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## **REVIEWING THE COLLECTIONS ACT**

**WORKING PAPER NO. PONC54  
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In its Draft Report on its Inquiry into Charitable Organisations published in October 1994, the Industry Commission examined the various present State Collection Acts and concluded that "much of the legislation covering fundraising is dated, inconsistent.. and badly needs rethinking".

The IC has recommended that the Council of Australian Governments (COAG) consider either adopting uniform fundraising legislation or mutual recognition of existing legislation.

Anyone who is familiar with Queensland's own The Collections Act 1966-1989 will recognise that it is not the exception to the IC's finding.

"The Minister responsible for the Act has announced that it will be completely redrafted and submitted to Parliament. It is expected that the Act will be streamlined and some deregulation will occur."<sup>1</sup> It seems fair to assume that the Queensland Justice Minister will not spend too much energy on redrafting the Act before the COAG process has had a chance to consider the IC recommendation.

If the Queensland government does decide to go it alone with a new Act then some consideration should be given to first articulating the reasons for such legislation in the first place.

### **What public good is served by having special legislation which governs fundraising?**

After all there are presently in place perfectly good laws covering fraud, misappropriation and theft if the concern is honesty, and there are the Incorporated Associations Act and the Corporations law to deal with accountability and openness concerns.

It seems that there is anecdotal evidence of a general public view that charitable monies need to be especially protected from misuse. The recent thefts of the proceeds of church collection plates in suburban Brisbane brought forth a particularly strong sense of outrage in the media and yet the almost routine household thefts experienced in those same suburbs go almost unreported. Somehow there is an expectation that charitable monies will be dealt with in an even more scrupulously honest way than other monies.

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<sup>1</sup> Incorporated Associations Manual, pp.16-100, published by Program on Nonprofit Corporations, May 1990.

In a qualitative market research survey of attitudes to charity conducted by the Benevolent Society of NSW in 1984,<sup>2</sup> the respondents were asked to personify charities as if they were a person you could meet. The caricature that emerged was of a kind hearted, but strict 50 year old unmarried aunt who was careful with every penny. Does this kind of public perception colour the kind of fundraising legislation that will be enacted.?

In quantitative research conducted at the same time,<sup>3</sup> respondents were asked to state the reasons why they chose to support a particular charity. One of the key issues identified by respondents was their concept of the "worthiness" of the charity. Further questions found that, after "relevance to giver", came notions of "trust", "well managed" and that "the gift will get to the people who need it."

It is contended that the need for special legislation covering public fundraising is a political response to these community concerns rather than a response to some failure of the criminal law to adequately deal with dishonesty or fraud in charities.

**Is it appropriate that the regulatory framework governing the incorporation and registration of charities should also deal with improper fundraising activities?**

Why is it that the issues relating to the regulatory framework for charities are different to those that regulate to commercial organisations? The regulatory framework for charities is somewhat different to those that regulate commercial organisations in that it tends to combine aspects of corporate, trust and tax law as well as regulations about the honest and ethical conduct of public appeals. If for example a properly constituted charity with all the appropriate legal, audit and tax structures, with highly efficient services to its clients, were to employ questionable public fundraising practices, their authority to conduct further appeals (and hence their client services) could be in jeopardy. Contrast a large well established commercial organisation which may employ deceptive sales techniques. The Australian Securities Commission does not threaten its continued registration as a company nor deal with deceptive sales practices. There are other pieces of legislation which can deal separately with these matters.

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<sup>2</sup> "Attitudes Towards the Benevolent Society of NSW", conducted by Reark Rresearch for the Benevolent Society of NSW 1984.

<sup>3</sup> Ibid.

The notion that the legislative framework for charities need necessarily deal with the conduct of public appeals needs to be further explored.

### **What then are the basic principles on which fundraising legislation should be founded?**

From an analysis of the public submissions to and the transcript of public hearings of the Industry Commission's Inquiry Into Charitable Organisations, it is possible to distil the following chief concerns.

1. That the public should be able to feel confident that public fundraising appeals are only made by legitimate charitable organisations or semi-government organisations and NOT by organisations for personal profit.
2. That the public who support a particular fundraising appeal should be able to feel confident that the money will go to the "cause" for which their support was given.
3. That the public expect that legitimate charitable organisations which conduct public fundraising appeals will spend the money wisely.
4. That the public expect to be protected from nuisance fundraising appeals.
5. That the public expects that their support for a particular charity will be treated with respect for individual privacy.

