



Law Council
OF AUSTRALIA

Legal Practice Section

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Charitable Fundraising National Working Group
Charitable fundraising cross-border recognition consultation
Better Regulation Division
NSW Department of Customer Service
SYDNEY NSW 2000

By email: charitablereforms@customerservice.nsw.gov.au

Dear Colleague

PROPOSED CROSS-BORDER RECOGNITION MODEL FOR CHARITABLE FUNDRAISERS

1. This submission has been prepared by the Charities & Not for Profits Committee (**the Committee**)¹ of the Law Council of Australia's Legal Practice Section. The Committee welcomes the opportunity to make a submission to the New South Wales Department of Customer Service in relation to the proposed cross-border recognition model for Charitable Fundraisers.
2. This submission is made in response to your request for submissions² and particularly considers matters raised in your August 2020 Discussion Paper titled, *CHARITABLE FUNDRAISING IN AUSTRALIA: Proposed cross-border recognition model*.³ A number of the matters set out in this submission were raised by members of the Committee in oral comments made in videoconference consultations you convened. The Committee, however, thought it would be of benefit to your Working Group to gather those comments together in this written submission.

The need for nationally consistent fundraising regulatory reform

3. The need for substantial fundraising reform across all Australian jurisdictions in order to arrive at a national system that reduces red tape, removes unnecessary overlapping multi-jurisdictional inconsistent regulation in relation to the same activity,⁴

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

² Source: <https://www.fairtrading.nsw.gov.au/consultation-tool/charitable-fundraising-cross-border-recognition>

³ https://www.fairtrading.nsw.gov.au/_data/assets/pdf_file/0017/901160/CFNWG_Charitable-Fundraising-Discussion-Paper.pdf

⁴ Each State and Territory has its own regulation. Additionally, the *Australian Consumer Law* also applies to some fundraising activity. Finally Local Government also often has regulation that must be complied with.

and also promotes trust and confidence in the charitable sector is well understood.⁵ The Committee welcomes the significant contribution of the working group towards that outcome.

Harmonisation -v- repeal of State and Territory regulation and amendment of the ACL

4. While the preference of the Committee is the ultimate repeal of the State and Territory based fundraising regulation and the amendment of the *Australian Consumer Law*⁶ to apply to all fundraising activity, the Committee welcomes any law reform towards a nationally consistent harmonised fundraising regulation that would reduce red tape and compliance costs for the charitable sector while also providing sufficient regulatory oversight to maintain and promote public trust and confidence in the sector.
5. In summary, what the working group is proposing in the Discussion Paper in terms of “deemed authorities” for charities is a good and welcome first step along the national harmonisation pathway.

Deemed Authorities

6. It is noted, that “*under the proposed model, each ACNC-registered charity could be deemed to hold a local fundraising authority in each participating jurisdiction.*”⁷
7. This concept of *deemed authority* is welcome as each ACNC-registered charity is already subject to the gatekeeping (and ongoing) regulatory oversight of the *Australian Charities and Not-for-profits Commission (ACNC)*.⁸ Those charities that are registered by the ACNC (or whose registration is revoked) are published of the public ACNC Charity Register⁹, the records of which are available for free to any member of the public via the internet and the ACNC web site.
8. The Committee notes that it intended this *deemed authority* would cease if ACNC-registered charity status is revoked for any reason. This seems sensible and is supported.
9. Finally, the Committee notes that the intention is that individual State and Territory jurisdictions may (emphasis added):
 1. “retain some flexibility to manage who is authorised to fundraise in the jurisdiction, such as applying additional conditions for deemed authorisation”¹⁰;

and that the

⁵ See for example, *Charity Fundraising in the 21st Century – Senate Select Committee Inquiry. Final Report February 2019*.

⁶ An approach outlined clearly in the #fixfundraising campaign advocated for by Justice Connect and supported by the Law Council. See: <https://www.nflaw.org.au/fundraisingreform> for the Justice Connect advocacy and the view of the Law Council at <https://www.lawcouncil.asn.au/publicassets/6bf9b536-929b-e811-93fc-005056be13b5/3482%20-%20Charity%20Fundraising%20in%20the%2021st%20Century.pdf>

⁷ Discussion Paper p6.

