, Deputy Chair, Charities and Not for Profits Committee, Law Council of Australia, Senate Select Committee on Charity Fundraising in the 21st Century, *Committee Hansard*, 29 October 2018, p. 13.

43 Ms Sue Woodward, Head, Not-for-profit Law, Justice Connect, *Committee Hansard*, 29 October 2018, p. 8.

44 Public Fundraising Regulatory Association, *Submission 25*, pp. 5–6.

5.50 The FIA argued against the imposition of a mandatory code administered by the ACCC:

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.

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.⁴⁵

5.51 Mr Scott McClellan, Executive Manager, Code and Regulatory Affairs for the FIA, gave evidence that, in contrast to voluntary industry codes of practice:

...A mandated, mandatory code is quite a different beast. We are talking about black-letter law here. It is regulation by another name. I would caution that we should be careful what we ask for when we're seeking a mandated code. [I]f we go down the path of a regulated, mandatory code without the agreement of the states to resile from the space, we could have the perverse outcome of yet another layer of red tape imposed on the sector. That would be, as you say, the worst outcome for us.⁴⁶

5.52 The ACCC did not support the introduction of a mandatory code of conduct located in the CCA, stating:

...the policy objectives of state-based NFP sector regulation are fundamentally different to the policy objectives of the CCA and of industry codes specifically... [T]he policy objectives of industry codes align with the broader policy objectives of the CCA and ACL to enhance the welfare of Australians through the promotion of competition and fair trading... Industry codes do this by addressing market failures which need specific regulation... These objectives are fundamentally different to the accountability and probity objectives of state-based NFP sector legislation.

Further, a CCA industry code for the NFP sector would not cover the entire sector. This is because industry codes are subject to the same trade or commerce limitation as the ACL... It would not lead to the industry-wide coverage and harmonisation that the NFP sector desires.⁴⁷

Voluntary codes of practice and industry standards

5.53 As noted in Chapter 3, several voluntary, self-regulatory codes of practice already exist in different parts of the charitable fundraising sector in Australia.

45 Fundraising Institute Australia, *Submission 28.1: Supplementary to submission 28*, pp. 2, 4.

46 Mr Scott McClellan, Executive Manager, Code and Regulatory Affairs for Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 4.

47 Australian Competition and Consumer Commission, *Submission 50*, pp. 3–4.

5.54 The FIA administers a voluntary, self-regulatory code of conduct for its members that governs their fundraising activities. FIA representatives noted that nearly 80 per cent of Australian charities that fundraise more than half a million dollars annually are FIA members and subject to this code of conduct.⁴⁸ It argued that any revised regulatory regime for charitable fundraising in Australia must recognise the importance of voluntary industry codes:

Under any future regulatory regime for the charitable and not for profit fundraising sector, FIA believes there will continue to be an important role for its Code to establish and promote an ethical framework that balances broader community interests, including those of charity beneficiaries who often lack a voice in policy debates.

FIA suggests that the Committee recommend a greater role for self-regulation to maintain trust and confidence in charities by promoting best practice and ethical conduct in fundraising activity.⁴⁹

5.55 Mr Peter Hills-Jones, Chief Executive Officer of the Public Fundraising Regulatory Association, the self-regulatory body for face to face fundraising in Australia, argued similarly that self-regulatory codes are an important component of a well-functioning regulatory framework:

Our members submit to a self-regulatory, voluntary code. We have the power to issue breaches, which lead to penalty fines, and in 2019 we're moving to a new penalty system that we hope will be much more effective in terms of deterring poor behaviour. We also have the power to suspend and terminate our members, and we terminated four members last year for a variety of reasons. I suppose, really, it's dispelling the myth that self-regulation is somehow lesser than state regulation, or less effective. In many ways, it is more flexible, more responsive and closer to the ground than state regulation.⁵⁰

Harmonisation of states and territory legislation

5.56 Some submitters and witnesses suggested that pursuing harmonisation of state and territory fundraising legislation may be preferable to attempting to pursue national regulation through the ACL.

