



Law Council  
OF AUSTRALIA

*Legal Practice Section*

29 June 2020

Royal Commission into National Natural  
Disaster Arrangements  
Locked Bag 2000  
MANUKA ACT 2603

By email: [rcnda.enquiries@royalcommission.gov.au](mailto:rcnda.enquiries@royalcommission.gov.au)

Dear Sir/Madam

## **SUPPLEMENTARY SUBMISSION - ROYAL COMMISSION INTO NATIONAL NATURAL DISASTER ARRANGEMENTS**

1. This submission has been prepared by the Charities & Not for Profits Committee (**the Committee**)<sup>1</sup> of the Law Council of Australia's Legal Practice Section. The Committee welcomes the opportunity to make a submission to the Royal Commission into Natural Disaster Arrangements which requires and authorises the Commission to inquire into "*whether changes are needed to Australia's legal framework for the involvement of the Commonwealth in responding to national emergencies...*". This is a supplementary submission to the Legal Practice Section's earlier submission sent on 30 April 2020.
2. The extreme bushfire season in 2019-2020 prompted a rapid fundraising response from individuals, commercial companies, charities and not-for-profits wanting to help on a national and international scale. Over \$500 million was raised during the bushfire season to respond to the national emergency. However, the fundraising which occurred has yet again demonstrated that Australia's legal framework for fundraising, which is comprised of a myriad of different state and territory laws, is not fit for purpose.

### **Legal Framework for Fundraising**

3. The issues with the current fundraising legal framework and proposed reform are clearly outlined in Justice Connect's '#fixfundraising' campaign,<sup>2</sup> a campaign which the Law Council has supported strongly. The web of state and territory fundraising laws is complex, outdated and inconsistent.
4. Fundraising often occurs rapidly in response to disasters such as the bushfires. The legal framework for fundraising needs to be dynamic, flexible and responsive while also safeguarding the public's confidence in how funds are raised and applied. There

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<sup>1</sup> 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.

<sup>2</sup> <https://www.nfplaw.org.au/fundraisingreform>.

needs to be clear and simple compliance obligations for fundraisers and transparency for donors.

5. Fundraising for the recent bushfires demonstrates that many fundraisers were not aware of the existence of charitable fundraising laws, leading to non-compliance on a massive scale. It appears that there has been little regulatory action as a result and little-known damage to consumers and donors from the fundraisers not being registered or having licences or an authority to fundraise, as the case may be. This supports the proposition that there is no need for the differing registration, licencing and authority requirements in the current fundraising laws. Rather, the principles-based standards of fairness embodied in the Australian Consumer Law are the best foundation for taking action against scams or misleading representations.
6. The vast majority of the bushfire fundraising was done via internet donation portals, online platforms and mobile phones, and also through events and retailers operating nationally and internationally. The material issue for donors is whether the statements (representations) made when being asked to donate are realised when the funds are given. The regulatory/compliance failure is that most of the fundraisers were not aware of the need to (or did not) register or get authorisation in the manner required under the various fundraising laws. There needs to be a process of determining the most appropriate form of modern regulation for the mischiefs that are apparent in the immediate aftermath of a natural disaster.
7. Examples of the fundraising that occurred during this period:
  - There was a GoFundMe campaign run by 'Aussie Influencers for Australia', a group of Instagram influencers to raise money for six listed charities. The promotional material included a statement that: "*All bank statements and donations will be made public so people can see exactly how much funds have been received and the charities they have been allocated to*". The donations appeared to be directed to personal bank accounts and the Committee is not aware of any public disclosure of where the money was allocated (and who received a tax deduction if any).<sup>3</sup>
  - Many individuals and organisations fundraising for the Red Cross Disaster Relief and Recovery Fund stated that they were fundraising for the Australian bushfires. However, that particular fund is not specific to Australian bushfires and the Red Cross has discretion to send the funds elsewhere. While the Red Cross makes this clear if a person donates directly, this was not made clear when people bought tickets to events or goods or services provided in connection with fundraising.<sup>4</sup>
  - Hundreds of Australian retailers pledged that their 'profits' or 'proceeds' would go towards the 'Australian bushfires', without identifying amounts or charities.<sup>5</sup>

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<sup>3</sup> <https://www.gofundme.com/f/d3atam-australia-we-are-with-you>.

<sup>4</sup> See the description of '*where the money will go*', available at <https://www.finder.com.au/australian-bushfires-the-iconic>.

<sup>5</sup> See e.g. <https://www.instagram.com/p/B69vCYyH3ze/>.

- For some fundraising events which involved issuing a ticket, donors were told that payments made for events being hosted were tax deductible when they were not.<sup>6</sup>
  - Many fundraising platforms did not clearly distinguish between individuals, organisations and charities. Many of the fundraising campaigns were also confusing as to where the funds were going, or suggesting that the funds would be used for a purpose or region beyond the powers/purposes of the nominated charity (for instance, see the Celeste Barber RFS case outlined further below).
8. Publicly, there were no awareness campaigns about the need for fundraisers to apply for licences, registration or authorities under the various fundraising laws or any public compliance action against those not complying.
  9. The national regulators were the first to provide guidance. This supports the proposition that, especially in an online world, charitable fundraising should be regulated by the Australian Competition & Consumer Commission (**ACCC**) and the Australian Charities and Not for Profits Commission (**ACNC**):
    - the first of all the regulators to respond to the emergency was the ACNC who issued guidance to charities on safe fundraising in November 2019;<sup>7</sup> and
    - the ACCC was the second to respond, by providing guidance to donors on scams, a dedicated scam hotline and information on how donors could verify whether an organisation is a charity through the ACNC register on 6 January 2020.<sup>8</sup>
  10. The legal framework for fundraising would be far more effective if there was a single regulator communicating and enforcing the message to fundraisers that they must not be misleading, they must check with the charity for which they are fundraising, before commencing fundraising, and they must apply the money they receive in the way they told the donors they would.
  11. Making donations to charities is generally triggered by an emotional response and this is particularly so in the case of disaster fundraising. Donors cannot be expected to spend time investigating the credentials of a charity or a fundraiser. Other regulatory strategies are required.