⁸ Despite its name we note that the ACNC currently only regulates charities.

⁹ <https://www.acnc.gov.au/charity> | <https://www.acnc.gov.au/charity/about-charity-register>

¹⁰ Ibid

2. “the obligations under local regulatory regimes could still apply to fundraisers operating in those jurisdictions.”¹¹
11. The Committee agrees (at this stage or harmonisation) with the second proposition, but not the first proposition. The first proposition is inconsistent with **deemed** authorization. If the deeming is conditional upon meeting additional conditions at a State or Territory level, then we submit that this is not deemed authorization at all, but simply **partial** authorization. Even if the only condition might be notification (which we comment on below) this also creates a problem of when, from evidentiary point of view, the authorization is deemed to commence with potentially different dates in different jurisdictions.
12. While it is understood, at least at with this first step towards harmonisation, that State and Territory jurisdictions will preserve their individual ability to impose regulatory requirements on charities who are deemed to be authorized (licensed) in their jurisdiction, this is quite a different matter to certainty about whether and when a charity holds the relevant deemed fundraising authority in each State or Territory (that is, when the first checkpoint been passed).
13. The Committee **recommends** that the working group report recommends that States and Territories **not** retain the ability to impose additional conditions for deemed authorisation.

Notification requirements

14. In summary this is not welcome and opposed, as unnecessary additional red tape for no discernable purpose of any utility.
15. The Discussion Paper is brief on this aspect:
- An ACNC registered charity that has a deemed local fundraising authority by virtue of that registration would still be required to complete a notification process to advise the relevant regulator that the charity intends to undertake a charitable fundraising appeal in that location. The charity would also have to comply with any relevant local regulatory requirements.*
- While an online notification process is considered optimal, jurisdictions could establish their own processes.*¹²
16. If the policy intention is *notification only*, and not the need to comply with any additional conditions (in order to achieve the deemed authorisation), in our submission such a notification is simply not necessary, as notification can also be taken as being given by virtue of the record of the charity on the public ACNC Charity Register (and the information sharing arrangements between the ACNC and State and Territory regulators).
17. The Committee **recommends** that the Working Group report recommends that recording on the ACNC Charity Register will be taken to be notification to State and Territory regulators. The reform could be elegantly simplified by removing the concept of notification entirely with no change to regulatory effectiveness.

¹¹ Ibid.

¹² Discussion Paper p6.

18. This recommendation:
- is consistent with the policy intention of the public ACNC Charity Register to be a report once use often repository of key data and reporting by charities.
 - will reduce public purse regulatory expenditure by the capturing and recording of data by State and Territory based regulators that is already publicly available on the ACNC Charity Register; and
 - will seek to ensure a 'single point of truth' is respect of details of a charity. For example, if a charity changes its name (which is not uncommon) there are not disparate registers of those charities (the ACNC and State & Territory fundraising registers).
19. If the policy intention is to allow the relevant State or Territory regulator to engage in *regulatory nudging* by writing back to a notifying charity with some compliance information, we submit that this is able to be achieved without imposing the additional requirement of notification. This can be achieved through the resources and communications of the ACNC and indeed also directly by State and Territory regulators by obtaining information already reported to the ACNC and usually on the public ACNC Charity Register about what States and Territories the charity operates in. Practically to the extent that a State or Territory regulator would seek to regulate the fundraising activity of any charity if the only connection with that jurisdiction was a 'donate now' button on a charity website able to be viewed in that State or Territory they should perhaps already be writing to all charities in any event (given that this appears to be becoming the norm rather than the exception).
20. State and Territory based notification requirements will we submit create confusion for charities about when they need to notify and when they do not, depending upon their degree of connection with or activity in a particular jurisdiction and the actual regulatory requirements of that jurisdiction. This will add red tape and a compliance burden (and expense) that serves no regulatory purpose.
21. The jurisdictional ability of a State or Territory to regulate a charity fundraising in their jurisdiction is of course not dependent upon whether a charity obtains an authorization in that jurisdiction, or provides a notification.

Auditing Requirements

22. It is noted that the Discussion Paper proposes:

Under the proposed model, each jurisdiction would have the option of requiring registered charities to comply with local auditing requirements or obtain copies of financial information from the ACNC as an alternative means of satisfying the local requirements. Clearly, the later arrangement would deliver more significant reduction of red tape and administrative costs.