5.57 The ACCC proposed that 'a uniform state code could be adopted in each jurisdiction', in which states and territories would remain responsible for regulation and enforcement. It noted the importance of state and territories responsible for administering such a code having 'the appropriate enforcement, compliance and investigative tools and adequate resources to provide meaningful oversight'.⁵¹

48 Mr Scott McClellan, Executive Manager, Code and Regulatory Affairs, Fundraising Institute Australia, *Committee Hansard*, 30 October 2018, p. 6.

49 Fundraising Institute of Australia, *Submission 28*, p. 8.

50 Mr Peter Hills-Jones, Chief Executive Officer, Public Fundraising Regulatory Association *Proof Committee Hansard*, 31 January 2019, p. 31.

51 Australian Competition and Consumer Commission, *Submission 50*, p. 5.

5.58 Mr David Crosbie from the Community Council for Australia expressed scepticism that harmonisation of state and territory fundraising regulation would ever occur, after numerous failed attempts in the past:

I hear that we need to 'harmonise'. I'm not a young man, but I think I've heard that phrase for well over a decade. I've watched enthusiastically from the sideline as various COAG [Council of Australian Governments] committees, led by this jurisdiction or that jurisdiction, have sought to do this—even the federal Treasury at one point, frustrated with the inability to harmonise fundraising regulations, put out their own discussion paper about possible federal legislation. Of course, what that did was stimulate the states to say, 'We should harmonise,' and we entered the process of failure again where we didn't harmonise. I well remember we had it on the agenda for consumer affairs ministers—I think it was in 2012 or 2013... and it was taken off the agenda because it wasn't seen as a significant issue by the consumer affairs ministers. And I have to say that my board asked me to criticise that very strongly.⁵²

5.59 Mr Scott Gregson, Executive General Executive General Manager, Mergers and Authorisation Review Division at the ACCC, took a different view, and cautioned against adopting an approach other than harmonisation simply because harmonisation in this area of law has been difficult to achieve thus far:

[H]armonisation of state and territory laws is a fairly common feature of Federation, particularly in the last number of decades. There are a number of success stories, including the way in which states, territories and the Commonwealth worked on the Australian Consumer Law, health regulation and food standards... The fact that that hasn't been able to be achieved [in the area of fundraising legislation] by governments isn't, in our view, a reason to look for a second, third or fourth best model. It should be up to those governments to get together and agree on what harmonisation and deregulation might look like.⁵³

5.60 The FIA stated similarly:

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... 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

52 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, 7 November 2018, p. 39.

53 Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division, Australian Competition and Consumer Commission, *Committee Hansard*, 7 November 2018, p. 28.

have not aligned their annual financial reporting requirements with the ACNC annual information statement.⁵⁴

5.61 The FIA argued that in order to further the harmonisation agenda, various actions are required, including the following:

- all Australian governments commit to harmonise fundraising regulation within an agreed time limit of two years;
- re-establish the COAG Not-for-profit Working Group to elevate fundraising regulation reform;
- restore fundraising reform and charity/NFP issues to the COAG agenda;
- create a greater role for the ACNC Charity Portal to facilitate alignment and harmonisation of fundraising regulation; and
- centralise overall responsibility for fundraising issues at Commonwealth level under one senior minister.⁵⁵

5.62 Professor Myles McGregor-Lowndes from the Australian Centre for Philanthropy and Nonprofit Studies at Queensland University of Technology also argued that harmonisation was urgently required, noting that the increasing use of the internet for 'frauds and scams' poses 'a great risk to charities and their reputations'.⁵⁶

Harmonisation through the use of template legislation

5.63 Mr Derek Mortimer from DF Mortimer & Associates suggested that ministerial agreement on the Co-operatives National Law proved that ministers responsible for fundraising were able to develop 'template legislation' to achieve harmonisation across jurisdictions. Template legislation, he explained:

...is where a host jurisdiction creates a law and that particular law is then adopted by the other jurisdictions... These laws can be used to create congruence. They can also be used to modernise laws and they can also be used to address the problem of multiple registrations and reporting that besets the charitable fundraising industry.⁵⁷

5.64 Mr Mortimer used the intergovernmental agreement on the Co-operatives National Law as an example of template legislation.⁵⁸ In this agreement, state and

54 Fundraising Institute Australia, *Submission 28.1: Supplementary to Submission 28*, p. 6.

55 Fundraising Institute Australia, *Submission 28*, p. 2.

56 Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Proof Committee Hansard*, 31 January 2019, p. 14.

