20 December 2018

Bonnie Allan
Secretary
Senate Select Committee on Fundraising in the 21st Century

Email: charityfundraising.sen@aph.gov.au

Dear Ms. Allan

Inquiry into Charity Fundraising in the 21st Century – Questions on Notice

Justice Connect is pleased to provide further information as requested by the *Senate Committee on Fundraising in the 21st Century* on 30 November 2018.

1. **Treasury suggested that state harmonisation in the co-operatives sector provides a good example of how fundraising could be harmonised. Is the co-operative model a useful comparison?**

In our view, the state harmonisation in the co-operatives sector is not a good example of the way in to achieve a nationally consistent means of regulating fundraising misconduct.

We note that work commenced in the 1990s to create consistency between state and territory co-operatives law,[1] yet it was not until 2007 that the Ministerial Council on Consumer Affairs agreed that legislation should be implemented for co-operatives to reduce the legislative differences for co-operatives operating in more than one state, as well as the associated registration fees.

It has continued to be slow-moving to implement national consistency and, to a certain degree, it is still not fully implemented. For example, it took seven years after the initial agreement for the first pieces of uniform legislation to be implemented in New South Wales and Victoria (in 2014). It began on 22 May 2015 in South Australia, 1 July 2015 in the Northern Territory, 1 September 2015 in Tasmania, 1 January 2017 in Western Australia and 1 May 2017 in the Australian Capital Territory.

[1] Australian Co-operative Links, Australian National Co-operatives http://www.coopdevelopment.org.au/natlinks.html.

Queensland does not operate under the national law – in 2015, it decided to remove itself from the plan altogether and the *Cooperatives Act 1997* (Qld) continues to apply.[2]

The sought uniformity has also been challenging to execute. Western Australia decided that instead of implementing the template uniform legislation, it would amend its *Co-operatives Act 2009* (WA).[3] Similarly, each jurisdiction is able to make amendments to their template uniform legislation, raising the issue of how ongoing uniformity is ensured.

In our view, there are a number of reasons why this model of legislative change is not the best model to regulate fundraising conduct across the nation.

(a) We note that NSW Fair Trading has put on record that one of the reasons why executing the plan to create uniform co-operative rules has taken so long is due to the political climate in each state and territory.[4] Election cycles and corresponding changes of governments, as well as changing legislative priorities have caused a delay in the progress in the commencement of the legislation in each jurisdiction. We consider there would likely be a similar issue in changing fundraising laws using this template model.

(b) The number of co-operatives that these laws affected is small – in 2012 there was approximately only 1 700 co-operatives in Australia.[5] This compares to 55 000 charities that would be negatively affected by rolling out fundraising laws in way that has proved to be slow and protracted; waiting even more years to roll out laws which are unnecessary given registration and reporting by charities to the ACNC and conduct regulated by the Australian Consumer Law.

(c) **The foundation from which to harmonise was much stronger for co-operatives than exists for fundraising.** As outlined in the submission from the Australian Centre for Philanthropy and Nonprofit Studies (Queensland University of Technology):

"Currently, no single shared understanding exists about what 'fundraising' involves in the laws of the Australian states and territories. … Our research shows that 'fundraising' encompasses so many ideas and issues that it is very difficult to regulate as a unified concept or set of behaviours.

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[2] National Co-operative Law Update, Issue 16, May 2017, http://services.enews.fairtrading.nsw.gov.au/online/18270931-12.html.
[3] Ibid.
[4] National Co-operative Law Update, Issue 12, March 2015, http://services.enews.fairtrading.nsw.gov.au/online/18254826-71.html.
[5] "Regulation of Co-operatives in Australia", Year Book Australia 2012, http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Regulation%20of%20co-operatives%20in%20Australia~287.

Internationally and in Australia, there is no agreed definition of what 'fundraising' is: in the law, amongst academics, and even amongst people who are professional fundraisers."[6]

By contrast, the various state and territory-based co-operatives laws were much closer to a nationally consistent approach and therefore much easier to harmonise once there was political agreement to do so. There are well-articulated and understood internationally[7] recognised 'co-operative principles' that form the building blocks for harmonisation.

Extract, co-operative principles from National Act

Co-operatives (Adoption of National Law) Act 2012 No 29

Current version for 15 January 2016 to date (accessed 18 December 2018 at 17:29)

Appendix › Co-operatives National Law › Chapter 1 › Part 1.3 › Section 10

10 Co-operative principles

The co-operative principles are the following principles:

1 **Voluntary and open membership**
Co-operatives are voluntary organisations, open to all persons able to use their services and willing to accept the responsibilities of membership, without gender, social, racial, political or religious discrimination.

2 **Democratic member control**
Co-operatives are democratic organisations controlled by their members, who actively participate in setting their policies and making decisions. Men and women serving as elected representatives are accountable to the membership. In primary co-operatives members have equal voting rights (1 member, 1 vote) and co-operatives at other levels are organised in a democratic way.