However, many jurisdictions have already harmonised their audit and reporting requirements with those of the ACNC, or have moved (or are moving to) exempt ACNC-registered entities from local audit and reporting requirements.¹³

¹³ Discussion Paper p7.

23. The Committee understands that harmonisation on this issue may be beyond the scope of the current remit of the working group. We would however urge the working group to consider commenting in its report on how some interim harmonisation may be able to be recommended on this issue. For example:
- A trail period for accepting the reporting and audit requirements of the ACNC; or
 - Accepting the reporting and audit requirements of the ACNC with the ability to request further reporting / information as part of desk-top or more detailed review or investigation activity of a State or Territory regulator.

Information Sharing Agreements

24. It is noted that the Discussion Paper proposes:

To support this model, participating jurisdictions could enter into an information sharing agreement for the purposes of establishing a shared register of deemed authority holders and for other purposes related to authorities issued in other jurisdictions.

Through information sharing agreements, a local regulator could notify the ACNC and participating jurisdictions of any disciplinary action or enforcement action or prohibition action taken by that regulator against an organisation in respect of a deemed local authority. It would remain up to participating jurisdictions to decide what action, if any, to take in response to the notified action.

In addition, a register could be kept by a regulator of any disciplinary or enforcement action taken in another jurisdiction against an organisation if it is also operating in that regulator's jurisdiction.¹⁴

25. In our submission information sharing arrangements appear eminently sensible and they are supported.
26. The use of the record on the ACNC Charity Register for charities fundraising in a State or Territory would not be inconsistent with each State and Territory being able to separately record on their State or Territory based Register details of disciplinary or enforcement action against a relevant charity in that jurisdiction, by way of exception.

Data

27. To assist the sector in tracking the costs of fundraising compliance and providing insight into further fundraising regulatory reform the Committee **recommends** that the report of the working group recommends that each State and Territory regulator report publicly on the following data on an annual basis (with historical data for three years):
- number of registrations;
 - total on the register;

¹⁴ Ibid.

- number of notifications by ACNC-registered charity deemed authority holders (if applicable);
- number that have gone off the register;
- number of complaints; and
- number of prosecutions.

Otherwise State / Territory fundraising laws would still apply

28. It is anticipated that this first step in the harmonisation process through deemed authorisations for charities, absent conditions being able to be imposed on notifications, will result in some red tape reduction (and compliance cost reductions) for fundraising charities. However, it is also expected that the real and more substantial red tape and compliance cost reductions will only occur when the substantive fundraising requirements applying to those authorized to fundraise in each jurisdiction are harmonised.
29. The Committee **recommends** that the working group consider how the communication takes place with the sector about the deemed authorisation, at this stage only relieving the gatekeeping compliance obligations and that all other State and Territory post authorisation obligations should be assumed to still apply. Additionally, the Committee **recommends** education resources to help charities understand, navigate and comply with these the differences reducing the compliance assistance expenditure required would be most welcome.
30. Absent some intentional communication and education resources, we expect that the deemed authorisation approach will cause confusion as charities for the following reasons:
- charities may think that due to the deemed authorisation they have done all they need to do in order to comply in a State or Territory; and
 - charities may find that where in fact they would not have had to apply in a State for fundraising registration/licensing due to the differing entry requirements or because they would have been exempt due to the differing exemptions from State to State, they may with a deemed authority need to comply in a State they did not previously need to.
31. Further to the second dot point above, the Committee **recommends** that States and Territories also make it clear in their regulation, that to the extent that an exemption may have applied previously that exemption will be preserved despite the deemed authorisation. Absent this, the reform will increase the regulatory burden for some charities.

More work is required

32. The Committee stands ready and desirous of contributing to ongoing consultation in the harmonisation challenge of the substantive post authorisation State and Territory fundraising regulations or ultimately the repeal of the State and Territory based legislation and seeing it housed in the *Australian Consumer Law* for example.

33. The Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact Jennifer Batrouney AM QC from the Charities & Not for Profits Committee on jennifer_batrouney@vicbar.com.au.

Yours sincerely



Michael Tidball
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