57 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Committee Hansard*, 29 October 2018, p. 19.

58 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Committee Hansard*, 29 October 2018, p. 19.

territory ministers agreed in 2007, via the forum of the Ministerial Council for Consumer Affairs, to implement uniform legislation on co-operatives.⁵⁹

5.65 New South Wales is the host jurisdiction for the Co-operatives National Law. The New South Wales Parliament passed the *Co-operatives (Adoption of National Law) Act 2012* in May 2012, which includes the template Co-operatives National Law. As of December 2018, all jurisdictions except Queensland had introduced enabling or consistent co-operatives laws with the New South Wales template legislation.⁶⁰

5.66 The Ministerial Council for Consumer Affairs noted that the Co-operatives National Law remade pre-existing:

...co-operatives legislation as laws of each State and Territory in a uniform manner. The terms of the supporting inter government agreement permits a jurisdiction to make consistent legislation as well as applying the Co-operatives National Law as a template.⁶¹

5.67 Co-operatives that have registered in a jurisdiction that has adopted the Co-operatives National Law or passed consistent co-operatives legislation have authority to carry on business in other jurisdictions. The Law includes a civil penalty regime for breaches of duties that are not criminal in nature.⁶² The Ministerial Council for Consumer Affairs stated that the Co-operatives National Law scheme sits within the legislative powers of states and territories, and 'makes no provision which directly impacts upon federal laws, other than the Corporations legislation'.⁶³

59 Ministerial Council for Consumer Affairs, *Co-operatives: A National Approach. Co-operatives National Law – Decision Making Regulatory Impact Statement*, <https://ris.pmc.gov.au/sites/default/files/posts/2012/02/02-Cooperatives-National-Law-RIS.pdf> (accessed 17 December 2018), p. 3.

60 New South Wales Fair Trading, *Co-operatives national law*, <https://www.fairtrading.nsw.gov.au/associations-and-co-operatives/co-operatives/about-co-operatives/co-operatives-national-law> (accessed 17 December 2018).

61 Ministerial Council for Consumer Affairs, *Co-operatives: A National Approach. Co-operatives National Law – Decision Making Regulatory Impact Statement*, <https://ris.pmc.gov.au/sites/default/files/posts/2012/02/02-Cooperatives-National-Law-RIS.pdf> (accessed 17 December 2018), p. 3.

62 Ministerial Council for Consumer Affairs, *Co-operatives: A National Approach. Co-operatives National Law – Decision Making Regulatory Impact Statement*, <https://ris.pmc.gov.au/sites/default/files/posts/2012/02/02-Cooperatives-National-Law-RIS.pdf> (accessed 17 December 2018), p. 8.

63 Ministerial Council for Consumer Affairs, *Co-operatives: A National Approach. Co-operatives National Law – Decision Making Regulatory Impact Statement*, <https://ris.pmc.gov.au/sites/default/files/posts/2012/02/02-Cooperatives-National-Law-RIS.pdf> (accessed 17 December 2018), p. 9.

5.68 Mr Mortimer asserted that a template approach to harmonisation of state and territory laws would need to begin with 'an agreement at the Legislative and Governance Forum on Consumer Affairs' between the various jurisdictions.⁶⁴

5.69 Dr Ted Flack put forward a similar proposal for the development of National Model Fundraising Regulation as 'the most practical means of reforming fundraising regulation in Australia', with the following steps:

Step 1. The Commonwealth Government appoints an expert panel to develop a National Model Fundraising Regulation in close consultation with State and Territory regulators and not-for-profit peak bodies.

Step 2. Negotiate the progressive amendment of State and Territory existing fundraising legislation to comply with the agreed National Model.

