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Where not-for-profits go for help

A submission to the Transparency Code Working Group,
Individuals and Indirect Tax Division,
The Treasury

Via email to: charitiesconsultation@treasury.gov.au

July 20, 2021

Developing a voluntary code to improve the transparency of charitable donations during natural disasters

Our Community regards the proposal for a voluntary Transparency Code for not-for-profit organisations involved with emergencies as a misguided attempt to address a problem that has nothing to do with transparency and that will be in no way ameliorated by such a scheme.

The Working Group was asked “to consider the merits of developing a voluntary code to improve the transparency of the use of charitable donations during natural disasters (the Transparency Code), and to develop its key features”. Its main failing is that it does not consider the merits of such a scheme, simply assuming its value and seeking comment only on points of implementation.

This failing is reflected in the structure of the paper, which invites comment on a number of questions premised on the basic desirability of a Transparency Code. This submission will not follow this format, preferring to address more fundamental issues.

1. What is the problem that the Working Group is trying to fix?

The Treasury Consultation paper suggests that

However, early into the recovery process it became evident that there was a mismatch between the expectations of donors around how their funds would be used and the obligations of the charities to use funds in line with their charitable purpose. It also became clear that there was a gap between donor expectations around the speed with which funds should be distributed and the challenges charities face in ensuring funds are used to support people in genuine need through both the immediate and long term impacts of a natural disaster, whilst operating in an uncertain environment.

This is a very general account of a very specific issue. The principal problem to do with charitable donations that emerged during the crisis was that Celeste Barber (to her great credit) raised through her Instagram account some \$51 million for fire victims but unfortunately specified that donations should go to the Rural Fire Service (RFS), which while a worthy cause was unable to spend money on many of the things that Barber's donors wanted.

The RFS, to its credit, recognised the unsatisfactory nature of this situation, and offered to pass on half the funds to organisations that could meet these other needs. The NSW courts vetoed this expedient.

The problem, then, was that the Barber case revealed a lamentable lack of flexibility in Australian fundraising regulation (which is the bigger issue that should be being addressed), where what everybody agreed was the right thing to do was rendered impossible by black-letter charities law.

The Working Group itself suggests that the primary problem is that

The Black Summer bushfires highlighted the loss of trust and confidence in the sector that can eventuate where charities are unable to use donations for the purpose the public intended.

There were few complaints at the time about lack of transparency. Most complaints about the slowness of rollout were directed to government agencies and insurance companies rather than charities.

The Working Group provides no analysis of the media reports of bushfire relief that would suggest that transparency in these circumstances is a matter of public concern. Until some evidence is produced that this is a serious handicap, action seems premature.

2. [What are the problems with the Working Group's suggested solutions?](#)

To begin with, the Code is addressed to the wrong people.

The Working Group suggests

To inform donation decisions, the working group proposes that signatories to the Transparency Code should publish an appeal intent on their webpage when they become involved in a natural disaster response.

The problem revealed by the Barber case is that a charity may not have any involvement in an appeal launched over social media. As the judge said,

Ms Barber established her public fundraising appeal on Facebook, a social media platform, on about 3 January 2020. Her initiative was spontaneous. Neither the trustees, nor the New South Wales Rural Fire Service contacted her before she acted. But her appeal clearly identified the RFS Fund as its object.

In cases like these, the Working Group is advising charities to shut the stable door after the horse has bolted.

The Working Group suggests that it is important that the Code should apply only to

Charities working in response to the natural disaster covered by [a] national emergency disaster declaration”

Using the declaration as the trigger for reporting requirements will ensure that the Transparency Code only comes into effect in nationally significant times of natural disaster. This will target reporting to situations where transparent communications will be most important, minimising the additional reporting obligations created by the Code.

except where the natural disaster is not declared (“before a formal declaration, wherever they felt it was appropriate”), a reservation that presumably means that reporting obligations will not be minimised at all.

While the voluntary nature of the proposed Code will doubtless reduce the risk of the government being criticised for imposing unnecessary costs on the sector, it will also mean that any charity that feels its performance is unlikely to bear scrutiny will not adopt it, largely removing any value that there might be in the Code’s inter-charity comparisons.

It is actually not clear why, if this system is in fact valuable in this context (a matter addressed below), it should not be applied universally. What relevant considerations differentiate natural disasters from other charitable uses? What will Australian Instagram influencers target next?

The most serious objection to the Working Group paper is in fact that the assumed value of the Code has not been demonstrated. The sector is being asked to assume new and resource-intensive responsibilities without any guarantee that this will be to its advantage.

In general terms, it is clear that the proposed code would place considerable administrative burdens on any organisation signing up to it. The Paper suggests at a number of points that adhering to the code would provide countervailing advantages to such organisations, both in general –

Greater transparency by charities would support public understanding of charity fundraising and the use of charitable donations in responses to natural disasters, strengthening public trust in the sector. Strong public trust will drive continued donations, allowing charities to provide crucial services to recovering communities.

And in particular –

Charities will be motivated to become a signatory due to the benefits of the Code. Greater transparency about the use of donations will likely stimulate the allocation of public donations to the charity allowing them to provide vital services to the community impacted by the natural disaster. It will also help to build public trust and confidence in the organisation, reducing the likelihood of reputational damage.

Charities benefit when they increase the transparency of their operations. If donors and the broader public can see that a charity is using funds appropriately and meeting its operating obligations, their trust and support for the charity strengthens.

No evidence for these propositions is presented, and the circumstances of the Barber case argue strongly against them.

Unless further research can substantiate the claim of higher donation rates, charities should not be asked or expected to undertake further effort to meet the 'requirements' of the Code.

It may be relevant that neither of the large charities represented on the Working Group have been sufficiently convinced of the advantages of the code to follow Code specifications in their own reports on their bushfire activities. In particular, neither list administrative costs, and neither give examples of what they cannot legally do.

The recommendations, furthermore, are vague and, to the extent they are specific, impossible of achievement. The Group suggests, for example, that to remove all doubt these charities should specify all the activities that they do not engage in. Even if this is narrowed down to cover only all those activities that a naïve user of social media might imagine a charity might do, this is still ridiculous.

The provision for listing administrative costs is highly contentious and in detail misguided. That alone would be sufficient to make it undesirable that any government pressure –

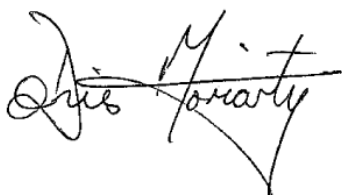
The Government could incentivise participation by publicly recognising those charities which have signalled that they are complying with the Transparency Code, for example by enhancing information on the ACNC website.

– would be highly inappropriate.

The Working Group should be asked to withdraw the consultation paper and conduct further research on

- a) **Total review of fundraising law in line with the Fix Fundraising work already done.**
- b) **Possible legal remedies that might give charities more flexibility in meeting the demands of donors and**
- c) **Public opinion on the priority to be given to transparency within not-for-profit organisations when considering donating.**

Yours sincerely,

A handwritten signature in black ink, appearing to read "Denis Moriarty". The signature is written in a cursive style with a large, sweeping flourish at the end.

Denis Moriarty
Group Managing Director

About Our Community

[Our Community](#) is a social enterprise that has been working for over 20 years to support and strengthen the Australian not-for-profit sector. Through our conferences, our newsletters, our manuals, our training courses, our online material, and our dedicated software we offer not-for-profit organisations the tools they need to meet the challenges of a complex and changing environment. We have unparalleled experience in consulting and working with the not-for-profit sector.

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