It is therefore appropriate to consider each of these concerns and the way in which the Queensland Collections Act deals with them.

### **Who can conduct a public fundraising appeal?**

Section 10 of the Act specifies that no person or association can make "an appeal for support" unless they apply for a "sanction" under the Act or are exempted from the provisions of the Act.

The Act provides different types of registration depending on the attributes of the association. The association may be registered as a charity or as an association whose purposes have been sanctioned as a community purpose under the Act. The determination of what is "charitable" has largely been left the common law definition. The Act does however prescribe what is a "community purpose" and Section 5 of the Act sets out five classes of such purposes which can loosely be described as those which promote the general welfare of the public.

A religious body which is registered for the purposes of the Commonwealth Marriage Act 1961 is exempted from the provisions of the Act except when these organisations want to conduct a street collection or a door to door appeal for a purpose other than "advancement of religion".

Together then these restrictions on who can conduct a public fundraising appeal (appeal for support) are intended to respond to the first of the public concerns outlined above in that they are intended to ensure that only legitimate charitable (in the non technical sense) organisations can lawfully conduct public appeals.

It should be noted that the various equivalent legislation in other Australian jurisdictions have different criteria for what is a charitable and what is a community purpose.

In practice, the Queensland Department of Justice rely wherever possible on determinations made by the Australian Tax Office (ATO) to provide a benchmark on what is charitable by requesting copies of letters from the ATO which grant tax concessions and/or tax deductibility of donations to the applicant organisation.

### **What kinds of public fundraising activities are covered by the Act.**

Section 5 of the Act defines an "appeal for support" very widely by stating that it includes "any invitation (expressed or implied, and whether made verbally, or by writing or conduct, or by any advertisement), to the public, which is designed to obtain money or articles for that purpose, including..". There follows a long list of fundraising "products" which includes, by the way, any selling or offering for sale of any ticket or chance in any art union. I think there is plenty of evidence to suggest that there is widespread ignorance of the all encompassing nature of this definition and therefore widespread non compliance with Act.

It is worth noting that the Queensland Art Union and Public Amusements Act 1992, in Section 4 of that Act, specifies "eligible associations" as those that include charities, schools, sporting, religious, patriotic and community purpose groups, a parents and citizens association, a registered political party and a constituent unit of these types of organisations.

It appears therefore that it is possible for "an eligible association" to be given a permit to conduct an art union under the Art Union and Public Amusements Act but not be able to qualify for "a sanction" under The Collections Act because of the different eligibility criteria used in each Act.

It is submitted that both of the pieces of fundraising legislation should rely on a standard set of criteria for what is "charitable" and what is "community purpose". (An examination of the classifications used to define "charity" and "community purpose" in the various State legislation governing art unions, bingo and other charitable gambling shows an even greater variety of definitions. See Appendix A)

The Queensland Collections Act contains the most comprehensive definition of what constitutes a public appeal in all the various State fundraising legislation.

These provisions are intended to define what kind of conduct should be included in the regulatory regime necessary to protect the public from bogus fundraising and they are a necessary part of the legislative response to our first public concern.

## **How can the public be sure that the money gets to the Charity?**

There are four groups of measures designed to ensure that the proceeds of any "appeal for support" get to the charity as follows:

- Provisions for the authorisation and identification of collectors (Reg 20)
- Provisions for the disclosure of commercial interests (Part VIIIA of the Act's Regulations)
- Provisions for safeguarding and receipting of collections [Regulations 31(1) and (2)]
- Record keeping and annual reporting requirements. (Part VIII of the Regulations)

It is submitted that provisions related to the authorisation and identification of collectors although well intentioned are too prescriptive. It could be argued that the public would be just as well served by adopting an appropriate degree of caution and a common sense approach. The idea that the public must be protected in this way does not apply to any other form of direct marketing - Why should it apply to fundraising?

The provisions related to joint charity - commercial promotions are a matter of some concern for trade practices legislation but not for specialist fundraising legislation. It is submitted that the charitable organisation is happy to receive the proceeds of any legitimate joint venture arrangement - the problem arises not from the fundraising perspective but from the potential for deceptive trading practices by the commercial entity.

The provisions relating to the safeguarding and receipting of collections are matters of internal audit control for the charity and are designed to reduce the opportunities for fraud and theft.