Step 3. Amend the ACNC legislation to include powers to allow the ACNC to regulate the fundraising activities of charities in accordance with the National Model. (State and territory regulators would continue to regulate non-charity, not-for-profit fundraising entities.)

Step 4. Negotiate with State and Territory fundraising regulators for a 'report once' arrangement for ACNC registered charities to reduce the compliance costs of reporting both to the ACNC and State and Territory fundraising regulators.⁶⁵

5.70 Justice Connect did not support the use of template legislation as an appropriate way forward in relation to fundraising reforms, stating that 'this model of legislative change is not the best model to regulate fundraising conduct across the nation' for the following reasons:

- the commencement of legislation in each jurisdiction would be delayed because of state election cycles and corresponding changes of government;
- the legislation would be unnecessary, given existing reporting requirements to the ACNC and existing regulations governing conduct in the ACL;
- the legislation regulating charities at the state and territory levels is marked by much greater inconsistency than was the case for co-operatives; and
- the pace at which fundraising practices are changing could mean that by the time template legislation was developed and enacted, it would be out-of-date.⁶⁶

Development of a national scheme for charities and not-for-profits

5.71 The committee heard that there were alternatives to relying on the ACL and the ACCC for fundraising regulation. For example, while acknowledging that this

64 Mr Derek Mortimer, Principal, DF Mortimer & Associates, *Committee Hansard*, 29 October 2018, p. 24.

65 Dr Ted Flack, *Submission 91*, pp. 7–8.

66 Justice Connect, answers to written questions on notice, 30 November 2018 (received 20 December 2018), pp. 2–4.

option had some merit, Dr Matthew Turnour, Lawyer and member of the Review Panel of the ACNC Legislation, argued that the 'proper' and 'best' option would be a more comprehensive 'national scheme focused on charities' and not for profits.⁶⁷ At the Brisbane hearing, Dr Turnour explained his position:

To put [this issue] in a broader legal context, there's a body of law for government and administration and it's centred on the constitution and administrative law. That regulates the power of government and its limits. There's a body of law that deals with families and justice within families around family law in states and so on and so forth. There's a body of law which centres on the regulation and support of the market. It's centred on the concept of contract law and qualifications to that. What's emerging at the end of the 20th and the beginning of the 21st century is a body of law around the not-for-profit space. It focuses on two things: the enabling and the encouraging of voluntary participation and giving.

What we are endeavouring to do if we force this solution under the ACCC is to try to shoehorn the not-for-profit law under the commercial law rubric because we can't get it anywhere else, but the logical development is to develop a national scheme of non-profit law in the same way that we developed a national scheme of corporations law, consumer law and so on. So my strong personal preference is for us to develop a national non-profit law scheme—and I say non-profit, not just charity, because, whilst it will be centred on charity law, charities actually make up a relatively small percentage of the total civil society space.⁶⁸

5.72 This proposal is broader in scope than addressing just the issue of fundraising regulation, and would presumably face similar criticisms from Justice Connect and others who value expediency. However, the committee notes that the legislative and administrative reforms called for by Justice Connect and others would also take time.

Harmonising local regulations in relation to face-to-face fundraising activities

5.73 As noted in Chapter 3, charities conducting face-to-face fundraising are also subject to regulation by local councils, governing issues such as the use of public spaces for fundraising activities. Mr Peter Hills-Jones, Chief Executive Officer of the Public Fundraising Regulatory Authority, commented that this creates an additional layer of regulatory burden for charities:

I think it's also worth emphasising, for street and door-to-door fundraising... the role of local councils. Around 80 per cent of local councils, for instance, also issue permits for face-to-face fundraisers, so effectively charities are submitting to three tiers of registration, a federal, state and local level, to collect money to help people in need. I think if you were to compare that regulatory structure to some other areas of the

67 Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard*, 31 January 2019, p. 12.