3 **Member economic participation**
Members contribute equitably to, and democratically control, the capital of their co-operative. At least part of the capital is usually the common property of the co-operative. They usually receive limited compensation (if any) on capital subscribed as a condition of membership. Members allocate surpluses for any or all of the following purposes:

(a) developing the co-operative, possibly by setting up reserves, part of which at least would be indivisible;

(b) benefiting members in proportion to their transactions with the co-operative;

(c) supporting other activities approved by the membership.

4 **Autonomy and independence**
Co-operatives are autonomous, self-help organisations controlled by their members. If they enter into agreements with other organisations, including governments, or raise capital from external sources, they do so on terms that ensure democratic control by their members and maintain their co-operative autonomy.

5 **Education, training and information**
Co-operatives provide education and training for their members, elected representatives, managers and employees so they can contribute effectively to the development of their co-operatives. They inform the general public, particularly young people and opinion leaders, about the nature and benefits of co-operation.

6 **Co-operation among co-operatives**
Co-operatives serve their members most effectively and strengthen the co-operative movement by working together through local, national, regional and international structures.

7 **Concern for the community**
While focusing on member needs, co-operatives work for the sustainable development of their communities through policies accepted by their members.

Note. The co-operative principles are those adopted by the International Co-operative Alliance.

[6] Submission 56, Australian Centre for Philanthropy and Nonprofit Studies, under heading 2(a)
[7] International Co-operative Alliance https://www.ica.coop/en/cooperatives/cooperative-identity

(d) **The pace at which fundraising practices change (vs a more static subject matter like a specific legal structure),** means that fundraising is ill suited to the 'co-operatives model' with its long process of design, consultation and implementation. With this lead time it could mean that by the time the harmonised law is enacted it could be quickly (if not immediately) be out-of-date. Again, as the Australian Centre for Philanthropy and Nonprofit Studies note " 'Fundraising' often refers to an ever-changing mix of particular activities and transaction types".[8]

In contrast to trying to energise all state and territory governments around a 'co-operatives' model approach, we argue that the principles based nature of the Australian Consumer Law and its existing intergovernmental agreement provides a ready-made, currently applicable and relatively future-proofed process[9] for regulation of fundraising behaviour across the nation.

2. ACCC and Treasury raised concerns about changing the threshold regarding the trade and commerce definition in the Australian Consumer Law. Is that change part of the *#fixfundraising* proposition?

No. We are not suggesting any change to the threshold requirement of 'trade or commerce'. In the the initial position promoted by the #fixfundraising coalition in 2016 (as part of the the review of the Australian Consumer Law) we did seek to modify this 'trade or commerce' threshold but, in light of the final report from that review and push back from the ACCC, we (and #fixfundraising) have modified our stance so that there is no request to modify this threshold test.

Our suggested amendments to the Australia Consumer Law (as outlined in our submission to the Committee and to the ACNC Review Panel) **do not alter the 'trade or commerce' requirement**. Rather our suggested reforms are to existing provisions concerning harassment and coercion (section 50) and false or misleading representations (section 29) – we are seeking that they be amended so they apply to fundraising activities within trade or commerce even if there is no supply

[8] Submission 56, Australian Centre for Philanthropy and Nonprofit Studies, under heading 2(a)

[9] We note the Australian Consumer Law is part of a federal Act (Consumer Act) and operates as a uniform national code that is implemented by each of the States and Territories through Application Acts. Amendments to the ACL are automatically incorporated by the States and Territories and apply unless modified or excluded by way of proclamation by the State or Territory. Changes to the ACL are made pursuant to the Intergovernmental Agreement for the ACL, which mean changes needed consent of the Commonwealth and four other parties, three of which must be States.

of goods or services (currently these provisions require both thresholds to be met, but there are also other provisions that only require the 'trade or commerce' threshold).

This change would provide regulators with increased remedies to address serious fundraising misconduct. It would provide regulators a broader range of remedies to those available for misleading or deceptive or unconscionable conduct (e.g. substantiation notices and criminal penalties for false or misleading representations).

These amendments could be made to the provisions of the Australian Consumer Law without affecting their constitutional validly as they do not hinge on the words 'trade or commerce'.

3. **The Department of Finance in its evidence noted that the Australian Consumer Law does not cover prudential regulation of charities. Given charities already report annually on their income and spending to the ACNC, what kind of necessary prudential regulation is not covered already by the ACNC's annual financial reporting requirements?**

We understand that five jurisdictions require registered[10] fundraisers to keep separate bank accounts for funds that are raised in relation to a specific fundraising activity, but it is not required in Queensland and Tasmania, and of course the Northern Territory which has no law (without any apparent issue). Anecdotal evidence is that most charities (even those that are audited) do not comply with this requirement. Is it really necessary to effective regulation for a charity to manage, say five additional bank accounts with that number growing for every annual fundraising campaign they run (let alone the number of accounts this might create for large charities)? We note the Victorian government[11] is streamlining its own bank accounts for this very reason (inefficiencies in managing so many accounts as well as the monetary cost of doing so) and that it will 'mean better value for money for Victorians … an additional $125 million to invest in the things our community needs' – the same could be said for charities (less bank accounts will mean it can invest more in its charitable purposes).