It is submitted that these issues are matters that are more appropriately dealt with by the appropriate Audit requirements of Incorporated Association or Corporate law and the Criminal Code. (It will be noted that many external auditors are loath to sign unqualified certificates in respect of donations, reflecting the fact that it is very difficult to have total control of this kind of income especially where street collections are involved).

The provisions relating to records keeping and annual reporting duplicate the more general provisions of Incorporated Association or Corporate law and, given the introduction of appropriate accounting standards for not-for-profit organisations, are unnecessary and overly prescriptive.

It is interesting to note that the general public's concern to ensure that fundraising monies are only spent on the charitable purpose rather than the general purposes of the charity, was taken up in the

Industry Commission's Draft Report.<sup>4</sup> The problem with such notions is however that the donor is often not in the best position to know what are the most pressing purposes to which the board of management of the recipient charity would want to allocate the funds. If left to the donor to chose the specific purpose, rather than "for the general purposes of " the charity, the result will be the creation of many thousands of unmanageable and useless special purpose trusts.

It is submitted that the provisions in the Act for exemptions for religious organisations are an anachronism in a modern Australia and should be abandoned. The principle that should be adopted is that if an organisation makes a public appeal, then details of its financial affairs must be available for public access.

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<sup>4</sup> Draft Report of the Industry Commission Inquiry into Charitable Organisations, p.241.



## **How can the Public be sure that legitimate charitable organisations which conduct public fundraising appeals will spend the money wisely?**

The record of the state charity regulators in Australia and overseas in their attempts to supervise charities is not good.<sup>5</sup> It appears that the issue of public accountability of charities will be best served by measures that are designed to provide "transparency" through the provision of publicly available information on the activities and financial status of charities and by the development of self regulatory codes of practice.<sup>6</sup> The question then is whether there is a separate requirement for the creation of a public record in the Queensland State charity administration or whether the Incorporated Association or Corporate Law and ATO record should suffice.

It is submitted that, given that all public fundraising charities are incorporated, that there are adequate provisions for full disclosure of all relevant information about the activities of charities including fundraising accounts in annual reporting, then there should be no need for additional reporting to a State charity regulator.

It should be noted that several state jurisdictions continue to insist on local control of public fundraising charities. These provisions require the establishment of separately incorporated "branches" in each State or the nomination of three "trustees" resident in the that State, so as to provide a local recipient of the funds raised in the State. Common fundraising legislation in all States or mutual recognition of state fundraising legislation will need to address the issues associated with the accountability of members of Boards of Management who are resident in another State jurisdiction. It is submitted that these provisions are anachronisms in the Australia of the 1990s and should be abandoned.

The Collections Act does not contain provisions for the maximum proportion of income that can be spent on fundraising expenses. It should be noted that although the Industry Commission found that "legislative controls on the acceptable ratio of costs to fundraising are not desirable",<sup>7</sup> the NSW Charitable Fundraising Act 1991 and the Charitable Fundraising Regulation 1993, the most modern fundraising legislation in Australia, does set such limits.

## **How can the Public be protected from Nuisance Fundraising?**

The Queensland Collections Act's Regulations provide for some protection from nuisance fundraising practices (Reg 20) by limiting the hours in which door to door collections can take place to 9 am to 5pm on any day in connection with any appeal. Other regulations provide that:

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<sup>5</sup> Public Fundraising Charities in Queensland, PONC Working Paper No.14, McGregor-Lowndes et al April 1993.

<sup>6</sup> "Charity and Accountability -Keeping it Honest", paper by John A Edie, at Australia Charities at the Crossroads Conference November 1994, published by Australian Association of Philanthropy.

<sup>7</sup> Draft Report of the Industry Commission Inquiry into Charitable Organisations, p.203.

- No collector shall persist in soliciting money from any person to the point of annoying that person, or remain in or at the door of any place of residence or employment if requested by any occupant to leave.
- No collector shall intimidate any person to make a donation or buy anything which he/she otherwise would not have made or bought.
- No collector shall take part in a collection commonly known as a "hi-jack" collection or be masked or use toy firearms whilst making a collection.

There are no provisions in the Act for any limits on tele-marketing or direct mail "appeals for support".

It is difficult to argue that there does not need to be some provisions like these to protect the public from nuisance fundraising practices, however it is harder to justify reasons why such nuisance causing fundraising practices should be singled out for special treatment. For example, a volunteer door-knock collector is subjected to regulation but door to door religious missionaries and house cladding sales people are not!