68 Dr Matthew Turnour, Chairman, Neumann and Turnour Lawyers, *Proof Committee Hansard*, 31 January 2019, pp. 12–14.

economy that are potentially creating harm to local communities—it's a frustration of charities that they are subject to that degree of regulation.⁶⁹

5.74 Mr Paul Tavatgis told the committee that inconsistencies in the rules applied by different local authorities in relation to fundraising permits can create significant costs for the sector:

When it comes to the local authority situation... [t]here are many different forms of rules. There is no consistency across local authorities, which means that charities or third-party fundraising businesses need to maintain significant teams of people to, essentially, liaise with local authorities on a week-to-week basis to ensure that their fundraisers have the correct permits in order to fundraise in each local authority area. That absorbs a huge amount of overhead. Charities are immensely conscious of overhead as being something that gets public scrutiny. They may want to minimise it. They want to direct as many funds as possible to the services they deliver. A significant face-to-face fundraising system may have as many as two, three or even four full-time staff solely working on that bureaucratic exercise.⁷⁰

5.75 Mr Tavatgis argued greater uniformity is required in this area:

There could be some form of consistency in that process if there were a uniform code of conduct that many local authorities could sign up to, or a uniform system for managing the practicalities of where people are going to stand and what days they're going to stand there. That would save tens of thousands of dollars—probably more—every year, I'd imagine. If the staff were involved, it would probably be in the hundreds of thousands of dollars.⁷¹

5.76 Professor McGregor-Lowndes proposed that the creation of a model code or set of by-laws for local councils to adopt would be a useful way forward in the regulation of 'public nuisance' issues associated with face-to-face fundraising:

We think local authorities are the best to deal with that [face to face conduct on] the streets. They can decide where fundraisers should stand on the street; in communities with vulnerable people, like Indigenous communities, they can decide whether fundraisers should be allowed in to canvass at all. I would suggest that that could be largely harmonised if the professional bodies got together and formed a code or drafted a model set

69 Mr Paul Tavatgis, Director, Whipbird Consulting, *Proof Committee Hansard*, 31 January 2019, p. 2.

70 Mr Paul Tavatgis, Director, Whipbird Consulting, *Proof Committee Hansard*, 31 January 2019, p. 2.

71 Mr Paul Tavatgis, Director, Whipbird Consulting, *Proof Committee Hansard*, 31 January 2019, p. 2.

of by-laws for local councils—one for cities, one for regional towns and one for rural areas. Local government is best for that public nuisance.⁷²

Committee view

5.77 The committee appreciates the position of Justice Connect and others: the time for action to reform fundraising regulation in Australia was more than 20 years ago. The committee commends Justice Connect for its significant work in mobilising the charity sector and highlighting the need for urgent action on fundraising reform. The committee is grateful to the witnesses and submitters to this inquiry who have each taken the time to carefully prepare submissions and appear at public hearings, despite the number of previous inquiries examining this issue that have not borne results of any significance. The committee expects that this trend will end with this report.

5.78 The committee has received a large number of thoughtful and intelligent proposals to address the current regulatory situation. Each of these has strengths and weaknesses, supporters and detractors. All participants agree that action must be taken immediately and that any reform is better than nothing, as long as it lessens the regulatory burden.

5.79 It is rightly the concern of many stakeholders to the inquiry that a regulatory fix be implemented as quickly as possible. However, the committee has sought to balance calls for expediency against the need to ensure that the proposed solution results in a concrete reduction of red tape for fundraising organisations and has the necessary support of all relevant stakeholders.

5.80 In this context, it is worth noting that any solution will necessarily involve the input and cooperation of state and territory governments. Even minor amendments to the Australian Consumer Law, as advocated for as part of the Justice Connect proposal, require ratification by the states and territories. Options involving the harmonisation of state and territory fundraising legislation would involve more significant work to reach consensus outcomes.

Government response to ACNC legislation review panel recommendations

5.81 As discussed in Chapter 2, in December 2017 the Australian Government announced an independent review of the ACNC's enabling legislation. The report and recommendations were provided to the government in May 2018 and on 22 August 2018 the Australian Government tabled the report. The government is yet to provide a formal response to the panel's recommendations. Recommendations relevant to this inquiry include:

72 Professor Myles McGregor-Lowndes, Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology, *Proof Committee Hansard*, 31 January 2019, p. 12.

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.

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.