[10] Some jurisdictions refer to registering, some to licensing or other terms

[11] *State realises it doesn't need 8500 banks accounts,* saves $125m, The Age, 20 December 2018 at https://www.theage.com.au/politics/victoria/state-realises-it-doesn-t-need-8500-banks-accounts-saves-125m-20181219-p50nam.html

In turn, we are not aware of regulators undertaking any specific compliance activity in relation to this requirement. Even where it is requirement, it hasn't prevented serious misconduct (e.g. New South Wales RSL).

We suggest these requirements hark back to the days of paper based banking where donations were cash then taken to be deposited at a bank into a specific account and evidenced in a paper 'passbook' by a line entry and stamp. Today, many charities (certainly those that have a donate button on their website) accept the transfer of funds and can immediately access their account(s) and it is easy to trace monies deposited and withdrawn. It is onerous (and more than most States currently provide) to require a charity to open and maintain a bank account for every different fundraising campaign it might ever undertake.

This requirement conveys a lack of trust – rather than assuming (as the ACNC does in its Regulatory Approach Statement) that the vast majority of charities are acting honesty, it assumes most are likely 'but for' this requirement to use donated funds for purposes other than their charitable purpose. We note that if this is the case, the ACNC could consider revocation of the organisation's charitable registration. We note comments made by 'yourtown' in its submission (number 79) that the "regulation of charities appears to start from a premise of mistrust" and "the over-regulation of charities disrespects the generosity of the Australian people that give".

In short, it is our view there is sufficient prudential oversight with reporting to and oversight by the ACNC. If the States and Territories want additional data, there is capacity for the ACNC to collect and share it as they have already agreed with some States and the ACT.

4. **Please provide a breakdown by state and territory—if possible—of the 16.94 full time equivalent employees in state and territory agencies dealing with charity compliance.**

This figure was drawn from Queensland University of Technology, Business School, The Australian Centre for Philanthropy and Nonprofit Studies, "Registered Fundraising Organisations". The paper states "*Across Australia, there are 16.95 equivalent full time staff directly engaged in administering fundraising legislation at the end of 2010-11. This is an average of 0.6 full time staff per 500 registrations across Australia*".

The paper can be accessed here. [12] It sets out the following table:

Fundraising Regulation 2011

	NSW	VIC	QLD	SA	WA	TAS	ACT	AUST (Total)
Total No. Fundraising / Patriotic Licences / Authorities	5206	2388	3835	688	889	590	368	13964
Change in Total No. Fundraising Licences 2007–08 to 2010–11	2.4%	40.9%	3.7%	77.3%	27%	23.7%	513.3%	Median = 27%
No. of equivalent full-time staff engaged in administering the Act	(E) 7	2.5	2.5	2	2.4	0.05	0.5	16.95
No. of prosecutions	0	2*	7	0	1	0	0	10
No. of complaints	103	5*	55	39	2	0	0	204
No. full-time staff per 500 Fundraising Licences/ Authorities	0.7	0.5	0.3	1.5	1.3	0.04	0.7	0.6

(E) = estimate
* For Victoria: investigations or enforcements.
Source: Annual reports and correspondence from each jurisdictional office.

5. What changes would need to be made to the Australian Consumer Law to regulate charity fundraising conduct that needs to be regulated, should states and territories repeal their laws?

States and Territories could repeal their laws without further changes to the Australian Consumer Law (**ACL**). The ACL already regulates fundraising conduct by charities (misleading and deceptive conduct that is in 'trade or commerce', unconscionable conduct that is in 'trade or commerce', and unconscionable conduct that is in 'trade or commerce' and involves the supply of 'goods or services'). It also regulates conduct that involves harassment or coercion (s50), or false or misleading representations (s29) where it is in 'trade or commerce' and there is a supply of 'goods or services'. Similar to the ACL, the criminal law is also being used to address fundraising misconduct.

It is our view our recommended changes to the ACL would, however, provide regulators with additional remedies should fundraisers engage in conduct that involves harassment or coercion (s50) or false or misleading representations (s29) that, while in 'trade or commerce' does not involve the 'supply of goods or services'.

We have received specialist pro bono legal advice that these changes to the ACL could be effected in a number of ways. However we consider this best be resolved be expert legislative drafters (i.e. Office of Parliamentary Counsel).

[12] https://wiki.qut.edu.au/display/nmlp/Issues+sheets+and+conference+papers?preview=/118897665/142901883/Fundraising%20issues%20sheet_registered%20fundrais_2012.pdf