### **Rural Fire Service (RFS) Case**

12. Celeste Barber's fundraising during the bushfire season and the recent decision handed down by Slattery J in *Re New South Wales Rural Fire Service & Brigades Donations Fund* [2020] NSWSC 604 (**RFS Case**) demonstrate that the federated laws regulating fundraising and charitable trusts have left the public disappointed and confused.

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<sup>6</sup> See e.g. <https://www.melbournefoodandwine.com.au/about-mfwf/restaurants-for-relief>.

<sup>7</sup> <https://www.acnc.gov.au/media/news/safe-fundraising-and-giving-response-drought-and-bushfire-disasters>.

<sup>8</sup> <https://www.accc.gov.au/update/bushfires-and-scams>.

13. Celeste Barber raised over \$50 million, and the donors that were inspired by Ms Barber gave to PayPal Giving Fund through Ms Barber's Facebook fundraising page. At the start of her campaign, Ms Barber's Facebook fundraising page stated:<sup>9</sup>

*"Fundraiser for The Trustee for NSW Rural Fire Service & Brigades Donations Fund by Celeste Barber.*

*Donations are made to PayPal Giving Fund Australia (ABN 65 106 950 945) and granted to the charity within 90 days, subject to PayPal Giving Fund's policies."*

14. On 9 January, Ms Barber was quoted as saying: <sup>10</sup>

*"...I'm gonna make sure that Victoria gets some, that South Australia gets some, also families of people who have died in these fires, the wildlife.*

*I get it, I get it all, I'm hearing you all. I want you to know that, otherwise why raise this money if it's not going to go to the people who absolutely need it."*

15. The Facebook fundraising page was not updated following Ms Barber's statements and it continued to state that it was fundraising for the Trustee for NSW Rural Fire Service & Brigades Donations Fund (**RFS**). Any donor who had read the terms and conditions of their donation would have seen that PayPal Giving Fund can give to any charitable deductible gift recipient (**DGR**) and that the trustees of the fund ultimately have complete discretion in deciding which charitable DGR will receive the money. It seems that PayPal Giving Fund should either have updated the Facebook fundraising page or should have contacted Ms Barber to make sure she did not make misleading representations.
16. From the first week of January, there were charity and philanthropy experts raising concerns in the media on this issue.<sup>11</sup> There was an apparent failure of any regulator to respond, comment or act when members of the public raised the issue in media early on. This apparent failure from the regulator is particularly concerning given the action taken in the United States in relation to the PayPal Giving Fund.<sup>12</sup>
17. Most of the public discussions surrounding the fundraising and the Second Reading Speech for the Rural Fires Amendment (NSW RFS and Brigades Donations Fund) Bill 2020 have focussed on the restrictions in the RFS trust deed, instead of considering the role and responsibilities of the trustees of the PayPal Giving Fund. The RFS Case was also limited to dealing with the submissions before the court regarding how the RFS could use the money raised and did not consider whether the trustees of the PayPal Giving Fund had appropriately discharged their fiduciary obligations.

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<sup>9</sup> <https://www.facebook.com/donate/1010958179269977/>.

<sup>10</sup> <https://www.abc.net.au/news/2020-01-09/celeste-barber-bushfire-donations-fundraisers/11852588>.

<sup>11</sup> See e.g. <https://emergencylaw.wordpress.com/2020/01/07/further-complicating-the-issue-of-diverting-facebook-donations-and-perhaps-an-out/> and multiple contributions from Krystian Seibert, Industry Fellow at Swinburne University of Technology.

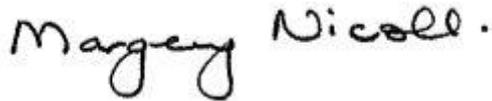
<sup>12</sup> Press Release of New York Attorney General 14/1/20: <https://ag.ny.gov/press-release/2020/attorney-general-james-announces-settlement-paypal-charitable-giving-fundinc> and the Agreement at [https://ag.ny.gov/sites/default/files/ppgf\\_-\\_multistate\\_aod\\_ny\\_final\\_1-14-20.pdf](https://ag.ny.gov/sites/default/files/ppgf_-_multistate_aod_ny_final_1-14-20.pdf).

18. The fundraising laws are clearly not fit for purpose if \$50 million can be raised and not given for the purposes stated with no apparent regulatory action.

### **Conclusión**

19. The funds raised from the public during the bushfire season were significant and fundraising will undoubtedly be a component of any future response to a national disaster. It is crucial that the legal framework surrounding fundraising is effective to ensure public confidence in the management and regulation of donations.
20. The Charities & Not for Profits Committee would welcome the opportunity to discuss this submission with the Department. In the first instance, please contact the Chair, Jennifer Batrouney AM QC on Jennifer\_Batrouney@vicbar.com.au.

Yours sincerely

A handwritten signature in black ink that reads "Margery Nicoll." The signature is written in a cursive, slightly slanted style.

**Margery Nicoll**  
**Acting Chief Executive Officer**