5.82 The committee considers that an urgent response to the review panel's report is required, to inform possible future reforms to fundraising regulations; indeed the Consumer Affairs Ministers' forum has delayed its consideration of harmonising charitable statutory regimes until a response is provided.⁷³

Recommendation 1

5.83 The committee recommends that the Australian government urgently provide a public response to the recommendations made in the review panel's report, *Strengthening for Purpose: Australian Charities and Not-for-profits Commission Legislation Review*.

A way forward for reform of national fundraising regulation

5.84 The Australian Government does not currently have a policy position on fundraising regulation for the charity and not-for-profit sector (other than the default policy of maintaining the status quo). The committee considers that a policy response is long overdue. Submitters and witnesses generally support that any reforms to charity fundraising laws must contain the following elements:

- (a) A truly national scheme
- (b) Simple and modern
- (c) Address the regulation at all three levels of government
- (d) Reduction of red tape for the sector
- (e) If there is a code of conduct, any rules must be expressed as principles (this means the document is dynamic and can respond quickly to the emergence of new technologies and methods of fundraising)

73 Legislative and Governance Forum on Consumer Affairs, *Joint Communique: Meeting of Ministers for Consumer Affairs*, 26 October 2018, p. 6. See also Chapter 2 of this report.

- (f) Apply to all charities and not-for-profits, and be tailored to the needs of both large and small fundraisers

5.85 Given the lack of consensus from expert witnesses before the committee about which specific model of regulation should be adopted, and the necessity of working closely with the states and territories to achieve either harmonisation or complete repeal of state and territory fundraising regulations, it is difficult for the committee to recommend a detailed regulatory model for immediate implementation. However, the Australian Government must demonstrate a commitment to achieve urgent reform.

5.86 The committee considers that the Commonwealth, State and Territory governments should commit to developing a nationally consistent model for the regulation of charitable and not-for-profit fundraising within a time limit of two years.

Recommendation 2

5.87 The committee recommends that the Australian Government commit to working with state and territory governments and the not-for-profit sector to develop a consistent national model for regulating not-for-profit and charitable fundraising activities within a time limit of two years.

Senator Catryna Bilyk
Chair
Senator for Tasmania

Senator Rachel Siewert
Deputy Chair
Senator for Western Australia

Appendix 1

Submissions, tabled documents and answers to questions on notice

Submissions

- 1 Heart Support Australia Ltd
- 2 Ms Nicky Dangar
- 3 Ms Bridie Smith
- 4 Ms Pamela Hyland
- 5 WISA Wellbeing in Schools Australia
- 6 DF Mortimer & Associates
- 7 Lasallian Foundation
- 8 Australian Charities and Not-for-profits Commission
- 9 Australian Communities Foundation
- 10 Australian Council of Social Service
- 11 mycause
- 12 Oceania Province
- 13 Aged & Community Services Australia
- 14 Addministry Inc
- 15 Sea Mercy Australia
- 16 Australian Wildlife Society
- 17 AWARE Wildlife Rescue
- 18 Warrnambool Surf Life Saving Club
- 19 Maydena Community Association Inc
- 20 Historical Society of Mooroopna Inc
- 21 Christina Noble Children's Foundation - Australia/New Zealand
- 22 JusticeNet SA
- 23 Melbourne Fringe
- 24 Australian Major Performing Arts Group
- 25 Public Fundraising Regulatory Association
- 26 UN Women National Committee Australia
- 27 Our Community
- 28 Fundraising Institute Australia
- 29 Buddhist Society Western Australia Inc
- 30 Prader-Willi Research Foundation