Surely nuisance high pressure door to door sales calls are equally a nuisance whether they are from commerce, religion or charity. Similarly tele-marketing and other forms of direct marketing are matters more appropriately dealt with in a general way by local government ordinances, trade practices and privacy legislation.

The Australian Direct Marketing Association (ADMA) and Fundraising Institute Australia (FIA) have well developed voluntary codes of practice which would enhance more general regulation.

## **What are the Privacy concerns associated with Fundraising?**

It is not clear from the evidence before the Industry Commission just what the privacy issues are that arise from fundraising. There are some references to the alleged trade in names and address lists of donors between charities although the main issue seems to be the sale or hire of lists by commerce to charities.

As with the public nuisance debate, there is no convincing argument as to why fundraising should be dealt with in any different way to other industries who use database marketing techniques.

Regulation in this area would be more properly a matter for privacy legislation at the Commonwealth government level rather than in State fundraising legislation.

The privacy issues associated with the use of telecommunications would similarly fall to Commonwealth privacy legislation and regulatory bodies like Austel, which regulate electronic communications.

## **What does this mean for the shape of a new Queensland Collections Act?**

In conclusion then, a review of the Queensland Collections Act is long overdue. In considering the nature of a new Collections Act it is submitted that the following matters be taken into account:

- that the criteria for deciding what is a charitable or a community purpose organisation and what is not, should be based on an Australia wide standard so as to ensure that there is a common approach between the States and the Commonwealth and across other legislation. Whether there needs to be several classes of such organisation with differing levels of authority to make public fundraising appeals is a matter for careful consideration.
- that all organisations that are permitted to make public appeals should be incorporated and be required to lodge publicly accessible annual accounts. (There may need to be special arrangements made to accommodate the requirements of charitable trusts which are not incorporated.)

- that the measures for the supervision of charities in Queensland do not duplicate the provisions of the Incorporated Associations Act, Corporations Act or other statutes that provide incorporation for charitable organisations.
- that measures taken for the authorisation and identification of those who make public fundraising appeals should require disclosure of the name of the incorporated body to which the funds raised will be credited. (The use of ACN or ARBN numbers could be a useful device for this purpose rather than have "registered charity" numbers as in the present Act.)
- that the widest definition of what is to be included in "a public fundraising appeal" or "an appeal for support" should be used so as to include the full range of fundraising products.
- that "joint-venture" fundraising conducted on behalf of the charity by commercial interests, should be regulated by trade practices or fair trading legislation rather than by specialist fundraising legislation.
- that the proportion of expenses in a public fundraising appeal not be regulated.
- that matters relating to nuisance fundraising practices and privacy be dealt with in terms of more general legislation and not by specialist fundraising legislation.

It is submitted that the need for detailed regulation of fundraising practice in specialist fundraising legislation has passed. More broadly based legislation, which provide consumers with protection against deceptive or invasive marketing practices has developed to the point where the special measures designed for charities in the 1950s and 1960s should now be widely applied to a whole range of aspects of modern Australian life including fundraising.

Until some kind of national registration system is established, there will need to be State legislation which licences organisations who make public fundraising appeals.

Let us hope that there is an effort made this time to come to a nation wide consensus about the kinds of organisations which should be licensed.

**Comparison of Terms Used to Describe Eligible Classes  
of Organisations for Applicants for  
Minor Forms of Gambling Permits**

South Australia	Western Australia	Northern Territory	Victoria	Tasmania	Queensland	New South Wales
		Association		Not for Private Gain		Nonprofit Organisation
Charitable	Charitable		Charity		Charitable Purpose	Charities
Patriotic			Patriotic		Patriotic Purpose	
Religious			Religion		Religious Purpose	
Educational			Education		Educational Purpose	
Cultural			Culture			
Industrial						Trade Unions
Social	Social					Social Clubs
Sporting	Sporting		Sporting		Sporting Purpose	
Political	Political		Political Party			Political Parties
	Literary					
	Artistic		Promotion of Art			
	Benevolent		Benevolent			
			Philanthropic			
			Science			
			Recreational			
	Other like activity				Community Purpose	
					Parents and Citizens	
						Registered Clubs

**Source:** Guidelines for applicants for permits issued by the various State and Territory regulatory authorities