- 31 Portuguese Cultural & Welfare Centre Inc
- 32 Herbert Smith Freehills
- 33 Boxer Rescue Network
- 34 Friedreich Ataxia Research Association
- 36 Dr Matthew Turnour
- 37 Climate Council of Australia
- 38 Australasian Leukaemia & Lymphoma Group
- 39 Association of Australian Medical Research Institutes
- 40 Chartered Accountants Australia and New Zealand
- 41 Good Shepherd Australia New Zealand
- 42 Humane Society International Australia
- 43 Community Council for Australia
- 44 CPA Australia
- 45 WA Council of Social Service
- 46 World Vision Australia
- 47 Law Council of Australia
- 48 Greenpeace Australia Pacific
- 49 Justice Connect
- 50 Australian Competition & Consumer Commission
- 51 Community Broadcasting Association of Australia
- 52 Vision Australia
- 53 PwC
- 54 The Smith Family
- 55 ME/CFS Australia
- 56 The Australian Centre for Philanthropy and Nonprofit Studies, Queensland
University of Technology (ACPNS, QUT)
- 57 Queensland Law Society
- 58 The Benevolent Society
- 59 Volunteering Australia
- 60 Whipbird Consulting
- 61 Baptist Care Australia
- 62 Australia New Zealand Third Sector Research
- 63 Australian Red Cross Society
- 64 Mills Oakley
- 65 Shedden & Green Chartered Accountants
- 66 350.org Australia
- 67 White Ribbon Australia

68	Saward Dawson Chartered Accountants
69	Community Legal Centres Queensland
70	Oxfam Australia
71	Community Employers WA
72	Foundation for Alcohol Research and Education
73	Australian Catholic Bishops Conference
74	ACT Government
75	RSPCA Australia
76	Department of Social Services
77	Philanthropy Australia
78	Australian Community Philanthropy
79	yourtown
80	Australian Conservation Foundation
81	Australian Human Rights Commission
82	Cancer Council Australia
83	Multiple Sclerosis Australia
84	Arts Law Centre of Australia
85	History Council of SA Inc
86	Mr Simon Furness
87	Ms Margaret McCann
88	Food Is Free Inc
89	CanTeen Australia
90	Anglicare Australia
91	Dr Ted Flack
92	World Education Australia Limited
93	Public Interest Advocacy Centre
94	Federation of Parents and Citizens Associations of New South Wales
95	FOUR PAWS Australia
96	Better Hearing Australia VIC
97	Dr Sue-Anne Wallace AM
98	Ms Suzanne LJC
99	Ms Barbara Crljen
100	Ms Eva Gutray
101	Law Institute of Victoria
102	Australian Catholic Religious Against Trafficking in Humans (ACRATH)
103	Confidential
104	Mr Brian Woods

Tabled documents

- 1 Excerpt from Senate Economics Legislation Committee Estimates Hansard 1 March 2017, tabled by Mr David Crosbie at a public hearing in Canberra on 7 November 2018.

Answers to Questions on Notice

- 1 Answer to question taken on notice at a public hearing in Melbourne on 29 October 2018 by DF Mortimer & Associates.
- 2 Answer to question taken on notice at a public hearing in Sydney on 30 October 2018 by the Australian Charities and Not-for-profits Commission (ACNC).
- 3 Answers to questions taken on notice at a public hearing in Melbourne on 29 October 2018 by AAMRI.
- 4 Answers to question taken on notice at a public hearing in Sydney on 29 October 2018 by Fundraising Institute Australia.
- 5 Answers to questions taken on notice at a public hearing in Canberra on 7 November 2018 by ACOSS.
- 6 Answers to questions taken on notice at a public hearing in Canberra on 7 November 2018 by Baptist Care Australia.
- 7 Answers to questions taken on notice at a public hearing in Canberra on 7 November 2018 by Anglicare.
- 8 Answers to questions taken on notice at a public hearing in Canberra on 7 November 2018 by Volunteering Australia.
- 9 Answers to written questions on notice, provided by the Australian Competition and Consumer Commission on 18 December 2018
- 10 Answers to written questions on notice, provided by Justice Connect on 20 December 2018

Appendix 2

Public hearings and witnesses

Monday, 29 October 2018 – Melbourne

Justice Connect

Ms Sue Woodward, Head, Not-for-profit Law

Ms Nadine Clode, Manager, Education and Advocacy, Not-for-profit

Law Council of Australia

Ms Alice Macdougall, Deputy Chair Charities and Not for Profits Committee

Philanthropy Australia

Ms Sarah Wickham, Policy and Research Manager

DF Mortimer & Associates

Mr Derek Mortimer, Principal

mycause

Ms Tania Burstin, Managing Director

Australian Red Cross Society

Mr Bruce Moore, General Counsel

Australasian Leukaemia & Lymphoma Group

Ms Delaine Smith, Chief Executive Officer

Mr Peter Kempen, Chairman of the Board

Ms Bebe Beckerman, Philanthropy and Fundraising Manager

Association of Australian Medical Research Institutes

Dr Peter Thomas, Director of Policy and Operations

Law Institute of Victoria

Mr Alex Milner, Member, Charities & Not-for-profits Law Committee

Tuesday, 30 October 2018 – Sydney

Fundraising Institute Australia

Ms Katherine Raskob, Chief Executive Officer

Mr Scott McClellan, Executive Manager Code & Regulatory Affairs

Chartered Accountants Australia and New Zealand

Ms Geraldine Magarey, Leader Research and Thought Leadership

Mr David Thomas, Policy and Thought Leadership Leader

Australian Charities and Not-for-profits Commission

Dr Gary Johns, Commissioner

Australian Major Performing Arts Group

Ms Bethwyn Serow, Executive Director

Mrs Sarah Falzarano, Director of Finance, Sydney Symphony Orchestra

Mr John Scott, Company Secretary and Accountant, Australian Brandenburg Orchestra

The Smith Family

Dr Lisa O'Brien, Chief Executive Officer

Ms Anne Hampshire, Head of Research and Advocacy

Mills Oakley

Ms Vera Visevic, Partner

Mr John Vaughan-Williams, Lawyer

Cancer Council Australia

Mr Paul Grogan, Director, Public Policy and Knowledge Management

Mr Andrew Buchanan, Director of Fundraising at Cancer Council Victoria

Ms Lyndsey Rice, Director of Fundraising at Cancer Council NSW

Wednesday, 7 November 2018 – Canberra**Australian Council of Social Service**

Mr John Mikelsons, Senior Policy and Advocacy Officer

Ms Nicole Stanmore, Director, Business Development, Engagement and Operations

Volunteering Australia

Ms Lavanya Kala, Policy Manager

Anglicare Australia

Ms Maiy Azize, Director of Media and Communications

Ms Kasy Chambers, Executive Director

Baptist Care Australia

Ms Marcia Balzer, Executive Director

Australian Competition & Consumer Commission (Submission 50)

Mr Scott Gregson, Executive General Manager, Mergers and Authorisation Review Division

Mr Rami Greiss, Executive General Manager, Enforcement Division

NSW Fair Trading, Department of Finance, Services and Innovation

Ms Rose Webb, Deputy Secretary, Better Regulation Division

Ms Gabrielle Mangos, Director of Regulatory and National Reform

Community Council for Australia

Mr David Crosbie, CEO

ATO

Mr Michael Hardy, Assistant Commissioner, Aggressive Tax Planning

Mr Albert Beric, Client Engagement Director, Not for Profit Strategy

Treasury

Ms Kate Lynch, Principal Adviser, Consumer and Corporations Policy Division, Markets Group

Mr Ian Lawrence, Manager, Consumer Policy Unit, Consumer and Corporations Policy Division, Markets Group

Mr Nicholas Berger-Thomson, Senior Adviser, Individuals and Indirect Tax Division, Revenue Group

Thursday, 31 January 2019 – Brisbane**Whipbird Consulting**

Mr Paul Tavatgis, Director

yourtown

Ms Tracy Adams, Chief Executive Officer

Ms Tracey Gillinder, Head of Marketing and Fundraising

Neumann & Turnour Lawyers

Dr Matthew Turnour, Chairman

**The Australian Centre for Philanthropy and Nonprofit Studies,
Queensland University of Technology**

Professor Myles McGregor-Lowndes, Adjunct Professor

Private capacity

Mr Norman J. O'Bryan, AM SC

Private capacity

Dr Ted Flack

Public Fundraising Regulatory Association

Mr Peter Hills-Jones, Chief Executive

Responses to certain evidence given during public hearings

- 1 Correspondence from the Association of Australian Medical Research Institutes—response to certain evidence given during a public hearing on 29 October 2018.

